Most Litigated Issues: Introduction

Internal Revenue Code (IRC) § 7803(c)(2)(B)(ii)(X) requires the National Taxpayer Advocate to identify in her Annual Report to Congress (ARC) the ten tax issues most litigated in federal courts (Most Litigated Issues).[1] The National Taxpayer Advocate may analyze these issues to develop recommendations to mitigate the disputes resulting in litigation.

The Taxpayer Advocate Service (TAS) identified the Most Litigated Issues from June 1, 2010, through May 31, 2011, by using commercial legal research databases. For purposes of this section of the ARC, the term "litigated" means cases in which the court issued an opinion.[2] This year's Most Litigated Issues are:

- Summons enforcement (IRC §§ 7602(a), 7604(a), and § 7609(a));
- Trade or business expenses (IRC § 162(a) and related Code sections);
- Appeals from collection due process (CDP) hearings (IRC §§ 6320 and 6330);
- Failure to file penalty (IRC § 6651(a)(1)) and failure to pay estimated tax penalty (IRC § 6654);
- Gross income (IRC § 61 and related Code sections);
- Accuracy-related penalty (IRC § 6662(b)(1) and (2));
- Civil actions to enforce federal tax liens or to subject property to payment of tax (IRC § 7403);
- Relief from joint and several liability for spouses (IRC § 6015);
- Frivolous issues penalty (IRC § 6673 and related appellate-level sanctions); and
- Deduction for charitable contributions (IRC § 170).

The majority of these issues were identified as Most Litigated Issues last year, with the exception of the deduction for charitable contributions.[3] Summons enforcement was the top issue again this year. The number of CDP cases dropped significantly for the second year in a row—from 170 in 2009 to 131 in 2010 and 89 in 2011.[4] Cases with accuracy-related penalty issues decreased from 125 in 2010 to 55 in 2011, a 56 percent reduction.[5]

1 Federal tax cases are tried in the United States Tax Court, United States District Courts, the United States Court of Federal Claims, United States Bankruptcy Courts, United States Courts of Appeals, and the United States Supreme Court.

2 Many cases are resolved before the court issues an opinion. Some taxpayers reach a settlement with the IRS before trial, while the courts dismiss other taxpayers' cases for a variety of reasons, including lack of jurisdiction and lack of prosecution. Additionally, courts can issue less formal "bench opinions," which are not published or precedential. *See Characteristics of Earned Income Tax Credit Cases that the IRS Fully Concedes in Tax Court, infra*.

3 *See* National Taxpayer Advocate 2010 Annual Report to Congress 414.

4 *See* National Taxpayer Advocate 2010 Annual Report to Congress 416, Table 3.0.1; National Taxpayer Advocate 2009 Annual Report to Congress 405, Table 3.0.1.

5 *See* National Taxpayer Advocate 2010 Annual Report to Congress 416, Table 3.0.1.

Once TAS identified the Most Litigated Issues, it analyzed each one in four sections: summary of findings, description of present law, analysis of the litigated cases, and conclusion. Each case is listed in Appendix III, where the cases are categorized by type of taxpayer (*i.e.*, individual or business).[6] Appendix III also provides the citation for each case, indicates whether the taxpayer was represented at trial or argued the case *pro se* (*i.e.*, without representation), and lists the court's decision.[7]

Following this introduction is a brief discussion of an ongoing TAS study of Earned Income Tax Credit (EITC) cases where the IRS settled or conceded the EITC issue, but only after the case was already in the United States Tax Court. We do not include settled cases in the count of cases for the Most Litigated Issues; however, this research study is relevant because its findings may shed light on how IRS practices affect the timing of when a case is resolved. We have also included a "Significant Cases" section that summarizes important decisions that are relevant to tax administration but were not included in the above-listed top ten issues.[8]

AN OVERVIEW OF HOW TAX ISSUES ARE LITIGATED

Initially, taxpayers can generally litigate a tax matter in four different courts: the United States Tax Court, United States District Courts, the United States Court of Federal Claims, and United States Bankruptcy Courts. With limited exceptions, taxpayers have an automatic right of appeal from decisions of any of these courts.[9]

The Tax Court is generally a "prepayment" forum. In other words, taxpayers can access the Tax Court without having to pay the disputed tax in advance. The Tax Court has jurisdiction over a variety of issues, including deficiencies, certain declaratory judgment actions, appeals from collection due process hearings, relief from joint and several liability, and determination of employment status.[10]

The United States District Courts and the United States Court of Federal Claims have concurrent jurisdiction over tax matters in which (1) the tax has been assessed and paid in

6 Individuals filing Schedules C, E, or F are deemed business taxpayers for purposes of this discussion even if items reported on such schedules were not the subject of litigation.

7 "*Pro se*" means "for oneself; on one's own behalf; without a lawyer." *Black's Law Dictionary* (9th ed. 2009). For purposes of this analysis, we considered the court's decision with respect to the issue analyzed only. A "split" decision is defined as a partial allowance on the specific issue analyzed. The citations also indicate whether decisions were on appeal at the time this report went to print.

8 One of the cases discussed in the "Significant Cases" section of this report was decided outside the June 1, 2010, through May 31, 2011 period used to identify the ten most litigated issues, but we nonetheless have included it because of its impact on tax administration.

9 *See* IRC § 7482, which provides that the United States Courts of Appeals (other than the United States Court of Appeals for the Federal Circuit) have jurisdiction to review the decisions of the Tax Court. There are exceptions to this general rule. For example, IRC § 7463 provides special procedures for small Tax Court cases (where the amount of deficiency or claimed overpayment totals $50,000 or less) for which appellate review is not available. *See also* 28 U.S.C. § 1294 (appeals from a United States District Court are to the appropriate United States Court of Appeals); 28 U.S.C. § 1295 (appeals from the United States Court of Federal Claims are heard in the United States Court of Appeals for the Federal Circuit); 28 U.S.C. § 1254 (appeals from the United States Courts of Appeals may be reviewed by the United States Supreme Court).

10 IRC §§ 6214; 7476-7479; 6330(d); 6015(e); 7436.

full,[11] and (2) the taxpayer has filed an administrative claim for refund.[12] The United States District Courts, along with the bankruptcy courts in very limited circumstances, provide the only forums in which a taxpayer can receive a jury trial.[13] Bankruptcy courts can adjudicate tax matters that were not adjudicated prior to the initiation of a bankruptcy case.[14]

ANALYSIS OF *PRO SE* LITIGATION

As in previous years, many taxpayers appeared before the courts *pro se*. Table 3.0.1 lists the Most Litigated Issues for the period of June 1, 2010, through May 31, 2011, and identifies the number of cases, broken down by issue, in which taxpayers appeared without representation. As illustrated in the table below, the issues with the highest rates of *pro se* taxpayers are the frivolous issues penalty and the failure to file penalty. The high percentages of *pro se* taxpayers litigating these issues suggest that representatives may be unwilling to take these kinds of cases, or that these issues affect many low and middle income taxpayers who cannot afford representation. The data may suggest a need for more low income taxpayer clinics (LITCs) and volunteers to provide free or low-cost representation.

TABLE 3.0.1, *Pro Se* Cases by Issue

Most Litigated Issue	Total Number of Litigated Cases Reviewed	*Pro Se* Litigation	Percentage of *Pro Se* Cases
Summons Enforcement	132	98	74%
Trade or Business Expenses	107	31	29%
Collection Due Process	89	56	63%
Failure to File and Estimated Tax Penalties	74	65	88%
Gross Income	62	46	74%
Accuracy-Related Penalty	55	24	44%
Civil Actions to Enforce Federal Tax Liens or to Subject Property to Payment of Tax	48	25	52%
Joint and Several Liability	44	23	52%
Frivolous Issues Penalty (and analogous appellate-level sanctions)	44	42	95%
Charitable Deduction	27	13	14%
Total	**682**	**423**	**62%**

Table 3.0.2 demonstrates our belief that overall, taxpayers are more likely to prevail if they are represented. However, *pro se* taxpayers actually experienced a substantially higher rate of success than represented taxpayers in litigation over trade or business expenses. The higher success rate for *pro se* taxpayers litigating this issue is noteworthy and indicates

11 28 U.S.C. § 1346(a)(1). *See Flora v. United States*, 362 U.S. 145 (1960), *reh'g denied*, 362 U.S. 972 (1960).

12 IRC § 7422(a).

13 The bankruptcy court may only conduct a jury trial if the right to a trial by jury applies, all parties expressly consent, and the district court specifically designates the bankruptcy judge to exercise such jurisdiction. 28 U.S.C. § 157(e).

14 *See* 11 U.S.C. §§ 505(a)(1) and (a)(2)(A).

possible communication barriers between taxpayers and the IRS in the administrative process.

TABLE 3.0.2, Outcomes for *Pro Se* and Represented Taxpayers

	Pro Se Taxpayers			Represented Taxpayers		
Most Litigated Issue	Total Cases	Taxpayer Prevailed in whole or in part	Percent	Total Cases	Taxpayer Prevailed in whole or in part	Percent
Summons Enforcement	98	3	3%	34	8	24%
Trade or Business Expenses	31	18	58%	76	30	39%
Collection Due Process	56	3	5%	33	3	9%
Failure to File and Estimated Tax Penalties	65	4	6%	9	2	22%
Gross Income	46	6	13%	16	3	19%
Accuracy-Related Penalty	24	6	25%	31	13	42%
Civil Actions to Enforce Federal Tax Liens or to Subject Property to Payment of Tax	25	2	8%	23	4	17%
Joint and Several Liability	23	10	43%	21	10	48%
Frivolous Issues Penalty (and analogous appellate-level sanctions)	42	18	43%	2	0	0%
Charitable Deduction	13	1	8%	14	4	29%
Total	**423**	**71**	**17%**	**259**	**77**	**30%**

Characteristics of Earned Income Tax Credit Cases that the IRS Fully Concedes in Tax Court

This discussion of the ten Most Litigated Issues does not take into account the Tax Court cases that are settled each year without being litigated. In fiscal year (FY) 2001, the Tax Court closed 13,600 cases.[1] By FY 2010, the number had risen to 30,900, a 127 percent increase. However, only a small percentage of cases (fewer than three percent every year since 2007) are closed as a result of a trial and decision. Some cases are closed because the taxpayer defaults or the case is dismissed, but the largest category of closed cases, more than 75 percent every year since 2007, consists of settlements.

Decision documents for settled cases sometimes show that there was no deficiency in tax—in other words, the IRS apparently conceded the case in full. TAS is undertaking a study, *Characteristics of EITC Cases that the IRS Fully Concedes in Tax Court*, that will focus on these cases, specifically those in which the disallowed Earned Income Tax Credit (EITC) was an issue. The research question this study will attempt to answer is why the IRS conceded only after the taxpayer petitioned Tax Court. If these cases present common elements, the IRS may be able to adjust its procedures so that concessions, where appropriate, can be made earlier (perhaps during the Examination phase, or in any event before a Tax Court petition is filed). The IRS has an interest in the answer to this question because earlier resolution of cases conserves resources by reducing or eliminating Appeals or Chief Counsel involvement.

TAS conducted a focus group with three Chief Counsel paralegals who work with and routinely settle docketed cases involving EITC. We then developed a data collection instrument that explores the characteristics of a fully-conceded EITC case, such as:

- Whether the return at issue was prepared by a paid preparer;
- How long the case was in IRS Examination;
- Whether the taxpayer responded or instead "dropped out" of the original exam;
- Whether the taxpayer submitted information to the IRS during the exam that the IRS did not process or consider before the taxpayer filed the Tax Court petition;
- How long it took to settle the case once the Tax Court petition was filed;
- Whether the taxpayer was represented;
- Whether and when the taxpayer or representative spoke to the IRS by telephone or in person;
- Whether Counsel or Appeals accepted testimony as a substitute for documents;

[1] The data in this paragraph are from the IRS Office of Chief Counsel report prepared for American Bar Association, Tax Section, Court Procedure Committee (2011) 6, 19.

- Whether another taxpayer claimed the same person as a qualifying child; and
- Whether Counsel or Appeals found the examiner misapplied the law.

We will use the data collection instrument to evaluate cases in our sample, which is likely to consist of approximately 300 cases, depending on the size of the population.

Once we obtain a sample that when analyzed will allow us to describe the relevant population with a 95 percent confidence level and a precision margin of +/- five percent, we will proceed to retrieve and analyze those case files. We expect preliminary results within three months after identifying the sample cases, and we plan to publish our findings in the National Taxpayer Advocate's 2012 Annual Report to Congress.

Significant Cases

The purpose of this section is to describe certain judicial decisions that generally do not involve any of the ten Most Litigated Issues, but nonetheless highlight important issues relevant to tax administration.[1] These decisions are summarized below.

In *Arizona Christian School Tuition Organization v. Winn,* the Supreme Court held that a taxpayer lacked standing to challenge a state tuition tax credit (*i.e.*, a so-called "tax expenditure") as violating the Establishment Clause, even though taxpayers generally have standing to challenge the use of more direct government expenditures.[2]

Arizona law provided dollar-for-dollar tax credits of up to $500 per person and $1,000 per married couple for contributions to "student tuition organizations" (STO). STOs used the contributions to provide scholarships to students attending private schools, including religious schools. The Arizona Christian School Tuition Organization, a group of Arizona taxpayers, challenged the STO tax credit as a violation of Establishment Clause principles under the First and Fourteenth Amendments to the U.S. Constitution. The group alleged the statute allowed STOs to use Arizona income tax revenues to pay tuition for students at religious schools, some of which discriminated on the basis of religion in selecting students.

In a majority opinion by Justice Kennedy, joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito, the Court held that the Arizona taxpayers lacked standing under Article III of the Constitution to obtain a determination on the merits in federal court. The Court distinguished its decision from *Flast v. Cohen*,[3] where it determined that taxpayers had standing to challenge the direct expenditure of federal funds to purchase textbooks and other instructional materials for use in religious schools. In the case of direct expenditures, taxpayers may suffer sufficient injury to have standing because "their property is transferred through the Government's Treasury to a sectarian entity."[4] In the case of tax expenditures, by contrast, the Court reasoned that taxpayers sustain no such injury because the government does not "extract and spend," but rather, allows taxpayers to retain their own funds. The Court deemed the need to raise other taxes to fund operations as too speculative to trigger standing. It observed that funding STOs could reduce the need for expenditures on public schools, potentially offsetting any financial loss to the state. Even if the tax credit did result in a financial loss, there was no way to know if the legislature would react to an invalidation of the tax credit and reversal of any such loss by reducing taxes.

1 When identifying the ten most litigated issues, TAS analyzed federal decisions issued during the period beginning on June 1, 2010, and ending on May 31, 2011. For purposes of this section of the report, we generally use the same period.

2 131 S.Ct. 1436 (2011), *rev'g* 562 F.3d 1002 (9th Cir. 2009).

3 392 U.S. 83 (1968).

4 *Arizona Christian School Tuition Org.*, 131 S.Ct. at 1446 (citing *Flast*, 392 U.S. at 105-106).

This decision is significant because it provides an incentive for legislators to use nonrefundable tax expenditures in lieu of direct expenditures because they may be less susceptible to constitutional challenge.[5] It is unclear if refundable tax expenditures (*e.g.*, refundable education tax credits), which are more akin to direct expenditures, would receive the same protection as nonrefundable tax expenditures. It appears that a majority of the Court, however, would not have drawn a distinction between direct spending and tax expenditures.[6]

In *Mayo Foundation for Medical Education and Research v. United States*, the Supreme Court held that "interpretive" Treasury regulations were entitled to *Chevron* deference, and accordingly, a hospital's medical residents who regularly worked 40 hours or more per week were not eligible for the student exemption from Federal Insurance Contributions Act (FICA) taxes.[7]

Wages are generally subject to FICA taxes.[8] However, wages paid by a school to its "students" may be eligible for an exception if the work is "incident to and for the purpose of pursuing a course of study."[9] Whether a person qualifies for the student exception has historically been determined based on an analysis of various facts and circumstances, including the number of hours worked.[10] In 2004, the IRS amended the FICA regulations, establishing a bright-line rule that a person whose normal work schedule is 40 hours or more per week is a full-time employee and therefore ineligible for the student exception.[11]

The Mayo Foundation paid FICA taxes for its medical residents who regularly work 40 hours or more per week, and then filed a refund suit in district court, challenging the validity of the 2004 regulations. The district court held that the regulations were invalid.[12] First, it noted that the validity of "interpretive" regulations—regulations issued pursuant to general authority under IRC § 7805(a) rather than a specific legislative directive—should be analyzed using the heightened standard identified by the Supreme Court in *National Muffler* rather than the more deferential standard set forth in *Chevron*.[13] Then it concluded that the regulations were invalid under either test.[14]

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5 For a detailed discussion of tax expenditures, see National Taxpayer Advocate 2010 Annual Report to Congress, vol. 2, 101-119 (*Evaluate the Administration of Tax Expenditures*).

6 In a concurring opinion, Justice Scalia, joined by Justice Thomas, argued that taxpayers should not have standing to challenge either direct expenditures or tax expenditures. In a dissenting opinion, Justice Kagan, joined by Justices Ginsburg, Breyer, and Sotomayor, argued that taxpayers should have standing to challenge both direct expenditures and tax expenditures.

7 131 S.Ct. 704 (2011), *aff'g* 568 F.3d 675 (8th Cir. 2009), *rev'g* 503 F. Supp. 2d 1164 (D. Minn. 2007) (hereinafter *Mayo*). For prior coverage, see National Taxpayer Advocate 2009 Annual Report to Congress, 407, 412-413; National Taxpayer Advocate 2008 Annual Report to Congress 459, 462-463.

8 *See* IRC § 3101 *et seq*.

9 IRC § 3121(b)(10); Treas. Reg. § 31.3121(b)(10)-2(d)(3)(iii). The Social Security Act, which governs workers' eligibility for benefits, contains a similar student exception. 42 U.S.C. § 410(a)(10).

10 *See* Rev. Rul. 78-17, 1978-1 C.B. 306.

11 T.D. 9167, 69 Fed. Reg. 76,404, 76,405 (Dec. 21, 2004) (effective for services performed on or after April 1, 2005).

12 *Mayo*, 503 F. Supp. 2d at 1164.

13 *Id*. at 1171.

14 *Id*. at 1174.

Under *Chevron*, agency regulations are entitled to deference (sometimes called "*Chevron* deference") unless they contradict an unambiguous statute or set forth an unreasonable construction of it.[15] Under the heightened *National Muffler* standard, a court considers whether a regulation is a substantially contemporaneous construction of the statute, the length of time the regulation has been in effect, the manner in which it evolved, the reliance placed on it, the consistency of the IRS's interpretation, and whether Congress has scrutinized the regulation in subsequent amendments or reenactments of the statute.[16] The district court in *Mayo* explained that the regulations were invalid under *Chevron* because the plain language of the statute was not ambiguous. Moreover, pursuant to *National Muffler*, the fact that the regulations were issued long after the statute was enacted and in the wake of an adverse court decision weighed against the government.[17]

The Court of Appeals for the Eighth Circuit reversed, holding that the 2004 regulations were valid.[18] Applying *Chevron*, it reasoned that the statute was ambiguous and that the regulations were a reasonable construction of it.[19] However, it also applied the factors set forth in *National Muffler*.[20] Like the district court, the Eighth Circuit's analysis assumed an interpretive regulation that upsets settled expectations years after a statute is enacted is more likely to be invalid, as suggested by *National Muffler*.[21]

The Supreme Court affirmed the Eighth Circuit's holding, declaring that *Chevron* deference applies to all regulations, even if those regulations are promulgated long after a statute is enacted, reverse longstanding agency positions, or are prompted by litigation.[22] The Court rejected the notion that the analysis is any different for "interpretive" regulations than for "legislative" regulations. Applying *Chevron*, it found the term "student" was ambiguous. Next, it concluded that the regulation's definition was reasonable, particularly in light of the fact that the agency used the notice-and-comment procedure to issue the regulation. It noted that the preamble to the regulations explained that the bright-line 40-hour-a-week rule was adopted to improve the administrability of the provision and to address concerns raised by the Social Security Administration.

15 *Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

16 *Nat'l Muffler Dealers Ass'n, Inc. v. United States*, 440 U.S. 472, 477 (1979) (citations omitted).

17 *Mayo*, 503 F.Supp.2d at 1176.

18 *Mayo*, 568 F.3d at 684.

19 *Id.* at 682.

20 *Id.* at 682-83.

21 *Id.* at 682.

22 *Mayo*, 131 S.Ct. at 713-714.

This case is significant because it may assist the government in defending interpretive Treasury regulations, particularly regulations issued to address losses in court.[23] Given the Supreme Court's emphasis on the importance of the notice-and-comment process and the strength of the government's justification for the rule, however, the decision may be less helpful in defending regulations that sidestep the notice-and-comment process, such as those that are effective before the public has had an opportunity to offer comments or those that do not provide any justification for adopting a rule.[24]

In *Grapevine Imports, Ltd. v. United States*, the Court of Appeals for the Federal Circuit held that Treasury regulations were entitled to *Chevron* deference, and accordingly an overstatement of basis triggered the extended six-year statute of limitations on assessment in IRC § 6501(e).[25]

Mr. and Mrs. Tigue owned Grapevine Imports, Ltd. (Grapevine), a limited liability partnership. In 1999, they caused Grapevine to enter into a so-called Son-of-BOSS (Bond and Option Sales Strategy) tax shelter and then sold it. They took the position that the tax shelter increased their basis in Grapevine, thereby reducing taxable gain on the sale. In 2004, more than three but less than six years after Grapevine filed returns for 1999, the IRS issued a Final Partnership Administrative Adjustment (FPAA), increasing the gain on the sale.

Grapevine challenged the FPAA in the Court of Federal Claims, arguing the FPAA was time-barred because the IRS issued it after the expiration of the three-year statute of limitations under IRC §§ 6501(a) and 6229(a).[26] The government disagreed, contending that Grapevine's overstatement of basis was a substantial omission from "gross income" that triggered the extended six-year statute of limitations under IRC §§ 6501(e)(1)(A) and 6229(c)(2). The Court of Federal Claims sided with Grapevine, holding that an overstatement of basis is not an omission from gross income for purposes of IRC § 6501(e)(1)(A).[27]

By way of background, the Courts of Appeals for the Fifth, Ninth, and Federal Circuits had previously held that an overstatement of basis is not an omission from gross income for

23 *See, e.g.*, Amy S. Elliott, *Mayo Decision 'Means More Guidance Faster' From IRS, Official Says*, 2011 TNT 15-7 (Jan. 24, 2011) (quoting the IRS Deputy Associate Chief Counsel (Technical) as saying, "the less-deferential multifactor test in *National Muffler Dealers Association Inc. v. United States*, 440 U.S. 472 (1979) is dead."); Jeremiah Coder, *Federal Circuit Grapples with Aftermath of Mayo*, 2011 TNT 9-2 (Jan. 13, 2011) (reporting the government cited the Mayo decision in its oral argument before a panel of judges on the U.S. Court of Appeals for the Federal Circuit where it was defending the validity of section 6501 regulations); Jeremiah Coder, Officials Comment On Interpreting Mayo, 2011 TNT 16-4 (Jan. 25, 2011) (reporting the Acting Deputy Assistant Attorney General indicated that "when Congress passes an ambiguous statute, any Treasury regulation is probably valid under Mayo. . . [and] even revenue rulings should be subject to Chevron deference"). But see, Home Concrete & Supply, LLC v. United States, 634 F.3d 249 (4th Cir. 2011) (holding that Treasury regulations were not entitled to Chevron deference because, according to a pre-Chevron Supreme Court opinion that analyzed legislative history, the statute was not ambiguous).

24 *See, e.g.*, Amy S. Elliott, *Mayo Decision 'Means More Guidance Faster' From IRS, Official Says*, 2011 TNT 15-7 (Jan. 24, 2011) (quoting the IRS Deputy Associate Chief Counsel (Technical) as saying "the IRS will take to heart the Court's emphasis on the importance of notice and comment in its regulatory process.").

25 636 F.3d 1368 (Fed. Cir. 2011), *reh'g en banc denied*, 2011 U.S. App. LEXIS 14144 (June 6, 2011), rev'g 77 Fed. Cl. 505 (2007).

26 *Grapevine Imports Ltd. v. United States*, 77 Fed. Cl. 505 (2007).

27 *Id*. at 512.

purposes of IRC § 6501(e)(1)(A).[28] These decisions cite the Supreme Court's 1958 decision in *Colony*, which held that an overstatement of basis is not an omission from gross income (under a predecessor of IRC § 6501(e)) because no income is "left out" of the return.[29] By contrast, the Court of Appeals for the Seventh Circuit recently agreed with the government's view that *Colony's* holding is limited to overstatements of basis on the sale of goods and services by a trade or business, rather than the sale of capital assets.[30] Therefore, the court applied the general definition of gross income in IRC § 61 and concluded that the taxpayers' overstatement of basis resulted in an understatement of gross income sufficient to trigger the six-year limitations period.[31]

While numerous cases were pending in the courts, the IRS issued temporary and final regulations in 2009 and 2010, respectively, which mirror its litigating position that outside of a trade or business context, an overstatement of basis is an omission from gross income for purposes of IRC § 6501(e).[32]

In this case, the Court of Appeals for the Federal Circuit sided with the government. It distinguished its own prior decision in *Salman Ranch*, which was decided before the government issued the temporary regulations. Citing the recent Supreme Court decision in *Mayo* (discussed above), it applied the two-step test set forth in *Chevron* (discussed above), and concluded the final regulations were entitled to deference because (1) the statute was ambiguous and (2) the regulations were not unreasonable.[33] The court also discounted Grapevine's argument that the regulations did not or should not apply retroactively.[34] The resulting split among the circuits makes it more likely that the Supreme Court will decide to review this issue.

28 *See, e.g.*, *Salman Ranch Ltd. v. United States*, 573 F.3d 1362 (Fed. Cir. 2009); *Bakersfield Energy Partners, LP v. Comm'r*, 568 F.3d 767 (9th Cir. 2009); *Burks v. United States*, 633 F.3d 347 (5th Cir. 2011); *Home Concrete & Supply, LLC v. United States*, 634 F.3d 249 (4th Cir. 2011), *cert. granted*, 2011 U.S. LEXIS 5196 (Sept. 27, 2011). For prior coverage of this issue, see National Taxpayer Advocate 2010 Annual Report to Congress 418, 423 (discussing *Intermountain Ins. Serv. of Vail, LLC v. Comm'r*, 134 T.C. 211 (2010), *rev'd*, 650 F.3d 691 (D.C. Cir. 2011)) and National Taxpayer Advocate 2009 Annual Report to Congress 407, 416 (discussing *Bakersfield Energy Partners, LP v. Comm'r*, 568 F.3d 767 (9th Cir. 2009)).

29 *The Colony, Inc. v. Comm'r*, 357 U.S. 28 (1958) (hereinafter *Colony*).

30 *Beard v. Comm'r*, 633 F.3d 616 (7th Cir. 2011), *reh'g en banc denied*, 107 A.F.T.R.2d (RIA) 1771 (7th Cir. 2011) (reasoning that because the taxpayers were not engaged in a trade or business, *Colony* was not controlling).

31 *Beard*, 633 F.3d at 621, 622.

32 T.D. 9466, 74 Fed. Reg. 49,321 (Sept. 28, 2009) (temporary regulations); T.D. 9511, 75 Fed. Reg. 78,897 (Dec. 17, 2010) (final regulations).

33 *Accord Beard*, 633 F.3d at 623 (citations omitted) (noting that even if it had determined that *Colony* was controlling, the court would have applied *Chevron* deference to both the temporary and final regulations, regardless of the fact that the temporary regulations had not been subject to notice and comment). In contrast, the Court of Appeals for the Fifth Circuit more recently characterized these regulations, which it deemed inapplicable, as "an unreasonable interpretation of settled law," and suggested it would not have given them deference. *Burks v. United States*, 633 F.3d 347, n.9 (5th Cir. 2011) (speculating that the lack of notice and comment may have been fatal and quoting Supreme court precedent stating that "'[D]eference to what appears to be nothing more than an agency's convenient litigating position' is 'entirely inappropriate.'" (internal citations omitted)).

34 In contrast, the Tax Court concluded that the regulations were invalid and criticized the effective date of those regulations as being circular. *See Intermountain Ins. Serv. of Vail, LLC v. Comm'r*, 134 T.C. 211 (2010), *rev'd*, 650 F.3d 691(D.C. Cir. 2011). For a discussion of *Intermountain*, see National Taxpayer Advocate 2010 Annual Report to Congress 418, 423.

In *Perry v. Commissioner*, the Tax Court declined to enjoin the IRS from offsetting a refund to collect an unassessed liability that the taxpayer was disputing.[35]

In August of 2008, the IRS sent Mr. Perry a notice of deficiency with respect to his 2002 return. In October 2008, it applied his 2007 overpayment to offset part of the deficiency. In November 2008, Mr. Perry filed a timely petition in the Tax Court to contest the deficiency. He subsequently filed a motion seeking an order to: (1) enjoin the IRS from offsetting his 2007 refund against the 2002 deficiency, and (2) have the IRS refund his 2007 overpayment.

Mr. Perry argued that IRC § 6213(a) prohibits the IRS from engaging in all collection activities, including offsets, during the period in which the taxpayer may petition the Tax Court (*i.e.*, 90 or 150 days after the notice of deficiency is mailed), or if the taxpayer files a petition, until the court's decision becomes final. Mr. Perry argued that the "underlying fundamental principle" of the statute is that during the period in which the statute's restriction is in effect, the IRS is prohibited from collecting by any means, including an offset, a deficiency that a taxpayer may dispute in the Tax Court.

The IRS argued that the plain language of IRC § 6213(a) only prohibits certain assessments, levies, and in-court collection proceedings—not offsets. The court agreed with the IRS and dismissed Mr. Perry's motion.

This case may be significant because, in response to calls for legislation to prevent the IRS from collecting unassessed and disputed liabilities using its offset authority, the IRS stated that its procedures generally prevent it from using offsets to collect an individual's disputed liabilities before they are assessed.[36] The case shows that IRS procedures do not always prevent it from collecting disputed liabilities from taxpayers, using its offset authority.[37] IRS procedures failed to preserve the taxpayer's ability to dispute the IRS-asserted liability in the Tax Court before paying it. Accordingly, it represents an example of a case in which legislation could be helpful, particularly since the IRS's assurance was inaccurate.[38]

35 T.C. Memo. 2010-219.

36 When the IRS published Rev. Rul. 2007-51, 2007-2 C.B. 573, which concluded that the IRS may offset overpayments against IRS-asserted, but unassessed and disputed liabilities, it provoked criticism that low-income taxpayers would be deprived of an opportunity to seek judicial review of the matter in the Tax Court before paying the tax. Letter from Carlton M. Smith, Director of the Cardozo Tax Clinic, Benjamin N. Cardozo School of Law, to Hon. Charles B. Rangel, Chairman, House Ways and Means Committee and Hon. Max Baucus, Chairman, Senate Finance Comm., *reprinted as*, *Associate Professor Calls IRS Ruling 'Harmful To Low-Income Taxpayers'*, 2007 TNT 185-70 (Sept. 24, 2007). The IRS responded, in part, by explaining that its procedures "are not designed to setoff an overpayment against a liability prior to the time the liability is assessed" and describing how IRS procedures prevent such offsets. Letter from Deborah A. Butler, Associate Chief Counsel (Procedure and Administration), IRS Office of Chief Counsel, to Carlton M. Smith, Director of the Cardozo Tax Clinic, Benjamin N. Cardozo School of Law, *reprinted as*, *IRS Maintains Legality of Revenue Ruling on Refund Offsets in Letter to Law Professor*, 2008 TNT 5-9 (Jan. 8, 2008).

37 One recent article cites speculation that this case may indicate that the IRS has changed its procedures and that the existing statutory scheme that permits such offsets should be revisited. Sam Young, *Tax Court Opinion on Individual Overpayments Brings Practitioner Fears to Life*, 2010 TNT 201-3 (Oct. 19, 2010).

38 The National Taxpayer Advocate has recommended legislation to help address this problem. National Taxpayer Advocate 2008 Annual Report to Congress 442 (Legislative Recommendation: *Crediting an Overpayment Against an Unassessed, Outstanding Tax Liability*); Legislative Recommendation: *Taxpayer Bill of Rights*, *supra*.

In *Renkemeyer, Campbell & Weaver, LLP v. Commissioner*, the Tax Court held that the distributive share of the income allocable to limited partners who are active in the partnership's business is subject to self-employment tax.[39]

Renkemeyer, Campbell & Weaver, LLP was a three-person law firm organized as a limited liability partnership (LLP) under Kansas law. The firm made a special allocation of income to a fourth partner, which was an S corporation owned by a tax-exempt employee stock ownership plan (ESOP). After disregarding this special allocation and reallocating the income among the individual partners, the IRS determined that each individual partner's distributive share of the income was subject to self-employment tax.

In general, an individual general partner's distributive share of income or loss from any trade or business carried on by the partnership is subject to self-employment tax.[40] A limited partner's distributive share of a partnership's income (other than "guaranteed payments," such as the partner's salary), however, is generally not subject to self-employment tax because it is excluded under IRC § 1402(a)(13).[41]

The exclusion under IRC § 1402(a)(13) does not define the term "limited partner" with respect to entities not organized as limited partnerships (LPs). It was enacted in 1977, before limited liability partnerships (LLPs) and limited liability companies (LLCs) were contemplated. As LLPs and LLCs became more common, the Secretary issued proposed regulations, which would have defined "limited partner" for purpose of this exclusion.[42] These regulations caused such controversy that Congress prohibited the IRS from issuing regulations in this area before July 1, 1998, and the Senate passed a resolution calling for the withdrawal of the proposed regulation.[43]

In the absence of guidance from Congress, the Tax Court agreed with the IRS that the partners in the LLP were not "limited partners" for purposes of the exclusion from self-employment tax under IRC § 1402(a)(13). The Tax Court reasoned that one key difference between LPs and LLPs (and LLCs) is that a limited partner in an LP could lose his or her limited liability protection by engaging in the business operations of the partnership. Consequently, a limited partner in an LP is generally akin to a passive investor, whereas a limited partner in an LLP may enjoy limited liability protection even if actively managing the business. According to legislative history, Congress intended to exclude "earnings which are basically of an investment nature."[44] Because each partner had contributed a nominal amount ($110) for a partnership unit, it was clear that the partners' distributive shares were not earnings

39 136 T.C. 137 (2011).

40 IRC §§ 1401(a) and 1402(a).

41 IRC § 1402(a)(3) provides in relevant part that "there shall be excluded [from net earnings subject to self-employment tax] the distributive share of any item of income or loss of a *limited partner*." (Emphasis added).

42 62 Fed. Reg. 1702 (Jan. 13, 1997); Prop. Treas. Reg. § 1.1402(a)-2.

43 *See* Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 935, 111 Stat. 788, 882 (1997). *See also* 143 Cong. Rec. 13297 (June 27, 1997).

44 H.R. Rept. No. 95-702 (Part 1), at 9 (1977).

of an investment nature, but rather arose from legal services they performed. Thus, the court held the distributive shares were subject to self-employment tax.

This decision is significant because it clarifies that the distributive shares of partners and members of LLPs and LLCs may be subject to self-employment taxes. It has reportedly sent "shock waves through the legal and accounting communities" because many law and accounting firms are organized as LLPs or LLCs.[45] By one estimate based on 2008 data, the decision could raise $1.22 billion per year.[46]

In *Cohen v. United States*, the Court of Appeals for the District of Columbia held that it had jurisdiction to review the IRS's procedure for refunding telephone excise tax amounts that it had collected improperly.[47]

In May 2006, after losing several court challenges regarding the application of telephone excise taxes, the IRS issued Notice 2006-50, which announced it would no longer collect the tax on telephone charges based solely on transmission time.[48] Notice 2006-50 also outlined a procedure for claiming refunds (usually about $30-$60 for individuals) of excise taxes that the IRS improperly collected after February 28, 2003, and before August 1, 2006.[49]

The class action appellants in this case challenged the lawfulness and adequacy of the IRS telephone excise refund process. They argued that Notice 2006-50 was substantively flawed because it under-compensated many taxpayers for the excise taxes actually paid, and procedurally flawed because it was not subject to notice and comment, as required by the Administrative Procedure Act (APA).[50] The district court dismissed the case, concluding that the appellants did not exhaust the administrative remedies and failed to state a valid claim under the APA or any other federal law.[51]

On appeal, the D.C. Circuit reversed and remanded the case to the district court for a decision on the merits of the APA claim.[52] Rehearing the case *en banc*, the Court of Appeals

45 Martin A. Sullivan, *Economic Analysis: Renkemeyer Annual Cost to Partners Could Exceed $1 Billion*, 2011 TNT 55-2 (Mar. 22, 2011).

46 *Id*.

47 108 A.F.T.R.2d (RIA) 5046 (D.C. Cir. 2011), *en banc rehearing of* 578 F.3d 1 (D.C. Cir. 2009), *rev'g sub nom. In re Long–Distance Tel. Service Fed. Excise Tax Refund Litig.*, 539 F. Supp. 2d 281 (D.C. 2008).

48 Telephone service providers are required to collect from customers and pay directly to the IRS a three percent excise tax on certain phone calls. *See* IRC §§ 4251 and 4291. The tax applies to communications charges that are based upon distance and transmission time. IRC § 4252(b). With the rise of cellular phones, telephone service providers increasingly based fees solely on time without regard to distance. Various courts have held that such charges are not to be subject to the excise tax. *See* Notice 2006-50, 2006-1 C.B. 1141, *amplified and modified by* Notice 2007-11, 2007-1 C.B. 405.

49 *See* Notice 2006-50, 2006-1 C.B. 1141.

50 5 U.S.C. § 551, *et seq*.

51 *In re Long–Distance Tel. Service Fed. Excise Tax Refund Litig.*, 539 F. Supp. 2d 281 (D.C. 2008).

52 The opinion states:

> In sum, the IRS unlawfully expropriated billions of dollars from taxpayers, conceded the illegitimacy of its actions, and developed a mandatory process as the sole avenue by which the agency would consider refunding its ill-gotten gains. It cannot avoid judicial review of that process by simply designating it a policy statement. Notice 2006-50 constituted a final agency action that aggrieved taxpayers by hindering their access to court. Accordingly, we reverse the district court and remand Appellants' APA claims for further consideration. *Cohen v. U.S.*, 578 F.3d 1, 12 (D.C. Cir. 2009).

for the D.C. Circuit held that it had jurisdiction and the appellants stated a valid claim.[53] It reasoned that the district court had general jurisdiction to review cases and controversies involving federal law, such as the APA;[54] the APA provided a waiver of sovereign immunity for those seeking relief other than monetary damages;[55] and neither the Anti-Injunction Act (AIA) nor the Declaratory Judgment Act (DJA) barred the appellants' challenge.[56] Moreover, in addressing the IRS's argument that the appellants failed to exhaust administrative remedies before seeking judicial review, it explained that exhaustion was not required in this case because the challenge was to the adequacy of the administrative remedy itself.

Similarly, the AIA, which prohibits suits to restrain the assessment or collection of taxes, did not prevent the suit because the appellants were not seeking to restrain the assessment or collection of taxes, but rather challenging procedures for refunding taxes already collected. According to the court, the DJA likewise only bars suits seeking to prevent the assessment and collection of taxes.

This case may be significant because it suggests that, like those of other federal agencies, IRS actions may be subject to judicial review, at least when the plaintiff does not seek a remedy that would restrain the assessment or collection of tax. It also lends support to the notion that the IRS should subject more of its procedures and guidance to the notice and comment process.[57]

In *United States v. Williams*, the District Court for the Eastern District of Virginia held that the government did not prove that a taxpayer's failure to report his foreign accounts on a *Report of Foreign Bank and Financial Accounts* (FBAR) was willful, even though Schedule B of his income tax return indicated that he had no foreign accounts and he acknowledged willfully failing to report income from the accounts on his return.[58]

Mr. Williams, a U.S. citizen and New York University-trained lawyer, pled guilty to tax evasion and criminal conspiracy to defraud the government with respect to more than $7 million in unreported income that he deposited in foreign accounts and more than $800,000 in earnings on those deposits. In connection with this plea, Mr. Williams admitted that he

53 *Cohen*, 108 A.F.T.R.2d (RIA) at 5046.

54 *See* 28 U.S.C. § 1331.

55 *See* 5 U.S.C. § 702.

56 IRC § 7421(a) (AIA) ("Except as provided in [specified sections]... no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person"); 28 U.S.C. § 2201(a) (DJA) ("In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986 [other exceptions omitted]..., as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration....").

57 For a discussion of other problems with the IRS's use of unreviewed guidance such as "frequently asked questions," *see* Most Serious Problem, *The IRS's Failure to Consistently Disclose and Vet Its Procedures Harms Taxpayers, Deprives It of Valuable Comments, and Violates the Law*, *supra*.

58 2010-2 U.S.T.C. ¶ 50,623 (E.D. Va. 2010). In the related case of *Williams v. Comm'r*, 131 T.C. 54 (2008), the Tax Court held that it lacked jurisdiction to redetermine the taxpayer's liability for FBAR penalties. For a discussion of that case, *see* National Taxpayer Advocate 2009 Annual Report to Congress 413. For a helpful discussion of both cases, *see* Hale E. Sheppard, *District Court Rules that Where There's No Will, There's a Way to Avoid FBAR Penalties*, 113 J. Tax'n 293 (Nov. 2010).

intentionally failed to report income in an effort to evade income taxes between 1993 and 2000. Acting on a request from the U.S., the Swiss government froze his accounts in 2000.

A U.S. person with a financial interest in, or signature authority over, one or more foreign financial accounts with an aggregate value greater than $10,000 is required to file Form TD F 90–22.1, *Report of Foreign Bank and Financial Accounts (*FBAR), by June 30 of each year.[59] In addition, *U.S. Individual Income Tax Return*, Form 1040, Schedule B asks:

> At any time during 2010, did you have an interest in or a signature or other authority over a financial account in a foreign country, such as a bank account, securities account, or other financial account? [Yes/No.] See instructions on back for exceptions and filing requirements for Form TD F 90-22.1

Although Mr. Williams pled guilty in 2003, he did not file any FBARs for 1993 through 2000 until 2007, at which point the six-year period for imposing an FBAR penalty had expired for each year except 2000. He or his preparer checked "no" in the box on Schedule B of his 2000 return, indicating that he had no foreign accounts.

After sentencing, the IRS initiated a civil examination of Mr. Williams and sought to impose the maximum FBAR penalty for 2000.[60] To succeed, it had to meet its burden to prove that Mr. Williams "willfully" violated a known legal duty to file the FBAR (*i.e.*, that he knew he was required to file and intentionally failed to do so).[61] The IRS argued that his failure to file was willful because his signature on the tax return was *prima facie* evidence that he knew the contents of the return. In other words, the IRS sought to infer that the violation was willful from the fact that he signed a return that referenced the FBAR filing requirement next to a false statement indicating that he had no foreign accounts. The IRS also argued that Mr. Williams' guilty plea should estop him from arguing that he did not willfully violate the FBAR reporting requirement.

The court held that the government failed to establish Mr. Williams willfully violated the FBAR reporting requirement. It concluded that Mr. Williams' plea acknowledged he intentionally failed to report income on his return, but not that he willfully failed to file the FBAR. Mr. Williams testified that he relied on his accountants to fill out his Form 1040 and the court was not persuaded that he was lying about his ignorance as to its contents or the requirement to file the FBAR. The court noted that he failed to file the FBAR in June 2001, after he learned that U.S. and Swiss authorities knew about the accounts and had frozen them. Moreover, he disclosed the accounts during conversations with the IRS in January 2002, disclosures that would be consistent with his belief that the IRS already knew about

59 *See* 31 U.S.C. § 5314; 31 C.F.R. § 1010.350(a).

60 Prior to 2004, 31 U.S.C. § 5321(a)(5)(B) provided that a person who willfully violated the requirement to file an FBAR could be subject to a civil penalty of up to $100,000 per account, per year. The American Jobs Creation Act of 2004, Pub. L. No. 108-357, Title VIII, § 821(a), 118 Stat. 1418, 1586 (2004) amended 31 U.S.C. § 5321(a)(5) to establish a penalty for non-willful violations and to increase the penalty for willful violations.

61 *See, e.g., Ratzlaf v. United States*, 510 U.S. 135 (1994); IRM 4.26.16.4.5.3 (July 1, 2008).

the accounts six months before in June 2001, when he was alleged to have willfully failed to disclose the accounts. This case is significant because it indicates that a taxpayer's response to the checkbox on Schedule B may be insufficient to establish that a taxpayer willfully violated the FBAR requirements, even if the taxpayer intentionally omitted income from the accounts on his or her return.[62]

In *Cooper v. Commissioner*, the Tax Court held that it had jurisdiction to review the IRS's denial of a whistleblower claim.[63]

Mr. Cooper submitted two whistleblower claims to the IRS in 2008 on Forms 211, *Application for Award for Original Information*.[64] Nine months after notifying Mr. Cooper that it had received his claims, the IRS Whistleblower Office notified him by letter that it could not make an award determination because he "did not identify federal tax issue[s] upon which the IRS will take action" and the information did not "result in the detection of the underpayment of taxes."[65] Mr. Cooper timely petitioned the Tax Court to review the IRS's determination within 30 days of receiving the letter.

The IRS argued that the Whistleblower Office's letter did not constitute a "determination regarding an award" that would confer Tax Court jurisdiction under IRC § 7623(b)(4). It argued there can be such a determination only if the Whistleblower Office undertakes an administrative or judicial action and thereafter determines to make an award. The IRS also argued that its letter to Mr. Cooper was not a determination because it was not labeled as such. The court rejected both arguments. Citing legislative history, the court explained that the statute permits an individual to seek judicial review of either the amount or denial of an award.[66] The court also explained that the name or label of a document does not control whether it constitutes a determination conferring jurisdiction.[67] Accordingly, the Tax Court had jurisdiction to review the IRS's denial of the claims and denied the government's motion to dismiss.[68]

62 *Compare U.S. v. Sturman*, 951 F.2d 1466 (6th Cir. 1991) (suggesting that the failure to answer the questions on Form 1040, Schedule B, regarding signature authority over foreign accounts can create an inference that the failure to file an FBAR was willful) and IRM 4.26.16.4.5.3(6) (July 1, 2008) ("[t]he mere fact that a person checked the wrong box, or no box, on a Schedule B is not sufficient, by itself, to establish that the FBAR violation was attributable to willful blindness."). For a discussion of problems with the IRS's 2009 offshore voluntary compliance program, see Most Serious Problem, *The IRS's Offshore Voluntary Disclosure Program "Bait and Switch" May Undermine Trust For The IRS and Future Compliance Programs, supra*. For a discussion of FBAR penalty issues see Most Serious Problem, *U.S. Taxpayers Abroad Face Challenges in Understanding How the IRS Will Apply Penalties to Taxpayers Who Are Reasonably Trying to Comply or Return Into Compliance, supra.*

63 135 T.C. 70 (2010).

64 IRC § 7623 authorizes the payment of awards from the proceeds of amounts the Government collects by reason of the information provided by a whistleblower.

65 *Cooper v. Comm'r*, 135 T.C. 70 (2010) at 72.

66 *Cooper v. Comm'r*, at 75 (citation omitted).

67 *Id*.

68 The government subsequently filed a motion for summary judgment, which the Tax Court granted. *See Cooper v. Comm'r*, 136 T.C. No. 30 (2011). It reasoned that because the IRS did not collect any amounts by reason of the information provided by Mr. Cooper, he was not entitled to a whistleblower award. *Id*.

In *Friedland v. Commissioner*, the Tax Court held that it lacked jurisdiction to review the IRS's denial of a whistleblower claim because the whistleblower did not file a timely petition, even though the filing may have been delayed because the Whistleblower Office erroneously advised the whistleblower to file with the Court of Federal Claims.[69]

In September of 2009, Mr. Friedland submitted a whistleblower claim to the IRS on Form 211, *Application for Award for Original Information*. On November 13, 2009, the IRS Whistleblower Office sent Mr. Friedland a letter, denying the claim. Mr. Friedland followed up by calling the Whistleblower Office and sending additional information. This prompted the Whistleblower Office to send him three more letters, one of which advised that to challenge its decision he could "write to the US Court of Claim (sic.). . . ."[70] The other letters from the Whistleblower Office were duplicates, confirming that it received and considered the additional information, but that its initial determination remained the same. Mr. Friedland filed a complaint in the Court of Federal Claims, as suggested by the Whistleblower Office. The Court of Federal Claims dismissed the complaint for lack of jurisdiction on May 26, 2010. Mr. Friedland then filed a petition with the Tax Court on June 18, 2010, 217 days after he received the first letter.

The IRS filed a motion to dismiss for lack of jurisdiction, arguing that no determination notice had been issued, or alternatively, if one had been issued, Mr. Friedland failed to file his petition with the Tax Court within the requisite 30-day period following a determination.[71] Relying on *Cooper v. Commissioner*,[72] the court found that the November 13, 2009 letter was the IRS's determination, which then triggered the requirement in IRC § 7623(b)(4) to file a petition within 30 days. Consequently, the court concluded that it lacked jurisdiction because Mr. Friedland did not file a timely petition.[73] While sympathizing with Mr. Friedland's reliance on the IRS's erroneous advice, the court concluded that "estoppel cannot create jurisdiction where none exists."[74] This case could be significant because it suggests the Tax Court will not apply equitable tolling principles in determining whether a whistleblower's petition is timely.[75]

69 T.C. Memo. 2011-90.

70 *Id*.

71 IRC § 7623(b)(4) ("Any determination regarding an award ... may, within 30 days of such determination, be appealed to the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter.)").

72 135 T.C. 70 (2010) (discussed above).

73 *Friedland*, T.C. Memo. 2011-90.

74 *Id*. (citation omitted).

75 For an argument that the Tax Court should have applied equitable tolling, see Carlton M. Smith, *Friedland: Did the Tax Court Blow Its Whistleblower Jurisdiction?*, 131 Tax Notes 843 (May 23, 2011).

MLI #1

Summons Enforcement Under Internal Revenue Code Sections 7602, 7604, and 7609

SUMMARY

The IRS may examine any books, records, or other data relevant to an investigation of a civil or criminal tax liability.[1] To obtain this information, the IRS may serve a summons directly on the subject of the investigation or any third party who may possess relevant information.[2]

A person who has a summons served on him or her may contest its legality if the government petitions a court to enforce it.[3] If the IRS serves a summons on a third party, any person entitled to notice of the summons may challenge its legality by filing a motion to quash or by intervening in any proceeding regarding the summons.[4] Generally, the burden on the taxpayer to establish the illegality of the summons is formidable.[5] We identified 132 cases decided between June 1, 2010, and May 31, 2011, that included issues of IRS summons enforcement. The parties contesting the summons prevailed in full in only five of these cases, with six cases resulting in split decisions, and the IRS prevailing in the remaining 121 cases.

PRESENT LAW

The IRS has broad authority under IRC § 7602 to issue a summons to examine a taxpayer's books and records or demand testimony under oath.[6] Further, the IRS may obtain information related to an investigation from a third party if, subject to the exceptions of IRC § 7609(c), it provides notice to those identified in the summons.[7] However, the IRS may not issue a summons *after* referring the matter to the Department of Justice (DOJ).[8] If the recipient fails to comply with a summons, the United States may commence an action under IRC § 7604 in the appropriate United States District Court to compel production or testimony.[9] If the United States files a petition to enforce the summons, the taxpayer may contest the validity of the summons in that proceeding.[10] Also, if the summons is served

1 Internal Revenue Code (IRC) § 7602(a)(1); Treas. Reg. § 301.7602-1.

2 IRC § 7602(a).

3 *U.S. v. Powell*, 379 U.S. 48, 58 (1964).

4 IRC § 7609(b).

5 *Bodensee Fund, LLC v. U.S. Dept. of Treasury-IRS*, 101 A.F.T.R.2d (RIA) 2092 (E.D. Pa. 2008).

6 IRC § 7602(a). *See also LaMura v. U.S.*, 765 F.2d 974, 979 (11th Cir. 1985) (*citing U.S. v. Bisceglia*, 420 U.S. 141, 145-46 (1975)).

7 IRC § 7602(a). Those entitled to notice of a third-party summons (other than the person summoned) must be given notice of the summons within three days of the day on which the summons is served to the third party, but no later than the 23rd day before the day fixed on the summons on which the records will be reviewed. IRC § 7609(a).

8 IRC § 7602(d). This restriction applies to "any summons, with respect to any person if a [DOJ] referral is in effect with respect to such person." IRC § 7602(d)(1).

9 IRC § 7604.

10 *U.S. v. Powell*, 379 U.S. 48, 58 (1964).

upon a third party, any person entitled to notice may initiate a petition to quash the summons in U.S. District Court, or intervene in any proceeding regarding the enforceability of the summons.[11]

A person named in a third party summons is generally entitled to notice,[12] but two exceptions may apply. First, the IRS is not required to give notice if the summons is issued to aid in the collection of "an assessment made or judgment rendered against the person with respect to whose liability the summons is issued."[13] This exception reflects congressional recognition of a difference between a summons issued in an attempt to compute the taxpayer's taxable income, and a summons issued after the IRS has made an assessment or obtained a judgment. For example, notice would not be necessary where the IRS has made the assessment and is attempting to determine whether the taxpayer has an account in a certain bank with sufficient funds to pay the tax. Giving taxpayers notice in such a case would seriously impede the IRS's ability to collect the tax.[14] The courts have interpreted this "aid of collection" exception to apply only where the taxpayer owns a legally identifiable interest in the account or other property for which records are summoned.[15] The second notice exception, also to facilitate tax collection, occurs when an IRS criminal investigator serves a summons on any person who is not the third party record keeper in connection with a criminal investigation.

Regardless of whether the taxpayer contests the summons in a motion to quash or a response to an IRS petition to enforce, the legal standard is the same.[16] In *United States v. Powell*, the Supreme Court set forth four threshold requirements that must be satisfied to enforce an IRS summons:

- The investigation must be conducted for a legitimate purpose;
- The information sought must be relevant to that purpose;
- The IRS must not already possess the information; and
- All required administrative steps must have been taken.[17]

The IRS bears the initial burden of establishing that these requirements have been met.[18] However, this burden is minimal, as the government need only introduce a sworn affidavit of the agent who issued the summons declaring that each of the *Powell* requirements has

11 IRC § 7609(b). The petition to quash must be filed not later than the 20th day after the date on which notice was served. IRC § 7609(b)(2)(A).

12 IRC § 7609(a)(1).

13 IRC § 7609(c)(2)(D)(i). The exception also applies to the collection of a liability of "any transferee or fiduciary of any person referred to in clause (i)." IRC § 7609(c)(2)(D)(ii).

14 H.R. Rep. No. 94-658 at 310, *reprinted in* 1976 U.S.C.C.A.N. at 3206. *See also* S. Rep. No. 94-938, pt. 1, at 371-72, *reprinted in* 1976 U.S.C.C.A.N. at 3800-01 (containing essentially the same language).

15 *Ip v. U.S.*, 205 F.3d 1168, 1172-76 (9th Cir. 2000).

16 *Phillips v. Comm'r*, 99 A.F.T.R.2d (RIA) 3487 (D. Ariz. 2007).

17 *U.S. v. Powell*, 379 U.S. 48, 57-58 (1964).

18 *Fortney v. U.S.*, 59 F.3d 117, 119-20 (9th Cir. 1995).

been satisfied.[19] The burden then shifts to the person contesting the summons to demonstrate that the IRS did not meet the requirements or that enforcement of the summons would be an abuse of process.[20]

A taxpayer may also allege that the information requested is protected by a statutory or common-law privilege, such as the:

- Attorney-client privilege;[21]
- Work-product privilege;[22] or
- Tax practitioner privilege.[23]

However, these privileges are limited. For example, they extend to "tax advice" but not to tax return preparation materials.[24] Another limitation is the "tax shelter" exception, which permits discovery of communications between a tax practitioner and client that promote participation in any tax shelter.[25]

ANALYSIS OF LITIGATED CASES

Summons enforcement has appeared as a Most Litigated Issue in the National Taxpayer Advocate's Annual Report to Congress every year since 2005. At that time, we identified only 44 cases but predicted the number would rise as the IRS became more aggressive in its enforcement initiatives. Our prediction was accurate, as the volume of cases increased to 101 in 2006, 109 in 2007, 146 in 2008, and 158 in 2009, before declining to 146 in 2010 and 132 in 2011.[26] A detailed list of this year's cases appears in Table 1 in Appendix III.

The IRS prevailed in full in 121 cases, taxpayers prevailed in five cases, and six cases resulted in split decisions. Attorneys represented taxpayers in 34 cases, while taxpayers appeared *pro se* (*i.e.*, without counsel) in the other 98. Ninety-five cases involved individual

19 *U.S. v. Dynavac, Inc.*, 6 F.3d 1407, 1414 (9th Cir. 1993).

20 *Id.*

21 The attorney-client privilege generally provides protection from discovery of information where:
(1) legal advice of any kind is sought, (2) from a professional legal advisor in his or her capacity as such, (3) the communication is related to this purpose, (4) made in confidence, (5) by the client, (6) and at the client's insistence protected, (7) from disclosure by the client or the legal advisor, (8) except where the privilege is waived. *U.S. v. Evans*, 113 F.3d 1457, 1461 (7th Cir. 1997) (citing John Henry Wigmore, *Evidence in Trials at Common Law* § 2292 (John T. McNaughten rev. 1961)).

22 The work product doctrine protects against the discovery of documents and other tangible materials prepared in anticipation of litigation. Fed. R. Civ. P. 26(b)(3); *see also Hickman v. Taylor*, 329 U.S. 495 (1947).

23 IRC § 7525 extends the protection of the common law attorney-client privilege to federally authorized tax practitioners in federal tax matters. Criminal tax matters and communications regarding tax shelters are exceptions to the privilege. IRC § 7525(a)(2), (b). The tax practitioner privilege is interpreted based on the common law rules of the attorney-client privilege. *U.S. v. BDO Seidman, LLP*, 337 F.3d 802, 810-12 (7th Cir. 2003), *petition for cert. denied*, *Roes v. U.S.*, 540 U.S. 1178 (2004).

24 *U.S. v. Frederick*, 182 F.3d 496, 500 (7th Cir. 1999), *petition for cert. denied*, 528 U.S. 1154 (2000).

25 IRC § 7525(b); *Valero Energy Corp. v. U.S.*, 569 F.3d 626 (7th Cir. 2009).

26 National Taxpayer Advocate 2010 Annual Report to Congress 428-435; National Taxpayer Advocate 2009 Annual Report to Congress 430-437; National Taxpayer Advocate 2008 Annual Report to Congress 488-494; National Taxpayer Advocate 2007 Annual Report to Congress 588-593; National Taxpayer Advocate 2006 Annual Report to Congress 582-588.

taxpayers, while the remaining 37 involved business taxpayers (21 of whom had representation). The arguments the litigants raised against IRS summonses generally fell into the following categories:

***Powell* Requirements:** Taxpayers frequently argued that the IRS did not meet one or more of the *Powell* requirements. However, because the burden on the government to establish its *prima facie*[27] case is minimal, while the burden on the taxpayer is very high, these arguments were generally unsuccessful.[28] We identified only one case in which the taxpayer successfully challenged the government's *prima facie* showing. In *Miccosukee Tribe of Indians of Florida. v. United States*,[29] the court rejected many of the taxpayer's objections to the third party summonses the IRS issued. The court held, however, that a hearing was necessary to determine whether the IRS already possessed certain summoned materials and whether the IRS acted in bad faith, and thus lacked a legitimate purpose for the summons.

Criminal Referral: As long as a matter has not been referred to DOJ, the IRS may issue summonses for the purpose of investigating a possible criminal offense.[30] Some taxpayers argued that, because the IRS issued the summons pursuant to a possible criminal investigation, it violated the IRC § 7602(d) restriction on issuing a summons after referring the matter to DOJ. However, the courts were careful to distinguish between a *referral* to the DOJ, which prevents the IRS from issuing a summons, and a *criminal investigation* by the IRS, which does not.[31] Additionally, the IRC § 7602(d) restriction on issuing a summons after DOJ referral applies only when the IRS has referred the taxpayer whose tax liabilities are under investigation to the DOJ. This restriction does not apply when summoning a third party whose own tax matter has been referred to the DOJ.[32]

Constitutional Arguments: Taxpayers asserted several unsuccessful constitutional arguments. For example, courts have long stated that taxpayers cannot use the Fourth Amendment as a defense against a third party summons.[33] Although the courts also routinely rejected blanket assertions of Fifth Amendment protection,[34] taxpayers may have valid Fifth Amendment claims regarding specific documents or testimony.[35] One court quashed the portion of an IRS summons requesting documents finding that portion of the

27 "*Prima facie*" means "at first sight, on first appearance but subject to further review or evidence." *Black's Law Dictionary* (9th ed. 2009).

28 *See, e.g., United States v. Cathcart*, 409 Fed. Appx. 74 (9th Cir. 2010), *aff'g* D.C. No. 2:07-cv-08395-GHK-SH (C.D. Cal. 2008); *Canatella v. United States*, 107 A.F.T.R.2d (RIA) 1690 (N.D. Cal. 2011); *United States v. Swanson Flo-Systems, Co.*, 107 A.F.T.R.2d (RIA) 2434 (D. Minn. 2011), *adopted by* 107 A.F.T.R.2d (RIA) 2438 (D. Minn. 2011).

29 730 F. Supp. 2d 1344 (S.D. Fla. 2010), *appeal dismissed* (11th Cir. May 23, 2011).

30 *See, e.g., Foust v. United States*, 107 A.F.T.R.2d (RIA) 2178 (N.D. Cal. 2011).

31 *See, e.g., Kern v. IRS*, 107 A.F.T.R.2d (RIA) 1894 (E.D. Mich. 2011), *adopting* 2007 U.S. Dist. LEXIS 99167 (E.D. Mich. 2007).

32 *Nova Benefit Plans, LLC v. Comm'r*, 107 A.F.T.R.2d (RIA) 1512 (D. Neb. 2011).

33 *Moyes v. United States*, 106 A.F.T.R.2d (RIA) 5980 (E.D. Cal. 2010) (citing *Donaldson v. United States*, 400 U.S. 517, 522 (1971)).

34 *United States v. Roe*, 421 Fed. Appx. 881 (10th Cir. 2011), *aff'g* 107 A.F.T.R.2d (RIA) 2013 (D. Colo. 2010), *motion to stay pending appeal denied by* 107 A.F.T.R.2d (RIA) 2280 (D. Colo. 2010); *United States/IRS v. Lanoie*, 403 Fed. Appx. 328 (10th Cir. 2010), *aff'g* 106 A.F.T.R.2d (RIA) 7213 (D.N.M. 2010).

35 *United States v. Shadley*, 106 A.F.T.R.2d (RIA) 5440 (E.D. Cal. 2010).

summons "extremely broad." The court then ordered the government to issue a narrower summons, limited to documents in which the taxpayer's possession was a foregone conclusion.[36] Fifth Amendment rights are not applicable to a taxpayer contesting a third party summons because the Fifth Amendment only protects against compelled self incrimination, not testimony by others.[37] Courts have also rejected taxpayers' arguments asserting a violation of the taxpayers' First Amendment rights

Privilege: Courts generally rejected blanket claims of attorney-client privilege. In *United States v. Richey*,[38] the Ninth Circuit reversed a decision by the district court holding that the attorney-client privilege protected the work file related to the appraisal of a conservation easement. The taxpayers were required to obtain this appraisal in order to claim a charitable deduction for the value of the easement. The Ninth Circuit found that any communication related to the appraisal was not made for the purpose of providing legal advice, but, instead, for the purpose of determining the value of the easement and thus not subject to the attorney-client privilege or the work-product doctrine. In *United States v. Trenk*,[39] the Third Circuit remanded the case back to the district court so that the taxpayer could argue that the crime-fraud exception to attorney-client privilege did not apply to certain documents.[40]

The identity of a taxpayer's client is not protected by the attorney-client privilege unless revealing such evidence would be "tantamount to [disclosing] a confidential communication."[41] Similarly, bank records pertaining to an attorney's client trust accounts are not protected by the attorney-client privilege.[42]

In addition to attorney-client privilege, taxpayers may use the tax practitioner privilege under IRC § 7525 or work-product privilege as defenses to summons enforcement. The tax practitioner privilege exists to the extent the communication would be considered privileged if it took place between a taxpayer and an attorney and its purpose was obtaining tax advice from a federally authorized tax practitioner.[43] The privilege does not, however, apply to communication in connection with the promotion of the direct or indirect participation

36 *United States v. Stevenson*, 107 A.F.T.R.2d (RIA) 1928 (D. Minn. 2011), *adopting in part, rejecting in part* 2010 U.S. Dist. LEXIS 142775 (D. Minn. 2010), *appeal dismissed* (8th Cir. July 7, 2011).

37 *Moyes v. United States*, 106 A.F.T.R.2d (RIA) 5980 (E.D. Cal. 2010).

38 632 F.3d 559 (9th Cir. 2011), *rev'g* 103 A.F.T.R.2d (RIA) 1228 (D. Idaho 2009).

39 385 Fed. Appx. 254 (3d Cir. 2010) *remanded to* 107 A.F.T.R.2d (RIA) 1633 (D.N.J. 2011) *adopted in part, rejected in part by* 107 A.F.T.R.2d (RIA) 1634 (D.N.J. 2011).

40 The crime-fraud exception may override the attorney-client privilege. The party seeking the exception must show that "(1) the client was committing or intending to commit a fraud or crime, and (2) the attorney-client communications were in furtherance of that alleged crime or fraud." *United States v. Trenk*, 385 Fed. Appx. 254, 258 (citation omitted) (citing *In re Grand Jury Subpoena*, 223 F.3d 213, 217 (3d Cir. 2000).

41 *Sears v. United States*, 392 Fed. Appx. 605 (9th Cir. 2010) (citing *United States v. Blackmun*, 72 F.3d 1418, 1424 (9th Cir. 1985).

42 *Gjerde v. United States*, 107 A.F.T.R.2d (RIA) 1798 (E.D. Cal. 2011), *adopted by* 2011 U.S. Dist. LEXIS 50793 (E.D. Cal. 2011).

43 IRC § 7525(a)(1). *See Pasadena Ref. Sys, Inc. v. United States*, 107 A.F.T.R.2d (RIA) 2300 (N.D. Tex. 2011), *adopted by* 107 A.F.T.R.2d (RIA) 2303 (N.D. Tex. 2011), *appeal dismissed* (5th Cir. Sept. 27, 2011) (applying attorney-client and tax practitioner privilege to communications between firm and its corporate client, but not to petitioner's internal documents).

of a taxpayer in any tax shelter.[44] Under the tax shelter exception, the tax practitioner privilege does not apply to any written communication between a federally authorized tax practitioner and "any person, any director, officer, employee, agent, or representative of the person, or any other person holding a capital or profits interest in the person" and "in connection with the promotion of the direct or indirect participation of the person in any tax shelter."[45] A tax shelter is defined as "a partnership or any other entity, any investment plan or arrangement, or any other plan or arrangement, if a significant purpose of such partnership, entity, plan or arrangement is the avoidance or evasion of Federal income tax."[46]

The IRS prevailed in 38 of the 44 cases involving motions to quash summonses, in part because the courts lacked jurisdiction to hear the cases. The courts dismissed these cases for lack of jurisdiction for the following reasons:

Lack of Jurisdiction Due to Procedural Requirements: The United States is immune from suit unless Congress has expressly waived its sovereign immunity.[47] Since a motion to quash service of an IRS summons is a suit against the United States, a court has jurisdiction only when Congress has expressly waived sovereign immunity.[48] When a taxpayer wishes to challenge an IRS summons issued to a third party, federal law sets forth the exclusive method by which a taxpayer may proceed.[49] A taxpayer may initiate a proceeding in the U.S. District Court in which the third party resides, no later than 20 days from the date the notice of summons was given.[50] Accordingly, the courts have strictly construed IRC § 7609 when determining if sovereign immunity has been waived.[51] For example, a court dismissed a *pro se* taxpayer's motion to quash for lack of jurisdiction because the taxpayer filed the motion nine days after the 20-day limitation had expired.[52] Another court held that it lacked subject matter jurisdiction over a petition to quash a third-party tax summons, where the third party neither resided nor was found within jurisdiction of the district court.[53] Courts have also dismissed motions to quash because the IRS had not yet attempted to enforce an administrative summons.[54]

Lack of jurisdiction due to notice requirements: Courts denied several motions to quash because the parties contesting the summonses were not entitled to notice of the summonses due to one of the IRC § 7609(c) exceptions, and therefore lacked standing to contest

44 IRC § 7525(b).

45 *Id*.

46 IRC § 6662(d)(2)(C)(ii).

47 *U.S. v. Dalm*, 494 U.S. 596, 608 (1990).

48 *Kasian v. IRS*, 106 A.F.T.R.2d (RIA) 7274 (D. Ariz. 2010).

49 IRC § 7609(b)(2)(A). *See Felt v. Mondfrans*, 107 A.F.T.R.2d (RIA) 621 (D. Utah 2011).

50 IRC § 7609(b)(2)(A); *Williams v. United States*, 107 A.F.T.R.2d (RIA) 1453 (N.D. Tex. 2011), *appeal reinstated* (5th Cir. June 20, 2011).

51 *Ellis v. Comm'r*, 107 A.F.T.R.2d (RIA) 1450 (S.D. Cal. 2011).

52 *Id.*

53 *Deems v. United States*, 2010 U.S. Dist. LEXIS 141127 (S.D. Ga. 2010), *adopted by* 2011 U.S. Dist. LEXIS 11706 (S.D. Ga. 2011)

54 *Woodruff v. U.S. Dept. of Treas.*, 106 A.F.T.R.2d (RIA) 5105 (D. Utah 2010).

the validity of the summonses.[55] In *Nelson v. IRS*,[56] for instance, the court dismissed a taxpayer's challenge to a summons issued to his corporation because the taxpayer, as an individual, lacked standing to bring such a challenge.

CONCLUSION

The IRS may issue a summons to obtain information needed to determine whether a tax return is correct or if a return should have been filed, to ascertain a taxpayer's tax liability, or collect a liability.[57] Accordingly, the IRS may request documents and testimony from taxpayers who have failed to provide that information voluntarily. Taxpayers and third parties rarely succeed in contesting IRS summonses due to the significant burden of proof and strict procedural requirements. It appears that as the IRS employs a more aggressive enforcement policy, it will continue to rely heavily on the summons enforcement tool, and the courts will continue to see these cases.

55 IRC § 7609(c)(2)(D)(i); *Kirkland v. IRS*, 106 A.F.T.R.2d (RIA) 6962 (D. Nev. 2010), *adopting* 106 A.F.T.R.2d (RIA) 6960 (D. Nev. 2010).

56 107 A.F.T.R.2d (RIA) 403 (E.D. Pa. 2011).

57 IRC § 7602(a).

MLI #2

Trade or Business Expenses Under Internal Revenue Code Section 162 and Related Sections

SUMMARY

The deductibility of trade or business expenses is perennially among the ten Most Litigated Issues. We identified 107 cases involving a trade or business expense issue that were litigated between June 1, 2010, and May 31, 2011. The courts affirmed the IRS position in the majority (approximately 53 percent) of cases, while taxpayers prevailed about seven percent of the time.[1] The remaining cases resulted in split decisions.

PRESENT LAW

Internal Revenue Code (IRC or the "Code") § 162 allows deductions for ordinary and necessary trade or business expenses paid or incurred during the course of a taxpayer's taxable year. Rules regarding the practical application of IRC § 162 have evolved largely from case law and administrative guidance. The IRS, the Department of the Treasury, Congress, and the courts continue to provide legal guidelines about whether a taxpayer is entitled to certain deductions. The cases analyzed for this report illustrate that this process is ongoing and involves the analysis of facts and circumstances. When a taxpayer seeks judicial review of the IRS's determination of a tax liability stemming from the deductibility of a particular trade or business expense, the courts must often address a series of questions, including those discussed below.

What is a trade or business expense under IRC § 162?

Although "trade or business" is one of the most widely used terms in the IRC, neither the Code nor the Treasury Regulations provide a definition.[2] The definition of a "trade or business" comes from common law, where the concepts have been developed and refined by the courts.[3] The Supreme Court has interpreted "trade or business" for purposes of IRC § 162 to mean an activity conducted "with continuity and regularity" and with the primary purpose of earning income or making a profit.[4]

What is an ordinary and necessary expense?

IRC § 162(a) requires a trade or business expense to be both "ordinary and necessary" in relation to the taxpayer's trade or business in order to be deductible. In *Welch v. Helvering*, the Supreme Court stated that the words "ordinary" and "necessary" have different meanings, both of which must be satisfied for a taxpayer to benefit from the deduction.[5] The

1 The IRS prevailed in full in 57 of the 107 cases, while taxpayers prevailed in full in only eight cases.

2 In 1986, the term "trade or business" appeared in at least 492 subsections of the Code and 664 Treasury Regulations. *See* F. Ladson Boyle, *What Is a Trade or Business?* 39 Tax Law. 737 (Summer 1986).

3 Carol Duane Olson, *Toward a Neutral Definition of "Trade or Business" in the Internal Revenue Code*, 54 U. Cin. L. Rev. 1199 (1986).

4 *Comm'r v. Groetzinger*, 480 U.S. 23, 35 (1987).

5 290 U.S. 111, 113 (1933).

Supreme Court describes an "ordinary" expense as customary or usual and of common or frequent occurrence in the taxpayer's trade or business.[6] The Court describes a "necessary" expense as one that is appropriate and helpful for development of the business.[7]

Common law also requires that in addition to being ordinary and necessary, the amount of the expense must be reasonable for the expense to be deductible. In *Commissioner v. Lincoln Electric Co.*, the Court of Appeals for the Sixth Circuit held "the element of reasonableness is inherent in the phrase 'ordinary and necessary.' Clearly it was not the intention of Congress to automatically allow as deductions operating expenses incurred or paid by the taxpayer in an unlimited amount."[8]

Is the expense a currently deductible expense or a capital expenditure?

A currently deductible expense is an ordinary and necessary expense that is paid or incurred during the taxable year in the course of carrying on a trade or business.[9] No deductions are allowed for the cost of acquisition, construction, improvement, or restoration of an asset that is expected to last more than one year.[10] Instead, capital expenditures may be subject to amortization, depletion, or depreciation over the useful life of the property.[11]

Determining whether to deduct expenditures under IRC § 162(a) or to capitalize them under IRC § 263 is a question of fact. Courts have adopted a case-by-case approach to applying principles of capitalization and deductibility.[12]

When is an expense paid or incurred during the taxable year, and what proof is there that the expense was paid?

IRC § 162(a) requires an expense to be "paid or incurred during the taxable year" to be deductible. The Code also requires a taxpayer to maintain books and records that substantiate income, deductions, and credits—including adequate records to substantiate deductions claimed as trade or business expenses.[13] If a taxpayer cannot substantiate exact amounts of deductions by documentary evidence (*e.g.*, invoice, paid bill, or canceled check) but can establish nonetheless that he or she had some business expenditures, the courts may employ the *Cohan* rule to grant the taxpayer a reasonable amount of deductions.

The *Cohan* rule is one of "indulgence" established in 1930 by the Court of Appeals for the Second Circuit in *Cohan v. Commissioner.*[14] The court held that the taxpayer's business

6 *Deputy v. du Pont*, 308 U.S. 488, 495 (1940) (citation omitted).

7 *Comm'r v. Tellier*, 383 U.S. 687, 689 (1966) (citations omitted).

8 176 F.2d 815, 817 (6th Cir. 1949), *cert. denied*, 338 U.S. 949 (1950).

9 IRC § 162(a).

10 IRC § 263. *See also INDOPCO, Inc. v. Comm'r*, 503 U.S. 79 (1992).

11 IRC § 167.

12 *See PNC Bancorp, Inc. v. Comm'r*, 212 F.3d 822 (3d Cir. 2000); *Norwest Corp. v. Comm'r*, 108 T.C. 265 (1997).

13 IRC § 6001. *See also* Treas. Reg. §§ 1.6001-1 and 1.446-1(a)(4).

14 39 F.2d 540 (2d Cir. 1930).

expense deductions were not adequately substantiated, but "the [Tax Court] should make as close an approximation as it can, bearing heavily if it chooses upon the taxpayer whose inexactitude is of his own making. But to allow nothing at all appears to us inconsistent with saying that something was spent."[15]

The *Cohan* rule may not be utilized in situations where IRC § 274(d) applies. Section 274(d) provides that unless a taxpayer complies with strict substantiation rules, no deductions are allowable for:

1. Travel expenses;
2. Entertainment, amusement, or recreation expenses;
3. Gifts; or
4. Certain "listed property."[16]

A taxpayer must substantiate a claimed IRC § 274(d) expense with adequate records or sufficient evidence to corroborate the taxpayer's statement establishing the amount, time, place, and business purpose of the expense.[17]

Who has the burden of proof in a substantiation case?

Generally, the taxpayer bears the burden of proving that he or she is entitled to the business expense deductions and the IRS's proposed determination of tax liability is incorrect.[18] IRC § 7491(a) provides that the burden of proof shifts to the IRS when a taxpayer:

- Introduces credible evidence with respect to any factual issue relevant to ascertaining the taxpayer's liability;
- Complies with the requirements to substantiate deductions;
- Maintains all records required under the Code; and
- Cooperates with reasonable requests by the IRS for witnesses, information, documents, meetings, and interviews.[19]

ANALYSIS OF LITIGATED CASES

Trade or business expenses have been one of the ten Most Litigated Issues since the first edition of the National Taxpayer Advocate's Annual Report to Congress in 1998.[20] In this

15 39 F.2d 540, 544 (2d Cir. 1930).

16 "Listed property" means any passenger automobile; any property used as a means of transportation; any property of a type generally used for purposes of entertainment, recreation, or amusement; any computer or peripheral equipment (except when used exclusively at a regular business establishment and owned or leased by the person operating such establishment); and any other property specified by regulations. IRC § 280F(d)(4)(A) and (B).

17 Treas. Reg. § 1.274-5T(b).

18 *See Welch v. Helvering*, 290 U.S. 111, 115 (1933) (citations omitted) and U.S. Tax Court Rules of Practice and Procedure, Rule 142(a).

19 IRC § 7491(a)(1) applies to a court proceeding in which the examination started after July 22, 1998, and if there is no examination, to the taxable period or events which started or occurred after July 22, 1998.

20 *See* National Taxpayer Advocate 1998-2010 Annual Reports to Congress.

year's report, we reviewed 107 cases involving trade or business expense issues that were litigated in federal courts from June 1, 2010, through May 31, 2011. Table 2 in Appendix III contains a list of the main issues in those cases. Table 3.2.1 (below) categorizes the main issues raised by taxpayers. Cases involving more than one issue are included in more than one category.

TABLE 3.2.1, Trade or Business Expense Issues in Cases Reviewed

Issue	Type of Taxpayer	
	Individual	Business (including sole proprietorships)
Substantiation of expenses, including application of the *Cohan* rule[21]	24	55
Profit objective[22]	0	6
Ordinary and necessary trade or business expenses[23]	2	3
Personal vs. business expenses[24]	4	9
Business expenses vs. capital expenditures[25]	0	1
Education expenses[26]	0	3
Did the taxpayer establish the carrying on of a trade or business?	0	7
Gambling expenses[27]	0	2

Approximately 71 percent of the taxpayers litigating trade or business deduction issues represented themselves (*pro se*). Taxpayers represented by counsel fared noticeably better than their *pro se* counterparts. Taxpayers with representation received full or partial relief in approximately 58 percent of litigated cases (18 of 31), while *pro se* taxpayers received partial relief in approximately 34 percent of litigated cases (26 of 76). Only four *pro se* taxpayers received full relief.

21 IRC § 6001 and Treas. Reg. § 1.6001-1 require a taxpayer to maintain books and records that substantiate income, deductions, and credits. Treas. Reg. § 1.162-17 provides guidance regarding maintaining adequate records to substantiate deductions claimed as trade or business expenses in connection with the performance of services as an employee. The *Cohan* rule allows courts to estimate certain expenses not properly substantiated. *See Cohan v. Comm'r*, 39 F.2d 540, 544 (2d Cir. 1930).

22 IRC § 183(a) provides that no deduction attributable to an activity engaged in by an individual or an S corporation shall be allowed if such activity is not engaged in for profit.

23 IRC § 162(a) allows deductions for ordinary and necessary trade or business expenses paid or incurred during the taxable year.

24 IRC § 262(a) provides that personal, living, and family expenses are generally not deductible.

25 Under IRC § 263(a), generally no deduction is allowed for capital expenditures, where capital expenditures include any amount paid for permanent improvements made to increase the value of any property. Under IRC § 195(a), start-up expenditures generally cannot be deducted unless a taxpayer makes an expense/amortization election according to IRC § 195(b). Taxpayers who make the election may generally deduct up to $5,000 of start-up expenditures in the tax year in which an active trade of business begins and amortize any excess over 180 months. The $5,000 deduction is reduced by a dollar for every dollar that total start-up expenditures exceed $50,000. *See* IRC § 195(b)(1)(A), (B).

26 Treas. Reg. § 1.162-5(a) provides that a taxpayer may deduct educational expenses under IRC § 162(a) if the education maintains or improves skills required by the individual in his or her employment or other trade or business, or meets the express requirements of the individual's employer.

27 IRC § 165(d) provides that "[l]osses from wagering transactions shall be allowed only to the extent of the gains from such transactions."

Individual Taxpayers

None of the 28 decisions involving individual taxpayers (where the term "individual" excludes a sole proprietorship) was issued as a regular opinion of the Tax Court.[28] Of the 28 cases litigated by individual taxpayers, all but 11 appeared *pro se*. Two individual taxpayers received full relief, and 13 of the individual cases resulted in split decisions. The most prevalent issue was the substantiation of claimed trade or business expense deductions, which appeared in 24 cases. For example, in *Forrest v. Commissioner*,[29] the Tax Court denied several deductions claimed by the taxpayer for lack of substantiation, including telephone and litigation fees, meals, and automobile expenses. With respect to the telephone and litigation fees, the court found the taxpayer had not properly substantiated the items and there was not sufficient evidence to provide an estimate under the *Cohan* rule. The meals and automobile expenses were denied because the Tax Court found the taxpayer had not complied with the strict substantiation requirements of IRC § 274(d).

Even in cases where a taxpayer maintains records to substantiate a deduction, the taxpayer still has to prove that the expense in question was paid during the tax year. For example, in *Pendergraft v. United States*,[30] the issue was whether the taxpayers, a husband and wife, had properly substantiated commission expenses paid in their furniture business. Although the taxpayers kept a log to record their expenses, the IRS maintained that they had not proven the disputed fees were actually paid for services rendered, and so they could not be deducted as business expenses. The taxpayers and the government filed motions for summary judgment, and the court concluded that there was not sufficient evidence for either party to carry its burden of demonstrating that summary judgment was appropriate, and therefore denied each party's motion.

A prevalent issue in cases involving individual taxpayers was expenses for travel to participate in employment away from home. IRC § 162(a)(2) allows a taxpayer to deduct ordinary and necessary travel expenses, including meals and lodging, paid or incurred while away from home in pursuit of a trade or business. The word "home" for this purpose means a taxpayer's "tax home."[31] In general, an individual's tax home is the vicinity of his or her principal place of employment, not his or her residence, if the residence is different from the principal place of employment.[32] An exception to the general rule is where a taxpayer accepts temporary, rather than indefinite, employment away from his or her personal

28 Tax Court decisions fall into three categories: regular decisions, memorandum decisions, and small tax case ("S") decisions. The regular decisions of the Tax Court include cases which have some new or novel point of law, or in which there may not be general agreement, and therefore have the most legal significance. In contrast, memorandum decisions generally involve fact patterns within previously settled legal principles and therefore are not as significant. Finally, "S" case decisions (for disputes involving $50,000 or less) are not appealable and, thus, have no precedential value. *See* IRC § 7463(b). *See also* U.S. Tax Court Rules of Practice and Procedure, Rules 170-175. All but nine of the cases involving individual taxpayers (excluding sole proprietorships) were "S" cases.

29 T.C. Memo. 2010-263.

30 94 Fed. Cl. 79 (2010), *appeal dismissed*, 2011 U.S. App. LEXIS 10987 (Fed. Cir. Apr. 27, 2011).

31 *Mitchell v. Comm'r*, 74 T.C. 578, 581 (1980) (citations omitted).

32 *Id*.

residence; in that situation, the taxpayer's residence may be the "tax home."[33] Several related cases involved Filipino teachers hired through a State Department exchange program.[34] In these cases, the deductions for living expenses were denied because the employment was determined to be "indefinite" rather than "temporary."[35]

Business Taxpayers

Seventy-nine cases involved business taxpayers, who had less success than individual taxpayers in obtaining a favorable outcome. Business taxpayers received full or partial relief in approximately 42 percent of cases (33 of 79) compared to 54 percent for individuals (15 of 28). In other words, individual taxpayers were approximately 28 percent more likely than business taxpayers to obtain full or partial relief. In fewer than half of the favorably decided cases, business taxpayers were represented by counsel.

As with individual taxpayers, substantiation of expenses was by far the most prevalent issue,[36] and in some instances the courts denied business taxpayers' deductions for failure to substantiate.[37] On the other hand, courts allowed business taxpayers' trade or business expense deductions that were properly substantiated.[38] There were also business cases where the courts allowed the use of the *Cohan* rule to estimate expenses when documentation was present but incomplete.[39]

Another common question for business taxpayers was whether the deductions were attributable to a legitimate "for profit" activity constituting an actual trade or business. In *Dennis v. Commissioner*,[40] the taxpayers, a husband and wife, raised horses at a substantial financial loss. However, the taxpayers kept separate books and accounts for the horse breeding activity, and took steps to reduce costs over time. Even though the horse breeding activity did not actually produce a profit, it was engaged in with that aim in mind, and so qualified as a "trade or business" eligible for deductions under IRC § 162(a). Conversely, in *DKD Enterprises, Inc. v. Commissioner*,[41] the taxpayers (two business partners) were found to have raised cats for personal pleasure rather than profit. The taxpayers expended large amounts of time and money on the activity that had previously been a hobby, but sold very few cats to offset those costs.

33 *Peurifoy v. Comm'r*, 358 U.S. 59, 60 (1958).

34 *Malazarte v. Comm'r*, T.C. Summ. Op. 2010-168; *Abiog v. Comm'r*, T.C. Summ. Op. 2010-166; *Samaco v. Comm'r*, T.C. Summ. Op. 2010-165; *Ucol-Cobaria v. Comm'r*, T.C. Summ. Op. 2010-162. All of these cases were "S" cases, with no precedential value, but they do illustrate the confusion taxpayers face in determining what is their "tax home."

35 For purposes of IRC § 162(a)(2), the taxpayer is not treated as being temporarily away from home if the period of employment exceeds one year.

36 Substantiation of expenses issue appeared in 55 of 79 cases involving business taxpayers.

37 *See, e.g., Coury v. Comm'r*, T.C. Memo. 2010-132; *Griffin v. Comm'r*, T.C. Memo. 2010-252.

38 *See, e.g., Stewart v. Comm'r*, T.C. Memo. 2010-184.

39 *See, e.g., Jenkins v. Comm'r*, T.C. Memo. 2010-251; *Stroff v. Comm'r*, T.C. Memo. 2011-80.

40 T.C. Memo. 2010-216.

41 T.C. Memo. 2011-29, *appeal docketed*, No. 11-2526 (8th Cir. July 11, 2011).

One significant development in the trade or business arena involved IRC § 165. Typically there are no limits on ordinary and necessary business deductions, but IRC § 165(d) limits deductions for gambling losses to the extent of winnings. Until recently, the Tax Court had interpreted this limitation as applying to both wagering losses and gambling expenses other than wagering losses (*e.g.*, cost of traveling to a casino).[42] Earlier this year, however, the Tax Court reconsidered the issue in *Mayo v. Commissioner*[43] and reached a different result with regard to gambling expenses other than wagering losses. In *Mayo*, the taxpayer was a professional gambler and argued that the limitation of IRC § 165(d) only applied to his wagering losses and did not encompass the other business expenses he incurred in carrying on his professional gambling activities, and as a result, those other business expenses should be fully deductible under IRC § 162. The Tax Court held that expenses in support of professional gambling that were not made as wagers could be deducted under IRC § 162(a) without the limitation of § 165(d), while actual wagering expenses are still subject to the § 165(d) limit.

Other business cases of interest included *Fresenius Medical Care Holdings, Inc. v. United States*,[44] where a district court held that civil damages paid to the government in settlement of a violation of the False Claims Act did not qualify as ordinary and necessary business expenses under IRC § 162(a), and *Media Space, Inc. v. Commissioner*,[45] in which the Tax Court held that forbearance payments renegotiated yearly did not constitute a reacquisition of stock under IRC § 162(k), and therefore were deductible as ordinary and necessary business expenses and not prohibited by IRC § 162(k).[46]

CONCLUSION

Taxpayers continue to challenge the IRS's denials of trade or business deductions. From June 1, 2010, through May 31, 2011, those taxpayers who were represented fared significantly better than those who represented themselves. While the IRS generally prevailed, the courts did not always favor the IRS's application of the law to the taxpayers' facts and circumstances. Thus, the issue of what constitutes an allowable trade or business expense remains open to interpretation and is highly fact-specific.

Many of these cases demonstrate taxpayer confusion over the legal requirements, especially those in IRC § 274(d) relating to strict substantiation of listed items. The IRS can minimize litigation by providing clear guidance on the deductibility of trade or business expenses. Through education, outreach, and collaboration with stakeholders, the IRS can help taxpayers understand what trade or business deductions are allowable and how to substantiate them. The IRS will encourage compliance and minimize litigation by helping self-employed and small business taxpayers understand these requirements.

42 *See Offutt v. Comm'r*, 16 T.C. 1214 (1951) (construing § 23(h) of the 1939 Code, a predecessor of current IRC§ 165(d) with identical language).

43 136 T.C. 81 (2011)

44 106 A.F.T.R.2d (RIA) 5028 (D. Mass. 2010).

45 135 T.C. 424 (2010), appeal docketed (2nd Cir. May 24, 2011).

46 IRC § 162(k) prohibits a deduction for an amount paid or incurred by a corporation in connection with a reacquisition of its stock.

MLI #3

Appeals From Collection Due Process Hearings Under Internal Revenue Code Sections 6320 and 6330

SUMMARY

Collection Due Process (CDP) hearings were created by the IRS Restructuring and Reform Act of 1998 (RRA 98).[1] CDP hearings provide taxpayers with an independent review by the IRS Office of Appeals (Appeals) of the decision to file a Notice of Federal Tax Lien (NFTL) or the IRS's proposal to undertake a levy action. In other words, a CDP hearing gives taxpayers an opportunity for a meaningful hearing before the IRS issues its first levy or immediately after it files its first lien with respect to a particular tax liability. At the hearing, the taxpayer has the statutory right to raise any relevant issues related to the unpaid tax, the lien, or the proposed levy, including the appropriateness of the collection action, collection alternatives, spousal defenses, and under certain circumstances, the underlying tax liability.[2]

Taxpayers have the right to judicial review of Appeals' determinations provided that they timely request the CDP hearing and timely petition the United States Tax Court.[3] Generally, the IRS suspends levy actions during a levy hearing and any judicial review that may follow.[4]

Since 2003, CDP has been one of the federal tax issues most frequently litigated in the federal courts and analyzed for the National Taxpayer Advocate's Annual Report to Congress. The trend continues this year, with the courts issuing 89 opinions during the review period of June 1, 2010, through May 31, 2011.[5] Of these 89 cases, taxpayers prevailed in full in three and in part in three others (approximately seven percent).[6] Of the six cases in which the courts found for the taxpayer in whole or in part, the taxpayers appeared *pro se* (without counsel) in three cases,[7] and were represented in the three others.[8] The cases discussed below demonstrate that CDP serves an important function by providing taxpayers with a forum to raise legitimate issues before the IRS deprives them of property. Many of these decisions provide guidance on substantive issues. Where taxpayers attempted to use the

1 RRA 98, Pub. L. No. 105-206, § 3401, 112 Stat. 685, 746 (1998).

2 Internal Revenue Code (IRC) §§ 6320(c) (lien) and 6330(c) (levy). IRC § 6320(c) generally requires Appeals to follow the levy hearing procedures under IRC § 6330 for the conduct of the lien hearing, the review requirements, and the balancing test.

3 IRC § 6330(d) (setting forth the time requirements for obtaining judicial review of Appeals' determination); IRC §§ 6320(a)(3)(B) and 6330(a)(3)(B) (setting forth the time requirements for requesting a CDP hearing for lien and levy matters, respectively).

4 IRC § 6330(e)(1) provides that generally, levy actions are suspended during the CDP process (along with a corresponding suspension in the running of the limitations period for collecting the tax). However, IRC § 6330(e)(2) allows the IRS to resume levy actions during judicial review upon a showing of "good cause," if the underlying tax liability is not at issue.

5 For a list of all of the cases reviewed, see Appendix III, *infra*.

6 *Byk v. Comm'r*, T.C. Summ. Op. 2010-137, *Dalton v. Comm'r*, 135 T.C. 393 (2010), *appeal docketed* (1st Cir. Oct. 12, 2011), and *Alessio Azzari, Inc. v. Comm'r*, 136 T.C. 178 (2011).

7 *Byk v. Comm'r*, T.C. Summ. Op. 2010-137, *Malone v. Comm'r*, T.C. Summ. Op. 2011-24, and *Thornberry v. Comm'r*, 136 T.C. 356 (2011).

8 *Dalton v. Comm'r*, 135 T.C. 393 (2010), *appeal docketed* (1st Cir. Oct. 12, 2011), *Orian v. Comm'r*, T.C. Memo. 2010-234, and *Alessio Azzari, Inc. v. Comm'r*, 136 T.C. 178 (2011).

process inappropriately, courts imposed sanctions or warned taxpayers that they might face sanctions in the future.

PRESENT LAW

Current law provides taxpayers an opportunity for independent review of an NFTL filed by the IRS, or of a proposed levy action.[9] As noted above, the purpose of CDP rights is to give taxpayers adequate notice of IRS collection activity and a meaningful hearing before the IRS deprives them of property.[10] The hearing allows taxpayers an opportunity to raise issues relating to the collection of the tax liability, including:

- Appropriateness of collection actions;[11]
- Collection alternatives such as an installment agreement (IA), offer in compromise (OIC), posting a bond, or substitution of other assets;[12]
- Appropriate spousal defenses;[13]
- The existence or amount of the underlying tax liability, but only if the taxpayer did not receive a notice of deficiency or otherwise have an opportunity to dispute the liability;[14] and
- Any other relevant issue relating to the unpaid tax, the NFTL, or the proposed levy.[15]

A taxpayer cannot raise an issue considered at a prior administrative or judicial hearing if the individual participated meaningfully in that hearing or proceeding.[16]

Procedural Collection Due Process Requirements

The IRS must provide a CDP notice to the taxpayer after it has filed the first NFTL or generally before its first intended levy for the particular tax and tax period.[17] The IRS must provide the notice not more than five business days after the day of filing the lien notice, or at

9 IRC §§ 6320 and 6330. *See* RRA 98, Pub. L. No. 105-206, § 1001(a), 112 Stat. 685 (1998).

10 Prior to RRA 98, the U.S. Supreme Court had held that a post-deprivation hearing was sufficient to satisfy due process concerns in the tax collection arena. *See U.S. v. National Bank of Commerce*, 472 U.S. 713, 719-722 (1985); *Phillips v. Comm'r*, 283 U.S. 589, 595-601 (1931).

11 IRC § 6330(c)(2)(A)(ii).

12 IRC § 6330(c)(2)(A)(iii).

13 IRC § 6330(c)(2)(A)(i).

14 IRC § 6330(c)(2)(B).

15 IRC § 6330(c)(2)(A); Treas. Reg. §§ 301.6320-1(e) and 301.6330-1(e).

16 IRC § 6330(c)(4).

17 IRC § 6330(f) permits the IRS to levy without first giving a taxpayer a CDP notice in the following situations: the collection of tax is in jeopardy, a levy was served on a state to collect on a state tax refund, the levy is a disqualified employment tax levy; or the levy was served on a federal contractor. A disqualified employment tax levy is any levy to collect employment taxes for any taxable period if the person subject to the levy (or any predecessor thereof) requested a CDP hearing with respect to unpaid employment taxes arising in the most recent two-year period before the beginning of the taxable period with respect to which the levy is served. IRC § 6330(h). The federal contractor levy exception was recently added to the exceptions found at IRC § 6330(f). *See* Pub. L. No. 111-240 § 2104(a), 124 Stat. 2504, 2565 (2010).

least 30 days before the day of the proposed levy.[18] In a lien filing, the notice must inform the taxpayer of his or her right to request a CDP hearing within a 30-day period, which begins on the day after the end of the five-business-day period after the filing of the NFTL.[19] In the case of a levy, the notice must inform the taxpayer of his or her right to request a hearing within the 30-day period beginning on the day after the date on the CDP notice.[20]

Requesting a CDP Hearing

Under both lien and levy procedures, the taxpayer must return a signed and dated written request for a CDP hearing within the applicable period.[21] Taxpayers who fail to timely request a hearing will be afforded an "equivalent hearing," which is similar to a CDP hearing, but without judicial review.[22] The Code and regulations require taxpayers to provide their reasons for requesting a hearing. The regulations ask taxpayers to use Form 12153, *Request for a Collection Due Process or Equivalent Hearing*. Failure to provide the basis for the hearing may result in denial of a face-to-face hearing.[23] Taxpayers must request an equivalent hearing within the one-year period beginning the day after the five-business-day period following the filing of the NFTL, or in levy cases, within the one-year period beginning the day after the date of the CDP notice. [24]

Conduct of a CDP Hearing

The IRS generally will suspend levy action throughout a CDP hearing involving intent to levy, unless it determines the collection of tax is in jeopardy, the collection resulted from a levy on a state tax refund, or the IRS has served a disqualified employment tax levy or a federal contractor levy.[25] The IRS also suspends collection activity throughout any judicial review of Appeals' determination, unless the underlying tax liability is not at issue and the IRS can demonstrate to the court good cause to resume collection activity.[26]

CDP hearings are informal. When a taxpayer requests a CDP hearing with respect to both a lien and a proposed levy, Appeals will attempt to conduct one hearing.[27] Courts have

18 IRC § 6320(a)(2) or § 6330(a)(2). The CDP notice can be provided to the taxpayer in person, left at the taxpayer's residence or dwelling, or sent by certified or registered mail (return receipt requested) to the taxpayer's last known address.

19 IRC § 6320(a)(3)(B); Treas. Reg. § 301.6320-1(b)(1).

20 *Id*.

21 IRC §§ 6330(a)(3)(B) and 6320(a)(3)(B); Treas. Reg. §§ 301.6320-1(c)(2) A-C1(ii) and 301.6330-1(c)(2) A-C1(ii).

22 Treas. Reg. §§ 301.6320-1(i)(2) Q&A-I16 and 301.6330-1(i)(2) Q&A-I16; *Orum v. Comm'r*, 123 T.C. 1 (2004); *Moorhous v. Comm'r*, 116 T.C. 263 (2001).

23 IRC §§ 6320(b)(1) and 6330(b)(1); Treas. Reg. §§ 301.6320-1(c)(2) A-C1, 301.6330-1(c)(2) A-C1, 301.6320-1(d)(2) A-D8 and 301.6330-1(d)(2) A-D8. The regulations require the IRS to provide the taxpayer an opportunity to "cure" any defect in a timely filed hearing request, including providing a reason for the hearing. Form 12153 includes space for the taxpayer to identify collection alternatives that he or she wants Appeals to consider, as well as examples of common reasons for requesting a hearing. *See* IRS Form 12153, *Request for Collection Due Process or Equivalent Hearing* (Mar. 2011).

24 Treas. Reg. §§ 301.6320-1(i)(2) A-17 and 301.6330-1(i)(2) A-17.

25 IRC § 6330(e)(1) provides the general rule for suspending collection activity. IRC § 6330(f) provides that if collection of the tax is deemed in jeopardy, the collection resulted from a levy on a state tax refund, or the IRS served a disqualified employment tax levy or a federal contractor levy, IRC § 6330 does not apply, except to provide the opportunity for a CDP hearing within a reasonable time after the levy. *See Clark v. Comm'r*, 125 T.C. 108, 110 (2005) (citing *Dora v. Comm'r*, 119 T.C. 356 (2002)).

26 IRC §§ 6330(e)(1) and (e)(2).

27 IRC § 6320(b)(4).

determined that a CDP hearing need not be face-to-face but can take place by telephone or by correspondence.[28] The Office of Appeals presumptively establishes telephonic CDP hearings, so it is incumbent on the taxpayer to request a face-to-face session.[29] The CDP regulations state that taxpayers who provide non-frivolous reasons for opposing the IRS collection action will generally be offered but not guaranteed face-to-face conferences.[30] Taxpayers making frivolous arguments are not entitled to face-to-face conferences.[31] A taxpayer will not be granted a face-to-face conference concerning a collection alternative, such as an IA or OIC, unless other taxpayers would be eligible for the alternative under similar circumstances.[32] For example, the IRS will not grant a face-to-face conference to a taxpayer who proposes an OIC as the only issue to be addressed but has failed to file all required returns and is therefore ineligible for an offer. Appeals may, however, at its discretion, grant a face-to-face conference to explain the eligibility requirements for a collection alternative.[33]

The CDP hearing is to be held by an impartial officer from Appeals, who is barred from engaging in *ex parte* communication with IRS employees about the substance of the case and who has had "no prior involvement" in the case.[34] In addition to addressing the issues raised by the taxpayer, the Appeals Officer must verify that the IRS has met the requirements of all applicable laws and administrative procedures.[35] In its determination, Appeals must weigh the issues raised by the taxpayer and decide whether the proposed collection

28 *Katz v. Comm'r*, 115 T.C. 329, 337-38 (2000) (finding that telephone conversations between the taxpayer and the Appeals Officer constituted a hearing as provided in IRC § 6320(b)). Treas. Reg. §§ 301.6320-1(d)(2) A-D6, A-D8 and 301.6330-1(d)(2) A-D6, A-D8.

29 *See, e.g.*, Appeals Letter 4141 (rev. Oct. 2011) acknowledges the taxpayer's request for a CDP hearing and provides information on the availability of a face-to-face conference. The National Taxpayer Advocate has repeatedly raised concerns regarding the inadequacy of Appeals' discussion on how to request a face-to-face hearing and the location of this discussion in the letter. *See* National Taxpayer Advocate 2005 Annual Report to Congress, *Appeals Campus Centralization*, at 136; National Taxpayer Advocate 2009 Annual Report to Congress, *Appeals' Efficiency Initiatives Have Not Improved Customer Satisfaction or Confidence in Appeals*, at 70, and National Taxpayer Advocate 2010 Annual Report to Congress, *The IRS's Failure To Provide Timely and Adequate Collection Due Process Hearings May Deprive Taxpayers of an Opportunity To Have Their Cases Fully Considered*, at 128. In response to taxpayers' and their representatives' dissatisfaction with the Appeal's CDP hearings, including the difficulty of receiving a face-to-face hearing, TAS worked with Appeals to test the use of "telepresence" or "virtual" face-to-face hearings. TAS began running this test in 2011 between two Low Income Taxpayer Clinics (LITCs) and two campus Appeals units.

30 Treas. Reg. 301.6320-1(d)(2) A-D8.

31 Treas. Reg. §§ 301.6320-1(d)(2) A-D7 and 301.6330-1(d)(2) A-D7. Appeals Letter 3846 (rev. July 2008) provides that to be allowed a face-to-face conference about collection alternatives the taxpayer must have filed all required returns.

32 Treas. Reg. §§ 301.6320-1(d)(2) A-D8 and 301.6330-1(d)(2) A-D8.

33 *Id*. *See also* National Office Program Manager Technical Advice, PMTA-2010-0153 (Mar. 23, 2010). Appeals Interim Guidance, *Face-to-Face Collection Due Process Conferences in the Absence of a Collection Information Statement* (Oct. 12, 2010), *available at* http://www.irs.gov/pub/irs-utl/ap-08-1010-06.pdf. The guidance addresses how Appeals should handle a request for a face-to-face conference when the taxpayer has not produced the collection information necessary to evaluate the collection alternative. Consistent with the regulations, the guidance states Appeals should "[g]rant a face-to-face request if it is necessary to explain the requirements for becoming eligible for a collection alternative. Taxpayers may be better able to understand the requirements for becoming eligible for a collection alternative if they are able to meet with an Appeals employee face-to-face. Examples include a taxpayer who has a hearing impairment, speaks little or no English, or lacks sophistication." This guidance expired October 12, 2011, and is being incorporated into the Internal Revenue Manual (IRM).

34 IRC §§ 6320(b)(1), 6320(b)(3), 6330(b)(1) and 6330(b)(3). *See also* Rev. Proc. 2000-43, 2000-2 C.B. 404. *See, e.g.*, *Industrial Investors v. Comm'r*, T.C. Memo. 2007-93; *Moore v. Comm'r*, T.C. Memo 2006-93, *action on dec.*, 2007-2 (Feb. 27, 2007); *Cox v. Comm'r*, 514 F.3d 1119, 1124-1128 (10th Cir. 2008), *action on dec.*, 2009-22 (June 1, 2009).

35 IRC § 6330(c)(1); *Hoyle v. Comm'r*, 131 T.C. 197 (2008).

action balances the need for efficient collection of taxes with the legitimate concern of the taxpayer that any collection be no more intrusive than necessary.[36]

Special rules apply to the IRS's handling of hearing requests that raise frivolous issues. IRC § 6330(g) provides that the IRS may disregard any portion of a hearing request based on a position the IRS has identified as frivolous, or that reflects a desire to delay or impede the administration of tax laws.[37] Similarly, IRC § 6330(c)(4) provides that a taxpayer cannot raise an issue at a hearing if it is based on a position identified as frivolous or reflects a desire to delay or impede tax administration.

IRC § 6702(b) allows the IRS to impose a penalty for a specified frivolous submission, which includes a frivolous CDP hearing request.[38] A request is subject to the penalty if any part of it "(i) is based on a position which the Secretary has identified as frivolous...or (ii) reflects a desire to delay or impede the administration of the Federal tax laws."[39]

Judicial Review of CDP Determination

Within 30 days of Appeals' determination, the taxpayer may petition the Tax Court for judicial review.[40] Where the validity of the underlying tax liability is properly at issue in the hearing, the court will review the amount of the tax liability on a *de novo* basis.[41] Where the appropriateness of the collection action is at issue, the court will review the IRS's administrative determination for abuse of discretion.[42]

ANALYSIS OF LITIGATED CASES

We identified and reviewed 89 CDP court opinions, a 32 percent decrease from the 131 cases in last year's report. However, these 89 opinions do not reflect the full number of CDP cases because the court does not issue an opinion in all cases. Some are resolved through settlements, and in other cases taxpayers do not pursue litigation after filing a petition with the court. The Tax Court also disposes of some cases by issuing unpublished orders. Table 3 in Appendix III provides a detailed list of the 89 CDP opinions, including specific information about the issues, the types of taxpayers involved, and the outcomes of the cases.

36 IRC § 6330(c)(3)(C).

37 IRC § 6330(g). Section 6330(g) is effective for submissions made and issues raised after the date on which the IRS first prescribed a list of frivolous positions. Notice 2007-30, 2007-1 C.B. 883, which was published on or about April 2, 2007, provided the first published list of frivolous positions. Notice 2010-33, 2010-17 C.B. 609, contains the current list.

38 The frivolous submission penalty applies to the following submissions: CDP hearing request, OIC, IA, and application for a taxpayer assistance order.

39 IRC § 6702(b)(2)(a). Before asserting the penalty, the IRS must notify the taxpayer that it has determined that the taxpayer filed a frivolous hearing request. The taxpayer then has 30 days to withdraw the submission to avoid the penalty. IRC § 6702(b)(3).

40 IRC § 6330(d)(1). Prior to October 17, 2006, the taxpayer could also petition the federal district court if the Tax Court did not have jurisdiction over the underlying tax liability (*e.g.*, if the matter involved an employment tax liability).

41 The legislative history of RRA 98 addresses the standard of review courts should apply in reviewing the Appeals' CDP determinations. H.R. Rep. No. 105-99, at 266 (Conf. Rep.). The term *de novo* means anew. Black's Law Dictionary, 447 (7th ed. 1999).

42 *See, e.g.*, *Murphy v. Comm'r*, 469 F.3d 27 (1st Cir. 2006).

Litigation Success Rate

Taxpayers prevailed in full in three of the 89 cases (approximately three percent).[43] Of the cases in which the courts found for the taxpayer in whole or in part, the taxpayers appeared *pro se* in three cases[44] and were represented in the three others.[45] Table 3.3.1 below compares litigation success rates in CDP cases reported in the 2003 through 2011 Annual Reports to Congress.[46]

TABLE 3.3.1, Success Rates in CDP Cases[47]

Court Decision	2003	2004	2005	2006	2007	2008	2009	2010	2011
Decided for IRS	96%	95%	89%	90%	92%	90%	92%	89%	92%
Decided for Taxpayer	1%	4%	8%	8%	5%	8%	4%	10%	3%
Split Decision	3%	1%	3%	2%	3%	2%	4%	2%	3%
Neither	N/A	N/A	N/A	N/A	Less than 1%	N/A	N/A	N/A	1%

ISSUES LITIGATED

The cases discussed below are those the National Taxpayer Advocate considers significant or noteworthy. The outcomes of these cases can provide important information to Congress, the IRS, and taxpayers about the rules and operation of CDP hearings. Equally important, all of the cases offer the opportunity to improve the CDP process in both application and execution.

Procedural Rulings

Dalton v. Commissioner

In *Dalton v. Commissioner*,[48] the Tax Court held that the IRS abused its discretion by rejecting the taxpayers' OIC because the IRS should not have included the value of property held by a trust when evaluating the OIC. The IRS included the trust property when calculating an acceptable offer amount because it concluded that the trust was the nominee of the taxpayer.

43 *Byk v. Comm'r*, T.C. Summ. Op. 2010-137, *Dalton v. Comm'r*, 135 T.C. 393 (2010), *appeal docketed* (1st Cir. Oct. 12, 2011), and *Alessio Azzari, Inc. v. Comm'r*, 136 T.C. 178 (2011).

44 *Byk v. Comm'r*, T.C. Summ. Op. 2010-137 *Malone v. Comm'r*, T.C. Summ. Op. 2011-24 and *Thornberry v. Comm'r*, 136 T.C. 356 (2011).

45 *Dalton v. Comm'r*, 135 T.C. 393 (2010), *appeal docketed* (1st Cir. Oct. 12, 2011), *Orian v. Comm'r*, T.C. Memo. 2010-234, and *Alessio Azzari, Inc. v. Comm'r*, 136 T.C. 178 (2011).

46 *See* National Taxpayer Advocate 2008 Annual Report to Congress 482, Table 3.2.1, for 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, and 2011 statistics.

47 Numbers have been rounded to nearest percentage. A "split" decision refers to a case with multiple issues where both the IRS and the taxpayer prevail on one or more substantive issues. A "neither" decision refers to a case where the court's decision was not in favor of either party.

48 135 T.C. 393 (2010), *appeal docketed* (1st Cir. Oct. 12, 2011).

As a threshold matter, the Tax Court had to determine whether it had jurisdiction to enter a decision that would affect a trust when the trust was not a party to the proceeding. The court found that although it could not enter a decision affecting the trust, it had jurisdiction to determine whether the IRS abused its discretion by rejecting the OIC, and that in exercising that jurisdiction it was proper for the court to examine whether the trust held property as the nominee of the taxpayers. After examining all the facts and analyzing the relevant law, the court found that the trust did not hold the property as a nominee for the taxpayer. The court reached this conclusion in part because the trust was validly created under Maine law, and all of the transfers of property were recorded more than ten years before the tax liability at issue arose.

Tucker v. Commissioner

In July 2005, Mr. Tucker submitted an OIC in which he agreed to pay a total of $36,772 ($317 per month for 116 months) to settle his tax debts for 2000, 2001, and 2002.[49] The Settlement Officer rejected the offer, concluding that the taxpayer's dissipated assets had to be considered when determining the proper offer amount. A dissipated asset is any asset "that has been sold, transferred, or spent on non-priority items or debts and that is no longer available to pay the tax liability."[50] If the IRS determines an asset is dissipated, the IRS can include its value when determining the proper offer amount.[51]

In January 2003, Mr. Tucker opened an E-trade account and began day trading. During that month, he deposited $23,700 into the account and deposited $21,000 more between March 13 and April 3. Mr. Tucker had not yet filed his tax returns for tax years 1999 through 2001, although the returns were past due. As a result, in April of 2003 he had accrued tax liabilities of approximately $14,945 for those years. Mr. Tucker stated that he made the deposits and engaged in the trading in an effort to make enough money to pay off his delinquent taxes, as well as paying his upcoming 2002 tax liability.

By the time Mr. Tucker stopped trading on April 21, 2003, he had lost $22,645 of his initial $44,700 deposits, which left approximately $22,000 in the E-Trade account. Mr. Tucker maintained that he used this money to provide for basic living expenses from May 2 through October 27, 2003. Because the court must evaluate the facts in the light most favorable to the taxpayer when evaluating the IRS's motion for summary judgment, the court found the taxpayer used the $22,000 for necessary expenses. Therefore, the court looked at only the other $22,645 that Mr. Tucker lost as potential dissipated assets.

The court held that the Office of Appeals acted appropriately in finding that assets were dissipated; Mr. Tucker knew he had tax liabilities for tax years 1999, 2000, and 2001, and had the cash to pay them in full as of early 2003, but chose instead to hold that money in

49 T.C. Memo. 2011-67, *appeal docketed*, No. 11-1191 (D.C. Cir. May 23, 2011).

50 *Tucker v. Comm'r*, T.C. Memo. 2011-67, *appeal docketed*, No. 11-1191 (D.C. Cir. May 23, 2011).

51 IRM 5.8.5.16 (Oct. 22, 2010).

a risky investment. However, the Tax Court found that only $14,975 should be considered a dissipated asset because in April 2003, when Mr. Tucker had lost $22,645 from his day trading, he only had outstanding federal tax liabilities of $14,975.

Alessio Azzari, Inc. v. Commissioner

In *Alessio Azzari, Inc. v. Commissioner*,[52] the taxpayer requested subordination of the NFTL. The taxpayer entered into a financing agreement with Penn Business Credit (PBC) in which PBC agreed to make loans that would be secured by the taxpayer's accounts receivable. When PBC discovered the NFTL filing, it refused to make any more loans until the NFTL had been subordinated to PBC's security interest in the accounts receivable. The Settlement Officer determined that subordination was not an option because the IRS did not have priority over PBC. The Appeals Officer simply compared the date the PBC financing statement was filed to the date the NFTL was filed. Because PBC filed its statement first, on February 2, 2007, and the IRS did not file the NFTL until November 26, 2007, the Appeals Officer determined PBC already had priority and the NFTL could not be subordinated. However, the Court ruled this determination was an error of law.

The court found under IRC § 6323(c) that the accounts receivable on the taxpayer's books before the filing of the NFTL were complete and superior to subsequent liens because the amounts were then fixed and ascertainable.[53] However, to the extent that accounts receivable were acquired more than 45 days after the NFTL was filed or after PBC had actual knowledge of the NFTL, whichever was earlier, the government's tax lien had priority. Accordingly, the court held it was an abuse of discretion for the Settlement Officer to fail to consider the taxpayer's request to subordinate the lien on the basis of an erroneous conclusion of law that the federal tax lien did not have priority.

The court further held that it was an abuse of the Appeals Officer's discretion to reject the taxpayer's proposed IA, because the taxpayer's failure to timely make employment tax deposits for the third quarter of 2008, making him noncompliant, was not independent of the Appeals Officer's erroneous determination that the NFTL could not be subordinated. The taxpayer contended it could have made the deposits on time if the subordination was granted, and could have borrowed against its accounts receivable in June or even earlier. Therefore, unlike other cases where the courts have ruled it was not an abuse of discretion to reject an IA due to noncompliance, the noncompliance here was driven by the Appeals Officer's erroneous determination and not by the taxpayer alone. The court remanded the case so Appeals could reconsider the taxpayer's request to subordinate the NFTL and enter into an IA.

52 136 T.C. 178 (2011).

53 The basic rule for determining priority of competing liens is referred to as "first in time, first in right." IRC § 6323(c) modifies the result by providing that if an account receivable is acquired more than 45 days after the NFTL is filed, the lender's security interest in the account receivable will not have priority over the tax lien even if the agreement establishing the security interest predates the NFTL filing. *See Am. Inv. Fin. v. United States*, 476 F.3d 810 (10th Cir. 2006).

Thornberry v. Commissioner

In *Thornberry v. Commissioner*,[54] the IRS sent the taxpayers CDP notices under IRC §§ 6320 and 6330 with respect to the taxpayers' unpaid income taxes for 2000, 2001, and 2002, and a civil penalty under IRC § 6702. The taxpayers' timely request for a hearing included frivolous arguments, but also legitimate ones such as requesting an IA and the discharge, withdrawal, or subordination of the NFTL. In response, the Settlement Officer sent a boilerplate Letter 4380, *Appeals Received Your Request for a Collection Due Process and/or Equivalent Hearing*. It stated that the officer had determined the request for a hearing contained either a frivolous position specifically identified by the IRS in Notice 2008-14,[55] a frivolous reason not specified in the notice, or constitutional, moral, or religious arguments. However, the Settlement Officer did not specify what arguments raised frivolous issues. The Settlement Officer requested that the taxpayers either amend the request to reflect only legitimate issues or withdraw the entire request. The Settlement Officer warned that failure to take such action within 30 days would result in the case being returned to the Collection function and a frivolous submission penalty of $5,000 under IRC § 6702(b) being assessed. The Settlement Officer also explained that if Appeals disregarded the hearing request, the taxpayers could not seek review of that decision by the Tax Court. The taxpayers took no action, the Settlement Officer sent the case back to Collection, and the taxpayers then petitioned the Tax Court for judicial review of the Settlement Officer's decision.

The IRS filed a motion to dismiss for lack of jurisdiction because Appeals had made no determination that would confer jurisdiction on the court. However, the Tax Court held that if Appeals determines a request for an administrative hearing is based entirely on a frivolous position under IRC § 6702(c), and issues a notice stating that Appeals will disregard the request, the Tax Court does have jurisdiction to review Appeals' decision if the taxpayer timely petitions for review. The Tax Court found the Appeals letter disregarding the hearing request was a determination conferring jurisdiction under IRC § 6330(d)(1) because it authorized the IRS to proceed with the disputed collection action.

After determining that it did have jurisdiction, the court ordered the taxpayers to file a report setting forth the specific issues they wanted to raise at their hearing. The taxpayers stated they wished to contest the assessment of the civil penalty and discuss collection alternatives and that the taxpayer-wife wanted to seek innocent spouse relief. The court then remanded the case back to Appeals to consider these issues.[56]

Brady v. Commissioner

In *Brady v. Commissioner*,[57] the taxpayer argued at his CDP hearing that he was entitled to overpayments from prior years that would satisfy his liability if applied to it. The Appeals

54 136 T.C. 356 (2011).

55 2008–1 C.B. 310.

56 *Thornberry v. Comm'r*, T. C. Docket No. 580-10L (Aug. 3, 2011).

57 136 T.C. No. 19 (2011), *appeal docketed* (2nd Cir. July 13, 2011).

Officer rejected the taxpayer's position because the IRS had already disallowed his refund claims and sent him a notice of disallowance by certified mail in 2004 or 2005 (the date was in dispute). Under IRC § 6532, the taxpayer had two years from the date of the disallowance to file a refund suit. However, the taxpayer missed the two-year limitation regardless of whether the notice was issued in 2004 or 2005. Because the taxpayer did not file within that time, any suit or judicial proceeding challenging the disallowance of the refund claims was barred. The taxpayer was also barred from receiving any credit toward his liability under IRC § 6514(a), which prohibits credits or refunds from being applied or issued when the statute of limitations for claim for refund has expired.

Appeals Officer's Legal Authority

Tucker v. Commissioner

In *Tucker v. Commissioner*,[58] the court considered Mr. Tucker's motion for remand, which contested the constitutional validity of the Office of Appeals' staffing. Mr. Tucker argued that an Appeals Officer is an "Officer of the United States" who must be appointed by the President or by one of "the Heads of Departments" (in this case, the Secretary of the Treasury), according to the Appointments Clause of Article II, Section 2, of the Constitution.[59] However, the Appeals Officers who conducted Mr. Tucker's CDP hearings and the team manager who signed and issued the notices of determination were not appointed, but hired by the IRS Commissioner under IRC § 7804(a). Therefore, Mr. Tucker argued he had not been given the CDP hearing that Congress mandated.

To be considered an "Officer of the United States" for purposes of the Appointments Clause, it is characteristic for the position to be "established by Law" or carry "significant authority." In this case, the court held that the positions of Settlement Officer, Appeals Officer, and team manager are not "established by law" and do not have "significant authority." The court explained that the Appeals Officer does not exercise an authority more "significant" than the authority exercised by other personnel important to tax administration, such as the Chief of the Office of Appeals (an Appeals Officer's superior), or other high-ranking officials in the IRS, or as significant as the authority exercised by Administrative Law Judges in many other agencies. Because none of these IRS positions involve significant authority, the court determined that singling out IRS Appeals Officers as somehow possessing that authority and requiring constitutional appointment would be inappropriate.

Byk v. Commissioner

Although the following case has no precedential value because it is a small tax case, we have included it to highlight the importance of verifying, as required under the Code, that all applicable law and administrative procedures have been met. In *Byk v. Commissioner*,[60]

58 *Tucker v. Comm'r*, 135 T.C. 114 (2010), *appeal docketed*, No. 11-1191 (D.C. Cir. May 23, 2011).

59 U.S. Const., art. II, sec. 2, cl. 2.

60 *Byk v. Comm'r*, T.C. Summ. Op. 2010-137.

the IRS in 2007 sent the taxpayer a NFTL concerning his Form 941, *Employee's Quarterly Federal Tax Return*, liability for the second quarter of 2000, and the taxpayer filed a timely hearing request. At the hearing, the taxpayer asserted that he had timely filed his Form 941 and paid the tax. Appeals disagreed and issued a determination sustaining the lien and stating that it had verified that the IRS had followed all legal and procedural requirements. The taxpayer filed a petition in the Tax Court seeking review of the determination on the grounds that the Appeals Officer had failed to verify that IRS actions and procedures were in accordance with the law, and maintaining that a return had been filed and the liability paid.

The court found Appeals failed to establish that it had verified that all legal and procedural requirements were met, which is required under IRC § 6330(c)(1). The IRS witness testified that the IRS normally provides taxpayers with a transcript documenting nonfiling of a return or a Form 3050, *Certification of Lack of Record*, supporting the IRS determination that a return had not been filed. In this case, however, the IRS provided no such documentation. The IRS only provided the taxpayer with transcripts that were hard to read, and with two codes to decipher the numerous symbols, codes, and acronyms in the transcripts—many of which the IRS witness could not explain. The IRS simply asserted the taxpayer's Form 941 for that tax period was not filed until 2008 but offered no supporting evidence; nor could the IRS witness verify it. Thus, the court concluded Appeals had not adequately shown that the Appeals Officer had verified that all requirements were met, and that Appeals' determination to proceed with collection without verification was an error as a matter of law.

Imposition of Sanctions

Over the past few years, one notable issue that began emerging from the review of CDP decisions was the extent to which the courts imposed sanctions on taxpayers for frivolous positions. IRC § 6673(a)(1) authorizes the Tax Court to impose sanctions when it appears that proceedings have been instituted or maintained primarily for delay or when the taxpayer's position is frivolous or groundless.[61] These penalties are meant to deter the filing of frivolous CDP hearing requests. As we found in last year's analysis, the courts imposed these penalties in only a few cases. Of the 89 cases decided during this year's review period, the courts imposed sanctions in only four cases, or approximately four percent.[62] Last year, with 131 cases decided, the courts imposed sanctions in five cases, which again was four percent.[63] This low number may be attributable to IRC § 6330(g),[64] which allows the IRS to disregard a frivolous hearing request.

61 For a more detailed discussion of IRC § 6673, see Most Litigated Issue: *Frivolous Issues Penalty and Related Appellate Level Sanctions Under Internal Revenue Code Section 6673*, *infra*.

62 *See, e.g.*, *Mattina v. Comm'r*, T.C. Memo. 2010-127, *appeal docketed*, No. 10-73032 (9th Cir. Sept. 27, 2010); *Miller-Wagenknect v. Comm'r*, 385 Fed. Appx. 230 (3d Cir. 2010).

63 National Taxpayer Advocate 2010 Annual Report to Congress at 437.

64 Pub. L. No. 109-432, 120 Stat. 2922 (2006).

Pro Se Analysis

Pro se taxpayers (those without benefit of counsel) litigated 56 (or 63 percent) of the 89 CDP cases brought before the Tax Court, a small decrease from 64 percent in the previous year, but still up from 58 percent in 2008.[65] Table 3.3.2 shows the breakdown of *pro se* and represented cases and the decisions rendered by the court, indicating that about seven percent of taxpayers (represented or unrepresented) received some relief on judicial review.

TABLE 3.3.2, *Pro Se* and Represented Taxpayer Cases and Decisions

Court Decisions	*Pro Se* Taxpayers		Represented Taxpayers	
	Volume	Percentage of Total	Volume	Percentage of Total
Decided for IRS	53	95%	29	88%
Decided for Taxpayer	1	2%	2	6%
Split Decisions	2	4%	1	3%
Neither			1	3%
Totals	**56**		**33**	

CONCLUSION

CDP hearings continue to provide an invaluable opportunity for taxpayers to meaningfully address the appropriateness of IRS collection actions. Given the important protection that CDP hearings offer, it should be of little surprise that CDP remains one of the most frequently litigated tax issues in the federal courts—a trend unlikely to change anytime soon. The cases this year illustrate how complex issues involving both collection and collection alternatives are often present in CDP cases, and that Appeals Officers must have extensive knowledge of these areas to handle the cases properly. The Tax Court also grappled with the scope of its authority to review IRS decisions disregarding a frivolous hearing request under IRC § 6330(g) and to consider issues that may affect third parties that have not been joined in the proceeding. Because of the important role of CDP hearings in protecting taxpayer rights, taxpayers and their representatives will likely continue to pursue their CDP rights in court, and CDP will most likely continue to be a heavily litigated issue in years to come.

65 National Taxpayer Advocate 2008 Annual Report to Congress 486.

MLI #4

Failure to File Penalty Under Internal Revenue Code Section 6651(a)(1) and Failure to Pay Estimated Tax Penalty Under Internal Revenue Code Section 6654

SUMMARY

We reviewed 74 decisions issued by the federal court system from June 1, 2010, to May 31, 2011, regarding the addition to tax under Internal Revenue Code (IRC) § 6651(a)(1) for failure to timely file a tax return, the addition to tax under IRC § 6654 for failure to pay estimated income tax, or both.[1] The phrase "addition to tax" is commonly referred to as a penalty, so we will refer to these two additions to tax as the failure to file penalty and the estimated tax penalty. Thirty-two cases involved the imposition of the estimated tax penalty in conjunction with the failure to file penalty, two cases involved only the estimated tax penalty, and the remaining 40 cases involved only the failure to file penalty.

The failure to file penalty is mandatory unless the taxpayer can demonstrate that the failure is due to reasonable cause and not willful neglect.[2] The estimated tax penalty is mandatory unless the taxpayer can meet one of the statutory exceptions.[3] In the cases analyzed, taxpayers were largely unable to avoid either penalty.

PRESENT LAW

Under IRC § 6651(a)(1), a taxpayer that fails to file a return on or before its due date (including extensions) will be subject to a five percent penalty for each month or partial month the return is late, up to a maximum of 25 percent, unless the failure is due to reasonable cause and not willful neglect.[4] The penalty is based on the amount of tax due, minus any credit the taxpayer is entitled to receive or payment made by the due date.[5] The failure to file penalty applies to income, estate, gift, and certain excise tax returns.[6] To establish reasonable cause, the taxpayer must show that he or she exercised ordinary business care and prudence but was still unable to file by the due date.[7]

IRC § 6654 imposes a penalty on any underpayment of a required installment of estimated tax by an individual.[8] The law requires four installments per taxable year, each of which is generally 25 percent of the annual payment.[9] The required annual payment is the lesser

1 IRC §§ 6651(a)(2) and (a)(3) also impose additions to tax for failure to pay a tax liability shown on a return and for failure to pay a required tax liability not shown on a return, respectively. However, because only a small number of cases involved these penalties, we did not include them in our analysis.

2 IRC § 6651(a)(1).

3 IRC § 6654(e).

4 IRC § 6651(a)(1). The penalty is increased to 15 percent per month up to a maximum of 75 percent if the failure to file is fraudulent. *See* IRC § 6651(f).

5 IRC § 6651(b)(1).

6 IRC § 6651(a)(1).

7 Treas. Reg. § 301.6651-1(c)(1).

8 IRC §§ 6654(a), (b).

9 IRC §§ 6654(c)(1), (d)(1).

of 90 percent of the tax for the current taxable year or 100 percent of the tax shown on the taxpayer's return for the previous year.[10] The IRS will determine the amount of the penalty by applying the underpayment rate according to IRC § 6621 to the amount of the underpayment for the related period.[11]

The estimated tax penalty applies to returns of individuals and certain estates and trusts.[12] To avoid the penalty, the taxpayer has the burden of proving that one of the following exceptions applies:

- The tax due (after taking into account any federal income tax withheld) is less than $1,000;[13]
- The preceding taxable year was a full 12 months, the taxpayer had no liability for the preceding taxable year, and the taxpayer was a U.S. citizen or resident throughout the preceding taxable year;[14]
- The IRS determines that because of casualty, disaster, or other unusual circumstances, the imposition of the penalty would be against equity and good conscience;[15] or
- The taxpayer retired after reaching age 62 or became disabled in the taxable year for which estimated payments were required or in the taxable year preceding that year, and the underpayment was due to reasonable cause and not willful neglect.[16]

In any court proceeding, the IRS has the initial burden of providing sufficient evidence that it appropriately imposed the failure to file penalty and the estimated tax penalty.[17]

ANALYSIS OF LITIGATED CASES

We analyzed 74 opinions issued between June 1, 2010, and May 31, 2011, where the failure to file penalty or estimated tax penalty (or both) was in dispute. All but three of these cases were litigated in the United States Tax Court. A detailed list appears in Table 4 in Appendix III. Forty-nine cases involved individual taxpayers and 25 involved businesses (including individuals engaged in self-employment or partnerships). Of the 65 cases in which taxpayers appeared *pro se* (without counsel), taxpayers prevailed in full in only one case, and three cases resulted in split decisions. Of the nine cases in which taxpayers appeared with representation, two were resolved in the taxpayer's favor.

10 IRC §§ 6654(d)(1)(B)(i), (ii).

11 IRC §§ 6654(a)(1) – (3).

12 IRC §§ 6654(a), (l).

13 IRC § 6544(e)(1).

14 IRC § 6654(e)(2).

15 IRC § 6654(e)(3)(A).

16 IRC § 6654(e)(3)(B).

17 *Higbee v. Comm'r*, 116 T.C. 438, 446 (2001) (quoting IRC § 7491(c)). An exception to this rule alleviates the IRS from this initial burden where the taxpayer's petition fails to state a claim for relief from the penalty, such as where the taxpayer only makes frivolous arguments. *Funk v. Comm'r*, 123 T.C. 213 (2004).

Failure to File Penalty

A common basis for the courts' ruling against taxpayers was the lack of evidence that the failure to file was due to reasonable cause. In fact, in 56 of the 72 cases, the taxpayers did not present any evidence of reasonable cause. In cases where taxpayers did present evidence in defense of their failures to file timely (or at all), the arguments included the following:

Medical Illness: Depending on the facts and circumstances, a medical illness may establish reasonable cause for failing to file, if the taxpayer can show incapacitation to such a degree that he or she could not file a return on time.[18] A court also may find reasonable cause where a taxpayer who is caring for another person is unable to file on time due to providing the care.[19]

The Tax Court determined that reasonable cause did not exist where a taxpayer claimed that her health complications and medical issues prevented her from filing a return, because during the same period she was able to travel and earn significant income as a real estate agent.[20] The same rationale applied in *Campbell v. Commissioner*, in which the taxpayers (husband and wife) argued that their need to care for a sick daughter who was going through pregnancy provided them with reasonable cause for filing their return two years late.[21] The Tax Court held that because they also ran a construction business and operated a distributorship to sell products through direct marketing, despite their daughter's illness, it was implausible that caring for her constituted reasonable cause for failing to timely file.[22]

Mistaken Belief as to Filing Obligation: Taxpayers often mistakenly believe they are not required to file returns. If a taxpayer's mistaken belief about the filing requirement is based on an incomplete or flawed reading of the law, the taxpayer does not have reasonable cause.[23] When a taxpayer receives competent advice that leads him or her to believe there is no filing requirement, courts may be more inclined to conclude that the failure to file is reasonable. For example, in *Holmes v. Commissioner*, the taxpayer prevailed on an argument that he was not required to file because he understood that the wages he received while working in a combat zone in Iraq were not taxable.[24] This belief was based on a memo promulgated by the IRS. The Tax Court held that the

18 *Williams v. Comm'r*, 16 T.C. 893, 905-06 (1951) (interpreting § 291 of the 1939 Code, a predecessor to IRC § 6651), *acq.*, 1951-2 C.B. 1. *See, e.g., Harbour v. Comm'r*, T.C. Memo. 1991-532 (the taxpayer was in a coma the month before the due date of his tax return and therefore had reasonable cause for failing to timely file).

19 *Tabbi v. Comm'r*, T.C. Memo. 1995-463 (reasonable cause existed for late filing a joint return when taxpayers' son had heart surgery and taxpayers were continuously at hospital for four months surrounding due date of return).

20 *Coury v. Comm'r*, T.C. Memo. 2010-132.

21 T.C. Memo. 2011-42.

22 *Campbell v. Comm'r*, T.C. Memo. 2011-42.

23 *See Shomaker v. Comm'r*, 38 T.C. 192, 202 (1962) (citation omitted) ("in the absence of obtaining competent advice, the mistaken belief on the part of a taxpayer that no return was required under the statute does not constitute reasonable cause for noncompliance.").

24 T.C. Memo. 2011-26.

taxpayer's mistaken belief that his payments were not taxable was reasonable, given his lack of background in tax law, coupled with the fact the advice came directly from the IRS while he was serving in a combat zone. Consequently, the taxpayer was not liable for the failure to file penalty.[25]

Reliance on Agent: The United States Supreme Court, in *United States v. Boyle,*[26] held that taxpayers have a nondelegable duty to file a return on time, and a taxpayer's reliance on an agent does not excuse a failure to file. In *Owusu v. Commissioner*, a taxpayer who failed to timely file his return argued that he instructed his accountant to request an extension because he needed to correct his Form W-2, *Wage and Tax Statement*, and he filed the return as soon as possible when he learned the extension had not been requested.[27] Citing *Boyle*, the Tax Court held that even if the taxpayer believed his accountant had filed the extension request, reliance on his accountant did not constitute reasonable cause, and therefore the taxpayer was liable for the penalty.[28]

A taxpayer may establish reasonable cause if the taxpayer can prove that he or she reasonably relied on a professional tax advisor or that the taxpayer made a good-faith effort to ascertain return filing requirements.[29] In order to reasonably rely on the advice of a tax professional, the taxpayer must present evidence of the professional's expertise and show that the taxpayer provided him or her with all necessary and accurate information.[30] In *Russell v. Commissioner*, the taxpayer argued that she filed her return late because her attorney advised her to delay filing until the exact losses from her husband's business could be calculated and used to offset the couple's income. The taxpayer alleged that her attorney advised her that filing a return without perfect information would be fraudulent and perjurious.[31] The Tax Court concluded that the taxpayer had an obligation to file a timely return with the best available information, and amend it later.[32] Consequently, reliance on her attorney's advice that it was necessary to wait for complete information before filing a return was not reasonable cause.[33]

"Zero Return" Filers and Other Frivolous Arguments: Under the longstanding four-part test articulated in *Beard v. Commissioner*, a valid return must: (1) purport to be a return; (2) be signed under penalties of perjury; (3) contain sufficient data to calculate the tax liability; and (4) represent an honest and reasonable attempt to satisfy

25 *Holmes v. Comm'r*, T.C. Memo. 2011-26.

26 469 U.S. 241 (1985).

27 T.C. Memo. 2010-186.

28 *Owusu v. Comm'r*, T.C. Memo. 2010-186.

29 *Estate of La Meres v. Comm'r*, 98 T.C. 294, 315-17 (1992) (citations omitted).

30 *Id*.

31 T.C. Memo. 2011-81.

32 *Russell v. Comm'r*, T.C. Memo. 2011-81 (citing *Estate of Vriniotis v. Comm'r*, 79 T.C. 298, 311 (1982)).

33 *Russell v. Comm'r*, T.C. Memo. 2011-81.

the requirements of the tax laws.[34] Each year, some taxpayers claim they have no obligation to pay taxes by filing returns reporting zero income when they have earned substantial wages accurately reported on a Form W-2.[35] A "zero return" does not constitute a tax return under the *Beard* test for purposes of the failure to file penalty of IRC § 6651(a)(1).[36] Thus, when the taxpayer in *Oman v. Commissioner* filed a return containing all zeros, the Tax Court sustained the IRS's decision to impose the failure to file penalty.[37]

In addition, any departure from the jurat[38] above the signature block provided in IRS forms invalidates a document purporting to be a return under the *Beard* test.[39] For example, in *Holmes v. Commissioner*,[40] the taxpayer wrote "Non assumpsit by" over his signature on the jurat of his return and stated that for reasons of conscience he would not swear an oath for his tax return, among other arguments. The court rejected his arguments and upheld the failure to file penalty. In addition, the court applied the IRC § 6673 penalty for making frivolous arguments.[41] In nine other cases where the IRS had asserted the failure to file penalty, the courts also imposed the IRC § 6673 penalty when the taxpayers presented frivolous arguments.[42]

Estimated Tax Penalty

Courts routinely found taxpayers liable for the IRC § 6654 estimated tax penalty when the IRS proved the taxpayer had a tax liability, had no withholding credits, made no estimated tax payments for that year, and the taxpayer offered no evidence to refute the IRS's evidence.[43]

The IRS has the burden of production under IRC § 7491(c) to produce evidence that a taxpayer was required to make an annual payment under IRC § 6654(d)(1)(B). In both cases where the taxpayers prevailed regarding the estimated tax penalty for some or all of the years at issue, their success was a result of the IRS failing to prove the penalty was appropriate. For example, in *Banister v. Commissioner*, the U.S. Court of Appeals for the Ninth Circuit upheld the Tax Court's determination that the IRS had not met its burden of

34 82 T.C. 766, 777 (1984), *aff'd per curiam*, 793 F.2d 139 (6th Cir. 1986).

35 *See, e.g., Burchfield v. Comm'r*, T.C. Memo. 2011-30 (taxpayer and spouse earned over $100,000 in wages but reported zero wage income on Form 1040).

36 *See Turner v. Comm'r*, T.C. Memo. 2004-251, and the numerous cases cited therein.

37 T.C. Memo. 2010-276.

38 A "jurat" is a "certification added to an affidavit or deposition stating when and before what authority the affidavit or deposition was made." *Black's Law Dictionary* (9th ed. 2009).

39 *See Borgeson v. United States*, 757 F.2d 1071 (10th Cir. 1985).

40 T.C. Memo. 2011-31.

41 IRC § 6673 authorizes the United States Tax Court to impose a penalty against a taxpayer if the taxpayer institutes or maintains a proceeding primarily for delay, takes a frivolous position in a proceeding, or unreasonably fails to pursue available administrative remedies.

42 *See* Most Litigated Issue: *Frivolous Issues Penalty Under Internal Revenue Code Section 6673 and Related Appellate-Level Sanctions*, *infra*.

43 *See, e.g., Amesbury v. Comm'r*, T.C. Memo. 2010-148; *Steinshouer v. Comm'r*, T.C. Memo. 2011-53.

production because it introduced no evidence that the taxpayer filed a return for the previous tax year.[44]

CONCLUSION

The United States tax system relies on taxpayers voluntarily filing accurate returns and paying their taxes. Penalties attempt to establish fairness by imposing an additional cost on the noncompliant taxpayer. The penalties for failure to file and failure to pay estimated tax were designed to encourage voluntary compliance and deter noncompliance.[45]

The IRS should determine whether these penalties positively influence compliance as intended, particularly in the case of taxpayers who comply with their filing obligations, although in an untimely manner. If compliance is not significantly improved, then the penalties fail to serve their primary function. Although revenue is generated by the penalties, the imposition of a one-time abatement for taxpayers who comply with filing obligations in an untimely manner could potentially reduce litigation without significantly impacting compliance. The National Taxpayer Advocate reiterates her recommendation to implement a one-time abatement of the failure to file penalty for taxpayers who comply with their filing obligations, but in an untimely manner.[46]

44 107 A.F.T.R.2d (RIA) 1156 (9th Cir. 2011), *aff'g* T.C. Memo. 2008-201.

45 *See* Policy Statement 20-1 (formerly P-1-18), IRM 1.2.20.1.1 (June 29, 2004). *See also United States v. Boyle*, 469 U.S. 241, 245 (1985) ("Congress' purpose in the prescribed civil penalty was to ensure timely filing of tax returns to the end that tax liability will be ascertained and paid promptly.").

46 *See* National Taxpayer Advocate 2001 Annual Report to Congress 188. A provision to waive the failure to file penalty for first-time unintentional minor errors was included in the House-passed Taxpayer Protection and IRS Accountability Act of 2003. *See* H.R. 1528, 108th Cong. § 106 (2003). Although the IRS has provided for a one-time administrative waiver of the failure to file penalty in IRM 20.1.1.3.6.1 (Dec. 11, 2009), the National Taxpayer Advocate continues to recommend a statutory waiver similar to IRC § 6656(c).

MLI #5

Gross Income Under Internal Revenue Code Section 61 and Related Sections

SUMMARY

When preparing tax returns, taxpayers must complete the crucial calculation of gross income for the taxable year to determine the tax they must pay. Gross income has been among the Most Litigated Issues in each of the National Taxpayer Advocate's Annual Reports to Congress.[1] For this report, we reviewed 62 cases decided between June 1, 2010, and May 31, 2011. Gross income issues in these cases include:

- Damage awards;
- Discharge of indebtedness income;
- Parsonage income; and
- Gain from sale of principal residence.

PRESENT LAW

Internal Revenue Code (IRC) § 61 broadly defines gross income as "all income from whatever source derived."[2] The U.S. Supreme Court has defined gross income as any accession to wealth.[3] However, over time, Congress has carved out numerous exceptions to and exclusions from this broad definition and has based other elements of tax law on the definition.[4]

ANALYSIS OF LITIGATED CASES

In the 62 opinions involving gross income issued by the federal courts and reviewed for this report, gross income issues most often fall into two categories: (1) what is included in gross income under IRC § 61, and (2) what can be excluded under other statutory provisions. A detailed list of all cases analyzed appears in Table 5 of Appendix III.

In 16 cases (about 26 percent), taxpayers were represented, while the rest were *pro se* (without counsel). Three of the 16 represented taxpayers (about 19 percent) prevailed in full in their cases, whereas *pro se* taxpayers prevailed in full in just one case, and in part in five others. Overall, taxpayers prevailed in full or in part in nine of 62 cases (less than 15 percent). The vast majority of gross income cases this year involved taxpayers failing to

1 *See, e.g.*, National Taxpayer Advocate 2009 Annual Report to Congress 445-450; National Taxpayer Advocate 2010 Annual Report to Congress 467-471.

2 IRC § 61(a).

3 *Comm'r v. Glenshaw Glass*, 348 U.S. 426, 431 (1955) (interpreting § 22 of the Internal Revenue Code of 1939, the predecessor to IRC § 61).

4 *See, e.g.*, IRC §§ 104 (compensation for injuries or sickness); 105 (amounts received under accident and health plans); 108 (income from discharge of indebtedness); 6501 (limits on assessment and collection, determination of "substantial omission" from gross income).

report items of income, including some specifically mentioned in IRC § 61 such as wages,[5] interest,[6] and pensions.[7]

Concerning items that can be excluded from gross income, the following are some of the issues litigated.

Damage Awards

Taxation of damage awards continues to generate litigation. This year, at least seven taxpayers (about 11 percent of the cases reviewed) challenged the inclusion of damage awards in their gross income, and only one taxpayer prevailed in part on the issue.[8] IRC § 104(a)(2) specifies that damage awards and settlement proceeds[9] are taxable as gross income unless the award was received "on account of personal physical injury or physical sickness."[10] Congress added the "physical injury or physical sickness" requirement in 1996;[11] until then, the word "physical" did not appear in the statute. The legislative history of the 1996 amendments to IRC § 104(a)(2) provides that "[i]f an action has its origin in a physical injury or physical sickness, then all damages (other than punitive damages) that flow therefrom are treated as payments received on account of physical injury or physical sickness... [but] emotional distress is not considered a physical injury or physical sickness."[12] Thus, damage awards for emotional distress are not considered as received on account of physical injury or physical sickness, even if the injury is emotional distress resulting in "insomnia, headaches, [or] stomach disorders."[13]

To justify exclusion from income under IRC § 104, the taxpayer must show settlement proceeds are in lieu of damages for physical injury or sickness.[14] In *Parkinson v. Commissioner*, the taxpayer petitioned the U.S. Tax Court to exclude from his income a settlement award from an intentional infliction of emotional distress and invasion of privacy lawsuit.[15] During the course of his employment, he suffered a heart attack that reduced his hours from 70 hours per week to 40.[16] Upon returning to work, he alleged that two other employees harassed him and pressured him to work overtime and double shifts. He alleged that while being harassed he suffered a second heart attack and that as he received treatment in

5 IRC § 61(a)(1). *See, e.g.*, *Nelson v. U.S.*, 392 Fed. Appx. 681 (11th Cir. 2010), *aff'g* 105 A.F.T.R.2d (RIA) 635 (N.D. Fla. 2010).

6 IRC § 61(a)(4). *See, e.g.*, *Alonim v. Comm'r*, T.C. Memo. 2010-190.

7 IRC § 61(a)(11). *See, e.g.*, *Buckardt v. Comm'r*, T.C. Memo. 2010-145, *appeal docketed* (9th Cir. Sept. 15, 2010).

8 *See, e.g.*, *Parkinson v. Comm'r*, T.C. Memo. 2010-142.

9 *See* Treas. Reg. § 1.104-1(c) (damages received, for purposes of IRC § 104(a)(2), means amounts received "through prosecution of a legal suit or action based upon tort or tort type rights or through a settlement agreement entered into in lieu of such prosecution.")

10 IRC § 104(a)(2).

11 Pub. L. No. 104-188, § 1605(a), 110 Stat. 1755, 1838 (1996).

12 H.R. Rep. No. 104-586, at 143-44 (1996).

13 H.R. Conf. Rep. No. 104-737, at 301 (1996). Note, however, that IRC § 104(a)(2) excludes from income damages, up to the cost of medical treatment for which a deduction under IRC § 213 was allowed for any prior taxable year, for mental or emotional distress causing physical injury.

14 *See, e.g.*, *Green v. Comm'r*, 507 F.3d 857 (5th Cir. 2007), *aff'g* T.C. Memo. 2005-250.

15 T.C. Memo. 2010-142.

16 *Parkinson v. Comm'r*, T.C. Memo. 2010-142.

the emergency room, one employee continued to call him and demand he return to work or face disciplinary action. The taxpayer eventually resigned from his job due to being disabled by the second heart attack. He settled with his former employer, and in 2005 received an installment payment under the settlement agreement. He did not report the payment on his 2005 income tax return, on the theory that the payment was for physical injuries.[17]

Because the parties disagreed on the characterization of the settlement payments, the court looked to the employer's intent in making the payment.[18] The settlement agreement contained no specific allocation of the payments other than to characterize them as "as noneconomic damages and not as wages or other income."[19] The Tax Court then looked to the contents of the taxpayer's complaint for insight into what the settlement payment was for, and determined that at least 50 percent of the complaint focused on the physical ailments the taxpayer suffered. This led the court to conclude that the employer knew it was paying for both the physical and emotional consequences of the actions of the two employees. Moreover, the Tax Court immediately recognized that the taxpayer's "heart attack and its physical aftereffects constitute physical injury or sickness rather than mere subjective sensations or symptoms of emotional distress." Thus, the taxpayer was able to show that a portion of the settlement proceeds was in lieu of damages for physical injury. Consequently, 50 percent of the payment was excluded from his gross income.[20]

As illustrated by taxpayers continuing to litigate issues involving the characterization of settlement damages year in and year out, the question of when damage awards can be excluded from gross income continues to confuse taxpayers. Even when taxpayers seek legal advice before filing a complaint for damages or accepting settlement proceeds, they may not understand how to characterize the damages in the complaint in order for them to be excludable under IRC § 104(a)(2), or may be confused about the proper tax treatment of the proceeds. For example, in *Espinoza v. Commissioner*, the taxpayer's attorney informed the taxpayer and her family that her settlement proceeds would not be taxed.[21] Even though the taxpayer received Form 1099-MISC from the payor, she did not realize she would be taxed on the settlement award until she received a notice of deficiency.[22]

Discharge of Indebtedness

We reviewed four cases in which taxpayers disputed the IRS's determination that a discharge of indebtedness was taxable income. Taxpayers prevailed in full in only one of these cases. Generally, a taxpayer must include income from discharge of indebtedness

17 *Parkinson v. Comm'r*, T.C. Memo. 2010-142.

18 *Id.*

19 *Id.*

20 *Id.*

21 636 F.3d 747 (5th Cir. 2011), *aff'g* T.C. Memo. 2010-53.

22 *Espinoza v. Comm'r*, 636 F.3d 747 (5th Cir. 2011), *aff'g* T.C. Memo. 2010-53.

when calculating gross income,[23] but in certain circumstances cancellation of indebtedness income may be excluded. In this regard, IRC § 108(a) provides that a taxpayer may exclude, subject to limitations, income from the discharge of indebtedness if the discharge occurs in a bankruptcy case, when the taxpayer is insolvent, or if the indebtedness is qualified farm or business real estate debt or qualified principal residence indebtedness.[24]

The burden of proof is on the taxpayer to show that any of the exceptions in IRC § 108(a) apply.[25] For example, in *Oglesby v. Commissioner*, the taxpayer had discharge of indebtedness income from settling a debt for less than he owed.[26] The taxpayer admitted that he settled the debt for less than he owed and did not argue that he qualified for any exception.[27] Consequently, the taxpayer was required to include the discharge of indebtedness income in his gross income.[28]

Parsonage Income

The court issued decisions in at least two cases concerning the excludability of parsonage income.[29] IRC § 107 provides an exclusion from income for the rental value of parsonages. A minister of the gospel may exclude from gross income the rental value of a home provided to him or the rental allowance provided to him up to the amount that he uses it to rent or provide a home, insofar as the parsonage income is part of his compensation package.[30]

In *Driscoll v. Commissioner*, [31] a case of first impression, the taxpayers were a husband and wife and the husband was a minister who received a parsonage allowance as part of his compensation from his employer, a tax-exempt organization under IRC § 501(a). Mr. Driscoll excluded the allowance from his income under IRC § 107 and used the allowance to provide a primary residence and a second home on a lake for his family. The IRS determined a deficiency in income for the portion of the parsonage allowance used for the lake home in each of the tax years at issue. In denying the exclusion from gross income for the portion of the parsonage allowance used to provide the lake home, the IRS took the position that exclusions from income should be narrowly construed and that the plain language

23 IRC § 61(a)(12).

24 IRC § 108(a)(1)(A)-(E).

25 U.S. Tax Court Rules of Practice and Procedure, Rule 142(a).

26 T.C. Memo. 2011-93.

27 *Oglesby v. Comm'r*, T.C. Memo. 2011-93.

28 *Id*.

29 *See Chambers v. Comm'r*, T.C. Memo. 2011-114; *Driscoll v. Comm'r*, 135 T.C. 557 (2010), *appeal docketed* (11th Cir. May 24, 2011).

30 IRC § 107. Recent litigation has challenged the constitutionality of IRC § 107 under the Establishment Clause of the Constitution. *See Freedom from Religion Foundation, Inc. v. Geithner*, 715 F. Supp. 2d 1051 (E.D. Cal. 2010), *stipulated dismissal*, June 17, 2011. The Establishment Clause of the First Amendment to the United States Constitution prohibits the government from making any law respecting an establishment of religion, that is, the government may neither make laws that favor nor disadvantage religious institutions. U.S. Const. amend. I. Section 107 of the IRC provides an exclusion from gross income available only to ministers of the gospel. Although the case was eventually dismissed for lack of standing, findings during an initial motion to dismiss hearing indicated that the court could ultimately hold for the plaintiffs (a nonprofit organization and its members that advocate for the separation of church and state) if they bring suit with proper standing. It is likely that constitutional challenges to IRC § 107 will be brought again in the future.

31 135 T.C. 557 (2010), *appeal docketed* (11th Cir. May 24, 2011).

of IRC § 107 permits the exclusion of the allowance up to the amount used to provide "a home," indicating a singular residence.[32]

The court found for the taxpayers, holding that nothing in the plain language of IRC § 107 prohibits a taxpayer from using a parsonage allowance to provide more than one residence.[33] The court turned to the United States Code (USC) which states: "In determining the meaning of any Act of Congress, unless the context indicates otherwise—words importing the singular include and apply to several persons, parties, or things."[34] The court concluded that Congress did not intend to limit the parsonage exclusion to one home and in fact, the language in the USC negated the position of the IRS that "a home" indicated only the singular "one home."[35] The government has appealed the decision in *Driscoll v. Commissioner*, leaving the question of the excludability of the parsonage allowance in regards to a second home open for interpretation by the 11th Circuit Court of Appeals.

Gain from Sale of Principal Residence

Generally, gain realized on the sale of property is included in a taxpayer's gross income.[36] IRC § 121(a), however, allows a taxpayer to exclude from income a gain on the sale or exchange of property if the taxpayer has owned and used the property as his or her principal residence for at least two of the five years immediately preceding the sale. The maximum exclusion is $500,000 for a husband and wife who file a joint return for the year of the sale or exchange.[37]

A married couple filing a joint return is eligible for the $500,000 exclusion on the sale or exchange of property they owned and used as their principal residence if either spouse meets the ownership requirement, both spouses meet the use requirement, and neither spouse claimed an exclusion under IRC § 121(a) during the two-year period before the sale or exchange.[38] In *Gates v. Commissioner*, the Tax Court acknowledged that IRC § 121 does not define two critical terms—"property" and "principal residence."[39] The taxpayers in *Gates* were a husband and wife who had lived together for two years before demolishing their house and building a new one on the same property. Mr. and Mrs. Gates then sold the new house without ever living in it and did not report the gain from the sale.

The IRS argued that Mr. and Mrs. Gates did not sell property they had owned and used as their principal residence for the required two-year period and therefore were ineligible for the exclusion from gross income. Applying principles of statutory construction, the

32 *Driscoll v. Comm'r*, 135 T.C. 557, 563-64 (2010), *appeal docketed* (11th Cir. May 24, 2011).

33 *Id.*

34 *Id.*

35 *Id.*

36 IRC § 61(a)(3).

37 IRC § 121(b)(2)(A).

38 IRC § 121(b)(2)(A)(i)-(iii).

39 135 T.C. 1 (2010), *appeal docketed*, No. 10-73209 (9th Cir. Oct. 19, 2010).

Tax Court found that the terms "property" and "principal residence" could have multiple meanings.[40] Turning then to the legislative history for IRC § 121 and its predecessor provisions, the Tax Court concluded that Congress intended the terms "property" and "principal residence" to mean a house or other dwelling in which the taxpayer actually lives.[41] Consequently, the taxpayers were not entitled to the exclusion from gross income because the house they sold had never been used as their principal residence.

CONCLUSION

Taxpayers litigate many of the same gross income issues year after year due to the complex nature of what constitutes gross income. This report has highlighted some of the main areas of confusion under IRC § 61, though these issues are not discrete. The National Taxpayer Advocate has previously recommended a legislative change that would clarify the tax treatment of court awards and settlements by permitting taxpayers to exclude any payments received as a settlement or judgment for mental anguish, emotional distress, or pain and suffering.[42]

40 *Gates v. Comm'r*, 135 T.C. 1, 7 (2010), *appeal docketed*, No. 10-73209 (9th Cir. Oct. 19, 2010).

41 *Id.*

42 National Taxpayer Advocate Annual 2009 Report to Congress 351-356 (Legislative Recommendation: *Exclude Settlement Payments for Mental Anguish, Emotional Distress, and Pain and Suffering from Gross Income*).

MLI #6

Accuracy-Related Penalty Under Internal Revenue Code Section 6662(B)(1) and (2)

SUMMARY

Internal Revenue Code (IRC) § 6662(b)(1) and (2) authorize the IRS to impose a penalty if a taxpayer's negligence or disregard of rules or regulations caused an underpayment of tax, or if an underpayment exceeded a computational threshold, called a substantial understatement. IRC § 6662(b) also authorizes the IRS to impose three other accuracy-related penalties.[1] We did not analyze these other accuracy-related penalties because during our review period of June 1, 2010, through May 31, 2011, taxpayers litigated these penalties less frequently than the negligence and substantial understatement penalties.

PRESENT LAW

The amount of an accuracy-related penalty equals 20 percent of the portion of the underpayment attributable to the taxpayer's negligence or disregard of rules or regulations, or a substantial understatement.[2] The IRS may assess penalties under both IRC § 6662(b)(1) and IRC § 6662(b)(2), but the total penalty rate cannot exceed 20 percent (*i.e.*, the penalties are not "stackable").[3] Generally, taxpayers are not subject to the accuracy-related penalty if they establish that they had reasonable cause for the underpayment and acted in good faith.[4] In addition, a taxpayer will be subject to the negligence component of the penalty only on the portion of the underpayment attributable to negligence. For example, if a taxpayer wrongly reports multiple items of income, some errors may be justifiable mistakes while others might be the result of negligence; the penalty applies only to the latter.

Negligence

The IRS may impose the IRC § 6662(b)(1) negligence penalty if it concludes that a taxpayer's negligence or disregard of the rules or regulations caused the underpayment.[5] Negligence includes a failure to make a reasonable attempt to comply with internal revenue laws, including a failure to keep adequate books and records or to substantiate items that gave rise to the underpayment.[6] Strong indicators of negligence include instances where a taxpayer failed to report income on a tax return that a payor reported on an information

1 IRC § 6662(b)(3) authorizes a penalty for any substantial valuation misstatement for income taxes; IRC § 6662(b)(4) authorizes a penalty for any substantial overstatement of pension liabilities; and IRC § 6662(b)(5) authorizes a penalty for any substantial valuation understatement of estate or gift taxes.

2 IRC § 6662(b)(1) (negligence or disregard of rules or regulations) and IRC § 6662(b)(2) (substantial understatement).

3 Treas. Reg. § 1.6662-2(c). The penalty rises to 40 percent if any portion of the underpayment is due to a "gross valuation misstatement." *See* IRC § 6662(h)(1).

4 IRC § 6664(c)(1).

5 IRC § 6662(c) defines negligence as "any failure to make a reasonable attempt to comply with the provisions of this title, and 'disregard' includes any careless, reckless, or intentional disregard."

6 Treas. Reg. § 1.6662-3(b)(1).

return as defined in IRC § 6724(d)(1),[7] or failed to make a reasonable attempt to ascertain the correctness of a deduction, credit, or exclusion.[8] The IRS can also consider various other factors in determining whether the taxpayer's actions were negligent.[9]

Substantial Understatement

Generally, an "understatement" is the difference between (1) the correct amount of tax and (2) the amount of tax reported on the return, reduced by any rebate.[10] Understatements are usually reduced by the portion of an understatement attributable to (1) an item for which the taxpayer had substantial authority; or (2) any item for which the taxpayer adequately disclosed the relevant facts affecting the item's tax treatment in the return or an attached statement, and the taxpayer had a reasonable basis for the tax treatment.[11] For individuals, the understatement of tax is substantial if it exceeds the greater of $5,000 or ten percent of the tax required to be shown on the return.[12] For corporations (other than S corporations or personal holding companies), an understatement is substantial if it exceeds the lesser of ten percent of the tax required to be shown on the return or $10,000,000.[13]

For example, if the correct amount of tax should have been $10,000 and an individual taxpayer reported $6,000, the substantial understatement penalty under IRC § 6662(b)(2) would not apply because although the $4,000 shortfall is more than the ten percent test ($1,000 is ten percent of $10,000), it is less than the fixed $5,000 threshold. Conversely, if the same individual reported a tax of $4,000, the substantial understatement penalty would apply because the $6,000 shortfall is more than $5,000, which is the greater of the two thresholds.

Reasonable Cause

The accuracy-related penalty does not apply to any portion of an underpayment where the taxpayer acted with reasonable cause and in good faith.[14] A reasonable cause determination takes into account all of the pertinent facts and circumstances.[15] Generally, the most important factor is the extent of the taxpayer's effort to determine the proper tax liability.[16]

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7 IRC § 6724(d)(1) defines an information return by cross-referencing various other sections of the Code that define information returns (*e.g.*, IRC § 6724(d)(1)(A)(ii) references IRC § 6042(a)(1) for reporting of dividend payments).

8 Treas. Reg. §§ 1.6662-3(b)(1)(i) and (ii).

9 These factors include the taxpayer's history of noncompliance; the taxpayer's failure to maintain adequate books and records; actions taken by the taxpayer to ensure the tax was correct; and whether the taxpayer had an adequate explanation for underreported income. Internal Revenue Manual (IRM) 4.10.6.2.1 (May 14, 1999).

10 IRC § 6662(d)(2)(A).

11 IRC § 6662(d)(2)(B). No reduction is permitted, however, for any item attributable to a tax shelter. *See* IRC § 6662(d)(2)(C)(i).

12 IRC §§ 6662(d)(1)(A)(i) and (ii).

13 IRC §§ 6662(d)(1)(B)(i) and (ii).

14 IRC § 6664(c)(1).

15 Treas. Reg. § 1.6664-4(b)(1).

16 *Id.*

Penalty Assessment and the Litigation Process

In general, the IRS proposes the accuracy-related penalty as part of its examination process[17] and through its Automated Underreporter (AUR) computer system.[18] Before a taxpayer receives a notice of deficiency, he or she has opportunities to engage the IRS on the merits of the penalty.[19] Once the IRS concludes an accuracy-related penalty is warranted, it must follow the same deficiency procedures it uses with other assessments (*i.e.*, IRC §§ 6211-6213).[20] Thus, the IRS must send a notice of deficiency with the proposed adjustments and inform the taxpayer that he or she has 90 days to petition the United States Tax Court to challenge the assessment.[21] Alternatively, taxpayers may seek judicial review through refund litigation.[22] Under certain circumstances, a taxpayer can request an administrative appeal of IRS collection procedures (and the underlying liability) through a Collection Due Process (CDP) hearing.[23]

Burden of Proof

In court proceedings, the IRS bears the initial burden of production regarding the accuracy-related penalty.[24] The IRS must first present sufficient evidence to establish that the penalty is warranted. The burden of proof then shifts to the taxpayer to establish any exception to the penalty, such as reasonable cause.[25]

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17 IRM 20.1.5.3(1) and (2) (July 1, 2008).

18 The AUR is an automated program that identifies discrepancies between the amounts that taxpayers reported on their returns and what payors reported via Form W-2, Form 1099, and other information returns. *See* IRM 4.19.2 (Aug. 5, 2011). IRC § 6751(b)(1) provides the general rule that IRS employees must have written supervisory approval before assessing any penalty. However, IRC § 6751(b)(2)(B) allows an exception for situations where the IRS can calculate a penalty automatically "through electronic means." The IRS interprets this exception as allowing it to use its AUR system to propose the substantial understatement and negligence components of the accuracy-related penalty without human review. If a taxpayer responds to an AUR-proposed assessment, the IRS first involves its employees at that point to determine whether the penalty is appropriate. If the taxpayer does not respond timely to the notice, the computers automatically convert the proposed penalty to an assessment. *See* National Taxpayer Advocate 2007 Annual Report to Congress 259 ("Although automation has allowed the IRS to more efficiently identify and determine when such underreporting occurs, the IRS's over-reliance on automated systems rather than personal contact has led to insufficient levels of customer service for taxpayers subject to AUR. It has also resulted in audit reconsideration and tax abatement rates that are significantly higher than those of all other IRS examination programs.").

19 For example, when the IRS proposes to adjust a taxpayer's liability, including additions to tax such as the accuracy-related penalty, it typically sends a notice ("30-day letter") of proposed adjustments to the taxpayer. A taxpayer has 30 days to contest the proposed adjustments to the IRS Office of Appeals, during which time he or she may raise issues related to the deficiency, including any reasonable cause defense to a proposed penalty. If the issue is not resolved after the 30-day letter, the IRS sends a statutory notice of deficiency ("90-day letter") to the taxpayer. *See* IRS Pub. 5, *Your Appeal Rights and How to Prepare a Protest If You Don't Agree* (Jan. 1999); IRS Pub. 3498, *The Examination Process* (Nov. 2004).

20 IRC § 6665(a)(1).

21 IRC § 6213(a). A taxpayer has 150 days instead of 90 to petition the Tax Court if the IRS sent the notice of deficiency to an address outside the United States.

22 Taxpayers may litigate an accuracy-related penalty by paying the tax liability (including the penalty) in full, filing a timely claim for refund, and then instituting a refund suit in the appropriate United States District Court or the Court of Federal Claims. 28 U.S.C. § 1346(a)(1); IRC § 7422(a); *Flora v. U.S.*, 362 U.S. 145 (1960) (requiring full payment of tax liabilities as a prerequisite for jurisdiction over refund litigation).

23 IRC §§ 6320 and 6330 provide for due process hearings in which a taxpayer may raise a variety of issues including the underlying liability, provided the taxpayer did not receive a statutory notice of deficiency or did not otherwise have an opportunity to dispute such liability. IRC § 6330(c)(2).

24 IRC § 7491(c) provides that "the Secretary shall have the burden of production in any court proceeding with respect to the liability of any individual for any penalty, addition to tax, or additional amount imposed by this title."

25 IRC § 7491(c). *See also* Tax Court Rule 142(a).

ANALYSIS OF LITIGATED CASES

From June 1, 2010, through May 31, 2011, we identified 55 cases where taxpayers litigated the negligence, disregard of rules or regulations, or substantial understatement components of the accuracy-related penalty. The IRS prevailed in full in 36 cases (65 percent), the taxpayers prevailed in full in 14 cases (25 percent), and five cases (nine percent) resulted in split decisions. Taxpayers prevailed partially or fully in 35 percent of the penalty disputes. Table 6 in Appendix III provides a detailed list of these cases.

Taxpayers appeared *pro se* (without representation) in 24 of the 55 cases (43 percent) and convinced the court to dismiss or reduce the penalty in six (25 percent) of their cases. Represented taxpayers fared much better, achieving full or partial relief from the penalty in 13 (42 percent) of their cases.

In some cases, the court was unclear on whether subsection (b)(1) or (b)(2) of the accuracy-related penalty was applied. Regardless of the subsection at issue, the analysis of reasonable cause is the same. Therefore, we have combined our analyses of reasonable cause for the negligence and substantial understatement cases.

Reasonable Cause

Adequacy of Records and Substantiation of Deductions for Reasonable Cause and as Proof of Taxpayer's Good Faith

Taxpayers are required to maintain records sufficient to establish the amount of gross income, deductions, and credits claimed on a return.[26] Taxpayers were most successful in establishing a defense for an underpayment when they produced adequate records or proved they made a reasonable attempt to comply with the requirements of the law. For example, in *Stroff v. Commissioner*,[27] the taxpayer was a self-employed handyman who claimed deductions for labor expenses. The taxpayer produced a list of his clients, along with his weekly planners, and testified regarding the nature of his handyman business. While the court noted his substantiation fell short of being adequate, his recordkeeping nonetheless was a reasonable attempt to comply with the law. Therefore, the court declined to impose the penalty.

Conversely, in other cases, the court found that the taxpayer did not show good faith in attempting to comply with tax laws, and had no reasonable cause when presenting inadequate records or insufficient substantiation. For example, in *Viralam v. Commissioner*,[28] the taxpayers claimed a charitable contribution deduction but failed to maintain any records to substantiate the contribution. The Tax Court concluded the failure to substantiate was an indication of negligence, and consequently, sustained the IRS's determination that the taxpayers were liable for the accuracy-related penalty. Similarly, the taxpayer in *Whitaker*

26 IRC § 6001; Treas. Reg. § 1.6001-1(a).

27 T.C. Memo. 2011-80.

28 136 T.C. No. 8 (2011).

v. Commissioner,[29] the owner of a mortgage brokerage, failed to produce records substantiating her Schedule C gross receipts, Schedule C deductions, long-term capital gain, and Schedule E rental expenses. The Tax Court upheld the imposition of the accuracy-related penalty.

Reliance on Advice of a Tax Professional as Reasonable Cause

Reliance on a tax professional was another commonly litigated example of reasonable cause. To qualify for reliance on a tax professional under the reasonable cause exception, the taxpayers must establish that: (1) they provided all necessary information to the tax professional; (2) the tax professional was competent with sufficient expertise; and (3) the taxpayers relied in good faith on the tax professional's opinion or tax return preparation.[30] The taxpayer's education, sophistication, and business experience are relevant in determining whether the taxpayer's reliance on tax advice was reasonable.[31]

In *NPR Investments, LLC v. United States*,[32] the IRS argued that reliance on a tax professional was not appropriate because the transaction was "too good to be true." In that case, the taxpayers (partners in a limited liability company (LLC) treated as a partnership for tax purposes) participated in a foreign currency option investment strategy. When the partners withdrew from the LLC, they received cash and foreign currencies representing the fair market value of their interests. The partners obtained a legal opinion that detailed the proper tax treatment of their investments. Because the partners had no tax expertise, they consulted their accountant regarding the legal opinion and their accountant advised them that their tax position was more likely than not correct. The district court concluded the partners were not liable for the accuracy-related penalty, finding that the partners proved "their good faith in relying on the advice of qualified tax accountants and tax lawyers."[33]

Taxpayers cannot rely on the advice of an advisor with an inherent conflict of interest, such as an advisor who financially benefits from the transaction.[34] For example, in *Canal Corporation v. Commissioner*,[35] the taxpayer (a corporation), formed an LLC. An accounting firm advised the taxpayer on structuring the transaction. Based on the opinion of the accounting firm, the taxpayer treated the transaction as a tax-free contribution of property to a partnership and did not report any income from the transaction on its tax return. In concluding that the taxpayer was subject to the accuracy-related penalty for a substantial understatement, the court found it significant that the tax professional from the accounting firm who provided the tax advice had also been the auditor of the LLC. Moreover, that tax

29 T.C. Memo. 2010-209.

30 *Neufeld v. Comm'r*, T.C. Memo. 2008-79; *Neonatology Associates, P.A. v. Comm'r*, 115 T.C. 43, 99 (2000) (citations omitted), *aff'd*, 299 F.3d 221 (3d Cir. 2002); Treas. Reg. § 1.6664-4(c)(1).

31 Treas. Reg. § 1.6664-4(c)(1). *See also* IRM 20.1.5.6.1(6) (July 1, 2008).

32 732 F. Supp. 2d 676 (E.D. Tex. 2010).

33 732 F. Supp. 2d 676, 693 (E.D. Tex. 2010).

34 *See Tigers Eye Trading, LLC v. Comm'r*, T.C. Memo. 2009-21, and the cases cited therein.

35 135 T.C. 199 (2010), *appeal docketed*, No. 10-2253 (4th Cir. Oct. 29, 2010).

professional had been "intricately involved in drafting the joint venture agreement, the operating agreement, and the indemnity agreement. In essence, [the tax professional] issued an opinion on a transaction he helped plan without the normal give-and-take in negotiating terms with an outside party."[36]

Reliance on Tax Preparation Software

Reliance on tax return preparation software, much like reliance on a tax professional, does not necessarily entitle the taxpayer to escape liability for accuracy-related penalties. We reviewed three cases where the taxpayer claimed reliance on software as evidence of reasonable cause and good faith, and in each case, the Tax Court upheld the penalty. For example, in *Anyika v. Commissioner*,[37] the taxpayers (a husband and wife) tried to blame TurboTax for the miscalculation in their income which gave rise to a substantial understatement. Yet the taxpayers did not provide any evidence showing the information they entered into TurboTax, which is a preliminary showing required to decide whether the software was in any way at fault.[38] Tax return preparation software is only as good as the information the taxpayer puts into it.[39] Misuse of tax return preparation software, whether unintentional or not, is no defense to accuracy-related penalties.[40] Consequently, the Tax Court found the taxpayers' reliance on TurboTax was not reasonable cause for their underpayment.

Tax Shelter Penalty Litigation

We identified at least one case where accuracy-related penalties were assessed in the tax shelter context.[41] To discern whether the taxpayer acted with reasonable cause or in good faith with regard to shelters, one may look at all circumstances, including the actions of the taxpayer and the pass-thru entity.[42] In *Fidelity International Currency Advisor A Fund, LLC v. United States*,[43] the taxpayers were partners who held significant amounts of corporate stock and entered into transactions to avoid large tax liabilities on the sale of that stock. The court found that the conduit transaction was a tax shelter because its only purpose was to avoid tax liability. Consequently, there was no reduction in the accuracy-related penalty for relying on substantial authority.[44]

36 *Canal Corp. v. Comm'r*, 135 T.C. 199 (2010), *appeal docketed*, No. 10-2253 (4th Cir. Oct. 29, 2010).

37 T.C. Memo. 2011-69.

38 *Paradiso v. Comm'r*, T.C. Memo. 2005-187 (involving the reasonable cause component of the failure to file penalty, IRC § 6651(a)(1)).

39 *Bunney v. Comm'r*, 114 T.C. 259, 267 (2000).

40 *Lam v. Comm'r*, T.C. Memo. 2010-82.

41 IRC § 6662(d)(2)(C). A tax shelter is an entity or transaction whose "significant purpose...is the avoidance or evasion of Federal income tax."

42 Treas. Reg. § 1.6664-4(e).

43 747 F. Supp. 2d 49 (D. Mass. 2010).

44 *See* IRC § 6662(d)(2)(C)(i).

CONCLUSION

In the cases reviewed, the courts generally upheld deficiency determinations or portions of the deficiency determined by the IRS. However, the courts at times overruled the IRS in full or in part in regard to the accuracy-related penalties.

These cases indicate that although the taxpayer may have been incorrect on the underlying tax issue, if the taxpayer made a legitimate attempt to ascertain the correct amount of tax, the taxpayer often escaped liability for the penalty. Adequacy of records and reliance on tax professionals were the preeminent bases for finding reasonable cause. In addition, factors such as the knowledge of the taxpayer and the circumstances surrounding the taxpayer's reliance on a professional were also balanced by the courts. In the few cases where the taxpayer prevailed on the penalty issue, the IRS should take a closer look at the court's rationale. While the existence of reasonable cause is very fact-specific, those cases may offer lessons to be learned, which the IRS can incorporate into the Internal Revenue Manual and training materials.

MLI #7

Civil Actions to Enforce Federal Tax Liens or to Subject Property to Payment of Tax Under Internal Revenue Code Section 7403

SUMMARY

Internal Revenue Code (IRC or the "Code") § 7403 authorizes the United States to file a civil action in a United States District Court against a taxpayer who has refused or neglected to pay any tax, to enforce a federal tax lien or to subject any of the delinquent taxpayer's property to the payment of the tax. We identified 48 opinions issued between June 1, 2010, and May 31, 2011, which involved civil actions to enforce federal tax liens under IRC § 7403. The courts affirmed the position of the United States in the majority of cases. Taxpayers prevailed in only three cases and three cases resulted in split decisions. This is the third year that this issue has appeared as a Most Litigated Issue in the National Taxpayer Advocate's Annual Report to Congress.[1]

PRESENT LAW

IRC § 7403 specifically authorizes the United States to enforce a federal tax lien with respect to a taxpayer's delinquent tax liability, or to subject any property, right, title, or interest in the property of the delinquent taxpayer to the payment of tax liability, by initiating a civil action in the appropriate United States District Court against the taxpayer.[2] All persons holding liens or claiming any interest in the taxpayer's property should be named as parties to the action.[3] The nature of a taxpayer's legal interest in the property subject to a lien is determined by the law of the state where the property is located.[4] However, once it is determined that a delinquent taxpayer has an interest in the property, federal law controls whether the property is exempt from attachment.[5]

The U.S. District Court may order that the property be sold by an officer of the court and the proceeds applied to the delinquent tax liability.[6] However, the court is not required to authorize a forced sale under all circumstances and may exercise limited equitable discretion.[7] In cases where the forced sale involves the interests of non-delinquent third parties, a U.S. District Court should consider the following four factors when determining whether the property should be sold:

1. The extent to which the government's financial interests would be prejudiced if they were relegated to a forced sale of the partial interest of the delinquent taxpayer;

1 *See* National Taxpayer Advocate 2010 Annual Report to Congress 483-486; National Taxpayer Advocate 2009 Annual Report to Congress 465-470.

2 IRC § 7403(a); Treas. Reg. § 301.7403-1(a). Such action may be initiated regardless of whether levy has been made.

3 IRC § 7403(b).

4 *U.S. v. National Bank of Commerce*, 472 U.S. 713, 722 (1985).

5 *U.S. v. Rodgers*, 461 U.S. 677 (1983). Similarly, federal tax liens can attach to property exempt from the reach of creditors under state law, including property held by a delinquent taxpayer as a tenant by the entirety. *U.S. v. Craft*, 535 U.S. 274 (2002).

6 IRC § 7403(c).

7 *Rodgers*, 461 U.S. at 711.

2. Whether the innocent third party with a separate interest in the property, in the normal course of events, has a legally recognized expectation that the property would not be subject to a forced sale by the delinquent taxpayer or his or her creditors;
3. The likely prejudice to the third party in personal dislocation costs and inadequate compensation; and
4. The relative character and value of the non-liable and liable interests held in the property.[8]

The United States may bid at the sale of the property when it holds a first lien.[9] However, the amount of the bid is limited to the amount of the lien, plus selling expenses.[10] If any of the taxpayer's other creditors institute an action to foreclose their lien on the property which is subject to the federal tax lien, and the United States is not a party, the United States may intervene as if it had originally been joined as a party[11] and may remove the case to the U.S. District Court if such action was instituted in a state court.[12] However, junior federal tax liens may be effectively extinguished in a foreclosure and sale under state law, even if the United States is not a party to the proceeding.[13] The Code also specifically authorizes the court to appoint a receiver to enforce the lien and, upon the government's certification that it is in the public interest, the court may appoint a receiver with all powers of a receiver in equity to preserve and operate the property prior to sale.[14]

ANALYSIS OF LITIGATED CASES

We reviewed 48 opinions entered between June 1, 2010, and May 31, 2011, in civil actions to enforce federal tax liens. Table 7 in Appendix III contains a detailed list of those cases. In 25 cases, taxpayers represented themselves (*pro se*), while 23 of the 48 taxpayers were represented by counsel. Taxpayers with representation received full relief in two cases and partial relief in two cases, while *pro se* taxpayers received full relief in one case and partial relief in one case.

The issue of whether it was appropriate to foreclose the federal tax lien against the taxpayer's real property was the most prevalent issue. The courts considered this issue in 47

8 *Rodgers*, 461 U.S. at 709-11.

9 IRC § 7403(c).

10 *Id.*

11 IRC § 7424; 28 U.S.C. § 2410.

12 28 U.S.C. § 1444. However, if the application of the United States to intervene is denied, the adjudication will have no effect upon the federal tax lien on the property. IRC § 7424.

13 *U.S. v. Brosnan*, 363 U.S. 237 (1960).

14 IRC §§ 7403(d) and 7402(a).

cases, with the government prevailing fully in 39 of these cases.[15] A typical case is *United States v. Benoit,*[16] in which the government filed an action to foreclose its tax liens and sell the taxpayer's real property to which the liens had attached. First, the court determined that the government had correctly assessed the taxpayer's liabilities and the tax assessments remained unpaid.[17] Thus, federal tax liens attached to the taxpayer's property.[18] The court then observed that the assessments were made after notice and demand and within the applicable statute of limitations period.[19] Thus, the court granted the government's motion for summary judgment and ordered the foreclosure of the valid federal tax liens against the taxpayer's real property.

In *United States v. Johnson,*[20] the court issued a split ruling on a motion for summary judgment. According to the court, the collection period had expired regarding one tax year at issue, but remained open with respect to nine years in question. Further, a genuine issue of material fact remained regarding whether the taxpayer had executed a valid extension of the collection period for three other years.

In a number of cases, the courts considered the equitable factors under the United States Supreme Court decision in *United States v. Rodgers.*[21] For example, in *United States v. Winsper,*[22] the court applied the *Rodgers* factors and denied the government's motion for foreclosure of federal tax liens on the taxpayer's home, a home he owned with his wife who did not have any outstanding federal tax debts. The court declined to authorize the foreclosure, finding that two of the *Rodgers* factors weighed against relief. First, the court found that the wife, as joint owner of the property, had a legally recognized expectation that the property would not be subject to forced sale given the fact that in Kentucky, where the property is located, courts have established a policy against the foreclosure of a marital residence to satisfy the wrongdoing of only one spouse. Second, the sale was likely to generate a relatively small amount of proceeds, and the wife's portion of the proceeds would not be

15 In eight cases, the United States Courts of Appeals affirmed the trial courts' decisions in favor of the government. *See U.S. v. Christiansen*, 107 A.F.T.R.2d (RIA) 840 (11th Cir. 2011) (per curiam), *aff'g* 107 A.F.T.R.2d (RIA) 937 (M.D. Fla. 2010); *U.S. v. Morgan*, 419 Fed. Appx. 958 (11th Cir. 2011) (per curiam), *aff'g* 105 A.F.T.R.2d (RIA) 442 (M.D. Fla. 2010); *U.S. v. Wesselman*, 406 Fed. Appx. 64 (7th Cir. 2011), *aff'g* 105 A.F.T.R.2d (RIA) 2021 (S.D. Ill. 2010); *U.S. v. Zurn*, 107 A.F.T.R. 2d (RIA) 2127 (9th Cir. 2011), *aff'g* 103 A.F.T.R.2d (RIA) 939 (C.D. Cal. 2009); *U.S. v. Barr*, 617 F.3d 370 (6th Cir. 2010), *aff'g* 102 A.F.T.R.2d (RIA) 6078 (E.D. Mich. 2008), *reh'g en banc denied*, 106 A.F.T.R.2d (RIA) 6893 (6th Cir. 2010), *cert. denied*, 131 S. Ct. 1678 (2011); *U.S. v. Niamatali*, 389 Fed. Appx. 334 (5th Cir. 2010) (per curiam), *aff'g* 07-00108 (S.D. Tex. 2009); *U.S. v. Neal*, 391 Fed. Appx. 569 (8th Cir. 2010) (per curiam), *aff'g* 103 A.F.T.R.2d (RIA) 643 (W.D. Ark. 2008); *U.S. v. Wheeler,* 403 Fed. Appx. 301 (9th Cir. 2010), *aff'g* 07-06384 (C.D. Cal. 2008).

16 107 A.F.T.R.2d (RIA) 1056 (S.D. Cal. 2010), *reconsideration denied by* 107 A.F.T.R.2d (RIA) 2577 (S.D. Cal. 2011), *appeal dismissed* (9th Cir. Oct. 19, 2011).

17 Once the government introduces into evidence a Certificate of Assessments and Payments (Form 4340), it establishes a presumption of correctness with respect to the tax assessment and constitutes a *prima facie* case of liability on the part of the taxpayer. *Hughes v. United States*, 953 F.2d 531, 535 (9th Cir. 1991). The burden then shifts to the taxpayer to show that the assessment was not properly made. *Id*. In *Benoit*, the government introduced the Certificate, and the taxpayer failed to produce any evidence to refute the presumption of correctness.

18 If a taxpayer, after notice and demand for a payment, refuses or fails to pay, a "secret" lien that attaches to all of the taxpayer's property or rights to property arises upon assessment under IRC §§ 6321 and 6322.

19 IRC § 6502.

20 107 A.F.T.R.2d (RIA) 2330 (E.D. Mo. 2011).

21 461 U.S. 677 (1983).

22 106 A.F.T.R.2d (RIA) 6945 (W.D. Ky. 2010).

sufficient to allow her to relocate to other reasonable housing. In *United States v. Porath*,[23] the court found the IRS held a valid federal tax lien on the taxpayer's one-half interest in his family home, despite the taxpayer's subsequent conveyance of that interest to his wife. However, the order of foreclosure allowed the Poraths to continue to live in the home so long as they maintain the property, keep it insured, and pay the real estate taxes.

Another common issue litigated by the government was foreclosure of federal tax liens against the taxpayer's property titled in the name of a nominee.[24] A nominee is a party that holds legal title to a property while all or some of the benefits of the property are retained by a different party, in this case the taxpayer.[25] In *United States v. Burnett*,[26] the IRS assessed federal income and employment taxes against the taxpayer and recorded notices of federal tax liens against his property. Several years later, the taxpayer, acting as attorney-in-fact for his grandmother a week prior to her death, transferred two of her properties to a trust. The United States filed suit to enforce the tax liens against the properties held by the trust arguing that the trust was simply the nominee of the taxpayer and that the taxpayer, rather than the trust, was the true beneficial owner of the properties. The taxpayer, on the other hand, argued that he never held title to the properties in question and that the trust existed for the benefit of his children. The court sided with the IRS, noting that the property was transferred to the trust for minimal consideration and in anticipation of litigation, the taxpayer continued to exercise control over the property, the taxpayer maintained a close relationship with the trust company, and the taxpayer continued to enjoy the benefits of the property. As such, the court concluded, the trust was merely the taxpayer's nominee, and the government was entitled to enforce its tax liens against the property.

Similarly, in *United States v. Felt*,[27] the government filed an action to foreclose its tax liens and sell the taxpayer's real property to which the liens had attached. The court found that the tax liens attached to property that was titled in the name of the Felt Trust, rather than in the name of the taxpayer. The court determined that the trust was the nominee of the taxpayer as the taxpayer transferred the property to the trust for inadequate consideration, the taxpayer and his wife resided at the property without ever paying rent, and enjoyed all the benefits of the property. Thus, the court granted the motion for summary judgment and ordered the foreclosure of the valid federal tax liens against the taxpayer's real property.

23 764 F. Supp. 2d 883 (E.D. Mich. 2011), *appeal docketed* (6th Cir. Apr. 1, 2011), *appeal dismissed* (6th Cir. Apr. 22, 2011), *appeal reinstated* (6th Cir. May 3, 2011).

24 *See, e.g.*, *U.S. v. Felt*, 107 A.F.T.R.2d (RIA) 2239 (D. Utah 2011); *U.S. v. Zimmerman*, 107 A.F.T.R.2d (RIA) 1887 (E.D. Pa. 2011), *order entered by* 2011 WL 1483349 (E.D. Pa. 2011), *motion for relief from judgment and to vacate sale filed* (E.D. Pa. Nov. 3, 2011); *U.S. v. Benice*, 106 A.F.T.R.2d (RIA) 6485 (C.D. Cal. 2010); *U.S. v. Lupi*, 105 A.F.T.R.2d (RIA) 2806 (M.D. Fla. 2010).

25 *See U.S. v. Lupi*, 105 A.F.T.R.2d (RIA) 2806 (M.D. Fla. 2010).

26 106 A.F.T.R.2d (RIA) 6699 (S.D. Tex. 2010), *appeal docketed* (5th Cir. Dec. 22, 2010).

27 107 A.F.T.R.2d (RIA) 2239 (D. Utah 2011).

CONCLUSION

Federal tax lien enforcement first appeared as a Most Litigated Issue in 2009, and enforcement activities by the IRS continue to increase each year. In fiscal year (FY) 2002, the IRS filed approximately 492,000 Notices of Federal Tax Lien (NFTLs); that number rose to nearly 1.1 million in FY 2010, an increase of nearly 125 percent in just eight years.[28] Between FY 2009 and FY 2010 alone, NFTL filings increased by over 130,000.[29] This rise in NFTL filings has led more taxpayers to contest the foreclosure actions on these liens in the federal court system. As the IRS continues to increase enforcement activities such as filing NFTLs, we expect the number of court cases involving suits to foreclose liens will also continue to increase.

28 The IRS filed 492,000 NFTLs in FY 2002 and 1,096,376 in FY 2010. Statistics of Income Data Books, Table 16b, Delinquent Collection Activities, 2002-2010.

29 The IRS filed 965,618 NFTLs in FY 2009 and 1,096,376 in FY 2010. Statistics of Income Data Books, Table 16b, Delinquent Collection Activities, 2002-2010.

MLI #8

Relief From Joint and Several Liability Under Internal Revenue Code Section 6015

SUMMARY

Married couples may elect to file their federal income tax returns jointly or separately. Spouses filing joint returns are jointly and severally liable for any deficiency or tax due.[1] Joint and several liability permits the IRS to collect the entire amount due from either taxpayer.[2]

IRC § 6015 provides three avenues for relief from joint and several liability. Section 6015(b) provides "traditional" relief for deficiencies. Section 6015(c) also provides relief for deficiencies for certain spouses who are divorced, separated, widowed, or not living together, by allocating the liability between the spouses. Section 6015(f) provides "equitable" relief from both deficiencies and underpayments, but only applies if a taxpayer is not eligible for relief under IRC § 6015(b) or (c).

We reviewed 43 federal court opinions involving relief under IRC § 6015 that were issued between June 1, 2010, and May 31, 2011, as well as one decision, *Jones v. Commissioner*,[3] issued on June 13, 2011. As we found last year, the most significant issue the courts addressed this year is the period of time within which a taxpayer may request relief under IRC § 6015(f). Ultimately, the controversy surrounding the validity of a Treasury regulation that imposes a two-year deadline for requesting equitable relief under IRC § 6015(f) was resolved when the IRS announced that the regulation will be revised to remove the two-year time limit.[4] The Tax Court also explored the difference between a *de novo* scope and standard of review and a review for abuse of discretion limited to the administrative record,[5] and a Court of Appeals discussed the effect of a final notice of determination that was returned as undeliverable.[6]

PRESENT LAW

Traditional Innocent Spouse Relief Under IRC § 6015(b)

IRC § 6015(b) provides that a requesting spouse shall be partially or fully relieved from joint and several liability, pursuant to procedures established by the Secretary, if the requesting spouse can demonstrate that:

1 IRC § 6013(d)(3). We use the terms "deficiency" and "understatement" interchangeably for purposes of this discussion and the case table in Appendix III, even though IRC § 6015(b)(1)(D) and IRC § 6015(f) expressly use the term "deficiency" and IRC § 6015(b)(1)(B) refers to an "understatement of tax."

2 The National Taxpayer Advocate, in the 2005 Annual Report to Congress, proposed legislation that would eliminate joint and several liability for joint filers. See National Taxpayer Advocate 2005 Annual Report to Congress 407.

3 *Jones v. Comm'r*, 642 F.3d 459 (4th Cir., 2011), *rev'g and remanding* T.C. Docket No. 17359-08 (2009).

4 IR 2011-80 (July 25, 2011), *available at* http://www.irs.gov/newsroom/article/0,,id=242867,00.html. Details of the changes in the rule are provided by IRS Notice 2011-70 (July 25, 2011), *available at* http://www.irs.gov/pub/irs-drop/n-11-70.pdf.

5 *Wilson v. Comm'r*, T.C. Memo. 2010-134, *appeal docketed*, No.10-72754 (9th Cir. Sept. 10, 2010).

6 *Terrell v. Comm'r*, 625 F.3d 254 (5th Cir. 2011), *rev'g and remanding* Tax Court Docket No. 15894-07 (July 30, 2009).

1. A joint return was filed;
2. There was an understatement of tax attributable to erroneous items of the nonrequesting spouse;[7]
3. Upon signing the return, the requesting spouse did not know or have reason to know of the understatement;
4. Taking into account all the facts and circumstances, it is inequitable to hold the requesting spouse liable; and
5. The requesting spouse elected relief within two years after the IRS began collection activities against him or her.[8]

Allocation of Liability Under IRC § 6015(c)

IRC § 6015(c) provides that the requesting spouse shall be relieved from liability for deficiencies allocable to the nonrequesting spouse, pursuant to procedures established by the Secretary. To obtain relief under this section, the requesting spouse must demonstrate that:

1. A joint return was filed;
2. At the time relief was elected, the joint filers were unmarried, legally separated, widowed, or had not lived in the same household for the 12 months immediately preceding the election; and
3. The election was made within two years after the IRS began collection activities with respect to the requesting spouse.

This election allocates to each joint filer the portion of the deficiency attributable to each filer as calculated under the allocation provisions of IRC § 6015(d). A taxpayer is ineligible to make an election under IRC § 6015(c) if the IRS demonstrates that, at the time he or she signed the return, the requesting taxpayer had "actual knowledge" of any item giving rise to the deficiency.[9] Relief is not available for amounts attributable to fraud, fraudulent schemes, or certain transfers of disqualified assets.[10] Finally, no credit or refund is allowed as a result of relief granted under IRC § 6015(c).[11]

7 An erroneous item is any income, deduction, credit, or basis that is omitted from or incorrectly reported on the joint return. *See* Treas. Reg. § 1.6015-1(h)(4).

8 Not all actions that involve collection will trigger the two-year limitations period. Under the regulations, only the following four events constitute "collection activity" that will start the two-year period: (1) an IRC § 6330 notice; (2) an offset of an overpayment of the requesting spouse against the joint income tax liability under IRC § 6402; (3) the filing of a suit by the United States against the requesting spouse for the collection of the joint tax liability; and (4) the filing of a claim by the United States to collect the joint tax liability in a court proceeding in which the requesting spouse is a party or which involves property of the requesting spouse. Treas. Reg. § 1.6015-5(b)(2).

9 IRC § 6015(c)(3)(C).

10 IRC §§ 6015(c)(4), (d)(3)(C).

11 IRC § 6015(g)(3).

Equitable Relief Under IRC § 6015(f)

IRC § 6015(f) provides that the Secretary may relieve a taxpayer from liability for both deficiencies and underpayments[12] where the taxpayer demonstrates that:

1. Relief under IRC § 6015(b) or (c) is unavailable; and
2. Taking into account all the facts and circumstances, it would be inequitable to hold the taxpayer liable for the underpayment or deficiency.

Prior to July 25, 2011, the IRS applied one of the regulations under IRC § 6015(f) which requires the taxpayer to request equitable relief within two years after the IRS initiates collection activity with respect to the taxpayer.[13] As discussed in last year's report, the United States Court of Appeals for the Seventh Circuit reversed the Tax Court's holding that the regulation was invalid, and held that the two-year rule is a valid interpretation of IRC § 6015(f).[14] This year, two additional Courts of Appeals, in separate cases, reversed the Tax Court's holding that the regulation was invalid.[15] Several other cases were pending in other Courts of Appeal.[16]

On July 25, 2011, the IRS announced that notwithstanding the appellate court decisions that upheld the validity of the regulation, the regulations issued under IRC § 6015 should be revised to remove the two-year rule for requests for equitable relief.[17] Pending modification of the regulation to formally remove the two-year rule, taxpayers requesting equitable relief under IRC § 6015(f) after July 25, 2011, may do so without regard to when the first collection activity was taken. Requests must be filed within the period of limitation on collection in IRC § 6502[18] or, for any credit or refund of tax, within the period of limitation in IRC § 6511.[19] Motions for voluntary dismissal were filed on July 25, 2011, in cases pending in the various appellate courts.

12 An underpayment of tax occurs when the tax is properly shown on the return but is not paid. *Washington v. Comm'r*, 120 T.C. 137, 158-159 (2003).

13 Treas. Reg. §1.6015-5(b)(1).

14 *Lantz v. Comm'r*, 607 F.3d 479 (7th Cir. 2010), *rev'g and remanding* 132 T. C. 131 (2009).

15 *Mannella v. Comm'r*, 631 F.3d 115 (3d Cir. 2011); *Jones v. Comm'r*, 642 F.3d 459 (4th Cir. 2011).

16 *Hall v. Comm'r*, 135 T.C. 374, *appeal docketed*, No. 10-2628 (6th Cir. Dec. 14, 2010); *Buckner v. Comm'r*, T.C. Docket No. 12153-09, *appeal docketed*, No. 10-2056 (6th Cir. Aug. 18, 2010); *Payne v. Comm'r*, T.C. Docket No. 10768-09, *appeal docketed*, No. 10-72855 (9th Cir. Sept. 17, 2010); *Coulter v. Comm'r*, T.C. Docket No. 1003-09, *appeal docketed*, No. 10-680 (2d Cir. Feb. 24, 2010).

17 IR 2011-80 (July 25, 2011), *available at* http://www.irs.gov/newsroom/article/0,,id=242867,00.html. Details of the changes to the rule are provided in IRS Notice 2011-70 (July 25, 2011), *available at* http://www.irs.gov/pub/irs-drop/n-11-70.pdf. The notice provides transitional rules, and provides that pending litigation will be managed consistently with the removal of the two-year rule.

18 The statutory period of limitations on collection is generally ten years after the date the tax is assessed. IRC § 6502(a). However, if a court proceeding to collect the tax is brought, such as a suit to reduce a tax liability to judgment, the period of limitations on collection is extended. Therefore, the period of limitations on collection could exceed ten years and a claim for innocent spouse relief would be valid at any point during that time.

19 Generally, taxpayers must request a refund within three years from the date their return was filed, or two years from the time the tax was paid, whichever occurs later, or, if no return was filed, within two years from the time the tax was paid. IRC § 6511(a). If taxpayers meet the three-year requirement, they can recover payments made during the three-year period that precedes the date of the refund request, plus the period of any extension of time for filing the return. However, taxpayers who do not meet the three-year requirement can recover only payments made during the two-year period preceding the date of the refund request. IRC § 6511(b)(2).

Revenue Procedure 2003-61 lists some of the factors the IRS considers in determining whether equitable relief is appropriate.[20] These factors include marital status, economic hardship, knowledge or reason to know, legal obligations of the nonrequesting spouse, significant benefit to the requesting spouse, compliance with income tax laws, and abuse.

Rights of Nonrequesting Spouse

The individual with whom the requesting spouse filed the joint return is generally referred to as a "nonrequesting spouse," and is granted certain rights by IRC § 6015. The nonrequesting spouse must be notified and given an opportunity to participate in any administrative proceedings concerning a claim under IRC § 6015.[21] Further, if during the administrative process full or partial relief is granted to the requesting spouse, the nonrequesting spouse can file a protest and receive an administrative conference in the IRS Appeals function.[22] The nonrequesting spouse does not have the right to petition the Tax Court in response to the IRS's administrative determination regarding IRC § 6015 relief.[23] If the requesting spouse files a Tax Court petition, the nonrequesting spouse must receive notice of the Tax Court proceeding and has an unconditional right to intervene in the proceeding to dispute or support the requesting spouse's claim for relief.[24] However, an intervening spouse has no standing to appeal the Tax Court's decision to the United States Court of Appeals.[25]

Judicial Review

Taxpayers seeking relief under IRC § 6015 generally file Form 8857, *Request for Innocent Spouse Relief*.[26] After reviewing the request, the IRS issues a final notice of determination granting or denying relief in whole or in part. The taxpayer has 90 days from the date the IRS mails the notice to file a petition with the Tax Court.[27] The Tax Relief and Health Care Act of 2006 amended IRC § 6015(e) to expressly provide that the Tax Court has jurisdiction in stand-alone cases to review IRC § 6015(f) determinations, even where no deficiency has been asserted.[28]

20 Rev. Proc. 2003-61, 2003-2 C.B. 296.

21 IRC § 6015(h)(2).

22 Rev. Proc. 2003-19, 2003-5 C.B. 371.

23 IRC § 7442; *Maier v. Comm'r*, 119 T.C. 267 (2002), *aff'd by* 360 F.3d 361 (2d Cir. 2004) (holding that there are no provisions in IRC § 6015 that allow the nonrequesting spouse to petition the Tax Court from a notice of determination).

24 *Van Arsdalen v. Comm'r*, 123 T.C. 135 (2004).

25 *Baranowicz v. Comm'r*, 432 F.3d 972 (9th Cir. 2005).

26 *See* IRS Form 8857, *Request for Innocent Spouse Relief*, Instructions (Sept. 2010).

27 IRC § 6015(e)(1)(A)(ii).

28 Pub. L. No. 109-432, Div. C, § 408(a), (c), 120 Stat. 2922, 3061-62 (2006). The filing of a Tax Court petition in response to the final notice of determination or after the IRC § 6015 claim is pending for six months is often referred to as a "stand-alone" proceeding, because jurisdiction is predicated on IRC § 6015(e) and not deficiency jurisdiction under IRC § 6213.

ANALYSIS OF LITIGATED CASES

We analyzed 43 opinions issued between June 1, 2010, and May 31, 2011, including 38 cases in the Tax Court, one each in the United States Courts of Appeals for the Third and Fifth Circuits, two in the Court of Appeals for the Ninth Circuit, and one in a U.S. District Court. In addition, we analyzed one opinion issued on June 13, 2011, by the United States Court of Appeals for the Fourth Circuit. Fifty-five percent of the cases (24 of 44) were decided in favor of the IRS, 30 percent (13 of 44) in favor of the taxpayer (including one case in which only the intervenor opposed granting relief), and 16 percent (seven of 44) ended in split decisions.[29] In 52 percent (23 of 44) of the cases, the taxpayers were *pro se* (*i.e.*, they represented themselves). Taxpayers prevailed in 26 percent (six of 23) of the cases in which they proceeded *pro se*; four other *pro se* taxpayers obtained split decisions. The nonrequesting spouse intervened in 18 percent of the cases (eight of 44).

Seventy-seven percent of the cases (34 of 44) involved an analysis of whether to grant relief. Thirty-four percent of the cases (15 of 44) involved procedural issues,[30] with 67 percent (ten of 15) of these cases decided in favor of the IRS, and 33 percent (five of 15) in favor of the taxpayer.

Of the 34 cases decided on the merits, 47 percent (16 of 34) were decided in favor of the IRS, 32 percent (11 of 34) in favor of the taxpayer, and in 21 percent (seven cases) the court split its decision. See Table 8 in Appendix III for a detailed breakdown of the cases.[31]

Procedural Issues

The most significant procedural issue courts addressed is the validity of a Treasury regulation that requires a taxpayer to request relief under IRC § 6015(f) within two years after the IRS commences collection activity. Additionally, the Tax Court explored the difference between a *de novo* scope and standard of review and a review for abuse of discretion limited to the administrative record, and a Court of Appeals discussed the effect of a notice of determination that was returned as undeliverable.

Mannella v. Commissioner and Jones v. Commissioner

As reported last year, in *Lantz v. Commissioner*[32] the Tax Court considered the validity of Treasury Regulation §1.6015-5(b)(1), which requires the requesting spouse to make an election for relief under IRC § 6015(f) within two years after the IRS initiates collection activity against the requesting spouse. The court held that the regulation was not entitled to

29 These percentages add up to more than 100 due to rounding.

30 The percentages add up to more than 100 and the number of cases adds up to more than 44 because five cases addressed the procedural issue of the validity of the two-year rule in Treas. Reg. § 1.6015-5(b)(1) and also contained an analysis of whether to grant relief on the merits.

31 Table 8 in Appendix III also includes *Lantz v. Comm'r*, 607 F.3d 479 (7th Cir. 2010), *rev'g and remanding* 132 T. C. 131 (2009), which we discussed in last year's report and do not discuss this year. We include the *Lantz* case in the table for the sake of completeness, as it was the first case in which the Tax Court held invalid the two-year rule in Treas. Reg. 1.6015-5(b)(1).

32 *Lantz v. Comm'r*, 132 T.C. 131 (2009), *rev'd and remanded by* 607 F3d 479 (7th Cir. 2010).

judicial deference because it failed the test articulated by the Supreme Court in *Chevron.*[33] Shortly after the *Lantz* decision, the Tax Court decided *Mannella v. Commissioner*,[34] in which it again held that the regulation containing the two-year rule was invalid. The IRS appealed both Tax Court decisions to the United States Courts of Appeals for the Seventh and Third Circuits, respectively. As we reported last year, the Court of Appeals for the Seventh Circuit reversed the Tax Court's decision in *Lantz* and remanded the case to the Tax Court.

After the Seventh Circuit's reversal in the *Lantz* case, the Tax Court adhered to the rule in *Golsen v. Commissioner*[35] that it will defer to a Court of Appeals decision that is squarely on point where an appeal from the Tax Court decision lies to that Court of Appeals. The Tax Court continued to hold the regulation invalid in cases appealable to other courts, and the IRS appealed some of those decisions.[36] This year, the Court of Appeals for the Third Circuit reversed and remanded the *Mannella* case to the Tax Court with instructions to consider whether the doctrine of equitable tolling would operate to suspend the two-year period.[37] The Court of Appeals for the Fourth Circuit also reversed the Tax Court on the same issue this year in *Jones v. Commissioner*, and remanded the case for the Tax Court to consider whether an extension of time to request relief might be available pursuant to a different Treasury regulation.[38]

As described above, on July 25, 2011, the IRS announced that the Treasury regulations under IRC § 6015 would be revised to remove the two-year rule for claims for equitable relief, and moved to dismiss affected cases pending in appellate courts. On October 20, 2011, the IRS notified the Tax Court that the parties had reached a settlement in the *Jones* case and were preparing a stipulated decision.[39] Pursuant to agreement of the parties, the Tax Court on August 30, 2011, entered a decision in the *Mannella* case that no income tax was due after the application of IRC § 6015(f).[40]

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33 *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

34 132 T.C. 196 (2009).

35 54 T.C. 742, 757 (1970), *aff'd by* 445 F.2d 985 (10th Cir. 1971).

36 *See, e.g.*, *Young v. Comm'r*, T.C. Docket No. 12718-09 (May 12, 2011); *Pullins v. Comm'r*, 136 T.C. No. 20 (2011); *Stephenson v. Comm'r*, T.C. Memo. 2011-16 (2011); *Hall v. Comm'r*, 135 T.C. 374, *appeal docketed*, No. 10-2628 (6th Cir. Dec. 14, 2010); *Buckner v. Comm'r*, T.C. Docket No. 12153-09, *appeal docketed*, No. 10-2056 (6th Cir. Aug. 18, 2010); *Carlile v. Comm'r*, T.C. Docket No. 11567-09; *Payne v. Comm'r*, T.C. Docket No. 10768-09, *appeal docketed*, No. 10-72855 (9th Cir. Sept. 17, 2010); *Coulter v. Comm'r*, T.C. Docket No. 1003-09, *appeal docketed*, No. 10-680 (2d Cir. Feb. 24, 2010). However, where a district court, prior to the Tax Court's decision in *Lantz*, held that the two-year rule precluded relief, the doctrine of *res judicata* prevented the taxpayer from raising the claim in Tax Court post-*Lantz*. *Haag v. Comm'r*, T.C. Memo. 2011-87; IRC § 6015(g). Additionally, the IRS prevailed in two cases in which the Tax Court disregarded the two-year rule. *Bland v. Comm'r*, T.C. Memo. 2011-8; *Kelly v. Comm'r*, T.C. Memo. 2010-267.

37 *Mannella v. Comm'r*, 631 F.3d 115, 125-126 (3d Cir. 2011) *rev'g and remanding* 132 T.C. 196 (2009). Citing its own precedent, the court noted: "there may be equitable tolling '(1) where the defendant has actively misled the plaintiff respecting the plaintiff's cause of action; (2) where the plaintiff in some extraordinary way has been prevented from asserting his or her rights; or (3) where the plaintiff has timely asserted his or her rights mistakenly in the wrong forum.'"

38 *Jones v. Comm'r*, 642 F.3d 459 (4th Cir. 2011), *rev'g and remanding* T.C. Docket No. 17359-08 (2009). Treas. Reg. § 301.9100-3 permits the IRS to grant an extension of time to a taxpayer for "regulatory elections . . . when the taxpayer provides the evidence . . . to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and the grant of relief will not prejudice the interests of the Government."

39 *See Jones v. Comm'r*, *order*, T.C. Docket No. 17359-08 (Oct. 25, 2011).

40 *Mannella v. Comm'r*, *decision entered*, T.C. Docket No. 17531-07 (Aug. 30, 2011).

Wilson v. Commissioner

In *Wilson v. Commissioner*,[41] Mr. Wilson, an insurance salesman, generated additional income by steering people into a Ponzi scheme. Mrs. Wilson was aware of the additional income but believed it derived from legitimate business operations. The additional income, which arose in 1997-1999, was not reported on the joint returns the couple filed for 1997 or 1998. The couple later filed amended 1997 and 1998 returns that reported the income, and included the additional income on their 1999 joint return. The resulting $540,000 tax debt from the returns for the three years remained unpaid. In 2002, Mrs. Wilson requested innocent spouse relief under IRC § 6015(f) in a stand-alone petition.[42]

In the Tax Court proceeding, pursuant to *Porter v. Commissioner* (*Porter I*),[43] the Tax Court's scope of review was *de novo*, which means that the court could and did consider evidence introduced at trial that was not part of the administrative record.[44] The Court of Appeals for the 11th Circuit has held that *de novo* review is appropriate for Tax Court review of stand-alone claims under IRC § 6015(f).[45] However, the IRS does not agree with the decision in *Porter I*, and has instructed Chief Counsel attorneys to, among other things, continue to raise the scope of review argument whenever appropriate.[46] Pursuant to its decision in *Porter v. Commissioner (Porter II)*,[47] the Tax Court used the *de novo* standard of review, rather than an abuse of discretion standard of review. Under a *de novo* standard, the court considers the facts of the case anew and determines whether it is inequitable to hold the requesting spouse liable for the unpaid tax or deficiency. Under an abuse of discretion standard, the court reviews the IRS's denial of relief and overturns that determination only where it is shown to be arbitrary, capricious, or without sound basis in fact, and the requesting spouse bears the burden of proving that the Commissioner abused his discretion in denying relief.[48] The IRS also does not agree with the decision in *Porter II*, and has

41 T.C. Memo. 2010-134, *appeal docketed*, No.10-72754 (9th Cir. Sept. 10, 2010).

42 The trial began in 2005, but the Tax Court suspended the case due to the questioned jurisdiction of the Tax Court over stand-alone innocent spouse cases. *See Comm'r v. Ewing*, 439 F.3d 1009 (9th Cir. 2006), *rev'g* 118 T.C. 494 (2002) and vacating 122 T.C. 32 (2004). As discussed *supra*, the Tax Relief and Health Care Act of 2006 amended IRC § 6015(e) to expressly provide that the Tax Court has jurisdiction in stand-alone cases to review IRC § 6015(f) determinations, permitting Mrs. Wilson's case to go forward.

43 130 T.C. 115 (2008) (*Porter I*). In *Porter I*, the Tax Court denied the IRS's motion *in limine* (*i.e.*, as a preliminary matter), which sought to preclude the taxpayer from offering evidence not already contained in the administrative record.

44 The Tax Court's decision in *Porter I* was in turn based on its earlier holding in *Ewing v. Comm'r*, 118 T.C. 494 (2002), vacated on other grounds sub nom. *Comm'r v. Ewing*, 439 F.3d 1009 (9th Cir. 2006), in which the Tax Court found that the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706 (2000), which limits the scope of judicial review to the administrative record, was not applicable to Tax Court proceedings, including IRC § 6015 proceedings. Further, the Tax Court found that the use of the word "determine" in IRC § 6015 is similar to the use of the word "redetermination" in IRC § 6213(a) under which it is unquestioned that the court conducts trials *de novo*. The Tax Court concluded that the use of this term meant that Congress intended the court to have *de novo* review authority for IRC § 6015 cases.

45 *Neal v. Comm'r*, 557 F.3d 1262 (11th Cir. 2009), *aff'g* T.C. Memo. 2005-201.

46 Notice CC-2009-021 (June 30, 2009).

47 132 T.C. No 11 (2009); *Porter II* is a continuation of the same case that produced the 2008 holding (*Porter I*, *see supra* note 43) that Tax Court review of denials of relief under IRC § 6015(f) is not limited to the administrative record.

48 *Jonson v. Comm'r*, 118 T.C. 106, 125, *aff'd by* 353 F.3d 1181 (10th Cir. 2003).

instructed Chief Counsel attorneys to, among other things, continue to raise the standard of review argument whenever appropriate.[49]

The Tax Court articulated the ways in which its conclusions, based on *de novo* review, differed from the IRS's conclusions that were based solely on the administrative record. First, the court considered Mrs. Wilson's marital status. Pursuant to Revenue Procedure 2000-15,[50] if a requesting spouse is "separated (whether legally separated or living apart) or divorced," this factor favors granting relief, while if the requesting spouse is still married to the other joint filer the factor is neutral. Mrs. Wilson requested innocent spouse relief in 2002. Her responses to IRS inquiries during the period the IRS was considering her claim showed that she was still married to Mr. Wilson, so the IRS treated this factor as neutral. However, the Wilsons divorced in 2007. The Tax Court, considering Mrs. Wilson's marital status at the time of trial in 2008, therefore found the marital status factor weighed in favor of relief. Similarly, the administrative record showed that Mrs. Wilson had made a good faith effort to comply with federal income tax laws in 2001 and 2002, the years following those to which the request for relief related, so, pursuant to Revenue Procedure 2000-15 the IRS treated this factor as neutral. The Tax Court, however, considering Mrs. Wilson's failure to adduce testimony or evidence at trial as to her compliance in 2003 and 2004, found this factor slightly weighed against relief.

Another area of divergence was the evaluation of the requesting spouse's knowledge or reason to know. According to Revenue Procedure 2000-15, if the requesting spouse knew or had reason to know the reported liability would be unpaid at the time the return was signed, this factor weighs against granting relief. The IRS wrote to Mrs. Wilson, asking her to explain what she knew when she signed the returns, but Mrs. Wilson did not respond. During administrative proceedings, she did not otherwise show that she did not know or have reason to know the liability would not be paid. The IRS therefore treated this factor as weighing against relief. The Tax Court, however, reasoned that the amounts of tax shown on the original returns for 1997 and 1998 (*i.e.*, without taking into the additional tax attributable to Mr. Wilson's fraudulent business activity) were such that, in view of Mr. Wilson's earnings and the couple's assets, Mrs. Wilson reasonably believed Mr. Wilson would pay them. The situation for the 1999 return was slightly different, because that return included the additional tax attributable to the fraudulent activity, but the Tax Court found that Mrs. Wilson still reasonably believed that family assets would be sufficient to pay the tax. The same was true of the amended returns for 1997 and 1998, which Mrs. Wilson signed on the same date as the original return for 1999; even though the amended returns showed substantially greater amounts of taxes due than the original returns, Mrs. Wilson lacked reason to know that Mr. Wilson would fail to pay them. Therefore, the Tax Court found that the knowledge factor weighed in favor of relief.

49 Notice CC-2009-021 (June 30, 2009).

50 Rev. Proc. 2000-15, 2000-1 C.B. 447, was in effect when Mrs. Wilson filed her request for innocent spouse relief. It has been superseded by Rev. Proc. 2003-61, 2003-2 C.B. 296, discussed *supra*, which generally applies to requests for relief filed on or after Nov. 1, 2003.

The Tax Court also arrived at a different conclusion than the IRS with respect to the hardship factor. According to Revenue Procedure, 2000-15, if satisfaction of the tax liability would cause the requesting spouse to be unable to pay her reasonable basic living expenses, this factor weighs in favor of relief. Mrs. Wilson provided records to the IRS during the administrative proceedings showing that her monthly income exceeded her expenses by only a small amount, but she failed to substantiate her expenses as requested and the IRS therefore concluded that she would not suffer economic hardship. The Tax Court, however, considered Mrs. Wilson's credible testimony, her modest living arrangements at the time of trial, and other expenses not included in the administrative record, and concluded that the hardship factor weighed in favor of relief.

Finally, the Tax Court evaluated the question of attribution of the liability differently from the IRS. Under Revenue Procedure 2000-15, if the tax liability is solely attributable to the nonrequesting spouse, the factor weighs in favor of granting relief, and if the liability is attributable to requesting spouse, the factor weighs against granting relief.[51] Because Mrs. Wilson provided basic clerical work for Mr. Wilson and was an employee of his company, and there was little information in the administrative record pertaining to attribution of the tax liability, the IRS assumed that 50 percent of the tax liability was attributable to Mrs. Wilson. The factor therefore weighed against granting relief. The Tax Court instead found that based on the trial record, Mrs. Wilson had no understanding of Mr. Wilson's business and merely assisted her husband, who made all the business decisions. The court concluded that the tax liability was entirely attributable to Mr. Wilson, so this factor weighed in favor of relief.

Taking into account all the facts and circumstances, and after weighing the various factors, the Tax Court held that Mrs. Wilson was entitled to relief. The IRS has appealed the Tax Court's decision to the Court of Appeals for the Ninth Circuit.

Terrell v. Commissioner

In *Terrell v. Commissioner*,[52] Mrs. Terrell requested innocent spouse relief by filing Form 8857, and shortly thereafter moved to an address different from the one shown on the form. Using the address on the Form 8857, the IRS mailed Mrs. Terrell a letter confirming receipt of the form, as well as two preliminary notices of determination denying relief. All of this correspondence was returned to the IRS as undeliverable by February 28, 2007. Hearing nothing from Mrs. Terrell, the IRS on April 6, 2007, mailed a final notice of determination denying relief, again using the old address on the Form 8857. The final notice of determination, which informed Mrs. Terrell that she had 90 days to petition the Tax Court for review, was returned to the IRS as undeliverable on May 7, 2011. In the meantime (between the time the IRS mailed the final notice and the time it was returned), on April

51 The current Rev. Proc. 2003-61 does not include attribution among the factors to be considered in determining whether to grant relief, but generally requires that the liability be attributable to the nonrequesting spouse as a threshold condition for obtaining relief. *See* Rev. Proc. 2003-61 sec. 4.01(7).

52 625 F.3d 254 (5th Cir. 2011), *rev'g and remanding* Tax Court Docket No. 15894-07 (July 30, 2009).

11, 2007, Mrs. Terrell filed her 2006 return using her new address. When the IRS received the returned final notice of determination, it searched its databases, discovered the new address, and on May 14, 2007, re-sent the final notice of determination to that address. Mrs. Terrell filed her Tax Court petition on July 13, 2007.

The IRS contended that the 90-day period for petitioning the Tax Court began to run on April 6, 2007, the date the final notice of determination was sent the first time. Because Mrs. Terrell did not file her Tax Court petition within 90 days that date, the IRS moved to dismiss the case for lack of jurisdiction. Mrs. Terrell contended that the 90-day period commenced on May 14, 2007, when the final notice of determination was sent the second time, and because she filed her Tax Court petition within 90 days of May 14, her petition was timely. The Tax Court agreed with the IRS and, holding that it lacked jurisdiction because there was no timely petition, dismissed the case.

Whether the first notice of determination operated to commence the 90-day period depends on whether it was mailed to Mrs. Terrell's last known address, as required by IRC § 6015(e). The Court of Appeals for the Fifth Circuit, analogizing cases under IRC §§ 6012 and 6013 that deal with the timeliness of Tax Court petitions filed in response to a notice of deficiency, relied on its own precedent[53] and held that the IRS is entitled to consider the address on the taxpayer's most recently filed return as the last known address. However, the IRS must also use reasonable diligence to determine the taxpayer's address in light of all relevant circumstances. Reasonable diligence requires further investigation where the IRS knows at the time of mailing that the address on file may no longer be valid because previous letters have been returned.

The Court of Appeals for the Fifth Circuit held that when the IRS sent the notice of determination the first time, three pieces of correspondence sent to Mrs. Terrell at that address had already been returned as undeliverable. Because the IRS did nothing to ascertain the correct address at that point, it did not exercise reasonable diligence, and the notice of determination was not sent to Mrs. Terrell's last known address the first time. Because the notice of determination that was sent the first time did not actually reach Mrs. Terrell, the "no prejudice" rule adopted by other Courts of Appeal did not apply.[54] The notice of determination was null and void the first time it was sent. However, it was legally effective to commence the 90-day period for petitioning the Tax Court the second time it was sent. Because Mrs. Terrell filed her petition within the statutory period, the Tax Court had jurisdiction to hear her claim. The Court of Appeals reversed and remanded the case to the Tax Court.

53 *Pomeroy v. U.S.*, 864 F.2d 1191 (5th Cir. 1989); *Mulder v. Comm'r*, 855 F.2d 208 (5th Cir. 1988).

54 Under the "no prejudice" rule, the IRS satisfies the statutory notice requirement if the taxpayer actually receives the notice without delay prejudicial to his or her ability to petition the Tax Court, even though the IRS failed to mail the notice to the taxpayer's last known address.

Relief on the Merits

While the courts considered many factors in determining the appropriateness of relief on the merits under IRC § 6015, the most significant factor was whether the requesting taxpayer had actual or constructive knowledge of the tax deficiency or that the nonrequesting spouse would not pay the tax. All three avenues for relief contain a knowledge element or factor, making it the linchpin in most of the courts' analyses.[55] Actual or constructive knowledge was a factor in 32 of the 34 decisions on the merits. These cases suggest that determining what a taxpayer knew or should have known will continue to generate a significant amount of controversy as long as joint filers are taxed on their combined incomes and remain jointly and severally liable for the tax required to be shown on the return.

Another significant factor the Tax Court considered was spousal abuse, which was a factor in nine of the 34 decisions on the merits. The Tax Court found spousal abuse weighed in favor of granting relief under IRC § 6015(f) in five cases, and granted full or partial relief in all of them. This suggests that taxpayers who are victims of domestic abuse are likely to be entitled to equitable relief when all the facts and circumstances are taken into account.

CONCLUSION

This year, the courts continued to address the procedural issue of whether the Treasury regulation that imposes a two-year time period within which a requesting spouse must elect relief under IRC § 6015(f) was invalid. Three Courts of Appeal ultimately held that the regulation was valid, and the issue was pending in other appellate courts. On July 25, 2011, the IRS announced that it was eliminating the two-year rule for requests for relief under IRC § 6015(f). Another procedural issue the Tax Court explored is its *de novo* standard and scope of review. With respect to determinations on the merits, issues concerning the requesting spouse's knowledge continued to predominate. The issue of domestic abuse as a factor in determining whether to grant equitable relief was also frequent, with the taxpayer prevailing in whole or in part whenever that factor weighed in favor of granting relief.

55 *See* IRC § 6015(b)(1)(C); § 6015(c)(3)(C); Rev. Proc. 2003-61, 2003-2 C.B. 296 §§ 4.02(1)(b) and 4.03(2)(a)(iii).

MLI #9

Frivolous Issues Penalty Under Internal Revenue Code Section 6673 and Related Appellate-Level Sanctions

SUMMARY

From June 1, 2010, through May 31, 2011, the federal courts issued decisions in at least 43 cases involving the Internal Revenue Code (IRC) § 6673 "frivolous issues" penalty, and at least one case involving an analogous penalty at the appellate level. These penalties are imposed against taxpayers for maintaining a case primarily for delay, raising frivolous arguments, unreasonably failing to pursue administrative remedies, or filing a frivolous appeal.[1] In many of the cases we reviewed, taxpayers escaped liability for the penalty but were warned they could face sanctions for similar conduct in the future.[2] Nonetheless, we included these cases in our analysis to illustrate what conduct will and will not be tolerated by the courts.

PRESENT LAW

The U.S. Tax Court is authorized to impose a penalty against a taxpayer if the taxpayer institutes or maintains a proceeding primarily for delay, takes a frivolous position in a proceeding, or unreasonably fails to pursue available administrative remedies.[3] The maximum penalty is $25,000.[4] In some cases, the IRS requests that the Tax Court impose the penalty;[5] in other cases, the Tax Court exercises its discretion, *sua sponte*,[6] to do so.

Taxpayers who institute an action pursuant to IRC § 7433[7] in a United States District Court for damages against the United States could be subject to a maximum penalty of $10,000 if the court determines the taxpayer's position in the proceedings is frivolous or groundless.[8]

1 The Tax Court generally imposes the penalty under IRC § 6673(a)(1). Other courts may impose the penalty under IRC § 6673(b)(1). U.S. Courts of Appeals generally impose sanctions under IRC § 7482(c)(4), 28 U.S.C. § 1927, or Rule 38 of the Federal Rules of Appellate Procedure, although some appellate-level penalties may be imposed under other authorities.

2 *See, e.g.*, *Forrest v. Comm'r*, T.C. Memo. 2010-263.

3 IRC §§ 6673(a)(1)(A), (B), and (C).

4 IRC § 6673(a)(1).

5 The standards for the IRS's decision to seek sanctions under IRC § 6673(a)(1) are found in the Chief Counsel Directives Manual (CCDM). *See* CCDM 35.10.2 (Aug. 11, 2004). For sanctions of opposing parties, under IRC § 6673(a)(2), all requests for sanctions are reviewed by the designated agency sanctions officer under Executive Order 12988 on Civil Justice Reform. This review ensures uniformity on a national basis. *See, e.g.*, CCDM 35.10.2.2.3 (Aug. 11, 2004).

6 "*Sua sponte*" means without prompting or suggestion; on its own motion. *Black's Law Dictionary* (9th ed. 2009). Thus, for conduct that it finds particularly offensive, the Tax Court can choose to impose a penalty under IRC § 6673 even if the IRS has not requested the penalty. *See, e.g.*, *Hyde v. Comm'r*, T.C. Memo. 2011-104.

7 IRC § 7433(a) allows taxpayers a civil cause of action against the United States if an IRS employee intentionally or recklessly disregards any IRC provision or regulation promulgated under the IRC.

8 IRC § 6673(b)(1).

In addition, IRC § 7482(c)(4),[9] §§ 1912 and 1927 of Title 28 of the U.S. Code,[10] and Rule 38 of the Federal Rules of Appellate Procedure[11] (among other laws and rules of procedure) authorize federal courts to impose penalties against taxpayers or attorneys for raising frivolous arguments or using litigation tactics primarily to delay the collection process. Because the sources of authority for imposing appellate-level sanctions are numerous and some of these sanctions may be imposed in non-tax cases, this report focuses primarily on the IRC § 6673 penalty. However, Table 9 in Appendix III lists one tax case in which a Court of Appeals imposed sanctions under other authorities.[12]

ANALYSIS OF LITIGATED CASES

We analyzed 43 opinions issued between June 1, 2010, and May 31, 2011, that addressed the IRC § 6673 penalty. Thirty-six of these opinions were issued by the Tax Court and seven were issued by U.S. Courts of Appeals in cases brought by taxpayers who sought review of the Tax Court's imposition of the penalty. Notably, the Courts of Appeals sustained the Tax Court's position in all seven cases.

In 18 cases, the Court imposed penalties under IRC § 6673, with the amounts ranging from $500 to the maximum of $25,000. We reviewed seven cases where taxpayers prevailed when the IRS asked the court to impose a penalty. In five of these cases the court warned the taxpayers not to bring similar arguments in the future.[13] In the remaining two cases where the taxpayer prevailed when the IRS sought imposition of the penalty, the court found that the taxpayers' behaviors did not rise to the level of asserting frivolous issues or being solely for the purpose of delaying proceedings.[14] Two taxpayers were represented by attorneys; all 41 others appeared *pro se* (represented themselves). The taxpayers in these cases presented a wide variety of arguments that the courts have generally rejected on numerous occasions. Upon encountering these arguments, the courts almost invariably cited the language set forth in *Crain v. Commissioner:*

> We perceive no need to refute these arguments with somber reasoning and copious citation of precedent; to do so might suggest that these arguments have some colorable merit. The constitutionality of our income tax system—including the role played

9 IRC § 7482(c)(4) provides that the United States Courts of Appeals and the Supreme Court have the authority to impose a penalty in any case where the Tax Court's decision is affirmed and the appeal was instituted or maintained primarily for delay or the taxpayer's position in the appeal was frivolous or groundless.

10 28 U.S.C. § 1912 provides that when the Supreme Court or a United States Court of Appeals affirms a judgment, the court has the discretion to award to the prevailing party just damages for the delay, and single or double costs. 28 U.S.C. § 1927 authorizes federal courts to sanction an attorney or any other person admitted to practice before any court of the United States or any territory thereof for unreasonably and vexatiously multiplying proceedings.

11 Federal Rule of Appellate Procedure 38 provides that if a United States Court of Appeals determines an appeal is frivolous, the court may award damages and single or double costs to the appellee.

12 *See Walbaum v. Comm'r*, 387 Fed. Appx. 668 (8th Cir. 2010), *cert. denied*, 131 S. Ct. 1056 (2011) (imposing $5,000 in damages pursuant to 28 U.S.C. § 1912 for the frivolous appeal).

13 *See, e.g., Cook v. Comm'r*, T.C. Memo. 2010-137.

14 *See Anyika v. Comm'r*, T.C. Memo. 2011-69 and *Pace v. Comm'r*, T.C. Memo. 2010-272.

within that system by the Internal Revenue Service and the Tax Court—has long been established.[15]

In the cases we reviewed, taxpayers raised the following issues that the Tax Court deemed frivolous. Consequently, the taxpayers were subject to a penalty under IRC § 6673(a)(1) (or, in some cases, the court warned that such arguments were frivolous and could lead to a penalty in the future if the taxpayers maintained the same positions):

- **Citizens of certain states are not subject to income taxes:** At least four taxpayers argued that as residents of a "sovereign," "compact," or "independent" state, they are not subject to income taxes imposed by the United States government.[16] The Tax Court imposed penalties of $1,000[17] to $5,000[18] in these cases.
- **IRS forms and notices violate the Paperwork Reduction Act because they do not display a valid Office of Management and Budget (OMB) Control Number:** In at least two cases, taxpayers argued that IRS forms and notices violated the Paperwork Reduction Act (PRA), and therefore the taxpayers had no duty to file tax returns.[19] Under the PRA, OMB is given authority to review an agency "collection of information" and to assign a control number to each "collection of information" it approves.[20] If a "collection of information" does not display a current control number or fails to state that the request for information is not subject to the PRA, the PRA provides that a person cannot be subject to a penalty for the failure to maintain or provide information.[21] These taxpayers argued that because certain IRS forms and notices do not contain OMB control numbers, the PRA protects them from any penalties for failure to comply with the IRS's request for information. The courts have consistently rejected such arguments.[22]
- **Only income earned from the United States government or entities associated with the United States government is taxable:** Taxpayers in at least three cases presented arguments that only federal government employees, public servants, those who earn income from the United States government, or those who earn income from federally licensed corporations are subject to the income tax.[23]

15 *Crain v. Comm'r*, 737 F.2d 1417, 1417-18 (5th Cir. 1984).

16 *See, e.g.*, *Callahan v. Comm'r*, T.C. Memo. 2010-201 and *Mooney v. Comm'r*, T.C. Memo. 2011-35.

17 *See McLaurine v. Comm'r*, T.C. Memo. 2010-236.

18 *See Burchfield v. Comm'r*, T.C. Memo. 2011-30.

19 *See Hyde v. Comm'r*, T.C. Memo. 2011-104 and *Antolick v. Comm'r*, 107 A.F.T.R.2d (RIA) 1768 (11th Cir. 2011), *aff'g* Tax Ct. No. 21635-08L.

20 44 U.S.C. §§ 3502, 3504, 3507(a).

21 44 U.S.C. § 3512.

22 *See U.S. v. Dawes*, 951 F.2d 1189, 1191-93 (10th Cir. 1991) (citations omitted); *Pitts v. Comm'r*, T.C. Memo. 2010-101.

23 *See, e.g.*, *Burchfield v. Comm'r*, T.C. Memo. 2011-30.

CONCLUSION

Taxpayers in the cases analyzed this year presented the same arguments raised and repeated year after year, which the courts routinely and universally reject.[24] Taxpayers avoided the IRC § 6673 penalty in only seven cases where the IRS requested it, demonstrating the willingness of the courts to penalize taxpayers when they offer frivolous arguments or institute a case merely for delay. Where the IRS has not requested the penalty, the court may nonetheless raise the issue *sua sponte*, and in many cases imposes the penalty or cautions the taxpayer that similar future behavior will result in a penalty.[25] Finally, the U.S. Courts of Appeals have shown their willingness to uphold the penalties imposed by the Tax Court without fail in the cases analyzed for the period between June 1, 2010, and May 31, 2011.

24 *See, e.g.*, National Taxpayer Advocate 2010 Annual Report to Congress 479-482.

25 *See, e.g., Hyde v. Comm'r*, T.C. Memo. 2011-104 (court raised the issue *sua sponte* and found taxpayer liable for $3,000 penalty).

MLI #10

Charitable Deductions Under Internal Revenue Code Section 170

SUMMARY

Subject to certain limitations, taxpayers can take a deduction from their adjusted gross income for contributions of cash or other property to charitable organizations.[1] Taxpayers must contribute to certain qualifying organizations,[2] and are required to substantiate contributions of $250 or more.[3] Litigation generally arises over one of four issues:

- Whether the organization receiving the contribution is charitable in nature;
- Whether the property contributed qualifies as a charitable contribution;
- Whether the amount deducted equals the fair market value of the property contributed; and
- The extent to which the taxpayer has substantiated the contribution.

We reviewed 27 cases from June 1, 2010, through May 31, 2011, with charitable deductions as a contested issue. The IRS prevailed in 22 cases (81 percent) and there were five split decisions (*i.e.*, the court ruled partially in favor of the taxpayer and partially in favor of the government). Taxpayers appeared *pro se* in 13 of the 27 cases (48 percent).

PRESENT LAW

Taxpayers can generally take a deduction for charitable contributions made within the taxable year.[4] For individuals, these deductions are generally limited to 50 percent of the taxpayer's contribution base (adjusted gross income computed without regard to any net operating loss carryback to the taxable year under IRC § 172).[5] However, subject to certain limitations, individual taxpayers can carry forward unused charitable contributions in excess of the 50 percent base for up to five years.[6] Corporate charitable deductions are generally limited to ten percent of the taxpayer's taxable income.[7] Taxpayers cannot deduct services that they offer to charitable organizations; however, incidental expenditures

1 Internal Revenue Code (IRC) § 170.

2 To claim a charitable contributions deduction, a taxpayer must establish that a gift was made to a qualified entity organized and operated exclusively for an exempt purpose, no part of the net earnings of which inures to the benefit of any private shareholder or individual. IRC § 170(c)(2).

3 IRC § 170(f)(8).

4 IRC § 170(a)(1).

5 IRC §§ 170(b)(1)(A), (G). While the 50 percent contribution base limitation applies to most charitable organizations, deductions are limited to 30 percent of the taxpayer's contribution base for gifts to certain specific types of organizations, including veterans' organizations, fraternal societies, nonprofit cemeteries, and certain private non-operating foundations. IRC § 170(b)(1)(B). Moreover, the allowable deduction is reduced if the charitable gift is a capital gain property for which the deduction is calculated using fair market value without a reduction for appreciation; in this case, the allowable deduction is reduced to 30 percent for 50-percent organizations and to 20 percent for 30-percent organizations, respectively. IRC §§ 170(b)(1)(C), (D).

6 IRC § 170(d)(1).

7 IRC § 170(b)(2).

incurred while serving a charitable organization and not reimbursed may constitute a deductible contribution.[8]

Substantiation

Deductions for charitable contributions of $250 or more are disallowed in the absence of a contemporaneous written receipt from the recipient.[9] For cash contributions, taxpayers must maintain receipts from the charitable organization, copies of cancelled checks, or other reliable records showing the name of the organization, the date, and the amount contributed.[10] For each contribution of property other than money, taxpayers generally must maintain a receipt showing the name of the recipient, the date and location of the contribution, and a description of the property.[11] When property other than money is contributed, the amount of the allowable deduction is the fair market value of the property at the time of the contribution.[12]

Cohan Doctrine

In cases where taxpayers have provided credible evidence they made a charitable contribution but have difficulty substantiating the precise amount, a judicial doctrine has evolved that allows courts to determine, based on the best evidence at hand, the amount of the contribution.[13] The *Cohan* doctrine does not relieve the taxpayer of the responsibility of substantiating his or her charitable contribution, although it can assist taxpayers who can demonstrate that contributions were made, but have not kept records of the amounts.[14]

ANALYSIS OF LITIGATED CASES

We reviewed 27 opinions entered between June 1, 2010, and May 31, 2011, involving the allowance of a charitable contribution deduction. Table 10 in Appendix III contains a detailed list of those cases. Of the 27 cases, one involved the issue of whether the recipient was a

8 Treas. Reg. § 1.170A-1(g). Meal expenditures in conjunction with offering services to qualifying organizations are not deductible unless the expenditures are away from the taxpayer's home. *Id*. Likewise, travel expenses associated with contribution are not deductible if there is a significant element of personal pleasure involved with the travel. IRC § 170(j).

9 IRC § 170(f)(8); *see also* Treas. Reg. § 1.170A-13(f).

10 Treas. Reg. § 1.170A-13(a)(1).

11 Treas. Reg. § 1.170A-13(b)(1).

12 Treas. Reg. § 1.170A-1(c)(1). Note that the fair market value must be reduced for certain contributions of ordinary income and capital gain property. *See* IRC § 170(e).

13 *Cohan v. Comm'r*, 39 F.2d 540, 543-44 (2d Cir. 1930). In *Cohan*, a theatrical production manager claimed unsubstantiated deductions for the entertainment of actors, employees, and critics. He did not maintain records of these expenses, but knew they were substantial sums. The Second Circuit determined that the Board of Tax Appeals was authorized to estimate unsubstantiated taxpayer expenses when it is certain that expenses were incurred, but the amount could not be quantified. *Id*. at 543.

14 As a general rule, if the trial record provides sufficient evidence that the taxpayer has incurred a deductible expense, but the taxpayer is unable to substantiate adequately the precise amount of the deduction to which he or she is otherwise entitled, the Court may estimate the amount of the deductible expense and allow the deduction to that extent. In these instances, the Court is permitted to make as close an approximation of the allowable expense as it can, bearing heavily against the taxpayer whose inexactitude is of his or her own making. *See Cohan v. Comm'r*, 39 F.2d 540, 543-44. However, in order for the Court to estimate the amount of an expense, the Court must have some basis upon which an estimate may be made. *See Vanicek v. Comm'r*, 85 T.C. 731, 743 (1985).

qualified charitable organization,[15] five cases involved a dispute over the valuation of the property,[16] three cases involved the issue of whether the property contributed qualified as a deductible contribution,[17] and 16 involved the taxpayers' substantiation (or lack thereof) of the claimed contributions.[18] None of the taxpayers were entitled to a charitable contribution deduction in full. However, the court partially allowed the deduction in five cases.

Qualifying Charitable Organization

To be deductible, a contribution must be made to a qualifying organization.[19] In one case, the taxpayers' deductions were rejected for failing to meet this threshold test. The Tax Court held that the taxpayers failed to prove the organization to which they made donations was an entity eligible to receive charitable contributions under IRC § 170.[20]

Qualified Contribution

To constitute a qualified contribution for purposes of IRC § 170, the donor-taxpayer must possess a transferable property interest in the property and intend to irrevocably relinquish all rights, title, and interest to the property without an expectation of some benefit in return.[21] In two of the cases we reviewed, the courts disallowed the deduction because the taxpayers received a substantial benefit from the charitable donation. In *Viralam v. Commissioner*, the taxpayer-husband sold his medical practice and reported a gain from the sale.[22] He then transferred the proceeds of sale to a foundation. Several years later, the foundation lent the taxpayers' son funds to pay for college. The taxpayers presented no evidence that the foundation exercised any judgment in selecting their son for a student loan. The Tax Court disallowed the charitable deductions to the foundation because the taxpayers maintained dominion and control over the contributions and received a substantial benefit.[23] In another case, the court denied the taxpayers' charitable contribution deduction because the value of the services the taxpayers received exceeded the value of the property donated. In that case, the taxpayers donated their lake house, but no real property, to the fire department so that the fire department could use the house for firefighter training and eventual demolition. The Tax Court held that the taxpayers were not entitled

15 *Ahmadian v. Comm'r*, T.C. Summ. Op. 2010-126.

16 *Evans v. Comm'r, T.C.* Memo. 2010-207, *Scheidelman v. Comm'r*, T.C. Memo. 2010-151, *Boltar, LLC v. Comm'r*, 136 T.C. No. 14 (2011), *Trout Ranch, LLC v. Comm'r*, T.C. Memo 2010-283, *appeal docketed*, No. 11-9006 (10th Cir. Mar. 21, 2011), *Whitehouse Hotel LP v. Comm'r*, 615 F.3d 321 (5th Cir. 2010).

17 *Kaufman v. Comm'r*, 136 T.C. No. 13 (2010); *Rolfs v. Comm'r*, 135 T.C. 471 (2010), *Viralam v. Comm'r*, 136 T.C. No. 8 (2011).

18 One case contained more than one of these issues. *See Viralam v. Comm'r*, 136 T.C. No. 8 (2011).

19 Qualifying charitable organizations include: (1) federal, state or local governments, and (2) corporations, trusts or funds organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition, or for the prevention of cruelty to children or animals, no part of the net earnings of which inure to the benefit of a private individual or shareholder. See IRC § 170(c) for a full description of qualifying organizations.

20 *Ahmadian v. Comm'r*, T.C. Summ. Op. 2010-126.

21 IRC § 170(f)(3) requires that taxpayers relinquish all rights, title and interest in property contributed.

22 *Viralam v. Comm'r*, 136 T.C. No. 8 (2011).

23 *Id.*

to a charitable contribution deduction because the value of the demolition far exceeded the value of the property donated.[24]

Valuation

Five cases involved disputes between the IRS and taxpayers over the value of property contributed. When taxpayers contribute non-cash items, they must determine the fair market value of the property as of the date of the contribution.[25] Fair market value is the price at which the property would change hands between a willing buyer and a willing seller.[26] Determining the fair market value of non-cash property with precision can be difficult for taxpayers, especially when easements are being donated.

Of the five cases involving disputes over the value of property contributed, four involved the valuation of easements.[27] In *Evans v. Commissioner*,[28] the taxpayers claimed a charitable contribution deduction for a donation of façade easements to a qualified conservation organization. The taxpayers failed to provide credible evidence of the fair market value of the easements; thus, the court found the taxpayers were not entitled to deduct them as charitable contributions. Taxpayers may provide expert reports or testimony as evidence of valuation. However, to be admissible in court, expert testimony must be based on sufficient facts or data. Further, the testimony must be based on reliable principles and methods, which must be applied to the facts of the case.[29]

In *Boltar v. Commissioner*, the taxpayer claimed a $3.2 million charitable deduction for an easement donation.[30] Prior to trial, the taxpayer submitted an expert report from an appraisal firm stating that the property's highest and best use was as a condominium development.[31] The report was found to be inadmissible because, among other things, it failed to determine the highest and best use of the property after the easement was granted. The Commissioner's valuation engineers concluded that the highest and best use of the property was for the development of single-family detached residential homes.

Substantiation

Sixteen cases involved the substantiation of deductions for charitable contributions. The IRS prevailed in full in 15 cases and one ended in a split decision.

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24 *Rolfs v. Comm'r*, 135 T.C. 471 (2010).

25 Treas. Reg. § 1.170A-1(c)(1).

26 Treas. Reg. § 1.170A-1(c)(2).

27 *Boltar, LLC v. Comm'r*, c), *Evans v. Comm'r*, T.C. Memo. 2010-207, *Trout Ranch, LLC v. Comm'r*, T.C. Memo 2010-283, *appeal docketed*, No. 11-9006 (10th Cir. Mar. 21, 2011), *Whitehouse Hotel LP v. Comm'r*, 615 F.3d 321 (5th Cir. 2010).

28 T.C. Memo. 2010-207.

29 Fed. R. Evid. 702. An expert report that is not based on sufficient facts or data and does not state the facts or data and detailed reasons for the conclusions, as required by U.S. Tax Ct. R. 143(g), is not admissible as expert testimony or as an expert report in a matter before the U.S. Tax Court.

30 136 T.C. No. 14 (2011).

31 The concept of "highest and best use" is an element in the determination of fair market value.

In *Lang v. Commissioner*, the taxpayer (a freelance "voice-over" artist) claimed a charitable deduction for local transportation expenses for a play for which he volunteered services.[32] These deductions were disallowed since the taxpayer offered no other evidence, other than his testimony, to prove how he calculated the claimed amount.

When determining whether or not a claimed charitable deduction is adequately substantiated, courts tend to follow a strict interpretation of IRC § 170. For example, in *Hendrix v. United States*, the taxpayers (husband and wife) reported a charitable deduction for their donated house to the city for fire training.[33] The court denied the deduction because the taxpayers failed to provide a valid appraisal under IRC § 170(f)(11)(E)(i)(I), and also because they did not provide a contemporaneous acknowledgment that met the requirements of IRC § 170(f)(8). Further, in *Schrimsher v. Commissioner*,[34] the taxpayers granted a facade easement to the Alabama Historical Commission and claimed the property as a charitable contribution. The court denied the deduction because, although the taxpayers produced a written contemporaneous acknowledgement, it did not state whether the taxpayers received any goods or services from the historical commission in consideration of the contribution as required under IRC § 170(f)(8)(B)(ii).

Pro Se Analysis

In 13 of the 27 cases we reviewed, taxpayers were *pro se*. None of the taxpayers who appeared *pro se* were entitled to a charitable deduction in full, but one of the five taxpayers who received partial relief was *pro se*. With respect to relief, there does not appear to be a correlation between represented taxpayers and those who were *pro se*, since, like *pro se* taxpayers, no represented taxpayers were found to be entitled to a charitable deduction in full.

CONCLUSION

IRC § 170 and the applicable Treasury Regulations provide detailed requirements as to what constitutes adequate substantiation for a charitable deduction. Cases such as *Hendrix v. United States*[35] and *Schrimsher v. Commissioner*[36] demonstrate that courts strictly interpret IRC § 170 and its accompanying regulations.

32 T.C. Memo 2010-152.

33 106 A.F.T.R.2d (RIA) 5373 (S.D. Ohio 2010).

34 T.C. Memo 2011-71.

35 T.C. Memo 2010-152.

36 T.C. Memo 2011-71.

Case Advocacy

Activities of the Office of the Taxpayer Advocate

Under Internal Revenue Code (IRC) § 7803(c), the Office of the Taxpayer Advocate has four principal functions:

- Assist taxpayers in resolving problems with the IRS;
- Identify areas in which taxpayers are experiencing problems with the IRS;
- Propose changes in the administrative practices of the IRS to mitigate problems taxpayers are experiencing with the IRS; and
- Identify potential legislative changes which may be appropriate to mitigate such problems.

Taxpayer Advocate Service (TAS) employees assist taxpayers whose tax problems are causing financial difficulty, who are seeking help in resolving tax problems that have not been resolved through normal channels, or who believe an IRS system or procedure is not working as it should. And while all IRS personnel must consider and protect taxpayer rights, TAS employees have a special responsibility for ensuring that taxpayers are treated fairly by the IRS.

In addition to helping taxpayers with specific cases and individual problems, TAS employees advocate for taxpayers by identifying IRS procedures that adversely impact taxpayer rights or create taxpayer burden, recommending solutions to taxpayer problems, and working with the IRS to improve tax administration. TAS serves as the voice of the taxpayer within the IRS by providing the taxpayer's viewpoint when the IRS is considering new policies, procedures, or programs. Additionally, TAS administers the Low Income Taxpayer Clinic (LITC) grant program[1] and oversees the Taxpayer Advocacy Panel (TAP).[2]

TAS Analyzes Economic and Systemic Burden Case Receipts for Process Improvements.

Taxpayers come to TAS with specific cases when:

- They have experienced a tax problem that causes financial difficulty;
- They have encountered problems trying to resolve their issues directly with the IRS; or
- An IRS action or inaction has caused or will cause them to suffer a long-term adverse impact, including a violation of taxpayer rights.

1 The LITC program provides matching grants to qualifying organizations to operate clinics that represent low income taxpayers in disputes with the IRS, or educate taxpayers for whom English is a second language about their rights and responsibilities as U.S. taxpayers. LITCs provide services to eligible taxpayers for free or for no more than a nominal fee. *See* IRC § 7526.

2 TAP is a Federal Advisory Committee established by the Department of the Treasury to provide a taxpayer perspective on improving IRS service to taxpayers. TAS provides oversight and support to the TAP program. The Federal Advisory Committee Act (5 U.S.C. Appendix) prescribes standards for establishing advisory committees when those committees will furnish advice, ideas, and opinions to the federal government. *See also* 41 C.F.R. Part 102-3.

TAS generally accepts cases in four categories:

- Economic Burden – Cases in which a taxpayer is experiencing financial difficulty;
- Systemic Burden – Cases in which an IRS process, system, or procedure has failed to operate as intended, and as a result, the IRS has failed to timely respond to or resolve a taxpayer's issue;
- Equitable Treatment or Taxpayer Rights Issues – Cases accepted to ensure taxpayers receive fair and equitable treatment and taxpayers' rights are protected; and
- Public Policy – Cases accepted when the National Taxpayer Advocate determines compelling public policy warrants assistance to an individual or group of taxpayers.

In fiscal year (FY) 2011, TAS received 295,904 cases, a one percent decrease from FY 2010, and provided relief to taxpayers in 75.7 percent of cases closed.[3] Figure 4.1 shows the FY 2011 receipts and closures by case category.

FIGURE 4.1, TAS Case Receipts, Closures, And Relief Rates[4]

	FY 2011 Receipts	FY 2011 Closures	Relief Rate
Economic Burden	131,482	127,615	72.7%
Systemic Burden	164,173	167,549	78.0%
Equitable Treatment or Taxpayer Rights Issues	216	222	73.0%
Public Policy	33	24	79.2%
Total Cases	**295,904**	**295,410**	**75.7%**

As reflected above, the bulk of TAS's cases involve either economic or systemic burden. While TAS strives to expeditiously resolve all cases meeting TAS criteria, it places special emphasis on helping taxpayers who are experiencing financial difficulty (*i.e.*, economic burden). In these instances, TAS requires case advocates to take specific actions to expedite initial case processing, and to contact the taxpayer to communicate these actions and request additional information (if needed) within three workdays of the date TAS received the case.[5]

While TAS received slightly fewer cases overall in FY 2011 than in FY 2010, the number of economic burden receipts continues to grow. As noted above, these cases require quicker action. As shown in Figure 4.2, economic burden cases increased by nearly ten percent

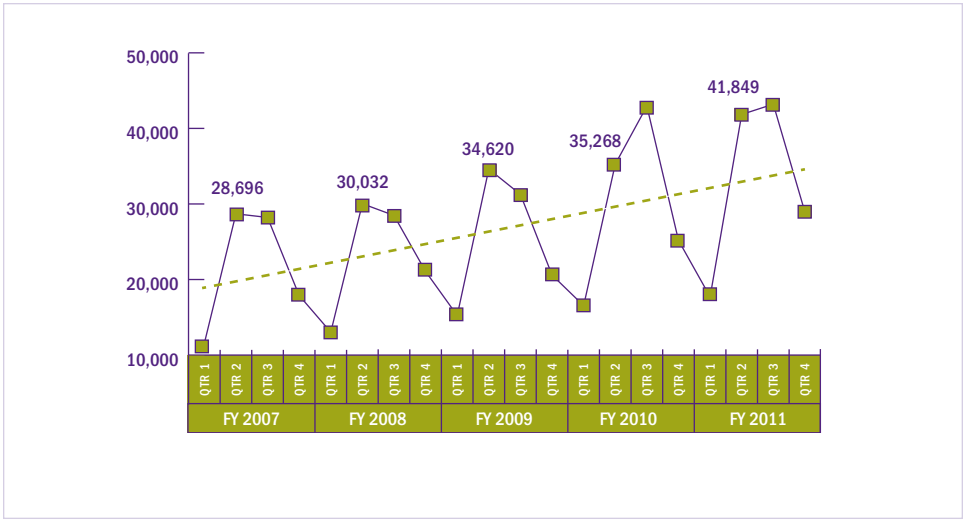
3 TAS determines relief based upon whether TAS can provide full or partial relief or assistance on the issue initially identified by the taxpayer. Because TAS frequently provides relief on issues that differ from the ones first identified, the relief rate, as calculated, is understated. Data obtained from the Taxpayer Advocate Management Information System (TAMIS) (Oct. 1, 2011). TAS uses TAMIS to record, control, and process taxpayer cases, as well as to analyze the issues that bring taxpayers to TAS.

4 Data obtained from TAMIS. TAS tracks resolution of taxpayer issues through codes entered at the time of closing on TAMIS and requires case advocates to indicate the type of relief or assistance they provide to the taxpayer. *See* Internal Revenue Manual (IRM) 13.1.21.1.2.1.2 (Feb. 1, 2011). The codes reflect full relief, partial relief, or assistance provided. The relief rate is determined by dividing the total number of cases closed with full relief, partial relief, or assistance by the total number of closures.

5 IRM 13.1.18.2(1) (Feb. 1, 2011).

in FY 2011 compared to FY 2010. These receipts also have risen more than 52 percent compared to FY 2007.[6]

FIGURE 4.2, TAS Economic Burden Receipts By Quarter, FY 2007- 2011[7]



With the nation's unemployment rate hovering around nine percent[8] and the housing market showing few signs of recovery,[9] it is hardly surprising that taxpayers facing economic burden are coming to TAS for assistance. However, to identify the immediate cause behind the increase in receipts, TAS tracks the underlying tax issues. Figure 4.3 lists the top five economic burden issues in FY 2011.

6 Data obtained from TAMIS (Oct. 1, 2007; Oct. 1, 2010; Oct. 1, 2011).

7 Data obtained from TAMIS (Oct. 1, 2011).

8 Bureau of Labor Statistics, *The Employment Situation – September 2011*, USDL-11-1441 (Oct. 7, 2011). The unemployment rate was 9.1 percent in September 2011. "Since April, the rate has held in a narrow range from 9.0 to 9.2 percent."

9 RealtyTrac Staff, *Foreclosure Activity Off 29 Percent for First Half of 2011* (July 13, 2011), *available at* http://www.realtytrac.com/content/press-releases/midyear-2011-us-foreclosure-market-report-6681. RealtyTrac states: "Processing and procedural delays are pushing foreclosures further and further out – we estimate that as many as 1 million foreclosure actions that should have taken place in 2011 will now happen in 2012, or perhaps even later. This casts an ominous shadow over the housing market, where recovery is unlikely to happen until the current and forthcoming inventory of distressed properties can be whittled down to a manageable number."

FIGURE 4.3, Top Five Economic Burden Case Issues FY 2010 and FY 2011[10]

Rank	Issue Description	FY 2010	FY 2011	Percentage Change
1	Identity Theft	7,655	21,500	180.9%
2	Levies (including Federal Payment Levy Program)[11]	15,263	13,299	-12.9%
3	Unpostable and Reject Returns[12]	10,500	8,658	-17.5%
4	Pre-Refund Wage Verification Hold[13]	1,210	8,616	554.6%
5	Open Audit (not Earned Income Tax Credit)	9,778	8,411	-14.0%

Identity theft is the number one issue in economic burden case receipts and, as shown in the next section, it is currently the leading reason that taxpayers seek TAS assistance.[14] In FY 2011, economic burden identity theft receipts rose nearly 181 percent compared to FY 2010. Of the 34,006 taxpayers who came to TAS with this issue during FY 2011, 21,500 or 63 percent were experiencing economic burden.[15]

Levy issues are second on the list of issues in economic burden cases. As shown above, however, economic burden levy receipts have decreased nearly 13 percent from FY 2010 to FY 2011.

Collection Issues Continue to Contribute Significantly to TAS Economic Burden Receipts.

In FY 2011, collection issues accounted for more than 18 percent of all economic burden receipts and nearly 13 percent of TAS's total caseload. TAS provided relief for nearly 67 percent of the taxpayers in the total collection cases closed.[16] In addition, in FY 2011 TAS issued 57 Taxpayer Assistance Orders (TAOs) in collection cases where the IRS did not

10 Data obtained from TAMIS (Oct. 1, 2011; Oct. 1, 2010). TAS computed the top five economic burden cases using only Primary Issue Codes (PIC). Often TAS cases involve more than one issue and TAS tracks this data, however these are not included within this computation to avoid counting a case more than once.

11 The Federal Payment Levy Program (FPLP) is a systemic collection enforcement tool authorized by IRC § 6331(h). It allows the IRS to levy on federal payments disbursed by the Treasury's Financial Management Service (FMS) to taxpayers with an outstanding tax liability. Each week, the IRS creates a file of certain balance due accounts and transmits the file to FMS's Treasury Offset Program. FMS transmits a weekly file back to the IRS listing those that matched. FPLP will subsequently transmit levies on matching accounts. For a detailed discussion of FPLP issues, see Most Serious Problem: *The New Income Filter For The Federal Payment Levy Program Does Not Fully Protect Low Income Taxpayers From Levies On Social Security Benefits, supra.*

12 Each account transaction, including tax return processing, is subjected to a series of validity checks before posting to the IRS Master File. A transaction is termed unpostable when it fails to pass any of the checks and is returned to the campus (Rejects Function) for follow-up action(s). IRM 21.5.5.2 (Oct. 1, 2007).

13 Because TAS did not use PIC 045 until March 24, 2010, a more appropriate comparison would be between the economic burden PIC 045 receipts from the last two quarters of FY 2011 (6,913 cases) and the last two quarters of FY 2010 (1,056 cases), which represents a 554.6 percent increase. The 8,616 economic burden pre-refund wage verification (PIC 045) cases actually represent a 612 percent increase over the 1,210 PIC 045 cases received in FY 2010. For more information about pre-refund wage verification holds, see Most Serious Problem: *The IRS's Wage and Withholding Verification Procedures May Encroach on Taxpayer Rights and Delay Refund Processing, supra.*

14 For a more detailed discussion of identity theft issues, see Most Serious Problem: *Tax-Related Identity Theft Continues to Impose Significant Burden on Taxpayers and the IRS, supra.*

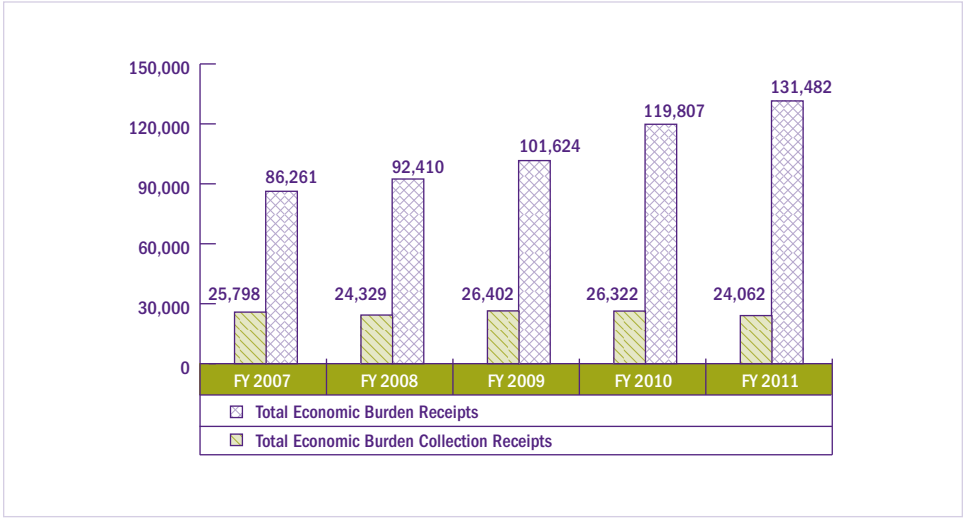
15 Data obtained from TAMIS (Oct. 1, 2011).

16 *Id.*

agree with TAS's case-specific recommendations, of which the IRS complied with 44, TAS rescinded six, and seven are still in process.[17]

As shown in Figure 4.4, while economic burden cases overall have increased more than 52 percent from FY 2007 to FY 2011, economic burden receipts resulting from IRS collection issues dropped nearly seven percent.

FIGURE 4.4, TAS Total and Collection Economic Burden Receipts, FY 2007 Through FY 2011[18]



While collection issues continue to be a significant source of TAS economic burden receipts, in FY 2011 these cases have declined by more than eight percent from FY 2010, from 26,322 to 24,062. Nearly 20 percent of this decline is attributable to a policy and programming change designed to prevent harm to low income Social Security beneficiaries.[19]

The IRS Screens Out Low Income Taxpayers from Levies on Social Security.

This change affects the FPLP, an automated system that allows the IRS to issue continuous levies up to 15 percent of certain federal payments to collect taxpayers unpaid federal tax liabilities.[20] While FPLP levies can attach to a variety of federal sources of income, ranging from salaries to retirement income to federal contractor (or vendor) payments, the bulk of FPLP levy payments have historically been related to Social Security benefits. Over the years, the National Taxpayer Advocate has continuously advocated for an FPLP screening filter, and in recent years has worked with the IRS on a research project to create and implement a filter to protect low income taxpayers from being harmed by the

17 For a detailed discussion of TAOs, *see TAS Uses Taxpayer Assistance Orders to Advocate Effectively in Taxpayer Cases, infra*.

18 Data obtained from TAMIS (Oct. 1, 2007; Oct 1, 2008; Oct. 1, 2009; Oct. 1, 2010; and Oct. 1, 2011).

19 Data obtained from TAMIS, Oct. 1, 2010 (FY 2010 data) and Oct. 1, 2011 (FY 2011 data).

20 IRC § 6331(h)(2)(A), as prescribed by the Taxpayer Relief Act of 1997, Pub. L. No. 105-34 § 1024, 111 Stat. 788, 923 (1997) authorizes the IRS to issue continuous levies on certain federal payments.

FPLP.[21] On January 23, 2011, the IRS implemented an FPLP screening filter developed by TAS and the IRS. Each month, the Low Income Filter (LIF) systemically identifies and screens out taxpayers from inclusion in the FPLP if they have income at or below 250 percent of the federal poverty level.[22] This filter is intended to protect low income taxpayers from experiencing an economic hardship due to a levy on their Social Security old age or disability benefits, and to ensure that the IRS does not issue levies that it would likely have to release immediately on the grounds of economic hardship.[23] The National Taxpayer Advocate is generally pleased with its development.

Since the IRS implemented filter, TAS receipts concerning FPLP levies on Social Security benefits declined more than 22 percent, from 2,827 FPLP economic burden cases in FY 2010 to 2,198 in FY 2011 (nearly 20 percent of the total decline in economic burden collection receipts during FY 2011).[24] However, the filter's effectiveness has not yet been tested.[25] Further, the National Taxpayer Advocate is concerned that the filter still leaves some taxpayers subject to the FPLP, even though their incomes otherwise fit the guidelines (*i.e.,* taxpayers who have an unfiled return or an outstanding business debt).[26]

TAS Continues to Advocate for Changes in Lien Filing Policies.

The National Taxpayer Advocate has repeatedly expressed concern about the adverse impact of IRS lien filing policies on taxpayers and future compliance.[27] She has proposed several administrative and legislative steps to improve these policies and procedures, and to grant relief to taxpayers harmed by automatic Notice of Federal Tax Lien (NFTL) filings.[28] In response, the IRS announced a new effort to help financially struggling taxpayers

21 *See e.g.,* National Taxpayer Advocate 2009 Annual Report to Congress 318–319 (Status Update: *Federal Payment Levy Program: IRS Agrees to Low Income Taxpayer Filter*).

22 Small Business/Self-Employed Division (SB/SE), *New Federal Payment Levy Program (FPLP) and Railroad Retirement Low Income Filter* (Feb. 4, 2010). The Department of Health and Human Services issues annual poverty guidelines used to determine financial eligibility for certain federal programs.

23 IRC § 6343(a) and Treas. Reg. § 301.6343-1(b)(4); IRS, Servicewide Electronic Research Program Alert, *New Low Income Filter (LIF) Analysis for the Federal Payment Levy Program (FPLP)* (Jan. 20, 2011).

24 Data obtained from TAMIS, Oct. 1, 2011 (FY 2011 data), Oct. 1, 2010 (FY 2010 data). Since the IRS implemented the filter (from January through September 2011), TAS FPLP cases have declined by 26.6 percent compared to the same period in 2010. Data obtained from TAMIS (Nov. 9, 2011).

25 Email from Wage and Investment Division (W&I) senior analyst to TAS senior researcher (Oct. 11, 2011). The IRS will not complete a review of the FPLP LIF until FY 2012.

26 For a more detailed discussion of FPLP issues and the National Taxpayer Advocate's concerns about how this program is being implemented, see *The New Income Filter For The Federal Payment Levy Program Does Not Fully Protect Low Income Taxpayers From Levies On Social Security Benefits, supra.*

27 National Taxpayer Advocate Fiscal Year 2012 Objectives Report to Congress 12-13; National Taxpayer Advocate 2010 Annual Report to Congress 302-310; National Taxpayer Advocate 2009 Annual Report to Congress 17-40; National Taxpayer Advocate 2009 Annual Report to Congress vol. 2, 1-18. *See also* National Taxpayer Advocate 2009 Annual Report to Congress 357-364.

28 See Taxpayer Advocate Directive (TAD) 2010-1, Immediately discontinue automatic lien filing on Currently Not Collectible (CNC) hardship accounts with an unpaid balance of $5,000 of more, require employees to make meaningful notice of federal tax lien (NFTL) filing determinations, and require managerial approval for filings of an NFTL in all cases where the taxpayer has no assets (Jan. 20, 2010); TAD 2010-2, Withdrawal of a notice of federal tax lien (NFTL) where the statutory withdrawal criteria are satisfied, even if the underlying lien has been released (Jan. 20, 2010). For copies of the TADs, see National Taxpayer Advocate Fiscal Year 2011 Objectives Report to Congress, Appendix VIII, *available at* http://www.irs.gov/pub/irs-utl/nta2011objectivesfinal.pdf.

get a "fresh start," which included several positive changes in how it files and withdraws NFTLs.[29] TAS worked very closely with the Collection function in developing and clearing procedural guidance related to the "Fresh Start" initiative,[30] which included:

- Doubling the dollar threshold for filing most NFTLs from $5,000 to $10,000, resulting in fewer NFTLs;[31]
- Changing procedures for NFTL withdrawals after lien releases;[32]
- Withdrawing liens in most cases where certain dollar limits and other conditions are met and a taxpayer enters into a Direct Debit Installment Agreement;[33]
- Including situations where the balance to be reflected on the individual NFTL is less than $2,500 as a situation where the NFTL should not be filed;[34]
- Creating easier access to installment agreements for more struggling small businesses;[35] and
- Expanding a streamlined offer in compromise program to cover more taxpayers.[36]

In addition, the IRS hosted an Open House on Saturday, July 16, 2011 at dozens of Taxpayer Assistance Centers across the county emphasizing the Fresh Start initiative,[37] and on August 31, the IRS presented a webinar on the initiative for tax professionals.[38] The impact of these changes on IRS collection activities and TAS case receipts will become evident over time. Notwithstanding these positive changes, the IRS still files NFTLs automatically when certain dollar thresholds are met, instead of filing NFTLs only after analyzing the taxpayer's circumstances to ascertain whether the NFTL is appropriate. As a result, NFTL filings in FY 2011 decreased by only 54,000 or about five percent compared to FY 2010.[39] Although the short-term impact of changes from the Fresh Start initiative appears promising, the decrease in NFTL filings so far has been minimal, given the millions of NFTLs filed in recent years.[40]

29 IRS, Media Relations Office, IRS Announces New Effort to Help Struggling Taxpayers Get a Fresh Start; Major Changes to Lien Process, IR-2011-20 (Feb. 24, 2011).

30 IRS Announcement IR-2011-20, IRS Announces New Effort to Help Struggling Taxpayers Get a Fresh Start; Major Changes Made to Lien Process (Feb. 24, 2011).

31 SB/SE, *Interim Guidance Memorandum*, Control No. SBSE-05-0311-039 (Mar. 28, 2011).

32 SB/SE, *Interim Guidance Memorandum*, Control No. SBSE-05-0611-037 (June 10, 2011). This guidance was issued in response to TADs 2010-1 and 2010-2. *See also* National Taxpayer Advocate Fiscal Year 2012 Objectives Report to Congress 12.

33 SB/SE, *Interim Guidance Memorandum*, Control No. SBSE-05-0411-036 (Apr. 7, 2011).

34 SB/SE, *Interim Guidance Memorandum*, Control No. SBSE-05-0511-050 (May 13, 2011).

35 SB/SE, *Interim Guidance Memorandum*, Control No. SBSE-05-0311-038 (Mar. 28, 2011).

36 SB/SE, *Interim Guidance Memorandum*, Control No. SBSE-05-0511-026 (May 13, 2011).

37 Special Edition Tax Tip 2011-04, IRS Taxpayer Assistance Centers Open on Saturday July 16 (July 14, 2011).

38 Headliner Volume 313, IRS Live Presents the Fresh Start Initiative (July 25, 2011).

39 IRS, Collection Activity Report NO-5000-23, *Collection Workload Indicators* (Oct. 30, 2011); IRS, *Fiscal Year 2010 Enforcement Results, available at* http://www.irs.gov/pub/irs-utl/2010_enforcement_results.pdf.

40 The IRS filed 5,200,913 NFTLs during FYs 2003-2010. IRS, *Fiscal Year 2010 Enforcement Results, available at* http://www.irs.gov/pub/irs-utl/2010_enforcement_results.pdf.

At the request of the National Taxpayer Advocate, TAS Research & Analysis is conducting a comprehensive, multi-year study of the impact of NFTLs on delinquent taxpayers' current and future payment and filing compliance and their ability to earn income.[41] Preliminary findings show that taxpayers with NFTLs filed against them were generally over ten percent less likely than comparable taxpayers without NFTLs to be compliant in paying current and future liabilities, at least within the first three to five years after the NFTL filing. The study also has confirmed an NFTL's negative impact on the filing compliance behavior and financial viability of affected taxpayers for years after the initial filing. With the preliminary results of the new TAS study in hand, the National Taxpayer Advocate has offered to work with the IRS on new, meaningful lien filing criteria. These standards would be based on the effectiveness of filings to increase revenue, promote future compliance, and minimize economic harm.[42]

TAS Identifies Problems and Trends That Negatively Impact Taxpayers, and Advocates to Resolve These Issues.

By analyzing the underlying issues in individual casework, TAS identifies trends that affect larger groups of taxpayers and uses that information to work with the IRS to resolve the broader issues.[43] Figure 4.5 lists the top 15 issues facing taxpayers.

41 *See* TAS Research Study: *Impact of Liens on Taxpayer Compliance Behavior, Preliminary Results*, Vol. 2, *infra*. *See also* National Taxpayer Advocate 2010 Annual Report to Congress vol. 2, 89-100 (TAS Research and Related Studies: *Estimating the Impact of Liens on Taxpayer Compliance Behavior: An Ongoing Research Initiative*).

42 *See* Most Serious Problem: *Changes to IRS Lien Filing Practices Are Needed to Improve Future Compliance, Increase Revenue Collection, and Minimize Economic Harm Inflicted on Financially Struggling Taxpayers, supra*.

43 TAS uses a variety of sources to identify systemic problems, including TAS employees, other IRS employees, tax practitioners, members of Congress, LITCs, TAP, and the public. These stakeholders submit systemic issues to TAS through a variety of channels, including the Systemic Advocacy Management System (SAMS) on the IRS employee intranet and the TAS site on IRS.gov (http://www.irs.gov/advocate).

FIGURE 4.5, Top 15 Issues Received In TAS in FY 2011[44]

Rank	Issue Description	FY 2010	FY 2011	Percentage Change
1	Identity Theft	17,291	34,006	96.7%
2	Processing Amended Return	30,891	22,743	-26.4%
3	Open Audit (not Earned Income Tax Credit)	26,182	21,397	-18.3%
4	Pre-Refund Wage Verification Hold[45]	3,171	21,286	504.4%
5	Levies (including Federal Payment Levy Program)	18,015	15,466	-14.1%
6	Unpostable and Reject Returns	22,341	13,288	-40.5%
7	Reconsideration of Audits[46] and Substitute for Return under IRC § 6020(b)[47]	12,843	11,902	-7.3%
8	Processing Original Return	11,997	11,578	-3.5%
9	Expedite Refund Request	11,755	9,386	-20.2%
10	Earned Income Tax Credit	11,198	8,729	-22.0%
11	Injured Spouse Claim	7,777	8,295	6.7%
12	IRS Offset	6,865	6,995	1.9%
13	Returned and Stopped Refunds	6,115	6,489	6.1%
14	Other Refund Inquiries and Issues	6,707	6,135	-8.5%
15	Installment Agreements	6,039	5,899	-2.3%
Total TAS Receipts		**298,933**	**295,904**	**-1.0%**

Significant trends include the continued rise in identity theft receipts, the reappearance of the Questionable Refund Program (QRP)[48] in the form of Pre-Refund Wage Verification Hold cases, and the IRS's difficulties administering the First-Time Homebuyer Credit (FTHBC) and the Adoption Credit, discussed below.

44 Data obtained from TAMIS (Oct. 1, 2010; Oct. 1, 2011). TAS computed the Top 15 cases using only Primary Issue Codes. Often TAS cases involve more than one issue and TAS tracks this data, however these are not included within this computation to avoid counting a case more than once. Data reflect only the top 15 issues, not all TAS receipts for the FY.

45 Because TAS did not use PIC 045 until March 24, 2010, a more appropriate comparison would be between PIC 045 case receipts from the last two quarters of FY 2011 (18,018 cases) and the last two quarters of FY 2010 (2,981 cases), which represents a 504.4 percent increase. The 21,286 pre-refund wage verification (PIC 045) cases actually represent a 571 percent increase over the 3,171 PIC 045 cases received in FY 2010. For more information about pre-refund wage verification holds, *see* Most Serious Problem: *The IRS's Wage and Withholding Verification Process May Encroach on Taxpayer Rights and Delay Refund Processing, supra*.

46 The IRS uses audit reconsideration to reevaluate the results of a prior audit where additional tax was assessed and remains unpaid, or a tax credit was reversed. IRM 21.5.10.4.3 (Oct. 1, 2010).

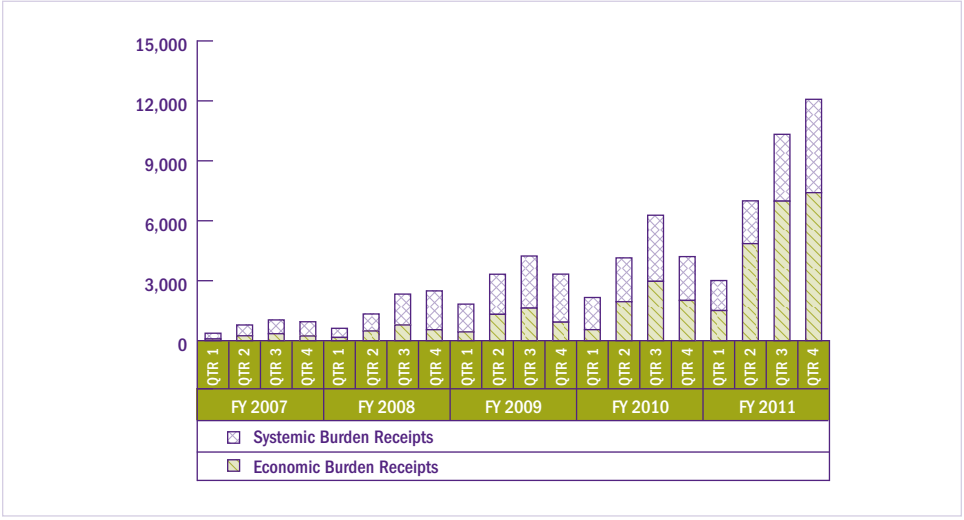
47 IRC § 6020(b) allows the IRS to prepare a return on behalf of the taxpayer based on available information, and assess the tax after providing a statutory notice deficiency to the taxpayer.

48 The IRS Criminal Investigation (CI) QRP identifies fraudulent returns, stopping the payment of fraudulent refunds, and referring fraudulent refund schemes to CI field offices. *See* National Taxpayer Advocate 2007 Annual Report to Congress 448-458 (Status Update: *Questionable Refund Program*); National Taxpayer Advocate 2006 Annual Report to Congress 408-421 (Status Update: *Major Improvements in the Questionable Refund Program and Some Continuing Concerns*); National Taxpayer Advocate 2005 Annual Report to Congress 25-54 (Most Serious Problem: *Criminal Investigation Refund Freezes*); National Taxpayer Advocate 2003 Annual Report to Congress 175-181 (Most Serious Problem: *Criminal Investigation Freezes*).

The IRS Needs to Make More Improvements to its Handling of Identity Theft Cases. Effective June 2010, W&I's Identity Protection Specialized Unit (IPSU) began working non-economic burden identity theft (IDT) cases.[49] In FY 2010, the IPSU handled nearly 3,400 cases that TAS would otherwise have received; in FY 2011 this number increased to nearly 26,700.[50]

However, despite this process improvement, IDT ranked as the number one reason taxpayers came to TAS in FY 2011. TAS IDT receipts continued to increase substantially in FY 2011, as reflected in Figure 4.6 below.

FIGURE 4.6, TAS Identity Theft Receipts, FY 2007 – FY 2011, Economic and Systemic Burden[51]



TAS is also participating in a servicewide Identity Theft Assessment Action Group (ITAAG) created to address identity theft challenges, which include:

- Keeping pace with a growing, increasingly complex caseload;

49 See Memorandum of Understanding Between the National Taxpayer Advocate and the Commissioner, W&I to Transition TAS Criteria 5-7 Identity Theft Cases to W&I IPSU (Mar. 31, 2010). The following are examples of when TAS would continue to advocate for identity theft victims: (1) the taxpayer declines referral to the IPSU; (2) the IPSU has already tried to provide relief in the past, and has failed; (3) systemic burden cases that require advocacy which might lead to the issuance of a TAO on behalf of the taxpayer; (4) taxpayer cases added to TAMIS will remain in TAS and be resolved through the Operations Assistance Request (OAR) process; (5) taxpayers not satisfied with the assistance provided through the IPSU; (6) taxpayers being assisted by the IPSU, who subsequently face economic burden while the IPSU is processing their request when the IPSU cannot provide relief within 24 hours; (7) congressional cases; and (8) any cases previously open in TAS. *Available at:* http://www.irs.gov/advocate/article/0,,id=171162,00.html. *See also* TAS Interim Guidance Memorandum TAS-13.1.16-1011-011, *Interim Guidance on Referring Identity Theft Criteria 5-7 Cases to the Identity Protection Specialized Unit (IPSU)* (Oct. 18, 2011) *available at* http://www.irs.gov/pub/foia/ig/tas/tas-13.1.16-1011-011.pdf.

50 IRS, *IPSU Identity Theft Report* (Oct. 2, 2010); IRS, *IPSU Identity Theft Report* (Oct. 1, 2011).

51 Data obtained from TAMIS. TAS retrieved the data on the first day of the month following the end of each quarter for FY 2007 through FY 2011.

- Implementing consistent identity theft procedures across multiple IRS organizations; and
- Improving taxpayer service and identity theft case processing efficiency while managing the complex case resolution process.

The ITAAG established five teams to analyze current ID theft operations, identify the key "pain points" and quick actions to improve them, determine a future structure for improving taxpayer service and case resolution, and recommend a plan to achieve these goals.

The National Taxpayer Advocate testified before Congress in May 2011 on IRS challenges in dealing with identity theft perpetrators and victims and has discussed IDT issues in numerous reports to Congress.[52] TAS continues to search for ways to improve the IRS's ability to assist victims of identity theft. In addition to assisting individual taxpayers, TAS asked all its employees to suggest improvements in IDT procedures to the ITAAG team.[53]

Reappearance of the QRP in TAS Case Receipts

The QRP has reappeared as a top issue in TAS casework in the form of Pre-Refund Wage Verification Hold (PRWVH) receipts.[54] In FY 2011, TAS received 21,286 PRWVH cases, providing some form of relief in 75 percent of the cases closed.[55] Figure 4.7 shows the dramatic increase in these cases.

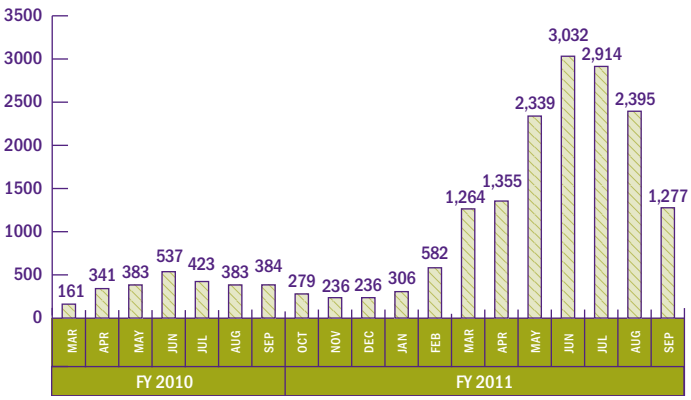
52 *The Spread of Tax Fraud by Identity Theft: A Threat to Taxpayers, A Drain on the Public Treasury, Hearing Before S. Subcomm. on Fiscal Responsibility and Economic Growth, S. Comm. on Finance*, 112th Congress (Statement of Nina E. Olson, National Taxpayer Advocate) (May 25, 2011). National Taxpayer Advocate 2005 Annual Report to Congress 180-191 (Most Serious Problem: *Identity Theft*); National Taxpayer Advocate 2007 Annual Report to Congress 96-115 (Most Serious Problem: *Identity Theft Procedures*); National Taxpayer Advocate 2008 Annual Report to Congress 79-94 (Most Serious Problem: *IRS Process Improvements to Assist Victims of Identity Theft*); National Taxpayer Advocate 2009 Annual Report to Congress 307-317 (Status Update: *IRS's Identity Theft Procedures Require Fine Tuning*); National Taxpayer Advocate FY 2012 Objectives Report to Congress 14-18 (Areas of Focus: *The IRS Needs to Improve Its Identity Theft Victim Assistance Strategy*).

53 For a more detailed discussion of identity theft issues and the National Taxpayer Advocate's concerns about how this program is being implemented, see Most Serious Problem: *Tax-Related Identity Theft Continues to Impose Significant Burden on Taxpayers and the IRS, supra.*

54 *See* National Taxpayer Advocate 2007 Annual Report to Congress 448-458 (Status Update: *Questionable Refund Program*); National Taxpayer Advocate 2006 Annual Report to Congress 408-421 (Status Update: *Major Improvements in the Questionable Refund Program and Some Continuing Concerns*); National Taxpayer Advocate 2005 Annual Report to Congress 25-54 (Most Serious Problem: *Criminal Investigation Refund Freezes*); National Taxpayer Advocate 2003 Annual Report to Congress 175-181 (Most Serious Problem: *Criminal Investigation Freezes*).

55 Data obtained from TAMIS. TAS determines relief based upon whether TAS is able to provide full or partial relief or assistance on the issue initially identified by the taxpayer.

FIGURE 4.7, TAS Monthly Pre-Refund Wage Verification Hold Receipts, March 2010 Through September 2011[56]



The civil side of the QRP is now referred to as the Accounts Management Taxpayer Assurance Program (AMTAP). To accomplish its primary goal of revenue protection, AMTAP selects questionable returns before releasing refunds and screens them electronically to verify the accuracy of the taxpayers' wages and withholding. If this initial review cannot confirm the amounts, AMTAP employees begin a manual verification process that can take up to 13 weeks or more.[57] Such delays can create financial hardship for taxpayers who are awaiting legitimate refunds.

As discussed earlier in this report, in FY 2011 AMTAP's inventory reached 690,000 cases,[58] due to a combination of insufficient staffing and inexperienced employees. The resulting delays are causing more taxpayers who are experiencing economic burden to come to TAS searching for their refunds. TAS has issued 210 TAOs to AMTAP during FY 2011 to help these taxpayers.[59]

56 Data obtained from TAMIS. TAS retrieved the data on the first day following the end of each month, *i.e.*, Oct. 1, 2011 for September 2011; for March 2010 through September 2011. TAS computed the receipts included in this table using PICs. Often TAS cases involve more than one issue and TAS tracks this data, however these are not included within this computation to avoid counting a case more than once.

57 The manual verification process includes contacting the taxpayer's employer or if directed by the employer, the payroll processing firm to verify wages and withholding. AMTAP employees will also perform research to ensure they have the employer's current address. It takes the IRS two weeks to screen the cases and 11 weeks to verify the wages and withholding. TAS Notes for TAS-AMTAP OAR Backlog conference call (May 2, 2011). *See also* IRM 21.9.1.2.3(1) (Mar. 7, 2011).

58 IRS Decedent Schemes conference call (Apr. 21, 2011). *See* Most Serious Problem: *The IRS's Wage and Withholding Verification Procedures May Encroach on Taxpayer Rights and Delay Refund Processing, supra*.

59 For a detailed discussion of TAOs, see *TAS Uses Taxpayer Assistance Orders to Advocate Effectively in Taxpayer Cases, infra.*

The problems with the AMTAP program are similar to those TAS identified when CI administered the QRP.[60] The National Taxpayer Advocate is concerned that systemic QRP issues harm legitimate taxpayers, and will continue to advocate for systemic change.[61] In the summer of 2011, the IRS convened a cross-functional team called Accelerated Revenue Assurance Program (ARAP) to explore ways to effectively combat refund fraud. TAS is participating on the ARAP team to ensure that the IRS respects taxpayer rights while endeavoring to protect Treasury revenue.

Policymakers Can Learn from the Implementation of the FTHBC.

The FTHBC[62] was designed largely to bolster the residential real estate market during the recession and continuing economic downturn.[63] To claim the FTHBC, taxpayers navigated through a complex set of rules, making numerous determinations to ascertain which credit and what amount they were eligible to claim.[64] Further, because taxpayers are required to attach a "settlement statement" to their tax returns to substantiate eligibility for the credit, they cannot file returns electronically.[65]

Tax year 2011 marked the first year taxpayers had to file returns that recaptured or repaid the FTHBC. While the IRS knew for more than two years that FTHBC repayment programming was necessary, it chose not to start the programming changes until the 2011 filing season was already underway. This last-minute move prevented the IRS from properly testing the programming to identify and correct flaws. It created unnecessary burden and delays for taxpayers, essentially because the IRS failed to properly plan, implement, and communicate the recapture and repayment requirements.

Since 2009, the National Taxpayer Advocate has expressed concern over the challenges presented by complexity of the FTHBC, the complicated procedures intended to address

60 *See* National Taxpayer Advocate 2005 Annual Report to Congress 25 (Most Serious Problem: *Criminal Investigation Refund Freezes*); National Taxpayer Advocate 2007 Annual Report to Congress 448 (Status Update: *Questionable Refund Program*).

61 For a detailed discussed of the National Taxpayer Advocate's recommendations to improve the TAP program, see Most Serious Problem: *The IRS's Wage and Withholding Verification Procedures May Encroach on Taxpayer Rights and Delay Refund Processing, supra.*

62 IRC § 36.

63 Associated Press, *Northeast Home Sales Post 13 Pct. Annual Increase*, The New York Times (Mar. 23, 2010).

64 There are different maximum credit amounts, two different eligibility phase-outs based on adjusted gross income, two different eligible statuses (first-time homebuyer and long-time resident) with special rules for military personnel, and three different effective dates with separate eligibility dates for entering into a contract and for completing the sale. There are also age limits, home purchase price limits, and related-party rules. Additionally, the $7,500 FTHBC allowed under the Housing and Economic Recovery Act of 2008 requires repayment of the credit over 15 years. Pub. L. No. 110-289, § 3011, 122 Stat. 2654, 2888 (July 30, 2008). The FTHBC allowed under the American Recovery and Reinvestment Act of 2009 (Pub. L. No. 111-5, § 1006, 123 Stat. 115, 316 (Feb. 17, 2009)) and continued under the Worker, Homeownership, and Business Assistance Act of 2009 (Pub. L. No. 111-92, § 11, 123 Stat. 2984, 2989 (Nov. 6, 2009)), increased the credit to $8,000 and eliminated the repayment requirement.

65 *See* Worker, Homeownership, and Business Assistance Act of 2009, Pub. L. No. 111-92, § 11, 12(b) Stat. 2984, 2991 (Nov. 6, 2009), *amending* IRC § 36(d).

improper payments, and the IRS administration of the credit.[66] Figure 4.8 shows TAS FTHBC case receipts by issue category. Over the last three FYs, the FTHBC was responsible for 79,245 new cases in TAS (approximately nine percent of the total TAS case receipts for that period).

FIGURE 4.8, TAS FTHBC Receipts by Issue Category, FY 2009 Through FY 2011[67]

Issue Category	FY 2009	FY 2010	FY 2011
Refund Issues	393	2,633	1,897
Document Processing Issues	2,318	22,314	16,377
Audit Issues	1,403	18,300	9,690
Appeals Issues	4	542	1,011
Other Issues	510	1,051	802
Total FTHBC Cases	4,628	44,840	29,777
Total TAS Case Receipts	272,404	298,933	295,904
Percentage of FTHBC Cases to Total TAS Case Receipts	1.7%	15.0%	10.1%

All cases in TAS inventory are part of the IRS workload; they are generated in response to some IRS action or inaction, or some law that the IRS administers. This is readily apparent in TAS's large FTHBC case inventory, most of which it received because the IRS:

- Was slow to process the taxpayer's original or amended return claiming the credit;
- Found a math error when trying to process an FTHBC return; or
- Selected the return for audit.

While these issues persist in FY 2011, TAS is seeing a "natural shift" from FTHBC document processing and audit issues to cases where taxpayers want to appeal or seek reconsideration of the results of an audit.[68]

66 *See* National Taxpayer Advocate 2009 Annual Report to Congress 506-509; National Taxpayer Advocate 2010 Annual Report to Congress 15-27, 513-515 (Most Serious Problem: *The IRS Mission Statement Does Not Reflect the Agency's Increasing Responsibilities for Administering Social Benefits Programs*) (Case Advocacy: *TAS Assists the IRS with the Administration of the First-Time Homebuyer Credit*); National Taxpayer Advocate Fiscal Year 2011 Objectives Report to Congress 37-43; National Taxpayer Advocate Fiscal Year 2012 Objectives Report to Congress 28-32; *Hearing on Tax Filing Season Update: Current IRS Issues, Before the S. Comm. on Finance*, 111th Cong. (statement of Nina E. Olson, National Taxpayer Advocate) (Apr. 15, 2010); *Hearing on Complexity and the Tax Gap: Making Tax Compliance Easier and Collecting What's Due, Hearing Before the S. Comm. on Finance*, 112th Cong. (statement of Nina E. Olson, National Taxpayer Advocate) (June 28, 2011).

67 Data obtained from TAMIS. TAMIS is a dynamic system and TAS did not compile the statistics gathered for the issue categories for this table on the same date as the total TAS case receipts. TAS retrieved the FTHBC data by issue category on Oct. 18, 2011.

68 When a taxpayer does not agree with the results of an audit, the taxpayer may request an administrative hearing or "appeal" to resolve tax controversies without having to go through litigation; should the taxpayer and IRS fail to administratively resolve the tax controversy, the taxpayer still retains the right to litigate. *See* IRM 8.1.1 (Oct. 23, 2007). The IRS uses the audit reconsideration process to reevaluate the results of previous audits where additional tax was assessed and remains unpaid or a tax credit was reversed. IRM 4.13.1.2 (Oct. 1, 2006). The IRS also uses the audit reconsideration process when a taxpayer disputes a Substitute for Return (SFR) assessment by filing an original delinquent return. *See also* IRS Publication 3598, *What You Should Know About the Audit Reconsideration Process* (Sept. 2011).

The FTHBC was available to taxpayers who entered into a written binding contract before May 1, 2010, to close on the purchase of a principal residence before July 1, 2010.[69] TAS expects case receipts for this issue will continue to decline, but the National Taxpayer Advocate encourages policymakers to use the "lessons learned" from the implementation of the FTHBC in future legislation. When a benefit will require up-front substantiation to reduce improper payments, policymakers should consider whether a direct spending program is a better vehicle, particularly if agencies other than the IRS have relevant expertise. Requiring taxpayers to include substantiation up-front, *e.g.*, a settlement statement for FTHBC, counters the efficiency and policy reasons for using the tax system to administer these benefits. Up-front substantiation:

- Is burdensome for the taxpayer and the IRS;
- May reduce taxpayer participation by increasing burden, thus negating a primary reason for administering a benefit through the tax code;
- Frustrates IRS efforts to meet congressionally mandated goals for e-filing; and
- Does not effectively eliminate fraud.[70]

Delays in Processing Returns Claiming the Adoption Credit Are a Result of Up-Front Documentation Requirements.

The Patient Protection and Affordable Care Act increased the maximum adoption credit from $12,150 to $13,170,[71] and made the credit fully refundable for 2010 and 2011. The eligibility rules are different for domestic, foreign, and special needs child adoptions. However, in all three categories, taxpayers claiming the credit can no longer file returns electronically because the IRS requires paper documentation with Form 8839, *Qualified Adoption Expenses*.

The IRS scrutinizes these returns because the credit is large and refundable. As in examinations of other refundable credits, the IRS holds the adoption credit portion of the refund until the audit determines whether the taxpayer is eligible for the credit.[72] On March 31, 2011, the IRS posted a reminder on its website for taxpayers to include the documentation.[73] According to the Treasury Inspector General for Tax Administration (TIGTA), "through April 28, 2011, the IRS received 72,656 individual claims for more than $897

69 IRC § 36(h)(1) and (2).

70 For a more detailed discussion of special tax benefits and spending programs implemented through the tax code, see *Hearing on Complexity and the Tax Gap: Making Tax Compliance Easier and Collecting What's Due, Hearing Before the S. Comm. on Finance*, 112th Cong. (statement of Nina E. Olson, National Taxpayer Advocate) (June 28, 2011); National Taxpayer Advocate 2009 Annual Report to Congress, vol. 2, 75 -104 (*Running Social Programs Through the Tax System*); National Taxpayer Advocate 2010 Annual Report to Congress, vol. 2, 101 – 119 (*Evaluate the Administration of Tax Expenditures*).

71 Pub. L. No. 111-148, § 10,909, 124 Stat. 119, 1021 (Mar. 23, 2010) (amending IRC § 23 and redesignating it as IRC § 36C). Rev. Proc. 2008-66, 2008-2 C.B. 1107.

72 IRM 21.5.10.4.1.2, *Examination Refund Hold Projects*, (Mar. 16, 2011).

73 IRS, *Adoptive Parents: Don't Delay Your Adoption Credit Refund, available at* http://www.irs.gov/newsroom/article/0,,id=236883,00.html (last visited May 27, 2011).

million in adoption credits. Of these, 42,399 (58 percent) either had no required documentation or the documentation was invalid or insufficient."[74]

In FY 2011, TAS has received 5,572 adoption credit cases and provided relief in 85.6 percent of the 4,160 cases closed.[75] In addition, TAS continues to receive submissions of potential systemic advocacy issues related to this topic. TAS identified the following concerns stemming from IRS administration of the credit:

- IRS auditors asked taxpayers to provide documentation before reviewing the information the taxpayers included with their original returns, so taxpayers who already submitted documentation had to send it twice;
- The IRS did not inform taxpayers how long it would take to audit their returns and when they could expect their refunds;
- IRS examiners were not knowledgeable about the expanded adoption credit under the Patient Protection and Affordable Care Act and how to handle the credit claimed for special needs children; and
- The hold on issuing the adoption credit portion of the refund caused financial burden for some taxpayers.

The adoption credit is another example of using the tax code to deliver social benefits requiring up-front substantiation, in the form of an adoption order or decree; or in the case of a special needs child, a copy of the state's determination of special needs.[76] The relief rate is significantly greater than the relief rate for all TAS cases.[77] As in the case of the FTHBC, the substantiation requirements eliminated the taxpayer's ability to file electronically and highlighted training and knowledge deficiencies in the manual processing of these claims.[78]

TAS Assists Taxpayers Impacted by Receivership of the Deutch Law Firm.

In May 2011, the California Attorney General's office contacted the National Taxpayer Advocate to seek assistance for a large number of clients impacted when the Law Firm of Roni Lynn Deutch was placed in control of a receiver, after Ms. Deutch closed the firm and surrendered her California law license.[79]

On August 23, 2010, the state of California filed suit against Roni Deutch, a professional corporation, and Roni Lynn Deutch, individually, (the defendants) alleging they orchestrated

74 *Improper Payments in the Administration of Refundable Tax Credits, Hearing Before the H. Comm. on Oversight*, 112th Cong. (May 25, 2011) (Testimony of The Honorable J. Russell George, Treasury Inspector General for Tax Administration).

75 Data obtained from TAMIS (Oct. 1, 2011).

76 Notice 2010-66; 2010-2 C.B. 437.

77 The FY 2011 relief rate for all TAS cases is 75.7 percent. The adoption credit case relief rate is 9.9 percent higher. Data obtained from TAMIS (Oct. 1, 2011).

78 See *Policymakers Can Learn from the Implementation of the First-Time Homebuyer Credit*, *supra*.

79 The State Bar of California website, *available at* http://members.calbar.ca.gov/fal/Member/Detail/152429.

a scheme that swindled thousands of dollars from taxpayers who had collection problems with the IRS. The complaint alleged that the defendants engaged in a scheme to cheat taxpayers, including senior citizens and the disabled, who could not afford to pay their tax debts by enticing them to engage the defendants to negotiate a resolution of their debts with the IRS. The complaint alleged the defendants falsely represented both their success rate in negotiating for clients and the type of resolution they could secure. The defendants promised, for example, to lower the amount the clients owed the IRS, eliminate accrued interest and penalties, establish a low monthly payment plan to retire the debt, or prevent the IRS from collecting it. The complaint further alleged the defendants falsely represented that they could immediately stop IRS collection actions, such as levies and wage garnishments, if clients retained the defendants.[80]

TAS worked with the state attorney general and the receiver to identify the taxpayers who needed immediate attention and to help all of those affected. The receiver provided TAS a full client list of 3,994 taxpayers, and another list of 928 identified as having "critical needs."[81] A "triage" process is in place to screen "critical need" taxpayers and identify their problems. TAS employees throughout the country will assist these taxpayers.

To date, TAS has accepted approximately 170 "Deutch" cases resulting from direct taxpayer calls or the triage process where TAS has reached out to taxpayers that appear to have a current IRS levy, *i.e.*, a critical need.[82] The majority of these cases deal with collection-related issues, with approximately 35 percent of them involving an unresolved OIC. TAS has closed 124 Deutch cases with a relief rate of 66 percent.[83] The National Taxpayer Advocate alerted other IRS business units of this potential influx of cases and negotiated with the IRS to refrain from any automated collection activity through September 30, 2011. During the triage, TAS employees and revenue officers are working together to suspend enforcement activity on cases identified as being assigned to Field Collection, allowing the former Deutch clients time to evaluate their options and possibly seek new representation. Additionally, the IRS agreed to refrain from returning or rejecting any OICs submitted by the taxpayers, and instead will work with the taxpayers to try to perfect the offers or arrive at another resolution.

Finally, because the affected taxpayers are located nationwide, the National Taxpayer Advocate sent them a letter to educate them about the options for resolving their problems,

80 Complaint filed in *The People of the State of California v. Roni Deutch, a Tax Corporation and Roni Lynn Deutch, an individual*, Docket No. 34-2010-00085933 (Sup. Ct. Cal.), *available at* http://ag.ca.gov/cms_attachments/press/pdfs/n1978_complaint.pdf.

81 Data obtained from TAMIS (Nov. 4, 2011).

82 *Id*.

83 *Id*. TAS determines relief based on whether TAS can provide full or partial relief or assistance on the issue initially identified by the taxpayer. Because TAS frequently provides relief on issues that differ from the ones first identified, the relief rate as calculated is understated.

and provide them with numbers to reach both the IRS and TAS for assistance, as well as information about LITCs. TAS and the LITCs are ready to assist former Deutch taxpayers.[84]

TAS Uses Taxpayer Assistance Orders to Advocate Effectively in Taxpayer Cases.

The Taxpayer Assistance Order is a powerful tool that Local Taxpayer Advocates (LTAs) can use to resolve their cases. An LTA should consider issuing a TAO in a well-developed case if the taxpayer is suffering or about to suffer a significant hardship as a result of the manner in which the internal revenue laws are being administered and the law and the facts support the relief.[85] The LTA may issue a TAO to order the IRS to take an action, cease an action, or refrain from taking an action;[86] for example, to release a levy.[87] The LTA may also issue a TAO to order the IRS to expedite consideration of a taxpayer's case, reconsider its determination in a case, or review the case at a higher level.[88]

The ability to issue a TAO ensures "that TAS can effectively resolve problems and protect taxpayer rights when the taxpayer has a significant hardship, even when the IRS disagrees or has other internal priorities."[89] TAS has implemented various approaches to ensure that LTAs better understand the types of cases that require TAOs. One such approach involves coordinated informal monthly discussions with all LTAs about case scenarios that may result in a TAO. These discussions help LTAs share experiences and learn more about what is necessary to resolve cases.[90] Increased awareness of the importance of the TAO as an advocacy tool has resulted in an increased use of TAOs over the past three FYs. TAS issued 45 TAOs in FY 2009, 95 in FY 2010, and 422 in FY 2011. Of the 422 TAOs issued in FY 2011, 407 have been resolved.[91] The IRS complied with 388 of these 407 TAOs, a 95 percent compliance rate.[92] Figure 4.9 shows the areas that generated TAOs in FY 2011 and how they were resolved.

84 LITCs are independent from the IRS. Some clinics serve individuals whose income is below a certain level and who need to resolve a tax problem. These clinics provide professional representation before the IRS or courts in audits, appeals, tax collection disputes, and other issues for free or for a small fee. Some clinics provide information about taxpayer rights and responsibilities in many different languages for individuals who speak English as a second language.

85 Treas. Reg. § 301.7811-1(a), 76 Fed. Reg. 18,059 (Apr. 1, 2011). *See also* IRC § 7811(a)(1); IRM 13.1.20.1 (Dec. 15, 2007).

86 Treas. Reg. § 301.7811-1(c), 76 Fed. Reg. 18,059 (Apr. 1, 2011); IRM 13.1.20.3 (Dec. 15, 2007).

87 IRC § 7811(b)(1).

88 Treas. Reg. § 301.7811-1(c), 76 Fed. Reg. 18,059 (Apr. 1, 2011); IRM 13.1.20.3 (Dec. 15, 2007).

89 IRM 13.1.20.2(5) (Feb. 1, 2011).

90 The monthly sessions are termed *TAO Cafés*, and these discussions, equipped with moderators and a detailed agenda, allow LTAs the ability to ask questions about TAO authority under different scenarios.

91 Data obtained from TAMIS (Oct. 1, 2011). TAOs resolved include TAOs that the IRS fully complied with, TAOs that were modified and the IRS complied with, and TAOs that TAS rescinded.

92 Data obtained from TAMIS (Oct. 1, 2011). TAOs complied with include TAOs that the IRS fully compiled with and TAOs that were modified and the IRS complied with.

FIGURE 4.9, Taxpayer Assistance Orders Issued in FY 2011[93]

Type of Issue	Number of TAOs Issued	Resolution			
		IRS Complied	TAO Modified & IRS Complied	TAS Rescinded	In Process
Refund	212	200	2	8	2
Collection	57	41	3	6	7
Document Processing	43	40	1		2
Audit	33	31	1	1	
Entity	38	34	1		3
Penalty	14	10	1	2	1
Appeals	11	8	2	1	
Criminal Investigation	5	4		1	
Other	9	9			
Total	**422**	**377**	**11**	**19**	**15**

TAS's Strategy for Future Case Receipts

TAS's case receipts have grown substantially, from 247,839 in FY 2007 to 295,904 in FY 2011, an increase of more than 19 percent.[94] TAS recognized the need to strategically address its rising inventories through a two-pronged approach of increased staffing and improved processes. In FY 2008, TAS began a hiring effort focused on acquiring the right mix of staffing to effectively advocate for taxpayers.[95] In 2010, TAS secured funds for and began development of the Taxpayer Advocate Service Integrated System (TASIS) to update and replace its current information systems.[96]

Even with this two-pronged approach, it has become clear that in the current federal budget environment TAS will not have the resources to continue to handle its current inventory levels without adverse impact on its ability to provide effective and timely service. TAS is a scarce resource and, as such, must continue to provide effective service to those taxpayers who need our help or to whom TAS is best suited to assist.

TAS carefully analyzed its case inventory for instances where TAS involvement and advocacy efforts are minimal, focusing on areas where:

- TAS does not have the statutory or delegated authority to resolve an issue and must ask the IRS to take action to resolve the case;
- The taxpayer is not suffering an economic burden; or

93 Data obtained from TAMIS (Oct. 1, 2011).

94 Data obtained from TAMIS (Oct. 1, 2007; Oct. 1, 2011).

95 For additional information concerning TAS's hiring efforts, see National Taxpayer Advocate Fiscal Year 2011 Objectives Report to Congress 73-76.

96 See National Taxpayer Advocate Fiscal Year 2012 Objectives Report to Congress 69-73 (*Integrated Technology: TASIS*).

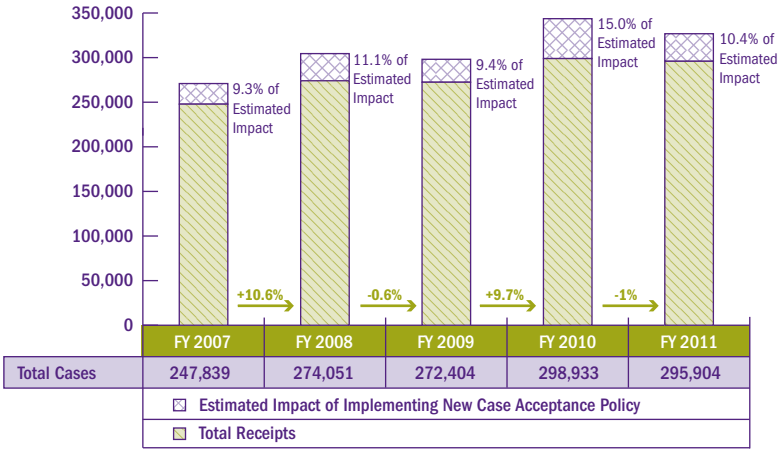
- The IRS frequently resolves the taxpayer's issue before TAS is able to contact the IRS for case resolution.

Beginning October 1, 2011, TAS generally will not accept inquiries from taxpayers experiencing a systemic burden *solely* relating to the processing of an original return, an unpostable or rejected return,[97] the processing of an amended return, or the processing of an injured spouse claim.[98] TAS will, however, continue to accept cases for these categories where:

- The taxpayer is experiencing an economic burden or the issue involves equitable treatment or taxpayer rights;
- The issue is complex and involves more than simply processing a return, *i.e.*, the taxpayer is filing an amended return to resolve an ongoing collection issue; or
- TAS received the case from a congressional office.

Figure 4.10 illustrates how TAS's receipts could have been reduced in the past five FYs if this policy had been in place.[99]

FIGURE 4.10, TAS Case Receipts, FY 2007 – FY 2011 and Potential Impact of Implementation of Case Acceptance Policy[100]



97 Each account transaction is subjected to a series of validity checks prior to posting to the Master File. A transaction is termed unpostable when it fails to pass any of the validity checks and is then returned to the campus (Rejects Function) for follow-up action(s). IRM 21.5.5.2 (Oct. 1, 2007).

98 TAS's role in these types of situations is typically limited to issuing an OAR to the appropriate IRS function to advocate for resolution of the taxpayer's problem, providing updates to taxpayers, and looking for patterns of delay to identify systemic problems. *See* TAS Interim Guidance Memorandum TAS-13.1.7-0911-014, *Interim Guidance on Changes to Case-Acceptance Criteria* (Sept. 1, 2011) *available at* http://www.irs.gov/pub/foia/ig/tas/tas_13.1.7-0911-014.pdf.

99 The estimated reduction in TAS workload is overstated. It does not take into account complex cases (defined above) or cases received from a congressional office.

100 Data obtained from TAMIS. TAS retrieved the data on the first day following the end of the FY for FY 2007 through FY 2011.

During the coming year, we will continue to prioritize cases to ensure we can provide effective service to taxpayers who most need our assistance or whom TAS is best suited to assist.

Congressional Case Trends

TAS is responsible for responding to certain tax account inquiries sent to the IRS by members of Congress. As shown in Figure 4.11, document processing, audit, and collection-related issues made up the top three categories of congressional inquiries in 2011.

FIGURE 4.11, Issues In Congressional Cases, FY 2010 – FY 2011[101]

Issue Category	FY 2010	FY 2011	Percentage Change
Audit Issues	3,244	3,111	-4.1%
Document Processing Issues	3,451	2,623	-24.0%
Collection Issues	3,009	2,779	-7.6%
Refund Issues	1,778	1,568	-11.8%
Entity Issues	830	1,625	95.8%
Penalty Issues	1,258	1,145	-9.0%
Technical, Procedural, or Statute Issues	1,367	1,101	-19.5%
Payment or Credit Issues	335	397	18.5%
Appeals Issues	278	267	-4.0%
Interest Issues	88	84	-4.6%
Other Issues	49	45	-8.2%
Criminal Investigation Issues	24	16	-33.3%
Total Congressional Issues	**15,711**	**14,761**	**-6.1%**

Since FY 2008, congressional inquiries have continued to decline. As shown in Figure 4.12, issues relating to the Economic Stimulus Payments and FTHBC contributed significantly to TAS congressional receipts in recent years.

[101] Data obtained from TAMIS (Oct. 1, 2010; Oct. 1, 2011).

FIGURE 4.12, TAS Congressional Receipts, FY 2007 – FY 2011[102]

	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Congressional Receipts	9,779	22,097	17,603	15,711	14,761
Total Case Receipts	247,839	274,051	272,404	298,933	295,904
% of Total Receipts	3.9%	8.1%	6.5%	5.3%	5.0%
Congressional Receipts Related to the Economic Stimulus Payment (ESP)[103]		10,320	4,264	127	22
Congressional Receipts Related to FTHBC				3,243	2,018
Adoption Credit					496

[102] Data obtained from TAMIS. TAS retrieved the data on the first day following the end of the FY for FY 2007 through FY 2011.

[103] *See* IRC § 6428.

Top 25 Case Advocacy Issues for FY 2011 by TAMIS* Receipts

Issue Code	Description	FY 2011 Cases
425	Stolen Identity	34,006
330	Processing Amended Return	22,743
610	Open Audit (Non-Revenue Protection Strategy (RPS), Earned Income Tax Credit (EITC))	21,397
045	Pre-Refund Wage Verification Hold	21,286
71X	Levies	15,466
315	Unpostable / Reject	13,288
620	Reconsideration / Substitute for Return / IRC § 6020(b) / Audit	11,902
310	Processing Original Return	11,578
020	Expedite Refund Request	9,386
63X-640	EITC Claims / Certification / Reconsideration / Recertification	8,729
340	Injured Spouse Claim	8,295
060	IRS Offset	6,995
040	Returned / Stopped Refunds	6,489
090	Other Refund Inquiries / Issues	6,135
75X	Installment Agreement	5,899
540	Civil Penalties other than Trust Fund Recovery Penalty	5,301
675	Combined Annual Wage Reporting / Federal Unemployment Tax Act (CAWR-FUTA)	5,192
670	Closed Underreporter	5,151
72X	Liens	4,637
320	Math Error	4,471
390	Other Document Processing Issues	4,419
790	Other Collection Issues	4,267
91X	Appeals	4,056
520	Failure to File (FTF) / Failure to Pay (FTP) Penalty	3,586
010	Lost / Stolen Refunds	3,239
Total Top 25 Receipts		**247,913**
Total TAS Receipts		**295,904**

* Taxpayer Advocate Management Information System.

Appendix Two

Advocacy Portfolio Advisor Assignments

Portfolio Assignment	Portfolio Owner	Location	Phone Number
Military Issues	Douts, K	AK	907-271-6297
Powers of Attorney	Hawkins, D	AL	205-912-5634
Designated Federal Official (DFO) Area 5	Wilde, B	AR	501-396-5820
Levies	Wilde, B	AR	501-396-5820
Withholding Compliance	Murphy, M	AZ	602-636-9503
Tax Forum Case Resolution Room	Sawyer, M	CA-Fresno	559-442-6418
DFO Area 7	Curran, D	CA-LA	213-576-3016
Tax Forum Case Resolution Room	Adams, C	CA-Laguna Niguel	949-389-4790
e-Services	Todaro, T	CA-Oakland	510-637-3079
Audit Reconsiderations	Martin, T	CA-Sacramento	916-974-5191
Collection Statute Expiration Dates (CSEDs)	Sherwood, T	CO	303-603-4601
Federal Tax Liens	Sherwood, T	CO	303-603-4601
Federal Levy Payment Program (FPLP)	Moquin, K	CT	860-756-4550
Employment Tax Policy	Garvin, W	DE	302-286-1545
Seizure and Sales	Crook, T	FL-Ft. Lauderdale	954-423-7676
Examination Strategy	Revel-Addis, B	FL-Jacksonville	904-665-0523
DFO Area 3	McClendon, L	GA-Atlanta Campus	770-936-4543
Individual Master File Information Reporting & Document Matching (Automated Underreporter)	McClendon, L	GA-Atlanta Campus	770-936-4543
U.S. Territories & Possessions	James, G	HI	808-566-2927
Health Care I (Individual)	DeTimmerman, P	IA	515-564-6880
Innocent Spouse	Knowles, J	ID	208-387-2827 ex 272
Health Care II (Business)	Taylor, S	IL-Chicago	312-566-3801
Penalty Administration	Bates, P	IL-Springfield	217-862-6348
Correspondence Exam	Blinn, F	IN	317-685-7799
Identity Theft	Johnson, D	KY-Covington	859-669-4013
Earned Income Tax Credit (EITC) Outreach	Campbell, D	KY-Louisville	502-572-2201
Low Income Taxpayer Clinics (LITC)	Lewis, C	LA	504-558-3468
LITC	Leifeld, K	ME	207-622-8577
Identity Protection Specialized Unit - Identity Theft	Benoit, F	MA-Andover	978-247-9020
IRS Training on Taxpayer Rights	Zarrella, J	MA-Boston	617-316-2625
Appeals Collection Based	Leith, J	MD	410-962-8120
Appeals Examination Based	Leith, J	MD	410-962-8120
Individual Taxpayer Identification Number (ITIN) Outreach	Blount, P	MI	313-628-3664
Nonfiler Strategy (Substitute for Return, Automated Substitute for Return)	Warren, J	MN	651-312-7874
Accessing Taxpayers' Files	Todd, J	MO-Kansas City	816-291-9019
Undelivered Mail	Todd, J	MO-Kansas City	816-291-9019
Exempt Organization Outreach	Guinn, P	MO-St. Louis	314-612-4371
Disaster Response & Recovery	Washington, J	MS	601-292-4810
Interest Computation Issues	Thompson, T	MT	406-441-1044

Portfolio Assignment	Portfolio Owner	Location	Phone Number
DFO Area 2	Juncewicz, T	NC	336-378-2141
Abusive Schemes/Refund Fraud	Kenyon, M	ND	701-237-8299
Fraud/Victim Assistance	Swantz, C	NE	402-233-7270
Communications	Simmons, M	NH	603-433-0753
EITC Compliance	Harrison, M	NJ	973-921-4376
Adoption Credit	Halker, S	NM	505-837-5522
Taxpayer Compliance Behavior	Halker, S	NM	505-837-5522
Tip Reporting and Compliance	Brooks, D	NV	702-868-5180
Return Preparer Penalties	Greene, S	NY-Albany	518-427-5412
DFO Area 1	Tehrani, B	NY-Brooklyn	718-488-3501
Offer in Compromise	Tehrani, B	NY- Brooklyn	718-488-3501
Business Master File Information Reporting and Document Matching merged (Combined Annual Wage Reporting /Federal Unemployment Tax (CAWR/FUTA))	Morell, C	NY-Brookhaven	631-654-6935
Indian Tribal Governments	Wirth, W	NY-Buffalo	716-686-4820
Collection/Allowable Living Expenses	Spisak, J	NY-Manhattan	212-436-1010
Exempt Organizations (Application Approval Processing)	Eyman, N	OH-Cincinnati	513-263-3249
Domestic Violence - Related Tax Issues	Davis, S	OH-Cleveland	216-522-8241
Financially Distressed Taxpayers	Hensley, D	OK	405-297-4139
Processing Payments	Ashurex, S	OR	503-415-7030
Automated Collection System (ACS)	Lombardo, L	PA-Philadelphia	215-861-1237
Bankruptcy	Mettlen, A	PA-Pittsburgh	412-395-6423
Office of Professional Responsibility	Juarez, V	PA-Philadelphia Campus	267-941-2357
International Taxpayers	Vargas, C	Puerto Rico	787-622-8950
Practitioner Priority Services	Szargowicz, L	RI	401-528-1916
Math Error	Sonier, G	SC	803-765-5300
Farm Income & Taxation	Gilchrist, L	SD	605-377-1606
DFO Area 4	Wess, D	TN-Memphis	901-395-1700
Accounts Management Taxpayer Assurance Program	Wess, D	TN- Memphis	901-395-1700
Electronic Tax Administration	Martin, B	TN-Nashville	615-250-6015
ITIN Processing	Farthing, N	TX-Austin Campus	512-460-4652
Multilingual Initiatives	Rolon, J	TX-Austin	512-499-5970
Amended Returns	Martinez, G	TX-Dallas	214-413-6520
First-Time Homebuyer Credit	Lucas, D	TX-Houston	713-209-4781
Customer Account Data Services (CADE)	Logan, A	UT-Salt Lake City	801-799-6962
DFO Area 6	Logan, A	UT- Salt Lake City	801-799-6962
Trust Fund Recovery Penalty (TFRP)	Campbell, M	VA	804-916-3500
DFO Area 1	Fett, R	VT	802-859-1056
Taxpayer Assistance Centers	Mezger, W	WA	206-220-5704
Returned/Stopped Refunds	Johnson, B	WI	414-231-2391
Injured Spouse	Post, T	WV	304-420-8659
Installment Agreement Processing	Hough, C	WY	307-633-0881

Appendix Three

Table 1 Summons Enforcement Under IRC §§ 7602, 7604, and 7609

Case Citation	Issue(s)	*Pro Se*	Decision
Individual Taxpayers (But Not Sole Proprietorships)			
Allen, U.S. v., 105 A.F.T.R.2d (RIA) 2847 (S.D. Ohio 2010), *adopting* 105 A.F.T.R.2d (RIA) 887 (S.D. Ohio 2009), *appeal docketed*, No. 10-3782 (6th Cir. June 28, 2010)	Powell requirements satisfied; TP's jurisdictional challenges and other claims dismissed as frivolous	Yes	IRS
Allen, U.S. v., 107 A.F.T.R.2d (RIA) 2328 (S.D. Miss. 2011), *adopted by* 107 A.F.T.R.2d (RIA) 2329 (S.D. Miss. 2011)	Powell requirements satisfied	Yes	IRS
Allen, U.S. v., 2011 U.S. Dist. LEXIS 55509 (S.D. Miss. 2011), *adopted by* 107 A.F.T.R.2d (RIA) 2311 (S.D. Miss. 2011)	Powell requirements satisfied	Yes	IRS
Angerami, U.S. v., 107 A.F.T.R.2d (RIA) 1637 (D.N.H. 2011), *adopted by* 2011 U.S. Dist. LEXIS 31705 (D.N.H. 2011)	Powell requirements satisfied; costs awarded to government	Yes	IRS
Barton, U.S. v., 2010 U.S. Dist. LEXIS 64860 (D.N.H. 2010), *adopted by* 2010 U.S. Dist. LEXIS 64731 (D.N.H. 2010)	Powell requirements satisfied; costs awarded to government	Yes	IRS
Barton, U.S. v., 2010 U.S. Dist. LEXIS 97884 (D.N.H. 2010), *adopted by* 2010 U.S. Dist. LEXIS 97937 (D.N.H. 2010)	Powell requirements satisfied; costs awarded to government	Yes	IRS
Beeman, U.S. v., 388 Fed. Appx. 82 (3d Cir. 2010) (per curiam), *aff'g* 105 A.F.T.R.2d (RIA) 1137 (W.D. Pa. 2010)	District court's summons enforcement order affirmed	Yes	IRS
Bilan v. U.S., 107 A.F.T.R.2d (RIA) 1182 (N.D. Cal. 2011)	TP's motion to quash third-party summons stayed to allow TP to respond to alleged defects in jurisdiction and service of process	Yes	TP
Bright, U.S. v., 106 A.F.T.R.2d (RIA) 5206 (D. Haw. 2010), *adopting with modifications* 106 A.F.T.R.2d (RIA) 5230 (D. Haw. 2010)	Civil contempt upheld; sanctions reduced	No	IRS
Brownfield, U.S. v., 107 A.F.T.R.2d (RIA) 447 (W.D. Ky. 2011), *adopting* 107 A.F.T.R.2d (RIA) 446 (W.D. Ky. 2010)	Enforcement of summons ordered	Yes	IRS
Buccilli, U.S. v., 2011 U.S. Dist. LEXIS 63005 (E.D. Mich. 2011), *adopted by* 2011 U.S. Dist. LEXIS 59960 (E.D. Mich. 2011)	Powell requirements satisfied; contempt inappropriate	Yes	IRS
Buckler, U.S. v., 107 A.F.T.R.2d (RIA) 1863 (W.D. Ky. 2011)	TPs' (H&W) motion to quash third-party summons granted with respect to W because statute of limitations expired; denied for H	No	Split
Canatella v. U.S., 107 A.F.T.R.2d (RIA) 1690 (N.D. Cal. 2011)	TPs' (H&W) motion to quash third-party summons denied; Powell requirements satisfied; third-party summons upheld	Yes	IRS
Carlisle, U.S. v., 106 A.F.T.R.2d (RIA) 6534 (W.D. Mo. 2010), *adopted by* 106 A.F.T.R.2d (RIA) 6536 (W.D. Mo. 2010)	*Powell* requirements satisfied	Yes	IRS
Cascolan, U.S. v., 107 A.F.T.R.2d (RIA) 2282 (S.D. Cal. 2011)	*Powell* requirements satisfied	Yes	IRS
Cathcart, U.S. v., 409 Fed. Appx. 74 (9th Cir. 2010), *aff'g* D.C. No. 2:07-cv-08395-GHK-SH (C.D. Cal. 2008)	Summons enforcement upheld; Powell requirements satisfied; affirming authority of district court to modify summons request to permit TP to mail response; TP's bad faith argument rejected	No	IRS
Cloutier, U.S. v., 2010 U.S. Dist. LEXIS 93676 (D.N.H. 2010), *adopted by* 2010 U.S. Dist. LEXIS 93674 (D.N.H. 2010)	*Powell* requirements satisfied; costs awarded to government	Yes	IRS
Condon, U.S. v., 2011 U.S. Dist. LEXIS 8867 (D.N.H. 2011), *adopted by* 2011 U.S. Dist. LEXIS 9311 (D.N.H. 2011)	*Powell* requirements satisfied; costs awarded to government	Yes	IRS
Cotterman v. U.S. IRS, 2010 U.S. Dist. LEXIS 73707 (D. Minn. 2010), *adopting* 2010 U.S. Dist. LEXIS 73730 (D. Minn. 2010)	TP's motion to quash summons dismissed; TP lacked standing to quash summons issued against him personally under I.R.C. section 7602	Yes	IRS
Cryer, U.S. v., 105 A.F.T.R.2d (RIA) 2949 (W.D. La. 2010), *adopting* 105 A.F.T.R.2d (RIA) 2946 (W.D. La. 2010)	Powell requirements satisfied; TP's Fifth Amendment objection lacked merit	Yes	IRS

Table 1: Summons Enforcement Under IRC §§ 7602, 7604, and 7609

Case Citation	Issue(s)	*Pro Se*	Decision
Cunningham, U.S. v., 106 A.F.T.R.2d (RIA) 6341 (S.D. Cal. 2010), *later proceeding at* 107 A.F.T.R.2d (RIA) 382 (S.D. Cal. 2011) *appeal dismissed* No. 10-56784 (9th Cir. Aug. 29, 2011)	*Powell* requirements satisfied	Yes	IRS
Deems v. U.S., 2010 U.S. Dist. LEXIS 141127 (S.D. Ga. 2010), *adopted by* 2011 U.S. Dist. LEXIS 11706 (S.D. Ga. 2011)	TP's motion to quash third-party summons dismissed for lack of subject matter jurisdiction, must be filed in district court in which third-party resides	Yes	IRS
In re: Does, 107 A.F.T.R.2d (RIA) 2318 (E.D. Cal. 2011)	Court rejected "John Doe" summons for information from state for all taxpayers transferring property for little or no consideration; request lacked requisite specificity and reasonable basis to believe TPs violated tax laws	No	TP
Ellis v. Comm'r, 107 A.F.T.R.2d (RIA) 1450 (S.D. Cal. 2011)	TP's untimely motion to quash third-party summons dismissed for lack of subject matter jurisdiction	Yes	IRS
Ewing, U.S. v., 2011 U.S. Dist. LEXIS 4559 (E.D. Tex. 2011), *adopting* 2010 U.S. Dist. LEXIS 139910 (E.D. Tex. 2010)	*Powell* requirements satisfied	Yes	IRS
Fabian v. Comm'r, 390 Fed. Appx. 250, (4th Cir. 2010) (per curiam), *aff'g* 105 A.F.T.R.2d (RIA) 1848 (D. Md. 2010)	District court did not abuse discretion or clearly err in denying TP's motion to quash third-party summons	Yes	IRS
Felt v. Van Mondfrans, 106 A.F.T.R.2d (RIA) 6417 (D. Utah 2010)	TP's untimely motion to quash third-party summons dismissed for lack of jurisdiction	Yes	IRS
Felt v. Van Mondfrans, 107 A.F.T.R.2d (RIA) 621 (D. Utah 2011)	TP's untimely motion to quash third-party summons dismissed for lack of subject matter jurisdiction	Yes	IRS
Foust v. U.S., 2010 WL 4608199 (N.D. Cal. 2010)	TP's untimely motion to quash third-party summons dismissed for lack of subject matter jurisdiction	Yes	IRS
Foust v. U.S., 107 A.F.T.R.2d (RIA) 2178 (N.D. Cal. 2011)	TP's untimely motion to quash third-party summons dismissed for lack of subject matter jurisdiction; *Powell* requirements satisfied; enforcement ordered	Yes	IRS
Gauthier, U.S. v., 106 A.F.T.R.2d (RIA) 5027 (M.D. Fla. 2010), *adopting* 106 A.F.T.R.2d (RIA) 5026 (M.D. Fla. 2010)	Enforcement of summons ordered	Yes	IRS
Glavin v. U.S., 2010 U.S. Dist. LEXIS 55435 (W.D. Wis. 2010)	TP's motions to quash third-party summons dismissed; IRS agent dismissed as party to suit	Yes	IRS
Gomez, U.S. v., 107 A.F.T.R.2d (RIA) 2338 (E.D. Cal. 2011), *adopted by* 107 A.F.T.R.2d (RIA) 2428 (E.D. Cal. 2011)	*Powell* requirements satisfied	No	IRS
Hall, U.S. v., 107 A.F.T.R.2d (RIA) 470 (E.D. Cal. 2011), *adopted by* 107 A.F.T.R.2d (RIA) 765 (E.D. Cal. 2011)	*Powell* requirements satisfied	Yes	IRS
Hawpe v. U.S., 107 A.F.T.R.2d (RIA) 1194 (D. Ariz. 2011)	TP's untimely motion to quash third-party summons dismissed for lack of subject matter jurisdiction; TP received proper notice; *Powell* requirements satisfied; third-party summons upheld	Yes	IRS
Hensley, U.S. v., 2011 U.S. Dist. LEXIS 16333 (C.D. Cal. 2011)	*Powell* requirements satisfied	Yes	IRS
Hernandez v. U.S., 2010 U.S. Dist. LEXIS 134153 (D. Or. 2010)	TP's motion to quash third-party summons dismissed; TP's First Amendment objection lacked merit; *Powell* requirements satisfied; enforcement ordered	Yes	IRS
Hernandez v. U.S., 106 A.F.T.R.2d (RIA) 7387 (D. Or. 2010)	TP's untimely motion to quash third-party summons dismissed for lack of subject matter jurisdiction; sovereign immunity was not waived	Yes	IRS
Hom, U.S. v., 106 A.F.T.R.2d (RIA) 6419 (N.D. Cal. 2010)	*Powell* requirements satisfied	Yes	IRS
Hudman, U.S. v., 107 A.F.T.R.2d (RIA) 624 (S.D. Cal. 2011)	*Powell* requirements satisfied	Yes	IRS
Jenkins, U.S. v., 105 A.F.T.R.2d (RIA) 2956 (E.D. Cal. 2010), *rejected as moot by* 105 A.F.T.R.2d (RIA) 2957 (E.D. Cal. 2010)	*Powell* requirements satisfied; enforcement recommended	Yes	IRS
Johnson, U.S. v., 2010 WL 3394410 (D. Utah 2010), adopted by 2010 WL 3394408 (D. Utah 2010)	*Powell* requirements satisfied	No	IRS
Kasian v. IRS, 106 A.F.T.R.2d (RIA) 5227 (D. Ariz. 2010)	TP's motion for TRO against IRS in third-party summons request denied	Yes	IRS
Kasian v. IRS, 106 A.F.T.R.2d (RIA) 7274 (D. Ariz. 2010)	TP's untimely motion to quash third-party summons dismissed for lack of subject matter jurisdiction; sovereign immunity was not waived	Yes	IRS

Appendix Three

Table 1: Summons Enforcement Under IRC §§ 7602, 7604, and 7609

Case Citation	Issue(s)	*Pro Se*	Decision
Kern v. IRS, 107 A.F.T.R.2d (RIA) 1894 (E.D. Mich. 2011), *adopting* 2007 U.S. Dist. LEXIS 99167 (E.D. Mich. 2007)	Court adopted magistrate's recommendation; TP's motion to quash third-party summons dismissed; *Powell* requirements satisfied; third-party summons enforced	Yes	IRS
Keyes, U.S. v., 2011 U.S. Dist. LEXIS 51183 (E.D. Mich. 2011), *adopted by* 2011 U.S. Dist. LEXIS 51181 (E.D. Mich. 2011)	*Powell* requirements satisfied; contempt inappropriate	Yes	IRS
Kirkland v. IRS, 106 A.F.T.R.2d (RIA) 6962 (D. Nev. 2010), *adopting* 106 A.F.T.R.2d (RIA) 6960 (D. Nev. 2010)	Court adopted magistrate's recommendation to dismiss TP's motion to quash third-party summons; TP summons failed to establish standing and subject matter jurisdiction	Yes	IRS
Kwolek v. U.S., 107 A.F.T.R.2d (RIA) 1521 (W.D. Pa. 2011)	TP's motion to quash summons dismissed for lack of personal jurisdiction; IRS did not receive proper service of process	No	IRS
Lahasky v. U.S., 2010 WL 2671803 (E.D.N.Y. 2010)	TP's motion to quash third-party summons dismissed; Powell requirements satisfied; enforcement ordered	Yes	IRS
Lanoie, U.S./IRS v., 403 Fed. Appx. 328, (10th Cir. 2010), *aff'g* 106 A.F.T.R.2d (RIA) 7213 (D.N.M. 2010)	Summons enforcement upheld; *Powell* requirements satisfied; TP's Fifth Amendment challenge to summons rejected for lack of specificity; TP not entitled to *in camera* review of documents	Yes	IRS
Lavery, U.S. v., 2011 U.S. Dist. LEXIS 12970 (D.N.H. 2011), *adopted by* 2011 U.S. Dist. LEXIS 12957 (D.N.H. 2011)	*Powell* requirements satisfied; costs awarded to government	Yes	IRS
Lawler, U.S. v., 400 Fed. Appx. 476, 106 A.F.T.R.2d (RIA) 6807 (11th Cir. 2010) (per curiam), *aff'g* DC No. 1:10-cv-00759-CAP (N.D. Ga. 2010)	Enforcement order affirmed; TP's failure to respond or object to petition waived defenses	No	IRS
Lyons, U.S. v., 2011 U.S. Dist. LEXIS 67135 (E.D. Tex. 2011), *adopted by* 2011 U.S. Dist. LEXIS 67140 (E.D. Tex. 2011)	Enforcement of summons ordered	Yes	IRS
Manning, U.S. v., 2011 U.S. Dist. LEXIS 29386 (M.D. Fla. 2011), *adopting* 2011 U.S. Dist. LEXIS 29378 (M.D. Fla. 2011)	*Powell* requirements satisfied	Yes	IRS
Martin, U.S. v., 106 A.F.T.R.2d (RIA) 6973 (E.D. Ky. 2010), *adopted by* 106 A.F.T.R.2d (RIA) 6974 (E.D. Ky. 2010)	*Powell* requirements satisfied	Yes	IRS
Maxwell v. U.S., 106 A.F.T.R.2d (RIA) 5699 (M.D. Tenn. 2010)	TP's motion to quash third-party summons dismissed; TP's objections were frivolous and without merit; enforcement ordered	Yes	IRS
Mazzaferro v. U.S., 107 A.F.T.R.2d (RIA) 910 (N.D. Cal. 2011)	TP's motion to quash third-party summons dismissed; *Powell* requirements satisfied; enforcement ordered	Yes	IRS
McCarthy, U.S. v., 106 A.F.T.R.2d (RIA) 5127 (W.D. Mo. 2010), *adopting* 106 A.F.T.R.2d (RIA) 5125 (W.D. Mo. 2010)	*Powell* requirements satisfied	Yes	IRS
Melick, U.S. v., 106 A.F.T.R.2d (RIA) 5707 (D.N.H. 2010)	TP's motions to dismiss summons denied; enforcement ordered; costs awarded to government	Yes	IRS
Moore, U.S. v., 107 A.F.T.R.2d (RIA) 804 (S.D. Cal. 2011)	*Powell* requirements satisfied	Yes	IRS
Mottahedeh v. U.S., 411 Fed. Appx. 274, 107 A.F.T.R.2d (RIA) 671 (11th Cir. 2011) (per curiam), *aff'g* 105 A.F.T.R.2d (RIA) 2997 (S.D. Fla. 2010)	Third-party summons upheld; *Powell* requirements satisfied	Yes	IRS
Moyes v. U.S., 106 A.F.T.R.2d (RIA) 5980 (E.D. Cal. 2010)	TP's motion to quash third-party summons dismissed; *Powell* requirements satisfied; Fourth Amendment does not protect bank records from summons; Fifth and Fourteenth Amendments inapplicable because TP not investigated for criminal charges; enforcement ordered	Yes	IRS
Neal, U.S. v., 107 A.F.T.R.2d (RIA) 806 (S.D. Cal. 2011)	*Powell* requirements satisfied	Yes	IRS
Nguyen, U.S. v., 107 A.F.T.R.2d (RIA) 2221 (S.D. Tex. 2011)	TPs' blanket Fifth Amendment objection denied; enforcement ordered	No	IRS
Parenteau, U.S. v., 2011 WL 1033718 (D.N.H. 2011), *adopted by* 2011 WL 1043368 (D.N.H. 2011)	*Powell* requirements satisfied; costs awarded to government	Yes	IRS
Parker, U.S. v., 107 A.F.T.R.2d (RIA) 758 (S.D. Miss. 2011), *adopted by* 107 A.F.T.R.2d (RIA) 759 (S.D. Miss. 2011)	*Powell* requirements satisfied	Yes	IRS
Parker, U.S. v., 2011 WL 1085669 (D.N.H. 2011), *adopted by* 2011 WL 1043369 (D.N.H. 2011)	*Powell* requirements satisfied; court declined to award costs to government	Yes	IRS

Table 1: Summons Enforcement Under IRC §§ 7602, 7604, and 7609

Case Citation	Issue(s)	*Pro Se*	Decision
Poole v. U.S., 107 A.F.T.R.2d (RIA) 597 (N.D. Cal. 2011)	TP's motion to quash third-party summons dismissed; *Powell* requirements satisfied; enforcement ordered	Yes	IRS
Rayl, U.S. v., 107 A.F.T.R.2d (RIA) 1236 (N.D. Cal. 2011)	Enforcement of summons ordered	Yes	IRS
Reid-Bills, U.S. v., 107 A.F.T.R.2d (RIA) 1411 (E.D. Cal. 2011), *adopted by* 107 A.F.T.R.2d (RIA) 1738 (E.D. Cal. 2011)	*Powell* requirements satisfied	Yes	IRS
Remmen, U.S. v., 106 A.F.T.R.2d (RIA) 7032 (D. Minn. 2010), *adopted by* 106 A.F.T.R.2d (RIA) 7033 (D. Minn. 2010)	*Powell* requirements satisfied	No	IRS
Rollins, U.S. v., 2011 U.S. Dist. LEXIS 7504 (D.N.H. 2011), adopted by 2011 U.S. Dist. LEXIS 7233 (D.N.H. 2011)	*Powell* requirements satisfied; costs awarded to government	Yes	IRS
Roulston, U.S. v., 2010 WL 5387637 (D.N.H. 2010), *adopted by* 2010 WL 5387630 (D.N.H. 2010)	*Powell* requirements satisfied; costs awarded to government	Yes	IRS
Rossey, U.S. v., 2011 U.S. Dist. LEXIS 7677 (D.N.H. 2011), *adopted by* 2011 U.S. Dist. LEXIS 7825 (D.N.H. 2011)	*Powell* requirements satisfied; costs awarded to government	Yes	IRS
Savage, U.S. v., 2010 U.S. Dist. LEXIS 88118 (M.D. Fla. 2010), *adopted by* 2010 U.S. Dist. LEXIS 88165 (M.D. Fla. 2010)	Court rejected IRS's petition for contempt; summons order modified	Yes	Split
Scharringhausen v. U.S., 106 A.F.T.R.2d (RIA) 5221 (S.D. Cal. 2010)	TP's motion for reconsideration of summons enforcement order dismissed	No	IRS
Scott, U.S. v., 105 A.F.T.R.2d (RIA) 2978 (E.D. Cal. 2010), *adopting* 105 A.F.T.R.2d (RIA) 2622 (E.D. Cal. 2010)	Enforcement of summons ordered	Yes	IRS
Senecal, U.S. v., 2011 U.S. Dist. LEXIS 64132 (D.N.H. 2011), *adopted by* 2011 U.S. Dist. LEXIS 63951 (D.N.H. 2011)	*Powell* requirements satisfied	Yes	IRS
Shadley, U.S. v., 106 A.F.T.R.2d (RIA) 5440 (E.D. Cal. 2010)	Court rejected IRS's petition for contempt; TP's Fifth Amendment claim is valid	Yes	TP
Simpson, U.S. v., 2010 WL 5557053 (D.N.H. 2010), *adopted by* 2011 U.S. Dist. LEXIS 2360 (D.N.H. 2011)	*Powell* requirements satisfied; costs awarded to government	Yes	IRS
Sommers, U.S. v., 106 A.F.T.R.2d (RIA) 5070 (W.D. Mo. 2010), *adopting* 106 A.F.T.R.2d (RIA) 5065 (W.D. Mo. 2010)	Court adopted magistrate's recommendation; summons enforced	Yes	IRS
Stevens, U.S. v., 106 A.F.T.R.2d (RIA) 6025 (W.D. Mo. 2010), *adopting* 106 A.F.T.R.2d (RIA) 6024 (W.D. Mo. 2010)	Court adopted magistrate's recommendation; *Powell* requirements satisfied; summons enforced	Yes	IRS
Stevenson, U.S. v., 107 A.F.T.R.2d (RIA) 1928 (D. Minn. 2011), *adopting in part, rejecting in part* 2010 U.S. Dist. LEXIS 142775 (D. Minn. 2010)	IRS summons was overbroad, quashed; enforcement ordered with regard to unobjectionable questions	No	Split
Stotler, U.S. v., 105 A.F.T.R.2d (RIA) 2791 (N.D. Cal. 2010)	Enforcement of summons ordered	Yes	IRS
Thorne, U.S. v., 2010 U.S. Dist. LEXIS 77397 (D. Minn. 2010), *adopted by* 2010 U.S. Dist. LEXIS 78038 (D. Minn. 2010)	Enforcement of summons ordered; government not awarded costs	No	IRS
Tofiga, U.S. v., 107 A.F.T.R.2d (RIA) 2283 (S.D. Cal. 2011)	*Powell* requirements satisfied	Yes	IRS
Udovich, U.S. v., 106 A.F.T.R.2d (RIA) 7378 (N.D. Cal. 2010)	*Powell* requirements satisfied	Yes	IRS
Usufy, U.S. v., 2010 U.S. Dist. LEXIS 126827 (E.D. Cal. 2010), *adopted by* 2011 U.S. Dist. LEXIS 8385 (E.D. Cal. 2011)	TP sufficiently complied with IRS summons request; petition to enforce dismissed as moot	Yes	IRS
Utter v. U.S., 2010 U.S. Dist. LEXIS 80495 (W.D. Ark. 2010)	Government's motion to enforce summons granted; TP's objections lacked merit	Yes	IRS
Walls, U.S. v., 106 A.F.T.R.2d (RIA) 5410 (D. Minn. 2010), *adopted by* 106 A.F.T.R.2d (RIA) 5412 (D. Minn. 2010)	*Powell* requirements satisfied; costs awarded to government	Yes	IRS
Wankel, U.S./IRS v., 2011 U.S. Dist. LEXIS 67160 (D.N.M. 2011)	Enforcement of summons ordered	Yes	IRS
Whitehouse, U.S. v., 106 A.F.T.R.2d (RIA) 7124 (D. Conn. 2010)	*Powell* requirements satisfied; TP's Fourth and Fifth Amendment claims rejected	Yes	IRS
Whitman, U.S. v., 105 A.F.T.R.2d (RIA) 2954 (E.D. Cal. 2010), *adopted by* 106 A.F.T.R.2d (RIA) 5302 (E.D. Cal. 2010)	*Powell* requirements satisfied; TP waived venue challenge by failing to file timely opposition	Yes	IRS

Appendix Three

Table 1: Summons Enforcement Under IRC §§ 7602, 7604, and 7609

Case Citation	Issue(s)	*Pro Se*	Decision
Woodruff v. U.S. Dept. of Treas., 106 A.F.T.R.2d (RIA) 5105 (D. Utah 2010)	TP's motion to quash summons denied for lack of jurisdiction	Yes	IRS
Zuloaga v. U.S., 106 A.F.T.R.2d (RIA) 7116 (S.D. Fla. 2010), *accepting* 106 A.F.T.R.2d (RIA) 7115 (S.D. Fla. 2010)	TP's motion to quash third-party summons dismissed for lack of personal jurisdiction; government did not receive proper service of process	Yes	IRS
Business Taxpayers (Corporations, Partnerships, Trusts, and Sole Proprietorships - Schedules C, E, F)			
Antonio, U.S. v., 107 A.F.T.R.2d (RIA) 1448 (E.D. Cal. 2011), *adopted by* 107 A.F.T.R.2d (RIA) 1770 (E.D. Cal. 2011)	*Powell* requirements satisfied	Yes	IRS
Barton, U.S. v., 107 A.F.T.R.2d (RIA) 352 (W.D. Mo. 2010), *adopted by* 107 A.F.T.R.2d (RIA) 355 (W.D. Mo. 2010)	*Powell* requirements satisfied	Yes	IRS
Bates v. U.S., 401 Fed. Appx. 247, 106 A.F.T.R.2d (RIA) 6895 (9th Cir. 2010), *aff'g* D.C. No. 2:09-cv-00817-LKK-EFB (E.D. Cal. 2010)	District court's dismissal of TP's motions to quash was proper; sanctions imposed	Yes	IRS
Boccasini, U.S. v., 2010 U.S. Dist. LEXIS 64371 (E.D.N.Y. 2010)	*Powell* requirements satisfied	Yes	IRS
Briggs, U.S. v., 107 A.F.T.R.2d (RIA) 2321 (E.D. Cal. 2011), *adopted by* 2011 U.S. Dist. LEXIS 59479 (E.D. Cal. 2011)	*Powell* requirements satisfied	No	IRS
Burdick, U.S. v., 2011 U.S. Dist. LEXIS 37077 (M.D. Fla. 2011), *adopted by* 2011 U.S. Dist. LEXIS 37081 (M.D. Fla. 2011)	*Powell* requirements satisfied	Yes	IRS
Corley, U.S. v., 107 A.F.T.R.2d (RIA) 1925 (S.D. Ala. 2011), *adopted by* 2011 U.S. Dist. LEXIS 41336 (S.D. Ala. 2011)	*Powell* requirements satisfied	Yes	IRS
Dadgar v. U.S., 106 A.F.T.R.2d 7421 (N.D. Cal. 2010), *adopted by* 106 A.F.T.R.2d (RIA) 7424 (N.D. Cal. 2010)	TP's motion to quash third-party summons dismissed; *Powell* requirements satisfied; enforcement ordered	No	IRS
Dadgar v. U.S., 2011 WL 588153 (N.D. Cal. 2011), *adopted by* 2011 WL 588152 (N.D. Cal. 2011)	TP's untimely motion to quash third-party summons dismissed for lack of subject matter jurisdiction	No	IRS
DeOrio v. U.S., 390 Fed. Appx. 706, 106 A.F.T.R.2d (RIA) 5541 (9th Cir. 2010), *aff'g* D.C. No. 08-cv-932-CJC-ANx (C.D. Cal. 2008)	Dismissal TP's motion to quash third-party summons for lack of subject matter jurisdiction affirmed	Yes	IRS
G.P.R.A. Corp., U.S. v., 106 A.F.T.R.2d (RIA) 6755 (S.D. Cal. 2010)	*Powell* requirements satisfied	No	IRS
Gangi v. U.S., 107 A.F.T.R.2d 1542 (D.N.J. 2011), *adopting in part, rejecting in part* 107 A.F.T.R.2d (RIA) 1538 (D.N.J. 2010)	*Powell* requirements satisfied with respect to TP; advance-notice requirement of Section 7602(c) not satisfied with respect to TP's businesses; motion to quash third-party summons granted in part, denied in part	No	Split
Gangi v. U.S., 107 A.F.T.R.2d 1029 (D. Kan. 2011)	TP's motion to quash third-party summons dismissed; *Powell* requirements satisfied	No	IRS
Gjerde v. U.S., 107 A.F.T.R.2d (RIA) 1798 (E.D. Cal. 2011), *adopted by* 2011 U.S. Dist. LEXIS 50793 (E.D. Cal. 2011)	TP's motion to quash third-party summons dismissed; *Powell* requirements satisfied; TP's motion to block access denied; attorney-client privilege does not protect bank records from IRS summons	Yes	IRS
Health Plus Chiropractic, Inc. v. U.S., 107 A.F.T.R.2d (RIA) 2174 (M.D. Fla. 2011), *adopted by* 107 A.F.T.R.2d (RIA) 2177 (M.D. Fla. 2011)	TP's motion to quash third-party summons dismissed for lack of jurisdiction	No	IRS
Jatinder Dhillon, a Med. Corp. v. U.S., 107 A.F.T.R.2d (RIA) 1143 (N.D. Cal. 2011)	TP's motion to quash third-party summons dismissed; *Powell* requirements satisfied	No	IRS
Lara-Davila, U.S. v., 107 A.F.T.R.2d (RIA) 2335 (E.D. Cal. 2011), *adopted by* 2011 U.S. Dist. LEXIS 62848 (E.D. Cal. 2011)	*Powell* requirements satisfied	Yes	IRS
MarCon, Inc. v. U.S., 2010 U.S. Dist. LEXIS 70640 (D. Idaho 2010)	TP's motion to stay enforcement of third-party summons denied	No	IRS
Mattoon, U.S. v., 106 A.F.T.R.2d (RIA) 6515 (W.D. Mo. 2010), *adopted by* 106 A.F.T.R.2d (RIA) 6518 (W.D. Mo. 2010)	Summons enforcement ordered; that summons was issued as part of fraud investigation did not constitute bad faith	Yes	IRS

Table 1: Summons Enforcement Under IRC §§ 7602, 7604, and 7609

Case Citation	Issue(s)	*Pro Se*	Decision
Miccosukee Tribe of Indians of Fla. v. U.S., 730 F. Supp. 2d 1344, 106 A.F.T.R.2d (RIA) 5773 (S.D. Fla. 2010)	Court rejected TPs' arguments to quash third-party summons on grounds of tribal sovereign immunity, overbreadth, and irrelevance; remanded for hearing to determine validity of claims that IRS acted in bad faith or is already in possession of materials summoned	No	Split
Nelson v. IRS, 107 A.F.T.R.2d (RIA) 403 (E.D. Pa. 2011)	TP, as an individual, lacked standing to file motion to quash third-party summons issued against corporation	Yes	IRS
Nissan N. Am., Inc. & Subsidiaries, U.S. v., 107 A.F.T.R.2d (RIA) 348 (M.D. Tenn. 2011)	*Powell* requirements satisfied	No	IRS
North American Commc'ns, Inc. v. U.S., 106 A.F.T.R.2d (RIA) 6955 (D.S.D. 2010), *adopted by* 106 A.F.T.R.2d (RIA) 6956 (D.S.D. 2010)	TP's untimely motion to quash third-party summons dismissed for lack of subject matter jurisdiction; *Powell* requirements satisfied; enforcement ordered	No	IRS
Nova Ben. Plans v. Comm'r, 107 A.F.T.R.2d (RIA) 719 (D. Neb. 2011)	TP's motion to quash third-party summons dismissed; *Powell* requirements satisfied	No	IRS
Nova Ben. Plans v. Comm'r, 2011 U.S. Dist. LEXIS 57018 (D. Neb. 2011)	TP's motion to amend judgment and stay compliance with summons denied; no evidence that TP was under criminal investigation at time of court order	No	IRS
Pasadena Ref. Sys. v. U.S., 107 A.F.T.R.2d (RIA) 2300 (N.D. Tex. 2011), *adopted by* 107 A.F.T.R.2d (RIA) 2303	TP's motion to quash third-party summons granted in part, denied in part	No	Split
Richey, U.S. v., 632 F.3d 559, 107 A.F.T.R.2d (RIA) 573 (9th Cir. 2011), *rev'g* 103 A.F.T.R.2d (RIA) 1228 (D. Idaho 2009)	IRS did not act in bad faith in continuing efforts to enforce summons after TPs consented to deficiency assessment; contents of appraisal-work files not protected by work-product doctrine; *Powell* requirements satisfied, but remanded for district judge to perform *in camera* review to determine if attorney-client privilege applies	No	TP
Roe, U.S. v., 2011 WL 1615432 (10th Cir. 2011), *aff'g* 107 A.F.T.R.2d (RIA) 2013 (D. Colo. 2010), *motion to stay pending appeal denied by* 107 A.F.T.R.2d (RIA) 2280 (D. Colo. 2010)	Summons enforcement upheld; Powell requirements satisfied; Court rejected TP's Fourth and Fifth Amendment arguments	Yes	IRS
Rolff, U.S. v., 107 A.F.T.R.2d (RIA) 2336 (E.D. Cal. 2011)	*Powell* requirements satisfied	Yes	IRS
Sears v. U.S., 392 Fed. Appx. 605, 106 A.F.T.R.2d (RIA) 5979 (9th Cir, 2010), *rev'g* D.C. No. 8:08-cv-00769-DOC-MLG (C.D. Cal.)	District court's denial of IRS motion to dismiss TP's motion to quash reversed; identities of clients not protected by attorney-client privilege	No	IRS
Sideman & Bancroft, LLP, U.S. v., 107 A.F.T.R.2d (RIA) 1780 (N.D. Cal. 2011)	Enforcement ordered; TP's Fifth Amendment objections rejected	No	IRS
Stiner, U.S. v., 107 A.F.T.R.2d (RIA) 2316 (E.D. Cal. 2011), *adopted by* 2011 U.S. Dist. LEXIS 59622 (E.D. Cal. 2011)	*Powell* requirements satisfied	Yes	IRS
Swanson Flo-Systems, Co., U.S. v., 107 A.F.T.R.2d (RIA) 2434 (D. Minn. 2011), *adopted by* 107 A.F.T.R.2d (RIA) 2438 (D. Minn. 2011)	*Powell* requirements satisfied; costs awarded to government	No	IRS
Trenk, U.S. v., 385 Fed. Appx. 254, 106 A.F.T.R.2d (RIA) 5073 (3d Cir. 2010)	Order enforcing summons remanded to provide TP with hearing to argue against crime-fraud exception to attorney-client privilege	No	TP
Ursua, U.S. v., 107 A.F.T.R.2d (RIA) 1263 (E.D. Cal. 2011)	*Powell* requirements satisfied	Yes	IRS
Valero Energy Corp. v. U.S., 106 A.F.T.R.2d (RIA) 5690 (W.D. Tex. 2010)	Motion to quash third-party summons denied; enforcement ordered; costs imposed, despite withdrawal of challenges mooted by TP's compliance	No	IRS
Williams v. U.S., 107 A.F.T.R.2d (RIA) 1453 (N.D. Tex. 2011)	TP's motion to quash third-party summons dismissed for lack of subject matter jurisdiction, must be filed in district court in which third-party resides	Yes	IRS

Appendix Three

Table 2 Trade or Business Expenses Under IRC § 162 and Related Sections

Case Citation	Issue(s)	*Pro Se*	Decision
Individual Taxpayers (But Not Sole Proprietorships)			
Abiog v. Comm'r, T.C. Summ. Op. 2010-166	Deductions allowed for legal and job placement fees; deductions denied for living expenses because employment was indeterminate, not temporary. Deductions allowed for school supplies to the extent of substantiation	No	Split
Alexander v. Comm'r, T.C. Summ. Op. 2011-48	Deductions denied for unsubstantiated unreimbursed employee expenses; deduction allowed for professional certification	No	Split
Arnold v. Comm'r, T.C. Memo. 2010-223	Deductions denied for personal use of automobile; deduction allowed for job search expenses to the extent of substantiation subject to IRC § 67(a)	No	Split
Brookshire v. Comm'r, T.C. Memo. 2010-193	Deductions denied for unsubstantiated expenses	Yes	IRS
Cook v. Comm'r, T.C. Memo. 2010-137	Deductions denied for unsubstantiated meals, cell phone, and automobile expenses	Yes	IRS
Davis v. Comm'r, T.C. Summ. Op. 2010-89	Expenses incurred by city employees were deductible as unreimbursed employee expenses, not ordinary and necessary business deductions	Yes	IRS
De Werff v. Comm'r, T.C. Summ. Op. 2011-29	Deductions denied for unsubstantiated expenses with no apparent business purpose	Yes	IRS
Deltoro v. Comm'r, T.C. Summ. Op. 2010-123	Deduction denied for travel and living expenses because TP did not need to stay away from home and employment was indeterminate, not temporary	Yes	IRS
Forrest v. Comm'r, T.C. Memo. 2010-263	Deductions allowed for meals; deductions denied for unsubstantiated phone, legal, and automobile expenses	Yes	Split
Gregoline v. Comm'r, T.C. Summ. Op. 2010-112	Deductions denied for unsubstantiated travel expenses	Yes	IRS
Groat v. Comm'r, T.C. Summ. Op. 2010-154	Deduction denied for legal fees because they were not stemming from an income-producing activity; deductions denied for telephone and postal expenses personal in nature and unsubstantiated cell phone and internet expenses	Yes	IRS
Hamper v. Comm'r, T.C. Summ. Op. 2011-17	Deductions allowed for legal and professional fees, deductions denied for other unsubstantiated and inherently personal expenses	Yes	Split
Hartman v. Comm'r, T.C. Summ. Op. 2010-164	Deduction allowed for special fire scene investigation clothes; other deductions denied for lack of substantiation	Yes	Split
Holland v. Comm'r, T.C. Summ. Op. 2010-132	Deductions denied for unsubstantiated travel expenses; deductions allowed for union dues, special clothing, and employer-substantiated travel expenses	Yes	Split
Igberaese v. Comm'r, T.C. Memo. 2010-284	Deductions denied for unsubstantiated and personal travel and clothing expenses	Yes	IRS
Javorski v. Comm'r, T.C. Summ. Op. 2010-136	Deductions allowed for money paid to store to protect taxpayer's job and interest because it was paid to protect his business as an employee	No	TP
Lumaban v. Comm'r, T.C. Summ. Op. 2010-169	Deductions allowed for job placement expenses; deductions denied for unsubstantiated lump sums	No	Split
Madsen v. Comm'r, T.C. Summ. Op. 2010-151	Deductions allowed for all meals and travel expenses (at the federal rate) while working away from home; deductions denied for unsubstantiated incidental expenses	Yes	Split
Malazarte v. Comm'r, T.C. Summ. Op. 2010-168	Deductions allowed for job placement expenses to the extent substantiated; deductions denied for living expenses because employment was indeterminate, not temporary	No	Split
Martinez v. Comm'r, T.C. Memo. 2011-34	Deductions denied for unsubstantiated expenses	Yes	IRS
Pagarigan v. Comm'r, T.C. Summ. Op. 2010-167	Class expense was necessary and ordinary so deductions allowed under Cohan; other deductions denied for failure to substantiate	No	Split
Pendergraft v. U.S., 94 Fed. Cl. 79 (2010), *appeal dismissed*, 2011 U.S. App. LEXIS 10987 (Fed. Cir. Apr. 27, 2011)	Summary judgment denied for disputed deduction for commission fees paid in the course of TPs' (H&W) furniture business; appeal dismissed by agreement of the parties	No	TP's Motion for Summary Judgment denied

Table 2: Trade or Business Expenses Under IRC § 162 and Related Sections

Case Citation	Issue(s)	*Pro Se*	Decision
Samaco v. Comm'r, T.C. Summ. Op. 2010-165	Deductions allowed for legal and job placement fees; deductions denied for unnecessary and unsubstantiated laptop and some school supplies; deductions denied for living expenses because employment was indeterminate, not temporary; other deductions allowed for substantiated expenses.	No	Split
Solomon v. Comm'r, T.C. Memo. 2011-91	Deductions denied for unsubstantiated automobile and miscellaneous expenses	Yes	IRS
Sullivan v. Comm'r, T.C. Memo. 2010-138	Deductions denied for unsubstantiated cell phone and automobile expenses	Yes	IRS
Summerfield v. Comm'r, T.C. Summ. Op. 2010-143	Deductions allowed after determination that TP's tax home was Washington, DC and that some travel was deductible unreimbursed employee expenses	No	TP
Ucol-Cobaria v. Comm'r, T.C. Summ. Op. 2010-162	Deductions allowed for legal and job placement fees and union dues; deductions denied for unsubstantiated laptop and airfare expenses; deductions denied for living expenses because employment was indeterminate, not temporary	No	Split
Williams v. Comm'r, T.C. Summ. Op. 2010-86	Deductions denied for unsubstantiated unreimbursed employee expenses	Yes	IRS
Business Taxpayers (Corporations, Partnerships, Trusts, and Sole Proprietorships – Schedules C, E, F)			
Adams v. Comm'r, T.C. Summ. Op. 2010-134	Deductions denied for unsubstantiated automobile, travel, meals, and entertainment expenses	Yes	IRS
Alvi v. Comm'r, T.C. Summ. Op. 2010-79	Deductions denied for five activities because TP failed to prove carrying on a trade or business; deductions allowed for online retail business expenses	Yes	Split
Bangura v. Comm'r, T.C. Summ. Op. 2011-23	Deductions denied for unsubstantiated business and automobile expenses	Yes	IRS
Barajas v. Comm'r, T.C. Summ. Op. 2011-2	Deductions allowed for automobile expenses because TPs (H&W) did not need to prove 100% corroboration of expenses	Yes	TP
Bednarski v. Comm'r, T.C. Summ. Op. 2010-74	Deductions denied for unsubstantiated and commuting expenses	Yes	IRS
Blanchette v. Comm'r, T.C. Summ. Op. 2011-15	Deductions denied because TPs (H&W) did not prove carrying on a trade or business	Yes	IRS
Bosque v. Comm'r, T.C. Memo. 2011-79	Deductions denied for unsubstantiated home use and real estate expenses; deduction allowed for professional and legal expenses	Yes	Split
Brown v. Comm'r, T.C. Summ. Op. 2010-97	Deduction denied for unsubstantiated or personal automobile expenses; deductions denied for home office because TP did not show exclusive business use	Yes	IRS
Bureriu v. Comm'r, T.C. Summ. Op. 2011-52	Deductions denied for majority of home expenses because TPs (H&W) did not show exclusive business use; deductions denied for automobile expenses; deductions allowed 50% under *Cohan*	Yes	Split
Campbell v. Comm'r, T.C. Memo. 2011-42	Deductions allowed for business and rental deductions under *Cohan*; deduction denied for unsubstantiated rental expenses	Yes	Split
Christine v. Comm'r, T.C. Memo. 2010-144	Deductions denied for unsubstantiated travel, entertainment, automobile, and laptop expenses; deductions allowed for mailing and membership expenses; deductions denied for home office because TPs (H&W) did not show exclusive business use	Yes	Split
Collins v. Comm'r, T.C. Memo. 2011-37	Deductions denied for expenses that were properly deductible in previous year; deductions denied because TPs (H&W) failed to prove carrying on a trade or business	Yes	IRS
Coury v. Comm'r, T.C. Memo. 2010-132	Deductions denied for unsubstantiated automobile and home use expenses	Yes	IRS
Dennis v. Comm'r, T.C. Memo. 2010-216	Deduction allowed for business losses because even though not successful, horse breeding activity had profit motive	No	TP
DKD Enterprises, Inc. v. Comm'r, T.C. Memo. 2011-29, *appeal docketed*, No. 11-2526 (8th Cir. July 11, 2011).	Deductions denied for cattery operations because no profit motive and so not a trade or business	No	IRS
Daoud v. Comm'r, T.C. Memo. 2010-282	Deductions denied for unsubstantiated COG, insurance, interest, equipment, repairs, supplies, travel and entertainment and other expenses; deductions allowed for taxes to the extent substantiated; deductions allowed for lease expenses under *Cohan*	No	Split
Dunn v. Comm'r, T.C. Memo. 2010-198	Deduction denied for personal airplane expenses	No	IRS
Ellman v. Comm'r, T.C. Summ. Op. 2010-83	Deductions denied because TP did not prove carrying on a trade or business (start up); deductions denied for unsubstantiated employee losses	Yes	IRS

Appendix Three

Table 2: Trade or Business Expenses Under IRC § 162 and Related Sections

Case Citation	Issue(s)	*Pro Se*	Decision
Epps v. Comm'r, T.C. Summ. Op. 2011-7	Deduction denied because field employee's expenses over employer's monthly allowance were not ordinary, reasonable, or substantiated	Yes	IRS
F.W. Servs., Inc. & Subsidiaries v. Comm'r, T.C. Memo. 2010-128	Reserve fund contract was not truly insurance and so not deductible	No	IRS
Fessey v. Comm'r, T.C. Memo. 2010-191	Deductions denied for unsubstantiated automobile, travel, meals, entertainment, and contract labor expenses, as well as credit card membership dues and depreciation	Yes	IRS
Forrest v. Comm'r, T.C. Memo. 2011-4	Deductions denied for expenses because TP failed to establish carrying on a trade or business (start up); deduction denied for litigation expenses which would be properly categorized as misc. itemized deductions	Yes	IRS
Fresenius Med. Care Holdings, Inc. v. U.S., 106 A.F.T.R.2d (RIA) 5028 (D. Mass. 2010)	Civil damages paid to the government in settlement of a violation of the False Claims Act may not qualify for IRC § 162(a) deduction	No	TP's Motion for Summary Judgment denied
Gamblin v. Comm'r, T.C. Summ. Op. 2011-8	Deductions denied for unsubstantiated office, supplies, travel, and labor expenses; deduction allowed for a portion of home office expenses under *Cohan*	Yes	Split
Gittens v. Comm'r, T.C. Summ. Op. 2011-47	Deductions denied for unsubstantiated expenses	Yes	IRS
Griffin v. Comm'r, T.C. Memo. 2010-252	Deductions denied for unsubstantiated and personal expenses	Yes	IRS
Hafeez v. Comm'r, T.C. Summ. Op. 2010-109	Deductions allowed for some automobile expenses under *Cohan*; deduction denied for unsubstantiated cell phone expenses	Yes	Split
Hammond v. Comm'r, T.C. Summ. Op. 2011-26	Deductions denied for unsubstantiated rent and utilities expenses	Yes	IRS
Helms, U.S. v., 106 A.F.T.R.2d (RIA) 6008 (S.D. Cal. 2010)	SJ granted for U.S. with regard to some unsubstantiated rent, automobile, storage, loan interest, travel and entertainment, and employment taxes; TP did not meet the for-profit motive or ownership tests for engaging in a trade or business; SJ denied for U.S. with regard to deductions for office rental expenses	No	Split
Herrington v. Comm'r, T.C. Memo. 2011-73	Deduction allowed for money taken by abusive boyfriend from business accounts under IRC § 165 theft instead of IRC § 162 business expenses	No	TP
Hill v. Comm'r, T.C. Memo. 2010-268	Deductions denied for unsubstantiated or personal home furnishings, motorcycle, and legal fees	Yes	IRS
Hollingsworth v. Comm'r, T.C. Memo. 2010-262	Deductions denied for unsubstantiated or not ordinary or necessary expenses	Yes	IRS
Jarman v. Comm'r, T.C. Memo. 2010-285	Deductions denied for unsubstantiated travel expenses	Yes	IRS
Jenkins v. Comm'r, T.C. Memo. 2010-251	Deductions allowed for commission fees under *Cohan*; deductions denied for unsubstantiated expenses	Yes	Split
Karkour v. Comm'r, T.C. Memo. 2010-124	Deductions denied for unsubstantiated expenses	Yes	IRS
Kuntz v. Comm'r, T.C. Memo. 2011-52	Deduction denied for personal caregiver expenses which should be properly claimed as Schedule A medical deductions; deduction partially allowed for the clerical services rendered by the caregiver	Yes	Split
Lang v. Comm'r, T.C. Memo. 2010-152	Deductions denied for unsubstantiated phone, automobile, internet, equipment, and travel; deduction allowed for educational materials	Yes	Split
Le v. Comm'r, T.C. Summ. Op. 2010-94	Deductions allowed for TPs (H&W) carrying on the trade or business of gambling	Yes	TP
Lewis v. Comm'r, T.C. Summ. Op. 2010-156	Deductions denied for unsubstantiated travel, meals and entertainment, personal certification classes, and outside services expenses; deductions allowed for reimbursements and referral fees under *Cohan*	Yes	Split
Lynch v. Comm'r, T.C. Summ. Op. 2010-95	Deductions allowed for automobile expenses to the extent substantiated; deductions denied for unsubstantiated travel, meals and entertainment, cell phone and office supplies; deductions allowed for computer and web design expenses	Yes	Split
MacGregor v. Comm'r, T.C. Memo. 2010-187, *appeal docketed*, No. 11-70693 (9th Cir. Mar. 7, 2011).	Deductions denied for lack of substantiation; deductions allowed for limited substantiated business expenses	Yes	Split

Table 2: Trade or Business Expenses Under IRC § 162 and Related Sections

Case Citation	Issue(s)	*Pro Se*	Decision
Mahdavi v. Comm'r, T.C. Summ. Op. 2010-178	Deduction denied for unsubstantiated automobile expenses	Yes	IRS
Mayo v. Comm'r, 136 T.C. 81 (2011)	Deductions disallowed for excess of wagering losses as limited by IRC § 165; gambling expenses other than the cost of wagers are allowed as unlimited	Yes	Split
Media Space, Inc. v. Comm'r, 135 T.C. 424 (2010), *appeal docketed* (2nd Cir. May 24, 2011).	Deductions partially allowed for forbearance payments because they did not qualify as a reacquisition of stock under IRC § 162(k)	No	Split
Moore v. Comm'r, T.C. Summ. Op. 2010-102	Deductions denied for unsubstantiated automobile expenses	Yes	IRS
Moore v. Comm'r, T.C. Summ. Op. 2011-51	Deductions denied for duplicate claimed expenses; deductions denied because TP failed to prove carrying on a trade or business (going concern)	Yes	IRS
Mulcahy, Pauritsch, Salvador & Co. v. Comm'r, T.C. Memo. 2011-74, *appeal docketed*, No. 11-2105 (7th Cir. May 9, 2011).	Deductions denied for consulting fees because they were not paid to the shareholders, and because they were not presumptively reasonable, nor was there intent to compensate, but rather a distribution of profits; deduction denied for unsubstantiated interest payment	No	IRS
Multi-Pak Corp. v. Comm'r, T.C. Memo. 2010-139	Deductions allowed for reasonable compensation and bonuses to principal; deduction denied for unreasonable compensation in one year	No	Split
Oglesby v. Comm'r, T.C. Memo. 2011-93	Deductions denied for repairs that should be capitalized under IRC § 167; deduction denied for unsubstantiated automobile expenses; deduction allowed for union dues	Yes	Split
Ognibene v. Comm'r, T.C. Summ. Op. 2010-131	Deductions denied for unsubstantiated expenses	Yes	IRS
Owens v. Comm'r, T.C. Memo. 2010-265	Deductions denied because TP failed to establish carrying on a trade or business and for lack of substantiation	Yes	IRS
Pace v. Comm'r, T.C. Memo. 2010-272	Deductions denied for unsubstantiated and personal automobile, travel, meals and entertainment, and office expenses	Yes	IRS
Paquin v. Comm'r, T.C. Summ. Op. 2010-120	Deductions denied for personal racing activity because no profit motive	Yes	IRS
Raeber v. Comm'r, T.C. Memo. 2011-39	Deductions denied for unsubstantiated expenses	Yes	IRS
Rayden v. Comm'r, T.C. Memo. 2011-1	Deduction allowed for portion of home used for business; deduction denied for rooms not exclusively used for business	No	Split
Robinson v. Comm'r, T.C. Memo. 2011-99	Deductions denied for home office because TPs (H&W) failed to show regularity of business use; deductions denied for unsubstantiated and personal cell phone, computer, automobile, travel, meals, entertainment, etc.	Yes	IRS
Rooney v. Comm'r, T.C. Memo. 2011-14	Deductions denied for unsubstantiated depreciation; deductions denied for unsubstantiated expenses	No	IRS
Rozar v. Comm'r, T.C. Summ. Op. 2010-145	Deductions denied for unsubstantiated automobile, travel, insurance, and maintenance expenses	Yes	IRS
Sada v. Comm'r, T.C. Summ. Op. 2010-146	Deduction denied because TPs (H&W) failed to establish carrying on a trade or business	Yes	IRS
Sakkis v. Comm'r, T.C. Memo. 2010-256	Deduction allowed for rental property expenses and realty investment expenses which should properly have been on Schedule E; deduction denied for unsubstantiated radio business expenses	No	Split
Sanford v. Comm'r, T.C. Summ. Op. 2011-4	Deductions for travel, lodging, meals, repair, maintenance, etc. allowed to the extent substantiated; deductions denied for unsubstantiated books and automobile use	Yes	Split
Scroggins v. Comm'r, T.C. Memo. 2011-103	Deductions denied for unsubstantiated travel, meals, and entertainment expenses	No	IRS
Shiekh v. Comm'r, T.C. Memo. 2010-126	Deductions denied for home office because TP did not show exclusive business use; deductions denied because TP failed to prove carrying on a trade or business; deduction denied for unsubstantiated personal foreign travel	Yes	IRS
Shpilrain v. Comm'r, T.C. Summ. Op. 2010-133	Deductions denied for unsubstantiated and personal travel, books, meals, and entertainment	Yes	IRS
Simon v. IRS, 106 A.F.T.R.2d (RIA) 6732 (D. Neb. 2010)	Suit allowed to move forward on basis of preliminary evidence presented regarding business use of automobile	Yes	TP
Smith v. Comm'r, T.C. Summ. Op. 2010-142	Deductions allowed to the extent of substantiation for legal, professional, and office expenses on Schedule A; deductions denied for unsubstantiated or personal travel, automobile, meals, and entertainment expenses on Schedule C	Yes	Split

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Table 2: Trade or Business Expenses Under IRC § 162 and Related Sections

Case Citation	Issue(s)	*Pro Se*	Decision
Stangeland v. Comm'r, T.C. Memo. 2010-185	Deductions denied for real estate activity expenses because TP failed to establish carrying on a trade or business	No	IRS
Stenslet v. Comm'r, T.C. Summ. Op. 2010-127	Deductions denied because TPs (H&W) failed to establish carrying on a trade or business; deductions denied for living expenses incurred at TPs' tax home	Yes	IRS
Stewart v. Comm'r, T.C. Memo. 2010-184	Deductions denied for legal expenses not originating in profit-seeking activity; deductions allowed for fees, taxes, cleaning, maintenance, supplies and rent; deductions denied for travel; deductions allowed for automobile expenses to the extent substantiated	Yes	Split
Stroff v. Comm'r, T.C. Memo. 2011-80	Deductions denied for unsubstantiated phone, meals and entertainment; deductions partially allowed for automobile and labor expenses under *Cohan*	Yes	Split
Stromatt v. Comm'r, T.C. Summ. Op. 2011-42	Deductions allowed for payment for services rendered because TPs (H&W) met profit motive test for carrying on a trade or business and had adequate substantiation	Yes	TP
Sword v. Comm'r, T.C. Summ. Op. 2010-158	Deduction partially denied for depreciation where TP did not own part of the item depreciated	Yes	IRS
Tarr v. Comm'r, T.C. Summ. Op. 2011-28	Deductions denied for unsubstantiated expenses	Yes	IRS
Tax Practice Management, Inc. v. Comm'r, T.C. Memo. 2010-266	Deductions denied for unsubstantiated or personal rent, repairs, meals, and travel	No	IRS
Weekend Warrior Trailers, Inc. v. Comm'r, T.C. Memo. 2011-105	Deductions denied for unnecessary or unreasonable management fees; deductions denied for unsubstantiated airplane and automobile expenses; accelerated depreciation denied for plane because did not meet original use test.	No	IRS
Whitaker v. Comm'r, T.C. Memo. 2010-209	Deductions denied for unsubstantiated commissions and fees, car and truck expenses, office supplies, gifts, etc.	No	IRS
Woody v. Comm'r, 403 Fed. Appx. 519 (D.C. Cir. 2010), *aff'g* T.C. Memo. 2009-93	Deductions denied for real estate activity expenses because TP failed to establish carrying on a trade or business (start up)	No	IRS
Zeng v. Comm'r, T.C. Summ. Op. 2010-77	Deductions denied for expenses that were properly deductible in previous year; deductions denied for unsubstantiated automobile, meals, and entertainment expenses; deductions allowed for substantiated travel expenses	Yes	Split
Zhang v. Comm'r, T.C. Summ. Op. 2011-21	Deductions denied for unsubstantiated foreign travel; deduction allowed for home office expenses	Yes	Split

Table 3 Appeals From Collection Due Process (CDP) Hearings Under IRC §§ 6320 and 6330

Case Citation	Lien or Levy	Issue(s)	*Pro Se*	Decision
Adair v. Comm'r, T.C. Memo. 2011-75	Lien	No abuse of discretion in denying lien withdrawal	No	IRS
Allivato v. Comm'r, T.C. Summ. Op. 2011-3	Levy	No abuse of discretion; Tax Court lacked jurisdiction to consider abatement request	No	IRS
Anson v. Comm'r, T.C. Memo. 2010-119	Levy	Section 6330 notice sent to TP's last known address; Dismissed for lack of jurisdiction	Yes	IRS
Appleton v. Comm'r, T.C. Memo. 2010-225	Lien	Summary judgment for IRS granted; IRS not precluded from filing NFTL because TP's husband's assets were in hands of receiver	Yes	IRS
Atkins v. Comm'r, T.C. Memo. 2011-12	Levy/Lien	Appeals Officer communication with TP constituted a hearing.	Yes	IRS
Bang v. Comm'r, T.C. Summ. Op. 2011-1	Levy	Inability to challenge tax liability	No	IRS
Becker v. Comm'r, T.C. Memo. 2010-120	Levy	Remanded to determine portion of subject taxes not part of bankruptcy case	No	
Berkery v. Comm'r, T.C. Memo. 2011-57	Lien	No abuse of discretion in sustaining filing of NFTL after TP had entered into IA, nor in denying lien withdrawal	Yes	IRS
Blaga v. Comm'r, T.C. Memo. 2010-170	Levy	No abuse of discretion in determining to proceed with collection of penalties; frivolous arguments	Yes	IRS
Brady v. Comm'r, 136 T.C. No. 19 (2011), *appeal docketed* (2nd Cir. July 13, 2011)	Levy	TP not entitled to apply prior years' credit to satisfy current liability	Yes	IRS
Bryant v. Comm'r, 106 A.F.T.R.2d (RIA) 6735 (6th Cir. 2010), *aff'g* T.C. Memo. 2009-78	Levy	No abuse of discretion in applying TP's overpayment to only most recent liability	Yes	IRS
Byk v. Comm'r, T.C. Summ. Op. 2010-137	Lien	Insufficient evidence that Appeals Officer had verified procedural requirements had been met; remanded	Yes	TP
Chenault v. Comm'r, T.C. Memo. 2011-56	Levy	Challenge to underlying liability	Yes	IRS
Colvin v. Comm'r, T.C. Memo. 2010-235, *appeal docketed* (9th Cir. Jan. 24, 2011)	Levy	Taxes were not discharged in bankruptcy; inability to challenge underlying tax liability	Yes	IRS
Costi v. Comm'r, T.C. Memo. 2010-246	Lien	No abuse of discretion	Yes	IRS
Covington v. Comm'r, T.C. Memo. 2011-32	Lien	No abuse of discretion in rejecting collection alternatives. Sanction $5,000 penalty for filing petition for delay	Yes	IRS
Currier v. Comm'r, T.C. Memo. 2011-113	Levy	No abuse of discretion in rejecting TP payment as full settlement of liabilities; no obligation to compromise liabilities	No	IRS
Dalton v. Comm'r, 135 T.C. 393 (2010), *appeal docketed* (1st Cir. Oct. 12, 2011)	Levy	Abuse of discretion in rejecting OIC	No	TP
Deems v. Comm'r, 107 A.F.T.R.2d (RIA) 2275 (11th Cir. 2011)	Levy	No abuse of discretion in denying face-to-face hearing; TP didn't provide financial information and collection alternatives; noncompliant with tax obligations	Yes	IRS
Freeman v. Comm'r, T.C. Memo. 2011-38	Lien	The installment agreement did not justify the release of the NFTL to collect TP's IRC 6672 penalty liability	Yes	IRS
Gillum v. Comm'r, T.C. Memo. 2010-280, *appeal docketed*, No. 11-1664 (8th Cir. Mar. 22, 2011)	Lien/Levy	No abuse of discretion in rejecting collection alternative; criminal plea agreement and restitution do not limit tax liabilities; TP failed to provide financial information	No	IRS
Golditch v. Comm'r, T.C. Memo. 2010-260, *appeal docketed*, No. 11-70742 (9th Cir. Mar. 11, 2011)	Levy	No abuse of discretion in denying TP face-to-face hearing; frivolous arguments; TP failed to provide financial information; noncompliant with tax obligations	No	IRS
Goff v. Comm'r, 135 T.C. 231 (2010)	Levy	Bonded promissory note of TP's husband was not payment of liability or penalties. TP was sanctioned $15,000 for filing a frivolous petition with the court	Yes	IRS
Gross v. Comm'r, T.C. Memo. 2010-176	Lien	Lien attached to ERISA qualified pension plan account, even after bankruptcy discharged liability	No	IRS
Grunsted v. Comm'r, 136 T.C. No. 21 (2011)	Levy	No abuse of discretion; frivolous arguments	Yes	IRS
Guldager v. Comm'r, T.C. Summ. Op. 2010-104	Levy	No abuse of discretion; TP failed to propose collection alternatives	Yes	IRS
Hartman v. Comm'r, 638 F.3d 248 (3d Cir. 2011)	Levy	No abuse of discretion; TP failed to timely submit alternative collection proposal	Yes	IRS

Appendix Three

Table 3: Appeals From Collection Due Process (CDP) Hearings Under IRC §§ 6320 and 6330

Case Citation	Lien or Levy	Issue(s)	*Pro Se*	Decision
Heidermann v. Comm'r, T.C. Summ. Op. 2010-155	Levy	No abuse of discretion; TP failed to provide documentation in support of inability to pay	Yes	IRS
Henry v. Comm'r, 403 Fed. Appx. 105 (7th Cir. 2010)	Levy	Tax Court lacked jurisdiction to hear TP's claims related to offset; inability to challenge underlying tax liability	Yes	IRS
Hoyle v. Comm'r, 136 T.C. No. 22 (2011)	Lien	NFTL remained in existence because period of limitations on collections suspended	Yes	IRS
Jackson v. Comm'r, T.C. Memo. 2010-180	Levy	No abuse of discretion in denying face-to-face hearing; TP failed to provide financial information for collection alternatives to be considered	Yes	IRS
Johnson v. Comm'r, 136 T.C. No. 23 (2011), *appeal docketed* (D.C. Cir. Aug. 16, 2011)	Lien/Levy	No abuse of discretion in rejecting OIC, nor in delaying handling of TP's case	No	IRS
Johnson v. Comm'r, T.C. Summ. Op. 2010-69	Levy	TP's tax liabilities not discharged in bankruptcy; inability to challenge underlying tax liability; no abuse of discretion in sending letter to stop payment	Yes	IRS
Kanofsky v. Comm'r, 107 A.F.T.R.2d (RIA) 1901 (3d Cir. 2011), *aff'g* T.C. Memo. 2010-46	Levy	No abuse of discretion for approving proposed levy; TP failed to propose collection alternatives, didn't provide financial information, and was unable to challenge underlying tax liabilities	Yes	IRS
Kreisler v. Comm'r, T.C. Memo. 2011-21	Levy	No abuse of discretion for declining to delay levy because of the prospect that the IRS's priority claim would be paid by taxpayer's bankruptcy estate	Yes	IRS
Kubon v. Comm'r, T.C. Memo. 2011-41, *appeal docketed*, No. 11-71592 (9th Cir. May 16, 2011)	Lien	Inability to challenge underlying tax liability; IRS verified assessment; TPs failed to propose collection alternative	Yes	IRS
Kuechenmeister v. Comm'r, T.C. Summ. Op. 2010-161	Levy	No abuse of discretion in proceeding with collection; no genuine issue as to existence or amount of liability	Yes	IRS
Leathley v. Comm'r, T.C. Memo. 2010-194	Lien	TP's tax liabilities not discharged in bankruptcy	No	IRS
Lee v. C'mmr, T.C. Memo. 2011-112	Lien/Levy	Presence of compliance officer did not prevent TP from receiving hearing; no abuse of discretion in sustaining collection action; Tax Court barred from considering TP liability	Yes	IRS
Ludzack v. Comm'r, T.C. Memo. 2011-111	Levy	No abuse of discretion in failing to consider any OIC; TP did not submit Form 656	Yes	IRS
Mahlum v. Comm'r, T.C. Memo. 2010-212	Levy	No abuse of discretion in denying non-collectible status as alternative to levy; TP failed to provide financial information; noncompliant with tax obligations	No	IRS
Malone v. Comm'r, T.C. Summ. Op. 2011-24	Lien/Levy	No abuse of discretion in denying abatement of interest, abuse of discretion in determining to proceed with collection; error as matter of law	Yes	Split
Estate of Mangiardi v. Comm'r, T.C. Memo. 2011-24, *appeal docketed*, No. 11-11609 (11th Cir. Apr. 6, 2011)	Levy	No abuse of discretion in rejecting OIC	No	IRS
Marasscalco v. Comm'r, 107 A.F.T.R.2d (RIA) 1600 (5th Cir. 2011), *aff'g* T.C. Memo. 2010-130	Lien	No abuse of discretion in denying IA	No	IRS
Martinez v. Comm'r, T.C. Memo. 2010-181	Levy	Inability to challenge underlying tax liability	No	IRS
Martinez v. Comm'r, T.C. Summ. Op. 2010-148	Levy	Inability to challenge underlying tax liability	Yes	IRS
Mattina v. Comm'r, T.C. Memo. 2010-127, *appeal docketed*, No. 10-73032 (9th Cir. Sept. 27, 2010)	Levy	Notices of deficiencies were not invalid. Sanctioned $5,000 for filing frivolous petition.	Yes	IRS
McPeek v. Comm'r, 403 Fed. Appx. 113 (8th Cir. 2010)	Levy	Court of Appeals held that Tax Court's dismissal was not an abuse its discretion	Yes	IRS
Miller-Wagenknect v. Comm'r, 385 Fed. Appx. 230 (3d Cir. 2010)	Levy	TP waived argument that IRS improperly denied face-to-face CDP hearing; sanctions imposed by Tax Court not abuse of discretion	Yes	IRS
Mostafa v. Comm'r, T.C. Memo. 2010-277	Levy	TP did not compromise her tax liability	Yes	IRS
Murphy v. Comm'r, T.C. Summ. Op. 2010-170	Lien	No abuse of discretion in rejecting OIC	Yes	IRS
Oman v. Comm'r, T.C. Memo. 2010-276	Levy	Inability to challenge underlying tax liability; no abuse of discretion in denying face-to-face hearing	Yes	IRS

Table 3: Appeals From Collection Due Process (CDP) Hearings Under IRC §§ 6320 and 6330

Case Citation	Lien or Levy	Issue(s)	*Pro Se*	Decision
Orian v. Comm'r, T.C. Memo. 2010-234	Levy	TPs not precluded from challenging underlying tax liability. No abuse of discretion in denying OIC or collection alternative; TPs failed to submit financial information; noncompliant with tax obligations	No	Split
Oropeza v. Comm'r, 402 Fed. Appx. 221 (9th Cir. 2010), *aff'g* T.C. Memo. 2008-94	Levy	No abuse of discretion in approving collection action	Yes	IRS
Perlman v. Comm'r, T.C. Summ. Op. 2011-34	Levy	No abuse of discretion in denying OIC, nor in failing to consider IA; TP did not submit financial information nor propose collection alternative	Yes	IRS
Pough v. Comm'r, 135 T.C. 344 (2010)	Lien/Levy	No abuse of discretion in denying IA; TP did not submit financial information nor written proposal. No abuse of discretion in not waiting for TP to submit written request for abatement	Yes	IRS
Ranuio v. Comm'r, T.C. Memo. 2010-178	Levy	No abuse of discretion in requesting financial information, nor in rejecting OIC	No	IRS
Revah v. Comm'r, T.C. Memo. 2010-269, *appeal docketed*, No. 11-70211 (9th Cir. Jan. 18, 2011)	Levy	Equitable recoupment not applicable defense to collection; no abuse of discretion in rejecting abatement request	No	IRS
Ruhaak v. Comm'r, 422 Fed. Appx. 530 (7th Cir. 2011)	Levy	TP has no constitutional or statutory right to withhold taxes based on moral or religious objections to government expenditures	Yes	IRS
Scherman v. Comm'r, T.C. Memo. 2010-135	Lien	No abuse of discretion in rejecting collection alternatives; TP failed to submit financial information and submit written request for abatement	Yes	IRS
Schwendeman v. Comm'r, T.C. Memo. 2011-70	Lien	No abuse of discretion in sustaining NTFL. Future collection action purely speculative	No	IRS
Shaw v. Comm'r, T.C. Memo. 2010-210	Lien	No abuse of discretion in rejecting TPs' request for IA. No abuse of discretion in rejecting OIC; TPs failed to provide financial documents and submit Form 656. No abuse of discretion in sustaining NTFL	No	IRS
Sher v. Comm'r, 381 Fed. Appx. 62 (2d Cir. 2010), *aff'g* T.C. Memo. 2009-86	Levy	No abuse of discretion in rejecting abatement request, nor in refusing to lift penalties on liability	Yes	IRS
Slingsby v. Comm'r, T.C. Memo. 2011-3	Lien	No abuse of discretion for proceed with lien	Yes	IRS
Springer v. Comm'r, 107 A.F.T.R.2d (RIA) 1318 (10th Cir. 2011)	Lien	Dismissed for lack of jurisdiction; Determination not issued because TP did not timely request CDP hearing	Yes	IRS
Swanton v. Comm'r, T.C. Memo. 2010-140	Levy	No abuse of discretion in denying collection alternative. TPs failed to provide financial information and propose terms of agreement	Yes	IRS
Talaske v. Comm'r, T.C. Summ. Op. 2011-33	Levy	Inability to challenge underlying liability	Yes	IRS
Taylor v. Comm'r, T.C. Memo. 2010-213	Levy	No abuse of discretion in denying IA; TP did not provide financial information	Yes	IRS
Thompson v. Comm'r, T.C. Summ. Op. 2011-31	Levy	No abuse of discretion in refusing to consider IA; TP did not provide financial information. TP afforded adequate opportunity for hearing	Yes	IRS
Thornberry v. Comm'r, 136 T.C. 356 (2011)	Lien/Levy	Tax Court had jurisdiction to review determination disregarding hearing request on the grounds that it was a frivolous request under section 6330(g)	Yes	Split
Tinnerman v. Comm'r, T.C. Memo. 2010-150, *appeal docketed* (D.C. Cir. Oct. 12, 2010)	Levy	No abuse of discretion. Settlement Officer can rely on Form 4340 absent showing of irregularity in assessment	No	IRS
Toth v. Comm'r, T.C. Memo. 2010-227, *appeal docketed* (6th Cir. Mar. 31, 2011)	Levy	No abuse of discretion in denying face-to-face hearing, sustaining levy, and rejecting collection alternatives. TP failed to provide financial information; noncompliant with tax obligations	Yes	IRS
Tucker v. Comm'r, T.C. Memo. 2011-67, *appeal docketed*, No. 11-1191 (D.C. Cir. May 23, 2011)	Levy	No abuse of discretion in rejecting OIC and insisting on partial payment IA	No	IRS
Tucker v. Comm'r, 135 T.C. 114 (2010), *appeal docketed*, No. 11-1191 (D.C. Cir. May 23, 2011)	Levy	Appeals Officers are not "appointed officers" under the Appointment Clause of the U.S. Constitution	No	IRS
Tuttle v. Comm'r, 107 A.F.T.R.2d (RIA) 2288 (9th Cir. 2011)	Levy	Equivalent hearing correctly held in lieu of CDP hearing. Tax Court lacked jurisdiction to review results of equivalent hearing	No	IRS
Van Camp v. Comm'r, 388 Fed. Appx. 706 (9th Cir. 2010)	Levy	Tax Court did not abuse discretion in allowing collection to proceed. Inability to challenge tax liability; present issue not raised in CDP and Tax Court hearings	No	IRS

Appendix Three

Table 3: Appeals From Collection Due Process (CDP) Hearings Under IRC §§ 6320 and 6330

Case Citation	Lien or Levy	Issue(s)	*Pro Se*	Decision
Wadleigh v. Comm'r, 134 T.C. 280 (2010)	Levy	IRS not barred from levying prepetition property excluded from bankruptcy case. Notice of levy not premature; insufficient records to determine abuse of discretion in sustaining levy	No	IRS
West v. Comm'r, T.C. Memo. 2010-250, *appeal docketed* (1st Cir. Dec. 21, 2010)	Lien	TP's OIC received adequate consideration in prior proceeding	Yes	IRS
White v. Comm'r, 385 Fed. Appx. 92 (3d Cir. 2010)	Levy	No abuse of discretion in denying face-to-face hearing; frivolous arguments	Yes	IRS
Williams v. Comm'r, 107 A.F.T.R.2d (RIA) 2243 (9th Cir. 2011), *aff'g* T.C. Memo. 2009-158, and T.C. Memo. 2009-159	Levy	No abuse of discretion in closing CDP hearing before larger assessments made	No	IRS
Zastrow v. Comm'r, T.C. Memo. 2010-215	Lien	Inability to challenge underlying tax liabilities. No abuse of discretion in denying face-to-face hearing, nor in rejecting collection alternatives; noncompliant with tax obligations	Yes	IRS
Zelden v. Comm'r, T.C. Memo. 2011-13	Lien	No abuse of discretion in rejecting collection alternative; noncompliant with tax obligations	No	IRS
Zigmont v. Comm'r, T.C. Memo. 2010-253	Levy	No abuse of discretion in denying face-to-face hearing; frivolous arguments	Yes	IRS
Business				
535 Ramona, Inc. v. Comm'r, 135 T.C. 353 (2010), *appeal docketed*, No. 10-73386 (9th Cir. Nov. 4, 2010)	Levy	Tax Court lacked jurisdiction to consider propriety of lien notice	No	IRS
Alessio Azzari, Inc. v. Comm'r, 136 T.C. 178 (2011)	Lien/Levy	Abuse of discretion in denying IA; IRS's abuse of discretion in refusing to consider subordination of NFTL led to late tax deposits	No	TP
Assured Source, Inc. v. Comm'r, T.C. Memo. 2010-243	Levy	No abuse of discretion in refusing to consider collection alternatives; TP did not submit financial information	No	IRS
Comensoli v. Comm'r, 107 A.F.T.R.2d (RIA) 2080 (6th Cir. 2011), *aff'g* T.C. Memo 2009-242	Lien/Levy	No clear evidence that Tax Court erred in determining TP to be sole member of business entity	No	IRS
Enmed, LLC v. Comm'r, T.C. Memo. 2010-136	Lien	No abuse of discretion; TP received notices and did not propose collection alternatives	Yes	IRS
Law Offices of Robert A. Cushman, LLC v. Comm'r, T.C. Summ. Op. 2011-37	Levy	No abuse of discretion in conducting CDP hearing through telephone and correspondence, nor in denying IA	No	IRS

Table 4 Failure to File Penalty Under IRC § 6651(A)(1) and Failure to Pay Estimated Tax Penalty Under IRC § 6654

Case Citation	Issue(s)	*Pro Se*	Decision
Individual Taxpayers (But Not Sole Proprietorships)			
Ajah v. Comm'r, T.C. Summ. Op. 2010-90	6651(a)(1); Reliance on accountant to file and obtain extension; No evidence of reasonable cause presented	Yes	IRS
Amesbury v. Comm'r, T.C. Memo. 2010-148	6651(a)(1); 6654; Nonfiler; No evidence of reasonable cause or exception presented	Yes	IRS
Asbury v. Comm'r, T.C. Memo. 2011-107	6654; Nonfiler; No exception presented	Yes	IRS
Avery v. Comm'r, 399 Fed. Appx. 195, *aff'g* Tax Ct. No. 17315-05	6651(a)(1); Nonfiler; No evidence of reasonable cause presented	Yes	IRS
Banister v. Comm'r, 107 A.F.T.R.2d (RIA) 1156, *aff'g* T.C. Memo. 2008-201	6651(a)(1); 6654; Nonfiler; No evidence of reasonable cause presented; IRS failed to meet burden of production for 6654	Yes	Split (IRS 6651(a)(1), TP 6654)
Bream v. Comm'r, T.C. Summ. Op. 2010-110	6651(a)(1); Family death and financial setback for TP; No evidence of reasonable cause presented	Yes	IRS
Brookshire v. Comm'r, T.C. Memo. 2010-193	6651(a)(1); 6654; Nonfiler; No evidence of reasonable cause or exception presented	Yes	IRS
Buckardt v. Comm'r, T.C. Memo. 2010-145	6651(a)(1); 6654; TP reported all "zeros" on return; No evidence of reasonable cause or exception presented	Yes	IRS
Burchfield v. Comm'r, T.C. Memo. 2011-30	6651(a)(1); 6654; TPs (H&W) reported "zero" wages on return; No evidence of reasonable cause or exception presented	Yes	IRS
Callahan v. Comm'r, T.C. Memo. 2010-201	6651(a)(1); 6654; Nonfiler; No evidence of reasonable cause or exception presented	Yes	IRS
Calloway v. Comm'r, 135 T.C. 26 (2010), *appeal docketed*, No. 11-10395 (11th Cir. Jan. 27, 2011)	6651(a)(1); No evidence of reasonable cause presented	No	IRS
Cook v. Comm'r, T.C. Memo. 2010-137	6651(a)(1); 6654; Nonfiler; No evidence of reasonable cause or exception presented	Yes	IRS
Crouse v. Comm'r, T.C. Memo. 2011-97	6651(a)(1); No evidence of reasonable cause presented	Yes	IRS
Deltoro v. Comm'r, T.C. Summ. Op. 2010-123	6651(a)(1); No evidence of reasonable cause presented	Yes	IRS
Dickey v. Comm'r, T.C. Memo. 2011-47	6651(a)(1); 6654; No evidence of reasonable cause or exception presented	Yes	IRS
Forrest v. Comm'r, T.C. Memo. 2010-263	6651(a)(1); 6654; Nonfiler; No evidence of reasonable cause or exception presented	Yes	IRS
Gates v. Comm'r, 135 T.C. 1 (2010)	6651(a)(1); No evidence of reasonable cause presented	No	IRS
Glover v. Comm'r, T.C. Memo. 2010-228	6651(a)(1); 6654; TP filed estate tax returns instead of individual tax returns; No evidence of reasonable cause or exception presented	Yes	IRS
Gregoline v. Comm'r, T.C. Summ. Op. 2010-112	6651(a)(1); Filing date fell on a Sunday and so return was timely	Yes	TP
Harper v. Comm'r, T.C. Summ. Op. 2011-56	6651(a)(1); 6654; Nonfiler; No evidence of reasonable cause or exception presented	Yes	IRS
High v. Comm'r, T.C. Summ. Op. 2011-36	6651(a)(1); No evidence of reasonable cause presented	Yes	IRS
Holmes v. Comm'r, T.C. Memo. 2011-31	6651(a)(1); No evidence of reasonable cause presented	Yes	IRS
Holmes v. Comm'r, T.C. Memo. 2011-26	6651(a)(1); 6654; Nonfiler; Internal IRS memo received while in Iraq satisfied reasonable cause; No exception presented	Yes	Split (TP 6651(a)(1), IRS 6654)
Hyde v. Comm'r, T.C. Memo. 2011-104	6651(a)(1); 6654; Nonfiler; No evidence of reasonable cause or exception presented	Yes	IRS
Igberaese v. Comm'r, T.C. Memo. 2010-284	6651(a)(1); No evidence of reasonable cause presented	Yes	IRS
Jeanmarie v. Comm'r, T.C. Memo. 2010-281	6651(a)(1); No evidence of reasonable cause presented	Yes	IRS
Jones v. Comm'r, T.C. Summ. Op. 2010-139	6651(a)(1); 6654; Incarceration and divorce from TP's spouse; No evidence of reasonable cause or exception presented	Yes	IRS
Mathews v. Comm'r, T.C. Memo. 2010-226	6651(a)(1); Nonfiler; No evidence of reasonable cause presented	Yes	IRS
O'Boyle v. Comm'r, T.C. Memo. 2010-149, *appeal docketed*, No. 11-11897 (11th Cir. Apr. 25, 2011)	6651(a)(1); 6654; No evidence of reasonable cause or exception presented	Yes	IRS

Appendix Three

Table 4: Failure to File Penalty Under IRC § 6651(A)(1) and Failure to Pay Estimated Tax Penalty Under IRC § 6654

Case Citation	Issue(s)	*Pro Se*	Decision
Ohsman v. Comm'r, T.C. Memo. 2011-98, *appeal docketed*, No. 11-72127 (9th Cir. July 26, 2011)	6651(a)(1); TPs (H&W) not required to file disputed form so not liable for addition to tax	No	TP
Oliver v. Comm'r, T.C. Memo. 2011-43	6651(a)(1); Nonfiler; No evidence of reasonable cause presented	Yes	IRS
Oliver v. Comm'r, T.C. Memo. 2011-44	6651(a)(1); 6654; Nonfiler; No evidence of reasonable cause or exception presented	Yes	IRS
Oman v. Comm'r, T.C. Memo. 2010-276	6651(a)(1); 6654; TP reported all "zeros" on return; No evidence of reasonable cause presented	Yes	IRS
Owusu v. Comm'r, T.C. Memo. 2010-186	6651(a)(1); Reliance on accountant to obtain extension; No evidence of reasonable cause presented	Yes	IRS
Palaniappan v. Comm'r, T.C. Summ. Op. 2010-82	6651(a)(1); No evidence of reasonable cause presented	Yes	IRS
Pennington v. Comm'r, T.C. Summ. Op. 2010-144	6651(a)(1); TP failed to prove submission of return; No evidence of reasonable cause presented	Yes	IRS
Pushman v. Comm'r, T.C. Summ. Op. 2011-6	6651(a)(1); 6654; Nonfiler; No evidence of reasonable cause or exception presented	Yes	IRS
Rahall v. Comm'r, T.C. Memo. 2011-101	6651(a)(1); No evidence of reasonable cause presented	Yes	IRS
Roberts v. Comm'r, T.C. Summ. Op. 2010-76	6651(a)(1); No evidence of reasonable cause presented	Yes	IRS
Russell v. Comm'r, T.C. Memo. 2011-81	6651(a)(1); Reliance on tax professional that no tax would be due was not reasonable cause for late filing	No	IRS
Sakkis v. Comm'r, T.C. Memo. 2010-256	6654; No exception presented	No	IRS
Smith v. Comm'r, T.C. Memo. 2011-82	6651(a)(1); Nonfiler; No evidence of reasonable cause presented	Yes	IRS
Sullivan v. Comm'r, T.C. Memo. 2010-138	6651(a)(1); 6654; Nonfiler; No evidence of reasonable cause or exception presented	Yes	IRS
Tinnerman v. Comm'r, T.C. Memo. 2010-150 *sustaining* T.C. Memo. 2006-250, *appeal docketed* (D.C. Cir. Oct. 12, 2010)	6651(a)(1); 6654; No evidence of reasonable cause or exception presented	No	IRS
Verduzco v. Comm'r, T.C. Memo. 2010-278	6651(a)(1); 6654; Nonfiler; No evidence of reasonable cause or exception presented	Yes	IRS
Wheeler v. Comm'r, T.C. Memo. 2010-188	6651(a)(1); 6654; Nonfiler; No evidence of reasonable cause or exception presented	Yes	IRS
White v. Comm'r, 385 Fed. Appx. 95 (3d Cir. 2010) *aff'g* Tax Ct. No. 24177-08	6651(a)(1); 6654; Nonfiler; No evidence of reasonable cause or exception presented	Yes	IRS (appeal dismissed)
Williams v. Comm'r, T.C. Summ. Op. 2010-86	6651(a)(1); No evidence of reasonable cause presented	Yes	IRS
Zilberberg v. Comm'r, T.C. Memo. 2011-5	6651(a)(1); 6654; Nonfiler; No evidence of reasonable cause or exception presented	Yes	IRS
Business Taxpayers (Corporations, Partnerships, Trusts, and Sole Proprietorships – Schedules C, E, F)			
Alvi v. Comm'r, T.C. Summ. Op. 2010-79	6651(a)(1); 6654; No evidence of reasonable cause or exception presented	Yes	IRS
Bangura v. Comm'r, T.C. Summ. Op. 2011-23	6651(a)(1); No evidence of reasonable cause presented	Yes	IRS
Campbell v. Comm'r, T.C. Memo. 2011-42	6651(a)(1); Daughter's illness during time in question; No evidence of reasonable cause presented	Yes	IRS
Coury v. Comm'r, T.C. Memo. 2010-132	6651(a)(1); Nonfiler; TP had car accidents and medical issues; No evidence of reasonable cause presented	Yes	IRS
Eckardt v. Comm'r, T.C. Summ. Op. 2011-13	6651(a)(1); 6654; Nonfiler; No evidence of reasonable cause or exception presented	Yes	IRS
Fessey v. Comm'r, T.C. Memo. 2010-191	6651(a)(1); 6654; No evidence of reasonable cause or exception presented	Yes	IRS
Garrison v. Comm'r, T.C. Memo. 2010-261	6651(a)(1); No evidence of reasonable cause presented	Yes	IRS
Griffin v. Comm'r, T.C. Memo. 2010-252	6651(a)(1); No evidence of reasonable cause presented	Yes	IRS
Hafeez v. Comm'r, T.C. Summ. Op. 2010-109	6651(a)(1); No evidence of reasonable cause presented	Yes	IRS
Hammond v. Comm'r, T.C. Summ. Op. 2011-26	6651(a)(1); No evidence of reasonable cause presented	Yes	IRS
Hellweg v. Comm'r, T.C. Memo. 2011-58	6651(a)(1); TPs not require to file disputed form so not liable for addition to tax	No	TP
Helms, U.S. v., 106 A.F.T.R.2d (RIA) 6008 (S.D. Cal. 2010)	6651(a)(1); 6654; No evidence of reasonable cause or exception presented	No	IRS

Table 4: Failure to File Penalty Under IRC § 6651(A)(1) and Failure to Pay Estimated Tax Penalty Under IRC § 6654

Case Citation	Issue(s)	*Pro Se*	Decision
Hultquist v. Comm'r, T.C. Memo. 2011-17	6651(a)(1); No evidence of reasonable cause presented	No	IRS
Jensen v. Comm'r, T.C. Memo. 2010-143	6651(a)(1); 6654; Nonfiler; No evidence of reasonable cause or exception presented; IRS failed to meet burden of production for TY 2005	Yes	Split (TP 6654, IRS 6651(a)(1))
Lang v. Comm'r, T.C. Memo. 2010-152	6651(a)(1); Reliance on tax preparer to file and obtain extension; No evidence of reasonable cause presented	Yes	IRS
Laszloffy v. Comm'r, T.C. Memo. 2010-258	6651(a)(1); 6654; Nonfiler; No evidence of reasonable cause or exception presented	Yes	IRS
Lewis v. Comm'r, T.C. Summ. Op. 2010-156	6651(a)(1); 6654; No evidence of reasonable cause or exception presented	Yes	IRS
Moore v. Comm'r, T.C. Summ. Op. 2010-102	6651(a)(1); No evidence of reasonable cause presented	Yes	IRS
Oglesby v. Comm'r, T.C. Memo. 2011-93	6651(a)(1); No evidence of reasonable cause presented	Yes	IRS
Olson v. Comm'r, T.C. Summ. Op. 2010-96	6651(a)(1); No evidence of reasonable cause presented	Yes	IRS
Pace v. Comm'r, T.C. Memo. 2010-272	6651(a)(1); No evidence of reasonable cause presented	Yes	IRS
Robinson v. Comm'r, T.C. Memo. 2011-99	6651(a)(1); No evidence of reasonable cause presented	Yes	IRS
Sanford v. Comm'r, T.C. Summ. Op. 2011-4	6651(a)(1); No evidence of reasonable cause presented	Yes	IRS
Steinshouer v. Comm'r, T.C. Memo. 2011-53	6651(a)(1); 6654; Nonfiler; No evidence of reasonable cause presented	Yes	IRS
Whipple v. Comm'r, T.C. Memo. 2011-49	6651(a)(1); No evidence of reasonable cause presented	Yes	IRS

Appendix Three

Table 5 Gross Income Under IRC § 61 and Related Sections

Case Citation	Issue(s)	*Pro Se*	Decision
Individual Taxpayers (But Not Sole Proprietorships)			
Abbott v. Comm'r, T.C. Summ. Op. 2010-88	Unreported state tax refund and cancellation of debt income	Yes	IRS
Alexander v. Comm'r, T.C. Summ. Op. 2011-48	Unreported payments received from state for providing care for TP's elderly parents not excludable from gross income as foster care payments	No	IRS
Alonim v. Comm'r, T.C. Memo. 2010-190	Unreported interest income	Yes	IRS
Bayse v. Comm'r, T.C. Summ. Op. 2010-118	Unreported hazardous duty injury income not excludable from gross income as disability payments under a worker's compensation act	Yes	IRS
Brown v. Comm'r, T.C. Memo. 2011-83, *appeal docketed*, No. 11-2508 (7th Cir. June 30, 2011)	Unreported taxable gain from termination of life insurance contract	No	IRS
Buckardt v. Comm'r, T.C. Memo. 2010-145, *appeal docketed* (9th. Cir. Sept. 15, 2010)	Unreported pension and annuity distributions	Yes	IRS
Cadwell v. Comm'r, 136 T.C. 38 (2011), *appeal docketed*, No. 11-1667 (4th Cir. June 23, 2011).	Conversion of a multi-employer plan to a single-employer plan, resulting in unreported life insurance premiums, cash value of life insurance policy, excess premiums, and mortality and other charges	No	IRS
Callahan v. Comm'r, T.C. Memo. 2010-201	Unreported compensation for services	Yes	IRS
Chambers v. Comm'r, T.C. Memo. 2011-114	Parsonage allowance for unreported funds deposited into a church bank account over which TPs (H&W) had full control and used the funds to pay personal expenses	No	IRS
Chenault v. Comm'r, T.C. Memo. 2011-56	Unreported annuity contract income	Yes	Split
Chiarito v. Comm'r, T.C. Summ. Op. 2010-149	Unreported real estate gains	Yes	IRS
Crouse v. Comm'r, T.C. Memo. 2011-97	Unreported embezzled income	Yes	IRS
Driscoll v. Comm'r, 135 T.C. 557 (2010), *appeal docketed* (11th Cir. May 24, 2011)	Exclusion from gross income of parsonage allowance for second home	No	TP
Ernle v. Comm'r, T.C. Memo. 2010-237	Unreported retirement income, nonemployee compensation, and wage income	Yes	IRS
Espinoza v. Comm'r, 636 F.3d 747 (5th Cir. 2011), *aff'g* T.C. Memo. 2010-53	Settlement proceeds under IRC § 104(a)(2).	Yes	IRS
Fennel v. Comm'r, T.C. Summ. Op. 2011-19	Unreported wage income	Yes	IRS
Gates v. Comm'r, 135 T.C. 1 (2010), *appeal docketed*, No. 10-73209 (9th Cir. Oct. 19, 2010)	Unreported capital gain income from the sale of real property excludable under IRC § 121	No	IRS
Gentile v. Comm'r, T.C. Memo. 2010-254	Unreported disability payment	No	IRS
Glover v. Comm'r, T.C. Memo. 2010-228	Unreported wage income	Yes	IRS
Greenberg v. Comm'r, T.C. Memo. 2011-18	Unreported punitive damage award from a lawsuit	No	IRS
Gregoline v. Comm'r, T.C. Summ. Op. 2010-112	Unreported wage income	Yes	IRS
Hale v. Comm'r, T.C. Memo. 2010-229, *appeal docketed*, No. 10-73670 (9th Cir. Nov. 22, 2010)	Unreported wage, interest, and rental income	Yes	IRS
Handy v. Comm'r, T.C. Summ. Op. 2011-61	Child support payments	Yes	IRS
Harper v. Comm'r, T.C. Summ. Op. 2011-56	Unreported payments received for providing care to TP's disabled adult child	Yes	IRS
Hawkins v. Comm'r, 386 Fed. Appx. 697 (9th Cir. 2010), *aff'g* T.C. Memo. 2007-286	Settlement proceeds under IRC § 104(a)(2)	Yes	IRS
High v. Comm'r, T.C. Summ. Op. 2011-36	Settlement proceeds under IRC § 104(a)(2)	Yes	IRS
Hollingsworth v. Comm'r, T.C. Memo. 2010-262	Unreported retirement plan distributions	Yes	IRS
Holmes v. Comm'r, T.C. Memo. 2011-26	Unreported income earned in Iraq	Yes	IRS
Hyde v. Comm'r, T.C. Memo. 2011-104	Unreported compensation for services, dividend income, interest income, distribution from an IRA, and state tax refund	Yes	IRS

Table 5: Gross Income Under IRC § 61 and Related Sections

Case Citation	Issue(s)	*Pro Se*	Decision
Jeanmarie v. Comm'r, T.C. Memo. 2010-281	Unreported disability payments and interest income	Yes	IRS
Marchisio v. Comm'r, T.C. Summ. Op. 2011-39	Cancellation of debt income	Yes	TP
Martin v. Comm'r, T.C. Summ. Op. 2011-62	Unreported cancellation of debt income	Yes	IRS
Mathews v. Comm'r, T.C. Memo. 2010-226	Unreported retirement income	Yes	IRS
Mooney v. Comm'r. T.C. Memo. 2011-35	Unreported income	Yes	IRS
Nelson v. U.S., 392 Fed. Appx. 681 (11th Cir. 2010), *aff'g* 105 A.F.T.R.2d (RIA) 635 (N.D. Fla. 2010), *adopting* 105 A.F.T.R.2d (RIA) 627 (N.D. Fla. 2009)	Unreported wage income	Yes	IRS
Norwood v. Comm'r, T.C. Summ. Op. 2011-27	Unreported non-employee compensation	Yes	IRS
Oliver v. Comm'r, T.C. Memo. 2011-44	Settlement proceeds under IRC § 104(a)(2) and income from the sale of real property	Yes	IRS
Parkinson v. Comm'r, T.C. Memo. 2010-142	Settlement proceeds partially excludable under IRC § 104(a)(2) and unreported disability payments	Yes	Split
Rahall v. Comm'r, T.C. Memo. 2011-101	Unreported trust income, capital gains income, and bank deposits from unknown sources	Yes	IRS
Reynolds v. Comm'r, T.C. Summ. Op. 2010-157	Unreported rehabilitative alimony is not alimony for federal tax purposes	No	TP
Rocchio v. Comm'r, T.C. Summ. Op. 2011-58	Unreported undistributed S Corp income	Yes	IRS
Sanders v. Comm'r, T.C. Memo. 2010-279	Unreported constructive distribution from the termination of TP's life insurance policy	Yes	IRS
Stipe v. Comm'r, T.C. Memo. 2011-92	Unreported disability payments	Yes	IRS
Tribin v. Comm'r, T.C. Memo. 2010-224	Unexplained bank deposits treated as unreported income but cash deposits to make loan payments on sister's behalf not taxable	Yes	Split
Viralam v. Comm'r, 136 T.C. No. 8 (2011)	Unreported long term capital gains, dividends, and interest on investments in which the legal title was transferred to a charitable foundation	No	IRS
Williams v. Comm'r, T.C. Summ. Op. 2010-86	Unreported wages includable as gross income, but unemployment compensation includable in tax year not at issue in which compensation was paid, not in tax year at issue in which it was awarded	Yes	Split
Zardo v. Comm'r, T.C. Memo. 2011-7	Unreported pension plan disability retirement benefits and unreported Social Security disability benefits	Yes	IRS
Business Taxpayers (Corporations, Partnerships, Trusts, and Sole Proprietorships – Schedules C, E, F)			
Brown v. Comm'r, T.C. Summ. Op. 2010-97	Unreported and unexplained deposits in a bank account with commingled business and personal funds	Yes	IRS
Cole v. Comm'r, 637 F.3d 767 (7th Cir. 2011), *aff'g* T.C. Memo. 2010-31	Unreported business income	Yes	IRS
Energy Research & Generation, Inc. v. Comm'r, T.C. Memo. 2011-45	Unreported income	No	IRS
Fishman v. Comm'r, T.C. Memo. 2011-102	Unreported income from reimbursement of business expenses	No	TP
Garrison v. Comm'r, T.C. Memo. 2010-261	Unreported real estate transaction income	Yes	IRS
Hammond v. Comm'r, T.C. Summ. Op. 2011-26	Underreported gross receipts and unreported interest income	Yes	IRS
Holt v. Comm'r, T.C. Summ. Op. 2010-92	Underreported income	Yes	IRS
Jarman v. Comm'r, T.C. Memo. 2010-285	Unreported gross receipts, interest income, and state tax refund	Yes	IRS
Knutsen-Rowell, Inc. v. Comm'r, T.C. Memo. 2011-65	Unreported dividend income	No	IRS
MacGregor v. Comm'r, T.C. Memo. 2010-187, *appeal docketed*, No. 11-70693 (9th Cir. Mar. 7, 2011)	Settlement proceeds under IRC § 104(a)(2), unreported capital gains, and other unreported income	Yes	Split
O'Boyle v. Comm'r, T.C. Memo. 2010-149, *appeal docketed*, No. 11-11897 (11th Cir. Apr. 25, 2011)	Unreported capital gains income, income from the sale of real property, and compensation for services	Yes	IRS
Oglesby v. Comm'r, T.C. Memo. 2011-93	Unreported cancellation of debt income	Yes	IRS

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Table 5: Gross Income Under IRC § 61 and Related Sections

Case Citation	Issue(s)	*Pro Se*	Decision
R.V.J. Cezar Corp., Inc. v. Comm'r, T.C. Memo. 2010-173	Unreported constructive dividends	No	IRS
Tax Practice Management, Inc. v. Comm'r, T.C. Memo. 2010-266	Unreported constructive dividends	No	IRS
Weekend Warrior Trailers, Inc. v. Comm'r, T.C. Memo. 2011-105	Unreported interest and constructive dividend income	No	IRS

Table 6 Accuracy-Related Penalty Under IRC § 6662(B)(1) and (2)

Case Citation	Issue(s)	*Pro Se*	Decision
Individual Taxpayers (But Not Sole Proprietorships)			
Abiog v. Comm'r, T.C. Summ. Op. 2010-166	6662(b)(1) & (2) - TP, a nonresident alien, acted in good faith and reasonably relied upon advice of a competent tax return preparer.	No	TP
Alexander v. Comm'r, T.C. Summ. Op. 2011-48	6662(b)(1) - TP failed to properly substantiate disallowed items or to show reasonable cause and good faith.	No	IRS
Anyika v. Comm'r, T.C. Memo. 2011-69	6662(b)(1) & (2) - TPs' (H&W) reliance on tax return preparation software not reasonable.	Yes	IRS
Au v. Comm'r, T.C. Memo. 2010-247	6662(b)(1) & (2) - TPs' (H&W) reliance on tax return preparation software to claim fictitious deductions not reasonable.	Yes	IRS
Bosque v. Comm'r, T.C. Memo. 2011-79	6662(b)(1) - TP not entitled to claimed deductions related to his rental properties	Yes	IRS
Brown v. Comm'r, T.C. Memo. 2011-83, *appeal docketed*, No. 11-2508 (7th Cir. June 30, 2011)	6662(b)(2) - TP husband substantially understated gross income by failing to claim recognized gain under termination of his life insurance. TPs failed to show neither reasonable cause nor good faith for the understatement.	No	IRS
Cadwell v. Comm'r, 136 T.C. 38 (2011)	6662(b)(1) & (2) - TP substantially understated income by failing to report any wages, or the value of life insurance policy.	No	IRS
Calloway v. Comm'r, 135 T.C. 26 (2010)	6662(b)(1) - TPs did not show their delay in filing was due to reasonable cause and not willful neglect, nor did they show reasonable reliance upon a competent professional adviser.	No	IRS
De Werff v. Comm'r, T.C. Summ. Op. 2011-29	6662(b)(1) - TP failed to show that adviser was competent, that she provided adviser with necessary information, or that she relied in good faith on such advice to take the deductions at issue.	Yes	IRS
Dunn v. Comm'r, T.C. Memo. 2010-198	6662(b)(1) -TP failed to show that he reasonably relied on tax advice regarding disallowed airplane rental and non-rental expenses.	No	IRS
Etchinson v. Comm'r, T.C. Summ. Op. 2011-30	6662(b)(1) - TP failed to show reasonable cause or that she acted in good faith regarding disallowed deductions and filing status, nor did she make any attempt to recreate or substantiate her allegedly stolen records.	Yes	IRS
Gundanna v. Comm'r, 136 T.C. No. 8 (2011)	6662(b)(1) & (2) - TP failed to substantiate a charitable contribution deduction.	No	IRS
Hammond v. Comm'r, T.C. Summ. Op. 2011-26	6662(b)(1) - TP husband filed false and fraudulent return for 2004 and is thus liable for the fraud penalty under section 6663; alternative argument regarding section 6662(a) not addressed.	Yes	TP
Hamper v. Comm'r, T.C. Summ. Op. 2011-17	6662(b)(1) - TP not entitled to deduct personal expenses.	Yes	IRS
Hartman v. Comm'r, T.C. Summ. Op. 2010-164	6662(b)(1) - Though TP did not present adequate substantiating records to support business-related expenses at trial, 6662 penalty was rejected given TPs' claim they had previously supplied documents to an IRS agent who IRS never called at trial.	Yes	TP
Jarman v. Comm'r, T.C. Memo. 2010-285	6662(b)(1) - TPs (H&W) failed to report income and maintain records to substantiate disallowed deductions.	Yes	IRS
Kaufman v. Comm'r, 136 T.C. No. 13 (2011)	6662(b)(1) &(2) - TPs (H&W) were liable for penalty under 6662(b)(1) only as to claimed deductions for cash contributions, but acted in good faith with respect to their claimed contribution of a façade easement.	No	Split
Lumaban v. Comm'r, T.C. Summ. Op. 2010-169	6662 - TP, a nonresident alien, reasonably relied upon advice of a competent tax return preparer and acted in good faith.	No	TP
Madsen v. Comm'r, T.C. Summ. Op. 2010-151	6662(b)(1) - TP acted with reasonable cause and in good faith with respect to the portion of the underpayment attributable to her meal and expense rate travel expenses, but was negligent and had no reasonable cause to report disallowed deductions, labeled 'incidental.'	Yes	Split
Malazarte v. Comm'r, T.C. Summ. Op. 2010-168	6662(b)(1) - TP, a nonresident alien, reasonably relied upon advice of a competent tax return preparer and acted in good faith.	No	TP

Table 6: Accuracy-Related Penalty Under IRC § 6662(B)(1) and (2)

Case Citation	Issue(s)	*Pro Se*	Decision
Moss v. Comm'r, 135 T.C. 365 (2010)	6662(b)(2) - TPs (H&W) failed to show they acted with reasonable cause and in good faith in deducting passive activity losses.	Yes	IRS
Norwood v. Comm'r, T.C. Summ. Op. 2011-27	6662(b)(1) - TP failed to report nonemployee compensation as income.	Yes	IRS
Pagarigan v. Comm'r, T.C. Summ. Op. 2010-167	6662(b)(1) - TP, a nonresident alien, reasonably relied upon advice of a competent tax return preparer and acted in good faith.	No	TP
Parker v. Comm'r, T.C. Summ. Op. 2010-78	6662(b)(2) - TP failed to report any self-employment tax on 2005 and 2006 returns. TP's reliance on tax return preparation software did not show reasonable cause or that he acted in good faith.	Yes	IRS
Parsley v. Comm'r, T.C. Summ. Op. 2011-35	6662(b)(1) & (2) - TPs' (H&W) experience and knowledge as real estate agents suggests that they knew or should have known the basis on which they computed their gain from the sale of property was inflated.	Yes	IRS
Rolfs v. Comm'r, 135 T.C. 471 (2010)	6662(b)(1) & (2) - TPs' (H&W) deduction for charitable contribution of a house to their local volunteer fire department was disallowed, but they were not liable for accuracy-related penalty as they acted with reasonable cause and in good faith based on a qualified appraisal of the value.	No	TP
Savary v. Comm'r, T.C. Summ. Op. 2010-150	6662(b)(1) - Comm'r failed to meet burden of production with regards to whether portions of income earned by U.S. citizen residing in France were underreported.	No	TP
Scroggins v. Comm'r, T.C. Memo. 2011-103	6662(b)(1) - TPs (H&W) not entitled to claimed travel deductions.	No	IRS
Stenslet v. Comm'r, T.C. Summ. Op. 2010-127	6662(b)(1) - TPs (H&W) reasonably relied upon a tax preparer to prepare their returns.	Yes	TP
Stewart v. Comm'r, T.C. Memo. 2010-184	6662(b)(1) - TP acted in good faith or with reasonable cause in regards to bad debt and legal expense deductions, but did not have a good faith or reasonable cause defense with regards to unsubstantiated theft losses, travel, and automobile expenses.	Yes	Split
Stroff v. Comm'r, T.C. Memo. 2011-80	6662(b)(1) - TP entitled to deductions for casual labor expenses and accuracy-related penalty was unwarranted, but penalty was warranted with respect to other disallowed deductions.	Yes	Split
Ucol-Cobaria v. Comm'r, T.C. Summ. Op. 2010-162	6662(b)(1) - TP, a nonresident alien, reasonably relied upon advice of a competent tax return preparer and acted in good faith.	No	TP
Viralam v. Comm'r, 136 T.C. No. 8 (2011)	6662(b)(1) - TP failed to substantiate a charitable contribution deduction and failed to include long-term capital gain from the sale of stocks in gross income.	No	IRS
Wadsworth v. Comm'r, 400 Fed. Appx. 289 (9th Cir. 2011), *aff'g* T.C. Memo. 2008-171	6662(b)(1) - TPs ignored advice of longtime tax preparer and introduced no evidence at trial to explain why they disregarded the advice.	No	IRS
Whitaker v. Comm'r, T.C. Memo. 2010-209	6662(b)(2) - TP failed to substantiate her Sch. C gross receipts, Sch. C deductions, long-term capital gain, & Sch. E rental expenses; pending final calculation of understatement, TP liable for penalty.	No	IRS
Winter v. Comm'r, T.C. Memo. 2010-287	6662(b)(1) - Comm'r failed to meet burden of production.	No	TP
Zhu v. Comm'r, T.C. Summ. Op. 2010-67	6662(b)(1) - TP was allowed to deduct some gambling losses, but was negligent in overstating gambling losses and not reporting capital gain.	Yes	IRS
Business Taxpayers (Corporations, Partnerships, Trusts, and Sole Proprietorships – Schedules C, E, F)			
106 Ltd. v. Comm'r, 136 T.C. 67 (2011), *appeal docketed*, No. 11-60342 (5th Cir. May 20, 2011)	6662(b)(1) - TP failed to show good faith or reasonable cause for entering into a Son-of-BOSS transaction.	No	IRS
Adams v. Comm'r, T.C. Summ. Op. 2010-134	6662(b)(1) - TPs (H&W) claimed personal expenses as business expenses and failed to maintain records to substantiate deductions.	Yes	IRS
Bemont Invs., LLC v. U.S., 106 A.F.T.R.2d (RIA) 5542 (E.D. Tex. 2010)	6662(b)(1) - Negligence penalties were applicable with regards to transactions that had no economic benefit and lacked economic substance; TP Partnership did not show reasonable cause or good faith, but statute of limitations had run on 2001 tax year.	No	Split
Canal Corp. v. Comm'r, 135 T.C. 199 (2010), *appeal docketed*, No. 10-2253 (4th Cir. Oct. 29, 2010)	6662(b)(1) - TP failed to report gain and unreasonably relied on opinion of tax advisor with a conflict of interest.	No	IRS
Fid. Int'l Currency Advisor A Fund, LLC v. U.S., 747 F. Supp. 2d 49 (D. Mass. 2010)	6222(b)(1) & (2) - TPs entered into complex tax shelter transactions to avoid large tax liabilities on the sale of stock.	No	IRS

Table 6: Accuracy-Related Penalty Under IRC § 6662(B)(1) and (2)

Case Citation	Issue(s)	*Pro Se*	Decision
Hafeez v. Comm'r, T.C. Summ. Op. 2010-109	6662(b)(1) - TP was entitled to some of the disallowed items, but failed to show reasonable cause or that he acted in good faith on advice from his preparer.	Yes	IRS
Historic Boardwalk Hall, LLC v. Comm'r, 136 T.C. 1 (2011), *appeal docketed*, (3rd Cir. Mar. 29, 2011)	6662(b)(1) - Respondent's determinations in FPAA were incorrect, accuracy-related penalties were thus inapplicable.	No	TP
Karkour v. Comm'r, T.C. Memo. 2010-124	6662(b)(1) & (2) - TP failed to substantiate deductions or provide evidence at trial to prove reasonable cause or good faith.	Yes	IRS
Klebanoff v. Comm'r, T.C. Summ. Op. 2011-46	6662 (b)(1) & (2) - TP satisfied the reasonable cause exception, TP consulted with tax professionals who advised her to file an amended partnership return.	No	TP
Moore v. Comm'r, T.C. Summ. Op. 2011-51	6662(b)(1) & (2) - TP failed to substantiate personal and duplicate deductions on his Sch. C-1 & C-2; reliance on computer program was not reasonable cause.	Yes	IRS
Mulcahy, Pauritsch, Salvador & Co. v. Comm'r, T.C. Memo. 2011-74, *appeal docketed*, No. 11-2105 (7th Cir. May 9, 2011)	6662(b)(2) - TP not entitled to claimed deductions.	No	IRS
NPR Invs., LLC v. U.S., 732 F. Supp. 2d 676 (E.D. Tex. 2010)	6662(b)(1) & (2) - TPs acted reasonably in relying on tax advisor.	No	TP
Sada v. Comm'r, T.C. Summ. Op. 2010-146	6662(b)(1) - TPs (H&W) failed to maintain and produce adequate records to substantiate deductions and failed to show they acted with reasonable cause or good faith.	Yes	IRS
Sakkis v. Comm'r, T.C. Memo. 2010-256	6662(b)(1) - TPs (H&W) disregarded advice of long-time competent tax preparer and relied on advice of a shyster, eliminating good faith reliance defense.	No	IRS
Shokeh v. Comm'r, T.C. Summ. Op. 2010-71	6662(b)(1) - TP claimed inflated Sch. C expenses for a fictitious consulting business and failed to show reasonable cause or good faith.	Yes	IRS
Stobie Creek Invs. LLC v. U.S., 608 F.3d 1366 (Fed. Cir. 2010), *aff'g* 82 Fed. Cl. 636 (Fed. Cl. 2008)	6662(b)(1) - TPs did not act with reasonable cause or in good faith regarding underpayments resulting from sham transactions to conceal gain.	No	IRS
Tax Practice Mgmt. v. Comm'r, T.C. Memo. 2010-266	6662(b)(1) - TP failed to show reasonable cause, substantial authority, or any other basis for reducing the penalties for underpayment.	No	IRS
Weekend Warrior Trailers, Inc. v. Comm'r, T.C. Memo. 2011-105	6662(b)(2) - TP not entitled to claimed business deductions.	No	IRS

Appendix Three

Table 7 Civil Actions to Enforce Federal Tax Liens or to Subject Property to Payment of Tax Under IRC § 7403

Case Citation	Issue(s)	*Pro Se*	Decision
Individual Taxpayers (But Not Sole Proprietorships)			
Ameriquest Mortgage Co. v. Savalle, 107 A.F.T.R.2d (RIA) 416 (E.D. Mich. 2011)	Federal tax liens foreclosed against TP's jointly owned real property.	No	IRS
Anderson, U.S. v., 106 A.F.T.R.2d (RIA) 7356 (W.D.N.Y. 2010)	Foreclosure of federal tax liens against the TP's interest in jointly owned real property denied; material factual dispute existed whether the government would be prejudiced and whether the joint tenant (wife) would be harmed.	No	TP
Barr, U.S. v., 617 F.3d 370 (6th Cir. 2010), *aff'g* 102 A.F.T.R.2d (RIA) 6078 (E.D. Mich. 2008), *reh'g en banc denied*, 106 A.F.T.R.2d (RIA) 6893 (6th Cir. 2010), *cert. denied*, 131 S. Ct. 1678 (2011)	Federal tax liens foreclosed against TP's jointly owned real property.	No	IRS
Benice, U.S. v., 106 A.F.T.R.2d (RIA) 6485 (C.D. Cal. 2010)	Federal tax liens valid and foreclosed against TP's real property and property held by TP's nominee.	Yes	IRS
Benoit, U.S. v., 107 A.F.T.R.2d (RIA) 1056 (S.D. Cal. 2010), *reconsideration denied by* 107 A.F.T.R.2d (RIA) 2577 (S.D. Cal. 2011), *appeal dismissed* (9th Cir. Oct. 19, 2011)	Federal tax liens valid and foreclosed against TP's real property.	Yes	IRS
Black, U.S. v., 725 F. Supp. 2d 1279 (E.D. Wash. 2010), *motion to dismiss denied by* 106 A.F.T.R.2d (RIA) 5320 (E.D. Wash. 2010), *appeal docketed* (9th Cir. Oct. 6, 2011)	Federal tax liens valid and foreclosed against TPs' (H&W) property and property held by TPs' nominees.	Yes	IRS
Bowser, U.S. v., 107 A.F.T.R.2d (RIA) 1240 (E.D. Va. 2011)	Federal tax lien foreclosed against TP's property held as joint tenants in the entirety with wife.	No	IRS
Brown, U.S. v., 107 A.F.T.R.2d (RIA) 392 (E.D. Tex. 2010), *adopted by* 107 A.F.T.R.2d (RIA) 398 (E.D. Tex. 2011)	Federal tax lien foreclosed against TPs' (H&W) real property.	Yes	IRS
Buaiz, U.S. v., 106 A.F.T.R.2d (RIA) 6168 (E.D. Tenn. 2010), *motion to dismiss denied by* 108 A.F.T.R.2d (RIA) 5856 (E.D. Tenn. 2011)	Federal tax lien valid against TP's property and property held by TP's nominee; foreclosure denied pending further briefing.	Yes	Split
Burnett, U.S. v., 106 A.F.T.R.2d (RIA) 6699 (S.D. Tex. 2010), *appeal docketed* (5th Cir. Dec. 22, 2010)	Federal tax lien foreclosed against TP's property held by nominee.	No	IRS
Campbell, U.S. v., 106 A.F.T.R.2d (RIA) 6488 (C.D. Cal. 2010)	Federal tax liens valid and foreclosed against 100% of real property owned by TPs (H&W), despite H's transfer of 80% of the property to his four siblings at a time when the IRS had not refiled its Notice of Federal Tax Lien because there was no consideration for the transfer.	Yes	IRS
Case, U.S. v., 106 A.F.T.R.2d (RIA) 6421 (N.D.N.Y. 2010), *adopted by* 106 A.F.T.R.2d (RIA) 6473 (N.D.N.Y. 2010), *appeal docketed* (2nd Cir. Oct. 25, 2011)	Default judgment against TP; federal tax liens valid and foreclosed against TP's property.	Yes	IRS
Christiansen, U.S. v., 107 A.F.T.R.2d (RIA) 840 (11th Cir. 2011) (per curiam), *aff'g* 107 A.F.T.R.2d (RIA) 937 (M.D. Fla. 2010)	Foreclosure of federal tax liens against TP's real property affirmed.	Yes	IRS
D'Andrea, U.S. v., 106 A.F.T.R.2d (RIA) 6456 (D. Colo. 2010), *adopting* 106 A.F.T.R.2d (RIA) 6446 (D. Colo. 2010)	Federal tax lien valid and foreclosed against property transferred by TP (deceased) to plaintiff.	Yes	IRS
DuBarry, U.S. v., 107 A.F.T.R.2d (RIA) 1632 (N.D. Fla. 2011), *adopting* 107 A.F.T.R.2d (RIA) 1625 (N.D. Fla. 2011) *appeal dismissed* (11th Cir. Sept. 22, 2011)	Federal tax liens foreclosed against TP's real property.	Yes	IRS
Elsberg, U.S. v., 106 A.F.T.R.2d (RIA) 7240 (D. Colo. 2010), *adopting* 106 A.F.T.R.2d (RIA) 7236 (D. Colo. 2010)	Default judgment against TPs (H&W); federal tax liens valid and foreclosed against TPs' real property.	Yes	IRS
Felt, U.S. v., 107 A.F.T.R.2d (RIA) 2239 (D. Utah 2011)	Federal tax liens valid and foreclosed against TP's real property held by nominee.	Yes	IRS

Table 7: Civil Actions to Enforce Federal Tax Liens or to Subject Property to Payment of Tax Under IRC § 7403

Case Citation	Issue(s)	*Pro Se*	Decision
Flaherty, U.S. v., 106 A.F.T.R.2d (RIA) 6873 (D. Haw. 2010), *judgment entered by* 2010 U.S. Dist. LEXIS 125158 (D. Haw. 2010)	Federal tax liens valid and foreclosed against TP's real property.	Yes	IRS
Gallina, U.S. v., 107 A.F.T.R.2d (RIA) 1326 (E.D.N.Y. 2011), *adopting* 107 A.F.T.R.2d (RIA) 1469 (E.D.N.Y. 2010)	Federal tax liens valid and foreclosed against TPs' (H&W) real property.	Yes	IRS
Gavett, U.S. v., 107 A.F.T.R.2d (RIA) 2171 (D.N.J. 2011)	Federal tax liens foreclosed against TPs' (H&W) real property despite transfer of deed to his children after the filing of the lien.	Yes	IRS
J. P. Morgan Chase Bank, N.A., U.S. v., 107 A.F.T.R.2d (RIA) 1516 (E.D.N.Y. 2011), *adopting* 107 A.F.T.R.2d (RIA) 1841 (E.D.N.Y. 2010)	Federal tax lien valid and foreclosed against decedent TP's real property.	No	IRS
Johnson, U.S. v., 107 A.F.T.R.2d (RIA) 2330 (E.D. Mo. 2011)	Federal tax liens valid and foreclosed against TPs' (H&W) real property.	No	IRS
Jones, U.S. v., 107 A.F.T.R.2d (RIA) 499 (N.D. Cal. 2011)	Federal tax lien foreclosed against the TP's one-half interest in real property transferred to ex-wife in divorce for taxes accrued prior to transfer.	No	IRS
Lockard, U.S. v., 106 A.F.T.R.2d (RIA) 6971 (E.D. Mich. 2010)	Federal tax lien foreclosed against TPs' (H&W) real property.	No	IRS
Lupi, U.S. v., 105 A.F.T.R.2d (RIA) 2806 (M.D. Fla. 2010)	Federal tax liens valid and foreclosed against TP's property held in trust by TP's nominee.	Yes	IRS
McKenzie, U.S. v., 108 A.F.T.R.2d (RIA) 5516 (S.D. Iowa 2011), *appeal docketed* (8th Cir. Sept. 23, 2011)	Federal tax liens foreclosed against property held by TP's nominees; TP's transfers of property to trust and family members were fraudulent.	No	IRS
Morgan, U.S. v., 419 Fed. Appx. 958 (11th Cir. 2011) (per curiam), *aff'g* 105 A.F.T.R.2d (RIA) 442 (M.D. Fla. 2010)	Affirmed lower court's decision to foreclose federal tax liens against TPs' (H&W) real property held by nominee.	Yes	IRS
Niamatali, U.S. v., 389 Fed. Appx. 334 (5th Cir. 2010) (per curiam), *aff'g* 07-00108 (S.D. Tex. 2009)	Affirmed lower court's decision to foreclose federal tax liens against TP's real property.	Yes	IRS
OMOA Wireless, S. de R. L. v. U.S., 106 A.F.T.R.2d (RIA) 5810 (M.D.N.C. 2010)	Federal tax liens foreclosed against property held by TP's nominees.	No	IRS
Palmer, U.S. v., 106 A.F.T.R.2d (RIA) 6297 (D. Utah 2010)	Federal tax liens valid and foreclosed against TPs' real property.	No	IRS
Porath, U.S. v., 764 F. Supp. 2d 883 (E.D. Mich. 2011), *appeal docketed* (6th Cir. Apr. 1, 2011), *appeal dismissed* (6th Cir. April 22, 2011), *appeal reinstated* (6th Cir. May 3, 2011)	Federal tax lien on TP's one-half interest in home valid and foreclosure of liens delayed so long as TP and W live in home.	No	IRS
Register, U.S. v., 717 F. Supp. 2d 517 (E.D. Va. 2010)	Federal tax liens foreclosed against TP's jointly owned real property.	No	IRS
Sebastian, U.S. v., 106 A.F.T.R.2d (RIA) 5160 (M.D. Pa. 2010)	Federal tax liens valid and foreclosed against TPs' (H&W) real property.	Yes	IRS
Stuler, U.S. v., 396 Fed. Appx. 798 (3d Cir. 2010) (per curiam), *dismissing appeal from* 105 A.F.T.R.2d (RIA) 764 (W.D. Pa. 2010)	Dismissed appeal of federal tax lien foreclosure for lack of arguable basis in law or fact.	Yes	IRS
Wheeler, U.S. v., 403 Fed. Appx. 301 (9th Cir. 2010) *aff'g* 07-06384 (C.D. Ca. 2008)	Affirmed lower court's decision to foreclose federal tax liens against property held by TP's nominee.	No	IRS
Winsper, U.S. v., 106 A.F.T.R.2d (RIA) 6437 (W.D. Ky. 2010), *appeal docketed* (6th Cir. Dec. 27, 2010)	Federal tax liens on TP's real property valid, but foreclosure denied for lack of information regarding property's value, method of distribution of proceeds of foreclosure sale, amount due to other creditors.	No	Split
Winsper, U.S. v., 106 A.F.T.R.2d (RIA) 6945 (W.D. Ky. 2010)	Foreclosure of federal tax liens on marital property not appropriate; wife of TP would be unduly harmed by forced sale of property.	No	TP
Zimmerman, U.S. v., 107 A.F.T.R.2d (RIA) 1887 (E.D. Pa. 2011), *order entered by* 2011 WL 1483349 (E.D. Pa. 2011), *motion for relief from judgment and to vacate sale filed* (E.D. Pa. Nov. 3, 2011)	Federal tax liens valid and foreclosed against TPs' (H&W) real property and property held in trust by TPs' nominee.	Yes	IRS

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Table 7: Civil Actions to Enforce Federal Tax Liens or to Subject Property to Payment of Tax Under IRC § 7403

Case Citation	Issue(s)	*Pro Se*	Decision
Business Taxpayers (Corporations, Partnerships, Trusts, and Sole Proprietorships - Schedules C, E, F)			
Eckhardt v. U.S., 2010 U.S. Dist. LEXIS 142176 (S.D. Fla. 2010)	Federal tax lien valid and foreclosed against corporation and H's portion of marital property, as the corporation's alter ego; federal tax lien against W's portion of marital property is invalid.	No	Split
Electro-Cut Forging Die Co., U.S. v., 106 A.F.T.R.2d (RIA) 5602 (N.D. Ohio 2010), *adopted by* 106 A.F.T.R.2d (RIA) 5606 (2010)	Federal tax liens valid and foreclosed against TP's real property.	No	IRS
Lee, U.S. v., 107 A.F.T.R.2d (RIA) 1774 (N.D. Cal. 2011)	Federal tax liens foreclosed against TP's real property.	No	IRS
Martin, U.S. v., 107 A.F.T.R.2d (RIA) 1795 (N.D. W. Va. 2011)	Federal tax liens valid but not foreclosed against TP's real property because issue of material fact remained as to whether the federal liens holds superiority over other interests.	Yes	IRS
Neal, U.S. v., 391 Fed. Appx. 569 (8th Cir. 2010) (per curiam), *aff'g* 103 A.F.T.R.2d (RIA) 643 (W.D. Ark. 2008)	Affirmed lower court's decision to foreclose federal tax liens against TP's real and personal property held by nominee.	Yes	IRS
Philadelphia Housing Authority v. STA Painting Co., Inc., 106 A.F.T.R.2d (RIA) 7406 (E.D. Pa. 2010)	Valid federal tax lien foreclosed against funds due to TP from PHA; TP may not direct allocation of funds	No	IRS
Steeley, U.S., 106 A.F.T.R.2d (RIA) 5581 (N.D. Fla. 2010)	Federal tax liens valid and foreclosed against TP's property.	No	IRS
Vacante, U.S. v., 106 A.F.T.R.2d (RIA) 6415 (N.D. Cal. 2010)	Federal tax liens valid and foreclosed against TPs' (H&W) real property.	Yes	TP
Wesselman, U.S. v., 406 Fed. Appx. 64 (7th Cir. 2011), *aff'g* 105 A.F.T.R.2d (RIA) 2021 (S.D. Ill. 2010)	Affirmed lower court's decision to foreclose federal tax liens against TP's real property held by nominee.	Yes	IRS
Zurn, U.S. v., 107 A.F.T.R. 2d (RIA) 2127 (9th Cir. 2011), *aff'g* 103 A.F.T.R.2d (RIA) 939 (C.D. Cal. 2009)	Affirmed lower court's decision to foreclose federal tax liens against TP's property.	No	IRS

Table 8 Relief from Joint and Several Liability Under IRC § 6015

Case Citation	Issue(s)	*Pro Se*	Intervenor	Decision
Argyle v. Comm'r, T.C. Summ. Op. 2010-129	6015(f) (underpayment); claim made after the two year rule of Treas. Reg. 1.6015-5(b)(1)	Yes	No	IRS
Bland v. Comm'r, T.C. Memo 2011-8	6015(f) (underpayment); claim made after the two year rule of Treas. Reg. 1.6015-5(b)(1)	Yes	No	IRS
Brady v. Comm'r, T.C. Summ. Op. 2010-107	No joint return	Yes	No	IRS
Cody v. Comm'r, T.C. Summ. Op. 2011-49	6015(f) (underpayment)	No	Yes	TP
Collis v. Comm'r, T.C. Summ. Op. 2010-91	6015(b), (c), (f) (understatement)	Yes	No	Split
Conyers v. Comm'r, T.C. Summ. Op. 2011-25	6015(b), (c), (f) (understatement)	Yes	No	IRS
Crouse v. Comm'r, T.C. Memo. 2011-97	6015(b), (c), (f) (understatement)	Yes	No	Split
Daye v. Comm'r, T.C. Summ. Op. 2010-103	6015(f) (underpayment)	Yes	Yes	IRS
Downs v. Comm'r, T.C. Memo. 2010-165	6015(f) (underpayment)	No	Yes	TP*
Drayer v. Comm'r, T.C. Memo. 2010-257	6015(f) (underpayment)	No	No	TP
Dulaney v. Comm'r, T.C. Summ. Op. 2011-38	6015(b), (c) (understatement)	Yes	Yes	TP
Dykes v. Comm'r, T.C. Summ. Op. 2010-85	6015(b), (c), (f) (understatement)	Yes	No	IRS
Evans v. Comm'r, T.C. Memo. 2010-199, *appeal docketed*, No.10-73745 (9th Cir. Dec. 8, 2010)	6015(b),(c), (f) (understatement)	No	No	IRS
Gilbert v. Comm'r, 107 A.F.T.R. 2d (RIA) 2062 (9th Cir. 2011), *affirming* T.C. Docket No. 9996-04 (July 7, 2005)	6015(f) (underpayment)	Yes	No	IRS
Haag v. Comm'r, T.C. Memo. 2011-87, *appeal docketed*, No. 11-1979 (1st Cir. Aug. 19, 2011)	6015(g) prior proceedings bar relief	No	No	IRS
Hall v. Comm'r, 135 T.C. 374, *appeal docketed*, No. 10-2628 (6th Cir. Dec. 14, 2010)	6015(f) (underpayment); IRS conceded that relief would be appropriate but for the two year rule of Treas. Reg. 1.6015-5(b)(1)	No	No	TP
Harper v. Comm'r, T.C. Summ. Op. 2010-153	6015(f) (underpayment); claim made after the two year rule of Treas. Reg. 1.6015-5(b)(1)	Yes	No	TP
Hayes v. Comm'r, T.C. Summ. Op. 2010-121	6015(b), (c), (f) (understatement)	Yes	Yes	Split
Jones v. Comm'r, 642 F.3d 439 (4th Cir. 2011) *rev'g and remanding* T.C. Docket No. 17359-08 (May 28, 2010)	6015(f) (underpayment); Treas. Reg. 1.6015-5(b)(1) application of a two-year rule to claims for relief under section 6015(f) is a valid interpretation of section 6015(f).	No	No	IRS
Kelly v. Comm'r, T.C. Memo. 2010-267	6015(f) (underpayment); claim made after the two year rule of Treas. Reg. 1.6015-5(b)(1)	No	No	IRS
Knight v. Comm'r, T.C. Memo. 2010-242	6015(c) (understatement)	Yes	Yes	TP*
Kruse v. Comm'r, T.C. Memo. 2010-270	6015(b), (c), (f) (understatement)	Yes	No	IRS
Lantz v. Comm'r, 607 F.3d 479 (7th Cir. 2010), *rev'g and remanding* 132 T. C. 131 (2009)	6015 (f) (underpayment); Treas. Reg. 1.6015-5(b)(1) application of a two-year rule to claims for relief under section 6015(f) is a valid interpretation of section 6015(f).	No	No	IRS+
Mannella v. Comm'r, 631 F.3d 115 (3d Cir. 2011), *rev'g and remanding* 132 T.C. 196 (2009)	6015(f) (underpayment); Treas. Reg. 1.6015-5(b)(1) application of a two-year rule to claims for relief under section 6015(f) is a valid interpretation of section 6015(f).	No	No	IRS
Maudi v. Comm'r, T.C. Summ. Op. 2011-57	6015(f) (understatement); claim made after the two year rule of Treas. Reg. 1.6015-5(b)(1)	No	No	TP
McGhee v. Comm'r, T.C. Memo. 2010-259	6015(f) (underpayment)	No	No	IRS
Milhouse v. Comm'r, T.C. Summ. Op. 2011-12	6015(c) (understatement)	Yes	Yes	TP

*The IRS agreed that the TP was entitled to relief; only the intervenor was opposed.
+ The case was also included in last year's report.

Appendix Three

Appendix Three

Table 8: Relief from Joint and Several Liability Under IRC § 6015

Case Citation	Issue(s)	*Pro Se*	Intervenor	Decision
Mullins v. Comm'r, T.C. Summ. Op. 2010-108	6015(b), (c), (f) (understatement)	Yes	Yes	IRS
Nicoletti v. Comm'r, T.C. Summ. Op. 2010-93	6015(f) (underpayment)	Yes	No	IRS
Olivera v. Comm'r, T.C. Summ. Op. 2010-119	6015 (b), (c), (f) (understatement, underpayment)	Yes	No	Split
Pinsky, U.S. v., 107 A.F.T.R.2d (RIA) 1597 (D.N.J. Mar. 31, 2011)	District Court willing to consider 6015 claim in collection suit, but raised too late in proceedings	No	No	IRS
Pugsley v. Comm'r, T.C. Memo. 2010-255	6015 (f) (underpayment)	No	No	IRS
Pullins v. Comm'r, 136 T.C. No. 20 (2011)	6015(f) (underpayment); claim made after the two year rule of Treas. Reg. 1.6015-5(b)(1)	No	No	TP
Riganti v. Comm'r, T.C. Summ. Op. 2010-113	6015(f) (underpayment)	Yes	No	IRS
Schultz v. Comm'r, T.C. Memo. 2010-233	6015(f) (understatement)	No	No	Split
Simcox v. Comm'r, T.C. Summ. Op. 2010-101	6015(f) (underpayment); petition not timely	No	No	IRS
Smith v. Comm'r, T.C. Memo. 2010-240, *appeal docketed*, No.11-9003 (10th Cir. Feb. 8, 2011)	6015(b), (c), (f) (understatement)	Yes	No	IRS
Smolen v. Comm'r, T.C. Summ. Op. 2010-106	6015(f) (underpayment)	No	No	IRS
Sommer, Estate of v. Comm'r, T.C. Summ. Op. 2010-177	6015(f) (underpayment)	No	No	IRS
Stephenson v. Comm'r, T.C. Memo. 2011-16	6015(f) (underpayment); claim made after the two year rule of Treas. Reg. 1.6015-5(b)(1)	Yes	No	TP
Taylor v. Comm'r, 107 A.F.T.R. 2d (RIA) 1361 (9th Cir. 2011), *affirming* T.C. Memo. 2008-193	6015(b), (c), (f) (understatement)	Yes	No	IRS
Terrell v. Comm'r, 625 F.3d 254 (5th Cir. 2011), *rev'g and remanding* T. C. Docket No. 15894-07 (July 30, 2009)	Undelivered notice of determination did not begin 90-day period for petitioning Tax Court.	No	No	TP
Thomassen v. Comm'r, T.C. Memo. 2011-88	6015(b), (c), (f) (understatement)	No	No	Split
Wilson v. Comm'r, T.C. Memo. 2010-134, *appeal docketed* No.10-72754 (9th Cir. Sept. 10, 2010)	6015(f) (underpayment)	No	No	TP
Withers v. Comm'r, T.C. Summ. Op. 2010-73	6015(f) (underpayment)	Yes	No	TP

*The IRS agreed that the TP was entitled to relief; only the intervenor was opposed.
+ The case was also included in last year's report.

Table 9 Frivolous Issues Penalty Under IRC § 6673 and Related Appellate-Level Sanctions

Case Citation	Issue(s)	*Pro Se*	Decision	
Individual Taxpayers (But not Sole Proprietorships)				
Anyika v. Comm'r, T.C. Memo. 2011-69	Taxpayers (H&W) petitioned for redetermination of deficiency and penalties and argued taxpayer (H) was a real estate professional	Yes	TP	
Buckardt v. Comm'r, T.C. Memo. 2010-145	Taxpayer petitioned for redetermination of deficiency and argued his pension and annuity income are excluded from taxation, and that an assessment must precede a notice of deficiency	Yes	TP	
Burchfield v. Comm'r, T.C. Memo. 2011-30	Taxpayers (H&W) petitioned for redetermination of deficiency and additions to tax and argued that only income earned from the federally licensed corporations and dividends are taxable; the word income does not include the earnings of employees of the private sector; they are residents of the "several States"; income tax can only be collected through the states; the court may only set the rate of tax; the IRS cannot issue a deficiency notice without making an assessment; and their Form 1040 must be accepted because it is not frivolous on its face	Yes	IRS	$5,000
Callahan v. Comm'r, T.C. Memo. 2010-201	Taxpayer petitioned for redetermination of deficiency and additions to tax and argued that he is a citizen of the "Republic of Wisconsin," not the State of Wisconsin or the United States, and therefore not liable for federal taxes; the Form 1099-MISC reflecting his compensation is not signed under penalties of perjury; and that the Tax Court may not use other Tax Court cases as precedent	Yes	IRS	$3,000
Cook v. Comm'r, T.C. Memo. 2010-137	Taxpayer petitioned for redetermination of deficiency and additions to tax and made arguments common to followers of the Robert Clarkson- Patriot Network, which promotes tax avoidance; that the IRS relied on hearsay; that third party reports of his income are not authenticated or certified; that he believed that he had no tax liabilities; that he received no Forms W-2; and that he had no recollection of his earnings or IRA distribution	Yes	TP	
Covington v. Comm'r, T.C. Memo. 2011-32	Taxpayer petitioned for review of IRS decision to collect via levy and asserted frivolous arguments that the abbreviation of his middle name on the notice of deficiency made it invalid; that he had never been to the Virgin Islands; and that he was not an American citizen	Yes	IRS	$5,000
Ernle v. Comm'r, T.C. Memo. 2010-237	Taxpayer petitioned for redetermination of deficiency and failed to abide by the Court's Rules and to stipulate all relevant matters; refused to testify; and delayed court proceedings by filing unnecessary motions and making unnecessary objections	Yes	IRS	$4,000
Fennel v. Comm'r, T.C. Summ. Op. 2011-19	Taxpayer petitioned for redetermination of deficiency and argued that his income was from a private corporation with no connection to the United States government	Yes	IRS	$2,250
Goff v. Comm'r, 135 T.C. 231 (2010)	Taxpayer petitioned for review of decision to proceed with collection and argued her debt had been paid by a bonded promissory note; refused to enter into a stipulation of facts; disobeyed the court's order to submit a pretrial memorandum; and submitted claim that the court was a for-profit corporation	Yes	IRS	$15,000
Holmes v. Comm'r, T.C. Memo. 2011-31	Taxpayer petitioned for redetermination of deficiency and argued that his income is not taxable and that payment of federal income tax is voluntary	Yes	IRS	$75,000
Hyde v. Comm'r, T.C. Memo. 2011-104	Taxpayer petitioned for redetermination of deficiency and argued that the notice of deficiency did not conform to the Paperwork Reduction Act; that she is not liable for federal income tax because the tax laws are incomprehensible to her; and that the substitute for return created by the IRS is not valid because she did not authorize it	Yes	IRS	$3,000
Jensen v. Comm'r, T.C. Memo. 2010-143	Taxpayer petitioned for redetermination of deficiency and additions to tax and asserted frivolous arguments	Yes	TP	

Table 9: Frivolous Issues Penalty Under IRC § 6673 and Related Appellate-Level Sanctions

Case Citation	Issue(s)	*Pro Se*	Decision	Amount
Kubon v. Comm'r, T.C. Memo. 2011-41, *appeal docketed*, No. 11-71592 (9th Cir. May 16, 2011)	Taxpayers (H&W) petitioned for review of IRS decision to collect via levy and asserted frivolous arguments and consistently refused to participate in collection due process hearings	Yes	IRS	$20,000
Kuechenmeister v. Comm'r, T.C. Summ. Op. 2010-161	Taxpayer petitioned for review of IRS decision to collect via levy and asserted frivolous arguments	Yes	TP	
Laszloffy v. Comm'r, T.C. Memo. 2010-258	Taxpayer petitioned for redetermination of deficiency, additions to tax, and penalties and argued that federal law does not apply to him, he is not a federal taxpayer, and federal income tax payments are voluntary	Yes	IRS	$2,500
Mathews v. Comm'r, T.C. Memo. 2010-226	Taxpayer petitioned for redetermination of deficiency and additions to tax and asserted frivolous arguments, including that garnishment of his military retirement pay allowed him to exclude it from gross income	Yes	IRS	$500
Mattina v. Comm'r, T.C. Memo. 2010-127, *appeal docketed*, No. 10-73032 (9th Cir. Sept. 27, 2010)	Taxpayer petitioned for review of IRS decision to collect via levy and asserted frivolous arguments including that the notice of deficiency was invalid because it did not say that the IRS had audited a return	Yes	IRS	$5,000
McLaurine v. Comm'r, T.C. Memo. 2010-236	Taxpayer petitioned for redetermination of deficiency and argued he was a citizen of the State of Alabama and not a United States citizen and therefore his income is from a foreign source and not taxable	Yes	IRS	$1,000
Mooney v. Comm'r, T.C. Memo. 2011-35	Taxpayer petitioned for redetermination of deficiency and additions to tax and argued that he lives in the Commonwealth of Virginia and works for a private corporation and is not subject to income tax	Yes	IRS	$2,000
Wheeler v. Comm'r, T.C. Memo. 2010-188	Taxpayer petitioned for redetermination of deficiency and additions to tax and asserted frivolous arguments	Yes	IRS	$25,000
Wnuck v. Comm'r, 136 T.C. No. 24 (2011)	Taxpayer petitioned for a redetermination of deficiency and argued wages not subject to income tax	Yes	IRS	$1,000 in bench opinion, $5,000 when TP asked for reconsideration
Business Taxpayers (Corporations, Partnerships, Trusts, and Sole Proprietorships – Schedules C, E, F)				
Christine v. Comm'r, T.C. Memo. 2010-144	Taxpayers (H&W) petitioned for redetermination of deficiency	Yes	TP	
O'Boyle v. Comm'r, T.C. Memo. 2010-149, *appeal docketed*, No. 11-11897 (11th Cir. Apr. 25, 2011)	Taxpayers (H&W) petitioned for redetermination of deficiency and additions to tax and asserted frivolous arguments	Yes	IRS	$45,000
Pace v. Comm'r, T.C. Memo. 2010-272	Taxpayer petitioned for redetermination of deficiency, additions to tax, and penalties and vigorously contested the Commissioner's determination	Yes	TP	
Tinnerman v. Comm'r, T.C. Memo. 2010-150, *appeal docketed* (D.C. Cir. Oct. 12, 2010)	Taxpayer petitioned for review of decision to proceed with collection and asserted frivolous arguments and refused to cooperate with stipulation of facts process	No	IRS	$25,000
Section 6673 Penalty Not Requested or Imposed but Taxpayer Warned To Stop Asserting Frivolous Arguments				
Forrest v. Comm'r, T.C. Memo. 2010-263	Taxpayer petitioned for redetermination of deficiency and additions to tax and delayed court proceedings	Yes		
Forrest v. Comm'r, T.C. Memo. 2011-4	Taxpayer petitioned for redetermination of deficiency and delayed court proceedings	Yes		
Glover v. Comm'r, T.C. Memo. 2010-228	Taxpayer petitioned for redetermination of deficiency and additions to income tax and argued that he transferred the income to a trust and therefore it was trust income rather than individual income	Yes		
Gregoline v. Comm'r, T.C. Summ. Op. 2010-112	Taxpayer petitioned for redetermination of deficiency and argued that his income is not taxable under the Constitution	Yes		
Grunsted v. Comm'r, 136 T.C. No. 21 (2011)	Taxpayer petitioned for review of decision to proceed with collection and asserted frivolous arguments, including that wages are not taxable	Yes		
Jeanmarie v. Comm'r, T.C. Memo. 2010-281	Taxpayers (H&W) petitioned for redetermination of deficiency and delayed court proceedings by filing unnecessary motions	Yes		
Lowery v. Comm'r, T.C. Memo. 2010-167	Taxpayer petitioned for redetermination of deficiency and asserted that her income did not come from a trade or business specifically enumerated in the IRC	Yes		

Table 9: Frivolous Issues Penalty Under IRC § 6673 and Related Appellate-Level Sanctions

Case Citation	Issue(s)	*Pro Se*	Decision	Amount
Oman v. Comm'r, T.C. Memo. 2010-276	Taxpayer petitioned for redetermination of deficiency and additions to tax and argued his wages were an exchange of property for property	Yes		
Smith v. Comm'r, T.C. Memo. 2010-240, *appeal docketed* (10th Cir. Feb. 1, 2011)	Taxpayers (H&W) petitioned for redetermination of deficiency, additions to tax, and penalties, and delayed court proceedings	Yes		
Sullivan v. Comm'r, T.C. Memo. 2010-138	Taxpayer petitioned for redetermination of deficiency and asserted frivolous arguments, including that the amounts in the notice of deficiency were from illegal immigrants using the taxpayer's social security number	Yes		
Zigmont v. Comm'r, T.C. Memo. 2010-253	Taxpayer petitioned for review of decision to proceed with collection and assessment of penalties and asserted frivolous arguments	Yes		
US Courts of Appeals' Decisions on Appeal of Section 6673 Penalties Imposed by US Tax Court				
Antolick v. Comm'r, 107 A.F.T.R.2d (RIA) 1768 (11th Cir. 2011), *aff'g* Tax Ct. No. 21635-08L	Penalty affirmed	Yes	IRS	$500
Avery v. Comm'r, 399 Fed. Appx. 195 (9th Cir. 2010), *aff'g* Tax Ct. No. 17315-05	Penalty affirmed	No	IRS	$5,000
Deems v. Comm'r, 107 A.F.T.R.2d (RIA) 2274 (11th Cir. 2011), *aff'g* Tax Ct. No. 1273-09L	Penalty affirmed	Yes	IRS	$1,000
Miller-Wagenknecht v. Comm'r, 385 Fed. Appx. 230 (3rd Cir.2010), *aff'g* Tax Ct. No. 11219-07	Penalty affirmed	Yes	IRS	$1,000
Oropeza v. Comm'r, 402 Fed. Appx. 221 (9th Cir. 2010), *aff'g* T.C. Memo. 2008-94	Penalty affirmed	Yes	IRS	$10,000
Thomason v. Comm'r, 401 Fed. Appx. 921 (5th Cir. 2010), *aff'g* Tax Ct. No. 21182-08	Penalty affirmed	Yes	IRS	$2,000
White v. Comm', 385 Fed. Appx. 95 (3rd Cir. 2010), *aff'g* Tax Ct. No. 7101-09L	Penalty affirmed	Yes	IRS	$10,000
U.S. Courts of Appeals' Decisions on Sanctions Under Section 7482 (c)(4), FRAP Rule 38, or Other Authority				
Walbaum v. Comm'r, 387 Fed. Appx. 668 (8th Cir. 2010), *cert. denied*, 131 S. Ct. 1056 (2011)	Taxpayer appealed Tax Court decision dismissing his petition for redetermination of deficiency and asserted frivolous arguments	Yes	IRS	$5,000

Appendix Three

Table 10 Charitable Deductions Under IRC § 170

Case Citation	Issue(s)	*Pro Se*	Decision
Individual Taxpayers (But Not Sole Proprietorships)			
Ahmadian v. Comm'r, T.C. Summ. Op. 2010-126	TP failed to establish donee organization qualifies as a charitable organization under § 170	No	IRS
Bell v. Comm'r, T.C. Summ. Op. 2011-54	Substantiation	Yes	Split
De Werff v. Comm'r, T.C. Summ. Op. 2011-29	Substantiation	Yes	IRS
Evans v. Comm'r, T.C. Memo. 2010-207	Valuation of easement	No	IRS
Fessey v. Comm'r, T.C. Memo. 2010-191	Substantiation	Yes	IRS
Freedman v. Comm'r, T.C. Memo. 2010-155	Substantiation	Yes	IRS
Hendrix v. United States, 106 A.F.T.R.2d (RIA) 5373 (S.D. Ohio 2010)	Substantiation	No	IRS
Hollingsworth v. Comm'r, T.C. Memo. 2010-262	Substantiation	Yes	IRS
Igberaese v. Comm'r, T.C. Memo. 2010-284	Substantiation	Yes	IRS
Kaufman v. Comm'r, 136 T.C. No. 13 (2010)	TP's donated facade easement was not protected in perpetuity pursuant to 26 C.F.R. § 1.170A-14(g)(6). Cash payments were not deductible in 2003, but were deductible in 2004.	No	Split
Lang v. Comm'r, T.C. Memo 2010-152	Substantiation	Yes	IRS
Murphy v. Comm'r, T.C. Memo. 2010-264	Substantiation	Yes	IRS
Roberts v. Comm'r, T.C. Summ. Op. 2010-76	Substantiation	Yes	IRS
Rolfs v. Comm'r, 135 T.C. 471 (2010)	TP received a substantial benefit in exchange for donation; failed to show value of the property donated exceeded value of the benefit received	No	IRS
Scheidelman v. Comm'r, T.C. Memo. 2010-151	TP failed to establish fair market value of donated property required under 26 C.F.R. § 1.170A-13(c)	No	Split
Schrimsher v. Comm'r, T.C. Memo 2011-71	Substantiation	No	IRS
Smith v. Comm'r, T.C. Memo. 2010-162	Substantiation	Yes	IRS
Towell v. Comm'r, T.C. Summ. Op. 2010-141	Substantiation	Yes	IRS
Viralam v. Comm'r, 136 T.C. No. 8 (2011)	TP not entitled to deduction because retained dominion and control over stocks transferred to charitable foundation; Substantiation	NO	IRS
Williams v. Comm'r, T.C. Summ. Op. 2010-86	Substantiation	Yes	IRS
Williams v. Comm'r, T.C. Memo 2011-89	TP was entitled to charitable deductions for his basis in donated artwork, not entitled to deduct excess.	No	IRS
Business Taxpayers (Corporations, Partnerships, Trusts, and Sole Proprietorships – Schedules C, E, F)			
1982 East, LLC v. Comm'r, T.C. Memo. 2011-84	Donated property not a qualified conservation contribution because it failed to meet the requirements of § 170(h)(4) and (5).	No	IRS
Boltar, LLC v. Comm'r, 136 T.C. No. 14 (2011)	Valuation of easement	No	IRS
Ognibene v. Comm'r, T.C. Summ. Op. 2010-131	Substantiation	Yes	IRS
Saunders v. Comm'r, T.C. Summ. Op. 2010-138	Substantiation	No	IRS
Trout Ranch, LLC v. Comm'r, T.C. Memo 2010-283, *appeal docketed*, No. 11-9006 (10th Cir. Mar. 21, 2011)	Valuation of easement	No	Split
Whitehouse Hotel LP v. Comm'r, 615 F.3d 321 (5th Cir. 2010)	Valuation of easement	No	Split

Acronym Glossary — Annual Report to Congress 2011

Acronym	Definition
AARS	Appeals Account Resolution Specialist
ABA	American Bar Association
ACDS	Appeals Centralized Database System
ACH	Automated Clearinghouse
ACM	Appeals Case Memoranda
ACS	Automated Collection System
ACSS	Automated Collection System Support
ACTC	Additional Child Tax Credit or Advance Child Tax Credit
ADA	Americans With Disabilities Act
ADR	Alternative Dispute Resolution or Address Research System
AGI	Adjusted Gross Income
AIA	Anti-Injunction Act
AICPA	American Institute of Certified Public Accountants
AIS	Automated Insolvency System
AJCA	American Jobs Creation Act of 2004
AIMS	Audit Information Management System
ALE	Allowable Living Expenses
ALS	Automated Lien System
AM	Accounts Management
AMS	Accounts Management System
AMT	Alternative Minimum Tax
AMTAP	Accounts Management Taxpayer Assurance Program
ANMF	Automated Non Master File
AQR	Automated Questionable Refund
ANPR	Advance Notice of Proposed Rulemaking
AO/SO	Appeals or Settlement Officer
AOIC	Automated Offer In Compromise
APA	American Payroll Association or Administrative Procedure Act
APS	Appeals Processing Service
AQC	Automated Questionable Credits
AQMS	Appeals Quality Management System
ARAP	Accelerated Revenue Assurance Program
ARC	Annual Report to Congress
ARRA	America Recovery and Reinvestment Act
ASA	Average Speed of Answer
ASED	Assessment Statute Expiration Date
ASFR	Automated Substitute for Return
ATAO	Application for Taxpayer Assistance Order
ATFRS	Automated Trust Fund Recovery System

Acronym	Definition
ATIN	Adoption Taxpayer Identification Number
ATP	Abusive Transaction Program
AUR	Automated Underreporter
AWSS	Agency Wide Shared Services
BIR	Bureau of Internal Revenue
BMF	Business Master File
BOSS	Bond and Option Sales Strategy
BNA	Bureau of National Affairs
BPR	Business Performance Review
BRTF	Business Returns Transaction File
BTA	Board of Tax Appeals
CADE2	Customer Account Data Engine 2
CAF	Centralized Authorization File
CAP	CAWR Automated Program
CARE	Customer Assistance, Relationships & Education
CAS	Customer Account Services
CAWR	Combined Annual Wage Reporting
CBO	Congressional Budget Office
CBPP	Center on Budget & Policy Priorities
CBRS	Currency & Banking Retrieval System
CC	Chief Counsel (Office of)
CCB	Check Claims Branch
CCISO	Cincinatti Campus Innocent Spouse Operations
CCP	Centralized Case Processing
CDP	Collection Due Process
CDPTS	Collection Due Process Tracking System
CDE	Compliance Data Environment
CDW	Compliance Data Warehouse
CEAS	Correspondence Examination Automation Support
CFf	Collection Field Function
CFIF	Check Forgery Insurance Fund
CI	Criminal Investigation (Division)
CIP	Compliance Initiative Project
CIQMS	Complex Interest Quality Management System
CIS	Correspondence Imaging System
CLD	Communications, Liaison and Disclosure
CNC	Currently Not Collectible
COBRA	Consolidated Omnibus Budget Reconciliation Act
CODI	Cancellation Of Debt Income

Appendix Four

Acronym	Definition
COIC	Centralized Offer In Compromise
COTR	Contract Officer Technical Representative
CONOPS	Concept of Operations
CPE	Continuing Professional Education
CPS	Collection Process Study
CQMS	Collection Quality Management System
CRIS	Compliance Research Information System
CSCO	Compliance Services Collection Operations
CSED	Collection Statute Expiration Date
CSI	Campus Specialization Initiative
CSR	Customer Service Representative
CTC	Child Tax Credit
DA	Disclosure Authorization
DAC	Disability Access Credit
DART	Disaster Assistance Review Team
DATC	Doubt As To Collectibility
DATL	Doubt As To Liability
DCIA	Debt Collection Improvement Act (of 1996)
DCCP	Debit and Credit Card Payment
DD	Direct Deposit
DDb	Dependent Data Base
DDIA	Direct Deposit Installment Agreement
DDP	Daily Delinquency Penalty
DFO	Designated Federal Official
DI	Desktop Integration or Debt Indicator
DIF	Discriminant Income Function
DJA	Declaratory Judgment Act
DLN	Document Locator Number
DMF	Death Master File
DOD	Department of Defense
DOJ	Department of Justice
DoMA	Defense of Marriage Act
EA	Enrolled Agent
EAJA	Equal Access to Justice Act
EAR	Electronic Account Resolution
EBE	Employee Business Expense
EBT	Electronic Benefits Transfer
ECS	Enterprise Collections Strategy
EGTRRA	Economic Growth and Tax Relief Reconciliation Act (of 2001)
EFDS	Electronic Fraud Detection Center
EFTPS	Electronic Federal Tax Payment System

Acronym	Definition
EFW	Electronic Funds Withdrawal
EIC	Earned Income Credit
EIN	Employer Identification Number
EITC	Earned Income Tax Credit
ELMS	Enterprise Learning Management System
ELS	Electronic Lodgment Service
ERIS	Enforcement Revenue Information System
EO	Exempt Organization
EP	Employee Plans
EQRS	Embedded Quality Review System
ERIS	Enforcement Revenue Information System
ERO	Electronic Return Originator
ERISA	Employee Retirement Income Security Act
ERSA	Employee Retirement Savings Account
ES	Estimated Tax Payments
ESA	Economic Stimulus Act
ESL	English as a Second Language
ESOP	Employee Stock Ownership Plan
ESP	Economic Stimulus Payment
ETA	Effective Tax Administration
ETAAC	Electronic Tax Administration Advisory Committee
ETARC	Electronic Tax Administration and Refundable Credits
ETLA	Electronic Tax Law Assistance
FA	Field Assistance
FAFSA	Free Application for Financial Student Aid
FATCA	Foreign Account Tax Compliance Act
FBAR	Foreign Bank Account Report
FBU	Federal Benefits Unit
FCR	Federal Case Registry
FCRA	Fair Credit Reporting Act
FDCPA	Fair Debt Collection Practices Act
FDIC	Federal Deposit Insurance Corporation
FEIE	Foreign Earned Income Exclusion
FEMA	Federal Emergency Management Agency
FICA	Federal Insurance Contribution Act
FMV	Fair Market Value
FMS	Financial Management Service
FOIA	Freedom Of Information Act
FPAA	Final Partnership Administrative Adjustment
FPLP	Federal Payment Levy Program
FRA	Federal Records Act

Acronym	Definition
FLSA	Fair Labor Standards Act
FSRP	Facilitated Self-Assistance Research Project
FTA	First-Time Abatement or Forum on Tax Administration
FTC	Federal Trade Commission or Foreign Tax Credit
FTD	Federal Tax Deposit or Failure To Deposit
FTE	Full Time Equivalent
FTF	Failure To File
FTHBC	First-Time Homebuyer Credit
FTI	Federal Tax Information
FTL	Federal Tax Lien
FTP	Failure To Pay
FTS	Fast Track Settlement
FUTA	Federal Unemployment Tax
FY	Fiscal Year
GCCF	Gulf Coast Claims Facility
GCI	Geographic Coverage Initiative
GCM	General Counsel Memorandum
GLD	Governmental Liaison and Disclosure
GE	Government Entities
GAO	Government Accountability Office or General Accounting Office
HCTC	Health Coverage Tax Credit
HERA	Housing and Economic Recovery Act
IA	Installment Agreement
IAT	Integrated Automation Technology
ICAS	Internet Customer Account Services
ICP	Integrated Case Processing
ICS	Integrated Collection System
IDAP	IDRS Decision Assisting Program
IRDM	Information Reporting and Document Matching
IDFP	IRS Directory for Practitioners
IDRS	Integrated Data Retrieval System
IDS	Inventory Delivery System
IMD	Internal Management Document
IMF	Individual Master File
IMRS	Issue Management Resolution System
IPM	Integrated Production Model
IPOC	International Planning and Operations Council
IP PIN	Identity Protection Personal Identification Number
IPSU	Identity Protection Specialized Unit
IRB	Internal Revenue Bulletin
IRC	Internal Revenue Code

Acronym	Definition
IRM	Internal Revenue Manual
IRMF	Information Returns Master File
IRP	Information Returns Processing
IRPTR	Information Returns Processing Transcript Requests
IRS	Internal Revenue Service
IRSAC	Internal Revenue Service Advisory Council
IRSN	Internal Revenue Service Number
ITAAG	Identity Theft Assessment and Action Group
ITAR	Identity Theft Assistance Request
ITIN	Individual Taxpayer Identification Number
JCT	Joint Committee on Taxation
JGTRA	Jobs and Growth Tax Relief Reconciliation Act (of 2003)
JOC	Joint Operations Center
LB&I	Large Business and International Operating Division
LCCI	Last Chance Compliance Initiative
LCTU	Large Corporation Technical Unit
LEM	Law Enforcement Manual
LEP	Limited English Proficiency
LIF	Low Income Filter
LIHTC	Low Income Housing Tax Credit
LILO	Lease-In Lease-Out
LITC	Low Income Taxpayer Clinic
LLC	Limited Liability Company
LLP	Limited Liability Partnership
LOS	Level of Service
LP	Limited Partnership
LSB	Language Services Branch
LTA	Local Taxpayer Advocate
M&P	Media and Publications
MAGI	Modified Adjusted Gross Income
MFDRA	Mortgage Forgiveness Debt Relief Act
MFT	Master File Tax
MIRSA	My IRS Account Application
MITS	Modernization and Information Technology Services
MLI	Multilingual Initiative or Most Litigated Issue
MWP	Making Work Pay Credit
NAEA	National Association of Enrolled Agents
NCOA	National Change of Address
NFTL	Notice of Federal Tax Lien
NMF	Non-Master File
NOD	Notice of Deficiency

Appendix Four

Acronym	Definition
NPS	National Print Site
NQRS	National Quality Review System
NRP	National Research Program
NTA	National Taxpayer Advocate
OAR	Operations Assistance Request
OBRA	Omnibus Budget Reconciliation Act (of 1990)
OD	Operating Division
OIC	Offer in Compromise
OECD	Organisation for Economic Co-Operation and Development
OMB	Office of Management and Budget
OMM	Operation Mass Mail
OPERA	Office of Program Evaluation, Research, & Analysis
OPI	Office of Penalty and Interest Administration or Over the Phone Interpreter
OSI	Office of Servicewide Interest
OPR	Office of Professional Responsibilitly
OSP	Office of Servicewide Penalties
OTA	Office of Tax Analysis
OTBR	Office of Taxpayer Burden Reduction
OTP	Office of Tax Policy
OUO	Official Use Only
OVC	Office for Victims of Crime
OVCI	Offshore Voluntary Compliance Initiative
OVDP	Offshore Voluntary Disclosure Program
OWI	Office of War Information
PCA	Private Collection Agency
PCAOB	Public Company Accounting Oversight Board
PCI	Potentially Collectible Inventory
PDC	Private Debt Collection
PFA	Pre-Filing Agreement
PGLD	Privacy, Governmental Liaison and Disclosure (Office of)
PIC	Primary Issue Code
PNI	Potential New Inventory
PLR	Private Letter Ruling
POA	Power Of Attorney
POP	Phone Optimization Project
PPA	Pension Protection Act (of 2006)
PPACA	Patient Protection and Affordable Care Act
PPIA	Partial Payment Installment Agreement
PPS	Practitioner Priority Service
PRA	Paperwork Reduction Act

Acronym	Definition
PRP	Problem Resolution Program
PRWORA	Personal Responsibility and Work Opportunity Reconciliation Act (of 1996)
PSC	Philadelphia Service Center
PREA	Premature Referral and Acceptance
PTIN	Preparer Tax Identification Number
PY	Processing Year
QBU	Qualified Business Unit
QETP	Questionable Employment Tax Practices
QRP	Questionable Refund Program
RA	Revenue Agent
RAC	Refund Anticipation Check
RAL	Refund Anticipation Loan
RCA	Reasonable Cause Assistant
RCP	Reasonable Collection Potential
RGS	Report Generating Software
RICS	Return Integrity and Correspondence Services
RO	Revenue Officer
ROFT	Record of Federal Tax Liability
ROI	Return on Investment
ROTERS	Records of Tax Enforcement Results
RPS	Revenue Protection Strategy
RRA 98	(Internal Revenue Service) Restructuring and Reform Act of 1998
RPC	Return Preparer Coordinator
RPS	Revenue Protection Strategy
RPP	Return Preparer Program
RRP	Return Review Program
RSED	Refund Statute Expiration Date
SAMS	Systemic Advocacy Management System
SAR	Strategic Assessment Report
SARP	State Audit Report Program
SBA	Small Business Administration
SBDC	Small Business Development Center
SB/SE	Small Business/Self-Employed Operating Division
SBJPA	Small Business Job Protection Act
SEC	Securities and Exchange Commission
SEP	Special Enforcement Program
SERP	Servicewide Electronic Research Program
SFR	Substitute for Return
SL	Stakeholder Liaison
SLA	Service Level Agreement

Acronym	Definition
SNOD	Statutory Notice of Deficiency
SO	Settlement Officer
SOI	Statistics of Income
SP	Submission Processing
SPC	Submission Processing Center(s)
SPDER	Office of Servicewide Policy, Directives, and Electronic Research
SPEC	Stakeholder Partnerships, Education & Communication
SPOC	Single Point of Contact
SSA	Social Security Administration
SSI	Supplemental Security Income
SSN	Social Security Number
STC	Student Tax Clinic
STO	Student Tuition Organization
SVC	Stored Value Card
TAB	Taxpayer Assistance Blueprint
TAC	Taxpayer Assistance Center
TACT	Taxpayer Communications Taskgroup
TAD	Taxpayer Advocate Directive
TAMIS	Taxpayer Advocate Management Information System
TAMRA	Technical and Miscellaneous Revenue Act (of 1988)
TANF	Temporary Assistance to Needy Families
TAO	Taxpayer Assistance Order
TAP	Taxpayer Advocacy Panel
TAS	Taxpayer Advocate Service
TASIS	Tazxpayer Advocate Service Integrated System
TBOR	Taxpayer Bill of Rights
TC	Transaction Code
TCE	Tax Counseling for the Elderly
TDA	Taxpayer Delinquent Account
TDRA	Tip Rate Determination Agreement
TDI	Taxpayer Delinquent Investigation
TE	Tax Examiner or Tax Exempt
TEFRA	Tax Equity and Fiscal Responsibility Act (of 1982)
TEC	Taxpayer Education and Communication
TE/GE	Tax Exempt & Government Entities Operating Division

Acronym	Definition
TEFRA	Tax Equity and Fiscal Responsibility Act
TEI	Tax Executives Institute
TFP	Tax Forms & Publications
TFRP	Trust Fund Recovery Penalty
TIGTA	Treasury Inspector General for Tax Administration
TIN	Taxpayer Identification Number
TIPRA	Tax Increase Prevention and Reconciliation Act (of 2005)
TOP	Treasury Offset Program
TOS	Terms of Service
TPNC	Taxpayer Notice Code
TPP	Third Party Payer
TPPA	Third Party Payroll Agent
TRA	Tax Reform Act
TRHCA	Tax Relief and Health Care Act (of 2006)
TTB	(Alcohol and Tobacco) Tax and Trade Bureau
TY	Tax Year
UAA	Undeliverable As Addressed
UAL	Uniform Acknowledgement Letter
UCR	Uniform Call Routing
UDOC	Uniform Definition of a Child
UPU	Universal Postal Union
URF	Unidentified Remittances File
URP	Underreporter
USPS	United States Postal Service
USPTO	United States Patent and Trademark Office
UWR	Uniform Work Request
VAT	Value Added Tax
VITA	Volunteer Income Tax Assistance
VSD	Virtual Service Delivery
VTO	Virtual Translation Office
W & I	Wage and Investment Operating Division
WFTRA	Working Families Tax Relief Act
WO	Whistleblower Office
XSF	Excess Collection File
XSFTG	Excess Collection File Task Group

Appendix Five

Taxpayer Advocate Service Directory

HEADQUARTERS

National Taxpayer Advocate
1111 Constitution Avenue NW
Room 3031, TA
Washington, DC 20224
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Deputy National Taxpayer Advocate
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Room 3219, TA:SA
Washington, DC 20224
Phone: 202-622-7175
FAX: 202-622-3125

Executive Director, Case Advocacy
1111 Constitution Avenue NW
Room 3213, TA:CA
Washington, DC 20224
Phone: 202-622-0755
FAX: 202-622-4646

Congressional Affairs Liaisons
1111 Constitution Avenue NW
Room 3031, TA
Washington, DC 20224
Phone: 202-622-4321 or 202-622-4315
FAX: 202-622-6113

Systemic Advocacy Directors

Director, Immediate Interventions and Advocacy Projects
1111 Constitution Avenue NW
Room 3219, TA:SA:AP/II
Washington, DC 20224
Phone: 202-622-7175
FAX: 202-622-3125

Director, Systemic Advocacy Systems
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Washington, DC 20224
Phone: 202-622-7175
FAX: 202-622-3125

Director, Advocacy Implementation and Evaluation
1111 Constitution Avenue NW
Room 3219, TA:SA:AIE
Washington, DC 20224
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FAX: 202-622-3125

AREA OFFICES

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FAX: 212-298-2016

Richmond
400 N. 8th Street, Room 328
Richmond, VA 23219
Phone: 804-916-3510
FAX: 804-916-3641

Atlanta
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Dallas, TX 75244
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Appendix Five

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California (San Jose)*
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San Jose, CA 95113
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Denver, CO 80202
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Hartford, CT 06103
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