Current Federal Tax Developments

Week of May 16, 2022

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SECTION 469
TAXPAYER MATERIALLY PARTICIPATED IN ACTIVITY MOVED TO NEW ENTITY IN REORGANIZATION

Rogerson v. Commissioner, TC Memo 2022-49, 5/12/22

In the case of *Rogerson v. Commissioner*, TC Memo 2022-49[1] the taxpayer argued that, following a reorganization of the S corporation he owned 100% of into multiple corporations, he had not materially participated in the activities of one of these resulting corporations for the three years following the reorganization. He took this position despite not separating this particular activity from other activities of the prior corporation in earlier years, treating the operations of that S corporation as a single activity in which he actively participated.

With that view, the income from the operation of this corporation (Rogerson Aircraft Equipment Group, referred to as RAEG in the opinion) was treated as passive income on those returns, enabling the deduction of losses from other passive activities.

The IRS disagreed, asserting that Mr. Rogerson was materially participating in RAEG under Temp. Reg. § 1.469-5T(a)(5). The Tax Court ultimately agreed that Mr. Rogerson did materially participate in RAEG, and that this would be true even if the temporary regulations in question were invalid, based on the application of the provisions of IRC §469 itself.

Passive Activities and the Temporary Regulations

A key issue for dealing with the passive activity provisions of §469 is identifying whether or not a taxpayer materially participates in a business activity. Only if the taxpayer does not materially participate in an activity will it be deemed to be a passive activity whose income can be offset by losses from other passive activities.

[1] *Rogerson v. Commissioner*, TC Memo 2022-49, May 12, 2022, https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/aerospace-business-income-nonpassive%3b-yacht-activity-was-passive/7dh6g (retrieved May 13, 2020)

IRC §469(h)(1) provides the following definition of material participation:

> (h) Material participation defined. For purposes of this section--
>
> > (1) In general. A taxpayer shall be treated as materially participating in an activity only if the taxpayer is involved in the operations of the activity on a basis which is--
> >
> > > (A) regular,
> > >
> > > (B) continuous, and
> > >
> > > (C) substantial.

In this case, Congress specifically authorized the IRS to issue regulations to define what is material participation. IRC §469(l)(1) provides:

> (l) Regulations. The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out provisions of this section, including regulations--
>
> > (1) which specify what constitutes an activity, material participation, or active participation for purposes of this section, …

The key regulation provision that the IRS will raise in this case is found at Reg. §1.469-5T(a)(5). This is one of the seven defined ways a taxpayer will be found to materially participate in a trade or business and reads:

> (a) In general.
>
> Except as provided in paragraphs (e) and (h)(2) of this section, an individual shall be treated, for purposes of section 469 and the regulations thereunder, as materially participating in an activity for the taxable year if and only if—
>
> > …
> >
> > (5) The individual materially participated in the activity (determined without regard to this paragraph (a)(5)) for any five taxable years (whether or not consecutive) during the ten taxable years that immediately precede the taxable year; …

Reg. §1.469-5(j)(1) provides a method for applying this rule when the activities change in some form:

> (j) Material participation for preceding taxable years.
>
> (1) In general.
>
> For purposes of section 1.469-5T(a)(5) and (6), a taxpayer has materially participated in an activity for a preceding taxable year if the activity includes significant section 469 activities that are substantially the same as significant section 469 activities that were included in an activity in which the taxpayer materially participated (determined without regard to section 1.469-5T(a)(5)) for the preceding taxable year.

The point of the "five of the last ten years rule" was to prevent taxpayers from using active participation to make an activity profitable and then scaling back their hours (perhaps due to retirement) but continuing to receive an income stream that would now be available to free up passive losses. One of the IRS's key areas of focus in putting together these regulations following the enactment of IRC §469 was eliminating what had been termed "passive income generators" better known by the acronym of PIGs.

The Facts of the Case

In this case, Mr. Rogerson had owned and been deeply involved in running Rogerson Aircraft Corporation for over 40 years. In 2014 he separated this existing business into different entities based on the type of product produced.

One of those entities was Rogerson Aircraft Equipment Group (RAEG) that manufactured analog products. Mr. Rogerson retained 100% ownership of RAEG. He also remained the chief executive officer of RAEG.

The opinion describes the nature of Mr. Rogerson's interaction with RAEG and the related companies during the years in question:

> While other company employees, including a small number of executives, ran the day-to-day operations of each corporation, Mr. Rogerson was actively engaged with them all, including RAEG, in particular by monitoring operations and production, communicating with management on employment issues, and taking a hands-on approach to sales and customer relations.[2]

[2] *Rogerson v. Commissioner*, TC Memo 2022-49, May 12, 2022

The opinion discussed the general nature of his involvement:

> With respect to RAEG specifically, Mr. Rogerson received regular reports on the company's results, attended meetings to discuss the results, and took action when they fell below expectations. He ordered the Kratos Instruments move from Pasadena to Irvine and oversaw its progress, including setting the timeline, making decisions with respect to staffing matters, and deciding on the wording of materials explaining the move to employees and customers. As one company executive put it when discussing the phrasing of an employee offer letter: "Michael gets the last word." Mr. Rogerson directed executives as to which engineers within the Rogerson companies could work on Kratos Instruments projects. He approved capital expenditures and provided input on accounting issues. He also was involved in the refurbishment of the Irvine facilities to accommodate the Kratos Instruments move.[3]

Mr. Rogerson was deeply involved with employees of RAEG:

> On employment matters, Mr. Rogerson hired and fired executives, set department budgets, and weighed in on staffing at all levels of the company. During the years at issue, he was asked to approve all bonuses and even an hourly rate increase of $0.50. Generally, not even the president of RAEG was authorized to increase salaries or provide bonuses to RAEG employees — those decisions were made by Mr. Rogerson.
>
> Consistent with his authority over staffing matters, Mr. Rogerson knew employees by their first names, communicated with them directly, and weighed in on how and when they should be replaced. When one employee was out on medical leave, Mr. Rogerson directed that his replacement should be hired from outside the company rather than promoted from within, citing "mid management depth" that was "too thin." Mr. Rogerson alerted executives when he felt certain employees were not pulling their weight, noting in one instance that an engineer "did not carry his own load during the [Kratos Instruments] move" and that Mr. Rogerson "[did not] see rewarding him by having [another engineer] doing his job now."[4]

Mr. Rogerson also was deeply involved in sales and customer relations:

> During this period, Mr. Rogerson was perhaps most extensively involved in sales and customer relations. On multiple occasions, he

[3] *Rogerson v. Commissioner*, TC Memo 2022-49, May 12, 2022

[4] *Rogerson v. Commissioner*, TC Memo 2022-49, May 12, 2022

> personally met with RAEG customers and potential customers and participated in customer negotiations. He traveled to visit customers, including internationally, and also hosted customers at RAEG's offices. He drafted press releases, received reports on customer visits that he did not attend, and got personally involved when disputes with customers arose. More than once, Mr. Rogerson told RAEG executives that he would resolve a problem by meeting personally with the customer involved. And customers sometimes reached out directly to Mr. Rogerson with complaints. His approval was required for any bid provided to a customer with an aggregate value over $100,000; in one month in 2016, that approval was requested at least a dozen times.[5]

Finally, the opinion discussed Mr. Rogerson's interaction with other executives of RAEG:

> As part of his activities, Mr. Rogerson discussed RAEG with company executives, both in person and on the phone. During the years at issue, he communicated with RC and RAEG executives regarding RAEG's finances, its operations, the Kratos Instruments move, and the potential sale of the company. The RAEG president and the Rogerson companies' chief financial officer, together or separately, spent at least 10 to 15 hours per month with Mr. Rogerson on RAEG financial and operational matters. Mr. Rogerson also communicated with those individuals and others via email, including on weekends and holidays.[6]

As the opinion concludes about Mr. Rogerson's activities:

> In short, Mr. Rogerson was an actively engaged CEO throughout the years at issue. And his level of involvement in RAEG in particular and in the Rogerson companies more generally during those years was substantially the same as it was during the years preceding the 2014 reorganization.[7]

Applying the Regulations to Mr. Rogerson's Situation

The court notes that Mr. Rogerson's CPA only looked to the hours Mr. Rogerson participated in the activity for the years in question in determining that he did not materially participate in it. It seems very possible that the CPA had overlooked the five of the previous ten year rule. Or, at the very least, the CPA believed that by forming new entities out of the old ones Mr. Rogerson would be able to ignore the history of materially participating in the predecessor entity.

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[5] *Rogerson v. Commissioner*, TC Memo 2022-49, May 12, 2022

[6] *Rogerson v. Commissioner*, TC Memo 2022-49, May 12, 2022

[7] *Rogerson v. Commissioner*, TC Memo 2022-49, May 12, 2022

The IRS, not surprisingly, asserted that Mr. Rogerson had materially participated in what was this activity for more than 5 of the preceding 10 years and, thus, materially participated in this activity in 2014, 2015 and 2016, the years under examination. The Tax Court agreed that the five of ten test meant Mr. Rogerson would be materially participating in RAEG in those years even if he had absolutely zero hours of participation in the activity in those years.

The Court first looked at Mr. Rogerson's involvement in the aerospace industry in activities that eventually found their way to RAEG. The opinion states:

> Turning first to Mr. Rogerson's tax reporting, we have found at his request that all the results of his aerospace business, including the RAEG-related activity, were reported on RAC's income tax returns from 2005 to 2013. We have further found, again at Mr. Rogerson's request, that no effort was made during these years to separate the various activities of the Rogerson companies for purposes of the passive activity loss rules. In other words, RAC treated the aerospace business, including the activities that became part of RAEG, as a single, undifferentiated activity on its tax returns and when it issued Schedules K-1 to Mr. Rogerson. Mr. Rogerson reported his involvement in this [*20] consolidated activity as nonpassive on his personal income tax returns and similarly did not attempt to separate the activities. Cf. Treas. Reg. § 1.469-4(d)(5)(i) (providing that a shareholder of an S corporation may not treat activities grouped together by his corporation as separate activities). According to his own tax returns, therefore, Mr. Rogerson maintained that he materially participated in his aerospace business as a whole from at least 2005 to 2013.
>
> Mr. Rogerson does not seem to dispute that his involvement in the overall business was nonpassive during those years; indeed, he maintains that Rogerson Kratos, which also was part of the aerospace business from 2005 to 2013, required large amounts of his time, and that he was involved with product development, manufacturing, and sales for the Rogerson Kratos product lines. Mr. Rogerson continued to report his activity with respect to Rogerson Kratos (i.e., RAC), as well as RC, as nonpassive during the years 2014 to 2016. And Mr. Chang, Mr. Rogerson's tax return preparer, testified with respect to the consolidated RAC activity that "it was pretty clear [Mr. Rogerson] was involved in that business."[8]

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[8] *Rogerson v. Commissioner*, TC Memo 2022-49, May 12, 2022

The Court then noted that the activities now carried out in RAEG were a significant part of the overall activity of what had been reported as a single activity in which Mr. Rogerson materially participated in the prior years:

> There also is no dispute that, for the years 2005 to 2013, the product lines that ultimately were combined into RAEG in 2014 were a significant part of the consolidated RAC activity that Mr. Rogerson characterized as nonpassive. As described above, for purposes of applying the five of ten test, a taxpayer is treated as materially participating in an activity (here, RAEG) during a preceding year if the activity was included in an activity, or substantially overlaps with an activity (here, the aerospace business as a whole), in which the taxpayer materially participated for the preceding year. Treas. Reg. § 1.469-5(j)(1).
>
> There can be no question there is substantial overlap between RAEG's activities in 2014 and later years and the activities of the overall aerospace business before 2014. Documentary evidence and the testimony of multiple witnesses confirms that the products, employees, and customers of the Rogerson companies were generally the same before and after the 2014 reorganization. In other words, the business activities that became part of RAEG were the same before and after the reorganization, but organized differently. And each of the RAEG product lines had been part of the RAC consolidated activity since long before the relevant ten-year period. As Mr. Rogerson states in his opening brief: "[T]he RAEG Activity that commenced in 2014 is really the compilation and consolidation of multiple product lines from various entities that had been conducted on a historical basis." Pet'r's Simultaneous Opening Br. 73.[9]

The taxpayer did attempt to argue that, despite the above analysis, the RAEG activity was truly a brand new activity. He first claims that, in fact, the activity (which is not the same as an entity) truly did not exist prior to 2014:

> In support of his first proposed alternative — i.e., that for purposes of the five of ten test, RAEG did not exist as activity before 2014 — Mr. Rogerson states as follows:
>
> > It is clear that the Rogerson companies did not actually segregate [R]AEG as a separate "activity" before 2014. No position was taken on any RAC return before 2014 reflecting anything other than a single activity. [Mr.] Chang[10] clearly believed no such determination was appropriate because

[9] *Rogerson v. Commissioner*, TC Memo 2022-49, May 12, 2022

[10] Mr. Chang is Mr. Roberson's CPA who advised him on this issue.

> everything related to the Rogerson companies was reported on a single RAC return.
>
> Pet'r's Simultaneous Suppl. Br. 25. Accordingly, Mr. Rogerson appears to contend that before the 2014 reorganization, the aerospace business as a whole (as reflected on RAC's returns) was the relevant activity under the regulations and that RAEG should therefore be treated as a new activity for 2014, 2015, and 2016. If RAEG was a new activity starting in 2014, Mr. Rogerson further contends, then the five of ten test cannot apply, because Mr. Rogerson would have no history of involvement in the activity.[11]

However, the Court notes that the regulations that look at predecessor activities clearly cover this particular situation:

> Mr. Rogerson's argument is foreclosed by Treasury Regulation § 1.469-5(j)(1). As discussed in detail in Opinion Part II.B.1 above, that rule does not require the taxpayer's precise activity to have existed in prior years for purposes of applying the five of ten test. Indeed, the entire point of the rule is to address situations in which circumstances change over time. The rule applies as long as the taxpayer's current-year activity (here, RAEG) "includes significant section 469 activities" (here, the RAEG product lines or RAEG as a whole) "that are substantially the same as significant section 469 activities there were included in [a preceding-year activity] in which the taxpayer materially participated" (here, the aerospace business as a whole). In other words, all that is required is substantial overlap between the current and preceding-year activities. The record here leaves no doubt that the activity conducted by RAEG in 2014, 2015, and 2016 overlaps substantially with the "single activity" reflected on RAC's prior returns — i.e., the aerospace business as a whole.[12]

Mr. Rogerson also argues that even though his involvement with the combined operation as a whole in prior years (RAC) may have met the material participation test, his involvement with the RAEG products lines did not meet that test.

The Court begins analyzing this point as follows:

> Mr. Rogerson's second alternative — that his involvement in the RAEG product lines was passive even before 2014 — faces a factual problem. There is no question that before 2014 Mr. Rogerson's involvement in the aerospace business as a whole was nonpassive. Similarly, there is no dispute that Mr. Rogerson reported his

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[11] *Rogerson v. Commissioner*, TC Memo 2022-49, May 12, 2022

[12] *Rogerson v. Commissioner*, TC Memo 2022-49, May 12, 2022

> involvement in the aerospace business as a whole, including the activities that became part of RAEG, as nonpassive. In light of Treasury Regulation § 1.469-5(j)(1), these facts are sufficient to satisfy the five of ten test with respect to RAEG in 2014, 2015, and 2016.[13]

The opinion describes how Mr. Rogerson sought to avoid having this treatment of RAC taint RAEG:

> In an attempt to escape the implications of his prior reporting, Mr. Rogerson contends that neither he nor RAC ever made an affirmative decision to group the RAEG product lines with his other aerospace activities. According to Mr. Rogerson, RAC's returns made no effort to indicate whether they reported "one activity or many activities, grouped or not." Pet'r's Simultaneous Answering Br. 34. The implication seems to be that, if the product lines that became part of RAEG were not formally grouped with RAC in prior years, then Mr. Rogerson's reporting and activity with respect to RAC as a whole would be irrelevant in applying the five of ten test to the RAEG product lines in subsequent years.[14]

SECTION 6031
NINTH CIRCUIT PANEL RULES THAT PROVIDING RETURN TO IRS AGENT BEGINS STATUTE OF LIMITATIONS IF RETURN NOT PREVIOUSLY FILED

Seaview Trading LLC v. Commissioner, CA9, Case No. 20-72416, 5/11/22

The IRS in 2005 sends a partnership a notice that they have no record of their 2001 income tax return being filed. The taxpayer's accountant, in response to the notice faxes a signed copy of the Form 1065 to the IRS at the response number in the notice along with a certified mail receipt to show timely filing. A month later the IRS began an examination of the partnership. As part of the examination, in July 2007 the partnership's counsel mailed another signed copy of the return and certified mail receipt to an IRS attorney.

In October of 2010, the IRS issued the partnership a Final Partnership Administrative Adjustment, more than three years after the second signed copy of the tax return had been provided to IRS personnel per their requests. While you might be thinking that the IRS is too late now, since the statute for issuing the FPAA was three years after the

[13] *Rogerson v. Commissioner*, TC Memo 2022-49, May 12, 2022

[14] *Rogerson v. Commissioner*, TC Memo 2022-49, May 12, 2022

return was filed, the IRS argued that the FPAA was timely as the return was never filed in accordance with the regulations, so the statute never began to run.

The Tax Court agreed with the IRS,[15] finding that the taxpayer had not complied with the requirements found in Treasury Reg. §1.6031(a)-1(e)(1) as the return was not filed with the IRS Service Center designated to receive the return. However, in a split decision with a long dissent, a Ninth Circuit panel overruled the Tax Court,[16] finding the return had been filed more than 3 years prior to the date the FPAA was issued when a copy of the return was provided to an IRS employee who had requested the return.

Filing a Tax Return

The case depends solely on what constitutes the filing of a tax return, which requires looking to the Code and Regulations first to see what they provide.

IRS §6230(i), which applied to TEFRA partnerships for 2001, provided a partnership return "shall be filed or made at such time, in such manner, and at such place as may be prescribed in regulations."

Reg. §1.6031(a)-1(e) provides:

> (e) Procedural requirements
>
> > (1) Place for filing.
> >
> > The return of a partnership must be filed with the service center prescribed in the relevant IRS revenue procedure, publication, form, or instructions to the form (see section 601.601(d)(2)).
> >
> > (2) Time for filing.
> >
> > The return of a partnership must be filed on or before the date prescribed by section 6072(b).
> >
> > (3) Magnetic media filing.
> >
> > For magnetic media filing requirements with respect to partnerships, see section 6011(e)(2) and the regulations thereunder.

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[15] *Seaview Trading LLC v. Commissioner*, TC Memo 2019-122, September 19, 2019

[16] *Seaview Trading LLC v. Commissioner*, CA9, Case No. 20-72416, May 11, 2022, https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/ninth-circuit-holds-return-was-filed%2c-irs-adjustments-untimely/7dh1s (retrieved May 12, 2022)

For 2001 the instructions for Form 1065 provided that the partnership return in question was to be filed with the Ogden Service Center of the IRS.

Facts of the Case

The case begins with the taxpayers' filing of their 2001 return for the partnership, a filing the IRS claimed it never received:

> Seaview believed it filed its partnership tax return—also known as a Form 1065—for the 2001 tax year back in July 2002. In its Form 1065 for 2001, Seaview reported a $35,459,542 loss from a tax-shelter transaction. Seaview claims it mailed the return to the IRS service center in Ogden, Utah—the correct place to send timely returns. But the IRS has no record of receiving such a filing.[17]

The first inkling the taxpayers had that the IRS did not have a record of their partnership return being filed occurred in 2005:

> In July 2005, an IRS revenue agent sent Seaview a letter notifying the partnership that the IRS had not received its 2001 federal income tax return. Attached to that letter was a request to "[p]lease produce the following information and documents":
>
>> 1. Did Seaview Trading file a Form 1065 (U.S. Return of Partnership Income) or other Federal Income tax return for its taxable year 2001? If so, what type of form did it file, what service center was the return filed with, and when was the return filed?
>>
>> 2. Provide copies of all retained copies of the return referred to in paragraph 1, above.
>>
>> 3. Provide copies of all receipts and other proof of mailing of the return referred to in paragraph 1, above.[18]

The taxpayer's accountant promptly responded to this request and provided the requested information:

> In response, in September 2005, Seaview's accountant faxed the IRS revenue agent a signed copy of Seaview's 2001 Form 1065 return, along with the certified mail receipt purporting to show its delivery to the IRS. In the cover letter to the IRS revenue agent, Seaview's

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[17] *Seaview Trading LLC v. Commissioner*, CA9, Case No. 20-72416, May 11, 2022

[18] *Seaview Trading LLC v. Commissioner*, CA9, Case No. 20-72416, May 11, 2022

> accountant stated: "As we discussed, I have attached the 2001 tax return for Seaview Trading LLC as well as the certified mailing."[19]

The IRS then began an examination of the partnership. During this examination, the IRS confirmed that it had received the faxed copy of the Form 1065 from the accountant:

> As part of its examination, the IRS interviewed Seaview's accountant in January 2006. During the interview, the IRS noted that the accountant had "previously provided" Seaview's signed 2001 tax return and introduced the Form 1065 as an exhibit. In June 2007, the IRS also interviewed Robert Kotick. Again, the IRS acknowledged that it "obtained from [Seaview's accountant] a Form 1065 prepared for Seaview Trading, LLC, for its tax year 2001." The IRS also entered the Form 1065 as an exhibit for the interview.[20]

As well, in July 2007 the IRS obtained yet another copy of the return in question:

> In July 2007, Seaview's counsel mailed another signed copy of the 2001 tax return to an IRS attorney "[p]ursuant to [their] prior conversation."[21]

However, the IRS released their Final Partnership Administrative Adjustment (FPAA) for the partnership more than 3 years after the second copy of the return that the agency agrees it received was transmitted to the agency, holding that neither of those returns had been properly filed, thus the statute of limitations never began running:

> More than three years later, in October 2010, the IRS issued Seaview a Final Partnership Administrative Adjustment for the 2001 tax year. In that notice, the IRS stated that "[p]er Internal Revenue Service records, no tax return was filed by [Seaview] for 2001," but said, "[d]uring the examination," the partnership provided "a copy of a 2001 tax return which taxpayer claimed to have filed." The IRS then determined that "none of the income/loss/expense amounts reflected on the 2001 unfiled tax return provided by [Seaview was] allowable." It then informed Seaview that it would adjust its 2001 reported loss from over $35 million to zero dollars.[22]

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[19] *Seaview Trading LLC v. Commissioner*, CA9, Case No. 20-72416, May 11, 2022

[20] *Seaview Trading LLC v. Commissioner*, CA9, Case No. 20-72416, May 11, 2022

[21] *Seaview Trading LLC v. Commissioner*, CA9, Case No. 20-72416, May 11, 2022

[22] *Seaview Trading LLC v. Commissioner*, CA9, Case No. 20-72416, May 11, 2022

The Tax Court Ruling – the Return Was Never Filed

The matter went to the Tax Court which had to decide if, in fact, a return was filed when the signed copy was faxed to the IRS agent. The Tax Court analysis began by noting:

> Generally, a limitations period "runs against the United States only when they assent and upon the conditions prescribed." *Lucas v. Pilliod Lumber Co.*, 281 U.S. 245, 249 (1930). For a taxpayer to secure the benefit of a limitations period bar, there must be "meticulous compliance by the taxpayer with all named conditions." *Winnett v. Commissioner*, 96 T.C. 802, 807-808 (1991) (quoting *Lucas v. Pilliod Lumber Co.*, 281 U.S. at 249). One such requirement is that a return be filed at the designated place of filing returns. See id. at 808. However, if a taxpayer submits a return to the wrong place but the return is later forwarded to designated place for filing, the limitations period commences when the return is received at the designated place for filing. See *id.*[23]

The Tax Court found that no return ever made its way to the Ogden Service Center:

> Section 1.6031(a)-1(e)(1), Income Tax Regs., designates the proper place to file a Federal partnership income tax return. The designated place for filing is the "service center prescribed in the relevant IRS revenue procedure, publication, form, or instructions to the form". The instructions for Form 1065 for 2001 state that the proper service center for filing was the Ogden, Utah, service center. Thus, Seaview did not submit a return to the proper place for filing when it faxed a copy to Agent Johnson in 2005 or when it sent a copy to respondent's counsel in 2007. Neither of the purported returns was forwarded to the Ogden service center. Additionally, there is a plethora of caselaw holding that a revenue agent is not a designated filing place. *W.H. Hill Co. v. Commissioner*, 64 F.2d 506 (6th Cir. 1933), *aff'g* 22 B.T.A. 1351 (1931) and 23 B.T.A. 605 (1931); *Green v. Commissioner*, T.C. Memo. 1993-152, 1993 Tax Ct. Memo LEXIS 154, at *20, *aff'd,* 33 F.3d 1378 (5th Cir. 1994); see *Metals Ref., Ltd. v. Commissioner*, T.C. Memo. 1993-115, 1993 Tax Ct. Memo LEXIS 113, at *20-*21.[24]

The Tax Court also distinguished this case from a criminal case where the return was given to the Criminal Investigation Division (CID) agent:

> With respect to Seaview's faxing of the return, petitioner maintains that the Internal Revenue Manual requires revenue agents to process

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[23] *Seaview Trading LLC v. Commissioner*, TC Memo 2019-122, September 19, 2019

[24] *Seaview Trading LLC v. Commissioner*, TC Memo 2019-122, September 19, 2019

> delinquent returns that they receive. In support, petitioner relies on *Dingman v. Commissioner*, T.C. Memo. 2011-116, 2011 Tax Ct. Memo LEXIS 112. *Dingman* is inapplicable to the present case. In *Dingman*, we held, in a unique factual situation, that a taxpayer filed his returns when his counsel provided delinquent returns to the IRS Criminal Investigation Division (CID). *Id*. at *31-*43. In sum, we held that in the precise situation in Dingman, the CID was an appropriate place to hand-deliver a return. *Id*. *Dingman* is applicable only to hand-delivery of returns arising under the facts present in that case.[25]

The Tax Court also notes that, unlike *Dingman*, in this case the taxpayer continued to take the position it had timely filed the 2001 return.

> In *Dingman* the taxpayer clearly intended that the returns submitted to the CID be delinquent returns with payments, and the IRS processed them as such and assessed the taxpayer's payments. Those facts are not present in the instant case. Indeed, petitioner continues to maintain that Seaview timely filed its 2001 return.[26]

The Tax Court argues that *Dingman* does not override the regulation in question:

> *Dingman* did not create a blanket rule that a taxpayer can file a return by whatever method he chooses; nor did it create an additional place for taxpayers to file returns beyond the places specifically designated in the Code or the regulations.[27]

The Tax Court also noted that even if such a submission could constitute a filing, what the taxpayer had submitted was not, in the view of the Tax Court, intended to be a tax return, but rather was presented solely as a copy of an already filed return:

> The relevant question in this case is whether the purported copy of the return Seaview either faxed to Agent Johnson in 2005 or mailed to respondent's counsel in 2007 purported to be a return. In *Friedman v. Commissioner*, T.C. Memo. 2001-207, 2001 Tax Ct. Memo LEXIS 240, at *5, aff'd, 80 F. App'x 285 (3d Cir. 2003), a revenue agent requested from a taxpayer copies of his returns for 1989 and 1990. The revenue agent believed that the taxpayer filed returns for those years although the taxpayer had not. *Id*. at *5-*6. The taxpayer provided copies of the returns to the revenue agent but did not tell him that he had failed to file the returns. *Id*. at *6. And the revenue agent received the returns thinking that they had already been filed. Id.

[25] *Seaview Trading LLC v. Commissioner*, TC Memo 2019-122, September 19, 2019
[26] *Seaview Trading LLC v. Commissioner*, TC Memo 2019-122, September 19, 2019
[27] *Seaview Trading LLC v. Commissioner*, TC Memo 2019-122, September 19, 2019

> We therefore held, in part, that the taxpayer had not intended his delivery of the documents to constitute the filing of returns. *Id*. at *24.
>
> The situation in the present case is similar. When Seaview's accountant faxed a purported copy of the return to Agent Johnson in 2005, he enclosed a copy of certified mail receipt purporting to show that the return had been previously filed in 2002. Seaview's accountant thus led respondent to believe that the return had been previously filed in 2002. Therefore, Seaview did not intend to file a return when it faxed a copy to Agent Johnson.
>
> Seaview has the same problem with respect to the mailing of the purported copy of the return in 2007. Seaview's attorney enclosed with the document a cover letter stating that the document was a "copy of its 2001 Form 1065". This indicates that Seaview believed it had previously filed its return and, thus, Seaview did not intend to file a return when it mailed a copy to respondent's counsel.[28]

There is one very interesting point to note here—the taxpayer was not, at this point in time, arguing that the 2001 return had been timely filed despite having sent along a certified mail receipt to show the return had been filed in July of 2002.

IRC Section 7502(c) provides:

> (c) Registered and certain mailing; electronic filing.
>
> > (1) Registered mail. For purposes of this section, if any return, claim, statement, or other document, or payment, is sent by United States registered mail--
> >
> > > (A) such registration shall be prima facie evidence that the return, claim, statement, or other document was delivered to the agency, officer, or office to which addressed; and
> > >
> > > (B) the date of registration shall be deemed the postmark date.
> >
> > (2) Certified mail; electronic filing. The Secretary is authorized to provide by regulations the extent to which the provisions of paragraph (1) with respect to prima facie evidence of delivery and the postmark date shall apply to certified mail and electronic filing.

[28] *Seaview Trading LLC v. Commissioner*, TC Memo 2019-122, September 19, 2019

Reg. §301.7502-1(e)(2) provides the regulations to allow the use of certified mail to give *prima facie* evidence that the document was delivered to the office to which it was addressed:

> <u>(i) Registered and certified mail.</u> In the case of a document (but not a payment) sent by registered or certified mail, proof that the document was properly registered or that a postmarked certified mail sender's receipt was properly issued and that the envelope was properly addressed to the agency, officer, or office constitutes prima facie evidence that the document was delivered to the agency, officer, or office.

This means that if the taxpayer has a certified mail receipt with a proper postmark and evidence the document was addressed to the Ogden Service Center, the presumption now shifts to the IRS to show that the document was not actually delivered to the IRS—a virtually impossible task.

But the taxpayer did not use this obvious route to show the return was properly mailed and delivered to the Ogden Service Center in July 2002. Establishing the return had been delivered to the Ogden Service Center would have meant the FPAA had clearly been issued well after the statute had closed.

But at the Tax Court the taxpayer only reserved the right to later argue the return had been timely filed and, by the time the case got to the Ninth Circuit panel, "Seaview concedes that it can't prove its Form 1065 was ever received by the service center in Ogden."[29]

Presumably, despite having a certified mailing receipt of some sort, the taxpayer was unable to provide the items required by Reg. §301.7502-1(e)(2) to gain the presumption of delivery to Ogden. The issues to prove would appear to have been, at a minimum:

- A certified mailing receipt issued by the U.S. Postal Service (a receipt issued by a UPS Store or similar service that will mail documents for a taxpayer would not be sufficient);
- The receipt must contain a proper postmark, applied by a USPS employee that contains the date of the mailing, which will be treated as the postmark date under IRC §7502; and
- The address that the document was addressed to must be able to be shown and it needs to be the proper address to which the return should have been delivered.[30]

[29] *Seaview Trading LLC v. Commissioner*, CA9, Case No. 20-72416, May 11, 2022

[30] Reg. §301.7502-1(e)(2)

Another reason to believe that there was some issue with the certified mail receipt is that the IRS was clearly aware of the existence of this receipt, but still acted as if no return had ever been filed.

Finally, when the Tax Court did not find that the copies represented timely filing, the taxpayer apparently did not go forward with showing it had sufficient information to obtain the presumption that the return had been delivered to the Ogden Service Center in July 2002. Rather, the taxpayer and IRS settled all other issues and only the question of whether providing the second or third copy of the return represented a filing was taken up with the Ninth Circuit Court of Appeals.

Unfortunately, since the taxpayer never asked a Court to rule upon the issue of the certified mail proof of filing and eventually simply conceded the issue away, we won't know what issue prevented the use of the certified mail receipt to resolve the matter.

The Ninth Circuit Majority Opinion

The taxpayer appealed this decision to the Ninth Circuit Court of Appeals and the case was heard by a three judge panel. Two of the judges ruled that the provision of the signed copy of the return to the IRS agent by the partnership was the filing of a proper income tax return which began the running of the statute of limitations, overturning the Tax Court decision. As that was more than three years before the FPAA was issued, the FPAA had been issued too late.

The opinion finds that the regulations govern only the filing of a *timely* return:

> …[T]he IRS regulations expressly govern the time and place to file timely partnership returns. They must be filed by April 15 following the tax year and, for partnerships with a principal place of business in California, sent to the IRS Service Center in Ogden, Utah. *See* Form 1065, Instructions. If Seaview was seeking to show a *timely* filing of its partnership return, it could not do so.[31]

Remember that the taxpayer had, by this time, conceded it could not show the form had been delivered to the Ogden Service Center (nor, it would appear, could it provide the necessary evidence to obtain the *prima facie* presumption with certified mail).

But the panel argues that the issue before it is not if Seaview timely filed its return, but whether it had properly filed the return late:

> The question is whether Seaview *belatedly* "filed" its tax return by following the instructions of IRS officials and delivering the returns to them.[32]

[31] *Seaview Trading LLC v. Commissioner*, CA9, Case No. 20-72416, May 11, 2022

[32] *Seaview Trading LLC v. Commissioner*, CA9, Case No. 20-72416, May 11, 2022

The majority finds that the regulations don't govern the question of whether a late return was filed:

> Section 1.6031(a)-1(e) doesn't expressly establish how taxpayers are to file delinquent returns. Nothing in the text says that the time and place requirements apply to untimely returns. Indeed, by definition, if a taxpayer files a return after April 15, the taxpayer can't comply with § 1.6031(a)- 1(e) since the regulation specifies that date as when the return "must be filed." 26 C.F.R. § 1.6031(a)-1(e)(2). So, at most, the regulation is silent on filing procedures for late returns.[33]

The majority found no regulation prevented the filing of a tax return with an IRS official who had actually requested the return:

> As the IRS itself noted, there is more than one place for a partnership to properly file a return. For example, the law permits partnerships to hand-carry returns to certain IRS offices. See 26 U.S.C. § 6091(b)(4) (2000) (allowing filing by hand-carrying to an appropriate internal revenue district); 26 C.F.R. § 1.6091-2(d)(1) (allowing filing by hand-carrying to "any person assigned the responsibility to receive hand-carried returns in the local Internal Revenue Service office"). So an IRS service center isn't the only place a partnership can file its returns—even when timely.[34]

The majority argues that the ordinary meaning of filing should be used since the regulations fail to define the term in this context, holding:

> Based on the ordinary meaning of "filing," we hold that a delinquent partnership return is "filed" under § 6229(a) when an IRS official authorized to obtain and process a delinquent return asks a partnership for such a return, the partnership delivers the return to the IRS official in the manner requested, and the IRS official receives the return.[35]

The majority opinion goes on to note that the IRS actually *encourages* that returns be filed with IRS agents and other employees in various internal IRS guidance (the Internal Revenue Manual, a 2006 IRS Policy Statement and a 1999 Chief Counsel

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[33] *Seaview Trading LLC v. Commissioner*, CA9, Case No. 20-72416, May 11, 2022

[34] *Seaview Trading LLC v. Commissioner*, CA9, Case No. 20-72416, May 11, 2022

[35] *Seaview Trading LLC v. Commissioner*, CA9, Case No. 20-72416, May 11, 2022

Advice).[36] The opinion notes that the Chief Counsel Advice[37] states a preference for such returns to be filed with the IRS agent:

> What's more, the memorandum expressed a preference for delinquent returns being filed with IRS officers. Given the costs and delays with sending a return to a service center, the Chief Counsel advised that "it is generally in the taxpayer's best interest[] to file the delinquent return directly with the revenue officer instead of mailing it to the appropriate Service Center." Id. (emphasis added); see also id. at 4 n.2. So even the IRS Chief Counsel recognizes that taxpayers can and should file a late return directly with the revenue officer rather than send it to a service center.[38]

The majority, while admitting these documents aren't necessarily binding on the IRS, uses the documents to buttress support for the idea that even the IRS sees filing as including cases where returns are delivered to IRS agents:

> The IRS doesn't deny that its internal procedures conflict with its current litigation position, but only claims that its internal "procedures are primarily for the benefit of the IRS, not taxpayers." That may be so, but the point is not whether these internal documents benefit taxpayers. The point is that the IRS's own directives confirm the plain language of the Tax Code and IRS regulations—that taxpayers may file delinquent returns with authorized officials. And the inconsistency of the IRS's position is troubling: The IRS wants the ability to direct taxpayers to submit delinquent returns to its authorized officials, while maintaining the power to unilaterally decide whether the returns are "filed" for statute-of-limitations purposes. We reject this nonsensical position and instead follow the ordinary meaning of the Tax Code.[39]

In addressing the dissent the opinion does note that several Tax Court cases support the IRS's view in this case, as well as noting cases decided outside the Ninth Circuit that held submitting a return to IRS personnel or to the wrong place doesn't constitute a filing. But in the out of circuit cases, the panel indicates that the facts aren't quite the same as the ones in this case, though the panel does not distinguish why these differences would be important and lead to a different decision (or even if they would do so in the majority's view).

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[36] *Seaview Trading LLC v. Commissioner*, CA9, Case No. 20-72416, May 11, 2022

[37] Chief Counsel Advice No. 199933039, *Filing Delinquent Returns Directly With Revenue Officers*, August 20, 1999

[38] *Seaview Trading LLC v. Commissioner*, CA9, Case No. 20-72416, May 11, 2022

[39] *Seaview Trading LLC v. Commissioner*, CA9, Case No. 20-72416, May 11, 2022

The Dissent

The case comes with a rather lengthy (52 page) dissent that argues the original Tax Court decision was correct, noting:

> For many years—indeed, in all its communications with the IRS and in litigating this case before the Tax Court— Seaview maintained that it had filed its 2001 partnership return in 2002, and that it had filed the return to the correct location, the IRS service center in Ogden, Utah.1 See 26 C.F.R. § 1.6031(a)-1(e) (2001); IRS, Instructions for Form 1065 at 4 (2001). Now, Seaview acknowledges that it cannot show that its return ever reached the Ogden service center. It is therefore undisputed that Seaview failed to file its return to the correct location, either on time or belatedly. That conclusion should end our inquiry, and we should affirm the Tax Court.[40]

The dissent argues that the majority opinion sought to address what it perceived as an unfairness in the Tax Court's result:

> The majority, however, goes to great lengths to avoid the result that the plain text of the Tax Code and the IRS regulations compel, taking issue with what it sees as the IRS's "inconsistency." Maj. Op. 6–7, 16, 19. The majority relies on IRS internal guidance documents to conclude that requiring Seaview to file its partnership return at the time and place designated in the regulations is unfair. Maj. Op. 16–19.[41]

In a footnote, the dissent clarifies this reading of the majority opinion:

> To be sure, the majority avoids explicitly complaining that the Tax Code and regulations are "unfair." But the opening paragraphs of the opinion—in which the majority asks its readers to "imagine" that they, like Seaview, were mistreated when the IRS did not treat unfiled returns as properly filed returns, and laments "How can this be?"—expose the majority's underlying angst that the filing requirements are unfair. Maj. Op. 6–7.[42]

The dissent goes on to argue that the majority ignores binding law and precedent to achieve its result:

> In its attempt to remedy this perceived unfairness, the majority brushes aside all sources of binding and persuasive legal authority. For the

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[40] *Seaview Trading LLC v. Commissioner*, CA9, Case No. 20-72416, Dissent, May 11, 2022

[41] *Seaview Trading LLC v. Commissioner*, CA9, Case No. 20-72416, Dissent, May 11, 2022

[42] *Seaview Trading LLC v. Commissioner*, CA9, Case No. 20-72416, Dissent, May 11, 2022

> majority, it matters little that the Tax Code and regulations specify the mandatory time and place for filing a tax return, 26 U.S.C. § 6230(i) (2000); 26 C.F.R. § 1.6031(a)-1 (2001), and that Seaview never complied with those provisions. Maj. Op. 10–15. And to reach its desired result, the majority disregards Supreme Court precedent holding that taxpayers must meticulously comply with filing requirements to benefit from the statute of limitations, *Lucas v. Pilliod Lumber Co.*, 281 U.S. 245, 249 (1930), and that we must strictly construe the statute of limitations in favor of the government, *Badaracco v. Comm'r*, 464 U.S. 386 (1984). Maj. Op. 19, 22 n.6. The majority also tramples the overwhelming body of case law from our sister circuits and the Tax Court rejecting the result it reaches. Maj. Op. 20– 21.

The dissent focuses on the fact that Seaview gets the return treated as filed only after failing to timely file the return:

> How does the majority manage to sidestep so much binding and persuasive legal authority? In what can only be described as an astonishing and unprecedented holding, the majority decides that because Seaview violated some subsections of the applicable statute and regulation, the remaining provisions do not apply to it. Maj. Op. 13–15 & n.2. In other words, the majority reasons that the parts of the law governing where to file a partnership return do not apply in this case because Seaview did not comply with the parts of the law governing when to file a partnership return. Maj. Op. 13–15 & n.2.
>
> … Under the majority's sweeping holding, as long as a taxpayer does not comply with the regulatory deadlines for filing a return (or in other words as long as the taxpayer submits a return late), the taxpayer is not subject to the regulation's other provisions and can "file" its return by sending it to virtually any IRS employee. Maj. Op. 10, 21 & n.4. The majority thus effects a sea change in the interpretation of long-standing, and previously uncontroversial, filing regulations.[43]

So What Do We Make of This

At this point it is important to note that the IRS may yet ask for a rehearing of this decision by a larger panel of the Ninth Circuit. But assuming the IRS does not do that or the Ninth Circuit declines to have a larger panel hear the case, for now this rule would only appear to be binding in the Ninth Circuit.

It's also important to note the unique facts of this case. Our lack of information on why no argument was made regarding the certified mail receipt being *prima facie*

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[43] *Seaview Trading LLC v. Commissioner*, CA9, Case No. 20-72416, Dissent, May 11, 2022

evidence of receipt of the return by the Ogden Service Center is an important missing fact.

It's not clear why the IRS was so confident that the certified mail receipt would not meet the requirement of the timely filing regulations that the agency went forward with the exam even though the statute would have just expired if that delivery to Ogden took place.

Nor is it clear why the taxpayers never put the issue of the certified mail receipt before the Tax Court for a determination, rather going ahead with completing the entire exam and then going to the Court of Appeals to only argue over the question of whether this submission that initially sought to show timely filing now should be counted as an original late filing of the return.

But it probably does suggest that if a taxpayer wishes to begin the running of the statute for a late filed return that the IRS has contacted the client about, it may be best to mail a copy of that return to the appropriate IRS processing center and only provide the agent with a copy and notice that the filed return has been sent to the Service Center even if the IRS agent specifically asks the taxpayer not to send the return to the Service Center but rather give it to him/her.

The IRS position that there must be strict compliance with the regulations to begin the running of the statute would seem to mandate sending all such returns to the Service Center.

SECTION 6041
TIGTA REPORTS IRS DESTROYED AN ESTIMATED 30 MILLION INFORMATION RETURNS

A Service-Wide Strategy Is Needed to Address Challenges Limiting Growth in Business Tax Return Electronic Filing, TIGTA Report Number: 2022-40-036, 5/4/22

A paragraph in a recently released Treasury Inspector General for Tax Administration Report[44] disclosed that the IRS destroyed an estimated 30 million paper-filed information returns in March 2021 due to the backlog in processing paper documents at the agency.

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[44] A Service-Wide Strategy Is Needed to Address Challenges Limiting Growth in Business Tax Return Electronic Filing, TIGTA Report Number: 2022-40-036, May 4, 2022, https://www.taxnotes.com/research/federal/other-documents/treasury-reports/irs-should-prioritize-business-e-filing%2c-compliance%2c-tigta-says%c2%a0/7dgqn (retrieved May 11, 2022)

The audit was initiated to look at issues preventing broader use of electronic filing for business returns, but it began by noting that the decision to destroy these returns led to the audit:

> This audit was initiated because the IRS's continued inability to process backlogs of paper-filed tax returns contributed to management's decision to destroy an estimated 30 million paper-filed information return documents in March 2021.[45]

The report itself gives little information about the information returns involved, aside from listing Forms 1099-MISC as an example of the types of forms that were destroyed:

> Since reopening its Tax Processing Centers in June 2020, the IRS continues to have a significant backlog of paper-filed individual and business tax returns that remain unprocessed. The continued inability to process backlogs of paper-filed tax returns contributed to management's decision to destroy an estimated 30 million paper-filed information return documents in March 2021. The IRS uses these documents to conduct post-processing compliance matches such as the IRS's Automated Underreporter Program to identify taxpayers not accurately reporting their income. IRS management advised us that once the tax year concludes, the information returns, e.g., Forms 1099-MISC, *Miscellaneous Information*, can no longer be processed due to system limitations. This is because the system used to process these information returns is taken offline for programming updates in preparation for the next filing season.[46]

The news was met with a number of not very favorable responses from the tax community. In an article by Jonathan Curry in *Tax Notes Today Federal*, CPA Joe Kristan's reaction was described as follows:

> Joe Kristan of Eide Bailly LLP shared a similar sentiment: "It's shocking. . . . For the IRS to just throw all that work away is insulting." He also described the news as a slap in the face to taxpayers who properly filed their information returns electronically, because their return information can be matched, while taxpayers who may have disregarded their paper information return obligations or underreported income won't get caught.[47]

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[45] A Service-Wide Strategy Is Needed to Address Challenges Limiting Growth in Business Tax Return Electronic Filing, TIGTA Report Number: 2022-40-036, May 4, 2022

[46] A Service-Wide Strategy Is Needed to Address Challenges Limiting Growth in Business Tax Return Electronic Filing, TIGTA Report Number: 2022-40-036, May 4, 2022

[47] Jonathan Curry, "Tax Pros Livid Over IRS Destroying Information Returns," *Tax Notes Today Federal*, May 11, 2022, https://www.taxnotes.com/tax-notes-today-federal/tax-system-administration/tax-pros-livid-over-irs-destroying-information-returns/2022/05/11/7dgyq subscription required (retrieved May 11, 2022)

The article quotes former National Taxpayer Advocate Nina Olson as saying "How can the agency ask taxpayers to meet their filing obligations for information returns when it cavalierly destroys duly filed documents?"[48]

Certainly, it seems the IRS may have difficulty justifying imposing penalties related to 2020 electronically filed information returns when it appears that had the forms been filed on paper the issues never would have been brought to light due to IRS actions.

SECTION 6402
TAXPAYERS LOSES REFUND DUE TO FILING RETURN BEFORE CARES ACT EFFECTIVE DATE

Seto v. United States, US Court of Federal Claims, Docket No. 1:21-CV-01497, 5/9/22

The U.S. Court of Federal Claims rejected a taxpayer's argument that the IRS improperly allowed the offset of a tax refund on his 2019 return filed in January 2020 against his outstanding student loan debt in violation of the CARES Act. As the opinion pointed out in the case of *Seto v. United States*, US Court of Federal Claims, Docket No. 1:21-CV-01497[49], since the offset took place over a month before the CARES Act was signed into law, there was no relief available that would enable him to recover his refund.

Facts of the Case

Mr. Seto had outstanding student loans that were in default. He had been receiving notices of delinquency and default beginning in 2015. In December of 2018 he received the following notice from the U.S. Department of Education indicating the agency planned to take the step of asking the Treasury to apply certain federal payments due to Mr. Seto, including income tax refunds, against the outstanding student loan balance:

> The Department intends to refer your [student loan] debt to the U.S. Department of the Treasury for collection through Treasury offset against all payment streams that are currently authorized by law or that become authorized in the future. These payment streams may include, but are not limited to, Federal and State tax refunds, Social Security benefits, and Federal travel reimbursements.[50]

[48] Jonathan Curry, "Tax Pros Livid Over IRS Destroying Information Returns," *Tax Notes Today Federal*, May 11, 2022

[49] *Seto v. United States*, US Court of Federal Claims, Docket No. 1:21-CV-01497, May 9, 2022, *Seto v. United States*, US Court of Federal Claims, Docket No. 1:21-CV-01497 (retrieved May 10, 2022)

[50] *Seto v. United States*, US Court of Federal Claims, Docket No. 1:21-CV-01497, May 9, 2022

In February 2019 the Department of Education certified Mr. Seto's outstanding debt to the Department of the Treasury in order that any income tax refunds he was eligible to receive would be offset against the outstanding loan.

Despite this notice, Mr. Seto decided to take advantage of a federal tax credit program that ended up generating a significant income tax refund for 2019. As the court describes the situation:

> …[O]n July 19, 2019, Mr. Seto purchased a rooftop solar energy system for his home at a total cost of $26,939, financed over ten years with Loanpal. ECF 20 at Exs. 1-2. Mr. Seto's decision to invest in renewable energy was inspired, in part, by the Federal Investment Tax Credit (commonly known as the Solar Tax Credit) which, in 2019, granted taxpayers a residential energy efficient property credit equal to thirty percent (30%) of the cost of rooftop solar energy systems. See https://www.irs.gov/newsroom/energy-incentives-for-individuals-residential-property-updated-questions-and-answers.[51]

Mr. Seto was facing a requirement to come up with a significant lump sum payment to keep his monthly payments at their initial level not later than March 4, 2021—so the refund generated by the credit presumably would be very helpful in meeting that requirement and ensuring his payments did not increase.

> Indeed, in accordance with the terms of the Loanpal Loan Closing Certificate, Mr. Seto's initial monthly payment of $187.22 would increase to $277.05 on March 4, 2021, if he failed to pay down the loan principal by $10,094.71 and meet the "target balance" of $16,844.29 by that date. ECF 20 at Ex. 1.[52]

Thus, early in 2020 Mr. Seto filed his 2019 income tax return and awaited the receipt of his refund.

> In January 2020, Mr. Seto filed his 2019 federal income tax return with the IRS, claiming a $7,994 Federal Investment Tax Credit for the purchase and installation of the solar energy system and a net refund of $9,288.[53]

[51] *Seto v. United States*, US Court of Federal Claims, Docket No. 1:21-CV-01497, May 9, 2022

[52] *Seto v. United States*, US Court of Federal Claims, Docket No. 1:21-CV-01497, May 9, 2022

[53] *Seto v. United States*, US Court of Federal Claims, Docket No. 1:21-CV-01497, May 9, 2022

But, alas, he was not to see that $9,288 (or at least the vast majority of it). The Department of Treasury did not send Mr. Seto the refund he expected. Rather the opinion notes:

> By letter dated February 20, 2020, the Department of the Treasury, Bureau of the Fiscal Service, notified Mr. Seto that his 2019 federal income tax refund in the amount of $9,288 had been applied to offset (in part) his outstanding student loan debt. ECF 16-1 at A179. Thereafter, on July 16, 2020, following the Setos' submission of a verified innocent spouse claim with the IRS, the Department of Education refunded them $2,075. See id. at A116-17, 178.[54]

On March 27, 2020, the CARES Act was signed into law by the President. In Section 3513(e) the Act provided for suspension of various collection activities related to student loans, including "reduction of tax refund by amount of debt authorized under section 3720A of title 31, United States Code, or section 6402(d) of the Internal Revenue Code of 1986."[55] No provision in the law provided for an effective date for this provision prior to the enactment date of the law (March 27, 2020), though the law did provide that the suspension period would run through September 30, 2020.[56]

Court's Decision

The taxpayer claims that the offset of his refund was improper:

> Mr. Seto avers that the IRS unlawfully offset his refund in light of fact that, had he filed his 2019 federal income tax return later in the tax season, his refund would not have been withheld due to certain financial relief provisions included in the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. No. 116-136, 134 Stat. 281 (2020).[57]

In essence, had Mr. Seto not filed very early in tax season to get his refund (which he didn't end up getting) and had rather filed his return later in tax season, he would have received his entire refund. Mr. Seto was right about that—had he filed his return on or near the July 15, 2020, eventual due date for 2019 returns, the refund would not have been offset.

But the opinion notes that the law only took effect on March 27, 2020:

> Although the CARES Act temporarily suspended collection actions for borrowers with defaulted federal student loans, including federal

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[54] *Seto v. United States*, US Court of Federal Claims, Docket No. 1:21-CV-01497, May 9, 2022

[55] CARES Act Section 3513(e)(2)

[56] CARES Act Section 3513(a)

[57] *Seto v. United States*, US Court of Federal Claims, Docket No. 1:21-CV-01497, May 9, 2022

> income tax refund offsets, the statute did not go into effect until the President signed the bill into law on March 27, 2020. Pub. L. No. 116-136, 134 Stat. 281 (2020).[58]

All of the activities related to Mr. Seto's tax return and refund took place more than one month before the bill was signed into law:

> Mr. Seto filed his 2019 federal income tax return in January 2020. ECF 1 at 3. The IRS processed his return and applied his refund to offset a portion of his outstanding student loan debt on or before February 20, 2020, when Mr. Seto was formally notified of the government's action. ECF 16-1 at A179.[59]

Those dates proved to be a problem for Mr. Seto. While it might be deemed "unfair" it was nevertheless the result of the law that was passed, as the court could not add a retroactive effective date to a law that lacked such a clause:

> Nothing in the CARES Act states or clearly suggests that the student loan temporary relief provisions applied retroactively. Absent such statutory language, courts cannot construe laws and implementing regulations to have retroactive effect. *Hicks v. Merit Sys. Prot. Bd.*, 819 F.3d 1318, 1321 (Fed. Cir. 2016) ("Retroactivity is not favored in the law and congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result. Accordingly, we will construe a statute to avoid retroactivity unless there is clear evidence that Congress intended otherwise.") (cleaned up). Consequently, the enactment of the CARES Act has no bearing on Mr. Seto's illegal exaction claim.[60]

SECTION 6501
TAX COURT FINDS EXTENSION OF STATUTE WAS NOT SIGNED UNDER DURESS

Evert v. Commissioner, TC Memo 2022-48, 5/9/22

The taxpayer in the case of *Evert v. Commissioner*, TC Memo 2022-48[61] argued that she had signed a Form 872, *Consent to Extend the Time to Assess Tax*, under duress,

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[58] *Seto v. United States*, US Court of Federal Claims, Docket No. 1:21-CV-01497, May 9, 2022

[59] *Seto v. United States*, US Court of Federal Claims, Docket No. 1:21-CV-01497, May 9, 2022

[60] *Seto v. United States*, US Court of Federal Claims, Docket No. 1:21-CV-01497, May 9, 2022

[61] *Evert v. Commissioner*, TC Memo 2022-48, May 9, 2022, https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/consent-to-extend-assessment-period-wasn%e2%80%99t-under-duress/7dgsw (retrieved May 10, 2022)

rendering it invalid and, thus, the IRS had failed to timely issue a notice of deficiency for 2015. The Tax Court did not agree with the taxpayer.

Period of Limitations for the IRS to Assess Tax

IRC §6501 provides time limits for the IRS to assess and collect federal taxes. Such a limitation allows taxpayers to be relieved from having to defend against tax assessments in perpetuity, since once the appropriate statute has closed the IRS can no longer assess tax against the year in question.

The limitation on assessment is found in IRC §6501(a) which provides:

> (a) General rule. Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period. For purposes of this chapter, the term "return" means the return required to be filed by the taxpayer (and does not include a return of any person from whom the taxpayer has received an item of income, gain, loss, deduction, or credit).

The law does allow the IRS and the taxpayer to agree to extend this time period. While it might seem against the taxpayer's interests to extend the time period in question, extending the time period allows the matter to remain at the examination or appellate level, when the alternative would likely be the taxpayer facing the issuance of a notice of deficiency for the maximum possible assessment based on the data the IRS possesses as the statute approaches. At that point, the taxpayer's options would be:

- File a petition in the U.S. Tax Court to continue to contest the proposed assessment;
- Pay the tax due. then pursue relief with a claim for refund followed by filing a petition in the U.S. District Court or U.S. Court of Federal Claims; or
- Simply paying the balance due without contesting the amounts.

Due to the costs inherent in litigation, a taxpayer might find that neither of the first two options would likely be cost effective, even if the taxpayer prevailed. Thus, the choice might really be between extending the statute or paying a maximum assessment.

Even if the math does work to contest the matter in court, the taxpayer may nevertheless prefer to avoid those costs if possible and continue working with the IRS at the administrative level.

IRC §6501(c)(4) provides for the extension by agreement:

> (c) Exceptions.
>
> …
>
> (4) Extension by agreement.
>
> > (A) In general. Where, before the expiration of the time prescribed for the assessment of any tax imposed by this title, except the estate tax provided in chapter 11, both the Secretary and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.
> >
> > (B) Notice to taxpayer of right to refuse or limit extension. The Secretary shall notify the taxpayer of the taxpayer's right to refuse to extend the period of limitations, or to limit such extension to particular issues or to a particular period of time, on each occasion when the taxpayer is requested to provide such consent.

The IRS will typically initiate the conversation about extending the statute a number of months before the statute is set to expire.

Facts of This Case

In this case the taxpayer's 2015 return had been examined and, upon conclusion of the exam, the taxpayer took the case to the IRS Office of Appeals. The IRS assigned the case to an Appeals Officer who initiated contact with the taxpayer:

> On April 23, 2018, AO Mack mailed petitioner Letter 5157, Non-docketed Acknowledgement & Conference, and requested that she call him by May 5, 2018. After AO Mack did not hear from petitioner, he attempted to reach her by phone on May 10, 2018. On May 21, 2018, AO Mack reached petitioner and scheduled a telephone conference for June 4, 2018. Petitioner later requested that the IRS Appeals conference be rescheduled to June 11, 2018, and AO Mack agreed.[62]

[62] *Evert v. Commissioner*, TC Memo 2022-48, May 9, 2022, https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/consent-to-extend-assessment-period-wasn%e2%80%99t-under-duress/7dgsw (retrieved May 10, 2022)

The conference went forward on the scheduled date:

> During the June 11, 2018, conference, AO Mack told petitioner that he needed additional information in order to consider her positions. AO Mack agreed to leave the file open so that petitioner had time to gather the additional information to support her arguments and did not give petitioner a firm deadline. On July 9, 2018, petitioner contacted AO Mack by phone, telling him that she had gathered some additional information and would get more information later that week. Petitioner did not send any additional information in July 2018.[63]

The statute was due to expire in April of 2019 on the taxpayer's timely filed 2015 return that was the subject of the review. That brought it within the timeframe when IRS procedures require those handling the case to deal with the pending expiration of the statute:

> In early August 2018 AO Mack prepared two reports that were due to his manager at the beginning of each month: a list of his oldest cases and a list and status summary of his cases where the period of limitations for assessment would expire in the subsequent nine months (period expiration report). AO Mack's August 2018 period expiration report included petitioner's case because he calculated that the period of limitations for assessment of tax for tax year 2015 would expire within nine months. AO Mack was required to report his actions taken to protect the period of limitations for each case. After evaluating the status of petitioner's case, AO Mack decided to seek her consent to extend the period of limitations because he had not received any information from petitioner since her followup call on July 9, 2018.[64]

The Appeals Officer sent the following information to the taxpayer as part of the request for her to consent to an extension of the statute:

> On August 2, 2018, AO Mack mailed to petitioner: (1) Letter 967 (Rev. 12-2016), *Consent Extending Period of Limitation Transmittal*, (2) Form 872 (Rev. 7-2014), *Consent to Extend the Time to Assess Tax, for tax year 2015*, and (3) IRS Publication 1035 (Rev. 9-2017), *Extending the Tax Assessment Period*. The Letter 967 included the following statement: "The law limits the amount of time we can assess additional tax on your federal return. This limitation period will expire before Appeals can complete the consideration of your case. Therefore, we request that you agree to extend the period." The Form 872 mailed

[63] *Evert v. Commissioner*, TC Memo 2022-48, May 9, 2022

[64] *Evert v. Commissioner*, TC Memo 2022-48, May 9, 2022

to petitioner included the following statement, titled "Your Rights as a Taxpayer":

> You have the right to refuse to extend the period of limitations or limit this extension to a mutually agreed-upon issue(s) or mutually agreed-upon period of time. Publication 1035, *Extending the Tax Assessment Period*, provides a more detailed explanation of your rights and the consequences of the choices you may make. If you have not already received a Publication 1035, the publication can be obtained, free of charge, from the IRS official who requested that you sign this consent or from the IRS' web site at www.irs.gov or by calling toll free at 1-800-TAX-FORM (1-800-829-3676). Signing this consent will not deprive you of any appeal rights to which you would otherwise be entitled.

The Publication 1035 mailed to petitioner was a four-page document explaining: (1) the statute of limitations for assessment of tax; (2) why the Commissioner may request that a taxpayer consent to extend the period of limitations for assessment; (3) the taxpayer's options and rights when the Commissioner requests such a consent; and (4) what actions the Commissioner may take in response to the taxpayer's choices. Publication 1035 explained that the Commissioner will request an extension of the period of limitations if it will soon expire because "additional time allows [the taxpayer] to provide further documentation to support [his or her] position [or] request an appeal if [he or she does] not agree with the examiner's findings." Publication 1035 further explained that a taxpayer has three options when the Commissioner requests a consent: (1) sign an unconditional consent; (2) negotiate consent terms; or (3) refuse to sign the consent. Publication 1035 included a detailed explanation of what happens if a taxpayer refuses to sign the consent, including the following:

> If [the taxpayer] choose[s] not to sign the consent, [the Commissioner] will take steps that will allow [the Commissioner] to assess any tax [the Commissioner] determine[s] to be due. These steps begin with the issuance of a formal notice [of deficiency] . . . [that] neither requires that [the taxpayer] make an immediate payment, nor that [the taxpayer] immediately take [his or her] case to the Tax Court.[65]

[65] *Evert v. Commissioner*, TC Memo 2022-48, May 9, 2022

The Court notes that Ms. Evert received the documents. She signed and returned the consent.

> Petitioner received the Letter 967, Form 872, and Publication 1035 that AO Mack mailed. On August 12, 2018, petitioner signed and returned the Form 872, agreeing to extend the period of limitations for assessment of tax for tax year 2015 to April 15, 2020. AO Mack received the signed Form 872 and, on August 16, 2018, signed the Form 872 on behalf of the IRS.[66]

While the taxpayer did promptly respond to the request to extend the statute, she still failed to provide the information she had promised to get the Appeals Officer by the end of July 2018, leading to an eventual issuance of notices of deficiency both for the 2015 year for which the statute had been extended and tax year 2016 which had also been part of the exam:

> After the Form 872 was signed, AO Mack continued to provide petitioner with the opportunity to present her positions and supporting documents in IRS Appeals for several months. Ultimately, respondent mailed the notice of deficiency for tax years 2015 and 2016 on April 17, 2019.[67]

While the taxpayer did not contest the assessment for 2016 in Tax Court, she did argue that the 2015 notice of deficiency had not been timely mailed to her:

> Petitioner timely petitioned this Court to challenge the determinations in the notice of deficiency. After the case was docketed, petitioner moved to amend her Petition to argue that she had signed the Form 872 under duress, that the Form 872 is accordingly invalid, and that respondent failed to timely mail the notice of deficiency before the period of limitations for assessment of tax for tax year 2015 expired.[68]

If the taxpayer's assertion that the Form 872 was invalid was correct, then the IRS would lose the ability to pursue the assessment against 2015 as the clock had expired.

The Tax Court's Analysis and Decision

The Tax Court described the situation as follows:

> The parties agree that petitioner timely filed her return for tax year 2015 and that the three-year limitations period provided for under section 6501(a), without extension, would have expired before the date

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[66] *Evert v. Commissioner*, TC Memo 2022-48, May 9, 2022

[67] *Evert v. Commissioner*, TC Memo 2022-48, May 9, 2022

[68] *Evert v. Commissioner*, TC Memo 2022-48, May 9, 2022

> on which respondent mailed the notice of deficiency for tax year 2015. Thus, petitioner has made the requisite prima facie showing. Respondent has introduced a Form 872 signed by petitioner on August 12, 2018, valid on its face, which extended the period of limitations through April 15, 2020. Therefore, respondent has discharged his burden of going forward. See *Ballard v. Commissioner*, T.C. Memo. 1987-471, 1987 Tax Ct. Memo LEXIS 467, at *6–7 (holding that the Commissioner met his burden of going forward when he introduced a Form 872, signed by the taxpayers on a date six months before the date the period of limitations was due to expire), *aff'd without published opinion*, 851 F.2d 359 (5th Cir. 1988).
>
> Where the Commissioner has introduced an apparently valid consent and the taxpayer asserts that the consent was ineffective, it is then the taxpayer's burden to affirmatively show the written consent is not valid. *Mecom*, 101 T.C. at 382–83; *Concrete Eng'g Co.*, 19 B.T.A. at 221–22; *Ballard*, 1987 Tax Ct. Memo LEXIS 467, at *6–7. Therefore, petitioner bears the burden of proving her contention that she signed Form 872 under duress.[69]

If the taxpayer could establish that the document had been signed under duress, the matter would be settled since the Court noted the parties had agreed the actual notice was mailed after the date the statute would have expired without a valid extension.

The Tax Court goes back to a 1929 Board of Tax Appeals case to describe what constitutes duress in the tax setting:

> The Board of Tax Appeals defined duress in *Diescher v. Commissioner*, 18 B.T.A. 353, 358 (1929), as follows:
>
>> In modern jurisprudence the definition of duress has been enlarged much beyond the narrow limits recognized in the common law. It is now well settled that if an act of one party deprives another of his freedom of will to do or not to do a specific act the party so coerced becomes subject to the will of the other, there is duress, and in such a situation no act of the coerced person is voluntary and contracts made in such circumstances are void because there has been no voluntary meeting of the minds of the parties thereto.
>
> The Board of Tax Appeals held that the taxpayer signed a waiver of the period of limitations under duress when the Commissioner threatened to impose a 100% fraud penalty should the taxpayer fail to sign the waiver. *Id.* at 357–59. In invalidating the waiver, the Board of Tax

[69] *Evert v. Commissioner*, TC Memo 2022-48, May 9, 2022

> Appeals explained that the parties "were not dealing with each other at arm's length" and that the taxpayer "was not acting with a free will, but was coerced by the will of the [Commissioner]." *Id.* at 358–59.[70]

However, the Tax Court notes that not all statements made by IRS personnel related to what will happen if an extension is not granted rise to the level of duress:

> We have also held that "actions that deprive another of her freedom of will are distinguishable from legally authorized actions that merely limit another to choose between options that are not desirable." *Hall v. Commissioner*, T.C. Memo. 2013-93, at *12. Hence, it is not duress when the Commissioner makes statements informing a taxpayer that lawful means to assess and collect the tax will be used. *Burnet v. Chi. Ry. Equip. Co.*, 282 U.S. 295, 303 (1931); *Mulford v. Commissioner*, 25 B.T.A. 238, 242–43 (1932), aff'd, 66 F.2d 296 (3d Cir. 1933). Accordingly, we have held that a taxpayer did not sign a consent under duress when the Commissioner told the taxpayer that an opportunity for an IRS Appeals conference would not be allowed if the taxpayer failed to sign a consent. *Ballard*, 1987 Tax Ct. Memo LEXIS 467, at *8 (reasoning that it was not duress for the revenue agent to inform the taxpayer that a notice of deficiency would be issued without an opportunity for administrative appeal because such statements were nothing more than notice that the Commissioner intended to use lawful means at his disposal to assess the tax); *Jarvis*, 1980 Tax Ct. Memo LEXIS 207, at *9–10 (explaining that the Commissioner's refusal to conduct an IRS Appeals conference without the taxpayers' execution of Form 872 was a necessary step in the Commissioner's pursuit of the lawful means provided for income tax assessment because holding an IRS Appeals conference without extending the period of limitations would have caused the Commissioner to issue an untimely notice of deficiency).[71]

The information available from the Appeals Officer indicated that his communications with the taxpayer were of the informational nature, not threats that rose to the level of duress:

> We conclude that petitioner has not met her burden of showing that she signed Form 872 under duress. AO Mack's testimony, his contemporaneous case notes, and the documentary evidence in the record support respondent's assertion that AO Mack requested by mail that petitioner consent to extend the period of limitations for tax year 2015 and advised petitioner that her failure to consent would cause AO Mack to close her IRS Appeals conference without giving her

[70] *Evert v. Commissioner*, TC Memo 2022-48, May 9, 2022

[71] *Evert v. Commissioner*, TC Memo 2022-48, May 9, 2022

> much additional time to provide documents. AO Mack's communications were statements about how respondent would act to assess and collect the tax he believed petitioner owed.[72]

However, the taxpayer alleged that the Appeals Officer had a conversation with the taxpayer before he mailed the forms where she alleged he made statements that would rise to the level of duress:

> Petitioner testified that AO Mack had a conversation about the consent form with her before he mailed it to her on August 2, 2018, where he allegedly made statements about what would happen if she refused to consent to extend the period of limitations.[73]

The Appeals Officer denied that any such conversation ever took place:

> AO Mack flatly denied that any conversation took place and testified that he "cold" mailed Form 872, along with Letter 967, and Publication 1035.[74]

In a footnote, the Court discussed a number of points on which the Appeals Officer contradicted the taxpayer's testimony beyond just this issue:

> AO Mack directly contradicted petitioner's testimony on several points, including whether they discussed the consent form before AO Mack's sending it on August 2, 2018. AO Mack's testimony and case notes also directly contradicted petitioner's testimony that she had already sent AO Mack additional documents substantiating some of her tax positions, he had agreed to accept her documents as sufficient to substantiate her positions, and he had threatened to go back on his agreements if she did not sign the consent. AO Mack testified that petitioner had not provided additional documentation before he mailed the consent forms on August 2, 2018.[75]

The Court notes that since it has directly conflicting testimony, the Court has to consider the credibility of the witnesses.

And now the taxpayer faced a problem, as the Court found the Appeals Officer credible, noting:

> We found AO Mack to be credible. He was an experienced IRS Appeals officer, and his testimony demonstrated significant competence in IRS procedures and administration. Moreover, his

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[72] *Evert v. Commissioner*, TC Memo 2022-48, May 9, 2022

[73] *Evert v. Commissioner*, TC Memo 2022-48, May 9, 2022

[74] *Evert v. Commissioner*, TC Memo 2022-48, May 9, 2022

[75] *Evert v. Commissioner*, TC Memo 2022-48, May 9, 2022

> testimony was supported by, and made sense in the light of, other evidence in the record. His testimony was consistent with his written case notes and the documents mailed to petitioner on August 2, 2018. We find that AO Mack was not scrambling to get petitioner's consent; he had plenty of time to allow her to receive the documents in the mail, review them, and consider his request.[76]

Conversely, the Court did not find the taxpayer's presentation sufficiently credible to overcome her burden:

> Apart from petitioner's testimony, there is no evidence that AO Mack had any conversation with petitioner about the consent form. Faced with AO Mack's credible testimony and the other evidence in the record, we did not find petitioner's testimony sufficient to meet her burden. Petitioner's testimony was uncorroborated and vague, lacked critical detail, and was not believable in the light of other evidence in the record.5 For instance, petitioner could not recall the date on which she allegedly spoke to AO Mack about the period of limitations before he sent the consent documents. We find that AO Mack "cold" mailed the Letter 967, Form 872, and Publication 1035 to petitioner, and that petitioner was not under duress when she signed and mailed back the Form 872.[77]

Although the Court doesn't go into details, the recitation of items that the Appeals Officer testified that were at odds with the taxpayer suggests a key problem was that the AO's statements were such that the taxpayer arguably should have been able to provide additional evidence to show they were untrue.

For instance, if the taxpayer had provided copies of the additional documents she had provided the agent after the July meeting, that would have gone a long way to damage the AO's credibility. Similarly, had she been able to give a date for the phone conversation that took place after their initial conference but before the request to extend the statute had been mailed, phone records documenting the call would have likely been devastating to the AO's credibility. But her inability to provide any such date or records itself became a problem for her credibility.

[76] *Evert v. Commissioner*, TC Memo 2022-48, May 9, 2022

[77] *Evert v. Commissioner*, TC Memo 2022-48, May 9, 2022