

Legislative Recommendation #13**Require Independent Managerial Review and Written Approval Before the IRS May Assert Multiyear Bans Barring Taxpayers From Receiving Certain Tax Credits and Clarify That the Tax Court Has Jurisdiction to Review the Assertion of Multiyear Bans****PRESENT LAW**

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

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

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

IRC § 6751(b) prohibits the IRS from assessing certain penalties unless an employee's initial determination to impose a penalty is personally approved (in writing) by his or her immediate supervisor or a higher-level official.

REASONS FOR CHANGE

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

These refundable credits can be a lifeline to low-income taxpayers. A 2019 TAS study found that on average, EITC accounted for more than 20 percent of taxpayers' adjusted gross incomes. Given the potentially devastating financial impact of multiyear bans, adequate safeguards are critical to ensure both that the IRS imposes a ban only when a taxpayer acts with the requisite state of mind and that a taxpayer has access to meaningful review of an IRS final determination to assert the ban.

Presently, the IRS may disallow an examined year's credit and assert a multiyear ban against claiming the credit in future years when it issues a notice of deficiency at the conclusion of an audit. A taxpayer may contest a notice of deficiency in the Tax Court, but it is uncertain whether the court has jurisdiction to review the IRS's assertion of a ban applicable to future tax years that has no impact on the taxpayer's liability for the tax year before the court.¹ Once a ban on claiming a credit in future years takes effect, the IRS will disallow the credit if the taxpayer claims it, and it may do so using its summary assessment procedures. The IRS would issue a notice of deficiency in that instance only if the taxpayer disputes the summary assessment.

¹ Compare *Garcia v. Comm'r*, T.C. Summ. Op. 2013-28 (holding, in a nonprecedential case, that a ban did not apply) with *Ballard v. Comm'r*, No. 03843-15S (T.C. Feb. 12, 2016) (declining to rule on the application of IRC § 32(k), noting that the application of the ban had no effect on the taxpayer's federal income tax liability for the year before it).

Written Managerial Approval

The IRS's internal rules allow it to impose two-year bans automatically in some EITC cases.² The IRS is expanding the practice of automatically imposing bans to include the refundable portion of the CTC (referred to as the additional child tax credit, or ACTC).³ In all other ban cases, IRS procedures require a manager to review the case independently and approve the assertion of a ban in writing.⁴ IRC § 6751(b), which generally requires managerial approval before the IRS imposes penalties, does not apply to multiyear bans. Significantly, two TAS research studies of two-year ban cases found that this required managerial approval is usually lacking.⁵

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

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

Tax Court Jurisdiction

IRC § 6214 restricts the Tax Court to determining the amount of tax owed in the tax year(s) before the court. Thus, the court may determine whether the taxpayer properly claimed credits for the year that is the subject of a notice of deficiency. By contrast, the court may not have jurisdiction to determine whether the IRS's asserted ban should apply to the future years that are not before it, even if the ban is proposed in the notice of deficiency, because a ban has no effect on a taxpayer's liability in the tax year in which it is imposed (it affects only the following two or ten years).⁶ If the Tax Court does not consider whether a ban was properly imposed and the ban is left intact, and the taxpayer claims the banned credit on a subsequent return, the IRS will disallow the claim and may do so pursuant to its summary assessment procedures. The taxpayer would then be required to dispute the summary assessment and, once the IRS issues a notice of deficiency for the subsequent year, seek Tax Court review to determine whether the taxpayer properly claimed the credits. However, it is not clear whether the Tax Court has jurisdiction to determine whether the IRS properly imposed the ban in an earlier year that is not before the court (and if it lacks that jurisdiction, it may conclude that because the ban is intact, the court does not have the authority to allow the credit in the ban years).

Transparency is a critical element of taxpayer rights and fairness, and taxpayers should understand clearly when they may seek Tax Court review of an adverse IRS determination. In most cases, the law is clear. Here,

2 Internal Revenue Manual (IRM) 4.19.14.7.1.5, Project Codes 0027 and 0028 – EITC Recertification with a Proposed 2 Year EITC Ban (Dec. 16, 2020).

3 The American Rescue Plan Act, Pub. L. No. 117-2, § 9611, 135 Stat. 4, 359-376 (2021), makes the CTC fully refundable for tax year 2021. See Treasury Inspector General for Tax Administration, Ref. No. 2021-40-036, *Improper Payment Rates for Refundable Tax Credits Remain High 8* (May 10, 2021) (reporting that "IRS management stated that, starting in Processing Year 2021, systemic processes will assess the two-year ban for the ACTC.").

4 IRM 4.19.14.7.1(3), 2/10 Year Ban – Correspondence Guidelines for Exam Technicians (CET) (Dec. 11, 2019).

5 See National Taxpayer Advocate 2019 Annual Report to Congress vol. 2, at 239-256 (Research Study: *Study of Two-Year Bans on the Earned Income Tax Credit, Child Tax Credit, and American Opportunity Tax Credit*); National Taxpayer Advocate 2013 Annual Report to Congress 103-115 (Most Serious Problem: Earned Income Tax Credit: *The IRS Inappropriately Bans Many Taxpayers From Claiming EITC*).

6 See note 1, *supra*.

the law is not clear, and there appear to be four possible outcomes: (i) the Tax Court may have jurisdiction to review a ban both for the year in which it is imposed and for the year in which it is effective; (ii) the Tax Court may have jurisdiction to review a ban for the year in which it is imposed but not for the year in which it is effective; (iii) the Tax Court may not have jurisdiction to review a ban for the year in which it is imposed but may have jurisdiction to review it for the year in which it is effective; or (iv) the Tax Court may not have jurisdiction to review a ban at any time. These procedural uncertainties undermine the taxpayer's *rights to appeal an IRS decision in an independent forum and to a fair and just tax system* and require clarification.

RECOMMENDATIONS

- Amend IRC §§ 24(g), 25A(b), and 32(k) to require independent managerial review and written approval based on consideration of all relevant facts and circumstances before the IRS asserts a multiyear ban. Alternatively, amend IRC § 6751 to implement this change.
- Amend IRC § 6214 to grant the Tax Court jurisdiction to (i) review the IRS's final determination to impose a multiyear ban under IRC §§ 24(g), 25A(b), or 32(k) in any deficiency proceeding in which the notice of deficiency asserts a multiyear ban or any subsequent deficiency proceeding in which the IRS disallows a claimed credit because a multiyear ban is in effect and (ii) allow the affected credit if it finds a multiyear ban was improperly imposed and the taxpayer otherwise qualifies for the credit.