IRS Insights
A closer look.
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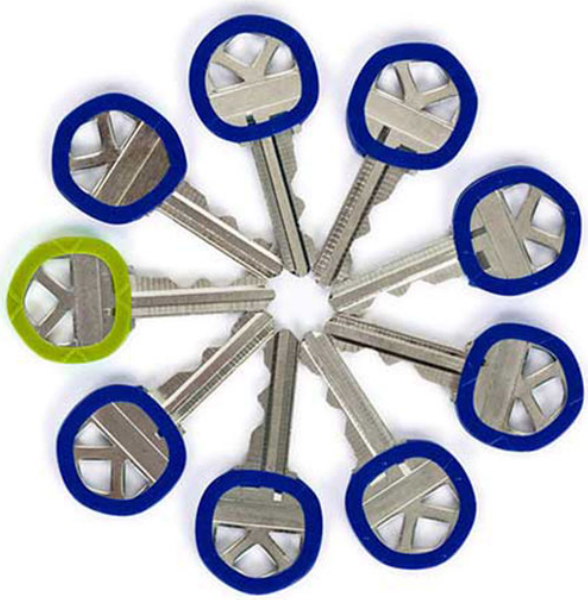

In this issue:

Haynes v. United States: Can Reliance on a Return Preparer to E-File a Tax Return Establish Reasonable Cause?

When a taxpayer fails to timely file an income tax return, the Internal Revenue Code imposes a penalty on the taxpayer.1 That penalty, however, does not apply if the failure was due to reasonable cause and not due to willful neglect. In *United States v. Boyle*, the Supreme Court held that reliance on a return preparer to file a tax return cannot, by itself, establish reasonable cause because the filing of an income tax return is a nondelegable duty and does not require professional advice.[2] In *Haynes v. United States*, the Fifth Circuit declined to answer whether a taxpayer may establish reasonable cause with reliance on a return preparer to e-file a tax return.[3] But, in declining to answer this question, the Fifth Circuit clarified that – even under *Boyle* – a return preparer's diligence may establish reasonable cause for a taxpayer's failure to file a tax return.

[1] *See* I.R.C. § 6651(a)(1).
[2] 469 US at 245.
[3] No. 17-50816 (5th Cir. Jan. 29, 2019).

In *Haynes*, the Taxpayers' return preparer attempted to e-file the Taxpayers' Form 1040, *Individual Income Tax Return*, for 2010 on the extended due date. The tax return was transmitted to the Internal Revenue Service ("IRS"), but the IRS rejected the tax return because of a technical error in completing the tax return. For reasons unknown, neither the return preparer nor the Taxpayers were aware that the tax return was rejected. In fact, the return preparer explicitly told the Taxpayers that he had e-filed the tax return by the extended due date. In August 2012, the IRS sent an overdue-return notice to the Taxpayers. In response, the Taxpayers filed a paper return, and the IRS subsequently assessed a penalty under section 6651(a)(1) against the Taxpayers for untimely filing their 2010 tax return. The Taxpayers paid the penalty and sued for a refund in the United States District Court for the Western District of Texas.

Following discovery, the government and the Taxpayers each moved for summary judgement. The Taxpayers argued that reasonable cause existed for the late filing of their 2010 tax return because they relied on their return preparer to e-file their tax return. The government argued that the bright-line rule set forth in *Boyle* precludes the Taxpayers from establishing reasonable cause on this basis. The district court held that the *Boyle* rule applied with equal force in the context of a return preparer's failure to e-file a tax return and, therefore, granted the government's motion for summary judgment.

The Taxpayers appealed to the Fifth Circuit. They argued that, although reliance on a return preparer generally does not establish reasonable cause, the complexity of e-filing requires a different conclusion.[4] However, the Fifth Circuit declined to answer this question and, instead, held that the district court erred in granting summary judgment because of a genuine dispute of material fact.

The genuine dispute of material fact identified by the Fifth Circuit rests on an important clarification of the *Boyle* rule. The Fifth Circuit clarified that a fundamental agency rule underlies *Boyle*. That rule is: the authorized actions of an agent are imputed to its principal. In *Boyle*, the taxpayer's attorney negligently failed to mark the due date of the tax return on his calendar, which caused the attorney to file the tax return late. Therefore, the taxpayer was compelled to argue that his reliance on his attorney to file the tax return established reasonable cause for the taxpayer despite the negligence of his agent. In this case, by contrast, the Fifth Circuit held that it is unclear whether the return preparer was negligent in failing to timely e-file the tax return. Although the return preparer did not receive a rejection notice from the IRS, he also did not receive an acceptance notice or confirm that the IRS accepted the tax return. According to the Fifth Circuit, this type of uncertainty is the province of the jury, not the district court. If, after considering all the evidence, a jury determines that the return preparer was diligent, then the diligence of the return preparer would be imputed to the Taxpayers and would establish that the Taxpayers acted with reasonable cause and not willful neglect.

Although the Fifth Circuit avoided answering whether the *Boyle* rule applies to delinquent e-filed tax returns, it clarified that the *Boyle* rule is not as bright as it might have previously seemed: a taxpayer can still establish reasonable cause if the taxpayer can establish that the return preparer acted diligently but was nonetheless unable to timely file the tax return. And there is still the possibility that the Fifth Circuit will eventually answer whether the bright-line *Boyle* rule continues to apply in the age of e-filing.

National Taxpayer Advocate's 2018 Annual Report to Congress

On February 12, 2019, Nina E. Olson, the National Taxpayer Advocate ("NTA"), released her 2018 Annual Report to Congress ("2018 Report"), for the fiscal year ("FY") ending September 30, 2018.[5] The 2018 Report identifies specific challenges that the IRS is currently facing; these are labeled the "Most Serious Problems" ("MSPs"). The 2018 Report also makes several "Legislative Recommendations" ("LRs"). In addition to the 2018 Report's Preface, select MSPs (including a Status Update) and LRs are briefly discussed below.

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[4] After all, unlike paper filing taxpayers, e-filing taxpayers are required to use third-party intermediaries to e-file their tax returns. *See* Rev. Proc. 2007-40, 2007-1 C.B. 1488.

[5] Taxpayer Advocate Service, National Taxpayer Advocate's 2018 Annual Report to Congress (Feb. 12, 2019), available online at www.TaxpayerAdvocate.irs.gov/2018AnnualReport (accessed Feb. 2019).

Preface[6]

In her Preface to the 2018 Report, Ms. Olson highlights concerns related to the IRS's antiquated information technology systems. Ms. Olson also discusses the impact of the recent federal government shutdown on the IRS and taxpayers. Additionally, the NTA notes that the Taxpayer Advocate Service ("TAS") was negatively affected by the government shutdown. The NTA and Local Taxpayer Advocates were not permitted to assist taxpayers experiencing significant hardships or issue Taxpayer Assistance Orders during the shutdown.

The NTA offers recommendations which include: Congress providing the IRS with dedicated, multi-year funding to replace its antiquated IT systems, and Congress amending the Anti-Deficiency Act to provide that, where the government takes enforcement action against a taxpayer during a shutdown, certain IRS personnel be excepted from furlough to ensure that statutory protections are available to taxpayers.

MSP #3 – Navigating the IRS[7]

MSP #3 details the difficulties that taxpayers encounter in navigating the IRS, reaching the appropriate personnel to resolve tax issues, and holding IRS employees accountable. From the NTA's perspective, these challenges are problematic because the IRS's failure to adequately engage taxpayers can jeopardize voluntary compliance.

The 2018 Report suggests that the source of the IRS's communication quality issues is the IRS's attempt to interact with all taxpayers in a "one size fits all" virtual environment. To address these communication problems, the NTA recommends that the IRS establish a 311-type system to promptly connect callers to operators capable of quickly researching their questions or transferring the callers to an appropriate office that can assist them.

The 2018 Report also observes that taxpayers often have trouble having their calls returned and receiving responsive information. Currently, there is no universal complaint mechanism in place that allows taxpayers to address these issues. To facilitate accountability, the NTA recommends that the IRS create a comprehensive system that allows taxpayers to request to speak with a manager and that tracks the resolution of issues.

MSP #9 – Field Examinations[8]

MSP #9 addresses difficulties experienced by taxpayers who are selected for field audits. The 2018 Report found that a high percentage of IRS field audits result in IRS examiners making no changes to the taxpayer's assessed tax. According to the NTA, a no-change audit means that the IRS expended time and resources without assessing any additional tax. In addition, the NTA expressed concern that a no-change audit may cause the taxpayer to choose to report less tax in future tax periods.

In measuring the effectiveness of its field examination program, the IRS primarily measures the revenue generated by an audit per resources expended. In its 2014 Annual Report to Congress, the NTA recommended that the IRS adopt a metric that measures whether IRS compliance initiatives (such as IRS audits) increase voluntary compliance.[9] However, both Small Business/Self Employed ("SB/SE") and Large Business and International ("LB&I") have declined to add such a metric to their Business Performance Review.

Finally, the 2018 Report noted that, unlike LB&I, SB/SE does not share an audit plan with taxpayers at the beginning of an audit. The NTA is concerned that this lack of transparency impairs SB/SE taxpayers' right to be informed, prevents the IRS from identifying issues that should be excluded from the audit, and from using taxpayer feedback to guide its enforcement and service efforts.

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[6] *See id.*, at vii-xxiii.
[7] *See id.*, at 52 – 64.
[8] *See id.*, at 142 – 52.
[9] *See id.*, at 146 (citing Taxpayer Advocate Service, National Taxpayer Advocate's 2014 Annual Report to Congress, at 122 (Dec. 31, 2014), available online at www.TaxpayerAdvocate.irs.gov/2014AnnualReport (accessed Feb. 2019)).

MSP #13 – Statutory Notices of Deficiency[10]

MSP #13 addresses design concerns with certain statutory notices of deficiency ("SNODs") templates. In FY 2017, less than 1% of taxpayers that received an SNOD petitioned the Tax Court. The NTA is concerned that the low Tax Court petition rate may be partially attributable to flawed SNOD templates and poor presentation of critical information in the SNODs. To address these concerns, the NTA recommends that the IRS redesign the SNODs to more clearly communicate the IRS's proposed action and its consequences, the obligations and rights of taxpayers, and the resources available to assist taxpayers.

MSP # 14 – Collection Due Process Notices[11]

MSP #14 focuses on design concerns with certain collection due process ("CDP") notice templates. The NTA observed that CDP notices generally have a very low response rate, and the NTA is concerned that the low response rate to CDP notices may be attributable to the design and wording of the CDP notices that the IRS issues. The NTA recommends that the IRS make specific improvements to the content and appearance of the CDP notices to facilitate better communication with taxpayers.

MSP Status Update – Office of Appeals[12]

In the 2018 Report, the NTA also provided a status update on the Office of Appeals ("Appeals"), and commended Appeals on its recent policy change to reinstitute the right of campus taxpayers to transfer their cases to field offices for the purpose of having in-person conferences. Nevertheless, the NTA remains concerned that Appeals continues to rely too heavily on campuses.

LR #1 – IT Modernization[13]

In the 2018 Report, the NTA takes the position that the "IRS does not have adequate information technology (IT) systems to do its job effectively or efficiently," noting that the IRS's core IT systems are antiquated and among the oldest in the Federal government.[14] From the perspective of the NTA, the IT modernization efforts to date have been insufficient because these efforts have been directed at modernizing IT capabilities and because IT funding has been unpredictable and inadequate. Accordingly, the 2018 Report recommends that Congress (1) provide significant additional funding for the IRS to replace its core legacy systems with new IT systems and (2) mandate proper oversight to ensure that the IRS makes sufficient progress towards its IT modernization objectives.

LR #2 – Administrative Appeal Rights[15]

According to the NTA, the mission of Appeals can be undermined when the IRS issues SNODs in situations where they are unwarranted and when the IRS uses "sound tax administration" to justify its decision to circumvent Appeals. Consequently, the NTA's 2018 Report includes a recommendation for Congress to amend section 7803(a) "to establish an independent Office of Appeals and grant taxpayers the right to a prompt administrative appeal within the IRS that provides impartial review of all compliance actions and an explanations of the Appeals decision," except in specific cases where the IRS has determined that Appeals' review is not available and promulgated regulations to that effect.[16]

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[10] *See id.*, at 198 – 211.
[11] *See id.*, at 212 – 22.
[12] *See id.*, at 307 – 13.
[13] *See id.*, at 359 – 58.
[14] *See id.*, at 351.
[15] *See id.*, at 359 – 63.
[16] *See id.*, at 360.

IRS Announces that Refundable AMT Credits Claimed under Section 53(e) are Not Subject to Sequestration

For taxable years beginning after December 31, 2017, the alternative minimum tax ("AMT") is repealed for corporate taxpayers. In addition, under section 53(e) of the Internal Revenue Code, any unused minimum tax credit carried over to years after 2017 is refundable for tax years 2018 through 2021. The amount of the refundable credit is equal to 50 percent (100 percent in taxable years beginning in 2021) of the excess of the minimum tax credit for the taxable year over the amount of the credit allowable for the year against regular tax liability.

In March and November 2018, the IRS announced that, like refundable AMT credits claimed in lieu of bonus depreciation under section 168(k)(4), refundable AMT credits claimed under section 53(e) are subject to sequestration.[17] Refundable credits that are subject to sequestration and that are processed from October 1, 2018 until September 31, 2019, are reduced by 6.2%. This results in a permanent loss of the sequestered credits.

On January 14, 2019, the IRS announced that refundable credits claimed under section 53(e) for tax years beginning after December 31, 2017 will not be subject to sequestration under the BBA.[18] The IRS issued the new guidance after the Office of Management and Budget ("OMB") concluded that the refundable AMT credits claimed under section 53(e) are not subject to sequestration.

Notably, the January 2019 guidance did not exempt refundable AMT credits claimed under section 168(k)(4) from sequestration. It is unclear whether the OMB will reconsider its position with respect to those credits.

In addition, in July 2018, the IRS announced that it was initiating a campaign for taxpayers who improperly restore sequestered AMT credits in subsequent tax years.[19] It remains to be seen whether the policy change discussed above will affect this campaign.

IRS Publishes Several New Forms for Partnerships Subject to the BBA Centralized Partnership Audit Regime

New Forms for Centralized Partnership Audit Regime

IRS recently published several new forms addressing various aspects of the BBA Centralized Partnership Audit Regime.[20] The IRS issued Form 8979, *Partnership Representative Revocation, Designation, and Resignation*,[21] which is used to revoke, designate, or resign as a Partnership Representative or Designated Individual. The IRS also published a new Form 8082, *Notice of Inconsistent Treatment or Administrative Adjustment Request (AAR)*,[22] which is used:

1. To notify the IRS of a position on a partner's return that is inconsistent treatment with the treatment of an item or
2. By a partnership to file an Administrative Adjustment Request ("AAR").

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[17] Under the Balanced Budget Act of 1985, as amended by the Budget Control Act of 2011 and budget agreements in 2013 and 2015 ("BBA"), certain refundable credits are subject to sequestration. *See* Effect of Sequestration on the Alternative Minimum Tax Credit for Corporations, https://www.irs.gov/businesses/effect-of-sequestration-on-the-alternative-minimum-tax-credit-for-corporations.
[18] *See* Effect of Sequestration on the Alternative Minimum Tax Credit for Corporations (fiscal year 2019), https://www.irs.gov/newsroom/effect-of-sequestration-on-the-alternative-minimum-tax-credit-for-corporations-fiscal-year-2019.
[19] *See* IRS Announces the Identification and Selection of Five Large Business and International Compliance Campaigns, https://www.irs.gov/businesses/irs-announces-the-identification-and-selection-of-five-large-business-and-international-compliance-campaigns#Restoration of Sequestered AMT Credit Carryforward.
[20] Bipartisan Budget Act of 2015, Pub. L. No. 114 – 74, §1101 (2015)
[21] Available at https://www.irs.gov/pub/irs-pdf/f8979.pdf.
[22] Available at https://www.irs.gov/pub/irs-pdf/f8082.pdf.

The Form 8082 is also used for these purposes by a partnership subject to the TEFRA[23] partnership audit regime. Accordingly, on the updated Form 8082, the filer must identify whether it is being filed as a Notice of Inconsistent Treatment or as an AAR and, if it is filed as an AAR, whether the partnership is subject to the TEFRA provisions or the BBA Centralized Partnership Audit Regime.

The IRS published three forms for requesting modification of imputed underpayments in a partnership-level audit under section 6225 or in an AAR under section 6227. The new forms are: Form 8980, *Partnership Request for Modification of Imputed Underpayments Under IRC Section 6225(c)*;[24] Form 8982, *Affidavit for Partner Modification Amended Return Under IRC Section 6225(c)(2)(A) or Partner Alternative Procedure under IRC Section 6225(c)(2)(B)*;[25] and Form 8983, *Certification of Partner Tax Exempt Status for Modification under IRC Section 6225(c)(3)*.[26]

Finally, the IRS published two forms relating to the push-out election under section 6226, whereby a partnership elects to push-out an adjustment to the reviewed year partners rather than have the partnership pay the imputed underpayment. The new forms with respect to the push-out election are Form 8988, *Election for Alternative to Payment of the Imputed Underpayment – IRC Section 6226*[27] and Form 8989, *Request to Revoke the Election for Alternative to Payment of the Imputed Underpayment*.[28]

[23] Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 401-06 (1982)
[24] Available at https://www.irs.gov/pub/irs-pdf/f8980.pdf.
[25] Available at https://www.irs.gov/pub/irs-pdf/f8982.pdf.
[26] Available at https://www.irs.gov/pub/irs-pdf/f8983.pdf.
[27] Available at https://www.irs.gov/pub/irs-pdf/f8988.pdf.
[28] Available at https://www.irs.gov/pub/irs-pdf/f8989.pdf.