

International Fiscal Association

2015 Basel Congress

**cahiers**

de droit fiscal  
international

**VOLUME 100B**

Offprint

The practical protection  
of taxpayers'  
fundamental rights



1938-2015

## Summary and conclusion

There are legitimate policy arguments for, and against, all of the provisions discussed in this report. For instance, does the confidentiality of return information enhance compliance, or is compliance better if all information is made public? Even procedural protections like the collection due process (CDP) require the commitment of substantial resources by the Internal Revenue Service (IRS), and they consequently slow the tax system's operation. "Fairness" (however perceived) and efficiency are thus often in tension. And nearly everyone would agree that the US system is imperfect in balancing these tensions, even if they came out on one side or the other in considering any particular right or program.

The USA continues to adjust its tax system as necessary, but its experience affords useful lessons in the balance between taxpayer rights and an efficient tax administration. Ultimately, as a general proposition, Congress and the IRS are committed to providing taxpayers with substantial rights in connection with the determination and collection of taxes in the USA.

## 1. Introduction

The US tax system<sup>1</sup> relies heavily on what is referred to as "voluntary compliance". This does not mean that complying with the system as a whole is optional or elective.<sup>2</sup> Rather, it refers to the US system of self-reporting, and in that sense "volunteering" the information necessary to determine each taxpayer's liability. Coupled with third party reporting, which for major parts of the US economy enables verification by the IRS of the information voluntarily provided by each taxpayer, the US system has enjoyed remarkably high levels of overall compliance.

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<sup>1</sup> The USA has a federal system of government. This report focuses only on the national ("federal") system of taxation, not on state or local tax systems, although many have taxpayer rights protections that parallel, and in some cases even mirror, the federal system.

<sup>2</sup> Tax protestors often make this frivolous assertion. See <http://www.irs.gov/Tax-Professionals/The-Truth-About-Frivolous-Tax-Arguments-Section-I-A-to-C>.

A cornerstone of this compliance, however, is the assurance, and the perception of assurance, that taxpayers' rights will be protected in the administration of the tax system. These rights often operate in conjunction to ensure that fairness is achieved. There are aspects of the protection of taxpayer rights in the USA that the reporters suggest are worthy of consideration in other countries' tax systems.

The balance of this report will generally discuss most of the elements identified as of interest by the directives for branch reporters. However, the report will discuss in more detail four of the particular rights that US taxpayers enjoy with respect to the administration of the tax laws. The four rights discussed in more detail below are:

- taxpayer confidentiality;
- the right to an independent appeal;
- procedural safeguards in the administration of government liens and levies; and
- separate and independent civil and criminal investigations, with appropriate protections.

Before that discussion, however, we set forth below a brief summary of the sources of taxpayer rights law in the USA.

## 2. The institutional framework for protecting taxpayer rights

Generally speaking, the sources of law applicable to federal taxes, some of which are sources of taxpayer rights, include (in roughly descending order): the US Constitution; treaties; statutes enacted by the US Congress, most importantly the Internal Revenue Code of 1986 (as amended), Title 26 USC (IRC or Code); court cases and rulings; regulations promulgated by the Department of the Treasury and the IRS; and other, less formal guidance promulgated by the IRS, including revenue rulings and revenue procedures, notices and announcements, forms, and publications. Most relevant for present purposes are the statutes, implementing regulations, and publications.

### 2.1. Statutes

Since 1913 Congress has enacted numerous provisions governing federal tax procedure and the administration of the tax laws. Most of these have been codified in Subtitle F of the Code. These include provisions governing the voluntary self-reporting system, the examination and investigation processes, collection procedures, the specification of criminal tax violations, adjudication of disputes, and numerous other topics. More specifically, most of the taxpayer rights provisions discussed in this article were initially passed as separate legislation but have been incorporated into Subtitle F.

The first specific legislation denominated as a Taxpayer Bill of Rights was passed by Congress in 1988.<sup>3</sup> Congress had discussed taxpayer rights bills for sev-

<sup>3</sup> The Omnibus Taxpayer Bill of Rights, Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, §6226, 102 Stat. 3342, 3730 (1988).

eral years, and various versions had been co-sponsored by as many as two-thirds of the members of the Senate and over half of the members of the House of Representatives. The bill as finally enacted included just over twenty useful and important improvements in tax administration. Generally speaking, the enumerated rights fell into a number of categories: limitations on IRS actions (for instance, permitting the taxpayer to record IRS interviews of taxpayers and third party witnesses, improving evaluations of IRS employees, and “sunsetting” temporary regulations);<sup>4</sup> collection rights (such as providing for installment payments in more situations);<sup>5</sup> administrative appeal rights (with respect to notices of federal tax lien, jeopardy assessments, and seizures of property or “levies”);<sup>6</sup> litigation opportunities (two new causes of action for unauthorized collection actions and failure to release a federal tax lien, modifications to the jurisdiction of the principal forum (the US Tax Court) for adjudicating tax disputes, and additional recovery of attorneys’ fees);<sup>7</sup> and disclosure to taxpayers (notices regarding procedural options available to taxpayers at various stages of the tax administration process).<sup>8</sup> More specifically, the first taxpayer bill of rights required the IRS to prepare a statement of taxpayer rights and to distribute it to taxpayers when they were contacted for examination,<sup>9</sup> which the IRS has in fact done in Publication 1, discussed below. And this legislation included the first provision authorizing the Taxpayer Ombudsman to override ordinary actions taken by the IRS in certain circumstances, with what is referred to as a “taxpayer assistance order”.<sup>10</sup>

Less than a decade later, in 1996, Congress passed a stand-alone statute entitled the “Taxpayer Bill of Rights 2”.<sup>11</sup> This bill contained about forty provisions, which generally fall into the same categories as the prior taxpayer rights bill: limitations on IRS behavior (safeguards on certain “designated” summonses and required review of terminated installment payment agreements);<sup>12</sup> collection rights (such as abatement of interest and penalties, expanded opportunities to compromise liability, indexing amounts of property exempt from levy, and providing a right of contribution on certain penalties);<sup>13</sup> appeal rights (including, as discussed below, considerable expansion of the Taxpayer Assistance Authority and renaming of the Taxpayer Ombudsman the National Taxpayer Advocate);<sup>14</sup> litigation remedies (Tax Court review of certain failures to abate interest and procedural rules regarding attorneys fees);<sup>15</sup> and finally disclosures and notices (for instance, regarding collection activity on joint returns and certain penalties).<sup>16</sup>

Most of these were somewhat incremental changes, leading one tax publisher, CCH, to write:

<sup>4</sup> *Ibid.* §§6228, 6231, 6232.

<sup>5</sup> *Ibid.* §6234.

<sup>6</sup> *Ibid.* §§6237, 6238.

<sup>7</sup> *Ibid.* §§6239–241, 6243–247.

<sup>8</sup> *Ibid.* §§6227, 6233.

<sup>9</sup> *Ibid.* §6227.

<sup>10</sup> *Ibid.* §6230.

<sup>11</sup> Taxpayer Bill of Rights 2, Pub. L. No. 104–168, 110 Stat. 1452 (1996).

<sup>12</sup> *Ibid.* §§201–02, 1002, 1003.

<sup>13</sup> *Ibid.* §§301, 304, 502–03, 903.

<sup>14</sup> *Ibid.* §§101–02.

<sup>15</sup> *Ibid.* §§302, 701–04, 801–02.

<sup>16</sup> *Ibid.* §§408, 901, 1202.

“Although the majority of these provisions may not seem all that significant to the average taxpayer, *collectively* they are of considerable assistance to tax practitioners.”<sup>17</sup>

The provisions regarding the Taxpayer Advocate, however, were particularly significant for the protection of taxpayer rights. The Advocate was provided with both “systemic” powers and the ability to provide relief in specific instances. Systemically, the Advocate is authorized to identify areas in which taxpayers encounter problems in dealing with the IRS and to recommend solutions, either by legislation or, to the extent possible, administratively under existing statutes.<sup>18</sup> The Advocate is also broadly empowered “to assist taxpayers in resolving problems” with the IRS,<sup>19</sup> and may issue taxpayer assistance orders directing the IRS to take or withhold practically any action regarding examination, collection, or other enforcement of the internal revenue laws.<sup>20</sup> The Advocate must submit two annual reports directly to Congress, without review or editing by others in the IRS or administration.<sup>21</sup>

Only two years later, Congress passed a third set of taxpayer rights provisions as part of the Internal Revenue Service Restructuring and Reform Act of 1998.<sup>22</sup> The overall aim of the bill was “to restructure the IRS ... with an organizational structure that features operating units serving particular groups of taxpayers with similar needs”.<sup>23</sup> It was thought that the revised organizational structure would enable the IRS to provide better “customer service” to different types of taxpayers, such as large corporations, small businesses, individuals, or tax-exempt organizations, by placing “a greater emphasis on serving the public and meeting taxpayers’ needs”.<sup>24</sup> A significant part of the restructuring plan was to require an “independent appeals function” within the IRS and to prohibit “ex parte communications between appeals officers” and other IRS employees “to the extent that such communications appear to compromise the independence of the appeals officers”.<sup>25</sup> Another significant development was codification of the grounds for obtaining a taxpayer assistance order.<sup>26</sup>

<sup>17</sup> Mark Luscombe, *Preface to Taxpayer Bill of Rights 2: Law and Explanation* (CCH 1996) (emphasis added).

<sup>18</sup> Taxpayer Bill of Rights 2, §101(a), now codified at IRC §7403(c)(2).

<sup>19</sup> *Ibid.*

<sup>20</sup> IRC §7811(b). The current requirements to obtain a Taxpayer Assistance Order are discussed below.

<sup>21</sup> IRC §7603(c)(2)(B).

<sup>22</sup> Internal Revenue Service Restructuring and Reform Act of 1998 (RRA), Pub. L. No. 105-206, §3000, 112 Stat. 685 (1998).

<sup>23</sup> H.R. Rep. No. 105-599, at 194 (1998) (Conf. Rep.).

<sup>24</sup> *Ibid.*

<sup>25</sup> RRA §1001(a)(4). This provision is discussed in more detail below.

<sup>26</sup> In order to obtain a Taxpayer Assistance Order, a taxpayer is usually required to show “a significant hardship as a result of the manner in which the internal revenue laws are being administered”. IRC §7811(a)(1)(A); see also Treas. Reg. §301.7811-1(a)(1). “Significant hardship” includes such items as “an immediate threat of adverse action”, “a delay of more than 30 days in resolving a taxpayer account problem”, “significant” costs (including professional fees) to resolve a matter, or “irreparable injury to, or a long-term adverse impact on, the taxpayer if relief is not granted”. IRC §7811(a)(2); see also Treas. Reg. §301.7811-1(a)(1).

As in the prior bills, the 1998 taxpayer rights provisions included significant changes but fell within the same general substantive areas: limitations on IRS behavior (including limitations on certain audit techniques, enhanced approval processes for liens, levies, and jeopardy and termination assessments, and various other limitations on levies);<sup>27</sup> collection rights (providing for mitigation of penalties during offers in compromise and installment payment agreements, encouraging more offers and installment payment agreements, adjusting levy-exempt amounts, and providing a right of contribution on trust fund penalties);<sup>28</sup> appeal rights (the “independence” requirement mentioned previously, as well as the role of the National Taxpayer Advocate discussed above, and most importantly the CDP provisions, which are discussed in more detail below);<sup>29</sup> litigation remedies (such as Tax Court review of spousal relief, higher damages for collection actions, and expanded eligibility for costs and fees);<sup>30</sup> and disclosures and notices (including third party contact notices, deficiency notices with dates, requiring IRS officials to provide contact information, etc.).<sup>31</sup>

In short, Congress has consistently emphasized providing information, service, and assistance for the taxpayer public. Mandating such requirements, and providing new remedies if the requirements are not met, are routine features of such legislation.

## 2.2. Regulations and other guidance

The Treasury Department and the IRS are generally granted authority to promulgate regulations interpreting statutory provisions (called Treasury Regulations and often referred to herein simply as regulations),<sup>32</sup> and Congress sometimes specifically directs them to do so.<sup>33</sup> Much of the detail regarding taxpayer rights procedures is thus set forth in the Treasury Regulations. To give a few examples: section 301.6330-1 of the Treasury Regulations lays out the circumstances in which a CDP hearing may be obtained, the contents of the notices and appeal, the conduct of the hearing, etc.;<sup>34</sup> section 301.7811-1 sets forth the requirements for taxpayer assistance orders;<sup>35</sup> and section 301.7122-1 provides rules regarding “offers in compromise” to settle tax debts.

Generally speaking, in order to be binding under US law, regulations are announced as “proposed” to enable comment by interested members of the public

<sup>27</sup> *Ibid.* §§3412, 3421, 3432–434, 3441–444.

<sup>28</sup> *Ibid.* §§3303, 3431, 3435, 3462(b), 3467.

<sup>29</sup> *Ibid.* §§3105, 3401, 3435, 3462(b), 3465.

<sup>30</sup> *Ibid.* §3001, 3101–106, 3201, 3415.

<sup>31</sup> *Ibid.* §§3307, 3308, 3417, 3463, 3501–509.

<sup>32</sup> IRC §7805(a).

<sup>33</sup> E.g. IRC §7811(a)(1) (requiring regulations to be promulgated governing the form, manner, and time of taxpayer assistance orders and setting forth certain requirements to obtain them).

<sup>34</sup> The substantive rules governing CDP are discussed in more detail below.

<sup>35</sup> The Treasury Regulations closely follow the statute discussed above, but also provide examples of “significant hardship”, and note that such a significant hardship is a necessary precondition to obtaining a taxpayer assistance order but not automatically sufficient to do so. Treas. Reg. §§301.7811-1(a)(4)(iv), -1(a)(5). The regulations also give examples of the kinds of actions that the IRS may be directed to take in a taxpayer assistance order, such as releasing a collection seizure (levy), expediting review of an issue, etc. *Ibid.* -1(c).



before they are finalized and given the force and effect of law.<sup>36</sup> When it is desirable that guidance be less formal, more flexible, or more easily modified than such formal regulations, the IRS frequently uses other forms of administrative guidance such as revenue procedures, publications, and the Internal Revenue Manual (IRM) to communicate its directives.<sup>37</sup> For example, guidance regarding the *ex parte* rules, which generally prohibit IRS appeals officers from communicating with other IRS personnel on a substantive issue while an appeal of that issue is pending, is set forth in Revenue Procedure 2012-18, 2012-10 IRB 455. Guidance promulgated in such forms may nevertheless be relied upon by taxpayers, for instance for the purpose of avoiding penalties.<sup>38</sup>

### 2.3. Publications

As discussed above, a consistent theme of taxpayer rights legislation has been for Congress to impose statutes that require the IRS to provide taxpayers with notifications and information about tax procedures and rights. There are consequently many such provisions in the Code, requiring specific, and often detailed, notices and explanations of administrative matters.<sup>39</sup>

The IRS relies heavily on its distribution of Publication 1, *Your Rights as a Taxpayer*, to inform taxpayers. A copy of Publication 1 is included in all notices of audit sent to taxpayers, and as a matter of policy the IRS distributes Publication 1 even when it is not statutorily required to do so. The bulk of Publication 1 lays out in simple terms the processes for examination, appeal, collection, and refunds, but as recently revised<sup>40</sup> the first page of Publication 1 sets forth a “Taxpayer Bill of Rights”:

- the right to be informed;
- the right to quality service;
- the right to pay no more than the correct amount of tax;
- the right to challenge the IRS’s positions and be heard;
- the right to appeal an IRS decision in an independent forum;
- the right to finality;
- the right to privacy;

<sup>36</sup> Administrative Procedure Act, 5 USC §551 *et seq.*; see also Treas. Reg. §601.601 (discussing the process of promulgating tax regulations).

<sup>37</sup> See Treas. Reg. §601.601(d) (for discussion of the objectives and standards for certain kinds of less formal advice such as revenue rulings and revenue procedures, and their publication by the IRS in the weekly official Internal Revenue Bulletin, available on the IRS website at <http://www.irs.gov/IRB/>). Forms and publications are generally available in hard copy at IRS offices or online at <http://www.irs.gov/Forms-&-Pubs>. The IRM is also available electronically at <http://www.irs.gov/irm/index.html>.

<sup>38</sup> Treas. Reg. §1.6662-4(d)(3)(iii) (describing “type of authority” that may be relied upon for penalty avoidance).

<sup>39</sup> See e.g. IRC §§7521 (explanation of audit and collection processes and taxpayer rights); 6751 (notice of penalty must include explanation of the computation); 6320 and 6330 (requiring notice explaining “collection due process” rights in connection with certain collection activities, discussed below); 7522 (content of tax due notice, deficiency notice, and other notices).

<sup>40</sup> The revision occurred in June 2014, when the IRS formally adopted this Taxpayer Bill of Rights. See IRS News Release IR-2014-72 (10 June 2014), available at <http://www.irs.gov/uac/Newsroom/IRS-Adopts-Taxpayer-Bill-of-Rights;-10-Provisions-to-be-Highlighted-on-IRSGov,-in-Publication-1>.

- the right to confidentiality;
- the right to retain representation; and
- the right to a fair and just tax system.<sup>41</sup>

These “rights” are not provided for in statute or regulations in so many words. For instance, the “right to finality” conceptually incorporates numerous technical rules regarding limitations periods, and the “right” to “a fair and just tax system” may reasonably be said to be aspirational at best. But this statement is instead intended to educate taxpayers and give them confidence that they are not powerless, and it is at least partly meant to remind and encourage IRS employees to treat taxpayers appropriately. The same ten taxpayer rights set forth on the first page of Publication 1 are also enumerated on the IRS website.<sup>42</sup>

While the IRS created Publication 1, the Taxpayer Advocate Service (TAS) reviews it periodically. The TAS frequently surveys taxpayers to determine whether Publication 1 is effective. The TAS then proposes changes, with the idea that the more an individual believes he or she is heard and treated fairly, the more that person will believe the tax system is procedurally just. The TAS has also launched an external campaign to increase awareness of the rights outlined in Publication 1.

Different publications cover other phases of the tax controversy system; for instance, Publication 556 discusses *Examination of Returns, Appeal Rights, and Claims for Refund*,<sup>43</sup> and Publication 594 discusses *The IRS Collection Process*,<sup>44</sup> in more detail than Publication 1. In part at the urging of the TAS, therefore, Publication 1 has been dramatically shortened.

## 2.4. Other sources of law

Judicial review of tax cases may occur in several different procedural postures. Opinions in such cases may explain the operation of taxpayer rights provisions in the other sources of law discussed above, including limitations that may be imposed on both the IRS and on taxpayers. A full review of this case law is beyond the scope of this article. Instead, we will review a few of the more significant taxpayer rights and procedures that US law provides.

## 3. Taxpayers and tax returns

As a general rule, all persons subject to tax in the USA are obliged to file a return according to the forms and regulations prescribed by the Secretary of the Treasury

<sup>41</sup> Publication 1, *Your Rights as a Taxpayer* (rev. June 2014), available at <http://www.irs.gov/pub/irs-pdf/p1.pdf>.

<sup>42</sup> *Taxpayer Bill of Rights*, available at <http://www.irs.gov/Taxpayer-Bill-of-Rights> (page last updated June 2014).

<sup>43</sup> Publication 556, *Examination of Returns, Appeal Rights, and Claims for Refund*, available at <http://www.irs.gov/pub/irs-pdf/p556.pdf> (rev. September 2013).

<sup>44</sup> Publication 594, *The IRS Collection Process*, available at <http://www.irs.gov/pub/irs-pdf/p594.pdf> (rev. April 2012).

<sup>45</sup> IRC §6011(a).



and containing the information required by such forms or regulations.<sup>45</sup> This includes individuals, estates, and trusts with gross income in excess of certain amounts,<sup>46</sup> corporations subject to tax,<sup>47</sup> and certain other forms of organization.<sup>48</sup> Husbands and wives may generally file a joint return combining their tax items for purposes of reporting and computing the amount of tax due;<sup>49</sup> the liability for such taxes is generally joint and several, but the law provides for relief from joint liability in certain circumstances.<sup>50</sup> Partnerships, certain “pass-through” corporations, and a host of other types of organization are also obligated to file annual returns reporting their income, even though they may have no tax liability themselves.<sup>51</sup>

Most returns are filed electronically, and for many taxpayers electronic filing is now mandatory.<sup>52</sup> Moreover, many returns are prepared by accountants or other return preparers and filed by them after review and signature by the taxpayer. In such cases, the return preparer is subject to very strict confidentiality requirements, violation of which is punishable as a felony.<sup>53</sup> Preparers may also be subject to penalties for preparing returns that take unjustified tax positions.<sup>54</sup>

As mentioned above, US law requires numerous forms of information returns to be filed as well.<sup>55</sup> Persons who must file these include all sorts of payors of the income that taxpayers may be required to self-report on their own income tax returns, such as wages, dividends and interest, certain benefit payments, and a wide variety of other payments.<sup>56</sup> Most information returns are also required to be filed electronically,<sup>57</sup> and if prepared by commercial return preparers they are subject to the same penalties and confidentiality restrictions as apply with respect to taxpayer returns.<sup>58</sup> The information provided on such information returns is eventually “matched” electronically against the information provided by taxpayers; discrepancies typically result in a type of audit notice.

This “voluntary self-assessment system” of return and information return filing rarely results in actual infringements on taxpayer rights. Americans are quite

<sup>46</sup> IRC §§6012(a)(1), (a)(3), (a)(4).

<sup>47</sup> IRC §6012(a)(2).

<sup>48</sup> IRC §§6012(a)(5)–(a)(8).

<sup>49</sup> IRC §6013.

<sup>50</sup> IRC §6015.

<sup>51</sup> See e.g. IRC §§6031–6039J.

<sup>52</sup> As of 13 March 2014, the IRS reported that 62.2 million individual returns were e-filed (this does not take into account the organizations required to e-file business returns. <http://www.irs.gov/uac/Newsroom/More-Taxpayers-Filing-from-Home-Computers-in-2014> – Many-Taxpayers-Eligible-to-Use-Free-File; see e.g. Treas. Reg. §301.6011-2(b).

<sup>53</sup> IRC §7216.

<sup>54</sup> Primarily pursuant to IRC §6694.

<sup>55</sup> Information reporting largely began during World War II, with the introduction in the USA of the withholding tax regime. This, in part, explains the high rate of income tax compliance in the USA among wage-earners and those who receive interest and dividend income. The knowledge that the IRS has relevant and accurate tax information that has been submitted by other persons obviously discourages taxpayers from reporting that information improperly themselves.

<sup>56</sup> See e.g. IRC §§6041–6050W.

<sup>57</sup> E.g. Treas. Reg. §§1.6041-7 and 1.9101-1 (regarding wage reports and most income reports), 1.6402-2(e) (regarding dividend payments).

<sup>58</sup> See Treas. Reg. §1.7701-15(b)(4).

accustomed to the annual return requirement, which is well-covered in the media, and they (more or less) accept it as a duty of citizenship. Because many taxpayers have more tax withheld from their wages than is ultimately due, they may even look forward to getting a refund of the overwithheld amounts and thus are eager to file their annual returns. Taxpayers do occasionally protest against the compelled disclosure of information, but the courts typically dismiss those claims as not well founded.<sup>59</sup>

Moreover, because penalties may apply to information return filers who submit incorrect information,<sup>60</sup> information return filers also have an incentive to provide accurate data regarding taxpayers. Taxpayers even have a civil cause of action against a filer who willfully submits a fraudulent information return<sup>61</sup> – although that situation is vanishingly rare. As a consequence, disputes over the accuracy of the data reported on information returns are ordinarily resolved during the examination process discussed below.

The IRS is granted the power to prepare a return on behalf of a taxpayer who fails to file a return or submits a false or fraudulent return.<sup>62</sup> Once such a return is prepared, however, the deficiency procedures apply to the amount proposed as tax, and the taxpayer is permitted to seek judicial review and a redetermination of the amount of tax due in the US Tax Court.<sup>63</sup>

## 4. Assessments

The IRS is authorized to make an immediate assessment of the tax (including interest and certain penalties) determined by the taxpayer on a return.<sup>64</sup> The assessment of tax is simply a bookkeeping entry by an authorized delegate of the IRS,<sup>65</sup> and legitimate (non-frivolous) disputes over the validity of an assessment are rare, at least with respect to the amount of tax self-reported by taxpayers through the return process discussed above. There are numerous procedural safeguards, however, before the IRS can assess a proposed deficiency of tax (an amount beyond what the taxpayer self-assessed on the return). Statutorily, the IRS must first provide a taxpayer notice of a proposed deficiency, and then wait at least 90 days after the notice, in order to permit the taxpayer to seek judicial review in the US Tax Court.<sup>66</sup> The IRS's power to assess is stayed for the 90-day period and for as long as any Tax Court proceeding is pending.<sup>67</sup> There are very

<sup>59</sup> The US Constitution's Fifth Amendment protects against compelled self-incrimination, but it is narrowly applied by the courts in connection with routine tax returns.

<sup>60</sup> IRC §6721.

<sup>61</sup> IRC §7434.

<sup>62</sup> IRC §6020(b).

<sup>63</sup> See IRC §6213(a); *Millsap v. Comm'r*, 91 TC 926, 931 (1988).

<sup>64</sup> IRC §6201(a). As the Tax Court said, "the return is a consent to assessment of tax in our tax system". *Millsap v. Comm'r*, 91 TC 926, 932 (1988).

<sup>65</sup> IRC §6203.

<sup>66</sup> IRC §§6212–6213.

<sup>67</sup> IRC §6213(a). The limitations period on the IRS's power to assess is likewise tolled by the pendency of a Tax Court case. IRC §6501(a)(1).

few exceptions to this mandatory requirement: the IRS can only assess immediately to correct a mathematical error by the taxpayer on a return,<sup>68</sup> in cases where assessment will be jeopardized by delay,<sup>69</sup> or in a limited number of other situations.<sup>70</sup> Numerous safeguards also attend the collection of any tax, whether self-assessed by the taxpayer or otherwise. As a result, the assessment process itself is rarely in dispute.

## 5. Confidentiality

The IRS is a storehouse for sensitive information for all US taxpayers. The confidentiality of that information is a significant taxpayer right in the USA, which the report will discuss in depth.

The realities of tax administration in a modern economy have necessitated a huge number of provisions in the Code that impose information-gathering and reporting obligations on individuals and entities in the private sector.<sup>71</sup> These obligations initially fall on taxpayers themselves, starting with the basic requirement that an annual income tax return be submitted to the IRS.<sup>72</sup> But many reporting obligations fall on third parties with which taxpayers conduct business, and who must complete information returns reporting on financial and employment transactions with taxpayers. Broadly speaking these include not only truthful information returns, but also certain reporting obligations by intermediary or non-taxpaying organizations, counterparties to transactions, and even tax practitioners themselves.

The vast majority of this information is now provided to the IRS, and maintained by it, in electronic form. Taxpayers and privacy advocates are justifiably concerned that the IRS has become a comprehensive and immediately accessible database of the most sensitive financial information that the government gathers. This concern is exacerbated by the knowledge that many people view the IRS as an all-purpose reservoir of important information about Americans. There is an enormous range of demands for specific information that the IRS gathers, from other governmental agencies, to economic researchers, to marketers, hackers, and the just plain curious.<sup>73</sup>

Congress has responded to the demand for information with several provisions in the Code governing the use or disclosure of taxpayer information, once it is in the hands of the IRS. The basic provision is section 6103, the first sentence of which enshrines the principle that tax information is confidential and shall not be disclosed unless such disclosure is specifically authorized by law.<sup>74</sup> This principle

<sup>68</sup> IRC §6213(b)(1).

<sup>69</sup> IRC §6861.

<sup>70</sup> IRC §§6213(b)(3)–(b)(5).

<sup>71</sup> All of Code Chapter 61 (Information and Returns) and much of Chapter 78 (Discovery of Liability and Enforcement of Title), for instance.

<sup>72</sup> IRC §§6012(a), 6072(a).

<sup>73</sup> To the point that in 1997 Congress enacted a prohibition on IRS employees “browsing” the information the agency keeps. IRC §7213A.

<sup>74</sup> IRC §6103(a).

is usually justified on the grounds that it enhances voluntary compliance with the tax system: taxpayers will not provide the IRS with accurate information, the theory goes, unless they believe that the information will be kept confidential and will not be used for other purposes; therefore, the IRS must keep such information confidential. Maintenance of the confidentiality of information provided to the IRS is thus an enormously important right of US taxpayers.

While the confidentiality principle is easy to state, most of the rest of section 6103 consists of numerous exceptions, describing certain information that can be disclosed and specifying the circumstances under which such disclosures are authorized. Obviously, for example, disclosure to the taxpayer is authorized, and to certain parties related to the taxpayer.<sup>75</sup> A taxpayer may likewise waive confidentiality and authorize disclosures in certain circumstances, for purposes such as obtaining a mortgage, a background security check, new employment, etc.<sup>76</sup> Disclosure is of course permitted within government agencies, and as necessary to the courts and public to support tax administration itself.<sup>77</sup> But there are many exceptions authorizing disclosures for non-tax administration purposes that are less obvious, such as social security or pension laws, Medicare, food stamps, child support enforcement, or the repayment of student loans.<sup>78</sup>

The confidentiality rule is largely reversed for certain information and kinds of organizations that are subject to a different provision of the Code, section 6104. Certain charitable organizations, for instance, must make part or all of their returns and return information public, and even publish them on the internet.<sup>79</sup> The rationale for this reversal of the confidentiality rule for such organizations is unclear. It is usually said to be the price paid for receiving the public benefit of exemption from taxation; but then many other taxpayers receive all kinds of public benefits through the Code, and yet they still have the benefit of confidentiality of their return information.

A third section of the Code, section 6110, governs the information distributed by the IRS to the public at large, including published guidance, rulings, determination letters, chief counsel advice, technical advice memoranda, and other written determinations. Generally, any taxpayer-specific information that is contained in such material is redacted before the documents are released and published, and taxpayers are granted the opportunity to review the proposed redactions, contest them, and even litigate (anonymously) over them if agreement cannot be reached on the scope of the redactions.<sup>80</sup> This provision has been expanded over the years to cover more and more types of internal IRS communications; what is referred to as “chief counsel advice”,<sup>81</sup> and the scope of the definition of such advice has even been the subject of much litigation. The IRS is also authorized to withhold from public release under section 6110 the same kinds of material it could withhold under the US general Freedom of Information Act,<sup>82</sup> including material that is subject to

<sup>75</sup> *Ibid.* §6103(e).

<sup>76</sup> *Ibid.* 6103(c).

<sup>77</sup> *Ibid.* §§6103(h) and (k).

<sup>78</sup> *Ibid.* §6103(l).

<sup>79</sup> *Ibid.* §§6104(a)(1), (d)(1).

<sup>80</sup> *Ibid.* §§6110(f), (j).

<sup>81</sup> *Ibid.* §6110(i).

<sup>82</sup> 5 USC §552; see IRC §6110(i)(3)(B).

attorney–client privilege, the work product doctrine, or a special “deliberative process” privilege that applies only within the government.

The Code contains various collateral provisions, such as penalties and remedies, associated with these general rules. For instance, there are two provisions making it a crime for employees of the government to make unauthorized disclosures of returns or return information, or even to “browse” such information unnecessarily.<sup>83</sup> Civil remedies are also provided for taxpayers who are aggrieved by unauthorized disclosures of information,<sup>84</sup> or even inadequate redactions.<sup>85</sup>

These procedural provisions are rarely used, however, although it is unclear whether that is because there are so few breaches of confidentiality or because the remedies for such breaches may be inadequate. In practice, the IRS is extremely cautious about disclosing return information inadvertently, to the point that in many cases information is arguably over-withheld. The IRS routinely makes very conservative and even cramped interpretations of the exceptions permitting disclosure,<sup>86</sup> or refuses to utilize the authority it does have to disclose information.<sup>87</sup> Conversely, when information is disclosed, it can almost always be justified under some exception to section 6103,<sup>88</sup> and the authorized disclosures each year total literally in the billions.<sup>89</sup> As a consequence, disagreements over the confidentiality principle are a mainstay of discussion among tax professionals in the USA.<sup>90</sup>

At any rate, the principle of confidentiality is a significant taxpayer right in the USA, even mentioned in Publication 1.

## 6. Audits

The IRS is given extremely broad authority to audit returns. The statutory provision<sup>91</sup> first enumerates a series of purposes for which examinations may occur, and then a series of powers that may be utilized in such examinations:

“For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary

<sup>83</sup> IRC §§7213, 7213A.

<sup>84</sup> *Ibid.* §7431.

<sup>85</sup> *Ibid.* §6110(j).

<sup>86</sup> See e.g. Treas. Reg. §301.6103(c)-1, interpreting the situations when information may be disclosed to a person designated by a taxpayer.

<sup>87</sup> For instance, the IRS has never to the reporters’ knowledge utilized the authority in IRC §6103(n) and Treas. Reg. §301.6103(n)-2 to disclose information to whistleblowers under certain specified conditions.

<sup>88</sup> E.g. IRC §6103(k)(6), permitting disclosures as necessary for investigative purposes.

<sup>89</sup> See Joint Committee on Taxation, Disclosure Report for Public Inspection Pursuant to Internal Revenue Code section 6103(p)(3)(C) for Calendar Year 2012, JCX-8-13 (15 April 2013). Admittedly, 8.2 billion of the 8.3 billion disclosures identified by the Joint Committee were inter-governmental (to states or within the federal government) pursuant to exceptions in s. 6103.

<sup>90</sup> See e.g. C. Rizek, “Taxpayer Privacy and Disclosure Issues Will Continue to Touch Us All”, in *The Future of American Taxation* (Tax Analysts, December 2002).

<sup>91</sup> IRC §7602(a).

of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized –

- (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
- (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and
- (3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.”

Up to the point at which a case is referred to the US Department of Justice for criminal prosecution, the IRS may even use these authorities to investigate potential criminal offenses.<sup>92</sup> The Secretary’s authority to examine is extremely broad. Anything that “might throw light upon” a taxpayer’s liability<sup>93</sup> is considered fair game for investigation by the IRS; one court has even said that under this investigative power the IRS is “licensed to fish”.<sup>94</sup>

Accompanying this broad authority, however, are a wide array of procedural protections for taxpayers. Space does not permit a complete review of all these protections, but speaking very generally, and subject to numerous limitations and exceptions, they include: the right of representation during the audit process;<sup>95</sup> a “reasonable” time and place for examination of books and records or the taking of testimony,<sup>96</sup> which is usually negotiated between the taxpayer and the IRS agent; a single examination for each tax liability<sup>97</sup> (which may, however, extend over many weeks or even years); notice of contacts with third parties,<sup>98</sup> and in particular the right to be notified of, and to seek to quash, demands for records or testimony made to third parties;<sup>99</sup> the recording of any testimony;<sup>100</sup> costs and fees for certain witnesses;<sup>101</sup> clear notifications regarding taxes, penalties, and interest,<sup>102</sup> and annual reminders of unpaid amounts;<sup>103</sup> the right to access to the taxpayer’s own file;<sup>104</sup> and a shift of the burden of proof in litigation to the IRS if the taxpayer

<sup>92</sup> IRC §§7602(b), 7602(d).

<sup>93</sup> *United States v. Harrington*, 388 F.2d 520, 523-24 (2d Cir. 1968).

<sup>94</sup> *United States v. Giordano*, 419 F.2d 564 (8th Cir. 1969), *cert. denied*, 397 US 1037 (1969).

<sup>95</sup> IRC §7521(c); see also Treas. Reg. §§601.501- 602.508, *passim*. This right is essentially unlimited so long as the taxpayer is represented by an attorney, certified public accountant, or enrolled agent who is in good standing.

<sup>96</sup> IRC §7605(a).

<sup>97</sup> IRC §7605(b).

<sup>98</sup> IRC §7602(c)(2).

<sup>99</sup> IRC §§7609(a), (b)(2).

<sup>100</sup> IRC §7521(a).

<sup>101</sup> IRC §7610.

<sup>102</sup> IRC §7522.

<sup>103</sup> IRC §7524.

<sup>104</sup> See 5. USC §552, the US general Freedom of Information Act.

has cooperated in the examination process and produces “credible” evidence for the taxpayer’s position.<sup>105</sup>

The process by which taxpayers are selected for examination in the first place, however, is extremely opaque. Generally speaking, returns are classified for examination as part of intake and processing, and returns “with the highest examination potential” and “those most in need of examination” are selected for office or field examination.<sup>106</sup> The IRS initially uses a “discriminant index function” (DIF), which is a mathematical technique or formula used to score income tax returns for their examination potential, based on past data.<sup>107</sup> Not surprisingly, however, the DIF formula is a closely guarded secret at the IRS, and has been held to be exempt from access under the US Freedom of Information Act.<sup>108</sup> The IRS also periodically commences programs aimed at auditing certain groups of taxpayers, such as “high net worth” individuals<sup>109</sup> or participants in “abusive” transactions.<sup>110</sup> Taxpayers are essentially given no choice in the matter of whether their returns are to be examined.

Generally speaking, extraordinarily intrusive examination techniques, such as searches of taxpayer premises or telephone surveillance (wiretaps), are used only in criminal tax investigations. Even then they are used relatively rarely, and only under judicial supervision and subject to many constitutional and statutory protections. The IRS’s authority to enter premises in civil tax examinations is generally limited to cases involving taxable objects, such as firearms or fuel subject to excise taxes,<sup>111</sup> not income, estate, or gift taxes.

## 7. Appeals

The right to appeal nearly all IRS activities is a very important taxpayer protection, so it will be discussed in some detail.

Notwithstanding the “right to appeal an IRS decision in an independent forum” stated in Publication 1, the right to an administrative appeal is in most circumstances not provided for by statute.<sup>112</sup> Exceptions to this rule include the CDP provisions and certain related collection appeals (discussed below), which are statutorily required. Appeal rights are also occasionally referred to in other provisions of the Code, for instance, the provision that triggers the right to recover attorneys’ fees and costs incurred in contesting an IRS action.<sup>113</sup>

<sup>105</sup> IRC §7491(a).

<sup>106</sup> Treas. Reg. §601.105(a).

<sup>107</sup> IRM §4.1.3.2 (10 August 2012).

<sup>108</sup> E.g. *Small v. Internal Revenue Service*, 820 F.Supp. 162 (D.N.J. 1992); see also IRC §6103(b)(2) (standards used to select returns for examination may be withheld).

<sup>109</sup> IRM §4.1.3.1.3 (10 August 2012).

<sup>110</sup> IRM §4.1.3.1.2 (10 August 2012).

<sup>111</sup> IRC §7606.

<sup>112</sup> The IRS has, however, long afforded appeals rights administratively, even though not required by statute to do so. See Treas. Reg. §601.106.

<sup>113</sup> IRC §7430(c)(2). (Flush language at end.) This provision permits the recovery by taxpayers of their reasonable administrative costs, including professional fees, incurred after the receipt of a



One statutory provision is of note, however. The first section of the 1998 RRA, which required the IRS to promulgate its reorganization plan, also required the plan to include an independent appeals function within the IRS.<sup>114</sup> The RRA went on to state that the plan must prohibit “*ex parte* communications between appeals officers and other Internal Revenue Service employees”. The prohibition applies, however, only “to the extent that such communications appear to compromise the independence of the appeals officers”.<sup>115</sup> The IRS has implemented this restriction with a revenue procedure, IRM provisions, and other informal guidance.<sup>116</sup> Both the National Taxpayer Advocate and the Treasury Inspector General for Tax Administration have evaluated whether the restriction on *ex parte* communications has been effective, with varying results.<sup>117</sup> In particular, taxpayers and the IRS often hold differing views on whether the independence of appeals appears to have been compromised,<sup>118</sup> and there is no clear remedy for a violation of the *ex parte* restrictions. Thus the National Taxpayer Advocate has recommended improvements to the *ex parte* rules, including training, better documentation of violations, and providing enhanced regulatory guidance.<sup>119</sup>

Because there is little statutory direction, the IRS has generally provided appeals rights by regulation in most tax controversy situations.<sup>120</sup> These are usually elective by the taxpayer, but may be bypassed by the IRS only in certain limited circumstances (e.g. where a limitations period is about to expire, in situations of imminent jeopardy, etc.).

As noted above, although the Appeals Office remains a part of the tax agency itself, and nominally reports to the Commissioner of Internal Revenue, it is statutorily required to provide “independent” review. The mission of appeals is “to resolve tax controversies, without litigation, on a basis which is fair and impartial to both the government and the taxpayer and in a manner that will enhance voluntary compliance and public confidence in the integrity and efficiency of the Service”.<sup>121</sup> The appeals process is not a continuation or an extension of the examination process.<sup>122</sup> In particular, examining agents are not permitted to consider the potential hazards of litigating a legal position, but appeals officers are specifically

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notification entitling them to appeal. Recovery is not automatic, however; other conditions apply, including demonstrating that the IRS position was “not substantially justified” and falling below certain net worth requirements. IRC §7430(c)(4).

<sup>114</sup> RRA §1001(a)(4). This provision is not codified in the IRC but is nevertheless law.

<sup>115</sup> *Ibid.*

<sup>116</sup> Rev. Proc. 2012-18, 2012-10 IRB 455 (5 March 2012); IRM 8.1.10.1 (1 October 2012); IRS Chief Couns. Not. 2012-010 (10 May 2012).

<sup>117</sup> National Taxpayer Advocate’s 2010 Annual Report to Congress, MSP #8, 110 (5 January 2011), available at [http://www.irs.gov/pub/irs-utl/vol\\_1\\_msp\\_6\\_15\\_taxpayerrights.pdf](http://www.irs.gov/pub/irs-utl/vol_1_msp_6_15_taxpayerrights.pdf); Highlights of TIGTA’s Report on the Overall Independence of Appeals, available at <http://www.irs.gov/Individuals/Highlights-of-TIGTA’s-Report-on-the-Overall-Independence-of-Appeals> (page last updated on 16 January 2014).

<sup>118</sup> See e.g. IRS Chief Couns. Adv. 201432018 (issued 8 August 2014).

<sup>119</sup> MSP #8, *op. cit.*

<sup>120</sup> See generally Treas. Reg. §601.106.

<sup>121</sup> IRM §8.1.1.1 (10 February 2012).

<sup>122</sup> IRM §8.6.1.6.2 (14 November 2013).

authorized to do so.<sup>123</sup> These may be either factual hazards (such as evidence issues or the taxpayer's ability to prove facts other than those the Examination division believes to be true), or new legal theories or alternative legal arguments that support the parties' positions. However, the appeals officer will not raise new issues or develop evidence that is not in the case file to support new theories or arguments, but will instead focus dispute resolution efforts on resolving the points of disagreement identified by the parties.<sup>124</sup>

The most common appeals situation involves "routine" determinations of income (or estate and gift) taxes. In such cases, the IRS must in most circumstances offer a right to appeal before the assessment of a deficiency. The IRS first issues a "revenue agent's report" setting forth the proposed adjustments, which is accompanied by a letter (known as the "30 Day Letter") that gives the taxpayer 30 days to protest the proposed determination to appeals. If appeal is not sought, the taxpayer receives a statutory notice of deficiency, also known as the "90 Day Letter" because it gives the taxpayer the right to litigate the IRS's determination by filing a petition within 90 days with the US Tax Court.<sup>125</sup> Alternatively, if an agreement cannot be reached in appeals, the Appeals Office will issue the deficiency notice entitling the taxpayer to proceed to Tax Court.<sup>126</sup> The advantage of the Tax Court is that the issue may be litigated before the taxpayer is required to pay the deficiency amount. If a taxpayer who has already paid an assessed amount ascertains that there has been an overassessment, the taxpayer may claim a refund of the amount overpaid.<sup>127</sup> If the IRS denies the refund, an appeal of the denial is ordinarily afforded.<sup>128</sup>

The Appeals Office has jurisdiction to resolve disputes in a variety of other situations, including employment taxes, excise taxes, certain assessable penalties, etc.<sup>129</sup> In most of these situations, the appeal is offered after the IRS has assessed the liability in question but before collection activities have begun. Since the RRA in 1998, one of the most important functions of the Appeals Office relates to CDP cases (which are separately discussed below). Appeals will also consider disputes related to many other collection activities. For instance, the IRS is authorized by statute<sup>130</sup> to enter into agreements with taxpayers allowing them to make tax payments in installments, or to compromise liabilities for reduced amounts.<sup>131</sup> The Code<sup>132</sup> requires the IRS to establish procedures to allow a taxpayer to appeal a rejection of an offer in compromise or installment agreement, and the IRS has done so.<sup>133</sup> Under the collection appeals program (CAP), taxpayers may also appeal IRS

<sup>123</sup> "Appeals will ordinarily give serious consideration to an offer to settle a tax controversy on a basis which fairly reflects the relative merits of the opposing views in the light of the hazards which would exist if the case were litigated." IRM §1.2.17.1.6, Policy Statement 8-47 (6 April 1987).

<sup>124</sup> IRM §8.6.1.6.2 (14 November 2013).

<sup>125</sup> IRC §6213(a).

<sup>126</sup> See generally IRM §8.17.4.1 (27 September 2013).

<sup>127</sup> Treas. Reg. §301.6402-2.

<sup>128</sup> IRM §8.1.3.1 (23 October 2007); IRM §8.7.7.1 (11 December 2013).

<sup>129</sup> IRM §8.1.3.1 (23 October 2007).

<sup>130</sup> IRC §6159.

<sup>131</sup> *Ibid.* §7122(a).

<sup>132</sup> *Ibid.* §7122(e).

<sup>133</sup> IRM §8.24.1.2.3 (17 December 2013) (installment payment agreements); IRM §8.23.1 (20 November 2013) (offers in compromise).

seizures of property or lien filings, even if they do not technically qualify for the CDP procedures.<sup>134</sup>

Because the Appeals function is the principal mechanism for dispute resolution with the IRS,<sup>135</sup> the IRS stresses the dissemination of proper information regarding Appeals to taxpayers. Its principal methods of taxpayer education regarding Appeals are once again publications, notably Publication 5, *Your Appeal Rights and How to Prepare a Protest if You Don't Agree*,<sup>136</sup> and Publication 556, *Examination of Returns, Appeal Rights, and Claims for Refund*.<sup>137</sup> Within 30 days of the receipt of a case in appeals, a letter is sent to the taxpayer, usually accompanied by Publication 4227, *Overview of the Appeals Process Brochure*,<sup>138</sup> and appeals officers must ordinarily communicate the current status of the case to the taxpayer within reasonable intervals, or approximately every 90 days. The appeals process itself, however, is generally quite informal, frequently involving multiple conversations between the appeals officer and the taxpayer or the taxpayer's representatives.<sup>139</sup>

Alternative dispute resolution (ADR) programs were mandated by the RRA in what is now Code section 7123, which requires the IRS to establish arbitration and mediation procedures. The Appeals Office and the IRS also offer a variety of other programs, generally implemented by revenue procedures, to resolve disagreements outside the regular appeals process, including "early referral" and "fast track" procedures. Although a full discussion of each of these processes is beyond the scope of this report,<sup>140</sup> they are briefly summarized below. Importantly, all of these programs require a certain level of cooperation between the IRS and the taxpayer; in particular, neither party can invoke them unilaterally.

- Early referral: this program<sup>141</sup> allows certain unagreed but fully developed issues to be referred to appeals while the examination is still on-going. The Appeals Office retains final settlement authority over the issue(s) referred. Taxpayers and tax practitioners often find this procedure useful in multi-issue examinations when they anticipate the resolution of one or two unagreed issue(s) will help resolve the case completely without further proceedings.
- Fast track: in contrast to early referral, under the "fast track" program<sup>142</sup> the entire case is ordinarily moved to appeals, but the examination team rather than the appeals officer has final settlement authority over the disputed issues. The appeals officer uses mediation techniques to bring the parties to

<sup>134</sup> IRM §8.24.1.2 (17 December 2013).

<sup>135</sup> IRM §8.1.1.2 (10 February 2012).

<sup>136</sup> Publication 5, *Your Appeal Rights and How to Prepare a Protest if You Don't Agree*, available at <http://www.irs.gov/pub/irs-pdf/p5.pdf> (rev. January 1999).

<sup>137</sup> Publication 556, *op. cit.*, at 9.

<sup>138</sup> IRM §8.2.1.7 (28 June 2012); Publication 4227, *Overview of the Appeals Process Brochure*, available at <http://www.irs.gov/pub/irs-pdf/p4227.pdf> (rev. October 2010).

<sup>139</sup> IRM §8.2.1.7 (28 June 2012).

<sup>140</sup> Most of them are discussed in Publication 4167, *Appeals – Introduction to Alternative Dispute Resolution*, available at <http://www.irs.gov/pub/irs-pdf/p4167.pdf> (rev. July 2012).

<sup>141</sup> Rev. Proc. 99-28, 1991-1 CB 109; IRM §8.26.4.1 (26 October 2007).

<sup>142</sup> Rev. Proc. 2003-40, 2003-1 CB 1044; Announcement 2006-61, 2006-36 IRB 390; Announcement 2011-5, 2011-4, IRB 430; Announcement 2008-105, 2008-2 CB 1219; Announcement 2012-34, 2012-36 IRB 334; IRM §8.26.1.1 (1 October 2012); IRM §8.26.1.2 (27 September 2012); IRM §8.26.7.1 (28 March 2014).

an acceptable resolution; thus an important condition of fast track is that the *ex parte* rules be waived by the taxpayer, so that Appeals can candidly discuss the merits of the issue with the examination team as well as the taxpayer. Fast track is most useful where the examiners recognize that there are hazards of litigation to the IRS's position, because it enables them to settle an issue on that basis.

- Post-appeals mediation: as the name implies, the “post-appeals mediation” program<sup>143</sup> involves the use of mediation techniques after the taxpayer and the Appeals Office have been unable to resolve an issue using the ordinary procedures. Usually a mediator from appeals (who was not previously involved in the case), as well as an outside mediator handle this mediation process.
- Arbitration: binding arbitration may be used to resolve issues while a case is in appeals after settlement discussions are unsuccessful and, generally, when all other issues are resolved.<sup>144</sup> Generally, only factual issues are eligible for arbitration; legal issues are not.<sup>145</sup> Arbitration is not yet popular with taxpayers or the IRS, because it is usually binding and unappealable, and it is not clear whether it has significant cost advantages over traditional litigation.

In short, there is an abundance of law, and many programs and forms of remedy, ensuring the taxpayer's right to an independent appeal of proposed actions within the IRS. Because of the ability of the Appeals Office to consider the hazards of litigation, as a practical matter it often serves as an alternative to litigation in the courts, or at least a precursor to it.<sup>146</sup> And the high success rate of appeals in settling cases ensures that many disputes between taxpayers and the IRS are appropriately resolved earlier and at less cost than they would be if litigated.

## 8. Criminal and administrative sanctions

The Fifth Amendment to the US Constitution protects against double jeopardy, stating that no person may “be subject for the same offence to be twice put in jeopardy of life or limb”. It is a well-established principle, however, that successive proceedings regarding crimes and civil liabilities (including tax, civil penalties, interest, and certain other additions to tax) do not offend this principle.<sup>147</sup> Nevertheless, civil and criminal tax investigations ordinarily proceed separately in the United States, proving a significant taxpayer protection.

The criminal tax function is an important part of the IRS's overall enforcement system. It acts to foster voluntary compliance and deter wrongdoing. Criminal tax

<sup>143</sup> Rev. Proc. 2009-44, 2009-40 IRB 462; IRM §8.26.5.1 (27 August 2010).

<sup>144</sup> Rev. Proc. 2006-44, 2006-44, IRB 800; IRM §8.26.6.1 (7 August 2009).

<sup>145</sup> IRM §8.26.6.3.1 and IRM §8.26.6.3.2 (17 June 2008).

<sup>146</sup> Indeed, when a taxpayer brings a case in a US Tax Court without having previously gone through the appeals process, the IRS will refer the case for a short period to Appeals to see if it can be settled without further litigation. Treas. Reg. §601.106(d)(3).

<sup>147</sup> *Helvering v. Mitchell*, 303 US 391 (1938); see also *Hudson v. United States*, 522 US 93 (1997).

cases usually begin with the IRS Criminal Investigation Division after a civil IRS agent or a criminal investigator receives a “firm indication of fraud” involving a taxpayer. With a few exceptions, all civil examination and collection activity ceases at this time, and the case is placed on a “criminal track”. From the IRS perspective, the criminal matter will end either in a recommendation to prosecute or not, and once the case is referred to the US Department of Justice (DOJ) (which has an entire division devoted to criminal and civil tax matters), the case will move forward to indictment or be “declined”. In either instance, and again with exceptions, it is only after completion of the criminal case that the IRS can resume civil assessment and collection activity.

Thus, criminal investigation and civil examination proceedings are ordinarily separated as a matter of policy. The separation of the criminal and civil functions protects both the integrity of the tax system and taxpayer rights. First, it quite obviously prevents taxpayers under investigation from “buying” their way out of trouble by offering to pay outstanding taxes, interest, and penalties. A fundamental principle of criminal tax enforcement in the USA is that a taxpayer who is the subject of a criminal tax investigation may not terminate the case, or otherwise negotiate or compromise aspects of the case, merely by paying, or agreeing to pay the taxes at issue. Criminal tax cases instead are evaluated on their own merits (that is, whether the government can prove a criminal tax violation and would likely win if the case goes to court), and they serve a hugely important deterrent function in the overall scheme of US tax enforcement. The USA has long believed that whether to prosecute a criminal tax case, or the decision of who to prosecute, should not be influenced by the defendant’s ability or inability to pay the taxes due. This policy reflects the bedrock American legal principle of equality of all before the law.

The separation of the criminal and civil tax functions also protects taxpayers. Most significantly, it substantially reduces the chances of inadvertent (or compelled) self-incrimination, which is a fundamental right of citizens guaranteed by the Fifth Amendment to the US Constitution. Without the separation of these functions, taxpayers would be required to work with IRS civil examiners and respond (truthfully) to their inquiries, the (truthful) answers to which could then be used against them in the criminal investigation.

As noted above, there are exceptions to this policy. In certain instances, the IRS and DOJ may conduct “parallel proceedings,” i.e. both civil and criminal cases involving the same general set of transactions. This occurs in cases such as those involving tax shelter transactions, where the IRS and DOJ may seek to prosecute promoters of the scheme, but audit civilly the taxpayers who participated. It can also occur in investigations of fraudulent tax return preparers, where the DOJ may audit the taxpayers whose returns were prepared by an unscrupulous professional at the same time the return preparer is under criminal investigation. There are similar cases, but in all events, the government places the criminal matter as the higher priority, and it will not entertain an offer of payment to resolve the criminal matter.

## 9. Enforcement of taxes: collection

Because enforced collection of taxes is a procedural area that frequently causes conflicts between taxpayers and the IRS, there are many safeguards built into the collection process. These fall into the typical categories of limitations on IRS actions: rights to collection alternatives, administrative appeal rights, litigation opportunities, and disclosure and notifications to taxpayers regarding all of the above. We will discuss these in some greater detail.

A brief overview of the substantive rules governing collection is necessary for background. The Code provides that a lien in favor of the USA arises on “all property and rights to property” of the taxpayer if, after demand is made, the taxpayer neglects or refuses to pay that tax.<sup>148</sup> The lien dates back to the date the assessment is made and exists until the lien becomes unenforceable (either because the tax is paid, or because the limitations period on collection, which is generally ten years, has expired).<sup>149</sup> The lien is perfected immediately upon assessment, but its priority versus other creditors depends on the “first in time, first in right” principle.<sup>150</sup> The Code provides that in most situations priority is obtained only after notice of the federal tax lien is filed or recorded properly.<sup>151</sup>

The IRS also has the authority to “levy”, or seize, property administratively,<sup>152</sup> without first obtaining a court judgment as most other creditors must do. The IRS may levy on “all property and rights to property” belonging to a taxpayer, or on which a lien exists, if within ten days after notice and demand, the taxpayer neglects or refuses to pay. Property is defined to include salary and wages, although certain exemptions from levy, both in kind and in amount, are set forth in the Code (and are generally indexed for inflation).<sup>153</sup>

But as noted above, the procedural safeguards surrounding these collection tools are extensive. For instance, the IRS must notify a taxpayer of the filing of notice of federal tax lien within five days after the lien is filed.<sup>154</sup> This notice must state the amount of unpaid tax, inform the taxpayer of the 30-day period within which a CDP appeal can be made, explain the administrative appeals available to the taxpayer, and set forth the Code provisions relating to a lien.<sup>155</sup>

Similarly, at least 30 days before a levy may be executed, the IRS must notify the taxpayer in writing of its intention to levy.<sup>156</sup> The notice must state the amount of unpaid tax, the IRS’s proposed action, the Code provisions relating to levy, the procedures available to the IRS, the administrative appeals available to the taxpayer, and the alternatives available to prevent the levy. The IRS is further

<sup>148</sup> IRC §6321.

<sup>149</sup> *Ibid.* §§6322 (period of lien), 6502(a) (collection after assessment).

<sup>150</sup> *United States v. City of New Britain*, 347 US 81 (1954).

<sup>151</sup> *Ibid.* §§6323(a), (f).

<sup>152</sup> *Ibid.* §§6331(a), (b).

<sup>153</sup> *Ibid.* §§6331(e), 6334.

<sup>154</sup> *Ibid.* §6320(a)(1) and (a)(2).

<sup>155</sup> *Ibid.* §6320(a)(3). The CDP procedures with respect to lien filings are explained in Treas. Reg. §301.6320-1 and IRM §5.1.9.1 (14 June 2014).

<sup>156</sup> IRC §6331(d).



required to notify the taxpayer of his or her CDP rights at least 30 days before a levy.<sup>157</sup>

Under either CDP procedures (either after a lien filing or before a levy), the taxpayer has a right to a hearing by an impartial officer from the IRS Office of Appeals. All that the taxpayer must do is request a hearing in writing within the 30-day period provided, although only one hearing per tax period is permitted.<sup>158</sup> The taxpayer may raise any relevant issue relating to the unpaid tax, including appropriate spousal defenses, challenges to the appropriateness of collection actions, or offers of collection alternatives such as posting a bond, an installment payment agreement, or an offer in compromise.<sup>159</sup> If the taxpayer has not previously had opportunity to challenge the underlying nature of the assessment (i.e. whether he is liable), such a defense may be presented at the hearing.<sup>160</sup> The taxpayer is given an independent review by the Office of Appeals to ensure that the lien filing or proposed levy is warranted. In particular, the hearing officer must verify that the proper procedures were followed and consider the issues raised by the taxpayer. The hearing officer also evaluates whether the proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary.<sup>161</sup>

If the hearing does not resolve the collection action, the taxpayer may obtain review of the appeals determination by the US Tax Court by filing a petition within 30 days after the determination letter is sent.<sup>162</sup> The Tax Court will evaluate the appropriateness of the appeals determination using an “abuse of discretion” standard, unless the amount of the underlying tax liability is properly at issue, in which case review is *de novo*.<sup>163</sup> The availability of such judicial review helps to ensure that the IRS has acted appropriately and within the confines of the law.

Since the enactment of the CDP procedures in 1998, taxpayers and tax practitioners have found them very useful as a brake on the routine IRS collection processes. The IRS Appeals Office and the Tax Court have been required to devote considerable resources to these cases, however.

Failure to seek a CDP hearing is not an absolute bar to appeal. The IRS offers a CAP appeal, which is similar in nature to a CDP hearing,<sup>164</sup> the principal difference being that there is no right of judicial review by the Tax Court of a determination by a

appeals in a CAP case. Nevertheless, the CAP program, like CDP, affords taxpayers an opportunity to present collection defenses to an independent appeals officer and to try to resolve collection issues cooperatively.

Aside from administrative appeals, there are a variety of other rules governing federal tax liens and levies. For instance, no levy may be made while an offer in

<sup>157</sup> *Ibid.* §6330(a). The CDP procedures with respect to levies are explained in Treas. Reg. §301.6330-1 and IRM §5.1.9.1 (14 June 2014).

<sup>158</sup> IRC §§6320(b), 6330(b).

<sup>159</sup> *Ibid.* §§6320(c), 6330(c)(2).

<sup>160</sup> *Ibid.* §§6320(c), 6330(c)(2)(B).

<sup>161</sup> *Ibid.* §§6320(c), 6330(c)(3).

<sup>162</sup> *Ibid.* §§6320(c), 6330(d)(1).

<sup>163</sup> *Freije v. Comm’r*, 125 TC 14, 23 (2005); *Goza v. Comm’r*, 114 TC 176, 181-82 (2000).

<sup>164</sup> IRM 5.1.9.4 (7 February 2014).

<sup>165</sup> IRC §6331(k).



compromise or an offer of an installment payment agreement is pending.<sup>165</sup> Additionally, levy cannot occur when an installment agreement is in place, or within 30 days of its termination (or longer, if appealed by the taxpayer).<sup>166</sup> And judicial remedies exist for certain other improper collection actions, e.g. retrieving wrongfully levied-upon property<sup>167</sup> or clearing the title of property from a federal tax lien.<sup>168</sup>

In short, Congress and the IRS have provided taxpayers with numerous rights regarding the collection process. While the IRS can sometimes be highly aggressive in the collection of taxes, and the process can sometimes be very contentious, the existence of such rights helps to assure taxpayers that at least they have remedies within the system to protect against what might be perceived as abuse or overly harsh treatment.

<sup>166</sup> *Ibid.* §6331(k)(2).

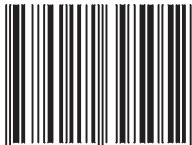
<sup>167</sup> *Ibid.* §7426(a)(1).

<sup>168</sup> 28 USC §2410(a).



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ISBN 978 90 12 39505 2



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