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Low-Income Taxpayers and the Modernized IRS: A View from the Trenches

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LOW-INCOME TAXPAYERS AND THE MODERNIZED IRS: A VIEW FROM THE TRENCHES

By Janet Spragens and Nancy Abramowitz

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This article examines the continuing effects on low-income taxpayers of the 1998 Internal Revenue Service reorganization and computer modernization of the agency. Specifically, the article highlights the severe hardships that have been experienced by that segment of the taxpayer population resulting from agency efforts to streamline resolution of postfiling disputes. Those efforts include acceleration of the administrative process, centralization of agency function, elimination of local contracts, and increasing reliance on computer-generated correspondence. The authors believe that the net result for many taxpayers has been the trading of fairness for administrative efficiency and the contraction — and often denial — of taxpayer prepayment rights.

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I. Introduction

The Internal Revenue Service Restructuring and Reform Act of 1998[1] initiated a vast reorganization of the IRS that is evolving even today as the Service continues to streamline its processes of tax administration. In the seven years since the restructuring act was passed, the reorganization (sometimes referred to hereinafter as IRS modernization) and the computer upgrade that accompanied it, have had a far-reaching effect on the way taxpayers do business with the IRS.

In many ways, the changes in agency structure under IRS modernization have generated significant efficiency gains and advancements for the IRS and for taxpayers. For many individual taxpayers whose returns are not accepted as filed, however, the changes brought about by the reorganization have almost uniformly made dealing with the agency more difficult, impersonal, frustrating, and costly. The changes have taken a particular toll on low-income taxpayers, many of whom do not speak English, are not connected to the Internet, and who do not have ready access to much of the technology on which IRS processes are often premised (for example, Web sites, telecopy communications, and so forth). Those taxpayers tend to be better helped through local walk-in offices and opportunities to resolve their controversies in face-to-face meetings rather than through an organizational structure based on geographically remote specialized campuses, computerized telephone trees with automated selections, computer-generated correspondence, and electronic transfers.

For low-income taxpayers, the efficiency gains under modernization, achieved by the IRS's increasing reliance on specialized offices and computer generated notices, have often come at the expense of fairness. An interesting outgrowth from the reorganization has been the regularity with which low-income taxpayers have been falling out of the regular administrative controversy resolution processes, and their increasing dependence on alternative ''back-door'' problem-solving avenues to get to the right result in their cases, after the case has been transferred to collections. Those alternative processes include audit reconsideration, offers-in-compromise (based on ''doubt as to liability''), currently noncollectible (CNC) status, collections due process (CDP) hearings, and hardship appeals to the office of the National Taxpayer Advocate.

But a review of a case once it is in collections, even a ''substantive issue'' one, is not the same as receiving a fair review during the initial audit of the case. Moreover, it is not clear what will happen to those taxpayers once section 6306 (involving outsourcing of debt collections) becomes operational and their names are forwarded to private debt collectors with limited information about (or interest in) the correctness of the original return.

[1]Pub. L. No. 105-206, 112 Stat. 685 (1998) (the restructuring act).

The authors both teach in the American University Federal Tax Clinic and supervise third-year law school student-attorneys who represent low-income taxpayers in controversy and collection matters with the IRS. From that perspective, they have had front-row seats to see the problems low-income taxpayers have been experiencing in the IRS in recent years. Their observations — as well as their suggestions for what the IRS can do to improve service to those taxpayers — are the subject of this article.

II. The 1998 Reorganization

The 1998 IRS reorganization created four operating divisions, each having ''end-to-end'' responsibility for the needs of taxpayers within their jurisdictional groupings. That structure replaced a system based on local offices with overlapping functions in 33 districts and 9 regions. The purpose of the reorganization was to bring the agency's methods of doing business into the 21st century and to move the agency toward an interactive, technologically advanced, and efficient system of tax administration.

An integral part of the reorganization has been the automation and computerization of many IRS functions, as well as the centralization of many of those functions in the campuses: For example, innocent spouse claims are now worked exclusively at the Covington, Kentucky, campus. Offers in compromise go to Brookhaven, N.Y., and Memphis. Docketed ''S'' cases are reviewed by Appeals at the Philadelphia and Fresno campuses. EITC certification,[2] if instituted, will be handled in Kansas City.

The model that Congress and the Clinton administration used for the IRS reorganization to a large extent relied on organizational principles that many large corporations had employed in the prior decade to enhance customer service. In the committee reports accompanying the 1998 legislation, Congress expressed its view that the public was not being properly served by an agency focused solely on revenue collection.[3] Congress's intent was to restructure the IRS's priorities and put more emphasis on taxpayer service.[4] By grouping similarly situated taxpayers together and focusing agency personnel on their needs, Congress also anticipated efficiency gains as IRS employees developed expertise in particular areas.[5] The new structure, Congress believed, would not only be more taxpayer friendly, it would also be more streamlined and efficient, and it would better serve the needs of accountability and continuity.[6]

Interestingly, the 1998 legislation also had as one of its principal goals the enhancement of taxpayer rights in dealing with the agency. Included in the legislation were provisions for shifting the burden of proof from the taxpayer to the government in the Tax Court in certain cases,[7] extending attorney-client privilege to accountants and enrolled agents,[8] expanding the IRS's ability to compromise taxpayer debts,[9] and expanding innocent spouse relief.[10] The law also redesigned and enhanced the responsibilities of the national taxpayer advocate,[11] and created a matching grant program for tax clinics that represented low-income taxpayers in controversies with the agency.[12]

Under the reorganization, the movement toward centralization of functions at the campuses has been accompanied by reductions in the number of IRS walk-in centers (now known as taxpayer assistance centers or TACs), and reduced staffing and hours of operation at those centers. TACs offer a variety of services to both English-speaking and Spanish-speaking taxpayers, including tax return preparation for taxpayers earning less than $36,000 a year and agency employees who will answer taxpayers' questions about the law, explain IRS letters and notices, and help taxpayers with collections matters (for example, release of levies on wages, or installment payment plans). TACs can also check on the status of a refund or other adjustment to the taxpayer's tax account. Taxpayers need not make an appointment to use TAC services or meet with a TAC employee. They can simply go to the center, take a number, and wait their turn. That is particularly appealing to seniors who may have the luxury of time to wait for service and who may not be Internet savvy, as well as to taxpayers with limited English proficiency (LEP) who prefer to explain their problem in person, to an individual behind a desk, rather than over the phone in a language not native to them.

The IRS budget request for Fiscal 2006 proposed almost a $39 million reduction for taxpayer service.[13] *Tax Notes* reported earlier this year that the IRS is currently considering closing more than 100 TACs as a result of budgetary pressure.[14] That is roughly one-fourth of all TACs. On June 6, *Tax Notes* reported that the Service has decided to close 68 TACs.[15]

By some measures, the reorganization has fully delivered the efficiency and computer modernization gains it was intended to produce. For example, more than 60 million taxpayers in the United States e-filed their tax returns last year,[16] resulting in faster processing, faster

[2]*See* section D below.
[3]S. Rep. No. 105-174, at 8 (1998); H.R. Rep. No. 105-599, at 194 (1998).
[4]H.R. Rep. No. 105-364, pt. 1, at 34 (1997); S. Rep. No. 105-174, at 8-9 (1998).
[5]H.R. Rep. No. 105-364, pt. 1, at 35 (1997); S. Rep. No. 105-174, at 12 (1998).
[6]H.R. Rep. No. 105-364, pt. 1, at 46 (1997); S. Rep. No. 105-174, at 9 (1998).
[7]Section 7491, added by restructuring act section 3001. Section references are to the Internal Revenue Code of 1986, as amended, except as otherwise noted.
[8]Section 7525, added by restructuring act.
[9]Section 7122, added by resructuring act.
[10]Section 6015, added by restructuring act.
[11]S. Rep. No. 105-174, at 23-24 (1998).
[12]Section 7526, added by restructuring act.
[13]Internal Revenue Service, ''The Budget in Brief, Fiscal Year 2006,'' Department of the Treasury, at 1 (February, 2005), http://www.irs.gov/pub/irs-utl/bib_irs.pdf.
[14]Kenney, A., ''Déjà Vu? Bush wants $500 Million for IRS to Toughen Up in 2006,'' *Tax Notes*, Feb. 14, 2005, p. 747.
[15]Kenney, A., ''IRS Announces Plans to Close Taxpayer Assistance Centers,'' *Tax Notes*, June 6, 2005, p. 1219.
[16]Kenney, A. ''Electronic Filing Reaches Record High in 2004,'' *Tax Notes*, May 17, 2004, p. 790.

refunds, direct deposit of refund checks, immediate verification of certain return information, and enormous savings for the IRS in terms of putting taxpayer data into the system. IRS forms, instruction booklets, notices, and publications as well as other valuable information are all now available for downloading from the IRS Web site — a huge convenience. And with IRS electronic processing significantly accelerating the payment of refunds, the system reduces the attractiveness of high-interest refund anticipation loans (RALs) and other short-term loan products that erode the amounts received from the EITC and otherwise prey on low-income taxpayers.[17]

Insofar as controversy resolution for low- and middle-income taxpayers is concerned, however, the reorganization has not enhanced taxpayer rights and service. In fact, in our experience, the trend has been in the opposite direction.

III. Taxpayer Rights Under IRS Modernization

A. The Postfiling Issues of Low-Income Taxpayers

As we have written about before,[18] contrary to the popular stereotype, low-income taxpayers do not all have simple, audit-proof returns consisting essentially of wage and salary income subject to wage withholding, and the standard deduction. Many of those taxpayers claim the earned income tax credit, which can be an economic lifeline but also an audit magnet. Returns of low-income wage earners also contain a variety of other items with audit potential, such as the child credit, dependent care credit, education credits, head of household filing status, income from disability pensions, in-kind charitable contributions, premature IRA distributions, and gambling losses — to name a few.

Moreover, many low-income taxpayers are entrepreneurs with their own small businesses — for example, as food service providers, taxi drivers, hairdressers, roofers, merchants, child care providers, or carpet installers — and, as a result, are required to file quarterly estimates of tax, pay self-employment taxes, and claim business deductions on schedule C. Often, those self-employed low-income taxpayers have only the most rudimentary understanding about the recordkeeping necessary to meet filing requirements or about the filing requirements themselves.

A growing number of low-income taxpayers are limited english proficiency (LEP) taxpayers and face major language barriers in understanding their tax obligations and the avenues for challenging IRS disallowance of their filing positions. Many of those taxpayers seek help with their tax obligations from professional preparers, but their inability to communicate in English often leads them to seek out preparers who speak their language without checking the preparer's credentials or training in taxation. The advice they get from those preparers can range from excellent to incompetent to totally fraudulent. If the taxpayers are undocumented workers, they may be more likely to become embroiled in issues with the IRS involving erroneous Social Security numbers or identity theft.

Fair resolution of those cases has traditionally involved cultural, communication, language, and other barriers for the IRS that are different from those raised in cases involving other taxpayers. In resolving those issues successfully, an important part of the process has historically involved allowing the taxpayers the time and opportunity to have a face-to-face meeting with IRS employees. Taxpayers in that demographic tend not to keep good records, and the face-to-face meetings afford taxpayers an opportunity to tell their stories and for the government to assess their credibility, ask them questions, and elicit facts that the taxpayers might not otherwise know could be relevant. The opportunity for taxpayers to describe their circumstances has been very important in reaching correct resolutions, particularly when the issues have involved family status, family relationships, and living patterns (for example, the EITC, filing status, dependency exemptions, and the child credit) — issues that are often not amenable to proof by cancelled checks and other financial records. Even the communications to arrange the meetings added time, focus, and deliberation to the process for involved taxpayers, helping them to better understand what was happening.

The need for individual attention and consideration of taxpayer circumstances has also been very important when offers in compromise based on ''effective tax administration,'' or innocent spouse claims based on equitable grounds, have been involved. Those cases are not easily routinized, because taxpayer circumstances are so different.

B. Controversy Resolution Under Modernization

Increasingly, individual audits under modernization are being conducted long distance via mail, including all EITC audits. Those audits for the most part are based on notices that are computer generated on the IRS campuses. In the notices, the IRS requests that the taxpayer's information and supporting documents be mailed to the campus officer working the case. When a taxpayer responds to the notice by submitting records and other information, there is (based on our anecdotal experience and the experiences of other clinics) very little reaching out to or attempting to contact taxpayers who send in partial responses to requests for information, or to those who send in information that is not in the precise form requested by the agency. The emphasis is on rapid case processing with minimum resources expended — and reduced discretion of IRS employees to accept alternative forms of proof — to produce uniform results. That often translates into the prompt issuance of a deficiency notice shortly after the filing of a return, sometimes as quickly

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[17]Berube, Kim, Forman, and Burns, ''The Price of Paying Taxes: How Tax Preparation and Refund Loan Fees Erode the Benefits of the EITC,'' *The Brookings Institution and Progressive Policy Institute Survey Series* (May 2002).

[18]*See* Spragens and Abramowitz, ''IRS Modernization and Low-Income Taxpayers,'' 53 *Admin. L. Rev.* 701 (2001); Spragens and Olson, ''Tax Clinics: The New Face of Legal Services,'' *Tax Notes*, Sept. 18, 2000, p. 1525; Spragens, ''Welfare Reform and Tax Counseling: Overlooked Part of the Welfare Debate,'' *Tax Notes*, Oct. 21, 1996, p. 353. *See also Testimony of Janet Spragens before the IRS Oversight Board, 2005, 2004, 2003, 2002*, http://www.treas.gov/irsob/meetings.

as within six to eight months (or less) of the filing date. The taxpayer is then required to file a petition in the Tax Court to engage in a dialogue with anyone in an effort to resolve the issue.[19]

Efficiency goals have also led the IRS to issue so-called combination letters in all EITC audits. Those letters, which the IRS has stated it will begin phasing out in 2006, combine the traditional two-step examination/appeals process in which an IRS examiner first asks the taxpayer for documentation or other information to support a claimed return position and then sends him proposed adjustments in a ''30-day letter'' that allows the taxpayer to request an administrative appeal. The ''combination letter,'' which is the first correspondence to the taxpayer regarding examination of the return, asks him to forward the requested information *or* to request an administrative appeal — all within 30 days of the date of the letter. If the taxpayer does not reply within 30 days, or if the information sent does not satisfy the IRS, the next letter the taxpayer gets is a notice of deficiency. If the taxpayer then does not file a Tax Court petition within 90 days of receiving the deficiency notice, the tax is assessed and the case is sent to Collections. In many cases that all occurs before the taxpayer has a full understanding that the time to contest the merits of the IRS's position has expired.

Moreover, under modernization each tax year is processed as a separate case, often by different campuses. A common scenario we have seen as a result is taxpayers throwing away the deficiency notice for the subsequent year, believing it to be simply a copy of the notice for a prior year. By doing so, the taxpayer loses the right to Tax Court review of the disallowance, even though he may believe that the benefit on the return was correctly claimed and even though he has filed a petition in the Tax Court to litigate the first year. The taxpayer must then deal with collections (or audit reconsideration) for the defaulted year while dealing with area counsel for the primary year. Because the proof and issues will overlap in those cases, and because the administrative file in the case has been sent to counsel, the IRS representative attempting to resolve the second year's case will be dealing for the most part with computer entries to obtain knowledge about the taxpayer's circumstances.[20]

Another trend we have been seeing in the last several years has been the IRS's increasing use of math error authority, under section 6213, to process cases. Math error authority historically has applied to cases in which the tax return shows an obvious and clear error, for example, when there is an addition, subtraction, multiplication, or division error on the return; an omission of required information; or an incorrect use of a tax table. Under math error authority, the IRS can assess the additional tax due without first allowing the taxpayer to exercise rights under the more lengthy examination deficiency procedures. Under math error procedures, the taxpayer has only very limited time — as offered in less than a clear notice — to challenge the math error determination before the ''error'' is assessed.[21]

Under section 6213(g), enacted in 1976, Congress authorized the IRS to use math error procedures in EITC audits when data from the Federal Case Registry (FCR) is inconsistent with the return. The FCR is a federally maintained database, based on reports from state agencies, that contains child support orders indicating the parent with whom a child resides. That information is used by the IRS to determine whether the taxpayer is the custodial parent, a requirement for claiming the credit. But information regarding child custody is not static and unchanging as is, for example, birth date information obtained by the IRS from the Social Security Administration. Taxpayers' living and custody circumstances can change frequently, making the FCR information out of date.

A few examples illustrate some of the problems that are occurring today in the modernized IRS:

Example 1: Assume a taxpayer receives a combination letter challenging her entitlement to the earned income tax credit and requesting documentation — for example, school records, medical records, birth certificates — that the taxpayer's child was related to her and lived with her for more than half of the year. The letter asks for a response within 30 days, the information to be sent to one of the IRS campuses remote to her. Assume further that it takes some time for the taxpayer to collect the information, but the taxpayer does so and sends it to the agency on the 29th day. However, before the taxpayer's information is forwarded to the person working the case, the IRS computer, which generated the original notice and has been programmed to act on the 30th day, sends the taxpayer a notice of deficiency by return mail. The taxpayer is understandably confused because it is unclear why the documentation has been turned down or whether it even has been considered. However, because the taxpayer has received a notice of deficiency, the taxpayer must file a petition in the Tax Court within 90 days to keep the case open. Because the taxpayer thought her timely submission took care of the problem, she does not file in the Tax Court. Accordingly, the taxpayer, who correctly claimed the credit, will be effectively denied any substantive review of the proposed deficiency and the case will show up in IRS statistics as a misclaim of the credit.

Example 2: The second taxpayer receives the same letter, but he responds on the 15th day. However, this taxpayer, who is a recent immigrant to the United States, cannot produce all the information the IRS has requested; for example, he does not have a birth certificate for the child who was born in Sierra Leone. However, the taxpayer states that he is willing to testify or submit

[19]We have recently seen several taxpayers who were told by the IRS early in the administrative process that if they didn't have the exact papers requested, ''just wait for a 90-day letter, go to Tax Court, and talk to IRS Area Counsel.'' Not only is that inefficient, but it also exacts a Tax Court filing fee as a toll charge to speak to the IRS. It also may prolong the receipt of a claimed refund by many months or more.

[20]This problem is not insignificant. We raised it in a letter to the IRS some years ago, but the problem continues unabated. *See* Spragens and Abramowitz, letter to Chief Counsel Stuart Brown, *Doc 1999-27217, 1999 TNT 160-20* (Aug. 16, 1999).

[21]Section 6213(b).

affidavits (as are others) about the child. Without any attempt to contact the taxpayer, the IRS denies the claim and sends the taxpayer a notice of deficiency. The taxpayer fails to understand the 90-day window for filing a Tax Court petition, and he too winds up in collections, even though the claim of the credit was accurate.

Example 3: The third taxpayer, after being sent a notice of deficiency by the campus, files a timely petition in the Tax Court and successfully defends his entitlement to the credit. However, after decision documents are entered and the taxpayer inquires when he will receive his refund, he learns that he will not be receiving it at all, because six months earlier he had received another notice of deficiency — comparable to the one for the year before the court except for an unremarkable notation in small print in the upper right-hand corner that it was for the year subsequent to the year in dispute. Thinking it was simply a duplicate of the first notice, the taxpayer threw it away and did not file a Tax Court petition for that year. As a result, the second disputed year, which was entirely separated from the IRS administrative file for the first year and handled by another campus, was treated as defaulted and sent to collections. The refund won in the Tax Court will be used against the supposed deficiency for the second year.

All of those cases are based on actual experiences at our clinic, and those stories are being repeated all over the country, as automated, centralized, and streamlined processing of cases becomes more pervasive and taxpayer opportunities to challenge IRS errors are reduced.

The above examples involve earned income tax credit audits. But similar problems occur in other substantive areas, such as the other child-based benefits of the code (child credit, dependent care credit, head of household filing status, and dependency exemptions), the education credits, and Schedule A and C deductions, and are subject to the same processing methods.

In her annual reports to Congress, National Taxpayer Advocate Nina Olson is required to list the 20 most serious problems facing taxpayers in their dealings with the agency. In 2002 the number one problem she named was the difficulty taxpayers have in navigating the agency and finding the right person to talk to about their particular issue.[22] Also on the list were IRS procedures for dealing with EITC claims, including combination letters and unclear correspondence concerning appeal rights (Problem 7); and lack of IRS response to taxpayer inquiries during EITC audits (Problem 8).[23] In 2003 the advocate's list of the 20 most serious problems repeated the problem of navigating the IRS (Problem 9), and also included combination letters (Problem 6), closing TACs (Problem 11), and the expansion of math error authority with inadequate explanations to taxpayers of their rights under this procedure (Problem 8).[24]

In her 2004 report, the advocate's list of the 20 most serious problems included taxpayer access — reduction in face-to-face interactions (Problem 2) and remote interactions (Problem 3).[25] The report also described a study the Taxpayer Advocate Service (TAS) had undertaken involving 330 EITC audit reconsideration cases, for tax years 2000 to 2003.[26] On average, TAS case advocates made five phone calls to the taxpayer who had requested audit reconsideration, a significantly higher number than is usually made by exam or the regular audit reconsideration staff. The increase in phone contact had a significant effect on case results. The study showed that with the increased number of attempted contacts, an additional 43 percent of taxpayers in the study received some or all of the credit that had been denied in the regular audit processes.

C. Alternative Process Resolutions

The extreme compression of the audit process under modernization, the computerization of follow-up notices, and the inability to deal with the agency except through difficult long-distance contacts, has, as noted above, taken a particular toll on low-income taxpayers. Those taxpayers often have a low or delayed reaction rate to correspondence from the IRS. And when timelines are expedited and there is no possibility of local resolution, those taxpayers simply miss the deadlines for reply set by the correspondence or fail to respond entirely. The IRS then takes their nonresponses as a concession of their cases.

A certain number of taxpayers caught up in those scenarios will simply pay the bill or have it offset against their future refunds, despite the fact that they do not owe it. Those overpayments will never be recouped by those taxpayers.

Other taxpayers to whom this occurs will belatedly wake up and attempt to prove their cases. But their recourse at that point is solely through remedies available once the case is in collections, such as audit reconsideration,[27] CDP hearings, and OICs. And although Congress significantly expanded those remedies in 1998,[28] they remain, for the most part, remedies that are limited and that often rely on the exercise of administrative grace by an overburdened agency.

A 2001 Tax Inspector General for Tax Administration (TIGTA) report on audit reconsideration recognized problems in this type of controversy resolution. The report stated:[29]

[22]National Taxpayer Advocate, 2002 Annual Report to Congress, IRS Pub. No. 2104 (2002), at 7, http://www.irs.gov/pub/irs-utl_2002_annual_rpt.pdf.

[23]*Id.* at 55, 64.

[24]*Id.* at 87, 122, 145 (2003).

[25]*Id.* at 8, 26 (2004).

[26]*See supra* note 18.

[27]Audit reconsideration is a process that permits taxpayers to request reconsideration of an audited year and present information not previously considered during the regular audit. Under section 6404, the IRS has discretionary authority to abate assessments or unpaid taxes that are deemed to be excessive.

[28]Restructuring act, *supra* note 1.

[29]*Audit Reconsideration Cases Create Unnecessary Burden on Taxpayers and the Internal Revenue Service,* TIGTA Report No. 2001-40-053 (March 2001), at 4-5, http://www.treas.gov/tigta/auditreports/2001reports/200140053fr.html.

> Audit reconsideration cases create an unnecessary burden on both the taxpayer and the Internal Revenue Service. In FY 1999 alone, the IRS abated audit assessments on the accounts of approximately 106,000 individual taxpayers through its audit reconsideration process. This represents a burden on taxpayers because it requires them to address excessive tax assessments that should have been resolved during the initial audit. The IRS is also burdened by this rework because it must redirect its current compliance resources away from today's compliance issues.

TIGTA noted that the high number of abatements in its study ''may indicate a problem with inappropriate audit assessments.''[30] The 106,000 1999 abatements totaled more than $711 million in taxpayer dollars.[31]

Moreover, during audit reconsideration, all taxpayer refunds are frozen and applied against the supposed deficiency. And if the issue involves an asserted misclaim of the earned income tax credit, once the year has been assessed, a ''recertification indicator''[32] will be added to the taxpayer's account. Because those indicators are not easily removed,[33] resolving the case through a collections remedy will be only one step in restoring the taxpayer's correct tax position. The taxpayer will have to engage in further adversarial battles, perhaps with other audit reconsideration offices on different campuses, to clear other years affected by the erroneous denial of the primary year.

The OIC program is also an imperfect substitute for taxpayers who have missed having their cases adjudicated in the regular controversy resolution processes. Among other things, the high volume of offers has created processing problems for the IRS and has resulted in a focus on resolving offers quickly or treating them as ''nonprocessable.'' Our experience in that program involves submitted offers that are rejected and sent back to the taxpayer with no meaningful explanation of the reasons for the rejection; delayed and additional processing that results in requests for further (and more current) financial information from the taxpayer; supplemental material that is submitted being ignored; and taxpayers being sent requests for additional information that has no bearing on the offer being considered — such as a request to a homeless and destitute taxpayer to confirm that he has no ''brokerage account information'' — all to ''process'' the case. Also, the extensive forms required for the offer, which involve complicated financial submissions and disclosures, do not give the taxpayer an opportunity and place to ''tell his story'' — which we have found is a very important part of a successful offer.

In a September 3, 2004, letter to Treasury Secretary John Snow raising questions about the agency's administration of the OIC program, including its high rejection rate of offers as ''nonprocessable,'' Sens. Chuck Grassley, R-Iowa, and Max Baucus, D-Mont., (the chair and ranking minority member of the Senate Finance Committee, respectively) wrote as follows:

> We have heard from many practitioners and interested parties that the IRS is more interested in managing OIC inventory rather than getting to a resolution of tax debt and giving the taxpayers a fresh start.

Apart from the processing issues, OICs do not grant refunds to taxpayers who have been improperly denied them, nor do they help taxpayers with the EITC recertification issue.

D. Problems in the Earned Income Tax Credit

The compression of audit process described above is a theme that is being taken to a new level in the proposed certification of the earned income tax credit that the IRS is currently considering implementing for up to four million low-income taxpayers each year. If that initiative is implemented, some taxpayers claiming the earned income tax credit (mostly fathers of qualifying children) would be required to submit their supporting information — and be subject to a preaudit of the credit — when they file their tax return for the year. They would then be immediately certified for the credit — or denied certification, pending submission of more data. All EITC refunds would be withheld until the certification information was accepted.

1. A short history of certification. The certification proposal was developed because several IRS studies have shown the EITC to have a high overclaim rate[34] and the Government Accountability Office has for several years identified the EITC as a high-risk program and instructed the IRS to develop methods of reducing the error rate in the credit.[35]

In 2002 the IRS created a task force to examine ways of better targeting the EITC to its intended beneficiaries,

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[30]*Id.* at 2-3.

[31]*Id.* at 7.

[32]Under section 32(k), a taxpayer who has had the earned income tax credit denied in an examination must prove eligibility for the credit before being able to claim it again. To implement that rule, the IRS places a ''recertification indicator'' on the taxpayer's account. The recertification indicator can be removed only through a complicated ''recertification'' process. According to a March 2005 TIGTA report, as of December 2003, almost one million taxpayers had recertification indicators on their accounts, and the recertification program was fraught with problems. *The Earned Income Credit Recertification Program Continues to Experience Problems,* TIGTA Report No. 2005-40-036, *Doc 2005-5395, 2005 TNT 50-19* (Mar. 11, 2005).

[33]*Id.*

[34]Under the most recent study, released in February 2002, the IRS concluded that of the $31.3 billion in EITC claimed in 1999, erroneous payments represented 27 percent to 31.7 percent of total claims, or a total of between $8.5 billion and $9.9 billion. It is not known what percent of the overclaims represent fraud and what percent represent unintentional errors.

The most frequent source of errors was taxpayers claiming children who did not meet the residency requirement of the credit.

[35]GAO, *Earned Income Tax Credit: Opportunities to Make Recertification Program Less Confusing and More Consistent*, GAO-02-449 (April 25, 2002), http://www.gao.gov/new.items/do2449.pdf. *See also* Book, ''Noncompliance: What We Don't Know Can Hurt Them,'' *Tax Notes*, June 23, 2003, p. 1821.

reducing overclaims, but also maximizing eligible participation rates in the credit. (The IRS has estimated that only about 75 percent of those entitled to the credit actually claim it.)

Using recommendations of the task force, in 2003 the IRS developed a proposal to require claimants of the credit to ''precertify'' eligibility by submitting, in the summer months preceding the close of the tax year, documentation concerning the residency and relationship requirements of the credit, both a frequent source of errors. Under that plan, the precertification forms were due on or before December 31 of the tax year. Precertification was aimed at a maximum of about four million taxpayers whose residency and relationship status with their qualifying child was unable to be verified by the IRS through other means. To implement that program, the IRS's 2004 budget request asked for a $100 million appropriation for 650 new full-time equivalent employees. That budgetary request was in addition to about $145 million the IRS has spent each year since 1997 solely on EITC compliance measures.

The task force's precertification recommendation followed earlier unsuccessful attempts to reduce the overclaim rate, first by increasing the audit resources targeted at EITC claimants,[36] and second by adding to the law extremely harsh penalties for misclaims of the credit.[37] Currently, a taxpayer who erroneously claims the credit is barred from claiming it again — even though he is entitled to do so — for a 2- or 10-year period, the length of time depending on whether the error was negligent or fraudulent.[38]

To our knowledge, no other provision in the code has its own enforcement appropriation line in the IRS budget. Moreover, to our knowledge, there is no other penalty in the code comparable to section 32(k), for any other type of conduct. Also, once those penalties take effect, reinstatement of eligibility to claim the credit is subject to a complicated ''recertification'' process, that often is little understood by taxpayers and involves the filing of forms that are not automatically sent or available to taxpayers. Moreover, a recertification application results in an automatic audit of the reinstatement year.[39]

[36]In 1997 Congress authorized a five-year $716 million appropriation to increase EITC audit activity as well as customer service and education related to the credit. Although the five-year period ended in 2002, Congress has continued to make EITC-specific enforcement appropriations in the IRS budget each year. *See* Balanced Budget Act of 1997, H.R. 2015, Pub. L. No. 105-33.

[37]Section 32(k)(1).

[38]*Id.*

[39]Section 32(k)(2). To ''recertify,'' the taxpayer must attach Form 8862, ''Information to Claim Earned Income Tax Credit After Disallowance'' with proof of entitlement to the credit for the current year. Although the IRS informs taxpayers, when the credit is disallowed, that they must recertify for the credit using Form 8862 if they wish to claim it again, it does not enclose the form with the EITC disallowance letter. Failure to include the Form 8862 with the tax return results in a math error disallowance notice.

Despite those harsh enforcement strategies, the 2002 IRS study of the EITC remarkably showed no reduction in overclaims.

The originally designed precertification initiative — requiring taxpayers to submit relationship and residence data during the summer months preceding the filing season for the tax year about the likely course of events for the whole year — raised many concerns and objections in the low-income clinic community. Those concerns included the fact that taxpayers were being asked to submit tax data at a time other than tax season, when there was no tax preparation community (a seasonal business) to help them; that the data (particularly regarding relationships) could be difficult and time-consuming to obtain;[40] and that, in some cases, the submission date to the IRS occurred before the data (that the child had lived with the taxpayer for more than one-half of the year) in fact was available. Also, the program as designed provided no effective appeal rights from a denial of precertification, because examination deficiency procedures are based on a taxpayer's actually claiming a benefit on a return and it being disallowed. If a taxpayer received a notice from the IRS before tax filing season telling him that he was not entitled to claim the credit, and accordingly he did do so, there would be nothing on the return for the IRS to audit or any deficiency for the Tax Court to adjudicate.

On June 30, 2003, the IRS published Ann. 2003-40,[41] which described the precertification initiative, and requested comments about the proposal from the tax community. An avalanche of negative comments followed.[42] At the end of the comment period, the precertification program evolved into a certification program,

[40]Robert Greenstein, ''The New Procedures for the Earned Income Tax Credit,'' *Tax Notes*, June 9, 2003, p. 1525.

[41]2003-1 C.B. 1132, *Doc 2003-14495, 2003 TNT 115-6* (June 30, 2003).

[42]*See, e.g.*, ''Professors Comment on EITC Precertification''; *Doc 2003-18445, 2003 TNT 155-16* (Aug. 11, 2003) (Janet Spragens, Nancy Abramowitz, and Leslie Book); ''Community Foundation Opposes EITC Precertification,'' *Tax Notes*, Aug. 18, 2003, p. 897 (San Francisco Foundation); Greenstein, ''The New Procedures for the Earned Income Tax Credit,'' *Tax Notes*, June 9, 2003, p. 1525 (Center on Budget and Policy Priorities); Shinn, ''Professor Comments on EITC Precertification,'' *Tax Notes*, Sept. 8, 2003, p. 1264 (Marybeth Shinn, New York University); ''H&R Block Wants EITC Precertification Pilot Delyated,'' *Tax Notes*, Sept. 8, 2003, p. 1264; Henderson, ''Civil Rights Coalition Comments on EITC Precertification,'' *Tax Notes*, Sept. 8, 2003, p. 1265 (Wade Henderson, Leadership Conference on Civil Rights); ''Group Finds EITC Plan Troublesome,'' *Tax Notes*, Sept. 8, 2003, p. 1265 (Paula Roberts, Center for Law And Social Policy); ''Religious Group Fears Impact of Precertification Program on Current Success of EITC,'' *Tax Notes*, Sept. 8, 2003, p. 1265 (Mark Pelavin, Religious Action Center of Reform Judaism); ''New York City Council Objects to EITC Precertification Pilot Program,'' *Tax Notes*, Aug. 25, 2003, p. 1011 (Gifford Miller, New York City Council); ''Professors Comment on EITC Precertification,'' *Tax Notes*, Sept. 8, 2003, p. 1265; ''Federation Opposes EITC Precertification,'' *Tax Notes*, Aug. 18, 2003, p. 897 (Kerry Korpi, American Federation of State County and Municipal Employees, AFL-CIO).

involving asking taxpayers to mail the EITC supporting data with the tax return for the year. Also, the requirement to precertify relationship was dropped.

In November 2003, the IRS announced that before it would implement the certification program wholesale, it would pilot-test certification on a random population of 25,000 (originally 45,000) taxpayers. The purpose of the pilot was both to test the clarity of the IRS forms and to determine if taxpayers could comply with the information requests within the time allowed. In December 2003 the taxpayers in the pilot study (each of whom had claimed the EITC with a qualifying child for the previous year) were sent a letter asking them to submit documentation, with their tax returns, that they had lived with a qualifying child for more than one half of the year. They were told that they would not be mailed their EITC refunds until the documentation was accepted and they were certified for the credit.

The pilot study informed taxpayers that they could provide the residence information in one of three ways: They could send in documents (for example, school or doctor's records) that showed that the qualifying child lived with them for more than half the year; they could send in letters on letterhead stationery from IRS-approved officers stating the shared residency; or they could obtain notarized affidavits from relatives, neighbors, child-care providers, or others attesting to the residency requirement.

The data from the pilot was evaluated by an outside evaluator, Mathematica Policy Research Inc. Preliminary results from the pilot indicated fewer taxpayers claiming the EITC than in a control group of a second 25,000; fewer taxpayers claiming qualifying children; and smaller amounts of EITC claimed. What was not clear from the results, however, was the extent to which the reduction in EITC claims was due to weeding out ineligible claimants and to what extent it resulted from a chilling effect on claiming the credit by rightful claimants caused by the certification requirement. Results of the data are being further examined to determine answers to those questions.

In November 2004 the IRS initiated a second pilot, recommended by Mathematica, to test the effects of certification on a particular community and the institutions of that community (for example, schools) to determine, for example, the effect on those institutions when they were inundated with requests for data. The community selected was Hartford, Conn., and about a third of the EITC notices in the second pilot were sent to Hartford residents. Hartford was chosen, according to the IRS, because it shares demographic characteristics (race, gender, patterns of EITC claims, geographic distribution of EITC taxpayers, and infrastructure supporting low-income taxpayers) with many other areas of the country having high concentrations of EITC claimants. In the second pilot, taxpayers were also asked to submit the data ''before April 15'' rather than ''with their returns,'' because many in the prior survey had responded by forwarding the information in advance of filing.

On November 29, 2004, the city of Hartford, together with individual plaintiffs, filed a class action lawsuit in federal district court in Connecticut, seeking injunctive and declaratory judgment relief, to prevent the IRS from pursuing the EITC pilot and from withholding refunds until the targeted population sent in the requisite data.[43] The suit alleged that the pilot was unconstitutional, violated the equal protection and due process clauses, and discriminated against African-Americans and Hispanics in violation of sections 1981, 1985, and Title VI of the Civil Rights Act of 1964. The suit alleged that the city (as well as individual plaintiffs) would be harmed by reason of the city's having to incur additional costs for housing, shelter, and food programs for persons eligible to receive the EITC. There has been no outcome of the lawsuit to date.

2. Continuing concerns about precertification. Despite the changes to the original precertificiation proposal, which have addressed some of the most egregious parts of the proposal, we continue to have concerns about certification. Those fall into several categories.

i. Effect on taxpayer burden and participation rates. A principal concern, shared by many in the low-income taxpayer community, as well as by many in the broader pro bono and legal services communities, involves the effect of certification on taxpayer burden and participation rates. More specifically, the concern is that a high nonresponse or inadequate response rate to the initiative within the allowed timeframes is likely, resulting in a significant reduction in the number of eligible taxpayers obtaining the credit.

Some important predictors for the certification process are the problems low-income taxpayers have been experiencing in the ''regular'' controversy resolution processes under modernization (described earlier in this report), as well as the dramatic findings of erroneously denied credits in the national taxpayer advocate's 2004 audit reconsideration study. The time allowed for providing certification information is short, and we have concerns that many taxpayers faced with those challenges will simply give up the credit or not follow up on a ''failure to certify'' letter based on a partial submission.

Also, the information required by certification can in some cases be surprisingly difficult to obtain. For example, fathers' names (as opposed to mothers') are often not included on birth certificates or on school or medical records. Many taxpayers who claim the credit change residences often live in atypical, multigenerational households to offset the high cost of housing. Their names may not be on the lease or utility bills sent to the residence. Some taxpayers use addresses other than their own to permit their children to attend a better school. Taxpayers with infant children who receive medical care at emergency rooms or clinics may not be able to document residence using school or medical records. Taxpayers with foreign-born children may have difficulty obtaining birth certificates. And so on.

If the certification program is implemented, and up to four million taxpayers per year are sent certification requests to be processed during the filing season, it is

[43]''Single Parents, City of Hartford File Complaint to Halt EITC Test Program,'' *Tax Notes*, Dec. 6, 2004, p. 1362; *Diana M. Ramos et al. v. Treasury Department et al.* The complaint is available at *Doc 2004-22805* or *2004 TNT 231-13*.

hard to imagine the IRS making many follow-up phone calls or working with taxpayers to obtain the information they need. Moreover, if certification is administered in a manner similar to EITC audits by the campuses, many deserving taxpayers may wind up without the credit despite the IRS's best efforts to operate the program fairly.

ii. Appeal rights. A second concern involves taxpayer rights to appeal a failure to be certified. Assume a scenario in which the taxpayer fails to comply with the certification request by either failing to submit any documents whatsoever or by submitting incomplete information that is not, in the IRS's view, sufficient for certification. The tax return filed by the taxpayer for the year has claimed the credit.

The IRS writes to the taxpayer, telling him that his EITC refund for the year will be frozen pending receipt of the certification information. The taxpayer can then send in additional information — or not. But at some point, the IRS must offer the taxpayer an opportunity to contest the denial of the credit and must give the taxpayer a deficiency notice to permit review of the issue by the Tax Court. When and how will that occur?

A problem for the IRS is that certification is an audit of the return, but only regarding one issue. Theoretically, there may be other auditworthy issues on the taxpayer's return unrelated to the credit, such as, for example, payment of self-employment tax, unreported gambling income, or substantiation of charitable contributions or automobile expenses. Section 7605(b) prohibits multiple audits of a taxpayer's return for the same year. Therefore, if the deficiency notice is issued immediately, the IRS may be surrendering its right to audit other issues by focusing entirely on the credit. However, at some point, taxpayers are entitled to contest their entitlement to the credit in court and obtain their refund. Failure to allow a timely contest may prolong receipt of a needed family benefit.

Certification thus raises the possibility of either second audits of the same year after a deficiency notice has been quickly issued in connection with the claim of the EITC or of delayed appeal rights of a denial of the credit until the entire return can be examined. Neither is a good result. And those are not the only process issues.

Assume a second scenario in which the taxpayer submits the certification data exactly in the form required by the IRS and is accordingly certified by return mail. The taxpayer's refund check is released and sent to the taxpayer. But the taxpayer is in fact ineligible for the credit because, although he lives with a qualifying child, he is married and has filed as a head of household on his tax return. (Section 32(d) requires that married taxpayers claiming the credit must file joint returns.)

In that scenario, the problem is that certification is a preaudit of the credit, but only regarding *one* of its statutory requirements — the residency requirement. Thus, in the above example, a certified taxpayer could still later be found ineligible for the credit if she fails to meet *other* statutory requirements, filing status being only one. For example, a taxpayer at the end of the year could be determined to be ineligible for the credit because his income exceeded the statutory limits (section 32(b)), the taxpayer earned excessive investment income for the year (section (32(i)), or the taxpayer failed the relationship test of the statute.

The IRS has said it is going to examine only the residency requirement in the certification process, not other requirements of the credit. Moreover, in the first test study of certification, there were 700 ''prefilers,'' that is, people who submitted the requested documentation and were certified before they filed their returns.[44] In those cases, the IRS would have no information about whether other credit statutory requirements were met.

In short, taxpayers who have gone through the certification process are likely to be confused and upset when, *despite* having been certified, the IRS tells them their credit has been denied and the refund check must be repaid. Moreover, the issue also raises the second audit problem under section 7605(b).

In still other scenarios, it is unclear how certification will work when the taxpayer has a ''tiebreaker'' relationship with another taxpayer who lives in the same household; for example, a grandmother and a parent who live together with the child, both of whom may be eligible for the credit with respect to the child. Under changes to the tiebreaker rules enacted in 2001, the parent's claim has priority, so that the grandmother will be able to claim the credit only if the parent does not claim it, which will not be known without examining both returns. To be sure, if the information is sent in with the individuals' tax returns, the IRS could address and rule on the tiebreaker issue during the certification period based on computer matches involving the Social Security number of the qualifying child. But there is nothing to prevent the two tiebreaker taxpayers from filing their returns at different times during the filing season (one early; one late) or during subsequent extension periods; and the IRS may not know of a second potential claim of the credit involving the same child until the first taxpayer has been certified and the refund check has been mailed.

Those issues have not been adequately addressed by the IRS, and the right answers are not necessarily clear.

iii. Disparate treatment. The most fundamental problem with certification is that it treats poor taxpayers differently from other taxpayers. Overall, certification puts a reporting and compliance burden on a targeted taxpayer group that is far heavier than that imposed on any other — a group that is least able to absorb it.

To be sure, the high error rate in the EITC requires IRS attention if the IRS studies of overclaim rates are accurate. Based on our own anecdotal evidence of EITC audits described earlier in this article, however, as well as the TAS audit reconsideration study of EITC audits in the 2004 National Taxpayer Advocate's Report to the Congress, there is some evidence that the IRS studies' numbers are inflated by a high nonresponse rate and/or a false high concession rate due to taxpayer inability to, or fear of, navigating the tax controversy system. Indeed, in 2000 the advocate herself, then the director of a low-income taxpayer clinic, stated that ''as much as 25 percent

[44]Kenney, A. ''Early Results of EITC Child Certification Pilot Released,'' *Tax Notes*, May 10, 2004, p. 633.

of the EITC 'error rate' are people who are entitled to the credit and simply fall out of the system because they cannot respond to IRS notices in time, don't have access to phones, or can't take time off work to get the required documentation.''[45]

But whether the EITC studies are accurate or not, the differential enforcement strategies for low-income taxpayers and others in the system is inappropriate. The earned income tax credit is not the only area of tax law with a high error rate. Yet, historically, the EITC has been subject to more scrutiny than any other provision in the code. In the 1990s there were three major IRS compliance studies of the EITC (for tax years 1994, 1997, and 1999 returns) compared with *no* general compliance studies of the rest of the taxpaying population since 1988 (the last year the taxpayer compliance measurement program was used). In the same time period that audits of EITC claimants were ballooning, audit activity of other taxpayers declined and in some cases almost disappeared. Misclaims of the EITC subject the claimant to heavy penalties and a complicated ''recertification'' procedure to claim it in a future year. There are no comparable penalties or reinstatement procedures for misclaimed tax benefits, for any other taxpayers in the system, no matter how large the error. Nor is there a preaudit requirement for any other class of taxpayers.

With the certification initiative, the IRS continues to differentiate the EITC, which it has repeatedly described as a social welfare program embedded in the tax code and therefore subject to special scrutiny. But however the IRS describes it, the plain fact is that the EITC is a tax provision that provides incentive benefits to a targeted group of taxpayers, and is certainly not the only code provision to do so.

To be sure, unlike other tax benefits, the EITC is refundable and therefore involves the government actually writing checks to qualifying taxpayers. But from an enforcement perspective, it is hard to see the difference between $1 paid out erroneously and $1 that is not collected from failure to audit an overstated claim on a return. The effect on the fisc is the same, although the class of taxpayers benefiting is not.

For all of the above reasons, we believe the certification proposal should not be implemented.

V. Identity Theft

Identity theft is one of the most rapidly growing crimes in the United States, with devastating consequences to its victims. The FTC has stated that there are almost 10 million identity thefts per year in the United States, and the numbers are growing.[46] Victims of identify theft receive bills for purchases they never made, loan foreclosure notices for loans they never received, and dunning notices from bill collectors threatening to destroy their credit ratings. They can also receive tax bills for income they never earned. Proving a negative is always difficult, and those transactions are very complicated and time-consuming to straighten out.

Identity theft can occur in a number of ways. A taxpayer could have her wallet or purse stolen thereby losing identifying information and a Social Security card. Identifying information has also been fraudulently obtained by cyber thieves, or through mistaken security breaches by credit agencies.[47] In addition to actual thefts, taxpayers who are undocumented workers may make up or ''borrow'' someone else's Social Security number when asked by an employer to fill out a W-4 form that is required for employment. At the end of the year, those numbers are then used by the employer in reporting the employee's income to the IRS and in providing a W-2 wage statement to the employee. When the true owner of the Social Security number does not report the wages, she will be issued a notice of unreported income by the IRS.

In the clinic, we have also seen false forms W-2 or 1099 intentionally fabricated by employers for former employees or unpopular relatives or acquaintances to create additional deductions or to create trouble for a person they didn't like.

When the IRS receives an information report of income and the computer fails to match it with reported income on a return, the nonreporting taxpayer will get a computer-generated math error notice stating that the taxpayer owes a deficiency in tax. The taxpayer must then convince the IRS (within the short time periods allowed in math error cases) that he did not earn the income and does not owe the additional tax, in the face of a W-2 or 1099 to the contrary.

Proving a taxpayer's identity, as well as the fact that the W-2 or 1099 issued in the taxpayer's name is erroneous, can require some very creative lawyering. Sometimes the taxpayer's own validly issued W-2 and the erroneous W-2 containing the taxpayer's Social Security number will have different names on them, suggesting the identity theft. In other cases, the information reported on the W-2s will be internally inconsistent, such as reporting income from two full-time jobs in different parts of the country.

If the taxpayer's credit cards and Social Security card were stolen, the taxpayer may have filed a police report and may be able to obtain a copy of the report, may have made reports to credit card companies cancelling the stolen cards, and may have made requests to the Social Security Administration for a substitute card. All provide important evidence of the identity theft.

However, many never think to report those problems to a government agency and may be unaware that a tax issue exists until receipt of a preposterous tax bill. Also, many LEP taxpayers may harbor a cultural reluctance to engage in much governmental interaction.

Another sometimes successful line of attack we have used has been to write to the pseudo-employers with an

[45]Stratton, S., H. Glenn, and R.J. Donmoyer, ''EITC Rates Up; Review Process Slows Down,'' *Tax Notes*, Oct. 2, 2000, p. 28.

[46]Federal Trade Comm'n, Identity Theft Survey Report (September 2003), http://www.ftc.gov/os/2003/09/synovatereport.pdf.

[47]Caroline E. Mayer, ''Choicepoint Victims Have Work Ahead,'' *The Washington Post,* Feb. 23, 2005, at E01, http://www.washingtonpost.com/wp-dyn/articles/A45534-2005Feb22.html.

enclosed picture and signature copy of the client and ask them to verify (on letterhead stationery) that the taxpayer never worked for them. The taxpayer may also have reported the identity theft to the Federal Trade Commission.[48] Those are all important pieces of proof to send to the IRS (usually the of audit reconsideration office) together with a personal statement explaining the situation.

In addition to straightening out the tax consequences of the identity theft, it is important also to contact the Social Security Administration to correct the taxpayer's earnings record.[49]

But even for taxpayers who use their best efforts to straighten out an identity error, we have found that the IRS is very reluctant to give up a claim of income when it has an information statement (such as a W-2 or 1099) in the taxpayer's name. Moreover, when those identity issues are combined with the accelerated processing of cases in today's modernized IRS, as well as the upcoming privatization of debt collection, they raise many of the same issues as described earlier in this report.

VI. Privatization of Debt Collection

The enforcement trends we described in the preceding section, have serious implications for the IRS's impending program involving outsourcing of debt collection that was authorized by Congress in the *American Jobs Creation Act of 2004* (P.L. 108-357). Commentators and others have discussed many of the problems inherent in that program,[50] which include balancing taxpayer rights with tax collection, controlling overreaching by the private debt collectors whose income is directly tied to the revenue produced, and ensuring taxpayer privacy regarding their tax returns and return information. But it also seems predictable that as the IRS moves forward with the transfer of collections accounts to private debt collectors — particularly if they are essentially ''boiler rooms'' located in foreign countries, have no understanding of the controversy resolution processes, and are operating solely through electronic means of communication — that many low-income taxpayers and identity theft victims may find themselves caught in a crossfire as they simultaneously try to deal with those collectors and correct errors in their cases. It will be important to see how the IRS and the debt collectors will distinguish taxpayers with true debts from those who do not owe additional tax but who have simply been denied process. In particular, it will be important to see how audit reconsideration will work in connection with privatization.

VII. Suggestions for the Agency

It is clear that the changes brought about by modernization are here to stay and that the IRS is not going to turn back the clock. Recognizing that, we nonetheless have several suggestions to improve the process for low-income taxpayers:

1. *Slow down the audit process, eliminate all combination letters immediately, and allow a two-step examination/appeals process in each case.* For many low-income taxpayers, the audit process has been collapsed from two-plus years following the filing of the return, to less than nine months, together with an audit cycle that for many taxpayers allows insufficient time to collect information, engage in a reasonable dialogue with the IRS, and reach a fair resolution of the matter. We believe that sacrificing several months of efficiency to inject an opportunity for a more comprehensive evaluation of the taxpayer's case is a fair compromise between efficiency and process. To be sure, this proposal will reduce the overall number of cases handled annually by the IRS and the average case cycle time, and it will require more enforcement resources to be expended by the IRS. But it is not at all clear whether the current audit procedures are saving the agency money, because taxpayers are flooding into audit reconsideration and other alternative processes within the IRS, causing the agency to shift more resources to those offices. Giving taxpayers a larger window of opportunity to have their cases correctly reviewed and decided at the front end would reduce the need for, and taxpayer reliance on, those backdoor offices. Moreover, it would dramatically improve taxpayer morale and make taxpayers feel that they have received a fair shake from the system. That alone, in a self-assessment system, is a reason to adopt this proposal.

2. *Grant regular extensions of time to taxpayers for complying with the IRS's requests for information, and inform taxpayers that they may request those extensions.* This suggestion also would prolong the case cycle time for the IRS to review a taxpayer's case, and it would also create delays in evaluating the taxpayer's information. However, it also appears to be a reasonable compromise between efficiency and process. Much information in EITC or other family status cases is difficult to obtain and may require the taxpayer to take time off from work and make special trips to schools, doctors' offices, or government record offices, as well as the post office all within 30 days. Moreover, it is one thing for the IRS to be tough on extensions when the statute of limitations is about to run, but it's quite another when the statute of limitations expires in two and a half years.

3. *During the extended audit process, provide options to taxpayers in every case for face-to-face or telephonic contacts with IRS employees.* Many low-income taxpayer audits (EITC, dependency exemptions, filing status, child credit, and so forth) involve the need to present family status information, including complicated family relationships, living patterns, children who move back and forth between relatives, and so forth. It is extremely helpful in those cases if the taxpayer is given an opportunity to ''tell

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[48]Identity Theft Data Clearinghouse (Consumer Sentinel, FederalTradeComm'n,Washington,DC),http://www.consumer.gov/idtheft.

[49]Social Security Administration Publication No. 05-10064 (Feb. 2004).

[50]*See, e.g.*, Catts, ''House GOP Members Blast IRS Debt Collection Privatization,'' *Tax Notes*, Oct. 27, 2003, p. 459; Hamilton, ''The Fight Over the IRS Hiring Private Debt Collectors,'' *Tax Notes*, Oct. 20, 2003, p. 321; U.S. House Ways and Means Committee, Hearing on IRS Use of Private Debt Collection Agencies, *Doc 2003-12694, 2003 TNT 100-36* (May 13, 2003).

his story'' to the IRS and not just present documents. Moreover, individual contact with an IRS officer gives the IRS an opportunity to work with the taxpayer to complete the audit in a manner agreeable to both sides and gives the taxpayer a chance to ask questions.

4. *Put a single person (whether or not remotely located from the taxpayer) in charge of the taxpayer's case when multiple years are involved. Make sure the individual's name and phone number are prominently displayed on all correspondence, as well as the hours that individual is available to take calls from the taxpayer.* It is hard to describe the number of times our student-attorneys have called IRS representatives who are looking into a second or third year in a multiple-year audit of the taxpayer, only to find that that person has had no contact with the person handling the initial year of the audit, has no administrative file on the case, has no knowledge of documents the taxpayer has already given the IRS, and is working entirely from a computer screen. The student-attorney is then required to start entirely over again with the new person, even though the issues in all years under review are the same. That is inefficient for the IRS and is extremely frustrating for taxpayers.

5. *Improve the clarity of notices to taxpayers explaining in bold and in short declarative sentences the tax year involved; the IRS's position regading the taxpayer's return; and the taxpayer's options.* Current communications are packed with too much information, too small fonts, and unclear descriptions of a taxpayer's options. One of our academic colleagues, at a conference for low-income taxpayer clinics in December 2004 in Philadelphia, suggested the IRS start using ''Top Boxes'' on its notices, that is, short boxed information that succinctly described what the notice is, such as (in bold type) ''NOTICE OF DEFICIENCY FOR TAX YEAR 2002'' or ''COLLECTIONS NOTICE FOR TAX YEAR 2001.'' In communicating with his lawyer, the client could simply read the top box rather than try to explain a recent communication from the IRS that was received in the mail. We strongly support this suggestion.

6. *Reinstate Problem Solving Days.*

7. *Don't close any more TACs.*

8. *Lobby Congress to repeal sections 32(k) and 6306.*