

Steve Leimberg's Income Tax Planning Email Newsletter - Archive Message #222

Date: 29-Jun-22

From: Steve Leimberg's Income Tax Planning Newsletter

Subject: [Mary Vandenack's Notes from the NYU 14th Annual Tax Controversy Forum](#)

“The current Dirty Dozen transactions are very much on the IRS’s radar. GRATs and split dollar life insurance arrangements are being reviewed. The IRS is pursuing promoters of questionable strategies with a vengeance. The IRS recommends getting a second opinion from a non-promoter adviser before engaging in a transaction, particularly if the transaction type is on the IRS target list. With respect to the Dirty Dozen items, the IRS is seeking to raise both civil and criminal fraud when appropriate. This is different from many of the civil cases where the IRS is simply seeking to get taxpayers back into compliance.”

The [14th Annual NYU Tax Controversy Forum](#) was held June 23 and June 24, 2022, at the Westin Grand Central, New York, New York. Mary E. Vandenack attended the NYU Tax Controversy Forum and agreed to share her notes with [LISI](#) members.

Mary E. Vandenack, J.D., ACTEC, CAP®, COLPM®, is CEO, founding and managing member of **Vandenack Weaver Truhlsen** in Omaha, Nebraska, and Elite Trust and Estate Services, a Delaware entity. Mary is a highly regarded practitioner in the areas of tax, trusts and estates, private wealth planning, asset protection planning, executive compensation, business and business succession planning, tax dispute resolution, and tax-exempt entities. Mary also has expertise in mental health law and professional licensing. Mary’s practice serves businesses and business owners, executives, real estate developers and investors, health care providers, companies in the financial industry, and tax-exempt organizations. Mary is a member of the American Bar Association Real Property Trust and Estate Section where she serves on the Planning Committee, Nominations, and Council. Mary is a member of the American Bar Association Law Practice Division where she currently serves as Vice Chair. Mary has been named to ABA LTRC Distinguished Women of Legal Tech, received the James Keane Award for e-lawyering, and serves on ABA Standing Committee on Information and Technology Systems. Mary is a frequent writer and speaker on tax, benefits, asset protection planning, and estate planning topics as well as on practice management topics including improving the delivery of legal services, technology in the practice of law and process automation. At conferences, Mary will also often teach a yoga or mindfulness class. Mary hosts a podcast called Legal Visionaries.

<https://www.vwattys.com/resources-vw-podcasts/>

NOTES:

Keynote Address: State of the IRS

Charles P. Rettig, Esq., Commissioner, Internal Revenue Service, Washington, DC

Tax Compliance and Enforcement Update Part I

Mr. Rettig opened with personal comments reflecting his passion about having had the opportunity to be part of the IRS. Mr. Rettig spoke about his parents, who are immigrants, and his wife and her parents, who came to this country as refugees. The Commissioner is proud of the efforts made during his term to guide the IRS on a path toward being user friendly and available to all taxpayers despite the challenges of COVID, understaffing, and upon occasion, disrespect from the press and the public. Mr. Rettig's passion for the United States, including the tax system, was evident in his remarks. Mr. Rettig's entire address was an incredibly impassioned speech about the importance of this country, the role of the IRS in the existence and functioning of this country. Mr. Rettig noted that, without compliance with the tax system, this country cannot function financially. Mr. Rettig also encouraged respect for those who are working at the IRS in sometimes very difficult circumstances.

The IRS will be fully back in the office date as of July 25. Significant steps have been taken to keep employees safe.

The average audit for a high net worth taxpayer is 16 months after the due date. Because almost all high net worth taxpayers file extensions, returns typically are not filed until October of the year due. Rettig mentioned this with reference to articles that claim that low income taxpayers are audited at a higher rate than high income taxpayers. Rettig indicated that such statements are incorrect because they are based on when audit occurs and assume that audits of high income and low income taxpayers would occur in the same year; however, given that most high income taxpayers extend returns, the audits don't occur until the year following the year of filing.

Audits of EIC returns run about 1%. Upon review of the rate of audit at the point where the statute of limitations expires, the rate of audit of high income taxpayers is close to 8%. The rate varies by level of income. Income at the \$1m level is still largely W-2 income and the IRS has the information related to such taxpayers. Income over \$1m is often that of the entrepreneur and the IRS does not have the same access to that information so the audit rate is higher.

The vast majority of audit planning involves artificial intelligence and data science. Mr. Rettig has made significant efforts to improve the IRS approach to audit so that recovery is cost efficient.

The current Dirty Dozen transactions that are very much on the IRS radar. GRATs and split dollar life insurance arrangements are being reviewed. The IRS is pursuing promoters of questionable strategies with a vengeance. The IRS recommends getting a second opinion from a non-promoter adviser before engaging in a transaction, particularly if the transaction type is on the IRS target list. With respect to the dirty dozen items, the IRS is seeking to raise both civil and criminal fraud when appropriate. This is different from many of the civil cases where the IRS is simply seeking to get taxpayers back into compliance. Mr. Rettig connected his passion on this issue to his passion for this country and our obligations to do the right thing by this country.

Mr. Rettig spoke about the importance of hiring sufficient staff and training them so that the right thing can be done with respect to the tax system. He also spoke to the importance of implementing more technology.

Mr. Rettig indicates that the IRS will continue to be aggressive with respect to promoted and aggressive transactions as well as high net worth taxpayers. Rettig indicates this focus will continue after he is no longer commissioner.

Mr. Rettig asked practitioners to help support compliance and respect for the IRS. He suggested thanking IRS employees rather than complaining about the level of service and creating a negative narrative. Instead, focus on solutions such as funding.

Call time for IRS employees has been close to an average of six minutes. During the pandemic, IRS started to receive calls from people who had lost spouses and businesses due to COVID. The IRS made a business decision to focus on the human side of these issues so that IRS employees could become, in some senses, first responders. Taking these calls has been difficult on employees. There is counseling available to employees to help deal with the impact of the many calls that they were handling. Chatbots have been implemented to help with routine calls so that live agents can take more time on in person calls.

Mr. Rettig finished his presentation by reiterating his passion for this country, IRS employees and tax practitioners.

Staying Ahead of the Tax Enforcement Curve and the New Emerging Issues Group

Moderator: Michelle F. Schwerin, Esq., CPA, Shareholder, Capes, Sokol, Goodman & Sarachan, PC, St. Louis, MO

Panelists: Thomas A. Cullinan, Esq., Acting Chief of Staff to the Commissioner, Internal Revenue Service, Washington, DC; Danielle M. Grimm, Special Counsel, IRS Office of Chief Counsel, Passthroughs and Special Industries, Washington, DC; Benjamin M. Swartz, Senior Advisor to the Commissioner, IRS Small Business/Self-Employed Division, Examination, Washington, DC

An emerging issue generally is a new or novel set of facts related to tax issues. It isn't necessarily abusive but could be. Looking at emerging issues isn't new to the IRS but the group has been created to specifically help identify.

Examples of emerging issues programs include LB&I campaigns, SB/SE Emerging Issues program and Counsel Program. Recent investment in emerging issues include Office of Fraud Enforcement, Emerging Threats Mitigation Team, and Office of Promoter Investigations.

What has really changed is social media being use to promote tax scams. You can simply google "how to save taxes" and find all kinds of results. Historically, most would consult an advisor that they knew personally or had been referred to by someone they knew personally.

Misinformation moves quickly through social media. There is a much larger blueprint of those being reached by the information.

The Joint Strategic Emerging Issues Group has been formed to help bring to life getting aggressive with abusive transactions. The goal is to bring together emerging issues from across the IRS to create a collaborative, enterprise approach to the identification, development and compliance planning of emerging issues and abusive transactions. The group supports a venue for communication among business operating divisions, Chief Counsel, and Supporting Organizations.

Tools and Treatments for Emerging issues include:

- Examination Activity
- Soft Letter/Notice
- Examiner Issue Awareness/Training
- Taxpayer/Preparer Education & Outreach
- Published Guidance/Change in Law
- Tax Form/Publication Revision
- Administrative Guidance
- Consideration of designating transactions as listed and/or transactions of interest.
- Litigation
- Promoter Investigations

Practitioners can help by Reporting Potential Abuse to the IRS. Taxpayers and tax professionals can report suspected abusive schemes to the IRS by completing the Form 14242, Reporting Abusive Tax Promotions and/or Preparers. Taxpayers and tax professionals can also report information as a Whistleblower by completing Form 211, Application for Reward for Original Information. Practitioners should stay current on IRS Communications and Publications. Be familiar with the IRS Dirty Dozen. Read News Releases. Write an article. The IRS reads what practitioners write.

Micro-captives and conservation easements will continue to be attacked. The panel encouraged practitioners to be thinking ahead to other transactions that the IRS will be looking at including sales to trusts and similar transactions.

Information regarding the Emerging Issues Group can be found in the Internal Revenue Manual.

https://www.irs.gov/irm/part4/irm_04-034-001

IRS Large Business & International Division Enforcement Update

Moderator: Sharon Katz-Pearlman, Esq., National Principal-in-Charge, Tax Dispute Resolution Network, KPMG, New York, NY; Global Head, Tax Dispute Resolution and Controversy, KPMG International

Panelists: Jennifer Best, Director, IRS Large Business & International Division, Treaty and Transfer Pricing Operations, Washington, DC; Nikole Flax, Commissioner, IRS Large Business & International Division, Washington, DC

The Large Business and International (LB&I) Division is responsible for tax administration activities for domestic and foreign businesses with a United States tax reporting requirement and assets equal to or exceeding \$10 million as well as the Global High Wealth and International Individual Compliance programs.

Active campaigns of LB&I can be found at:

<https://www.irs.gov/businesses/corporations/lbi-active-campaigns>

LB&I has been getting feedback from Taxpayers that there need to be more options on resolution programs.

LB&I wants to expand coverage of transfer pricing reviews. Hires are being made in this area to support this expansion.

Coverage is also being increased in the partnership area. There is a large partnership compliance program. There are several partnership specific campaigns.

Who Needs Tax Rules and Regulations? The Surprising Ways the Administrative Procedure Act is Affecting Tax Practice

Moderator: John Colvin, Esq., Partner, Colvin + Hallet Law, Seattle, WA

Panelists: David W. Foster, Esq., Partner, Skadden, Arps, Slate, Meagher & Flom, Washington, DC; Jenny L. Johnson, Esq., Partner, McDermott Will & Emery, Chicago, IL; Kevin L. Kenworthy, Esq., Member, Miller & Chevalier, Washington, DC

***Cohen v. United States*, 650 F.3d 717 (D.C. Cir. 2011)** was a challenge to Notice 2006-50, which provided procedures for seeking refunds of the telephone excise tax. Taxpayers could either request the refund of a small safe harbor amount on their income tax return, or provide full documentation of the actual tax paid and request a refund of that amount.

The court noted that the suit was not about restraining or assessment or collection of any tax. The suit was about the procedures under which the IRS will return taxpayers' money. In noting the same, the court indicated that even if the IRS's procedures were upheld, the ruling would not affect the assessment or collection of taxes after the fact.

***Direct Marketing Ass'n v Brohl*, 135 S. Ct. 1124 (2015)** construed TIA rather than AIA (TIA is modeled on AIA and generally interpreted in similar fashion). The court interpreted the phrase "assessment, levy or collection" from TIA as not encompassing Colorado's requirement for out-of-state retailers to provide notices or information relative to in-state customer state use tax liabilities.

In ***CIC Servs., LLC v. IRS*, 141 S. Ct. 1582 (2021)**, plaintiff asserted that IRS was required to go through Notice and Comment rulemaking before it could impose the reporting regime on taxpayers. Notice 2016-66 designated certain §831(b) captive insurance transactions as "transactions of interest," a species of reportable transaction. Being identified as a "reportable transaction" subjects participants/material advisors to a reporting regime, coupled with civil and criminal penalties for non-compliance. The Court ruled that reporting obligation is separate from and steps removed from the tax penalty. Refund option is not a realistic option because of criminal exposure. Suit better characterized as suit to enjoin reporting obligation (rather than a tax).

Notice and Comment Requirements – 5 USC §553

Notice of proposed rulemaking with the terms or substance of the proposed rule or a description of the subjects and issues involved. The agency shall give interested persons an opportunity to submit written data, views, or arguments with or without opportunity for oral presentation. After considering public comments, the agency must incorporate in the rules adopted a concise general statement of their basis and purpose. The presenters encouraged practitioners to submit comments when possible but also to do so within the applicable timelines.

There are exceptions to the rulemaking comment requirements.

In ***Mann Construction, Inc. v. U.S.* (6th Cir. 2022)**, taxpayers sued to recover penalties for failing to disclose participation in cash value life insurance policies designated as reportable transaction in Notice 2007-83. Notice subject to notice and comment under APA. The Court was unwilling to infer statutory carve out from APA.

IRS argued the urgency of getting rules in place in instances to stop tax shelters and abuses but the IRS did not accept such argument.

In ***Liberty Global Inc. v. U.S.* (D. Colo. 2022)**, District Court granted summary judgment for Liberty Global, ruling:

- Temporary regulations subject to APA notice and comment requirements;
- Notice and comment not excused by section 7805(e);
- Treasury/IRS failed to demonstrate good cause, rejecting government claims that. The Court rejected arguments that time notice and comment would encourage taxpayers to engage in aggressive tax planning and that delay would impose tax compliance costs.

In ***Chamber of Commerce v. IRS* (W.D. Tex. 2017)**, the Court found regulation met *State Farm* reasoned-decision-making standard but flunked the notice-and-comment requirements of the APA. The Court rejected claims that temporary regulations are exempt from notice and comment requirements. Regulation at issue is not an “interpretative” regulation exempt from notice and comment. Section 7805(b) retroactivity rules do not trump notice and comment.

2019 Treasury Policy Statement

The Treasury indicated intent to commit to

- Notice-and-comment even for interpretive rules
- Statement of good cause for temporary regulations

APA Requires agency to respond to “significant comments”. It is not clear what significant comments are. In general, they include those that raise points relevant to the agency's decision and which, if adopted, would require a change in an agency's proposed rule cast doubt on the reasonableness of a position taken by the agency.”

In ***Hewitt v. Commissioner* (11th Cir. 2021)**, a conservation easement case, taxpayer challenged 1986 regulations that prescribe a formula for proceeds to the donee in the event the easement is later extinguished by law (e.g., condemnation) – the formula includes the value of later improvements to the land. The Eleventh Circuit held this regulation violated procedural requirements of the APA for failing to address significant comments in the required “basis and purpose” statement. The preamble claimed that notice and comment not required because the regulations were interpretive.

In ***Oakbrook Land Holdings LLC v. Comm’r* (6th Cir. 2022)**, the court held that Treasury adequately explained its rationale:

- Context reveals “reasoned path” to the basis and purpose of the rule.
- None of identified comments required direct response.
- Rule adopted consistent with Congressional desire to require donations to be in perpetuity.

In **Altera v. Commissioner (9th Cir. 2019)**, the Tax Court ruled that the regulation under section 482 requiring that employee stock options be included in the pool of costs to be shared under a qualified cost sharing agreement flunked *State Farm* reasoned decision-making standard because the rule lacked a factual basis and was contrary to evidence submitted to Treasury. A divided panel of the Ninth Circuit reversed stating that the regulations were a permissible interpretation of section 482 as amended in 1986.

The Potential Application of the Six-Year SOL

28 USC §2401 is the general catchall federal six-year statute of limitations. This applies generally to actions brought under the APA. *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1094 (D.C. Cir. 1996); *Bannister v. U.S. Treasury*, 2021 U.S. Dist. LEXIS 185697, 2021 WL 4443020 (S.D. N.Y. 2021). For matters outside of the deficiency and refund processes (e.g., reporting requirements imposed by listed transaction notices), the six-year period would start when the “right of action first accrues.” §2401(a). Ordinarily, a challenge to administrative action accrues when agency action become final. *Wind River Mining Corp. v. United States*, 946 F.2d 710, 715 (9th Cir. 1991). Actions seeking to invalidate listing notices (or “transactions of interest”) would be mostly barred at this point, except for SCEs (Notice 2017-10) and §831(b) captives (2016-66).

Research – Obtaining NPRM File and Comments

Review Federal Register Notice of Proposed Rulemaking (NPRM), any comments received, and IRS/Treasury discussion and resolution of the comments. Submit comments if regulations might affect you (or TP that you represent). Make sure comments are submitted in a timely manner (agency need not address if untimely). Write comments in a way that they will be determined to be significant. Provide business or economic justification if possible.

Presenters think that this line of cases may result in the IRS issuing less notices.

From the Frying Pan and Into the Fire: Handling Audits Under the New Centralized Partnership Audit Regime

Moderator: Megan L. Brackney, Esq., Partner, Kostelanetz & Fink, New York, NY

Panelists: Rochelle Hodes, Esq., Principal, Crowe LLP, Washington, DC; Amanda H. Nussbaum, Esq., Partner, Proskauer Rose, New York, NY; Joy Gerdy Zogby, Esq., Senior Technician Reviewer, IRS Office of Chief Counsel, Procedure and Administration, Washington, DC

There are a lot of partnerships eligible to elect out that are not doing so. Chances of audit are not less one way or the other.

Information and Forms Online

<https://www.irs.gov/businesses/partnerships/bba-centralized-partnership-audit-regime>

Election Out

<https://www.irs.gov/businesses/partnerships/elect-out-of-the-centralized-partnership-auditregime>

Designating a Partnership Representative

<https://www.irs.gov/businesses/partnerships/designate-a-partnership-representative>

Administrative Adjustment Requests

<https://www.irs.gov/businesses/partnerships/file-an-administrative-adjustment-request-underbipartisan-budget-act-of-2015-bba>

BBA Partnership Audit Resource

Notices to expect from the IRS and actions to take during a [BBA partnership audit](#), also called an examination.

<https://www.irs.gov/businesses/partnerships/bba-partnership-audit-process>

Internal Revenue Manual 4.31.9 Centralized Partnership Audit Regime (BBA) Field Examination Procedures

Basic Concepts

Partnership-related items determined at partnership level. Treas. Reg. §301.6221-1(a); §301.6241-1(a)(6)(ii). 1065 gets adjusted. This impacts partner level items including penalties.

- Penalties determined at partnership level. Treas. Reg. §301.6221-1(c).
- Partner-level defenses to penalties cannot be asserted during partnership-level audit proceeding. Partner-level defenses to such items can only be asserted through refund actions following assessment and payment. Treas. Reg. §301.6221-1(d).

Partnership-Related Item – IRC §6241(2)(b)

“(i) any item or amount with respect to the partnership (without regard to whether or not such item or amount appears on the partnership's return and including an imputed underpayment and any item or amount relating to any transaction with, basis in, or liability of, the partnership) which is relevant (determined without regard to this subchapter) in determining the tax liability of any person under chapter 1, and (ii) any partner's distributive share of any item or amount described in clause (i).

BBA Key Terms

Imputed Underpayment – Under the BBA, the IRS generally assesses and collects any understatement of tax (called an imputed underpayment or “IU”) at the partnership level. If an adjustment is made and it results in a payment due, then imputed underpayment will be calculated. Adjustments can be “pushed out” within 45 days after notice of underpayment.

Push-Out Election – IRC §6226: Shifts assessment and collection to reviewed year partners, rather than the partnership.

Reporting Year – Treas. Reg. §301.6226-3(a): Taxable year of the partner that includes the date a “push-out” statement was furnished to all relevant partners.

Reviewed Year – Treas. Reg. § 6241-1(a)(8): The partnership taxable year that is being adjusted.

Partnership Representative – IRC §6223: A partner or other person with a substantial presence in the U.S. designated by the partnership (or, in certain cases, by the IRS) with sole authority to act on behalf of the partnership and to bind the partnership and partners.

Election Out of BBA

Certain partnerships with 100 or fewer partners may elect out of the BBA regime. The number of partnerships election out of BBA is less than expected and presenters noted that it is not clear why more partnerships are not electing out.

The numbers of partners is determined by rules under IRC §6031(b) (Schedules K-1), with a special look-through rule for S-corporation partners, IRC §6221(b). A disregarded entity is an ineligible direct partner, precluding election out.

Election-out must be made on the partnership’s timely filed return—including extensions—for the taxpayer year to which the election applies. All required information must be included. Partners must be notified within 30 days.

BBA Audit Process

Partnership Representative

Each partnership must designate for each taxable year a partnership representative on its *IRS Form 1065, "U.S. Return of Partnership Income."* The partnership representative has sole authority to act on behalf of the partnership, Treas. Reg. §301.6223-2(c). This is significant authority and the partnership should select someone that the partnership very much trusts.

The designation remains in effect for a taxable year until terminated by: (i) resignation; (ii) valid revocation; or (iii) determination by IRS designation not in effect. The designation may also be superseded by a subsequent designation for such year. Eligibility considerations, including "substantial presence" in the U.S. for a "Designated Individual" (where partnership representative is an entity) and availability to meet. There are various companies that will act as Partnership Representative. Keep in mind that if there is no acting Partnership Representative, the IRS can appoint one. Action should be taken to avoid that but a service should be selected with care. Presenters did note that the IRS really doesn't want to appoint Partnership Representatives.

Designation remains in effect for a taxable year until terminated by: (i) resignation; (ii) valid revocation; or (iii) determination by IRS designation not in effect. The designation may also be superseded by a subsequent designation for such year.

Resignation of Partnership Representative is covered by Treas. Reg. §301.6223-1(d)(1):

- o For any reason by notification to IRS by partnership representative/designated individual.
- o Can only be filed after IRS issues notice of partnership administrative audit proceeding ("NAP") (or with Notice of Administrative Proceedings).
- o Resigning partnership representative may NOT designate a successor.

Imputed Underpayment

The sum of total net positive partnership adjustments, multiplied by the highest federal income tax rate applicable to either individuals or corporations in effect for the reviewed year.

The IRS can make multiple imputed underpayments, which can be separately treated (for, e.g., purposes of the push out election) and contested.

If there is no imputed underpayment, adjustments must be taken into account in the adjustment year under Treas. Reg. § 301.6225-3 (absent push-out election).

Regulations permit an imputed underpayment to be categorized into general” and “specific” underpayments. Specific imputed underpayments represent adjustments to items that were allocated to one partner or group. “General ”imputed underpayments represent all other adjustments.

Modification of Imputed Underpayment

Within 270 days of the mailing of the Notice of Proposed Partnership Adjustment (“NOPPA”), the partnership may request modification of the imputed underpayment by submitting a request providing substantiation for the requested modification. IRC §6225(c);Treas. Reg. §301.6225-2. Modification requests do not impact a partnership’s ability to challenge the substance of a proposed adjustment.

To request modification, the partnership representative must complete and electronically submit Form 8980, *Partnership Request for Modification of Imputed Underpayment Under IRC Section 6225(c)*.

Modifications are completely at the discretion of the IRS.

Amended Return Modification

Treas. Reg. §301.6225-2(d)(2)

The imputed underpayment is reduced by the allocable share of adjustments taken into account by a reviewed year partner on an amended return filed for the reviewed year and all intervening years (with payment of tax reported thereon).

Amended returns are required for all relevant partners, together with tax, interest and penalties. Amended returns should only reflect proposed adjustments to partnership-related items (no non partnership-related items). The partnership representative must provide affidavits from each partner that the partner filed amended returns *and paid* the tax, penalties and interest due.

Alternative Pull-in Reduction to Imputed Underpayment

Treas. Reg. §301.6225-2(d)(2) provides a streamlined process for submitting modification requests per forms, instructions and other guidance providing “all information and payment of any tax, penalties, additions to tax, additional amounts, and interest” instead of amended returns for relevant partners.

Pull-In Option: If partnership owes an imputed underpayment, a *reviewed year* partner can pay its allocable share of the adjustment without needing to file an amended return. The partnership can then reduce the imputed underpayment by the amount paid in by the reviewed year partner.

Pull-in Procedure: The partner must make the payment within 270 days of the NOPPA and provide the IRS the necessary information to substantiate that the proper amounts were paid.

In the event of partnership sale, it is important to address elections that should be made.

Administrative Adjustment Requests

Partnership (but not partners) may file AAR to correct one or more errors in a prior year partnership return. Partnership representative only may file an AAR. Notice of administrative proceeding (audit) bars filing AAR. Where an imputed underpayment results the partnership may approach the issue in the same manner as under IRC §6225 (imputed underpayment) or IRC §6226 (pushout election). Treas. Reg. §301.6227-2(b)(1).

The partners take these adjustments into account in the reviewed year but they reflect the tax effect of taking those adjustments into account in the reporting year. If the adjustments result in an imputed underpayment the partnership pays the amount at the time the AAR is filed.

Partnership Terminations

IRC §6241(7); Treas. Reg. §301.6241-3: The IRS may in sole discretion determine that a partnership ceases to exist before a partnership adjustment takes effect. The IRS may determine that partnership ceases to exist if:

- o The partnership terminates because no part of any business, financial operation, or venture of the partnership continues to be carried on by any of its partners in a partnership under IRC §708.

- o The partnership does not have the ability to pay assessments for which the partner is liable.

- If the partnership ceases to exist, the former partners are required to take into account the partnership adjustments. The former partners are the adjustment year partners.

Self employment taxes are not covered by the BBA. BBA covers taxes under Chapter 1. Chapters 2 and 2A are not covered by BBA. Current structure requires two proceedings to address BBA issues and self-employment taxes. There is a Greenbook proposed revision to resolve this.

Tips for Contesting Foreign Asset Reporting Penalties

Moderator: Brian C. McManus, Esq., Partner, Latham & Watkins, Boston, MA

Panelists: Richard J. Sapinski, Esq., Member, Sills Cummis & Gross PC, Newark, NJ; Thomas J. Sawyer, Esq., Senior Litigation Counsel and Counsel for International Tax Matters, Tax Division, U.S. Department of Justice, Washington, DC; Philip J. Wilson, CPA, Office Managing Partner, Marcum, Costa Mesa, CA

Form 3520 is the form for the purpose of US taxpayers reporting certain foreign transactions. I.R.C. §§ 679(c), 6048.

A reportable event includes:

- The creation of a foreign trust by a U.S. person, I.R.C. § 6048(a)(3)(A)(i).
- The transfer of money or property (directly or indirectly) to a foreign trust by a U.S. person, I.R.C. § 6048(a)(3)(A)(ii).
- The death of a U.S. citizen or resident with an interest in a Foreign Trust, I.R.C. § 6048(a)(3)(A)(iii).
- Generally, Form 3520 is required to be filed within the statutory filing dates of the income tax return of the Form 3520 filer. See Notice 97-34, 1997-1 C.B. 422, §VIII.

Certain U.S. citizens and residents must file Form 5471. There are 5 categories of filers. Form 5471 is due when the income tax return of the U.S. person subject to the reporting requirement is due, including extensions. Form 5471 is attached to such person's income tax return. See Treas. Reg. §1.6038-2(i).

Penalties regarding Form 3520 are specified in I.R.C. § 6677. See also § 6039F and § 6662(j). Penalties for failure to file 5471 depend on the classification of the taxpayer who failed to file.

The IRS offers a variety of options to come into compliance. Returns can be amended in some instances. There may be a voluntary disclosure program. There may be a streamlined filing compliance process. There are procedures for filing delinquent returns involving filings on international issues. Voluntary disclosure may prevent a taxpayer from being referred to criminal. Substantial civil penalties will likely still be imposed.

Taxpayers generally must pay the full amount of a tax penalty before they can challenge its correctness in a suit for refund. See *Flora v. United States*, 362 U.S. 145 (1960); I.R.C. §7422(a); 28 U.S.C. 1346(a)(1). A suit for refund is commenced by filing a complaint in Federal district court or the Court of Federal Claims. Fed. R. Civ. P. 3; Rules of the Court of Federal Claims (RCFC) 3.

The Tax Division handles or authorizes most civil and criminal litigation that concerns or relates to the internal revenue laws in Federal district and appellate courts. The

Office of Review evaluates settlement offers in light of litigating potential and policy considerations, furnishes advice and assistance to the trial sections in complex cases, takes final action on settlements within its authority, and advises the Assistant Attorney General on settlements that require final action at a higher level. The Office of Review also assists in resolving disagreements between the litigating sections and the IRS, so that the positions of the Division and the IRS remain consistent.

IRS Criminal Investigation Division Enforcement Update

Moderator: Don Fort, CPA, Director of Investigations, Kostelanetz & Fink, Washington, DC

Presenter: James Robnett, Deputy Chief, IRS Criminal Investigation, Washington, DC

CI mission investigates financial crimes. CI efforts are the backbone to voluntary compliance. CI dedicates the entirety of its time to financial investigations. Priority of division is to cover the most significant cases but also to cover the broadest spectrum of cases. International tax fraud, cyber crime, refund fraud, abusive schemes, and public corruption are all significant areas. Tax crimes are about 75% of the investigations. Money laundering and similar crimes constitute most of the balance of investigations.

CI recommends prosecutions to Department of Justice. CI investigates but does not prosecute. Investigations often occur side by side with an agent. CI referrals often come from fraud. CI has a 95% prosecution rate.

Referral rate to CI has decreased due to better screening with technology prior to referral. Technology and collaboration are being used to help identify badges of fraud. As a result of improved analysis prior to referrals, the investigation process has become more efficient and effective.

Five promoters and two appraisers have been indicted criminally in the syndicated conservation easements. Cryptocurrency is another area being targeted by criminal investigations.

There is a KleptoCapture tax force. The group has financial and cyber expertise and collaborates in international enforcement.

Seven percent of investigative time has addressed COVID related fraud. There has been a 100 percent conviction rate in this area.

IRS Small Business/Self-Employed Division Enforcement Update

Moderator: Eric L. Green, Esq., Partner, Green & Sklarz, New Haven, CT

Panelists: Darren John Guillot, Commissioner, IRS Small Business/Self-Employed Division, Collection, Washington, DC; Scott Irick, Director, IRS Small Business/Self-Employed Division, Examination, Washington, DC

The Small Business/Self-Employed Division serves small businesses and self-employed taxpayers, helping them understand and meet their tax obligations.

Changes have been made due to COVID. New balances are being rolled into existing installment agreement. Short-term installment agreements are being extended to 180 days. If an offer-in-compromise has been accepted, more time has been given to pay the balance.

Chatbots have been implemented and have been instrumental in answering certain phone calls. By using the chatbots to answer basic questions, humans are being freed up to deal with calls that need the in person interaction.

Revenue has been increased. Analytics have improved to assist with identifying returns that should be reviewed.

900 employees have been added. All are bilingual. This was accomplished in part by moving into Puerto Rico.

Enforcement continues to evolve with the use of data in FATCA, trust fund recovery, Offer in Compromise and Virtual Currency. Other exam areas are promoters/preparers, abusive transactions, digital assets/virtual currency and high-income taxpayers.

There is a 100% rate of audit of syndicated conservation easements.

If you suspect a tax scam, there are processes for reporting. They can be found at:

<https://www.irs.gov/businesses/small-businesses-self-employed/tax-scams-how-to-report-them>

IRS Independent Office of Appeals Update

Moderator: Todd Welty, Esq., President and CEO, Todd Welty PC, Atlanta, GA

Presenter: Andy Keyso, Chief, IRS Independent Office of Appeals, Washington, DC

This office is the dispute resolution arm of the IRS and comes into play when the initial audit process has not been able to resolve issues between the IRS and the taxpayer. The Office hears almost any type of case. The Office is an independent organization within the IRS that seeks to resolve cases through an informal process. The Taxpayer First Act resulted in the creation of the Independent Office of Appeals.

Appeals was significantly impacted by the pandemic because many cases were still on paper. The transition to electronic cases has facilitated the office catching up.

In person appeals will return. The presenter noted there are many new employees who have not handled in person appeals.

There are a significant number of cases getting to appeals on technicalities that possibly could have been resolved at the examination level. In many cases, taxpayers did not respond to IRS letters for reasons related to the pandemic and IRS is trying to create an opportunity to resolve the cases despite the cases finding their way to appeals. There is also an effort to reduce the docketing of these cases.

The IRS is seeking the input of tax practitioners, particularly on handling the under-reporting landing on a Tax Court Track. Appeals can be reached through IRS website and plan is to publish processes being considered on which practitioners can comment.

Appeals must work every case that comes into the appeals office. One goal is to hire more outside practitioners to come into the appeals office.

IRS Office of Chief Counsel Update

Moderator: Brian W. Kittle, Esq., Partner, Mayer Brown, New York, NY

Presenter: Catherine Gugar, Associate Area Counsel, IRS Large Business & International Division, Washington, DC

The chief legal counsel is the legal advisor to the IRS Commissioner on all matters pertaining to the interpretation, administration and enforcement of the Internal Revenue Laws (as well as all other legal matters). The Chief Counsel provides legal guidance and interpretive advice to the IRS, Treasury and to taxpayers.

The office of Promoter Investigations has a mission of investigating and ending the promotion of abusive tax promotions. The office is one year old. The office of chief legal counsel strategizes with Promoter Investigations on how to identify transactions that should be reviewed. The Office of Promoter Investigations does not actually conduct the investigations.

The office has added 200 positions to support litigation of Syndicated Conservation Easements.

U.S. Tax Court Update

Moderator: Michael J. Desmond, Esq., Partner, Gibson, Dunn & Crutcher, Los Angeles, CA and Washington, DC

Panelist: The Hon. Kathleen Kerrigan, Chief Judge Elect, United States Tax Court, Washington, DC

The Tax Court's jurisdiction is set forth in Title 26 and includes income, estate, gift and certain excise tax deficiency determinations. In addition to its deficiency case jurisdiction, the Court has jurisdiction to hear matters involving collection due process, claims for innocent spouse relief, partnership adjustments (both TEFRA and BBA), declaratory judgments over tax exempt status, interest abatements, whistleblower awards and IRS passport certifications.

Geographical footprint is quite large. Tax Court trials are held in 74 cities. Virtual sessions have been conducted since 2020. The Tax Court issued 320 opinions in 2021. The Court currently has 17 judges. Judges are appointed by the president. Ten judges are on recall and there are five special trial judges.

The bulk of filed cases are deficiency cases. The Tax Court jurisdiction continues to expand.

Duggan v. Commissioner, 879 F.3d 1029 (9th Cir. 2018) (time period for filing appeal from IRS collection due process hearing is jurisdictional)

Myers v. Commissioner, 928 F.3d 1025 (D.C. Cir. 2019) (time period for filing appeal from IRS whistleblower determination is *not* jurisdictional)

Boechler v. Commissioner, ___ U.S. ___, Docket No. 20-1472 (April 21, 2022) (time period for filing appeal from IRS collection due process hearing not jurisdictional)

Hallmark Research Collective v. Commissioner, Tax Court Docket No. 21284-21 (pending motion involving jurisdictional question for income tax deficiency proceeding)

National Taxpayer Advocate Update

Moderator: Josh O. Ungerman, Esq., CPA, Partner, Meadows, Collier, Reed, Cousins, Crouch & Ungerman, Dallas, TX

Panelist: Erin Collins, National Taxpayer Advocate, Washington, DC

The Taxpayer Advocate Service is an independent organization. The employees assist and advocate for taxpayers who are experiencing economic harm or need help with resolving issues. TAS seeks to ensure that taxpayers are treated fairly.

TAS assists with: resolving problems; resolving systemic issues; administrative issues; reporting to Congress to propose legislation that will help tax administration; and administration, support and partnering with low income taxpayer clinics and the Taxpayer Advocacy Panel.

TAS helps all taxpayers. There is no dollar limitation. The TAS does not have the authority to get on the IRS system and “fix issues.”

TAS has a local taxpayer advocate in each of the 50 states. There are about 77 local offices and more than 1600 employees. Groups are case advocacy, systemic advocacy, and research.

There is a TAS section on the IRS website. <https://www.irs.gov/pub/irs-pdf/f922.pdf>. You can locate a phone number for your local office; however, getting through on the phone is currently difficult. Form 911 can be submitted. Contact can be initiated through the website. TAS is asked to reach out within three days from initial contact.

Congress adopted a Taxpayer Bill of Rights. TAS assists with ensuring that taxpayers rights are honored. The Taxpayer Bill of Rights can be found at the IRS website:

<https://www.irs.gov/taxpayer-bill-of-rights>

Case Advocacy provides confidential assistance to taxpayers with specific issues and concerns regarding IRS systems and procedures. Taxpayers may be able to get assistance from TAS if they have been unable to resolve an issue on their own, are having financial difficulty resulting from their IRS problem, or believe an IRS procedure isn't working as it should.

To be eligible for Case Advocacy, there must be an economic burden on taxpayer. There must be a systemic burden such as delay or no response or resolution as promised. The best interest of the taxpayer is at issue. There are compelling public policy considerations that warrant assistance for an individual or group of taxpayers.

Advocacy tools available beyond a request to the IRS to fix an issue include Service Level Agreements (SLA), Operations Assistance Requests (OARs), and Taxpayer Assistance Orders (TAOs). To request assistance from TAS, complete a detailed Form 911 on behalf of your client.

TAS has a significant focus on systemic issues. This can help a lot of taxpayers rather than just one. Systemic advocacy studies and seeks to resolve problems that affect groups of taxpayers. Systemic issues are those that affect multiple taxpayers, require administrative or legislative solutions, and involve protecting taxpayer rights. There is a form that can be filled out on the SAMS website on issues that may be systemic so that the issue can be addressed for all taxpayers being affected. <https://www.irs.gov/advocate/tas-systemic-advocacy.faq>.

The research group publishes a blog. The blog can be subscribed to:

<https://www.taxpayeradvocate.irs.gov/taxnews-information/blogs-nta/>

TAS annual report to Congress can be located:

<https://www.taxpayeradvocate.irs.gov/reports/2021-annual-report-to-congress/national-taxpayer-advocate-2022-purple-book/>

TAS has a Low Income Taxpayer Clinic (LITC). There is a grant program for organizations that operate an LITC. See Publication 4134 for a list of clinics.

<https://www.irs.gov/pub/irs-pdf/p4134.pdf>

For information, visit:

<https://www.taxpayeradvocate.irs.gov/about-us/low-income-taxpayer-clinics-litc>

TAS has concerns regarding current voluntary disclosure process. To determine eligibility, current VDP requires taxpayers to admit potentially incriminating details of tax fraud in a written questionnaire that is signed under penalties of perjury. The taxpayer has no certainty that the disclosures won't result in criminal charges. If accepted to program, exam will go through typical process and examiner has broad discretion. TAS concern is that this approach may actually discourage taxpayers from participating.

The TAS is also proposing solutions to assessment of penalties on international information returns. TAS is proposing pre-assessment correspondence providing taxpayers an opportunity to provide information as to why the penalties should not apply.

The TAS has identified that the IRS sometimes collects beyond the ten year statute of limitations on collecting a tax debt. The statute can be tolled for various reasons but there was apparently a computer glitch that allowed tolling for periods of time beyond those permissible and collections continued with respect to amounts that were outside the statute of limitations. The TAS notes continuing efforts to advocate to protect taxpayers from collection due to erroneous tolling of statute.

Contact TAS as follows:

<https://www.taxpayeradvocate.irs.gov/contact-us/>

<https://www.irs.gov/pub/irs-prior/p1546--2017.pdf>

Call 1 877 777 4778

Download and complete Form 911.

<https://www.irs.gov/pub/irs-pdf/f911.pdf>

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

Mary Vandenack

CITE AS:

LISI Income Tax Planning Newsletter #222 (June 29, 2022) at <http://www.leimbergservices.com> Copyright 2022 Leimberg Information Services, Inc. (LISI). Reproduction in Any Form or Forwarding to Any Person Prohibited Without Express Permission. This newsletter is designed to provide accurate and authoritative information regarding the subject matter covered. It is provided with the understanding that LISI is not engaged in rendering legal, accounting, or other professional advice or services. If such advice is required, the services of a competent professional should be sought. Statements of fact or opinion are the responsibility of the authors and do not represent an opinion on the part of the officers or staff of LISI.

[Click here to comment on this newsletter.](#)

HELP US HELP OTHERS! TELL A FRIEND ABOUT OUR NEWSLETTERS. JUST **[CLICK HERE.](#)**

[Click Here](#) for Steve Leimberg and Bob LeClair's **NumberCruncher** and **Quickview** Software, Books, and Other Resources