IRS Practice & Procedures

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Federal Tax Controversy in the COVID-19 ERA

John Healy

December 4, 2020
IRS Challenges
IRS – confronting spectrum of challenges

Leadership Change
Implementation of TCJA
Tax Year 2019 filing season
Resource limitations
COVID-19 impact
Compliance portfolio
Taxpayer First Act
IRS – navigating a range of challenges

Focus of the new leadership
Commissioner – Charles Rettig  -- a “tax” commissioner
Chief Counsel – Mike Desmond
Increasing compliance/aggressive enforcement – a consistent theme

Broad challenges
Implementation of TCJA:
— Remaining guidance issues
— Commencement of examinations
Budget picture improving, but comes after 10 year drought
Other demanding workload: BBA; FATCA; BEPS; Taxpayer First Act; Cares Act
COVID-19 – Impacts of suspended operations, reduced staffing and temporary procedures
IRS resource shrinkage

Resource slippage 2010 to 2018

IRS Data Book
More challenges …

Resources
IRS budget has declined by $2.1B (15.7 %) from FY 2011 through 2018, after adjusting for inflation
   — 2019 budget -- $11.3B
   — 2020 budget -- $11.4B

Other budget indicia
Corporate income tax returns audited (excluding S Corp)
   — 30,000 (2010)
   — 19,000 (2017)
   — 16,000 (2018)

Audits of largest companies (>-$20B in assets)
   — 96% in 2010
   — 58% in 2017
   — 49% in 2018
## Attrition in key enforcement positions*

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* Table 30 of 2018 Annual IRS Data Book and Table 32 of the 2019 Annual IRS Data Book
Frontline budget impacts …

**Impact on operations:**
Case interruptions, inconsistencies, delays
Revolving managers, executives, specialists; “actors” throughout
Inadequate & vulnerable technology
Routine matters – not routine; joint committee cases; settlement calculations
Issue escalation difficult but often necessary

Core programs (PFA, APA, PLR) must compete for resources with TCJA-related workload demands
— LB&I hiring 500 new employees – agents, attorneys, economists, engineers, appraisers, tax law specialists and data scientists
COVID-19 – Ongoing Impacts
Temporary changes in IRS operations in response to COVID-19

On March 25th the IRS launched the People First Initiative which temporarily adjusted certain procedures through July 15th, including:

— Suspension of most collection activities;
— Suspension of automatic, systemic liens and levies; and
— Only opening new examinations in limited circumstances.

Other temporary procedural changes include:

— Suspension of the Large Business & International Division ("LB&I") IDR enforcement process;
— Acceptance of e-signatures and scanned/copied signatures on certain documents;
— Acceptance of Forms 1139 and 1045 via fax; and
— Expanded use of e-mail and secure messaging.
Phased-in Resumption of IRS operations

On April 27th the IRS began recalling employees in "mission-critical" functions to perform work that must be conducted onsite and as of July 15th most operations are operational but not at full capacity.

The IRS has been gradually reopening other campuses and service centers
- Long wait times to speak with individuals
- Centralized Authorization File (CAF) Unit is working on a limited basis
- Notices generated shortly before closure are now being issued
- Mail processing remains scaled back
- Strongly encouraged to submit returns electronically

LB&I has resumed examination activity - Revised LB&I Compliance Priorities During the COVID-19 Pandemic and Approval for Deviation from IDR Process and Enforcement (LB&I-04-0620-0011)
- Appointments are starting to be scheduled but there are delays and inconsistent resumption of exam activities.
- Examiners instructed to consider the taxpayer's circumstances when scheduling appointments, IDR due dates, and whether to deviate from the IDR enforcement process

Continuing to maximize teleworking for those that can work remotely
Exams
Leading practices

— Anticipate the government’s interest
— Explore “information” alternatives that reduce the need for IDR
— Concentrate on getting the front-end correct
— If cannot agree on focus or timing, then challenge early; do not wait for initiation of enforcement steps
— Track and monitor all facets of IDR process
— Request feedback on sufficiency of IDR responses
— Hold team coordinator accountable for rationalizing specialists’ information (IDR) needs
— Escalate when appropriate
— Recognize if you cannot resolve an issue at the Examination level, the matter will likely go next to Appeals
— If Appeals receives underdeveloped cases, it may pursue settlement based on the cases’ factual hazards
— Appeals may return nondocketed cases to Examination if a taxpayer submits new information or evidence or raises a new issue that merits investigation or additional analysis
LB&I: Examination focus – Shift from enterprise to issue

**Past**

- **Enterprice** examinations and audits
- Large taxpayer audits traditionally the cornerstone of enforcement approach
- Comprehensive “team” examinations generally driven primarily by size and covered 2 – 3 tax year cycles
- Return assigned to local team to select issues that warranted examination
- CIC Program impacted 1,000 largest taxpayers

**Future state**

- Selected risk **issues**
- Issue centrally risk assessed, developed and monitored
- Some large taxpayers may remain in Coordinated Industry Case (CIC) Program
- Agents may identify other issues, but must obtain approval to expand scope
- Issue focus likely to impact taxpayers not previously examined
Shift from enterprise to issue

- Information Document Request must be issue focused
- Provide draft IDR to taxpayer
- Parties mutually agree upon time frame for taxpayer’s response
- Include date by which examiner must notify taxpayer regarding sufficiency of response
- Delinquent/incomplete IDRs may trigger a mandatory enforcement process
Leading practices: The “Factual” IDR

Towards the end of Exams, certain revenue agents have been issuing IDRs that ask the Taxpayer to agree to a set of given facts.

It is suggested not to blindly agree to this IDR.

The “facts” in such IDRs may have been written from the government’s perspective and in the light most favorable to the government.

Prior to responding to such IDRs it is recommended to have detailed knowledge of the pertinent facts and their impact and be ready to challenge any faulty assumptions.

The “factual” IDR is generally the most important IDR.

Failure to properly respond may lead to significant adverse consequences for the taxpayer.
Publication 5125… LB&I examination process

- Reinforces earlier changes in IDR process
- Informal claims must be submitted within 30 days of opening conference; later-filed claims must be formal amended return
- Defines LB&I issue teams’ control of substantive issues while overall case management stays with *compliance managers*
- Issue teams directed to secure taxpayer’s *acknowledgement* of the facts for unagreed issue
- If taxpayer provides Appeals new information (facts or issues) requiring investigation or analysis, case is returned to examination
- Fast Track required to be considered for all unagreed issues
Appeals and beyond
Appeals independence policies

Appeals generally will not raise new issues or reopen issues agreed to by taxpayer and Compliance (except for fraud or malfeasance)

Appeals generally attempts to settle a case based on factual hazards when the case is not fully developed and taxpayer presents no new information or evidence
Independence policies

Appeals will generally return non-docketed cases to Compliance when a taxpayer submits new information or evidence or raises a new issue warranting investigation or additional analysis.

Appeals generally requests comments from Compliance (subject to ex parte requirements) when:

— Taxpayer raises a new theory or alternative legal argument on a non-docketed case.
— Taxpayer presents a factual scenario that warrants additional investigation or verification.

If a case is not fully developed (and the taxpayer has not raised new issues or evidence) Appeals generally assess the case's hazards of litigation.

Generally, new case receipts in Appeals must have at least one year remaining on the statute of limitations.
Statutory notice of deficiency

- “Ticket” to the Tax Court
- 90 days to petition
- 150 days if taxpayer outside U.S.
- Section 6212 – Determination by Commissioner
- Presumed correct
- Invalid or imperfect Statutory Notice of Deficiency
- Rescission of Statutory Notice of Deficiency
Tax litigation

— U.S. Tax Court
  - Pre-payment
  - Types of decisions
    — Bench – cannot be relied upon as precedent
    — Reviewed – entire court; longer process
    — Regular – sufficiently important legal issue or principle
    — Memo – generally fact intensive without novel legal issues
    — Goshen Rule – Tax Court will apply law of the circuit to which appeal would be taken
— U.S. District Court (94 courts) – primarily refund issues
— U.S. Court of Federal Claims – refunds
— U.S. Circuit Court of Appeals (12 circuits) – appeals from lower court decisions
Taxpayer First Act
Independent Office of Appeals

Congress codified the general right of taxpayers to appeal tax disputes to an Independent Office of Appeals, the purpose of which is to resolve Federal tax controversies without litigation on a basis which:

— is fair and impartial to both parties,
— promotes a consistent application and interpretations of, and voluntary compliance with, the Federal tax laws, and
— enhances public confidence in the integrity and efficiency of the IRS.

The new Chief of Appeals is one of only five statutory officials created by the Code, together with the Commissioner, the Chief Counsel, the National Taxpayer Advocate, and the new Chief Information Officer.
Expanded influence of Taxpayer Advocate

Taxpayer Advocate Directives must now be:

— enforced,
— modified, or
— rescinded

by the Commissioner or Deputy Commissioner within 90 days. The Taxpayer Advocate may appeal any modification or rescission to the Commissioner.

IRS must also provide the Taxpayer Advocate with statistical support.

Congress removed the streamlined critical pay authority provision for the National Taxpayer Advocate.
Modernization of IRS

Requires plan to modernize the IRS
— Eliminates requirement to organize by constituencies
— Charge to streamline
— Question of CID’s placement
— AICPA, ABA, TEI and others – consulting/commenting

Mandates comprehensive plan for customer service
— Updated training and guidance material
— Adoption of best practices

Comprehensive overall training plan required
Other TFA provisions

Limits non-IRS employee access to returns/return information
Increases rights of whistleblowers
  — Information disclosure
  — Updates
Prioritizes cybersecurity & identity protection
Grants streamlined critical pay for certain I.T. hires
Expands e-file mandate
Requires internet platform for 1099 filing (by 2023)
Thank you!

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