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By Christopher E. Pulick

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Sent to Taxpayer's POA: In this chief counsel advice, a Notice of Deficiency was not mailed to the taxpayer's last known address, but a copy was mailed to the taxpayer's authorized Power of Attorney (POA). The IRS attorney noted that a Notice sent to a POA does not satisfy the *last known address* requirement unless the taxpayer receives actual notice of the deficiencies with sufficient time to file a timely petition with the Tax Court. This test needs to be **1. Procedure—Disputing Tax Liability in CDP Hearing:** Taxpayers cannot challenge the existence or amount of their underlying tax liability in a Collection Due Process (CDP) hearing if they received a notice of deficiency or otherwise had an opportunity to dispute the liability. In this emailed advice, the IRS summarily assessed the taxpayers' liability from excessive tentative carryback adjustments pursuant to [IRC Sec. 6213\(b\)\(3\)](#). Thus, the IRS wasn't required to issue a notice of deficiency, which means that the taxpayers can challenge their underlying liability for the carryback tax years. While a signed Form 4549 (Income Tax Examination Changes) ordinarily waives the right to contest the underlying liability, the Form 4549 signed by the taxpayers only related to the loss year. [CCA 201040005](#).

2. Procedure—Obtaining Copy of Return or Transcript: According to a 10/5/10 *QuickAlerts for Tax Professionals* (an IRS email service), to request free transcripts, call the new toll-free number (1-800-908-9946) and follow the message prompts, or complete Form 4506T (Request for Transcript of Tax Return) and mail it to the address listed in the instructions. To obtain an exact copy of a previously filed and processed tax return with attachments (including Form W-2), complete Form 4506 (Request for Copy of Tax Return) and mail it to the address listed in the instructions, along with a \$57 fee for each tax year requested. Copies are generally available for returns filed in the current year and going back six years.

3. Procedure—Filing a Superseding "First Return": In *Hagger Co. v. Helvering* [[23 AFTR 794 \(1940\)](#)], the Supreme Court held that when two or more tax returns are filed before the due date for filing, the last return filed is deemed to be *the original return* and supersedes all prior filings. In recent emailed chief counsel advice, the IRS cited this case and IRS rulings supporting the position that a superseding "first return" is considered the original return as long as it is filed by the extended due date. If the superseding return is filed after the extended due date, then "all bets are off." [CCA 201042037](#).

4. Procedure—Cash Reporting Requirements: [IRC Sec. 6050l\(a\)](#) requires businesses receiving more than \$10,000 in cash in one transaction (or two or more related transactions) to file Form 8300 (Report of Cash

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Payments Over \$10,000 Received in a Trade or Business) within 15 days. According to IRS emailed advice, the *related transactions* test depends on whether the same payor and payee exchange currency within a 24-hour period, and then whether the \$10,000 reporting threshold is met. A business receiving more than one cash payment for related transactions must report the multiple payments once the total amount received exceeds \$10,000 in cash within a 12-month period. There is no indication that the *related transaction* and *aggregation of multiple payment* concepts cannot apply together. [Reg. 1.6050I-1\(b\)](#) states in part that the "receipt of multiple cash deposits or cash installment payments . . . relating to a single transaction (or two or more related transactions) is reported. . . ." [CCA 201044014](#) .

5. Procedure—Joint Tax Return after Substitute for Return: When a taxpayer refuses to file an income tax return, a Substitute for Return (SFR) can be prepared under [IRC Sec. 6020\(b\)](#) based on available (e.g., Form 1099 and Form W-2) information. In emailed advice, the IRS looked at whether a taxpayer can file a joint return with his deceased spouse after the IRS prepared an SFR and issued a notice of deficiency to the taxpayer. According to [IRC Sec. 6013\(a\)\(3\)](#) , a joint return can be filed by the surviving spouse if no return for the year has been filed by the decedent, and no executor or administrator has been appointed. Therefore, the taxpayer is not precluded from filing a joint return with his deceased spouse. [CCA 201044011](#) .

6. Procedure—Offshore Account Disclosure Program: Because of the account holder information the IRS obtained under the 8/09 agreement with the Swiss government and UBS, Commissioner Doug Shulman announced on 11/16/10 that the IRS had withdrawn its John Doe Summons in the UBS AG matter. The Commissioner added that since the Voluntary Disclosure Program (VDP) closed, the IRS had received 3,000 voluntary disclosures from individuals with bank accounts from around the world, in addition to the 15,000 voluntary disclosures that came in before the VDP program ended. Account sizes and taxes vary from case to case, but the "closed cases so far have averaged more than \$200,000 in tax collections per case, which includes back taxes, interest and penalties."

7. Procedure—Reportable Transaction Disclosure: Taxpayers who participate in reportable transactions under [Reg. 1.6011-4](#) must report the transactions on Form 8886 (Reportable Transaction Disclosure Statement). In this chief counsel advice, the IRS discusses whether a partnership and its partners had disclosure obligations for two situations (Situation 1 involving corporate partners, and Situation 2 involving individual partners) where losses were claimed under [IRC Sec. 165](#) . In two additional situations, the IRS considered whether hypothetical disclosure statements filed by a tiered investment partnership and its lower

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tier entities in one case, and a partnership with no corporate partners in another case, satisfied the requirements under the regulations. [CCA 201045022](#) .

8. Procedure—Suit for Refund of Overpaid Tax: Before filing a refund suit in District Court or the Court of Federal Claims, [IRC Sec. 6532\(a\)\(1\)](#) requires the taxpayer to (1) wait at least six months after filing the claim for refund, but (2) file suit within two years from when the IRS mails a notice of claim disallowance. In emailed advice, the IRS stated that the six-year statute of limitations under the Federal Tort Claims Act (which is not part of the Internal Revenue Code) does not apply when the IRS doesn't issue a notice of claim disallowance. Instead, the taxpayer can file suit for refund at any time beginning six months after the claim was filed. [CCA 201044006](#) .

9. Procedure—Taxpayer's Correct Mailing Address: In program manager technical assistance, the IRS described the steps it must take to determine a taxpayer's last known address. IRS personnel must conduct a documented search through all regularly available internal file systems to determine if there has been a clear and concise notification of an address different than the one found on the last properly filed and processed tax return. The IRS can update its address records based on information placed on an envelope by the Postal Service where it has "reasonable confidence" that the updated address in the Postal Service's National Change of Address (NCOA) database pertains to the same taxpayer. IRS personnel cannot update an address based on third-party software, but can send a letter to an address found in third-party software to solicit a response from the taxpayer regarding a potential new address. PMTA 01634.

10. Procedure—Foreign Bank and Financial Accounts: U.S. citizens, residents, and domestic entities that have a financial interest in, or signature authority over a foreign financial account that exceeds \$10,000 at any time during the calendar year are required to file a Report of Foreign Bank and Financial Accounts (FBAR). Furthermore, newly enacted [IRC Sec. 6038D](#) will require tax return disclosures from individuals with interests in "specified foreign financial assets" if the aggregate value of the assets exceeds \$50,000. In a recent report (number 2010-30-125), the Treasury Inspector General for Tax Administration noted that the number of FBARs filed with the IRS increased from 217,699 in 2004 to 534,043 in 2009. Unlike the FBAR information, which normally cannot be verified against tax return information due to disclosure concerns, new [IRC Sec. 6038D](#) has no such restrictions. This change will "allow the IRS to use its full complement of tools to verify the information or lack of information filed."

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11. Procedure—Guidance on Pre-approved IRAs: A new revenue procedure provides guidance for drafters and users of pre-approved IRAs, including (1) rules for when documents must be submitted to the IRS, (2) new user fees for individual retirement annuities, (3) guidance to users of IRS's model IRAs, and (4) the availability of new model individual retirement annuities. [Rev. Proc. 2010-48, 2010-50 IRB](#) .

12. Procedure—Attorney's Fees When Representing Yourself: Taxpayer successfully challenged an IRS claim filed in his bankruptcy case, and thereafter sought attorneys' fees under [IRC Sec. 7430](#) , which permits the prevailing party to recover litigation costs incurred in any proceeding to collect taxes, interest, or penalties. In concluding that lawyers appearing *pro se* (i.e., on their own behalf) who prevail in administrative or court proceedings against the U.S. are ineligible for attorneys' fees under [IRC Sec. 7430](#) , the 2nd Circuit agreed that taxpayer spent time to litigate the matter, but paid no out-of-pocket expenses and incurred no obligation for the services of an attorney. The 2nd Circuit joined other Circuits and the Tax Court that "have held that lawyers appearing *pro se* did not pay any fees for legal services nor incur any debts which remain outstanding." *Hudson v. U.S.* , [106 AFTR 2d 2010-7017](#) (2nd Cir.).

13. Procedure—Piercing the Corporate Veil: Taxpayer filed articles of incorporation for Xcluseif, Inc. on 7/19/05. Taxpayer intended to operate various businesses through Xcluseif including putting drink machines at various locations, providing a UPS shipping center, selling things on eBay, and tutoring. Xcluseif was administratively dissolved for failing to file an annual report on 9/15/06. On his amended Form 1040 , taxpayer omitted the gross receipts and expenses of the business. In agreeing with the IRS that the income and expenses should have been reported on Schedule C, the Tax Court noted that taxpayer never filed an annual report for Xcluseif, paid Xcluseif's expenses out of his personal account, and "didn't see any way to, to separate [himself] and [his] own expenses, personal expenses, from the things that [he] spent on Xcluseif." *Hal Hollingsworth* , [TC Memo 2010-262](#) (Tax Ct.).

14. Procedure—Prisoners' Fraudulent Refund Claims: In a recent report on improving the identification of fraudulent tax returns (number 2010-40-129), the Treasury Inspector General for Tax Administration (TIGTA) found that the majority of tax returns the IRS identifies as filed by prisoners are not screened for their fraud potential. TIGTA found that 253,929 of the 287,918 tax returns filed by prisoners as of 3/24/10

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were not selected for screening. Of those tax returns not screened, 48,887 individuals with no reported wage information claimed refunds totaling more than \$130 million, including Earned Income Tax Credit (EITC) claims of \$78.5 million. There were similar findings in a report issued earlier this year on erroneous first-time homebuyer credit claims (number 2010-41-069). There, TIGTA identified 4,608 prisoners on the Form 2009 Prisoner File who attempted to claim the credit on their 2008 return, despite the fact that they were incarcerated at the time their qualifying home was reportedly purchased.

15. Procedure—Sale of Marital Home to Pay One Spouse's Debt: The Supreme Court ruled in *U.S. v. Rodgers* [[52 AFTR 2d 83-5042 \(1983\)](#)] that jointly owned property can be sold to satisfy one owner's tax debt, subject to (1) the prejudice to the IRS from selling only the taxpayer's interest; (2) the other owners' expectation to be free from a forced sale; (3) the cost of relocating and compensating the other owners; and (4) the character and value of the nonliable interest(s). In this case, a Kentucky District Court found the husband liable for \$901,052 in unpaid taxes, penalties, and interest. In ruling against a forced sale, the court relied on the second factor (state policy against foreclosure on a marital residence to satisfy one spouse's debts) and the third factor (proceeds due the wife, estimated at \$71,500, would not permit her to relocate to other reasonable housing). *U.S. v. Winsper*, [106 AFTR 2d 2010-6945](#) (D.C. W. Ky.).

16. Procedure—Innocent Spouse Relief: From 2001 until 2008, taxpayer was away from her home in Florida for health reasons. She earned wages but regularly received money from her husband to pay living expenses. The IRS examined the couple's 2003 and 2004 tax returns and determined deficiencies from (in part) improper deductions relating to the husband's lawn care business. In denying taxpayer's claim for relief under the separate liability election rules of [IRC Sec. 6015\(c\)](#), the Tax Court noted that "taxpayer does not contend that she had any intention other than to remain only temporarily absent from their home in Florida. In fact, she lived out of state for health reasons, a circumstance the regulations specifically contemplate to be a mere temporary absence." *James Kruse*, [TC Memo 2010-270](#) (Tax Ct.).

17. Procedure—NOL Statute of Limitations: According to [IRC Sec. 6511\(a\)](#), a claim for refund of an overpayment must be filed within the later of three years from when the return was filed or two years from when the tax was paid. But under [IRC Sec. 6511\(d\)\(2\)](#), the limitation period for a claim relating to an overpayment attributable to a NOL carryback is the period ending three years after the due date of the return (plus extensions) for the tax year of the NOL. However, there is no limitation period for a claim for refund

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from an NOL carryback that, if allowed, would not result in an overpayment but would simply reduce the taxpayer's outstanding tax liability. [CCA 201049035](#) .

18. Procedure—Refund from IRS Failing to Release Levy: The IRS issued a continuous wage levy to taxpayer's employer, but failed to release the levy. So, the employer continued to make payments that the IRS applied to tax years not listed on the levy where the taxpayer has not filed a tax return. After noting that the most recent payments were more than three years ago and taxpayer has not filed any claims for refund, the IRS concluded that taxpayer should have been aware of the amount of taxes properly subject to the wage levy. Although the IRS should have released the levy, the taxpayer had ample time to raise an objection, and ask that the IRS stop the levy and refund the surplus proceeds. [CCA 201049034](#) .

19. Procedure—Valuation Discount in Lien Discharge Case: The IRS can discharge certain property from a tax lien (meaning that the lien remains attached to the remaining property) in several situations under [IRC Sec. 6325\(b\)](#) . In emailed advice, the IRS found that there is nothing in the Code or the regulations that requires it to apply a minority interest discount in discharge cases. But under [Reg. 301.6325-1\(b\)\(6\)](#) , the appropriate official may, in his or her discretion, consider the forced sale value (generally, a reduction of up to 25% of the fair market value of the property) in appropriate cases. [CCA 201048036](#) .

20. Procedure—Arbitration and Mediation Program: The IRS extended the arbitration and mediation procedures for Offer in Compromise (OIC) and Trust Fund Recovery Penalty (TFRP) cases until 12/31/12 for taxpayers whose appeals will be considered in Atlanta, Chicago, Cincinnati, Houston, Indianapolis, Louisville, Phoenix and San Francisco. The announcement includes a list of issues appropriate for arbitration or mediation in OIC and TFRP cases. [IRS Ann. 2011-6, 2011-4 IRB](#) .

21. Procedure—Corporate Actions Affecting Stock Basis: Effective 1/1/11, [IRC Sec. 6045B\(a\)](#) requires issuers of a *specified security* to file an information return describing "any organizational action which affects the basis of such specified security." A *specified security* includes shares of corporate stock, which means that this reporting requirement applies to organizational actions affecting the basis of closely held and publicly held corporate stock. [**Editor's Note:** According to a report by the staff of the Joint Committee on Taxation, stock splits, mergers, and acquisitions are examples of organizational changes that affect basis.] The return must be filed on or before the 45th day after the organizational action, or, if earlier, 1/15 of the year

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following the calendar year during which the action occurred. However, under [Reg. 1.6045B-1\(a\)\(3\)](#), it can be posted to the corporation's website in lieu of filing with the IRS.

22. Procedure—Innocent Spouse Relief: Taxpayer's wife embezzled money from her employer from 4/01 until 6/02, when she was caught. In determining whether taxpayer is entitled to equitable innocent spouse relief under [IRC Sec. 6015\(f\)](#), the Tax Court looked to the "facts and circumstances test" in [Rev. Proc. 2003-61 \(2003-2 CB 296\)](#). The Tax Court found that four of the ten factors are neutral, two favor relief (compliance with the federal tax laws and economic hardship), and two weigh against relief (significant benefit and knowledge). Faced with a seeming tie, the Tax Court denied relief in part because taxpayer waited until the IRS started the audit to file amended joint returns reflecting the embezzlement proceeds that he had "long known about." *Robert McGhee*, [TC Memo 2010-259](#) (Tax Ct.).

23. Procedure—Notice applied on a case-by-case basis to determine whether the Notice of Deficiency is valid. [CCA 201050030](#).

24. Procedure—Payment with Amended Tax Return: Taxpayer mailed its tax return one day before the extended due date, which was received by the IRS several days later. Three years after the date of mailing, taxpayer filed Form 1120X reporting additional tax owed, and included payment of that amount. In refusing to assess the tax reported on the amended return, the IRS noted that the *timely mailing as timely filing rule* under [IRC Sec. 7502\(a\)\(1\)](#) only applies to returns or claims "required to be filed," which does not include amended returns (i.e., the postmark rule of [IRC Sec. 7502](#) does not apply to an amended return that is received after the limitation period expired and shows additional tax due). [CCA 201052003](#).

25. Procedure—Payments Requiring Information Reporting: Some restaurants, clubs, etc., pay drivers a referral fee, tip, or incentive for delivering patrons to the establishment. Generally, the drivers do not report the payments to their employer as tips, and the employers do not treat the payments as wages reportable on Form W-2. The absence of reporting on Form 1099 or Form W-2 may result in the drivers omitting the payments from their income tax return. Therefore, an IRS memo recommends that IRS agents, when examining service businesses, "probe for the existence of payments of this type which are usually paid in cash or by a voucher that can be converted to cash at a later date." SBSE-04-1210-068.

26. Procedure—Preparer Electronic Filing Requirement: [IRC Sec. 6011\(e\)\(3\)](#) requires *specified tax return preparers* to electronically file income tax returns for individuals, estates, and trusts, unless an exception

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applies. For 2011, a specified tax return preparer is a preparer who (or a firm whose members) reasonably expect(s) to file 100 or more individual income tax returns during the year. However, specified tax return preparers can request a waiver of the e-filing requirement on grounds of undue hardship. The IRS has announced that Form 8944 (Preparer e-file Hardship Waiver Request) is now available at www.irs.gov/pub/irs-pdf/f8944.pdf and must be used to voluntarily request waivers of the e-filing requirement for 2011. [IRS Ann. 2010-96, 2010-52 IRB](#) .

27. Procedure—Refund after Limitations Expires: Under [IRC Sec. 6532\(a\)\(1\)](#) , a taxpayer must file a suit for refund within two years from when the IRS mails a notice of disallowance of the claim. Nothing in the Code or regulations prevents the IRS from allowing a claim for refund after the expiration of the two-year period for bringing a refund suit, as long as the taxpayer timely filed the claim with the IRS under [IRC Sec. 6511\(a\)](#) . If the Appeals Office receives a taxpayer's request to reconsider a refund claim before the expiration of the two-year period, it can consider and allow the taxpayer's claim. [ILM 201048030](#) .

28. Procedure—Special PIN for Identity Theft Victims: According to the e-News for Tax Professionals (issue 2010-50, 12/21/10), the IRS will begin sending a new notice to some taxpayers identified as victims of identity theft that has affected the filing or processing of their federal tax return in one or more prior tax years. The new notice (CP01A Notice) will provide the taxpayer with a six-digit Identity Protection PIN (IP PIN), valid for a single use only when filing their 2010 federal tax return. When preparing a federal tax return, practitioners should ask the taxpayer, as part of the interview process, if they have ever contacted the IRS regarding identity theft and, if so, if they have received a notice from the IRS containing a six-digit IP PIN. If so, the IP PIN should be entered in the proper area on the tax return.

29. Procedure—E-signatures for Electronic Filing: According to a fact sheet, the IRS has eliminated the paper signature document for e-filed returns. Now, taxpayers who file their tax returns electronically must use electronic signatures. There are two ways to create an IRS e-signature PIN: the self-select PIN method and the practitioner PIN method. The self-select method must be used by taxpayers preparing their own returns while those using a volunteer or paid preparer can authorize the preparer to enter the taxpayer's PIN or generate a PIN for the taxpayer. Taxpayers using a preparer must sign Form 8879 (IRS e-file Signature Authorization), which is retained by the preparer, not mailed to the IRS. Fact Sheet FS-2011-7.

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30. Procedure—Extended Limitations Period for Basis Overstatement: A six-year statute of limitations for assessment applies under [IRC Sec. 6501\(e\)\(1\)](#) when a taxpayer omits from gross income an amount greater than 25% of the gross income reported on the return. Reversing the Tax Court, the 7th Circuit held that an overstatement of basis is an omission from income triggering the six-year limitations period. Although much of the opinion focused on the application of the 1958 Supreme *Court Colony, Inc.* opinion [357 U.S. 28 (1958)], the 7th Circuit noted that it "would have been inclined" to defer to [final Reg. 301.6501\(e\)-1](#) (found in [TD 9511](#) , issued 12/17/10), which states that a basis overstatement outside of a trade or business that leads to an understatement of gross income constitutes an omission from gross income for [Section 6501\(e\)\(1\)\(A\)](#) purposes. *Beard v. Comm.* , [107 AFTR 2d 2011-552](#) (7th Cir.).

31. Procedure—Allocation of Joint Return Tax Payments: In email advice, the IRS reviewed the allocation of an overpayment from a married couple's joint return that was credited to estimated tax in the following year. The couple is divorcing, but their separate tax returns were completed by the same return preparer. According to [Reg. 1.6654-2\(e\)\(5\)\(ii\)](#) , the estimated tax payments can be allocated to the husband (TPH), the wife (TPW), or divided between the two by agreement. [Rev. Rul. 76-140](#) (1976-1 CB 376) adds that consistent tax returns allocating estimated tax payments can be considered evidence of an allocation agreement. A subsequent refund claim, without further evidence of a different agreement between the parties, should be ignored. Here, the separate returns evidenced an agreement between the parties to allocate 100% of the estimated tax payments to TPW. An allocation such as this is acceptable under [Reg. 1.6654-2\(e\)\(5\)\(ii\)](#) . [CCA 201106013](#) .

32. Procedure—Faxed Consent to Extend Limitations: Faxed consents to extend the statute of limitations are usually discouraged because of the risk of disavowal. But according to [CCA 200518079](#) , a faxed signature can be legally sufficient, with proper safeguards, to authenticate and verify the consent. Therefore, faxed consents can (and should) be accepted in cases where time is of the essence and it is the only way to save the statute of limitations. [CCA 201105040](#) .

33. Procedure—Taxpayer Consent to Disclosure: According to informal IRS advice, there is no restriction on use or disclosure as it relates to determining estimated tax for a particular taxpayer, since [IRC Sec. 7216\(b\)\(2\)](#) provides a specific exception to the general rule. If the tax return preparer intended to solicit other services (e.g., financial planning), the taxpayer would need to sign the consent prior to the preparer's presentation of the completed return to the taxpayer for signature. [CCA 201105036](#) .

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34. Procedure—Allocating Credits between Community Property Spouses: According to emailed advice, when taxpayers live in a community property state, the child tax credit should be allocated equally under Internal Revenue Manual (IRM) 21.4.6.5.11, which states that "[i]n community property states, all joint amounts are divided equally, with the exception of the [Earned Income Tax Credit]." The recovery rebate credit should be allocated 50/50 between the spouses, based on [IRC Sec. 6428\(f\)\(2\)](#). When the taxpayers reside in a community property state, the first-time homebuyer credit and making work pay credit should be allocated pursuant to the community property laws for that state. [CCA 201108036](#).

35. Procedure—Change of Address: Taxpayers who have changed their home or business address need to update that information with the IRS to ensure they receive any refunds or correspondence. According to this Tax Tip, there are several ways to change the address on file with the IRS, such as entering the new address in the appropriate boxes on the tax return, or submitting Form 8822 (Change of Address) at any other time during the year. While the IRS uses the U.S. Postal Service's change of address files to update taxpayer addresses, it's still a good idea to notify the IRS directly. IRS Tax Tip 2011-37.

36. Procedure—Subordination of Tax Lien: The IRS can subordinate its tax lien under [IRC Sec. 6325\(d\)](#) if doing so will ultimately increase the amount realizable from the property subject to the lien. Here, outside financing secured by an interest in taxpayer's accounts receivable helped taxpayer remain current with its employment tax deposits; however, the IRS filed a Notice of Federal Tax lien (NFTL) for taxes still owed. The Tax Court decided it was an abuse of discretion for the IRS to refuse to consider taxpayer's request to subordinate the NFTL, and for the IRS to deny taxpayer's request for an installment agreement based on taxpayer's failure to stay current on its tax deposits. Refusing to consider subordination of the NFTL contributed to taxpayer falling behind on its tax deposits. *Alesio Azari, Inc.*, [136 TC No. 9](#) (Tax Ct.).

37. Procedure—Summons Third-party Notice Requirement: Under [IRC Sec. 7609\(c\)\(2\)\(D\)](#), the IRS does not have to provide notice to the taxpayer that it has served a summons on a third party if the IRS issues the summons to collect an assessed amount, judgment rendered against the taxpayer, or the liability of a transferee or fiduciary of the taxpayer. In chief counsel advice, the IRS applied this rule to a taxpayer who may have fraudulently transferred property to another person who was immune from transferee liability because the statute of limitations under [IRC Sec. 6901](#) had expired. The summons was issued to determine whether the conveyance was fraudulent, so taxpayer need not have received notice. [CCA 201107024](#).

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38. Procedure—Circular 230 Sanctions: When the Office of Professional Responsibility (OPR) determines that an attorney, CPA, enrolled agent, or other person subject to the Circular 230 regulations governing practice before the IRS (practitioner) has violated those regulations, it can disbar or suspend the practitioner, which means that he or she is permanently or temporarily ineligible to represent taxpayers before the IRS. Censure doesn't affect a practitioner's eligibility to represent taxpayers before the IRS, but OPR can subject future representations to conditions designed to promote the proper standard of conduct. Monetary penalties can be imposed on the practitioner or the practitioner's employer, firm, or entity if it knew, or reasonably should have known, of the misconduct. [IRS Ann. 2011-24, 2011-12 IRB](#) .

39. Procedure—Correspondence Exam Program: According to the 2010 IRS Data Book, about 78% of the individual audits conducted during the fiscal year ending 9/30/10 were conducted by correspondence. Based on a statistical sample of closed cases for the period 4/09–12/09, the Treasury Inspector General for Tax Administration (TIGTA) found significant delays in closing correspondence cases in a timely manner (see TIGTA report 2011-30-016). For example, in 63% of the cases, the computer system was not updated within five business days of the IRS receipt date. [**Editor's Note:** TIGTA's analysis showed that taxpayer correspondence was stored on shelves from 13 to 822 days prior to closing.] This meant that IRS employees working the toll-free telephone lines could not advise taxpayers that their correspondence had been received and was being considered. In addition, employees could not consider the correspondence because the computer system had no record of the correspondence being received.

40. Procedure—Filing Deadline Postponed by Hurricane: In this emailed advice, taxpayer's original return (presumably for 2004) was timely filed because taxpayer obtained a filing extension, but prior to 10/15/05, Hurricane Rita struck Texas. Since Hurricane Rita was a Presidentially Declared Disaster and taxpayer was an *affected taxpayer* , the due date for filing the return was postponed until 2/28/06 under [IRC Sec. 7508A](#) . Taxpayer's amended return/claim for refund was filed within three years of the date the original return was filed, so the claim for refund was timely filed. [CCA 201109018](#) .

41. Procedure—Limitations Period for Basis Overstatement: A six-year statute of limitations for assessment applies under [IRC Sec. 6501\(e\)\(1\)](#) when a taxpayer omits more than 25% of the gross income reported on the return. Over the past year, several appellate courts have issued decisions on whether an overstatement of basis is an omission from income triggering the six-year limitations period. In *Colony Inc.* [357 U.S. 28 (1958)], the Supreme Court held that an overstatement of basis in a business context (land sales)

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wasn't an omission from income for limitations purposes. However, recently finalized [Reg. 301.6501\(e\)-1](#) states that understated gross income from an overstatement of basis outside of a trade or business context constitutes an omission from income under the statute of limitations. Now, the Federal Circuit held that an overstatement of basis from an alleged "Son of BOSS" tax shelter extended the statute of limitations to six years because the regulation was a reasonable interpretation of an ambiguous Code section. *Grapevine Imports Ltd. v. U.S.* , 107 AFTR 2d 2011-XXXX (Fed. Cir.).

42. Procedure—Refund After Two-year Period Expires: A taxpayer who timely files a claim for credit or refund has two years to file a lawsuit to obtain the credit or refund under [IRC Sec. 6532\(a\)\(1\)](#) , measured from the date the IRS mails a notice of claim disallowance. If the taxpayer timely files a claim but does not timely file suit, [IRC Sec. 6514\(a\)](#) declares any refund made as erroneous and any credit given as void. Therefore, [IRC Sec. 6514\(a\)](#) precludes any division of the Service, including Appeals, from allowing a credit or refund after the expiration of the statute. [CCA 201110011](#) .

43. Procedure—Refund Withholding and Offset: The Financial Management Service (FMS), which issues IRS tax refunds, can partially or fully withhold or offset a federal tax refund to satisfy unpaid federal or state income taxes or to pay child support or student loan debt that was submitted for offset. The taxpayer will receive a notice if an offset occurs, which identifies the agency receiving the payment and a contact address and telephone number. A taxpayer who filed a joint return, but is not responsible for the debt, can request his or her portion of the refund by filing Form 8379 (Injured Spouse Allocation). Form 8379 can be attached to the original Form 1040, Form 1040A, or Form 1040EZ , or filed by itself after the taxpayer receives notification of the offset. IRS Tax Tip 2011-59.

44. Procedure—Offer in Compromise: When the IRS considers an Offer in Compromise (OIC), it may include the value of assets that have been sold, given away, or spent on nonpriority items (dissipated) in establishing an acceptable offer amount. In this case, taxpayer used an advance payment for professional services to engage in day trading in an attempt to pay the tax and other debts. The Tax Court found that the losses realized from day trading were dissipated amounts, up to the amount of the taxpayer's tax liabilities at the time of the losses, and could be used by the IRS in determining an appropriate settlement amount. *Larry Tucker* , [TC Memo 2011-67](#) (Tax Ct.).

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45. Procedure—Reporting Foreign Financial Accounts: The IRS clarifies how to answer questions related to "foreign financial accounts" on 2010 federal income tax and information returns (e.g., Schedule B of Form 1040, the Other Information section of Form 1041 of Form 1065, and Schedule N of Form 1120 , among others). Clarification is necessary due to the recent publication of the final foreign bank account regulations and the revised Report of Foreign Bank and Financial Accounts (FBAR) form and instructions. [Notice 2011-31, 2011-17 IRB](#) .

46. Procedure—Tax Lien Priorities: Final regulations (found in [TD 9520](#)) update guidance under [IRC Sec. 6323](#) regarding the priority of tax liens for purchasers, holders of security interests, mechanic's lienors, and judgment lien creditors. Under the regulations, (1) a purchaser of property in a casual sale is protected against a filed tax lien if the sale price is less than \$1,400 for 2011, (2) a holder of a mechanic lien is protected against a filed tax lien with respect to residential property in an amount not more than \$6,990 for 2011, and (3) household goods (e.g., fuel, provisions, furniture) are exempt from levy to the extent they do not exceed \$8,370 in value for 2011. The final regulations provide that a notice of federal tax lien is extinguished if it contains a certificate of release and is not timely refiled. The regulations are effective 4/4/11. [Regs. 301.6323\(b\)-1](#) , 301.6323(c)-2, 301.6323(f)-1, and 301.6323(g)-1.

47. Procedure—Taxpayer Assistance Orders: [IRC Sec. 7811](#) authorizes the Taxpayer Advocate to issue a Taxpayer Assistance Order (TAO) if the taxpayer is found to be suffering or about to suffer a significant hardship due to the way the tax laws are being administered. Final regulations (found in [TD 9519](#)) adopt proposed revisions to [Reg. 301.7811-1](#) issued in 7/09 with one minor revision affecting what is a significant cost for purposes of a significant hardship. In part, the final regulations (1) define the term *significant hardship* , (2) provide guidance on what constitutes *significant hardship* under the delay standard and other criteria, (3) clarify that a finding of significant hardship will not automatically result in the issuance of a TAO, and (4) explain what a TAO can require the IRS to do, once it is established that the taxpayer is facing significant hardship and the facts and law support relief for the taxpayer.

48. Procedure—Information Reporting Requirements: On 4/14/11, President Obama signed H.R. 4, the Comprehensive 1099 Taxpayer Protection and Repayment of Exchange Subsidy Overpayments Act of 2011, which repeals the Form 1099 reporting expansion by the Affordable Care Act. Now, businesses will only have to report payments of \$600 or more to service providers. For further discussion, see NTA-764, dated 4/13/11.

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49. Procedure—Managing Tax Records: The IRS provided tips on keeping good tax records, including: (1) the use of a three-year rule for keeping most records, (2) certain records that should be kept longer (e.g., settlement statements, stock transactions, IRA and business and rental property transactions), (3) general advice on keeping documents that impact the federal tax return, and (4) the kinds of records that should be kept (e.g., receipts, invoices, mileage logs). [IRS Pub. 552](#) (Recordkeeping for Individuals) contains additional information on what kinds of records to keep. IRS Tax Tip 2011-71.

50. Procedure—Disclosures by Art Appraisal Office: The IRS can disclose return information to third parties under [IRC Sec. 6103\(k\)\(6\)](#) to the extent necessary to obtain information not otherwise available to make a correct determination of the tax owed. This program manager technical assistance involves Office of Art Appraisal Services (AAS) reviews of property appraisals submitted by taxpayers to support the FMV of art on federal tax returns. As part of this review, AAS contacts third party appraisers to verify the validity of the taxpayers' valuations. AAS does not identify the taxpayer or the return under examination, but may disclose details about the artwork (such as the artist's name, title of the piece, medium, etc.). While this may enable the third party to identify the taxpayer, the IRS concluded that these disclosures are permissible if they meet the conditions described in this document. PMTA 2011-010.

51. Procedure—Tax Return Filed under Stolen SSN: This program manager technical assistance addresses a sub-category of identity-theft returns, typically filed by undocumented aliens who are in the U.S. illegally. Because of their status, the workers do not have a Social Security Number (SSN), so they provide a stolen or misappropriated SSN to their employer, and use the stolen or misappropriated SSN to file a tax return reporting the earnings and income tax withheld. The IRS concluded that the use of another person's SSN does not by itself invalidate the tax return. If the return otherwise meets the established criteria for a valid return, it will start the statute of limitations for assessment. PMTA 2011-009.

52. Procedure—Withholding by Government Entities: Final and proposed regulations (see [TD 9524](#)) delay the effective date of the 3% withholding requirement imposed by [IRC Sec. 3402\(t\)](#) on payments by government entities for property or services. Under the final regulations, the withholding and reporting requirements apply to payments after 12/31/12, subject to an existing binding contract exception. So, government entities are not subject to any liability, penalties, or interest for failure to comply with the rules for payments before 1/1/13. Under the proposed regulations, payments on or after 1/1/14 under all contracts (existing and new) would be subject to the rules unless an exception applies. Future guidance may

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be issued addressing prime contractors, subcontractors, and payment administrators along with the application of the statute and regulations to certain public assistance and welfare programs.

53. Procedure—Abatement of Assessment: [IRC Sec. 6404\(a\)](#) authorizes the abatement of assessed but unpaid tax that is erroneous, excessive, or illegal. According to chief counsel advice, taxpayers have no right to sue in court if the abatement request is denied, as they would if they had paid the assessed tax and pursued a refund suit. Instead, taxpayers can (1) pay the assessed tax and request a refund on Form 843 (Claim for Refund and Request for Abatement), (2) request an audit reconsideration, or (3) submit an offer in compromise based on doubt as to liability. [CCA 201118018](#) .

54. Procedure—FBAR Deadline Extended for Some Filers: The Report of Foreign Bank and Financial Accounts (FBAR) is used to report a financial interest in, or signature or other authority over, financial accounts in a foreign country. U.S. persons are required to file Form TD F 90-22.1 if the aggregate value of the foreign accounts exceeds \$10,000 at any time during the calendar year. However, a small subset of individuals who have signature or other authority over, but no financial interest in a foreign financial account will receive a one-year filing extension to 6/30/12. All other U.S. persons required to file an FBAR must meet the 6/30/11 deadline, which cannot be extended. [News Release IR-2011-57](#) .

55. Procedure—Invalid Tax Return: After issuing a Refund Anticipation Loan (RAL) check to taxpayer, the CPA who prepared taxpayer's return increased the charitable contribution amount on the return that was filed, and deposited into his account the excess refund resulting from the higher contribution, without the taxpayer's knowledge. In this program manager technical advice, the IRS held (1) the document did not constitute a return because the taxpayer was unaware of the changes made by the CPA, (2) a second refund would not be issued since the RAL amount was correct, and (3) because the altered return was null, an accurate Form 1040 must be filed, rather than Form 1040X. PMTA 2011-13.

56. Procedure—Offer in Compromise: Assets that a taxpayer has dissipated can be included in the minimum amount that must be paid under an acceptable Offer in Compromise (OIC). Here, the taxpayer filed his 1999 and 2000 tax returns in 2002 but paid no tax. The IRS assessed tax exceeding \$1 million for these two years. Taxpayer requested a Collection Due Process (CDP) hearing, and proposed an OIC that he subsequently lowered from \$400,000 to \$140,000. During the CDP proceeding, taxpayer sold investments but paid none of the proceeds to the IRS. In finding that the Appeals Office did not abuse its discretion in

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declining the terms of the OIC, the Tax Court noted that dissipated assets should be included "unless the taxpayer can substantiate that such assets were used to fund necessary living expenses," which the taxpayer in this case failed to do. *Stephen Johnson* , [136 TC No. 23](#) (Tax Ct.).

57. Procedure—Tax Deposit Earns No Interest: [Rev. Proc. 2005-18 \(2005-1 CB 798\)](#) provides guidance on making payments of tax to suspend the running of interest on deficiencies under [IRC Sec. 6603](#) . If the taxpayer does not identify the amount and nature of the *disputable tax* in writing, interest is not allowed if the deposit is later withdrawn by the taxpayer. In this chief counsel advice, taxpayer's representative sent a check to the IRS with a letter designating the check as a deposit in the nature of a cash bond rather than a payment. Since the letter did not specify the *disputable issue* as required by [Rev Proc. 2005-18](#) , the deposit should be returned without interest. [CCA 201120023](#) .

58. Procedure—Assessment Period for Tax Liability: The IRS's attempt to assess the [IRC Sec. 6651\(f\)](#) penalty for fraudulent failure to file was denied by the Tax Court because the assessment was not made within the three-year assessment period under [IRC Sec. 6501](#) . The taxpayer was under criminal investigation and delivered returns and payments to the Criminal Investigation Division (CID) rather than an appropriate IRS office. The IRS argued there was not a proper filing to start the three-year assessment period because the CID was not authorized to accept returns. However, the court held that the returns were received by an IRS office that had authority to process its contents and payments were in fact posted to taxpayer's accounts. *Martin Dingman* , [TC Memo 2011-116](#) (Tax Ct.).

59. Procedure—Circular 230 Sanctions: In a disciplinary appeal (Luis R. Hernandez, Complaint No. 2010-09) posted to the IRS website at www.irs.gov/pub/irs-utl/hernandez_decision_on_appeal.pdf , the Appellate Authority suspended an attorney from practice before the IRS for a period of 40 months for failing to timely file his income tax returns for 2001–2005, and failing to file tax returns for 2006 and 2007. The Appellate Authority concluded that a five year statute of limitations applies under 28 U.S.C. Sec. 2462 , which is not part of the Internal Revenue Code. Furthermore, the limitations period begins to run "from the date when the claim first accrued," which was the date each tax return was due. Since the counts for 2001, 2002, and 2003 accrued on 8/15/02, 10/15/03, and 10/15/04, and the IRS's complaint was filed on 4/13/10 (more than five years later), those counts "could not be grounds on which to enforce a penalty."

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60. Procedure—Claims for Credit or Refund: According to proposed regulations (see REG-137128-08), the proper place to file a claim for credit or refund is with the Service Center (Campus) where a taxpayer would currently be required to file a tax return that is of the type to which the refund claim relates. Other notable changes would require taxpayers to use the prescribed form for filing a refund claim, or when no form is prescribed, to file the claim on Form 843 (Claim for Refund and Request for Abatement). For employment taxes, a separate claim would be filed for each taxable period. [Prop. Regs. 301.6402-2](#) , [301.6402-3](#) , and [301.6402-4](#).

61. Procedure—County Reporting in Tax Lien Foreclosure: IRS chief counsel advice concluded that a county is not required to issue a Form 1099-S , Form 1099-A, or Form 1099-C to the former property owner whose land was sold in a tax lien foreclosure sale. While [IRC Sec. 6045\(e\)](#) , which addresses the reporting of certain real estate transactions, would seem to apply, the regulations provide an exception for "transfers in full or partial satisfaction of any indebtedness secured by the property so transferred including a foreclosure, transfer in lieu of a foreclosure, or abandonment." [CCA 201122020](#) .

62. Procedure—Extended Statute of Limitations: The statute of limitations is extended to six years under [IRC Sec. 6501\(e\)](#) when the taxpayer omits gross income in an amount exceeding 25% of gross income reported on the income tax return. The District of Columbia Court of Appeals has now weighed in on whether a basis overstatement is an omission of income for purposes of the extended six-year limitations period. In answering this question "yes" (thereby reversing the Tax Court), the District of Columbia Circuit found that [Reg. 301.6229\(c\)\(2\)-1](#) (which states that "an understated amount of gross income resulting from an overstatement of unrecovered cost or other basis constitutes an omission from gross income") applied to this case. Because of the split in the appellate courts, the Supreme Court may ultimately decide this issue. *Intermountain Insurance Service of Vail v. Comm.* , 107 AFTR 2d 2011-XXXX (Dist. Col. Cir.).

63. Procedure—Reporting Foreign Assets and Investments: [IRC Sec. 6038D](#) authorized new reporting requirements for "specified foreign financial assets" that in total exceed \$50,000, while [IRC Sec. 1298\(f\)](#) requires annual reporting by U.S. persons who are shareholders of a Passive Foreign Investment Company (PFIC). Both provisions were effective as of 3/18/10. New IRS guidance temporarily suspends these information reporting requirements. The suspension will last until the IRS releases a new Form 8938 (Statement of Foreign Financial Assets) and a revised Form 8621 (Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund). [Notice 2011-55](#), [2011-29 IRB](#) .

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64. Procedure—Examination versus Survey of Tax Return: While the IRS agent believed that only one of six tax years had been examined and the remainder had been surveyed, taxpayer had signed Form 870 (Waiver of Restrictions on Assessment and Collection of Deficiency. . .) for all six years. So, it was uncertain whether all six years had been examined. In chief counsel advice, the IRS noted that an examination involves contact with the taxpayer and an examination/analysis of the books and records, while a survey does not. Merely reviewing tax returns and adjusting computations does not rise to the level of an examination. From the facts presented, only one year was examined and five years were surveyed, and the taxpayer's execution of Form 870 didn't change this determination. [CCA 201125026](#) .

65. Procedure—Recovery of Erroneous Tax Refund: On their 2007 Form 1040, taxpayers reported taxable Social Security benefits of \$20,441 on line 20b, but left line 20a for the gross amount of Social Security benefits blank. In processing the return, the IRS mistakenly concluded that taxpayers did not receive any Social Security benefits, had overreported their income by \$20,441, and issued a \$3,077 refund check. In concluding that the "law is well settled that the making of an erroneous refund does not preclude the [IRS] from issuing a notice of deficiency to recover the refund," the Tax Court observed that the IRS, "confronted by millions of returns and an economy which repeatedly must be nourished by quick refunds, must first pay and then look." *Lawrence Willey* , [TC Summ. Op. 2011-79](#) (Tax Ct.).

66. Procedure—Taxpayer Request for IRS to Sell Seized Stock: Under [IRC Sec. 6335\(f\)](#) , a taxpayer can ask that seized property be sold within 60 days, in which case the IRS must comply unless an expedited sale would not be in the best interests of the Government. The taxpayers in this case requested that the IRS sell their stock and apply the proceeds to their outstanding tax liabilities. However, the IRS neither sold the stock nor made the best interests determination required by the statute. After concluding that the Tax Court had jurisdiction to review the IRS's failure to comply with [IRC Sec. 6335\(f\)](#) , the 9th Circuit stated that "the IRS generally does not assume the risk of depreciation if it sells the property as soon as practicable. Here, however, [taxpayers] requested a sale of their property under [IRC Sec. 6335\(f\)](#) and the IRS did not comply. It is at that point, when the IRS violated its statutory mandate, that the IRS became responsible for any decrease in stock price." *Zapara v. Comm.* , 108 AFTR 2d 2011-XXXX, (9th Cir.).

67. Procedure—Collection Limitations Period: According to [IRC Sec. 6503\(c\)](#) , the 10-year statute of limitation for collecting assessed tax is suspended while the taxpayer is out of the country for a continuous period of at least six months. If there is no other evidence that a taxpayer was in the U.S. for a continuous six

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month period, a Small Business/Self-Employed (SB/SE) Division memo states that the use of a foreign address for that time may be sufficient to establish that the taxpayer was outside of the U.S. If a partnership has a foreign address, the Collection Statute Expiration Date (CSED) may be suspended for balance due accounts (e.g., employment or excise taxes) until the partnership "returns" to the U.S. If a partnership has an address outside the U.S. but one or more partners are in the U.S., the CSED for the taxes assessed against the partnership is still suspended under [IRC Sec. 6503\(c\)](#). If the partners owe individual taxes and live in the U.S., their individual taxes are not suspended. Memo SBSE-05-0711-022.

68. Procedure—Requirements for Tax Return Preparers: The following chart identifies the requirements for specific categories of preparers under the rules for registration and regulation of tax return preparers. Additional information and FAQs are available at www.irs.gov.

Category	Tax Compliance		Background	Competency	Continuing
	PTIN	Check	Check	Test	Education
Attorneys	X	X			
CPAs	X	X			
Enrolled Agents	X	X			
Registered Tax Return Preparers	X	X	X	X	X
Supervised Preparers	X	X	X		
Non-1040 Preparers	X	X	X		

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69. Procedure—Abatement of Interest on Tax Liability: Under IRC Sec. 6404(e)(1) , interest can be abated if caused by an unreasonable IRS error or delay resulting from a ministerial or managerial act. In this case, the decedent lived in Croatia at death, and due to Croatian courts, his nephew who was executor of his estate and resided in New Jersey was unable to gain access to the estate's funds to pay the estate taxes. An IRS employee told him on a phone call that nothing other than taxes would be owed once the returns were filed and taxes paid, as long as he sent a letter explaining the situation. The Tax Court denied the executor's request for interest abatement because the incorrect advice by the IRS employee did not cause a delay in payment of the taxes, and there was no affirmative misconduct to invoke the doctrine of equitable estoppel. *Estate of Nicolas Telesmanich* , TC Memo 2011-181 (Tax Ct.).

70. Start-up and Organizational Expenses: Final regulations (found in TD 9542) govern elections to deduct start-up expenditures under IRC Sec. 195 , organizational expenditures of corporations under IRC Sec. 248 , and organizational expenses of partnerships under IRC Sec. 709 . Under all three provisions, taxpayers can elect to deduct the lesser of (1) the expenses incurred; or (2) \$5,000, reduced (but not below zero) by the amount by which the expenses exceed \$50,000. Any remaining expenses are amortized ratably over a 180-month period. Generally speaking, an election statement need not be filed with the IRS. Instead, taxpayers that want to capitalize start-up or organizational costs must affirmatively elect to capitalize the costs on a timely filed federal income tax return. See Regs. 1.195-1 , 1.248-1, and 1.709-1, which apply to expenditures paid or incurred after 8/16/11 (although taxpayers can apply the regulations to expenditures paid or incurred after 10/22/04 if the limitations period is still open).