

Pennies on the Dollar: Tax Collection Controversies and the IRS Fresh Start Program

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“The IRS just gave me notice of levy regarding my bank account, and there is no way in the world that I can pay the \$750,000 they say I owe!” your client exclaims. “Settle down,” you respond. “Thanks to the IRS *Fresh Start Program* there are reasonable remedies – what IRS calls ‘reasonable collection alternatives’ – including the Offer in Compromise (OIC), Installment Agreement (IA), either ‘full pay’ or a ‘partial pay,’ and Currently Not Collectible (CNC).”

In fact, taxpayers who owe IRS are often able to settle with an OIC for *pennies on the dollar*; i.e., less than 10% of the total tax, penalties, and interest debt. It all depends on the complex rules and crunching the numbers. In addition, if you are not able to resolve your issues with IRS, you have the right to appeal their decision to the U.S. Tax Court, which often results in a court settlement, or a remand of the case back to IRS for your second bite at the apple for a cash on the barrel head settlement.

Thanks to the Congressional mandate of 1998, IRS was forced to be kinder and gentler when it comes to collection. For example, under 26 U.S.C §6330 IRS must give taxpayers a “Collection Due Process Hearing” (CDPH) by which you can freeze

IRS collection levies, obtain a hearing with a Settlement Officer, and then offer collection alternatives. Plus, if an agreement is not reached within the CDPH you can petition Tax Court; and, if necessary, appeal to the 9th Circuit. Section 6720 provides the same remedy for IRS lien actions except that the lien is filed and remains until the dispute is resolved. Moreover, because of the 2008 economic disaster – resulting in a slow economy for several years thereafter – beginning in 2012 IRS began its OIC *Fresh Start Program* by which the rules were greatly relaxed, making the OIC far more feasible for millions of taxpayers.

Pennies on the dollar? Can this be true? Consider the results our firms, The MacPherson Group (TMG) – a team of father and three sons; two are attorneys and one is a college professor – has obtained for clients, even those who have gone to prison for tax offenses. For example, a woman who was sentenced to a year in prison for filing a false tax return obtained an OIC of \$300 against over \$1M owed. Well, okay, she was 62 years old, not in good health, and her sole source of income was Social Security Administration (SSA) retirement payments. But how about a businessman who took a chance and lost in expanding

his business, ending up owing IRS \$4.4M? We obtained an OIC by which he paid \$250k – 6¢ on the dollar – \$1k a month for 23 months, and a balloon payment in month 24. No longer saddled with his misjudged expansion, he ran a mean and lean business for two years, which enabled him to save up for the final payment.

For another businessman we obtained an offer of \$160k as against \$1.5M owed, 11¢ on the dollar. Consider another client who entered pleas to tax evasion and failure to file a tax return: he received probation, but owed IRS \$800k for which an OIC was accepted for \$55k, 7¢ on the dollar. Or another client, a lady who spent three years in prison on tax offenses before hiring TMG, owed \$200k, and IRS accepted her offer of \$1k: 5/10 of a penny on the dollar. Our medical professional client owes \$1.5M but IRS recently accepted his partial pay IA by which he will pay a total of \$240k. Another client, a medical doctor, was sentenced to sixteen months in prison for tax evasion prior to hiring TMG; the criminal case resulted in him owing IRS \$750k. Although IRS rejected his offer, it agreed to CNC, which our client readily accepted because he was by then retired and was glad to be finished with IRS. Likewise for another client who spent four years in prison

for conspiracy to defraud IRS and tax evasion and owes IRS \$1M: IRS granted CNC status.

My undergraduate degree is in engineering science from West Point. My son, Scott, has a Bachelor of Science in mathematics from Grand Canyon University, plus a master's degree in mathematics from Purdue. My son, Nathan, has a finance degree from Grand Canyon University. Thus, we apply a combination of a systems engineering and financial analysis approach to the tax collection resolution challenge. In addition, as in both the military and western traditions, as tax controversy attorneys we "surreptitiously and under cover of darkness" "ride herd" on IRS collection efforts by obtaining their "Taxpayer Account Transcripts" for each year at issue. These transcripts provide, in chronological order: the past, current, and even planned future actions of IRS. At the risk of overstating our efforts, our tax transcript analysis – often hampered by numerous errors contained within the transcript – is not unlike crypto analysts deciphering German messages during World War II with the use of a captured U-Boat code device, code-named *Enigma* by the British.

Sound preposterous? Well, take for example: by IRS lack of oversight our client was saved \$1M! No small potatoes. Absent any "tolling" or "suspension" events, such as a CDPH request or a bankruptcy, under §6502 IRS has ten years from the date of assessment to collect the tax liability or file a suit to reduce the assessment to judgment. The duration of the IRS lien is subject to the same statute of limitations (SOL) rule. Our client, Bob, was assessed tax, penalties, and interest many years ago and in recent years IRS levied his \$2k SSA retirement check each month. Bob wanted us to take action regarding the levy; but, seeing from the transcripts that IRS recognized the statute was nearing but planned no action, we advised Bob to let sleeping dogs lie; Bob just might dodge a bullet. We cautioned Bob that the Department of Justice (DOJ), Tax Division, can and might bring suit within the ten-year collection deadline. With eager anticipation, especially during the last month of the ten-year term, Bob and TMG awaited the result. No suit was filed. We then pulled new transcripts, and gladly read: "Write off – \$1M."

Not convinced? In another recent but very different type of example our client Jake was saved \$1.2M for lack of attention by IRS. Again, the account transcripts provided us with guidance. Jake and his wife Sally separated, and Sally later filed for "innocent spouse relief" under §6015, meaning failure of the couple to pay the tax was the sole fault of hus-

band Jake. IRS agreed with Sally; and, as reflected on her transcript, abated her liability and released the lien against her. But by gross error, IRS also abated the liability and released the lien for Jake. A perfect example of the left hand does not know what the right hand is doing. IRS asleep at the switch? Meanwhile, the ten-year SOL ran. Thus, even if IRS were to now catch the transcript entry errors, it is too late for IRS to attempt collection.

Finally, a third riding herd example presents a paradox: the lack of IRS oversight, and, as taught at West Point – lack of RTP (read the problem) and ATD (attention to detail) – occurred: (1) during a CDPH; (2) with a Settlement Officer at the helm; (3) followed by Tax Court litigation involving IRS counsel; (4) a remand of the case for a second CDPH; (5) which included advice to the Settlement Officer from additional IRS counsel; (6) review of the CDPH decision by the Appeals Manager; (7) followed by a second Tax Court appeal...

Our client Bruce, on SSA retirement, invested wisely resulting in income of \$560k for 2005. He filed his return in 2006 showing \$160k owed of which he failed to pay \$70k. As to the \$70k due to IRS, in 2007 Bruce received his "Urgent – final notice before levy and right to a CDPH" letter but Bruce failed to request a CDPH. Then in 2008 Bruce's CPA pointed out that Bruce incorrectly included some income for 2004-06, and so Bruce filed amended returns. IRS accepted 2004 and 2006 but by a strange aberration – not uncommon with IRS, as will be seen – IRS denied the 2005 amended return. Bruce timely appealed. And waited. *He would wait seven years ...*

Read the full story at <https://attorneyatlaw-magazine.com/pennies-on-the-dollar>.

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Meanwhile, IRS would first issue a “Final notice before levy on SSA benefits” and an “Account match for federal levy payment program,” meaning IRS was about to grab Bruce’s monthly SSA payment. But nothing happened. In 2010 IRS issued a “Tax period blocked from automatic levy program.” With no collection efforts by IRS - due no doubt to the pending appeal - Bruce gladly watched the ten year collection SOL clock continue to tick. But Bruce’s luck ran out seven years later when in 2015 he received a new final notice before levy. This notice was for an additional \$10k which IRS claimed was owed but in fact was not. IRS, in error, had failed to apply to Bruce’s account a \$10k ear-marked check that Bruce in 2008 mailed to IRS with a cover letter. This time Bruce filed a CDPH request and later hired TMG.

We claimed no liability: the amended return should be accepted as to the claimed \$70k owed - now grown to \$130k due to accumulation of penalties and interest (compounded daily) - and the \$10k claim is totally bogus because it was paid in full by the ear-marked check. According to IRS policy and procedure, IRS must apply a payment in accordance with specific instructions provided by the taxpayer. Our CDPH arguments were denied by the Settlement Officer, we petitioned Tax Court, and IRS counsel agreed to remand the case back to IRS for reconsideration of our arguments, with the amended returns to be considered by an Appeals Officer outside of the CDPH. The reason for the remand: although the \$130k was not included in the CDPH - despite the fact that the IRS final notice letter said otherwise - Bruce never had his amended return appeal heard.

On remand the Appeals Officer denied the amended returns, but by this time the ten-year SOL had expired as to the \$130k, at least so we argued. IRS disagreed, claiming tolling due to the CDPH. But, as we argued to IRS and then to counsel on our new appeal back to Tax Court: the tolling applied not to the \$130k but only to the \$10k, the only subject of the CDPH. *Apples versus oranges - a hyper-technical federal tax procedural nuance.* IRS, we argued, could not have its cake and eat it too. IRS had decided that the \$130k was not part of the CDPH; ergo, we argued: if it was not within the CDPH, then, by definition, no tolling as to the \$130k. *Logical deductive reasoning.* Counsel sought advice from the IRS National Office which agreed with our position, saving us from filing a motion for summary judgment and saving Bruce \$130k for failure of IRS personnel - during the (under the microscope) 18 months of CDPH and Tax Court litigation - to keep their eye on the ball. Missed the forest for the trees. With *Enigma-like* analysis we had reviewed the transcripts, and then - during two administrative hearings and two appeals to the Tax Court - with bated breath we watched the SOL clock tick.

As to the \$10k, the sole subject of the CDPH, fortunately our client was able to locate a copy of his cover letter and check mailed to IRS in 2008. Ten years earlier. In 2018 IRS counsel wisely agreed to full settlement: Bruce owed IRS nothing.

We attribute the current lack of due diligence by IRS to several factors: reduced budget, baby boomers retiring, no re-hires, and no promotions. In fact, we often ask Revenue Agents (audits), Revenue Officers (collection), Settlement Officers (CDPH), and Appeal Officers (audits and collection) about their morale. “Rock bottom low.” We are told: if Sally retires, her work

load is placed on Jim's desk, and Jim is expected to stay current with the total workload, without a raise or a promotion.

Another major offensive weapon for our clients to be used against IRS tax collection efforts is bankruptcy. Our mantra beginning in 1987 has been, "Contrary to popular belief, income tax debts can be discharged through bankruptcy." In fact, all three of my sons assisted me with the writing and self-publishing in 1991 of *"Secret Exposed" - Eliminate Income Tax Debts Through Bankruptcy - A Systems Engineering Approach*. My son Ryan, who holds a Ph.D. from Notre Dame, is a college professor, and provides consulting services to TMG, was, at age fourteen, responsible for the desktop publishing of *Secret Exposed*, using a Macintosh computer. At the time, most attorneys and CPAs did not believe that income tax debts could be discharged. Also, through its *Publication 908* IRS provided the public with false information about discharging taxes through bankruptcy. I wrote to the IRS National Office, which effort resulted in IRS changing the publication language.

Although the current success of the *Fresh Start Program* - for both IRS and taxpayers who owe substantial sums to IRS - precludes for many the need for a bankruptcy, it still remains an option for serious consideration. This was the case for our clients when an OIC was not feasible because of the substantial equity in their home and lack of ability to offer IRS 80% of equity. Asleep at the switch, IRS failed - over a span of eight years of close taxpayer scrutiny by IRS - to timely file a lien which would have trumped the Arizona \$150k homestead exemption, captured the entire home equity, and precluded a bankruptcy remedy. Thus, our clients filed a Chapter 7 bankruptcy, resulting in discharge of a \$400k income tax debt. In previous years, many of our clients discharged over \$1M in tax debt.

It is noteworthy that not all debtors are forced to file a Chapter 13 personal reorganization. If consumer debts do not exceed the tax debt, as in the case of our clients who recently obtained a discharge, then a Chapter 7 can be filed. The tax discharge rules are complex: (1) *Return filed rule* - returns must have been filed; (2) *Three-Year Rule* - if the return was filed on time, the due date of the return, including extensions, must be at least three years prior to the bankruptcy petition date; (3) *Two-Year Rule* - if the return is filed late, the date the return is filed must be at least two years prior to the petition date (some federal circuits, not including the 9th Circuit, hold that in no case can the debt respecting a late filed return be discharged); (4) *240-Day Rule* - the assessment date must be at least 240 days prior to the petition filing date; (5) *No Post-Petition Assessment Rule* - the tax must not be "assessable, under applicable law or by agreement," after the petition date; (6) *No Tax Fraud Rule* - the tax return must be non-fraudulent; (7) *No Attempted Tax Evasion* - the client cannot have willfully attempted to evade or defeat the tax; (8) *Good Faith* - the client must act in good faith; e.g., not hide assets or otherwise "attempt to abuse the system." Timing is critical; four of the eight rules are timing rules. See 11 U.S.C. §507, §523, and §707. The tax-bankruptcy hyper-technical nuances require cutting-edge legal analysis.

An offensive weapon not reported in any tax treatise, IRS publication, case, or other source - and claimed as unavailable by some IRS counsel - is a Tax Court litigation cash on the

barrel head settlement. We were able to obtain such settlements following criminal tax cases in which our clients did not go to prison and IRS later issued a Statutory Notice of Deficiency (SNOD), claiming that amounts owed ranged from \$300k to millions of dollars, including the fraud penalty which is 75% of the tax claimed. §6501. We petitioned Tax Court knowing that because only 1% of Tax Court cases go to trial our chances of settlement were very good. We also knew that even though our clients had pled guilty, they pled not to tax evasion, §7201, but to filing false tax returns, §7206. Therefore, the rule of *collateral estoppel/res judicata* did not apply to the fraud allegation and the burden was on IRS to prove fraud “by clear and convincing evidence.” This is a judge-made rule of law despite the §7206 title: “*Fraud* or false statement;” the §7201 title is “Attempt to evade or defeat tax.”

In several cases we offered a 5% penalty together with a cash payment which was accepted. In one case, involving the “offshore triple trust,” IRS claimed \$1M and our effort was similar to the OIC: our client claimed he could afford only \$300k which IRS accepted. Because IRS wanted - for reasons of principle and statistical reporting - the fraud penalty included in the settlement language, we used simple algebra to back into the number so that the 75% fraud penalty was included but the total remained \$300k. I hand carried the certified check to IRS counsel.

We settled several similar cases. In one case, \$300k was claimed and \$100k was accepted. In another offshore trust case involving millions we provided a cash settlement in exchange for reduction of the fraud penalty from 75% to 5%. But the best of all cash settlements was \$1M owed plus the \$750k fraud penalty, which penalty IRS counsel agreed to totally eliminate. *No harm in asking.*

How does IRS legally assess a tax liability if IRS believes you owe more in taxes and the matter is not resolved through the audit? The law requires that IRS mail to you a SNOD aka a “90-day letter” which gives you 90 days to file a petition with the Tax Court, a court in which you are not entitled to trial by jury. Whether by trial or settlement the case results not in a “judgment” but in a “Decision and Order” because the Tax Court is without statutory authority to enter judgments. Instead, from the order IRS must “assess” the tax through a clerical procedure by which an authorized Assessment Officer dates and signs the assessment source document. This has the same result as a judgment; i.e, lien and levy can follow. However, there are published federal circuit cases in which the assessment was held void for; e.g., failure of the Assessment Officer to sign or date the assessment, resulting in no liability because at the time of the ruling the assessment SOL had expired.

Generally, IRS has three years to assess from the due date or filing date of the tax return, whichever is later. §6501. Thus, for non-filers the clock never starts. If gross income is unreported by 25% or more, the rule is six years; and if IRS can prove fraud “by clear and convincing” evidence, there is no SOL. Because in a criminal tax case IRS usually freezes any current civil action, after resolution of the criminal case - whether by IRS’ decision to decline prosecution or by plea or trial - often more than six years has passed, resulting in the burden on IRS to prove fraud, with the end result: settlement leverage for our clients. We often utilize our “SOL/IRS

must prove fraud” leverage in conjunction with the cash settlement offer. If you want to resolve an income tax issue by jury determination, the case must be filed in U.S. District Court and the price of litigation is: (1) payment of the tax; (2) await administrative denial by IRS of your request for a refund; and (3) if IRS denies your request, file a refund suit and demand trial by jury.

Once the tax collection process begins, one of our options - whether through a CDPH or otherwise - is to challenge the assessment. For example, if our client claims that a SNOD was not received, the burden is on IRS to prove by IRS or U.S. Postal Service records that the SNOD was in fact mailed by certified mail or otherwise. Years ago we administratively won a major tax case for a California restaurant because of the inability of IRS to produce evidence of mailing. “The records are lost,” so claimed IRS.

Moreover, in a 1989 controversial Tax Court decision, in which the judges were split 12:6, the court ruled that if a taxpayer claims lack of receipt of the SNOD he can petition the court well past the 90-day limit and require IRS to prove mailing. Of course if IRS fails to do so the assessment is void. Such a situation presents a paradox, a Catch-22: clients must file their petition within 90 days of the SNOD, a jurisdictional requirement, and the result of failure to do so is, in effect, a default judgment. But if our client claims under penalties of perjury that he did not receive the SNOD, the Tax Court accepts jurisdiction to decide whether IRS has proof of mailing. If not the court voids the assessment with the result: IRS starts all over, if the SOL permits. This is what happened in a 2018 reported case.

Hyper-technical tax procedure nuances? IRS asleep at the switch? As a final note, consider our client who in 1991 was saved \$2.5M for failure of IRS to simply dot its i’s and cross its t’s. Our client faced a criminal investigation, seizure of millions of dollars in California real estate, and a civil suit for forfeiture of the property. But as the IRS Special Agent, Criminal investigation Division, testified at his deposition: IRS had failed to comply with §7401 which requires that IRS obtain authorization from the Treasury Secretary prior to the property seizure and initiation of the forfeiture suit. It was for this violation that upon a motion to dismiss for lack of jurisdiction that the District Court dismissed the suit “with prejudice” and ordered the U.S. Marshals Service to release to our client the proceeds from the sale of the properties. The Marshal’s Office informed me that it would mail to our office several checks, one for each property sold, totaling \$2.5M and made out to our client and our law firm. I declined the invitation. Instead, I sent an attorney to San Francisco to pick up the checks at the Marshal’s Office, and fly back to Phoenix with the checks in hand. Copies of the checks are framed. The criminal case was dropped. *The devil is in the details.*

As shown, the myriad of issues presented in civil tax cases results in permutations of possible assessment and collection results. But what of the criminal tax case? What must IRS prove to obtain a conviction? Why do sentences in criminal tax cases substantially vary? Why are so many public figures charged with tax crimes in conjunction with other financial crimes? Those issues and more will be presented in the April issue of *Attorney at Law Magazine*.

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