PILLA TALKS TAXES

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THE TAXPAYER FIRST ACT AND THE "NEW" INDEPENDENT OFFICE OF APPEALS

What Does it Mean?

The Taxpayer First Act was passed by Congress recently and signed into law by President Trump on July 1, 2019. It is touted as "historic" legislation that "will modernize the IRS and rightfully prioritize taxpayers." This according to the news release issued by the House Ways and Means Committee when the bill was passed out of Committee. See: Ways and Means Press Release, April 2, 2019 (116th Congress).

Whether this legislation is "historic" or not remains to be seen. However, the reality is that it does not come even close to the level of modification of the IRS and the establishment of new taxpayer rights that were swept in by the 1998 IRS Restructuring and Reform Act. In addition to numerous minor changes to taxpayer rights and IRS procedures, there were several major reforms in 1998 that had a powerful and lasting impact on taxpayer rights and the administration of the tax code. Chief among these were the creation of Collection Due Process Appeal rights and reforms to the innocent spouse statute, code §6015.

The IRS Restructuring Act also moved the Office of the Taxpayer Advocate out of the chain of command from the IRS's enforcement functions, such as Examination and Collection. It was transformed into a separate office, under the command of the Commissioner of the IRS alone, and not answerable to any mid- or even upper-level managers within any enforcement activity. In this way, the Taxpayer Advocate became free of oversight from the enforcement officers whose actions it was supposed to check or control. The Taxpayer Advocate Service has functioned fairly well in carrying out its duties as a result of this independence.

The centerpiece of the Taxpayer First Act is a provision that purports to do exactly the same thing with the IRS's Office of Appeals.

In this issue

What is the Office of Appeals?

The Office of Appeals is a critical element of tax administration. The Appeals Office serves as the agency's quasi-judicial board of review. The Taxpayer Bill of Rights Act guarantees every taxpayer the right to "challenge the position of the Internal Revenue Service and be heard," along with the right to "appeal a decision of the Internal Revenue Service in an independent forum." See: Code §7803(a)(3). The Appeals Office is charged with carrying out these duties.

Indeed, the Appeals Office has for some time been set up in the IRS's organizational structure much like the Office of the Taxpayer Advocate. See the IRS's organizational chart reproduced below (2018 IRS Data Book, Publication 55B). That is to say, the Chief of Appeals was answerable directly to the Commissioner of the IRS. She was not within the chain of command, whether under or over, any enforcement office of the IRS. For example, the Examination function did not evaluate the performance of Appeals Officers in the context of reviewing the adjustments made by revenue agents in audit cases. If that were the case, it would seem plausible (if not likely) that Appeals Officers would be inclined to simply rubber stamp (to a greater or lesser degree) those decisions.

Likewise with the Collection function. Section 6330(b) guarantees every citizen the "right to a fair hearing" in the context of a Collection Due Process appeal. This applies to both levy appeal hearings under §6330 and lien appeal hearings under §6320. Those sections were added to the code by the IRS Restructuring Act in 1998. If Appeals Officers fell under the authority of the Collection function, how could a taxpayer reasonably expect to get a "fair hearing" as required by law in such an appeal?

And even if all performance review criteria for Appeals Officers had nothing to do with the extent to which they modified or overturned decisions of tax auditors and collectors, the fact that their managers were directly connected with the Appeals function would taint the process with an insurmountable appearance of impropriety.

The Appeals Office "Call to Action"

Treasury Regulation §601.106(f) sets forth the rules of procedure for the Office of Appeals. Rule 1 states as follows:

> An exaction by the U.S. Government, which is not based upon law, statutory or otherwise, is a taking of property without due process of law, in violation of the Fifth Amendment to the U.S. Constitution. Accordingly, an Appeals representative in his or her conclusions of fact or application of the law, shall hew to the law and the recognized standards of legal construction. It shall be his or her duty to determine the correct amount of the tax, with strict impartiality as between the taxpayer and the Government, and without favoritism or discrimination as between taxpayers.

This regulation was last amended in October 1987.

Part 8 of the Internal Revenue Manual (IRM), Appeals, articulates the mission of Appeals in the very its first section. Section 8.1.1.1(1) reads as follows:

> The Appeals Mission is to resolve tax controversies, without litigation, on a basis which is fair and impartial to both the Government and the taxpayer and in a manner that will enhance voluntary compliance and public confidence in the integrity and efficiency of the Service.

This IRM language was in effect as of October 1, 2016. At the same time, the IRS more publicly repeated the claim that Appeals is wholly independent from any IRS enforcement function. In the Fact Sheet entitled "IRS Clarifies Office of Appeals Policies," October 1, 2016, the agency states:

> Appeals' role is to settle disputes on a fair and impartial basis that favors neither the government nor the taxpayer. Appeals should not perform compliance actions. Rather, we attempt to settle a case after IRS compliance functions (Accounts Management, Collection, and Examination) have made a determination with which the taxpayer disagrees.
>
> *
>
> Our recent policy changes help to preserve the opportunity for an impartial appeal for taxpayers by ensuring Appeals is reviewing a final determination made by a compliance function.
>
> *
>
> Although there will be a period of transition as these policies are implemented, we are confident that they will improve the appeals process by supporting Appeals' mission and strengthening a taxpayer's right to an independent appeal.

The March 2016 edition of IRS Publication 4227, *Appeals*, provides in part as follows:

> Appeals is a separate function and independent

of the IRS office that proposed the adjustment or collection action. Appeals will not engage in communication with employees of other IRS functions (commonly referred to as ex parte communications) to the extent such communication appears to compromise our independence.

While it might seem that changes in 2016 are so recent as to render the claim of "independence" somewhat hollow, the fact is that the Office of Appeals was formed in 1927. And though there were numerous changes over the years (such as giving it jurisdiction over CDP appeals), its stated mission, expressed in the IRM provision cited above, has always been the same.

Along Comes the Taxpayer First Act

Against this historical and legal backdrop we welcome the Taxpayer First Act, the jewel of which is Act §1001. Section 1001 amends code §7803 by adding a new subsection (e). Section 7803(e)(1) reads:

> There is established in the Internal Revenue Service an office to be known as the "Internal Revenue Service Independent Office of Appeals".
>
> Section 7803(e)(2) states:
>
> The Internal Revenue Service Independent Office of Appeals shall be under the supervision and direction of an official to be known as the "Chief of Appeals". The Chief of Appeals shall report directly to the Commissioner of Internal Revenue….

I might be missing something, but if you examine the organizational chart shown below, I see that there already is an Office of Appeals, and that such office is currently under the direction of an official known as the "Chief of Appeals," and what's more, that the Chief of Appeals already reports directly to the IRS Commissioner.

So excuse me for asking, but what has this accomplished? From an organizational standpoint, it seems like the answer is "nothing."

From an operational standpoint, there may be some benefit to the law. It is a fact that the IRM is not law. The various federal courts have stated repeatedly that the IRM does not confer any rights on taxpayers, and the various manual provisions do not necessarily create affirmative duties that the IRS is bound to follow. In this sense, one might say that IRS's flowery mission statement in IRM Part 8.1, declaring the function of Appeals, is, well, not worth the paper it's written on.

And in the strictest sense, such a person would be entirely correct. Thus, for example, if a taxpayer found himself before an Appeals Officer who was somehow not "fair and impartial," he would have no standing to point to IRM Part 8 and claim that the conduct constituted a violation of his rights. Of course, that assumes that the Taxpayer Bill of Rights was not law.

To this point, the Taxpayer First Act effectively codified the IRS's mission statement. New Code §7803(e)(3) reads as follows:

> It shall be the function of the Internal Revenue Service Independent Office of Appeals to resolve Federal tax controversies without litigation on a basis which—
>
> a) is fair and impartial to both the Government and the taxpayer;
>
> b) promotes a consistent application and interpretation of, and voluntary compliance with, the Federal tax laws; and
>
> c) enhances public confidence in the integrity and efficiency of the Internal Revenue Service.

As you can see, this is word-for-word the Appeals mission statement from IRM Part 8.

Access to Case Files

One way in which the Taxpayer First Act will change the Appeals landscape in a positive way is through new code §7803(e)(7). This addresses a longstanding problem we face in dealing with select Appeals Officers over the years. That problem is getting access to documents in the client's case file that are in the hands of the Appeals Officer (AO) assigned to review the case.

Historically, different AOs approached the question of disclosure in different ways. Most AOs are happy to provide copies of forms and documents relevant to the case and which bear on the decision that's under review. It seems only natural and reasonable that an AO will release documents that purport to support the IRS's position being challenged. Without access to such documents, the right of appeal becomes somewhat hollow because the taxpayer, who almost always has the burden of proof, cannot respond to the evidence in the IRS's file with contrary information to refute the facts allegedly supporting the IRS's position.

For example, it is common in Trust Fund Recovery Penalty cases for the IRS to gather information from third parties as to who in the company was responsible for taking care of the company's financial obligations. Information from such persons is collected in a so-called "4180 interview." It's referred to as a 4180 interview because the interview questions are derived from IRS Form 4180, *Report of Interview with Individual Relative to Trust Fund Recovery Penalty*.

The IRS may collect several such forms, which bear the name and signature of the person being interviewed. These statements are considered evidence in the investigation and are used against the person ultimately assessed with the Trust Fund Recovery Penalty. It is obvious that in order to mount a creditable defense to such an assessment, the target is entitled to see—and indeed must see—all Forms 4180 that are in the investigative file.

The problem is the IRS doesn't unilaterally release the forms. And certain AOs commonly refuse to release the information (along with other aspects of the investigative file, including the investigating officer's report and recommendation on why the assessment is justified).

The alternative is to go through the Freedom of Information Act (FOIA) to get the material. The problem there is that it usually takes many months to get the documents. I've had AOs tell me there's no way they were going to hold the case open long enough for me to get material through the FOIA, and then provide the additional time I need to review, evaluate and respond to all the documents.

So here's the essential position of the AO:

1) I'm not giving you the material you need to effectively represent your client in this appeal, and

2) I'm not waiting for you to get, through the FOIA (or, presumably, any other source), the material you need to effectively represent your client in this appeal.

This unreasonable position puts the taxpayer and counsel at a distinct disadvantage. I'm sure you would agree that such position cuts deeply into the notion that the AO is functioning in accordance with the "fair and impartial" dictates of IRM part 8.1.

Enter new code §7803(e)(7). It reads as follows:

> In any case in which a conference with the Internal Revenue Service Independent Office of Appeals has been scheduled upon request of a specified taxpayer, the Chief of Appeals shall ensure that such taxpayer is provided access to the nonprivileged portions of the case file on record regarding the disputed issues (other than documents provided by the taxpayer to the Internal Revenue Service) not later than 10 days before the date of such conference.

For example, referring to our TFRP case, the citizen appealing the assessment gets full access to the case file, including all Forms 4180, upon written request to the AO.

However, note the clause stating that the appealing taxpayer is allowed access to all "nonprivileged" portions of the file. In the case of Form 4180, for example, it bears the name of, and is signed by, a third party. The name and identifying information of that person would be redacted from the form itself. That would leave you with all the statements made by the person. Counsel and the client would have to use their powers of association to determine who may have actually made the statement. In any event, you at least know the purported facts that are stacked up against you.

A Bizarre "Hate-the-Rich" Clause

Also note the clause saying that one must be "a specified taxpayer" to get access to the material. The definition of a "specified taxpayer" is found in §7803(e)(7)(C)(i). It casts a most bizarre light upon this purported right of discovery in an Appeals case.

That section defines a "specified taxpayer" from the standpoint of both an individual and an entity, such as a corporation, partnership, etc. In the case of a natural person, a "specified taxpayer" is anyone with adjusted gross income that "does not exceed $400,000" for the year in which the dispute relates. In the case of an entity, the term is defined as a taxpayer whose "gross receipts do not exceed $5,000,000" for the year in which the dispute relates.

Here is a wild and absurd example of how the "hate the rich" philosophy has infected every aspect of tax law. It's one thing to ask high income people to pay a greater percentage of their incomes in taxes, or to cap—even cut—their otherwise perfectly legal deductions, exemptions, etc., which other taxpayers are entitled to claim. But it's quite another thing to effectively deny them the right to a "fair and impartial" appeal by limiting their access to documents the IRS is using against them, solely because of their income.

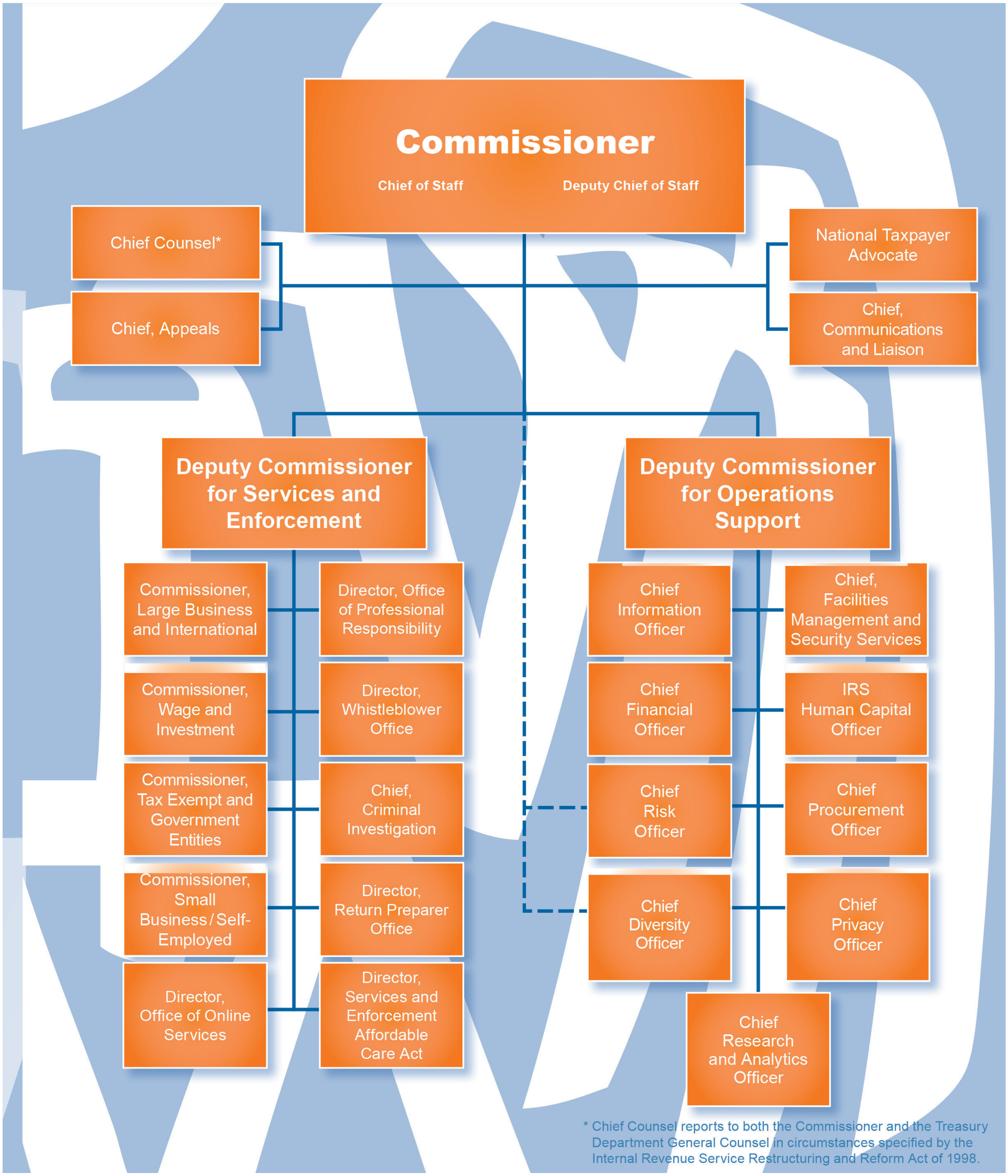
It is an abomination and a frontal assault on the Fifth Amendment right to due process of law to deny people access to justice solely because of their income level. Imagine the outrage that would justifiably swell if the law provided that low income people, or people of color, were not entitled to full and complete appeal rights under the tax code, solely because of their poverty or heritage.

This is a monstrous position that essentially states that Congress doesn't care if you might not actually owe the tax under protest. Since you are a high income person or corporation, you can just pay it anyway. In fact, they are saying, "We're going to steal the money from you precisely because you can pay it."

More on the Taxpayer First Act

As time goes on, I will address further elements of the Taxpayer First Act. In addition, we will discuss these issues at the 2019 Taxpayers Defense Conference in Minneapolis this October. Make your plans now to attend. There is more information on the conference provided below.

Internal Revenue Service Data Book, 2018



CALIFORNIA REACTS TO *WAYFAIR*

Establishes New Use Tax Collection Requirements for Remote Sellers

California Governor Gavin Newsom recently signed a law that reacts to the Supreme Court's 2018 decision in *South Dakota v. Wayfair, Inc*., 138 S. Ct. 2080. That decision dismantled the long-standing "physical presence" test for determining whether the various states had the right to assess and collect sales taxes against a remote retailer—that is, a seller with no presence in the state seeking to assess the tax. The physical presence test required a seller to have an actual presence of some kind within the state, such as sales people, a warehouse, a phone center, a show floor, etc., before that state could impose sales taxes.

The Supreme Court trashed the physical presence test in favor of what is called the "nexus" test. The nexus test suggests that any connection between the seller and the state can trip liability for the tax. The flood gates have opened as states around the nation are passing laws to impose taxes on remote sellers. This is so important that I include a chapter in my new book, ***Dan Pilla's Small Business Tax Guide***, to address this issue. My chapter on *Wayfair*-related state sales tax laws details four different ways that the various states are claiming "nexus," and thus imposing taxes on remote sellers.

California's law requires out-of-state retailers with no physical presence in California to collect use tax if, during the preceding or current calendar year, the total combined sales of tangible personal property for delivery in California by the retailer and all persons related to the retailer exceed $500,000. The law also requires all retailers, whether located inside or outside of California, to collect and pay the district use tax on all sales made for delivery in any district that imposes a district tax. This requirement attaches if, during the preceding or current calendar year, the total combined sales of tangible personal property in California, or for delivery in California by the retailer and all persons related to the retailer, exceed $500,000.

In other words, any retailer whose total sales of tangible personal property in California, including sales for resale, exceed the $500,000 threshold is considered "engaged in business" in every district in California that imposes a district tax. As such, the retailer is now required to collect the district use tax on taxable sales made for delivery in every taxing district, regardless of the amount of the retailer's sales to any individual district.

This requirement was effective as of April 1, 2019. The new district use tax collection requirement was effective as of April 25, 2019. For more information, California has a link on its website explaining the law. See the "Special Notice, New Use Tax Collection Requirements for Remote Sellers and New District Use Tax Collection Requirements for All Retailers," at:

www.cdtfa.ca.gov/formspubs/l632.pdf

A second guide entitled, "Use Tax Collection Requirements Based on Sales into California Due to the Wayfair Decision," is available at:

www.cdtfa.ca.gov/industry/wayfair.htm.

This is just one more reason everyone in business needs my new book, ***Dan Pilla's Small Business Tax Guide***.

THE KEY TO THE VALIDITY OF IRS LIENS

"First in Time is First in Line"

By Scott B. MacPherson

The case of *First Sentinel Bank v. United States*, 123 A.F.T.R.2d 2019-608 (W.D. Va Jan. 25, 2019), offers a refresher course on the interplay between federal tax liens and foreclosure sales. The district court explained that the federal tax lien on the real property owned by First Sentinel Bank would have been discharged under §7425 if the procedure in that statute was followed, but it wasn't, so the tax lien survived. But it survived subordinate to the Bank's lien. In other words, "first in time" wins, even over an IRS tax lien.

The facts were simple enough. The homeowners obtained a line of credit deed of trust from First Sentinel Bank. The loan was secured by a lien. After that deed of trust was recorded, the IRS filed a notice of tax lien against the homeowners. The bank was first in line ahead of the IRS.

The court in its recitation of facts then jumped ahead to a nonjudicial foreclosure sale of the property. Because it was a nonjudicial foreclosure, code §7425 applied. That statute provides that property subject to a federal tax lien remains subject to the lien following a nonjudicial foreclosure sale unless the IRS is given at least 30 days notice of the foreclosure sale. Unfortunately, the third-party trustee appointed for that sale did not fulfill the requirements of that statute. He only gave the IRS 16 days notice of the sale. And to make it worse, he sent the notice to the wrong IRS office. *Id*. at *1. At the foreclosure sale the Bank bought the property.

The Bank was not aware of the trustee's mistake. It believed the tax lien was discharged by the foreclosure. It learned of the trustee's mistake when it tried to sell the property. The sale collapsed due to clouded title. The Bank then sued for a declaration that its lien survived and had priority over the IRS lien. Both parties then moved for summary judgment. The first issue before the court was whether the Bank's lien merged into its title as a result of its purchase of the property at the foreclosure sale.

That question was resolved by state law. The question of what constitutes "property" or "rights to property" to which a federal tax lien can attach is always resolved by the law of the state in which the property is located.

Under Virginia law, when the legal ownership of the land and the absolute ownership of the encumbrance become vested in the same person, there is a merger if the note holder intended a merger, and there is not a merger if he did not intend a merger. "If this intention has been expressed, it controls. In the absence of such an expression, the intention will be presumed from what appear to be the best interests of the party as shown by all the circumstances." *Id*. at *2 (internal quotation omitted).

The court found in the uncontested facts nothing to indicate that the Bank wanted to merge the lien with its title, and, clearly, such merger was against the Bank's interests. Thus, the court inferred that the Bank did not intend a merger. As such, its lien still existed.

That settled, the second issue was whether the IRS tax lien also still existed (as the IRS argued), and if so, whether the tax lien had priority (as the IRS argued) over the Bank's lien. The court swiftly held that because §7425 was not followed (remember the trustee's error) that the tax lien still existed. But, the court pointed out that the IRS's tax lien was recorded second in time after the Bank's lien. Thus, before the foreclosure sale, the IRS's lien was subordinate to the Bank's lien. Nothing transpired to change that ranking. The tax lien was still subordinate to the Bank's lien. *Id*. at *4.

In summary, the district court clearly believed that the federal tax lien would have been discharged under §7425 if the procedure in that statute was followed. But the procedure was not followed, so the court held that the tax lien was not extinguished. That turned out to be fine however because, under the pertinent state law (Virginia), the Bank's lien did not merge into its title. The Bank still had a lien, and because the Bank's lien was first in time before the foreclosure, it was still first in time after the foreclosure. So the Bank beat the IRS.

Scott MacPherson *is a tax attorney licensed in Arizona and California. He is the son of Mac MacPherson and as such, is a second-generation Tax Freedom Institute member. Scott can be reached at* 310-773-2042, *or by email at* scott@taxhelponline.com.

LET'S NOT FORGET THERE'S A REASON FOR KEEPING TAX RETURNS PRIVATE

By Lawrence Gibbs

Over this past weekend I read the timely article, "INSIGHT: My Taxes Are None of Your Business," published by Bloomberg Tax on August 10, 2019. The article was written by Alan Morrison, who is the Lerner Family Associate Dean at George Washington University Law School. Dean Morrison's article discusses the risks to taxpayers under present law (involving the provisions of tax code §6103 that protect the privacy and confidentiality of tax return information) if the federal courts in pending litigation were to permit the chairman of the House Ways and Means Committee to obtain copies of the president's federal income tax returns and return information that might later be made public or publicly discussed.

I agree with Dean Morrison that the president's failure to disclose his returns publicly "is not a reason for making his returns public, and all of us have a stake in seeing that his privacy is protected." I also agree with Dean Morrison that, as an alternative, "Congress could, of course, change the law and direct the IRS to make public the tax returns of future U.S. presidents, or even candidates for president or Congress, if they do not do so in a timely manner."

As a former Internal Revenue Service commissioner, I believe taxpayers assume the IRS will protect the privacy and confidentiality of whatever information they put in their tax returns or otherwise provide to the IRS. I also believe that if politicians are able to obtain and make public the president's tax returns and tax information, they are likely to do the same thing to anyone else they choose to target in the future, including but likely not limited to political donors or other supporters of any public figure in any political party.

I was at the IRS during the Nixon administration when President Nixon attempted to cause the IRS to provide him with confidential taxpayer information to facilitate IRS audits of his enemies, which is a matter of public record embodied in the Article II(1) count of the Watergate House indictment of President Nixon in 1974.

To prevent similar abuses in the future, I subsequently helped draft the revisions to section 6103 that were enacted in 1976. In drafting these revisions, we were determined that no politician or anyone else should be able to circumvent the protections provided by section 6103 to cause the IRS to release the content of or information about individuals' tax returns for an improper purpose. One of the reasons we did so was because prior presidents—both Republican and Democrat—used a pre-1976 presumption in section 6103 to occasionally request individual taxpayer returns and information from the IRS by alleging they had the power to do so because such was not prevented by executive order. Therefore, in the 1976 legislation, the pre-1976 presumption in section 6103 was reversed, so that thereafter all tax returns and tax information were made private and confidential unless expressly made public by executive order.

I do not recall whether or not there was any focus at that time on potential problems if Congress at the other end of Pennsylvania Avenue made similar requests, but I personally do not recall doing so. However, the principle should be the same. No politician or other government personnel should ever be able to request from the IRS and publicly discuss or disclose anything in or about an individual taxpayer's return or other tax information unless such request and disclosure have an unequivocally proper purpose and otherwise are clearly authorized by law.

The potential damage to our tax system of upholding any request and disclosure that do not meet the foregoing tests is significant. The public generally does not trust either politicians or bureaucrats. Taxpayers are likely to decide that if the IRS cannot protect the privacy and confidentiality of even the president's returns and tax information, no one else's returns and tax information can be protected. In turn, taxpayers predictably are likely to be less willing than they previously have been to provide information requested by the IRS in tax returns.

As a result, I believe it will be more difficult for the IRS to identify the best returns to audit, and the audit process itself is likely to become less efficient and effective as taxpayers are less willing to be forthcoming in tax information they provide in response to IRS audit requests. If that were to happen, our tax system likely would collect less revenue at a time when our national debt (presently in excess of $22 trillion) and our annual federal operating deficits (soon to exceed $1 trillion each year) are escalating rapidly and in huge amounts. As often has been said, our tax system depends upon the confidence of the public in order to function properly. Today we can ill afford for any further lack of public confidence in our federal government, including our tax system.

Editor's Note: **Gibbs** *was commissioner of the IRS from 1986 to 1989. This article first appeared in BNA's Insight on August 14, 2019.*

VIRTUAL CURRENCY OWNERS CAN'T HIDE
IRS Already Has Thousands of Names

For years I've been arguing with the owners of crypto-currency, such as Bitcoin, also known as virtual currency, over: 1) whether gains derived from trading in such a currency are taxable, and b) whether, in any event, the IRS can find out whether one traded in virtual currency.

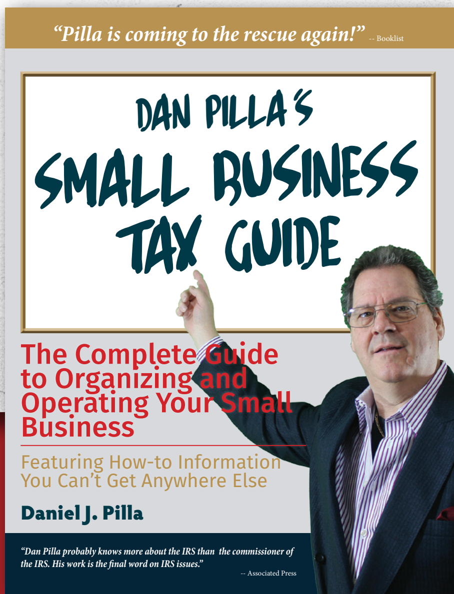
As to question 2, the IRS did find out because the agency served summons on various virtual currency clearing houses as part of their ongoing compliance initiative. As a result, starting the last week if July, the IRS will be sending letters to virtual currency owners who potentially failed to report income and pay the tax from virtual currency transactions or did not report their transactions properly.

According to the IRS, "By the end of August, more than 10,000 taxpayers will receive these letters." See: IRS News Release IR-2019-132 (July 26, 2019). IRS Commissioner Chuck Rettig warns that "Taxpayers should take these letters very seriously." A copy of IRS Letter 6173 is attached following this article.

As to question 1, as far as the IRS is concerned, virtual currency is property and is to be treated like any other property for tax purposes. That is, if you buy virtual currency for X dollars, and sell it for X-plus, the profit is taxable income. In 2014, the IRS issued Notice 2014-21, addressing the virtual current issue. Question 1 of the Frequently Asked Questions addressed in the notice reads:

Q-1: How is virtual currency treated for federal tax purposes? A-1: For federal tax purposes, virtual currency is treated as property. General tax principles applicable to property transactions apply to transactions using virtual currency.

I said repeatedly that the IRS would not look the other way on this issue. As far as the agency is concerned, any "accession to wealth" is taxable, and profit from trading in such currency is no exception. Now is the time to get help if you misreported for failed to report virtual currency trades.



Dan Pilla's Small Business Tax Guide

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