

# **Recent Developments in Federal Income Taxation**

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**Clary Hood, Inc. v. Commissioner,  
69 F.4th 168 (4th Cir. 5/31/23)**

***Outline: item C.1, page 2***

- The taxpayer was a subchapter C corporation.
- Clary Hood served as CEO and he and his wife were the sole shareholders and members of the board of directors.
- The corporation operated a land excavation and grading business and averaged gross revenue of \$21 million from 2000-2010, which grew to \$44 million in 2015 and \$69 million in 2016.
  - The corporation never paid any dividends.
  - Mr. Hood's annual salary ranged from \$130,000 to \$196,500.
- In part to make up for undercompensating Mr. Hood in prior years, the corporation paid him bonuses of \$5 million in each of 2015 and 2016.
- Issue: could the corporation deduct the bonuses under § 162 as reasonable compensation?
- Held: No. Only \$3.7 million is deductible for 2015 and \$1.4 million for 2016.
  - Court approved of use of multi-factor test (rather than independent investor test)
  - Court reversed Tax Court on accuracy related penalties

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**Laidlaw's Harley Davidson Sales, Inc. v. Comm'r  
29 F.4th 1066 (9th Cir. 3/25/22)**

***Outline: item A.1.a, page 6***

- An IRS revenue agent sent a 30-day letter informing the taxpayer that the IRS would assess a penalty under § 6707A for failure to report a listed transaction if the taxpayer did not respond.
- The revenue agent's supervisor did not approve the penalty until after the 30-day letter was sent and the taxpayer had filed a protest with IRS appeals.
- Issue: Whether the IRS complied with requirement of § 6751(b)(1) that the "initial determination" of the assessment of a penalty be "personally approved (in writing) by the immediate supervisor of the individual making such determination."
- Held: Yes. Contrary decision of U.S. Tax Court (154 T.C. 68 (1/16/20)) reversed.
  - When the IRS need not issue a notice of deficiency before assessing a penalty, the language of § 6751(b) contains no requirement that supervisory approval be obtained before the IRS formally communicates the penalty to the taxpayer.
  - Section 6751(b)(1) requires written supervisory approval before the assessment of the penalty or, if earlier, before the relevant supervisor loses discretion whether to approve the penalty assessment.
    - The IRS complied with this requirement.

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**Kroner v. Commissioner**  
**48 F.4th 1272 (11th Cir. 9/13/22)**  
***Outline: item A.1.b, page 7***

- **Issue:** when the IRS *must issue a notice of deficiency* before assessing a penalty, can the IRS comply with the supervisory approval requirement of § 6751(b) by obtaining supervisory approval at any time before assessment of the penalty?
- **Held:** Yes. Contrary decision of U.S. Tax Court (154 T.C. 68 (1/16/20)) reversed.
  - “We disagree with Kroner and the Tax Court. We conclude that the IRS satisfies Section 6751(b) so long as a supervisor approves an initial determination of a penalty assessment before it assesses those penalties. See *Laidlaw’s Harley Davidson Sales, Inc. v. Comm’r*, 29 F.4th 1066, 1071 (9th Cir. 2022). Here, a supervisor approved Kroner’s penalties, and they have not yet been assessed. Accordingly, the IRS has not violated Section 6751(b).”

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**Minemyer v. Commissioner**  
**131 A.F.T.R.2d 2023-364 (10th Cir. 01/19/23)**  
***Outline: item A.1.c, page 9***

- **Issue:** when the IRS *must issue a notice of deficiency* before assessing a penalty, when must the IRS comply with the supervisory approval requirement of § 6751(b)?
- **Held:** Before the IRS issues the notice of deficiency. Contrary decision of U.S. Tax Court (T.C. Memo. 2020-99 (7/1/20)) reversed.
  - “We agree with these assessments of § 6751(b)(1) and hold that its plain language does not require approval before proposed penalties are communicated to a taxpayer.”
  - “We are persuaded by the Second Circuit’s reasoning and hold that with respect to civil penalties, the requirements of § 6751(b)(1) are met so long as written supervisory approval of an initial determination of an assessment is obtained on or before the date the IRS issues a notice of deficiency.”

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**Dillon Trust Co., LLC v. United States**  
**162 Fed. Cl. 708 (11/10/22)**  
***Outline: item A.2, page 10***

- The IRS asserted transferee liability against several trusts with a common trustee.
- The trustee deposited \$72 million with the IRS pursuant to § 6033 to stop the running of interest.
  - The trustee wrote a single check for all of the trusts and attached an allocation schedule.
- The IRS never credited the deposit to the accounts of any of the trusts and instead credited it to a general ledger account.
- More than two years later, the IRS returned the deposit.
- Issue: was the IRS obligated to return \$10 million of interest that would not have accrued had the IRS credited the deposit as requested?
- Held: No. Section 6603 is permissive and does not mandate that the IRS treat a deposit as a payment of tax.

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**Boechler, P.C. v. Commissioner**  
**\_\_ U.S. \_\_ (4/21/22)**  
***[Not in outline]***

- Following a collection due process (CDP) hearing, the IRS issued a notice of determination upholding proposed collection action.
- Under § 6330(d)(1), the taxpayer had 30 days to contest the determination by filing a petition with the U.S. Tax Court.
- The 30-day period expired on August 28, 2017.
- Taxpayer:
  - Mailed his petition to the Tax Court on August 29, 2017 (one-day late).
  - Argued that the 30-day period should be equitably tolled.
- Issue: is the 30-day period specified in 6330(d)(1) for filing a Tax Court petition to contest an IRS notice of determination jurisdictional and therefore not subject to equitable tolling?
- Held: No. This 30-day period is not jurisdictional and *is* subject to equitable tolling.

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**Hallmark Research Collective v. Commissioner,  
159 T.C. No. 6 (11/29/22)  
Outline: item E.1, page 12**

- A unanimous, reviewed decision of the U.S. Tax Court.
- Issue: is the 90-day period specified in § 6213(a) for filing a Tax Court petition in response to a notice of deficiency jurisdictional, and is it subject to equitable tolling?
- Held: Yes, the 90-day period is jurisdictional. The period is not subject to equitable tolling.
  - U.S. Supreme Court’s decision in *Boechler, P.C. v. Commissioner*, \_\_\_ U.S. \_\_\_ (4/21/22), does not dictate a contrary result.

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**Nutt v. Commissioner,  
160 T.C. No. 10 (5/2/23)  
Outline: item E.2, page 13**

- Taxpayers received a notice of deficiency.
  - Section 6213(a) provides a 90-day period
  - During this period, taxpayer can file a Tax Court petition to challenge the notice of deficiency
- The last day to file a Tax Court petition to challenge the notice of deficiency was July 18, 2022.
- Taxpayer, residing in the central time zone (in Alabama), electronically filed the Tax Court petition on:
  - July 18 at 11:05 a.m. central time
  - July 19 at 12:05 a.m. eastern time
- Issue: was the taxpayer’s petition timely filed?
- Held: No. When the “timely mailing” rule does not apply, a Tax Court petition is filed when received by the court.
  - The petition was received one-day late, on July 19, where the court is located

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**Sanders v. Commissioner,  
160 T.C. No. 16 (6/20/23)  
Outline: item E.3, page 14**

- Taxpayers received a notice of deficiency.
  - Section 6213(a) provides a 90-day period
  - During this period, taxpayer can file a Tax Court petition to challenge the notice of deficiency
- The last day to file a Tax Court petition was December 12, 2022.
- Taxpayer had trouble logging into the Tax Court’s system (DAWSON) on his mobile phone, and switched to his computer.
- The upload of his petition began at 12:00:09 a.m. on December 13, 2022, and the court received the petition at 12:00:11 a.m.
- Issue: was the taxpayer’s petition timely filed?
- Held: No. When the “timely mailing” rule does not apply, a Tax Court petition is filed when received by the court.
  - The petition was received 11 seconds late.

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**Smith v. Commissioner,  
159 T.C. No. 3 (8/25/22)  
Outline: item I.1, page 15**

- Taxpayer was U.S. citizen working in Australia, received a notice of deficiency.
- The taxpayer signed a closing agreement with the IRS waiving the right to claim the foreign earned income exclusion of section 911 for 2016-2018.
- The taxpayer later filed original or amended returns claiming the section 911 exclusion and the IRS issued refunds.
- Issues: was the closing agreement binding?
  1. Had it been signed by an appropriate IRS official?
  2. Had the IRS committed malfeasance by disclosing confidential taxpayer information under § 6103 and misrepresented material facts in the terms of the closing agreement.
- Held: The agreement is binding. Both arguments rejected.

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**United States v. Meyer,  
50 F.4<sup>th</sup> 23 (11<sup>th</sup> Cir. 9/26/22)  
*Outline: item I.2, page 15***

- The taxpayer in this case, Michael L. Meyer, was sued in 2018 by the U.S. Department of Justice (the “2018 litigation”) for promoting bogus charitable deduction tax-evasion schemes.
- The 2018 litigation settled and ostensibly was “closed” in 2019 when the U.S. District Court entered a permanent injunction against Mr. Meyer.
- In 2020, the IRS assessed penalties against Mr. Meyer under § 6700 (promoting abusive tax shelters).
- Taxpayer filed a motion for a protective order in the same U.S. District Court that handled the 2018 litigation.
- Issue: is taxpayer’s motion barred by the Anti-Injunction Act?
- Held: No. The term “suit” used in the Anti-Injunction Act does not extend to a defensive motion filed in connection with the 2018 litigation.

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