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April 6, 2018

The Honorable Lynn Jenkins
Chairman
Subcommittee on Oversight of the Committee on Ways and Means
1526 Longworth House Office Building
Washington, D.C. 20515

The Honorable John Lewis
Ranking Member
Subcommittee on Oversight of the Committee on Ways and Means
343 Cannon House Office Building
Washington, D.C. 20515

Dear Chairman Jenkins and Ranking Member Lewis:

The Federal Tax Clinic at the Legal Services Center of Harvard Law School (the Clinic) welcomes your discussion draft on "The Taxpayer First Act." The Clinic writes to comment on your proposals and to offer some suggested additions consistent with your ideas.

The Clinic will not comment on each proposal. On select proposals, the Clinic will offer its views. The failure to comment simply means the Clinic has no valuable insight on a proposal and not that it agrees or disagrees with the proposal. In general, the Clinic agrees with the proposals and the goals of the proposals. All taxpayers benefit when the system of working with the IRS improves.

Section 101 – The Clinic suggests that Appeals provide the record to the taxpayer 30 days prior to the scheduled conference, rather than 10 days. In order for the conference with Appeals to be meaningful, the parties benefit from an exchange of information prior to the conference with enough time to digest the information and properly prepare. If Appeals sends information to the taxpayer 10 days prior to the conference, by the time the taxpayer receives and digests this information, the taxpayer will have little or no time to provide Appeals with meaningful information prior to the conference based on the information received.

The Clinic suggests that the role of Appeals in Small Tax Court cases change and move forward to a much earlier point in the process in order to ensure continued taxpayer engagement. The Clinic will discuss this with a specific proposal in discussing suggesting changes to Tax Court procedures in discussing Section 601, et seq.

The primary thrust of the changes proposed in Section 101 concerning Appeals and its independence do not implicate low-income taxpayers represented by the Clinic. Because almost all Clinic clients do not have their case assigned to an individual during the examination or collection stage of their case, there is no compliance division or Chief Counsel employee with any knowledge of their case or any concern about their case. So, no one at the IRS seeks to compromise the independence of Appeals in the cases of our clients.

Although the Clinic has essentially no concern about independence, it is concerned about the ability of its clients and unrepresented low-income taxpayers generally to actually meet with an Appeals Officer when such a face-to-face meeting would be beneficial. Appeals places most of its lower-graded employees, the individuals to whom it would assign almost all cases of low-income taxpayers, in Service Centers rather than in local offices convenient to low-income taxpayers. Therefore, low-income taxpayers have little opportunity to meet with Appeals Officers other than by the telephone. The Clinic suggests that the Committee consider providing funding and statutory incentives for Appeals to provide face to face meetings with low-income taxpayers or "electronic" face-to-face meetings so that low-income taxpayers with issues needing a face-to-face type of contact have the opportunity for a meaningful Appeals conference.

Section 202 – The Clinic suggests creating a uniform definition of low-income taxpayer for purposes of VITA and LITC engagement. Creating varying distinctions creates needless confusion. The Clinic also suggests pegging the dollar criteria for eligibility to the cost of living. Although creating a cost of living index adds complexity, an individual living in Boston where the Clinic is located (or New York City or San Francisco or Los Angeles, etc.) faces housing costs that put the current criteria for LITC eligibility too low and creates a significant distinction between individuals seeking assistance in large, high cost of living cities and those in less urban, less expensive locations. The eligibility criteria should recognize those distinctions as other programs in the government already do.

Section 203 (and later sections regarding information returns) – The filing of an accurate return is the single most important step in the process of tax administration. We have placed too great an emphasis on speed over accuracy in the return filing process. The current process also requires individuals to potentially collect numerous third party returns in order to properly prepare their own return. There has been some movement in the right direction but the Clinic suggests putting more emphasis on getting the third party returns to the IRS as quickly as possible so that the IRS can put the returns into one document and deliver that one document to the individual taxpayer by the end of February. The Clinic suggests that the filing season begin when the IRS delivers the consolidated third party information reporting package to the taxpayer. This would cut down on identity theft, automated underreporter issues, and a host of other problems created by inaccurate returns.

Section 206 – This is long overdue. IRS employees should be able to do more than just hand a taxpayer a publication on LITCs that is nationwide and difficult for some to understand. The prohibition on IRS employees making referrals to specific providers is understandable and good public policy, but not when applied to organizations providing pro bono services with oversight by the IRS through the grant reporting process. In addition to this improvement, which will allow low-income taxpayers to more easily learn of the opportunity for assistance, the Clinic has other suggestions for improving the tax system as it relates to low-income taxpayers.

Reduce the Issuance of Form 1099-C in Situations in which Debt Forgiveness Does not Generate Income

Many low-income taxpayers have received Form 1099-C in situations in which the party writing off the debt does so because the debt is contested. Cancelling a disputed debt should not give rise to income to the party contesting the debt. This issue is currently playing out in a large numbers of cases involving student loan debt owed to for-profit colleges. The Clinic proposes a mechanism for assisting these taxpayers and the IRS. *See attached Proposal #1.*

Amend the Flora *Rule*

While this suggestion impacts low-income taxpayers, it also impacts individual and entity taxpayers at different income strata. The Clinic suggests that taxpayers should have the opportunity to go to Tax Court to contest what are currently labeled as assessable penalties. The lack of an opportunity to judicially contest these liabilities prior to assessment often leads to the lack of an opportunity to judicially contest these liabilities at all if the amount is too large for the taxpayer to pay. The Tax Court also provides a forum more conducive to low-income taxpayers and one in which it costs less to litigate. *See attached Proposal #2.*

Improve the I.R.C. § 32(k) Penalty

The current penalty imposed under I.R.C. § 32(k) is unlike almost any other penalty in the Internal Revenue Code and operates more like a penalty imposed in the welfare context than one imposed by the tax code. Because of its unusual nature, the IRS has had trouble properly administering this penalty and taxpayers have had trouble knowing when and where to contest the penalty. *See attached Proposal #3.*

Eliminate Taxation of Statutory Attorney's Fees

Low-income taxpayers who are the victims of consumer fraud or similar statutes that provide a statutory award and statutory attorneys' fees can lose money by protecting their rights because of the income tax consequences of the statutory fee award to their attorney. This disincentive to protecting rights should not exist. *See attached Proposal #4.*

Section 404 – Require the ID Theft unit to provide the victim of identity theft with a transcript of their account as the unit closes the case. This will provide the individual with the proof they need that the account adjustment has properly gone through and that they will not have recurring problems with respect to the issue created by the theft. The ID theft indicator prevents the taxpayer, and the taxpayer's representative, from obtaining transcripts through the ordinary means. Having the ID Theft unit send this transcript with the closing letter should not significantly add to the work of that unit yet it provides important information to the individual not otherwise easily available.

Section 601, et seq – Changing the name of the Tax Court documents and the Special Trial Judges to bring the names into greater conformity with other federal jurisdictions may eliminate some confusion. This is not a major issue for low-income taxpayers coming before the Tax Court but other issues of conformity are.

Access to Records

Creating additional conformity with other federal courts on the issue of access to the records of the Tax Court would provide a benefit to the community if redaction issues can be appropriately addressed. The Tax Court currently operates outside of PACER and, although its records are public records, the records of the Tax Court are not easily or cheaply accessed. Approximately 70% of the Tax Court's docket consists of pro se petitioners. The Tax Court does an outstanding job of conforming its rules and practices to meet the needs of the high volume of *pro se* petitioners it serves while also serving as the forum for very high dollar corporate and individual litigants. It limits electronic access to its records in part to protect the many *pro se* litigants who have difficulty following the Court's instructions regarding redaction of personal information.

There should be a means of redacting personal information and making documents publicly available. *Attached as Proposal #5* from the Clinic is a suggestion regarding a statute change that would bring the Tax Court into the PACER system making its records truly public in the modern era; however, the Clinic suggests that in doing so Congress require other changes that would protect information. Perhaps the most common form of disclosure of public information in the Tax Court's internal electronic files is the submission by the taxpayer of the document giving the taxpayer the right to petition the Court. Tax Court rules and its form petition require the petitioner to attach a copy of the notice of deficiency or notice of determination to the petition. Those notices contain multiple instances of inclusion of the taxpayer's personal identification number (almost always the social security number.) Even diligent taxpayers can miss one or two instances of the number appearing as they try to redact the document for submission.

Rather than have individual taxpayers go through what can be a lengthy document in search of all of the information they should redact, the IRS should issue, as a part of the notice, a one-page document entitled "Ticket to Tax Court." On that document, there should be the taxpayer's name, the document should address the last date to file the petition (*see suggestion #6 below*), and there should be a bar code. The taxpayer should file that one-page document with the Tax Court. When the Court transmits the petition to the IRS, the IRS can identify the taxpayer from the bar code and provide the Court with a redacted copy of the appropriate notice. Other suggestions might further refine the means of keeping personal identifying information out of the public files but there should be a way to meet the goals of making the Tax Court records truly public while simultaneously protecting taxpayer information. Tax cases exist in district courts, the Court of Federal Claims, and bankruptcy courts. The Tax Court is not unique in handling tax cases but it is unique in the number of *pro se* litigants it has to protect and in the way it handles access to its public records. Uniformity and openness of the records, coupled with protection of identifying information, should be a goal of all of the federal courts handling tax cases.

Notifying All Taxpayers of the Deadline to File a Tax Court Petition

In 1998, Congress required that the IRS place the last date to file a Tax Court petition onto the notice of deficiency. In other notices leading to Tax Court jurisdiction, the IRS is not statutorily required to put on the date and it does not. Congress should require the date on all notices giving taxpayers the right to go to Tax Court in order that no taxpayers lose their opportunity as a result of confusion over this time period. For the same reasons that Congress had the IRS place the date on the notice of deficiency, it should do so for all similar notices. *See attached Proposal #6.*

Make Clear That Date for Filing Tax Court Petition is not Jurisdictional

Supreme Court case law over the past decade has created a strong preference for reading time periods for filing petitions as claims processing rules that are not jurisdictional. Congress should make clear that the time periods it sets for filing a Tax Court petition are not jurisdictional but should be respected absent significant reasons for equitably tolling the date in the statute. *See attached Proposal #7.*

Clear Up Issues in Collection Due Process Cases Preventing Appropriate Access to the Tax Court

- *Move the CDP Filing Deadline to 90 days after the Notice of Determination to line it up with the Time Period in the Notice of Deficiency and Extend Timeframe if Taxpayer is Overseas*

The current time period of 30 days reflected a Congressional intent for CDP cases that has not played out in the administrative or judicial handling of these cases. Although taxpayers were given a very short time period to file a petition, no time periods were imposed on the Appeals Office or the Tax Court to quickly handle these cases. As a result, CDP cases actually can take longer than deficiency cases to resolve in Appeals and in Tax Court. Adding 60 more days to the time for individuals to petition would not materially impact the rather lengthy timeline of a CDP case. Also, allowing individuals who are out of the country at the time of the mailing of the CDP notice of determination to have extra time to petition the Tax Court, as they do in deficiency cases, would create an appropriate parallel time period and not impact CDP litigation in a way detrimental to the system. *See attached Proposal #8.*

- *Permit Taxpayers to Obtain Refunds in CDP cases*

Current judicial precedent does not allow taxpayers to obtain refunds in CDP cases; however, allowing refunds would benefit individual taxpayers and improve judicial economy. *See attached Proposal #9.*

- *Grant CDP Access to Non-Taxpayers Against Whom a Federal Tax Lien is Filed*

The current regulations do not permit non-taxpayers to benefit from the CDP provisions when the IRS files a lien naming them as a result of a third party relationship with the taxpayer. Allowing the Tax Court to resolve lien disputes in this situation is a natural result consistent with the intent of CDP. *See attached Proposal #10.*

- *Replace Answer in Small Tax Cases*

The answer requirement in small tax cases burdens the IRS and provides little benefit to the taxpayer. It is possible to replace the answer with information that would provide meaningful information to the petitioner and the Court more quickly. It is also possible to speed up the opportunity to meet with Appeals in order to keep *pro se* petitioners from losing touch with their case. *See attached Proposal #11.*

The Clinic thanks the Subcommittee on Oversight for the opportunity to submit these comments and welcomes any questions that the Subcommittee might have regarding the comments contained in this response.

Sincerely,

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Proposal #1: Amend Section 6050P to Exclude Debt Cancelled Due to Misconduct of For-Profit Colleges

Policies that encourage overzealous issuance of Form 1099-C by creditors result in substantial costs and inefficiencies to the IRS in both collection and compliance functions. Furthermore, such policies may adversely affect the rights of the most vulnerable taxpayer populations. Therefore, the Internal Revenue Code Section 6050P should be amended so that creditors cancelling debt incurred to attend for-profit colleges are not required to send Form 1099-C where the debt is cancelled due to misconduct of the for-profit college.

Present Law

Internal Revenue Code § 6050P does not clearly require issuance of Form 1099-C when a cancelled debt is not taxable. In fact, the statute appears to give Treasury leeway in determining how and when an information return is required under statute.[1] However, it is clear that the IRS would generally expect a creditor to issue Form 1099-C even for discharge of debt that clearly does not result in taxable income, as it did for student loans cancelled as part of the Public Service Loan Forgiveness Program, 20 U.S.C. § 1087ee, which cancellation is explicitly non-taxable, IRC § 108(f).[2]

Treasury has acknowledged in two instances that Form 1099-C should not issue to defrauded student loan borrowers.

Recently, Treasury determined that Form 1099-Cs should not issue for certain cancellations of federal student loans from two for-profit colleges found to have committed widespread misconduct.[3] In Revenue Procedure 2015-57 and Revenue Procedure 2017-24, Treasury concluded that taxpayers who attended Corinthian Colleges, Inc., and American Career Institute, Inc., respectively, need not recognize income when they receive borrower defense loan cancellations. This analysis should extend to cancellations of any type of student loan debt incurred to attend a for-profit colleges.

In Revenue Procedure 2015-57 and Revenue Procedure 2017-24, Treasury presumptively applied two independent exceptions to the rule that income should accrue when a debt is cancelled. First, Treasury acknowledged that income does not accrue and a Form 1099-C need not issue for a cancelled student debt if school misconduct creates a "legal infirmity that relates

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[1] *See* I.R.C. § 6050P(a) (explicitly giving the Secretary control via regulations over the "time and form" required for an entity discharging debt).

[2] *See* IRS Notice 2009-0126 (requiring Department of Education to send information returns (Form 1099-C)).

[3] *See* Rev. Proc. 2015-57, 2015-51 I.R.B. 863; Rev. Proc. 2017-24, 2017-7 I.R.B. 916. And yet, Form 1099-Cs did issue in one of those instances. *See* National Consumer Law Center, *Defrauded Corinthian Students Sent Confusing 1099-Cs*, Mar. 15, 2017, http://www.studentloanborrowerassistance.org/defrauded-corinthian-students-sent-confusing-1099-cs/.

back to the original sales transaction."[4] Second, Treasury recognized that a former student of a for-profit college can "exclude from gross income a discharge of indebtedness that occurs when the taxpayer is insolvent."[5] In the case of Corinthian and American Career Institute, Treasury applied these exceptions to all former students who received borrower defense cancellations of their federal student loans. This type of federal student loan cancellation is predicated on schools' violations of state law.[6]

Legal infirmities infect all debts cancelled as a result of for-profit school misconduct, and all such debt should be considered disputed.

The fraudulent and abusive practices prevalent in the for-profit college industry are well-documented.[7] Many students have been misled by their for-profit schools about the transferability of credits they would earn, externship opportunities they would enjoy, job placement rates they could expect, and income they would earn after graduation. Moreover, countless students have been subjected to unfair recruitment tactics—including high-pressure sales calls, rushed enrollment meetings, and lies about enrollment deadlines—as well as other unfair practices—including targeting on the basis of gender and race, unsafe learning environments, and wholly inappropriate externships. And crucially, many students are subject to unfair and deceptive financial aid practices, including lies about the nature and consequences of student debt and pressure to incur debt.

These unfair and deceptive acts and practices toward students violate state law,[8] which in turn entitles students to cancellation of their debts.[9] All federal student loan debt contracts provide for cancellation when a school's act or omission would give rise to a cause of action

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[4] Rev. Proc. 2015-57 at 3; Rev. Proc. 2017-24 at 3.

[5] Rev. Proc. 2015-57 at 3; *accord* Rev. Proc. 2017-24 at 4.

[6] Rev. Proc. 2015-57; Rev. Proc. 2017-24; *see* 20 U.S.C. § 1087e(h) (providing for borrower defense loan cancellation); 34 C.F.R. § 685.206(c) (same); 34 C.F.R. § 682.209(g) (same).

[7] Of the nearly 100,000 borrower defense loan cancellation claims received by the United States Department of Education as of August 15, 2017, over 98% were submitted by former students of for-profit colleges. *See* Yan Cao & Tariq Habash, The Century Foundation, *College Complaints Unmasked* (Nov. 8, 2017), https://perma.cc/D26X-XDPC. Moreover, this misconduct is not confined to a few bad actors. Among the 100,000 pending claims, forty-seven different schools generated twenty or more borrower defense claims each. *Id.*

[8] *See, e.g.*, Compl., *Colon v. DeVos*, No. 17-cv-8790 (S.D.N.Y., Nov. 12, 2017) (outlining misconduct at Sandford-Brown Institute); Class Action Adversary Proceeding Compl. at 10–48, *Jorge Villalba, James Eric Brewer, et al. v. ITT Educational Services, Inc.*, No. 16-07207-JMC-7A (Bankr. S.D. Ind. Jan. 1, 2017) (summarizing misconduct at ITT Technical Institutes); First Am. Compl, *Williams v. DeVos*, No. 16-cv-11949 (D. Mass Sept. 28, 2016) (summarizing misconduct at Corinthian Colleges, Inc.). *See also, e.g.*, Complaint, California v. Ashford University, LLC et al., No. RG17883963 (Cal. Super. Nov. 29, 2017).

[9] *See, e.g.*, Amicus Brief of Commonwealth of Massachusetts at 3–4, 7, *Williams*, No. 16-cv-11949, *available at* https://perma.cc/4FS6-6KDL (enumerating widespread violations of Massachusetts law experienced by former Corinthian Colleges students and explaining that this misconduct renders their debts not legally enforceable).

against the school under applicable state law.[10] And private student loans arranged by or through schools are required to include the Federal Trade Commission's "Holder Rule" language in their contracts, making any holder of the note liable for all claims and defenses the borrower has against the school.[11]

In sum, all debt procured by the unfair, deceptive, or fraudulent practices of for-profit colleges is unenforceable and legally infirm.

Many or most borrowers affected by for-profit school misconduct are insolvent.

Most for-profit colleges target low-income students. According to a 2012 study by the Health, Education, Labor and Pensions Committee of the U.S. Senate, the annual median family income of students at for-profit colleges is $23,000, compared to $62,000 for students of private not-for-profit institutions and $45,000 for students of public not-for-profit schools.[12] Indeed, in a recent internal survey, the Project on Predatory Student Lending at the Legal Services Center of Harvard Law School estimated that over 90% of its clients who submitted borrower defense loan cancellation applications were eligible for Pell grants, which are available only to low-income students.[13] The prevalence of low-income students at for-profit colleges is no accident. Many for-profit schools use advertising to specifically target low-income students, including recruiting recipients of government assistance and making false promises of high wages.[14]

Moreover, for-profit colleges are more expensive than not-for-profit and public alternatives. On average, for-profit schools charge more than three-and-a-half times as much as public institutions in the same state.[15] Lower student family incomes and higher cost mean that students of for-profit colleges must incur large student debts to finance their education. Indeed, nearly all students at for-profit colleges take out student loans, and they borrow more money than students at other types of schools.[16]

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[10] *See* 20 U.S.C. § 1087e(h) (providing for borrower defense loan cancellation); 34 C.F.R. § 685.206(c) (same); 34 C.F.R. § 682.209(g) (same).

[11] Private loans must contain the Federal Trade Commissions "Holder Rule" language. 16 C.F.R. § 433.2. This language permits private loan borrowers to seek cancellation of debts for the same reasons as the language in federal student loan notes. Similarly, institutional debts may be subject to cancellation in litigation or negotiation with schools. *Cf. ITT Trustee to Stop Collection on All "Temporary Credit Accounts*, Project on Predatory Student Lending (May 19, 2017), https://perma.cc/9DTQ-445A.

[12] U.S. Senate Health, Educ., Labor and Pensions Comm., *For-Profit Higher Education: The Failure to Safeguard the Federal Investment and Ensure Student Success*, 96 n.369 (July 30, 2012), https://perma.cc/5UKJ-VWUJ [hereinafter HELP Report].

[13] Federal Pell Grant Program: Purpose, U.S. Dep't of Educ., https://perma.cc/5FL5-U524 (last modified June 4, 2015).

[14] *Accord* HELP Report at 18 (reporting that for-profit colleges "often target their marketing to low-income independent students").

[15] *Id.* at 35.

[16] *Id.* at 7 ("Ninety-six percent of for-profit students take out student loans, according to the most recent U.S. Department of Education data.").

Third, former students experience exceedingly poor employment outcomes after attending for-profit colleges. Their financial outlooks do not improve after attending for-profit schools, and often they get worse. After being induced to incur large amounts of student debt to attend, borrowers struggle to find employment in their fields and many return to the same jobs they had before they enrolled. According to an expert report prepared for the Project on Predatory Student Lending, students of one Massachusetts for-profit college are likely to experience a decrease in income, and to earn less than average local high school graduates with no college education. National studies corroborate this finding,[17] and suggest that former students of for-profit schools are more likely than their counterparts at not-for-profits to experience unemployment.[18] With grim employment prospects, former students of for-profit colleges account for a disproportionate share of all student loan defaults nationwide.[19]

The combination of low family income, high debt burden, and poor employment outcomes means that many former students of for-profit colleges whose student debts are cancelled on the basis of school misconduct qualify for the insolvency exception.

Reasons for Change

Treasury has recognized in the two instances discussed above that cancelled debt from for-profit colleges does not create taxable income and that creditors need not issue Form 1099-C in these instances. However, because the language of the statute does not clearly provide guidance leading to this result, Treasury has not been able to provide blanket assurances to creditors in nearly identical circumstances. The absence of such assurances leads to massively harmful and unnecessary problems for borrowers and the IRS alike.

Neither the legal infirmities relating to school misconduct nor the likely applicability of the insolvency exception is unique to federal student loan debts from Corinthian Colleges and American Career Institute. Because the same logic applies to educational debts from many other for-profit schools, the statute should allow Treasury to extend its presumptive application of the legal infirmities/disputed debt doctrine and the insolvency exception to all cancellations of student indebtedness based on school misconduct by for-profit colleges, including private student loans and institutional debts.

Issuing Form 1099-Cs to taxpayers who will not have taxable income as a result, as current regulations often require, creates problems for taxpayers and the IRS.

Current law and regulations lead to the creation, dissemination, and processing of tens of thousands of information returns where no taxable income has actually resulted from the cancellation of debt. First, current regulations unduly emphasize the "identifiable events" leading to issuance. This is particularly evident in the requirement that a creditor issue Form 1099-C

[17] *See* Kevin Lang & Russell Weinstein, *Evaluating Student Outcomes at For-Profit Colleges*, Nat'l Bureau of Econ. Research (2012), http://www.nber.org/papers/w18201.pdf.
[18] HELP Report at 8.
[19] *Id.* at 114.

"regardless of whether the debtor is subject to tax on the discharged debt under Sections 61, 108 or otherwise by applicable law." Second, existing regulations appear to impose reporting obligations on applicable entities for discharge of a debt obligation over the $600 threshold amount, regardless of whether the debtor is subject to tax on the amount of income.[20]

When an entity issues Form 1099-Cs based on current regulatory requirements, but all or nearly all taxpayers will not have taxable income as a result of the cancelled debt, the best possible result is a significant unnecessary paperwork burden to the taxpayer and the IRS (not to mention the paperwork required of the entity cancelling the debt.) In this best-case scenario, the taxpayer cheated by a for-profit college files Form 8275 to explain the legal infirmities and disputed nature of the underlying debt and, if applicable, Form 982 to claim insolvency. The IRS would then review these forms and make a manual determination on a case by case basis for thousands or tens of thousands of individuals.

But taxpayers and the IRS are likely to face outcomes worse than the unnecessary expenditure of time to reach an appropriate outcome. Taxpayers—likely low-income[21]—will probably be confused even if they receive and understand the obligations imposed by the Form 1099-C. The taxpayer cannot obtain advice from VITA sites about cancellation of debt income,[22] nor can low-income taxpayer clinics help them file tax returns appropriately reporting the information on their Form 1099-C.

Many taxpayers receiving Form 1099-C may conclude that they have taxable income they must report.[23] In such cases, vulnerable taxpayers may accrue tax liabilities they do not have the ability to pay and should never have had to pay. Reporting the amount on the Form 1099-C as taxable income usually creates a liability that the individual cannot pay which places the individual into the IRS collection notice stream and into ten years of purgatory of the liability hanging over their head. The cost to the IRS for each of these cases in collection is not insubstantial. In addition to the tax cost, the additional reported income can cause the individual to lose other income based benefits because of the phantom income that never really existed.

Others may ignore the Form 1099-C, and would most likely receive Automated Under-Reporter (AUR) notices. After examination by the AUR Tax Examiner, if reasonable doubt still exists, a CP 2000 Notice is generally issued,[24] followed by a Notice of Deficiency (NOD) if the taxpayer does not respond.[25] From here, there are only bad options: the taxpayer may pay to

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[20] 26 C.F.R. § 1.6050P-(a)(3). The Department of Education is an "applicable entity" pursuant to Internal Revenue Code Section 6050P(c)(1)(A).
[21] *See supra* n. 13-14.
[22] See VITA training module, https://apps.irs.gov/app/vita/content/15/36_04_010.jsp?level=advanced (excluding most cancellation of debt income).
[23] Indeed, the Treasury comments withdrawing the 36-Month Rule explicitly mention this possibility. *See* 81 F.R. 7808 (Nov. 10, 2016) (T.D. 9793 Regulatory History).
[24] *See* Internal Revenue Manual § 4.19.3.2 (11).
[25] *See* Form CP 2000 at 1 ("If We Don't Hear From You"), https://www.irs.gov/pub/notices/cp2000_english.pdf.

petition the tax court, requiring IRS Counsel to file an answer, and both parties would devote additional unavailable resources until the issue is resolved. Or, the tax liability would go into collection, thereby converting one unfair and uncollectible debt into another with all of the consequences discussed above.

Requiring creditors to issue Form 1099-C in circumstances that are extremely unlikely to result in taxable income imposes an enormous cost on some of the most vulnerable taxpayers as well as a significant cost on the IRS. Cancellation of debt incurred to attend a for-profit college is one such circumstance. Taxpayers should not be required to report these cancellations on their return: all the information return accomplishes is to increase the chance that the taxpayer erroneously overpays or the IRS audits (or otherwise devotes resources to examining) a return that neglects to report non-taxable income.

Solutions that would simply declare the tax treatment of the cancelled debt, without preventing the Form 1099-C issuance, do not address the issue efficiently. The IRS may be able to ameliorate the problem of taxpayers who fail to report on information from Form 1099-Cs by marking the Form 1099-Cs such that the failure to address them does not trigger the AUR function. However, it is unclear that the IRS would be able to identify taxpayers who *do* erroneously include the cancelled debt as income. This type of systematic error vitiates a taxpayer's right to be informed and to pay no more tax than is due.[26] Preventing the Form 1099-C issuance is the more complete and effective solution.

In light of the widespread misrepresentations committed by for-profit schools and the resulting legal infirmities of the related debts, as well as the likelihood that former students are insolvent, Section 6050P should be amended to extend the logic of Revenue Procedures 2015-17 and 2017-24 to prevent issuance of Form 1099-C for all cancellations of student indebtedness that result from school misconduct by for-profit colleges, including federal, private, and institutional debt. These suggestions protect vulnerable taxpayers against paying more tax than is due, or being subject to unnecessary audit, and they help conserve and better concentrate the resources of the IRS by enhancing the "quality, utility, and clarity of the information" that is to be collected and used for compliance.

Recommendations

Suggested Statutory Change

Returns relating to the cancellation of indebtedness by certain entities
Section 6050P of the Internal Revenue Code (26 U.S.C. § 6050P) is amended:

(1) By striking in subparagraph (b) "Subsection (a) shall not apply to any discharge of less than $600." and inserting the following:

> "Subsection (a) shall not apply to
> (1) any discharge of less than $600;
> (2) any qualified settlement indebtedness; or

[26] *See* I.R.C. § 7803(a)(3)(A), (C).

(3) any discharge of qualified proprietary school indebtedness."

(2) By adding to the end of subparagraph (c) the following:

"(4) **Qualified Settlement Indebtedness**. The term 'qualified settlement indebtedness' means discharge of credit (within the meaning of 15 U.S.C. 1602(f)) offered or extended to a consumer (within the meaning of 15 U.S.C. 1602(i)) for personal, family, or household purposes pursuant to:

(A) A settlement agreement between any applicable financial entity and any Federal agency (within the meaning of 5 U.S.C. 551(1)) or any State (within the meaning of 26 U.S.C. 3510(f)(4)) attorney general or agency; or

(B) A judicial, administrative, or arbitration determination or settlement agreement entered into between any consumer and any applicable financial entity in lieu of such determination based, in part, on a consumer's claims of fraud.

(5) **Qualified Proprietary School Indebtedness**. The term 'qualified proprietary school indebtedness' means a personal loan to fund attendance at an institution described in 20 U.S.C. §1002(b)."

Proposal #2: Changes to U.S. Tax Court Jurisdiction to Include Judicial Review of Administrative Penalties Imposed by the Internal Revenue Service

Present Law

The Flora *Rule*

A number of recent cases call into question the structure of the present tax procedure statutes and regulations governing access to judicial review. These cases exist because the current position of the government and the courts blocks certain taxpayers from obtaining judicial review, raising serious questions about the rights of taxpayers with respect to liabilities imposed by the Internal Revenue Code that do not fall within the deficiency procedures.[1] In a country that traces its roots back to the problem of taxation without representation or a voice, the inability to obtain judicial review of tax determinations made by the IRS raises serious questions about due process and fundamental fairness.

Under current law, the two types of proceedings for judicial review of a tax determination by the IRS are a deficiency proceeding in which the taxpayer goes to Tax Court before the assessment of the outstanding liability in order to obtain a pre-assessment review of the proposed liability (the deficiency route) and a suit for refund of the tax in the district court or court of federal claims after assessment of the proposed tax and full payment of the amount assessed (the refund route). When a taxpayer pursues the refund route, 28 U.S.C. § 1346(a)(1) provides that district courts have jurisdiction over:

> Any Civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws ....

The *Flora* decisions[2] interpret 28 U.S.C. § 1346, which grants authority to sue the government to obtain a tax refund. The interpretation of this provision by the Supreme Court in *Flora* requiring full payment of a liability before a district court or court of federal claims has jurisdiction has survived almost six decades with only minor revision, despite the fact that our system of tax administration has changed vastly in that time. Those unable to pay the liability that the IRS has assessed are barred from judicial proceedings to determine the fairness or accuracy of that assessment.

Assessable Penalties

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[1] *Our Country Home Enterprises, Inc. v. Commissioner*, 855 F.3d 773 (7th Cir. 2017); *Keller Tank, Inc. v. Commissioner*, 854 F.3d 1178 (10th Cir. 2017); *Iames v. Commissioner*, 850 F.3d 160 (4th Cir. 2017); *Larson v. United States*, Case 17-503 (2nd Circuit appealed from decision of S.D.N.Y. on December 28, 2016).

[2] *Flora v. United States*, 357 U.S. 63 (1958) (*Flora I*), *aff'd on reh'g*, 362 U.S. 145 (1960) (*Flora II*)

The term "assessable penalty" refers to a penalty that frequently stands alone from a tax liability and relates to inappropriate behavior regarding the tax system but not necessarily the determination of a specific tax. The law permits the assessment of these penalties prior to the opportunity of a taxpayer to have judicial review. In the federal tax procedure context, the term "assessment" is a term of art referring to the act of the IRS in recording the liability on its books as a debt of the taxpayer. Once the IRS makes an assessment, the taxpayer's account goes into collection. Almost immediately after assessment, the IRS sends a notice and demand letter required by I.R.C. § 6303. If the taxpayer does not immediately pay, the IRS begins to use its collection tools such as levy, offset, and filing a notice of federal tax lien. The taxpayer feels the full force of the powerful collection tools at the disposal of the IRS at a point when the taxpayer has only had the opportunity to discuss the correctness of the liability with someone at the IRS but not with a judicial officer.

At the time of the *Flora* decisions, there were only three assessable penalties: the so-called 100% penalty (I.R.C. § 6672), damages for instituting Tax Court proceedings merely for delay (I.R.C. § 6673), and a penalty for a fraudulent statement or failure to furnish a statement to employees (I.R.C. § 6674). However, I.R.C. § 6672 (also known as the 100% penalty or the trust fund recovery penalty) is more accurately described as a collection device, rather than a penalty.[3] This penalty also permits a taxpayer to obtain judicial review after paying the withheld employment taxes for one employee for one quarter which requires payment of a nominal sum in order to meet the test. At the time *Flora I* was decided and continuing until today, I.R.C. § 6673 referred to the imposition of "damages"—not a penalty at all. And I.R.C. § 6674 applied (and applies today) only to "willful" failures, and is "in addition to the criminal penalty provided by section 7204." In 1954, the category of civil assessable penalties consisted of a collection device, damages imposed for delaying Tax Court proceedings, and what was essentially a criminal penalty. Today, by contrast, Subchapter B of Chapter 68 contains about 50 different civil, assessable penalties.

The Inadequate Remedy of Collection Due Process (CDP)

Congress recognized that the tax system, and the assessable penalty regime in particular, did not allow taxpayers the opportunity for judicial review in many circumstances. In 1998, it created the Collection Due Process provisions (I.R.C. §§ 6320 and 6330) allowing taxpayers to have an additional administrative hearing with the possibility of judicial review to discuss the collection action proposed by the IRS and, in certain circumstances, the merits of the underlying tax. The basic structure of Collection Due Process permits taxpayers to contest the merits of the underlying liability in circumstances in which they did not previously have the opportunity to do so.

It has been argued that the existence of Collection Due Process remedied the situation concerning assessable penalties that *Flora* did not address because these penalties did not exist at the time of the decision. However, CDP does not remedy the problem of judicial review for assessable penalties because of the manner in which the IRS has interpreted the statute. In its

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[3] *Botta v. Scanlon*, 314 F.2d 392, 393 (2d Cir. 1963)

regulations, the IRS provides that taxpayers who have a prior opportunity for administrative review after the imposition of a liability may not raise the merits of that liability in the Collection Due Process context because of this prior opportunity. CDP hearings allow the taxpayer to raise "any relevant issue relating to the unpaid tax or the proposed levy." I.R.C. § 6330(c)(2)(A). But she may not raise an issue if it was "raised and considered at a … previous administrative or judicial proceeding" in which she "participated meaningfully." I.R.C. § 6330(c)(4)(A). Additionally, a taxpayer may contest the assessed liability, but only if she "did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability." I.R.C. § 6330(c)(2)(B). The Treasury Regulations confirm that "[a]n opportunity to dispute the underlying liability includes a prior opportunity for a conference with [the] Appeals [Office] that was offered either before or after the assessment of the liability." Treas. Reg. § 301.6330-1(e)(3) Q&S-E2.

Because, in almost every case, the IRS affords persons assessed an assessable penalty the opportunity for an administrative review of that penalty, the opportunity for judicial review of the assessable penalty does not exist in CDP cases according to the IRS. Some commentators and some taxpayers take exception with the position of the IRS that Collection Due Process does not provide a judicial review of liabilities where no judicial review existed prior to the collection proceeding. In recent litigation, the courts have uniformly upheld the IRS regulations making it clear that Collection Due Process does not provide a relief valve from the full payment rule of *Flora* for taxpayers assessed with an assessable penalty.[4]

Reasons for Change

The Harvard Federal Tax clinic believes that all taxpayers should have the opportunity for judicial review of the imposition of any tax or penalty by the IRS. The current regime under *Flora* and the recent cases following it—which require payment in full of any liability before judicial review may be obtained in district court—often pose an insurmountable obstacle to taxpayers seeking judicial review of IRS determinations. Moreover, the CDP remedy that was intended, in part, to address these deficiencies has proven inadequate in many cases. The Harvard Law Tax Clinic believes that it is time to re-examine assessable penalties and expand the jurisdiction of the Tax Court to hear non-deficiency cases before penalties are assessed.

Recommendations

Proposed Changes

The Supreme Court decisions in the *Flora* cases were made before the advent of the current assessable penalty regime. Assessable penalties—which started to grow in number around the time of the Flora decisions—were likely not envisioned by the Court and may have led to a different outcome had their proliferation been anticipated and their implications for due process understood. The proposed statutory changes solve this problem by reconceptualizing assessable penalties as administrative penalties subject in each instance to the judicial review of the Tax Court.

[4] *See, e.g.*, *Country Home*, *Keller Tank*, and *Iames*, *supra* n. 1.

Suggested Statutory Language

Amend I.R.C. § 6214 - Determinations by Tax Court, to include new section (e) as follows:

(e) Jurisdiction as to penalties under section 6671
The Tax Court shall have jurisdiction to adjudicate the imposition of any penalty by the Secretary under section 6671.

Amend I.R.C. § 6671 - Rules for application of assessable penalties, as follows:

Section 6671: Rules for application of other administrative penalties

(a) Application of other administrative penalties.
The penalties and liabilities provided by this subchapter shall be paid upon notice and demand by the Secretary unless a petition is made timely to the Tax Court, under regulations prescribed by the secretary. Following a determination by the Tax Court or a lapse in the time to timely file a petition to the Tax Court, penalties under this subchapter shall be assessed and collected in the same manner as taxes. Except as otherwise provided, any reference in this title to "tax" imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter.

Proposal #3: I.R.C. Section 32(k)

Present Law

Section 32(k)(1)(B)(ii) provides that a taxpayer cannot claim the Earned Income Tax Credit in the two tax years that follow a tax year for which the IRS made a final determination that the taxpayer's claim of the EITC was "due to reckless or intentional disregard of rules and regulations (but not due to fraud)."[1] "Reckless disregard" and "intentional disregard" are not defined in the context of Section 32(k)(1)(B)(ii). But in the section of the Internal Revenue Code that deals with accuracy related penalties, "reckless disregard" and "intentional disregard" are clearly distinguished from mere negligence.[2] Therefore, the natural interpretation is that Congress intended to require more than negligence for the IRS to ban a taxpayer from claiming the Earned Income Tax Credit for two years.

But the IRS imposes the ban on people even when it has no evidence that the person acted with "reckless or intentional disregard" instead of merely negligently or under some confusion about the eligibility requirements. In fact, the IRS imposes the two-year ban on some taxpayers systematically and without having gathered any evidence of the taxpayer's state of mind. Under the Internal Revenue Manual, when a taxpayer's claim of the EITC is disallowed, the taxpayer's record is marked and if the taxpayer claims the EITC in a later year then the IRS asks the taxpayer to certify eligibility.[3] If the taxpayer does not provide the recertification and the case is chosen for an audit then it is assigned a project code 0027 or 0028.[4] In both types of cases, the IRS sends a letter to the taxpayer proposing a two-year ban and if the taxpayer does not respond, then the ban is automatically imposed.[5] Thus the IRS imposes the ban in these cases without having the kind of communication with the taxpayer that is necessary to determine the taxpayer's state of mind in claiming the EITC.

When a taxpayer challenges the IRS's imposition of the two-year ban, it is not clear whether the taxpayer or the IRS has the burden of production on whether the ban was properly imposed. The IRS has the burden of production when it comes to accuracy related penalties. [6] But it's not clear whether the two-year ban is a "penalty" under the Code.[7] Therefore it is not

[1] 26 U.S. Code § 32(k)(1)(B)(ii).
[2] *See* 26 U.S. Code § 6662. "For purposes of this section, the term "negligence" includes any failure to make a reasonable attempt to comply with the provisions of this title, and the term "disregard" includes any careless, reckless, or intentional disregard." *Id.*
[3] IRM 4.19.14.6, Recertifications
[4] IRM 4.19.14.6
[5] IRM 4.19.14.6.1.5
[6] IRC § 7491(c) provides that "[n]otwithstanding any other provision of this title, the Secretary shall have the burden of production in any court proceeding with respect to the liability of any individual for any penalty, addition to tax, or additional amount imposed by this title." Allocating the burden of production to the IRS means "the Commissioner must come forward with sufficient evidence indicating that it is appropriate to impose the relevant penalty.
[7] Two-year ban is contained in §32 and not in the normal penalty section, §68 which is titled "Additions to the Tax, Additional Amounts, and Assessable Penalties."

clear at present whether a taxpayer who challenges two-year ban has to produce evidence that the ban was improperly imposed or if the IRS has to proffer evidence that shows the taxpayer acted with a "reckless or intentional disregard of rules and regulations."

Reasons for Change

1. *The Harvard Tax Clinic Believes that Congress should amend the statute to require that the IRS has direct evidence of the taxpayer's state of mind in claiming the Credit before it imposes the two-year ban.*

At present, the IRS imposes the ban on people in cases where it has no evidence that the person had the requisite state of mind simply because the taxpayer fails to respond to IRS inquiries. This is despite guidance from the IRS Chief Counsel that says that it is improper to impose the ban when the taxpayer has merely failed to respond to inquiries. [8]

The Earned Income Tax Credit is a complicated welfare provision that has been placed into the Internal Revenue Code. Because of our self-assessment tax system, this means that people are asked to self-certify whether they meet the complicated statutory requirements to receive the benefit of the EITC. This can be contrasted with traditional welfare programs, such as food stamp programs, where an official considers the evidence and determines whether a person is eligible for the program. This saves the government certain administrative costs but places a burden on low-income taxpayers to navigate this complex system. The Harvard Tax Clinic believes that the statute should recognize the problems that low-income tax payers face in trying to determine whether they are eligible for the EITC, and that it should only impose the two-year ban when there is direct evidence that the taxpayer acted with a "reckless or intentional disregard of rules and regulations."

Many low-income taxpayers depend on the Earned Income Tax Credit to get by. The Taxpayer Advocate Service found that taxpayers who would have been eligible for the EITC in 2012 and 2013 but were subject to the two-year ban would have on average received $4,600 from the EITC in those two years.[9] These taxpayers had an average income of $15,500.[10] It doesn't make sense to take away money that these taxpayers would use—in most cases—to support their families without some real evidence that the taxpayer acted improperly.

2. *The Harvard Tax Clinic believes that Congress should amend the statute to clearly allocate to the IRS the burden of production in a case where a taxpayer challenges the two-year ban.*

It is consistent with other parts of the Internal Revenue Code to require the IRS to produce the evidence upon which it decided to impose the ban. For example, I.R.C. § 7491(c) currently places the burden of production on the IRS "for any penalty, addition to tax, or additional amount imposed by this title."

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[8] IRS Service Center Advisory SCA 200245051 (Nov. 8, 2002).
[9] National Taxpayer Advocate, 2013 Annual Report to Congress at 104.
[10] *Id.*

The two-year ban is in the nature of a penalty because it prevents taxpayers from claiming the Earned Income Tax Credit in a year in which they are otherwise entitled to it. While it may serve a prophylactic function by preventing people from claiming the EITC again based on facts that the IRS has already determined are inadequate, it is a blunt instrument for this purpose. Low-income taxpayers, as a group, face family and housing changes at a rate higher than other groups. Because family relationships and housing situations are important determinants of eligibility for the EITC, low-income taxpayers' eligibility for the credit can and often does change from year to year. Because the two-year ban prevents taxpayers whose situation has changed so that they are now eligible for the EITC from claiming it, it functions as a penalty. A more proper prophylactic is to mark for special review the EITC claims of taxpayers who have previously been subject to a disallowance instead of banning such claims outright.

Recommendations

Suggested Statutory Language

Amend 32(k)(1)(B)(ii) to read "the period of 2 taxable years after the most recent taxable year for which there was a final determination ***based on direct evidence*** that the taxpayer's claim of credit under this section was due to reckless or intentional disregard of rules and regulations (but not due to fraud)."

Amend 7491(c) to read "Notwithstanding any other provision of this title, the Secretary shall have the burden of production in any court proceeding with respect to the liability of any individual for any penalty, addition to tax, additional amount imposed by this title, ***or disallowance under Section 32(k)***."

Proposal #4: Elimination of Application of *Banks* to Individuals Seeking Statutory Remedies Where Attorney's Fees are Statutory

Present Law

In *Commissioner v. Banks*, the Supreme Court held a litigant's recovery constitutes income under the Internal Revenue Code[1] if the litigant's income includes the portion of the recovery paid to the attorney as a contingent fee.[2] *Banks* involved two taxpayers who did not include the amount paid to their attorney in gross income on their federal income tax returns. The Court relied on the anticipatory assignment doctrine, which was first stated in *Lucas v. Earl*.[3] The anticipatory assignment doctrine prohibits a taxpayer from excluding an economic gain from gross income by assigning the gain, in advance, to another party. The rationale is that gains should be taxed to those who earned them.[4] The Court found the contingent-fee agreement should be viewed as an anticipatory assignment to the attorney of a portion of the client's income from any litigation recovery.[5]

The Court recognized that the litigant does not always have dominion over the income at the moment of receipt, but found the income nevertheless attributable to the litigant because he retains dominion over the income-generating asset.[6] The Court relied on the notion that he "who owns or controls the source of the income, also controls the disposition of that which he could have received himself and diverts the payment from himself to others as the means of procuring the satisfaction of his wants."[7] The income generating asset in the case of litigation recovery is the cause of action that derives from the litigant's legal injury. Throughout litigation, the litigant retains dominion over this asset. This is true even though the attorney is vested with the ability to make tactical decisions without the client's consultation. The Court reasoned that because attorney-client relationships are akin to agent-principal relationships, the attorney is merely acting as the agent of his client and in doing so, is bound to act only in the interests of the principal, the client. Given this relationship, it is appropriate to find the recovery amount attributable to the principal, the client.

In its ruling, the Court *did not* address whether its holding would extend to claims involving statutes that authorize fee awards to the prevailing litigant.[8] The Court acknowledged the perverse hypothetical where a litigant could prevail on a lawsuit, but because of a variety of

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[1] I.R.C. § 104(a)(1)-(2) excludes from gross income certain amounts received in compensation for injuries.
[2] 543 U.S. 426, 430 (2005).
[3] 281 U.S. 111 (1930).
[4] *Id.* at 114.
[5] *Banks*, 543 U.S. at 434.
[6] *Id.*
[7] *Id.* (quoting *Helvering v. Horst*, 311 U.S. 122, 116-17 (1940)).
[8] *Id.* at 438-39.

circumstances, lose money as a result.[9] The Court, however, in dicta mentioned the amendment added by the American Jobs Creation Act of 2004, which allowed a taxpayer, in computing adjusted gross income to deduct attorneys' fees for certain lawsuits, would redress the concern for "many, perhaps most, claims governed by fee-shifting statutes."[10] However, this is not necessarily true.

Under *Banks*, attorneys' fees and the judgment award are fully includable in the litigant's gross income. Attorneys' fees may be deducted from gross income either as "above the line" deductions or "below the line" deductions depending on the nature of the underlying legal liability. Only in consumer cases involving employment discrimination, whistleblowing, or civil rights can the litigant deduct under I.R.C. § 62 attorneys' fees as above the line deductions in calculating their adjusted gross income. In most cases, such a deduction will completely offset the included income. However, in all other litigated claims, attorneys' fees can only be deducted under I.R.C § 212, which allows for a below the line deduction for ordinary and necessary expenses incurred in the production or collection of income, for the management, conservation, or maintenance of property held for production of income, or in connection with the determination, collection, or refund of any tax. If the litigant is unable to satisfy the criteria of I.R.C. § 212, he will be unable to deduct the expenses paid to attorneys' fees or costs.[11]

Reasons for Change

Litigants who bring challenges under the laws of the United States are faced with an additional consideration, being strapped with a significant tax liability for income from which they did not directly benefit. Among those who will be most affected are low-income taxpayers. If the taxpayer is not able to deduct attorneys' fees, that taxpayer will face a taxable income that is otherwise significantly above what is warranted based on the amount of income the taxpayer actually enjoyed. This could result in an inability to pay the liability because of a lack of liquidity. In addition, the taxpayer could lose out on beneficial credits, which are typically based on gross income or adjusted gross income. For instance, the Earned Income Tax Credit is based on a taxpayer's adjusted gross income. If the taxpayer is unable to take an above the line deduction, that could mean that taxpayer who otherwise might qualify for this credit, would fail to fall within the statutory guidelines.

Not only are there significant tax implications, there are also numerous benefits that are calculated based on a person's gross income.

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[9] *Id.* at 439 ("Sometimes, as when the plaintiff seeks only injunctive relief, or when the statute caps plaintiffs' recoveries, or when for other reasons damages are substantially less than attorney's fees, court-awarded attorney's fees can exceed a plaintiff's monetary recovery. Treating the fee award as income to the plaintiff in such cases, it is argued, can lead to the perverse result that the plaintiff loses money by winning the suit. Furthermore, it is urged that treating statutory fee awards as income to plaintiffs would undermine the effectiveness of fee-shifting statutes in deputizing plaintiffs and their lawyers to act as private attorneys general.").

[10] *Id.*

[11] If the litigant is a business entity, it can fully deduct attorneys' fee expenses that are deemed ordinary and necessary expenses incurred in carrying on any trade or business. I.R.C. § 162.

Recommendations

Suggested Statutory Language

If attorneys' fees are to remain fully includable in gross income, the Harvard Law School Legal Services Center recommends Congress statutorily amend I.R.C. § 62 to include a deduction for all attorneys' fees. In the alternative, the Harvard Law School Legal Services Center recommends Congress limit the application of *Banks* to contingent fee cases and not cases that involve statutory awards of attorneys' fees.

Proposal #5: Tax Court Public Access

Present Law

I.R.C. § 7458 provides as a general matter that "[h]earings before the Tax Court and its divisions shall be open to the public." Similarly, I.R.C. § 7461(a) provides that, with limited exception, "all reports of the Tax Court and all evidence received by the Tax Court and its divisions, including a transcript of the stenographic report of the hearings, shall be public records open to the inspection of the public." Consistently, the Tax Court has remarked that "[i]t is the goal of this Court to provide as robust a public record as possible while protecting" a taxpayer's confidential or proprietary information.[1]

The E-Government Act of 2002 requires the "Chief Justice of the United States, the chief judge of each circuit and district and of the Court of Federal Claims, and the chief bankruptcy judge of each district shall cause to be established and maintained, for the court of which the judge is chief justice or judge, a website that contains," among other things, "[a]ccess to documents filed with the courthouse in electronic form."[2] Absent from that legislation is a requirement that the Tax Court similarly maintain a website where the public can access documents filed with the court.

Unlike most other Federal courts, including those that adjudicate tax matters, the Tax Court does not provide public access to filed documents online. Instead, the Tax Court only "offers public online access to opinions, orders, decisions, and docket sheets."[3] The Court does provide public access to all other documents filed in a case, but these documents are only available "at the [Tax Court] Clerk's Office during regular business hours,"[4] requiring travel to Washington, D.C.

Reasons for Change

The Committee would like to resolve the discrepancy between how most Federal courts and the Tax Court provide public access to filed documents. Requiring the Tax Court to provide online access to filed documents will ensure the Tax Court's practices are consistent with those of other Federal courts.

The Tax Court is also a court of national jurisdiction, available to taxpayers across the United States.[5] At present, filed documents are publicly available only to individuals who view them in the Tax Court's Clerk's Office, requiring travel to Washington, D.C. This disadvantages parties, their counsel, and members of the public who are located outside the Washington, D.C. area. Providing online public access to filed documents ensures geographical parity.

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[1] *Medtronic Inc. & Consolidated Subsidiaries v. Commissioner*, Tax Court Docket No. 6944-11, Order dated Jan. 23, 2015.
[2] Pub. L. No. 107-347, § 205, 116 STAT. 2899, 2913 (2002).
[3] https://www.ustaxcourt.gov/electronic_access.htm
[4] *Id.*
[5] *See* I.R.C. §§ 7442, 7446.

Requiring that filed documents be available online also improves the Tax Court's operational efficiency by automating the document retrieval process, thereby freeing up resources in the Tax Court's Clerk's Office.

Finally, making filed documents available online should take little technical effort on the part of the Tax Court. The Tax Court has already developed and implemented an "Electronic Case Access and Filing" website.[6] All documents electronically filed with the Tax Court are posted to this site, and are viewable by the court, parties to the case, and their counsel. It should take little technological effort to make these documents available to the public as well.

Explanation of Provisions

The provision requires the Tax Court to make publicly available on its website all documents electronically filed with the Court. In order to ensure a seamless transition to public online access, and to help protect the privacy interests of taxpayers filing cases before the Tax Court, the provision applies only to cases docketed after December 31, 2018.

Recommendations

Suggested Statutory Language

Amend I.R.C. § 7461 to add new section (c) as follows:

(c) ELECTRONIC PUBLIC ACCESS TO FILED DOCUMENTS.—The chief judge of the United States Tax Court shall cause to be established and maintained a website that contains public access to documents filed with the Tax Court in electronic form.

(1) ELECTRONIC FILINGS.—

(a) IN GENERAL.—Except as provided under paragraph (b), the Tax Court shall make any document that is filed electronically publicly available online. The Tax Court may convert any document that is filed in paper form to electronic form. To the extent such conversions are made, all such electronic versions of the document shall be made available online.

(b) EXCEPTIONS.—Documents that are filed that are not otherwise available to the public, such as documents filed under seal, shall not be made available online.

[6] This website is available at: https://www.ustaxcourt.gov/electronic_access.htm

(2) TIME REQUIREMENTS.— The Tax Court will provide public access to filed documents only for those cases first docketed with the Tax Court after December 31, 2018.

Proposal #6: Changes to Collection Due Process and Innocent Spouse Determination Letters

Present Law

I.R.C. §§ 6320 and 6330 entitle taxpayers to an administrative hearing with the IRS Office of Appeals—commonly called a CDP hearing—before the IRS collects an assessed deficiency by lien or levy.[1] After such a hearing, taxpayers have 30 days to petition the Tax Court for review of the Office of Appeals determination.[2]

I.R.C. § 6015 entitles taxpayers to an analogous right to petition the Tax Court for review—but does so for Innocent Spouse Relief requests.[3] Following an IRS determination on a taxpayer's § 6015 relief request, a taxpayer has 90 days to petition the Tax Court for review.[4]

In either of the scenarios above, taxpayers who fail to file a Tax Court petition by the statutory deadline—30 days after a CDP hearing notice of determination, or 90 days following an Innocent Spouse Relief notice of determination—permanently forfeit their right to review by the Tax Court.[5] This is so because the Tax Court's filing deadlines are jurisdictional and the Tax Court therefore has no jurisdiction to hear petitions that were not timely filed.[6]

Notwithstanding the dire consequence of filing a late petition, neither the notice of determination following a CDP hearing, nor the notice of determination following a request for Innocent Spouse Relief are required to specify a date by which a taxpayer must file a petition.[7] By contrast, I.R.C. § 6213(a), which applies to IRS notices of deficiency, requires the IRS to specify a date by which taxpayers must file a Tax Court petition and states that any petition filed by such date shall be treated as timely filed.[8]

Thus, under current law, IRS notices of determination concerning Innocent Spouse Relief requests and CDP hearings—unlike IRS notices of deficiency—do not alert taxpayers to the filing deadline for a Tax Court petition. This statutory inconsistency increases the risk that taxpayers fail to file a timely petition.

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[1] I.R.C. §§ 6320, 6330; *see also* IRS Publication 1660. Section 6320 gives taxpayers the right to a hearing following the issuance of a notice of lien, while I.R.C. § 6330 provides for the right to a hearing before levy.
[2] IRS Letter L3193, *Notice of Determination: Concerning Collection Action(s) Under Section 6320 and/or 6330 of The Internal Revenue Code* (Rev. Dec. 2016).
[3] I.R.C. § 6015(e).
[4] I.R.C. § 6016(e)(1)(A); *see also* IRS Letter 5086, *Final Determination* (Rev. Feb. 2015).
[5] *See* National Taxpayer Advocate 2017 Annual Report to Congress 300.
[6] *See, e.g.*, *Matuszak v. Comm'r*, 862 F.3d 192 (2d Cir. 2017); *see also* National Taxpayer Advocate 2017 Annual Report to Congress 300.
[7] National Taxpayer Advocate 2017 Annual Report to Congress 300.
[8] I.R.C. § 6213(a) ("Any petition filed with the Tax Court on or before the last date specified for filing such petition by the Secretary in the notice of deficiency shall be treated as timely filed.").

Tax Court Suits

The Tax Court has recently seen several cases where, owing to their confusion regarding the petition filing deadline, pro se taxpayers have submitted late petitions for review of Innocent Spouse Relief requests or CDP hearing notices of determination and thereby forfeited their right to Tax Court review.[9] Indeed, since 2015, at least eight pro se taxpayers have fallen victim to this statutory trap for unwary.[10]

The *Protter* case is illustrative of the difficult situation pro se taxpayers face. There, the taxpayer's petition was dismissed because the taxpayer interpreted the language "a 30-day period beginning the day after the date of this letter" to mean that the date on the notice of determination letter marked day zero, rather than day one.[11]

Reasons for Change

Requiring the IRS to specify deadlines on notices of determinations for CDP hearings under I.R.C. §§ 6320 and 6330 and requests for Innocent Spouse Relief under § 6015 would enhance the overall consistency of the Code by removing the inconsistency between these notices and notices of deficiency, which are required to specify a filing deadline.[12]

In addition, this change would provide much-needed protection of taxpayers' right to review by the Tax Court. As the National Taxpayer Advocate has noted, "absence of the requirement to provide the last date . . . to file a CDP or Innocent Spouse petition with the Tax Court jeopardizes the taxpayers' rights to be informed, to appeal the IRS's decision in an independent forum, and to a fair and just tax system."[13] This threat to taxpayers' rights is especially acute for pro se taxpayers.

Finally, this change would help taxpayers avoid the harsh consequences of missing jurisdictional filing deadlines under current law.

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[9] National Taxpayer Advocate 2017 Annual Report to Congress 300 n. 29.

[10] *See Duggan v. Commissioner*, 879 F.3d 1029 (2018); *Cunningham v. Commissioner*, 2018 U.S. App. LEXIS 1183 (4th Cir. 2018); order dated March 4, 2016, in *Pottgen v. Commissioner*, Tax Court Docket No. 1410-15L; order dated January 14, 2016, in *Swanson v. Commissioner,* Tax Court Docket No. 14406-15S; order dated April 20, 2017, in *Wallaesa v. Commissioner*, Tax Court Docket No. 1179-17L; order dated May 31, 2017, in *Saporito v. Commissioner*, Tax Court Docket No. 8471-17L; order dated May 31, 2017, in *Integrated Event Management, Inc. v. Commissioner*, Tax Court Docket No. 27674-16SL; order dated September 26, 2017, in *Protter v. Commissioner*, Tax Court Docket No. 22975-15SL.

[11] Order dated September 26, 2017, in *Protter v. Commissioner*, Tax Court Docket No. 22975-15SL; National Taxpayer Advocate 2017 Annual Report to Congress 303.

[12] National Taxpayer Advocate 2017 Annual Report to Congress 303–304.

[13] National Taxpayer Advocate 2017 Annual Report to Congress 304.

Explanation of Provisions

The proposed changes below require the IRS to include on each notice of determination with respect to a CDP hearing or request for Innocent Spouse Relief the date determined by the IRS as the last day on which the taxpayer may file a petition with the Tax Court. These amendments also provide that a petition filed with the Tax Court by this date is treated as timely filed.

Recommendations

Suggested Statutory Language

Amend I.R.C. §§ 6320(a)(3), 6330(a)(3) to require the IRS to include the petition filing deadline by adding a new subsection (f) reading: "the last date for filing a petition with the Tax Court for review of the determination in such notice."

Amend I.R.C. § 6330(d)(1) to state that any petition filed by the date specified in the notice of determination will be deemed timely filed, similar to I.R.C. § 6213(a). The new I.R.C. § 6330(d)(1) would read as follows:

> "The person may, within 30 days of a determination under this section, petition the Tax Court for review of such determination (and the Tax Court shall have jurisdiction with respect to such matter). Any petition filed with the Tax Court on or before the last date specified for filing such petition by the Secretary in the notice of determination shall be treated as timely filed."

Amend I.R.C. § 6015(e)(1)(A) to add a new subsection (iii) reading:

> "The notice of the Secretary's final determination of relief available to the individual shall include the last date for filing a petition with the Tax Court for review of the determination in such notice. Any petition filed with the Tax Court on or before the last date specified for filing such petition by the Secretary in the notice of determination shall be treated as timely filed."

Proposal #7: Proposed Jurisdictional Changes

Present Law

Suits for Refund and Wrongful Levy

There is a long-standing split of authority between Circuit courts as to whether the time periods to file tax refund and wrongful levy suits are jurisdictional or whether they are periods of limitations subject to waiver, forfeiture, estoppel, and equitable tolling.[1]

Branding a rule as going to a court's subject-matter jurisdiction alters the normal operation of the adversarial system. Under that system, courts are generally limited to addressing the claims and arguments advanced by the parties. Courts do not usually raise claims or arguments on their own, but have an independent obligation to ensure that they do not exceed the scope of their jurisdiction, and therefore they must raise and decide jurisdictional questions that the parties either overlook or elect not to press.[2] Jurisdictional time periods may not be subject to waiver, forfeiture, estoppel, or equitable tolling.[3]

In 2004, the Supreme Court narrowed the use of the word "jurisdiction" to denote only personal jurisdiction and subject matter jurisdiction, not claims-processing rules that seek to promote the orderly progress of litigation.[4] In 2006, the Supreme Court created an exception to this rule for instances where Congress has made a "clear statement" in the statute that a claims-processing rule be treated as a jurisdictional requirement.[5]

In 2007 and 2008, the Supreme Court also created a stare decisis exception to this rule for statutory periods that the Supreme Court has, in multiple opinions over decades, called jurisdictional.[6]

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[1] For the tax refund suit period of limitations, *compare, e.g.*, *Miller v. United States*, 500 F.2d 1007 (2d Cir. 1974) (period a statute of limitations subject to estoppel), with *RHI Holdings, Inc. v. United States*, 142 F.3d 1459 (Fed. Cir., 1998) (period jurisdictional and not subject to equitable tolling or estoppel). For the wrongful levy suit period, *compare, e.g.*, *Volpicelli v. United States*, 777 F.3d 1042 (9th Cir. 2015) (period not jurisdictional and subject to equitable tolling), with *Becton Dickinson & Co. v. Wolckenhauer*, 215 F.3d 340 (3d Cir. 2000) (period jurisdictional and not subject to equitable tolling).

[2] *Henderson v. Shinseki*, 562 U.S. 428, 434 (2011).

[3] *Sebelius v. Auburn Regional Medical Center*, 568 U.S. 145, 154 (2013); *Henderson v. Shinseki*, *supra* n. 2, at 434.

[4] *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004) (by waiting until after creditor's summary judgment motion was granted to raise objection to timeliness of creditor's objection, bankruptcy debtor forfeited right to complain, since time period to file was not jurisdictional).

[5] *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-516 (2006).

[6] *Bowles v. Russell*, 551 U.S. 205 (2007); *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008).

Although it has created these two exceptions, the Supreme Court has indicated that time periods to file are "quintessential claims-processing rules",[7] and noted that "most time bars are nonjurisdictional" under its recent rules.[8]

The Supreme Court has never expressed a view as to whether the time periods to bring tax refund or wrongful levy suits are jurisdictional.

Fewer than 200 tax refund suits were brought in the courts in the fiscal year ended September 30, 2016.[9]

Tax Court Suits

For many years before 2004, the Tax Court and all Circuit courts of appeal to have considered the question have held that compliance with the time period to file a deficiency petition in the Tax Court is a jurisdictional requirement.[10] One appeals court recently reaffirmed this holding under the recent Supreme Court case law.[11]

The Tax Court and two Circuit courts have held that the time period in which to file a Tax Court stand-alone innocent spouse petition is jurisdictional and not subject to equitable tolling under the recent Supreme Court case law.[12]

The Tax Court and one Circuit court have held that the time period in which to file a Tax Court Collection Due Process petition is jurisdictional and not subject to equitable tolling under the recent Supreme Court case law.[13]

One Circuit court has raised the possibility that the time period to file a Tax Court declaratory judgment petition concerning pension plan qualification may be subject to equitable tolling or estoppel.[14]

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[7] *Henderson v. Shinseki*, *supra* n. 2, at 435.
[8] *United States v. Wong*, 135 S. Ct. 1625, 1632 (2015) ("noting the rarity of jurisdictional time limits").
[9] IRS Data Book, 2016 at 62 (Table 27).
[10] *See, e.g.*, *Patmon and Young Professional Corp. v. Commissioner*, 55 F.3d 216, 217 (6th Cir. 1995); *Pugsley v. Commissioner*, 749 F.2d 691, 692 (11th Cir. 1985); *Foster v. Commissioner*, 445 F.2d 799, 800 (10th Cir. 1971); *Axe v. Commissioner*, 58 T.C. 256 (1972).
[11] *Tilden v. Commissioner*, 846 F.3d 882 (7th Cir. 2017).
[12] *Matuszak v. Commissioner*, 862 F.3d 192 (2d Cir. 2017); *Rubel v. Commissioner*, 856 F.3d 301 (3d Cir. 2017); *Pollock v. Commissioner*, 131 T.C. 21 (2009).
[13] *Duggan v. Commissioner*, 879 F.3d 1029 (9th Cir. 2018); *Guralnik v. Commissioner*, 146 T.C. 230, 235-238 (2016).
[14] *Flight Attendants Against UAL Offset v. Commissioner*, 165 F.3d 572, 578 (7th Cir. 1999) ("The argument that the Tax Court cannot apply the doctrines of equitable tolling and equitable estoppel because it is a court of limited jurisdiction is fatuous.") (Posner, J.).

In its rules of practice and procedure, the Tax Court takes the position that compliance with a time period to file in the court under any of its jurisdictions is a jurisdictional requirement of suits.[15]

Approximately 30,000 suits were brought in the Tax Court in the fiscal year ended September 30, 2016.[16]

The Tax Court is a court of record established under Article I of the Constitution,[17] as is the Court of Appeals for Veterans Claims.[18] The Supreme Court has held that under its current case law on jurisdiction, the time period to file in the Court of Appeals for Veterans Claims is not jurisdictional.[19]

Recognizing the difficulty that pro se taxpayer have in counting days for purposes of determining how long they have to file suit in the Tax Court, in 1998, Congress required the IRS to set forth a last date to file on all notices of deficiency and provided that the taxpayer's petition will be timely if filed on or before the date shown in the notice, even if the date is erroneous.[20]

Congress has not similarly required the IRS to set forth the last date to file on other notices or letters that potentially can give rise to Tax Court jurisdiction in other areas. The IRS does not set forth the last date to file in the Tax Court in notices or letters other than notices of deficiency.

Reasons for Change

The Committee would like to resolve the splits among the Circuits concerning whether the time periods to file tax refund and wrongful levy suits are jurisdictional or subject to waiver, forfeiture, estoppel, and equitable tolling. The Committee also would like to clarify whether all time periods to file in the Tax Court are subject to waiver, forfeiture, estoppel, and equitable tolling.

The Committee sees no reason why each of these filing periods should not be treated as nonjurisdictional and subject to waiver, forfeiture, estoppel, and equitable tolling – i.e., the usual rules in federal courts for filing periods. Nor does the Committee anticipate any administrative problems, considering the relatively modest number of court petitions or complaints that are filed late each year in these tax actions. The IRS is already adequately handling statutory tolling of

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[15] Rule 13(c) ("In all cases, the jurisdiction of the Court also depends on the timely filing of a petition.").
[16] IRS Data Book, 2016 at 62 (Table 27).
[17] I.R.C. § 7441.
[18] 38 U.S.C. § 7251.
[19] *Henderson v. Shinseki*, *supra* n. 2. In the case, the government did not argue that, if the time period was not jurisdictional, it was still not subject to equitable tolling. *Id.*, 562 U.S. at 441 n.4. In *Dixon v. McDonald*, 815 F.3d 799 (Fed. Cir. 2016), the Federal Circuit held that the doctrine of waiver could also apply to defeat a belated argument that a filing was untimely.
[20] Pub. L. 105-206 § 3463.

these time periods required by sections 7502 (timely mailing is timely filing), 7508 (tolling on account of service in combat zones), and 7508A (tolling as a result of Presidentially-declared disasters).

A large majority of taxpayers who file petitions in the Tax Court do so without counsel.[21] As the Committee recognized in 1998, self-represented taxpayers may have difficulty calculating the last date by which to file Tax Court petitions, and this problem is not only specific to deficiency cases.

In two recent opinions in the Courts of Appeals, the taxpayers filed late stand-alone innocent spouse petitions, in part, because the last date to file was not shown on the notices of determination that the IRS issued denying administrative relief.[22] In one case, the IRS also later provided the taxpayer with a letter stating the wrong last date by which to file in the Tax Court.[23]

Since mid-2015, at least eight pro se taxpayers misunderstood a sentence in IRS Collection Due Process notices of determination (notices that did not set out a last date by which to file) and so mailed their petitions to the Tax Court a day late, resulting in the Tax Court dismissing their petitions for lack of jurisdiction.[24]

Because courts have uniformly held the deficiency time period to file to be jurisdictional, the Tax Court expends substantial time policing the issue of whether a filing was jurisdictional – in some cases investigating and raising the issue itself.[25] In a recent deficiency case, the Tax Court would not accept the concession by the IRS that the petition was filed timely when the Tax Court took a different view as to the applicable regulation under section 7502.[26] In other cases, the IRS files answers that do not raise the issue of the petitions' untimeliness, but the IRS later moves to dismiss the cases for lack of jurisdiction only many months later, after the cases are set

[21] In 2015, Tax Court Chief Special Trial Judge Peter Panuthos reported that over 72% of Tax Court petitioners in all pending cases were *pro se*. David van den Berg, "ABA Meeting: Low-Income Clinic Representation Levels Constant", *Tax Notes Today*, 2015 TNT 91-13 (May 12, 2015).

[22] *Matuszak v. Commissioner*, *supra* n. 12; *Rubel v. Commissioner*, *supra* n. 12.

[23] *Rubel v. Commissioner*, *supra* n. 12.

[24] *See Duggan v. Commissioner*, *supra* n. 13; *Cunningham v. Commissioner*, 2018 U.S. App. LEXIS 1183 (4th Cir. 2018); order dated March 4, 2016, in *Pottgen v. Commissioner*, Tax Court Docket No. 1410-15L; order dated January 14, 2016, in *Swanson v. Commissioner*, Tax Court Docket No. 14406-15S; order dated April 20, 2017, in *Wallaesa v. Commissioner*, Tax Court Docket No. 1179-17L; order dated May 31, 2017, in *Saporito v. Commissioner*, Tax Court Docket No. 8471-17L; order dated May 31, 2017, in *Integrated Event Management, Inc. v. Commissioner*, Tax Court Docket No. 27674-16SL; order dated September 26, 2017, in *Protter v. Commissioner*, Tax Court Docket No. 22975-15SL.

[25] *See*, *e.g.*, order dated November 9, 2016, in *Bahan v. Commissioner*, Tax Court Docket No. 25666-14S, in which the Tax Court raised the issue of the timeliness of the filing of a deficiency petition on its own over five months after the trial was held in the case.

[26] *See* order dated December 3, 2015 in *Tilden v. Commissioner*, Tax Court Docket No. 11089-19, reversed in *Tilden v. Commissioner*, 846 F.3d 882 (7th Cir. 2017).

for trial.[27] If the time period was not jurisdictional, the IRS would have been expected to raise the untimeliness argument as a statute of limitations defense much earlier, in its answer.[28]

Explanation of Provisions

The provision requires the IRS to include on each notice or letter that gives rise to Tax Court jurisdiction the date determined by the IRS as the last day on which the taxpayer may file a petition with the Tax Court. The provision provides that a petition filed with the Tax Court by this date is treated as timely filed.

The provision treats all time periods in which to file petitions in the Tax Court or complaints in tax refund or wrongful levy suits as nonjurisdictional time periods that are subject to the judicial doctrines of waiver, forfeiture, estoppel, and equitable tolling.

Recommendations

Suggested Statutory Language

Amend section 7442 to add new sections (b) and (c) as follows:

> (b) Timely Filing Nonjurisdictional.—Notwithstanding any other provision of this title,
>
> (1) all periods of limitations for filing suit in the Tax Court are subject to waiver, forfeiture, estoppel, and equitable tolling; and
> (2) an order of the Tax Court dismissing a suit for untimely filing shall not be considered a ruling on the merits and shall not preclude the litigation of any later claim or issue brought in the Tax Court or any other court.
>
> (c) Last Date on Notice Determinative.—The Secretary shall include on each notice or letter to a taxpayer that is a jurisdictional predicate of a Tax Court suit the date determined by the Secretary as the last date on which the taxpayer may file a petition with the Tax Court. Any petition filed with the Tax Court on or before the last date specified for filing such petition by the Secretary in such notice or letter shall be treated as timely filed.

Amend section 6213(a) to delete the last sentence.

Amend section 7459(d)'s last sentence to add before the period: "or untimely filing".

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[27] *See, e.g.*, November 10, 2015 IRS motion to dismiss case for lack of jurisdiction as untimely in a stand-alone innocent spouse case where the petition was filed on January 7, 2015. *Matuszak v. Commissioner*, Tax Court Docket No. 471-15.

[28] *See* Tax Court Rule 39, requiring the pleading of "special matters", including statute of limitations defenses.

Amend section 6532 to add a new subsection (d) reading:

(d) Timely Filing Nonjurisdictional.—The time periods set out in subsections (a) and (c) are subject to waiver, forfeiture, estoppel, and equitable tolling.

Proposal #8: Extend I.R.C. § 6630(d)(1)'s Deadline to Petition the Tax Court for Review of IRS Determination

Present Law

Taxpayers have the right to a Collection Due Process (CDP) hearing to review collection actions taken or proposed by the Internal Revenue Service (IRS), including liens on taxpayers' property and levies on taxpayers' income and assets.[1] At the conclusion of the CDP hearing, the IRS Office of Appeals issues a Notice of Determination Concerning Collection Action under I.R.C. § 6320 and/or § 6330 (Notice of Determination), which reflects the Office of Appeals' findings and recommendations from the CDP hearing.[2] Taxpayers who do not agree with the Office of Appeals' determination may petition for judicial review by the United States Tax Court within 30 days of the Notice of Determination's issuance.[3] The 30-day period applies both to taxpayers residing in the United States and to those residing outside the United States.[4]

The Tax Court does not have jurisdiction to consider a petition filed after the petition period nor does it have authority to extend the period, regardless of "the equities of a particular case . . . and regardless of the cause of [the petition] not being filed within the required period."[5] This bar applies even if the taxpayer did not receive the Notice of Determination within the petition period.[6] In such circumstances, taxpayers are deprived of their right to judicial review.

Reasons for Change

The consequences of not filing a timely petition are dire. If a taxpayer misses the deadline, the Tax Court does not have jurisdiction to review the IRS's determination and taxpayers are deprived of their due process rights.

Domestic Taxpayers

Under I.R.C. § 6630(d)(1), a taxpayer has only 30 days to petition the Tax Court to review the Office of Appeals' adverse determination. In contrast, under I.R.C. § 6213(a), a taxpayer has 90 days to petition the Tax Court to review a Notice of Deficiency.[7] Certain Notices of Determination also carry the 90-day petition period, including a notice following a

[1] Internal Revenue Service, Publication 594: The IRS Collection Process 4 (rev. 2017).
[2] Treas. Reg. § 301.6330-1(e)(3).
[3] I.R.C. § 6330(d)(1); Treas. Reg. § 301.6330-1(f)(1) ("The taxpayer may appeal such determinations made by Appeals within the 30-day period commencing the day after the date of the Notice of Determination to the Tax Court.").
[4] *Sarrell v. Commissioner*, 117 T.C. 122, 126 (2001) ("Congress did not provide an extended filing period under sections 6320 or 6330 when a notice of determination is addressed to a person outside the United States.").
[5] *Axe v. Commissioner*, 58 T.C. 256, 259 (1972); *see also* Tax Court Rules of Practice and Procedure Rule 330(b).
[6] *Weber v. Commissioner*, 122 T.C. 258, 261–63 (2004).
[7] I.R.C. § 6213(a).

decision on innocent spouse status.[8] The mismatch between the petition periods is problematic when there are multiple collections issues: If the only issue is denial of innocent spouse relief, the petition must be filed within 90 days. However, if the issue involves both denial of innocent spouse relief and other collection issues, the petition must be filed within 30 days to preserve judicial review of the non–innocent spouse issues.[9] The current 30-day petition period is a source of confusion and results in untimely Tax Court petitions, especially for low-income and pro se taxpayers. Extending the petition period to 90 days would ensure consistency across Code sections.

The current 30-day petition period is calculated from the date on which the Notice of Determination is mailed by the IRS using registered or certified mail,[10] rather than the date on which the notice is delivered to the taxpayer. Given that it may take several days for the taxpayer to receive the notice, this shortened petition period impedes on the taxpayer's ability to prepare a proper Tax Court petition or to seek help preparing such a petition. Extending the petition period to 90 days would allow taxpayers a more meaningful opportunity to exercise their right to judicial review and to a fair and just tax system.

Foreign Taxpayers

The problems described above are exacerbated for taxpayers residing abroad. Unlike I.R.C. § 6213(a), which extends the petition period for an additional 60 days (for a total of 150 days) for a Notice of Deficiency mailed to a foreign address, I.R.C. § 6630(d)(1) does not contain an equivalent extension.[11] It is not uncommon for a taxpayer residing abroad to receive the Notice of Determination after the 30-day petition period has elapsed.[12] Under the current statute, "it is immaterial when the taxpayer receives the notice, which may even be after the expiration of the 30-day filing period."[13] Extending the petition period to 150 days better ensures that taxpayers residing abroad receive the Notice of Determination before the petition period's expiry and that they are not deprived of due process.

Even if a taxpayer residing abroad receives the notice within the 30-day petition period, he or she must ensure that the Tax Court receives the petition before the 30th day. In contrast to petitions mailed from domestic addresses that are considered timely filed if postmarked by the

[8] I.R.C. §§ 6015(e)(1)(A)(ii).
[9] Treas. Reg. §§ 301.6320-1(f)(2), 301.6330-1(f)(2).
[10] The 30-day petition period begins the day after the Notice of Determination's issuance. Treas. Reg. § 301.6330-1(f)(1).
[11] *Compare* I.R.C. § 6320(d)(1) ("The person may, within 30 days of a determination under this section, petition the Tax Court for review of such determination . . . ."), with I.R.C. § 6213(a) ("Within 90 days, or 150 days if the notice is addressed to a person outside the United States, after the notice of deficiency . . . is mailed . . . , the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency.").
[12] *See, e.g.*, *Atuke v. Commissioner*, No. 31680-15SL (T.C. Apr. 15, 2016) (receiving the Notice of Determination 11 days after the petition period has elapsed).
[13] *Atuke v. Commissioner*, No. 31680-15SL (T.C. Apr. 15, 2016) (citing *Weber v. Commissioner*, 122 T.C. 258, 263 (2004)).

30th day,[14] petitions mailed from foreign addresses are not considered filed until actually received by the Tax Court.[15] Thus, within 30 days, taxpayers residing abroad must receive the notice, prepare the petition, and ensure receipt of their petition by the Tax Court. In some parts of the world, this requires the taxpayer to mail their petitions using overnight or express mail services, which may be prohibitively expensive for low-income taxpayers. Providing additional time for these taxpayers would improve the fairness of the tax system and make it consistent with other provisions of the Internal Revenue Code.[16]

The Current State

I.R.C. § 6630(d)(1)'s 30-day petition period is an anomaly of the Internal Revenue Code that deprives taxpayers' due process rights. When Congress enacted the CDP provisions, it envisioned an expedited process through which taxpayers could resolve collection issues with the IRS by seeking review of collection actions in the Office of Appeals and then in the Tax Court.[17] However, the current process is the opposite of Congress's vision: The Office of Appeals takes up to six months to issue a determination, and then the Tax Court takes up to one year to resolve the case.[18] Thus, the current system, including its short 30-day petition period for all taxpayers, does not realize the benefits intended by Congress, yet jeopardizes taxpayers' rights to appeal the IRS's decision in an independent forum and to a fair and just tax system.[19]

Congress should amend the statute to provide taxpayers 90 days, or 150 days if the taxpayer is residing abroad, to petition the Tax Court for review of the Notice of Determination. Such an amendment would render I.R.C. § 6330(d)(1) consistent with other sections of the Internal Revenue Code and would preserve taxpayers' due process rights.

<u>Recommendations</u>

Suggested Statutory Language

Amend I.R.C. § 6330(d)(1) to read as follows:

> "The person may, within 90 days, or 150 days if the notice is addressed to a person outside the United States, of a determination under this section, petition the Tax Court for review of such determination (and the Tax Court shall have jurisdiction with respect to such matter)."

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[14] I.R.C. § 7502.
[15] *Sarrell v. Commissioner*, 117 T.C. 122, 126 (2001).
[16] National Taxpayer Advocate, 2017 Annual Report to Congress 304–05 (2018).
[17] Carlton M. Smith & T. Keith Fogg, *Tax Court Collection Due Process Cases Take Too Long*, 130 Tax Notes 403, 404 (2011).
[18] *Id.* at 403.
[19] National Taxpayer Advocate, 2017 Annual Report to Congress 300 (2018).

Proposal #9: Make Clear that Taxpayers Can Obtain Refunds in CDP cases

Present Law

The Tax Court has jurisdiction in deficiency proceedings to determine a deficiency, to find no deficiency, to find an overpayment, and to order the IRS to pay the overpayment as a refund.[1] I.R.C. § 6330(d)(1) gives jurisdiction to the Tax Court the hear appeals of notices of determination issued at the end of the Appeals Office CDP hearings. It also gives the Tax Court, in the right circumstances, jurisdiction to hear the issue of the underlying liability and to make a determination concerning that liability. However, the Tax Court has been found to not have jurisdiction to issue refunds in CDP cases even if it is clear that the taxpayer is entitled to a refund.[2]

In *Greene-Thapedi v. Commissioner*, the Tax Court held that once the IRS notifies the court that, since the liability has been fully paid, the IRS is no longer seeking to collect the liability and the case is moot, and therefore should be dismissed. The Tax Court held that the case should be dismissed even if the taxpayer was then arguing the taxpayer overpaid the tax assessment, because the Tax Court had no overpayment jurisdiction in its CDP appeal jurisdiction.

In 2015, the D.C. Circuit finally considered the issue of Tax Court refund jurisdiction in CDP cases, and agreed that the Tax Court lacks refund jurisdiction.[3] The D.C. Circuit held that the case becomes moot, and is thus properly dismissed, not only that the Tax Court lacks refund jurisdiction in such cases.

Reasons for Change

The only other option is to sue for refund in district court or federal claims court. The Tax Court has most if not all of the information needed to make a decision concerning the overpayment. It is much cheaper for the taxpayer and the government to wrap up this issue in a single proceeding. The district court or federal claims court options take longer, cost more and may result in the taxpayer missing the statute of limitation. New options become difficult for taxpayers to understand what needs to be done to receive the refund to which they are properly entitled. Permitting refund jurisdiction in CDP cases consolidates the proceedings, expedites the proceedings, and ensures all parties involved understand the underlying issues.

Recommendation

Suggested Statutory Language

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[1] The Tax Court's refund jurisdiction, and the limitations, can be found at I.R.C. § 6512(b).

[2] *Greene-Thapedi v. Commissioner*, 126 T.C. 1 (2006); *Willson v. Commissioner*, 2015 U.S. App. LEXIS 19389 (Nov. 6, 2015); *Byers v. Commissioner*, 740 F.3d 668 (D.C. Cir. 2014).

[3] *Willson v. Commissioner*, 2015 U.S. App. LEXIS 19389 (Nov. 6, 2015)

Amend I.R.C. § 6330, subsections (c)(1), (c)(2), and (d) to create refund jurisdiction for the Tax Court in CDP cases.

Proposal #10: Make Clear that the Tax Court Can Grant Relief through the CDP Process for Nominees, Alter Egos and other Third Parties against whom the IRS Files a Public Lien Notice

Present Law

Current I.R.C. § 6320 states that any "person described in section 6321" of the Code is entitled to CDP rights under I.R.C. § 6320.[1] The "person" who is described in I.R.C. § 6321 is "any person liable to pay any tax."

The language of I.R.C. § 6330 seemingly requires the IRS to follow the levy CDP procedures not just where the IRS intends to levy on property owned by the person who is liable for the unpaid taxes in question but also where the IRS wants to levy on property that is owned by a person other than the person who is liable for the unpaid taxes in question on which the IRS has a valid lien. I.R.C. § 6330(a)(1) states that "[n]o levy may be made on any property or right to property of **any person** unless the Secretary has notified such person in writing of their right to a hearing under this section before such levy is made." I.R.C. § 6331(a) allows the IRS to levy on "all [non-exempt] property and rights to property" of the "person liable to pay any tax" and on any property on which the IRS has a lien. The ability of the IRS under I.R.C. § 6331(a) to levy on property on which it has a tax lien, even if the property is not owned by the person who is liable for the unpaid tax liability, seemingly reinforces the notion that I.R.C. § 6330 gives CDP rights to all "persons" who own property on which there is a tax lien, even if those persons are not personally liable for the unpaid taxes.

Treasury Regulation § 301.6330-1(a) provides, in relevant part, that under I.R.C. § 6330(a)(1), a pre-levy or post-levy CDP notice is required to be given only to the person whose property or right to property is intended to be levied upon. The regulation goes on to state that the person described in I.R.C § 6330(a)(1) is the same person described in I.R.C. § 6331(a), which is the person liable to pay the tax due after notice and demand who refuses or neglects to pay, and that is the person to whom the pre- or post-levy CDP notice will be given. The regulation goes on to answer the question, "Will the IRS give notification to a known nominee of, a person holding property of, or a person who holds property subject to a lien with respect to, the taxpayer of the IRS' intention to issue a levy?" in the negative because such a person is not the person described in I.R.C. § 6331(a)(1) and that such persons have other remedies.

Treasury Regulation § 301.6320-1 states that "Under section 6320(a)(1), notification of the filing of a NFTL on or after January 19, 1999, is required to be given only to the person described in section 6321 who is named on the NFTL that is filed. The person described in section 6321 is the person liable to pay the tax due after notice and demand who refuses or neglects to pay the tax due (hereinafter, referred to as the taxpayer)." The regulation further states that a nominee of, or a person holding property of, the taxpayer is not entitled to a CDP hearing or an equivalent hearing because such person is not the person described in I.R.C. § 6321.

[1] 26 U.S.C. Section 6320(a)(1) ("I.R.C. § 6320(a)(1)").

In the case of *Pitts v. United States*,[2] a general partnership incurred unpaid employment taxes. Pitts was a general partner in that partnership, and the IRS filed a notice of federal tax lien against her, in her capacity as a general partner, without making a separate assessment against her first. Pitts later filed for bankruptcy, and received a discharge, after which she filed a proceeding against the IRS seeking to invalidate the tax liens filed against her for the taxes incurred by the partnership. The Bankruptcy Court upheld the validity of the liens, the District Court affirmed, as did the Ninth Circuit. The Ninth Circuit found that Pitts was a "person liable to pay any tax" under I.R.C. § 6321, citing *In re Crockett*[3] and *Bresson v. Commissioner*.[4] The Ninth Circuit went on to hold that the United States could use administrative enforcement procedures to collect the debt from Pitts because she was secondarily liable for the assessed debt, citing *United States v. Galletti*.[5]

Under the current Internal Revenue Manual, general partners are supposed to be given CDP lien and levy notices, in addition to those provided to the taxpayer partnership.[6]

Reasons for Change

Current I.R.C. § 6320 states that any "person described in section 6321" of the Code is entitled to CDP rights under I.R.C. § 6320.[7] The "person" who is described in I.R.C. § 6321 is "any person liable to pay any tax." Thus, I.R.C. § 6320 should apply if there is a "person," a tax is owed, and the "person" is "liable" for that tax. I.R.C. § 7701(a)(1) defines the term "person" very broadly.

The *Pitts* case stated that a person who is secondarily liable for a tax liability under state law is considered, under I.R.C. § 6321, to be a "person liable to pay any tax," and is presumably also such a person under I.R.C. § 6331. Thus, if a person who is secondarily liable for a tax liability under state law would appear to be subject to administrative collection action under I.R.C. §§ 6321 and 6331, and such person should also be entitled to the protections of the CDP procedures.

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[2] 515 B.R. 317 (C.D. Cal. 2014), aff'd, 668 Fed. Appx. 774, 2016 U.S. App. LEXIS 16287, 118 A.F.T.R.2d (RIA) 5644, 2016-2 U.S. Tax Cas. (CCH) P503992016 (9th Cir. 2016)(unpublished opinion).
[3] 150 F.Supp. 352, 354 (N.D. Cal. 1957) (California partner was liable for debts of partnership under state law; accordingly, partner was liable for entire amount of partnership's employment taxes, and was "person liable to pay" under § 6321's identically worded predecessor).
[4] 213 F.3d 1173, 1178 (9th Cir. 2000) (where the IRS relied on state law to establish an individual's liability, "the government's underlying right to collect money in this case clearly derives from the operation of federal law (i.e., the Internal Revenue Code)").
[5] 541 U.S. 114, 122-23 (2004) ("After the amount of liability has been established and recorded, the IRS can employ administrative enforcement methods to collect the tax"). The United States is not obligated to make a second assessment against Pitts individually, because the consequences of its assessment attach to the assessed debt "without reference to the special circumstances of the secondarily liable parties."
[6] CDP Hearing Requests, I.R.M. section 5.19.8.4.2(5)(08-05-2016)
[7] I.R.C. § 6320(a)(1).

In these circumstances, the IRS's position is that it may use state law to pursue collection of a tax liability against someone other than the person who incurred the tax liability.[8] Therefore, if the IRS's assertion of a tax liability under state law to enforce collection against a secondarily liable person is sufficient to trigger CDP rights for that person, the IRS's assertion should be sufficient for any third party who is secondarily liable as an alleged alter ego, successor in interest, or transferee to trigger CDP rights for that alleged alter ego, successor in interest, or transferee.

Wolfe v. United States,[9] and the cases cited therein, make clear that a corporation can be a valid, separate entity from the original taxpayer for CDP procedure purposes.

Allowing all parties against whom the IRS files a notice of federal tax lien is consistent with the CDP process and would provide a relatively low cost administrative and court process for resolving third party lien notices that the current regulation thwarts.

Recommendation

Suggested Statutory Language

Amend I.R.C. §§ 6320 and 6330 and their associated regulations, to permit CDP hearings and other relief for alter egos, successors in interest, nominees, and transferees.

[8] *See Commissioner v. Stern*, 357 U.S. 39 (1958) (dealing with the assertion of transferee liability under what is now I.R.C. section 6901).
[9] 798 F.2d 1241, (9th Cir. 1986).

Proposal #11: Remove Answer in S cases

Present Law

Under Tax Court Rule 173(b), the Commissioner is required to file an answer to a petition in every Tax Court case.

The small tax case procedure, codified in I.R.C. § 7463, arose out of congressional concern over "a failure to provide a readily available means of impartial review of modest deficiency disputes."[1] In response, the 1969 Tax Reform Act authorized a simplified and relatively informal procedure for deficiency disputes under a particular amount;[2] the amount has been raised periodically over time from $1,000, to $1,500, $5,000, $10,000, and finally $50,000.[3]

However, in 1978, the Tax Court amended its rules to provide that the IRS was no longer required to file an answer in small tax cases unless there was an issue for which the IRS had the burden of proof or if specifically directed by the court.[4] The accompanying note to the rule change stated:

> "The experience of the Court under its preexisting procedure has shown that the filing of answers in all small tax cases has not been helpful in the disposition of such cases and has resulted generally in merely calling for unnecessary additional paperwork, particularly in the light of the fact that most of these cases are actually disposed of without trial. Furthermore, the Commissioner has assured the Court that, in the relatively small number of cases expected to be tried, he will file with the Court and serve upon the petitioner an informative statement amplifying the matters in dispute that are to be adjudicated."[5]

For good reasons, the Tax Court reversed itself in 2007 by amending its rules again, to require the IRS to file an answer in every small tax case just as it must do in regular cases.[6] Several justifications were given for the reversal; "First, partly as a result of the considerable increase in the amount in dispute to $50,000, small tax cases came to represent approximately half of the Tax Court's docket.[7] Additionally, the court observed that taxpayers and the low-income taxpayer clinics that increasingly represented them in small tax cases often faced

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[1] H. Dubroff & B.J. Hellwig, *The United States Tax Court: An Historical Analysis*, 883 (Government Publishing Office, 2d ed. 2014) (citing S. REP. NO. 91-552, at 302 (1969)).
[2] *Id.* at 883-84 (citing Tax Reform Act of 1969, Pub. L. No. 91-172, § 957(a), 83 Stat. 733 (enacting I.R.C. § 7463)).
[3] *Id.* at 883-84 (citing The State and Local Fiscal Assistance Act of 1972, Pub. L. No. 92-512, § 203(b)(2), 86 Stat. 919, 945 (1972); The Revenue Act of 1978, Pub. L. No. 95-600, § 502(a)(1), 92 Stat. 2763, 2879 (1978); The Tax Reform Act of 1984, Pub. L. No. 98-369, § 461 (a), 98 Stat. 494, 823).
[4] Former TAX CT. R. 175(b), 71 T.C. 1212 (1975).
[5] Rules Comm. Note, TAX CT. R. 175, 71 T.C. 1212 (1978)
[6] H. Dubroff & B.J. Hellwig, *supra* n. 1, at 895.
[7] Rules Comm. Note, TAX CT. R. 173(b), 128 T.C. 231 (2007).

difficulty in contacting the attorney representing the Service due to the absence of a responsive filing. Answers filed in small tax cases would provide this information and, as a result, facilitate essential pretrial communication between the parties.[8] Lastly, the court observed that the filing of answers in small tax cases may promote the identification of novel legal issues at any earlier stage in the litigation, permitting the court to make informed decisions concerning whether discontinuance of the small tax procedure pursuant to § 7463(d) was appropriate."[9]

Reasons for Change

We now have more than a decade of experience with the renewed requirements for filing answers in S cases. The same reasons that applied when the Tax Court first amended its rule in 1978 to remove the requirement of an answer by the IRS apply again today. When taxpayers file their petition, the answer filed by the IRS does not provide meaningful information to assist in the disposition of the case. In the vast majority of cases the answer filed by the IRS simply denies or denies for lack of knowledge all of the allegations of the taxpayer leaving the parties procedurally in the same place they were prior to the answer. The filing of the answer creates additional cost for the IRS in moving files and preparation. The blanket denials typical of an answer filed by the IRS also create confusion amount many taxpayers receiving this formal document in a case designed for informal proceedings.

Although the formal information provided in the answer adds almost no value to the case and at considerable cost to the IRS, the informal information that is provided in the answer, i.e. the name and contact information of the government attorney assigned to the case, has value. During the years in which the Tax Court did not require the filing of an answer, the taxpayer would typically go months after the filing of the petition without hearing from the IRS. This caused the taxpayers to wonder if they still had a Tax Court case and caused many to call the Tax Court itself in an effort to understand what was happening.

An informal process in lieu of the answer that speeds up notification to the taxpayer and provides more meaningful notification could provide significant benefits to the taxpayer who petitions the Tax Court and to the system. Requiring an answer slows the proceedings. The IRS has sixty days to answer and they typically sends the case to the Office of Appeals where it waits for 3-6 months before anyone contacts the taxpayer. Many taxpayers lose interest in their case after filing which results in a not insignificant amount of defaults for lack of prosecution.

Rather than put the taxpayer who files a petition requesting an informal proceedings on ice for approximately six months or longer, a better system might reach out to the taxpayer shortly after the filing of the petition while the matter is still fresh in the taxpayer's mind. To do this the answer could be replaced with a notice filed by the IRS within 15 days after the petition alerting the taxpayer and the Tax Court of the specific attorney assigned to the case and the specific Appeals Officer in those cases in which an Appeals Officer is assigned. The letter would be followed by an offer of an Appeals conference within 45 days. This quick turnaround

[8] *Id.*
[9] *Id.*

time would allow taxpayers to remain engaged with their cases decreasing the amount of defaults and leading to more resolutions at an earlier stage in the proceeding.

In addition to the fixing the problem of notification, the Tax Court also reinstated the answer requirement in order to cause the attorney answering the case to focus on the jurisdictional issues in the case and raise those issues at the outset of the case rather than immediately prior to trial. If the answer is again eliminated, it would be necessary for the attorney representing the IRS to file a certification that the file was reviewed to ascertain that the Tax Court had jurisdiction and that the election of the small tax case status was permissible. The certification would not waive jurisdictional defects later discovered since the IRS cannot grant jurisdiction to the Tax Court but it would insure that someone carefully reviewed the file at an early stage in order to identify and defects in the case and resolve them prior to the time of the trial of the case.

Recommendations

Suggested Statutory Language

Amend I.R.C. § 7463 to provide that if a taxpayer elects small case status the IRS need not file an answer, that in lieu of an answer the IRS would file, within 15 days of the petition, a statement noting the assignment of the attorney and the Appeals Officer (when necessary) in a document that contains their address and phone number.

Further amend I.R.C. § 7463 to require that the IRS file an affirmative statement regarding the Tax Court's jurisdiction over the case and the appropriateness of the small tax case election.

Further amend I.R.C. § 7463 to require that the Appeals Office offer an initial conference within 45 days after the filing of the statement noting assignment of the attorney and the Appeals Officer.