SAMPLE EXCERPTS FROM IRS PRACTICE & PROCEDURE (from 2012 and 2013)

Supreme Court upholding the individual mandate found in the Patient Protection Affordable Care Act (PPACA) and finding that the Anti-Injunction Act did not preclude review of the constitutionality of the statute:

Penalties under subchapter B of Chapter 68 are subject to the Anti-Injunction Act (AIA). There has been litigation regarding the constitutionality of the Patient Protection Affordable Care Act (PPACA), with individuals seeking injunctive relief preventing implementation and enforcement, and a declaratory judgment that the provision is unconstitutional. Initially the government took the position that the AIA barred consideration of the constitutionality of PPACA, until taxpayers brought refund actions or the cases arose in deficiency proceedings. While the government changed its position and is no longer arguing the claim is not ripe, courts on their own have an obligation to consider jurisdictional issues even if the parties do not raise them. The Fourth Circuit in *Liberty University v. Geithner* has held the AIA bars suits to challenge the individual mandate until the mandate comes into effect in 2014, reasoning that the mandate has the substance of a tax. Over a vigorous dissent, the DC Circuit Court of Appeals in *Seven-Sky v. Holder* concluded that the AIA did not bar consideration of the merits, holding that while the shared responsibility payment is to be "assessed and collected in the same manner as taxes," that phrase does not mean that the penalty is a tax for purposes of the AIA.

In *National Federation of Independent Business v. Sebelius*, the Supreme Court upheld the constitutionality of the individual mandate under Congress' taxing powers, and found that the AIA did not preclude review of the statute's constitutionality. The Court applied different tests to determine whether a law constitutes a tax for constitutional purposes as compared to the AIA. For constitutional purposes, whether a law is a tax takes a more functional approach (that is, whether the statute while could be treated as a tax even if not called one), whereas for the AIA,

the inquiry hinges on whether Congress intended the law to function as a tax. The justification for the differing approaches was that unlike the constitution which sets absolute limits on Congressional power, the AIA is legislative policy, with Congress free to specify whether the policy should apply in particular cases. To that end, the Supreme Court's AIA analysis hinged largely on the label Congress used, and it held that the AIA did not prohibit the court from reviewing the issue, as Congress had specified that the mandate was a penalty and not a tax. The Court further held Section 5000A(g)(1) command that the penalty be "assessed and collected in the same manner" as taxes is best read as referring to the assessment and collection powers, thus giving the Service the "same authority and guidance with respect to the penalty" rather than specifically making the AIA applicable.

In light of *Sebelius*, Congress' authority to regulate by its taxing authority may take a more prominent role. Presumably, to be safe from AIA challenges, future legislation should specify if Congress intends the statute not to be subject to the AIA if Congress thinks it would be beneficial to have challenges decided prior to implementation.

Bemont v. United States: Discussion of a recent Fifth Circuit opinion addressing the exception to the three year limitations period on assessment with respect to a listed transaction where the material advisor (Deutsche Bank) responded to an IRS summons but, according to the Court, failed in its disclosure to allow the Service to determine the required information without delay or difficulty.

Regulations under Section 6112 require the manner in which the organizer must maintain the list, as well as what information must be included in the list. Reg. § 301.6112-1T, Q&A 16 and 17. The regulations require, among other things, that the list enable the Service to "determine the information required by A-17 without undue delay or difficulty." Reg. § 301.6112-1T, Q&A 16.

The Fifth Circuit concluded that an organizer's response to a summons did not satisfy the regulatory requirements when the response was included within millions of pages of documents and where the references to the advisees engaging in shelter transactions did not apprize the Service that the advisees engaged in shelter transactions. Bemont v. United States, 109 AFTR 2d 2012-1922 (5th Cir. 2013).

Citywide v. United States: Discussion of a recent Second Circuit opinion reversing the Tax Court and finding indefinite extension of the statute of limitations where a return preparer engaged in fraudulent conduct:

On appeal, the Second Circuit reversed the Tax Court and found that the accountant's actions extended the statute indefinitely. The Second Circuit criticized the Tax Court for confusing motive and intent and held that the preparer's motive for his action was beside the point. The Service only had to prove that the third party "intended to underpay the Commissioner taxes that City Wide owed when he filed a fraudulent return on City Wide's behalf, not that he intended to avoid City Wide's taxes for City Wide's benefit." In light of the taxpayer's concession that the accountant filed false returns on its behalf (which was not made at the Tax Court), the court said it need not decide "whether certain factual situations might arise that sever the taxpayer's liability from the tax-preparer's wrongdoing."

The Court stated that the preparer's actions were not remote or secondary to the fraudulent returns, though it did suggest that not all third party fraudulent misconduct would by itself trigger the extended statute. Attributing a third-party's fraud to the taxpayer for statute of limitations purposes gives the Service a powerful weapon, though it is unclear how far removed the third-party misconduct must be from the taxpayer's tax liability in order to sever the unlimited extension. City Wide Transit v. Comm'r, 111 AFTR 2d 2013-1012 (2d Cir. 2013).

Developments relating to when it may be appropriate to remand to Appeals from Tax Court in the context of collection due process cases:

The Tax Court has held that a remand is appropriate when the record at Appeals is not developed. Wadleigh v. Comm'r, 134 TC 280, 299 (2010) (remanding to clarify and supplement the record when the record was insufficient to allow the court to determine whether Appeals abused its discretion). The Tax Court has suggested that the judicial power to remand includes situations where due to changed circumstances the remand would be helpful, necessary or productive. See Van Camp v. Comm'r, TC Memo. 2012-36 (2012). In Chief Counsel Notice 2013-002 (Nov. 30, 2012), the Service stated its position that remands due to changed circumstances should be infrequent. Given the likelihood that taxpayers will experience some change in circumstances following the determination, there are likely to be many disputes about when the changes will warrant a remand. The Chief Counsel Notice states that the Service believes remand should only arise if the taxpayer fully cooperated in the original hearing and when the change in circumstances, if known at the time of the original hearing, would likely have altered the determination. It remains to be seen whether the Tax Court will embrace that more limited approach.