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### Upcoming Free Events

#### **Tax Practice, Part I - Substantiating Deductions**

January 9                      RSVP: [conta.cc/2op1rxl](http://conta.cc/2op1rxl)  
Hackensack, NJ

#### **Town Hall on the Hot Tax Issues of 2018: Tax Reform and Passport Revocation**

January 10                      RSVP: [info@mfolaw.com](mailto:info@mfolaw.com)  
New York City, NY

#### **Seton Hall's 2018 NJ Tax Controversy Update**

January 19                      RSVP: [conta.cc/2DAafnS](http://conta.cc/2DAafnS)  
Newark, NJ

#### **The Ninth Annual Federal and New Jersey Criminal Tax Enforcement Update**

January 31                      RSVP: [conta.cc/2DwDkk5](http://conta.cc/2DwDkk5)  
Paramus, NJ

#### **Tax Practice, Part II - Filing Status, Exemption & Credits**

February 6                      RSVP: [conta.cc/2AdpNz0](http://conta.cc/2AdpNz0)  
Hackensack, NJ

#### **Tax Practice, Part III - Gross Income, Exclusions, Penalties, etc**

May 8                              RSVP: [conta.cc/2otNGgT](http://conta.cc/2otNGgT)  
Hackensack, NJ

### PROTECTING THE TAXPAYER FACING PASSPORT REVOCATION

**By Frank Agostino, Esq.  
Edward Mazlish, Esq.<sup>1</sup>**

If a taxpayer owes the Internal Revenue Service ("IRS" or "Service") more than \$50,000 (\$51,000 after January 1, 2018)<sup>2</sup> in unpaid tax liabilities (including interest and penalties) he may be subject to passport revocation. Specifically, Congress has given the IRS the ability to request that the State Department deny, revoke or limit the passports of certain delinquent taxpayers. This article explores this new tax collection device and suggests strategies for representing taxpayers facing passport revocation.

### **What Does the Payment of Taxes Have to Do with Issuance of Passports?**

Late in 2015, Congress passed the Fixing America's Surface Transportation ("FAST") Act, which added Section 7345 to the Internal Revenue Code ("Code" or "IRC").<sup>3</sup> Under IRC § 7345, Congress authorized the IRS to certify certain tax debts as "seriously delinquent tax debt," (the "Certification") and report those taxpayers to the State Department ("State Department").<sup>4</sup> The State Department, in turn, is then authorized under that statutory authority to "deny, revoke, or otherwise limit" the ability of those taxpayers to use their passports until they pay their tax debts or otherwise get into good standing with the IRS.

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IRC § 7345 is an example of a collateral sanction (i.e., a non-monetary non criminal sanction) intended to incentivize voluntary tax compliance. The use of "collateral sanctions" (also known as "collateral consequences") to address tax non-compliance is part of a new trend in tax collection that, some law professors have argued, can result in greater voluntary compliance with the tax law.<sup>5</sup>

Several states, including New York, California, Louisiana, and Massachusetts already impose the collateral consequence of revocation of driving privileges for certain taxpayers who are sufficiently delinquent in their taxes.<sup>6</sup> The New York program, for example, has been very successful: since its implementation in July of 2013, it has generated revenue in excess of \$288 million, far in excess of the original estimates, \$26 million for the first year and \$6 million for each succeeding year, which were predicted when the law was originally proposed.<sup>7</sup>

A Government Accounting Office ("GAO") Report prepared in March 2011<sup>8</sup> noted the ballooning federal budget deficit and national debt, and likewise suggested that a linkage between passport issuance and payment of delinquent taxes could be a useful weapon for the IRS in collecting delinquent debts. The report asserts that such a linkage would help the IRS collect more of the outstanding taxes owed, while simultaneously promoting broader "voluntary" compliance with the tax laws.

According to the above cited GAO Report, the State Department had issued passports to 224,000 individuals who owed more than \$5.8 billion in known unpaid federal taxes as of September 30, 2008.<sup>9</sup> The report further asserts that the \$5.8 billion estimate "likely substantially understates the full extent of unpaid taxes owed by these or other individuals," because, among other reasons, the analysis only consisted of passports issued during fiscal year 2008.<sup>10</sup>

By contrast, some taxpayer advocates contend that the lack of a direct connection between the penalty and the misconduct being punished both violates taxpayers' rights and undermines their attempts to voluntarily comply with the law.<sup>11</sup> This is so because a passport represents more than a travel document used for international vacations. The passport is commonly used by employers to verify a taxpayer's eligibility to work in the United States; a taxpayer without a passport is potentially unemployable. A United States passport is also a necessary travel document for U.S. citizens that need to travel for business (i.e., a U.S. employer may ask an applicant to certify as a condition of employment that he have no known travel restrictions). Taxpayers in some states need a passport as identification to get through TSA lines in airports if they live in states where a state-issued driver's license is not an acceptable form of ID for air travel. Hence, the loss of a passport impacts more than just international travel.

A federal district court in California has even held that suspending a driver's license for failing to pay taxes was a penalty so unrelated to the bad conduct and so unreasonable under the particular circumstances that it could not be sustained.<sup>12</sup> We anticipate that similar litigation will be brought challenging whether passport revocation violates IRC § 6330(c)(3)'s mandate that the proposed collection action balance the need for the efficient collection of taxes with the legitimate concern of the taxpayer that any collection action be no more intrusive than necessary.

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### **What Tax Debts Could Result in the Loss of a Taxpayer's Passport?**

IRC §7345 defines a "*seriously delinquent tax debt*" as a legally enforceable and assessed tax liability of more than \$51,000 (including unpaid taxes, interest, and penalties) that is not the subject of an innocent spouse request under IRC § 6015, a collection due process hearing under IRC § 6330, an installment agreement under IRC § 6159, or an offer in compromise under IRC § 7122.<sup>13</sup> Seriously delinquent tax debt does not include debts collected by the IRS such as the FBAR Penalty and Child Support.<sup>14</sup>

Before certifying a tax debt as seriously delinquent, the IRS must have (a) issued a levy with respect to the tax liability, or (b) a lien must have been filed and all administrative remedies for lien relief must have been exhausted or lapsed.

Tax professionals should note that IRC § 7345 does not require either the IRS or the State Department to deny or revoke a delinquent taxpayer's passport. Instead, the statute gives both agencies the discretion to act. Specifically, IRC §7345(a) provides that *if* the IRS certifies a debt as a seriously delinquent debt, then the Secretary of the Treasury shall report that certification to the State Department. Similarly, the statute does not require the State Department to revoke the taxpayer's passport; instead, it also authorizes the State Department to put "limitations" on the taxpayer's passport if, in the discretion of the State Department, that would be appropriate. Consequently, in addition to exhausting a taxpayer's administrative rights under IRC §§ 6015, 6330, 6159 and 7122, taxpayers and professionals should consider whether to file a Form 911 (*Request for Taxpayer Advocate Service Assistance (And Application for Taxpayer Assistance Order)*) requesting that the Taxpayer Advocate enter an order prohibiting passport revocation on the ground that revocation would cause a serious hardship pursuant to Treas. Reg. § 301.7811-1(a)(4).

The IRS has not yet issued regulations pursuant to IRC § 7345, however, it has added two sections to the Internal Revenue Manual ("IRM"): (ii) IRM Section 5.17.5.21 entitled, *IRC §7345 Right to Determine Whether Certification as a Seriously Delinquent Taxpayer is Erroneous*, (January 6, 2017) and IRM 25.3.3.7.5, *IRC §7345 Right to Determine Whether Certification as a Seriously Delinquent Taxpayer is Erroneous*, (January 13, 2017). These IRM sections currently restate the statute and provide little guidance on how and why the IRS intends to exercise this new collection device.<sup>15</sup>

### **Doesn't Passport Revocation Violate the Taxpayer's Right to Travel?**

In a 1958 case, the United States Supreme Court noted that the right to travel abroad is a part of the liberty rights protected by the Fifth Amendment of the United States Constitution, which cannot be taken away without due process of law.<sup>16</sup>

Revocation of a taxpayer's passport may implicate this right and require that the taxpayer receive a measure of procedural and substantive due process before his or her passport is revoked.

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Nevertheless, restricting a person's travel to punish bad behavior is not unprecedented. In 1996, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996, which required the State Department to deny, revoke, or limit a passport if the person owed delinquent child support. In the context of passport denial for unpaid child support, courts have found due process is satisfied as long as a debtor is afforded notice and an opportunity to be heard prior to certification.<sup>17</sup>

We offer no opinion as to whether revocation of a taxpayer's passport violates the Fifth Amendment's right to travel or the Taxpayer Bill of Rights, codified by IRC § 7803. We note, however, that IRC § 6330 provides that "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." Consequently, we recommend that, at the very least, every tax professional filing a Form 12153 - *Request for a Collection Due Process or Equivalent Hearing* ("Form 12153") include a paragraph asserting that revocation violates the United States Constitution and the Taxpayer Bill of Rights. Further, the Form 12153 should request that the IRS and the Court review the certification for compliance with the Bill of Rights, contained in both the United States Constitution and the Internal Revenue Code.

#### **How Will the IRS Notify a Taxpayer That It is Requesting That the State Department Deny, Revoke, or Limit His or Her Passport ?**

IRC § 7345(d) requires that the IRS give contemporaneous notice to the taxpayer at the time it makes its Certification to the State Department. Stated simply: no advance notice to the taxpayer of the pending certification is required by IRC § 7345(d).

The IRS plans to provide the notice required by IRC § 7345(d) by issuing Notice CP 508C to taxpayers subject to passport revocation.<sup>18</sup>

In addition to our recommendation that tax professionals drafting Form 12153 supplement their submissions to include a request that the Appeal's Office verify IRS compliance with applicable laws and administrative<sup>19</sup> procedure, we further recommend that the Appeal's Office be requested to evaluate whether any passport revocation appropriately balances the need for the efficient collection of taxes with the legitimate concern of the taxpayer that any collection action be no more intrusive than necessary.

Here, it should be noted that the IRC § 7345(d) required notice language was not included in Final Notices issued before January 2017.<sup>20</sup> The lack of notice to taxpayers of the possibility of passport revocation in regard to old tax debts may make retroactive application of the statute to those taxpayers susceptible to a future court challenge.

#### **Has the IRS Sent the State Department Any Certifications Pursuant to IRC § 7345?**

No. Despite having been granted the statutory authority in late 2015 to link passport issuance to tax collections, the IRS has needed time to coordinate with the State Department before it could

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enforce its new statutory authority. However, according to the IRS website, the Service will begin enforcing this new collection program in January of 2018.<sup>21</sup>

### **What Should a Taxpayer Do to Avoid Passport Revocation?**

To date, the IRS has not sent any certifications to the State Department. The short answer is that a taxpayer should immediately evaluate whether he or she can: (1) make a payment that brings his or her tax debt below \$51,000; (2) file an innocent spouse request under IRC § 6015; (3) file an offer in compromise pursuant to IRC § 7122; (4) request an installment agreement; or (5) file a Form 911 and argue that the Taxpayer Advocate enter an order prohibiting passport revocation on the ground that revocation would cause a serious hardship pursuant to Treas. Reg. § 301.7811-1(a)(4).

Tax professionals with clients living abroad should verify compliance by ordering copies of the taxpayer's account transcripts.

Note, however, that the IRS will not accept a payment plan or an offer in compromise unless the taxpayer makes full and complete disclosure of his financial position to the IRS. As explained below, for some taxpayers with seriously delinquent tax debt, the tax professional must balance the desire to avoid passport revocation and the taxpayer's right to remain silent.

### **Does Filing for Bankruptcy Stop or Delay Passport Revocation?**

Taxpayers that cannot make a payment that brings his or her tax debt below \$51,000 or file for one of the collection alternatives described above should consider whether a bankruptcy filing and plan of reorganization can be used to save his or her passport.

The filing of a petition in bankruptcy generally results in an "automatic stay." The automatic stay is a statutory injunction of attempts to collect debts, including tax debts, during the pendency of the bankruptcy proceeding.

The automatic stay applies to a State Department denial, revocation, or limitation of a passport in child support cases. Accordingly, tax professionals believe that the bankruptcy courts will apply the automatic stay to passport revocation proceedings in this context as well. The IRS has not answered the question of whether the automatic stay applies to passport revocation but the agency has said that it will do so before implementing IRC § 7345.

### **When, If Ever, Should a Taxpayer with a Seriously Delinquent Tax Debt Invoke the Right to Remain Silent?**

In recent years, the Criminal Investigation Division of the IRS has made the investigation of evasion of payment and international investigation a high priority.<sup>22</sup> The IRM provides for information sharing between the civil and criminal divisions and specifically instructs that sharing information between revenue officers and government attorneys assigned to the case is a key ingredient in

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developing civil and criminal cases simultaneously and efficiently.<sup>23</sup> Further, "[u]nless prohibited under grand jury secrecy Rule 6(e) of the Federal Rules of Criminal Procedure and disclosure provisions of Section 6103, *Confidentiality and Disclosure of Returns and Return Information*, information sharing between civil and criminal functions is appropriate."<sup>24</sup>

Given that some passport revocation will involve either substantial tax liabilities, offshore non-compliance, or both, tax professionals in passport revocation cases must be more sensitive to the possibility of a criminal referral than in a garden variety collection case. Stated another way, tax professionals should evaluate whether the disclosures necessary to avoid passport revocation would provide the IRS with the evidence to prosecute a criminal tax violation.

A taxpayer with a seriously delinquent tax debt has a right to remain silent under the Fifth Amendment to the U.S. Constitution. However, the exercise of that right may result in a certification of the debt to the State Department and a loss of the taxpayer's passport. The decision to comply with IRS document requests to avoid passport revocation must be balanced against the knowledge that disclosure of information could result in a criminal investigation and conviction.

Consequently, in some cases the tax professional will have to engage in an uncomfortable conversation with an IRS representative as to why he or she is requesting certain information, and request how the IRS plans to use the information provided. Based on the answers to the preliminary questions, the tax professional may need to ask the Revenue Officer if a criminal referral has been made or is contemplated before filing a Form 433-A.<sup>25</sup> The IRS may not answer the question but it will not lie.

Finally, in connection with the analysis of the taxpayer's options, the Tax Professional should review the IRS Offshore Voluntary Disclosure Programs and evaluate those options, which provide for both the equivalent of amnesty from criminal prosecution and the processing of collection alternatives.

### **Where and How Does a Taxpayer Challenge the Certification that He or She Has a Seriously Delinquent Tax Debt?**

IRC § 7345(e) allows a taxpayer to bring an action in Federal District Court or in the United States Tax Court to determine whether the certification was erroneous. That section specifically provides that the Taxpayer may sue the United States - not merely the IRS - in either Tax Court or Federal District Court to "determine whether the certification was erroneous or whether the Commissioner has failed to reverse the certification."

The statute authorizes suits against the United States and not just the IRS. However, the remedy available to litigants under IRC § 7345(e) is limited:

(2) Determination. If the court determines that such certification was erroneous, ***then the court may order the Secretary to notify the Secretary of State that such certification was erroneous.***

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(emphasis added)

The IRS website explains that the statute does not authorize suit against the State Department. Whether the taxpayer should sue in Tax Court or Federal District Court will likely turn on the specific facts of his case. However, if the taxpayer wants an order in the nature of mandamus to be entered against the Department of State, a district court judge may be able to render more complete relief than the Tax Court.

### **Conclusion**

The IRS has incorporated IRC § 7345 into its publications and IRS revenue officers working collection cases have started explaining IRC § 7345 to delinquent taxpayers. The first passports revoked will be against those Americans living and working abroad. We will report on the processing of these cases as soon as reliable data is available. Finally, we have not addressed reversal of the Certification because we believe it is premature to do so; no taxpayer's cases have been certified.

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Footnotes:

1. Frank Agostino, Esq. is the Principal of and Ed Mazlish, Esq. is a senior associate at Agostino & Associates, P.C.
2. Under the original statute, the threshold amount of delinquent tax debt which would subject the taxpayer to possible passport revocation is \$50,000. However, subsection (f) of the statute allows for an inflation
3. See §32101 of the FAST Act for the amendment to the Internal Revenue Code. Unless otherwise specified, all other Code Sections herein refer to the Internal Revenue Code, codified as Title 26 of the United States Code.
4. I.R.C. § 7345.
5. Joshua D. Blank, *Collateral Compliance*, 162 U. PA. L. REV. 719 (2014), available at <https://poseidon01.ssrn.com/d/e/i/v/e/r/y/p/h/p/?ID=534125082092087099103027024118084101033003058035043086102105078087078028022075103081098099038005016125097091127097064067009074020002055000087007103124023003006098066048052113093091073021115024117115090123110005007098087102068120065065074003020069120&EXT=pdf>.
6. New York State Bar Association Tax Section, *Report on New York State Driver's License Suspension Program*, Report #1344 (May 5, 2016), available at [https://www.nysba.org/Sections/Tax/Tax\\_Section\\_Reports/Tax\\_Reports\\_2016/Tax\\_Section\\_Report\\_1344.html](https://www.nysba.org/Sections/Tax/Tax_Section_Reports/Tax_Reports_2016/Tax_Section_Report_1344.html), at page 13.
7. New York State Bar Association Tax Section, *Report on New York State Driver's License Suspension Program*, [https://www.nysba.org/Sections/Tax/Tax\\_Section\\_Reports/Tax\\_Reports\\_2016/Tax\\_Section\\_Report\\_1344.html](https://www.nysba.org/Sections/Tax/Tax_Section_Reports/Tax_Reports_2016/Tax_Section_Report_1344.html), at page 5.
8. U.S. Gov't Accountability Office, GAO-11-272, *Federal Tax Collection: Potential for Using Passport Issuance to Increase Collection of Unpaid Taxes*, March 10, 2011.
9. Id. at page 4 (analysis consisted of all individuals issued a passport in fiscal year 2008).
10. Id. at page 7-8.
11. See, e.g., [https://taxpayeradvocate.irs.gov/Media/Default/Documents/2018-JRC/JRC18\\_Volume1\\_AOF\\_02.pdf](https://taxpayeradvocate.irs.gov/Media/Default/Documents/2018-JRC/JRC18_Volume1_AOF_02.pdf)
12. *Berjikian v. Franchise Tax Bd.*, 93 F.Supp. 3d 1151, 1160 (C.D.Ca. 2015). Note that the trial court's decision was reversed and vacated without opinion in an unreported decision, *Berjikian v. Franchise Tax Bd.*, 2016 WL 4008419 (9th Cir. 2016)( Note that the trial court's decision was reversed and vacated without opinion in an unreported decision).
13. See I.R.C. § 7345 (b).
14. IRS Update on Passport Revocation available at <https://www.irs.gov/businesses/small-businesses-self-employed/revocation-or-denial-of-passport-in-case-of-certain-unpaid-taxes>.
15. See also, 22 U.S.C. 2714a (e); 22 C.F.R. 51.60 (statutory authority for the State Department to revoke passports upon receipt of the IRS certification under 26 U.S.C. §7345, and State Department regulations effectuating same).
16. *Kent v. Dules*, 357 U.S. 116, 125 (1958).
17. *Weinstein v. Albright*, 261 F.3d 127, 139 (2d Cir. 2001).
18. See Update on Passport Revocation available at <https://www.irs.gov/businesses/small-businesses-self-employed/revocation-or-denial-of-passport-in-case-of-certain-unpaid-taxes#notice>.
19. See The IRS's New Passport Program: Why Notice to Taxpayers Matters, Taxpayer Advocate Service, available at <https://taxpayeradvocate.irs.gov/news/the-irs-s-new-passport-program-why-notice-to-taxpayers-matters-part-1-of-2>.
20. See The IRS's New Passport Program: How Lack of Notice Harms Taxpayers, Taxpayer Advocate Service, available at <https://taxpayeradvocate.irs.gov/ntablog/passportprogrampart2>.
21. See Update on Passport Revocation available at <https://www.irs.gov/businesses/small-businesses-self-employed/revocation-or-denial-of-passport-in-case-of-certain-unpaid-taxes>.
22. IRS: Examples of Internal Investigations, available at <https://www.irs.gov/compliance/criminal-investigation/examples-of-international-investigations-fiscal-year-2017>.
23. See, e.g., Justin Andreozzi, J.D., et al., *The Threat of Parallel Investigations: When Civil Isn't Civil*, The Tax Adviser (August 1, 2015), available at <https://www.thetaxadviser.com/issues/2015/aug/threat-of-parallel-investigations.html>.
24. See IRM pt. 5.1.5.9.2 (August 3, 2009).
25. *US v. Tweel*, 550 F.2d 297 (5th Cir. 1977)



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## FIFTH AMENDMENT PRIVILEGE IN TAX: HOW TO KEEP THE CASE MOVING WHILE PROTECTING THE TAXPAYER

By Frank Agostino, Esq.  
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### I. Introduction

The IRS's mission is to help taxpayers "understand and meet their tax responsibilities and enforce the law with integrity and fairness to all."<sup>2</sup> The IRS accomplishes this mission, in part, by examining returns for correctness, creating returns where there are none, and determining and collecting tax liability in accordance with the Internal Revenue Code ("Code").<sup>3</sup>

The majority of IRS examinations begin and end as civil matters. Nevertheless, "[a]n IRS audit is an official investigation that may be the first step leading to a criminal conviction for tax violations."<sup>4</sup> Information collected during a civil examination may be given to prosecutors and used against the taxpayer in criminal proceedings.<sup>5</sup> Consequently, information voluntarily provided to the IRS in a civil examination could result in a criminal indictment.

Against this background, this column reviews how taxpayers and tax professionals should evaluate IRS information and document requests and when a taxpayer should decline to respond to IRS requests for testimony, documents, and other information.

More specifically, this column will address:

- (1) The Fifth Amendment privilege in tax matters and its limitations;
- (2) The obligations tax professionals have to their clients and the IRS;
- (3) The consequences of invoking the privilege during examinations of offshore transactions; and
- (4) The impact that asserting the privilege during an examination has on future proceedings before the U.S. Tax Court ("Tax Court"), U.S. District Courts ("District Courts"), and U.S. Court of Federal Claims, and during Collection Due Process ("CDP") Cases.

### II. The Fifth Amendment and the Filing of Tax Returns

Individuals are required by Code Sec. 6012<sup>6</sup> to file annual income tax returns. Moreover, taxpayers are obligated to keep adequate records to establish the amounts of gross income and expenses shown on their tax return.<sup>7</sup> The privilege against self-incrimination contained in the Fifth Amendment to the U.S. Constitution (sometimes the "Fifth Amendment") is litigated with some frequency with respect to reporting of income to the IRS.

In *Sullivan*,<sup>8</sup> the Supreme Court held that the requirement to file tax returns does not violate taxpayers' Fifth Amendment rights.<sup>9</sup> The Court reasoned that a taxpayer could claim the Fifth Amendment on a return if the form required disclosures that the taxpayer was privileged from making; however, the taxpayer could not refuse to make any return at all.<sup>10</sup> Returns required by law must be filed and must provide enough information for the IRS to judge the "substantial correctness of the self-assessment."<sup>11</sup> Willful failure to file such a return can lead to civil penalties and, in certain cases, criminal prosecution.<sup>12</sup>

Consequently, if the return calls for answers that a taxpayer is privileged from making, a timely privilege claim<sup>13</sup> can be permitted against specific disclosures on a line by line or document by document basis.<sup>14</sup> The Tax Court recently ruled in *Youssefzadeh*<sup>15</sup> that privilege against self-incrimination can be asserted against the source of certain interest income on the taxpayer's timely return when the total amount of interest income is reported by the taxpayer, providing the IRS with substantial information to judge the correctness of the return.<sup>16</sup>

### III. Invoking the Fifth Amendment in Response to an IRS Request for a Taxpayer Interview

Code Sec. 7602 grants the IRS a broad, but not unlimited, power to compel taxpayers to provide information in connection with examination of tax returns.<sup>17</sup> To evaluate when and whether to invoke the Fifth Amendment privilege against self-incrimination, in response to a Code Sec. 7602 request, tax professionals should understand the Fifth Amendment's purpose and limitations.

The Fifth Amendment provides that "no person ... shall be compelled in any *criminal* case to be a witness against himself."<sup>18</sup> The purpose of the Fifth Amendment privilege is "to avoid governmental abuse and forcing the defendant to choose between ... perjury, self-incrimination, or contempt in the face of possible incarceration."<sup>19</sup>

The Fifth Amendment privilege also extends to civil proceedings.<sup>20</sup> It may be invoked in all phases of civil proceedings<sup>21</sup> where a witness has reasonable cause to believe that the compelled testimony, regardless of whether it will be admissible in a criminal prosecution,<sup>22</sup> would support a conviction under a criminal statute or simply "furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime."<sup>23</sup> Accordingly, a taxpayer is entitled to invoke the Fifth Amendment privilege during administrative proceedings before the IRS, and in civil proceedings before a court with respect to complaints, depositions, and discovery requests, if doing so would require admission of potentially incriminating facts.

With respect to taxpayer interviews, "[t]o properly invoke the Fifth Amendment privilege, [taxpayer] must appear before the IRS and assert the privilege, as appropriate, on a question by question and document by document basis."<sup>24</sup> If a taxpayer is "faced with hazards of self-incrimination that are real and appreciable, not merely imaginary and unsubstantial,"<sup>25</sup> a court will sustain his or her assertion of the Fifth Amendment.

Given the Fifth Amendment's plain language and purpose, taxpayers under examination often ask: why don't I invoke my right against self-incrimination? If an IRS investigation may result in civil penalties or criminal exposure, why comply with IRS requests for testimony and documents? In answering these questions, tax professionals should consider the taxpayer's rights, the burden of proving that privilege exists, and potential unwanted consequences of invoking the privilege.

First, Code Sec. 7803(c)(3)(I) requires the IRS to recognize taxpayers' right to retain representation. Taxpayers have the right to retain authorized representatives of their choice to represent them in disputes with the IRS. In particular, Code Sec. 7521(c) provides that "an officer or em-

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ployee of the Internal Revenue Service may not require a taxpayer to accompany the representative in the absence of an administrative summons issued to the taxpayer under subchapter A of chapter 78.” A taxpayer with competent representation will seldom put him or herself in a position where he or she will be required to assert the Fifth Amendment privilege.

Second, Code Sec. 7803(a)(3) refers to additional pre-assessment rights afforded to taxpayers, including the right to be informed and the right to a fair and just tax system. Before asserting the Fifth Amendment, the tax professional should request a copy of the IRS administrative file pursuant to Code Sec. 7803(a) and the IRM pt. 4.2.5.7(1),<sup>26</sup> entitled *Requests for File and Workpapers*, which provides:

During the course of an examination, the examiner may be asked by a taxpayer or representative for a copy of the examiner’s files or workpapers. IRC 6103(e), Disclosure to Persons Having Material Interest, provides for the release of information to the taxpayer or their representative. This section advises that *the Service shall give taxpayers access to their returns or return information unless the Secretary determines that the release of the information would seriously impair tax administration.* (emphasis added).

In most cases, the examiner will provide the file and, after review, the tax professional will conclude that the assertion of the Fifth Amendment is unnecessary. The examiner can, however, decline to provide the file on the ground that the release of the information would seriously impair tax administration. In that instance, the tax professional should err toward asserting all applicable privileges.

Third, the burden of proving that the assertion of a privilege is valid falls on the party invoking the privilege.<sup>27</sup> The privilege is “not [to] be exercised solely upon the subjective determination of the witness who invokes it.”<sup>28</sup> The courts, as opposed to the taxpayers, determine whether silence is justified.<sup>29</sup> The assertion of a Fifth Amendment claim using “mere speculative, generalized allegations of tax-related prosecution” will not be upheld.<sup>30</sup>

Finally, very few examinations have realistic prosecution potential. However, most IRS agents will draw an adverse inference against a taxpayer invoking the Fifth Amendment. Although assessments of tax cannot be based solely on a taxpayer’s assertion of a privilege, “silence is often evidence of the most persuasive character.”<sup>31</sup> Asserting a privilege in every examination may also have unwanted consequences for a taxpayer, such as unwanted delay and unnecessary legal expenses.

When evaluating whether to assert a privilege, it is important to remember that a waiver of privilege early in the process will extend to all future related questions unless answering those inquiries would substantially increase the risk of further incrimination.<sup>32</sup>

#### **IV. Invoking the Fifth Amendment in Response to IRS Requests for Documents**

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Code Sec. 7602 grants the IRS a broad, but not unlimited, power to summon any books, papers, records, or other data which may be relevant or material to the examination.<sup>33</sup> The evaluation of when and whether to invoke the Fifth Amendment privilege in response to an IRS request for documents requires an understanding of Code Sec. 7602, the act of production doctrine, and the required records doctrine.

A taxpayer with a good faith belief that the IRS document request is improper may refuse to comply with all or part of a summons.<sup>34</sup> The burden then shifts to the IRS to bring an enforcement proceeding seeking a court order directing compliance with the summons. To enforce a summons for information, the IRS must show the court “that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner’s possession, and that the administrative steps required by the Code have been followed.”<sup>35</sup>

Reviewing the case law on the production of documents by way of summons illustrates four principles. First, a summoned person has no Fifth Amendment privilege in the contents of voluntarily created, pre-existing documents. This is because the IRS did not compel that person to create the documents.

Second, the act of producing the documents<sup>36</sup> requested by the IRS may incriminate a summoned person. The act of producing the documents compels the witness to admit that (a) the documents exist, (b) the documents are in that person’s possession, and (c) he or she believes the documents produced are those required by the summons.<sup>37</sup> Whether any of these implicit admissions can incriminate a summoned person depends on the facts and circumstances of each case. Consequently, a taxpayer may have a valid Fifth Amendment privilege against producing voluntarily created, pre-existing documents.

Third, a taxpayer may not assert Fifth Amendment “act of production” immunity in response to a request for “required records” (e.g., foreign bank account records). The required records doctrine allows the government to inspect the records it requires an individual to keep by law as a condition of voluntarily participating in a particular regulated activity.<sup>38</sup> When deciding the applicability of the required records doctrine, courts consider the following:

- (1) The purposes of the government inquiry must be essentially regulatory;
- (2) Information is to be obtained by requiring the preservation of records of a kind which the regulated party has customarily kept;
- (3) The records themselves must have assumed public aspects which render them at least analogous to a public document.<sup>39</sup>

Documents falling within the required records doctrine must be produced notwithstanding the act of production doctrine.

Finally, the IRS cannot use its summons power to essentially compel the taxpayer to waive his

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Fifth Amendment privilege by requiring the preparation of a tax return, IRS Form 433-A, *Collection Information Statement for Wage Earners and Self-Employed Individuals*, type financial statement, or other document necessary to assess or determine a tax.<sup>40</sup>

## **V. Obligations of Tax Professionals to Balance the Prompt Disposition of a Matter and the Obligation to Protect Privileges**

The U.S. tax system depends on the voluntary compliance of taxpayers. To protect the integrity of the voluntary tax system, the Treasury Department has set forth rules and regulations governing the practice of tax professionals before the IRS.<sup>41</sup> Tax professionals “should be the pillars of our system of taxation, not the architects of its circumvention.”<sup>42</sup>

For tax professionals, cooperation with IRS inquiries is an integral component of the self-reporting and voluntary payment system that is the envy of the world. The blanket assertion of Fifth Amendment privilege by all taxpayers under examination would result in litigation over whether the invocation of privilege was appropriate and would, consequently, exponentially increase the cost of conducting the audits that corroborate self-reporting and voluntary compliance. By contrast, both the Code and the ethical rules governing professionals protect client confidences. Treasury Circular No. 230 (“Circular 230”) guides tax professionals on balancing these two competing concerns. Circular 230 §10.21 entitled “Knowledge of Client’s Omission” provides:

A practitioner who, having been retained by a client with respect to a matter administered by the Internal Revenue Service, knows that the client has not complied with the revenue laws of the United States or has made an error in or omission from any return, document, affidavit, or other paper which the client submitted or executed under the revenue laws of the United States, *must advise the client promptly of the fact of such noncompliance, error, or omission*. The practitioner must advise the client of the consequences as provided under the Code and regulations of such noncompliance, error, or omission.<sup>43</sup> (emphasis added).

Circular 230 §10.23 entitled “Prompt Disposition of Pending Matters” provides:

A practitioner may not *unreasonably delay the prompt disposition* of any matter before the Internal Revenue Service. (emphasis added).

Toward that end, Circular 230 §10.20 provides:

(a) To the Internal Revenue Service. (1) A practitioner must, on a proper and lawful request by a duly authorized officer or employee of the Internal Revenue Service, promptly submit records or information in any matter before the Internal Revenue Service *unless the practitioner believes in good faith and on reasonable grounds that*

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*the records or information are privileged. ...*

(b) Interference with a proper and lawful request for records or information. A practitioner may not interfere, or attempt to interfere, with any proper and lawful effort by the Internal Revenue Service, its officers or employees, to obtain any record or information *unless the practitioner believes in good faith and on reasonable grounds that the record or information is privileged.* (emphasis added).

Circular 230 requires tax professionals, attorneys, accountants, and enrolled agents, to thoughtfully *balance* the aforementioned obligations to the IRS with their duties of loyalty and confidentiality to their clients.

The balancing becomes more difficult during an “eggshell audit.” An “eggshell audit” is one in which the taxpayer has filed an incorrect return in a prior year and the IRS auditor is not aware of the error. In such an audit, the tax professional has to walk on eggshells. This involves guiding the examination and preventing suspicion by the IRS agent, preserving the taxpayer’s privileges, including the Fifth Amendment privilege, while complying with the Circular 230 §10.22 requirement of “Diligence as to Accuracy.” Circular 230 §10.22 states that a practitioner must exercise due diligence:

- (1) In preparing or assisting in the preparation of, approving, and filing tax returns, documents, affidavits, and other papers relating to IRS matters; and
- (2) In determining the correctness of oral or written representations made by the practitioner to the Department of the Treasury.

The tax professional must preserve the taxpayer’s privileges while not lying, misleading, or “unreasonably delay[ing] the prompt disposition of any matter before the IRS.”<sup>44</sup> Complicating the analysis is the “Misprision of Felony” statute:

Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.<sup>45</sup>

The crime of Misprision of Felony requires active concealment of a known felony rather than mere failure to report it.<sup>46</sup> Simply stated, it is the obligation of the tax professional to comply with lawful requests while at the same time evaluating and protecting privileged information.

## **VI. Navigating Between the Invocation of Fifth Amendment Privileges and Continuation Penalties in Offshore Audits**

IRS examinations of offshore transactions present additional challenges for taxpayers to consider

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when balancing cooperation and the assertion of privilege. Taxpayers with foreign financial assets, who have failed to report or pay all tax due in respect to those assets, are at risk of criminal liability and/or substantial civil penalties. Such taxpayers who did not or could not enter into the Offshore Voluntary Disclosure Program (“OVDP”) are being selected for examination by the IRS.

*a. Invoking the Fifth Amendment During IRS Interviews*

Unlike the traditional examination of domestic income, in audits involving offshore issues, it is not unusual for revenue agents to request to interview the taxpayer. As indicated above, these interviews are inconsistent with Code Sec. 7521(c) and the right to representation under Code Sec. 7803. Most practitioners report that these interviews, like the Information Document Requests and summonses, are targeted fishing expeditions in which the IRS seeks to get evidence to fill the gaps in foreign records. Stated another way, the IRS rejects exculpatory testimony as self-serving and uses inculpatory testimony to make a criminal referral or support a penalty assertion.

In evaluating whether to make the taxpayer available for interview, the conventional wisdom in these examinations is to decline to answer questions on the basis of the Fifth Amendment privilege and to request that the revenue agent put his or her questions in writing so that the taxpayer, under the advice of counsel, can determine what information can be provided without waiving privilege.

*b. Invoking the Fifth Amendment When Late-Filing Foreign Information Forms*

Where a taxpayer was required to file a foreign information return, but did not, the taxpayer may be subject to an initial \$10,000 penalty for each form that was not timely filed.<sup>47</sup> The initial penalty separately applies to each required form for each year that was required to be filed but was not.<sup>48</sup> If the failure to file continues more than 90 days after the date on which the IRS notifies the taxpayer of the failure to file, then a separate \$10,000 continuation penalty applies for each additional 30-day period (or fraction thereof) during which the failure to file continues.<sup>49</sup> The continuation penalty is generally capped at \$50,000, which means that the taxpayer can face penalties totaling \$60,000 for each form for each year that was required to be filed but was not. The initial and continuation penalties are generally not subject to the deficiency procedures set forth in Code Sec. 6212, *et seq.*

During an offshore audit, after the IRS determines that an international form was not filed as required, the revenue agent typically sends the taxpayer a notice requesting that the required form be filed.<sup>50</sup> At this point, the taxpayer is faced with a difficult choice: either file the information return and confess that he or she violated internal revenue laws or do not file the information return and risk assessment of the continuation penalty. In these situations, the tax professional must advise the taxpayer of the consequences of filing a Fifth Amendment return versus filing a delinquent information return.

As stated above, in *Sullivan*,<sup>51</sup> the Supreme Court held that the Fifth Amendment does not excuse a complete failure to file a tax return. The Supreme Court noted that if the tax return “called for answers that the defendant was privileged from making he could have raised the objection in the return.”<sup>52</sup> The Supreme Court later specifically held that the Fifth Amendment privilege applies to

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tax returns provided the taxpayer affirmatively claims the privilege on the return before he files it.<sup>53</sup> An issue which arises in offshore audits, but which the courts have not yet been asked to resolve, is whether the filing of an information return asserting the Fifth Amendment privilege forecloses the assessment of the continuation penalty. On the one hand, the Supreme Court has held that a Fifth Amendment return is sufficient to have the failure-to-file penalty not apply.<sup>54</sup> On the other hand, the IRM specifically provides that information returns which do not contain complete and accurate information are considered “not having been filed.”<sup>55</sup> This conflict must be evaluated and discussed with the client.

Some authors<sup>56</sup> have suggested that in response to the initial non-filing notice, the taxpayer should file the required information return and selectively assert the Fifth Amendment privilege on a line-by-line basis. Further, the response to subsequent continuation penalty notices should be that the required information return was previously submitted (*i.e.*, refer the IRS to the Fifth Amendment information return). Once the IRS assesses the initial and continuation penalties, do not ignore the final collection notices (*i.e.*, the Final Notice of Intent to Levy or the Notice of Federal Tax Lien filing). Instead, file with the IRS Form 12153, *Request for a Collection Due Process or Equivalent Hearing*, and request a *de novo* review of the penalty. The CDP hearing may be the first meaningful opportunity to challenge the filing requirement, the reasonableness of the privilege, and reasonable cause for not filing the return. Thereafter, the Tax Court has jurisdiction to review the IRS’s decision to assess the penalty.<sup>57</sup>

The Tax Court cited this approach favorably in *Youssefzadeh*.<sup>58</sup> There, the taxpayer asserted his Fifth Amendment privilege to not incriminate himself in response to a question on Schedule B, *Interest and Ordinary Dividends*. The IRS asserted a frivolous return penalty under Code Sec. 6702(a)(1), and it proposed to levy the taxpayer’s property to collect the penalty. The taxpayer requested a CDP hearing with the IRS Office of Appeals (“Appeals”), and during the CDP hearing, he challenged the appropriateness of the penalty. Appeals upheld the imposition of the penalty, and the taxpayer petitioned the Tax Court to review Appeals’ decision. Both parties moved for summary judgment as to whether the penalty could be collected. The Tax Court concluded that the taxpayer was justified in asserting his Fifth Amendment privilege, and that the taxpayer was entitled to judgment as a matter of law that the collection action could not proceed. *Youssefzadeh* involved a frivolous return penalty under Code Sec. 6702(a)(1), but the reasoning therein should equally apply to a Fifth Amendment information return.<sup>59</sup>

In sum, taxpayers selected for audit in connection with offshore transactions should evaluate what information they can provide to the IRS without waiving privilege and carefully consider filing an information return asserting privilege on a line-by-line basis or, in some cases, a Fifth Amendment return to impede the assessment of continuation penalties.

## **VII. The Impact of Asserting the Fifth Amendment During an Examination on the Scope of Review in the U.S. Tax Court, District Courts, and Court of Federal Claims**

### *a. Contesting the Determination Set Forth in the Notice of Deficiency*

Asserting the Fifth Amendment during an IRS examination will cause the IRS to issue a Notice of

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Deficiency (“Notice”) disallowing deductions and imputing income. The taxpayer can challenge the IRS’s determination of tax set forth in the Notice in the U.S. Tax Court, District Courts, or the Court of Federal Claims, depending on whether the taxpayer wants to prepay the tax or not. In all three courts, the IRS determination is initially presumed to be correct and the taxpayers are allocated the burden of presenting credible evidence to support a finding contrary to that of the Notice.<sup>60</sup>

When selecting a forum to contest an IRS determination resulting from the assertion of privilege during the examination, tax professionals should consider each court’s standard and scope of review of an IRS determination. The scope of judicial review refers to the evidence the reviewing court will examine in reviewing an agency decision while the standard of judicial review refers to how the reviewing court will examine that evidence.<sup>61</sup>

The Tax Court hears prepayment cases. With the exception of certain CDP cases, the Tax Court’s standard and scope of review, when redetermining liabilities determined by the IRS, is *de novo*.<sup>62</sup> *De novo* review means that the facts and law are determined anew based on the evidence and arguments presented to the court, rather than on “any previous record developed at the administrative level.”<sup>63</sup> Accordingly, the taxpayer’s assertion of privilege during the examination will not lead to a negative inference by the Tax Court. Once the fear of criminal prosecution has passed, the taxpayer is free to waive privilege before the Tax Court and challenge the IRS’s determination.

Refund suits are generally filed in the District Courts or the Federal Court of Claims. Both courts subscribe to the *de novo* standard of review.<sup>64</sup> Unlike the Tax Court, however, the scope of review in these courts is limited by the doctrine of variance and the administrative record.<sup>65</sup> The doctrine of variance bars taxpayers from presenting claims in a tax refund suit that substantially vary from the legal theories and factual bases presented to the IRS.<sup>66</sup> The doctrine of variance is what ensures that the IRS has an opportunity to administratively correct errors, thus limiting litigation.<sup>67</sup> Because the District Court and Court of Federal Claims do not generally consider evidence that was not presented to the IRS, taxpayers who chose to invoke the Fifth Amendment privilege during the IRS examination should carefully consider the impact of the doctrine of variance on the ability to prosecute a refund claim.

It should also be noted that the taxpayer’s assertion of the Fifth Amendment during an examination will impact the taxpayer’s ability to shift the burden of proof in every forum. Initially, the taxpayer has the burden of proof in court proceedings with respect to factual issues resulting in the tax liability.<sup>68</sup> Pursuant to Code Sec. 7491(a), the burden shifts to the government if the taxpayer produces “credible evidence with respect to any factual issue relevant to ascertaining the relevant tax liability.”<sup>69</sup> To shift the burden of proof, the taxpayer must: (a) introduce credible evidence relevant to determining taxpayer’s liability, (b) prove that he or she cooperated with reasonable requests from the IRS in its investigation, and (c) demonstrate compliance with the substantiation and recordkeeping requirements in the code and regulations.<sup>70</sup> Assertion of the Fifth Amendment during an examination may foreclose the taxpayer’s ability to shift the burden of proof.

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*b. Collections Due Process Cases*

The impact of asserting the Fifth Amendment in an IRS collection case is more problematic for the taxpayer. Most IRS collection cases require the taxpayer to submit financial information under penalty of perjury.<sup>71</sup> The taxpayer's assertion of the Fifth Amendment before the IRS Collection Division will result in the issuance of a Notice of Intent to Levy or a Notice of Federal Tax Lien. Taxpayers may request a CDP hearing with Appeals after receiving either notice of levy or a federal tax lien. The Tax Court has exclusive jurisdiction of appeals of IRS determinations in CDP cases.<sup>72</sup>

Where the validity of the underlying tax liability is properly at issue, the Tax Court will apply the *de novo* standard of review.<sup>73</sup> Where the validity of the underlying tax liability is not properly at issue (e.g., proposed collection alternatives), the Court will review the IRS's administrative determination for abuse of discretion.<sup>74</sup>

As for the scope of review, the First, Eighth, and Ninth Circuits<sup>75</sup> have limited the Tax Court's review to the administrative record.<sup>76</sup> Thus, taxpayers in these jurisdictions, who desire to invoke the Fifth Amendment privilege during a CDP hearing, should carefully consider the impact of this "record rule" on their ability to obtain *de novo* review of the IRS's determination of the underlying tax liability, including the tax deficiency, additions to tax, and statutory interest.

When evaluating a taxpayer's claim that the IRS's rejection of a proposed collection alternative was an abuse of discretion, the scope of the Tax Court's review is limited to issues that were properly raised during the CDP hearing.<sup>77</sup> "An issue is not properly raised if the taxpayer fails to request Appeals consideration of the issue or the taxpayer requests consideration but fails to present any evidence regarding that issue after being given reasonable opportunity."<sup>78</sup> Consequently, the taxpayer's invocation of the Fifth Amendment privilege could reasonably be anticipated to foreclose review of the IRS's determination to proceed with enforced collection and result in the rejection of the taxpayer's proposed collection alternative.

## VIII. Conclusion

Taxpayers at risk of or already involved in an IRS audit are often inclined to assert the Fifth Amendment privilege against self-incrimination in response to their fear of high civil penalties and criminal prosecution. To encourage resolution of tax cases while also protecting taxpayers' rights, tax professionals should understand the limits of the Fifth Amendment in civil cases, the obligation to balance prompt disposition of a tax case with the obligation to protect privileges, and the additional considerations involved with offshore audits. Most importantly, when deciding whether the taxpayer should invoke the privilege against self-incrimination during the administrative process, tax professionals should evaluate the impact that asserting or waiving the privilege at the administrative level will have on future proceedings.

### Footnotes:

1. Frank Agostino, Esq. is the Principal of and Valerie Vlasenko, Esq. is an Associate at Agostino & Associates, P.C.

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2. IRM pt. 1.1.1.2 (June 6, 2015).
3. I.R.C. § 7602(a).
4. *United States v. Yip*, CA-9, 592 F3d 1035, 1042.
5. *Id.*
6. Unless otherwise specified, all other Code Sections herein refer to the Internal Revenue Code, codified as Title 26 of the United States Code.
7. I.R.C. § 7601.
8. *United States v. Sullivan*, 274 U.S. 259 (1927).
9. *Id.* at 263.
10. *Id.*; see also *Garner v. United States*, 424 US 648, 650–51, n. 3 (1975) (“[N]othing we say here questions the continuing validity of Sullivan’s holding that returns must be filed”).
11. I.R.C. § 7203(a).
12. I.R.C. § 7203.
13. *Garner*, 424 US at 665; see also *United States v. Trenk*, 2009 WL 1298420 at \*3 (D.N.J. May 8, 2009).
14. *Sullivan*, 274 US at 263.
15. *Youssefzadeh v. Comm’r*, No. 14868-14L (TC June 25, 2014).
16. *Id.*
17. See I.R.C. § 7602.
18. U.S. CONST. amend. V.
19. See Richard L. Scheff, Scott A. Coffina & Jill Baisinger, *Taking the Fifth in Civil Litigation*, 29 LITIGATION 30, 70 (Fall 2002).
20. *Lefkowitz v. Turley*, 414 US 70, 77 (1973).
21. *Id.*
22. *The Pillsbury Comp. v. Conboy*, 459 US 248, 266, n. 1 (1983) (Marshall J., concurring).
23. *Hoffman v. United States*, 341 US 479, 486 (1951).
24. *United States v. Trenk*, 2009 WL 1298420 at \*3 (2009).
25. *United States v. Neff*, 615 F2d 1235, 1239 (9th Cir. 1980).
26. IRM pt. 4.2.5.7(1) (July 29, 2011).
27. *California v. Byers*, SCt, 402 US 424, 429 (1971).
28. *Nat’l Life Ins. Co. v. Hartford Acc. & Indem. Co.*, 615 F2d 595, 598 (3rd Cir. 1980).
29. *Hoffman v. United States*, 341 US 479, 486 (1951).
30. *United States v. Raniere*, 895 FSupp 699, 705 (D.N.J. 1995).
31. *Baxter v. Palmigiano*, 425 US 308, 319 (1976).
32. *Rogers v. United States*, 340 US 367, 373 (1951).
33. I.R.C. § 7602.
34. See, e.g., *Reineman v. United States*, 301 F2d 267 (7th Cir. 1962) (recognizing the taxpayer’s remedy of self-help); *Mangone Co. Inc. v. United States*, 54 F2d 168, (Ct. Cl. 1931)
35. *United States v. Powell*, 379 US 48, 55 (1964).
36. The Internal Revenue Manual recognizes that a grant of immunity is appropriate in cases where a witness’s Fifth Amendment privilege is implicated by a summons. Specifically, IRM 9.4.5.12.4 (May 15, 2008), subsection 1, notes that “a witness’s act of production in response to a subpoena or summons may have incriminating testimonial aspects for which statutory immunity must be granted before production may be compelled.”
37. *United States v. Hubbell*, 530 US 27, 37 (2000).
38. *In re Special Feb. 2011-1 Grand Jury Subpoena Dated Sept. 12, 2011*, 691 F3d 903 (7th Cir. 2012).
39. *Id.*
40. *United States v. Doyle*, 2007 WL 2670057, at \*9, n. 16 (D. Ka. 2007); IRS Chief Counsel Adv. 111225-08 (Dec. 11, 2009), available online at [www.I.R.S.gov/pub/I.R.S.-wd/0950044.pdf](http://www.I.R.S.gov/pub/I.R.S.-wd/0950044.pdf) (“The Service cannot



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- require the summoned person to create a document that responds to a list of questions"); IRM pt. 5.17.6.1 (Sept. 26, 2014) ("A summons cannot require a witness to prepare or create documents, including tax returns, that do not currently exist").
41. *Sicignano v. United States*, 127 FSupp2d 325, 332 (D. Conn. 2001).
42. *Nomination of Hon. Mark W. Everson: Hearing Before Comm. on Finance*, 108th Cong. 31 (2003) (Prepared statement of Hon. Mark Everson, nominee for Comm. of Internal Revenue Service).
43. Note that the Circular 230 §10.21 does not require the taxpayer to correct his or her non-compliance.
44. Circular No. 230 (Rev. 6-2014) §10.23.
45. 18 USC §4 (1994).
46. See *United States v. Johnson*, 546 F2d 1225, 1227 (5th Cir. 1977) ("The mere failure to report a felony is not sufficient to constitute a violation of 18 U.S.C.A. § 4").
47. See, e.g., I.R.C. §§ 6038(b)(1) (for certain foreign corporations, certain foreign partnerships, certain disregarded entities, and passive foreign investment companies or qualified electing funds); 6038A(d) (1) (for certain foreign-owned corporations); 6038C(c) (for certain foreign corporations engaged in a U.S. trade or business); 6038D(d)(1) (for certain specified foreign financial assets); and 6677(a) (for beneficiaries of certain trusts and estates); see also I.R.C. § 6048(c). For certain transfers to foreign persons, I.R.C. § 6038(B) imposes a reporting obligation and a penalty equal to 10% of the fair market value of the transferred property at the time of the exchange. For a complete discussion of the penalties which can apply to the failure to file required international forms, as well as strategies to challenge such penalties, see Frank Agostino, Brian D. Burton & Lawrence A. Sannicandro, *De Novo Review of Assessable International Penalties*, AGOSTINO & ASSOCIATES, P.C. NEWSLETTER 5–11, Hackensack, N.J. (Sept. 2014), available at <https://docs.google.com/file/d/0B719qAMBEjGQdF9VdWJza2duVFE/edit>.
48. Accord IRM pt. 20.1.9.3.4(1) (Apr. 22, 2011).
49. See, e.g., I.R.C. §§ 6038(b)(2) (for certain foreign corporations, certain foreign partnerships, certain disregarded entities, and passive foreign investment companies or qualified electing funds); 6038A(d) (2) (for certain foreign-owned corporations); 6038C(c) (for certain foreign corporations engaged in a U.S. trade or business); 6038D(d)(2) (for certain specified foreign financial assets); and 6677(a) (for beneficiaries of certain trusts and estates); see also I.R.C. § 6048(c); IRM pt. 20.1.9.3.4(3) (Apr. 22, 2011).
50. IRM pt. 20.1.9.2(13) (Nov. 30, 2015).
51. *Sullivan*, 274 US at 263.
52. *Id.*
53. *Garner*, 424 US at 656.
54. *Sullivan*, 274 US at 262; see also *Garner*, 424 US at 656.
55. IRM pt. 20.1.9.1(1)(d) (July 8, 2015).
56. See Frank Agostino & Lawrence A. Sannicandro, *Invoking the Fifth Amendment in Audits with Offshore Issues: Required Records Under the Bank Secrecy Act, Greenfield, and Continuation Penalties*, AGOSTINO & ASSOCIATES, P.C. NEWSLETTER 5–11, Hackensack, N.J. (Sept. 2014), available at <https://docs.google.com/viewer?a=v&pid=sites&srcid=ZGVmYXVsdGRvbWFpbnczZW1pbmFybWF0ZXJpYWxzGd4OjU0NTI4NDE0MDg2MTg0NmU>.
57. Accord I.R.C. §§ 6330(c)(2)(A) (providing the taxpayer requesting a collection review hearing may raise "any relevant issue" relating to the unpaid tax or the IRS's collection action); 6330(c)(2)(B) (providing the taxpayer "may also raise at the hearing challenges to the existence or amount of the underlying tax liability" if the taxpayer did not receive any statutory notice of deficiency for such liability or did not otherwise have an opportunity to dispute it); cf. *C.M. Fitzpatrick*, 112 TCM 481, Dec. 60,725(M), TC Memo. 2016-199 (allowing a taxpayer *de novo* review of a trust fund recovery penalty assessment where he or she did not receive a Letter 1153, giving him or her an opportunity to protest the penalty assessment).



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58. IRM pt. 20.1.9.1(1)(D) (July 8, 2015). The IRS's position as stated in the IRM is inconsistent with Supreme Court precedent, which generally holds that the timely filing of a Fifth Amendment return precludes the imposition of a failure to file penalty under I.R.C. § 6651(a)(1). *See Sullivan*, 274 US at 262; *see also Garner*, 424 US at 656. Nor does the filing of the Fifth Amendment return warrant the imposition of a frivolous return penalty under I.R.C. § 6702(a)(1). *See Youssefzadeh*, No. 14868-14L (Order and Decision denying the IRS's motion for summary judgment and granting taxpayer's motion for summary judgment).
59. *Youssefzadeh*, No. 14868-14L.
60. I.R.C. § 7491; Tax Ct. R. Prac. & Proc. 142.
61. *Porter v. Comm'r*, 130 TC 115, 126 (2008) (Vasquez J., concurring).
62. *Greenberg's Express, Inc. v. Comm'r*, 62 TC 324, 328 (1974).
63. *Gatlin v. Comm'r*, 754 F.2d 921, 923 (11th Cir. 1985).
64. *Mulholland v. United States*, 25 Cl.Ct. 748 (1992); *Bowman v. Comm'r*, 2010 WL 1780194 at \*3 (Apr. 30, 2010).
65. *Bowman v. Comm'r*, 2010 WL 1780194 at \*3 (Apr. 30, 2010).
66. *United States v. Felt & Tarrant Mfg. Co.*, 283 US 269, 270 (1931).
67. *Computervision Corp. v. United States*, 445 F.3d 1355, 1363 (Fed. Cir. 2006).
68. *Helvering v. Taylor*, 293 US 507, 514 (1935).
69. I.R.C. § 7491(a)(1).
70. *Kohler Jr. et al v. Comm'r*, TC Memo. 2006-152.
71. Form 433-A, *Collection Information Statement for Wage Earners and Self-Employed Individuals*.
72. I.R.C. § 6330(d)(1).
73. *Sego v. Comm'r*, 114 TC 604 (2000).
74. IRM pt. 8.22.4.2.1 (Nov. 5, 2013).
75. Tax Court decisions are appealable to the U.S. Court of Appeals and are bound by the Circuit in which they sit. *See* I.R.C. § 7482.
76. *Rosenbloom v. Comm'r*, TC Memo. 2011-140.
77. *Giamelli v. Comm'r*, 129 TC 107 (2007).
78. Treas. Reg. §§ 301.6320-1(f)(2) Q&A-F3, 301.6330-1(f)(2).

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**TAC TIP**

Part Pay Installment Agreement and 2 year review

A Partial Pay Installment Agreement (PPIA) allows for partial payment of a liability over time. Before approval, the IRS will review the taxpayer's assets and income to show full payment cannot be made before the collection statute expires. Although the taxpayer has an approved PPIA and all requirements are being made such as timely payments and full compliance, the agreement is to be *re-viewed* once every two years. See IRC 6159(d). Information related to a review is on the lower left corner of the first page of the Installment Agreement form 433-D and noted under IRS USE ONLY. The box checked will indicate the type and time of a future review. The practitioner should review the selections to ensure it is accurate and the taxpayer understands and is aware of the review process.

December 2017

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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

January 29, 2018

February 5, 2018

March 5, 2018

April 9, 2018

May 14, 2018

June 11, 2018

## ***TOWN HALL ON THE HOT TAX ISSUES OF 2018: TAX REFORM AND PASSPORT REVOCATION***

Taxpayers and tax professionals are preparing for the tax changes we will see in 2018. What does this mean for the taxpayer in terms of rates and deductions and what will be the economic impact? What about businesses owned by attorneys and accountants? Will the same tax cut apply to these professionals as everyone else? What about deductions for state and local taxes and medical expenses? Will tax reform have an impact on the tax implications of getting divorced? Also promised in 2018, is passport certification by the IRS for those who owe more than \$50,000 in taxes, penalties and interest combined, which may lead to passport revocation by the State Department. What will be the certification/revocation procedure and what is a taxpayer to do? Come hear from our distinguished panel.

<b>Registration:</b>	Free - RSVP at: <a href="http://services.nycbar.org/EventDetail?EventKey=PIT011018">http://services.nycbar.org/EventDetail?EventKey=PIT011018</a>
<b>Date &amp; Time:</b>	Wednesday, January 10, 2018 • 6:00 - 7:30 pm
<b>Location:</b>	The New York City Bar, 42 West 44 <sup>th</sup> Street, NYC
<b>Sponsoring Committee:</b>	The Personal Income Tax Committee, Fran Obeid Chair

***David Kamin***  
***Professor of Law, New York University School of Law***

***Drita Tonuzi***  
***IRS Deputy Chief Counsel***

***Interviewers:***  
***Frank Agostino, Agostino and Associates***  
***Stow Lovejoy, Kostelanetz & Fink***



**NYCLA - U.S. TAX COURT CALENDAR CALL PRO BONO PROGRAM**  
**Calendars for January through June 2018**

Date	Presiding Judge	RSVP to Volunteer/Observe
January 29, 2018	The Honorable Peter Panuthos	<a href="https://www.eventbrite.com/e/us-tax-court-calendar-1-29-2018-special-trial-judge-peter-j-panuthos-tickets-3937807">https://www.eventbrite.com/e/us-tax-court-calendar-1-29-2018-special-trial-judge-peter-j-panuthos-tickets-3937807</a> 2876
February 5, 2018	The Honorable Michael B. Thorton	<a href="https://www.eventbrite.com/e/us-tax-court-calendar-nyc-february-5-2018-the-honorable-judge-michael-b-thorton-tickets-39378419914">https://www.eventbrite.com/e/us-tax-court-calendar-nyc-february-5-2018-the-honorable-judge-michael-b-thorton-tickets-39378419914</a>
March 5, 2018	The Honorable Michael B. Thorton	<a href="https://www.eventbrite.com/e/us-tax-court-calendar-nyc-march-5-2018-judge-michael-b-thorton-tickets-39378742">https://www.eventbrite.com/e/us-tax-court-calendar-nyc-march-5-2018-judge-michael-b-thorton-tickets-39378742</a> 880
April 9, 2018	The Honorable Juan F. Vasquez	<a href="https://www.eventbrite.com/e/us-tax-court-calendar-nyc-4-9-2018-judge-juan-f-vasquez-tickets-41257078031">https://www.eventbrite.com/e/us-tax-court-calendar-nyc-4-9-2018-judge-juan-f-vasquez-tickets-41257078031</a>
May 14, 2018	The Honorable Albert G. Lauber	<a href="https://www.eventbrite.com/e/us-tax-court-calendar-nyc-5-14-2018-judge-albert-g-lauber-presiding-registration-41296098743">https://www.eventbrite.com/e/us-tax-court-calendar-nyc-5-14-2018-judge-albert-g-lauber-presiding-registration-41296098743</a> 96098743
June 11, 2018	The Honorable Peter Panuthos	<a href="https://www.eventbrite.com/e/us-tax-court-calendar-6-11-2018-special-trial-judge-peter-j-panuthos-tickets-41296275271">https://www.eventbrite.com/e/us-tax-court-calendar-6-11-2018-special-trial-judge-peter-j-panuthos-tickets-41296275271</a> 5271

The U.S. Tax Court Calendar Call Pro Bono Program provides counseling to self-represented taxpayers seeking advice in the area of 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 decide to 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 interested 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 K. 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.





<b>Tax Court Practice &amp; Preparation for the US Tax Court Admission Exam for Non-attorneys</b>	
<b>Three (3) Free NY &amp; NJ CLE<sup>1</sup>, CPE<sup>2</sup>, and EA CE Credits <i>per class</i></b>	
<b>WHERE</b>	<b>Bergen Community College, Ciarco Learning Center, 355 Main Street, Room 102/103, Hackensack, NJ 07601</b>
<b>TIME</b>	<b>6:00 PM to 9:00 PM</b>

<b>Date</b>	<b>Topic</b>	<b>RSVP</b>
1/9/18	Tax Practice, Part I - Substantiating Deductions	<a href="http://conta.cc/2op1rxi">http://conta.cc/2op1rxi</a>
2/6/18	Tax Practice, Part II - Filing Status, Exemption & Credits	<a href="http://conta.cc/2ossIEB">http://conta.cc/2ossIEB</a>
5/8/18	Tax Practice, Part III - Gross Income, Exclusions, Penalties, etc	<a href="http://conta.cc/2otNGgT">http://conta.cc/2otNGgT</a>
6/5/18	Tax Practice, Part IV - Basis, Depreciation, Accounting Methods	<a href="http://conta.cc/2ovm3Uf">http://conta.cc/2ovm3Uf</a>
7/10/18	Tax Court Rules of Practice and Procedure, Part I	<a href="http://conta.cc/2A03VYr">http://conta.cc/2A03VYr</a>
8/7/18	Tax Court Rules of Practice and Procedure, Part II	<a href="http://conta.cc/2oxkdD4">http://conta.cc/2oxkdD4</a>
9/4/18	Federal Rules of Evidence, Part I	<a href="http://conta.cc/2ouJy0f">http://conta.cc/2ouJy0f</a>
10/9/18	Federal Rules of Evidence, Part II	<a href="http://conta.cc/2otZlfr">http://conta.cc/2otZlfr</a>
11/6/18	Ethics & Professional Conduct	<a href="http://conta.cc/2onj2M">http://conta.cc/2onj2M</a>

 APPROVED CONTINUING EDUCATION PROVIDER	The goal of each component of the series is to (a) review best practices for tax professionals interested in tax controversy/representation, and (b) prepare nonattorneys for the 2018 Tax Court admission exam. Each seminar and the series are free! A&A asks that each attendee volunteer for 3 hours of pro bono service per class
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<sup>1</sup> This program has been approved by the Board on Continuing Legal Education of the Supreme Court of New Jersey for 3 hours of total CLE credit. Of these, 0 qualify as hours of credit for ethics/professionalism, and 0 qualify as hours of credit toward certification in civil trial law, criminal trial law, workers compensation law and/or matrimonial law. This course or program has been approved in accordance with the requirements of the New York State Continuing Legal Education Board for a maximum of 3 credit hours.

<sup>2</sup> 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. 1 CFP CE Credit will be provided.





## Preparation for the US Tax Court Admission Examination for Non-Attorneys

### Practice Sessions - 2018 Examination

<i>Dates</i>	<i>RSVP</i>
June 2, 2018	<a href="http://conta.cc/2AdCWYZ">http://conta.cc/2AdCWYZ</a>
July 7, 2018	<a href="http://conta.cc/2AEIzQc">http://conta.cc/2AEIzQc</a>
August 4, 2018	<a href="http://conta.cc/2iVFjFI">http://conta.cc/2iVFjFI</a>
September 1, 2018	<a href="http://conta.cc/2iWrhna">http://conta.cc/2iWrhna</a>
October 6, 2018	<a href="http://conta.cc/2AevlX">http://conta.cc/2AevlX</a>

Where	<b>Agostino &amp; Associates</b> <b>14 Washington Place, Hackensack, NJ 07601 (201) 488-5400</b>	
Time	Breakfast	9:00 - 9:30 AM
	Examination	9:30 - 1:30 AM
	Questions	1:30 - 2:00 AM

These practice examinations are intended to assist in studying for the 2018 U.S. Tax Court Non-Attorney Admission Examination. Results of this practice examination are not a prediction of future results on the official 2018 U.S. Tax Court Non-attorney Admission Examination. In addition, this practice examination is not a prediction of what you will be asked on the 2018 U.S. Tax Court Non-attorney Admission Examination. There is no guarantee of future success as a result of taking this practice examination. While we strive to provide accurate and up-to-date information, the accuracy, completeness, adequacy or currency of any content provided is not guaranteed. No representation or warranty, express or implied, is made with respect to the administration of this practice examination.