Significant Cases

This section describes cases that do not involve the ten most litigated issues, but highlight important issues relevant to federal tax administration.[1] Cases relevant to the National Taxpayer Advocate's recommendations are summarized immediately below, and other significant cases of interest to a broad range of stakeholders are summarized further below.

In *Myers v. Commissioner*, the U.S. Court of Appeals for the D.C. Circuit held that the deadline under IRC § 7623(b)(4) for filing a petition with the Tax Court for the review of a whistleblower award was subject to equitable tolling.[2]

> **Significance**: The dispute in *Myers* reminds us that the Tax Court does not always have jurisdiction to determine if equitable considerations (*e.g.*, the IRS's confusing communications) extended the filing deadline under the equitable tolling doctrine. Because low-income taxpayers often miss filing deadlines for reasons beyond their control, the National Taxpayer Advocate has recommended legislation that would allow courts to consider if equitable tolling would make their filings timely.[3] Such a change would further a taxpayer's rights *to appeal an IRS decision in an independent forum* and *to a fair and just tax system*.[4] This case highlights the need for legislation because, although it addresses the problem for whistleblowers, it does not solve the problem for taxpayers in other contexts.

Summary

Mr. Myers filed Form 211, Application for Award of Original Information, with the IRS's Whistleblower Office (WBO). He sought a monetary award under IRC § 7623(b), alleging that his former employer intentionally misclassified him and other employees as independent contractors. In four letters written to Mr. Myers and sent by regular mail, the WBO declined to pay an award. The letters did not state they were determinations under the statute. Nor did they explain that to contest the determination, Mr. Myers needed to file a Tax Court petition within 30 days. Apparently confused about what to do next, he wrote to various government officials.

---

1 When identifying the ten most litigated issues, TAS analyzed federal decisions issued during the period beginning on June 1, 2019, and ending on May 31, 2020. For purposes of this section, we used the same period.

2 *Myers v. Comm'r*, 928 F.3d 1025 (D.C. Cir. 2019), *reh'g denied*, 2019 U.S. App. LEXIS 30046 (D.C. Cir. Oct. 4, 2019).

3 *See* National Taxpayer Advocate 2021 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration* 100-102 (*Provide That the Time Limits for Bringing Tax Litigation Are Subject to the Judicial Doctrines of Forfeiture, Waiver, Estoppel, and Equitable Tolling*). The low income taxpayer clinic at the Legal Services Center of Harvard Law School filed an *amicus* brief in this case on behalf of Mr. Myers. *See* Carlton Smith, *D.C. Circuit Denies DOJ En Banc Rehearing Petition in* Myers *Whistleblower Case*, Procedurally Taxing Blog (Oct. 9, 2019), https://procedurallytaxing.com/d-c-circuit-denies-doj-en-banc-rehearing-petition-in-myers-whistleblower-case/; Carlton Smith, *D.C. Circuit Holds Tax Court Whistleblower Award Filing Deadline Not Jurisdictional and Subject to Equitable Tolling*, Procedurally Taxing Blog (July 3, 2019), https://procedurallytaxing.com/d-c-circuit-holds-tax-court-whistleblower-award-filing-deadline-not-jurisdictional-and-subject-to-equitable-tolling/.

4 IRC § 7803(a)(3).

After receiving no satisfactory responses, Mr. Myers filed a petition *pro se* with the Tax Court. He filed after the 30-day deadline provided by IRC § 7623(b)(4). IRC § 7623(b)(4) says:

> Any determination regarding an award … may, within 30 days of such determination, be appealed to the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter).

Based on this language, the Tax Court concluded that the deadline provided by IRC § 7623(b)(4) is "jurisdictional." Thus, it had no jurisdiction to consider if the IRS's confusing communications extended the deadline under the doctrine of equitable tolling. The Tax Court dismissed the case for lack of jurisdiction.[5] The U.S. Court of Appeals for the D.C. Circuit reversed and remanded so the Tax Court could consider if the doctrine would make the filing timely.

Without a "clear statement" indicating that a deadline is jurisdictional, it is merely a claim-processing rule, and is presumed to be subject to equitable tolling, according to the Supreme Court.[6] The IRS argued before the D.C. Circuit that the statutory grant of jurisdiction in IRC § 7623(b)(4) "with respect to such matter" limited jurisdiction to matters appealed "within 30 days." Unconvinced, the court concluded that "such matter" could refer to determining the award under certain provisions (rather than on timing).[7] The court also observed the Supreme Court has not yet identified a single filing deadline that meets the "clear statement" test.[8]

Next, the court said there was no reason to believe Congress intended to exclude whistleblower claims from the equitable tolling doctrine. Two factors supported applying the doctrine: (1) the Tax Court is not an internal administrative body, and (2) Tax Court petitioners are typically *pro se* individuals who have never petitioned the Tax Court before. The only factor in the IRS's favor was "[t]hat the whistleblower award statute is not unusually protective of claimants."[9]

The Tax Court may now apply equitable tolling to review the appeal of whistleblower award determinations otherwise late. Because the D.C. Circuit is the sole appellate jurisdiction for whistleblower award appeals from the Tax Court, this is a nationwide victory for whistleblowers.

Perhaps even more important, the language of the whistleblower filing deadline (*i.e.*, IRC § 7623(b)(4)) mirrors the language of the collection due process filing deadline (*i.e.*, IRC § 6330(d)(1)), which the Ninth Circuit found was jurisdictional.[10] Thus, taxpayers outside the Ninth Circuit may now have an easier time arguing that the collection due process filing deadline is subject to equitable tolling. The ruling arguably creates a split with the Ninth Circuit, which could prompt the Supreme Court to review the issue.

---

5 *Myers v. Comm'r*, 148 T.C. 438 (2017).

6 *See*, *e.g.*, *U.S. v. Kwai Fun Wong*, 575 U.S. 402 (2015) and the cases cited therein.

7 *Myers*, 928 F.3d at 1035, n ‡. The court distinguished this grant of jurisdiction in IRC § 7623(b)(4) from the one applicable to innocent spouse cases (in IRC § 6015(e)(1)(A)), which depends on the timing of the appeal (*i.e.*, limiting the Tax Court's jurisdiction with respect to such matter "if such petition is filed — [during a certain time period]").

8 *Myers*, 928 F.3d at 1035.

9 The D.C. Circuit also dismissed the government's argument that the filing deadline for whistleblower awards in Tax Court is similar to an internal administrative filing deadline, which the Supreme Court said was not subject to equitable tolling in *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145 (2013).

10 *Duggan v. Comm'r*, 879 F.3d 1029, 1034 (9th Cir. 2018). Some have argued that the analysis in *Duggan* is incomplete. *See*, *e.g.*, Bryan T. Camp, *New Thinking About Jurisdictional Time Periods in the Tax Code*, 73 The Tax Lawyer 1-60 (Fall 2019).

In *In re Shek*, the U.S. Court of Appeals for the Eleventh Circuit held that a tax debt assessed on a late-filed tax return was dischargeable in bankruptcy.[11]

> **Significance**: *In re Shek* illustrates inconsistencies faced by taxpayers in different circuits regarding whether debts arising from late-filed returns are subject to discharge.[12] Previously, the National Taxpayer Advocate recommended legislation that would remove these inconsistencies by establishing a uniform rule.[13] Such legislation would further a taxpayer's rights *to be informed* and *to a fair and just tax system*.[14] It might also reduce the need for litigation about which tax debts are discharged in bankruptcy.

Summary

Mr. Shek filed his 2008 state income tax return with the Massachusetts Department of Revenue (DOR) seven months late and did not pay the assessment. Six years later, he received a discharge in bankruptcy. After the DOR resumed collection activities, Mr. Shek moved to reopen his bankruptcy to determine if the discharge encompassed his state tax debt. The bankruptcy court held that his state tax liability had been discharged.[15] The district court affirmed,[16] and the U.S. Court of Appeals for the Eleventh Circuit also affirmed.

Under 11 U.S.C. § 523(a)(1)(B), there is an exception to discharge for tax liabilities (federal and state) with respect to which a return was (i) not filed or (ii) filed late and within two years before the bankruptcy. If something was filed, disputes center on whether the filing was a "return" under the discharge rules and when it was filed.

Whether a document is a "return" under the tax rules depends on whether it was an "honest and reasonable attempt" to satisfy the law, but does not depend on whether it was timely filed.[17] In 2005, Congress attempted to clarify the bankruptcy discharge rules by amending 11 U.S.C. § 523(a) to include a so-called "hanging paragraph."[18] This paragraph defines a "return" under the discharge rules as a filing that:

> satisfies the requirements of applicable nonbankruptcy law (including *applicable filing requirements*). Such term includes a return prepared pursuant to section 6020(a) of the Internal Revenue Code of 1986, or similar State or local law…. (Emphasis added).

11 *Mass. Dep't of Revenue v. Shek (In re Shek)*, 947 F.3d 770 (11th Cir. 2020).

12 For helpful commentary, see, *e.g.*, Keith Fogg, *Is the One Day Late Interpretation of Bankruptcy Code 523 Finally Headed to the Supreme Court?*, Procedurally Taxing Blog (Jan. 28, 2020), https://procedurallytaxing.com/is-the-one-day-late-interpretation-of-bankruptcy-code-523-finally-headed-to-the-supreme-court/#comments.

13 *See* National Taxpayer Advocate 2014 Annual Report to Congress 417-422 (Legislative Recommendation: *Late-Filed Returns: Clarify the Bankruptcy Law Relating to Obtaining a Discharge*). For prior coverage of litigation involving this issue, see, *e.g.*, National Taxpayer Advocate 2017 Annual Report to Congress 351, 361-63 (*Significant Cases*).

14 IRC § 7803(a)(3).

15 *In re Shek*, 578 B.R. 918 (Bankr. M.D. Fla. 2017).

16 *In re Shek*, 2018 WL 7140300 (M.D. Fla. Nov. 13, 2018).

17 *Beard v. Comm'r*, 82 T.C. 766, 777 (1984), *aff'd per curiam*, 793 F.2d 139 (6th Cir. 1986) (applying a test set forth in *Zellerbach Paper Co. v. Helvering*, 293 U.S. 172 (1934)).

18 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 714, 119 Stat. 23, 128-29 (2005) (modifying 11 U.S.C. § 523(a)).

Focusing on the phrase "applicable filing requirements," three circuit courts have held that liabilities regarding a late filing cannot be discharged because a late filing is not a "return" under the discharge rules.[19] Similarly, the DOR argued that Mr. Shek's liability was not discharged because his filing was not timely, and therefore, was not treated as a "return" under the discharge rules.[20]

The U.S. Court of Appeals for the Eleventh Circuit disagreed with the DOR and the circuit court decisions in *McCoy*, *Mallo*, and *Fahey*. The Eleventh Circuit reasoned that interpreting "applicable filing requirements" to mean "all" filing requirements would render the word "applicable" superfluous. It said the "applicable" requirements include only those relevant to establishing that the substance of the filing is a return, rather than tangential considerations, such as whether it is timely filed. Next, the court said that if a late filed return could not be treated as a return, then the provision (11 U.S.C. § 523(a)(1)(B)(ii)) that excludes from discharge liabilities on late returns filed within two years of the bankruptcy, would be a "near nullity." Under the DOR's interpretation, the provision would only apply to the liabilities of the small subset of taxpayers who also filed those returns under IRC § 6020(a) (*i.e.*, jointly prepared by the IRS and the delinquent taxpayer) or a similar state or local provision. An interpretation that rendered the exclusion so insignificant would violate the surplusage canon of statutory construction.[21] Had Congress intended to modify the exclusion in such a drastic, convoluted, and confusing way, the court said it would likely have clearly indicated its intent.

In *Norman v. United States*, the U.S. Court of Appeals for the Federal Circuit held regulations that capped the FBAR penalty were superseded by legislation enacted in 2004.[22]

> **Significance**: *Norman* illustrates that continuing controversy surrounds the application of the penalty for failure to file a Report of Foreign Bank and Financial Accounts (FBAR) and the conduct considered willful in this context. Previously, the National Taxpayer Advocate recommended legislation that would reduce the disproportionality of the FBAR penalty for willful violations and clarify the conduct considered willful.[23] Additional clarity in this area could reduce litigation and would further a taxpayer's rights *to be informed*, *to finality,* and *to a fair and just tax system*.[24]

Summary

Although Ms. Norman had owned a Swiss bank account since 1999, she did not indicate on her 2007 tax return she had a foreign bank account and did not file an FBAR for the year. The Bank Secrecy Act (BSA) provides:

---

19 *See In re McCoy*, 666 F.3d 924 (5th Cir. 2012); *In re Mallo*, 774 F.3d 1313 (10th Cir. 2014); *In re Fahey*, 779 F.3d 1 (1st Cir. 2015). Note that attorneys at the IRS do not share the same view as those three circuit courts. *See* Chief Counsel Notice CC-2010-016 (Sept. 2, 2010) (indicating that once the IRS has made an assessment pursuant to a substitute for return, a subsequently filed Form 1040 does not qualify as a return because the filing is not an "honest and reasonable attempt" to satisfy the law, as required under *Beard*).

20 *In re Shek*, 947 F.3d at 775.

21 This canon means that an interpretation should not be favored "when that interpretation would render a 'clause, sentence, or word … superfluous, void, or insignificant.'" *In re Shek*, 947 F.3d at 777 (quotations omitted).

22 *Norman v. United States*, 942 F.3d 1111 (Fed. Cir. 2019).

23 *See* National Taxpayer Advocate 2014 Annual Report to Congress 331-345 (*Foreign Account Reporting: Legislative Recommendations to Reduce the Burden of Filing a Report of Foreign Bank and Financial Accounts (FBAR) and Improve the Civil Penalty Structure*); National Taxpayer Advocate 2021 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration* 73-75 (*Modify the Standard of Proof for Willful FBAR Violations and Reduce the Maximum Penalty Amounts*).

24 IRC §§ 7803(a)(3)(A), (F).

> [t]he Secretary of the Treasury *may* impose a civil money penalty on any person who violates [the FBAR rules, and] … [I]n the case of any person willfully violating [the FBAR rules] … the *maximum* penalty … *shall* be increased to the greater of — (I) $100,000, or (II) 50 percent of … the balance in the account at the time of the violation. [Emphasis added.][25]

The IRS determined that Ms. Norman willfully failed to report the account. It assessed a penalty of $803,530, which was 50 percent of the account's balance. Ms. Norman paid the penalty and requested a refund, suing in the Court of Federal Claims. The court denied the request.[26] Finding no "clear error," the U.S. Court of Appeals for the Federal Circuit affirmed.

First, Ms. Norman argued before the Federal Circuit that her FBAR violation was not willful because she did not know of the FBAR filing requirement or the contents of her 2007 return. She argued willfulness requires actual knowledge of the obligation to file an FBAR, as explained in the Internal Revenue Manual (IRM). Otherwise, every failure to file an FBAR would be willful, and such an interpretation would render superfluous the penalties for non-willful violations.

The Federal Circuit disagreed, explaining that a violation would generally not be willful if a taxpayer had no reason to know about the account. Thus, its interpretation of willfulness would not make superfluous the penalty for non-willful violations.

The Federal Circuit explained that (1) courts are not bound by the IRM, (2) Ms. Norman could be charged with constructive knowledge of the contents of her return, (3) she had been reckless in failing to learn about the filing requirements, (4) other courts had held that recklessness was enough to trigger the willful penalty,[27] and (5) IRM 4.26.16.6.5.1(5) said "the failure to learn of the filing requirements coupled with other factors, such as efforts taken to conceal the existence of the accounts and the amounts involved, may lead to a conclusion" that the taxpayer acted willfully.

The court emphasized that Ms. Norman tried to conceal the account by: (1) opening a "numbered" account that did not list her name, (2) preventing the bank from investing in U.S. securities, (3) withdrawing a significant amount in cash, and (4) inconsistently stating her knowledge of, and the circumstances surrounding, the account. Thus, the violation was willful.

Next, Ms. Norman argued that the willful FBAR penalty was capped at $100,000 by regulation.[28] From 1986 to 2004, the BSA only authorized FBAR penalties for willful violations and capped them at $100,000. A regulation issued in 1987 reiterated that the maximum FBAR penalty was $100,000.[29] In 2004, Congress increased the maximum FBAR penalty for willful violations (as quoted above) and added a $10,000 penalty

---

25 31 U.S.C. § 5321(a)(5)(A)-(D).

26 *Norman v. United States*, 138 Fed. Cl. 189 (Ct. Cl. 2018).

27 *See, e.g.*, *Bedrosian v. United States*, 912 F.3d 144, 152-53 (3d Cir. 2018); *United States v. Williams*, 489 F. App'x 655, 658-59 (4th Cir. 2012).

28 At least one district court agreed with this argument. *See United States v. Colliot*, 2018-1 U.S.T.C. (CCH) ¶50,259 (W.D. Tex. 2018). The Federal Circuit did not discuss *Colliot*.

29 *Amendments to Implementing Regulations Under the Bank Secrecy Act*, 52 Fed. Reg. 11436, 11445–46 (1987) (codified as 31 C.F.R. § 103.57(g)(2), and later re-codified as 31 C.F.R. § 1010.820(g)(2)) (authorizing FBAR penalties "not to exceed the greater of the amount (not to exceed $100,000) equal to the balance in the account at the time of the violation, or $25,000," an upper limit that reiterated what was then provided by 31 U.S.C. § 5321(a)(5)(C)).

for nonwillful violations.[30] However, the government did not amend the 1987 regulation, which still provides for a maximum penalty of $100,000. But the court held the 2004 amendment rendered void the 1987 regulation because the law said the maximum penalty "shall" be increased.

This case clarifies that the 2004 legislation, which increased the "maximum" penalty the government "may" impose superseded regulations that provide for a lower penalty. Although the court was persuaded that Ms. Norman knew she had to report the account and intentionally violated the law, the alternative justifications for its holding may suggest that inadvertent FBAR violations could trigger the penalties supposedly reserved for "willful" violations, unless a taxpayer can show he or she did not know about the account.[31]

In *Estate of Stauffer v. IRS*, the U.S. Court of Appeals for the First Circuit held that the limitations period for filing a refund claim was not tolled by the taxpayer's financial disability because another person could file the returns and claim the refund(s).[32]

Significance: *Estate of Stauffer* illustrates how the financial disability exception to the refund statute of limitations can fail to protect those with financial disabilities. The National Taxpayer Advocate has recommended broadening the circumstances in which a disability tolls the period to file a refund claim.[33] Such legislation would further a taxpayer's rights *to appeal an IRS decision in an independent forum* and *to a fair and just tax system*.[34]

Summary

Mr. Hoff Stauffer had a durable power of attorney (POA) to file returns and otherwise act on behalf of his elderly father, Mr. Carlton Stauffer, who was mentally ill. After a falling out, Hoff told Carlton and third parties he would no longer exercise his POA. Carlton failed to file multiple tax returns before he died in 2012.

As executor of Carlton's estate, Hoff filed delinquent returns for tax years 2006 through 2012 in 2013. The 2006 return reflected an overpayment. The estate requested a portion of the overpayment be applied to the liability for 2007 and a refund of the remainder. The claim would have been late under IRC § 6511(a), unless the limitations period was extended by Carlton's financial disability.[35] Although Carlton himself was financially disabled, IRC § 6511(h)(2)(B) provides that an individual is not treated as financially disabled during any period that another person is "authorized to act" on his or her behalf in financial matters. After determining that Hoff was "authorized to act" for Carlton, the IRS denied the claim, and Hoff filed a refund suit. The U.S. district court[36] dismissed the complaint, believing that the limitations period for filing a refund claim was not tolled while Hoff held a POA, and the U.S. Court of Appeals for the First Circuit agreed.

30 American Jobs Creation Act of 2004 (AJCA), Pub. L. No. 108–357, § 821, 118 Stat. 1418, 1586 (2004) (codified at 31 U.S.C. § 5321(a)(5)).

31 For a discussion of problems with this approach, see, *e.g.*, National Taxpayer Advocate Fiscal Year 2017 Objectives Report to Congress 164-176 (Area of Focus 12: *The IRS's Offshore Voluntary Disclosure (OVD)-Related Programs Have Improved, But Problems Remain*).

32 *Estate of Stauffer v. IRS*, 939 F.3d 1 (1st Cir. 2019).

33 *See*, *e.g.*, National Taxpayer Advocate 2013 Annual Report to Congress 302-310 (*Legislative Recommendation: Broaden Relief From Timeframes for Filing a Claim for Refund for Taxpayers With Physical or Mental Impairments*).

34 IRC § 7803(a)(3).

35 Under IRC § 6511(a), taxpayers generally must file a refund claim within three years from the time the return was filed or two years from the time the tax was paid, whichever period expires later. IRC § 6511(h), however, provides an exception under which the general periods in IRC § 6511(a) are suspended if the individual is financially disabled. In a related case, the IRS lost the argument that a statement from Carlton's psychologist could not be used to establish financial disability. *See* National Taxpayer Advocate 2018 Annual Report to Congress 432, 441 (*Significant Cases*) (discussing *Estate of Stauffer v. IRS*, 285 F. Supp. 3d 474 (D. Mass. 2017)).

36 *Estate of Stauffer v. IRS*, 2018 WL 5092885 (D. Mass. Sept. 29, 2018).

The estate argued that Hoff should not be treated as "authorized to act" on behalf of Carlton because he did not have both a duty to file Carlton's tax returns, and actual or constructive knowledge that the tax returns had not been filed. The First Circuit rejected this argument because it found that Hoff was "authorized" to act on Carlton's behalf, and the plain meaning of "authorized" does not permit it to superimpose a requirement for the person to also have a duty to do so or actual or constructive knowledge that the returns need to be filed.[37]

In *CIC Services, LLC v. Commissioner*, the U.S. Court of Appeals for the Sixth Circuit denied a request to rehear a decision in which it held that the Anti-Injunction Act (AIA) barred it from enjoining enforcement of a reportable transaction notice allegedly promulgated in violation of the Administrative Procedure Act (APA).[38]

Significance: *CIC* illustrates that the AIA can sometimes block judicial review of rules backed by tax penalties unless taxpayers first: violate them, wait for the IRS to assess the penalties, pay the penalties in full, and then sue for a refund. Low-income taxpayers are unlikely to have the time, resources, or appetite for this.[39] Therefore, the AIA could discourage them from claiming benefits to which they are entitled and from challenging rules that are invalid. This case highlights the continuing importance of the National Taxpayer Advocate's legislative recommendation to allow judicial review of penalties without first requiring taxpayers to pay them in full.[40] Such legislation would further a taxpayer's rights *to appeal an IRS decision in an independent forum* and *to a fair and just tax system*.[41]

Summary

Taxpayers and their material advisors must maintain and submit records to the IRS pertaining to "reportable transactions," or face severe penalties.[42] Reportable transactions include those that the IRS has identified as "transactions of interest."[43] In November of 2016, the IRS issued Notice 2016-66, which designated certain "micro-captive" insurance transactions as "transactions of interest."[44]

CIC Services (CIC), a captive insurance company, sued the IRS, seeking to enjoin the IRS from enforcing Notice 2016-66. CIC argued that Notice 2016-66 was invalid because it was a "legislative rule," which had been promulgated without notice and comment (*i.e.,* a process in which the public is given an opportunity to comment on the proposed rule before it becomes effective, as discussed above). The IRS countered that the AIA barred CIC from suing "for the purpose of restraining the assessment or collection of any tax," and that

---

37 *Estate of Stauffer*, 939 F.3d at 9.

38 *CIC Servs., LLC v. IRS*, 925 F.3d 247 (6th Cir. 2019), *reh'g denied*, 936 F.3d 501 (6th Cir. 2019), *petition for cert. filed* (Jan. 24, 2020) (No. 19-930).

39 The Center for Taxpayer Rights highlights concerns in an *Amicus* brief before the Supreme Court that the executive branch could impose onerous information reporting duties on low income taxpayers that the AIA would prevent them from challenging. See *CIC Servs., LLC v. IRS*, Brief of the Center for Taxpayer Rights as *Amicus Curiae* in Support of Petitioner (No. 19-930). *Amicus* briefs were filed by many other parties not listed here.

40 *See*, *e.g.*, National Taxpayer Advocate 2017 Annual Report to Congress 343-386 (Legislative Recommendation: *#3 Fix the Flora Rule: Give Taxpayers Who Cannot Pay the Same Access to Judicial Review as Those Who Can*); National Taxpayer Advocate 2021 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration* 94-97 (*Repeal Flora and Expand the Tax Court's Jurisdiction: Give Taxpayers Who Cannot Pay the Same Access to Judicial Review as Those Who Can*).

41 IRC § 7803(a)(3).

42 IRC §§ 6111, 6112, and 6707A.

43 *See* Treas. Reg. § 1.6011-4(b)(6).

44 Notice 2016-66, 2016-47 I.R.B. 745.

the penalties that could be imposed for failure to report micro-captive transactions were treated as taxes for this purpose.[45]

Both the district court and the Sixth Circuit agreed that the AIA prohibited the suit, finding that federal district courts lacked jurisdiction over suits seeking to enjoin the assessment or collection of taxes.[46] The Sixth Circuit explained that CIC could challenge Notice 2016-66 by paying the penalty and then filing a claim for refund.[47]

In August of 2019, the Sixth Circuit denied a petition for rehearing.[48] The Sixth Circuit acknowledged that the AIA was not meant to ban all prospective relief from IRS regulations, but also recognized the importance of the IRS revenue-collection process. In May of 2020, the Supreme Court granted *certiorari*.[49]

In *Bullock v. IRS*, the U.S. District Court for the District of Montana held the IRS violated the APA when it waived the requirement for tax-exempt organizations to report their donors without following the notice and comment process.[50]

> **Significance**: *Bullock* illustrates that the IRS sometimes makes or changes rules without providing public notice of proposed changes, considering comments from stakeholders, and explaining the rationale for the rule, as required by the APA. The National Taxpayer Advocate is recommending legislation that would require the IRS to submit proposed or temporary regulations to the National Taxpayer Advocate for comment and to address any such comments in the preamble to the final rule.[51] The National Taxpayer Advocate is uniquely positioned to help the IRS consider the views of unrepresented stakeholders who might not otherwise offer comments. Such legislation would help ensure the IRS considers their perspectives. Incorporating their perspectives would further a taxpayer's *right to a fair and just tax system*.[52]

Summary

Tax-exempt organizations are required by IRC § 6033(a)(1) to file a return that includes "other information… [that] the Secretary may by forms or regulations prescribe." In 1970, after providing the public with notice and an opportunity to comment, the Secretary exercised this authority by issuing regulations that required exempt organizations to include the "names and addresses of all persons who contributed, bequeathed, or devised $5,000 or more" in money or property on their returns.[53] That information was reported on Schedule B of Form 990, Return of Organization Exempt from Income Tax. In 2018, the IRS issued Rev. Proc. 2018-38, which said that tax-exempt organizations would "no longer be required to provide the names and addresses of contributors,"[54] and updated Schedule B of Form 990 and its instructions.

45 IRC § 7421(a).
46 *CIC Servs., LLC v. IRS*, 2017 WL 5015510 (E.D. Tenn. Nov. 2, 2017), *aff'd*, 925 F.3d at 247.
47 *CIC Servs., LLC*, 925 F.3d at 247.
48 *CIC Servs., LLC v. IRS*, 936 F.3d 501, 505 (6th Cir. 2019) (Sutton, J., concurring in denial of reh'g). The D.C. Circuit had similarly weighed in on the issue in 2015. *See Fla. Bankers Ass'n v. U.S. Dep't of the Treasury*, 799 F.3d 1065 (D.C. Cir. 2015).
49 *CIC Servs., LLC v. IRS*, 2020 WL 2105208 (May 4, 2020).
50 *Bullock v. IRS*, 401 F. Supp. 3d 1144 (D. Mont. 2019).
51 National Taxpayer Advocate 2021 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration* 89 (*Require the IRS to Address the National Taxpayer Advocate's Comments in Final Rules*).
52 IRC § 7803(a)(3).
53 Treas. Reg. § 1.6033-2(a)(2)(ii)(f).
54 Rev. Proc. 2018-38, 2018-31 I.R.B. 280.

Montana and New Jersey did not like Rev. Proc. 2018-38 because they were using the donor information that the IRS collected. They sued, alleging the IRS violated the APA by changing the reporting requirement without first providing public notice of the proposed change and an opportunity to comment. This notice and comment process is required when an agency issues or changes a "legislative rule."[55] It is not required when an agency issues or makes changes to

> interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice . . . or when the agency for good cause finds . . . that notice and public procedure are impracticable, unnecessary, or contrary to the public interest.[56]

The IRS argued that Rev. Proc. 2018-38 was an interpretive rule because it interpreted and clarified the "other information" that IRC § 6033(a)(1) allows the IRS to require. However, the U.S. District Court for the District of Montana concluded that it was a legislative rule because it amended the previous legislative rule that required tax-exempt organizations to file substantial-contributor information annually. Thus, because Rev. Proc. 2018-38 changed a legislative rule without following the notice and comment process, the court set it aside.[57]

This case is significant because it suggests that when the IRS promulgates a legislative rule by publishing a form, it can change the form only after providing the public notice and an opportunity to comment, even if the change seems to reduce taxpayer burden.[58]

In *Silver v. IRS*, the U.S. District Court for the District of Columbia held that a taxpayer had standing to challenge the IRS's failure to carry out evaluations under the Regulatory Flexibility Act (RFA) and the Paperwork Reduction Act (PRA) when issuing regulations, and that the AIA did not bar the suit.[59]

> **Significance**: Like *Bullock* (discussed above), *Silver* illustrates that the IRS sometimes makes or changes rules without considering taxpayer burden, as required by the APA. This case is significant because it suggests that a broad range of tax regulations may be subject to challenge on the same bases (*i.e.*, a failure to conduct analysis under the RFA or PRA).[60] In 2016, the Government Accountability Office reported that only two of over 200 regulations issued by Treasury between 2013 and 2015 included an RFA analysis.[61]

---

55 5 U.S.C. §§ 553(b), (c).

56 5 U.S.C. § 553(b)(3)(A)-(B). Before 2011, the Supreme Court had suggested that regulations issued pursuant to a specific legislative grant of authority were "legislative" and entitled to greater deference than regulations issued pursuant to a general grant of authority (such as IRC § 7805(a)), which were called "interpretive." *See Rowan Cos. v. United States*, 452 U.S. 247, 253 (1981). In 2011, however, the Supreme Court said the source of the authority for issuing a rule was not determinative. *See Mayo v. United States*, 562 U.S. 44 (2011). As the *Bullock* court noted, the effect of the rule (rather than the source of the authority for the rule) determines whether it is legislative or interpretive.

57 The IRS subsequently updated the regulations using the notice and comment procedure. *See Guidance Under Section 6033 Regarding the Reporting Requirements of Exempt Organizations*, 84 Fed. Reg. 47,447 (Sept. 10, 2019) (codified at Treas. Reg. § 1.6033–2 with an optional effective date for returns filed after Sept. 6, 2019).

58 This holding is generally consistent with a recently-issued policy statement, which says: "… if the intended interpretation or position would have the effect of modifying existing legislative rules or creating new legislative rules on matters not addressed in existing regulations, the interpretation or position will generally be issued through notice-and-comment rulemaking, absent exceptional circumstances." Treasury Department, *Policy Statement on the Tax Regulatory Process* (Mar. 5, 2019). *See also* Chief Counsel Notice CC-2019-006 (Sept. 17, 2019).

59 *Silver v. IRS*, 2019 U.S. Dist. LEXIS 220193 (D.D.C. Dec. 24, 2019).

60 Stuart J. Bassin, *Rethinking Validity Challenges to Tax Regulations*, 166 Tax Notes Federal 573 (Jan. 27, 2020).

61 Government Accountability Office (GAO), GAO-16-720, *Treasury and OMB Need to Reevaluate Long-standing Exemptions of Tax Regulations and Guidance* 22 (2016).

Summary

As part of the Tax Cuts and Jobs Act (TCJA), Congress enacted certain "transition tax" provisions applicable to "controlled foreign corporations" owned by "United States persons."[62] Mr. Monte Silver, an American citizen, and Monte Silver, Ltd., the controlled foreign corporation through which he practiced law in Israel (collectively, Mr. Silver), challenged the validity of regulations implementing the transition tax. Although Mr. Silver reported no transition tax liability, he alleged the IRS did not follow procedures mandated by the APA, the RFA, or the PRA — rules designed to protect small businesses from burdensome and costly regulations — when it issued the regulations.

The government moved to dismiss. It argued that Mr. Silver had no standing because he suffered no injury, and that any injury he sustained was due to the TCJA and not the regulations. It also argued that his suit was barred because invalidating the transition tax regulations would restrain "the assessment or collection of any tax," in violation of the AIA.[63]

The court found that Mr. Silver had standing because he was injured by compliance costs (recordkeeping and collection of information) that were traceable to the government's failure to follow procedural rules. Although the TCJA itself may have imposed the burden, a procedural violation that reasonably increased the risk of injury to Mr. Silver was enough to establish that the IRS's violation (and not the statute) caused the injury for purposes of standing. Finally, the AIA was not applicable because Mr. Silver was merely asking the court to compel the agency to conduct RFA and PRA analyses. The court said it would not have to analyze whether a stay of enforcement of the regulations would violate the AIA unless Mr. Smith prevailed on the merits.

In *Essner v. Commissioner*, the Tax Court held that IRC § 7605(b) does not bar the IRS from auditing a return while simultaneously using its automated document matching process (called Automated Underreporter or AUR) to address underreporting on the same return.[64]

> **Significance**: Although IRC § 7605(a) may create an expectation that the IRS will only review and adjust a taxpayer's return once, *Essner* shows this expectation is wrong, and that the IRS's communications about different reviews can be confusing. As automated error-correction procedures increasingly replace examinations, the National Taxpayer Advocate has suggested that the procedural protections available to taxpayers under examination (*e.g.*, the rights to avoid unnecessarily repetitive inquires and to petition Appeals before issuance of a notice of deficiency) should be extended to those facing more automated procedures.[65] As this case shows, IRS procedures are inconsistent with a taxpayer's rights *to be informed* and *to finality*.[66] Some have suggested that a legislative fix may be needed.[67]

---

62 *See generally* Pub. L. No. 115-97 § 14103(a), 131 Stat. 2054, 2195 (2017) (codified at IRC § 965).

63 IRC § 7421(a).

64 *Essner v. Comm'r*, T.C. Memo. 2020-23.

65 *See*, *e.g.*, National Taxpayer Advocate Fiscal Year 2019 Objectives Report to Congress vol. 2, at 38-43 (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*); Nina E. Olson, "Real" vs. "Unreal" Audits and Why This Distinction Matters, National Taxpayer Advocate Blog (July 6, 2018), https://www.taxpayeradvocate.irs.gov/news/ntablog-real-vs-unreal-audits-and-why-this-distinction-matters/.

66 IRC §§ 7803(a)(3)(A), (F).

67 *See*, *e.g.*, Leslie Book, *Unreal and Real Audits: Surgeon Finds No Relief From IRS's "Byzantine" Exam Procedures*, Procedurally Taxing Blog (Feb. 14, 2020), https://procedurallytaxing.com/unreal-and-real-audits-surgeon-finds-no-relief-from-irss-byzantine-exam-procedures/.

Summary

Mr. Essner took distributions in 2014 and 2015 from an individual retirement account (IRA) he inherited. After reviewing material on the IRS website, he determined that the distributions were not taxable. He did not disclose them to his preparer, even though they were reported on Forms 1099-R, Distributions From Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc.

In March of 2016, Mr. Essner received a letter from the IRS's AUR unit, proposing to increase his taxable income for 2014 by the IRA distribution.[68] In October 2016, Mr. Essner's 2014 return was also selected for examination. The examination addressed his expense deductions, but not his IRA distributions. During the examination, he received a notice of deficiency from the AUR unit increasing his income for 2014 by the IRA distribution.

Mr. Essner did not establish that any portion of the IRA distributions represented a non-taxable return of his late father's original investment. He argued, however, that the IRS was barred from assessing a deficiency because it had violated IRC § 7605(b), which prohibits the IRS from conducting (1) "unnecessary examination(s) or investigations," and (2) more than one "inspection of a taxpayer's books" unless "after investigation," the IRS notifies the taxpayer that an additional inspection is necessary.

The court explained that the AUR review process involved communication with the taxpayer and a comparison of third-party records with the taxpayer's return. These activities are not an examination or an inspection of the taxpayer's books and records.[69] In addition, because both the examination and AUR process resulted in adjustments, neither was an "unnecessary" investigation. Thus, while acknowledging that a "taxpayer ought not to have been subjected to such a byzantine examination," it held that the IRS did not violate IRC § 7605(b).[70]

In *Rodriguez v. Federal Deposit Insurance Corp.*, the Supreme Court held that state law (and not federal common law) governs the ownership of a tax refund claimed on a consolidated return, potentially calling into question other federal common law doctrines and underscoring the importance of tax allocation agreements.[71]

Significance: Following *Rodriguez v. Federal Deposit Insurance Corp.,* consolidated groups are more likely to find that the "wrong" member will unexpectedly own tax refunds under state law if the tax allocation agreement is unclear. Thus, it reminds consolidated groups to ensure their tax allocation agreements are clear.[72] This case is also significant because it may suggest that longstanding federal

68 Mr. Essner's 2015 return would have been due in April 2016, after he received the letters. Perhaps this is why the IRS proposed and the court sustained an accuracy-related penalty under IRC § 6662 for that year.

69 According to the IRS, an attempt to resolve a discrepancy between a taxpayer's return and third-party data does not constitute an examination, inspection, or reopening because the IRS merely is asking the taxpayer to explain the discrepancy. *See* Rev. Proc. 2005-32, § 4.03, 2005-1 C.B. 1206.

70 *Essner*, 2020 WL 708950 at *11. For further analysis, see, *e.g.*, Bryan Camp, *Lesson From the Tax Court: IRS Automated Matching Program Not an 'Examination'*, Tax Prof Blog (Feb. 17, 2020), https://taxprof.typepad.com/taxprof_blog/2020/02/lesson-from-the-tax-court-irs-automated-matching-program-not-an-examination.html.

71 *Rodriguez v. Fed. Deposit Ins. Corp.*, 140 S. Ct. 713 (2020), *vacating and remanding* 914 F.3d 1262 (10th Cir. 2019).

72 For further analysis, see, *e.g.*, Anthony V. Sexton, *The Death of Bob Richards: Are There Broader Lessons?*, 166 Tax Notes Federal 2055 (Mar. 30, 2020).

common law doctrines, such as the substance-over-form doctrine, the sham transaction doctrine, and the step transaction doctrine are invalid because they are products of federal common law. [73]

Summary

A bank holding company filed a consolidated federal income tax return to claim a refund on behalf of itself and its federally insured subsidiary, United Western Bank. By the time the IRS paid the refund, the Federal Deposit Insurance Corporation (FDIC) had taken control of the bank subsidiary, and the holding company had filed for bankruptcy. Both the trustee for the holding company (Simon Rodriguez) and the receiver for the bank (the FDIC) claimed the refund. The parties' tax allocation agreement did not unambiguously address who owned the refund, but one clause said any ambiguity would be resolved in favor of the bank. After the case was reviewed by a bankruptcy court[74] and a district court,[75] the United States Court of Appeals for the Tenth Circuit held the refund belonged to the FDIC as receiver for the bank.

The Tenth Circuit explained that "[f]ederal common law … provides a framework for resolving this issue."[76] Pursuant to a federal common law rule (called the *Bob Richards* rule), in the absence of an unambiguous tax allocation agreement to the contrary, a refund belongs to the consolidated group member responsible for the losses.[77] Thus, the Tenth Circuit said its holding was consistent with the *Bob Richards* rule.

On appeal to the Supreme Court, the FDIC declined to defend the *Bob Richards* rule, arguing instead that it was entitled to the refund under the tax allocation agreement. However, the Supreme Court said it "took this case to decide *Bob Richards*'s fate,"[78] and held that the rule was not a legitimate exercise of federal common lawmaking. It explained that in the absence of congressional authorization, federal common lawmaking must be "necessary to protect uniquely federal interests."[79] Although this was a federal bankruptcy and a tax dispute, the Court observed that it was really about property rights, which are governed by state law.

In *Texas v. United States*, the U.S. Court of Appeals for the Fifth Circuit held the "individual mandate" to buy insurance is unconstitutional because it is no longer backed by a tax penalty, and thus, cannot be an exercise of Congress's power to tax.[80]

Significance: Holding unconstitutional the "individual mandate" to purchase insurance is significant in its own right, but the *Texas* court's analysis about why the mandate is unconstitutional is also significant. Under the court's reasoning, regulatory mandates that would otherwise be unconstitutional are valid only if backed by a tax penalty of greater than $0.

---

73 Although the Supreme Court's opinion does not directly reference these doctrines, as one academic has observed, federal courts apply these doctrines in tax cases to disregard transactions that state law would honor. *See* Daniel Hemel, *Opinion Analysis: In Tax Refund Case, Justices Decide a Narrow Question But Leave Much Unresolved*, Scotusblog (Feb. 26, 2020), https://www.scotusblog.com/2020/02/opinion-analysis-in-tax-refund-case-justices-decide-a-narrow-question-but-leave-much-unresolved/.

74 *In re: United Western Bancorp v. Fed. Deposit Ins. Corp.*, 558 B.R. 409 (Bankr. D. Colo. 2016).

75 *United Western Bancorp*, 574 B.R. 876 (D. Colo. 2017).

76 *Rodriguez*, 914 F.3d at 1269.

77 *See, e.g.*, *Barnes v. Harris*, 783 F.3d 1185, 1195 (10th Cir. 2015) (citing *In re Bob Richards Chrysler-Plymouth Corp.*, 473 F.2d 262, 265 (9th Cir. 1973)).

78 *Rodriguez*, 140 S. Ct. at 717.

79 *Id.*

80 *Texas v. United States*, 945 F.3d 355 (5th Cir. 2019).

Summary

Enacted as part of the Patient Protection and Affordable Care Act (ACA),[81] IRC § 5000A(a) requires certain individuals to ensure that they and their dependents have minimum essential health insurance coverage or qualify for a coverage exemption (the "individual mandate"). IRC § 5000A(b) imposes a penalty called a "shared responsibility payment" on those who do not have coverage or qualify for an exemption.

In 2012, the Supreme Court held in *NFIB* that although Congress did not have the authority to require individuals to buy insurance under the Commerce Clause or the Necessary and Proper Clause of the U.S. Constitution, the individual mandate and shared responsibility payments were a constitutional exercise of its power to lay and collect taxes.[82] In December 2017, the TCJA reduced the "shared responsibility payment" to zero, effective January 1, 2019.[83]

A collection of state attorneys general and governors and two citizens filed a lawsuit challenging the continuing constitutionality of the ACA. The District Court for the Northern District of Texas held that setting the shared responsibility payment to zero rendered the individual mandate unconstitutional, and the unconstitutional provision could not be severed from any other part of the ACA.[84] The U.S. Court of Appeals for the Fifth Circuit affirmed that the individual mandate is no longer constitutional. Instead of deciding whether the rest of the ACA must be struck down, however, it remanded the case for additional analysis.[85]

81 Pub. L. No. 111-148, 124 Stat. 119 (2010).
82 *Nat'l Fed'n of Indep. Bus. v. Sebelius (NFIB)*, 567 U.S. 519 (2012).
83 Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092 (2017) (codified at IRC § 5000A(c)).
84 *Texas v. United States*, 340 F. Supp. 3d 579 (N.D. Tex. 2018).
85 In the meantime, another group of state attorneys general and governors, the state of California, and the U.S. House of Representatives petitioned the Supreme Court for review in support of the ACA. The Supreme Court granted certiorari. *See California v. Texas*, 140 S. Ct. 1262 (Mar. 2, 2020).