

Area of Focus #7 **The IRS Has Expanded Its Math Error Authority, Reducing Due Process for Vulnerable Taxpayers, Without Legislation and Without Seeking Public Comments**

TAXPAYER RIGHTS IMPACTED¹

- *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*

DISCUSSION

When the IRS processes a return that contains a math or clerical error (*e.g.*, omitting a required Taxpayer Identification Number), it is authorized to change the return and summarily assess tax — without first providing the taxpayer a “notice of deficiency,” which grants taxpayers the right to access the Tax Court.² Ever since its enactment in 1926, the IRS has sought to expand this authority (called “math error authority” or MEA).³ For example, since 2012 the Treasury has been asking Congress to authorize it to use its regulatory authority to expand the types of issues it could address using MEA (called “correctable error” authority).⁴

The IRS Recently Discovered Long-Dormant “Post-Processing” Math Error Authority

Although Congress has been willing to authorize use of MEA in specific instances, it has so far declined to give the IRS a broad grant of authority to issue regulations to expand the types of issues it could

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 Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401(a), 129 Stat. 2242, 3117 (2015) (codified at IRC § 7803(a)(3)). Division Q is also called the Protecting Americans from Tax Hikes (PATH) Act.

² See IRC § 6213(b), (g).

³ The Revenue Act of 1926, Pub. L. No. 69-20 § 274(f), 44 Stat 9, 56 (1926) (codified at IRC §§ 6213(b), (g)). In 1976, when math error authority (MEA) was expanded to include “clerical” errors, a House report said that “[t]he term mathematical error, has been interpreted by the Service to include several types of error which are broader in nature than literal errors of arithmetic.... Court opinions, however, generally have limited the scope of the term, mathematical error, to arithmetic errors involving numbers which are themselves correct.” H.R. Rep. No. 94-658, at 289 (1976).

⁴ See, *e.g.*, Department of the Treasury, *General Explanations of the Administration's Fiscal Year 2013 Revenue Proposals* 168–169 (Feb. 2012); Department of the Treasury, *General Explanations of the Administration's Fiscal Year 2017 Revenue Proposals* 225–226 (Feb. 2016). The Treasury Inspector General for Tax Administration (TIGTA) appears to support this recommendation. See, *e.g.*, TIGTA, Rep. No. 2016-40-036, *Without Expanded Error Correction Authority, Billions of Dollars in Identified Potentially Erroneous Earned Income Credit Claims Will Continue to Go Unaddressed Each Year* (Apr. 27, 2016). For concerns about it, see, *e.g.*, National Taxpayer Advocate 2015 Annual Report to Congress 329–339; National Taxpayer Advocate 2017 Purple Book 44-45; Nathan J. Richman, *Expanding Math Error Authority Could Worsen 2 Tax Systems Issues*, 2017 TNT 127-2 (July 05, 2017).

address using MEA.⁵ However, the IRS recently issued a Program Manager Technical Advice (PMTA), which concludes it is authorized to use MEA *after* it has processed returns and issued refunds, expanding MEA without legislation and without issuing a regulation.⁶

Particularly when the IRS's adjustments are incorrect, this expansion will have a significant adverse effect on the *rights to pay no more than the correct amount of tax and to appeal an IRS decision in an independent forum*. It will also increase the likelihood that low income taxpayers who rely on the earned income tax credit (EITC) for the means to live will be deprived of it without sufficient due process, raising questions about the constitutionality of using post-processing MEA for this purpose — questions that the IRS has not seriously considered.

Math Error Procedures Raise Concerns When the Assessments Are Erroneous

As discussed in prior reports, the IRS's pre-existing MEA raises the following concerns when the resulting assessments are (or may be) erroneous:⁷

- The IRS does not try to resolve apparent discrepancies before burdening taxpayers with summary assessments that they are expected to disprove;⁸
- IRS communication difficulties, fewer letters (*i.e.*, one math error notice vs. three or more letters from exam), and shorter deadlines (*i.e.*, 60 days vs. more than 120 days in an exam) make it more difficult for taxpayers to respond timely (*e.g.*, because they want to call the IRS to make sure they understand the letter before responding);
- Because it is easier to miss math error deadlines, more taxpayers — particularly low income taxpayers — will lose access to the Tax Court; and
- Internal Revenue Code § 7605(b) generally prohibits the IRS from examining a return more than once, but the IRS can examine a return after making a math error adjustment.⁹

5 For example, Section 203(e) of the PATH Act (codified at IRC § 6213(g)(2)(O)) expanded the definition of a math or clerical error to encompass the inclusion on a return of an Individual Taxpayer Identification Number which has expired, been revoked by the Secretary, or is otherwise invalid. There are now 17 specific types of errors that can trigger a math error adjustment. See IRC § 6213(g)(2)(A)-(Q).

6 Memo from Deputy Associate Chief Counsel (Procedure & Administration) to National Taxpayer Advocate, POSTS-129453-17, *TIGTA Report/Section 6213 Math Error Assessment Authority* (Apr. 10, 2018).

7 See, *e.g.*, National Taxpayer Advocate 2014 Annual Report to Congress 163; National Taxpayer Advocate 2013 Annual Report to Congress vol. 2, 5, 91-92; National Taxpayer Advocate 2011 Annual Report to Congress 74; National Taxpayer Advocate 2006 Annual Report to Congress 311; National Taxpayer Advocate 2003 Annual Report to Congress 113; National Taxpayer Advocate 2002 Annual Report to Congress 25, 186; National Taxpayer Advocate 2001 Annual Report to Congress 33. These concerns would all be heightened if the IRS had authority to use correctable error or math error authority more broadly, as it has proposed.

8 As an example, a TAS study of math errors triggered by incorrect Taxpayer Identification Numbers (TINs) found that the IRS subsequently reversed at least part of these math errors on 55 percent of the returns. National Taxpayer Advocate 2011 Annual Report to Congress vol. 2, 114, 120 (Research Study: *Math Errors Committed on Individual Tax Returns – A Review of Math Errors Issued on Claimed Dependents*). The IRS could have resolved 56 percent of these errors using information already in its possession (*e.g.*, a similar TIN listed for the same dependent on a prior year return), rather than assessing tax and asking the taxpayer to explain the apparent discrepancy. *Id.* Because it did not do this work before assessing math errors, the IRS burdened taxpayers, as well as its own employees who had to process the abatements. Moreover, in 41 percent of the cases where the IRS could have corrected the TINs (and in another 11 percent where it could have corrected at least one TIN) without contacting the taxpayer, the taxpayer did not respond and was denied a tax benefit — \$1,274 on average — that he or she was eligible to receive. *Id.*

9 See National Taxpayer Advocate 2017 Annual Report to Congress 49–63.

The IRS's Newfound Post-Processing Math Error Authority Raises Additional Concerns

The IRS plans to use its newfound post-processing MEA to recover refundable credits, including the EITC, from taxpayers over a year after processing their returns.¹⁰ Post-processing adjustments make it more difficult for taxpayers to:

- Discuss the issue with a preparer who could help them respond;
- Access underlying documentation to demonstrate eligibility;
- Recall and explain relevant facts;
- Return any refunds (or endure an offset) without experiencing an economic hardship; and
- Learn how to avoid the problem before the next filing season.

Perhaps for the same reasons, the law limits how long after filing the IRS can make assessments, and the IRS tries to maintain the “currency” of its audits.¹¹ If the IRS is doing a good job, it should be able to detect math and clerical errors while processing returns. If the IRS took seriously the taxpayer’s *right to quality service*, it would flag such discrepancies when processing return filings or not at all.¹² Such a policy would avoid penalizing taxpayers for the IRS’s lack of timeliness in detecting potential discrepancies. Moreover, there does not seem to be a good reason to reduce the due process we provide to taxpayers if the issue is so complicated that the IRS cannot even detect the error when processing the return.

The IRS's Analysis Did Not Seriously Consider Due Process Concerns

The law does not explicitly bar the IRS from using MEA after processing the return or authorize it to do so.¹³ However, there is no indication that Congress contemplated post-processing MEA. A 1929 House report said the IRS could make math error assessments “at any time,” but it was merely distinguishing the math error assessment process from regular deficiency procedures, under which an assessment could only be made after the period for filing an appeal had expired.¹⁴ There would not have been a need for post-processing adjustments in 1926 because MEA only applied to arithmetic errors appearing on the face of the return, which the IRS detected while processing returns.

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- 10 IRS Response to TAS Information Request (Apr. 17, 2018). The IRS has committed to address a recommendation by TIGTA to recover refundable credits claimed on returns filed in 2016. See TIGTA, Ref. No. 2017-40-042, *Processes Do Not Maximize the Use of Third-Party Income Documents to Identify Potentially Improper Refundable Credit Claims* (July 17, 2017); TIGTA, Ref. No. 2018-40-032, *The Internal Revenue Service Is Not in Compliance with Improper Payment Requirements 11–12* (Apr. 9, 2018).
- 11 IRC § 6501(a) (assessment limitations period); IRS, *Reducing the Federal Tax Gap, A Report on Improving Voluntary Compliance 36* (Aug. 2, 2007), https://www.irs.gov/pub/irs-news/tax_gap_report_final_080207_linked.pdf (discussing audit currency).
- 12 The concerns with post-processing MEA would all be heightened if Congress were to authorize the IRS to address facts and circumstances inquires using correctable error authority. In addition, post-processing MEA will not reduce the improper payment rate because that rate is supposed to be determined without regard to payments that are subsequently recovered. See Government Accountability Office (GAO), GAO-18-377, *IMPROPER PAYMENTS: Actions and Guidance Could Help Address Issues and Inconsistencies in Estimation Processes* (May 2018).
- 13 IRC § 6213(b)(1). When first enacted in 1929, the law said:
[i]f the taxpayer is notified that, on account of a mathematical error appearing on the face of the return an amount of tax in excess of that shown upon the return is due, and that an assessment of the tax has been or will be made on the basis of what would have been the correct amount of tax but for the mathematical error, such notice shall not be considered ... as a notice of a deficiency ... nor shall such assessment or collection be prohibited... [as it is when the IRS issues a notice of deficiency]. The Revenue Act of 1926, Pub. L. No. 69-20 § 274(f), 44 Stat. 9, 56 (1926).
- 14 H.R. Rep. No. 69-1, at 11 (1926) (section 274(f) “provides that in the case of a mere mathematical error appearing upon the face of the return, assessment of a tax due to such mathematical error may be made at any time and that such assessment shall not be regarded as a deficiency notification.”).

The IRS's recent PMTA did not seriously consider whether the IRS's interpretation could be held to violate procedural due process.¹⁵ Due process “is flexible and calls for such procedural protections as the particular situation demands.”¹⁶ Accordingly, more process is required when the government deprives people with literacy challenges and language barriers of the means to live (*e.g.*, terminating welfare benefits) than when it collects taxes from sophisticated, high-income taxpayers.

A sophisticated taxpayer can obtain pre-payment judicial review of a math error adjustment by timely figuring out how to file a petition, and a wealthy one can pay the tax and obtain post-payment judicial review. Moreover, in 1931 the Supreme Court indicated that due process does not require the government to provide a sophisticated taxpayer with the right to petition a court to re-determine his tax liability before paying.¹⁷

However, it was not until 1975 that Congress enacted today's EITC, a means-tested tax credit to assist the working poor.¹⁸ Because the recovery of EITC is more like the termination of welfare than a tax, it is likely that the government is required to offer more procedural protection before recovering EITC than before collecting taxes.

In 1970, the Supreme Court held the government must provide a hearing to welfare recipients before terminating their benefits.¹⁹ The hearing must permit them to appear personally with or without counsel before the decision-making official and to confront or cross-examine adverse witnesses.²⁰ It explained the “termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits.”²¹ Moreover, “written submissions are an unrealistic option for most [welfare] recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance.”²² In other words, the government is required to provide more process when it is depriving potentially illiterate individuals of their “means to live” (*e.g.*, by recovering EITC) than when it is merely collecting taxes from sophisticated, high-income individuals.

While the IRS's procedures may satisfy the requirements of procedural due process, the government should not assume that they do without seriously considering this issue in the context of the EITC.²³ For example, the PMTA did not discuss whether the IRS's automated math error procedures sufficiently empower EITC recipients who “lack the educational attainment necessary to write effectively and

15 Memo from Deputy Associate Chief Counsel (Procedure & Administration) to National Taxpayer Advocate, POSTS-129453-17, *TIGTA Report/Section 6213 Math Error Assessment Authority* (Apr. 10, 2018).

16 *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (internal citations omitted).

17 See, *e.g.*, *Phillips v. Comm'r*, 283 U.S. 589 (1931). See also *Bob Jones Univ. v. Simon*, 416 U.S. 725, 746–48 (1974) (post-deprivation hearing sufficient when revoking tax exemption); *Todd v. United States*, 849 F.2d 365, 369 (9th Cir. 1988) (collecting cases). A pre-deprivation hearing is not even required before terminating disability benefits. See *Mathews v. Eldridge*, 424 U.S. 319 (1976).

18 See Pub. L. No. 94-12, § 204, 89 Stat. 26 (1975) (codified at IRC § 32).

19 *Goldberg v. Kelly*, 397 U.S. 254 (1970). *Accord Sniadach v. Family Fin. Corp. of Bay View*, 395 U.S. 337 (1969) (pre-deprivation hearing required before garnishing half of a person's wages).

20 *Goldberg v. Kelly*, 397 U.S. at 268 (1970).

21 *Goldberg v. Kelly*, 397 U.S. at 264. *Mathews* distinguished disability from welfare benefits, in part, on the basis that disability benefits are “not based upon financial need.” *Mathews v. Eldridge*, 424 U.S. 319, 340 (1976).

22 *Goldberg v. Kelly*, 397 U.S. at 264.

23 See, *e.g.*, Leslie Book, *Annual TIGTA Review of IRS Erroneous Payments and The Possible Expansion of Math Error Powers*, PROCEDURALLY TAXING BLOG (Dec. 22, 2014), <http://procedurallytaxing.com/annual-tigta-review-of-irs-erroneous-payments-and-the-possible-expansion-of-math-error-powers> (suggesting the use of MEA to disallow EITC benefits could raise constitutional concerns); Megan Newman, *The Low-Income Tax Gap: The Hybrid Nature of the Earned Income Tax Credit Leads to its Exclusion from Due Process Protection*, 64 TAX LAW. 719 (2011) (discussing related issues).

who cannot obtain professional assistance” to figure out how to obtain a hearing and show they were entitled to the EITC they claimed.²⁴ MEA procedures do not even require the IRS to send notice to the taxpayer’s last known address, as required for a notice of deficiency.²⁵ Even if the IRS’s procedures are sufficient, a court might try to avoid this analysis by holding that the statute does not authorize the IRS to use MEA post-processing.²⁶

In addition, if the IRS wants to take the unprecedented step of using post-processing MEA, it should do so only after considering public comments and issuing a final regulation. Even a regulation could be subject to challenge.²⁷ In the absence of a validly-adopted regulation, however, the IRS’s position will be given more limited deference (if any) by a court.²⁸ More importantly, public comments received as part of the rulemaking process could help inform the IRS’s consideration of these issues.

CONCLUSION

After nearly 100 years, the IRS has suddenly decided that it has post-processing MEA, which it may use to require taxpayers to prove they are entitled to benefits long after filing their returns, when they are less likely to recall the relevant facts or to have access to relevant records, a preparer, or refunds that have been expended. The IRS made this historic expansion of MEA without express legal authority and without first asking for public comments from stakeholders.

FOCUS FOR FISCAL YEAR 2019

In fiscal year 2019, TAS will:

- Advocate for the IRS not to apply math error adjustments after processing returns; and
- If the IRS decides to move forward with this expansion of its MEA, advocate for it to do so only after issuing a proposed regulation and considering public comments from stakeholders.

24 *Goldberg v. Kelly*, 397 U.S. at 264.

25 Compare IRC § 6212 (requiring notice of deficiency that includes a phone number for the Local Taxpayer Advocate to be mailed by certified or registered mail to the taxpayer’s last known address) with IRC § 6213(b)(1) (requiring only that a math error notice contain an explanation of the alleged error). Even if the IRS uses the same mailing addresses and procedures for math error notices, the more limited statutory requirement means there fewer remedies when the taxpayer does not receive the notice.

26 See, e.g., *Nat’l Cable Television Assn., Inc. v. United States et al.*, 415 U.S. 336 (1974) (reading the user fee law narrowly to avoid constitutional problems).

27 5 U.S.C. § 551 *et seq.*

28 Legislative rules, adopted after notice and comment, are generally entitled to deference unless they (1) contradict an unambiguous statute, or (2) adopt an unreasonable construction of it. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Other agency pronouncements are not. See, e.g., *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (“[T]he weight [accorded to an agency judgment] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”). For further discussion of the appropriate standard of review, see, e.g., *Kristin E. Hickman, IRB Guidance: The No Man’s Land of Tax Code Interpretation*, 2009 Mich. St. L. Rev. 239, 260 (2009) (“Since the Court’s decision in *Mead*, most courts and commentators have assumed or concluded that *Skidmore* provides the appropriate evaluative standard for revenue rulings and, to a lesser extent, other IRB guidance as well, although not everyone agrees.”). However, judicial doctrines requiring deference to agency interpretations have been subject to significant limitations in recent years. See, e.g., Richard Pierce, *The Future of Deference*, 84 GEO. WASH. L. REV. 1293, 1299–1308 (2016).