NATIONAL TAXPAYER ADVOCATE

Annual Report to Congress

2019

www.TaxpayerAdvocate.irs.gov/2019AnnualReport

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NATIONAL TAXPAYER ADVOCATE 2020 PURPLE BOOK:
Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration (published as separate volume)

PREFACE: Introductory Remarks by the Acting National Taxpayer Advocate

I respectfully submit for your consideration the National Taxpayer Advocate's 2019 Annual Report to Congress. This is the first Annual Report since 2000 that has not been submitted by Nina Olson. Nina retired on July 31, 2019, after leading the Taxpayer Advocate Service for over 18 years. During her time as the National Taxpayer Advocate, Nina fought tirelessly for taxpayer rights and created an organization of advocates who will carry on her legacy. The Taxpayer Advocate Service and all taxpayers are forever grateful for her advocacy.

Changes to the Annual Report to Congress

The 2019 Annual Report looks decidedly different from previous reports in several ways. Section 7803(c)(2)(B)(ii) of the Internal Revenue Code, as amended by the Taxpayer First Act (TFA), requires the National Taxpayer Advocate to submit this report each year and to include in it, among other things, a description of the ten most serious problems encountered by taxpayers as well as administrative and legislative recommendations to mitigate those problems. Previously, the report was required to contain a description of at least 20 of the most serious problems facing taxpayers. By reducing the number of Most Serious Problems to the top ten, we have been able to focus on what we consider to be the critical issues currently impacting taxpayers, the IRS, and tax administration. In Appendix 3, you will find a scorecard detailing how TAS assessed the Most Serious Problems in this year's report.[1]

TAS also took the opportunity to reevaluate the Annual Report as a whole and make a few other changes. The Most Serious Problems are shorter, which gives these sections a sharper focus on how the identified problem impacts taxpayers and the IRS. All parts of the report except our legislative recommendations are now consolidated into one volume. For ease of reference and use, we present all of our active legislative recommendations, from this year and prior years, in the "Purple Book." The report also contains a description of the ten tax issues most frequently litigated in the federal courts over the past year, as required by statute, as well as several research studies.

Consistent with the Taxpayer First Act, TAS worked with the IRS to verify the data contained in this report.[2] The only notable exception to this verification process is the research studies found later in this report.

1 See Appendix 3, *Identifying the Most Serious Problems*, *infra*. The table in Appendix 3 presents factors considered by the National Taxpayer Advocate in determining the areas of tax administration that merited inclusion in this year's report. Each Most Serious Problem topic is categorized with a Low, Medium, or High degree of relevance to each factor.

2 IRC § 7803(c)(2)(B)(ii)(XII) requires that the National Taxpayer Advocate, "with respect to any statistical information included in [this] report, include a statement of whether such statistical information was reviewed or provided by the Secretary under section 6108(d) and, if so, whether the Secretary determined such information to be statistically valid and based on sound statistical methodology." The data cited in the National Taxpayer Advocate's annual reports generally come from one of three sources: (i) publicly available data such as the IRS Data Book, Government Accountability Office (GAO) reports, and Treasury Inspector General for Tax Administration (TIGTA) reports; (ii) IRS databases to which TAS has access; and (iii) IRS data that is provided by the Operating Divisions pursuant to TAS information requests. Once data has been compiled, TAS's Office of Research and Analysis double checks it. Then TAS sends the IRS all data included in the "most serious problems" section of the report and most data included in other sections of the report for final verification prior to publication (except where noted). On the rare occasion where TAS and the IRS have a disagreement about data, we generally discuss it, and if a disagreement persists, we note it in the report.

A Period of Change Within the IRS

The Taxpayer First Act marks changes not just for the Taxpayer Advocate Service, but for the IRS as well. By passing the Taxpayer First Act, Congress has sent the IRS a clear message that it needs to rethink the way it operates — the services it provides, its organizational structure, the way it trains employees, and the technology it uses.[3]

The IRS's mission is to "[p]rovide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and enforce the law with integrity and fairness to all."[4] Currently the IRS is struggling on both fronts. Its current inability to meet taxpayers' customer service needs results in an inability to enforce the law fairly for all taxpayers.

The President's Management Agenda emphasizes the importance of high-quality customer service and cites the American Customer Satisfaction Index (ACSI) and the Forrester U.S. Federal Customer Experience Index™ as key benchmarks.[5] Those indices find the IRS is among the lowest performing federal agencies when it comes to the customer experience. The ACSI report for 2018 ranks the Treasury Department tied for 10th out of 12 Federal Departments and says that "most [IRS] programs score … well below both the economy-wide national ACSI average and the federal government average."[6] The 2019 Forrester report ranked the IRS 13th out of 15 federal agencies and characterized the IRS's score as "very poor."[7]

As I will discuss below, funding constraints are a significant part of the problem. The IRS receives approximately 100 million telephone calls every year,[8] and to provide "top quality service," as its mission statement commits it to do,[9] it requires adequate funding to hire enough employees to answer those calls. But the problems in IRS customer service go beyond just the budget.

While we support the IRS's efforts to expand online accounts and communicate with taxpayers digitally, initiatives like those will not by themselves make the IRS into a customer-focused agency. To truly transform the organization, the IRS must start with a culture shift. If the culture of the organization is one where employees look to minimize interactions with taxpayers in an effort to move work, or where taxpayers who owe money are automatically viewed negatively, then expanding digital services will not improve customer service. The IRS needs to take a holistic view of how it operates and understand what is and is not working. Working collaboratively with TAS to understand what we are seeing in our cases is one of the best ways for the IRS to understand the pain points taxpayers experience and which processes are most likely to break down. Couple this information with a focus on training IRS employees on empathy and taxpayer interaction, as well as focusing on tracking customer service measures such as first contact resolution and fairness, and the IRS can begin the cultural change needed to fundamentally improve its approach to serving its customers.

3 *See* Taxpayer First Act, Pub. L. No. 116-25, §§ 1101 (directing the IRS to develop a comprehensive customer service strategy), 1302 (directing the IRS to modernize its organizational structure), 2402 (directing the IRS to submit to Congress a comprehensive training strategy), and 2101 (creating the statutory position of "chief information officer" and directing that individual to develop a multi-year IT strategic plan).

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

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

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

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

8 IRS, Joint Operations Center, Snapshot Reports: Enterprise Snapshot (final week of each fiscal year for FY 2012 through FY 2019).

9 IRS Mission Statement (Aug. 2019), https://www.irs.gov/about-irs/the-agency-its-mission-and-statutory-authority.

However, the IRS's shortcomings in its customer service also impact the agency's ability to fairly administer the tax law. At the same time that the IRS is faced with reevaluating its customer service strategy, the Commissioner has placed a renewed focus on enforcement.[10] TAS has been supportive of some of these efforts, particularly increased Revenue Officer hiring to help ensure the agency has a physical presence throughout the country.[11] But this enforcement focus must be coupled with an improvement in taxpayer service *within* enforcement. If the IRS is going to go out into communities to talk to taxpayers who owe back taxes, then those same taxpayers need to be able to get answers to their questions when they call the IRS or have an indicator placed on their account to designate when they might be at risk of economic hardship before they set up a payment plan.[12] To do otherwise will cause harm to those who can least afford it.

To start, the IRS should prioritize improving telephone service on its compliance lines. While the IRS needs to improve telephone service across the board, it is particularly critical that it answer calls from taxpayers after it has garnished wages, levied on bank accounts, or filed notices of federal tax lien against a taxpayer's house. These enforcement actions prompt many taxpayers to call the IRS to resolve their delinquent liabilities, and some of these taxpayers face economic hardship, such as pending eviction, as a result of IRS compliance actions.

By law, the IRS is required to release levies that are causing economic hardships.[13] But taxpayers often cannot reach the IRS to make it aware of their hardships. In fiscal year (FY) 2019, the IRS received about 15 million calls on its consolidated Automated Collection System lines.[14] IRS employees answered only 31 percent, and taxpayers who managed to get through waited on hold an average 38 minutes.[15] The IRS has an obligation to be accessible to these taxpayers, and it should not ramp up enforcement actions beyond the point where it has enough telephone assistors to handle the taxpayer calls those actions generate.

The level of service is even worse for taxpayers calling the balance due line to make payment arrangements or set up installment agreements. Live assistors last fiscal year answered only 26 percent of those calls and wait times averaged about 45 minutes. These are live taxpayers on the line, trying to talk to the IRS about the money they owe.[16] Yet the IRS does not answer 74 percent of these calls. To treat taxpayers with respect, taxpayer services like this must be prioritized. TAS will continue to evaluate the IRS's progress in future reports.

10 *See, e.g.*, Joshua Rosenberg, *Rettig Wants IRS Audits To 'Touch Every Neighborhood'*, Law 360 (Oct. 29, 2019) (quoting the Commissioner as saying the IRS should "touch every neighborhood" in choosing which taxpayers to audit and that, directly or indirectly, "[w]e want to touch everyone.").

11 See National Taxpayer Advocate 2018 Annual Report to Congress 240 (Most Serious Problem: *Field Collection: The IRS Has Not Appropriately Staffed and Trained Its Field Collection Function to Minimize Taxpayer Burden and Ensure Taxpayer Rights Are Protected*) (recognizing the importance of the individualized case work and geographic presence of revenue officers (ROs)).

12 See National Taxpayer Advocate 2020 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration* 51-52 (*Direct the IRS to Study the Feasibility of Using an Automated Formula to Identify Taxpayers at Risk of Economic Hardship*).

13 IRC § 6343 (a)(1)(D).

14 IRS, Joint Operations Center, Snapshot Reports: Enterprise Snapshot (week ending Sept. 30, 2019). IRS data for the consolidated ACS lines includes calls to the Installment Agreement/Balance Due telephone line. The Installment Agreement/Balance Due line assists taxpayers who have unpaid taxes but whose cases generally have not yet been assigned to ACS.

15 *Id*.

16 IRS, Joint Operations Center, Snapshot Reports: Product Line Detail (week ending Sept. 30, 2019).

While every organization must find ways to operate within its resources, it should be noted that the IRS's ability to do its job has been constrained by a significant reduction in resources over the past decade. Since FY 2010, the IRS budget has been reduced by about 20 percent after adjusting for inflation, and the IRS workforce has shrunk by about 22 percent.[17] These cuts make little business sense.

The IRS functions as the "accounts receivable" department of the federal government, and it is remarkably efficient. In FY 2018, the IRS collected nearly $3.5 trillion on a budget of about $11.43 billion, producing an overall return on investment (ROI) of more than 300:1.[18] However the IRS cannot continue to be as effective as it has been with a declining budget. As we discuss in our legislative recommendation regarding IRS funding, the current rules for setting IRS funding levels should be reconsidered. A private sector business would continue to provide more funding for its accounts receivable department as long as the funding produced a positive return on investment. Yet the federal budget process generally treats the IRS purely as a cost center, with no explicit recognition that a dollar appropriated to the IRS generally returns substantially more than one dollar in return. We encourage Congress and the Office of Management and Budget to take a hard look at improving the procedures for setting IRS funding levels.

Report Contents and Taxpayer First Act Implementation

This year's Annual Report starts with a look at the Taxpayer First Act. The first group of Most Serious Problems focuses on the IRS's efforts to revise its customer service strategy and some of the key issues it needs to address if it is truly going to transform the way it serves taxpayers and practitioners. We also look at how the IRS's ability to improve customer service is tied to its IT modernization efforts and how adequate IRS funding ultimately impacts both of these areas. The remaining Most Serious Problems look at more focused problems facing taxpayers and practitioners in the areas of customer service and enforcement. Specifically, how the IRS is interacting with certain groups — such as return preparers, users of Free File, and multilingual taxpayers — and what the IRS needs to do to improve those interactions. We also examine how certain IRS initiatives — such as the presence of IRS compliance personnel in Appeals conferences, the Offer in Compromise program, and Combination letters — are impacting taxpayer rights, and we make recommendations for increasing their effectiveness.

To implement key provisions of the Taxpayer First Act, the IRS has established a dedicated office to oversee and coordinate the agency's TFA implementation efforts. The office is being led by the Commissioner's Chief of Staff and includes executives from the Wage & Investment Division, the Small Business/Self-Employed Division, and the Chief Information Officer's Information Technology function. IRS leadership declined to include a representative from TAS. I find this deeply concerning. Congress created the Office of the Taxpayer Advocate to serve as the statutory voice of the taxpayer within the IRS. No one has a better view into the problems that taxpayers and practitioners face day to day when working with the IRS than TAS. Over the last 20 years, TAS has worked more than 4.4 million cases resulting from problems with IRS systems or processes.[19] That history with individual and business taxpayers' problems gives TAS unique insight, perspective, and information that could be a key resource for identifying areas in need of improvement as the IRS develops a comprehensive customer service strategy.

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

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

19 Taxpayer Advocate Management System (TAMIS) data pulled by TAS (Oct. 1, 2001 to Oct. 1, 2019).

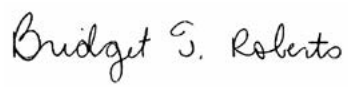
As the IRS decides how to implement the aptly named "Taxpayer First Act," I believe TAS should have a seat at the table to the same extent as key IRS operating divisions, particularly for purposes of implementing the Act's requirements that the IRS develop a comprehensive customer service strategy, modernize its organizational structure, create online taxpayer accounts, and develop a comprehensive employee training strategy that includes taxpayer rights. Having been excluded from the core implementation group, TAS will participate on executive teams and lower-level working groups and will offer our recommendations to the extent we have an opportunity to do so.

Closing Thoughts

March 2020 marks the 20th anniversary of the Taxpayer Advocate Service.[20] Now more than ever, the role of TAS is vital to effective tax administration. In the face of numerous challenges, many of which are detailed in this report, TAS will continue to be here to assist taxpayers who experience economic hardships due to their tax problems and taxpayers who fall through the cracks of the IRS bureaucracy. TAS will continue to advocate for systemic changes within the IRS where IRS procedures are imposing undue burdens on taxpayers. And TAS will continue to use its reports to Congress to identify significant issues and recommend administrative and legislative actions to resolve those issues.

While I am honored to serve as the Acting National Taxpayer Advocate and will continue to serve in this capacity for as long as necessary, the Office of the Taxpayer Advocate — and taxpayers — deserve a permanent appointee.[21] As in other organizations, acting leaders are caretakers — charged with keeping the trains running on time but lacking the authority to make significant changes and often not taken as seriously as permanent officials. It has now been five months since Nina Olson retired. Given the current crossroads at which the IRS finds itself, it is critical that a permanent National Taxpayer Advocate be appointed as quickly as possible to help ensure the IRS protects taxpayer rights and meets its obligations to taxpayers.

Respectfully submitted,



Bridget T. Roberts
Acting National Taxpayer Advocate
December 31, 2019

20 TAS was established in its current form by the Internal Revenue Service Restructuring and Reform Act (RRA 98), Pub. L. No. 105-206, § 1102, 112 Stat. 685, 698-702 (1998) (codified at IRC §7803(c)). After extensive planning, TAS commenced operations in March 2000.

21 IRC § 7803(c)(1)(B)(ii) provides, in relevant part: "The National Taxpayer Advocate shall be appointed by the Secretary of the Treasury after consultation with the Commissioner of Internal Revenue and the Oversight Board." The IRS issued a public statement on May 13 soliciting applications. *See* IRS Statement, *IRS seeking candidates interested in National Taxpayer Advocate position* (May 13, 2019), https://www.irs.gov/newsroom/irs-statement-on-the-national-taxpayer-advocate-position. In June and early July, the Commissioner and Assistant Secretary (Tax Policy) interviewed leading candidates for the position. No appointment has been made and no additional information has been provided since that time.

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THE MOST SERIOUS PROBLEMS ENCOUNTERED BY TAXPAYERS: Introduction

Internal Revenue Code (IRC) § 7803(c)(2)(B)(ii)(III) requires the National Taxpayer Advocate to submit an annual report to Congress that, among other things, contains a summary of ten "most serious problems" encountered by taxpayers. In previous years, Congress tasked the National Taxpayer Advocate with identifying at least the 20 most serious problems impacting taxpayers. As noted in the Preface, this change was the result of the recent passage of the Taxpayer First Act.[1]

With the change to the number of Most Serious Problems, TAS revisited its method of selecting its list of ten based on multiple factors. While we rank each year's problems using the same methodology (described below), the list remains inherently subjective in many respects. See Appendix 3 for additional information on how TAS ranked the Most Serious Problems.

METHODOLOGY OF THE MOST SERIOUS PROBLEM LIST

The National Taxpayer Advocate is in a unique position to identify the most pressing problems that taxpayers face. Because TAS is an independent part of the IRS, it can serve as the advocate for the taxpayer and use the experience of its staff to identify taxpayer problems to make recommendations to improve the IRS from within the organization. TAS also works with more than 300,000 taxpayers and practitioners every year through its casework and outreach events so it sees problems from an external perspective as well. On a daily basis, TAS employees interact with taxpayers and IRS employees to try to resolve taxpayers' individual problems and make systemic fixes to widespread problems.

The National Taxpayer Advocate becomes aware of potential Most Serious Problems through multiple channels. Trends in TAS's casework, research studies completed by TAS and outside groups, advocacy projects worked by TAS's Office of Systemic Advocacy, and findings from IRS taskforces and teams on which TAS participates often reveal issues. Additionally, the National Taxpayer Advocate hears directly from individuals, including Taxpayer Advocacy Panel members, IRS employees, taxpayers, tax practitioners, and other external stakeholders, through TAS's Systemic Advocacy Management System and other channels.[2]

The National Taxpayer Advocate considers several factors in identifying, evaluating, and ranking the Most Serious Problems encountered by taxpayers. The ten issues in this year's report are ranked largely according to the following criteria:

- Impact on taxpayer rights;
- Number of taxpayers impacted;
- Financial impact on taxpayers;
- Visibility, sensitivity, and interest to stakeholders, Congress, and external indicators (*e.g.,* media, etc.);

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

2 The Systemic Advocacy Management System (SAMS) is a database of systemic issues and information reported online to TAS by IRS employees and members of the public. https://www.irs.gov/advocate/systemic-advocacy-management-system-sams. TAS reviews and analyzes the submissions and determines a course of action, which can include information-gathering projects, immediate interventions, and advocacy projects. Internal Revenue Manual (IRM) 1.4.13.4.9.2, Systemic Advocacy Management System (SAMS) (Sept. 17, 2019).

- Barriers to tax law compliance, including cost, time, and burden;
- Taxpayer Advocate Management Information System (TAMIS) inventory data; and
- Emerging issues.

TAXPAYER ADVOCATE MANAGEMENT INFORMATION SYSTEM LIST

The identification of the Most Serious Problems reflects not only the mandates of Congress and the IRC but also TAS's integrated approach to advocacy — using individual cases as a means for detecting trends and identifying systemic problems in IRS policy and procedures or the IRC. TAS tracks individual taxpayer cases on TAMIS. The top 25 case issues, listed in Appendix 4, reflect TAMIS receipts based on taxpayer contacts in fiscal year 2019, a period spanning October 1, 2018, through September 30, 2019.

USE OF EXAMPLES

The examples presented in this report illustrate issues raised in cases TAS handled. To comply with IRC § 6103, which generally requires the IRS to keep taxpayer returns and return information confidential, TAS has changed the details of the fact patterns. In some instances, the taxpayer has provided written consent for the National Taxpayer Advocate to use facts specific to that taxpayer's case. We note these exceptions in footnotes to the examples.

DATA COMPILATION AND VALIDATION

The data cited in the National Taxpayer Advocate's annual reports generally come from one of three sources: (i) publicly available data such as the IRS Data Book, Government Accountability Office reports, and Treasury Inspector General for Tax Administration reports; (ii) IRS databases to which TAS has access; and (iii) IRS data that IRS operating divisions provide pursuant to TAS information requests. After TAS compiles data, TAS's Office of Research and Analysis confirms it. In accordance with IRC § 7803(c)(2)(B)(ii)(XII), TAS then sends all data included in the Most Serious Problem section of the report to the IRS for final verification prior to publication.

On the rare occasion where TAS and the IRS have a disagreement about data, we generally discuss it, and if a disagreement persists, we note it in the report. This process ensures data integrity and full transparency regarding data sources and reliability.

MSP #1 CUSTOMER SERVICE STRATEGY: The IRS Needs to Develop a Comprehensive Customer Service Strategy That Puts Taxpayers First, Incorporates Research on Customer Needs and Preferences, and Focuses on Measurable Results

RESPONSIBLE OFFICIALS

Charles P. Rettig, Commissioner, Internal Revenue
Sunita B. Lough, Deputy Commissioner for Services and Enforcement
Jeffrey J. Tribiano, Deputy Commissioner for Operations Support
Amalia C. Colbert, Chief of Staff and Project Director, Taxpayer First Act Office

TAXPAYER RIGHTS IMPACTED[1]

- *The Right to Be Informed*
- *The Right to Quality Service*
- *The Right to a Fair and Just Tax System*

PROBLEM

In 2015, Commissioner Koskinen characterized IRS customer service as "abysmal."[2] In 2018, the President's Management Agenda emphasized the importance of high-quality customer service. It said: "Federal customers … deserve a customer experience that compares to — or exceeds — that of leading private sector organizations," and it cited data from the American Customer Satisfaction Index (ACSI) and the Forrester U.S. Federal Customer Experience Index as key benchmarks.[3] The ACSI report for 2018 ranks the Treasury Department tied for 10th out of 12 Federal Departments and says that, "most [IRS] programs score … well below both the economy-wide national ACSI average and the federal government average."[4] The 2019 Forrester report ranked the IRS 13th out of 15 federal agencies and characterized the IRS's score as "very poor."[5]

To address these shortcomings, Congress earlier this year enacted the most comprehensive revisions to IRS procedures since the IRS Restructuring and Reform Act of 1998, and it pointedly titled the new law

1 See Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are now listed in the Internal Revenue Code (IRC). *See* IRC § 7803(a)(3).

2 John A. Koskinen, Commissioner of Internal Revenue, Address to National Press Club (Mar. 31, 2015).

3 President's Management Agenda 7, 28 (Sept. 19, 2019), https://www.whitehouse.gov/wp-content/uploads/2018/03/Presidents-Management-Agenda.pdf.

4 American Customer Satisfaction Index, *ACSI Federal Government Report 2018*, at 3-4 (Jan. 2019), https://www.theacsi.org/images/stories/images/govsatscores/19jan-Gov-report-2018.pdf.

5 Rick Parrish, *The US Customer Experience Index 2019: How Brands Build Loyalty with the Quality of Their Experience*, Forrester Research 16 (June 2019).

the "Taxpayer First Act (TFA)." Among other things, the law requires the IRS to create and submit a comprehensive customer service strategy to Congress by July 1, 2020.[6]

Although the title and some of the content of the legislation reflect congressional concern about the IRS's performance, the IRS should view congressional interest as a valuable opportunity to revamp its customer service strategy and engage congressional stakeholders in understanding the type and amount of resources needed to implement its new strategy.[7] As the IRS develops this strategy, the National Taxpayer Advocate has identified several concerns with the IRS's current approach to customer service that the new plan should address:

- Improving customer service begins with a cultural shift within the IRS;
- The IRS does not view itself as a service organization first and foremost;
- Customer service decisions are not informed by using multi-disciplined, comprehensive research into customer needs and preferences;
- Taxpayers need assistance navigating the complex tax system, including the agency itself;
- Forcing taxpayers to use digital channels undermines taxpayer rights;
- There is a current absence of meaningful customer service measures to effect desired results;
- Any strategy also needs to address the needs of practitioners who interact with the IRS on behalf of taxpayers; and
- The strategy cannot be merely aspirational — it needs to include an implementation plan complete with cost estimates.

The IRS's past strategic plans focused on the IRS's perspective (*e.g.*, cutting costs, pushing taxpayers to use online services without maintaining adequate telephone and in-person service, and aiming for "efficiencies") without adequately considering the customers' perspective. For that reason, TAS believes it is critical that TAS be integrally involved in developing and vetting all aspects of the plan.[8] Despite numerous requests, the IRS has failed to include a TAS executive as part of the team leading the Taxpayer First Act Office (TFAO) that will coordinate the IRS's implementation of the new law.[9] TAS is actively engaging in senior level discussions and all TFAO meetings with IRS points of contact and executives regarding the customer service strategy; however, the TFA implementation team is typically making decisions on major plans without the inclusion of TAS, increasing the risk that the final plan will not adequately address the needs of taxpayers. TAS has made countless recommendations over the past 20 years on ways the IRS can and should enhance customer service. We will not cover each of those

6 *See* Taxpayer First Act, Pub. L. No. 116-25, § 1101, 133 Stat. 981 (2019) (The provision provides that the strategy shall include "a plan to provide assistance to taxpayers that is secure, designed to meet reasonable taxpayer expectations, and adopts appropriate best practices of customer service provided in the private sector, including online services…."). In addition, the Cross-Agency Priority goals included in the President's Management Agenda highlighted the need for improved customer experience with federal services, and set the specific goal of providing a modern, streamlined, and responsive customer experience. Office of Management and Budget, *CAP Goal Action Plan: Improving Customer Experience with Federal Services* 2, https://www.performance.gov/CAP/action_plans/FY2018_Q1_Improving_Customer_Experience.pdf (last visited Nov. 26, 2019).

7 *See* Most Serious Problem: *IRS Funding: The IRS Does Not Have Sufficient Resources to Provide Quality Service*, *infra*; Most Serious Problem: *Information Technology Modernization: The IRS Modernization Plan's Goal to Improve the Taxpayer Experience Is Commendable, But the IRS Needs Additional Multi-Year Funding to Bring It to Fruition*, *infra*.

8 TAS has made a number of recommendations related to improving customer service over the years. For a list of recommendations made by the National Taxpayer Advocate over the last seventeen years, see Appendix 1, *Past TAS Recommendations on Taxpayer Service*, *infra*.

9 While an Executive Readiness Candidate from TAS is assigned to the TFAO as Assistant to the Project Director for Taxpayer Experience, this individual is on a developmental detail to the TFAO and is not at the same level as a TAS executive.

recommendations in this discussion but rather will address the larger issues that the IRS must consider as it develops its customer service strategy. Appendix 1 of this report includes a list of all the taxpayer service-related recommendations TAS has made over the years that we believe are still relevant and that the IRS should consider.

IMPACT ON TAXPAYERS

Background

Congress has long been concerned with IRS customer service and has required the IRS to train employees in customer service, produce customer service plans detailing its approach to customer service, and implement other requirements aimed at improving service.[10] In 2006 and 2007, in response to a congressional directive, the IRS created a comprehensive service strategy in two phases: the 2006 Taxpayer Assistance Blueprint (TAB I) and the 2007 Taxpayer Assistance Blueprint (TAB II).[11] Congress required the IRS to provide annual updates on its progress toward implementation of the TAB.[12] However, when Congress failed to require the annual update to the TAB in the fiscal year (FY) 2017 appropriations bill, the IRS determined it was no longer required.[13] Accordingly, the updates provided to Congress became mere laundry lists with no comprehensive strategy, no analysis of service gaps that prompted any initiative, and no follow-through to measure the success of initiatives to meet taxpayer needs.[14] Moreover, there was no linkage between the TABs and the annual IRS budget requests.

In April 2019, the IRS issued the IRS Integrated Modernization Business Plan, a "six-year road map for achieving necessary modernization of IRS systems and taxpayer services…." Although the plan states that it addresses multiple service channels, it focuses on information technology rather than the overall customer experience.[15]

Improving Customer Service Begins With a Cultural Shift Within the IRS

An effective IRS service strategy considers the customer's perspective from the first interaction with the tax system through full resolution of any enforcement actions. The IRS instead approaches service and enforcement as mutually exclusive rather than understanding that it cannot separate these concepts. It must integrate customer service into all aspects of IRS operations and make it fundamental to ensuring the IRS protects taxpayer rights and promotes voluntary compliance. This requires starting with an overall look at the culture within the IRS and how it interacts with taxpayers. The IRS must look broader than just the type of services it offers to taxpayers and the channels through which it offers them; it must look at the type of employees the agency hires and how they are trained. Is the IRS training employees to be empathetic to customers and to value their interactions with them? Or is the

10 IRS Reform and Restructuring Act of 1998 (RRA 98), Pub. L. No. 105-206, § 1205; H.R. Rep. No. 109-307, at 209 (2005).

11 H.R. Rep. No. 109-307, at 209 (2005); IRS, The 2006 Taxpayer Assistance Blueprint (2006); IRS, The 2007 Taxpayer Assistance Blueprint (2007).

12 *See, e.g.*, H. Comm. On Appropriations, 111th Cong., *Committee Print on H.R. 1105, Omnibus Appropriations Act, 2009, Division D-Financial Services and General Government*, at 959 (2009).

13 However, the IRS continues to conduct the Taxpayer Experience Survey on an annual basis, which was used to evaluate progress toward the TAB, to gather information on the taxpayer experience and preference. The results from this annual survey are used to inform business decisions. IRS response to TAS fact check (Nov. 15, 2019). *See* Consolidated Appropriations Act, 2017, Pub. L. No. 115-31. Email from the IRS (May 15, 2017) (on file with TAS).

14 IRS, The 2006 Taxpayer Assistance Blueprint, (Apr. 2006); IRS, The 2007 Taxpayer Assistance Blueprint (2007).

15 IRS Integrated Modernization Business Plan 4-11 (Apr. 2019); *See* Most Serious Problem: *Information Technology Modernization: The IRS Modernization Plan's Goal to Improve the Taxpayer Experience Is Commendable, But the IRS Needs Additional Multi-Year Funding to Bring It to Fruition*, *infra*.

IRS training employees to move work as quickly as possible and to try to limit customer interactions? The IRS can undertake an extensive effort to expand digital services and enhance its interactions with taxpayers and practitioners as part of its customer service strategy. However, if at the end of the day the organization is one where employees do not want to engage with taxpayers or where employees negatively view taxpayers who owe money, then an expansion of services will not fundamentally improve the customer service experience.

Customer Service Is the Responsibility of Every Part of the IRS

An overarching IRS-wide customer service strategy is critical, and each Business Operating Division (BOD) in the IRS must consider how it applies the Servicewide strategy to its particular taxpayer populations and form a plan specific to customer needs during those interactions.[16] The current lack of plans for each taxpayer segment magnifies that the IRS does not first consider itself a service organization. The TFA also requires the IRS to develop a plan to redesign its structure.[17] The IRS should consider using the customer service strategy to inform any potential restructure to avoid the silos that currently cause problems in how the IRS serves customers.

To ensure it incorporates service throughout the organization, the IRS should appoint a Chief Customer Experience Officer (CCEO) who reports directly to the Commissioner or Deputy Commissioner and serves as a liaison to coordinate all service initiatives and strategies across different functions. A CCEO would ensure that IRS senior leadership views decisions through the lens of the taxpayer's experience.[18]

Customer Services Must Meet Customer Needs and Preferences

The IRS provides service through various communication channels such as the internet, phone, and in-person assistance. Taxpayers and representatives have different preferences for each of these channels and these preferences may vary depending on the specific needs of the taxpayer or the type of task the taxpayer or representative is trying to accomplish. To provide world class service to customers and protect their *right to quality service*, the IRS must base service strategy decisions on research into customer needs rather than on what the IRS thinks is best and lowest cost. The IRS should conduct research into why taxpayers or their representatives do not use certain service channels for particular tasks so that it can minimize existing barriers and improve services in those areas, if possible. This includes talking with taxpayers and their representatives directly about what they want from the IRS — not just guessing at what the best delivery method might be. Finally, to better understand customer satisfaction with actual usage of each service channel, the IRS should track the subject of taxpayer complaints for each service channel.[19]

While many taxpayers prefer to interact with the IRS electronically in certain transactions, to meet the needs and preferences of all taxpayers, the IRS must maintain an omnichannel service environment. An

16 We acknowledge that the Taxpayer First Act requires the Secretary to submit a plan to redesign the IRS's structure. We are discussing BODs as they are currently structured, but we recognize that the IRS could recommend a reorganization that makes the organization look completely different. Taxpayer First Act, Pub. L. No. 116-25, § 1302, 133 Stat. 981 (2019).

17 *Id*.

18 U.S. General Services Administration, Customer Experience Toolkit (Aug. 8, 2019). The Department of Veterans Affairs, General Services Administration, Export-Import Bank, and Federal Student Aid have all created similar positions. Rick Parrish, *Why Every Federal Agency Should Have a Chief Customer Officer*, GovLoop.com (May 6, 2015), https://www.govloop.com/why-every-federal-agency-should-have-a-chief-customer-officer/.

19 National Taxpayer Advocate 2017 Annual Report to Congress 22, 29-30 (Most Serious Problem: *Telephones: The IRS Needs to Modernize the Way It Serves Taxpayers Over the Telephone, Which Should Become an Essential Part of an Omnichannel Customer Service Environment*).

omnichannel service environment is one that provides taxpayer service in a seamless manner through various channels such as in-person help, phone calls, and online applications. Taxpayers can choose one or several channels to obtain issue resolution, depending on their particular service task, preferences, needs, or access.[20] An omnichannel service environment will ensure that the IRS does not leave behind those taxpayers who do not have access to digital service options due to the lack of broadband access or inability to pass e-authentication requirements for online applications.[21]

The IRS must integrate customer service into all aspects of IRS operations and make it fundamental to ensuring the IRS protects taxpayer rights and promotes voluntary compliance.

A key part of a comprehensive taxpayer service strategy is offering online accounts to share information and enable both taxpayers and practitioners to interact digitally with the IRS. These online accounts contain sensitive taxpayer information and must be safeguarded with strict authentication requirements.[22] However, some taxpayers have difficulty passing strict authentication requirements to access those accounts.[23] For FY 2019, only 43 percent of taxpayers attempting to authenticate their identity were able to pass the strict authentication standards and register for a new online account.[24] As the IRS looks to expand its online service offering, it must make its e-authentication requirements as least burdensome as possible while also satisfying the guidelines issued by the National Institute of Standards and Technology (NIST).[25] We suggest working with NIST and reviewing the methods used by other international taxing authorities. In Canada and the United Kingdom, taxpayers can authenticate through banking partners with links the Canada Revenue Agency and Her Majesty's Revenue and Customs provide.[26] These countries also allow taxpayers to verify in person.[27] Similarly, U.S. taxpayers should have options to authenticate by phone, in person at a Taxpayer Assistance Center (TAC), or via an authentication code sent to their address of record.

20 See National Taxpayer Advocate 2017 Annual Report to Congress 22, 22-35 (Most Serious Problem: *Telephones: The IRS Needs to Modernize the Way It Serves Taxpayers Over the Telephone, Which Should Become an Essential Part of an Omnichannel Customer Service Environment*).

21 See, e.g., National Taxpayer Advocate 2017 Annual Report to Congress 36 (Most Serious Problem: *The IRS's Focus on Online Service Delivery Does Not Adequately Take into Account the Widely Divergent Needs and Preferences of the U.S. Taxpayer Population*).

22 For a detailed description of the information required to pass Secure Access requirements, see IRS, Secure Access: How to Register for Certain Online Self-Help Tools, https://www.irs.gov/individuals/secure-access-how-to-register-for-certain-online-self-help-tools (last visited Oct. 26, 2019).

23 See National Taxpayer Advocate Fiscal Year 2020 Objectives Report 108 (Area of Focus: *Facilitate Digital Interaction Between the IRS and Taxpayers While Still Maintaining Strict Security of Taxpayer Information*).

24 IRS response to TAS fact check (Nov. 26, 2019).

25 National Institute of Standards and Technology, Special Publication 800-63-3, *Digital Identity Guidelines* (June 2017). The IRS must also comply with Office of Management and Budget, M-04-04, *E-Authentication Guidance for Federal Agencies* (Dec. 16, 2003).

26 The Canada and United Kingdom tax authorities provide additional ways for taxpayers to verify their identities, such as through financial institutions, in person, telephone, and video calls. See Government of Canada Revenue Agency, *My Account for Individuals*, https://www.canada.ca/en/revenue-agency/services/e-services/e-services-individuals/account-individuals.html (last visited Oct. 10, 2019); United Kingdom, *Government Digital Service*, https://www.gov.uk/government/publications/introducing-govuk-verify/introducing-govuk-verify (last visited Oct. 10, 2019).

27 See Government of Canada Revenue Agency, *My Account for Individuals*, https://www.canada.ca/en/revenue-agency/services/e-services/e-services-individuals/account-individuals.html (last visited Oct. 10, 2019); United Kingdom, *Government Digital Service*, https://www.gov.uk/government/publications/introducing-govuk-verify/introducing-govuk-verify (last visited Oct. 10, 2019).

Taxpayers Need Assistance Navigating the Complex Tax System

To address various taxpayer communication preferences and assist taxpayers in better navigating the agency itself, the IRS should establish a 311-type phone system, as TAS has previously recommended.[28] The 311 system would provide the taxpayer the option to connect with an operator who would ask questions to understand why a taxpayer is calling. The operator would then match the taxpayer with the specific office within the IRS that handles the taxpayer's issue or case. Such a channel would facilitate increased efficiencies, diminished wait times, and improved interactions between taxpayers and appropriate IRS personnel. It would also fit within a more comprehensive omnichannel environment that utilizes customer experience mapping and customer journey analytics already employed in private industry.[29]

Reducing Levels of Service on Personal Service Channels Forces Taxpayers Into Using Digital Channels

Although in-person assistance is the most costly service channel, TAS research into taxpayer needs and preferences has clearly indicated a demand for personal services by certain populations and certain types of interactions or tasks.[30] The IRS's reduction in staff and the number of TACs, the switch to appointments-only in the TACs, and the low percentage of telephone calls answered by live assistors leave taxpayers with little choice but to attempt to complete tax-related tasks on the internet (where the taxpayer often does not get issue resolution)[31] or to spend money for professional assistance. If the IRS steers taxpayers toward digital channels when they require or prefer a more personal channel, it is undermining the taxpayers' *rights to be informed* and *to quality service*. It is also causing a downstream impact as the IRS may have to handle multiple requests from the same taxpayer or deal with an exam or collection issue if taxpayers do not get the response they need and are unable to meet their tax obligations.

Low Percentage of Telephone Calls Actually Answered by Live Assistors

As illustrated in Figure 1.1.1, IRS phone service has fallen short in recent years for taxpayers who chose that service channel expecting to receive personal assistance.[32] Phone assistors only answered about 29 percent of calls enterprisewide in FY 2019. On the Consolidated Automated Collection System line, live assistors answered only about 31 percent of the calls, and the average speed of answer was about 38 minutes. Even worse, for taxpayers calling the Installment Agreement/Balance Due line to make payment arrangements because they could not pay in full, live assistors only answered about 26 percent of the calls, and wait times averaged about 45 minutes. While the IRS touts relatively high levels of service (LOS)

28 See National Taxpayer Advocate 2018 Annual Report to Congress 52 (Most Serious Problem: *Navigating the IRS: Taxpayers Have Difficulty Navigating the IRS, Reaching the Right Personnel to Resolve Their Tax Issues, and Holding IRS Employees Accountable*).

29 National Taxpayer Advocate 2017 Annual Report to Congress 22 (Most Serious Problem: *Telephones: The IRS Needs to Modernize the Way It Serves Taxpayers Over the Telephone, Which Should Become an Essential Part of an Omnichannel Customer Service Environment*); National Taxpayer Advocate FY 2019 Objectives Report to Congress 41 (Area of Focus: *IRS's Failure to Create an Omnichannel Service Environment Restricts Taxpayers' Ability to Get Assistance Using the Communication Channels That Best Meet Their Needs and Preferences*); Maxie Schmidt-Subramanian and Andrew Hogan, *How to Measure Digital Customer Experience*, Forrester Research 3 (June 21, 2016).

30 National Taxpayer Advocate 2017 Annual Report to Congress, vol. 2, at 61 (Research Study: *A Further Exploration of Taxpayers' Varying Abilities and Attitudes Toward IRS Options for Fulfilling Common Taxpayer Service Needs*); National Taxpayer Advocate Public Forums, https://taxpayeradvocate.irs.gov/public-forums (last visited Aug. 19, 2019); National Taxpayer Advocate 2015 Annual Report to Congress, vol. 2, at 101 (Research Study: *Understanding the Hispanic Underserved Population*); National Taxpayer Advocate 2014 Annual Report to Congress, vol. 2, at 9 (Research Study: *Low Income Taxpayer Clinic Program: A Look at Those Eligible to Seek Help From the Clinics*).

31 IRS response to TAS information request (July 1, 2019), from the IRS Customer Satisfaction Survey, FY 2018 Accounts Management (AM) Toll-Free Annual Report, W&I Strategies and Solutions Research Group 1 (Jan. 2019).

32 IRS, JOC, Snapshot Reports: Enterprise Snapshot and Product Line Detail (weeks ending Sept. 30, 2015; Sept. 30, 2016; Sept. 30, 2017; Sept. 30, 2018; Sept. 30, 2019).

for its Accounts Management (AM) line — 65 percent in FY 2019 — live assistors really only answered about 28 percent of the calls made to that line.[33] We are not suggesting that the IRS only served 28 percent of callers as we recognize that some are adequately served through automation and some quickly hang up for personal reasons (*e.g.,* a call-waiting notification is received just after the start of the call).

FIGURE 1.1.1, Levels of Service for Total Enterprise, Accounts Management, Consolidated ACS, and Installment Agreement Telephone Lines for Fiscal Years 2015–2019[34]

	FY 2015	FY 2016	FY 2017	FY 2018	FY 2019
Total Enterprise Net Attempts	116.7 mil	117.5 mil	95.6 mil	98.5 mil	99.3 mil
Total Enterprise Assistor Calls Answered	26.1 mil (22%)	32.2 mil (27%)	32.6 mil (34%)	34.7 mil (35%)	28.6 mil (29%)
Total Enterprise Level of Service (LOS)	44%	56%	68%	69%	56%
Total Enterprise Average Speed of Answer (ASA) (minutes)	25.9 mins	17.4 mins	12.8 mins	11.3 mins	16.2 mins
Accounts Management (AM) Net Attempts	101.5 mil	104.3 mil	74.5 mil	77.7 mil	76.8 mil
AM Assistor Calls Answered	18.2 mil (18%)	25.5 mil (25%)	23.2 mil (31%)	25.3 mil (33%)	21.3 mil (28%)
AM ASA (minutes)	30.5 mins	17.8 mins	8.4 mins	7.5 mins	11.3 mins
AM LOS	38%	53%	77%	76%	65%
Consolidated ACS Net Attempts	N/A	4.9 mil	13.1 mil	12.1 mil	15 mil
Consolidated ACS Assistor Calls Answered	N/A	2.8 mil (58%)	5.7 mil (44%)	5.9 mil (49%)	4.7 mil (31%)
Consolidated ACS ASA (minutes)	N/A	17.9 mins	30.6 mins	24.4 mins	38.1 mins
Consolidated ACS LOS	N/A	70%	47%	53%	34%
Installment Agreement/Balance Due (IA/Bal Due) Net Attempts[35]	11.1 mil	10.4 mil	8.6 mil	7.6 mil	9.3 mil
IA/Bal Due Assistor Calls Answered	4.1 mil (37%)	4.6 mil (44%)	3.7 mil (42%)	3.6 mil (48%)	2.4 mil (26%)
IA/Bal Due ASA (minutes)	34.8 mins	22.5 mins	32.7 mins	27.5 mins	44.5 mins
IA/Bal Due LOS	37%	44%	42%	48%	26%
Practitioner Priority Service (PPS) Net Attempts	2.1 mil	2 mil	2.4 mil	3.1 mil	3.5 mil
PPS Calls Answered	0.9 mil (41%)	1.3 mil (62%)	1.7 mil (73%)	2.2 mil (72%)	2.1 mil (61%)
PPS ASA (minutes)	46.6 mins	10.5 mins	8.9 mins	7.5 mins	8.8 mins
PPS LOS	48%	71%	82%	85%	78%

33 The Accounts Management line has the highest call volume and is used for account inquiries and tax law questions, among other things.

34 IRS, JOC, Snapshot Reports: Enterprise Snapshot and Product Line Detail (weeks ending Sept. 30, 2015; Sept. 30, 2016; Sept. 30, 2017; Sept. 30, 2018; Sept. 30, 2019).

35 The IRS moved the Installment Agreement line from Accounts Management to Consolidated ACS in October 2016 (FY 2017).

To better understand taxpayer interaction with the phone tree system, the IRS should conduct research into why a significant number of taxpayers who call the various IRS phone lines hang up either before or after they are placed in a queue for a particular phone line. The IRS refers to these hang-ups as "primary abandonments" (*i.e.,* when the taxpayer hangs up before they are placed in the queue, such as when a call-waiting notification is received just after the start of the call) and "secondary abandonments" (*i.e.*, when the taxpayer hangs up after they are placed in the queue and before they receive any service).[36] In FY 2019, of the approximate 99 million calls to the IRS enterprisewide, about 25 million (about 25 percent) were primary abandonments, and 11 million (about 11 percent) were secondary abandonments.[37] Research into the reasons for these abandonments will aid the IRS's understanding of the taxpayer experience to help improve telephone service overall and protect the taxpayer's *right to quality service*.

In addition, telephone callback technology would address the poor levels of service on the phones. In fact, the TFA mandates the IRS to include callback services as part of the customer service strategy.[38] This technology would enable the caller to request a callback instead of waiting on hold. If the IRS cannot keep up with call volumes on the phone lines and taxpayers experience long hold times, this technology will prevent the IRS from losing the taxpayer who is presumably contacting the IRS in an effort to comply with the tax laws. The IRS tested the technology during the 2019 filing season but has yet to fully roll out the capability. By implementing this technology, the IRS will provide phone service with a taxpayer-centric approach.[39]

Reduction in Service at Taxpayer Assistance Centers

The IRS continues to reduce service at its TACs, the main vehicle for in-person interaction with the IRS. Since 2011, the IRS has closed 43 TACs (over ten percent of its total TACs).[40] As of October 2019, of the remaining 358 TACs, 34 (over nine percent) have no staff and no circuit riders (employees who work at multiple TACs) or seasonal employees and are effectively closed; one is only open seasonally; and eight are staffed by circuit riders and were open less than 35 hours per week.[41] Staffing in TACs has declined over 40 percent since FY 2011.[42] The IRS implemented an appointment-only-based system in the TACs by the end of calendar year 2016.[43] In the first two full fiscal years of the appointment system, TAC visits declined by 38 percent.[44] While an appointment-only system would naturally lead to a decline in TAC visits, this does not mean that fewer taxpayers demand face-to-face service. Rather, it means less face-to-face service is available to taxpayers. The IRS needs to make decisions based on what taxpayers need as opposed to current usage because current usage does not capture taxpayer demands. Figure 1.1.2 shows the steady decline in TAC visits since FY 2014.

36 IRS response to TAS information request (July 2, 2019).

37 IRS, JOC, Snapshot Reports: Enterprise Snapshot (week ending Sept. 30, 2019).

38 Taxpayer First Act, Pub. L. No. 116-25, § 1101(a)(1), 133 Stat. 981, 986 (2019).

39 For more information on callback technology, see Most Serious Problem: *IRS Funding: The IRS Does Not Have Sufficient Resources to Provide Quality Service*, *infra*; Most Serious Problem: *Information Technology Modernization: The IRS Modernization Plan's Goal to Improve the Taxpayer Experience Is Commendable, But the IRS Needs Additional Multi-Year Funding to Bring It to Fruition*, *infra*.

40 Effective July 1, 2019, the Taxpayer First Act, Pub. L. No. 116-25, § 1403, 133 Stat. 981 (2019), imposed new notification and reporting requirements on the IRS before it can close TACs. IRS response to TAS information request (Dec. 23, 2014; July 2, 2019); IRS response to TAS fact check (Nov. 15, 2019).

41 IRS response to TAS information request (July 2, 2019); IRS response to TAS fact check (Nov. 15, 2019).

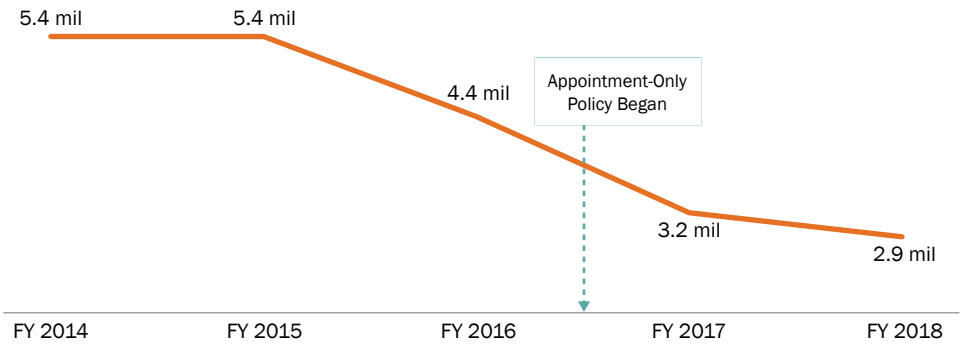
42 IRS response to TAS information request (Sept. 3, 2017; July 2, 2019); IRS response to TAS fact check (Nov. 15, 2019).

43 Memorandum from Debra Holland, Commissioner, Wage & Investment (W&I) to All W&I Employees (Dec. 13, 2016).

44 IRS response to TAS information request (Sept. 2, 2017; July 2, 2019); IRS response to TAS fact check (Nov. 15, 2019).

FIGURE 1.1.2

Taxpayer Assistance Centers Taxpayer Visits by Fiscal Year



The IRS Should Increase Access to Personal Service Channels for Interactions Associated With High Anxiety Levels

Forcing taxpayers into digital services for transactions associated with high anxiety levels might be counterproductive. Such forced migration may just create delays, greater taxpayer anxiety, and more IRS rework. Even worse, it could create anger and distrust on behalf of taxpayers, which could lead to increased noncompliance.[45] TAS has previously recommended creating a taxpayer anxiety index to understand how taxpayers respond in certain situations.[46] Once established, the IRS should conduct periodic surveys to determine the level of anxiety associated with different interactions with the IRS and track taxpayer complaints for each service channel to gauge the associated level of anxiety. Based on survey findings and taxpayer complaints, the IRS would better understand which types of interactions cause more anxiety and require more personal services. The IRS could also provide dedicated helplines for interactions or tasks associated with particularly high anxiety levels.[47]

Improved Measures Will Identify Performance Gaps

The Taxpayer First Act requires the IRS to identify metrics and benchmarks to measure its progress in implementing the service strategy.[48] It is often said "you get what you measure." If the IRS is focused on the speed of its interactions with taxpayers and not on ensuring it resolves all of the taxpayers' issues, employees will naturally focus on working quickly instead of spending the time needed to resolve the issue. It is crucial that the IRS develop measures that ensure the IRS is truly focusing on taxpayer service. This includes measures such as the rate of first contact resolution for each service channel. In

45 See National Taxpayer Advocate FY 2020 Objectives Report to Congress 1, 5-8 (Introduction: *The National Taxpayer Advocate's Remarks on the Role of Trust and Taxpayer Advocate Service in Fostering Tax Compliance*); Michelle A. Shell and Ryan W. Buell, *Why Anxious Customers Prefer Human Customer Service* (Apr. 15, 2019), https://hbr.org/2019/04/why-anxious-customers-prefer-human-customer-service.

46 TAS has previously suggested the "Taxpayer Anxiety Index" (TAI) as a methodology to analyze how the IRS should design its service strategy, especially the digital component thereof. For a detailed discussion of the TAI and an illustration of its application to the tax return processing roadmap, see National Taxpayer Advocate FY 2020 Objectives Report to Congress 1, 5-8 (Introduction: *The National Taxpayer Advocate's Remarks on the Role of Trust and Taxpayer Advocate Service in Fostering Tax Compliance*).

47 National Taxpayer Advocate 2015 Annual Report to Congress 240 (Most Serious Problem: *Earned Income Tax Credit (EITC): The IRS Does Not Do Enough Taxpayer Education in the Pre-filing Environment to Improve EITC Compliance and Should Establish a Telephone Helpline Dedicated to Answering Pre-filing Questions From Low Income Taxpayers About Their EITC Eligibility*).

48 Taxpayer First Act, Pub. L. No. 116-25, § 1101(a)(5), 133 Stat. 981 (2019).

addition, the strategy should revisit existing telephone LOS measures to improve transparency and enable the IRS to identify gaps in performance and serve as the basis for funding requests to meet taxpayers' needs.[49]

First Contact Resolution

Achieving a high level of service on the phones does not mean much if the IRS is unable to answer taxpayers' questions or guide them to an appropriate solution to resolve their issues. To more thoroughly evaluate its telephone service and service on other communication channels, the IRS should incorporate additional measures aimed at assessing taxpayer satisfaction. According to researchers, the "single biggest driver of customer satisfaction" is First Contact Resolution.[50] Taxpayers want to be able to resolve all of their issues the first time they contact the IRS, not make multiple attempts to get an answer. Almost 40 percent of taxpayers calling the IRS felt one call did not fully resolve their problems.[51] In FY 2018, approximately 77 percent of callers to the AM lines said they used other resolution methods prior to calling the IRS, with 44 percent visiting IRS.gov prior to calling.[52] The data shows that many taxpayers still need to speak to a live representative even after reviewing many of the non-telephone resources available to them. Incorporating this measure into the plan will more accurately gauge taxpayer satisfaction.

Telephone Level of Service Measures Need More Transparency

Telephone LOS measures must be transparent and capture what is truly happening with service. For example, the IRS received approximately 99 million telephone calls enterprisewide and reported an LOS of about 65 percent on its AM telephone lines during FY 2019.[53] This level marks a significant decline from the IRS's performance during FY 2018, when the IRS reported a 76 percent LOS.[54] However, this measure is narrow and does not reflect the full taxpayer experience. The current LOS measure does not capture all calls to the IRS and insufficiently gauges what the taxpayer actually experiences when using this service channel.[55] The IRS, in collaboration with TAS, should determine a more transparent measure for telephone service.

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49 *See* National Taxpayer Advocate 2017 Annual Report to Congress, vol. 2, at 230 (Literature Review: *Improve Telephone Service Through Better Quality Measures*).

50 Jeff Rumburg & Eric Zbikowski, *The Seven Most Important Performance Indicators for the Service Desk*, METRICNET, https://www.thinkhdi.com/~/media/HDICorp/Files/Library-Archive/Rumburg_SevenKPIs.pdf (last visited Dec. 30, 2019).

51 National Taxpayer Advocate 2017 Annual Report to Congress vol. 2, at 62, 85 (Research Study: *A Further Exploration of Taxpayers' Varying Abilities and Attitudes Toward IRS Options for Fulfilling Common Taxpayer Service Needs*).

52 IRS response to TAS information request (July 1, 2019), from the IRS Customer Satisfaction Survey, FY 2018 AM Toll-Free Annual Report, W&I Strategies and Solutions Research Group 1 (Jan. 2019). A study by the Harvard Business Review suggests an even higher percentage, finding that 57 percent of inbound calls to commercial call centers come from customers that attempted to use web resources first. Matthew Dixon, Karen Freeman, & Nicholas Toman, *Stop Trying to Delight Your Customers*, Harvard Business Review (July-Aug. 2010), https://hbr.org/2010/07/stop-trying-to-delight-your-customers.

53 *Id*. IRS, JOC, Snapshot Reports: Enterprise Snapshot (week ending Sept. 30, 2019). The IRS reports the AM Customer Service Representative LOS as its benchmark measure of telephone performance.

54 IRS, JOC, Snapshot Reports: Enterprise Snapshot (week ending Sept. 30, 2019).

55 The LOS measure only captures calls directed to the AM lines. About 77 million calls (about 77 percent) are routed to AM lines. The reported benchmark LOS accounts only for these calls, not the remaining twelve million calls (such as the compliance phone lines). Further, the denominator in the LOS computation is derived from calls routed to telephone assistors, rather than from all calls to that phone line. As a result, while the IRS is reporting a benchmark LOS of 65 percent, IRS employees answered only 28 percent of the calls received on the AM lines and 29 percent of calls received on all lines. IRS, JOC, Snapshot Reports: Enterprise Snapshot (week ending Sept. 30, 2019); *See* National Taxpayer Advocate FY 2020 Objectives Report to Congress 15, 24-28 (*Review of the 2019 Filing Season*).

A Service Strategy Is Not Comprehensive Unless It Addresses Practitioners

Considering that millions of taxpayers choose to interact with the IRS through their representatives, making them a vehicle for taxpayer compliance, the development of a comprehensive customer service strategy would be incomplete without addressing the service needs and preferences of practitioners.[56] Because practitioner needs and preferences are different than those of taxpayers, the IRS should conduct research to determine which service channels practitioners prefer for various service tasks. The IRS should also conduct customer satisfaction surveys to determine how to improve service offerings for this population.

As the IRS develops the customer service strategy, it should coordinate with the team developing the Servicewide return preparer strategy to ensure consistency and avoid duplication of efforts. In this report, we have provided a list of items we believe the IRS should include in the Servicewide return preparer strategy, some of which involve online application access for practitioners, outreach and education, and a public education campaign to taxpayers on what they should expect from their return preparers.[57]

IMPACT ON THE INTERNAL REVENUE SERVICE

Strategy Must Include an Implementation Plan

If the IRS wants to change the way it interacts with taxpayers, the customer service strategy cannot be merely aspirational. The IRS must couple the strategy with an implementation plan that lays out the obstacles and challenges for each stage of implementation. Many of the items the IRS will include in the strategy cannot be accomplished without information technology upgrades and the requisite funding. Accordingly, the implementation plan must provide cost estimates for the various initiatives in the strategy.[58]

CONCLUSION

In the Taxpayer First Act, Congress has given the IRS a directive to revamp the ways in which they serve taxpayers. This challenges the IRS to change how it views taxpayers and their representatives, what they need from the IRS, and how the IRS can best provide those services to meet their needs. Customer service touches every facet of IRS operation and must be a primary consideration as the IRS implements new programs and retires or retrofits current ones to address changing needs and goals. Robust research into taxpayer and practitioner needs and preferences as well as meaningful customer service measures should inform all IRS service decisions. Throughout the development of a comprehensive customer service strategy, the IRS should leverage the wealth of knowledge and experience TAS has acquired through decades of interacting with and assisting taxpayers and their representatives.

56 Over 80 million tax year (TY) 2018 individual tax returns were prepared and filed by return preparers. IRS, Compliance Data Warehouse, Individual Return Transaction File Entity file (data updated Oct. 24, 2019); IRS response to TAS fact check (Nov. 8, 2019). *See also* Most Serious Problem: *Return Preparer Strategy: The IRS Lacks a Comprehensive Servicewide Return Preparer Strategy*, *infra*.

57 *See* Most Serious Problem: *Return Preparer Strategy: The IRS Lacks a Comprehensive Servicewide Return Preparer Strategy*, *infra*.

58 *See* Most Serious Problem: *IRS Funding: The IRS Does Not Have Sufficient Resources to Provide Quality Service*, *infra*; Most Serious Problem: *Information Technology Modernization: The IRS Modernization Plan's Goal to Improve the Taxpayer Experience Is Commendable, But the IRS Needs Additional Multi-Year Funding to Bring It to Fruition*, *infra*.

RECOMMENDATIONS

Administrative Recommendations to the IRS

The National Taxpayer Advocate recommends that the IRS:

1. Ensure that each taxpayer segment and BOD are part of the overall customer service strategy to ensure the IRS is addressing the needs of all customers and responsibility is not falling on any one part of the IRS.
2. Appoint a Chief Customer Experience Officer, reporting to the Commissioner or Deputy Commissioner, to unify all taxpayer initiatives across different functions.
3. Work with NIST to determine how to make e-authentication requirements as least burdensome as possible and review the e-authentication methods used by other international taxing authorities.
4. Conduct research into why taxpayers and practitioners do not use certain service channels for particular tasks to enable the IRS to minimize any existing barriers and improve services in that area.
5. Establish a 311-type phone system to provide the taxpayer or practitioner the option to connect with an initial operator who would ask questions to understand the reason for the call. The operator would then match the caller with the specific office within the IRS that handles that particular issue or case.
6. Conduct research into why a significant number of customers who call the various IRS phone lines hang up either before or after they are placed in a queue for a particular phone line (primary and secondary abandonments).
7. Work with TAS to create a Taxpayer Anxiety Index.
8. Track the subject of taxpayer and practitioner complaints for each service channel to better understand the customer's satisfaction with actual usage of each service channel.
9. Develop meaningful and transparent measures to monitor the success of all customer service initiatives, including first contact resolution and more transparent telephone level of service measures.
10. Coordinate the team developing the Servicewide return preparer strategy to ensure consistency of strategies.
11. Collaborate with TAS throughout the development of the comprehensive customer service strategy required by the Taxpayer First Act.
12. Couple the customer service strategy with an implementation plan, complete with cost estimates for various initiatives.

Legislative Recommendations to Congress

The National Taxpayer Advocate recommends that Congress:

1. Provide the necessary funding to the IRS for the adequate staffing, budget, and technology needed to provide a robust, world class customer service experience.[59]

59 For more details on this legislative recommendation, see National Taxpayer Advocate 2020 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration* 6 *(Provide The IRS With Sufficient Funding to Meet Taxpayer Needs and Improve Federal Tax Compliance)*.

MSP #2 INFORMATION TECHNOLOGY MODERNIZATION: The IRS Modernization Plan's Goal to Improve the Taxpayer Experience Is Commendable, But the IRS Needs Additional Multi-Year Funding to Bring It to Fruition

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TAXPAYER RIGHTS IMPACTED[1]

- *The Right to Be Informed*
- *The Right to Quality Service*
- *The Right to Privacy*
- *The Right to Confidentiality*
- *The Right to a Fair and Just Tax System*

PROBLEM

Aging IRS information technology (IT) infrastructure continues to plague the IRS and directly impact taxpayers.[2] For example, equipment added to support the IRS's IT infrastructure in 2017 crashed during the 2018 filing season, temporarily preventing taxpayers from electronically filing their tax returns and payments.[3] To address the IRS's failing IT infrastructure and need for updated technology, the IRS developed an Integrated Modernization Business Plan (Plan). The Plan aims to improve "the taxpayer experience, by modernizing core tax administration systems, IRS operations and cybersecurity."[4] If implemented, the Plan would greatly improve the IRS's IT infrastructure, make tax administration more efficient, and enable the IRS to provide better taxpayer service. While the Plan does not address all of the IRS's IT issues, for the IRS to make any progress in modernizing its systems, its efforts must be fully funded.[5]

1 See Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are now listed in the Internal Revenue Code (IRC). See IRC § 7803(a)(3).

2 See, e.g., Jeff Stein, Damian Paletta & Mike DeBonis, *IRS to Delay Tax Deadline by One Day After Technology Collapse*, Wash. Post, Apr. 17, 2018, https://www.washingtonpost.com/business/economy/irs-electronic-filing-system-breaks-down-hours-before-tax-deadline/2018/04/17/4c05ecae-4255-11e8-ad8f-27a8c409298b_story.html.

3 See Aaron Boyd & Frank Konkel, *IRS' 60-Year-Old IT System Failed on Tax Day Due to New Hardware*, Nextgov (Apr. 19, 2018) (citing an IRS official), https://www.nextgov.com/it-modernization/2018/04/irs-60-year-old-it-system-failed-tax-day-due-new-hardware/147598.

4 IRS Pub. 5336, IRS Integrated Modernization Business Plan (Apr. 2019).

5 See *id*.

IMPACT ON THE INTERNAL REVENUE SERVICE

The National Taxpayer Advocate has previously discussed the urgent need to modernize the IRS's IT systems.[6] Current IRS IT capabilities substantially limit the IRS's ability to carry out effective tax administration and negatively impact taxpayers and practitioners.[7] The IRS currently operates about 60 separate case management systems, many of which are aged and do not fully integrate with each other.[8] These systems lack basic functionality such as digital communication and recordkeeping, making it difficult for IRS and TAS employees to perform their jobs efficiently and provide quality service to taxpayers.[9]

In April 2019, the IRS released the IT Modernization Plan and a related Companion Document to address various components of the IRS IT strategy for the near future.[10] The six-year plan seeks to improve the taxpayer experience and taxpayer service by modernizing the IRS's information technology.[11] The Companion Document lays out the implementation timeline for IT components and details how the agency intends to measure the success of modernization efforts.[12] The National Taxpayer Advocate commends the IRS for focusing its Plan in large part on updates to its systems to improve taxpayer experience and service.

In fiscal year (FY) 2019, the IRS implemented 18 of the 20 planned capabilities of the Plan.[13] The Plan became even more important after the Taxpayer First Act (TFA) became law on July 1, 2019. The TFA seeks to modernize and improve the IRS's IT and requires the IRS to develop and implement a multi-year strategic plan for its information technology needs.[14] The plan must be reviewed and updated on an annual basis and must consider the development of new IT.[15] The TFA also requires the IRS to create and submit a comprehensive customer service strategy to Congress by July 1, 2020.[16] As the IRS's existing Plan is merged into the plan required by TFA, the Plan will need to be further updated after the

6 *See, e.g.*, National Taxpayer Advocate Fiscal Year 2019 Objectives Report to Congress 47 (Area of Focus: *The IRS's Enterprise Case Management Project Shows Promise, But to Achieve 21st Century Tax Administration, the IRS Needs an Overarching Information Technology Strategy With Proper Multi-Year Funding*).

7 For a discussion about how taxpayers and practitioners are negatively impacted by current IRS information technology, see National Taxpayer Advocate 2018 Annual Report to Congress 351 (Legislative Recommendation: *IT Modernization: Provide the IRS with Additional Dedicated, Multi-Year Funding to Replace Its Antiquated Core IT Systems Pursuant to a Plan That Sets Forth Specific Goals and Metrics and Is Evaluated Annually by an Independent Third Party*).

8 *Id.*; National Taxpayer Advocate Fiscal Year 2019 Objectives Report to Congress 47 (Area of Focus: *The IRS's Enterprise Case Management Project Shows Promise, But to Achieve 21st Century Tax Administration, the IRS Needs An Overarching Information Technology Strategy With Proper Multi-Year Funding*).

9 See National Taxpayer Advocate Fiscal Year 2019 Objectives Report to Congress 1, 6-7 (Preface: *National Taxpayer Advocate's Introductory Remarks*).

10 IRS Pub. 5336, IRS Integrated Modernization Business Plan (Apr. 2019).

11 *Id.*

12 IRS Pub. 5336-A, IRS Integrated Modernization Business Plan: Companion Document (Apr. 2019).

13 IRS Integrated Modernization Business Plan Treasury Monthly Briefing 3 (Sept. 26, 2019). A nineteenth capability planned for FY 2019 was completed in October 2019. Only Electronic Case Management was not implemented, due to Government Accountability Office (GAO) protest. IRS response to TAS fact check (Nov. 22, 2019).

14 TFA, Pub. L. No. 116-25, §§ 2101-2103, 133 Stat. 981 (2019).

15 TFA, Pub. L. No. 116-25, § 2101, 133 Stat. 981, 1009 (2019) (codified as amended at 26 U.S.C. § 7803(f)(4)(B)).

16 *See* TFA, Pub. L. No. 116-25, § 1101, 133 Stat. 981 (2019) (providing that the strategy shall include "a plan to provide assistance to taxpayers that is secure, designed to meet reasonable taxpayer expectations, and adopts appropriate best practices of customer service provided in the private sector, including online services…."). See Most Serious Problem: *Customer Service Strategy: The IRS Needs to Develop a Comprehensive Customer Service Strategy That Puts Taxpayers First, Incorporates Research on Customer Needs and Preferences, and Focuses on Measurable Results*, *supra*, for a discussion on the plan and IRS taxpayer and customer service.

development of the customer service strategy, as many aspects of improving customer service are likely to be technology-related.

The Plan Is a Good Step Toward Information Technology Modernization But May Never Be Fully Implemented Unless It Is Adequately Funded

In the Plan, the IRS explains that "overall success will depend on several special legislative proposals and regulatory authorities that we believe are appropriate for an effort of this scope and importance."[17] Success will require receiving funding and authority to hire IT staff and adequate, predictable funding to pay for the IT upgrades — both of which are outside of the IRS's control.[18] TAS has previously advocated for multi-year funding and clear independent oversight of progress for IRS IT modernization.[19] Although the TFA extended pay authority for the IRS to hire critical IT personnel to aid in its IT modernization,[20] Congress has not yet allocated IT funding for multiple years, which the IRS requires to execute its Plan.[21]

Full Funding Is Needed for Complete Implementation of the Plan

The IRS estimates that full implementation of its Plan over six years — with Phase 1 being FYs 2019-2021 and Phase 2 being FYs 2022-2024 — will cost $2.3 to $2.7 billion.[22] In FY 2019, the IRS spent $289.7 million in implementing its Plan.[23] However, it will likely need more than $2 billion for the remaining years to meet its estimated cost for total implementation.[24] Without full funding, the IRS will fall short of its goals to modernize its systems and enhance taxpayer service.

IT modernization projects are massive and generally span years. In order to be able to award funding for these projects, the IRS needs consistent multi-year funding.[25] For example, the Plan includes the IRS's existing efforts to standardize technology support for IRS business processes, creating an Enterprise Case Management (ECM) system.[26] Through ECM the IRS plans to create a simplified infrastructure, hopefully eliminating the need to maintain or rebuild older IT systems.[27] ECM is not a project that the IRS can stop and start as funding becomes available. The project is currently estimated to take six years

17 IRS Pub. 5336, IRS Integrated Modernization Business Plan 15 (Apr. 2019).

18 *Id*.

19 *See* National Taxpayer Advocate 2018 Annual Report to Congress 351 (Legislative Recommendation: *IT Modernization: Provide the IRS with Additional Dedicated, Multi-Year Funding to Replace Its Antiquated Core IT Systems Pursuant to a Plan that Sets Forth Specific Goals and Metrics and Is Evaluated Annually by an Independent Third Party*). TFA requires the IRS to submit a multi-year strategic plan for the information technology needs of the IRS and requires the IRS to enter into a contract with an independent reviewer to verify and validate the implementation plans. TFA, Pub. L. No. 116-25, § 2101, 133 Stat. 981, 1008-1009 (2019) (codified as amended at 26 U.S.C. § 7803(f)).

20 TFA, Pub. L. No. 116-25, § 2103, 133 Stat. 981, 1009 (2019) (codified as amended at 26 U.S.C. § 7812).

21 *See* TFA, Pub. L. No. 116-25, 133 Stat. 981 (2019).

22 IRS Pub. 5336-A, IRS Integrated Modernization Business Plan: Companion Document 3 (Apr. 2019). The IRS anticipated IT modernization costs of $300 million for FY 2019 and an additional $300 million for FY 2020. *Id*.

23 IRS Integrated Modernization Business Plan Treasury Monthly Briefing 22 (Oct. 24, 2019). In FY 2019, the IRS allocated $201 million from the Business Systems Modernization appropriations account, which includes the FY 2019 appropriations and carryover balances and $99 million in user fees. *See* IRS Pub. 5336-A, IRS Integrated Modernization Business Plan: Companion Document 3 (Apr. 2019).

24 IRS Pub. 5336-A, IRS Integrated Modernization Business Plan: Companion Document 3 (Apr. 2019).

25 National Taxpayer Advocate 2020 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration* 6 *(Provide The IRS With Sufficient Funding to Meet Taxpayer Needs and Improve Federal Tax Compliance)*.

26 IRS Pub. 5336, IRS Integrated Modernization Business Plan 26 (Apr. 2019).

27 *Id*.

to develop and implement, so absent continued multi-year funding, the IRS will be unable to make progress in its ECM efforts.[28]

The TFA requires the IRS to develop a strategic plan for the IT needs of the IRS.[29] While the current Plan satisfies several requirements of the TFA, the IRS is currently in the process of updating the Plan to fully conform to the TFA requirements.[30] However, Congress did not provide additional funding to the IRS in the TFA, including funding for the modernization efforts.[31]

The IRS Also Requires Adequate Funding for Ongoing Information Technology Costs While It Modernizes

In FY 2018, the IRS spent approximately $2.5 billion on Information Services, which included telecommunications and information technology development, enhancement, operations, maintenance, and security.[32] Between FYs 2017 to 2019, the IRS spent about $2 billion per year on "IT spending [to] maintain current capability and performance levels." However, the cost to operate the IRS technology infrastructure annually now exceeds $2.2 billion and is expected to exceed $3 billion by FY 2026 if current trends continue.[33] "Capital asset acquisitions" of IT systems, *i.e.*, the IRS modernizing its IT systems, are separately funded and budgeted in the Business Systems Modernization account.[34]

While the IRS needs the separate funding for its modernization efforts, at the same time it also needs adequate funding to maintain and update existing systems. As noted previously, modernization efforts take time, and the IRS cannot sacrifice maintaining its existing systems to devote all of its resources to implementing new systems. As evidenced by the crash during the 2018 filing season, the IRS needs to be able to reliably deliver existing capabilities even as it looks

While the IRS needs the separate funding for its modernization efforts, at the same time it also needs adequate funding to maintain and update existing systems. As noted previously, modernization efforts take time, and the IRS cannot sacrifice maintaining its existing systems in order to devote all of its resources to implementing new systems.

28 IRS Pub. 5336-A, IRS Integrated Modernization Business Plan: Companion Document 9 (Apr. 2019). "The initial foundation for ECM will be established in FY 2020. By FY 2022, the ECM's target platform and core capabilities [should be] in use for case management, with most major business organizations having an operational footprint on the target platform and demonstrating value to the taxpayer." IRS response to TAS fact check (Nov. 22, 2019).

29 TFA, Pub. L. No. 116-25, § 2101(a), 133 Stat. 981, 1008-009 (2019) (codified as amended at 26 U.S.C. § 7803(f)(4)).

30 IRS response to TAS information request (Oct. 21, 2019).

31 *See* TFA, Pub. L. No. 116-25, 133 Stat. 981 (2019).

32 IRS, 2018 Data Book 65. In FY 2017 Operations Support spending was almost $4.1 billion. Of that, about $2.2 billion was for Information Services. Approximately $315 million was spent on Business Systems Modernization. *Id*. IRS, 2018 Data Book 65.

33 IRS response to TAS fact check (Nov. 22, 2019).

34 In FY 2018 the Business Systems Modernization account received about $247 million in funding, a small amount compared to the total Operations Support budget. IRS, 2018 Data Book 65.

to develop new ones.[35] Failure to fund existing operations and maintenance could result in even more problems with existing technology.

While this ongoing maintenance comes at a cost, the Treasury Inspector General for Tax Administration has noted that "some unfunded IT requests would actually result in the IRS achieving overall cost savings by replacing alternative inefficient manual workarounds."[36] Therefore, a current investment in the IRS's IT future could reduce costly maintenance efforts in the future.

Congress Should Hold the IRS Accountable for Meeting Certain Milestones and Conduct an Independent Review of Modernization Efforts, Similar to Enterprise Case Management

Asking Congress to provide consistent, multi-year funding to the IRS in support of its modernization efforts is not without risk. The IRS is preparing a monthly briefing for the Department of Treasury on its implementation progress and costs incurred to show its dedication to the project. The IRS should prepare a similar document to update Congress on modernization efforts and to address related congressional concerns.[37] However, to further mitigate risk, Congress should take an approach similar to ECM. The TFA requires the IRS to have an independent reviewer verify and validate the ECM implementation plans, which includes performance milestones and cost projections of the ECM system.[38] Congress should require the same independent review of the IRS's modernization efforts at critical performance milestones to monitor how the IRS is spending funds.[39]

The Plan Does Not Result in the Modernization of the IRS's Business Master File, Which May Continue to Hinder Business Taxpayers

The IRS uses the Individual Master File (IMF) and Business Master File (BMF) information systems, both of which it implemented in the 1960s and are the oldest systems in the entire federal government.[40] The IMF is the central repository of all tax data pertaining to individual taxpayers, and it maintains a continuously updated and current record of all individual taxpayer's accounts, while BMF serves the same purpose for business taxpayers.[41] For the fiscal year period ending September 30, 2018, there were approximately 175 million returns and other forms filed in the IMF system and approximately 75 million returns and other forms filed in the BMF system.[42]

35 IRS, IRS Provides Additional Day to File and Pay for Taxpayers Through Wednesday, April 18; IRS Processing Systems Back Online, IR-2018-100 (Apr. 17, 2018), https://www.irs.gov/newsroom/irs-provides-additional-day-to-file-and-pay-for-taxpayers-through-wednesday-april-18-irs-processing-systems-back-online; Jeff Stein, Damian Paletta & Mike DeBonis, *IRS to Delay Tax Deadline By One Day After Technology Collapse*, Wash. Post, Apr. 17, 2018, https://www.washingtonpost.com/business/economy/irs-electronic-filing-system-breaks-down-hours-before-tax-deadline/2018/04/17/4c05ecae-4255-11e8-ad8f-27a8c409298b_story.html.

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

37 *See, e.g.*, IRS Integrated Modernization Business Plan Treasury Monthly Briefing (Oct. 24, 2019).

38 TFA, Pub. L. No. 116-25, § 2101(b), 133 Stat. 981, 1009 (2019) (requiring independent verification of Electronic Case Management system). A similar requirement exists for the IRS's Customer Account Date Engine 2 (CADE 2) plans. *Id*.

39 National Taxpayer Advocate 2020 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration* 6 *(Provide The IRS With Sufficient Funding to Meet Taxpayer Needs and Improve Federal Tax Compliance)*.

40 GAO, GAO-16-468, *Information Technology: Federal Agencies Need to Address Aging Legacy Systems* 28 (May 2016).

41 *Id*.

42 IRS Pub. 55B, 2018 Internal Revenue Service Data Book: Oct. 1, 2017 to Sept. 30, 2018 (May 2019). IMF returns include all individual returns. BMF returns include corporate, partnership, employment tax, estate tax, gift tax, excise tax, and tax-exempt organization returns. *See* IRM Exhibit 25.7.1-5 (Jan. 1, 2018).

The Plan's efforts are largely focused on IMF, while complete modernization of the BMF infrastructure, which would greatly help the IRS and business taxpayers, is not included.[43] Without a plan for modernization of BMF, the IRS will not be able to provide the same level of service to business taxpayers that it will provide to individual taxpayers.[44] Assuming the IRS is able to fully achieve the modernization of IMF by 2024, then certain services the modernization efforts establish may only be available to individual taxpayers. For example, TAS is aware of situations where, after a taxpayer submits a payment to the IRS, the computer systems do not update for several weeks, preventing a taxpayer or the IRS from knowing if a taxpayer has successfully paid a tax debt. After the IRS fully implements the Plan, this should no longer be a concern for individual taxpayers. However, since the Plan is not modernizing the BMF, business taxpayers will continue to see these types of delays. It is critical that the IRS expand its modernization efforts to include BMF and ensure it can adequately meet the needs of all taxpayers.

IMPACT ON TAXPAYERS

If the IRS Does Not Receive Adequate Information Technology Modernization Funding, Taxpayers Will Not Receive the Improved Taxpayer Service That Modern Products and Services Would Provide

The IRS has been rolling out numerous services to improve taxpayer service in the past several years with additional improvements included in the Plan.[45] These new and planned services can help to address current issues with taxpayer services.[46] For example, customer callback is a feature that could address many of the issues taxpayers experience trying to get through to the IRS. This technology allows callers to elect to receive a call back when the next customer service representative is available rather than waiting on hold. When the IRS previously proposed acquiring customer callback technology in its FYs 2015 and 2016 budgets, it estimated the total cost would be $3.3 million.[47] However, the IRS later revealed that to actually use the callback technology, it would need to upgrade its entire phone system, which would cost an estimated $48.5 million.[48] While the IRS did eventually upgrade the phone system and is working to roll out the callback technology, this is an example of how aging core systems are prohibiting the implementation of critical new technologies.

43 See IRS Pub. 5336, IRS Integrated Modernization Business Plan 24 (April 2019). While modernization of BMF is not in the Plan, the Plan is largely focused on initiatives that support critical initiatives the IRS could accomplish with sufficient funding. The "taxpayer experience" initiatives benefit many types of customers, including individuals, businesses, and third parties. IRS response to TAS fact check (Nov. 22, 2019).

44 See *IRS Legacy Information Technology Systems*, Hearing Before the House Comm. on Oversight and Government Reform, 114th Cong. (2016) (statement of Terence Milholland, Chief Technology Officer, IRS).

45 See IRS Pub. 5336, IRS Integrated Modernization Business Plan (Apr. 2019); IRS Pub. 5336-A, IRS Integrated Modernization Business Plan: Companion Document (Apr. 2019).

46 See Most Serious Problem: *Customer Service Strategy: The IRS Needs to Develop a Comprehensive Customer Service Strategy That Puts Taxpayers First, Incorporates Research on Customer Needs and Preferences, and Focuses on Measurable Results*, *supra*.

47 See IRS, Congressional Justification for Appropriations Accompanying the President's FY 2015 Budget IRS-20 (2014); IRS, Congressional Justification for Appropriations Accompanying the President's FY 2016 Budget IRS-22 (2015). The IRS IT division also requested funding of $3.3 million in FY 2018, which was the first time the IT division requested callback funding. IRS response to TAS fact check (Nov. 22, 2019).

48 See Lisa Rein, *IRS Customer Service Will Get Even Worse This Tax Filing Season, Tax Chief Warns*, Wash. Post, Nov. 3, 2015, https://www.washingtonpost.com/news/federal-eye/wp/2015/11/03/irs-customer-service-will-get-even-worse-this-tax-filing-season-tax-chief-warns/?noredirect=on.

The IRS is looking at similar improvements to enhance customer service in the near term. Some taxpayers in pilot programs with certain issues requiring only a brief interaction with the IRS can use Webchat, freeing up the phone lines for customers who need more in-depth assistance, which could help to reduce call waiting times.[49] The IRS is trying to roll out Secure Messaging, which allows taxpayers and IRS employees to exchange documentation safely, securely, and quickly and offers an alternative to traditional channels like mail and fax.[50] An enhanced online taxpayer account can provide information on amount of taxes owed, payment options, and payment history, in addition to access to tax transcripts.[51]

The forthcoming customer service strategy should include a number of recommendations that will involve technology enhancements, as discussed in the Most Serious Problem on Customer Service Strategy.[52] However, these enhancements will come at a price. Without extensive IT modernization, the IRS cannot implement a comprehensive taxpayer service strategy. Without the required multi-year funding, taxpayers will continue to suffer from customer service that fails to meet their needs and is not supported with real-time data updates and now-industry standard methods of interaction. The TFA requires the IRS to examine how to improve customer service, but those improvements cannot become reality without additional funding. Improved customer service resulting from funding the IRS's modernization plans is likely to improve taxpayer trust of the IRS and, in turn, increase voluntary compliance, increasing overall revenue for the federal government.[53]

CONCLUSION

Taxpayers, the IRS, and TAS all face problems due to the IRS's aging and outdated IT infrastructure. While the IRS's Plan may help to fix many of the issues, lack of consistent funding raises questions as to whether the IRS will successfully implement all the capabilities outlined in its Plan or upgrade its core systems. If the IRS does not receive all of the requested funding or otherwise allocate necessary funding from other sources, it may be unable to adopt some of the new technology underlined in the Plan and may need to continue to spend resources to maintain and patch its aging systems. This may result in increased costs over time and postpone upgrades of the IRS core systems, preventing the IRS from adequately managing cases and providing improved taxpayer service, ultimately harming both taxpayers and the IRS.

49 *See* IRS.gov (Webchat is an available option piloted on several pages across the website).

50 *See, e.g.*, IRS, TEBConnect, https://www.irs.gov/help/tebconnect (last visited Nov. 20, 2019).

51 *See* IRS, View Your Account Information, https://www.irs.gov/payments/view-your-tax-account (last visited Oct. 28, 2019).

52 *See* Most Serious Problem: *Customer Service Strategy: The IRS Needs to Develop a Comprehensive Customer Service Strategy That Puts Taxpayers First, Incorporates Research on Customer Needs and Preferences, and Focuses on Measurable Results*, *supra*. *See also* TFA, Pub. L. No. 116-25, § 1101, 133 Stat. 981 (2019).

53 *See* National Taxpayer Advocate 2016 Annual Report to Congress 50 (Most Serious Problem: *Voluntary Compliance: The IRS Is Overly Focused on So-Called "Enforcement" Revenue and Productivity, and Does Not Make Sufficient Use of Behavioral Research Insights to Increase Voluntary Tax Compliance*). *See also* GAO, GAO-12-652T, *Opportunities to Improve the Taxpayer Experience and Voluntary Compliance* (Apr. 2012).

RECOMMENDATIONS

Administrative Recommendations to the IRS

The National Taxpayer Advocate recommends that the IRS:

1. Modify the Plan to conform to the requirements of the TFA, by itemizing the anticipated project costs and potential risks if the Plan is not fully funded.
2. Conduct independent verification and validation of the updated plan to verify that it will result in complete modernization of IRS IT systems, similar to the independent verification and validation required in the TFA of the CADE 2 and ECM systems. The IRS should include for all modernization projects a process and plan to release funding as results are demonstrated in the programs relating to taxpayer and/or customer experience improvements.
3. Include in future modernization plans the modernization of the BMF system.

Legislative Recommendations to Congress

The National Taxpayer Advocate recommends that Congress:

1. Provide the IRS with additional dedicated multi-year funding to replace its aging IT systems pursuant to a plan that sets forth specific goals and metrics and is evaluated annually by an independent third party.[54]

54 For more details on this legislative recommendation, see National Taxpayer Advocate 2020 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration* 6 *(Provide The IRS With Sufficient Funding to Meet Taxpayer Needs and Improve Federal Tax Compliance)*. National Taxpayer Advocate Fiscal Year 2019 Objectives Report to Congress 47 (Area of Focus: *The IRS's Enterprise Case Management Project Shows Promise, But to Achieve 21st Century Tax Administration, the IRS Needs An Overarching Information Technology Strategy With Proper Multi-Year Funding*).

MSP #3 IRS FUNDING: The IRS Does Not Have Sufficient Resources to Provide Quality Service

TAXPAYER RIGHTS IMPACTED[1]

- *The Right to Be Informed*
- *The Right to Quality Service*
- *The Right to Pay No More Than the Correct Amount of Tax*
- *The Right to Challenge the IRS's Position and Be Heard*
- *The Right to Appeal an IRS Decision in an Independent Forum*
- *The Right to Finality*
- *The Right to Privacy*
- *The Right to Confidentiality*
- *The Right to a Fair and Just Tax System*

PROBLEM

Between fiscal years (FYs) 2010 and 2019, the IRS budget was cut by 20.4 percent after adjusting for inflation.[2] Mostly because of antiquated technology, a smaller workforce, and an increasing workload, the IRS cannot afford to provide the quality of service that taxpayers deserve. With the IRS developing a comprehensive taxpayer service strategy[3] and much of that strategy likely dependent on technology modernization,[4] it will be nearly impossible for the IRS to improve service without additional funding.

IMPACT ON TAXPAYERS

Background

While no single data point provides a perfect measure of the IRS's workload, the number of income tax returns the IRS receives is probably the best general indicator. Most of the IRS's core work (*e.g.*, answering calls and letters, conducting audits, and taking collection actions) increases with the number of filers. Between FYs 2010 and 2019, the number of income tax returns increased by about nine percent. At the same time, the IRS's appropriation (after adjusting for inflation) and number of employees both declined by more than 20 percent, respectively, as shown in Figures 1.3.1-1.3.3.

1 See Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are also codified in the Internal Revenue Code (IRC). See IRC § 7803(a)(3).

2 IRS response to TAS information request (Oct. 2, 2019). Data is re-based to FY 2010 using the Gross Domestic Product Chained Price Index (GDP Index). See Office of Management and Budget, *Fiscal Year 2020 Budget of the U.S. Government, Historical Tables*, Table 10.1 (showing year-to-year increases in the GDP index), https://www.whitehouse.gov/omb/historical-tables/ (last visited Dec. 13, 2019).

3 For further discussion, see Most Serious Problem: *Customer Service Strategy: The IRS Needs to Develop a Comprehensive Customer Service Strategy That Puts Taxpayers First, Incorporates Research on Customer Needs and Preferences, and Focuses on Measurable Results*, *supra*.

4 For further discussion, see Most Serious Problem: *Information Technology Modernization: The IRS Modernization Plan's Goal to Improve the Taxpayer Experience Is Commendable, But the IRS Needs Additional Multi-Year Funding to Bring It to Fruition*, *supra*.

FIGURE 1.3.1[5]

Individual and Business Income Tax Returns, Fiscal Years 2010-2019

Between FYs 2010 and 2019, the number of income tax returns increased by about 9%

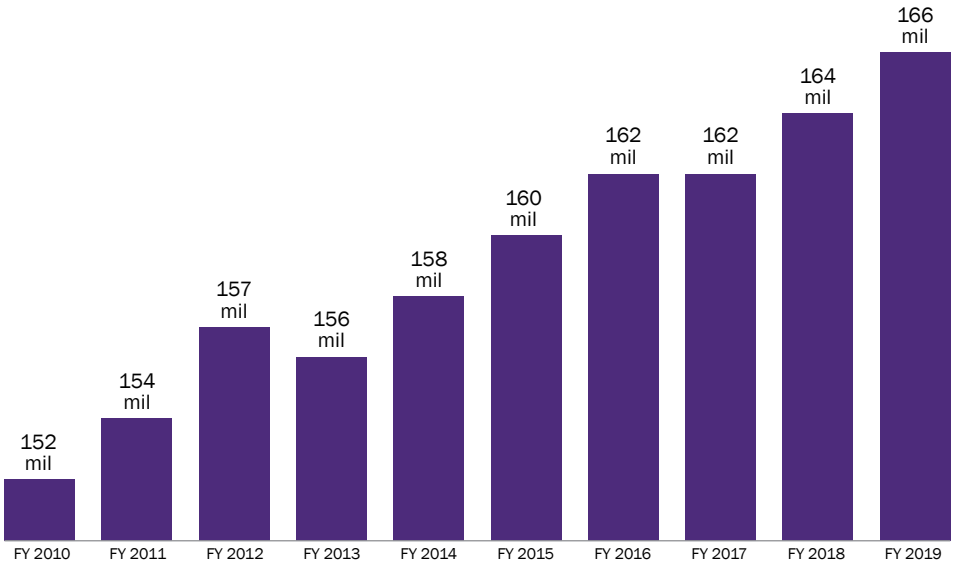
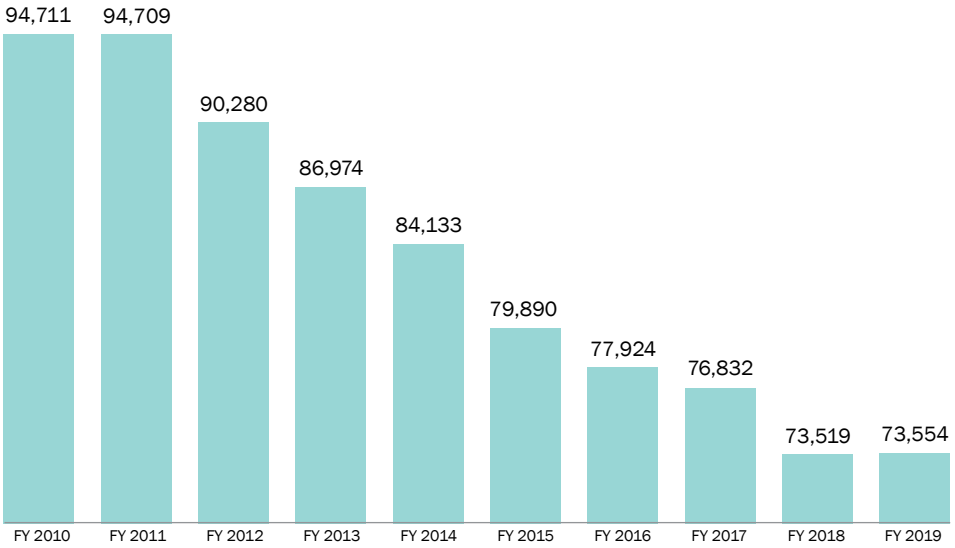


FIGURE 1.3.2[6]

Average Full-Time Equivalent IRS Employees, Fiscal Years 2010-2019

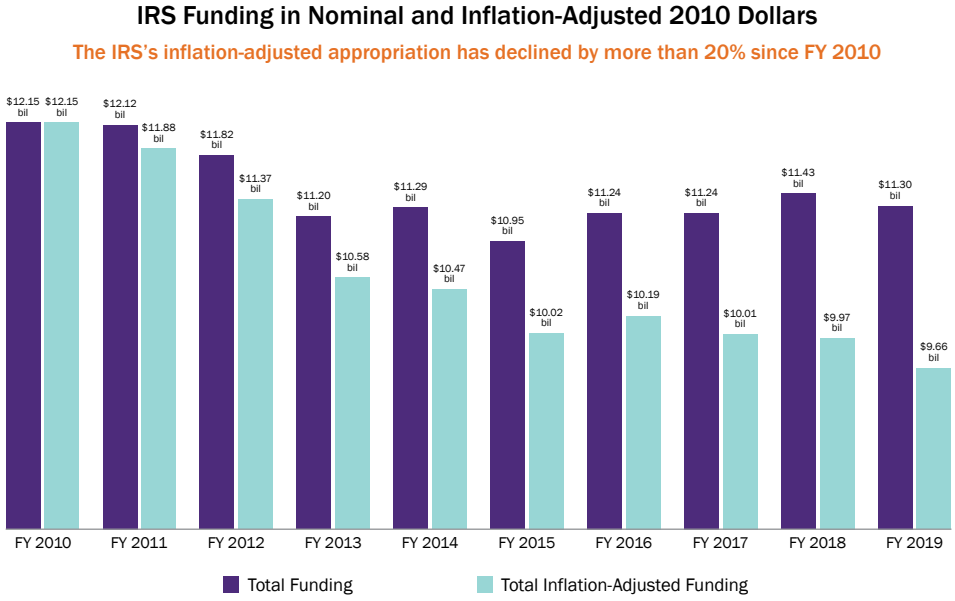
Between FYs 2010 and 2019, the number of IRS employees decreased by more than 20%



5 IRS, 2018 Data Book, Table 2, Numbers of Returns Filed by Type of Return & Fiscal Year: 2010-2018 (May 2019); IRS, Pub. 6292, Fiscal Year Return Projections by State: 2019–2026 3 (Sep. 20, 2019) (table 1).

6 IRS response to TAS information request (Oct. 2, 2019); IRS response to TAS fact check (Nov. 15, 2019) (excludes full-time equivalents (FTEs) attributable to overtime, terminal leave, and those funded by reimbursable agreements and private debt collection funds).

FIGURE 1.3.3[7]



In addition, legislative changes sometimes divert resources. For example, over the last decade the IRS spent more than $2.6 billion to implement the Patient Protection and Affordable Care Act, more than $500 million to implement the Foreign Account Tax Compliance Act, and more than $600 million to implement the Tax Cuts and Jobs Act (TCJA).[8] These responsibilities combine with a steadily increasing workload and a declining appropriation to make it nearly impossible for the IRS to provide good service.

High Quality Customer Service Is Important

The taxpayers who pay our nation's bills deserve high quality service. In 1998, Congress directed the IRS to "restate its mission to place a greater emphasis on serving the public and meeting taxpayers' needs."[9] More recently, Congress enacted the Taxpayer Bill of Rights, which makes "quality service" a right, directed the IRS to make service a priority, and directed it to come up with a plan to improve service.[10]

Service is also a critical investment because it contributes to voluntary tax compliance. In FY 2018, the IRS collected nearly $3.5 trillion on an appropriated budget of about $11.43 billion, producing an overall return on investment (ROI) of more than 300:1.[11] Less than two percent of this revenue is

7 IRS response to TAS information request (Oct. 2, 2019). These budget figures include rescissions and supplemental funds. The inflation adjustment is computed using the GDP Index.

8 *Id.* Although Congress sometimes allocated supplemental funds to implement these changes (*e.g.*, the TCJA), any such funding is included in the figures above.

9 IRS Restructuring and Reform Act of 1998 (RRA 98), Pub. L. No. 105-206, 112 Stat. 722, Title I, § 1002 (1998).

10 IRC § 7803(a)(3)(B) (providing the right to "quality service"). The Consolidated Appropriations Act, 2018 (Pub. L. No. 115-141, Division E, Title I, § 104) directed the IRS to make improvements to the "help line service a priority…" and section 1101 of the Taxpayer First Act (Pub L. No. 116-25) required the Secretary of the Treasury to provide Congress with a comprehensive customer service strategy for the IRS.

11 IRS, 2018 Data Book, Table 1: Collections and Refunds, by Type of Tax (May 2019).

collected through direct enforcement action.[12] The remaining 98 percent is paid timely and voluntarily as a result of taxpayer service and the potential for enforcement.[13]

Because taxpayers pay both taxes and the costs of tax compliance, the government has a responsibility to answer their calls and letters and meet with them when necessary. As former Commissioner Rossotti observed:

> Some critics argue that the IRS should solve its budget problem by reallocating resources from customer support to enforcement. In the IRS, customer support means answering letters, phone calls, and visits from taxpayers who are trying to pay the taxes they owe. Apart from the justifiable outrage it causes among honest taxpayers, I have never understood why anyone would think it is good business to fail to answer a phone call from someone who owed you money.[14]

Taxpayers Have Difficulty Reaching the IRS

When taxpayers contact the IRS, whether by phone, by letter, or in person, they often have difficulty reaching a person or getting a timely response.

- Enterprisewide, the IRS received about 99 million calls in FY 2019, but telephone assistors answered only about 29 percent of them — and only after those callers waited an average of 16.2 minutes on hold.[15]
- The IRS's Accounts Management function received about 6.9 million pieces of correspondence from taxpayers during FY 2019, including letters responding to proposed adjustments and other notices.[16] About 52.3 percent of the correspondence in open inventory had not been answered within the IRS's timeframes (generally 45 days).[17]

12 Enforcement revenue accounted for $59.4 billion (or 1.7 percent) of the $3.5 trillion the IRS collected in FY 2018. Government Accountability Office (GAO), GAO-19-150, *IRS's Fiscal Years 2018 and 2017 Financial Statements* 23 (Nov. 2018).

13 Some services (*e.g.*, updating forms, establishing procedures, clarifying the rules, and accepting returns and payments) make it possible, or at least more convenient, for taxpayers to pay their taxes. When paying taxes is inconvenient, fewer are likely to pay voluntarily. Other services (*e.g.*, reviewing and responding to certain submissions) make it possible for the IRS to assess and collect taxes using "enforcement" resources without violating procedural requirements. Still other services (*e.g.*, access to the Taxpayer Advocate Service) probably also bring in revenue by improving goodwill and trust for the agency (or diminishing distrust) because trust is correlated with voluntary compliance. *See, e.g.*, National Taxpayer Advocate 2012 Annual Report to Congress vol. 2, at 1-70 (*Factors Influencing Voluntary Compliance by Small Businesses: Preliminary Survey Results*).

14 Charles O. Rossotti, *Many Unhappy Returns: One Man's Quest to Turn Around the Most Unpopular Organization in America* 285 (2005).

15 IRS, Joint Operations Center (JOC), Snapshot Reports: Enterprise Snapshot (week ending Sept. 30, 2019).

16 IRS, JOC, Adjustments Inventory Reports: FY 2019 July–September Fiscal Year Comparison (Oct. 19, 2019).

17 IRS, Customer Account Services, Weekly Enterprise Adjustments Inventory Report (week ending Sept. 28, 2019); Internal Revenue Manual (IRM) 1.4.16.4.9(2), Managing Inventory Timeliness and Quality (Dec.17, 2018) (defining "overage" correspondence).

- The IRS provided face-to-face assistance at 324 Taxpayer Assistance Center (TACs) to over 2.3 million taxpayers during fiscal year 2019.[18] When taxpayers called to schedule a visit to a TAC, the IRS answered only about 57 percent of their calls in FY 2019.[19]

The IRS generally does not assist taxpayers who visit a TAC without an appointment.[20] In-person visits to a TAC declined by 38 percent in the first two full fiscal years after 2016 when the IRS adopted its appointment-only policy.[21]

Moreover, IRS employees may not be as well trained as they were in 2010.[22] The IRS spent $616 per employee on training in FY 2019, down from $1,775 per employee in FY 2010.[23]

Taxpayers Have Difficulty Responding to Compliance Contacts

Revenue Agents (RAs) and Revenue Officers (ROs) audit returns and collect tax in the field. While most taxpayers do not want to hear from RAs and ROs, they provide more personalized service than the IRS's automated systems.[24] However, the IRS employed 38.6 percent fewer RAs and 50.4 percent fewer ROs in FY 2019 than in FY 2010.[25] When the IRS relies instead on its automated systems, it is often

18 *See IRS Oversight: TIGTA: Hearing Before the Subcomm. on Financial Services and General Government of the H. Comm. on Appropriations*, 116th Cong. (Sept. 26, 2019) (statement of J. Russell George, Treasury Inspector General for Tax Administration (TIGTA)) ("Although the IRS reports having 358 TACs for the 2019 Filing Season, 33 TACs were not open because they had not been staffed as of April 15, 2019"); W&I, Business Performance Review 16 (Nov. 7, 2019) (number of taxpayers). As of October 2019, 34 TACs were unstaffed. IRS response to TAS fact check (Nov. 14, 2019).

19 IRS, JOC, Snapshot Reports: Enterprise Snapshot, IRS Enterprise Total (week ending Sept. 30, 2019).

20 GAO, GAO-18-471, 2018 *Tax Filing Season: IRS Managed Processing Challenges and Enhanced Its Management of Tax Law Changes* 15 (Sept. 2018), https://www.gao.gov/assets/700/694403.pdf. In FY 2019, the IRS assisted about 270,000 taxpayers who did not have appointments. Wage and Investment (W&I), Business Performance Review 16 (Nov. 7, 2019). Appointments are not required to drop off non-cash payments or current-year 1040-series returns, or to obtain forms or publications. *See* IRM 21.1.1.3(18), Customer Service Representative (CSR) Duties (Oct. 1, 2018).

21 IRS response to TAS fact check (Nov. 14, 2019). Over half of the taxpayers calling to make a TAC appointment in FY 2018 had their questions answered by the IRS employee on the appointment line and no longer needed an appointment. GAO, GAO-18-471, *2018 Tax Filing Season: IRS Managed Processing Challenges and Enhanced Its Management of Tax Law Changes* 15 (Sept. 2018). Nonetheless, this policy makes it more difficult for taxpayers to visit in person and some probably give up in frustration.

22 In light of Congress' focus on service, on October 1, 2019 the IRS reversed a policy adopted in 2014 that sharply limited the period within which the IRS could answer tax law questions on the phones and in the TACs. Email from W&I to TAS (Sept. 30, 2019). For a more detailed discussion on telephone and TAC service, see, *e.g.*, National Taxpayer Advocate 2017 Annual Report to Congress 22-35 (Most Serious Problem: *Telephones: The IRS Needs to Modernize the Way It Serves Taxpayers Over the Telephone, Which Should Become an Essential Part of an Omnichannel Customer Service Environment*); National Taxpayer Advocate 2017 Annual Report to Congress 117-127 (Most Serious Problem: *Taxpayer Assistance Centers (TACs): Cuts to IRS Walk-In Sites Have Left the IRS With a Substantially Reduced Community Presence and Have Impaired the Ability of Taxpayers to Receive In-Person Assistance*); National Taxpayer Advocate 2018 Annual Report to Congress 19 (Most Serious Problem: *Tax Law Questions: The IRS's Failure to Answer the Right Tax Law Questions at the Right Time Harms Taxpayers, Erodes Taxpayer Rights, and Undermines Confidence in the IRS*). IRS employees will need to be trained to answer more questions.

23 IRS response to TAS information request (Oct. 2, 2019); IRS response to TAS fact check (Nov. 15, 2019) (providing employee and training figures, which TAS used to compute training dollars per employee). For further discussion of training issues, see National Taxpayer Advocate 2017 Annual Report to Congress 84-92 (Most Serious Problem: *Employee Training: Changes to and Reductions in Employee Training Hinder the IRS's Ability to Provide Top Quality Service to Taxpayers*).

24 Providing personalized service to taxpayers who are subject to compliance contacts is consistent with the National Taxpayer Advocate's recommendation that the IRS provide personalized service to taxpayers in situations where they are likely to have the most anxiety. *See* National Taxpayer Advocate Fiscal Year 2020 Objectives Report to Congress 1-14 (Introduction: *The National Taxpayer Advocate's Remarks on the Role of Trust and Taxpayer Advocate Service in Fostering Tax Compliance*).

25 IRS response to TAS information request (Oct. 2, 2019) (between FY 2010 and 2019 the average number of ROs declined from 6,042 to 2,995 and the average number of RAs declined from 13,879 to 8,526).

difficult for it to address the resulting calls, letters, and visits from taxpayers — so difficult, in fact, that the IRS sometimes curtails its enforcement efforts.[26] For example:

- The Automated Collection System (ACS) stopped issuing systemic levies between January 2016 and July 2018 because the IRS did not have sufficient resources to answer the resulting calls.[27]
- Due to resource constraints between FYs 2013 and 2017, the IRS virtually stopped using its authority to automatically create a substitute return for certain businesses that had failed to file.[28] Although the Treasury Inspector General for Tax Administration (TIGTA) recommended the IRS reinstate the program, the IRS said it was concerned about "any downstream effects that will result from the reallocation of resources."[29] The IRS may have been concerned about answering the resulting calls and letters.

Customer service suffers the most, however, when the IRS makes automated compliance contacts even if it does not have the resources to adequately address the downstream consequences. For example:

- The IRS has recently been delaying more refunds to ensure they are not fraudulent (using the Return Integrity Verification Operation (RIVO)), draining service resources.[30] In calendar year (CY) 2019, RIVO delayed more than seven times as many refunds as in 2017 (*i.e.*, increasing from 219,210 to 1,650,999),[31] resulting in a five-fold increase in taxpayers asking TAS for help (from 16,432 in CY 2017 to 89,584 in CY 2019).[32] Overall TAS's FY 2019 receipts rose by 11 percent as compared with FY 2018 (240,777 compared with 216,792).[33] As a result, the FY 2019 median cycle time for TAS cases increased by 12.2 percent (55 days vs. 49 days in the prior year).[34]
- Between FYs 2018 and 2019, ACS levies increased by 114 percent (from 200,024 to 427,596) and its lien filings increased by 93 percent (from 184,368 to 356,609),[35] even though the IRS did not have the resources to provide adequate phone service to those it contacted. Only about ten percent of the calls to its lien lines reached a telephone assistor, and those that got through waited on hold for an average of 58.1 minutes in FY 2019, as shown in Figure 1.3.4.

26 For further discussion of various error correction procedures (called "unreal" audits) and refund verification procedures, see, *e.g.*, National Taxpayer Advocate 2017 Annual Report to Congress 49-63 (Most Serious Problem: *Audit Rates: The IRS Is Conducting Significant Types and Amounts of Compliance Activities That It Does Not Deem to Be Traditional Audits, Thereby Underreporting the Extent of Its Compliance Activity and Return on Investment, and Circumventing Taxpayer Protections*); Most Serious Problem: *Processing Delays: Refund Fraud Filters Continue to Delay Taxpayer Refunds for Legitimately Filed Returns, Potentially Causing Financial Hardship*, *infra*.

27 *See* TIGTA, Ref. No. 2018-30-068, *Fiscal Year 2018 Statutory Review Of Compliance With Legal Guidelines When Issuing Levies* 7-8 (Sept. 7, 2018).

28 TIGTA, Ref. No. 2019-30-069, *Billions of Dollars of Nonfiler Employment Taxes Went Unassessed in the Automated 6020(b) Program Due Primarily to Resource Limitations* 3 (Sept. 16, 2019) (noting "A6020(b) program closures decreased by 92 percent, from 261,582 in FY 2013 to 21,746 in FY 2017. This was caused by a reduction in the FTEs assigned to the program of 84 percent, from 12.11 FTEs in FY 2013 to 1.88 FTEs in FY 2017.").

29 *Id*. at 12.

30 Over the past three years, the IRS's refund fraud filters have had false positive rates over 50 percent. W&I, Business Performance Review 13 (Aug. 14, 2019); W&I, Business Performance Review 16 (Nov. 8, 2018).

31 IRS response to TAS fact check (Nov. 22, 2019) (data as of Sept. 4, 2019). These figures include non-identity theft cases, those flagged using filters and business rules, and systemically released refunds. *Id*.

32 Taxpayer Advocate Management Information System (TAMIS) (Nov. 1, 2019) (data as of Oct. 1, 2018, and Oct. 1, 2019).

33 *Id*.

34 *Id*.

35 IRS response to TAS fact check (Nov. 15, 2019); Collection Activity Report NO-5000-25, *Lien Source* (Oct. 11, 2018 and Oct. 8, 2019); Collection Activity Report NO-5000-24, *Levies and Seizures Source* (Oct. 2, 2018 and Oct. 1, 2019).

Even small increases in enforcement can have a significant effect on service. Between FYs 2018 and 2019, when Congress increased the IRS appropriation for enforcement by $50.6 million and increased the appropriation for taxpayer service by $44 million, it was more difficult for taxpayers to speak to an assistor on nearly all the lines shown in Figure 1.3.4 that taxpayers call to respond to compliance contacts.[36]

FIGURE 1.3.4, IRS Telephone Service in Response to Compliance Contacts in FYs 2018 and 2019[37]

Telephone Line	FY	Dialed Attempts	Calls Answered by an Assistor (Number)	Calls Answered by an Assistor (Percent)	Average Speed of Answer
Automated Collection System (ACS)	2018	4,447,277	2,275,544	51.17%	19.3 min
	2019	5,655,228	2,186,446	38.66%	31.2 min
Installment Agreement/ Balance Due	2018	7,622,022	3,646,674	47.84%	27.5 min
	2019	9,270,239	2,425,539	26.16%	44.5 min
Lien Processing	2018	383,142	85,095	22.21%	59.5 min
	2019	543,987	55,403	10.18%	58.1 min
National Taxpayer Advocate[38]	2018	681,738	382,471	56.10%	3.2 min
	2019	960,412	412,633	42.96%	8.8 min
W&I Individual Customer Response	2018	6,120,135	2,691,633	43.98%	7.1 min
	2019	5,882,801	2,025,034	34.42%	12.5 min
Self-Employed Individual Customer Response	2018	3,591,304	1,527,195	42.52%	7.9 min
	2019	3,323,552	1,149,108	34.57%	12.7 min
Business Customer Response	2018	2,418,631	1,544,569	63.86%	12.2 min
	2019	2,377,677	1,113,337	46.82%	20.0 min
Automated Underreporter (AUR)	2018	2,540,241	1,037,719	40.85%	21.2 min
	2019	1,756,130	648,536	36.93%	23.8 min
SB/SE Exam	2018	468,569	165,968	35.42%	22.2 min
	2019	317,737	108,069	34.01%	28.2 min
W&I Exam	2018	1,440,366	458,333	31.82%	31.5 min
	2019	1,098,142	330,394	30.09%	34.7 min

36 IRS response to TAS information request (Oct. 2, 2019) (showing between FYs 2018 and 2019 the post-transfer allocation to enforcement increased from $4.6270 billion to $4.6776 billion and the allocation to service increased from $2.512554 billion to $2.556554 billion). The IRS CFO's figures reported in this discussion (and in Figure 1.3.5) do not match the Treasury Department's public figures because the CFO's figures show enacted budgetary authority net of any inter-appropriation transfers and rescissions, and including supplemental funds with the appropriation into which they were transferred.

37 IRS, JOC, Snapshot Reports: Enterprise Snapshot, IRS Enterprise Total (week ending, Sept. 30, 2019). This table focuses on number and percentage of calls answered by an assistor. Some taxpayers hang up quickly and others are routed to a recording and disconnected. Both types of callers are excluded from the denominator when the IRS computes its "level of service" (LOS) metric, even though most people probably call the IRS because they want to speak to a person. *Id.*

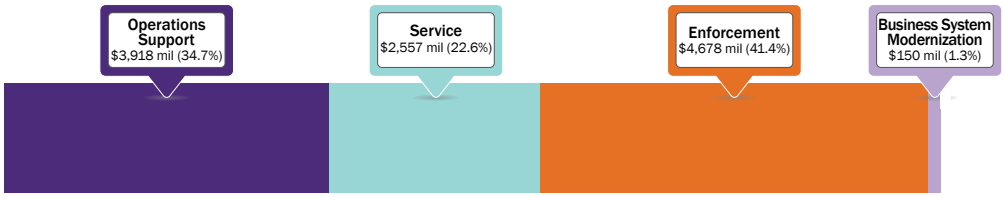
38 The National Taxpayer Advocate line is staffed by the IRS. Several of the lines (e.g., the National Taxpayer Advocate and the Customer Response lines) receive calls in response to compliance contacts as well as other calls.

Enforcement Can Deplete Resources for Service

Congress funds the IRS's service and enforcement accounts separately, as shown in Figure 1.3.5. However, enforcement contacts deplete service resources. In response to compliance contacts, taxpayers call the IRS, write letters, and ask TAS for assistance. Thus, any increase in funding for enforcement not coupled with an increase in funding for services is likely to make it more difficult for taxpayers to communicate with the IRS.

FIGURE 1.3.5[39]

Components of IRS's FY 2019 Budget (in Millions)



For the same reason, a "program integrity cap" (PIC) adjustment can deplete resources for service. The Administration's FY 2020 budget proposed to increase the baseline funding for enforcement by about five percent while reducing funding for taxpayer services by about seven percent.[40] To increase enforcement funding, it proposed an additional $362 million using a PIC adjustment — an exception to the spending cap rules. This exception applies only where additional enforcement expenditures will generate an ROI of greater than 1:1 (*i.e.,* the additional expenditures will increase federal revenue on a net basis).[41] Under the proposal, PIC adjustments would increase funding for enforcement by $15 billion over the next ten years.[42]

These adjustments cannot increase funding for services, even though the proposal acknowledges (for purposes of computing the ROI) that enforcement initiatives consume service resources.[43] Yet issuing guidance; updating forms and publications; conducting outreach and education; assisting taxpayers, tax preparers, and tax software providers; and otherwise administering the tax filing season are absolute prerequisites for tax compliance. Thus, the ROI for many of these service activities is probably greater than the ROI for enforcement actions.

Even when used to address specific compliance problems, services can have a greater ROI than enforcement. For example, it is sometimes more cost effective for the IRS to send out soft letters or

39 IRS response to TAS information request (Oct. 2, 2019). These percentages would be slightly different if the numbers were not rounded.

40 Department of Treasury and IRS, *Congressional Budget Justification and Annual Performance Report and Plan* FY 2020 IRS-89, https://home.treasury.gov/system/files/266/02.-IRS-FY-2020-CJ.pdf (last visited Dec. 13, 2019).

41 Department of Treasury and IRS, *Congressional Budget Justification and Annual Performance Report and Plan* FY 2020 IRS-89; Office of Management and Budget, *Budget of the United States Government: Analytical Perspectives, Supplemental Materials, Fiscal Year 2020* 134, https://www.whitehouse.gov/omb/analytical-perspectives/ (last visited Dec. 13, 2019).

42 *Id*.

43 Department of Treasury and IRS, *Congressional Budget Justification and Annual Performance Report and Plan* FY 2020 IRS-93 (noting that increasing audit coverage increases downstream costs for TAS and W&I).

issue guidance to help the vast majority of taxpayers who are willing to comply voluntarily (based on statistics cited above), so that it can reserve its costly enforcement efforts for those few who do not respond by complying. The IRS's Large Business and International Division has launched a series of tax compliance "campaigns" that reflect its view that enforcement is not always the best treatment stream.[44] Accordingly, increased funding for the IRS's enforcement account could waste resources, degrade service to taxpayers, and violate the *right to privacy* (*i.e.*, the right to expect that enforcement "will be no more intrusive than necessary"), unless coupled with appropriate increases to its service account.

For similar reasons, any increase in funding for enforcement or service should be coupled with proportionate increases in operations support so that the IRS can afford the infrastructure needed to support those operations. Operations support includes, among other things, "rent payments; facilities services; printing; postage; physical security; headquarters and other IRS-wide administration activities…."[45] The IRS cannot hire employees for its enforcement or service functions if it cannot afford the infrastructure to support them. For example, in FY 2019, the IRS had such critical information technology (IT) needs, which could only be funded out of operations support, that it requested to transfer appropriations from enforcement to operations support.[46]

Modern Technology Could Improve Service[47]

According to the Government Accountability Office (GAO), the IRS has "inaccurate tax records … [which] place an undue burden on taxpayers who may be compelled to respond to IRS inquiries caused by errors in their accounts" due to the IRS's systemic limitations.[48] In addition, the IRS stores account information for individuals and businesses on its Individual Master File (IMF) and Business Master File (BMF) information systems, both of which were established in the 1960s.[49] They are the oldest systems in the federal government.[50]

An IRS system crash, attributed to equipment supporting the IMF, prevented taxpayers from submitting tax returns and payments electronically and prompted the IRS to extend the April 17, 2018, filing deadline.[51] The IRS has been taking steps to replace the core components of the IMF with a system known as the Customer Account Data Engine 2 (CADE 2).[52] However, funding for IRS technology upgrades — provided through the Business Systems Modernization (BSM) account — has been very limited. Congress reduced BSM funding by 48.3 percent between FY 2017 ($290 million) and FY 2019

44 *See, e.g.*, IRS, IRS Announces Rollout of 11 Large Business and International Compliance Campaigns (Nov. 3, 2017), https://www.irs.gov/businesses/large-business-and-international-compliance-campaigns (citing the initial rollout on Jan. 31, 2017).

45 Department of Treasury and IRS, *Congressional Budget Justification and Annual Performance Report and Plan* FY 2020 IRS-20.

46 IRS response to TAS fact check (Nov. 15, 2019).

47 For a more detailed discussion, see Most Serious Problem: *Information Technology Modernization: The IRS Modernization Plan's Goal to Improve the Taxpayer Experience Is Commendable, But the IRS Needs Additional Multi-Year Funding to Bring It to Fruition*, *supra*.

48 GAO, GAO-19-150, *IRS's Fiscal Years 2018 and 2017 Financial Statements* 11 (Nov. 2018).

49 GAO, GAO-16-468, *Information Technology: Federal Agencies Need to Address Aging Legacy Systems* 28-30 (May 2016).

50 *Id.*

51 *See* Aaron Boyd & Frank Konkel, *IRS' 60-Year-Old IT System Failed on Tax Day Due to New Hardware*, NEXTGOV (Apr. 19, 2018) (citing an IRS official), https://www.nextgov.com/it-modernization/2018/04/irs-60-year-old-it-system-failed-tax-day-due-new-hardware/147598.

52 IRS response to TAS fact check (Nov. 15, 2019) (clarifying that if resources are available as planned, the strategy for replacing the IMF "will be developed by 2021 and subsequently independently validated. CADE 2, which is currently in the second of three transition states to completion, will replace only the core components of the IMF.").

($150 million) and it constituted just 1.3 percent of the agency's overall appropriation in FY 2019, even though the IRS says the success of its modernization plan depends on receiving funding that is "available for multiple fiscal years at somewhat predictable intervals."[53]

FIGURE 1.3.6, Business System Modernization Appropriation, FYs 2017–2019[54]

Fiscal Year	BSM Funding	Total IRS Funding	BSM as Percentage of Total IRS Funding
2017	$290 M	$11.24 B	2.6%
2018	$110 M	$11.43 B	1.0%
2019	$150 M	$11.30 B	1.3%

Modern technology would not only enable the IRS to become more efficient but also would improve taxpayer service. Consider the following examples:

Customer Callback Technology Could Reduce Time Wasted on Hold. A customer callback system would enable callers to request a call back from the IRS so they would not have to wait on hold.[55] While the IRS recently tested its callback technology for the balance due line (technically one "application" on the line), it was used for such a small number of calls that the technology did not significantly reduce the time that taxpayers spent on hold.[56] The IRS should fully implement customer callback on all of its major lines as soon as possible.

E-Filing of Amended Tax Returns Could Reduce Burden. Taxpayers are expected to file approximately 3.9 million amended returns for 2018 — all on paper.[57] Allowing taxpayers to e-file amended returns would reduce filing burdens and speed up corrections and refunds. It could also reduce processing costs and follow-up calls, and help the IRS address potentially erroneous refunds.[58] This $5.6 million upgrade could save the IRS $79.4 million over five years in processing costs alone.[59]

An Integrated Case Management System Could Reduce Processing Times and Expand Information Available Through Online Accounts. The IMF and BMF contain account information, whereas case management systems generally track case-related information within each IRS function or process (*e.g.*, the status of the case and the basis for any determination by the function). The IRS has about 60 case management

53 IRS Pub. 5336, IRS Integrated Modernization Business Plan 15 (Apr. 2019).

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

55 Department of Treasury and IRS, *Congressional Budget Justification and Annual Performance Report and* Plan FY 2020 IRS-5 ("The technologies provided for in the plan, such as customer callback and online notifications, will simplify taxpayer interactions with the IRS across all service channels and expedite return processing times, allowing taxpayers to comply and receive refunds faster").

56 IRS Pub. 5336, IRS Integrated Modernization Business Plan 20 (Apr. 2019). As shown on Figure 1.3.4, customer service representatives (CSRs) answered only 26.16 percent of the calls to the balance due application after taxpayers waited on hold for an average of 44.5 minutes in FY 2019. The IRS plans to implement customer callback on four more applications by the second quarter of 2020 and on up to 15 total applications by the third quarter of 2021. IRS Integrated Modernization Business Plan, Treasury Monthly Briefing (Oct. 24, 2019). A lack of funding could derail these plans.

57 *See, e.g.*, IRS, Electronic Tax Administration Advisory Committee, Publication 3115, Annual Report to Congress (June 2019), https://www.irs.gov/pub/irs-pdf/p3415.pdf.

58 *See* TIGTA, Ref. No. 2019-40-042, *Actions Have Not Been Taken to Improve Amended Tax Return Review Procedures to Reduce Erroneous and Fraudulent Refunds* 1 (July 2019).

59 *Id.* at 1 and 9.

systems that are not fully integrated with each other.[60] Each function's employees must transcribe or import information from other electronic systems into their own case management systems, and then mail or fax files and supporting documents to other functions (*e.g.*, quality review, Appeals, and Counsel).

These workarounds can lead to delays, lost files, and data security risks. A single integrated system could improve efficiency and reduce such delays, losses, and risks. Particularly when combined with upgrades to IMF and BMF (and/or CADE 2), an integrated system would expand the information that IRS employees could provide to taxpayers when they call the IRS or visit a TAC. Such upgrades could also expand what taxpayers could access directly through their online accounts.

CONCLUSION

In FY 2018, U.S. taxpayers paid $3.5 trillion to finance the operations of the federal government. The IRS, as the federal government's "accounts receivable" department, collected those funds on an appropriated budget of approximately $11.43 billion, producing an ROI of over 300:1. Both to improve service and to enhance its ability to collect taxes, the IRS requires additional funding. In particular, it requires additional funding to ensure taxpayers can reach an IRS employee more easily. It also requires additional funding to modernize its aging IT systems, which will help employees to both assist taxpayers and collect revenue.

RECOMMENDATIONS

Legislative Recommendations to Congress

The National Taxpayer Advocate recommends that Congress:

1. Provide the IRS with sufficient additional funding to improve taxpayer service and modernize its IT systems over a predictable multi-year period.[61]
2. Ensure that any increase in funding for enforcement (including program integrity cap adjustments) is coupled with a commensurate increase in funding for service and operations support so that taxpayers seeking to respond to the IRS can do so easily.[62]

60 See National Taxpayer Advocate 2018 Annual Report to Congress 351-358 (Legislative Recommendation: *IT Modernization: Provide the IRS with Additional Dedicated, Multi-Year Funding to Replace Its Antiquated Core IT Systems Pursuant to a Plan that Sets Forth Specific Goals and Metrics and Is Evaluated Annually by an Independent Third Party*); National Taxpayer Advocate Fiscal Year 2019 Objectives Report to Congress 47-51 (Area of Focus: *The IRS's Enterprise Case Management Project Shows Promise, But to Achieve 21st Century Tax Administration, the IRS Needs an Overarching Information Technology Strategy With Proper Multi-Year Funding*).

61 For more detailed recommendations, see National Taxpayer Advocate 2020 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration* 6-8 *(Provide The IRS With Sufficient Funding to Meet Taxpayer Needs and Improve Federal Tax Compliance)*.

62 *Id*.

MSP #4 PROCESSING DELAYS: Refund Fraud Filters Continue to Delay Taxpayer Refunds for Legitimately Filed Returns, Potentially Causing Financial Hardship

RESPONSIBLE OFFICIAL

Ken Corbin, Commissioner, Wage and Investment Division

TAXPAYER RIGHTS IMPACTED[1]

- *The Right to Be Informed*
- *The Right to Quality Service*
- *The Right to a Fair and Just Tax System*

PROBLEM

The IRS has designed a number of filters to assist in the detection and prevention of identity theft (IDT) and non-IDT refund fraud. These fraud detection filters are an essential component of combating refund fraud, and from January 1 through September 30, 2019, have protected the IRS from issuing about $2.7 billion in improper refunds.[2] However, the filters have also created problems for taxpayers, most notably delays in obtaining their refunds, creating a financial hardship for hundreds of thousands of taxpayers. Predictably, this resulted in more taxpayers seeking Taxpayer Advocate Service (TAS) assistance. Specifically, these problems include:

- A new non-IDT refund fraud filter (Filter X) suspended nearly double the returns than projected, and about a quarter of these returns took 40 days or longer to be processed;[3]
- The IRS received most W-2 information timely, but the transmittal of paper W-2s was delayed;[4]
- Other non-IDT refund fraud filters had false positive rates (FPRs) of 71 percent;[5]
- Refund delays were nearly three weeks beyond normal processing times, causing economic hardship for a large number of taxpayers;[6]
- The IRS often provides taxpayers little information regarding the precise reason for refund delays and what steps they can take to expedite the process; and

1 See Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are also codified in the Internal Revenue Code (IRC). See IRC § 7803(a)(3).

2 IRS response to TAS consolidated end of year information request (Nov. 22, 2019). Filter X also protected about $1.6 million in revenue after June 15, 2019 (the date that Filter X was retired). The information on these returns was verified after this date. IRS, Identity Theft (IDT) and Integrity and Verification Operations (IVO) Performance Report, Slide 7 (Oct. 9, 2019).

3 IRS Compliance Data Warehouse (CDW), Individual Returns Transaction File (IRTF) Form 1040 (Oct. 23, 2019); IRS CDW, Individual Master File (IMF) Transaction History File (Oct. 23, 2019).

4 By the end of filing season (FS) 2019, the IRS had received information on 2.6 million paper Forms W-2 from the Social Security Administration (SSA), compared to information on 6.2 million paper Forms W-2 during the same period in FS 2018. Generalized Mainline Framework (Jan. 2 through Apr. 26, 2019).

5 IRS response to TAS consolidated end of year information request (Nov. 22, 2019).

6 *Id*.

- The issues with the new Filter X, in conjunction with high FPRs and processing delays, contributed to a 405 percent increase in TAS non-IDT refund fraud inventory from January 1 through September 30, 2019, compared with the same timeframe in 2017.[7]

IMPACT ON TAXPAYERS

Background

The IRS's efforts to detect and prevent refund fraud are managed by the Return Integrity Verification Operations (RIVO) of Wage and Investment (W&I), which oversees both the IDT refund fraud program in the Taxpayer Protection Program (TPP) and non-IDT refund fraud in the Pre-Refund Wage Verification Hold Program (PRWVH).[8]

These programs rely primarily on two systems to detect and prevent fraud: the Dependent Database (DDb) to detect IDT, and the Return Review Program (RRP) to detect IDT *and* non-IDT refund fraud. The DDb contains filters comprised of rules that are binary in nature (*i.e.*, if the rule is broken, the return will be selected for further analysis; if the rule is not broken, the return will continue through normal processing).

The RRP, on the other hand, contains filters comprised of both rules and models.[9] Once the models complete their analysis, each return is given a risk score. That score is fed into RRP filters, which will select returns based on whether the score exceeds a specified threshold while considering other information in the system. If the score exceeds the threshold and other conditions are met, the IRS will route the return to either the TPP or PRWVH, whichever is most appropriate.

Figure 1.4.1 provides a simplified flowchart of the complicated processes the IRS uses to screen returns where a taxpayer has claimed a refund and the IRS suspects either IDT or non-IDT refund fraud.

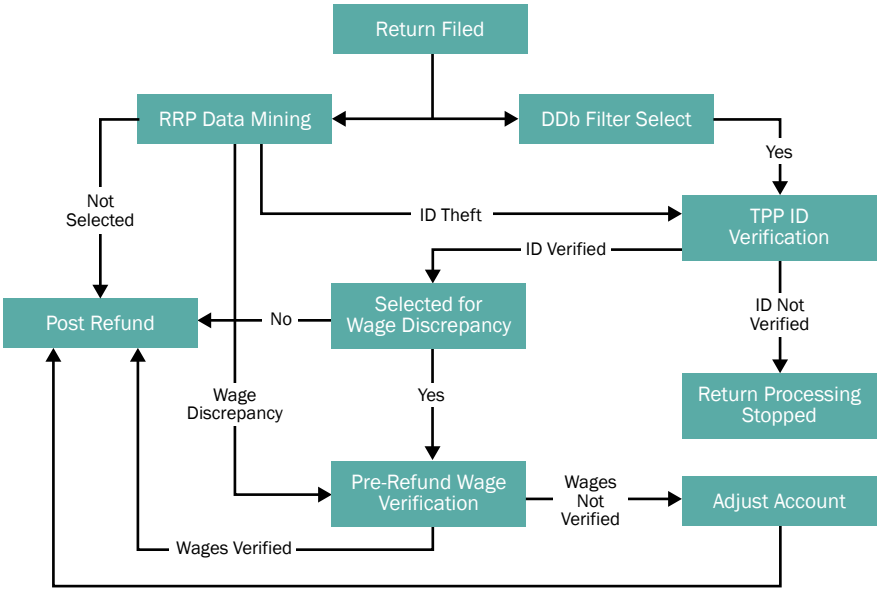
7 Data obtained from Taxpayer Advocate Management Information System (TAMIS). TAS extracts data on the day following the last day of the month.

8 See Internal Revenue Manual (IRM) 25.25.6.1(1) and (3), Program Scope and Objectives (Aug. 20, 2019); IRM 25.25.3.1(1), Program Scope and Objectives (Aug. 30, 2019). For purposes of this Most Serious Problem, we have used "TPP" and "IDT refund fraud program" interchangeably, as well as the terms, "pre-refund wage verification hold program" and "non-IDT refund program."

9 National Taxpayer Advocate 2018 Annual Report to Congress 79-90 (Most Serious Problem: *False Positive Rates: The IRS's Fraud Detection Systems Are Marred by High False Positive Rates, Long Processing Times, and Unwieldy Processes Which Continue to Plague the IRS and Harm Legitimate Taxpayers*). The filter models use techniques such as predictive models, business rules, and clustering.

FIGURE 1.4.1[10]

Refund Return Screening for Identity Theft and Non-Identity Theft Refund Fraud



Once the IRS selects a taxpayer's return into the TPP program, it asks the taxpayer to authenticate his or her identity either over the phone, online, or by visiting a Taxpayer Assistance Center.[11] For taxpayer returns selected into the PRWVH program, the IRS matches the information on the return with third-party information provided by the taxpayer's employer(s) and payor(s) to the Social Security Administration (SSA) or the IRS. Beginning in Filing Season (FS) 2017, employers and other specified payers were required to submit third-party reporting information (Forms W-2 and 1099-MISC-Nonemployee Compensation) no later than January 31 to the SSA or the IRS.[12] The purpose of this change in the law was to get information to the IRS earlier so it could have more time to match the wage and tax information reported on the taxpayer's return against information submitted by third parties; however, the IRS does not receive all third-party information from SSA by January 31.[13] Once the SSA receives third-party information from employers, it begins the process of transmitting this information to the IRS in accordance with an agreement entered into between both agencies. This transmittal process is efficient for third-party information submitted to the SSA electronically. For paper

10 For a more detailed roadmap of IRS processes, see IRS Pub. 5341, The Taxpayer Roadmap 2019: An Illustration of the Modern United States Tax System (Sept. 2019).

11 IRM 25.25.6.1.7(3), Taxpayer Protection Program Overview (Aug. 20, 2019). International taxpayers can mail in documentation to authenticate their identity. Letter 5447C, Potential Identity Theft during Original Processing; Foreign Address (Sept. 2018).

12 Section 201 of the Protecting Americans From Tax Hikes (PATH) Act of 2015 amended IRC § 6071 to require that certain information returns be filed by January 31, generally the same date as the due date for employee and payee statements and are no longer eligible for the extended filing date for electronically filed returns under IRC § 6071(b). *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 201 (2015). However, the January 31 deadline for submitting W-2 information does not apply to other reporting requirements of income sources. For example, state and local refunds are required to be reported to the IRS on or before February 28 (March 31 if filed electronically). 26 C.F.R. § 1.6050E-1.

13 *See* 42 U.S.C. 432 § 232, Processing of Tax Data; 20 C.F.R. § 422.114, Annual Wage Reporting Process. "Under the authority of section 232 of the Act, SSA and IRS have entered into an agreement that sets forth the manner by which SSA and IRS will ensure that the processing of employee wage reports is effective and efficient."

information though, the SSA administers a laborious manual process, resulting in backlogs in processing paper W-2s, which keeps the SSA from transmitting some data to the IRS until August or September.[14]

In calendar year (CY) 2019, the IRS made several changes to improve the efficiency and effectiveness of the refund fraud program, namely reducing processing times and increasing the accuracy of filter selections. The changes include:

- During the filing season, the IRS modified its new non-IDT refund fraud filter (Filter X) to systemically check for the posting of third-party information daily instead of weekly;
- When the return was selected due to a mismatch between the information on the return and the third-party information, the IRS conducted additional analysis. If the third-party information had no impact on the amount of the refund, the refund was released immediately; and
- When a return carried with it both an IDT and non-IDT refund fraud concern, IRS systems had the capability to systemically verify income and withholding information upon successful authentication of the taxpayer's identity, thereby compressing the processing time.

During FS 2020, the IRS intends to expand the number of non-IDT refund fraud filters that will check for posting of third-party information daily instead of weekly and release the refunds systemically once the IRS verifies the information on the return.[15] TAS anticipates that this additional automation of the IRS's fraud detection filters will further reduce processing times. These improvements are in addition to a change this year in the IRS's ability to verify returns without third-party information from certain employers' submissions. More specifically, for FS 2019, the IRS identified employers who historically filed late income information. If a taxpayer's return was selected and the information was largely consistent with prior year returns, the IRS presumed the return was legitimate and released the refund.[16] The National Taxpayer Advocate applauds the IRS for implementing these improvements to its filters to help expedite the process while also protecting revenue.

A New Non-Identity Theft Refund Fraud Filter (Filter X) Suspended Nearly Double the Returns Projected, and About a Quarter of These Returns Took 40 Days or Longer to Be Processed

While the IRS has made a number of improvements in its filters, issues remain. For FS 2019, the IRS added Filter X to assist in identifying returns suspected of non-IDT refund fraud. Filter X selects returns where Earned Income Tax Credit (EITC) or the Additional Child Tax Credit (ACTC) is claimed on the return; where there is either no or only some W-2 information available, and thus the information and withholding on the return cannot be verified; and where other criteria programmed into the filter have been met (*i.e.*, the returns that do not meet the programmed criteria will proceed through normal processing channels).[17]

The IRS originally projected that Filter X would suspend about 500,000 returns annually;[18] this projection was a significant understatement, as it ultimately suspended about 1.1 million returns from

14 Government Accountability Office (GAO), GAO-14-633, *Identity Theft: Additional Actions Could Help IRS Combat the Large, Evolving Threat of Refund Fraud* 21 (Aug. 2014).

15 IRS response to TAS information request (July 16, 2019).

16 IRS, IDT and IVO Performance Report, Slide 8 (Oct. 9, 2019). The IRS released 223,515 refunds as a result of the Information Return Processing (IRP) Release Plan.

17 IRS response to TAS information request (Sept. 23, 2019).

18 IRS Processing Year 2019 Treatment Process Update (Dec. 5, 2018).

January 1 through September 26, 2019.[19] Of the returns held by Filter X, about half (590,384) had the original refund claimed on the return released after February 15, 2019, the earliest date under the law that the IRS could release these refunds.[20] The IRS held half of these, or about a quarter of all returns selected by Filter X, for 40 days or longer from the time the return was selected.[21] These delays caused hardship for a number of taxpayers who were relying on their refunds and had to come to TAS for assistance.

The IRS Received Most W-2 Information Timely, But the Transmittal of Some Paper W-2s Was Delayed

The IRS's daily posting of third-party information resulted in it posting a large amount of W-2 data to IRS systems sooner. For instance, the IRS received 219 million W-2s through February 4 in FS 2019, compared with 101 million for the same period in FS 2018 — an increase of about 117 percent.[22] The receipt of significantly more W-2s earlier in the filing season helps speed up the processing of returns. As part of the Taxpayer First Act, Congress amended Internal Revenue Code (IRC) § 6011 authorizing the IRS, beginning in 2022, to issue regulations that require employers to file electronic information returns when filing more than ten documents annually.[23] This will continue the earlier receipt of W-2 information, allowing the IRS filters to verify wage information earlier. However, the IRS will continue to struggle with the delays caused by paper W-2s. The IRS should work with SSA to speed up the transmission of paper W-2 data.

Other Refund Fraud Filters Had False Positive Rates of 71 Percent

Problems persist for the IRS's remaining set of refund fraud filters. Specifically, these filters had an FPR of 71 percent for January 1 through October 2, 2019.[24] The FPR is the number of returns that turned out to be legitimate divided by the number of returns selected by the filter.[25] As Figure 1.4.2 illustrates, this FPR is lower than last year's by about ten percent, but is higher than 2017.

19 IRS, IDT and IVO Performance Report, Slide 8 (Oct. 9, 2019). This filter was retired beginning in June because it is believed that at this point, all the W-2 information that SSA has should have been transmitted to IRS.

20 IRS, CDW, IRTF Form 1040 (Oct. 23, 2019); IRS CDW, IMF Transaction History File (Oct. 23, 2019). Out of the 1,072,192 returns, 419,885 were released shortly after February 15, the earliest date the IRS could release these returns under the law. Of the remaining 652,307 returns, 590,384 had the refunds released because the IRS had received W-2 data from SSA. The remaining 61,923 returns (652,307–590,384) are still being held by Filter X and are not yet resolved, have been sent to a treatment stream such as Exam, or the taxpayer received a partial refund or no refund.

21 IRS, CDW, IRTF Form 1040 (Oct. 23, 2019); IRS CDW, IMF Transaction History File (Oct. 23, 2019).

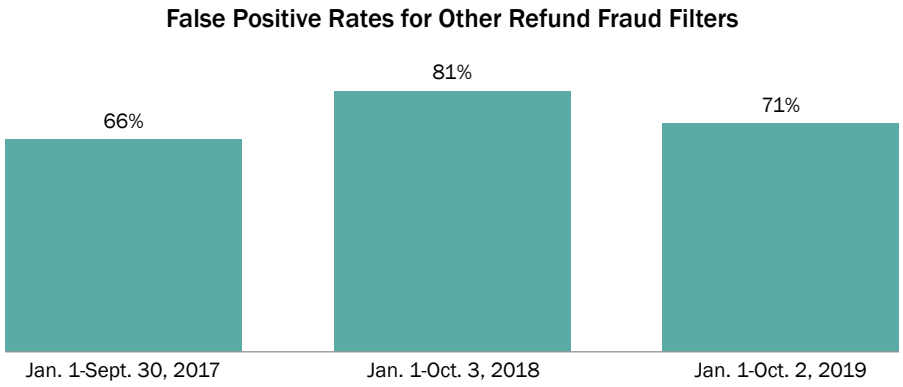
22 IRS, IDT and IVO Performance Report, Slide 10 (Feb. 6, 2019).

23 Taxpayer First Act of 2019, H.R. 1957, § 2301, 116th Cong. The National Taxpayer Advocate has previously made a similar recommendation. See National Taxpayer Advocate 2017 Annual Report to Congress 267, 276 (Legislative Recommendation: *Timing of Refunds: Direct the IRS to Study the Impact of Delaying the Issuance of Refunds to Allow Sufficient Time to Process Information Returns and Perform Document-Matching*). Treas. Reg. § 301.6011-2(b). This regulation, in certain situations, requires the following to be submitted electronically: Form 1042-S, 1094 series, 1095-B, 1095-C, 1098, 1098-E, 1098-T, 1099 series, 5498, 8027, W-2G, and Form W-2 and other forms treated as Form W-2.

24 IRS, IDT and IVO Performance Report Appendix, Non-IDT Refile Rate, Slide 1 (Oct. 9, 2019).

25 *Id*.

FIGURE 1.4.2[26]



Additionally, the returns that comprise the 71 percent FPR took the IRS, on average, 38 days to process.[27] However, the IRS processed the returns that turned out to be legitimate quicker when compared to the 2018 filing season. The IRS needs to continue to learn from the returns that were part of the FPR to further refine the filters and continually work to lower the FPR.

Refund Delays Were Nearly Three Weeks Beyond Normal Processing Times, Causing Economic Hardship for a Large Number of Taxpayers

For non-IDT refund fraud, the IRS tracks how long it takes to release legitimate returns selected by fraud detection filters. This is referred to as the "operational performance rate" (OPR).[28] This figure represents the number of legitimate returns the non-IDT refund fraud filters selected that took more than four weeks for the IRS to release from the time of selection.[29] From January 1 through October 2, 2019, the OPR was 34 percent compared to a 64 percent rate for the same time period in the prior year – nearly half last year's rate.[30] This means it took the IRS more than four weeks to release 34 percent of the returns these filters selected from the time of selection.[31] However, as discussed in last year's Annual Report to Congress, the Operational FPR, which is the number of returns that comprise the FPR that took more than four weeks from the time of selection to process, better illustrates how many legitimate

26 IRS, IDT and IVO Performance Report, Slides 19 and 32 (Oct. 10, 2018) (showing rate for 2018); IRS response to TAS information request (Oct. 19, 2017) (providing rates for 2017).

27 IRS response to TAS information request (Sept. 23, 2019). W&I response to TAS consolidated end of year information request (Nov. 22, 2019).

28 The IRS defines the OPR as returns that are selected and not released by the pre-wage verification program within two weeks of selection (prior to selection, these returns are screened for an additional two weeks). The National Taxpayer Advocate believes the OPR is not an accurate measure of the post-screening/selection FPR.

29 National Taxpayer Advocate 2018 Annual Report to Congress 79, 84 (Most Serious Problem: *False Positive Rates: The IRS's Fraud Detection Systems Are Marred by High False Positive Rates, Long Processing Times, and Unwieldy Processes Which Continue to Plague the IRS and Harm Legitimate Taxpayers*). The OPR retains the same denominator as the FPR (the total number of returns selected by the IRS), but the numerator is decreased by the number of returns that the IRS clears as legitimate within two weeks of selection. *See also* IRS, IDT and IVO Performance Report Appendix, Non-IDT OPR Calculation, Slides 1-2 (Oct. 9, 2019).

30 IRS, IDT and IVO Performance Report Appendix, Non-IDT OPR Calculation, Slides 1-2 (Oct. 9, 2019); IDT and IVO Performance Report, Slide 32 (Oct. 10, 2018).

31 *Id*.

returns selected by the non-IDT refund fraud filters were delayed more than four weeks.[32] This Operational FPR rate has also improved, dropping to 55 percent for January 1 through October 2, 2019, compared to 72 percent for the same time period in the prior year.[33]

Although this drop is an improvement, the IRS still took more than four weeks from the time of selection to release nearly half of the returns that comprise the FPR.[34] The IRS should continue to take steps to reduce the Operational FPR if FPRs are to remain at the same level. Alternatively, the IRS should take steps to reduce the FPR, if it cannot further reduce the Operational FPR.

Additionally, TAS found there were delays in sending returns to the necessary treatment stream where the information on the returns could not be otherwise verified.[35] An analysis of TAS cases showed that out of 309 TAS case receipts with PRWVH indicators received between August 25 and August 31, 2019, 236 waited an average of 141 days from the return filing date for the IRS to screen and determine that it could not verify the information on the returns.[36] Further, as of October 1, 2019, the IRS had assigned only 36 percent of the 236 returns to a particular treatment stream. By October, the IRS should have received all W-2 information, and the fact that it had not yet released or sent to a treatment stream over 60 percent of these cases is concerning.

While it is essential for the IRS to prevent fraud and protect revenue, these processing delays, accompanied with the processing delays experienced by returns selected by Filter X due to the SSA's delays in transmitting paper W-2 data, caused a financial hardship for many taxpayers. These delays have a significant impact on low-income taxpayers. This is especially true for selected returns where EITC or ACTC is claimed. Often, low-income taxpayers are waiting on their refunds to pay day-to-day living expenses such as rent, car repairs, or healthcare, and any delay can cause taxpayers significant hardship. To address these processing delays, the IRS should look to increase staffing for the manual validation process so it can verify returns and assign them to the appropriate treatment stream quickly.

32 National Taxpayer Advocate 2018 Annual Report to Congress 79-91 (Most Serious Problem: *False Positive Rates: The IRS's Fraud Detection Systems Are Marred by High False Positive Rates, Long Processing Times, and Unwieldy Processes Which Continue to Plague the IRS and Harm Legitimate Taxpayers*). The Operational FPR is the ratio of the legitimate returns resolved after the four-week period (the numerator) and the number of returns left after the four-week period (the denominator). This formula is a more accurate depiction of the number of legitimate returns that took more than two weeks to be resolved from the time of selection than the OPR because, unlike the OPR, the numerator and denominator mirror one another. Specifically, both numbers exclude the number of returns resolved within two weeks of selection. On the other hand, the OPR does not exclude the number of returns resolved within two weeks of selection from the formula's denominator, which distorts the percentage and gives an inaccurate appearance of improved performance.

33 IRS, IDT and IVO Performance Report Appendix, Non-IDT Extended Refile Rate Calculation, Slide 3 (Oct. 9, 2019); the IRS did not track this data until FS 2019, but TAS calculated its own rate for FS 2018. *See* National Taxpayer Advocate 2018 Annual Report to Congress 79-91 (Most Serious Problem: *False Positive Rates: The IRS's Fraud Detection Systems Are Marred by High False Positive Rates, Long Processing Times, and Unwieldy Processes Which Continue to Plague the IRS and Harm Legitimate Taxpayers*). The IRS refers to this as the extended refile rate, but for purposes of this discussion, we will refer to it as the Operational FPR.

34 IRS, IDT and IVO Performance Report Appendix, Non-IDT Extended Refile Rate Calculation, Slide 3 (Oct. 9, 2019).

35 If the information on returns cannot be verified through a verification process, the returns will then be referred to one of three treatment streams: CP05A/WOW, wage and withholding only issues (no refundable credits to be addressed); Automated Questionable Credit (AQC) Program, for wage and withholding issues where a refundable credit is claimed; or Correspondence Examination, selections by the Examination Department and not eligible for another IVO treatment stream (refund tolerances and the availability of budget resources will affect how many returns are selected).

36 Case receipts data obtained from TAMIS on September 13, 2019. The sample was based on a 95 percent confidence level with a 4.2 percent margin of error rate.

The IRS Generally Provides Taxpayers Little Information Regarding the Precise Reason for Refund Delays and What Steps They Can Take to Expedite the Process

In prior Annual Reports to Congress, TAS has pointed out that taxpayers who call the IRS because their refunds have been held as part of the non-IDT refund fraud program receive little information regarding the cause of the refund delay.[37] Specifically, prior to April 2019, IRS assistors were advised to tell taxpayers that "…no further action is required."[38]

As a result of TAS's successful advocacy, the Accounts Management IRM has been updated to instruct assistors to provide taxpayers with the following information:

> Advise the taxpayer that we select some returns to determine if income, expenses, and credits are being reported accurately. Recommend the taxpayer review their return and all income information statements (*e.g.*, Form W-2) to ensure all income and withholding matches the information reported on the return. If they determine they have made an error, file an amended return.[39]

Although the IRS has made improvements regarding the information it gives taxpayers while holding their refunds, communication regarding the status of the taxpayer's return falls short in several instances and does not fully observe the taxpayer's *right to be informed*. Specifically:

- Letter 4464C, Questionable Refund 3rd Party Notification Letter, instructs taxpayers that the IRS is holding their refund, but does not provide any guidance as to what they can do to expedite the process (*i.e.,* review their return to ensure the income and withholding reported is accurate, and if it is not, file an amended return);[40]
- Not all taxpayers whose refunds are held as part of the non-IDT refund fraud program receive the same periodic update notices. The IRS sends out Notice CP05, We're Holding Your Refund Until We Finish Reviewing Your Return, and follows up with a subsequent interim letter it sends every 60 days if it is still holding the refund.[41] Conversely, taxpayers whose returns the IRS selected for verification by other non-IDT refund fraud filters receive Letter 4464C, Questionable Refund 3rd Party Notification, and no other subsequent interim letter while the IRS reviews the return;[42] and
- When an account is transferred by RIVO to a different IRS treatment stream such as Exam, taxpayers receive no notification, and the taxpayer won't hear from the IRS again until an employee in that treatment stream begins working the account.

37 National Taxpayer Advocate 2017 Annual Report to Congress 219, 225 (Most Serious Problem: *Fraud Detection: The IRS Has Made Improvements to Its Fraud Detection Systems, But a Significant Number of Legitimate Taxpayers Are Still Being Improperly Selected by These Systems, Resulting in Refund Delays*).

38 IRM 21.5.6.4.35.3.1.2(2), -R Freeze with IVO Involvement - No IVO Letter or Notice Issued (Oct. 1, 2018).

39 IRM 21.5.6.4.35.3.1.2(2), -R Freeze with IVO Involvement - No IVO Letter or Notice Issued (Oct. 1, 2019).

40 Letter 4464C, Questionable Refund 3rd Party Notification Letter ("What you need to do: If you filed the tax return: You don't need to do anything at this time. We understand your tax refund is very important to you and we'll work to complete our review as quickly as possible."). TAS received several submissions on this issue to its Systemic Advocacy Management System (SAMS). TAS SAMS issues 40219, 41107, and 41114.

41 IRM 21.5.6.4.35.3.1.4(2), -R Freeze with IVO Involvement - IVO Letter 2645C/2644C Issued (Oct. 1, 2019); Notice CP 05, We're Holding Your Refund Until We Finish Reviewing Your Return. Although an interim letter is manually issued for accounts where a Letter 4464C is issued and the return review has not been completed, it has been TAS's experience that this manual issuance of the interim letter is done inconsistently.

42 Although an interim letter is manually issued for accounts where a Letter 4464C is issued and the return review has not been completed, it has been TAS's experience that this manual issuance of the interim letter is done inconsistently.

Understandably, the IRS needs to be very careful about the amount of information it releases to prevent supporting fraud. However, when taxpayers are provided information regarding the status of their refunds, including what actions they can take to expedite the process, they may be less likely to call the IRS inquiring about their refunds and take steps to help identify if there is an issue with their return. Recently, RIVO has agreed to work with TAS on piloting notices that have more information about why the IRS is holding the taxpayer's return and what they can do to address the problem.[43] TAS looks forward to working with RIVO on this pilot to test the impact on taxpayer behavior and better observe the taxpayer's *right to be informed*.

TAS is also currently working with the e-file industry to ensure that preparation and filing software include sufficient alerts on (1) the importance of accurately reporting on the return information from third-party information reports and (2) when the law allows the IRS to release refunds. For example, taxpayers may not know the importance of information on the return matching other third-party documentation. In an effort to obtain their refunds as early as possible, some taxpayers may use their last paystub of the year to fill in the income and withholding on their return. However, a discrepancy between the year's last paystub and the W-2 may result in the refund fraud filter identifying the return, which will delay the processing of the refund. Additionally, if the taxpayer's refund includes EITC or ACTC, this early filing is futile as, by law, the IRS cannot release their refund until after February 15.[44]

IMPACT ON THE TAXPAYER ADVOCATE SERVICE

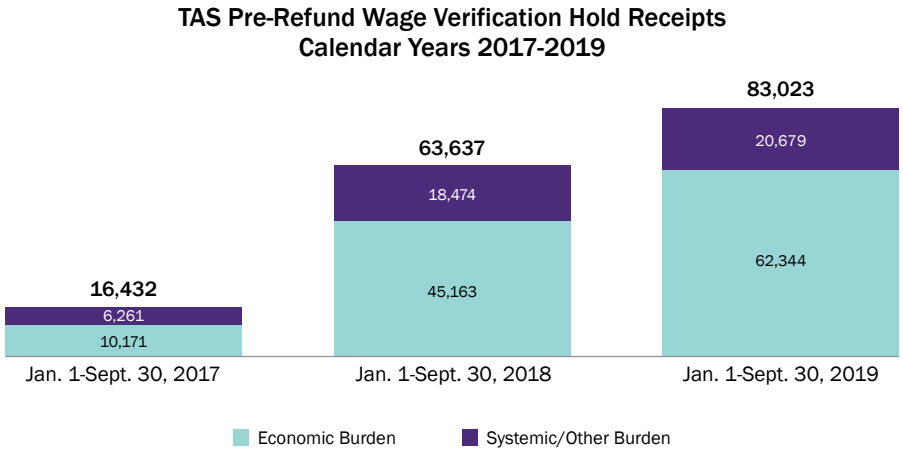
Issues With the New Filter X, in Conjunction With High False Positive Rates and Processing Delays, Contributed to a 405 Percent Increase in TAS Non-Identity Theft Refund Fraud Cases

As discussed above, IRS challenges with PRWVH cases have resulted in a large number of taxpayers seeking TAS assistance. As shown in Figure 1.4.3, TAS PRWVH case receipts have increased over five times over the past three years, from over 16,000 cases in CY 2017 to over 83,000 in CY 2019, and about 75 percent of the case receipts for CY 2019 were accepted under TAS's economic hardship criteria.

43 TAS/Return Integrity and Compliance Services (RICS) Executive Meeting (Sept. 9, 2019).

44 See PATH Act of 2015, Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 201 (2015).

FIGURE 1.4.3[45]



The increase in cases — significantly more than TAS anticipated — resulted in delays in TAS's ability to timely respond to and work cases.

To more precisely identify the root of this increase, TAS Research reviewed nearly 32,000 TAS closed cases involving PRWVH, received between January 28 and June 30, 2019, where the taxpayers ultimately received the refund claimed on their original returns. A majority of these involved the new Filter X.[46] As discussed above, a number of returns selected by Filter X were delayed due to the slow transmittal of paper W-2 data by SSA. Additionally, there were also a subset of cases where delays in sending cases to the necessary treatment stream resulted in taxpayers seeking TAS assistance. These issues, which the IRS can take steps to improve, delayed the processing of returns and were the primary factors behind TAS's significant increase in PRWVH case receipts. For a more in-depth discussion of TAS's non-IDT refund fraud case receipts, see the Case Advocacy section in this report.[47]

CONCLUSION

When taxpayers file their tax returns, they anxiously await the receipt of their refunds and actively monitor their status. Taxpayers who have filed on time and done everything right do not understand why the IRS holds their refunds for more than a month and why it does not explain exactly what is happening and how to fix the issue. The IRS has made significant improvements to its refund fraud program and plans to continue making improvements in the upcoming filing season. However, refund delays and high false positive rates continue, harming significant numbers of taxpayers. These delays create anxiety and frustration for taxpayers, infringe on taxpayers' rights, and result in more requests for TAS assistance. The IRS needs to take additional steps to improve its filters, improve communications with taxpayers, and improve the time in which it processes legitimate returns.

45 Data obtained from TAMIS (Oct. 1, 2019; Oct. 1, 2018; Oct. 1, 2017).

46 TAMIS cases for tax year 2018, Master File Tax Code (MFT) 30, received between January 28, 2019, and June 30, 2019, with primary core issue code 045 or secondary core issue code 045 and other specifications and exclusions matched to selection tables 2019_SV_Selection and 2019_IW_Selection.

47 National Taxpayer Advocate 2019 Annual Report to Congress TAS Case Advocacy section, *infra*.

RECOMMENDATIONS

Administrative Recommendations to the IRS

The National Taxpayer Advocate recommends that the IRS:

1. Work with SSA to speed up the transmission of paper W-2 data to earlier in the year.
2. Identify acceptable FPR and Operational FPR ranges each year as part of its refund fraud projections.
3. Continue to learn from the returns that were part of the FPR to further refine the filters and continually work to lower the false positive rate.
4. Increase RIVO staffing to improve the processing time for validating information on returns and assigning returns to a compliance stream for further treatment.
5. Send an interim letter every 60 days to all taxpayers whose returns it is holding in the PRWVH program.
6. Revise the Letter 4464C initial contact notice instructing taxpayers to review their returns to verify the income and withholding reported is accurate and correct, and if a mistake is identified, to file an amended return.
7. Instruct RIVO to send Letter 86C, Referring Taxpayer Inquiry/Forms to Another Office, informing taxpayers that it has referred their return to another IRS function and providing them with the name of the specific function and contact information.

MSP #5 FREE FILE: Substantial Free File Program Changes Are Necessary to Meet the Needs of Eligible Taxpayers

RESPONSIBLE OFFICIALS

Charles Rettig, Commissioner, Internal Revenue
Sunita Lough, Deputy Commissioner for Services and Enforcement
Ken Corbin, Commissioner, Wage and Investment Division

TAXPAYER RIGHTS IMPACTED[1]

- *The Right to Be Informed*
- *The Right to Quality Service*
- *The Right to Confidentiality*
- *The Right to a Fair and Just Tax System*

PROBLEM

To fulfill its statutory duty to increase electronic filing (e-filing), the IRS partners with Free File, Inc. (FFI), a group of private-sector tax return preparation software providers, to offer free federal tax preparation software products accessible through IRS.gov to approximately 105 million eligible taxpayers.[2] While the rate of electronic filing approached 90 percent for tax year (TY) 2018 individual returns, less than two percent of all individual returns filed (or about 2.5 million returns) were filed using Free File program software products.[3] In addition, data on repeat usage suggests that taxpayers who use Free File have generally been dissatisfied with it. Among taxpayers who used Free File software in 2017, nearly half (47 percent) did not use Free File software again in 2018.[4]

During 2019, after ProPublica alleged that FFI was engaging in deceptive marketing practices and Congress submitted inquiries, the IRS engaged MITRE Corporation to conduct an independent assessment of the program.[5] The MITRE 2019 Free File Report, issued on October 3, 2019, confirmed

1 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are also codified in the Internal Revenue Code (IRC). *See* IRC § 7803(a)(3).

2 *See* IRS Restructuring and Reform Act of 1998 (RRA 98), Pub. L. No. 105–206, § 2001, 112 Stat. 685, 723. The FFI products must be available to 70 percent of all taxpayers, particularly focusing on economically disadvantaged or underserved taxpayers. Eighth Memorandum of Understanding (MOU) on Service Standards and Disputes Between the Internal Revenue Service and Free File, Inc. 3 (effective as of Oct. 31, 2018) (hereinafter 2018 Free File MOU), https://www.irs.gov/pub/irs-utl/Eight%20Free%20File%20MOU.pdf.

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

4 *Id*.

5 To access the MITRE 2019 Free File Report, see IRS, IRS Statement on Free File Program (Oct. 11, 2019), https://www.irs.gov/newsroom/irs-statement-on-free-file-program. ProPublica published a series of investigative reports. *See* ProPublica, *The TurboTax Trap: How Tax Prep Industry Makes You Pay*, https://www.propublica.org/series/the-turbotax-trap (last visited Oct. 20, 2019).

the accusations on deceptive marketing practices but also concluded that IRS oversight was generally adequate and effective.[6]

Based on the MITRE 2019 Free File Report findings, the public response, as well as Taxpayer Advocate Service's (TAS) 2018 review of the Free File program,[7] the National Taxpayer Advocate believes that the current program is not promoting the best interests of taxpayers for the following reasons:

- FFI member companies are steering eligible taxpayers away from their Free File program software products and toward their commercial products;
- Cross-marketing of fee-based services on Free File program software products can confuse taxpayers and gives the impression of IRS endorsement;
- The Free File program is not meeting the needs and preferences of eligible taxpayers, as illustrated by its low usage rate; and
- The IRS does not perform routine quality testing of the Free File program software.

IMPACT ON TAXPAYERS

Background

The Free File Program

The IRS Restructuring and Reform Act of 1998 (RRA 98) directed the IRS to set a goal of increasing the e-file rate to at least 80 percent by 2007.[8] In 2002, the IRS entered into an agreement with a consortium of tax software companies under which the companies would provide free online return preparation services on an IRS.gov webpage to 60 percent of taxpayers during the tax filing season, and in exchange, the IRS would not compete with these companies by providing its own software to taxpayers.[9] The agreement allows the software providers to determine the scope of their offerings but obligates the IRS to take oversight action, such as implementing usability performance measures and notifying the consortium if services are not being properly performed.[10] The IRS also has the authority to terminate the agreement if the consortium fails to provide appropriate coverage, taking into account "the extent to which actual usage of Free Services has increased."[11]

The IRS intended the Free File partnership to be the "best method" to "promote higher quality Free Services by utilizing the existing expertise of the private sector, maximize consumer choice, promote competition for such Free Services, and thereby meet the objectives in the least costly manner."[12]

6 MITRE 2019 Free File Report at vi-ix. The press questioned the independence of MITRE and criticized the review as too narrow and lacking meaningful proposals for reform. *See, e.g.*, ProPublica, *IRS-Funded Review Confirms TurboTax Hid Free Filing From Search Engines, but Says There's No Need for Major Changes* (Oct. 9, 2019), https://www.propublica.org/article/irs-funded-review-confirms-turbotax-hid-free-filing-from-search-engines-but-says-theres-no-need-for-major-changes.

7 National Taxpayer Advocate 2018 Annual Report to Congress 65-78 (Most Serious Problem: *Free File: The IRS's Free File Offerings Are Underutilized, and the IRS Has Failed to Set Standards for Improvement*).

8 Pub. L. No. 105-206, § 2001(a)(2), 112 Stat. 685, 723 (1998).

9 Free On-Line Electronic Tax Filing Agreement Entered Into Between the IRS and the Free File Alliance, LLC (effective as of Oct. 30, 2002), https://www.irs.gov/pub/irs-utl/2002-free-online-electronic-tax-filing-agreement.pdf (hereinafter 2002 Free File Agreement); IRS, Free File: About the Free File Alliance, https://www.irs.gov/e-file-providers/about-the-free-file-alliance (last visited Oct. 20, 2019) (provides links to each Free File program agreement and MOU).

10 2002 Free File Agreement at 3-4.

11 *Id*. at 2.

12 *Id*. at 1. Dept. of Treas., *Treasury, IRS Announce New Efforts to Expand E-Filing* (Jan. 30, 2002), https://www.treasury.gov/press-center/press-releases/Pages/po964.aspx.

Beginning with the 2006 Free File Memorandum of Understanding (MOU), the IRS has "pledged to not enter the tax preparation software and e-filing services marketplace."[13]

The IRS has renewed its agreement multiple times, including the most recent agreement with FFI, signed on October 31, 2018.[14] FFI currently consists of 11 private-sector companies.[15] Amendments to the agreement have included broadening the scope of eligibility for the Free File program to 70 percent of all taxpayers, heightening security and privacy requirements, and requiring members to provide an electronic Free File indicator on returns to allow the parties to track usage.[16] During the 2019 filing season, taxpayers with adjusted gross incomes (AGIs) of less than $66,000 were eligible to use Free File software.[17]

IRS Engaged MITRE to Assess Free File Program

In 2019, ProPublica issued a series of articles accusing the FFI of not acting in the best interests of taxpayers by steering them away from free preparation software options.[18] In response, the IRS engaged MITRE to independently assess the program. Among the many findings and recommendations included in the MITRE report, the National Taxpayer Advocate believes the following are the most significant:

- **Search Engine Avoidance:** Five of the FFI member companies used a coding device to prevent taxpayers from finding their Free File program page when searching the internet for the program.[19]
- **Program Oversight:** The public-private partnership has room for improvement, but current compliance processes are "adequate and effective to support the integrity of the program."[20]
- **Taxpayer Participation:** The often-cited low participation numbers are misleading because they do not factor in taxpayer choice and behavior.[21]

Deceptive Marketing Practices Steer Taxpayers Away From Free File Program Options

The MITRE 2019 Free File Report confirmed that five of the FFI member companies used a coding device to exclude their Free File landing page from organic searches on search engines such as Google or Bing.[22] The members took the position that such practice keeps them in compliance with the MOU language requiring the program software to be accessible only through IRS.gov.[23] In addition, seven members bought ads for keywords relating to free tax filing that directed traffic toward their fee-based software products.[24] As result, MITRE recommended that the next negotiated MOU address the IRS position on this issue.

13 2006 Free File MOU at 4.

14 2018 Free File MOU.

15 At the date of execution of the 2018 Free File MOU, there were 12 members of FFI. However, one member (Drake) dropped out of the group in July 2019. Therefore, herein, we refer to 11 member companies. MITRE, IRS, Wage and Investment, IRS Free File Program, *Independent Assessment of the Free File Program: Free File Program Assessment Final Report*, iii n.2 (Oct. 3, 2019).

16 2006 Free File MOU at 4.

17 It is our understanding that taxpayers with adjusted gross income of $69,000 or less will be eligible to use Free File software to prepare and e-file returns during the 2020 filing season. IRS, Draft Instructions to Tax Year 2019 Form 1040 and 1040-SR (Oct. 10, 2019). *See* Free File: Do Your Federal Taxes for Free, https://www.irs.gov/filing/free-file-do-your-federal-taxes-for-free (last visited Oct. 23, 2019).

18 ProPublica, *The TurboTax Trap: How Tax Prep Industry Makes You Pay*, https://www.propublica.org/series/the-turbotax-trap (last visited Oct. 20, 2019).

19 MITRE 2019 Free File Report at vii.

20 *Id*. at viii-ix.

21 *Id*. at x.

22 *Id*. at vi-vii.

23 *Id*. at vi.

24 MITRE 2019 Free File Report at vi-vii.

These intentionally deceptive practices by FFI members violate the intent of the MOU, which is to provide Free File options for economically disadvantaged and underserved taxpayers in exchange for the IRS agreeing to not provide such services. While the IRS attempts to protect these taxpayers by ensuring free services through the MOU, FFI is capitalizing on the confusion and potential unsophistication of these taxpayers by purposefully directing them to fee-based services in lieu of the free services they are required to provide. The National Taxpayer Advocate believes that the IRS should explicitly prohibit this practice in the MOU to protect taxpayers' *right to be informed* and *to quality service*. Further, the IRS should collaborate with the National Taxpayer Advocate and the industry to determine the best way to eliminate confusion between Free File program products and other free software offered by FFI members.

Cross-Marketing of Other For-Fee Services on Free File Program Software Products Can Confuse Taxpayers and Gives the Impression of IRS Endorsement

Despite the fact that all Free File program software products are accessed through the official IRS.gov website, marketing of fee-based products and services through the program platform still occurs. The National Taxpayer Advocate commends the IRS for including important amendments to strengthen taxpayer protections and limit the marketing of paid services by FFI members in the 2018 Free File MOU. The new MOU includes language requiring software providers to automatically return taxpayers to the IRS Free File page if they don't qualify for an offer, preventing software providers from upselling their other products through "value-add" buttons on landing pages.[25] The MOU also contains provisions for limiting email solicitations of taxpayers in subsequent years and requiring Free File software providers to offer returning taxpayers Free File program software products as a first option in subsequent years.[26]

While the 2018 MOU amendments are an improvement, the National Taxpayer Advocate continues to be concerned over the marketing of paid state tax filing services on Free File program software products. While some states offer free filing independent of the Free File program, the 2018 Free File MOU prohibits the IRS from making taxpayers aware of these services.[27] By providing links on the Free File program software to software providers marketing paid state-return options and not advertising the other free state options available, the IRS is in effect endorsing these for-fee products. Thus, rather than providing a service that meets taxpayers' needs, Free File program software has the potential to mislead taxpayers and ensnare them in for-fee product offerings. This behavior impinges taxpayers' *rights to be informed, to quality service,* and *to confidentiality* as well as undermines the purpose of the Free File program.

25 IRS News Release IR-2018-213, IRS, Free File Alliance Announce Changes to Improve Program; Improved Taxpayer Options Available for 2019 Free File Program (Nov. 2, 2018), https://www.irs.gov/newsroom/irs-free-file-alliance-announce-changes-to-improve-program-improved-taxpayer-options-available-for-2019-free-file-program. *See also* 2018 Free File MOU § 4.32.2 (requiring Members to "provide, as a first option, a prominent hyperlink for the taxpayer to return to the IRS Free File Landing Page" if the taxpayer "enters a Member's Free File Landing Page and begins to complete a return but ultimately cannot qualify for the Member's free offer."); § 4.32.6 ("Members shall not include a "value-added" button (*i.e.*, an icon, link or any functionality that provides a taxpayer with access to a Member's commercial products or services) on the Member's Free File Landing Page.").

26 *See also* 2018 Free File MOU § 4.14 (A returning taxpayer must "be given a first option to return to the Member's Free File offer before receiving any other alternative choices for the Member's publicly available commercial tax preparation products or services."); 2018 Free File MOU § 4.32.4 ("Free File Members shall communicate not less than once annually via email with their taxpayer customers who used Free File services and completed their returns through Free File in the immediately preceding tax year prior to the opening of the following tax season. The content of this email(s) shall only remind the taxpayer about the availability of the Member's Free File offer and invite them to return to the Member's Free File Landing Page. Free File Members shall not use these communications to communicate with the taxpayer about any non-Free File commercial products or services. No marketing, soliciting, sale or selling activity, or electronic links to such activity, will be permitted in these email(s).").

27 *See* 2018 Free File MOU § 4.21. The 2018 Free File MOU specifies that providing links from "the IRS Free File Website to Non-Free File State Department of Revenue websites is grounds for FFI to immediately dissolve its obligations in this MOU." 2018 Free File MOU § 4.22.

Less Than Two Percent of Tax Year 2018 Individual Tax Returns Were Prepared Using Free File Program Software

The Free File program was created to help the IRS reach the 80 percent statutory e-file goal included in RRA 98.[28] However, with a current e-file rate of about 89 percent, and less than two percent (approximately 2.5 million returns) of total filers using Free File program software, the IRS has surpassed its goal with minimal contribution from the program.[29] The MITRE 2019 Free File report argues that many taxpayers prefer to use other return preparation methods, leaving the true pool of Free File eligible taxpayers at about 30 million, which is substantially lower than the roughly 105 million taxpayers the National Taxpayer Advocate believes are eligible to use the program (70 percent of all individual taxpayers).[30] However, the National Taxpayer Advocate disagrees with the report's assessment because it does not consider the reasons why eligible taxpayers chose other preparation methods. For example, some eligible taxpayers could have used paid return preparers or fee-based commercial software products because they were unaware of the Free File program, while others are unable to use the program due to its eligibility restrictions and language limitations. Taxpayers who do use the program have little guidance in the Free File Software Lookup Tool about the strengths and weaknesses of each software package's offering prior to selection and may begin preparing a return only to find the program lacks the capability to prepare the return or to fully capture the deductions and credits available to the taxpayer.[31] Moreover, data on repeat usage suggests that taxpayers who use Free File have generally been dissatisfied with it. Among taxpayers who used Free File software in 2017, nearly half (47 percent) did not use Free File software again in 2018.[32]

Since 2006, all Free File MOUs specifically highlight economically disadvantaged and underserved populations as the targeted groups for Free File services.[33] Taxpayers in vulnerable groups typically have limited disposable income and free time to spend on tax return preparation. In addition, age restrictions sharply curtail the number of Free File Program software options available to elderly taxpayers.[34] While the IRS offers the Tax Counseling for the Elderly program to assist taxpayers age 60 or older with return preparation, this program is not designed to serve every taxpayer in this age range.[35] Free on-demand electronic tax preparation service is still a valuable resource for taxpayers in this demographic. However, only four of the 11 FFI providers offer services to taxpayers of all ages, and even these have use restrictions based on the taxpayer's state of residence, income, or eligibility for the Earned Income Tax Credit.[36] In addition, four of the 11 FFI providers have age limitations that start before the age of 60.[37]

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

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

30 The report concludes that the pool of eligible taxpayers should only include taxpayers who prefer "do-it-yourself" preparation methods; thereby excluding taxpayers who chose paid or volunteer return preparers. MITRE 2019 Free File Report at x.

31 *See* IRS, Free File Software Lookup Tool, https://apps.irs.gov/app/freeFile/jsp/wizard.jsp (last visited Oct. 20, 2019); MITRE 2019 Free File Report at 73.

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

33 2006 Free File MOU at 4.

34 MITRE 2019 Free File Report at 8. Seven of the 11 FFI members prevent taxpayers ranging from ages 53-70 from using their Free File program. MITRE 2019 Free File Report at 8.

35 IRS, Tax Counseling for the Elderly, https://www.irs.gov/individuals/tax-counseling-for-the-elderly (last visited Oct. 20, 2019); IRS Pub. 3676-B, IRS Certified Volunteers Providing Free Tax Help (Oct. 2015).

36 For example, one FFI software provider makes its services available to all ages, but the taxpayer must have AGI of less than $34,000 or be eligible for the Earned Income Tax Credit. See Free File Software Offers, https://apps.irs.gov/app/freeFile/jsp/index.jsp (last visited Oct. 15, 2019); MITRE 2019 Free File Report at 8.

37 *See* Free File Software Offers, https://apps.irs.gov/app/freeFile/jsp/index.jsp (last visited Oct. 15, 2019); MITRE 2019 Free File Report at 8.

These age restrictions make it more difficult for elderly taxpayers to choose a preparation method suited to their needs and preferences and affects their *right to a fair and just tax system*.

Moreover, English as a Second Language (ESL) taxpayers face difficulty navigating and using Free File software. In the 2018 Free File MOU, the IRS chose making tax filing easier for underserved populations a key objective and even required members to provide a Spanish Free File indicator to show how many taxpayers took advantage of such services.[38] However, during Filing Season 2019, only one Free File option was available in a language other than English (Spanish), and the offer was not available to taxpayers over age 50.[39] A 2015 TAS study showed that because of language barriers and less education, Spanish-speaking taxpayers may be especially vulnerable to unscrupulous return preparers who promote high-interest loans and charge high fees.[40] Thus, there is a great need for the IRS to make available several options for free tax return preparation assistance that it has vetted for Spanish-speaking taxpayers, as well as other ESL taxpayers. Limitations in service can drive these taxpayers to costly paid preparer options.

The MOU limits the IRS's ability to provide free file services in exchange for FFI filling the void and providing those services to the majority of taxpayers (*i.e.*, 70 percent with emphasis on economically disadvantaged and underserved populations). However, the poor usage numbers indicate that the void still exists. Free File is a critical service to this group of vulnerable taxpayers, most of whose only contact with the IRS will be the filing of the return. Thus, the IRS should ensure that the MOU provides an easy, assessable free file platform for these taxpayers.

To achieve a discernible increase in Free File participation, the National Taxpayer Advocate recommends that before entering into a new agreement with FFI, the IRS conduct research studies, develop actionable goals, create measures evaluating taxpayer awareness and satisfaction, test each member's software, provide options for ESL taxpayers, and conduct more outreach.[41] Taking these steps before negotiating a new MOU will protect taxpayers' *rights to be informed, to quality service,* and *to a fair and just tax system.* However, if the Free File program cannot attain (1) a significantly higher usage rate (*e.g.*, ten percent of the 70 percent of taxpayers eligible to use the program) and (2) a retention rate of 75 percent of taxpayers who used Free File in the preceding year by filing season 2025, it is in the best interests of taxpayers to replace the program with an alternative approach to make the tax software available to taxpayers at no or low cost.[42]

The IRS Does Not Conduct Routine Quality Testing of the Program Software

The IRS has not taken sufficient steps to evaluate the quality of the return preparation in the Free File program. To ensure program standards are being met, the 2018 Free File MOU emphasizes the "in-place

38 2018 Free File MOU at 5, 18; 2015 Free File MOU at 5, 16.

39 *See* IRS, Free File: Ofrece el Software en Español, https://www.irs.gov/es/filing/free-file-ofrece-el-software-en-espanol (last visited Oct. 12, 2019).

40 National Taxpayer Advocate 2015 Annual Report to Congress vol. 2, at 102 (Research Study: *Understanding the Hispanic Underserved Population*). TAS research has shown that only six percent of Hispanic taxpayers used a free tax preparation service by a trained volunteer, while 60 percent used a paid tax return preparer other than an attorney, CPA, or enrolled agent. *Id*.

41 *See* MITRE 2019 Free File Report at 79-88.

42 Among taxpayers who used Free File software in 2017, nearly half (47 percent) did not use Free File software again in 2018. IRS response to TAS fact check (Dec. 20, 2019).

review process" for the program rather than adding any new initiatives.[43] The "in-place review process" occurs once prior to filing season and once during filing season. This review is mainly to ensure the software providers' technical compliance with the Free File MOU and does not evaluate the quality of the offerings from Free File software providers.[44] Thus, the National Taxpayer Advocate is concerned that merely reemphasizing the current limited reviews in the 2018 MOU will not adequately gauge the experiences of taxpayers using the program. The 2018 MOU does specifically assign the FFI members the responsibility to "provide the necessary support to accomplish a customer satisfaction survey."[45] The National Taxpayer Advocate believes customer satisfaction surveys coupled with routine quality testing are necessary to provide effective oversight by enabling the IRS to evaluate whether the software programs are meeting the needs of taxpayers and accurately preparing returns. The IRS and FFI should work together to collect data through customer satisfaction surveys.

Conducting robust demographics analysis and satisfaction surveys, along with testing of taxpayer scenarios, would help the IRS determine why particular groups use or do not use the Free File offerings, which providers are offering inadequate services, and how it can improve its agreement with FFI to better meet the needs of taxpayers.[46] By neglecting to measure and evaluate the Free File program, the IRS is missing a valuable opportunity to fulfill its promises in the 2018 Free File MOU to make the program more taxpayer-friendly. The IRS should work with the National Taxpayer Advocate to develop meaningful measures and better oversight, including routine quality testing, to better ensure the offerings provided on Free File fulfill the *right to quality service.*

CONCLUSION

The IRS's Free File program in its current format has become an ineffective relic of early efforts to increase e-filing. Rather than being a beneficial program providing free return preparation services, it provides limited services and is used by only a small percentage of eligible taxpayers. To increase participation, the IRS must first understand why eligible taxpayers choose their particular method of return preparation, including fee-based options. Further, before the IRS negotiates another agreement with the FFI, it must set actionable goals that address issues currently faced by taxpayers and establish measures to assess whether those goals are being met. The IRS must monitor and perform quality testing of the products and present taxpayers with more information so they can make an informed choice about whether to use each product. When the services provided by FFI fail to meet the needs and preferences of taxpayers, particularly in underserved communities, it reflects poorly on the IRS and can further erode taxpayers' trust in fair tax administration.

43 IRS News Release IR-2018-213, Free File Alliance Announce Changes to Improve Program; Improved Taxpayer Options Available for 2019 Free File Program (Nov. 2, 2018). https://www.irs.gov/newsroom/irs-free-file-alliance-announce-changes-to-improve-program-improved-taxpayer-options-available-for-2019-free-file-program.

44 These reviews accomplish the following: validate that the software has acquired the appropriate security and privacy certifications; test that a filer can easily prepare, file, print, download and save a tax return using the Free File software; ensure ancillary services/products, Refund Anticipation Checks and Refund Anticipation Loans are not being offered; ensure third party security and privacy certifications have been acquired to assure industry security and privacy standards and practices are being used; validate a guarantee of calculations is provided by each company. IRS response to TAS information request (Sept. 7, 2018). *See also* MITRE 2019 Free File Report at 55-58.

45 2018 Free File MOU at 19.

46 For example, the most recent Free File demographics report from 2015 does not show how many Spanish speaking taxpayers used its services. See Demographics of TY 2015 Traditional Free Filers, Free File Fillable Form Users, True Paper Filers, V-code Filers, and Form 1040 Series Filers, included in IRS response to TAS information request (Sept. 7, 2018).

RECOMMENDATIONS

Administrative Recommendations to the IRS

The National Taxpayer Advocate recommends that the IRS:

1. Explicitly prohibit the use of special coding by FFI members to exclude Free File program software from organic searches on search engines.
2. Collaborate with the National Taxpayer Advocate and the FFI member companies to determine the best way to eliminate confusion between Free File program products and other non-program free software offered by FFI members.
3. Collaborate with the National Taxpayer Advocate as it responds to the recommendations made in the MITRE 2019 Free File Report.
4. Conduct research to determine why taxpayers eligible to use the Free File program, particularly economically disadvantaged and underserved populations, chose their method of return preparation, including fee-based methods.
5. Develop actionable goals for the Free File program before entering into a new agreement that, among other things, provide targeted use percentages aimed to substantially increase taxpayer usage and increase the percentage of taxpayers who continue to use the program from year to year.
6. Work with the National Taxpayer Advocate to create measures evaluating taxpayer satisfaction with the Free File program and test each return preparation software's ability to complete various forms, schedules, and deductions.
7. Conduct customer satisfaction surveys and routine quality testing of each Free File program software product to determine clarity of prompts, accuracy of preparation, ease of navigation, and coverage of forms and schedules.
8. Redesign the Free File Software Lookup Tool to better direct taxpayers to software providers that best meet their circumstances.
9. Provide more Free File program options for ESL taxpayers.
10. Prepare an advertising and outreach plan to make taxpayers, particularly in underserved communities, aware of the Free File program.

Legislative Recommendations to Congress

The National Taxpayer Advocate recommends that Congress:

1. Mandate that the IRS, in consultation with the National Taxpayer Advocate, submit a report to Congress by June 30, 2020, summarizing the actions it has taken to address the recommendations made by the MITRE 2019 Free File report as well as recommendations made by the National Taxpayer Advocate herein to improve the Free File program by Filing Season 2021.[47]
2. Direct the IRS to set a goal of increasing the usage rate of the Free File program to significantly higher yet attainable level (*e.g.*, ten percent of the 70 percent of taxpayers eligible to use the program) and a goal of increasing the retention rate to 75 percent of taxpayers who used Free File in the preceding year and, if those goals are not attained by 2025, to replace Free File with an alternative approach to make tax software available to taxpayers at no or low-cost, including through the use of sole-source or multi-source contracts with tax software companies.[48]

47 For more details on this legislative recommendation, see National Taxpayer Advocate 2020 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration* 19 *(Direct the IRS to Set Goals of Substantially Increasing the Usage Rate and the Retention Rate of the Free File Program by Filing Season 2025 and to Replace Free File With An Alternative Approach If Those Goals Are Not Attained)*.

48 *Id.*

MSP #6 RETURN PREPARER STRATEGY: The IRS Lacks a Comprehensive Servicewide Return Preparer Strategy

RESPONSIBLE OFFICIALS

Carol Campbell, Director, Return Preparer Office
Eric Hylton, Commissioner, Small Business/Self-Employed Division
Ken Corbin, Commissioner, Wage and Investment Division
Elizabeth Kastenberg, Acting Director, Office of Professional Responsibility

TAXPAYER RIGHTS IMPACTED[1]

- *The Right to Be Informed*
- *The Right to Pay No More Than the Correct Amount of Tax*
- *The Right to Confidentiality*
- *The Right to Retain Representation*
- *The Right to a Fair and Just Tax System*

PROBLEM

With over 80 million tax year (TY) 2018 individual tax returns prepared by return preparers, and preparers interacting on a regular basis with most functions of the IRS, the development of a comprehensive return preparer strategy is long overdue.[2] As the IRS works to develop a comprehensive taxpayer service strategy, it is critical that the needs of return preparers are included in this effort.[3] However, a return preparer strategy needs to address more than just service to preparers. During 2019, in response to a recommendation by the Treasury Inspector General for Tax Administration (TIGTA) that the IRS develop a "preparer misconduct strategy," the Small Business/Self-Employed (SB/SE) Operating Division led a cross-functional effort to develop a "coordinated Servicewide Return Preparer Strategy."[4] The resulting strategy focuses on return preparer misconduct issues, which are only one component of a truly comprehensive servicewide return preparer strategy.[5] In addition to addressing misconduct issues,

1 See Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are also codified in the Internal Revenue Code. See IRC § 7803(a)(3).

2 IRS Compliance Data Warehouse (CDW), Individual Returns Transaction File (IRTF) Entity file (data updated Oct. 24, 2019); IRS response to TAS fact check (Nov. 8, 2019).

3 See Most Serious Problem: *Customer Service Strategy: The IRS Needs to Develop a Comprehensive Customer Service Strategy That Puts Taxpayers First, Incorporates Research on Customer Needs and Preferences, and Focuses on Measurable Results*, *supra*.

4 TIGTA, Ref. No. 2018-30-042, *The Internal Revenue Service Lacks a Coordinated Return Preparer Strategy to Address Unregulated Return Preparer Misconduct* (July 25, 2018).

5 IRS, SB/SE, Servicewide Preparer Strategy: Taxpayer Advocate Team Member Overview (Mar. 25, 2019). The National Taxpayer Advocate has long proposed the need for the IRS to develop a servicewide return preparer strategy. See, *e.g.*, National Taxpayer Advocate 2009 Annual Report to Congress 41-69 (Most Serious Problem: *The IRS Lacks a Servicewide Return Preparer Strategy*).

the National Taxpayer Advocate recommends that the IRS develop a comprehensive return preparer strategy with the following components:

- Emphasize the taxpayer's *right to retain representation*;
- Encourage return preparer competency within the bounds of its authority;
- Address the current lack of transparency in preparer fees;
- Incorporate a comprehensive taxpayer education campaign;
- Restrict access to confidential taxpayer information on online applications to only those preparers over whom the IRS has oversight authority; and
- Track preparer noncompliance data by type of preparer.

IMPACT ON TAXPAYERS

Background

Millions of taxpayers choose to interact with the IRS through their representatives, making them a vehicle for taxpayer compliance. However, currently there are no competency or licensing requirements for federal unenrolled tax return preparers. Attorneys, certified public accountants (CPAs), and enrolled agents (EAs) must pass competency examinations and satisfy continuing education requirements. In addition, the IRS requires volunteer preparers to pass competency examinations as part of the Volunteer Income Tax Assistance and Tax Counseling for the Elderly programs.[6] However, most paid preparers are non-credentialed and are not required to pass any competency tests or take any educational courses on tax return preparation.[7] The evolution of the commercial tax return preparation and filing industry has made it easier for inexperienced and untrained preparers to enter into the business without having any knowledge of tax law.[8]

Figure 1.6.1 provides information on total TY 2018 Forms 1040 and Forms 1040 filed with Schedule EIC (Form 1040), Earned Income Credit, prepared by different types of preparers.

6 IRS Pub. 5166, IRS Volunteer Quality Site Requirements 5 (Oct. 2018); IRS Pub. 5101, Intake/Interview & Quality Review Training, 2019 Filing Season (Oct. 2018); IRS Pub. 4961, VITA/TCE Volunteer Standards of Conduct – Ethics Training, 2018 Returns (Oct. 2018).

7 As of September 3, 2019, the IRS has issued approximately 779,000 Preparer Tax Identification Numbers (PTINs) in calendar year (CY) 2019, of which over 30,000 are attorneys, 211,000 are CPAs, 218 are enrolled actuaries, 56,000 are enrolled agents, 684 are enrolled retirement plan agents, and 60,000 are Annual Filing Season Program (AFSP) Record of Completion Holders. IRS Return Preparer Office, Return Preparer Office Federal Tax Return Preparer Statistics (Oct. 1, 2019).

8 For a detailed discussion of the participants in the tax preparation industry, see Government Accountability Office (GAO), GAO-19-269, *Tax Refund Products: Product Mix Has Evolved and IRS Should Improve Data Quality* 4-9 (Apr. 2019).

FIGURE 1.6.1, Tax Year 2018 Forms 1040 and Forms 1040 Filed With Schedule Earned Income Credit by Type of Preparer (Through September 26, 2019)[9]

Type of Preparer	Forms 1040	Percentage of Total Forms 1040	Forms 1040 with Schedule EIC	Percentage of Total Forms 1040 with Sched. EIC
Unenrolled Preparer	38,419,176	53%	9,613,511	76%
Attorney	824,042	1%	46,574	0%
Certified Acceptance Agent	504,596	1%	118,646	1%
Certified Public Accountant	20,433,903	28%	1,092,920	9%
Enrolled Agent	9,120,259	13%	1,040,972	8%
Enrolled Actuary	12,709	0%	3,594	0%
Enrolled Retirement Plan Agent	137	0%	64	0%
State-Regulated Tax Preparer	3,531,971	5%	711,408	6%
Total	**72,846,793**	**100%**	**12,627,689**	**100%**

As the figure indicates, unenrolled preparers prepared about 53 percent of all TY 2018 Forms 1040 and about 76 percent of all Forms 1040 filed with a Schedule EIC through September 26, 2019.

*Pre-*Loving *Return Preparer Program*

Since 2002, the National Taxpayer Advocate has recommended that Congress authorize the IRS to conduct preparer oversight.[10] The proposals included a program to register, test, and certify unenrolled preparers as well as increase preparer penalties and improve due diligence requirements. The National Taxpayer Advocate also recommended that the IRS mount a comprehensive taxpayer education campaign to inform taxpayers how to choose a competent preparer and remind them to obtain a copy of the tax return with the preparer's signature.[11] Such proposed oversight has received widespread support from various practitioner groups and members of Congress.[12] In 2011, the IRS began to implement a program that included minimum competency standards.[13] However, the program was enjoined in 2013 when a U.S. district court held in *Loving v. IRS* that the IRS does not have the authority to impose preparer standards without statutory authorization.[14] Subsequent to *Loving*, the IRS has failed to develop a truly comprehensive servicewide return preparer strategy separate from the competency standards.

9 IRS CDW Return Preparer Providers (RPP), PTIN Table; IRS CDW, Individual Returns Transaction File (IRTF), Form 1040 Table (through Sept. 26, 2019).

10 *See, e.g.*, National Taxpayer Advocate 2002 Annual Report to Congress 216-230 (Legislative Recommendation: *Regulation of Federal Tax Return Preparers*).

11 *See, e.g.*, National Taxpayer Advocate 2013 Annual Report to Congress 61-74 (Most Serious Problem: *Regulation of Return Preparers: Taxpayers and Tax Administration Remain Vulnerable to Incompetent and Unscrupulous Return Preparers While the IRS Is Enjoined From Continuing its Efforts to Effectively Regulate Unenrolled Preparers*); National Taxpayer Advocate 2009 Annual Report to Congress 41-69 (Most Serious Problem: *The IRS Lacks a Servicewide Return Preparer Strategy*); National Taxpayer Advocate 2002 Annual Report to Congress 216-230 (Legislative Recommendation: *Regulation of Federal Tax Return Preparers*); Fraud in Income Tax Return Preparation: *Hearing Before the Subcomm. On Oversight of the H. Comm. on Ways and Means*, 109th Cong. (2005) (statement of Nina E. Olson, National Taxpayer Advocate).

12 *See* National Taxpayer Advocate 2020 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration* 16 *(Authorize the IRS to Establish Minimum Competency Standards for Federal Tax Return Preparers)*.

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

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

The IRS's Voluntary Annual Filing Season Program

In the absence of mandatory minimum competency standards, the IRS created the voluntary Annual Filing Season Program (AFSP) to encourage the accurate preparation of individual income tax returns by unenrolled preparers. In addition to satisfying annual continuing education requirements and annually renewing their preparer tax identification number (PTIN), participating preparers must consent to adhere to the duties, restrictions, and sanctions relating to practice before the IRS in Circular 230.[15] Upon completion of these requirements, preparers receive a Record of Completion, which enables them to represent taxpayers before the IRS during an examination of a tax return or claim for refund they prepared.[16] In addition, they are included in a public database of return preparers on the IRS website.[17] As of October 1, 2019, the IRS had issued approximately 60,000 AFSP Records of Completion in calendar year (CY) 2019.[18]

As the IRS Develops a Comprehensive Customer Service Strategy, It Must Address Service to Return Preparers

The Taxpayer First Act requires the IRS to create and submit a comprehensive customer service strategy to Congress by July 1, 2020.[19] Considering that millions of taxpayers choose to interact with the IRS through their preparers, the customer service strategy would be incomplete without including service to those preparers.[20] Accordingly, the teams developing the return preparer and customer service strategies should coordinate to ensure both strategies are consistent and comprehensive.

The IRS Is Developing a Return Preparer Misconduct Strategy in Response to a 2018 TIGTA Report

In July 2018, TIGTA issued a report criticizing the IRS for not having a coordinated preparer strategy, despite the availability of significant information about preparer misconduct.[21] In response to a recommendation in TIGTA's report, the IRS formed a cross-functional team, headed by SB/SE, to develop a draft servicewide return preparer strategy to address preparer misconduct. However, the forthcoming preparer misconduct strategy is only one component of a truly comprehensive strategy. Addressing return preparer misconduct is important, but the IRS needs to address the needs and actions of return preparers holistically.

Emphasize the Taxpayer's *Right to Retain Representation*

Pursuant to the Taxpayer Bill of Rights (TBOR), taxpayers have the *right to retain representation*. Specifically, TBOR provides that taxpayers have the right to retain an authorized representative of their choice to represent them in their dealings with the IRS. In addition, this right provides that taxpayers have the right to seek assistance from a Low Income Taxpayer Clinic if they cannot afford

15 31 C.F.R. Part 10; IRS, Requirements for Annual Filing Season Program Record of Completion, https://www.irs.gov/tax-professionals/general-requirements-for-the-annual-filing-season-program-record-of-completion (Sept. 4, 2019); Rev. Proc. 2014–42, I.R.B. 2014-29 (July 14, 2014).

16 Rev. Proc. 2014–42, I.R.B. 2014-29 (July 14, 2014).

17 IRS, Directory of Federal Tax Return Preparers with Credentials and Select Qualifications, https://irs.treasury.gov/rpo/rpo.jsf (last visited Sept. 4, 2019).

18 IRS Return Preparer Office, Return Preparer Office Federal Tax Return Preparer Statistics (Oct. 1, 2019).

19 *See* Taxpayer First Act, Pub. L. No. 116-25, § 1101, 133 Stat. 981 (2019).

20 *See* Most Serious Problem: *Customer Service Strategy: The IRS Needs to Develop a Comprehensive Customer Service Strategy That Puts Taxpayers First, Incorporates Research on Customer Needs and Preferences, and Focuses on Measurable Results*, *supra*.

21 TIGTA, Ref. No. 2018-30-42, *The Internal Revenue Service Lacks a Coordinated Strategy to Address Unregulated Return Preparer Misconduct* (July 25, 2018).

representation.[22] Emphasizing this taxpayer right in the high-level return preparer strategy would send a strong message to all IRS employees that they must respect, support, and vigorously protect this fundamental right as they develop and implement strategies and procedures throughout the agency. Representation helps both taxpayers and the IRS resolve disputes. In addition, taxpayers' representatives play an important role in obtaining fair and equal treatment of taxpayers and access to justice.

Encourage Preparer Competency

An effective return preparer strategy should take a proactive approach by encouraging preparer competency within the bounds of the IRS's authority post-*Loving*. While the IRS does not have the authority to impose minimum competency requirements after *Loving*, it still has tools to encourage preparers to improve the quality of their return preparation services. For example, the IRS could likely increase preparer compliance by incorporating robust outreach and education initiatives into its preparer strategy. The strategy should include initiatives to educate preparers through several forms of media — not solely through the internet — such as by mail, email, or face-to-face meetings. Most importantly, the strategy should aim to touch preparers *before* the detection of any preparer misconduct. In fact, the IRS should attempt to reach new unenrolled preparers before they even start preparing returns. The IRS could identify these new preparers through the PTIN registration system.

The Taxpayer First Act requires the IRS to create and submit a comprehensive customer service strategy to Congress… Considering that millions of taxpayers choose to interact with the IRS through their preparers, the customer service strategy would be incomplete without including service to those preparers.

In addition, the strategy should address the low participation in the IRS's AFSP, with approximately 60,000 record of completion holders for the AFSP in CY 2019.[23] The National Taxpayer Advocate previously raised concerns about the lack of an official examination component of this voluntary program.[24] The IRS Return Preparer Office responded by noting adding an official exam requirement would potentially increase the costs of the program to prohibitive levels and reduce participation even further.[25] However, the IRS could counter this effect by increasing the incentives to participate, such as granting access to certain online applications.[26]

22 IRC § 7803(a)(3); TAS, *Taxpayer Bill of Rights*, www.TaxpayerAdvocate.irs.gov/taxpayer-rights.

23 IRS Return Preparer Office, Return Preparer Office Federal Tax Return Preparer Statistics (Oct. 1, 2019).

24 National Taxpayer Advocate 2017 Annual Report to Congress 46, 36-48 (Most Serious Problem: *Online Accounts: The IRS's Focus on Online Service Delivery Does Not Adequately Take Into Account the Widely Divergent Needs and Preferences of the U.S. Taxpayer Population*). There is no official exam component for AFSP participation. However, there is a test administered by the continuing education (CE) provider at the conclusion of the Annual Federal Tax Refresher (AFTR) course about the course material. The participant must pass the test in order to receive credit for the six-hour course. There are no tests associated with the other 12 hours of CE courses needed for AFSP participation. IRS response to TAS fact check (Nov. 8, 2019).

25 Telephone Meeting Between TAS and the IRS Return Preparer Office (June 17, 2019).

26 *See* National Taxpayer Advocate FY 2020 Objectives Report, vol. 3 (Special Report: *Earned Income Tax Credit: Making the EITC Work for Taxpayers and the Government*).

Address the Current Lack of Transparency in Preparer Fees

Taxpayers have the *right to be informed,* and this includes receiving a detailed breakdown of fees charged for the preparation and filing of their federal income tax returns. The National Consumer Law Center (NCLC) recently noted that it is common practice among unenrolled preparers to refuse to provide upfront fee information to taxpayers. The Government Accountability Office confirmed the NCLC's statements when it conducted undercover preparer visits during a recent investigation on refund products.[27]

The lack of transparency in fees at the outset of the preparation engagement prevents taxpayers from comparison shopping or even from predicting the cost before entering into the transaction. Not allowing the taxpayer to predict the cost of preparation and filing also sets the stage for the preparer to sell the taxpayer ancillary refund products, such as Refund Anticipation Checks (also known as Refund Transfers), to pay the unpredicted preparation fees.[28] IRS Publication 1345, Handbook for Authorized IRS e-file Providers of Individual Income Tax Returns, provides that all authorized e-file providers should "[a]dvise taxpayers of all fees and other known deductions to be paid from their refund and the remaining amount the taxpayers will receive."[29] However, this language is located in the refund products section of the publication and only seems to apply to returns claiming refunds. Further, it is unclear if the IRS actually enforces this provision in its administrative guidance. The IRS needs a strategy to ensure compliance with fee requirements and provide appropriate sanctions, including suspension of status as an authorized IRS e-file provider.

Incorporate a Taxpayer Education Campaign on What to Expect From Return Preparers

Because the IRS does not have the resources to maintain widespread geographic presence to enforce preparer requirements, it must empower taxpayers to protect themselves. Taxpayer communications are just as important as preparer communications in a return preparer strategy. Failure to incorporate taxpayer communications into the preparer strategy could result in a less effective or disjointed communications strategy on preparer-related topics. Accordingly, the strategy should include a comprehensive taxpayer education campaign, particularly to low-income, immigrant, and other taxpayer populations that are vulnerable to unskilled and unethical preparers.[30] The education campaign should provide information on preparer roles, responsibilities, and requirements (such as signing the return, entering their PTIN on the return, and providing a copy of the completed and signed return to the taxpayer).[31] The campaign should also inform taxpayers how to report preparer misconduct.

27 Mandi Matlock and Chi Chi Wu, NCLC, *2019 Tax Season: The Return of the Interest-Bearing Refund Anticipation Loan and Other Perils Faced by Consumers* 11 (Apr. 2019); GAO, GAO-19-269, *Tax Refund Products: Product Mix Has Evolved and IRS Should Improve Data Quality* 36-40 (Apr. 2019).

28 A RAC or Refund Transfer is the most common refund product whereby the preparer receives the refund in a temporary bank account, deducts the preparer and ancillary fees, and pays the remainder to the taxpayer. *See also*, GAO, GAO-19-269, *Tax Refund Products: Product Mix Has Evolved and IRS Should Improve Data Quality* 40 (Apr. 2019). In 2017, the National Taxpayer Advocate recommended that the IRS require all Electronic Return Originators to prepare a "truth-in-lending" statement if they offered a Refund Anticipation Loan (RAL) product. National Taxpayer Advocate 2017 Annual Report to Congress 233 (Most Serious Problem: *Refund Anticipation Loans: Increased Demand for Refund Anticipation Loans Coincides with Delays in the Issuance of Refunds*).

29 IRS Publication 1345, Handbook for Authorized IRS e-file Providers of Individual Income Tax Returns 35.

30 National Taxpayer Advocate 2015 Annual Report to Congress 261-283 (Most Serious Problem: *Earned Income Tax Credit (EITC): The IRS's EITC Return Preparer Strategy Does Not Adequately Address the Role of Preparers in EITC Noncompliance*).

31 IRC § 6695.

Limit Access to Confidential Taxpayer Information Through Online Applications to Only Those Preparers Over Whom the IRS Has Oversight Authority

The National Taxpayer Advocate has recommended that the IRS limit access to the future online account application for tax professionals. Only tax professionals who are subject to IRS oversight under Circular 230 should have access to this application.[32] If Circular 230 professionals misuse information from the application, the IRS has authority to take action. It is TAS's understanding that the IRS has not made a policy decision to limit access to the application.[33] To safeguard confidential taxpayer information, the IRS must ensure it is limiting those who can access its systems. The online account will provide a service to return preparers and the IRS can and should place restrictions on those who can access this service. If the IRS ignores this important consumer protection issue, it could inadvertently perpetuate preparer misconduct.

Address the Need to Routinely Track Preparer Noncompliance Data by Type of Designation

There is no current IRS initiative to track preparer noncompliance data by type of preparer designation.[34] The IRS already has the ability to track this data if it validates the PTINs entered on returns accepted for processing. Resulting analysis of the noncompliance data will assist the IRS in determining the appropriate level of oversight as well as any necessary preparer treatments. Maintaining this type of data would also potentially support the need for Congress to authorize the IRS to impose minimum competency requirements on unenrolled return preparers. Accordingly, TAS strongly recommends that a return preparer strategy include initiatives to routinely track and analyze noncompliance data by preparer type.

CONCLUSION

Despite the important role tax return preparers play in the tax system, the IRS has failed to develop a truly comprehensive return preparer strategy. It is vital that such strategy emphasize the taxpayer's *right to retain representation*. It must also focus on improving preparer competency, increasing the transparency of preparer fees, and addressing taxpayer communications on what to expect from preparers. Further, the IRS must safeguard taxpayer information by limiting access to the online account for professionals.

An effective strategy would provide for the routine tracking and analysis of preparer noncompliance by preparer type. We strongly believe that TAS participation in the development of such strategy is vital given our wealth of knowledge gained from TAS's decades of experience in assisting taxpayers impacted by incompetent and unscrupulous preparers, as well as our extensive interactions with return preparers.[35] Finally, because representatives are also customers of the IRS and their needs are often different than those of taxpayers, we believe that the development of the return preparer strategy must coincide with the development of the comprehensive taxpayer service strategy mandated by the Taxpayer First Act.[36]

32 National Taxpayer Advocate 2017 Annual Report to Congress 36-48 (Most Serious Problem: *Online Accounts: The IRS's Focus on Online Service Delivery Does Not Adequately Take Into Account the Widely Divergent Needs and Preferences of the U.S. Taxpayer Population*).

33 National Taxpayer Advocate FY 2019 Objectives Report to Congress, vol. 2, at 36-37 (*IRS Responses and National Taxpayer Advocate's Comments Regarding Most Serious Problems Identified in 2017 Annual Report to Congress: IRS Response to TAS Recommendation* 3-34).

34 IRS response to TAS information request (July 12, 2019).

35 *See* National Taxpayer Advocate 2018 Annual Report to Congress 105 (Most Serious Problem: *Return Preparer Oversight: The IRS Lacks a Coordinated Approach to Its Oversight of Return Preparers and Does Not Analyze the Impact of Penalties Imposed on Preparers*).

36 *See* Taxpayer First Act, Pub. L. No. 116-25, § 1101, 133 Stat. 981 (2019).

RECOMMENDATIONS

Administrative Recommendations to the IRS

The National Taxpayer Advocate recommends that the IRS develop a comprehensive servicewide return preparer strategy that:

1. References the taxpayer's *right to retain representation* in the mission of the strategy.
2. Increases preparer competency through outreach and education to preparers before any detection of noncompliance.
3. Requires disclosure of fees charged in connection with the preparation and filing of tax returns and enforce such requirements.
4. Includes a comprehensive public education campaign, particularly to low-income and other taxpayer populations that are vulnerable to unskilled and unethical preparers. Such a campaign should provide information to taxpayers about preparer roles, responsibilities, requirements, and reporting misconduct.
5. Limits access to confidential taxpayer information through online applications to only those preparers over whom the IRS has oversight authority.
6. Routinely tracks preparer noncompliance data by type of designation.
7. Collaborates with TAS in the development of the comprehensive servicewide return preparer strategy.
8. Incorporates service to return preparers into the comprehensive taxpayer service strategy mandated by the Taxpayer First Act, because return preparers are customers of the IRS and important vehicles of taxpayer compliance.

Legislative Recommendation to Congress

The National Taxpayer Advocate recommends that Congress:

1. Amend Title 31, § 330 of the U.S. Code to authorize the Secretary to establish minimum standards for federal tax return preparers.[37]

37 For more details on this legislative recommendation, see National Taxpayer Advocate 2020 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration* 16 *(Authorize the IRS to Establish Minimum Competency Standards for Federal Tax Return Preparers)*.

MSP #7 APPEALS: The Inclusion of Chief Counsel and Compliance Personnel in Taxpayer Conferences Undermines the Independence of the Office of Appeals

RESPONSIBLE OFFICIAL

Andrew Keyso, Jr., Acting Chief, Office of Appeals

TAXPAYER RIGHTS IMPACTED[1]

- *The Right to Challenge the IRS's Position and Be Heard*
- *The Right to Appeal an IRS Decision in an Independent Forum*
- *The Right to a Fair and Just Tax System*

PROBLEM

The Office of Appeals' (Appeals) emphasis on including Counsel and Compliance in certain conferences fundamentally alters the role of Appeals and runs counter to the congressional priority of an independent Appeals process.[2] Currently, Appeals is not gathering sufficient quantitative and qualitative data to adequately evaluate the success of a pilot program to study the effects of this inclusion. However, anecdotal reports of tax practitioners participating in the pilot validate the National Taxpayer Advocate's prior reservations about the involvement of Counsel and Compliance in conferences.[3]

IMPACT ON TAXPAYERS

The Participation of Counsel and Compliance in Certain Appeals Conferences Fundamentally Alters the Role of Appeals and Runs Counter to an Independent Appeals Process

Beginning in October 2016, Appeals undertook a concerted effort to expand the participation of IRS Counsel and Compliance personnel in appeals conferences.[4] In May 2017, Appeals expanded this approach with a pilot initiative designed to make the inclusion of representatives from the Large Business and International (LB&I) examination audit team a matter of "routine," without requesting taxpayer

1 See Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are also codified in the Internal Revenue Code (IRC). See IRC § 7803(a)(3).

2 The Internal Revenue Service Restructuring and Reform Act of 1998 (RRA 98), Pub. L. No. 105-206, Title III, Subtitle E, § 3465(b) (July 22, 1998). This priority was recently reinforced by Congress when it established Appeals as an independent organization within the IRS. Taxpayer First Act, Pub. L. No. 116-25, §1001, 133 Stat. 981 (2019). As stated by one member of Congress, "I am proud that the Taxpayer First Act also includes a provision that I had in my bill that I introduced with a Republican colleague, Jason Smith, the Preserving Taxpayers' Rights Act. This provision establishes an independent office of appeals within the IRS and gives taxpayers a legal right to impartial, timely, and efficient dispute resolution." H.R. Rep. Vol. 165, No. 61 (2019) (statement of Rep. Sewell). See also H.R. Rep. No. 116-39, pt. 1, at 29 (2019).

3 These reservations, which were shared by the National Taxpayer Advocate, were discussed in the National Taxpayer Advocate 2017 Annual Report to Congress 203-210 (Most Serious Problem: *Appeals: The IRS's Decision to Expand the Participation of Counsel and Compliance Personnel in Appeals Conferences Alters the Nature of Those Conferences and Will Likely Reduce the Number of Agreed Case Resolutions*).

4 Internal Revenue Manual (IRM) 8.6.1.5.4, Participation in Conferences by IRS Employees (Oct. 1, 2016).

consent.[5] This pilot, which applies to large cases run by Appeals Team Case Leaders (ATCLs), negatively impacts affected taxpayers and does not give taxpayers the ability to object to the inclusion of others in the Appeals conference.[6] Currently, smaller cases are excluded from the pilot, and Appeals has indicated that it has no plans to expand coverage of the program to these cases.[7] Nevertheless, Appeals will not rule out inclusion of Counsel or Compliance in specific smaller cases if Appeals believes that such participation will be beneficial.[8]

By definition, Appeals cases arise only when taxpayers and Compliance reach an impasse.[9] Appeals' mission is to facilitate resolution of these cases on a basis that is fair and impartial to both taxpayers and the IRS.[10] In order to minimize litigation and maximize future tax compliance, taxpayers must feel that they have had the opportunity to effectively present their cases in an independent and unbiased venue.[11]

Prior to the 2016 guidance changes, Counsel and Compliance were typically granted their say via the case file and a pre-conference, if the case was particularly large or complex.[12] The Appeals conference itself generally was devoted to presentation of the taxpayer's case and settlement negotiations between the taxpayer and the Appeals Technical Employee (ATE). Counsel and Compliance rarely attended such conferences, leaving taxpayers and ATEs free to develop rapport, seek common ground, and pursue case resolution.[13]

Appeals' new emphasis on including third parties, however, allows Counsel and Compliance to reiterate and even expand their positions, converts Appeals to a more adversarial forum, and limits negotiation between taxpayers and ATEs.[14] As one practitioner observed, "Adding IRS employees to the Appeals conference turns the Appeals conference into more of a trial setting as opposed to the historic conduct of most Appeals conferences."[15] Appeals finds authority for this approach within the Internal Revenue Manual — guidance that Appeals itself created.[16]

Counsel and Compliance are not technically a party to the actual settlement discussions, which occur near the conclusion of the conference.[17] Nevertheless, when Counsel and Compliance are given an opportunity to present an oral argument setting forth their case, this inevitably drives taxpayers and

5 IRS, Appeals Team Cases: All Parties Conferences, https://www.irs.gov/pub/irs-utl/atclfaqs.pdf (last visited Nov. 20, 2019).

6 ATCLs manage a team of Appeals Officers who together conduct an appeal for the often-complex cases that originate in the LB&I operating division. IRM 8.7.11.3, Appeals Team Case Leader (ATCL) Position (Sept. 4, 2018).

7 Appeals response to TAS fact check (Oct. 18, 2019).

8 *Id*.

9 Appeals response to TAS information request (June 9, 2017), Tab 3. This category of cases is known as nondocketed Appeals. The other category, docketed Appeals, consists of cases that bypass Appeals on their way to the U.S. Tax Court and then are remanded to Appeals for further consideration.

10 IRM 8.1.1.1, Accomplishing the Appeals Mission (Oct. 1, 2016).

11 Congress recently reaffirmed the importance of an unbiased and objective administrative appeal for taxpayers and enacted provisions to facilitate and protect this independence. *See* Taxpayer First Act, Pub. L. No. 116-25, §1001, 133 Stat. 981 (2019).

12 Michael I. Saltzman & Leslie Book, IRS Practice and Procedure 9.06 (2016); IRM 8.7.11.8.1, Purpose of Pre-Conference Meeting (Mar. 16, 2015).

13 Chelsea Looper-Stockwell, *Sitting Down with Appeals Chief, Donna Hansberry*, Appeals Quarterly Newsletter, Feb. 2017, at 1-2.

14 Under the pilot, Compliance can raise additional arguments or present new information no later than 45 days prior to the conference. *IRS Outlines Procedures for Appeals Conference Program*, 2019 TNT 175-27 (Sept. 9, 2019).

15 Marie Sapirie, *IRS Appeals Chief Clarifies Policy Changes in Open Letter*, 2016 TNT 215-5 (Nov. 14, 2016).

16 *See* IRM 8.6.1.5.4, Participation in Conferences by IRS Employees (Oct. 1, 2016).

17 Appeals response to TAS information request (June 19, 2019).

their representatives to respond in kind.[18] This dynamic fundamentally changes the role of appeals conferences and runs the risk of poisoning the environment for the meaningful dialogue between taxpayers, representatives, and ATEs, which can facilitate resolution.

Further, as TAS cautioned when the pilot was first initiated, inviting Counsel and Compliance to attend conferences makes it difficult for Appeals to serve as an unbiased participant in the case resolution process.[19] Compliance is placed in a position to put pressure on ATEs to adopt and sustain the prior asserted outcome and has an opportunity to directly counter the arguments of taxpayers. Additionally, ATEs may be reluctant to override the views of Counsel when Counsel actually has a seat at the table.[20] An ATE may lack the personal confidence or the institutional support necessary to stand firm in exercising independent judgment in the face of opposition from Compliance regarding the strengths and weaknesses of a case, or the assessment of Counsel regarding hazards of litigation.[21] By inviting these parties to conferences as a routine matter, Appeals is undermining its own independent mechanisms for case resolution.

In order to minimize litigation and maximize future tax compliance, taxpayers must feel that they have had the opportunity to effectively present their cases in an independent and unbiased venue.

Additional IRS participants cannot help but alter taxpayers' perceptions of the proceedings and the fairness of the outcomes. Taxpayers may not feel they are going before an objective and unrelated party to seek a resolution to their cases; instead, it may seem that they are simply continuing their disagreements with the IRS as an institution, this time with an extra party or two added to the conversation. Such an appearance is a far cry from the independent arbiter envisioned by the IRS Restructuring and Reform Act of 1998: "With this legislation, we require the agency to establish an independent Office of Appeals — one that may not be influenced by tax collection employees or auditors."[22]

Congress reiterated this desire and created the institutional structure necessary to safeguard the availability of objective appeals for taxpayers when it passed the Taxpayer First Act, which was signed into law in July 2019.[23] In establishing Appeals as an independent function within the IRS reporting directly to the Commissioner, Congress recognized that Appeals is taxpayers' last, and sometimes best,

18 Nina E. Olson, *Appeals Should Facilitate Mutual Respect and Trust by Allowing Taxpayers a Choice in the Expanded Participation of Counsel and Compliance in Appeals Conferences*, NTA Blog, (June 21, 2017), https://taxpayeradvocate.irs.gov/news/appeals-should-facilitate-mutual-respect-and-trust-by-allowing-taxpayers-a-choice-in-the-expanded-participation-of-counsel-and-compliance-in-appeals-conferences?category=Tax%20News.

19 National Taxpayer Advocate 2017 Annual Report to Congress 203-210 (Most Serious Problem: *Appeals: The IRS's Decision to Expand the Participation of Counsel and Compliance Personnel in Appeals Conferences Alters the Nature of Those Conferences and Will Likely Reduce the Number of Agreed Case Resolutions*).

20 Rev. Proc. 2012-18, § 2.02(3)(b), 2012-10 I.R.B. 455.

21 The National Taxpayer Advocate has previously suggested steps that would enhance Appeals' independence, such as locating at least one Appeals Officer and Settlement Officer in every state, the District of Columbia, and Puerto Rico, and maintaining separate office space and communication facilities from other IRS personnel. National Taxpayer Advocate 2009 Annual Report to Congress 348, 346-350 (Legislative Recommendation: *Strengthen the Independence of the IRS Office of Appeals and Require at Least One Appeals Officer and Settlement Officer in Each State*). This independence could be further strengthened if, as also recommended for TAS, Appeals were provided with an independent Counsel to help Appeals evaluate positions adopted by IRS Counsel. National Taxpayer Advocate 2002 Annual Report to Congress 198 (Legislative Recommendation: *The Office of the Taxpayer Advocate*).

22 RRA 98, Pub. L. No. 105-206, Title III, Subtitle E, § 3465(b) (July 22, 1998); 144 Cong. Rec. S7622 (1998) (statement of Sen. Roth).

23 Taxpayer First Act, Pub. L. No. 116-25, §1001, 133 Stat. 981 (2019).

hope to resolve their cases within the IRS.[24] Such case resolutions, however, depend on the ability of taxpayers to receive unbiased and objective case reviews from Appeals. Despite this strong affirmation of the need for Appeals' independence, Appeals continues to conduct business as usual and, by emphasizing the inclusion of Counsel and Compliance in conferences, is disregarding the intention of Congress.

The Anecdotal Reports of Tax Practitioners Included in the Pilot Validate Prior Reservations About the Inclusion of Counsel and Compliance in Conferences

Often, parties bring hard feelings developed during the examination into Appeals and they spill over into the proceedings. "Counsel and Compliance just end up arguing across the table with taxpayers and the debate only muddies the waters."[25] The impressions and experiences of practitioners participating in the Appeals pilot confirm this contentious relationship. Under the pilot, conferences have become increasingly adversarial and ATEs appear to lack either the ability or the willingness to rein in Counsel and Compliance.[26]

According to Appeals, a primary goal of the pilot is to increase the efficiency of the proceedings.[27] However, the opposite may be occurring. Even though the IRS is hampered by limited resources, conferences conducted under the pilot are extremely large, often involving multiple representatives of Counsel, Compliance, and Appeals, sometimes outnumbering taxpayers and their representatives by a ratio of five to one.[28] Moreover, the proceedings are anything but smooth: "Exam often keeps interrupting the taxpayer's presentation and pushing its own points… Counsel and Compliance say whatever they want and stay as long as they want. The ATE looks helpless, like a parent refereeing a fight."[29] According to one practitioner, some time savings did occur in a case when a discouraged taxpayer walked out in the middle of an appeal and took the case directly to court.[30] Otherwise, some practitioners report that conferences conducted under the pilot are taking longer.[31]

Further, these cases are being resolved in ways that trouble practitioners and that should worry Appeals. According to one practitioner who had several cases in the pilot, "I was not able to reach settlement on a single case where Counsel and Compliance were involved."[32] Multiple practitioners report taking pilot cases to both the U.S. Tax Court and the Court of Federal Claims, where they enjoyed significant success in resolving those cases, typically via pretrial settlement.[33]

In large part, this failure to resolve cases is attributable to the circumstance that, under the pilot, Appeals loses actual and perceived independence. One practitioner related a scenario in which Counsel, Compliance, and Appeals representatives all had breakfast together immediately before the conference commenced and then went out for lunch together, leaving the taxpayer to wonder about the nature of

24 H.R. Rep. No. 116-39, pt. 1, at 29 (2019).

25 TAS conference call with participants from the American Bar Association (ABA) (May 23, 2019).

26 Stephanie Cumings, *IRS Open to Appeals Pilot 'Ground Rules' Checklist*, 2018 TNT 188-6.

27 Chelsea Looper-Stockwell, *Sitting Down with Appeals Chief, Donna Hansberry*, Appeals Quarterly Newsletter, Feb. 2017, at 1-2.

28 Stephanie Cumings, *Appeals Process Getting Crowded Under New Procedures*, 2018 TNT 150-1; TAS conference call with participants from the ABA (May 23, 2019).

29 TAS conference call with participants from the ABA (May 23, 2019).

30 *Id*.

31 *Id*.

32 *Id*.

33 *Id*. While these favorable outcomes are beneficial for taxpayers, they demonstrate that the cases should have been resolved administratively in the first instance. Moreover, such cases subject both taxpayers and the IRS to unnecessary expenditures and case delays.

the relationships and what was being discussed. Another described a Counsel representative begging the ATE not to provide a favorable settlement.[34] Likewise, practitioners have observed that ATEs are unwilling to challenge Counsel's assertions regarding hazards of litigation. Instead, as was explicitly admitted in one case, they seek "buy-in" from Counsel and Compliance regarding the proposed resolution.[35] Given this lack of independence, some practitioners included in the pilot are losing confidence in Appeals. "Previously I found Appeals to be very important in helping to avoid Tax Court. Now these conferences are a waste of time and money."[36]

Appeals has issued guidance that it hopes will reduce these negative experiences and alleviate the continuing concerns of taxpayers and practitioners.[37] This guidance outlines the processes, procedures, and general expectations surrounding pilot conferences. While the procedural clarity provided by these guidelines is welcome, the guidelines do not, in and of themselves, guarantee the preservation of Appeals' independence or the protection of taxpayer rights, and only time will tell the extent to which they are effective.

IMPACT ON THE INTERNAL REVENUE SERVICE

Appeals Is Not Gathering Sufficient Data to Adequately Evaluate the Pilot

The pilot was originally designed to run for two years, until May 2019. However, it was extended for a third year through May 2020.[38] The primary quantitative datapoints used to evaluate the pilot will be cycle time and average hours per case.[39] Given that the pilot has already been running for over two years, TAS sought to obtain an initial look at the efficiency of pilot proceedings by requesting a limited amount of data from Appeals. TAS planned to compare cycle times and hours per case in pilot cases against those measures in traditional ATCL cases. Appeals refused to provide this data, stating, "The ATCL pilot is in process and expected to run through May 2020. At this point, it would be premature to provide the data requested…Appeals will evaluate the results of the pilot following its completion."[40]

Currently, cycle times and case hours are the only quantitative measures that Appeals intends to use to evaluate the effectiveness of the pilot.[41] In order to fully gauge the impact of Counsel and Compliance participation, Appeals should also compare outcome data from pilot cases against the results of traditional ATCL cases. Appeals states that it does not track this information, as, in its view, every case is different and comparisons could be misleading.[42] Nevertheless, to adequately evaluate the pilot, Appeals, taxpayers, and their representatives must have some way of verifying that taxpayers are not significantly disadvantaged by the inclusion of Counsel and Compliance in conferences.

34 Andrew Velarde, *Appeals May Seek Taxpayer Feedback on Conference Procedures*, 2018 TNT 121-7.

35 TAS conference call with participants from the ABA (May 23, 2019).

36 *Id*.

37 *IRS Outlines Procedures for Appeals Conference Program*, 2019 TNT 175-27 (Sept. 9, 2019).

38 Appeals response to TAS information request (June 19, 2019).

39 Appeals response to TAS fact check (Oct. 18, 2019). Cycle time is defined as the period between when a case is opened in Appeals and when it is closed out of Appeals. "Average hours per case" reflects the time spent on a case by Appeals personnel. Appeals indicates that it also will be considering the results of the Customer Satisfaction Survey distributed to pilot participants. Although potentially valuable, TAS views these results and the data they generate as qualitative, rather than quantitative.

40 Appeals response to TAS information request (June 19, 2019).

41 Appeals response to TAS fact check (Oct. 18, 2019).

42 Appeals response to TAS information request (June 19, 2019).

Notwithstanding Appeals' reluctance to compile and publish even high-level outcome data, this comparative information can be developed and circulated in a way that is meaningful and helpful to taxpayers and their representatives. For example, TAS tracks outcome data from a taxpayer perspective by measuring the percent of cases receiving full or partial relief based on the type of assistance requested by the taxpayer. If taxpayers and their representatives reach the conclusion that Counsel and Compliance participation makes it unduly difficult to obtain relief in their cases, they likely will begin to bypass Appeals and go directly to court, resulting in delayed case resolutions and increased costs for the IRS.

As one way of gaining insight into the impact of Counsel and Compliance participation in appeals conferences, TAS attempted to compare the ratio of statutory notices of deficiency (SNODs) issued in pilot cases versus SNODs issued in ATCL cases between fiscal years 2014 and 2016. While this inquiry does not directly analyze outcome data on an individual case basis, it would provide a useful snapshot of how case resolutions are potentially affected by Counsel and Compliance participation. If, for example, a high proportion of pilot cases conclude with the generation of a SNOD, this data would correspond with and tend to confirm the anecdotal experiences of tax practitioners, discussed above. Appeals has refused to provide TAS with the requested SNOD data.[43] Moreover, it does not intend to consider such data when evaluating the pilot.[44]

If the pilot study is to be meaningful, Appeals must rely on quantitative data to assess its results. This means looking not only at efficiency data, such as cycle time and hours per case, but also at statistical measures that would allow taxpayers to know whether they are advantaged, disadvantaged, or unimpacted when Counsel and Compliance attend appeals conferences.

Additionally, the reports received from tax practitioners underscore the need for Appeals to systematically obtain evaluations and comments from taxpayers and tax practitioners whose cases are included in the pilot. Appeals is collecting such comments via a survey, but the information to be sought in that survey and whether the results will be made public have not been disclosed.[45]

Appeals must define its constituency, not just as the IRS and Appeals employees, but also as taxpayers and their representatives. Appeals should take very seriously the opinions of taxpayers and practitioners included in the pilot and distribute the results of the follow-up survey. Doing so would evidence willingness to engage with the tax community and understand all aspects of the current pilot; failure to do so would raise the question of whether Appeals is more concerned with cycle time than with its independence and would run the risk of eroding the foundations of objectivity and trust on which Appeals' success depends.

43 Appeals response to TAS information request (June 19, 2019).

44 Appeals response to TAS fact check (Oct. 18, 2019).

45 Cumings, Stephanie, *IRS Guidelines Provide Insight on Appeals Conference Initiative*, 2019 TNT 175-7 (Sept. 9, 2019); Appeals response to TAS information request (June 19, 2019).

CONCLUSION

The credibility of Appeals hinges on its ability to undertake direct and unbiased settlement negotiations with taxpayers and their representatives. This credibility and the independence of Appeals, bolstered by the recently passed Taxpayer First Act, are undermined by the participation of Counsel and Compliance in appeals conferences. The ATCL pilot is reportedly giving rise to conferences that are contentious, chaotic, lengthier, and that impact taxpayers' ability to resolve their cases without going to court. This hurts taxpayers by forcing them to incur extra costs and delays, and likewise damages the IRS in the long run by generating additional litigation and associated resource burdens. Appeals should carefully consider the negative impact of these unintended consequences potentially flowing from the inclusion of Counsel and Compliance in conferences. Further, when evaluating the pilot, Appeals should examine a range of data and pay careful attention to the comments and experiences of taxpayers and their representatives.

RECOMMENDATIONS

Administrative Recommendations to the IRS

The National Taxpayer Advocate recommends that Appeals:

1. Compile quantitative data regarding the efficiency and outcomes of pilot proceedings and publish that data when the pilot is complete.
2. Carefully consider and publish the reactions of taxpayers and tax practitioners who participate in the pilot.
3. Regardless of the pilot's outcome, only include Counsel and Compliance in appeals conferences with taxpayers' consent. To the extent taxpayers do not agree to this participation, offer the parties the possibility of nonbinding mediation as a means of resolving or narrowing their differences through collaborative exploration of factual and legal disputes prior to an appeals conference.
4. If the participation of Counsel and Compliance continues after the pilot, restrict this participation to ATCL cases, other than in exceptional circumstances.

MSP #8 MULTILINGUAL NOTICES: The IRS Undermines Taxpayer Rights When It Does Not Provide Notices in Foreign Languages

RESPONSIBLE OFFICIALS

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TAXPAYER RIGHTS IMPACTED[1]

- *The Right to Be Informed*
- *The Right to Challenge the IRS's Position and Be Heard*
- *The Right to a Fair and Just Tax System*

PROBLEM

Taxpayers with limited English proficiency (LEP) frequently do not receive notices in their preferred languages, impairing their *right to be informed*. Even when the IRS has a notice already translated into Spanish, taxpayers have no simple way to request it or notate their accounts to reflect their preference. This resulted, for example, in the IRS sending in Spanish only *one out of almost a million* notices related to renewing Individual Taxpayer Identification Numbers (ITINs) during fiscal year (FY) 2019.[2] Additionally, the IRS website fails to include notices and information about those notices in languages other than English.[3]

IMPACT ON TAXPAYERS

LEP persons do not speak English as their primary language and have a limited ability to read, speak, write, or understand English.[4] The United States has an estimated 5.3 million LEP households.[5] Over 22 percent of Spanish-speaking households and over a quarter of Asian and Pacific island language households are LEP households.[6] Pursuant to the Civil Rights Act of 1964,[7] Executive Order 13166 requires all federal agencies to examine their service and develop and implement a system allowing LEP

1 See Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are also codified in the Internal Revenue Code (IRC). See IRC § 7803(a)(3).

2 During FY 2019, the IRS issued CP 48, Renew Your ITIN, 969,863 times. Yet, during this same period, the IRS issued CP 748, the Spanish version of this letter, only once. IRS, Servicewide Notice Information Program (SNIP) Database (Sept. 18, 2019).

3 While this piece is focused on IRS notices, a similar problem exists for other IRS communications, including IRS Forms, Publications, and website content.

4 67 Fed. Reg. 41459 (June 18, 2002).

5 U.S. Census Bureau, *2013-2017 American Community Survey 5-Year Estimates* (Dec. 2018), https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_17_5YR_S1602&prodType=table.

6 *Id*. Estimates for 2013-2017 are 3,191,985 Spanish speaking LEP households and 1,084,682 Asian and Pacific Island languages LEP households.

7 "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Pub. L. N. 88-352, 78 Stat. 252 § 601.

persons to meaningfully access those services.[8] The Department of Justice issued guidance providing four factors to be considered in ensuring meaningful access:

1. The number or proportion of LEP persons eligible to be served or likely to be encountered by the program or grantee;
2. The frequency with which LEP individuals come in contact with the program;
3. The nature and importance of the program, activity, or service provided by the program to people's lives; and
4. The resources available to the grantee/recipient and costs.[9]

Meeting one's legal tax filing and payment obligations or claiming one of the many federal benefits administered through the tax code is fundamentally important to taxpayers' lives. From objecting during an examination, to claiming appeal rights, to demonstrating a hardship caused by collection, taxpayers must be able to understand what the correct amount of tax should be, why the IRS is taking an action, and what rights they can exercise. Balancing the other factors such as the number of LEP taxpayers, the frequency of taxpayer contacts, and resource requirements, the IRS should provide notices in languages other than English in order to provide meaningful access to IRS services.

Many IRS Notices Providing Statutory Rights or Fulfilling Statutory Directives Are Not Translated Into Languages Other Than English

The IRS only translates some important statutory notices into Spanish and none into languages other than English or Spanish.[10] For example, the statutory notice of deficiency (SNOD), which the law requires the IRS to issue, provides taxpayers with the statutory right to appeal the liability in U.S. Tax Court, the only opportunity the taxpayer has to challenge the liability in court prior to paying it.[11] The notice provides a deadline by which the taxpayer must exercise this right and is accompanied by a waiver, which allows a taxpayer to choose to give up the important right of appealing the decision in court. However, of the five most commonly issued versions of this notice, only two are available in Spanish and none are available in any languages other than English or Spanish.[12] The offer in compromise rejection letter, which provides the taxpayer with the statutory right to receive an independent review of the rejection by the IRS Office of Appeals, is only available in English.[13]

8 65 Fed. Reg. 50121 (Aug. 16, 2000).

9 70 Fed. Reg. 6069 (Feb. 4, 2005).

10 IRS response to TAS information request (June 28, 2019).

11 IRC §§ 6212(a), 6213(a).

12 The five English versions are Letter 3219, Notice of Deficiency; Notice CP 3219A, Automated Under Reporter (AUR) Statutory Notice of Deficiency; Letter 3219B, Business Master File (BMF) AUR Statutory Notice of Deficiency - 90 Day Letter; Letter 3219C, Statutory Notice of Deficiency; and Notice CP 3219N, Automated Substitute for Return (ASFR) 90-Day Letter. The two Spanish versions are Letter 3219(SP), Notice of Deficiency (Spanish) and Notice CP 3219N(SP), Automated Substitute for Return (ASFR) 90-Day Letter (Spanish). See IRS Product Catalog Information and SNIP for copies of these letters. *See also* National Taxpayer Advocate 2018 Annual Report to Congress 198, 201-202 (Most Serious Problem: *Statutory Notices of Deficiency: The IRS Fails to Clearly Convey Critical Information in Statutory Notices of Deficiency, Making It Difficult for Taxpayers to Understand and Exercise Their Rights, Thereby Diminishing Customer Service Quality, Eroding Voluntary Compliance, and Impeding Case Resolution*).

13 *See* Letter 238, Offer in Compromise Rejection Letter, in the Automated Offer in Compromise system. *See also* IRC § 7122(e).

Even When Notices Are Available in Spanish, the IRS Does Not Track Taxpayers Who Want to Receive Notices in Spanish or Provide Simple Options for These Taxpayers to Request Spanish Notices

Although the IRS has an LEP indicator on its electronic account system, the Integrated Data Retrieval System, it is unclear how this indicator is placed on taxpayers' accounts and whether it has any effect.[14] Currently, the IRS has programmed its Individual Master File (IMF) so Spanish notices are only received if the taxpayer has filed a Form 1040PR, which is used by residents of Puerto Rico in certain limited situations.[15] Given only about 104,000 Form 1040PRs were filed in FY 2019, this programming severely limits the eligible Spanish-speaking LEP taxpayers who might automatically receive Spanish notices.[16] If a taxpayer who previously filed a Form 1040PR subsequently files a Form 1040 in a later year, then the taxpayer will no longer receive Spanish notices.

While IRS employees can manually generate some notices in Spanish upon request, a taxpayer will only receive these notices if he or she knows to request one each time a notice is issued.[17] Furthermore, even when taxpayers know to call the IRS and request the Spanish version of the notice they received, it may be too late. Often the important statutory letters carry strict deadlines for providing information or requesting an appeal, and by the time the taxpayer receives the new notice, he or she may have forfeited his or her rights. Additionally, some notices for which the IRS has Spanish versions cannot be manually generated.[18]

Taxpayers who file the Spanish version of Form W-7, Application for Individual Taxpayer Identification Number (ITIN), will receive notices related to the Form W-7 in Spanish, but they will not automatically receive other notices in Spanish unless they also file a Form 1040PR.[19] This occurs because the IRS does not transmit language preference from the ITIN Real Time System to the IMF, even though it transmits other information such as the name and address components of an ITIN application. Figure 1.8.1 demonstrates how the IRS handles Spanish notices for taxpayers in the different situations discussed.

14 IRS response to TAS information request (June 28, 2019) states, "Since there is no requirement to input a [LEP indicator] TC 971 AC 192, it would not appear in the Compliance Data Warehouse or any other data source."

15 Form 1040PR, U.S. Self-Employment Tax Return (Including the Additional Child Tax Credit for Bona Fide Residents of Puerto Rico) (2018) is used by Puerto Rico residents to report self-employment income and claim the additional child tax credit. In addition to filing a Form 1040PR, a taxpayer must also have a collection location code indicating the Philadelphia Service Center, which handles international returns, and have a universal location code indicating Puerto Rico in order to receive Spanish notices. IRS response to TAS information request (June 28, 2019). *See* Form 1040PR, U.S. Self-Employment Tax Return (Including the Additional Child Tax Credit for Bona Fide Residents of Puerto Rico) (2018).

16 TAS Research used Compliance Data Warehouse (CDW), Individual Returns Transaction File, F1040 Table.

17 For example, the Automated Collection System (ACS) can accommodate taxpayers' requests to manually generate a notice in Spanish. *See* Internal Revenue Manual (IRM) Exhibit 5.19.5-5, ACS History Codes Reference IRM 5.19.5.4 (Nov. 21, 2019).

18 IRS response to TAS subsequent information request (Sept. 25, 2019).

19 Taxpayers who are ineligible for a Social Security number but who have a tax filing obligation must apply for an ITIN using Form W-7(SP), Application for IRS Individual Taxpayer Identification Number (Spanish Version), Solicitud de Número de Identificación Personal del Contribuyente del Servicio de Impuestos Internos.

FIGURE 1.8.1[20]

Examples of How the IRS Currently Handles Spanish Notices for Taxpayers With Limited English Proficiency

20 IRS response to TAS subsequent information request (Sept. 25, 2019).

The Percentage of Spanish Notices Sent to Taxpayers Is Substantially Lower Than the Estimated Percentage of Limited English Proficiency Spanish Taxpayers

Given the IRS has not programmed its LEP markers for use,[21] TAS Research used the latest U.S. Census Five-Year Estimates data to estimate a benchmark for the percentage of all U.S. taxpayers who are Spanish-speaking, working age, and LEP taxpayers.[22] TAS Research used IRS data to generate the numbers of all IRS notices and letters issued in English and Spanish for FYs 2017 to 2019.[23] From these numbers, TAS contrasted the percentage of the relevant U.S. population who are LEP Spanish-speaking, working age taxpayers (almost four percent)[24] with the percentage of the notices and letters sent in Spanish (about a third of one percent). Given that the population of LEP Spanish-speaking taxpayers identified by TAS does not include taxpayers who speak English well but who would prefer to receive their notices in Spanish, the actual population of taxpayers who would choose Spanish notices if given a choice is likely higher than four percent. Figure 1.8.2 shows that the actual percentage of Spanish notices is substantially lower than TAS's conservative benchmark of four percent.

FIGURE 1.8.2, Total Notices and Letters and Spanish Notices and Letters, FYs 2017–2019[25]

	FY 2019		FY 2018		FY 2017	
	Count	% of All Letters	Count	% of All Letters	Count	% of All Letters
All Notice and Letter Volumes Less Spanish Notice and Letter Volumes	146,483,794	99.67%	153,347,519	99.67%	157,093,912	99.63%
Spanish Notice and Letter Volumes	486,831	0.33%	503,473	0.33%	587,739	0.37%
Total	**146,970,625**		**153,850,992**		**157,681,651**	

TAS Research further examined specific notices and letters that provided important statutory rights or fulfilled a statutory directive from Congress for taxpayers. Figure 1.8.3 shows the results for these four notice/letter groups, with the share of Spanish notices and letters at less than one percent, in contrast to TAS's conservative benchmark of approximately four percent for the relevant population of Spanish-speaking LEP taxpayers.

21 IRS response to TAS fact check (Oct. 25, 2019).

22 The relevant Spanish speaking, working-age taxpayers are described as Spanish speaking persons who speak English not well or not at all and are employed out of the total number of persons age 18 and over. TAS Research used the U.S. Census Bureau, *Age by Language Spoken at Home by Ability to Speak English for the Population 5 Years and Over*, B16004, and U.S. Census, *Employment Status*, S2301, for 2013-2017.

23 TAS Research used data information from IRS systems, SNIP and CDW Notice Delivery System Database (NDS).

24 The estimate was derived using the Spanish Population age 18 & over, who speak English "not well" or "not at all," the Spanish employment ratio, the U.S. Population age 18 & over, and U.S. employment ratio, which produced 3.8 percent. U.S. Census 2013-2017 American Community Survey 5-Year Estimates Tables, B16004 and S2301.

25 TAS Research used data information from IRS systems, SNIP Annual Correspondex (C-Letter) Volumes by Letter number and Center for FYs 2017-2019 and Annual Notice Volumes by CP number and Center for FYs 2017-2019; and CDW NDS, NDS NOTICE Table for FYs 2017-2019.

FIGURE 1.8.3, Selected Notices and Letters in English and Spanish, FYs 2017-2019[26]

	FY 2019		FY 2018		FY 2017	
	Count	% of CP11 & CP711	Count	% of CP11 & CP711	Count	% of CP11 & CP711
CP11 – English Error on Return – Balance Due	488,078	99.30%	613,093	99.40%	580,746	99.30%
CP711 – Spanish Error on Return – Balance Due	3,668	0.70%	3,485	0.60%	4,092	0.70%
Total	**491,746**		**616,578**		**584,838**	

	Count	% of CP105C & CP105(C-SP)	Count	% of CP105C & CP105(C-SP)	Count	% of CP105C & CP105(C-SP)
Letter 105C – English Claim Disallowed	305,061	99.90%	350,211	99.93%	375,592	99.90%
Letter 105(C-SP) – Spanish Claim Disallowed	226	0.10%	259	0.07%	342	0.10%
Total	**305,287**		**350,470**		**375,934**	

	Count	% of CP106C & CP106(C-SP)	Count	% of CP106C & CP106(C-SP)	Count	% of CP106C & CP106(C-SP)
Letter 106C - English Claim Partially Disallowed	57,375	99.90%	50,281	99.77%	56,657	99.80%
Letter 106(C-SP) - Spanish Claim Partially Disallowed	46	0.10%	114	0.23%	88	0.20%
Total	**57,421**		**50,395**		**56,745**	

	Count	% of Letter 845C & 845(C-SP)	Count	% of Letter 845C & 845(C-SP)	Count	% of Letter 845C & 845(C-SP)
Letter 854C - English Penalty Waiver or Abatement Disallowed/ Appeals Procedure Explained	74,067	99.90%	79,292	99.88%	104,201	99.90%
Letter 854(C-SP) - Spanish Penalty Waiver or Abatement Disallowed/ Appeals Procedure Explained	63	0.10%	93	0.12%	89	0.10%
Total	**74,130**		**79,385**		**104,290**	

These numbers demonstrate that in terms of important notices, the IRS is only meeting the needs of very few of the Spanish-speaking LEP population and none of the LEP population speaking other languages.

26 TAS Research used data information from IRS systems, SNIP Annual Correspondex (C-Letter) Volumes by Letter number and Center for FYs 2017-2019 and Annual Notice Volumes by CP number and Center for FYs 2017-2019.

The IRS Could Do More to Identify Taxpayers Who Should Receive Notices in Spanish

If the IRS began using its existing LEP indicator to generate notices in Spanish, it could place a simple checkbox on Form 1040 to allow taxpayers to indicate their preference for receiving notices in Spanish. In response to TAS's information request, the IRS stated: "At this time the check box option has not been considered, therefore, there are no technological barriers identified."[27] The IRS could also create a checkbox on its online accounts system to allow taxpayers to record a preference for Spanish notices. Additionally, the IRS could transmit the language preference automatically from the ITIN Real Time System and prompt the LEP indicator to be placed on a taxpayer's account. This could prevent situations such as what has been occurring with the CP 48, Renew Your ITIN, notice. Despite the prevalence of Spanish-speaking taxpayers within the ITIN population, in FY 2019, only *one out of almost a million* copies of the ITIN renewal notice sent to taxpayers was sent in Spanish.[28]

The IRS could also consider other factors that would lead to marking a taxpayer's account with a preference for another language. The Social Security Administration (SSA) considers several criteria to determine whether an individual should receive a notice in Spanish:

- The application shows the claimant was born in a country or territory where Spanish is the predominant language (*e.g.*, Mexico, Puerto Rico);
- The claimant has a Hispanic surname;
- The claimant lives in a known Spanish-speaking area (*e.g.*, "Little Havana" or "East Los Angeles");
- The interview is conducted in Spanish or with the assistance of a Spanish translator;
- The claimant has difficulty speaking English but is fluent in Spanish;
- The claimant requests notification in Spanish; or
- The claimant meets none of the criteria, but there are circumstances which indicate that Spanish notices would be helpful, and the claimant would like to receive them.[29]

If one of these criteria is met, the SSA tells those individuals they may receive Spanish notices and asks them if they want to receive them.[30] In addition, the SSA manual states: "If an individual files a Request for Hearing (HA-501-U5), or Request for Review of Hearing Decision/Order (HA-520-U5), and meets any of the criteria listed above, state whether the individual wants to receive Spanish notices in the section of the form that gives the reason for filing a hearing or a review."[31] The IRS could adopt similar criteria to proactively identify taxpayers who may need to receive their notices in Spanish and allow taxpayers to easily communicate this when filling out certain forms.

The IRS Website Fails to Include Notices and Related Information About Those Notices in Languages Other Than English

The IRS is increasingly relying on its website to inform taxpayers, and to its credit, it has created individual pages to help taxpayers understand the specific notice that they have received. For example, the IRS has a page titled, *Understanding Your CP 3219N Notice*, which explains the CP 3219N, one

27 IRS response to TAS information request (June 28, 2019).

28 During FY 2019, the IRS issued CP 48, Renew Your ITIN, 969,863 times. Yet, during this same period, the IRS issued CP 748, the Spanish version of this letter, only once. IRS SNIP Database (Sept. 18, 2019).

29 SSA, Program Operations Manual System (POMS) NL 00801.025 Spanish Language Notices (2007).

30 *Id.*

31 *Id.*

of the IRS's statutory notices of deficiency that provides the taxpayer with his or her only opportunity to challenge the liability in U.S. Tax Court prior to paying it if he or she timely files a petition.[32] The webpage has seven sections: What the notice is about; What you need to do; If you want to file a petition with the Tax Court; You may want to…; Helpful Information; Frequently asked questions; and Tips for next year.[33] Although the IRS has a Spanish translation of Notice 3219N, it does not have a similar webpage in Spanish for taxpayers. The Spanish webpage for notices provides only general information about understanding any IRS notice or letter, and when one searches by notice number, the results are in English.[34]

The IRS touts that with its Spanish website and at least five other non-English websites, "potentially 85 percent of the U.S. LEP population can be serviced through the online channel."[35] However, this service is inadequate when LEP taxpayers do not have similar access to the explanations and instructions for key notices that provide taxpayer rights. Eighty-nine percent of Spanish LEP taxpayers report having internet access at home,[36] and IRS research indicates that one of the most frequently cited activities that Spanish LEP taxpayers reported as being likely to use on the IRS website was responding to a notice.[37]

Although translating every page into another language may be onerous, the IRS could create some general explanations in each of the top five foreign languages that would apply to different groups of notices. For example, instead of having an individual foreign language page for every SNOD or every single Collection Due Process (CDP) letter, the IRS could at minimum create some standard language for how to petition Tax Court after receiving a SNOD or when a taxpayer must request a CDP hearing. While the IRS has a webpage, *Understanding a federal tax lien*, translated into at least five languages other than English, there is no cross-reference to the notices that taxpayers receive, such as the Notice of Federal Tax Lien, and there is no mention of CDP hearing rights on this page.[38] The IRS could translate the page *Letters and Notices Offering an Appeal Opportunity*, which provides a brief description of each notice that provides appeal rights, and link to this page from the main notice page for each of the five foreign languages.[39]

The majority of our discussion has been focused on Spanish because it is by far the most frequent primary language for LEP taxpayers and the only language the IRS has chosen for translating its notices. However, by only translating notices in Spanish, the IRS is leaving out literally millions of other LEP

32 IRS, Understanding Your CP3219N Notice, https://www.irs.gov/individuals/understanding-your-cp3219n-notice.

33 *Id*.

34 IRS, Understanding Your IRS Notice or Letter, https://www.irs.gov/individuals/understanding-your-irs-notice-or-letter (English) and IRS, Entendiendo sus cartas o avisos del IRS, https://www.irs.gov/es/individuals/understanding-your-irs-notice-or-letter (Spanish).

35 IRS, Limited-English Proficient (LEP) Customer Base Report, FY 2012–2015, 211 (Jan. 2018).

36 IRS, Taxpayer Experience Survey (TES) 2017 Spanish Limited English Proficient (LEP) Report 8 (Apr. 30, 2018).

37 Spanish LEP respondents reported they were likely to use the IRS website to find an answer to a tax law question (67 percent); respond to a notice or letter received from the IRS (65 percent); and get an IRS form or publication (64 percent). *Id*. at 21 (Apr. 30, 2018).

38 IRS, Understanding a Federal Tax Lien, https://www.irs.gov/businesses/small-businesses-self-employed/understanding-a-federal-tax-lien, is translated into six different languages, specifically Spanish, Chinese, Korean, Russian, Vietnamese and Haitian Creole.

39 IRS, Letters and Notices Offering an Appeal Opportunity, https://www.irs.gov/appeals/letters-and-notices-offering-an-appeal-opportunity. *See also* Most Serious Problem: *Customer Service Strategy: The IRS Needs to Develop a Comprehensive Customer Service Strategy That Puts Taxpayers First, Incorporates Research on Customer Needs and Preferences, and Focuses on Measurable Results*, *supra*.

taxpayers.[40] In 2015, there were an estimated 1.8 million LEP persons in the United States speaking Chinese, Vietnamese, Korean, Cantonese, or Russian, which are the five most popular foreign languages for LEP persons after Spanish.[41] Focusing on the top five foreign languages in addition to Spanish and translating the notices that have the most importance in terms of taxpayer rights would show the IRS is committed to serving multilingual taxpayers. TAS commends the IRS for translating publications, such as its new Publication 5307, Tax Reform Basics for Individuals and Families, into languages other than English and Spanish.[42] Still, by focusing on publications taxpayers will use on the front end when filing their taxes, and not translating key notices that are sent to taxpayers when they have a problem related to their taxes, the IRS impairs taxpayers' *right to be informed*.

IMPACT ON THE INTERNAL REVENUE SERVICE

The IRS Overlooks the Positive Impact When Determining Which Documents to Translate

In FY 2017, the IRS had 323 translated vital documents, meaning they were required by law or critical for taxpayers to receive a benefit or service.[43] The IRS's Standard Translation Process requires, among other items, that a document must (1) be important to LEP taxpayers, (2) be unavailable by alternate means, and (3) have an acceptable level of downstream adverse impact (such as staffing to handle additional calls).[44] Certainly, notices required by law to be issued to taxpayers or those which provide statutory rights are "important to LEP taxpayers." One might argue that if the IRS translates one SNOD, then the information is available to taxpayers by alternate means. However, because the IRS does not post the translated notices on its webpage, and it would not issue the similar translated notice to the taxpayer, then the document is not available by alternate means.

In considering downstream adverse impacts, the IRS should weigh these with the positive benefits. For example, issuing an exam notice in another language may lead the taxpayer to call the IRS to ask questions using an interpreter, which would be an adverse downstream effect in terms of resources. However, this same event may be positive for the IRS in that the taxpayer is responding to the notice, participating in the exam, and possibly learning from the exam to avoid repeating mistakes on future returns. The IRS's LEP Customer Base Report notes the costs for not only publishing LEP written materials but also the postage costs when sending these materials.[45] The IRS should not consider these costs a downstream consequence because regardless of what language the taxpayer prefers, the IRS must send the taxpayer the notice, and postage costs are the same for translated notices. In FY 2015, the IRS spent $877,087 on over-the-phone interpretation services for Spanish speakers.[46] It is possible that issuing a greater number of notices in Spanish and providing more detailed information about the notices on the IRS's Spanish webpages could reduce some of the need for taxpayers to call the IRS.

40 LEP persons speaking one of the top 10 languages in addition to Spanish numbered 2.5 million in 2015. IRS, LEP Customer Base Report, FY 2012–2015, 28 (Jan. 2018).

41 IRS, LEP Customer Base Report, FY 2012–2015, 28 (Jan. 2018).

42 IRS.gov, Tax Reform Tax Tip 2019-140, Tax Reform Publication Translated Into Different Languages (Oct. 8, 2019), https://www.irs.gov/newsroom/tax-reform-publication-translated-into-different-languages.

43 IRS, LEP Customer Base Report, FY 2012–2015, 10 (Jan. 2018).

44 IRS response to TAS information request (June 28, 2019).

45 IRS, LEP Customer Base Report, FY 2012–2015, 104 (Jan. 2018).

46 *Id*.

The IRS Should Use Its Limited English Proficiency Demographic Assessment to Identify Documents to Translate

According to the IRS, the document business owner has the program responsibility for the technical content of the document and is the only one who can request a document be translated.[47] Placing the onus on the document owner to identify whether taxpayers need a document translated is misguided, considering the document owner may be an expert on the technical content but have little knowledge of what demographic, geographic, or ethnic group is receiving the document.

A better approach would be for the IRS to start with data from its LEP Demographic Assessment and use this data to make recommendations to program owners as to which documents the IRS should translate. The IRS gathers thorough data on the LEP population and publishes a useful document detailing this data in the LEP Demographic Assessment.[48] When asked for an explanation of how it uses the LEP demographic assessment, the Wage and Investment Division responded that it uses the data to determine the top five languages the IRS will serve and to "learn where these potential customers are located, industry they are employed in, education levels and other socio-economic and behavior information like computer use to determine how and where to serve taxpayers."[49] Yet, it is not clear whether the IRS is using this data to select which notices it will translate. The most recent LEP Demographic Assessment states:

> The IRS would benefit from further analysis into document translation demand, particularly in light of the success of the non-English website pages. Overall requests for document translation (internal requests from employees) have been increasing but is not that high a number, peaking at 2,422 in 2015, primarily for Spanish translation. What percent 'share of the need' this represents is not clear, *i.e.*, are there many others who would benefit from this who didn't ask?[50]

Some program owners may not think to ask for a translation, which could cause a discrepancy in which notices are translated. Currently, only two of the five most commonly issued versions of the statutory notice of deficiency are translated into Spanish.[51] Furthermore, IRS leadership could identify some primary notices to translate into one of the top five identified foreign languages other than Spanish because the notices are so fundamental to taxpayer rights.

In addition to not leveraging the LEP Customer Data, the IRS misses the opportunity to evaluate whether it is meeting the notice needs of LEP taxpayers. The IRS appears to lack central coordination of when Spanish letters are issued, how they are accounted for, and how a taxpayer is notated as an LEP taxpayer. As the IRS prepares to implement Enterprise Case Management, now is an ideal opportunity to build in LEP indicators that will help the IRS communicate effectively across the organization.[52]

47 The business document owner is an IRS individual who is responsible for the technical content, publishing and edits of specific letters. If a person other than the business document owner requests a letter translation, then the person must contact the business document owner and receive their concurrence. *See* IRS response to TAS information request (June 28, 2019).

48 IRS, LEP Customer Base Report, FY 2012–2015, 23-81 (Jan. 2018).

49 IRS response to TAS information request (June 28, 2019).

50 IRS, LEP Customer Base Report, FY 2012–2015, 20 (Jan. 2018).

51 The two Spanish versions are Letter 3219(SP), Notice of Deficiency (Spanish) and Notice CP 3219N(SP), Automated Substitute for Return (ASFR) 90-Day Letter (Spanish). IRS Product Catalog Information.

52 Enterprise Case Management (ECM) solution provides an IRS-wide solution for streamlining case and workload management processes. The solution digitizes case information, automates work selection, and improves resource alignment. *See* IRS Integrated Modernization Business Plan 23 (Apr. 2019). *See also* National Taxpayer Advocate FY 2019 Objectives Report to Congress 47-51; Most Serious Problem: *Information Technology Modernization: The IRS Modernization Plan's Goal to Improve Taxpayer Experience Is Commendable, But the IRS Needs Additional Multi-Year Funding to Bring It to Fruition, supra*.

CONCLUSION

A tax agency dedicated to taxpayer rights should take a proactive approach to LEP taxpayers by identifying potential taxpayers who may want notices in other languages and allowing them to check a box to easily request notices in foreign languages. The IRS has identified no information technology barriers to placing a checkbox on its Form 1040 to allow taxpayers to receive notices in other languages. As the IRS relies more on its website to answer taxpayers' questions about notices and how to exercise their rights, it should translate webpages that explain the key notices. Until the IRS makes these changes, LEP taxpayers will continue to face difficulty in responding to IRS notices, exercising their rights, and coming into compliance.

RECOMMENDATIONS

Administrative Recommendations to the IRS

The National Taxpayer Advocate recommends that the IRS:

1. Place a checkbox on Form 1040 to allow taxpayers to choose to receive their notices in Spanish and, as more notices are translated, expand the 1040 checkbox to languages other than Spanish.
2. Incorporate language information from the ITIN Real Time System in the IRS's account systems so that if a taxpayer files a Form W-7 in Spanish, an indicator is systemically placed on his or her accounts.
3. Translate into the five most common non-English languages the IRS webpages that correspond to the four notices identified above (CP 11 – English Math Error on Return – Balance Due; Letter 105C – English Claim Disallowed; Letter 106C – English Claim Partially Disallowed; Letter 854C – English Penalty Waiver or Abatement Disallowed/Appeals Procedure Explained), along with other IRS webpages that correspond to other statutory notices and taxpayer rights.
4. Develop a plan to identify additional notices that provide statutory rights and webpages that specifically pertain to those notices to be translated into the top five LEP languages by using the LEP demographics. The plan should include options to create a hyperlink or scannable code on the notices that would direct an LEP taxpayer to a webpage providing alternate language templates of the notice.
5. Create procedures similar to those used by the SSA to identify taxpayers who may have LEP, instruct employees to ask these taxpayers about language preference, and allow employees to mark a taxpayer's account to reflect this preference.
6. Place a note on all correspondence providing taxpayers with instructions explaining how to receive their notices in languages other than English.
7. Expand the LEP indicator and use the indicator to centrally coordinate and record the issuance of notices in languages other than English.

MSP #9 COMBINATION LETTERS: Combination Letters May Confuse Taxpayers and Undermine Taxpayer Rights

RESPONSIBLE OFFICIALS

Ken Corbin, Commissioner, Wage and Investment Division
Eric Hylton, Commissioner, Small Business/Self-Employed Division

TAXPAYER RIGHTS IMPACTED[1]

- *The Right to Be Informed*
- *The Right to Quality Service*
- *The Right to Pay No More Than the Correct Amount of Tax*
- *The Right to a Fair and Just Tax System*

PROBLEM

The IRS uses the Combination Letter, which combines the Initial Contact Letter and the 30-Day Letter, in hundreds of thousands of correspondence audits.[2] In fiscal years (FYs) 2015-2019, the IRS used the Combination Letter in approximately 16 percent, or about 500,000, correspondence audits.[3] When the IRS combines two letters with very different functions, taxpayers may experience:

- Insufficient time to provide necessary documentation and resolve questionable items;
- Confusion because the inclusion of the audit report in the initial contact gives the appearance that the result of the audit is a foregone conclusion;
- Insufficient understanding of their right to appeal and the related timeframe; and
- A lower likelihood of responding to the letter as compared to taxpayers who received two separate letters.[4]

Despite the problems Combination Letters create for taxpayers, the IRS Wage & Investment (W&I) Division has plans to expand its use of the letters to additional issues.[5]

1 See Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are also codified in the Internal Revenue Code (IRC). See IRC § 7803(a)(3).

2 Audits conducted through the mail are also referred to as "correspondence" audits.

3 In this Most Serious Problem (MSP), we focus solely on Combination Letters sent by the IRS Wage and Investment (W&I) and Small Business/Self-Employed (SB/SE) divisions. All data and procedural analysis referenced in this MSP is based on W&I and SB/SE data and procedures. Because the IRS does not track the type of initial contact letter sent, the exact number of Combination Letters versus non-Combination Letters could not be determined within the project codes designated at Figure 1.9.1 in comparison to the total correspondence exams started after September 30, 2014. This is an estimate based on project codes where a Combination Letter could have been sent. IRS response to TAS fact check (Nov. 25, 2019).

4 See Figure 1.9.2, *infra*. IRS response to TAS fact check (Nov. 25, 2019).

5 IRS response to TAS information request (July 2, 2019) (W&I is considering expanding use of the Combination Letter to "[Premium Tax Credit] within project code 1300 for specific error codes" and "Unallowable Project Code 0000 with Source Code 03 (for those items that are truly unallowable by law)."

IMPACT ON TAXPAYERS

The Combination Letter combines the Initial Contact Letter and the 30-Day Letter into a single letter.[6] The use of the Combination Letter is usually limited to correspondence audits, the most common type of IRS examination.[7] While the IRS generally uses a two-letter process for the majority of its examinations, it began using Combination Letters in 1999 to shorten the time required for correspondence exams and to maximize employee resources.[8] Prior to 2006, the Combination Letter was most often used in examinations of the Earned Income Tax Credit (EITC).[9] In response to the National Taxpayer Advocate's concerns surrounding the IRS's use of the Combination Letter,[10] the IRS stopped using the Combination Letter in EITC exams.[11] However, the Combination Letter still impacted approximately 16 percent of the three million correspondence examinations opened by the IRS W&I and Small Business/Self-Employed (SB/SE) divisions between FYs 2015-2019.[12]

The IRS Uses Combination Letters to Fast-Track Certain Examinations, Shortening the Timeframe for Taxpayers to Resolve Problems When Compared to the Two-Letter Process

In the two-letter process, the IRS mails an Initial Contact Letter to the taxpayer at the beginning of the examination to inform him or her that the IRS has selected his or her return for examination, to specify the items under examination, and to request documentation to verify the items the IRS is examining.[13] This letter allows taxpayers 30 days to provide support for the examined items.[14] The 30-Day Letter is sent to a taxpayer to communicate the audit adjustments after the IRS has considered any information that the taxpayer provided.[15] This letter gives taxpayers 30 days to provide additional documentation, rebut the audit adjustments, or request an appeal of the audit adjustments prior to paying any additional tax due.

The 30-Day Letter is critical because it is the only way the taxpayer can appeal the IRS's determination in an independent forum prior to going to Tax Court. For many taxpayers, it is the only appeal right they will get because many cannot afford legal representation, or they find the idea of going to court intimidating.

6 *See, e.g.*, Letter 566B. See also National Taxpayer Advocate 2003 Annual Report to Congress 87 (Most Serious Problem: *Combination Letter*).

7 In FY 2018, the IRS conducted 741,400 audits via correspondence, and 74.8 percent of all audits conducted were via correspondence. The remaining 25.2 percent were conducted in the field by revenue agents, tax compliance officers, tax examiners, and revenue officer examiners. IRS Pub. 55B, IRS Databook 2018, 23 (May 2019) (Table 9a).

8 *See* National Taxpayer Advocate 2003 Annual Report to Congress 87 (Most Serious Problem: *Combination Letter*).

9 At the time, EITC examinations made up approximately three quarters of all correspondence audits. In FY 2001, Correspondence Examination units on IRS campuses conducted 401,448 EITC examinations, 9,624 non-filer examinations, and 129,830 other examinations for a total of 540,902 examinations. *See* National Taxpayer Advocate 2003 Annual Report to Congress 89 (Most Serious Problem: *Combination Letter*).

10 *See* National Taxpayer Advocate 2003 Annual Report to Congress 87 (Most Serious Problem: *Combination Letter*).

11 *Id.*; IRS response to TAS information request (July 2, 2019). *See also* Internal Revenue Manual (IRM) 4.19.1.5.2, RPS Examination Process (Jan. 1, 2006).

12 Because the IRS does not track the type of initial contact letter sent, the exact number of Combination Letters versus non-Combination Letters could not be determined within the project codes designated at Figure 1.9.1 in comparison to the total correspondence exams started after September 30, 2014. This is an estimate based on project codes where a Combination Letter could have been sent. IRS response to TAS fact check (Nov. 25, 2019).

13 IRM 4.19.13., Initial Contact (Mar. 10, 2016). *See, e.g.*, Letter 566; Letter 566D. *See also* National Taxpayer Advocate 2008 Annual Report to Congress 243 (Most Serious Problem: *The IRS Correspondence Examination Program Promotes Premature Notices, Case Closures, and Assessments*).

14 *See, e.g.*, Letter 566D.

15 IRM 4.19.13.12, No Response and Unagreed Cases (Feb. 9, 2018). *See also* Letter 525 (sent as 30-Day Letter and also as a Combination Letter).

In the Combination Letter process, taxpayers receive only one letter that both informs them that their tax return is under audit and serves as a letter transmitting the audit report reflecting the audit outcome should the taxpayer fail to substantiate the items under examination. The letter date not only starts the 30-day timeframe in which the taxpayer must respond and provide substantiation for examined items, it also starts the clock on the taxpayer's 30-day window to request an appeal. While the Combination Letter refers the taxpayer to IRS Publication 3498-A, The Examination Process (Audits by Mail), for more information on the audit process, including appeal rights, it does not fully discuss the taxpayer's options within the body of the letter.[16]

The IRS sends Combination Letters for examinations where the taxpayers were previously contacted by the IRS and subsequently selected for examination.[17] The IRS also uses Combination Letters when it "can clearly determine the taxpayers are not entitled to the credits or there is a clear mathematical computation"[18] or "if the item is clearly unallowable."[19] In essence, the IRS is fast-tracking certain correspondence exams where it believes taxpayers are definitely in the wrong.

Because the IRS cannot provide data showing the number of Combination Letters it sends in a given year or show the outcome of cases in which it used the Combination Letter,[20] the IRS is unable to track data or analyze the effects of using Combination Letters on the IRS or taxpayers.[21] To understand when the IRS uses Combination Letters, Figure 1.9.1 details the issues for which such letters might be used. By reviewing the examination results for these issues, we have estimated the impact of the Combination Letter by comparing these examination results to other correspondence examination results as shown in Figures 1.9.2 and 1.9.3.

16 *See, e.g.* Letter 566B; *see also* National Taxpayer Advocate 2008 Annual Report to Congress 243 (Most Serious Problem: *The IRS Correspondence Examination Program Promotes Premature Notices, Case Closures, and Assessments*).

17 IRS response to TAS information request (July 2, 2019).

18 *Id.* (this is the procedure for W&I).

19 *Id.* (this is the procedure for SB/SE).

20 *Id.*

21 *See* IRS response to TAS information request (July 2, 2019). Because the IRS does not track the type of initial contact letter sent, the exact number of Combination Letters versus non-Combination Letters could not be determined within the project codes designated at Figure 1.9.1 in comparison to the total correspondence exams started. Estimates are based on project codes where a Combination Letter could have been sent. IRS response to TAS fact check (Nov. 25, 2019).

FIGURE 1.9.1, Project Codes Where a Combination Letter May Be Issued[22]

Project Code	Issue Description	Combination Letter Number
0	Unallowable Program	525
44	Erroneous Refunds	566B
59	Related Pickup Non-EITC Duplicate TIN	566B
124	SE Tax	718
125	Math Error Non-EITC	566B
133	Criminal Investigation - CI - Non-EITC Referral	566B
277	Substitute for Returns (SFR)	1862
385	Criminal Investigation - Non-EITC Credits	566B
394	Child & Dependent Care - Child turned 13 the first half of the year	566B
400	Child & Dependent Care - Child over 12 the entire year	566B
406	Hope Education Credit Greater Than 2 years for same student	566B
420	General Business Credit, No Business Indicators	566S*
505	Health Coverage Tax Credit	525
628	Child & Dependent Care - Duplicate Dependent for Child Tax Credit, Child and Dependent Care Credit or Education Credit	566B
631	Alternative Minimum Tax	2194
1521	Automated Underreporter With Greater Than 100 Information Returns	2625C, 2626C, Computer Paragraph Notice (CP) 2000 or CP 2501

22 These are the project codes that the IRS informed us a Combination Letter may be issued, as well as additional project codes we found independently in the IRM. IRS response to TAS information request (July 2, 2019) (identifying that Combination Letters may be issued in project codes 0000, 0124, 0394, 0400, 0420, 0631, and 1521). Please note that the IRS identified project code 0420 as one that the IRS used Combination Letters for. However, the IRS did not provide an associated Combination Letter with this project code, nor could TAS find one, so we included in Figure 1.9.1 Letter 566S, the initial contact letter associated with the 0420 project code. *See also* IRM 4.19.15.17(8), Erroneous Refunds (Nov. 4, 2019) (0044); IRM 4.19.15.11.1(2), Initial Contact (Dec. 1, 2017) (0059); IRM 4.19.15.10(4), Math/Clerical Error (Dec. 1, 2017) (0125); IRM 4.19.15.3(4), Education Tax Benefits - General Requirements and Exam Programs (Nov. 4, 2019) (0406, beginning on March 14, 2016, the IRS no longer used Combination Letters for this project code); IRM 4.19.15.2(6), Child and Dependent Care Credit (Nov. 4, 2019) (0628). The IRS informed us that a Combination Letter was no longer use in project code 0000 cases after November 1, 2016. IRS response to TAS follow-up request (Nov. 25, 2019).

Taxpayers May Miss Deadlines Because the Combination Letter Reduces Response Time and Taxpayer Contacts

The IRS gives taxpayers who receive both an Initial Contact Letter and a 30-Day Letter two separate opportunities to provide documentation — one 30-day period upon receiving the initial contact requesting documentation and another 30-day period upon receiving the audit report at the conclusion of the exam.[23] The Combination Letter can cut the time taxpayers have to provide documentation to a single 30-day period.[24] This compressed timeframe may be insufficient for taxpayers to properly gather and provide the necessary documentation needed to resolve any questionable items.

Taxpayers may be so focused on the news that they are under audit and the tasks necessary to gather the requested documents that they may overlook that the 30-day period provided by the Combination Letter is also their opportunity to request an Appeals conference. Taxpayers will likely believe that their exam is not yet final and will not realize that, even if they provide supporting information that the IRS deems insufficient, the IRS may not provide the taxpayer additional time beyond the 30-day period to request an Appeals conference,[25] thereby effectively losing the *right to appeal in an independent forum*.

The Combination Letter Gives the Appearance the Audit Result Is a Foregone Conclusion, Causing Taxpayer Confusion and Failure to Respond

Enclosed with the Combination Letter is an audit report showing the items in question as disallowed. However, neither the audit report[26] nor the Combination Letter indicate that the adjustments on the enclosed audit report are tentative. Additionally, one Combination Letter begins, "If you don't agree with the proposed changes…"[27] This can give the appearance that the IRS has already determined the outcome of the audit and any input from the taxpayer would be superfluous. Data shows that the non-response rate for taxpayers identified as being potentially subject to the issuance of the Combination Letter is, on average, 29 percentage points higher[28] than taxpayers who received the Initial Contact and 30-Day letters. (See Figure 1.9.2)

23 *See, e.g.*, Letters 566D & 525. *See also* National Taxpayer Advocate 2008 Annual Report to Congress 243 (Most Serious Problem: *The IRS Correspondence Examination Program Promotes Premature Notices, Case Closures, and Assessments*).

24 In some circumstances the taxpayer can have longer than 30 days to respond, depending on the IRS response. The IRS also generally gives 15 days for mail processing, though taxpayers are not made aware of this "extra" time. W&I response to TAS fact check (Nov. 14, 2019). The time given, however, is still shorter than the 60 days from the two-letter process. IRM 4.19.13.10.1, Taxpayer Responses – Additional Information Needed (Apr. 3, 2017), instructs examiners to update cases to status code 25, thereby suspending the case for 30 days prior to the issuance of the Statutory Notice of Deficiency. *See also* IRM 4.19.10.1.5.2, Standard Suspense Periods for Correspondence Examination (Dec. 8, 2017). Taxpayers are not informed of this suspension period. Examiners typically give taxpayers a response date of 15 days from the date the L692 was sent, giving taxpayers the impression that the response date is the final date they can submit information for the audit.

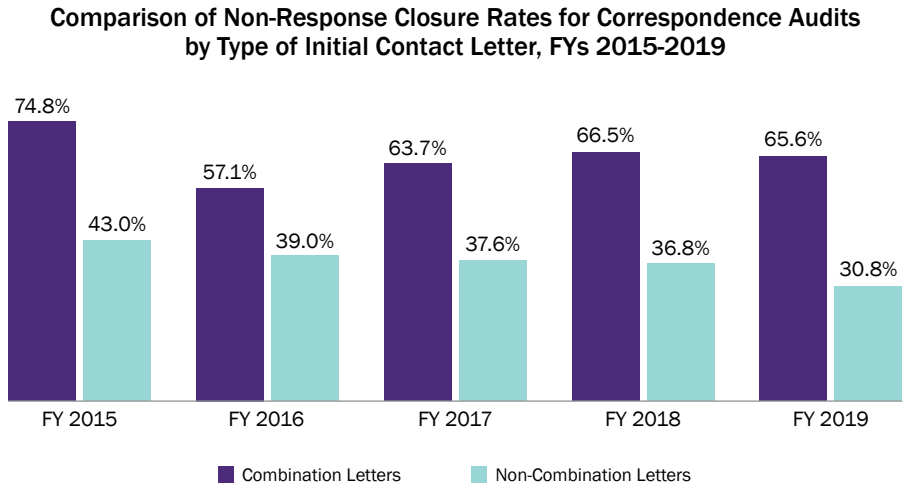
25 IRM 4.19.13.10.1, Taxpayer Responses – Additional Information Needed (Apr. 3, 2017) (instructing examiners who receive insufficient information from a taxpayer to: 1) attempt calling the taxpayer to explain why the information sent is not sufficient and what is still needed, no Letter 692 is sent, or 2) send Letter 692 with an explanation of why the information received is insufficient and what information is still needed if attempt to reach taxpayer was unsuccessful).

26 Usually Form 4549, Report of Income Tax Examination Changes.

27 *See, e.g.*, Letter 566B.

28 The average non-response rate between FYs 2015-2019 for W&I and SB/SE correspondence examinations is 43 percent. IRS response to TAS fact check (Nov. 25, 2019). The non-response rate for W&I and SB/SE correspondence cases subject to combination letter procedures is 67 percent. IRS response to TAS fact check (Nov. 25, 2019).

FIGURE 1.9.2[29]



Unfortunately, this failure to respond to the IRS may cause taxpayers to pay more tax than required, jeopardizing their *right to pay no more than the correct amount of tax.* Alternatively, the Combination Letter may cause taxpayers to make an appeal prematurely, thinking they have no choice but to appeal something the IRS has already decided against them. Since a taxpayer cannot appeal without having provided substantive support, Appeals will almost always send these cases back, wasting both the taxpayer's time and the IRS's resources.

Considering the confusion the Combination Letter may cause, a taxpayer's *right to a fair and just tax system* is inadvertently violated by the IRS's use of this letter. Furthermore, when taxpayers decline to participate in an examination, future compliance is impacted because the IRS misses an opportunity to educate these taxpayers during an audit about reoccurring errors they may be making. Despite these risks to taxpayers' rights, the IRS has not conducted research studies on the effect design (or redesign) of Combination Letters has on taxpayer responsiveness.[30]

29 Because the IRS does not track the type of initial contact letter sent, the exact number of Combination Letters versus non-Combination Letters could not be determined within the project codes designated at Figure 1.9.1 in comparison to the total correspondence exams. Estimates are based on project codes where a Combination Letter could have been sent for audits starting after September 30, 2014. IRS response to TAS fact check (Nov. 25, 2019).

30 Neither W&I nor SB/SE have conducted behavioral research studies on these Combination Letter issues. IRS response to TAS information request (July 2, 2019). The IRS Research, Applied Analytics and Statistics Division (RAAS) has also not conducted any behavioral research studies on Combination Letters. IRS Response to TAS Information Request (Sept. 24, 2019).

The Combination Letter's Current Design May Limit Taxpayers' Ability to Understand and Exercise Their Appeal Rights

Cognitive science and behavioral psychology both inform us that, for better understanding, there should not be too many or conflicting messages in one communication.[31] Yet, Combination Letters simultaneously tell taxpayers that they are under audit and that they can request an administrative appeal of a determination that the IRS has not yet made. While providing documentation and requesting an appeal is not an either/or situation, the design of the Combination Letter gives the appearance that taxpayers must make a choice between these two options.

For an example of how one Combination Letter deemphasizes appeal rights by relegating them to a single sentence, Letter 525 states the enclosed "Publication 3498-A describes the audit process and explains other options, including your appeal rights, if you disagree with our proposed changes."[32] Moreover, in the same paragraph the taxpayer is told if he or she disagrees with the IRS's proposed changes, he or she must "[r]eturn a copy of this letter along with your explanation and any supporting documents."[33] Nowhere does the letter state that to protect their option to appeal at a later point in the audit, taxpayers must request an appeal within 30 days of the letter's date.

Considering the confusion the Combination Letter may cause, a taxpayer's *right to a fair and just tax system* is inadvertently violated by the IRS's use of this letter.

Behavioral science also shows that if a document requires readers to look elsewhere for information, they are much less likely to retrieve it.[34] The IRS merely mentioning Publication 3498-A, The Examination Process (Audits by Mail), in the Combination Letter does not fulfill the IRS's obligation to fully inform taxpayers of their appeal rights. The eight-page Publication 3498-A discusses the audit process but does not specifically address scenarios in which taxpayers receive an audit report with the initial contact letter (*i.e.,* Combination Letter).

The rate at which taxpayers request an Appeals conference is historically low in correspondence examinations (less than one percent).[35] Because appeal rates are so low, it is difficult to draw a definitive conclusion as to why affected taxpayers are not requesting an appeal, however taxpayers who receive Combination Letters request appeals at a rate consistently lower when compared to all correspondence examinations, as shown in Figure 1.9.3.

31 See National Taxpayer Advocate 2018 Annual Report to Congress vol. 2, at 193 (Literature Review: *Improving Notices Using Psychological, Cognitive, and Behavioral Science Insights*).

32 See Letter 525.

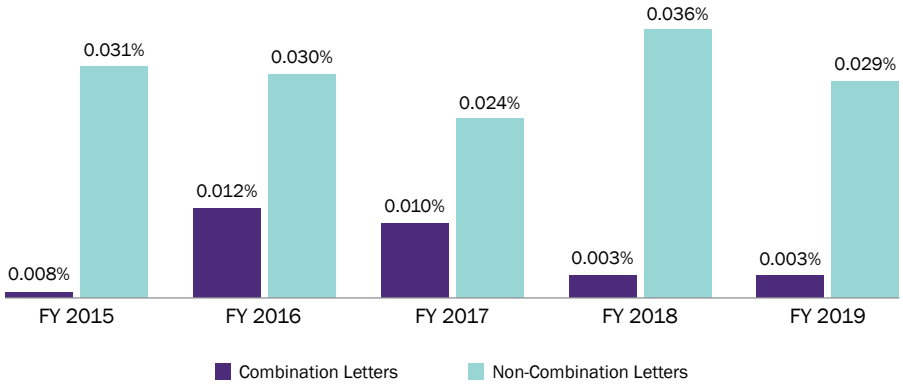
33 *Id.*

34 See National Taxpayer Advocate 2018 Annual Report to Congress vol. 2, at 193 (Literature Review: *Improving Notices Using Psychological, Cognitive, and Behavioral Science Insights*).

35 Because the IRS does not track the type of initial contact letter sent, the exact number of Combination Letters versus non-Combination Letters could not be determined within the project codes designated at Figure 1.9.1 in comparison to the total correspondence exams started after September 30, 2014. IRS response to TAS fact check (Nov. 25, 2019).

FIGURE 1.9.3[36]

Comparison of Appealed Closure Rates for Correspondence Audits by Type of Initial Contact Letter, FYs 2015-2019



IMPACT ON THE INTERNAL REVENUE SERVICE

The IRS uses Combination Letters because it believes they reduce the number of contacts with taxpayers, thereby reducing the cycle time for these cases. However, the IRS should want to positively engage with taxpayers rather than limiting interactions. The examination process should not only be used to resolve the issues under examination but also as an opportunity for the IRS to educate taxpayers. While reducing cycle time may be a valid goal to keep audits from unnecessarily dragging out, focusing solely on cycle times and limiting the number of interactions are potentially harmful to taxpayers. The IRS's aim should be to get to the correct answer, not just reduce case cycle times.

Regardless of its claim of the benefits of using the Combination Letter (namely saving employee resources by reducing taxpayer contacts and shortening case cycle times), the IRS can neither accurately identify the number and type of interactions it has with taxpayers who received the Combination Letter versus an Initial Contact Letter, nor can it accurately measure the cycle time for these same groups.[37] Thus, there is no evidence that taxpayer contacts or cycle times are notably better when the IRS uses Combination Letters rather than the two-letter process.[38] Despite the lack of data supporting its effectiveness, W&I is considering expanding the use of the Combination Letter to two additional project codes, which is concerning given the above issues.[39]

36 IRS response to TAS fact check (Nov. 25, 2019).

37 IRS response to TAS information request (July 2, 2019).

38 *Id*. Phone call with W&I and SB/SE on May 30, 2019.

39 IRS response to TAS information request (July 2, 2019) (W&I is considering expanding use of the Combination Letter to "[Premium Tax Credit] within project code 1300 for specific error codes" and "Unallowable Project Code 0000 with Source Code 03 (for those items that are truly unallowable by law)."

CONCLUSION

Combination Letters negatively impact taxpayers because of the short timeframe taxpayers have to gather documentation, respond to the examiner, and request an appeal. Combination Letters may confuse taxpayers by giving the impression that the audit is a foregone conclusion. The design and wording of the Combination Letters may lead taxpayers to overlook or misunderstand their ability to request an appeal. Without considering the impact on taxpayers, the IRS is considering expanding the use of the Combination Letter.[40] The IRS can and should address these issues by using two separate notices, the Initial Contact Letter and the 30-Day Letter, in all audits, thereby reducing taxpayer confusion and protecting taxpayer rights.

RECOMMENDATIONS

Administrative Recommendations to the IRS

The National Taxpayer Advocate recommends that the IRS:

1. Discontinue the use of Combination Letters and provide all taxpayers undergoing an examination with a separate Initial Contact Letter and 30-Day Letter, providing taxpayers with sufficient time to submit documentation and explanations before issuing the 30-Day Letter.
2. If the IRS chooses not to discontinue use of Combination Letters, it should work with the Taxpayer Advocate Service (TAS) on a joint study to track and compare Combination Letter data with Initial Contact Letter data to identify the causes of significant discrepancies between the two populations, as well as analyze potential issues and areas for improvement.
3. Refrain from expanding the use of Combination Letters until research is conducted on the impact to taxpayers and the IRS.
4. If the IRS continues to use Combination Letters, work with TAS to redesign them to clearly communicate to taxpayers:
    a. Their tax return is under examination;
    b. The possible outcomes of the audit, including what happens if the taxpayer provides documentation the IRS deems inadequate;
    c. The timeframe in which they have to request an appeal and the factors that impact this timeframe; and
    d. The steps they must take to request an appeal.
5. Revise IRS Publication 3498-A, The Examination Process (Audits by Mail), to include guidance specific to the Combination Letter.

40 IRS response to TAS information request (July 2, 2019) (W&I is considering expanding use of the Combination Letter to "[Premium Tax Credit] within project code 1300 for specific error codes" and "Unallowable Project Code 0000 with Source Code 03 (for those items that are truly unallowable by law)."

MSP #10 OFFER IN COMPROMISE: The IRS's Administration of the Offer in Compromise Program Falls Short of Congress's Expectations

RESPONSIBLE OFFICIALS

Eric Hylton, Commissioner, Small Business/Self-Employed Division
Andrew Keyso, Jr., Acting Chief, Appeals

TAXPAYER RIGHTS IMPACTED[1]

- *The Right to Be Informed*
- *The Right to Quality Service*
- *The Right to Finality*
- *The Right to a Fair and Just Tax System*

PROBLEM

Congress has granted the IRS broad authority to use offers in compromise (OICs) to accept less than the full amount due for some taxpayers. It has urged the IRS to educate the public about OICs and adopt a liberal acceptance policy to provide an incentive for taxpayers to continue to file tax returns and pay their taxes.[2] Both taxpayers and the IRS benefit when the IRS accepts an OIC; however, TAS research studies have shown that in 40 percent of returned and rejected OICs, the IRS never collects the amount offered by the taxpayer, much less the reasonable collection potential (RCP) it calculated.[3] The National Taxpayer Advocate remains concerned that the IRS's administration of the OIC program falls short of Congress's expectations because:

- The IRS oftentimes estimates a higher collection potential than the amount a taxpayer offers, but then never collects that amount, rejecting viable OICs it could accept;
- The IRS generally fails to consider the effect of bankruptcy when considering an OIC; and
- The IRS is sending more accounts to its Automated Collection System (ACS) and private collection agencies (PCAs) resulting in less communication with taxpayers about OICs.

IMPACT ON TAXPAYERS

The goal of the OIC program is to reach a compromise that is in the best interest of both the taxpayer and the IRS while achieving collection of what is potentially collectible at the earliest possible time and at the least cost to the government.[4] Therefore, the IRS's policy is to accept an OIC when it is unlikely the tax liability can be collected in full and the amount offered reasonably reflects collection potential.[5]

1 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are also codified in the Internal Revenue Code (IRC). *See* IRC § 7803(a)(3).

2 *See* IRC § 7122; H.R. Rep. No. 105-599, at 287 (1998) (Conf. Rep.); S. Rep. No. 105-174 at 88 (1998).

3 National Taxpayer Advocate 2017 Annual Report to Congress vol. 2, at 42, 60 (Research Study: *A Study of the IRS Offer in Compromise Program*).

4 Internal Revenue Manual (IRM) 1.2.1.6.17, Policy Statement 5-100, Offers Will Be Accepted (Jan. 30, 1992).

5 *Id*.

The IRS recognizes that the success of the program relies on taxpayers making adequate compromise proposals consistent with their ability to pay and on the IRS making prompt and reasonable decisions.[6] It is also the IRS's longstanding policy to educate and assist taxpayers who make a good faith effort to comply and to discuss OIC alternatives and assist taxpayers in preparing required forms when it has determined that an OIC is a viable solution to tax delinquency.[7] The IRS benefits from accepting an OIC because it immediately secures a payment and requires the taxpayer to remain in filing and payment compliance for the five-year period following acceptance.[8] The taxpayer benefits from receiving a fresh start and the finality of settling a debt that cannot be satisfied in full.[9]

The National Taxpayer Advocate remains concerned that the IRS's administration of the Offer in Compromise program falls short of Congress's expectations.

Acceptance of an OIC generally depends upon whether the amount offered reflects the taxpayer's RCP, which is calculated by evaluating a taxpayer's equity in assets and expected future income after allowing for the payment of necessary living expenses.[10] The IRS has developed national and local allowances for determining necessary living expense amounts but is required to deviate from these amounts to ensure taxpayers can still provide for their basic living expenses.[11] Accordingly, in determining a taxpayer's RCP, the IRS will consider the taxpayer's overall situation, which requires the examiner to use judgment to evaluate the facts and circumstances of each case.[12]

When calculating RCP, the IRS may also consider the effect of a bankruptcy on the collectibility of the tax debt.[13] In bankruptcy, income taxes may be discharged if certain conditions are met.[14] However, the IRS will consider the effect of filing for bankruptcy on the RCP only if the taxpayer indicates he or she may file for bankruptcy.[15]

6 IRM 1.2.1.6.17, Policy Statement 5-100, Offers Will Be Accepted (Jan. 30, 1992).

7 IRM 1.2.1.6.1, Policy Statement 5-1, Enforcement Is a Necessary Component of a Voluntary Assessment System (Aug. 18, 1994); IRM 1.2.1.6.17, Policy Statement 5-100, Offers Will Be Accepted (Jan. 30, 1992).

8 IRM 1.2.1.6.17, Policy Statement 5-100, Offers Will Be Accepted (Jan. 30, 1992).

9 While an OIC is being considered, the IRS is generally prohibited from levying against the taxpayer. IRC § 6331(k). Once the OIC is accepted and the taxpayer has paid the compromised liability amount, the IRS will release any federal tax liens. IRS, Form 656, Offer in Compromise 6 (Aug. 2019).

10 IRM 5.8.4.3(2), Doubt as to Collectibility (Jan. 18, 2018); IRM 5.8.4.3.1 Components of Collectibility (Apr. 30, 2015).

11 IRC § 7122(d)(2); IRM 5.8.5.22.1, Necessary Expenses (Oct. 22, 2010).

12 IRM 5.8.4.3(2), Doubt as to Collectibility (Jan. 18, 2018). *But see* National Taxpayer Advocate 2018 Annual Report to Congress vol. 2, at 39, 41 (Research Study: *A Study of the IRS's Use of the Allowable Living Expense Standards*) (finding IRS employees do not always exercise judgment to allow statutorily authorized deviation from the tables).

13 IRM 5.8.10.2.2, Offers in Compromise Before Bankruptcy (Feb. 14, 2017).

14 Income taxes are generally dischargeable if they become due three years before the taxpayer files for bankruptcy as long as it has been at least two years since the taxpayer filed the tax return and 240 days since the taxes were assessed. 11 U.S.C. §§ 507(a)(8)(A) and 523(a)(1)(B)(ii).

15 IRM 5.8.10.2.2, Offers in Compromise Before Bankruptcy (Feb. 14, 2017).

Reasonable Collection Potential Calculations Result in the IRS Rejecting Offers in Compromise on Accounts for Which They Then Do Not Collect the Tax or Amount Offered

TAS conducted a research study in 2017 on individual OICs processed from 2009 to 2013, which showed that:

- The IRS never collected the amount offered in 40 percent of the returned and rejected OICs;
- For rejected OICs, the IRS's calculation of an individual taxpayer's RCP was over 15 times the amount offered but over 40 times the amount actually collected; and
- Taxpayers with accepted OICs have higher rates of future filing and payment compliance.[16]

In the 2018 Annual Report to Congress, the National Taxpayer Advocate recommended that the IRS "conduct a study to analyze the OIC amount offered and collected amounts to understand why the IRS is rejecting OICs that have an offered amount greater than the dollars collected. For instance, the IRS should look at how it is applying the Allowable Living Expense (ALE) standards and where the taxpayer is obtaining the payment for the OIC."[17] The IRS agreed to conduct a study reviewing the collection results for OICs that were rejected between 2014 and 2019, but failed to review how it had calculated RCP in individual cases to understand why it was rejecting these OICs.[18] Based on the study results of amounts collected, the IRS responded to TAS that a change to the OIC program was unwarranted.[19]

In its study reviewing rejected OICs, the IRS found that in 29 percent of the lump sum payment OICs and in 34 percent of the periodic payment OICs that were not accepted, the IRS did not later collect the offered amount within 48 months of the OIC closure.[20] Similar to the 2017 TAS study results, the IRS study also shows that in a sizeable amount of cases, the IRS never collected the amount offered.[21] Furthermore, the IRS did not analyze why it is rejecting OICs that have an offered amount greater than the dollars collected. The IRS should review how it is applying ALE standards and calculating RCP to determine if these amounts are factors in rejecting potentially viable offers, consequently collecting lower amounts after the rejection. Therefore, the IRS's response to the 2018 Annual Report to Congress that a change to the OIC program is unwarranted is based on incomplete information.

This year, TAS conducted its own study to determine how the IRS was applying ALE standards and calculating RCP.[22] TAS took a statistically valid sample of individual OICs that were included in the 2017 study (250 cases) and reviewed the IRS's calculations of RCP in each case. TAS determined what financial factors were primary in the decision to reject the offer[23] and found that in 68 percent (171 of

16 National Taxpayer Advocate 2017 Annual Report to Congress vol. 2, at 42, 44, 60 (Research Study: *A Study of the IRS Offer in Compromise Program*).

17 National Taxpayer Advocate 2018 Annual Report to Congress 266, 276 (Most Serious Problem: *Offer in Compromise: Policy Changes Made by the IRS to the Offer in Compromise Program Make It More Difficult for Taxpayers to Submit Acceptable Offers*).

18 IRS, Draft Response to MSP #18 OIC (Aug. 8, 2019).

19 *Id*.

20 *See Id*. and attachment Enforcement Revenue Information System OIC – Stakeholder Analysis Brief – 20190612 – Final 7.

21 The TAS study reviewed cases four or more years after OIC closure, and the IRS study reviewed cases 48 months after closure.

22 The statistical information in this research study was not provided or reviewed by the Secretary under IRC § 6108(d). *See* IRC § 7803(c)(2)(B)(ii)(XII).

23 The TAS Data Collection Instrument for the case review considered the amount of the calculated future income potential, the calculated equity in assets, and the percentage of each attributable to the total RCP. It also considered the percentage of total asset equity attributable to retirement assets, life insurance, real property, dissipated assets, investment assets or other assets.

250) of the cases, the rejection was based solely on the calculation of future income.[24] The TAS study found that the IRS may be miscalculating taxpayers' future income potential in determining their RCP and recommends the IRS review additional cases to verify this finding.[25]

Of the 250 cases it reviewed, TAS also reviewed the status of the accounts after rejection. In 82 percent of the 250 cases TAS reviewed this year, the IRS attempted to collect the debt after rejecting the OIC by assigning the accounts to ACS or field collection.[26] As of the end of fiscal year (FY) 2019, the IRS was not able to collect even the amount offered in 65 percent of these post-OIC referrals.[27] Furthermore, as of the end of FY 2019, 50 percent of the taxpayer accounts related to these 250 OICs either remained in the Queue or Currently Not Collectible (CNC) status, or the collection statute expired.[28] This emphasizes the need for the IRS to further study why it could not collect the calculated RCP on these accounts. Rejecting viable OICs impacts a taxpayer's *right to finality, to quality service,* and *to a fair and just tax system* as well as reducing dollars collected and losing the opportunity to bring the taxpayer into compliance.

The IRS Fails to Calculate the Potential Impact of Bankruptcy in Reviewing Offers in Compromise

The IRS acknowledges that there are benefits to both the IRS and the taxpayer when accepting an OIC instead of the taxpayer filing for bankruptcy. For example:

- The IRS can negotiate for assets that may not be collectible if the taxpayer declares bankruptcy;
- The IRS may be able to collect the offer amount more quickly; and
- The taxpayer's credit will not reflect a bankruptcy, improving the taxpayer's ability to comply with future tax obligations.[29]

24 The TAS Data Collection Instrument for the case review considered the rejection based solely on the calculation of future income when there was a positive monthly ability to pay and there was either no asset equity or the total asset equity accounted for less than 25 percent of the total RCP. The margin for the 95 percent confidence interval is plus or minus 5.7 percent.

25 The 2017 study was based on OICs that were rejected or returned between 2009 and 2013, years during which the IRS took into account projected income for 48 months or longer when calculating the future income for RCP purposes. IRM 5.8.5.23, Calculation of Future Income (Oct. 22, 2010); IRM 5.8.5.6.6, Calculation of Future Income (Sept. 23, 2008). The IRS's method for calculating future income changed in 2018, and now the IRS generally bases the calculation on 12 months of future income for a lump sum cash OIC and 24 months for a periodic payment OIC. IRM 5.8.5.29, Payment Terms (Mar. 23, 2018). TAS applied the current calculation method to the reviewed cases and found that in almost 90 percent of the cases the 24-month future income calculation also exceeded the amount offered. IRS Compliance Data Warehouse (CDW), Individual Returns Transaction File (Tax Years (TYs) 2009-2013). The margin for the 95 percent confidence interval is plus or minus 4.5 percent. The collection statute could only be determined in 138 of the 171 cases. Of those 138 cases, 24 cases went to collection status code 12 due to abatement of the tax or full payment after the study. In about 90 percent of the remaining 114 cases, the 24-month future income calculation exceeded the amount offered. The margin for the 95 percent confidence interval is plus or minus 5.5 percent.

26 IRS CDW, Individual Returns Transaction File (TYs 2009-2013). For this purpose, TAS considered the IRS attempted to collect if the account went into Collection Status 22 (ACS) or 26 (Field Collection) after leaving Status 71 (OIC). The margin for the 95 percent confidence interval is plus or minus 4.7 percent.

27 *Id*. The margin for the 95 percent confidence interval is plus or minus 5.9 percent.

28 *Id*. The margin for the 95 percent confidence interval is plus or minus 6.1 percent. The Queue holds taxpayer balance due accounts awaiting assignment based on IRM 5.1.20.2, Inventory Delivery System Overview (July 8, 2019). See IRM 5.16, Currently Not Collectible (Sept. 18, 2018) for an explanation of CNC status.

29 IRM 5.8.10.2.2, Offers in Compromise Before Bankruptcy (Feb. 14, 2017).

Of the 14,420 OICs reviewed in the 2017 TAS study, 13 percent (1,922 OICs) later filed for bankruptcy.[30] For the IRS to take into account the effect of a bankruptcy on RCP only in cases where the taxpayer indicates he or she may file for bankruptcy impacts a taxpayer's *right to a fair and just tax system*. This policy also impacts the IRS's ability to collect from the taxpayer after OIC rejection and post-bankruptcy. The IRS should review rejected OICs where the taxpayer subsequently declares bankruptcy to determine if the IRS would have collected more if it had accepted the OIC in the first instance. Then, the IRS should consider whether it should change its policy to consider the effect of a potential bankruptcy filing in calculating every taxpayer's RCP.

IMPACT ON THE INTERNAL REVENUE SERVICE

The IRS could be more efficient if it accepted viable offers rather than rejecting them and later assigning them to other Collection functions such as field collection, ACS, or shelved status.[31] Despite existing resource constraints, the IRS could potentially increase dollars collected and decrease CNC and shelved inventories by educating taxpayers in these statuses about the OIC program. Encouraging these taxpayers' participation in the OIC program is consistent with both Congress's intent in creating the statute and the IRS's policy to educate and assist taxpayers with OICs.[32]

The IRS collection function consists of field and campus components, such as revenue officers (ROs) and ACS. When the IRS assigns the RO a case, he or she contacts the taxpayer and then attempts to collect the liability and financial information to determine the taxpayer's ability to pay.[33] The RO does a full analysis of the case and resolves the account before closing it. For example, the RO could place the taxpayer into CNC status, enter the taxpayer into a full-pay or partial pay installment agreement, or assist the taxpayer in completing and submitting an OIC.

In contrast, ACS, which automatically sends payment demand notices and notices of federal tax lien and levies, relies upon taxpayers to call ACS employees after receiving a balance due notice. If contacted, then ACS employees will attempt to assist the taxpayer in resolving the liability, but they have less financial analysis training than ROs and do not work with taxpayers from inception to resolution as ROs do.

In recent years the number of ROs has declined by 40 percent, which has resulted in fewer taxpayers working with one employee to resolve their tax debt.[34] Although TAS has supported increased staffing, and the IRS has begun hiring additional ROs, reaching the level of staffing necessary to handle many

30 IRS CDW, Individual Returns Transaction File (TYs 2009-2013). For purposes of determining what percentage of taxpayers later filed for bankruptcy, TAS limited its review to 14,420 rejected OICs where the IRS calculated a RCP higher than the offer amount and did not subsequently collect the amount offered.

31 The IRS uses the term "shelved" to refer to cases that are inactive and unassigned.

32 See IRM 1.2.1.6.17, Policy Statement 5-100, Offers Will Be Accepted (Jan. 30, 1992).

33 IRM 5.15.1, Financial Analysis Handbook (July 24, 2019).

34 Full-time Revenue Officers declined from 3,752 to 2,239. IRS, Small Business/Self-Employed (SB/SE) Division, Collection Activity Report NO-5000-23, Collection Workload Indicators (FYs 2009-2019).

more accounts may not be possible under the current IRS budget.[35] The IRS is assigning more cases (81 percent in FY 2019) to ACS, as accounts assigned to ROs declined to five percent in FY 2019.[36]

If ACS cannot resolve the liability, then the account is either put into CNC status or shelved. The IRS's CNC inventory has grown from approximately $61 billion in FY 2009 to approximately $144 billion in FY 2019.[37] As of the end of FY 2019, IRS shelved inventory reached 8.2 million tax modules, with 47 percent of shelved modules later sent to PCAs.[38] PCAs only have authority to request the taxpayer make a voluntary payment or enter into a full payment installment agreement without assessing a taxpayer's RCP.[39] Currently, more taxpayers' accounts are going from ACS and the Queue to shelved status now that the IRS is required by statute to assign cases to PCAs.[40] With the statutory mandate that the IRS use PCAs, the delinquent tax dollars in IRS's shelved inventory have increased approximately 244 percent.[41] Beginning in 2021, the IRS will be required to withhold certain vulnerable taxpayers' accounts from PCAs, which will likely increase shelved or CNC inventory.[42] Each year unaccepted offers contribute to that total, many with little chance of any future collection because some of these taxpayers are either considered low-income or their allowable living expenses exceed income.[43]

35 The IRS planned to hire 500 to 600 ROs and estimated that 250 ROs would depart during FY 2019. Michael Cohn, *IRS Faces Hiring Shortages Amid Workforce Attrition*, Accounting Today, June 25, 2019, https://www.accountingtoday.com/news/irs-faces-hiring-shortages-amid-workforce-attrition. In FY 2019, the total number of ROs increased by 71. IRS, SB/SE Division, Collection Activity Report NO-5000-23, Collection Workload Indicators (FY 2018-2019). See generally National Taxpayer Advocate 2018 Annual Report to Congress 240 (Most Serious Problem: *Field Collection: The IRS Has Not Appropriately Staffed and Trained Its Field Collection Function to Minimize Taxpayer Burden and Ensure Taxpayer Rights Are Protected*) (recognizing the importance of the individualized case work and geographic presence of ROs).

36 IRS, SB/SE Division, Collection Activity Report NO-5000-2, Taxpayer Delinquency Account Cumulative Report (FY 2019).

37 IRS, SB/SE Division, Collection Activity Report NO-5000-149, Recap of Accounts Currently Not Collectible (FYs 2009-2019).

38 IRS, SB/SE Division, Collection Activity Report NO-5000-149, Recap of Accounts Currently Not Collectible (FY 2019).

39 IRS Private Collection Agencies Policy and Procedures Guide, § 10, Individual and Business Payment Options (May 3, 2019). Under IRC § 6306, the IRS is required to enter into qualified collection contracts with private debt collectors to collect inactive account receivables.

40 *See* IRC § 6306. In 2015, the Fixing America's Surface Transportation Act, Pub. L. No. 114-94, § 32102, 129 Stat. 1312, 1733 (2015), mandated the IRS hire private debt collectors to collect inactive inventories. The IRS began implementing the program in April 2017. IRS Servicewide Electronic Research Program Alert #17A0120, Private Debt Collection (Apr. 4, 2017).

41 IRS SB/SE Division, Collection Activity Report NO-5000-149, Recap of Accounts Currently Not Collectible (FYs 2015-2019). Shelved inventory was $11,330,340,718 at the end of FY 2015 and $38,956,141,758 at the end of FY 2019.

42 Taxpayer First Act, Pub. L. No. 116-25, § 1205, 133 Stat. 981 (2019) (amending IRC § 6306(d)(3) to insert subparagraphs (E) and (F) as of December 31, 2020 to prohibit the IRS from sending to PCAs accounts of taxpayers whose income substantially consists of certain social security disability insurance benefits or whose adjusted gross incomes do not exceed 200 percent of the applicable poverty level).

43 The total individual OIC receipts for FY 2017, 2018, and 2019 were 141,006, representing 131,528 unique taxpayers. Of those who filed a tax return prior to OIC submission, over 15 percent (20,284) are now in CNC or shelved status (59 percent of these had income below 250 percent of poverty level and 56 percent had projected allowable living expenses greater than income). IRS CDW, Individual Returns Transaction File (TYs 2017-2019). Allowable expenses include transportation expenses, which may consist of ownership expenses (loan or lease payments) and operating expenses (maintenance, repairs, insurance, fuel, registrations, licenses, inspections, parking, and tolls). Unless otherwise indicated, in calculating taxpayers' ALEs, TAS allowed operating expenses (two allowances in the case of joint filers and one allowance for all other taxpayers), and all taxpayers were allowed one vehicle ownership expense. TAS used the ALE housing and utility standards published by SB/SE, but some five-digit zip codes may match to more than one county. Note: "A tax return prior to OIC submission" means a tax return was filed for the tax year preceding the fiscal year (*e.g.*, for an offer submitted in FY 2017, TAS reviewed the tax year 2016 return) and some taxpayers may be counted in more than one fiscal year if they submitted offers in more than one fiscal year.

The IRS Could Affirmatively Identify Cases and Increase Collection Revenues With Targeted Outreach About the Offer in Compromise Program

Despite the fact that the IRS may be rejecting some viable OICs, the OIC program is generally an effective vehicle for collecting revenues and bringing taxpayers into compliance. In FY 2019, the IRS collected approximately 12.5 percent of the total liability on each accepted OIC through the OIC program.[44] The IRS has also been successful at collecting revenue through collection notices, which made up approximately 51 percent of total enforcement revenues in FY 2018.[45] To meet Congress's intent and its own goals of achieving long-term compliance and educating and assisting taxpayers,[46] the IRS should be actively identifying cases that are suitable for the OIC program. Before shelving cases or assigning cases to PCAs, the IRS could be contacting this group of taxpayers with targeted notices about the benefits of the OIC program. This could potentially increase compliance and revenues with little effort while giving taxpayers finality in settling their tax debt. Active outreach may increase collection and compliance, and protect taxpayers' *rights to finality, to be informed, to quality service,* and *to a fair and just tax system*.

CONCLUSION

When the IRS rejects an OIC because it overstates RCP, fails to account for its future collection inactivity, or declines to consider the effect of filing bankruptcy in calculating the taxpayer's RCP, it is harmful to both the IRS and the taxpayer. The IRS does not immediately collect on the liability and instead will have to decide whether to expend additional resources to pursue enforced collection. Moreover, taxpayers whose OICs are accepted have a higher tendency to maintain filing and payment compliance for the five-year period following acceptance, which benefits both taxpayers and the IRS.[47] Overstating RCP is not reasonable or consistent with the IRS's current policy in accepting OICs where the amount offered reasonably reflects collection potential.[48] Rejecting otherwise viable OICs and missed opportunities to educate taxpayers on the program infringes on taxpayers' *rights to be informed, to quality service, to finality,* and *to a fair and just tax system* and may also result in loss of confidence in the program and its ultimate success.

44 IRS, SB/SE Division, Collection Activity Report NO-5000-108, Monthly Report of Offer in Compromise Activity (FY 2019). Contrast this to the 1.34 percent collection rate of the private debt collection (PDC) program from inception through FY 2018. PDC Program Scorecard for FY 2019.

45 Treasury Inspector General for Tax Administration, Ref. No. 2019-30-063, *Trends in Compliance Activities Through Fiscal Year 2018* 7 (Sept. 9, 2019).

46 *See* IRM 1.2.1.6.17, Policy Statement 5-100, Offers Will Be Accepted (Jan. 30, 1992) (stating that in cases were an OIC appears to be a viable solution to a delinquency, the employee assigned to the case will discuss the OIC alternative with the taxpayer, and when necessary, assist in preparing the required forms); IRM 1.2.1.6.1, Policy Statement 5-1, Enforcement Is a Necessary Component of a Voluntary Assessment System (Aug. 18, 1994) (recognizing long-term voluntary compliance as an IRS goal).

47 *See* National Taxpayer Advocate 2018 Annual Report to Congress, vol. 2, at 131, 137 (Research Study: *A Study of the IRS Offer in Compromise Program for Business Taxpayers*) (finding that 70 percent of individual taxpayers remained in filing compliance and 72 percent had no balance due, as opposed to 66 percent and 52 percent, respectively, for individual taxpayers whose OICs were rejected).

48 *See* IRM 1.2.1.6.17, Policy Statement 5-100, Offers Will Be Accepted (Jan. 30, 1992).

RECOMMENDATIONS

Administrative Recommendations to the IRS

The National Taxpayer Advocate recommends that the IRS:

1. Conduct a follow-up study evaluating a statistically-valid sample of rejected OICs to determine the accuracy of future income calculations and why the IRS is not collecting the RCP.
2. Review rejected OICs where taxpayers later declared bankruptcy and determine whether the policy should be revised to consider the effect of a potential bankruptcy on the RCP on all OICs rather than only those where the taxpayer threatens bankruptcy.
3. Work with the National Taxpayer Advocate to develop a pilot program where the IRS sends informative, educational letters about the OIC program to taxpayers in CNC or shelved status.

STATUS UPDATE

PRIVATE DEBT COLLECTION: Forthcoming Changes to the Private Debt Collection Program Will Better Protect Low-Income Taxpayers and Achieve a Program That More Appropriately Respects Taxpayer Rights

RESPONSIBLE OFFICIAL

Eric Hylton, Commissioner, Small Business/Self-Employed Division

TAXPAYER RIGHTS IMPACTED[1]

- *The Right to Be Informed*
- *The Right to Quality Service*
- *The Right to Pay No More Than the Correct Amount of Tax*
- *The Right to Challenge the IRS's Position and Be Heard*
- *The Right to Finality*
- *The Right to Privacy*
- *The Right to Confidentiality*
- *The Right to a Fair and Just Tax System*

PROBLEM

After the passage of the Fixing America's Surface Transportation Act (FAST Act) in 2015, the IRS implemented the Private Debt Collection (PDC) program, and in April 2017, it began assigning accounts to private collection agencies (PCAs).[2] Recently Congress modified the program to better protect taxpayer rights by excluding the accounts of certain low-income taxpayers from assignment to PCAs beginning January 1, 2021.[3] As the IRS implements these changes and the program continues to evolve, the IRS should consider the following issues:

- Accounts of taxpayers who are likely experiencing economic hardship that were assigned to PCAs prior to January 1, 2021 will continue to reside in PCA inventory;
- Complex Business Master File (BMF) accounts assigned to PCAs may prove to be more difficult to resolve;
- Accounts may reside in PCA inventory indefinitely, even though there has been no progress toward resolution; and

1 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are also codified in the Internal Revenue Code (IRC). *See* IRC § 7803(a)(3).

2 *See* FAST Act, Pub. L. No. 114-94, Div. C, Title XXXII, § 32102, 129 Stat. 1312, 1733-1736 (2015) (adding subsections (c) and (h) to IRC § 6306).

3 Taxpayer First Act, Pub. L. No. 116-25, § 1205, 133 Stat. 981 (2019). Congress amended IRC § 6306 to exclude accounts from assignment to PCAs where the taxpayer's gross income is at or below 200 percent of the federal poverty level, or where the taxpayer receives Supplemental Security Income (SSI) or Social Security Disability Insurance (SSDI), beginning January 1, 2021.

- Authorization to PCAs to arrange installment payments through direct debit may result in scammers impersonating PCAs.

IMPACT ON TAXPAYERS

Background

Since its inception in April 2017 through September 30, 2019, the IRS has assigned $22,592,758,797 in delinquent tax debt (2,441,382 accounts) to the PCAs.[4] The PCAs have collected $301,771,103 (or just over one percent) of the dollars assigned, and when accounting for the cost of the program, it has begun to generate modest revenue, about $170,029,949 (as of September 30, 2019).[5]

Accounts of Taxpayers Who Are Likely Experiencing Economic Hardship That Were Assigned to Private Collection Agencies Prior to January 1, 2021, Will Continue to Reside in the Inventory

On July 1, 2019, the president signed into law the Taxpayer First Act, which contains two significant changes to the administration of the IRS's PDC program.[6] Effective after December 31, 2020, the following types of tax receivables are no longer eligible for collection by PCAs:

- Where substantially all of a taxpayer's income is attributable to Social Security Disability Insurance (SSDI) benefits or Supplemental Security Income (SSI); or
- Where a taxpayer's adjusted gross income (AGI) is at or below 200 percent of the Federal Poverty Level (FPL) based on the most recent taxable year for which such information is available.

Since nearly the inception of the PDC program, TAS has made similar recommendations and believes these changes will result in a program that strikes a better balance between collecting outstanding tax debts and protecting taxpayer rights.[7]

However, the accounts of taxpayers who fall into one of these categories but were assigned to a PCA prior to January 1, 2021, will remain in PCA inventory beyond that date. As of September 12, 2019, there were an estimated 1,162,606 accounts in PCA inventory of individual master file (IMF) taxpayers whose AGI was at or below 200 percent FPL, and an estimated 105,587 accounts of IMF taxpayers who

4 IRS, PDC Program Scorecard for fiscal year (FY) 2019.

5 *Id*.

6 Taxpayer First Act, Pub. L. No. 116-25, § 1205, 133 Stat. 981 (2019).

7 National Taxpayer Advocate Fiscal Year 2020 Objectives Report to Congress 72 (Area of Focus: *TAS Will Continue to Advocate for Vulnerable Taxpayers Whose Cases Are Assigned to Private Debt Collection Agencies (PCAs) and for a Reduction of Inactive PCA Inventory*); National Taxpayer Advocate 2018 Annual Report to Congress 277, 288 (Most Serious Problem: *Private Debt Collection: The IRS's Expanding Private Debt Collection Program Continues to Burden Taxpayers Who Are Likely Experiencing Economic Hardship While Inactive Private Collection Agency Inventory Accumulates*); National Taxpayer Advocate 2019 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration* 52, 53 (*Amend IRC § 6306(D) To Exclude The Debts of Taxpayers Whose Incomes Are Less Than Their Allowable Living Expenses From Assignment to Private Collection Agencies or, If That Is Not Feasible, Exclude the Debts of Taxpayers Whose Incomes Are Less Than 250 Percent of the Federal Poverty Level*); National Taxpayer Advocate 2017 Annual Report to Congress 10, 17 (Most Serious Problem: *Private Debt Collection: The IRS's Private Debt Collection Program Is Not Generating Net Revenues, Appears to Have Been Implemented Inconsistently with the Law, and Burdens Taxpayers Experiencing Economic Hardship*). TAS Research found that 99 percent of the 278,548 taxpayers whose AGI was at or below 200 percent of the FPL had income at or below their allowable living expenses (ALEs), meaning that paying on an outstanding tax liability likely would result in them not being able to pay other necessary living expenses. National Taxpayer Advocate Fiscal Year 2020 Objectives Report to Congress 72, 75 (Area of Focus: *TAS Will Continue to Advocate for Vulnerable Taxpayers Whose Cases Are Assigned to Private Debt Collection Agencies (PCAs) and for a Reduction of Inactive PCA Inventory*).

received SSDI.[8] However, the IRS applied a different calculation than TAS to determine the number of taxpayers who had AGI at or below 200 percent FPL, which identified 783,046 IMF accounts.[9] The IRS's calculation retains about 379,000 IMF accounts in PCA inventory where the taxpayer, based on the most recent income data available to the IRS, likely has AGI at or below 200 percent FPL. These numbers will likely grow, as the IRS plans to continue to assign accounts that fall into these categories until the January 1, 2021, effective date. Congress carved out these vulnerable taxpayers out of concern that they might make payments on their tax debts when contacted by a PCA, even though doing so may impact their ability to pay other necessary living expenses and place them in an economic hardship situation.[10] The National Taxpayer Advocate believes it is prudent to cease assignment of these cases immediately and recall these cases that have already been assigned to PCA inventory.

Complex Business Master File Accounts Assigned to Private Collection Agencies May Be More Difficult to Resolve

In August 2019, the IRS began assigning BMF accounts to PCAs. Although a majority of the BMF accounts have balances below $50,000, these accounts can have liabilities as large as $500,000.[11] Generally, these accounts are older than individual accounts assigned to PCAs, because most BMF work takes longer to reach shelved status – the status from which the IRS selects cases for assignment to PCAs.[12] These factors may make BMF accounts even more difficult for PCAs to collect on than individual accounts.

Additionally, about 13 percent of the BMF accounts are employment tax modules.[13] This means that the business entity is liable for a failure to remit employment taxes, and the responsible individual(s) may have been assessed a trust fund recovery penalty (TFRP).[14] These are two separate liabilities, and payment on one will reduce the other (*i.e.,* the liabilities mirror one another). It is possible that the assignment of BMF cases to the PCAs could include a business entity's employment tax liability, while an individual's TFRP for the failure to remit employment taxes could reside in IRS inventory. Having these liabilities split between the IRS and a PCA increases the prospect of confusion for the taxpayer, particularly where the individual who is responsible for remitting employment taxes (*i.e.,* the individual who has been assessed a TFRP) is also the owner or has partial ownership of the business. Therefore,

8 To identify taxpayers whose income fell within this range, TAS Research used AGI from the most recent return on file from the past two years (*i.e.* TY 2017 or TY 2018). When there was either no return on file, or the most recent return on file fell outside the past two-year timeframe, TAS Research used third-party income information reported to the IRS to determine a taxpayer's gross income.

9 The IRS's calculation always used the most recent return on file to determine a taxpayer's AGI, and never consulted more recent third-party income data, even if the return was filed several years ago. IRS response to TAS fact check (Nov. 21, 2019).

10 165 Cong. Rec. E865-01 (daily ed. June 28, 2019); 165 Cong. Rec. H4352-04 (daily ed. June 10, 2019); 164 Cong. Rec. H10402-01 (daily ed. Dec. 20, 2018) ("For these reasons, I am especially proud of our work to prevent private debt collectors from excessively targeting low-income taxpayers. As a result, our bill will ease the burden on those who are already struggling to keep a roof over their head and food on the table.") (statement of Rep. John R. Lewis).

11 IRS response to TAS information request (July 8, 2019). The maximum liability of the available BMF inventory is $500K, with 94% having a balance less than $50,000.

12 Shelved inventory consists of accounts that are not being worked due to resource limitations. *See* National Taxpayer Advocate 2013 Annual Report to Congress 124, 124 n.4 (Most Serious Problem: *Collection Strategy: The Automated Collection System's Case Selection and Processes Result in Low Collection Yields and Poor Case Resolution, Thereby Harming Taxpayers*).

13 IRS response to TAS fact check (Nov. 21, 2019).

14 IRC § 6672; Treas. Reg. § 301.6672-1. When a business fails to withhold and remit income tax, Social Security tax, or Railroad Retirement tax for their employees, the individual in the business who is responsible for taking these actions may be assessed a penalty equal to the amount of the trust fund tax (*i.e.*, the amount of income tax, Social Security tax, or Railroad Retirement tax that was required to be withheld from employees' checks).

the IRS should refrain from assigning BMF employment tax accounts to PCAs when a corresponding account with a trust fund recovery penalty resides with the IRS.

Accounts May Reside in Private Collection Agency Inventory Indefinitely, Even Though There Has Been No Progress Toward Resolution

Since the inception of the PDC program through September 12, 2019, the IRS has placed 2,311,295 accounts with PCAs. Out of these accounts, 80 percent of the IMF taxpayer accounts have been in PCA inventory three months or more, yet the PCA has not received any payments on the accounts and has not organized any installment agreements.[15] In fact, these accounts have been in PCA inventory on average about 11 months with no resolution on the account.[16]

PCAs have the discretion to return accounts to the IRS that they have deemed unproductive, but there are no time constraints as to how long a PCA can retain unproductive accounts in inventory.[17] Since the inception of the program through June 13, 2019, PCAs only returned 19,874 accounts out of the 1,927,814 accounts assigned to the PCAs (or just over one percent) that were deemed "unproductive."[18]

Allowing inventory to reside with PCAs for an unlimited amount of time is a significant change from how the IRS administered the prior PDC program when it required PCAs to return accounts that had not been paid or converted to a satisfactory payment plan within 12 months from the date the IRS referred them to the PCA.[19] The current PDC program's omission of a time restriction for how long the PCAs can retain accounts without any resolution allows PCAs to hold accounts in perpetuity in the hopes that they will eventually be successful in contacting the taxpayer and collecting the debt. This essentially converts PCA inventory into another IRS queue, where accounts sit without steps toward resolution.[20] To prevent this conversion, the IRS should reinstate the requirement that PCAs return to the IRS accounts where a satisfactory payment plan or full payment has not been established within 12 months from the date the account was assigned to the PCA.

15 IRS response to TAS fact check (Nov. 21, 2019).

16 *Id.*

17 PCAs conduct operations in compliance with the most current version of the Private Collection Agency Policy and Procedures Guide (PPG). References to the PPG are to the March 8, 2019 version unless stated otherwise. PPG § 102, "… there will be times that the PCA, after having exhausted all reasonable efforts to work the case, determines it can do nothing further (*e.g.*, cannot locate the taxpayer, the PCA is unable to collect) and desires to return the case."

18 IRS response to TAS information request (July 8, 2019). The total number of accounts is taken through June 13, 2019, and the number of accounts returned as deemed "unproductive" was taken through May 16, 2019, so there could be a slight variation in the percentage since these numbers were not extracted at the same time.

19 PPG § 14.2 (Jan. 1, 2007).

20 The Queue is a holding inventory where collection cases sit, usually after being in Automated Collection System (ACS), and before being assigned to the Collection Field function (CFf) or reassignment to ACS. Cases sit in the Queue based on business rules and available resources. *See* National Taxpayer Advocate 2013 Annual Report to Congress 124, 124 n.4 (Most Serious Problem: *Collection Strategy: The Automated Collection System's Case Selection and Processes Result in Low Collection Yields and Poor Case Resolution, Thereby Harming Taxpayers*).

Authorizing Private Collection Agencies to Arrange Installment Payments Through Direct Debit May Result in Scammers Impersonating PCAs

Beginning October 8, 2019, taxpayers can choose the option of a preauthorized direct debit to make one payment or a series of payments toward their federal tax debt. With direct debit, the taxpayer signs an authorization form giving permission to the PCA to authorize a payment on the taxpayer's behalf to the U.S. Department of Treasury. Although this is a convenient option for taxpayers to pay their outstanding tax liabilities, it comes with some risk, which has caused the Federal Trade Commission (FTC) to prohibit telemarketers from exercising this payment option in other circumstances.[21] As the public becomes aware that PCAs are offering a direct debit payment option for outstanding tax liabilities, PCA impersonators may exploit this option as a way to secure taxpayers' personal bank information to use for malicious purposes.

This is a significant departure from how the IRS administered this PDC program up until this point and the prior program. Previously, the IRS was always able to tell taxpayers that PCAs would never ask for their personal financial information to coordinate a payment to the IRS on an outstanding tax liability. Now this message is more convoluted, making it increasingly difficult for taxpayers to distinguish between a legitimate PCA employee attempting to collect on an outstanding tax liability and an imposter trying to secure personal financial information. In order to minimize this confusion and ensure that taxpayers have the necessary information to distinguish between a genuine PCA assistor and an impostor, the IRS should conduct a public outreach campaign informing taxpayers that PCAs will require a signed authorization form prior to accepting direct debit payments.

CONCLUSION

By preventing the IRS from assigning some accounts to PCAs, the Taxpayer First Act makes an important and significant step toward protecting taxpayers who are likely experiencing economic hardship. The IRS should aim to swiftly implement the changes in the Taxpayer First Act. Moving forward, the IRS should carefully monitor PCAs' success at collecting on older and often more complex accounts such as BMF accounts, and the length of time these accounts reside in PCA inventory without resolution. Finally, providing more convenient payment options to taxpayers comes with the risk of providing PCA impostors an avenue by which they can obtain taxpayers' financial information and the IRS needs to warn taxpayers of this potential scam. TAS will continue to monitor the IRS's PDC program, particularly that the exclusions set out in the Taxpayer First Act are implemented in a manner that best protects taxpayer rights and minimizes harm to taxpayers who are financially distressed.

21 See C.F.R. 310.4(a)(9); Jon Sheldon, *FTC Bans Telechecks, Other Abusive Payments in Telephone Sales*, NCLC (June 10, 2016), https://library.nclc.org/ftc-bans-telechecks-other-abusive-payments-telephone-sales-0; FTC, *FTC Amends Telemarketing Rule to Ban Payment Methods Used by Scammers* (Nov. 18, 2015) https://www.ftc.gov/news-events/press-releases/2015/11/ftc-amends-telemarketing-rule-ban-payment-methods-used-scammers ("… the Federal Trade Commission has approved final amendments to its Telemarketing Sales Rule (TSR), including a change that will help protect consumers from fraud by prohibiting four discrete types of payment methods favored by con artists and scammers.").

RECOMMENDATIONS

Administrative Recommendations to the IRS

The National Taxpayer Advocate recommends that the IRS:

1. Begin immediately excluding from PCA inventory, accounts of taxpayers who have AGI at or below 200 percent of the FPL, or receive SSI or SSDI, and recall from PCAs cases that currently reside in their inventory and fall into one of these two categories.
2. Not assign a BMF employment tax account to a PCA if a corresponding account with a trust fund recovery penalty resides with the IRS.
3. Reinstate the requirement from the IRS's first PDC program requiring PCAs to return accounts to the IRS when a satisfactory payment plan or full payment has not been established within 12 months from the date the account was assigned to the PCA.
4. Conduct a public outreach campaign informing taxpayers that PCAs will require a signed authorization form prior to accepting direct debit payments.

STATUS UPDATE AUTOMATED SUBSTITUTE FOR RETURN: The IRS Has Revised the Selection Criteria for Its Reinstated Automated Substitute for Return Program, But Some Concerns Remain Unaddressed

RESPONSIBLE OFFICIAL

Ken Corbin, Commissioner, Wage and Investment Division

TAXPAYER RIGHTS IMPACTED[1]

- *The Right to Be Informed*
- *The Right to Pay No More Than the Correct Amount of Tax*
- *The Right to Challenge the IRS's Position and Be Heard*
- *The Right to a Fair and Just Tax System*

PROBLEM

The Automated Substitute for Return (ASFR) program assists the IRS in enforcing filing compliance for taxpayers who have not filed individual income tax returns but appear to owe a tax liability.[2] In the National Taxpayer Advocate's 2015 Annual Report to Congress, TAS identified the administration of the ASFR program as one of the most serious problems encountered by taxpayers in their dealings with the IRS.[3]

Specifically, we noted that the ASFR program yielded a poor return on investment, as the IRS collected less than one-third of the amount assessed, and it abated 29 percent of all ASFR assessments.[4] TAS found that the criteria used to select cases for the ASFR program and determine liabilities were deficient, imposing undue burden on taxpayers and creating rework for the IRS.

Citing resource constraints, the IRS temporarily suspended the ASFR program in the fall of 2015.[5] The IRS resumed selecting cases for the ASFR program on May 21, 2019, and selected 380,348 cases to work in fiscal year (FY) 2019.[6] For FY 2019, the IRS had just over 100 full-time equivalent employees assigned to the ASFR program.[7]

1 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are also codified in the Internal Revenue Code (IRC). *See* IRC § 7803(a)(3).

2 *See* Internal Revenue Manual (IRM) 5.18.1.2, Automated Substitute for Return (ASFR) Program Overview (Apr. 6, 2016).

3 *See* National Taxpayer Advocate 2015 Annual Report to Congress 188-195 (Most Serious Problem: *Automated Substitute for Return (ASFR) Program: Current Selection Criteria for Cases in the ASFR Program Create Rework and Impose Undue Taxpayer Burden*).

4 *Id*. at 189.

5 The IRS halted new inventory into the ASFR program from September 15, 2015, to May 10, 2016, and again from November 8, 2016, to October 24, 2017. *See* IRS email to TAS (Mar. 6, 2019).

6 IRS responses to TAS information requests (July 3, 2019 and Oct. 30, 2019).

7 IRS response to TAS fact check (Nov. 22, 2019).

Upon reinstatement of the ASFR program in 2019, TAS found that the IRS:

- Adopted TAS's recommendation to consider third-party information that supports exemptions and deductions before selecting cases for the ASFR program;
- Adopted TAS's recommendation to adjust the ASFR selection process by implementing modeling that takes into consideration taxpayers' prior filing history; and
- Declined to adopt TAS's recommendation to improve the accuracy of ASFR abatement reason codes.

IMPACT ON TAXPAYERS

Background

If a taxpayer with a filing requirement fails to file a tax return, the IRS is authorized to use third-party information to determine and assess a tax liability.[8] In such situations, the IRS may prepare a Substitute for Return and assess the liability based on information reporting documents (such as Forms W-2 and 1099) filed by employers, banks, and other third parties.[9]

The ASFR program uses an algorithm that makes assumptions designed to maximize a taxpayer's liability. It assumes that the taxpayer is single (or married filing separately where there is evidence the taxpayer is married) and has no dependents, and allows one exemption and only the standard deduction, even where the IRS possesses third-party documentation that shows the taxpayer has allowable deductions that exceed the standard deduction amount.[10] As a result, the ASFR program often computes a liability that exceeds what the taxpayer owes because it fails to take into account the taxpayer's actual filing status, dependency exemptions, and deductions.

Beginning with the 2018 tax year, the Tax Cuts and Jobs Act (TCJA) increased the standard deduction substantially.[11] In addition, personal and dependency deductions have been suspended for tax years 2018 to 2025.[12] It is unclear what impact these changes will have on how the IRS selects cases for its ASFR program and how frequently the IRS will need to abate ASFR assessments.

8 IRC § 6020(b).

9 IRM 5.18.1.2, Automated Substitute for Return (ASFR) Program Overview (Apr. 6, 2016). To meet ASFR processing criteria, the proposed tax liability must meet or exceed a predetermined dollar threshold established by the IRS for the ASFR program.

10 IRM 5.18.1.3.6, Taxpayer Delinquency Investigation (TDI) Supplement Information (Apr. 6, 2016); IRM 5.18.1.6.2, Computing Taxable Income (Oct. 1, 2005); IRM 5.18.1.6.3, Computing Tax Due, Penalties and Interest (Apr. 6, 2016). ASFR programming determines the filing status, taxable income, tax, interest, and penalties "systemically" (*i.e.*, without employee review).

11 Tax Cut and Jobs Act (TCJA) increased the standard deduction from $6,500 to $12,000 for individual filers, from $13,000 to $24,000 for joint returns, and from $9,550 to $18,000 for heads of household in 2018. As before, the amounts are indexed annually for inflation. TCJA, Pub. L. No. 115-97, 131 Stat. 2054 (2017).

12 *See* IRC § 151(d)(5).

The IRS Has Agreed to Consider Third-Party Information When Selecting Cases for the Automated Substitute for Return Program

In its 2015 Annual Report to Congress, TAS noted that the ASFR program's rate of abatement was significant.[13] For FYs 2011 to 2014, the IRS abated 29 percent of the amount assessed by the ASFR program.[14]

As we noted in 2015, the high abatement rate is attributable, at least in part, to assumptions built into the ASFR program's algorithm that generally overstate a taxpayer's tax liability. For example, the IRS already possesses third-party documentation regarding the mortgage interest deduction and many other itemized deductions. The IRS may also receive documentation regarding state tax payments. These items can have a significant impact on the taxpayer's liability, yet the IRS to date has failed to take them into account.

In TAS's 2015 annual report, for example, we published an analysis of ASFR assessments issued to taxpayers who had received a Form 1098, Mortgage Interest Statement. TAS found that more than 60 percent of ASFR accounts with a Form 1098 showed mortgage interest expense amounts higher than the applicable standard deduction (indicating these taxpayers would generally itemize), yet the IRS calculated the assessment based on the standard deduction.[15]

To address this problem, TAS recommended that the IRS develop a selection algorithm that incorporates mortgage interest paid and education expenses.[16] The IRS recently informed TAS that its Strategic Analysis and Modeling (SAM) group has revised its modeling to include third-party information for ASFR case selection and will test the model to select cases from tax year 2017.[17]

The IRS Has Adjusted the Automated Substitute for Return Selection Process by Implementing Modeling That Takes Into Consideration Taxpayers' Prior Filing Information

The use of taxpayers' historical data in the selection algorithm may also improve the accuracy of the ASFR selection process. For example, the IRS may have data from prior-year returns regarding the taxpayer's filing status or the number of exemptions for dependents claimed. The IRS states that the revised modeling by its SAM group for 2019 does take into consideration taxpayers' prior filing information.[18]

The IRS's decision to consider taxpayers' prior filing status history, in addition to third-party documentation that support deductions, should improve the accuracy of ASFR determinations and thereby reduce taxpayer burden and IRS rework.

13 National Taxpayer Advocate 2015 Annual Report to Congress 188-195 (Most Serious Problem: *Automated Substitute for Return (ASFR) Program: Current Selection Criteria for Cases in the ASFR Program Create Rework and Impose Undue Taxpayer Burden*).

14 *Id.* at 189.

15 *Id.* at 192-193.

16 *Id.* at 194-195.

17 IRS response to TAS information request (July 3, 2019).

18 *Id.*

IMPACT ON THE INTERNAL REVENUE SERVICE

Use of Third-Party Documentation Will Save the IRS Time and Resources

When the IRS conducts an ASFR assessment that later results in an abatement, it is inefficiently using its resources. In many instances, the IRS allows an abatement of tax after the taxpayer submits documentation (to which the IRS already has access) to substantiate allowable deductions. Thus, by making use of third-party documentation, the IRS would save time and resources.

The IRS Should Refine Automated Substitute for Return Abatement Reason Codes

When the IRS abates an ASFR assessment, it records the reason for abatement. In TAS's 2015 Annual Report to Congress, we noted that that reason codes used were so vague and nondescript that they often provided little information as to why the liability was abated.[19] For example, the most commonly entered reason code was "reconsideration allowed in full." Another common reason code was the application of itemized deductions, without specifying the particular itemized deduction.

TAS recommended that the IRS refine the ASFR abatement reason codes, making them specific enough to provide useful information to the IRS.[20] For example, it would be extremely helpful to know whether mortgage interest is the largest driver of abatement. By continuing to use the broad reason code "itemized deductions," the IRS will not obtain the specific information it needs to improve its algorithm.

The IRS considered this recommendation but declined to create new reason codes for abatement. The IRS responded that it determined the existing reason codes are sufficient, and it will rely on ASFR employees to use their judgment to select the appropriate reason code based on the circumstances.[21]

CONCLUSION

After suspending the ASFR program for nearly four years, the IRS reinstated the ASFR program in 2019, with two significant changes in how it selects cases. It has adopted our recommendation to consider third-party documentation and the prior filing history of taxpayers when determining which cases to select for the ASFR program. By including this information in the selection algorithm, the IRS will minimize the number of abatements, reducing both IRS rework and taxpayer burden.

To date, however, the IRS has declined to refine the ASFR reason abatement codes, making it difficult to pinpoint which business rules are most responsible for the program's inaccurate results. Without more knowledge about the source of the inaccurate results, the ASFR program will continue to impose undue burden on taxpayers and require the IRS to expend its limited resources to correct errors and abate tax.

TAS will continue to review the operation and effectiveness of the ASFR program as more data becomes available regarding assessments, abatement, and collection.

19 See National Taxpayer Advocate 2015 Annual Report to Congress 193 (Most Serious Problem: *Automated Substitute for Return (ASFR) Program: Current Selection Criteria for Cases in the ASFR Program Create Rework and Impose Undue Taxpayer Burden*).

20 See *id*. at 195.

21 IRS response to TAS information request (July 3, 2019).

RECOMMENDATION

Administrative Recommendation to the IRS

The National Taxpayer Advocate reiterates her recommendation that the IRS:

1. Refine ASFR abatement reason codes, making them specific enough to identify which factors contributed to the abatement.

MOST LITIGATED ISSUES: Introduction

Internal Revenue Code (IRC) § 7803(c)(2)(B)(ii)(XI) requires the National Taxpayer Advocate to identify in her Annual Report to Congress the ten tax issues most litigated in federal courts (Most Litigated Issues).[1] The National Taxpayer Advocate may analyze these issues to develop legislative recommendations to mitigate the disputes resulting in litigation.

TAS identified the Most Litigated Issues from June 1, 2018, through May 31, 2019, by using commercial legal research databases. For purposes of this section of the Annual Report, the term "litigated" means cases in which the court issued an opinion.[2] This year's Most Litigated Issues are, in order from most to least cases:

1. Trade or Business Expenses (IRC § 162(a) and related Code sections);
2. Collection Due Process (CDP) hearings (IRC §§ 6320 and 6330);
3. Accuracy-Related Penalty (IRC § 6662(b)(1) and (2));[3]
4. Gross Income (IRC § 61 and related Code sections);
5. Summons Enforcement (IRC §§ 7602(a), 7604(a), and 7609(a));
6. Civil Actions to Enforce Federal Tax Liens or to Subject Property to Payment of Tax (IRC § 7403);
7. Failure to File Penalty (IRC § 6651(a)(1)), Failure to Pay Penalty (IRC § 6651(a)(2)), and Failure to Pay Estimated Tax Penalty (IRC § 6654);
8. Schedule A Deductions (IRC §§ 211-224);
9. Charitable Contribution Deductions (IRC § 170); and
10. Frivolous Issues Penalty (IRC § 6673 and related appellate-level sanctions).

Overall, the total number of cases identified in the Most Litigated Issues section decreased again this year, from 623 in 2018 to 524 this year, a 16 percent decrease from last year.[4] Seven of the ten categories decreased in number of cases litigated this year. Accuracy-related penalties saw the greatest decrease since last year, dropping from 120 cases to 79 cases we identified this year (a 34 percent decrease). CDP, Liens, and Schedule A cases saw increases, with Schedule A seeing the biggest proportional increase from 23 to 32 cases (39 percent), and the Liens category seeing the biggest increase in cases, from 39 cases in 2018 to 52 cases this year (33 percent increase). Overall, taxpayers prevailed in full or in part in 86 cases (about 16 percent), a slight decrease from last year.

1 Federal tax cases are tried in the United States Tax Court, United States District Courts, the United States Court of Federal Claims, United States Bankruptcy Courts, United States Courts of Appeals, and the United States Supreme Court.

2 Many cases are resolved before the court issues an opinion. Some taxpayers reach a settlement with the IRS before trial, while the courts dismiss other taxpayers' cases for a variety of reasons, including lack of jurisdiction and lack of prosecution. Courts can issue less formal "bench opinions," which are not published or precedential.

3 IRC § 6662 also includes (b)(3), (b)(4), (5), (6), (7), and (8), but because those types of accuracy-related penalties were not heavily litigated, we have only analyzed (b)(1), and (2).

4 *See* National Taxpayer Advocate 2018 Annual Report to Congress 426. This decline may be attributed to the general decline in tax litigation in recent years. *See, e.g.*, David McAffee, Tax Court: *Tax Court Caseload Drops as Enforcement Lags: Former Chief Judge* 142 DTR 8 (July 24, 2018) (former Chief Judge L. Paige Marvel noted that the Tax Court's inventory is dropping, due in part to lax enforcement).

TAS analyzed each of the Most Litigated Issues, specifically a summary of findings, taxpayer rights impacted, description of present law, analysis of the litigated cases, and conclusion.[5] Each case is listed in Appendix 5, which categorizes the cases by type of taxpayer (*e.g.*, individual or business).[6] Appendix 5 also provides the citation for each case, indicates whether the taxpayer was represented at trial or argued the case *pro se*, and lists the court's decision.[7]

We have also included a "Significant Cases" section summarizing decisions that are not among the top ten issues but are relevant to tax administration. In this section, we generally used the same reporting period, beginning on June 1, 2018, and ending on May 31, 2019, that we used for the ten Most Litigated Issues; however, we also included one significant case decided outside of the reporting period.

AN OVERVIEW OF HOW TAX ISSUES ARE LITIGATED

Taxpayers can generally litigate a tax matter in four different types of courts:

- U.S. Tax Court;
- U.S. District Courts;
- U.S. Court of Federal Claims; and
- U.S. Bankruptcy Courts.

With limited exceptions, taxpayers have an automatic right of appeal from the decisions of any of these courts.[8]

The Tax Court is a "prepayment" forum. In other words, taxpayers can access the Tax Court without having to pay the disputed tax in advance. The Tax Court has jurisdiction over a variety of issues, including deficiencies, certain declaratory judgment actions, appeals from CDP hearings, relief from joint and several liability, and determination of employment status.[9]

The U.S. District Courts and the U.S. Court of Federal Claims have concurrent jurisdiction over tax matters in which (1) the tax has been assessed and paid in full[10] and (2) the taxpayer has filed an

5 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR that was proposed by the National Taxpayer Advocate and adopted by the IRS are now codified in the IRC. *See* IRC § 7803(a)(3).

6 Individuals filing Schedules C, E, or F are deemed business taxpayers for purposes of this discussion even if items reported on such schedules were not the subject of litigation.

7 "*Pro se*" means "for oneself; on one's own behalf; without a lawyer." BLACK'S LAW DICTIONARY (10th ed. 2014). For purposes of this analysis, we considered the court's decision with respect to the issue analyzed only. A "split" decision is defined as a partial allowance on the specific issue analyzed. The citations also indicate whether decisions were on appeal at the time this report went to print.

8 *See* IRC § 7482, which provides that the U.S. Courts of Appeals (other than the U.S. Court of Appeals for the Federal Circuit) have jurisdiction to review the decisions of the U.S. Tax Court. There are exceptions to this general rule. For example, IRC § 7463 provides special procedures for small Tax Court cases (where the amount of deficiency or claimed overpayment totals $50,000 or less) for which appellate review is not available. *See also* 28 U.S.C. § 1294 (appeals from a U.S. District Court are sent to the appropriate U.S. Court of Appeals); 28 U.S.C. § 1295 (appeals from the U.S. Court of Federal Claims are heard in the U.S. Court of Appeals for the Federal Circuit); 28 U.S.C. § 1254 (appeals from the U.S. Courts of Appeals may be reviewed by the U.S. Supreme Court).

9 IRC §§ 6214; 7476-7479; 6330(d); 6015(e); 7436.

10 28 U.S.C. § 1346(a)(1). *See Flora v. United States*, 362 U.S. 145 (1960), *reh'g denied*, 362 U.S. 972 (1960). *See* National Taxpayer Advocate 2020 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration* 82-84 (*Repeal Flora: Give Taxpayers Who Cannot Pay the Same Access to Judicial Review as Those Who Can*).

administrative claim for refund.[11] The U.S. District Courts, along with the bankruptcy courts in very limited circumstances, provide the only fora in which a taxpayer can receive a jury trial.[12] Bankruptcy courts can adjudicate tax matters that were not adjudicated prior to the initiation of a bankruptcy case.[13]

ANALYSIS OF *PRO SE* LITIGATION

As in previous years, many taxpayers appeared before the courts *pro se*. Figure 2.0.1 shows that taxpayers assisted by a representative achieved better outcomes than *pro se* taxpayers who represented themselves. *Pro se* taxpayers prevailed in full or in part in only 26 cases (five percent), and in five of the ten categories, the only taxpayers that achieved a favorable outcome were represented.

FIGURE 2.0.1, Outcomes for *Pro Se* and Represented Taxpayers

	Pro Se Taxpayers			Represented Taxpayers		
Most Litigated Issue	Total Cases	Taxpayer Prevailed in Full or in Part	Percent	Total Cases	Taxpayer Prevailed in Full or in Part	Percent
Trade or Business Expenses	35	6	17%	47	15	32%
Collection Due Process	25	4	16%	55	2	4%
Accuracy-Related Penalty	37	12	32%	42	15	36%
Gross Income	35	0	0%	37	12	32%
Summons Enforcement	37	0	0%	22	4	18%
Civil Actions to Enforce Federal Tax Liens or to Subject Property to Payment of Tax	23	0	0%	29	4	14%
Failure to File, Failure to Pay, and Estimated Tax Penalties	19	0	0%	15	2	13%
Schedule A Deductions	16	1	6%	16	2	13%
Charitable Deductions	7	0	0%	10	4	40%
Frivolous Issues	13	3	23%	3	0	0%
Total	**247**	**26**	**11%**	**276**	**60**	**22%**

11 IRC § 7422(a).

12 The Bankruptcy Court may only conduct a jury trial if the right to a trial by jury applies, all parties expressly consent, and the District Court specifically designates the bankruptcy judge to exercise such jurisdiction. 28 U.S.C. § 157(e).

13 *See* 11 U.S.C. §§ 505(a)(1) and (a)(2)(A).

ANALYSIS OF UNPUBLISHED OPINIONS

For the third year, we reviewed Tax Court summary judgments and bench orders, both of which are unpublished.[14] Unpublished litigation from the Tax Court has become available to the public in recent years through the court's website, but remains unavailable through electronic legal commercial databases.

We identified 63 bench orders and 181 summary judgments[15] by searching the Tax Court orders on its web site.[16] We listed the bench orders and summary judgments in tables, Appendix 5, Tables 11 and 12. We selected cases in which either a decision was entered on the merits of a substantive issue, or there was a substantive discussion of a distinct tax law matter.[17] The most prevalent issues discussed in the bench orders reviewed were trade or business expense deductions (17 of 63 or about 27 percent), CDP (13 of 63 or about 21 percent), and gross income (11 of 63 or about 17 percent).[18]

Eighty-five percent (991 of 1,172) of summary judgments we reviewed were procedural and did not discuss a substantive tax law issue, leaving 181 substantive decisions. CDP matters dominated this category of unpublished tax court litigation by far, comprising about 70 percent (127 of 181) of the remaining substantial, non-procedural summary judgments. The second largest category was gross income issues which made up about eight percent (15 of 181) of summary judgments.

Overall, the IRS prevailed in about 90 percent of motions for summary judgment (162 of 181) and in about 68 percent of bench orders (43 of 63). About two percent (three of 181) of summary judgment orders and about 25 percent (16 of 63) of bench orders resulted in split decisions. Taxpayers were least successful in bench order outcomes, with about six percent (four of 63) of taxpayers prevailing; whereas 16 of 181 taxpayers prevailed in summary judgments (about nine percent). Taxpayers appeared *pro se* in 46 of the 63 bench orders (73 percent) and were represented by counsel in only 17 of the 63 (about 27 percent). Of the total of 181 summary judgment orders, 126 (70 percent) taxpayers appeared *pro se*.[19]

14 In prior years our review of litigation in federal courts was generally limited to discussing U.S. Tax Court opinions published in commercial databases. Each division or memorandum opinion goes through a legislatively mandated pre-issuance review by the Chief Judge. IRC §§ 7459(b); 7460(a). While division opinions are precedential, orders are not, being issued "in the exercise of discretion" by a single judge. *See* IRC § 7463(b); Unites States Tax Court Rules of Practice and Procedure, Rule 50(f), (denying precedential status to orders) and Rule 152(c) (denying precedential status to bench opinions).

15 Unlike bench orders, summary judgments are decisions without trial. United States Tax Court Rules of Practice and Procedure, Title XII. Denying summary judgment in full or in part leaves issues in play for litigation and is not a final disposition on the merits of the litigated issue, which is a prerequisite for including a case as a Most Litigated Issue.

16 We utilized the orders search tab on the U.S. Tax Court website, applying the reporting period date restriction and key search phrases: "summary judgment" and "7459(b)" and "152(b)." We did not analyze summary judgments and bench orders in other federal courts. There are thousands of documents to be reviewed in other federal courts to determine whether the cases were decided on the merits of a particular litigated issue. *See* Public Access to Court Electronic Records (PACER) User Manual for ECF Courts, Sept. 2014, https://www.pacer.gov/documents/pacermanual.pdf (explaining PACER search functions).

17 Under Tax Court Rule 121(d), if the adverse party does not respond to the motion for summary judgment, then the Tax Court may enter a decision against that party, when appropriate, and in light of the evidence contained within the administrative record. *See* United States Tax Court Rules of Practice and Procedure, Rule 121(d). We included summary judgments entered upon default in situations where the order discussed the merits.

18 Since many of the bench orders involve multiple issues, the percentages do not add up to 100 percent.

19 *See* Appendix 5, Most Litigated Issues Case Tables 11 and 12, *infra*.

MOST LITIGATED ISSUES: Significant Cases

This section describes cases that generally do not involve any of the ten most litigated issues, but nonetheless highlight important issues relevant to federal tax administration.[1] These decisions are summarized below.

In *Altera Corp. v. Commissioner*, the U.S. Court of Appeals for the Ninth Circuit held that Treasury's cost-sharing regulations were both substantively and procedurally valid.[2]

Altera Corp. (Altera), a Delaware corporation, and its foreign subsidiary agreed to share the cost of a research and development project. The agreement originally included both cash and stock compensation paid to project employees, thereby reducing Altera's ability to shift income to its foreign subsidiary by bearing a disproportionate share of the project's costs for compensation. To address income shifting, Internal Revenue Code (IRC) § 482 authorizes the Secretary to (re)allocate income and expenses among related entities "clearly to reflect the income" of the entities.

In 2005, the Tax Court held in *Xilinx* that the government could not use IRC § 482 to require related entities to share stock-based compensation under regulations applicable to tax years 1997-1999.[3] In 2003, the government had updated its regulations to require related entities to share stock-based compensation.[4] Nonetheless, Altera responded to *Xilinx* by modifying its cost-sharing agreement in 2005 to exclude stock-based compensation. Predictably, the IRS audited Altera and increased its U.S. taxable income for 2004-2007 to account for the employees' stock-based compensation, as provided by the new regulation.[5] Altera argued the regulation was invalid under the Administrative Procedure Act[6] and the Tax Court agreed.

By way of background, other regulations provide that the allocation under IRC § 482 "to be applied in every case is that of a taxpayer dealing at arm's length with an uncontrolled taxpayer," but they specify several different methods for reaching this so-called "arm's length" result.[7] They explain that "whether a transaction produces an arm's length result generally will be determined by reference to the results of comparable transactions under comparable circumstances."[8] However, in 1986, Congress added a sentence to IRC § 482, which says the allocation of income in connection with the transfer of intangible property must be "commensurate with the income attributable to the intangible,"[9] diluting the relevance of comparable arm's length transactions in certain circumstances.

1 When identifying the ten most litigated issues, TAS analyzed federal decisions issued during the period beginning on June 1, 2018, and ending on May 31, 2019. For purposes of this section, we generally used the same period. However, we included one case, *Altera Corp. v. Comm'r*, for which an opinion was issued immediately after the end of the reporting period because it is particularly significant. In addition, we have included one case, *J.B. v. United States*, which is discussed as part of a most litigated issue (Summons). We include it here because of its potential impact on IRS procedures unrelated to summons that have been discussed in prior reports (*i.e.*, third party contacts).

2 *Altera Corp. v. Comm'r*, 926 F.3d 1061 (9th Cir. 2019), *rev'g* 145 T.C. 91 (2015) [hereinafter *Altera*]. The Ninth Circuit had previously reversed the Tax Court, but the original reversal was withdrawn because Circuit Court Judge Reinhardt died after oral arguments but before the opinion was issued. *See Altera Corp. v. Comm'r*, 2018-2 U.S.T.C. (CCH) ¶ 50,344 (9th Cir. 2018), *withdrawn by* 898 F.3d 1266 (9th Cir. 2018).

3 *Xilinx Inc. v. Comm'r*, 125 T.C. 37, 57 (2005), *aff'd*, 598 F.3d 1191 (9th Cir. 2010).

4 Treas. Reg. § 1.482-7(d)(1)(i) (as amended by T.D. 9088, 2003-42 I.R.B. 841).

5 Treas. Reg. § 1.482-7A(d)(2).

6 5 U.S.C. §§ 550-596.

7 Treas. Reg. § 1.482-1(b)(1).

8 *Id*.

9 Tax Reform Act of 1986, Pub. L. No. 99-514, Title XII, § 1231(e)(1), 100 Stat. 2085, 2562-2563 (1986).

Nonetheless, the preamble to the disputed regulation proposed in 2002 did not expressly justify the rule — that cost sharing agreements must include stock-based compensation — on the basis that doing so was "commensurate with income."[10] Rather, it emphasized that the rule would produce an arm's length result. In response, stakeholders submitted information showing that unrelated parties did not share the cost of stock-based compensation because its value is speculative, potentially large, and outside of their control.

Instead of explicitly adopting another basis for the rule (*e.g.*, to ensure the allocation was "commensurate with the income"), the preamble to the final regulations reiterated that "stockbased compensation must be taken into account … [to satisfy the] arm's length standard."[11] It continued to assert that parties dealing at arm's length "generally would not distinguish between stock-based compensation and other forms of compensation."[12]

Under the framework established in *Chevron*, if a court determines that a statute is ambiguous, it generally defers to regulations unless they are arbitrary and capricious.[13] Altera argued, and the Tax Court generally agreed, that the disputed regulation was arbitrary and capricious, and therefore, invalid because the government did not explain why it rejected significant comments it received from stakeholders and did not provide a contemporaneous "reasoned explanation" for its final rule as required under *State Farm*.[14]

The U.S. Court of Appeals for the Ninth Circuit reversed. Applying *Chevron*, the Ninth Circuit determined that the statute was ambiguous, and the regulations were not arbitrary and capricious. The court observed that even before the 1986 amendment, an analysis of comparable transactions was not the only way to reach an arm's length result.[15] Congress explained in 1986 that the "commensurate with income" standard was necessary because of "difficulties in determining whether the arm's length transfers between unrelated parties are comparable."[16] Thus, the court concluded the rule was substantively reasonable.

Turning to the procedural requirements, the Ninth Circuit said "Treasury made clear that it was relying on the commensurate with income provision… [and that it would] coordinate the new regulations with the arm's length standard, suggesting that it was attempting to synthesize the potentially disparate

10 Prop. Treas. Reg. § 1.482-7(d)(2), 67 Fed. Reg. 48,997, 49,002 (July 29, 2002).

11 T.D. 9088, 68 Fed. Reg. 51,171, 51,173 (Aug. 26, 2003).

12 *Id*.

13 *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

14 5 U.S.C. § 706(2)(A) (establishing an "arbitrary, capricious, an[d] abuse of discretion" standard of review); 5 U.S.C. § 553(c) (requiring an agency to consider comments and provide a concise statement explaining the basis and purpose for a final rule when promulgating legislative rules); *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) (requiring rules to be the product of reasoned decisionmaking).

15 Because the court rejected *Altera's* argument that the rule's departure from comparability analysis and its new requirement to include stock-based compensation as a cost was a significant departure from prior policy, it also rejected Altera's argument that a more searching review was required under *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009).

16 H.R. Rep. No. 99-426, at 425 (1985) (Conf. Rep.).

standards."[17] The court also concluded that Treasury made "clear enough" its decision to abandon comparability analysis by including "citations to legislative history."[18]

Accordingly, the court reasoned that comments documenting a lack of comparable transactions between unrelated parties reinforced Treasury's decision to abandon comparability analysis. When viewed in this light, the comments might not even have been significant enough to require a response, according to the court. Nonetheless, the preamble to the final regulations addressed the comments by distinguishing the situations cited by commentators on the basis that they did not involve the "development of high-profit intangibles."[19] Thus, the regulations satisfied the procedural requirements.

This case is significant because it could stall Treasury's stepped-up efforts to provide taxpayers with reasonably clear advanced notice about significant shifts in policy or practice, to respond to significant comments, and to explain the reasons for those shifts.[20] Such efforts are consistent with a taxpayer's *right to be informed*.[21] This case may also be significant because commenters have suggested that given the amount of money riding on the issue in other cases, Altera is likely to appeal.[22]

In *Good Fortune Shipping v. Commissioner*, the U.S. Court of Appeals for the District of Columbia Circuit held that Treasury regulations were invalid because the explanation provided by the government for the change was unreasonable.[23]

Good Fortune Shipping SA (Good Fortune) was a foreign corporation that earned income by shipping goods to and from the United States. Such income is subject to a special transportation tax under IRC § 887 unless it is exempt. Corporations "organized in a foreign country" that "grants an equivalent exemption to corporations organized in the United States," are exempt from the transportation tax under IRC § 883(a)(1). A foreign corporation is ineligible for the exemption, however, "if 50 percent or more of the value" of its stock "is owned by individuals who are not residents" of a country providing a reciprocal exemption.[24]

Good Fortune was organized in a qualifying country, had issued shares in bearer form (*i.e.*, unregistered shares, which are not held in the owner's name), and had documentation that its bearer shares were indirectly owned by qualifying individuals. Accordingly, it took the position that it qualified for the

17 *Altera*, 926 F.3d at 1081.

18 *Id*. at 1082. For the same reasons, the Ninth Circuit concluded that the government did not violate *Chenery's* bar against post hoc justifications. *Id*. at 1083 (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)). A forceful dissent characterizes the preamble's citation to legislative history as "cryptic." *Id*. at 1087 (O'Malley, J., dissenting). It also asserts that the majority opinion: "supplies a reasoned basis for the agency's action that the agency itself has not given, … encourages 'executive agencies' penchant for changing their views about the law's meaning almost as often as they change administrations, … and endorses a practice of requiring interested parties to engage in a scavenger hunt to understand an agency's rulemaking proposals." *Id*. at 1087-1088 (Internal citations omitted).

19 T.D. 9088, 68 Fed. Reg. 51,171, 51,173 (Aug. 26, 2003).

20 Andrew Velarde, *Reg Process Could Get Slower and Less Stable, Wilkins Warns*, 2016 TNT 123-7 (June 27, 2016) (discussing the agency's response to the Tax Court decision). The Ninth Circuit arguably lowered the bar for how clearly an agency must identify what it is changing and why. On the other hand, the court may have concluded that the IRS's relatively "cryptic" explanation was only "clear enough" considering the intended audience–international corporations sophisticated enough to have tax sharing agreements. If so, the decision does not alter the requirement for regulations of more general applicability.

21 IRC § 7803(a)(3)(A).

22 Reuven Avi-Yonah, *9th Circ. Got Cost-Sharing Right in Altera v. Commissioner*, 2019 Law360 169-60 (June 18, 2019). Moreover, another taxpayer could mount a successful challenge to these very same regulations before the Tax Court because the Tax Court is not bound by the Ninth Circuit's decision in cases appealable to other circuits. *See Golsen v. Comm'r*, 54 T.C. 742, 757 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971).

23 *Good Fortune Shipping v. Comm'r*, 897 F.3d 256 (D.C. Cir. 2018), *rev'g* 148 T.C. 262 (2017).

24 IRC § 883(c)(1).

exemption on its 2007 return. Because Good Fortune's shares were issued in "bearer" form, however, the IRS took the position based on its regulations (discussed below) that Good Fortune could not substantiate the identity of its shareholders to qualify for the exemption. Good Fortune petitioned the Tax Court, arguing that the regulations were invalid.

Between 1991 and 2003 when the disputed regulations were issued, foreign corporations were allowed to prove qualifying ownership of bearer shares.[25] Notwithstanding objections received during the notice and comment period, the IRS explained that it adopted a new categorical rule in 2003, which excluded bearer shares because of "the difficulty" of reliably tracking "the location of a given owner."[26]

The Tax Court upheld the regulations because it said the statute was ambiguous and the regulations were reasonable, but the U.S. Court of Appeals for the District of Columbia Circuit reversed. It said the regulations rewrote the meaning of "owned" in IRC § 883(c)(1) to require not only valid ownership, but also ownership that is not "difficult" to track. It might have been reasonable for the IRS to do so if it had found that their owners were "impossible" to track, but it did not. Indeed, it had determined between 1991 and 2003 that they could be tracked, and in preamble to regulations it issued under IRC § 883 in 2010, the IRS observed that bearer shares were becoming easier to track over time.[27] Thus, it was unclear why the agency seemed to decide that bearer shares were more difficult to track in 2003 than in 1991.

The court also observed that other forms of ownership make the beneficial owners difficult to track, including the appointment of nominees and trustees. Yet, the 2003 regulations treat ownership through these arrangements as qualifying if the taxpayer submits detailed statements substantiating the beneficial owners. Thus, it was unreasonable for the 2003 regulations to adopt a categorical rule to deny the opportunity to provide similar substantiation of the ownership of bearer shares without explanation.

Finally, the court observed that the IRS allowed corporations to substantiate the ownership of bearer shares when determining if a corporation is closely held.[28] It said that the IRS cannot reasonably treat bearer shares as a form of second-class ownership in some contexts but not in others where the same concerns exist unless it provides a reasonable contemporaneous explanation, which it had not done.

This case is significant to the extent it suggests that regulations are invalid, even if they provide an explanation for the rules being adopted, if that explanation does not seem reasonable. An explanation may be unreasonable if it is not consistent with reasoning or facts expressed or acknowledged by the IRS in other contexts.[29]

25 *Compare* Rev. Proc. 91-12, § 8.02(3), 1991-1 C.B. 473 *with* Treas. Reg. §§ 1.883-4(a), -4(b), -4(c), -4(d) (as amended by T.D. 9087, 2003-40 I.R.B. 781).

26 Notice of Proposed Rulemaking, 67 Fed. Reg. 50,510, 50,518 (Aug. 2, 2002) (re-proposed regulations); T.D. 9087, 68 Fed. Reg. 51,394, 51,399 (Aug. 26, 2003). In 2010, the regulations were amended to allow certain types of bearer shares that could be tracked. T.D. 9502, 75 Fed. Reg. 56,858, 56,860 (Sept. 17, 2010). However, this amendment is not applicable to the period at issue (*i.e.*, 2007).

27 T.D. 9502, 75 Fed. Reg. 56,858, 56,860 (Sept. 17, 2010).

28 *See Good Fortune Shipping*, 897 F.3d at 265 (citing IRC § 884(e)(4)(B) and T.D. 8432, 57 Fed. Reg. 41,644 (Sept. 11, 1992)).

29 For additional discussion of the case's significance, see, *e.g.*, Andrew Velarde, *Another Altera May Be Waiting in the Wings of the D.C. Circuit*, 2018 TNT 131-3 (July 9, 2018).

In *Baldwin v. United States*, the U.S. Court of Appeals for the Ninth Circuit held that a claim for refund was late because the common law mailbox rule was supplanted by Treas. Reg. § 301.7502-1(e)(2)(i).[30]

To claim a refund for 2005, the Baldwins were required to file an amended return by October 15, 2011. They sent the return to the IRS by U.S. mail in June 2011, but the IRS did not receive it or pay a refund. The Baldwins then brought a refund suit in district court. The main issue was whether the refund claim was timely.

Under the longstanding common law "mailbox" rule, if a taxpayer has proof that they timely mailed a document, it is presumed to have been delivered when such a mailing would ordinarily arrive.[31] In 1954, Congress enacted IRC § 7502, which said a document is deemed timely if it is: (1) postmarked on or before the deadline, and (2) *actually delivered*.[32] If the document is never delivered, this statutory mailbox rule does not apply.[33]

Although some circuits have held that the statutory rule displaced the common law rule, others, including the Ninth Circuit, have held the statutory rule provided a safe harbor that supplements the common law rule, rather than displacing it.[34] Because the IRS did not receive the Baldwins' claim, the statutory rule was no help to them. Accordingly, they sought to rely on the common law mailbox rule to establish that their claim for refund was presumptively delivered to the IRS (timely) in June 2011.

The government countered that regulations had eliminated the circuit split and supplanted the common law rule. Specifically, Treas. Reg. § 301.7502-1(e) was amended in 2011 to say:

> Other than direct proof of actual delivery, proof of proper use of registered or certified mail, and proof of proper use of a duly designated [private delivery service] … are the *exclusive means* to establish prima facie evidence of delivery …. *No other evidence of a postmark or of mailing will be prima facie evidence of delivery or raise a presumption that the document was delivered*.[35]

The district court held the regulations invalid. It reasoned that the plain language of IRC § 7502 unambiguously supplemented the common law rule, leaving no gap in the law for the regulations to fill.[36]

30 *Baldwin v. United States*, 921 F.3d 836 (9th Cir. 2019), *reh'g denied*, 2019 U.S. App. LEXIS 18968 (9th Cir. June 25, 2019), *petition for cert. filed*, 2019 WL 4673331 (U.S. Sept. 23, 2019) (No. 19-402).

31 *See, e.g.*, *Detroit Automotive Products Corp. v. Comm'r*, 203 F.2d 785, 785-786 (6th Cir. 1953) (per curiam); *Arkansas Motor Coaches, Ltd. v. Comm'r*, 198 F.2d 189, 191 (8th Cir. 1952).

32 The National Taxpayer Advocate has recommended extending the mailbox rule to cover electronic transmissions. *See* National Taxpayer Advocate 2019 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration* 22-23 (*Treat Electronically Submitted Tax Payments as Timely if Submitted Before the Applicable Deadline*); National Taxpayer Advocate 2017 Annual Report to Congress 278 (Legislative Recommendation: *Electronic Mailbox Rule: Revise the Mailbox Rule to Include All Time-Sensitive Documents and Payments Electronically Transmitted to the IRS*).

33 *See Miller v. United States*, 784 F.2d 728, 730 (6th Cir. 1986) (per curiam).

34 *Anderson v. United States*, 966 F.2d 487, 491 (9th Cir. 1992) ("The statute itself does not reflect a clear intent by Congress to displace the common law mailbox rule. Accordingly, we decline to read section 7502 as carving out exclusive exceptions to the old common law physical delivery rule.").

35 T.D. 9543, 76 Fed. Reg. 52,561 (Aug. 23, 2011) (emphasis added).

36 *Baldwin v. United States*, 2:15-cv-06005-RGk-AGR, 2016 WL 11593219 (C.D. Cal. 2016), *rev'd and remanded*, 921 F.3d 836 (9th Cir. 2019).

On appeal, the U.S. Court of Appeals for the Ninth Circuit reversed. It applied the two-step analysis set forth in *Chevron*.[37] It found that although IRC § 7502 applies a presumption of delivery to documents sent by registered mail, electronic filing, certified mail, and private delivery services, it is silent as to whether any presumption of delivery applies to documents sent by regular mail. Thus, IRC § 7502 left a gap for the regulations to fill.

Under *Brand X*, "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."[38] In this case, the Ninth Circuit said its prior decision made clear that it was filling a statutory gap. Thus, the Treasury Department was free to fill that gap by adopting its own reasonable interpretation of IRC § 7502.

This case is significant because it confirms that the common law mailbox rule has been superseded in the Ninth Circuit. It is perhaps even more significant because it highlights the increasingly controversial Supreme Court decisions in *Chevron* and *Brand X*, which generally allow reasonable agency regulations to trump judicial interpretations where the statute is silent or ambiguous.[39] Litigators have indicated this case may be the perfect vehicle for the Supreme Court to consider overruling those decisions.[40] If it overrules *Chevron* and *Brand X*, commenters have speculated that the common law mailbox rule could spring back to life in the Ninth Circuit.[41]

In *JB v. United States*, the United States Court of Appeals for the Ninth Circuit held that IRS Publication 1 did not provide the taxpayer with "reasonable notice in advance" of third-party contacts, as required by IRC § 7602(c)(1).[42]

Mr. Baxter is an attorney who accepts appointments from the California Supreme Court to represent indigent defendants. In July 2013, the Baxters received a letter indicating their joint return for 2011 had been selected for an audit as part of the IRS's National Research Program. The letter came with IRS Publication 1, Your Rights as a Taxpayer (Pub 1), which says, in relevant part, that "we sometimes talk with other persons if we need information that you have been unable to provide, or to verify information we have received." Two months later, the IRS requested documents from the Baxters. The Baxters responded by asking the IRS to excuse them from the audit because of Mr. Baxter's poor health and the couples' advanced age. The IRS refused, and in May 2015, the Baxters filed a separate suit to stop the audit based on health concerns.

37 *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

38 *Baldwin*, 921 F.3d at 843 (quoting *National Cable & Telecom. Assoc. v. Brand X Internet Services*, 545 U.S. 967, 982 (2005)).

39 *See, e.g.*, Andrew Velarde, *Can the Humble Mailbox Rule Bring Monumental Changes to Chevron?* 94 Tax Notes Int'l 412 (Apr. 29, 2019) (noting that Justices Thomas, Gorsuch, Kavanaugh, Alito, Breyer, and Chief Justice John Roberts have arguably expressed reservations about an overly broad reading of *Chevron*).

40 *See id.*

41 Carlton Smith, *Ninth Circuit Holds Reg. Validly Overrules Case Law; Disallows Parol Evidence of Timely Mailing*, Procedurally Taxing Blog (Apr. 18, 2019), https://proceduralltaxing.com/ninth-circuit-holds-reg-validly-overrules-case-law-disallows-parol-evidence-of-timely-mailing/.

42 *JB v. United States*, 916 F.3d 1161 (9th Cir. 2019), *aff'g sub nom. Baxter v. United States*, 117 A.F.T.R.2d (RIA) 694 (N.D. Cal. 2016).

In September 2015, the IRS issued a summons to the California Supreme Court (Mr. Baxter's employer) seeking invoices or other documents that resulted in payment to Mr. Baxter for the 2011 calendar year.[43] The Baxters filed a timely petition to quash, arguing that the IRS had not followed the requirement of IRC § 7602(c)(1) to provide "reasonable notice in advance" that third parties may be contacted. The district court agreed that Pub 1 did not provide sufficient notice, reasoning that "the implementing regulations contemplate notice for each contact, not a generic publication's reference that the IRS may talk to third parties throughout the course of an investigation."[44]

The U.S. Court of Appeals for the Ninth Circuit affirmed. It explained that the requirement for "reasonable notice in advance" means the IRS must provide enough specific information that it gives the taxpayer a "meaningful opportunity to volunteer records on his own, so that third-party contacts may be avoided if the taxpayer complies with the IRS's demand."[45] Its holding was based, in large part, on the unambiguous plain language of the statute and the Supreme Court's interpretation of similar notice requirements in other laws.

Just as a taxpayer is given notice of a summons under IRC § 7609 and a meaningful opportunity to file a petition to quash it, the advance notice requirement is supposed to protect the taxpayer's reputation because it "gives the taxpayer a meaningful opportunity to resolve issues and volunteer information before the IRS seeks information from third parties, which would be unnecessary if the relevant information is provided by the taxpayer himself."[46] Pub 1 is so general that without more, it provided no such meaningful opportunity in this case, according to the court.

The court reasoned that the statutory exceptions to the advance notice requirement suggest that Congress intended the pre-contact notice to reference a specific contact or piece of information. IRC § 7602(c)(3) waives the requirement if (a) the taxpayer has authorized the contact; (b) the Commissioner, with good cause, believes the notice may jeopardize the IRS's tax collection efforts or open a third party to reprisal; or (c) there is a pending criminal investigation. These exceptions would be unnecessary if the requirement could always be satisfied with a generic notice such as Pub 1. Only if the notice reveals who the IRS plans to contact or what the IRS plans to request does the taxpayer have enough information to authorize the contact, jeopardize collection efforts, retaliate against the third parties, or interfere with a pending criminal investigation. Thus, the IRS's interpretation of the notice requirement would make the statutory exceptions superfluous.

Next, the court rejected the IRS's argument that the requirement under IRC § 7602(c)(2) to provide the taxpayer with a post-contact report of who it contacted would be superfluous if their names had to be furnished beforehand under IRC § 7602(c)(1). First, the court said that IRC § 7602(c)(1) only requires reasonable notice, and what is reasonable depends on the facts. Reasonable notice may not always require the IRS to provide a list of names in advance. Second, the pre-contact notice requirement applies to

43 The Ninth Circuit remarked that [according to the National Taxpayer Advocate], the Baxters' "experience receiving notice after a third party has been contacted is becoming more common." *JB*, 916 F.3d at 1166 n.6 (9th Cir. 2019) (citing statistics from the National Taxpayer Advocate 2015 Annual Report to Congress 123, 128 (Most Serious Problem: *Third Party Contacts: IRS Third Part Contact Procedures Do Not Follow the Law and May Unnecessarily Damage Taxpayers' Businesses and Reputations*), and the National Taxpayer Advocate Fiscal Year 2018 Objectives Report to Congress 98-101 (Area of Focus: *IRS Third Party Contact (TPC) Notices Should Be More Specific, Actionable, and Effective*).

44 *Baxter v. United States*, 117 A.F.T.R.2d (RIA) 694, 2016 U.S. Dist. LEXIS 15855, at *8 (N.D. Cal. 2016), *aff'd sub nom.*, *JB v. United States*, 916 F.3d 1161 (9th Cir. 2019).

45 *JB*, 916 F.3d at 1173; *J.B.*, 916 F.3d at 1168 (citing S. Rep. No. 105-174, at 77 (1988) and quoting Internal Revenue Manual (IRM) 4.11.57.2(3), Definition of TPC (May 26, 2017), and *Third Party Contacts*, 67 Fed. Reg. 77,419, 77,419-77,420 (Dec. 18, 2002)).

46 *JB*, 916 F.3d at 1168.

those the IRS "may" contact, whereas the post-contact report must list those the IRS did contact (with certain exceptions). Thus, neither requirement is superfluous because they apply to two different groups.

The IRS also argued that the subsection title for IRC § 7602(c)(1) (*i.e.*, "General Notice") and the subsection title for IRC § 7602(c)(2) (*i.e.*, "Notice of Specific Contacts") lend support to its argument that the statute was at least ambiguous about whether the pre-contact notice could be "general." The court cited cases holding that titles cannot limit the plain meaning of a statutory text, reasoning that titles cannot create ambiguity where, as in this case, the statutory language is clear.[47] It also cited legislative history suggesting that both the pre- and post-contact notices were intended to protect the taxpayer's reputation, and to do so they had to be specific enough to be meaningful (*i.e.*, actionable).[48]

In addition, the IRS argued that when the Conference Committee clarified that "in general," the IRS could provide advance notice to the taxpayer "as part of an existing IRS notice provided to taxpayers," it meant that the IRS could include a general notice in Pub 1. The court explained that Congress knew how to refer to Pub 1 when it wanted to — it referenced Pub 1 by name three times in the same legislation — but did not reference it by name in connection with the pre-contact notice requirement. The court also observed that immediately after enactment, the IRS itself did not believe that a single general notice like Pub 1 was sufficient to comply with the statutory requirement, as discussed in the National Taxpayer Advocate's report.[49] Moreover, even the agency's regulations support an interpretation of "reasonable notice" that requires meaningful notice to the taxpayer.[50]

Next, the court addressed the IRS's argument that every court to have considered the issue has held that Pub 1 satisfied the pre-contact notice requirement. It pointed out that other courts have recognized that IRC § 7602(c)(1) requires a context-dependent inquiry, and in some contexts the Pub 1 might be sufficient. In this case, it was particularly troubled by the fact that (1) the IRS had reason to know that the billing records at issue might have been subject to attorney-client privilege, (2) the taxpayers would have been able to provide the pertinent records if the IRS had given them a meaningful opportunity, and (3) the Pub 1 was "divorced from any specific request for documents."[51]

Although the Ninth Circuit acknowledged that a context-dependent inquiry might be difficult to administer, it said this concern was a matter for Congress. Nonetheless, it was "doubtful that Publication 1 alone will ever suffice to provide reasonable notice in advance to the taxpayer, as the statute requires."[52]

The National Taxpayer Advocate previously recommended changes to the IRS's pre-contact procedures that would give taxpayers a meaningful opportunity to provide information and avoid contacts that could damage their reputations.[53] This case is significant because it suggests that IRS procedures did

47 *JB*, 916 F.3d at 1169 (citing for example, *Oregon Public Utility Comm'n v. ICC*, 979 F.2d 778, 780 (9th Cir. 1992)).

48 *JB*, 916 F.3d at 1170 (citations omitted).

49 *Id*. at 1170-1171 (citing National Taxpayer Advocate 2015 Annual Report to Congress 123, 127 n.23 (Most Serious Problem: *Third Party Contacts: IRS Third Part Contact Procedures Do Not Follow the Law and May Unnecessarily Damage Taxpayers' Businesses and Reputations*)).

50 Treas. Reg. § 301.7602-2 ("the pre-contact notice may be given either orally or in writing").

51 *JB*, 916 F.3d at 1169.

52 *Id*. at 1172 n.15. The Tenth Circuit appears to disagree. *See High Desert Relief, Inc. v. United States*, 917 F.3d 1193 (10th Cir. 2019) (assuming without deciding, after JB, that Pub. 1 did provide sufficient notice under section 7602(c)(1)).

53 *See* National Taxpayer Advocate 2015 Annual Report to Congress 123-142 (Most Serious Problem: *Third Party Contacts: IRS Third Party Contact Procedures Do Not Follow the Law and May Unnecessarily Damage Taxpayers' Businesses and Reputations*); National Taxpayer Advocate Fiscal Year 2018 Objectives Report to Congress 98-101 (Area of Focus: *IRS Third Party Contact (TPC) Notices Should Be More Specific, Actionable, and Effective*).

not always comply with the requirement to provide reasonable notice in advance.[54] Subsequently enacted legislation now requires the IRS to issue a notice when it actually intends to make a third-party contact and to specify approximately when the contact(s) will be made.[55] However, it removed the requirement to provide reasonable notice in advance.[56] Nonetheless, the case remains significant because of its analysis of what constitutes reasonable notice could apply in other contexts.[57]

In *Haynes v. United States*, the U.S. Court of Appeals for the Fifth Circuit held that when an e-filed return was timely submitted by a preparer and rejected by the IRS without notice, a taxpayer had reasonable cause to avoid a negligence penalty if the preparer was not negligent (*i.e.*, the preparer had reasonable cause).[58]

On October 17, 2011, Mr. Dunbar, the Hayneses' accountant, electronically transmitted their 2010 income tax return to the Lacerte Software Corporation for filing with the IRS. The same day, he notified Mr. Haynes that the return had been timely filed. Although Mr. Dunbar did not receive a rejection notice from the IRS, the IRS had rejected the return because Mrs. Haynes's Social Security number (SSN) erroneously appeared on the line designated for an employment identification number. Neither Mr. Dunbar nor the Hayneses took further action to confirm that the IRS had received the return or acknowledged its acceptance for processing. Additionally, although the Hayneses' return reflected an unpaid balance due of more than $40,000, they made no tax payment prior to August

54 For the IRS's initial response to the National Taxpayer Advocate's concerns, see National Taxpayer Advocate Fiscal Year 2017 Objectives Report to Congress 72-79 (*Review of the 2016 Filing Season*). For further analysis of this case, see, *e.g.*, Leslie Book, *Ninth Circuit Rejects IRS's Approach to Notifying Taxpayers of Third Party Contacts*, Procedurally Taxing Blog (Mar. 4, 2019), http://proceduralltaxing.com/ninth-circuit-rejects-irss-approach-to-notifying-taxpayers-of-third-party-contacts/. The IRS appears to be planning to defend its prior practice. See IRM 5.17.6.7, Third-Party Contact Requirements of IRC § 7602(c) (Aug. 1, 2019) ("If challenged, the IRS intends to defend third-party contacts that its employees previously made (before the effective date of section 1206 of the Taxpayer First Act of 2019), in accordance with then-existing instructions ...).

55 Taxpayer First Act, Pub. L. No. 116-25, § 1206, 133 Stat. 981 (2019) (codified at IRC § 7602(c)(1)) (requiring a third party contact to occur only "during a period (not greater than 1 year) which is specified in a notice which — (A) informs the taxpayer that contacts with persons other than the taxpayer are intended to be made during such period, and (B) except as otherwise provided by the Secretary, is provided to the taxpayer not later than 45 days before the beginning of such period.").

56 Due, in part, to the fact that the notice is no longer required to be "reasonable," the IRS does not believe it is required to include the information it needs on the TPC notice. *See, e.g.*, IRS, Interim Guidance on Third-Party Contact Notification Procedures, SBSE-04-0719-0034 (July 26, 2019). For a legislative recommendation to require the IRS to inform the taxpayer of what information it needs, see National Taxpayer Advocate 2020 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration* 101-102 *(Require the IRS to Specify the Information It Needs in Third Party Contact Notices)*.

57 For example, we wonder whether the Ninth Circuit's analysis of the requirement to provide "reasonable notice" before making third party contacts under IRC § 7602(c)(1) provides any insight about how a court might interpret the requirement for agencies to provide reasonable notice of the basis for rule changes in the preamble to proposed regulations that apply to individuals and small businesses. As noted in the discussion of *Altera* (above), the Ninth Circuit found the requirement for the IRS to provide a "reasonable" explanation for a rule was satisfied by a reference to legislative history that the dissent called "cryptic." Although the court was applying a different statute, *Altera* and *JB* could be reconciled on the basis that to be "reasonable" the IRS needs to provide more specific information to individuals under audit, than it must provide to experts representing international businesses.

58 *Haynes v. United States*, 760 F. App'x 324 (5th Cir. 2019) (unpublished, per curiam), *vacat'g and remand'g* 119 A.F.T.R.2d (RIA) 2202 (W.D. Tex. 2017). The Hayneses subsequently requested a rehearing, urging the court to decide if the taxpayers could have reasonable cause even if the preparer was negligent. *Appellants' Petition for Panel Rehearing, Haynes v. United States*, 123 A.F.T.R.2d (RIA) 570 (5th Cir. 2019) (No. 3:16-CV-112) (Feb. 25, 2019). For a legislative recommendation addressing these issues, see National Taxpayer Advocate 2020 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration* 57-59 *(Extend Reasonable Cause Abatement of the Failure-to-File Penalty to Taxpayers Who Rely on Return Preparers to E-File Their Returns)*.

2012.[59] After the IRS assessed a late fling penalty, they paid the penalty and requested a refund on the basis that their failure to timely file did not result from "willful neglect," and was due to "reasonable cause" under IRC § 6651(a)(1).[60] The IRS denied their claim, and they timely filed a refund suit in district court.

In *Boyle*, the Supreme Court explained in 1985 that reasonable cause may exist for failure to file when a taxpayer relies on the erroneous advice of counsel concerning a substantive question of law (*e.g.*, whether a liability exists or a return is required), but generally not when a taxpayer relies on an agent to file.[61] The Court reasoned that no expertise is required to know that returns have fixed filing deadlines. The Hayneses argued before the District Court:

> (1) that *Boyle* only applies to paper-filed returns; (2) that the act of e-filing a tax return itself is a form of substantive legal advice; (3) that a defective return transmitted to and rejected by the IRS is nonetheless a timely-filed return; (4) that the alleged failure of the Lacerte software to provide notification of the IRS's rejection of the tax return amounts to circumstances beyond Plaintiffs' control and establishes reasonable cause; and (5) that reliance on Plaintiffs' experienced, educated, and prominent accountant constitutes 'reasonable cause.'[62]

Unpersuaded, the District Court granted the government's motion for summary judgment based on the bright line rule expressed in *Boyle*. On appeal the U.S. Court of Appeals for the Fifth Circuit did not decide whether to extend *Boyle* to e-filed returns.[63] It explained that in *Boyle* the preparer was negligent in missing the deadline and his negligence was imputed to the taxpayer, whereas the negligence of Mr. Dunbar had not been established in this case. Thus, even if the logic of *Boyle* were extended to e-filing, the government was not entitled to summary judgment because it was not clear, as a factual matter, whether Mr. Dunbar was negligent or if his actions met the reasonable cause standard (*i.e.*, whether ordinary business care and prudence would demand that he personally contact the IRS to ensure acceptance). Accordingly, the Fifth Circuit vacated and remanded the decision.

59 A fact finder might view a couple who did not take the time to ensure they had timely paid their liabilities as less likely to have exercised reasonable care to ensure they filed timely.

60 *See also* Treas. Reg. § 301.6651-1(a) ([a penalty applies] "unless the failure to file the return within the prescribed time is shown to … be due to reasonable cause and not to willful neglect"); Treas. Reg. § 301.6651-1(c)(1) ("If the taxpayer exercised ordinary business care and prudence and was nevertheless unable to file the return within the prescribed time, then the delay is due to a reasonable cause.").

61 *United States v. Boyle*, 469 U.S. 241, 250-52 (1985).

62 *Haynes v. United States*, 2017 U.S. Dist. LEXIS 106252, at *10 (W.D. Tex. June 15, 2017).

63 Amici argued that the bright line rule of *Boyle* should not apply to e-filed returns. *See* Brief of Amicus Curiae, American College of Tax Counsel, In Support of Appellants and Reversal, *Haynes v. United States*, 123 A.F.T.R.2d (RIA) 570 (5th Cir. 2019) (No. 17-50816) (Nov. 27, 2017). They point out that if the return had been mailed on the same date, it would have been timely filed under the mailbox rule (*i.e.*, IRC § 7502). Applying *Boyle* unfairly discriminates against e-filers who are forced to depend on third parties to determine if the IRS has accepted their returns, according to the brief. As noted above, the National Taxpayer Advocate has recommended legislation to extend the mailbox rule to electronic submissions. *See, e.g.*, National Taxpayer Advocate, 2020 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration* 14-15 (*Treat Electronically Submitted Tax Payments and Documents as Timely If Submitted Before the Applicable Deadline*); National Taxpayer Advocate 2019 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration* 22-23 (*Treat Electronically Submitted Tax Payments as Timely if Submitted Before the Applicable Deadline*).

This case is significant because its analysis is likely to shape whether and how the late filing penalty will apply to e-filed returns that are timely transmitted to the IRS but not timely accepted.[64] We can expect taxpayers to continue to argue that they have reasonable cause for late e-filing on the basis that: (1) the preparer was not negligent (*e.g.*, because the IRS did not timely alert him or her to an error), and (2) the taxpayer can reasonably rely on a preparer's confirmation that an e-filed return was timely filed because the bright line rule established in *Boyle* does not apply to e-filing deadlines.[65]

In *BASR Partnership v. United States*, the U.S. Court of Appeals for the Federal Circuit awarded attorney fees to a partnership with no assets after the government rejected a qualified offer of $1 to settle.[66]

The Pettinati family formed the BASR partnership to shelter the gain from the sale of their printing business in 1999. It was not until 2010 that the IRS issued a Final Partnership Administrative Adjustment (FPAA), proposing to disallow the purported tax benefits from the sale under procedures established by the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA").[67] Mr. Pettinati, BASR's tax matters partner, filed suit in the U.S. Court of Federal Claims, challenging the FPAA as untimely. While the case was pending, BASR, which had no assets, made a "qualified offer" to settle for $1.[68] The government rejected the offer.

The Court of Federal Claims held that BASR's limitations period had expired.[69] BASR then moved for an award of litigation costs under IRC § 7430, which the Court of Federal Claims granted, and the U.S. Court of Appeals for the Federal Circuit affirmed.

A "party" to a court proceeding meeting the net worth requirements of 28 U.S.C. § 2412(d)(2)(B) can be awarded litigation costs under IRC § 7430(c)(1) if he or she is the "prevailing party" and the tax liability pursuant to the judgment is equal to or less than the taxpayer's "qualified offer" to settle with respect to the tax "at issue" in the proceeding.

The government argued that BASR was not eligible because: (1) the BASR partnership could not be a "party" because only partners are parties in TEFRA litigation, (2) the amount of tax liability was not "at issue" because BASR had none — tax liability is determined at the partner level, (3) BASR did not incur any litigation costs — the costs were incurred by the Pettinati family, (4) the Pettinati family was the real-party-in-interest, but they did not meet the net worth requirement, and (5) the trial court abused its

64 For helpful commentary, see, *e.g.*, Leslie Book, *Update on Haynes v US: Fifth Circuit Remands and Punts on Whether Boyle Applies in E-Filing Cases*, Procedurally Taxing Blog (Feb. 12, 2019), http://proceduralltaxing.com/update-on-haynes-v-us-fifth-circuit-remands-and-punts-on-whether-boyle-applies-in-e-filing-cases/; Leslie Book, *Delinquency Penalties: Boyle in the Age of E-Filing*, Procedurally Taxing Blog (Nov. 30, 2017), http://proceduralltaxing.com/delinquency-penalties-boyle-in-the-age-of-e-filing/ ("If there is no timely notification and little way for the taxpayer to independently check whether the return was rejected, it seems unfair to apply *Boyle* in these circumstances"); Andrew Velarde, *Circuit Court Punts on Application of Boyle to E-Filing*, 2019 TNT 5-35 (Feb. 4, 2019).

65 Similar arguments were recently rejected on the basis that even if a taxpayer uses a preparer he is free to file by mail. *See Intress v. United States*, 2019 U.S. Dist. LEXIS 130504 (M.D. Tenn. 2019).

66 *BASR Partnership v. United States*, 915 F.3d 771 (2019), *aff'g* 130 Fed. Cl. 286 (2017).

67 IRC § 6221 *et seq*.

68 In certain circumstances, a taxpayer may recover reasonable litigation costs if their liability turns out to be less than or equal to a "qualified offer" they made to settle the dispute with the government. *See generally* IRC § 7430; Treas. Reg. § 301.7430-1 *et. seq*.

69 *BASR Partnership v. United States*, 113 Fed. Cl. 181 (2013), *aff'd*, 795 F.3d. 1338 (Fed. Cir. 2015). We discussed this case in the 2014 report. *See* National Taxpayer Advocate 2014 Annual Report to Congress 427, 437 (Most Litigated Issues: *Significant Cases*).

discretion in awarding costs because BASR's settlement offer of $1 was not a good faith effort to settle. The Federal Circuit rejected these arguments.

This case is significant because it confirms that partnerships can obtain litigation costs under IRC § 7430 if they — and not necessarily their partners — meet the requirements in 28 U.S.C. § 2412. More importantly, it rejected the government's suggestion that it would be an abuse of discretion to award litigation costs when a qualified offer is too low.[70] Low-income taxpayers who have had their refunds frozen and believe they will prevail often submit $1 offers, hoping a qualified offer will prompt the government to resolve their cases more quickly. Time is of the essence because they often need the refunds to meet their basic living expenses.

In *Montrois v. United States*, the U.S. Court of Appeals for the District of Columbia Circuit held the IRS had authority to impose a fee to issue and renew Preparer Tax Identification Numbers (PTINs) because PTINs provide a specific benefit to preparers by protecting the confidentiality of their SSNs.[71]

A group of tax return preparers filed suit arguing that the IRS lacks authority under the Independent Offices Appropriations Act of 1952 (IOAA) to charge for obtaining and renewing PTINs. Under the IOAA, agencies may only establish a fee "for a service or thing of value provided by the agency."[72] The IOAA only permits agencies to charge for special benefits that are voluntarily requested and not shared by the general public.[73]

Before 2010, anyone could prepare and file a tax return for someone else. Preparers were required to enter their SSN or a PTIN on the returns they prepared.[74] In 2010, the government began to regulate return preparers, issuing regulations requiring that preparers have a PTIN (not just an SSN), which would only be issued to those who paid a user fee.[75] The regulation noted that the requirement would benefit preparers by helping to "maintain the confidentiality of [their] SSNs."[76] The IRS issued another regulation to establish a fee for the initial PTIN registration and for each annual renewal.[77]

In 2014, the U.S. Court of Appeals for the District of Columbia Circuit held in *Loving* that the Treasury Department lacked authority to regulate the conduct of registered tax return preparers.[78] Following *Loving*, the only remaining parts of the regulatory scheme were the requirements to obtain and use PTINs and to pay PTIN fees. The preparers filed suit challenging the fee.[79]

70 Two low income taxpayer clinics submitted an amicus brief because of the importance of this issue to low-income taxpayers. *See* Brief for the Harvard Federal Tax Clinic and the Philip C. Cook Low-Income Taxpayer Clinic of Georgia State University as Amici Curiae in Support of the Appellees, *BASR Partnership v. United States*, 123 A.F.T.R.2d (RIA) 691 (2019) (No. 17-1925) (Nov. 2, 2017); Ted Afield, *Nominal Qualified Offers and TEFRA*, Procedurally Taxing Blog (Feb. 25, 2019), http://proceduralltaxing.com/nominal-qualified-offers-and-tefra/; *Tax Clinic Amicus Brief Argument Supported*, Georgia State Law Clinical Programs Blog (Feb. 8, 2019), https://georgiastatelawclinicalprograms.blog/2019/02/08/tax-clinic-amicus-brief-argument-supported/.

71 *Montrois v. United States*, 916 F.3d 1056 (D.C. Cir. 2019), *petition for cert. filed* (May. 24, 2019) (No. 18-1493).

72 31 U.S.C. § 9701(b).

73 *See Nat'l Cable Television Assn. v. United States*, 415 U.S. 336 (1974).

74 *Furnishing Identifying Number of Income Tax Return Preparer*, T.D. 8835, 64 Fed. Reg. 43,910 (Aug. 12, 1999).

75 *Furnishing Identifying Number of Tax Return Preparer*, T.D. 9501, 75 Fed. Reg. 60,309, 60,315 (Sept. 30, 2010).

76 *Id*. at 60,309.

77 *User Fees Relating to Enrollment and Preparer Tax Identification Numbers*, T.D. 9503, 75 Fed. Reg. 60,316 (Sept. 30, 2010).

78 *Loving v. Comm'r*, 742 F.3d 1013 (D.C. Cir. 2014), *aff'g* 920 F. Supp. 2d 108 (D.D.C. 2013).

79 While the case was pending before the district court, the IRS reduced the amount of the PTIN fee from $50 to $33 (not including a vendor fee) to reflect the fact that fee proceeds were no longer needed to cover the regulation of preparers. *Preparer Tax Identification Number (PTIN) User Fee Update*, T.D. 9781, 81 Fed. Reg. 52,766 (Aug. 10, 2016).

The district court ruled in favor of the preparers, issued an injunction barring the IRS from charging the PTIN fee, and ordered the IRS to refund previously collected fees.[80] It reasoned that if every member of the public could obtain a PTIN, as they could after *Loving*, the IRS was not providing a special benefit that was not available to the general public. Moreover, the regulations did not indicate that SSNs were being inadvertently disclosed or find that their confidentiality was at risk.

The District of Columbia Circuit vacated the district court. It concluded that the protection of the confidentiality of tax return preparers' SSNs was a special benefit. Although the preamble to the regulations did not discuss the confidentiality concern when the agency adopted the fee,[81] the concern runs throughout the regulatory history of the requirement, including the legislative history of Congress's authorization for the IRS to mandate the use of PTINs. In addition, H&R Block and others had submitted comments in support of mandatory PTINs because the requirement would "protect the confidentiality of SSNs."[82] In summary, the IRS could rely on the special benefit of confidentiality even though this benefit was not articulated in the user fee regulations because the benefit was articulated in related regulations, comments, and legislative history pertaining to the requirement to use a PTIN.

This case is significant because it clarifies that the IRS is authorized to charge preparers for PTINs under the IOAA, even though the use of PTINs is mandated by the IRS.[83]

In *Gaylor v. Mnuchin*, the U.S. Court of Appeals for the Seventh Circuit held the federal parsonage housing tax exemption is constitutional because it is neutral towards religion (*i.e.*, it does not violate the Free Exercise or the Establishment clauses of the U.S. Constitution).[84]

Under the longstanding "convenience of the employer" doctrine (later incorporated into IRC § 119(a)(2)) housing provided to employees for the convenience of their employer (*e.g.*, for sailors aboard ships) was not income, but in 1921, the Treasury Department said that housing provided to ministers was income.[85] Congress responded by enacting IRC § 107, which provides that a "minister of the gospel" may exclude housing provided in-kind (under IRC § 107(1)) or in the form of a housing allowance (under IRC § 107(2)).

Seeking to challenge constitutionality of IRC § 107, the Freedom from Religion Foundation (FFRF) paid a housing allowance to employees and former employees, none of whom were ministers. The employees filed amended tax returns claiming refunds for their housing allowances under IRC § 107(2). After six months, the FFRF and its employees filed suit in district court as permitted by IRC § 6532(a)(1). The district court permitted several pastors and their religious organizations to intervene to defend IRC § 107(2).

80 *Steele v. United States*, 260 F.Supp.3d 52 (D.D.C. 2017), *vacated and remanded by Montrois v. United States*, 916 F.3d 1056 (D.C. Cir. 2019). For a discussion of *Steele*, see, *e.g.*, National Taxpayer Advocate 2017 Annual Report to Congress 351, 364-366 (Most Litigated Issues: *Significant Cases*).

81 *Id.* (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)). The IRS had discussed the benefit in connection with regulations imposing the requirement to use a PTIN (cited above).

82 *Montrois v. United States*, 916 F.3d 1056, 1066 (D.C. Cir. 2019).

83 For concerns about user fees, see, *e.g.*, National Taxpayer Advocate 2015 Annual Report to Congress 14-22 (Most Serious Problem: *IRS User Fees: The IRS May Adopt User Fees to Fill Funding Gaps Without Fully Considering Taxpayer Burden and the Impact on Voluntary Compliance*); National Taxpayer Advocate Memo to Associate Chief Counsel (Procedure and Administration), *Comments on User Fees for Offers in Compromise* (Nov. 28, 2016), https://www.regulations.gov/document?D=IRS-2016-0038-0003.

84 *Gaylor v. Mnuchin*, 919 F.3d 420 (7th Cir. 2019).

85 O.D. 862, 4 C.B. 85 (1921).

Both parties filed for summary judgment. The District Court for the Western District of Wisconsin held the statute violates the Establishment Clause of the First Amendment,[86] but the U.S. Court of Appeals for the Seventh Circuit reversed.[87]

To determine if IRC § 107(2) violates the Establishment Clause, the Seventh Circuit applied the *Lemon* test and the historical significance test.[88] Under the *Lemon* test, the statute must: (1) have a secular legislative purpose; (2) have a principal or primary effect that neither advances nor inhibits religion; and (3) not foster excessive government entanglement with religion.

First, the Seventh Circuit deferred to the government's sincere articulation of three secular purposes: to eliminate discrimination against ministers, to eliminate discrimination between ministers (*i.e.*, between those who receive in-kind housing and those that do not), and to avoid excessive entanglement with religion. It reasoned that IRC § 107(2) is simply one of many *per se* rules that provide a tax exemption to employees with work-related housing requirements.[89] The ease of administration represented by a categorical exclusion is a secular purpose. While the exclusion applicable to ministers is overbroad, it is no more overbroad than the other categorical exclusions, according to the court. Although the IRS must still determine whether a taxpayer qualifies as a "minister," the court found that this inquiry is less intrusive than an inquiry into how a religious organization uses its facilities. Thus, IRC § 107(2) has a secular purpose to avoid entanglement, which satisfies both the first and third prongs of the *Lemon* test.[90]

Moving to the second prong of the *Lemon* test, the court rejected FFRF's argument that the tax exemption for ministers under IRC § 107(2) has the principal effect of advancing religion by subsidizing it. After acknowledging the economic equivalence of a tax exemption and a subsidy, the court said that a tax exemption is not the same as a subsidy for purposes of this test.[91]

Turning to the historical purpose test, the court said that for over two centuries, states have implemented church property tax exemptions. While the provision at issue was an income tax provision, the income tax was not constitutional before 1913 and Congress excluded parsonages within a few years of income

86 *Gaylor v. Mnuchin*, 278 F. Supp. 3d 1081, 1104 (W.D. Wis. 2017).

87 *Gaylor*, 919 F.3d at 420.

88 *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (the *Lemon* test); *Town of Greece v. Galloway*, 572 U.S. 562 (2014) (the historical significance test).

89 For example, IRC § 132 and § 162 exclude housing provided to an employee away on business for less than a year; IRC § 134 excludes housing provided to current or former members of the military; IRC § 911 excludes housing above a certain level provided to citizens or residents living abroad; IRC § 912 excludes housing provided to civilian officers and employees of the U.S. government living abroad. These categorical exemptions allow a wide range of employees to receive tax-exempt housing without needing to prove it was provided for the convenience of the employer under IRC § 119(a)(2).

90 Critics have observed that defining "minister of the gospel" is a "really hard and invasive question." *See, e.g.*, Amy Lee Rosen, *Clergy Tax Exemption Problematic Despite 7th Circ. Ruling*, 2019 Law360 78-138 (Mar. 19, 2019) (quoting Samuel D. Brunson, a professor at Loyola University Chicago School of Law). Moreover, several tax professors, including Brunson, signed an amicus brief to the Seventh Circuit arguing the clergy housing tax exemption should be quashed because it entangles church and state and subsidizes religion. Amicus Curiae Brief of Tax Law Professors in Support of Appellees, *Gaylor v. Mnuchin*, 919 F.3d 420 (2019) (No. 18-1277), 2018 WL 3311509.

91 Amici observed that "[T]reating targeted exemptions differently from direct spending would permit Congress to subvert the First Amendment by offering refundable tax credits to churches, exempting all ministerial income from tax, or exempting all religious people from the income tax." Amicus Curiae Brief of Tax Law Professors in Support of Appellees, at 13, *Gaylor v. Mnuchin*, 919 F.3d 420 (2019) (No. 18-1277), 2018 WL 3311509. For further analysis of the constitutionality of tax exemptions, see Edward A. Zelinsky, *Winn and the Inadvisability of Constitutionalizing Tax Expenditure Analysis*, 121 Yale L.J. Online 25 (2011).

becoming taxable; and a few decades later it excluded cash housing allowances as well.[92] Thus, it held IRC § 107(2) does not violate the Free Exercise Clause or the Establishment Clause.

This case is significant because over 200,000 congregations provide a housing allowance to their ministers.[93] Because it raises controversial constitutional issues, however, we might expect further litigation in this area.[94]

In *Wagner v. United States*, the U.S. District Court for the Eastern District of Washington held that the two-year period for filing a refund claim under IRC § 6532(a) was subject to equitable tolling due to confusing correspondence from the IRS.[95]

The Wagners timely filed their 2012 federal income tax return, claiming a refund of $1,364,363. They asked for $500,000 to be refunded and for the remainder ($864,363) to be applied to their tax liability for 2013. In November 2014, the IRS sent a letter, which indicated it was allowing only $839,999 of the claim and disallowing the remainder ($524,364). On December 5, 2014, the Wagners appealed.

The IRS did not respond until May 2016, when it sent another letter, this time stating it "allowed only $0.00 of the claim," apparently disallowing the $839,999 of the claim for the first time. Because there was an outstanding and unexplained credit of $523,686 on the account, the IRS took only $335,871 (rather than the entire $859,357 then owed for 2012 – the original $839,999 plus interest and penalties) from the Wagners' 2014 refund and applied it to their 2012 tax liability.[96]

On March 1, 2018, the Wagners filed suit seeking a refund of $839,999. The government moved to dismiss, arguing that the portion of the claim that was not offset against the credit from tax year 2014 (*i.e.*, $523,686) was time barred.[97] It reasoned that the two-year period provided by IRC § 6532(a) to bring suit commenced when the IRS sent its first letter in November 2014, and ended in November 2016.

The court denied the government's motion, holding that the filing was timely for two reasons. First, it reasoned that the two-year period for filing suit did not commence until May 2016, when the IRS issued the second letter, which was the first time it informed the taxpayer of its decision to disallow the $839,999 claim. Therefore, the March 1, 2018, filing was within the two-year period.

In the alternative, if the two-year period commenced in November 2014, the court said the period was tolled and the filing deadline was extended because of "equitable considerations" generated by the IRS's confusing correspondence, "including the fact that Plaintiffs were informed that $839,999 of the

92 Amici observe that without a property tax exemption, the state might lien or levy on church property if the tax went unpaid, whereas if a housing allowance were subject to the income tax, no similar entanglement would ensue. Amicus Curiae Brief of Tax Law Professors in Support of Appellees, at *17, *Gaylor v. Mnuchin*, 919 F.3d 420 (2019) (No. 18-1277), 2018 WL 3311509.

93 *Gaylor*, 919 F.3d at 424 n.3.

94 See Amy Lee Rosen, *Clergy Tax Exemption Problematic Despite 7th Circ. Ruling*, 2019 Law360 78-138 (Mar. 19, 2019); Amicus Curiae Brief of Tax Law Professors in Support of Appellees, *Gaylor v. Mnuchin*, 919 F.3d 420 (2019) (No. 18-1277), 2018 WL 3311509. Moreover, the *Lemon* test was subsequently questioned by the Supreme Court. *See Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019).

95 *Wagner v. United States*, 353 F. Supp. 3d 1062 (E.D. Wash. 2018).

96 The decision does not indicate when the IRS offset the 2014 refund against the 2012 liability. The IRS presumably applied the refund to 2012 (rather than 2013, as requested) because it arose in 2012 and the IRS did not believe there was an overpayment in 2012.

97 The court did not address the question of whether it lacked jurisdiction because the Wagners had not fully paid the liability. *See Flora v. United States*, 362 U.S. 145 (1960). For a proposal to repeal or limit this rule, see National Taxpayer Advocate 2018 Annual Report to Congress (Legislative Recommendation: *Fix The* Flora *Rule: Give Taxpayers Who Cannot Pay the Same Access to Judicial Review as Those Who Can*).

requested refund claim was not going to be allowed less than 6 months before the statute of limitations expired..."[98]

Because equitable tolling does not apply to jurisdictional deadlines, the court examined whether the filing deadline was jurisdictional. Filing deadlines are non-jurisdictional unless Congress makes them jurisdictional through a "clear statement."[99] "Congress must do something special, beyond setting an exception-free deadline, to tag a statute of limitations as jurisdictional and so prohibit a court from tolling it," according to the Supreme Court.[100]

The District Court reasoned that the distance between the waiver of sovereign immunity, which is found in 28 U.S.C. § 1346(a)(1), and the filing deadline, which is found in IRC § 6532(a) under a subtitle labeled "Procedure and Administration," is a strong indication that the deadline is procedural and not jurisdictional. The deadline does not explicitly limit the court's power and is not cast in jurisdictional terms. Moreover, it reasoned that the recovery of amounts wrongfully withheld is akin to the common law tort of conversion, and the grant of jurisdiction does not in any way limit the court's usual equitable powers.

This case is significant because it suggests for the first time that the period for filing a refund claim under IRC § 6532(a) is subject to equitable tolling.[101] Equitable tolling is consistent with the taxpayer's *rights to appeal an IRS decision in an independent forum* and *to a fair and just tax system*.

98 *Wagner*, 353 F. Supp.3d at 1069.

99 *United States v. Wong*, 135 S. Ct. 1625 (2015) (citation omitted) (finding the filing deadlines for Federal Court Claims Act suits in 28 U.S.C. § 2401(b) non-jurisdictional and subject to equitable tolling). *See also Volpicelli v United States*, 777 F.3d 1042 (9th Cir. 2015) (holding the filing deadline in IRC § 6532(c) to bring suit to recover a wrongful levy in district court was non-jurisdictional and subject to equitable tolling).

100 *Wong*, 135 S. Ct. at 1632.

101 *See, e.g., Hessler v. United States*, 2016 U.S. Dist. LEXIS 1210, at *12 n.5 (E.D. Cal. 2016) ("Whether equitable tolling applies to section 6532(a)(1) remains an open question"); *Drake v. United States*, 2011 U.S. Dist. LEXIS 22563 *6 (D. Ariz. 2011) ("We find no authority to apply equitable tolling to this statute and decline to do so when plaintiff does not expressly raise it"). *But see Smith v. United States*, Dkt No. 1:19-cv-271 (W.D. Mich. 2019) (concluding the filing deadlines under IRC §§ 7422(a) and 6432(a)(1) are jurisdictional in the Sixth Circuit). For further discussion of the Wagner case and advocacy on this issue, see Carlton Smith, *District Court Equitably Tolls 2-Year Deadline to File Refund Suit*, Procedurally Taxing Blog (Nov. 28, 2018), http://proceduralltaxing.com/district-court-equitably-tolls-2-year-deadline-to-file-refund-suit/. The National Taxpayer Advocate has recommended extending equitable doctrines, such as equitable tolling, to periods prescribed by the IRC. *See* National Taxpayer Advocate 2017 Annual Report to Congress 283 (Legislative Recommendation: *Equitable Doctrines: Make the Time Limits for Bringing Tax Litigation Subject to the Judicial Doctrines of Forfeiture, Waiver, Estoppel, and Equitable Tolling, and Clarify That Dismissal of an Untimely Petition Filed in Response to a Statutory Notice of Deficiency Is Not a Decision on the Merits of a Case*).

MLI #1 Trade or Business Expenses Under IRC § 162 and Related Sections

SUMMARY

The deductibility of trade or business expenses has perpetually been among the ten Most Litigated Issues (MLIs) since the first National Taxpayer Advocate's Annual Report to Congress in 1998.[1] We identified 82 cases involving a trade or business expense issue that were litigated in federal courts between June 1, 2018, and May 31, 2019. The courts affirmed the IRS position in 61 of these cases, or about 74 percent, while taxpayers fully prevailed in only two cases, or about two percent of the cases. The remaining 19 cases, or about 23 percent, resulted in split decisions.

TAXPAYER RIGHTS IMPACTED[2]

- *The Right to Be Informed*
- *The Right to Pay No More Than the Correct Amount of Tax*
- *The Right to Challenge the IRS's Position and Be Heard*
- *The Right to Appeal an IRS Decision in an Independent Forum*
- *The Right to a Fair and Just Tax System*

PRESENT LAW

Internal Revenue Code (IRC) § 162(a) permits a taxpayer to deduct ordinary and necessary trade or business expenses paid or incurred during the taxable year.[3] These expenses include:

- A reasonable allowance for salaries or other compensation for personal services actually rendered;
- Travel expenses while away from home in the pursuit of a trade or business; and
- Rentals or other payments for use of property in a trade or business.[4]

In addition to the general allowable expenses described above, IRC § 162 addresses deductible and nondeductible expenses incurred in carrying on a trade or business, and provides special rules for health insurance costs of self-employed individuals.[5]

The interaction of IRC § 162 with other Code sections that explicitly limit or disallow deductions can be complex. For example, the year in which the deduction for trade or business expenses can be taken and its amount depend on when the cost was paid or incurred, the useful life of an asset on the date of

1 See National Taxpayer Advocate 1998-2018 Annual Reports to Congress.

2 See Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are also codified in the Internal Revenue Code (IRC). See IRC § 7803(a)(3).

3 The taxable year in which a business expense may be deducted depends on whether the taxpayer uses the cash or accrual method of accounting. IRC § 446.

4 IRC § 162(a)(1), (2), and (3).

5 See, e.g., IRC § 162(c), (f), and (l). For example, nondeductible trade or business expenses include illegal bribes, kickbacks, fines, and penalties.

acquisition, and when it was sold or when the business operation is terminated.[6] Rules regarding the practical application of IRC § 162 have evolved largely from case law and administrative guidance over the years. When a taxpayer seeks judicial review of the IRS's determination of a tax liability relating to the deductibility of a particular expense, the courts must often address a series of questions, including, but not limited to, the ones discussed below.

What Is a Trade or Business Expense Under IRC § 162?

Although "trade or business" is a widely used term in the IRC, neither the Code nor the Treasury Regulations provide a definition.[7] The definition of a "trade or business" comes from common law, where the concepts have been developed and refined by the courts.[8] The Supreme Court has interpreted "trade or business" for purposes of IRC § 162 to mean an activity conducted with "continuity and regularity" and with the primary purpose of earning income or making a profit.[9]

What Is an Ordinary and Necessary Expense?

IRC § 162(a) requires a trade or business expense to be both "ordinary" and "necessary" in relation to the taxpayer's trade or business to be deductible.[10] The Supreme Court describes an "ordinary" expense as customary or usual and of common or frequent occurrence in the taxpayer's trade or business.[11] The Court describes a "necessary" expense as one that is appropriate and helpful for the development of the business.[12] Further, an employee business expense is not ordinary and necessary if the employee is entitled to reimbursement from the employer.[13] Common law also requires that in addition to being ordinary and necessary, the amount of the expense must be reasonable for the expense to be deductible.[14]

Is the Expense a Currently Deductible Expense or a Capital Expenditure?

A currently deductible expense is an ordinary and necessary expense paid or incurred during the taxable year in the course of carrying on a trade or business.[15]

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6 *See, e.g.*, IRC § 165 (deductibility of losses), IRC § 167 (deductibility of depreciation), IRC § 183 (activities not engaged in for profit), and IRC § 1060 (special allocation rules for certain asset acquisitions, including the reporting of business asset sales when closing a business).

7 *Comm'r v. Groetzinger*, 480 U.S. 23, 35 (1987).

8 Carol Duane Olson, *Toward a Neutral Definition of "Trade or Business" in the Internal Revenue Code*, 54 U. Cin. L. Rev. 1199 (1986).

9 *Groetzinger*, 480 U.S. at 35.

10 In *Welch v. Helvering*, the Supreme Court stated that the words "ordinary" and "necessary" have different meanings, both of which must be satisfied for the taxpayer to benefit from the deduction.

11 *Deputy v. du Pont*, 308 U.S. 488, 495 (1940) (internal citations omitted).

12 *See Comm'r v. Heininger*, 320 U.S. 467, 471 (1943).

13 *Podems v. Comm'r*, 24 T.C. 21, 22-23 (1955). As unreimbursed employee business expenses are miscellaneous itemized deductions under IRC § 67, they will not be available to taxpayers for the 2018-2025 tax years under IRC § 67(g). The employee has the burden of establishing the amount of the expense and that the expense is not eligible for reimbursement.

14 In *Comm'r v. Lincoln Electric Co.*, the Court of Appeals for the Sixth Circuit held "the element of reasonableness is inherent in the phrase 'ordinary and necessary.' Clearly it was not the intention of Congress to automatically allow as deductions operating expenses incurred or paid by the taxpayer in an unlimited amount." 176 F.2d 815, 817 (6th Cir. 1949), *cert. denied*, 338 U.S. 949 (1950).

15 IRC § 162(a). IRC § 263. No current deduction is allowed for the cost of acquisition, construction, improvement, or restoration of an asset expected to last more than one year. *See also INDOPCO, Inc. v. Comm'r*, 503 U.S. 79 (1992). Instead, those types of expenses are generally considered capital expenditures, which may be subject to depreciation, amortization, or depletion over the useful life of the property. IRC § 167; IRC § 179. Note, the Tax Cuts and Jobs Act increased the maximum deduction under IRC § 179 from $500,000 to $1 million and increased the maximum asset-spending phaseout from $2 million to $2.5 million. IRC § 179(b)(1), (b)(2).

When Is an Expense Paid or Incurred During the Taxable Year, and What Proof Is There That the Expense Was Paid?

IRC § 162(a) requires an expense to be "paid or incurred during the taxable year" to be deductible. The IRC also requires taxpayers to maintain books and records that substantiate income, deductions, and credits, including adequate records to substantiate deductions claimed as trade or business expenses.[16] If a taxpayer cannot substantiate the exact amounts of deductions by documentary evidence (*e.g.*, invoice paid, paid bill, or canceled check) but can establish that he or she had some business expenditures, the courts may employ the *Cohan* rule to grant the taxpayer a reasonable amount of deductions.[17]

When Can an Approximation of Business Expenses Be Used?

The *Cohan* rule is one of "indulgence" established in 1930 by the Court of Appeals for the Second Circuit in *Cohan v. Commissioner*.[18] The court held that the taxpayer's business expense deductions were not adequately substantiated, but stated that "the [Tax Court] should make as close an approximation as it can, bearing heavily if it chooses upon the taxpayer whose inexactitude is of his own making. But to allow nothing at all appears to us inconsistent with saying that something was spent."[19] In *Estate of Elkins v. Commissioner*, the Fifth Circuit described "the venerable lesson of Judge Learned Hand's opinion in *Cohan*: In essence, make as close an approximation as you can, but never use a zero."[20]

The *Cohan* rule cannot be used in situations where IRC § 274(d) applies. IRC § 274(d) provides that unless a taxpayer complies with strict substantiation rules, no deductions are allowable for:

- Travel expenses (including meals and lodging while away from home);
- Gifts; and
- Certain "listed property."[21]

A taxpayer must substantiate a claimed IRC § 274(d) expense with adequate records or sufficient evidence to establish the amount, time, place, and business purpose.[22]

16 IRC § 6001. *See also* Treas. Reg. §§ 1.6001-1 and 1.446-1(a)(4).

17 *See Cohan v. Comm'r*, 39 F.2d 540 (2d Cir. 1930).

18 *Id.*

19 39 F.2d 540 (2d Cir. 1930) at 544, *aff'g and remanding* 11 B.T.A. 743 (1928).

20 767 F.3d 443, 449 n. 7 (5th Cir. 2014) (citing *Cohan*, 39 F.2d at 543-44), *rev'g* 140 T.C. 86 (2013).

21 "Listed property" means any passenger automobile; any other property used as a means of transportation; any property of a type generally used for purposes of entertainment, recreation, or amusement; any computer or peripheral equipment (except when used exclusively at a regular business establishment and owned or leased by the person operating such establishment); and any other property specified by regulations. IRC § 280F(d)(4)(A) and (B).

22 Treas. Reg. § 1.274-5T(b). Ironically, if George M. Cohan brought his case today before the Tax Court, he would be unable to benefit from application of that rule because of the strict substantiation required by IRC § 274(d). A contemporaneous log is not explicitly required, but a statement not made at or near the time of the expenditure has the same degree of credibility only if the corroborative evidence has "a high degree of probative value." Treas. Reg. § 1.274-5T(c)(1); *Reynolds v. Comm'r*, 296 F.3d 607, 615-616 (7th Cir. 2002) (noting that keeping written records is not the only method to substantiate IRC § 274 expenses but "alternative methods are disfavored").

ANALYSIS OF LITIGATED CASES

This year, we reviewed 82 cases involving trade or business expenses that were litigated in federal courts from June 1, 2018, through May 31, 2019. The table 1 listed in Appendix 5 contains a list of the respective issues in these cases. Figure 2.1.1 categorizes the main issues raised by taxpayers. Cases involving more than one issue are included in more than one category.

FIGURE 2.1.1, Trade or Business Expense Issues Cases Reviewed[23]

Issue	Type of Taxpayer	
	Individual	Business
Substantiation of Expenses Under IRC § 162, Including Application of the *Cohan* Rule	10	34
Substantiation of Expenses under IRC § 274(d)	8	18
Schedule A Unreimbursed Employee Expenses Requiring Proof Employer Did Not Reimburse Taxpayer Under IRC § 162	8	7
Hobby Losses, Nondeductible Under Either IRC §§ 183 or 162	0	9
Home Office Under IRC § 280A	4	5
Net Operating Losses Under IRC § 172	0	6
Personal Expenditures Disallowed Under IRC § 262	2	2
Capitalization and Cost Recovery Under IRC §§ 263, 263A, 195, 179, and 167	0	10
Illegal Activities Under IRC §§ 280E, 162(c), 162(f), and 162(g)	0	6
Economic Substance Doctrine	0	2
Business Bad Debt Deduction Under IRC § 166	0	4
Not Engaged In a Trade or Business Under IRC § 162	0	2
Interest Deduction Under IRC § 163	0	1

Taxpayers represented themselves (*pro se*) in 35 of the 82 cases (about 43 percent). Taxpayers were represented by counsel in 47 out of the 82 cases (about 57 percent). Of the 82 cases, the taxpayers prevailed in two cases in full, and in 19 cases in part. The IRS won in the remaining 61 cases. None of the *pro se* individual taxpayers prevailed in full.

As in previous years, a number of individual taxpayers claimed deductions for Schedule A unreimbursed employee expenses that were either related to personal rather than business activities or the taxpayer did not meet the burden of showing his or her employer would not reimburse these expenses.[24] Additionally, taxpayers claimed travel, meals, and entertainment expenses, but occasionally failed to meet the heightened substantiation requirements of IRC § 274(d).[25] Many *pro se* litigants were unable to meet substantiation requirements.[26]

23 Multiple issues can appear within one case; therefore these figures will not match the total case count.

24 See, e.g., *Farolan v. Comm'r*, T.C. Summ. Op. 2018-28; *Cates v. Comm'r*, T.C. Memo. 2017-178, *appeal dismissed,* (11th Cir. Apr. 30, 2018); *Beckey v. Comm'r*, T.C. Summ. Op. 2017-80.

25 See *Lewis v. Comm'r*, T.C. Memo. 2017-117; *Fehr v. Comm'r*, T.C. Summ. Op. 2018-26.

26 See *Wooten v. Comm'r*, T.C. Summ. Op. 2017-58.

Individual Taxpayers

Unsurprisingly, relatively few of this year's IRC § 162 trade or business cases involve individual taxpayers (the term "individual" excludes sole proprietorships). All but one of these cases were issued as either Tax Court memorandum opinions or summary opinions.[27]

The sole individual case decided by a Court of Appeals was *Liljeberg v. Commissioner*, in which the Court of Appeals for the D.C. Circuit affirmed an earlier decision by the U.S. Tax Court.[28] *Liljeberg* involved the question of whether three nonresident foreign students enrolled in the State Department's Exchange Visitor Program could deduct Schedule A unreimbursed employee business expenses for travel, meal, and entertainment costs. The students, who were from Finland, Russia, and Ireland, entered the U.S. on nonimmigrant "J visas," which permitted them to work part-time jobs while studying as full-time students for up to four consecutive months. The students argued that they could deduct their travel, meal, and entertainment expenses under IRC § 162(a)(2), which allows taxpayers to deduct business expenses incurred while "away from home" for business reasons.[29]

The D.C. Circuit, however, ruled that the students were not away from home on business in the manner contemplated by IRC § 162(a)(2). Such was the case because the students came to work in the U.S. voluntarily and were not required by their employers to retain an abode in their home countries. The fact that this home country residency requirement was established by the visa process, as opposed to the employers themselves, was insufficient in the eyes of the D.C. Circuit. As a result, the Court of Appeals affirmed the Tax Court and denied deductions for unreimbursed employee business expenses not incurred in the pursuit of a trade or business.

Another case illustrating some of the most commonly arising issues in the individual trade or business context is *Sutherland v. Commissioner*.[30] There, a taxpayer sought to deduct a variety of job search expenses. The court allowed deductions related to the creation and mailing of a "value proposition deck," because it was used to seek employment. On the other hand, deductions incurred for meals, entertainment, and transportation costs during the job search were disallowed because Taxpayer did not meet the heightened contemporaneous documentation standards of IRC § 274(d). Likewise, Taxpayer could not establish that computer supplies had been used solely for business purposes.

Taxpayer's spouse, a manager for a furniture company, also attempted to deduct meals and entertainment expenditures as unreimbursed employee business expenses. He claimed deductions for meals purchased while out of town on business and for costs incurred in taking his employees out for meals and entertainment for team building and recognition. However, these deductions were disallowed because, among other reasons, he never requested reimbursement and because he did not seek authorization from his superiors for the recognition-related expenses.

27 Tax Court decisions are categorized into three types: regular decisions, memorandum decisions, and small tax case ("S") decisions. The regular decisions of the Tax Court include cases which have some new or novel point of law, or in which there may not be general agreement, and therefore have the most legal significance. In contrast, memorandum decisions generally involve fact patterns within previously settled legal principles and therefore are not as legally significant. Finally, "S" case decisions (for disputes involving $50,000 or less where the taxpayer has elected Small Case status) are not appealable and, thus have no precedential value. *See also* IRC § 7463(b); U.S. Tax Court Rules of Practice and Procedure, Rules 170-175.

28 *Liljeberg v. Comm'r*, 907 F.3d 623 (D.C. Cir. 2018), *aff'g* 148 T.C. 83 (2017).

29 *See Barone v. Comm'r*, 85 T.C. 462, 465 (1985) (citations omitted), which states that for an expense to qualify under section 162(a)(2) it must (1) be ordinary and necessary, (2) have been incurred while the taxpayer was "away from home", and (3) have been incurred in the pursuit of a trade or business. The second element of whether the taxpayers were "away from home" was in dispute in *Liljeberg*.

30 *Sutherland v. Comm'r*, T.C. Memo. 2018-186.

Business Taxpayers

TAS reviewed 69 cases involving business taxpayers. Business taxpayers prevailed fully in two cases (approximately three percent), partially prevailed in 16 cases (approximately 23 percent), and the IRS was completely successful in the remaining cases (approximately 74 percent). Of cases in which business taxpayers fully or partially prevailed, 67 percent (12 of 18) involved taxpayers represented by counsel. Alternatively, six *pro se* business taxpayers partially prevailed, but none fully prevailed. Of cases in which the IRS fully prevailed, approximately 61 percent (31 of 51) involved business taxpayers represented by counsel, while approximately 39 percent (20 of 51) involved *pro se* taxpayers.

One of the more commonly litigated issues from year to year is whether an activity is carried on as a business for profit or whether it simply represents a hobby. This distinction is significant because losses attributable to a hobby can only be deducted to the extent of income generated by the activity, while business losses have no such limitation.[31]

The analysis employed to distinguish between business and hobby activities is well illustrated by *Ford v. Commissioner*. The case focused on a music venue called Bell Cove that enjoyed substantial success when operated by Taxpayer, a former country music singer, and her husband, a producer and record label owner.[32] The venue closed upon the husband's death, but was reopened by Taxpayer several years later as she attempted to restore Bell Cove to its former glory. Among other things, Taxpayer engaged musicians to perform on weekends and hosted various events, including parties and weddings. Despite Taxpayers' efforts, however, Bell Cove was consistently unprofitable, losing approximately $420,000 between 2008 and 2014. She was able to continue operating the venue by drawing on trust funds at her disposal.

In affirming the prior Tax Court decision, the Sixth Circuit analyzed the nine-factor test for distinguishing for-profit activities from hobbies, set forth in the regulations under IRC § 183.[33] Based on these factors, the Sixth Circuit determined that Taxpayer did not have the requisite intent to make a profit in her operation of Bell Cove. Among other things, the Sixth Circuit noted that Bell Cove was not operated in the manner of a traditional business, as Taxpayer made no effort either to minimize expenses or to undertake improvements and innovations that would increase revenue. Further, the activity generated ongoing losses that showed no realistic likelihood of being offset by annual profits or appreciation in the property. These circumstances, when combined with the substantial personal pleasure derived by Taxpayer from running Bell Cove and her ability to defray losses with her personal income, caused the Sixth Circuit to conclude that Bell Cove and its operations represented a hobby, rather than a business. Accordingly, Taxpayer was unable to deduct Bell Cove's losses against her income from other sources.

On the other hand, in *Potter v. Commissioner*, Taxpayer found a way of circumventing the loss limitations of IRC § 183.[34] Taxpayer, an independent contractor who sold soil on commission, operated his business through a C corporation, of which he was the sole shareholder and only employee. When the third-party company for whom Taxpayer sold soil was purchased, Taxpayer, via his corporation, received substantial termination pay and discontinued all sales activities. Having significant leisure time, he took up cowboy mounted shooting, in which participants, wearing old western or military garb, engage in riding and shooting competitions for prize money.

31 IRC § 183(b)(2).

32 *Ford v. Comm'r*, 751 F. App'x. 843 (6th Cir. 2018) *aff'g* T.C. Memo. 2018-8.

33 Treas. Reg. § 1.183-2(b).

34 *Potter v. Comm'r*, T.C. Memo. 2018-153.

In furtherance of this activity, Taxpayer purchased a truck, trailer, and tractor for over $150,000. These expenditures were capitalized and depreciated by Taxpayer's corporation. At first, the deductions were disallowed by the IRS on the grounds that Taxpayer was involved in a hobby, rather than a for-profit activity. However, IRC § 183, by its very terms, does not apply to C corporations. Thus, when the Tax Court determined that Taxpayer was pursuing his cowboy mounted shooting through the corporation, rather than in his individual capacity, this ruling led to the presumptive conclusion that Taxpayer was involved in a trade or business, expenses from which could be deducted even if they exceeded income from the associated activity.

Where a trade or business is being carried on, compensation is one of the few deductible expenses specifically identified by IRC § 162.[35] Occasionally, controversy arises regarding whether payments made by the business are in fact deductible compensation, or instead represent some other sort of nondeductible transfer. Just such an issue was presented in the case of *Little Mountain Corp v. Commissioner*.[36]

Taxpayer (Little Mountain Corp) purchased a precious metals business from Franklin Sanders, who then set up a sole proprietorship, Always Frank Consulting, and purportedly began performing consulting services for Taxpayer.[37] According to Taxpayer, it paid him approximately $900,000 of consulting fees, which Taxpayer deducted on its 2011 return. However, Taxpayer did not issue Sanders a Form 1099, and he reported no compensation of any sort during that year. The IRS disallowed Taxpayer's deduction on the grounds that Taxpayer failed to prove that the payments in question were deductible compensation.

The Tax Court sustained this determination and, upon review, the Ninth Circuit affirmed the lower court's decision. In particular, the Ninth Circuit was concerned that the payments were provided in the form of checks made out to "cash," which ultimately were endorsed by individuals unassociated with Franklin Sanders or his consulting business. Likewise, an ill-kept ledger and generic invoices, when combined with the lack of any Forms 1099 and Sanders's nonreporting, failed to clarify the nature of the payments. As a result, the Ninth Circuit held that Taxpayer had fallen short of the level of proof necessary to establish that the cash transfers in question represented deductible compensation.

An increasing number of cases also present scenarios in which otherwise allowable expenses are barred from deductibility because of a specific statutory exclusion. The most common of these prohibitions arises with respect to illegal expenses under IRC § 280E in the context of marijuana dispensaries. *Patients Mut. Assistance Collective Corp. v. Commissioner* provides an excellent discussion of the legal issues surrounding the controversy.[38] The case involved a corporate taxpayer that operated a medical marijuana dispensary, legally organized under California law. Taxpayer incurred a variety of expenses, including employee compensation, that it sought to deduct. Despite conceding that these expenditures were directly related to Taxpayer's trade or business, the IRS disallowed these deductions under IRC § 280E, which specifies, "No deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade or business if such trade or business (or the activities which comprise such trade or business) consists of trafficking in controlled substances." In upholding the IRS's disallowance of the deductions, the Tax Court explained that IRC § 280E had been passed by

35 IRC § 162(a)(1).

36 *Little Mtn. Corp. v. Comm'r*, 736 F. App'x 691 (9th Cir. 2018), *aff'g* T.C. Memo. 2016-147.

37 Taxpayer was owned by relatives of Franklin Sanders and, according to the Tax Court, "The record strongly suggests that the corporation is Mr. Sanders' alter ego." *Little Mtn. Corp. v. Comm'r, T.C. Memo.* 2016-147.

38 *Patients Mut. Assistance Collective Corp. v. Comm'r*, 151 T.C. No. 11 (2018).

Congress as a direct response to a prior decision that "allowed a cocaine dealer to deduct the ordinary and necessary expenses of his illicit trade."[39]

Taxpayer also provided a variety of other non-marijuana services and products, including yoga, tai chi, hypnotherapy, acupuncture, and t-shirts. The IRS disallowed all expenses related to these lines of business as well. In sustaining the IRS disallowances, the Tax Court premised its conclusion on a broad reading of IRC § 280E, holding that it prohibits deductions from all activities within a trade or business, even if only part of the trade or business actually involves the direct sale of marijuana.[40]

CONCLUSION

The existence and amount of allowable business expenses are highly fact-specific and are often open to interpretation. IRC § 162 deductions are based upon a complex interaction of multiple statutes and regulations, as well as case law. This circumstance perpetuates substantial controversy between the IRS and taxpayers regarding the scope and extent of properly claimed business deductions. As a result, courts rendered decisions in 82 cases involving IRC § 162 related issues between June 1, 2018, and May 31, 2019.

As in prior years, a variety of cases arose regarding the merits of claimed deductions for legal fees, costs associated with marijuana dispensaries, and business expenses that were held to be personal in nature. Many cases involved taxpayers' often-unsuccessful attempts to meet general substantiation requirements or to comply with the heightened substantiation rules of IRC § 274(d). Moreover, a number of taxpayers in this year's litigated cases evidenced difficulty distinguishing between nondeductible personal expenses or hobby losses on the one hand, and deductible business expenses on the other hand.

39 *Edmonson v. Comm'r*, T.C. Memo. 1981-623.

40 In a separate case dedicated to the consideration of whether Taxpayer should be liable for accuracy-related penalties under IRC § 6662(a), the Tax Court determined that these penalties were inapplicable because of the lack of clear authority in this area.

MLI #2 Appeals From Collection Due Process Hearings Under IRC §§ 6320 and 6330

SUMMARY

A Collection Due Process (CDP) hearing is an opportunity for a taxpayer to have an independent and meaningful review by the IRS Office of Appeals (Appeals) prior to the IRS's first levy or immediately after its first Notice of Federal Tax Lien (NFTL) filing to enforce a tax liability.[1] At the hearing, the taxpayer has the right to raise any relevant issues related to the unpaid tax, the lien, or the proposed levy, including the appropriateness of the collection action, collection alternatives, spousal defenses, and, under certain circumstances, the underlying tax liability.[2]

Once Appeals issues a determination, a taxpayer has the right to judicial review of that determination if the taxpayer timely requests a CDP hearing and timely petitions the U.S. Tax Court.[3] Generally, the IRS suspends levy actions during a levy hearing and any subsequent judicial review of the Appeals determination that follows the hearing.[4]

CDP has been one of the federal tax issues most frequently litigated in the federal courts since 2001; however, only a small fraction of eligible taxpayers exercise their right to an administrative hearing, and far fewer taxpayers petition the Tax Court to review their case. Between 2003 and 2019, only 1.44 percent of the taxpayers who received a CDP notice requested an administrative hearing (*i.e.*, 426,484 out of 29,614,768) and only 0.08 percent filed a petition in Tax Court (*i.e.*, 24,690 out of 30,726,471).

Our review of litigated issues found 80 opinions on CDP cases during the review period of June 1, 2018, through May 31, 2019, which is an increase of about eight percent since last year's report.[5] Taxpayers prevailed in full in four of these cases (five percent) and, in part, in two others (about three percent). The eight percent success rate for the taxpayers is lower than last year. Of the six opinions where taxpayers prevailed in whole or in part, four taxpayers appeared without a representative authorized to advocate to the court on their behalf (*pro se*),[6] and two were represented by an attorney or other court-approved professional. Cognizant of the distinct disadvantage that *pro se* litigants face, federal courts routinely read their submissions liberally and interpret them to raise the strongest arguments that they

1 IRS Restructuring and Reform Act of 1998 (RRA 98), Pub. L. No. 105-206, § 3401, 112 Stat. 685, 746 (1998). Prior to RRA 98, the U.S. Supreme Court had held that a post-deprivation hearing satisfied due process concerns in the tax collection arena. *See United States v. Nat'l Bank of Commerce*, 472 U.S. 713, 726-31 (1985); *Phillips v. Comm'r*, 283 U.S. 589, 595-601 (1931).

2 Internal Revenue Code (IRC) §§ 6320(c) (lien) and 6330(c)(2) (levy). IRC § 6320(c) generally requires Appeals to follow the levy hearing procedures under IRC § 6330 for the conduct of the lien hearing, the review requirements, and the balancing test.

3 IRC § 6330(d) (setting forth the time requirements for obtaining judicial review of Appeals' determination); IRC §§ 6320(a)(3)(B) and 6330(a)(3)(B) (setting forth the time requirements for requesting a CDP hearing for lien and levy matters, respectively).

4 IRC § 6330(e)(1) provides that generally, levy actions are suspended during the CDP process (along with a corresponding suspension in the running of the limitations period for collecting the tax). However, IRC § 6330(e)(2) allows the IRS to resume levy actions upon a determination by the Tax Court of "good cause," if the underlying tax liability is not at issue.

5 For a list of all cases reviewed, see Table 2 in Appendix 5, Most Litigated Issues Case Tables, *infra*.

6 *Pro se* means "[f]or oneself; on one's own behalf; without a lawyer." *Pro Se*, Black's Law Dictionary (10th ed. 2014).

suggest.[7] The IRS prevailed fully in 74 cases (about 93 percent) of the opinions, an increase from the 88 percent success rate last year.[8]

TAXPAYER RIGHTS IMPACTED[9]

- *The Right to Be Informed*
- *The Right to Quality Service*
- *The Right to Pay No More Than the Correct Amount of Tax*
- *The Right to Challenge the IRS's Position and Be Heard*
- *The Right to Appeal an IRS Decision in an Independent Forum*
- *The Right to Privacy*
- *The Right to a Fair and Just Tax System*

PRESENT LAW

Current law provides taxpayers an opportunity for independent review when the IRS proposes a levy action or after it files an NFTL.[10] CDP rights ensure taxpayers receive adequate notice of IRS collection activity and an opportunity for a meaningful hearing before the IRS deprives the taxpayer of property.[11] The hearing allows taxpayers to raise issues related to collection of the liability, including:

- The appropriateness of collection actions;[12]
- Collection alternatives such as an installment agreement (IA), offer in compromise (OIC), a bond posting, or substitution of other assets;[13]
- Appropriate spousal defenses;[14]
- A challenge of the existence or amount of the underlying tax liability, but only if the taxpayer did not receive a statutory notice of deficiency or have another opportunity to dispute the liability;[15] and
- Any other relevant issue relating to the unpaid tax, the NFTL, or the proposed levy.[16]

A taxpayer cannot raise an issue already raised and considered at a prior administrative or judicial hearing if the taxpayer participated meaningfully in that hearing or proceeding.[17]

7 *See Haines v. Kerner*, 404 U.S. 519, 520 (1972); *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994); *Buczek v. United States*, No. 15-CV-273S, 2018 U.S. Dist. LEXIS 77471, at *3 (W.D.N.Y. May 8, 2018).

8 National Taxpayer Advocate 2018 Annual Report to Congress 488-508 (Most Litigated Issue: *Appeals from Collection Due Process Hearings Under IRC §§ 6320 and 6330)*.

9 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are also codified in the Internal Revenue Code. *See* IRC § 7803(a)(3).

10 IRC §§ 6320 and 6330.

11 IRC §§ 6320(c) (lien) and 6330(c)(2) (levy). IRC § 6320(c) generally requires Appeals to follow the levy hearing procedures under IRC § 6330 for the conduct of the lien hearing, the review requirements, and the balancing test.

12 IRC § 6330(c)(2)(A)(ii).

13 IRC § 6330(c)(2)(A)(iii).

14 IRC § 6330(c)(2)(A)(i).

15 IRC § 6330(c)(2)(B).

16 IRC § 6330(c)(2)(A); Treas. Reg. §§ 301.6320-1(e) and 301.6330-1(e).

17 IRC § 6330(c)(4).

Procedural Collection Due Process Requirements

The IRS must provide a CDP notice to the taxpayer indicating the specific tax and tax period after filing the first NFTL and generally before the first intended levy is issued.[18] The IRS must provide the notice not more than five business days after the day of filing the NFTL, or at least 30 days before the day of the proposed levy.[19]

If the IRS files a lien, the CDP lien notice must inform the taxpayer of the right to request a CDP hearing within a 30-day period, which begins on the day after the end of the five-business-day period after the filing of the NFTL.[20] In the case of a proposed levy, the CDP levy notice must inform the taxpayer of the right to request a hearing within the 30-day period beginning on the day after the date of the CDP notice.[21]

Requesting a Collection Due Process Hearing

Under both lien and levy procedures, the taxpayer must return a signed and dated written request for a CDP hearing, including the reasons for requesting a hearing, within the applicable period.[22] Taxpayers who fail to timely request a CDP hearing will be afforded an "equivalent hearing" that is similar to a CDP hearing, but there is no judicial review of an adverse determination.[23] Taxpayers must request an equivalent hearing within the one-year period beginning the day after the five-business-day period following the filing of the NFTL, or in levy cases, within the one-year period beginning the day after the date of the CDP notice.[24]

How a Collection Due Process Hearing Is Conducted

CDP hearings are informal. When a taxpayer requests a hearing with respect to both a lien and a proposed levy, Appeals will attempt to conduct one hearing.[25] A taxpayer can request that the hearing be in-person; however, courts have ruled that a CDP hearing need not be in-person but can take place

18 IRC § 6330(f) permits the IRS to levy without first giving a taxpayer a CDP notice in the following situations: the collection of tax is in jeopardy, a levy was served on a state to collect a state tax refund, the levy is a disqualified employment tax levy, or the levy was served on a federal contractor. A disqualified employment tax levy is any levy to collect employment taxes for any taxable period if the person subject to the levy (or any predecessor thereof) requested a CDP hearing with respect to unpaid employment taxes arising in the most recent two-year period before the beginning of the taxable period with respect to which the levy is served. IRC § 6330(h)(1). A federal contractor levy is any levy if the person whose property is subject to the levy (or any predecessor thereof) is a federal contractor. IRC § 6330(h)(2). Under IRC § 6330(f), the IRS must still provide the opportunity for a CDP hearing "within a reasonable period of time after the levy."

19 IRC §§ 6320(a)(2) or 6330(a)(2). The CDP notice can be provided to the taxpayer in person, left at the taxpayer's dwelling or usual place of business, or sent by certified or registered mail (return receipt requested, for the CDP levy notice) to the taxpayer's last known address.

20 IRC § 6320(a)(3)(B); Treas. Reg. § 301.6320-1(b)(1).

21 *Id*.

22 IRC §§ 6320(a)(3)(B) and 6330(a)(3)(B); Treas. Reg. §§ 301.6320-1(c)(2), Question and Answer (Q&A) (C1)(ii) and 301.6330-1(c)(2), Q&A (C1)(ii). The regulations require the IRS to provide the taxpayer an opportunity to "cure" any defect in a timely filed hearing request, including providing a reason for the hearing. Form 12153 includes space for the taxpayer to identify collection alternatives that he or she wants Appeals to consider, as well as examples of common reasons for requesting a hearing. *See* IRS Form 12153, Request for Collection Due Process or Equivalent Hearing (Dec. 2013); Internal Revenue Manual (IRM) 8.6.1.5.1, Conference Practice (Sept. 25, 2019).

23 Treas. Reg. §§ 301.6320-1(i)(2), Q&A (I6) and 301.6330-1(i)(2), Q&A (I6); *Business Integration Servs., Inc. v. Comm'r*, T.C. Memo. 2012-342 at 6-7; *Moorhouse v. Comm'r*, 116 T.C. 263 (2001). A taxpayer can request an Equivalent Hearing by checking a box on Form 12153, by making a written request, or by confirming that he or she wants the untimely CDP hearing request to be treated as an Equivalent Hearing when notified by Collection of an untimely CDP hearing request. IRM 5.19.8.4.3, Equivalent Hearing (EH) Requests and Timeliness of EH Requests (Nov. 1, 2007).

24 Treas. Reg. §§ 301.6320-1(i)(2), Q&A (I7) and 301.6330-1(i)(2), Q&A (I7).

25 IRC § 6320(b)(4).

by telephone or correspondence,[26] and Appeals will typically conduct the hearing by telephone unless the taxpayer requests an in-person conference and provides non-frivolous reasons for opposing the IRS collection action.[27]

The CDP hearing is to be held by an impartial officer from Appeals who has had "no prior involvement" and who is barred from engaging in *ex parte*[28] communications with IRS employees about the substance of the case.[29] In addition to addressing the issues raised by the taxpayer, the Appeals Officer (AO) must verify that the IRS has met the requirements of all applicable laws and administrative procedures.[30] An integral component of the CDP analysis is the balancing test, which requires the IRS AO to determine whether the proposed collection action balances the need for efficient collection of taxes with the legitimate concern of the taxpayer that any collection action be "no more intrusive than necessary."[31] The balancing test is central to a CDP hearing because it instills a notion of fairness into the process from the perspective of the taxpayer.[32]

Judicial Review of an IRS Determination After a Collection Due Process Hearing

Within 30 days of Appeals' determination, the taxpayer may petition the Tax Court for judicial review;[33] however, if the petition is filed even one day late, the Tax Court will not have jurisdiction to review the IRS's determination.[34] The court will only consider issues, including challenges to the

26 *Katz v. Comm'r*, 115 T.C. 329, 337-38 (2000) (finding that telephone conversations between the taxpayer and the AO constituted a hearing as provided in IRC § 6320(b)). Treas. Reg. §§ 301.6320-1(d)(2), Q&A (D)(6), Q&A (D)(8) and 301.6330-1(d)(2), Q&A (D)(6), Q&A (D)(8).

27 Under IRM 8.6.1.4.1, Conference Practice (Oct. 1, 2016), the default rule is to hold conferences by telephone, and to offer virtual conferences as an alternative to in-person conferences. Appeals may be able to accommodate a taxpayer's request for an in-person hearing in a field office, however Appeals campus locations cannot accommodate in-person conferences. *See* IRS, Interim Guidance on Appeals Conference Procedures, AP-08-1017-0017 (Oct. 13, 2017). A taxpayer will not be granted an in-person conference concerning a collection alternative, such as an IA or OIC, unless other taxpayers would be eligible for the alternative under similar circumstances. For example, the IRS will not grant an in-person conference to a taxpayer who proposes an OIC as the only issue to be addressed but failed to file all required returns and is therefore ineligible for an offer. *See* Treas. Reg. §§ 301.6320-1(d)(2), Q&A (D)(8) and 301.6330-1(d)(2), Q&A (D)(8).

28 Rev. Proc. 2012-18, 2012-1 C.B. 455 § 2.01 defines *ex parte* communication as "a communication that takes place between any Appeals employee (*e.g.*, Appeals Officers, Settlement Officers, Appeals Team Case Leaders, Appeals Tax Computation Specialists) and employees of other IRS functions, without the taxpayer/representative being given an opportunity to participate in the communication. The term includes all forms of communication, oral or written. Written communications include those that are manually or electronically generated."

29 IRC §§ 6320(b)(1), 6320(b)(3), 6330(b)(1), and 6330(b)(3). *See also* Rev. Proc. 2012-18, 2012-1 C.B. 455. *See, e.g.*, *Industrial Investors v. Comm'r*, T.C. Memo. 2007-93; *Moore v. Comm'r*, T.C. Memo. 2006-171, *action on dec.*, 2007-2 (Feb. 27, 2007); *Cox v. Comm'r*, 514 F.3d 1119, 1124-28 (10th Cir. 2008), *action on dec.*, 2009-1 (June 1, 2009), 2009-22 I.R.B.1.

30 IRC § 6330(c)(1); *Hoyle v. Comm'r*, 131 T.C. 197 (2008); *Talbot v. Comm'r*, T.C. Memo. 2016-191 (2016).

31 IRC § 6330(c)(3)(C); IRM 8.22.4.2.2, Summary of CDP Process (Aug. 9, 2017). *See also* H.R. Rep. No. 105-599, at 263 (1998). For simplicity, we use the term "proposed collection action" referring to both the actions taken and proposed. Treasury Regulations under IRC § 6320 require a Hearing Officer to consider "[w]hether the continued existence of the filed [NFTL] represents a balance between the need for the efficient collection of taxes and the legitimate concern of the taxpayer that any collection action be no more intrusive than necessary." *See* Treas. Reg. § 301.6320-1(e)(3), Q&A (E)(1)(vi).

32 *See* National Taxpayer Advocate 2014 Annual Report to Congress 185-196 (Most Serious Problem: *Collection Due Process: The IRS Needs Specific Procedures for Performing the Collection Due Process Balancing Test to Enhance Taxpayer Protections*). *See also* Nina E. Olson, *Taking the Bull by Its Horns: Some Thoughts on Constitutional Due Process in Tax Collection*, 2010 Erwin N. Griswold Lecture Before the American College of Tax Counsel, 63 Tax Law. 227 (2010).

33 IRC § 6330(d)(1).

34 *See, e.g.*, *Duggan v. Comm'r*, Order of Dismissal for Lack of Jurisdiction, Tax Ct. No. 4100-15L (2015) (dismissing for lack of jurisdiction where petition was filed "31 days after the mailing of the notices of determination"); *Pottgen v. Comm'r*, Order of Dismissal for Lack of Jurisdiction, Tax Ct. No. 1410-15L (2016) (dismissing for lack of jurisdiction where petition was received by Tax Court one day late).

underlying liability, that were properly raised during the CDP hearing.[35] An issue is not properly raised if the taxpayer fails to request that Appeals consider the issue, or if the taxpayer fails to present any evidence regarding consideration of that issue after being given a reasonable opportunity.[36] The Tax Court, however, may remand a case back to Appeals for more fact finding when the taxpayer's factual circumstances have materially changed between the hearing date and the trial.[37] When the case is remanded to Appeals, the Tax Court retains jurisdiction.[38] The resulting hearing on remand provides the parties with an opportunity to complete the initial hearing while preserving the taxpayer's right to return to Court and receive judicial review of the ultimate administrative determination.[39]

The standard of review the court will apply depends on the nature of the issue it is reviewing. Where the validity of the underlying tax liability is properly at issue in the hearing, the court will review the amount of the tax liability on a *de novo*[40] basis, and the scope of its review extends to evidence introduced at the trial that was not a part of the administrative record.[41] Where the Tax Court is reviewing the appropriateness of the collection action or subsidiary factual and legal findings, the court will review these determinations under an abuse of discretion standard.[42]

Special rules apply to the IRS's handling of hearing requests that raise frivolous issues. Internal Revenue Code (IRC) § 6330(g) provides that the IRS may disregard any portion of a hearing request based on a position the IRS has identified as frivolous or that reflects a desire to delay or impede the administration of tax laws.[43] Similarly, IRC § 6330(c)(4)(B) provides that a taxpayer cannot raise an issue if it is based on a position identified as frivolous or reflects a desire to delay or impede tax administration.

IRC § 6702(b) allows the IRS to impose a penalty for a specified frivolous submission, including a frivolous CDP hearing request.[44] A request is subject to a penalty if any part of it "(i) is based on a position that the Secretary has identified as frivolous … or (ii) reflects a desire to delay or impede the administration of Federal tax laws."[45] A taxpayer can timely petition the Tax Court to review an Appeals decision if Appeals determined that a request for an administrative hearing was based entirely on a

35 *Giamelli v. Comm'r*, 129 T.C. 107 (2007).

36 Treas. Reg. §§ 301.6320-1(f)(2), Q&A (F)(3); 301.6330-1(f)(2), Q&A (F)(3).

37 *Churchill v. Comm'r*, T.C. Memo. 2011-182; see also IRS Chief Counsel Notice CC-2013-002, Remands to Appeals in CDP Cases When There Is a Post-Determination Change in Circumstances (Nov. 30, 2012), which provides Counsel attorneys with instructions on when a remand based on changed circumstances might be appropriate; *but see Kehoe v. Comm'r*, T.C. Memo. 2013-63 (taxpayer's eligibility to make withdrawals from his IRA without the threat of penalty does not amount to a material change in circumstances such that remand would be appropriate).

38 *See, e.g., Pomeroy v. Comm'r*, T.C. Memo. 2013-26 at 20; Bob Kamman, *For IRS Appeals Office, An Epidemic of Remands*, Procedurally Taxing Blog (Oct. 9, 2018), http://proceduralltaxing.com/for-irs-appeals-office-an-epidemic-of-remands/.

39 *Wadleigh v. Comm'r*, 134 T.C. 280, 299 (2010).

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

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

42 *See, e.g., Murphy v. Comm'r*, 469 F.3d 27 (1st Cir. 2006); *Dalton v. Comm'r*, 682 F.3d 149 (1st Cir. 2012).

43 IRC § 6330(g). IRC § 6330(g) is effective for submissions made and issues raised after the date on which the IRS first prescribed a list of frivolous positions. Notice 2007-30, 2007-1 C.B. 833 provided the first published list of frivolous positions. Notice 2010-33, 2010-17 C.B. 609, contains the current list.

44 The frivolous submission penalty applies to the following submissions: CDP hearing requests under IRC §§ 6320 and 6330, OIC under IRC § 7122, IAs under IRC § 6159, and applications for a Taxpayer Assistance Order under IRC § 7811.

45 IRC § 6702(b)(2)(A). Before asserting the penalty, the IRS must notify the taxpayer that it has determined that the taxpayer filed a frivolous hearing request. The taxpayer has 30 days to withdraw the submission to avoid the penalty. IRC § 6702(b)(3).

frivolous position under IRC § 6702(b)(2)(A) and issued a notice stating that Appeals will disregard the request.[46] If IRS Counsel's review reveals that a CDP hearing was properly denied under IRC § 6330(g), Counsel will file an appropriate motion with the Court to resolve the case through a dismissal or summary judgment. If the Tax Court determines that a hearing was improperly denied, IRS Counsel will request a remand to Appeals. Counsel will also consider filing a motion to permit levy so that the Service can immediately levy after the Tax Court's order.[47]

Court Review of Facts Outside the Administrative Record

When the review is for abuse of discretion, it is the position of the Tax Court that the scope of its review extends beyond the administrative record to include evidence adduced at trial, although in nonliability CDP cases appealable to the U.S. Courts of Appeals for the First, Eighth, and Ninth Circuits, the scope of review is limited to the administrative record.[48] However, in cases appealable to the other U.S. Courts of Appeals that have yet to address that precise issue in a precedential opinion, the court may consider new evidence not contained in the administrative record.[49]

Opportunity to Contest an Underlying Liability

The regulations distinguish between liabilities that are subject to deficiency procedures and those that are not. For liabilities subject to deficiency procedures, an opportunity for a post-examination conference with the IRS Office of Appeals does not bar the taxpayer (in appropriate circumstances) from contesting his or her liability in a later CDP proceeding.[50] On the other hand, where a liability is not subject to deficiency procedures, "[a]n opportunity to dispute the underlying liability includes a prior opportunity for a conference with Appeals that was offered either before or after the assessment of the liability."[51] For example, an IRC § 6707A penalty[52] is an assessable penalty not subject to deficiency procedures.[53]

46 *See Thornberry v. Comm'r*, 136 T.C. 356, 367 (2011). The D.C. Appeals Court upheld *Thornberry* in *Ryskamp v. Comm'r*, 797 F.3d 1142 (D.C. Cir. 2015) *cert. denied*, 136 S. Ct. 834 (2016). *See also* National Taxpayer Advocate 2015 Annual Report to Congress 481, 489 (Most Litigated Issue: *Appeals from Collection Due Process Hearings Under IRC §§ 6320 and 6330*).

47 IRS Chief Counsel Notice CC-2016-008, Disregarding Frivolous CDP Hearing Requests Under Section 6330(g) (Apr. 4, 2016).

48 *See Kasper v. Comm'r*, 150 T.C. No. 2 at 19 n.13 (2018); *see also Keller v. Comm'r*, 568 F.3d 710, 718 (9th Cir. 2009), *aff'g* in part as to this issue T.C. Memo. 2006-166; *Murphy v. Comm'r*, 469 F.3d 27; *Robinette v. Comm'r*, 439 F.3d 455 (8th Cir. 2006), *rev'g* 123 T.C. 85 (2004).

49 *See* IRC § 7482(b)(1)(G)(i); *Rozday v. Comm'r*, 703 F. App'x. 138, 139 (3d Cir. 2017); *Tuka v. Comm'r*, 324 F. App'x 193, 195 n.2 (3d Cir. 2009); *Emery Celli Cuti Brinckerhoff & Abady, P.C. v. Comm'r*, T.C. Memo. 2018-55; and *Robinette v. Comm'r*, 123 T.C. at 103.

50 *See* Treas. Reg. §§ 301.6320-1(e)(3), Q&A-E2 and 301.6330–1(e)(3), Q&A–E2. *Cf.* IRC § 6330(c)(2)(B) (receiving the statutory notice of deficiency precludes the taxpayer from contesting the underlying liability).

51 *See* Treas. Reg. §§ 301.6320-1(e)(3), Q&A-E2 and 301.6330–1(e)(3), Q&A–E2.

52 IRC § 6707A provides a monetary penalty for the failure to include a reportable transaction required to be disclosed under IRC § 6011.

53 The Tax Court reiterated that a taxpayer is entitled to challenge his underlying liability for a § 6707A penalty only if the taxpayer did not have a prior opportunity to dispute it. A "prior opportunity" was found to include a prior opportunity for a conference with Appeals. *See Bitter v. Comm'r*, T.C. Memo. 2017-46. The *Bitter* determination was a culmination of similar developments in circuit court decisions on the same issue. *See Iames v. Comm'r*, 850 F.3d 160 (4th Cir. 2017); *Keller Tank Serv. II, Inc. v. Comm'r*, 854 F.3d 1178 (10th Cir. 2017); *Our Country Home Enterprises, Inc. v. Comm'r*, 855 F.3d 773 (7th Cir. 2017).

Appellate Venue From Decisions of the Tax Court

Under the rule established in *Golsen v. Commissioner*,[54] the Tax Court follows the precedent of the circuit court to which the parties have the right to appeal regardless of whether the taxpayer's tax liability was at issue. IRC § 7482(b)(1)(G) specifies that CDP cases are appealable to the circuit of the taxpayer's legal residence (if the taxpayer is an individual) or the taxpayer's principal place of business, office, or agency (if the taxpayer is not an individual).[55]

ANALYSIS OF LITIGATED CASES

We identified and reviewed 80 CDP court opinions, an increase of about eight percent from the 74 published opinions in last year's report. During 12 out of the last 16 years, the number of requests for IRS CDP hearings has risen and fallen consistent with the number of CDP notices the IRS mails to taxpayers each year. The number of petitions for judicial review in the Tax Court has followed a similar trend during ten out of the last 16 years. This year, the number of petitions decreased by five percent while the IRS issued 11 percent more notices than it did last year. Notably, only a small fraction of taxpayers exercise their right to request an administrative hearing or petition for judicial review. Fewer than one in 50 taxpayers who received a CDP notice requested an administrative hearing, and fewer than one in 800 filed a petition in Tax Court. This could be an indication that taxpayers aren't reading CDP notices or that they don't understand how to respond to them or exercise their rights as taxpayers. Figure 2.2.1 depicts these trends.

54 54 T.C. 742 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971).

55 According to the ruling in *Byers v. Comm'r*, the correct venue for appeals from the Tax Court in cases filed before December 18, 2015 generally was the D.C. Circuit Court unless one of the rules specified in IRC § 7482(b)(1) or exceptions specified in IRC § 7482(b)(2) or (b)(3) applied. *Byers*, 740 F. 3d 668 (D.C. Cir. 2014). In 2015, Congress amended IRC § 7482 to overturn *Byers*. Pub. L. No. 114-113, Div. Q, Title IV, § 423(a), (b) (2015). The National Taxpayer Advocate recommended this precise legislative change. See National Taxpayer Advocate 2014 Annual Report to Congress 387-391 (Legislative Recommendation: *Appellate Venue in Non-Liability CDP Cases: Amend IRC § 7482 to Provide That the Proper Venue to Seek Review of a Tax Court Decision in All Collection Due Process Cases Lies with the Federal Court of Appeals for the Circuit in Which the Taxpayer Resides*). For a more detailed discussion of the *Byers* case see National Taxpayer Advocate 2014 Annual Report to Congress 477-494 (Most Litigated Issue: *Appeals from Collection Due Process Hearings Under IRC §§ 6320 and 6330*).

FIGURE 2.2.1

Collection Due Process (CDP) Notices, Hearing Requests, Petitions, and Litigation

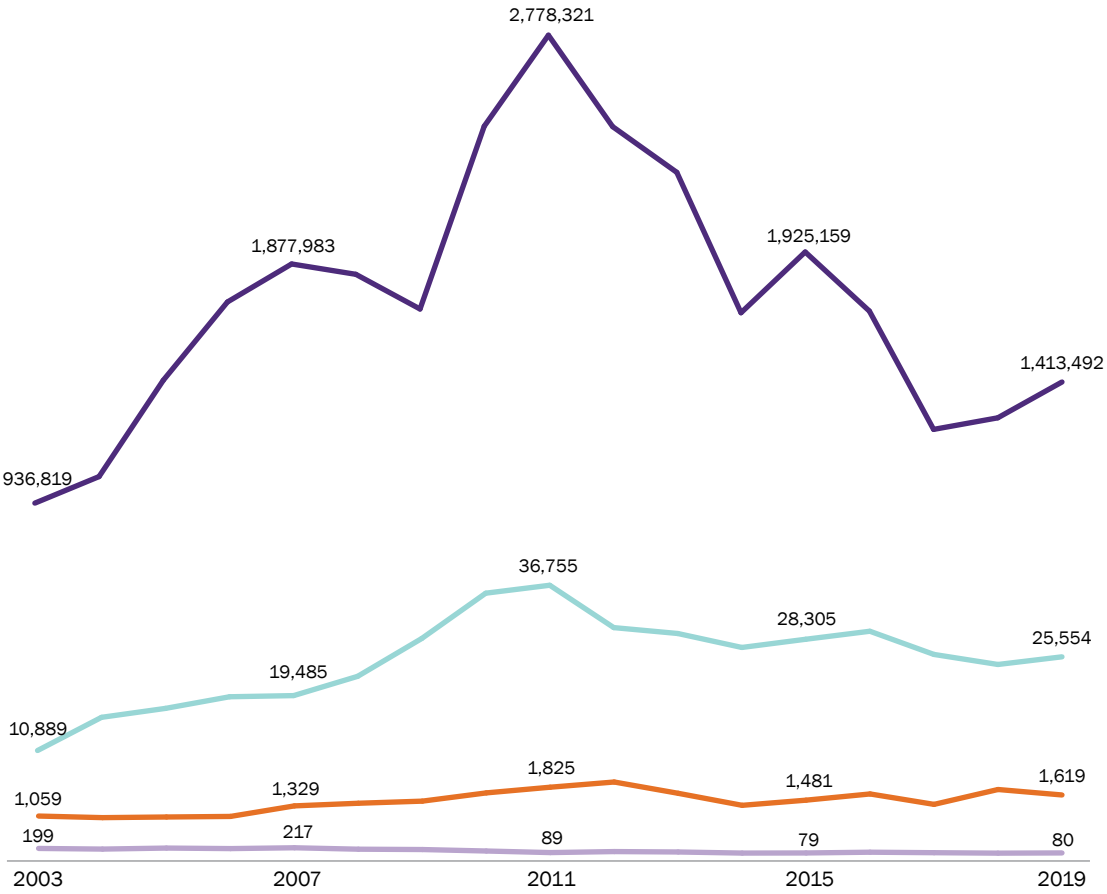
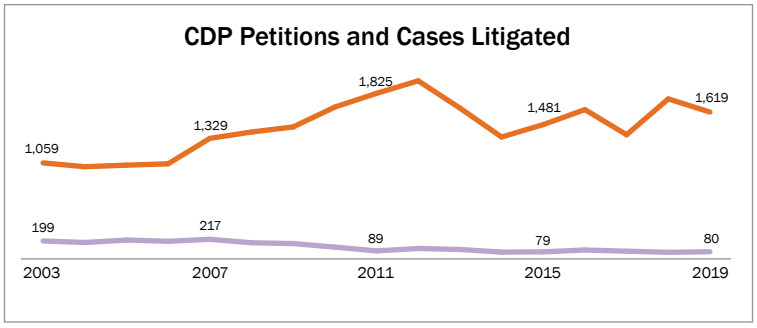


Figure is not to exact scale



The 80 opinions identified this year do not reflect the full number of CDP cases because the court does not issue an opinion in all cases.[56] Some are resolved through settlements, and in other cases, taxpayers do not pursue litigation after filing a petition with the court.[57] The Tax Court also disposes of some cases by issuing unpublished orders.[58] Table 2 in Appendix 5 provides a detailed list of the published CDP opinions, including specific information about the issues, the types of taxpayers involved, and the outcomes of the cases.

Kearse v. Commissioner

In *Kearse v. Commissioner*,[59] the taxpayer sought review, pursuant to IRC §§ 6320(c) and 6330(d)(1), of the IRS's determination to uphold an NFTL filing. Mr. Kearse is a retired professional athlete who played in the National Football League from 1999 to 2010. His liability stems from an IRS determination rejecting a $1,359,000 deduction he claimed on his Form 1040, U.S. Individual Income Tax Return, in 2010 for a "business bad debt expense."[60] On May 11, 2012, the IRS issued a notice of deficiency to the Kearse's last known address. The taxpayer contended that the IRS failed to properly mail the notice of deficiency. Both parties stipulated that the IRS could not provide United States Postal Service (USPS) Form 3877 to prove the notice was properly mailed.

On November 4, 2012, the IRS filed an NFTL for the 2010 tax liability and sent Kearse a Letter 3172, Notice of Federal Tax Lien and Filing and Your Right to a Hearing.[61] In response, Kearse timely submitted a CDP hearing request, Form 12153, Request for a Collection Due Process or Equivalent Hearing, and an OIC request, Form 656-L, Offer in Compromise (Doubt as to Liability). In his OIC request, he offered to pay $1 and attached a document disputing the proper mailing of the notice. At the CDP hearing, Kearse's authorized representative raised his underlying tax liability and alleged that the notice of deficiency was not properly mailed. The AO sent Kearse a Notice of Determination stating that the requirements of applicable law or administrative procedures had been met and the actions taken were appropriate under the circumstances and sustained the NFTL. Kearse timely filed a petition with the Tax Court for review of the notice of determination.

The Tax Court held that the AO failed to accurately verify that a properly mailed notice preceded the taxpayer's assessment as mandated by IRC § 6330(c).[62] If the defaulted notice of deficiency is the basis for the assessment, an AO must verify that the notice of deficiency was properly mailed to the taxpayer before the assessment.[63] The court rejected the AO's reliance on the IRS's Integrated Data Retrieval

56 See U.S. Tax Court, Orders Search, https://www.ustaxcourt.gov/InternetOrders/OrdersSearch.aspx.

57 Prior to Oct. 17, 2006, the taxpayer could also petition the federal district court if the Tax Court did not have jurisdiction over the underlying tax liability (*e.g.*, if the matter involved an employment tax liability).

58 The statistics analyzing the number of litigated cases exclude Tax Court summary judgments and bench orders, which are unpublished; however, Appendix 5, Tables 11 and 12 lists the summary judgments and bench orders. Each division or memorandum opinion goes through a legislatively mandated pre-issuance review by the Chief Judge. IRC §§ 7459(b); 7460(a). While division opinions are precedential, orders are not, being issued "in the exercise of discretion" by a single judge. *See* IRC § 7463(b); Rule 50(f), Tax Court Rules of Practice and Procedure (denying precedential status to orders) and 152(c) (denying precedential status to bench opinions). *See also Introduction: Most Litigated Issues*, *supra*.

59 T.C. Memo. 2019-53.

60 During the CDP process and in Tax Court the taxpayer asserted that he had not suffered a business bad debt loss but rather a theft loss of $1,679,500.

61 IRC § 6320.

62 IRC § 6320(c).

63 IRM 8.22.5.4.2, Legal and Administrative (L & A) Procedure Review (Mar. 29, 2012); 8.22.5.4.2.1.1, Statutory Notice of Deficiency (SNOD) (Nov. 8, 2013).

System to verify that the notice was issued per the IRS guidance.[64] When a taxpayer claims a notice was not properly mailed, the AO must review a copy of the notice of deficiency and the USPS Form 3877 or the equivalent IRS certified mail list bearing a USPS date stamp or the initials of a postal employee.[65] The AO acknowledged that she did not secure and review either of these documents before the notice of determination was issued.[66] The court concluded that the AO failed to verify that all procedural requirements were met before sustaining the NFTL and thus abused her discretion.

Gregory v. Commissioner[67]

In *Gregory v. Commissioner*, the taxpayer also challenged the validity of the assessment during the CDP hearing, but the IRS did not make a stipulation as to proof of the mailing, and the Tax Court upheld the IRS AO's determination.[68] The IRS mailed the NFTL to the taxpayer on January 28, 2014, and the taxpayer requested a CDP hearing one month later. IRS Appeals issued a notice of determination sustaining the NFTL in December 2015. The taxpayer's argument challenging the validity of the assessment was four-fold.

First, the taxpayer claimed the IRS did not create a notice of deficiency because the administrative file did not contain a copy of the actual notice that was mailed. The Court rejected the claim holding that even if the reprint does not qualify as a duplicate, it can still serve as evidence that the IRS prepared a notice of deficiency.[69]

Second, regarding the taxpayer's challenge as to the mailing of the notice, the Court agreed that the IRS had provided a certified mail list it maintains that associates a certified mail number with the notice and thus provides evidence that the notice was not only created but also mailed.[70] The taxpayer also objected to the IRS's use of a certified mail list in place of USPS Form 3877, but the Tax Court held that it was equivalent evidence of proper mailing of a notice of deficiency for his 2009 taxable year because Gregory did not identify any information missing from the IRS's certified mail list that would be included on a USPS Form 3877.

Third, the taxpayer challenged the validity of the assessment claiming the reprint lacked some of the elements described in Internal Revenue Manual (IRM) 4.8.9.2. However, the Tax Court noted that it is immaterial that the IRM defines the term "notice of deficiency" to consist of elements beyond those required by case law. Specifically, a notice of deficiency is adequate if it notifies the taxpayer of the Commissioner's intent to assess a deficiency and gives him the opportunity to petition the Tax Court for redetermination.

64 IRC § 6330(c)(1); IRM 8.22.5.4.2.1.1 (Nov. 8, 2013).

65 IRM 8.22.5.4.2.1.1(6) (Nov. 8, 2013).

66 It should be noted that the IRS was eventually able to produce USPS Form 3877, verifying that the notice of deficiency was properly mailed to Kearse. However, both parties had previously stipulated that the IRS could not produce the document. Stipulations are treated as conclusive admissions, which the Court will not allow a party to alter or contradict, unless in extraordinary circumstances. The IRS also did not challenge or ask to be released from the stipulation, so the Court maintained the stipulation. *Kearse v. Comm'r*, T.C. Memo. 2019-53 (citing *Winter v. Comm'r*, T.C. Memo. 2010-287, at 10).

67 *Gregory v. Comm'r*, T.C. Memo. 2018-192, *appeal dismissed*, 2019 WL 4184071 (9th Cir. June 21, 2019).

68 *Id*.

69 Because the information shown on the reprint was included in the IRS's database, the Court could infer that it was created in accordance with customary practice.

70 By the time of the taxpayer's CDP hearing in March 2015, however, that certified mail number could not have been used to track a notice of deficiency mailed on November 13, 2012, because the Postal Service stores tracking information on items sent by certified mail for no more than two years.

Lastly, the taxpayer challenged the validity of the assessment as lacking the signature of an authorized individual. The notice was signed by a technical services territory manager in the Small Business/Self-Employed (SB/SE) division of the IRS. The Tax Court followed the ruling in *Muncy v. Commissioner*[71] that accepted Delegation Order 4-8, IRM 1.2.43.9 (Sept. 4, 2012), as documentation that SB/SE technical services territory managers have authority to issue notices of deficiency.

Ultimately, having rejected each of the taxpayer's challenges to the validity of the assessment the Tax Court concluded that the AO properly sustained the NFTL.

Loveland v. Commissioner[72]

In *Loveland v. Commissioner*, a married couple stopped paying their taxes after suffering a series of health issues and losing their home to foreclosure during a recession.[73] In 2015, the IRS issued a notice of intent to levy for their outstanding tax liabilities for taxable years 2011-2014 in an amount over $60,000. During negotiations with a revenue officer, the taxpayers discussed an OIC based on doubt as to collectibility with "special circumstances." The IRS rejected the OIC stating that based on the financial information provided, the taxpayers could pay the full amount, and that their "special circumstances" did not warrant accepting the OIC.

The taxpayers tried to borrow money to make a large payment to bring their liability below $50,000, qualifying them for a streamlined installment agreement processing. However, on the same day the taxpayers submitted their loan application, the IRS filed an NFTL. As a result, the taxpayers were unable to obtain a loan. The taxpayers timely requested a CDP hearing with the IRS Office of Appeals, asking for release of the lien and claiming that it derailed a mortgage refinance and caused economic hardship. The IRS AO sent the taxpayers a letter scheduling their hearing and informing them of the necessary documents to submit for a collection alternative to be considered. In response, the taxpayers sent a letter containing several documents, including Form 433-A, Collection Information Statement for Wage Earners and Self-Employed Individuals, and requested the AO revisit the OIC, consider an installment agreement, and consider their economic hardship and exceptional circumstances.

During the hearing, the AO rejected the taxpayers' proposed installment agreement and did not consider the taxpayers' financial information. The AO sent a notice of determination to the taxpayers and refused to release the lien, stating incorrectly that the couple had not provided the necessary financial documents.

The taxpayers filed a petition in the Tax Court for review of the decision to sustain the lien. They contended that the determination caused economic hardship and violated their due process rights, and that the AO did not genuinely consider their special circumstances. They provided the financial information that they had previously submitted and cited to regulations that allowed the IRS to present alternatives for taxpayers whose disabilities limit their ability to pay.

The Tax Court held that meeting with a revenue officer did not constitute a previous administrative proceeding under IRC § 6330(c)(4)(A)(i) and Treas. Reg. § 301.63201(e)(1) because the taxpayers only negotiated with the IRS revenue officer and did not have a CDP hearing regarding her rejection of their OIC. Thus, they could request consideration of the same OIC in a subsequent CDP hearing on the same

71 T.C. Memo. 2017-83.

72 *Loveland v. Comm'r*, 151 T.C. 78 (2018).

73 Mr. Loveland is a retired boilermaker, and Mrs. Loveland is a retired teacher.

tax liabilities for the same tax periods. The court held that the AO's refusal to consider the proposed OIC, failure to consider a proposed installment agreement on a false premise that taxpayers did not provide any financial information, and failure to consider taxpayers' claim of economic hardship was an abuse of discretion. The court remanded the case to Appeals for further consideration.

Romano-Murphy v. Commissioner

In *Romano-Murphy v. Commissioner*, the IRS sent the Chief Operating Officer of a nurse-staffing company, Ms. Romano-Murphy, a Letter 1153, Trust Fund Penalty Recovery Letter, to propose a trust fund recovery penalty (TFRP) under IRC § 6672(a) for the failure to pay employment taxes withheld from employees' wages of Nurses PRN, LLC.[74] Ms. Romano-Murphy filed a timely protest of the proposed assessment and requested "a conference to discuss the supporting documents contained with her formal written protest." The IRS did not make a final administrative determination regarding her protest and instead assessed the TFRP and proceeded with collection actions such as issuing a notice of proposed levy and filing of an NFTL. The taxpayer timely requested a CDP hearing with the IRS Office of Appeals. At the hearing she challenged her liability for the penalty. The Office of Appeals determined that she was liable for the penalty and sustained the proposed levy and the filing of the notice of lien.

The Tax Court determined that the IRS was not required to make a final administrative determination regarding her protest before assessing the TFRP and upheld Appeals' determination.[75] The taxpayer appealed the Tax Court's decision to the U.S. Court of Appeals for the Eleventh Circuit arguing the IRS failed to provide her with a pre-assessment determination following her response to Letter 1153.[76] The IRS argued that IRC § 6672(b)(3) does not confer a right to a pre-assessment hearing or a pre-assessment final administrative determination; instead, it extends the period for the IRS to assess the penalty.[77] The Eleventh Circuit held that the IRS improperly assessed the penalty because IRC § 6672(b)(3)(B) and Treasury regulations required the IRS to make a final administrative determination before assessing the penalty, and that requirement was one of the "requirements of applicable law or administrative procedure," compliance with which had to be verified under IRC § 6330(c)(1).[78] The Eleventh Circuit remanded the case back to the Tax Court to determine what corrective action should be taken to remedy the IRS's violation of this requirement.[79]

On remand, the Tax Court held that the TFRP assessment was invalid and that the Office of Appeals abused its discretion in upholding the proposed levy and the filing of the NFTL to collect the assessment without first making a final decision on the protest.[80] The Tax Court also determined that its holding was consistent with general principles of law regarding harmless error.[81] The timing of the

74 2019 U.S. Tax Ct. LEXIS 17 (May 21, 2019).

75 T.C. Memo. 2012-330.

76 *Romano-Murphy v. Comm'r*, 816 F.3d 707 (11th Cir. 2016), *rev'g and remanding* T.C. Memo. 2012-330.

77 *See* IRC § 6672(b)(3)(B).

78 The Court of appeals states that even assuming IRC § 6672 were ambiguous, Treasury regulations require the IRS Office of Appeals to make a pre-assessment determination of § 6672 liability when a timely protest is filed. *See* Treas. Reg. §§ 301.7430-3(d), Ex. (5) and (7); 301.6320-1(e)(4), Ex. (3). This is also consistent with § 601.106(a)(1)(iv), Statement of Procedural Rules, which provides that the taxpayer may appeal certain penalties to the Office of Appeals after assessment. However, the TFRP is not such a penalty "because the taxpayer has the opportunity to appeal this penalty prior to assessment." *Id*.

79 *Romano-Murphy v. Comm'r*, 816 F.3d at 714.

80 2019 U.S. Tax Ct. LEXIS 17.

81 *Id*.

assessment determines when collection can legally begin and end, so the Court did not need to consider whether the taxpayer was specifically harmed by the timing error.

CONCLUSION

CDP hearings provide instrumental protections for taxpayers to meaningfully address the appropriateness of IRS collection actions. Given the important safeguard that CDP hearings offer taxpayers, it is unsurprising that CDP remains one of the most frequently litigated issues. The cases discussed this year were important for a variety of reasons.

These cases affirmed important rights for taxpayers, including the *rights to be informed*, *to challenge the IRS's position and be heard*, and *to appeal an IRS decision in an independent forum*.[82] A key to ensuring that these rights are protected is the IRS's communication with the taxpayer.[83] This year, the courts reemphasized the importance of IRS AOs verifying that the requirements of applicable law or administrative procedure are met before issuing determinations as required under IRC § 6330(c)(1). The IRS satisfying procedural requirements in the CDP process goes a long way to protect the taxpayer *rights to be informed*, *to appeal the IRS's decision in an independent forum*, and *to a fair and just tax system*.[84] Court decisions in *Kearse* and *Romano-Murphy* showed that courts would not tolerate AOs failing to verify that the IRS met all applicable legal and administrative procedure requirements when sustaining IRS collection actions. Although the burden is on the IRS during the court proceeding to produce documents that verify it followed procedural requirements, taxpayers should keep track of when the 30-day appeal filing period begins, namely, the requirement in IRC § 6330(d)(1) that the taxpayer petition the Tax Court within 30 days of the date of an IRS notice. The taxpayer may be at a disadvantage in this situation because the IRS is the party with the records in its custody. For example, in *Gregory*, the Tax Court did not find an abuse of discretion in the IRS AO sustaining the NFTL when the IRS's administrative record showed that the IRS met all procedural requirements for the assessment. For the reasons stated above, it is possible that this will be an issue of litigation in the future.

In a full Tax Court opinion in *Loveland*, the court reinforced the taxpayers' *rights to challenge the IRS's position and be heard* and *to fair and just tax system* by raising alternatives to the collection action during the CDP hearing. The court sent a clear message to the IRS that it is an abuse of discretion to neglect to consider all of the issues raised by a taxpayer and the appropriate financial information the taxpayers provided. A thorough and meaningful verification that all procedural requirements are met may reduce litigation and improve voluntary compliance.

82 On July 2, 2019, Congress passed the Taxpayer First Act. It codifies the independence of the Office of Appeals within the IRS. It will also give certain taxpayers the ability to access administrative case files referred to the Independent Appeals. S. 1, 116 Cong. H.R. 1957 (2019).

83 See National Taxpayer Advocate 2018 Annual Report to Congress 212-222 (Most Serious Problem: *Collection Due Process Notices: Despite Recent Changes to Collection Due Process Notices, Taxpayers Are Still at Risk for Not Understanding Important Procedures and Deadlines, Thereby Missing Their Right to an Independent Hearing and Tax Court Review*).

84 See *Kearse v. Comm'r*, T.C. Memo. 2019-53; *Romano-Murphy v. Comm'r*, 2019 U.S. Tax Ct. LEXIS 17 (May 21, 2019).

MLI #3 Accuracy-Related Penalty Under IRC § 6662(b)(1) and (2)

SUMMARY

Internal Revenue Code (IRC) § 6662(b)(1) and (2) authorizes the IRS to impose a penalty if a taxpayer's negligence or disregard of rules or regulations causes an underpayment of tax required to be shown on a return, or if an underpayment exceeds a computational threshold called a substantial understatement, respectively. IRC § 6662(b) also authorizes the IRS to impose the accuracy-related penalty on an underpayment of tax in six other circumstances.[1] We identified 79 opinions issued between June 1, 2018, and May 31, 2019, where taxpayers litigated the negligence or substantial understatement components of the accuracy-related penalty, which is a notable decrease over recent years.

TAXPAYER RIGHTS IMPACTED[2]

- *The Right to Pay No More Than the Correct Amount of Tax*
- *The Right to Challenge the IRS's Position and Be Heard*
- *The Right to Appeal an IRS Decision in an Independent Forum*
- *The Right to a Fair and Just Tax System*

PRESENT LAW

The amount of an accuracy-related penalty equals 20 percent of the portion of the underpayment attributable to the taxpayer's negligence or disregard of rules or regulations, or to a substantial understatement.[3] An underpayment is the amount by which any tax imposed by the IRC exceeds the excess of: the sum of (A) the amount shown as the tax by the taxpayer on his or her return, plus (B) amounts not shown on the return but previously assessed (or collected without assessment), over the amount of rebates made.[4] For this computation, Congress changed the law in 2015 to provide that the excess of refundable credits over the tax is taken into account as a negative amount.[5] Therefore, for

1 IRC § 6662(b)(3) authorizes a penalty for any substantial valuation misstatement under chapter 1 (IRC §§ 1-1400Z-2); IRC § 6662(b)(4) authorizes a penalty for any substantial overstatement of pension liabilities; IRC § 6662(b)(5) authorizes a penalty for any substantial estate or gift tax valuation understatement; IRC § 6662(b)(6) authorizes a penalty when the IRS disallows the tax benefits claimed by the taxpayer when the transaction lacks economic substance; IRC § 6662(b)(7) authorizes a penalty for any undisclosed foreign financial asset understatement; and IRC § 6662(b)(8) authorizes a penalty for any inconsistent estate basis. IRC § 6662(b)(8) was added by the Surface Transportation and Veterans Health Care Choice Improvement Act of 2015, Pub. L. No. 114-41, § 2004(c)(1), 129 Stat. 443, 456 (2015). We have chosen not to cover the IRC § 6662(b)(3) - (8) penalties in this report, as these penalties were not litigated nearly as often as IRC § 6662(b)(1) and 6662(b)(2) during the period we reviewed.

2 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are also codified in the IRC. *See* IRC § 7803(a)(3).

3 IRC § 6662(b)(1) (negligence/disregard of rules or regulations); IRC § 6662(b)(2) (substantial understatement of income tax).

4 IRC § 6664(a).

5 IRC § 6664(a). Prior to December 18, 2015, refundable credits could not reduce below zero the amount shown as tax by the taxpayer on a return. *See Rand v. Comm'r*, 141 T.C. 376 (2013). On December 18, 2015, Congress enacted a law that reversed the Tax Court's decision in *Rand* and amended IRC § 6664(a) to be consistent with the rule of IRC § 6211(b)(4). *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title II, § 209, 129 Stat. 2242, 3084 (2015).

returns filed after December 18, 2015, or returns filed on or before that date for which the period of limitations on assessment under IRC § 6501 has not expired, a taxpayer can be subject to an IRC § 6662 underpayment penalty based on a refundable credit that reduces tax below zero.

The IRS may assess penalties under IRC § 6662(b)(1) and (2), but the total penalty rate generally cannot exceed 20 percent (*i.e.*, the penalties are not "stackable").[6] Generally, taxpayers are not subject to the accuracy-related penalty if they establish that they had reasonable cause for the underpayment and acted in good faith.[7]

Negligence

The IRS may impose the IRC § 6662(b)(1) negligence penalty if it concludes that a taxpayer's negligence or disregard of the rules or regulations caused the underpayment. The negligence component of the penalty applies only to the portion of the underpayment attributable to negligence. Negligence is defined to include "any failure to make a reasonable attempt to comply with the provisions of this title, and the term 'disregard' includes any careless, reckless, or intentional disregard."[8] Negligence includes a failure to keep adequate books and records or to substantiate items that give rise to the underpayment.[9] Strong indicators include instances where a taxpayer failed to report income on a tax return that a payor reported on an information return,[10] as defined in IRC § 6724(d)(1),[11] or failed to make a reasonable attempt to ascertain the correctness of a deduction, credit, or exclusion.[12] The IRS can also consider various other factors in determining negligence.[13]

Substantial Understatement

Generally, an "understatement" is the difference between (1) the correct amount of tax and (2) the tax reported on the return, reduced by any rebate.[14] An understatement of tax may be reduced by any portion of the understatement attributable to an item for which there is either (1) substantial authority for the tax treatment of the item or (2) the tax treatment is adequately disclosed and supported by a reasonable basis.[15] This substantial authority standard is met if the taxpayer's position reasonably relies on one or more authorities listed in Treas. Reg. § 1.6662-4(d)(3)(iii).[16]

6 Treas. Reg. § 1.6662-2(c). The penalty rises to 40 percent if any portion of the underpayment is due to a gross valuation misstatement (IRC § 6662(h)(1); Treas. Reg. § 1.6662-5(a)), a nondisclosed noneconomic substance transaction (IRC § 6662(i)(1)), or an undisclosed foreign financial asset understatement (IRC § 6662(j)(3)).

7 IRC § 6664(c)(1).

8 IRC § 6662(c).

9 Treas. Reg. § 1.6662-3(b)(1).

10 Treas. Reg. § 1.6662-3(b)(1)(i).

11 IRC § 6724(d)(1) defines an information return by cross-referencing various other sections of the IRC that require information returns (*e.g.*, IRC § 6724(d)(1)(A)(ii) cross-references IRC § 6042(a)(1) for reporting of dividend payments).

12 Treas. Reg. § 1.6662-3(b)(1)(ii).

13 These factors include the taxpayer's history of noncompliance; the taxpayer's failure to maintain adequate books and records; actions taken by the taxpayer to ensure the tax was correct; and whether the taxpayer had an adequate explanation for underreported income. Internal Revenue Manual (IRM) 4.10.6.2.1, Negligence (May 14, 1999). *See also* IRM 20.1.5.3.2, Common Features of Accuracy-Related and Civil Fraud Penalties (Apr. 22, 2019).

14 IRC § 6662(d)(2)(A)(i) - (ii).

15 IRC § 6662(d)(2)(B)(i) - (ii).

16 Treas. Reg. § 1.6662-3(b)(3). Applicable authority could include information such as sections of the IRC; proposed, temporary, or final regulations; revenue rulings and revenue procedures; tax treaties and regulations thereunder, and Treasury Department and other official explanations of such treaties; court cases; and congressional intent as reflected in committee reports. Treas. Reg. § 1.6662-4(d)(3)(iii).

For individuals, the understatement of tax is substantial if it exceeds the greater of $5,000 or ten percent of the tax that must be shown on the return for the taxable year.[17] For corporations (other than S corporations or personal holding companies), an understatement is substantial if it exceeds the lesser of ten percent of the tax required to be shown on the return for the taxable year (or, if greater, $10,000), or $10,000,000.[18]

Reasonable Cause and Good Faith

The accuracy-related penalty does not apply to any portion of an underpayment where the taxpayer acted with reasonable cause and in good faith.[19] A reasonable cause determination considers all the pertinent facts and circumstances.[20] Generally, the most important factor is the extent to which the taxpayer made an effort to determine the proper tax liability.[21] Reliance on a return preparer may constitute reasonable cause and good faith if the reliance was reasonable and the taxpayer acted in good faith.[22] *Neonatology Associates v. Commissioner* establishes the three-part test for reasonable reliance on a tax professional in accuracy-related penalty cases:

(1) The adviser was a competent professional who had sufficient expertise to justify reliance;

(2) The taxpayer provided necessary and accurate information to the adviser; and

(3) The taxpayer actually relied in good faith on the adviser's judgment.[23]

Penalty Assessment and the Litigation Process

In general, the IRS proposes the accuracy-related penalty as part of its examination process[24] and through its Automated Underreporter (AUR) computer system.[25] Before a taxpayer receives a notice of deficiency, he or she generally has an opportunity to engage the IRS on the merits of the penalty.[26] Once the IRS concludes an accuracy-related penalty is warranted, it must follow deficiency procedures (*i.e.*, IRC §§ 6211-6213).[27] The IRS must send a notice of deficiency with the proposed adjustments and inform the taxpayer that he or she has 90 days to petition the U.S. Tax Court to challenge the

17 IRC § 6662(d)(1)(A)(i) - (ii). Note, however, that in the case of a taxpayer who claims a deduction allowed under IRC § 199A, the understatement of income tax is substantial if it exceeds the greater of five percent of the tax required to be shown on the return or $5,000.

18 IRC § 6662(d)(1)(B)(i) - (ii). S corporations and personal holding companies are subject to the same thresholds as individuals and all other non-C corporation taxpayers, found in IRC § 6662(d)(1)(A)(i) - (ii).

19 IRC § 6664(c)(1).

20 Treas. Reg. § 1.6664-4(b)(1).

21 *Id*.

22 Treas. Reg. § 1.6664-4(b).

23 115 T.C. 43, 99 (2000) (citations omitted), *aff'd*, 299 F.3d 221 (3d Cir. 2002).

24 IRM 4.10.6.2(1), Recognizing Noncompliance (May 14, 1999) ("assessment of penalties should be considered throughout the audit"). See also IRM 20.1.5.4, Examination Penalty Assertion (Apr. 22, 2019).

25 The AUR is an automated program that identifies discrepancies between the amounts that taxpayers reported on their returns and what payors reported via Form W-2, Form 1099, and other information returns. IRM 4.19.3.2, Overview of IMF Automated Underreporter (Dec. 15, 2017); IRM 4.19.3.18.6, Accuracy-Related Penalty Due to Negligence or Disregard of Rules or Regulations (Negligence Disregard Penalty) (May 19, 2017).

26 For example, when the IRS proposes to adjust a taxpayer's liability, it typically sends a notice ("30-day letter"), which gives the taxpayer 30 days to contest the proposed adjustments to the Office of Appeals and raise issues related to the deficiency, including any reasonable cause defense to a proposed penalty. If not resolved after the 30-day letter, the IRS sends a statutory notice of deficiency ("90-day letter"). *See* IRS Pub. 5, Your Appeal Rights and How to Prepare a Protest If You Don't Agree (Jan. 1999); IRS Pub. 3498, The Examination Process (Nov. 2004).

27 IRC § 6665(a)(1).

assessment.[28] Alternatively, taxpayers may seek judicial review through refund litigation.[29] Under certain circumstances, a taxpayer can request an administrative review of IRS collection procedures (and the underlying liability) through a Collection Due Process (CDP) hearing.[30]

IRC § 6751(b)(1) provides the general rule that no penalties may be assessed "unless the initial determination of such assessment is personally approved (in writing) by the immediate supervisor of the individual making such determination or such higher-level official as the Secretary may designate." However, IRC § 6751(b)(2)(B) provides an exception for penalties calculated automatically "through electronic means." The IRS interprets this exception as allowing it to use its AUR system to propose the substantial understatement and negligence components of the accuracy-related penalty without supervisor review.[31]

Burden of Proof

In court proceedings involving individual taxpayers, the IRS bears the initial burden of production regarding the accuracy-related penalty.[32] The IRS must first present sufficient evidence to establish that the penalty was warranted.[33] The burden of proof then shifts to the taxpayer to establish a penalty exception, such as reasonable cause.[34]

28 IRC § 6213(a). A taxpayer has 150 days instead of 90 to petition the Tax Court if the notice of deficiency is addressed to a taxpayer outside of the United States.

29 Taxpayers may litigate an accuracy-related penalty by paying the tax liability (including the penalty) in full, filing a timely claim for refund, and then timely instituting a refund suit in the appropriate United States District Court or the Court of Federal Claims. 28 U.S.C. § 1346(a)(1); 28 U.S.C. § 1491; IRC §§ 7422(a); 6532(a)(1); *Flora v. United States*, 362 U.S. 145 (1960) (generally requiring full payment of tax liabilities as a prerequisite for jurisdiction over refund litigation).

30 IRC §§ 6320 and 6330 provide for due process hearings in which a taxpayer may raise a variety of issues, including the underlying liability, provided the taxpayer did not actually receive a statutory notice of deficiency or did not otherwise have an opportunity to dispute such liability. IRC §§ 6320(c), 6330(c)(2)(B).

31 If the taxpayer does not respond timely to an AUR notice proposing an assessment, the computers automatically convert the proposed penalty to an assessment without managerial review. IRM 4.19.3.21.1.4, Accuracy-Related Penalties (Sept. 30, 2018).

32 IRC § 7491(c) provides that "the Secretary shall have the burden of production in any court proceeding with respect to the liability of any individual for any penalty, addition to tax, or additional amount imposed by this title."

33 *Higbee v. Comm'r*, 116 T.C. 438, 446 (2001); IRC § 7491(c). *See Portillo v. Comm'r*, 932 F.2d 1128 (5th Cir. 1991), *rev'g in part*, *aff'g in part*, *remanding* T.C. Memo. 1990-68, which involved an assessment based solely on an information return submitted by a third party and held that the presumption of correctness does not apply to the IRS's deficiency assessment in a case involving unreported income if the IRS cannot present any evidence supporting the determination.

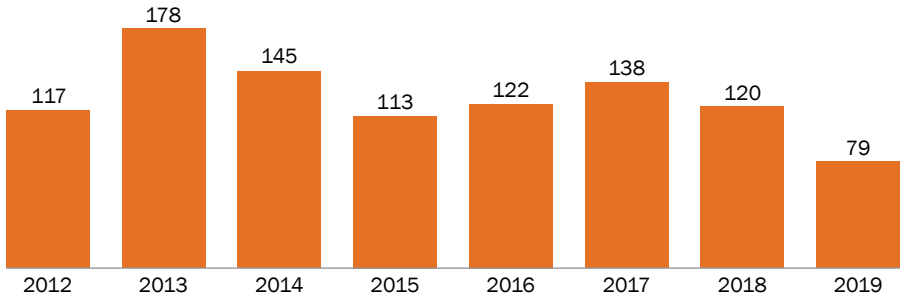
34 IRC § 7491(a). *See also* Tax Ct. R. 142(a).

ANALYSIS OF LITIGATED CASES

We identified 79 opinions issued between June 1, 2018, and May 31, 2019, where taxpayers litigated the negligence or substantial understatement components of the accuracy-related penalty. This is the lowest number of accuracy-related penalty cases in the last eight years, as shown in Figure 2.3.1.

FIGURE 2.3.1

Accuracy-Related Penalty Cases Under IRC § 6662(b)(1) and (2) Decided During One-Year Periods Ending May 31 for 2012-2019



The IRS prevailed in full in 52 cases (66 percent), taxpayers prevailed in full in 25 cases (32 percent), and two cases (three percent) were split decisions. Table 3 in Appendix 5 provides a detailed list of these cases.

Taxpayers appeared *pro se* (without representation) in 37 of the 79 cases (47 percent). *Pro se* taxpayers convinced the court to dismiss or reduce the penalties in 32 percent of these 37 cases, which is the same as the overall success rate for all taxpayers challenging these penalties. In some cases, the court found taxpayers liable for the accuracy-related penalty but failed to clarify whether it was for negligence under IRC § 6662(b)(1) or a substantial understatement of tax under IRC § 6662(b)(2), or both. Regardless of the subsection at issue, the analysis of reasonable cause is generally the same. As such, we have combined our analyses of reasonable cause for the negligence and substantial understatement cases.

Requirement for Managerial Approval Prior to Assessment of Penalties

In several past reports, we reported on significant decisions regarding the IRC § 6751(b)(1) requirement to have a supervisor approve the penalties in writing prior to the initial determination of assessment.[35] Of the 27 decisions we reviewed this year where taxpayers prevailed in full or in part, 19 were due to the IRS's failure to obtain written supervisory approval prior to the initial determination of assessment. This is a significant increase over last year, where only eight out of 34 decisions where taxpayers prevailed in full or in part were due to the IRS's lack of compliance with the IRC § 6751(b) supervisory approval requirement. Additionally, we noted many opinions this year that verified compliance with the supervisory approval requirement — courts verified compliance in 32 of the 54 cases where the

35 *See Chai v. Comm'r*, 851 F.3d 190 (2d Cir. 2017); *Graev v. Comm'r*, 147 T.C. 460 (2016), *vacated*, Docket No. 30638-08 (T.C. Mar. 30, 2017). In late 2017, the Tax Court overruled in part its 2016 *Graev* decision and held that it was appropriate in the deficiency proceeding to consider the taxpayers' argument that the IRS failed to comply with the IRC § 6751(b)(1) supervisory approval requirement. *Graev III*, 149 T.C. 485 (2017) (This decision was the third in a series of Tax Court decisions related to the Graevs' liability for tax years 2004 and 2005).

IRS prevailed in whole or in part. The courts also discussed the supervisory approval requirement in an additional nine cases.[36]

We reviewed a number of memorandum decisions that teased out some of the intricacies of the IRC § 6751(b) requirement.[37] Two decisions highlighted timing issues. In one case, the court refused to accept an undated written supervisory approval,[38] and in another case the IRS did not prevail when it tried to satisfy IRC § 6751(b) by reasserting the accuracy-related penalties in an amended answer and then securing supervisory approval for the amendments.[39] In two cases, the taxpayer sought to question the IRS about the supervisory approval. In *Raifman v. Commissioner*, in response to the IRS's motion to reopen the record to demonstrate supervisory approval, the taxpayers requested the opportunity to cross examine the revenue agent and his supervisor.[40] However, the court did not allow it, noting that the penalty approval form itself would indicate compliance with IRC § 6751(b). In *Archer v. Commissioner*, the IRS's motion to reopen the record to demonstrate IRC § 6751(b) compliance was accompanied by a declaration of the examiner, and the court permitted the taxpayer to serve on the IRS interrogatories comprised of single, definite questions directed towards the examiner's declaration.[41]

In some cases, the Tax Court took a strict stance with the supervisory approval requirement. In one case, the Tax Court disallowed the accuracy-related penalty because the statutory notice of deficiency only listed the IRC § 6662(b)(2) penalty based on substantial understatement, but the supervisory approval was for the negligence component of the penalty under IRC § 6662(b)(1).[42]

Although no CDP hearing cases were included in our count of reviewed decisions because none decided the accuracy-related penalty based on the merits, we did note CDP opinions are increasingly referencing the IRC § 6751(b) requirement. In two of these CDP cases, the IRS conceded the penalty based on the settlement officer's failure to verify that the supervisory approval requirement had been met, even though the taxpayer could not challenge the liability in either of these cases.[43]

Discussed in detail below, all four of the full Tax Court decisions issued during our reporting period include analyses of the IRS's compliance with IRC § 6751(b).

Palmolive Building Investors, LLC v. Commissioner[44]

The taxpayer filed a Form 1065, U.S. Return of Partnership Income, claiming a $33 million deduction for the charitable contribution of a façade easement. The IRS disallowed the deduction and asserted

36 In some of these cases, analysis of whether the IRS met its burden was unnecessary because the taxpayer established reasonable cause. In others, there was simply no analysis of how the IRS met the requirement.

37 Generally, the Tax Court issues memorandum opinions in cases that do not involve a novel legal issue. These opinions can be cited as legal authority and appealed. United States Tax Court, Taxpayer Information: After Trial, https://www.ustaxcourt.gov/taxpayer_info_after.htm (last visited Aug. 12, 2019).

38 *Shuman v. Comm'r*, T.C. Memo. 2018-135, *aff'd*, 774 F. App'x 813 (4th Cir. Aug. 15, 2019).

39 *Endeavor Partners Fund, LLC v. Comm'r*, T.C. Memo. 2018-96, *appeal docketed*, Nos. 18-1275, 18-1276, 18-1277, 18-1278 (D.C. Cir. Oct. 3, 2019).

40 *Raifman v. Comm'r*, T.C. Memo. 2018-101.

41 *Archer v. Comm'r*, T.C. Memo. 2018-111, *appeal docketed*, Nos. 19-70304, 19-70305 (9th Cir. Feb. 4, 2019). In this case, the court found that the taxpayer submitted interrogatories outside the scope of what was permitted and thus squandered the opportunity to provide a valid objection to the IRS's motion to reopen the record.

42 *Estate of Ronning v. Comm'r*, T.C. Memo. 2019-38.

43 *Ansley v. Comm'r*, T.C. Memo. 2019-46; *Ransom v. Comm'r*, T.C. Memo. 2018-211. Taxpayers can only raise the underlying liability at a collection due process hearing if taxpayer did not receive a statutory notice of deficiency for the liability or did not otherwise have an opportunity to dispute the liability. IRC § 6330(c)(2)(B).

44 152 T.C. No. 4 (2019).

multiple penalties under IRC § 6662. The Tax Court previously granted the IRS's motion for summary judgement with respect to the deduction,[45] and the taxpayer and the IRS subsequently filed competing motions, asking the court to address whether the IRS obtained supervisory approval for the penalties, required under IRC § 6751(b).

During the examination, the examiner initially asserted two penalties related to the disallowed deduction — a 40 percent gross valuation misstatement penalty under IRC § 6662(h) and a 20 percent accuracy-related penalty for negligence under IRC § 6662(b)(1). The examiner's supervisor signed the Form 5701, Notice of Proposed Adjustment, which included only the IRC § 6662(h) penalty, but was accompanied by two Forms 866A, Explanation of Items, which included both penalties. Following an Appeals conference, the Appeals Officer proposed issuing a final partnership administrative adjustment (FPAA) by issuing a Form 5402-c, Appeals Transmittal and Case Memo. Attached to the appeals case memo was a Form 866A, Explanation of Items, which included the initial two penalties proposed by the examiner, and penalties for substantial understatement of tax under IRC § 6662(b)(2) and substantial valuation misstatement under IRC § 6662(b)(3). Subsequently, the IRS issued the FPAA to the taxpayer disallowing the deduction and determining all four penalties.

The court held that the initial determinations of the penalties were those by the examiner when he issued the Form 5701, which was approved in writing by his supervisor, and by the Appeals Officer when he issued the Form 5402-c, which was also approved in writing by his supervisor. The court was not persuaded by the taxpayer's observance that the examiner only asserted and received supervisory approval for two of the penalties because it held there is no requirement under IRC § 6751(b) for all the penalties to be asserted and approved at the same time. The taxpayer also argued that the penalty determinations were invalid because the IRS failed to comply with the IRM instruction for the penalty approval to be documented in the examination work papers. The court noted that the IRM is not binding and held that using a form other than what is prescribed by administrative rules does not preclude a finding of compliance with IRC § 6751(b) and the statute does not require approval on any particular form. Thus, the court granted the IRS's motion for summary judgement.

Alternative Health Care Advocates v. Commissioner[46]

The Tax Court held the taxpayer, a C corporation operating a medical dispensary, was not entitled to business expense deductions because its sole trade or business was trafficking in a controlled substance. The Tax Court also held that the C corporation had substantially understated its income tax and did not establish reasonable cause. The court rejected the taxpayer's arguments that it would be unfair to impose the accuracy-related penalty given the unsettled case law and confusion over IRC § 280E at the time the returns were filed. The court drew a clear distinction between the present case and the only relevant case involving medical marijuana during the years at issue, where the facts allowed the court to allocate expenses between the taxpayer's businesses. The court stated that the only directly relevant authority was directly against the taxpayer's tax treatment.[47] In a footnote, the court explained that because IRC § 7491(c) does not apply to corporations, the IRS did not have the burden of production with respect to the accuracy-related penalty and since the taxpayer did not raise IRC § 6751(b), it was unnecessary to reopen the record for the IRS to demonstrate compliance with the supervisory approval requirement.[48]

45 *Palmolive Bldg. Inv'rs, LLC v. Comm'r*, 149 T.C. 380 (2017).

46 151 T.C. 225 (2018).

47 *Alt. Health Care Advocates*, 151 T.C. at 247.

48 *Id*. at 246 n.15.

Walquist v. Commissioner[49]

In this case, the IRS examined the taxpayers via correspondence and issued a 30-day letter to them via its Correspondence Examination Automated Support (CEAS) software program, which processes a case with little to no examiner involvement unless the taxpayer responds. The software automatically calculated a substantial understatement penalty under IRC § 6662(b)(2), which was included in the 30-day letter. When the taxpayers failed to respond to the 30-day letter, the CEAS software generated a statutory notice of deficiency (SNOD), which included the IRC § 6662(b)(2) penalty. The penalty was not reviewed by an employee prior to the issuance of the SNOD. The court held that because the penalty was determined mathematically by a computer software program with no involvement by a human IRS employee, the penalty was "automatically calculated through electronic means." The court explained how it would be difficult for the IRS demonstrate compliance with IRC § 6751(b)(1) for a penalty calculated by a computer program because there would be no individual making the determination; if the computer itself were the individual, then the question would arise as to who the immediate supervisor of the computer program was. Thus, the court held the IRS had met its burden with respect to the accuracy-related penalty.

Clay v. Commissioner[50]

The taxpayers, members of a Native American tribe, challenged the IRS's determination of unreported income from tribal casino revenue and related penalties. Although the Tax Court found the members were liable for the unreported income, it found the taxpayers not liable for the accuracy-related penalty due to the IRS's failure to obtain supervisory approval. The trial was held before the Tax Court issued its third *Graev* ruling, so the court accepted the IRS's motion to reopen the record to demonstrate compliance, as well as motions by the taxpayers to conduct additional discovery around the new documents. The taxpayers argued the IRS did not meet its burden because the supervisory approval did not occur before the IRS sent the taxpayers written notice of the proposed penalties in the form of the revenue agent report, which contained the first suggestion of the penaltes. The court agreed that the revenue agent report transmitted with the 30-day letter constituted the initial determination of the penalties. The court cited the *Palmolive* decision discussed above, stating "when those proposed adjustments are communicated to the taxpayer formally as part of a communication that advises the taxpayer that penalties will be proposed and giving the taxpayer the right to appeal them with Appeals (via a 30-day letter), the issue of penalties is officially on the table."[51]

Reasonable Cause

Losantiville Country Club v. Commissioner[52]

The taxpayer, a private country club operating as an IRC § 501(c)(7) tax exempt organization, deducted expenses for nonmember events from its investment income. The IRS disallowed these deductions because it stated that the club did not intend to profit from its nonmember sales, meaning it could not deduct these losses under IRC § 162. The IRS also asserted accuracy-related penalties for negligence. The Tax Court ruled in favor of the IRS on both issues, finding that the taxpayer did not prepare the returns in good faith and did not have reasonable cause.[53] The Court of Appeals for the Sixth Circuit likewise ruled that the taxpayer did not have reasonable cause and could not demonstrate reasonable

49 152 T.C. No. 3 (2019).
50 152 T.C. No. 13 (2019).
51 *Clay*, 152 T.C. No. 13, 2019 U.S. Tax Ct. LEXIS 14, at *40 (T.C. Apr. 24, 2019).
52 906 F.3d 468 (6th Cir. 2018), *aff'g* T.C. Memo. 2017-158.
53 *Losantiville Country Club v. Comm'r*, T.C. Memo. 2017-158.

reliance on the advice of a tax professional.[54] The taxpayer did not submit any opinion letters or correspondence from its accountants explaining their advice, and the evidence shows that the taxpayer itself communicated its own opinions about its tax obligations to its accountants. The taxpayer argued that because it was advocating for a novel application of existing law, it met the reasonable cause exception. The court rejected this argument, noting that the tax treatment had to be buttressed by substantial authority to meet reasonable cause and the taxpayer did not provide any evidence supporting its arguments for underpayment.[55]

CONCLUSION

This year marked a significant decrease in cases deciding the accuracy-related penalty under IRC § 6662(b)(1) and (2). Despite this decrease in overall cases, more courts are grappling with the issue of whether the IRS obtained the required supervisory approval for the accuracy-related penalty. Notably, the majority of cases where taxpayers prevailed this year were due to the IRS's failure to meet the supervisory approval provision. Based on the decisions this year, it appears that the timing of the supervisory approval is something that will continue to be contested. The following administrative recommendations to update the IRM and further specify when the approval must occur could mitigate future litigation.

RECOMMENDATIONS TO MITIGATE DISPUTES

The National Taxpayer Advocate recommends that Congress:

- Amend IRC § 6751(b)(2)(B) to clarify that written managerial approval is required prior to the assessment of the accuracy-related penalty imposed on the portion of an underpayment attributable to negligence or disregard of rules or regulations under IRC § 6662(b)(1) and consider clarifying which penalties or facts-and-circumstances result in penalties "automatically calculated through electronic means" that are exempt from the managerial-approval requirement.[56]

The National Taxpayer Advocate recommends that the IRS:

- Issue regulations clarifying that written supervisory approval required under IRC § 6751(b) must occur prior to the first time the IRS formally communicates the proposed penalties to the taxpayer in writing.
- Update the IRM to require written supervisory approval not just "prior to the issuance of the Statutory Notice of Deficiency (SNOD)"[57] but instead "prior to the first time the penalties are communicated to the taxpayer formally as part of a written communication that advises the taxpayer the penalties will be proposed."[58]

54 *Losantiville Country Club*, 906 F.3d at 476, *aff'g* T.C. Memo. 2017-158.

55 *Id*.

56 National Taxpayer Advocate 2020 Purple Book: *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration*, 62-63 (*Clarify the Parameters for Written Managerial Approval Required for Penalty Assessments under IRC § 6751(B)*). *See also* National Taxpayer Advocate 2014 Annual Report to Congress 404 (Legislative Recommendation: *Managerial Approval: Amend § 6751(b) to Require IRS Employees to Seek Managerial Approval Before Assessing the Accuracy-Related Penalty Attributable to Negligence under IRC § 6662(b)(1)*).

57 IRM 20.1.5.2.3, Supervisory Approval of Penalties - IRC 6751 Procedural Requirements (Apr. 22, 2019).

58 This language is based on the Tax Court's holding in *Clay v. Comm'r*, 152 T.C. No. 13 (2019).

MLI #4 Gross Income Under IRC § 61 and Related Sections

SUMMARY

When preparing tax returns, taxpayers must complete the calculation of gross income for the taxable year to determine the tax they must pay. Gross income has been among the Most Litigated Issues in each of the National Taxpayer Advocate's Annual Reports to Congress.[1] For this report, we reviewed 72 cases decided between June 1, 2018, and May 31, 2019. The majority of cases involved taxpayers failing to report items of income, including some specifically mentioned in Internal Revenue Code (IRC) § 61 such as wages,[2] interest,[3] dividends,[4] and pensions.[5]

TAXPAYER RIGHTS IMPACTED[6]

- *The Right to Be Informed*
- *The Right to Pay No More Than the Correct Amount of Tax*
- *The Right to Appeal an IRS Decision in an Independent Forum*
- *The Right to a Fair and Just Tax System*

PRESENT LAW

IRC § 61 broadly defines gross income as "all income from whatever source derived."[7] The U.S. Supreme Court has defined gross income as any accession to wealth.[8] The concept of "gross income" is to be broadly construed, while exclusions from income are to be narrowly construed.[9] However, over time, Congress has carved out numerous exceptions and exclusions from this broad definition of gross income, and has based other elements of tax law on the definition.[10]

1 *See, e.g.*, National Taxpayer Advocate 2017 Annual Report to Congress 420 (Most Litigated Issue: *Gross Income Under IRC § 61 and Related Sections*); National Taxpayer Advocate 2013 Annual Report to Congress 355 (Most Litigated Issue: *Gross Income Under IRC § 61 and Related Sections*).

2 IRC § 61(a)(1). *See, e.g.*, *Canzoni v. Comm'r*, T.C. Memo. 2018-130.

3 IRC § 61(a)(4). *See, e.g.*, *Allen v. United States*, 331 F. Supp. 3d 852 (E.D. Wis. 2018).

4 IRC § 61(a)(7). *See, e.g.*, *Smith v. Comm'r*, 151 T.C. 41 (2018).

5 IRC § 61(a)(9). *See, e.g.*, *Castaneda v. Comm'r*, T.C. Memo. 2018-173, *appeal docketed*, No. 19-71793 (9th Cir. July 17, 2019).

6 *See* IRS, Taxpayer Bill of Rights (TBOR), http://www.irs.gov/Taxpayer-Bill-of-Rights. The rights contained in the TBOR are codified in the IRC. *See* IRC § 7803(a)(3).

7 IRC § 61(a).

8 *Comm'r v. Glenshaw Glass*, 348 U.S. 426, 431 (1955) (interpreting § 22 of the Internal Revenue Code of 1939, the predecessor to IRC § 61).

9 *See Comm'r v. Schleier*, 515 U.S. 323, 327-328 (citations omitted) (1995); *Taggi v. United States*, 35 F.3d 93, 95 (citations omitted) (2d Cir. 1994).

10 *See, e.g.*, IRC §§ 104 (compensation for injuries or sickness); 105 (amounts received under accident and health plans); 108 (income from discharge of indebtedness); 6501 (limits on assessment and collection, determination of "substantial omission" from gross income).

If the Commissioner determines a tax deficiency, the IRS issues a statutory notice of deficiency.[11] If the taxpayer challenges the deficiency, the Commissioner's notice is entitled to a presumption of correctness; the taxpayer generally bears the burden of proving that the determination is erroneous or inaccurate.[12]

ANALYSIS OF LITIGATED CASES

In the 72 opinions involving gross income issued by the federal courts and reviewed for this report, gross income issues most often fell into two categories: (1) what is included in gross income under IRC § 61, and (2) what can be excluded under other statutory provisions. A detailed list of the cases appears in Table 4 of Appendix 5.

In 37 cases (51 percent), taxpayers were represented, while the rest were *pro se* (without counsel). In 12 of the 37 cases where taxpayers had representation (about 32 percent), they prevailed in full or in part in their cases, whereas *pro se* taxpayers did not prevail in full or in part in any cases identified during this review period.

Drawing on the full list in Table 4 of Appendix 5, we have chosen to discuss discharge of indebtedness and a case involving the tax treatment of a *qui tam* award.[13]

Discharge of Indebtedness

We reviewed six cases in which taxpayers challenged the IRS's determination that a discharge of indebtedness was taxable income. Taxpayers prevailed in part in one case.[14] Generally, a taxpayer must include income from discharge of indebtedness when calculating gross income,[15] but in certain circumstances cancellation of indebtedness income may be excluded. IRC § 108(a) provides that a taxpayer may exclude, subject to limitations, income from the discharge of indebtedness if the discharge occurs in a title 11 bankruptcy case, when the taxpayer is insolvent, or if the indebtedness is qualified farm indebtedness (for a taxpayer other than a C corporation), qualified real property business indebtedness debt, qualified principal residence indebtedness discharged before January 1, 2018, or subject to an arrangement that is entered into and evidenced in writing before January 1, 2018.[16] The creditor may issue a Form 1099-C, Cancellation of Debt, to the taxpayer for canceled debts of $600 or more.[17] If a creditor has discharged a debt the taxpayer owes, the taxpayer must include the discharged amount in gross income, even if it is less than $600 or a Form 1099-C is not received, unless one of the exceptions in IRC § 108(a) applies. The issuance of a Form 1099-C is not dispositive of whether or when the debt is actually discharged.[18] A debt is deemed to have been discharged for purposes of information

11 IRC § 6212. *See also* Internal Revenue Manual 4.8.9.2, Notice of Deficiency Definition (Aug. 11, 2016). The Commissioner may identify particular items of unreported income or reconstruct a taxpayer's gross income using indirect methods such as the bank deposits method. IRC § 6001. *See, e.g., DiLeo v. Comm'r*, 96 T.C. 858, 867 (1991).

12 *See* IRC § 7491(a) (burden shifts only where the taxpayer produces credible evidence contradicting the Commissioner's determination and satisfies other requirements). *See also Welch v. Helvering*, 290 U.S. 111, 115 (1933) (citations omitted).

13 *Qui tam pro domino rege quam pro se ipso in hac parte sequitur*: "who as well for the king as for himself sues in this matter." *A qui tam* action is brought under a statute that allows a private individual to sue for a penalty where, if successful, the government or other public institution will receive a portion of the penalty and the individual will share in the recovery. Black's Law Dictionary (11th ed. 2019).

14 *See Bui v. Comm'r*, T.C. Memo. 2019-54.

15 IRC § 61(a)(11).

16 IRC § 108(a)(1)(A)-(E).

17 IRS, Instructions for Form 1099-A and 1099-C Acquisition or Abandonment of Secured Property and Cancellation of Debt, https://www.irs.gov/pub/irs-pdf/i1099ac.pdf (Oct. 3, 2018).

18 *Kleber v. Comm'r*, T.C. Memo. 2011-233 (citation omitted).

reporting, and a Form 1099-C is required, if and only if, an "identifiable event" has occurred.[19] Form 1099-C may be required even if the discharged amount is not taxable to the debtor.[20] Generally, the burden of proof is on the taxpayer to show that any of the exceptions in IRC § 108(a) apply.[21] However, if a Form 1099-C serves as the basis for the determination of a deficiency, IRC § 6201(d) may apply to shift the burden of production to the IRS. IRC § 6201(d) provides that in any court proceeding, if a taxpayer asserts a reasonable dispute with respect to the income reported on an information return and the taxpayer has fully cooperated with the IRS, then the IRS has the burden of producing reasonable and probative information in addition to the information return.

In one case we reviewed, the taxpayer prevailed in part under the qualified principal residence exclusion in IRC § 108(a)(1)(E) and in part under the insolvency exception in IRC § 108(a)(1)(B). In the case of *Bui v. Commissioner*, the taxpayer excluded over $350,000 of discharged indebtedness from her gross on her tax year 2011 tax return, indicating that the discharged debt was qualified principal residence indebtedness under IRC § 108(a)(1)(E).[22] At trial, the taxpayer further asserted the discharged indebtedness should be excluded under IRC § 108(a)(1)(B) due to insolvency. The court determined that only $12,000 of the discharged indebtedness was qualified principal residence indebtedness; however, the taxpayer was limited to excluding $5,299 by operation of IRC § 108(h)(4), which allows a taxpayer to exclude only the amount that exceeds the portion of the debt discharged that is not qualified principal residence debt. The taxpayer's original loan was $250,000, of which $12,000 was determined to be qualified principal residence debt. The total discharged debt was $243,299, and subtracting the $238,000 of nonqualified debt allowed the taxpayer to exclude $5,299.

At trial, the Commissioner conceded that at the time of the discharge of indebtedness, the taxpayer was insolvent by the amount of $42,852.[23] While the taxpayer asserted the Commissioner was incorrect in this calculation, the taxpayer had already agreed to the calculation prior to trial and thus the court found the taxpayer could exclude $42,852 from gross income under the insolvency exclusion.

Qui Tam Award

During this review cycle, we identified one case that addressed the tax treatment of a *qui tam* award.[24] A *qui tam* action is brought under a statute by a private individual on behalf of the government and if the claim succeeds, the individual keeps a portion of the recovery while the rest goes to the government or other public institution. In the case of *Barnes v. United States*, Mrs. Barnes filed a *qui tam* action under the False Claims Act[25] and then reached a settlement agreement with the United States and the defendants for over $20 million, of which she received over $3.5 million.[26]

19 *See* Treas. Reg. § 1.6050P-1(a)(1). Note that the IRS has issued final regulations which eliminate the 36-month testing period for information returns required to be filed, and payee statements required to be furnished, after December 31, 2016. 81 Fed. Reg. 78908 (Nov. 10, 2016). *See also* National Taxpayer Advocate 2010 Annual Report to Congress 383-386 (Legislative Recommendation: *Remove the 36-Month "Testing Period" That May Trigger Cancellation of Debt Reporting*).

20 Treas. Reg. § 1.6050P-1(a)(3).

21 U.S. Tax Court Rules of Practice and Procedure, Rule 142(a).

22 T.C. Memo. 2019-54.

23 *Bui v. Comm'r*, T.C. Memo. 2019-54. Under IRC § 108(a)(2)(C), the insolvency exclusion applies only when the taxpayer elects the insolvency exclusion to apply in lieu of the qualified principal residence indebtedness exclusion. In this case, the taxpayer did not elect to do so but had three different loans discharged. The exclusion was applied to one of the loans.

24 *Barnes v. United States*, 353 F. Supp. 3d 582 (N.D. Tex. 2019).

25 31 U.S.C. § 3730(b) (2010).

26 353 F. Supp. 3d 582 (N.D. Tex. 2019).

Mr. and Mrs. Barnes reported the settlement amount on their joint income tax return and paid tax on it. They then filed a refund claim on the basis that settlement proceeds from a *qui tam* action are not taxable. After the IRS disallowed the claim in part, they filed a refund suit under the theory that the award Mrs. Barnes received for her *qui tam* action was not taxable income and further argued that if the court found the award to be taxable income, that it should be taxed as a capital gain rather than ordinary income.[27] The court agreed with the government's argument that a *qui tam* award is rightly classified as a bounty or fee rewarding the individual who initiated the *qui tam* action for assisting the government in making and successfully litigating the claim. A bounty or fee is not excluded under IRC § 61 and is thus includable in gross income. Further, the court disagreed with the taxpayer's contention that the *qui tam* award, if taxable, should be taxable as capital gains and found for the government that the award is taxable is ordinary income. The taxpayers argued that the award should be a capital gain based on the accretion of value over the three years between the filing of the claim and the settlement of the action. The court concurred with the reasoning of other courts that a *qui tam* award is more analogous to a contingency fee arrangement or a future payment for services rendered than a capital gain.[28]

CONCLUSION

Taxpayers litigate many of the same gross income issues every year due to the complex nature of what constitutes gross income. As the definition is very broad and the courts broadly interpret accession to wealth as gross income, most cases (about 83 percent) were decided in favor of the IRS and exclusions from gross income continued to be narrowly interpreted. However, taxpayers in this review cycle raised a less prevalent issue about the tax treatment of *qui tam* awards, and litigation in areas such as retirement plan distributions and settlement proceeds were not as prevalent either.[29]

Overall, litigation of gross income issues decreased this year, from 79 cases in the 2018 reporting cycle to 72 cases this year, about a nine percent decrease.[30] Of note this year, no *pro se* taxpayers prevailed in full or in part in any cases identified for this review cycle, while the number of represented taxpayers increased from 47 percent to about 51 percent this year and had a higher success rate of 32 percent compared to 24 percent in the 2018 review cycle.[31]

27 353 F. Supp. 3d 582 (N.D. Tex. 2019).

28 *See, e.g.*, *Patrick v. Comm'r*, 799 F. 3d 885 (7th Cir. 2015) *aff'g* 142 T.C. 124 (2014).

29 We identified only four cases involving settlement income in this review period compared to seven cases in the 2018 review period and four cases involving retirement plan distributions compared to 18 in the 2017 review period. *See* National Taxpayer Advocate 2018 Annual Report to Congress 481, 487 (Most Litigated Issue: *Gross Income Under IRC § 61 and Related Sections*); National Taxpayer Advocate 2017 Annual Report to Congress 420, 423 (Most Litigated Issue: *Gross Income Under IRC § 61 and Related Sections*).

30 National Taxpayer Advocate 2018 Annual Report to Congress 481, 487 (Most Litigated Issue: *Gross Income Under IRC § 61 and Related Sections*).

31 *Id.*

MLI #5 Summons Enforcement Under IRC §§ 7602, 7604, and 7609

SUMMARY

Pursuant to Internal Revenue Code (IRC) § 7602, the IRS may examine any books, records, or other data relevant to an investigation of a civil or criminal tax liability.[1] To obtain this information, the IRS may serve a summons directly on the subject of the investigation or any third party who may possess relevant information.[2] If a person summoned under IRC § 7602 neglects or refuses to obey the summons; to produce books, papers, records, or other data; or to give testimony as required by the summons, the IRS may seek enforcement of the summons in a U.S. District Court.[3]

TAS identified 60 federal cases decided between June 1, 2018, and May 31, 2019, involving IRS summons enforcement issues. The government was the initiating party in 35 cases, while the taxpayer was the initiating party in 25 cases. Overall, taxpayers fully prevailed in two cases, while two cases were split. The IRS prevailed in the remaining 56 cases.

TAXPAYER RIGHTS IMPACTED[4]

- *The Right to Appeal an IRS Decision in an Independent Forum*
- *The Right to Privacy*
- *The Right to a Fair and Just Tax System*

PRESENT LAW

The IRS has broad authority under IRC § 7602 to issue a summons to examine a taxpayer's books and records or demand testimony under oath.[5] Further, the IRS may obtain information related to an investigation from a third party if, subject to the exceptions of IRC § 7609(c), it provides notice to the taxpayer or other person identified in the summons.[6] In limited circumstances, the IRS can issue a summons even if the name of the taxpayer under investigation is unknown, *i.e.*, a "John Doe" summons.[7] Under the recent changes in the law, the IRS must narrowly tailor the information sought in a John Doe summons and give taxpayers 45 days advance notice if it intends to contact third

1 IRC § 7602(a)(1); Treas. Reg. § 301.7602-1.

2 IRC § 7602(a).

3 IRC § 7604(b). Summons enforcement cases are different from many other cases described in other Most Litigated Issues because often the government, rather than the taxpayer, initiates the litigation.

4 See Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are also codified in the IRC. See IRC § 7803(a)(3).

5 IRC § 7602(a). See also *LaMura v. United States*, 765 F.2d 974, 979 (11th Cir. 1985) (citing *United States v. Bisceglia*, 420 U.S. 141, 145-46 (1975)).

6 IRC § 7602(c). Those entitled to notice of a third-party summons (other than the person summoned) must be given notice of the summons within three days of the day on which the summons is served to the third party but no later than the 23rd day before the day fixed on the summons on which the records will be reviewed. IRC § 7609(a).

7 The court must approve a "John Doe" summons prior to issuance. In order for the court to approve the summons, the United States commences an *ex parte* proceeding. The United States must narrowly tailor the summons and establish during the proceeding that its investigation relates to an ascertainable class of persons; it has a reasonable basis for the belief that these unknown taxpayers may have failed to comply with the tax laws; and it cannot obtain the information from another source. IRC § 7609(f).

parties during a specified period.[8] The new law also limits access of tax return information to non-IRS employees except for expert assistance and prohibits non-IRS employees from questioning witnesses under oath in summons hearings.[9] The IRS cannot issue a summons after referring the matter to the Department of Justice (DOJ).[10]

If the recipient fails to comply with a summons, the United States may commence an action under IRC § 7604 in the appropriate U.S. District Court to compel document production or testimony.[11] If the United States files a petition to enforce the summons, the taxpayer may contest the validity of the summons in that proceeding.[12] Also, if the summons is served upon a third party, any person entitled to notice may petition to quash the summons in an appropriate district court, and may intervene in any proceeding regarding the enforceability of the summons.[13]

Generally, a taxpayer or other person named in a third-party summons is entitled to notice.[14] However, the IRS does not have to provide notice in certain situations. For example, the IRS is not required to give notice if the summons is issued to aid in the collection of a liability or judgment[15] or if it is attempting to determine assets owned by the taxpayer to pay an assessed tax because such notice might seriously impede the IRS's ability to collect the tax.[16] Additionally, the IRS is not required to give notice when, in connection with a criminal investigation, an IRS criminal investigator serves a summons on any person who is not the third-party record-keeper.[17]

Whether the taxpayer contests the summons in a motion to quash or in response to the United States' petition to enforce, the legal standard is the same.[18] In *United States v. Powell*, the Supreme Court set

8 Taxpayer First Act (TFA), Pub. L. No. 116-25, §§ 1204 and 1206, 133 Stat. 981 (2019). (Adding new subsection (f) to IRC § 7609 and amending section 7602(c)(1)). *See also United States v. Coinbase*, 120 A. F.T.R.2d (RIA) 5239 (N.D. Cal. 2017); National Taxpayer Advocate 2018 Annual Report to Congress 469 (Most Litigated Issue: *Summons Enforcement Under IRC §§ 7602, 7604, and 7609*).

9 TFA, Pub. L. No. 116-25, §1208, 133 Stat. 981 (2019). (Adding new subsection (f) to IRC § 7602). *See also* National Taxpayer Advocate 2015 Annual Report to Congress 467 (Most Litigated Issue: *Summons Enforcement Under IRC §§ 7602, 7604, and 7609*); National Taxpayer Advocate 2016 Annual Report to Congress 455 (Most Litigated Issue: *Summons Enforcement Under IRC §§ 7602, 7604, and 7609*).

10 IRC § 7602(d). This restriction applies to "any summons, with respect to any person if a [DOJ] referral is in effect with respect to such person." IRC § 7602(d)(1).

11 IRC § 7604.

12 *United States v. Powell*, 379 U.S. 48, 58 (1964).

13 IRC § 7609(b). The petition to quash must be filed not later than the 20th day after the date on which the notice was served. IRC § 7609(b)(2)(A).

14 IRC § 7609(a)(1); Treas. Reg. § 301.7609-1(a)(1). *See, e.g.*, *Cephas v. United States*, 112 A.F.T.R.2d (RIA) 6483 (D. Md. 2013).

15 IRC § 7609(c)(2)(D)(i). The exception also applies to the collection of a liability of "any transferee or fiduciary of any person referred to in clause (i)." IRC § 7609(c)(2)(D)(ii). Congress created this exception because it recognized a difference between a summons issued to compute the taxpayer's taxable income and a summons issued after the IRS has assessed tax or obtained a judgment.

16 H.R. Rep. No. 94-658 at 310, *reprinted in* 1976 U.S.C.C.A.N. at 3206. *See also* S. Rep. No. 94-938, pt. 1, at 371, *reprinted in* 1976 U.S.C.C.A.N. at 3800-01 (containing essentially the same language). The "aid in collection" exception applies only if the taxpayer owns a legally identifiable interest in the account or other property for which records are summoned. *Ip v. United States*, 205 F.3d 1168, 1172-76 (9th Cir. 2000).

17 IRC § 7609(c)(2)(E). A third-party record-keeper is broadly defined and includes banks, consumer reporting agencies, persons extending credit by credit cards, brokers, attorneys, accountants, enrolled agents, and owners or developers of computer source code but only when the summons "seeks the production of the source or the program or the data to which the source relates." IRC § 7603(b)(2).

18 *Kamp v. United States*, 112 A.F.T.R.2d (RIA) 6630 (E.D. Cal. 2013).

forth four threshold requirements (referred to as the *Powell* requirements) that must be satisfied to enforce an IRS summons:

1. The investigation must be conducted for a legitimate purpose;
2. The information sought must be relevant to that purpose;
3. The IRS must not already possess the information; and
4. All required administrative steps must have been taken.[19]

The IRS bears the initial burden of establishing that these requirements have been satisfied.[20] The government meets its burden by providing a sworn affidavit of the IRS agent who issued the summons declaring that each of the *Powell* requirements has been satisfied.[21] The burden then shifts to the person contesting the summons to demonstrate that the IRS did not meet the requirements or that enforcement of the summons would be an abuse of process.[22] Generally, the burden on the taxpayer to establish the illegality of the summons is heavy.[23]

The taxpayer can show that enforcement of the summons would be an abuse of process if he or she can prove that the IRS issued the summons in bad faith.[24] In *United States v. Clarke*, the Supreme Court held that during a summons enforcement proceeding, a taxpayer has a right to conduct an examination of the responsible IRS officials about whether a summons was issued for an improper purpose only when the taxpayer "can point to specific facts or circumstances plausibly raising an inference of bad faith."[25] Blanket claims of improper purpose are not sufficient, but circumstantial evidence can be.[26]

A taxpayer may also allege that the information requested is protected by a constitutional, statutory, or common-law privilege, such as the:

- Fifth Amendment privilege against self-incrimination;
- Attorney-client privilege;[27]
- Tax practitioner privilege;[28] or

19 *United States v. Powell*, 379 U.S. 48, 57-58 (1964).

20 *Fortney v. United States*, 59 F.3d 117, 119-20 (9th Cir. 1995).

21 *United States v. Dynavac, Inc.*, 6 F.3d 1407, 1414 (9th Cir. 1993).

22 *Id.*

23 *United States v. LaSalle Nat'l Bank*, 437 U.S. 298, 316 (1978).

24 *United States v. Powell*, 379 U.S. 48, 58 (1964).

25 *United States v. Clarke*, 134 S. Ct. 2361, 2367 (2014), *vacating* 517 F. App'x 689 (11th Cir. 2013), *rev'g* 2012-2 U.S. Tax Cas. (CCH) ¶ 50,732 (S.D. Fla. 2012).

26 *Id.*

27 The attorney-client privilege provides protection from discovery of information where: (1) legal advice is sought, (2) from a professional legal advisor in his or her capacity as such, (3) the communication is related to this purpose, (4) made in confidence, (5) by the client, (6) and at the client's insistence protected, (7) from disclosure by the client or the legal advisor, (8) except where the privilege is waived. *United States v. Evans*, 113 F.3d 1457, 1461 (7th Cir. 1997) (citing 8 John Henry Wigmore, Evidence in Trials at Common Law § 2292 (John T. McNaughten rev. 1961)). The attorney-client privilege protects "tax advice," but not tax return preparation materials. *United States v. Frederick*, 182 F.3d 496, 500 (7th Cir. 1999).

28 IRC § 7525 extends the protection of the common law attorney-client privilege to federally authorized tax practitioners in federal tax matters. Criminal tax matters and communications regarding tax shelters are exceptions to the privilege. IRC § 7525(a)(2), (b). *Valero Energy Corp. v. United States*, 569 F.3d 626 (7th Cir. 2009). The interpretation of the tax practitioner privilege is based on the common law rules of attorney-client privilege. *United States v. BDO Seidman, LLP*, 337 F.3d 802, 810-12 (7th Cir. 2003).

- Work product privilege.[29]

However, these privileges are limited. For example, courts reject blanket assertions of the Fifth Amendment,[30] but note that taxpayers may have valid Fifth Amendment claims regarding specific documents or testimony.[31]

ANALYSIS OF LITIGATED CASES

Summons enforcement has been a Most Litigated Issue in the National Taxpayer Advocate's Annual Report to Congress every year since 2005, when TAS identified only 44 cases but predicted the number would rise as the IRS became more aggressive in its enforcement initiatives. The number of cases peaked at 158 for the reporting period ending on May 31, 2009, but has gradually declined each year, except for a one-year spike to 153 cases for the year ending May 31, 2012. By the year ending May 31, 2015, the number of cases fell to 84 and generally plateaued until a decline again this year. For the period ending May 31, 2019, TAS identified 60 cases, a 29 percent decrease from the 85 cases identified during last year's reporting period. A detailed list of these cases appears in Table 5 of Appendix 5.

Of the 60 cases TAS reviewed this year, the IRS prevailed in full in 56, a 93 percent success rate, which is one percent greater than the 2018 reporting period.[32] Taxpayers had representation in 22 cases (37 percent) and appeared *pro se* (*i.e.*, on their own behalf) in 37 cases.[33] This is the second consecutive year of a notable increase in the percentage of represented taxpayers as only 28 percent of taxpayers were represented during the 2017 reporting period, but is still a decline from the percentage we observed in the 2016 reporting period, where 44 percent of taxpayers had presentation.[34] Forty-five cases involved individual taxpayers, while the remaining 15 involved business taxpayers, including sole proprietorships.[35] Cases generally involved one of the following themes:

29 The work product privilege protects against the discovery of materials prepared in anticipation of litigation. Fed. R. Civ. P. 26(b)(3); *see also Hickman v. Taylor*, 329 U.S. 495 (1947).

30 *See, e.g.*, *United States v. McClintic*, 113 A.F.T.R.2d (RIA) 330 (D. Or. 2013).

31 *See, e.g.*, *United States v. Lawrence*, 113 A.F.T.R.2d (RIA) 1933 (S.D. Fla. 2014). Individual taxpayers may claim the Fifth Amendment right against self-incrimination, but not on behalf of a business entity. *Braswell v. United States*, 487 U.S. 99 (1988). Additionally, taxpayers cannot withhold self-incriminatory evidence if the summoned documents fall within the "foregone conclusion" exception, which applies if the government establishes its independent knowledge of the document's existence, the document's authenticity, and the possession or control of the documents by the person to whom the summons was issued. *United States v. Bright*, 596 F.3d 683, 692 (9th Cir. 2010).

32 *See* National Taxpayer Advocate 2018 Annual Report to Congress 473 (Most Litigated Issue: *Summons Enforcement Under IRC §§ 7602, 7604, and 7609*).

33 One case was an *ex parte* proceeding to issue the John Doe Summons to unknown taxpayers.

34 *See* National Taxpayer Advocate 2017 Annual Report to Congress 390, 395 (Most Litigated Issue: *Summons Enforcement Under IRC §§ 7602, 7604, and 7609*); National Taxpayer Advocate 2016 Annual Report to Congress 455, 459 (Most Litigated Issue: *Summons Enforcement Under IRC §§ 7602, 7604, and 7609*).

35 There were cases in which the IRS issued summons for investigations into both the individual taxpayer and his or her business. For the purposes of this Most Litigated Issue, TAS placed these cases into the business taxpayer category.

Petitions to Enforce and *Powell* Requirements

The United States petitioned to enforce a summons in 30 cases and successfully met its burden under *Powell* in all cases.[36] In cases where taxpayers contested the summons, they generally argued that the IRS did not satisfy one or more of the *Powell* requirements, but these arguments were not successful. Taxpayers did not meet with much success because the government's burden of proving that the *Powell* requirements have been met is "slight or nominal."[37] Then, the burden shifts to the taxpayer to show that enforcement of the summons would be an abuse of the court's process, and that burden is heavy.[38]

Petitions to Quash and Lack of Subject Matter Jurisdiction

Taxpayers petitioned to quash an IRS summons to a third party in 25 instances.[39] In six of these cases, courts dismissed the petitions for lack of jurisdiction on procedural or notice grounds.[40] One taxpayer was successful in quashing a summons after proving the IRS failed to follow all of the required administrative steps in issuing the summons. In *JB v. United States,* [41] the U.S. Court of Appeals for the Ninth Circuit affirmed the district court's finding that the IRS failed to give reasonable advance notice to the taxpayer before making a third-party contact, and therefore failed to satisfy the fourth element of the *Powell* requirements. The significant cases portion of this report provides a discussion of the case.[42]

Although the Ninth Circuit in *JB* did not prescribe what would constitute reasonable advance notice in each case, it suggested, based on the legislative history of IRC § 7602(c), Treasury Regulations, and the exceptions to the advance notice requirement in IRC § 7602(c)(1), that the IRS provide taxpayers with a meaningful advance notice and opportunity to respond. Although the Taxpayer First Act (TFA) eliminated the requirement for notice to be "reasonable," it now requires that when the IRS has intent to contact third parties, notice be sent to the taxpayer at least 45 days before third-party contacts are made and specify the period (not to exceed one year) during which the IRS will make contacts.[43] The IRS began implementing the TFA on August 15, 2019, but its revised notices to taxpayers do not include the information the IRS is seeking to obtain or verify from third parties.[44] Although the Ninth Circuit in *JB* contemplated that the notice would occur either simultaneously with or after an information request to allow the taxpayer to provide the information without need for the IRS to contact the third

36 *See, e.g., United States v. Boyd*, 123 A.F.T.R.2d (RIA) 302 (W.D. Ky. 2018); *United States v. Brammer*, 122 A.F.T.R.2d (RIA) 6258 (S.D. Cal. 2018); *United States v. Castanhiero*, 122 A.F.T.R.2d (RIA) 6956 (M.D. Fla. 2018); *United States v. Fleishman*, 2018 WL 6303687 (M.D. Fla. 2018). As mentioned above, the government initiated summons litigation in 30 cases during the current reporting period. The government petitioned to enforce summons litigation in 29 cases. In one case, *In the Matter of the Tax and Liabilities of John Does*, 122 A.F.T.R.2d (RIA) 6306 (W.D. Tex. 2018), the government filed an *ex parte* petition with the court for leave to serve a "John Doe" summons.

37 *Mazurek v. United States*, 271 F.3d 226, 230 (5th Cir. 2001).

38 *United States v. Kris*, 658 F.2d 526 (7th Cir. 1981).

39 In some instances, the taxpayer made the motion to quash in its answer to the government's petition to enforce.

40 *See, e.g., Floyd v. United States*, 2018 WL 7199738 (E.D. Mo. 2018), *appeal dismissed*, 2019 WL 3731373 (8th Cir. Apr. 2, 2019); *Floyd v. United States*, 122 A.F.T.R.2d (RIA) 6894 (W.D. Tex. 2018), *appeal dismissed*, 2019 WL 3574245 (5th Cir. Apr. 9, 2019); *Floyd v. United States*, 123 A.F.T.R.2d (RIA) 1642 (D. Del. 2019), *appeal dismissed*, No. 19-02627 (3d Cir. Aug. 15, 2019); *Floyd v. United States*, 2019 WL 386385 (W.D. Mo. 2019), *appeal dismissed*, No. 19-01253 (8th Cir. Mar. 28, 2019); *Pelletier v. United States*, 123 A.F.T.R.2d (RIA) 1102 (S.D. Cal. 2019); *Speidell v. United States*, 123 A.F.T.R.2d (RIA) 1704 (D. Colo. 2019), *appeal docketed*, No. 19-01214 (10th Cir. June 18, 2019).

41 *JB v. United States*, 916 F.3d 1161 (9th Cir. 2019), *aff'g* 117 A.F.T.R.2d (RIA) 694 (N.D. Cal. 2016).

42 *See* Most Litigated Issues: *Significant Cases, supra.*

43 TFA, Pub. L. No. 116-25, § 1206, 133 Stat. 981 (2019).

44 IRS, Interim Guidance Memorandum (IGM) SBSE-04-0719-0034, Interim Guidance on Third-Party Contact Notification Procedures (July 26, 2019). Despite the holding in *JB*, if challenged in a case existing before TFA became effective, the IRS will defend its prior practice of satisfying the advance notice requirement as provided in the Internal Revenue Manual (IRM). *See* IRM 5.17.6.7, Third-Party Contact Requirements of IRC § 7602(c) (Aug. 1, 2019).

party, the IRS's new procedures seem to assume the TFA has eliminated any such requirement. Because there is no clear indication that Congress intended to remove the requirement by allowing the IRS to provide a boilerplate notice in advance that deprives taxpayers of any meaningful opportunity to respond, taxpayers may challenge its new procedures, particularly in the Ninth Circuit. Accordingly, we recommend the IRS include the information it is seeking to obtain from third parties in every taxpayer pre-contact notice. This practice might reduce litigation and would be consistent with the taxpayer's *rights to privacy* and *confidentiality*.

Finally, during this reporting period, four businesses involved in the marijuana industry unsuccessfully petitioned to quash summonses issued to a third parties.[45] In each case, the IRS was investigating the taxpayer on the basis of IRC § 280E, which prohibits deductions or credits for expenses paid or incurred in the trade or business of trafficking in controlled substances. Although the courts found that the IRS made a *prima facie* showing that the *Powell* requirements were met, the taxpayers generally argued that the IRS lacked good faith in issuing the summonses because they believed the IRS was instead issuing the summons to place them in criminal jeopardy. Each court, including the Tenth Circuit Court of Appeals, rejected the taxpayers' arguments finding that there was no basis to conclude the IRS was acting in bad faith or harassing the taxpayers.[46]

The 2018 summons enforcement narrative discussed at length the *Rifle Remedies, LLC* case,[47] and this year summons suits related to the marijuana industry increased fourfold. As more states legalize or decriminalize the sale of marijuana and the industry grows, IRS examinations will also likely increase to ensure compliance with IRC § 280E. Thus, we anticipate that litigation in this area will continue to grow, despite the fact courts continue to find that the IRS is not acting in bad faith in issuing summonses to these taxpayers or third parties. To avoid litigation in this area, the IRS could try to educate this industry on the special compliance rules that apply.

Privileges

As in past years, taxpayers attempted to invoke various privileges, including the Fifth Amendment and attorney-client privileges in response to an IRS summons.[48] Taxpayers were partially successful in invoking privileges in two cases. In the *Durham* case, the court enforced the summons in part, concluding that the taxpayer properly invoked his Fifth Amendment right against self-incrimination with respect to some of the information requested by the IRS.[49] In the *Baldwin* case, the court found that the documentation requested by the IRS was subject to the attorney-client privilege and granted in part the taxpayer's motion to quash a third-party summons.[50] However, in *U.S. v. Sanmina Co. and Subsidiaries,* which was on remand from the Ninth Circuit Court of Appeals, the taxpayer was not successful in

45 *Green Sol., LLC v. United States*, 123 A.F.T.R.2d (RIA) 1711 (D. Colo. 2019), *appeal docketed*, No. 19-01214 (10th Cir. June 18, 2019); *High Desert Relief, Inc. v. United States*, 917 F.3d 1170 (10th Cir. 2019); *Medicinal Wellness Center, LLC v. United States*, 123 A.F.T.R.2d (RIA) 1714 (D. Colo. 2019), *appeal docketed*, No. 19-01217 (10th Cir. June 19, 2019); *Medicinal Wellness Center, LLC v. United States*, 123 A.F.T.R.2d (RIA) 1699 (D. Colo. 2019), *appeal docketed*, No. 19-01218 (10th Cir. June 18, 2019); *Standing Akimbo, LLC v. United States*, 2018 WL 6791071 (D. Colo. 2018), *appeal docketed*, No. 19-01049 (10th Cir. Feb. 8, 2019), *adopting* 2018 WL 6791104 (D. Colo. Oct. 6, 2018).

46 *See, e.g., High Desert Relief, Inc. v. United States*, 917 F.3d 1170 (10th Cir. 2019); *Green Sol., LLC v. United States*, 123 A.F.T.R.2d (RIA) 1711 (D. Colo. 2019), *appeal docketed*, No. 19-01214 (10th Cir. June 18, 2019).

47 *Rifle Remedies, LLC v. United States*, 120 A.F.T.R.2d (RIA) 6385 (D. Colo. 2017).

48 *See Belcik v. United States*, 123 A.F.T.R.2d (RIA) 5702 (N.D. Ala. 2018).

49 *See United States v. Durham*, 122 A.F.T.R.2d (RIA) 5100 (E.D. Mo. 2018).

50 *See Baldwin v. United States*, 2018 WL 4372553 (C.D. Cal. 2018).

invoking privileges. Although the district court determined that two documents were indeed privileged under the attorney work-product and attorney-client privilege, both grounds had been waived.[51]

Civil Contempt

A person who "neglects or refuses to obey" an IRS summons may be held in civil contempt.[52] In four cases this year, taxpayers were held in civil contempt for failing to comply with a court order enforcing an IRS summons.[53] Overall, contempt proceedings accounted for approximately seven percent of all summons-related cases. Unless the taxpayer complied with the court order, the taxpayer was subject to arrest.[54]

International Treaty Obligations

Courts denied three taxpayers' motions to quash third-party summonses and granted the government's motion to enforce a summons in one other case based on the government's compliance with international agreements.[55] Taxpayers generally argued that the IRS summonses were not issued for a legitimate purpose as the foreign countries were requesting the information in bad faith. The courts applied the *Powell* requirements, citing Supreme Court precedent that as long as the IRS itself acts in good faith and complies with the applicable statutes, it is entitled to enforcement of its summons.[56]

CONCLUSION

The IRS may issue a summons to obtain information to determine whether a tax return is correct or if a return should have been filed to ascertain a taxpayer's tax liability or to collect a liability.[57] Accordingly, the IRS may request documents and testimony from taxpayers who have failed to provide that information voluntarily.

Summons enforcement continues to be a significant source of litigation. The IRS also continues to be successful in the vast majority of summons enforcement litigation. Taxpayers and third parties rarely succeed in contesting IRS summonses due to the significant burden of proof and strict procedural requirements. However, we anticipate that the TFA's change to the requirements for John Doe summonses and advance notice before making third-party contacts should reduce summons litigation.

51 *United States v. Sanmina Co. and Subsidiaries*, 122 A.F.T.R.2d (RIA) 6232 (N.D. Cal. 2018), *appeal docketed*, No. 18-17036 (9th Cir., Oct. 19, 2018), 707 F. App'x 865 (9th Cir. 2017), *vacating and remanding* 115 A.F.T.R.2d (RIA) 1882 (N.D. Cal. 2015). We discussed the lower court's decision in the 2015 and 2018 Annual Reports. See National Taxpayer Advocate 2018 Annual Report to Congress 469, 476-477 (Most Litigated Issue: *Summons Enforcement Under IRC §§ 7602, 7604, and 7609*); National Taxpayer Advocate 2015 Annual Report to Congress 467, 473-474 (Most Litigated Issue: *Summons Enforcement Under IRC §§ 7602, 7604, and 7609*).

52 IRC § 7604(b).

53 *See United States v. Edwards*, 122 A.F.T.R.2d (RIA) 7035 (W.D. Tenn. 2018); *United States v. Gonzalez*, 122 A.F.T.R.2d (RIA) 5352 (M.D. Fla. 2018); *United States v. Heist*, 123 A.F.T.R.2d (RIA) 1493 (W.D. Wis. 2019), *appeal dismissed*, 2019 WL 4464233 (7th Cir. May 2, 2019); *United States v. Higgins*, 122 A.F.T.R.2d (RIA) 5705 (D. Ariz. 2018).

54 *See United States v. Edwards*, 122 A.F.T.R.2d (RIA) 7035 (W.D. Tenn. 2018); *United States v. Gonzalez*, 122 A.F.T.R.2d (RIA) 5352 (M.D. Fla. 2018); *United States v. Heist*, 123 A.F.T.R.2d (RIA) 1493 (W.D. Wis. 2019), *appeal dismissed*, 2019 WL 4464233 (7th Cir. May 2, 2019).

55 *See GA2.com SP. ZO. O. (LTD) v. United States*, 123 A.F.T.R.2d (RIA) 5759 (D. Del. 2018); *Verges v. United States*, 121 A.F.T.R. 2d (RIA) 2287 (S.D. Fla. 2018); *Vistadis, LLC v. United States*, 123 A.F.T.R.2d (RIA) 1353 (E.D. Pa. 2019); *United States v. Thielemann*, 123 A.F.T.R.2d (RIA) 665 (S.D. Cal. 2019).

56 *Vistadis, LLC v. United States*, 123 A.F.T.R.2d (RIA) 1353 (E.D. Pa. 2019) (citing *United States v. Stuart*, 409 U.S. 353 (1989)).

57 IRC § 7602(a).

RECOMMENDATIONS TO MITIGATE DISPUTES

The National Taxpayer Advocate recommends that Congress:

- Amend IRC § 7602(c)(1) to clarify that the IRS must tell the taxpayer what information it needs (or needs to verify) and to give the taxpayer a reasonable opportunity to provide the information (or verification of it) before contacting a third party, unless doing so would be pointless or an exception applies.

The National Taxpayer Advocate recommends that the IRS:

- Revise its letters and internal guidance to inform the taxpayer of what information it needs (or needs to verify) and to give the taxpayer a reasonable opportunity to provide the information (or verification of it) before contacting the third parties.
- Educate industries involved in the sale of controlled substances about the prohibition on claiming any deduction or credit under IRC § 280E.

MLI #6 Civil Actions to Enforce Federal Tax Liens or to Subject Property to Payment of Tax Under IRC § 7403

SUMMARY

The United States may file a civil action in U.S. District Court under Internal Revenue Code (IRC) § 7403 to enforce its federal tax lien by subjecting any of the delinquent taxpayer's property, right, title, or interest in property to the payment of the taxpayer's liability. Unlike cases in other Most Litigated Issues, lien enforcement cases are always initiated by the government through the Department of Justice (DOJ) rather than the taxpayer. If the United States succeeds in proving the lien is valid and may be enforced, the court will typically issue an order of sale that (1) authorizes the United States to foreclose on the taxpayer's subject property and (2) describes how the proceeds of sale should be distributed.

During our reporting period from June 1, 2018, to May 31, 2019, we identified 52 opinions that involved civil actions to enforce liens under IRC § 7403. The IRS prevailed in 48 of these cases, taxpayers prevailed in two cases, and two cases resulted in split decisions in which the IRS and taxpayers or a third party prevailed in part. The 52 cases identified for this reporting period represent a 33 percent increase from the 39 cases reported last year.

TAXPAYER RIGHTS IMPACTED[1]

- *The Right to Appeal an IRS Decision in an Independent Forum*
- *The Right to Finality*
- *The Right to Privacy*
- *The Right to a Fair and Just Tax System*

PRESENT LAW

A federal tax lien (FTL) arises when the IRS assesses a tax liability, sends the taxpayer notice and demand for payment, and the taxpayer does not fully pay the debt within ten days of the notice and demand.[2] An FTL is effective as of the date of assessment and attaches to all of the taxpayer's property and rights to property, whether real or personal, including those acquired by the taxpayer after that date.[3] This lien continues against the taxpayer's property until the liability either has been fully paid or is legally unenforceable.[4] Section 7403 authorizes the United States to enforce a federal tax lien over the taxpayer's liability or to subject any of the delinquent taxpayer's property, right, title, or interest in property to the payment of that liability by initiating a civil action in the appropriate U.S. District Court.[5]

1 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are also codified in the Internal Revenue Code. *See* IRC § 7803(a)(3).

2 IRC §§ 6321 and 6322. IRC § 6201 authorizes the IRS to assess all taxes owed. IRC § 6303 provides that within 60 days of the assessment the IRS must provide notice and demand for payment to any taxpayer liable for an unpaid tax.

3 *See* IRC § 6321; Internal Revenue Manual (IRM) 5.12.1.1.1, Federal Tax Liens, Background (July 11, 2018).

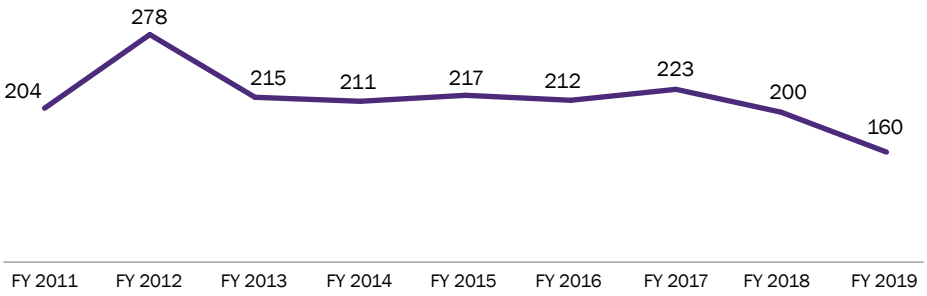
4 IRC § 6322.

5 IRC § 7403(a); Treas. Reg. § 301.7403-1(a).

To bring an enforcement suit, the IRS must refer a case to the DOJ and request it to file the foreclosure suit.[6] In fiscal year (FY) 2019, the IRS referred 160 cases to the DOJ. Figure 1 shows the trend in the number of lien enforcement cases referred to the DOJ since FY 2011, which has been mostly steady with a small downward trend in the last two fiscal years.

FIGURE 2.6.1

Liens Cases Referred to U.S. Department of Justice



The Internal Revenue Manual (IRM) provides the factors the IRS should consider when determining whether to initiate an enforcement suit, including the feasibility of administrative collection devices, the statute of limitations, and the economic value of lien foreclosure.[7] With respect to a recommendation to foreclose on a taxpayer's principal residence, the IRM instructs the IRS to refer a case to DOJ to file suit to foreclose only when there are no other reasonable administrative remedies and the foreclosure would not create or exacerbate hardship issues for the taxpayer or result in the inability of the taxpayer to secure future housing.[8]

Once the DOJ receives the referral, it can initiate suit to enforce the lien under IRC § 7403 by filing a complaint in the appropriate district court.[9] The DOJ is required to name all parties having liens on or otherwise claiming interest in the relevant property as parties to the action.[10] The law of the state where the property is located determines the nature of a taxpayer's legal interest in the property.[11] However, once it is determined that the taxpayer has an interest under state law in the property, federal law

6 IRC § 7401. The IRS prepares a suit recommendation package, and then the IRS Office of Chief Counsel reviews it, and if it agrees, sends a letter to the DOJ asking the DOJ to commence the litigation. Chief Counsel Directives Manual 34.6.1.1.1, Steps Prior to Litigation (Oct. 7, 2015).

7 IRM 5.17.4.8, Foreclosure of Federal Tax Lien (May 23, 2019).

8 IRM 5.17.4.8.2.5, Lien Foreclosure on a Principal Residence (May 23, 2019). The requirement to include an analysis of ability to secure future housing is an update from previous versions of the IRM. This provision is a step towards meeting the National Taxpayer Advocate's recommendation that the IRS instruct employees to more thoroughly consider the negative impact of foreclosing a principal residence. *See* National Taxpayer Advocate 2012 Annual Report to Congress 537 (Legislative Recommendation: *Amend IRC § 7403 to Provide Taxpayer Protections Before Lien Foreclosure Suits on Principal Residences*).

9 The United States may also intervene in foreclosure actions initiated by other creditors to assert any lien on the property that is the subject of such action. If the lien enforcement claim arises as a counterclaim or interpleader action in a case that originated in a state court, the United States may remove the case to a U.S. District Court. 28 U.S.C. § 1444. However, if the foreclosure action is adjudicated under state court proceedings, federal tax liens that are junior to other creditors may be effectively removed, even if the United States is not a party to the proceeding. *See United States v. Brosnan*, 363 U.S. 237 (1960).

10 IRC § 7403(b).

11 *United States v. Nat'l Bank of Commerce*, 472 U.S. 713, 722 (1985).

determines the respective priorities of the federal tax lien and competing liens or, alternatively, whether the property is exempt from attachment of the lien.[12]

Section 7403(c) directs the court to "finally determine the merits of all claims to and liens upon the property." If the United States proves a claim or interest, the court may order an officer of the court to sell the property and distribute the proceeds in accordance with the court's findings with respect to the interests of the parties, including the United States' claim for the delinquent tax liability.

ANALYSIS OF LITIGATED CASES

We reviewed 52 opinions during our reporting period that involved civil actions to enforce federal tax liens. Table 6 in Appendix 5 contains a detailed list of those cases. Of the 52 cases, ten resulted in default judgment against the taxpayer. Taxpayers appeared *pro se* (without counsel) in 23 cases, while 19 of the cases involved taxpayers with representation. The IRS prevailed in all cases brought against *pro se* taxpayers. This section will highlight key issues in the cases we identified, including the enforcement of tax liens where a non-liable taxpayer has an interest in the subject property; the enforcement of a lien against property held by third parties; and the government's ability to enforce its lien during the existence of an installment agreement.

Foreclosure of Tax Liens Where a Non-Liable Taxpayer Had Interest in Property

Ordering the sale of a taxpayer's property is a powerful collection tool and directly affects any parties who have an interest in the property subject to sale. Based on the Supreme Court case *United States v. Rodgers*,[13] when a forced sale involves the interests of a third party who does not have a federal tax debt, the court should consider the following four factors when determining whether the property should be sold:

1. The extent to which the government's financial interests would be prejudiced if they were relegated to a forced sale of the partial interest of the delinquent taxpayer;
2. Whether the innocent third party with a separate interest in the property, in the normal course of events, has a legally recognized expectation that the property would not be subject to a forced sale by the delinquent taxpayer or taxpayer's creditors;
3. The likely prejudice to the third party in personal dislocation costs and inadequate compensation; and
4. The relative character and value of the non-liable and liable interests held in the property.[14]

The *Rodgers* analysis balances the right of the United States to receive the highest return possible by selling the property in its entirety while also ensuring third parties receive just compensation through judicial valuation and distribution. Following the forced sale, any proceeds are distributed in accordance with the relative interests of the parties, with the United States receiving the proceeds of sale proportional to only the interest of the delinquent taxpayer.

The courts addressed the *Rodgers* factors in four cases during this reporting period. For example, in the case of *United States v. Jackson*, the defendant taxpayer and his wife contested the government's proposed sale of a property, arguing that the proposed sale and distribution would unduly diminish the taxpayer's wife's interest in the subject properties because her portion would be reduced after payments were made

12 *United States v. Rodgers*, 461 U.S. 677, 683 (1983).
13 *United States v. Rodgers*, 461 U.S. 677 (1983).
14 *Id.* at 709-711.

to Property Appraisal and Liquidation Specialists (PALS).[15] The court evaluated the appropriateness of sale using the *Rodgers* factors. First, the court found that the United States would be prejudiced if it were relegated to selling only the taxpayer's interest rather than the properties in their entirety, as this would diminish the value the government could expect to receive in a sale. Second, the wife lacked any expectation the properties would not be sold because she had participated in the fraudulent transfer of the properties, acting to frustrate the government's collection efforts and tilting the balance against her for this factor.[16] Third, the wife would not receive inadequate consideration for her share of the property, and she cited no legal authority to show that the administrative costs of sale should be borne by the government. The court relied on "the Government's paramount interest in prompt and certain collection of delinquent taxes" to conclude that the net proceeds from the sale of the properties should be distributed to PALS first.[17] Finally, the court held that the government would recover "more than 'a fraction of the value of the propert[ies]'" in a forced sale.[18] Thus, all factors weighed in favor of sale of the properties and distribution of the sale proceeds.

Foreclosure of Tax Liens Against Property Held by Third Parties

During this reporting period, we identified 18 cases in which the United States sought to enforce its federal tax lien against property that it claimed was nominally held by a third party. The IRM identifies the following legal theories under which a third party can be held liable for the tax liability of another: fiduciary liability, successor liability, transferee liability, and nominee or alter ego.[19] Although the "nominee" and "alter ego" doctrines frequently overlap, the nominee analysis typically focuses on the taxpayer's use and control of the property, while the alter ego analysis focuses on the nature of taxpayer's relationship to the entity with legal title to the property.[20] Nominee and alter ego situations also share common elements with fraudulent transfers but do not require transfer of legal title or that the taxpayer be insolvent for the lien to attach.[21] A tax lien attaches to property held by a third party such as the taxpayer's nominee or alter ego.[22]

In *Shaw v. United States*, the district court evaluated a delinquent taxpayer's transfer of property to a business trust under the nominee, alter ego, and fraudulent transfer theories, and found that each showed the transfer should be set aside and the tax lien enforced against the property.[23] First, in its nominee analysis, the court found that the taxpayer was the source of the funds used to purchase the property initially, and he transferred the property to the trust for no consideration. After the transfer, he continued to use the property without paying rent, and he paid for its maintenance out of an account containing solely his funds. In addition, the court emphasized that the taxpayer transferred the property to the trust in anticipation of evading his liabilities, as he explicitly stated the role of the trustee was to "protect

15 123 A.F.T.R.2d (RIA) 594 (W.D. Mo. 2019). The taxpayer and wife also objected to distribution to the county, another lien holder with priority. However, the court found that the wife was liable for outstanding property tax payments owed to the county, justifying the county's priority position in proceed distribution.

16 The taxpayer and his wife had attempted to transfer the subject properties to various trusts after the taxpayer's debts had arisen, but they conceded that those transfers were invalid during the course of litigation. 123 A.F.T.R.2d (RIA) 594 at *3.

17 123 A.F.T.R.2d (RIA) 594 at *3.

18 123 A.F.T.R.2d (RIA) 594 at *3, *citing United States v. Bierbrauer*, 936 F.2d 373, 375 (8th Cir. 1991).

19 IRM 5.17.14.1, Third Party Liability Overview (Jan. 24, 2012).

20 Alter egos typically relate to sham business entities controlled by or indistinct from the taxpayer, while a nominee is generally a third-party individual who holds legal title to property of a taxpayer while the taxpayer enjoys full use and benefit of that property. *See* IRM 5.17.2.5.7.1, Alter Ego (Mar. 19, 2018); IRM 5.17.2.5.7.2, Nominee (Mar. 19, 2018).

21 IRM 5.17.14.6, Nominee and Alter Ego Doctrines (Jan. 24, 2012). *See Holman v. United States*, 505 F.3d 1060, 1064-65 (10th Cir. 2007) (nominee lien against property purchased by nominee with money from the taxpayer is permissible).

22 *See, e.g., Fourth Inv., L.P. v. United States*, 720 F.3d 1058, 1066 (9th Cir. 2013).

23 122 A.F.T.R.2d (RIA) 6151 (D. Nev. 2018).

the trust from any third party or government agencies."[24] These factors indicated that the taxpayer still maintained use and control of the property, and thus the tax lien could be enforced against it.

Second, in its alter ego analysis, the court found that the taxpayer "showed no respect for the 'separate identity' of the corporation," as the trust did not keep records, issue quarterly reports, or even maintain a bank account separate from the taxpayer.[25] The court found the United States would suffer injustice if it treated the trust as a separate entity, as the taxpayer impoverished himself by transferring all his property to it. There was also fraudulent intent, as the transfer occurred just as the taxpayer was accruing significant tax liabilities, and the transfer was made for the purpose of protecting his assets. These factors showed the trust was a sham entity and supported the court's finding of alter ego liability.[26]

Third, the court found that taxpayer's transfer of the property was both constructively and actually fraudulent under Nevada law.[27] The court highlighted that the transfer occurred after the taxpayer reasonably should have believed he would incur debts beyond his ability to pay. Thus, the nominee, alter ego, and fraudulent transfer analyses all showed that the tax lien attached to the property, and the United States could enforce it by sale.[28]

In another case, *United States v. Orr*, the district court assessed the nominee doctrine in the context of married taxpayers.[29] The United States attempted to enforce a tax lien against a property held by a delinquent taxpayer's wife, asserting that she was his nominee. However, each had provided part of the cost for purchase of the property, weighing against nominee status. Importantly, the court noted the purchase occurred two years before the IRS assessed the tax against the taxpayer, indicating it was not in anticipation of litigation.[30] The court placed less weight on several factors that typically indicate a nominee situation because of the taxpayer's marital relationship. Although the taxpayer had a close relationship with his wife, and he possessed and enjoyed the benefits of the property, the court would "not hold it against a married couple to live together."[31] Thus, the court found that the wife was not the taxpayer's nominee. However, because the wife purchased the property with commingled funds, some of which were traceable to the taxpayer, the court found the taxpayer did have a partial interest in the property. The United States was allowed to foreclose on the property but was required to compensate the wife for her interest.

Lien Enforcement During Existence of an Installment Agreement

The existence of an installment agreement prohibits the IRS from continuing certain types of collection actions against taxpayers. For example, IRC § 6331(k) prevents the IRS from undertaking a levy against a taxpayer while installment agreement is pending or in effect. In *State Auto Prop. Cas. Ins. Co. v. Burnett*, the district court considered whether the existence of an installment agreement barred

24 *Id* at *8.

25 122 A.F.T.R.2d (RIA) 6151 (D. Nev. 2018) at *9-10.

26 The court addressed the question of whether federal or state standards should be used in the nominee analysis, and determined that the alter ego inquiry "goes not to the ownership of property (a question of state law), but rather to the question of who is liable for a tax," which should be evaluated under federal law. 122 A.F.T.R.2d (RIA) 6151 (D. Nev. 2018) at *9. However, even if state law applied, the court found the trust was the taxpayer's nominee as well.

27 Property rights are determined under state law. *See United States v. Nat'l Bank of Commerce*, 472 U.S. 713, 722 (1985).

28 Any one of these three findings would be sufficient for the lien to attached to the property and be enforced.

29 336 F. Supp. 3d 732 (W.D. Tex. 2018).

30 The court would not speculate that the couple had schemed for the taxpayer to fail to pay his income taxes that far in advance.

31 336 F. Supp. 3d 732, 760 (W.D. Tex. 2018).

the United States from enforcing its tax lien against interpleaded insurance funds.[32] The court found, "There is nothing in the IRS Code suggesting that the limitations found in the statue governing levies (§ 6331) are applicable to the statute governing liens (§ 6321)."[33] Thus, in light of the statute's plain language, as well as similar interpretations by other courts, the court held that despite the existence of an installment agreement, the United States was entitled to enforce its lien against the interpleaded insurance funds.[34]

CONCLUSION

Lien enforcement cases continue to be a frequent source of litigation and often implicate the rights of taxpayers and third parties. In particular, the National Taxpayer Advocate is concerned with the following aspects of the lien enforcement process.

First, seizure of a taxpayer's principal residence may have potentially devastating impact on the taxpayer and his or her family, especially if the taxpayer is at risk of economic hardship. As discussed in the 2018 Annual Report to Congress, the IRS is inadequately using internally available data to identify taxpayers at risk of economic hardship, which could be used to shield taxpayers from referral to the DOJ.[35] Foreclosing on a taxpayer's home when he or she is experiencing economic hardship jeopardizes the taxpayer's *right to a fair and just tax system*. While the May 2019 revisions to the IRM instruct the IRS to provide additional details in the referral including whether the action proposed would result in an inability to secure future housing or otherwise lead to an economic hardship, these provisions are simply instructions that can be modified or rescinded at any time. Furthermore, taxpayers may generally not use IRM violations as the basis for challenging IRS actions in court, leaving them little opportunity for relief at the stage of lien enforcement.[36]

Second, Collection Due Process (CDP) notice and hearing procedures described in IRC §§ 6320 and 6330 are not extended to third parties that may have an interest in property subject to lien enforcement. This deprives affected third parties, such as alleged nominees or alter egos, of the *right to challenge the IRS's position and be heard* prior to a lien enforcement suit. Allowing affected third parties the opportunity to raise defenses and propose collection alternatives in a CDP hearing could help reduce litigation by resolving these issues earlier in the process.[37]

32 122 A.F.T.R.2d (RIA) 5407 (N.D. Miss. 2018). IRC § 6331(k)(3) prevents the IRS from referring a case to the Department of Justice "for the commencement of a proceeding in court against a person named in an installment agreement … if levy to collect the liability is prohibited under paragraph (a)(1)," but it does not prevent the United States from filing a counterclaim or defend the United States in an action under § 2410 in which the taxpayer's liability for a tax that is the subject of an installment agreement may be established.

33 122 A.F.T.R.2d (RIA) 5407 (N.D. Miss. 2018) at *3.

34 *See, e.g., Am. Tr. v. Am. Cmty. Mut. Ins. Co.*, 142 F.3d 920, 923-24 (6th Cir. 1998) ("The United States Courts of Appeals that have considered the relationship between administrative levies and tax liens have recognized that a tax lien under § 6321 can attach to property that would be exempt from a § 6331 administrative levy."); *United States v. Cazzell*, 2016 U.S. Dist. LEXIS 168875, at *3 (W.D. Mo. Aug. 10, 2016) ("[W]hile the Government is precluded from using an administrative levy while an installment agreement is pending, the Government is not precluded from seeking judicial enforcement of their tax lien.").

35 *See* National Taxpayer Advocate 2018 Annual Report to Congress 228 (Most Serious Problem: *Economic Hardship: The IRS Does Not Proactively Use Internal Data to Identify Taxpayers at Risk of Economic Hardship Throughout the Collection Process*).

36 National Taxpayer Advocate 2020 Purple Book: *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration* 46-47 *(Provide Taxpayer Protections Before the IRS Recommends the Filing of a Lien Foreclosure Suit on a Principal Residence*).

37 National Taxpayer Advocate 2020 Purple Book: *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration* 48 *(Provide Collection Due Process Rights to Third Parties Holding Legal Title to Property Subject to IRS Collection Actions*).

Third, allowing the United States to seize funds through a lien enforcement proceeding while the taxpayer has a pending or existing installment agreement infringes on the taxpayer's *rights to finality* and *a fair and just tax system*. When a taxpayer enters into an installment agreement, the agreement constitutes a defined plan by which a taxpayer will address his or her liability and allows the taxpayer to create a budget for other expenses. If taxpayers continue to face the possibility that the IRS can intervene to enforce a lien against their property interests even after they enter a payment plan, they could be discouraged from entering into installment agreements. Allowing lien enforcement actions to continue is also incongruous with IRC § 6331, which prevents levies while offers in compromise or installment agreements are pending or in effect.

RECOMMENDATIONS TO MITIGATE DISPUTES

The National Taxpayer Advocate recommends that Congress:

1. Amend IRC § 7403 to codify current IRM administrative protections, including that an IRS employee must receive executive-level written approval to proceed with a lien foreclosure suit referral.[38]
2. Amend IRC § 7403 to preclude IRS employees from requesting that the DOJ file a civil action in U.S. District Court seeking to enforce a tax lien and foreclose on a taxpayer's principal residence except where the employee has determined that (1) the taxpayer's other property or rights to property, if sold, would be insufficient to pay the amount due, including the expenses of the proceedings, and (2) the foreclosure and sale of the residence would not create an economic hardship due to the financial condition of the taxpayer.[39]
3. Amend IRC §§ 6320 and 6330 to extend CDP rights to "affected third parties" who hold legal title to property subject to IRS collection actions.[40]

38 National Taxpayer Advocate 2020 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration* 46-47 *(Provide Taxpayer Protections Before the IRS Recommends the Filing of a Lien Foreclosure Suit on a Principal Residence)*.

39 *Id.*

40 National Taxpayer Advocate 2020 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration* 48 *(Provide Collection Due Process Rights to Third Parties Holding Legal Title to Property Subject to IRS Collection Actions)*.

MLI #7 Failure to File Penalty Under IRC § 6651(a)(1), Failure to Pay an Amount Shown as Tax on Return Under IRC § 6651(a)(2), and Failure to Pay Estimated Tax Penalty Under IRC § 6654

SUMMARY

We reviewed 34 decisions issued by federal courts from June 1, 2018, to May 31, 2019, regarding additions to tax for:

1) Failure to file a tax return by the due date under Internal Revenue Code (IRC) § 6651(a)(1);
2) Failure to pay an amount shown as tax on a tax return under IRC § 6651(a)(2);
3) Failure to pay installments of the estimated tax under IRC § 6654; or
4) Some combination of the three.

The phrase "addition to tax" is commonly referred to as a penalty, so we will refer to these additions to tax as the failure to file penalty, the failure to pay penalty, and the estimated tax penalty. Three cases involved the successful imposition of the estimated tax penalty in conjunction with the failure to file and failure to pay penalties; 30 cases involved the failure to file and/or failure to pay penalties without the estimated tax penalty; however, the estimated tax penalty was not the sole issue in any of the cases.

A taxpayer can avoid the failure to file and failure to pay penalties by demonstrating the failure is due to reasonable cause and not willful neglect.[1] The estimated tax penalty is imposed unless the taxpayer falls within one of the statutory exceptions.[2] Taxpayers were unable to avoid a penalty in just two of the 34 cases.

TAXPAYER RIGHTS IMPACTED[3]

- *The Right to Pay No More Than the Correct Amount of Tax*
- *The Right to Appeal an IRS Decision in an Independent Forum*
- *The Right to a Fair and Just Tax System*

PRESENT LAW

Under IRC § 6651(a)(1), a taxpayer who fails to file a return on or before the due date (including extensions of time for filing) will be subject to a penalty of five percent of the tax due (minus any credit the taxpayer is entitled to receive, and payments made by the due date) for each month or partial month the return is late. This penalty will accrue up to a maximum of 25 percent, unless the failure is due to reasonable cause and not willful neglect.[4] For the taxpayer to avoid the penalty by showing there was a

1 IRC § 6651(a)(1), (a)(2).

2 IRC § 6654(e).

3 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are also codified in the Internal Revenue Code. *See* IRC § 7803(a)(3).

4 IRC § 6651(a)(1), (b)(1). The penalty increases to 15 percent per month up to a maximum of 75 percent if the failure to file is fraudulent. IRC § 6651(f). When an income tax return is filed more than 60 days after the due date (including extensions), the penalty shall not be less than the lesser of two amounts — 100 percent of the tax required to be shown on the return that the taxpayer did not pay on time, or a specific dollar amount which is adjusted annually due to inflation.

reasonable cause, the taxpayer must have exercised ordinary business care and prudence.[5] The failure to file penalty applies to income, estate, gift, employment, self-employment, and certain excise tax returns.[6]

The failure to pay penalty, IRC § 6651(a)(2), applies to a taxpayer who fails to pay an amount shown or required to be shown as tax on the return.[7] When the IRS imposes both the failure to file and failure to pay penalties for the same month, it reduces the failure to file penalty by the amount of the failure to pay penalty.[8] The taxpayer can avoid the penalty by establishing the failure was due to reasonable cause; in other words, the taxpayer must have exercised ordinary business care and prudence but nonetheless was unable to pay by the due date, or that paying on the due date would have caused undue hardship.[9] The failure to pay penalty applies to income, estate, gift, employment, self-employment, and certain excise tax returns.[10]

Courts will consider "all the facts and circumstances of the taxpayer's financial situation" to determine whether the taxpayer exercised ordinary business care and prudence.[11] In addition, "consideration will be given to the nature of the tax which the taxpayer has failed to pay."[12]

IRC § 6654 imposes a penalty on any underpayment of estimated tax by an individual or by certain estates or trusts.[13] The law requires four installments per tax year, each generally 25 percent of the required annual payment.[14] The required annual payment is generally the lesser of 90 percent of the tax shown on the return for the current tax year, or 100 percent of the tax for the previous tax year.[15] The IRS lowered to 80 percent the threshold required for certain taxpayers to qualify for estimated tax penalty relief if their federal income tax withholding and estimated tax payments fell short of their total tax liability in tax year 2018.[16]

5 Treas. Reg. § 301.6651-1(c)(1).

6 IRC § 6651(a)(1).

7 IRC § 6651(a)(2). Note that if the taxpayer timely files the tax return (including extensions) but an installment agreement is in place, the penalty will continue accruing at the lower rate of 0.25 percent rather than 0.5 percent of the tax shown. IRC § 6651(h). The penalty accrues at a rate of half a percent (0.5 percent) per month on the unpaid balance for as long as it remains unpaid, up to a maximum of 25 percent of the amount due.

8 IRC § 6651(c)(1). When both the failure to file and failure to pay penalties are accruing simultaneously, the failure to file will max out at 22.5 percent and the failure to pay will max out at 2.5 percent, thereby abiding by the 25 percent maximum limitation.

9 Treas. Reg. § 301.6651-1(c)(1). Even when a taxpayer shows undue hardship, the regulations require proof of the exercise of ordinary business care and prudence.

10 IRC § 6651(a)(2).

11 Treas. Reg. § 301.6651-1(c)(1). *See, e.g., East Wind Indus., Inc. v. United States*, 196 F.3d 499, 507 (3d Cir. 1999).

12 Treas. Reg. § 301.6651-1(c)(2).

13 IRC § 6654(a), (l).

14 IRC § 6654(c)(1), (d)(1)(A).

15 IRC § 6654(d)(1)(B). If the adjusted gross income shown on the return of the individual for the preceding taxable year exceeds $150,000, the required annual payment increases to 110 percent of the tax shown on the return of the individual for the preceding tax year (if the preceding tax year was 2002 or after). IRC § 6654(d)(1)(C)(i).

16 Notice 2019-11, 2019-05 I.R.B. 430, *modified and superseded by* Notice 2019-25, 2019-15 I.R.B. 942. Notice 2019-25 updated procedures for requesting the waiver of the addition to tax and provided procedures for requesting a refund of penalties paid for TY 2018. On August 14, 2019, the IRS announced it would automatically waive the estimated tax penalty for the more than 400,000 eligible taxpayers who already filed their 2018 federal income tax returns but did not claim the waiver. IR-2019-144.

The amount of the penalty is dependent upon the particular facts of the underpayment.[17] To avoid the penalty, the taxpayer has the burden of proving that one of the following exceptions applies:

- The tax due (after taking into account any federal income tax withheld) is less than $1,000;[18]
- The preceding tax year was a full 12 months, the taxpayer had no liability for the preceding tax year, and the taxpayer was a U.S. citizen or resident throughout the preceding tax year;[19]
- It is determined that because of casualty, disaster, or other unusual circumstances, the imposition of the penalty would be against equity and good conscience;[20] or
- The taxpayer retired after reaching age 62, or became disabled in the tax year for which estimated payments were required, or in the tax year preceding that year, and the underpayment was due to reasonable cause and not willful neglect.[21]

In any court proceeding, the IRS has the burden of producing sufficient evidence that it imposed the failure to file, failure to pay, or estimated tax penalties appropriately.[22]

ANALYSIS OF LITIGATED CASES

We analyzed 34 opinions issued between June 1, 2018, and May 31, 2019, where the failure to file penalty, failure to pay penalty, or estimated tax penalty was in dispute. Twenty-eight of these cases were either litigated in the U.S. Tax Court, or an appeal of a Tax Court decision. A detailed list appears in Table 7 in Appendix 5. Twenty-four cases involved individual taxpayers and ten involved businesses (including individuals engaged in self-employment or partnerships).

Of the 19 cases in which taxpayers appeared *pro se* (without counsel), the outcomes always favored the IRS. Taxpayers were represented in the only two cases in which the court ruled in their favor.

Failure to File Penalty

In 30 out of the 32 cases reviewed where the failure to file penalty was at issue, the taxpayers could not prove that the failures to file were due to reasonable cause.[23] Taxpayers provided reasons such as physical injury or mental illness and reliance on an agent as a basis for reasonable cause. Circumstances suggesting reasonable cause are typically outside the taxpayer's control.[24]

Physical Injury/Mental Illness or Pending Litigation as Defense

A physical injury or mental illness may provide a basis for a taxpayer to establish reasonable cause for not filing if the condition affected the taxpayer to such a degree that he or she could not file a tax return on

17 The amount of the penalty is determined by applying: the underpayment rate established under IRC § 6621; to the amount of the underpayment; for the period of the underpayment. The amount of the underpayment is the excess of the required payment over the amount paid by the due date.

18 IRC § 6654(e)(1).

19 IRC § 6654(e)(2).

20 IRC § 6654(e)(3)(A).

21 IRC § 6654(e)(3)(B).

22 IRC § 7491(c). *See also Higbee v. Comm'r*, 116 T.C. 438, 446 (2001) (applying IRC § 7491(c)). An exception to this rule relieves the IRS of this burden where the taxpayer's petition fails to state a claim for relief from the penalty (and therefore is deemed to concede the penalty). *Funk v. Comm'r*, 123 T.C. 213, 218 (2004).

23 A taxpayer avoided the failure to file penalty by successfully proving reasonable cause in just one case.

24 *McMahan v. Comm'r*, 114 F.3d 366, 369 (2d Cir. 1997) (citation omitted), *aff'g* T.C. Memo. 1995–547.

time. When determining whether the condition establishes reasonable cause, the court analyzes how the taxpayer conducted his or her business affairs during the illness.

In *Namakian v. Commissioner,* the court held the taxpayer did not establish reasonable cause for failure to file his 2011, 2012, and 2013 tax returns.[25] The taxpayer argued that his financial decline beginning in 2007, along with the death of his mother-in-law in 2011, and his father-in-law in 2014, invoked stress-induced anxiety and depression, which caused insomnia and an inability to retain focus. The taxpayer stated that these stress-induced health problems rendered him unable to file his returns.[26] The court sympathized with the taxpayer's circumstances, but did not believe these setbacks constituted reasonable cause, as the taxpayer was still able to generate significant income during these time periods, showing that he was capable of managing his business affairs.

The taxpayer also argued that his failure to file was due to awaiting a pending outcome on litigation regarding his 2007 and 2008 returns that he believed would affect the filing of these later years. The court pointed out that a stipulated decision on his 2008 matter was entered on August 27, 2013, several months prior to the due date for his 2013 return; thus, this explanation for his late filing of his 2013 return was unconvincing. The court further pointed out, in regard to the 2011 and 2012 returns, that the reasonable and prudent course of action would have been to file timely using the best information available, disclosing that a dispute existed regarding how he should be treated regarding his stock sales, (*i.e.,* investor or trader).

Reliance on Agent Defense

When a taxpayer relies on an agent to fulfill a known filing requirement, it does not relieve the taxpayer of the responsibility for ensuring timely filing.[27] Taxpayers have a non-delegable duty to file a tax return on time.[28] In order for reliance on an agent to rise to the standard of reasonable cause for failing to fulfill the filing requirement, the taxpayer must make full disclosure of all relevant facts to the tax professional that he or she relies upon.[29] In other words, merely hiring a tax professional (*e.g.*, accountant, lawyer, or Enrolled Agent) to handle tax return filing is not enough to establish that the taxpayer used ordinary business care and prudence if there are facts that indicate otherwise.

In *Burbach v. Commissioner*, the IRS imposed failure to file penalties on the taxpayer (Mr. Burbach) and the taxpayer's business (Burbach Aquatics Inc. or BAI, Inc.).[30] Both Mr. Burbach and BAI argued that their failure to file was due to their reliance on their tax professional and advice given by this professional. However, the court held that both Mr. Burbach's and BAI's reliance was unreasonable.

In regards to BAI, Inc.'s corporate tax returns, Mr. Burbach relied on his tax professional's statement that corporations have six years to file their returns. The court stated that it did not find credible

25 *Namakian v. Comm'r*, T.C. Memo. 2018-200.

26 *Id*.

27 The Supreme Court held in *United States v. Boyle* that reasonable cause may exist when a taxpayer relies on the erroneous advice of counsel concerning a question of law. To escape liability for the failure to file penalty, the taxpayer bears the heavy burden of proving both (1) that the failure did not result from "willful neglect," and (2) that the failure was "due to reasonable cause." 469 U.S. 241, 245, 250 (1985).

28 *United States v. Boyle*, 469 U.S. 241 (1985). The Court noted that "[i]t requires no special training or effort to ascertain a deadline and make sure that it is met." *Boyle*, 469 U.S. at 252.

29 *Boyle*, 469 U.S. at 241.

30 *Burbach v. Comm'r*, T.C. Memo. 2019-17.

Burbach's statement that he relied on this advice, because he had timely filed his own business and personal returns for decades, and described Burbach as a sophisticated businessman.[31]

Regarding Mr. Burbach's individual tax returns, the court also rejected his reasonable cause defense for many of the same reasons stated above (*i.e.,* Mr. Burbach was a sophisticated businessman), concluding that it was unwilling to excuse his late filing because he relied on advice that he knew, or should have known, was inaccurate.

In *Estate of Sanders v. Commissioner*, the taxpayer disputed a failure to file penalty under IRC § 6651(a)(1) for 2002, arguing that he was not required to file a return with the IRS because he was a *bona fide* resident of the U.S. Virgin Islands (USVI) for that year. Further, the taxpayer stated that even if he was not a *bona fide* USVI resident, and thus was required to file a return with the IRS, the penalty should be abated under reasonable cause because he reasonably relied on professional advice.[32]

In regards to the *bona fide* resident argument, the court determined, after considering 11 factors that fell into one of four broad categories,[33] that the taxpayer was a non-*bona fide* USVI resident for 2002,[34] meaning the taxpayer was required to file two income tax returns — one with the IRS and another with the Virgin Islands Bureau of Internal Revenue (VIBIR).[35] The taxpayer filed a return with the VIBIR for 2002, but did not file a return with the IRS for that year. However, the court held that the taxpayer's failure to file was due to reasonable cause and not willful neglect, because he had relied on advice from his attorney that he was a *bona fide* resident of the USVI, and thus did not need to file a return with the IRS.[36]

Failure to Pay an Amount Shown Penalty

As with the failure to file penalty, raising a reasonable cause defense to the failure to pay penalty requires that the taxpayer show that he or she exercised ordinary business care and prudence in the payment of his or her tax liabilities, but nevertheless was either unable to timely pay the tax or would suffer undue hardship if the payment was made on time.[37] Unsurprisingly, taxpayers often use medical illness or reliance on an agent as the basis for establishing reasonable cause to avoid the failure to pay penalty under IRC § 6651(a)(2), as they do for the failure to file penalty under IRC § 6651(a)(1).

In *Deaton Oil Company v. United States*, the taxpayer, Deaton Oil Co., LLC, was assessed a failure to pay penalty under IRC § 6651(a)(2) for 2010 through 2013 for failure to pay its employment taxes.[38] In 2015, the taxpayer paid the penalties and interest on the unpaid employment taxes, and subsequently

31 The court was unable to verify whether Mr. Burbach's tax return preparer was actually an enrolled agent. See *Burbach v. Comm'r*, T.C. Memo. 2019-17.

32 *Estate of Sanders v. Comm'r*, T.C. Memo. 2018-104.

33 The four categories are: intent; physical presence; social, family, and professional relationships; and the taxpayer's own representation.

34 "The single filing requirement of section 932(c)(2) applies only if a taxpayer 'is a bona fide resident of the Virgin Islands'. Sec. 932(c)(1)(A). The term 'bona fide resident of the Virgin Islands' was not defined by the Code until 2004. The Secretary did not promulgate final regulations for determining whether a taxpayer is a bona fide resident of the USVI until 2006. As a result, a taxpayer attempting to determine whether he or she was a bona fide resident of the USVI for tax years 2002-03 would not find the answer in either the Code or the regulations." *Estate of Sanders v. Comm'r*, T.C. Memo. 2018-104, 2018 Tax Ct. Memo LEXIS at *36-37 (July 15, 2018).

35 Under IRC § 932, non-bona fide residents of the US Virgin Islands who derive income from the USVI, must file two income tax returns: one with the IRS, and another with the VIBIR.

36 *Estate of Sanders v. Comm'r*, T.C. Memo. 2018-104.

37 See Treas. Reg. § 301.6651–1(c)(1).

38 *Deaton Oil Company v. United States*, 904 F.3d 634 (8th Cir. 2018), *aff'g* 119 A.F.T.R.2d (RIA) 1945 (W.D. Ark. 2017).

filed Form 843, Claim for Refund and Request for Abatement, seeking a refund of penalties and interest. The IRS refunded most of the penalties and interest assessed for 2013, but denied the claims for 2010, 2011, and 2012. Shortly thereafter, the taxpayer filed a refund suit in federal district court, which was dismissed for failure to state a claim.[39] The taxpayer appealed this decision.

The taxpayer argued that the paid IRC § 6651(a)(2) penalties should be refunded because the failure to pay was due to reasonable cause. Specifically, the taxpayer's operations manager failed to pay the taxes, which were part of his official responsibilities. Further, Deaton's operations manager did not inform Deaton's owner of these missed filing deadlines, withheld IRS notices from him, and even began settlement negotiations with the IRS without the express consent of Deaton's owner. Additionally, the taxpayer argued that it reasonably relied on its outside Certified Public Accountant's (CPA) assurances that tax returns were filed, and taxes paid timely.

The Court of Appeals for the Eighth Circuit determined that the failure of the operations manager (an agent of Deaton) to fulfill his obligations to Deaton (the principal) by filing tax returns and making payments on behalf of Deaton does not establish reasonable cause for Deaton's failure to comply with its tax obligations, because that failure did not render Deaton disabled with regard to its tax obligations. Further, the court concluded that disability is not established because the operations manager was subject to Deaton's control, regardless of whether or not Deaton sufficiently exercised that control. Therefore, the actions of the operations manager do not establish reasonable cause.

Additionally, the court held that the taxpayer's reliance on its outside CPA to confirm with its operations manager that all filings and payments had been timely made was not a basis for relief. The taxpayer's outside CPA merely asked the operations manager if such filings and payments had been completed and then relayed to the taxpayer that the necessary filings and payments had been made, even though the CPA did not request documentation to verify these actions. The court stated the CPA was not offering tax advice on which the taxpayer could rely, but was merely stating whether or not the tax obligations had been met.[40] Thus, the Court of Appeals determined that the taxpayer did not establish reasonable cause, and consequently was not entitled to relief, thereby affirming the district court's decision to dismiss the taxpayer's case.[41]

Estimated Tax Penalty

In court proceedings involving individuals, the IRS has the burden to produce evidence that IRC § 6654(d)(1)(B) requires an annual payment from the taxpayer.[42] If a taxpayer did not pay enough tax throughout the year, either through withholding or by making estimated tax payments, the IRS will assess a penalty for underpayment of estimated tax.

In all four cases where an IRC § 6654 penalty was imposed, the IRS was able to show that the taxpayer had a required annual payment.[43] In none of these cases did the taxpayer present any evidence to show that he or she qualified for any of the statutory exemptions to the penalty. Thus, the penalty was imposed in all four cases.

39 *Deaton Oil Company v. United States*, 119 A.F.T.R.2d (RIA) 1945 (W.D. Ark. 2017).
40 *Deaton Oil Company v. United States*, 904 F.3d at 638.
41 *Deaton Oil Company v. United States*, 904 F.3d at 642.
42 IRC § 7491(c).
43 *Namakian v. Comm'r*, T.C. Memo. 2018-200; *Wells v. Comm'r*, T.C. Memo. 2018-188; *De Sylva v. Comm'r*, T.C. Memo. 2018-165.

CONCLUSION

Only two taxpayers prevailed in full out of the 34 (about six percent) of the failure to file, failure to pay, and estimated tax penalty cases analyzed in this report. The number of cases in which failure to file, failure to pay, or estimated tax penalties were at issue decreased by almost 28 percent from last year, and the portion of cases where the taxpayer received at least some form of relief decreased from 13 percent to six percent. This decline may be attributed to the general decline in tax litigation in recent years.[44]

44 David McAfee, *Tax Court: Tax Court Caseload Drops as Enforcement Lags: Former Chief Judge* 142 DTR 8 (July 24, 2018). Former Chief Judge L. Paige Marvel noted that the Tax Court's inventory is dropping, due in part to lax enforcement. This trend could correlate with the fewer litigated lien cases in the U.S. District Courts. *See also* National Taxpayer Advocate 2019 Annual Report to Congress (Most Litigated Issue: *Civil Actions to Enforce Federal Tax Liens or to Subject Property to Payment of Tax Under IRC § 7403*), *supra*.

MLI #8 Itemized Deductions Reported on Schedule A (Form 1040)

SUMMARY

For the past two years, itemized deductions reported on Schedule A of IRS Form 1040 have been among the ten Most Litigated Issues. We identified 32 cases involving itemized deductions that were litigated in federal courts between June 1, 2018, and May 31, 2019.[1] The courts affirmed the IRS position in 29 of these cases, or about 91 percent, while taxpayers fully prevailed in one case, or about three percent of the cases. The remaining two cases, or about six percent, resulted in split decisions.

TAXPAYER RIGHTS IMPACTED[2]

- *The Right to Be Informed*
- *The Right to Pay No More Than the Correct Amount of Tax*
- *The Right to Challenge the IRS's Position and Be Heard*
- *The Right to Appeal an IRS Decision in an Independent Forum*
- *The Right to a Fair and Just Tax System*

PRESENT LAW

Itemized Deductions Prior to the Tax Cuts and Jobs Act[3]

In order to calculate taxable income, individual taxpayers can deduct from gross income (or adjusted gross income (AGI)), a standard deduction based on filing status[4] or may instead elect to itemize deductions.[5] Common itemized deductions include personal expenses such as interest payments (including interest and points on mortgages secured by a principal or secondary residence);[6] state and

1 We excluded cases involving unreimbursed employee expenses and charitable deductions as they are discussed elsewhere in the National Taxpayer Advocate's Annual Report to Congress. *See* National Taxpayer Advocate 1998-2019 Annual Reports to Congress. Unreimbursed employee expenses are discussed in detail in Most Litigated Issue: *Trade or Business Expenses Under IRC § 162 and Related Sections*, *supra*. Cases involving charitable deductions are discussed in detail in Most Litigated Issue: *Charitable Contribution Deductions Under IRC § 170*, *infra*.

2 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are also codified in the Internal Revenue Code (IRC). *See* IRC § 7803(a)(3).

3 Pub. L. No. 115-97, 131 Stat. 2054 (2017). TAS has a website, available in both English and Spanish, to educate individual taxpayers about items that were changed and not changed as a result of the Tax Cuts and Jobs Act (TCJA). For a detailed list of these changes, see TAS, *Tax Changes by Topic*, https://taxchanges.us/ (last visited Aug. 19, 2019).

4 IRC § 63. Married taxpayers must generally both elect the standard deduction or to itemize deductions, regardless of whether they file joint or separate returns. IRC § 63(c)(6)(A).

5 Itemized deductions are specified "personal" and "other" expenses allowed as deductions from AGI in calculating taxable income. See IRC § 62 for the calculation of AGI. Eligible taxpayers may claim itemized deductions by filing a Schedule A (Form 1040), Itemized Deductions, with their tax returns.

6 IRC § 163.

local income, sales,[7] and property taxes;[8] charitable contributions;[9] casualty and theft losses;[10] and medical and dental expenses exceeding a certain threshold of the taxpayer's AGI.[11]

Prior to the Tax Cuts and Jobs Act (TCJA) (tax years before 2018), itemized deductions also included miscellaneous deductions, such as tax advice and preparation fees, appraisal fees for purposes of charitable contributions or casualty losses, work-related expenses, and moving expenses.[12] Pre-TCJA, taxpayers with an AGI over a certain threshold amount are limited as to the total itemized deductions they can claim.[13] For taxpayers with an AGI over the threshold, allowable itemized deductions are reduced by three percent of the AGI above the applicable threshold to a maximum reduction of 80 percent of the total allowable deductions for the year.[14]

Changes Made Under the Tax Cuts and Jobs Act and Subsequent Regulation[15]

The TCJA eliminated or restricted many itemized deductions in 2018 and increased the standard deduction.[16] For tax year (TY) 2017, there were 143.1 million Forms 1040 filed through the last full processing cycle in fiscal year (FY) 2018, and 43.3 million taxpayers claimed itemized deductions (about 30.2 percent).[17] For TY 2018, there were 144.0 million Forms 1040 filed through the last full processing cycle of FY 2019, and 15.2 million taxpayers claimed itemized deductions (about 10.6 percent).[18] This represents a nearly 65 percent decrease, or about 28 million fewer taxpayers claiming itemized deductions in TY 2018.[19]

7 IRC § 164.

8 *Id*.

9 IRC § 170. Charitable contributions are discussed in a separate Most Litigated Issue, *Charitable Contribution Deductions Under IRC § 170*, *infra*.

10 IRC § 165(e) and (h).

11 IRC § 213. Other deductible expenses include certain payments related to the production or collection of income, such as property management expenses (under IRC § 212), investment interest expenses (under § 163(d)), and gambling losses (under IRC § 165(d)).

12 Work-related expenses include subscriptions to professional journals, home office expenses, union or professional dues, and unreimbursed work-related travel expenses or employee expenses reimbursed under a nonaccountable plan. *See* IRC § 67(b).

13 IRC § 68(a).

14 IRC § 68(a). These limitations apply to charitable donations, the home mortgage interest deduction, state and local tax deductions, and miscellaneous itemized deductions, but do not apply to medical expenses, investment interest expenses, gambling losses, and certain theft and casualty losses. IRC § 68(c).

15 Pub. L. No. 115-97, 131 Stat. 2054 (2017).

16 The Joint Committee on Taxation staff estimated the number of taxpayers who itemize would tumble from about 46.5 million in 2017 to about 18 million in 2018. Joint Comm. on Taxation, *Tables Related to the Federal Tax System as in Effect 2017 Through 2026* (JCX-32-18) (Apr. 23, 2018).

17 Individual Returns Transaction File on the IRS Compliance Data Warehouse (CDW) (through cycle 39 of 2018).

18 Individual Returns Transaction File on the IRS CDW (through cycle 39 of 2019).

19 Individual Returns Transaction File on the IRS CDW (comparing tax returns filed between January 1 and October 1 in both TYs 2017 and 2018).

The TCJA made the following changes to itemized deductions:[20]

1. *Standard deduction*. For TYs 2018-2025, the TCJA roughly doubles the standard deduction amounts from $6,350 to $12,000 for single individuals, $18,000 for heads of household up from $9,350, and $24,000 for joint filers up from $12,700.[21]
2. *Medical expense deduction*. Under prior law, most taxpayers whose unreimbursed medical expenses exceeded ten percent of their AGI could deduct that excess.[22] Under the TCJA, all taxpayers may deduct unreimbursed medical expenses that exceed 7.5 percent of his or her AGI in TYs 2017 and 2018.[23] This change was made retroactive to January 1, 2017.[24] Beginning in TY 2019, all taxpayers will only be able to deduct medical expenses if they exceed ten percent of their AGI.[25]
3. *State and local taxes.* The TCJA limits the aggregate amount of the itemized deduction taxpayers can claim for state and local income, sales, real estate, or personal property taxes to $10,000 per year ($5,000 in the case of a married individual filing a separate return) for TYs 2018-2025.[26] Prior to the TCJA changes, there was no limitation on the amount of state and local taxes a taxpayer could take as an itemized deduction. This aspect of the TCJA has faced significant opposition and motivated numerous states to develop workarounds to circumvent the limitation, including the creation of charities that residents can donate to in exchange for state and local tax credits.[27] The Department of Treasury and the IRS have promulgated regulations that address these workarounds, requiring taxpayers, under certain circumstances, to reduce their claimed charitable contribution deductions by the amount of any state or local tax credits they receive in return for said contributions.[28] We anticipate litigation in this area in coming years.[29]
4. *Mortgage and home equity interest deduction.* For mortgages entered into after December 15, 2017, the TCJA generally allows a taxpayer to deduct interest only up to $750,000 on mortgage debt used to buy, build, or improve a principal home ($375,000 in the case of married taxpayers filing separate returns) for TYs 2018-2025.[30] However, the limit remains at $1 million ($500,000 in

20 Pub. L. No. 115-97, 131 Stat. 2054 (2017).

21 Pub. L. No. 115-97, § 11021, 131 Stat. 2054, 2072 (2017) (adding IRC § 63(c)(7)). These amounts are adjusted for inflation. IRC § 63(c)(7)(B). The TCJA employed a new Consumer Price Index. Specifically, the new index differs from the previous Consumer Price Index by attempting to account for the ability of individuals to alter their consumption patterns in response to relative price changes. *See* Pub. L. No. 115-97, § 11002, 131 Stat. 2054, 2059 (2017).

22 IRC § 213(a). For tax years 2013-2016, a taxpayer could deduct the excess over 7.5 percent of AGI if the taxpayer or his or her spouse had attained age 65 before the close of the taxable year. IRC § 213(f)(1).

23 Pub. L. No. 115-97, § 11027, 131 Stat. 2054, 2077 (2017); IRC § 213(a), (f).

24 *Id*.

25 *Id*.

26 Pub. L. No. 115-97, § 11042, 131 Stat. 2054, 2085 (2017); IRC § 164(b)(6).

27 For a discussion of the various state workarounds, see Cynthia M. Pedersen, *States' Workarounds to the State and Local Tax Deduction Limitation*, The Tax Adviser (Aug. 1, 2018), https://www.thetaxadviser.com/issues/2018/aug/workarounds-state-local-tax-deduction-limitation.htm.

28 Treas. Reg. § 1.170A-1(h)(3) (as amended in August 2019) (addressing the federal income tax treatment of contributions by reducing federal deductions by the amount of any state or local tax credit that a taxpayer receives or expects to receive in consideration for the taxpayer's payment or transfer).

29 The states of New York, Connecticut, Maryland, and New Jersey (and the Village of Scarsdale, New York) have challenged the validity of Treas. Reg. § 1.170A-1(h)(3), arguing, *inter alia*, that it interferes with the states' ability to invest in their citizens and infrastructure, and with the states' sovereign authority to determine their own taxation and fiscal policies. *See, e.g.*, *New Jersey v. Mnuchin*, No. 19-06642 (S.D.N.Y. July 17, 2019). U.S. District Judge J. Paul Oetken dismissed this case, but it may be appealed. *See* Toby Eckert, *Judge Throws Out States' Challenge to Tax Deduction Cap*, Politico (Sept. 30, 2019), https://www.politico.com/news/2019/09/30/judge-dismisses-state-local-tax-deduction-cap-lawsuit-012686.

30 Pub. L. No. 115-97, § 11043, 131 Stat. 2054, 2086 (2017); IRC § 163(h)(3)(F).

the case of married taxpayers filing separate tax returns) for mortgage debt incurred on or before December 15, 2017.[31]

The TCJA also eliminates the deduction for interest on home equity debt for TYs 2018-2025.[32] However, home equity debt interest might still be deductible if the funds are used for a purpose where interest otherwise may be deductible, such as for home improvement, investment, or business purposes.[33]

5. *Casualty and theft loss deductions.* The TCJA provides that, for TYs 2018-2025, taxpayers may not deduct any personal casualty or theft losses not compensated by insurance or otherwise, unless the casualty loss is attributable to a federally declared disaster.[34] The loss must still exceed $100 per casualty and the total net loss must exceed ten percent of the taxpayer's AGI.[35]
6. *Miscellaneous itemized deductions.* For TYs 2018-2025, the deduction for miscellaneous expenses subject to the two percent of the AGI floor, such as certain professional fees, investment expenses, and unreimbursed employee business expenses, has been suspended under the TCJA.[36]
7. *Charitable contribution deductions.*[37] For TYs 2018-2025, the limit on the deduction for cash donations to public charities is increased from 50 to 60 percent of AGI.[38] However, charitable deductions for payments made in exchange for college athletic event seating rights are eliminated.[39]
8. *Tax return preparation fees.* Prior to the TCJA tax return preparation fees were deductible subject to a two percent of AGI limitation. TCJA suspended the deduction of these fees for TYs 2018-2025.[40]

ANALYSIS OF LITIGATED CASES

For the third time since the National Taxpayer Advocate's Annual Report to Congress in 2000, itemized deductions reported on Schedule A of IRS Form 1040 were among the ten Most Litigated Issues. This year, we analyzed 32 cases between June 1, 2018, to May 31, 2019, in which itemized deductions were in dispute. All but two of these cases were litigated in the U.S. Tax Court. A detailed list appears in Table 8 in Appendix 5. Of the 16 cases in which taxpayers appeared *pro se* (without counsel), the IRS prevailed in 15. Notably, the only case where the taxpayer prevailed was a case where the taxpayer appeared *pro se*, as none of the represented taxpayers prevailed. The highest portion of this year's 32 cases involved taxpayers claiming deductions for casualty and theft losses,[41] mortgage and equity interests,[42] and

31 IRC § 163(h)(3)(F)(i)(III).
32 *Id*.
33 IRC § 163(h)(3)(A)(i) and (B). *See also* IR-2018-32, Interest on Home Equity Loans Often Still Deductible Under New Law (Feb. 21, 2018), https://www.irs.gov/newsroom/interest-on-home-equity-loans-often-still-deductible-under-new-law.
34 Pub. L. No. 115-97, § 11044, 131 Stat. 2054, 2087 (2017); IRC § 165(h)(5).
35 IRC § 165(c)(3), (h)(1) and (2).
36 IRC § 67(g); Pub. L. No. 115-97, § 11045, 131 Stat. 2054, 2088 (2017).
37 *See also* Most Litigated Issue: *Charitable Contribution Deductions Under IRC § 170*, *infra*.
38 IRC § 170(b)(1)(G); Pub. L. No. 115-97, § 11023, 131 Stat. 2054, 2074 (2017).
39 IRC § 170(l); Pub. L. No. 115-97, § 13704, 131 Stat. 2054, 2169 (2017).
40 *See* IRC §§ 67(a), 212(3); Pub. L. No. 115-97, § 11045, 131 Stat. 2054, 2088 (2017).
41 IRC § 165.
42 IRC § 163.

deductions for state and local taxes paid.[43] Figure 2.8.1 categorizes the main issues raised by taxpayers in the 32 cases we identified.

FIGURE 2.8.1, Itemized Deduction Issues[44]

Itemized Deduction	Number of Cases	Percentage of Cases
Casualty/Theft Loss	12	37.5
Mortgage Interest	10	31
State and Local Taxes Paid Deductions	7	22
Medical and Dental Expenses	3	9
Tax Preparation Fees	2	6.3
Gambling	4	12.5
Other	1	3

Casualty and Theft Loss Deduction

In *Mancini v. Commissioner*, the taxpayer claimed a casualty loss as a result of gambling and investment losses allegedly caused by his altered mental state resulting from a medication he was prescribed.[45] In 2004, Mr. Mancini was diagnosed with Parkinson's disease and was prescribed Pramipexole to treat his symptoms. After allegedly experiencing an altered mental state induced by the medication, the taxpayer began gambling excessively and selling investment properties at irrationally low prices in part to pay off his gambling debts. Mr. Mancini did not keep logs of his gambling activities; however, he did report gambling losses to the extent of gambling profits in TYs 2008-2010 and presented documents from several casinos. The taxpayer argued that his gambling losses should not be subject to the normal limits on such losses, because they were in fact "other casualty" losses resulting from his "sudden, unexpected and unusual" reaction to a prescription drug."[46] The taxpayer argued that his obsessive gambling caused by Pramipexole fell within the definition of an "other casualty" because it emerged suddenly and was unexpected by both the taxpayer and his doctor.[47] However, the Tax Court disagreed, stating that "a casualty loss is deductible only if the taxpayers property suffered physical damage." [48] The Tax Court also found that Mr. Mancini failed to substantiate his claims.[49] Thus, the taxpayer's casualty loss deductions were disallowed.

Mancini reaffirms longstanding precedent related to the requirement for physical damage in order to claim a casualty loss deduction and for the "sudden" nature of "other casualty losses." [50] The case also made clear that to qualify as an "other casualty loss," the loss must be "sudden, unexpected, or unusual"

43 IRC § 164.

44 Several cases we identified had more than one of the issues listed in Figure 2.8.1.

45 *Mancini v. Comm'r*, T.C. Memo. 2019-16, *appeal docketed*, No. 19-72438 (9th Cir. Sept. 25, 2019).

46 *Id.*

47 The Tax Court noted, "other casualty" is a loss arising from something "sudden, unexpected, or unusual" as opposed to something resulting from a "progressive deterioration [due to] a steadily operating cause," even if the damage "was not discovered until it was complete." *Id. See also* IRC §165(a)-(c)(3); Treas. Reg. §§ 1.165-1(d)(1), 1.165-7(a)(1).

48 *Mancini*, T.C. Memo. 2019-16, at 8, *appeal docketed*, No. 19-72438 (9th Cir. Sept. 25, 2019) (citing *Kamanski v. Comm'r*, 477 F. 2d 452 (9th Cir. 1973), *aff'g* T.C. Memo. 1970-352).

49 *Mancini*, T.C. Memo. 2019-16, *appeal docketed*, No. 19-72438 (9th Cir. Sept. 25, 2019).

50 *Mancini*, T.C. Memo. 2019-16, at 7-8 (citations omitted), *appeal docketed*, No. 19-72438 (9th Cir. Sept. 25, 2019).

rather than the result of "progressive deterioration."[51] In preparing for a casualty loss deduction dispute, a taxpayer should pay special attention to documenting the value and the nature of the loss, as well as the timing of the loss's cause.

Mortgage Interest

In *Milkovich v. United States*, the taxpayers claimed they were entitled to a tax refund of $18,817 for 2011, and the government motioned to have the lawsuit dismissed for failure to state a claim, which the district court granted.[52] The taxpayers, Mr. and Mrs. Milkovich, purchased a personal residence in February 2005 with a monthly mortgage payment of approximately $3,700. However, they stopped making payments in February 2009 and filed Chapter 7 bankruptcy. The property was sold in a short sale in July 2011. At the time of the sale, unpaid interest in the amount of $114,688 had accrued on the mortgage. The mortgage holder, Citi Mortgage, received just over $522,000 from the sale and allocated this amount to satisfy the $114,688 in accrued unpaid interest first. The taxpayers deducted $144,688 in mortgage interest from their 2011 taxes, which they claimed should have resulted in a $18,817 tax refund. The court found the parties' dispute centered on the statutory interpretation of the meaning of the term "indebtedness" under Internal Revenue Code (IRC) § 163. Specifically, the court looked at whether the Milkoviches were entitled to deduct mortgage interest paid on the property after it was discharged through bankruptcy and where the outstanding mortgage amount exceeded the fair market value of the property. The court found that while interest deductions are generally allowable, there is an exception when the nonrecourse liability (here, the mortgage) exceeds a reasonable estimate of the fair market value of the indebted property. In such a case, an interest deduction is not allowed. The court found that because the fair market value of the short sale was far below the outstanding mortgage debt, it was not reasonable to expect the taxpayers to satisfy the mortgage debt themselves. For this reason, the court found that the taxpayers' transaction lacked "economic substance."[53] Given the recent legislative changes, we expect to see more litigation in this area.

Substantiation of Itemized Deductions

Taxpayers are required to substantiate expenses underlying each claimed deduction by maintaining records sufficient to establish the amount of the deduction and to enable the Commissioner to determine the correct tax liability.[54] Taxpayers were unable to or had difficulty substantiating their itemized deduction claims in 20 of the 32 cases we identified, or nearly 63 percent of the cases.

One such case was *Sutherland v. Commissioner*,[55] in which the Tax Court found that the taxpayers had not met their burden in substantiating claimed transportation costs associated with seeking medical attention. Mr. and Mrs. Sutherland provided no mileage logs to substantiate the claimed mileage. Instead, they provided only a total mileage amount that corresponded to each medical expense without substantiating where the trip originated, what vehicle was used, or other evidence to substantiate the reported expenses. Thus, the Tax Court disallowed the deduction.

51 *Mancini*, T.C. Memo. 2019-16, at 7-8 (citations omitted), *appeal docketed*, No. 19-72438 (9th Cir. Sept. 25, 2019).

52 *Milkovich v. United States*, 2019 WL 2161665 (W.D. Wash. May 17, 2019).

53 *Id.*, at *3.

54 IRC § 6001; *Welch v. Helvering*, 290 U.S. 111, 115 (1933); *Cohan v. Comm'r*, 39 F.2d 540, 543-44 (2d Cir. 1930); Temp. Treas. Reg. § 1.274-5T(b). For detailed recordkeeping guidance for taxpayers, see also IRS, Burden of Proof, https://www.irs.gov/businesses/small-businesses-self-employed/burden-of-proof (last visited July 29, 2019) (describing the requirement to substantiate certain elements of expenses in order to shift the burden of proof according to IRC § 7491) and IRS Publication 583, Starting a Business and Keeping Records (Jan. 2015).

55 *Sutherland v. Comm'r*, T.C. Memo. 2018-186.

Substantiation is also important for the gambling loss deduction. A taxpayer who is not in the trade or business of gambling can deduct gambling losses as an itemized deduction but only to the extent of gambling winnings.[56]

In *Castaneda v. Commissioner*, though the taxpayers failed to appear for trial, the Tax Court nonetheless determined that Mr. and Mrs. Castaneda were not entitled to deduct $295,871 of gambling losses.[57] The court found that the taxpayers failed to keep records of their gambling winnings or use players' cards, which would have provided reliable casino records. As a result, the court had no basis to allow those deductions.

In *Kurdziel v. Commissioner*, the Tax Court held that a former fighter pilot, who is the only person in the United States who owns and is licensed to fly a Fairey Firefly, could not deduct losses he incurred in restoring the World War II fighter and anti-submarine aircraft.[58] Among other expenses, the Tax Court disallowed the taxpayer's claimed home mortgage interest, real estate taxes, and tax return preparation fees. While the Commissioner merely argued that the taxpayer had failed to substantiate these deductions without providing more, Mr. Kurdziel also did not add anything more to the record. The Court stated, "[w]hen there's nothing in the record, defeat comes for the party with the burden of proof," finding for the Commissioner on those disputed amounts.[59]

In *Simpson v. Commissioner*,[60] the only case during this reporting period where a taxpayer prevailed on the merits of an issue covered by this Most Litigated Issue, the Tax Court held that Mr. and Mrs. Simpson were entitled to an additional deduction for state and local income taxes for TY 2013 after introducing into evidence an additional payment of $895.96 that was applied to their 2011 California income tax. Under IRC § 164(a)(3), state and local income taxes are allowed as a deduction for the taxable year within which they are paid or accrued. Mr. and Mrs. Simpson had made a direct contribution to the California State Disability Insurance, which the Tax Court has held constitutes a valid income tax payment deductible under IRC § 164(a)(3).

CONCLUSION

In TY 2015, the IRS Statistics of Income data showed that 29.6 percent of individual return filers chose to itemize their deductions.[61] As we anticipated and noted in the 2018 Annual Report to Congress, the number of itemizers significantly decreased, by about 65 percent beginning in TY 2018 because of the tax changes brought about by the TCJA.[62]

A reduction in the number of itemizers may eventually lead to a decrease in litigation in the coming years, especially as it relates to non-disaster related personal casualty or theft losses and miscellaneous deductions. However, litigation related to remaining itemized deductions, such as medical and dental

56 IRC § 165(d).

57 *Castaneda v. Comm'r*, T.C. Memo. 2018-173.

58 *Kurdziel v. Comm'r*, T.C. Memo. 2019-20.

59 *Id.*, at *13 (citing IRC § 7491(a)).

60 *Simpson v. Comm'r*, T.C. Summ. Op. 2019-9.

61 IRS, SOI Tax Stats—Individual Income Tax Returns Publication 1304, "Table 1.2: All Returns: Adjusted Gross Income, Exemptions, Deductions, and Tax Items" (June 21, 2018), https://www.irs.gov/statistics/soi-tax-stats-individual-income-tax-returns-publication-1304-complete-report.

62 For TY 2017, there were 43.2 million taxpayers who claimed itemized deductions (about 30.2 percent). For TY 2018, there were 15.2 million taxpayers who claimed itemized deductions (about 10.6 percent). Individual Returns Transaction File on the IRS CDW (comparing tax returns filed between January 1 and October 1 in both TYs 2017 and 2018).

expenses or state and local taxes, may increase. Taxpayers should also be careful to maintain detailed records related to any deductions they claim. This will assist taxpayers in verifying deductions with the IRS before disputes result in litigation. The IRS must continue to increase awareness and to clarify these deductibility changes, including recordkeeping requirements, which will protect taxpayers' *rights to be informed* and *to pay no more than the correct amount of tax*. By doing so, the IRS will encourage taxpayers to comply with their tax obligations and minimize the risk of litigation.

RECOMMENDATION TO MITIGATE DISPUTES

The National Taxpayer Advocate recommends that the IRS:

- Develop a Tax Forum presentation and communication strategy to better educate return preparers and practitioners about itemized deductions, including recordkeeping requirements.

MLI #9 Charitable Contribution Deductions Under IRC § 170

SUMMARY

Subject to certain limitations, taxpayers can take deductions from their adjusted gross incomes (AGIs) for contributions of cash or other property to or for the use of charitable organizations.[1] To take a charitable deduction, taxpayers must contribute to a qualifying organization.[2] Taxpayers must also comply with certain substantiation requirements when making a contribution of $250 or more.[3] Litigation generally occurred in this reporting cycle in the following three areas:

- Substantiation of the charitable contribution;
- Valuation of the charitable contribution; and
- Requirements for a qualified conservation contribution.

We identified and reviewed 17 cases decided between June 1, 2018, and May 31, 2019, with charitable deductions as a contested issue. The IRS prevailed in 13 cases, and four cases resulted in split decisions. Taxpayers represented themselves (appearing *pro se*) in seven of the 17 cases (41 percent). The IRS prevailed in all seven *pro se* cases. The deduction of conservation easement contributions is an emerging issue during this reporting period as the IRS is focused on curtailing abuse in this area by designating syndicated conservation easements as a listed transaction.[4] We expect to see continued litigation on this issue in the future. Taxpayers must pay close attention to the elements of donating a qualified conservation easement in the absence of safe harbors or other guidance from the IRS on how they may construct a conservation easement deed that satisfies the strict statutory requirements.

TAXPAYER RIGHTS IMPACTED[5]

- *The Right to Pay No More Than the Correct Amount of Tax*
- *The Right to Appeal an IRS Decision in an Independent Forum*
- *The Right to a Fair and Just Tax System*

PRESENT LAW

Charitable contributions made within the taxable year are generally deductible by taxpayers, but in the case of individual taxpayers, a taxpayer must itemize deductions from income on his or her income tax return in order to deduct the contribution.[6] Transfers to qualifying organizations are deductible only if

1 Internal Revenue Code (IRC) § 170.

2 IRC § 170(c).

3 IRC § 170(f)(8).

4 See IRS Notice 2017-10, 2017-4 I.R.B. 544, Syndicated Conservation Easement Transactions; IRS, IR-2019-47, Abusive Tax Shelters, Trusts, Conservation Easements Make IRS' 2019 "Dirty Dozen" List of Tax Scams to Avoid (Mar. 19, 2019).

5 See Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are also codified in the Internal Revenue Code. See IRC § 7803(a)(3).

6 IRC §§ 63(d) & (e), 161, and 170(a).

they are contributions or gifts,[7] not payments or other consideration in exchange for goods or services.[8] A contribution or gift will be allowed as a deduction under Internal Revenue Code (IRC) § 170 only if it is made "to" or "for the use of" a qualifying organization.[9] Taxpayers cannot deduct services that they offer to charitable organizations; however, incidental expenditures incurred while serving a charitable organization and not reimbursed may constitute a deductible contribution.[10]

Under prior law, individual taxpayers' charitable contribution deductions were generally limited to 50 percent of the taxpayer's contribution base (AGI computed without regard to any net operating loss carryback to the taxable year under IRC § 172).[11] The Tax Cuts and Jobs Act (TCJA) increased the limitation to 60 percent for cash donations in tax years (TYs) 2018 through 2025.[12] Subject to certain limitations, individual taxpayers can carry forward unused charitable contributions in excess of these limitations for up to five years.[13]

For corporate taxpayers, charitable deductions are generally limited to ten percent of the taxpayer's taxable income and are also available for carryforward for up to five years, subject to limitations.[14]

Substantiation

For cash contributions, taxpayers must maintain receipts from the charitable organization, copies of cancelled checks, or other reliable records showing the name of the organization, the date, and the amount contributed.[15] Deductions for single charitable contributions of $250 or more are disallowed in the absence of a contemporaneous written acknowledgement from the charitable organization.[16] The taxpayer is generally required to obtain the contemporaneous written acknowledgment no later than the date he or she files the return for the year in which the contribution is made.[17] The contemporaneous written acknowledgement must include:

- The name of the organization;
- The amount of the cash contribution;
- A description (but not the value) of the noncash contribution;
- A statement that no goods or services were provided by the organization in return for the contribution, if that was the case;
- A description and good faith estimate of the value of goods or services, if any, that an organization provided in return for the contribution; and

7 The Supreme Court of the United States has defined "gift" as a transfer proceeding from a "detached and disinterested generosity." *Comm'r v. Duberstein*, 363 U.S. 278, 285 (1960).

8 Treas. Reg. § 1.170A-1(h).

9 IRC § 170(c).

10 Treas. Reg. § 1.170A-1(g). Meal expenditures in conjunction with offering services to qualifying organizations are not deductible unless the expenditures are away from the taxpayer's home. *Id.* Likewise, travel expenses associated with contributions are not deductible if there is a significant element of personal pleasure involved with the travel. IRC § 170(j).

11 IRC § 170(b)(1)(A).

12 IRC § 170(b)(1)(G); Tax Cuts and Jobs Act, Pub. L. 115-97, § 11023, 131 Stat. 2054 (2017) ¶ 230.

13 IRC § 170(b)(1)(G)(i) & (d)(1).

14 IRC § 170(b)(2) & (d)(2).

15 Treas. Reg. § 1.170A-13(a)(1).

16 IRC § 170(f)(8); Treas. Reg. § 1.170A-13(f).

17 Treas. Reg. § 1.170A-13(f)(3).

- A statement that goods or services, if any, that an organization provided in return for the contribution consisted entirely of intangible religious benefits, if that was the case.[18]

For each contribution of property other than money, taxpayers generally must maintain a receipt showing the name of the recipient, the date and location of the contribution, and a description of the property.[19] Generally, when taxpayers contribute property other than money, the amount of the allowable deduction is the fair market value of the property at the time of the contribution.[20] For contributions of property that result in a taxpayer claiming a deduction in excess of $5,000, the taxpayer must obtain a qualified appraisal prepared by a qualified appraiser.[21]

Valuation

The amount of a charitable contribution that is noncash property is the fair market value of the property at the time of its contribution.[22] The fair market value is "the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts."[23] This is generally true even when the donation is for a partial interest in property, such as a conservation easement.[24] The value of a conservation easement is "the fair market value of the perpetual conservation restriction at the time of the contribution."[25]

Qualified Conservation Contributions

For a gift to constitute a qualified contribution under IRC § 170, the donor must possess a transferrable interest in the property and intend to irrevocably relinquish all rights, title, and interest to the property without any expectation of some benefit in return.[26] Taxpayers generally are not permitted to deduct gifts of property consisting of less than the taxpayer's entire interest in that property.[27] Nevertheless, taxpayers may deduct the value of a contribution of a partial interest in property that constitutes a "qualified conservation contribution,"[28] also known as a conservation easement. A contribution will constitute a qualified conservation contribution only if it is of a "qualified real property interest," made to a "qualified organization," "exclusively for conservation purposes."[29] All three conditions must be satisfied for the donation to be deemed a "qualified conservation contribution."[30]

18 IRC § 170(f)(8)(B); Treas. Reg. § 1.170A-13(f)(2); IRS Pub. 1771, Charitable Contributions Substantiation and Disclosure Requirements (Rev. Mar. 2016).

19 Treas. Reg. §§ 1.170A-13(b)(1)(i) to (iii).

20 Treas. Reg. § 1.170A-1(c)(1). This general rule is subject to certain exceptions that in some cases limit the deduction to the taxpayer's cost basis in the property, or otherwise reduced for certain contributions of ordinary income and capital gain property. *See* IRC § 170(e).

21 IRC § 170(f)(11)(C); Treas. Reg. § 1.170A-13(c). "Qualified appraisal" and "qualified appraiser" are defined in IRC § 170(f)(11)(E)(i) and (ii), respectively. Further, taxpayers must attach that qualified appraisal to their Federal income tax returns when claiming a deduction of more than $500,000. IRC § 170(f)(11)(D).

22 Treas. Reg. § 1.170A-1(c)(1).

23 Treas. Reg. § 1.170A-1(c)(2). The calculation of the fair market value is generally determined by a number of factors outlined in the regulations. *See* Treas. Reg. § 1.170A-14(h).

24 *Browning v. Comm'r*, 109 T.C. 303, 311-314 (1997) (citing Treas. Reg. § 1.170A-7(c)).

25 Treas. Reg. §§ 1.170A-7(c) & 1.170A-14(h)(3).

26 IRC § 170(f)(3); *Goldstein v. Comm'r*, 89 T.C 535, 541-542 (1987).

27 IRC § 170(f)(3).

28 IRC § 170 (f)(3)(B)(i), (h).

29 IRC § 170(h)(1).

30 *Id.*

Recent Development: Payments Resulting in State or Local Tax Benefits

The TCJA capped the state and local tax deduction that taxpayers could take at $10,000, for TYs 2018 through 2025.[31] This aspect of the TCJA resulted in numerous states developing workarounds to circumvent the limitation, including the creation of charities which residents can donate to in exchange for state and local tax credits.[32]

The Department of Treasury and the IRS promulgated regulations that address these workarounds, and require taxpayers, under certain circumstances, to reduce their charitable contribution deductions by the amount of any state or local tax credits they receive or expect to receive in return.[33] The reasoning in the new regulation is that if a taxpayer expects to receive a state or local tax credit in exchange for a payment or property transfer considered in IRC § 170(c), that credit is generally a *quid pro quo*, and will reduce the taxpayer's deduction by the amount of the credit.[34] These regulations apply to contributions made after August 27, 2018.[35]

There are a few exceptions to the general rule established by the new regulation. If the state or local tax credits received or expected by the taxpayer amount to 15 percent or less of the taxpayer's payment or the fair market value of their property contribution, the taxpayer may claim the deduction without reducing the federal charitable contribution deduction under IRC § 170.[36]

If the taxpayer receives or expects to receive state or local tax deductions, the taxpayer will not be required to reduce his or her federal charitable contribution deduction, so long as the state and local deductions do not exceed the value of the taxpayer's charitable contribution.[37] Because the regulations became effective after our reporting period ended, we did not review any cases involving the new regulations, though we anticipate that we may see cases involving them in the coming years.

ANALYSIS OF LITIGATED CASES

TAS reviewed 17 decisions entered between June 1, 2018, and May 31, 2019, involving charitable contribution deductions claimed by taxpayers. Table 9 in Appendix 5 contains a detailed list of those cases. Of the 17 cases, the most common issues were: substantiation (or lack thereof) of the claimed contribution (ten cases), valuation of the property contributed (six cases), and contribution of an easement (seven cases).[38]

31 *See* IRC § 164(b)(6)(B); Tax Cuts and Jobs Act, Pub. L. 115-97, §11042, 131 Stat. 2054 (2017) ¶ 215.

32 For a discussion of the various state workarounds, see Cynthia M. Pedersen, *States' Workarounds to the State and Local Tax Deduction Limitation*, The Tax Adviser (Aug. 1, 2018), https://www.thetaxadviser.com/issues/2018/aug/workarounds-state-local-tax-deduction-limitation.html.

33 Treas. Reg. § 1.170A-1(h)(3) *as amended by* 84 Fed. Reg. 27,513 (June 13, 2019) (effective Aug. 12, 2019). The IRS also issued Notice 2019-12 to provide a safe harbor for itemizing taxpayers to be able to add some payments that are or will be disallowed under the new regulation to their state and local tax deductions (up to the $10,000 limit for single and married filing jointly taxpayers; $5,000 if married filing separately). IRS, Notice 2019-12: Guidance Providing a Safe Harbor Under Section 164 for Certain Individuals Who Make a Payment to or for the Use of an Entity Described in Section 170(c) in Return for a State or Local Tax Credit (June 11, 2019).

34 84 Fed. Reg. 27,513 (June 13, 2019), https://www.federalregister.gov/documents/2019/06/13/2019-12418/contributions-in-exchange-for-state-or-local-tax-credits (providing an explanation of the new rules).

35 Treas. Reg. § 1.170A-1(h)(3)(viii). Regulations were effective on August 12, 2019.

36 Treas. Reg. § 1.170A-1(h)(3)(vi).

37 Treas. Reg. § 1.170A-1(h)(3)(ii).

38 Cases addressing more than one described issue are counted for each issue. For example, cases addressing the valuation of easements are counted once as a valuation issue case and again as a conservation easement issue case. As a result, the breakdown of case issues above will not add up to the total number of cases reviewed by TAS.

Substantiation

Ten cases involved the substantiation of deductions for charitable contributions. When determining whether a claimed charitable contribution deduction is adequately substantiated, courts tend to follow a strict interpretation of IRC § 170. As noted earlier, deductions for single charitable contributions of $250 or more are disallowed in the absence of a contemporaneous written acknowledgement from the charitable organization.[39]

Blau, LLC v. Commissioner

Blau, LLC v. Commissioner involved the issue of whether the taxpayer, RERI Holdings I, LLC (RERI), substantiated its noncash charitable contribution.[40] RERI claimed a charitable contribution deduction of approximately $33 million for its donation of a noncash asset, a future interest in a piece of commercial property, to the University of Michigan.[41] This valuation was based on an appraisal, which RERI attached to its Form 8283, Noncash Charitable Contributions.[42] However, on the Form 8283, RERI did not fill in the space for "Donor's cost or adjusted basis," or explain why it omitted the basis.[43]

Generally, IRC § 170 allows taxpayers to claim deductions for donations to charitable organizations, but "only if verified under regulations prescribed by the [IRS]."[44] To fulfill this requirement, as well as the direction from Congress[45] to make stricter the verification requirements for noncash donations, the Department of Treasury and the IRS promulgated Treas. Reg. § 1.170A-13(c). This regulation requires taxpayers that donate certain noncash property to:

> (A) "[o]btain a qualified appraisal"; (B) "[a]ttach a fully completed appraisal summary ... to the tax return"; and (C) "[m]aintain records" containing specified information. Paragraph (c)(3) defines a "qualified appraisal" and paragraph (c)(4) details the necessary elements of an "appraisal summary," one of which is "[t]he cost or other basis of the property." The taxpayer must provide the appraisal summary on IRS Form 8283.[46]

If these requirements are not met, the deduction is generally not allowed. However, there is an exception for reasonable cause if a taxpayer cannot provide information in the appraisal summary on the manner of acquisition and the basis of the contributed property.[47]

On review, the U.S. Court of Appeals for the D.C. Circuit had to decide whether RERI substantially complied with the substantiation regulations, and thus whether it was entitled to its claimed charitable contribution deduction.

At the trial level, the Tax Court held that RERI was not entitled to a charitable contribution deduction because RERI had failed to "substantially comply" with the requirements of the substantiation regulations by failing to disclose its basis in the donated property.[48]

39 IRC § 170(f)(8); Treas. Reg. § 1.170A-13(f).
40 *Blau v. Comm'r*, 924 F.3d 1261 (D.C. Cir. 2019), *aff'g* 149 T.C. 1 (2017).
41 *Id.* at 1265.
42 *Id.* at 1267.
43 *Id.*
44 IRC § 170(a)(1).
45 Deficit Reduction Act of 1984, Pub. L. No. 983-69, § 155(a)(1), 98 Stat. 494,691.
46 *Blau*, 924 F.3d at 1268 (quoting Treas. Reg. § 1.170A-13(c)).
47 Treas. Reg. § 1.170A-13(c)(4)(iv)(C)(1).
48 *RERI Holdings I, LLC v. Comm'r*, 149 T.C. 1, 15 (2017).

The U.S. Court of Appeals for the D.C. Circuit reviewed this issue *de novo*, as it had not previously decided whether substantial compliance was enough to satisfy the substantiation regulation.[49] On appeal, the IRS argued that the test should be stricter than the test applied by the Tax Court, citing substantial compliance standards used by the Fourth, Fifth, and Seventh Circuits, and proposing that anything short of full compliance could be excused only if "(1) [the taxpayer] had a good excuse for failing to comply with the regulation and (2) the regulation's requirement is unimportant, unclear, or confusingly stated in the regulations or statute."[50]

The Court assumed, but did not decide, that substantial compliance with the regulations would suffice, but determined that RERI's failure to disclose its basis in the donated property meant that it did not substantially comply with Treas. Reg. § 1.170A-13.[51] RERI argued that the Tax Court's ruling conflicted with its prior holding in *Dunlap v. Commissioner*,[52] where the court had excused the petitioner's failure to provide their basis on Form 8283 because providing the basis was not necessary to substantially comply.[53] However, the Tax Court distinguished its non-precedential memorandum opinion in *Dunlap*, which did not consider whether the taxpayers fulfilled the substantiation requirements, and where there was no significant difference in the basis and the claimed deduction.[54] Regardless of whether substantial compliance with the regulations is sufficient, the Court of Appeals agreed with the Tax Court that RERI "fell short of the substantiation requirements by omitting its basis in the donated property"[55] and affirmed the Tax Court judgement. Thus, the taxpayer's charitable contribution deduction was disallowed.[56]

Value of the Property Contributed

Value of the property contribution (valuation) made up six of the 17 cases that TAS reviewed. Three of the six valuation cases arose from the donation of conservation easements.

Pine Mountain Preserve, LLLP v. Commissioner

In *Pine Mountain Preserve, LLLP v. Commissioner*,[57] the Tax Court entered a decision for the IRS on two of three conservation easements at issue. The Tax Court determined the fair market value of the third easement in a separate memorandum opinion filed concurrently, for which the court allowed a charitable contribution deduction.[58] The valuation of the third easement, a conservation easement from 2007, involved the IRS's and the taxpayer's experts computing the valuation using different methodology and reasoning. We will analyze this separate opinion in greater detail.

49 *Blau*, 924 F.3d at 1269.

50 *Id.* at 1269 (citing *Volvo Trucks of N. Am., Inc. v. United States*, 367 F.3d 204, 210 (4th Cir. 2004); *McAlpine v. Comm'r*, 968 F.2d 459, 462 (5th Cir. 1992); *Prussner v. United States*, 896 F.2d 218, 224 (7th Cir. 1990)).

51 *Blau*, 924 F.3d at 1269.

52 103 T.C.M. (CCH) 1689 (2012).

53 *Blau*, 924 F.3d at 1270.

54 *Id.* at 1270-1271 (citing *Dunaway v. Comm'r*, 124 T.C. 80, 87 (2005) for the proposition that the Tax Court is not bound by its non-precedential memorandum opinions).

55 *Id.*

56 *Id.* at 1280.

57 *Pine Mountain Pres., LLLP v. Comm'r*, 151 T.C. 247 (2018), *appeal docketed*, Nos. 19-11795 and 19-12173 (11th Cir. May 8, 2019, and June 5, 2019).

58 *Pine Mountain Pres., LLLP v. Comm'r*, T.C. Memo. 2018-214, *appeal docketed*, Nos. 19-11795 and 19-12173 (11th Cir. May 8, 2019, and June 5, 2019).

The value of a charitable contribution of noncash property is the fair market value of the property at the time of its contribution.[59] The fair market value is "the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts."[60] Treas. Reg. § 1.170A-14(h)(3) provides the rules for determining the fair market value of a charitable qualified conservation contribution.[61] In its separate memorandum opinion the court broke down those rules into five salient points:

1. The value of the easement is the fair market value at the time it is contributed.
2. To determine the fair market value, look to see if there is a substantial record of comparable sales of similar easements to the donated one. If so, base the valuation on those sales prices.
3. If no record of comparable easements exists, the general rule is that the fair market value of the conservation contribution equals the difference in the value of the encumbered property before granting the easement minus the fair market value of the property after granting the easement.
4. If the easement is only on a portion of the taxpayer's land, its value is calculated by ascertaining the difference between the fair market value of the taxpayer's contiguous property minus the fair market value of the same after the easement is granted.
5. Further, if the donation of the easement increased the value of other property owned by the donor or a related person, the deduction for the conservation easement is reduced by the amount of the increase in the value of the other property (even if the property is not contiguous).[62]

Both the taxpayer, and the IRS had their own experts testify as to the valuation of the conservation easement, and argued that the other expert's method of valuation did not comply with the Treasury Regulation § 1.170A-14(h)(3).[63] The court went through the regulation sentence by sentence and compared the regulation to each expert's method of calculation to evaluate how the easement should be valued.[64]

To determine the fair market value at the time the easement was contributed, the court first looked at the second sentence of the regulation to determine if there were comparable sales that could guide the valuation of the easement at issue in the case. The IRS expert valued the easement based on other sales of easements he thought were comparable to the 2007 easement. However, Pine Mountain Preserve argued that the easements the IRS expert used had little development potential, while the 2007 easement could be developed in the future. It is standard to price a property at its "highest and best" use, so the valuation depended on whether it was reasonably probable that the donated land would be developed. The court examined the relevant facts — "the access from the property to highways, the likelihood that one of the municipalities would approve a real-estate subdivision, and the changing state of the real-estate market" — and reasoned that the Pine Mountain property did have development potential.[65] Because there was development potential, the court determined that "the Pine Mountain property could have been sold to a third-party buyer and the buyer would have paid a relatively high price that corresponded

59 Treas. Reg. § 1.170A-1(c)(1).
60 Treas. Reg. § 1.170A-1(c)(2).
61 Treas. Reg. § 1.170A-14(h)(3).
62 *Pine Mountain Preserve, LLLP*, T.C. Memo. 2018-214 at *4–5 (citing Treas. Reg. § 1.170A-14(h)(3)(i)).
63 *Id.* at *6–16.
64 *Id.* at *16–28.
65 *Id*. at *6.

to the development potential of the property."[66] Therefore, "the second sentence of the regulation does not compel the use of the comparable sales method as employed by [the IRS expert]."[67]

The court next examined how the Pine Mountain Preserve's expert calculated the value of the easement based on the third sentence of the regulation, the general rule that the value equals the fair market value before less the fair market value after. This is the general rule, but the court noted that the easement was only for a portion of Pine Mountain Preserve's contiguous property, governed by the fourth sentence of the regulation. The court reasoned that the expert's opinion did not account for the beneficial effects of the easement on the unencumbered parts of the donor's property. Thus, it was not in compliance with the fourth sentence of the regulation, to consider the fair market value of the whole property both before and after the grant of an easement to a portion of the donor's property. Because the court found that the expert's method was not in compliance with the fourth sentence of the regulation, it did not consider whether the expert's method was also contrary to the fifth sentence.

The court found neither experts' methods complied with the regulation.[68] The court concluded that it could weigh the testimony of each expert to determine how to come to the correct valuation, and that it "[was] not bound by the opinion of any expert witness."[69] The court noted: "(1) how both experts' opinions have aspects that are useful to the determination of the easement's value, (2) the nature of the errors made by each expert, and (3) how weighting the two experts' opinions tends to correct the errors in their respective approaches."[70] Considering these factors, the court believed that the errors present in the two experts' values balanced comparably (equally overestimated by Pine Mountain's expert and underestimated by the IRS's expert).[71] Therefore, the court reasoned that combining the two valuations could correct for each expert's errors. Thus, the court added together fifty percent of each expert's valuation to calculate the allowable charitable deduction.[72]

The IRS and the taxpayer have filed cross-appeals with regard to the Court's decisions in this case.

Qualified Conservation Contribution

The question of whether a donation constituted a qualified conservation contribution arose as an issue in seven of the cases reviewed by TAS. This is also a threshold issue in the two cases discussed above. If the taxpayer fails to establish that the easement is a qualified conservation contribution then the Court will never need to answer questions about valuation and substantial compliance. All of the conservation contribution cases involved business taxpayers (Corporations, Partnerships, Trusts, and Sole Proprietorships: Schedules C, E, F). The Court of Appeals for the Fifth Circuit also decided a conservation easement case during our reporting period. That case is discussed below.

PBBM-Rose Hill, Ltd. v. Commissioner

In *PBBM-Rose Hill, Ltd. v. Commissioner*,[73] the taxpayer, PBBM-Rose Hill, Ltd. (PBBM), appealed the Tax Court's decision that PBBM's contribution of a conservation easement to a land trust did

66 *Pine Mountain Preserve, LLLP*, T.C. Memo. 2018-214 at *6.
67 *Id.* at *7 (citing Treas. Reg. § 1.170A-14(h)(3)(i)).
68 *Id.* at *28-30 (citing Treas. Reg. § 1.170A-14(h)(3)(i)).
69 *Id.* at *28-29.
70 *Id.* at *29-30.
71 *Id.* *31-36.
72 *Id.* at *36.
73 *PBBM-Rose Hill, Ltd. v. Comm'r*, 900 F.3d 193 (5th Cir. 2019), *aff'g* No. 26096-14 (T.C. Jan. 9, 2017).

not constitute a qualified conservation contribution and therefore it disallowed PBBM's charitable contribution deduction and sustained a penalty for overvaluing the easement.

In general, a charitable contribution deduction may be permitted when a taxpayer's donation of an easement constitutes the donation of a qualified conservation contribution.[74] To qualify as a qualified conservation contribution, the easement donation must be (1) of a qualified real property interest, (2) to a qualified organization, and (3) made exclusively for conservation purposes.[75]

The main issue in this case was whether the easement donated by PBBM was made exclusively for conservation purposes.[76] The statute outlines specific easement purposes that constitute a conservation purpose.[77] Each specific purpose has a different requirement for how much public access must be granted.[78] The statute also states that in order for an easement to qualify as having been made "exclusively" for such a conservation purpose, the conservation purpose must be protected in perpetuity.[79]

The Department of Treasury and the IRS issued the "extinguishment regulation"[80] to require that a donated easement's conservation purpose is "protected in perpetuity" in the event that the property underlying the donated easement changes in such a way that it is impossible or impractical for the continued use of the donated property for the conservation purposes.[81] Of particular importance in this case is the part of that regulation that explains that

> [A]t the time of the gift the donor must agree that the donation of the perpetual conservation restriction gives rise to a property right ... with a fair market value that is at least equal to the proportionate value that the perpetual conservation restriction at the time of the gift, bears to the value of the property as a whole at that time.... [T]hat ***proportionate value*** of the donee's property rights shall remain constant.... [When the unexpected change occurs, the donee] must be entitled to a portion of the proceeds at least equal to that proportionate value of the perpetual conservation restriction.[82]

On the question of whether the donated easement was meant to serve a conservation purpose, there was no substantive dispute; the easement ostensibly served the purpose of preserving "land areas for outdoor

74 IRC § 170(f)(3)(B)(iii) & (h).

75 IRC § 170(h)(1).

76 IRC § 170(h)(4), (5).

77 These purposes are:

"(i) the preservation of land areas for outdoor recreation by, or the education of, the general public,

(ii) the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem,

(iii) the preservation of open space (including farmland and forest land) where such preservation is—(I) for the scenic enjoyment of the general public, or (II) pursuant to a clearly delineated Federal, State, or local governmental conservation policy, and will yield a significant public benefit, or

(iv) the preservation of an historically important land area or a certified historic structure." IRC § 170(h)(4).

78 Treas. Reg. § 1.170A-14(d)(2)(ii), (d)(3)(iii), (d)(4)(ii)(B) & (d)(4)(iii)(C).

79 IRC § 170(h)(5).

80 Treas. Reg. § 1.170A-14(g)(6). The court explains that the purpose of the extinguishment regulation is: The purpose of this regulation is "(1) to prevent a taxpayer (or his successor) 'from reaping a windfall if the property is destroyed or condemned' such that the easement cannot remain in place and (2) to assure that the donee can use its portion of any proceeds to advance the conservation purpose elsewhere." *PBBM-Rose Hill, Ltd.*, 900 F.3d at 205.

81 *PBBM-Rose Hill, Ltd.*, 900 F.3d at 205.

82 *Id.* (quoting Treas. Reg. § 1.170A-14(g)(6)(ii)) (emphasis added).

recreation by … the general public."[83] The issue on appeal for the U.S. Court of Appeals for the Fifth Circuit, rather, was whether the conservation easement had sufficiently preserved that land for use by the general public, as the applicable regulations require that land underlying a conservation contribution must be available "for the substantial and regular use of the general public."[84]

At the trial level, the Tax Court held that the conservation easement did not adequately protect public access to the land. It noted that the deed required the donated property to be open for use by the general public, but also that there was not a right of public access. Furthering the Tax Court's conclusion was the fact that after the creation of the easement the land underlying the easement was operated as an 18-hole golf course and a park. Access to the property was controlled by a gatehouse. Upon entry, visitors would be given a pass that would limit their access to certain areas; they could go to the golf course or restaurant, but not the park.[85]

The Court of Appeals analyzed the regulations regarding conservation easements which "indicate that public access should generally be determined by examining the language of the deed."[86] Additionally, the regulations suggest that whether a conservation easement qualifies should be determined at the time of the donation, not what the subsequent owner does with the property.[87]

The court construed the deed as a whole and gave the specific language in the deed more weight than the general language.[88] PBBM included the statutory conservation purposes for IRC § 170(h)(4)(i)-(iii) in its easement deed.[89] The deed stated that "[t]he Property is and shall continue to be and remain open for substantial and regular use by the general public for outdoor recreation."[90] Additionally, it included language that prohibited charging fees that would defeat this public use or "result in the operation of the Property as a private membership club."[91] The court reasoned that this language in the deed was enough to obligate the owner of the property to operate it in such a way that provided access to the public for substantial and regular recreational use, as the regulation required.[92] The court further explained that the general terms in the deed, which did not grant a right of public access, and retained the right for the owner to put up no-trespassing signs, did not override the specific language that did grant certain public access.[93] Lastly, the court decided that these provisions in the deed referred to "[t]he Property" in its entirety. For that reason, the IRS's argument "that the deed allows the owner to prevent the public from accessing certain areas of the land fails."[94] Therefore, the easement's language fulfilled the public-access requirement for the conservation purpose of outdoor recreation for the general public.[95]

83 *PBBM-Rose Hill, Ltd.*, 900 F.3d at 205. at 201.

84 *Id*. at 205. at 201-202 (citing Treas. Reg. § 1.170A-14(d)(2)(ii)).

85 *Id*. at 202.

86 The Court explained that there is an exception to this general rule when the donor knew or should have known at the time of the donation that the access in actuality would be significantly less than the access under the terms of the deed. Here, however, the court held PBBM failed to meet this exception. *PBBM-Rose Hill, Ltd.,* 900 F.3d at 202-203 (distinguishing Treas. Reg. § 1.170A-14(d)(4)(ii)(B) and (5)(iv)(C)).

87 *PBBM-Rose Hill, Ltd.*, 900 F.3d at 202 (citing Treas. Reg. § 1.170A-14(g)(6)(ii) &(h)(3)).

88 *Id*. at 204-205.

89 *Id*. at 203-204.

90 *Id*. at 204.

91 *Id*.

92 *Id*.

93 *PBBM-Rose Hill, Ltd.,* F.3d at 204.

94 *Id.* at 205.

95 *Id*.

However, for the easement to be considered exclusively for conservation purposes, it must also protect that conservation purpose in perpetuity. This brings us to the extinguishment regulation, and the term "proportionate value," which was of particular importance in this case. The Court of Appeals for the Fifth Circuit interpreted "proportionate value" to be "a fraction equal to the value of the conservation easement at the time of the gift, divided by the value of the property as a whole at that time."[96] In this case, the easement deed's extinguishment provision provided that the donee would be provided a portion of the proceeds of a sale or conversion of the donated property based on the fair market value at the time of the deed or proceeds after the expenses of the sale and the "amount attributable to improvements constructed upon the Conservation Area … are deducted."[97]

The Tax Court determined that the terms of PBBM's conservation easement failed to comply with the extinguishment regulation because "the donee would not receive the amount required by the extinguishment regulation in some circumstances."[98] The regulation does not include language that any amount may be subtracted from the portion of the proceeds owed to the donee.[99] The conservation easement deed contained language that allows the value of improvements to be subtracted out of the total proceeds from a future sale before the donee receives its portion.[100] On appeal, the IRS argued that the extinguishment provision could not include factors like the value of improvements that could potentially reduce the donee's proceeds below the minimum required by the regulation.[101] The Fifth Circuit agreed that the plain language of the regulation stated that the donee "must be entitled to a portion of the proceeds at least equal to that proportionate value," and included nothing about the subtraction of other amounts to that.[102] In fact, the regulation demands that the donee must receive at least the proportionate value of the proceeds.[103] Because the taxpayer's conservation easement deed allowed for a subtraction of the value of improvements from the proceeds, which could reduce the total donee proceeds below the proportionate value, the court held that the conservation easement violated the requirement set forth in the extinguishment regulation.[104]

Thus, the Court of Appeals for the Fifth Circuit held that PBBM's easement did not constitute a qualified conservation contribution, as its failed to comply with the statute's "exclusively for conservation purposes" requirement and with the terms of the related extinguishment regulation.[105] For that reason, the court held that the taxpayer was not entitled to a charitable contribution deduction.[106]

96 *PBBM-Rose Hill, Ltd.,* F.3d at 207.

97 *Id*.

98 *Id*.

99 *See* Treas. Reg. § 1.170A-14(g)(6).

100 *PBBM-Rose Hill, Ltd*., 900 F.3d at 207-08.

101 *Id*. at 207.

102 *Id*. (quoting Treas. Reg. § 1.170A-14(g)(6)(ii)).

103 *Id*. at 207-08 (citing Treas. Reg. § 1.170A-14(g)(6)(ii)).

104 *Id*. at 208-09.

105 *Id*. at 209.

106 *PBBM-Rose Hill, Ltd.*, 900 F.3d at 209. The Fifth Circuit additionally decided on the issues of the valuation of the conservation easement and if PBBM was liable for the accuracy-related penalty, finding for the IRS on both issues. *Id*. at 213-215.

CONCLUSION

IRC § 170 and the accompanying Treasury Regulations provide detailed requirements with which taxpayers must strictly comply. The rules and regulations surrounding charitable contributions are complex. The IRS is focused on curtailing abuse in this area by designating syndicated conservation easements as a listed transaction[107] and abusive conservation easements as one of the top tax scams to avoid in 2019.[108] Thus, we anticipate that litigation will likely continue to increase and we will continue to see this topic as a most litigated issue. Taxpayers must carefully follow all aspects of the relevant laws and regulations when attempting to claim a charitable contribution deduction. Particularly, taxpayers must pay attention to the strict requirements for substantiation of a charitable contribution and to the elements of donating a qualified conservation easement.

RECOMMENDATION TO MITIGATE DISPUTES

The National Taxpayer Advocate recommends that the IRS:

- Develop and publish guidance to provide safe harbors and/or sample easement provisions to provide taxpayers with examples of how they may construct a conservation easement deed that satisfies the statutory requirements and prevent unnecessary litigation.

107 *See* IRS Notice 2017-10, 2017-4 I.R.B. 544, Syndicated Conservation Easement Transactions (these transactions deal with promoter companies obtaining inflated appraisals for real property and constructing conservation easement transactions that purport to give investors the opportunity to obtain charitable contribution deductions in amounts that significantly exceed the amount invested).

108 IRS, IR-2019-47, Abusive Tax Shelters, Trusts, Conservation Easements Make IRS' 2019 "Dirty Dozen" List of Tax Scams to Avoid (Mar. 19, 2019).

MLI #10 Frivolous Issues Penalty Under IRC § 6673 and Related Appellate-Level Sanctions

SUMMARY

From June 1, 2018, through May 31, 2019, the federal courts issued decisions in at least 16 cases involving the Internal Revenue Code (IRC) § 6673 "frivolous issues" penalty, with one case involving an analogous penalty at the appellate level. Appellate level penalties are imposed for maintaining a case primarily for delay, raising frivolous arguments, unreasonably failing to pursue administrative remedies, or filing a frivolous appeal.[1] In many of the cases we reviewed, taxpayers escaped liability for the penalty but were warned they could face sanctions for similar conduct in the future.[2] Nonetheless, we included these cases in our analysis to illustrate what conduct will and will not be tolerated by the courts.

TAXPAYER RIGHT IMPACTED[3]

- *The Right to Appeal an IRS Decision in an Independent Forum*

PRESENT LAW

The U.S. Tax Court is authorized to impose a penalty against a taxpayer if the taxpayer institutes or maintains a proceeding primarily for delay, takes a frivolous position in a proceeding, or unreasonably fails to pursue available administrative remedies.[4] The maximum penalty is $25,000.[5] In some cases, the IRS requests that the Tax Court impose the penalty;[6] in other cases, the Tax Court exercises its discretion, *sua sponte*,[7] to consider whether the penalty is appropriate.

1 The Tax Court generally imposes the penalty under IRC § 6673(a)(1). Other courts may impose the penalty under IRC § 6673(b)(1). U.S. Courts of Appeals are authorized to impose sanctions under IRC § 7482(c)(4), or Rule 38 of the Federal Rules of Appellate Procedure, although some appellate-level penalties may be imposed under other authorities.

2 *See, e.g., Belanger v. Comm'r*, T.C. Memo. 2019-1, *aff'd*, 2019 WL 4316498 (5th Cir. Sept. 11, 2019) (The Tax Court concluded that the taxpayer's positions were "unquestionably frivolous" but recognized it was his first appearance before the court and therefore gave just a warning).

3 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are also codified in the Internal Revenue Code. *See* IRC § 7803(a)(3).

4 IRC § 6673(a)(1)(A), (B), and (C). Likewise, the Tax Court is also authorized to impose a penalty against any person admitted to practice before the Tax Court for unreasonably and vexatiously multiplying the proceedings in any case. *See* IRC § 6673(a)(2). We did not identify any cases under this authority during this review cycle. 28 U.S.C. § 1927 authorizes federal courts to sanction an attorney or any other person admitted to practice before any court of the United States or any territory thereof for unreasonably and vexatiously multiplying proceedings; such person may be required to personally pay the excess costs, expenses, and attorneys' fees reasonably incurred because of his or her conduct. We identified one case under 28 U.S.C. § 1927, *Lopez v. IRS*, 2018 U.S. Dist. LEXIS 179364 (D. Conn. Aug. 27, 2018), where the District Court sanctioned the taxpayer's counsel $2,500 for vexatiously multiplying the proceedings and introducing frivolous issues, however, we do not discuss it here (nor is it in the case table) as this behavior is attributable to the representative and not indicative of issues taxpayers are litigating.

5 IRC § 6673(a)(1).

6 The standards for the IRS's decision to seek sanctions under IRC § 6673(a)(1) are found in the Chief Counsel Directives Manual (CCDM). *See* CCDM 35.10.2 (Aug. 11, 2004). For sanctions of any attorney or other person authorized to practice before the Tax Court, under IRC § 6673(a)(2), all requests for sanctions are reviewed by the designated agency sanctions officer (currently the Associate Chief Counsel (Procedure & Administration)). This review ensures uniformity on a national basis. *See, e.g.*, CCDM 35.10.2.2.3 (Aug. 11, 2004).

7 *"Sua sponte"* means without prompting or suggestion; on its own motion. Black's Law Dictionary (10th ed. 2014). Thus, for conduct that it finds particularly offensive, the Tax Court can choose to impose a penalty under IRC § 6673 even if the IRS has not requested the penalty. *See, e.g., Walquist v. Comm'r*, 2019 WL 962901 (T.C. Feb. 25, 2019).

Taxpayers who institute actions under IRC § 7433[8] for certain unauthorized collection actions can be subject to a maximum penalty of $10,000 if the court determines the taxpayer's position in the proceedings is frivolous or groundless.[9] In addition, IRC § 7482(c)(4),[10] § 1912 of Title 28 of the U.S. Code,[11] and Rule 38 of the Federal Rules of Appellate Procedure[12] (among other laws and rules of procedure) authorize federal courts to impose penalties against taxpayers or their representatives for raising frivolous arguments or using litigation tactics primarily to delay the collection process. Because the sources of authority for imposing appellate-level sanctions are numerous and some of these sanctions may be imposed in nontax cases, this report focuses primarily on the IRC § 6673 penalty.

In our report last year, we took special note of the decision in *Williams v. Commissioner*, even though it fell outside of last year's reporting cycle, as it involved the novel issue of whether IRC § 6751(b)(1) constrained the ability of the Tax Court to impose a penalty under IRC § 6673(a)(1).[13] Section 6751(b)(1) generally prohibits the imposition of a penalty unless the penalty is approved, in writing, by the supervisor of the employee imposing the penalty or other higher level designee of the Secretary.[14] Section 6673(a)(1) gives the authority to impose the penalty in a Tax Court proceeding solely to the Tax Court, and permits the Tax Court to impose it either at the request of the Commissioner or *sua sponte* (of its own accord). The Tax Court looked to the legislative history of IRC § 6751(b)(1) and § 6673(a)(1) to determine whether the two sections can coexist or whether IRC § 6751(b)(1) supersedes IRC § 6673(a)(1). The Tax Court found that the legislative intent behind IRC § 6751(a)(1) was to prevent the IRS from using the threat of a penalty as a bargaining chip when negotiating with taxpayers, whereas the intent of IRC § 6673(a)(1) was to dissuade taxpayers from wasting judicial resources. Because the Tax Court is not mentioned in IRC § 6751(b)(1) or its legislative history, the Tax Court held that IRC § 6751(b)(1) does not apply when it imposes a penalty pursuant to IRC § 6673(a)(1). Thus, when an IRS Office of Chief Counsel attorney requests the Tax Court impose a penalty under IRC § 6673(a)(1), the decision to request the penalty does not require personal written supervisory approval.

ANALYSIS OF LITIGATED CASES

We analyzed 16 opinions issued between June 1, 2018, and May 31, 2019, in which courts addressed the IRC § 6673 penalty. Twelve of these opinions were issued by the Tax Court and four were issued by U.S. Courts of Appeals in cases brought by taxpayers seeking review of the Tax Court's imposition of the penalty. The Courts of Appeals sustained the Tax Court's position in all four cases. One decision issued

8 IRC § 7433(a) allows a taxpayer a civil cause of action against the United States if an IRS officer or employee intentionally or recklessly, or by reason of negligence, disregards any IRC provision or regulation promulgated under Title 26 of the United States Code in connection with collecting the taxpayer's federal tax liability.

9 IRC § 6673(b)(1).

10 IRC § 7482(c)(4) provides that the United States Courts of Appeals and the Supreme Court have the authority to impose a penalty in any case where the Tax Court's decision is affirmed and the appeal was instituted or maintained primarily for delay or the taxpayer's position in the appeal was frivolous or groundless.

11 28 U.S.C. § 1912 provides that when the Supreme Court or a United States Court of Appeals affirms a judgment, the court has the discretion to award to the prevailing party just damages for the delay, and single or double costs.

12 Federal Rule of Appellate Procedure 38 provides that if a United States Court of Appeals determines an appeal is frivolous, the court may award damages and single or double costs to the appellee.

13 151 T.C. 1 (2018). *See* National Taxpayer Advocate 2018 Annual Report to Congress 547-550.

14 IRC § 6751(b)(2) provides an exception for additions to tax imposed under §§ 6651, 6654, or 6655. Or any other penalty automatically calculated through electronic means.

by the Fifth Circuit Court of Appeals addressed both an analogous appellate level penalty and reviewed the Tax Court's imposition of the IRC § 6673 penalty.[15]

In five cases, the Tax Court imposed penalties under IRC § 6673, with the amounts ranging from $1,000 to $12,500. In three cases, taxpayers prevailed when the IRS asked the court to impose a penalty. In most of these cases the court warned the taxpayers not to bring similar arguments in the future.[16] Thirteen taxpayers appeared *pro se* (represented themselves) while three were represented. The taxpayers presented a wide variety of arguments that the courts have generally rejected on numerous occasions. Upon encountering these arguments, the courts almost invariably cited the language set forth in *Crain v. Commissioner:*

> We perceive no need to refute these arguments with somber reasoning and copious citation of precedent; to do so might suggest that these arguments have some colorable merit. The constitutionality of our income tax system — including the role played within that system by the Internal Revenue Service and the Tax Court — has long been established.[17]

In the cases we reviewed, taxpayers raised the following issues that the courts deemed frivolous. Consequently, the taxpayers were subject to a penalty under IRC § 6673(a)(1) or other appellate level sanctions (or, in some cases, the court warned that such arguments were frivolous and could lead to a penalty in the future if the taxpayers maintained the same positions):

- **Taxpayers are not taxpayers, are exempt from the income tax, are not required to file a return, or wages are not income:** Taxpayers in at least nine cases presented arguments that they are not taxpayers, they are exempt from tax for various reasons, or that wage income is not taxable.[18] In one case, a taxpayer argued that only federal employees must pay income tax, and the court imposed a penalty of $1,000.[19]
- **The Tax Court should garnish the Secretary of Treasury's Salary:** In an argument the Tax Court deemed "novel (but equally frivolous)," the taxpayers (married filing jointly) argued the court should garnish the salary of the Secretary of the Treasury in an amount equal to the taxpayers' unpaid taxes.[20] The taxpayers in this case further argued that U.S. currency is not lawful money and they have no obligation to file a return.

15 We identified one decision in which the Court of Appeals addressed both the Tax Court's imposition of the IRC § 6673 penalty and an analogous appellate level penalty. *Lange v. Comm'r*, 748 F. App'x. 635 (5th Cir. 2019) *aff'g* No.11492-17 (T.C. Apr. 27, 2018), *petition for cert. filed*, No. 19-366 (U.S. Sept. 19, 2019) (affirming § 6673 penalty of $2,500 and imposing an additional $8,000 penalty). For purposes of the total number of cases reviewed for this report, we counted this case once. We reviewed a total of 16 cases for this reporting cycle.

16 *See, e.g.*, *Burnett v. Comm'r*, T.C. Memo. 2018-204. In declining to impose a penalty, the Tax Court noted that the taxpayer had not previously made frivolous claims before the Tax Court. Interestingly, the taxpayer had a second case decided on the same day in which he made similar arguments, and the Tax Court again declined to impose the penalty. *Burnett v. Comm'r*, T.C. Memo. 2018-205, *aff'd*, 2019 WL 4233804 (4th Cir. Sept. 6, 2019).

17 *See, e.g.*, *Williams v. Comm'r*, 2018 WL 3301501 (T.C. July 3, 2018) (*citing Crain v. Comm'r*, 737 F.2d 1417, 1417-18 (5th Cir. 1984)).

18 *See, e.g.*, *MacDonald v. Comm'r*, T.C. Memo. 2018-138.

19 *Weiler v. IRS*, 2019 WL 2346915 (N.D. Ohio May 31, 2019), *appeal docketed*, No. 19-3729 (6th Cir. Aug. 1, 2019).

20 *See Walquist v. Comm'r*, 2019 WL 962901 (T.C. Feb. 25, 2019).

CONCLUSION

Taxpayers in the cases analyzed this year presented the same arguments raised and repeated year after year, which the courts routinely and universally reject.[21] Taxpayers avoided the IRC § 6673 penalty in only three cases we identified where the IRS requested it and often warned the taxpayers in these cases not to bring similar arguments in the future, demonstrating the willingness of the courts to penalize taxpayers when they offer frivolous arguments or institute a case merely for delay. Where the IRS has not requested the penalty, the court may nonetheless raise the issue *sua sponte,*[22] and in all but one case, the court either imposed the penalty or cautioned the taxpayer that similar future behavior will result in a penalty.[23]

As indicated by the accompanying Case Table 10 in Appendix 5, the penalty amount varies, regardless of the type of frivolous argument being raised. The Tax Court has indicated, however, that it can be lenient when it is the taxpayer's first court appearance.[24] Moreover, if the taxpayer has previously been sanctioned, the Tax Court may impose a higher penalty, but not necessarily anything close to the maximum.[25]

Finally, the U.S. Courts of Appeals have shown their willingness to uphold the penalties imposed by the Tax Court without fail in the cases analyzed for the period between June 1, 2018, and May 31, 2019, continuing a trend of upholding all penalties in cases we have analyzed since June 1, 2005.

21 *See, e.g.*, National Taxpayer Advocate 2016 Annual Report to Congress 503-506 (Most Litigated Issue: *Frivolous Issues Penalty Under IRC § 6673 and Related Appellate-Level Sanctions*) .

22 *See, e.g.*, *Venable v. Comm'r*, T.C. Memo. 2018-144 (court raised the issue *sua sponte* and warned the taxpayer not to assert similar arguments in the future).

23 The only case where this did not occur was in *Hartmann v. Comm'r*, T.C. Memo. 2018-154, *aff'd*, 2019 WL 4447378 (3d Cir. Sept. 17, 2019).

24 *See, e.g.*, *Burnett v. Comm'r*, T.C. Memo. 2018-204.

25 *See, e.g.*, *Wesley v. Comm'r*, T.C. Memo. 2019-18 (court imposed $10,000 penalty after imposing $7,500 and $2,500 in earlier cases).

TAS Case Advocacy

OFFICE OF THE TAXPAYER ADVOCATE

Under Internal Revenue Code (IRC) § 7803(c)(2)(A), the Office of the Taxpayer Advocate, known as the Taxpayer Advocate Service (TAS), has four principal functions:

- Assist taxpayers in resolving problems with the IRS;
- Identify areas in which taxpayers are experiencing problems with the IRS;
- Propose changes in the administrative practices of the IRS to mitigate problems taxpayers are experiencing with the IRS; and
- Identify potential legislative changes that may be appropriate to mitigate such problems.

The first function described in the statute relates to TAS's case advocacy, which involves assisting taxpayers with their cases. A fundamental part of helping taxpayers resolve their problems involves protecting taxpayer rights and reducing taxpayer burden.[1] The TAS Case Advocacy function is primarily responsible for direct contact with all types of taxpayers (including individuals, businesses, and tax-exempt entities), their representatives, and congressional staff to resolve specific problems taxpayers are experiencing with the IRS. Information from these contacts and case results are vital to TAS's statutory mission to propose changes in the IRS's administrative practices to alleviate taxpayers' problems and identify potential legislative changes to relieve such problems.[2] This section of the report discusses how TAS fulfills its mission to assist taxpayers with their specific issues and concerns involving IRS systems and procedures.[3]

TAS Case Receipt Criteria

Taxpayers typically seek TAS assistance with specific issues when:

- They experience a tax problem that causes financial difficulty;
- They are unable to resolve their issues directly with the IRS through normal channels; or
- An IRS action or inaction caused or will cause them to suffer a long-term adverse impact, including a violation of taxpayer rights.

TAS accepts cases in four categories: economic burden, systemic burden, best interest of the taxpayer, and public policy, as shown in Figure 3.1.

1 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are also codified in the IRC. *See* IRC § 7803(a)(3).

2 TAS staff often uses Case Advocacy's findings as the basis for many of the Most Serious Problems and Legislative Recommendations in the National Taxpayer Advocate's Annual Report to Congress.

3 TAS's other three functions involve identifying and proposing changes to systemic problems affecting taxpayers. TAS employees advocate systemically by identifying IRS procedures that adversely affect taxpayer rights or create taxpayer burden, and recommending solutions, either administrative or legislative, to improve tax administration. (Note: IRS employees, taxpayers, practitioners, and other external stakeholders can use the Systemic Advocacy Management System (SAMS) to submit systemic issues to TAS at www.taxpayeradvocate.irs.gov/SAMS).

FIGURE 3.1

Taxpayer Advocate Service Case Acceptance Criteria

As an independent organization within the IRS, TAS protects taxpayer rights under the Taxpayer Bill of Rights, helps taxpayers resolve problems with the IRS, and recommends changes to prevent future problems. TAS fulfills its statutory mission by working with taxpayers to resolve problems with the IRS.[1]

TAS case acceptance criteria fall into four main categories:

Economic Burden	**Economic burden cases are those involving a financial difficulty to the taxpayer: an IRS action or inaction has caused or will cause negative financial consequences or have a long-term adverse impact on the taxpayer.**
Criteria 1	The taxpayer is experiencing economic harm or is about to suffer economic harm.
Criteria 2	The taxpayer is facing an immediate threat of adverse action.
Criteria 3	The taxpayer will incur significant costs if relief is not granted (including fees for professional representation).
Criteria 4	The taxpayer will suffer irreparable injury or long-term adverse impact if relief is not granted.
Systemic Burden	**Systemic burden cases are those in which an IRS process, system, or procedure has failed to operate as intended, and as a result the IRS has failed to timely respond to or resolve a taxpayer issue.**[2]
Criteria 5	The taxpayer has experienced a delay of more than 30 days to resolve a tax account problem.
Criteria 6	The taxpayer has not received a response or resolution to the problem or inquiry by the date promised.
Criteria 7	A system or procedure has either failed to operate as intended, or failed to resolve the taxpayer's problem or dispute within the IRS.
Best Interest of the Taxpayer	**TAS acceptance of these cases will help ensure that taxpayers receive fair and equitable treatment and that their rights as taxpayers are protected.**[3]
Criteria 8	The manner in which the tax laws are being administered raises considerations of equity, or has impaired or will impair the taxpayer's rights.
Public Policy	**Acceptance of cases into TAS under this category will be determined by the National Taxpayer Advocate and will generally be based on a unique set of circumstances warranting assistance to certain taxpayers.**[4]
Criteria 9	The National Taxpayer Advocate determines compelling public policy warrants assistance to an individual or group of taxpayers.

1 Internal Revenue Code (IRC) § 7803(c)(2)(A)(i).

2 TAS changed its case acceptance criteria to generally stop accepting certain systemic burden issues. *See* Internal Revenue Manual (IRM) 13.1.7.3(d), Exceptions to Taxpayer Advocate Service Criteria (Feb. 4, 2015).

3 *See* IRM 13.1.7.2.3 (Feb. 4, 2015).

4 *See* Interim Guidance Memorandum (IGM) TAS-13-0219-003, Interim Guidance on Accepting Cases Under TAS Case Criteria 9, Public Policy (Feb. 21, 2019).

Economic burden (EB) cases often occur where an IRS action or inaction has caused or will cause negative financial consequences or have a long-term adverse impact on the taxpayer. In many of the economic burden cases, time is critical. If the IRS does not act quickly (*e.g.*, to remove a levy or release a lien), the taxpayer will experience additional economic harm.[4] Systemic burden cases include situations where an IRS process, system, or procedure has failed to resolve the taxpayer's issue.[5] Best interest of the taxpayer (Criteria 8) includes violations of the Taxpayer Bill of Rights.[6]

With respect to public policy cases (Criteria 9), the National Taxpayer Advocate has the sole authority to determine which issues are included in this criterion and will designate them by memorandum. The National Taxpayer Advocate issued an Interim Guidance Memorandum (IGM) on February 21, 2019 (effective until February 20, 2021), that designated Criteria 9 cases to include private debt collection; passport denial, revocation, or limitation; automatic exempt organization revocations due to failure to file an annual return or notice for three consecutive years; and congressional referred tax account-related inquiries that do not fit into any other category.[7]

Case Receipt Trends in Fiscal Year 2019

In fiscal year (FY) 2019, TAS received 240,777 cases, nearly 24,000 more cases than received in FY 2018, an increase of about 11 percent.[8] Intake Advocates also resolved another 26,209 taxpayer calls without the need to establish a TAS case.[9] Taxpayers who call the IRS National Taxpayer Advocate Toll-Free line, which is staffed by IRS employees, are transferred to the TAS Centralized Case Intake (CCI) function if the IRS assistors are unable to assist the taxpayer and determine the taxpayer's issue meets TAS criteria.[10] Of the 63,509 taxpayer calls transferred, CCI assisted 41 percent of the taxpayers without creating a new case.[11] Providing taxpayers this assistance during the initial contact allows TAS to use its specialized skills and resources on more complex situations.

Increasing numbers of non-identity theft refund fraud (Pre-Refund Wage Verification Hold (PRWVH)) cases accounted for much of the increase in case receipts.[12] In addition (as with the rest of the IRS), the 35-day partial government shutdown impacted TAS; only a limited number of TAS employees were

4 IRC § 7803(c)(2)(C)(ii); Internal Revenue Manual (IRM) 13.1.7.2.1, TAS Case Criteria 1-4, Economic Burden (Feb. 4, 2015).

5 IRC § 7803(c)(2)(C)(ii); IRM 13.1.7.2.2, TAS Case Criteria 5-7, Systemic Burden (Feb. 4, 2015).

6 IRC § 7803(c)(2)(C)(ii); IRM 13.1.7.2.3, TAS Case Criteria 8, Best Interest of the Taxpayer (Feb. 4, 2015). *See* TBOR, www.TaxpayerAdvocate.irs.gov/taxpayer-rights; IRC § 7803(a)(3).

7 *See* Interim Guidance Memorandum (IGM) TAS-13-0219-0003, Interim Guidance on Accepting Cases Under TAS Case Criteria 9, Public Policy (Feb. 21, 2019).

8 Data obtained from Taxpayer Advocate Management Information System (TAMIS) (Oct. 1, 2018; Oct. 1, 2019).

9 The TAS CCI Function serves as the first contact for most taxpayers coming to TAS for assistance. Intake Advocates are responsible for answering calls and conducting in-depth interviews with taxpayers to determine the correct disposition of their issue(s). Intake Advocates take actions where possible to resolve the issue upfront, create cases after validating the taxpayer meets TAS criteria, and offer taxpayers information and assistance with self-help options. *See* IRM 13.1.16.1.4, Intake Advocate Delegated Authority Principles (Mar. 28, 2017).

10 TAS also has Intake Advocates in the CCI function.

11 Data obtained from TAMIS (Oct. 1, 2019); IRS, Joint Operations Center (JOC), Snapshot Report (Sept. 30, 2019).

12 For additional information about the impact of PRWVH issues on TAS case receipts, see Pre-Refund Wage Verification Hold (PRWVH), *infra*.

excepted to work, and that work was limited to checking the mail and processing checks.[13] TAS received 41,193 cases through the end of January 2019, compared with 37,761 cases for the same period in FY 2018.[14] Despite the shutdown, TAS still experienced an almost ten percent increase in cases. TAS closed 234,613 cases, providing relief to taxpayers in approximately 78 percent of closed cases.[15] Another 15,678 taxpayers received relief directly from the IRS prior to TAS intervention.[16] Figure 3.2 compares FY 2018 and FY 2019 case receipts and relief rates by case acceptance category.

FIGURE 3.2, TAS Case and Intake Receipts and Relief Rates, FYs 2018-2019[17]

Case Categories	Receipts FY 2018	Receipts FY 2019	Percent Change	Relief Rates FY 2018	Relief Rates FY 2019	Percent Change
Economic Burden	124,755	141,768	13.6%	76.7%	77.2%	0.7%
Systemic Burden	91,160	98,207	7.7%	81.7%	78.5%	-3.9%
Best Interest of the Taxpayer	577	560	-2.9%	82.3%	79.7%	-3.2%
Public Policy	300	242	-19.3%	83.0%	80.0%	-3.6%
Subtotal	**216,792**	**240,777**	**11.1%**	**78.7%**	**77.8%**	**-1.1%**
Calls Resolved by Intake Advocates	32,521	26,209	-19.4%			
Grand Total Receipts	**249,313**	**266,986**	**7.1%**			

13 The 35-day partial government shutdown began December 22, 2018. For a detailed discussion of the impact the government shutdown had on TAS operations, see National Taxpayer Advocate FY 2020 Objectives Report to Congress 40-44 (*Impact of the 35-Day Partial Government Shutdown on the Taxpayer Advocate Service*). For a discussion about the Anti-Deficiency Act and TAS's ability to be excepted during a lapse under the safety of life and protection of property exception, see National Taxpayer Advocate 2018 Annual Report to Congress (*Preface*). *See also* National Taxpayer Advocate 2019 Purple Book 80-81 (*Authorize the Office of the Taxpayer Advocate to Assist Certain Taxpayers During a Lapse in Appropriations*); National Taxpayer Advocate 2017 Purple Book, Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration 75 (*Authorize the Office of the Taxpayer Advocate to Assist Certain Taxpayers During a Lapse in Appropriations*); National Taxpayer Advocate FY 2015 Objectives Report to Congress 79-91 (*The IRS's Decision Not to Except Any TAS Employees During the Government Shutdown Resulted in Violations of Taxpayer Rights and Undermined TAS's Statutory Authority to Assist Taxpayers Suffering or About to Suffer Significant Hardship*); National Taxpayer Advocate 2014 Annual Report to Congress 275-310 (Legislative Recommendation: *Taxpayer Rights: Codify the Taxpayer Bill of Rights and Enact Legislation That Provides Specific Taxpayer Protections*); National Taxpayer Advocate FY 2012 Objectives Report to Congress 1-2 (*Taxpayers May Not Be Adequately Protected During a Lapse in Appropriations*); National Taxpayer Advocate 2011 Annual Report to Congress 552-557 (Legislative Recommendation: *Clarify That the Emergency Exception to the Anti-Deficiency Act Includes IRS Activities That Protect Taxpayer Life and Property*).

14 Data obtained from TAMIS (Feb. 1, 2018; Feb. 1, 2019).

15 Data obtained from TAMIS (Oct. 1, 2019).

16 *Id*.

17 Relief Rates are computed on closed cases and may not be associated with the case receipts in this table. Data obtained from TAMIS (Oct. 1, 2018; Oct. 1, 2019).

Most Prevalent Issues in TAS Cases, With a Focus on Economic Burden Cases

Figure 3.3 compares the top ten sources of TAS receipts by issue for FY 2019 to FY 2018.[18]

FIGURE 3.3, Top 10 Issues for FY 2019 Cases Received in TAS Compared to FY 2018[19]

Rank	Issue Description	FY 2018	FY 2019	FY 2019 Percent of Total	Percent Change FY 2018 to FY 2019
1	Pre-Refund Wage Verification Hold	66,048	91,747	38.1%	38.9%
2	Earned Income Tax Credit (EITC)	21,203	18,691	7.8%	-11.8%
3	Unpostables and Rejects	8,673	10,292	4.3%	18.7%
4	Processing Amended Returns	8,767	9,427	3.9%	7.5%
5	Other Refund Inquiries and Issues	7,628	9,425	3.9%	23.6%
6	Identity Theft	13,787	8,490	3.5%	-38.4%
7	Injured Spouse Claims	3,231	7,892	3.3%	144.3%
8	Taxpayer Protection Program Issues	7,947	6,037	2.5%	-24.0%
9	Open Audit (Not EITC)	5,823	5,858	2.4%	0.6%
10	Processing Original Returns	5,312	5,150	2.1%	-3.0%
Other TAS Receipts[20]		68,373	67,768	28.1%	-0.9%
Total TAS Receipts		**216,792**	**240,777**		**11.1%**

Economic Burden Cases

More than half of TAS's case receipts continue to involve taxpayers experiencing economic burden.[21] Because these taxpayers face potential immediate adverse financial consequences, TAS requires employees to work the cases using accelerated timeframes.[22]

Figure 3.4 shows the top five issues driving economic burden receipts in FY 2019 compared to FY 2018. TAS dedicates significant resources to resolving the systemic causes of these issues, and as discussed in the Most Serious Problems section of this and past reports, provides recommendations to the IRS to improve processes that cause taxpayers to experience economic or systemic burden.

18 IRM 13.1.16.13.1.2, Primary Core Issue Code (Mar. 28, 2017) (stating the primary core issue code (PCIC) is a three-digit code that defines the most significant issue, policy, or process within the IRS that underlies the cause of the taxpayer's problem).

19 Data obtained from TAMIS (Oct. 1, 2018; Oct. 1, 2019).

20 The "Other TAS Receipts" category encompasses the remaining issues not in the top ten.

21 For the eighth consecutive FY, more than half of TAS's case receipts involve taxpayers' experiencing EB. Data obtained from TAMIS (Oct. 1, 2012; Oct. 1, 2013; Oct. 1, 2014; Oct. 1, 2015; Oct. 1, 2016; Oct. 1, 2017; Oct. 1, 2018; Oct. 1, 2019).

22 IRM 13.1.18.3(1), Initial Contact (May 5, 2016). The TAS employee is required to contact the taxpayer or representative by telephone within three workdays of the taxpayer advocate received date (TARD) for criteria 1-4 cases and within five workdays of the TARD for criteria 5-9 cases to notify the taxpayer of TAS's involvement. Per IRM 13.1.18.1.1(1), Working TAS Cases (Feb. 1, 2011), TAS's policy is that cases involving EB will be worked sooner than other cases.

FIGURE 3.4, Top Five Case Issues Causing Economic Burden Receipts in FY 2019 Compared to FY 2018[23]

Rank	Issue Description	FY 2018	EB Receipts as % Total EB Receipts for Issue FY 2018	FY 2019	EB Receipts as % Total EB Receipts for Issue FY 2019	EB Percent Change FY 2018 to FY 2019
1	Pre-Refund Wage Verification Hold	45,834	36.7%	64,877	45.8%	41.5%
2	Earned Income Tax Credit	15,637	12.5%	13,190	9.3%	-15.6%
3	Unpostables and Rejects	5,947	4.8%	6,610	4.7%	11.1%
4	Injured Spouse Claims	2,523	2.0%	5,813	4.1%	130.4%
5	Identity Theft	8,217	6.6%	4,830	3.4%	-41.2%

Pre-Refund Wage Verification Hold

As discussed earlier in the Most Serious Problem involving processing delays,[24] the IRS's efforts to detect and prevent refund fraud are managed by the Return Integrity Verification Operations (RIVO), which oversees non-identity theft (IDT) refund fraud in the PRWVH Program.[25] RIVO primarily relies on the Return Review Program (RRP) to detect non-IDT refund fraud. The RRP contains filters comprised of both rules and models.[26] Once the models complete their analysis, each return is given a risk score. That score is fed into RRP filters, which will select returns based on whether the score exceeds a specified threshold while considering other information in the system.

For the 2019 filing season, the IRS added Filter X to assist in identifying returns suspected of non-IDT refund fraud. Filter X selects returns where Earned Income Tax Credit (EITC) or the Additional Child Tax Credit (ACTC) is claimed on the return; where there is either no or only some Form W-2 information available, and thus the information and withholding on the return cannot be verified; and where other criteria programmed into the filter have been met (*i.e.*, the returns that do not meet the programmed criteria will proceed through normal processing channels).[27] The IRS originally projected that Filter X would suspend about 500,000 returns annually;[28] however, this projection was a significant understatement, as it ultimately suspended nearly 1.1 million returns from January 1 through September 26, 2019.[29] While it is essential for the IRS to prevent fraud and protect revenue, since Filter X only

23 Data obtained from TAMIS (Oct. 1, 2018; Oct. 1, 2019).

24 See Most Serious Problem: *Processing Delays: Refund Fraud Filters Continue to Delay Taxpayer Refunds for Legitimately Filed Returns, Potentially Causing Financial Hardship*, *supra*.

25 See IRM 25.25.3.1(1), Program Scope and Objectives (Aug. 30, 2019).

26 National Taxpayer Advocate 2018 Annual Report to Congress 79-90 (Most Serious Problem: *False Positive Rates: The IRS's Fraud Detection Systems Are Marred by High False Positive Rates, Long Processing Times, and Unwieldy Processes Which Continue to Plague the IRS and Harm Legitimate Taxpayers*). The filter models use such techniques as predictive models, business rules, and clustering.

27 IRS response to TAS information request (Sept. 23, 2019).

28 IRS Processing Year 2019 Treatment Process Update (Dec. 5, 2018).

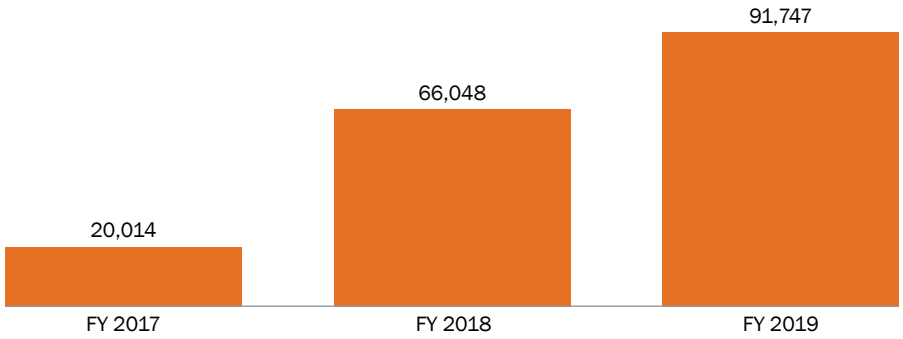
29 IRS, Identity Theft (IDT) and Integrity and Verification Operations (IVO) Performance Report, Slide 8 (Oct. 9, 2019). This filter is retired beginning in June because it is believed that at this point, all the W-2 information that the Social Security Administration (SSA) has should have been transmitted to IRS.

selects returns where EITC or ACTC is claimed, these delays have a significant impact on low-income taxpayers. Often, these taxpayers are waiting on the refund to pay day-to-day living expenses, and any delay can cause the taxpayer hardship.

As shown in Figure 3.5, TAS PRWVH case receipts have more than quadrupled over the past three years, from about 20,000 cases in FY 2017 to over 90,000 in FY 2019, and about 71 percent of the case receipts for FY 2019 were accepted under TAS's economic hardship criteria.[30]

FIGURE 3.5[31]

TAS Pre-Refund Wage Verification Hold Receipts
Fiscal Years 2017-2019



To address this increase, TAS created case guidance for returns selected for the PRWVH Program to help TAS employees identify PRWVH issues, determine what actions were needed to resolve the issues, and provide reminders for working PRWVH cases.[32] TAS also encouraged its local offices to use a bulk operations assistance request (OAR) process for PRWVH case receipts, which bundles multiple OARs for multiple cases into one request that TAS sends to the operating division for action.[33]

Finally, TAS tested a triage process of incoming PRWVH cases beginning May 31, 2019, through August 23, 2019. TAS Account Technical Advisors (ATAs) and Analysts reviewed PRWVH cases received daily for selected offices to identify those cases meeting bulk OAR criteria, added the case to the weekly bulk OAR, prepared a letter for the Case Advocate to send to the taxpayer explaining the actions TAS was taking to resolve his or her problem, and updated the Taxpayer Advocate Management Information System (TAMIS) for the Case Advocate. For those cases not meeting bulk OAR criteria, ATAs and Analysts researched the account and provided guidance in the TAMIS History to assist the Case Advocate upon assignment of the case. The triage process resulted in the average number of bulk

30 Data obtained from TAMIS (Oct. 1, 2017; Oct. 1, 2018; Oct. 1, 2019).

31 *Id*.

32 TAS, Welcome Screen article, PRWVH Case Guidance Now Available (Apr. 5, 2019).

33 When TAS lacks the statutory or delegated authority to resolve a taxpayer's problem, it works with the responsible IRS Business Operating Division (BOD) or function to resolve the issue. Generally, TAS uses a Form 12412, Operations Assistance Request (OAR), to request the BOD take the specified action on an account. For the bulk OAR, TAS provided a weekly listing of the cases to RIVO, requesting they be reviewed, and the refund released, thereby saving TAS and the IRS the effort of preparing and tracking each OAR individually.

OAR cases for participating offices to increase from 26 bulk OARs per week to 57 per week, a 119 percent increase in cases identified as meeting bulk OAR criteria.[34]

The selection of a return by Filter X is not the only cause increasing TAS PRWVH receipts. In calendar year 2019, the IRS made several changes to improve the efficiency and effectiveness of the refund fraud program, namely reducing processing times and increasing the accuracy of filter selections.[35] One change impacting Filter X selections involved systemically checking the posting of third-party information daily instead of weekly. Many IRS and TAS employees were not fully aware of the change and referred taxpayers/accepted taxpayers into TAS before allowing the daily matching process a full opportunity to work. From January through April 2019, TAS closed about ten percent of TAS PRWVH cases where the IRS took action to resolve the taxpayer's issue before TAS was able to act on the case.[36] This prompted TAS to issue an IGM implementing a three-week moratorium on accepting Filter X cases into TAS and allowing the IRS to update the IRM so that IRS assistors could identify taxpayer accounts where RIVO had already taken action to release the taxpayer's refund.[37]

To evaluate TAS's increasing PRWVH receipts, TAS Research analyzed all the non-IDT refund fraud cases in the TAS inventory that were related to issues arising out of taxpayers' tax year 2018 returns that were received between January 28 and June 30, 2019 and subsequently closed by the end of August.[38] During this time period, TAS closed 45,236 PRWVH cases, and out of this number, at least 31,973 (71 percent) taxpayers received the refund originally shown on their return.[39] Some of these taxpayers may have waited for their refunds because the IRS does not receive paper W-2 data from the Social Security Administration (SSA) until well after filing season. Therefore, the taxpayer must wait for his or her refund until the IRS receives the third-party data from the SSA or contacts the employer directly and the employer verifies the data.[40]

Other taxpayers may have had withholding from non-wage income, such as unemployment compensation. Non-wage income documents are sent directly to the IRS for processing (not the SSA). Processing delays can occur if the IRS software is unable to read the document or when the payer does not have to file the document until a later date (*e.g.*, payers electronically filing Form 1099-G, which is used to report certain government payments such as unemployment compensation, have until March 31 to send the forms to the IRS). If a taxpayer had withholding from their non-wage income, the refund could be delayed until the IRS verifies the withholding claimed by the taxpayer. In these instances, the IRS has not released the taxpayer's refund, but the taxpayer may not understand the reason for the delay

34 TAS consolidates the bulk OARs listing sent to RIVO weekly for tracking purposes.

35 For a more detailed discussion of the IRS's changes to the refund fraud program, see Most Serious Problem: *Processing Delays: Refund Fraud Filters Continue to Delay Taxpayer Refunds for Legitimately Filed Returns, Potentially Causing Financial Hardship*, *supra*.

36 Data obtained from TAMIS (Oct. 30, 2019).

37 IRS, IGM TAS-13-0419-0004, Interim Guidance on Exclusion from TAS Case Acceptance Criteria Taxpayers Impacted by Pre-Refund Wage Verification Hold – Filter X, (Apr. 2, 2019); IRM 21.5.6.4.35.3.1(4), -R Freeze Phone Procedures for Accounts with Integrity and Verification Operations (IVO) Involvement (Oct. 1, 2019).

38 Data obtained from TAMIS for PRWVH (PCIC and Secondary Core Issue Code (SCIC) 045).

39 Data obtained from TAMIS between January 28, 2019, and June 30, 2019, for PRWVH (PCIC and SCIC 045) compared to data obtained from the IRS Compliance Data Warehouse (CDW) Individual Master File (IMF) Transactions History table and the CDW Individual Returns Transaction File (IRTF) Form 1040 table (Oct. 23, 2019). TAS did not analyze the ultimate refund amount if the taxpayer filed an amended return, the return was not selected for further verification by the IRS, or if the issue resulted from refunds returned as suspicious by a financial institution.

40 For a discussion concerning the delay in receiving paper Forms W-2 from SSA and in the impact on returns selected by Filter X, see Most Serious Problem: *Processing Delays: Refund Fraud Filters Continue to Delay Taxpayer Refunds for Legitimately Filed Returns, Potentially Causing Financial Hardship*, *supra*.

or the process going forward.[41] Upon contacting TAS, the Case Advocate will review the income and withholding information with the taxpayer and educate the taxpayer on what information is needed by the IRS to release the refund.

TAS also found that some taxpayers had mismatches between data on the return and third-party data. This occurs when a taxpayer with a PRWVH issue has made an error when entering the information from his or her W-2 on the tax return or used a paystub to complete the return that does not match the W-2. TAS educates the taxpayer regarding errors on the return, the reasons for those errors, and the impact those errors will have on the refund. After this discussion, the Case Advocate encourages the taxpayer to file an amended return so the taxpayer can receive the portion of refund to which he or she is entitled.[42]

When the IRS is unable to verify the information on a return, the return is assigned to a specific treatment stream. TAS found through a review of its case receipts that taxpayers whose returns had to go to a compliance treatment stream experienced delay. Specifically, of the 309 TAS PRWVH cases received between August 25 and August 31, 2019, 76 percent of the taxpayers waited an average of 141 days from the date the return was filed for the IRS to screen the return to determine if the return needed to go to an additional treatment stream.[43] This means the taxpayer still had to wait for the IRS compliance unit assigned to the return to contact the taxpayer to discuss what information was needed to resolve the taxpayer's issue. As of October 1, 2019, only 36 percent of these taxpayers had been referred to a compliance treatment stream.[44] Predictably, taxpayers experiencing significant delays seek TAS assistance. Throughout the filing season, TAS PRWVH increases were caused by taxpayers needing their refund quickly to resolve economic hardships. As filing season ended, taxpayers contacted TAS because of the IRS's lack of communication and delays in resolving the account issues, a systemic failure. The National Taxpayer Advocate understands the IRS needs to prevent fraud and protect revenue, but the IRS needs to address delays in the screening process that are harming taxpayers.

In Filing Season 2020, RIVO will implement a process to automate most of their screening procedures like Filter X. TAS will continue to analyze case receipts to identify issues arising from RIVO's verification procedures and will share its findings with RIVO.

41 For a more detailed discussion of IRS's communication with taxpayers regarding the status of their return, see Most Serious Problem: *Processing Delays: Refund Fraud Filters Continue to Delay Taxpayer Refunds for Legitimately Filed Returns, Potentially Causing Financial Hardship*, *supra*.

42 TAS does not have the authority to accept returns for processing and in the past, there was no way for the IRS to identify a return involving a TAS taxpayer during normal processing. TAS and the IRS negotiated a process to identify amended returns filed by TAS taxpayers with PRWVH issue to expedite processing so taxpayers experiencing a hardship can avoid further delays and receive the portion of the refund to which they are entitled as soon as possible. Normal IRS amended return processing is 16 weeks. *See* IRM 21.4.1.4(6), Refund Inquiry Response Procedures (Oct. 1, 2019); IRM 13.1.18.6.3, Taxpayers Delivering Returns to TAS and TAS Date Stamp (Feb. 1, 2011).

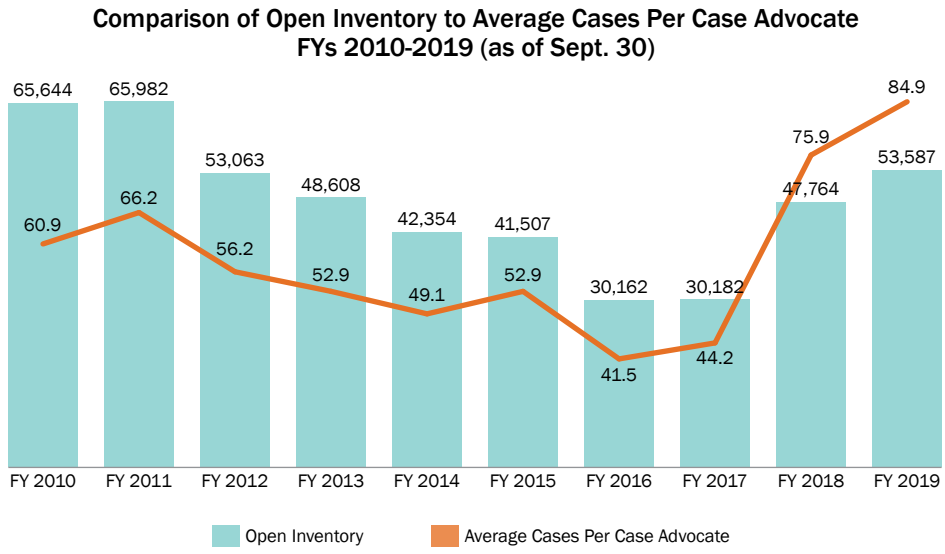
43 TAS found a total of 1,394 cases reflecting a PCIC 045 or SCIC 045. The sample of 309 cases has a 95 percent confidence level with a +/- 4.2 percent margin of error. Data obtained from TAMIS (Sept. 13, 2019).

44 The 95 percent confidence level with a +/- 5.6 percent margin of error. Data obtained from TAMIS (Sept. 13, 2019; Oct. 1, 2019).

EMERGING ISSUE: Decreased Staffing and Attrition Impacts TAS's Ability to Assist Taxpayers

As discussed earlier, TAS received nearly 24,000 more cases in FY 2019 than in FY 2018, an increase of about 11 percent.[45] However, as shown in Figure 3.6, the average number of cases per Case Advocate, 84.9 cases as of September 30, 2019, is the highest it has been in the past ten years.[46] As of September 30, 2010, TAS had 65,644 cases in its inventory with 1,078 Case Advocates to work the cases compared to 2019 where TAS had fewer cases in its inventory (53,587) with 631 Case Advocates to work the cases.[47]

FIGURE 3.6[48]



To compound the issue, TAS is experiencing higher attrition than ever. Approximately one-third of Case Advocates are eligible to retire by the end of 2022.[49] During FY 2019, TAS received additional funding to address increased inventory levels for the first time since FY 2015, and as a result, hired 377 employees, including 221 new Case and Intake Advocates.[50] Increased staffing will help in the long-term, but newly hired employees require training before they are equipped to assist taxpayers on the phone or through casework. Experienced Intake and Case Advocates help train new employees and serve as on-the-job instructors, passing on valuable institutional knowledge. Passing on this experience comes with a cost, as using experienced employees means these same employees have less time to devote to casework. Thus, the number of cases per Case Advocate continued to rise in FY 2019. As a result, TAS will need to continue its hiring efforts in FY 2020.

45 *See* Case Receipt Trends in Fiscal Year 2019, *supra*. Data obtained from TAMIS (Oct. 1, 2018; Oct. 1, 2019).

46 Data obtained from TAMIS (Oct. 1, 2010; Oct. 1, 2011; Oct. 1, 2012; Oct. 1, 2013; Oct. 1, 2014; Oct. 1, 2015; Oct. 1, 2016; Oct. 1, 2017; Oct. 1, 2018; Oct. 1, 2019); TAS Onrolls Tracking Sheet, pay period 19, 2010 through 2019.

47 Data obtained from TAMIS (Oct. 1, 2010; Oct. 1, 2019); TAS Onrolls Tracking Sheet, pay period 19, 2010 and 2019.

48 Data obtained from TAMIS (Oct. 1, 2010; Oct. 1, 2011; Oct. 1, 2012; Oct. 1, 2013; Oct. 1, 2014; Oct. 1, 2015; Oct. 1, 2016; Oct. 1, 2017; Oct. 1, 2018; Oct. 1, 2019); TAS Onrolls Tracking Sheet, pay period 19, 2010 through 2019.

49 IRS, Retirement Projection Statistical Report (Oct. 31, 2019).

50 TAS Gains and Losses Report (pay period 19 of FY 2019).

TAS OPERATIONS ASSISTANCE REQUEST TRENDS

To assist taxpayers more efficiently, the Commissioner of Internal Revenue delegated to the National Taxpayer Advocate certain tax administration authorities that do not conflict with or undermine TAS's unique statutory mission but allow TAS to resolve routine problems.[51] When TAS lacks the statutory or delegated authority to resolve a taxpayer's problem, it works with the responsible IRS Business Operating Division (BOD) or function to resolve the issue, a process necessary in 66 percent of TAS cases in FY 2019.[52] After independently reviewing the facts and circumstances of a case and communicating with the taxpayer, TAS issues OARs to convey a recommendation or request that the IRS take action to resolve the issue and provides documentation that supports it. The OAR also serves as an advocacy tool by:

- Giving the IRS a second chance to resolve the issue;
- Giving TAS and the BOD a chance to resolve the issue without having to elevate it; and
- Documenting systemic trends that could lead to improvements in IRS processes.

All BODs agree to work TAS cases on a priority basis and expedite the process for taxpayers whose circumstances warrant immediate handling.[53] Form 12412, Operations Assistance Request, includes an "expedite" box that TAS Case Advocates may check when the BOD needs to act immediately to relieve the taxpayer's hardship. Figure 3.7 shows the number of "expedite" OARs TAS issued to each BOD in FY 2019.

FIGURE 3.7, Expedited and Non-Expedited OARs Issued by BOD, FY 2019[54]

Business Operating Division	FY 2019 OARS Issued Requesting Expedite Action	FY 2019 OARs Issued Without Expedite Request	FY 2019 Total OARs Issued
Appeals	196	389	585
Criminal Investigation	56	100	156
Large Business & International	165	547	712
Small Business/Self-Employed	13,282	17,712	30,994
Tax Exempt/ Government Entities	247	257	504
Wage & Investment	101,816	94,085	195,901
Total	**115,762**	**113,090**	**228,852**

51 IRM 1.2.2.12.2(1), Delegation Order 13-2 (Rev. 1), Authority of the National Taxpayer Advocate to Perform Certain Tax Administration Functions (Mar. 3, 2008).

52 TAS closed 154,336 cases with OARs in FY 2019. TAS can issue more than one OAR on a case. Data obtained from TAMIS (Oct. 1, 2019). If the IRS already has an open control on an account, TAS must use the OAR process and request that the IRS function take the requested actions.

53 TAS has a Service Level Agreement (SLA) with each BOD. Each SLA states the terms of engagement between TAS and the BODs, as agreed to by their respective executives, including timeframes and processes for communication in the OAR and Taxpayer Assistance Order (TAO) processes to assure that the IRS treats TAS cases with the agreed upon level of priority.

54 Data obtained from TAMIS (Oct. 1, 2019).

TAS generally sends one or more OARs on individual cases to secure action by the IRS, but TAS may use a single OAR to work the same issue for multiple taxpayers, which TAS calls a "bulk OAR." In FY 2019, TAS used a bulk OAR process to resolve 3,852 PRWVH cases.[55] TAS also worked with the Small Business/Self-Employed (SB/SE) Collection Division to develop bulk OAR procedures in cases where taxpayers were suffering or about to suffer a severe hardship because of the government shutdown.[56] These cases were instances where the taxpayer's hardship was created by the shutdown or where the shutdown exacerbated an existing hardship. TAS and SB/SE prioritized and addressed 60 of the most urgent OARs related to lien release/withdrawals, levy releases, and return of levy proceeds.[57]

TAS Uses Taxpayer Assistance Orders to Advocate Effectively

The Taxpayer Assistance Order (TAO) is a powerful statutory tool, delegated by the National Taxpayer Advocate to Local Taxpayer Advocates (LTAs) to resolve taxpayer cases.[58] LTAs issue TAOs to order the IRS to take certain actions, cease certain actions, or refrain from taking certain actions.[59] A TAO may also order the IRS to expedite consideration of a taxpayer's case, reconsider its determination in a case, or review the case at a higher level.[60] If a taxpayer faces significant hardship and the facts and law support relief, an LTA may issue a TAO when the IRS refuses or otherwise fails to take the action TAS requested to resolve the case.[61] Once TAS issues a TAO, the BOD must comply with the request or appeal the issue for resolution at higher management levels.[62] Only the National Taxpayer Advocate, Commissioner of Internal Revenue, or Deputy Commissioner may rescind a TAO by the National Taxpayer Advocate, and unless that rescission occurs, the BOD must abide by the action(s) ordered in the TAO.[63]

In FY 2019, TAS issued 617 TAOs, including 28 in cases where the IRS failed to respond to an OAR, further delaying relief to taxpayers. Of these 28 TAOs, the IRS complied with 57 percent of them in ten days or less, meaning the IRS did not have a significant disagreement as to the resolution and the taxpayers could have had relief sooner if the IRS had been more responsive to TAS.[64] Figure 3.8A reflects the results of all FY 2019 TAOs. Figure 3.8B shows the TAOs issued by fiscal year.

55 TAS consolidates the bulk OARs listing sent to RIVO weekly for tracking purposes. See Pre-Refund Wage Verification Hold (PRWVH), *supra*, for a discussion of how the bulk OAR process helped resolve PRWVH issues.

56 The 35-day partial government shutdown began December 22, 2018.

57 Data obtained from TAMIS (Mar. 1, 2019; Mar. 25, 2019). SB/SE Collection and TAS ended the shutdown OAR procedures on March 15, 2019. For a detailed discussion of the impact the government shutdown had on TAS operations, see National Taxpayer Advocate Fiscal Year 2020 Objectives Report to Congress 40-44 (*Impact of the 35-Day Partial Government Shutdown on the Taxpayer Advocate Service*).

58 IRC § 7811(f) states that for purposes of this section, the term "National Taxpayer Advocate" includes any designee of the National Taxpayer Advocate. See IRM 1.2.2.12.1 Delegation Order 13-1 (Rev. 1), Authority to Issue, Modify or Rescind Taxpayer Assistance Orders (Mar. 17, 2009).

59 IRC § 7811(b)(2); Treas. Reg. § 301.7811-1(c)(2); IRM 13.1.20.3, Purpose of Taxpayer Assistance Orders (Dec. 15, 2007).

60 Treas. Reg. § 301.7811-1(c)(3); IRM 13.1.20.3, Purpose of Taxpayer Assistance Orders (Dec. 15, 2007).

61 IRC § 7811(a)(1)(A); Treas. Reg. § 301.7811-1(a)(1) and (c).

62 IRM 13.1.20.5(2), TAO Appeal Process (Dec. 9, 2015).

63 IRC § 7811(c)(1); Treas. Reg. § 301.7811-1(b).

64 Data obtained from TAMIS (Oct. 1, 2019).

FIGURE 3.8A, Actions Taken on FY 2019 TAOs Issued[65]

Action	Total
IRS complied with the TAO	498
IRS complied after the TAO was modified	19
TAS rescinded the TAO	58
TAO pending (in process)	42
Total	**617**

FIGURE 3.8B, TAOs Issued to the IRS, FYs 2014-2019[66]

Fiscal Year	TAOs Issued
2014	362
2015	236
2016	144
2017	166
2018	1,489
2019	617

The examples presented in this report illustrate issues raised in cases where TAS issued TAOs to obtain relief. In issuing TAOs, TAS protects taxpayers' *rights to pay no more than the correct amount of tax, to quality service, to finality*, and *to a fair and just tax system*.[67] To comply with IRC § 6103, which generally requires the IRS to keep taxpayers' returns and return information confidential, the details of the fact patterns have been modified or redacted. As noted in certain examples, however, TAS has obtained the written consent of the taxpayer to provide more detailed facts.

Taxpayer Assistance Orders to Resolve Passport Issues

In FY 2019, TAS issued 278 TAOs to advocate for taxpayers facing revocation, limitation, or denial of a passport under IRC § 7345.[68] In 2018, the IRS began implementing the legislative-directed program to certify taxpayers' seriously delinquent tax debts to the Department of State. The statute provides exceptions to passport certification for certain debts under specific circumstances.[69] The National Taxpayer Advocate accepts cases from taxpayers facing passport issues as a matter of public policy.[70] These TAOs involved taxpayers who were unable to travel for work, medical treatment, or significant

65 Data obtained from TAMIS (Oct. 1, 2019).

66 Data obtained from TAMIS (Oct. 1, 2014; Oct. 1, 2015; Oct. 1, 2016; Oct. 1, 2017; Oct. 1, 2018; Oct. 1, 2019).

67 *See* TBOR, www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in TBOR are also codified in the IRC. *See* IRC § 7803(a)(3).

68 In 2015, Congress passed the Fixing America's Surface Transportation (FAST) Act, which requires the Department of State to deny an individual's passport application and allows the Department of State to revoke or limit an individual's passport if the IRS has certified the individual as having a seriously delinquent tax debt. FAST Act, Pub. L. No. 114–194, Div. C. Title XXXII, § 32101, 129 Stat. 1312, 1729-1733 (2015) (codified as IRC § 7345).

69 See IRC § 7345(b)(2) for statutory exceptions and IRM 5.19.1.5.19.4, Discretionary Certification Exclusions (Dec. 26, 2017) for discretionary exclusions created by the IRS.

70 *See* IGM TAS-13-0219-0003, Interim Guidance on Accepting Cases Under TAS Case Criteria 9, Public Policy (Feb. 21, 2019).

life events (*e.g.*, marriages and funerals of immediate family). TAS also issued 165 additional TAOs on passport cases to expedite or facilitate actions including:[71]

- Currently Not Collectible determinations;
- Establishment of acceptable debt repayment through installment agreements;
- Consideration of offers in compromise to resolve the debt;
- Consideration of audit reconsiderations to reduce the amount due;
- Submission of original and amended returns to reduce the amount due and fulfill filing obligations; and
- Penalty relief, bankruptcy, payment transfers, and other account-related actions impacting collection of the balances due.

TAS's efforts resulted in bringing these taxpayers with seriously delinquent tax debts back into communication with the IRS to address their balances due and compliance issues, resulting in long-term resolution for both the taxpayer and the IRS.

Taxpayer Assistance Orders to Examination Functions

In FY 2019, TAS issued 74 TAOs to examination units for issues including EITC, audit reconsiderations, actions to complete open audits of original returns, and penalty abatements.[72] Specifically, in five (16 percent) of the 32 audit reconsideration TAOs, the examination had been concluded, and the IRS had determined that all or a portion of the tax and penalties should be abated. However, the IRS failed to input the adjustments, or input them incorrectly, leaving the taxpayers with incorrect balances due, subject to collection action. Without TAS's involvement and use of the TAO to ensure the adjustments were properly made, these taxpayers would have been denied their *rights to finality, quality service, to pay no more than the correct of amount of tax*, and *to a fair and just tax system*.[73]

Taxpayer Assistance Orders on Collection Issues

In FY 2019, TAS issued 175 TAOs in collection cases where the IRS did not initially agree with TAS's recommendations. Of those 175 TAOs, 140 were complied with, meaning the IRS's negative responses to TAS's requests unnecessarily delayed resolution, further harming the taxpayers when there was no material disagreement on the resolution.[74] For example, the IRS continued to apply payments from the taxpayer's Social Security benefits under the Federal Payment Levy Program after declaring the accounts uncollectible because the IRS failed to remove the indicator that includes the account in this automated program.[75] TAS used the TAO to return the levy proceeds collected after the taxpayer had proven an inability to pay, protecting the taxpayer's *right to a fair and just tax system*.[76]

71 The 165 cases may also be included in the Examination, Collection, and Account Issues categories discussed below. Data obtained from TAMIS (Oct. 1, 2019).

72 *Id.*

73 *See* TBOR, www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in TBOR are also codified in the IRC. *See* IRC § 7803(a)(3).

74 Data obtained from TAMIS (Oct. 1, 2019).

75 In this instance, the taxpayer has provided written consent under IRC § 6103(c) for the Acting National Taxpayer Advocate to use facts specific to the taxpayer's case. Release signed by the taxpayer on Aug. 27, 2019 (on file with TAS).

76 *See* TBOR, www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in TBOR are also codified in the IRC. *See* IRC § 7803(a)(3).

Taxpayer Assistance Orders to Resolve Account Issues

In FY 2019, TAS issued 52 TAOs to resolve account and return processing issues, and the IRS complied with 43 of the TAOs, rescinded five, and four remain open.[77] There were 16 TAOs issued to resolve amended return processing issues; in five of those cases (31 percent), the TAO had to be issued after multiple OARs were rejected because the IRS could not agree on which unit was responsible for taking the action, which was delaying relief to taxpayers.[78] TAS issued the TAOs to get the IRS to take responsibility for handling the amended return and assign the work to a specific unit, so that these taxpayers' *rights to finality, to quality service, to pay no more than the correct of amount of tax,* and *to a fair and just tax system* would be protected.[79]

In another case, a taxpayer used a link through the IRS.gov website to submit an electronic payment on a balance due account. The taxpayer wanted to make a partial payment, but the payment that was deducted from the taxpayer's account was thousands more than the payment the taxpayer intended to make. The deducted payment wiped out the balance in her account, leaving her unable to pay necessary living expenses. The IRS directed her to her financial institution, which was unable to resolve the issue and denied her claim, directing her back to the IRS. The IRS has no procedures for returning inadvertent voluntary payments, only procedures for returning involuntary payments (levy proceeds or offsets) based on hardship. TAS used the TAO to advocate for a return of the inadvertent voluntary overpayment on the basis of hardship and identified this as a systemic problem. The IRS should have a process to address inadvertent errors to protect the taxpayer's *right to quality service*, the *right to challenge the IRS's position and be heard*, and the *right to a fair and just tax system*.[80]

TAS USES TAXPAYER ADVOCATE DIRECTIVES TO ADVOCATE FOR CHANGE

Section 1301 of the Taxpayer First Act amended IRC § 7803(c) the process for the IRS to respond to a Taxpayer Advocate Directive (TAD), how the National Taxpayer Advocate may appeal a denied TAD, and a reporting requirement for any TADs not honored by the IRS. Delegation Order 13-3 provides the National Taxpayer Advocate with the authority to issue a TAD.[81] TADs mandate that the IRS make certain administrative or procedural changes to improve a process or grant relief to groups of taxpayers (or all taxpayers).[82] The authority to issue a TAD is delegated *solely* to the National Taxpayer Advocate and *may not be redelegated*. TADs are limited to situations in which the National Taxpayer Advocate has previously requested, in writing, a change to improve a functional process or grant relief to a group of taxpayers. TADs do not interpret law and will only be used when the National Taxpayer Advocate believes specific actions are necessary to:

- Protect the rights of taxpayers;
- Ensure equitable treatment of taxpayers; or
- Provide an essential service to taxpayers.

77 Data obtained from TAMIS (Oct. 1, 2019).

78 *Id*.

79 *See* TBOR, www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in TBOR are also codified in the IRC. *See* IRC § 7803(a)(3).

80 In this instance, the taxpayer has provided written consent under IRC § 6103(c) for the Acting National Taxpayer Advocate to use facts specific to the taxpayer's case. Release signed by the taxpayers on August 26, 2019 and on file with TAS. *Id*.

81 IRC § 7803(c)(5); IRM 1.2.2.12.3, Delegation Order 13-3 (formerly DO-250, Rev. 1), Authority to Issue Taxpayer Advocate Directives (Jan. 17, 2011).

82 Pursuant to IRC § 7803(c)(2)(B)(ii)(VIII), the National Taxpayer Advocate will identify, in her Annual Report to Congress, any TAD which was not honored by the IRS in a timely manner.

The National Taxpayer Advocate did not issue a TAD in FY 2019.

CONGRESSIONAL CASE TRENDS

Taxpayers often turn to their congressional representatives when faced with IRS issues. The congressional representatives refer these taxpayers to TAS, which is responsible for responding to tax account inquiries sent to the IRS by members of Congress. Figure 3.9 reflects congressional case receipts and TAS receipts from other contacts.

FIGURE 3.9[83]

Comparison of TAS Congressional Receipts to Total TAS Case Receipts, FYs 2013-2019

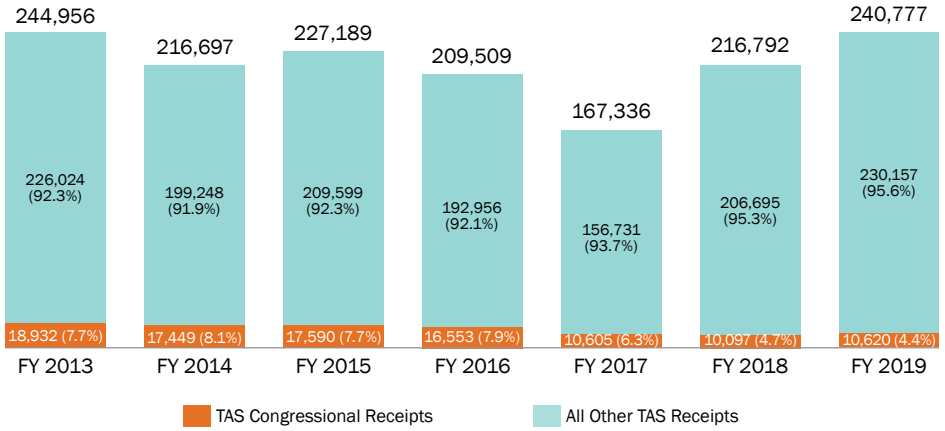


Figure 3.10 shows the top ten Primary Core Issue Codes (PCICs) causing taxpayers to seek the assistance of their congressional representatives. PRWVH receipts increased by nearly 72 percent and EITC receipts increased by nearly 12 percent.[84] These trends followed the overall TAS increases in receipts for these issues.[85]

83 Data obtained from TAMIS (Oct. 1, 2013; Oct. 1, 2014; Oct. 1, 2015; Oct. 1, 2016; Oct. 1, 2017; Oct. 1, 2018; Oct. 1, 2019).

84 Data obtained from TAMIS (Oct. 1, 2018; Oct. 1, 2019).

85 *Id.*

FIGURE 3.10, TAS Top Ten Congressional Receipts by PCICs for FY 2019 Compared to FY 2018[86]

Rank	Issue Description	FY 2018	FY 2019	Percent Change
1	Pre-Refund Wage Verification Hold	929	1,597	71.9%
2	Other Refund Inquiries and Issues	509	577	13.4%
3	Processing Amended Returns	399	462	15.8%
4	Installment Agreements	321	415	29.3%
5	Application for Exempt Status	353	410	16.1%
6	Processing Original Returns	440	408	-7.3%
7	Transcript Requests	546	394	-27.8%
8	Failure to File and Failure to Pay Penalties	309	324	4.9%
9	Unpostables and Rejects	319	322	0.9%
10	EITC	283	316	11.7%
Other Issues		**5,689**	**5,395**	**-5.2%**
Total Congressional Receipts		**10,097**	**10,620**	**5.2%**

86 Data obtained from TAMIS (Oct. 1, 2018; Oct. 1, 2019).

TAS Research and Related Studies 1

Study of Subsequent Compliance of Taxpayers Who Received Educational Letters From the National Taxpayer Advocate

EXECUTIVE SUMMARY

This study expands upon two studies, described in the National Taxpayer Advocate's 2016 and 2017 Annual Reports to Congress, of taxpayers who received educational letters from the National Taxpayer Advocate in January 2016 or January 2017.[1] The National Taxpayer Advocate sent the letters to taxpayers who appeared to have claimed the Earned Income Tax Credit (EITC) in error because they did not meet the relationship or residency requirements, or another taxpayer claimed EITC with respect to the same child. The letters explained the requirements for claiming EITC with respect to a qualifying child and advised which requirement the taxpayer did not appear to meet.

In 2017, a separate group of taxpayers who appeared to have claimed EITC without meeting the residency test received a letter that included an extra help phone number the taxpayer could call to speak with a Taxpayer Advocate Service (TAS) employee about his or her eligibility for EITC. This study considers the effect of the TAS letters on taxpayers' compliance in claiming EITC in the years following the year in which they received TAS's letter.

Among this year's study findings:

- Where the error consisted of not meeting the relationship test, the TAS letter enhanced compliance for all three years following the year the taxpayer received the letter; and
- Where the error consisted of not meeting the residency test, the TAS letter that included an extra help phone number enhanced compliance for both years following the year the taxpayer received the letter.[2]

INTRODUCTION

Internal Revenue Code (IRC) § 32 provides for the EITC, a refundable credit available to low-income workers and families. During 2019, 25 million eligible workers and families received about $61 billion in EITC.[3] The amount of EITC available is a function not only of a taxpayer's earned income but also the number of "qualifying children" in the household.[4] A "qualifying child" is a person who, among other things, meets age requirements, bears a specified relationship to the taxpayer, and has the same principal residence as the taxpayer for more than half the year.[5] Taxpayers usually receive EITC with respect to qualifying children, although taxpayers who did not have a qualifying child accounted for nearly 25 percent of all 2018 tax returns claiming EITC that the IRS processed in 2019.[6]

1 National Taxpayer Advocate 2016 Annual Report to Congress vol. 2, 32-52 (*Study of Subsequent Filing Behavior of Taxpayers Who Claimed Earned Income Tax Credits (EITC) Apparently in Error and Were Sent an Educational Letter From the National Taxpayer Advocate*); National Taxpayer Advocate 2017 Annual Report to Congress vol. 2, 15-39 (*Study of Subsequent Filing Behavior of Taxpayers Who Claimed Earned Income Tax Credits (EITC) Apparently In Error and Were Not Audited But Were Sent an Educational Letter From the Taxpayer Advocate Service, Part 2: Validation of Prior Findings and the Effect of an Extra Help Phone Number and a Reminder of Childless-Worker EITC*). The statistical information in this research study was not provided or reviewed by the Secretary under IRC § 6108(d). *See* IRC § 7803(c)(2)(B)(ii)(XII).

2 As discussed below, the TAS letter with the extra help phone number was sent for the first time as part of the 2017 study. Thus, we had data about the effect of this letter for only two years following the year in which it was sent. As discussed below, very few — 35 — taxpayers actually called the extra help phone number and spoke to a TAS employee.

3 IRS, EITC Fast Facts, https://www.eitc.irs.gov/partner-toolkit/basic-marketing-communication-materials/eitc-fast-facts/eitc-fast-facts (Nov. 18, 2019).

4 IRC § 32(c)(1) sets out the definition of "eligible individual" and IRC § 32(b) contains the calculation of the amount of allowable credit.

5 IRC §§ 32(c)(3); 152(c).

6 IRS, Compliance Data Warehouse (CDW), Individual Returns Transaction File (IRTF) as of 2019 cycle 26.

The IRS generally selects returns that claim EITC for audit using the Dependent Database (DDb) workload selection tool. The DDb combines data from IRS and third-party sources, compares returns against this data, and scores returns for the probability of noncompliance, using filters for characteristics that are strong indicators of noncompliance.[7]

Of the returns filed for tax year 2018 on which EITC was claimed, DDb identified over 6.5 million returns as potentially noncompliant, including over 1.4 million returns that broke a DDb rule because the child claimed for EITC purposes appeared to not meet the residency or relationship rules for claiming EITC, or more than one taxpayer claimed the same qualifying child.[8] However, the IRS only has the resources to audit a fraction of these EITC claims that appear to be erroneous. EITC has an improper payment rate of about a quarter of the EITC dollars disbursed by the IRS.[9]

BACKGROUND

For the 2016 study, TAS identified a representative sample of taxpayers who were not audited but who, according to the DDb, erroneously claimed EITC on their tax year 2014 returns. The error consisted of claiming EITC with respect to a qualifying child when:

- The relationship test did not appear to have been met;
- The residency test did not appear to have been met; or
- Another taxpayer claimed EITC with respect to the same child (*i.e.*, there were duplicate claims).[10]

In January 2016, before tax year 2015 returns were due, the National Taxpayer Advocate sent taxpayers in the sample a letter that explained the requirements for claiming EITC and identified the error the taxpayers appeared to have made on their 2014 returns.

TAS then studied the extent to which taxpayers who received the TAS letter properly claimed EITC on their tax year 2015 returns, compared to two groups:

- A representative sample of unaudited taxpayers who also appeared to have claimed EITC in error on their 2014 returns for one of the same three reasons (the relationship or residency tests were not met, or there was a duplicate claim), but who were not sent a TAS letter (*i.e.*, the control group); and
- A representative sample of taxpayers who appeared to have claimed EITC in error on their 2014 returns for one of the same three reasons, and whose 2014 return was audited.[11]

For the 2017 study, TAS identified a representative sample of taxpayers who were not audited but who, according to the DDb, erroneously claimed EITC on their tax year 2015 returns for one of the same

7 *See* Department of the Treasury, *Report to Congress on Strengthening Earned Income Tax Credit Compliance through Data Driven Analysis* 14 (July 5, 2016), https://www.treasury.gov/resource-center/tax-policy/Documents/Report-EITC-Data-Driven-Compliance-2016.pdf.

8 Data is from a Business Object interface with the DDb, showing returns claiming EITC scored by the DDb.

9 *See, e.g.*, Department of Treasury, *Agency Financial Report (AFR) Fiscal Year (FY) 2018* at 194 (Nov. 2018), estimating an EITC improper payment rate of 25.06 percent.

10 National Taxpayer Advocate 2016 Annual Report to Congress vol. 2, at 32 (*Study of Subsequent Filing Behavior of Taxpayers Who Claimed Earned Income Tax Credits (EITC) Apparently in Error and Were Sent an Educational Letter From the National Taxpayer Advocate*).

11 Audited taxpayers were not sent TAS letters. Taxpayers whose TAS letters were returned as undeliverable, or were deceased, were excluded from the samples.

three reasons (failing to meet the relationship or residency tests, or the existence of a duplicate claim).[12] In January 2017, before tax year 2016 returns were due, the National Taxpayer Advocate sent these taxpayers educational letters that were similar to the previous year's letters. Part of the purpose of the study was to corroborate the findings of the prior year study, which primarily showed a statistically valid increase in compliance among the group of taxpayers who had received a TAS letter after apparently violating DDb *relationship* rules.

In addition, in January 2017, TAS sent a separate letter to a group of unaudited taxpayers who appeared to have erroneously claimed EITC on their 2015 returns because the *residency* test was not met.[13] The letter to this group was the same as the letter sent to other taxpayers who claimed EITC without appearing to have met the residency test, except that this letter included a toll-free number taxpayers could call to speak to a TAS employee about their eligibility for EITC.

TAS then studied the extent to which taxpayers who received the TAS letter (including the letter with the extra help phone line sent to taxpayers who appeared not to meet the residency test) properly claimed EITC on their tax year 2016 returns, compared to two groups:

- A representative sample of unaudited taxpayers who also appeared to have claimed EITC on their 2016 returns in error for one of the same three reasons (the relationship or residency tests were not met, or there was a duplicate claim) but who were not sent a TAS letter (*i.e.*, the control group); and
- A representative sample of taxpayers who appeared to have claimed EITC in error on their 2015 returns for one of the same three reasons, and the 2015 returns had been audited.[14]

Among other things, the 2016 and 2017 studies showed that taxpayers' improved compliance behavior depended on the type of DDb rule that was broken. The TAS letter was particularly effective in averting erroneous EITC claims where the apparent error was that the relationship test had not been met. For example, both reports found that sending the TAS letter to all taxpayers whose returns appeared to be erroneous because the relationship test was not met would have averted about $50 million of erroneous EITC claims.[15]

The 2017 study also showed that the TAS letter was effective in averting erroneous claims where the residency test appeared not to have been met, but only where the letter included the additional phone

12 National Taxpayer Advocate 2017 Annual Report to Congress vol. 2, at 15 (*Study of Subsequent Filing Behavior of Taxpayers Who Claimed Earned Income Tax Credits (EITC) Apparently In Error and Were Not Audited But Were Sent an Educational Letter From the Taxpayer Advocate Service, Part 2: Validation of Prior Findings and the Effect of an Extra Help Phone Number and a Reminder of Childless-Worker EITC*).

13 All of the TAS letters sent in 2017 also reminded taxpayers they could be eligible for EITC even if they did not have a qualifying child. The 2017 study found that some taxpayers who received the TAS letter claimed the childless-worker credit more frequently on their 2016 returns than they had on their 2015 returns. National Taxpayer Advocate 2017 Annual Report to Congress vol. 2, 32-33 (*Study of Subsequent Filing Behavior of Taxpayers Who Claimed Earned Income Tax Credits (EITC) Apparently In Error and Were Not Audited But Were Sent an Educational Letter From the Taxpayer Advocate Service, Part 2: Validation of Prior Findings and the Effect of an Extra Help Phone Number and a Reminder of Childless-Worker EITC*). For the 2019 study, we did not explore the extent to which recipients of a TAS letter claimed the childless-worker EITC in the following years.

14 National Taxpayer Advocate 2017 Annual Report to Congress vol. 2, 15-39 (*Study of Subsequent Filing Behavior of Taxpayers Who Claimed Earned Income Tax Credits (EITC) Apparently In Error and Were Not Audited But Were Sent an Educational Letter From the Taxpayer Advocate Service, Part 2: Validation of Prior Findings and the Effect of an Extra Help Phone Number and a Reminder of Childless-Worker EITC*).

15 National Taxpayer Advocate 2016 Annual Report to Congress vol. 2, at 32 (*Study of Subsequent Filing Behavior of Taxpayers Who Claimed Earned Income Tax Credits (EITC) Apparently in Error and Were Sent an Educational Letter From the National Taxpayer Advocate*), reporting that $47 million of these erroneous claims could have been averted.

number. The 2017 study found that sending that letter to all taxpayers whose 2015 returns appeared to be erroneous because the residency test was not met would have averted more than $44 million of erroneous EITC claims.[16]

In 2019, we studied the effect of the previous years' letters on the same taxpayers' compliance with respect to claiming EITC. Specifically, we studied whether the 2016 TAS letter continued to be effective by analyzing returns the recipients filed for the following three tax years — 2016, 2017, and 2018. We studied whether the 2017 TAS letters continued to be effective by analyzing the returns the recipients filed for the following two tax years — 2017 and 2018.

RESEARCH QUESTIONS

1. **Whether the tax returns filed by recipients of TAS letters were more compliant, in terms of claiming EITC in the following two or three years, compared to:**
   a. **Tax returns filed by unaudited taxpayers who were not sent a TAS letter (*i.e.*, taxpayers in the control group); and**
   b. **Tax returns filed by taxpayers who were audited; and**

2. **Whether compliance in later years depended on whether the error the TAS letter identified was:**
   a. **Not meeting the relationship test;**
   b. **Not meeting the residency test; or**
   c. **The existence of a duplicate claim.**

METHODOLOGY

As described above, TAS began testing the effect of issuing an educational letter to taxpayers whose returns broke only one of three DDb rules (*i.e.*, the relationship or residency tests were not met, or there was a duplicate claim). Specifically, for both of the prior studies, TAS selected, for each type of rule break, a representative sample of approximately 2,400 taxpayers whose returns were unaudited but had broken the corresponding DDb rule for a total sample selection of about 7,200 returns. For the 2017 study, in addition to these sample groups, we selected a representative sample of approximately 1,200 taxpayers who appeared to not meet the residency test to whom we sent a letter that contained an additional help phone number, for a total sample selection of about 8,400 returns. Each of the three sample groups were mailed a letter, corresponding to the specific DDb rule break issue, which provided a plain summary of the EITC eligibility rule the taxpayer appeared to have not met.

A comparable control group of about twice the size of the sample groups was also selected for each of the three types of DDb rule breaks. Finally, three groups of audited taxpayers with corresponding

16 National Taxpayer Advocate 2017 Annual Report to Congress vol. 2, at 24 (*Study of Subsequent Filing Behavior of Taxpayers Who Claimed Earned Income Tax Credits (EITC) Apparently In Error and Were Not Audited But Were Sent an Educational Letter From the Taxpayer Advocate Service, Part 2: Validation of Prior Findings and the Effect of an Extra Help Phone Number and a Reminder of Childless-Worker EITC*), reporting that $53 million of these erroneous claims could have been averted.

characteristics were also selected to compare to both the group receiving the TAS letters and the control group.[17]

TAS had hoped to continue testing these letters on a sample of taxpayers who violated DDb rules in tax year 2016; however, TAS was unable to send the letters prior to the beginning of the filing season for tax year 2017 returns. A 2018 government shutdown prevented TAS from sending similar letters the following year in 2019 in time for the filing season for tax year 2018 returns.

This study uses the same sample taxpayers from the two prior studies and explores the EITC compliance of these taxpayers in the subsequent tax years. We examined subsequent EITC compliance for each of the tax years due after the year in which TAS mailed the initial study letter.

We analyzed the data in terms of the number of tax years that elapsed from receipt of the TAS letter until the taxpayer filed a return. Where possible, for each type of rule break we combined the data about the three groups of taxpayers who were part of the first TAS study (in 2016) with data about the three groups of taxpayers who were part of the second TAS study (in 2017). For example:

- To analyze compliance one year after receipt of the TAS letters, we combined the data about tax year 2016 returns filed by taxpayers who were part of the first TAS study with data about tax year 2017 returns filed by taxpayers who were part of the second TAS study; and
- To analyze compliance two years after receipt of the TAS letters, we combined the data about tax year 2017 returns filed by taxpayers who were part of the first TAS study with data about tax year 2018 returns filed by taxpayers who were part of the second TAS study.[18]

This study reports on the percentage of taxpayers in the test, control, and audit groups who broke *any* DDb rule and who broke *the same* DDB rule for taxpayers in the residency and relationship groups. We separately discuss the subsequent compliance of taxpayers who broke a residency rule and received an educational letter with a telephone number to call for more assistance. We provide the percentages of taxpayers who filed returns with any DDb rule breaks as well as the percentages that filed returns with the same DDb rule break identified in the TAS letter.

Unless otherwise noted, all findings are statistically significant at the 95 percent confidence level.[19] Because so few taxpayers continued to make duplicate claims in subsequent years, we do not provide detailed findings on the subsequent compliance of taxpayer with duplicate dependent DDb rule breaks.

17 For a detailed description of the methodology adopted in the earlier studies, see National Taxpayer Advocate 2016 Annual Report to Congress vol. 2, at 36 (*Study of Subsequent Filing Behavior of Taxpayers Who Claimed Earned Income Tax Credits (EITC) Apparently in Error and Were Sent an Educational Letter From the National Taxpayer Advocate*); National Taxpayer Advocate 2017 Annual Report to Congress vol. 2, at 19 (*Study of Subsequent Filing Behavior of Taxpayers Who Claimed Earned Income Tax Credits (EITC) Apparently In Error and Were Not Audited But Were Sent an Educational Letter From the Taxpayer Advocate Service, Part 2: Validation of Prior Findings and the Effect of an Extra Help Phone Number and a Reminder of Childless-Worker EITC*).

18 The tax year 2018 returns we analyzed in this study were those filed by cycle 26 of 2019, which is approximately the end of June 2019.

19 We did not attempt to determine statistical significance for the data shown in Figures 4.1.2 and 4.1.4, pertaining to the reduction in noncompliance within each group over the three year period.

DATA COLLECTION

TAS Research reviewed IRS records to determine how many taxpayers who received a TAS letter filed a return for 2016, 2017, and 2018 and claimed EITC with respect to a child.

The prior TAS EITC educational letter studies only analyzed the taxpayers' level of compliance for the return that was due shortly after TAS mailed the educational letter. This study quantifies the EITC compliance of these same taxpayers for tax returns due in the years after TAS mailed the educational letter. For each return these taxpayers filed in the years after the taxpayer received the TAS educational letter, TAS researched:

- How many taxpayers appeared to have claimed EITC erroneously because the return broke a DDb rule including relationship or residency rules, or was a duplicate claim; and
- Of the returns that broke a DDb rule, how many appeared to break the same DDb rule as that identified in the TAS letter.

TAS Research collected the same information about taxpayers:

- Who broke the same DDb rules in the same year as those who received the TAS letter, but who were not sent a TAS letter and were not audited (*i.e.*, the control group); and
- Who broke the same DDb rules in the same years as those who received the TAS letter, and who were audited.

FINDINGS

1. In All Three Years Following the Year in Which a TAS Letter Advised That the EITC Claim Appeared Erroneous Because the Relationship Test Had Not Been Met, Taxpayers Who Received the Letters Filed Returns That Were More Compliant Than the Returns of Taxpayers in the Control Group

As discussed above, some taxpayers received a TAS letter advising them that they apparently erred in claiming EITC because the relationship test had not been met. Some taxpayers received the letter in 2016 and some in 2017. There were 2,202 taxpayers in this group in the 2016 study and 2,309 taxpayers in this group in the 2017 study. The combined results are presented below.

A. Returns Filed One Year After the TAS Letter Advised That the Apparent Error Consisted of Not Meeting the Relationship Test

Of the returns filed by taxpayers in the year after they received a TAS letter (*i.e.*, tax year 2016 returns for taxpayers who received the letter in 2016, and tax year 2017 returns for taxpayers who received the letter in 2017):

i. 74.4 percent appeared to have claimed EITC in error. In contrast, 77.3 percent of returns filed by taxpayers in the control group, but only 71.3 percent of returns filed by audited taxpayers, appeared to claim EITC in error; and

ii. 59.4 percent appeared to have claimed EITC in error because the relationship test had not been met (*i.e.*, the return contained the same error identified in the TAS letter). In contrast, 66.7 percent of returns filed by taxpayers in the control group, but only 46.6 percent of returns filed by taxpayers who had been audited, appeared to contain the same error.

Thus, taxpayers who received the TAS letter filed returns that were more compliant with respect to EITC for the following tax year, compared to control group taxpayers. However, returns filed by audited taxpayers were more compliant than returns filed by taxpayers in either of the other two groups.

B. Returns Filed Two Years After the TAS Letter Advised That the Apparent Error Consisted of Not Meeting the Relationship Test

Of the returns filed by taxpayers two years after they received a TAS letter (*i.e.*, tax year 2017 returns for taxpayers who received the letter in 2016, and tax year 2018 returns for taxpayers who received the letter in 2017):

i. 69.7 percent appeared to have claimed EITC in error. In contrast, 72.7 percent of returns filed by taxpayers in the control group, but only 66.7 percent of returns filed by audited taxpayers, appeared to claim EITC in error; and

ii. 52.2 percent appeared to have claimed EITC in error because the relationship test had not been met (*i.e.*, the return contained the same error identified in the TAS letter). In contrast, 58.5 percent of returns filed by taxpayers in the control group, but only 40.3 percent of returns filed by taxpayers who had been audited, appeared to contain the same error.

Thus, taxpayers who received the TAS letter filed returns that were more compliant with respect to EITC in the following two tax years, compared to control group taxpayers. However, returns filed by audited taxpayers continued to be more compliant than returns filed by taxpayers in either of the other two groups.

C. Returns Filed Three Years After the TAS Letter Advised That the Apparent Error Consisted of Not Meeting the Relationship Test

Of the returns filed by taxpayers three years after they received a TAS letter (*i.e.*, tax year 2018 returns for taxpayers who received the TAS letter in 2016):

i. 66.6 percent appeared to have claimed EITC in error. In contrast, 70.3 percent of returns filed by taxpayers in the control group, but only 65.1 percent of returns filed by audited taxpayers, appeared to claim EITC in error;[20] and

ii. 45.1 percent appeared to have claimed EITC in error because the relationship test had not been met (*i.e.*, the return contained the same error identified in the TAS letter). In contrast, 54.5 percent of returns filed by taxpayers in the control group, but only 37.1 percent of returns filed by taxpayers who had been audited, appeared to contain the same error.

Thus, taxpayers who received the TAS letter filed returns that were more compliant with respect to EITC in the following three tax years, compared to taxpayers in the control group. Moreover, by the third year, there was no statistically significant difference between the error rate in returns filed by taxpayers who received a TAS letter and returns filed by audited taxpayers. Audited taxpayers continued to be less likely to *repeat* their error, however, than taxpayers in either of the other two groups.

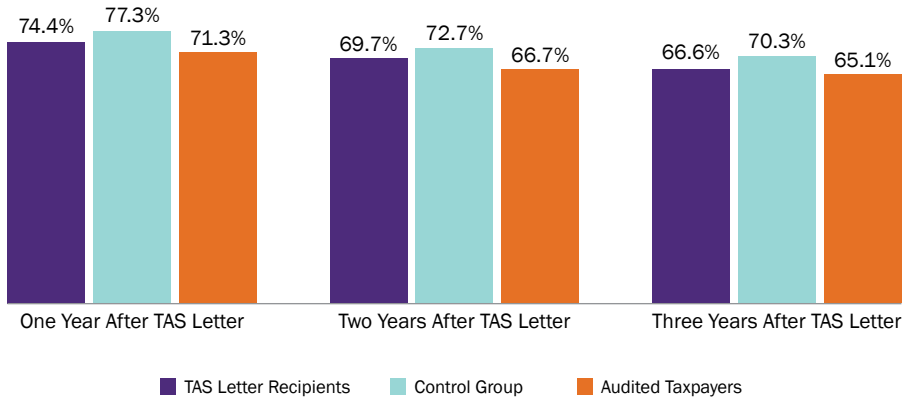
20 The difference between the error rate for taxpayers who received the TAS letter and taxpayers who were audited is not statistically significant.

We first illustrate how often taxpayers made *any* error in claiming EITC on subsequent returns (Figures 4.1.1 and 4.1.2), and then how often taxpayers *repeated their error* on subsequent returns (Figures 4.1.3 and 4.1.4).

Figure 4.1.1 summarizes the data about the frequency with which taxpayers appeared to continue to claim EITC in error.

FIGURE 4.1.1

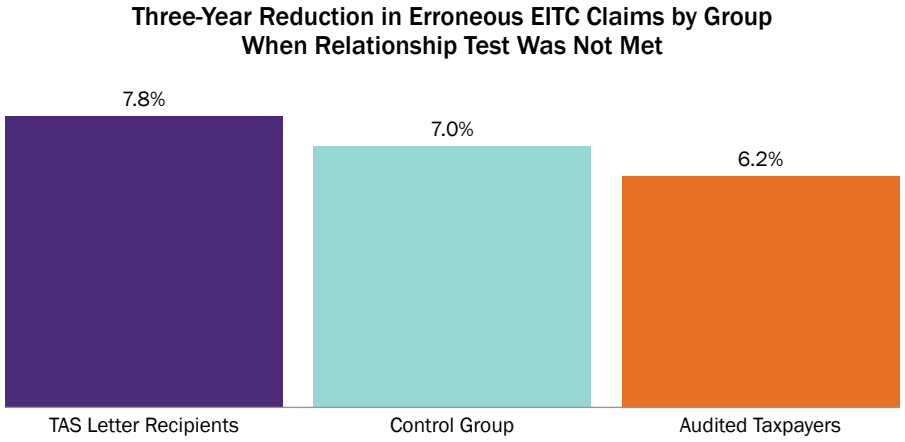
Frequency With Which Taxpayers in the Study Groups Erroneously Claimed EITC When the Relationship Test Was Apparently Not Met



As Figure 4.1.1 demonstrates, taxpayers in all three groups were less likely to make erroneous EITC claims over time. However, taxpayers who received the TAS letter showed more improvement in tax compliance over time than taxpayers in the other two groups. For example, one year after receiving the TAS letter, taxpayers erroneously claimed EITC 74.4 percent of the time, but this rate decreased to 66.6 percent by the third year after receiving the letter, a decline of 7.8 percentage points. In contrast, the rate at which control group taxpayers erroneously claimed EITC over the same three-year period declined by only seven percentage points (from 77.3 percent to 70.3 percent). The rate at which audited taxpayers erroneously claimed EITC over the same three-year period declined by only 6.2 percentage points (from 71.3 percent to 65.1 percent).

Figure 4.1.2 shows the increase in compliance (or decrease in noncompliance) of the three groups over three years.

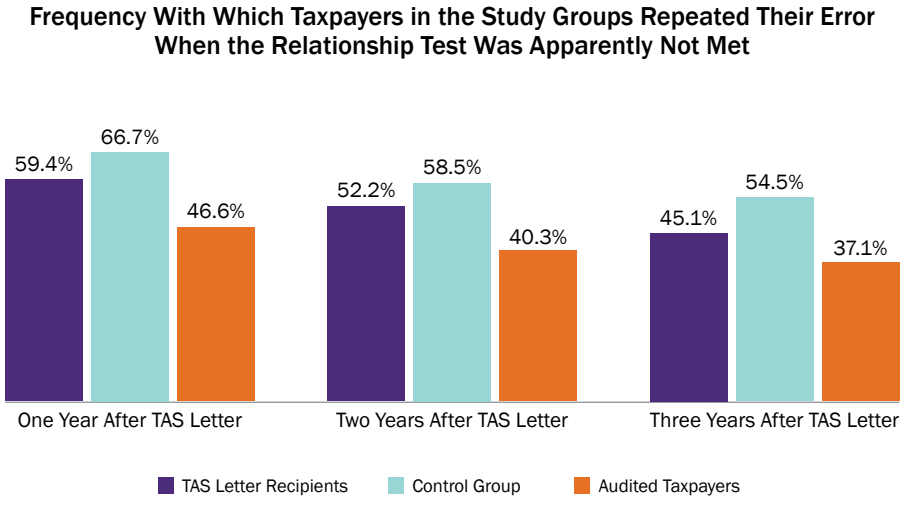
FIGURE 4.1.2



As discussed above, taxpayers who received the TAS letter were less likely to make the same error of claiming EITC when the relationship test did not appear to be met, compared to taxpayers in the control group. Audited taxpayers were less likely to repeat their error than taxpayers in the other two groups.

Figure 4.1.3 summarizes the frequency with which taxpayers appeared to repeat their error.

FIGURE 4.1.3



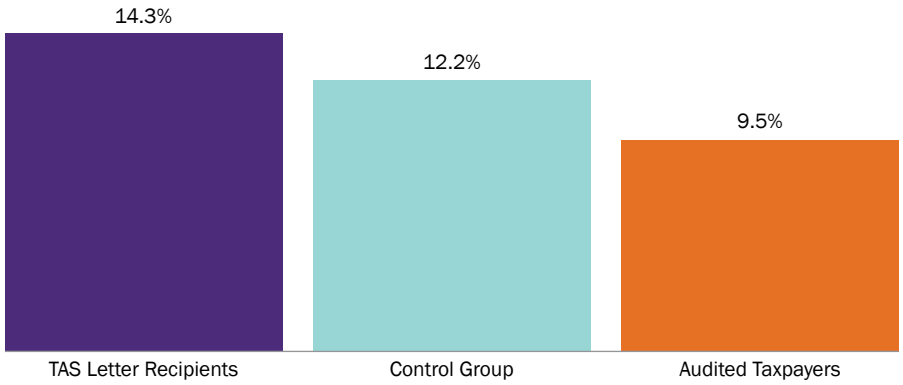
As Figure 4.1.3 demonstrates, taxpayers in all three groups were less likely to repeat their error each year. However, taxpayers who received the TAS letter again showed more improvement in tax compliance over time than taxpayers in the other two groups. For example, one year after receiving the TAS letter, taxpayers erroneously repeated their error 59.4 percent of the time, but this rate decreased to 45.1 percent by the third year after receiving the letter, a decline of 14.3 percentage points. In contrast, the

rate at which taxpayers in the control group repeated their error over the same three-year period declined by only 12.2 percentage points (from 66.7 percent to 54.5 percent). The rate at which audited taxpayers repeated their error over the same three-year period declined by only 9.5 percentage points (from 46.6 percent to 37.1 percent).

Figure 4.1.4 shows the increase in compliance (or decrease in noncompliance), in terms of repeating their error, of the three groups over three years.

FIGURE 4.1.4

Three-Year Reduction in Repeating the Error of Not Meeting the Relationship Test



2. In Both Years Following the Year in Which a TAS Letter Advised That the Residency Test Appeared Not to Have Been Met and Provided an Additional Help Line, Taxpayers Who Received the Letter Filed Returns That Were More Compliant Than the Returns of Taxpayers in Any Other Group

As discussed above, the first version of the TAS letter sent as part of the 2016 study to taxpayers who appeared to not meet the residency test did not include a telephone help line that taxpayers could call and speak to a TAS employee about their eligibility for EITC.[21] In addition, a separate group of taxpayers, 967 in total, who appeared to have claimed EITC without meeting the residency test received a different letter that not only advised them of the error but also included an additional toll-free phone number they could call to speak with a TAS employee.[22]

21 There were 2,173 taxpayers who received this letter as part of the 2016 study and 2,255 taxpayers who received this letter as part of the 2017 study.

22 As we reported in the 2017 study, the letters we sent to these taxpayers were returned as undeliverable more often than letters sent to taxpayers who appeared not to meet the residency test whose letter did not include an additional phone number. National Taxpayer Advocate 2017 Annual Report to Congress vol. 2, at 22, note 19 (*Study of Subsequent Filing Behavior of Taxpayers Who Claimed Earned Income Tax Credits (EITC) Apparently In Error and Were Not Audited But Were Sent an Educational Letter From the Taxpayer Advocate Service, Part 2: Validation of Prior Findings and the Effect of an Extra Help Phone Number and a Reminder of Childless-Worker EITC*). We analyzed the returns filed by taxpayers who received a letter with an extra help phone number and whose letters were undeliverable and found that including these taxpayers in the sample would not have changed the outcomes we report here (*i.e.*, as discussed below, returns filed by taxpayers who received the TAS letter with the extra help phone number were more compliant than returns filed taxpayers in any of the other groups).

A. Returns Filed One Year After the TAS Letter Advised That the Apparent Error Consisted of Not Meeting the Residency Test and Included an Extra Help Phone Line

Of the returns filed by taxpayers one year after the TAS letter was received (*i.e.*, for tax year 2017):

i. 73.4 percent appeared to have claimed EITC in error. In contrast, 81.5 percent of 2017 returns filed by taxpayers who had received a letter from TAS which did not contain the additional phone number; 81.1 percent of returns filed by taxpayers in the control group; and 81.6 percent of returns filed by taxpayers who were audited appeared to have claimed EITC in error;[23] and

ii. 54.1 percent appeared to have claimed EITC in error because the residency test had not been met (*i.e.*, the return contained the same error identified in the TAS letter). In contrast, 67.7 percent of returns filed by taxpayers who received a letter from TAS without the additional phone number; 66.5 percent of returns filed by taxpayers in the control group; and 60.1 percent of returns filed by taxpayers who had been audited appeared to contain the same error.

Thus, the TAS letter with the extra help phone line was more effective in averting erroneous EITC claims than sending the TAS letter without the extra help phone line, not sending a letter at all, or even auditing the taxpayer. This finding is particularly interesting considering that very few taxpayers — 35 in total — actually called the extra help number and spoke to a TAS employee.

B. Returns Filed Two Years After the TAS Letter Advised That the Apparent Error Consisted of Not Meeting the Residency Test and Included an Extra Help Phone Line

Of the returns filed by taxpayers two years after the TAS letter was received (*i.e.*, for tax year 2018):

i. 73.1 percent appeared to have claimed EITC in error. In contrast, 79.2 percent of returns filed by taxpayers who received a letter from TAS without the additional phone number; 77.8 percent of returns filed by taxpayers in the control group; and 77.7 percent of returns filed by taxpayers who were audited appeared to have claimed EITC in error; and

ii. 49.3 percent appeared to have claimed EITC in error because the residency test had not been met (*i.e.*, the return contained the same error identified in the TAS letter). In contrast, 60.2 percent of returns filed by taxpayers who received a letter from TAS without the additional phone number; 61.9 percent of returns filed by taxpayers in the control group; and 53.6 percent of returns filed by taxpayers who had been audited appeared to contain the same error.

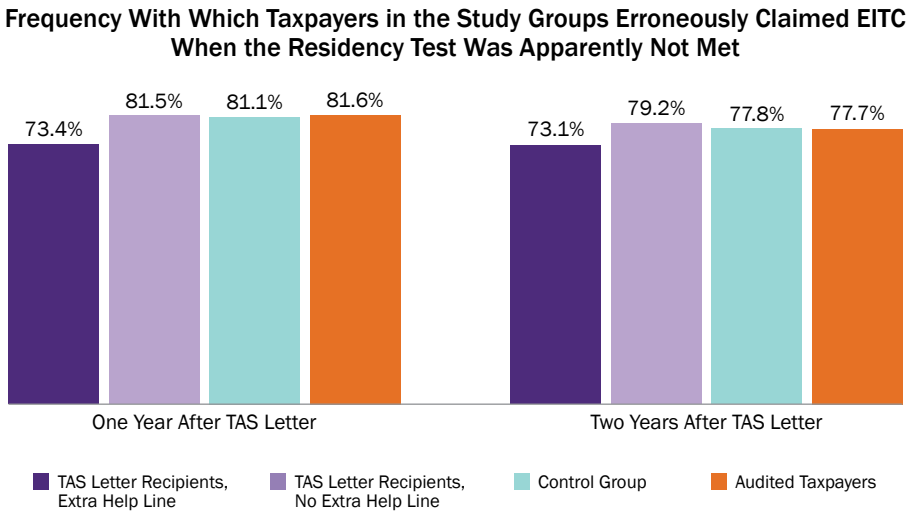
Thus, the TAS letter with the extra help phone line was still more effective in averting repeated errors in claiming EITC claims than sending the TAS letter without the extra help phone line, not sending a letter at all, or even auditing the taxpayer.

We first illustrate how often taxpayers made *any error* in claiming EITC on subsequent returns (Figure 4.1.5), and then illustrate how often taxpayers *repeated their error* on subsequent returns (Figure 4.1.6).

Figure 4.1.5 summarizes the frequency with which taxpayers appeared to continue to claim EITC in error when the residency test was apparently not met.

23 There was never any statistically significant difference in the subsequent compliance of returns filed by taxpayers who received a TAS letter advising that the residency test had not been met, but without providing an extra help phone number, and returns filed by taxpayers in the control group.

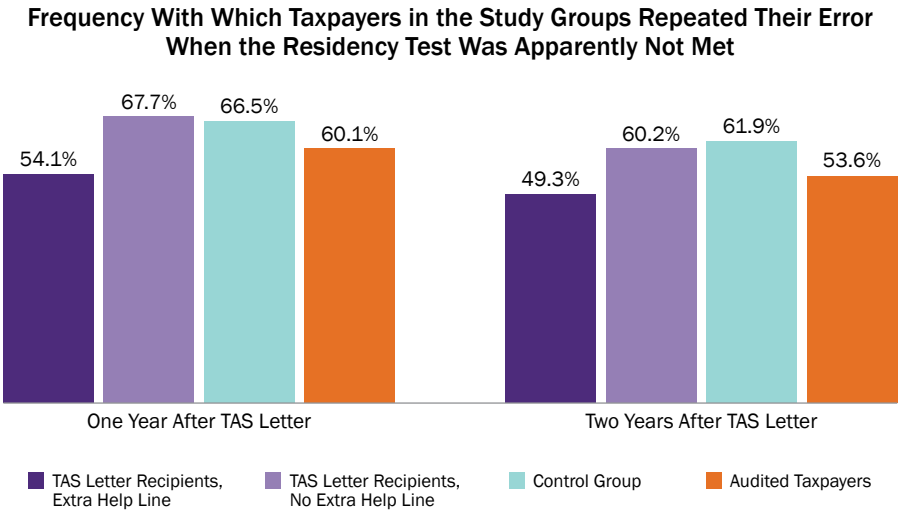
FIGURE 4.1.5



As Figure 4.1.5 demonstrates, taxpayers in all four groups were less likely to make erroneous EITC claims over time, but the returns of taxpayers who received the TAS letter *with the extra help line* were markedly more compliant than the returns of taxpayers in any of the other groups.

Figure 4.1.6 summarizes the differences in the frequency with which taxpayers repeated their error.

FIGURE 4.1.6



As Figure 4.1.6 demonstrates, taxpayers in all four groups were less likely to repeat their error over time, but the returns of taxpayers who received the TAS letter *with the extra help line* were much less likely to

repeat the error of claiming EITC when the residency test was not met than the returns of taxpayers in any of the other groups.

3. The TAS Letter Advising Taxpayers That a Duplicate Claim Had Been Made Did Not Affect Future Erroneous Claims

As discussed above, some taxpayers received a TAS letter advising them that they apparently erred in claiming EITC because another taxpayer had claimed EITC with respect to the same child.[24]

The TAS letter did not appear to avert erroneous EITC claims with respect to returns these taxpayers filed in any of the three years after receiving the TAS letter, compared to taxpayers in the control group. Thus, we do not present those detailed findings. However, we note that the number of taxpayers who *repeated* this error dwindled over the years; by the second year after the TAS letter advised that there appeared to be duplicate claims, no more than five percent of taxpayers in any of the three groups repeated this error.

CONCLUSION

The data demonstrates that sending a tailored, educational letter to taxpayers who appear to have erroneously claimed EITC averts future erroneous EITC claims, and the effect extends beyond the year in which the taxpayer receives the letter. The letter is particularly effective where the apparent error consists of not meeting the relationship test. Audits are sometimes more effective in averting erroneous EITC claims where the error consists of not meeting the relationship or residency tests, compared to sending an educational letter. However, where the relationship test appears not to have been met, there is no statistically significant difference between the overall accuracy of the returns filed by taxpayers three years after receiving a TAS letter and returns filed by audited taxpayers. Where the apparent error is that the residency test was not met, an educational letter that includes a telephone help line that taxpayers can use to determine their eligibility for the credit averts noncompliance even more effectively than audits do. In any event, in view of the volume of returns that appear to erroneously claim EITC because the relationship or residency tests were not met, audits do not appear to be the most realistic option for addressing erroneous EITC claims.

RECOMMENDATIONS

The National Taxpayer Advocate recommends that the IRS send tailored, educational letters, similar to the TAS letters, to EITC claimants the IRS does not have current plans to audit:

1. Where the claimant does not appear to meet the relationship requirement for claiming EITC, because such a letter appears to prevent taxpayers from erroneously claiming EITC for at least three years; and
2. Where the claimant does not appear to meet the residency requirement for claiming EITC, but only if the letter includes an additional help telephone number the taxpayer can call for assistance in determining for EITC, because such a letter appears to prevent taxpayers from erroneously claiming EITC for at least two years.

24 There were 2,189 taxpayers who received this letter as part of the 2016 study and 2,340 taxpayers who received this letter as part of the 2017 study.

TAS Research and Related Studies 2

Study of Two-Year Bans on the Earned Income Tax Credit, Child Tax Credit, and American Opportunity Tax Credit

EXECUTIVE SUMMARY

The Internal Revenue Code (IRC) authorizes the IRS to ban taxpayers from claiming certain refundable credits (the Earned Income Tax Credit (EITC), the Child Tax Credit (CTC), or the American Opportunity Tax Credit (AOTC)) for two years if it determines that the taxpayer claimed the credit recklessly or with intentional disregard of rules and regulations.[1] A review of a representative sample of cases in which the bans were imposed as a result of audits of tax year 2016 returns shows the IRS often did not follow its own procedures:

- In 53 percent of the cases, required managerial approval for imposing the ban was not secured;
- In 82 percent of the cases, the IRS did not adequately explain to the taxpayer why the ban was imposed as required;
- In 61 percent of the cases in which the auditor was required to speak to the taxpayer before imposing the ban, no such conversation took place; and
- In 54 percent of the cases in which taxpayers submitted documents, it appeared from the documents submitted that the taxpayer believed he or she qualified for the credit.

These improper bans deprived taxpayers, if they were otherwise eligible for a credit in the ensuing two years, of significant tax benefits. For example, taxpayers who were banned from claiming EITC lost almost $5,000 on average.[2]

Moreover, the IRS may exercise its summary assessment authority to disallow credits that taxpayers claim while a ban on that credit is in effect.[3] Thus, affected taxpayers may not receive a notice of deficiency that would permit them to file a petition with the Tax Court for review of the disallowance. In other situations, taxpayers may be required to petition the Tax Court multiple times to remove the effect of an erroneously imposed ban.[4]

INTRODUCTION

The EITC, enacted in 1975, is a tax credit targeted at low-income workers (primarily workers with children).[5] It has become one of the government's largest means-tested anti-poverty programs.[6] During 2018, 25 million eligible workers and families received about $63 billion in EITC.[7] The CTC, enacted

1 IRC §§ 32(k)(1)(B)(ii) (relating to the EITC); 24(g)(1)(B)(ii) (relating to the CTC); and 25(A)(b)(4)(a)(ii)(II) (relating to the AOTC). The statistical information in this research study was not provided or reviewed by the Secretary under IRC § 6108(d). See IRC § 7803(c)(2)(B)(ii)(XII).

2 IRS Compliance Data Warehouse (CDW), Individual Returns Transaction File (IRTF), average EITC for returns receiving this credit in tax years 2017 and 2018 as of cycles 201839 and 201939, respectively.

3 See Protecting Americans from Tax Hikes (PATH Act) of 2015, Pub. L. No. 114-113, div. Q, title 2, § 208, 129 Stat. 2242, 3084, amending IRC § 6213(g)(2)(K) and adding subparagraphs (P) and (Q), applicable to tax years beginning after Dec. 31, 2015. *See also* Consolidated Appropriations Act, 2018, Pub. L. 115-141, Div. U, Title I, § 101(l)(18), Title IV § 401(a)(277), (278) (2018), making technical corrections to IRC § 6213(g)(2)(P) and (Q) retroactive to enactment of the PATH Act.

4 IRC § 6214(b), relating to the Tax Court's jurisdiction, discussed below.

5 Pub. L. No. 94-12, § 204, 89 Stat. 26 (1975).

6 Congressional Budget Office, *Federal Means-Tested Programs and Tax Credits – Infographic* (Feb. 11, 2013), https://www.cbo.gov/publication/43935.

7 IRS, About EITC (Mar. 2019), https://www.eitc.irs.gov/eitc-central/about-eitc/about-eitc.

in 1997, is also a means-tested tax credit available to working families.[8] Together, the EITC and CTC lift millions of people out of poverty.[9]

The AOTC, enacted in 2009, is a means-tested tax credit for those who incur qualified education expenses.[10] The credit is available with respect to a student enrolled at least half-time in a college, university, or other accredited post-secondary educational institution, and pursuing a degree or education credential.[11]

If the IRS determines that a taxpayer improperly claimed the EITC, CTC, or AOTC "due to reckless or intentional disregard of rules and regulations," then the IRS may ban the taxpayer from claiming the credit for two years.[12] Audits of tax year 2016 returns resulted in two-year bans being imposed on 3,831 taxpayers, sometimes with respect to more than one credit.

BACKGROUND

The IRS has had the authority to ban taxpayers from claiming the EITC since 1997.[13] It acquired the same authority with respect to CTC and AOTC in 2016.[14] In 2013, the National Taxpayer Advocate raised concerns about the IRS's practices and procedures for imposing the two-year ban on claiming the EITC.[15] The concerns were based on IRS data showing that the IRS frequently — almost 40 percent of the time — imposed the ban without making the statutorily required determination about the taxpayer's state of mind, discussed below.[16] Moreover, a 2013 TAS study of a representative sample of two-year ban cases found, among other things:

- The IRS frequently — 19 percent of the time — imposed the ban solely because the EITC had been disallowed in the previous year;
- The IRS often — 69 percent of the time — did not obtain managerial approval before imposing the ban, as required by its own procedures; and

8 Pub. L. 105–34, title I, § 101(a), 111 Stat. 796 (1997).

9 Chuck Marr, Chye-Ching Huang, Arloc Sherman and Brandon DeBot, *CBPP-EITC and Child Tax Credit Promote Work, Reduce Poverty, and Support Children's Development, Research Finds* (Oct. 1, 2015), https://www.cbpp.org/research/federal-tax/eitc-and-child-tax-credit-promote-work-reduce-poverty-and-support-childrens (reporting that together, the EITC and CTC lifted 9.4 million people out of poverty in 2013).

10 Pub. L. 111-5, div. B, title 1, § 1004, 123 Stat. 313 (2009).

11 IRC § 25A(b).

12 IRC §§ 32(k)(1)(B)(ii); 24(g)(1)(B)(ii); and 25(A)(b)(4)(a)(ii)(II). The IRS is authorized to impose a ten-year ban on taxpayers who fraudulently claim the EITC, CTC, or AOTC. IRC §§ 32(k)(1)(B)(i); 24(g)(1)(B)(i); and 25(A)(b)(4)(a)(ii)(I).

13 *See* IRC § 32(k), enacted by the Tax Reform Act of 1997, Pub. L. No. 105-34, § 1085(a)(1), 111 Stat. 788, 956 (applicable to taxable years beginning after Dec. 31, 1996).

14 *See* PATH Act of 2015, Pub. L. No. 114-113, div. Q, title 2, § 208, 129 Stat. 2242, 3083-3084, enacting IRC §§ 24(g) and 25(A) (applicable to taxable years beginning after Dec. 31, 2015).

15 National Taxpayer Advocate 2013 Annual Report to Congress 103-115 (Most Serious Problem: *Earned Income Tax Credit: The IRS Inappropriately Bans Many Taxpayers from Claiming EITC*).

16 *Id*. (noting, among other things, that of the taxpayers on whom the IRS imposed the ban in 2011, the accounts of 39 percent were designated on IRS records as "no show/no response" or carried the notation that mail sent to them was returned as undelivered). IRS, CDW, IRTF (Tax Year 2011).

- Almost 90 percent of the time, neither IRS work papers nor communications to the taxpayer contained an adequate explanation of why the ban was being imposed.[17]

The Rules for Claiming the Earned Income Tax Credit, Child Tax Credit, and American Opportunity Tax Credit Are Complex, Differ From Each Other, and Were Easily Confused With the Rules for Claiming a Dependency Exemption[18]

The amount of allowable EITC and CTC is a function of a taxpayer's earned income or "modified adjusted gross income" and the number of "qualifying children" in the household.[19] A "qualifying child" is a person who, among other things, meets age requirements, bears a specified relationship to the taxpayer, and has the same principal residence as the taxpayer for more than half the year.[20]

The EITC and CTC age requirements differ, and disabled dependents may meet the definition of a qualifying child for purposes of the dependency exemption and the EITC, but not for purposes of the CTC.[21] Moreover, the dependency exemption was available not only with respect to a "qualifying child" but also with respect to a "qualifying relative."[22]

The amount of allowable AOTC, like the CTC, is a function of "modified adjusted gross income" and, like the CTC but unlike the EITC, is only partially refundable.[23]

A Taxpayer's Recklessness or Intentional Disregard of Rules and Regulations, Rather Than Mere Negligence, Is Required to Trigger a Ban

The IRC authorizes the IRS to impose two-year bans following "a *final determination* that the taxpayer's claim of credit was due to *reckless or intentional disregard of rules and regulations*."[24] Neither the IRC nor Treasury regulations defines the terms "reckless or intentional disregard" for purposes of imposing the

17 National Taxpayer Advocate 2013 Annual Report to Congress 103-115 (Most Serious Problem: *Earned Income Tax Credit: The IRS Inappropriately Bans Many Taxpayers from Claiming EITC*). The National Taxpayer Advocate renewed her concerns in 2019. *See* National Taxpayer Advocate Fiscal Year 2020 Objectives Report to Congress, vol. 3, at 44-48 (Special Report: *Earned Income Tax Credit: Making the EITC Work for Taxpayers and the Government, Improving Administration and Protecting Taxpayer Rights*).

18 The Tax Cuts and Jobs Act (TCJA), Pub. L. No. 115-97 §§ 11022 and 11041 (2017), added a new credit for other dependents under IRC § 24 for a dependent who is not a qualifying child for purposes of the CTC, significantly increased the CTC, and suspended dependency exemptions. These changes to the tax law are effective for tax years 2018-2025. Thus, for all the taxpayers described in this study, the applicable rules were those in effect prior to passage of the TCJA.

19 See IRC §§ 32(c)(1) and 24(a) relating to eligibility to claim the credit, and IRC §§ 32(b) and 24(b) for the calculation of the amount of allowable credit.

20 IRC §§ 32(c)(3); 24(c); 152(c) (providing that a qualifying child is an individual who is the taxpayer's son, daughter, stepchild, foster child, or a descendant of any of them (*e.g.*, a grandchild), or a child who is a sibling, stepsibling, or half-sibling of the taxpayer, or a descendant of any of them).

21 See IRC § 24(c)(1), requiring a qualifying child to not have attained the age of 17, and IRC § 152(c)(3)(B), providing an exception to the general age requirements, for purposes of IRC § 152(c)(3)(A), but not for purposes of IRC § 24, for individuals who are permanently and totally disabled. For the National Taxpayer Advocate's recommendation that this inconsistency be removed, see National Taxpayer Advocate 2018 Annual Report to Congress 421-424 (Legislative Recommendation: *Child Tax Credit: Amend Internal Revenue Code § 24(c)(1) to Conform With § 152(c)(3)(B) for Permanently and Totally Disabled Individuals Age 17 and Older*).

22 *See* IRC §152(a)(2) and (d). A qualifying relative includes, for example, the taxpayer's sibling, father, and mother.

23 *See* IRC §§ 25A(i), 24(d).

24 IRC §§ 32(k)(1)(B)(ii); 24(g)(1)(B)(ii); and 25(A)(b)(4)(a)(ii)(II) (emphasis added). Under IRC §§ 32(k)(1)(B)(i); 24(g)(1)(B)(i); and 25(A)(b)(4)(a)(ii)(I), the IRS is also authorized to impose a ten-year ban on taxpayers who fraudulently claim these credits, but it imposes the ten-year ban infrequently (for example, audits of 2016 returns resulted in the imposition of ten-year bans on 162 taxpayers - IRS, CDW Individual Master File (IMF)).

ban, and there is no judicial interpretation of those terms in the context of two-year bans.[25] However, IRS Chief Counsel guidance provides that a "taxpayer's failure to respond (or failure to provide an adequate response) to a request for substantiation and verification of EITC does not, in and of itself, constitute reckless or intentional disregard of the rules and regulations."[26]

According to IRS Procedures, Auditors' Work Papers Must Contain a Detailed Explanation for Imposing a Ban, Managers Must Approve Bans, Auditors Must Speak to Taxpayers Who Are Being Audited for the First Time Before Imposing a Ban, and the IRS Must Explain to the Taxpayer Why It Is Imposing a Ban

Following the publication of TAS's research findings from the 2013 study on two-year EITC bans, the IRS revised the Internal Revenue Manual (IRM) to provide additional guidance to auditors about when to impose bans.[27] Both the current version of the IRM and the 2013 version require auditors who propose the two-year ban to note in their work papers, with more than just a cursory explanation, the reason for the decision.[28] However, the IRM now explicitly directs auditors to review the documentation submitted by the taxpayer and to determine whether to impose a ban based on applicable law; the taxpayer's documentation; contact with the taxpayer; and research on IRS databases, including work papers for the prior year.[29]

Both the current version of the IRM and the 2013 version also require the auditor's manager to approve the imposition of a ban.[30] However, the IRM now explicitly directs managers to review the entire case file and ensure that the workpapers properly document the decision and reason to impose or not impose a ban.[31] Managers are now also required to ensure that the decision to assert the ban is warranted and to record approval of the ban on the IRS Correspondence Examination Automation Support (CEAS) database.[32]

One current IRM provision that was not part of the 2013 IRM requires the auditor to speak with the taxpayer before imposing the ban if the taxpayer is being audited with respect to the disallowed credit

25 Neither the statutes nor the regulations thereunder cross reference any other Code section (such as IRC § 6662) or regulations that contain similar language. Under IRC § 6662(b)(1), an accuracy-related penalty may be imposed on certain underpayments due to "negligence or disregard of rules or regulations." IRC § 6662(c) provides: "For purposes of this section, the term 'negligence' includes any failure to make a reasonable attempt to comply with the provisions of this title, and the term 'disregard' includes any careless, reckless, or intentional disregard." Treas. Reg. § 1.6662-3(b)(2) provides: "A disregard is 'reckless' if the taxpayer makes little or no effort to determine whether a rule or regulation exists, under circumstances which demonstrate a substantial deviation from the standard of conduct that a reasonable person would observe. A disregard is 'intentional' if the taxpayer knows of the rule or regulation that is disregarded."

26 IRS Service Center Advice (SCA) 2002-45051 (Nov. 8, 2002).

27 The applicable provision in 2013, captioned EITC 2/10 Year Ban - Correspondence Guidelines for Examination Technicians (CET), was IRM 4.19.14.6.1. That IRM is now numbered as 4.19.14.7.1.

28 IRM 4.19.14.7.1(2), 2/10 Year Ban - Correspondence Guidelines for Examination Technicians (CET) (May 8, 2018) provides "**Note**: Do not use standard statements such as 2-year ban is applicable because taxpayer showed intentional disregard of the rules and regulations for EIC/ACTC/AOTC. Proper workpaper documentation should clearly outline the audit steps taken and fully explains the decision to assert or not assert the 2-year ban." (emphasis in original).

29 IRM 4.19.14.7.1(2), 2/10 Year Ban - Correspondence Guidelines for Examination Technicians (CET) (May 8, 2018).

30 *Id*.

31 *Id*.

32 *Id*.

for the first time and has responded to the audit.[33] Another current IRM provision that was not part of the 2013 IRM requires auditors to "[w]rite an 886-A explanation to the taxpayer clearly explaining the reason for the assertion of the 2-year ban."[34] Form 886-A, Explanation of Items, is used as a schedule or exhibit to audit reports.

At the conclusion of the audit, a taxpayer may agree to the proposed additional assessment and ban. If he or she does not agree and does not seek a conference with IRS Appeals (or does not prevail in an Appeals conference), the IRS issues a statutory notice of deficiency to which it may attach the Form 886-A that was sent to the taxpayer. At this point, the taxpayer may seek Tax Court review of the IRS's determination to impose additional tax. As discussed below, however, the Tax Court may not have jurisdiction to consider whether the ban was properly imposed.

Once the ban has been imposed, the IRS sends the taxpayer Notice CP 79A, We Denied One or More of the Credits Claimed on Your Tax Return and Applied a Two-Year Ban, reciting that it denied one or more of the credits claimed on the return and applied a two-year ban.[35] Notice CP 79A advises the taxpayer "you don't need to take any action at this time," but also refers the taxpayer to an IRS web page for additional information. At that web page, the answer to "What do I need to do if I disagree with the 2-year ban?" is "You may request a reconsideration of the audit. In your request, send us proof you are entitled to the credits for the audited year, or proof your claim for the credits wasn't due to reckless or intentional disregard of rules and regulations."[36]

The IRS May Disallow Claimed Credits Pursuant to Its Summary Assessment Authority While a Ban Is in Effect

When a taxpayer claims a credit while subject to a ban, the IRS is authorized, pursuant to its summary assessment authority, to assess additional tax (which includes reducing the amount of refund due) that arises from disallowing the credit, without issuing a statutory notice of deficiency.[37] However, if the taxpayer responds to the IRS's notice of such an assessment within 60 days, the IRS must reverse the summary adjustment and issue a notice of deficiency before assessing additional tax.[38] The taxpayer may then petition the Tax Court for a redetermination of the tax for that year. As noted above, in order to seek relief from the ban administratively, according to IRS procedures, the taxpayer must request audit

33 IRM 4.19.14.7.1(7), 2/10 Year Ban - Correspondence Guidelines for Examination Technicians (CET) (May 8, 2018), provides that "IF this is the first year EITC, CTC/ACTC, or AOTC was audited; AND the TP has responded, you must speak with the taxpayer before you recommend assertion of the ban. Based on the information received and your conversation with the taxpayer, the taxpayer shows they had prior knowledge of the rules and regulations for claiming one or more of the credits, but chose to take it anyway; THEN Assert the ban on each of the credits to which it applies and include the specific details that showed the taxpayer had prior knowledge of the rules and regulations." The IRM does not define what constitutes a first-time audit.

34 IRM 4.19.14.7.1(4), 2/10 Year Ban – Correspondence Guidelines for Examination Technicians (CET) (May 8, 2018).

35 IRM 4.19.14.7.1(5), 2/10 Year Ban – Correspondence Guidelines for Examination Technicians (CET) (May 8, 2018) (providing that "[w]hen the case closes Master File will mail CP 79A to the taxpayer explaining that the 2-year ban was applied and what they need to do in the future").

36 IRS, Understanding Your CP79A Notice (Oct. 29, 2019), www.irs.gov/cp79a.

37 IRC § 6213(g)(2)(K), (P), and (Q); IRM 4.19.14.7.1.1, Project Codes 0697 and 0698 - EITC Claimed Under the 2/10 Year Ban (Nov. 2, 2017). If the taxpayer did not participate in the audit that triggered the ban (perhaps because mail to the taxpayer was undeliverable, as discussed below) this disallowance may be the first time the taxpayer realizes the ban was imposed.

38 *See* IRC § 6213(a), (b)(2).

reconsideration (not abatement of the tax).[39] The IRS's summary assessment notice does not inform taxpayers of this avenue for seeking removal of the ban.[40]

The IRS Automatically Imposes Two-Year Bans in Some Recertification Cases

A taxpayer whose claimed EITC, CTC, or AOTC for a particular tax year is disallowed is required to demonstrate eligibility for the credit before claiming it in subsequent years.[41] The IRS places an indicator on the taxpayer's account and if the taxpayer claims the same credit in a later year, the IRS requests the taxpayer to recertify eligibility for the credit.[42] If EITC recertification is required but is not submitted and the case is selected for audit, the case is assigned one of two project codes:

- Project Code 27 - Full scope EITC with two-year ban proposed; or
- Project Code 28 - Schedule C and full scope EITC with two-year ban proposed.[43]

If a case is assigned project code 27 or 28, the IRS will request documentation from the taxpayer to prove he or she is entitled to claim the EITC. If the taxpayer does not respond, the two-year EITC ban is automatically, or systemically, imposed. If the taxpayer replies to the request for documentation, an auditor evaluates the taxpayer's response.

These procedures not only circumvent the statutory requirement that the IRS ascertain whether the taxpayer acted recklessly or with intentional disregard of rules and regulations, they also place the burden on the taxpayer to show that the ban should *not* be imposed, rather than requiring the IRS to show that the ban should apply.

If the auditor proposes a ban, then the same procedures applicable to other proposed ban cases apply: managerial approval is required, and a detailed explanation for imposing the ban must be provided to the taxpayer.[44]

39 IRM 4.13.3.17, Audit Reconsiderations EITC 2/10 Year Ban (Dec. 17, 2015).

40 The summary assessment notice sent in the year following the ban, for example, advises the taxpayer "We disallowed the amount claimed as earned income credit on your tax return. Our records indicate that we've banned you from claiming earned income credit for two tax years. (Form 1040/A)." A letter with similar language is sent in the second year of the ban, and similar letters are sent with respect to summarily disallowed CTC and AOTC. IRM Exhibit 3.12.3-2, Taxpayer Notice Codes (Feb. 6, 2018), taxpayer notice codes 814, 815, 819-824.

41 IRC §§ 32(k)(2), 24(g)(2) and 25A(b)(4)(B) all provide that "[i]n the case of a taxpayer who is denied [the credit under this section] for any taxable year as a result of the deficiency procedures under subchapter B of chapter 63, no [credit] shall be allowed under this section for any subsequent taxable year unless the taxpayer provides such information as the Secretary may require to demonstrate eligibility for such credit."

42 IRM 4.19.14.7, Recertification (Apr. 11, 2018).

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

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

In 2013, the National Taxpayer Advocate pointed out the inappropriateness of automatically imposing bans under these procedures and recommended the IRS immediately suspend the automatic imposition of the two-year EITC ban.[45] In response to this recommendation, the IRS noted that it "is working with the Office of Chief Counsel [OCC] to ensure we are applying the EITC ban in appropriate circumstances."[46] In April 2014, the IRS received advice from OCC that attempted to describe the circumstances in which automatic imposition of a ban could be permissible under the statute. OCC shared the advice with TAS, but in May 2014, OCC notified the IRS that it was withdrawing the advice.

Taxpayers May Be Required to Petition the Tax Court Multiple Times to Remove the Effect of an Erroneously Imposed Ban

Under IRC § 6214, the Tax Court's jurisdiction is restricted to determining the amount of tax owed in the tax year(s) before it. Thus, if a taxpayer files a Tax Court petition in response to a statutory notice of deficiency issued with respect to Year 1, the court may not have jurisdiction to determine whether a ban included in that statutory notice of deficiency should apply to future years (Years 2 and 3) that are not included in the statutory notice of deficiency and are thus not before it.[47]

If the Tax Court does not consider whether a ban was properly imposed in Year 1 and the ban is left intact, then if the taxpayer claims the banned credit in Year 2 or 3, the IRS will disallow the claim pursuant to its summary assessment procedures. The taxpayer would be required to dispute the summary assessment and again seek Tax Court review to determine whether the credit was properly claimed once the IRS issues a statutory notice of deficiency for that year. Consequently, to alleviate the effects of a two-year ban that was improperly imposed, a taxpayer may be required to request Tax Court review multiple times.

Moreover, the Tax Court has not held that it has jurisdiction, in a deficiency proceeding in which Year 2 or 3 is at issue, to determine whether the ban was properly imposed in Year 1 (and if it lacks that jurisdiction, it may not have the authority to allow the credit in Year 2 or 3). Thus, it is unclear whether and at what point the Tax Court has jurisdiction to review a ban determination.[48]

45 See National Taxpayer Advocate 2013 Annual Report to Congress 103, 107 (Most Serious Problem: *Earned Income Tax Credit: The IRS Inappropriately Bans Many Taxpayers from Claiming EITC*), noting that under these procedures, "[t]here is no attempt to ascertain whether the reason for the previous disallowance is different from the reason for the current year's disallowance (*e.g.*, whether the same children were claimed as qualifying children), or whether there was ever any contact with the taxpayer from which to surmise he or she understood the reason for either disallowance. According to this [IRM] provision, if these taxpayers do respond to audit notifications, it is their burden to show that two-year ban should not apply, rather than the IRS's burden to show that it does apply."

46 National Taxpayer Advocate Fiscal Year 2015 Objectives Report to Congress vol. 2, 42-43 (*IRS Responses and National Taxpayer Advocate's Comments*).

47 *Compare Garcia v. Comm'r*, T.C. Summ. Op. 2013-28 (Apr. 3, 2013), https://ustaxcourt.gov/UstcInOp/OpinionViewer.aspx?ID=10538, a nonprecedential case in which the Tax Court held a ban did not apply *with Ballard v. Comm'r*, No. 3843-15 (Feb. 12, 2016), https://www.ustaxcourt.gov/UstcDocketInq/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 consequence to the taxpayer's federal income tax liability for the year before it.

48 The National Taxpayer Advocate recommends clarifying that the Tax Court has jurisdiction to review bans. See National Taxpayer Advocate 2020 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration* 30-32 (*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*).

RESEARCH QUESTIONS

A 2013 TAS study demonstrated that the IRS often imposes EITC bans in error, and the IRS made some adjustments to its procedures in the light of that study. A primary objective of this year's study is to determine the extent to which erroneous bans continue. Thus, we posed the following questions:

1. **Overall, how often does the IRS impose two-year bans?**
2. **Overall, how often did the IRS impose bans even though the taxpayer did not participate in the audit or mail to the taxpayer was undeliverable?**
3. **What are the income characteristics of taxpayers who are subjected to bans?**
4. **How often is the required managerial approval obtained before the ban is imposed?**
5. **How often is there an adequate explanation on Form 886-A of why the ban is being imposed as required by IRS procedures?**
6. **How often does the IRS speak to taxpayers who are being audited for the first time before imposing the ban, as required by IRS procedures?**
7. **How often does it appear from documents taxpayers submit that they believe they are qualified for the credit?**
8. **How many bans are systemically imposed?**
9. **How often do taxpayers seek audit reconsideration of the ban?**
10. **How often does the IRS use its summary assessment authority with respect to taxpayers subject to a ban?**

METHODOLOGY

In past reports, including our 2013 study, we calculated the number of two-year bans according to when the ban appeared on IRS databases.[49] Updates in IRS databases allow us to identify the tax year at issue in audits that triggered a two-year ban.

In this study, we provide data about the population of taxpayers on whom a two-year ban was imposed. In addition, to learn more about how the IRS imposes two-year bans, TAS Research extracted a random, statistically valid sample of 289 cases in which the IRS imposed one or more two-year bans on a given taxpayer as a result of an audit of the taxpayer's 2016 return (the most recent year for which data is available).[50] Using a Data Collection Instrument (DCI) that was substantially similar to the DCI that

49 *See, e.g.*, National Taxpayer Advocate 2018 Annual Report to Congress 91-104 (Most Serious Problem: *Improper Earned Income Tax Credit Payments: Measures the IRS Takes to Reduce Improper Earned Income Tax Credit Payments Are Not Sufficiently Proactive and May Unnecessarily Burden Taxpayers*); National Taxpayer Advocate 2013 Annual Report to Congress 103-115 (Most Serious Problem: *Earned Income Tax Credit: The IRS Inappropriately Bans Many Taxpayers from Claiming EITC*).

50 As discussed below, some taxpayers were subjected to a ban with respect to more than one credit.

was used in the 2013 TAS study, the TAS team reviewed and analyzed records stored on IRS databases.[51] Unless otherwise indicated, the sample findings can be projected to the entire population and are statistically valid at the 95 percent confidence level with a margin of error of +/- 5.6 percent.

FINDINGS

1. Overall, the IRS imposes fewer two-year bans than in the past, but the number is rising.

The IRS imposed two-year bans on 3,534 taxpayers as a result of audits of tax year 2014 returns; on 4,613 taxpayers as a result of audits of tax year 2015 returns; and 3,831 taxpayers as a result of audits of tax year 2016 returns.[52] Thus, the number of overall bans in recent tax years appears to have declined compared to the number of bans that appeared in IRS databases in 2011. However, the number of bans imposed as a result of audits of 2015 and 2016 returns was higher than the number of bans imposed as a result of audits of 2014 returns.

2. In 19 percent of the cases in which the IRS imposed bans, the taxpayer did not participate in the audit or mail to the taxpayer was returned as undeliverable.

IRS records may designate an account as "no show/no response" to indicate that the taxpayer did not participate in an audit, or the account may carry the notation that mail sent to the taxpayer was returned as undelivered.[53] As noted above, a taxpayer's failure to respond to a request for substantiation and verification of EITC does not, in and of itself, constitute reckless or intentional disregard of the rules and regulation.[54]

Nevertheless, of the 3,831 taxpayers overall on whom a two-year ban was imposed following an audit of their 2016 returns, 714 cases were designated as "no show/no response" or mail was undeliverable, a rate of 19 percent. However, this rate represents a significant improvement over the 39 percent rate at which bans were imposed in 2011, as we found in our 2013 study.

Figure 4.2.1 shows, for the most recent data available, the percent of two-year bans imposed on taxpayers whose accounts were designated as no show/no response or carried the notation that mail was returned to the taxpayer as undelivered.[55]

51 Among other databases, the TAS team consulted the IRS CEAS database that includes copies of the auditor's work papers and correspondence with taxpayers. There were four cases originally selected for inclusion in the sample for which CEAS records could not be found. Those cases were excluded from the final sample. In some other cases, information was not available to allow the reviewer to respond to all DCI questions. In these instances, the margin of error for the 95 percent confidence level is shown for the smaller sample sizes. Three of the four reviewers also participated as reviewers in the 2013 TAS study.

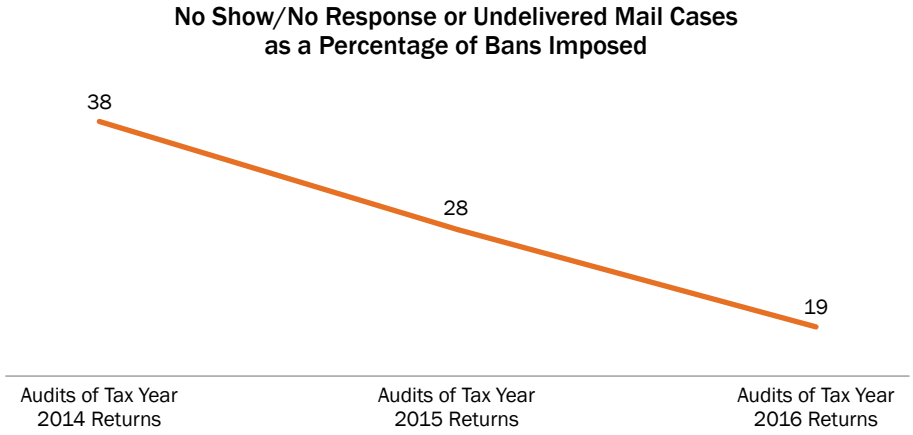
52 National Taxpayer Advocate 2013 Annual Report to Congress 103, 105 (Most Serious Problem: *Earned Income Tax Credit: The IRS Inappropriately Bans Many Taxpayers from Claiming EITC*) (reporting that 4,030 two-year bans appeared on IRS databases in 2009; 4,071 in 2010; and 5,438 in 2011).

53 IRS, CDW Individual Master File and Audit Information Management System.

54 IRS SCA 2002-45051 (Nov. 8, 2002).

55 IRS, CDW, IRTF (Tax Years 2014, 2015, and 2016), showing the number of two-year ban cases that were closed as no show/no response or undeliverable mail was 1,358 out of 3,534 (38 percent); 1,299 out of 4,613 (28 percent); and 714 out of 3,831 (19 percent) for tax years 2014, 2015, and 2016, respectively.

FIGURE 4.2.1



3. For taxpayers in the sample, disallowed EITC was 23 percent of adjusted gross income.

For almost all of the taxpayers in our sample (276 out of 289, or 96 percent), a ban was imposed with respect to the EITC. In some cases, a ban was imposed with respect to more than one credit.[56]

The immediate effect of disallowing EITC was to deprive the taxpayer of a significant tax benefit. The average adjusted gross income of taxpayers in the sample who claimed EITC was $17,268.[57] The average amount of denied EITC was $4,004, or 23 percent of EITC claimants' adjusted gross income.[58]

However, imposing a ban affects two years following the audited tax year. The average amount of the EITC for eligible taxpayers was $2,476 in 2017 and $2,491 in 2018.[59] The combined average was $4,967. Thus, a taxpayer whose audit of his or her 2016 return triggered the EITC ban and who (but for the ban) was eligible for the credit in the following two years was deprived of a tax benefit that averaged almost $5,000 for the two years combined.

4. Required managerial approval of the bans was often lacking.

In 155 cases out of the 289 cases in our sample, or more than half the time, the ban was imposed without the required managerial approval.[60] As discussed above, the required managerial approval consists of indicating on the CEAS database that the manager has reviewed the file and agrees with the auditor's proposal to impose the ban.[61] Yet, despite improvement in the percentage of cases that

56 There were 248 cases in which the ban applied only to the EITC; no cases in which the ban applied only to the CTC; and 11 cases in which the ban applied only to the AOTC. Where the same taxpayer was subjected to bans with respect to more than one credit (30 cases), the bans usually applied to the EITC and CTC (26 cases), followed by EITC and AOTC (two cases) and CTC and AOTC (two cases). There were no cases in which the ban was imposed with respect to all three credits.

57 TAS Research, IRS, CDW, IRTF (Tax Years 2014, 2015, and 2016).

58 *Id.*

59 TAS Research, IRS, CDW, IRTF, as of cycle 39 for tax years 2017 and 2018.

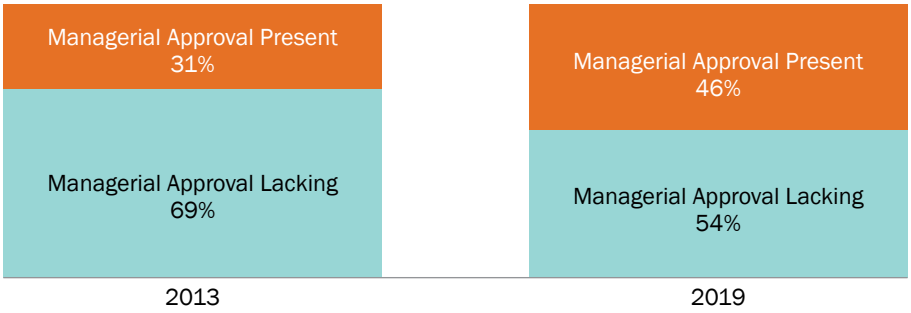
60 155 out of 289 is 54 percent.

61 IRM 4.19.14.7.1(3), 2/10 Year Ban - Correspondence Guidelines for Examination Technicians (CET) (May 8, 2018) provides: "The manager must review the entire case file and ensure the following: the workpapers are documented according to 4.19.13.6 including the decision and reason to impose or not impose the 2-year ban; the decision to assert the 2-year ban is warranted. The manager must input a CEAS non-action note to approve the assertion on the 2-year ban."

contained managerial approval, this crucial step was frequently lacking.[62] Figure 4.2.2 shows the rate at which two-year bans were imposed with and without the required managerial approval, according to this year's study and our 2013 study.

FIGURE 4.2.2

Rate of Managerial Approval of Two-Year Bans



5. Form 886-A, Explanation of Items, often did not contain an adequate explanation of why the ban was imposed, as required by IRS procedures.

Of the 289 taxpayers in the sample, 282 were sent Form 886-A. Out of these 282 cases, the explanation to the taxpayer on Form 886-A clearly explained why the ban was imposed in 44 cases — 16 percent of the time.[63] For example, one explanation was:

> A two-year ban of earned income tax credit (EITC), per Internal Revenue Code (IRC) section 32(k), was asserted. Our records show you had a 2014 audit and claimed the same person as for this audit, [name of a relative with a relationship to the taxpayer that is not listed in IRC § 32(c)(3) as someone who can be a qualifying child]. Our phone records from [date] regarding your 2014 audit show you stated that you claimed [that person] and you were advised [that person] did not qualify for earned income tax credit. Evidence suggests you have shown reckless disregard of tax laws, rules and regulations since you aware [that person] was not eligible for the earned income tax credit [in 2014] but you claimed [that person] again for the earned income tax credit on your 2016 tax return.

In 236 of the 282 cases, or 84 percent of the time, the explanation provided to the taxpayer on Form 886-A was inadequate.[64] We consulted auditors' workpapers in these cases for a better understanding of why the ban was imposed. In 73 of these 236 cases, or 31 percent of the time, the auditors' workpapers

62 The National Taxpayer Advocate recommends amending IRC § 6751 to require managerial approval before imposing a ban. See National Taxpayer Advocate 2020 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration* 30-32 (*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*).

63 The DCI question was: "Does Form 886-A clearly explain the reason for the assertion of the 2-year ban?"

64 For one case, we were unable to locate Form 886-A.

demonstrated the ban was imposed solely because the same credit had been disallowed in a previous year.[65] A typical explanation provided to the taxpayer in these cases was:

> As you have been previously audited more than once and not been able to prove the return, you should be aware of the rules and regulations to claim the earned income tax credit. We propose that ban of two years to claim the earned income tax credit from the time the examination is closed be imposed. We also propose a penalty of 20 percent for negligence under IRC 6662, as you continue to claim dependents to which you are not entitled.

According to this explanation, the auditors imposed the ban simply because, according to the auditor, the taxpayer "should be aware of the rules and regulations." The auditors did not even profess to have determined what the taxpayer's state of mind was.

Moreover, the explanation provided to the taxpayer on Form 886-A sometimes appeared to be based on a form or template. For example, in multiple cases we found the following explanation, or very similar versions of it:

> Your [prior year] tax return was examined for the same issue and you did not establish that the child you were claiming qualified for the EIC. You were previously informed of the requirements and the specific rules and regulations pertaining to the EIC and still have not sent in proper documents that verify that you qualify for this credit. Based on the information we have available, we are proposing an accuracy penalty and a 2-year ban on the Earned Income Credit (EIC) due to reckless or intentional disregard of the rules and regulations regarding the EIC. If we receive the proper documents that verify that you qualify for this credit, we will consider removing the penalty and ban.

From this explanation, the taxpayer could infer that the ban is being imposed because the previous year's credit was disallowed. The explanation does not say *why* the child claimed in the previous year was not a qualifying child (*e.g.*, whether it was the age, relationship, or residency test that was not met), whether the same error was made on the audit year return, or even whether the person being claimed as a qualifying child in the audit year is the same as the person who was not a qualifying child in the prior year. The explanation recites that the taxpayer "was informed of the requirements and the specific rules and regulations" but does not indicate what specific rules appear not to have been followed.[66]

The situation with respect to taxpayers who did not participate in the audit requires additional analysis. As noted above, a taxpayer's failure to respond to a request for substantiation and verification of EITC does not, in and of itself, constitute reckless or intentional disregard of the rules and regulation.[67] Out of the 289 cases in the sample, the IRS requested additional documentation from the taxpayer in 280 cases. Of these 280 cases, 48 were no show/no response cases, or mail to the taxpayer was returned as undelivered.

65 At the 95 percent confidence level, the margin of error is +/- 5.7 percent.

66 Confusingly, the letter includes the accuracy-related penalty, which applies to negligent conduct, in the discussion. Incorrectly, the letter states that if the taxpayer demonstrates eligibility for the credit, the IRS will only "consider" removing the penalty and ban.

67 IRS SCA 2002-45051 (Nov. 8, 2002).

In only five of the 48 no show/no response cases did the IRS provide an adequate explanation for imposing the ban to the taxpayer on Form 886-A.[68] In only ten of the 48 cases (including the five cases in which the Form 886-A explanation was adequate) did the auditor's workpapers contain an adequate explanation for imposing the ban, as required by IRS procedures.[69] For the remaining cases in which an adequate explanation for the ban was not found, the inference arises that the IRS imposed the ban for the simple reason that the taxpayer did not participate in the audit — exactly what OCC cautioned against.

Providing taxpayers with an adequate explanation for the ban on Form 886-A is important not only as a matter of sound tax administration and because it is required by IRS procedures, but also because the explanation on Form 886-A may be the only explanation taxpayers receive contemporaneously with the statutory notice of deficiency.[70]

6. The IRS usually did not speak to taxpayers in the sample who were being audited for the first time before imposing a ban, as required by IRS procedures.

If the audit that resulted in the ban was the first time the taxpayer had been audited since 2006, we considered it a first-time audit.[71] We adopted this approach because we did not find it reasonable to expect taxpayers to recall or retain information they may have learned in an audit more than ten years ago, especially as the rules for claiming the credits changed over the years. Moreover, the IRS advises taxpayers that they generally must retain their tax records for three years from the time they filed a (non-fraudulent) return.[72] Where there was a prior year's audit of the same credit, but the audit had not concluded by the time the taxpayer filed a return for tax year 2016, we treated the audit of tax year 2016 as a first-time audit. We adopted this approach to recognize that a taxpayer may have known a previous year was being audited (*e.g.*, tax year 2015), but as long as the audit of that earlier year was still open, the taxpayer did not have the benefit of knowing whether or why there was any error on that return when filing the return for tax year 2016.[73]

In first-time audit cases in which the taxpayer participated in the audit, the reviewers ascertained whether the IRS spoke with the taxpayer before imposing the ban, as required by IRS procedures. There were 44 cases in our sample in which the taxpayer was being audited for the first time and participated in the audit. Of those 44 cases, we found 17 cases in which the IRS spoke to the taxpayer as required. Thus, the IRS is following its own procedures that apply to first-time audits only 39 percent of the time.[74]

68 At the 95 percent confidence level, the margin of error is +/- 8.4 percent.

69 At the 95 percent confidence level, the margin of error is +/- 11.5 percent. Five out of the eight cases involved misreported income, which resulted in disallowance of the EITC.

70 The version of Letter 3219, Statutory Notice of Deficiency, issued to taxpayers in our sample does not specifically reference the two-year ban, but recites that "The enclosed statement shows how we figured the deficiency." The referenced enclosed statement generally included Form 4549, Income Tax Examination Changes, Form 886-A, or both.

71 The IRS sometimes appeared to not to consider the current audit a first-time audit if there had *ever* been a prior audit: for example, auditors in two cases referenced audits from more than a decade ago. The IRS did not speak with the taxpayer in either case before imposing the ban.

72 IRS, How Long Should I Keep Records? (July 10, 2019), https://www.irs.gov/businesses/small-businesses-self-employed/how-long-should-i-keep-records.

73 We identified four cases with this fact pattern.

74 17 cases out of 44 cases is 39 percent. The margin of error for this finding at the 95 percent confidence level is +/- 14.3 percent.

7. From documents they submitted, it appears that taxpayers often believed they qualified for the credit, and auditors sometimes imposed the ban for mere negligence.

As noted above, out of the 289 cases in the sample, the IRS requested additional documentation from the taxpayer in 280 cases. Taxpayers submitted documents in 181 of those 280 cases, or 65 percent of the time.

In 97 of the 181 cases, or 54 percent of the time, it appeared from the documents submitted that the taxpayer believed he or she qualified for the credit.[75] For example, one of the 97 taxpayers, filing as a head of household, claimed the EITC and CTC with respect to one qualifying child. In response to the auditor's request for additional information, the taxpayer submitted documents that included:

- A birth certificate establishing that the claimed qualifying child was the taxpayer's child and met the age requirement;
- A lease agreement showing that taxpayer and the child lived at the same address;[76] and
- A utilities bill for the address shown on the lease.[77]

As noted, the auditor rejected the documents (and we do not imply that the auditor should have accepted them). However, the auditor noted in the workpapers: "TP has displayed negligence (a willful disregard for rules and regulations) in claiming the dependent. The accuracy-related penalty (PEN) for negligence and the 2-year ban for CTC/EIC are being asserted at this time." This was not the only case in our sample in which the auditor equated negligence with willful disregard of rules and regulations and believed that mere negligence by the taxpayer justified imposing a ban.[78]

In 24 of the 181 cases in which taxpayers submitted documents in response to a request by the IRS, or 13 percent of the time, it was unclear from the documents submitted whether the taxpayer believed he or she qualified for the credit. In some of these cases the work papers show the auditor vacillated, changing an initial decision to not impose the ban.[79]

In only 60 of the 181 cases, or 33 percent of the time, were the documents clearly insufficient to support the claimed credit, raising the possibility that the taxpayer had the requisite state of mind to justify the ban.[80] For example, to substantiate income, a taxpayer submitted a Form 1099 that appeared false.

75 The margin of error for this finding at the 95 percent confidence level is +/- 7.1 percent.

76 The auditor rejected the lease agreement as satisfying the residency test, with the notation "Not accepted. Incomplete. The [other parent] of the children was not named as an occupant. A lease alone cannot be used to verify residency or support because it was unsigned." We are uncertain why it was relevant to the auditor that the other parent was not named as an occupant on the lease.

77 The auditor rejected the utilities bill as evidence, with the notation "Considered, but not accepted. No proof of payment. Clearly stated only 1 occupant during those timeframes."

78 At least one of the 97 cases involved a second auditor who changed the first auditor's determination not to impose a ban. In that case, the first auditor's workpapers note: "Not asserting the two year ban as there is no evidence that the taxpayer recklessly or intentionally disregarded the EIC rules. TP [taxpayer] was partially allowed EIC in [year of earlier] audit. Some EIC rules have changed since the last audit. There is no evidence TP is aware of and understands current EIC rules and regulations." The second auditor determined to impose the ban, noting "TP was examined during [year of earlier audit]. TP corresponded 3 times to the examination and signed the Form 4549 agreed per examination changes. TP was made aware of the rules and regulations regarding Earned Income Credit."

79 The margin of error for this finding at the 95 percent confidence level is +/- 4.8 percent.

80 At the 95 percent confidence level, the margin of error is +/- 6.7 percent.

In some cases in the sample, the auditor imposed the ban while also determining that a negligence penalty under IRC § 6662(c) did not apply. The workpapers in several of these cases simply recite that there was "no clear evidence of taxpayer's disregard/negligence of the rules and regulations in completing tax return."

8. The IRS did not often impose bans systemically, but when taxpayers responded to proposed systemic bans the IRS did not follow its procedures.

Overall, of the 3,831 audits of tax year 2016 that resulted in a ban, 125 were designated with project code 27 or 28. We found 13 project 27 or 28 cases in our sample. Of the 13 cases, there were four cases in which the taxpayers responded to the correspondence from the IRS about the proposed ban. In only one of those four cases was there managerial approval for the ban. In only one of those four cases (a different case than the one that had the required managerial approval) was there an adequate explanation to the taxpayer of the reason for imposing the ban. In other words, there were no cases in which a taxpayer responded to a proposed automatic ban and the IRS proceeded with the ban only after obtaining managerial approval and providing an explanation to the taxpayer, as required by IRS procedures.[81]

9. Taxpayers rarely sought audit reconsideration of the ban, but even when credits were allowed after reconsideration, the ban was not always removed.

Overall, of the 3,831 taxpayers who were subjected to a ban as a result of audits of tax year 2016 returns, 86 sought audit reconsiderations. In 25 of the 86 cases, almost a third of the time, all or part of the banned credit was allowed.

In six of the 25 cases, the credit was fully allowed. However, the ban was removed in only one of these six cases; the ban remains in effect in the other five. In 19 of the 25 audit reconsideration cases, the credit was partially allowed; the ban was not removed in any of these cases.

10. The IRS did not often disallow credits pursuant to its summary assessment authority, and taxpayers rarely challenged the summary assessments.

Of the 3,831 taxpayers on whom a ban was imposed as a result of an audit of their 2016 return, 203 (including nine taxpayers in our sample) were issued a notice of summary assessment because they claimed a banned credit on their 2017 return.[82] Of these 203 taxpayers, 31 (none of whom were included in our sample) responded to the notice of summary assessment and were issued a statutory notice of deficiency. None of the 31 taxpayers petitioned the Tax Court in response to the statutory notice of deficiency. Of the 3,831 taxpayers, 354 were issued a notice of summary assessment as a result of claiming a banned credit on their 2018 return. None of them were issued a statutory notice of deficiency.

81 Due to the small sample size, we do not project these findings to the population.

82 IRS CDW, IMF, IRTF, as of cycle 201939.

CONCLUSION

The IRS imposes two-year bans when the statutory requirements have not been met, *i.e.*, in the absence of a determination that the taxpayer claimed the credit due to reckless or intentional disregard of rules and regulations. The IRS also fails to follow its own procedures: required managerial approval is often not secured before the ban is imposed, an adequate explanation of why the ban was imposed is frequently lacking, and auditors usually do not telephone a taxpayer before imposing the ban when required to do so. Taxpayers are harmed not only because they are deprived of credits for which they are eligible but also because challenging the appropriateness of the ban is procedurally difficult.

RECOMMENDATIONS

The National Taxpayer Advocate recommends that the IRS:

1. Revise procedures for imposing two-year bans to require IRS employees to speak with the taxpayer in every case before imposing a ban.
2. Suspend the practice of automatically imposing two-year bans.
3. Conduct quality reviews for at least three years of every case in which the IRS proposes to impose the two-year ban.

TAS Research and Related Studies 3

Audit Impact Study: The Specific Deterrence Implications of Increased Reliance on Correspondence Audits[1]

1 This research was conducted for the National Taxpayer Advocate by B. Erard and Associates, LLC under contract TIRNO-17-E-00019. This study was conducted by Brian Erard, Erich Kirchler, and Jerome Olsen. Any opinions expressed in this report are those of the authors and do not necessarily reflect the views of the National Taxpayer Advocate. We thank the National Taxpayer Advocate and the Taxpayer Advocate Service (TAS) for their sponsorship and support of this research study, and, in particular, Jeff Wilson for his substantial assistance and helpful advice. The statistical information in this research study was not provided or reviewed by the Secretary under IRC § 6108(d). *See* IRC § 7803(c)(2)(B)(ii)(XII).

INTRODUCTION

Tax administrations rely on audits as a key tool for promoting and enforcing tax compliance. Since audit resources are costly and scarce, however, they are largely reserved for cases with substantive compliance risks. The overall audit rate for U.S. federal individual income tax returns has decreased over time, from one percent of returns filed in 1990 to six-tenths of one percent of returns filed in 2017. There also has been a substantial change in the composition of audits over this period. Whereas face-to-face audits accounted for the majority (62 percent) of all examinations of returns filed in 1990, the lion's share (81 percent) of all audits of returns filed in 2017 were conducted through correspondence.[2]

An important objective of tax audits is specific deterrence: improving the future compliance behavior of those taxpayers who have been targeted for an audit. Past research on the specific deterrent effect of an audit has largely focused on the impact of random audits, either in a laboratory or a field setting.[3] In contrast, most real-world tax audits are targeted towards returns that are considered to be at substantive risk for noncompliance. To better understand how the population of taxpayers who are targeted for risk-based audits responds to examinations, we focus in this study on the role of operational rather than random audits.

A second limitation of existing studies is that they do not distinguish between audit approaches. In comparison with face-to-face audits, correspondence examinations tend to be more narrowly focused and less costly to undertake. At the same time, they are more impersonal. In fact, a recent survey study commissioned by TAS (Erard et al., 2018) indicates that, while most taxpayers who have received a face-to-face examination are able to recall their audit experience, the majority of those who have received a correspondence examination report that they have not been audited. This suggests that many taxpayers do not perceive a correspondence examination as a genuine audit. In this study, we investigate whether face-to-face audits impact future taxpayer reporting behavior differently than correspondence audits. Given the increasing reliance of the Internal Revenue Service (IRS) on correspondence examinations in response to budgetary pressures, this is a question of significant practical importance.

This study relies on a large and unique data base that includes audit and comparison samples covering two different tax years: 2010 and 2014. The tax year 2010 sample includes nearly 53,000 self-employed taxpayers (Schedule C filers) who experienced either a face-to-face or correspondence audit of their tax year 2010 returns as well as a comparison group of approximately 421,000 unaudited Schedule C filers.[4] The sample for tax year 2014 includes about 17,000 audited self-employed taxpayers as well as a comparison group of 377,000 Schedule C filers who were not audited in that year. To estimate the impacts of face-to-face and correspondence examinations on future reporting behavior, we apply an inverse probability weighting methodology. This methodology produces two separate sets of weights for the subsample of unaudited taxpayers. The first set of weights is used to make this subsample representative of taxpayers who received a correspondence audit, while the second set makes it representative of taxpayers who received a face-to-face audit. In this way, the weighted subsample is able to serve as a counterfactual for how the respective groups of audited taxpayers would have behaved in the absence of their audits.

2 Authors' calculations based on Internal Revenue Service (1991, Table 11, p. 24) and Internal Revenue Service (2018, Table 9a, p. 23).

3 Two exceptions are Erard (1991) and Beer et al. (2015).

4 Schedule C is a form used by U.S. federal individual income taxpayers to report income and losses from a non-farm sole proprietorship.

The results indicate that face-to-face audits are consistently effective in promoting future reporting compliance. For tax year 2010, a face-to-face examination is predicted to result in more than a 40 percent increase in reported taxes for the first tax year following the initiation of the audit and a 27 percent increase for the subsequent tax year. For tax year 2014, the estimated pro-deterrent effect is even larger, ranging from 62 to 97 percent, depending on whether the audit takes place later or earlier in the examination cycle. On the other hand, the impact of correspondence audits on self-employed taxpayers is more nuanced. Correspondence audits that are undertaken shortly after filing (prior to the filing for the subsequent tax year) tend to have a counter-deterrent effect, reducing reported taxes by 6 to 15 percent over the two years following the examination. In contrast, correspondence audits that take place later (after the next year's tax return has been filed) have a pro-deterrent effect, similar in size to that observed for face-to-face examinations. We suspect that these contrary outcomes may reflect differences in the types of issues or taxpayers that are addressed over the correspondence audit cycle. However, more research is needed to understand the reasons underlying this result. More generally, the findings point to a need for further investigation into the proper balance between face-to-face and correspondence examinations.

The remainder of this paper is organized as follows. An overview of the theoretical insights on the specific deterrent effect of an audit is provided in Section 2, while Section 3 describes our estimation methodology. The data are summarized in Section 4, and Section 5 presents the estimation results. Section 6 concludes.

Theoretical Insights

There is no consensus from theoretical models regarding the impact of an audit on a taxpayer's subsequent reporting decisions. In the standard economic model of tax compliance behavior (Allingham and Sandmo, 1972), all relevant parameters influencing one's reporting decision are fixed and known with certainty, including the true level of taxable income, the tax rate, the audit rate, and the penalty rate on unreported income. Consequently, no useful information is learned from an audit that would influence future tax reporting behavior.

To allow for a specific deterrent effect of audits, new sources of uncertainty or taxpayer motivation need to be introduced. For instance, it may be the case that future perceptions of the risk of audit and punishment are influenced by an audit experience. If an audit leads to a higher perceived risk of future examinations, this should make one relatively more compliant. Several random audit studies (Kleven et al., 2011; Gemmell and Ratto, 2012; DeBacker et al., 2015; and Advani, Elming, and Shaw, 2017) have attributed their findings of a specific pro-deterrent effect to this cause. On the other hand, some laboratory experiments (Guala and Mittone, 2005; Mittone, 2006) have produced evidence of "bomb-crater effects" — instances of increased cheating following an audit in an earlier round of a tax compliance game. Kastlunger et al. (2009) attribute such behavior to a misperception that the likelihood of receiving a second consecutive audit is extremely low.

In addition to perceptions of audit risk, researchers have proposed a variety of other pathways for audits to impact future taxpayer reporting behavior, including loss repair motivations (Maciejovski, Kirchler, & Schwarzenberger, 2007), dynamic reporting considerations (Engel & Hines, 1999), uncertainty about either one's tax liability (Scotchmer & Slemrod, 1989; Beck & Jung, 1987) or the tax agency's capacity to detect tax underreporting (Beer et al., 2015), and tax morale (Feld & Frey, 2003; Frey, 2011; Frey, Benz, & Stutzer, 2004).

Correspondence audits tend to be more narrow in scope and less personal than face-to-face examinations. From a theoretical perspective, these differences in audit characteristics may have implications for perceptions of future audit risk, beliefs about the capacity of the tax administration to uncover evasion when it is present, the level of certainty about true tax liability, and tax morale. In turn, these factors may influence future reporting behavior. To address this possibility, we develop separate estimates of the specific deterrent effect for these two audit types.

Estimation Methodology

To control for differences in characteristics among taxpayers who have experienced a correspondence audit, a face-to-face audit, or no audit when estimating specific deterrent effects, we rely on the inverse probability of treatment weighting (IPTW) methodology. This methodology requires no assumptions about the functional relationship between the determinants of audit selection and taxpayer reporting behavior. Under this approach, one begins by estimating the propensity scores (predicted probabilities) π_i^c, π_i^f, and π_i^{na}, associated with a correspondence audit, a face-to-face audit, and no audit, respectively. Define the indicator variable for taxpayers in the sample who did not experience an audit as I^{na}, and denote the outcome variable as y. The Horvitz-Thompson estimator of the expected counterfactual outcome among taxpayers receiving a correspondence audit had they not been audited is then defined as:

$$\left(\frac{1}{\sum I_i^{na}}\right)\sum\left[I_i^{na}\ y_i\left(\frac{\pi_i^c}{\pi_i^{na}}\right)\right].$$

Similarly, the Horvitz-Thompson estimator of the expected counterfactual outcome among taxpayers receiving a face-to-face audit had they not received an examination is defined as:

$$\left(\frac{1}{\sum I_i^{na}}\right)\sum\left[I_i^{na}\ y_i\left(\frac{\pi_i^f}{\pi_i^{na}}\right)\right].$$

These counterfactual outcome estimates are thus computed as a weighted average of the outcomes observed for the unaudited taxpayers in the sample, where the weights are computed as the ratio of the relevant propensity scores.[5] Intuitively, greater weight is applied to unaudited taxpayers with a relatively high predicted probability of selection for the specified type of audit, as taxpayers with their characteristics will tend to have greater representation among the sample of filers who received that type of audit. The estimated specific-deterrent effect is computed as the difference between the actual mean outcome for taxpayers who received the specified type of audit and the estimated counterfactual outcome for these taxpayers.

In our analysis, we rely on propensity scores derived from a multinomial logit model of audit selection.[6] This analysis allows for three possible audit selection outcomes: (1) no audit, (2) correspondence audit; or (3) face-to-face audit. We have constructed a set of over 60 candidate explanatory variables for the audit selection process. Included among these covariates are measures of the current and prior year DIF-scores that are relied upon by the IRS to help identify high-risk returns for examination. A sequential selection process is employed to choose the final set of covariates.

Some taxpayers in our sample were audited prior to filing the next year's tax return, and others were audited after doing so. To account for differences in the audit selection process for these two groups, a

5 In our application, we follow the conventional approach to stabilizing the weights used in our analysis.

6 We employ sample weights in estimation to account for the choice-based nature of our data sample.

separate multinomial logit analysis is performed for each group. The estimation results are employed to predict the odds of a correspondence audit and the odds of a face-to-face audit (relative to no audit) for each taxpayer in the estimation sample.

For taxpayers who were audited prior to filing the next year's tax return, our outcome variable is the difference between the natural log of reported tax for a subsequent tax year (either of the next two filed tax returns) and the natural log of reported tax on the audited return. Effectively, then, this approach produces "difference-in-differences" estimates to account for unobserved time-invariant differences between the audited and unaudited taxpayers in our sample. A one-year ahead impact estimate is derived using the very next year as the subsequent tax year, while a two-year ahead impact estimate is obtained using the following year as the subsequent tax year.

In the case of taxpayers who were audited only after filing their tax return for the following year, we rely on our one-period ahead impact estimate as a "placebo test". Since these taxpayers were not aware of the audit until after they had filed a return for the following year, the one-period ahead impact estimate has an expected value of zero. Therefore, this placebo test provides a useful check on the quality of the matching process. The two-period ahead impact estimate calculated as described above is effectively a one-period ahead estimate for this group, since the return filed two years later was the first return that was filed subsequent to the initiation of the audit.

DATA

The data for this study includes detailed line-item information from returns filed by audited and unaudited self-employed taxpayers. The audit sample consists of all Schedule C filers who experienced an audit of the return they filed for the relevant tax year (2010 or 2014), excepting those who failed to satisfy one or more of the following eligibility criteria:

- The taxpayer filed Schedule C for at least three years, including on the return that was audited, the return filed for the previous tax year, and the return filed for the subsequent tax year.[7]
- The taxpayer filed at least five tax returns in chronological order, including the return that was audited, the returns for the previous two tax years, and the returns for the subsequent two tax years.
- The audit was not focused on certain specialized issues that would make it especially difficult to identify a matched unaudited taxpayer.[8]
- The audit was initiated prior to the date when the taxpayer filed the return for the second subsequent tax year.[9]
- No earlier audits were initiated or closed within two years of the date that the audited return was filed.
- If the taxpayer was subsequently audited for another tax year, this subsequent audit was not initiated until at least one year had passed from the start of the earlier audit.
- The taxpayer did not reside in a U.S. territory or outside of the U.S.

7 If returns for additional tax years were filed, these were also required to be filed in chronological order.

8 Certain types of audits were excluded on the basis of source codes that an IRS examination expert deemed to fit this criterion.

9 The records concerning the dates that a given return was filed and the taxpayer was notified of an audit are imprecise, so we excluded ambiguous cases where the return filing date and audit notification date were within forty-five days of each other.

A stratified random sample of taxpayers who did not experience an audit was also drawn. To be eligible for this sample, the following requirements had to be met:

- The taxpayer filed Schedule C at least on the return filed for the reference audit year (tax year 2010 or tax year 2014), the return for the preceding year, and the return for the subsequent year.
- The taxpayer filed returns in chronological order for at least five years that bracket the reference audit year.[10]
- The return for the reference audit year was not audited, and no other audits were initiated or closed in the two years preceding or the two years subsequent to the date that return was filed.
- The taxpayer did not reside in a U.S. territory or outside of the U.S.

The members of the unaudited taxpayer sample were selected to provide a means for developing counterfactual estimates of behavior for the members of the audit sample. Therefore, an important sampling objective was to include a substantial number of unaudited taxpayers who had characteristics similar to those of audited taxpayers. To achieve this goal, a 1 percent probability sample was drawn from the members of the eligible population with DIF-scores that were in the range commonly observed for audited taxpayers in the same examination class. As discussed in Section 3, the DIF-score is a key risk assessment measure employed by the IRS when selecting individual income tax returns for examination. To ensure that all eligible members of the overall population of unaudited taxpayers had at least some chance of being included in the sample, a 0.3 percent probability sample was drawn from this general population. To account for the stratified nature of the sampling process, a set of sample weights was constructed so that the sample can be made representative of all eligible filers in the population.

For each sampled taxpayer, the data include detailed line item information from each tax return filed for the reference audit year, the two prior years, and the two subsequent years. Figure 4.3.1 presents the numbers of audited and unaudited taxpayers that were sampled.

FIGURE 4.3.1, Sample Count of Taxpayers by Audit Type

Reference Audit Year	Correspondence	Face-to-Face	Unaudited
Tax Year 2010	40,359	12,541	421,309
Tax Year 2014	13,629	3,274	377,168

RESULTS

The estimated one-period and two-period ahead specific deterrent effects for correspondence and face-to-face audits of self-employed taxpayers are presented in Figure 4.3.2. These estimates represent the predicted change in the natural log of reported tax liability associated with the specified tax year and examination type. In Figure 4.3.3, these estimates have been translated into measures of the predicted percentage change in reported tax liability using the formula:

$$\%chg = \left(e^{estimate} - 1\right).$$

10 If returns for additional tax years were filed, these were also required to be filed in chronological order.

For audits that were initiated after the return for the following year was filed (but before the 2nd subsequent return was filed), a placebo impact estimate is provided for the next year's return. The expected audit impact is equal to zero in this year, since the taxpayer would not have been aware of the audit when that return was filed. The estimated impact for each audit type is in fact small and statistically insignificant, consistent with expectations. This finding helps to substantiate the validity of the estimation methodology.

The estimation results indicate that face-to-face audits have a large specific deterrent effect. For tax year 2010 audits that began prior to the filing of the tax year 2011 return, reported tax liability is estimated to have increased by 40.8 percent ($e^{0.3423}$-1) for tax year 2011 and 27.3 percent for tax year 2012 as a result of the examination. For audits that began after the tax year 2011 return was filed, reported tax liability is estimated to have increased by 37.5 percent in tax year 2012. The estimated impacts are even larger for tax year 2014 audits. For audits that began prior to the filing of the tax year 2015 return, reported tax liability is estimated to increase by more than 95 percent in tax year 2015 and remain around that level the following tax year. For tax year 2014 audits that began after the tax year 2015 return was filed, reported tax liability is estimated to increase by more than 61 percent on the first return filed since the audit was initiated (tax year 2016).

The estimation results for correspondence audits are more nuanced. For audits that began prior to the filing of the tax year 2011 return, there is evidence of a counter-deterrent effect. Reported tax liability is estimated to have declined by 7.3 percent ($e^{-0.076}$-1) in tax year 2011 and 8.3 percent in tax year 2012 as a result of the examination. On the other hand, reported tax liability is estimated to have been 37.5 percent higher in tax year 2012 for taxpayers whose tax year 2010 audits were initiated later in the examination cycle.

FIGURE 4.3.2, Estimated Specific Deterrent Effect on Natural Log of Reported Tax Liability by Audit Type and Tax Year

Audit Type	Audited Before Next Return Filed		Audited After Next Return Filed	
	1st Year Impact	2nd Year Impact	Placebo Impact	1st Year Impact
Tax Year 2010 Audit Results				
Correspondence	-0.0760* (5.26)	-0.0869* (4.83)	-0.0125 (0.62)	0.3187* (14.98)
Face-to-Face	0.3423* (7.92)	0.2414* (5.37)	0.0406 (1.17)	0.3184* (8.88)
Tax Year 2014 Audit Results				
Correspondence	-0.0585* (2.30)	-0.1622* (5.17)	0.0897* (2.58)	0.4766* (12.15)
Face-to-Face	0.6696* (11.87)	0.6796* (11.19)	0.0906 (1.31)	0.4809* (6.57)

(absolute value of t-statistics in parentheses; asterisk indicates significance at the 5 percent level)

FIGURE 4.3.3, Predicted Percentage Change in Reported Tax Liability by Audit Type and Tax Year

Audit Type	Audited Before Next Return Filed		Audited After Next Return Filed	
	1st Year Impact	2nd Year Impact	Placebo Impact	1st Year Impact
Tax Year 2010 Audit Results				
Correspondence	-7.32%	-8.32%	-1.24%	37.53%
Face-to-Face	40.82%	27.30%	4.14%	37.49%
Tax Year 2014 Audit Results				
Correspondence	-5.68%	-14.97%	9.38%	61.06%
Face-to-Face	95.34%	97.31%	9.48%	61.75%

The disparity among the findings within the correspondence audit group may reflect differences in the types of issues or taxpayers that are addressed over the correspondence audit cycle. Based on a preliminary analysis of audit findings, approximately half of all correspondence audits involving self-employed taxpayers are initiated before the taxpayer has filed a return for the following tax year. A very substantial share (over 70 percent) of these early audits involve taxpayers who claim the Earned Income Credit (EIC).[11] In contrast, only about 19 percent of the audits initiated later in the cycle (after the return for the following tax year has been filed) involve EIC claimants.

Among self-employed taxpayers who do not claim the EIC, a disproportionate share of the correspondence audits that are initiated early in the examination cycle involve questionable refunds or claims for certain other tax credits. On the other hand, audits that take place later in the cycle (after the return has been filed for the following tax year) are much more likely to involve issues pertaining to the business, various claims for itemized deductions, or claims for some other types of tax credits.

Since EIC claimants account for such a large share of correspondence examinations overall (approximately 45 percent) and, especially, of audits that take place early in the examination cycle, we have extended our estimation methodology to develop separate audit impact estimates for claimants and non-claimants. The results are summarized in Figure 4.3.4 and 4.3.5. Similar patterns are observed for both groups. Correspondence audits that take place later in the examination cycle (after the next tax return has been filed) have a substantial pro-deterrent effect, while those that take place early in the cycle have a moderate counter-deterrent effect. This heterogeneity in outcomes may be attributable to differences in the characteristics of the taxpayers and the issues facing them at different points in the examination cycle. Alternatively, it could have to do with the amount of time that lapses between filing a return and being notified of an audit.

11 Some of these correspondence audits involve issues beyond the EIC.

FIGURE 4.3.4, Estimated Specific Deterrent Effect of Correspondence Audits on Natural Log of Reported Tax Liability by EIC Claim Status and Tax Year

EIC Claim Status	Audited Before Next Return Filed		Audited After Next Return Filed	
	1st Year Impact	2nd Year Impact	Placebo Impact	1st Year Impact
Tax Year 2010 Audit Results				
Claimant	-0.1455* (2.20)	-0.1162* (2.39)	-0.0175 (0.72)	0.5334* (6.75)
Non-claimant	-0.0503* (2.34)	-0.1306* (5.45)	-0.0343 (1.56)	0.2507* (11.35)
Tax Year 2014 Audit Results				
Claimant	-0.0201 (0.64)	-0.1527* (3.83)	0.1562 (1.81)	0.6459* (5.25)
Non-Claimant	-0.1432* (3.72)	-0.1428* (11.19)	0.0490 (1.14)	0.4434* (6.52)

(absolute value of t-statistics in parentheses; asterisk indicates significance at the 5 percent level)

EIC claimants make up about 19 percent of the self-employed taxpayers who experience an audit later in the examination cycle. Although the pro-deterrent impact of these later audits is substantial for both EIC claimants and non-claimants, it is especially large for EIC claimants (53 percent increase in reported tax liability for tax year 2010 audits and 65 percent for tax year 2014 audits, compared to 25 percent and 44 percent, respectively, for non-claimants).

FIGURE 4.3.5, Predicted Percentage Change in Reported Tax Liability for Correspondence Audits by EIC Claim Status and Tax Year

EIC Claim Status	Audited Before Next Return Filed		Audited After Next Return Filed	
	1st Year Impact	2nd Year Impact	Placebo Impact	1st Year Impact
Tax Year 2010 Audit Results				
Claimant	-13.54%	-10.97%	-1.73%	70.47%
Non-claimant	-4.91%	-12.24%	-3.37%	28.49%
Tax Year 2014 Audit Results				
Claimant	-1.99%	-14.16%	16.91%	90.77%
Non-claimant	-13.34%	-13.26%	5.02%	55.80%

As summarized in the Appendix, we have performed some sensitivity analyses involving alternative estimation methodologies and additional tax years. The results corroborate our main findings.

CONCLUSION

An important purpose of audits beyond immediate revenue generation is to discourage future reporting noncompliance. The existing empirical literature on the specific-deterrent effect of an audit has generally found that audits do improve future reporting behavior, although some laboratory experiments have uncovered "bomb-crater" effects and, in earlier work (Beer et al., 2015), we have found evidence of a counter-deterrent effect in cases where audits fail to uncover any noncompliance. However, much of the empirical literature has focused on random audits, and the role of audit type has not been explored. In practice, audit selection at the IRS is overwhelmingly risk-based rather than random, and there has been a marked shift over time away from face-to-face examinations and towards correspondence audits.

In this paper, we have conducted a preliminary analysis of how operational audits impact future reporting behavior, and we have paid special attention to how correspondence and face-to-face examinations may differ in this regard. Our estimation results indicate that correspondence audits that take place later in the examination cycle (after the subsequent tax return has been filed) are comparable to face-to-face audits in terms of their impact on future reporting behavior. Both types of audits have a substantial pro-deterrent effect when they are initiated after the following year's tax return has been filed. In contrast, however, correspondence audits that take place early in the audit cycle are actually associated with a counter-deterrent effect. Reported tax liability is estimated to fall by 6 to 15 percent in the first two tax years following the initiation of the audit. This is an important finding, because approximately half of all correspondence examinations take place early in the audit cycle.

Overall, then, the results of this study suggest that correspondence audits are not a perfect substitute for face-to-face examinations. Not only do they tend to be more narrowly targeted and impersonal, they also appear to be less consistent in terms improving future taxpayer reporting behavior. This raises concerns about IRS' increasing reliance on this form of enforcement. The disparate findings for correspondence audits that take place at different points in the audit cycle may reflect differences in the types of issues or taxpayers that are addressed over the cycle. Alternatively, the amount of time that lapses between filing a return and notification of an audit may have a direct impact on future reporting behavior. Further research is needed to understand this result. More generally, the findings suggest that further study on the proper balance between face-to-face and correspondence audits is warranted.

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APPENDIX: SENSITIVITY ANALYSES

To investigate the robustness of our findings, we have experimented with two alternative estimation methodologies:

1. **Inverse Probability of Treatment Weighting with Regression Adjustment.** This method extends the methodology discussed in the main text by incorporating a regression specification for the natural log of reported tax liability. The regression equation relies on the same explanatory variables as the multinomial logit specification for audit type. A separate regression is estimated for taxpayers associated with each audit status (face-to-face audit, correspondence audit, or no audit). The regression estimates are used jointly with the predicted audit status probabilities to estimate audit impacts. These estimates are "doubly robust", meaning that they will be consistent so long as either the multinomial logit model is correctly specified or the regression model is correctly specified, even if the other model is incorrectly specified.
2. **Nearest Neighbor Matching on the Vector of Propensity Scores.** As with the IPTW methodology described in the main text, a multinomial logit model is employed to predict the likelihood of a face-to-face audit and the likelihood of a correspondence audit for each taxpayer in the estimation sample. For each audited taxpayer, a match is found to one or more unaudited taxpayers (with replacement) who have similar predicted probabilities of each type of audit. A Mahalanobis distance criterion is used to identify the best match(es).[12] The mean difference between the future reported tax liability of the audited taxpayers and their matched counterparts then serves as the audit impact estimate for a given period. We have experimented with alternately matching 1, 5, and 15 unaudited taxpayers to each audited taxpayer.

We have also experimented with some additional tax years between 2010 and 2014. Overall, the results from our alternative estimation methodologies and estimation years are qualitatively quite similar to those presented in Section 5, which lends credibility to the main findings of our study.[13]

12 No adequate matches can be found for a modest number of audited taxpayers under this approach. These taxpayers are therefore excluded from the audit impact estimation.

13 The one exception is that our nearest neighbor matching methodology produces evidence of a counter-deterrent effect for tax year 2012 correspondence audits of EIC recipients taking place after the tax year 2013 return had been filed. In contrast, both the IPTW methodology and the IPTW with regression adjustment methodology provide evidence of a pro-deterrent effect for this population and tax year.

TAS Research and Related Studies 4

Study of the Extent to Which the IRS Continues to Erroneously Approve Form 1023-EZ Applications

EXECUTIVE SUMMARY

Organizations recognized by the IRS as exempt under Internal Revenue Code (IRC) § 501(c)(3) may be exempt from federal tax, and contributions to them may be tax deductible. For decades, Form 1023, Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code, was the IRS form organizations used to request recognition of IRC § 501(c)(3) status. Form 1023-EZ, Streamlined Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code, was introduced in 2014. It is a truncated version of Form 1023, consisting mainly of checkboxes, and requires applicants to attest, rather than demonstrate, that they meet the requirements for IRC § 501(c)(3) status.

One of the requirements for IRC § 501(c)(3) status is that the organization satisfy an "organizational test," which generally means its organizing document (articles of incorporation, for a corporation) must contain adequate purpose and dissolution clauses. Form 1023-EZ applicants are not required to submit their organizing documents to the IRS; they merely attest that the organizational test has been met. Although some states make articles of incorporation available online at no charge, the IRS does not retrieve and review these publicly-available articles of incorporation when it evaluates a Form 1023-EZ application (unless the application is one that is randomly selected for pre-determination review).

In 2015, 2016, and 2017, TAS studied representative samples of articles of incorporation for corporations from 20 states that make articles of incorporation viewable online at no cost and whose Form 1023-EZ had been approved by the IRS during the preceding year. The studies found that between 26 percent and 42 percent of the time, the approved organizations did not meet the organizational test and thus did not qualify for the exempt status the IRS had conferred. In 2019, TAS repeated the study and found that 46 percent of the approved organizations did not qualify for IRC § 501(c)(3) status.

The 2019 study also found that some states provide form, or template, articles of incorporation. Depending on the template, corporations that use the template are virtually guaranteed to meet, or fail to meet, the organizational test. A review of other information that applicants provide on Form 1023-EZ, such as their websites, may provide useful insight about whether the organization qualifies for exempt status.

Form 1023-EZ was revised in 2018 to require applicants to provide a description (in 255 characters or less) of their mission or most significant activities. However, according to IRS procedures, the described mission or activities need only be "within the scope of IRC § 501(c)(3)" to be deemed sufficient. According to the 2019 study results, the IRS made erroneous determinations more frequently after it added the description field.

INTRODUCTION

Under IRC § 501(a) and (c)(3), organizations devoted to charitable, religious, educational, or certain other purposes may be exempt from federal tax, and contributions to these organizations may be tax deductible.[1] To receive tax exemption, and for their donors to receive the benefit of an income tax deduction, organizations generally must formally apply for recognition of their tax-exempt status and file annual information returns or notices.[2] For over 70 years, Form 1023, Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code, was the only IRS form used for applying for recognition of IRC § 501(c)(3) status.[3]

If an applicant for exempt status fails either the "organizational test" or the "operational test," it is not an organization described in IRC § 501(c)(3) and is subject to taxation on its income.[4]

The organizational test requires an applicant's "organizing document" (articles of incorporation, for a corporation) to establish that it is "organized and operated exclusively" for one of the eight exempt purposes enumerated in IRC § 501(c)(3):[5]

- Religious;
- Charitable;
- Scientific;
- Testing for public safety;
- Literary;
- Educational;
- To foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment); or

1 IRC § 170(c). The estimated cost of permitting donors to deduct their contributions to IRC § 501(c)(3) organizations is more than $260 billion over the five-year period from 2017-2021. See Joint Comm. on Tax'n, *Estimates of Federal Tax Expenditures for Fiscal Years 2017-2021*, JCX-34-18 (May 25, 2018) 40, 42, 43, estimating tax expenditures of $46.2 billion attributable to deductions for charitable contributions to educational institutions; $24.6 billion attributable to deductions for charitable contributions to health organizations; and $190.3 billion attributable to deductions for charitable contributions other than for education and health, totaling $261.1 billion. The statistical information in this research study was not provided or reviewed by the Secretary under IRC § 6108(d). *See* IRC § 7803(c)(2)(B)(ii)(XII).

2 IRC § 508(a); IRC § 6033 (a)(1). Churches, their integrated auxiliaries, and conventions or associations of churches are excepted from these application and filing requirements. IRC § 508(c)(1)(A); IRC § 6033 (a)(3)(A)(i). In addition, Congress excused exempt organizations that are not private foundations and whose gross receipts are normally not more than $5,000 from applying for recognition. IRC § 508(c)(1)(B). The general obligation to file annual returns or notices applies to all organizations exempt under IRC § 501(a), not only those described in IRC § 501(c)(3).

3 A reference to Form 1023 as a means of applying for recognition of exempt status appeared in regulations as early as 1942. T.D. 5125, *Section 19.101-1: Proof of Exemption*, 1942-1 C.B. 101 (1942). Form 1023 was at that time captioned simply "Exemption Application."

4 Treas. Reg. § 1.501(c)(3)–1(a)(1).

5 IRC § 501(c)(3); Treas. Reg. § 1.501(c)(3)-1(b)(1)(i). Treas. Reg. § 1.501(c)(3)-1(b)(4) provides that "[a]n organization is not organized exclusively for one or more exempt purposes unless its assets are dedicated to an exempt purpose. An organization's assets will be considered dedicated to an exempt purpose, for example, if, upon dissolution, such assets would, by reason of a provision in the organization's articles or by operation of law, be distributed for one or more exempt purposes…" Moreover, "an organization does not meet the organizational test if its articles or the law of the State in which it was created provide that its assets would, upon dissolution, be distributed to its members or shareholders." In states that have adopted the *cy pres* doctrine, a nonprofit corporation's articles need not include a specific dissolution provision because by operation of state law or court action the organization's assets would be distributed upon dissolution for one or more exempt purposes, or to the federal government, or to a state or local government, for a public purpose.

- For the prevention of cruelty to children or animals.[6]

The operational test is met if the organization engages primarily in activities which accomplish one or more of the eight exempt purposes specified in IRC § 501(c)(3); no more than an insubstantial part of its activities is not in furtherance of an exempt purpose; and it is operated to further public rather than private interests.[7]

Form 1023 applicants must demonstrate they meet the requirements for exempt status by providing:

- Responses to "core" questions, including questions about financial data;
- Copies of organizing documents and copies of certain contracts with third parties; and
- Additional schedules, depending on the applicant's characteristics (*e.g.*, a school is required to complete Schedule B, and a hospital is required to complete Schedule C).

In 2014, the IRS introduced Form 1023-EZ, Streamlined Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code. Generally, organizations with total assets up to $250,000 and those expecting annual gross receipts up to $50,000 are eligible to use Form 1023-EZ to apply for recognition of exempt status.[8] However, certain organizations (*e.g.*, churches, schools, and hospitals) are ineligible to use Form 1023-EZ and must seek IRC § 501(c)(3) status by filing Form 1023.[9]

Form 1023-EZ consists of a series of checkboxes that allow applicants to simply attest they meet the requirements for exempt status. Applicants are not required or even permitted to submit substantiating documentation, such as organizing documents, with the application.

6 Further, to qualify as an IRC § 501(c)(3) organization, no part of the organization's net earnings can inure to the benefit of any private shareholder or individual (IRC § 501(c)(3); Treas. Reg. § 1.501(c)(3)-1(c)(2)); the organization cannot devote more than an insubstantial part of its activities to attempting to influence legislation by propaganda or otherwise attempting to influence legislation (IRC § 501(c)(3); Treas. Reg. § 1.501(c)(3)-1(b)(3)(i)); and the organization cannot participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office (IRC § 501(c)(3)).

7 *See* Treas. Reg.§ 1.501(c)(3)-1(c)(1), (d)(1)(ii).

8 Rev. Proc. 2019-5, § 6.05, 2019-1 I.R.B. 230 (Jan. 2, 2019).

9 *Id*.

BACKGROUND

In 2015 and 2016, TAS studied representative samples of corporations in 20 states that made articles of incorporation viewable online at no cost and whose Form 1023-EZ application had been approved.[10] The studies showed, respectively, that 37 percent and 26 percent of the organizations in the samples did not meet the organizational test.

In 2017, TAS again reviewed a representative sample of corporations in the same 20 states, which allowed us to compare the results with the results of the earlier studies. The 2017 study found that 42 percent did not meet the organizational test.

By 2017, four additional states made articles of incorporation available online at no charge.[11] Thus, for the 2017 study, in addition to selecting a valid sample of organizations from the same 20 states that were included in the 2015 and 2016 studies, TAS expanded the sample to include representative cases from these four "new" states. When these states were taken into account, 46 percent of organizations in the sample did not meet the organizational test. We noted that further research is needed to ascertain the reason for the higher rate of erroneous approvals for organizations from the four additional states, compared to the original 20 states.

Even though all the organizations in the samples had received a favorable determination from the IRS granting them tax-exempt status and making contributions to them eligible for a tax deduction by the donor, a significant portion of them did not qualify for IRC § 501(c)(3) status as a matter of law.[12]

RESEARCH QUESTIONS

In 2019, TAS again studied a representative sample of corporations in the same original 20 states that were included in the 2015-2017 studies, which allows us to compare the results with the earlier studies. By 2019, yet another state, California, made articles of incorporation available online at no charge. Thus, for the 2019 study, TAS expanded the sample to include representative cases from five "new" states (the four additional states added in the 2017 study, plus California).

For a representative sample of organizations from states that make articles of incorporation available online at no charge whose Form 1023-EZ was approved, we investigated:

1. How often organizations' articles of incorporation failed to satisfy the organizational test; and
2. Whether revising Form 1023-EZ to require a short description affected the rate of erroneous approvals.

10 National Taxpayer Advocate 2015 Annual Report to Congress vol. 2, at 1-31 (*Study of Taxpayers That Obtained Recognition as IRC § 501(c)(3) Organizations on the Basis of Form 1023-EZ*); National Taxpayer Advocate 2016 Annual Report to Congress 254 (Most Serious Problem: *Form 1023-EZ: The IRS's Reliance on Form 1023-EZ Causes It to Erroneously Grant Internal Revenue Code § 501(c)(3) Status to Unqualified Organizations*); National Taxpayer Advocate 2017 Annual Report to Congress 64-72 (Most Serious Problem: *Exempt Organizations: Form 1023-EZ, Adopted to Reduce Form 1023 Processing Times, Increasingly Results in Tax Exempt Status for Unqualified Organizations, While Form 1023 Processing Times Increase*). Organizations were in the following 20 states: Alaska, Colorado, Florida, Idaho, Indiana, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Mississippi, Missouri, New Hampshire, North Carolina, Ohio, Oregon, Rhode Island, South Dakota, and Texas.

11 The additional four states were Arizona, Georgia, Virginia, and Vermont.

12 As a whole, the results of the 2015-2017 studies are statistically valid at the 95 percent confidence level with a margin of error no greater than +/- five percent. Unless otherwise noted, the 2019 study discussed below is also statistically valid at the 95 percent confidence level with a margin of error no greater than +/- five percent.

METHODOLOGY

The IRS's Tax Exempt and Government Entities (TE/GE) Division releases to the public a data file that includes information for approved Form 1023-EZ applications.[13] Out of these organizations, TAS Research identified a representative, random sample of 365 organizations from the same 20 states as in the 2015, 2016, and 2017 random samples. The articles of incorporation for 18 organizations in the sample (five percent) were not found on the official site for the state in which, according to the application, the organization was formed. We excluded these organizations from our sample, resulting in a sample size of 347.

In addition to selecting a valid sample of organizations from the same 20 states that were included in all the samples in previous studies, we expanded the sample to include representative cases from five additional jurisdictions that now make articles of incorporation available online at no charge.[14] TAS Research identified a representative, random sample of 135 organizations in the additional five states. The articles of incorporation for seven organizations in the sample (five percent) were not found on the official site for the state in which, according to the application, the organization was formed. Thus, we considered 128 organizations from these additional five states.

Therefore in total we reviewed 475 organizations' articles of incorporation.

Like the results of the 2015-2017 studies, the results of this study are statistically valid at the 95 percent confidence level with a margin of error no greater than +/- five percent.[15]

DATA COLLECTION

A team of four reviewers, using training material developed by TE/GE on the legal requirements for exempt status as an IRC § 501(c)(3) organization, completed a data collection instrument (DCI) to capture information about each organization in the sample. The DCI was substantially similar to the one used in the prior TAS studies. The four reviewers, consisting of TAS Senior Tax Analysts and Technical Advisors, were the same reviewers who completed DCIs in the 2017 TAS study.

Answering some DCI questions required a review of the organization's publicly available articles of incorporation.[16] Other DCI questions required a review of the IRS's publicly accessible Tax Exempt Organization Search database.[17] Still other DCI questions required a review of the organization's website

13 The data file is available at https://www.irs.gov/charities-non-profits/exempt-organizations-form-1023ez-approvals. The data is based on information provided by applicants on Forms 1023-EZ that were approved by the IRS.

14 The additional five jurisdictions are Arizona, California, Georgia, Virginia, and Vermont (the additional jurisdiction since the 2017 study is California).

15 Study findings can be projected to the population of 27,350 organizations from the original 20 states in our study and to the population of 29,500 organizations in the combined 25 states.

16 As noted above, in states that have adopted the *cy pres* doctrine, state law or court action satisfies the requirement for a dissolution provision where there is no provision in the articles of incorporation. Of the states in our sample, California, Massachusetts, Missouri, Ohio, and Texas have adopted the *cy pres* doctrine. See Rev. Proc. 82-2, 1982-1 C.B. 367 and IRS response to TAS information request (June 19, 2019) providing a job aid used by IRS employees to evaluate Form 1023-EZ applications that are selected for pre-determination review. However, if the articles of incorporation contain a dissolution provision that is defective, state law or court action would not cure the defect. *See* Elizabeth Ardoin, 2004 EO CPE Text Organizational Test — IRC 501(c)(3) 12, Q.11, https://www.irs.gov/pub/irs-tege/eotopicd04.pdf. Thus, the reviewers evaluated dissolution clauses for all organizations in the sample.

17 The Tax Exempt Organization Search (Formerly Select Check) data base, https://www.irs.gov/charities-non-profits/tax-exempt-organization-search (Nov. 25, 2019).

(if any). To minimize bias, the case reviewers met each week to discuss the data collection and proper completion of the DCI.

FINDINGS

Almost Half — 46 Percent — of Organizations in the 20-State Sample Failed the Organizational Test Because Their Articles Lacked an Adequate Purpose Clause, Dissolution Clause, or Both

The study found that of the 347 organizations in the 20-state sample, 159, or 46 percent, did not meet the organizational test:

- The articles of incorporation of 60 organizations had a required dissolution clause but lacked an acceptable purpose clause;[18]
- The articles of incorporation of 27 organizations had an acceptable purpose clause but lacked a required dissolution clause; and
- The articles of 72 organizations had neither an acceptable purpose clause nor a required dissolution clause.[19]

Put another way, the articles of incorporation of 188, or 54 percent, had both an adequate purpose clause and a required dissolution clause and thus met the organizational test. Figure 4.4.1 shows the frequency with which organizations in our 20-state sample met (or did not meet) the organizational test, and the reason the test was not met.

FIGURE 4.4.1, Outcomes of 20-State Sample

20-State Sample	Count	Percent
Unacceptable Purpose Clause, Acceptable Dissolution Clause	60	17%
Acceptable Purpose Clause, Unacceptable Dissolution Clause	27	8%
Neither Acceptable	72	21%
One or Both Unacceptable	159	46%
Both Acceptable	188	54%
Total	**347**	

When considering the 475 organizations in the expanded 25-state sample, we found that 191, or 40 percent, did not meet the organizational test:

- The articles of incorporation of 66 organizations had a required dissolution clause but lacked an acceptable purpose clause;[20]

18 Of these 60 organizations, the articles of incorporation of 51 had purpose clauses that were inadequate and nine had no purpose clause at all.

19 Of these 72 organizations, the articles of incorporation of 54 had purpose clauses that were inadequate (including one organization that filed its articles of incorporation after it had already received its favorable determination from the IRS) and 18 had no purpose clause at all.

20 Of these 66 organizations, the articles of incorporation of 55 had purpose clauses that were inadequate and 11 had no purpose clause at all.

- The articles of incorporation of 31 organizations had an acceptable purpose clause but lacked a required dissolution clause; and
- The articles of 94 organizations had neither an acceptable purpose clause nor a dissolution clause.[21]

Stated differently, the articles of incorporation of 284 organizations, or 60 percent, had both an adequate purpose clause and a required dissolution clause and thus met the organizational test. Figure 4.4.2 shows the frequency with which organizations in our expanded sample that included five additional states met (or did not meet) the organizational test, and the reason the test was not met.

FIGURE 4.4.2, Outcomes of 25-State Sample

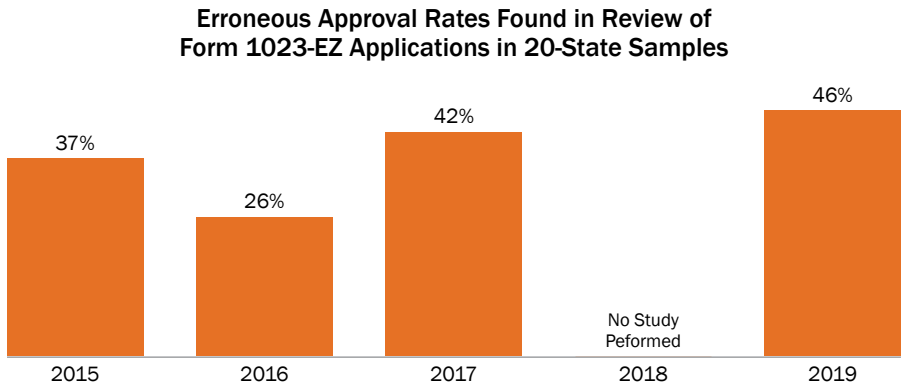
25-State Sample	Count	Percent
Unacceptable Purpose Clause, Acceptable Dissolution Clause	66	14%
Acceptable Purpose Clause, Unacceptable Dissolution Clause	31	7%
Neither Acceptable	94	20%
One or Both Unacceptable	191	40%
Both Acceptable	284	60%
Total	**475**	

Figure 4.4.3 shows the rate at which Form 1023-EZ applications were erroneously approved over the past years for organizations in the 20 states included in each TAS study.[22]

21 Of these 94 organizations, the articles of incorporation of 58 had purpose clauses that were inadequate and 36 had no purpose clause at all.

22 The data reflects the result of the 2015-2017 and 2019 TAS studies. The Form 1023-EZ applications of organizations in the 2015 TAS study were approved between July 1, 2014, and Mar. 27, 2015. The Form 1023-EZ applications of organizations in the 2016 study were approved between July 1, 2015, and June 30, 2016. The Form 1023-EZ applications of organizations in the 2017 study were approved between July 1, 2016, and June 30, 2017. The Form 1023-EZ applications in the 2019 study were approved between July 1, 2018, and June 30, 2019.

FIGURE 4.4.3



Including California in the 2019 25-State Sample Reduced the Frequency of Erroneous Approvals to 40 Percent

As noted above, the additional five states in our sample are Arizona, California, Georgia, Virginia, and Vermont. California is the only state that is included in our study for the first time (*i.e.*, we did not find California articles of incorporation available online at the time of our 2015-2017 studies, but they are now available online at no charge). There were 128 organizations from these five states in our sample. Of these 128 organizations, 70 were from California, more than from any other state.[23] Of the 70 California organizations, only four organizations, or six percent, did not meet the organizational test:

- None of the organizations lacked a required dissolution clause in their articles of incorporation;[24] and
- The articles of only four organizations lacked an acceptable purpose clause.[25]

Stated differently, the articles of incorporation of 66 organizations, or 94 percent, had both an adequate purpose clause and a required dissolution clause and thus met the organizational test. Thus, articles of incorporation of California organizations satisfied the organizational test significantly more frequently than those of:

- Organizations in the sample of 20 original states (of which 54 percent satisfied the organizational test); and
- Organizations in the expanded sample of 25 states (of which 60 percent satisfied the organizational test).

23 There were more organizations from California than in any other state, in the 20-state sample and in the expanded sample that included the additional five states. While the 70 California cases were part of a larger sample, percentages reported here for only those 70 cases are statistically valid at the 90 percent confidence level with a margin of error no greater than +/- ten percent.

24 As noted above, California has adopted the doctrine of *cy pres*. Moreover, as discussed below, California provides a template, or form, that organizations may use for their articles of incorporation, and the template contains the required dissolution clause.

25 As discussed below, a California template for articles of incorporation includes a purpose clause. Two of the four organizations whose articles did not contain an adequate purpose clause did not use the template; two others submitted an incomplete template.

The higher rate at which California organizations' articles of incorporation satisfied the organizational test, together with the relatively large number of California organizations in our sample, contributed to lowering the erroneous approval rate for the 25 states in our sample (40 percent), compared to the erroneous approval rate for the 20 original states (46 percent) shown in Figure 4.4.3. We discuss below the reasons why California organizations are more likely to meet the organizational tests.

Defects in Articles of Incorporation Suggest That Organizations Do Not Understand the Requirements for Internal Revenue Code § 501(c)(3) Status

A common defect in organizations' purpose clauses was a lack of specificity such that an exempt purpose could not be identified, or if an exempt purpose was suggested, the organization's activities were not limited to that exempt activity. For example, the following statements comprised the entire purpose clause contained in various organizations' articles of incorporation:

- "Helping people in need;"
- "Non profit youth organization;"
- "Fundraise & boost spirit for high school girls soccer team;"
- "Reduce low self esteem and inspire persons ages 12-18 to have the confidence to celebrate them regardless of any obstacle they may face through events, activities and resources;" and
- "Provide services for ex-offenders: Jobs, housing, counseling to change their attitudes and beliefs about crime, drugs, addressing mental health issues, providing mentoring, connecting them with community resources."[26]

In other cases, the purpose clause in the articles of incorporation suggested that the organization may *not* have been organized for an exempt purpose (*e.g.*, an organization whose purpose clause in its entirety is "to provide financial assistance to family members with mental health illness").[27]

A common defect in organizations' dissolution clauses was simply naming a specific recipient to receive the organization's assets upon dissolution. Even if the named recipient is currently an IRC § 501(c)(3) organization, the dissolution clause is inadequate if there is no provision ensuring that the organization's assets will be dedicated to a charitable purpose in the event the named recipient is unwilling to accept the assets, is no longer described in IRC § 501(c)(3), or is no longer in existence.[28]

Moreover, some organizations were apparently unaware that they are not eligible to file Form 1023-EZ.[29] For example, our sample included:

- A church;

26 The instructions to Form 1023-EZ on page 4 give this example of an acceptable purpose clause: "The organization is organized exclusively for charitable, religious, educational, and scientific purposes under section 501(c)(3) of the Internal Revenue Code, or corresponding section of any future federal tax code."

27 As noted above, to qualify for IRC § 501(c)(3) status, no part of the organization's net earnings can inure to the benefit of any private shareholder or individual.

28 The instructions to Form 1023-EZ on page 5 provide this example of an dissolution purpose clause: "Upon the dissolution of this organization, assets shall be distributed for one or more exempt purposes within the meaning of section 501(c)(3) of the Internal Revenue Code, or corresponding section of any future federal tax code, or shall be distributed to the federal government, or to a state or local government, for a public purpose." As the instructions note, "Naming a specific organization or organizations to receive your assets upon dissolution will be acceptable only if your articles state that the specific organization(s) must be exempt under section 501(c)(3) at the time your dissolution takes place and your organizing document provides for distribution for one or more exempt purposes within the meaning of section 501(c)(3) if the specific organization(s) are not exempt."

29 Rev. Proc. 2019-5, § 6.05, 2019-1 I.R.B. 230 (Jan. 2, 2019).

- A university;
- Two limited liability corporations;
- Two organizations that appear to be private operating foundations;
- Three organizations that appear to have applied for reinstatement more than 15 months after their exempt status had been automatically revoked; and
- An organization that appeared to have been previously exempt under a different subsection of IRC § 501(c).

These organizations may qualify for IRC § 501(c)(3) status, but they are not eligible to file Form 1023-EZ; they may request recognition of exempt status by filing Form 1023. Nevertheless, the IRS did not require a full Form 1023 and approved the applications submitted on the truncated Form 1023-EZ.

Using Template Articles of Incorporation Affects Whether Organizations Meet the Organizational Test

Some organizations adopt template articles of incorporation provided by their state of incorporation, but the "form" articles do not always satisfy the organizational test. Georgia is an example of one such state.[30] The Georgia template does not contain specific fields for a purpose clause or for a dissolution clause but does provide a field for "Optional Provisions." Instructions adjacent to the form advise as follows: "Note to nonprofit corporations that will pursue 'tax exempt' status: If you intend to apply to the Internal Revenue Service (IRS) for recognition of federal tax-exempt status as a charitable organization under section 501(c)(3) of the Internal Revenue Code, your articles of incorporation must contain certain provisions." The note is followed by links to IRS websites with the relevant information, but the note does not explain what the required provisions are or clarify that the template does not include the required provisions.

Out of 27 Georgia organizations in our sample, 13 had simply adopted the template form shown on the Georgia Secretary of State website without any including any Optional Provisions, and therefore did not meet the organizational test. State regulators are aware of this problem and note that "[w]hen such organizations' ["form"] articles of incorporation do not confine the organizations' activities to charitable purposes, it invites abuse and makes it very difficult for state charity regulators to protect and safeguard what should be charitable assets."[31]

On the other hand, some states provide template articles of incorporation with purpose and dissolution clauses that appear to comply with the requirements for IRC § 501(c)(3) status. For example, California provides a template for "Articles of Incorporation of a Nonprofit Public Benefit Corporation."[32] Item 4a of the template, captioned "Purpose Statement," recites that "This corporation is a nonprofit benefit corporation and is not organized for the private gain of any person. It is organized under the Nonprofit

30 For sample articles of incorporation for nonprofits, see Filing Procedure - Corporations, https://sos.ga.gov/cgi-bin/corpforms.asp.

31 Letter from Hugh R. Jones, National Association of State Charity Officials (NASCO) President 2007-2008, to Rep. Lynn Jenkins, Chairman, Subcommittee on Oversight, Committee on Ways and Means and Rep. John Lewis, Ranking Member, Subcommittee on Oversight, Committee on Ways Means (Apr. 26, 2018). The letter notes that Hawaii is one state in which nonprofit organizations may use "form" articles of incorporation to simplify the incorporation process, but those "form" articles do not satisfy the organizational test. Because Hawaii does not make articles of incorporation available online, our sample did not include Hawaiian organizations.

32 *See* California Form ARTS-PB-501(c)(3), https://www.sos.ca.gov/business-programs/business-entities/forms/. The form notes, among other things, that "This form is for use by corporations seeking tax-exempt status within the meaning of Internal Revenue Code section 501(c)(3)."

Public Benefit Corporation Law for; [checkbox] public purposes [checkbox] charitable purposes." The organization is instructed that one or both of the boxes must be checked.

Of the 69 California organizations in our sample, 46, or two-thirds, used the template described above. As long as the organization checked the box to indicate it was organized for charitable purposes, we considered the organization to have an adequate purpose clause.[33] Only two organizations that used the template did not check the "charitable purposes" box.

We note that Item 4b of the California template asks for "the specific purpose of this corporation." Organizations are instructed to complete Item 4b if "public" purposes is checked in Item 4a, or "if you intend to apply for tax-exempt status in California."

Generally, the specific descriptions provided in Item 4b consisted of one or two sentences or sentence fragments or the organization's mission statement. The descriptions generally articulated activities consistent with an IRC § 501(c)(3) charitable purpose, although standing alone they would not qualify as adequate purpose clauses (*i.e.*, if the "charitable" box had not been checked, we would not have considered the purpose clause to be adequate). In this respect, Item 4b of the California template is similar to the field on Form 1023-EZ that solicits a description of the applicant's activities, as discussed below.

Organizations' Websites May Shed Additional Light on Their Activities

As noted above, we did not inquire whether the organizations also met the operational test. However, we viewed organizations' websites where they provided one on the Form 1023-EZ they submitted. The instructions to Form 1023-EZ direct the applicant to provide its current website address. If the organization does not maintain a website it is directed to enter "N/A" (not applicable). Only 134 organizations in our sample provided a website address. Even a cursory review of some organizations' websites raised doubt about whether the organization operated as an IRC § 501(c)(3) organization, even where the organizational test was met.[34]

For example, one California organization checked the "charitable" box in Item 4a of the California template and described its specific purpose in Item 4b as "help create freedom for the unbanked, excluded, hopeless, helpless & homeless." The website it provided on its Form 1023-EZ application, however, invites the visitor to consider that:

> Non-Profit organisations simply do not work, because there is no benefit for the donator and contributor other than a thought of "I have helped someone less fortunate than myself" How do you know? Would it not be better IF you could donate and the person or the family you are helping can turn their life around and your help will give you a direct benefit…

The same website also invites the visitor to:

> Imagine a new, asset-backed cryptocurrency with its own organic ecosystem of fully owned consumer businesses. One that lets you fulfil [sic] all your travel, cosmetics, education,

33 Item 5 of the template, captioned Additional Statements, provides in Item 5a that "This corporation is organized and operated exclusively for the purposes set forth in Article 4 hereof within the meaning of Internal Revenue code section 501(c)(3)."

34 IRS reviewers do not routinely review the website the organization provides on Form 1023-EZ. See Internal Revenue Manual (IRM) 7.20.9.4, General Case Processing (Sept. 28, 2019) (requiring review of the website where the organization appears to be an LLC, IRS databases indicate the organization may be formed as a for profit entity, or where the organization used an NTEE code that is invalid or inconsistent with the stated mission or activity).

> property, restaurant, and entertainment needs at wholesale prices while rewarding you with more currency to spend. [Ours] is the world's only asset backed cryptocurrency. It already saves our customers over 50%...

As another example, a different organization provided a website on its Form 1023-EZ that notifies the visitor on the first page that "As for me, personally, besides this global Quest, Cause, and Movement, I am running as independent for the U.S. House of Representatives, [District and State] this coming November 2018."[35]

Additional Information Added to Form 1023-EZ in 2018 Does Not Appear to Have Affected the Erroneous Approval Rate

At the National Taxpayer Advocate's insistence, Form 1023-EZ was revised, and since January 2018 has contained a field for applicants to "Briefly describe the organization's mission or most significant activities."[36] Thus, all the organizations in our sample filed the revised Form 1023-EZ. The instructions to Form 1023-EZ direct applicants to:

> Briefly describe your mission or most significant activities (limit 255 characters). Provide a brief summary of your tax-exempt 501(c)(3) purposes and the activities you engage in to further those purposes (see below for examples and a description of various 501(c)(3) purposes). Don't refer to or repeat purposes in your organizing document or speculate about potential future programs. You should describe either actual or planned mission or activities.

Considering the 20-state samples we evaluated over the years, the erroneous approval rate increased after the Form 1023-EZ was changed to require the short description discussed above, from 42 percent in 2017 to 46 percent in the 2019 study.[37] Thus, the additional information did not appear to avert erroneous approvals.[38]

A possible explanation for this phenomenon — that the IRS has more information yet actually makes erroneous determinations more frequently — could lie in how IRS reviewers (tax examiners) are instructed to evaluate the description. They do not review organizing documents such as articles of incorporation, even when the documents are available online. Thus, they do not know whether the short

35 As noted above, to qualify for IRC § 501(c)(3) status, the organization cannot participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office (IRC § 501(c)(3)).

36 The National Taxpayer Advocate issued a Taxpayer Advocate Directive (TAD) on September 26, 2016, directing the IRS, among other things, to revise Form 1023-EZ to require applicants to submit a brief narrative statement of their actual or planned activities. The IRS acquiesced to that portion of the TAD. The National Taxpayer Advocate has the authority to issue a TAD "to mandate administrative or procedural changes to improve the operation of a functional process or to grant relief to groups of taxpayers (or all taxpayers) when implementation will protect the rights of taxpayers, prevent undue burden, ensure equitable treatment, or provide an essential service to taxpayers" pursuant to Delegation Order 13-31 (formerly DO-250, Rev. 1), *reprinted* as IRM 1.2.50.4 (Jan. 17, 2001). *See also* IRM 13.2.1.6, Taxpayer Advocate Directives (July 16, 2009).

37 As discussed above, the relatively low rate of 40 percent we found in our 25-state sample is likely due to the use of template articles of incorporation, especially by organizations in one large state, California.

38 Requiring the additional description also did not appear to assist applicants in formulating acceptable purpose clauses. In our 2015 study, for example, we found that out of 408 organizations in the 20-state sample, 124 organizations, or 30 percent, lacked an adequate purpose clause. National Taxpayer Advocate 2015 Annual Report to Congress vol. 2, at 11 (*Study of Taxpayers That Obtained Recognition as IRC § 501(c)(3) Organizations on the Basis of Form 1023-EZ*). The 2019 study shows that out of 347 organizations in the 20-state sample, 132 organizations, or 38 percent, lacked an adequate purpose clause.

description merely "repeated purposes in the organizing document." Moreover, the described mission and activities need only be "within the scope of IRC § 501(c)(3)" to be deemed sufficient.[39]

If the tax examiner finds that the applicant has provided "a potentially non-501(c)(3) mission/activity" or "an incomplete mission/activity," the tax examiner is required to refer the case to a specialist.[40] If the specialist then finds that the description is incomplete, the specialist may reject the (incomplete) application or have the case assigned for further review. If the specialist finds "a potentially non-501(c)(3) mission/activity," he or she will have the case assigned for further review.[41] If the employee to whom the case is assigned finds that there is an "unclear, incomplete, or potentially non-501(c)(3) mission/activity description," then the employee must "research or ask for information as needed to determine qualification for exemption."[42]

TAS is unable to determine whether the applications of specific organizations in our sample had been referred to a specialist or then assigned for further review. However, it appears that further review was warranted in some cases, such as where the descriptions appeared incomplete or were so broad as to be virtually meaningless. Examples of such descriptions, in their entirety, include:

- "Sober living;"
- "Community outreach;"
- "Promoting cultural relationships thru food and activities;"
- "[Name of organization] is a nonprofit dedicated to increasing diversity and breaking down barriers to entry in the blockchain space;" and
- "To provide international medical mission and community outreach services."

The descriptions provided by some applicants in our sample did not appear to meet even the very broad "within the scope of IRC § 501(c)(3)" standard. Examples in this category include the following descriptions:

- "To stimulate the economies of underresourced urban communities in [City] by providing affordable loans to local businesses offering goods and services directly to those communities;"
- "Build new homes to be sold to low income families;" and
- "The [Foundation's] purpose is to equip individuals and families with the necessary tools to obtain the highest level of education possible, to live a healthy lifestyle and to accomplish the American dream through home ownership."

In view of the high rate of erroneous approvals despite the additional information Form 1023-EZ now elicits, it appears that more far-reaching revisions to Form 1023-EZ — or a different standard for evaluating the description — are needed.[43]

39 IRS reviewers are instructed to "review the activity description to determine if the organization's mission and activities are within the scope of IRC Section 501(c)(3)." IRM 7.20.9.4 (11), General Case Processing (Sept. 28, 2018).

40 IRM 7.20.9.4.5, Tax Examiner Requests Specialist Involvement (Tax Examiner) (Sept. 28, 2018).

41 IRM 7.20.9.4.5.1, Specialist Involvement (Specialist) (Sept. 28, 2018).

42 IRM 7.20.9.4.6, Pre-determination Review and Tax Examiner Referral Cases (Specialist) (Sept. 28, 2018).

43 The IRS Deputy Commissioner for Services and Enforcement rescinded the portion of the TAD in which the National Taxpayer Advocate ordered the IRS to require Form 1023-EZ applicants to submit their organizing documents (unless the documents are already retrievable from a state online database). Memorandum from the Deputy Commissioner for Services and Enforcement to the National Taxpayer Advocate (Oct. 25, 2016) sustaining in part National Taxpayer Advocate TAD 2016-1 (Oct. 5, 2016).

CONCLUSION

The IRS approves Form 1023-EZ applications submitted by organizations that do not qualify for IRC § 501(c)(3) status at a rate that is unacceptable and is higher now than when the form was introduced. The use of template articles of incorporation is widespread in some jurisdictions. In some states, using the template practically guarantees that the organization will (or will not) meet the organizational test. Even where applicants meet the organizational test, it is sometimes apparent from information on the websites they provide as part of their Form 1023-EZ application that they do not operate for an exempt purpose. The additional information Form 1023-EZ now elicits, a short description of the applicant's mission or activities, does not appear to have reduced the rate at which the IRS erroneously approves applications.

RECOMMENDATIONS

1. Require Form 1023-EZ applicants to submit their organization documents as part of the application and make a determination only after reviewing the organizing documents.
2. Review Form 1023-EZ applicants' websites, if any, before making a determination.
3. Ascertain the frequency with which applicants' descriptions of their mission and activities on Form 1023-EZ result in referrals of the application for further review, and if such further review is infrequent, conduct additional training on procedures for evaluating Form 1023-EZ applications.
4. Revise IRS procedures to require reviewers to determine whether applicants' descriptions of their mission and activities on Form 1023-EZ clearly identify an exempt purpose, rather than requiring a determination of whether the mission or activity is "within the scope" of IRC § 501(c)(3).

Appendix 1: Past TAS Recommendations on Taxpayer Service[1]

Year of Most Serious Problem/ Status Update Recommendation	Title of Most Serious Problem/Status Update	National Taxpayer Advocate Recommendation
Accuracy of Assistance *These recommendations address the accuracy of tax law assistance provided to taxpayers.*		
2004-4-1	Accuracy of Tax Law and Accounts Assistance	The IRS needs to continually monitor tax law and account accuracy rates at the TACs and on the Toll-Free telephone service to determine the effectiveness of the corrective actions taken. The training provided to employees must be tailored to the findings of these reviews in order to sufficiently meet the changing needs of the employees and address emerging issues.
2004-4-2	Accuracy of Tax Law and Accounts Assistance	W&I should continue to explore ways to achieve other goals, such as lowering customer wait time and multiple transfers, without adversely impacting the accuracy of its responses.
2004-4-3	Accuracy of Tax Law and Accounts Assistance	W&I should consider sponsoring research to determine the comparative implications of various items, such as improved accuracy rates and shorter wait times, on taxpayer compliance. For example, will taxpayers tolerate longer wait times and one or two transfers if they understood that they will ultimately receive more accurate answers? The results of this research should assist the IRS in designing a long-term solution to this issue rather than merely reacting to periodic customer satisfaction surveys.
Exempt Organizations *These recommendations address specialized handling and unique needs of Exempt Organizations.*		
2005-17-1	Inadequate Taxpayer Service to Exempt Organizations	Revise the Form 990 and Form 990-EZ instructions to improve clarity and ease of use. These instructions should particularly be revised to clearly set forth the Schedules A and B filing requirements. Alternatively, revise Forms 990 and 990-EZ themselves to include Schedules A and B as part of the forms.
2005-17-2	Inadequate Taxpayer Service to Exempt Organizations	Implement the recommendations made by the TE/GE Customer Account Services 2003 Ogden Campus Study (Ogden Study): ♦ Redefine what constitutes an Information Return Item (IRI) error. ♦ Increase the time allowed for exempt organizations to reply to filing error notices before being penalized.
2005-17-3	Inadequate Taxpayer Service to Exempt Organizations	Contact the exempt organizations sampled for the Ogden Study to identify (1) why these organizations made filing errors and (2) what information would have helped them avoid these errors. Use this information to develop an education and outreach strategy to reduce common Form 990 and 990-EZ filing errors.
2005-17-4	Inadequate Taxpayer Service to Exempt Organizations	Provide the necessary resources to adequately staff the TE/GE toll-free phone line.
2005-17-5	Inadequate Taxpayer Service to Exempt Organizations	Develop partnerships with existing organizations that serve and educate the exempt organization community. These partnerships could help the IRS (1) target and deliver need specific information to exempt organizations; (2) reach more exempt organizations with existing materials, information, and workshops; (3) co-sponsor additional workshops for exempt organizations; and (4) receive feedback from the exempt organization community on how the IRS could best help exempt organizations correctly comply with information reporting obligations.

1 The National Taxpayer Advocate has made numerous recommendations related to improving taxpayer service. This appendix represents 17 years of Most Serious Problem and Status Update recommendations related to taxpayer service made by the National Taxpayer Advocate in the Annual Reports to Congress. The recommendations are listed by categories of service provided by the IRS.

Year of Most Serious Problem/ Status Update Recommendation	Title of Most Serious Problem/Status Update	National Taxpayer Advocate Recommendation
2005-17-7	Inadequate Taxpayer Service to Exempt Organizations	Develop a tax reporting handbook specifically for small exempt organizations. Alternatively, make the course materials for the small and mid-sized exempt organization workshop available to non-attendees.
Free File *These recommendations address ways to improve or expand Free File.*		
2002-13-1	Free U.S. Individual Income Tax Return Preparation	We do not recommend that Operations reduce services provided in all TAC offices at this time. We encourage the leadership to reevaluate this and to retain services at those TACs where it has clearly been demonstrated that SPEC and VITA cannot yet adequately meet the demand.
2018-4-1	Free File	Develop actionable goals for the Free File program, including targeted-use percentages, prior to entering into a new agreement with Free File, Inc.
2018-4-2	Free File	Work with TAS to create measures evaluating taxpayer satisfaction with the Free File program and test each return preparation software's ability to complete various forms, schedules, and deductions.
2018-4-3	Free File	Provide Free File Fillable Forms and Software options for English as a Second Language taxpayers.
2018-4-4	Free File	Prepare an advertising and outreach plan to make taxpayers, particularly in underserved communities, aware of the services available through the Free File program.
2018-4-5	Free File	Allow Free File members to provide services to all taxpayers as a part of its next operating agreement instead of capping the percentage of eligible taxpayers each software provider can cover.
2018-4-6	Free File	Redesign the Free File Software Lookup Tool to better direct taxpayers to software providers that best meet their circumstances.
2018-4-7	Free File	Improve the capabilities offered to taxpayers through Free File Fillable Forms, including: a. Linking from IRS form instructions to related IRS publications; b. Providing increased guidance for common areas of taxpayer confusion; c. Ensuring taxpayer's abilities to download, save, and print all forms with troubleshooting assistance; and d. Creating a dedicated email where taxpayers can get help when experiencing technology glitches.
2018-4-8	Free File	If the above recommendations are not substantially adopted, discontinue the Free File Program and create an improved electronic free fillable forms program including the features described in Recommendation 7.
Geographic Presence *These recommendations address TAS's concerns with the lack of IRS presence and access in local communities.*		
2008-6-2	Taxpayer Service: Bringing Service to the Taxpayer	The National Taxpayer Advocate recommends that the IRS conduct a survey of tax law needs by geographic location and bring tax law areas into scope at the TACs based on taxpayer demand.
2008-6-3	Taxpayer Service: Bringing Service to the Taxpayer	The National Taxpayer Advocate recommends that the IRS co-locate with other federal and state agencies, use mobile vans, and explore the possibility of "tele-presence" to reach taxpayers in locations where the IRS has limited or no face-to-face presence.
2008-6-4	Taxpayer Service: Bringing Service to the Taxpayer	Collaborate with the Taxpayer Advocate Service in all ongoing and new studies pertaining to taxpayer service, including the Taxpayer Assistance Blueprint for small business and self-employed taxpayers currently underway.
2016-4-1	Geographic Focus	Expand partnerships with private and non-profit organizations, similar to the Alaska Volunteer Tax and Loan Program, to visit most remote and underserved regions and provide tax education and preparation to taxpayers within their communities.

Year of Most Serious Problem/ Status Update Recommendation	Title of Most Serious Problem/Status Update	National Taxpayer Advocate Recommendation
2016-4-2	Geographic Focus	Use the Service Priorities Project (SPP) model to make decisions on taxpayer services, including the location of TACs.
2016-4-3	Geographic Focus	Work with community partners to host virtual service delivery terminals for taxpayers located in remote and otherwise underserved communities.
2016-4-4	Geographic Focus	Re-staff Appeals Officers and Settlement Officers locally so that one of each employee is located and regularly available in every state, the District of Columbia, and Puerto Rico.
2016-4-5	Geographic Focus	Re-staff local outreach and education positions to bring an actual presence to every state.
2016-4-6	Geographic Focus	Provide face-to face service through the use of mobile taxpayer assistance stations (vans) in each state.
International *These recommendations address the issue of substantially fewer resources provided to taxpayers located outside the United States, effectively putting international taxpayers at a disadvantage when trying to meet their tax obligations.*		
2008-9-1	Access to the IRS by Individual Taxpayers Located Outside the United States	The National Taxpayer Advocate recommends that the IRS Provide international toll-free telephone access to the Accounts Management function in Philadelphia and the National Taxpayer Advocate (NTA) toll-free line for U.S. taxpayers in Canada and Mexico, followed by expansion to other countries with large U.S. taxpayer populations.
2008-9-2	Access to the IRS by Individual Taxpayers Located Outside the United States	The National Taxpayer Advocate recommends that the IRS Resolve the security issues with the Internet Customer Account Services (ICAS) system and reinstate the "My IRS Account" application, providing taxpayers outside the United States with online access to their accounts.
2008-9-3	Access to the IRS by Individual Taxpayers Located Outside the United States	The National Taxpayer Advocate recommends that the IRS translate the complete IRS website content into Spanish, followed by expansion of IRS forms and publications available in other languages.
2008-9-4	Access to the IRS by Individual Taxpayers Located Outside the United States	The National Taxpayer Advocate recommends that the IRS implement Estimated Waiting Time (EWT) functionality on IRS toll customer service lines and reduce the wait time for international taxpayers at the Accounts Management function.
2009-7-1	U.S. Taxpayers Located or Conducting Business Abroad Face Compliance Challenges	Develop a method to identify U.S. taxpayers located or conducting business abroad and assess their filing compliance rate.
2009-7-2	U.S. Taxpayers Located or Conducting Business Abroad Face Compliance Challenges	Develop a comprehensive strategy and outreach materials, including a dedicated web page for small businesses, specifically targeting tax problems facing this taxpayer population based on the results of the survey of needs and preferences of U.S. taxpayers abroad.
2009-7-3	U.S. Taxpayers Located or Conducting Business Abroad Face Compliance Challenges	Devote more tax attaché posts to taxpayer service, including reinstatement of in-person taxpayer service to U.S. taxpayers residing in Mexico.
2009-7-4	U.S. Taxpayers Located or Conducting Business Abroad Face Compliance Challenges	Open case resolution rooms at tax attaché posts and during tax venues abroad.
2009-7-5	U.S. Taxpayers Located or Conducting Business Abroad Face Compliance Challenges	Implement a pilot of PFA for small businesses with reduced fees and reduce filing fees for the APA program for small businesses with assets of $10 million or less.

Year of Most Serious Problem/ Status Update Recommendation	Title of Most Serious Problem/Status Update	National Taxpayer Advocate Recommendation
2011-8-1	Individual U.S. Taxpayers Working, Living or Doing Business Abroad Require Expanded Service Targeting Their Specific Needs and Preferences	Simplify tax return and information reporting forms for individual U.S. taxpayers abroad.
2011-8-2	Individual U.S. Taxpayers Working, Living or Doing Business Abroad Require Expanded Service Targeting Their Specific Needs and Preferences	Expand self-serve options, including Tele File, fax, and Free File, and develop a free website application from IRS.gov (Net File).
2011-8-3	Individual U.S. Taxpayers Working, Living or Doing Business Abroad Require Expanded Service Targeting Their Specific Needs and Preferences	Extend telephone access to the existing Accounts Management function and the National Taxpayer Advocate (NTA) toll-free lines for the continental U.S. to taxpayers in Canada and Mexico.
2011-8-4	Individual U.S. Taxpayers Working, Living or Doing Business Abroad Require Expanded Service Targeting Their Specific Needs and Preferences	Pilot secure email communications, virtual service delivery, and access to the MyIRS account application for international taxpayers, including answers to account-specific questions and access to TAS.
2011-8-5	Individual U.S. Taxpayers Working, Living or Doing Business Abroad Require Expanded Service Targeting Their Specific Needs and Preferences	Establish a tax attaché office in Mexico.
2011-8-6	Individual U.S. Taxpayers Working, Living or Doing Business Abroad Require Expanded Service Targeting Their Specific Needs and Preferences	Partner with the Department of State to train embassy and consulate staff to provide a full range of taxpayer services, including assistance with preparation of tax returns, similar to what the Social Security Administration does for beneficiaries overseas.
2013-20-1	International Taxpayer Service	Make the IITA a permanent initiative with reporting responsibilities.
2013-20-2	International Taxpayer Service	Develop and implement free electronic filing of Forms 1040NR and W-7.
2013-20-3	International Taxpayer Service	Prioritize the delivery of online services to the overseas population of international taxpayers, given their special circumstances and communication barriers, by including them in the first group of pilot projects the IRS launches.
2013-20-4	International Taxpayer Service	Improve the CSR level of service for international taxpayers who call the international call site.
2013-20-5	International Taxpayer Service	Explore the use of voice-over-Internet-protocol and other alternative methods of telephone services that will allow the IRS to contact taxpayers, and taxpayers to contact the IRS, without paying international call rates.
2013-20-6	International Taxpayer Service	Open more foreign tax attaché offices, and locate a Local Taxpayer Advocate at each site.
2015-7-1	International Taxpayer Service	Reopen the four international tax attaché offices and provide funding for TAS to establish one LTA position at each office.

Year of Most Serious Problem/ Status Update Recommendation	Title of Most Serious Problem/Status Update	National Taxpayer Advocate Recommendation
2015-7-2	International Taxpayer Service	Conduct impact studies to determine the effects on taxpayer service, compliance, and revenue by opening additional tax attaché offices around the world.
2015-7-3	International Taxpayer Service	Reestablish the ETLA (or a similar program) with timeframes for responses and create a process for using the information from ETLA inquiries in updates to IRS internal and external materials, including the irs.gov website.
2015-7-4	International Taxpayer Service	Allocate funding for staffing additional telephone service to accommodate the need created by the expansion of international enforcement activities.
2015-7-5	International Taxpayer Service	Create a task force to analyze and provide a report within one year on the barriers to VOIP usage and partnering with the U.S. Department of State to employ VSD technology for taxpayers at U.S. embassies and consulates.
2015-7-6	International Taxpayer Service	Reinstate the IITA Team, with a formal charter, regular meetings, objectives, and measurable results.
Individual Taxpayer Identification Number (ITIN) Applications *These recommendations involve the IRS's handling of ITIN applications and its subsequent burden on ITIN applicants.*		
2003-5-1	Individual Taxpayer Identification Number Program and Application Process	The IRS could improve the accuracy of Form W-7 submissions and shorten delays by promoting, strengthening, and increasing communication to educate taxpayers through the Acceptance Agent program.
2003-5-3	Individual Taxpayer Identification Number Program and Application Process	The NTA recommends IRS permit the taxpayer himself or herself to submit a substitute information document (Form 4852, Substitute for Form W-2, Wage and Tax Statement), listing the correct taxpayer identification number accompanied by proof that the taxpayer is indeed the person who earned the income shown on the form (*e.g.*, a year-end paycheck stub). Upon receiving such proof, the IRS can continue to process the return and issue any refund due. The IRS can also "fence off" the wages or other income from being attributed to the victim of identity theft.
2008-8-1	IRS Handling of ITIN Application Significantly Delays Taxpayer Returns and Refunds	The National Taxpayer Advocate recommends that the IRS permit applicants to file an ITIN application without a tax return prior to the filing season if applicants can document that they are required to file returns.
2008-8-3	IRS Handling of ITIN Application Significantly Delays Taxpayer Returns and Refunds	The National Taxpayer Advocate recommends that the IRS measure the processing time for all ITIN applications, including applications suspended by the IRS as incomplete.
Limited English Proficient Taxpayer Communication *These recommendations involve taxpayers with English as a second language (ESL) and the challenges they face in understanding their rights, tax obligations, and subsequent compliance issues.*		
2002-12-1	Language and Cultural Barriers Impact Taxpayer Compliance	Development of a check box on the tax return to identify the preferred language for taxpayer contact could facilitate communication. If transcribed and posted to the taxpayer's account during processing, this "preferred language indicator" would cause subsequent letters and notices to be printed in Spanish initially, and in other languages as the technology expands. The indicator could also prompt IRS notices to print the applicable IRS contact telephone number best suited to help the taxpayers in Spanish, or other desired language.
2002-12-2	Language and Cultural Barriers Impact Taxpayer Compliance	Enhanced diversity or sensitivity training can help employees understand cultural differences and comprehend why, for example, a taxpayer may not be able to provide the requested documentation, and help this taxpayer provide alternates.

Year of Most Serious Problem/ Status Update Recommendation	Title of Most Serious Problem/Status Update	National Taxpayer Advocate Recommendation
2002-12-3	Language and Cultural Barriers Impact Taxpayer Compliance	The IRS should explore not just the demographics of this population (or populations, given the diversity of the multi-lingual community). Many programs – federal, state, for-profit, and nonprofit – have developed attitudinal, cultural, and psychographic profiles of various immigrant communities in the United States. The IRS should utilize this readily available information when designing audit programs, initiating collection contacts, and developing outreach strategies to the ESL community. Rather than "translating" current IRS strategies and imposing them on the ESL population, a more productive approach would entail designing a strategy that fits the characteristics of the target population.
2002-12-4	Language and Cultural Barriers Impact Taxpayer Compliance	The IRS, on its own initiative and because of its understanding of the importance of this notice, should immediately undertake the translation of the Notice of Deficiency into Spanish.
Navigating the IRS *These recommendations address taxpayers' inability to navigate the IRS and contact the right person for assistance.*		
2002-1-1	Navigating the IRS	The IRS should ensure that directory information is continually updated as needed. Uninformative, broad categories such as "leadership" or "compliance" offered in the "Information for Our Partners" on the IRS web site should be avoided. To help guide customers to determine where to go on first contact, specific IRS processes should be clearly identified.
2002-1-2	Navigating the IRS	In addition to a customer directory, a list of contacts for local issues is needed. This list could be accessed by state and should include local phone numbers for the lien desk, the bankruptcy liaison, the practitioners' complaint line, the coordinator for return preparers, and the state's income tax customer service line. Fax numbers for Offer-in-Compromise (OIC), Employer Identification Number (EIN), and Centralized Authorization File (CAF) should also be part of this local list.
2003-9-1	Navigating the IRS	The National Taxpayer Advocate recommends that The IRS Roadmap, or a similar directory, be added to the IRS public Internet site. The roadmap is easy to use, and because it is segmented by state, the output is very concise and would not overwhelm taxpayers and practitioners.
2003-9-2	Navigating the IRS	The IRS needs to establish toll-free numbers or a suitable alternative for overseas taxpayers who do not have access to current toll-free lines, and to publish links to appropriate offices for taxpayer assistance abroad.
2003-9-3	Navigating the IRS	The IRS' plans to also include the toll numbers in noncompliance notices sent to international addresses beginning in January 2004, and to list these toll numbers in more publications, will help serve this taxpayer group. The National Taxpayer Advocate suggests that the IRS include these numbers in the next revision of Publication 1, Your Rights as a Taxpayer, and Publication 594, What You Should Know About The IRS Collection Process.
2008-7-1	Navigating the IRS	The National Taxpayer Advocate recommends that the IRS revise the IRM to direct its employees to accommodate taxpayer requests to speak to a particular employee, whenever feasible.
2008-7-2	Navigating the IRS	The National Taxpayer Advocate recommends that the IRS create a personnel directory for internal use, searchable by the same employee number that IRS employees give to taxpayers.
2008-7-4	Navigating the IRS	The National Taxpayer Advocate recommends that the IRS adjust the topical tax index on IRS.gov to include telephone numbers of offices associated with each topic.
2008-7-5	Navigating the IRS	The National Taxpayer Advocate recommends that the IRS establish a cognitive learning lab to test and observe taxpayers' experiences in navigating the IRS.

Year of Most Serious Problem/ Status Update Recommendation	Title of Most Serious Problem/Status Update	National Taxpayer Advocate Recommendation
2014-12-1	Access to the IRS	Provide an option for taxpayers calling the local TAC lines to speak to a live person or be transferred to another part of the IRS.
2014-12-2	Access to the IRS	Provide a phone line for elderly or disabled taxpayers to call to make an appointment at a TAC, including messaging and callback service, and establish and publicize timeframes within which callbacks must occur.
2014-12-3	Access to the IRS	Make the IRS Telephone Directory for Practitioners or a similar directory available to the public.
2014-12-4	Access to the IRS	Institute a system similar to a 311 system where a taxpayer can be transferred by an operator to the specific office within the IRS that handles his or her issue or case.
2018-3-1	Navigating the IRS	Provide all members of the general public with an accessible and easily searchable IRS directory that incorporates metadata and common-speech terminology to assist taxpayers in contacting particular offices within the IRS.
2018-3-2	Navigating the IRS	Institute a 311-type system where taxpayers can be transferred by an operator to the specific office within the IRS that is responsible for their cases.
2018-3-3	Navigating the IRS	Adopt a model for correspondence examinations and similar cases, such as those worked in ACS, in which a single employee is assigned to the case while it is open within the IRS function.
2018-3-4	Navigating the IRS	Establish a complaint and inquiry tracker that monitors and records requests to speak with supervisors, subsequent follow-up, and the results of that contact.
Online *These recommendations address the IRS's challenge in incorporating online technology.*		
2012-14-1	The IRS Is Striving to Meet Taxpayers' Increasing Demand for Online Services, Yet More Needs to Be Done	Develop an online account program to allow taxpayers to view the status of their accounts as well as interact with the IRS by responding to notices, scanning documents, etc.
2012-14-2	The IRS Is Striving to Meet Taxpayers' Increasing Demand for Online Services, Yet More Needs to Be Done	Review online service offerings of foreign and state tax administrations to identify those that might translate well and quickly to the IRS environment.
2013-18-1	Online Services	Consult with and solicit comments from impacted stakeholders, *i.e.*, the practitioner community, before deciding whether to retire applications.
2013-18-2	Online Services	Establish a strategic plan to identify develop, and promote viable electronic alternatives to discontinued applications prior to discontinuance.
2012-18-3	Online Services	For online practitioner applications experiencing low usage, solicit comments from the users on how to improve the applications to boost usage to acceptable levels.
2013-18-4	Online Services	Solicit suggestions from practitioners on marketing strategies and potentially develop a joint marketing initiative, leveraging stakeholders' ability to communicate with their members.
2013-18-5	Online Services	Evaluate potential electronic alternatives to the retired e-services applications.
2015-5-1	Taxpayer Access to Online Account System	Conduct a biennial nationwide survey of taxpayers to identify trends and determine the types of transactions or other activities taxpayers would be willing to conduct with the IRS digitally. The survey should include oversamples of low income, Spanish-speaking, and small business taxpayers to ensure that the IRS tracks their needs.

Year of Most Serious Problem/ Status Update Recommendation	Title of Most Serious Problem/Status Update	National Taxpayer Advocate Recommendation
2015-5-2	Taxpayer Access to Online Account System	Conduct research to identify the taxpayer base who will utilize the online taxpayer account system as well as other online service offerings. For those taxpayers likely to use the online services, the research should break it down by specific types of transaction or interaction with the IRS. Further, if a taxpayer has indicated that he or she will not use the program, the research should address the reasons for not using the program.
2015-5-3	Taxpayer Access to Online Account System	Incorporate into the CONOPS, budget initiatives, and in the strategic plan a recognition and plan for meeting the service needs of those taxpayers who are not likely to use online service offerings. Such plan should take into account the reasons for the taxpayer's behavior and potentially tailor the personal services to meet those needs.
2015-5-4	Taxpayer Access to Online Account System	Research taxpayer response to the necessary online account system cybersecurity and authentication measures to determine the percentage of taxpayers who decide the necessary barriers to entry are too burdensome and avoid online account access as a result.
2016-7-1	Online Accounts	By mid-2017, make available at least 24 months of payment history, rather than only 18 months, on the online account in order to provide information necessary for refund claims.
2016-7-2	Online Accounts	By mid-2017, provide a link on the payments page of the online account to give the taxpayer an option, other than paying the tax, to dispute the balance due shown. The IRS should provide a button on the payment page indicating "I don't think I owe this amount." Once the taxpayer selects this option, the IRS should provide links for different options, including: amending a return, audit reconsideration, refund claims, penalty abatement, innocent spouse, injured spouse, identity theft, return preparer fraud, and doubt as to liability offer in compromise.
2016-7-3	Online Accounts	Work collaboratively with the National Taxpayer Advocate to review the recommendations of participants in the 2016 National Taxpayer Advocate Public Forums, the 2016 IRS Nationwide Tax Forum TAS Focus Groups, as well as the findings of TAS and third party research, and address the public's recommendations in the plans for the online account.
2016-7-4	Online Accounts	Conduct research, in consultation with the National Taxpayer Advocate, using a variety of methods (online, landline and cell phone) into taxpayer and practitioner service needs and preferences for the various existing and proposed service channels by type of transaction, with acknowledgement that the taxpayer may choose multiple service channels to resolve a single issue.
2016-7-5	Online Accounts	Incorporate into the Future State vision realistic expectations for access to and use of the online account application given robust e-authentication measures.
2016-7-6	Online Accounts	Limit access to the online account to only those practitioners who are subject to Circular 230 oversight.
2017-3-1	Online Accounts	Maintain an omnichannel approach to taxpayer service delivery to meet the needs and preferences of taxpayers and representatives who either cannot or prefer not to use the online account application for their particular interaction with the agency.
2017-3-2	Online Accounts	The Commissioner of Wage & Investment, the Director of Online Services, and the National Taxpayer Advocate should jointly undertake a collaborative and comprehensive study of taxpayer needs and preferences by taxpayer segment, using surveys (telephone, online, and mail), focus groups, town halls, public forums, and research studies (including TAS research studies and literature reviews). These initiatives should be designed to determine taxpayer needs and preferences, and not be biased by the IRS's own desired direction. This study should contain recommendations jointly agreed to by the principals for a comprehensive 21st century taxpayer service strategy.

Year of Most Serious Problem/ Status Update Recommendation	Title of Most Serious Problem/Status Update	National Taxpayer Advocate Recommendation
2017-3-3	Online Accounts	Explore establishing a method for taxpayers to electronically submit documents or payments to the IRS which involves a less rigorous level of e-authentication.
2017-3-4	Online Accounts	Restrict third party access to those practitioners subject to Circular 230 oversight. Once the IRS strengthens the AFSP examination requirements, the IRS should permit ASFP Record of Completion holders to gain access to the application.
Outreach and Education *These recommendations address the complexity, planning, and delivery of outreach and education critical to taxpayers in specific segments and on specific tax topics.*		
2006-11-1	Small Business Outreach	Undertake an initiative similar to the Taxpayer Assistance Blueprint (TAB) to access needs of the small business taxpayers. Develop a strategic five-year plan that outlines the services the IRS should provide and determines the most effective way to deliver and improve outreach and education to small business taxpayers and provides for an interactive process of assessing and meeting these needs.
2006-11-2	Small Business Outreach	Conduct research or focus groups to obtain information about the characteristics and needs of small business and self-employed taxpayers, including their usage of computer technology and practitioners.
2006-11-3	Small Business Outreach	Establish a measure for the effectiveness of outreach activities. At a minimum, the IRS should survey small business owners and self-employed taxpayers to ascertain that outreach delivered through practitioners and small business organizations reaches the taxpayers and remains accurate.
2006-11-4	Small Business Outreach	Evaluate and reconsider staffing levels in SB/SE's outreach and education division. At a minimum, there should be a Stakeholder Liaison in each and every state.
2007-12-3	Outreach and Education on Disability Issues for Small Business/Self-Employed Taxpayers	Provide accessible laptops at live outreach sessions, rather than requiring taxpayers to bring their own.
2007-12-4	Outreach and Education on Disability Issues for Small Business/Self-Employed Taxpayers	Use the REI Tour to educate taxpayers regarding the accommodations the IRS provides taxpayers with a disability.
2007-12-5	Outreach and Education on Disability Issues for Small Business/Self-Employed Taxpayers	Include information regarding IRS accommodations for taxpayers with a disability in IRS notices.
2007-12-6	Outreach and Education on Disability Issues for Small Business/Self-Employed Taxpayers	Provide SB/SE's internet small business classroom materials as streaming translation in American Sign Language (ASL) for taxpayers who are deaf or hard-of-hearing.
2007-13-1	Exempt Organization Outreach and Education	Conduct an EO Taxpayer Assistance Blueprint (TAB), akin to the servicewide TAB but tailored to EOs, to study their service needs and preferences (by size and type of organization) and develop a plan to improve service to these organizations. The EO blueprint should include a study of the availability of the Internet, how exempt organizations use the Internet (particularly small, volunteer-staffed entities), and their willingness and ability to change how they use the Internet.
2007-13-2	Exempt Organization Outreach and Education	After completion of the EO TAB, conduct further research about the tax-exempt sector, including annual focus groups held at Tax Forums and elsewhere of EO directors, officers, staff, volunteers, and advisors.

Year of Most Serious Problem/ Status Update Recommendation	Title of Most Serious Problem/Status Update	National Taxpayer Advocate Recommendation
2007-13-3	Exempt Organization Outreach and Education	Dedicate a group of employees, from both outreach and compliance functions, entirely to small EOs. Such entities have very different needs from mid-sized and large EOs and require a different approach.
2007-13-4	Exempt Organization Outreach and Education	Staff the tax-exempt telephone line at sufficient levels to generate a high level of service and make training of the staff a high priority, with TE/GE approving the content of the training.
2007-13-6	Exempt Organization Outreach and Education	Develop a directory of institutions that offer courses in nonprofit management and a teaching toolkit for the small to medium nonprofit that instructors at such institutions can use.
2007-13-7	Exempt Organization Outreach and Education	Make a sufficient number of a variety of EO outreach materials available in print (non-electronic format) to preparers, Local Taxpayer Advocates, Stakeholder Partnerships, Education and Communication (SPEC), community foundations, state attorneys general and charities bureaus, and others for distribution.
2007-13-8	Exempt Organization Outreach and Education	Develop a multi-faceted approach to measure the effectiveness of education and outreach activities and use the results to modify existing programs and plan new initiatives.
2007-13-9	Exempt Organization Outreach and Education	Permit small EOs to file the e-Postcard at Taxpayer Assistance Centers (TACs), either on computers provided for taxpayer use (if any) or with the help of TAC assistors, and publicize this alternative widely.
2007-13-10	Exempt Organization Outreach and Education	Train Taxpayer Assistance Center (TAC) employees to answer questions about how to complete and submit the new e-Postcard.
2012-18-1	The IRS Is Substantially Reducing Both the Amount and Scope of Its Direct Education and Outreach to Taxpayers and Does Not Measure the Effectiveness of Its Remaining Outreach Activities, Thereby Risking Increased Noncompliance	Collaborate with TAS and Compliance employees (*e.g.*, Revenue Officers and Revenue Agents) to design research initiatives to measure the effect of education and outreach methods on specific taxpayer populations or with respect to specific issues.
2012-18-3	The IRS Is Substantially Reducing Both the Amount and Scope of Its Direct Education and Outreach to Taxpayers and Does Not Measure the Effectiveness of Its Remaining Outreach Activities, Thereby Risking Increased Noncompliance	Adjust the distribution of outreach and education staff over geographic areas in light of research findings about taxpayer characteristics in those areas.
2012-18-4	The IRS Is Substantially Reducing Both the Amount and Scope of Its Direct Education and Outreach to Taxpayers and Does Not Measure the Effectiveness of Its Remaining Outreach Activities, Thereby Risking Increased Noncompliance	Suspend the current policy of not offering outreach and education, beyond the narrow list of topics the IRS identifies, unless other government agencies or organizations agree to pay the cost.
2017-9-1	Outreach and Education	Conduct research into the outreach and education needs of taxpayers, broken down by various demographics.
2017-9-2	Outreach and Education	Evaluate and implement two-way digital communication models into the outreach and education strategy (instead of one-way messaging).

Year of Most Serious Problem/ Status Update Recommendation	Title of Most Serious Problem/Status Update	National Taxpayer Advocate Recommendation
2017-9-3	Outreach and Education	Incorporate into the IRS outreach and education strategy the findings of TAS research on taxpayers' varying abilities and attitudes toward IRS taxpayer service, as well as the needs and preferences of low income and Hispanic taxpayers, and the recommendations from the National Taxpayer Advocate's 2016 Public Forums.
2017-9-4	Outreach and Education	Assign at least one employee to conduct outreach activities in each state, territory, and the District of Columbia (and who resides in that state, territory, or district) and provide each employee with sufficient resources to travel and engage in regular face-to-face communications with taxpayers throughout the state.
2017-9-5	Outreach and Education	Establish a program in which the IRS provides various services, including traditional face-to-face outreach and education, through the use of mobile taxpayer assistance stations (vans) in rural and underserved communities.
Preparer Access Online *These recommendations address the oversight of tax preparer access and scope of taxpayer online accounts.*		
2015-6-1	Preparer Access to Online Accounts	Limit preparer access to the taxpayer online account system to only those preparers subject to IRS oversight under Circular 230.
2015-6-2	Preparer Access to Online Accounts	Develop the online account system so it validates the preparer's PTIN information. If the preparer is not subject to Circular 230 oversight, the system should block certain authorization checkboxes automatically.
2015-6-3	Preparer Access to Online Accounts	Develop the online account system so that the taxpayer can adjust preparer authorizations by checking a separate box for each type of action the designated preparer can take on the taxpayer's behalf. The checkboxes should use plain language explanations that Taxpayer Advocacy Panel members and Low Income Taxpayer Clinics have reviewed.
2015-6-4	Preparer Access to Online Accounts	Develop procedures to track preparer access to the taxpayer's online account and verify the taxpayer authorized the actions taken.
2015-6-5	Preparer Access to Online Accounts	Develop procedures to automatically alert the taxpayer of any preparer activities on the online account system and provide information to the taxpayer on how to report unauthorized access.
2015-6-6	Preparer Access to Online Accounts	Work with the Department of Treasury to issue guidance specifically applying the provisions of IRC §§ 6713 and 7216 to unauthorized access to the online account system. In addition, the IRS should work with Treasury to revise Circular 230 sanctions to include sanctions for preparers who conduct, or attempt to conduct, unauthorized transactions on the online account system.
Taxpayer Face-to-Face Access *These recommendations address concerns about taxpayers' inability to have face-to-face contact with the IRS.*		
2004-2-2	Taxpayer Access to Face-to-Face Interaction	Examine how the Social Security Administration (SSA) is able to expand its electronic services without sacrificing customers' access to face-to-face service.
2004-2-4	Taxpayer Access to Face-to-Face Interaction	Monitor the effects of the change in the transcript delivery system at TACs to ensure they have not increased burden on either taxpayers or other IRS functions.
2004-2-5	Taxpayer Access to Face-to-Face Interaction	Revisit the existing "extreme hardship" exception for the transcript delivery system to ensure that it is broad enough to cover those taxpayers in serious need of assistance.

Year of Most Serious Problem/ Status Update Recommendation	Title of Most Serious Problem/Status Update	National Taxpayer Advocate Recommendation
2004-2-6	Taxpayer Access to Face-to-Face Interaction	Provide additional training to employees on the "extreme hardship" exception, including real life examples, so employees will know when they are presented with a request that meets the exception and take appropriate actions to assist the taxpayer.
2004-2-7	Taxpayer Access to Face-to-Face Interaction	Continue to monitor those small sites that are being forced to close either permanently or temporarily and ensure that additional assistance remains available in the area and that taxpayers are not forced to travel long distances in order to receive face-to-face assistance from the IRS.
2004-2-8	Taxpayer Access to Face-to-Face Interaction	Conduct research to identify what services should be offered at the TACs and kiosks and determine whether the existing service offerings at each location actually meets taxpayers' needs.
2010-19-1	The IRS Has Been Reluctant to Implement Alternative Service Methods That Would Improve Accessibility for Taxpayers Who Seek Face-to-Face Assistance	Test a program that uses mobile vans to increase face-to-face service.
2010-19-2	The IRS Has Been Reluctant to Implement Alternative Service Methods That Would Improve Accessibility for Taxpayers Who Seek Face-to-Face Assistance	Pilot a program to work with state and local agencies to increase the IRS's face-to-face presence.
2010-19-3	The IRS Has Been Reluctant to Implement Alternative Service Methods That Would Improve Accessibility for Taxpayers Who Seek Face-to-Face Assistance	Test telepresence in remote areas.
Taxpayer Access Remote *These recommendations suggest alternatives of remote access and include the need to survey customers about their satisfaction, needs, and problems.*		
2004-3-1	Taxpayer Access: Remote Interaction	The IRS must educate taxpayers on the advantages and short-comings of using remote assistance. This involves informing taxpayers of the services available to meet different needs as well as the benefits and limitations associated with each application. This information will prepare taxpayers as to what they should expect and prevent future frustrations.
2004-3-2	Taxpayer Access: Remote Interaction	W&I should conduct a real-time study during filing season that would ask randomly selected Toll-Free customers whether they had called previously regarding the same issue. If so, the survey should question why the customers felt the need to call again (*i.e.*, clarification, confusion, the multiple calls. The findings would facilitate strategic planning to reduce the unnecessary burden on the system by eliminating the customers' perceived need to make multiple calls. For example, the findings may assist the IRS in determining how to address these issues through employee training or changes to the Probe and Response Guide.

Year of Most Serious Problem/ Status Update Recommendation	Title of Most Serious Problem/Status Update	National Taxpayer Advocate Recommendation
2004-3-3	Taxpayer Access: Remote Interaction	Rather than merely conducting customer satisfaction surveys, the IRS needs to take a more proactive approach to determining the exact obstacles taxpayers face while they navigate through the Toll-Free system. This research could take the form of a learning lab, which would test different approaches and scenarios on focus groups, comprised of a representative sample of individuals, to understand how they navigate through the system and the optimal way to design the system to make the directions and menu options more user-friendly.
2004-3-6	Taxpayer Access: Remote Interaction	The IRS should review the experience of federal, state and local organizations, as well as organizations in the private sector, which utilize kiosks as a service delivery option. Did the kiosks replace other types of services? After a number of years in operation, how did customers rate the services provided at kiosks?
Taxpayer Assistance Centers *These recommendations address TAS's concerns about changes and closures at Taxpayer Assistance Centers.*		
2003-11-2	Taxpayer Assistance Centers	As the IRS does modify local services, TAS recommends developing customer satisfaction measurement techniques that accurately poll the customers affected. The traditional measurement, conducted within TAC walls, is not sufficient to reflect the impact of intended improvements.
2007-11-2	Service at Taxpayer Assistance Centers	Provide a specific vehicle or process for obtaining stakeholder advice and best practices. Involve TAC employees who will be serving taxpayers in this process.
2007-11-3	Service at Taxpayer Assistance Centers	Conduct a full-scale survey to research population segments (low-income, elderly, disabled, and limited English taxpayers) across the United States to determine the particular face-to-face out-of-scope service taxpayers need by geographical location, such as farmers, fishermen, foresters and small business self-employed. The IRS should not limit this research to taxpayers approaching the TACs. Include an analysis of the relationship between taxpayer services and voluntary compliance. As a result of the study change out-of-scope issues to in-scope and train employees accordingly.
2007-11-5	Service at Taxpayer Assistance Centers	Provide same-day service to taxpayers traveling to a TAC and do not turn them away or refer them elsewhere.
2007-11-6	Service at Taxpayer Assistance Centers	Make it a priority of answering calls on published TAC telephone numbers. The IRS should also market telephone numbers to the community by methods such as forms and publications, television, and radio as well as the IRS website.
2007-11-7	Service at Taxpayer Assistance Centers	Provide small business representatives at each larger TAC location.
2007-11-8	Service at Taxpayer Assistance Centers	Accept all payments presented to the IRS, understanding that cash payments must be converted to money orders.
2007-11-9	Service at Taxpayer Assistance Centers	Ensure that all monies saved from shifting taxpayers to electronic services should be funneled directly into providing face-to-face services at TACs.
2017-10-1	Taxpayer Assistance Centers	Institute a dual appointment and walk-in structure at TACs at the taxpayer's choice.
2017-10-2	Taxpayer Assistance Centers	Request the funding for, and in consultation with TAS, develop a pilot mobile van program.
2017-10-4	Taxpayer Assistance Centers	Reinstate return preparation for amended disaster-based casualty loss returns.
2017-10-5	Taxpayer Assistance Centers	Staff TACs during peak times with co-located staff such as revenue officers or revenue agents to handle overflow and appointments.

Year of Most Serious Problem/ Status Update Recommendation	Title of Most Serious Problem/Status Update	National Taxpayer Advocate Recommendation
Taxpayer Service *These recommendations address the need for research about taxpayers' preferences as tools evolve.*		
2005-1-2	Trends in Taxpayer Service	Develop an understanding of what taxpayers prefer, as well as whether taxpayer preferences can be changed and if there are any limitations on the IRS' ability to change those preferences.
2005-1-4	Trends in Taxpayer Service	Examine both internal and external research regarding taxpayer preferences.
2005-1-5	Trends in Taxpayer Service	Explore how any changes to taxpayer service will affect compliance.
2005-1-6	Trends in Taxpayer Service	Develop a strategy for implementing changes to the current taxpayer service structure, including a plan for migrating taxpayers to different communication channels.
2005-1-8	Trends in Taxpayer Service	Examine other state and federal agencies to determine if anything can be learned from the ways in which they provide services.
2007-10-1	Taxpayer Service and Behavioral Research	Enhance its existing research capacities by developing an applied research lab and exploring different approaches to improving tax morale.
2009-21-1	The IRS Should Develop an In-House Cognitive Research Lab to Understand Taxpayer Behavior and Devise More Effective Products and Programs	The IRS National Headquarters Research, along with representatives from the operating Divisions, and TAS, should study cognitive labs to determine how best to structure an IRS lab.
2009-21-2	The IRS Should Develop an In-House Cognitive Research Lab to Understand Taxpayer Behavior and Devise More Effective Products and Programs	Identify IRS employees who could be trained to staff the lab.
2009-21-3	The IRS Should Develop an In-House Cognitive Research Lab to Understand Taxpayer Behavior and Devise More Effective Products and Programs	Hire staff that cannot be developed rapidly from current IRS employees.
2009-21-4	The IRS Should Develop an In-House Cognitive Research Lab to Understand Taxpayer Behavior and Devise More Effective Products and Programs	Build a cognitive research lab.
2012-3-1	The IRS is Significantly Underfunded to Serve Taxpayers and Collect Tax	Revise the budget rules so that the IRS is "fenced off" from otherwise applicable spending ceilings and is viewed more like an accounts receivable department. It should be funded at a level designed to maximize tax compliance, particularly voluntary compliance, with due regard for protecting taxpayer rights and minimizing taxpayer burden.
2012-3-2	The IRS is Significantly Underfunded to Serve Taxpayers and Collect Tax	In allocating IRS resources, keep in mind that tax compliance requires a combination of high quality taxpayer service, outreach and education, and effective tax-law enforcement, and the IRS should continue to maintain a balanced approach toward that end.

Year of Most Serious Problem/ Status Update Recommendation	Title of Most Serious Problem/Status Update	National Taxpayer Advocate Recommendation
2012-12-1	The IRS Telephone and Correspondence Services Have Deteriorated Over the Last Decade and Must Improve to Meet Taxpayer Needs	Conduct studies (such as the TAS Dependent Taxpayer Identification Number Math Error study) to identify unnecessary "action required" correspondence and act to minimize taxpayer burden and delays caused by this correspondence.
2012-12-2	The IRS Telephone and Correspondence Services Have Deteriorated Over the Last Decade and Must Improve to Meet Taxpayer Needs	Use data the IRS has collected and analyzed to make taxpayer service decisions and resource allocations through an overall service strategy.
2012-12-3	The IRS Telephone and Correspondence Services Have Deteriorated Over the Last Decade and Must Improve to Meet Taxpayer Needs	Commit to using the jointly-developed ranking tool in all decisions about taxpayer service policy, including the taxpayer value measures proposed by TAS; to completing the research necessary to fully populate the tool's data fields, and to extending the methodology to enable scoring of changes to the way covered services are delivered including increases or decreases in the level of service or available service hours for a service activity.
2014-1-1	Taxpayer Service	In the short term, carefully monitor taxpayer service trends and ensure that the IRS receives the oversight and funding it requires to meet the needs of the taxpaying public.
2014-1-2	Taxpayer Service	Over the longer term, undertake comprehensive tax reform to reduce the complexity of the Internal Revenue Code and reduce compliance burdens.
2014-2-2	Taxpayer Service	Develop and execute a memorandum of understanding (MOU) with the National Taxpayer Advocate to document the steps needed to complete development of the Service Priorities Project ranking tool.
2014-2-3	Taxpayer Service	Incorporate the ranking tool and methodology into plans currently under development for the Services on Demand initiative.
2015-1-1	Taxpayer Service	The National Taxpayer Advocate recommends that Congress hold hearings during the next few months on the future state of IRS operations. These hearings: ♦ Will help foster better communication between the IRS and Congress on the front-end, potentially reducing the risk of continuing conflict in the future; ♦ Should seek testimony from groups representing the interests of individual taxpayers (including elderly, low-income, disabled, and limited English proficiency taxpayers), sole proprietors, other small businesses, and Circular 230 practitioners and unenrolled tax return preparers; and ♦ Should also include witnesses who can address the additional compliance burden the CONOPS will impose on various categories of taxpayers as well as the likely impact of the CONOPS on the overall rate of voluntary tax compliance.
2016-2-1	Worldwide Taxpayer Service	Conduct any taxpayer service surveys by calling taxpayers' land line telephones or cellphones, or by sending taxpayers the survey by mail.
2016-2-2	Worldwide Taxpayer Service	In surveys of TACs, include taxpayers who attempted to use TAC services but were turned away.
2016-2-3	Worldwide Taxpayer Service	In taxpayer service surveys, include menu options (such as "other") that allow respondents to indicate that the given alternatives do not describe their experience or preference.
2016-2-4	Worldwide Taxpayer Service	In developing taxpayer service surveys, use focus groups and pre-testing with real taxpayers to ensure the surveys reflect all the potential preferences of taxpayers.

Year of Most Serious Problem/ Status Update Recommendation	Title of Most Serious Problem/Status Update	National Taxpayer Advocate Recommendation
2016-2-5	Worldwide Taxpayer Service	In implementing taxpayer service programs, place highest priority on meeting the preferences of taxpayers and stakeholders.
2016-2-6	Worldwide Taxpayer Service	Implement procedures to safeguard against adopting service methods that have as their implicit or explicit objective forcing taxpayers to online channels.
2018-1-3	Tax Law Questions	Track calls and contacts about out-of-scope topics and develop ITLA scripts for frequently asked questions or consider declaring topics in-scope.
2018-1-4	Tax Law Questions	Develop a method to respond to uncommon or complex questions (*i.e.*, those that are out-of-scope for the phones and TACs) via email or call back to the taxpayer, utilizing artificial intelligence and pattern-recognition technology and regularly publish these answers online for the general public.
Taxpayer Service *These recommendations address TAS's concern with the decrease in the level of telephone service.*		
2002-18-1	Toll-Free Level of Service	We suggest the IRS state an option for live assistance when menu layers number more than two.
2002-18-2	Toll-Free Level of Service	The IRS should consider conducting observational studies, in which taxpayers with actual problems are observed navigating through the phone system – automated and live assistor. Was the taxpayer satisfied? If not, when did the taxpayer begin to feel frustrated, impatient, or dissatisfied? What additional information, prompts, or assistance might have mitigated this dissatisfaction?
2002-18-3	Toll-Free Level of Service	In general, the IRS efforts and rationale to improve toll-free service, while significant, have not been well communicated to the customer base. The IRS needs to reevaluate the involvement of stakeholders and taxpayers in defining acceptable quality service goals and methods.
2009-1-1	IRS Toll-Free Telephone Service Is Declining as Taxpayer Demand for Telephone Service Is Increasing	The National Taxpayer Advocate recommends the IRS should staff the toll-free lines sufficiently to achieve a CSR LOS of 85 percent and an ASA of 300 seconds.
2009-1-2	IRS Toll-Free Telephone Service Is Declining as Taxpayer Demand for Telephone Service Is Increasing	The National Taxpayer Advocate recommends the IRS should develop and staff a special phone unit to deal with tax issues relating to national disasters and late-year tax law changes.
2017-2-2	Telephones	Incorporate qualitative measures, such as First Contact Resolution rate, used by other government agencies and in the private sector to measure a caller's overall experience and satisfaction with a call.
2017-2-3	Telephones	Provide telephone assistors additional issue-focused training to help resolve a caller's inquiry directly in as few steps as possible.
2017-2-4	Telephones	Upgrade phone hardware technology to provide virtual hold and scheduled callback options to callers.
2017-2-5	Telephones	Institute a system similar to a 311 system where an operator can transfer a taxpayer to the specific office within the IRS that handles his or her issue or case.

Year of Most Serious Problem/ Status Update Recommendation	Title of Most Serious Problem/Status Update	National Taxpayer Advocate Recommendation
Virtual Face-to-Face (VFTF) *The National Taxpayer Advocate has previously recommended that the IRS test virtual service delivery to bring a type of face-to-face service to more taxpayers. This section identifies progress the IRS has made and additional recommendations by TAS.*		
2012-SU-4-1	The IRS Has Made Significant Progress in Delivering Virtual Face-to-Face Service and Should Expand Its Initiatives to Meet Taxpayer Needs and Improve Compliance	The IRS continue to study and propose areas where VFTF delivery options would benefit taxpayers.
2012-SU-4-2	The IRS Has Made Significant Progress in Delivering Virtual Face-to-Face Service and Should Expand Its Initiatives to Meet Taxpayer Needs and Improve Compliance	The IRS immediately identify international locations for VFTF sites and expand VFTF to taxpayers abroad.
2012-SU-4-3	The IRS Has Made Significant Progress in Delivering Virtual Face-to-Face Service and Should Expand Its Initiatives to Meet Taxpayer Needs and Improve Compliance	Congress provide funding specifically to allow the IRS and TAS to expand VFTF service using broadband and mobile technology as a way for citizens to interact with their government.
2012-SU-4-4	The IRS Has Made Significant Progress in Delivering Virtual Face-to-Face Service and Should Expand Its Initiatives to Meet Taxpayer Needs and Improve Compliance	The IRS pursue strategic solutions that would allow taxpayers to interact with IRS employees on their home computers or mobile devices.
2014-15-1	Virtual Service Delivery	Maximize the benefits of VSD in brick and mortar locations currently equipped for videoconferencing by offering VSD services from all such facilities on a day-to-day basis and by enhancing the scope of activities that taxpayers can undertake in conjunction with videoconferencing.
2014-15-3	Virtual Service Delivery	Develop and publish a definitive plan for the continued rollout of both VSD in brick and mortar locations, including non-IRS facilities, and TDC, and articulate concrete dates for implementation at different stages.
2014-15-4	Virtual Service Delivery	Allocate funding, or seek funding from Congress, sufficient to enable continued implementation of VSD initiatives in brick and mortar locations and over the Internet.

Appendix 2: Taxpayer Rights Assessment: IRS Performance Measures and Data Relating to Taxpayer Rights

The Taxpayer Rights Assessment provides the IRS, Congress, and other stakeholders with a "report card" to measure how the agency is doing in protecting and furthering taxpayer rights, as well as driving voluntary compliance. If properly used, this report card can become an integral part of the IRS's ongoing implementation of the Taxpayer Bill of Rights (TBOR), which organizes the multitude of taxpayer rights provided by the Internal Revenue Code (Code) into a list of ten fundamental rights. Following the IRS's adoption of the TBOR, Congress added the TBOR to the Code and created a commitment for the Commissioner of the IRS to "ensure that employees of the Internal Revenue Service are familiar with and act in accord with taxpayer rights as afforded by other provisions of this title, including — [the ten taxpayer rights comprising the TBOR]."[1] This statutory language shows Congress's intent not just to articulate the fundamental taxpayer rights, but to ensure the IRS is held accountable for putting them into practice. Without measures, the IRS and Congress face difficulty in determining whether the IRS is meeting its obligation.

Additionally, the Taxpayer First Act, passed in 2019, requires the IRS to include in its written comprehensive customer service strategy "identified metrics and benchmarks for quantitatively measuring the progress of the Internal Revenue Service in implementing such strategy."[2] The Taxpayer Rights Assessment will allow the IRS to identify areas where it must improve and measure the success of specific changes by comparing data prior to and after the implementation of the new customer service strategy.

The Office of the Taxpayer Advocate began publishing the Taxpayer Rights Assessment in 2014, following the IRS's adoption of the TBOR. While the Assessment has grown over the years in terms of data captured, it is still a work in progress. In some instances, data is not readily available and in others, there may not be sufficient measures in place at this time. Traditionally, IRS metrics have focused on "efficiency" — no change rates, cycle time, etc. If the IRS is to truly evolve in the customer experience arena, it will require new metrics. Nonetheless, these measures currently available will offer the IRS objective criteria to gauge whether employees truly are acting in accord with taxpayer rights and whether the IRS's new customer service strategy is effective in improving the taxpayer experience. TAS includes the Taxpayer Rights Assessment in the Annual Report to Congress to inform Congress about how the IRS is doing in meeting the statutory directives discussed above and to drive the IRS to improve its service to taxpayers.

1. **THE RIGHT TO BE INFORMED:** Taxpayers have the right to know what they need to do to comply with the tax laws. They are entitled to clear explanations of the laws and IRS procedures in all tax forms, instructions, publications, notices, and correspondence. They have the right to be informed of IRS decisions about their tax accounts and to receive clear explanations of the outcomes.

Measure/Indicator	Fiscal Year (FY) 2017	FY 2018	FY 2019
Individual Correspondence Volume (Adjustments)[3]	4,598,654	4,485,906	4,134,753
Average Cycle Time to Work Individual Master File (IMF) Correspondence[4]	69 days	66 days	74 days
Inventory Overage[5]	39.5%	37.9%	41.8%
Business Correspondence Volume (Adjustments)[6]	2,736,451	2,595,131	2,717,819
Average Cycle Time to Work Business Master File (BMF) Correspondence[7]	45 days	51 days	101 days
Inventory Overage[8]	11.7%	23.5%	57.8%
Total Correspondence (All Types)	TBD	TBD	TBD
Quality of IRS Forms & Publications	TBD	TBD	TBD
IRS.gov Web Page Ease of Use	TBD	TBD	TBD
IRS Outreach	TBD	TBD	TBD

2. **THE RIGHT TO QUALITY SERVICE:** Taxpayers have the right to receive prompt, courteous, and professional assistance in their dealings with the IRS, to be spoken to in a way they can easily understand, to receive clear and easily understandable communications from the IRS, and to speak to a supervisor about inadequate service.

Measure/Indicator	FY 2017	FY 2018	FY 2019
Number of Returns Filed (Projected, All Types)[9]	247,807,099	254,001,709	256,649,900
Total Individual Income Tax Returns[10]	150,786,286	152,937,949	154,601,100
E-File Receipts, Calendar Year (Received by 12/01/2017, 11/23/2018, 11/15/2019)[11]	132,319,000	135,459,000	138,205,000
E-File Receipts: Tax Professional (Calendar Year)[12]	60.0%	59.0%	58.0%
E-File Receipts: Self-Prepared (Calendar Year)[13]	40.0%	41.0%	42.0%
Returns Prepared by:			
Volunteer Income Tax Assistance (VITA)/Tax Counseling for the Elderly (TCE) (tax year)[14]	3,558,491	3,559,838	3,553,540
Free File Consortium (Tax Year)[15]	2,234,047	2,361,591	2,528,639
Fillable Forms (Tax Year)[16]	302,136	294,723	283,244
Number of Taxpayer Assistance ("Walk-In") Centers (TACs)[17]	371	359	358
Number of TAC Contacts[18]	3.3 million	2.9 million	2.4 million
Total Calls to IRS[19]	95,618,714	98,532,231	99,373,456
Number of Attempted Calls to IRS Customer Service Lines[20]	74,471,676	77,715,282	76,814,886
Toll-Free: Percentage of Calls Answered (Level of Service (LOS))[21]	77.1%	75.9%	65.4%
Toll-Free: Average Speed of Answer[22]	8.4 minutes	7.5 minutes	11.3 minutes
National Taxpayer Advocate Toll-Free: Percentage of Calls Answered (LOS)[23]	76.7%	78.4%	58.2%
NTA Toll-Free: Average Speed of Answer[24]	2.9 minutes	3.2 minutes	8.8 minutes
Practitioner Priority: Percentage of Calls Answered (LOS)[25]	81.9%	84.9%	78.3%
Practitioner Priority: Average Speed of Answer[26]	8.9 minutes	7.5 minutes	8.8 minutes
Tax Exempt/Government Entities Percentage of Calls Answered (LOS)[27]	69.5%	69.3%	80.0%
Tax Exempt/Government Entities: Average Speed of Answer[28]	9.2 minutes	8.8 minutes	6.9 minutes
Toll-Free Customer Satisfaction[29]	90.0%	90.0%	N/A
Awareness of Service (or Utilization)	TBD	TBD	TBD
IRS Issue Resolution: Percentage of Taxpayers Who Had Their Issue Resolved as a Result of the Service They Received	TBD	TBD	TBD
Taxpayer Issue Resolution: Percentage of Taxpayers Who Reported Their Issue Was Resolved After Receiving Service	TBD	TBD	TBD

3. **THE RIGHT TO PAY NO MORE THAN THE CORRECT AMOUNT OF TAX:** Taxpayers have the right to pay only the amount of tax legally due, including interest and penalties, and to have the IRS apply all tax payments properly.

Measure/Indicator	FY 2017	FY 2018	FY 2019
Toll-Free Tax Law Accuracy[30]	96.7%	95.5%	91.6%
Toll-Free Accounts Accuracy[31]	96.0%	96.1%	94.3%
Scope of Tax Law Questions Answered	TBD	TBD	TBD
Correspondence Examinations – Individual Tax Returns			
No Change Rate[32]	12.3%	12.3%	13.7%
Agreed Rate[33]	22.8%	23.5%	24.1%
Non-Response Rate[34]	42.1%	41.5%	38.2%
Percentage of Cases Appealed	TBD	TBD	TBD
Field Examinations – Individual Tax Returns			
No Change Rate[35]	14.3%	13.4%	15.4%
Agreed Rate[36]	46.1%	48.4%	48.7%
Non-Response Rate[37]	0.3%	0.7%	0.7%
Percentage of Cases Appealed	TBD	TBD	TBD
Office Examinations – Individual Tax Returns			
No Change Rate[38]	14.4%	12.2%	11.7%
Agreed Rate[39]	42.8%	44.1%	42.5%
Non-Response Rate[40]	19.0%	18.3%	18.4%
Percentage of Cases Appealed	TBD	TBD	TBD
Math Error Adjustments	TBD	TBD	TBD
Math Error Abatements	TBD	TBD	TBD
Number of Statutory Notices of Deficiency Issued	TBD	TBD	TBD
Number of Statutory Notices of Deficiency Appealed	TBD	TBD	TBD
Number of Collection Appeals Program (CAP) Conferences	TBD	TBD	TBD
Number of CAP Conferences Reversing IRS Position	TBD	TBD	TBD
Number of Collection Due Process (CDP) Conferences	TBD	TBD	TBD
Number of CDP Conferences Reversing IRS Position	TBD	TBD	TBD

4. **THE RIGHT TO CHALLENGE THE IRS'S POSITION AND BE HEARD:** Taxpayers have the right to raise objections and provide additional documentation in response to formal IRS actions or proposed actions, to expect that the IRS will consider their timely objections and documentation promptly and fairly, and to receive a response if the IRS does not agree with their position.

Measure/Indicator	FY 2017	FY 2018	FY 2019
Individual Correspondence Volume (Adjustments)[41]	4,598,654	4,485,906	4,134,753
Average Cycle Time to Work IMF Correspondence[42]	69 days	66 days	74 days
Inventory Overage[43]	39.5%	37.9%	41.8%
Business Correspondence Volume[44]	2,736,451	2,595,131	2,717,819
Average Cycle Time to Work BMF Correspondence[45]	45 days	51 days	101 days
Inventory Overage[46]	11.7%	23.5%	57.8%
Percentage of Math Error Adjustments Abated	TBD	TBD	TBD
Percentage of Statutory Notices of Deficiency Appealed to Tax Court	TBD	TBD	TBD
Number of CAP Conferences Requested by Taxpayers[47]	TBD	TBD	TBD
Percentage of CAP Conferences That Reversed the IRS Position	TBD	TBD	TBD
Number of CDP Hearings Requested by Taxpayers[48]	TBD	TBD	TBD
Percentage of CDP Hearings That Reversed the IRS Position	TBD	TBD	TBD

5. **THE RIGHT TO APPEAL AN IRS DECISION IN AN INDEPENDENT FORUM:** Taxpayers are entitled to a fair and impartial administrative appeal of most IRS decisions, including many penalties, and have the right to receive a written response regarding the Office of Appeals' decision. Taxpayers generally have the right to take their cases to court.

Measure/Indicator	FY 2017	FY 2018	FY 2019
Number of Cases Appealed[49]	103,574	92,430	87,535
Appeals Staffing (On-Rolls)[50]	1,345	1,207	1,230
Number of States Without an Appeals or Settlement Officer[51]	11	11	11
Customer Satisfaction of Service in Appeals[52]	68.0%	71.0%	N/A
Average Days in Appeals to Resolution	TBD	TBD	TBD
Percentage of Statutory Notices of Deficiency Appealed to Tax Court	TBD	TBD	TBD

6. **THE RIGHT TO FINALITY:** Taxpayers have the right to know the maximum amount of time they have to challenge the IRS's position as well as the maximum amount of time the IRS has to audit a particular tax year or collect a tax debt. Taxpayers have the right to know when the IRS has finished an audit.

Measure/Indicator	FY 2017	FY 2018	FY 2019
Average Days to Complete Correspondence Examination (Non-Earned Income Tax Credit (EITC))[53]	207 days	236 days	248 days
Average Days to Complete Correspondence Examination (EITC)[54]	222 days	240 days	273 days
Average Days to Reach Determination on Applications for Exempt Status[55]	54 days	69 days	88 days
Average Days for Exempt Organization Function to Respond to Correspondence[56]	27 days	46 days	58 days

7. **THE RIGHT TO PRIVACY:** The right to privacy goes to the right to be free from unreasonable searches and seizures and that IRS actions would be no more intrusive than necessary. Taxpayers have the right to expect that any IRS inquiry, examination, or enforcement action will comply with the law and be no more intrusive than necessary, and will respect all due process rights, including search and seizure protections and will provide, where applicable, a collection due process hearing.

Measure/Indicator	FY 2017	FY 2018	FY 2019
Number (or Percentage) of CDP Cases Where IRS Cited for Abuse of Discretion	TBD	TBD	TBD
Number of Offers in Compromise (OICs) Submitted Using "Effective Tax Administration" as Basis	TBD	TBD	TBD
Percentage of OICs Accepted That Used "Effective Tax Administration" as Basis	TBD	TBD	TBD
Number of Cases Where Taxpayer Received Repayment of Attorney Fees as Result of Final Judgment	TBD	TBD	TBD

8. **THE RIGHT TO CONFIDENTIALITY:** Taxpayers have the right to expect that any information they provide to the IRS will not be disclosed unless authorized by the taxpayer or by law. Taxpayers have the right to expect appropriate action will be taken against employees, return preparers, and others who wrongfully use or disclose taxpayer return information.

Measure/Indicator	FY 2017	FY 2018	FY 2019
Number of Closed Unauthorized Access of Taxpayer Account (UNAX) Investigations[57]	151	198	144
UNAX Investigations Resulting in Prosecution, Removal, Resignation, or Suspension of Employee[58]	64	78	61
UNAX Investigations Resulting in Other Administrative Dispositions[59]	74	105	65
UNAX Investigations Where Employee Cleared of Wrongdoing[60]	13	15	18

9. **THE RIGHT TO RETAIN REPRESENTATION:** Taxpayers have the right to retain an authorized representative of their choice to represent them in their dealings with the IRS. Taxpayers have the right to seek assistance from a Low Income Taxpayer Clinic if they cannot afford representation.

Measure/Indicator	FY 2017	FY 2018	FY 2019
Percentage of Power of Attorney Requests Overage (as of 9/30/17, 9/29/2018, 9/29/2019)[61]	18.2%	0%	6.8%
Number of Low Income Taxpayer Clinics Funded (Calendar Year)[62]	138	134	131
Funds Appropriated for Low Income Taxpayer Clinics[63]	$12.0 million	$12.0 million	$12.0 million
Number of States With a Low Income Taxpayer Clinic (Calendar Year)[64]	49	48	46
Number of Low Income Taxpayer Clinic Volunteer Hours (Calendar Year)[65]	47,480	57,914	56,971

10. **THE RIGHT TO A FAIR AND JUST TAX SYSTEM:** Taxpayers have the right to expect the tax system to consider facts and circumstances that might affect their underlying liabilities, ability to pay, or ability to provide information timely. Taxpayers have the right to receive assistance from TAS if they are experiencing financial difficulty or if the IRS has not resolved their tax issues properly and timely through its normal channels.

Measure/Indicator	FY 2017	FY 2018	FY 2019
OIC: Number of Offers Submitted[66]	62,243	59,127	54,225
OIC: Percentage of Offers Accepted[67]	38.1%	37.8%	35.3%
Installment Agreements (IAs): Number of Individual & Business IAs[68]	2,924,780	2,883,035	2,821,134
Streamlined IAs: Number of Individual & Business IAs[69]	2,236,434	2,079,743	1,931,454
IAs (CFf): Number of Individual & Business IAs[70]	35,449	39,178	30,343
Streamlined IAs (CFf): Number of Individual & Business IAs[71]	6,936	5,224	3,534
Number of OICs Accepted Per Revenue Officer[72]	10.7	11.0	8.0
Number of IAs Accepted Per Revenue Officer[73]	15.0	18.1	13.6
Percentage of Cases in the Queue (Taxpayers)[74]	13.9%	16.6%	24.1%
Percentage of Cases in the Queue (Modules)[75]	21.8%	24.6%	33.6%
Percentage of TDAs Reported Currently Not Collectible – Surveyed (Shelved)[76]	32.3%	75.6%	52.2%
Age of Delinquencies in the Queue[77]	4.5 years	4.8 years	4.8 years
Percentage of Modules in Queue Prior to Three Tax Years Ago[78]	78.2%	79.6%	77.9%
Percentage of Cases Where the Taxpayer Is Fully Compliant After Five Years[79]	47.0%	51.0%	49.0%

Endnotes

1 Internal Revenue Code (IRC) § 7803(a)(3).
2 Taxpayer First Act, Pub. L. No. 116-25, § 1101(a)(5), 133 Stat. 981 (2019).
3 IRS, Joint Operations Center (JOC), Adjustments Inventory Reports: July-September Fiscal Year (FY) Comparison (FY 2018 and FY 2019). This correspondence data is also repeated under Right 4 – *The Right to Challenge the IRS's Position and Be Heard.*
4 IRS, Research Analysis and Data (RAD), Accounts Management Reports: *Collection Information System (CIS) Closed Case Cycle Time* (FY 2018 and FY 2019).
5 IRS, Weekly Enterprise Adjustments Inventory Report, FY 2018 and FY 2019 (weeks ending Sept. 29, 2018, and Sept. 28, 2019).
6 IRS, JOC, Adjustments Inventory Reports: July-September Fiscal Year Comparison (FY 2018 and FY 2019).
7 IRS, RAD, Accounts Management Reports: CIS Closed Case Cycle Time (FY 2018 and FY 2019).
8 IRS, Weekly Enterprise Adjustments Inventory Report, FY 2018 and FY 2019 (weeks ending Sept. 29, 2018, and Sept. 28, 2019).
9 IRS Pub. 6292, Fiscal Year Return Projections for the United States: 2018-2025 3 (Aug. 2018); IRS Pub. 6292, Fiscal Year Return Projections for the United States: 2019-2026 3 (Sept. 2019). The FY 2018 figure has been updated from what we reported in the 2018 Annual Report to Congress to report actual return counts. The FY 2019 figures are projected numbers. The number of returns and related metrics are proxies for IRS workload and provide context for the environment in which taxpayers seek Quality Service and other rights.
10 *Id.* The FY 2018 figure has been updated from what we reported in the 2018 Annual Report to Congress to report actual return counts. The FY 2019 figures are projected numbers.
11 IRS, E-File Reports, http://efile.enterprise.irs.gov/Progress.asp (last visited Dec. 17, 2019). Rounded to the nearest thousand. The 2019 calendar year numbers are totaled through Nov. 15, 2019 as the Nov. 22, 2019 report was not yet available at time of print.
12 *Id*.
13 *Id.*
14 Free, in-person return preparation is offered to low-income and older taxpayers by non-IRS organizations through the Volunteer Income Tax Assistance (VITA) and Tax Counseling for the Elderly (TCE) programs. W&I response to TAS fact check (Dec. 19, 2019). The FY 2017 figures represent tax year 2016 tax returns. The FY 2018 figures represent tax year 2017 tax returns. The FY 2019 figures represent tax year 2018 tax returns. The FY 2017 and FY 2018 numbers have been updated from what was reported in the 2018 Annual Report to Congress.
15 W&I response to TAS fact check (Dec. 19, 2019). The FY 2018 figures represent tax year 2017 tax returns. The FY 2019 figures represent tax year 2018 tax returns. The FY 2017 and FY 2018 numbers have been updated from what was reported in the 2018 Annual Report to Congress.
16 *Id.* The FY 2017 figures represent tax year 2016 tax returns. The FY 2018 figures represent tax year 2017 tax returns. The FY 2019 figures represent tax year 2018 tax returns. The FY 2017 and FY 2018 numbers have been updated from what was reported in the 2018 Annual Report to Congress.
17 FY 2017 figure from IRS response to TAS information request (Nov. 3, 2017). FY 2018 figure from IRS response to TAS information request (Oct. 24, 2018). The FY 2018 figure was calculated as of August 2018, and does not include 38 face-to-face Virtual Service Delivery sites located at community partner facilities. FY 2019 figure from IRS response to TAS fact check (Nov. 15, 2019).
18 Wage and Investment Division (W&I), Business Performance Review (BPR), 4th Quarter, FY 2018 12 (Nov. 8, 2018), W&I, BPR, 4th Quarter, FY 2019 2 (Nov. 7, 2019).
19 IRS, JOC, Snapshot Reports: Enterprise Snapshot (weeks ending Sept. 30, 2018, and Sept. 30, 2019; reports generated Nov. 13, 2019).
20 *Id*. Number of calls to Accounts Management (formerly Customer Services) is the sum of 29 lines for FY 2017 (0217, 1040, 4933, 1954, 0115, 8374, 0922, 0582, 5227, 9887, 9982, 4184, 7388, 0452, 0352, 7451, 9946, 5215, 3536, 2050, 4017, 2060, 4778, 4259, 8482, 8775, 5500, 4490, and 5640). The FY 2018 figure includes the sum of a 30th line (5245). The FY 2019 figure includes the sum of 32 lines (all prior noted numbers with the addition of 7210 and 5070).
21 *Id*. Accounts Management calls answered include reaching live assistor or selecting options to hear automated information messages.
22 *Id.*
23 IRS, JOC, Snapshot Reports: Product Line Detail (weeks ending Sept. 30, 2018, and Sept. 30, 2019; reports generated Nov. 15, 2019).
24 *Id.*
25 *Id.*
26 *Id.*
27 *Id.*
28 *Id.*
29 W&I, BPR, 4th Quarter, FY 2017 11 (Nov. 9, 2017); W&I, BPR, 4th Quarter, FY 2019 2 (Nov. 7, 2019). FY 2019 percentage not yet available.
30 W&I, BPR, 4th Quarter, FY 2018 10 (Nov. 8, 2018); W&I, BPR, 4th Quarter, FY 2019 2 (Nov. 7, 2019).

31 W&I, BPR, 4th Quarter, FY 2018 10 (Nov. 8, 2018); W&I, BPR, 4th Quarter, FY 2019 2 (Nov. 7, 2019).

32 IRS, CDW, Audit Information Management System (AIMS), Closed Case Database excluding Pass Through Entity cases (Dec. 2019). IRM 4.4.12.5.49.1, No Change Disposal Codes (June 1, 2002) defines a no change as a case closed by the examiner with no additional tax due (disposal code 1 and 2). In the Small Business/Self-Employed Division (SB/SE) response to TAS fact check (Dec. 20, 2019), SB/SE notes disposal code 1 as an agreed closure. TAS does not agree with the SB/SE definition because these cases do not require agreement from the taxpayer since there is no additional tax liability (*see, e.g.*, IRM 4.10.8.2.2, No Change with Adjustments Report Not Impacting Other Tax Year(s) (Sept. 12, 2014)) and the taxpayer's agreement, or disagreement, with the adjustment(s) as it pertains to another's year's liability is not known. Treasury Inspector General for Tax Administration (TIGTA) Report 2018-30-069 concurs with TAS's definition of "no change" as case closed by the examiner with no additional tax due (disposal code 1 and 2). IRM 4.4.12.5.49.1, No Change Disposal Codes (June 1, 2002). The FY 2017 and FY 2018 numbers have been updated from what was reported in the 2018 Annual Report to Congress.

33 IRS, CDW, AIMS, Closed Case Database excluding Pass Through Entity cases (Dec. 2019). The IRM defines an agreed case as disposal code 3, 4, 8, or 9. IRM 4.4.12.5.22.2, Agreed (June 1, 2002). Disposal code 8 is considered an agreed case by the IRS; however; these cases are closed to technical services for the issuance of a statutory notice because the taxpayer did not agree with the proposed adjustments and did request an appeal. Technical Services requests that the groups use DC 08 for cases forwarded to Technical Services for the issuance of a stat notice. Based on the definition of disposal code 8, TAS does not concur that these are agreed cases. The FY 2017 and FY 2018 numbers have been updated from what was reported in the 2018 Annual Report to Congress.

34 IRS, CDW, AIMS, Closed Case Database excluding Pass Through Entity cases (Dec. 2019). The non-response rate represents case where the taxpayer did not have contact with the IRS. The FY 2017 and FY 2018 numbers have been updated from what was reported in the 2018 Annual Report to Congress.

35 IRS, CDW, AIMS, Closed Case Database (Dec. 2019). IRM 4.4.12.5.49.1, No Change Disposal Codes (June 1, 2002) defines a no change as a case closed by the examiner with no additional tax due (disposal code 1 and 2). In the Small Business/Self-Employed Division (SB/SE) response to TAS fact check (Dec. 20, 2019), SB/SE notes disposal code 1 as an agreed closure. TAS does not agree with the SB/SE definition because these cases do not require agreement from the taxpayer since there is no additional tax liability (see, e.g., IRM 4.10.8.2.2, No Change with Adjustments Report Not Impacting Other Tax Year(s) (Sept. 12, 2014)) and the taxpayer's agreement, or disagreement, with the adjustment(s) as it pertains to another's year's liability is not known. Treasury Inspector General for Tax Administration (TIGTA) Report 2018-30-069 concurs with TAS's definition of "no change" as case closed by the examiner with no additional tax due (disposal code 1 and 2). IRM 4.4.12.5.49.1, No Change Disposal Codes (June 1, 2002). The FY 2018 and FY 2019 numbers have been updated from what was reported in the 2018 Annual Report to Congress.

36 IRS, CDW, AIMS, Closed Case Database (Dec. 2019). The IRM defines an agreed case as disposal code 3, 4, 8, or 9. IRM 4.4.12.5.22.2, Agreed (June 1, 2002). Disposal code 8 is considered an agreed case by the IRS; however; these cases are closed to technical services for the issuance of a statutory notice because the taxpayer did not agree with the proposed adjustments and did request an appeal. Technical Services requests that the groups use DC 08 for cases forwarded to Technical Services for the issuance of a stat notice. Based on the definition of disposal code 8, TAS does not concur that these are agreed cases. The FY 2018 and FY 2019 numbers have been updated from what was reported in the 2018 Annual Report to Congress.

37 IRS, CDW, AIMS, Closed Case Database (Dec. 2019). The non-response rate represents case where the taxpayer did not have contact with the IRS. The FY 2018 and FY 2019 numbers have been updated from what was reported in the 2018 Annual Report to Congress.

38 *Id.*

39 *Id.*

40 *Id.*

41 IRS, JOC, Adjustments Inventory Reports: July-September Fiscal Year Comparison (FY 2018 and FY 2019).

42 IRS, RAD, Accounts Management Reports: CIS Closed Case Cycle Time (FY 2018 and FY 2019).

43 IRS, Weekly Enterprise Adjustments Inventory Report, FY 2018 and FY 2019 (weeks ending Sept. 29, 2018, and Sept. 28, 2019).

44 IRS, JOC, Adjustments Inventory Reports: July-September Fiscal Year Comparison (FY 2018 and FY 2019).

45 IRS, RAD, Accounts Management Reports: CIS Closed Case Cycle Time (FY 2018 and FY 2019).

46 IRS, Weekly Enterprise Adjustments Inventory Report, FY 2018 and FY 2019 (weeks ending Sept. 29, 2018, and Sept. 28, 2019).

47 Taxpayers may request a Collection Appeals Process review as the result of IRS actions such filing a Notice of Federal Tax Lien, an IRS levy or seizure of property, and termination, rejection, or modification of an installment agreement. See IRS Pub. 1660, Collection Appeal Rights (July 2018).

48 Taxpayers may request a Collection Due Process review when the IRS plans to take actions such as filing a federal tax lien or levy. See IRS Pub. 1660, Collection Appeal Rights (July 2018).

49 Office of Appeals, BPR, 4th Quarter, FY 2019 11 (Nov. 1, 2019). The FY 2019 number is a projected figure.

50 *Id.*

51 IRS, Human Resources Reporting Center, https://persinfo.web.irs.gov/posrpt.htm (last visited Dec. 18, 2019). Employee Position (OF8) Listing for weeks ending Sept. 30, 2017, Sept. 29, 2018, and Sept. 28, 2019. The IRS also has Appeals and Settlement Officers in the District of Columbia which are not included in this figure.

52 Office of Appeals, BPR, 4th Quarter, FY 2019 11 (Nov. 1, 2019). FY 2019 percentage not yet available.

53 W&I, BPR, 4th Quarter, FY 2018 14 (Nov. 8, 2018). The FY 2017 figures have been updated from what we reported in the 2017 Annual Report to Congress. For FY 2019, IRS, CDW, AIMS, Closed Case Database.

54 W&I, BPR, 4th Quarter, FY 2018 14 (Nov. 8, 2018). The FY 2017 figures have been updated from what we reported in the 2017 Annual Report to Congress. For FY 2019, IRS, CDW, AIMS, Closed Case Database.

55 For FY 2017, Tax Exempt & Government Entities (TE/GE), BPR, 4th Quarter, FY 2017 9 (Nov. 30, 2017). For FY 2018, TE/GE, Compliance, Planning & Classification email to TAS (Dec. 13, 2018). FY 2019, TE/GE, Compliance, Planning & Classification email to TAS (Nov. 25, 2019).

56 For FY 2017, TE/GE, BPR, 4th Quarter, FY 2017 9 (Nov. 30, 2017). For FY 2018, TE/GE, Compliance, Planning & Classification email to TAS (Dec. 13, 2018). FY 2019, TE/GE, Compliance, Planning & Classification email to TAS (Nov. 25, 2019).

57 IRS, Automated Labor and Employee Relations Tracking System (ALERTS). The number of IRS employees averaged 83,775 in FY 2017, 80,836 in FY 2018, and 79,395 in FY 2019. IRS, Human Resources Reporting Center, Fiscal Year Population Report.

58 IRS, ALERTS.

59 *Id*. Other administrative dispositions includes alternative discipline in lieu of suspension; case cancelled or merged with another case; caution letter; last chance agreement; oral counseling; reprimand; written counseling; etc.

60 *Id*.

61 IRS, JOC, Customer Account Services, Accounts Management Paper Inventory Reports (weeks ending Sept. 30, 2017, Sept. 29, 2018, and Sept. 28, 2019).

62 IRS Pub. 5066, Low Income Tax Clinics Program Report (Feb. 2018, Dec. 2018, and Dec. 2019).

63 Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, 131 Stat. 135 (2017); Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, 132 Stat. 348 (2018). Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, 133 Stat. 13 (2019). The amounts actually awarded to Low Income Taxpayer Clinics (LITCs) differed from the appropriated amounts. The amount awarded to clinics in FY 2017 was approximately $11.8 million based on the number of available grantees who met the requirements and were selected for funding. The amount awarded to clinics in FY 2018 was over $11.8 million based on the number of available grantees who met the requirements and were selected for funding. The amount awarded to clinics in FY 2019 was over $11.7 million based on the number of available grantees who met the requirement and were selected for funding.

64 IRS Pub. 5066, Low Income Tax Clinics Program Report (Feb. 2018, Dec. 2018, and Dec. 2019). Forty-six states and the District of Columbia have at least one LITC. As of the start of the 2019 grant year there were no LITCs in Hawaii, North Dakota, Wyoming, West Virginia, or Puerto Rico.

65 *Id*. The FY 2017 figure reflects volunteer hours from calendar year (CY) 2016. The FY 2018 figure reflects volunteer hours from CY 2017. The FY 2019 figure reflects volunteer hours from CY 2018.

66 IRS, SB/SE, Collection Activity Report No. 5000-108, Monthly Report of Offer In Compromise Activity FY 2019, cumulative through September, FY 2017 (Oct. 2, 2017), FY 2018 (Oct. 1, 2018), and FY 2019 (Sept. 30, 2019).

67 *Id*.

68 IRS, SB/SE, Collection Activity Report No. 5000-6, Installment Agreement Cumulative Report, FY 2017 (Oct. 1, 2017), FY 2018 (Sept. 30, 2018), and FY 2019 (Sept. 29, 2019).

69 *Id*.

70 *Id*.

71 *Id*.

72 IRS. SB/SE Collection Activity Report No. 5000-108, Monthly Report of Offer In Compromise Activity FY 2019, cumulative through September, FY 2017 (Oct. 2, 2017), FY 2018 (Oct. 1, 2018), and FY 2019 (Sept. 30, 2019) and Collection Activity Report 5000-23, Collection Workload Indicators cumulative through September, FY 2017 (Oct. 11, 2017), FY 2018 (Oct. 11, 2018), and FY 2019 (Oct. 9, 2019). The FY 2017 and FY 2018 number have been updated from what was reported in the 2018 Annual Report to Congress.

73 IRS, SB/SE, Collection Activity Report No. 5000-6, Installment Agreement Cumulative Report, FY 2017 (Oct. 1, 2017), FY 2018 (Sept. 30, 2018), and FY 2019 (Sept. 29, 2019) and Collection Activity Report 5000-23, Collection Workload Indicators cumulative through September, FY 2017 (Oct. 11, 2017), FY 2018 (Oct. 11,2018), and FY 2019 (Oct. 9, 2019). The FY 2017 and FY 2018 number have been updated from what was reported in the 2018 Annual Report to Congress.

74 IRS, SB/SE, Collection Activity Report No. 5000-2, Taxpayer Delinquent Account Cumulative Report, FY 2017 (Oct. 1, 2017), FY 2018 (Sept. 30, 2018), and FY 2019 (Sept. 29, 2019).

75 *Id*.

76 *Id*. Beginning in FY 2017, the IRS shelves cases prior to potential transfer for the Private Collection Initiative. Row title has been updated to clarify the data points.

77 Query by TAS Research of tax delinquent accounts with queue status in IRS CDW, Accounts Receivable Dollar Inventory, Individual Master File, Modules. Age of balance due cases in the collection queue as of cycle 37 of 2017, and 2018, and 2019. The age of Taxpayer Delinquency Investigations is not considered.

78 IRS, SB/SE, Collection Activity Report No. 5000-2, Taxpayer Delinquent Account Cumulative Report, FY 2017 (Oct. 1, 2017), FY 2018 (Sept. 30, 2018), and FY 2019 (Sept. 29, 2019).

79 Calculation by TAS Research. Percentage of taxpayers with tax delinquent accounts in 2012, 2013, and 2014, respectively, and who have no new delinquencies five years later. The FY 2017 figure has been updated from what we reported in the 2017 Annual Report Congress. IRS, CDW, IMF. The Service paused a number of nonfiler programs in 2017, which may have reduced the number of taxpayers with new unfiled return delinquencies.

Appendix 3: Identifying the Most Serious Problems

Internal Revenue Code (IRC) § 7803(c)(2)(B)(ii) requires the National Taxpayer Advocate to submit this report each year and in it, among other things, to identify the ten most serious problems (MSPs) encountered by taxpayers.

There is no objective way to determine which problems are the "most serious" because of the vast scope of tax administration. Among other things, the IRS receives more than 150 million individual income tax returns and more than 10 million business entity income tax returns each year; the types of taxpayers span a wide spectrum that runs from employed individuals to the self-employed, from low-income taxpayers to upper-income taxpayers, and from individuals to business entities (including partnerships, C corporations, and S corporations) to tax-exempt entities; and the stages in the tax administration process include return filing, audits, appeals, collection, and tax litigation.

The National Taxpayer Advocate regularly receives input on systemic problems from a wide variety of sources, including reports on TAS casework, meetings with tax practitioners and other stakeholders, information gathered from cross-functional IRS taskforces and teams on which TAS participates, and meetings with employees and taxpayers. The Taxpayer Advocate Service also receives several hundred submissions every year through an online system that describes systemic problems the submitters believe warrant attention.[1] TAS's staff reviews and prioritizes all such submissions for further action.

Based on this input, the National Taxpayer Advocate determines the most serious problems after considering a series of factors, including the following:

- Impact on taxpayer rights;
- Number of taxpayers impacted;
- Financial impact on taxpayers;
- Visibility, sensitivity, and interest to stakeholders, Congress, and external indicators (*e.g.,* media, etc.);
- Barriers to tax law compliance, including cost, time, and burden;
- Taxpayer Advocate Management Information System (TAMIS) inventory data; and
- Emerging issues.

The table below shows how the National Taxpayer Advocate assessed the 10 most serious problems included in this report in relation to these factors. For each problem, the factors are assigned a "Low," "Medium," or "High" weight. The factors are neither equally weighted nor exclusive. Ultimately, the National Taxpayer Advocate uses this analysis to help determine which problems to include.

1 The Systemic Advocacy Management System (SAMS) is a database of systemic issues and information reported online to TAS by IRS employees and members of the public. https://www.irs.gov/advocate/systemic-advocacy-management-system-sams. TAS reviews and analyzes the submissions and determines a course of action, which can include information-gathering projects, immediate interventions, and advocacy projects. Internal Revenue Manual (IRM) 1.4.13.4.9.2, Systemic Advocacy Management System (SAMS) (Sept. 17, 2019).

MSP Topic	Impact on Taxpayer Rights	Number of Taxpayers Impacted	Financial Impact on Taxpayers	VISIBILITY/SENSITIVITY/INTEREST			Barriers to Tax Law Compliance (Cost, Time, Burden)	TAS Case Inventory	Emerging Issues
				Stakeholders	Congress	External Indicators (Media, etc.)			
Customer Service Strategy	H	H	M	H	H	M	H	M	H
Information Technology Modernization	H	H	M	H	H	H	M	L	H
IRS Funding	H	H	M	H	H	H	H	L	H
Processing Delays	H	H	H	H	M	H	H	H	H
Free File	H	M	M	M	M	H	H	L	M
Return Preparer Strategy	H	H	H	H	M	M	M	L	M
Appeals	H	M	H	H	H	M	H	M	H
Multilingual Notices	H	M	M	M	M	L	M	L	M
Combination Letters	H	H	M	M	M	L	H	L	M
Offer in Compromise	H	M	H	M	M	M	H	H	H

Appendix 4: Top 25 Case Advocacy Issues in Fiscal Year 2019 by Taxpayer Advocate Management Information System Receipts

Rank	Issue Code	Description	FY 2019 Case Receipts
1	045	Pre-Refund Wage Verification Hold	91,747
2	63x - 640	Earned Income Tax Credit (EITC)	18,691
3	315	Unpostable and Reject	10,292
4	330	Processing Amended Return	9,427
5	090	Other Refund Inquiries and Issues	9,425
6	425	Identity Theft	8,490
7	340	Injured Spouse Claim	7,892
8	318	Taxpayer Protection Program Unpostables	6,037
9	610	Open Audit, Not EITC	5,858
10	310	Processing Original Return	5,150
11	71x	Levies	4,402
12	920	Health Insurance Premium Tax Credit for Individuals under IRC § 36B	3,971
13	040	Returned and Stopped Refunds	3,807
14	620	Reconsideration of Audits and Substitute for Return under IRC § 6020(b)	3,429
15	75x	Installment Agreements	2,970
16	670	Closed Automated Underreporter	2,840
17	790	Other Collection Issues	2,602
18	450	Form W-7, Individual Taxpayer Identification Number (ITIN), and Adoption Taxpayer Identification Number (ATIN)	2,541
19	060	IRS Offset	2,471
20	72x	Liens	2,261
21	520	Failure to File Penalty (FTF) and Failure to Pay (FTP) Penalty	2,123
22	320	Math Error	1,937
23	210	Missing and Incorrect Payments	1,806
24	151	Transcript Requests	1,716
25	390	Other Document Processing Issues	1,613
Total Top 25 Receipts			**213,498**
Total TAS Receipts			**240,777**

Appendix 5: Most Litigated Issues Case Tables

TABLE 1: Trade or Business Expenses Under IRC § 162 and Related Sections

Case Citation	Issue(s)	*Pro Se*	Decision
Individual Taxpayers (But Not Sole Proprietorships)			
Archuleta v. Comm'r, T.C. Summ. Op. 2018-55	Unreimbursed employee business expenses attributed to vehicles disallowed under IRC § 274(d); cell phone expenses unsubstantiated	No	IRS
Campbell v. Comm'r, T.C. Summ. Op. 2018-37	Unreimbursed employee business expenses related to vehicle expenses not substantiated as deductible under IRC § 162 or IRC § 280A; other unreimbursed employee business expenses, such as for laundry, unsubstantiated, or disallowed under IRC § 274(d), in the case of meals and lodging	Yes	IRS
Gibbs v. Comm'r, 2018 U.S. Tax Ct. LEXIS 58 (T.C. June 6, 2018), *aff'd* 757 F. App'x 274 (4th Cir. 2019)	Unreimbursed employee business expenses relating to vehicle expenses disallowed under IRC § 274; home office expenses disallowed under IRC § 280A	Yes	IRS
Liljeberg v. Comm'r, 907 F.3d 623 (D.C. Cir. 2018), *aff'g* 148 T.C. 83	Deductibility of expenses deducted under "away from home" provision of IRC § 162 unsubstantiated	No	IRS
Lucas v. Comm'r, T.C. Memo. 2018-80	Deductibility of legal and professional fees unsubstantiated	No	IRS
Martin v. Comm'r, T.C. Memo. 2018-109	Vehicle and travel expenses disallowed under IRC § 274(d); utilities expenses unsubstantiated; management fees unsubstantiated; cleaning and maintenance expenses partially substantiated; miscellaneous expenses including a maid unsubstantiated; residence expenses disallowed under IRC § 280A	Yes	Split
Perry v. Comm'r, T.C. Memo. 2018-90, *appeal dismissed*, 2018 WL 6444398 (9th Cir. Nov. 8, 2018)	Expenses for second home disallowed under IRC § 280A	Yes	IRS
Simpson v. Comm'r, T.C. Summ. Op. 2019-9	Deductibility of some unreimbursed employee business expenses unsubstantiated; others, including vehicle expenses, disallowed under IRC § 274(d)	Yes	IRS
Sutherland v. Comm'r, T.C. Memo. 2018-186	Job search expenses deducted on Schedule A partially substantiated; job search expenses attributed to travel, meals, and entertainment disallowed under IRC § 274(d); unreimbursed employee business expenses related to meals and entertainment disallowed under IRC § 274(d)	Yes	Split
Totten v. Comm'r, T.C. Summ. Op. 2019-1	Unreimbursed employee business expenses relating to vehicles and travel, meals, and entertainment disallowed under IRC § 274(d); other business expenses unsubstantiated	Yes	IRS
Triggs v. Comm'r, T.C. Summ. Op. 2018-58	Unreimbursed employee business expenses related to travel and vehicle expenses disallowed under IRC § 274(d); lodging expenses disallowed as personal under IRC § 262; expenses for protective clothing and tools partially substantiated	Yes	Split
Valle v. Comm'r, T.C. Summ. Op. 2018-51	Education expenses that qualified taxpayer for a new trade or business disallowed as personal under IRC § 262	Yes	IRS
Washburn v. Comm'r, T.C. Memo. 2018-110, *appeal dismissed*, No. 18-72899 (9th Cir. June 28, 2019)	Deductibility of unreimbursed employee business expenses related to restitution payments unsubstantiated and also not allowable under IRC § 165	No	IRS
Business Taxpayers (Corporations, Partnerships, Trusts, and Sole Proprietorships - Schedules C, E, F)			
2590 Assocs., LLC v. Comm'r, T.C. Memo. 2019-3	Deduction for worthless debt originally created for construction purposes allowed under IRC § 166	No	TP

TABLE 1: Trade or Business Expenses Under IRC § 162 and Related Sections

Case Citation	Issue(s)	*Pro Se*	Decision
Alpenglow Botanicals, LLC v. United States, 894 F.3d 1187 (10th Cir. 2018), *aff'g* 118 A.F.T.R.2d (RIA) 6968 (D. Colo. 2016), *cert. denied*, 139 S.Ct. 2745 (June 24, 2019).	Expenses related to running a marijuana dispensary disallowed under IRC § 280E	No	IRS
Alterman v. Comm'r, T.C. Memo. 2018-83	Deductions for medical marijuana dispensary disallowed as illegal activity under IRC § 280E	No	IRS
Alt. Health Care Advocates v. Comm'r, 151 T.C. 225 (2018)	Expenses related to running a marijuana dispensary disallowed as illegal activity under IRC § 280E	No	IRS
Amelsberg v. Comm'r, T.C. Memo. 2018-94	Qualification for net operating loss carryover under IRC § 172 not established; deduction for rent unsubstantiated	Yes	IRS
Andersen, Estate of, v. Comm'r, T.C. Memo. 2019-2	Contract labor expenses improperly added to basis under IRC § 263 and reclassified as Schedule C expenses; these reclassified contract labor expenses, along with other various deductions, unsubstantiated; Schedule C vehicle expenses and travel expenses disallowed under IRC § 274(d); theft loss with respect to business-related equipment disallowed under IRC § 165	No	IRS
Archer v. Comm'r, T.C. Memo. 2018-111, *appeal docketed*, Nos. 19-70304, 19-70305 (9th Cir. Feb. 4, 2019)	Schedule C advertising expenses partially substantiated; miscellaneous other Schedule C expenses unsubstantiated or disallowed under IRC § 274(d)	Yes	Split
Baker Hughs Inc. v. United States, 313 F.Supp.3d 804 (S.D. Tex. 2018), *appeal docketed*, No. 18-20585 (5th Cir. Aug. 20, 2018)	U.S. parent corporation's advances to Russian subsidiary did not create or pay a debt and therefore could not be deducted under IRC § 166; these payments likewise could not be substantiated as ordinary and necessary business expenses and were classified as contributions to capital	No	IRS
Balocco v. Comm'r, T.C. Memo. 2018-108	Airplane costs deducted on Schedule C disallowed under IRC § 274(d)	No	IRS
Bass v. Comm'r, 738 F. App'x 178 (4th Cir. 2018), *aff'g* T.C. Memo. 2018-19	Vehicle expenses on Schedule C disallowed under IRC § 274(d); miscellaneous expenses disallowed as unsubstantiated	Yes	IRS
Becnel v. Comm'r, T.C. Memo. 2018-120	Deduction for facility expenses related to operation of yacht reclassified as entertainment and activity expenses and disallowed under IRC § 274(n)	No	IRS
Berry v. Comm'r, T.C. Memo. 2018-143, *appeals docketed*, No. 19-70709 (9th Cir. Mar. 25, 2019), No. 19-70684 (9th Cir. Mar. 21, 2019)	Vehicle expenses disallowed under IRC § 274(d); deduction for business use of home disallowed under IRC § 280A	Yes	IRS
Bolles v. Comm'r, T.C. Memo. 2019-42	Deduction for contract labor expenses substantiated; vehicle expense deduction unsubstantiated	No	Split
Burbach v. Comm'r, T.C. Memo. 2019-17	Deductions for depreciation of equipment ranging from computers to cars partially allowed under IRC § 179	No	Split
Cavanaugh v. Comm'r, 766 F. App'x 98 (5th Cir. 2019), *aff'g* T.C. Memo. 2012-324	Deductibility of settlement payment and related legal fees unsubstantiated	No	IRS
Chaganti v. Comm'r, 745 F. App'x 259 (8th Cir. 2018), *aff'g* T.C. Memo. 2013-285, *cert. denied*, 139 S.Ct. 2728 (June 17, 2019)	Deductibility of legal fees unsubstantiated	Yes	IRS
Dasent v. Comm'r, T.C. Memo. 2018-202	Schedule C expenses relating to education consulting business disallowed because taxpayer was not engaged in trade or business; Schedule A unreimbursed employee business expenses, including travel, meals, and entertainment, disallowed under IRC § 274(d)	Yes	IRS

TABLE 1: Trade or Business Expenses Under IRC § 162 and Related Sections

Case Citation	Issue(s)	*Pro Se*	Decision
de Sylva v. Comm'r, T.C. Memo. 2018-165	Deductibility of Schedule C expenses related to boat rental business disallowed because taxpayer was not engaged in trade or business	Yes	IRS
Dorval v. Comm'r, T.C. Memo. 2018-167	Various Schedule C expenses, such as clothing and tools, unsubstantiated	Yes	IRS
Doyle v. Comm'r, T.C. Memo. 2019-8	Schedule C deduction for legal fees in first year unsubstantiated but reclassified as allowable Schedule A expense subject to the two percent floor; legal fees for second tax year unsubstantiated	No	Split
Eldred v. Comm'r, T.C. Summ. Op. 2018-49	Schedule C vehicle expenses disallowed under IRC § 179; Schedule C license deduction unsubstantiated; research and development expenses partially disallowed as personal under IRC § 262 and partially substantiated under *Cohan*; current deduction for miscellaneous computer expenses disallowed under IRC § 179	Yes	Split
Feinberg v. Comm'r, 916 F.3d 1330 (10th Cir. 2019), *aff'g* T.C. Memo. 2017-211, *cert. denied*, 205 L. Ed. 2d 199 (U.S. Oct. 7, 2019)	Deductions for medical marijuana dispensary disallowed as illegal activity under IRC § 280E	No	IRS
Ferguson v. Comm'r, T.C. Memo. 2019-40	Schedule C yacht rental expenses unsubstantiated; vehicle expenses unsubstantiated; bad debt disallowed under IRC § 166	No	IRS
Ferguson v. Comm'r, T.C. Memo. 2019-40	Settlement payment partially deductible as unreimbursed employee business expense, rather than as Schedule C expense	No	Split
Ford v. Comm'r, 751 F. App'x 843 (6th Cir. 2018), *aff'g* T.C. Memo. 2018-8	Expenses related to running a country music venue disallowed under IRC § 183	No	IRS
Garcia v. Comm'r, T.C. Summ. Op. 2018-38	Legal fees unsubstantiated	No	IRS
Gaunt v. Comm'r, T.C. Memo. 2018-78	Schedule C advertising expenses unsubstantiated; Schedule C vehicle expenses disallowed under IRC § 274(d); Schedule C contract labor expenses partially substantiated; depreciation expenses allowed under IRC § 179; miscellaneous Schedule C expenses, such as legal fees, home office expenses, and travel expenses partially substantiated	No	Split
Gervais v. Comm'r, T.C. Summ. Op. 2018-30	Lodging, meals, and incidental expenses deducted under "away from home" rule partially substantiated; travel expenses unsubstantiated	Yes	Split
Hagos v. Comm'r, T.C. Memo. 2018-166	Uber driver's Schedule C vehicle expenses disallowed under IRC § 274(d)	Yes	IRS
Hernandez v. Comm'r, T.C. Memo. 2018-163, *appeal docketed*, No. 19-60086 (5th Cir. Feb. 5, 2019)	Schedule C deductions, such as for travel and car and truck expenses, unsubstantiated or disallowed under IRC § 274(d)	Yes	IRS
Householder v. Comm'r, T.C. Memo. 2018-136	Claimed deductions for horse breeding activity disallowed for a number of reasons, including failure of the regulatory tests under IRC § 183	No	IRS
Imperato v. Comm'r, T.C. Memo. 2018-126, *appeal dismissed*, 2019 WL 1529474 (11th Cir. Mar. 7, 2019)	Schedule C vehicle and travel expenses disallowed under IRC § 274(d); home office expenses disallowed under IRC § 280A; commission expense unsubstantiated	Yes	IRS
Kho v. Comm'r, T.C. Summ. Op. 2018-32	Deductions for meals and entertainment disallowed as personal under IRC § 262	Yes	IRS
Kurdziel v. Comm'r, T.C. Memo. 2019-20	Aircraft-related activities disallowed under IRC § 183, including IRC § 172 net operating losses	No	IRS
Langston v. Comm'r, T.C. Memo. 2019-19, *appeal docketed*, No. 19-09002 (10th Cir. Aug. 12, 2019)	Depreciation deductions for yacht and RV under IRC § 167 disallowed under IRC § 274(d)	No	IRS

TABLE 1: Trade or Business Expenses Under IRC § 162 and Related Sections

Case Citation	Issue(s)	*Pro Se*	Decision
Little Mt. Corp. v. Comm'r, 736 F. App'x 691 (9th Cir. 2018), *aff'g* T.C. Memo. 2016-147	Deduction for compensation unsubstantiated	No	IRS
Losantiville Country Club v. Comm'r, 906 F.3d 468 (6th Cir. 2018), *aff'g* T.C. Memo. 2017-158	Certain losses nondeductible from country club's effectively connected income based on lack of IRC § 183 profit motive	No	IRS
Loughman v. Comm'r, T.C. Memo. 2018-85	Expenses related to running a marijuana dispensary, including deductions of wages, disallowed as illegal activity under IRC § 280E	No	IRS
McDowell v. Comm'r, T.C. Summ. Op. 2019-3	Schedule C meeting expenses unsubstantiated; training expenses partially substantiated; subscription expenses unsubstantiated; telephone and software expenses partially substantiated; travel expenses unsubstantiated and disallowed under IRC § 274(d); DC license should have been amortized under IRC § 197	Yes	Split
Mercado-Brown v. Comm'r, T.C. Memo. 2019-30, *appeal docketed*, No. 19-12653 (11th Cir. July 15, 2019)	Deductions for weekly travel expenses unsubstantiated because taxpayer was not "away from home" for tax purposes	No	IRS
Morowitz v. United States, 123 A.F.T.R.2d 1001 (D.R.I. 2019)	Deductibility of Schedule C expenses related to law firm unsubstantiated	Yes	IRS
Mowry v. Comm'r, T.C. Memo. 2018-105	Deductions for depreciation disallowed under IRC § 167	No	IRS
Najafpir v. Comm'r, T.C. Memo. 2018-103	Home office expenses deducted for storage of business records disallowed under IRC § 280A	Yes	IRS
NextEra Energy, Inc. v. United States, 893 F.3d 1353 (11th Cir. 2018), *aff'g* 119 A.F.T.R.2d (RIA) 2017-1260	Net operating loss deductions under IRC § 172 for disposal of spent nuclear fuel disallowed	No	IRS
Nix v. Comm'r, T.C. Memo. 2018-116	Cosmetic sales activity was not a trade or business under IRC § 183; deductions consequently disallowed	No	IRS
Pac. Mgmt. Grp. v. Comm'r, T.C. Memo. 2018-131	Business deductions for "fees" under IRC § 162 lacked economic substance	No	IRS
Patients Mut. Assistance Collective Corp. v. Comm'r, 151 T.C. 11 (2018)	Expenses related to running a marijuana dispensary disallowed as illegal under IRC § 280E; other business deductions, such as those related to yoga classes, disallowed as not a trade or business distinct from the primary business of selling marijuana	No	IRS
Potter v. Comm'r, T.C. Memo. 2018-153	Cowboy horseback shooting activity was carried on as a trade or business and deductions consequently allowed under IRC § 183	No	TP
Pugh v. Comm'r, T.C. Summ. Op. 2019-2	Mortgage interest properly deducted as a business expense under IRC § 163; legal fees deducted on Schedule C unsubstantiated	No	Split
Ray v. Comm'r, T.C. Memo. 2019-36	Deductibility of legal fees relating to damages and funds management losses partially substantiated	No	Split
Robison v. Comm'r, T.C. Memo. 2018-88	Despite history of losses, ranching activity was engaged in for profit under IRC § 183; deductions suspended under IRC § 469	No	Split
Rodriguez v Comm'r, T.C. Summ. Op. 2019-4	Schedule C deductions for expenses such as meals and entertainment and vehicles disallowed under IRC § 274(d); deductions for expenses such as contract labor and supplies unsubstantiated; unreimbursed employee business expenses disallowed	Yes	IRS
Sanders, Estate of, v. Comm'r, T.C. Memo. 2018-104	Deductions claimed for consulting fees disallowed as transactions lacked economic substance	No	IRS
Schaekar v. Comm'r, T.C. Summ. Op. 2018-35	Various unreimbursed employee business expenses and Schedule C business expenses unsubstantiated	Yes	IRS

TABLE 1: Trade or Business Expenses Under IRC § 162 and Related Sections

Case Citation	Issue(s)	*Pro Se*	Decision
Sharpe v. Comm'r, T.C. Memo. 2018-107	Schedule C expenses disallowed under IRC § 183; unreimbursed employee business expenses relating to travel unsubstantiated; unreimbursed employee business expenses attributed to business use of home office disallowed under IRC § 280A	Yes	IRS
Shaw, United States v., 122 A.F.T.R.2d (RIA) 6151 (D. Nev. 2018)	Deductions disallowed under IRC § 274(d)	No	IRS
Singh v. Comm'r, T.C. Memo. 2018-132, *appeal docketed*, No. 18-72695 (9th Cir. Oct. 3, 2018)	Schedule C deductions, such as for machinery, cars, attorney's fees, and compensation either unsubstantiated or disallowed under IRC § 274(d)	Yes	IRS
Singh v. Comm'r, T.C. Memo. 2018-79, *appeal docketed*, No. 18-72160 (9th Cir. Aug. 1, 2018)	Schedule C deductions related to rental and leasing business unsubstantiated	Yes	IRS
Smith v. Comm'r, T.C. Memo. 2018-127, *appeal docketed*, Nos. 19-1050, 19-1051, 19-1052 (D.C. Cir. Feb. 25, 2019)	Schedule C deductions for meals, entertainment, and business gifts disallowed under IRC § 274(d); other deductions, such as for professional services, unsubstantiated; net operating losses disallowed under IRC § 172	No	IRS
Smith v. Comm'r, T.C. Memo. 2018-170	Deductions for vehicle and listed property expenses disallowed under IRC § 274(d); net operating loss deduction disallowed under IRC § 172	No	IRS
Steiner v. Comm'r, T.C. Memo. 2019-25	Yacht charter operation was an activity not engaged in for profit under IRC § 183; related deductions disallowed	No	IRS
Sugarloaf Fund, LLC v. Comm'r, T.C. Memo. 2018-181, *appeal docketed*, No. 19-2468 (7th Cir. Aug. 2, 2019)	Deductions for legal and accounting expenses and management fees partially substantiated; other deductions, including for IRC § 166 bad debt and for amortization of startup costs under IRC § 195, unsubstantiated	Yes	Split
Wainwright v. Comm'r, 744 F. App'x 1 (D.C. Cir. 2018), *aff'g* T.C. Memo. 2017-70	Deduction for vehicle depreciation disallowed under IRC § 167	Yes	IRS
Wasco Real Properties I, LLC v. Comm'r, 744 F. App'x 534 (9th Cir. 2018), *aff'g* T.C. Memo 2016-224	Property taxes deducted currently reclassified as IRC § 263A capital expenditures	No	IRS
Weaver v. Comm'r, T.C. Summ. Op. 2018-40	Unreimbursed employee business expenses unsubstantiated; Schedule C expenses for vehicles and for meals and entertainment disallowed under IRC § 274(d); travel expenses unsubstantiated; contract labor expenses partially substantiated; miscellaneous Schedule C expenses unsubstantiated	Yes	Split
White v. Comm'r, T.C. Memo. 2018-102	Schedule C advertising expenses substantiated; deductions for rent unsubstantiated	No	Split
Yapp v. Comm'r, T.C. Memo. 2018-147, *appeal docketed*, No. 19-70431 (9th Cir. Feb. 21, 2019)	Legal and professional services expenses partially substantiated; deduction for wages paid unsubstantiated; research and development expenses not currently deductible under IRC § 195	No	Split
Yaryan v. Comm'r, T.C. Memo. 2018-129	Bad debt deduction and related IRC § 172 net operating loss disallowed as nonbusiness bad debt under IRC § 166	No	IRS
Zhu v. Comm'r, T.C. Summ. Op. 2019-6	Unreimbursed employee business expenses unsubstantiated; deductions for other expenses unsubstantiated; Schedule C deductions for vehicles unsubstantiated; home office deduction disallowed under IRC § 280A	Yes	IRS

TABLE 2: Appeals From Collection Due Process (CDP) Hearings Under IRC §§ 6320 and 6330

Case Citation	Lien/Levy	Issue(s)	*Pro Se*	Decision
Individual Taxpayers (But Not Sole Proprietorships)				
Alamo v. Comm'r, 751 F. App'x 583 (5th Cir. 2019), *aff'g* T.C. Memo. 2017-215	Lien	Tax Court decision affirmed; no abuse of discretion; collection action sustained	Yes	IRS
Ansley v. Comm'r, T.C. Memo. 2019-46	Levy	TP precluded from challenging underlying the tax liabilities; no abuse of discretion in rejecting TP's OIC; IRS's motion for summary judgment granted; proposed collection action sustained	Yes	IRS
Belanger v. Comm'r, T.C. Memo. 2019-1, *aff'd* 776 F. App'x (5th Cir. Sept. 11, 2019)	Lien	No abuse of discretion; collection action sustained	Yes	IRS
Bontrager v. Comm'r, 151 T.C. 213 (2018)	Lien	TP precluded from challenging underlying tax liability; no abuse of discretion; proposed collection action sustained	No	IRS
Burnett v. Comm'r, T.C. Memo. 2018-204	Levy	TP failed to supply required forms and supporting financial information; TP was not in compliance with current tax obligations; no abuse of discretion; collection action sustained; IRS's motion for summary judgment granted	Yes	IRS
Burnett v. Comm'r, T.C. Memo. 2018-205, *aff'd* 776 F. App'x 798 (4th Cir. Sept. 6, 2019)	Levy	No abuse of discretion in not affording a face-to-face hearing; IRS's motion for summary judgment granted; proposed collection action sustained	Yes	IRS
Carpenter v. Comm'r, 2019 U.S. Tax Ct. LEXIS 13 (Apr. 18, 2019), *appeal docketed*, No. 19-01703 (4th Cir. July 2, 2019)	Lien/Levy	No abuse of discretion; proposed collection action sustained	Yes	IRS
Colacurcio v. Comm'r, 727 F. App'x 705 (D.C. Cir. 2018), *aff'g* No. 22123-14 (T.C. Mar. 31, 2017)	Levy	Tax Court decision affirmed; no abuse of discretion in rejecting TP's proposed installment plan; proposed collection action sustained	No	IRS
Davis v. Comm'r, T.C. Memo. 2018-197, *appeal docketed*, No. 19-09001 (10th Cir. May 10, 2019)	Levy	IRS issued a valid notice of deficiency and proper assessment; no abuse of discretion in denying a face-to-face hearing or sustaining the collection action; IRS's motion for summary judgment granted	Yes	IRS
Gillette v. Comm'r, T.C. Memo. 2018-195, *appeal docketed*, No. 19-01343 (7th Cir. Feb. 26, 2019)	Levy	TP's impairment and gambling addiction was a remediable impairment and not a disability to qualify as a valid exception to the IRC § 72(t)(2) ten percent penalty; no abuse of discretion in denying TP collection alternative	Yes	IRS
Giller v. Comm'r, 735 F. App'x 460 (9th Cir. 2018), *aff'g* 2018 U.S. App. LEXIS 5270 (T.C. Feb. 28, 2018)	Levy	TP did not raise challenge to FTF penalty in his request for a CDP hearing or during the hearing itself; no abuse of discretion; summary judgment upheld	Yes	IRS
Goosby v. Comm'r, T.C. Memo. 2019-49	Levy	Rejecting TP's proposed installment plan was not abuse of discretion based on national and local standards for basic living expenses; IRS's motion for summary judgment granted; proposed collection action sustained	Yes	IRS
Gregory v. Comm'r, T.C. Memo. 2018-192, *appeal dismissed*, 2019 WL 4184071 (9th Cir. June 21, 2019)	Lien	Reprint of notice of deficiency based on information in IRS databased combined with certified mail list provided sufficient evidence that notice was properly mailed and assessment was valid; collection action properly sustained	Yes	IRS
Grumbkow v. Comm'r, T.C. Memo. 2019-13	Levy	TP precluded from challenging underlying tax liability; TP failed to supply supporting financial information and was not in compliance with current tax obligations; no abuse of discretion in sustaining collection action; IRS's motion for summary judgment granted	Yes	IRS

TABLE 2: Appeals From Collection Due Process (CDP) Hearings Under IRC §§ 6320 and 6330

Case Citation	Lien/Levy	Issue(s)	*Pro Se*	Decision
Hartmann v. Comm'r, T.C. Memo. 2018-154, *aff'd* 124 A.F.T.R.2d (RIA) 5939 (3d Cir. Sept. 17, 2019)	Lien/Levy	TP failed to supply required forms and supporting financial information; was not in compliance with his current tax obligations; rejecting collection alternative was not abuse of discretion; IRS's motion for summary judgment granted	Yes	IRS
Henderson v. Comm'r, T.C. Memo. 2018-150, *appeal dismissed*, 2019 WL 2525400 (10th Cir. Apr. 30, 2019)	Lien	TPs not entitled to challenging underlying tax liabilities; collection action sustained	Yes	IRS
Herndon v. Comm'r, 758 F. App'x 857 (11th Cir. 2019), *aff'g* No. 17-21071 (T.C. May 7, 2018), *reh'g and reh'g en banc denied*, No. 18-13306 (11th Cir. Apr. 18, 2019)	Levy	Tax Court decision affirmed; rejection of proposed collection alternative was not an abuse of discretion; proposed collection action sustained	Yes	IRS
Hoglund v. Comm'r, T.C. Memo. 2018-185	Levy	TP failed to supply required forms and supporting financial information; was not in compliance with current tax obligations; no abuse of discretion; collection action sustained	Yes	IRS
Huminski v. Comm'r, 736 F. App'x 242 (11th Cir. 2018), *aff'g* No. 16-16614 (T.C. Aug. 17, 2017)	Levy	Tax Court decision affirmed; TP prohibited from challenging the underlying tax liabilities; no abuse of discretion in granting summary judgment and denying motion to compel discovery	Yes	IRS
Jennette v. Comm'r, 741 F. App'x 140 (3d Cir. 2018), *aff'g* T.C. Memo. 2018-47, *cert. denied*, 139 S.Ct. 1636 (Apr. 29, 2019), *reh'g denied*, 139 S.Ct. 2735 (June 17, 2019)	Levy	Tax Court decision affirmed; TP failed to show any abuse of discretion and all other arguments failed	Yes	IRS
Kearse v. Comm'r, T.C. Memo. 2019-53	Lien	TP raised issue in CDP hearing that notice of deficiency was not properly mailed; Appeals Officer abused discretion by not verifying mailing before the assessment	No	TP
Kopstad v. Comm'r, T.C. Memo. 2018-139	Levy	No abuse of discretion in sustaining proposed collection action; TP proposed no collection alternatives; Settlement Officer performed CDP balancing test; summary judgment granted	Yes	IRS
Krehnbrink v. Comm'r, T.C. Memo. 2019-56, *appeal docketed*, No. 19-1963 (6th Cir. Aug. 28, 2019)	Lien/Levy	IRS refusal to abate interest was not an abuse of discretion	Yes	IRS
Levin v. Comm'r, T.C. Memo. 2018-172, *appeal docketed*, No. 19-70314 (9th Cir. Feb. 4, 2019)	Lien/Levy	Rejecting TP's proposed installment agreement was not abuse of discretion; summary judgment granted	Yes	IRS
Linton v. Comm'r, 764 F. App'x 674 (10th Cir. 2019), *aff'g* No. 15-15904 (T.C. Feb. 16, 2018)	Levy	Tax Court's granting of IRS's motion for summary judgment affirmed; claim for refund before filing of return was not a valid claim	Yes	IRS
Longino v. Comm'r, T.C. Memo. 2018-175	Lien	TP failed to supply required forms and supporting financial information; was not in compliance with current tax obligations; no abuse of discretion; collection action sustained	Yes	IRS
Loveland v. Comm'r, 151 T.C. 78 (2018)	Lien/Levy	Appeals Officer abused discretion by failing to consider TPs' offer-in compromise, proposed installment agreement, and claim of economic hardship; case remanded to Appeals Office for further consideration	Yes	TP

TABLE 2: Appeals From Collection Due Process (CDP) Hearings Under IRC §§ 6320 and 6330

Case Citation	Lien/Levy	Issue(s)	*Pro Se*	Decision
Ludlam v. Comm'r, T.C. Memo. 2019-21, *appeal docketed*, No. 19-12694 (11th Cir. July 10, 2019)	Lien/Levy	TP precluded from challenging underlying tax liability; no abuse of discretion in not affording a face-to-face hearing; summary judgment granted	Yes	IRS
McMurtry v. Comm'r, T.C. Memo. 2019-22	Lien	TP failed to supply required forms and supporting financial information; TP was not in compliance with current tax obligations; no abuse of discretion; collection action sustained; summary judgment granted	Yes	IRS
Millen v. Comm'r, T.C. Memo. 2019-60, *appeal docketed*, No. 19-01646 (6th Cir. June 13, 2019)	Levy	TP precluded from challenging underlying tax liabilities; TP failed to supply required forms and supporting financial information; no abuse of discretion; collection action sustained; IRS's motion for summary judgment granted	Yes	IRS
Morgan v. Comm'r, T.C. Memo. 2018-98, *appeal dismissed*, 2019 WL 1612789 (D.C. Cir. Feb. 25, 2019)	Levy	No abuse of discretion; proposed collection action sustained	No	IRS
Moriarty v. Comm'r, 122 A.F.T.R.2d (RIA) 5984 (6th Cir. 2018), *aff'g* T.C. Memo. 2017-204, *reh'g denied*, 2018 WL 6985209 (6th Cir. Dec. 18, 2018), *cert. denied*, 139 S.Ct. 1635 (Apr. 29, 2019)	Levy	Tax Court decision affirmed; TPs precluding from challenging underlying liability; no abuse of discretion	Yes	IRS
Muir v. Comm'r, 753 F. App'x 329 (5th Cir. 2019), *aff'g* T.C. Memo. 2017-224	Levy	TP failed to supply required forms and supporting financial information; was not in compliance with current tax obligations; no abuse of discretion in not affording a face-to-face hearing; collection action sustained	Yes	IRS
Namakian v. Comm'r, T.C. Memo. 2018-200	Lien	TP failed to prove reasonable cause for abatement of additions to tax; no abuse of discretion in sustaining collection action	Yes	IRS
Obeirne v. Comm'r, T.C. Memo. 2018-210	Lien	TP precluded from challenging underlying tax liabilities; no abuse of discretion; summary judgment granted	Yes	IRS
Plotkin v. Comm'r, T.C. Memo. 2019-27	Levy	TP failed to supply required forms and supporting financial information; collection action sustained for tax years within collection statute expiration date	Yes	Split
Randall v. Comm'r, T.C. Memo. 2018-123	Levy	Settlement Officer's rejection of doubt as to collectability OIC below the TP's reasonable collection potential was not an abuse of discretion; proposed collection action sustained	Yes	IRS
Ransom v. Comm'r, T.C. Memo. 2018-211, *appeal dismissed*, No. 19-01055 (D.C. Cir. Oct. 21, 2019)	Levy	TP precluded from challenging underlying the tax liabilities; no abuse of discretion in rejecting TP's OIC; TP failed to provide financial information, and was not current with filing and payment obligations; no abuse of discretion in rejecting collection alternatives; summary judgment granted	Yes	IRS
Richardson v. Comm'r, T.C. Memo. 2018-189	Lien	TP proposed no collection alternatives; further proceedings are required to resolve inconsistencies in settlement officer's determinations regarding discharge and abatement from TP's bankruptcy filing; partial summary judgment granted for certain tax years	Yes	Split
Rosenberg v. Comm'r, T.C. Memo. 2019-52	Levy	TP precluded from challenging underlying tax liabilities; summary judgment granted	Yes	IRS
Ruddy v. Comm'r, 727 F. App'x 777 (4th Cir. 2018), *aff'g* T.C. Memo. 2017-39	Levy	Tax Court decision affirmed; summary judgment upheld	Yes	IRS

TABLE 2: Appeals From Collection Due Process (CDP) Hearings Under IRC §§ 6320 and 6330

Case Citation	Lien/Levy	Issue(s)	*Pro Se*	Decision
Sadjadi v. Comm'r, T.C. Memo. 2019-58, *appeal docketed*, No. 19-60663 (5th Cir. Sept. 6, 2019)	Levy	TP defaulted on OIC agreement; no abuse of discretion; collection action sustained	Yes	IRS
Salter v. Comm'r, 2019 U.S. Tax Ct. LEXIS 21 (Feb. 5, 2019), *aff'd* 2019 U.S. App. LEXIS 25549 (T.C. Aug. 26, 2019)	Levy	TP failed to supply required forms and supporting financial information; no abuse of discretion; collection action sustained; summary judgment granted	Yes	IRS
Samaniego v. Comm'r, T.C. Memo. 2019-7	Levy	TP failed to supply required forms and supporting financial information; no abuse of discretion; collection action sustained; summary judgment granted	Yes	IRS
Snipes v. Comm'r, T.C. Memo. 2018-184	Lien	Settlement Officer's rejection of doubt as to collectability OIC below the TP's reasonable collection potential was not an abuse of discretion; summary judgment granted; proposed collection action sustained	No	IRS
Steinhardt v. Comm'r, T.C. Memo. 2018-206, *appeal docketed*, No. 19-01320 (4th Cir. Mar. 28, 2019)	Levy	TP precluded from challenging underlying tax liability; no abuse of discretion in not affording a face-to-face hearing; summary judgment granted	Yes	IRS
Stout v. Comm'r, T.C. Memo. 2018-179	Levy	TP precluded from challenging underlying tax liabilities; TP failed to supply required forms and supporting financial information; no abuse of discretion; summary judgment granted; proposed collection action sustained	Yes	IRS
Terrell v. Comm'r, T.C. Memo. 2018-216	Levy	No abuse of discretion; summary judgment granted; proposed collection action sustained	Yes	IRS
Venable v. Comm'r, T.C. Memo. 2018-144	Lien	TP precluded from challenging underlying tax liabilities; no abuse of discretion; collection action sustained	Yes	IRS
Wesley v. Comm'r, T.C. Memo. 2019-18	Levy	TP precluded from challenging underlying tax liability; no abuse of discretion in not affording a face-to-face hearing; proposed collection action sustained	Yes	IRS
Business Taxpayers (Corporations, Partnerships, Trusts, Sole Proprietorships - Schedules C,E,F)				
Amaefuna v. Comm'r, T.C. Summ. Op. 2018-34	Levy	No abuse of discretion in sustaining proposed collection action	Yes	IRS
ATL & Sons Holdings, Inc. v. Comm'r, 2019 U.S. Tax Ct. LEXIS 8 (Mar. 13, 2019)	Levy	No error or abuse of discretion; summary judgment granted; proposed collection action sustained	Yes	IRS
Bletsas v. Comm'r, T.C. Memo. 2018-128, *appeal docketed*, No. 18-2647 (2d Cir. Aug. 30, 2018)	Lien	IRS initiated collection with respect to TFRPs; TP did not request a collection alternative and did not supply financial information; no abuse of discretion; summary judgment granted; collection action sustained	No	IRS
Campbell v. Comm'r, T.C. Memo. 2019-4	Lien/Levy	Appeals Officer abused discretion by including trust assets as dissipated assets, determining the trust was a nominee of the TP without supporting evidence, and determining the petitioner had control over the Trust's assets; supplemental notice of determination not sustained	No	TP
Coastal Luxury Mgmt. v. Comm'r, T.C. Memo. 2019-43	Levy	No abuse of discretion in rejecting collection alternative where TP failed to submit requested financial obligations or be current with filling obligations; proposed collection action sustained	No	IRS
Cmty. Law Firm, Inc. v. Comm'r, T.C. Memo. 2018-198	Levy	No abuse of discretion in rejecting collection alternative where TP failed to submit requested financial obligations or be current with filling obligations; summary judgment granted; proposed collection action sustained	No	IRS

TABLE 2: Appeals From Collection Due Process (CDP) Hearings Under IRC §§ 6320 and 6330

Case Citation	Lien/Levy	Issue(s)	*Pro Se*	Decision
Colon v. Comm'r, T.C. Memo. 2018-113	Levy	TP precluded from challenging liability for TFRPs; no abuse of discretion; the relief of one set of TFRPs does not preclude the IRS from collecting on another set of TFRPs; proposed collection action sustained	No	IRS
DAF Charters, LLC, v. Comm'r, 2019 U.S. Tax Ct. LEXIS 15 (May 9, 2019)	Levy	Tax Court rejected TP's challenge to his tax liability, finding him subject to employment tax; no abuse of discretion in sustaining collection action; summary judgment granted	No	IRS
Davison v. Comm'r, T.C. Memo. 2019-26, *appeal docketed*, No. 19-60367 (5th Cir. May 30, 2019)	Levy	TP precluded from challenging underlying tax liabilities; no abuse of discretion by sustaining proposed collection action when TP failed to propose collection alternatives	No	IRS
Eichler v. Comm'r, T.C. Memo. 2018-161	Levy	TP precluded from challenging liability for TFRPs; Settlement Officer did not abuse her discretion in denying TP's request for a collection alternative; proposed collection action sustained	No	IRS
Gallagher v. Comm'r, T.C. Memo. 2018-77	Levy	Including equity value of TP's LLC into the reasonable collection potential (RCP) calculation and rejecting TP's OIC was not abuse of discretion; summary judgment granted	Yes	IRS
Gardinier Assoc. v. Comm'r, T.C. Memo. 2019-29	Lien/Levy	TP was not in noncompliance with quarterly employment tax obligations; no abuse of discretion; proposed collection action sustained; summary judgment granted	No	IRS
Gilliam v. United States, 737 F. App'x 660 (4th Cir. 2018), *aff'g* 119 A.F.T.R.2d 1799 (2017)	Lien	TP's request for a CDP hearing tolled the statutory period for collection; government's collection action was timely	No	IRS
Goldsmith v. Comm'r, 753 F. App'x 425 (8th Cir. 2019), *aff'g* No. 21235-16 (T.C. Sept. 29, 2017)	Lien/Levy	Tax Court decision affirmed; collection action sustained	Yes	IRS
Gustashaw v. Comm'r, T.C. Memo. 2018-215	Levy	TP's involvement in a tax shelter made an effective tax administration OIC inappropriate; Settlement Officer's rejection of doubt as to collectability OIC below the TP's reasonable collection potential and to set aside speculative future expenses was not an abuse of discretion	No	IRS
Hampton Software Dev., LLC v. Comm'r, T.C. Memo. 2018-87	Levy	TP challenged underlying tax liability; failed to prove employee was not misclassified as independent contractor; proposed collection action sustained	No	IRS
Hinerfeld v. Comm'r, T.C. Memo. 2019-47	Lien	Settlement Officer's rejection of TP's proposed OIC was not an abuse of discretion; state law supported Settlement Officer's determination that TP(W) held residence as TP(H)'s nominee, despite the fact that the property transfer occurred three years before TFRP liabilities were assessed	No	IRS
Humiston v. Comm'r, T.C. Memo. 2019-9	Lien/Levy	TP failed to submit requested financial information; no abuse of discretion; collection action sustained for TFRP related to excise taxes from tanning business	No	IRS
IBDR, Inc. v. Comm'r, T.C. Memo. 2018-207	Lien/Levy	TP failed to submit requested financial information; no abuse of discretion; summary judgment granted for the IRS and proposed collection action sustained	Yes	IRS
Kane v. Comm'r, T.C. Memo. 2018-122	Lien	TP did not offer a collection alternative or supply financial information; no abuse of discretion; summary judgment granted and proposed collection action sustained	No	IRS

TABLE 2: Appeals From Collection Due Process (CDP) Hearings Under IRC §§ 6320 and 6330

Case Citation	Lien/Levy	Issue(s)	*Pro Se*	Decision
McAvey v. Comm'r, T.C. Memo. 2018-142	Levy	Settlement Officer's rejection of doubt as to collectability OIC below the TP's reasonable collection potential was not an abuse of discretion; summary judgment granted; proposed collection action sustained	No	IRS
McLane v. Comm'r, T.C. Memo. 2018-149	Lien	TP argued that notice of deficiency never received but raised no timely challenges to underlying liability; Tax Court lacked jurisdiction to determine and order a credit or refund any overpayment	Yes	IRS
Melasky v. Comm'r, 151 T.C. 93 (2018), *appeal docketed*, No. 19-60084 (5th Cir. Feb. 4, 2019)	Levy	No abuse of discretion in sustaining proposed collection action; Settlement Officer performed CDP balancing test; summary judgment granted	No	IRS
Ragsdale v. Comm'r, T.C. Memo. 2019-33	Levy	Settlement Officer's rejection of doubt as to collectability OIC below the TP's reasonable collection potential was not an abuse of discretion; collection action sustained	No	IRS
Romano-Murphy v. Comm'r, 2019 U.S. Tax Ct. LEXIS 17 (May 21, 2019)	Lien/Levy	Office of Appeals abused its discretion when it upheld a proposed levy and lien; IRS made an invalid assessment of TFRP before making a determination; collection action not sustained	Yes	TP
Rosendale v. Comm'r, T.C. Memo. 2018-99	Levy	Rejecting TPs' proposed partial pay installment agreement was not abuse of discretion; summary judgment granted; proposed collection action sustained	No	IRS
Shuman v. Comm'r, T.C. Memo. 2018-135, *aff'd* 2019 U.S. App. LEXIS 24345 (4th Cir. Aug. 15, 2019)	Levy	No abuse of discretion; proposed collection action sustained	Yes	IRS
T-Star Eng'g & Tech. Serv., Inc. v. Comm'r, T.C. Memo. 2018-162, *appeal dismissed*, 2019 WL 2525024 (3d Cir. Feb. 12, 2019)	Lien	TP challenged frivolous tax return penalties; proposed collection action sustained	Yes	IRS
Vica Techs., LLC, v. Comm'r, T.C. Summ. Op. 2019-7	Lien	No abuse of discretion; summary judgment granted; proposed collection action sustained	Yes	IRS
Washburn v. Comm'r, T.C. Memo. 2018-110, *appeal dismissed*, No. 18-72899 (9th Cir. June 28, 2019)	Levy	Restitution payments for criminal activity were not a deductible business expense; collection action sustained	No	IRS

TABLE 3: Accuracy-Related Penalty Under IRC § 6662(b)(1) and (2)

Case Citation	Issue(s)	Business	*Pro Se*	Decision
Allen v. United States, 331 F.Supp.3d 852 (E.D. Wis. 2018)	IRC § 6662(b)(2) - TP substantially understated income tax; did not establish reasonable cause and good faith	No	No	IRS
Alt. Health Care Advocates v. Comm'r, 151 T.C. No. 13 (2018)	IRC § 6662(b)(2) - TP substantially understated income tax; no substantial authority or reasonable basis; no reasonable reliance on the advice of a tax professional	Yes	No	IRS
Alterman v. Comm'r, T.C. Memo. 2018-83	IRC § 6662(b)(1), (2) - TPs (MFJ) were negligent; did not establish reasonable cause or good faith	Yes	No	IRS
Archer v. Comm'r, T.C. Memo. 2018-111, *appeal docketed*, Nos. 19-70304, 19-70305 (9th Cir. Feb. 4, 2019)	IRC § 6662(b)(1), (2) - TP was negligent due to failure to keep adequate books and records; TP substantially understated income; did not establish reasonable cause	Yes	Yes	IRS
Ayissi-Etoh v. Comm'r, T.C. Memo. 2018-107	IRC § 6662(b)(1), (2) - TPs (MFJ) were negligent due to failure to keep adequate books and records; substantially understated income tax; did not establish reasonable cause	Yes	Yes	IRS
Ballard v. Comm'r, T.C. Summ. Op. 2018-53	IRC § 6662(b)(2) - TPs (MFJ) substantially understated income tax; did not establish reasonable cause or good faith	No	Yes	IRS
Barbara v. Comm'r, T.C. Memo. 2019-50	IRC § 6662(b)(2) - TPs (MFJ) did not establish reasonable cause	No	No	IRS
Becnel v. Comm'r, T.C. Memo. 2018-120	IRC § 6662(b)(1), (2) - TP was negligent due to failure to keep adequate books and records; not liable for penalty because IRS did not satisfy its burden with respect to the supervisory approval requirement under IRC § 6751(b)(1)	Yes	No	TP
Berry v. Comm'r, T.C. Memo. 2018-143, *appeal docketed*, Nos. 19-70684, 19-70709 (9th Cir. Mar. 25, 2019)	IRC § 6662(b)(1), (2) - TPs (MFJ) were negligent due to failure to keep adequate books and records; did not establish reasonable cause	Yes	Yes	IRS
Brown v. Comm'r, T.C. Memo. 2019-30, *appeal docketed*, No. 19-12653 (11th Cir. July 15, 2019)	IRC § 6662(b)(1) - TPs (MFJ) were negligent	Yes	No	IRS
Burbach v. Comm'r, T.C. Memo. 2019-17	IRC § 6662(b)(1), (2) - TP did not establish reasonable cause and good faith; no reasonable reliance on the advice of a tax professional	Yes	No	IRS
Campbell v. Comm'r, T.C. Summ. Op. 2018-37	IRC § 6662(b)(1) - TPs (MFJ) were negligent due to failure to keep adequate books and records; did not establish reasonable cause; no reasonable reliance on the advice of a tax professional	No	Yes	IRS
Canatella v. Comm'r, 122 A.F.T.R.2d (RIA) 7057 (9th Cir. 2018), *aff'g* No. 13787-12 (T.C. Sept. 24, 2014)	IRC § 6662(b)(1), (2) - TP did not establish reasonable cause and good faith	Yes	Yes	IRS
Chaganti v. Comm'r, 745 F. App'x 259 (8th Cir. 2018), *aff'g* T.C. Memo. 2013-285, *cert. denied*, 139 S.Ct. 2728 (2019)	IRC § 6662(a) - TP was liable for penalty	No	Yes	IRS
Clay v. Comm'r, 152 T.C. No. 13 (2019)	IRC § 6662(b)(1), (2) - TPs (MFJ) were not liable for penalty because IRS because IRS did not satisfy its burden with respect to the supervisory approval requirement under IRC § 6751(b)(1)	No	No	TP
Curtis v. Comm'r, T.C. Summ. Op. 2018-50	IRC § 6662(b)(1), (2) - TPs (MFJ) not liable for penalty because IRS did not satisfy its burden with respect to the supervisory approval requirement under IRC § 6751(b)(1)	No	Yes	TP
Dasent v. Comm'r, T.C. Memo. 2018-202	IRC § 6662(b)(2) - TPs (MFJ) did not establish reasonable cause	Yes	Yes	IRS

TABLE 3: Accuracy-Related Penalty Under IRC § 6662(b)(1) and (2)

Case Citation	Issue(s)	Business	*Pro Se*	Decision
Dieringer v. Comm'r, 917 F.3d 1135 (9th Cir. 2019), *aff'g* 146 T.C. No. 8 (2016)	IRC § 6662(b)(1) - TP was negligent; did not establish reasonable cause and good faith	No	No	IRS
Doyle v. Comm'r, T.C. Memo. 2019-8	IRC § 6662(b)(1), (2) - TPs (MFJ) substantially understated income tax; TPs established reasonable cause through reasonable reliance on advice of a tax professional and acted in good faith; IRS did not satisfy its burden with respect to the supervisory approval requirement under IRC § 6751(b)(1)	No	No	TP
Eldred v. Comm'r, T.C. Summ. Op. 2018-49	IRC § 6662(b)(1), (2) - TPs (MFJ) did not establish reasonable cause and good faith	Yes	Yes	IRS
Endeavor Partners Fund, LLC v. Comm'r, T.C. Memo. 2018-96, *appeal docketed*, Nos. 18-1275, 18-1276, 18-1277, 18-1278 (D.C. Cir. Oct. 3, 2019)	IRC § 6662(a) - TP not liable for penalty because IRS did not satisfy its burden with respect to the supervisory approval requirement under IRC § 6751(b)(1)	Yes	No	TP
Exelon Corp. v. Comm'r, 906 F.3d 513 (7th Cir. 2018), *aff'g* 147 T.C. 230 (2016), *reh'g en banc denied*, 2018 U.S. App. LEXIS 34293 (7th Cir. Dec. 5, 2018)	IRC § 6662(b)(1) - TP was negligent; did not establish reasonable cause and good faith	Yes	No	IRS
Felton v. Comm'r, T.C. Memo. 2018-168	IRC § 6662(b)(2) - TPs (MFJ) substantially understated income tax; did not establish reasonable cause or good faith	No	No	IRS
Fiedziuszko v. Comm'r, T.C. Memo. 2018-75, *appeal docketed*, No. 18-73342 (9th Cir. Dec. 12, 2018)	IRC § 6662(b)(2) - TPs (MFJ) did not establish reasonable cause and good faith	Yes	Yes	IRS
Forde v. Comm'r, 741 F. App'x 943 (4th Cir. 2018), *aff'g* No. 1280-16 (T.C. Feb. 20, 2018)	IRC § 6662(b)(2) - TP substantially understated income tax; did not establish reasonable cause	No	Yes	IRS
Garcia v. Comm'r, T.C. Summ. Op. 2018-38	IRC § 6662(b)(2) - TPs (MFJ) substantialled understated income tax; did not establish reasonable cause or good faith	Yes	No	IRS
Gianulis v. Comm'r, T.C. Memo. 2018-187	IRC § 6662(b)(2) - TP substantially understated income tax; did not establish reasonable cause and good faith	Yes	Yes	IRS
Gibbs v. Comm'r, 2018 U.S. Tax Ct. LEXIS 58 (June 6, 2018), *aff'd*, 757 F. App'x 274 (4th Cir. 2019)	IRC § 6662(b)(2) - TPs (MFJ) substantially understated income tax; did not establish reasonable cause	No	Yes	IRS
Gibbs v. Comm'r, 757 F. App'x 274 (4th Cir. 2019), *aff'g* 2018 U.S. Tax Ct. LEXIS 58 (June 6, 2018)	IRC § 6662(b)(2) - TPs (MFJ) substantially understated income tax; did not establish reasonable cause	No	Yes	IRS
Giunta v. Comm'r, T.C. Memo. 2018-180	IRC § 6662(b)(2) - TPs (MFJ) substantially understated income tax; did not establish reasonable cause; no reasonable reliance on the advice of a tax professional	Yes	Yes	IRS
Golan v. Comm'r, T.C. Memo. 2018-76	IRC § 6662(b)(2) - TPs (MFJ) established reasonable cause and good faith; reasonable reliance on the advice of a tax professional	No	No	TP
Green Gas Del. Statutory Trust v. Comm'r, 903 F.3d 138 (D.C. Cir. 2018), *aff'g* 147 T.C. No 1 (2016)	IRC § 6662(b)(1) - TP was negligent; did not establish reasonable cause and good faith	Yes	No	IRS

TABLE 3: Accuracy-Related Penalty Under IRC § 6662(b)(1) and (2)

Case Citation	Issue(s)	Business	*Pro Se*	Decision
Hagos v. Comm'r, T.C. Memo. 2018-166	IRC § 6662(a) - TP was not liable for penalties because the IRS did not satisfy its burden with respect to the supervisory approval requirement under IRC § 6751(b)(1)	Yes	Yes	TP
Hettinga v. United States, 2019 U.S. Dist. LEXIS 113416 (C.D. Cal. May 20, 2019), *appeal docketed*, No. 19-55672 (9th Cir. June 12, 2019)	IRC § 6662(b)(2) - TP substantially understated income tax	Yes	Yes	IRS
Householder v. Comm'r, T.C. Memo. 2018-136	IRC § 6662(b)(1), (2) - TPs (MFJ) substantially understated income tax; did not establish reasonable cause and good faith; no reasonable reliance on the advice of a tax professional; no substantial authority	No	No	IRS
Imperato v. Comm'r, T.C. Memo. 2018-126, *appeal dismissed*, 2019-1 U.S.T.C. (CCH) ¶50,168 (11th Cir. Mar. 7, 2019)	IRC § 6662(b)(1), (2) - TP was negligent; substantially understated income tax; did not establish reasonable cause	Yes	Yes	IRS
Kho v. Comm'r, T.C. Summ. Op. 2018-32	IRC § 6662(b)(1), (2) - TPs (MFJ) established reasonable cause and good faith; established reasonable reliance on the advice of a tax professional	Yes	Yes	TP
Kurdziel v. Comm'r, T.C. Memo. 2019-20	IRC § 6662(b)(1), (2) - TP substantially understated income tax; was negligent; TP not liable for penalties because IRS did not satisfy its burden with respect to the supervisory approval requirement under IRC § 6751(b)(1)	Yes	No	TP
Langston v. Comm'r, T.C. Memo. 2019-19, *appeal docketed*, No. 19-9002 (10th Cir. Aug. 12, 2019)	IRC § 6662(b)(2) - TPs (MFJ) did not establish reasonable cause or good faith; no reasonable reliance on advice of a tax professional	Yes	No	IRS
Lawson v. Comm'r, T.C. Summ. Op. 2018-44	IRC § 6662(b)(1), (2) - TPs (MFJ) were negligent due to failure to keep adequate books and records; substantially understated income; did not establish reasonable cause or good faith; no reasonable reliance on advice of a tax professional	Yes	Yes	IRS
Leuenberger v. Comm'r, T.C. Summ. Op. 2018-52	IRC § 6662(b)(2) - TP substantially understated income tax; not liable for penalty because IRS did not satisfy its burden with respect to the supervisory approval requirement under IRC § 6751(b)(1)	No	Yes	TP
Losantiville Country Club v. Comm'r, 906 F.3d 468 (6th Cir. 2018), *aff'g* T.C. Memo. 2017-158	IRC § 6662(b)(1) - TP did not establish reasonable cause; no reasonable reliance on the advice of a tax professional; failed to show substantial authority for the TP's position	Yes	No	IRS
MacDonald v. Comm'r, T.C. Memo. 2018-138	IRC § 6662(b)(2) - TP substantially understated income tax; did not establish reasonable cause and good faith	No	Yes	IRS
Maki v. Comm'r, T.C. Summ. Op. 2018-30	IRC § 6662(a) - TP not liable for penalty because IRS did not satisfy its burden with respect to the supervisory approval requirement under IRC § 6751(b)(1)	Yes	Yes	TP
Mancini v. Comm'r, T.C. Memo. 2019-16, *appeal docketed*, 19-72438 (9th Cir. Sept. 25, 2019)	IRC § 6662(b)(1), (2) - TP substantially understated income tax; was negligent; TP not liable for penalties because IRS did not satisfy its burden with respect to the supervisory approval requirement under IRC § 6751(b)(1)	No	No	TP
Martin v. Comm'r, T.C. Memo. 2018-109	IRC § 6662(b)(1), (2) - TPs (MFJ) not liable for penalty because IRS did not satisfy its burden with respect to the supervisory approval requirement under IRC § 6751(b)(1)	No	Yes	TP

TABLE 3: Accuracy-Related Penalty Under IRC § 6662(b)(1) and (2)

Case Citation	Issue(s)	Business	*Pro Se*	Decision
Najafpir v. Comm'r, T.C. Memo. 2018-103	IRC § 6662(b)(1), (2) - TP not liable for penalty because IRS did not satisfy its burden with respect to the supervisory approval requirement under IRC § 6751(b)(1)	Yes	Yes	TP
Nix v. Comm'r, 123 A.F.T.R.2d (RIA) 1519 (E.D. Tex. 2018)	IRC § 6662(b)(2) - TPs established reasonable cause and good faith; reasonable reliance on the advice of a tax professional	Yes	No	IRS
Nix v. Comm'r, T.C. Memo. 2018-116	IRC § 6662(b) (1), (2) - TP was negligent due to failure to keep adequate books and records; did not establish reasonable cause and good faith	No	No	IRS
Oliveri v. Comm'r, T.C. Memo. 2019-57	IRC § 6662(b)(2) - TP not liable for penalty because IRS did not satisfy its burden with respect to the supervisory approval requirement under IRC § 6751(b)(1)	Yes	No	TP
Palmolive Bldg. Inv'rs, LLC v. Comm'r, 152 T.C. No. 4 (2019)	IRC § 6662(b)(1), (2) - IRS satisfied its burden with respect to the supervisory approval requirement under IRC § 6751(b)(1)	Yes	No	IRS
Patients Mut. Assistance Collective Corp. v. Comm'r, T.C. Memo. 2018-208	IRC § 6662(b)(2) - TP substantially understated income tax; TP established reasonable cause and good faith	Yes	No	TP
Potter v. Comm'r, T.C. Memo. 2018-153	IRC § 6662(b)(1), (2) - TP established reasonable cause and good faith; reasonable reliance on the advice of a tax professional	Yes	No	TP
Presley v. Comm'r, T.C. Memo. 2018-171, *appeal docketed*, No. 18-9008 (10th Cir. Dec. 17, 2018)	IRC § 6662(b)(2) - TPs (MFJ) substantially understated income tax; did not establish reasonable cause and good faith; no reasonable reliance on the advice of a tax professional	Yes	No	IRS
Raifman v. Comm'r, T.C. Memo. 2018-101	IRC § 6662(b)(1), (2) - TPs (MFJ) did not establish reasonable cause; no reasonable reliance on the advice of a tax professional	No	No	IRS
Ramirez, Estate of, v. Comm'r, T.C. Memo. 2018-196	IRC § 6662(b)(2) - TP substantially understated income tax; did not establish reasonable cause and good faith; no reasonable reliance on the advice of a tax professional; TP not liable for penalty because IRS did not satisfy its burden with respect to the supervisory approval requirement under IRC § 6751(b)(1)	Yes	No	TP
Ray v. Comm'r, T.C. Memo. 2018-160	IRC § 6662(b)(1), (2) - TPs (MFJ) were negligent due to failure to keep adequate records; did not establish reasonable cause and good faith	Yes	No	IRS
Ray v. Comm'r, T.C. Memo. 2019-36	IRC § 6662(b)(1), (2) - TP was negligent; substantially understated income tax; did not establish reasonable cause or good faith	No	No	IRS
Rodriguez v. Comm'r, T.C. Summ. Op. 2019-4	IRC § 6662(a) - TPs (MFJ) were not liable for penalty because IRS did not satisfy its burden with respect to the supervisory approval requirement under IRC § 6751(b)(1)	Yes	Yes	TP
Rogers v. Comm'r, T.C. Memo. 2019-61	IRC § 6662(b)(1), (2) - TPs (MFJ) were negligent due to failure to keep adequate books and records; did not establish reasonable cause or good faith	Yes	No	IRS
Ronning, Estate of, v. Comm'r, T.C. Memo. 2019-38	IRC § 6662(b)(1), (2) - TP negligent and did not establish reasonable cause with respect to one underpayment; TP not liable for penalty with respect to other underpayment because IRS did not satisfy its burden with respect to the supervisory approval requirement under IRC § 6751(b)(1)	Yes	No	Split
Schaekar v. Comm'r, T.C. Summ. Op. 2018-35	IRC § 6662(b)(1), (2) - TP was negligent; failed to properly substantiate deductions and losses claimed	No	Yes	IRS

TABLE 3: Accuracy-Related Penalty Under IRC § 6662(b)(1) and (2)

Case Citation	Issue(s)	Business	*Pro Se*	Decision
Shaw, United States v., 122 A.F.T.R.2d (RIA) 6151 (D. Nev. 2018)	IRC § 6662(b)(2) - TP substantially understated income tax	No	No	IRS
Shuman v. Comm'r, T.C. Memo. 2018-135, *aff'd*, 774 F. App'x 813 (4th Cir. Aug. 15, 2019)	IRC § 6662(b)(2) - TP not liable for penalty because IRS did not satisfy its burden with respect to the supervisory approval requirement under IRC § 6751(b)(1)	Yes	Yes	TP
Siemer Milling Co. v. Comm'r, T.C. Memo. 2019-37	IRC § 6662(b)(1), (2) - TPs established reasonable cause and good faith; reasonable reliance on the advice of a tax professional	Yes	No	TP
Singh v. Comm'r, T.C. Memo. 2018-132, *appeal docketed*, No. 18-72695 (9th Cir. Oct. 3, 2018)	IRC § 6662(b)(1) - TPs (MFJ) not liable for penalty because IRS did not satisfy its burden with respect to the supervisory approval requirement under IRC § 6751(b)(1)	Yes	Yes	TP
Singh v. Comm'r, T.C. Memo. 2018-79, *appeal docketed*, No. 18-72160 (9th Cir. Aug. 1, 2018)	IRC § 6662(b)(1), (2) - TPs (MFJ) did not establish reasonable cause	Yes	Yes	IRS
Smith v. Comm'r, T.C. Memo. 2018-127, *appeal docketed*, Nos. 19-1050, 19-1051, 19-1052 (D.C. Cir. Feb. 25, 2019)	IRC § 6662(b)(1), (2) - TPs (MFJ) were negligent; did not establish reasonable cause and good faith; no reasonable reliance on the advice of a tax professional	Yes	No	IRS
Sugarloaf Fund, LLC v. Comm'r, 911 F.3d 854 (7th Cir. 2018), *aff'g* 143 T.C. No. 18 (2014)	IRC § 6662(b)(1), (2) - TP was negligent; did not establish reasonable cause and good faith	Yes	No	IRS
Sugarloaf Fund, LLC v. Comm'r, T.C. Memo. 2018-181, *appeal docketed*, No. 19-2468 (7th Cir. Aug. 2, 2019)	IRC § 6662(a) - TP was not liable for part of the penalties because the IRS did not satisfy its burden with respect to the supervisory approval requirement under IRC § 6751(b)(1); TP was liable for part of penalties where IRS satisfied its burden with respect to the supervisory approval requirement under IRC § 6751(b)(1)	Yes	No	Split
Syzygy Ins. Co. Inc. v. Comm'r, T.C. Memo. 2019-34	IRC § 6662(b)(1), (2) - TPs established reasonable cause and good faith; reasonable reliance on the advice of a tax professional	Yes	No	TP
Triggs v. Comm'r, T.C. Summ. Op. 2018-58	IRC § 6662(b)(1), (2) - TP established reasonable cause and good faith; established reasonable reliance on the advice of a tax professional	No	Yes	TP
Wainwright v. Comm'r, 744 F. App'x 1 (D.C. Cir. 2018), *aff'g* T.C. Memo. 2017-70	IRC § 6662(b)(1) - TP was negligent; did not keep adequate books and records	No	Yes	IRS
Walquist v. Comm'r, 152 T.C. No. 3 (2019)	IRC § 6662(b)(2) - TPs (MFJ) substantially understated income tax	No	Yes	IRS
Weaver v. Comm'r, T.C. Summ. Op. 2018-40	IRC § 6662(b)(2) - TPs (MFJ) substantially understated income tax; did not establish reasonable cause or good faith	Yes	Yes	IRS
Whiteford v. Comm'r, T.C. Summ. Op. 2018-39	IRC § 6662(b)(2) - TPs (MFJ) substantially understated income tax	Yes	Yes	IRS
Yapp v. Comm'r, T.C. Memo. 2018-147, *appeal docketed*, No. 19-70431 (9th Cir. Feb. 21, 2019)	IRC § 6662(b)(2) - TPs (MFJ) substantially understated income tax; did not establish reasonable cause and good faith; no reasonable reliance on the advice of a tax professional	Yes	No	IRS
Yaryan v. Comm'r, T.C. Memo. 2018-129	IRC § 6662(b)(2) - TPs (MFJ) substantially understated income tax; did not establish reasonable cause or good faith	No	No	IRS
Zhu v. Comm'r, T.C. Summ. Op. 2019-6	IRC § 6662(b)(2) - TPs (MFJ) established reasonable cause and good faith	Yes	Yes	TP

TABLE 4: Gross Income Under IRC § 61 And Related Sections

Case Citation	Issue(s)	*Pro Se*	Decision
Individual Taxpayers (But Not Sole Proprietorships)			
Arseo v. Comm'r, T.C. Summ. Op. 2019-8	Unreported interest income and gambling income	Yes	IRS
Barnes v. United States, 353 F.Supp. 3d 582 (N.D. Tex. 2019)	Qui tam award includable in gross income and taxable as ordinary income	No	IRS
Bui v. Comm'r, T.C. Memo. 2019-54	Unreported cancellation of debt income partially excludable under IRC § 108(a)(1)(E) qualified principal residence indebtedness and IRC § 108(a)(1)(B) insolvency exception	No	Split
Canzoni v. Comm'r, T.C. Memo. 2018-130	Unreported wage income and gambling income	Yes	IRS
Castaneda v. Comm'r, T.C. Memo. 2018-173, *appeal docketed*, No. 19-71793 (9th Cir. July 17, 2019)	Unreported embezzlement income, unemployment compensation, pension and annuity income, and gambling income	Yes	IRS
Clay v. Comm'r, T.C. Memo. 2018-145	Unreported long-term disability payments and Social Security disability payments	Yes	IRS
Clay v. Comm'r, 152 T.C. No. 13 (2019)	Unreported tribal gaming distributions	No	IRS
Connell v. Comm'r, T.C. Memo. 2018-213, *appeal docketed*, No. 19-2668 (3d Cir. July 23, 2019)	Unreported cancellation of debt income	No	IRS
Doyle v. Comm'r, T.C. Memo. 2019-8	Settlement proceeds not excludable from income under IRC § 104(a)(2)	No	IRS
Felton v. Comm'r, T.C. Memo. 2018-168	Gifts to taxpayer (H) constituted taxable income to taxpayers (MFJ)	No	IRS
French v. Comm'r, T.C. Summ. Op. 2018-36	Settlement proceeds not excludable from income under IRC § 104(a)(2), disputed debt doctrine, or as a refund or reimbursement	No	IRS
Hendrickson v. Comm'r, T.C. Memo. 2019-10, *appeal docketed*, No. 19-2139 (6th Cir. Oct. 3, 2019)	Unreported wage and non-wage income, and other income	Yes	IRS
Jackson v. Comm'r, T.C. Summ. Op. 2018-43	Unreported cancellation of debt income	No	IRS
Jim, United States v., 891 F.3d 1242 (11 Cir. 2018), *aff'g* 2016 WL 7539132 (S.D. Fla. 2016), *cert. denied*, 139 S.Ct. 2637 (May 28, 2019)	Unreported tribal gaming distributions	No	IRS
Kaviro v. Comm'r, T.C. Summ. Op. 2018-57	Unreported gambling income, wage income	Yes	IRS
Krantz v. Comm'r, 123 A.F.T.R.2d 1261 (6th Cir. 2019)	Unreported wages	Yes	IRS
Leuenberger v. Comm'r, T.C. Summ. Op. 2018-52	Foreign earned income not excludable	Yes	IRS
Lim v. Comm'r, T.C. Summ. Op. 2018-59	Unreported IRA distribution	Yes	IRS
MacDonald v. Comm'r, T.C. Memo. 2018-138	Unreported IRA distribution and wage income	Yes	IRS
McKelvey, Estate of, v. Comm'r, 906 F.3d 26 (2d Cir. 2018) *rev'g and remanding* 148 T.C. No. 13 (2017) *reh'g and reh'g en banc denied* (Dec. 10, 2018), *cert. denied*, 139 S.Ct.. 2715 (June 17, 2019)	Unreported long and short-term capital gains	No	Split
Morten v. Comm'r, 739 F. App'x 3 (D.C. Cir. 2018)	Unreported income	Yes	IRS
Moya v. Comm'r, 152 T.C. No. 11 (2019)	Unreported Social Security income	Yes	IRS
Nelson v. Comm'r, T.C. Memo. 2018-95, *appeal dismissed*, No. 18-2834 (2d Cir. Feb. 22, 2019)	Unreported wage income and unemployment compensation	Yes	IRS
O'Kagu v. Comm'r, 151 T.C. No. 6 (2018)	Income not excludable under foreign earned income exclusion	Yes	IRS
Orth v. Comm'r, 727 F. App'x 223 (7th Cir. 2018) *aff'g* No. 18049-16 (T.C. Oct. 12, 2017), *cert. denied*, 139 S.Ct. 435 (Oct. 29, 2018)	Unreported income	Yes	IRS

TABLE 4: Gross Income Under IRC § 61 And Related Sections

Case Citation	Issue(s)	*Pro Se*	Decision
Palsgaard v. Comm'r, T.C. Memo. 2018-82	Unreported Social Security income	No	IRS
Park v. Comm'r, T.C. Summ. Op. 2018-46	Reimbursement for erroneous mortgage payments excludable from income; accrued interest taxable	No	Split
Perry v. Comm'r, T.C. Memo. 2018-90, *appeal dismissed*, No. 18-72114 (9th Cir. Nov. 8, 2018)	Unreported retirement account distribution	Yes	IRS
Ramsay v. Comm'r, 732 F. App'x 307 (5th Cir. 2018) *aff'g* T.C. Memo. 2017-223, *cert. denied*, 139 S.Ct. 1460 (Apr. 1, 2019)	Unreported imputed income	Yes	IRS
Rodriguez v. Comm'r, T.C. Summ. Op. 2019-4	Unreported cancellation of debt income	Yes	IRS
Smethers v. Comm'r, T.C. Memo. 2018-140	Unreported cancellation of debt income	Yes	IRS
Toso v. Comm'r, 151 T.C. No. 4 (2018)	Unreported current-year passive foreign investment company income includable for one year but not other years	No	Split
Walquist v. Comm'r, 152 T.C. No. 3 (2019)	Unreported unemployment compensation	Yes	IRS
Weiler v. Comm'r, 123 A.F.T.R.2d 2060 (N.D. Ohio 2019), *adopting* 123 A.F.T.R.2d 2057, *appeal docketed*, No. 19-3729 (6th Cir. Aug. 1, 2019)	Unreported wage income	Yes	IRS
Wells v. Comm'r, T.C. Memo. 2018-188	Unreported wage income	Yes	IRS
Wentworth v. Comm'r, T.C. Memo. 2018-194	Taxpayer qualified for foreign earned income exclusion	No	TP
Williams v. Comm'r, 151 T.C. No. 1 (2018)	Unreported wage income, unemployment compensation, and retirement distribution	Yes	IRS
Zinger v. Comm'r, T.C. Summ. Op. 2018-33	Settlement proceeds not excludable from income under IRC § 104(a)(2)	Yes	IRS
Business Taxpayers (Corporations, Partnerships, Trusts, and Sole Proprietorships – Schedules C, E, F)			
Allen v. United States, 331 F.Supp. 3d 852 (E.D. Wis. 2018)	Unreported interest income; settlement proceeds taxable as ordinary income	No	IRS
Amelsberg v. Comm'r, T.C. Memo. 2018-94	Unreported stock sale proceeds and gross receipts	Yes	IRS
Anderson, Estate of, v. Comm'r, T.C. Memo. 2019-2	Unreported capital gain; TP had some basis in the property sold	No	Split
Aiyissi-Etoh v. Comm'r, T.C. Memo. 2018-107	Unreported state income tax refund	Yes	IRS
Benenson v. Comm'r, 910 F.3d 690 (2d Cir. 2018) *rev'g and remanding* T.C. Memo. 2015-119	Unreported constructive dividends	No	TP
Berry v. Comm'r, T.C. Memo. 2018-143, *appeal docketed*, No. 19-70709 (9th Cir. Mar. 25, 2019)	Unreported gross receipts	Yes	IRS
Bolles v. Comm'r, T.C. Memo. 2019-42	Unreported gross receipts and guaranteed payments	No	Split
BrokerTec Holdings, Inc. v. Comm'r, T.C. Memo. 2019-32, *appeal docketed*, No. 19-2603 (3d Cir. July 11, 2019)	Cash grants by the state were nontaxable contributions to capital	No	TP
Burbach v. Comm'r, T.C. Memo. 2019-17	Director fees paid to TP were actually wages	No	IRS
De Los Santos v. Comm'r, T.C. Memo. 2018-155	Unreported split-dollar life insurance income	No	IRS
Dorval v. Comm'r, T.C. Memo. 2018-167	Unreported business income	Yes	IRS
Duncan v. Comm'r, T.C. Memo. 2018-190, *appeal docketed*, No. 19-72249 (9th Cir. Sept. 3, 2019)	Unreported business income	Yes	IRS
Eaton Corp. v. Comm'r, 152 T.C. No. 2 (2019)	Controlled foreign corporation must include distributive share of domestic partnership's gross income in taxable income	No	IRS

TABLE 4: Gross Income Under IRC § 61 And Related Sections

Case Citation	Issue(s)	*Pro Se*	Decision
Ginsburg v. United States, 922 F.3d 1320 (Fed. Cir. 2019)	State tax credit for building rehabilitation not excludable from income	No	IRS
Hernandez v. Comm'r, T.C. Memo. 2018-163, *appeal docketed*, No. 19-60086 (5th Cir. Feb. 5, 2019)	Unreported cancellation of debt income	Yes	IRS
Ill. Tool Works, Inc. v. Comm'r, T.C. Memo. 2018-121	Loan was bona fide debt	No	TP
Imperato v. Comm'r, T.C. Memo. 2018-126, *appeal dismissed*, No. 18-14703 (11th Cir. Mar. 7, 2019)	Unreported gross receipts	Yes	IRS
Machacek v. Comm'r, 906 F.3d 429 (6th Cir. 2018), *rev'g and remanding* T.C. Memo. 2016-55	Unreported split-dollar life insurance income	No	TP
Mowry v. Comm'r, T.C. Memo. 2018-105	Unreported S corporation income	No	IRS
Najafpir v. Comm'r, T.C. Memo. 2018-103	Unreported gross receipts	Yes	IRS
Pac. Mgmt. Grp. v. Comm'r, T.C. Memo. 2018-131	Disallowed deductions for factoring fee and management fee expenditures constituted constructive dividends	No	IRS
Ray v. Comm'r, T.C. Memo. 2018-160	Unreported wage income, gross receipts, and other compensation	No	Split
Reserve Mech. Corp. v. Comm'r, T.C. Memo. 2018-86, *appeal docketed*, No. 18-9011 (10th Cir. Dec. 27, 2018)	Fixed or determinable annual or periodical income	No	IRS
Ronning, Estate of, v. Comm'r, T.C. Memo. 2019-38	Unreported income	No	IRS
SIH Partners LLLO, Explorer Partner Corp., Tax Matters Partner v. Comm'r, 923 F.3d 296 (3rd Cir. 2019), *aff'g* 150 T.C. No. 3 (2018) *reh'g and reh'g en banc denied* 930 F.3d 586 (3rd Cir. July 3, 2019)	Unreported ordinary income deriving from loan guaranteed by controlled foreign corporation	No	IRS
Singh v. Comm'r, T.C. Memo. 2018-132, *appeal docketed*, No. 18-72695 (9th Cir. Oct. 3, 2018)	TPs (MFJ) not entitled to cost of goods sold (COGS) subtraction from gross business income due to failure to substantiate	Yes	IRS
Smith v. Comm'r, T.C. Memo. 2018-127, *appeal docketed*, No. 19-1051 (D.C. Cir. Feb. 25, 2019)	Unreported settlement proceeds, rental income, gross receipts	No	IRS
Smith v. Comm'r, T.C. Memo. 2018-170	Unreported S Corporation income and other compensation	No	IRS
Smith v. Comm'r, 151 T.C. 41 (2018)	Unreported ordinary dividend and constructive dividend	No	IRS
Sugarloaf Fund, LLC. v. Comm'r, T.C. Memo. 2018-181, *appeal docketed*, No. 19-2468 (7th Cir. Aug. 2, 2019)	Unreported income for some tax years and underreported income due to partial disallowance of deductions	No	IRS
Syzygy Ins. Co., Inc. v. Comm'r, T.C. Memo. 2019-34	Premiums received by TP should be included in gross income	No	IRS
Totten v. Comm'r, T.C. Summ. Op. 2019-1	Unreported IRA distribution and gross receipts	Yes	IRS
White v. Comm'r, T.C. Memo. 2018-102	Unreported gross receipts	No	IRS
Whiteford v. Comm'r, T.C. Summ. Op. 2018-39	Unreported income	Yes	IRS

TABLE 5: Summons Enforcement Under IRC §§ 7602, 7604, and 7609

Case Citation	Issue(s)	*Pro Se*	Decision
Individual Taxpayers (But Not Sole Proprietorships)			
Barfield v. United States, 122 A.F.T.R.2d (RIA) 5395 (S.D. Tex. 2018)	TP petition to quash third-party summons denied and dismissed; summons enforced	Yes	IRS
Belcik v. United States, 123 A.F.T.R.2d (RIA) 5702 (N.D. Ala. 2018)	TP motion to quash third-party summons dismissed and denied	Yes	IRS
Boyd, United States v., 123 A.F.T.R.2d (RIA) 302 (W.D. Ky. 2018), *adopting* 123 A.F.T.R.2d (RIA) 309 (W.D. Ky. 2018)	Summons enforced	Yes	IRS
Brammer, United States v., 122 A.F.T.R.2d (RIA) 6258 (S.D. Cal. 2018)	Summons enforced	Yes	IRS
Brayshaw, United States v., 727 F. App'x 407 (9th Cir. 2018)	Appeal dismissed for lack of jurisdiction	Yes	IRS
Castanheiro, United States v., 122 A.F.T.R.2d (RIA) 6956 (M.D. Fla. 2018), *adopting* 122 A.F.T.R.2d (RIA) 6955 (M.D. Fla. 2018)	Summons enforced	Yes	IRS
Daniels, United States v., 122 A.F.T.R.2d (RIA) 6309 (N.D. Tex. 2018), *adopting* 122 A.F.T.R.2d (RIA) 6307 (N.D. Tex. 2018)	Summons enforced	Yes	IRS
Durham, United States v., 122 A.F.T.R.2d (RIA) 5100 (E.D. Mo. 2018)	TP's right to assert Fifth Amendment right against incrimination upheld with respect to part of the summons; summons enforced in part	No	Split
Edwards, United States v., 122 A.F.T.R.2d (RIA) 7035 (W.D. Tenn. 2018)	TP held in contempt; warrants for arrest issued	No	IRS
Edwards, United States v., 122 A.F.T.R.2d (RIA) 5734 (C.D. Cal. 2018)	Summons enforced	No	IRS
Fleishman, United States v., 2018 WL 6303687 (M.D. Fla. Dec. 3, 2018), *adopting* 2018 WL 6620589 (M.D. Fla. Nov. 13, 2018)	Summons enforced	Yes	IRS
Floyd v. United States, 2019 WL 645046 (N.D. Okla. Feb. 15, 2019), *appeal dismissed*, No. 19-5018 (10th Cir. June 7, 2019), *adopting* 2019 WL 1281399 (N.D. Okla. Jan. 3, 2019)	TP petition to quash third-party summons denied; Gov't motion to dismiss motion to quash summons moot	Yes	IRS
Floyd v. United States, 2018 WL 7199738 (E.D. Mo. Dec. 12, 2018), *appeal dismissed*, 2019 WL 3731373 (8th Cir. Apr. 2, 2019)	TP petition to quash third-party summons denied; lack of subject matter jurisdiction	Yes	IRS
Floyd v. United States, 122 A.F.T.R.2d (RIA) 6894 (W.D. Tex. 2018), *appeal dismissed*, 2019 WL 3574245 (5th Cir. Apr. 9, 2019)	TP petition to quash third-party summons denied; lack of subject matter jurisdiction	Yes	IRS
Floyd v. United States, 123 A.F.T.R.2d (RIA) 1642 (D. Del. 2019), *appeal dismissed*, No. 19-02627 (3d Cir. Aug. 15, 2019)	TP petition to quash summons denied; lack of subject matter jurisdiction	Yes	IRS
Floyd v. United States, 2019 WL 386385 (W.D. Mo. 2019), *appeal dismissed*, No. 19-01253 (8th Cir. Mar. 28, 2019)	TP petition to quash third-party summons denied; lack of subject matter jurisdiction	Yes	IRS
Fridman, United States v., 337 F.Supp.3d 259 (S.D. N.Y. 2018), *appeal docketed*, No. 18-03530 (2d Cir. Nov. 26, 2018)	Summons enforced; foregone conclusion and collective entity doctrines apply causing TP's invocation of Fifth Amendment to fail	No	IRS
Gonzalez, United States v., 122 A.F.T.R.2d (RIA) 5352 (M.D. Fla. 2018), *adopting* 122 A.F.T.R.2d (RIA) 5350 (M.D. Fla. 2018)	TP held in contempt; warrants for arrest issued	Yes	IRS
Heist, United States v., 123 A.F.T.R.2d (RIA) 667 (W.D. Wis. 2019), *appeal dismissed*, 2019 WL 4464233 (7th Cir. May 2, 2019)	Summons enforced; TP counterclaims dismissed for lack of subject matter jurisdiction	Yes	IRS

TABLE 5: Summons Enforcement Under IRC §§ 7602, 7604, and 7609

Case Citation	Issue(s)	*Pro Se*	Decision
Heist, United States v., 123 A.F.T.R.2d (RIA) 473 (W.D. Wis. 2019), *appeal dismissed*, 2019 WL 4464233 (7th Cir. May 2, 2019)	Summons enforced	Yes	IRS
Heist, United States v., 123 A.F.T.R.2d (RIA) 1493 (W.D. Wis. 2019), *appeal dismissed*, 2019 WL 4464233 (7th Cir. May 2, 2019)	TP in contempt, must produce additional documentation by certain date	Yes	IRS
Higgins, United States v., 122 A.F.T.R.2d (RIA) 5705 (D. Ariz. 2018)	TP motion to dismiss denied; TP held in contempt; Attorney fees awarded	Yes	IRS
In the Matter of the Tax and Liabilities of John Does, 122 A.F.T.R.2d (RIA) 6306 (W.D. Tex. 2018)	John Doe summons issuance granted	N/A	IRS
JB v. United States, 916 F.3d 1161 (9th Cir. 2019), *aff'g* 117 A.F.T.R.2d (RIA) 694 (N.D. Cal. 2016)	TPs' petition to quash third-party summons granted	No	TP
Marchetti, United States v., 2019 WL 1092715 (M.D. Fla. Jan. 16, 2019), *adopting* 2018 WL 7568870 (M.D. Fla. Dec. 27, 2018)	Summons enforced	Yes	IRS
Pelletier v. United States, 123 A.F.T.R.2d (RIA) 1102 (S.D. Cal. 2019)	TP's petition to quash third-party summons dismissed for lack of jurisdiction	Yes	IRS
Pequeno, United States v., 123 A.F.T.R.2d (RIA) 552 (M.D. Fla. 2019), *adopting* 123 A.F.T.R.2d (RIA) 551 (M.D. Fla. 2019)	Summons enforced	Yes	IRS
Presley and Presley, PA v. United States, 761 F. App'x 879 (11th Cir. 2019), *aff'g* 121 A.F.T.R.2d (RIA) 1526 (S.D. Fla. 2018)	TP petition to quash third-party summons dismissed	Yes	IRS
Presley v. United States, 770 F. App'x 557 (11th Cir. 2019), *cert. denied*, 2019 WL 4922819 (U.S. Oct. 7, 2019), *aff'g* 123 A.F.T.R.2d (RIA) 1872 (S.D. Fla. 2018)	TP petition to quash third-party summons dismissed	No	IRS
Presley v. United States, 123 A.F.T.R.2d (RIA) 1872 (S.D. Fla. 2018), *aff'd* 770 F. App'x 557 (11th Cir. 2019), *cert. denied*, 2019 WL 4922819 (U.S. Oct. 7, 2019)	TP petition to quash third-party summons dismissed	No	IRS
Presley v. United States, 895 F.3d 1284 (11th Cir. 2018), *cert. denied* 139 S.Ct. 1376 (Mar. 25, 2019), *aff'g* 119 A.F.T.R.2d (RIA) 313 (S.D. Fla. 2017)	TP petition to quash third-party summons dismissed	No	IRS
Pruitt, United States v., 2018 WL 4492970 (D. Kan. June 4, 2018), *adopting* 2018 WL 4492983 (D. Kan. May 2, 2018)	Summons enforced	Yes	IRS
Ramirez, United States v., 122 A.F.T.R.2d (RIA) 5824 (E.D. Cal. 2018), *adopting* 121 A.F.T.R.2d (RIA) 5018 (E.D. Cal. 2018)	Summons enforced	Yes	IRS
Ridling, United States v., 2019 WL 1261410 (M.D.N.C. Mar. 5, 2019), *adopting* 2018 WL 7681359 (M.D.N.C. Dec. 18, 2018)	Summons enforced	Yes	IRS
Sanchez, United States v., 122 A.F.T.R.2d (RIA) 5830 (W.D. Tenn. 2018)	Summons enforced	Yes	IRS
Schmidt, United States v., 122 A.F.T.R.2d (RIA) 2190 (E.D. Cal 2018), *adopting* 122 A.F.T.R.2d (RIA) 1514 (E.D. Cal. 2018)	Summons enforced	Yes	IRS
Scott, United States v., 2019 WL 1242679 (D.N.H. Jan. 17, 2019), *adopting* 2018 WL 7635922 (D.N.H. Dec. 20, 2018)	Summons enforced	Yes	IRS
Speidell v. United States, 123 A.F.T.R.2d (RIA) 1704 (D. Colo. 2019), *appeal docketed*, No. 19-01214 (10th Cir. June 18, 2019)	TP petition to quash third-party summons dismissed for lack of subject matter jurisdiction; summons enforced	No	IRS
Urso, United States v., 122 A.F.T.R.2 (RIA) 5998 (N.D. Tex. 2018), *adopting* 122 A.F.T.R.2d (RIA) 5995 (N.D. Tex. 2018)	Summons enforced	No	IRS
Vargas, United States v., 122 A.F.T.R.2d (RIA) 5773 (D. Md. 2018)	Summons enforced	Yes	IRS
Verges v. United States, 121 A.F.T.R.2d (RIA) 2287 (S.D. Fla. 2018)	TP petition to quash third-party summons dismissed; Summons enforced	No	IRS

TABLE 5: Summons Enforcement Under IRC §§ 7602, 7604, and 7609

Case Citation	Issue(s)	*Pro Se*	Decision
Walck, United States v., 2018 WL 4565986 (M.D.N.C. Aug. 14, 2018), *adopting* 2018 WL 4565996 (M.D.N.C. July 23, 2018)	Summons enforced	Yes	IRS
Waldrop, United States v., 121 A.F.T.R.2d (RIA) 2033 (N.D. Tex. 2018), *adopting* 121 A.F.T.R.2d (RIA) 2031 (N.D. Tex. 2018)	Summons enforced; Gov't awarded court costs	Yes	IRS
Williamson, United States v., 122 A.F.T.R.2d (RIA) 6463 (D. Me. 2018), *adopting* 122 A.F.T.R.2d (RIA) 6461 (D. Me. 2018)	Summons enforced	Yes	IRS
Williamson, United States v., 2018 WL 5778401 (D. Me. Nov. 2, 2018), *adopting* 2018 WL 4807964 (D. Me. Oct. 4, 2018)	Summons enforced	Yes	IRS
Business Taxpayers (Corporations, Partnerships, Trusts, and Sole Proprietorships - Schedules C, E, F)			
Baldwin v. United States, 2018 WL 4372553 (C.D. Cal. Aug. 1, 2018), *adopting*, *in part*, 2018 WL 4372560 (C.D. Cal. June 14, 2018)	TP motion to quash third-party summons granted in part; TP properly invoked attorney-client privilege	No	TP
BMP Family Ltd. P'ship v. United States, 741 F. App'x 764 (11th Cir. 2018), *cert. denied*, 139 S.Ct. 1346 (Mar. 18, 2019), *aff'g* 120 A.F.T.R.2d (RIA) 5442 (S.D. Fla. 2017)	TP's petition to quash third-party summons denied	No	IRS
G2A.COM SP. ZO.O. (LTD) v. United States, 123 A.F.T.R.2d (RIA) 5759 (D. Del. 2018), *denying injunc.*, 123 A.F.T.R.2d (RIA) 973 (D. Del. 2019), *aff'd* No. 18-03401 (3rd Cir. Oct. 15, 2019)	TP petition to quash third-party summons granted in part; denied in part	No	Split
Green Sol., LLC v. United States, 123 A.F.T.R.2d (RIA) 1711 (D. Colo. 2019), *appeal docketed*, No. 19-01214 (10th Cir. June 18, 2019)	TP petition to quash third-party summons dismissed; summons enforced	No	IRS
High Desert Relief, Inc. v. United States, 917 F.3d 1170 (10th Cir. 2019), *denying stay*, 119 A.F.T.R.2d (RIA) 1866 (D.N.M 2017), *aff'g* 119 A.F.T.R.2d (RIA) 1369 (D.N.M. 2017), *denying stay pending appeal*, 119 A.F.T.R.2d (RIA) 1648 (D.N.M. 2017), *aff'g* 119 A.F.T.R.2d (RIA) 1495 (D.N.M. 2017)	TP's petition to quash third-party summons denied; summons enforced	No	IRS
Jerkovich, United States v., 122 A.F.T.R.2d (RIA) 6392 (E.D. Cal. 2018), *adopting* 122 A.F.T.R.2d (RIA) 5312 (E.D. Cal. 2018)	Summons enforced	No	IRS
Larios, United States v., 2019 WL 2406339 (D.N.H. Mar. 14, 2019), *adopting* 2019 WL 2406345 (D.N.H. Feb. 27, 2019)	Summons enforced	Yes	IRS
Medicinal Wellness Ctr., LLC v. United States, 123 A.F.T.R.2d (RIA) 1714 (D. Colo. 2019), *appeal docketed*, No. 19-01217 (10th Cir. June 18, 2019)	TP amended petition to quash third-party summons dismissed; summons enforced	No	IRS
Medicinal Wellness Ctr., LLC v. United States, 123 A.F.T.R.2d (RIA) 1699 (D. Colo. 2019), *appeal docketed*, No. 19-01218 (10th Cir. June 18, 2019)	TP petition to quash third-party summons dismissed; summons enforced	No	IRS
Olseth, United States v., 2019 WL 418848 (D. Minn. Feb. 1, 2019), *adopting* 2019 WL 418884 (D. Minn. Jan. 2, 2019)	Summons enforced	Yes	IRS
Sanmina Corp., United States v., 122 A.F.T.R.2d (RIA) 6232 (N.D. Cal. 2018), *appeal docketed*, No. 18-17036 (9th Cir. Oct. 19, 2018), 707 F. App'x 865 (9th Cir. 2017), *vacating and remanding*, 115 A.F.T.R.2d (RIA) 1882 (N.D. Cal. 2015)	TP waived privileges; summons enforced	Yes	IRS
Standing Akimbo, LLC v. United States, 2018 WL 6791071 (D. Colo. Dec. 10, 2018), *appeal docketed*, No. 19-01049 (10th Cir. Feb. 8, 2019), *adopting* 2018 WL 6791104 (D. Colo. Oct. 6, 2018)	TP petition to quash third-party summons denied; summons enforced	No	IRS
Taylor Lohmeyer Law Firm, PLLC v. United States, 385 F.Supp.3d 548 (W.D. Tex. 2019), *appeal docketed*, No. 19-50506 (5th Cir. June 4, 2019)	TP petitioned to quash John Doe summons; summons enforced	No	IRS
Thielemann, United States v., 123 A.F.T.R.2d (RIA) 665 (S.D. Cal. 2019)	Summons enforced	Yes	IRS
Vistadis, LLC v. United States, 123 A.F.T.R.2d (RIA) 1353 (E.D. Pa. 2019)	TP petition to quash third-party summons denied; summons enforced	No	IRS

TABLE 6: Civil Actions to Enforce Federal Tax Liens or to Subject Property to Payment of Tax Under IRC § 7403

Case Citation	Issue(s)	*Pro Se*	Decision	Individual, Business, or Estate
Allahyari, United States v., 122 A.F.T.R.2d (RIA) 6482 (W.D. Wash. 2018), *granting stay in part by* 123 A.F.T.R.2d 1087 (W.D. Wash. 2019), *appeal docketed*, Nos. 18-35956, 18-36076 (9th Cir. Dec. 26, 2018)	Federal tax liens valid and enforced by sale of subject property; deed of trust encumbering property set aside as a fraudulent transfer	No	IRS	Individual
Arlin Geophysical Co. v. United States, 122 A.F.T.R.2d (RIA) 6064 (D. Utah 2018), *appeal docketed*, No. 18-4166 (10th Cir. Nov. 27, 2018)	Federal tax liens valid and were properly enforced by sale of subject properties; TP retained beneficial interest in subject properties through a constructive trust; entity owning subject property was TP's nominee; bankruptcy discharge did not preclude lien enforcement	No	IRS	Individual
Armstrong, United States v., 122 A.F.T.R.2d (RIA) 5751 (S.D. Tex. 2018)	Federal tax liens valid and may be enforced by sale of subject property	No	IRS	Individual
Austin, United States v., 122 A.F.T.R.2d (RIA) 6757 (D.N.M. 2018), *adopting in part*, 122 A.F.T.R.2d 5417 (D.N.M. 2018)	Federal tax liens valid and enforced against subject property	Yes	IRS	Individual
Balice, United States v., 123 A.F.T.R.2d (RIA) 977 (D.N.J. 2019)	Federal tax liens valid and were properly enforced by sale of subject properties; TP's procedural arguments rejected	Yes	IRS	Individual
Bauer, United States v., 2018 U.S. Dist. LEXIS 174327 (D. Ariz. Oct. 10, 2018)	Federal tax liens valid and enforced by sale of subject property; entity owning subject property was TP's nominee	Yes	IRS	Individual
Bigley, United States v., 746 F. App'x 632 (9th Cir. 2018), *aff'g* 119 A.F.T.R.2d (RIA) 1792 (D. Ariz. 2017)	Affirmed lower court's decision; federal tax liens valid and could be enforced by sale of subject property; third parties owning property were TP's nominees, alter egos, and fraudulent transferees	Yes	IRS	Individual
Birdsong, United States v., 2018 U.S. Dist. LEXIS 205217 (D. Mont. Dec. 4, 2018), *judgment stayed by* 123 A.F.T.R.2d (RIA) 971 (D. Mont. 2019), *appeal docketed*, No. 19-35373 (9th Cir. May 2, 2019)	Federal tax liens valid and may be enforced by sale of subject properties; entity owning subject property was TP's nominee	No	IRS	Individual
Bogart, United States v., 121 A.F.T.R.2d (RIA) 2099 (M.D. Pa. 2018)	Denied TP's motion to reconsider order distributing proceeds of sale of subject property; TP's wife unable to claim an interest in the property because she failed to timely raise her argument, waiting until after the court determined the property was held by the TP's nominee	Yes	IRS	Individual
Bogart, United States v., 123 A.F.T.R.2d (RIA) 1664 (6th Cir. 2019), *aff'g* 119 A.F.T.R.2d (RIA) 2292 (M.D. Tenn. 2017)	Sixth Circuit affirmed district court and denied appeal of denied Rule 60(b) motion; TP's wife waived right to assert interest in the subject property by failing to timely raise the issue on appeal; challenge to order of sale barred by the law-of-the-case doctrine; district court's order of sale was not an abuse of discretion	Yes	IRS	Individual
Brooks, United States v., 122 A.F.T.R.2d (RIA) 6704 (D.S.C. 2018), *adopting in part*, *rejecting in part*, 122 A.F.T.R.2d (RIA) 6700 (D.S.C. 2018)	Federal tax liens valid and may be enforced by sale of subject property	Yes	IRS	Individual

TABLE 6: Civil Actions to Enforce Federal Tax Liens or to Subject Property to Payment of Tax Under IRC § 7403

Case Citation	Issue(s)	*Pro Se*	Decision	Individual, Business, or Estate
Carter, United States v., 122 A.F.T.R.2d (RIA) 5857 (E.D. Va. 2018), *aff'd* 124 A.F.T.R.2d (RIA) 5631 (4th Cir. 2019)	Federal tax liens valid and may be enforced by sale of subject property; entry of default against TP's wife set aside; TP's wife retains 50 percent interest in subject property	Yes	IRS	Individual
Clark, United States v., 123 A.F.T.R.2d (RIA) 1038 (D.S.C. 2019)	Default judgment against TPs (MFJ); federal tax liens valid and may be enforced by sale of subject property	N/A	IRS	Individual
Coleman, United States v., 123 A.F.T.R.2d (RIA) 1466 (E.D.N.Y. 2019), *adopting* 123 A.F.T.R.2d (RIA) 1463 (E.D.N.Y. 2019)	Default judgment against TP (estate); federal tax liens valid and may be enforced by sale of subject property	N/A	IRS	Estate
Edwards, United States v., 121 A.F.T.R.2d (RIA) 1983 (E.D. Cal. 2018), *adopting* 121 A.F.T.R.2d (RIA) 1660 (E.D. Cal. 2018)	Default judgment against TP and third parties; federal tax liens valid and may be enforced by sale of subject properties; entities owning the subject property are TP's fraudulent transferees	N/A	IRS	Individual
Falbo v. Falbo, 2018 U.S. Dist. LEXIS 118943 (S.D.W. Va. July 17, 2018)	Federal tax liens valid and may be enforced against proceeds of partition sale of subject property; costs of sale did not include attorney's fees	No	IRS	Individual
Fitzgerald, United States v., 121 A.F.T.R.2d (RIA) 2216 (D.N.J. 2018)	Default judgment against TP and third parties; federal tax liens valid and may be enforced by sale of subject property	N/A	IRS	Individual
Fournier, United States v., 122 A.F.T.R.2d (RIA) 6229 (D. Minn. 2018)	Federal tax liens valid and may be enforced by sale of subject property	Yes	IRS	Individual
Gandy, United States v., 123 A.F.T.R.2d 1561 (W.D. Tex. 2019)	Federal tax liens valid and may be enforced by sale of subject property; entity owning subject property was TP's nominee	Yes	IRS	Individual
Guy, United States v., 123 A.F.T.R.2d (RIA) 1448 (E.D.N.C. 2019)	Default judgment against TP and third parties; federal tax liens valid and may be enforced by sale of subject properties; entities owning subject properties were TP's alter egos and nominees	N/A	IRS	Business
Haney, United States v., 122 A.F.T.R.2d (RIA) 5015 (N.D. Ohio 2018)	Federal tax liens valid and may be enforced by sale of subject property	Yes	IRS	Individual
Jackson, United States v., 123 A.F.T.R.2d (RIA) 594 (W.D. Mo. 2019)	Federal tax liens valid and may be enforced by sale of subject properties; *Rodgers* factors supported sale of properties in their entirety	No	IRS	Individual
Kubon, United States v., 123 A.F.T.R.2d (RIA) 1772 (N.D. Cal. 2019), *motion to vacate dismissed by* 123 A.F.T.R.2d (RIA) 2037 (N.D. Cal. 2019), *appeal docketed*, No. 19-16059 (9th Cir. May 21, 2019)	Federal tax lien valid and may be enforced by sale of subject property	Yes	IRS	Individual
Kusek, United States v., 123 A.F.T.R.2d 2019 (W.D. Wis. 2019)	Default judgment against TP and third parties; federal tax liens valid and may be enforced by sale of subject property	N/A	IRS	Individual
Kwitny, United States v., 123 A.F.T.R.2d (RIA) 702 (M.D. Fla. 2019), *adopting in part, rejecting in part*, 123 A.F.T.R.2d (RIA) 396 (M.D. Fla. 2018)	Default judgment against TP granted in part; federal tax liens valid, but could not be enforced against subject property until resolving third party's interest	N/A	IRS	Individual

TABLE 6: Civil Actions to Enforce Federal Tax Liens or to Subject Property to Payment of Tax Under IRC § 7403

Case Citation	Issue(s)	*Pro Se*	Decision	Individual, Business, or Estate
Lain, United States v., 123 A.F.T.R.2d (RIA) 1602 (D. Wyo. 2019), *appeal dismissed* by 773 F. App'x 476 (10th Cir. 2019), *aff'd* 2019 WL 4745355 (10th Cir. Sept. 30, 2019)	Federal tax liens valid and may be enforced against subject property; entity owning subject property was TP's nominee	Yes	IRS	Individual
Lapso, United States v., 123 A.F.T.R.2d (RIA) 1635 (N.D. Ohio 2019)	Federal tax liens valid and may be enforced by sale of subject property	No	IRS	Individual
Lin, United States v., 122 A.F.T.R.2d (RIA) 6715 (N.D. Cal. 2018), *adopted by* No. 18-02088 (N.D. Cal. Nov. 19, 2018)	Default judgment against TPs (MFJ) and third party; federal tax liens valid and may be enforced by sale of subject property; third party owned nominal title of the property as TPs' transferee	N/A	IRS	Individual
LN Mgmt. LLC Series 31 v. United States, 729 F. App'x 588 (9th Cir. 2018), *aff'g* 117 A.F.T.R.2d (RIA) 1150 (D. Nev. 2016), *reh'g denied by* 2018 U.S. App. LEXIS 26154 (9th Cir. Sept. 14, 2018)	Affirmed lower court's decision; federal tax liens valid and may be enforced against subject property; reasonable inspection for NFTL entails searching for minor variations in TP's name	No	IRS	Business
Maassen, United States v., 122 A.F.T.R.2d (RIA) 5803 (N.D. Iowa 2018)	Federal tax liens valid and may be enforced by sale of subject property	Yes	IRS	Individual
Maier, United States v., 123 A.F.T.R.2d (RIA) 1248 (N.D. Ill. 2019), *appeal dismissed*, No. 19-01986 (7th Cir. July 31, 2019)	Federal tax liens valid and may be enforced by sale of subject properties; entity owning subject properties was TPs' nominee	Yes	IRS	Individual
Mengedoht, United States v., 123 A.F.T.R.2d (RIA) 408 (D. Neb. 2019)	Federal tax liens valid and may be enforced by sale of subject property	Yes	IRS	Estate
Moore, United States v., 123 A.F.T.R.2d (RIA) 1588 (E.D. Va. 2019)	Federal tax liens valid and may be enforced against interpleaded funds from sale of subject property	No	IRS	Individual
Nelson, United States v., 121 A.F.T.R.2d (RIA) 1888 (D.S.D. 2018), *motion to amend denied by* 122 A.F.T.R.2d (RIA) 5088 (D.S.D. 2018)	Federal tax lien valid and may be enforced by sale of subject property; trust owning subject property was TP's nominee or alter ego; *Rodgers* factors supported sale of subject property	Yes	IRS	Individual
Ness, United States v., 122 A.F.T.R.2d (RIA) 5570 (D. Minn. 2018)	Federal tax liens valid and may be enforced by sale of subject property, not subject to life estate held by third parties	Yes	IRS	Individual
Orr, United States v., 336 F.Supp.3d 732 (W.D. Tex. 2018)	Federal tax liens valid and may be enforced by sale of subject property; property was purchased with comingled funds, creating community property to which the tax liens attached; TP's wife was not TP's nominee, and must be compensated for her interest in the property	No	Split	Individual
Peacock, United States v., 122 A.F.T.R.2d (RIA) 5943 (S.D. Cal. 2018), *motion to vacate denied by* 2018 WL 7019348 (S.D. Cal. Oct. 23, 2018)	Federal tax liens valid and may be enforced by sale of subject property; entity owning the subject property was TP's nominee; state tax liens subordinate to federal because they were not perfected by listing the subject property	Yes	IRS	Individual
Premo Autobody, Inc. v. Parker, 122 A.F.T.R.2d (RIA) 6060 (W.D. Va. 2018)	Federal tax liens valid and may be enforced by sale of subject property	No	IRS	Individual

TABLE 6: Civil Actions to Enforce Federal Tax Liens or to Subject Property to Payment of Tax Under IRC § 7403

Case Citation	Issue(s)	*Pro Se*	Decision	Individual, Business, or Estate
Saccullo v. United States, 913 F.3d 1010 (11th Cir. 2019), *reversing and remanding*, 120 A.F.T.R.2d (RIA) 6943 (M.D. Fla. 2017)	Reversed and remanded lower court's decision; defective deed of property cured by operation of state statute prior to grantor's death and before claim for estate taxes and tax liens could have vested; lien cannot be enforced by sale of subject property	No	TP	Estate
Seeley, United States v., 122 A.F.T.R.2d (RIA) 6618 (D. Mass. 2018)	Federal tax liens valid and may be enforced by sale of subject property; homestead exemption does not prevent lien enforcement by sale	No	IRS	Individual
Shaw, United States v., 122 A.F.T.R.2d (RIA) 6151 (D. Nev. 2018)	Federal tax liens valid and may be enforced by sale of subject property; entity owning subject property was TP's nominee, alter ego, or fraudulent transferee; TP's wife unable to claim interest in subject property and could not oppose sale using *Rodgers* factors	No	IRS	Individual
Sorrell, United States v., 122 A.F.T.R.2d 6800 (W.D. Mo. 2018)	Default judgment against TPs; federal tax liens valid and may be enforced by sale of subject property	N/A	IRS	Individual
State Auto Prop. & Cas. Ins. Co. v. Burnett, 122 A.F.T.R.2d (RIA) 5407 (N.D. Miss. 2018)	Federal tax liens valid; existence of an installment agreement does not preclude lien enforcement; government is entitled to insurance proceeds to which the liens attached	Yes	IRS	Individual
T.J. Enters. & Acoustical, Inc., United States v., 123 A.F.T.R.2d (RIA) 2061 (D. Utah 2019), *appeal docketed*, No. 19-4108 (10th Cir. July 31, 2019)	Federal tax liens valid, but could not be enforced by sale of subject property because TP did not have an interest in the property through a resulting trust; government failed to identify or plead a nominee theory under Utah law	No	Split	Business
Tannenbaum, United States v., 764 F. App'x 115 (2d Cir. 2019), *aff'g* No. 12-05305 (E.D.N.Y. Apr. 16, 2018)	Affirmed lower court's decision to grant Rule 60(b) relief; federal tax liens could not be enforced by sale of the subject property because TP died and no longer had an interest in the subject property at the time motion for summary judgment was granted; district court did not abuse its discretion in declining to issue a retroactive judgment	No	TP	Individual
Taylor, United States v., 122 A.F.T.R.2d (RIA) 5159 (E.D. Pa. 2018), *aff'd* 757 F. App'x 194 (3d Cir. 2018), *cert. denied*, 139 S.Ct. 2704 (U.S. June 10, 2019)	Federal tax liens valid and may be enforced by sale of subject property	Yes	IRS	Individual
Taylor, United States v., 757 F. App'x 194 (3d Cir. 2018), *aff'g* 122 A.F.T.R.2d (RIA) 5159 (E.D. Pa. 2018), *cert. denied*, 139 S.Ct. 2704 (U.S. June 10, 2019)	Affirmed lower court's decision; federal tax liens valid and may be enforced by sale of subject property; lack of CDP hearing did not render collection action invalid because TP didn't show prejudice	Yes	IRS	Individual
Taylor, United States v., 123 A.F.T.R.2d (RIA) 1864 (N.D. Ala. 2019)	Federal tax liens valid and may be enforced by sale of TP's interest in subject properties	Yes	IRS	Individual
Ulasi, United States v., 122 A.F.T.R.2d 6910 (S.D. Tex. 2018), *appeal dismissed*, No. 19-20099 (5th Cir. Mar. 26, 2019)	Federal tax liens valid and may be enforced by sale of subject property	No	IRS	Business

TABLE 6: Civil Actions to Enforce Federal Tax Liens or to Subject Property to Payment of Tax Under IRC § 7403

Case Citation	Issue(s)	*Pro Se*	Decision	Individual, Business, or Estate
Washburn, United States v., 122 A.F.T.R.2d (RIA) 5392 (M.D. Penn. 2018)	Default judgment against TPs; federal tax liens valid and may be enforced by sale of subject property	N/A	IRS	Individual
Wight, United States v., 121 A.F.T.R.2d (RIA) 2033 (W.D. Wash. 2018), *reconsideration denied by* 122 A.F.T.R.2d (RIA) 5325 (W.D. Wash. 2018), *appeal dismissed*, 2018 WL 6536482 (9th Cir. Oct. 9, 2018)	Federal tax liens valid and may be enforced by sale of subject property at termination of TP's life estate; conveyance to third party vacated as fraudulent transfer; government's claim against fraudulent transferee moot	No	IRS	Individual
Z Inv. Props., LLC, United States v., 921 F.3d 696 (7th Cir. 2019), *aff'g* 121 A.F.T.R.2d (RIA) 1317 (N.D. Ill. 2018)	Affirmed lower court's decision; federal tax liens valid and may be enforced by sale of TP's real property; reasonable search would have revealed federal tax liens despite minor misspelling of TP's first name	No	IRS	Individual

TABLE 7: Failure to File Penalty Under IRC § 6651(a)(1), Failure to Pay an Amount Shown as Tax on Return Under IRC § 6651(a)(2), and Failure to Pay Estimated Tax Penalty Under IRC § 6654

Case Citation	Issue(s)	*Pro Se*	Decision
Individual Taxpayers (But Not Sole Proprietorships)			
Amelsberg v. Comm'r, T.C. Memo. 2018-94	IRC § 6651(a)(1) No reasonable cause	Yes	IRS
Canzoni v. Comm'r, T.C. Memo. 2018-130	IRC § 6651(a)(1), (2) No Reasonable cause	Yes	IRS
Castaneda v. Comm'r, T.C. Memo. 2018-173, *appeal docketed*, No. 19-71793 (9th Cir. July 17, 2019)	IRC § 6651(a) No reasonable cause	Yes	IRS
Eldred v. Comm'r, T.C. Summ. Op. 2018-49	IRC § 6651(a)(1) No reasonable cause	Yes	IRS
Gianulis v. Comm'r, T.C. Memo. 2018-187	IRC § 6651(a)(1) No reasonable cause	Yes	IRS
Giller v. Comm'r, 735 F. App'x 460 (9th Cir. 2018), *aff'g* No. 16755-14 (T.C. Jan. 3, 2017)	Ninth Circuit upheld Tax Court's IRC § 6651(a)(1) determination	Yes	IRS
Haynes v. United States, 760 F. App'x 324 (5th Cir. 2019), *vacating and remanding* 119 A.F.T.R.2d 2202 (W.D. Tex. 2017)	Genuine issue of material fact regarding reasonable cause for IRC § 6651(a)(1)	No	TP
Hendrickson v. Comm'r, T.C. Memo. 2019-10	IRC § 6651(a)(2) No reasonable cause	Yes	IRS
Kopstad v. Comm'r, T.C. Memo. 2018-139	IRC § 6651(a)(1), (2) No reasonable cause	Yes	IRS
Morten v. Comm'r, 739 F. App'x 3 (D.C. Cir. 2018), *aff'g* No. 02451-13 (T.C. Aug. 24, 2016)	IRC § 6651(a)(1), (2) No reasonable cause	Yes	IRS
Najafpir v. Comm'r, T.C. Memo. 2018-103	IRC § 6651(a)(1) No reasonable cause	Yes	IRS
Namakian v. Comm'r, T.C. Memo. 2018-200	IRC § 6651(a)(1), (2) No reasonable cause; IRC § 6654(a) No exceptions apply	Yes	IRS
Oliveri v. Comm'r, T.C. Memo. 2019-57	IRC § 6651(a)(1) No reasonable cause	No	IRS
Peng v. United States, 139 Fed. Cl. 630 (Fed. Cl. 2018)	IRC § 6651(a)(1) No reasonable cause	No	IRS
Ray v. Comm'r, T.C. Memo. 2018-160	IRC § 6651(a)(1) No reasonable cause	No	IRS
Rodriguez v. Comm'r, T.C. Summ. Op. 2019-4	IRC § 6651(a)(1) No reasonable cause	Yes	IRS
Sanders, Estate of, v. Comm'r, T.C. Memo. 2018-104	IRC § 6651(a)(1), (2) Reasonable cause was met; IRC § 6654 was imposed	No	TP
Smethers v. Comm'r, T.C. Memo. 2018-140	IRC § 6651(a)(1), (2) No reasonable cause	Yes	IRS
Totten v. Comm'r, T.C. Summ. Op. 2019-1	IRC § 6651(a)(1) No reasonable cause	Yes	IRS
Shaw, United States v., 122 A.F.T.R.2d 6151 (D. Nev. 2018)	IRC § 6651(a)(1) No reasonable cause	No	IRS
Waltner v. Comm'r, 748 F. App'x. 162 (9th Cir. 2019), *aff'g in part* T.C. Memo. 2014-133 (July 3, 2014), *petition for cert. filed*, No. 19-261 (U.S. Aug. 28, 2019)	IRC § 6651(a)(1) No reasonable cause	No	IRS
Wells v. Comm'r, T.C. Memo. 2018-188	IRC § 6651(a)(1), (2) No reasonable cause; IRC § 6654 No exceptions apply	Yes	IRS
Williams v. Comm'r, 151 T.C. 1 (2018)	IRC § 6651(a)(1), (2) No reasonable cause	Yes	IRS
Yaryan v. Comm'r, T.C. Memo. 2018-129	IRC § 6651(a)(1) No reasonable cause	No	IRS
Business Taxpayers (Corporations, Partnerships, Trusts, and Sole Proprietorships – Schedules C, E, F)			
ABL & Assoc. Plumbing, LLC v. United States, 123 A.F.T.R.2d 1894 (E.D.N.C. 2019)	IRC § 6651(a)(1) No reasonable cause	No	IRS
Archer v. Comm'r, T.C. Memo. 2018-111, *appeal docketed*, No. 19-70304 (9th Cir. Feb. 4, 2019)	IRC § 6651(a)(1) No reasonable cause	Yes	IRS
Burbach v. Comm'r, T.C. Memo. 2019-17	IRC § 6651(a)(1) No reasonable cause	No	IRS

TABLE 7: Failure to File Penalty Under IRC § 6651(a)(1), Failure to Pay an Amount Shown as Tax on Return Under IRC § 6651(a)(2), and Failure to Pay Estimated Tax Penalty Under IRC § 6654

Case Citation	Issue(s)	*Pro Se*	Decision
De Sylva v. Comm'r, T.C. Memo. 2018-165	IRC § 6651(a)(1), (2) No reasonable cause; IRC § 6654 No exceptions apply	Yes	IRS
Deaton Oil Co. LLC v. United States, 904 F.3d 634 (8th Cir. 2018), *aff'g* 119 A.F.T.R.2d (RIA) 1945 (W.D. Ark. 2017)	Taxpayer appealed the district court's dismissal with prejudice of its suit seeking refund, abatement, and recovery of delinquent tax penalties assessed against it under IRC § 6651(a)(1) & (2); District court decision affirmed	No	IRS
Hampton Software Dev., LLC, v. Comm'r, T.C. Memo. 2018-87	IRC § 6651(a)(1), (2) No reasonable cause	No	IRS
Imperato v. Comm'r, T.C. Memo. 2018-126, *appeal dismissed*, 2019 WL 1529474 (11th Cir. Mar. 7, 2019)	IRC § 6651(a)(1) No reasonable cause	Yes	IRS
Jones, Bell, Abbott, Fleming & Fitzgerald L.L.P. v. United States, 121 A.F.T.R.2d (RIA) 2085 (C.D. Cal. 2018), *appeal docketed*, No. 18-55934 (9th Cir. July 12, 2018)	IRC § 6651(a)(1); Court held taxpayer not entitled to refund	No	IRS
Mowry v. Comm'r, T.C. Memo. 2018-105	IRC § 6651(a)(1) No reasonable cause	No	IRS
Smith v. Comm'r, T.C. Memo. 2018-127, *appeal docketed*, No. 19-1051 (D.C. Cir. Feb. 25, 2019)	IRC § 6651(a)(1) No reasonable cause	No	IRS

TABLE 8: Itemized Deductions Reported on Schedule A (Form 1040)

Case Citation	Issue(s)	*Pro Se*	Decision
Individual Taxpayers (But Not Sole Proprietorships)			
Adkins v. United States, 140 Fed. Cl. 297 (2018), *appeal docketed*, No. 19-1356 (Fed. Cir. Jan. 2, 2019)	Theft loss deductions disallowed relating to TP's losses sustained due to fraudulent "pump and dump" investment scheme	No	IRS
Amaefuna v. Comm'r, T.C. Summ. Op. 2018-34	Expense deductions related to mortgage interest and state and local taxes disallowed; TP did not prevail due to failure to provide requested forms and failure to substantiate	Yes	IRS
Andersen, Estate of, v. Comm'r, T.C. Memo. 2019-2	TPs claimed mortgage interest expense deductions disallowed	No	IRS
Arseo v. Comm'r, T.C. Summ. Op. 2019-8	TP did not itemize deductions, but contends that he had gambling losses; TP's gambling losses, limited to the amount of his winnings, are not deductible due to failure to substantiate	Yes	IRS
Ayissi-Etoh v. Comm'r, T.C. Memo. 2018-107	TPs claimed and were allowed a deduction for state and local income taxes; however, TPs did not carry their burden of showing error in IRS's determination that they underreported portion of the taxable state tax refund they received	Yes	IRS
Bolles v. Comm'r, T.C. Memo. 2019-42	TP's casualty loss deductions disallowed for real property destroyed by a tornado for failure to substantiate adjusted basis. TP's casualty loss deductions for a pickup truck, old vehicle, and horse trailer also disallowed; some casualty loss for personal property in the house, shed, backyard, and pool house partially allowed	No	Split
Canzoni v. Comm'r, T.C. Memo. 2018-130	TP's gambling loss deductions would be allowed only to the extent of TP's winnings; however, since that amount is less than TP's standard deduction, TP cannot deduct any gambling losses	Yes	IRS
Castaneda v. Comm'r, T.C. Memo. 2018-173, *appeal docketed*, No. 19-71793 (9th Cir. July 17, 2019)	TP's gambling loss deductions disallowed due to failure to substantiate and failure to keep records of gambling winnings	Yes	IRS
Frankel v. Comm'r, T.C. Summ. Op. 2018-45	TP's claimed mortgage interest deduction disallowed due to lack of legal or equitable title to the property	No	IRS
Gaunt v. Comm'r, T.C. Memo. 2018-78	TPs failed to carry their burden of proving they had no reasonable prospect of recovery on insurance claim for stolen items, as required to establish their entitlement to theft loss deduction	No	IRS
Gibbs v. Comm'r, 757 F. App'x 274 (4th Cir. 2019), *aff'g Gibbs v. Comm'r*, 2018 U.S. Tax Ct. LEXIS 58 (June 6, 2018)	TP's deductions for casualty loss and medical and dental expenses disallowed due to failure to substantiate	Yes	IRS
Giunta v. Comm'r, T.C. Memo. 2018-180	TPs not entitled to claim theft loss deduction for overseas investment that they claimed was part of an alleged Ponzi scheme due to failure to substantiate claim	No	IRS
Householder v. Comm'r, T.C. Memo. 2018-136	TPs not entitled to deduct for theft loss for loss of money they paid for involvement in horse-breeding business as they did not suffer a deductible theft loss	No	IRS
Kurdziel v. Comm'r, T.C. Memo. 2019-20	TP not entitled to claim income tax deduction for home mortgage, real estate taxes, and tax return preparation fees due to failure to substantiate the expenses	No	IRS
Lawson v. Comm'r, T.C. Summ. Op. 2018-44	TPs entitled to an additional Schedule A mortgage interest deduction but only up to what the IRS already allowed	Yes	IRS
Mancini v. Comm'r, T.C. Memo. 2019-16, *appeal docketed*, No. 19-72438 (9th Cir. Sept. 25, 2019)	TP not entitled to casualty loss deductions for three taxable years at issue for gambling losses, due to failure to substantiate that any of TP's property suffered physical damage	No	IRS
Milkovich v. United States, 123 A.F.T.R.2d 1868 (W.D. Wash. 2019), *appeal docketed*, No. 19-35582 (9th Cir. July 12, 2019)	TPs not entitled to deduct mortgage interest deductions where they had no *bona fide* debt obligation and no incentive to reassume that debt obligation because they received a bankruptcy discharge and their mortgage debt on the property was nonrecourse	No	IRS

TABLE 8: Itemized Deductions Reported on Schedule A (Form 1040)

Case Citation	Issue(s)	*Pro Se*	Decision
Perry v. Comm'r, T.C. Memo. 2018-90, *appeal dismissed*, 2018 WL 6444398 (9th Cir. Nov. 8, 2018)	TPs not entitled to claim deduction for state and local real estate taxes for their second house because nothing in the record established the addresses of the TPs' properties and failure to substantiate bills were paid	Yes	IRS
Raifman v. Comm'r, T.C. Memo. 2018-101	Taxpayers did not establish the occurrence of theft under state law; therefore, theft losses not deductible; TPs also did not constitute "qualified investors" and thus do not qualify for safe harbor provisions of IRS revenue procedure allowing theft losses resulting from criminally fraudulent investment arrangements that take the form of Ponzi schemes, for their claim of theft losses from horse-breeding investment program	No	IRS
Schaekar v. Comm'r, T.C. Summ. Op. 2018-35	TP not entitled to deduction for medical expenses due to failure to substantiate	Yes	IRS
Schermer v. Comm'r, T.C. Memo. 2019-28	TP not entitled to a miscellaneous deduction for estate tax attributable to her late husband and father-in-law due to failure to substantiate	No	IRS
Simpson v. Comm'r, T.C. Summ. Op. 2019-9	TPs were able to substantiate claims for a deduction for state and local income taxes	Yes	TP
Singh v. Comm'r, T.C. Memo. 2018-79, *appeal docketed*, No. 18-72160 (9th Cir. Aug. 1, 2018)	TPs not entitled to mortgage interest expense deductions due to failure to substantiate	Yes	IRS
Shuman v. Comm'r, T.C. Memo. 2018-135, *aff'd* 774 F. App'x 813 (4th Cir. 2019)	TPs not entitled to claimed casualty loss deduction because claim was without merit	Yes	IRS
Smith v. Comm'r, T.C. Memo. 2018-127, *appeal docketed*, No. 19-1051 (D.C. Cir. Feb. 25, 2019)	TPs did not provide evidence to substantiate deductions for state and local taxes, real property taxes, and home mortgage interest deductions, in amounts larger than what IRS has already allowed	No	IRS
Sutherland v. Comm'r, T.C. Memo. 2018-186	TPs not entitled to deduct medical expenses which were transportation costs associated with seeking medical attention due to failure to provide any mileage logs or other evidence to substantiate the claimed mileage	Yes	IRS
Totten v. Comm'r, T.C. Summ. Op. 2019-1	TP failed to substantiate Schedule A deductions for tax return preparation fees, attorney's fees, and accountant's fees	Yes	IRS
Business Taxpayers (Partnerships and Sole Proprietorships - Schedules E and F)			
Evensen v. Comm'r, T.C. Memo. 2018-141	TP's theft loss deduction in connection with an investment in the Ponzi scheme disallowed due to failure to substantiate	Yes	IRS
McNely v. Comm'r, T.C. Memo. 2019-39	TPs (MFJ) not entitled to claim a passthrough deduction for theft losses purportedly sustained by TP husband's S corporation in fraudulent property investment scheme because prospect of non-recovery was unknowable at end of the tax year, and because TP husband's S corporation had not engaged an attorney, filed insurance claims, or made any effort to recoup any of the alleged losses	No	IRS
Mowry v. Comm'r, T.C. Memo. 2018-105	TP's S corporation not entitled to theft loss deductions due to failure to substantiate withdrawals constituted theft and failure to establish year in which theft loss occurred	No	IRS
Pugh v. Comm'r, T.C. Summ. Op. 2019-2	TP is entitled to deduction claimed for mortgage interest for each of the years in issue but not entitled to deduction for legal fees past what IRS has already allowed	No	Split
Singh v. Comm'r, T.C. Memo. 2018-132, *appeal docketed*, No. 18-72695 (9th Cir. Oct. 3, 2018)	TPs (MFJ) not entitled to deduct mortgage interest deductions because they did not establish how much of any yearly mortgage payment was allocable to interest or the existence or amount of any payments made; TPs also not entitled to deduction for real estate taxes due to failure to substantiate	Yes	IRS

TABLE 9: Charitable Contribution Deductions Under IRC § 170

Case Citation	Issue(s)	*Pro Se*	Decision
Individual Taxpayers (But Not Sole Proprietorships)			
Archer v. Comm'r, T.C. Memo. 2018-111, *appeal docketed*, No. 19-70304 (9th Cir. Feb. 4, 2019)	TP was denied a charitable deduction for failing to substantiate cash and noncash contributions; TP did not present receipts or other written evidence of his contributions	Yes	IRS
Ayissi-Etoh v. Comm'r, T.C. Memo. 2018-107	TP's charitable deduction to an entity that was not yet recognized by IRS as 501(c)(3) charity was denied; TP also failed to substantiate noncash contributions made to charity providing only a spreadsheet, not a receipt or recognition from charitable entities	Yes	IRS
Kho v. Comm'r, T.C. Summ. Op. 2018-32	TP was denied a charitable deduction for failing to substantiate deduction, offering no evidence to support the claim	Yes	IRS
Grainger v. Comm'r, T.C. Memo. 2018-117	TP failed to substantiate noncash contributions for donated clothing; some charitable deductions were allowed by the IRS, but court agreed that items TP substantiated had improper fair market value calculations	Yes	IRS
Mann v. United States, 364 F.Supp.3d 553 (D. Md. 2019), *appeal docketed*, No. 19-1793 (4th Cir. July 30, 2019)	TP was denied charitable deduction for contributing house for deconstruction because TP did not convey property under state law; TP did not value property properly, making the appraisal invalid; TP's contribution of cash to charity was deductible because TP did not receive a specific benefit for the donation and the charity benefited	No	Split
Oliveri v. Comm'r, T.C. Memo. 2019-57	TP claimed personal expenses as charitable contributions and failed to obtain contemporaneous written acknowledgments of unreimbursed expenditures for charity; TP was not entitled to charitable contribution deductions for any evangelism-related expenses in excess of $250; Could deduct some expenses as charitable contributions, but most denied	No	Split
Presley v. Comm'r, T.C. Memo. 2018-171, *appeal docketed*, No. 18-9008 (10th Cir. Dec. 17, 2018)	TP not entitled to deduct improvement expenses spent on land before year at issue and TP not entitled to claim deduction for contribution of residence	No	IRS
Simpson v. Comm'r, T.C. Summ. Op. 2019-9	TP's charitable contributions denied for failing to substantiate cash and noncash contributions; TP did not provide records for cash contributions under $250 or contemporaneous written acknowledgment for contributions over $250; letter from church for noncash donation did not contain sufficient information to substantiate	Yes	IRS
Totten v. Comm'r, T.C. Summ. Op. 2019-1	TP failed to substantiate some charitable contributions, not providing any receipts or records to support the cash donations or a contemporaneous written acknowledgment from the donation center of the noncash donations; IRS conceded some substantiated cash and noncash deductions; TP's unsubstantiated deductions were disallowed	Yes	IRS
Wainwright v. Comm'r, 744 F. App'x 1 (D.C. Cir. 2018), *aff'g* T.C. Memo. 2017-70	TP failed to substantiate deduction, not providing any reliable written record to support the claimed deduction; affirmed Tax Court decision	Yes	IRS
Business Taxpayers (Corporations, Partnerships, Trusts, and Sole Proprietorships - Schedules C, E, F)			
Belair Woods, LLC v. Comm'r, T.C. Memo. 2018-159	TP failed to comply with reporting requirements in regulations to claim charitable deduction of conservation easement, not including cost or adjusted basis in appraisal summary	No	IRS
Blau v. Comm'r, 924 F.3d 1261 (D.C. Cir. 2019), *aff'g* 149 T.C. 1 (2017).	Court denied TP's charitable contribution because TP did not substantially comply with substantiation requirements for noncash contribution; affirmed Tax Court decision	No	IRS
Champions Retreat Golf Founders, LLC v. Comm'r, T.C. Memo. 2018-146, *appeal docketed*, No. 18-14817 (11th Cir. Nov. 16, 2018)	TP was denied charitable deduction for qualified conservation easement deduction because TP failed to satisfy the conservation purpose requirement of IRC § 170(h)	No	IRS

TABLE 9: Charitable Contribution Deductions Under IRC § 170

Case Citation	Issue(s)	*Pro Se*	Decision
Harbor Lofts Assoc. v. Comm'r, 151 T.C. 17 (2018)	TP didn't have a qualified real property interest in the property donated to charity; a building lessee claimed a façade conservation easement, but only had a lease for a term of years; thus, TP could not give up real property rights so court denied charitable contribution	No	IRS
PBBM-Rose Hill, Ltd. v. Comm'r, 900 F.3d 193 (5th Cir. 2019), *aff'g* No. 26096-14 (T.C. Jan. 9, 2017)	Court did not allow conservation easement deduction because the easement did not comply with the extinguishment regulation; valuation was reduced from about $15 million to $100k, based on land not being able to have been developed; affirmed Tax Court	No	IRS
Pine Mountain Pres., LLLP v. Comm'r, T.C. Memo. 2018-214, *appeal docketed*, Nos. 19-11795 and 19-12173 (11th Cir. May 8, 2019 and June 5, 2019)	The value of TP's 2007 charitable contribution was 50 percent of the value TP claimed plus 50 percent of the value the IRS claimed	No	Split
Pine Mountain Pres., LLLP v. Comm'r, 151 T.C. 247 (2018), *appeal docketed*, Nos. 19-11795 and 19-12173 (11th Cir. May 8, 2019 and June 5, 2019)	TP's contributions in 2005 and 2006 were not qualified real property interests because TP could change designation, thus, disallowed; 2007 contribution was qualified conservation easement and deductible	No	Split

TABLE 10: Frivolous Issues Penalty Under IRC § 6673 and Related Appellate-Level Sanctions

Case Citation	Issue(s)	*Pro Se*	Decision	Amount	Comments
Individual Taxpayers (But Not Sole Proprietorships)					
Burnett v. Comm'r, T.C. Memo. 2018-204	TP petitioned for redetermination of IRS decision to proceed with levy and argued he was not subject to federal income tax	Yes	TP		Warned
Burnett v. Comm'r, T.C. Memo. 2018-205, *aff'd* 2019 WL 4233804 (4th Cir. Sept. 6, 2019)	TP petitioned for redetermination of IRS decision to proceed with levy and argued he was not subject to federal income tax	Yes	TP		Warned
Hartmann v. Comm'r, T.C. Memo. 2018-154, *aff'd* 2019 WL 4447378 (3d Cir. Sept. 17, 2019)	TP petitioned for review of the IRS determination to file a notice of federal tax lien and intent to levy	Yes	TP		
MacDonald v. Comm'r, T.C. Memo. 2018-138	TP petitioned for redetermination of deficiency and penalties and argued wages and IRA distributions are not taxable and he is not the type of taxpayer subject to tax	Yes	IRS	$5,000	
Walquist v. Comm'r, 2019 WL 962901 (T.C. Feb. 25, 2019)	TPs (MFJ) petitioned for redetermination of deficiency and penalties and argued that U.S. currency is not lawful money, that they have no obligation or liability to file a tax return, and that the Tax Court should garnish the wages of the Secretary of Treasury for the amount of their tax liability	Yes	IRS	$12,500	
Weiler v. IRS, 2019 WL 2346915 (N.D. Ohio May 31, 2019), *appeal docketed*, No. 19-3729 (6th Cir. Aug. 1, 2019)	TP petitioned for refund of taxes paid and argued that the 16th Amendment does not authorize a direct, non-apportioned income tax, income tax is an improper excise tax that cannot be levied, and only government employees pay income tax	Yes	IRS	$1,000	
Wesley v. Comm'r, T.C. Memo. 2019-18	TP petitioned for review of IRS determination to proceed with levy and asserted he couldn't be taxed under section 861 or 1040 and assessments were invalid because they were not personally signed by an assessment officer	Yes	IRS	$10,000	
Williams v. Comm'r, 2018 WL 3301501 (T.C. July 3, 2018)	TP petitioned for redetermination of deficiency, penalties, and additions to tax and argued he was not required to file a tax return	Yes	IRS	$2,000	
Section 6673 Penalty Not Requested or Imposed but Taxpayer Warned To Stop Asserting Frivolous Arguments					
Belanger v. Comm'r, T.C. Memo. 2019-1, *aff'd* 2019 WL 4316498 (5th Cir. Sept. 11, 2019)	TP petitioned for redetermination of IRS decision to proceed with a levy and asserted he was a non-taxpayer	Yes			Warned
Cmty. Tax Law Firm, Inc. v. Comm'r, T.C. Memo. 2018-198	TP petitioned for redetermination of IRS intent to levy	No			Warned
Venable v. Comm'r, T.C. Memo. 2018-144	TP petitioned for redetermination of deficiency, alleged the IRS settlement officer abused his discretion and argued his revenues are not subject to taxation	Yes			Warned
Wells v. Comm'r, T.C. Memo. 2018-188	TPs (MFJ) petitioned for redetermination of deficiency, penalties and additions to tax and argued they were not employees and their wages were not income	Yes			Warned

TABLE 10: Frivolous Issues Penalty Under IRC § 6673 and Related Appellate-Level Sanctions

Case Citation	Issue(s)	*Pro Se*	Decision	Amount	Comments
U.S. Courts of Appeals' Decisions on Appeal of Section 6673 Penalties Imposed by U.S. Tax Court					
Herndon v. Comm'r, 758 F. App'x 857 (11th Cir. 2019), *aff'g* No. 21071-17 (T.C. July 5, 2018), *reh'g denied by*, *reh'g*, *en banc*, *denied by*, 2019 U.S. App. LEXIS 11443 (11th Cir. Apr. 18, 2019)	Penalty affirmed	No	IRS		Tax Court imposed a penalty of $1,000.
Jagos v. Comm'r, 121 A.F.T.R.2d 2209 (6th Cir. 2018), *aff'g* T.C. Memo. 2017-202 (Oct. 16, 2017), *cert. denied*, 139 S.Ct. 2031 (U.S. May 13, 2019)	Penalty affirmed	Yes	IRS		Tax Court imposed a penalty of $1,000.
Lange v. Comm'r, 748 F. App'x 635 (5th Cir. 2019), *aff'g* No.11492-17 (T.C. Apr. 27, 2018), *petition for cert. filed*, No. 19-366 (U.S. Sept. 19, 2019)	Penalty affirmed	Yes	IRS		Tax Court imposed a penalty of $2,500.
Waltner v. Comm'r, 748 F. App'x. 162 (9th Cir. 2019), *aff'g in part* T.C. Memo. 2014-133 (July 3, 2014), *petition for cert. filed*, No. 19-261 (U.S. Aug. 28, 2019)	Penalty affirmed	No	IRS		Tax Court imposed a penalty of $2,500. The Ninth Circuit added a sanction of $10,000.
Other U.S. Courts' Decisions on Sanctions Under Section 7482 (c)(4), FRAP Rule 38, or Other Authority					
Lange v. Comm'r, 748 F. App'x 635 (5th Cir. 2019), *aff'g* No.11492-17 (T.C. Apr. 27, 2018), *petition for cert. filed*, No. 19-366 (U.S. Sept. 19, 2019)	TP appealed Tax Court's upholding of IRS frivolous submissions penalties and the Tax Court's imposition of a penalty under section 6673	Yes	IRS	$8,000	

TABLE 11: Unpublished United States Tax Court Summary Judgment Orders

Case Name	Docket No.	Order Date	Issue(s)	*Pro Se*	Decision	Corresponding MLI Topic
Allison v. Comm'r	16961-17L	7/6/18	Levy	Yes	IRS	CDP
Anderson v. Comm'r	23789-16	2/13/19	Deduction of Legal Expenses	No	TP	Schedule A Itemized Deductions
Antoine v. Comm'r	12070-18L	3/18/19	Lien	Yes	IRS	CDP
Baeza v. Comm'r	3402-18L	4/19/19	Lien	Yes	IRS	CDP
Bailey v. Comm'r	24831-17L	7/12/18	Levy	No	IRS	CDP
Ball v. Comm'r	13208-17L	7/19/18	Levy	Yes	IRS	CDP
Banini v. Comm'r	6699-18S	12/13/18	Education Expenses	Yes	IRS	Schedule A Itemized Deductions
Bara v. Comm'r	17107-17SL	4/25/19	Qualified Dividends; FTF Penalties	Yes	IRS	Gross Income; FTF/ FTP and Estimated Tax Penalties
Barefield v. Comm'r	19814-17SL	8/2/18	Levy	Yes	IRS	CDP
Barrett v. Comm'r	5261-18SL	9/17/18	Levy	Yes	IRS	CDP
Barrington v. Comm'r	1781-14	4/15/19	FTF; Tax Evasion	Yes	TP	FTF
Bates v. Comm'r	7366-18SL	3/12/19	Lien	Yes	IRS	CDP
Belair Woods, LLC v. Comm'r	19493-17	9/24/18	Charitable Contribution Deductions Under IRC § 170	No	IRS	Charitable Contributions
Benenson v. Comm'r	759-13	9/11/18	Roth IRA Contributions	No	TP	Other (Roth IRA Contributions and Related Excise Tax)
Benenson v. Comm'r	779-13	9/11/18	Roth IRA Contributions	No	TP	Other (Roth IRA Contributions and Related Excise Tax)
Berenblatt v. Comm'r	7208-17W	4/19/19	Whistleblower Action Under IRC § 7623(b)	No	TP	Whistleblower Award Determinations
Bertoni v. Comm'r	20343-17L	8/16/18	Lien	No	IRS	CDP
Bird v. Comm'r	20019-17L	11/27/18	Lien	Yes	IRS	CDP
Birdman, et. al, v. Comm'r	28897-10, 5816-11, 5817-11	4/26/19	Limitation on Collection Activity Under IRC § 6501(a); Deficiency Due to Fraud Under IRC § 6501(c)	No	IRS	Other
Bletsas v. Comm'r	4485-17L	8/17/18	Lien	No	IRS	CDP
Bowers v. Comm'r	5956-17SL	10/17/18	Lien; Levy	Yes	IRS	CDP
Brown v. Comm'r	25992-16L	10/16/18	Lien	Yes	IRS	CDP
Byrum v. Comm'r	4465-17L	9/18/18	Levy	Yes	IRS	CDP
Byrum v. Comm'r	12246-17L	10/18/18	Levy; Frivolous Returns Filing	Yes	IRS	CDP; Frivolous Returns Filing
Calpino v. Comm'r	11368-18L	5/14/19	Frivolous Issues Penalty	Yes	Split	Frivolous Issues Penalty
Carter v. Comm'r	25561-16L	7/11/18	Levy	Yes	IRS	CDP
Castaneda v. Comm'r	7697-17L	4/3/19	Levy	Yes	TP	CDP
Chambers v. Comm'r	24953-17L	9/24/18	Levy	Yes	IRS	CDP
Cheshier v. Comm'r	19154-16SL	10/17/18	Levy	Yes	IRS	CDP

TABLE 11: Unpublished United States Tax Court Summary Judgment Orders

Case Name	Docket No.	Order Date	Issue(s)	*Pro Se*	Decision	Corresponding MLI Topic
Clark v. Comm'r	20095-17	8/28/18	Accuracy Related Penalty	No	IRS	Accuracy Related Penalty
Coffey v. Comm'r	4949-10	7/24/18	Statute of Limitations Issues	No	TP	Statute of Limitation Issues
Coffey v. Comm'r	4720-10	7/24/18	Statute of Limitations Issues	No	TP	Statute of Limitation Issues
Combs v. Comm'r	784-18SL	8/28/18	Levy	Yes	IRS	CDP
Cotter v. Comm'r	7644-15L	5/22/19	Levy; Frivolous Returns Filing	Yes	IRS	CDP; Frivolous Returns Filing
Cottonwood Place, LLC v. Comm'r	14076-17	10/1/18	Charitable Contribution Deductions Under IRC § 170	No	IRS	Charitable Contributions
Courtier v. Comm'r	19714-16	4/8/19	Excise Tax	No	Split	Gross Income
Crawford v. Comm'r	24887-17L	3/15/19	Levy	Yes	IRS	CDP
Cronin & Byczek, LLP, v. Comm'r	619-18L	2/8/19	Lien	Yes	TP	CDP
Dail v. Comm'r	21411-17L	11/14/18	Lien; Levy; Frivolous Returns Filing; Frivolous Issues Penalty	Yes	IRS	CDP; Frivolous Returns Filing; Frivolous Issues Penalty
Davis v. Comm'r	5262-17L	9/7/18	Levy	Yes	IRS	CDP
De Los Santos v. Comm'r	5458-16	9/19/18	Gross Income Issues	No	IRS	Gross Income
Dieudonne v. Comm'r	6462-17W	9/11/18	Whistleblower Action Under IRC § 7623(b)	Yes	IRS	Whistleblower Award Determinations
Drinkard v. Comm'r	18465-17L	9/24/18	Lien; Levy	Yes	IRS	CDP
Dyer v. Comm'r	12085-17L	9/27/18	Lien	Yes	IRS	CDP
Elliott v. Comm'r	13839-17L	12/10/18	CDP	No	IRS	CDP
F. Scott Perrino MD, Inc. v. Comm'r	19810-17L	7/10/18	Levy	Yes	IRS	CDP
Fair v. Comm'r	1674-17SL	4/23/19	Lien	Yes	IRS	CDP
Fowler v. Comm'r	28935-14L	12/7/18	Lien; Levy	Yes	IRS	CDP
Gainer v. Comm'r	6558-18SL	11/14/18	Levy	Yes	IRS	CDP
Gallagher v. Comm'r	18928-16L	6/8/18	Levy	Yes	IRS	CDP
Ganousis v. Comm'r	16095-17L	9/6/18	Levy	Yes	IRS	CDP
Gerome v. Comm'r	19994-17L	8/24/18	Levy	Yes	IRS	CDP
Goddard v. Comm'r	22334-17L	2/8/19	Lien	No	TP	CDP
Gonsoulin v. Comm'r	18395-17	3/8/19	Levy; Frivolous Issues Penalty	Yes	IRS	CDP; Frivolous Issues Penalty
Gonsoulin v. Comm'r	18395-17L	4/12/19	Frivolous Issues Penalty	Yes	IRS	Frivolous Issues Penalty
Graham v. Comm'r	20242-12L	10/3/18	Levy	Yes	IRS	CDP
Grey v. Comm'r	4358-18L	9/24/18	Lien	Yes	IRS	CDP
Gross v. Comm'r	4022-18L	12/14/18	CDP	Yes	IRS	CDP

TABLE 11: Unpublished United States Tax Court Summary Judgment Orders

Case Name	Docket No.	Order Date	Issue(s)	*Pro Se*	Decision	Corresponding MLI Topic
Hamilton v. Comm'r	11823-18SL	12/13/18	Levy	Yes	IRS	CDP
Hanson v. Comm'r	22331-17L	2/21/19	Lien	No	TP	CDP
Harbor Lofts Ass'n v. Comm'r	993-17	8/29/18	Charitable Contribution Deductions Under IRC § 170	No	IRS	Charitable Contributions
Harrison v. Comm'r	17983-17	6/29/18	Levy	No	IRS	CDP
Hartmann v. Comm'r	24214-17L	9/17/18	Lien; Levy	Yes	IRS	CDP
Haynes v. Comm'r	714-16	6/28/18	Pension Income	Yes	IRS	Gross Income
Hefflin v. Comm'r	7164-17L	6/15/18	Lien	Yes	IRS	CDP
Heist v. Comm'r	8724-18L	2/21/19	Lien; Frivolous Return Filing	Yes	IRS	CDP; Frivolous Return Filing
Held v. Comm'r	3181-17SL	7/6/18	Levy	Yes	IRS	CDP
Hermit v. Comm'r	15998-17SL	10/11/18	Levy	Yes	IRS	CDP
Herndon v. Comm'r	21071-17L	7/5/18	Levy; Frivolous Returns	Yes	IRS	CDP; Frivolous Returns Filing
Hess v. Comm'r	26900-17L	10/16/18	Levy	Yes	IRS	CDP
Hirsch, et. al, v. Comm'r	28898-10, 5819-11, 5821-11, 6034-11	4/26/19	Limitation on Collection Activity Under IRC § 6501(a); Deficiency Due to Fraud Under IRC § 6501(c)	No	IRS	Other
Holcombe v. Comm'r	7981-18SL	12/20/18	Lien; Levy	Yes	IRS	CDP
Holder v. Comm'r	12071-17L	9/18/18	Levy	No	IRS	CDP
Hommertzheim Enter., Inc. v. Comm'r	25627-17SL	9/25/18	Levy	Yes	IRS	CDP
HRB-Delaware, Inc. & Subs. v. Comm'r	28129-12	1/29/19	Built-In Gain (BIG) Tax Valuation	No	TP	BIG Tax Valuation
Hudson v. Comm'r	18116-17L	7/26/18	Levy	Yes	IRS	CDP
Iannello v. Comm'r	23949-13L	7/23/18	Levy	No	IRS	CDP
IBDR, Inc. v. Comm'r	26819-16L	12/19/18	Lien; Levy	Yes	IRS	CDP
Irabagon v. Comm'r	1594-16L	11/19/18	Levy	Yes	IRS	CDP
J & T Washes, Inc. v. Comm'r	17649-17L	2/12/19	Levy	Yes	IRS	CDP
Jackson v. Comm'r	16854-17SL	7/18/18	Levy	Yes	IRS	CDP
Jackson v. Comm'r	3661-18L	2/1/19	Lien	Yes	IRS	CDP
Jarvis v. Comm'r	19387-18SL	4/22/19	Levy	Yes	IRS	CDP
Kane v. Comm'r	10988-17L	8/10/18	Lien	No	IRS	CDP
Kannry v. Comm'r	19091-16L	9/21/18	Lien	Yes	IRS	CDP
Kono v. Comm'r	18347-17L	11/1/18	Levy	Yes	IRS	CDP
Kopstad v. Comm'r	651-17L	8/30/18	Levy	Yes	IRS	CDP
Lawal v. Comm'r	12728-17	6/27/18	Levy	No	IRS	CDP
Lawson v. Comm'r	23278-17L	6/5/18	Levy	Yes	IRS	CDP
Lee v. Comm'r	19157-17	8/28/18	Gross Income	Yes	IRS	Gross Income
Levin v. Comm'r	11578-14L	10/17/18	Levy	Yes	IRS	CDP

TABLE 11: Unpublished United States Tax Court Summary Judgment Orders

Case Name	Docket No.	Order Date	Issue(s)	*Pro Se*	Decision	Corresponding MLI Topic
Lieber v. Comm'r	22228-17L	2/14/19	Levy	Yes	IRS	CDP
Locatelli v. Comm'r	6126-17L	9/25/18	CDP	Yes	IRS	CDP
Longino v. Comm'r	6817-17L	10/19/18	Lien	Yes	IRS	CDP
Machin v. Comm'r	15194-18L	5/3/19	Lien; Trust Fund Recovery Penalty	Yes	IRS	CDP
Marion v. Comm'r	21841-17L	8/24/18	Levy	Yes	IRS	CDP
Marshall v. Comm'r	1949-17L	10/12/18	Lien; Levy	Yes	IRS	CDP
Marvin v. Comm'r	23092-17L	7/31/18	Levy; Frivolous Issues Penalty	Yes	IRS	CDP; Frivolous Issues Penalty
Marzan v. Comm'r	6071-16L	7/3/18	CDP	Yes	IRS	CDP
Matus v. Comm'r	25997-16L	5/6/19	Levy	Yes	TP	CDP
McAvey v. Comm'r	2583-17L	8/30/18	Levy	No	IRS	CDP
McCrory v. Comm'r	16605-17W	12/20/18	Whistleblower Action Under IRC § 7623(b)	Yes	IRS	Whistleblower Award Determinations
McDonald v. Comm'r	11038-17SL	2/27/19	Levy	Yes	IRS	CDP
McGillivray v. Comm'r	26446-17SL	3/7/19	Levy	Yes	IRS	CDP
McHenry v. Comm'r	607-18L	11/8/18	Lien; Levy	No	IRS	CDP
Minemyer v. Comm'r	22182-10	2/26/19	Civil Fraud Penalty	Yes	IRS	Civil Fraud Penalty
Morning v. Comm'r	355-17L	2/15/19	CDP	Yes	IRS	CDP
Morrissette v. Comm'r	4415-14	2/21/19	"Split-dollar Life Insurance Arrangements"	No	TP	Gross Income
Muhammad v. Comm'r	22688-17SL	6/22/18	Lien	Yes	IRS	CDP
Namm v. Comm'r	8485-17; 8487-17; 8488-17; 8490-17; 8496-17; 8498-17; 8499-17; 8500-17; and 8501-17	11/5/18	Statute of Limitations Issue	No	IRS	Statute of Limitations Issues
NCA Argyle LP, et. al, v. Comm'r	3272-18	4/8/19	Partnership Profits	No	IRS	Partnership Issues; Gross Income
NCA Cherokee LP, et. al, v. Comm'r	6663-18	4/8/19	Partnership Profits	No	IRS	Partnership Issues; Gross Income
NCA Highland LP, et. al, v. Comm'r	6829-18	4/8/19	Partnership Profits	No	IRS	Partnership Issues; Gross Income
NCA Palladium LP, et. al, v. Comm'r	6662-18	4/8/19	Partnership Profits	No	IRS	Partnership Issues; Gross Income
Nevius v. Comm'r	6727-17L	7/6/18	Lien; Levy; Frivolous Issues Penalty	Yes	IRS	CDP; Frivolous Issues Penalty
Obeirne v. Comm'r	4313-17L	12/27/18	Lien	Yes	IRS	CDP
O'Kagu v. Comm'r	3835-18	9/20/18	Foreign Earned Income Exclusion	Yes	IRS	Foreign Earned Income Exclusion

TABLE 11: Unpublished United States Tax Court Summary Judgment Orders

Case Name	Docket No.	Order Date	Issue(s)	*Pro Se*	Decision	Corresponding MLI Topic
P.J. Enter., LLC v. Comm'r	14560-17L	8/28/18	CDP	No	IRS	CDP
Pennington v. Comm'r	19115-17SL	2/12/19	Lien	Yes	IRS	CDP
Perales v. Comm'r	20332-17W	8/20/18	Whistleblower Action Under IRC § 7623(b)	Yes	IRS	Whistleblower Award Determinations
Perales v. Comm'r	21791-17W	8/20/18	Whistleblower Action Under IRC § 7623(b)	Yes	IRS	Whistleblower Award Determinations
Perales v. Comm'r	787-18W	10/26/18	Whistleblower Action Under IRC § 7623(b)	Yes	IRS	Whistleblower Award Determinations
Perales v. Comm'r	25116-17W	10/30/18	Whistleblower Action Under IRC § 7623(b)	Yes	IRS	Whistleblower Award Determinations
Perales v. Comm'r	26906-17W	10/31/18	Whistleblower Action Under IRC § 7623(b)	Yes	IRS	Whistleblower Award Determinations
Pettengill v. Comm'r	4563-18L	2/7/19	Lien	Yes	IRS	CDP
Polk v. Comm'r	1781-17L	5/7/19	Levy; Frivolous Return Filing	Yes	Split	CDP; Frivolous Return Filing
Potts v. Comm'r	9307-17	6/20/18	Levy	No	IRS	CDP
Provitola, et al., v. Comm'r	12357-16, 16168-17	2/6/19	Accuracy Related Penalty	Yes	IRS	Accuracy Related Penalty
Reavis v. Comm'r	16342-17L	3/25/19	Levy	Yes	IRS	CDP
Red Oak Estates, LLC v. Comm'r	13659-17	10/1/18	Charitable Contribution Deductions Under IRC § 170	No	IRS	Charitable Contributions
Reid v. Comm'r	12152-17L	12/19/18	Levy	Yes	IRS	CDP
Renka, Inc. v. Comm'r	15988-11R	8/16/18	Tax-Exempt Status of Employee Stock Ownership Plan (ESOP)	No	TP	Other (ESOP/Tax-Exempt Status)
Rhodes v. Comm'r	1712-16W	8/16/18	Whistleblower Action Under IRC § 7623(b)	Yes	IRS	Whistleblower Award Determinations
Richter v. Comm'r	11191-18L	4/26/19	Levy	No	IRS	CDP
Rivas v. Comm'r	9490-17	9/27/18	Innocent Spouse Relief	No	IRS	Innocent Spouse Relief
Rivas v. Comm'r	24760-17L	11/14/18	Levy	Yes	IRS	CDP
Robbins v. Comm'r	16781-17L	10/3/18	CDP	Yes	IRS	CDP
Robinson v. Comm'r	15255-16SL	11/27/18	Lien; Levy; Trust Fund Recovery Penalty	Yes	IRS	CDP; Trust Fund Recovery Penalty
Rosendale v. Comm'r	7710-17L	7/5/18	Levy	No	IRS	CDP
Rothner v. Comm'r	525-18	4/11/19	Bad Business Debt Deduction IRC § 166	No	IRS	Other
Rufus v. Comm'r	8179-17W	7/5/18	Whistleblower Action Under IRC § 7623(b)	No	IRS	Whistleblower Award Determinations
Sachi v. Comm'r	12032-17	11/21/18	Affordable Care Act (ACA) Premium Tax Credit	Yes	IRS	Other (ACA Premium Tax Credit)
Salter v. Comm'r	553-18L	2/5/19	Levy	Yes	IRS	CDP

TABLE 11: Unpublished United States Tax Court Summary Judgment Orders

Case Name	Docket No.	Order Date	Issue(s)	*Pro Se*	Decision	Corresponding MLI Topic
Sarma v. Comm'r	26318-16	3/28/19	Basis in TEFRA Partnership	No	IRS	Partnership Issues
Sauter v. Comm'r	15972-17	9/17/18	Gross Income; Accuracy Related Penalty; Frivolous Issues Penalty	Yes	IRS	Gross Income; Accuracy Related Penalty; Frivolous Issues Penalty
Savonarola Editorale, Inc. v. Comm'r	21863-17L	3/1/19	Lien	No	IRS	CDP
Schneider v. Comm'r	10660-17L	7/3/18	Levy; Frivolous Issues Penalty	Yes	IRS	CDP; Frivolous Issues Penalty
Schneider v. Comm'r	15652-17	3/27/19	Unreported Pension, Unemployment Compensation, and Social Security Income; FTF/FTP Penalties; Frivolous Issues Penalty	Yes	IRS	Gross Income; FTF/FTP and Estimated Tax Penalties; Frivolous Issues Penalty
Shepherd v. Comm'r	19146-18L	4/18/19	Lien	Yes	TP	CDP
Sklar v. Comm'r	19506-17L	9/14/18	Lien	Yes	IRS	CDP
Smith v. Comm'r	14900-15	9/19/18	Dividend Income	No	IRS	Gross Income
Smith v. Comm'r	14578-18SL	2/22/19	Levy	No	IRS	CDP
Sopin v. Comm'r	6911-18L	2/6/19	Lien	No	IRS	CDP
Spanbock v. Comm'r	23659-16L	11/29/18	CDP	Yes	IRS	CDP
Stone v. Comm'r	4716-18SL	10/31/18	Levy	Yes	IRS	CDP
Stout v. Comm'r	19261-17L	10/29/18	Levy	Yes	IRS	CDP
Stripling v. Comm'r	19896-17L	3/6/19	Lien	Yes	IRS	CDP
Swartz v. Comm'r	402-17SL; and 403-17SL	11/29/18	Lien; Trust Fund Recovery Penalty	Yes	IRS	CDP; Trust Fund Recovery Penalty
Terra Equip. Co. v. Comm'r	14000-16L	6/28/18	Levy	Yes	IRS	CDP
The Cannon Corp. & Subs. v. Comm'r	12466-16	6/4/18	Deductibility of Energy Efficient Building Property (IRC § 179D)	No	IRS	Trade or Business
The Cmty. Law Firm, Inc. v. Comm'r	18478-17L	12/4/18	Levy	No	IRS	CDP
Thompson v. Comm'r	29498-12	11/19/18	Gross Income; FTF/FTP and Estimated Tax Penalties	Yes	IRS	Gross Income; FTF/FTP and Estimated Tax Penalties
Tiki Tanning, Inc. v. Comm'r	3574-18L	3/29/19	Levy	No	IRS	CDP
Toomey v. Comm'r	8238-18L	10/12/18	Lien; Levy	Yes	IRS	CDP
Total Printer Source of Georgia, Inc. v. Comm'r	14809-17L	7/11/18	Levy	No	IRS	CDP
Tsaras v. Comm'r	6934-17L	9/6/18	Levy	Yes	IRS	CDP
Utterback v. Comm'r	14560-16L	8/3/18	Lien	Yes	IRS	CDP
VanSickle v. Comm'r	11164-17SL	11/28/18	Levy	Yes	IRS	CDP

TABLE 11: Unpublished United States Tax Court Summary Judgment Orders

Case Name	Docket No.	Order Date	Issue(s)	*Pro Se*	Decision	Corresponding MLI Topic
Walker v. Comm'r	16108-14L	10/1/18	Lien; Levy; Frivolous Issues Penalty	Yes	IRS	CDP; Frivolous Issues Penalty
Walker v. Comm'r	9435-15L	10/2/18	Lien; Levy; Frivolous Issues Penalty	Yes	IRS	CDP; Frivolous Issues Penalty
Weatherup v. Comm'r	25370-17SL	12/27/18	Levy	Yes	IRS	CDP
Wells v. Comm'r	9693-17	11/13/18	Gross Income; FTF/FTP and Estimated Tax Penalties	Yes	IRS	Gross Income; FTF/FTP and Estimated Tax Penalties
Whistleblower 14040-16W v. Comm'r	14040-16W	2/15/19	Whistleblower Action Under IRC § 7623(b)	No	IRS	Whistleblower Award Determinations
Wiltshire v. Comm'r	19458-17	9/11/18	Innocent Spouse Relief	No	IRS	Innocent Spouse Relief
Wisc. Fire Sprinkler Installation & Insp. Serv. v. Comm'r	5624-18L	3/15/19	Levy	Yes	IRS	CDP
Wolff v. Comm'r	2189-18L	2/1/19	Lien	No	IRS	CDP
Wren v. Comm'r	21355-17L	2/26/19	Lien	Yes	IRS	CDP
Wright v. Comm'r	17068-17	9/20/18	Lien	Yes	IRS	CDP
Yee-Lo v. Comm'r	3836-18L	3/22/19	Levy	Yes	IRS	CDP
Young v. Comm'r	5323-18L	4/9/19	Levy	Yes	IRS	CDP
Zurn v. Comm'r	8012-17L	12/28/18	Levy	Yes	IRS	CDP

TABLE 12: Unpublished United States Tax Court Bench Orders

Case Name	Docket No.	Order Date	Issue(s)	*Pro Se*	Decision	Corresponding MLI Topic
Abdullayev v. Comm'r	9126-18S	4/16/19	Travel Expenses	Yes	IRS	Trade or Business
Anderson v. Comm'r	16323-17	11/14/18	Innocent Spouse Relief	Yes	IRS	Innocent Spouse
Aouriri v. Comm'r	4386-18S	4/22/19	Unreported Income; IRA Distribution	Yes	IRS	Gross Income
Baptiste v. Comm'r	7918-16	10/17/18	Profit or Loss from Business; First Time Homebuyers Credit; EIC; CTC; AOC; Making Work Pay Credit	Yes	IRS	Trade or Business; Family Status Issues; Civil Fraud Penalties
Barker v. Comm'r	22634-17S	11/8/18	Profit or Loss from Business; Vehicle Expenses	Yes	IRS	Trade or Business
Bass v. Comm'r	12871-17	6/8/18	Vehicle Expenses; Miscellaneous Unreimbursed Employee Business Expenses	Yes	Split	Trade or Business
Blackburn v. Comm'r	27721-14	6/26/18	Levy	No	IRS	CDP
Boulware v. Comm'r	5514-16	4/9/19	Diversion of Income; Unreported Income; FTF Penalty; Civil Fraud Penalty	No	IRS	Gross Income; FTF/FTP Penalties; Civil Fraud Penalty
Boulware, Estate of, v. Comm'r	5885-16	4/9/19	Diversion of Income; Unreported Income; FTF Penalty; Civil Fraud Penalty	No	IRS	Gross Income; FTF/FTP Penalty; Civil Fraud Penalty
Brooke v. Comm'r	5319-18S	12/19/18	Innocent Spouse Relief	Yes	Split	Innocent Spouse
Brown v. Comm'r	5817-18	3/14/19	Gross Income; FTF/FTP Penalties	Yes	IRS	Gross Income; FTF/FTP Penalties
Cortez v. Comm'r	14741-17	7/2/18	Unreported business income; propriety of bank deposits method	Yes (Petitioners did not show up to court)	IRS	Accuracy Related Penalty; FTF Penalty
Cruz v. Comm'r	16268-16	5/28/19	Dependency Exemption; EIC; CTC; Filing Status	No	Split	Family Status Issues
Dubin v. Comm'r	7752-18	5/6/19	Unemployment Compensation	Yes	IRS	Gross Income
Elsayed v. Comm'r	11994-17S	2/1/19	Filing Status	No	IRS	Family Status Issues
Elsayed v. Comm'r	11994-17S	2/1/19	Filing Status	No	IRS	Family Status Issues
Englander v. Comm'r	12735-18	4/4/19	Alimony; Gross Income	Yes	IRS	Other (Alimony); Gross Income
Freeman v. Comm'r	17114-15L	10/15/18	Trust Fund Recovery Penalty; Lien; Levy	No	Split	CDP; Trust Fund Recovery Penalty
Freeman v. Comm'r	5641-18L	10/15/18	Trust Fund Recovery Penalty; Lien; Levy	No	Split	CDP; Trust Fund Recovery Penalty
Garcia v. Comm'r	15144-17L	7/2/18	Levy	Yes	IRS	CDP
Gibbs v. Comm'r	6413-17	6/6/18	Education Credit; IRA Contribution Deduction; Schedule A Itemized Deductions (*e.g.*, Casualty Loss); Accuracy Related Penalty	No	IRS	Other (Education Credit); Trade or Business; Schedule A Itemized Deductions; Accuracy Related Penalty

TABLE 12: Unpublished United States Tax Court Bench Orders

Case Name	Docket No.	Order Date	Issue(s)	*Pro Se*	Decision	Corresponding MLI Topic
Giller v. Comm'r	4472-18L	3/15/19	FTF Penalty; Levy	Yes	IRS	FTF/FTP Penalties; CDP
Guy-Fabiyi v. Comm'r	16086-17	6/11/18	Innocent Spouse Relief	Yes	IRS	Innocent Spouse
Hadid v. Comm'r	14213-18L	4/10/19	Levy	No	IRS	CDP
Hasson v. Comm'r	15265-17S	2/4/19	Profit or Loss from Business; Accuracy Related Penalty	Yes	IRS	Trade or Business; Accuracy Related Penalty
Hasson v. Comm'r	25142-17S	2/4/19	Profit or Loss from Business; Accuracy Related Penalty	Yes	IRS	Trade or Business; Accuracy Related Penalty
Herceg v. Comm'r	25247-16	10/30/18	Dependency Exemption; CTC	Yes	IRS	Family Status Issues
Hom v. Comm'r	9778-16L	9/19/18	Lien	Yes	IRS	CDP
Humiston v. Comm'r	27125-16S	7/18/18	Alimony; Accuracy Related Penalty	Yes	IRS	Other (Alimony); Accuracy Related Penalty
Humiston v. Comm'r	1164-17S	7/18/18	Alimony; Accuracy Related Penalty	Yes	IRS	Other (Alimony); Accuracy Related Penalty
Interventional Ctr. for Pain Mgmnt., P.C., v. Comm'r	4966-18L	11/28/18	Lien	No	Split	CDP
Kernan v. Comm'r	17606-17S	12/19/18	Unreimbursed Employee Business Expenses	Yes	IRS	Trade or Business
Lieber v. Comm'r	22228-17L	4/26/19	Levy	No	IRS	CDP
Maddox v. Comm'r	5549-18	5/9/19	Dependency Exemption; HOH; EIC	Yes	IRS	Family Status Issues; Gross Income
Manzueta v. Comm'r	1092-18S	4/10/19	Qualifying Child; EIC; CTC	Yes	IRS	Family Status Issues
McCallum v. Comm'r	16833-17	11/14/18	Unreimbursed Employee Business Expenses; Accuracy Related Penalty	Yes	Split	Trade or Business; Accuracy Related Penalty
McCullers v. Comm'r	7669-18	4/29/19	Trade or Business Expenses	Yes	IRS	Trade or Business
Michael v. Comm'r	16761-17S	12/6/18	Innocent Spouse Relief	No	Split	Innocent Spouse; Accuracy Related Penalty
Molina v. Comm'r	16398-17	10/12/18	CTC; EITC; Vehicle Expenses	Yes	IRS	Family Status Issues; Trade or Business
Morrison v. Comm'r	22482-17	6/8/18	Unreimbursed Employee Business Expenses; Home Office Deduction	Yes	Split	Trade or Business
Newburn v. Comm'r	24737-17L	2/11/19	Innocent Spouse Relief	No	IRS	Innocent Spouse
Nordberg v. Comm'r	1426-17	11/8/18	Annuity Payments	Yes	Split	Gross Income
Nuss v. Comm'r	22655-17S	11/9/18	Interest Income; Pension Distribution	Yes	IRS	Gross Income
Pennington v. Comm'r	19115-17SL	2/12/19	Lien	Yes	IRS	CDP

TABLE 12: Unpublished United States Tax Court Bench Orders

Case Name	Docket No.	Order Date	Issue(s)	*Pro Se*	Decision	Corresponding MLI Topic
Peterson v. Comm'r	11719-17L	10/15/18	Lien	Yes	TP	CDP
R&L Heating & Air Conditioning Inc. v. Comm'r	5495-18L	3/29/19	Lien; FTP Penalty	Yes	IRS	CDP; FTF/FTP Penalties
Rady v. Comm'r	24547-17	4/22/19	Gross Income; Accuracy Related Penalty	Yes	IRS	Gross Income; Accuracy Related Penalty
Rangel-Palacios v. Comm'r	20885-16	10/15/18	Property Tax, Mortgage Interest, Job Expenses, and Miscellaneous Schedule A Itemized Deductions	Yes	TP	Schedule A Itemized Deductions; Accuracy Related Penalty
Sansone v. Comm'r	24051-17S	11/19/18	Social Security Benefits; Workers Compensation	Yes	IRS	Gross Income
Saunders v. Comm'r	2805-18S	2/19/19	Education Credit	Yes	IRS	Other (Education Credit)
Scurlock v. Comm'r	13177-17	5/28/19	Unemployment Compensation; Gross Income	Yes	IRS	Gross Income
Shao v. Comm'r	8413-18S	3/28/19	Travel Expenses	Yes	TP	Trade or Business
Shi v. Comm'r	6852-17S	10/18/18	Profit or Loss from Business; Accuracy Related Penalty	Yes	IRS	Trade or Business; Accuracy Related Penalty
Sloan v. Comm'r	22471-17S	12/10/18	Profit or Loss from Business; Schedule A Itemized Deductions; Accuracy Related Penalty	Yes	Split	Trade or Business; Schedule A Itemized Deductions; Accuracy Related Penalty
Smelser v. Comm'r	20883-17	2/12/19	Innocent Spouse Relief	No	TP	Innocent Spouse
Thomas v. Comm'r	5680-18S	4/16/19	Innocent Spouse Relief	Yes	Split	Innocent Spouse
Thornton v. Comm'r	15248-17	7/2/18	Travel, Meal, Entertainment, and Vehicle Expense Deductions	No	Split	Accuracy Related Penalty; Trade or Business
Treverton v. Comm'r	12518-17S	7/24/18	Miscellaneous Unreported Income	Yes	IRS	Gross Income
Tukes v. Comm'r	9946-18	5/10/19	Profit or Loss from Business; Accuracy Related Penalty	Yes	Split	Trade or Business
Weatherup v. Comm'r	25370-17SL	12/27/18	OIC	Yes	IRS	CDP
Wheeler v. Comm'r	6104-17S	3/29/19	Moving Expenses; Travel Expenses	No	IRS	Trade or Business
Zagar v. Comm'r	15292-17S	4/12/19	Profit or Loss from Business	Yes	Split	Trade or Business
Zero Vector Sol., Inc. v. Comm'r	16803-16SL	1/31/19	Levy	Yes	Split	CDP

Appendix 6: Taxpayer Advocate Service Directory

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Appendix 7: Glossary of Acronyms

Acronym	Definition
AAB	Aggregate Assessed Balance
AARP	American Association of Retired Persons
ABA	American Bar Association
AC	Action Code
ACA	Affordable Care Act
ACS	Automated Collection System
ACSI	American Customer Satisfaction Index
ACSS	Automated Collection System Support
ACTC	Additional Child Tax Credit
AES	Advanced Encryption Standard
AFR	Agency Financial Report
AFSP	Annual Filing Season Program
AFTR	Annual Federal Tax Refresher
AGI	Adjusted Gross Income
AIA	Anti-Injunction Act
AICPA	American Institute of Certified Public Accountants
AIMS	Audit Information Management System
AJAC	Appeals Judicial Approach and Culture
AJCA	American Jobs Creation Act
ALE	Allowable Living Expenses
ALERTS	Automated Labor and Employee Relations Tracking System
AM	Accounts Management
AMS	Accounts Management System
AMT	Alternative Minimum Tax
AO	Appeals Officer
AOD	Action on Decision
AOTC	American Opportunity Tax Credit
APA	Administrative Procedure Act
APTC	Advance Premium Tax Credit
ARC	Annual Report to Congress
ASA	Average Speed of Answer
ASFP	Annual Season Filing Program
ASFR	Automated Substitute for Return
ASL	American Sign Language
ATAO	Application for Taxpayer Assistance Order
ATCL	Appeals Team Case Leader
ATE	Appeals Technical Employee
ATIN	Adoption Taxpayer Identification Number
AUR	Automated Underreporter
BBA	Bipartisan Budget Act

Acronym	Definition
BFS	Bureau of Fiscal Services
BIR	Bureau of Internal Revenue
BLS	Bureau of Labor Statistics
BMF	Business Master File
BOD	Business Operating Division
BPR	Business Performance Review
BSA	Bank Secrecy Act
BSM	Business Systems Modernization
BTA	Board of Tax Appeals
CA	Correspondence Audit
CAA	Certified Acceptance Agent
CADE	Customer Account Data Engine
CAF	Centralized Authorization File
CAP	Collection Appeals Program
CAR	Collection Activity Report
CBO	Congressional Budget Office
CC	Command Code
CCA	Chief Counsel Advice
CCDM	Chief Counsel Directives Manual
CCE	Compliance Center Exam
CCEO	Chief Customer Experience Officer
CCH	Commerce Clearing House
CCI	Centralized Case Intake
C-CPI-U	Chained Consumer Price Index for All Urban Consumers
CDDB	Custodial Detail Database
CDP	Collection Due Process
CDW	Compliance Data Warehouse
CE	Continuing Education
CEAS	Correspondence Examination Automated Support
CEO	Chief Executive Officer
CET	Correspondence Examination Technicians or Correspondence Guidelines for Examination Technicians
CFf	Collection Field Function
CFO	Chief Financial Officer
CFR	Code of Federal Regulations
CHIP	Children's Health Insurance Program
CI	Criminal Investigation (Division)
CIC	Coordinated Industry Cases
CIP	Compliance Initiative Projects
CIS	Collection Information Statement

Acronym	Definition
CNC	Currently Not Collectible
COD	Cancellation of Debt
COIC	Centralized Offer in Compromise
CONOPS	Concept of Operations
CP	Computer Paragraph
CPA	Certified Public Accountant
CPE	Continuing Professional Education
CPI	Consumer Price Index
CRS	Congressional Research Service or Common Reporting Standard
CSED	Collection Statute Expiration Date
CSO	Communication and Stakeholder Outreach
CSR	Customer Service Representative
CTC	Child Tax Credit
CX	Customer Experience
CY	Calendar Year
DAS	Discriminant Analysis System
DCI	Data Collection Instrument
DDb	Dependent Database
DDIA	Direct Debit Installment Agreement
DEFRA	Deficit Reduction Act of 1984
DI	Debt Indicator
DIF	Discriminant Index Function
DJA	Declaratory Judgement Act of 1934
DMDC	Defense Manpower Data Center
DOD	Department of Defense
DOJ	Department of Justice
DSP	Disability Severance Pay
EA	Enrolled Agent
EB	Economic Burden
ECM	Enterprise Case Management
EDCA	Executive Director Case Advocacy
EDP	Economic Development Program
EDSA	Executive Director Systemic Advocacy
EFDS	Electronic Fraud Detection System
EFT	Electronic Funds Transfer
EFTPS	Electronic Federal Tax Payment System
EGTRRA	Economic Growth and Tax Reconciliation Act of 2001
EH	Equivalent Hearing
EIC	Earned Income Credit
EIN	Employer Identification Number
EITC	Earned Income Tax Credit
EO	Exempt Organization

Acronym	Definition
EPST	Exam Planning Scenario Tool
EQRS	Embedded Quality Review System
ERO	Electronic Return Originator
ESL	English as a Second Language
ESOP	Employee Stock Ownership Plan
ETA	Effective Tax Administration
ETARAS	Electronic Tax Administration Research and Analysis System
ETLA	Electronic Tax Law Assistance
EWT	Estimated Waiting Time
FA	Field Audit
FAFSA	Free Application for Federal Student Aid
FAST	Fixing America's Surface Transportation Act
FATCA	Foreign Account Tax Compliance Act
FBAR	Report of Foreign Bank and Financial Accounts or Foreign Bank Account Report
FCA	Financial Conduct Authority
FCR	First Call Resolution or Federal Case Registry
FFI	Free File, Inc. or Foreign Financial Institution
FFRF	Freedom From Religion Foundation
FICA	Federal Insurance Contributions Act
FIPIT	Field Inventory Process Improvement Team
FMIS	Financial Management Information System
FOIA	Freedom of Information Act
FPAA	Final Partnership Administrative Adjustment
FPL	Federal Poverty Level
FPLP	Federal Payment Levy Program
FPR	False Positive Rate
FRCP	Federal Rule of Civil Procedure
FS	Filing Season
FTC	Foreign Tax Credit or Federal Trade Commission
FTD	Federal Tax Deposit
FTE	Full-time Equivalents
FTF	Failure To File
FTL	Federal Tax Lien
FTP	Failure To Pay
FY	Fiscal Year
GAO	Government Accountability Office
GDP	Gross Domestic Product
GSA	General Services Administration
HCD	Human-Centered Design
HCO	Human Capital Office
HHI	Household Income
HHS	Health and Human Services

Acronym	Definition
HIV	Human Immunodeficiency Virus
HMRC	Her Majesty's Revenue and Customs
HOH	Head of Household
HUD	Housing and Urban Development
IA	Installment Agreement
IBFD	Independent Bureau of Fiscal Documentation
IBTF	In-Business-Trust-Fund
IC	Industry Cases
ICAS	Internet Customer Account Services
IDES	International Data Exchange System
IDR	Information Document Request
IDRS	Integrated Data Retrieval System
IDS	Inventory Delivery System
IDT	Identity Theft
IGA	Intergovernmental Agreements
IGM	Interim Guidance Memorandum
IIC	International Individual Compliance
IITA	International Individual Taxpayer Assistance
IMD	Internal Management Document
IMF	Individual Master File
IOAA	Independent Offices Appropriations Act
IP PIN	Identity Protection Personal Identification Number
IPERA	Improper Payments Elimination and Recovery Act of 2010
IPERIA	Improper Payments Elimination and Recovery Improvement Act of 2012
IPIA	Improper Payments Information Act of 2002
IPTW	Inverse Probability of Treatment Weighing
IRA	Individual Retirement Account
IRB	Internal Revenue Bulletin
IRC	Internal Revenue Code
IRI	Information Return Item
IRM	Internal Revenue Manual
IRMF	Information Returns Master File
IRP	Information Return Program
IRS	Internal Revenue Service
IRSAC	Internal Revenue Service Advisory Council
IRTF	Individual Returns Transaction File
ISRP	Individual Shared Responsibility Payment
IT	Information Technology
ITA	Interactive Tax Assistant
ITIN	Individual Taxpayer Identification Number
IVO	Integrity and Verification Operation
JCT	Joint Committee on Taxation

Acronym	Definition
JOC	Joint Operations Center
LB&I	Large Business and International Operating Division
LEP	Limited English Proficiency
LIF	Low Income Filter
LII	Low Income Indicator
LITC	Low Income Taxpayer Clinic
LLC	Limited Liability Company
LLP	Limited Liability Partnership
LM	Legal Memoranda
LOS	Level of Service
LR	Legislative Recommendation
LTA	Local Taxpayer Advocate
LUQ	Large, Unusual and Questionable Items
MANCOVA	Multivariate Analysis of Covariance
MAP	Monthly Assessment of Performance
MEA	Math Error Authority
MEF	Modernized Electronic Filing
MFJ	Married Filing Joint
MFS	Married Filing Separately
MFT	Master File Transcript
MLI	Most Litigated Issue
MOU	Memorandum of Understanding
MSA	Metropolitan Statistical Area
MSP	Most Serious Problem
MTLP	Municipal Tax Levy Program
MVRA	Mandatory Victim's Restitution Act
NALT	North American Land Trust
NASCO	National Association of State Charity Officials
NBER	National Bureau of Economic Research
NCLC	National Consumer Law Center
NDS	Notice Delivery System
NFTL	Notice of Federal Tax Lien
NIST	National Institute of Standards and Technology
NOL	Net Operating Loss
NPS	National Insurance and PAYE Service
NQRS	National Quality Review System
NRP	National Research Program
NSA	National Society of Accountants
NTA	National Taxpayer Advocate
NTEE	National Taxonomy of Exempt Entities
NTEU	National Treasury Employees Union
OA	Office Audit

Acronym	Definition
OAR	Operations Assistance Request
OCC	Office of Chief Counsel
OD	Operating Division
OECD	Organisation for Economic Co-operation and Development
OIC	Offer in Compromise
OLC	Office of Legal Counsel
OLS	Office of Online Services
OMB	Office of Management and Budget
OPA	Online Payment Agreement
OPI	Over the Phone Interpreter
OPR	Office of Professional Responsibility or Operational Performance Rate
OS	Operations Support
OTC	Office of Taxpayer Correspondence
OUO	Official Use Only
OVD	Offshore Voluntary Disclosure
PAC	Program Action Case
PACER	Public Access to Court Electronic Records
PAL	Property Appraisal and Liquidation Specialists
PATH	Protecting Americans from Tax Hikes
PAYE	Pay-As-You-Earn
PAYG	Pay-As-You-Go
PCA	Private Collection Agency
PCI	Potentially Collectible Inventory
PCIC	Primary Core Issue Code
PDC	Private Debt Collection
PFA	Pre-Filing Agreement
PIC	Program Integrity Cap
PII	Personally Identifiable Information
PIN	Personal Identification Number
PLR	Private Letter Ruling
PM	Program Manager
PMTA	Program Manager Technical Advice
POA	Power of Attorney
POMS	Program Operations Manual System
PPG	Policy and Procedure Guide
PPIA	Partial Payment Installment Agreement
PPS	Practitioner Priority Service
PRWVH	Pre-Refund Wage Verification Hold
PSP	Payroll Service Provider
PTC	Premium Tax Credit
PTIN	Preparer Tax Identification Number
PTSD	Post-Traumatic Stress Disorder

Acronym	Definition
PY	Processing Year
QBI	Qualified Business Income
QC	Qualifying Child
QTE	Qualified Tax Expert
RA	Revenue Agent
RAAS	Research, Analysis, and Statistics or Research, Applied Analytics, and Statistics
RAC	Refund Anticipation Check
RAD	Research Analysis and Data
RAL	Refund Anticipation Loan
RAND	Research and Development
RAS	(Office of) Research, Analysis and Statistics
RCA	Reasonable Cause Assistant
RCEO	Refundable Credits Examination Operation
RCP	Reasonable Collection Potential
RD	Return Delinquency
RDC	Research Development Center
RDD	Return Due Date
REI	Real Economic Impact
RIA	Research Institute of America
RICS	Return Integrity and Correspondence Services
RIO	Return Integrity Operations
RIVO	Return Integrity & Verification Operations
RO	Revenue Officer
ROI	Return on Investment
RPC	Return Preparer Coordinator
RPM	Return Preparer Misconduct
RPO	Return Preparer Office
RPP	Return Preparer Program or Return Preparer Provider
RRA 98	Internal Revenue Service Restructuring and Reform Act of 1998
RRP	Return Review Program
RUFI	Reduced User Fee Indicator
SAM	Strategic Analysis and Modeling
SAMS	Systemic Advocacy Management System
SB/SE	Small Business/Self-Employed Operating Division
SBA	Small Business Administration
SCA	Service Center Advice
SCIC	Secondary Core Issue Code
SCPP	Special Compliance Personnel Program
SE	Self Employed
SECA	Self-Employment Contributions Act
SERP	Servicewide Electronic Research Program
SFR	Substitute for Return

Acronym	Definition
SIA	Streamlined Installment Agreement
SIGTARP	Special Inspector General for the Troubled Asset Relief Program
SITLP	State Income Tax Levy Program
SL	Stakeholder Liaison
SLA	Service Level Agreement
SME	Small/Medium Enterprise
SMS	Short Messaging Service
SNAP	Supplemental Nutrition Assistance Program
SNIP	Servicewide Notice Information Program
SNOD	Statutory Notice of Deficiency
SO	Settlement Officer
SOI	Statistics of Income
SOL	Statute of Limitations
SP	Submission Processing
SPEC	Stakeholder Partnerships, Education & Communication
SPP	Service Priorities Project
SSA	Social Security Administration
SSDI	Social Security Disability Insurance or Income
SSF	Slippery Slope Framework
SSI	Supplemental Security Income
SSN	Social Security Number
TA	Taxpayer Advocate or Technical Assistance Memoranda
TAB	Taxpayer Assistance Blueprint
TAC	Taxpayer Assistance Center
TACT	Taxpayer Communications Taskgroup
TAD	Taxpayer Advocate Directive
TAMIS	Taxpayer Advocate Management Information System
TANF	Temporary Assistance to Needy Families
TAO	Taxpayer Assistance Order
TAP	Taxpayer Advocacy Panel
TAR	Tax Agency Reconciliations
TARD	Taxpayer Advocate Received Date
TAS	Taxpayer Advocate Service
TASIS	Taxpayer Advocate Service Integrated System
TBD	To Be Determined
TBOR	Taxpayer Bill of Rights
TC	Transaction Code
TCE	Tax Counseling for the Elderly
TCJA	Tax Cuts and Jobs Act
TCMP	Tax Compliance Measurement Program

Acronym	Definition
TCO	Tax Compliance Officer
TDA	Taxpayer Delinquent Account
TDC	Taxpayer Digital Communication
TDI	Taxpayer Delinquent Investigation
TE	Tax Examiner
TE/GE	Tax Exempt & Government Entities Operating Division
TEFRA	Tax Equity and Fiscal Responsibility Act
TES	Taxpayer Experience Survey
TFA	Taxpayer First Act
TFAO	Taxpayer First Act Office
TFRP	Trust Fund Recovery Penalty
TGR	Total Gross Receipts
TIA	Tax Injunction Act or Tax Implementation Agreement
TIGTA	Treasury Inspector General for Tax Administration
TIN	Taxpayer Identification Number
TIPRA	Tax Increase Prevention and Reconciliation Act
TLCATS	Tax Litigation Counsel Automated Tracking System
TP	Taxpayer
TPC	Third Party Contact
TPI	Total Positive Income
TPNC	Taxpayer Notice Code
TPP	Taxpayer Protection Program
TRIO	Tax Reform Implementation Office
TSR	Telemarketing Sales Rule
TY	Tax Year
UK	United Kingdom
UNAX	Unauthorized Access of Taxpayer Account
USC	United States Code
USPS	United States Postal Service
USVI	United States Virgin Islands
VAT	Value Added Tax
VBD	Voice Balance Due
VC	Voluntary Compliance
VFTF	Virtual Face-to-Face
VIBIR	Virgin Islands Bureau of Internal Revenue
VITA	Volunteer Income Tax Assistance
VOIP	Voice Over Internet Protocol
VSD	Virtual Service Delivery
W&I	Wage and Investment Operating Division
WVP	Wage Verification Program
YTD	Year to Date

TAXPAYER ADVOCATE SERVICE

YOUR VOICE AT THE IRS

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