



PILLA TALKS TAXES

DAN PILLA'S MONTHLY TAX AND FINANCIAL BULLETIN



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Complaint Regarding IRS Employee Misconduct *TDI Steps Up to Protect Your Right to Counsel*

In the June 2022 issue of *PTT*, we reported on the outrageous statements made by the IRS and Commissioner Rettig regarding your right to counsel. See article: "Is the IRS Preparing to Torpedo the Right to Counsel?" In my opinion, the statements rise to the level of a direct attack on your absolute right to counsel. Even worse, the statements are steeped in false claims about the Offer in Compromise (OIC) program, how it works, and who might qualify.

It's one thing to whine about something that's wrong; but it's quite another to do something about it. Well, TDI did something about it. On July 14, 2022, we filed a very detailed complaint with the Treasury Inspector General for Tax Administration (TIGTA). TIGTA is the watch-dog agency that oversees the actions of the IRS. It's their job to keep the IRS in line regarding tax law enforcement and administration. TIGTA has the authority to slap the agency's hand and cause them to correct the false and deceptive statements at issue here.

Our complaint was sent to the National Taxpayer Advocate's Office of Systemic Advocacy. This office handles systemic problems within the IRS, as opposed to problems associated with individual taxpayer cases. The Systemic Advocacy Office has already assigned a case number to our complaint

and will move it along in due course.

Because it's critical that we know exactly how the statements are false and will mislead taxpayers, I'm publishing our entire complaint in full (without exhibits), here. Please note that if it becomes necessary to further document our successes with OIC cases, I will call on TDI members to provide specific case examples similar to those discussed in the complaint.

I thank you in advance for your help with this important issue.

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2022 TAXPAYERS DEFENSE CONFERENCE 9

TAX AMNESTY BOOK I I

Complaint Regarding IRS Employee Misconduct

The purpose of this complaint is to report serious misconduct of an IRS employee.

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1. NATURE OF THE MISCONDUCT

The misconduct concerns both false and grossly misleading public statements regarding taxpayers' right to counsel and the IRS's ability to resolve delinquent tax debts.

The acts complained of below constitute serious violations of the Taxpayer Bill of Rights in two ways. We hereby request the immediate intervention of TIGA to preserve and protect the integrity of the tax system, as well as the public's perception of the fairness thereof.

2. IDENTITY OF THE IRS EMPLOYEE

The offending employee is the Commissioner of Internal Revenue Service, Charles Rettig. The statements in question are found in IRS news release IR-2022-119 (June 7, 2022) (copy attached).

3. IDENTITY AND CONTACT INFORMATION OF THE COMPLAINANT

The complainant is the Taxpayers Defense Institute (TDI) (formerly Tax Freedom Institute), a na-

tional association of tax professionals (attorneys, accountants and Enrolled Agents) focused on taxpayers rights issues, taxpayer defense at all levels of the civil and criminal administrative and judicial processes, and IRS problems resolution.

TDI is an IRS-approved continuing education provider. TDI has been in existence since 1994. Its members consist of about 90 law and accounting firms spread throughout the U.S. TDI provides support to its professional members in the form of articles, research reports, in-person seminars, Zoom and telephone conference calls, and direct personal interaction between our members.

The professional biography of Daniel J. Pilla, Executive Director of TDI, is attached.

4. BACKGROUND LAW AND FACTS

The statements of the IRS in general, and of the Commissioner in particular, published nationally via the news release in question, are pointed at two topics: (1) the right to counsel, and (2) the Offer in Compromise (OIC) program.

As explained more thoroughly below, the state-

ments constitute a deliberate attempt to (1) chill the absolute right to counsel enjoyed by every citizen when dealing with the IRS, particularly in the areas of enforced tax collection and an OIC, and (2) push taxpayers into a situation in which they are likely to pay more tax than they legally owe.

A. Violation of the Absolute Right to Counsel.

It is undisputed that taxpayers have the absolute right to counsel when dealing with the IRS. In the context of criminal matters the right is recognized by the Sixth Amendment to the U.S. Constitution. In the context of civil matters, the right is expressly recognized by the Taxpayer Bill of Rights, codified at Internal Revenue Code (Code) § 7803(a)(3) and broadly disseminated to taxpayers via IRS Publication 1. The right to counsel is expressed in Code § 7803(a)(3)(I) as the “right to representation.”

Specific to the IRS, the right to counsel pre-exists the Taxpayer Bill of Rights. The Supreme Court spoke clearly about the right to counsel in tax cases in the case of *United States v Boyle*, 469 U.S. 241 (1985). According to the Supreme Court, the engagement of professional counsel to ascertain and discharge one’s duties under the

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Code is “plainly an exercise of ordinary business care and prudence.” *Boyle*, 249 U.S. at 250.

At present, there are millions of people facing collection of unpaid taxes. When such debts are not immediately paid, citizens face potential enforced collection, including wage and bank levies, property seizures, and tax liens. These citizens also face the assessment of penalties and interest, which often double or triple the amount of the original tax itself.

Most people are unaware of the various options to mitigate enforcement action and, in certain cases, reduce or eliminate one’s debt. Because of the level of ignorance of the average citizen when dealing with the IRS, such people generally need counsel to navigate the process.

B. Violation of the Right to Pay No More Tax Than is Owed. It is axiomatic that taxpayers have no legal or moral duty to pay more tax than is legally owed. This right is protected by the Taxpayer Bill of Rights Act. Code § 8703(a)(3)(C) provides that taxpayers have “the right to pay no more than the correct amount of tax.”

5. THE NATURE OF THE FALSE PUBLIC STATEMENTS

A. The Claim. IRS relief options include, among other things, an installment agreement, penalty abatement relief, audit reconsideration, audit and collection appeals, and the IRS’s flagship settlement program, the OIC. An OIC allows a qualifying citizen to reduce a tax debt in any of four circumstances. News release IR-2022-119 overtly encourages delinquent citizens to avoid consulting counsel with regard to their tax problems, and particularly it does so in the context of considering the potential submission of an OIC.

The news release headline reads:

IRS urges anyone having trouble paying their taxes to avoid anyone claiming they can settle tax debt for pennies on the dol-

lar, known as OIC mills

This statement plainly suggests that “any claim” of the ability to settle one’s debt for some indefinite fraction of what is owed is *per se* fraudulent.

But it’s the headline itself that’s fraudulent, as explained next.

B. The OIC Statute. The OIC program is statutory. It was created by Congress and is codified at Code § 7122. Amendments to Code § 7122 were passed by Congress in 1998. These amendments broadened the scope of the OIC to make it more widely available to delinquent taxpayers.

In explaining the purpose of the changes, the Senate Finance Committee report reads as follows:

The Committee believes that the ability to compromise tax liability and to make payments of tax liability by installment enhances taxpayer compliance. In addition, the Committee believes that the IRS should be flexible in finding ways to work with taxpayers who are sincerely trying to meet their obligations and remain in the tax system. Accordingly, the Committee believes that the IRS should make it easier for taxpayers to enter into offer-in-compromise agreements, and should do more to educate the taxpaying public about the availability of such agreements. See: S. Rep. No 105-174, addressing § 3462 of the Internal Revenue Service Restructuring and Reform Act of 1998.

Code § 7122 explicitly provides the IRS with the authority to compromise any tax liability by accepting less than full payment in satisfaction of the liability. That is to say, IRS has the statutory authority to enter into a “pennies-on-the-dollar settlement” of tax debts. And, by definition, an accepted OIC means the taxpayer actually paid less in taxes than he otherwise might. In each of the years 2020 and 2021, the IRS accepted about 15,000 OICs. In every case, the settlement meant the taxpayer paid *less than was owed*.

C. Required Explanation to the Public. Section 3462 of the 1998 Restructuring and Reform Act put an affirmative duty on the IRS to issue a policy statement for distribution to the public, “setting forth the rights of the taxpayer and obligations of the IRS with regard to offers in compromise.” Such statement is to be written in “simple, nontechnical terms” explaining various factors relevant to the OIC process.

The news release issued by the IRS, and the statements of the Commissioner at issue here, do exactly the opposite of what Congress intended through the above provision of the Restructuring and Reform Act.

D. The IRS’s Website Contradicts the Commissioner’s Statements. Consistent with Restructuring and Reform Act requirements, the IRS’s public website plainly states that the OIC program “... allows you to settle your tax debt for less than the full amount you owe. It may be a legitimate option if you can’t pay your full tax liability or doing so creates a financial hardship.”

See: <https://www.irs.gov/payments/offer-in-compromise>

The website language (“An offer in compromise allows you to settle your tax debt for less than the full amount you owe”) defies the news release’s false allegation that tax pros offering OIC representation “make outlandish claims” that they are able to “settle a person’s tax debt for pennies on the dollar. That’s exactly what the OIC program allows one to do, as confirmed by the IRS’s own website. Again, quoting the website: “An offer in compromise allows you to settle your tax debt for less than the full amount you owe.” For example, if one owes \$100,000, but can pay just \$10,000, he can settle through an OIC for ten cents on the dollar—i.e., “pennies on the dollar.”

I personally recently settled an OIC on behalf of a client. The OIC acceptance letter is dated June 17, 2022. My client owed the IRS in excess of \$153,000. The OIC was accepted in the amount of \$5,000. That works out to 3.26%, or about 3.26

cents on the dollar, i.e., “pennies on the dollar.”

E. The Need for Counsel. Even worse than suggesting that OIC settlement claims are *per se* bogus is the claim regarding the IRS’s ability to help delinquent taxpayers. Commissioner Rettig is quoted as saying:

No one can get a better deal for taxpayers, than they can usually get for themselves by working directly with the IRS to solve their tax issues.

In other words, Commissioner Rettig suggests that people should avoid getting independent professional help because taxpayers “pay the OIC mill a fee to get the same deal” they would have gotten on their own.

The statement suggests that obtaining an OIC settlement is as easy as falling off a log. However, the verbose and complicated statute, regulations and Internal Revenue Manual that govern the OIC clearly suggest otherwise.

For example, the IRS devotes at least two chapters to the implementation of the OIC in its Internal Revenue Manual (IRM). See: IRM Part 5, Chapter 8, and IRM Part 8, Chapter 23, Section 1.

IRM Part 5.8 is dedicated to the processing, evaluation, investigation, and acceptance or rejection of an OIC—plus the appeal rights associated therewith. The length and detail of the instructions therein is an implicit admission by the IRS that taxpayers need professional help to get through the agency’s labyrinth of rules, regulations, procedures, forms, and instructions.

Moreover, it is quite common that personnel within the IRS’s Centralized OIC Unit (those who investigate OICs) do not themselves know the intimate details of their own manual. For this reason, Offer Examiners often issue erroneous denials (example provided, *infra*), which then must be appealed to the Office of Appeals. We regularly resolve rejected OICs in favor of the taxpayer at the Appeals level. Taxpayers entirely unaware of the process would have no way to know that.

Imagine the outrage of the A.C.L.U. (and like groups) if any state or local law enforcement agency issued an announcement declaring that nobody needs to consult counsel when dealing with such agency, because no lawyer can get them a better deal than “they can usually get for themselves by working directly with the police to resolve their issues.” This amounts to a kind of “reverse Miranda warning” and is completely outrageous.

F. OICs Can Not Be Negotiated Online. Commissioner Rettig makes another false statement: “Taxpayers can check online for their best deal.”

While it’s true that the OIC is discussed on the IRS’s website, it’s equally true that the site provides no specific instructions on how to prepare, submit, argue, negotiate, or appeal an OIC. Nor is there a portal to check to find out what one’s “best deal” might be.

Moreover, it is simply impossible to submit an OIC online because the application *must be filed in writing* on Form 656, and only through the IRS’s Centralized Offer in Compromise (COIC) Unit. It must be filed with the required financial statements and all supporting financial information, which varies from case to case, as well as with the required down payment. For reference, IRS Forms 656, 433-A (OIC), and 433-B are attached here, along with Publication 656-B.

Thus, the suggestion that one can submit, check on, and obtain an OIC online is completely false.

G. There is no Hotline. The Commissioner follows that false remark with yet another false remark. He says that (in addition to checking online), taxpayers can call a “specialized collection line where they can get fast service by using voice and chat bots or opting to speak with a live phone assister.”

For starters, there is presently no such thing as “fast service” when it comes to calling the IRS. TIGTA has repeatedly reported on the egregious wait-times taxpayers face when calling the IRS.

But even if one were able to get a call answered quickly, there’s no such thing as a “specialized collection line” for OICs. An OIC must be submitted in writing and it must be handled exclusively by the COIC Unit. It is simply impossible to get an OIC accepted over the phone or through a website.

Regarding the Commissioner’s claim that taxpayers can get their best deal “by using voice and chat bots” — is the Commissioner suggesting that citizens can and should use the agency’s newly-launched artificial intelligence tools to win acceptance of an OIC? This too is simply impossible, not just for the reasons already stated, but additionally, because every person’s financial facts and circumstances are unique.

OIC investigations necessarily take into account the totality of each individual’s personal and business financial circumstances as reflected in lengthy financial statements (Forms 433-A (individuals) and B (businesses), along with voluminous supporting documents) that must be submitted with the OIC application. OIC investigations also consider non-financial circumstances such as one’s age, health, future working potential, family size, market conditions, length of time remaining on the collection statute of limitations, and so on. The hard reality is that most citizens are unable to navigate the byzantine financial statements and the need to provide other information without experienced counsel.

For the Commissioner to suggest that one can get an OIC using “voice and chat bots” controlled by artificial intelligence is an outright false statement.

H. Further Proof that the News Release is False. On July 7, 2022, the IRS issued Tax Tips Issue Number 2022-103 (copy attached). The Tax Tip addresses OIC firms, and is apparently a supplement to the news release. This publication contains the admission that, “An Offer in Compromise with the IRS can help some taxpayers who can’t pay their bill.” The Tax Tip goes on to say that, “The Offer program gives eligible taxpayers a path

toward paying off their debt when they otherwise couldn't or would face financial hardship."

Clearly, that is the essence of the OIC program.

Compare those statements against the press release at issue, in which the IRS makes the blanket claim that anyone asserting they can settle with the IRS for less than is owed is *per se* making false and outlandish claims.

Moreover, the Tax Tip at least attempts to distinguish between legitimate firms and offer mills (discussed under point 6, below), which, according to the Tax Tip, "sometimes don't deliver and charge large fees."

But despite the nod toward legitimizing the OIC process and legitimizing firms that do deliver on their promises, the Tax Tip repeats the brazenly false statement that, "Taxpayers who do qualify for an OIC can get the same deal working directly with the IRS, without the extra [legal] fees."

For all of the above reasons, this statement is not just an outrageous attack on the right to counsel, it is simply not true. An unrepresented taxpayer is extremely *unlikely* to achieve an OIC settlement in any amount, never mind getting "the same deal" they would if represented by competent counsel.

Let me provide an actual case example. I am currently working with a client facing \$544,465.76 in tax assessments. We filed an OIC to resolve the debt. The OIC was filed as a proposed collection alternative through the Collection Due Process (CDP) appeal channel, per Code § 6330. The CDP appeal was filed in response to the IRS's Final Notice of Intent to Levy. Because we did that, I preserved my client's right to judicial review of the CDP determination if necessary (something very few citizens know to do).

The OIC was assigned to the COIC Unit to be worked. The initial determination was that my client could full pay the tax; his OIC was recommended for rejection. The determination was based on several erroneous factual and legal conclusions.

The case was referred back to the Appeals Settlement Officer (SO) for further review. After several exchanges between myself and the SO, the SO sustained the rejection, again, based on several erroneous factual and legal conclusions.

I filed a petition with the U.S. Tax Court challenging the OIC rejection as an abuse of discretion because of the erroneous factual and legal conclusions. After several discussions with the IRS Counsel attorney assigned to the case, we agreed that the case was mishandled by both the OIC Unit and the SO. A joint Motion to Remand was filed, and the Court ordered the case to be remanded to a new SO for proper consideration.

Upon remand, the newly assigned SO requested that we file another OIC with all updated financial information. Per IRS procedures, that OIC was referred to the COIC Unit to be worked. The Offer Examiner assigned to the case made *exactly the same mistakes* as did the first Offer Examiner and the first SO.

This time, the case was referred to the second SO (the one newly assigned upon remand) for review. After several discussions with that SO, we agreed on my client's true ability to pay based on *correct* factual and legal conclusions. The SO made the recommendation to accept our OIC at \$50,017.

As a result, my client will settle his tax debt for 9% of what he owes ("pennies on the dollar"). To get there, it took two Offer Examiners, two Settlement Officers, one Tax Court Petition and an IRS Counsel attorney. There is *no possible way* my client would have gotten that result—the *correct* result—without competent counsel.

To say that he would have gotten "the same deal working directly with the IRS" is an absolute lie.

6. THE MISLEADING REFERENCE TO "OIC MILLS"

The headline of the news release uses the phrase "OIC mill." There, the phrase defines "anyone

claiming” to settle for less than is owed as an “OIC mill.” In the body of the news release, the IRS claims that “OIC mills make outlandish claims” that they can settle a person’s tax debt for “pennies on the dollar.”

These false statements (as demonstrated above) make it apparent to the untrained eye that any firm offering OIC services to the public, (a) is an OIC “mill,” and (b) by virtue thereof, is scamming the public because, as the news release falsely states, “taxpayers pay the OIC mill a fee to get the same deal they could have gotten on their own.”

The IRS makes no attempt to define what constitutes a “mill” generally, or an “OIC mill” in particular. A “mill,” under the general definition of the term, is a factory, manufacturing facility, or workshop that turns out a specific product *en masse*. Examples include lumber mills and textile mills.

In the context of the tax resolution industry, an “OIC mill” is a firm that turns out OICs *en masse*. Such firms generally focus on the *quantity* of OICs they can produce. They often advertise broadly to generate as many clients as possible, then file OICs with little or no evaluation of the individual merits of each case. We admit that such firms exist and they are a problem. Such firms can give the false impression to unwitting citizens that the IRS will “automatically” accept an OIC at some set percentage of what’s owed.

It appears the IRS’s goal is to single out unscrupulous tax practice firms that either, (a) don’t in good faith represent the best interests of their clients but are simply churning fees, or (b) just don’t know what they’re doing. However, the news release makes no effort to distinguish between the few unscrupulous practitioners and the rest of us who provide needed and valuable services. Rather, the IRS claims that “anyone” offering OIC services to the public makes false and “outlandish claims”—which statement is itself false and outlandish.

7. THE NEWS RELEASE IS MISLEADING IN YET ANOTHER WAY

Apart from being outright false and deceptive regarding the efficacy of the OIC program generally, the news release is misleading insofar as we might presume its intentions.

It may be that the news release’s remark about “getting your best deal” by working with the IRS or going online refers to one’s ability to set up an installment agreement (IA). Note, however, that the news release never mentions the phrase “installment agreement,” nor does it address the issue, directly or indirectly. Likewise, Tax Tip 2022-103 does not mention an IA in the context of “getting your best deal.” There, the context is clearly and directly that of an OIC.

It is true that IAs can be set up online and that such can generally be accomplished quickly. But, while citizens who do not qualify for an OIC generally should consider an IA, it is *not* universally true that such people should agree to an IA.

There are many cases of citizens facing tax assessments that are erroneous for some reason. These might include (but are not limited to): (1) a Substitute for Return assessment (unfiled tax return) that was not corrected, (2) an erroneous audit determination that was not appealed, (3) an erroneous original tax return that was never amended, or (4) an erroneous Trust Fund Recovery Penalty assessment that was not challenged.

In *none of these cases* should a taxpayer enter into an IA to full pay the tax without exploring with counsel the possibility of getting the underlying assessment reduced or eliminated through one or more strategies, not the least of which is an OIC based on doubt as to liability (as opposed to collectability).

8. THE NEWS RELEASE VIOLATES THE TAXPAYER BILL OF RIGHTS A SECOND WAY

The second way the news release violates the Taxpayer Bill of Rights Act flows directly from the agency's abrogation of the statutory right to counsel. The news release (and the Tax Tip) will persuade citizens to avoid consulting counsel. As a result, many of these people will likely enter into installment agreements to pay taxes they *do not* owe. The act of guiding taxpayers to pay more than they owe is a violation by the IRS of the Taxpayer Bill of Rights. Section

8703(a)(3)(C) provides that taxpayers have "the right to pay no more than the correct amount of tax."

For those who legitimately owe a small amount, say \$10,000-\$15,000, and can reasonably pay within 60 months or less, an IA is very likely indicated, and such can likely be set up on the IRS's website or by calling ACS. In that case, such a person will likely get the "best deal" available. But even that person needs to know that penalties can be canceled for reasonable cause in a wide variety of cases. Such options are almost never discussed by ACS personnel and are not pointed out on the



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IRS's installment agreement website.

The news release mentions the IRS's First Time Penalty Abatement policy, but the agency rarely offers that relief to taxpayers without their requesting it. Those that do qualify should be granted such relief automatically, but they are not. In 2012 TIGTA reported that 90% of taxpayers who qualified for abatement of the failure to file penalty were not granted relief, and 92% were not granted relief for the failure to pay penalty. See: TIGTA, "Penalty Abatement Procedures Should Be Applied Consistently to All Taxpayers and Should Encourage Voluntary Compliance," 2012-40-113, September 18, 2012:

It is safe to say that without counsel, taxpayers cannot trust the IRS to do the right thing.

Even if a taxpayer does in fact owe the full amount assessed, simply establishing an IA on the IRS's website may not take into consideration all of the nuances of the taxpayer's situation. For example, the IA software (or phone assister) may demand a larger monthly payment than the taxpayer is able to make. This regularly happens when a tax liability is near the collection statute expiration date (CSED). ACS personnel regularly claim that the full tax must be paid before the CSED. The vast majority of citizens don't even know there is a CSED, never mind how to calculate it.

As a result, taxpayers routinely use current tax revenue to pay the back tax liability. That leads to even more delinquency as the taxpayer is thus unable to pay current estimated taxes because of the excessive IA payment. Restated, the Commissioner (through this news release) is setting taxpayers up to increase their tax debts and to pay more than they owe, by pushing them to use "bots" and "hot-lines" instead of professional counsel.

9. TIGTA ACTION REQUESTED

We request that TIGTA immediately take such steps as are necessary to require the IRS to rescind the false and misleading news release IR-

2022-119, and to the extent it is also false, Tax Tip 2022-103. The suggestions that counsel cannot help a taxpayer, and that it is "outlandish" to believe one can settle for less than is owed, and that a taxpayer on his own can get the same deal professional counsel can get him, are demonstrably false, and constitute a deliberate attempt to isolate taxpayers from counsel in derogation of Code § 7803(a)(3)(I).

The assertion that an OIC can be obtained online or over the phone is patently false. It will necessarily cause taxpayers to enter into IAs, which are often *not* the best resolution for either the IRS or the taxpayer. None of those taxpayers will be advised that penalties can be canceled for reasonable cause in a wide variety of cases, or that they might qualify for First Time Abatement. Some taxpayers will not be able to afford the IA they are pushed into (because no chat box or hotline operator will analyze a taxpayer's complete situation), resulting in further tax problems directly and proximately caused by the advice of IRS software or of an IRS employee on the phone.

If you have questions or need additional information, I can be reached at the address and phone number shown on the accompanying cover letter. Otherwise, I look forward to you promptly addressing the very serious concerns raised in this compliant.

Sincerely,

Daniel J. Pilla

Executive Director

Taxpayers Defense Institute

Approved: TDI Advisory Board

10. EXHIBITS

News Release IR-2022-119 (June 7, 2022)

Bio of Daniel J. Pilla

IRS Forms 656, 433-A (OIC), and 433-B

Publication 656-B

Tax Tips Issue Number 2022-103

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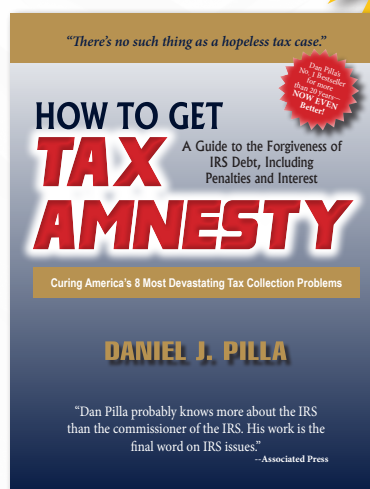
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- Negotiating Installment Agreements
- How to Appeal all Collection Actions
- Using the Office of the Taxpayer Advocate
- The Most Thorough Discussion on Negotiating Offers in Compromise Ever Written
- What Every Taxpayer Needs to Know About the Collection Statute of Limitations
- How to Identify Important IRS Correspondence
- How to Stop Levies Before They Happen
- Dealing with Penalties, Including the Oppressive "Frivolous Submissions Penalty"
- How to Release Wage and Bank Levies
- Dan's Definitive Guide to Discharging Taxes in Bankruptcy
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