

Tax Procedure

- 1) Who is a preparer: IRS doesn't want to license Preparers, since they do not want to give the public the impression that they are certifying them
  - a) Statutory definition: **any person who prepares for compensation, or who employs one or more persons to prepare for compensation 7701(a)(36)(A) prepares a substantial portion of the return.** 301.7701-15<sup>1</sup>. This definition does not take into account educational qualifications and professional status requirements. 301.7701-15(a)(3)
    - i) firms of Preparers:
      - (1) Only one person per firm is treated as a preparer 1.6694-1(b)(1).
        - (a) Usually the people with supervisory capacity are the preparers. 1.6694-1(b)
        - (b) But note that a person acting in concert with a preparer can be considered to be a preparer
      - (2) If the preparation of the return becomes a mechanical exercise, because someone else provided them with all of the information, then the provider of the information is the preparer<sup>2</sup>
        - (a) A lawyer that writes an opinion letter<sup>3</sup>
      - (3) For purposes of civil liability: only liable if the management of a firm or branch, knew, should of know, and had office procedures in place
    - ii) Safe harbors for People who are NOT preparers
      - (1) People who just furnish furnishes typing, reproducing, or other mechanical assistance 7701(a)(36)(B)(i)
      - (2) People who give advise on specific areas of the law unless the advise is given after the fact<sup>4</sup>

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301.7701-15	An income tax return preparer is any person who prepares for compensation, or who employs (or engages) one or more persons to prepare for compensation, other than for the person, all or a substantial portion of any return of tax
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<b>26 CFR § 301.7701-15(b)(1)</b>	(1) A person who furnishes to a taxpayer or other preparer sufficient information and advice so that completion of the return or claim for refund is largely a mechanical or clerical matter is considered an income tax return preparer, even though that person does not actually place or review placement of information on the return or claim for refund.
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<b>26 CFR § 301.7701-15(b)(1)(ii)</b>	The advice is directly relevant to the determination of the existence, characterization, or amount of an entry on a return or claim for refund. For example, if a lawyer gives an opinion on a transaction which a corporation has consummated, solely to satisfy an accountant (not at the time a preparer of the corporation's return) who is attempting to determine whether the reserve for taxes set forth in the corporation's financial statement is reasonable, the lawyer shall not be considered a tax return preparer solely by reason of rendering such opinion.
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- (3) Someone who works for someone form who is regularly employed  
7701(a)(36)(B)(ii)
- (4) People who prepare returns as fiduciaries for other people:  
7701(a)(36)(B)(iii)
- (5) People who are engaged in practice before the IRS (ie after an audit has begun)<sup>5</sup>
- iii) Types of preparers:
  - (1) Signing preparer
  - (2) Non-signing preparer: (someone who provides advice who is not associated with the same firm)
- b) Duties of preparer
  - i) Seems to include people who prepare opinion letters
    - (1) ethical duty to explain questionable areas of law
    - (2) if they should know of a misstatement of fact, they shouldn't give such an opinion
  - ii) **Preparers must** not wrongfully disclose return information– criminal penalties in § 7216
  - iii) **Preparers must** Give clients the return Sec. 6065.
    - (1) Fine is \$50, up to 25,000 per year
    - (2) Does not apply
      - (a) to people who only give advice about specific tax laws 1.6695-1(a)(1)(i)
      - (b) to people who applied a return to whom this return is based to people who only give advice about specific tax laws 1.6695-1(a)(1)(ii)
      - (c) safe harbor for preparers who run blind trusts for politicians 1.6695-1(2)(i)
  - iv) **Preparer must** sign return
    - (1) Fine is \$50, up to 25,000 per year
    - (2) Preparer can show there is reasonable cause and not willful neglect 6695(b)
  - v) **Preparer must** Keep copies of return, or keep a list Sec. 6065(a),(b)
    - (1) Fine is \$50, up to 25,000 per year
    - (2) Preparer can show there is reasonable cause and not willful neglect 6695(d)
    - (3) Doesn't apply to people who gave advise about specific issues, or were employees
  - vi) **Preparer must** Uses EIN or SS § 6109(a)(4)

26 CFR § 301.7701- 15(b)(1)(i)	The advice is given with respect to events which have occurred at the time the advice is rendered and is not given with respect to the consequences of contemplated actions
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7701(a)(36)(iv)	prepares a claim for refund for a taxpayer in response to any notice of deficiency issued to such taxpayer or in response to any waiver of restriction after the commencement of an audit of such taxpayer or another taxpayer if a determination in such audit of such other taxpayer directly or indirectly affects the tax liability of such taxpayer.
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- (1) Fine is \$50, up to 25,000 per year (but only one per return or claim for refund) 1.6695-1(c)(3)
- (2) Preparer can show there is reasonable cause and not willful neglect 6695(c)
- (3) Doesn't apply to people who gave advise about specific issues, or were employees
- vii) **Preparer must Not** cash the client's checks, unless given to the taxpayer.
  - (1) Fine is \$500/check 6695(f)
  - (2) Preparer-banks can cash checks for their customers
  - (3) If there is a written authorization it is allowed 1.6696-1(f)(2)
- viii) **Preparer must** use Diligence in determining earned income credit
  - (1) Fine is \$100/return 6695(g)
- ix) **Preparer must** Comply with IRS requests for information 6107(b) (requiring compliance with I.R.S. information requests)
  - (1) \$50/fine per failure 6695(d)
  - (2) up to \$25,000
  - (3) unless it is shown that such failure is due to reasonable cause and not due to willful neglect, burden is on preparer to show that he was not willful. Nordbrock (9<sup>th</sup> Cir. 1994)
- c) penalties to Preparers for incorrect reporting
  - i) Return or claim for refund is viewed as a whole 1.6694-1(c)
    - (1) not reduced by any carry back
  - ii) Substantive offenses:
    - (1) Understatements are a \$250 fine per return (**unrealistic position**).  
Preparer cannot sign a return unless he determines that there is a realistic possibility on the merits.
      - (a) Definition of understatement: realistic possibility of being sustained on the merits Sec. 6694(a)(1) or was frivolous Sec. 6694(a)(3).
        - (i) realistic possibility is defined as **1 in 3** 1.6694-2(b)
          - 1. practitioner must inform the taxpayer of a need to disclose and of the penalties. If he does this (and he can prove it) , he can avoid the penalties.
        - (ii) permissible authorities
          - 1. possible authorities<sup>6</sup>

2. date that possible authorities are determined based on
    - a. signing Preparers: date of signature 1.6694-2(b)(5) (if no date, it is the date of preparation of advise)
    - b. non-signing Preparers: date of advise 1.6694-2(b)(5)
- (b) Safe harbors
- (i) Preparers may rely on information provided to them in good faith, and are not required to audit the books of their clients § 1.6694-1(e)
    1. Preparer must still make reasonable inquiries § 1.6694-1(e)
    2. If the code requires a **specific document**, the preparer must be sure that they do, in fact, exist 1.6694-1(e)
  - (ii) No penalties for good faith
    1. Nature of the error 1.6694-2(d)
    2. Frequency of error 1.6694-2(d)
    3. Materiality 1.6694-2(d)
    4. Office practice 1.6694-2(d)
    5. Reliance on advise of other preparer that was reasonable 1.6694-
  - (iii) if the understatement is **disclosed** with a form under § 6662(d)(2)(B)(ii)
    1. may advise the taxpayer of the need to disclose to avoid penalties
    2. advise to disclose must be in same form (ie oral or written) as substantive advise 1.6664-2(c)(3)(A)

1.6662-4(d)(iii)	<p>Applicable provisions of the Internal Revenue Code and other statutory provisions; proposed, temporary and final regulations construing such statutes; revenue rulings and revenue procedures; tax treaties and regulations thereunder, and Treasury Department and other official explanations of such treaties; court cases; congressional intent as reflected in committee reports, joint explanatory statements of managers included in conference committee reports, and floor statements made prior to enactment by one of a bill's managers; General Explanations of tax legislation prepared by the Joint Committee on Taxation (the Blue Book); private letter rulings and technical advice memoranda issued after October 31, 1976; actions on decisions and general counsel memoranda issued after March 12, 1981 (as well as general counsel memoranda published in pre-1955 volumes of the Cumulative Bulletin); Internal Revenue Service information or press releases; and notices, announcements and other administrative pronouncements published by the Service in the Internal Revenue Bulletin. Conclusions reached in treatises, legal periodicals, legal opinions or opinions rendered by tax professionals are not authority. The authorities underlying such expressions of opinion where applicable to the facts of a particular case, however, may give rise to substantial authority for the tax treatment of an item. Notwithstanding the preceding list of authorities, an authority does not continue to be an authority to the extent it is overruled or modified, implicitly or explicitly, by a body with the power to overrule or modify the earlier authority. In the case of court decisions, for example, a district court opinion on an issue is not an authority if overruled or reversed by the United States Court of Appeals for such district. However, a Tax Court opinion is not considered to be overruled or modified by a court of appeals to which a taxpayer does not have a right of appeal, unless the Tax Court adopts the holding of the court of appeals. Similarly, a private letter ruling is not authority if revoked or if inconsistent with a subsequent proposed regulation, revenue ruling or other administrative pronouncement published in the Internal Revenue Bulletin.</p>
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3. employers and partnerships only are subject to penalties if one or more of the “principal officers” of a firm or a branch or office knew what was going on, or failed to provide for review procedures, or the review procedures were disregarded 1.6694-2(a)(2)(i)
  - (iv) the return is **not frivolous** and **the taxpayer is advised of the penalties**
    1. frivolous is defined as “patently improper” 1.6694-2(c)(2)
  - (v) preparer can, in good faith, rely on information provided by the client so long as he has no reason to know that it is false
    1. if there is a substantiation requirement, they need only if he has the substantiation information
      - a. *e. g.* if he is audited the next time he must actually make an inquiry
- (c) **Burden on preparer** to show that he didn’t know whether a questionable position was taken on the return 1.6694-2(e)
  - (i) burden is on preparer to show that the position is **not** questionable 1.6694-2(e)
  - (ii) burden is on preparer to show that a questionable position was disclosed 1.6694-2(e)
- (2) **Willful or reckless understatement**: \$1000 per return
  - (a) Definition: willful attempt to understate the liability
    - (i) contrary to rule or regulation – and they knew it 1.6694-3(c)
    - (ii) contrary to known facts 1.6694-3(b)
    - (iii) if it is contrary to the an Rev. Rul or IRS publication, not frivolous if it has a realistic possibility of success 1.6694-3(c)(3)
  - (b) Burden
    - (i) as to willful understatement, the IRS has the burden 1.6694-3(h)
    - (ii) as to reckless or intentional disregard of a rule or reg., the preparer has the burden 1.6694-3(h)(1)
    - (iii) as to good faith challenge to reg., preparer has burden 1.6694-3(h)(2)
    - (iv) **as to adequate disclosures**, the preparer has the burden. 1.6694-3(h)(3)
  - (c) There is **no double-counting** between understatement and negligent: any payment due to understatement is subtracted from a fine due to recklessness Sec. 6694(B)(2)
- d) Procedure for punishing preparers
  - i) Cannot rest on double-jeopardy or other substantive rights
    - (1) Can be additional penalties 6696(a)
    - (2) Other restrictions on assessment do not apply) 6696(b)
    - (3) In general, an action against a preparer need not involve an action against a taxpayer, 1.6694-1(c), unless it really involves the taxpayers liability
  - ii) Statute of limitations: 3 years – but tolled when in court § 6694(c)(1)
    - (1) In general, preparer can pay within 30 days after a notice and demand 6694(c)(1):

- (a) Notice must be separate from a claim for deficiency 1.6694-4(a)(2)
- (b) Any statute of limitations is tolled when the district court has jurisdiction 6694(c)(3)
- (2) Preparer can pay the penalty or Collection will be stayed if the preparer pays 15% and files a claim for refund or seeks an injunction. 6694(c)(2)
  - (a) After paying 15% can file a claim for refund of the amount paid
  - (b) **30 days** after a denial of a claim for refund, the preparer can file in district court 6694(c)(2)
    - (i) if the IRS doesn't respond, the preparer can file 30 days after 6 months at the district court 6694(c)(2) (7 months)
    - (ii) IRS can counterclaim for the remainder 1.6694-4(a)(4)
  - (c) Claims for refunds of penalties can only be made by the preparer (not the employer)
- (3) Regulations set for exhaustion requirement 1. 6696-1(j)
- (4) Refunds after penalty paid when there is no claim for a refund and 15% paid
  - (a) For violation of duties
    - (i) Preparer Can file a claim for refund within 3 years 6696(d)(2)
    - (ii) No sol for refund where preparer's penalties were based on an understatement of income 6694(d)
- (5) **No sol: If the preparer turns out to be correct**, money is refunded as an overpayment (with interest), with no statute of limitations § 6694(d)
- iii) burdens:
  - (1) Willful requires IRS to prove. With Reckless, the burden is on the preparer
  - (2) Overstatement: burden is on preparer
- iv) After penalties are paid, the directory of practice (treasury department) begins an action to disbar the person.
  - (1) Hearing in front of ALJ from Department of Agriculture
    - (a) Criminal violations as well as preparer penalties are also grounds for disbarment.
  - (2) Appeal to US district Court
  - (3) Results can be
    - (a) Suspension: must notify all clients
    - (b) public reprimand
    - (c) disbarment
  - (4) note: an attorney who is acting as a preparer and not an attorney can still be disbarred
- 2) examination of returns
  - a) types of audits
    - i) correspondence audits
    - ii) office audits
    - iii) field audits
      - (1) the IRS does not have the power to visit the office, so the lawyer can put the records in his office.
      - (2) Agent can SEE the place of business, but he can't conduct the exam there

- b) partnership audits (for partnerships of more than 10) (p. 96)
  - i) essentially one tax matters partner is designated for all partners
- c) powers
  - i) tax auditors must get permission to expand scope of audit
  - ii) field agents do not need permission to expand scope of audit
  - iii) can speak to managers
- d) privileges
  - i) common law privileges:
    - (1) general rule *Arthur Young*: there is no non-lawyer privilege in tax
      - (a) exceptions: when accountants act as interpreters for lawyers there work falls under attorney-client privilege (must have an agreement that says that)
    - (2) first circuit's test for existence of attorney-client privilege US v. Mit
      - (a) where legal advice of any kind is sought
      - (b) from a professional legal advisor in his capacity as such
      - (c) the communications relating to that purpose
      - (d) made in confidence
      - (e) by the client
      - (f) are at his insistence permanently protected (must be invoked)
      - (g) from disclosure by himself or the legal adviser
      - (h) except that the protection may be waived
  - ii) statutory accountant privilege: § 7525<sup>7</sup>)

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<sup>7</sup> SEC. 7525. CONFIDENTIALITY PRIVILEGES RELATING TO TAXPAYER COMMUNICATIONS. 7525(a) UNIFORM APPLICATION TO TAXPAYER COMMUNICATIONS WITH FEDERALLY AUTHORIZED PRACTITIONERS.--

7525(a)(1) GENERAL RULE.--With respect to tax advice, the same **common law protections of confidentiality** which apply to a communication between a taxpayer and an attorney shall also apply to a communication between a **taxpayer and any federally authorized tax practitioner** to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney.

7525(a)(2) LIMITATIONS.--Paragraph (1) may only be asserted in--  
 7525(a)(2)(A) any **noncriminal tax** matter before the Internal Revenue Service; and  
 7525(a)(2)(B) any **noncriminal tax** proceeding in Federal court brought by or against the United States.

7525(a)(3) DEFINITIONS.--For purposes of this subsection--  
 7525(a)(3)(A) **FEDERALLY AUTHORIZED TAX PRACTITIONER**.--The term "federally authorized tax practitioner" means any individual who is authorized under Federal law to practice before the Internal Revenue Service if such practice is subject to Federal regulation under section 330 of title 31, United States Code.  
 7525(a)(3)(B) **TAX ADVICE**.--The term "tax advice" means advice given by an individual with respect to a matter which is within the scope of the individual's authority to practice described in subparagraph (A).

7525(b) SECTION NOT TO APPLY TO COMMUNICATIONS REGARDING CORPORATE TAX SHELTERS.--

- (1) return preparation: **probably not privileged** because it is either not legal advice (4<sup>th</sup>); or just being a scrivener (8<sup>th</sup>); waiver (7<sup>th</sup>); no expectation of confidentiality (10<sup>th</sup>)
  - (a) 8<sup>th</sup> circuit later held that the disclosure on the return also waives the details of the underlying data
- (2) Litigation
  - (a) Would have to make sure that accountants and other segregate their stuff from other work (communications in the course of routine business are not considered work for the purpose of litigation) US v. Adlman (2d Cir. )
  - (b) However, might be able to argue that communications in “anticipation of litigation” are privileged” Adlman.<sup>8</sup> They use a “primary purpose test” or a “because of” test
  - (c) There is also a gray area into which a lot of legal advice that is partially business advice falls
- (3) Waiving the privilege
  - (a) Disclosure to other agencies constitutes a waiver
  - (b) Dual purpose documents are not privileged
  - (c) Posting on the intranet is not privileged
- 2) Who can practice before the service and whether or not they are bound by Cir. 230
  - a) People who practice before the IRS are different (attorneys, accountants enrolled agents)
    - i) Preparers can appear at examination, but no more
    - ii) Anyone can appear as a witness
  - b) Categories (from Circular 230, § 10.3): note, Preparers need not worry about violating 230, because they are not practicing
    - i) Attorneys
      - (1) Bar on contingent fees except on refund suits

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The privilege under subsection (a) shall not apply to any written communication between a federally authorized tax practitioner and a director, shareholder, officer, or employee, agent, or representative of a corporation in connection with the promotion of the direct or indirect participation of such corporation in any tax shelter (as defined in section 6662(d)(2)(C)(iii) ).

<sup>8</sup> In remanding, Judge Leval emphasized that he would not extend the work product doctrine to documents **that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation.** Five circuits apply this test, **which is called the 'because of' test**, but none has stretched it as far as Judge Leval did in Adlman. Only the Fifth Circuit, in Davis and El Paso, (cited earlier above) takes the position that the **primary purpose for which a document was prepared must be litigation for it to enjoy work product protection.**

**Judge Leval apparently found a likelihood of litigation in Adlman's correct prediction that it would occur, Sequa's continuous audit, and the necessity of Joint Committee approval of Sequa's giant refund claim.** The latter two are not properly considered litigation indicators, but Judge Leval would not be the first to mistake them as such. Courts, like the present Congress, routinely mistake IRS examinations as the commencement of litigation in work product doctrine cases. In *Bernardo v. Commissioner*, 104 T.C. 677 (1995), the Tax Court, a specialized court that should know better, took as the commencement of litigation the IRS's informing the taxpayer that its Art Advisory Panel disagreed with the taxpayer's valuation of a donation of a sculpture. At that point, Judge Wells said, it was reasonable for the taxpayer to conclude that litigation was in the offing.



- (2) Need only file a declaration with the IRS that they are an enrolled attorney
- ii) CPAs
- iii) Enrolled Actuaries
- iv) Enrolled agents
- c) Ethical duties
  - i) There is no need to reveal weaknesses in a case, but must not be misleading
  - ii) Lawyers giving opinions as to outcome should state any reasons why they can't given such an opinion
- d) Legal duties
  - i) Submitting records after a request (Cir. 230): (but there are safe harbors in Circular 230)
    - (1) To the IRS: *“unless he believes in good faith and on reasonable grounds that such record or information is privileged or that the request for, or effort to obtain, such record or information is of doubtful legality”*
    - (2) To the Director of Practice *“provide... any information he may, have concerning violation of the regulations in this part by any person, and to testify .... unless he believes in good faith and on reasonable grounds that such information is privileged or that the request therefor is of doubtful legality.”*
  - ii) Advising **clients** (not the IRS) of noncompliance, errors, or omission (Cir. 230)<sup>9</sup>
  - iii) Due diligence in the preparation of documents (Cir. 230)
    - (1) filing returns, documents, affidavits
    - (2) In determining the correctness of oral
    - (3) **or written representations** made by him to the Department of the Treasury... reference to any matter administered
  - iv) Not delaying disposition (Cir. 230)
- e) Disbarment procedure for people who *practice* before the IRS (seems to be no statute of limitations, but probably 3 years)
  - i) Grounds
    - (1) Criminal conviction
      - (a) Even if acquitted, can still be disbarred based on a lower standard of proof Harary
    - (2) Giving false or misleading information
    - (3) Solicitation of employment as prohibited in 10.30
      - (a) False
      - (b) Misleading
      - (c) Using the term "certified" wrong
    - (4) Willfully failing to file himself
    - (5) Misappropriation of, or failure to remit funds
    - (6) Bribes
    - (7) Disbarment elsewhere

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<sup>9</sup> Cir 230 § 10.21... has made an error in or omission from any return, document, affidavit, or other paper. which the client is required by the revenue laws of the United States to execute, shall advise the client promptly of the fact of such noncompliance, error, or omission.

- (8) Helping someone who was suspended to practice
- (9) Contempt of the IRS (including abusive language)
- (10) Giving a false or reckless opinion (tax shelter).
- ii) Procedure
  - (1) Complaint is filed by the director of practice
    - (a) Answer filed with 15 days
    - (b) Opportunity for a proceeding (31 CFR 10.5)
  - (2) May be appeal to the secretary of the Treasury with 30 days from the decision 31 CFR § 10.17
- iii) Punishments
  - (1) After disbarment, and five years one can petition to have their license reinstated
  - (2) Suspension is finite amount of time

Item	Burden	Source
willfull understatement by preparer	IRS	1.6694-3(h)
intentional disregard of a rule or regulations	Preparer	1.6694-3(h)(1)
good faith challenge to regulations	Preparer	1.6694-3(h)(2)
adequate disclosers	Preparer	1.6694-3(h)(3)
Overstatement	Preparer	
Reckless disregard	Preparer	

- 3) Confidentiality issues
  - a) Making stuff public: Statutory Pre-release procedure
    - i) Before release of material, or after a request for background material, the IRS must make it known that they are going to do that. Secretary must notify (by certified mail) people other than the petitioner of request 26 USC § 6110(f)(1)
      - (1) No requirements to make termination or jeopardy or fraud assessment TAMs public
      - (2) Chief counsel advice
        - (a) 60 days for non-taxpayer specific advice 6110(i) – and if taxpayer specific must mail it to the taxpayers
        - (b) Written determinations (determination letter, technical advice memorandum, or Chief Counsel advice.)
    - ii) Background information to the written determinations (request for the determination, and any supporting documentations) – onclose disclosed if asked for
      - (1) On request, people can get redacted background material
      - (2) Special procedure for additional disclosure
        - (a) After administrative exhaustion can file in TC or USDC for the District of Columbia asking for a written determination or a background file be made public – and will be reviewed de novo, without regard to previous determinations. 6110(f)
          - (i) Tax court can make proceedings confidential

iii) FOIA disclosures (District court has jurisdiction to compel 1) agency records 2) wrongfully 3) withheld). Note: **courts held that FOIA cannot be substituted for normal discovery procedures.**

(1) Three categories of mandatory disclosures (District court has jurisdiction to compel 1) agency records 2) wrongfully 3) withheld )

(a) Agency rules: even though not binding must still be disclosed

(b) Agency rulings: even though not binding must still be disclosed

(c) “records” of the agency

(i) defining records

1. agency must “create or obtain” the requested material (Tax Analysts)

a. therefore materials used (as trade journals) are included (Tax Analysts)

2. agency must be in control of the material when the request is made

a. personal materials don’t count (Tax Analysts)

i. basically anything that is received by an agency of the US under Federal law or in connection with a transaction of Public business (Tax Analysts)

ii. including district court opinions received by the agency

b. information in the abstract is not included (Tax Analysts)

(2) simply because the document is removed from the possession of the agency doesn’t mean that it loses control over it (Kissinger)

(3) exceptions to FOIA (note, 1<sup>st</sup> Cir. Holds that IRC preempts FOIA)

(a) arguably redundant disclosures:

(i) a department can only defend on the grounds of “redundant disclosers” if the department itself has already made the information available

1. statutory exceptions (courts construe them in favor of disclosure)

a. national defense exempted by executive order (5 USC § 552)

b. related solely to the internal personnel rules and practices of an agency

c. specifically exempted from disclosure by statute

d. includes statutes which protect taxpayers information from disclosure

e. privacy act contains exceptions which limit disclosure of individual’s data

i. Scientologist case: even if people’s identifying information is redacted it can still fall under the exceptions for personal data

f. if a taxpayer is party to the legal proceedings, the IRS can release information (RICE), even if the data obtained in the proceedings was derived from confidential data

(4) civil damages available for non-good faith violations )

- (5) exemptions from FOIA
- (a) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
    - (i) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information
      - 1. could reasonably be expected to interfere with **enforcement proceeding**
        - a. Government can use “tax administration” not to disclose information received from a foreign government based on a claim by the IRS that this could constitute serious impairment. Alo Vera
        - a. But can disclose anonymous information for statistical reasons 26 CFR § 301.6103(j)(1)-1
      - 2. would deprive a person of a right to a **fair trial** or an impartial adjudication,
      - 3. could reasonably be expected to constitute an **unwarranted invasion of personal privacy**
      - 4. could reasonably be expected to disclose the **identity of a confidential source**
      - 5. would disclose **techniques** and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law
      - 6. could reasonably be expected to endanger the life or physical **safety** of any individual;
    - (ii) this generally precludes a taxpayer from getting information that would normally have been precluded in discovery
      - 1. contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
        - a. geological and geophysical information and data, including maps, concerning wells
  - (b) courts have that there remains a privacy interest in not disclosing more than would normally be disclosed (RICE)
    - (i) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
    - (ii) ongoing criminal investigations
    - (iii) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency
      - 1. a.k.a. material that would otherwise be privileged and not discoverable (Sears). (things protected by atty-client privilege, and work product privilege)

- (iv) “deliberative process priv” includes papers which document the government’s “group thinking”
    - (v) includes information that is used in making policy that is conveyed from inferior officers to superior officers
  - (c) things that sound exempt, but are not
    - (i) however, the IRS has to release information that was obtained (that wouldn't harm an informant) that is derived from other sources other than intra-agency memoranda
      - 1. IRS’s analysis of important issues is obtaining under the FOIA
      - 2. FOIA includes administrative file that is created as part of an individual tax action
      - 3. Note: someone who does business with a company is not return information *per se*
    - iii) FOIA administration
      - (1) Begins with a letter to the IRS
        - (a) Initial determination in 10 days
          - (i) IRS can ask for repetitive extensions
        - (b) Administrative appeals of FOIA denials must be filed in 45 days (Proc. Reg. 601.702(c)(8))
      - (2) IRS has 20 days to grant or deny the appeal
      - (3) Appeal of admin agency to district court – 30 days to grant or deny
        - (a) Review of documents de novo
        - (b) If there is a large amount of documents, the agency compiles as “Vaugh Index”
        - (c) Bench trial
- b) Keeping stuff private
  - i) Material that is not subject to disclosure
    - (1) No requirements to make termination or jeopardy or fraud assessment
    - TAMs public
- c) Procedures available to ensure confidentiality: Timing for release of information that might have been confidential: Usually must release material between 75 and 90 days after notice is mailed
  - i) Notice must include: Must include the “category” of 3<sup>rd</sup> party contacts § 6110(d)
  - ii) timing
    - (1) After court decision: Or 30 days after a court decision
    - (2) Individuals can request a delay in disclosure up to 15 days up to the date that the transaction has been completed – but no more than 90 days
      - 6110(g)(3)
      - (a) Can get 180 days with good cause 6110(g)(4)
  - iii) Administrative hearing possible for intent to disclose
    - (1) After exhaustion of administrative remedies, 60 days before disclosure to IRS 26 USC 6110(f)(3)(A)(iii)
    - (2) There is no need to exhaust administrative remedies if

- (a) The petitioner request the information described within 15 days of an intent to disclose is noticed and he doesn't receive it within 30 day afterwards –
- (b) Or the petitions submit the statement of delectain within 35 days after the notice, but doesn't get the administrative answer within 65 days after the notice is published 303.6610-6(b)(2)(iv)
- iv) Rights that taxpayer has to keep things secret
- (1) Redaction requirements in normal disclosures
- (a) Confidential **return information** cannot be disclosed
- (b) Returns include the returns<sup>10</sup>, a claim for refund, all the information inside<sup>11</sup>, as well as closing agreements
- (i) Does not included anonymous data<sup>12</sup>
- (ii) Prohibited nondiscloses in 6103(B)(2)
1. Income
  2. Payment
  3. Receipts
  4. Deductions
  5. Exemptions
  6. Credits
  7. Assets
  8. Liabilities
  9. Net worth

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**6103(b)(1)** The term "return" means any tax or information return, declaration of estimated tax, or claim for refund required by, under, the provisions of this title which is filed with the Secretary by, on behalf of, or with respect to any person, and thereto, including supporting schedules, attachments, or lists which are supplemental to, or part of, the return so filed

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**6103(b)(2)(A-D)**

- a taxpayer's identity
- the nature, source, or amount of his income
- payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld
- deficiencies, overassessments, or tax payments
- **whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing,**
- any part of any written determination or any background file document relating to such written determination (as such terms are defined in section 6110(b)) which is not open to public inspection under section 6110,
- **any advance pricing agreement** entered into by a taxpayer and the Secretary and any background information related to such agreement or any application for an advance pricing agreement, and
- any agreement under section 7121, and any similar agreement, and any background information related to such an agreement or request for such an agreement,

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**6103(b)(2)(D)** but such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer..

- 10. Tax withheld
- 11. deficiencies
- 12. Overassessments
- 13. Whether a return is, or will be examined
- 14. Closing agreements
- (ii) There is no exception for "public records" beyond what is explicitly in the public record (e. g., can't disclose to everyone more than was explicitly already disclosed)
- (2) Cannot disclose information found within a file
- (3) Cannot disclose EINs or SS numbers of preparers to people outside the IRS or SS 6109(f)(3). Penalties are found in 7213(a) (felonies)
- (4) Confidentiality of enforcement proceedings
  - (a) Cannot disclose whether an audit is going on
  - (b) Information already disclosed in judicial proceedings can be disclosure
- (5) Disclosure to criminal or administrative agencies
  - (a) Grand jury proceedings: IRS can let DOJ see for purposes of a grand jury proceeding in state or federal court 26 CFR § 301.6103(h)(2)-1 – subject to requirements
  - (b) Wide disclosure in criminal prosecutions
    - (i) the taxpayer is or may be a party to the proceeding, or the proceeding arose out of, or in connection with, determining the taxpayer's civil or criminal liability (6103(h))
    - (ii) this means that when the taxpayer is not a party it doesn't automatically come in
      - 1. or: the treatment of an item reflected is dispositive of an issue in the proceeding or investigation; or (6103(h))
      - 2. such return or return information relates or may relate to a **transactional relationship** between a person who is or may be a party to the proceeding and the taxpayer which affects, or may affect, the resolution of an issue in such proceeding or investigation. (6103(h))
  - (c) Exceptions for disclosures (referrals) to criminal agencies
- ii) In general, when dealing with a criminal investigation, an ex parte order is required 6103(i). After the grant of the order, the information can only be used narrowly<sup>13</sup> and not spread around the government

6103(i)(1)(A)	<ul style="list-style-type: none"> <li>(i) preparation for any judicial or administrative proceeding pertaining to the enforcement of a specifically designated Federal criminal statute (not involving tax administration) to which the United States or such agency is or may be a party,</li> <li>(ii) any investigation which may result in such a proceeding, or</li> <li>(iii) any Federal grand jury proceeding pertaining to enforcement of such a criminal statute to which the United States or such agency is or may be a party, solely for the use of such officers and employees in such preparation, investigation, or grand jury proceeding.</li> </ul>
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- (1) Does not apply to information disclosed before 1977 when being used in forfeiture proceedings 26 CFR § 301.6103(a)-1(b)
- (2) In general this doesn't apply to pre-1977 rulings disclosures. 26 CFR § 301.6103(a)-2
- iii) Specific allowances for disclosure to other agencies
  - (1) to other agencies
    - (a) if the other agency has the technical skills
    - (b) for the purposes of making an interview with the taxpayer better
    - (c) to properly conduct negotiations with the taxpayer
    - (d) agencies w/ specific status for ERISA purposes
      - (i) PBGC: 26 CFR § 301.6103(1)(2)-1 (for ERISA purposes)
      - (ii) Labor: 26 C.F.R. § 301.6103(1)(2)-2 (for ERISA purposes)
      - (iii) Customs: § 301.6103(1)(14)-1
      - (iv) To agencies when the disclosures are necessary to comply with contractual procurement laws
      - (v) Social Security:
    - (e) First receipt provisions: if another agency already has them, they become public: 26 CFR 301.6103(p)(2)(B)-1T
  - (2) state agencies can be subject to administrative review of whether they are safeguarding their information.<sup>14</sup>
- b) Limits on the scope of taxpayer consent
  - i) if the taxpayer is going to voluntary consent to having his returns made public he must do so with specificity<sup>15</sup> -- Ward v. US
  - ii) the IRS claims that they can disclose information to the extent necessary to comply with a request<sup>16</sup>
  - iii) when filing electronically, the IRS thinks that consent is implied 26 CFR § 301.6103(c)-1T(d)
    - (1) Information to be disclosed to the taxpayer that is available only to him (or his proxies) relates only to his tax return, not his partners' (Martin)
- c) Remedies and penalties for improper disclosure

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301.6103(p)(7)-1	(a) Notice of Service's intention to terminate disclosure to a State tax agency. Notwithstanding subsection (d) of section 6103, the Internal Revenue Service may terminate disclosure of Federal returns and return information to a State agency, body, or commission described in section 6103(d) (hereinafter in this section referred to as a State tax agency) if the Service makes a determination that:,,,
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<b>26 CFR § 301.6103(c)-1T</b>	... The taxpayer must also indicate in the written document-- <ul style="list-style-type: none"> <li>(i) The taxpayer's taxpayer identity information described in <a href="#">section 6103(b)(6)</a>;</li> <li>(ii) The identity of the person or persons to whom the disclosure is to be made;</li> <li>(iii) The type of return (or specified portion of the return) or return information (and the particular data) that is to be disclosed; and</li> <li>(iv) The taxable year or years covered by the return or return information.</li> </ul>
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<b>26 CFR § 301.6103(c)-1T(c)</b>	
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- i) Damages: **2 year statute of limitations** (with discovery rule) § 7431(d)
    - (1) Must be non-good faith violations
    - (2) Damages are \$1,000 per violation, but act is an act on the part of the IRS.. not an actual person who receives the information – can get costs
    - (3) FOIA can be used as a sword here (Wewee)
    - (4) Doesn't necessarily apply to information being wrongly transmitted about a preparer
    - (5) Circuit split as to whether it is per act or per person
      - (a) Zariq Siddiqui: telling a crowd of people was one act
      - (b) Mallas: Each named person was one act
    - (6) There is a good faith exception to this
    - (7) Punitives not available unless there are actual damages, and not just the 1k minimu (Callies)
  - ii) No damages when all of the information was already in the public domain (if there is a criminal conviction, even then there may still be some secret information)
  - iii) Criminal Penalties § 7213
    - (1) Criminal penalties to federal officers or state employees, and other persons
    - (2) Any non-standard request must be communicated to the commissioner, and failure to do so can result in criminal penalties: 26 CFR § 301.9000-1 -- even in a judicial proceeding
    - (d) collection activity: loser rules for discloser of information based on collection activity: 26 CFR § 301.6103(k)(6)-1(a)
- 4) statutes of limitations
- a) substantive limits on assessment (3, 6, and none)
    - i) **general** three years
    - ii) "special" statute of limitations
      - (1) Special rule for amended returns: If a taxpayer claims that he owes more money 60 days before the end of the statute of limitations, the period for assessment lasts 60days longer 6501(c)(7)
      - (2) Prompt assessment 6501(d) – 18 months
        - (a) **Estates** can request prompt assessment
        - (b) **Bankruptcy** trustees can request that the return be accepted on its face, but the service can simply say no extension agreements: taxpayer and IRS can agree to extend the statute of limitations, taxpayer must be told that he can refuse to do this, and he can limit it to certain issues 6501(c)(4)(A)
    - iii) **gross omission 6 years**: 25% or more of the **amount of gross income stated in the return** (total tax due does not matter, nor does net income) – the statute of limitations applies to the entire return, so if there is a substantial omission, the extended return applies to the entire year *Coilestock* (legislative history indicates that taxpayers who are negligent shouldn't have the benefit of the 3 year bar)
      - (1) filing a new, non-fraudulent return does not change the statute of limitations
      - (2) Safe harbor:

- (a) An understatement of a receipt, in which the service is given notice of it takes the taxpayer out of the six year rule 6501(e)(1)(A)(ii)
- (b) If the taxpayer provides the service with notice of the additional gross income, then the 6 year rule is not triggered
- (c) Merely including partnership schedules is not enough CCF (must be more than a "mere clue for Sherlock Holmes")
- (3) the point of this additional statute of limitations (according to Harlan in *Colony*) is to give the IRS more time to investigate tax returns because of **a complete omission** of a taxable item – only where the return, on its face provides no clue as to the additional items
  - (a) *Colony* involved an overstatement of basis
  - (b) CCF: K1s of related partnerships are not proper notice
- (4) the 25% rule applies if the item is omitted in its entirety only (*The Colony*)
  - (a) however, if there is a substantial omission the extended statute of limitations applies to the entire return *Colts:ock*
  - (b) filing a new, non-fraudulent return does not change the statute of limitations
- (5) *Colony*: overstating basis does not constitute a gross omission of income
  - (a) However, adequate disclosure is not omission 6501(e)(1)(A)(ii)
    - (i) CCF: K1 forms of other entities do not constitute disclosure
- (6) Defining gross income to determine omissions
  - (a) Business: gross income is amount received from sale of goods, before diminution of their cost § 6501(e)(1)(A)(i) (safe harbor provisions apply)
  - (b) Any omission of Constructive dividends are included as income
  - (c) Understating a gross estate by 25% triggers this conclusion
  - (d) Any failure to file by a **personal holding company** triggers section
  - (e) Trusts or partnerships that are really corporations
    - (i) A good faith determination that something is a partnership, but it really turns out to be a corporation is treated as a corporation
    - (ii) This means that someone who files a partnership return when they should have filed a corporation return and v.v. has complied with the statute
  - (f) NOL and capital loss carryback issues
    - (i) 6501(h) applies: statute of limitations is the statute of limitations for the year of the carryback
- iv) **no statute of limitations** (filing a new, non-fraudulent return does not change the statute of limitations)
  - (1) times applies
    - (a) fraud
    - (b) no return
    - (c) termination of private foundation status
  - (2) filing a new, non-fraudulent return does not change the statute of limitations (*Badaracco*) (6501(c) is non-qualified language)
    - (a) difficult to complete a civil investigation in three years
  - (3) amended returns do not change the nature of a tax fraud investigation

- b) things that commence the statute of limitations
  - i) filing of an on ontime return: deemed to have been filed at correct date (e. g. 4/15) 7502
    - (1) extensions:
      - (a) there is a theory that if the taxpayer asks for an extension that this does not change the date that the statute of limitations starts to run, and the statute of limitations starts to run at the date of receipt anyway
    - (2) amended returns
      - (a) amended returns do not restart statute of limitations
    - (3) late returns
      - (a) late returns are not based on their mailing date, but on the date of actual filing
  - ii) defining a return
    - (1) what makes up a return (IRS has burden to show that a return was not filed)
      - (a) judicial criteria (from *Beard*)
        - (i) sufficient data to calculate tax (no requirement to file W2s)
          - 1. however service can delay refunds
        - (ii) data must purport to be return
        - (iii) honest attempt to comply (can't change caption) *Beard*
          - 1. note: dissent in *Beard* says that proper remedy for tax protestors is the frivolousness penalty found in 6702 if the taxpayer omits information on which the substantive correctness of the "self assessment" may be judged and/or contains facially incorrect information, or a desire to impede tax laws
          - 2. someone who files a partnership return when they should have filed a corporation return and v.v. has complied with the statute
      - (iv) must be under penalty of perjury
    - (b) IRS definitions
      - (i) Must make reference to income, deductions, and credits. Treas. Reg. 1.6014-2
      - (ii) Must compute tax, or elect to have commissioner do it Treas. Reg. 1.6014-2
      - (iii) Contain name, address, identifying number. IRC 6001, 60111, 6065
      - (iv) Failure to make computations can be delinquency, unless there is cause. 6651
      - (v) Missing schedules
        - 1. IRS says that a missing schedule is not fatal, and constitutes a return for tax purposes – probably will make up a claim for refund
        - 2. but, if the return is missing schedules necessary to corroborate, then it is fatal or "not processable" 6611(g)
    - (c) returns executed by commissioner are not returns
  - (2) if there is no return filed, there is no statute of limitations

- (a) burden is on the IRS to show that a return was not filed, but it is very easy to show this
- (3) taxpayer can file a "tentative return" if they do not have access to a return, which defines gross income and deductions. 1.6011-1(b)
- (4) Signatures on returns
  - (a) Should be in ink, or by electronic signatures as prescribed in regulations 6061
  - (b) Who can sign
    - (i) Corporate returns:
      1. President Sec. 6062
      2. VP Sec. 6062
      3. Treasurer Sec. 6062
      4. Assistant treasurer Sec. 6062
      5. CAO Sec. 6062
      6. fiduciary for a company under 6012(b)
    - (ii) partnership: can be signed by any of the partners
      1. the "tax matters partner" (as designated to the IRS) or the one with the largest partnership interest is served.
        - a. The TMP has to keep the other partners informed of the progress of administrative and judicial proceedings § 6223(g)
      2. After the TMP is served with a "Final Partnership administrative adjustment" (FPAA) IRS must send copies to each "notice partner" 6223(d)(2).
        - a. Notice partner is defined as someone whose name, address and profit interest appears on the return, and any partner that has furnished his address at least 30 days before the mailing of the FPAA to the TMP § 6223(a)
  - (c) effect of signature
    - (i) **presumption** of authenticity 6064
    - (d) statutory requirement that it is signed under penalties of perjury 6065
- b) tolling statute of limitations
  - i) 6501(a): even another person's return might change correctness of a return, the statute of limitations is not changed or tolled
- c) extending the statute of limitations
  - i) extension agreements: taxpayer and IRS can agree to extend the statute of limitations, taxpayer must be told that he can refuse to do this, and he can limit it to certain issues 6501(c)(4)(A)
  - ii) 872a: form that the statute of limitations will remain open until case resolved by settlement or a statutory notice is filed
  - iii) 872a is withdrawn by an 872T
- d) ending statute of limitations
  - i) IRS can end the statute of limitations by a general deficiency assessment (90 day letter)
    - (1) IRS can't assess during the 90 days – and the taxpayer can petition the taxcourt

- (a) Violation means that the taxpayer can seek an injunction and a refund of any tax collected IRC 6213, 7421
- ii) Special assessments
  - (1) Summary assessment: Where there is a summary assessment, the taxpayer can assess the general deficiency procedure
  - (2) Jeopardy assessments (after the tax year)
    - (a) Criteria
      - (i) IRS thinks he will leave the USA 1.6851-1, 301.6861-1
      - (ii) IRS thinks he will conceal property
      - (iii) IRS thinks that taxpayer's insolvency is in peril
    - (b) Procedure
      - (i) IRS chief counsel must approve 7429(a)(1)(A)
      - (ii) Notice must be sent within 60 days of the return or the date the return is filed
      - (iii) 5 days after assessment, IRS must make a written statement, which they relied upon in making the assessment or levy 7429(a)(1)(B)
      - (iv) taxpayer had 30 days to request administrative reviews
      - (v) taxpayer can file in US DC 7429
      - (vi) IRS bears burden of showing it acted reasonably 7249(g)
      - (vii) Taxpayer can file a bond to stay collection
    - (c) Termination assessments (during the tax year)
      - (i) Criteria
        - 1. IRS thinks he will leave the USA 1.6851-1, 301.6861-1
        - 2. IRS thinks he will conceal property
      - (e) IRS thinks that taxpayer's insolvency is in peril
- 5) Settlement of tax disputes before it gets to the tax court\
  - a) After the examination
    - i) Can reach a formal agreement with the agent or his supervisor, and file a FORM 870 which waives formal assessment
      - (1) Can selectively waive issues
      - (2) Note: a form 870AD is NOT a closing agreement, but the majority of courts have held that it is binding as a contract
    - ii) Before the 90-day letter is issued, a **30-day letter is issued**
      - (1) Taxpayer can request an appeals conference in the form of a protest letter, but the scope of the appeal can be enlarged as such a conference
  - b) Offers of judgment can be served on the service, which will render the taxpayer the prevailing party
- 6) Penalties
  - a) Substantive penalties
    - i) Failure to file and late filing (6651(a)): **5% of the amount required to be shown on the return for each month (or fraction) up to 25%. In the case of fraud, the penalty is 15% per month up to 75%.**
      - (1) Penalty starts first day after the return is due
      - (2) Must express in terms of months (and fraction) during which the failure to file continues (months are deemed to end on the “numerically corresponding day”)

- (a) Day count problems
  - (i) For non-filers, holidays and weekends don't count
  - (ii) For filers, if the return is required to be filed on a weekend or holiday it rolls
- (3) Minimum penalty of \$100. TC: no penalty at all if no tax due
- (4) IRS has initial burden, but it can be easy to meet § 7491
- ii) Failure to pay penalty: **.5% per month up to 25%. However, this penalty offsets the failure to file penalty. § 6651(c)**
  - (1) extensions of time for filing do not extend the time for payment
  - (2) If 90% of the tax shown on the return is paid by the due date, it is also deemed to be an extension of time to pay
  - (3) Failure to pay also includes a failure to pay a deficiency
  - (4) IRS has initial burden, but it can be easy to meet § 7491
- iii) Negligence or disregard 6662(b)(1): 20% for any negligence or disregard of rules and regulations
  - (1) Even if one gets a non-specific opinion from a lawyer it is not exercising "due care" Coleman
  - (2) Defenses to negligence
    - (a) Reasonable cause: (neither penalty will apply)
      - (i) People are presumed to know what they have to file a return
      - (b) Willful neglect is defined as "conscious, intentional failure or reckless indifference" Boyle
      - (c) Will not permit delegation to another person of this duty (because the taxpayers would have no redress) Boyle
      - (d) Consolidated returns: P. 508 provides various documentation for the safe harbors
    - (3) IRS has initial burden, but it can be easy to meet § 7491
  - iv) Substantial understatement. Penalty is 20% of the understatement of the tax, if the understatement is more than (10% of the amount or 5,000)
    - (1) Defenses:
      - (a) understatement is reduced by the amount attributed to **substantial authority**: but if the taxpayer uses one of the IRS's publications (or a statute or court order) order
        - (i) Substantial is defined as 1 in 3 chance of success
      - (b) Disclosure (except with tax shelter) is a defense. (form 8275) – **but there still must be some reasonable basis**
    - (2) IRS has initial burden, but it can be easy to meet § 7491
  - v) Civil fraud 6663 – 75% of the amount attributed to fraud
    - (1) Applies only if a tax return has been filed
    - (2) Initial burden always rests with the IRS, and it must meet it by clear and convincing evidence
- 7) In order to assess, the Service must send a **valid** notice of deficiency (90-day letter). This notice of deficiency locks the IRS into positions. (Collin: IRS can't try the case and then claim that the notice was meant to include other things)
  - a) A valid notice of deficiency must
    - i) Indicates the taxpayer

- ii) Identify the tax year involved
  - (1) Acceptable if the notice refers to only a part of the tax year, but the deficiency involves the full year Esofield
  - (2) The Service's view of the correct year is all that is necessary, even if the taxpayer thinks that the transaction dealt with other years Sanderling
- iii) Indicate that a deficiency has been determined that is not arbitrary and erroneous, and with some foundation**
  - (1) Make a determination is defined as
  - (2) Determination "connotes consideration, resolution, conclusion and judgment" (Appeal of Terminal Wine Co)
- iv) Right to contact local office of taxpayer advocate
- v) Deadline for filing tax court petition
  - (1) Not fatal, unless there was genuinely no notice Smith
  - (2) Notice setting fourth 90 day letter mat be good enough. Rochelle
  - (3) 10<sup>th</sup> Cir. held in Smith that there was no remedy for a failure to state a date
- vi) Need not be signed Urban (9<sup>th</sup> Cir.), Oswego Falls 2d Cir.
- b) Purposes
  - i) It is analogous to a "notice of a pending action" : however, the tax court will impute notice if there are minor deviations (like sending it to the wrong attorney, however this is an open question)
  - ii) Once the petitioner files in the tax court, it is analogous to a complaint. So its existence (though not its perfection) is a jurisdictional prerequisite to the tax court 6213(a)
  - iii) Tolls statute of limitations
- c) Prerequisites for valid notice of deficiency
  - i) Actual notice required
    - (1) Must be sent to last known address, but the IRS is entitled to a reasonable amount of time for the post office to update its computers – regardless of when the taxpayer actually receives it
    - (2) If it is sent to someone with a broad power of attorney as well it is good enough
    - (3) but sending it to someone who only has power of attorney to receive documents does not count as a valid notice Mulvania if there is prejudice if this happens the taxpayer must suffer some prejudice (e.g. not knowing when to file) to have the notice declared invalid
- d) Invalid notices of deficiency
  - i) Views on how closely the IRS must comply
    - (1) "only to advise that the commissioner must assess against him." Judge Hand in Olsen; § 7522 "An inadequate description under the preceding sentence shall not invalidate such notice."<sup>17</sup>
  - ii) Petition the tax court and ask them to dismiss for lack of jurisdiction

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<sup>17</sup> 7522: (a) General rule.--Any notice to which this section applies shall describe the basis for, and identify the amounts (if any) of, the tax due, interest, additional amounts, additions to the tax, and assessable penalties included in such notice. An inadequate description under the preceding sentence shall not invalidate such notice.

- (1) If it is not timely, the IRS will move to have the petition dismissed (also for lack of jurisdiction), however caselaw says that the taxpayer's motion is decided first. Dubin; Heaberlin
- (2) Taxcourt has jurisdiction to determine its own jurisdiction
- iii) Facial challenges to notice of deficiency
  - (1) Before the IRS can be given the presumption of correctness (or rather, the burden of going forward with the evidence) as to what is stated in the notice of deficiency, it must establish that the assessment has 1) some foundation Janis (e.g. not a naked assessment, and some predicate evidence (Anastasato)); 2) not arbitrary and erroneous
    - (a) Determination "connotes consideration, resolution, conclusion and judgment" (Appeal of Terminal Wine Co), so a bulk assessment of many people does not constitute an actual determination. Starr
    - (b) Merely assuming that someone is lying because a W2 doesn't match total reported income is arbitrary
- iv) After service meets that minimal burden, the taxpayer has the burden in the tax court
  - (1) There is a Rev. Proc., by which the IRS will withdraw a notice of deficiency administratively (but there must be adequate time left on the statute of limitations)
  - (2) If none of the commissioner's witnesses are prepared (or do) testify to what was asserted in the petition, the burden shifts (Paul Mitchell, 9<sup>th</sup> Cir.)
  - (3) Rule 34(b): taxpayer must make clear and concise arguments as to every error alleged to be committed by the petitioner
- v) As to new matters not stated in the notice of deficiency, the service has the burden of going forward with evidence
  - (1) On "new matters" plead in the answer or new affirmative defenses, the party making them bears the burden. Tax Court rule 142 (check FRCP cite)
    - (a) 9<sup>th</sup> Cir: if the IRS proves an amount less than was in the statutory notice, the notice is only valid to the extent of the burden (10/17)
    - (2) "new matters" is defined as a new factual matter, not a new theory that clarifies the previous matter (unless it is too late. Achiro)
- vi) commissioner has the burden of proof once 5 requirements have been met as per § 7491
  - (1) taxpayer produces credible evidence on the factual issue
    - (a) credible evidence is defined as *the quality of evidence which, after critical analysis, the court would find sufficient upon which to base a decision on the issue if no contrary evidence were submitted*
    - (b) must be worthy of belief Higbee
    - (c) Sykes: still must prove every part of the issue
  - (2) taxpayer complied with all substantiation requirements, including those which require satisfaction to the satisfaction of the secretary
  - (3) taxpayer maintained all required records
  - (4) taxpayer cooperated with IRS's reasonable requests for witnesses, information, documents, meetings, and interviews



- (5) if the taxpayer is a partnership it meets a "net worth limitation" (check this)
- e) in matters involving fraud, burden is on IRS and must meet it by clear and convincing evidence regardless of any burden-shifting. Tax Court Rule 142(b); IRC 7454<sup>18</sup>
- 8) Procedure in the Three Courts
- a) Tax court
- i) Limited to only the tax years in which there has been a deficiency
- (1) Taxpayer can assert refund claims in tax court if there is a notice of deficiency
- ii) Pleading requirements
- (1) Based on a notice of deficiency sent
- (2) Taxpayer must petition within 90 days (date of mailing is what matters) and attach notice to the petition.
- (3) **taxpayer can also claim in the petition a refund of an overpayment**
- (4) petition must include
- (a) name (parties)
- (i) Ratification theory:
1. court has used an agency theory to allow an amended petition to include both names, without compromising jurisdiction because the attachment of the joint notice of deficiency referred to both spouses Holt
  2. the Tax Court holds that the spouse who didn't sign should be given the opportunity to perfect a petition – all they need to do in the imperfect petition is use the pronoun “we” Beaumont. In fact, the tax court has allowed people not to be a party to the proceedings Williams
- (b) residence (or place of incorporation)
- (c) TIN
- (d) Office where the return was filed
- (e) Date of notice of deficiency
- (f) Amount of the alleged deficiency
- (g) Type of tax involved
- (h) Tax years in issue
- (i) Assignment of the service's errors (but really can be vague “the service improperly assessed”)
- (j) Statement of facts
- (k) Prayer for relief
- (l) Signature, mailing address, and telephone number
- (m) Copy of notice of deficiency<sup>19</sup>

<sup>18</sup> 7454: (a) Fraud.--In any proceeding involving the issue whether the petitioner has been guilty of fraud with intent to evade tax, the burden of proof in respect of such issue shall be upon the Secretary.

<sup>19</sup> 6512(b)(1) JURISDICTION TO DETERMINE.--Except as provided by paragraph (3) and by section 7463, if the Tax Court finds that there is no deficiency and further finds that the taxpayer has made an overpayment of income tax for the same taxable year, of gift tax for the same calendar year or calendar quarter, of estate tax in respect of the taxable estate of the same decedent, or of tax imposed by chapter 41, 42, 43, or 44 with respect to any act (or failure to act) to which such

- (5) can cure defective petition with a motion to amend
  - (a) court has used an agency theory to allow an amended petition to include both names, without compromising jurisdiction because the attachment of the joint notice of deficiency referred to both spouses  
Holt
- iii) Discovery
  - (1) Informal discovery
  - (2) Stipulations required<sup>20</sup> and are preferred over interrogatories. An informal interrogatory is referred to as a *Branerton letter*
    - (a) Can preserve an objection in a stipulation<sup>21</sup>
    - (b) Stipulations are binding only for the trial<sup>22</sup>
- iv) Fact-finders
  - (1) No juries
  - (2) Special trial court judges can try S-cases
    - (a) IRS, taxpayer and tax court must agree
    - (b) Special trial court judges in non-S-cases can hear larger cases, and the special trial court judge writes a report to a real judge. However, nobody sees that report. This may raise due process concerns.
- v) Binding Precedent

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petition relates for the same taxable period, in respect of which the Secretary determined the deficiency, or finds that there is a deficiency but that the taxpayer has made an overpayment of such tax, the Tax Court shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Tax Court has become final, be credited or refunded to the taxpayer. If a notice of appeal in respect of the decision of the Tax Court is filed under section 7483, the Secretary is authorized to refund or credit the overpayment determined by the Tax Court to the extent the overpayment is not contested on appeal.

<sup>20</sup> Rule 91 (a) **Stipulations Required:** (1) *General:* **The parties are required to stipulate**, to the fullest extent to which complete or qualified agreement can or fairly should be reached, all matters not privileged which are relevant to the pending case, regardless of whether such matters involve fact or opinion or the application of law to fact. Included in matters required to be stipulated are all facts, all documents and papers or contents or aspects thereof, and all evidence which fairly should not be in dispute. Where the truth or authenticity of facts or evidence claimed to be relevant by one party is not disputed, an objection on the ground of materiality or relevance may be noted by any other party but is not to be regarded as just cause for refusal to stipulate. The requirement of stipulation applies under this Rule without regard to where the burden of proof may lie with respect to the matters involved. Documents or papers or other exhibits annexed to or filed with the stipulation shall be considered to be part of the stipulation.

(2) *Stipulations to Be Comprehensive:* **The fact that any matter may have been obtained through discovery or requests for admission or through any other authorized procedure is not grounds for omitting such matter from the stipulation.** Such other procedures should be regarded as aids to stipulation, and matter obtained through them which is within the scope of subparagraph (1), must be set forth comprehensively in the stipulation, in logical order in the context of all other provisions of the stipulation.

<sup>21</sup> Rule 91 (d) **Objections:** Any objection to all or any part of a stipulation should be noted in the stipulation, but the Court will consider any objection to a stipulated matter made at the commencement of the trial or for good cause shown made during the trial.

<sup>22</sup> Rule 91(e) **Binding Effect:** A stipulation shall be treated, to the extent of its terms, as a conclusive admission by the parties to the stipulation, unless otherwise permitted by the Court or agreed upon by those parties. The Court will not permit a party to a stipulation to qualify, change, or contradict a stipulation in whole or in part, except that it may do so where justice requires. A stipulation and the admissions therein shall be binding and have effect only in the pending case and not for any other purpose, and cannot be used against any of the parties thereto in any other case or proceeding.

- (1) Will follow rule of tax court, UNLESS circuit court of appeals has a different rule that is on point *Golsen*
- vi) Appeals to circuit where taxpayer resided when he filed the petition
- vii) Opinions
  - (1) Division opinions: precedential value
  - (2) Memorandum opinions: privately published no precedential value
  - (3) Summary opinions: small tax cases (no precedential value)
- viii) Use of equity
  - (1) Equitable recoupment may be available (6<sup>th</sup> circuit disagrees)
  - (2) 9<sup>th</sup> cir. Says that tax court can reform an closing tax court had equitable power to reform consent-to-extend agreements. Kelley
- ix) settlement of tax court cases
  - (1) entered by judge as stipulated decision
  - (2) concession by one party can be treated as a stipulation, or as a decision (based on precedential value of case)
  - (3) relief from settlements:
    - (a) high standards:
    - (b) factors
      - (i) failure would prejudice petitioner
      - (ii) no substantial injury to the other parties
      - (iii) refusal would allow injustice
      - (iv) little court inconvenience<sup>23</sup>
        - 1. if the parties agree stipulate to an agreement, and the court sets aside a trial date, the parties will be held to their agreement abset fraud. *Mearkle*
- b) US District Court: for refund actions
  - i) Location: where taxpayer resides
  - ii) Follows CTA, if there is no law, the judge comes up with it himself
  - iii) FRCP governs rules of discovery
- c) Court of Claims: for refund actions
  - i) Has procedure which will allow a commissioner to hear evidence anywhere in the country
  - ii) Own rules of discovery
- d) Follows its in precedents and that of the Federal Circuit
- a) Burdens of proof has two components, the burden of production (going forward) and burden of persuasion The burdens
  - i) **burden of production** is defined as the party with the burden must produce prima facie evidence that something is true, or he loses. Once that happens the case goes forward.
  - ii) **Burden of persuasion** is defined as the bearing party must persuade the court that its version of facts is correct
- b) Allocating burden of proof

<sup>23</sup> Dorchester: The party seeking modification \* \* \* must show that the failure to allow the modification might **prejudice him**. \* \* \* Discretion should be exercised to allow modification where **no substantial injury** will be occasioned to the opposing party; refusal to allow modification **might result in injustice** to the moving party; and the **inconvenience to** the Court is slight. \* \* \*

- i) In general, the burden of proof is on the petitioner. Tax Court Rule 142<sup>24</sup>
  - (1) On “new matters” plead in the answer or new affirmative defenses, the party making them bears the burden. Tax Court rule 142 (check FRCP cite)
    - (a) 9<sup>th</sup> Cir: if the IRS proves an amount less than was in the statutory notice, the notice is only valid to the extent of the notice (10/17)
      - Simplot
  - (2) commissioner has the burden of proof once 5 requirements have been met as per § 7491
    - (a) taxpayer produces credible evidence on the factual issue
      - (i) credible evidence is defined as *the quality of evidence which, after critical analysis, the court would find sufficient upon which to base a decision on the issue if no contrary evidence were submitted*
      - (ii) must be worthy of belief Higbee
      - (iii) Sykes: still must prove every part of the issue
    - (b) taxpayer complied with all substantiation requirements, including those which require satisfaction to the satisfaction of the secretary
    - (c) taxpayer maintained all required records
    - (d) taxpayer cooperated with IRS's reasonable requests for witnesses, information, documents, meetings, and interviews
      - (i) this really means that the taxpayer must effectively relax discovery rules
    - (e) if the taxpayer is a partnership it meets a "net worth limitation" (check this)
  - (2) in matters involving fraud, burden is on IRS and must meet it by clear and convincing evidence Tax Court Rule 142(b); IRC 7454<sup>25</sup>
  - (3) 6201(d) (codified Portillo):<sup>26</sup> If a **taxpayer cooperates** (e.g. goes to meetings and provides witnesses) with the IRS, and the IRS's information is based only on third-party's information returns, the burden shifts to the service.
    - (a) Can tell an appellate conferee that they now have the burden of proof
- ii) Penalties: if it is as to a penalty the commission has the burden of proof, since he is the one asserting them (this comes up with non-filing). 7491(c).

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<sup>24</sup> The burden of proof shall be upon the petitioner, except as otherwise provided by statute or determined by the Court; and except that, in respect of any new matter, increases in deficiency, and affirmative defenses, pleaded in the answer, it shall be upon the respondent.

<sup>25</sup> 7454: (a) Fraud.--In any proceeding involving the issue whether the petitioner has been guilty of fraud with intent to evade tax, the burden of proof in respect of such issue shall be upon the Secretary.

<sup>26</sup> 6201(d) Required reasonable verification of information returns.--In any court proceeding, if a taxpayer asserts a reasonable dispute with respect to any item of income reported on an information return filed with the Secretary under subpart B or C of part III of subchapter A of chapter 61 by a third party and the taxpayer has fully cooperated with the Secretary (including providing, within a reasonable period of time, access to and inspection of all witnesses, information, and documents within the control of the taxpayer as reasonably requested by the Secretary), the Secretary shall have the burden of producing reasonable and probative information concerning such deficiency in addition to such information return.

- (1) But a taxpayer will have the burden of proving reasonable cause, and not willful neglect after the service proves that the return has not been received.
  - (a) Doesn't take much to prove nonreceipt
- (2) Late-filed tax return meet burden of proof Collins
- iii) statistical information: IRS has burden if information is constructed based on statistical information on unrelated taxpayers. 7491(b)
- c) in refund suits, where there is no notice of deficiency, the taxpayer bears the initial burden of establishing the correct amount of the tax
- d) other statutes of limitation for litigation
  - i) statute of limitations
    - (1) 2 years, in general
    - (2) 5 year for fraud or misrepresentation<sup>27</sup>
  - ii) suits by third parties: statute of limitations = 9 months from the date of levy, or extended by 12 if they ask<sup>28</sup>
- e) refund procedure
  - i) if there is a notice of deficiency, taxpayer can file a claim for refund in the tax court, for the same tax year which there was a notice of deficiency
  - ii) tax court has jurisdiction to award refunds if the notice of assessment is properly before it<sup>29</sup>
- e) standing to sue:
  - i) matters
    - (1) there must be an overpayment, and the word "overpayment" isn't defined in the statute
      - (a) "any payment in excess of what is properly due" Rosenman
      - (b) tax collected at the statute of limitations expired 6401(a)

<sup>27</sup> 6532(b): (b) Suits by United States for recovery of erroneous refunds.--Recovery of an erroneous refund by suit under section 7405 shall be allowed only if such suit is begun within 2 years after the making of such refund, except that such suit may be brought at any time within 5 years from the making of the refund if it appears that any part of the refund was induced by fraud or misrepresentation of a material fact.

<sup>28</sup> 6532(c): c) Suits by persons other than taxpayers.--(1) General rule.--Except as provided by paragraph (2), no suit or proceeding under section 7426 shall be begun after the expiration of **9 months from the date of the levy or agreement giving rise to such action.** (2) Period when claim is filed.--If a request is made for the return of property described in section 6343(b), the 9-month period prescribed in paragraph (1) shall be **extended for a period of 12 months from the date of filing of such request** or for a period of 6 months from the date of mailing by registered or certified mail by the Secretary to the person making such request of a notice of disallowance of the part of the request to which the action relates, whichever is shorter.

<sup>29</sup> 6512(b)(1) JURISDICTION TO DETERMINE.--Except as provided by paragraph (3) and by section 7463, if the Tax Court finds that there is no deficiency and further finds that the taxpayer has made an overpayment of income tax for the same taxable year, of gift tax for the same calendar year or calendar quarter, of estate tax in respect of the taxable estate of the same decedent, or of tax imposed by chapter 41, 42, 43, or 44 with respect to any act (or failure to act) to which such petition relates for the same taxable period, in respect of which the Secretary determined the deficiency, or finds that there is a deficiency but that the taxpayer has made an overpayment of such tax, the Tax Court shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Tax Court has become final, be credited or refunded to the taxpayer. If a notice of appeal in respect of the decision of the Tax Court is filed under section 7483, the Secretary is authorized to refund or credit the overpayment determined by the Tax Court to the extent the overpayment is not contested on appeal.

- (i) but the IRS, and the 4<sup>th</sup> 7<sup>th</sup> say that they do not have to return monies paid to them while the statute of limitations was open, and the statute of limitations expires without assessment being made
- (c) refundable credits that exceed the amount of tax imposed for the year 6401(b)
- (d) excessive withholding tax and estimated tax
- (e) an amount paid as tax for which the tax was paid 6401(c)
- (2) withholdings are deemed to be paid on the date of the return Baral
- (3) differentiating between a deposit and an overpayment
  - (a) deposits are refundable upon demand
  - (b) four-way circuit split as to what constitutes a deposit
    - (i) tax court (probably the rule in the 1<sup>st</sup> cir, because no explicit cases on point: an undesignated remittance made at a time when no tax liability has been ascertained or even proposed will be generally ASSUMED to be a deposit
    - (ii) IRS (Rev. Proc. 82-51)
      1. anything made before liability is proposed in writing will be assumed to be a cash bond
      2. full remittance after a statement of proposed liability from a revenue agent will be treated as payment of a tax
      3. partial remittance after statement of proposed liability from a revenue agent will be treated as partial payment of tax unless the taxpayer otherwise designates
      4. unless there is a note from the taxpayer otherwise remittance made after mailing of notice of deficiency in complete or partial satisfaction will be considered to be payment of the tax
      5. remittance made after the notice of deficiency, but before the expiration of the statute of limitations for filing in the tax court (90/150 days) will be treated as a “cash bond”
      6. remittance before tax court decision is final will be treated as “cash bond”
    - (iii) 7<sup>th</sup>, Fed, 4<sup>th</sup>, 3d: Balancing test of the facts and circumstances surrounding the
    - (iv) *per se* rule of the 8<sup>th</sup> and 5<sup>th</sup> which they have criticized themselves remittance is a payment only after there is an IRS assessment or filing of a return.
    - (v) 2d, 9<sup>th</sup>, 10<sup>th</sup>: look to the statutory scheme (e.g. a remittance with an automatic extension would constitute a payment as a matter of law)
- ii) persons: in general only taxpayers can sue for their refunds, but in Williams, the court held that if a taxpayer paid a tax which they claimed was assessed against them (as the wrong person) they could sue for refund

- f) if there is no notice of deficiency and if taxpayer already paid and filed and no notice of deficiency must first file and formal **amended claim for refund** § 7422(a),<sup>30</sup> before proceeding (form 1040X)
- i) must wait either 1) six months 2) for a notice of disallowance or 3) waiver of disallowance (asking for “immediate disallowance of claim”) 6532(a)(1)<sup>31</sup> (can take disallowance to appeals)
- (1) **statute of limitations for refund claims: 3 years from return filed or two years from when claimed tax is paid (whichever is later 6511(a))** – interest runs from date of filing claim
- (a) if an overpayment is credited against a different year, the two year statute of limitations runs from the **date credited**. Republic Petroleum; and maybe 7422(d)<sup>32</sup>
- (b) there is “implied authority” (Lewis v. Reynolds) for the IRS to reaudit returns when a claim for refund is made, so probably best idea strategically is to wait until last minute to file refund
- (c) when the statute of limitations on refund claims starts to run on a claim for refund
- (i) mailbox rule for time of filing
- (ii) original return can be considered to be a claim for refund (IRS has accepted this)
- (iii) in fact, a claim late return can also be a claim for refund
- (d) statute of limitations suspended due to “Unable To Manage Financial Affairs Due To Disability “ 6511(h)<sup>33</sup>
- (i) if he has a guardian he will not be considered to be finally disabled
- (e) special rule for claims for refund when an extension has been made<sup>34</sup>: 6 months after the assessment period

<sup>30</sup> 7422(a) No suit prior to filing claim for refund.--No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

<sup>31</sup> 6532: (1) General rule.--No suit or proceeding under section 7422(a) for the recovery of any internal revenue tax, penalty, or other sum, shall be begun before the expiration of 6 months from the date of filing the claim required under such section unless the Secretary renders a decision thereon within that time, nor after the expiration of 2 years from the date of mailing by certified mail or registered mail by the Secretary to the taxpayer of a notice of the disallowance of the part of the claim to which the suit or proceeding relates.

<sup>32</sup> 7422(d) Credit treated as payment.--The credit of an overpayment of any tax in satisfaction of any tax liability shall, for the purpose of any suit for refund of such tax liability so satisfied, be deemed to be a payment in respect of such tax liability at the time such credit is allowed.

<sup>33</sup> 6511(h)(2)(A) For purposes of paragraph (1), an individual is financially disabled if such individual is unable to manage his financial affairs by reason of a medically determinable physical or mental impairment of the individual which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. An individual shall not be considered to have such an impairment unless proof of the existence thereof is furnished in such form and manner as the Secretary may require.

6511(h)(2)(B) EXCEPTION WHERE INDIVIDUAL HAS GUARDIAN, ETC.--An individual shall not be treated as financially disabled during any

- (f) time for filing claim for refund begins on the date assessment is made. Rosenman
- (g) amended claims can be made any time the statute of limitations is still open 6512(b)(1)
- (h) note: can take unagreed refund case to appeals, but this is not necessary**
- (i) returns can be considered as refund claims
- (2) statute of limitations for refund **suits**
  - (a) taxpayer must wait six months after filing a refund claim
  - (b) if the IRS sends a notice of disallowance, the taxpayer can file a claim up to **two years**<sup>35</sup> from when the notice of disallowance was mailed **or** from when the taxpayer filed his waiver (4<sup>th</sup> circuit: waiver is “filed” when it is received by the IRS)<sup>36</sup>
    - (i) cleanup rule of 6512: tax court can always find, if it has jurisdiction of that tax year, that there was an overpayment<sup>37</sup>
    - (c) if no disallowance there is **no statute of limitations**
- ii) note: refund suit is limited to grounds asserted in claim for refund Hempt Brothers (variance doctrine will apply Decker) § 7322(a), 301.6402-2(b)(1)
  - (1) claim for one year will not be valid as a claim for a related year (arguably could use equitable recoupment)
- iii) alternatives to formal claim for refund
  - (1) informal claim for refund:
    - (a) 2d, 6<sup>th</sup>, Ct.Cl: FORM 870 (mutually agreed settlement) (not 870-AD (agreement for no claim for refund) is considered an informal claim
    - (b) general requirements for informal claims (service can waive requirement for formal claim)
      - (i) court determines that an informal claim was made
        1. did commission treat the allegation as a claim, and did service personnel know of the basis of the claim

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<sup>34</sup> 6511(c)(3) CLAIMS NOT SUBJECT TO SPECIAL RULE.--This subsection shall not apply in the case of a claim filed, or credit or refund allowed if no claim is filed, either--  
 6511(c)(3)(A) prior to the execution of the agreement or  
 6511(c)(3)(B) more than 6 months after the expiration of the period within which an assessment may be made pursuant to the agreement or any extension thereof.

<sup>35</sup> See n. 31

<sup>36</sup> 7532(a) (3) Waiver of notice of disallowance.--If any person files a written waiver of the requirement that he be mailed a notice of disallowance, the 2-year period prescribed in paragraph (1) shall begin on the date such waiver is filed.

<sup>37</sup> 6512(b)(1) JURISDICTION TO DETERMINE.--Except as provided by paragraph (3) and by section 7463, if the Tax Court finds that there is no deficiency and further finds that the taxpayer has made an overpayment of income tax for the same taxable year, of gift tax for the same calendar year or calendar quarter, of estate tax in respect of the taxable estate of the same decedent, or of tax imposed by chapter 41, 42, 43, or 44 with respect to any act (or failure to act) to which such petition relates for the same taxable period, in respect of which the Secretary determined the deficiency, or finds that there is a deficiency but that the taxpayer has made an overpayment of such tax, the Tax Court shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Tax Court has become final, be credited or refunded to the taxpayer. If a notice of appeal in respect of the decision of the Tax Court is filed under section 7483, the Secretary is authorized to refund or credit the overpayment determined by the Tax Court to the extent the overpayment is not contested on appeal.



- (ii) the claim is in writing or has a written component (need not be a single document)
  - 1. conditional endorsement of a check enough Night Hawk
- (iii) matters set forth are sufficient to apprise the IRS that a refund is sought
  - 1. claim must be actually communicated to IRS
  - 2. mere availability of the information is not notice
  - 3. handing a conditional endorsement to a collector enough Night Hawk
- (2) estoppel: form 870-AD (in which the taxpayer agrees not to file a claim for refund) is not binding under the code on the IRS, some courts have held that it estopps the service
- g) refund suit: requires full payment of the tax Flora
  - i) defining full payment
    - (1) circuit split over whether or not interest and penalties must be paid
      - (a) Fed. Cir.: only must prepay penalties if they are at issue
      - (b) 2d Cir: full payment required
    - (2) no hardship assessment
    - (3) in the case of exise taxes, where the tax is truly divisible, one can pay only the part that is currently due
  - ii) refund suit is limited to grounds asserted in claim for refund Hempt Brothers
- h) If the IRS mails a deficiency after the taxpayer has filed a refund suit but before the court has heard the case, the Refund court will stay the suit for 90 days, plus 60 days, in which time the taxpayer can petition the tax court.<sup>38</sup>
  - i) If the taxpayer files suit in the tax court, the refund court loses jurisdiction.
  - ii) If the taxpayer does not sue in tax court the US can counterclaim
- i) Availability of attorneys fees
  - i) Note: can be obtained in tax court
  - ii) Perquisites
    - (1) Must administratively exhaust<sup>39</sup>

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<sup>38</sup> 7422(e): If the Secretary prior to the hearing of a suit brought by a taxpayer in a district court or the United States Claims Court for the recovery of any income tax, estate tax, gift tax, or tax imposed by chapter 41, 42, 43, or 44 (or any penalty relating to such taxes) mails to the taxpayer a notice that a deficiency has been determined in respect of the tax which is the subject matter of taxpayer's suit, the proceedings in taxpayer's suit shall be stayed during the period of time in which the taxpayer may file a petition with the Tax Court for a redetermination of the asserted deficiency, and for 60 days thereafter. If the taxpayer files a petition with the Tax Court, the district court or the United States Claims Court, as the case may be, shall lose jurisdiction of taxpayer's suit to whatever extent jurisdiction is acquired by the Tax Court of the subject matter of taxpayer's suit for refund. If the taxpayer does not file a petition with the Tax Court for a redetermination of the asserted deficiency, the United States may counterclaim in the taxpayer's suit, or intervene in the event of a suit as described in subsection (c) (relating to suits against officers or employees of the United States), within the period of the stay of proceedings notwithstanding that the time for such pleading may have otherwise expired. The taxpayer shall have the burden of proof with respect to the issues raised by such counterclaim or intervention of the United States except as to the issue of whether the taxpayer has been guilty of fraud with intent to evade tax. This subsection shall not apply to a suit by a taxpayer which, prior to the date of enactment of this title, is commenced, instituted, or pending in a district court or the United States Claims Court for the recovery of any income tax, estate tax, or gift tax (or any penalty relating to such taxes).

- (a) Must request and go to appeals conference. § 301.7430-1
- (b) Must cooperate and submit facts to the appeals officers
- (2) Must agree to extensions of time
- (3) Cannot protract proceedings<sup>40</sup>
- iii) What is available
  - (1) “reasonable litigation costs”
    - (a) can only be from when the taxpayer receives the notice of the appeals decision or the notice of deficiency or the date of a 30-day letter 7430(c)(1)
    - (b) expert witness fees cannot exceed the highest price paid by the government
    - (c) attorneys fees are generally limited to \$125/hour
    - (d) can only be from when the taxpayer receives the notice of the appeals decision or the notice of deficiency or the date of a 30-day letter 7430(c)(1)
    - (e) having an accountant file a delinquent return is not a reasonable attorneys fee
  - (2) “reasonable administrative costs”
    - (a) statute of limitations: 90 days<sup>41</sup>
    - (b) expert witness fees cannot exceed the highest price paid by the government
    - (c) attorneys fees are generally limited to \$125/hour
    - (d) can only be from when the taxpayer receives the notice of the appeals decision or the notice of deficiency or the date of a 30-day letter 7430(c)(1)
    - (e) having an accountant file a delinquent return is not a reasonable attorneys fee
- iv) Criteria
  - (1) In court:
    - (a) Governments position must not have been substantially justified and the taxpayer must have “substantially prevailed” **and** the IRS must not have been substantially justified in their position-- with respect to the **amount in controversy** or the **most significant issues** 7430

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<sup>39</sup> 7430(b)(1) Requirement that administrative remedies be exhausted.--A judgment for reasonable litigation costs shall not be awarded under subsection (a) in any court proceeding unless the court determines that the prevailing party has exhausted the administrative remedies available to such party within the Internal Revenue Service. Any failure to agree to an extension of the time for the assessment of any tax shall not be taken into account for purposes of determining whether the prevailing party meets the requirements of the preceding sentence.

<sup>40</sup> 7430(b)(3): (3) Costs denied where party prevailing protracts proceedings.--No award for reasonable litigation and administrative costs may be made under subsection (a) with respect to any portion of the administrative or court proceeding during which the prevailing party has unreasonably protracted such proceeding.

<sup>41</sup> 7430(b)(4): Period for applying to IRS for administrative costs.--An award may be made under subsection (a) by the Internal Revenue Service for reasonable administrative costs only if the prevailing party files an application with the Internal Revenue Service for such costs before the 91st day after the date on which the final decision of the Internal Revenue Service as to the determination of the tax, interest, or penalty is mailed to such party.

- (i) Taxpayer can serve on the IRS a “qualified offer”, which, if awarded will make them the prevailing party – unless the service demonstrates that they were substantially justified (based on published guidance)
    - v) Administratively: IRS makes decision of who substantially prevailed, which can be appealed to the tax court
- 9) Criminal matters
  - a) Investigative procedure
    - i) Administrative (by IRS)
      - (1) Can use summons (not self-enforcing)
      - (2) Taxpayer has to be given notice, and taxpayer can move to quash
      - (3) In an Admin case, if there is a recommendation to prosecute, it gets forwarded to the tax division if there. To get a conference must (in advance of the recommendation) ask for one
    - ii) Grand jury (by US Attorney)
      - (1) No ability to use administrative summons
      - (2) After grand jury issues subpoenas, DC DOJ must still approve indictment (in Admin cases, they need approval of IRS)
  - b) Constitutional limits
    - i) Only attorney-client privilege
    - ii) 5<sup>th</sup>: there might not be a 5<sup>th</sup> amendment right to records mentioned in a return
    - iii) Miranda: there is no real requirement of Miranda warnings, there is a regulation which provides for quasi-miranda warnings, but unless the taxpayer is prejudiced, the court won't suppress evidence since the person wasn't in custody Beckwith
      - (1) Might be able to complain to TAO about violation of regulations
  - c) Calculating statute of limitations on tax crimes
    - i) In general, it is 3 years, but the exceptions (making it 6 years) swallow the rule § 6531
      - (1) Eight explicit 6-year statute of limitations (circuit split as to whether limitations should be construed narrowly because congress provides explicit exceptions to the exceptions)
        - (a) For defrauding whether by conspiracy or alone<sup>42</sup>
        - (b) For evading or defeating<sup>43</sup>
        - (c) Aiding and abetting<sup>44</sup>
        - (d) Failing to pay<sup>45</sup>: circuit split as to whether or not this applies to failure to *pay over* withholding.

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<sup>42</sup> 6531(1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner;

<sup>43</sup> 6531(2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof;

<sup>44</sup> 6531(3) for the offense of willfully aiding or assisting in, or procuring, counseling, or advising, the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a false or fraudulent return, affidavit, claim, or document (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document);

- (e) False statements or fraudulent documents<sup>46</sup>
- (f) Intimidating government employees<sup>47</sup>
- (g) Offenses committed by employees<sup>48</sup>
- (h) Conspiracy to defeat payment of taxes<sup>49</sup>
- ii) Beginning: usually on date that offense was committed (usually the date of filing)
- iii) Tolling
  - (1) Statute of limitations is tolled by defendant being outside country
  - (2) Statute of limitations is tolled by defendant being declared a fugitive
  - (3) Statute of limitations is tolled by obstruction
  - (4) Statute is tolled by a taxpayer's actions to quash a summons issued to a 3<sup>rd</sup> party (both on assessment and tax crimes)
  - (5) Under *Beacon Brass* the statute of limitations is suspended by any obstruction, so the statute of limitations starts on the date of obstruction
- iv) Extension: after complaint made, the statute of limitations is extended by 9 months
- d) Substantive Elements of tax crimes
  - i) Willfulness: In tax crimes willfulness is a bit different
    - (1) Cheek: “Willfulness requires the government to **prove that the law imposed a duty** on the defendant, that the **defendant knew of this duty**, and that he **voluntarily and intentionally violated** that duty.”
      - (a) A claim that a statute is unconstitutional imputes knowledge (jury can consider any evidence from any source showing that they knew of the duty to pay including his awareness of the relevant provisions of the Code or regulations, of court decisions rejecting his interpretation of the tax law, of authoritative rulings of the Internal Revenue Service, or of any contents of the personal income tax return forms and accompanying instructions that made it plain that wages should be returned as income)
        - (i) Jury need not hear questions about the validity of tax statutes, but can hear about how he thought he was complying, if it could be considered reasonable
        - (b) But Objective good faith that one complied with a duty may negate willful failure

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<sup>45</sup> 6531(4) for the offense of willfully failing to pay any tax, or make any return (other than a return required under authority of part III of subchapter A of chapter 61) at the time or times required by law or regulations;

<sup>46</sup> 6531(5) for offenses described in sections 7206(1) and 7207 (relating to false statements and fraudulent documents);

<sup>47</sup> 6531(6) for the offense described in section 7212(a) (relating to intimidation of officers and employees of the United States);

<sup>48</sup> 6531(7) for offenses described in section 7214(a) committed by officers and employees of the United States; and

<sup>49</sup> 6531(8) for offenses arising under section 371 of Title 18 of the United States Code, where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof.

<i>Crime and maximum sentence</i>	<i>Max Fine</i>	<i>Section</i>	<i>Elements</i>	<i>Collateral effects</i>
Evade or defeat tax <sup>50</sup>  Up to \$100,000 (500,000 for corporations) and/or 5 years	100/5 years  c: 500	§ 7201 (7203 is lesser included)	<ul style="list-style-type: none"> <li>• Tax deficiency</li> <li>• Affirmative act of tax evasion (either defeating the payment or assessment of tax)</li> <li>• Willful violation of a known duty</li> <li>• Must be some affirmative "willful and positive attempt". <u>Spies</u></li> </ul>	<ul style="list-style-type: none"> <li>• Conviction estops taxpayer from denying fraud in civil case. <u>Rodney; Moore</u> (4<sup>th</sup> Cir.)</li> <li>• <u>Surber</u> (4<sup>th</sup> Cir.): Conviction does not estop an spouse from arguing fraud in the inducement or duress</li> <li>• May be a probation condition to require a defendant to pay any deficiency. <u>Franks</u>.</li> </ul>
Failure to Pay Tax, ... <sup>51</sup>  Note: Misdemeanor  \$25,000 (\$100,000 for corporations)/1 year	25/1 year  c:100	7203 (lesser included of 7201)	<ul style="list-style-type: none"> <li>• Willfulness</li> <li>• Ability (since imprisonment for debt is not illegal).</li> <li>• Legal duty did exist (e. g. the taxpayer made enough to be required to file)</li> <li>• Failure to file return, pay tax.</li> </ul>	

<sup>50</sup> 7201: Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$100,000 (\$500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

<sup>51</sup> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$25,000 (\$100,000 in the case of a corporation), or imprisoned not more than 1 year, or both, together with the costs of prosecution. In the case of any person with respect to whom there is a failure to pay any estimated tax, this section shall not apply to such person with respect to such failure if there is no addition to tax under section 6654 or 6655 with respect to such failure. In the case of a willful violation of any provision of section 6050 I , the first sentence of this section shall be applied by substituting "felony" for "misdemeanor" and "5 years" for "1 year". (note: 6050 is repealed)

<i>Crime and maximum sentence</i>	<i>Max Fine</i>	<i>Section</i>	<i>Elements</i>	<i>Collateral effects</i>
Failure to ...File a Return, ... <sup>52</sup> Note: Misdemeanor	25/1 year c:100	7203 (lesser included of 7201)	(no deficiency required) <ul style="list-style-type: none"> <li>• Legal duty did exist (e. g. the taxpayer made enough to be required to file)</li> <li>• Taxpayer failed to file</li> <li>• Willful violation of a known legal duty. (But (objective) good faith claim of privilege may negate willfulness <u>Garner</u>). Good faith disagreement with the law is not a defense.</li> </ul>	
Failure to ...Supply Information, ... <sup>53</sup> Note: Misdemeanor	25/1 year c:100	7203 (lesser included of 7201)	<ul style="list-style-type: none"> <li>• Under a legal duty to supply information</li> <li>• Person failed to supply information required by law or regulations</li> <li>• Failure was willful. However, an objective good faith belief in a claim of privileges may negate the willfulness element. <u>Murdock</u></li> </ul>	
Failure to ...Keep records, ... <sup>54</sup> Note: Misdemeanor	25/1 year c:100	7203 (lesser included of 7201)		

<sup>52</sup> See n. 51

<sup>53</sup> See n. 51

<sup>54</sup> See n. 51

<i>Crime and maximum sentence</i>	<i>Max Fine</i>	<i>Section</i>	<i>Elements</i>	<i>Collateral effects</i>
Fraudulent Statement or failure to make statement to employees <sup>55</sup>	1000/1year	7204	<ul style="list-style-type: none"> <li>Required to furnish</li> <li>Willfully</li> <li>Fails to furnish or furnishes a false statement (e.g. W2)</li> </ul>	This cannot be combined with any other charge. Multiple counts may be given for each failure to file
Failure to Collect or Pay over Tax <sup>56</sup>	10/5 years c: same	7202	<ul style="list-style-type: none"> <li>Duty to collect, account for, and pay over tax. (Failure to do any is sufficient)</li> <li>Failure to fulfill that duty</li> <li>Willfulness</li> </ul>	
Submitting false return or documents <sup>57</sup>  Misdemeanor	10/1 year  c:50	7207	<ul style="list-style-type: none"> <li>Willfulness</li> <li>Affirmative act of delivery or disclosure of document known to be fraudulent</li> <li>Materiality</li> </ul> <p>No requirement that it be done with intention of evading taxes</p>	This does not estop taxpayer from claiming opposite in civil context

<sup>55</sup> In lieu of any other penalty provided by law (except the penalty provided by section 6674 ) any person required under the provisions of section 6051 to furnish a statement who willfully furnishes a false or fraudulent statement or who willfully fails to furnish a statement in the manner, at the time, and showing the information required under section 6051 , or regulations prescribed thereunder, shall, for each such offense, upon conviction thereof, be fined not more than \$1,000, or imprisoned not more than 1 year, or both.

<sup>56</sup> Any person required under this title to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

<sup>57</sup> Any person who willfully delivers or discloses to the Secretary any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter, shall be fined not more than \$10,000 (\$50,000 in the case of a corporation), or imprisoned not more than 1 year, or both. Any person required pursuant to subsection (b) of section 6047 or pursuant to subsection (d) of section 6104 to furnish any information to the Secretary or any other person who willfully furnishes to the Secretary or such other person any information known by him to be fraudulent or to be false as to any material matter shall be fined not more than \$10,000 (\$50,000 in the case of a corporation), or imprisoned not more than 1 year, or both.

<i>Crime and maximum sentence</i>	<i>Max Fine</i>	<i>Section</i>	<i>Elements</i>	<i>Collateral effects</i>
Perjury <sup>58</sup>  Felony	100/3 years  c:500	7206(1)	<ul style="list-style-type: none"> <li>• Making and subscribing a return or other document (taxpayer can be liable if he gave information to accountant, and accountant delivered the return) <u>Badwan</u></li> <li>• Written declaration under the penalties or perjury</li> <li>• Lack of belief by the signer that the document is true or correct</li> <li>• Willfulness (1) intentional violation of a 2) known duty)</li> <li>• Materiality</li> </ul> <p>No deficiency requirement. <u>Scholl</u></p>	This does not estop taxpayer from claiming opposite in civil context. (So, a true document that doesn't change deficiency can still constitute a crime.)
Attempts to interfere with administration of revenue laws <sup>59</sup>	\$5/3 years, if only threat (to government	7212(a)	<ul style="list-style-type: none"> <li>• corruptly (e. g. unlawfully <u>Bailey</u>) or by force or threats of force (including any threatening letter or communication). Note: threats of</li> </ul>	Base offense is higher under FSG, if the conduct is intended to intimidate people who are involved in proceedings against them.

<sup>58</sup> 7206(1) DECLARATION UNDER PENALTIES OF PERJURY.--Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

<sup>59</sup> Whoever corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, or in any other way corruptly or by force or threats of force (including any threatening letter or communication) obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title, shall upon conviction thereof, be fined not more than \$5,000, or imprisoned not more than 3 years, or both, except that if the offense is committed only by threats of force, the person convicted thereof shall be fined not more than \$3,000, or imprisoned not more than 1 year, or both. The term "threats of force", as used in this subsection, means threats of bodily harm to the officer or employee of the United States or to a member of his family.



<i>Crime and maximum sentence</i>	<i>Max Fine</i>	<i>Section</i>	<i>Elements</i>	<i>Collateral effects</i>
	employee) of force it is \$3/1year		<p>force limited to employees of US government or family</p> <ul style="list-style-type: none"> <li>endeavors to intimidate or impede ... due administration of this title</li> </ul> <p>Even if indictment is vague, there must be some prejudice to defendant to trigger due process dismissal. <u>Bailey</u></p> <p>Includes giving a false document that is true</p>	
Conspiracy <sup>60</sup>  Felony (unless underlying crime was misdemeanor)	5 years	18 USC § 371	<ul style="list-style-type: none"> <li>Agreement between two or more persons to commit a crime</li> <li>Defendant knowing participation in the conspiracy</li> <li>Knowledge of objective <u>Krasovich</u></li> <li>An overt act in furtherance of the conspiracy</li> </ul>	
"Klein Conspiracy" (conspiracy to defraud the US)  felony (unless underlying crime was	5 years	18 USC § 371	<ul style="list-style-type: none"> <li>Agreement between two or more persons to commit a crime</li> <li>Defendant knowing participation in the conspiracy</li> <li>Knowledge of objective (e. g. evade taxes) <u>Krasovich</u></li> </ul>	

<sup>60</sup> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both. If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

<i>Crime and maximum sentence</i>	<i>Max Fine</i>	<i>Section</i>	<i>Elements</i>	<i>Collateral effects</i>
misdemeanor)			<ul style="list-style-type: none"> <li>An overt act in furtherance of the conspiracy</li> </ul>	
Aiding and Abetting Felony	100/3 years c:500	7206(2) <sup>61</sup> 18 USC 2(a) <sup>62</sup>	<ul style="list-style-type: none"> <li>Aiding or abetting (assisted or otherwise caused)</li> <li>Willful</li> <li>The preparation of a return (7206(2) only)</li> </ul> <p>Principal need not be convicted <u>Sandefer</u> (or identified ) of underlying offence. <u>Campa</u></p> <p>Preparer can be charged with aiding and abetting if it can be shown that the taxpayer alone (and without the knowledge of the preparer) fabricated the information</p> <p>Preparer can have sentenced enhanced for being the "leader" of a criminal enterprise, if they set up a scheme to inflate deductions. <u>Dixon</u></p>	<p>Allows government to seek sentence enhancement if it can be show that they were the leader of some sort of scheme, even if they did not supervise. <u>Dixon</u>.</p> <p>No need to calculate amount lost with certainty in determining base offense for purposes of FSG. <u>Bryant</u></p>

<sup>61</sup> 7206(2) AID OR ASSISTANCE.--Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; or

<sup>62</sup> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal

<i>Crime and maximum sentence</i>	<i>Max Fine</i>	<i>Section</i>	<i>Elements</i>	<i>Collateral effects</i>
False Statements <sup>63</sup> Felony		18 USC 1001	<ul style="list-style-type: none"> <li>• Within the jurisdiction of one of the three branches</li> <li>• Knowingly and willingly</li> <li>• Falsified, conceals, or covers up</li> <li>• By any trick scheme or device</li> <li>• A material fact (Need only be material to anyone who might get their hands on the information. <u>Meuli</u>)</li> </ul> <p style="text-align: center;">-or-</p> <ul style="list-style-type: none"> <li>• Within the jurisdiction of one of the three branches</li> <li>• Knowingly and willingly</li> <li>• Makes</li> <li>• Materially (Need only be material to anyone who might get their hands on the information. <u>Meuli</u>)</li> <li>• false fictitious or fraudulent</li> </ul>	

<sup>63</sup> (a) ...in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully-- falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; (b)

**abut...** Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.

(c) With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to-- (1) administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or (2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.

<i>Crime and maximum sentence</i>	<i>Max Fine</i>	<i>Section</i>	<i>Elements</i>	<i>Collateral effects</i>
			<ul style="list-style-type: none"> <li>representation</li> </ul>	
False Claims Felony		18 USC 287 <sup>64</sup>	Presents to an officer of the US A claim against the US (usually false refund claim) Knowing it to be false	
Aiding and Abetting a fraud or false statement	100/3 years  c:500	7206(2) <sup>65</sup>	<ul style="list-style-type: none"> <li>Aiding, assistance, or causing the preparation of a return</li> <li>That the return was false or fraudulent</li> <li>The act was willful</li> </ul>	Allows government to seek sentence enhancement if it can be show that they were the leader of some sort of scheme, even if they did not supervise. <u>Dixon</u>
Failure to obey summons	\$1000	7210	<ul style="list-style-type: none"> <li>Duly summoned to appear to testify or appear and produce books</li> <li>Neglects to produce or appear</li> </ul>	

Offense Level	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)
1	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6
3	0-6	0-6	0-6	0-6
4	0-6	0-6	0-6	2-8
5	0-6	0-6	1-7	4-10
6	0-6	1-7	2-8	6-14
7	0-6	2-8	4-10	10-16
8	0-6	4-10	6-12	12-18
9	6-12	8-14	10-16	15-21
10	8-14	10-16	12-18	18-24
11	10-16	12-18	15-21	21-27
12	12-18	15-21	18-24	24-30
13	15-21	18-24	21-27	27-33
14	18-24	21-27	24-30	30-37
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64 Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned not more than five years and shall be subject to a fine in the amount provided in this title.

65 See n.61

FSG 2T4.1	Level
Amount of tax loss \$2,000 or less	6
More than \$2,000	7
More than \$5,000	8
More than \$10,000	9
More than \$20,000	10
More than \$40,000	11
More than \$70,000	12
More than \$120,000	13
More than \$200,000	14
More than	15

(criminal matters (continued))

a) methods of proof

- i) Specific items theory is defined as where the government shows that specific items were not disclosed, or that certain events giving rise to a deduction did not happen
- ii) "net worth method" is defined as *an increase in the taxpayer's patrimony must be traced to some source*
  - (1) mere understatement is not enough to infer fraud
  - (2) government must prove the taxpayers "opening net worth" for the year with some certainty Smith
  - (3) must provide "likely source" of non-reported income Smith
  - (4) agent must subtract non-taxable sources of funds Smith
    - (a) gifts, bank deposits, starting net worth (best to start rich)
- iii) "net worth expenditures" – from the Defendant's expenditures the DOJ tries to show that the defendant was spending beyond what he reported
- iv) likelihood to spent of the defendant (e. g. gambling) can be introduced without being prejudicial

b) sentencing

i) general rules

- (1) in general, an aggravator or mitigate must be proven by a preponderance by the party seeking a reduction
  - (a) 9<sup>th</sup> cir: the aggravator has a disproportionate effect on the sentence, it must be proven by clear and convincing evidence
- (2) for a sentence to be increased beyond the statutory maximum , the factors must be found by a jury beyond a reasonable doubt (but, factors that would not increase it beyond the statutory maximum need only be found by clear and convincing evidence)
- (3) there are non-statutory aggravators that can be found
  - (a) could be based on (usually on outrageous government conduct)
    - (i) imperfect entrapment
    - (ii) sentencing manipulation

ii) base level

- (1) based on total amount of tax loss
  - (a) including non-charged and acquitted conduct (circuit split)
  - (b) corporate and personal income tax crimes may be combined for an individual
- (2) No need to calculate amount lost with certainty in determining base offense for purposes of FSG. Bryant
- (3) If conduct is intended to intimate an ongoing investigation, it is deemed to be at the level of assault (increase by two levels). Jeffries
- (4) Can reduce base level if someone took responsibility for their conduct, which includes not hindering investigation. Jeffries
- (5) Sentencing judge can depart upward or downward from the base level
- (6) Can depart downward for – but there **must be acceptance of responsibility**

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- (a) Serious health problems
    - (b) Someone in the family relied on them
    - (c) A large number of people in a business relies on them
  - iii) aggravators
    - (1) leadership or organization (this would be an enhancement, but there is a question as to whether it applies in tax)
    - (2) violence
  - iv) appeal, generally can only appeal a non-specified aggravator, unless the judge misunderstood his authority Martin
  - v) consequences
    - (1) In zone A, Defendant can get probation
    - (2) In zone B, Defendant can get alternative sentence
    - (3) In Zone D, court can't order probation or alternative sentence
    - (4) Person can be placed in ½-way house if sentence is 12 months or less
- 10) Pre-collection
  - a) Perquisites
    - i) Valid assessment
      - (1) In a jeopardy assessment, only an assessment is required
  - b) General Restraints on the service
    - i) IRS is required to comply with the fair debt collection practices act
      - (1) Can't communicate with the taxpayer at a time that is inconvenient
      - (2) Can't communicate with the taxpayer at his workplace if it is know that such communications are frowned on 6304(a)<sup>66</sup>
      - (3) No threats of violence
      - (4) No harassment
    - ii) Can bring an action against the US in district court under 7433 for recovery.
  - c) Pre-collection action
    - i) After tax is assessed, IRS has 60 days to make a **valid** notice and demand 6303

<sup>66</sup> 6304(a) COMMUNICATION WITH THE TAXPAYER.--

Without the prior consent of the taxpayer given directly to the Secretary or the express permission of a court of competent jurisdiction, the Secretary may not communicate with a taxpayer in connection with the collection of any unpaid tax—

**6304(a)(1)** at any unusual time or place or a time or place known or which should be known to be inconvenient to the taxpayer;

**6304(a)(2)** if the Secretary knows the taxpayer is represented by any person authorized to practice before the Internal Revenue Service with respect to such unpaid tax and has knowledge of, or can readily ascertain, such person's name and address, unless such person fails to respond within a reasonable period of time to a communication from the Secretary or unless such person consents to direct communication with the taxpayer; or

**6304(a)(3)** at the taxpayer's place of employment if the Secretary knows or has reason to know that the taxpayer's employer prohibits the taxpayer from receiving such communication.

In the absence of knowledge of circumstances to the contrary, the Secretary shall assume that the convenient time for communicating with a taxpayer is after 8 a.m. and before 9 p.m., local time at the taxpayer's location.

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- (1) Failing to pay the bill triggers the failure to pay penalty. Failure to pay the amount owed triggers the failure to pay penalties 6651(a)(3)
  - (a) Tolloed for offer in compromise and if taxpayer outside country
  - ii) Will send bill at five-week intervals
- 11) Types of collection action
  - a) Administrative
    - i) Requires a valid notice and demand (an invalid notice and demand does not invalidate the underlying assessment)
    - ii) If the taxpayer fails to pay it, a lien attaches to the taxpayer's property (this happens with attachment, notice, and demand § 6321)
      - (1) \*jeopardy assessment\*: no notice and demand required, lien automatically attaches
      - (2) liens are really just an attachment – they still exist under state law
        - (a) Weak appeals process (5 days) before a lien can attach
        - (b) once the liens attach, they are known as a “secret lien”, in that third party creditors may not be put on notice but they may still be subordinate to this lien (they only require, assessment, notice and demand)
        - (c) for a 3<sup>rd</sup>-party creditor to have priority over the IRS it must have
          - (i) arisen before the assessment and
          - (ii) be “choate” before the tax was assessed
        - (d) procedure for a lien
          - (i) generally follows state law
          - (ii) revenue agent must inform taxpayer of the problems with notice
          - (iii) if it is over 5,000 or the debtor is intended to file a bankruptcy proceeding, a notice must be filed
        - (e) priorities
          - (i) things that have statutory priority over a tax lien under 6323 so long as the service gives files under 6323(f), which generally refer to state law procedure --**statute allow the priority of the lend to extend 45 days past filing of notice**
            - 1. purchaser
            - 2. holder of a security interest acquired for “monies worth”
              - a. a line of credit is not money's worth – so home equity loans are not for money's worth
            - 3. mechanic's lienor (look to state law)
            - 4. judgment lien creditor (specific and perfected)
          - (ii) superpriorities: things that have priority whether or not notice was filed
            - 1. purchasers of securities 6323(b)
            - 2. purchasers of cars 6323(b)
            - 3. purchasers of personal property purchased at retail 6323(b)
            - 4. personal property purchased at a causal sale for less than 1000 6323(b)
            - 5. mechanics liens 6323(b)
            - 6. general tax liens 6323(b)

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- 7. attorneys liens (specifics of the statute must be met) 6323(b)
- 8. annuities 6323(b)
- 9. collateralized loans 6323(b)
- (f) after-acquired real property
  - (i) because the government does not have a choice about whether or not to create a lien, since it must collect taxes, it will have priority on after-acquired property (at least property acquired before the recordation of a lien)
- (3) release of liens (they last ten years, until either 1) paid 2) statute of limitations expires; 3) become unenforceable; 4) discharged; 5) compromised)
  - (a) must be released after satisfaction
  - (b) must be released after it becomes legally unenforceable
  - (c) release v. discharge
    - (i) release: frees property from the tax lien
    - (i) discharge: free up specific property (e.g. to sell the encumbered property)
- (2) appeal of liens in a collections to process hearing
  - (a) Collection due process hearing
    - (i) Can request a due process hearing
    - (ii) Impartial appeals officer
      - 1. Can attack the underlying liability
        - a. Especially involving things that don't require deficiency notices
      - 2. Can also suggest collection alternatives that have been considered and rejected, or any number of possibilities
        - a. Including subordination, etc.
        - b. Innocent spouse issues can be raised here (and everywhere)
    - (iii) If you are late in filing a request for a due process hearing, they will give an "equivalent due process hearings"
      - 1. If the IRS rules against someone in an equivalent due process hearing, if the IRS rules against them, they can't appeal in a judicially appealable format
    - (iv) Appeals of due process collection hearings
      - 1. If the tax court has jurisdiction over the tax, it can go to there
      - 2. Otherwise (e. g. employment tax collection) goes to District court
      - 3. Review is as an administrative process
  - (b) may administratively appeal liens – to a DPCH.
    - (i) Any rejection of compromises (including subordination) can't be arbitrary
    - (ii) Can appeal to tax court
    - (iii) Big question is what constitutes the national standards for "ordinary and necessary expenses"
      - 1. The big question is what constitutes "national standards for ordinary and necessary standards"

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- a. There were disparities in how people were treated because different people had different debt obligations
- b. So now there are allowances for food and for other things which seem to vary based on income
- c. Taxpayers has one year to adjust to national standard
  - i. Full medical benefits
  - ii. Life insurance bills can be paid
  - iii. No private schools
  - iv. Allowance for a car that they feel is ordinary and necessary
- (iv) And if this fails, you get a due process collection hearing
- (3) third parties
  - (a) third parties can avoid encumbrances by posting a bond equal to the government's interest
  - (b) can seek re evaluation in the district court
- (4) seizure
  - (a) before seizure must inform the taxpayer of collection due process issues
  - (b) taxpayer can request a collection due process hearing (not a jeopardy assessment)
  - (c) levy can be executed against all property unless 6334(d) lists it
  - (d) levy can be executed against entire piece of property, not the delinquent taxpayers interest in the property
  - (e) procedure
    - (i) IRS will start with bank accounts, and now social security
    - (ii) Prior written approval required before the asset can be seized
    - (iii) Once a party surrenders the property, the lien is discharge
    - (iv) IRS may be required to release a levy (even after seizure) if
      - 1. release would facilitate collection
      - 2. economic hardship
    - (v) can seek relief in district courts
- (5) sale
  - (a) must provide taxpayer with a notice of sale
  - (b) overage of the proceeds of the sale go to taxpayer or whoever can claim title to them
  - (c) government can file an interpleader action
- d) Judicial
  - i) Government can sue to **foreclose** a tax lien
    - (1) Subject property to the tax
    - (2) Determines priorities of creditors
  - ii) Government can sue to reduce a tax lien to a **personal judgment**
- e) Things that can be levied against
  - i) Property
    - (1) Interest in property – including interests in an estate that could later be disclaimed Drye using the “control rein” theory

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- (2) Can attach to future interest that are contingent on the interests of the taxpayer
- f) Statutes of limitation in collection
  - i) In general: 10 years
  - ii) Exceptions:
    - (1) if there is an installment agreement, the taxpayer can extend the statute of limitation, and the period collect expires 90 days after that 6502(a)(2)(A)
    - b) if there has been a levy on a part of the property, and the taxpayer consents to extend the statute of limitations
- 12) Offer in compromise
  - a) Permitted by statute – (been in statute since the 1920s, but in 1992 it was changed. 92-95 resulted in lots of offers being accepted. Required to stay current for five years)
    - i) Three standards
      - (1) Doubt as to liability: you do not believe that you owe the tax.
        - (a) They don't want to see an OIC that should be a claim for refund
        - (b) Might want to see issues for penalties, or trust fund recovery issue
      - (2) Doubt as to collectability
        - (a) IRS determines the taxpayer's assets, and they value the assets insofar as the IRS has a lien priority
        - (b) Then they look at the other assets, (they don't care about liens or debts if they don't have priority over the IRS's liens)
        - (c) Then they turn to the current income portion: they do a PV of the taxpayer's income
          - (i) (if they were to do a levy on the taxpayer, how much would they get month to month, and how much would they get in an installment payment). Then they multiple that times 50 months or the amount of time length on the statute of limitations for collections (10 years, suspended for due process collection hearing, and OIC. Extended for installment agreement.)
            - 1. the amount of liability has nothing to do with the equation
            - 2. they are looking for
              - a. net equity and assets
              - b. plus present value of income
          - (ii) in 2000, the statute was amended to require all offers regardless of the amount (but still has nothing to do with anything on the dollar)
          - (iii) there is now a suspension of the statute of limitations on collection for OICs
            - 1. note: TAO orders do not suspend statute of limitations
      - (d) if you don't agree with the IRS based on the OIC issues, you can administratively appeal
      - (e) gets rid of things that can't be disposed of in bankruptcy
      - (f) IRS' fears about prior delinquent people since they don't want people to take advantage of the service.
    - (3) Effective tax administration
      - (a) Neither of the first two options can be available

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- (i) If you are in a position where all you have is a disability income, and the liability is less than 80% (remember: when you value liability, you subtract 20% withholding), but if you take away the pension (or IRA) the other two sources of income can't cover it.
  - (ii) Or there are dependants, etc., and they have to care for the people. E. g. they can't access the assets without doing themselves real damage
  - (b) this happens where stock options lose value, (IRS isn't too interesting in letting people trade tax credits)
- 13) bankruptcy option:
- a) bankruptcy statute may change when they get back into session
    - i) under the present statute, the future income is not in a chapter 7
      - (1) banks want to force people into an equivalent of ch 13 (restructuring and saving of house)
  - b) some taxes are not priority taxes
    - i) follow flowchart
      - (1) is the tax a priority tax?
        - (a) If it is an individual with income and gift tax if they are NOT Priority
        - (b) Priority taxes is defined as taxes that are due less than 3 years before the petition was filed
        - (c) Everything that was older than that would be dischargeable if it continues to meet that criteria
      - (2) If the debtor hasn't filed a return, then they can't take advantage of a discharge
        - (a) TAM: where the IRS filed a substitute return and the return was prepared, and taxpayer was later audited and there were schedules detailing the liability, and taxpayer admitted it, this is the equivalent of a return
        - (b) If you fail to require a statement of federal change based on state taxes, then that is the equivalent of a return
      - (3) Is the return fraudulent?
        - (a) Easy if the taxpayer has been convicted of evasion, etc.—then it isn't dischargeable
        - (b) If you don't file your returns in a pattern and all of the sudden you file all of those returns in 1999, you wait two years from the time of filing, the states and the federal government argues that that failure to file is a fraud
      - (4) Is the return late and FILED within 2 years of the petition date
      - (5) If there are any assessments, they have to be at least 280 days old. Then it can be discharged.
      - (6) Exemptions
        - (a) Can take state exemptions or
        - (b) Federal exemptions:
          - (i) ERISA-based plans were exempted from federal tax issues (so the liens continue to attach to exempt property). If the lien had value

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- than the lien survives the bankruptcy. **The service can still use the lien to levy on the ERISA accounts.**
1. All of the bankruptcy codes does is permit the bankruptcy court to discharge the ability of creditors to pursue the debt. What the bankruptcy court can't do is dispose of interests that the creditors have.
  2. Bankruptcy can't discharge a security interest in the debtor's property (can't discharge the tax, but not tax liens
    - a. There can be a "cram down" which reduces
- (ii) So, if the person has assets that are exempt in bankruptcy, there can still be levies.
1. statute of limitations are suspended while in bankruptcy
  2. liens don't go away (provided that there is notice), and they can take advantage of any increases in value (or the statute of limitations of 10 years end, e. g. paid or unenforceable by operation of law) (retroactive effect.)
    - a. if they haven't filed a notice of lien, then they are still out
- ii) Caveats
- (1) Service can still audit and send a stat notice, and any new liabilities have a priority for 280 days after its assessment
  - b) Must wait 280 days in order to discharge that liability
- 14) Trust fund recovery penalty
- a) Really a collection device to get around corporate (LLC, LLP, etc.) form
    - i) Employer is the agent of the USA
  - b) § 6672 is that mechanism:
    - i) there is no need to deal with 6672 if they are part of that, or the general partner is liability
    - ii) what 6672 says is that those individuals that are responsible to collect, pay over, etc. the trust fund liabilities, and who fail to do so willingly are personally responsible for those liabilities
    - iii) taxed based on "units" of trust fund
      - (1) the trust fund portion is only the amount that the taxpayer was to collect, account, and pay over (employee withholding and employee portion of the fica), and that is the trust fund portion
      - (2) the trust fund is therefore 35 units
    - iv) the trust fund portion is the only portion that the 6672 penalty deal with
      - (1) MA has a corresponding section, (31a ch 62c), and while it reads like the federal statute, the MA Supremes interpreted it to mean that the person is responsible for tax, penalties, and interest
      - (2) Vinnie (MA): who is responsible: doesn't matter what role the guy actually played, but what role did they play in the corporation, and what role did they play during the periods of delinquency
        - (a) In MA it is strict liability (no element of willfulness)
    - iii) Responsible person: did the person have the ability to stop the delinquency when he found out about it, or to prevent the delinquency

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- (1) IRS had to put out a policy of saying that they wouldn't bury non-employee shareholders
- iv) **Question is whether or not someone "authorizes" things** – what matters is the "role" not the status
- c) On willfulness in "Slutoff" is defined (Supremes) as "personal fault, beyond mere negligence"
  - i) While they might not be willful for a period of time, if, after they discover the liability, they use assets belonging to the corporation to pay other liabilities, their willfulness may disappear.
  - d) Important rule: voluntary payments made by a taxpayer have to be applied as directed by the taxpayer. Rev. Proc 2002-26: you show up at the taxpayer's place of business, and the taxpayer says that everything is dark and dismal: so, send the tax in and designate it to the tax and for the periods of delinquency.
    - i) Can't put it through the electronic payment system – have to send them a check separately
  - c) Involuntary payments will be paid any way it wants – to the benefit of the government.
- 15) Innocent spouse
  - a) Really a question of joint liability
    - i) Joint liability says that if people execute a joint income tax return
    - ii) 6015b: a loosening up of 6013e "if there is a joint return, and if there is an understatement that gives rise to the deficiency, that gives rise to the activities of one spouse, and the innocent spouse, had no reason to know, and taking into account all the facts and circumstances they get out"
      - (1) as long as they apply within 2 years from the first contact for collection, or 2 years for the first contact for collection
        - (a) have to have all of those 5 years, and if so you get out of the deficiency:
        - (b) Elements
          - (i) erroneous items attributable to guilty spouse
          - (i) inequality
          - (ii) inequitable to hold them liability
      - (2) for people who have filed a joint return and who are divorced/separated/living apart
        - (a) they can get relief by
          - (i) joint return
          - (ii) not living for a year and/or divorced
          - (iii) BOP on the USA to prove that they had knowledge when they signed the income tax return of the item giving rise to the deficiency, or they transferred assets around in order to escape the liability (doesn't include divorce transferred). "disqualified transferred"
            - 1. transfers for the benefit of the children are disqualified transfers
        - (b) they can ask for separate liability (doesn't have to be asked for request for separate liability)

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- (i) no point in telling them immediately
- (c) can get equitable relief from signed return – and in rev. proc 2000-15
  - (i) have to be separated/divorced, hardship, abused, liability was reported but not paid,
- (3) IRS has to notify the taxpayer
  - (a) They get to continue to brawle over innocent spouse liability
  - (b) When there is a joint liability – and the divorce agreement says "and X shall pay the liability" it means nothing
- e) 6015 deals with deficiencies that arise, and how they relate to individuals and joint return, than with joint liabilities
  - i) it can only be knocked out where there is equitable grounds under 6015(f)
  - ii) the essence of the problem is the joint liability in the first place (so it might be better to file separately, so there isn't liability, and someone else's property might be free of the lien).
- (1) Always have the option (statute changed) to go from separate to joint, and get a reduction in liability without a claim for refund (can't do vice-versa)

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