AGOSTINO & ASSOCIATES

August 2018

Monthly Journal of Tax Controversy

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NON-TRADITIONAL USES OF OFFERS IN COMPROMISE DURING TAX CONTROVERSIES

By Frank Agostino, Esq. and Valerie Vlasenko, Esq.[1]

In 2017, taxpayers proposed 62,000 offers in compromise to settle existing tax liabilities for less than the amount allegedly owed. The Internal Revenue Service ("IRS") accepted 25,000 offers, amounting to almost $256 million.[2] The offer in compromise program not only provides an efficient means of collecting outstanding liabilities, but also brings taxpayers into compliance for at least five years after their offers have been accepted. For taxpayers, the program provides a path towards paying off their tax debt and getting a fresh start.

An offer in compromise is typically considered when "payments of assessed liabilities are demanded, penalties for delinquency in filing returns are asserted, or specific civil or criminal penalties are incurred by taxpayers."[3] Doubt as to collectibility, however, may also exist during examinations and in cases before the United States Tax Court ("Tax Court") and can form the basis for an offer in compromise. Whether the case is in the examination, litigation, or the collection stage, the logical solution is to resolve the case quickly to avoid unnecessary costs.[4] A fair compromise where there is evidence of little or no collection potential can create a win-win situation for the IRS and the taxpayer.

The procedures for compromises of cases under examination and before the Tax Court are not widely publicized. This article aims to bring awareness to: 1) the goals of the IRS and its offer in compromise program; 2) the factors considered by the IRS in making determinations with respect to offers based on doubt as to collectibility and effective tax administration; 3) how to submit offers during examinations; and 4) the funda-

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mentals of submitting offers based on collectibility while in litigation before the Tax Court.

I. The Offer in Compromise Program

The IRS is granted broad authority to compromise tax liabilities in civil and criminal cases prior to referral to the Department of Justice ("DoJ") by I.R.C. § 7122.[5] It is well established that where an account receivable cannot be collected in full or there is a dispute regarding what is owed, it is accepted business practice to resolve collection and liability issues through compromise.[6] The goal is "achieve collection of what is potentially collectible at the earliest possible time and at the least cost to the Government"[7] and to reach a compromise that suits the best interest of both the taxpayer and the IRS.[8]

Congress has encouraged the IRS to be "flexible in finding ways to work with taxpayers who are sincerely trying to meet their obligations and remain in the tax system,"[9] and to adopt a liberal acceptance policy for offers in compromise to provide an incentive for taxpayers to continue to file tax returns and continue to pay their taxes[10]. Such direction is consistent with research showing that fair treatment of taxpayer by the IRS encourages voluntary compliance with tax laws[11] and the IRS mission to "provide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and by applying the tax law with integrity and fairness to all."[12]

Congress has instructed the IRS to also "take into account factors such as equity, hardship, and public policy where a compromise of an individual taxpayer's income tax liability would promote effective tax administration." Offers based on effective tax administration require a showing of either economic hardship or compelling public policy or other equitable grounds.[13] Further, Congress has directed the IRS "to resolve longstanding cases by forgoing penalties and interest which have accumulated as a result of delay in determining the taxpayer's liability."[14]

The IRS Examination function ('Examination") generally has jurisdiction over offers based on doubt as to liability[15] and provides the IRS Collection function ("Collection") with recommendations on offers based on effective tax administration with public policy or equity issues upon request.[16] Collection processes and investigates all offers based on: 1) doubt as to collectibility; 2) effective tax administration; and 3) doubt as to liability for either a trust fund recovery penalty or personal liability excise tax assessment.[17] In certain circumstances, the Office of Appeals has jurisdiction to consider offers.[18] While consideration of each offer depends on the facts and circumstances, all offers are subject to the basic requirements and principles set forth in Section II below.

II. Submitting an Offer Based on Doubt as to Collectibility or Effective Tax Administration

A taxpayer wishing to participate in the offer in compromise program must submit an offer in writing, signed by the taxpayer under penalty of perjury, which contains all the information prescribed or requested by the Secretary.[19] The IRS requires that the taxpayer use Form 656-B, *Offer in Compromise*, and, if applicable, pay a filing fee.[20] Offers other than doubt as to liability must also include a completed Form 433-A, *Collection Information Statement for Wage Earners & Self-Employed Individuals*, and/or Form 433-B, *Collection Information Statement for Businesses.*[21] The standard terms of the forms may not be altered,[22] and the offer must include "all liabilities to be covered by the compromise, the legal grounds for compromise, the amount the taxpayer proposed to pay, and the payment terms" (the amounts and due dates of payments).[23]

To be eligible for a compromise based on doubt as to collectibility or effective tax administration the taxpayer must be current with his or her filing obligations. Prior to 2017, taxpayers were given a brief window of time to file any delinquent returns. However, any missing returns will now render the taxpayer ineligible for the program. Where the taxpayer has not fully complied with his or her filing obligations, the taxpayer's application fee will be returned, but any initial payments will be applied to the outstanding tax liability. An offer rejected based on noncompliance may not be appealed.[24]

The offer is effective for the entire assessed liability for tax, penalties, and interest for the years or periods covered by the offer. Like closing agreements, all questions of tax liability for the years or periods covered by the agreement are conclusively settled.[25] Neither the taxpayer nor the government can reopen a compromised tax year or period unless the offer included false information, the ability to pay or assets were concealed, or a mutual mistake of a material fact is discovered that would cause the agreement to be set aside or reformed, even if the taxpayer defaults.[26]

Once the offer is pending, the statute of limitations on assessment and collection is suspended. The taxpayer must continue to timely file returns and make all required tax payment. Failure to meet filing and payment responsibilities during consideration of the offer will cause the offer to be returned without appeal rights.[27] During this time, the IRS may credit any overpayments made by the taxpayer against the liability that is the subject of the offer.

The obligation to timely file all required tax returns and pay all required tax continues after the offer is accepted.[28] If the taxpayer fails to timely file and pay any tax obligations within the five years of the offer being accepted the offer may be

defaulted. A taxpayer in default is liable for the original tax debt, less any payments made, and all accrued interest and penalties.[29]

III. Doubt as to Collectibility

"Doubt as to collectibility exists in any case where the taxpayer's assets and income are less than the full amount of the tax liability."[30] "An offer to compromise based on doubt as to collectibility generally will be considered acceptable if it is unlikely that the tax can be collected in full and the offer reasonably reflects the amount the IRS could collect through other means, including administrative and judicial collection remedies."[31] An offer will not be accepted if the IRS believes the liability can be paid in full in a lump sum or through a payment agreement unless special circumstances exist.[32]

Generally, the doubt as to collectibility offer amount must equal or exceed the taxpayer's reasonable collection potential ("RCP") to be acceptable.[33] The RCP is based on the taxpayer's: 1) assets, such as real property, vehicles, personal assets, and bank accounts; 2) anticipated future income less certain living expenses; 3) amounts collectible from third parties, and 4) assets and/or income available but beyond the reach of the government.[34]

The taxpayer may submit a lump-sum or a periodic payment offer.[35] The lump-sum offer is defined as an offer made in five or fewer installments. If the taxpayer makes a lump sum cash offer, the initial payment must equal twenty percent of the offered amount.[36] Period payment offers should include twenty-four monthly installments. The first payment of a periodic payment offer must be included with Form 656.[37] Failure to make an installment may be treated as a withdrawal of the offer.[38]

When drafting the offer, the goal is to make an adequate proposal consistent with the taxpayer's ability to pay.[39] In most cases, offers exceeding reasonable collection potential will be accepted.[40] However, even offers exceeding collection potential may be rejected based on public policy considerations if acceptance of the offer in any way may be detrimental to the interest of fair tax administration.[41]

IV. Effective Tax Administration[42]

"An offer may be accepted based on effective tax administration when there's no doubt that the tax is legally owed and that the full amount owed can be collected but requiring payment in full would either create an economic hardship or would be unfair and inequitable because of exceptional circumstances."[43] Such offers are accepted if they do not undermine compliance with the tax laws and collection of the full liability will be detrimental to voluntary compliance.[44]

Factors that support a finding that the compromise would not undermine compliance with the tax laws include: 1) the taxpayer's history of compliance with the filing and payment requirements; 2) the taxpayer has not taken deliberate actions to avoid the payment of taxes; and 3) the taxpayer has not encouraged others to refuse to comply with tax laws.[45]

A. Hardship

An offer to compromise based on economic hardship generally will be considered acceptable when, even though the tax could be collected in full, the offer reflects the amount the IRS can collect without causing the taxpayer economic hardship. "Economic hardship is defined as inability to pay reasonable expenses."[46] Because economic hardship is defined as the inability to meet reasonable *living* expenses, such offers can only be made by individuals.[47]

The determination to accept an amount is based on the taxpayer's individual facts and circumstances.[48] The IRS will examine the taxpayer's financial information and any special circumstances.[49] The IRS cannot reject an offer from a low-income taxpayer solely on the basis of the amount of the offer.[50] Regulations explain that factors supporting a determination that collection would cause economic hardship include, but are not limited to:

- Taxpayer is incapable of earning a living because of a long term illness, medical condition, or disability, and it is reasonably foreseeable that taxpayer's financial resources will be exhausted providing for care and support during the course of the condition;
- Although taxpayer has certain monthly income, that income is exhausted each month in providing for the care of dependents with no other means of support; and
- Although taxpayer has certain assets, the taxpayer is unable to borrow against the equity in those assets and liquidation of those assets to pay out-

> standing tax liabilities would render the taxpayer unable to meet basic living expenses.[51]

The Internal Revenue Manual ("I.R.M.") adds other factors, such as: 1) basic living expenses for health, welfare, and production of income; 2) the taxpayer's age and employment status; 3) number, age, and health of the taxpayer's dependents; 4) cost of living in the area the taxpayer resides; and 5) any special education expenses, a medical catastrophe, or natural disaster.[52]

Additionally, a taxpayer suffering or about to suffer a significant hardship because of the way the internal revenue laws are being administered by the IRS may seek assistance from the National Taxpayer Advocate Service. I.R.C. § 7811 explains that significant hardship includes:

- An immediate threat of adverse action;
- A delay of over thirty days in resolving taxpayer account problems;
- The incurring by the taxpayer of significant costs (including fees for professional representation) if relief is not granted; or
- Irreparable injury to, or a long-term adverse impact on, the taxpayer if relief is not granted.

While I.R.C. § 7811 is not directly linked to offers in compromise, the IRS is statutorily barred from imposing such hardship on taxpayers. Thus, the IRS should consider such hardships when processing offers in compromise. In the event of a current or imminent hardship, the taxpayer can file Form 911, *Request for Taxpayer Advocate Service Assistance*, with the Local Taxpayer Advocate.[53] Under I.R.C. § 7811(a), the Taxpayer Advocate has the authority to issue Taxpayer Assistance Orders. The Order may require the IRS to "cease any action, take any action as permitted by law, or refrain from taking any action with respect to the taxpayer" relating to collection or discovery of liability and enforcement of title.[54]

B. Public Policy or Equity

If there are no other grounds for compromise, the IRS may compromise a liability to promote effective tax administration where compelling public policy or equity considerations identified by the taxpayer provide a sufficient basis for compromising the liability.[55] Compromise will be justified only where, due to exceptional circumstances, collection for the full liability would undermine public confidence that the tax laws are being administered in a fair and equitable manner.[56]

Determinations in such cases are based on facts and circumstances.[57] The taxpayer must justify why the offer should be accepted even though a similarly situated taxpayer may have paid his liability in full.[58] The I.R.M. provides little guidance with respect to such offers because equity based compromises are fact sensitive. However, the I.R.M explains that a taxpayer entitled to relief on public policy or equity grounds: 1) must have remained in compliance since incurring the liability, and overall his or her compliance history must not weigh against compromise; 2) must have acted reasonably and responsibly in the situation giving rise to the liabilities; and 3) the circumstances of the case must be such that the result of the compromise does not place the taxpayer in a better position than he or she would occupy had the obligations been met timely and fully, unless special circumstances justifying the compromise are present.[59]

Notable examples of situations where compromise based on public policy and equity is appropriate include:

- The taxpayer's liability was directly caused by a processing error by the IRS;
- The liability resulted from the IRS's unreasonable delayed resolution of the taxpayer's case;
- The taxpayer incurred the liability because of following erroneous instruction from the IRS;
- The taxpayer demonstrated that the criminal or fraudulent act of a third party is responsible for the tax liability;
- The taxpayer was incapacitated or unable to comply with the tax laws; and
- Situations where there is clear and convincing evidence that rejecting the offer, and pursuing other collection alternatives, would have a significantly negative impact on the community in which the taxpayer lives or does business.[60]

Offers in Compromise During Examination

The I.R.M. specifically grants Collection jurisdiction over offers based on doubts as to collectibility.[61] Thus, the IRS recommends that the taxpayer wait for a resolution of an audit before submitting an offer.[62] A taxpayer unaware of IRS procedures for offers in compromise made during an examination may be inclined to concede the liability if he or she does not have the means to pay the potential liability or professional fees associated with defending the audit to submit an offer to Collection. Taxpayers wishing to make an offer based solely on collectibility should not be forced to agree to an arbitrary assessment because the Taxpayer Bill of Rights guarantees the right to pay no more than the correct tax, including interest and penalties.[63]

Consideration of the likelihood of collection during examination is a significant factor in ensuring that quality assessments are made. The I.R.M. also dictates that Small Business and Self Employed Examiners "must strive for quality assessments and promote an increased emphasis on early collections in the continuing effort to reduce the Collection function's inventory and currently not collectible (CNC) accounts." Accordingly, "[e]xaminers are required to consider the collectibility of a potential tax assessment during the pre-contact, audit, and closing phases of an examination."

Consistent with the IRS mission and Congressional intent behind the IRS's ability to compromise, the I.R.M. explains that "[t]he keystone of our compliance activities is to promote voluntary compliance, and examinations contribute to that by having an impact on changing taxpayer behavior and also providing a deterrent to other potentially noncompliant taxpayers."[64] Examiners "should consider the overall collectibility of the return during the pre-contact phase as one of many factors in determining whether to survey the return or limit the scope and depth of examination."[65]

When an offer in compromise appears to be the best approach to securing payment of the liability, the examiner should discuss compromise alternatives with the taxpayer and, in certain cases, assist the taxpayer in preparing the required forms.[66] The I.R.M. also states that this generally should not occur until the examiner has made a determination of the proper tax liability or deficiency, and the examiner should seek the group manager's approval before discussing collection alternatives with the taxpayer.[67] This provision, however, undermines not only the IRS mission and goals of the offer in compromise program, but also the taxpayer's right to be informed. Taxpayers have the right to clear explanations of the laws and the IRS procedures,[68] and should be informed of collection alternatives that can help alleviate or avoid hardship.

The procedures requiring examiners to consider collectibility during examinations are not well known, and often not followed by examiners. In 2016, the Treasury Inspector General For Tax Administration ("TIGTA") found that if examiners do not follow the relevant I.R.M. procedures to consider and evaluate collectibility: 1) there is a higher risk of uncollectible assessments and inefficient use of both the Examination and Collection functions' limited resources; 2) taxpayers with financial difficulties that cannot afford to make tax payments may be further burdened if the IRS audits them for additional assessments they cannot pay; and 3) taxpayers are not treated consistently.[69]

The division of responsibilities between Examination and Collection has frustrated the offer in compromise process because examiners do not always coordinate with Collection.[70] Quality assessments, however, require consistent and constructive collaboration between the Examination and Collection functions. With its expertise, Collection can help Examination identify taxpayers who are unable to pay the potential liabilities early in the examination process, which will save IRS and taxpayer resources and maximize the collectible amounts. Effective communication between the two functions would also minimize undue delay between closing cases and eliminate duplicate efforts.[71]

Any delay in resolution during an examination due to lack of communication between the Examination and Collection function not only wastes the IRS's precious resources, but also infringes on the taxpayers' rights under I.R.C. § 7803. Specifically, the rights to: 1) finality; 2) a fair and a just tax system; and 3) privacy, if the subsequent IRS enforcement actions are more intrusive than necessary.[72]

Taxpayers should be aware that the I.R.M. allows submission of offers to the examiners during or at the conclusion of the examinations.[73] To expedite processing of the offer, the examiner should review the offer package before forwarding it to Centralized Offer in Compromise. The examiner should verify that the offer includes:

- Full identification of taxpayer: name, address, social security number or employer identification number; both taxpayer names and signatures in instances of a joint liability offer.
- Identification of the liability (type of tax).
- Amount and terms of the offer.
- Appropriate signature(s).
- Basis for compromise.

- Completed Form 433-A, *Collection Information Statement for Wage Earners & Self-Employed Individuals*, and/or Form 433-B, *Collection Information Statement for Businesses*.
- Minimum of equity in assets offered.
- All outstanding liabilities and tax periods included.
- Application fee and the TIPRA payment, if applicable. Under TIPRA, taxpayers who qualify as low income, based on current criteria, and check the box in Section 4 on Form 656, are not required to submit the application fee or any TIPRA payment(s) while OIC is being investigated.[74]

If the examination is not complete and group manager agrees with the examiner that doubt as to collectability exists, the scope of the examination should be limited.[75] If agreement as to the liability is obtained, the case should be closed following existing procedures. The examiner should provide a copy of the audit report to the Collection employee handling the case.[76] The I.R.M. asserts that the examiner should not solicit or obtain a conditional agreement where the taxpayer agrees to the proposed tax with the condition that an offer in compromise simultaneously submitted is accepted.[77]

If agreement is not obtained, the case should be closed following normal unagreed procedures. The taxpayer's submission of the offer should be postponed until the issues and resulting liability are resolved. The taxpayer loses his or her right to appeal the merits of the liability if the offer is accepted by Collection.[78] If the taxpayer submits the offer directly to Collection during an examination, Collection will return the offer based on "other investigations pending."[79] Once all examination issues are resolved, the taxpayer may submit a new offer.[80]

Contrary to the I.R.M. provisions, some practitioners have been successful in resolving controversies by requesting that the examiner hold in escrow the following forms while the offer is being considered: 1) Forms 870, *Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment*; 2) Forms 866, *Agreement as to Final Determination of Tax Liability*; and 3) Forms 906, *Closing Agreement on Final Determination Covering Specific Matters.*[81] Once the offer is accepted, the appropriate form can be processed to assess the liability and the taxpayer is simultaneously relieved of the liability by the compromise. This procedure mirrors the Tax Court offer in compromise process discussed in Section VII below.

Taxpayers who find themselves under examination should proactively evaluate their cases and ability to pay any potential liabilities, and present "adequate compromise proposals consistent with their ability to pay" so that the IRS can make prompt and reasonable decisions.[82] Taxpayers with limited resources should reach out to low income tax clinics, and companies on the brink of bankruptcy should submit an offer as soon as possible.[83] If the examiner is not willing to consider an offer, the taxpayer should file a Form 911 with the Local Taxpayer Advocate.[84] As discussed above, the Taxpayer Advocate has statutory authority to prevent hardship using a Taxpayer Assistance Order.

VI. Non-Traditional Use of Offers in Compromise

The offer in compromise program may be useful for "Accidental Americans", who are United States citizens, but do not live in, and have limited or no ties to, the United States. Such taxpayers may be surprised to learn that they are subject to failure to file, failure to pay, accuracy, or FBAR related penalties.[85] An Accidental American unable to pay his or her unexpected tax liabilities should consider submitting an offer in compromise based on doubt as to collectibility or to promote effective tax administration.

VII. Offers During Litigation

In litigation before the Tax Court, IRS Counsel will consider settling the case based on the merits, rather than the taxpayer's ability to pay. The I.R.M. explains that "[i]t is preferable that all settlements be effectuated by a merits settlement rather than upon the basis of inability to pay. This general guideline is applicable even though there may be a substantial basis for concluding that the petitioner may not be able to pay the agreed deficiency. In this instance, the case should be settled on its merits, and if the petitioner is unable to pay such deficiency, he can later file an offer in compromise based upon doubt as to collectibility." These guidelines are not absolute. Common sense suggests that an agency trying to do more with less consider collectibility before investing resources into litigation.

Additionally, the tax must be assessed before the taxpayer can make an offer based on doubt as to collectibility and effective tax administration. In cases docketed in Tax Court, the taxpayer can litigate the tax case on the merits and, then make an offer in compromise if a decision is entered against him or her. However, as per the I.R.M., a taxpayer may request permission from IRS Counsel ("Counsel") to submit an offer based on collectibility or effective tax administration.[86] The offer should include all outstanding liabilities, even if they are not before the Court.

When requesting permission to submit an offer, it is vital to impress upon Counsel that the policy of settling Tax Court cases solely on the merits and without consideration of collectibility is contrary to the responsibilities and goals of the IRS. The IRS has "the responsibility of applying and administering the law in a reasonable, practical matter."[87] While, "[a]dministration should be both reasonable and vigorous," it should also be "conducted with as little delay as possible and with great courtesy and considerateness."[88] If a taxpayer that cannot pay the alleged liability presents a legitimate alternative, the offer should be considered by Counsel in lieu of protracted and costly litigation that will waste IRS resources and cause undue hardship for the taxpayer. If IRS Counsel refuses to allow the submission of an offer, the taxpayer may file Form 911 to request assistance from the local Taxpayer Advocate.

If Counsel agrees to allow the taxpayer to submit such an offer, the taxpayer must submit the offer in writing as discussed above and send it directly to Counsel. The I.R.M. requires that in such cases Counsel obtain from Petitioner a stipulation of the deficiencies and penalties to protect the IRS's ability to collect additional amounts if the financial status of the petitioner should change or the IRS must seek collection of the amount owed if the Petitioner defaults on payment. The alternative, and recommended option, is that the stipulation be held in escrow by Counsel to be signed only if the offer is accepted.[89]

Once an agreement is reached on the stipulation, IRS Counsel will forward the offer to the appropriate unit to be processed under the standard procedure. While the offer is pending, the Tax Court case should be continued. If the offer is rejected, the taxpayer can challenge the determination in Appeals or resume the Tax Court case. If the offer is accepted, a stipulation held in escrow should be filed with the Court. Once the stipulation is filed, the amount agreed is assessed, but the compromise simultaneously relieves the taxpayer of the liability.

By contrast to the Tax Court, DoJ attorneys can settle cases based on future ability to collect the liability. "Even though the Government may have a strong case on the merits, absent other considerations, Government lawyers should not expend substantial resources to obtain an uncollectible judgment. Instead, it may be more efficient to negotiate a collectibility settlement." DoJ has the authority to settle a suit at any stage of the proceeding, regardless of the IRS's position on the matter. However, the DOJ will generally request that the field offer specialist investigate and make a recommendation in doubt as to collection cases.[90]

VIII. Role of the IRS Office of Appeals

There must be an independent administrative review of any rejected offer before the rejection is communicated to the taxpayer.[91] An offer has not been rejected until the IRS issues a written notice to the taxpayer, or his representative, advising of the rejection, the reasons for rejection, and the right to an appeal.[92] The taxpayer may administratively appeal the rejection of an offer to the IRS Office of Appeals ("Appeals") if, within the thirty day period commencing the day after the date on the letter of rejection, the taxpayer requests such an administrative review in the manner provided by the secretary.[93]

A taxpayer can appeal a rejected offer within thirty days of the date on the rejection notice by filing Form 13711, *Request for Appeal of Offer in Compromised*. The appeal letter should address the issues raised in the rejection notice and the taxpayer may have to provide additional documentation. If accepted, the appeal will allow the taxpayer to renegotiate his or her rejected offer under more acceptable terms for the IRS.

Appeals also has jurisdiction to make decisions on offers: 1) submitted as an alternative to the proposed collection action in a CDP or equivalent hearing case before the CDP Notice of Determination or EH Decision Letter is issued; and 2) being evaluated by Collection when a Notice of Federal Tax Lien is filed and the taxpayer requests a CDP or equivalent hearing [94] Appeals, however, does not have jurisdiction to compromise a liability after referral of the tax years to the DoJ.

Once an offer is before Appeals, the conference settlement procedures differ from Compliance. In non-CDP offer appeals, the taxpayer must be provided with an opportunity for the conference he or she requested under I.R.C. § 7122(e)(2). At the hearing, Appeals will determine whether Compliance was correct in rejecting the taxpayer's offer by addressing the disputed issues that caused the offer to be rejected, provide a reasonable opportunity for the taxpayer to submit clarifying information or other documentation that the taxpayer believes is necessary to properly evaluate the offer and/or make the offer acceptable, accept offers improperly rejected by Compliance, and explain why offer cannot be accepted and discuss alternatives.[95]

Appeal's decision to sustain a rejection of a non-CDP offer is not subject to judicial review.[96] Appeals should consider only the items in dispute at the time of the rejection, or which are raised later by the taxpayer, rather than continue to develop the offer rejected by Compliance.[97] However, Appeals should evaluate the overall appropriateness of compromise. This often requires subjective judgment to be made by Appeals based on factors such as the success, or lack thereof, of prior collection efforts against the taxpayer and the advantage of the taxpayer's future compliance, secured

through acceptance of an offer.[98]

Last, "[t]he Appeals mission is to resolve tax controversies, without litigation, on a basis which is fair and impartial to both the Government and the taxpayer and in a manner that will enhance voluntary compliance and public confidence in the integrity and efficiency of the Service." Appeals is more likely to consider the "hazards of litigation" in making its determination.

Conclusion

TIGTA and the Taxpayer Advocate have written on the full measure of taxpayer rights with respect to offers in compromise. As advocates, tax professional must request and insist that the IRS follow the internal procedures that allow for compromise of cases during examinations and before the Tax Court. If the procedures discussed within this article are followed, the IRS can achieve its goals of maximizing collection in the most efficient and fair way possible and encouraging voluntary compliance in future years.

Footnotes:

1. Frank Agostino, Esq. is the principal of, and Valerie Vlasenko, Esq. is an associate at Agostino & Associates, P.C. in Hackensack, New Jersey.
2. IRS, *2017 Data Book* (Mar. 2017)*, available at* https://www.irs.gov/pub/irs-soi/17databk.pdf.
3. Treas. Reg. § 601.203(a)(2).
4. Outside the tax world, 80 to 92 percent of civil cases settle. A study found that defendants made the wrong decision by proceeding to trial in 24 percent of cases that do not settle and, on average, the cost for getting it wrong for those defendants was approximately $1.1 million dollars. The same logic can be applied in all areas of tax controversy. That is, the cost of a burdensome examination or a protracted litigation can significantly outweigh the collection potential for the IRS. *See* Jonathan Glater, *Study Finds Settling Is Better Than Going to Trial*, NY Times (Aug. 7, 2008), https://www.nytimes.com/2008/08/08/business/08law.html.
5. I.R.C. § 7122 also grants and the Attorney General may compromise any such case after referral to the Department of Justice. However, this subject is outside the scope of this article.
6. I.R.M., pt. 4.18.1.2 (Feb. 28, 2017).
7. I.R.M., pt. 1.2.1.14.1.17 (Jan. 30, 1992).
8. IRS Form 656 Booklet, *Offer in Compromise¸ available at* https://www.irs.gov/pub/irs-pdf/f656b.pdf [hereinafter *Form 656 Booklet*].
9. S. Rep. No. 105-174, at 94 (1998).
10. *Id.*
11. National Taxpayer Advocate, *2007 Annual Report to Congress*, *available at* https://www.irs.gov/pub/tas/arc_2007_vol_2.pdf.
12. IRS, *The Agency, its Mission and Statutory Authority*, https://www.irs.gov/about-irs/the-agency-its-mission-and-statutory-authority (last updated Jun. 27, 2018).
13. Treas. Reg. § 301.7122-1(b)(3); I.R.M., pt. 4.18.1.2 (Feb. 28, 2017); While this article focuses on offers in compromise, readers should also be aware of the Advance Pricing and Mutual Agreement Program that allows taxpayers to resolve actual or potential transfer pricing disputes. *See* IRS, *Advance Pricing and Mutual Agreement Program*, https://www.irs.gov/businesses/corporations/apma (last updated May 11, 2018).
14. H.R. Rep. No. 105-599, at 289 (1998).
15. Doubt as to liability exists where there is a genuine dispute as to the existence or amount of the correct tax debt under the law. Such offers are outside the scope of this article. For additional information regarding doubt as to liability review I.R.M., pt. 4.18.2 (Feb. 28, 2017).
16. I.R.M., pt. 5.8.1.6.3 (May 5, 2017).
17. *Id.*
18. I.R.M., pt. 4.18.1.2 (Feb. 28, 2017).
19. Treas. Reg. § 301.7122-1(d)(1).
20. Low income taxpayers, whose adjusted total monthly income falls at or below 250 percent of the applicable poverty level are not required to pay the filing fee. To receive a waiver, taxpayers must submit a Form 656-A, *Income Certification for Offer in Compromise Application Fee and Payment* (Feb. 2017), *available at* http://www.unclefed.com/IRS-Forms/2011/f656a.pdf.
21. Treas. Reg. § 601.203(b); IRS Form 433-A, *Collection Information Statement for Wage Earners & Self-Employed Individual* (Dec. 2012), *available at* https://www.irs.gov/pub/irs-pdf/f433a.pdf; IRS Form 433-B, *Collection Information Statement for Businesses* (Dec. 2012), *available at* https://www.irs.gov/pub/irs-pdf/f433b.pdf.
22. Rev. Proc. 2003-71, 2003-36 I.R.B. 517.
23. *Id.*
24. *Form 656 Booklet*, *supra* note 8.
25. Treas. Reg. § 301.7122-1(e)(5).
26. *Id.*; *See also* I.R.M., pt. 5.8.1.7.1 (Feb. 26, 2013).
27. *Form 656 Booklet*, *supra* note 8.

28. Rev. Proc. 2003-71, 2003-36 I.R.B. 517; IRS, *Topic Number 204- Offers In Compromise*, https://www.irs.gov/taxtopics/tc204 (last updated Mar. 1, 2018) [hereinafter *Topic 204*].
29. *Form 656 Booklet*, *supra* note 8.
30. Rev. Proc. 2003-71, 2003-36 I.R.B. 517; *Topic 204*, *supra* note 29.
31. Rev. Proc. 2003-71.
32. IRS, *2017 Data Book* (March 2017), *available at* https://www.irs.gov/pub/irs-soi/17databk.pdf.
33. I.R.M., pt. 5.8.1.2.3 (May 5, 2017).
34. I.R.M., pt. 5.8.4.3.1 (Apr. 30, 2015).
35. I.R.C. § 7122(c)(1).
36. I.R.C. § 7122(c)(1)(A).
37. I.R.C. § 7122(c)(1)(B).
38. I.R.C. § 7122(c)(1)(B)(ii).
39. I.R.M., pt. 1.1.14.1.17 (Jan. 30. 1992).
40. I.R.M., pt. 5.8.1.2.3 (May 5, 2017).
41. I.R.M., pt. 5.8.1.2.3 (May 5, 2017).
42. For a more in-depth discussion of offers based on effective tax administration, read Sandy Freud, *Effective Tax Administration Offers In Compromise – Why So Ineffective?*, 34 Va. Tax Rev. 157 (2014-2015).
43. *Topic 204*, *supra* note 29.
44. I.R.M., pt. 4.18.3.2 (Feb. 28, 2017); Rev. Proc. 2003-71, 2003-36 I.R.B. 517.
45. I.R.M., pt. 4.18.3.2 (Feb. 28, 2017).
46. Treas. Reg. § 301.6343-1(d).
47. I.R.M., pt. 5.8.11.2.1 (Aug. 5, 2015).
48. Rev. Proc. 2003-71, 2003-36 I.R.B. 517.
49. I.R.M., pt. 5.8.11.2.1 (Aug. 5, 2015).
50. I.R.C. § 7122(d)(3).
51. Treas. Reg. § 301.7122-1. See regulation for examples.
52. I.R.M., pt. 5.8.11.2.1 (Aug. 5, 2015).
53. IRS Form 911, *Request for Taxpayer Advocate Service Assistance* (Feb. 2015), *available at* https://www.irs.gov/pub/irs-pdf/f911.pdf (last visited Aug. 22, 2018).
54. I.R.C. § 7811(b).
55. Rev. Proc. 2003-71, 2003-36 I.R.B. 517.
56. *Id.*
57. *Id.*
58. Treas. Reg. § 301.7122-1.
59. I.R.M., pt. 5.8.11.2.2 (Aug. 5, 2015).
60. *Id.*
61. I.R.M., pt. 5.8.1.6.3 (May 5, 2017).
62. *See* IRS, *Offer in Compromise- Frequent Asked Questions* (Jun. 20, 2018), at question 9, https://www.irs.gov/businesses/small-businesses-self-employed/offer-in-compromise-faqs.
63. *See* I.R.C. § 7803(a)(3).
64. I.R.M., pt. 4.20.1.1.1 (Oct. 4, 2017).
65. I.R.M., pt. 4.20.1.2SB/ S (Oct. 4, 2017).
66. I.R.M., pt. 4.18.7.1 (Feb. 28, 2018).
67. *Id.*
68. *See* IRS Publication 1, *Your Rights as a Taxpayer* (Sept. 2009), available at https://www.irs.gov/pub/irs-pdf/p1.pdf.
69. Treasury Inspector General For Tax Administration, *Examination Collectibility Procedures Need to Be Clarified and Applied Consistently* (Sept. 7, 2016), *available at* https://www.treasury.gov/tigta/auditreports/2016reports/201630070fr.pdf [hereinafter *TIGTA Report*].
70. *Id.*
71. *Id.*
72. For an informative discussion on the link between the Taxpayer Bill of Rights and the Offer in Compromise Program see National Taxpayer Advocate, *Offers in Compromise: Despite Congressional Actions, the IRS Has Failed to Realize the Potential of Offers in Compromise*, *available at* https://taxpayeradvocate.irs.gov/Media/Default/Documents/2014-Annual-Report/OFFERS-IN-COMPROMISE-Despite-Congressional-Actions-the-IRS-Has-Failed-to-Realize-the-Potential-of-Offers-in-Compromise.pdf.
73. I.R.M., pt. 4.18.7.1 (Feb. 28, 2018).
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*

81. IRS Form 870, *Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Over-assessment* (Mar. 1992), available at https://www.irs.gov/pub/irs-utl/form870.pdf; IRS Form 866, *Agreement as to Final Determination of Tax Liability* (July 1981), available at https://www.irs.gov/pub/irs-utl/form_866.pdf; IRS Form 906, *Closing Agreement on Final Determination Covering Specific Matters* (Aug. 1994), https://www.irs.gov/pub/irs-utl/form_906.pdf.
82. I.R.M., pt. 5.8.1.2.3 (May 5, 2017); Taxpayers should be careful not file offers that may be deemed frivolous by the IRS. Frivolous submissions may be subject to penalties under I.R.C. § 6702.
83. Note, the IRS will not consider offer under its administrative procedures while the taxpayer is in bankruptcy. See I.R.M., pt. 5.8.10.2 (Sep. 27, 2011).
84. IRS Form 911, *Request for Taxpayer Advocate Service Assistance* (Feb. 2015), *available at* https://www.irs.gov/pub/irs-pdf/f911.pdf.
85. *See* Frank Agostino and Joseph Stackhouse, *United States Tax and the Accidental Americans*, for a discussion of hardships faced by Accidental Americans not able to compromise their liabilities during examinations or litigation.
86. I.R.M., pt. 35.6.2 (July 25, 2012).
87. Rev. Proc. 64-22, 1964-1 C.B. 689.
88. *Id.*
89. I.R.M., pt. 35.8.6.2.1 (Jul. 25, 2012).
90. I.R.M., pt. 5.8.1.6.2 (Feb. 26, 2016).
91. I.R.C. § 7122(e).
92. Treas. Reg. § 301.7122-1(f)(1).
93. Treas. Reg. § 301.7122-1(f)(5).
94. I.R.M., pt. 8.23.1.1 (Nov. 18, 2016).
95. I.R.M., pt. 8.23.1.3 (Nov. 18, 2016).
96. *Id.*
97. *Id.*
98. *Id.*

TAC TIP
SECTION 72(t)(1): TAX OR PENALTY SUBJECT TO SECTION 6751(B)[1]

By Frank Agostino, Esq. and Malinda Sederquist.

Section 6751(b) provides: "No penalty under [the I.R.C.] shall be assessed unless the initial determination of such assessment is personally approved (in writing) by the immediate supervisor of the individual making such determination or such higher level official as the Secretary may designate." In December 2017, the Tax Court held that the Internal Revenue Service ("IRS") must comply with Section 6751(b)(1) before asserting a penalty.[2]

It is common knowledge that early withdrawals from a retirement plan are subject to a ten percent penalty. What is not common knowledge is that the IRS claims, based on the statutory language of 72(t), this "penalty" is a "tax". That distinction may be critical for purposes of whether Section 6751(b) applies.

Since January of 2016, at least twenty-three 72(t)(1) penalty cases have been decided and to date none has set a precedent for whether Section 6751(b) applies to the penalties under Section 72(t). Section 72(t)(1) imposes a ten percent exaction on early distributions from retirement plans where exceptions do not apply.[3]

Based on *El v. Commissioner*, some tax professionals have prematurely concluded that Section 6751(b) is inapplicable to Section 72(t) penalties.[4] The Taxpayer Assistance Center ("TAC") is offering its assistance to tax professionals whose clients cannot afford the ten percent exaction and want to fight it in court because recent decisions in bankruptcy suggest that the Section 72(t) exaction is arguably a penalty.

Earlier this month, the United States District Court for the District of Massachusetts analyzed whether the ten percent exaction imposed by Section 72(t)(1) is a tax or a penalty. In *In re Daley v. Commissioner*, the District Court affirmed a bankruptcy court ruling and held that the Section 72(t)(1) exaction attributable to the Daleys' early withdrawals was a penalty for purposes of determining priority status in bankruptcy.[5]

First, the Court held that the characterization of the ten percent exaction as "additional tax" does not determine its status for priority in bankruptcy proceedings.[6] Unlike the decision in *El v. Commissioner*, which held that the exaction was a "tax" based on the label the statute used, the Court used the "Feiring-Anderson"[7] standard to classify the exaction.

After applying the tax defining standard, the District Court upheld the United States Circuit Court of Appeals for the 10th Circuit, which held that the ten percent exaction is a penalty in bankruptcy, because the purpose of the statute is to deter debtors from discharging their obligations at the expense of innocent creditors.[8] Here, the District Court reasoned that "[a]lthough the exaction may generate some revenue, the presence of 'hardship' exceptions to the early withdrawal rule indicates that the purpose of the statutory provision is to deter unwanted conduct. Therefore, the exaction functions as a penalty and not a tax."[9]

The District Court also agreed with appellees, that the exaction is a not a penalty for purposes of compensating actual pecuniary loss. The Court rejected the government's argument that the Section 72(t) penalty compensates the IRS for costs because (1) the penalty is also imposed on early withdrawals from Roth IRA plans that rarely provide tax revenue to the government, (2) the penalty is not adjusted according to the taxpayer's age, and (3) the flat rate fee bears no relationship to the government's financial loss.[10] The Court found that because the primary purpose of Section 72(t)(1), in the Bankruptcy Code, is to "deter taxpayers from making early withdrawals from qualified retirement plans and not to compensate the government for lost revenue," the penalty is not for actual pecuniary loss.[11]

The ruling of the 10th Circuit Court of Appeals and the District Court suggests that courts will continue to treat the ten percent exaction on early retirement withdrawals as a penalty. TAC recommends that taxpayers challenge Section 72(t)(1) exactions under Section 6751(b)(1) when applicable.

The first step practitioners should take to determine whether a 6751(b)(1) challenge is possible is to file a request under the Freedom of Information Act (FOIA) requesting the penalty authorization memo. If the government cannot produce a penalty authorization memo, or the 72(t)(1) penalty was not authorized in accordance with the statute, the penalty should be disputed.

If the case is not in Tax Court, and the Section 72(t)(1) penalties were assessed without prior authorization, taxpayers should seek penalty abatement using Form 843, *Claim for Refund and Request for Abatement*. If the 72(t) case is in Tax Court, taxpayers can contact Desa Lazar of TAC. Volunteers may be willing to try these cases until the Tax Court speaks definitively on the issue.

Footnotes:

1. Rule references are to the Tax Court Rules of Practice and Procedure. Unless otherwise indicated, section references are to the applicable version of the Internal Revenue Code ("I.R.C.").
2. *See* Graev v. Comm'r, 149 T.C. No. 23, 9 (2017).
3. I.R.C. Section 72(t)(1).
4. *See* El v.Comm'r, 144 T.C. 140, 148 n.13 (2015) (holding that 72(t) exactions are a tax and not a penalty within the meaning of Section 7491(c)); *See also* T.C. Summary Opinion 2017-64 (stating that 6751 (b) does not apply to Section 72(t)).
5. In re Daley, No. CV 17-10962-NMG, 2018 WL 3682487 (D. Mass. Aug. 2, 2018).
6. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).
7. U.S. v. Reorganized CF & I Fabricators of Utah, Inc., 518 U.S. 213, 222, 116 S. Ct. 2106 (1996).
8. In re Daley, 2018 WL 3682487 at *3.
9. *Id*
10. *Id.*
11. The IRS argued that it was entitled to priority status as an unsecured priority claim under Section 507 (a)(8)(G) because the penalty was to compensate for actual pecuniary loss.

UNITED STATES TAX AND THE ACCIDENTAL AMERICANS

By Frank Agostino, Esq. and Joseph A. Stackhouse, Jr.[1]

Introduction

Many tax professionals receive calls from offshore taxpayers identifying themselves as "accidental Americans". These taxpayers ask whether they must reply to correspondence from the Internal Revenue Service ("IRS"), comply with the Foreign Account Tax Compliance Act ("FATCA"), or pay income taxes to the United States ("US"). This article discusses the tax obligations "accidental Americans" face and options available to address their status as US taxpayers.[2]

I. Who are the "Accidental Americans"?

Accidental Americans is not a legal term (i.e., the US State Department does not recognize the term "accidental American"). Instead, the term accidental Americans is a term created by the media to describe individuals who do not live in the US, that have little or no connection to the US, but are considered US citizens. Most accidental Americans have no property, financial, or social ties to the US.[3] One recent example of a case in the popular press about an accidental American describes a woman who lived most her life in Canada, but was born in the US while her Canadian parents were studying abroad.[4] Under Section 1401(a) of Title 8 of the United States Code ("USC"), she is indeed a US citizen. According to 8 USC Section 1401, US citizens include:

- a person born in the US,
- a person born in the US to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe,
- a person born outside of the US to parents who are US citizens, one of whom has had a residence in the US, prior to the birth of such person,
- a person born outside of the US to parents one of whom is a US citizen physically present in the US for a continuous period of one year prior to the birth of such person,
- a person of unknown parentage found in the US while under the age of five years, and
- a person born outside the US to parents one of whom is a US citizen who, prior to the birth of such person, was physically present in the US for at least five years, at least two of which were after attaining the age of fourteen years.

Accidental Americans ask why they should pay a tax bill from an unfamiliar government while they have few economic connections to the US. The reason is that the Internal Revenue Code (Code[5]) requires US citizens to file tax returns and pay tax on their worldwide income, which is known as citizenship-based taxation. Citizens abroad that do not comply with U.S. tax laws may face civil and even criminal liability. Although the government rarely prosecutes non-resident individuals, the IRS criminal division has an active presence throughout the world. The IRS maintains a presence through its attachés on the ground in Barbados, Bogota, Frankfurt, Hong Kong, London, Mexico City, Ottawa, Panama City and Sydney.

II. How and Why are the IRS and Foreign Banks Identifying Accidental Americans, Demanding Proof of US Tax Compliance and Closing Accounts?

Another frequently asked question by those concerned about citizen based taxation is how does the IRS detect allegedly non-compliant accidental Americans? For some taxpayers, the IRS learns of their existence through FATCA. Under FATCA, non-US financial institutions ("FFI") must perform due diligence inquiries to determine whether any of their clients are US citizens. If an FFI determines its client is a US person, FATCA requires the FFIs collect information from the US client, including a completed IRS Form W-9, *Request for Taxpayer Identification Number and Certification*. The FFI reports this information to the IRS on Form 8966, *FATCA Report*. Form 8966 includes the name, address, taxpayer identification number, account balance, and total withdrawals or receipts of the US client's account(s). The IRS then matches the information it receives from FFIs with its database. FFIs are asking accidental Americans that refuse to

provide a Form W-9 or proof of compliance with their US filing obligations to close their accounts.

Cambridgeshire Live, a British news source, recently reported a case where the IRS found an accidental American through FATCA disclosures. The FATCA disclosures were provided by England, a country that enforces FATCA. According to the news source, Merryn Gimley, a 73-year-old woman from England, who was born in New York to British parents,[6] ended up paying £9,000 to hire a professional to discover she owed $277 in US tax.

A recent article in POLITICO, a global non-partisan politics and policy news organization, mentioned that world leaders, including French President Emmanuel Macron, want to help accidental Americans "loosen their ties to the US."[7] The European Parliament recently resolved to renegotiate FATCA and protect the fundamental rights of accidental Americans.[8]

Non-compliance by accidental Americans is being detected more than before because the IRS has increased its coordination with taxing authorities of foreign governments and law enforcement agencies. Besides FATCA information exchanges, the US also receives information on accidental Americans under tax treaties providing for tax information exchange agreements and mutual legal assistance treaties.

The IRS is also identifying noncompliant accidental Americans through disclosures made by family members of accidental Americans who are involved with voluntary disclosure programs and/or examinations of their US families' various ties to the US. Based on the information gathered under FATCA and the voluntary disclosure programs, the IRS has recently announced several audit campaigns targeting noncompliance by taxpayers residing outside the US, including noncompliance by individual nonresident aliens ("NRA").[9]

Finally, the IRS anticipates receiving more information citizens abroad because of notices being sent to noncompliant accidental Americans notifying them that, absent immediate tax compliance, the US State Department will be revoking or restricting their US passports under Section 7345.[10]

III. What Taxes Does the US Want Accidental Americans to Pay?

The US is one of only two countries in the world that taxes based on citizenship as opposed to residency.[11] Accidental Americans, like all US citizens, are subject to US tax laws. Being subject to US tax laws does not mean that US citizens abroad are subject to double taxation (once from their country of residence and once from the US).

Under Section 911, US citizens abroad can exclude up to $80,000 of foreign earned income, adjusted annually for inflation, from their US taxable income.[12] Section 911 also allows accidental Americans to deduct some of their housing costs. Section 901 minimizes double taxation by allowing accidental Americans to take a foreign tax credit equal to the taxes paid on income not excludable under Section 911.

The US Taxpayer Advocate Service reports that among those NRAs who file, many do not have an adjusted gross income ("AGI") high enough to generate a tax liability. About eighty-two percent of US taxpayers abroad have no US liability.[13]

The Code also requires accidental Americans to file information returns with the IRS, including Form 3520, *Annual Return to Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts;* its companion Form 3520-A, *Annual Information Return of Foreign Trust With a U.S. Owner;* Form 5471, *Information Return of U.S. Persons With Respect To Certain Foreign Corporations*, or Form 5472, *Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business*. Failure to file these forms may result in criminal prosecution and substantial civil penalties. These forms can lead the IRS to examine cross-border investments and estate and gift planning efforts.

Accidental Americans are also subject to non-tax reporting requirements. Title 31 of the Code of Federal Regulations ("CFR.") requires US citizens with bank accounts or other financial accounts in foreign countries to file a Report of Foreign Bank and Financial Account ("FBAR") if during a taxable year their foreign assets aggregated more than $10,000.[14] This information gets reported to the IRS on FinCen 114. FBAR

penalties can range from $10,000 in civil penalties for each non-willful violation to $100,000 in criminal penalties for willful violations.[15]

IV. An Accidental American Can End His or Her Future US Tax Filing Obligations by Giving Up His or Her American Citizenship

If a taxpayer fails to file a required return the statute of limitations for the IRS to pursue the tax due never expires. When an accidental American is aware of his tax obligations and refuses to file, he or she is willfully disobeying US law (i.e., a criminal offense). An accidental American cannot expatriate (i.e., give up his or her American citizenship) until he or she has settled all of their US filing requirements and tax liabilities. An accidental American can only terminate his or her future obligations by complying with US law. Then, he or she can expatriate and avoid any future tax obligations to the US.

V. The First Step For Some Accidental Americans to Become Compliant is to Obtain a US Passport

To become compliant, an accidental American needs a US social security number. Ironically, to get a social security number, an accidental American must prove his or her US citizenship. To prove his or her US citizenship, the accidental American needs either a US birth certificate or a US passport. Some accidental Americans were not born in the US and will not have a US birth certificate. For accidental Americans born outside the US, their only way to become compliant begins with getting the US passport they desire to relinquish.

To obtain a passport, an accidental American first fills out Form DS-11, *Application for a U.S. Passport*.[16] If the person does not have a social security number, as with most accidental Americans, the applicant must submit a statement declaring: "*I declare under penalty of perjury under the laws of the United States of America that the following is true and correct: I have never been issued a Social Security Number by the Social Security Administration."* [17]

The applicant then collects original copies of evidence of US citizenship: (a) a US birth certificate, (b) a Consular Report of Birth Abroad or Certification of Birth, (c) a Certificate of Naturalization, or a (d) Certificate of Citizenship. Most accidental Americans do not have these documents and will need to provide evidence that is more difficult to find: (a) evidence that a person's parents are US citizens, (b) marriage certificates, (c) resident records, (d) school records, or (e) hospital records.

The applicant also needs evidence of identity, such as a driver's license or passport from another country. Finally, the applicant must prepare a passport photo and bring it, along with Form DS-11 and all of his supporting documents, to the local Consular. The applicant will pay a fee between $145 and $175 and submit his or her application for processing.[18] Passport applications take 4 to 6 weeks to process. An applicant may pay an additional fee for expedited processing.[19]

VI. US Tax Compliance Requires the Accidental American to Obtain a US Social Security Number

Accidental Americans need a social security number to become compliant with US tax requirements. To apply for a social security number, the applicant will, again, need to provide (1) proof of citizenship, (2) proof of identity, and (3) proof of age.[20] The documents accepted as evidence of citizenship are (a) a US passport, (b) a Certificate of Naturalization, (c) a Certificate of Citizenship, (d) a Certificate of Report of Birth, or (d) a Consular Report of Birth Abroad. An applicant may use one document for more than one category of evidence, but cannot use one document to establish all three categories. The applicant will fill out an application for a new social security number and present his proof to the US Consular. There is no fee for getting a social security number, and it takes between ten and fourteen business days for the Social Security Administration to mail out the social security card.[21]

VII. Most Accidental Americans Can Become Compliant Using Streamlined Foreign Offshore Procedures

After an accidental American obtains a social security number, in most cases, he can file his delinquent tax returns under the Streamlined Filing Compliance Procedures using the Streamlined Foreign Offshore Procedures ("SFOP"). Under SFOP, accidental Americans file tax returns for the previous three tax years, FBAR for the previous six tax years, and pay any taxes owed. Certain expatriates may need to file five tax years. If the returns are in order, the filer will not be subject to failure to file, failure to pay, accuracy, or FBAR related penalties. If the IRS selects a return for audit, it will not assess penalties unless failure to file and pay taxes was willful or the return filed was fraudulent. Accidental Americans must also write "Streamline Foreign Offshore" in red ink at the top of each page to ensure the IRS properly processes the returns.

Accidental Americans must also complete Form 14653, *Certification by U.S. Person Residing Outside of the United States for Streamlined Foreign Offshore Procedures*, certifying that they are eligible for streamline filing, they have filed all FBARs, and their failure was non-willful. They attach Form 14653 to each return filed. The SFOP requires accidental Americans to certify that failing to report income, pay taxes, and file reports was due to negligence, mistake, or a good faith misunderstanding of the requirements.[22] The IRS processes returns submitted under SFOP as it would the return of any other US citizen.

VIII. Once in Compliance, Most Accidental Americans Can Expatriate Without Incurring a Substantial US Tax

Once the accidental American has completed the Streamlined Filing Compliance Procedures, he or she should evaluate whether to expatriate from the US.

8 USC Section 1481 allows a US citizen to relinquish his citizenship by:

- becoming a citizen of a foreign country,
- pledging allegiance to a foreign country,
- entering, or serving in, the armed forces of a foreign state if (A) such armed forces are engaged in hostilities against the US, or (B) such persons serve as a commissioned or non-commissioned officer,
- working in a government office for a foreign country after becoming a citizen of that country,
- working in a government office for a foreign country after pledging allegiance to that country,
- formally renouncing nationality before a diplomatic or consular officer of the US in a foreign state,
- making a formal written renunciation of nationality in the US whenever the US shall be in a state of war and the Attorney General shall approve such renunciation as not contrary to the interests of national defense, or
- committing any act of treason against the US.

Affluent accidental Americans expatriating need to consider the expatriation tax applicable to "covered expatriates" under Sections 877 and 877A. An accidental American is a covered expatriate if (a) his or her net worth is two million dollars or more as of the expatriation date, (b) his or her average net income over the previous five tax years was more than $124,000, adjusted annually for inflation;[23] or (c) he or she has failed to file Form 8854, *Initial and Annual Expatriation Statement*, certifying tax compliance for the five previous tax years.[24]

The IRS calculates the tax by treating the expatriate's assets as sold at fair market value and taxed on any gain from the sale. Covered expatriates may exclude $600,000 from their expatriation tax, adjusted annually for inflation.[25] Covered expatriates who reside outside of the US can avoid the tax if they have filed tax returns for the previous five tax years. A comprehensive discussion of Sections 877 and 877A and the exceptions to the tax are beyond the scope of this article except to note that most accidental Americans are

not covered expatriates or are subject to an exemption.

Expatriation effectively terminates the accidental American's future tax obligations. There are, however, fees to expatriate. There is also a $2,350 non-waivable fee for expatriation. The United States Department published an analysis in response to comments on the high expatriation fee in which it noted that the fee covered the minimal costs of processing an expatriation and the United States Consulate did not have authority to waive the fee.[26]

If after weighing the costs, an accidental American still wishes to expatriate, he or she should appear before the United States Consulate or diplomatic office and sign an oath renouncing all rights and privileges as a US citizen.[27] An accidental American must sign the oath from a country outside the US and should be a citizen of another country prior to expatriating. Failure to be a citizen of another country will leave an accidental American nationless and without the protection afforded nationals of a country. After paying the expatriation fee and any expatriation tax, the accidental American will have officially expatriated.

IX. Some accidental Americans Should Consider Filing a Collectability or Effective Tax Administration Offer in Compromise

About eighty two percent of US taxpayers abroad have no US liability.[28] For those accidental Americans wishing to expatriate that cannot pay their delinquent tax debt without hardship, the IRS has several programs to compromise these tax debts for less than full payment.

By way of background, Section 7122 permits the IRS to compromise any taxpayer's liability. A taxpayer may submit an Offer In Compromise ("OIC") to settle unpaid tax accounts for less than the full amount owed. The IRS has discretion either to accept or reject that offer. Indeed, the Code allows the IRS to "take into account factors such as equity, hardship and public policy where a compromise of an individual taxpayer's income tax liability would promote effective tax administration."[29] Consequently, the IRS can accept those offers to "resolve longstanding cases by forgoing penalties and interest which have accumulated as a result of the delay in determining the taxpayer's liability."[30]

Taxpayers that cannot pay their delinquent tax debt because of doubt as to collectability or economic hardship should file Form 656, *Offer in Compromise* and Form 433-A, *Collection Information Statement for Wage Earners and Self-Employed Individuals*.[31] The fee for submitting an offer is $168.[32] However, the IRS will waive this fee for accidental Americans with income below a certain level. Section 1 of Form 656 helps taxpayers determine if they fall below the income threshold.[33]

Accidental Americans that are able to pay their tax liabilities may still qualify for an OIC under the "effective tax administration" ("ETA") guidelines. The IRS will accept an ETA offer based on equity or public policy if there are no other grounds for compromise and, because of exceptional circumstances, its collecting the full liability would undermine public confidence that the tax laws are being administered in a fair and equitable manner.[34] The regulations provide that the following conditions must exist before the IRS will accept such a non-hardship ETA offer: (a) compelling public policy or equity considerations must be present to justify compromise, (b) collection of the full liability would undermine public confidence in the fair and equitable administration of the tax laws, or (c) circumstances exist to justify compromise even though a similarly situated taxpayer may have paid the liability in full.[35]

If the IRS rejects an OIC, the accidental American will receive a letter explaining why the IRS rejected the offer and how the decision can be appealed. The individual must appeal within thirty days from the letter.[36] The IRS funds Low-Income Taxpayer Clinics ("LITC") to assist low-income taxpayers with OIC filings. The services of LITCs are free.[37]

Conclusion

US law requires US persons to file US tax returns and pay US income taxes, regardless of where the individual lives. Besides filing income tax returns and related forms, US persons must file Financial Crimes Enforcement Network Form 114, i.e., the FBAR. US persons have the absolute right to expatriate. For those wishing to do so, the IRS has in several programs in place, including the Streamlined Foreign Off-

shore Procedures and OIC based on ETA to facilitate the desire to avoid US tax obligations. The IRS also funds LITCs that can assist low-income taxpayers with their OIC submissions. If you are a low-income taxpayer needing assistance, you can contact an advocate from the Taxpayer Advocate Service by following the directions at https://taxpayeradvocate.irs.gov/contact-us. Also feel free to email the authors of this article with questions about IRS programs to help accidental Americans with tax compliance.

Footnotes:

1. Frank Agostino, Esq. is the principal of, and Joseph A. Stackhouse, Jr. is a law clerk of, Agostino & Associates, P.C. in Hackensack, New Jersey.
2. A simple internet search on the term accidental American suggests that US taxation is of paramount importance to these US Persons. *See, e.g.*, Smith, *How To Tell If You Are An Accidental American,* https://www.iexpats.com/how-to-tell-if-you-are-an-accidental-american/(last visited Aug. 17, 2018); Mulraney, *Irish with 'inherited' US citizenship? You might have to pay taxes,* https://www.irishcentral.com/travel/moving-to-ireland/accidental-americans-us-taxes-fatca (last visited Aug. 17, 2018); Davidson, *For 'accidental Americans,' the hidden costs prove taxing,* https://www.csmonitor.com/World/Europe/2018/0504/For-accidental-Americans-the-hidden-costs-prove-taxing(last visited Aug. 17, 2018); Burggraf, *Plight of French 'Américains Accidentels' gets major US media coverage,* http://www.internationalinvestment.net/products/plight-of-french-americains-accidentels-gets-major-us-media-coverage/(Aug. 17, 2018). This article focuses solely on the US tax consequences of citizenship and renunciation.
3. Allison Christians, A Global Perspective on Citizenship-Based Taxation, 38 Mich. J. Int'l L. 193 (2016).
4. *See* "Tina's Story", *Id.* at 197.
5. Unless otherwise indicated, Section references refer to the Internal Revenue Code.
6. *See* Tommy Lumby and Raymond Brown, *Cambridge grandmother hounded to pay £200 in US taxes-despite leaving as a TODDLER*, Cambridge News (Jul. 11, 2018), available at https://www.cambridge-news.co.uk/news/cambridge-news/grandmother-toddler-dollars-usa-14873554?platform=hootsuite.
7. *See* Zachary Young, *Macron backs 'accidental Americans'*, POLITICO (Aug. 2, 2018) available at https://www.politico.eu/article/accidental-americans-emmanuel-macron-backs/.
8. *Id.*
9. IRS, IRS Announces the Identification and Selection of Six Large Businesshttps and International Compliance Campaigns, IRS.gov (June 22, 2018) www.irs.gov/businesses/irs-announces-the-identification-and-selection-of-six-large-business-and-international-compliance-campaigns.
10. I.R.C. § 7345(b)(1)(B). "[T]he term 'seriously delinquent tax debt' means an unpaid, legally enforeceable Federal tax liability of an individual…which is greater than $50,000…" including interest and penalties.
11. The only other country that taxes citizens based on citizenship is Eritrea in Africa. *See* Nick Giambruno, *Only Two Countries Do This Appalling Thing-And the U.S. Is One of Them*, International Man, available at https://internationalman.com/articles/this-appalling-practice-is-only-used-in-two-nations-and-the-us-is-one-of-th/ (last visited Aug. 17, 2018).
12. The Foreign Earned Income Exclusion for 2018 is $104,100 under I.R.C. §911. Christian Reeves, *Foreign Earned Income Exclusion for 2018*, Premier Offshore (Nov. 1 2018).
13. Taxpayer Advocate Service Annual Report to Congress, *Challenges Persist for International Taxpayers as the IRS Moves Slowly to Address Their Needs*, (MSP #15 2012), https://www.americansabroad.org/media/files/files/b1ccc38b/Most-Serious-Problems-International-Taxpayer-Issues.pdf.
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15. 31 U.S.C. § 5321(a)(5)(B).
16. Full instructions and requirements can be found at: U.S. Dept. of State – Bureau of Consular Affairs, https://travel.state.gov/content/travel/en/passports/apply-renew-passport/how-to-apply.html (last visited Aug. 17, 2018).
17. Language found on U.S. Dept. of State – Bureau of Consular Affairs, https://travel.state.gov/content/travel/en/passports/apply-renew-passport/outside-us.html (last visited Aug. 17, 2018) as prescribed by 22 U.S.C. § 2714(a) and 22 C.F.R. § 51.60(f).
18. More information about passport fees, including a fee calculator and fee chart, can be found at U.S. Dept. of State - Bureau of Consular Affairs, https://travel.state.gov/content/travel/en/passports/requirements/fees.html (last visited Aug. 17, 2018).
19. More information about processing times can be found at U.S. Dept. of State – Bureau of Consular Affairs, https://travel.state.gov/content/travel/en/passports/requirements/processing-times.html (last visited Aug. 17, 2018).
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32. *Id.*
33. *Id.*
34. Treas. Reg. § 301.7122-1(b)(3)(ii).
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REPORTING TRANSFERS FROM U.S. TAXPAYERS TO FOREIGN CORPORATIONS—IRS FORM 926

By Frank Agostino, Esq. and Victor M. Nazario, III[1]

Driven by international trade and investment, and connected by family and technology, New York and New Jersey small businesses are expanding their businesses offshore. Entrepreneurs transfer property, cash, and other assets overseas or to foreign holding corporations to conduct everyday business transactions. Most tax professionals have taken continuing education courses on the Form 5471, *Information Return of U.S. Persons With respect To Certain Foreign Corporations.* However, the audits of entrepreneurs have revealed a filing requirement being overlooked - when a U.S. Person transfers property to a foreign corporation, he or she may need to file Form 926, *Return by a U.S. Transferor of Property to a Foreign Corporation*.[2] This Article explains the basics of Form 926.

REPORTING OBLIGATIONS FOR LARGE PROPERTY TRANSFERS

Taxpayers Transferring either Cash and/or Property to a Foreign Corporation May Need to File Form 926

Form 926 is an information return that must be filed under Section 6038B.[3] Form 926 tells the Internal Revenue Service ("IRS") about transfers of cash or property (tangible or intangible) to a foreign corporation from a U.S. Taxpayer.[4] The Form prevents taxpayers from avoiding taxation when they transfer and simultaneously sell the property overseas to avoid the IRS's reach. The IRS is interested in property transfers to a foreign corporation that would be non-recognition transactions under Sections 332, 351, 354, 355, 356, 361, or 367 if they are done with domestic corporations.[5]

Form 926 is Attached to the Taxpayer's Income Tax Return

U.S. Taxpayers file Form 926 with their income tax return for the tax year, typically the fifteenth day of the fourth month after the close of the tax year (usually April 15th).[6] This filing deadline may be extended up to six months if the IRS grants a taxpayer's request to do so.[7]

Who Files Form 926?

A Taxpayer Must File Form 926 when he or she Transfers Property to a Foreign Corporation.
Section 6038B requires U.S. persons (i.e. U.S. Taxpayers)[8] to file Form 926 if:

1. a U.S. subsidiary corporation liquidated into its foreign parent corporation (i.e. Section 332 transaction);
2. any U.S. Taxpayer, a potential shareholder, contributed cash or property for a foreign corporation's stock and has immediate control over that foreign corporation (i.e. Section 351 transaction);
3. any U.S. Taxpayer, a current shareholder, exchanged stock or security with a foreign corporation, party in a reorganization who is pursuing a reorganization plan (i.e. Section 354 transaction);
4. any U.S. Taxpayer transferred property to a foreign corporation in a tax-free division (i.e. "Section 355 transaction");
5. any U.S. Taxpayer transferred property in a Section 354 or Section 355 transaction to a foreign corporation, but received additional property ("boot") from that corporation (i.e. "Section 356 transaction");
6. a U.S. corporation transferred property to a foreign corporation during a reorganization plan (i.e. "Section 361 transaction");
7. any U.S. Taxpayer transferred intangible property to a foreign corporation in a Section 351 transaction, Section 361 transaction, and Section 367(d) transaction; and

8. a U.S. corporation transferred property in a tax-free division, a Section 355 transaction (i.e. a Section 367(e) transaction).[9]

Form 926 requires the taxpayer to identify transactions with foreign entities that would be non-recognition transactions under Sections 332, 351, 354, 355, 356, 361, or 367 (hereinafter "Reportable Transactions") if a taxpayer conducts those Reportable Transactions with a domestic corporation.

Other reportable events for Form 926 are:

1. the IRS's re-characterization of a shareholder's debt into equity, a deemed property transfer;
2. purchasing foreign corporation shares through an underwriter on an IPO (Treas. Reg. 1.351-1(a)(3));
3. a transfer of intangible property where either the U.S. taxpayer disposes of the foreign corporation stock or the foreign corporation disposed of the transferred intangible property; and
4. transfers to a foreign corporation that a taxpayer does not control for Section 351 purposes.[10]

A Taxpayer Must File Form 926 when they Transfer Cash to a Foreign Corporation

If a taxpayer transfers cash to a foreign corporation, a taxpayer must report that cash transaction on Form 926 when:

1. U.S. taxpayer transferred cash to a foreign corporation and held ten percent of the voting stock or any class of stock in that corporation immediately after the transfer;[11] or
2. U.S. taxpayer, or a related party to a taxpayer, transferred over $100,000 to the foreign corporation within a twelve-month period ending on the date of the transfer.[12]

The phrase "twelve-month period" could apply to cash transfers that a taxpayer made in two tax years.[13] Based on this reading, some tax professionals aggregate the property transfers on a calendar year basis instead of any twelve-month period. This approach is wrong because a tax professional must track the cash transfers on a twelve-month cycle once the value of the cash transfer exceeds $100,000.[14]

The Instructions for Form 926 Include Special Rules for Partnerships, Married Taxpayers, and Taxpayers Transferring Assets with Built-In gains

Partnership Rule

If a partnership or limited liability company (taxed as a partnership), transferred property or cash, then each partner must file Form 926.[15] Each partner should report a proportionate share of the property.[16] The partner's Schedule K-1 will have the reported transaction, which informs the partner to report the transaction on their annual tax return.[17]

Spouses Transfer Rule

If spouses jointly owned property or cash and transferred that property or cash to a foreign corporation, the spouses may file a single Form 926 if they file a joint tax return.[18] A married taxpayer filing separately should file his or her own Form 926.[19]

Before filing a joint return with a non-resident, preparers should review Treas. Reg. 1.6038B-1T(b)(4)(iv). In one example, on March 1, 1986, D, a nonresident alien individual married to a U.S. citizen, transfers property to a foreign corporation in a Section 351 tax-free exchange.[20] On April 15, 1987, D and the spouse timely filed, with their 1986 tax return, an election under section 6013(g) for D to be treated as a U.S. resident.[21] The election is effective on January 1, 1986.[22] For section 6038B purposes, the transfer is considered to have occurred April 15, 1987, the date on which the prompt election was made under section 6013 (g) and Form 926 should be filed with the 1987 tax return.[23]

Gain Recognition Agreement
If a U.S. taxpayer files a Gain Recognition Agreement ("GRA"), under Treas. Reg. § 1.367(a)-8(p), the U.S. taxpayer who transferred stock or securities should report the market value, adjusted tax basis, and gain recognized of the transferred stock or securities on Part 1 and 2 of Form 926, along with the GRA.[24]

Besides the filing, the U.S. taxpayer must strictly follow the terms of a GRA to satisfy the obligations of Section 6038B.[25] While older regulations allowed a U.S. taxpayer to file a GRA instead of Form 926, the current Treasury Regulations require a U.S. taxpayer to file both a GRA and Form 926.[26]

Assets Transferred to Foreign Corporations are Reported at Fair Market Value on Form 926
For purposes of Form 926, a taxpayer must report the fair market value of transferred property at the time a taxpayer transferred that property to a foreign corporation (as explained above).[27] A taxpayer determines the property's fair market value at the time of the transfer.[28] The fair market value of an asset includes any valuation discounts to reflect the true nature of the property's value.[29]

Some Tax-Deferred reorganizations Involving Foreign Entities are Not Reported on Form 926.

Form 926 does not require U.S. taxpayers to report some tax-deferred reorganizations involving foreign entities.

Section 354 or 356 Stock Exchanges
A U.S. taxpayer need not file Form 926 in a transaction subject to Section 354 or Section 356 if:

1. The U.S. taxpayer exchanged a foreign corporation's stock in a tax-free recapitalization, Section 368(a)(1)(E); or
2. The taxpayer exchanged domestic or foreign corporation stock for stock of a foreign corporation in an asset reorganization, a non-indirect stock transfer under Treasury Regulation section 1.367(a)-3(d).[30]

Certain Section 355 Corporate Stock Distributions
A U.S. C Corporation taxpayer ("Domestic Corporation") need not file Form 926 when that Domestic Corporation distributed a domestic subsidiary corporation's stock or securities in a Section 355 transaction.[31] This exemption does not apply if the subsidiary corporation is actually a foreign corporation (i.e. "controlled foreign corporation") that distributed corporate stock or securities to a non-U.S. citizen or resident.[32]

Certain Stock Transfers Under Section 367
A U.S. taxpayer need not file Form 926 when a U.S. taxpayer[33] transfers stock or securities to a foreign corporation, which would not be a corporation for recognizing gain,[34] if:

1. The U.S. taxpayer owned less than five percent of the foreign corporation immediately after the transaction, and either:
   i. the U.S. taxpayer's transfer was a non-taxable exchange within Sections 1.367(a)-3(b) or(c);
   ii. the U.S. taxpayer, a tax-exempt entity, does not have unrelated business income;
   iii. the U.S. taxpayer properly reported the taxable transfer on their timely filed tax return; or
   iv. the transfer, to a foreign corporation, with a total value of less than $100,000 falls within Section 1.83-6(d)(1).[35]

2. The U.S. taxpayer owned less than five percent of the foreign corporation immediately after the transaction, and either:
   i. the U.S. taxpayer (or any successor) transferor filed a gain recognition agreement under Section 1.367(a)-8, and filed Form 926; or
   ii. the U.S. taxpayer, a tax-exempt entity, does not have unrelated business income;

iii. the U.S. taxpayer properly reported the income from the transferred property on their timely filed tax return; or
iv. the transfer, to a foreign corporation, with a total value of less than $100,000 falls within Section 1.83-6(d)(1).[36]

THE IRS DOES NOT RECOGNIZE THE DOCTRINE OF SUBSTANTIAL COMPLIANCE AS A DEFENSE TO SECTION 6038B BASED PENALTIES.

A taxpayer complies with section 6038B's reporting requirements by attaching Form 926 to their tax return.[37] The IRS contends that Form 926 is not filed until a taxpayer files a complete Form 926.[38] A failure to file penalty can also apply for failing to show the correct information or failing to report in a proper manner such as disclosing "property [that] will be used in the active conduct of a trade or business outside the U.S. when in fact the property continues to be used within the U.S."[39] Preparers frequently ask what they should do if the taxpayer has made best efforts to obtain documents to comply with a reporting requirement but cannot do so by the due date of the return.

In domestic income tax examinations, examiners and the Courts will sometimes excuse penalties based on the doctrine of substantial compliance.[40] This doctrine excuses the consequences of noncompliance (e.g., penalties and loss of a tax benefit) if the taxpayers show they have done all that can be expected of them but did not follow a procedural statute.[41]

When international information reporting forms are involved,[42] IRS training materials essentially direct examiners to reject the substantial compliance doctrine.[43] There are no reported opinions that analyze the application of the substantial compliance doctrine to section 6038B.

Notwithstanding the IRS's position,[44] some tax professionals advocate that tax professionals without complete information file a "Best Efforts Return," also sometimes called *Beard* filings.[45] Best Efforts Returns disclose the information within the taxpayer's control and explain why the taxpayer could not get the other required information.[46] Even if the IRS views Best Efforts Returns as not complying substantially with the filing requirements, some professionals believe these filings are a condition precedent to arguing that reasonable cause excuses penalties.[47]

Another variation on substantial compliance in Form 926 cases results from some preparers' lack of familiarity with the Form. In these cases, the information required by Form 926 appears on other forms (i.e. Form 5471, 8938, and/or another international information returns, like an FBAR) attached to the taxpayer's return. In these cases, tax professionals frequently argue that the doctrine of substantial compliance applies[48] because the return gave the IRS all of the information required by Section 6038B. Here, too, the IRS rejects the defense because a taxpayer did not report the transferred property's information in "the proper manner" as required under section 6038B.[49] There are no litigated cases on the application of the substantial compliance doctrine to Form 926.

THE IRS EXAMINATION OF FORM 926

A Tax Professional Should Review the IRS IPU for Form 926 Examinations Before Meeting with the Revenue Agent.

On June 14, 2016, the IRS published an International Practice Unit (IPU) for the examination of Form 926.[50] The IPU suggests the following:

First, the examination of whether a taxpayer must file a Form 926 often begins with the examination of the Form 5471 or Form 8938. These forms show whether a taxpayer has an interest in a foreign corporation.

Second, if a taxpayer has an interest in a foreign corporation, the IRS will send one or more document requests designed to ascertain whether the taxpayer was involved in a Reportable Transaction.[51]

Third, the IRS will verify if a taxpayer promptly filed a complete and a correct Form 926.[52] If a taxpayer did not file a Form 926 or they did not file a complete and a correct Form 926, the IRS will usually open a penalty case file.

Fourth, if the examiner believes a penalty is appropriate, he or she will send a Form 926 Penalty Notice Letter to a taxpayer[53] and/or determine a penalty under Section 6662.[54] This is the taxpayer's opportunity to assert that reasonable cause excuses any penalty.[55]

If compliance determines reasonable cause exists or that the taxpayer had no filing requirement,[56] the penalty file is closed using Form 3198.[57]

If compliance determines reasonable cause does not exist, it completes the case closing forms and inputs the Section 6038B penalties and/or section 6662 penalties onto Form 8278, *Assessment and Abatement of Miscellaneous Penalties*.[58] Before sending the Form 8278, the agent receives the managerial approval (manager's signature) as required by section 6751(b) (as outlined further below).[59]

The authors recommend that a taxpayer file a Freedom of Information Act request upon receipt of the Form 8278.

Failing to File Form 926 Extends the Statute of Limitations for an Examination.

Traditionally, the IRS has three years to examine and assess a liability against a taxpayer if that taxpayer filed his or her return on April 15th.[60] If a taxpayer fails to file Form 926 with his or her Form 1040, *U.S. Individual Income Tax Return*, the IRS has an unlimited time to examine the taxpayer for that tax year.[61] Once a taxpayer files Form 926, the IRS has three years to examine and assess a tax liability.[62] Under some circumstances, the IRS has six years to assess (i.e., if a taxpayer's reported basis or value on a Form 926 asset exceeded twenty-five percent of its true value).[63]

Remarkably, the regulations under Form 926 claim that besides non-filing of Form 926, the unlimited statute of limitations applies to any failure to provide complete and accurate information, including:

1. failing to report, at the proper time (i.e. late filing Form 926) or in the proper manner (i.e. reporting the property transaction on Form 8938, 5741, on the annual return, or other information return instead of Form 926);
2. providing false or inaccurate information on Form 926 (i.e. providing different or false information about the property or its value or basis);
3. failing to file a gain recognition agreement under Treas. Reg. 1.367(a)-8; or
4. failing to file a liquidation document under section 1.367(e)-2(b)(2).[64]

There are no court cases interpreting these regulations. Until the Courts have provided guidance, a taxpayer must expect that the IRS will contend with the statute of limitations does not run before the taxpayer makes the disclosures required on Form 926, the IRS determines that the disclosures are correct, and/or the terms of any gain recognition agreement have been satisfied.[65]

The statute of limitations to assess Section 6038B related taxes and penalties are extended if the taxpayer fails to file Form 8838, *Consent to Extend the Time to Assess Tax Under Section 367 – Gain Recognition Agreement*, consensually extending the statute of limitations under section 367 for realizing gain but not recognizing gain on the property transfer to a foreign corporation.[66] Stated another way, the IRS contends that if a taxpayer fails to consensually extend the statute of limitations for assessing a deferred tax by filing Form 8838, the taxpayer has not complied by section 6038B[67] and that the statute of limitations is extended by operation of law.[68]

THE PENALTIES RESULTING FROM FAILING TO FILE A SUBSTANTIALLY COMPLETE FORM 926 INCLUDE TAX ACCELERATION UNDER SECTION 367, ADDITIONS TO TAX UNDER SECTION 6662 (J) AND ADDITIONAL AMOUNTS

Failing to File Form 926 Results in a Monetary Penalty of Equal to Ten Percent of the Amount Transferred to the Foreign Entity.

Taxpayers who fail to file, provide correct information on Form 926, or fail to follow the other section 6038B's requirements will be assessed a monetary penalty under section 6038B.[69] Section 6038B sets forth a penalty equal to ten percent of the transferred property's fair market value at the time of the transfer.[70] However, the penalty can be excused if a taxpayer establishes a reasonable cause defense.[71] The section 6038B "shall not exceed $100,000"[72] unless the taxpayer "intentionally disregarded" his or her obligations under section 6038B.[73] The IRS defines intentional disregard to mean that the taxpayer "knew of the rule or regulation" and disregarded it.[74]

Failing to File Form 926 Can Result in an Additional Income Tax Liability.

Besides the monetary penalties, the IRS can determine an additional income tax liability for failing to file Form 926. If a taxpayer did not file Form 926 or comply with any of section 6038B reporting requirements (including filing a timely GRA), the property transferred to the foreign corporation ceases to qualify for the active trade or business conduct exception under Section 367.[75] This failure requires the taxpayer to recognize gain on any appreciated property (i.e., the amount by which the property's fair market value exceeded his or her cost basis in that property).[76] This tax is subject to the traditional notice of deficiency requirements.

The Tax Resulting from the Failure to File Form 926 is Subject to a Forty Percent Accuracy-Related Penalty.

Under Section 6662(j), a penalty can be imposed on any portion of an underpayment attributable to an undisclosed foreign financial asset. In a Form 926/Section 6038B examination, the underpayment results from the acceleration of tax based on the taxpayer's failure to file Form 926, GRA, or other event accelerating a tax for Section 367 purposes.[77]

THE IRS IS SKEPTICAL OF THE REASONABLE CAUSE DEFENSE IN SECTION 6038B CASES.

Many of the Section 6038B cases involve businesses expanding their businesses offshore. The IRS applies a heightened reasonable cause analysis to these taxpayers and their preparers. Against this background and at the conclusion of most examinations, the taxpayer argues that penalties should be excused based on "reasonable cause." Section 6038B provides that none of the penalties based on failing to file Form 926 apply if the taxpayer proves to the IRS's satisfaction that such failure was due "to reasonable cause and not willful neglect."[78] Section 6038B does not define "reasonable cause."[79] The regulations provide that reasonable cause is "based on all the facts and circumstances."[80]

First, to date, the IRS has not been influenced by taxpayers arguing that reasonable cause can be inferred from the fact there was no tax due resulting from failing to file Form 926.[81] Section 6038B's filing requirement is not conditioned on the taxability of transfers to a foreign corporation.[82] The IRS penalizes failure to file even when the filing shows no tax due.[83] The fact that there is no tax due, although a factor, is not issue determinative as to the existence of reasonable cause.[84]

Next, the IRS will not consider a reasonable cause defense until a taxpayer has filed all unfiled international information returns.[85] Frequently, the cost to avoid the Section 6038B penalty is the disclosure of facts that could cause an exponential increase in the number of potential penalties.

Similarly, the request for abatement includes "a written statement, explaining the reasons for failing to comply."[86] The IRS personnel, who are personally conducting the examination, review a taxpayer's request for abatement.[87] If the examination team does not accept the taxpayer's reasonable cause statement, they can use the statement as the basis for determining failing to file Form 926 was due to "intentional disregard"

and assess a penalty greater than the $100,000 limitation of Section 6038(c)(3).[88]

Finally, there are no reported cases defining reasonable cause under Section 6038B. Under a traditional reasonable cause analysis, a taxpayer proves their reasonable cause defense by exercising ordinary care and prudence, [even if the taxpayer was] unable to file the return within the prescribed time."[89] Reasonable cause defense is a fact-sensitive inquiry that considers:

1. a taxpayer's reason for failing to file;
2. his or her efforts to comply with the filing requirements; and
3. in certain circumstances, his or her knowledge or ignorance of the law.[90]

When asserting the reasonable cause defense, a taxpayer must show he or she either made a reasonable and good faith effort to follow the law or was unaware of the requirement and could not know of the requirement.[91]

Reasonable cause may also exist if the taxpayer relied in good faith on a tax expert.[92] Courts have agreed that a taxpayer's reliance on an attorney's or an accountant's mistaken advice establishes reasonable cause when the advice concerns: 1) when a taxpayer should file,[93] and 2) what forms a taxpayer should file. The IRS also requires proof that the taxpayer's reliance on the advice was in good faith.[94]

CHALLENGES TO SECTION 6038B PENALTIES

Section 6038B based Penalties for Failing to File Form 926 are Assessed on Form 8278

Under existing procedures, the IRS assesses penalties for failing to file Form 926 on Form 8278, *Assessment and Abatement of Miscellaneous Civil Penalties*. The completed Form 8278 satisfies the managerial approval requirements of Section 6751(b).[95] The authors recommend that the taxpayer file a Freedom of Information Act request upon receipt of the Form 8278 to verify compliance with section 6751(b).

After the assessment, the IRS will send a CP 15 or 215, *Notice of Penalty Charge*, to the taxpayer.[96] These forms provide for post-assessment prepayment appeals of Section 6038B based penalties.[97] There are no Tax Court rights associated with a post-assessment prepayment appeals being offered by the IRS.

First Time Penalty Abatement Policy May Apply to Form 926 Penalties

Before filing a protest to the Appeals Office, the taxpayer should request a First Time Abatement of the Section 6038B penalty.[98] The IRS rarely applies the First Time Abatements to returns that fail to include international information returns (e.g., Form 926).[99] If a taxpayer files a late income tax return but attaches a substantially complete Form 926 to the return, then the IRS may allow the first-time abatement of the Section 6038B penalty when abating the other late filing penalties associated with the delinquent return.[100]

The Taxpayer Should Consider Filing a Qualified Offer with His or Her Protest of Section 6038B Penalty

At or about the time the taxpayer makes his or her submission to IRS Appeals, he or she should evaluate whether to submit a qualified offer under Section 7430(g). Section 7403(g) makes the taxpayer eligible for an award of costs. More important, the submission of a qualified offer focuses the IRS's attention on the taxpayer's case and can lead to a prompt resolution.[101] The procedures and benefits of making a qualified offer were discussed in the April Edition of the Agostino & Associates Tax Controversy Journal. If you are submitting an international penalty protest to IRS Appeals in a case, we recommend you familiarize yourself with the procedures reviewed in the article.[102]

Verification Challenges to Section 6038B Penalties in a Collection Due Process Proceeding or an Equivalent Hearing

If a taxpayer does not pay the Form 926 penalties (including recognizing income or Section 6662 penalties) stated on Letter CP 15 or CP 215, the IRS will send a taxpayer either letter:

(a) Letter L-1058, *Notice of Intent to Levy and Notice of Your Right to a Hearing*;[103]
(b) LT 11, *Final Notice of Intent to Levy and Notice of Your Right to a Hearing*;[104] or
(c) Letter 3172, *Notice of Federal Tax Lien Filing and Your Right to a Hearing under IRC 6320*.[105]

Sections 6320 and 6330 allow a taxpayer to file IRS Form 12153, *Request for a Collection Due Process* ("CDP") *or Equivalent Hearing*, to challenge their liability before the Appeals Office.[106] Section 6330(c)(1) provides:

> "The appeals officer shall at the hearing obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met."

In several previous articles, the Agostino & Associates Tax Controversy Journal has discussed the need to verify the IRS's compliance with Section 6751(b) when challenging international information return penalties. To avoid duplication, we suggest anyone filing a CDP case, to contest an information return penalty, refer to those articles.[107] To date, no cases have discussed the verification requirements applicable to the Section 6038B based penalties.[108] To determine the requirements of any applicable law or administrative procedure, we begin with the plain language of the Code.

The assessable penalties are generally in Chapter 68 of the Code. Section 6677 penalizes failing to file either Form 3520 and/or Form 3520-A.[109] Section 6679 penalizes failing to file some Forms 5741 and Form 8865.[110]

The Section 6038B penalty, unlike most international information return penalties, is in Chapter 61 of the Code. These Chapter 61 penalties apply to information reports required to be attached to income tax returns.[111] Based on its placement in Chapter 61, did Congress intend to provide taxpayers with a prepayment forum to contest the penalty and condition the assessment of the section 6038B penalty on the issuance of a notice of deficiency?[112] Some authors say "yes."

Tax professionals, including Erin Collins and Garrett Hahn of KPMG LLP, argue that the international penalties found in Chapter 61, including the penalties under Section 6038, Section 6038A, and Section 6038B, are not assessable penalties[113] because they are not in Chapter 68 of the Code and not included within the penalties described in Sections 6677 and 6679.[114] If the penalties are not assessable, a condition precedent to assessment is a notice of deficiency or a notice of determination.

Based on the work of these authors, some tax controversy professionals recommend that their clients challenge the assessment of Section 6038B penalties in CDP Hearings under the verification requirement in Section 6330(c). Their argument is:

1. Section 6201 allows the IRS to assess the assessable penalties under Chapter 68.[115]
2. Section 6671, in Chapter 68, Subchapter B, provides the rules for the assessment of assessable penalties.[116]
3. Section 6671 only allows the assessment of penalties as "provided by this subchapter [("chapter 68")]."[117]
4. Since Chapter 68 does not include Chapter 61 penalties, the Chapter 61 penalties are not within the class of assessable penalties.[118]
5. Sections 6677 and Sections 6679 only exclude the penalties under Sections 6046, 6048A and 6048 from the deficiency procedures;[119] Congress did not exclude Section 6038B from the deficiency procedures.[120]
6. Thus, the IRS does not have the authority to assess and collect the Chapter 61 penalties, including Section 6038B penalties before issuing a notice of deficiency.[121]

Section 6038B supports Collins and Hahn's argument, which provides in part:

> "If any United States person fails to furnish the information described in subsection (a) at the time and in the manner required by regulations, such person shall pay a penalty equal to 10 percent of the **fair market value** of the property at the time of the exchange (and***, in the case of a contribution described in subsection (a)(1)(B), such person shall recognize gain as if the contributed property had been sold for such value at the time of such contribution***)." (Emphasis added).

Section 6038's requirement that the taxpayer "recognize gain" means that the calculation of the penalty is dependent on a deficiency in tax under Section 6211. Before assessing this "penalty", the IRS may have to send a notice of deficiency under Section 6213 which determines both the fair market value of the unreported property and the resulting deficiency. When a penalty depends upon determining a deficiency, then the penalty is subject to deficiency procedures and the Tax Court has jurisdiction to redetermine the tax and penalty.[122] Whether called a tax or an additional amount, the Tax Court would have jurisdiction to determine the correct amount under Section 6214.[123]

The taxpayer may want to argue that the Code requires the IRS to issue a notice of deficiency as a condition precedent to the assessment of the penalty. To date, no cases have discussed the verification requirements applicable to the Section 6038B based penalties.

If the Appeals Office rules against a taxpayer, then a taxpayer must appeal the decision within thirty days to the US Tax Court to challenge either the levy or the lien.[124] The taxpayer's appeal and/or Tax Court petition suspends the levy or lien action if a taxpayer appealed in a prompt manner (thirty days).[125]

There are No Reported Cases Discussing Challenges to Section 6038B Penalties in CDP Hearings, Deficiency, and/or Refund cases.

Although the audits under the IPU have begun, none of the audits have resulted in a trial based on the current information. To date, there are no reported opinions discussing the rules applicable to challenges to Section 6038B penalties.

The Delinquent International Information Return Submission Procedure

Based on the IPU and the increasing number of Form 5471 examinations, we expect that the IRS will be looking at the Section 6038B issue more carefully. If a taxpayer realizes that he or she has filed a non-compliant return and wishes to comply with Section 6038B, he or she should review the Delinquent International Information Return Submission Procedure ("DIIRSP").[126] DIIRSP allows eligible taxpayers to correct their failure to file without a penalty under these circumstances:

1. the taxpayer did not file one or more required international information returns;
2. the taxpayer has a reasonable cause for not timely filing the information return;
3. the taxpayer is not under a civil examination or criminal investigation by the IRS; and
4. the IRS has not already contacted the taxpayer about the delinquent return.[127]

Besides filing the delinquent returns, the taxpayer must attach a reasonable cause statement.[128] This reasonable cause statement explains the facts and circumstances that resulted in the taxpayer's failure to file Form 926.[129] In this statement, a tax professional must certify that the taxpayer filing Form 926 was not engaged in tax evasion.[130] A DIIRSP filing is not without risk; if the IRS does not accept the taxpayer's reasonable cause, then the IRS will assess the Section 6038B penalty.[131]

Conclusion

As cross-border business transactions increase, the incentives for aggressive tax planning and IRS imposition of the reporting obligations to detect that planning increase. With the enhanced reporting requirements come enhanced penalties for failure to file or otherwise comply with the enhanced reporting requirements. Whenever your client(s) invest in offshore corporations and enter offshore, tax professionals should review and consider whether to include a Form 926 with the Forms 5471 and/or 8938.

Endnotes:

1. Frank Agostino, Esq. is the principal of, and Victor M. Nazario III is a law clerk at, Agostino & Associates, P.C. in Hackensack, New Jersey. We recognize the contributions that Mary Beth Lougen, EA, USTCP, of American Expat Taxes made to this Article's development.
2. I.R.C. § 6038B(a).
3. Treas. Reg. § 1.6038B-1(b)(1)(i).
4. *Id.*
5. I.R.M., pt. 20.1.9.7.1 (2) (07-08-2015).
6. I.R.C. § 6072(a).
7. I.R.C. § 6081(a).
8. I.R.C. § 7701(a)(30) (explaining that US Taxpayers are US citizens, US residents, domestic corporations, and domestic estates and trusts).
9. I.R.C. § 6038B(a).
10. Treas. Reg. § 1.6038B-1(b)(1)(i); Treas. Reg. §§ 1.6038B-1T(d)(1)-(2).
11. I.R.C. § 6038B(a)(1)(A); Treas. Reg. § 1.6038B-1(b)(3)(i).
12. I.R.C. § 6038B(a)(1)(A); Treas. Reg. § 1.6038B-1(b)(3)(i).
13. Treas. Reg. § 1.6038B-1(b)(3)(i).
14. *Id.*
15. Treas. Reg. § 1.6038B-1(b)(1)(iii) ("If two or more persons transfer jointly-owned property to a foreign corporation in a transfer, which a notice is required under this section, then each person must report on the particular interest transferred, specifying the nature and extent of the interest.").
16. *Id.*
17. *Id.*; Amanda Lu, *Complex Foreign Reporting Rules Make Compliance Difficult for Individual Taxpayers*, THE TAX ADVISER (Dec. 1, 2014), *available at* https://www.thetaxadviser.com/issues/2014/dec/tax-clinic-06.html
18. Treas. Reg. § 1.6038B-1(b)(1)(iii).
19. *Id.*
20. Treas. Reg. § 1.6038B-1(b)(4)(iv).
21. *Id.*
22. *Id.*
23. *Id.*
24. Treas. Reg. § 1.6038B-1(b)(1)(iv).
25. *Id.*
26. Irwin Halpern & Meyer Jacobson, *Final Regulations Address Gain Recognition Agreements and Other Cross-Border Transfer Reporting,* THE TAX ADVISER (Mar. 1, 2015), https://www.thetaxadviser.com/issues/2015/mar/tax-clinic-01.html.
27. *See also* I.R.C. § 6038B(c)(1). I.R.S. Form 926, *Instructions to Form 926*, at p. 4. *See generally* Treas. Reg. § 1.6038B-1 (explaining in various sections that a taxpayer must show the fair market value of the transferred property on Form 926).
28. *See also* I.R.C. § 6038B(c)(1). I.R.S. Form 926, *Instructions to Form 926*, at p. 4. *See generally* Treas. Reg. § 1.6038B-1 (explaining in various sections that a taxpayer must show the fair market value of the transferred property on Form 926).
29. *See also* Treas. Reg. §§ 1.897-1(o)(1)-(2).
30. Treas. Reg. § 1.6038B-1(b)(1)(i).
31. *Id.* § 1.603B(e)(2).
32. *Id.* § 1.603B(e)(3).
33. Even though this Article focuses on individuals this rule mainly applies to corporations.
34. I.R.C. § 367(a).
35. Treas. Reg. § 1.6038B-1(b)(2)(i)(A).
36. Treas. Reg. § 1.6038B-1(b)(2)(i)(B).
37. Treas. Reg. § 1.6038B-1(b)(1)(i).
38. *Id.* §§ 1.6038B-1(f)(1)-(2).
39. *Id.* § 1.603B-1(f)(2).
40. *See Prussner v. U.S.*, 896 F.2d 218 (7th Cir. 1989) (en banc); *Bond v. Commissioner*, 100 T.C. 32 (1993); *Taylor v. Commissioner,* 67 T.C. 1071 (1977).

41. *See Estate of Chamberlain v. Commissioner*, T.C. Memo. 1999-181 (1999).
42. *See* LB&I International Concept Unit, *The Meaning of "Substantially Complete" with Reference to International Information Return Penalties*, IRS, *available at* https://www.irs.gov/pub/int_practice_units/iga_c_17_03_01_02.pdf [hereinafter referred as "LB&I International Concept Unit"] (last visited Aug. 20, 2018).
43. *Id.*
44. *See* LB&I International Concept Unit, *supra* note 42. *See also* I.R.S. Chief Counsel Advice 20429007 (explaining when a Form 5472 can be substantially complete).
45. *Beard v. Commissioner*, 82 T.C. 766, 777 (1984).
46. *Id.*
47. *See* LB&I International Concept Unit, *supra* note 42.
48. *See Estate of Chamberlain v. Commissioner*, T.C. Memo. 1999-181 (1999).
49. Treas. Reg. §§ 1.6038B-1(f)(1)-(2).
50. *See* LB&I International Practice Service Process Unit, *Failure to File the Form 926 – Return by a U.S. Transferor of Property to a Foreign Corporation – Monetary Penalty*, IRS, *available at* https://www.irs.gov/pub/int_practice_units/fen9433_01_12r.pdf [hereinafter referred as "LB&I International Practice Service Process"] (last visited Aug. 20, 2018).
51. *Id.* at 6-13.
52. *Id.* at 15.
53. *Id.* at 15, 34-6.
54. These penalties are discussed further below.
55. LB&I International Practice Service Process, *supra* note 50, at 36-46. The reasonable cause defense outlined below in this Article.
56. *Id.* at 51.
57. *Id.* at 52.
58. *Id.* at 36-46.
59. *Id.* at 51; I.R.C. § 6751(b). This article further outlines the penalty procedures later on.
60. I.R.C. § 6501(a).
61. *Id.* § 6501(c)(8).
62. *Id.*
63. *Id.* §§ 6501(e)(1)(A)-(B).
64. Treas. Reg. § 1.6038B-1(f)(2).
65. *Id.* § 1.6038B-1(1); I.R.C. § 6501(c)(8).
66. Treas. Reg. § 1.367(a)-8(g).
67. Treas. Reg. § 1.6038B-1(f)(2)(iii).
68. *Id.* § 1.6038B(f)(1); I.R.C. § 6501(c)(8).
69. I.R.C. § 6038B(c)(1); Treas. Reg. § 1.6038B-1(f)(1)(i).
70. I.R.C. § 6038B(c)(1); Treas. Reg. § 1.6038B-1(f)(1)(i).
71. I.R.C. § 6038B(c)(2).
72. I.R.C. § 6038B(c)(3); Treas. Reg. § 1.6038B-1(f)(1)(i).
73. Treas. Reg. § 1.6038B-1(f)(4).
74. *Id.*
75. Treas. Reg. § 1.367(a)-2(a)(2); I.R.M., pt. 20.1.9.7.4(1) (07-08-2015).
76. I.R.C. § 367(a)(1); I.R.M., pt. 20.1.9.7.4(1) (07-08-2015). *See* I.R.C. § 61(a)(3). *See also* Treas. Reg. § 1.367(a)-2(a)(2).
77. I.R.C. §§ 6662 (j)(1)-(3).
78. I.R.C. § 6038B(c)(2).
79. I.R.S. Field Service Advice, 2001 32029 (May 2, 2001).
80. I.R.C. § 6038B(c)(2); Treas. Reg. § 1.6038B-1(f)(3)(i).
81. I.R.S. Field Service Advice, 2001 32029 (May 2, 2001).
82. *Id.*
83. *Id.*
84. *Id.*; I.R.C. § 6038B(c)(1).
85. I.R.M., pt. 20.1.9.7.5(1) (03-21-2013).
86. Treas. Reg. § 1.6038B-1(f)(3)(ii)(A).
87. *Id.* § 1.6038B-1(B).
88. *Id.* § 1.6038B-1(f)(4).
89. *See U.S. v. Boyle*, 469 U.S. 241, 246 (1985); I.R.S. Field Service Advice, 2001 32029 (May 2, 2001).
90. *See e.g.*, *Congdon v. United States*, No. 4:09-CV-289, 2011 WL 3880524, at * 3 (E.D. Tex. 2011).
91. *Id.*
92. *See e.g.*, *Estate of La Meres v. Commissioner*, 98 T.C. 294, 320-22 (1992).
93. *See U.S. v. Boyle*, 469 U.S. 241, 250-52 (1985).
94. *See e.g.*, *Estate of La Meres v. Commissioner*, 98 T.C. 294, 319-22 (1992).
95. I.R.C. § 6751(b).

96. I.R.M., pt. Ex. 20.1.9-6,-7 (08-08-2015).
97. *Id.;* I.R.M., pt. 8.11.5.4(3) (12-18-2015)
98. I.R.M., pt. 20.1.1.3.3.2.1 (4) (11-21-2017).
99. I.R.M., pt. 20.1.9.5.5(3) (07-08-2015).
100. *See, e.g.*, I.R.M., pt. 21.8.1.25.1 (10-01-2013).
101. W Lance Stodghill, *The Qualified Offer: The Taxpayer's 90-Day Letter,* THE TAX ADVISER (May 1, 2008), *available at* https://www.thetaxadviser.com/issues/2008/may/thequalifiedofferthetaxpayers90dayletter.html.
102. Frank Agostino, Esq. & Steven Lechter, J.D., *How A Taxpayer Can Recover Fees & Costs from the IRS in Administrative Cases Going to the Appeals Office*, AGOSTINO & ASSOCIATES MONTHLY J. OF TAX CONTROVERSY 21–30 (Apr. 2018).
103. I.R.M., pt. 5.17.3.3.2 (01-07-2011); *see* I.R.C. § 6330(a).
104. *Id.*
105. I.R.M., pt. 5.12.6.3.5 (01-19-2018); *see* I.R.C. § 6320(a).
106. I.R.C. §§ 6320(a), 6330(a).
107. *See* Frank Agostino, Esq. & Phillip Colasanto, Esq., *Tax Controversies and Form 5472's Reporting and Record-keeping Requirements for Foreign-Owned U.S. Corporations and Foreign Corporations Doing Business in the United States*, AGOSTINO & ASSOCIATES MONTHLY J. OF TAX CONTROVERSY 5, 9-10 (Apr. 2018); Frank Agostino, Esq. & Phillip Colasanto, Esq., *Reporting Large Foreign Gifts and Inheritances – Internal Revenue Code § 6039F, Notice 97-34 & IRS Form 3520*, AGOSTINO & ASSOCIATES MONTHLY J. OF TAX CONTROVERSY 8-9 (Mar. 2018).
108. *Id.*
109. I.R.C. § 6677.
110. *See* I.R.C. § 6679.
111. *See* I.R.C. § 6211(a) (omitting Chapter 61 from the list of defined taxes or chapters that are covered under deficiency procedures); I.R.M., pt. 20.1.9.2(4) (04-22-2011).
112. *See, e.g.*, *Ventas, Inc. v. U.S.*, 381 F.3d 1156, 1161 (Fed. Cir. 2004) (explaining the maxim *expressio unius est exclusio alterius* for statutory construction and interpretation) ("Where Congress includes certain exceptions in a statute, the maxim *expressio unius est exclusio alterius* presumes that those are the only exceptions Congress intended.").
113. Erin Collins & Garrett Hahn, *Foreign Information Reporting Penalties: Assessable or Not?*, TAX NOTES (Jul. 9, 2018), at 212.
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id. See, e.g.*, *Ventas, Inc. v. U.S.*, 381 F.3d 1156, 1161 (Fed. Cir. 2004).
121. *Id.*
122. I.R.C. § 6214(a) ("the Tax Court shall have jurisdiction to re-determine . . . whether any additional amount or any addition to the tax should be assessed. . .").
123. *See, e.g.*, *Brown v. Commissioner*, T.C. Memo. 2018-91, at 16-7 (2018).
124. I.R.C. § 6330(d).
125. I.R.C. § 6330(e)(1).
126. *See Delinquent International Information Return Submission Procedures*, IRS, *available at* https://www.irs.gov/individuals/international-taxpayers/delinquent-international-information-return-submission-procedures (last visited Aug. 20, 2018).
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Delinquent International Information Return Submission Procedures Frequently Asked Questions and Answers*, IRS, *available at* https://www.irs.gov/individuals/international-taxpayers/delinquent-international-information-return-submission-procedures-frequently-asked-questions-and-answers (last visited Aug. 20, 2018).

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UPCOMING UNITED STATES TAX COURT CALENDAR CALLS

All Calendar Calls Are Held at:

Jacob K. Javits Federal Building
26 Federal Plaza
Rooms 206, 208
New York, NY 10278

October 01, 2018

November 05, 2018

November 26, 2018

December 17, 2018

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Tax Court Rules of Practice and Procedure-Part II

Three (3) Free NY & NJ CLE[1], CPE[2], and EA CE Credits

Bergen Community College ***Ciarco Learning Center*** **355 Main Street, Room 102/103Hackensack, NJ 07601**	**Tuesday, August 28, 2018** **6:00 PM to 9:00 PM**

Materials and Questions from the Practice and Procedure Section of the 2016 Tax Court Exam to be covered.

TOPICS, INCLUDE:

Rule 72 Production of Documents, Electronically Stored Information, and Things **Rule 74 Depositions** **Rule 90 Requests for Admission** **Rule 91 Stipulations** **Rule 103 Protective Orders** **Rule 121 Summary Judgment** **Rule 145 Exclusion of Proposed Witness**	**Rule 155 Comp. by Parties for Entry of Opinion** **Rule 170 Small Tax Cases** **Rule 174 Trial** **Rule 202 Disciplinary Matters** **Rule 229 Burden of Proof** **Rule 260 Proceedings to Enforce Overpayment Determination** **Rule 331 Commencement of Lien and Levy Action**

Questions: Jeffrey Dirmann, Esq. @ Jdirmann@AgostinoLaw.com

RSVP @ http://conta.cc/2oym3Uf

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[2] Based upon our interpretation of the regulations by the New York and New Jersey State Boards of Accountancy, this event will qualify for CPE credit. Our New Jersey CPE Sponsorship number is 20CE00213700. Our New York CPE Sponsorship number is 002405. Our Office of Professional Responsibility Sponsor Number is QVGWD.

TAX EVIDENCE, PART I: THE FEDERAL RULES OF EVIDENCE AS APPLIED BY THE U.S. TAX COURT

THREE FREE NY & NJ CLE*, CPE†, and EA CE CREDITS

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Bergen Community College
Ciarco Learning Center
355 Main Street
Room 102/103
Hackensack, NJ 07601

WHEN:
Tuesday, September 4, 2018
6:00 PM – 9:00 PM

DESCRIPTION:

In Tax Evidence, Part I & II, we will review the Federal Rules of Evidence and Tax Court Rules applied by the Tax Court judge to determine what testimony and documents will be admissible at trial.

TOPICS INCLUDE:

Rule 103- Rulings on Evidence
Rule 201- Judicial Notice of Adjudicative Facts
Rule 401- Relevance
Rule 404- Character Evidence; Crimes or Other Acts
Rule 405- Methods of Proving Character
Rule 408- Compromise Offers and Negotiations
Rule 608- A Witness's Character for Truthfulness or Untruthfulness
Rule 609- Impeachment by Evidence of a Criminal Conviction
Rule 611- Mode and Order of Examining Witnesses and Presenting Evidence
Rule 612- Writing Used to Refresh a Witness's Memory
Rule 613- Witness's Prior Statement

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† Based upon our interpretation of the regulations by the New York and New Jersey State Boards of Accountancy, this event will qualify for CPE credit. Our New Jersey CPE Sponsorship number is 20CE00213700. Our New York CPE Sponsorship number is 002405. Our Office of Professional Responsibility Sponsor Number is QVGWD. ‡CFP CE Credit will be provided..

TAXPAYERS ASSISTANCE CENTER

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TAX EVIDENCE, PART II: THE FEDERAL RULES OF EVIDENCE AS APPLIED BY THE U.S. TAX COURT

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WHERE:
Bergen Community College
Ciarco Learning Center
355 Main Street
Room 102/103
Hackensack, NJ 07601

WHEN:
Tuesday, October 9, 2018
6:00 PM – 9:00 PM

DESCRIPTION:

In Tax Evidence, Part I & II, we will review the Federal Rules of Evidence and Tax Court Rules applied by the Tax Court judge to determine what testimony and documents will be admissible at trial.

TOPICS INCLUDE:

Rule 701 - Opinion Testimony by Lay Witnesses
Rule 702 - Testimony by Expert Witnesses
Rule 801 - Definitions That Apply to This Article; Exclusions from Hearsay
Rule 803 - Exceptions to the Rule Against Hearsay - Regardless of Whether the Declarant Is Available as a Witness
Rule 806 - Attacking and Supporting the Declarant's Credibility
Rule 901 - Authenticating or Identifying Evidence
Rule 902 - Evidence That Is Self-Authenticating
Rule 1002 - Requirement of the Original
Rule 1006 - Summaries to Prove Content

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Calendars for October through December 2018

Date	Presiding Judge	RSVP to Volunteer/Observe
October 1, 2018	The Honorable Carolyn P. Chiechi	https://www.eventbrite.com/e/us-tax-court-calendar-nyc-october-1-2018-judge-carolyn-p-chiechi-tickets-48041564613
November 5, 2018	The Honorable John O. Colvin	https://www.eventbrite.com/e/us-tax-court-calendar-nyc-november-5-2018-judge-john-o-colvin-tickets-48042056083
November 26, 2018	The Honorable Michael B. Thornton	https://www.eventbrite.com/e/us-tax-court-calendar-nyc-november-26-2018-judge-michael-b-thornton-tickets-48042215560
December 17, 2018	The Honorable Lewis R. Carluzzo	https://www.eventbrite.com/e/us-tax-court-calendar-nyc-december-17-2018-judge-lewis-r-carluzzo-tickets-48042276743

The U.S. Tax Court Calendar Call Pro Bono Program provides counseling to self-represented taxpayers seeking advice in tax law at calendar call sessions of the U.S. Tax Court conducted in New York. Self-represented taxpayers are advised by volunteers while appearing pro se before the U.S. Tax Court.

Volunteers may be asked to consult with pro se petitioners regarding the merits of their cases and evaluate any settlement proposals from the Internal Revenue Service, act as a communicator or mediator between the parties to assist in resolving the case and provide procedural advice to pro se petitioners who proceed to trial. Individuals thinking of volunteering for the program and volunteers who are new to the program who would like to observe the calendar call session and client counseling are encouraged to attend.

For those of you interest in volunteering or in the Tax Court, PLEASE feel free to attend the calendar, observe and give moral support to the volunteers and unrepresented taxpayers. Volunteers should arrive at the court (Rooms 206/208, Jacob B. Javits Federal Building, 26 Federal Plaza) and check in with NYCLA no later than 9:30 AM. Please allow sufficient time to clear the building's security screening.