

# **CRIMINAL TAX RESTITUTION: THE INTERNAL REVENUE SERVICE HAS A NEW POWER OF ASSESSMENT**

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## **ABSTRACT**

*Since nearly the creation of the Internal Revenue Service (“IRS”), the IRS has held broad authority to assess income taxes. In addition to its assessment powers, the IRS holds collection powers including the power to file tax liens and seize and sell property. Even with such powers, however, the IRS was struggling to assess and collect tax against individuals convicted of tax crimes. In a report published by the Treasury Inspector General Tax Administration (“TIGTA”), TIGTA reviewed a sample of 90 restitution payments made by 62 persons convicted of tax crimes, and found that approximately 40% of the cases reviewed did not have civil tax assessments. Even more disturbing is that four of the 62 convicted individuals received income tax refunds totaling more than \$200,000.00.*

*In light of the problems encountered by the IRS, the Internal Revenue Code was amended in 2010 to grant the IRS another assessment power. Section 3(a) of the Firearms Excise Tax Improvement Act of 2010, P.L. 111-327, was enacted to authorize the IRS to assess and collect restitution in criminal tax cases. This article will examine the assessment and collection procedures utilized by the IRS prior to the change in law, the solution offered by the change in law, whether the IRS’s policies and procedures will permit the supposed purposes of the law to be met, and conclude with some suggested considerations for plea negotiations in the future and points of concern for tax practitioners representing taxpayers involved, directly or indirectly, in criminal tax proceedings.*

## **INTRODUCTION**

Since nearly the inception of the internal revenue laws and the creation of the Internal Revenue Service (“IRS”), the IRS has held broad authority to assess income taxes. The Internal Revenue Code further authorizes the IRS to file Federal tax liens and seize and sell property if a taxpayer is notified of a tax balance due and fails to pay the balance due after notice and demand for payment. Even with such broad powers, however, the IRS was failing to assess and collect tax in cases where persons were convicted of tax crimes. In a report published by the Treasury Inspector General Tax Administration (“TIGTA”), TIGTA reviewed a sample of restitution payments made by persons convicted of tax crimes. What TIGTA found is that approximately 40% of the individual cases reviewed did not have civil tax assessments. Even more disturbing is that of the cases reviewed, four convicted individuals received income tax refunds totaling more than \$200,000.00.

As a result of the IRS’s troubles assessing and collecting in criminal tax cases, Section 3(a) of the Firearms Excise Tax Improvement Act of 2010, P.L. 111-327, was enacted authorizing the IRS to assess and collect restitution in criminal tax cases<sup>1</sup>. The statute is effective for restitution ordered after August 16, 2010. This article will examine the assessment and collection procedures utilized by the IRS prior to the change in law including a discussion on why so many taxpayers

convicted of tax crimes never had civil tax assessments and the failures that led to the refund of restitution payments, the solution offered by the change in law, new issues raised by the change in law, and concludes with suggestions for attorneys representing a client during plea negotiations in criminal tax cases and potential pitfalls of the new law that tax practitioners representing taxpayers need to be aware of.

### **RESTITUTION IN CRIMINAL TAX CASES BEFORE AUGUST 16, 2010.**

The law authorizes judicial orders of restitution for specified convictions under Titles 18, 21, and 49<sup>ii</sup>. Tax offenses under Title 26 are not included among the list of convicted offenses where a judge can order restitution. A judge can order restitution for Title 26 tax offenses only if the parties agree<sup>iii</sup> (the judge can enforce the terms of a plea agreement/contract) or, as a condition of probation or supervised release<sup>iv</sup>. It may seem peculiar that the law excludes convictions under Title 26 from those offenses where a judge may order restitution; however, when one considers that the victim of a tax crime is the United States, the loss is the unpaid tax, and the civil assessment and collection tools available to the Internal Revenue Service, the exclusion does not appear quite so anomalous<sup>v</sup>.

### **THE IRS'S ASSESSMENT AND COLLECTION POWERS.**

Even before the addition of Internal Revenue Code ("I.R.C.") § 6201(a)(4) authorizing assessment of criminal tax restitution, the IRS possessed broad assessment power. The Internal Revenue Code already authorized the IRS to assess taxes shown on a return; taxes resulting from an overstatement of prepayment credits which were allowed against the tax shown on a return; additional taxes resulting from mathematical or clerical errors; additional taxes resulting from tentative carryback or refund adjustments; any tax amounts paid; and any deficiency amounts<sup>vi</sup>. A deficiency is defined as the tax imposed under the law less the sum of: the amount shown as tax upon the taxpayer's return, plus amounts previously assessed, less any rebates<sup>vii</sup>. Essentially, a deficiency is the amount of tax the taxpayer owes less amounts reported or previously assessed.

Additionally, I.R.C. § 6321 provides for an automatic lien against the property or rights to property for any person liable to pay a tax who neglects or refuses to pay such tax after notice and demand for payment<sup>viii</sup>. Internal Revenue Code § 6331 authorizes the IRS to levy upon any property or rights to property belonging to a taxpayer who is liable to pay any tax and neglects or refuses to pay such tax after notice and demand for payment<sup>ix</sup>. Of course, the IRS must notify the taxpayer of the collection action and offer the taxpayer a hearing before an impartial IRS officer, but the authority granted by I.R.C. §§ 6321 and 6331 are far reaching<sup>x</sup>. With such broad assessment and collection authority, it is no wonder Congress excluded Title 26 taxes from the offenses where a judge may order restitution. The civil assessment and collection provisions of the Internal Revenue Code authorized the IRS to recoup the unpaid tax loss.

### **THE BREAKDOWN OF THE IRS'S SYSTEM IN ASSESSING AND COLLECTING IN CRIMINAL TAX CASES.**

So, with such broad assessment and collection powers, why the need for a new assessment law specifically pertaining to restitution? The IRS encountered several problems in assessing and collecting restitution ordered for tax crimes. For the fiscal years 2007 through 2009, data from Criminal Investigations' Criminal Investigation Management Information Systems showed restitution was ordered in the total amount of \$673,000,000<sup>xi</sup>. TIGTA selected a sample of 90 restitution payments made by 62 convicted individuals from a population of 11,775 payments received by the IRS during fiscal years 2007 through 2009<sup>xii</sup>. TIGTA's review for the fiscal years 2007 through 2009 was conducted beginning April 2010 through June 2011<sup>xiii</sup>. TIGTA found that only 24% of the sampled 62 individuals had tax assessments with restitution payments fully credited; that 37% had tax assessments, but that restitution payments had only been partially

credited or not credited at all; and that 39% of the sampled 62 did not have tax assessments<sup>xiv</sup>. Further, of the 62 convicted individuals in the sample, four received erroneous refunds totaling \$282,470.00<sup>xv</sup>.

#### **THE FAILURE TO TIMELY ASSESS CIVIL TAX.**

The amount of tax loss determined in a criminal case frequently also meets the definition of a deficiency. As noted above, the IRS has the authority to assess a deficiency, but the IRS must first conduct a civil examination, issue a notice of deficiency, and wait either for the period to petition the Tax Court to expire (90 days or 150 days) or the decision of the Tax Court to become final<sup>xvi</sup>. A civil examination is suspended when firm indicators of fraud or willfulness are established<sup>xvii</sup>. Only once the referral to the Criminal Investigation Division is declined or the criminal investigation/prosecution has concluded does the IRS agent then proceed with a civil examination<sup>xviii</sup>. As a result, there can be a substantial lag in time between the conclusion of the criminal case that includes an order of restitution and the civil assessment of tax.

If a taxpayer/defendant pleads guilty to a tax crime, and the plea agreement includes an order for restitution, the taxpayer/defendant can immediately begin making payments towards the restitution order (presumably to show the Judge the taxpayer/defendant is being compliant and impact the Judge's decision on sentencing). Since there is no civil assessment of tax (the civil examination has likely not even started), the taxpayer/defendant's payments are deposited into a Miscellaneous Revenue Account<sup>xix</sup>. An attempt by the IRS to apply the restitution payments to the taxpayer/defendant's tax account before an assessment can be made results in a refund (as found in TIGTA's report) since there is no "tax" to apply the payment towards.

#### **THE FAILURE TO ASSESS ANY CIVIL TAX.**

In addition to the timeliness issue, TIGTA's report also found that a substantial number of criminal cases are not pursued civilly by the IRS as evidenced by the fact that 39% of the 62 convicted individuals sampled did not have civil assessments. There could be several reasons why the IRS civil division would choose not to pursue civil assessment. One such reason is resources. Once a case is returned from the Criminal Investigation Division ("criminal division"), an individual agent must be assigned the case, and would be required to conduct a complete examination including consideration of the civil fraud penalty<sup>xx</sup>. Unless the criminal conviction (including plea agreements) is pursuant to I.R.C. § 7201 (attempt to evade or defeat tax), the IRS has the burden of proof when civil fraud is asserted<sup>xxi</sup>. Although the conviction under I.R.C. § 7201 does not shift the burden, the IRS can rely on collateral estoppel to prevent the taxpayer from disputing he or she acted with the intent to evade or defeat taxes<sup>xxii</sup>. If the conviction, however, is under a criminal statute other than I.R.C. § 7201, such as I.R.C. § 7206 for fraudulent or false statements, the IRS agent is required to do a complete fraud examination because the conviction alone is not sufficient to sustain the civil fraud penalty<sup>xxiii</sup>. The majority of pure tax convictions are pursuant to I.R.C § 7206. For the fiscal year 2011, more than 1,100 tax crimes were successfully prosecuted<sup>xxiv</sup>. The lead charge in 183 of those cases was I.R.C. § 7201, while I.R.C. § 7206 was the lead charge in 238 cases<sup>xxv</sup>. Thus, for the majority of criminal tax cases sent back to the IRS's civil examination division, a revenue agent will be required to conduct a complete examination including establishing civil fraud.

Further problems arise if the criminal investigation was conducted using a grand jury. A grand jury investigation will generally be instigated if the administrative process is insufficient to timely obtain the necessary information or "the investigation has proceeded as far as the administrative process allows," and a grand jury would strengthen prosecution potential<sup>xxvi</sup>. In other words, the criminal division believes that it cannot obtain the necessary information for a conviction through its administrative powers. At the conclusion of a grand jury case that resulted in a final

adjudication, a closing letter is prepared that includes language terminating the criminal referral and seeking civil action<sup>xxvii</sup>. However, the civil division of the IRS is not entitled to the information gathered during the grand jury investigation. Federal Rule of Criminal Procedure 6(e) prevents disclosure of information obtained during a grand jury proceeding<sup>xxviii</sup>. Although there is an exception for government attorney's, Rule 6(e)(3)(B) limits the disclosure to "an attorney for the government in performing that attorney's duty to enforce federal criminal law<sup>xxix</sup>."

For fiscal year 2009, the Department of Justice Tax Division authorized 751 grand jury investigations<sup>xxx</sup>. Based on the 1,278 tax prosecution recommendations for 2009 reported by the IRS<sup>xxxi</sup> and the number of individual prosecutions authorized by the Department of Justice Tax Division (1,210)<sup>xxxii</sup>, more than one-half of the recommendations made and prosecutions authorized were attained by grand jury investigation. The information obtained by the criminal division in those grand jury investigations could not be communicated to the civil division. Consequently, the civil division would be required to rely on its administrative powers to obtain the necessary information to properly examine the case and prove civil fraud. If the criminal division uses grand jury investigations in those cases where the criminal division believes that it cannot obtain the necessary information for a conviction through its administrative powers, the civil division is not likely to obtain the information at all using its administrative powers. Hence, numerous criminal tax cases never resulted in a civil assessment of tax.

Before the enactment of I.R.C. § 6201(a)(4) authorizing assessment and collection of criminal restitution, the best case scenario was a duplication of efforts by the IRS criminal and civil divisions (a waste of resources and taxpayer money). Before a civil assessment of any kind could be made, the civil division was required to conduct an examination and issue a notice of deficiency. The taxpayer could then take the case to the U.S. Tax Court to dispute the deficiency asserted and any penalties. Unless collateral estoppel applied, an I.R.C. § 7201 conviction, the entire case was reexamined and, in some instances, relitigated in a civil forum. The worst case scenario, as shown in the TIGTA report, was many cases prosecuted for tax and tax related crimes never resulted in a civil tax assessment. In extreme cases, taxpayer/defendant's received refunds of their court ordered restitution payments.

**THE IRS IS GIVEN YET ANOTHER POWER OF ASSESSMENT: I.R.C. § 6201(a)(4).**

In an attempt to correct the failure of the IRS to assess and collect civil tax, Congress has given the IRS another power of assessment. Section 3 of The Firearms Excise Tax Improvement Act of 2010 (H.R. 5552) amended I.R.C. § 6201 of the Internal Revenue Code. Internal Revenue Code § 6201(a)(4) now authorizes the Secretary to "assess and collect the amount of restitution under an order pursuant to section 3556 of title 18, United States Code, for failure to pay any tax imposed under this title (Title 26) in the same manner as if such amount were such tax<sup>xxxiii</sup>."

The new assessment law does not change the circumstances in which criminal tax restitution can be ordered, i.e., if the parties agree (the judge can enforce the terms of a plea agreement/contract) or, as a condition of probation or supervised release. However, it does permit the IRS to assess and collect such restitution, when it is properly ordered, as if the restitution were a tax under Title 26. Internal Revenue Code § 6201 further provides that the underlying tax liability assessed pursuant to a restitution order cannot be challenged<sup>xxxiv</sup>. Additionally, such assessment may be made at any time<sup>xxxv</sup>. Internal Revenue Code § 6213 was also amended to make clear that a notice of assessment of restitution is not a notice of deficiency giving the taxpayer rights to petition the Tax Court; is not a notice of deficiency restricting the issuance of further deficiency letters; and is not a notice of deficiency prohibiting any credits or refunds after a petition to the Tax Court<sup>xxxvi</sup>.

The law is clear that the assessment is permitted for “failure to pay” any Title 26 taxes. The restitution order must be traceable to a tax imposed by Title 26<sup>xxxvii</sup>. The assessment should include any interest on the underpayment pursuant to I.R.C. § 6601 determined at the underpayment rate established by I.R.C. § 6621<sup>xxxviii</sup>. However, the restitution assessment cannot include any penalties or additional tax determined by the examination division<sup>xxxix</sup>. If the IRS’s civil division wishes to assess penalties and/or additional tax, it must follow the pre-law deficiency proceedings, i.e., conducting a full examination and issuing a notice of deficiency.

The general 10-year period of limitations for collection of the assessed amount has not been changed<sup>xl</sup>. The IRS may, however, proceed with a suit to reduce the tax assessment to judgment thereby taking advantage of the 20-year judgment lien period<sup>xli</sup>. Further, the collection rights ensured by I.R.C. §§ 6320 and 6330 (collection due process) apply to collection of the assessed restitution amounts<sup>xlii</sup>. However, the taxpayer is precluded from contesting the underlying liability based on restitution<sup>xliii</sup>.

### **THE CONTINUED WASTE OF RESOURCES AND TAXPAYER MONEY.**

The new restitution assessment law allows the IRS to assess restitution ordered in criminal cases where the restitution is traceable to failure to pay Title 26 taxes. The law appears to prevent the duplication of actions by the criminal and civil divisions of the IRS and ensure that erroneous refunds are not issued to criminal tax defendants. However, the IRS’s policies present complications that may defeat at least one of the intended purposes underlying the law.

In all cases where fraud is considered, an examining agent must document why the penalty is not asserted<sup>xliv</sup>. Additionally, when criminal prosecution has been recommended by the criminal division to the Department of Justice, a civil examination agent can only remove fraud penalties (civil fraud or fraudulent failure to file) with concurrence from the IRS Office of Chief Counsel<sup>xlv</sup>. The Department of Justice Tax Division is responsible for supervising the criminal tax enforcement program,<sup>xlvi</sup> which includes criminal proceedings relating to the internal revenue laws<sup>xlvii</sup>. Thus, most, if not all, prosecutions of criminal tax violations are referred to the Department of Justice. As such, prosecuted criminal tax cases sent back to the civil examination division will have been referred to the Department of Justice Tax Division.

As the Internal Revenue Manual currently reads, a civil examination agent who receives a case back from criminal investigation following prosecution will be required to consider asserting the civil fraud penalty and can only forego pursuing the penalty with the concurrence of Area Counsel. Since penalties are not part of the restitution order which can be assessed, and the issuance of a restitution assessment notice is not a notice of deficiency preventing the issuance of additional notices, the agent will have to conduct a full civil examination and issue a notice of deficiency asserting any additional tax, the civil fraud penalty, and any other applicable penalties.

As previously explained, the IRS can only rely on collateral estoppel to prevent the taxpayer from disputing he or she acted with the intent to evade or defeat taxes if the criminal conviction is pursuant to I.R.C. § 7201<sup>xlviii</sup>, and the majority of pure tax criminal convictions are pursuant to I.R.C. § 7206<sup>xlix</sup>. Following these procedures places the IRS in the same position it was in prior to the enactment of the new assessment law, a duplication of efforts by the IRS criminal and civil divisions where the civil division may or may not be entitled to the information gathered by the criminal division resulting in a waste of IRS resources and taxpayer money.

### **THE PLEA AGREEMENT: IS IT BEST FOR YOUR CLIENT?**

Further troubles appear in the form of plea negotiations and the willingness of criminal defense attorney’s to enter into plea agreements. U.S. Attorney’s are authorized and encouraged to enter

into plea agreements in tax cases<sup>1</sup>. It is reasonable to assume that the push for restitution in plea agreements for criminal tax cases will be greater now that restitution can be assessed as a tax, and that most jurisdictions will require such restitution in plea agreements going forward. The question is whether the taxpayer would be better off proceeding to trial. In 2010, 87 percent of all criminal cases in District Courts were resolved by plea agreement<sup>i</sup>. In 2010, 85 percent of all tax investigation indictments and informations resulted in taxpayers being convicted and sentenced<sup>iii</sup>. If tax crimes follow the disposition in other District Court cases, 13 percent of tax cases are tried, with only 85 percent of those cases resulting in conviction.

In light of the fact that restitution can only be ordered as part of a plea or in connection with probation, a criminal defense attorney must ask whether his or her client would be better going forward to trial or taking a plea agreement setting forth a tax loss number that is then assessable. The attorney would have to consider the potential conviction and sentence if the defendant proceeds to trial and is convicted; the defendant's current financial position (if the restitution can be assessed as a tax, the tax can be collected using the IRS's administrative collection powers); and the charges set forth in the indictment<sup>iii</sup>. In looking at a plea versus conviction under I.R.C. § 7206(1) for filing a false return, restitution set forth in a plea agreement would be assessed as a Title 26 tax<sup>iv</sup>. The IRS could then issue a notice and demand for payment. If the taxpayer fails to pay, the IRS may proceed with collection action. Prior to the enactment of the new assessment law and without the plea agreement, the IRS would have to examine the return, issue a notice of deficiency, and permit the taxpayer/defendant his opportunity to go to Tax Court where the burden of proving civil fraud rests with the IRS. As noted in TIGTA's report, the IRS previously failed to timely assess civil tax resulting in refunds of court ordered restitution, and often did not pursue civil assessment at all.

#### **PAYING TOO MUCH TAX.**

A tax practitioner must also be cognizant of the amount of restitution agreed to and the implications surrounding assessment and collection of restitution to avoid the IRS collecting more tax than is actually due. The Federal Sentencing Guidelines Manual ("Manual") discusses the calculation of "tax loss"<sup>v</sup>. Of important note is language in § 2T1.1(c) of the Manual providing that percentages apply in calculating tax loss. For example, "[i]f the offense involved filing a tax return in which gross income was underreported, the tax loss shall be treated as equal to 28% of the unreported gross income (34% if the taxpayer is a corporation) plus 100% of any false credits claimed against tax<sup>vi</sup>." Or, "[i]f the offense involved failure to file a tax return, the tax loss shall be treated as equal to 20% of the gross income (25% if the taxpayer is a corporation) less any tax withheld or otherwise paid, unless a more accurate determination of the tax loss can be made<sup>vii</sup>." These calculations and percentages do not take into account any additional deductions the taxpayer may be entitled to and certainly do not equate to the definition of a "deficiency" provided in the Internal Revenue Code.

With respect to joint return cases where only one spouse is indicted and enters into a plea that includes assessable restitution, will the assessment be on a joint account, i.e., will the non-indicted spouse be jointly and severally liable? If not, it is likely the IRS will issue a notice of deficiency to the other spouse. Tax practitioners must take care that the IRS does not then collect the "tax" from both the restitution amount agreed to by the indicted spouse and the deficiency, if any, subsequently assessed against the unindicted spouse. Further, if both spouses from a joint return are indicted and enter into a plea that includes assessable restitution, both tax practitioners and the government will have to address the issue of calculating "tax loss," the proper allocation of restitution, and/or the collection of restitution in order to avoid the IRS assessing and collecting more tax than is due.

Even greater questions arise with conspiracy cases<sup>lviii</sup>. Restitution ordered against a co-conspirator would be tax related and assessable under the law. Under the old law, the IRS could only assert and assess a deficiency against the taxpayer. The new law raises serious concerns about assessing restitution as a tax and then proceeding to collect against a co-conspirator who is not the “taxpayer”. Again, tax practitioners and the government will have to account for assessable restitution among co-conspirators to avoid the IRS assessing and collecting more tax than is due.

## CONCLUSION

The restitution assessment authority granted by I.R.C. §6201(a)(4) was designed to prevent the refund of court ordered restitution payments and prevent the waste of IRS resources and taxpayer money. It does appear the new law will prevent the refund of restitution payments. The law allows the IRS to assess a tax, and thus, assuming the IRS properly implements procedures to timely assess, a tax will be on the IRS books so the payments can be properly applied. The law, however, does not prevent the duplication of actions by the criminal and civil division since the policies of the IRS, contained in the Internal Revenue Manual, continue to require that the civil division address the civil fraud penalty, and thus, conduct an examination and, more often than not, issue a notice of deficiency.

Additionally, the new restitution assessment authority raises additional issues for tax practitioners to consider concerning plea agreements and tax collection. Criminal defense attorneys need to consider whether a plea agreement containing assessable restitution is the best alternative for their client. All tax practitioners will have to act to police the collection of restitution. Tax practitioners need to consider whether the restitution amount represents the correct tax due keeping in mind that, once agreed to, the amount cannot be disputed. Also, for those practitioners representing noncriminal spouses or co-conspirators, the correct tax due and owing should only be collected once. If there are multiple assessments of the same amount, the practitioner needs to ensure the “liability” has not already been paid in full.

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<sup>ii</sup> 18 U.S.C. § 3663(a)(1).

<sup>iii</sup> 18 U.S.C. § 3663(a)(3).

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<sup>vi</sup> 26 U.S.C. §§ 6201 and 6213.

<sup>vii</sup> 26 U.S.C. § 6211(a).

<sup>viii</sup> 26 U.S.C. § 6321.

<sup>ix</sup> 26 U.S.C. § 6331.

<sup>x</sup> 26 U.S.C. §§ 6320 and 6330.

<sup>xi</sup> TIGTA Final Audit Report – Procedures are Needed to Improve the Accounting and Monitoring of Restitution Payments to Prevent Erroneous Refunds, Reference No. 2012-30-012 (January 27, 2012).

<sup>xii</sup> *Id.*

<sup>xiii</sup> *Id.* page 3.

<sup>xiv</sup> *Id.* at page 5.

<sup>xv</sup> *Id.* at page 8.

<sup>xvi</sup> 26 U.S.C. § 6213.

<sup>xvii</sup> IRM 25.1.3.2.

<sup>xviii</sup> IRM 25.1.3.5; IRM 9.5.14.2; IRM 9.5.14.3.

<sup>xix</sup> TIGTA Final Audit Report – Procedures are Needed to Improve the Accounting and Monitoring of Restitution Payments to Prevent Erroneous Refunds, Reference No. 2012-30-012 (January 27, 2012), page 5.

<sup>xx</sup> IRM 25.1.6.2.

<sup>xxi</sup> *C.B.C. Supermarkets, Inc. v. Commissioner*, 54 T.C. 882 (1970); T.C. Rule 142(b).

<sup>xxii</sup> *Amos v. Commissioner*, 43 T.C. 50 (1964) (Criminal conviction pursuant to § 7201 was binding on issue of civil fraud. “Parties were the same, and “willfully” in criminal statute encompasses all elements of “fraud” within civil penalty”).

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- <sup>xxxiii</sup> 26 U.S.C. § 6201(a)(4).
- <sup>xxxiv</sup> 26 U.S.C. § 6201(a)(4)(C).
- <sup>xxxv</sup> 26 U.S.C. § 6501(c)(11).
- <sup>xxxvi</sup> 26 U.S.C. § 6213(b)(5).
- <sup>xxxvii</sup> Chief Counsel Notice 2011-018, <http://www.irs.gov/pub/irs-ccdm/cc-2011-018.pdf>, viewed on October 14, 2012.
- <sup>xxxviii</sup> Id.
- <sup>xxxix</sup> Id.
- <sup>xl</sup> See 26 U.S.C. 6502; Chief Counsel Notice 2011-018, <http://www.irs.gov/pub/irs-ccdm/cc-2011-018.pdf>, viewed on October 14, 2012.
- <sup>xli</sup> CCA 201105037 (November 18, 2010).
- <sup>xlii</sup> Chief Counsel Notice 2011-018, <http://www.irs.gov/pub/irs-ccdm/cc-2011-018.pdf>, viewed on October 14, 2012.
- <sup>xliii</sup> 26 U.S.C. § 6201(a)(4)(C).
- <sup>xliv</sup> IRM 25.1.6.2(4).
- <sup>xlv</sup> IRM 25.1.6.2(5).
- <sup>xlvi</sup> 28 C.F.R. § 0.70.
- <sup>xlvii</sup> Department of Justice Tax Division Criminal Tax Manual § 1.01[4][a] (2008), [http://www.justice.gov/tax/readingroom/2008ctm/CTM%20Chapter%201.htm#TOC3\\_1](http://www.justice.gov/tax/readingroom/2008ctm/CTM%20Chapter%201.htm#TOC3_1), viewed on October 14, 2012.
- <sup>xlviii</sup> *Amos v. Commissioner*, 43 T.C. 50 (1964) (Criminal conviction pursuant to § 7201 was binding on issue of civil fraud. “Parties were the same, and “willfully” in criminal statute encompasses all elements of “fraud” within civil penalty”).
- <sup>xlix</sup> IRS Criminal Enforcement by District, Percent of Prosecutions with Tax Lead Charge, Transactional Records Access Clearinghouse (TRAC), <http://trac.syr.edu/phptools/enforcement/irsfree.php>, viewed on October 14, 2012.
- <sup>l</sup> United States Attorney Manual § 6-4.370 (2007), [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam](http://www.justice.gov/usao/eousa/foia_reading_room/usam), viewed on October 14, 2012.
- <sup>li</sup> University at Albany, “Criminal defendants disposed of in U.S. District Courts, by type of disposition 1945-2010”, *Sourcebook of Criminal Justice Statistics Online*, Table 5.22.2010, <http://www.albany.edu/sourcebook/pdf/t5222010.pdf>, viewed October 15, 2012.
- <sup>lii</sup> Enforcement Statistics – Criminal Investigation (CI) Enforcement Strategy, [http://www.irs.gov/uac/Enforcement-Statistics-Criminal-Investigation-\(CI\)-Enforcement-Strategy](http://www.irs.gov/uac/Enforcement-Statistics-Criminal-Investigation-(CI)-Enforcement-Strategy), viewed October 14, 2012.
- <sup>liii</sup> A conviction under § 7201 estops the taxpayer/defendant from disputing the civil fraud penalty; a conviction under § 7206 does not.
- <sup>liv</sup> Harris, Steven, “Author Expands on Argument from Collateral Estoppel Article”, Tax Notes Today, 130 Tax Notes 717 (Feb. 7, 2011).
- <sup>lv</sup> 2011 Federal Sentencing Guidelines Manual, Chapter 2 - § 2T1.1, [http://www.ussc.gov/Guidelines/2011\\_guidelines/Manual\\_HTML/2t1\\_1.htm](http://www.ussc.gov/Guidelines/2011_guidelines/Manual_HTML/2t1_1.htm), viewed on October 26, 2012.

<sup>lvi</sup> Id.

<sup>lvii</sup> Id.

<sup>lviii</sup> Harris, Steven, “Author Expands on Argument from Collateral Estoppel Article”, Tax Notes Today, 130 Tax Notes 717 (Feb. 7, 2011).