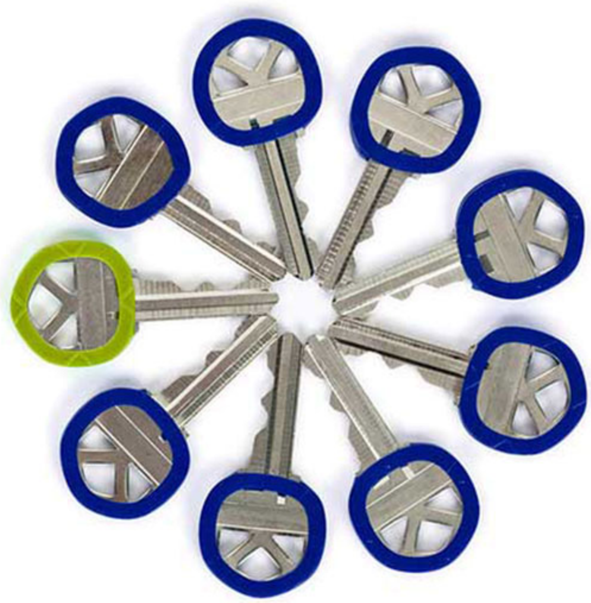

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Select Provisions of Interest in the Taxpayer First Act

On July 1, 2019, President Trump signed the Taxpayer First Act, H.R. 3151 ("TFA"). A summary of select provisions of the TFA is provided below. These select provisions relate to:

1. The establishment of an Independent Office of Appeals,
2. Sensible enforcement of the Internal Revenue Code,

3. The organization and modernization of the Internal Revenue Service ("IRS"),
4. The IRS's use of information technology,
5. Cybersecurity and identity theft protection,
6. The modernization of the consent-based income verification system,
7. Expanding the IRS's use of electronic systems, and
8. An increase in the minimum amount of a failure to file penalty.

Establishment of an Independent Office of Appeals

Section 1001 of the TFA establishes an Independent Office of Appeals and provides for the appointment of a Chief of Appeals. The Chief of Appeals will be appointed by the IRS Commissioner and will report directly to the Commissioner. The mission of the Independent Office of Appeals is to resolve controversies without litigation in a fair and impartial way and in a manner that promotes compliance with Federal tax laws and boosts public confidence in the IRS Section 1001 of the TFA also provides that a right of appeal shall be generally available to all taxpayers. It additionally provides for procedures to contest the denial of appeals rights after a taxpayer receives a notice of deficiency, requests referral to the Independent Office of Appeals, and is denied. If the Commissioner declines to provide the taxpayer with an opportunity to contest the notice of deficiency in Appeals, the Commissioner is required to provide the taxpayer with a written notice that provides a detailed description of the facts and basis of the decision to deny the request. The Commissioner must submit an annual report to Congress that discloses the number of requests denied and the reasons why. The IRS is instructed to prescribe procedures for administratively appealing the denial of a request to take a taxpayer's tax dispute to Appeals.

Section 1001 of the TFA allows the Independent Office of Appeals to obtain legal advice from the staff of the IRS Office of the Chief Counsel. The Office of Chief Counsel is directed to ensure that, to the extent practicable, assistance provided to the Independent Office of Appeals is provided by staff who did not work the case at issue in exam.

Upon the request of a specified taxpayer, the Chief of Appeals must ensure that the specified taxpayer has access to nonprivileged portions of the IRS case file at least 10 days before an Appeals conference. A specified taxpayer is defined as:

1. An individual whose adjusted gross income does not exceed $400,000 for the disputed taxable year and
2. A non-individual taxpayer whose gross receipts do not exceed $5,000,000 for the taxable year to which the dispute relates.

However, if the Taxpayer so elects, the nonprivileged portions of the case file can be provided to the taxpayer on the date of such conference.

Sensible Enforcement

Section 1206 of the TFA amends section 7602(c)(1) to provide that the IRS cannot contact a third party until 45 days after the IRS provides a notice to the taxpayer that it intends to contact third parties. After it provides the notice to the taxpayer, the IRS may contact third parties for up to 1 year (as specified in the notice). After 1 year, a new notice is required. The IRS is prohibited from issuing a notice if it does not intend to contact third parties at the time the notice is issued. Significantly, no remedy is provided for violations of this provision. The amendment is effective to notices provided, and third-party contacts made, after August 15, 2019.

Section 1207 of the TFA amends section 6503(j), which provides for an extension of the statute of limitations on assessment if the IRS issues a "designated summons." The Commissioner of the relevant operating division of the IRS and the Chief Counsel must now review and provide written approval for the issuance of a designated summons. The written approval must:

1. Recite facts that clearly establish that reasonable information requests were made and
2. Be attached to the designated summons.

Further, the IRS bears the burden of proving that reasonable information requests were made. The amendment to section 6503(j) is effective to summonses issues after August 15, 2019.

Section 1208 of the TFA amends section 7602 by adding two new rules:

1. The IRS cannot provide books and records obtained under the authority of section 7602 to third parties unless the third parties require the books and records to provide expert valuation services to the IRS.
2. Only IRS and Chief Counsel employees can question a witness whose testimony was obtained under authority of section 7602.

This provision is effective as of July 1, 2019 and applies to contracts entered into before the effective date.

Organization and Modernization

Section 1301(a)(1) of the TFA requires the Commissioner or a Deputy Commissioner to modify, rescind, or ensure compliance with any Taxpayer Advocate Directive within 90 days after the issuance of such directive. In the case of any directive which is modified or rescinded by the Deputy Commissioner, the National Taxpayer Advocate may appeal to the Commissioner and the Commissioner will either ensure compliance or provide reasons for the modification or rescission. Section 1301(b) of the TFA provides that the National Taxpayer Advocates' Annual Report to Congress will only be required to address the 10 most serious taxpayer problems (instead of the 20 most serious problems). In addition, the National Taxpayer Advocate must coordinate with the Treasury Inspector General for Tax Administration before beginning any research or statistical study.

Section 1302 of the TFA requires the Secretary of the Treasury to Congress to submit a comprehensive written plan to redesign the organization of the IRS by September 30, 2020. This section also repeals the restriction on organizational structure of the IRS beginning 1 year after the plan is submitted to Congress.

Information Technology

Section 2101(a) of the TFA creates the position of IRS Chief Information Officer ("IRS CIO"). The IRS CIO will be appointed by the IRS Commissioner. The Commissioner is required to act through the IRS CIO with respect to the development, implementation, and maintenance of all information technology for the IRS. The IRS CIO will also develop, implement, and annually update a multiyear strategic plan for the information technology needs of the IRS.

Section 2101(b)(1) of the TFA provides that the Commissioner shall enter into a contract with an independent reviewer to verify and validate implementation plans for the development of the Customer Account Data Engine 2 and Enterprise Case Management System. These plans must be implemented by July 1, 2020. Section 2103 of the TFA provides for streamlined critical pay authority for any position that is critical for the information technology operations of the IRS.

Cybersecurity and Identity Protection

Section 2003 of the TFA authorizes the IRS to participate in an information sharing and analysis center to centralize, standardize, and enhance data compilation and analysis for the purpose of preventing identity theft tax refund fraud. Section 2005 of the TFA instructs the IRS to establish a program that would provide a personal identification number for return filing purposes to any individual who requests such number. Section 2006 of the TFA instructs the IRS to implement procedures to provide taxpayers whose refunds are delayed because of identity theft with a "single point of contact" throughout the processing of the case. The single point of contact will be a team of IRS employees with the ability to work across IRS functions. Section 2007 of the TFA enacts a new section 7529, which provides that, if the IRS determines that there was, or may have been, unauthorized use of an individual's identity, the IRS is required to:

1. Notify the individual affected,
2. Provide instructions on how to file a police report,
3. Identify steps for the individual to take to protect the individual from harm,
4. Offer identity theft protection measures to the individual, and
5. Provide certain updates to the affected individual regarding the status of the investigation.

Modernization of Consent-Based Income Verification System

Section 2201 of the TFA requires the IRS to automate, and make available online, the procedures for requesting a qualified disclosure under section 6103(c) to verify the income or creditworthiness of a taxpayer. The IRS is required to develop security standards for these procedures and to establish a fee for the qualified disclosures.

Section 2202 of the TFA amends section 6103(c) by adding at the end of the subsection that persons who receive return information for the purpose of verifying the income or creditworthiness of a taxpayer shall not use the information for any other purpose than that purpose for which it was granted without the express permission of the taxpayer.

Expanded Use of Electronic Systems

Section 2302 of the TFA instructs the IRS to publish guidance regarding signatures and instructs the IRS to issue procedures for the acceptance of electronic signatures with respect to any request for disclosure of return information to a practitioner or any power of attorney granted by a taxpayer to a practitioner.

Minimum Failure to File Penalty Increase

Finally, section 3201 of the TFA amends section 6651 by increasing the minimum penalty for a failure to file a return within 60 days of the due date (including extensions) from the lesser of the amount of tax required to be shown on the return and $205 to the lesser of the amount of tax required to be shown on the return and $330. The amendment to section 6651 applies to returns that are required to be filed after December 31, 2019.

IRS Issues Penalty Relief to Partnerships and S Corporations that Relied on Proposed GILTI Regulations in Issuing Schedules K-1 to Partners

On August 22, 2019, the Department of the Treasury ("Treasury") and the Internal Revenue Service ("IRS") issued Notice 2019-46 in which they announced their intent to issue regulations that will permit a domestic partnership or S corporation to apply the rules in Prop. Treas. Reg. § 1.951A-5 (the "Proposed Regulations")[1] for taxable years ending before June 22, 2019. Notice 2019-46 also provides relief from certain penalties for a domestic partnership or S corporation that acted consistently with the Proposed Regulations on or before June 21, 2019.

Background

The Proposed Regulations provided a hybrid approach to the treatment of a domestic partnership that is a US shareholder ("US Shareholder Partnership") of a controlled foreign corporation ("Partnership CFC"). Under this approach, a US Shareholder Partnership would determine its global low-taxed intangible income under section 951A ("GILTI inclusion"), and any partner of the partnership that was not also a US shareholder of the Partnership CFC would be allocated its distributive share of the partnership's GILTI inclusion amount.[2]

On June 21, 2019, Treasury and the IRS promulgated Treas. Reg. § 1.951A-1(e) (the "Final Regulations").[3] Unlike the Proposed Regulations, the Final Regulations provide that no partnership (whether domestic or foreign) ever has a GILTI inclusion. In addition, no partnership (whether domestic or foreign) ever allocates any GILTI inclusion to any of its partners. The Final Regulations apply to taxable years of foreign corporations beginning after December 31, 2017 and to taxable years of US shareholders in which, or with which, such taxable years of foreign corporations end.

In Notice 2019-46, Treasury and the IRS acknowledged that many domestic partnerships and S corporations furnished Schedules K-1, *Partner's Share of Income, Deductions, Credits, etc.*, to their partners and shareholders on or before the date of publication of the Final Regulations on June 21, 2019. Consistent with the Proposed Regulations, these Schedules K-1 may have included a GILTI inclusion amount. To avoid potential penalties under sections 6698, 6699, or 6722, these entities could be required to file returns for the 2018 taxable year consistent with the Final Regulations and furnish Schedules K-1 to their partners or shareholders consistent with their Form 1065, *U.S. Return of Partnership Income*, or Form 1120S, *U.S. Income Tax Return for an S Corporation*. The issuance of corrected Schedules K-1 may result in significant additional costs to these taxpayers and burden the IRS.

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[1] 83 Fed. Reg. 51072 (Oct. 10, 2018).
[2] *See* Prop. Treas. Reg. § 1.951A-5(c).
[3] T.D. 9866, 84 Fed. Reg. 29288 (June 21, 2019).

Requirements for Penalty Relief

Notice 2019-46 provides penalty relief to a domestic partnership or S corporation that issued Schedules K-1 under the Proposed Regulations before June 22, 2019 and has not (and will not) reissue Schedules K-1 under the Final Regulations in one of two ways:

- First, the domestic partnership or S corporation may file its partnership or S corporation return for taxable years ending before June 22, 2019 consistent with the Proposed Regulations. Provided that the notice and reporting requirements of Notice 2019-46 are satisfied, the penalties under sections 6698, 6699, or 6722 would not apply.
- Second, the domestic partnership or S corporation may file its partnership or S corporation return consistent with the Final Regulations. Provided that the notice and reporting requirements of Notice 2019-46 are satisfied, the penalties under sections 6698, 6699, or 6722 would not apply.

In both cases, the partnership or S corporation must satisfy certain notification and reporting requirements. The notification that is required to be provided must provide the following information:

1. That the Schedule K-1 provided to the partner or shareholder is consistent with the Proposed Regulations;
2. Whether the partnership or S corporation filed a Form 1065 or Form 1120S consistent with (a) the Proposed Regulations or (b) the Final Regulations; and
3. That the notification is being provided in accordance with the Notice 2019-46.

The notification must be provided no later than the due date (including extensions) of the partnership or S corporation's tax return and may be provided through any reasonable method, including via mail, e-mail, or posting on a website through which the partnership or S corporation would ordinarily disseminate tax information to its partners or shareholders. If the partnership or S corporation filed its tax return and did not request an extension of time to file such return, the notification must be provided by the date on which the return would have been due had an extension been properly requested.

The partnership or S corporation must also attach the notification and Form 8992, *U.S. Shareholder Calculation of Global Intangible Low-Tax Income* (GILTI), reflecting computations under the Proposed Regulations to any tax return with respect to which the rules of Notice 2019-46 are being applied unless the return was filed before the publication of Notice 2019-46 (*i.e.*, August 22, 2019).

Notice 2019-46 does not directly address the application of the Proposed Regulations and the potential application of certain penalties to partners or shareholders of affected domestic partnerships and S corporations.

Revenue Procedure 2019-32 Provides a Six-Month Extension for Eligible BBA Partnerships to File a Superseding Form 1065 and Issue Corrected Schedules K-1

On July 25, 2019, the IRS issued Revenue Procedure 2019-32 ("Rev. Proc. 2019-32"), which allows a six-month extension for eligible BBA partnerships to file a superseding Form 1065, *U.S. Return of Partnership Income*, and furnish corresponding Schedules K-1, *Partner's Share of Income, Deductions, Credits, etc.*, to each of its partners to correct errors on a timely filed partnership return.
URL:
https://samlsso.deloitte.com/LexisAdvanceSSOLanding/?relaystate=https%3A%2F%2Fadvance.lexis.com%2Fapi%2Fdocument%2Fcitation%3Fcite%3DRev.+Proc.+2019-32
URL: https://www.irs.gov/pub/irs-pdf/f1065.pdf
URL: https://www.irs.gov/pub/irs-pdf/f1065sk1.pdf

Factual Background

Section 1101(a) of the Bipartisan Budget Act of 2015 ("BBA") removed the TEFRA partnership audit and litigation procedures, effective January 1, 2018.[4] Section 1001(c) of BBA replaced the TEFRA partnership procedures with a new centralized partnership audit regime ("BBA rules") found in sections 6621-6241 of the Internal Revenue Code ("Code"). Generally, the BBA rules determine, assess, and collect tax at the partnership level.
URL:
https://samlsso.deloitte.com/LexisAdvanceSSOLanding/?relaystate=https%3A%2F%2Fadvance.lexis.com%2Fapi%2Fdocument%2Fcitation%3Fcite%3D26+USCS+6621
URL:
https://samlsso.deloitte.com/LexisAdvanceSSOLanding/?relaystate=https%3A%2F%2Fadvance.lexis.com%2Fapi%2Fdocument%2Fcitation%3Fcite%3D26+USCS+6241

Except for partnerships that elected to opt-in to the BBA rules for the 2016 and 2017 taxable years, taxable years beginning in 2018 were the first years for which the BBA rules applied. The BBA rules apply to all partnerships, unless the partnership makes a valid election under section 6221(b) not to have those procedures apply.[5] Only certain partnerships that are required to issue fewer than 100 Schedules K-1 are eligible to make the election out of the BBA rules. Partnerships subject to the centralized partnership audit regime are referred to in Rev. Proc. 2019-32 as "BBA partnerships."
URL:
https://samlsso.deloitte.com/LexisAdvanceSSOLanding/?relaystate=https%3A%2F%2Fadvance.lexis.com%2Fapi%2Fdocument%2Fcitation%3Fcite%3D26+USCS+6221

Section 6031(a) requires partnerships to file a return for each taxable year that states items of gross income and deductions allowable under subtitle A of the Code and other information required by forms and regulations.[6] For a partnership, the return required by section 6031(a) is Form 1065, which includes Schedules K-1. Each Schedule K-1 provides the name of the partner and the partner's distributive share of taxable income along with other information. Section 6031(b) requires partnerships to provide a copy of the Schedule K-1 to each partner. Section 6031(b) also prohibits BBA partnerships from amending information required to be provided to the partners on the Schedule K-1 after the due date of the return.
URL:
https://samlsso.deloitte.com/LexisAdvanceSSOLanding/?relaystate=https%3A%2F%2Fadvance.lexis.com%2Fapi%2Fdocument%2Fcitation%3Fcite%3D26+USCS+6031

Section 6072(b) generally requires the filing of the Form 1065 and furnishing of the Schedules K-1 to occur on the 15th day of the third month after the end of the partnership's taxable year.[7] For calendar year end partnerships this deadline is March 15. Section 6081(a) allows the Secretary of the Treasury to grant reasonable extensions of time, generally no more than six months, for the filing of any required document.[8] Treas. Reg. § 1.6081-2(b) requires partnerships to submit an application for extension before the deadline for filing Form 1065.[9] A request for an automatic six-month extension to file Form 1065 is made by filing Form 7004, *Application for Automatic Extension of Time To File Certain Business Income Tax, Information, and Other Returns*.
URL:
https://samlsso.deloitte.com/LexisAdvanceSSOLanding/?relaystate=https%3A%2F%2Fadvance.lexis.com%2Fapi%2Fdocument%2Fcitation%3Fcite%3D26+USCS+6072

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[4] Bipartisan Budget Act of 2015 (P.L. 114-74)
URL:
https://samlsso.deloitte.com/LexisAdvanceSSOLanding/?relaystate=https%3A%2F%2Fadvance.lexis.com%2Fapi%2Fdocument%2Fcitation%3Fcite%3DP+.+L+114-74
[5] *See* IRC § 6221(b)
[6] *See* § 6031(a)
[7] *See* § Section 6072(b)
[8] *See* § Section 6081(a)
[9] *See* Treas. Reg. § 1.6081-2(b)
URL:
https://samlsso.deloitte.com/LexisAdvanceSSOLanding/?relaystate=https%3A%2F%2Fadvance.lexis.com%2Fapi%2Fdocument%2Fcitation%3Fcite%3D26+cfr+1.6081-2

URL:
https://samlsso.deloitte.com/LexisAdvanceSSOLanding/?relaystate=https%3A%2F%2Fadvance.lexis.com%2Fapi%2Fdocument%2Fcitation%3Fcite%3D26+USCS+6081
URL:
https://samlsso.deloitte.com/LexisAdvanceSSOLanding/?relaystate=https%3A%2F%2Fadvance.lexis.com%2Fapi%2Fdocument%2Fcitation%3Fcite%3D26+cfr+1.6081-2
URL: https://www.irs.gov/pub/irs-pdf/f7004.pdf

For calendar-year partnerships that timely request a six-month extension, the extended deadline is September 15. A partnership that filed its Form 1065 and furnished Schedules K-1 to its partners may file a superseding return and furnish corresponding Schedules K-1 to its partners prior to the extended deadline. A timely filed superseding Form 1065 is considered the original return of the partnership.

Certain BBA partnerships timely filed Form 1065 for their 2018 taxable year and timely furnished the required Schedules K-1 to their partners. Some of these partnerships may have made errors, including not reporting all of the required information on the Schedules K-1. These BBA partnerships did not request a filing extension and, due to the new restrictions in section 6031(b), were not able to amend the Schedules K-1 for the 2018 tax year absent relief.

Revenue Procedure 2019-32

Rev. Proc. 2019-32 provides relief for eligible BBA partnerships by treating the timely filing of Form 1065 as a timely and appropriately filed request for a six-month extension of the deadline to file the Form 1065. BBA partnerships are eligible for relief if they timely filed Form 1065 and timely furnished Schedules K-1 for a taxable year that ended before the issuance of Rev. Proc. 2019-32 on July 25, 2019, and for which the extended due date of the partnership taxable year is after July 25, 2019.

To qualify, BBA partnerships that timely filed Form 1065 and timely furnished Schedules K-1 before July 25, 2019, must file a superseding Form 1065 and corresponding Schedules K-1, on or before the six-month extension deadline after the original filing due date. These extensions apply only to partnership taxable years that ended before July 25, 2019, and for which the extended due date is after July 25, 2019. The BBA partnership must file a superseding Form 1065 and furnish corresponding Schedules K-1 to its partners in the same manner as the original return and Schedules K-1. The BBA partnership must also write on the top of the superseding Form 1065 “SUPERSEDING FORM 1065 PURSUANT TO REVENUE PROCEDURE 2019-32”. The superseding return that the BBA partnership files will replace any prior return for purposes of determining the partnership’s treatment of partnership related items.

LB&I Issues Memorandum re Timeframes for Cases to be Sent to Appeals

On July 15, 2019, the Large Business and International Division (“LB&I”) issued a memorandum that establishes timeframes for the transfer of cases to the Office of Appeals (“Appeals”). The memorandum, LB&I-04-0419-003, was issued in response to a Government Accountability Office (“GAO”), GAO-18-659, that recommended, among other things, that the IRS establish timeframes and monitoring procedures for timely transfer of taxpayer appeals requests by examination compliance units to Appeals. Treasury and the IRS agreed with the GAO recommendations, and the July 15, 2019 memorandum, which is effective as of August 15, 2019, sets new guidelines for closing cases to Appeals.

Under the new guidelines, examination cases under the large case program, whether the Coordinated Industry Case program or the Large Corporate Compliance program, should be closed to Appeals within 240 days from the issuance of the 30-day letter. For all other workstreams, the cases should be closed to Appeals within 120 days from the issuance of the 30-day letter. These guidelines will be incorporated in a future update to IRM 4.46.5.

IRS Ends Moratorium on Opening New Cost Sharing Arrangement Stock-Based Compensation Examinations After the Ninth Circuit's Decision in *Altera*

In memorandum LB&I-04-0719-008, dated July 31, 2019, Douglas O'Donnell, the Commissioner of the Large Business Division ("LB&I"), withdrew an earlier memorandum, LB&I-040-0118-005. LB&I-04-0118-005, issued January 12, 2018, directed examiners to stop opening examinations applying Treas. Reg. §§ 1.482-7A(d)(2) and 1.482-7(d)(3), the cost-sharing arrangement/stock-based compensation regulations invalidated by the Tax Court in *Altera Corp. v. Commissioner*,[10] pending the Ninth Circuit's consideration of the IRS's appeal in *Altera*.

On June 7, 2019, the Ninth Circuit reversed the Tax Court's opinion in *Altera*,[11] and on that basis, LB&I withdrew LB&I-040-0118-005. On July 22, 2019, the taxpayers in *Altera* filed a petition with the Ninth Circuit for a rehearing *en banc*. The new LB&I memorandum directs examiners to continue to apply Treas. Reg. §§ 1.482-7A(d)(2) and 1.482-7(d)(3), including by opening new examinations of cost-sharing arrangement/stock-based compensation issues when appropriate.

District Court Holds that an Individual Taxpayer Cannot Establish Reasonable Cause by Showing Reliance on a Tax Return Preparer to E-File a Tax Return

In *Intress v. United States*,[12] a district court held that an individual cannot establish reasonable cause for failing to timely file a tax return by showing that the individual relied on a tax return preparer to e-file his or her tax return. In doing so, the court held that the reasoning for the Supreme Court's holding in *United States v. Boyle*[13] has not been undermined by the widespread use of e-filing. The district court reasoned that, for an individual, e-filing is still optional, and an individual can still request to file a paper return. Thus, it is still appropriate to hold that the filing of an individual tax return is the non-delegable duty of the taxpayer.

Facts

The taxpayers hired a tax return preparer to file their 2014 Form 1040, *Individual Income Tax Return*. The tax return preparer prepared a Form 4868, *Application for Automatic Extension of Time to File U.S. Individual Income Tax Return*, to obtain an extension of time to file their 2014 return using the tax return preparer's e-filing software but failed to hit the send button. The tax return preparer, and the taxpayers, mistakenly believed that the Form 4868 was filed and did not discover otherwise until October 2015. It did not appear that the taxpayers ever attempted to verify that the Form 4868 was timely filed. The IRS assessed a late filing penalty under section 6651(a)(1) on the taxpayers. The taxpayers paid the assessed penalty and sued for a refund.

Background

Section 6651(a)(1) provides a failure to file penalty of 5% per month, not exceeding 25% in the aggregate, unless it is shown that such failure is due to reasonable cause and not to willful neglect. In *United States v. Boyle*, the Supreme Court held that the failure to timely file a tax return is not excused by the taxpayer's reliance on a professional third party, and such reliance is not reasonable cause for a late filing under section 6651(a)(1), because filing a return is a non-delegable duty of the taxpayer.[14]

In recent years, some taxpayers have argued that the reasoning behind the *Boyle* rule is inapplicable in the age of e-filing, where taxpayers often have no choice but to rely on third parties to file their tax returns. In *Haynes v. United States*,[15] the Fifth Circuit declined an invitation to answer this question and decided the case on alternative grounds.

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[10] 145 T.C. 91 (2015).
[11] 926 F.3d 1061 (9th Cir. 2019).
[12] No. 3:18-cv-851 (M.D. Tenn. Aug. 2, 2019).
[13] 469 U.S. 241 (1985).
[14] *See id.*
[15] 760 F. Appx. 324 (5th Cir. 2019).

In that case, the Fifth Circuit clarified that, even under the *Boyle* rule, if the tax return preparer (acting as an agent for the taxpayer) is diligent, the diligence of the agent would be imputed to the taxpayer. As the district court in *Intress* notes in a footnote, the Sixth Circuit appears to take a more restrictive view of the *Boyle* rule, holding, for example, that a taxpayer cannot rely on an agent to satisfy tax filing and payment obligations even where the failure was due to the malfeasance of the agent,[16] or where the agent would have had reasonable cause for the late filing.[17]

The district court's analysis

The government and the taxpayers each moved for summary judgment. The government argued that, under *United States v. Boyle*,[18] the taxpayers could not assert a reasonable cause defense based on their reliance on their tax return preparer. By contrast, the taxpayers argued that the *Boyle* rule was inapplicable because, unlike as in *Boyle*, taxpayers now effectively have to e-file their returns. Thus, *Boyle*'s reasoning that filing a return is a non-delegable duty of the taxpayer is no longer true because taxpayers must delegate their return filing to tax return preparers or e - file software vendors to comply with the e-filing requirements. The court agreed with the government and held that, at least with an individual taxpayer, the *Boyle* rule continues to apply with full force because the individual can still file a paper return. First, the court noted that there is no e-filing requirement for an individual income tax return unless the return is filed by a return preparer who files a minimum of 10 returns per year.[19] Second, the court noted that an individual can opt out of the e-filing requirement by providing a written statement to the return preparer and physically mailing the return.[20] Thus, the court held that e-filing has not fundamentally undermined the reasoning behind the *Boyle* rule.[21]

The court indicated that its holding depends on the current e-filing requirements for individual returns. However, if the e-filing requirements become more restrictive, the court suggested that its analysis may change. The court did not address how the e-filing requirements for corporate returns may affect the applicability of the *Boyle* rule in the context of a failure to timely file a corporate return.

Finally, the court noted that even if *Boyle* was inapplicable in the era of e-filing, a taxpayer would still need to demonstrate reasonable reliance on his or her tax return preparer. In this case, it did not appear that the taxpayers ever attempted to verify that the Form 4868 was timely filed before the mistake was discovered six months later.

Court Declines to Dismiss a Taxpayer's Equitable Estoppel Claim in *Fitzgerald Truck Parts & Sales v. United States*

In *Fitzgerald Truck Parts & Sales v. United States*,[22] the district court denied the government's motion to dismiss the taxpayer's equitable estoppel claim. The court reasoned that, although the Supreme Court has established a very high bar for sustaining an equitable estoppel claim against the government, the Supreme Court has not ruled out the possibility of bringing such a claim and the taxpayer alleged sufficient facts to survive a motion to dismiss.

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[16] *See Intress*, No. 3:18-cv-851, n.8 (citing *Vaughn v. United States*, 635 F. Appx. 216 (6th Cir. 2016) (financial manager embezzled and lied to taxpayer).
[17] *See id.* (citing *Specht v. United States*, 661 F. Appx. 357 (6th Cir. 2016) (return preparer suffered from undiagnosed brain cancer)).
[18] 469 U.S. 241 (1985).
[19] *See Intress*, No. 3:18-cv-851 (citing Rev. Proc. 2011-25, 2011-17 I.R.B. 725 (2011)).
[20] *See id.*
[21] As mentioned above, the Sixth Circuit appears to take a more restrictive view of the Boyle rule than the Fifth Circuit took in *Haynes*. It is therefore unsurprising that the court did not consider whether the return preparer reasonably believed that she had submitted the Form 4868 as the Fifth Circuit considered in *Haynes*.
[22] No. 2:19-cv-00008 (M.D. Tenn. July 15, 2019).

Background

Section 4051(a)(1) imposes a 12% excise tax on the first retail sale of semi-truck tractors. Section 4052(f)(1) provides that modifications and repairs to the tractors are not treated as the manufacture of a new tractor if the cost of such repairs or modifications does not exceed 75% of the retail price of a comparable new tractor.

The taxpayer is a semi-truck glider kit assembler.[23] It takes wrecked and worn-out highway tractors and rebuilds them using glider kits. The taxpayer alleges that its cost for each rebuilt tractor is less than 75% of the retail price of a comparable new highway tractor.

The IRS examined the taxpayer, and its predecessor's, excise tax returns four times before it opened an exam for 2012 – 2014.[24] In each of the prior instances, the IRS agreed with the taxpayer that the rebuilt tractor it sold qualified for the exemption under section 4052(f). In one instance, the taxpayer received a letter form the District Director confirming that the rebuilt tractors it sold "qualified for the 75% safe harbor provisions per Revenue Ruling 91-27."[25]

In 2014, the IRS opened an exam for each of the quarters in 2012 – 2014.[26] The examination team proposed to assess excise tax on the tractor sales for those years, and the taxpayer filed an Appeals protest. After initially failing to settle the case in Appeals, the taxpayer and the IRS agreed to present the case to an Appeals mediator.[27] Pursuant to the mediation, the IRS agreed not to assess any tax on tractor sales made prior to the agreement, and the taxpayer agreed to collect and pay the excise tax on tractor sales made after the agreement. This agreement was memorialized in a mediator's report, which was signed by the mediator, the IRS Appeals Team manager, and the taxpayer.

For unknown reasons, the IRS chose not to abide by the settlement and assessed excise tax, interest, and penalties of $64 million for 2012 – 2014 on the taxpayer.[28] As these taxes were not collected at the time of the tractor sales, the court noted that it is unlikely that any of the purchasers would agree to pay the excise tax assessed on the taxpayer.

The taxpayer paid the excise tax for one truck for each of the periods at issue and filed a refund claim in the United States District Court for the Middle District of Tennessee.[29] In its complaint, the taxpayer alleged that it was entitled to a refund of the tax paid because:

1. The sales were not taxable under the section 4052(f)(1) exception;
2. Equitable estoppel requires the IRS to act consistently with its previous determinations, rulings, and guidance; and
3. Equitable estoppel based on the alleged retroactivity of the new standard.

As a general matter, "'[e]stoppel is an equitable doctrine which a court may invoke to avoid injustice in particular cases.'"[30] "'The traditional elements of equitable estoppel are: (1) misrepresentation by the party against whom estoppel is asserted; (2) reasonable reliance on the misrepresentation by the party asserting estoppel; and (3) detriment to the party asserting estoppel.'"[31]

The government moved to dismiss the equitable estoppel claims and to strike certain paragraphs from the taxpayer's complaint that related to how other taxpayers were treated.[32] On the estoppel claims, the government heavily relied on *Richmond v. OPM*,[33] a Supreme Court case that sets a very high bar for bringing a successful equitable estoppel claim against the government. In *Richmond*, a civilian employee of the Navy was provided incorrect advice by a Navy civilian personnel department employee and, consequently, lost disability benefits of $3,993 dollars over a period of

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[23] *See Fitzgerald Truck*, Slip Op. at 1.
[24] *See id.*, Slip Op. at 2.
[25] *See id.*, Slip Op. at 3.
[26] *See id.*
[27] *See id.*
[28] *See id.*, Slip Op. at 4.
[29] *See id.*
[30] *Id.*, Slip Op. at 8 (quoting *Michigan Exp., Inc. v. United States*, 374 F.3d 424, 427 (6th Cir. 2004)).
[31] *Id.*
[32] *See id.*, Slip Op. at 4 – 5.
[33] 496 U.S. 414 (1990).

six months. The Supreme Court noted that it had reversed every finding of equitable estoppel against the government that came before it. In that case, the Supreme Court held that equitable estoppel was not established because an express statutory provision mandated the loss of benefits but declined to hold that equitable estoppel may never lie against the government.[34]

The district court rejected the governments assertion that the facts of this case are analogous to the facts in *Richmond*.[35] First, unlike as in *Richmond*, there is no express statutory provision that requires a contrary result. Second, whereas the employee in *Richmond* relied on the advice of a civilian Navy employee, the taxpayer here relied on a course of conduct and multiple IRS representations, including at least one revenue ruling and a written IRS correspondence, that were made over a period of more than two decades. Thus, the district court concluded that the taxpayer had stated a plausible equitable estoppel claim and denied the motion to dismiss.

Finally, the district court denied the government's motion to strike allegations in the taxpayer's complaint that other taxpayers had been treated differently by the IRS.[36] The court reasoned that these allegations could help the taxpayer in proving its equitable estoppel claim.

D.C. Circuit Holds that the 30-Day Period for Petitioning the Tax Court Under Section 7623(b)(4) is Non-jurisdictional and Subject to Equitable Tolling

In *Myers v. Commissioner*,[37] the D.C. Circuit, in a 2 – 1 decision, reversed the Tax Court and held that the 30-day filing period for petitioning the Tax Court under section 7623(b)(4) is not jurisdictional and is subject to equitable tolling.

Background

A whistleblower petitioned the Tax Court after the 30-day period that is provided in section 7623(b)(4) to appeal the IRS's adverse determination on his whistleblower claim to the Tax Court.[38] The IRS moved to dismiss for lack of jurisdiction, arguing that the petition was untimely. The Tax Court granted the motion, finding that the petition was not timely filed and holding that the 30-day filing period under section 7623(b)(4) is jurisdictional.[39] Consequently, the Tax Court held that the 30-day period for filing a whistleblower claim is not subject to equitable tolling.

D.C. Circuit Opinions

The D.C. Circuit agreed with the Tax Court that the petition was not timely filed, but the majority opinion disagreed with the Tax Court on the jurisdictional issue; the majority opinion held that that the 30-day filing period under section 7623(b)(4) is not jurisdictional and is subject to equitable tolling.[40]

In holding that the 30-day filing period is not jurisdictional, the majority opinion noted that a recent line of Supreme Court cases hold that most time bars are not jurisdictional and that it will consider a time bar to be jurisdictional only if Congress clearly says so.[41] The majority opinion applied this standard to the 30-day filing period under section 7623(b)(4). Section 7623(b)(4) provides that "[a]ny determination regarding an award…may, within 30 days of such determination, be appealed to the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter)." The majority opinion reasoned that, although the parenthetical in section 7623(b)(4) speaks in jurisdictional terms, the jurisdictional term can be understood as referring to the determinations of an award and not to the 30-day filing

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34 *See Fitzgerald Truck*, Slip Op. at 6.
35 *See id.*, Slip Op. at 6 – 7.
36 *See id.*, Slip Op. at 12.
37 *Myers v. Comm'r*, No. 18-1003 (D.C. Cir. July 02, 2019).
38 *See id.*, Slip Majority Op. at 4.
39 *See id.* (citing *Myers v. Comm'r*, 148 T.C. 438 (2017)).
40 *See id.*, Slip Majority Op. at 22.
41 *See id.*, Slip Majority Op. at 15 – 16 (citing *Gonzalez v. Thaler*, 565 U.S. 134 (2012); *Henderson v. Shinseki*, 562 U.S. 428 (2011)).

period.[42] However, the majority opinion noted that its conclusion was in tension with a recent Ninth Circuit opinion that held that a similarly worded time bar, section 6330(d)(1), is jurisdictional.[43]

The majority opinion then examined whether the section 7623(b)(4) filing requirement is subject to equitable tolling. The majority opinion noted that "a nonjurisdictional federal statute of limitations is normally subject to a rebuttable presumption in favor of equitable tolling."[44] The presumption can be rebutted by showing that there is "good reason to believe that Congress did not want the equitable tolling doctrine to apply."[45] After examining several factors that could bear on the presumed Congressional intent, the majority opinion concluded that the burden for rebutting the equitable tolling presumption was not met.[46]

The dissenting opinion would have agreed with the Tax Court that the timely claim filing requirement of section 7623(b)(4) is jurisdictional because the that provisions speaks in jurisdictional terms and there is no genuine ambiguity as to whether Congress intended the provision to be treated as jurisdictional in nature.[47] In the light of the majority opinion's conclusions, the D.C. Circuit remanded the case to the Tax Court for further proceedings to determine whether equitable tolling should apply to the facts of this case.

[42] *See id.*, Slip Majority Op. at 17 – 18.
[43] *See id.*, Slip Majority Op. at 18 (citing *Duggan v. Comm'r*, 879 F.3d 1029, 1034 (9th Cir. 2018)).
[44] *See id.*, Slip Majority Op. at 20 (quoting *Holland v. Florida*, 560 U.S. 631, 645 – 46 (2010)).
[45] *See id.*, Slip Majority Op. at 21 (quoting *United States v. Brockamp*, 519 U.S. 347, 350 (1997)).
[46] *See id.*, Slip Majority Op. at 22.
[47] *See id.*, Slip Dissenting Op. at 1.