RECENT DEVELOPMENTS IN FEDERAL INCOME TAXATION

We apologize to our readers. If we had more time, this outline would be much shorter.

By

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Note: This outline was prepared jointly with Cassady V. ("Cass") Brewer, Professor of Law, Georgia State University College of Law, Atlanta, GA.

I. ACCOUNTING

II. BUSINESS INCOME AND DEDUCTIONS

A. Income

B. Deductible Expenses versus Capitalization

C. Reasonable Compensation

1. Pigs get fat but hogs get slaughtered? Fourth Circuit upholds Tax Court decision that a portion of compensation paid to a C corporation shareholder-employee was unreasonable and nondeductible, but vacates the Tax Court's imposition of underpayment penalties. Clary Hood, Inc. v. Commissioner, 69 F.4th 168 (4th Cir. 5/31/23). The taxpayer in this case was a C corporation formed in 1980 to engage in the land excavation and grading business. The CEO, Clary Hood, and his spouse were 50/50 shareholders of the taxpayer and the sole members of the board of directors. Since its inception, the taxpayer-corporation never paid dividends. (*Uh, oh.*) From 2000 to 2010, the taxpayer-corporation averaged approximately $21 million in annual gross revenue and less than $1 million per year in net income before taxes. During those years, Mr. Hood's annual salary was roughly $130,000, and in some of those years Mr. Hood received a bonus, the largest of which was approximately $321,000. Then in 2011, at Mr. Hood's direction, the taxpayer-corporation shifted away from residential to commercial projects, and the taxpayer-corporation's revenues grew substantially. By 2015, the taxpayer-corporation's annual revenue grew to $44 million. By 2016, annual revenue grew to $69 million. Nevertheless, Mr. Hood's annual salary was only $168,559 for 2015 and only $196,500 for 2016. (*Uh, oh.*) Accordingly, the taxpayer-corporation decided to pay Mr. Hood a bonus of $5 million for 2015 and another $5 million for 2016. (*Uh, oh.*) The taxpayer-corporation, in consultation with its accountants, determined that the $5 million bonuses paid to Mr. Hood in each of years 2015 and 2016 were appropriate to reflect the taxpayer-corporation's recent success and to remedy undercompensating Mr. Hood in prior years. On audit, the IRS challenged the taxpayer-corporation's bonuses to Mr. Hood as unreasonable and therefore nondeductible to the extent of $1.3 million for 2015 and $3.6 million for 2016. The IRS also imposed substantial underpayment penalties for years 2015 and 2016 under § 6662.

The Tax Court's Decision. The Tax Court (Judge Greaves) largely sided with the IRS after a six-day trial. *See Clary Hood, Inc. v. Commissioner*, T.C. Memo. 2022-15 (3/2/22). The IRS's expert testified that, although Mr. Hood was undercompensated for the years 2000 to 2012, the taxpayer-corporation had begun to address this discrepancy in 2013 when Mr. Hood was paid $1.4 million in salary and bonuses. The IRS's expert further concluded that by the end of 2014, Mr. Hood had been undercompensated approximately $2.3 million in prior years. The IRS expert's report concluded that reasonable compensation amounts for Mr. Hood would have been roughly $3.7 million for 2015 and roughly $1.4 million for 2016. The taxpayer-corporation submitted two opposing expert reports; however, Judge Greaves determined that the taxpayer-corporation's expert reports deserved “little to no weight” due to “dubious assumptions” underlying the reports and the lack of supporting calculations. Consequently, in a 64-page opinion, Judge Greaves held for the IRS and concluded that the taxpayer-corporation could deduct about $3.7 million of Mr. Hood’s $5 million bonus for 2015 and about $1.4 million of Mr. Hood’s $5 million bonus for 2016. The Tax Court further determined that the taxpayer-corporation should not be subject to a § 6662 substantial understatement penalty for 2015 because it reasonably relied on professional tax advice in good faith, but for 2016, the taxpayer-corporation could not show reasonable cause and should be subject to a § 6662 substantial understatement penalty for that year. The taxpayer-corporation appealed to the Fourth Circuit.

The Fourth Circuit’s Decision. The Fourth Circuit, in an opinion written by Judge Niemeyer, initially recited the applicable law of § 162(a)(1) limiting a taxpayer’s deduction for salaries and other compensation to a “reasonable allowance . . . for personal services actually rendered.” Judge Niemeyer then highlighted the directive of Reg. § 1.162-7(b) that reasonable compensation is determined by taking into account “all the circumstances.” The Fourth Circuit further observed that compensation paid by closely-held corporations is subject to “close scrutiny” because such payments may be disguised dividends. Ultimately, the Fourth Circuit stated, the reasonableness of compensation is determined based upon a multi-factor analysis which considers the “totality of the circumstances,” including:

> the employee’s qualifications; the nature, extent and scope of the employee’s work; the size and complexities of the business; a comparison of salaries paid with gross income and net income; the prevailing general economic conditions; comparison of salaries with distributions to stockholders; the prevailing rates of compensation for comparable positions in comparable concerns; [and] the salary policy of the taxpayer as to all employees.

Moreover, the Fourth Circuit noted that the reasonableness of compensation in closely-held corporations may take into account additional factors such as pay for prior years as well as shareholder-employee guarantees of corporate debt. The Fourth Circuit agreed that the Tax Court (Judge Greaves) properly adopted the multi-factor analysis described above as the test for determining reasonable compensation.

The Fourth Circuit acknowledged that the various factors used to determine reasonable compensation may be viewed from the perspective of a hypothetical independent investor (i.e., whether such an investor would be willing to compensate an employee at the same level). The court declined, however, to accept the taxpayer-corporation’s argument that the Fourth Circuit should reverse the Tax Court and adopt the Seventh Circuit’s “independent investor” test as the exclusive approach to deciding reasonable compensation cases. In *Menard, Inc. v. Commissioner*, 560 F.3d 620 at 622-623 (7th Cir. 2009), and *Exacto Spring Corp. v. Commissioner*, 196 F.3d 833 at 839 (7th Cir. 1999), Judge Posner used the “independent investor” test to allow a taxpayer to establish a “rebuttable presumption” that compensation is reasonable so long as the corporation’s shareholders are receiving a sufficiently high rate of return on their investment in the stock of the corporation. According to the taxpayer-corporation, if the Tax Court and the Fourth Circuit adopted the Seventh Circuit’s “independent investor” test, they would conclude that Mr. Hood’s compensation was reasonable because the taxpayer-corporation generated a 22% rate of return on equity for its shareholders in 2015 and a 36% rate of return on equity for 2016.

The Fourth Circuit then found no error in the Tax Court’s application of the multi-factor approach to determining reasonable compensation for Mr. Hood. The Fourth Circuit emphasized, as did the Tax Court, that the taxpayer-corporation had never declared or paid a dividend to its shareholders. The Fourth Circuit also emphasized Mr. Hood’s testimony that in 2015 he became aware of the taxpayer-corporation’s need from an “income tax” perspective to begin “getting money out of [the] corporation” to prepare for a “changing of the guard.” The Tax Court also found that the taxpayer-corporation had no “structured system in place” for determining compensation and that Mr. Hood’s compensation was determined for the years in issue solely by himself and his wife as the only members of the board of directors. The Fourth Circuit considered this finding by the Tax Court to be significant, stating it was "glaring" that the taxpayer-corporation's other officers each received bonuses of $100,000 or less for 2015 and 2016, while Mr. Hood received bonuses of $5 million for each of those years. In addition, the Fourth Circuit thought that the Tax Court's reliance on comparability data provided by the IRS's expert was appropriate. The IRS's expert acknowledged that, based on comparability data, Mr. Hood deserved compensation in the 99th percentile for similarly situated taxpayers, but that the $5 million bonuses paid in 2015 and 2016 exceeded even that amount. In sum, the Fourth Circuit found that the taxpayer-corporation had not demonstrated on appeal that the Tax Court's findings or the IRS expert's report were clearly erroneous.

The Fourth Circuit did, however, agree with the taxpayer-corporation that the Tax Court erred in upholding the IRS's imposition of a § 6662 substantial understatement penalty for 2016. The Fourth Circuit believed that the taxpayer-corporation's reliance upon the professional advice of its accountants for 2016 established reasonable cause, just as the Tax Court had found reasonable cause for 2015 based upon the same professional advice provided to the taxpayer-corporation for that year.

Observation. Of course, hindsight is always 20/20, but the authors cannot help but wonder why the taxpayer-corporation in this case was not an S corporation. Perhaps the capital-intensive nature of the excavation and grading business conducted by the taxpayer-corporation argued for C corporation status and lower corporate-level income tax rates. Yet, the taxpayer-corporation had only two individual shareholders, Mr. Hood and his wife, and seemingly could have been an S corporation. Presumably, because the taxpayer is a C corporation, the IRS will assert that the amount of excess compensation paid to Mr. Hood for 2015 and 2016 constitutes disguised dividends to Mr. Hood and his wife for those years. Thus, the taxpayer-corporation's and Mr. Hood's IRS troubles may not be over.

D. Miscellaneous Deductions

E. Depreciation & Amortization

F. Credits

G. Natural Resources Deductions & Credits

H. Loss Transactions, Bad Debts, and NOLs

I. At-Risk and Passive Activity Losses

III. INVESTMENT GAIN AND INCOME

IV. COMPENSATION ISSUES

A. Fringe Benefits

B. Qualified Deferred Compensation Plans

C. Nonqualified Deferred Compensation, Section 83, and Stock Options

D. Individual Retirement Accounts

V. PERSONAL INCOME AND DEDUCTIONS

VI. CORPORATIONS

VII. PARTNERSHIPS

VIII. TAX SHELTERS

IX. EXEMPT ORGANIZATIONS AND CHARITABLE GIVING

A. Exempt Organizations

B. Charitable Giving

X. TAX PROCEDURE

A. Interest, Penalties, and Prosecutions

1. Is the IRS ever going to learn that the § 6751(b) supervisory approval requirement is not met unless the required supervisory approval of a penalty occurs *before* the initial determination that formally communicates the penalty to the taxpayer? Laidlaw's Harley Davidson Sales, Inc. v. Commissioner, 154 T.C. 68 (1/16/20). The taxpayer, a C corporation, failed to disclose its participation in a listed transaction as required by § 6011 and Reg. § 1.6011-4(a). The IRS revenue agent examining the taxpayer's return issued a 30-day letter to the taxpayer offering the opportunity for the taxpayer to appeal the proposal to the IRS Office of Appeals (IRS Appeals). The 30-day letter proposed to assess a penalty under § 6707A for failing to disclose a reportable transaction. Approximately three months after the 30-day letter was issued, the revenue agent's supervisor approved the penalty by signing a Civil Penalty Approval Form. Following unsuccessful discussions with IRS Appeals, the IRS assessed the penalty and issued a notice of levy. The taxpayer requested a collection due process (CDP) hearing with Appeals, following which Appeals issued a notice of determination sustaining the proposed levy. In response to the notice of determination, the taxpayer filed a petition in the Tax Court. In the Tax Court, the taxpayer filed a motion for summary judgment on the basis that the IRS had failed to comply with the supervisory approval requirement of § 6751(b). Section 6751(b)(1) requires that the "initial determination" of the assessment of a penalty be "personally approved (in writing) by the immediate supervisor of the individual making such determination." The Tax Court (Judge Gustafson) granted the taxpayer's motion. The court first concluded that the supervisory approval requirement of § 6751(b) applies to the penalty imposed by § 6707A. Next the court concluded that the supervisory approval of the §6707A penalty in this case was not timely because it had not occurred before the IRS's initial determination of the penalty. The parties stipulated that the 30-day letter issued to the taxpayer reflected the IRS's initial determination of the penalty. The supervisory approval of the penalty occurred three months later and therefore, according to the court, was untimely. The IRS argued that the supervisory approval was timely because it occurred before the IRS's *assessment* of the penalty. In rejecting this argument, the court relied on its prior decisions interpreting § 6751(b), especially *Clay v. Commissioner*, 152 T.C. 23 (2019), in which the court held in a deficiency case "that when it is 'communicated to the taxpayer formally … that penalties will be proposed', section 6751(b)(1) is implicated." In *Clay*, the IRS had issued a 30-day letter when it did not have in hand the required supervisory approval of the relevant penalty. The IRS can assess the penalty imposed by § 6707A without issuing a notice of deficiency. Nevertheless, the court observed "[t]hough Clay was a deficiency case, we did not intimate that our holding was limited to the deficiency context." The court summarized its holding in the present case as follows:

> Accordingly, we now hold that in the case of the assessable penalty of section 6707A here at issue, section 6751(b)(1) requires the IRS to obtain written supervisory approval before it formally communicates to the taxpayer its determination that the taxpayer is liable for the penalty.

The court therefore concluded that it had been an abuse of discretion for the IRS Office of Appeals to determine that the IRS had complied with applicable laws and procedure in issuing the notice of levy. The court accordingly granted the taxpayer's motion for summary judgment.

a. "We are all textualists now," says the Ninth Circuit. When the IRS need not issue a notice of deficiency before assessing a penalty, the language of § 6751(b) contains no requirement that supervisory approval be obtained before the IRS formally communicates the penalty to the taxpayer. Laidlaw's Harley Davidson Sales, Inc. v. Commissioner, 29 F.4th 1066 (9th Cir. 3/25/22), *rev'g* 154 T.C. 68 (1/16/20). In an opinion by Judge Bea, the U.S. Court of Appeals for the Ninth Circuit has reversed the decision of the Tax Court and held that, when the IRS need not issue a notice of deficiency before assessing a penalty, the IRS can comply with the supervisory approval requirement of § 6751(b) by obtaining supervisory approval of the penalty before assessment of the penalty provided that approval occurs when the supervisor still has discretion whether to approve the penalty. As previously discussed, the taxpayer, a C corporation, failed to disclose its participation in a listed transaction as required by § 6011 and Reg. § 1.6011-4(a). The IRS revenue agent examining the taxpayer's return issued a 30-day letter to the taxpayer offering the opportunity for the taxpayer to appeal the proposal to the IRS Office of Appeals (IRS Appeals). The 30-day letter proposed to assess a penalty under § 6707A for failing to disclose a reportable transaction. After the taxpayer had submitted a letter protesting the proposed penalty and requesting a conference with IRS Appeals, and approximately three months after the revenue agent issued the 30-day letter, the revenue agent's supervisor approved the proposed penalty by signing Form 300, Civil Penalty Approval Form. The Tax Court held that § 6751(b)(1) required the IRS to obtain written supervisory approval before it formally communicated to the taxpayer its determination that the taxpayer was liable for the penalty, i.e., before the revenue agent issued the 30-day letter. On appeal, the government argued that § 6751(b) required only that the necessary supervisory approval be secured before the IRS's *assessment* of the penalty as long as the supervisory approval occurs at a time when the supervisor still has discretion whether to approve the penalty. The Ninth Circuit agreed. In agreeing with the government, the court rejected the Tax Court's holding that § 6751(b) requires supervisory approval of the *initial determination* of the assessment of the penalty and therefore requires supervisory approval before the IRS formally communicates the penalty to the taxpayer. According to the Ninth Circuit, "[t]he problem with Taxpayer's and the Tax Court's interpretation is that it has no basis in the text of the statute." The court acknowledged the legislative history of § 6751(b), which indicates that Congress enacted the provision to prevent IRS revenue agents from threatening penalties as a means of encouraging taxpayers to settle. But the text of the statute as written, concluded the Ninth Circuit, does not support the interpretation of the statute advanced by the Tax Court and the taxpayer. The court summarized its holding as follows:

> Accordingly, we hold that § 6751(b)(1) requires written supervisory approval before the assessment of the penalty or, if earlier, before the relevant supervisor loses discretion whether to approve the penalty assessment. Since, here, Supervisor Korzec gave written approval of the initial penalty determination before the penalty was assessed and while she had discretion to withhold approval, the IRS satisfied § 6751(b)(1).

The court was careful to acknowledge that supervisory approval might be required at an earlier time when the IRS must issue a notice of deficiency before assessing a penalty because, "once the notice is sent, the Commissioner begins to lose discretion over whether the penalty is assessed." The IRS can assess the penalty in this case, imposed by § 6707A, without issuing a notice of deficiency.

Dissenting opinion by Judge Berzon. In a dissenting opinion, Judge Berzon emphasized that the 30-day letter the revenue agent sent to the taxpayer was an operative determination. The letter indicated that, if the taxpayer took no action in response, the penalty would be assessed. Judge Berzon analyzed the text of the statute and its legislative history and concluded as follows:

> In my view, then, the statute means what it says: a supervisor must personally approve the "initial determination" of a penalty by a subordinate, or else no penalty can be assessed based on that determination, whether the proposed penalty is objected to or not. 26 U.S.C. §§ 6751(b)(1). That meaning is consistent with Congress's purpose of preventing threatened penalties never approved by

> supervisory personnel from being used as a "bargaining chip" by lower-level staff, S. Rep. No. 105-174, at 65 (1998); see *Chai v. Commissioner*, 851 F.3d 190, 219 (2d Cir. 2017), which is exactly what happened here.

Because the 30-day letter was an operative determination, according to the dissent, "supervisory approval was required at a time when it would be meaningful-before the letter was sent."

b. Is the tide turning in favor of the government? The Eleventh Circuit has held that, when the IRS must issue a notice of deficiency before assessing tax, the government can comply with the requirement of § 6751(b) that there be written supervisory approval of penalties by securing the approval at any time before assessment of the penalty. Kroner v. Commissioner, 48 F. 4th 1272 (11th Cir. 9/13/22), *rev'g* T.C. Memo. 2020-73. In an opinion by Judge Marvel, the U.S. Court of Appeals for the Eleventh Circuit has held that, when the IRS must issue a notice of deficiency before assessing a penalty, the IRS can comply with the supervisory approval requirement of § 6751(b) by obtaining supervisory approval at any time before assessment of the penalty. The court's holding is contrary to a series of decisions of the Tax Court. Section 6751(b)(1) provides:

> No penalty under this title shall be assessed unless the initial determination of such assessment is personally approved (in writing) by the immediate supervisor of the individual making such determination or such higher level official as the Secretary may designate.

Second Circuit's reasoning in Chai v. Commissioner. In *Chai v. Commissioner*, 851 F.3d 190 (2d Cir. 2017), the Second Circuit focused on the language of § 6751(b)(1) and concluded that it is ambiguous regarding the timing of the required supervisory approval of a penalty. Because of this ambiguity, the court examined the statute's legislative history and concluded that Congress's purpose in enacting the provision was "to prevent IRS agents from threatening unjustified penalties to encourage taxpayers to settle." That purpose, the court reasoned, undercuts the conclusion that approval of the penalty can take place at any time, even just prior to assessment. The court held "that § 6751(b)(1) requires written approval of the initial penalty determination no later than the date the IRS issues the notice of deficiency (or files an answer or amended answer) asserting such penalty." Further, the court held "that compliance with § 6751(b) is part of the Commissioner's burden of production and proof in a deficiency case in which a penalty is asserted. … Read in conjunction with § 7491(c), the written approval requirement of § 6751(b)(1) is appropriately viewed as an element of a penalty claim, and therefore part of the IRS's prima facie case."

Tax Court's prior decisions in other cases. In *Graev v. Commissioner*, 149 T.C. 485 (2017), a reviewed opinion by Judge Thornton, the Tax Court (9-1-6) reversed its earlier position and accepted the interpretation of § 6751(b)(1) set forth by the Second Circuit in *Chai v. Commissioner*, 851 F.3d 190 (2d Cir. 2017). Since *Graev*, the Tax Court's decisions have focused on what constitutes the *initial determination* of the penalty in question. These decisions have concluded that the initial determination of a penalty occurs in the document through which the IRS Examination Division notifies the taxpayer in writing that the examination is complete and it has made a decision to assert penalties. *See, e.g.*, *Belair Woods, LLC v. Commissioner*, 154 T.C. 1 (2020); *Beland v. Commissioner*, 156 T.C. 80 (2021). Accordingly, if the IRS notifies the taxpayer that it intends to assert penalties in a document such as a revenue agent's report, and if the IRS fails to secure the required supervisory approval before that notification occurs, then § 6751(b)(1) precludes the IRS from asserting the penalty.

Facts of this case. In the current case, *Kroner v. Commissioner*, the taxpayer failed to report as income just under $25 million in cash transfers from a former business partner. The IRS audited and, at a meeting with the taxpayer's representatives on August 6, 2012, provided the taxpayer with a letter (Letter 915) and revenue agent's report proposing to increase his income by the cash he had received and to impose just under $2 million in accuracy-related penalties under § 6662. The letter asked the taxpayer to indicate whether he agreed or disagreed with the proposed changes and provided him with certain options if he disagreed, such as providing additional information, discussing the report with the examining agent or the agent's supervisor, or requesting a conference with the IRS Appeals Office. The letter also stated that, if the taxpayer took none of these steps, the IRS would issue a notice of deficiency. The IRS later issued a formal 30-day letter (Letter 950) dated October 31, 2012, and an updated examination report. The 30-day letter provided the taxpayer with the same options as the previous letter if he disagreed with the proposed adjustments and stated that, if the taxpayer took no action, the IRS would issue a notice of deficiency. The 30-day letter was signed by the examining agent's supervisor. On that same day, the supervisor also signed a Civil Penalty Approval Form approving the accuracy-related penalties. The IRS subsequently issued a notice of deficiency and, in response, the taxpayer filed a timely petition in the U.S. Tax Court.

Tax Court's reasoning in this case. The Tax Court (Judge Marvel) upheld the IRS's position that the cash payments the taxpayer received were includible in his gross income but held that the IRS was precluded from imposing the accuracy-related penalties. The Tax Court reasoned that the August 6 letter (Letter 915) was the IRS's initial determination of the penalty, and that the required supervisory approval of the penalty did not occur until October 31, and therefore the IRS had not complied with § 6751(b).

Eleventh Circuit's reasoning in this case. The Eleventh Circuit rejected the reasoning of the Tax Court as well as the reasoning of the Second Circuit in *Chai v. Commissioner*:

> We disagree with Kroner and the Tax Court. We conclude that the IRS satisfies Section 6751(b) so long as a supervisor approves an initial determination of a penalty assessment before it assesses those penalties. *See Laidlaw's Harley Davidson Sales, Inc. v. Comm'r*, 29 F.4th 1066, 1071 (9th Cir. 2022). Here, a supervisor approved Kroner's penalties, and they have not yet been assessed. Accordingly, the IRS has not violated Section 6751(b).

The Eleventh Circuit first reasoned that the phrase "determination of such assessment" in § 6751(b) is best interpreted not as a reference to communications to the taxpayer, but rather as a reference to the IRS's conclusion that it has the authority and duty to assess penalties and its resolution to do so. The court explained:

> The "initial" determination may differ depending on the process the IRS uses to assess a penalty. … But we are confident that the term "initial determination of such assessment" has nothing to do with communication and everything to do with the formal process of calculating and recording an obligation on the IRS's books.

The court then turned to the question of *when* a supervisor must approve a penalty in order to comply with § 6751(b). The court analyzed the language of § 6751(b) and concluded: "We likewise see nothing in the text that requires a supervisor to approve penalties at any particular time before assessment." Thus, according to the Eleventh Circuit, the IRS can comply with § 6751(b) by obtaining supervisory approval of a penalty at any time, even just before assessment.

Finally, the court reviewed the Second Circuit's decision in *Chai v. Commissioner*, 851 F.3d 190 (2d Cir. 2017), in which the court had interpreted § 6751(b) in light of Congress's purpose in enacting the provision, which, according to the Second Circuit, was to prevent IRS agents from threatening unjustified penalties to encourage taxpayers to settle. According to the Eleventh Circuit, the *Chai* decision did not take into account the full purpose of § 6751(b). The purpose of the statute, the court reasoned, was not only to prevent unjustified threats of penalties, but also to ensure that only accurate and appropriate penalties are imposed. There is no need for supervisory approval to occur at any specific time before assessment of penalties, the court explained, to ensure that penalties are accurate and appropriate and therefore carry out this aspect of Congress's purpose in enacting the statute. Further, the Eleventh Circuit concluded, there is no need for a pre-assessment deadline for supervisory approval to reduce the use of penalties as a bargaining chips by IRS agents. This is so, according to the court, because negotiations over penalties occur even after a penalty is assessed, such as in administrative proceedings after the IRS issues a notice of federal tax lien or a notice of levy. (This latter point by the court seems to us to be a stretch. Although it is possible to have penalties reduced or eliminated post-assessment, such post-assessment review does not meaningfully reduce the threat of penalties by IRS agents to encourage settlement at the examination stage.)

Concurring opinion by Judge Newsom. In a concurring opinion, Judge Newsom cautioned against interpreting statutes by reference to their legislative histories: "Without much effort, one can mine from § 6751(b)'s legislative history other—and sometimes conflicting—congressional 'purposes.'" The legislative history, according to Judge Newsom, is "utterly unenlightening." Statutes, in his view, should be interpreted by reference to their text.

c. Yes, the tide seems to be turning. The Tenth Circuit has held that, when the IRS must issue a notice of deficiency before assessing tax, the government can comply with the requirement of § 6751(b) that there be written supervisory approval of penalties by securing the approval no later than the date the IRS issues the notice of deficiency formally asserting a penalty. Minemyer v. Commissioner, 131 A.F.T.R.2d 2023-364 (10th Cir. 01/19/23), aff'g in part and rev'g in part T.C. Memo. 2020-99 (7/1/20). In an unpublished order and judgment by Judge Tymkovich, the U.S. Court of Appeals for the Tenth Circuit has held that, when the IRS must issue a notice of deficiency before assessing a penalty, the IRS can comply with the supervisory approval requirement of § 6751(b) by obtaining supervisory approval on or before the date on which the IRS issues a notice of deficiency.

The taxpayer in this case was indicted on two counts of tax evasion for the years 2000 and 2001. The taxpayer pleaded guilty with respect to the year 2000 and, in exchange, the government dismissed the count for 2001. Subsequently, the IRS asserted deficiencies for 2000 and 2001 and § 6663 civil fraud penalties for both years. In 2010, an IRS revenue agent visited the taxpayer in prison and obtained his signature on Form 4549, Income Tax Examination Changes, in which the IRS proposed the deficiencies and penalties for 2000 and 2001. At that time, the agent's supervisor had not approved the penalties. The taxpayer later requested that his agreement to the deficiencies and penalties be withdrawn. The IRS agreed to the withdrawal and later issued a 30-day letter (Letter 950) asserting the same deficiencies and penalties. The 30-day letter was signed by the revenue agent's supervisor. The IRS later issued a notice of deficiency asserting the deficiencies and penalties for both years.

Tax Court's Analysis. The taxpayer challenged the notice of deficiency by filing a petition in the U.S. Tax Court. The Tax Court (Judge Kerrigan) granted summary judgment in favor of the IRS as to the deficiencies for both years and as to the fraud penalty for 2000. Following a trial, the Tax Court held that the IRS was precluded from asserting the fraud penalty for 2001 by § 6751(b)(1). (The court also held that conviction for tax evasion on the 2000 count collaterally estopped the taxpayer from challenging the civil fraud penalty for 2000.) Section 6751(b)(1) provides:

> No penalty under this title shall be assessed unless the initial determination of such assessment is personally approved (in writing) by the immediate supervisor of the individual making such determination or such higher level official as the Secretary may designate.

The Tax Court's prior decisions have focused on what constitutes the *initial determination* of the penalty in question. These decisions have concluded that the initial determination of a penalty occurs in the document through which the IRS Examination Division notifies the taxpayer in writing that the examination is complete and it has made a decision to assert penalties. *See, e.g.*, *Belair Woods, LLC v. Commissioner*, 154 T.C. 1 (2020); *Beland v. Commissioner*, 156 T.C. 80 (2021). Accordingly, if the IRS notifies the taxpayer that it intends to assert penalties in a document such as a revenue agent's report, and if the IRS fails to secure the required supervisory approval before that notification occurs, then § 6751(b)(1) precludes the IRS from asserting the penalty. In this case, the Tax Court held, the IRS had failed to comply with § 6751(b)(1) because the Form 4549 the revenue agent presented to the taxpayer in prison was the initial determination of the penalties, and the IRS had not secured the required supervisory approval before the agent presented the form to the taxpayer.

Tenth Circuit's Analysis. On appeal, the U.S. Court of Appeals for the Tenth Circuit affirmed the Tax Court's grant of summary judgment to the government as to the deficiencies for both years and as to the fraud penalty for 2000 but reversed the Tax Court's decision as to the penalty for 2001. The court observed that the U.S. Courts of Appeal for the Ninth and Eleventh Circuits have disagreed with the Tax Court's position that the supervisory approval before the IRS first communicates to the taxpayer that it intends to assert penalties. See *Laidlaw's Harley Davidson Sales, Inc. v. Commissioner*, 29 F.4th 1066 (9th Cir. 3/25/22); *Kroner v. Commissioner*, 48 F. 4th 1272 (11th Cir. 9/13/22). The court agreed with the Ninth and Eleventh Circuits:

> We agree with these assessments of § 6751(b)(1) and hold that its plain language does not require approval before proposed penalties are communicated to a taxpayer.

The Tenth Circuit then addressed the question of what timing requirement, if any, § 6751(b)(1) imposes on the government to obtain the necessary supervisory approval. The court analyzed the Second Circuit's decision in *Chai v. Commissioner*, 851 F.3d 190 (2d Cir. 2017), and agreed with the Second Circuit's analysis:

> We are persuaded by the Second Circuit's reasoning and hold that with respect to civil penalties, the requirements of § 6751(b)(1) are met so long as written supervisory approval of an initial determination of an assessment is obtained on or before the date the IRS issues a notice of deficiency.

Because the revenue agent's supervisor had approved the 2001 civil fraud penalty before the IRS issued the notice of deficiency, the Tenth Circuit reversed the Tax Court's decision as to the 2001 penalty and remanded for a determination of whether the taxpayer was liable for the penalty.

2. Is what happened in this complicated taxpayer deposit case the tax equivalent of a shell game? Dillon Trust Company, LLC v. U.S., 162 Fed. Cl. 708 (11/10/22), *motion for reconsideration denied*, 164 Fed. Cl. 92 (2/9/23). The facts and holding in this Court of Federal Claims case remind us of a street-corner shell game, only the stakes were roughly $10 million of underpayment/overpayment interest arbitrage. Essentially, the IRS held for over two years almost $72 million of a § 6603 deposit made by a trustee on behalf of numerous trusts, but nevertheless, the IRS charged the taxpayer trusts with § 6621(a)(2) underpayment interest during those two years at a higher rate than the deposits earned in § 6611 overpayment interest. Read on for more details, but the upshot appears to be that any § 6603 deposits with the IRS should be made separately by each potentially liable taxpayer, and the taxpayer must ensure that the deposit is credited to the taxpayer's account as a payment of tax. The IRS is not legally required to honor, and may not properly account for, a lump sum deposit made under § 6033 on behalf of several different taxpayers, even if those taxpayers are trusts with a common trustee.

Factual Background. The facts of the case are exceedingly complicated, but the following summary should suffice. The taxpayers were nine original trusts (the "Original Trusts") that eventually became thirty continuing and successor trusts (each with distinct taxpayer identification numbers) during the period of the IRS examination. All the trusts were potentially liable for taxes, penalties, and interest as transferees under § 6901. The trusts' potential transferee liability apparently stemmed from distributions they received from a corporate taxpayer with large unpaid liabilities for taxes, interest, and penalties. The IRS examination of the Original Trusts began in 2014, but six of the Original Trusts already had been terminated by that time and their assets moved to successor trusts. The IRS was aware of the termination of the six Original Trusts and that the successor trusts would remain liable as secondary transferees under § 6901. The subsequent events leading to the dispute are as follows:

- First, in May of 2015, while the IRS examination remained ongoing, the trustee paid to the IRS a total of approximately $72 million as deposits pursuant to § 6603 to stop the running of potential underpayment interest under § 6621 against the remaining three Original Trusts and the successor trusts to the six terminated Original Trusts. Oddly (but perhaps practically), instead of writing multiple deposit checks (one for each trust) totaling almost $72 million, the trustee wrote one check for approximately $72 million and asked the IRS to credit each trust with their respective deposit shares according to an allocation schedule.

- The IRS, however, did not allocate the $72 million across the thirty separate trusts. Instead, the IRS deposited the $72 million to a "general ledger account," not the taxpayer accounts for each distinct trust.
- Next, in 2016, the IRS issued statutory notices of liability under § 6901 to the nine Original Trusts (but not the successor trusts). As noted above, though, six of the Original Trusts were no longer in existence with their assets being held by successor trusts. The IRS was fully aware of the circumstances involving the Original Trusts and the successor trusts.
- After receipt of the notices of transferee liability, the trustee then filed protests with IRS Appeals on behalf of all the trusts.
- Next, in early March 2017, the trustee again requested that roughly $20 million of the total $72 million deposit be allocated across the three remaining Original Trusts, and that the balance of approximately $52 million continue to be held as a deposit for the successor trusts.
- Still, the IRS did not allocate any portion of the $72 million across the separate taxpayer accounts for the trusts. The IRS Agent involved in the examinations explained that no amounts were allocated because "[IRS] procedures do not authorize a person to direct the [IRS] to apply a deposit to another person's liability," citing Rev. Proc. 2005-18, 2005 C.B. 798.
- Shortly thereafter, on March 16, 2017, the trustee requested the return of approximately $20 million of the $72 million deposit.
- By May of 2017, though, the IRS had not returned any portion of the $72 million deposit. The IRS had, however, credited two of the Original Trusts with deposits of roughly $250,000 each (a total of approximately $500,000). The remaining $71.5 million was not credited to any taxpayer accounts for the other trusts.
- Next, in July of 2017, the IRS agreed to return the full $72 million along with approximately $1 million of interest.
- Nevertheless, the $72 million deposit was not actually returned by the IRS until October of 2017.
- During the interim period between July 2017 and October 2017, the trustee paid the IRS approximately $79 million in assessed § 6901 transferee liabilities (including accrued underpayment interest) on behalf of the trusts. A short time thereafter, the trustee paid approximately another $4 million in assessed § 6901 transferee liabilities (including accrued underpayment interest) on behalf of the trusts.
- The trustee then filed suit in the Court of Federal Claims alleging that, because the IRS did not stop the accrual of underpayment interest against all the trusts as of May 2015 when the original $72 million deposit was made, the trusts were owed roughly $10 million of underpayment interest that they should not have been required to pay.

The initial subject matter jurisdiction issue. In response to the trustee's suit, the IRS moved for partial summary judgment, arguing that the trustee's $10 million interest claim on behalf of the trusts should be dismissed for lack of subject matter jurisdiction. The taxpayer trusts, of course, objected, arguing that § 7422 permitting refund claims should apply. The taxpayer trusts also cited 28 U.S.C. § 1491, which grants the Federal Court of Claims jurisdiction over "any claim against the United States founded … upon … any act of Congress." After analyzing relevant precedent, Judge Bruggink decided the jurisdictional issue for the trusts and against the IRS, holding that the Court of Federal Claims had subject matter jurisdiction over the trusts' interest claim. Judge Bruggink then turned to the merits of the dispute.

IRS argument. In further support of its motion for partial summary judgment, the IRS argued that, although the accrual of underpayment interest can be suspended by a cash deposit under § 6603, subsection (b) of the statute requires the deposit to be "used by the Secretary to pay tax." Therefore, according to the IRS, the accrual of underpayment interest is not suspended under § 6033 if the IRS does not actually use a deposit as a tax payment. The IRS argued that this is precisely what happened in this case: the deposit was never credited as a tax payment during the two-year period it was in the hands of the IRS. The deposit was not so credited because "[IRS] procedures do not authorize a person to direct the [IRS] to apply a deposit to another person's liability." *See* Rev. Proc. 2005-18, 2005 C.B. 798, at § 6.91. Moreover, § 6603(c) contemplates that to the extent the deposit is not used by the IRS as a tax payment, the IRS is not obligated to return the deposit or any portion thereof absent a written request by the taxpayer. The IRS acknowledged that Section 4.02 of Rev. Proc. 2005-18 allows a § 6033 deposit to be posted to a taxpayer's account as a tax payment after the taxpayer has received a notice of deficiency, but Rev. Proc. 2005-18 does not address an IRS notice of transferee liability and therefore could not be used to compel the IRS to credit the trusts' taxpayer accounts in this case.

The taxpayer trusts. The taxpayer trusts argued that the foregoing position by the IRS constituted an abuse of administrative agency discretion, especially given the "parade of IRS mistakes" in handling the examinations and the $72 million deposit. The taxpayer trusts also argued that the IRS should have followed its own internal guidance, which suggests that, like notices of deficiency, the notices of transferee liability for a terminated entity should be sent to the terminated entity's successor in interest—here, the successor trusts to the six terminated Original Trusts. If the IRS had followed its own internal guidance, the taxpayer trusts asserted, then there would have been no administrative impediment to the IRS crediting the deposit to various taxpayer trust accounts as the IRS does in accordance with Section 4.02 of Rev. Proc. 2005-18 after issuing notices of deficiency.

The court. The Court of Federal Claims (Judge Bruggink) seemed sympathetic to the plight of the taxpayer trusts; however, Judge Bruggink could not find that the IRS had violated any law or abused its discretion in failing to credit the deposit to the various taxpayer accounts. Judge Bruggink reasoned that § 6033(a), which authorizes deposits, is permissive—using the term "may" not "shall." Thus, the IRS is authorized to accept deposits for the purpose of suspending underpayment interest, but the IRS was not required to treat the deposit as a payment of tax under the unique circumstances before the court. Judge Bruggink concluded:

> For the IRS collection of underpayment interest here to have violated the law, one of two things must have been true: either the I.R.C. mandates applying a deposit as a tax payment when the taxpayer makes such a request (thus triggering interest suspension under § 6603(b)), or the I.R.C. requires suspension of interest when a § 6603 deposit is made, even if the Secretary does not use the deposit for a payment of tax. The plain language of the I.R.C. does not allow for either result.

B. Discovery: Summonses and FOIA

C. Litigation Costs

D. Statutory Notice of Deficiency

E. Statute of Limitations

1. The 90-day period specified in § 6213(a) for filing a petition in the U.S. Tax Court is jurisdictional and is not subject to equitable tolling, according to the Tax Court. Hallmark Research Collective v. Commissioner, 159 T.C. No. 6 (11/29/22). In a unanimous, reviewed opinion by Judge Gustafson, the Tax Court has held that the 90-day period specified by § 6213(a) within which taxpayers can challenge a notice of deficiency by filing a petition in the

Tax Court is jurisdictional and is not subject to equitable tolling. In this case, the IRS sent a notice of deficiency to the taxpayer. Pursuant to § 6213(a), the taxpayer then had 90 days within which to challenge the notice of deficiency by filing a petition in the U.S. Tax Court. The last day of this 90-day period was September 1, 2021. The taxpayer electronically filed its petition on September 2, 2021, which was one day late. In the petition, the taxpayer stated: "My CPA . . . contracted COVID/DELTA over the last 40 days and kindly requests additional time to respond." In other words, it appears that the taxpayer was requesting an extension of the § 6213(a) 90-day period.

Procedural history. The Tax Court issued an order to show cause in which it ordered the parties to respond as to why the court should not, on its own motion, dismiss the action for lack of jurisdiction. The taxpayer requested that the court defer ruling on the matter until the U.S. Supreme Court issued its opinion in *Boechler, P.C. v. Commissioner*, 142 S. Ct. 1493 (4/21/22), which was pending in the Supreme Court. The Tax Court declined to defer ruling and dismissed the taxpayer's action. After the U.S. Supreme Court issued its opinion in *Boechler,* the taxpayer moved to vacate the court's order of dismissal. After receiving briefing, the court issued a unanimous, reviewed opinion denying the motion to vacate its prior order of dismissal.

Tax Court' s holding. In a lengthy (57-pages) and extraordinarily thorough opinion, the Tax Court examined the text and history of § 6213(a) and concluded that Congress had clearly indicated that the 90-day period specified in the statute is jurisdictional. The court observed that the Tax Court is a court of limited jurisdiction and has only whatever jurisdiction it has been granted by Congress. Accordingly, because the 90-day period is jurisdictional, in the court's view, the court must dismiss cases, such as this one, in which the taxpayer's petition is filed late. And because the statute is jurisdictional, the court concluded, it is not subject to equitable tolling, i.e., taxpayers cannot argue for exceptions on the basis that they had good cause to meet the deadline. The court also concluded rather briefly that its view on the jurisdictional nature of § 6213(a) was not affected by the U.S. Supreme Court's decision in in *Boechler, P.C. v. Commissioner*, 142 S. Ct. 1493 (4/21/22). In *Boechler*, the Court held that the 30-day period specified in § 6330(d)(1) for requesting review in the Tax Court of a notice of determination following a collection due process hearing is *not* jurisdictional and *is* subject to equitable tolling. According to the Tax Court, *Boechler* "emphatically teaches that" § 6213(a) and § 6330(d)(1) "are different sections" that "[e]ach must be analyzed in light of its own text, context, and history." The fact that, in *Boechler*, the Supreme Court concluded that the 30-day period specified in § 6330(d)(1) is *not* jurisdictional did not change the Tax Court's view that the 90-day period specified in § 6213(a) *is* jurisdictional. Accordingly, the Tax Court dismissed the taxpayer's action.

2. Better be aware of your time zone when you e-file your Tax Court petition, says the Tax Court. A petition e-filed at 11:05 p.m. central time, which is 12:05 a.m. eastern time, was late and the Tax Court therefore had no jurisdiction to hear the matter. Nutt v. Commissioner, 160 T.C. No. 10 (5/2/23). The taxpayers in this case received a notice of deficiency with respect to tax year 2019. The last day of the 90-day period specified by § 6213(a) within which the taxpayers could challenge the notice of deficiency by filing a petition in the U.S. Tax Court was July 18, 2022. The taxpayers, who resided in Alabama, e-filed their petition at 11:05 p.m. central time on July 18. The IRS moved to dismiss for lack of jurisdiction on the basis that the taxpayers had not filed their petition by the last day of the 90-day period specified by § 6213(a). The Tax Court (Judge Buch) agreed with the government and granted the motion to dismiss. The court reasoned that "a petition is ordinarily 'filed' when it is received by the Tax Court in Washington, D.C." In this case, the court observed, the Tax Court, which is in the eastern time zone, had received the taxpayers' petition at 12:05 a.m. on July 19, which was one day late. Further, the court observed, the "timely mailing" rule of § 7502(a) does not apply to petitions filed electronically:

> Under section 7502(a), a document that is mailed before it is due but received after it is due is deemed to have been received when mailed. But that rule applies only to documents that are delivered by U.S. mail or a designated delivery service. I.R.C. § 7502(a)(1), (f). Because an electronically filed petition is not delivered by U.S. mail or a designated delivery service, the exception of section 7502 does not apply.

If the timely mailing rule does not apply, the court stated, then a taxpayer's petition is filed when it is received by the Tax Court. In this case, the court reasoned, although it was still July 18 where the taxpayers resided and where they e-filed their petition, it was July 19 in the eastern time zone and their petition therefore was filed one day late. Accordingly, the court granted the government's motion to dismiss for lack of jurisdiction.

- *Observation*: the court's holding could work to the advantage of a taxpayer who resides abroad. (Keep in mind that taxpayers residing abroad normally have 150 days (rather than 90) to file their petitions.) If a U.S. citizen resides, say, in England, and the last day to file the petition is July 18, then, assuming a 5-hour time difference, the taxpayers presumably would have until 4:59 a.m. on July 19 to e-file their petition because the petition would be received by the Tax Court in the eastern time zone at 11:59 p.m. on July 18.

3. Better mind the clock too! A petition e-filed *eleven seconds* after midnight is late, so the Tax Court lacks jurisdiction to hear the case. Sanders v. Commissioner, 160 T.C. No. 16 (6/20/23). The 90-day deadline under § 6213 for this pro se taxpayer to file a petition in the Tax Court was midnight on December 12, 2022. The Tax Court's DAWSON e-filing system was available and fully operational at all relevant times on December 12, 2022, during which the taxpayer sought to e-file his petition. The taxpayer initially attempted to use his mobile telephone to e-file his petition the evening of December 12, 2022; however, the taxpayer encountered technological problems using his mobile telephone. Next, after gaining access to a computer shortly before midnight, the taxpayer logged into the Tax Court's DAWSON e-filing system at 11:57 p.m. on December 12, 2022, and began the e-filing process. Several steps must be completed under the DAWSON system to e-file, and the taxpayer did not complete those steps prior to midnight. In fact, due to no fault of the DAWSON system, the upload process for the taxpayer's e-filed petition did not begin until 12:00:09 am on December 13, 2022, and the petition was not electronically received by the Tax Court until 12:00:11 am on December 13, 2022, eleven seconds late. Because the taxpayer's petition was filed eleven seconds late, the IRS filed a motion to dismiss for lack of subject matter jurisdiction. The taxpayer objected, arguing that the Tax Court should treat his petition as timely filed when the taxpayer logged into the DAWSON system at 11:57 pm and began the filing process. Essentially, the taxpayer argued that logging into the DAWSON e-filing system at 11:57 p.m. on December 12, 2022, to meet the 90-day deadline under § 6213 was equivalent to timely mailing a petition prior to midnight on December 12, 2022, under the special mailbox rule of § 7502. The Center for Taxpayer Rights, represented by the Tax Clinic at the Legal Services Center of Harvard Law School, filed an amicus brief supporting the taxpayer's position. The Tax Court (Judge Buch) nonetheless ruled that e-filing a petition to meet the 90-day deadline under § 6213 is not equivalent to mailing a petition under § 7502 prior to the 90-day deadline. Judge Buch reasoned that the mailbox rule of § 7502 is a limited exception to the general rule that a Tax Court petition is not filed until it is received, citing *Nutt v. Commissioner*, 160 T.C. No. 10 (5/2/23), discussed above in this outline. Furthermore, Judge Buch determined that another special rule under § 7451(b) that tolls the deadline for filing a Tax Court petition when "a filing location is inaccessible or otherwise unavailable to the general public" did not apply because the DAWSON system was functioning normally at all relevant times on December 12, 2022. According to Judge Buch, the courts have consistently held that "inaccessibility" under § 7451(b) does not extend to "user error or technical difficulties on the user's side." Finally, Judge Buch noted that equitable tolling does not apply to the filing of a Tax Court petition in a deficiency case. The filing deadline under § 6213 is jurisdictional, and the Tax Court must enforce it "regardless of equitable considerations."

F. Liens and Collections

G. Innocent Spouse

I. Miscellaneous

1. This bloke working in the Australian Outback reversed course to send Uncle Sam on a tricky § 911(a) foreign earned income exclusion walkabout, but Judge Toro's opinion demonstrates that the Tax Court is not a Kangaroo court. Smith v. Commissioner, 159 T.C. No. 3 (8/25/22). In the highly unusual circumstances of this case, the Tax Court held that a U.S. citizen working in Australia could not avoid U.S. tax by refuting the terms of a § 7121 advance closing agreement with the IRS to claim the benefits of the § 911(a) foreign earned income exclusion. The taxpayer was a U.S. citizen working as an engineer for Raytheon at "Pine Gap," a joint U.S.-Australian defense facility in the Outback. For the years in issue, 2016-2018, the taxpayer had signed a closing agreement with the IRS waiving the taxpayer's right to make an election under § 911(a). Section 911(a) allows a "qualified individual" (as defined) to elect to exclude "foreign earned income" (as defined) from U.S. gross income. Thus, the taxpayer agreed in advance that his earnings while in Australia would be subject to U.S. federal income taxation (not Australia's income tax). This advance closing agreement arrangement between the taxing authorities of the U.S. and Australia is sanctioned by treaty and has been standard practice with U.S. citizens employed at Pine Gap for quite some time. Here's where things went "down under," so to speak. After filing his original U.S. income tax return on Form 1040 for the years 2016 and 2017 reporting U.S. taxable income and paying tax thereon, the taxpayer filed amended returns for those years claiming the foreign earned income exclusion under § 911(a). The taxpayer also filed an original return for 2018 claiming the exclusion under § 911(a). (Apparently, the enrolled agent advising the taxpayer suggested this course of action, and the opinion states that nineteen other similar cases are before the Tax Court involving the same enrolled agent. No doubt this is why the Tax Court's opinion is so lengthy and thorough.) The IRS then issued refunds to the taxpayer for 2016-2017 and initially accepted the taxpayer's Form 1040 claiming the § 911(a) exclusion for 2018. Not surprisingly, however, the IRS soon caught on to the taxpayer's course reversal, and the IRS issued notices of deficiency for the years 2016-2018. On cross-motions for summary judgment, the IRS argued before the Tax Court to uphold the closing agreement and the deficiency determinations, while the taxpayer made two principal arguments for invalidating the agreement and overturning the deficiency determinations. *First*, the taxpayer argued that the IRS director (the Director, Treaty Administration, in the IRS Large Business and International Division) who signed the closing agreement on behalf of the IRS was not properly delegated authority to sign by the "Secretary" as required by § 7121. *Second*, the taxpayer argued that, even if the IRS director was authorized to sign, the closing agreement should be set aside under § 7121(b) because the IRS committed malfeasance by disclosing confidential taxpayer information under § 6103 and because the IRS misrepresented material facts in the terms of the closing agreement. Section 7121(b) provides that the finality accorded a closing agreement can be avoided only "upon a showing of fraud or malfeasance or misrepresentation of a material fact." The Tax Court (Judge Toro) sided with the IRS and against the taxpayer on both arguments. With respect to the taxpayer's first argument, Judge Toro examined and analyzed the relevant Treasury delegation orders to uphold the IRS director's authority to sign the § 7121 closing agreement with the taxpayer. With respect to the taxpayer's second argument, Judge Toro assumed without deciding that willful disclosure of confidential return information in violation of § 6103 is an act of malfeasance for purposes of § 7121(b). Making that assumption, however, the court concluded that no malfeasance had occurred "'in the making of' the 2016–18 Closing Agreement either because no return information was disclosed in contravention of § 6103 or because any inappropriate disclosure did not affect the making of the agreement." Accordingly, the court found no fraud, malfeasance, misrepresentation, or other circumstances that would invalidate the closing agreement. The court therefore granted in part the government's motion for summary judgment.

2. Either this taxpayer has the right "moves," the IRS is just too sneaky, or bad facts make bad law. You decide! U.S. v. Meyer, 50 F.4th 23 (11th Cir. 9/26/22). In an opinion by Judge Jordan (and joined by Judges Luck and Lagoa), the U.S. Court of Appeals for the Eleventh Circuit has held that, although the Anti-Injunction Act of 1867 (codified at IRC § 7421(a)) generally forecloses a "suit" against the IRS, it does not prohibit a defensive "motion" for a protective order in an IRS-initiated administrative action to assess penalties against a taxpayer-promoter. The taxpayer in this case, Michael L. Meyer, was sued in 2018 by the U.S. Department of Justice (the "2018 litigation") for promoting bogus charitable deduction tax-evasion schemes. See the linked article in Forbes for more background. After extensive discovery, including admissions by Mr. Meyer regarding his tax-evasion schemes, the 2018 litigation settled and ostensibly was "closed" in 2019 when the U.S. District Court entered a permanent injunction against Mr. Meyer. The injunction prohibited Mr. Meyer from (among other things) ever "representing anyone other than himself before the IRS; preparing federal tax returns for others; or furnishing tax advice regarding charitable contributions." Then, in 2020, the IRS assessed penalties against Mr. Meyer (the "2020 administrative action") under § 6700 (promoting abusive tax shelters). The IRS expressly relied upon the admissions that Mr. Meyer made in the 2018 litigation to support its assessment of penalties under § 6700 in the 2020 administrative action. Mr. Meyer objected, eventually filing a motion for a protective order in the same U.S. District Court that handled the 2018 litigation. Mr. Meyer's motion sought a protective order prohibiting the IRS from using his admissions connected to the 2018 litigation in the 2020 administrative action. The IRS argued in U.S. District Court that Mr. Meyer's motion for a protective order was barred by the Anti-Injunction Act, which, subject to very specific exceptions (e.g., Tax Court petitions under § 6213, jeopardy assessments under § 7429, etc.), prohibits any person from maintaining a "suit for the purpose of restraining the assessment or collection of any tax . . . in any court . . . whether or not such person is the person against whom such tax was assessed." The U.S. District Court held that Mr. Meyer's motion for a protective order was barred by the Anti-Injunction Act because, although a "motion" is not a "suit," granting the motion would have the practical effect of restraining the IRS's assessment and collection of tax. Mr. Meyer appealed the U.S. District Court's decision to the Eleventh Circuit. Perhaps fatally, the IRS did not argue in the U.S. District Court that the 2018 litigation (which was with the U.S. Department of Justice) was closed and thus the court had no jurisdiction to hear Mr. Meyer's motion vis-à-vis the IRS.

The Eleventh Circuit's Decision. The Eleventh Circuit held that Mr. Meyer's motion was not barred by the Anti-Injunction Act. The Eleventh Circuit reasoned that the term "suit" used in the Anti-Injunction Act was itself specific—based upon the 1867 and 1954 usage of the term—and did not extend to a defensive motion filed in connection with the 2018 litigation. Thus, the Eleventh Circuit seems to have viewed Mr. Meyer's motion as part of his defense to the (*ostensibly closed?*) 2018 litigation initiated by the U.S. Department of Justice, not the IRS's separate 2020 administrative action. The Eleventh Circuit rejected the U.S. District Court's and the IRS's broader reading of the Anti-Injunction Act (which has been adopted by some courts) that entertaining or granting Mr. Meyer's motion for a protective order would have the practical effect of restraining the assessment or collection of tax and therefore should be denied. *See U.S. v. Dema*, 544 F.2d 1373 (7th Cir. 1976) (holding that motion to compel the IRS to withdraw a notice of deficiency was barred by Anti-Injunction Act). Instead, the Eleventh Circuit reasoned that Mr. Meyer's motion was comparable to cases decided in the Second and Third Circuits. In both those cases, the taxpayer intervened in actions initiated by the IRS against a taxpayer's bank to access the taxpayer's safe deposit box. The Second and Third Circuits held in those cases that intervening in a suit between the IRS and the taxpayer's bank was not barred by the Anti-Injunction Act because the underlying action was not one for the assessment or collection of a tax. *See U.S. v. Mellon Bank*, N.A., 521 F.2d 708 (3d Cir. 1975), and *U.S. v. First National City Bank*, 568 F.2d 853 (2d Cir. 1977). The Eleventh Circuit thus vacated the U.S. District Court's decision and remanded the case for further proceedings consistent with its opinion. The Eleventh Circuit declined to hear the IRS's argument that the U.S. District Court had no jurisdiction to entertain Mr. Meyer's motion because the 2018 litigation was closed, determining that the argument was raised for the first time on appeal and therefore should be heard by the U.S. District Court first.

XI. WITHHOLDING AND EXCISE TAXES

XII. TAX LEGISLATION

A. <u>Enacted</u>