Pilla Talks Taxes

DAN PILLA'S MONTHLY TAX AND FINANCIAL BULLETIN

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Here Come The Notices!

The IRS is Back in the Collection Business

After a hiatus of over two years in mailing automated collection notices to delinquent citizens, the IRS is firing up the collection machine once again. This means that millions of citizens will soon begin receiving a barrage of tax-due notices and payment demands from the agency.

On August 21, 2020, during the height of the pandemic, the IRS announced that it was suspending the mailing of three specific collection notices: CP501, CP503 and CP504. These are follow-up notices mailed to citizens who owe taxes but have not paid in response to the initial tax-due notice, CP14.

The three suspended notices use progressively stiffer and more threatening language in communicating the nature of the delinquent debt and the need to pay right away. The CP504 threatens to levy a state tax refund owed to a taxpayer if the federal tax is not paid in full by the deadline expressed in the letter. For a full discussion of the IRS's collection process and how to respond to notices, see chapter 4 of my book, ***How to Get Tax Amnesty.***

The IRS suspended the mailing of these notices because of the agency shutdown that occurred in 2020. The result of the shutdown was the agency very quickly became overwhelmed with a backlog of millions of pieces of incoming correspondence. The IRS had shipping containers stuffed full of more than 30 million unopened envelopes containing tax returns, checks, and letters in response to various IRS

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correspondence. The IRS stopped the mailing of the three notices mentioned above until it could reduce the backlog.

In February 2022, with the backlog not improving, the IRS announced that it was suspending the mailing of more than a dozen additional enforcement letters, applicable to both individuals and businesses. The IRS pointed out that it was still facing millions of unprocessed tax returns and was "taking this step to help avoid confusion for taxpayers and tax professionals." By the end of the 2021 filing season, the IRS faced a backlog of more than 35 million tax returns. The IRS was dealing with what it called "unprecedented demands" on its systems brought about by the pandemic.

And while the agency still has a backlog of unprocessed documents, National Taxpayer Advocate Erin Collins reported in December 2023 that by the end of 2022, "The IRS had worked through most of its processing backlog" of tax returns.

That's the good news.

The bad news is, now that the agency has worked through the lion's share of the processing backlog, it announced in December that it is "resuming normal collection notices" beginning in 2024. As an apparent courtesy to taxpayers who haven't seen a notice in some time, the IRS will start with a "special reminder letter." The letter is intended to "alert the taxpayer of their liability," as well as recommend "easy ways to pay" the tax. This will put the delinquent citizen on notice that the IRS is back in the collection business.

The IRS also announced that it will grant certain automatic penalty relief to those who owed taxes during the period the notice machine was turned off. The announcement declares that the IRS will automatically cancel the failure to pay penalty for taxes owed during 2020 or 2021. The relief applies to any taxpayer who, as of December 7, 2023, owes less than $100,000 for tax year 2020 or 2021, and who was issued an initial balance due notice (CP14) on or before December 7, 2023, for the year 2020 or 2021. The relief applies to 1040 tax return filers and most corporate taxpayers filing Form 1120 or 1120S. About 4.7 million individuals, businesses, and tax-exempt organizations will be eligible for penalty relief for tax years 2020 and 2021. But the relief is temporary. If the tax owed is not paid right away, the penalty will resume accruing on April 1, 2024.

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With the IRS now back in the collection business, anyone with a delinquent tax debt simply must pay attention to IRS correspondence. The string of collection notices – CP501, CP503 and CP504 – makes it clear that the IRS intends to enforce collection if payment is not made by the stated deadline, or if arrangements are not made to pay over time. But, the IRS cannot take actual enforcement action until it mails a Final Notice, Notice of Intent to Levy and Notice of Your Right to a Hearing (LT11 or Letter 1058), per Code sections 6330(a) and 6331(d).

These are the last in the series of collection letters. They communicate the fact that the string is out, and the IRS is about to take enforcement action, such as wage or bank levies. The letters provide that the tax must be paid in full within thirty days, or the IRS will take levy action.

The letters also provide notice of your right to a Collection Due Process (CDP) hearing, which is a hearing before the IRS's Office of Appeals. See: Code § 6330. A CPD hearing gives the taxpayer the opportunity to present an alternative to enforcement action under which the tax is paid in a manner that does not cause hardship. But if you don't respond within the thirty-day deadline, you lose your right to a CPD hearing.

If you have unpaid tax debt, don't wait to seek a resolution. Consult competent, experienced counsel who can guide you through the maze of settlement options that are available. Start by reading my book, ***How to Get Tax Amnesty.***

MORE ON THE DECISION TO GRANT RELIEF OF THE FAILURE TO PAY PENALTY

While it is magnanimous of the IRS to grant relief to taxpayers of failure to pay penalties that accrued during the two-year period the agency shutdown the mailing of collection notices, I believe it did the right thing for the wrong reason. As we know from the above article, the IRS granted automatic (albeit temporary) relief from the failure to pay penalty that accrued during the period the mailing of notices was shutdown.

I am all in favor of the IRS granting penalty relief – and for just about any reason. However, I find it odd that it would use the "we weren't sending notices" argument to justify the decision. I say that based on Internal Revenue Code section 7524. That section was added to the law by the IRS Restructuring and Reform Act of 1998. That statute requires the IRS to send taxpayers with delinquent accounts a written notice that sets forth the amount of the tax owed as of the date of the notice, and to do so "[n]ot less often than annually."

IRS meets this legal obligation by sending Notice CP71. Even taxpayers whose accounts have been closed as Currently Not Collectible due to hardship, or who are on a formal installment agreement, receive Notice CP71 annually. It's important to note that the CP71 was *not* among the many notices that were suspended pursuant to the IRS announcements mentioned above. See: IRS Notice IR-2022-31, February 9, 2020. Thus, even though delinquent taxpayers did not receive collection notices during the shutdown period, they did in fact continue to receive their annual reminder notices, as required by Code section 7524.

Now you might say, "Hey Dan, why nitpick? What's the difference why the IRS cancels the penalty, as long as they do?"

I'm not one to look a gift horse in the mouth. However, in this case, I believe the gift is coming from the other end of the horse. I say that because the IRS should be granting hardship relief, not administrative relief because it stopped sending certain collection notices. Even with collection notices having stopped, taxpayers did continue to receive CP71 notices.

The problem is not that they didn't *know*, or somehow forgot, that they owed taxes. The problem is that they couldn't pay due to the economic hardship created by government shutdown orders halting commercial trade, commerce and interaction practically nationwide.

Recall that in August 2022, the IRS announced that it was granting automatic relief from the failure to file penalties for tax years 2019 and 2020, if delin-

quent returns were filed by September 30, 2022. See: IR-2022-155, August 24, 2022; IRS Notice 2022-36.

The overarching reason for that penalty relief is the fact that a nationwide emergency declaration was issued by the president, effective March 13, 2020. That declaration was issued as a result of the ongoing COVID-19 pandemic. The declaration instructed, among other things, the Treasury Secretary "to provide relief from tax deadlines to Americans who have been adversely affected by the COVID-19 emergency…" As part of the response, the IRS extended certain return filing deadlines in 2020 and 2021.

Most people with tax compliance problems attributable to COVID issues were not unable to file returns on time. Most people couldn't pay because of the negative economic impact of the shutdown orders. Why did the IRS grant relief from the filing penalties but not relief from the payment penalties, when clearly, the lack of ability to pay was the issue driving most delinquency problems?

Interestingly, some of the reasoning expressed in Notice 2022-36 for granting filing relief had to do with the IRS facing what turned out to be an overwhelming backlog of unprocessed returns. Agency employees were spread thin attending to other aspects of pandemic relief legislation passed by Congress (such as distributing economic impact payments to millions of people), while at the same time, attempting to recover from its own operations shutdown.

So while the IRS recognized that "Americans adversely affected" by COVID needed and deserved relief from failure to file penalties, no mention was made of the failure to pay penalty. Not until January 2024 did it occur to IRS thinkers in Washington that people needed help on that front also. But, rather than raise the hardship issue, the IRS proffers that relief is needed because, somehow, people may have forgotten that they owe taxes (never mind the CP71 reminders).

Clearly, recognizing broad-based economic hardship factors would expand potential relief to taxpayers who do not fall into the narrow time and liability restrictions mentioned in the January 2024 notice. For example, I recently spoke with a construction business owner from southern California who owes about $600,000 in employment taxes for 2022 and 2023. The liabilities stem largely from problems caused by COVID shutdown orders. He is not subject to the automatic penalty relief because he owes more than $100,000. Yet, his problems fall directly into the class of economic hardship issues that the IRS knows full well exist in droves throughout the nation.

So while it is good news that the IRS is granting failure to pay penalty relief, the program does not go nearly far enough to address the problems created in the economy by the government shutdown orders we suffered through in 2020 and 2021.

If you are facing such penalties, you must read chapter 4 of my book, ***The IRS Problem Solver.*** There I address the strategies for winning cancelation of penalties based on reasonable cause. See also: chapter 17, Dan Pilla's ***Small Business Tax Guide.***

How You Can Ask Dan Pilla a Question

If you have questions or problems you'd like Dan Pilla to address, please write to Dan at:

215 W. Myrtle Street
Stillwater, MN 55082

or e-mail to:

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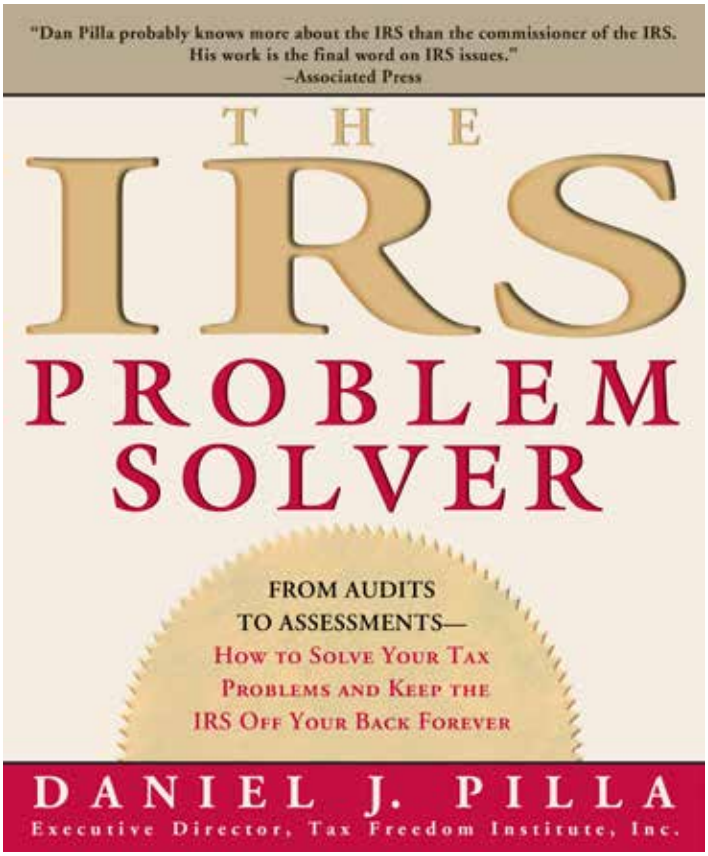
Write the word "newsletter" in the subject line.



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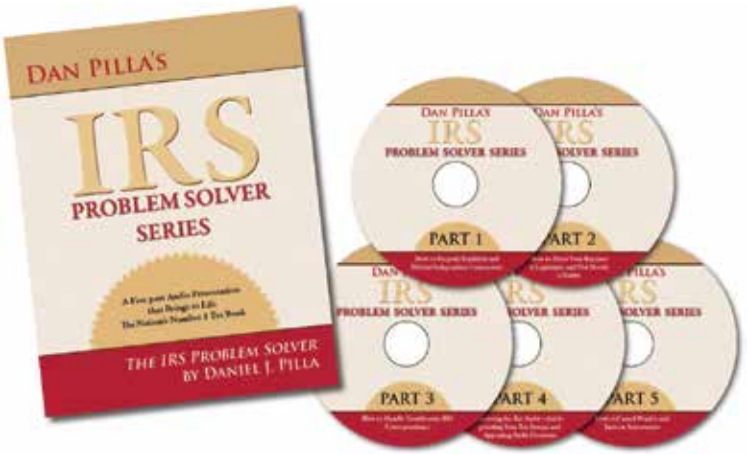

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IRS To Begin Redesigning Notices

Agency Launches "Simple Notice Initiative"

Using a bit of its Inflation Reduction Act $60-billion funding windfall, the IRS announced that it has undertaken the task of reviewing the approximately 200 different notices it uses to communicate with taxpayers. See: IR-2024-19, January 23, 2024. These notices make up the corpus of the nearly 170 million letters the agency mails annually to U.S. taxpayers. The initiative will expand the work that began last year, when IRS reviewed and redesigned 31 notices making up about 20 million annual taxpayer contacts.

The program will start with reviewing notices to individuals, and then notices to businesses. The agency intends to incorporate into the new notices simpler language to better explain the purpose of the notices, shorten the length of the notices, and to more "clearly and concisely communicate the next steps a taxpayer must take." The notices will also use a more modern typeface, and will incorporate headers and icons. They will also provide step-by-step guidance on how to respond. The new letters will feature a QR code that directs readers to a webpage where they can respond online instead of calling the IRS.

According to Commissioner Werfel,

> Simplifying and clarifying these letters will make it easier for taxpayers to understand the tax issues involved. This will help reduce questions and save headaches for taxpayers, the tax professional community as well as the IRS. Improving these letters is also critical to our internal operations at the IRS, and an important part of our transformation efforts. Clearer letters can create a ripple effect, reducing taxpayer phone calls and visits and freeing up IRS staff to help others. See: IR-2024-19.

The 31 notices already redesigned include notices to citizens, (a) who served in combat zones that may be eligible for tax deferment, (b) reminding them that they may have unfiled returns, and (c) reminding them of their balance due and where they can go for assistance.

The newly redesigned notices are already in use this filing season.

Over the course of 2024, with the goal of having them in use by January 2025, the IRS will redesign the over-40 million notices sent to businesses, and the less common notices mailed to individuals.

It's about time the IRS attends to the matter of simplifying its notices. On no fewer than four occasions, Congress commanded the IRS to produce materials that clearly and simply communicate to citizens what their rights and remedies are when dealing with the agency.

The first such command came in 1988, with the passage of the Technical and Miscellaneous Revenue Act of 1988. Title VI of that act included the first so-called Taxpayer Bill of Rights. Section 6227of that act is where Congress first required the IRS to notify taxpayers in "simple and nontechnical terms" about their rights during audits, appeals and in the collection process. That is the law that gave birth to IRS Publication 1, *Your Rights as a Taxpayer*, which purports to explain to citizens the legal rights they have when dealing with the IRS.

Alas, Publication 1 is just two pages long, while the Internal Revenue Code consists of more than 4 millions words, and probably three times that many in regulations. It is my considered option that the IRS left out a great deal of information concerning taxpayers' rights from of Publication 1.

In 1998, with the enactment of the Internal Revenue Service Restructuring and Reform Act, at section 3504, Congress commanded the IRS to provide taxpayers with "an explanation of the entire process from examination through collection" with respect to any outstanding tax liability.

That same Act added code sections 6320 and 6330 to the Tax Code. Section 6330(a)(3), dealing with Collection Due Process cases, affirmatively commands the IRS to explain in "simple and nontechnical terms" what one's rights are in the CDP process, and to explain one's rights under all elements of that provision.

Finally, section 6331(d)(4), the provision requiring a final notice of intent to levy prior to enforcement action, reiterates the IRS's duty to communicate with citizens in "clear and nontechnical terms" when it comes to enforced collection in general and the right to a CDP appeal in particular.

So as early as 1988, and as recently as 1998, the IRS has been mandated by law to communicate with citizens using "simple and nontechnical terms" so citizens can know and discharge their responsibilities in a correct and timely manner.

So here we are, some twenty-six years after the most recent congressional command, and the IRS is finally getting to the task. Better late than never I guess.

IRS Prepares to Institute Digital Currency Reporting Rules

Agency Drafting Regulations

Since 1984, the tax law has required the reporting of cash transactions in excess of $10,000. Generally, section 6050I of the Code provides that any person who is:

> (a) engaged in a trade or business, and
>
> (b) who receives "more than $10,000 in cash in 1 transaction (or 2 or more related transactions)" in connection with that trade or business,
>
> must file a statement with the IRS reporting such cash transaction(s).

Section 6050I(d) defines the term cash as including not only U.S. currency, but also foreign currency and "any monetary instrument (whether or not in bearer form)" with a face amount of not more than $10,000. This broad definition includes cashier's checks, money orders, bank drafts and traveler's checks.

The Infrastructure Investment Act of 2021 added to the definition of cash "any digital asset (as defined in section 6045(g)(3)(D))." The provision regarding the reporting of digital assets applies to transactions occurring after December 31, 2023.

The report I'm talking about here is filed with the IRS using Form 8300, *Report of Cash Payments Over $10,000 Received in a Trade or Business*. This form meets the requirements of Code section 6050I(b), which mandates the reporting of the payer's name, address and TIN, the amount of cash received, the date and the nature of the transaction, and "such other information as the Secretary may prescribe." A similar statement must be provided to the payer as confirmation of the payment along with the fact that a report was made to the IRS.

The addition of digital currency to the reporting requirement of cash transactions is just another in the long line of steps taken by the IRS to capture the tax owed on digital asset trading. The IRS is in the process of creating regulations clarifying the definition of the phrase "digital assets" as used in the law. The IRS proposed new regulations in August 2023 intended to provide that clarification, as well as providing additional forms and instructions for reporting digital asset transactions. However, the proposed regulations have not yet been adopted.

Because of this, the IRS suspended the requirement to file Form 8300 reporting digital asset transac-

tions in 2024. See: Announcement 2024-4, IR-2024-12, January 16, 2024. The requirement to report will take effect as to digital asset transactions carried out after December 31, 2024.

However, the announcement makes it clear that the suspension in no way "affects the income tax obligations of persons engaged in a trade or business who receive digital assets" to make any tax payments required as a result of income received. The receipt of digital assets in connection with the sale of products or services constitutes income and must be reported. This is true not only for persons engaged in business activities, but it is also true of employees who receive digital assets from their employers in exchange for services rendered.

Another new regulation under development, and which is expected to be released later this year, is reporting regulations applicable to cryptocurrency exchanges, such as Coinbase Global Inc. and Kraken. Under the proposed regulations, U.S.-based exchangesmust disclose to the IRS detailed information on their clients' transactions, just as other securities dealers are now required to report under existing regulations.

Under the proposed regulation, firms that facilitate the buying and selling of digital assets — crypto brokers — would have to track and report key information, such as customers' capital gains and losses. The term "brokers" includes digital-asset trading platforms, payment processors and certain hosted wallets. The proposal would also extend reporting requirements to real estate brokers in cases where digital assets are used to purchase property.

Under the proposed regulations, in 2026 brokers are required to start reporting gross proceeds for sales of digital assets that occur on or after January 1, 2025. Adjusted basis reporting — which would incorporate how much a customer paid for the assets — takes effect in the following year for sales on or after January 1, 2026. The separate dates are intended to give brokers more time to adjust to the new rules.

For much more on the tax consequences of digital assets, see articles in the July 2023, April/May 2023, and February 2023, issues of *Pilla Talks Taxes.*

Claim For Refund Statute of Limitations

Understanding the "Financial Disability" Exception

BY SCOTT MACPHERSON, ATTORNEY AT LAW

Due to the doctrine of sovereign immunity, the United States and its agencies are generally immune from suit. However, per 28 U.S.C. § 1348(a)(1), the federal government has consented to suits for tax refunds brought in the district courts. This consent is subject to a limitation under 26 U.S.C. § 7422(a). It provides that no suit may be heard "until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof."

A further restriction is imposed under 26 U.S.C. § 6511(a), which restricts the time period during which a taxpayer can make his refund request. That statute reads:

> Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the

> taxpayer, within 2 years from the time the tax was paid. Claim for credit or refund of an overpayment of any tax imposed by this title which is required to be paid by means of a stamp shall be filed by the taxpayer within 3 years from the time the tax was paid. Section 6511(a).

Then paragraph (b) bluntly reiterates that no refund shall be allowed after the expiration of that time period, and clarifies that the 3-year period is extended by any extensions of time for filing the return. See also: *Crosby v. United States,* 889 F. Supp. 143, 145 (D. Vt. 1995) ("Thus, the amount of credit or refund that may be claimed is limited to the amount of tax paid within the three years immediately preceding the filing of the claim, plus any extension period that has been granted by the IRS."); *Weisbart v. Dept. of Treasury,* 222 F.3d 93, 95 (2nd Cir. 2000) (finding that as long as a claim is filed within three years of the return, it is timely under § 6511(a), regardless of whether the return itself is timely); *Bryuhanova v. I.R.S,* 113 A.F.T.R.2d 2014-1778, *2-3 (D. Minn. 2014) (explaining that these time restrictions are a jurisdictional barrier beforedismissing the refund suit for lack of jurisdiction).

This all adds up to a jurisdictional barrier. Districts courts have jurisdiction under § 1348(a) only if the refund request was "duly filed" under § 7422(a) and timely under § 6511(a). In the words of the Supreme Court,

> Read together, the import of [sections 7422 and 6511] is clear: unless a claim for refund of a tax has been filed within the time limits imposed by § 6511(a), a suit for refund, regardless of whether the tax is alleged to have been "erroneously,""illegally," or "wrongfully" collected, "may not be maintained in any court." *United States v. Dalm,* 494 U.S. 596, 602 (1990) (citations omitted).

Now, enter the exception: you can still get a refund after the 3-year/2-year period if you have a doctor's note.Yes, you read that correctly.

If you have a doctor's note saying that you deserve extra time for requesting your refund, then the IRS (and the district court) will give you an extension beyond the time limitation of § 6511(a), never mind the quotes above. This exception comes from § 6511(h), which provides that, "In the case of an individual, the running of the periods specified in subsections (a), (b), and (c) shall be suspended during any period of such individual's life that such individual is financially disabled."

The term "financially disabled" is then defined to mean that a person

> is unable to manage his financial affairs by reason of a medically determinable physical or mental impairment of the individual which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. An individual shall not be considered to have such an impairment unless proof of the existence thereof is furnished in such form and manner as the Secretary may require. Section 6511(h)(2)(A).

Notice that the disability must be medically determinable; hence, the doctor's note.

However, the statute continues with an exception to the exception. An individual is not "financially disabled" if his "spouse or any other person" is authorized to act on his behalf in financial matters. Section 6511(h)(2)(B). In other words, even if you have a doctor's note attesting to a medically determinable condition that makes you unable to manage your tax affairs, and even if you always file a separate tax return, if your spouse is not so disabled, then by definition you are not financially disabled.

The appellate court in *Abston v. CIR.,* 691 F.3d 992 (8th Cir. 2012), recognized this disability exception to the refund rules. It said:

> In *United States v. Brockamp,* 519 U.S. 347, 350, 117 S.Ct. 849, 136 L.Ed.2d 818 (1997), a unanimous Supreme Court held that courts may not use nonstatutory equitable reasons to toll the "unusually emphatic" time limitations set forth in 26 U.S.C. § 6511. In 1998, Congress responded by enacting a statutory exception to the time limitations in § 6511(a)-(c) applicable to any period in which an individual taxpayer

is "financially disabled." Pub.L. 105–206, § 3202(a), 112 Stat. 740 (codified at 26 U.S.C. § 6511(h)(1)).*Abston* at 994.

The year after Congress amended the statute, the IRS issued Revenue Procedure 99-21 prescribing the form and manner the Secretary requires to prove a "medically determinable physical or mental impairment." See also *Teffeau v. CIR,* 110 A.F.T.R.2d 2012-6005, *4 (D. V.I. 2012) ("To date, no other exception to the *Brockamp* rule has been enacted.").

So, a doctor's note is the exception because the IRS said so, and courts take it seriously, as the taxpayer in *Bryuhanova v. I.R.S,* 113 A.F.T.R.2d 2014-1778, *2-3 (D. Minn. 2014) found out. She sought a refund after the 3-year/2-year time period in § 6511(a) on the argument that "she qualifies for the exemption for persons who are 'financially disabled' as provided in § 6511(h)." Id. at *5.

The court granted the government's motion to dismiss her refund suit because she did not follow the directions of § 6511(h)(A)(1), in that she did not prove her impairment "in such form and manner as the Secretary may require." The form and manner required by the Secretary is Revenue Procedure 99-21, and to make that point, the court put its disagreement with Bryuhanova in bold italic font:

> Unless otherwise provided in IRS forms and instructions, ***the following statements are to be submitted with a claim for credit or refund of tax to claim financial disability for purposes of § 6511(h).*** Id. at *5 (quoting Rev. Proc. 99-21, emphasis by the court).

The court then quoted verbatim from Revenue Procedure 99-21 what the doctor's note must set forth, and pointed out that Bryuhanova did not submit a physician statement at *all* with her refund claim. Her failure to follow the "form and manner" required by the Secretary deprived the district court of jurisdiction altogether. *Id*. at *5.

It behooves us, then, to look at the requirements of the Revenue Procedure, which are:

1. A written statement by a physician (as defined in § 1861(r)(1) of the Social Security Act, 42 U.S.C. § 1395x(r)), qualified to make the determination, that sets forth:

> (a) the name and a description of the taxpayer's physical or mental impairment;
>
> (b) the physician's medical opinion that the physical or mental impairment prevented the taxpayer from managing the taxpayer's financial affairs;
>
> (c) the physician's medical opinion that the physical or mental impairment was or can be expected to result in death, or that it has lasted (or can be expected to last) for a continuous period of not less than 12 months;
>
> (d) to the best of the physician's knowledge, the specific time period during which the taxpayer was prevented by such physical or mental impairment from managing the taxpayer's financial affairs; and
>
> (e) the following certification, signed by the physician:
>
> I hereby certify that, to the best of my knowledge and belief, the above representations are true, correct, and complete.

2. A written statement by the person signing the claim for credit or refund that no person, including the taxpayer's spouse, was authorized to act on behalf of the taxpayer in financial matters during the period described in paragraph (1)(d) of this section. Alternatively, if a person was authorized to act on behalf of the taxpayer in financial matters during any part of the period described in paragraph (1)(d), the beginning and ending dates of the period of time the person was so authorized. See: Revenue Procedure 99-21, § 4.

Bryuhanova tried to cure her deficiency with a letter from a doctor submitted with her Response to the government's motion to dismiss. That late submission failed for two reasons, the district court said. First, the Revenue Procedure requires that the doctor's note be submitted with the claim for refund (Rev. Proc. 99–21,

§ 4). Second, the Revenue Procedure requires a statement concerning whether any person "was authorized to act on behalf of the taxpayer in financial matters during the period" of the claimed financial disability, and that statement was missing from the late letter anyway (Rev. Proc. § 4(2)). The court explained by quoting the Eighth Circuit:

> The Eighth Circuit in *Abston [v. Commissioner,* 691 F.3d 992 (8th Cir. 2012)]wrote: "The limited waiver of sovereign immunity in § 6511(h) does not grant district courts power to decide *de novo* that a taxpayer was financially disabled." 691 F.3d at 995. In other words, if a taxpayer seeking a refund does not initially comply with the requirements of Revenue Procedure 99–21, she may not subsequently ask a District Court to find that she was, in fact, financially disabled, because the District Court lacks jurisdiction to consider the case. *Bryuhanova* at *6.

Notice that a taxpayer only gets one chance to do it right. But, if a taxpayer does it right, the time limit for refunds is tolled for the duration of "financial disability." The court in *Bryuhanova* was strict, but no more strict than every other court on this matter. Taxpayers always lose for lack of a doctor's note. For example, the taxpayer in *Abstonargued* that a court should and can make an independent determination of a taxpayer's financial disability, but the Eighth Circuit disagreed for three reasons. The first reason is the language of § 6511(h)(2)(A): "shall not be considered." Failure to comply with the Revenue Procedure simply deprives the courts of jurisdiction to hear the matter. It shall not be considered.

Second, the independent judicial determination of financial disability that Abston sought would be the kind of nonstatutory tolling the Supreme Court barred in *Brockamp*. The administrative burden of responding to late claims, the Court explained, "tells us that Congress would likely have wanted to decide explicitly whether, or just where and when, to expand the statute's limitations periods, rather than delegate to the courts a generalized power to do so whenever a court concludes that equity so requires." 519 U.S. at 353, 117 S.Ct. 849. The judicial remedy Abston urges is contrary to that principle and therefore beyond the power of the lower federal courts. *Abston* at 995-96.

And third, the Revenue Procedure was issued by the Secretary of the Treasury under the authority of § 6511 and therefore it must be honored:

> Knowing that the IRS would need to fairly and efficiently process a potentially large number of such claims, Congress instructed the Secretary to prescribe the method by which an individual could prove such an impairment. In Revenue Procedure 99–21, the Secretary logically prescribed, "Bring a doctor's note." Under any standard of judicial review of executive agency action, we must uphold this threshold requirement as an appropriate exercise of the authority Congress delegated to the Secretary. *Abston* at 996.

And every court follows suit. The *Abston* court listed six prior cases where the refund suit was dismissed because the taxpayer's claim of financial disability was not supported by a physician's statement complying with Revenue Procedure 99–21. See also: *Thorpe v. Department of the Treasury,* 123 A.F.T.R.2d 2019-1049, *4 (D. N.J. 2019) (court granted government's motion to dismiss because the taxpayers did not comply with Revenue Procedure 99–21); *Chan v. Commissioner,* 693 Fed.Appx. 752, 756 (10th Cir. 2017) ("Although Chan argues he now 'has enhanced evidence for claiming financial disability,' see Opening Br. at 5, the district court cannot make a determination of financial disability if he did not first provide the requisite proof to the IRS"); *Teffeau v. CIR,* 110 A.F.T.R.2d 2012-6005 (D. V.I. 2012) (dismissed because taxpayers did not submit a doctor's note); *Rosner v. U.S.,* 122 A.F.T.R.2d 2018-5145 (S.D. N.Y. 2018) (a finding of a financial disability under Rev. Proc. 99-21 for one tax year does not apply to other tax years); *Estate of Kirsch v. U.S.,* 265 F.Supp.3d 315 (W.D. N.Y. 2017) (refund suit dismissed because the doctor's note did not set forth the information required by the revenue procedure); *Williams v. U.S.,* 112 A.F.T.R.2d 2013-5720 (S.D. Tex. 2013) (government's motion for summary judgment granted because taxpayer did not submit a doctor's note and thus could not plead tolling under §6511(h)); *Jardine v. U.S.,* 111 A.F.T.R.2d 2013-

577 (W.D. Wa. 2013) (refund suit dismissed for lack of jurisdiction because the doctor's note did not set forth the information required by the revenue procedure); *Elmes v. Commissioner,* 110 A.F.T.R.2d 2012-6184 (D. V.I. 2012) (refund suit dismissed as time barred because taxpayer neither alleged nor showed that he was financially disabled per the revenue procedure). See also: *Israel v. U.S.,* 356 F.3d 221 (2nd Cir. 2004) (applying § 6651 to a refund of the Earned Income Credit and dismissing the refund suit).

The court in *Martinez v. U.S.,* 112 A.F.T.R.2d 2013-5373 (Fed. Cl. 2013) summed up the legal requirement:

> Failure to provide the IRS with a physician's statement that substantially complies with Revenue Procedure 99–21 denies a taxpayer recourse to the tolling provision in § 6511(h). This court cannot conduct a *de novo* proceeding to determine whether or not a taxpayer was financially disabled; a necessary predicate to a refund suit challenging the IRS's refusal to apply tolling under § 6511(h) is the provision to the IRS of the materials required by Revenue Procedure 99–21 in support of the taxpayer's refund claim.
>
> ...
>
> For the foregoing reasons, plaintiff's claim must be dismissed. Although the court has sympathy for Ms. Martinez and her situation, the tax laws do not provide her with a remedy from this court. *Martinez* at *8-9.

You might have noticed that the taxpayer in every case I cited lost. That is because the requirement of the revenue procedure is strict to the point of unfairness. Subparagraphs (1)(b) and (1)(c), quoted above, are well nigh impossible to meet, even if one did remember to ask a doctor for a note. That reality hamstrings judges who might otherwise want to help a citizen. As the district court in *Maconi v. U.S.,* 113 A.F.T.R.2d 2014-2448 (D. Del. 2014) explained in closing, just before it dismissed the refund suit for lack of jurisdiction,

> If the taxpayer does not qualify for a tolling of the statutory time period under the financial disability exception, the IRS retains these funds, and this court may not intervene. It is beyond the authority of this court to impose additional language into a duly enacted statute. The statutory limitations period of 26 U.S.C. § 6511 has just one exception, contained in § 6511(h), that suspends the running of the period. ...
>
> Hardship may occur when a statute of limitations prevents a plaintiff from successfully making a claim, "but the alleviation of that hardship is a matter of policy for the Congress." *Kaltreider Constr. v. U.S.,* 303 F.2d 366, 368–69 (3d Cir.1962). "Although 'not elegant,' the statutory scheme is straightforward." *Brosi*, 120 T.C. at 8 (citing *Comm'r v. Lundy,* 516 U.S. 235, 242 (1996)). Sympathy by the court for plaintiff's situation is not a basis to supersede the limited waiver of sovereign immunity under § 6511(h).
>
> "Admittedly, the result we reach is a harsh one, but we are firmly convinced that it is the one required by law." *Kreiger v. U.S.,* 539 F.2d 317, 322 (3d Cir.1976).*Meconi* at *6.

The moral of the story is simple: get a doctor's note!

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EDITOR'S NOTE: Our 2022 Taxpayers Defense Conference theme was claims for refund. We dissected every aspect of the refund process. We had one entire session dedicated to the "financial disability" issue, discussed in this article. So, for more details on this issue in particular, and tax refund procedures in general, see the 2022 Defense Conference materials.

2023 Taxpayers Defense Conference

The 2023 Taxpayers Defense Conference is now in the books. It was our 29th consecutive annual conference and it was a great success. We had about forty people in the room with us in Tampa, FL, and another fifteen streaming live online. Online attendees were able to participate by asking questions through the chat function on our platform.

Our presenters (besides myself) included Scott MacPherson, who did a two-hour ethics session; Steve Klitzner, who did a session on how to challenge underlying assessments in CDP appeals; and for the first time, my daughter MacKenzie Hesselroth (Pilla), who presented a session on how to meet the burden of proof in CDP cases. That session is an outstanding supplement to the above Special Report on releasing levies. All agree that she did a great job with her first-ever presentation of this kind. We will see more of her in the future.

2023 Defense Conference Speakers left to right: Dan Pilla, Steve Klitzner, MacKenzieHesselroth, Scott MacPherson

MacKenzie discusses the burden of Proof

Dan Answers Questions

If you missed the Conference, we are working to have the self-study materials available soon.

Check out PillaTaxAcademy.com for the latest coursers and webinarts available.

Jean takes questions from online attendees