

Current Federal Tax Developments

Week of June 27, 2022

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WEEK OF JUNE 27, 2022
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Published in 2022 by Kaplan Financial Education.

Printed in the United States of America.

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WHILE IRS ANNOUNCES AGENCY HAS MET A MILESTONE IN PROCESSING RETURNS, THE NATIONAL TAXPAYER ADVOCATE POINTS OUT THE SITUATION IS WORSE THAN A YEAR AGO

FY 2023 Objectives Report To Congress, National Taxpayer Advocate, 6/22/22

While the IRS posted a news release¹ announcing the agency had hit a key milestone in dealing with paper return filings that have been backlogged since the pandemic began, the National Taxpayer Advocate issued a report² a day later showing the agency had lost ground over the past year in attempting to catch up on dealing with such returns.

IRS Completes Work on 2021 Individual Paper Returns Without Errors

The IRS's announcement on June 21 noted that the agency was meeting the following milestone for 2020 individual tax returns:

Following intensive work during the past several months, the Internal Revenue Service announced today that processing on a key group of individual tax returns filed during 2021 will be completed by the end of this week.

Due to issues related to the pandemic and staffing limitations, the IRS began 2022 with a larger than usual inventory of paper tax returns and correspondence filed during 2021. The IRS took a number of steps to address this, and the agency is on track to complete processing of originally filed Form 1040 (individual tax returns without errors) received in 2021 this week.

Business paper returns filed in 2021 will follow shortly after. The IRS continues to work on the few remaining 2021 individual tax returns

¹ "IRS continues work on inventory of tax returns; original tax returns filed in 2021 to be completed this week," IRS News Release IR-2022-128, June 21, 2022, <https://www.irs.gov/newsroom/irs-continues-work-on-inventory-of-tax-returns-original-tax-returns-filed-in-2021-to-be-completed-this-week> (retrieved June 25, 2022)

² FY 2023 Objectives Report To Congress, National Taxpayer Advocate, June 22, 2022, <https://www.taxpayeradvocate.irs.gov/reports/2023-objectives-report-to-congress/full-report/> (retrieved June 25, 2022), "National Taxpayer Advocate issues mid-year report to Congress; expresses concern about continued refund delays and poor taxpayer service," IRS News Release IR-2022-129, June 22, 2022, <https://www.taxpayeradvocate.irs.gov/reports/2023-objectives-report-to-congress/newsroom/> (retrieved June 25, 2022)

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that have processing issues or require additional information from the taxpayer.³

Of course, returns filed in 2021 are generally returns for calendar year 2020, so this implies that the agency still has a long way to go on 2021 paper filed returns. The news release urges taxpayers who have not yet filed a 2021 return to do so electronically if possible.

The IRS reminds millions of taxpayers who have not yet filed their 2021 tax returns this year – including those who requested an extension until October 17 – to make sure they file their returns electronically with direct deposit to avoid delays. People who use e-file avoid the delays facing those who file paper returns; e-filed returns with no errors are typically processed in 21 days.

The IRS also urges people to file as soon as they are ready. There is no need to wait until the last minute before the October 17 extension deadline. Filing sooner avoids potential delays for taxpayers, and it also assists the larger ongoing IRS efforts to complete processing tax returns this year.⁴

But This Doesn't Mean the Situation Is Actually Improving

The following day the National Taxpayer Advocate presented her mid-year report to Congress. While nothing in the report contradicts what the IRS news release said, it places that information in context, making clear that even though a key milestone was met the IRS has fallen further behind in handling paper returns over the past year.

A news release accompanying the report begins:

National Taxpayer Advocate Erin M. Collins today released her statutorily mandated mid-year report to Congress. The report expresses concern about continuing delays in the processing of paper-filed tax returns and the consequent impact on taxpayer refunds. At the end of May, the agency had a backlog of 21.3 million unprocessed paper tax returns, an increase of 1.3 million over the same time last year.

“The IRS has said it is aiming to crush the backlogged inventory this year, and I hope it succeeds,” Collins wrote. “Unfortunately, at this point the backlog is still crushing the IRS, its employees, and most

³ “IRS continues work on inventory of tax returns; original tax returns filed in 2021 to be completed this week,” IRS News Release IR-2022-128, June 21, 2022

⁴ “IRS continues work on inventory of tax returns; original tax returns filed in 2021 to be completed this week,” IRS News Release IR-2022-128, June 21, 2022

importantly, taxpayers. As such, the agency is continuing to explore additional processing strategies.”⁵

The news release comments on the status of dealing with individual paper returns:

More than 90% of individual income taxpayers e-file their returns, yet last year, about 17 million taxpayers filed their returns on paper. Some choose to file on paper. Some have no choice because they encounter e-filing barriers, such as when they are required to file a tax form or schedule the IRS cannot accept electronically. Before the pandemic, the IRS typically delivered refunds to paper-filers within four to six weeks. Over the past year, refund delays on paper-filed returns have generally exceeded six months, with delays of 10 months or more common for many taxpayers.

The report says the IRS has failed to make progress in eliminating its paper backlog because “its pace of processing paper tax returns has not kept up with new receipts.” During the month of May, the IRS processed an average of about 205,000 individual income tax returns (Forms 1040) per week. Its Form 1040 backlog at the end of May stood at 8.2 million, with millions more paper tax returns not yet classified or expected to arrive before the extended filing deadline of October 15. The report says the IRS would have to process well over 500,000 Forms 1040 per week – more than double its current pace – to eliminate the backlog this year. “The math is daunting,” the report says.⁶

⁵ “National Taxpayer Advocate issues mid-year report to Congress; expresses concern about continued refund delays and poor taxpayer service,” IRS News Release IR-2022-129, June 22, 2022

⁶ “National Taxpayer Advocate issues mid-year report to Congress; expresses concern about continued refund delays and poor taxpayer service,” IRS News Release IR-2022-129, June 22, 2022

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The release summarizes the status of paper filings in late May in the current and prior year in the following table:

	Individual	Business	Not Specified	Total
Paper Returns Awaiting Processing – 2021				
Original Returns	6,100,000	5,600,000	5,100,000	16,800,000
Amended Returns	2,700,000	500,000	-	3,200,000
Total Paper Returns Awaiting Processing	8,800,000	6,100,000	5,100,000	20,000,000
Paper Returns Awaiting Processing – 2022				
Original Returns	8,200,000	6,500,000	3,400,000	18,100,000
Amended Returns	2,300,000	900,000	-	3,200,000
Total Paper Returns Awaiting Processing	10,500,000	7,400,000	3,400,000	21,300,000

Figure 1: Status of Unprocessed Paper Tax Returns Comparing Weeks Ending May 22, 2021 and May 27, 2022⁷

The report also notes major problems exist with the IRS’s handling of correspondence. The news release provides:

Through May 21, the IRS processed 5 million taxpayer responses to proposed adjustments. It took an average of 251 days to do so – more than eight months. That is more than triple the processing time of 74 days in fiscal year 2019, the most recent pre-pandemic year. “When a math error or similar notice is generated in connection with a paper-filed tax return,” the report says, “the combination of the return processing delay and the correspondence processing delay may mean that the taxpayer must wait well over a year to get the issue resolved and receive the refund due.”⁸

Taxpayers who were the victims of identity theft also face extreme delays. The news release notes:

There are currently over 336,000 taxpayers who could not file their returns or receive their refunds because identity thieves had already filed a return using their identifying information. These taxpayers must submit affidavits and other documentation to substantiate their identities. They now generally must wait at least a year to receive their refunds. The IRS website states: “[D]ue to extenuating circumstances caused by the pandemic our identity theft inventories have increased

⁷ “National Taxpayer Advocate issues mid-year report to Congress; expresses concern about continued refund delays and poor taxpayer service,” IRS News Release IR-2022-129, June 22, 2022

⁸ “National Taxpayer Advocate issues mid-year report to Congress; expresses concern about continued refund delays and poor taxpayer service,” IRS News Release IR-2022-129, June 22, 2022

and on average it is taking about 360 days to resolve identity theft cases.”⁹

Tax professionals know all too well that the IRS is currently unable to answer the vast majority of calls to their phone lines, and the news release gives data on this as well.

During the 2022 filing season, the IRS received about 73 million telephone calls. Only one out of 10 calls reached an IRS employee. Compared with the 2021 filing season, IRS employees answered less than half as many calls, but the percentage of calls answered remained about the same because they also received less than half as many calls. The time the average taxpayer spent waiting on hold rose from 20 minutes to 29 minutes. ...

“The combination of more than 21 million unprocessed paper tax returns, more than 14 million math error notices, eight-month backlogs in processing taxpayer correspondence, and extraordinary difficulty reaching the IRS by phone made this filing season particularly challenging,” Collins wrote.¹⁰

The news release provided a table comparing the IRS’s telephone performance in the past two years:

Filing Season	Calls Received	Number of Calls Answered by an IRS Employee	Percentage of Calls Answered by an IRS Employee	Time on Hold
2021	167 million	15.7 million	9%	20 minutes
2022	73 million	7.5 million	10%	29 minutes

Figure 2: IRS Enterprise Telephone Results Comparing Weeks Ending May 21, 2021, and April 23, 2022¹¹

⁹ “National Taxpayer Advocate issues mid-year report to Congress; expresses concern about continued refund delays and poor taxpayer service,” IRS News Release IR-2022-129, June 22, 2022

¹⁰ “National Taxpayer Advocate issues mid-year report to Congress; expresses concern about continued refund delays and poor taxpayer service,” IRS News Release IR-2022-129, June 22, 2022

¹¹ “National Taxpayer Advocate issues mid-year report to Congress; expresses concern about continued refund delays and poor taxpayer service,” IRS News Release IR-2022-129, June 22, 2022

SUPREME COURT TO RESOLVE SPLIT AMONG CIRCUITS ON HOW TO APPLY FBAR PENALTIES

Supreme Court Grant of Cert. 21-1195 BITTNER V. UNITED STATES, 6/21/22

The US Supreme Court has agreed to hear the taxpayer's appeal of the Fifth Circuit Court of Appeals decision in the case of *Bittner v. United States*.¹² The key issue is whether, in assessing penalties for failing to report interests in foreign accounts on an annual FBAR, the penalties apply on a per-account or per-reporting form basis, a matter which was decided differently in 2021 cases heard by the Fifth and Ninth Circuits.

The Court summarized the issue to be decided as follows:

Whether a “violation” under the Act is the failure to file an annual FBAR (no matter the number of foreign accounts), or whether there is a separate violation for each individual account that was not properly reported.¹³

The document granting certiorari provides the following information regarding the case and why the Supreme Court is taking up the matter:

This case presents a direct and acknowledged conflict regarding an important question of statutory construction under the Bank Secrecy Act, 31 U.S.C. 5311 *et seq.*, which generally requires taxpayers to report their interests in foreign bank accounts.

Under the Act, Congress instructed the Treasury Secretary to “require a resident or citizen of the United States * * * to keep records, file reports, or keep records and file reports, when the * * * person makes a transaction or maintains a relation for any person with a foreign financial agency.” 31 U.S.C. 5314(a). The Secretary's corresponding regulations require filing a single annual report (called an “FBAR”) for anyone with an aggregate balance over \$10,000 in foreign accounts. 31 C.F.R. 1010.350(a), 1010.306(c). The Act authorizes a \$10,000 maximum penalty for any non-willful violation of Section 5314. See 31 U.S.C. 5321(a)(5)(A)-(B).

¹² Supreme Court Grant of Cert. 21-1195 BITTNER V. UNITED STATES, June 21, 2022, <https://www.supremecourt.gov/qp/21-01195qp.pdf> (retrieved June 25, 2022), *Bittner v. United States*, CA5, Docket No. 20-40597, November 30, 2021, <https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/fifth-circuit-holds-non-willful-fbar-penalties-apply-per-account/7cn4d?h=Bittner> (retrieved June 25, 2022)

¹³ Supreme Court Grant of Cert. 21-1195 BITTNER V. UNITED STATES, June 21, 2022

In the decision below, the Fifth Circuit held that there is a separate violation (with its own \$10,000 penalty) for each foreign account not timely reported on an annual FBAR; it thus authorized a penalty on “a per-account, not a per-form, basis.” In so holding, the Fifth Circuit expressly rejected a contrary decision of the Ninth Circuit, which held the failure to file an annual FBAR constitutes a single violation, “no matter the number of accounts.” This critical issue arises all the time, and the Act’s penalties for identically situated parties will now turn on whether the taxpayer is from California or Texas.¹⁴

The Ninth Circuit opinion referenced by the Supreme Court was for the case of *United States v. Boyd*.¹⁵

For the taxpayer whose case is before the Supreme Court, applying the penalty on a per account basis added up to a total penalty of \$2.72 million, while if the Ninth Circuit’s per FBAR report basis had been followed the penalty would have amounted to \$50,000.

No date has been given for oral arguments, but the Court just ended its current term. Its new term will begin in October.

IRS ADDS VOICE BOTS FOR CERTAIN ACS MATTERS

“IRS expands voice bot options for faster service, less wait time,” IRS News Release IR-2022-127, 6/17/22

The IRS in News Release IR-2022-127¹⁶ announced they have made available automated voice bot options to assist taxpayers in verifying their identities and setting up payment plans.

The release begins:

The Internal Revenue Service today announced expanded voice bot options to help eligible taxpayers easily verify their identity to set up or modify a payment plan while avoiding long wait times.

“This is part of a wider effort at the IRS to help improve the experience of taxpayers,” said IRS Commissioner Chuck Rettig. “We continue to look for ways to better assist taxpayers, and that includes

¹⁴ Supreme Court Grant of Cert. 21-1195 BITTNER V. UNITED STATES, June 21, 2022

¹⁵ *United States v. Boyd*, CA9, Docket No. 19-55585, March 24, 2021, <https://cdn.ca9.uscourts.gov/datastore/opinions/2021/03/24/19-55585.pdf> (retrieved November 30, 2021)

¹⁶ “IRS expands voice bot options for faster service, less wait time,” IRS News Release IR-2022-127, June 17, 2022, <https://www.irs.gov/newsroom/irs-expands-voice-bot-options-for-faster-service-less-wait-time> (retrieved June 25, 2022)

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helping people avoid waiting on hold or having to make a second phone call to get what they need. The expanded voice bots are another example of how technology can help the IRS provide better service to taxpayers.”¹⁷

The new bots rolled out for the Automated Collection System (ACS) are described as follows:

Eligible taxpayers who call the Automated Collection System (ACS) and Accounts Management toll-free lines and want to discuss payment plan options can authenticate or verify their identities through a personal identification number (PIN) creation process. Setting up a PIN is easy: Taxpayers will need their most recent IRS bill and some basic personal information to complete the process.¹⁸

The release explains, in general, what voice bots are:

Voice bots run on software powered by artificial intelligence, which enables a caller to navigate an interactive voice response. The IRS has been using voice bots on numerous toll-free lines since January, enabling taxpayers with simple payment or notice questions to get what they need quickly and avoid waiting. Taxpayers can always speak with an English- or Spanish-speaking IRS telephone representative if needed.

...

“To date, the voice bots have answered over 3 million calls. As we add more functions for taxpayers to resolve their issues, I anticipate many more taxpayers getting the service they need quickly and easily,” said Darren Guillot, IRS Deputy Commissioner of Small Business/Self Employed Collection & Operations Support.¹⁹

This bot is not the first voice bot rolled out by the IRS. The release notes:

In addition to the payment lines, voice bots help people who call the Economic Impact Payment (EIP) toll-free line with general procedural responses to frequently asked questions. The IRS also added voice bots for the Advance Child Tax Credit toll-free line in February to provide

¹⁷ “IRS expands voice bot options for faster service, less wait time,” IRS News Release IR-2022-127, June 17, 2022

¹⁸ “IRS expands voice bot options for faster service, less wait time,” IRS News Release IR-2022-127, June 17, 2022

¹⁹ “IRS expands voice bot options for faster service, less wait time,” IRS News Release IR-2022-127, June 17, 2022

similar assistance to callers who need help reconciling the credits on their 2021 tax return.²⁰

The agency has plans to expand the use of voice bots in additional areas in 2022, noting:

Additional voice bot service enhancements are planned in 2022 that will allow authenticated individuals (taxpayers with established or newly created PINs) to get:

- Account and return transcripts.
- Payment history.
- Current balance owed.²¹

At the same time the news release was posted, the agency posted a short video on YouTube describing the automated collection bot. The video can be viewed at

<https://youtu.be/YX5LCHsuGSU>

²⁰ “IRS expands voice bot options for faster service, less wait time,” IRS News Release IR-2022-127, June 17, 2022

²¹ “IRS expands voice bot options for faster service, less wait time,” IRS News Release IR-2022-127, June 17, 2022