IMPROVE ASSESSMENT AND COLLECTION PROCEDURES

Legislative Recommendation #7

Require That Math Error Notices Describe the Reason(s) for the Adjustment With Specificity, Inform Taxpayers They May Request Abatement Within 60 Days, and Be Mailed by Certified Mail

SUMMARY

- *Problem:* Each year, the IRS sends millions of "math error" notices to taxpayers that propose to adjust their tax liabilities. These notices often do not explain the reason for the adjustments, are never received by the taxpayer, and/or do not state that the taxpayer must dispute the adjustments within 60 days or generally forfeit the right to do so.
- *Solution:* Require that all math error notices provide a clear explanation of the error alleged, be sent via certified or registered mail, and inform taxpayers they have 60 days from the date of the notice to request that the math error adjustment be abated or the adjustment generally will become final.

PRESENT LAW

Under IRC § 6213(b) the IRS may make a summary assessment of tax arising from a mathematical or clerical error, as defined in IRC § 6213(g). Summary assessment is often referred to as "math error" authority. When the IRS makes a math error adjustment, IRC § 6213(b)(1) requires it to send the taxpayer a notice describing "the error alleged and an explanation thereof." By law, the taxpayer has 60 days from the date of the notice to request that the summary assessment be abated.[1] If the taxpayer does not make an abatement request within 60 days, the assessment becomes final, and the taxpayer has lost his or her right to challenge the IRS's position in the Tax Court. If the taxpayer requests an abatement, the IRS must abate the summary assessment. If the IRS continues to believe the taxpayer owes the tax, it may audit the taxpayer and propose an adjustment by issuing a notice of deficiency. If the IRS does so, the taxpayer will have the right to challenge the IRS's position in the Tax Court.

REASONS FOR CHANGE

Many taxpayers do not understand that the failure to respond to an IRS math error notice within 60 days means they have conceded the adjustment and, except in limited circumstances, have forfeited their right to challenge the IRS's position in the Tax Court. Notably, the law does not specify how the IRS must describe the math error or require the IRS to inform taxpayers they have 60 days to request the math error assessment be reversed. Further, unlike a statutory notice of deficiency, which carries consequences similar to that of a math error notice (*i.e.*, assessment of tax that may result in future collection actions), IRC § 6213 does not require the IRS to send a math error notice by certified or registered mail.[2]

Although the statute requires the IRS to "set forth the error alleged and an explanation thereof" in a notice, the descriptions are often very general. Some notices provide taxpayers with a list of possible errors – leaving

1 IRC § 6213(b)(2)(A).

2 IRC § 6212(a) ("If the Secretary determines that there is a deficiency in respect of any tax imposed … he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.").

them uncertain which error, if any, was committed. Other notices indicate that a taxpayer understated his or her adjusted gross income but do not specify which item of gross income was understated. Further, during calendar year 2021, the IRS neglected to include language informing taxpayers they have 60 days to request an abatement in about 6.5 million math error notices.[3] Although the IRS later corrected this omission by sending taxpayers letters explaining the 60-day period, many taxpayers were left confused about what they needed to do, if anything.

It is unclear whether the IRS's explanation of alleged errors satisfies the statutory requirement when it makes a general statement or states that the error is due to one of multiple possible causes, as the statute does not describe the degree of specificity required. However, it is clear that the omission of the 60-day language from math error notices does not invalidate the notices, because IRC § 6213(b) does not require the IRS to tell taxpayers they have 60 days to request an abatement. While the IRS generally does so, the practice should not be discretionary.

Amending IRC § 6213(b) to require that the IRS specifically describe the error giving rise to the adjustment and inform taxpayers they have 60 days to request that the summary assessment be abated would help ensure taxpayers understand the adjustment and their rights. Additionally, requiring the notice be sent by either certified or registered mail would underscore the significance of the notice and be yet another safeguard to ensure that taxpayers are receiving this critical information.

RECOMMENDATIONS

- Amend IRC § 6213(b)(1) to require that:
  - All math error notices provide a detailed explanation of the specific error, including the line number on the return or the line number on the schedule (whichever is more specific) on which the alleged error was made.
  - All math error notices include a statement that the taxpayer has 60 days from the date of the notice to request that the summary assessment be abated and prominently display at the top of the notice the date on which the 60-day period expires.
  - All such notices will be sent by either certified or registered mail.

3 Erin M. Collins, Math Error, Part II: Math Error Notices Aren't Just Confusing; Millions of Notices Adjusting the Recovery Rebate Credit Also Omitted Critical Information, National Taxpayer Advocate Blog (Aug. 3, 2021), https://www.taxpayeradvocate.irs.gov/news/nta-blog-math-error-part-ii-math-error-notices-arent-just-confusing-millions-of-notices-adjusting-the-recovery-rebate-credit-also-omitted-critical-information/.

Legislative Recommendation #8

Continue to Limit the IRS's Use of "Math Error Authority" to Clear-Cut Categories Specified by Statute

SUMMARY

- *Problem:* The IRC provides taxpayers with "deficiency procedures" that generally give them certain rights to challenge an IRS determination that they owe tax, but it gives the IRS the authority to bypass deficiency procedures and summarily assess tax when a tax return contains one of 22 categories of "mathematical or clerical errors" (often referred to as "math errors"). On several occasions, the Department of the Treasury and the IRS have requested that Congress grant them the authority to add new categories of math errors by regulation. This would have the effect of depriving taxpayers of deficiency procedures in a wider range of circumstances.
- *Solution:* Congress should retain the authority to revise categories of math errors legislatively and not give the Department of the Treasury and the IRS the authority to add new categories of math errors administratively.

PRESENT LAW

Before the IRS may assess a deficiency, IRC § 6213(a) ordinarily requires that it send the taxpayer a "notice of deficiency" that gives the taxpayer 90 days (150 days if addressed to a taxpayer outside the United States) to contest it by filing a petition with the U.S. Tax Court (known as "deficiency procedures"). The taxpayer's ability to appeal a deficiency determination to the Tax Court before paying the tax is central to the taxpayer's *right to appeal an IRS decision in an independent forum*.[1]

As an exception to standard deficiency procedures, IRC § 6213(b)(1) authorizes the IRS to summarily assess and collect tax without first providing the taxpayer with a notice of deficiency or access to the Tax Court when addressing "mathematical and clerical" errors (known as "math error authority"). If a taxpayer contests a math error notice within 60 days, IRC § 6213(b)(2)(A) provides that the IRS must abate the assessment. If the IRS abates the assessment, it must follow deficiency procedures before it can reassess the tax. Taxpayers who do not contest a math error notice within 60 days lose the right to do so in court before paying. The IRS may summarily assess 22 types of mathematical or clerical errors, which are codified at IRC § 6213(g)(2) in subparagraphs A-V.

REASONS FOR CHANGE

Congress generally requires the IRS to follow deficiency procedures, which provide taxpayers with notice and a reasonable opportunity to challenge the IRS's tax adjustment. Math error authority, which provides fewer taxpayer protections, was authorized as a limited exception to regular deficiency procedures. It allows the IRS to make adjustments in cases of clear taxpayer error, such as where a taxpayer incorrectly adds numbers or incorrectly transcribes a number from one form to another. Because taxpayers have fewer protections under math error procedures, the procedures are not intended to be used where a substantive disagreement may exist. When Congress has expanded the IRS's math error authority, it has done so consistent with that principle.

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1 *See* IRC § 7803(a)(3)(E) (identifying the *right to appeal a decision of the Internal Revenue Service in an independent forum* as a taxpayer right).

Because math error procedures are cheaper and simpler for the IRS than deficiency procedures, the Department of the Treasury in the past has requested that Congress grant it the authority to add new categories of "correctable errors" by regulation.[2]

The National Taxpayer Advocate is concerned about the impact on taxpayer rights of giving the IRS broad authority to add new categories of math error. In our reports to Congress, we have documented numerous circumstances in which the IRS has used math error authority to address discrepancies that have undermined taxpayer rights.[3]

If the IRS uses math error authority to address more complex issues that require additional fact finding, its assessments are more likely to be wrong, and the IRS's computer-generated notices, which confuse many taxpayers in the simplest of circumstances, are likely to become even more difficult to understand.[4] A recent example illustrates a significant omission on math error notices, where taxpayers' Recovery Rebate Credits were adjusted. In 2021, the IRS issued about 6.5 million math error notices that omitted the 60-day time period language for requesting an abatement of the tax.[5] The IRS later reissued letters to these taxpayers informing them of their right to request an abatement and restarted the 60-day time period from the date of these new letters. Notably, the law does not require the IRS to tell taxpayers the assessment will become final if they fail to contest a math error adjustment within 60 days. As a result, taxpayers can lose their right to challenge the adjustments in court before paying, undermining the taxpayer's *right to appeal an IRS decision in an independent forum*.

2 *See, e.g.*, Joint Committee on Taxation, JCS-1-19, Description of Certain Revenue Provisions Contained in the President's Fiscal Year 2020 Budget Proposal 62, 64 (July 8, 2019); Department of the Treasury, General Explanations of the Administration's Fiscal Year 2016 Revenue Proposals 245-246 (Feb. 2015).

3 *See, e.g.*, National Taxpayer Advocate 2018 Annual Report to Congress 164 (Most Serious Problem: *Post-Processing Math Error Authority: The IRS Has Failed to Exercise Self-Restraint in Its Use of Math Error Authority, Thereby Harming Taxpayers*), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/07/ARC18_Volume1_MSP_11_PostProcessing.pdf; National Taxpayer Advocate 2018 Annual Report to Congress 174 (Most Serious Problem: *Math Error Notices: Although the IRS Has Made Some Improvements, Math Error Notices Continue to Be Unclear and Confusing, Thereby Undermining Taxpayer Rights and Increasing Taxpayer Burden*), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/07/ARC18_Volume1_MSP_12_MathError.pdf; National Taxpayer Advocate 2015 Annual Report to Congress 329-339 (Legislative Recommendation: *Math Error Authority: Authorize the IRS to Summarily Assess Math and "Correctable" Errors Only in Appropriate Circumstances*), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC15_Volume1_LR_02_Math-Error-Authority.pdf; National Taxpayer Advocate 2014 Annual Report to Congress 163-171 (Most Serious Problem: *Math Error Notices: The IRS Does Not Clearly Explain Math Error Adjustments, Making It Difficult for Taxpayers to Understand and Exercise Their Rights*), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/2014-ARC_VOL-1_S1_MSP-16-508.pdf; National Taxpayer Advocate 2013 Annual Report to Congress vol. 2, at 5 (*Do Accuracy-Related Penalties Improve Future Reporting Compliance by Schedule C Filers?*), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/2013-ARC_VOL-2-1.pdf; National Taxpayer Advocate 2013 Annual Report to Congress vol. 2, at 92-93, https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/2013-ARC_VOL-2.pdf; National Taxpayer Advocate 2011 Annual Report to Congress 74-92 (*Expansion of Math Error Authority and Lack of Notice Clarity Create Unnecessary Burden and Jeopardize Taxpayer Rights*), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/2011_ARC_MSP-2-6.pdf; National Taxpayer Advocate 2006 Annual Report to Congress 311 (Most Serious Problem: *IRS Implementation of Math Error Authority Impairs Taxpayer Rights*), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/2006_arc_vol_1_cover__section_1.pdf; National Taxpayer Advocate 2003 Annual Report to Congress 113 (Most Serious Problem: *Math Error Authority*), https://www.taxpayeradvocate.irs.gov/reports/2003-annual-report-to-congress/full-report/; National Taxpayer Advocate 2002 Annual Report to Congress 25 (Most Serious Problem: *Math Error Authority*), https://www.taxpayeradvocate.irs.gov/reports/2002-annual-report-to-congress/full-report/; National Taxpayer Advocate 2002 Annual Report to Congress 186 (Legislative Recommendation: *Math Error Authority*), https://www.taxpayeradvocate.irs.gov/reports/2002-annual-report-to-congress/full-report/; National Taxpayer Advocate 2001 Annual Report to Congress 33 (Most Serious Problem: *Explanations on Math Error Authority*), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/2001_tas.pdf.

4 Erin M. Collins, Math Error, Part I, National Taxpayer Advocate Blog (July 28, 2021), https://www.taxpayeradvocate.irs.gov/news/nta-blog-math-error-part-i/; Erin M. Collins, Math Error, Part II: Math Error Notices Aren't Just Confusing; Millions of Notices Adjusting the Recovery Rebate Credit Also Omitted Critical Information, National Taxpayer Advocate Blog (Aug. 3, 2021), https://www.taxpayeradvocate.irs.gov/news/nta-blog-math-error-part-ii-math-error-notices-arent-just-confusing-millions-of-notices-adjusting-the-recovery-rebate-credit-also-omitted-critical-information/.

5 Erin M. Collins, Math Error, Part II: Math Error Notices Aren't Just Confusing; Millions of Notices Adjusting the Recovery Rebate Credit Also Omitted Critical Information, National Taxpayer Advocate Blog (Aug. 3, 2021), https://www.taxpayeradvocate.irs.gov/news/nta-blog-math-error-part-ii-math-error-notices-arent-just-confusing-millions-of-notices-adjusting-the-recovery-rebate-credit-also-omitted-critical-information/.

Math error authority may be appropriate to use where required schedules are omitted or annual or lifetime dollar caps have been exceeded. It also may be appropriate to use where there is a discrepancy between a return entry and data available to the IRS from a reliable government database, such as records maintained by the Social Security Administration. But the IRS should not be the arbiter of that reliability. Rather, Congress should retain full authority to determine whether the administrative "efficiency" of using math error authority in these instances outweighs the loss of the significant taxpayer protections that deficiency procedures provide.

RECOMMENDATIONS

- Refrain from giving the IRS authority to add new categories of "correctable errors" by regulation. Because the deficiency procedures created by Congress provide important taxpayer protections, Congress should retain the sole authority to determine whether and when to create exceptions to deficiency procedures by adding categories of mathematical or clerical errors.
- Amend IRC § 6213(g) to authorize the IRS to exercise its existing (and any new) authority to summarily assess a deficiency due to "clerical errors" only where: (i) there is a discrepancy between a return entry and reliable government data; (ii) the IRS's notice clearly describes the discrepancy and how to contest it; (iii) the IRS has researched all information in its possession that could help reconcile the discrepancy; (iv) the IRS does not have to evaluate documentation to make a determination; and (v) there is a low abatement rate for taxpayers who respond.
- Amend IRC § 6213(g) to provide that the IRS is not authorized to use any new criteria or data to make summary assessments unless the Department of the Treasury, in conjunction with the National Taxpayer Advocate, has evaluated and publicly reported on the reliability of the criteria or data for that intended use.[6]

6 For a more limited recommendation, see National Taxpayer Advocate 2015 Annual Report to Congress 329-339 (Legislative Recommendation: *Math Error Authority: Authorize the IRS to Summarily Assess Math and "Correctable" Errors Only in Appropriate Circumstances*), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC15_Volume1_LR_02_Math-Error-Authority.pdf.

Legislative Recommendation #9

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

SUMMARY

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

PRESENT LAW

IRC §§ 24(g), 25A(b), and 32(k) require the IRS to ban a taxpayer from claiming CTC, the Credit for Other Dependents (ODC), the American Opportunity Tax Credit (AOTC), and EITC for two years if the IRS makes a final determination that the taxpayer improperly claimed the credit with reckless or intentional disregard of rules and regulations. The duration of the ban increases to ten years if the IRS makes a final determination that the credit was claimed fraudulently. These sections refer to the years in which the ban is imposed as the "disallowance period."[1]

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

REASONS FOR CHANGE

Congress directed the IRS to impose multiyear bans on CTC, ODC, AOTC, and EITC eligibility to deter and penalize certain taxpayers who improperly claim these credits. These multiyear bans are unique in tax law because they prevent taxpayers from receiving credits in future years, even if they otherwise satisfy all eligibility requirements in those years.

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

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

Written Managerial Approval

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

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

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

Tax Court Jurisdiction

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

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

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

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2 Internal Revenue Manual (IRM) 4.19.14.7.1(2), 2/10 Year Ban – Correspondence Guidelines for Examination Technicians (CET) (Apr. 15, 2021).

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

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

5 *See* National Taxpayer Advocate 2019 Annual Report to Congress vol. 2, at 239-256 (Research Study: *Study of Two-Year Bans on the Earned Income Tax Credit, Child Tax Credit, and American Opportunity Tax Credit*), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC19_Volume1_TRRS_02_EITCban.pdf; National Taxpayer Advocate 2013 Annual Report to Congress 103-115 (Most Serious Problem: *Earned Income Tax Credit: The IRS Inappropriately Bans Many Taxpayers From Claiming EITC*) https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/2013-ARC_VOL-1_S1-MSP-9.pdf.

6 *Compare Garcia v. Comm'r*, T.C. Summ. Op. 2013-28 (holding, in a nonprecedential case, that a ban did not apply), *with Ballard v. Comm'r*, No. 3843-15S (T.C. Feb. 12, 2016) (declining to rule on the application of IRC § 32(k), noting that the application of the ban had no effect on the taxpayer's federal income tax liability for the year before it).

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

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

RECOMMENDATIONS

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

7 IRC §§ 6213-6214.

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

Legislative Recommendation #10

Allow Additional Time for Taxpayers to Request Abatement of a Math Error Assessment Equal to the Additional Time Allowed to Respond to a Notice of Deficiency When the Math Error Notice Is Addressed to a Person Outside the United States

SUMMARY

- *Problem:* U.S. taxpayers living abroad generally need more time to respond to IRS notices than taxpayers living within the United States. The tax code gives taxpayers living abroad an additional 60 days to respond to a notice of deficiency, but it does not give taxpayers living abroad additional time to respond to a math error notice – even though failure to respond to a math error notice within 60 days means the IRS may assess the tax and the taxpayer forfeits the right to challenge the IRS's assessment in the U.S. Tax Court.
- *Solution:* Give taxpayers living abroad an additional 60 days to respond to math error notices.

PRESENT LAW

IRC § 6213(b) authorizes the IRS to make a "summary assessment" of tax arising from mathematical or clerical errors as defined in IRC § 6213(g), thus bypassing otherwise applicable deficiency procedures. A taxpayer has no right to file a petition in the U.S. Tax Court based on a math error notice. Under IRC § 6213(b)(2)(A), however, a taxpayer has 60 days after a math error notice is sent to request abatement. If the taxpayer makes an abatement request within 60 days, the IRS must abate the summary assessment and then follow deficiency procedures under IRC § 6212 if it wishes to reassess an increase in tax. If the taxpayer does not submit an abatement request within 60 days, the taxpayer forfeits his or her right to file a petition in the Tax Court. No additional time beyond the 60 days is allowed to request an abatement when the math error notice is addressed to a taxpayer outside the United States.

By contrast, a taxpayer outside the United States who receives a notice of deficiency is given additional time to respond. In general, a taxpayer may file a petition in the Tax Court for a redetermination of a deficiency within 90 days from the date the notice is mailed. However, when the notice of deficiency "is addressed to a person outside the United States," IRC § 6213(a) provides that the taxpayer has 150 days from the date the notice is mailed to file a Tax Court petition. The Tax Court has construed this language broadly, concluding among other things that the 150-day period for filing a petition applies not only when a notice of deficiency is mailed to an address outside the United States but also when a notice of deficiency is mailed to an address within the United States, provided the taxpayer is located outside the United States.[1]

1 *See, e.g.*, *Levy v. Comm'r*, 76 T.C. 228 (1981) (holding that the 150-day rule is applicable to a U.S. resident who is temporarily outside the country when the notice is mailed and delivered); *Looper v. Comm'r*, 73 T.C. 690 (1980) (holding that the 150-day rule is applicable where a notice is mailed to an address outside the United States); *Lewy v. Comm'r*, 68 T.C. 779 (1977) (holding that the 150-day rule is applicable to a foreign resident who is in the United States when the notice is mailed but is outside the United States when the notice is delivered); *Hamilton v. Comm'r*, 13 T.C. 747 (1949) (holding that the 150-day rule is applicable to a foreign resident who is outside the United States when the notice is mailed and delivered).

REASONS FOR CHANGE

An estimated nine million U.S. citizens live abroad as well as about 228,000 U.S. military service personnel.[2] In addition, more than 340,000 U.S. students study overseas.[3] Taxpayers living abroad (temporarily or permanently) often require more time to respond to IRS notices than taxpayers living in the United States. Mail delivery takes longer in both directions – in some cases, depending on where the taxpayer is located, substantially longer. In addition, persons temporarily abroad often do not have access to their tax or financial records, making it difficult for them to respond immediately.

By giving taxpayers living abroad 60 additional days to file a petition in the Tax Court in response to a notice of deficiency, Congress recognized that holding overseas taxpayers to the same deadlines as taxpayers located in the United States would be unreasonable. The same logic applies with respect to math error notices. In fact, the need for additional time is arguably greater in the case of math error notices because the standard response deadline is 60 days (as opposed to 90 days for filing a Tax Court petition in response to a notice of deficiency).

RECOMMENDATION

- Amend IRC § 6213(b)(2)(A) to allow taxpayers 120 days to request an abatement of tax when a math error notice is addressed to a person outside the United States.

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2 For fiscal year (FY) 2019, the Department of State estimates that about nine million U.S. citizens lived abroad. U.S. Department of State, Bureau of Consular Affairs, Consular Affairs by the Numbers, FY 2019 data (Jan. 2020), https://travel.state.gov/content/dam/travel/CA-By-the-Number-2020.pdf. As of June 30, 2021, about 228,000 U.S. military service personnel were stationed abroad, including military reserve personnel and Department of Defense civilian employees. U.S. Department of Defense, Defense Manpower Data Center (DMDC), Military and Civilian Personnel by Service/Agency by State/Country (June 30, 2021), https://dwp.dmdc.osd.mil/dwp/app/dod-data-reports/workforce-reports.

3 Open Doors, U.S. Study Abroad: All Destinations, https://opendoorsdata.org/data/us-study-abroad/all-destinations (last visited Sept. 2, 2020) (showing 341,751 U.S. students studied abroad during the 2017-2018 academic year).

Legislative Recommendation #11

Provide That Assessable Penalties Are Subject to Deficiency Procedures

SUMMARY

- *Problem:* To judicially challenge "assessable penalties," a taxpayer must pay the penalty in full and then bring suit in a U.S. district court or the U.S. Court of Federal Claims. The inability of taxpayers to obtain judicial review on a pre-assessment basis and the requirement that taxpayers pay the penalties in full to obtain judicial review on a post-assessment basis can effectively deprive taxpayers of the right to judicial review at all.
- *Solution:* Give taxpayers an opportunity to challenge assessable penalties in the U.S. Tax Court prior to assessment by making these penalties subject to the deficiency procedures.

PRESENT LAW

IRC § 6212 requires the IRS to issue a "notice of deficiency" before assessing certain liabilities. When the IRS issues a notice of deficiency, IRC § 6213 authorizes the taxpayer to petition the U.S. Tax Court within 90 days (or 150 days for notices addressed to a person outside the United States) to review the IRS determination as stated in the notice.

IRC § 6671(a) authorizes the IRS to assess some penalties without first issuing a notice of deficiency.[1] These penalties are generally subject to judicial review only if taxpayers first pay the penalties and then incur the costs of filing suit in a U.S. district court or the Court of Federal Claims to recover the payments.[2] The district courts and the Court of Federal Claims impose higher court fees than the U.S. Tax Court, and due to the complexities of their rules, taxpayers usually have to retain an attorney to dispute the assessment.

In addition, some assessable penalties are subject to the "full payment rule." In *Flora v. United States*, 362 U.S. 145 (1960), the U.S. Supreme Court held that, with limited exceptions, a taxpayer must have fully paid the assessment before filing suit in a U.S. district court or the Court of Federal Claims. One exception to the full payment rule applies to "divisible" taxes. In the case of divisible taxes, a taxpayer may pay only a fraction of the tax and judicially challenge the penalty. These penalties include the trust fund recovery penalty under IRC § 6672(a).

1 These "assessable" penalties are generally those that are due and payable upon notice and demand. Unlike penalties subject to deficiency procedures, assessable penalties carry no rights to a 30-day letter, agreement form, or notice requirements prior to assessment. Internal Revenue Manual 20.1.9.1.5, Common Terms and Acronyms (Jan. 29, 2021).

2 See IRC § 7422 for requirements relating to refund suits.

By contrast, other assessable penalties require the taxpayer to pay in full to obtain judicial review. These penalties include foreign information reporting penalties under IRC §§ 6038, 6038A, 6038B, 6038C, and 6038D,[3] and penalties with respect to reportable transactions under IRC §§ 6707 and 6707A.[4] Penalties under these sections can be substantial.[5]

REASONS FOR CHANGE

Taxpayers who are savvy enough to request an abatement based on reasonable cause or to request a conference with the IRS Independent Office of Appeals frequently obtain relief from assessable penalties, particularly where the IRS imposes a penalty systemically (rather than imposing it manually during an audit). TAS has previously reported that the IRS abated between 71 percent and 88 percent of dollars systemically assessed under IRC §§ 6038 and 6038A.[6] Specifying that deficiency procedures apply would prevent the systemic assessments the IRS so often abates, a process that unnecessarily consumes resources for the IRS and imposes undue burdens on taxpayers. Given how substantially these penalties can add up, requiring full payment puts judicial review out of reach for many if not most taxpayers. It is unconscionable to require taxpayers to pay penalties that can run into the millions of dollars without first giving taxpayers an opportunity to obtain judicial review of the IRS's determination. This is particularly important for taxpayers who face large penalties but have limited resources.

Providing that assessable penalties are subject to deficiency procedures would put pre-assessment judicial review of penalties in the hands of the Tax Court. In our view, that is where it belongs. Due to the tax expertise of its judges, the Tax Court is often better equipped to consider tax controversies than other courts. It is also more accessible to less knowledgeable and unrepresented taxpayers than other courts because it uses informal procedures, particularly in disputes that do not exceed $50,000. Another benefit is that taxpayers are generally offered the option of receiving free legal assistance from a Low Income Taxpayer Clinic or *pro bono* representative. In most instances, the Tax Court is the least expensive and easiest-to-navigate judicial forum for low-income taxpayers.

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3 Although IRC § 6671(a) specifically references only the "penalties and liabilities provided by this subchapter" (*i.e.*, IRC Chapter 68, Subchapter B), the IRS takes the position that various international information reporting penalties in Chapter 61 are also immediately assessable without the issuance of a notice of deficiency, including the penalty under IRC § 6038 for failure to file Form 5471, Information Return of U.S. Persons With Respect to Certain Foreign Corporations. *See* IRC §§ 6201(a); 7806(b). This position has also been accepted by some federal courts at least as to IRC § 6038. *See Dewees v. U.S.*, 272 F.Supp.3d 96 (D.D.C. 2017), *aff'd without published opinion*, 767 Fed.Appx. 4 (D.C. Cir. 2019), *cert. denied*, 140 S.Ct. 48 (2019) (holding that the failure to offer a preassessment opportunity for judicial review of a penalty under IRC § 6038 did not violate due process under the Fifth Amendment); *Wheaton v. U.S.*, 888 F.Supp. 622 (D.N.J. 1995) (holding the IRC § 6038 penalty was not subject to deficiency procedures). *Wheaton* also holds that IRC § 6038 penalties are subject to the *Flora* full payment rule. 888 F.Supp. at 627. *See also Gaynor v. U.S.*, 150 Fed. Cl. 519 (2020) (holding that a refund suit to challenge IRC § 6038 penalty for failure to file Form 5471 is subject to the full payment rule of *Flora*).

4 Courts ruled that full payment was required prior to a judicial challenge of the IRC § 6707 penalty in *Pfaff v. U.S.*, No. 14-cv-03349, 2016 WL 915738 (D. Colo. Mar. 10, 2016) and *Diversified Group v. U.S.*, 841 F.3d 975 (Fed. Cir. 2016).

5 The penalty under IRC § 6038 for failure to file Form 5471 with respect to certain foreign corporations and partnerships is $10,000 for each accounting period for each failure to file Form 5471 with respect to certain foreign corporations and partnerships. IRC § 6038(b). An additional "continuation penalty" of up to $50,000 can be added to each penalty if the failure continues for more than 90 days after the IRS sends notice of the failure. IRC § 6038(b)(2). The IRC § 6038 penalty in *Gaynor* totaled $120,000. *Gaynor*, 150 Fed.Cl. at 525, 527. The amount of the IRC § 6707 penalty is $50,000 for failure to furnish information regarding reportable transactions, other than listed transactions. IRC § 6707(b)(1). If the penalty is with respect to a listed transaction, the amount of the penalty is the greater of the following: $200,000, or 50 percent of the gross income derived by the material advisor with respect to aid, assistance, or advice which is provided before the date the information return is filed under IRC § 6111. IRC § 6707(b)(2). In *Diversified*, the penalties assessed under IRC § 6707 for failure to register their tax shelter totaled $24.9 million. *Diversified Grp., Inc. v. U.S.*, 123 Fed. Cl. 442, 445 (2015), *aff'd*, 841 F.3d 975 (Fed. Cir. 2016).

6 *See* National Taxpayer Advocate 2020 Annual Report to Congress 119, 124-125 (Most Serious Problem: *International: The IRS's Assessment of International Penalties Under IRC §§ 6038 and 6038A Is Not Supported by Statute, and Systemic Assessments Burden Both Taxpayers and the IRS*) (reporting that when penalties under IRC §§ 6038 and 6038A were applied systemically, the abatement percentage measured by number of penalties ranged from 55 to 72 percent and the abatement percentage measured by dollar value of penalties ranged from 71 to 88 percent in fiscal year 2020), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2021/01/ARC20_MSP_08_International.pdf. The IRS abated manual assessments at rates ranging from 17 percent to 39 percent by number and from eight percent to 66 percent by dollar value.

The National Taxpayer Advocate does not agree with the IRS's legal position that foreign information reporting penalties in Chapter 61 may be assessed without the issuance of a notice of deficiency under current law.[7] In light of the IRS's position, however, we believe Congress should clarify the point through legislation.

RECOMMENDATION

- Amend IRC § 6212 to require the IRS to issue a notice of deficiency before assessing any "assessable penalty."

7 *See* National Taxpayer Advocate 2020 Annual Report to Congress 119-131 (Most Serious Problem: *International: The IRS's Assessment of International Penalties Under IRC §§ 6038 and 6038A Is Not Supported by Statute, and Systemic Assessments Burden Both Taxpayers and the IRS*), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2021/01/ARC20_MSP_08_International.pdf.

Legislative Recommendation #12

Direct the IRS to Implement an Automated Formula to Identify Taxpayers at Risk of Economic Hardship

SUMMARY

- *Problem:* The tax code contains provisions designed to shield taxpayers experiencing economic hardship from IRS collection action, yet the IRS routinely enters into installment agreements (IAs) with taxpayers without undertaking the financial analysis required to determine whether the taxpayers can afford to make payments. Some anxious or intimidated taxpayers seek to resolve their liabilities quickly and do not know the IRS is required to halt collection action if they are in economic hardship. As a result, taxpayers often agree to make tax payments they cannot afford, leaving them unable to pay for basic necessities like food, shelter, and health care for themselves and their families.
- *Solution:* Direct the IRS to implement an algorithm, similar to one developed by TAS, to identify taxpayers at high risk of economic hardship and advise these taxpayers, before they enter into installment agreements, that they may not have to make current payments if they can document their hardship.

PRESENT LAW

The IRC contains several provisions that protect taxpayers experiencing economic hardship from IRS collection actions. IRC § 6330 authorizes a taxpayer in a collection due process hearing to propose collection alternatives, which may be based on an inability to pay the tax due to economic hardship.

IRC § 6343 requires the IRS to release a levy if the IRS determines that the levy "is creating an economic hardship due to the financial condition of the taxpayer." Under Treas. Reg § 301.6343-1 and the Internal Revenue Manual, economic hardship exists when an individual is "unable to pay his or her reasonable basic living expenses."

IRC § 7122(d) requires the IRS to develop and publish schedules of national and local allowances (known as allowable living expenses or ALEs) to ensure that taxpayers entering into offers in compromise are left with "an adequate means to provide for basic living expenses."

REASONS FOR CHANGE

In general, the IRS is required to halt collection actions if a taxpayer demonstrates that he or she is in economic hardship. However, the IRS routinely enters into IAs with taxpayers without undertaking the financial analysis required to make a hardship determination. For example, taxpayers are not required to submit any financial information to qualify for streamlined IAs and may enter into them online without interacting with an IRS employee. While this is convenient and an unintrusive collection alternative for many taxpayers, it is not necessarily good for all taxpayers. Many anxious or intimidated taxpayers seek to resolve their liabilities quickly and do not know the IRS is required to halt collection action if they are in economic hardship. As a result, taxpayers often agree to make tax payments they cannot afford.

TAS estimates that about 27 percent of taxpayers who entered into streamlined IAs through the IRS's Automated Collection System (ACS) in fiscal year (FY) 2022 had incomes at or below their ALEs.[1] To emphasize the point: More than a quarter of taxpayers who agreed to streamlined IAs in ACS would have received the benefit of collection alternatives, such as offers in compromise or currently not collectible hardship (CNC-Hardship) status, if they had known to call the IRS to explain their financial circumstances.

That is not a fair result. Whether a taxpayer is left with sufficient funds to pay basic living expenses for himself and his family should not depend on the taxpayer's knowledge of the IRS's procedural rules.

Furthermore, taxpayers with incomes below their ALEs who paid their liabilities are disproportionately likely to have incurred economic hardship to do so. Some of these taxpayers will default on their IAs, which subjects them to additional collection actions and further increases their burden.

To address this problem, the TAS Research function has developed an automated algorithm that we believe can, with a high degree of accuracy, identify taxpayers whose incomes are below their ALEs. If the IRS validates this formula or develops an alternative formula that is reasonably accurate, it could place a "low-income" indicator on the accounts of all taxpayers whom the formula identifies as having incomes below their ALEs.[2]

While the ALE standards represent only average expenses for taxpayers and should not be used to automatically close a case as CNC-Hardship, an ALE-based indicator would be a useful starting point for financial analysis in the collection context. It could be used to alert collection employees speaking with a taxpayer over the phone of the need to request additional financial information so the IRS can analyze the specific facts and circumstances of the taxpayer's case. The indicator could be used to trigger a notification to taxpayers entering into online IAs that informs them of their right to contact the IRS collection function for assistance if they believe they cannot pay their tax debts without incurring economic hardship. The IRS could also use this algorithm to screen out these taxpayers from automated collection treatments such as the Federal Payment Levy Program, selection for referral to private collection agencies, or passport certification, unless and until the IRS has made direct personal contact with the taxpayer to verify his or her financial information.

In short, an automated economic hardship screen would benefit taxpayers and the IRS alike. It would help protect low-income taxpayers from agreeing to make payments that would leave them without adequate means to pay their basic living expenses, and it would help the IRS avoid the rework that occurs when taxpayers default on IAs they cannot afford.

1 In FY 2018, TAS estimated that 39 percent of ACS taxpayers who entered into streamlined IAs had incomes at or below their ALEs. This estimate allowed two-vehicle ownership expenses for married taxpayers filing joint returns. TAS published a study on the feasibility of using an algorithm to identify taxpayers at risk of economic hardship in the National Taxpayer Advocate 2020 Annual Report to Congress. This study used a more conservative estimate of ALEs, allowing only one-vehicle ownership expense. *See* National Taxpayer Advocate 2020 Annual Report to Congress 249-267 (TAS Research Study: *The IRS Can Systemically Identify Taxpayers at Risk of Economic Hardship and Screen Them Before They Enter Into Installment Agreements They Cannot Afford*), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2021/01/ARC20_TRRS_EconomicHardship.pdf.

2 In 2018, in response to legislation that directed the IRS to waive or reimburse IA user fees for taxpayers with adjusted gross incomes at or below 250 percent of the Federal Poverty Level, the IRS developed a "Low Income Indicator" (LII). To date, however, the IRS uses the LII solely to determine user fees – not to determine a taxpayer's eligibility for collection alternatives. In addition, although the legislation directed the IRS to determine adjusted gross income for "the most recent year for which such information is available," the IRS is making the determination solely on the basis of the taxpayer's most recent filed return, even if the taxpayer has not filed a return, or even had a filing requirement, in recent years. Where no return has been filed within the past two years, we recommend the IRS utilize information reporting data (*e.g.*, Forms W-2 and 1099) to make the determination.

RECOMMENDATION

- Direct the IRS to implement an algorithm that will enable it to (i) identify taxpayers at high risk of economic hardship; (ii) respond appropriately to taxpayers who contact the IRS regarding a balance due; (iii) alert taxpayers at risk of economic hardship who seek to enter into streamlined IAs online of the resources available to them; (iv) determine whether to exclude taxpayers' debts from automated collection treatments such as the Federal Payment Levy Program, the private debt collection program, and passport certification; and (v) possibly rank cases for collection priority.

Legislative Recommendation #13

Provide That "an Opportunity to Dispute" an Underlying Liability Means an Opportunity to Dispute Such Liability in the U.S. Tax Court

SUMMARY

- *Problem:* The IRS takes collection actions against some taxpayers who did not have an opportunity to challenge the existence or amount of their tax liability in the U.S. Tax Court. As a result, some taxpayers have no alternative but to pay the tax the IRS says they owe and then seek a refund in a different federal court, an option that many taxpayers cannot afford and that imposes additional burden.
- *Solution:* Allow taxpayers to raise challenges to the existence or amount of an IRS-determined tax liability at a "Collection Due Process" (CDP) hearing in cases where they did not have a prior opportunity to dispute the liability in the U.S. Tax Court.

PRESENT LAW

IRC §§ 6320(b) and 6330(b) provide taxpayers with the right to request an independent review of a Notice of Federal Tax Lien filed by the IRS or a proposed levy action. This review is provided through a CDP hearing conducted by the IRS Independent Office of Appeals (Appeals) and is subject to review by the U.S. Tax Court, generally the only pre-payment judicial forum in which taxpayers may resolve their disputes with the IRS. Commonly, the existence of a tax liability has been conclusively determined by this point under procedures that gave the taxpayer an opportunity to seek U.S. Tax Court review of the IRS's determination. Thus, the purpose of the CDP hearing typically is to determine whether the taxpayer qualifies for collection alternatives (*e.g.*, an offer in compromise or a partial-payment installment agreement) based on inability to pay.

However, IRC § 6330(c)(2)(B) also provides that a taxpayer may dispute the existence or amount of the underlying tax liability at a CDP hearing if the taxpayer "did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability."[1]

The IRS and the courts interpret IRC § 6330(c)(2)(B) and the Treasury regulations under IRC §§ 6320 and 6330 restrictively. They take the position that a taxpayer does not have a right to dispute the existence or amount of a liability if the taxpayer had a prior opportunity for a conference with Appeals, even if the taxpayer had no prior opportunity for U.S. Tax Court review of the liability and even if no subsequent U.S. Tax Court review of the Appeals determination is available.[2] For example, one court recently held that a taxpayer who did not receive a notice of deficiency was not permitted to dispute his underlying liability in a CDP hearing because the taxpayer previously sought to resolve the tax liability through audit reconsideration.[3] Because the underlying liability was not at issue in the CDP hearing, the taxpayer was precluded from disputing the underlying liability in the Tax Court proceeding.[4]

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1 IRC §§ 6320(c), 6330(c)(2)(B). The phrase "underlying tax liability" includes the tax deficiency, any penalties and additions to tax, and statutory interest. *Katz v. Comm'r*, 115 T.C. 329, 339 (2000).

2 *See* Treas. Reg. §§ 301.6320-1(e)(3), Q&A (E2), 301.6330-1(e)(3), Q&A (E2) (2006); *Lewis v. Comm'r*, 128 T.C. 48, 61 (2007); *Iames v. Comm'r*, 850 F.3d 160 (4th Cir. 2017); *Keller Tank Servs. II v. Comm'r*, 854 F.3d 1178 (10th Cir. 2017); *Our Country Home Enters. v. Comm'r*, 855 F.3d 773 (7th Cir. 2017). Additionally, at least one Court of Appeals has held that IRC § 6330(c)(4)(A) provides an independent basis for denying a merits hearing in the CDP process if a prior merits hearing occurred. *Iames*, 850 F.3d 160.

3 *Lander v. Comm'r*, 154 T.C. 104 (2020). Audit reconsiderations are not subject to U.S. Tax Court review.

4 *See* Treas. Reg. § 301.6330-1(f)(2), Q&A (F)(3).

Mere notification of the right to request an Appeals conference may prevent the taxpayer from disputing the tax liability in a CDP hearing. For example, the IRS assesses some penalties without issuing a notice of deficiency.[5] The IRS notifies the taxpayer of the proposed penalty by sending a letter or notice. Whether or not the taxpayer requests or receives a conference with Appeals in response to the letter, the taxpayer will not be permitted to dispute the merits of the liability at a CDP hearing or in the U.S. Tax Court. To obtain judicial review of the underlying liability, the taxpayer must pay the tax – generally the full amount due – and seek a refund in a federal district court or the U.S. Court of Federal Claims.[6]

REASONS FOR CHANGE

The value of CDP proceedings is undermined when taxpayers who have never had an opportunity to dispute their underlying liability in the U.S. Tax Court are precluded from doing so during their CDP hearing, and these taxpayers have no alternative but to pay the tax and then seek a refund, an option that not all taxpayers can afford. The National Taxpayer Advocate believes that judicial and administrative interpretations limiting a taxpayer's ability to challenge the IRS's liability determination in a CDP hearing are inconsistent with Congress's intent when it enacted CDP procedures. Compared to the burden the current rules place on taxpayers, allowing more taxpayers to dispute their tax liabilities in CDP hearings will better protect taxpayer rights without imposing undue administrative burden on the IRS or the Tax Court.

RECOMMENDATIONS

- Amend IRC § 6330(c)(2)(B) to allow taxpayers to raise challenges to the existence or amount of the underlying tax liability at a CDP hearing for any tax period if the taxpayer did not receive a valid notice of deficiency for such liability, or in a non-deficiency case, the taxpayer did not have an opportunity to dispute the liability in the U.S. Tax Court.
- Clarify that IRC § 6330(c)(4)(A) applies only to collection issues and not to liability issues, which are addressed exclusively in IRC § 6330(c)(2)(B).

5 These "assessable" penalties are primarily found in IRC §§ 6671 through 6720C. The IRS sometimes assesses these penalties systemically (*i.e.*, automatically by computer rather than manually during an audit). *See, e.g.*, Internal Revenue Manual 21.8.2.20.2(1), Form 5471 Penalties Systemically Assessed From Late-Filed Form 1120 Series or Form 1065 (Feb. 4, 2022).

6 Under *Flora v. United States*, 362 U.S. 145 (1960), a taxpayer must have "fully paid" the assessment before filing a refund suit. One exception to the full payment rule applies to "divisible" taxes.

Legislative Recommendation #14

Prohibit Offset of the Earned Income Tax Credit (EITC) Portion of a Tax Refund to Past-Due Federal Tax Liabilities

SUMMARY

- *Problem:* The IRS has discretion to not offset tax refunds to satisfy outstanding federal tax liabilities, but it has not exercised that discretion with respect to Earned Income Tax Credit (EITC) refunds. Reducing the amount of EITC a taxpayer is eligible to receive by withholding a tax refund undermines the purpose of this anti-poverty program.
- *Solution:* Prohibit the IRS from offsetting the EITC portion of a taxpayer's refund to satisfy prior-year tax liabilities.

PRESENT LAW

IRC § 6402(a) generally authorizes the IRS to offset (*i.e.*, withhold) a taxpayer's refund and apply it to satisfy a prior-year federal tax liability, but it does not require the IRS to do so.[1] If a taxpayer can demonstrate that he/she will experience an economic hardship if the IRS offsets his/her refund, the IRS sometimes will "bypass" the offset (*i.e.*, pay the refund). This is referred to as an "offset bypass refund" (OBR).[2] Similarly, the IRS paid refunds generated by Recovery Rebate Credits (RRCs) enacted during the COVID-19 pandemic without reduction to satisfy a tax debt.[3]

The EITC is a refundable credit for low-income working individuals and families.[4] The EITC is claimed on a tax return and is included in the computations that determine whether a taxpayer is entitled to receive a refund and, if so, the amount of the refund.

The Debt Collection Improvement Act of 1996 (DCIA) requires federal agencies to offset certain federal payments to collect outstanding non-tax debts owed to the United States.[5] However, the amount subject to offset is statutorily limited in some instances, and payments made pursuant to "means-tested" anti-poverty programs, such as Supplemental Security Income and Temporary Assistance to Needy Families, are exempt

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1 *Kalb v. United States*, 505 F.2d 506, 509 (2d Cir. 1974), *cert. denied*, 421 U.S. 979 (1975). The IRS is required to offset a taxpayer's refund to certain liabilities, such as non-tax federal debts, past-due child support, and state income tax and unemployment compensation debts. *See* IRC § 6402(c), (d).

2 Internal Revenue Manual 21.4.6.5.11.1, Offset Bypass Refund (OBR) (Sept. 6, 2022).

3 In the Coronavirus Aid, Relief, and Economic Security (CARES) Act, Congress enacted IRC § 6428, providing for RRCs, payable in advance, which would not be offset to satisfy outstanding liabilities other than past-due child support obligations. *See* Pub. L. 116-136, § 2201(a), (d)(1)-(3). In the Consolidated Appropriations Act, 2021, Congress enacted IRC § 6428A, providing for additional RRCs, and amended section 2201 of the CARES Act to provide that only the portion of the RRCs that were paid as advance refunds were exempt from offset to satisfy outstanding liabilities other than past-due child support obligations. *See* Pub. L. No. 116-260, §§ 272(a), 273(b)(1). At TAS's urging, the IRS then exercised its discretion under IRC § 6402(a) to not offset RRCs, whether received in advance or claimed on a tax return, to satisfy outstanding tax liabilities, effective for returns filed on or after March 18, 2021. *See, e.g.*, IRS Fact Sheet, FS-2021-17, QE2, A2 (Dec. 2021), https://www.irs.gov/pub/taxpros/fs-2021-17.pdf; IRS Fact Sheet, FS-2022-04, QF2, A2 (Jan. 2022), https://www.irs.gov/pub/taxpros/fs-2022-04.pdf.

4 IRC § 32. The Supreme Court has stated: "The earned income credit was enacted to reduce the disincentive to work caused by the imposition of social security taxes on earned income … and to provide relief for low-income families hurt by rising food and energy prices." *Sorenson v. Sec'y of Treasury*, 475 U.S. 851, 864 (1986).

5 *See* Debt Collection Improvement Act of 1996, Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134 §31001 110 Stat. 1321, 1321 (1996), (codified at 31 U.S.C. § 3716). The offsets are carried out through the Treasury Offset Program.

from offset when exemption is requested by the head of the agency administering the program.[6] The EITC is sometimes referred to as a means-tested benefit, although it does not meet the DCIA definition of that term.[7]

Nevertheless, the amount of the EITC depends in part on the amount of a taxpayer's earned income. In 2022, for example, joint filers with no qualifying children who earn more than $22,610 will be ineligible for the credit; if they have two qualifying children and earn more than $55,529, they will be ineligible for the credit. All other filers with no qualifying children who earn more than $16,480 in 2022 will be ineligible for the credit; those with two qualifying children who earn more than $49,399 will be ineligible for the credit.[8] Any taxpayer with more than $10,300 of investment income in 2022 will be ineligible for the credit.[9]

REASONS FOR CHANGE

Like other anti-poverty programs, Congress created the EITC to provide financial assistance for low-income individuals and families and to reduce poverty. The average adjusted gross income of taxpayers who received the EITC for tax year 2020 was $20,174.[10]

Taxpayers whose EITC refund is subject to offset may request an OBR, but the timeframe for requesting an OBR is narrow. The IRS must approve an OBR between the date the return is filed and the date the IRS assesses the tax shown on the return. This period is approximately ten to 20 days when a return is filed electronically. In fiscal year 2022, only 377 taxpayers received OBRs.[11]

To its credit, the IRS has exercised its discretion to not offset some tax benefits to satisfy past-due federal tax liabilities, but the IRS has not adopted a policy of protecting EITC refunds from offset. Consistent with congressional recognition that offsets may impose economic hardships on recipients of federal benefits, the National Taxpayer Advocate recommends that Congress prohibit the IRS from offsetting the portion of a taxpayer's refund attributable to the EITC.

To be clear, we are not recommending that the full refund subject to offset be released – just the amount of the refund that is attributable to the EITC. Programming would be straightforward, rendering it easily administrable.[12]

RECOMMENDATION

- Amend IRC § 6402(a) to prohibit offset of the EITC portion of a taxpayer's refund to satisfy prior-year tax liabilities.

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6 31 U.S.C. § 3716(c)(3)(B). "Means-tested programs" are those which base eligibility on a determination that the income and/or assets of the beneficiary are inadequate to provide the beneficiary with an adequate standard of living without program assistance. 31 C.F.R. § 285.5(e)(7)(i). The Secretary of the Treasury has the discretion to exempt payments made under programs which are not means-tested, when so requested by the payment agency. 31 U.S.C. § (c)(3)(B); 31 C.F.R. § 285.5(e)(7)(ii).

7 *See, e.g.*, House Committee on the Budget, *What you Need to Know About Means-Tested Entitlements* (May 1, 2017), https://budget.house.gov/publications/report/what-you-need-know-about-means-tested-entitlements, and Congressional Budget Office, Federal Means-Tested Programs and Tax Credits – Infographic (Feb. 11, 2013), https://www.cbo.gov/publication/43935.

8 Rev. Proc. 2021-45, 2021-48 I.R.B. 764.

9 *Id.*

10 IRS, Compliance Data Warehouse (CDW), Individual Return Transaction File (data as of Oct. 28, 2022).

11 IRS, CDW, Individual Master File Transaction History table (data as of Oct. 28, 2022).

12 The Section of Taxation of the American Bar Association (ABA) has also advocated for a prohibition against offsetting the refunds of EITC recipients during the pandemic. ABA, Comments Regarding Review of Regulatory and Other Relief to Support Taxpayers During COVID-19 Pandemic (Jan. 15, 2021), https://www.americanbar.org/content/dam/aba/administrative/taxation/policy/2021/011521comments.pdf.

Legislative Recommendation #15

Require the IRS to Waive User Fees for Taxpayers Who Enter Into Low-Cost Installment Agreements or Who Have an Adjusted Gross Income Equal to or Less Than 250 Percent of the Federal Poverty Level

SUMMARY

- *Problem:* Financially struggling taxpayers who cannot pay their tax liabilities by the due date may enter into installment agreements (IAs) under which they make monthly payments. The IRS ordinarily charges these taxpayers a "user fee" to cover the agency's cost in managing the monthly payment plan. Although user fees are modest, they may deter some low-income taxpayers from applying for IAs and paying their taxes voluntarily.
- *Solution:* Require the IRS to waive the user fee for IAs with taxpayers whose adjusted gross incomes are equal to or less than 250 percent of the Federal Poverty Level and taxpayers who enter into direct-debit IAs.

PRESENT LAW

In cases where a taxpayer is unable to pay the full amount of his or her tax liability in a single lump sum, IRC § 6159(a) authorizes the IRS to enter into an IA under which the taxpayer will pay the liability in monthly installments. A taxpayer can apply for an IA on paper or by using an online payment agreement (OPA).

The Independent Offices Appropriations Act of 1952 (31 U.S.C. § 9701) and Office of Management and Budget Circular A-25 authorize the IRS to set user fees by regulation. Pursuant to Treas. Reg. § 300.1, the IRS currently charges $225 for entering into paper IAs and $149 for entering into OPAs.[1] If a taxpayer authorizes the IRS to "direct debit" a bank account each month, the fee is reduced to $107 for paper IAs and $31 for OPAs. These fees are designed to enable the agency to recover the full costs of administering IAs.

For low-income taxpayers (*i.e.*, taxpayers whose incomes do not exceed 250 percent of the Federal Poverty Level), Treas. Reg. § 300.1 caps the IA fee at $43. In addition, IRC § 6159(f)(2)(A) waives the fee for low-income taxpayers who enter into direct-debit IAs (DDIAs). Low-income taxpayers who cannot enter into DDIAs (*e.g.*, because they do not have a bank account) must pay the IA fee, but if they make all payments required under the IA, IRC § 6159(f)(2)(B) requires the IRS to reimburse the amount of the IA fee to them. In 2018, Congress amended IRC § 6159(f)(1) to prohibit the IRS from increasing the IA user fees.

REASONS FOR CHANGE

Even the reduced IA user fee for low-income taxpayers may deter these taxpayers from applying for IAs and paying their taxes voluntarily. Taxpayers ineligible for the reduced fee may also be experiencing some level of financial hardship, as evidenced by their inability to pay their balance at once. The cost to the IRS of OPAs and DDIAs is so low that requiring a user fee may cost the government more in lost tax revenue and increased enforcement costs than the user fee generates.

1 *See* User Fees for Installment Agreements (IAs), T.D. 9798, 81 Fed. Reg. 86,955 (Dec. 2, 2016).

The IRS is required to identify low-income individuals who request an IA, and it does so systemically by placing an indicator on a taxpayer's account based on the taxpayer's last filed return. Taxpayers whose accounts are marked with a low-income indicator do not pay the $43 fee when they request an IA. Low-income taxpayers without the indicator on their accounts may complete and submit Form 13844, Application for Reduced User Fee for Installment Agreement, for fee waiver approval. Removing the requirement to pay for an IA could encourage more low-income taxpayers to become compliant with their tax obligations. Taxpayers whose incomes exceed the 250 percent threshold and who enter into DDIAs should also be relieved of paying an IA user fee. This would incentivize more taxpayers to shift to an online resolution and acknowledge that this virtual transaction involves minimal employee cost for the IRS.

RECOMMENDATION

- Amend IRC § 6159 to require the IRS to waive the user fee for all direct-debit IAs and for IAs with taxpayers whose adjusted gross income is equal to or less than 250 percent of the Federal Poverty Level.[2]

2 For legislative language generally consistent with this recommendation, see Taxpayer Bill of Rights Enhancement Act of 2017, S. 1793, 115th Cong. § 301 (2017); Taxpayer Protection and Assistance Act, S. 1321, 109th Cong. § 301 (2006).

Legislative Recommendation #16

Improve Offer in Compromise Program Accessibility by Repealing the Partial Payment Requirement and Restructuring the User Fee

SUMMARY

- *Problem:* Financially struggling taxpayers who cannot afford to pay their tax liabilities in full may apply for an "offer in compromise" (OIC). Under an OIC, the IRS agrees to accept less than full payment in satisfaction of the debt. Currently, taxpayers are required to include non-refundable partial payments with their OIC applications. The Treasury Department has acknowledged that the partial payment requirement may substantially reduce access to the OIC program and has estimated that repealing the requirement would raise revenue.
- *Solution:* Repeal the requirements that taxpayers include partial payments with OIC applications.

PRESENT LAW

IRC § 7122(a) authorizes the IRS to settle a tax debt by accepting an OIC. According to Policy Statement 5-100, the IRS will "accept an offer in compromise when it is unlikely that the tax liability can be collected in full and the amount offered reasonably reflects collection potential." Taxpayers whose offers are accepted must file and pay their taxes for the next five years, as stated on IRS Form 656, Offer in Compromise (2022) (Section 7, items l and m). If they fail to remain in compliance for the five-year period, the IRS may seek to collect the amounts it compromised.

IRC § 7122(c)(1)(A) requires a taxpayer who would like the IRS to consider a "lump-sum" offer – payable in five or fewer installments – to include a nonrefundable partial payment of 20 percent of the amount of the offer with the application. IRC § 7122(c)(1)(B) requires a taxpayer who would like the IRS to consider a "periodic payment" offer – an offer payable in six or more installments – to include the first proposed installment with the application and to continue to make installment payments while the IRS is considering it. In addition to these upfront partial payments, Treas. Reg. § 300.3 requires that most offer applications include a $205 user fee. IRC § 7122(c)(3) provides that taxpayers with low incomes (*i.e.*, taxpayers with adjusted gross incomes for the most recent tax year, or taxpayers with household gross monthly incomes multiplied by 12 months, that is not more than 250 percent of the Federal Poverty Level guidelines) are not subject to the user fee or the partial payment requirement.[1] They may apply for a waiver on Form 656.

REASONS FOR CHANGE

By accepting an offer, the IRS often collects money it would not otherwise collect and may convert a noncompliant taxpayer into a compliant one by requiring the taxpayer, as a condition of the agreement, to timely file returns and pay taxes for the following five years. The Treasury Department's General Explanations of the Administration's Fiscal Year 2017 Revenue Proposals acknowledged the benefit of offers by proposing to repeal the partial payment requirement, explaining that the requirement "may substantially reduce access to the offer in compromise program. … Reducing access to the offer-in-compromise program makes it more

1 *See also* Treas. Reg. § 300.3(b)(ii) & (iii).

difficult and costly to obtain the collectable portion of existing tax liabilities." The Treasury Department estimated that repealing the requirement would raise revenue.[2]

A 2007 TAS study found that taxpayers above the low-income threshold were no better able to afford to make partial payments than those below it and that those below it frequently did not obtain a waiver. Similarly, a 2005 Treasury Inspector General for Tax Administration report found that when the IRS first imposed a user fee (it was $150 in 2003), OIC submissions declined by more than 20 percent among taxpayers at every income level, including those who were eligible for a fee waiver. Furthermore, after the partial payment requirement was imposed, the slight increase in the offer acceptance rate did not offset the 26 percent decrease in submitted offers, suggesting that higher upfront costs deterred many taxpayers from submitting acceptable offers. Thus, upfront payments such as the user fee and the partial payment requirement likely reduce collections and increase enforcement costs.

RECOMMENDATION

- Amend IRC § 7122(c) to remove the requirement that taxpayers include a partial payment with offer applications and restructure the user fee so that it is collected out of amounts otherwise due on accepted offers.[3]

2 In the past, the IRS expressed concern that repealing the partial payment requirement or limiting the user fee might have the effect of increasing the number of frivolous offers. To address concerns about frivolous submissions, Congress enacted a frivolous submissions penalty under IRC § 6702(b). In general, it imposes a penalty of $5,000 on any person who submits a frivolous OIC application (among other frivolous submissions).

3 For legislative language generally consistent with this recommendation, see John Lewis Taxpayer Protection Act, H.R. 3738, 117th Cong. § 206 (2021); Taxpayer Protection Act, H.R. 2171, 115th Cong. § 206 (2017); Taxpayer Protection Act, H.R. 4912, 114th Cong. § 206 (2015); Taxpayer Assistance Act, H.R. 4994, 111th Cong. § 202 (2010). For additional background, see, *e.g.*, National Taxpayer Advocate 2006 Annual Report to Congress 507-519 (Legislative Recommendation: *Improve Offer in Compromise Program Accessibility*), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/2006_arc_section2_v2.pdf.

Legislative Recommendation #17

Modify the Requirement That the Office of Chief Counsel Review Certain Offers in Compromise

SUMMARY

- *Problem:* The IRS Office of Chief Counsel is currently required to review and provide a legal opinion for every accepted offer in compromise (OIC) if the amount of unpaid tax is $50,000 or more, even though the IRS determines whether to accept an OIC primarily based on an analysis of the taxpayer's financial condition and very few OICs present significant legal issues. This requirement delays OIC processing and diverts Counsel attorneys from performing their core legal work.
- *Solution:* Revise current law to require Counsel review of OICs only in cases that present significant legal issues.

PRESENT LAW

IRC § 7122 authorizes the Secretary to enter into an agreement with a taxpayer that settles the taxpayer's tax liabilities for less than the full amount owed, as long as the taxpayer's case has not been referred to the Department of Justice. Such an agreement is known as an OIC. Treas. Reg. § 301.7122-1(b) provides that the IRS may compromise liabilities to the extent there is doubt as to liability or doubt as to collectibility, or to promote effective tax administration. The regulations further define these terms and describe instances when compromise is appropriate.

IRC § 7122(b) requires the Treasury Department's General Counsel to review and provide an opinion for accepted OICs in all criminal cases and in all civil cases where the amount of unpaid tax assessed (including any interest, additional amount, addition to tax, and assessable penalty) is $50,000 or more. This authority is exercised by the IRS Office of Chief Counsel.[1]

REASONS FOR CHANGE

The IRS receives tens of thousands of OIC applications every year. It decides whether to accept an OIC primarily by performing a financial analysis that compares the taxpayer's ability to pay (based on income and assets) with the taxpayer's allowable living expenses. Currently, the IRS also must verify that the legal and IRS policy requirements for compromise are met prior to proposing acceptance, even though very few OICs present significant legal issues that require Office of Chief Counsel involvement. The time Counsel employees spend learning the facts of every criminal OIC case and civil OIC case where the amount of unpaid tax assessed is $50,000 or more and writing opinions creates significant delays in OIC processing and is often duplicative of work the IRS has already performed. It also requires a significant commitment of legal resources on the part of the IRS. The Office of Chief Counsel reports that it spends thousands of hours each year reviewing OICs.[2] Taxpayers would be better served if those resources could be allocated elsewhere.

In addition, delays in OIC processing may impede a taxpayer's ability to make other financial decisions while awaiting a response and may even jeopardize the taxpayer's ability to pay the amount offered if his or her financial circumstances deteriorate while the OIC is awaiting Counsel review.

1 *See* Internal Revenue Manual 8.23.4.3.3, Counsel Review of Acceptance Recommendations (Apr. 7, 2022).
2 Emails from IRS Office of Chief Counsel (Nov. 29, 2021; Sept. 1, 2020; and Aug. 9, 2019) (on file with TAS).

The National Taxpayer Advocate believes the OIC process would be improved if Congress repeals the blanket requirement that Counsel review all OICs in civil cases where the unpaid tax assessed is $50,000 or more and replace it with language authorizing the Secretary to require Counsel review in cases that present significant legal issues.[3]

RECOMMENDATION

- Amend IRC § 7122(b) to repeal the requirement that Counsel review all OICs in civil cases where the amount of unpaid tax assessed (including any interest, additional amount, addition to tax, or assessable penalty) is $50,000 or more and replace it with language authorizing the Secretary to require Counsel review of OICs in cases that the Secretary determines present significant legal issues.[4]

3 The Secretary may issue guidance that specifies how the IRS will determine whether a significant legal issue exists. For example, the IRS employee evaluating the OIC application could be given the authority to make the determination, or OIC applications involving unpaid tax assessments above a certain threshold (*e.g.*, $1 million) could be submitted to Counsel personnel, who could make the determination without having to provide a legal opinion unless a significant legal issue is identified.

4 For legislative language generally consistent with this recommendation, see Taxpayer Bill of Rights Enhancement Act of 2017, S. 1793, 115th Cong. § 303 (2017); Taxpayer Bill of Rights Enhancement Act of 2015, S. 1578, 114th Cong. § 403 (2015); Tax Administration Good Government Act, S. 882, 108th Cong. § 104 (2003); Tax Administration Good Government Act, H.R. 1528, 108th Cong. § 304 (2004).

Legislative Recommendation #18

Require the IRS to Refund Any Payment Collected Pursuant to a Federal Tax Lien That Exceeds the Amount of an Accepted Offer in Compromise

SUMMARY

- *Problem:* Before the IRS agrees to accept an offer in compromise, it carefully evaluates the taxpayer's financial condition and calculates the amount it believes the taxpayer can reasonably afford to pay while leaving the taxpayer with enough funds to pay his or her basic living expenses. If the taxpayer sells property subject to a tax lien after the offer is accepted but before paying the agreed amount in full, however, the IRS may keep more than the amount it calculated the taxpayer could reasonably afford to pay.
- *Solution:* Require the IRS to return to the taxpayer any amount collected in excess of the amount the IRS determined the taxpayer could reasonably afford to pay (unless the IRS determines that the taxpayer materially misrepresented his or her financial condition).

PRESENT LAW

IRC § 7122 authorizes the Secretary to sign an agreement (an "offer in compromise" or OIC) with a taxpayer to settle the taxpayer's tax liabilities for less than the amount owed. OICs take one of two forms: (i) the taxpayer may pay the agreed amount in a single lump-sum[1] or (ii) the taxpayer may pay the agreed amount through periodic payments, generally monthly.[2] Treas. Reg. § 301.7122-1(b) provides that the IRS may compromise liabilities to the extent there is doubt as to liability or doubt as to collectibility, or to promote effective tax administration. With respect to offers based on doubt as to collectibility, the IRS has a legal basis to compromise when the taxpayer's equity in assets and future income potential are less than the taxpayer's liabilities.

The IRS follows guidelines set forth in Internal Revenue Manual (IRM) 5.8.5 to evaluate a taxpayer's equity in assets and future income potential. According to IRS Policy Statement 5-100, an OIC is considered a "legitimate alternative to declaring a case as currently not collectible or to a protracted installment agreement," and the goal is to "achieve the collection of what is potentially collectible at the earliest possible time and at the least cost to the government."[3]

Taxpayers seeking an OIC must complete Form 656, Offer in Compromise. Taxpayers seeking an OIC based on Doubt as to Collectibility must also complete a Collection Information Statement on Form 433. Section 7 of Form 656 includes certain terms and conditions a taxpayer must accept when submitting an OIC. In Paragraph (o) of Section 7, taxpayers agree that failure to meet the terms of an OIC, such as by missing payments, may cause default of the offer, possibly resulting in reinstatement of the full tax liability, plus penalties and interest. In Paragraph (q) of Section 7, taxpayers agree that:

> The IRS may file a Notice of Federal Tax Lien during consideration of the offer or for offers that will be paid over time. If the offer is accepted, the tax lien(s) for the periods and taxes listed in Section 1 will be released within 35 days after the payment has been received and verified. The time it takes to transfer funds to the IRS from commercial institutions varies based on the form of payment. If I have

1 *See* IRC § 7122(c)(1)(A).
2 *See* IRC § 7122(c)(1)(B).
3 IRM 1.2.1.6.17, Policy Statement 5-100, Offers will be accepted (Jan. 30, 1992).

not finished paying my offer amount, then the IRS may be entitled to any proceeds from the sale of my property. The IRS will not file a Notice of Federal Tax Lien on any individual shared responsibility debt.

IRC § 6331(a) authorizes the IRS to "levy upon all property and rights to property," but the IRS generally cannot levy while an offer is pending, for 30 days following the rejection of an offer, or during any period when an appeal is being considered.[4] The IRS may maintain a lien on any property owned by the taxpayer until all payments are made.[5]

REASONS FOR CHANGE

When the IRS accepts an OIC, the IRS contracts to settle a tax liability for less than the full amount of the liability. Prior to accepting an OIC, the IRS carefully reviews and verifies the taxpayer's financial condition.[6] It calculates the taxpayer's "reasonable collection potential" (RCP) based on the taxpayer's net realizable equity in assets plus future income, reduced for allowable living expenses.[7] Generally, an OIC is not accepted unless the offer proposed by the taxpayer is equal to or greater than the RCP, as calculated by the IRS.

In certain situations where the IRS has filed a lien on taxpayer property, the IRS may end up collecting more than the amount originally calculated as the taxpayer's reasonable collection potential. IRC § 6325 and IRS internal guidance call for a lien on property to remain in place until the taxpayer has made all payments.[8] If a taxpayer sells property subject to a lien prior to completing payment on the OIC, liens superior to the federal tax lien must be satisfied and the costs of sale must be paid. Thereafter, the IRS may take the remaining sale proceeds up to the full amount of its original lien, as provided by IRC § 6321 and stated in Section 7, Paragraph (q), of Form 656.[9] As a result, the IRS may collect more than it determined the taxpayer could reasonably afford to pay when it accepted the OIC.[10]

RECOMMENDATION

- Amend IRC § 7122 to require the IRS to return to the taxpayer any amount collected pursuant to a federal tax lien in excess of the payment amount of an accepted OIC, unless otherwise agreed upon, provided the taxpayer disclosed all material income and assets to the IRS on his or her application and made all payments in accordance with the terms of the agreement.

4 *See* IRC § 6331(k).
5 IRS, Form 656-B, Offer in Compromise (Apr. 2022).
6 IRM 5.8.5, Financial Analysis (Sept. 24, 2021).
7 IRM 5.8.4.3.1, Components of Collectibility (Apr. 30, 2015).
8 IRM 5.8.10.6, Discharge and Subordination Requests (Mar. 10, 2022).
9 IRM 5.8.10.6(4), Discharge and Subordination Requests (Mar. 10, 2022) (providing an example).
10 In some cases, the IRS enters into collateral agreements in which the IRS and the taxpayer agree that if real property is sold, the IRS will automatically receive a certain percentage of the sale price, even if the OIC offer amount is paid in full.

Legislative Recommendation #19

Require the IRS to Release All Levies Upon Acceptance of an Offer in Compromise and Return to the Taxpayer Any Amount Collected Pursuant to the Levies in Excess of the Agreed Payment Amount

SUMMARY

- *Problem:* When the IRS considers a taxpayer's application for an offer in compromise (OIC), it generally computes the maximum amount it believes the taxpayer can afford to pay while still leaving the taxpayer with enough funds to pay for his or her basic living expenses, such as food, shelter, and clothing. In some cases, the IRS collects more than the agreed amount stipulated in the OIC through a continuous levy or a levy on a taxpayer's fixed and determinable right to payment, potentially leaving the taxpayer without enough funds to pay for basic living expenses.
- *Solution:* Require the IRS to release all levies when an OIC is accepted and to return to the taxpayer any amounts collected by levy in excess of the accepted offer amount.

PRESENT LAW

IRC § 7122 authorizes the IRS to compromise tax liabilities and, in doing so, to make allowances to ensure that taxpayers are left with "an adequate means to provide for basic living expenses."[1] OICs are a routinely-used vehicle for addressing these tax liabilities.

IRC § 6331 authorizes the IRS to levy on a taxpayer's property and rights to property to collect a tax liability, following notice and demand. Under IRC § 6331(b), "a levy shall extend only to property possessed and obligations existing at the time thereof." However, a levy may attach to future payments where the IRS issues a continuous levy on salary and wages,[2] or issues a levy on certain federal payments,[3] or on a fixed and determinable right to payment.[4]

IRC § 6331(k)(1) and Treas. Reg. § 301.7122-1(g)(1) provide that the IRS will not levy against the property or rights to property of the taxpayer while an OIC is pending, during the 30 days following rejection of the OIC, or during a timely appeal of the rejection decision. But where a levy that attaches to future payments is already in place, the IRS takes the position that it is not legally prohibited from continuing to collect through the levy, even after an OIC is pending or accepted.[5] Further, the IRS takes the position that it has no obligation to repay amounts collected under such levies, even if the amounts collected ultimately exceed the amount agreed to in the OIC, because the levy payments do not create overpayments.[6]

REASONS FOR CHANGE

When a taxpayer submits and the IRS accepts an OIC, the agreement generally reflects an IRS determination that the OIC amount is the maximum payment the taxpayer can afford to make while still retaining enough funds to pay his or her basic living expenses. Prior to accepting an OIC, the IRS carefully reviews and

1 IRC § 7122(d).
2 IRC § 6331(e).
3 IRC § 6331(h).
4 Treas. Reg. § 301.6331-1; Treas. Reg. § 301.6343-1(b).
5 This position is also supported by *U.S. v. Ryals*, 480 F.3d 1101, 1109 (11th Cir. 2007).
6 IRC § 6402; *Jones v. Liberty Glass*, 332 U.S. 524, 531 (1947) (defining "overpayment" as "any payment in excess of that which is properly due").

verifies the taxpayer's financial condition and calculates the taxpayer's "reasonable collection potential" (RCP), accounting for assets, future income, other lienholders, and allowable living expenses. An OIC generally is not accepted unless the amount proposed by the taxpayer is equal to or greater than the RCP, as calculated by the IRS.[7]

In some cases, the IRS will have served a levy on a taxpayer's income stream, such as Social Security benefits, or a continuous levy on wages before the taxpayer submitted an OIC.[8]

The IRS may leave the levy in place while it considers the OIC, and it may even leave the levy in place while the taxpayer is making payments on an accepted OIC.[9] In cases where the IRS receives payments from a levy after an OIC is accepted but before all payments under the OIC have been received from the taxpayer, it will collect more from the taxpayer than the agreed amount stipulated in the OIC and typically more than the maximum amount it computed the taxpayer can afford to pay. This can leave the taxpayer without sufficient funds to pay his or her basic living expenses.

> *Example:* A taxpayer subject to a wage levy submits an OIC. The IRS calculates the taxpayer's RCP to be $5,000. The terms of the OIC require the taxpayer to pay $4,000 upon acceptance and $1,000 six months after acceptance. The IRS receives $1,200 on the wage levy after acceptance and before the $1,000 payment is received. The $1,200 is applied to the unpaid liability and not treated as a payment on the OIC. The IRS would collect $1,200 more than it determined that the taxpayer could reasonably afford to pay.

The National Taxpayer Advocate believes that when the IRS performs a financial analysis and determines a taxpayer's reasonable collection potential, it generally should not collect amounts in excess of the RCP. Outstanding levies against the taxpayer should be discontinued unless the payments obtained through the levies are a part of the OIC agreement or the taxpayer has acted in bad faith, and amounts collected in excess of the RCP should be returned to the taxpayer. In most cases, the IRS does release levies when it accepts an OIC, particularly levies other than continuous wage levies or those attached to fixed and determinable rights to payment, but taxpayers currently have no straightforward legal protection if routine procedures go awry.

RECOMMENDATION

- Amend IRC §§ 7122 and 6343 to require the IRS to release all levies when an OIC is accepted and to return to the taxpayer any amounts collected by levy in excess of the accepted offer amount, unless the taxpayer and the IRS reach a contrary agreement or the taxpayer did not disclose all material income and assets to the IRS.

7 The recommendation is generally focused on OICs based on doubt as to collectibility, which constitute the overwhelming majority of OICs received and processed. It should be noted, however, that OICs may be submitted on any of four grounds: doubt as to collectibility, doubt as to liability, effective tax administration (ETA) due to economic hardship, or ETA due to public policy or equitable considerations. *See* Treas. Reg. § 301.7122-1(b). The IRS does not perform a financial analysis for OICs based on doubt as to liability. *See* IRC § 7122(d)(3)(B)(ii). For ETA offers, a full financial analysis is required to determine the RCP and an acceptable OIC amount. However, the IRS only considers an ETA OIC if the taxpayer's RCP *exceeds* his or her tax liability. Internal Revenue Manual (IRM) 5.8.11.5.2, Financial Statement Analysis (Aug. 5, 2015) and IRM 5.8.11.3(5), Legal Basis for Effective Tax Administration Offer) (Oct. 4, 2019).

8 IRC §§ 6331(e) & 6631(h).

9 *See* IRS Form 656 (Rev. 4-2022), section 7(g); IRM 5.8.8.14(1), Continuous Wage Levy (Dec. 17, 2019).

Legislative Recommendation #20

Require the IRS to Mail Notices at Least Quarterly to Taxpayers With Delinquent Tax Liabilities

SUMMARY

- *Problem:* The IRS is required to send billing notices to taxpayers with tax debts once a year. Private businesses typically send billing notices more frequently, often monthly. By sending infrequent billing notices, the IRS receives fewer payments from taxpayers, and as a result, more taxpayers will face aggressive IRS collection actions such as levies and liens.
- *Solution:* The IRS should send billing notices to taxpayers with tax debts at least quarterly.

PRESENT LAW

IRC § 7524 requires the IRS, "[n]ot less often than annually," to send taxpayers with delinquent accounts a written notice that sets forth the amount of the tax delinquency as of the date of the notice.

REASONS FOR CHANGE

The IRS satisfies the IRC § 7524 requirement by sending taxpayers with delinquent accounts Notice CP-71, Reminder Notice, once a year. However, the infrequency of IRS billing notices leaves collectible revenue uncollected and subjects taxpayers who would make payments if they received more frequent reminders to additional penalties and interest charges. It also subjects taxpayers who would make payments if they received more frequent reminders to wage garnishments, bank account levies, and property liens.

We recognize that sending more frequent notices after the IRS's initial notice stream would entail additional postage and processing costs. However, private sector businesses, including credit card issuers and retailers, face this same trade-off, and they almost uniformly send billing notices more frequently than once a year. Most send delinquency notices on at least a monthly basis. They evidently have found that frequent notices generate more revenue, net of costs. Many individual and business taxpayers face financial challenges and prioritize paying the bills of creditors who are sending regular notices and are top of mind.

RECOMMENDATION

- Amend IRC § 7524 to require the IRS to notify taxpayers of delinquent tax liabilities at least quarterly.[1]

1 For legislative language generally consistent with this recommendation, see Protecting Taxpayers Act, S. 3278, § 201, 115th Cong. (2018). As more taxpayers establish online accounts, the IRS will be able to transmit notices to taxpayers electronically rather than by snail mail. For that reason, we are phrasing our recommendation broadly to allow that means of communication as an option.

Legislative Recommendation #21

Clarify When the Two-Year Period for Requesting Return of Levy Proceeds Begins

SUMMARY

- *Problem:* The IRS is authorized to return money wrongfully levied upon if the taxpayer or third party requests the return within two years from the "date of levy." For paper levies delivered by hand or mail, the "date of levy" is the date the notice of levy was served. For levies imposed by electronic means, the "date of levy" is the date on which the IRS received the levied proceeds. Consequently, individuals subject to electronic levies often are able to recover wrongfully levied funds that taxpayers subject to paper levies may not recover.
- *Solution:* Allow the IRS to return funds received through wrongful levies if the funds were received by the IRS within the preceding two years, regardless of the date the original levy was served.

PRESENT LAW

IRC § 6331(a) allows the IRS to levy on a taxpayer's property and rights to property that exist at the time the levy is served. Rights to property include fixed and determinable obligations to which the levy attaches, even if receipt of a payment arising from the obligation is deferred until a later date.

IRC § 6331(e) allows the IRS to serve a levy on the taxpayer's salary or wages that continues from the date the levy is first made until the levy is released under IRC § 6343.

IRC § 6331(h) allows the IRS to serve a levy on federal payments specified under that provision, such as Social Security benefits, which continues from the date the levy is first made until the levy is released. This levy is made by electronic means under the Federal Payment Levy Program (FPLP).

IRC § 6343(b) authorizes the IRS to return money levied upon or money received from the sale of levied property to *third parties* when it determines the levy was wrongful within the meaning of IRC § 7426(a)(1), provided that the third party requests the return within two years from the "date of levy."

IRC § 6343(d) authorizes the IRS to return money levied upon or money received from the sale of levied property to *the taxpayer* when it determines one of the circumstances specified in IRC § 6343(d)(2) exists, provided that the taxpayer requests the return within two years from the "date of levy."[1]

For levies delivered by hand, the IRS takes the position that the "date of levy" is the date of delivery.[2] For mailed levies, Treas. Reg. § 301.6331-1(c) similarly defines the term "date of levy" as the date the levy is delivered to the person in possession of the property. By contrast, for levies imposed by electronic means through the FPLP, the IRS has adopted a policy to return all or a portion of the FPLP proceeds it received during the two-year period preceding the date of request for their return without regard to the date the initial levy was delivered.[3]

1 IRC § 6343(b) & (d) permits the IRS to return specific property levied upon at any time.

2 *Cf. American Honda Motor Co., Inc. v. United States*, 363 F. Supp. 988, 991-992 (S.D.N.Y. 1973) (holding that date of levy for purposes of timely filing suit under IRC § 6532(c)(1) is the date when the notice of levy is served upon the person in possession of the taxpayer's property).

3 The Treasury regulations under IRC § 6331 do not define the term "date of levy" when the levy occurs through electronic means as used in the FPLP. The IRS's policy is set forth in the Internal Revenue Manual (IRM). *See* IRM 5.19.9.3.7(5), Returning SITLP Payments (June 23, 2022); IRM 5.11.7.3.7(2), Returning FPLP Levy Proceeds (July 1, 2022).

REASONS FOR CHANGE

The IRS may issue levies to attach a taxpayer's assets, such as wages, pension benefits, annuities, or Social Security benefits, that result in multiple payments over many years. The IRS has the authority to return levy proceeds to a third party or the taxpayer if the person requests the proceeds within two years of the date of levy. The IRS generally interprets the "date of levy" to mean the date the IRS delivers a notice of levy by mail or by hand to the person in possession of the property levied. In the case of a continuous levy under IRC § 6331(e), the date of levy is the date the notice of levy is first served by hand or by mail on the person in possession of the taxpayer's salary or wages.[4] If the taxpayer requests return of levy payments more than two years after the date the notice of levy was served, the IRS is not authorized to return any payments. In the case of FPLP levies under IRC § 6331(h), however, the IRS will return a levied payment if the payment was made within the two-year period before the date of the request for return. This results in similarly situated persons being treated differently and infringes upon a third party or taxpayer's *right to a fair and just tax system*.

> *Example:* Assume the IRS issues a continuous levy under IRC § 6331(e) to the taxpayer's employer in Year One, and the employer withholds and pays over to the IRS a portion of the taxpayer's paychecks for each month of the next four years. Then in Year Four, the taxpayer's dependent becomes ill, and as a result, his living expenses increase significantly due to large medical bills. The levy is now causing an economic hardship to the taxpayer.
>
> The taxpayer asks the IRS to release the levy and return the portion of the levy proceeds that were taken during the time in which the taxpayer was experiencing economic hardship, and the IRS agrees that it is in the best interests of the taxpayer and the government to do so. However, the IRS is prohibited from returning the levy proceeds to the taxpayer because more than two years have elapsed since the date the levy was served on the employer.
>
> Contrast this result with a taxpayer whose Social Security benefits are levied under the FPLP. The IRS may return up to the last two years of levy payments even if the request occurs more than two years after the FPLP levies began.

RECOMMENDATION

- Amend IRC § 6343(b) to strike the term "date of such levy" and substitute "each date the IRS receives money from the levy or the date the IRS receives the money from the sale of levied property."

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4 Such a levy is issued via Form 668-W and is generally a "paper" levy. A paper levy is defined as "either a manual or systemic levy on Form 668-A, or Form 668-W, that is prepared and issued by an RO." IRM 5.11.5.1.6, Terms/Definitions/Acronyms (June 13, 2018). This differs from an FPLP levy, which is an automated levy. Automated levies are "levies issued through the Automated Levy Programs. These levies are transmitted electronically. The proceeds are also received electronically." *Id.*

Legislative Recommendation #22

Protect Retirement Funds From IRS Levies, Including So-Called "Voluntary" Levies, in the Absence of "Flagrant Conduct" by a Taxpayer

SUMMARY

- *Problem:* Congress has provided significant tax incentives to encourage Americans to save for retirement. Those policies reflect recognition that almost all workers eventually retire and require retirement savings to pay their basic living expenses and that taxpayers who do not have savings are likely to qualify for costly public assistance programs. Those policies are undermined when the IRS encourages or allows taxpayers with tax liabilities to agree to "voluntary" levies on their retirement accounts.
- *Solution:* Prohibit the IRS from levying on retirement accounts unless a taxpayer has engaged in "flagrant conduct."

PRESENT LAW

The IRS has wide discretion to exercise its levy authority. IRC § 6331(a) provides that the IRS generally may "levy upon all property and rights to property" of the taxpayer, which includes retirement savings. Some property is exempt from levy pursuant to IRC § 6334.

As a policy matter, the IRS has decided not to levy on a taxpayer's retirement savings unless it determines that the taxpayer has engaged in "flagrant conduct."[1] However, there is no definition of the term "flagrant conduct" for purposes of this analysis in the IRC or the regulations. Although the Internal Revenue Manual (IRM) provides examples of flagrant conduct, it provides little protection to taxpayers. Taxpayers generally may not rely on IRM violations as a basis for challenging IRS actions in court, and the IRS may modify or rescind IRM provisions at any time without congressional or public input.[2]

REASONS FOR CHANGE

Congress has provided significant tax incentives to encourage taxpayers to save for retirement. There are strong public policy reasons to encourage retirement savings and to shield retirement savings from IRS levies. Almost all workers eventually retire, and they require retirement savings to pay for basic living expenses. In addition, retired taxpayers who do not have sufficient savings are more likely to experience economic hardship and qualify for public assistance, which other taxpayers pay to provide.

The IRS has taken certain steps to protect retirement savings by requiring a specialized analysis prior to levy, including a determination of whether the taxpayer engaged in "flagrant conduct." However, certain changes in IRS procedures have eroded these protections. Specifically, the IRS has adopted procedures that allow taxpayers to request or agree to "voluntary" levies on retirement accounts.[3] If a taxpayer agrees to a "voluntary" levy, the IRS bypasses the determination of "flagrant conduct."[4]

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1 IRM 5.11.6.3(5), Funds in Pension or Retirement Plans (May 26, 2021).

2 The IRM provides 16 examples of flagrant conduct. *See* IRM 5.11.6.3(6), Funds in Pension or Retirement Plans (May 26, 2021).

3 IRM 5.11.6.3(3), Funds in Pension or Retirement Plans (May 26, 2021).

4 The IRS will still verify that the taxpayer has received collection due process rights and considered collection alternatives and will analyze whether the taxpayer relies on funds in the retirement account (or will in the near future) for necessary living expenses. IRM 5.11.6.3(3), (4), and (7), Funds in Pension or Retirement Plans (May 26, 2021).

As a result, taxpayers who have not engaged in “flagrant conduct” in their tax matters and who therefore would have been shielded from levies on their retirement accounts in the past may agree to “voluntary” levies out of fear or anxiety and thus may find themselves in economic hardship during retirement.

Under IRC § 6334, the IRS is prohibited from levying on certain sources of payment, such as unemployment and child support. These exceptions reflect policy determinations. For example, Congress has determined that the IRS should not levy on child support payments because doing so would likely harm the children who rely on those benefits for support. To better protect retirement savings, the National Taxpayer Advocate believes that retirement savings should be added to the list of exempt property, absent “flagrant conduct,” and that the term “flagrant conduct” should be defined in the statute.

RECOMMENDATIONS

- Amend IRC § 6334(a) to include qualified retirement savings as a category of property exempt from levy unless it is determined that the taxpayer has engaged in “flagrant conduct.”[5]
- Amend IRC § 6334 to define “flagrant conduct” as willful action (or failure to act) that is voluntarily, consciously, and knowingly committed in violation of any chapter of Title 26 and that appears to a reasonable person to be a gross violation of any such provision.[6]

5 In rare cases, a taxpayer with millions of dollars in retirement savings may be delinquent in paying his or her tax debts without having engaged in flagrant conduct. To avoid providing an unlimited exemption from levy in these cases, Congress could make the levy exemption subject to a cap, such as $1 million in qualified retirement savings, and index it for inflation to maintain its value in future years.

6 For legislative language generally consistent with this recommendation, see John Lewis Taxpayer Protection Act, H.R. 3738, 117th Cong. § 203 (2021); Taxpayer Protection Act, H.R. 4912, 114th Cong. § 203 (2016); and Taxpayer Rights Act, S. 2333 and H.R. 4128, 114th Cong. §§ 306 & 307 (2015).

Legislative Recommendation #23

Provide Taxpayer Protections Before the IRS Recommends the Filing of a Lien Foreclosure Suit on a Principal Residence

SUMMARY

- *Problem:* Seizing and selling a taxpayer's home is one of the most severe and potentially devastating actions the IRS may take to collect a tax debt. The law provides two alternative procedures by which the IRS may seize and sell a home. Under one procedure (administrative seizure), the law provides significant and meaningful taxpayer protections before a seizure and sale may take place. Under the other procedure (lien foreclosure), far fewer procedural safeguards exist.
- *Solution:* Provide taxpayers and their families who are subject to lien foreclosure suits to seize their principal residences with the same protections as taxpayers who are subject to administrative sales of their principal residences.

PRESENT LAW

The sale of a taxpayer's principal residence to satisfy a tax liability is one of the most intrusive collection remedies that can be imposed against a taxpayer by the IRS. The IRS may follow either of two sets of procedures to seize and sell the principal residence of a taxpayer to satisfy a delinquent tax liability: (i) an administrative seizure or (ii) a lien foreclosure suit. The two cannot be used concurrently. Generally, the IRS will prefer the administrative seizure and sale procedures unless there are "questions concerning title to the particular property or priorities of liens that create an unfavorable or impossible market for administrative sale," or "it may be difficult to obtain the property or to preserve its value, and the aid of the court is necessary through specific order or the appointment of a receiver."[1] Thus, the IRS uses the foreclosure procedure to enhance its ability to sell the property and obtain a higher sale price.

Administrative Seizure

IRC § 6334(a)(13) provides that the principal residence of a taxpayer is generally exempt from levy, except as provided in subsection (e). IRC § 6334(e) provides that a principal residence shall not be exempt from levy if a judge or magistrate of a U.S. district court "approves (in writing) the levy of such residence." An administrative seizure is generally subject to significant taxpayer protections. Among them, IRC § 6343(a) requires the IRS to release a levy under certain circumstances, including where it determines that the levy "is creating an economic hardship due to the financial condition of the taxpayer."[2] The government must show that "the taxpayer's other assets subject to collection are insufficient to pay the amount due,"[3] and that "no reasonable alternative exists for collection of a taxpayer's debt."[4] In addition, if the property to be levied is owned by the taxpayer but is used as the principal residence of the taxpayer's spouse, the taxpayer's former spouse, or the taxpayer's minor child, the government will send a letter to each such person providing notice of the commencement of the proceeding. The letter will be addressed in the name of the taxpayer's

1 Chief Counsel Directives Manual 34.6.2.2(1), Foreclosure of the Tax Lien (06-12-2012); *see also* Internal Revenue Manual (IRM) 5.17.4.8.2.1, Administrative Collection Devices Are Not Feasible or Adequate (Mar. 25, 2022).

2 IRC § 6343(a)(1)(D).

3 IRC § 6334(e).

4 Treas. Reg. § 301.6334-1(d)(1). This requirement in the regulations is consistent with the legislative history of section 6334(e), which states that a principal residence "should only be seized to satisfy tax liability as a last resort." S. Rep. No. 105-174, at 86-87 (1998).

spouse or ex-spouse, individually or on behalf of any minor children. If it is unclear who is living in the principal residence property and/or what such person's relationship is to the taxpayer, a letter will be addressed to "Occupant."[5]

Lien Foreclosure Suit

IRC § 7403 authorizes the Department of Justice (DOJ) to file a civil action against a taxpayer in a U.S. district court to enforce a tax lien and foreclose on a taxpayer's property. There is no exclusion for property consisting of a taxpayer's principal residence. As compared with administrative seizures, statutory taxpayer protections are considerably more limited in lien foreclosure suits. For example, the Supreme Court has held: "We can think of virtually no circumstances … in which it would be permissible to refuse to authorize a sale simply to protect the interests of the delinquent taxpayer himself or herself."[6] A court has some discretion to refuse to authorize a sale that would impact a spouse, children, or other third parties, but even in that circumstance, the discretion is limited.[7] Further, there is no requirement the IRS establish that "no reasonable alternative exists for collection of a taxpayer's debt" or that the IRS notify the taxpayer's spouse, former spouse, or family unless they have an ownership interest in the property to be foreclosed.

REASONS FOR CHANGE

IRC § 6334(e), requiring judicial approval of the administrative sale of principal residences, was enacted as part of the IRS Restructuring and Reform Act of 1998. The Senate Finance Committee report stated that the "seizure of the taxpayer's principal residence is particularly disruptive to the occupants," and a principal residence therefore "should only be seized to satisfy tax liability as a last resort."[8]

This code section provided protections to taxpayers subject to administrative seizures of principal residences but offered no such protections to taxpayers subject to judicial foreclosures of principal residences. While the IRS may prefer one procedure over the other depending on the circumstances, from a taxpayer's standpoint there is no meaningful difference between these two actions. A foreclosure in this circumstance has the same devastating impact as an administrative seizure. The end result is that the taxpayer's principal residence is sold, and the proceeds are applied to his or her tax liability.[9] Both groups of taxpayers deserve the same protections, as do their families.

At the recommendation of the Office of the Taxpayer Advocate, the IRS has written procedures into its Internal Revenue Manual (IRM) that provide additional taxpayer protections before a case may be referred to DOJ for the filing of a lien foreclosure suit.[10] The IRM prescribes certain initial steps IRS employees must take, such as attempting to identify the occupants of a residence and advising the taxpayer about Taxpayer Advocate Service assistance options. It also sets forth an internal approval process prior to referring a lien enforcement case to DOJ. However, the IRM is simply a set of instructions to IRS staff. Taxpayers generally may not rely on IRM violations as a basis for challenging IRS actions in court, and the IRS may modify or rescind IRM provisions at any time.

5 Treas. Reg. § 301.6334-1(d)(3).

6 *United States v. Rodgers*, 461 U.S. 677, 709 (1983).

7 *Id.* at 680, 709-710.

8 S. Rep. No. 105-174, at 86-87 (1998).

9 For example, in *United States v. Maris*, 109 A.F.T.R.2d 2012-775, 2012-1 USTC P 50,182 (D. Nev. 2012), the court issued an order denying a request to lien foreclose on a principal residence because the government had not established that no reasonable alternative existed for collection of the taxpayer's debt. The court reconsidered this order when the government pointed out that this requirement only applied to an order approving an administrative seizure and sale under IRC § 6334(e). *United States v. Maris*, 2013 WL 3200079, 111 A.F.T.R.2d 2013-2475, 2013-2 USTC P 50,403 (D. Nev. 2013). From the standpoint of protecting a taxpayer's rights, the considerations of either cause of action are identical. There is no reason to afford fewer taxpayer protections in one circumstance than the other.

10 *See* IRM 5.17.4.8.2.5, Lien Foreclosure on a Principal Residence (Mar 25, 2022); IRM 5.17.12.20.2.2.4, Additional Items for Lien Foreclosure of Taxpayer's Principal Residence (May 24, 2019); IRM 25.3.2.4.5.2(3), Actions Involving the Principal Residence of the Taxpayer (Nov. 24, 2021).

Because of the devastating impact the seizure of a taxpayer's principal residence may have on the taxpayer and his or her family, the National Taxpayer Advocate believes taxpayer protections from lien foreclosure suit referrals should be codified and not left for the IRS to determine through IRM procedures.

RECOMMENDATIONS

- Amend IRC § 7403 to codify current IRM administrative protections, including that an IRS employee must receive executive-level written approval to proceed with a lien foreclosure suit referral.
- Amend IRC § 7403 to preclude IRS employees from requesting that DOJ file a civil action in a U.S. district court seeking to enforce a tax lien and foreclose on a taxpayer's principal residence, except where the employee has determined that:
  (1) The taxpayer's other property or rights to property, if sold, would be insufficient to pay the amount due, including the expenses of the proceedings, and no reasonable alternative exists for collection of a taxpayer's debt;
  (2) The foreclosure and sale of the residence would not create an economic hardship due to the financial condition of the taxpayer; and
  (3) If the property to be levied is owned by the taxpayer but is used as the principal residence of the taxpayer's spouse, the taxpayer's former spouse, or the taxpayer's minor child, the IRS has sent a notice addressed in the name of the taxpayer's spouse or ex-spouse, individually or on behalf of any minor children.[11]

11 For legislative language generally consistent with this recommendation, see Small Business Taxpayer Bill of Rights Act, H.R. 1828, 114th Cong. § 16 (2015); Small Business Taxpayer Bill of Rights Act, S. 949, 114th Cong. § 16 (2015); and Eliminating Improper and Abusive IRS Audits Act, S. 2215, 113th Cong. § 8 (2014).

Legislative Recommendation #24

Provide Collection Due Process Rights to Third Parties Holding Legal Title to Property Subject to IRS Collection Actions

SUMMARY

- *Problem:* When the IRS takes collection action against a taxpayer, the taxpayer is entitled to a collection due process (CDP) hearing at which he or she may raise defenses, challenge the appropriateness of the collection action, and propose collection alternatives. In some cases, the IRS may take collection action against third parties who are liable to pay the tax. These third parties are not entitled to a CDP hearing, giving them less procedural protection than the taxpayer who owes the tax.
- *Solution:* Clarify that affected third parties who hold legal title to property subject to IRS collection actions are entitled to CDP protections to the same extent as the taxpayers who owe the tax.

PRESENT LAW

Current law authorizes the IRS to file a Notice of Federal Tax Lien (NFTL) against and levy upon (seize) all property or rights to property of "any person liable to pay any tax" who neglects or refuses to do so, including property owned by certain third parties (individuals or entities). These third parties include nominees, alter egos, and persons to whom lien-encumbered property is transferred (collectively, "affected third parties").[1] In connection with taking these collection actions, the Secretary must provide CDP rights to "the person described in section 6321" (in the case of liens) and to "any person with respect to any unpaid tax" before levying against property (in the case of levies).[2]

REASONS FOR CHANGE

Congress created the CDP notice and hearing procedures to give taxpayers the right to a meaningful hearing before the IRS levies their property or immediately after the IRS files an NFTL against their property. During a CDP hearing with the IRS Independent Office of Appeals (Appeals), a taxpayer has the opportunity and right to raise defenses, challenge the appropriateness of collection actions, and propose collection alternatives. If the parties cannot otherwise resolve the issue, Appeals may issue an adverse Notice of Determination that is subject to review in the U.S. Tax Court and that may thereafter be appealed to the U.S. Courts of Appeals.

For purposes of CDP eligibility, the Treasury regulations interpret the statutory term "person" as including only the taxpayer (*i.e.*, the person upon whom the tax was imposed and who refused or neglected to pay following notice and demand). Thus, affected third parties are not afforded CDP rights.[3]

In some affected third-party circumstances, the IRS seeks to collect from specific property (*e.g.*, encumbered property that has been transferred to a third party, whether or not as a nominee). In other cases, the IRS seeks

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1 *See* IRC §§ 6323(f) and 6331(a).

2 IRC §§ 6320(a)(1) and 6331(d)(1). *See also* IRC §§ 6321, 6322, 6323(a), 6323(f), 6323(h)(6), and 6331(a). IRC § 6321 also refers to "any person liable to pay any tax." A CDP lien notice will only be given to the person described in IRC § 6321 who is named on the NFTL. Treas. Reg. § 301.6320-1(a)(2) Q&A-A1. A CDP levy notice will only be given to the person described in IRC § 6331(a). Treas. Reg. § 301.6330-1(a)(3) Q&A-A1.

3 *See* Treas. Reg. §§ 301.6320-1(a)(2) Q&A-A7, 301.6330-1(a)(3) Q&A-A2, 301.6320-1(b)(2) Q&A-B5, and 301.6330-1(b)(2) Q&A-B5. This interpretation is inconsistent in some respects with the stated congressional intent, and the Treasury Department could have interpreted the statute otherwise. The CDP regime was enacted by the IRS Restructuring and Reform Act of 1998, and in explaining CDP rights, the accompanying conference report referred to "[t]he taxpayer (or affected third party)." In addition, CDP levy rights are statutorily afforded to "persons" and are neither limited to taxpayers nor to persons who originally neglected or refused to pay the tax. The term "taxpayer" is defined in IRC § 7701(a)(14) as "any person subject to any internal revenue tax," which in this context arguably may include affected third parties, given that the IRS is seeking to collect from them. H.R. Rep. No. 105-599, at 264 (1998) (Conf. Rep.).

to collect from all property of the affected third party (*e.g.*, an alter ego).[4] In both situations, the IRS may file NFTLs that identify the affected third party and levy upon property that, under state law, belongs to the affected third party.

The current collection regime, including the available remedies for alleged nominees, alter egos, and persons to whom encumbered property is transferred, is costly, unduly burdensome, inefficient, and lacks adequate procedural safeguards. A third party may seek administrative review of the nominee/alter ego/lien determination by requesting a Collection Appeal Program (CAP) hearing through Appeals. However, a CAP hearing only provides a summary review, since Appeals' goal is to decide CAP cases within five days.[5] While Appeals' goal of quickly resolving CAP cases is laudable, the rights of the third party utilizing a CAP appeal can be adversely affected. In addition, no judicial appeal from an adverse Appeals decision is permitted in a CAP case. All CAP decisions are final.[6]

The available judicial remedies require filing in federal district court, which is difficult to navigate without legal representation and is therefore costly for both third parties and the government.[7] Some third parties who cannot afford the significant expense and burden of litigation may never be able to challenge an inappropriate or unlawful collection action.

In pre-pandemic years, the IRS generally issued over 1.5 million CDP notices to taxpayers, tens of thousands of taxpayers requested CDP hearings, and over a thousand taxpayers filed CDP petitions in the U.S. Tax Court.[8] By comparison, the IRS generally filed fewer than 1,000 nominee and alter ego NFTLs annually when TAS last obtained data.[9] Thus, expressly providing CDP rights to affected third parties would not impose an undue administrative burden on the IRS. Rather, it would save resources for both the government and the affected third parties by reducing litigation costs.

For these reasons, the National Taxpayer Advocate believes it is incongruous and inequitable for taxpayers who originally were responsible for tax debts to receive the full protection of IRC §§ 6320 and 6330, while third parties holding legal title to property that makes them currently subject to IRS collection actions do not receive these due process protections.

RECOMMENDATION

- Amend IRC §§ 6320 and 6330 to extend CDP rights to affected third parties who hold legal title to property subject to IRS collection actions.[10]

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4 *See Oxford Capital Corp. v. U.S.*, 211 F.3d 280, 284 (5th Cir. 2000); Internal Revenue Manual (IRM) 5.17.2.5.7(2), Property Held by Third Parties (Jan. 8, 2016).

5 IRM 8.24.1.3.8, Case Procedures under CAP (Sept. 28, 2021).

6 *Hughes v. Comm'r*, T.C. Memo. 2012-42; IRM 8.24.1.2, Distinctions Between CAP and Collection Due Process (CDP) Hearings (Sept. 28, 2021).

7 For example, if the IRS has filed an NFTL, the third party who holds the title is left with the option to bring an action to quiet title under 28 U.S.C. § 2410 in district court. To contest a nominee, alter ego, or transferee levy, the affected third party must file a wrongful levy action under IRC § 7426 in district court.

8 In addition, we identified 70,481 business taxpayers that requested CDP hearings in FY 2022. IRS Compliance Data Warehouse (CDW), Business Master File Transaction History table (FY 2022); IRS CDW, Individual Master File Transaction History table (FY 2022). The total number of CDP petitions filed in the Tax Court was compiled by the IRS Office of Chief Counsel and totaled 1,181 (Nov. 4, 2022). IRS, Counsel Automated Tracking System, Subtype DU. Inventory pending as of September 30, 2021. This data does not include cases on appeal. The IRS has taken fewer collection actions since the start of the COVID-19 pandemic, and CDP requests have therefore been lower over the last two years.

9 IRS response to TAS information request (Oct. 7, 2022).

10 For more detail, see National Taxpayer Advocate 2012 Annual Report to Congress 544 (Legislative Recommendation: *Amend IRC §§ 6320 and 6330 to Provide Collection Due Process Rights to Third Parties (Known as Nominees, Alter Egos, and Transferees) Holding Legal Title to Property Subject to IRS Collection Actions*), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/Legislative-Recommendations-The-IRS-Should-Provide-Collection-Due-Process-Rights-to-Third-Parties-Holding-Property.pdf.

Legislative Recommendation #25

Extend the Time Limit for Taxpayers to Sue for Damages for Improper Collection Actions

SUMMARY

- *Problem:* Both taxpayers and the government benefit when the IRS has an opportunity to consider a taxpayer's claim to recover damages for improper collection actions before the taxpayer files suit in court, but current filing deadlines in some cases require taxpayers to file suit in court before the IRS has a chance to consider their claims.
- *Solution:* Give taxpayers more time to file suit in court if they have filed a timely administrative claim with the IRS.

PRESENT LAW

IRC § 7433(a) authorizes taxpayers harmed by improper collection actions to sue the United States for damages if an IRS employee has recklessly or intentionally, or by reason of negligence, disregarded any provision of the tax code or any regulation relating to the collection of federal tax. Under IRC § 7433(d)(3) and Treas. Reg. § 301.7433-1(g)(2), the suit must be brought in a U.S. district court within two years from the date on which the taxpayer had a reasonable opportunity to discover all essential elements of a possible cause of action.

Before a taxpayer may sue the United States, IRC § 7433(d)(1) requires the taxpayer to file an administrative claim with the IRS. Treas. Reg. § 301.7433-1(d) provides that a taxpayer generally may not file suit in court until the earlier of (i) the date six months after filing an administrative claim or (ii) the date on which the IRS renders a decision on the claim. However, if the claim is filed within the last six months of the two-year period for filing suit, the taxpayer may file suit in court at any time before expiration of the two-year period.

REASONS FOR CHANGE

IRC § 7433(d)(1) reflects a policy decision that it is generally in the best interests of both the taxpayer and the government to allow the IRS to consider and render a decision on a taxpayer's claim before a case is brought to court. If a case is resolved at the administrative level, both parties are spared the time and expense of litigation. Treas. Reg. § 301.7433-1(d) reflects a complementary policy decision that if the IRS does not render a decision on an administrative claim within six months, taxpayers should be able to bring their cases to court without having to wait indefinitely for an IRS decision.

The existing rules, however, do not always achieve the goal of allowing the IRS to consider and render a decision before suit is filed. For example, while a claim is pending at the administrative level, the two-year period for filing suit in a U.S. district court continues to run. If a taxpayer files an administrative claim during the final six months of the two-year period, the taxpayer may be forced to file suit in a U.S. district court before the IRS has an opportunity to render a decision on the administrative claim (or else will forfeit the right to do so).

To give the IRS an opportunity to render an administrative decision while preserving the taxpayer's right to challenge an adverse decision in court, the two-year period that commences when the right of action accrues should be tied to the deadline for filing an administrative claim (rather than the deadline for filing suit). Specifically, if the IRS renders an adverse or partially adverse decision on a timely filed administrative claim, the taxpayer should be allowed to file suit within two years from the date of the IRS's decision (*i.e.*, similar to the time allowed for filing suit after a refund claim is denied).

At the same time, to ensure taxpayers do not have to wait indefinitely for an IRS decision, a taxpayer should be permitted to file suit in a U.S. district court if a timely filed administrative claim goes unanswered for six months. These rules would ensure the IRS has a full six-month period to consider and render a decision on a taxpayer's damages claim based on an alleged improper collection action while preserving the taxpayer's right to file suit if the IRS does not render a timely decision.

RECOMMENDATION

- Amend IRC § 7433(d)(3) to allow taxpayers who file an administrative claim with the IRS within two years from the date a right of action accrues to file a civil action in a U.S. district court (i) no earlier than six months from the date on which the administrative claim was filed and (ii) no later than two years from the date on which the IRS sends its decision on the administrative claim to the taxpayer by certified or registered mail.[1]

1 The Taxpayer Bill of Rights Enhancement Act of 2017 would have amended IRC § 7433(d)(3) to replace the requirement that taxpayers bring suit within two years of the date the cause of action accrues with a requirement that a suit be commenced by "*the later of the date on which administrative remedies available within the Internal Revenue Service have been exhausted or the date on which the taxpayer reasonably could have discovered that the actions of the officer or employee were done in disregard of a provision of this title or any regulation promulgated under this title.*" S. 1793, 115th Cong. § 201(c) (2017), and S. 1578, 114th Cong. § 301 (2015) (emphasis added). This proposed change would prevent taxpayers from being forced to file suit before the IRS has had the opportunity to render a decision on the administrative claim and is thus generally consistent with this recommendation. However, the recommendation we are making would also preserve the IRC § 7433(d)(1) requirement that taxpayers must file an administrative claim before they can bring suit in a U.S. district court and is thus more comprehensive.

Legislative Recommendation #26

Revise the Private Debt Collection Rules to Eliminate the Taxpayers Intended to Be Excluded by the Taxpayer First Act

SUMMARY

- *Problem:* The tax code prohibits the IRS from utilizing private companies to collect the tax debt of any taxpayer with adjusted gross income (AGI) of 200 percent or less of the Federal poverty level. The IRS currently determines AGI by relying exclusively on a taxpayer's last-filed tax return, going back up to ten years. However, collectibility determinations are normally made on the basis of the taxpayer's current financial condition, and a tax return filed ten years ago is not a reliable measure of a taxpayer's current financial condition.
- *Solution:* Direct the IRS to determine AGI based on third-party information reporting documents (*e.g.*, Forms W-2 and 1099) if no return has been filed in the last two years.

PRESENT LAW

IRC § 6306 directs the Secretary to enter into qualified tax collection contracts with private collection agencies (PCAs) to collect certain "inactive tax receivables."[1] Subsection (d) lists categories of collection cases that are not eligible for assignment to PCAs.

The Taxpayer First Act (TFA) added the following category to the list:[2]

> [A] taxpayer who is an individual with adjusted gross income, as determined for the most recent taxable year for which such information is available, which does not exceed 200 percent of the applicable poverty level (as determined by the Secretary).

REASONS FOR CHANGE

The IRS has implemented the exclusion for taxpayers with adjusted gross incomes that do not exceed 200 percent of the Federal Poverty Level in a manner that fails to identify those taxpayers accurately. It has chosen to rely exclusively on a filed tax return, even if the taxpayer has not filed a recent return. Rather than using alternative means to determine the taxpayer's current AGI (*e.g.*, third-party information reporting documents like Forms W-2 and 1099), the IRS reaches back up to *ten years* to locate a return to determine AGI.

This approach produces anomalous results. A taxpayer who could afford to pay tax ten years ago may not be able to do so today – and these are the cases Congress intended to exclude from assignment to PCAs. Conversely, a taxpayer who could not afford to pay tax ten years ago might have earned additional income or acquired additional assets and now be able to make payments.

> *Example:* A taxpayer last filed a tax return in 2012 when he earned $60,000. In 2013, he retired due to age or disability. He did not pay his tax liability and still has a balance due. Since 2012, his income has consisted solely of Social Security benefits, and he has not had a filing obligation. Under its current approach, the IRS will look at the taxpayer's 2012 tax return, determine the taxpayer's income is above 200 percent of the Federal Poverty Level, and assign his case to a PCA. Yet this is a case the TFA sought to exclude from assignment to a PCA.

1 IRC § 6306(a) & (c).

2 TFA, Pub. L. No. 116-25, § 1205, 133 Stat. 981, 989 (2019) (adding IRC § 6306(d)(3)(F)).

By contrast, if the same taxpayer earned only $30,000 in 2012, and third-party information reports show he earned $100,000 in 2019, the case might not be assigned to a PCA under the IRS's approach, even though the taxpayer can make payments currently.

To ensure that collectibility determinations are made based on current data, the National Taxpayer Advocate has recommended that the IRS utilize information on a tax return if one has been filed in the last two years and, if not, that the IRS compute AGI from the information reporting documents the IRS receives.[3]

If the IRS relies on information reporting documents, it will have to use gross income rather than AGI because it may not know for which adjustments a taxpayer qualifies, if any. In some cases, that may have the effect of overestimating a taxpayer's AGI and therefore assigning some cases to PCAs that should have been excluded. Even so, we believe that basing collectibility determinations on recent information will be far more accurate than reaching back for information up to ten years old.[4]

The Treasury Inspector General for Tax Administration (TIGTA) reached a similar conclusion and has similarly recommended that the IRS consider using "both last return filed information and third-party income information in its methodology to exclude low-income taxpayers from PCA inventory."[5]

RECOMMENDATION

- Amend IRC § 6306(d)(3)(F) to direct the IRS to determine an individual's adjusted gross income "for the most recent taxable year for which such information is available" by reference to the individual's most recently filed tax return if one has been filed in the preceding two years or, if not, by reference to information reporting documents described in part III of subchapter A of chapter 61 of the Internal Revenue Code.

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3 No method will be perfect. If the IRS uses third-party information reporting documents to make collectibility determinations, income not reported on those documents, such as self-employment income, will not be taken into account. But that is likely to be true even when the IRS relies on filed tax returns, as tax gap studies show most income not reported to the IRS on third-party documents is not reported on tax returns, either. *See* IRS Pub. 1415, Federal Tax Compliance Research: Tax Gap Estimates for Tax Years 2014-2016, at 20 (Oct. 2022), https://www.irs.gov/pub/irs-pdf/p1415.pdf. This study estimated the net misreporting percentage (NMP) of income subject to little or no information reporting is 55 percent. The NMP is roughly equivalent to the percentage of income that goes unreported. Prior tax gap studies have shown, as one would expect, that the nonreporting percentage is higher for income subject to no information reporting than income subject to little information reporting.

4 A data run the IRS performed to compare the method the IRS is using with the method TAS has proposed found it would exclude roughly the same number of taxpayers. Cases assigned to PCAs as of September 12, 2019, were matched to the Individual Returns Transaction File to determine the last individual income tax return filed and to the Information Returns Master File to determine current income reported by third-party payors. For the reasons described above, we believe the TAS approach would do a better job of identifying the taxpayers whom Congress intended to exclude.

5 Treasury Inspector General for Tax Administration, Ref. No. 2021-30-010, *Fiscal Year 2021 Biannual Independent Assessment of Private Collection Agency Performance* 20 (Dec. 2020).