

**Legislative Recommendation #9****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****SUMMARY**

- *Problem:* Refundable credits, including the Earned Income Tax Credit (EITC) and the Child Tax Credit (CTC), can be a lifeline for many low-income families, accounting for a high percentage of their household incomes. To deter improper claims, the law requires the IRS to ban taxpayers who make improper claims from receiving these credits in future years under certain circumstances – even if the taxpayers otherwise meet all eligibility requirements in those future years. Because a multiyear ban against receiving these tax credits can have financially devastating consequences, it is critical that there be adequate administrative and judicial safeguards to ensure they are only imposed in appropriate cases.
- *Solution:* Require IRS managerial approval of multiyear bans and clarify that the Tax Court has jurisdiction to review the imposition of a ban in a proceeding for the years in which the ban is imposed.

**PRESENT LAW**

IRC §§ 24(g), 25A(b), and 32(k) require the IRS to ban a taxpayer from claiming CTC, the Credit for Other Dependents (ODC), the American Opportunity Tax Credit (AOTC), and 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. These sections refer to the years in which the ban is imposed as the “disallowance period.”<sup>1</sup>

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.

**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. These multiyear bans are unique in tax law because they prevent taxpayers from receiving credits in future years, even if they otherwise satisfy all eligibility requirements in those years.

Refundable credits can be a lifeline for low-income taxpayers, so it is critical that there be adequate safeguards to ensure both that the IRS imposes a ban only when a taxpayer acts with the requisite improper intent and that a taxpayer has access to meaningful judicial review of an IRS ban determination. A 2019 TAS study found that, on average, EITC accounted for more than 20 percent of eligible taxpayers’ adjusted gross incomes.

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<sup>1</sup> IRC §§ 24(g)(1)(A), 25A(b)(4)(A), 32(k)(1)(B).

## Written Managerial Approval

In most ban cases, IRS procedures require a manager to review the case independently and approve the assertion of a ban in writing.<sup>2</sup> However, the IRS's internal rules allow the agency to impose two-year bans automatically in some EITC cases,<sup>3</sup> and it recently expanded its practice of automatically imposing bans to include the refundable portion of the CTC (referred to as the Additional Child Tax Credit, or ACTC).<sup>4</sup> Moreover, two TAS research studies of two-year ban cases found that managerial approval, even where required, is usually lacking.<sup>5</sup> The IRS also may change its policy of requiring managerial approval at any time.

The National Taxpayer Advocate does not believe that multiyear bans should ever be imposed by automatic or systemic means. The law provides for 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 it provides for imposition of the ten-year ban only in cases where the IRS determines a taxpayer's claim was fraudulent. Notably, 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 reckless or intentional disregard of rules and regulations (as opposed to inadvertent error or negligence). This determination requires an independent facts-and-circumstances investigation by an employee. In light of the potentially harsh financial impact of multiyear bans, managerial approval should be required in all cases before they are imposed.

## Tax Court Jurisdiction

Although a taxpayer should be able to obtain independent Tax Court review of a multiyear ban, it is not clear whether, or when, the Tax Court has the jurisdiction to reverse a multiyear ban. That is because the imposition of a ban and the effect of a ban on a taxpayer's tax liability occur in different tax years.

The Tax Court may not have jurisdiction to reverse a ban in the year it is imposed. IRC § 6214 generally limits the Tax Court to determining the amount of tax owed in the tax year(s) before the court. By its nature, a ban against claiming tax credits in future years will affect the taxpayer's tax liability in future years – not in the year in which it is imposed.<sup>6</sup>

The Tax Court also may lack jurisdiction to reverse a ban in the years in which the ban is in effect. By operation of law, a ban automatically denies benefits in future years. If a taxpayer challenges the IRS's deficiency determination in a year in which the ban denies tax credits, the year in which the ban was initially imposed generally will not be before the court. It is not clear whether the court may reach back to the earlier year to determine if the ban was properly imposed.

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- 2 Internal Revenue Manual (IRM) 4.19.14.7.1(2), 2/10 Year Ban – Correspondence Guidelines for Examination Technicians (CET) (Apr. 15, 2021).
  - 3 IRM 4.19.14.7.1.5, Project Codes 0027 and 0028 – EITC Recertification with a Proposed 2 Year EITC Ban (Dec. 16, 2020).
  - 4 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* (2021) (reporting that “IRS management stated that, starting in Processing Year 2021, systemic processes will assess the two-year ban for the ACTC.”).
  - 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*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC19\\_Volume1\\_TRRS\\_02\\_EITCban.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC19_Volume1_TRRS_02_EITCban.pdf); 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*) [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/2013-ARC\\_VOL-1\\_S1-MSP-9.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/2013-ARC_VOL-1_S1-MSP-9.pdf).
  - 6 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. 3843-15S (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).

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

In general, the Tax Court's jurisdiction to adjust CTC, ODC, AOTC, or EITC claims is based on its deficiency jurisdiction.<sup>7</sup> As noted above, the determination to subject a taxpayer to a multiyear ban does not itself create a deficiency in the current tax year. Therefore, the National Taxpayer Advocate recommends that Congress amend IRC § 6214 to grant the Tax Court jurisdiction to determine whether the ban was properly imposed during a proceeding concerning a year in the disallowance period involving a deficiency created by the imposition of the ban (*i.e.*, during the two years in which the credits are denied rather than the initial year in which the ban was imposed).

## 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 may assert a multiyear ban.<sup>8</sup>
- Amend IRC § 6214 to grant the Tax Court jurisdiction (i) to review the IRS's final determination to impose a multiyear ban under IRC §§ 24(g), 25A(b), or 32(k) in any proceeding before the Tax Court involving the years included in the disallowance period in which the notice of deficiency disallows CTC, ODC, AOTC, or EITC on the basis of a multiyear ban and (ii) to allow the affected credit if it finds a multiyear ban was improperly imposed and the taxpayer otherwise qualifies for the credit.

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<sup>7</sup> IRC §§ 6213-6214.

<sup>8</sup> The National Taxpayer Advocate is not proposing to amend IRC § 6751(b) because determinations made by electronic means are exempt from the requirement of supervisory approval under IRC § 6751(b)(2)(B). As discussed above, the determination of the application of a multiyear ban should not be determined electronically and should be reviewed and approved by the supervisor of the employee who makes the determination.