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Monday, June 10, 2013

## Taxpayer responds to IRS 2,545 days late — wins

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You filed your personal tax return - IRS Form 1040 (and the California Form 540) - on time on April 15. Or perhaps you filed an extension and will not file your returns until Oct. 15. In either case, you fervently hope that date is the last time you will have to think about tax year 2012. However, national statistics show that there is a 1 percent chance that any of the 145,000,000 individual taxpayers who file returns might be audited by the IRS. (Statistics are not as easily available for the Franchise Tax Board. However, the chances of audit may be half as high.) If your income is greater than \$200,000, that increases to 3.2 percent. If your income is

greater than \$1,000,000 that increases to 12.1 percent - a one in eight chance.

How will the IRS audit begin? Typically within one year to 18 months you will receive Letter 2205-A from the El Monte office of the IRS, which begins as follows: "Your federal return for the period(s) shown above has been selected for examination. Please call me on or before the response date listed at the top of this letter. ... The issues listed below are the preliminary items identified for examination. During the course of the examination, it may be necessary to expand or contract the list of items." You or your representative, typically the CPA who prepared your return, may meet and talk with the IRS agent. If agreement is not reached, you will ultimately receive another letter from the IRS. It might be marked Letter 531-T or 531(DO). However, the words NOTICE OF DEFICIENCY will appear in capital letters and bold type in the middle of the page. On the upper right side of the page is a date stamp which is labeled the "Last Day to File a Petition With the United States Tax Court." If you wish to contest the tax, without paying the tax, you must file a petition in the tax court no later than that date, which is 90 days after the date of the Notice of Deficiency. (You can use T.C. Form 2 to file a petition in tax court, though most experienced lawyers prefer their own format.) Otherwise, you must pay the tax; file a claim for a refund; and when the claim is denied, sue for a refund in either U.S. district court or the U.S. Court of Claims.

As you can imagine, most taxpayers wish to contest the deficiency without first paying the tax. Therefore, the 90-day deadline is extremely important. There are only four exceptions to the 90-day rule. For example, you have 150 days if the notice is addressed to a person outside the U.S. The time period is tolled or suspended if the taxpayer is serving in a combat zone or affected by a presidentially declared disaster. Tolling is also triggered when the automatic stay for bankruptcy precludes the filing of a petition challenging a Notice of Deficiency. If the taxpayer misses the deadline, the IRS can proceed to assess and collect the tax.



There is a favorable rule for taxpayers who mail petitions to the tax court before the 90-day period expires but the petitions are received after the period for filing has ended. The "timely mailing/timely filing" rules provide that the petition is deemed timely filed if it is delivered after the due date but the envelope bears a U.S. postmark date within the time for filing. The petition is also deemed timely filed if a certified or registered mail receipt is produced, even though the envelope containing the petition is lost in the mail and is never delivered to the tax court. By contrast, if the petition is sent by ordinary mail and the envelope is never received, the court may not allow other evidence concerning the mailing.

We have seen on the news lately of how paper files are stacking up in government buildings with hundreds of thousands of applications from veterans for benefits and, as a result, how it is taking months and years to process their claims. Imagine the same situation, except multiplied by 200, and you get an idea of what the underfunded IRS is facing. So, what happens when the IRS mails the Notice of Deficiency to the taxpayer and cannot later produce a copy of it?

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In *Galluzzo v. Commissioner*, T.C. Memo 2013-136 (May 30, 2013), the taxpayers credibly testified that they did not receive Notices of Deficiency for 1999-2001. The IRS was unable to locate the administrative file and, therefore, was unable to provide the court or the taxpayers with copies of the Notices of Deficiency. The IRS was able to produce a U.S. Postal Service Form 3877 which states that a Notice of Deficiency for the three years was mailed, in a timely fashion, to the taxpayers on June 2, 2005. According to their lawyer, Ken Cohen, the Galluzzos filed in tax court because the IRS was pursuing collection actions against them for the alleged deficiencies. However, they did not file within 90 days. In fact they were 2,545 days late. Obviously, the IRS objected to the petition as being late.

Happily for Mr. and Mrs. Galluzzo, there was already precedent that U.S. Postal Service Form 3877, in the absence of a copy of the Notice of Deficiency, is inadequate grounds on which to expect a taxpayer to pay. In this case, the IRS was unable to produce a draft copy of the notices of deficiency or any testimony from IRS employees who helped in the preparation of the notices of deficiency. As a result, not only did the IRS lose on the motion to dismiss the taxpayer's petition, the IRS lost on the deficiency itself. The moral of the story is that taxpayers should keep meticulous records, and not assume that the IRS will always be able to do the same.

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