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NTPI® Grad Level:

The IRS Passport Program

The IRS's "New" Tool for Collections

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Any client names and scenarios mentioned have been heavily modified to protect confidential information.

The material and information contained therein is believed to be correct as of the date of publication (February 27, 2024) but the world of federal tax procedure is constantly evolving and changing as time passes. Each tax practitioner is responsible for doing their own research and due diligence as to the procedures in place at the time they are performing engagements for clients.

TODAY'S PRESENTATION (Part 1 of 2)

1. How the IRS (traditionally) pursued collection internationally.

2. What led to the IRS Passport Program ("the Program")

3. What tax debt qualifies for the Program

4. What were initial concerns about the Program

TODAY’S PRESENTATION (Part 2 of 2)

1. How the Program works

1. How does a taxpayer get out of the Program

2. What to do with special cases

3. What concerns still exist

How the IRS (traditionally) pursued collection internationally

- IRS has always been able to seize or levy US based assets
- There are also statute suspension provisions in the Internal Revenue Code (IRC 6503(c)) if a taxpayer is out of the country
- IRS can also take other actions internationally but these are less common due to cost and technical requirements:
  - *Add taxpayer to a Department of Homeland Security watchlist*
  - *Submit a Mutual Collection Assistance Request (MCAR) to a foreign country's tax authority.*
  - *Ask a federal judge to issue a "writ ne exeat republica" to compel taxpayer to return assets to the US.*

Attendance Check #1

Please answer the poll in Zoom. If you are unable to enter your answer in the poll you can use the chat or Q&A box.

What led to the IRS Passport Program (1 of 3)

- The Government Accountability Office (GAO) issues a report in 2011 that 224,000 taxpayers who owed $5 billion in taxes received passports in 2008.

- This gets a lot of negative publicity and Congress realizes that there wasn't any mechanism in the law to affect passport holders with tax debts

- Congress had previously acted in 1996 to restrict non-custodial parents who owe more than a specified amount of child support (42 USC 652(k) and in 2008 to restrict individuals engaged in sex tourism (22 USC 212a) from being issued a passport.

- The child support restriction was quickly challenged and upheld by the courts

What led to the IRS Passport Program (2 of 3)

- The child support and sex tourism restrictions were an example of collateral sanctions which are more commonly seen at the state level
- The collateral sanction is treated as a matter of public policy due to failing to take some action
- States commonly suspend various licenses for delinquent child support and taxes.
- Courts have usually upheld these types of programs as long as there is some due process related to the determination by the state that the triggering action occurred.
- Litigation challenging Constitutionality of collateral sanctions rarely succeeds for these reasons

What led to the IRS Passport Program (3 of 3)

- Congress starts considering a similar passport restriction for “seriously delinquent tax debt”
- Congress passes the Fixing America’s Surface Transportation Act (“the FAST Act”) in 2015, which includes IRC 7345 providing statutory authority for passport application denial and passport revocation through the IRS Passport Program (“the Program”)
- The IRS started operating the Program in 2018 and has refined it over the years since.
- The Program was paused in 2020 due to COVID 19 but reinstated in 2021.

Attendance Check #2

Please answer the poll in Zoom. If you are unable to enter your answer in the poll you can use the chat or Q&A box.

What tax debt qualifies for the Program (1 of 2)

- IRC 7345 requires that tax debt be “seriously delinquent”
- The statutory definition is:
  - unpaid, legally enforceable Federal tax liability of an individual—
    - (A) which has been assessed,
    - (B) which is greater than $50,000*, and
    - (C) with respect to which—
    - (i) a notice of lien has been filed pursuant to section 6323 and the administrative rights under section 6320 with respect to such filing have been exhausted or have lapsed, or
    - (ii) a levy is made pursuant to section 6331.

**currently $62,000 due to inflation*

What tax debt qualifies for the Program (2 of 2)

- IRC 7345 also includes a list of statutory exceptions
  - Taxpayers with liabilities being timely paid under approved installment agreements or accepted offers in compromise or under the terms of settlement agreements with the Department of Justice
  - Taxpayers with open timely requests for CDP levy hearings (TC 520, code 77)
  - Taxpayers who made elections or requests for innocent spouse relief under IRC 6015

- IRC 7508(a) also creates a postponement for taxpayers serving in a combat zone or participating in a contingency operation.

Attendance Check #3

Please answer the poll in Zoom. If you are unable to enter your answer in the poll you can use the chat or Q&A box.

What initial concerns were there with the Program (1 of 3)

- First issue relates to the list of exceptions
- The statutory list of exceptions is very short and left open questions:
  - What about taxpayers in bankruptcy and the automatic stay?
  - What about taxpayers who are deemed currently not collectible (CNC)?
  - What about pending offers in compromise and installment agreement requests?
  - What about identity theft issues or erroneous/disputed assessments?
  - What about Equivalent Hearing requests?
  - What about taxpayers who need a passport to work?
  - What about humanitarian issues?
- A strict reading of the statute precludes IRS from administratively creating exceptions

What initial concerns were there with the Program (2 of 3)

- Another issue relates to passport revocations and due process
    - Courts have held that there is no absolute right to a passport (*Haig v. Agee*, 453 U.S. 280 (1981) nor is there an absolute right to travel (*Eunique v. Powell*, 281 F.3d 940 (9th Cir. 2002))
    - Right to travel and passports are a form of liberty interest (*Weinstein v. Albright*, 261 F. 3d 127 (2nd Cir. 2001)) and there must be some sort of due process for a right or privilege that is issued (like a passport or drivers license) before the right or privilege is taken away (*Bell v. Burson*, 402 U.S. 535, 539 (1971)).
- Child support passport restrictions have been upheld but State Department hasn’t applied them to existing passports so revoking a passport under this type of law hasn’t really been challenged.

What initial concerns were there with the Program (3 of 3)

- Final issue relates to due process for tax assessments
- Recall that collateral sanctions usually succeed if the sanctioned individual has some opportunity to challenge the underlying basis for the sanction
- Recall that taxpayers have the opportunity to challenge collection actions by requesting a Collection Due Process (CDP) hearing under IRC 6320 or 6330.
- A key question initially was whether the opportunity for a CDP hearing was adequate due to the balancing test.
  - Submission for passport revocation and application denial appears statutory
  - No exception for passports needed for work
- Previously completed CDP hearings wouldn't have considered these types of issues

Attendance Check #4

Please answer the poll in Zoom. If you are unable to enter your answer in the poll you can use the chat or Q&A box.

How the Program works (1 of 6)

- The Program is based on IRC 7345 and regulations will be at Reg. 301.7345-1 (if ever issued).
  - Initial implementation was announced in IRS Notice 2018-1
  - IRS was very slow at putting together published guidance
  - Most guidance on the Program is in the Internal Revenue Manual (IRM) at 5.19.25. IRS administrative exceptions are at IRM 5.19.25.5

- State Department regulation is part of 22 CFR 51.60 (this may be important for special cases)

- IRS and State Department also both have websites related to the program (links are in course materials).

How the Program works (2 of 6)

- IRM has a very useful overview of the process at 5.17.5.21
- It is important to note that there is a lengthy process that occurred before the Program is involved:
  - An assessment must be proposed
  - This assessment then must become final
  - IRS starts the collection process with the “notice cycle”
  - IRS takes levy action or files federal tax lien
- Taxpayers who find themselves subject to the Program often claim to be unaware of the tax debt or that their passport was in jeopardy

How the Program works (3 of 6)

- Taxpayers become part of the Program using the following process:
  - IRS runs systematic reports to identify taxpayers that have "seriously delinquent tax debt"
  - IRS then submits a list systematically to the Treasury Department
  - The Treasury Department systematically "certifies" the taxpayer and the liability to the State Department
  - The IRS sends the taxpayer CP 508 C after this process but does not send a copy to any representatives on file.
  - Taxpayer subsequently applies for a passport and receives a letter from the National Passport Information Center (NPIC) instructing them to contact the IRS and resolve the issue within 90 days or the application will be denied.
  - Taxpayer

How the Program works (4 of 6)

- Taxpayers that are not assigned to a revenue officer who inquire about passport certification are transferred to the Automated Collection System (ACS) site in Philadelphia.
- Revenue officer cases are handled by the assigned revenue officer
- Most cases are resolved systematically using normal processes

How the Program works (5 of 6)

- The following process exists (as of January 2024) for revenue officers to recommend passport revocation:
  - The Revenue Officer must verify that the taxpayer was certified and has a valid passport
  - The Revenue Officer must secure managerial approval to issue Letter 6152, *Notice of Intent to Request U.S. Department of State Revoke Your Passport* (if the passport is valid for more than 12 months) OR
  - The Revenue Officer must secure managerial approval and Passport Policy team approval to issue Letter 6152, *Notice of Intent to Request U.S. Department of State Revoke Your Passport* (if the passport is valid for less than 12 months)
  - The Revenue Officer sets a follow up date (either 45 or 105 days)

How the Program works (6 of 6)

- Once the follow up date arrives:
  - The Revenue Officer must verify the taxpayer is still certified and the balance due is still over the threshold
  - The Revenue Officer sends a memorandum through their manager to Civil Enforcement Advice & Support Operations (CEASO) (previously known as "Advisory")
  - The Director, CEASO and Director, Collection Policy must concur with all recommendations before they are sent to the State Department

- Recommendations that don't come from revenue officers are theoretically possible but would require approval from the Director, Headquarters Collection Policy

Attendance Check #5

Please answer the poll in Zoom. If you are unable to enter your answer in the poll you can use the chat or Q&A box.

How does a taxpayer get out of the Program (1 of 5)

- Taxpayers must no longer have “seriously delinquent tax debt” to be removed from the Program through a process called “decertification”

- There are four basic ways for taxpayer to no longer have “seriously delinquent tax debt”
  - The debt is no longer legally enforceable
  - The taxpayer fully paid the debt that was certified
  - The taxpayer meets a statutory exception
  - The taxpayer meets a discretionary exception

- There is also a right to limited judicial review of the certification but it is unlikely to help most taxpayers

How does a taxpayer get out of the Program (2 of 5)

- Statutory exceptions are specifically stated in IRC 7345 and IRC 7508(a)
- Discretionary exceptions are provided in IRM 5.19.25.5 and include:
  - Debt classified as CNC (Status 53) – economic hardship;
  - Debt that is Report of Foreign Bank and Financial Account (FBAR) penalties;
  - Debt that resulted from identity theft;
  - Debt of a taxpayer in bankruptcy;
  - Debt of a deceased taxpayer;
  - Debt that is included in a pending offer or pending installment agreement;
  - Debt where there is an IRS accepted adjustment that will satisfy the liability in full
  - Debt of a taxpayer located in a federally declared disaster area

How does a taxpayer get out of the Program (3 of 5)

- Discretionary exceptions also may include:
  - State Department requested decertification
  - An adjustment to the account that reduces the original certification amount below the threshold. The original return has been filed and processed or the adjustment has posted.

How does a taxpayer get out of the Program (4 of 5)

- Taxpayers are removed systematically and manually through a process called decertification
- Most taxpayers are removed systematically within 30-45 days of resolving the underlying issue through the following process:
  - The IRS runs systematic reports that identify taxpayers that no longer have seriously delinquent tax debt
  - These reports are submitted weekly to the State Department
  - State Department removes the name from the list and continues processing the passport application if one is still open
-

How does a taxpayer get out of the Program (5 of 5)

- Taxpayers are also removed manually through the expedited decertification process (9-16 days):
  - This process requires that the taxpayer is eligible for decertification and was not previously subject to a recommendation for revocation
  - The taxpayer must be able to provide proof of travel within 45 days that shows name, location, and date of travel (not required if overseas)
  - The taxpayer must also provide the passport denial letter from the State Department that is less than 90 days old (not required if overseas)
  - Older IRS guidance seemed to indicate that taxpayers who got expedited decertification through installment agreements who subsequently defaulted could face a recommendation for passport revocation
- State Department processes these according to the service level selected when the passport was applied for

Attendance Check #6

Please answer the poll in Zoom. If you are unable to enter your answer in the poll you can use the chat or Q&A box.

What about special cases

- Policy and procedure about the Program is still being developed but there are still a few special cases left.
- Taxpayers who wish to return to the United States can secure a limited validity document only good for return to the United States at any US Consulate.
- Taxpayers who delayed too long to qualify for expedited decertification will likely have to change their travel plans
- Other special cases will likely require taxpayer advocate (TAS) assistance through the client's Congressional delegation or intervention by Congressional staff with the State Department to override the certification due to emergency circumstances or humanitarian reasons.
- Expect further guidance over time as these issues develop

Attendance Check #7

Please answer the poll in Zoom. If you are unable to enter your answer in the poll you can use the chat or Q&A box.

What concerns still exist about the Program (1 of 8)

- IRS has addressed many concerns over the past few years but some still remain and have become more pressing:
  - How will taxpayers who aren’t assigned to revenue officers and exceed ACS jurisdiction resolve their cases?
  - How will Appeals treat potential economic hardship from loss of work in the CDP hearing process?
  - How will the IRS refusal to expedite decertification where revocation was recommended play out under judicial review?
  - How will the IRS handle the unique concerns of dual citizens overseas?
  - How will “emergency circumstances or humanitarian reasons” be interpreted?
  - Should discretionary exceptions be made statutory?
  - Will the State Department revoke passports?

What concerns still exist about the Program (2 of 8)

- How will taxpayers who aren’t assigned to revenue officers and exceed ACS jurisdiction resolve their cases?
  - Instructions say to transfer to ACS in Philadelphia but ACS has jurisdiction limits based on amounts
  - Potential for taxpayers who want to resolve their accounts to be unable to resolve their account or submit to questionable practices like a frivolous offer to achieve decertification

What concerns still exist about the Program (3 of 8)

- How will Appeals treat potential economic hardship from loss of work in the CDP hearing process?
  - IRS is restricted under IRC 6343 when levy actions create an economic hardship
  - Tax Court held in *Vinatieri v. Commissioner* that this overrides IRS policy related to compliance
  - Appeals is required to engage in a balancing test and it's unclear how the potential economic hardship would be considered
  - This will probably end up being litigated in Tax Court from a CDP determination

What concerns still exist about the Program (4 of 8)

- How will the IRS refusal to expedite decertification where revocation was recommended play out under judicial review?
  - The current policy would seem to also include cases where the taxpayer fully pays the liability due (which seems arbitrary and capricious)
  - This could create a potential issue if revenue officers routinely start submitting recommendations for revocation
  - IRS systems already have a delay for decertifying taxpayer accounts that may not be acceptable given current technology
  - There would be issues with a judicial challenge to this policy but it could happen and could force IRS to speed up the decertification process.

Attendance Check #8

Please answer the poll in Zoom. If you are unable to enter your answer in the poll you can use the chat or Q&A box.

What concerns still exist about the Program (5 of 8)

- How will the IRS handle the unique concerns of dual citizens overseas?
  - Dual citizens may have built a life using a US passport that is required to maintain residency or travel
  - The expansion of expedited decertification for expatriates is a step in the right direction but there are still issues that may arise depending on travel requirements or restrictions resulting from the second citizenship

What concerns still exist about the Program (6 of 8)

- How will “emergency circumstances or humanitarian reasons” be interpreted?
    - It appears the IRS is starting to recognize this as an issue with a potential discretionary exception but there is currently no published guidance
    - Currently no information on State Department websites either
    - The expansion of passport restriction to tax debts increases the likelihood of having to address this issue on a recurring basis.

What concerns still exist about the Program (7 of 8)

- Should discretionary exceptions be made statutory?
  - Some discretionary exceptions are likely required by other statutes such as the bankruptcy exception
  - IRS still has discretion and IRM provisions are not binding and don’t create rights so judicial enforcement is likely impossible
  - This may end up being a taxpayer rights issue

What concerns still exist about the Program (8 of 8)

- Will the State Department revoke passports?
  - The provisions to recommend revocation are there but make it clear that State has discretion to revoke a passport
  - State Department historically has not actively revoked passports and prefers to conserve resources by denying applications when passports expire
  - The requirements to make a recommendation appear calculated to minimize potential due process issues and will likely limit the number of recommendations being sent

Questions?

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