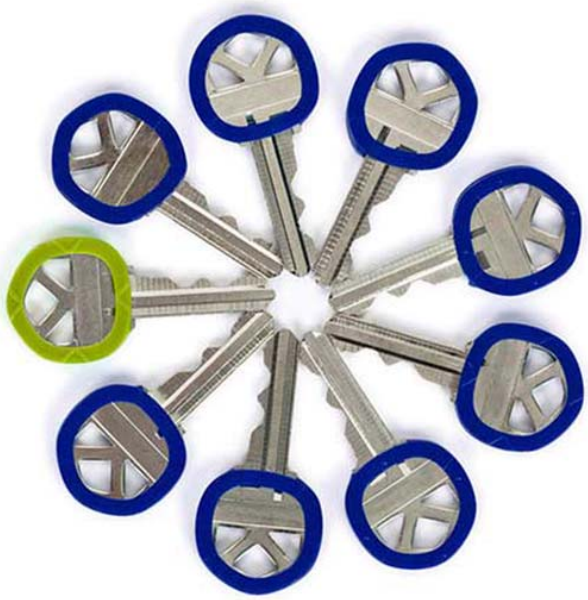

In this issue:

IRS Large Business & International Division Announces New Campaigns: Seven international campaigns and four domestic campaigns

On November 3, 2017, the IRS announced an additional 11 compliance campaigns as areas of focus for the Large Business & International Division ("Announcement").[1] The 11 newly identified campaigns focus primarily on international issues, with seven international campaigns and four domestic campaigns. In January 2017, the IRS

[1] IRS Announces rollout of 11 Large Business and International Compliance Campaigns (Nov. 3, 2017), located at: https://www.irs.gov/businesses/large-business-and-international-launches-compliance-campaigns-0, updated November 3, 2017.

launched its campaign initiative with an initial 13 compliance campaigns and subsequently conducted webinars to discuss the specific campaigns and campaign process.[2]

Similar to the initial campaigns, the 11 new campaigns were identified based upon data analysis and IRS employee suggestions. The primary treatment stream for the majority of the new campaigns is issue-focused examinations, but the Announcement notes that other treatment streams may also be utilized. The IRS' goal for campaigns is to move towards issue-focused examinations and effectively allocate resources to identified areas of compliance risk.[3]

The newly announced campaigns are as follows, by practice area:

- **Withholding & International Individual Compliance:**
  - Form 1120F Chapter 3 and Chapter 4 Withholding
  - Swiss Bank Program
  - Foreign Earned Income Exclusion
  - Verification of Form 1042-S Claimed on Form 1040NR
- **Cross Border Activities:**
  - Corporate Direct (Section 901) Foreign Tax Credit
  - Section 956 Avoidance
- **Enterprise Activities:**
  - Energy Efficient Commercial Building Property
- **Geographic Practice Area:**
  - Eastern: Agricultural Chemicals Security Credit
  - Northeastern: Deferral of Cancellation of Indebtedness Income
  - Western: Economic Development Incentives
  - Western: Individual Foreign Tax Credit (Form 1116)

International Campaigns[4]

Several of the newly identified international campaigns are extensions of current programs or policies. Both the Form 1120F Chapter 3 and Chapter 4 Withholding Campaign and Verification of Form 1042-S Claimed on Form 1040NR Campaign are designed to verify withholding for refunds claimed by non-resident taxpayers. In early 2016, the IRS implemented policy of systematic review of withholding documentation, such as Forms 1042-S, *Foreign Person US Source Income Subject to Withholding*, and Forms 8805, *Foreign Partner's Information Statement of Section 1446 Withholding Tax*, for taxpayers filing a Form 1120-F or Form 1040NR requesting a refund. This recent policy can delay the issuance of refunds up to six months. See Internal Revenue Manual Section 21.8.1 and 21.8.2.

Further, the Swiss Bank Program Campaign, is a continuation of a US Department of Justice initiative to identify potential reportable activity, and corresponding income, through communications with Swiss financial institutions. This campaign will be focused on identifying US persons with beneficial ownership of foreign financial accounts, which could impact both income tax filings and filings under 31 CFR 1010.350 requiring disclosure of foreign financial accounts on FinCEN Form 114 (commonly known as FBARs). Recently, John Cardone, director (withholding and international compliance), IRS Large Business and International Division speaking at the annual institute on current issues in International Taxation noted the IRS plans to send approximately 100 letters to US clients of financial institutions that participated in the US Department of Justice initiative to ask about data not reflected on tax filings.[5]

In addition, the Corporate Direct (Section 901) Foreign Tax Credit ("FTC") Campaign and Individual Foreign Tax Credit (Form 1116) Campaign focus on the foreign tax credit. The corporate FTC campaign specifically relates to taxpayers

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[2] For more information related to the initial 11 campaigns, see *IRS Insights*, "IRS Large Business & International Division Releases Initial Campaigns," March 2017 edition.
URL: http://newsletters.usdbriefs.com/2017/Tax/IRSI/170313_3.html

[3] IRS Announces rollout of 11 Large Business and International Compliance Campaigns (Nov. 3, 2017), located at: https://www.irs.gov/businesses/large-business-and-international-launches-compliance-campaigns-0, updated November 3, 2017.

[4] *Supra 1.*

[5] As reported by Tax Analysts, *IRS to Send 'Nudge Letters' to Taxpayers Linked to Swiss Bank Program*, Tax Notes for December 4, 2017.

claiming an FTC under Section 901 that are in an excess limitation position. The Announcement notes this campaign is only the first of several campaigns targeted on FTCs, and subsequent campaigns could address indirect credits and Section 904(a) FTC limitations. The individual FTC campaign is focused on evaluating whether the taxpayers have properly computed the limitations on the Form 1116 due to the complexities.

Other international campaigns will focus on whether taxpayers have properly included certain items of foreign income. The Section 956 Avoidance Campaign is designed to evaluate whether taxpayers are utilizing mechanisms, such as cash pooling or other arrangements, to mitigate Section 956 impacts. This provision generally requires an income inclusion in instances of a loan between a controlled foreign corporation and US parent entity. Additionally, the Foreign Earned Income Exclusion Campaign will examine whether individual taxpayers have properly excluded income under Section 911.

Domestic Campaigns[6]

The Announcement also includes four new domestic campaigns, of which the majority focuses the applicability of taxpayers to claim certain credits or incentives and tax treatment. The Energy Efficient Commercial Building Deduction Campaign and Agricultural Chemicals Security Credit Campaign are designed to assess whether taxpayers properly claimed these items. In addition, the new Economic Development Incentives Campaign will evaluate whether taxpayers that received government economic incentives, such as refundable credits, tax credits and/or grants, properly reported those incentives for tax purposes.

Lastly, the Deferral of Cancellation of Indebtedness Income Campaign, will evaluate whether taxpayers who properly deferred cancellation of debt income in tax years 2009 or 2010 have reported these items in later periods. The IRS will be utilizing issue-based examinations for this campaign as well, but is also considering soft letters requesting additional information.

Additional Guidance

Currently, it is unclear whether the IRS will conduct additional webinars, similar to the webinars for the initial campaigns. As noted in prior webinars, the IRS may release written guidance, such as Practice Units, related to issues identified in the campaigns.[7] In recent years, the IRS has released a number of Practice Units on a variety of topics, including both domestic and international topics.[8]

At this juncture, the IRS has not identified whether certain Practice Units relate specifically to a designated campaign, or if new Practice Units will be released by campaign. However, there are a number of Practice Units available that discuss certain campaign topics, such as the foreign tax credit. Accordingly, taxpayers and practitioners may want to look to these Practice Units for guidance in the IRS' interpretation of relevant authority.

IRS grants relief for certain entities performing acts by due date in effect prior to surface transportation act

The Surface Transportation and Veterans Health Care Choice Improvement Act of 2015 ("Surface Transportation Act") amended Section 6072 and changed the date by which a partnership is required to file an annual return for tax years beginning after December 31, 2015. Under the Surface Transportation Act, the due date of a partnership income tax return was changed from the 15th day of the 4th month (April 15 for calendar-year taxpayers) ("prior due date") following the end of the taxable year to the 15th day of the 3rd month (March 15 for calendar-year taxpayers) ("new due date").

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[6] *Supra 1.*
[7] For more information related to the initial 11 campaigns, see *IRS Insights*, "IRS Large Business & International Division Releases Initial Campaigns," March 2017.
URL: http://newsletters.usdbriefs.com/2017/Tax/IRSI/170313_3.html
[8] IRS Practice Units, located at: https://www.irs.gov/businesses/corporations/practice-units, updated November 21, 2017.

Recently, the IRS has issued notices to provide relief for entities that were required to file Forms 1065, *US Partnership Income Tax Return*, Form 1065-B, *US Return of Income for Electing Large Partnerships*, or Form 1066, *US Real Estate Mortgage Investment Conduit (REMIC) Income Tax Return* by the new due date for tax years beginning after December 31, 2015 and before January 1, 2017.

Notice 2017-47

In Notice 2017-47, the IRS granted relief from late filing penalties for the first taxable year that began after December 31, 2015, for Form 1065 or Form 1065-B filed by partnerships, or Form 1066 filed by a REMIC, if the return would have been timely under the partnership return due date prior to the Surface Transportation Act. This guidance specifies that taxpayers must have filed either a return by the prior due date, or submitted a Form 7004, *Application for Automatic Extension of Time to File Certain Business Income Tax, Information or Other Returns*, by the prior due date for the relief to apply.

In addition, Notice 2017-47 provides for penalty relief for the late filing, or issuance, of certain other forms dependent upon the due date of the partnership return. These forms include: Form 8804, *Annual Return for Partnership Withholding Tax*, Form 8805, *Foreign Partner's Information Statement of Section 1446 Withholding*, Form 5471, *Information Return of US Person with Respect to Certain Foreign Corporations*, and Schedule K-1, *Partner's Share of Income, Deductions, Credits, etc.*

Notice 2017-71

Subsequently, the IRS issued Notice 2017-71 ("Notice"), which amplifies, clarifies and supersedes Notice 2017-47. The Notice provides that certain acts ("applicable acts") performed by certain entities for tax years beginning after December 31, 2015 and prior to January 1, 2017[9] will be deemed timely if performed by the due date prior to the Surface Transportation Act. The Notice states that partnerships (Form 1065 and Form 1065-B), REMICs (Form 1066), banks with respect to common trusts and apostolic associations that file a Form 1065 (collectively "designated entities") are eligible for the relief.

The Notice defines applicable acts as those required to be completed by the due date of the designated entity's income tax return, such as elections, contributions to an employee pension plan or paying tax. Thus, the IRS will deem these acts timely if performed by the prior due date. For reference, the Notice contains a non-exhaustive list of applicable acts eligible for the relief.

Although the payment of tax will be deemed timely, the Notice states that interest under Section 6601 will not be waived. Accordingly, a taxpayer may not be subject to a late payment penalty under Section 6651 if payment is made by the prior due date, but the taxpayer will be subject to interest from the new due date.

Lastly, the Notice provides that if a taxpayer has already received a penalty notice related to a late filing for which relief has been granted, the IRS will issue an abatement letter shortly. For other acts, such as elections, the Notice states that taxpayers should treat these acts consistently with the act being performed in a timely manner.

Petition was timely filed when tax court finds that the date on a stamps.com postage label is within the meaning of Section 7502(b)

The Tax Court held that a petition was timely filed, in *Pearson v. Commissioner*, 149 T.C. No. 20 (November 29, 2017) when it determined that the date on a Stamps.com postage label was a "postmark not made by the United States Postal Service" under section 7502(b).

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[9] On December 14, 2017, the IRS clarified that penalty relief under Notice 2017-71 is available for taxpayers with fiscal-years that began in 2016, even if the period did not terminate until after the beginning of 2017.

Section[10] 7502 provides a "timely-mailing, timely-filing" rule, which treats the mailing date as the filing date for certain documents received by the IRS after the due date but mailed on or before that due date. Specifically, section 7502(a) states:

> If any…document required to be filed, or any payment required to be made, within a prescribed period or on or before a prescribed date under authority of any provision of the internal revenue laws is, after such period or such date, delivered by the United States mail to the agency, officer, or office with which such…document is required to be filed, or to which such payment is required to be made, the date of the United States postmark stamped on the cover in which such…document, or payment, is mailed shall be deemed to be the date of delivery or the date of payment, as the case may be.[11]

To rely on this provision, taxpayers must strictly comply with the procedural requirements set forth in section 7502. These mailing requirements, in part, require that the document[12] be deposited in the mail in the United States in an envelope, with postage prepaid, and properly addressed, with a *postmark* dated on or before the prescribed filing date. In those cases involving the *mailbox rule* with postmarks *not* made by the United States Postal Service ("USPS"), section 7205(b) provides that the *mailbox rule* only applies to the extent provided by Treasury Regulations.

Treas. Reg. § 301.7502-1(c) provides that if a postmark on an envelope is made other than by the USPS, then it must bear a legible date on or before the last date prescribed for filing, and the filing must be received by the intended recipient not later than the time when an envelope properly addressed and sent by mail with a USPS postmark would have been received.[13] Further, if the second requirement regarding timely receipt is not met, then the person filing the document must establish that the envelope was timely deposited in the mail, the delay in receipt was due to the US mail, and the cause of the delay.[14]

The Tax Court is a court of limited jurisdiction; it only has jurisdiction over a tax deficiency matter through (1) the issuance of a valid notice of deficiency, and (2) a timely filed petition.[15] In a recent case, *Pearson v. Commissioner*,[16] the Tax Court addresses whether the Tax Court has jurisdiction when a petition to the Tax Court was received by US mail after the filing deadline but its envelope bore a Stamps.com postage label dated before the filing deadline. Specifically, the Tax Court examines the regulations under section 7502(b) as they apply to an envelope bearing a Stamps.com postage label, but without a USPS postmark, to determine the timeliness of a Tax Court petition. Discussing and following a nearly identical case, *Tilden v. Commissioner*,[17] the *Pearson* court ultimately held that a Stamps.com postage label qualifies as a *postmark not made by the USPS* and the petition was timely filed, giving the Tax Court jurisdiction.

In the *Pearson* case, the IRS issued Lincoln and Victoria Pearson a valid notice of deficiency on January 22, 2015. The 90-day period to petition the Tax Court expired on April 22, 2015. The Tax Court received the Pearson's petition on April 29, 2015. The petition was sent to the Tax Court *via* USPS certified mail; the envelope containing the petition bore a Stamps.com[18] postage label and a USPS certified mail tracking number.

An administrative assistant at the law firm representing the Pearsons declared under penalties of perjury that on April 21, 2015, she created the Stamps.com postage label, affixed it to the envelope, and deposited the envelope in the mail at a Post Office in Salt Lake City. However, the earliest entry for that envelope in the USPS certified mail tracking

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[10] Unless otherwise indicated, all section references are to the Internal Revenue Code of 1986 (IRC), as amended.
[11] Section 7502(a)(1).
[12] It is important to note that only certain documents fall within the purview of section 7502. Treas. Reg. § 301.7502-1(b)(1)(iii) (iii) provides that the term "document" includes any document filed with the Tax Court, including a petition and a notice of appeal of a decision of the Tax Court.
[13] *See* Treas. Reg. § 301.7502-1(c)(1)(iii)(B)(1).
[14] See Treas. Reg. § 301.7502-1(c)(1)(iii)(B)(2).
[15] Section 6213(a); Tax Court Rule 13(a), (c).
[16] 149 T.C. No. 20 (2017).
[17] 846 F.3d 882, 887 (7th Cir. 2017), *rev'g and remanding* T.C. Memo. 2015-188. It is important to note that *Pearson* would be appealable to the Eighth Circuit, absent a stipulation to the contrary, because the petitioners resided in Arkansas. *See* section 7482(b)(1)(A).
[18] Stamps.com is an online postage services provider that enables users to buy and print USPS-approved postage from their personal computers.

system was April 23, 2015, showing its arrival at a mail facility, also in Salt Lake City. In the opinion of a USPS specialist, whom advised the IRS, it is unlikely the envelope sat for two days before processing; rather, it is likely the envelope was deposited and collected during the late afternoon of April 22, 2015 (which date was the last date to timely file a petition). On May 29, 2015, the IRS filed a motion to dismiss for lack of jurisdiction, but the Tax Court held the motion in abeyance pending resolution of the appeal in *Tilden*. Subsequently, the IRS joined with the Taxpayers in urging the Tax Court to deny its motion to dismiss.

The Tax Court "agree[d] in all respects with the Seventh Circuit's analysis" of *Tilden*,"[19] discussed below, and because the facts and circumstances in *Pearson* were virtually identical,[20] the Tax Court denied the IRS's motion to dismiss.

Tilden

In *Tilden*, the Tax Court held that the Stamps.com label should be disregarded under Treas. Reg. § 301.7502-1(c)(1)(iii)(B)(3), which provides that if an envelope has a postmark made by the USPS in addition to one not made by the USPS, the latter is disregarded. According to the Tax Court, the *Tilden* envelope had both a postmark made by the USPS and one not made by the USPS since the Tax Court determined that the USPS tracking information showing when the envelope entered the mail served as the "functional equivalent of, or [was] tantamount to, a USPS postmark."[21] Since the tracking information reflected a date of April 23, 2015, the petition was not timely mailed.

Both parties agreed to reconsideration of the decision that the Tax Court lacked jurisdiction, but the Tax Court declined because "jurisdiction cannot be conferred on this Court by agreement."[22] However, the Seventh Circuit reminded the parties that while they may not stipulate to jurisdiction, the may agree on the *facts* that determine jurisdiction.[23] By the time *Tilden* reached the Seventh Circuit, the IRS had conceded that the envelope at issue was timely mailed and that it was received in a time similar to that of an envelope bearing a USPS postmark. Given these concessions by the IRS, the Seventh Circuit ruled that the only basis for dismissing the taxpayer's petition would be the legal conclusion, adopted by the Tax Court, that Treas. Reg. § 301.7502-1(c)(1)(iii)(B)(3), which addresses situations where there is "a postmark made by the US Postal Service in addition to a postmark not so made," applied.

As such, the Seventh Circuit addressed the Tax Court's characterization of the USPS tracking information as a USPS postmark and rejected the Tax Court's holding that the USPS tracking information showing when the envelope entered the mail served as the "functional equivalent of" a USPS postmark. As a result, the Seventh Circuit found there were no competing postmarks on the envelope, that Treas. Reg. § 301.7502-1(c)(1)(iii)(B)(3) did not apply, and thus the petition had been timely mailed and timely filed.

***Auer* deference**

The *Pearson* court agreed with the Seventh Circuit in *Tilden* that a Stamps.com label is "a postmark[] not made by the United States Postal Service," under section 7502(b). The *Pearson* court went on to state that, because of the IRS's concession that the Pearson's petition was timely mailed under Treas. Reg. § 301.7502-1(c)(1)(iii)(B)(1)-(2), the IRS agreed that this was a case in which the postmark on the envelope is made other than by the US Postal Service. The *Pearson* court noted that under *Auer v. Commissioner*, the Secretary is entitled to deference of his own regulations,[24] and the *Pearson* court explained that there is nothing in the relevant regulations that suggests that a Stamps.com postage label should not be considered a postmark not made by the USPS. The Seventh Circuit in *Tilden* also commented that a Stamps.com postage label is the modern equivalent of the output of an old-fashioned postage meter, and the *Pearson* court reiterated the characterization, finding no reason for making a distinction between the two means of postage.

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[19] *Pearson*, 149 T.C. No. 20 (2017).
[20] The cases involved the same law firm, the same administrative assistant, and the same date of mailing; the *Tilden* petition was filed by the Tax Court just minutes before the *Pearson* petition.
[21] Pearson, 149 T.C. No. 20 (2017)
[22] *Dorn v. Commissioner*, 119 T.C. 356, 357 (2002).
[23] *Pearson*, 149 T.C. No. 20 (2017).
[24] *Auer v. Robbins*, 519 US 452, 461 (1997).

The Concurrence: Stamps.com labels are similar to other postage

In a concurring opinion, Judge Buch expands the reasoning behind the majority's lack of distinction between Stamps.com postage label and a postage meter. The concurrence argues that Congressional intent supports the evolution of the law with technology, supported by the fact that Congress did not limit the definition of "postmarks not made by the USPS" to postage meters. Then, the concurrence outlines the various ways in which Stamps.com postage labels are similar to other authorized postage to further support the majority's conclusion.

The Dissent: A postmark or a receipt?

In a dissenting opinion, two Tax Court judges refocus the postmark analysis, disputing the majority's interpretation of the term "postmark." The dissent addresses the purpose of the postmark, what it believes is the majority's overexpansion of the *Auer* doctrine, and a lack of analytical reconciliation in the majority's opinion between a postage meter and a postmark and a Stamps.com postage label.

The dissenters posit that the IRC uses a *postmark* as a means for verifying timeliness, as it shows the place and date, and often the time, of mailing, and that the majority lost sight of this fundamental principle. The dissenters believe the majority's holding that an independently printed postage label qualifies as a "postmark not made by the United States Postal Service" is unwarranted and majority's analysis fails to support such a conclusion.

Under section 7502(b), "a postmark not made by the United State Postal Service will be treated as a postmark – but 'only if and to the extent provided by regulations prescribed by the Secretary.'"[25] The dissent points outs that Section 7502(b) did not address postage meters, and the majority fails to explain why a postage meter was even thought reliable (nor comment on its equivalent). The dissenters then note that the regulations "expressly mention postage meters but do not mention Stamps.com labels." According to the dissenters, the IRS failed to provide the Tax Court with its construction of the relevant regulation in any of its filings, but the majority still construed section 7502(b) to include a Stamps.com postage label. As such, the dissenters believe that the majority overly expanded the *Auer* doctrine, such that they awarded deference to "an implication in or logical inference."

Finally, the dissenters find that the majority fails to explain why a postage meter is the equivalent of a postmark, or why a Stamps.com postage label is the equivalent of a postage meter. Again, arguing that the focus of the analysis should be on whether the Stamps.com postage label is equivalent to a postmark in the sense of verifying timeliness, on which the dissent accuses the majority of being silent. As a result, the dissent outlines the reasoning it believes the majority should have taken. The dissent cites case precedent that has held that a private postage meter marking should be considered a postmark because the sender is under an obligation to mail the item on the same day that the envelope is marked. Citing *Leventis v. Commissioner*, 49 T.C. 353 (1968), which explains the USPS procedure to "cancel" a postmark when the wrong date appears in the meter stamp on the date of mailing, the dissent argues that the Tax Court is silent as to whether that procedure, which reconciles meter date to mailing date to verify timeliness, is still used by the USPS. Going one step further, the majority also failed to inquire about the Stamps.com procedures and assurances regarding obligations to mail, though independently the dissenters confirmed that the Stamps.com website suggests that an item must be mailed on the date specified on the postage label. According to the dissent, to count as a postmark, there must be an obligation on behalf of the sender to mail the item on the date appearing on the label, but the Tax Court was silent. "A mere receipt for the purchase of postage is not a "postmark".

Tax Court denies refund claim due to a lack of jurisdiction

Under the statutory authority of IRC section 6512(b)(1), the Tax Court has jurisdiction to determine the amount of the overpayment of tax when the Court has also determined a deficiency (or has decided that there is no deficiency). However, IRC section 6512(b)(3) also limits the allowable amount of credit or refund to the amount of tax that was paid during one of three "lookback" periods. In *Borenstein v. Comm'r*, the Tax Court denied a refund to an individual taxpayer because it determined that it lacked jurisdiction to do so. While the Court explained it was sympathetic to the

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[25] *Pearson*, 149 T.C. No. 20 (2017).

taxpayer, as a result of its "plain-meaning" interpretation of one of the "lookback" provisions of IRC section 6512(b)(3), it had to determine that the taxpayer is not entitled to a refund or credit of the stipulated overpayment.

The Facts: Taxpayer claimed a refund on delinquent tax return filed after the mailing of a notice of deficiency

In *Borenstein v. Comm'r*,[26] Roberta Borenstein (the "Taxpayer") timely filed an automatic six-month extension request, extending the due date of her 2012 Form 1040 from April 15, 2013, to October 15, 2013. For the 2012 tax year, the Taxpayer had made tax payments totaling $112,000, which were deemed made on April 15, 2013.[27] However, the Taxpayer failed to file her 2012 Form 1040 by the extended due date of October 15, 2013.

On June 19, 2015, the IRS issued a notice of deficiency for the Taxpayer's 2012 tax year. A few weeks later, on August 29, 2015, the Taxpayer filed her delinquent 2012 income tax return, reporting a tax liability of $79,559, and an overpayment of $32,441. Then, on September 16, 2015, the Taxpayer timely petitioned the Tax Court.

The facts of this case were not contested; rather the IRS and the taxpayer agreed on the amount of the overpayment and submitted the case to the Tax Court for a decision without trial under Tax Court Rule 122.[28]

The Issue: Taxpayer's eligibility for a refund

The Tax Court had to decide whether the Taxpayer was allowed to receive a refund or credit of the overpayment claimed on her delinquent 2012 income tax return.[29] The IRS argued that the Taxpayer was not allowed to receive the refund from the 2012 refund claim because the payments giving rise to the refund were made outside the two-year lookback period of IRC section 6511(b)(2)(B).[30] Contrarily, the Taxpayer argued that she is entitled to a refund under the three-year lookback period of IRC section 6512(b)(3).

The relevant lookback periods of IRC Sections 6511 and 6512

IRC section 6512(b)(1) provides for Tax Court jurisdiction to determine an overpayment of tax in a deficiency case, but is limited by IRC section 6512(b)(3). Specifically, such a credit or refund is disallowed unless the tax payment was made within one of three "periods" specified in subparagraphs (A) through (C) of section 6512(b)(3), as determined in the Tax Court decision. The three applicable "periods" of section 6512(b)(3) are as follows:

- Subparagraph (A) refers to tax paid "*after the mailing* of the notice of deficiency."[31]
- Subparagraph (B) refers to tax paid within the limitations period for a refund claim "if *on the date of the mailing* of the notice of deficiency a claim had been filed (whether or not filed) stating the grounds upon which the Tax Court finds that there is an overpayment."[32]
- Subparagraph (C) refers to tax paid within the limitations period for a refund claim filed "*before the date of the mailing* of the notice of deficiency."[33]

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[26] 149 T.C. No. 10 (August 30, 2017).
[27] *See* IRC section 6513.
[28] Tax Court Rule 122, *Submission Without Trial*. (a) General. Any case not requiring a trial for the submission of evidence (as, for example, where sufficient facts have been admitted, stipulated, established by deposition, or included in the record in some other way) may be submitted at any time after joinder of issue (see Rule 38) by motion of the parties filed with the Court. The parties need not wait for the case to be calendared for trial and need not appear in Court. (b) Burden of Proof. The fact of submission of a case, under paragraph (a) of this Rule, does not alter the burden of proof, or the requirements otherwise applicable with respect to adducing proof, or the effect of failure of proof.
[29] The filing of a return reporting an overpayment generally constitutes the filing of a claim for refund. *McGregor v. United States*, 225 Ct. Cl. 566 (1980); Treas. Reg. § 301.6402-3(a)(1).
[30] IRC section 6511(b)(2)(B) provides that if the claim is not filed within the three-year period, the amount of the credit or refund must not exceed the portion of tax paid during the two years immediately preceding the filing of the claim.
[31] IRC section 6512(b)(3)(A) (emphasis added).
[32] IRC section 6512(b)(3)(B) (emphasis added).
[33] IRC section 6512(b)(3)(C) (emphasis added).

Both subparagraphs (B) and (C) reference the limitations period of IRC section 6511(b)(2), which provides for both a three-year lookback period (referencing the three-year period after the return was filed) and a two-year lookback period (referencing the tax paid during the two-year period before filing of the refund claim).[34] In *Commisioner v. Lundy*, the Supreme Court held that, in the case of a non-filer, the proper application of section 6512(b)(3)(B) requires that a two-year lookback period be applied since the "hypothetical" refund claim was not filed within three years from the time the return was filed.[35] In response to the Supreme Court's holding in *Lundy*, Congress amended IRC section 6512(b)(3) to provide a three-year lookback period (rather than a two-year lookback period) in certain circumstances where a return is not timely filed.

As amended, section 6512(b)(3) provides:

> In a case described in subparagraph (B) where the date of the mailing of the notice of deficiency is during the **third year** after the **due date (with extensions)** for filing the return of tax and no return was filed before such date, the applicable period under subsection (a) and (b)(2) of section 6511 shall be **3 years**. (*Emphasis added*.)

In this case, the Taxpayer's hypothetical refund claim, deemed to have been filed on the date that the notice of deficiency was mailed, June 19, 2015, was filed before the delinquent 2002 return was filed, which is outside of the three-year lookback period of IRC section 6511(b)(2)(A). Similarly, because the Taxpayer's 2002 payments were deemed paid on April 15, 2013, the Taxpayer's hypothetical refund claim filed on June 19, 2015 was outside of the two-year lookback period of IRC section 6511(b)(2)(B). However, given the amendment to IRC section 6512(b)(3) for delinquent filers, a three-year lookback period may still apply to the Taxpayer's refund claim.

The government's arguments

The IRS argued for a "plain language" interpretation of the statute, such that the parenthetical phrase "with extensions" modifies "due date." In the Taxpayer's 2012 tax return, the due date (with extensions) was October 15, 2013. The "third year" after October 15, 2013 began on October 15, 2015, and ended on October 14, 2016. However, the IRS mailed the statutory notice of deficiency on June 19, 2015, which is during the second year (and not the "third year") after the extended due date for filing the return.

Because the exception set forth in the final sentence of IRC section 6512(b)(3) does not apply, the IRS argued that a refund or credit of the Taxpayer's 2012 tax overpayment is barred under the two-year lookback rule of IRC section 6511(b)(2)(B).

The taxpayer's arguments

The Taxpayer countered with several arguments. First, she argued that the parenthetical phrase "with extensions" modifies "the third year" or, alternatively, modifies "3 years," such that she would be entitled to the 2012 overpayment. Additionally, she argued that the legislative history showed that Congress intended to similarly treat all non-filing taxpayers with overpayments during the three-year period following the initial due dates of their returns. Finally, the Taxpayer argued that under the anti-absurdity doctrine, a plain-meaning interpretation of section 6512(b)(3) would render it absurd and thus the statute must be construed to avoid such absurdity.

The Tax Court's holding

The Tax Court rejected each of the Taxpayer's arguments. The court determined that the final sentence of IRC section 6512(b)(3) was not ambiguous, that the legislative history was insufficient to countermand the plain meaning of the statutory language enacted by Congress, and that, even though the plain-language interpretation of the final sentence of section 6512(b)(3) produced an odd result in certain factual situations, it did not render the operation of the statutory amendment as a whole absurd.

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[34] IRC sections 6511(b)(2)(A) and (B).
[35] *Commissioner v. Lundy*, 516 US 235 (1996).

According to the Tax Court, despite this case being one of first impression, legal precedent supports the IRS's position regarding the interpretation of the placement of "with extensions."[36] As such, the Tax Court held that the Taxpayer was not eligible for any of the three-year lookback periods of IRC section 6512(b)(3) because the IRS did not mail the notice of deficiency "during the third year after the due date (with extensions) for filing of the return of tax." The third year after the due date (with the Taxpayer's filed extension) began on October 15, 2015; however, the notice of deficiency was mailed months beforehand, on June 19, 2015.

The Tax Court thus found that it lacked jurisdiction to award a refund or credit of the Taxpayer's 2012 overpayment because the Taxpayer (1) failed to file her 2012 income tax return before the notice of deficiency was issued, and (2) did not pay her tax liability within two years of the mailing of the notice of deficiency.

Appeals responds to TIGTA's recommendations for better documentation & record retention

The Chief, Appeals issued a letter captioned, *Management's Response to the Draft Report*, dated August 31, 2017 (Appeals' Response), addressing various documentation and record matters, in response to the Treasury Inspector General for Tax Administration (TIGTA) Office of Audit's report entitled, "*Better Documentation Is Needed To Support Office of Appeals' Decisions on International Cases*," issued September 28, 2017 (TIGTA Appeals Report).[37] The TIGTA Appeals Report documents TIGTA's review of a selection of cases resolved by Appeals "to determine whether controls over international appeals cases are designed to ensure that cases are processed according to IRS criteria and whether Appeals' decisions to concede assessments on international cases were adequately supported."[38] TIGTA reviewed a "judgmental sample" of 48 cases appealed by taxpayers during FY2015 with at least one international issue; the sample represented more than 90 percent of the IRS-proposed deficiencies not sustained by Appeals.[39] Then, TIGTA made two recommendations based on its findings: first, that Appeals should improve its quantitative documentation of the weighted hazards of litigation used in its settlement determinations; and second, that Appeals should improve processes used to track and locate case files.[40]

In Appeals' Response, Appeals primarily addressed its disagreement with TIGTA's use of dollar-based sustention data, TIGTA's findings regarding record retention, and TIGTA's conclusions as to deficiencies in documenting litigation hazards in settled cases.[41]

Appeals' dollar-based sustention data

TIGTA selected its judgmental sample using the dollar-based sustention data from the Appeals Centralized Database System. In FY 2015, as shown in Figure 1 below (from the TIGTA Appeals Report), Appeals reduced IRS-proposed deficiencies by 94 percent, conceding $407 million of $435 million IRS-proposed deficiencies.[42] However, as stated in Appeals' Response, the Chief, Appeals disagreed with TIGTA's use of dollar-based sustention data, arguing that it failed to reflect (1) the hazards of litigation, and (2) cases resolved within the IRS jurisdiction, as appealed cases often include an increased level of legal uncertainty. The Chief, Appeals also argued that the data compiled by the TIGTA Appeals Report was skewed by a few large-dollar cases which led to a misrepresentation of actual settlement results.[43]

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[36] *See e.g.*, *Petty v. Commissioner*, T.C. Memo. 2010-63; *see also Zarky v. Commissioner*, 123 T.C. 132, 134 n.2 (2004); *Butts v. Commissioner*, T.C. Memo. 2015-74.
[37] Reference Number 2017-10-068 to the Internal Revenue Service Chief, Appeals.
[38] TIGTA Appeals Report, p.12.
[39] *Id.* Footnote 1 of the TIGTA Appeals Report defines a "judgmental sample" as a nonprobability sample, the results of which cannot be used to project to the population.
[40] TIGTA Appeals Report, pp.10-11.
[41] *Management's Response to the Draft Report*, dated August 31, 2017, contained in the TIGTA Appeals Report, Appendix V, pp.17-19.
[42] *Id.* at 12.
[43] *Id.* at 17-18.

Figure 1: Summary of examination cases closed by the appeals international teams from FY 2012 through FY 2015

Fiscal Year	Number of Cases	Proposed Deficiency by Examination Function	Reduction in Proposed Deficiency by Appeals	Revised Deficiency After Appeal
2012	609	$232,528,657	$190,559,327 (82%)	$41,969,330 (18%)
2013	937	$186,797,662	$152,044,965 (81%)	$34,752,697 (19%)
2014	823	$446,765,752	$414,259,658 (93%)	$32,506,094 (07%)
2015	753	$434,722,947	$406,944,536 (94%)	$27,778,411 (06%)
Average	**781**	**$325,203,755**	**$290,952,122 (89%)**	**$34,251,633 (11%)**

Source: [TIGTA's] analysis of data from the Appeals Centralized Database System.[44]

Appeals' record retention

TIGTA selected 48 cases for its review sample, but Appeals was only able to locate 36 of the requested cases. While Appeals was able to locate an additional five selected cases several months later, only three cases were received before the completion of TIGTA's review. The nine "missing" cases represented $50.2 million of IRS-proposed deficiencies and $48.7 million of conceded adjustments by Appeals.[45]

In Appeals' Response, the Chief, Appeals dismissed TIGTA's findings regarding record retention. Appeals argued that since Appeals was only one of many users of the case files, the overall IRS records process needed improvement. However, Appeals did acknowledge that improved record retention was needed at an IRS agency-wide level.[46]

Appeals' documentation of litigation hazards

An Appeals Officer documents a basis for settlement in an Appeals Case Memo (ACM), using guidance in the Internal Revenue Manual (IRM).[47] Specifically, IRM 8.6.2.6.4.2 (10-18-2007), Resolved Based on Hazards of Litigation, provides the following requirement for an ACM:

1. Discuss the various factors that you considered in arriving at your settlement. The reader should understand why your settlement is appropriate. Explain the steps you took in your evaluation process as follows:
    a. Summarize the hazards that you identified in the discussion and analysis.
    b. Weigh their strengths and weakness.
    c. Determine the relative strengths of opposing positions.
    d. Convert your verbal evaluation to a percentage or numerical determination.[48]

In its review of Appeals cases, TIGTA found that the ACMs "lacked a clear link between opposing legal positions involved in each case and the numeric percentage conceded."[49] An ACM must show that Appeals consistently applies its procedures in determining settlements to "ensure that taxpayers and the Government received fair and impartial resolutions."[50] TIGTA found that the ACM documentation was insufficient to show Appeals' consistency in its settlements and to provide assurance that the Appeals' settlements were fair and impartial to both the IRS and the taxpayers.

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[44] *Id.* at 4.
[45] *Id.* at 10-11.
[46] *Id.* at 19.
[47] *Id.* at 5.
[48] IRM 8.6.2.5.4.2 (10-18-2007), *Resolved Based on Hazards of Litigation*. It is noted that IRM 8.6.2, *Conference and Settlement Practices, Appeals Case Memo (ACM) Procedures*, was revised as of August 17, 2017, and replaced with IRM 8.6.2, *Appeals Case Memo Procedures*. As such, IRM 8.6.2.5.4.2 appears to have been renumbered as IRM 8.6.2.6.4.2.
[49] TIGTA Appeals Report, p.6.
[50] *Id.* at 7.

The Chief, Appeals disagreed with TIGTA's findings that certain cases were deficient in documentation. In Appeals' Response, Appeals argued that (1) the form of analysis of the hazards of litigation is not specified in the IRM,[51] (2) the IRM does not require that Appeals officers convert each individual settlement factor into a numerical value, and (3) consideration must be given to the complexity and variation in Appeals cases when evaluating consistency.[52]

TIGTA's reaction to Appeals' Response

Reacting to Appeals' Response, TIGTA stated that it had "concerns about the accuracy of certain statements in [Appeals'] response to [its] report,"[53] which "warrant[ed] additional comment."[54] TIGTA issued its own response, defending its use of its dollar-based sustention data to provide perspective, cautioning that the IRM guidance referenced in Appeals Response was incomplete and lacked a requirement provision focusing on a reader's understanding of the settlement, and finally, re-emphasized the need for stronger and quantitative documentation of settlements resulting from litigation hazards given Appeals' 94-percent concession rate.

[51] As referenced by the TIGTA Appeals Report at footnote 16, and explained in the Chief, Appeals' response, IRM 8.6.2.5.4.2 (10-18-2007), *Resolved Based on Hazards of Litigation* (October 18, 2007), renumbered as IRM 8.6.2.6.4.2 (08-17-2017), provides the documentation requirements for Appeals.
[52] *Management's Response to the Draft Report*, dated August 31, 2017, contained in the TIGTA Appeals Report, Appendix V, pp.18-19.
[53] *Memorandum for Chief, Appeals*, dated September 28, 2017, contained as a preface to the TIGTA Appeals Report.
[54] *Office of Audit Comments on Management's Response*, contained in the TIGTA Appeals Report, Appendix VI, p.21.