



Section  
on  
Taxation

# Inside Basis

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*Interview with David Hubbert,  
Deputy Assistant Attorney General for Civil Matters,  
U.S. Department of Justice Tax Division*

**FBA:** Your bio states that you started your career in the attorney general's honors program in the Department of Justice, Tax Division. So, how did you end up at the DOJ?

**DH:** I had an accounting degree, then went to law school and I intended to have a tax practice. I clerked with a firm in Tucson that had three or four tax partners and, late in the summer, one of them whom I had not worked with came and got me and said "We're going to lunch." He said that the other guys there were great and it was a really interesting practice, but if I wanted to do that, I should learn how to handle my own controversy work and the place to do that was the Tax Division. So, when I got back to school I asked a couple of professors about it because I knew nothing about the Tax Division at the time. They had both worked at Justice and said, as many do, that it was the best job they had ever had. So, I applied to the summer program and really enjoyed it, then came back as a trial attorney in the honors program. I've now spent my entire career with the Tax Division.

**FBA:** How have your responsibilities evolved particularly with the Tax Division, but also, at least to your mind, how has the Tax Division changed in the last 10 to 15 years?



**David Hubbert**

**DH:** Even though I have always been involved in litigation, my responsibilities have evolved and changed, with the different positions I have held. As a line attorney or an attorney directly handling cases, you think about not only the law and how facts go together, but you also think about how to put that together with what witnesses you're going to call, when you're going to try to get witnesses to talk to you, and in what order you're going to do it. Those sort of things were just endlessly fascinating to me. As an assistant chief working with line attorneys on their cases, it was fun to think about what they saw and then try to fill in the gaps. The research they

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*Message from the Chair*

*Fred Murray*

I hope you enjoy this issue of *Inside Basis*. This issue includes an informative interview with David Hubbert, deputy assistant attorney general for civil matters with the U.S. Department of Justice, Tax Division, as well as updates on our section's recent past and upcoming activities. Many thanks to our editors, Christine Hooks and Alan Williams, for their work on our publications, including this newsletter—which I hope you will find to be not only informative but also an invitation to further participate in our activities.

On March 1, 2013, we will be hosting the 37th Annual Tax Law Conference at the Ronald Reagan Building and International Trade Center in Washington, D.C. Featured speakers at the conference include Tamara W. Ashford, deputy assistant attorney general for appellate & review, Tax Division, U.S.



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Department of Justice, Mark J. Mazur, assistant secretary (tax policy) at the U.S. Treasury Department, and William J. Wilkins, chief counsel for the Internal Revenue Service. This year's conference co-chairs are Todd Reinstein of Pepper Hamilton LLP and Patricia McDermott of the Joint Committee on Taxation. Immediately following the conference we will present the section's 2013 Liles Award for Distinguished Service to John A. DiCicco, former acting assistant attorney general at the Tax Division.

Also this month we are hosting the section's 12th Biennial Invitational Conference on Tax Administration and the Legislative Process (formerly known as the FBA Airlie House Conference). The conference will be held on Feb. 20, 2013, in the Cannon Caucus Room, Cannon House Office Building, in Washington, D.C. Invitees include current and former congressional staff, administration officials, academics, and tax practitioners. As with our previous conferences, the objective of this conference is to promote a wide-ranging discussion of topics related to tax administration and the legislation on which it is based, with a view to lessons learned and best approaches, as well as possible improvements.

Last and certainly not the least, the section, in conjunction with the Office of Chief Counsel, Internal Revenue Service, will present the 25th Annual FBA Insurance Tax Seminar on May 30–31, 2013, at the J.W. Marriott in Washington, D.C. The co-chairs this year of that very well known and respected conference program are Lori J. Jones of Scribner, Hall & Thompson LLP and Nancy Vozar Knapp of the Office of Chief Counsel, Internal Revenue Service.

The section also has a number of other exciting programs planned for the coming months, including the next in our very popular "Women in Tax Law" series, our annual Careers in Tax Law lunch for summer interns, and a "Beyond the Beltway" event in New York.

I am also excited to mention that we are beginning a new committee within the section: the Tax Practice and Procedure Committee. Led by Stuart Bassin of Baker & Hostetler LLP, Starling Marshall of the Department of Justice Tax Division, Christine Lane of Hogan Lovells LLP, and Mary Prosser of Miller & Chevalier, Chartered, the committee has created a Practice and Procedure Discussion Group. The intent of the group is to conduct recurring hour-long conference calls on various hot top-

ics in the realm of federal tax practice and procedure. All members across the country are welcome to dial in and join the discussion, or simply place the phone on mute and listen. Our first national call took place on Feb. 25 at 1 pm ET. Make sure your current email address is in the section's membership records to receive future monthly invitations!

I assumed the role of chair in October 2012 after the very capable Martin Milner led our section through a suc-

cessful year of conferences and programs.

We also welcome Andrew Strelka as chair-elect, Marissa Rensen as treasurer, and R. Zeb Kelley as secretary. I appreciate the opportunity to serve as section chair, and know from past experience what a great experience it is to work with so many fine tax attorneys within both the government and the private sector. The section relies on volunteers, and I am impressed by the energy and

enthusiasm of our section members who have developed programs, monitored our budget, and guided the section. The FBA staff, and in particular Sherwin Valerio and Kate Koch, have been a tremendous help as well. I am privileged to work with our fine steering committee members as we plan an exciting schedule for 2013.

I look forward to hearing from you, our members, about your ideas or suggestions to improve the section. If you would like to become more involved in the section, or have ideas for a program, or just want to let us know how we are doing, please feel free to contact me. Also, please visit [www.fedbar.org/Sections/Section-on-Taxation.aspx](http://www.fedbar.org/Sections/Section-on-Taxation.aspx) for announcements regarding section programs or to be added to our email distribution list. Thank you for your continued support of the FBA and of the Section on Taxation. ☘

**"I am privileged to work with our fine steering committee members as we plan an exciting schedule for 2013."**

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didn't have time to do or the identifying experiences they hadn't had and try to fill those things in. As a section chief, you thought about whether you have the right people on this case, are there other people who could be helping out, do I need to move resources from here to there? So at each stage there were different ways of thinking about the same case, but different aspects of it. Now as the deputy, I haven't been at it long enough to really have a view of what works and doesn't work; but the process of learning and thinking about that is interesting.

In terms of how the Tax Division has changed, we've pretty much been set up the same way since I've been here. The civil litigation sections are split into regional trial sections and the Court of Federal Claims Section. In many ways that organization differs from IRS Chief Counsel's National Office, which is set up based on specializations in particular substantive areas. Because our sections are set up by region, our attorneys take what comes up and are therefore more generalists. While the structure of the organization has stayed the same, some things have changed. I think there are a lot more attorneys working together, working in teams, and working across section assignments to make sure we've got everybody bringing their ideas to the cases that we have.

**FBA:** So far how has the transition been from section chief to deputy?

**DH:** It's like any time you change jobs; you try to scramble to figure out what has to be done, what's required, and get up to speed on that and figure out how you're going to do that as best you can. Then you start looking around for the things where you can make a difference or things that are interesting, or you want to follow up on. I think I'm still at the stage of figuring out how to get what's required done quickly and efficiently. I'm also still talking to the section chiefs, talking to the assistant chiefs, and talking to the line attorneys about what they think works well, what they think we can take a look at and see if we can do it another way. I'm still in the listening stage more than the stage of formulating plans.

**FBA:** Is there anything different about the job as DAAG than what you expected coming in?

**DH:** The pace is certainly different than in a section and that has been fun to adjust to, but I don't know if I'm necessarily surprised by it. In a trial section you can see things building and coming and you know there is a specific matter or issue that will need attention. In the front office, issues often come up on a relatively short lead time and there are seven sections sending issues to the front office. That pace is just different than in a trial section where you have a little bit better feel for what's going on day to day. I think we have just over 4,000 active civil cases pending in the Tax Division, so any given day there's something going on. However, the sections all have very competent attorneys and supervisors and so the things that come up are pretty well formed and thought out.

**FBA:** What kind of issues do the sections send up to you?

**DH:** There's a range of issues that are either sensitive or particularly important. Some matters require approval at a higher level. So there are all sorts of things that come up on a fairly regular basis. For instance, the department has a policy of requiring DAAG-level approval for subpoenas and IRS summonses that are going to be served on attorneys. Then there are particularly sensitive issues or cases that come up for some consultation.

**FBA:** The Tax Division has a number of compliance initiatives that it's working on at any given time. How are those developed?

**DH:** I would say most of the large initiatives come out of an ongoing conversation with the Office of Chief Counsel, as well as some of the divisions in the IRS about what their goals are, what their initiatives are, and we talk about what the Tax Division can bring to most of those. There are some initiatives that aren't directly tied to those things, but in large part we're working in concert with the chief counsel on where tax administration and tax enforcement wants to put resources.

**FBA:** How would you describe the Tax Division's role in the tax enforcement arena?

**DH:** As placed within the DOJ, the Tax Division serves the attorney general's role as an independent legal evaluator of cases pending against the United States or cases brought by the United States. So we take in the views of the chief counsel's office, which include what they hear from the IRS in the field, and consider those views in the context of tax administration, as well as the interest of the United States. The attorney general has unique authority in terms of settling cases, having the final decision on whether a case is appealed or not, and that is a process that Department of Justice attorneys take very seriously. We balance the views and goals of those involved in tax administration as well as the overall interest of the United States.

**FBA:** How does the division coordinate its efforts with the service, both the IRS and chief counsel?

**DH:** There is open and regular communication. The assistant attorney general of the Tax Division and chief counsel communicate regularly about issues at their level. There are also the section chiefs and assistant chiefs talking regularly with area counsel and associate area counsel and then line attorneys in the chief counsel's office and the national office having discussions. Sometimes we also have cross training. This month we have a group of four or five Tax Division attorneys holding a training session for chief counsel attorneys on how refund suits are handled. We've also asked some chief counsel attorneys to come over and do some training with us on an emerging issue. There is back and forth frequently on all levels.

**FBA:** What is the relationship between the Tax Division and the U.S. attorneys' offices?

**DH:** For the Tax Division, it differs a little bit on whether

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you're talking about the civil sections or the criminal sections. For both of them, we have very close relationships with the U.S. attorneys and their offices, and they differ a little bit in how they involve the assistant U.S. attorneys in their cases. The vast majority of the civil tax cases are handled directly by Tax Division attorneys. Often the U.S. attorney offices provide some support or have some involvement, but those cases are generally handled by Tax Division attorneys directly. In the criminal enforcement sections, once the case has been referred for a grand jury investigation, or there has been an indictment, there is more conversation about who's going to be involved, who's taking the lead, and how the case will be staffed. In those cases, you often have trial teams that have Tax Division and assistant U.S. attorneys together.

**FBA:** On the civil side, you said most of the civil cases are handled by Tax Division. What are the few civil cases that are handled by the U.S. attorneys' offices?

**DH:** Over the years, the relationship the Tax Division has had with the U.S. attorneys has led to a decision that certain cases are better handled at the local level, and those types of cases are listed in the U.S. Attorney's Manual. For example, quiet title cases arising under 28 U.S.C. § 2410 are largely handled in the U.S. attorney offices. The U.S. attorneys handle many of the suits seeking enforcement of IRS summonses, particularly where it's a relatively straightforward summons. A lot of the bankruptcy cases involving the IRS are handled in the U.S. attorney's office, although there, they often use chief counsel attorneys who are designated special AUSAs to handle those cases.

**FBA:** What sort of coordination is there between the civil and criminal sides of the Tax Division?

**DH:** The Tax Division has a coordinator for directly parallel civil and criminal proceedings, currently Carol Ide, who works to facilitate those cases. The DAAG for criminal, Ron Cimino, and I probably talk several times a week about things that have potential overlap between the two sections, enforcement matters that one could consider either civil or criminal, and how those might overlap or how tax administration would be best served by proceeding. The current assistant attorney general, Kathy Keneally, obviously comes from a practice where she handled both civil and criminal work, and is very well versed in how those issues arise and can be handled.

**FBA:** You mentioned parallel proceedings, what is an example of that?

**DH:** Several years ago both IRS chief counsel and the Tax Division tried to make it a goal to coordinate and pursue parallel proceedings where it works well for the overall goal of the investigation. For instance, if there's an investigation of criminal activity and there's ongoing fraud that can be stopped, tax administration is served well by stopping it. So there are cases in which an investigation can be handled concurrently with a civil injunction proceeding to stop the tax loss going forward.

**FBA:** What advice do you have for a new attorney begin-

ning their career?

**DH:** Well obviously, you want to be technically competent at what you're doing, and so it's important to work on those skills. Beyond that, I think everyone brings a certain intellectual curiosity to the way they approach problems, and I've always found that chasing that as much as you can has always brought dividends. The other piece of advice I got that has worked well in terms of the Tax Division is that an organization always has real strengths and you want to be able to know where those are and understand them, but you also want to look for gaps and the areas where there isn't someone with expertise in an issue and think whether it's a space that you can fill. In my experience, no one ever stops you from volunteering to work on something that they feel will be valuable. If you go out and provide some support or something of value, you can help your organization. That's always been a good path forward for me.

**FBA:** As you know, the Tax Division was without an appointed assistant attorney general for three years. Kathy Keneally was finally confirmed in March 2012. How has her presence benefitted the Tax Division so far?

**DH:** Having Kathy Keneally as the assistant attorney general has been great. She brings a lot of experience, insight, and energy. Kathy has contacts and a network that extends beyond what career people in the Tax Division have, so it's great to have her here and I've learned a lot working with her. The understanding and perspective that comes from her experience and the contact that she had with private practitioners allows her to evaluate what we're doing, how we're doing it, whether it's effective, whether we need to think about ways to modify what we're doing. These are all important issues for us to consider as we undertake our work. ☘

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## Spotlight on the Penalty for Excessive Refund Claims, I.R.C. § 6676

by Christine S. Hooks

The penalty for excessive refund claims is one of the more mysterious provisions in the Internal Revenue Code. Since its enactment in 2007, the penalty has received little attention. In part this is because, despite its inclusion on the IRS's priority guidance plan each year since 2007, the IRS has yet to issue regulations or other comprehensive guidance. The IRS has also rarely asserted the penalty. However, practitioners are observing that the penalty is being imposed with greater frequency, raising questions as to whether the IRS is consistently and fairly applying the penalty in the absence of published guidance. As the assertion of the penalty increases, taxpayers and practitioners should be aware of its implications and the issues that it raises, including constitutional concerns.

### What is the Penalty?

In 2007, Congress enacted the excessive refund penalty as part of the Small Business and Work Opportunity Tax Act of 2007.<sup>1</sup> It provides for a 20 percent penalty on any excessive erroneous claim for refund of income tax unless the taxpayer shows that the claim has a reasonable basis:

If a claim for refund or credit with respect to income tax (other than a claim for a refund or credit relating to the earned income credit under § 32) is made for an excessive amount, unless it is shown that the claim for such excessive amount has a reasonable basis, the person making such claim shall be liable for a penalty in an amount equal to 20 percent of the excessive amount.<sup>2</sup>

The penalty does not apply to any portion of the excessive amount that is subject to the negligence or fraud penalties for understatements of income.<sup>3</sup> While the term "excessive amount" is defined as the amount that a claim for refund exceeds the amount allowable,<sup>4</sup> the term "reasonable basis" is not defined by the statute. However, the statute was amended in 2010 to explicitly provide that any excessive amount that is attributable to a transaction described in § 6662(b)(6), or a noneconomic substance transaction, "shall not be treated as having a reasonable basis."<sup>5</sup> Thus strict liability is imposed for refund claims disallowed by the IRS based on the subject transaction lacking economic substance.

The term "reasonable basis" is used elsewhere in the code, as part of an exception to the accuracy-related penalty on underpayments.<sup>6</sup> Therefore, in the absence of regulations promulgated under § 6676, taxpayers have relied upon the regulations under § 6662 for guidance. Those regulations define "reasonable basis" as "a relatively high standard of tax reporting, that is, significantly higher than not frivolous or

not patently improper."<sup>7</sup> While it is a high standard, it is not as high as a requirement that a position be supported by "substantial authority."<sup>8</sup> Further, "the reasonable basis standard is not satisfied by a return position that is merely arguable or that is merely a colorable claim. If a return position is reasonable based on one or more of the authorities set forth in § 1.6662-4(d)(3)(iii) [including statutes, regulations, revenue rulings, revenue procedures, tax treaties, court cases, legislative history, and various administrative pronouncements published in the *Internal Revenue Bulletin*] ..., the return position will generally satisfy the reasonable basis standard even though it may not satisfy the substantial authority standard ..."<sup>9</sup>

Thus, the penalty seems to apply broadly to any refund claim that the IRS disallows and deems inadequately supported. How the reasonable basis standard will be applied in the case of emerging areas where the law is not yet settled remains to be seen.

### Legislative History

Despite the breadth of the penalty provision, it appears that Congress had in mind only a few types of excessive erroneous refund claims when it enacted the penalty. While the enactment itself was part of an emergency appropriations bill for which there is no official legislative history, some inferences can be drawn from the legislative history related to a predecessor version of the bill. With regard to that bill, the Joint Committee on Taxation explained that "the Treasury Inspector General for Tax Administration [TIGTA] has reported that certain refund schemes have overwhelmed IRS resources to the point where the IRS was unable to prevent the issuance of erroneous refunds."<sup>10</sup> The referenced TIGTA report examined two erroneous refund schemes, one involving false refund claims by prisoners, and the other involving 70,000 returns that used fictitious information on Schedule C ("Profit or Loss from Business") to claim the earned income tax credit.<sup>11</sup> The joint committee concluded that the penalty "may improve the overall functioning of the tax system by deterring erroneous refund claims and improving the level of service provided to taxpayers who do not make such refund claims."<sup>12</sup> It therefore appears that Congress was driven to enact the penalty in order to deter the types of fraudulent refund schemes that lead to floods of claims overwhelming the IRS's resources.

Interestingly, although both of the fraudulent schemes that apparently led Congress to enact the penalty involved false claims of the earned income tax credit, the statute specifically excludes excessive claims of the earned income tax credit from the penalty's application.

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### What the IRS Has Said About the Penalty So Far

Although the IRS has not yet issued regulations applying the penalty, it has had occasion to consider how and when the penalty applies through less formal guidance.

### How the Penalty Applies

The IRS has included informal guidance in the *Internal Revenue Manual*. In this guidance the IRS has made clear that the penalty is an assessable penalty that is not subject to deficiency procedures, and “should not be included on an examination report, on the examination 30-day letter, or on the statutory notice of deficiency.”<sup>13</sup> Instead, the examiner will open a “related” case file with a separate assessment form 8278, Assessment and Abatement of Miscellaneous Civil Penalties.<sup>14</sup> If the taxpayer disagrees with the examiner’s determination, the taxpayer may request Appeals consideration.<sup>15</sup> A taxpayer’s only option to seek judicial review of the imposition of the penalty is to pay the penalty and claim a refund.

In Chief Counsel Advice Memorandum 200747020, IRS chief counsel considered how the amount of the penalty is calculated. Noting that the penalty applies to all excessive/erroneous claims for refund of income taxes, whether reflected on an original return, amended return, or other form, counsel confirmed that the penalty is calculated as 20 percent of the excessive amount, unless the excessive amount is attributable to the earned income credit or is subject to other penalties under § 6662, § 6662A, or § 6663. It provided the following example:

For example, on March 8, 2008, taxpayer mails Form 1040, U.S. Individual Income Tax Return, along with a check for \$400 to cover the amount due to the applicable service center. On June 10, 2008, taxpayer files Form 1040X, Amended U.S. Individual Income Tax Return, as a result of changes in the amount of itemized deductions. Taxpayer claims a refund (line 23 of Form 1040X) in the amount of \$2,000. On consideration of the claim, it is determined that the taxpayer is not entitled to a refund in the amount of \$2,000, rather the amount of the refund allowed is only \$1,000. The disparity is not due to any argument having a reasonable basis. The excessive amount is \$1,000 (\$2,000-\$1,000). Taxpayer will be assessed a penalty in the amount of \$200 (20% (\$2,000-\$1,000)).

What is clear from this example is that the IRS views the penalty as applicable to the portion of the refund claim that it disallows. What is less clear is what the IRS considers to be a reasonable basis, and how the concept applies to portions of refund claims.

### When the Penalty Applies

Somewhat surprisingly, the IRS has determined that the refund penalty does not apply to a recent fraudulent refund scheme that has wreaked havoc on the IRS’s refund system. In Chief Counsel Advice Memorandum 201018002, chief counsel considered the penalty’s application to fraudulent refund claims made under the so-called Form 1099-OID Scheme. In that scheme, thousands of taxpayers falsely claimed on their original returns that income tax had been withheld. Typically these taxpayers fabricated Forms 1099-OID that stated an amount of income and tax withheld. The taxpayers reported the amount of income on their returns but reported no tax due based on the false amount withheld.

Chief counsel ultimately concluded that this scheme results in underpayments of tax, and therefore is subject to the accuracy-related and fraud penalties rather than the excessive refund penalty: “[I]f an ‘underpayment’ exists, the § 6676 penalty cannot apply.” Chief counsel based its rationale on the regulations under I.R.C. § 6664, which defines underpayments:

The Section 6664 regulations define an underpayment of income tax as the amount by which any income tax imposed under Subtitle A exceeds the excess of (A) the sum of (i) the amount shown as the tax by the taxpayer on his return, plus (ii) amounts not so shown previously assessed (or collected without assessment), over (B) the amount of rebates made. Treas. Reg. § 1.6664-2(a). The definition can be expressed as: underpayment =  $W - (X + Y - Z)$ , where  $W$  is the amount of income tax imposed,  $X$  is the amount shown as tax by the taxpayer on his return,  $Y$  is amounts not so shown previously assessed (or collected without assessment), and  $Z$  is the amount of rebates made ... Under the facts stated, the overstatement of income tax withheld decreases the amount shown as tax by the taxpayer on his return, as defined in Treas. Reg. § 1.6664-2(c), and increases the underpayment, if any, of tax. See Treas. Reg. § 1.6664-2(g), Example 3; see also *Sadler v. Commissioner*, 113 T.C. No. 4 (1999); *Rice v. Commissioner*, T.C. Memo. 1999-65. Thus, in a case where the only inaccuracy on a return is a claim of false withholding, an underpayment results and Section 6676 cannot apply.

Chief counsel’s interpretation may present a more limited application of the penalty than expected. While the statute provides only that the penalty does not apply to any portion of an excessive amount that is subject to the accuracy-related or fraud penalties, this Chief Counsel Advice Memorandum

holds that the penalty is inapplicable whenever there is an underpayment as defined in the regulations under 26 U.S.C. § 6664. This would seem to render the Section 6676 penalty inapplicable even when an understatement of income is less than 10 percent and not fraudulent, *i.e.*, when neither the accuracy-related nor fraud penalties apply. Moreover, under chief counsel's interpretation an erroneous refund paid based on an original return will often result in an underpayment, rendering the Section 6676 penalty inapplicable. This appears at odds with Congress' concern regarding erroneous refunds being issued as a result of fraudulent schemes, as such erroneous refunds are often issued in response to original returns.

### Taxpayer Concerns

The potential application of the penalty without formal guidance in place raises several concerns for taxpayers. Of paramount concern is the lack of guidance regarding what constitutes a reasonable basis for a refund claim. While it is likely that the IRS will interpret the term consistently with the regulations under Section 6662, it is not guaranteed. It also may not be sufficient; under Sections 6662 and 6663, in addition to the reasonable basis exception there is also a separate reasonable cause and good faith exception to the penalties provided by Section 6664(c). While this exception, enacted prior to Section 6676, does not explicitly apply to the Section 6676 penalty, the IRS may be able to apply the exception through its regulations. The reasonable cause and good faith exception may apply in circumstances such as the taxpayer's "honest misunderstanding of fact or law that is reasonable in light of all of the facts and circumstances, including the experience, knowledge, and education of the taxpayer," a computational or transcriptional error, or reasonable reliance on an information return, professional tax advice, or other facts.<sup>16</sup> Such an exception may be particularly appropriate in the context of an erroneous refund claim, for which the taxpayer is required to provide the IRS with an explanation of the grounds and facts upon which the claim is based, and which should allow the IRS to evaluate the taxpayer's reasonable cause and good faith.<sup>17</sup>

In addition, some taxpayers have begun to argue that only providing an exception to the penalty under the higher standard of reasonable basis as defined in Treasury Regulation § 1.6662-3 would be unconstitutional. In June 2012, Derek Ho, an attorney with Washington, D.C. firm, Kellogg, Huber, Hansen, Todd, Evans & Figel PLLC., sent a letter to the IRS commissioner arguing that the Section 6676 penalty may violate the U.S. Constitution's Petition Clause.<sup>18</sup> In particular Ho argued that the penalty may be unconstitutional if the "reasonable basis" safe harbor is more stringent than the "sham" exception to the Petition Clause. According to Ho, a person is entitled to petition the government for redress, which includes claims for refunds of taxes, and the First Amendment prohibits any sanction for pursuing such a petition. The only exception to this rule is for "sham" petitions that are both "objectively baseless in that no reasonable litigant could expect success on

the merits" and "subjectively motivated by bad faith."<sup>19</sup> Ho asserted that requiring that refund claims be more than "arguable" or "colorable," the definition of "reasonable basis" in the regulations under § 6662, would violate the Petition Clause by penalizing claims beyond the "sham" exception, and accordingly urged the IRS to interpret 26 U.S.C. § 6676 with these principles in mind.<sup>20</sup> Otherwise the penalty may have a chilling effect on legitimate challenges to IRS actions.

### Conclusion

Whether the IRS addresses any of these concerns in forthcoming regulations remains to be seen. In the meantime, taxpayers and practitioners should be careful to incorporate sufficient support to meet the "reasonable basis" standard under Section 6662 in any claim for refund filed. Until more comprehensive guidance is issued, that is the best line of defense against the imposition of the assessable, and potentially strict liability, penalty for excessive refund claims. ❧

*Christine S. Hooks is a tax controversy associate in Mayer Brown LLP's Washington, D.C., office.*

### Endnotes

<sup>1</sup>P.L. 110-28, § 8247(a).

<sup>2</sup>26 U.S.C. § 6676(a).

<sup>3</sup>See 26 U.S.C. § 6676(d).

<sup>4</sup>26 U.S.C. § 6676(b).

<sup>5</sup>Health Care and Education Reconciliation Act of 2010, P.L. 111-152, § 1409(d), codified at 26 U.S.C. § 6676(c).

<sup>6</sup>26 U.S.C. § 6662(d)(2)(B).

<sup>7</sup>26 C.F.R. § 1.6662-3(b)(3).

<sup>8</sup>See 26 C.F.R. § 1.6662-4(d).

<sup>9</sup>*Id.*

<sup>10</sup>Staff of the Joint Comm. on Taxation, 110th Cong., Description of Revenue Provisions Contained in the President's Fiscal Year 2008 Budget Proposal, JCS-2-07, at 186 (2007) (hereinafter "Joint Committee Report"), available at [www.jct.gov/publications.html?func=startdown&id=1218](http://www.jct.gov/publications.html?func=startdown&id=1218) (last visited February 2, 2013).

<sup>11</sup>TIGTA, Semiannual Report to Congress at 15-16 (April 1, 2005-September 30, 2005), available at [www.treasury.gov/tigta/semiannual/semiannual\\_dec2005.pdf](http://www.treasury.gov/tigta/semiannual/semiannual_dec2005.pdf) (last visited February 2, 2013).

<sup>12</sup>Joint Committee Report, *supra* note 10, at 186.

<sup>13</sup>I.R.M. § 20.1.5.16.2.

<sup>14</sup>I.R.M. § 20.1.5.16.3.

<sup>15</sup>I.R.M. § 20.1.5.16.4.

<sup>16</sup>26 C.F.R. § 1.6664-4(b)(1).

<sup>17</sup>26 C.F.R. § 301.6402-2(b)(1).

<sup>18</sup>See TaxAnalysts Doc. 2012-12603.

<sup>19</sup>*Id.* at 6 (quoting *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1080 n.4 (8th Cir. 1999)).

<sup>20</sup>*Id.* at 8, 9-10.

## Section on Taxation Recent Events

### Women in Tax Law

by Marissa Rensen

The FBA's Section on Taxation hosted a panel program and networking reception on Nov. 29, 2012, as part of its Women in Tax Law series, entitled "Women in Tax Law: Strategies and Perspectives on Tax Litigation." The event was held at Miller & Chevalier Chartered in Washington, D.C. The panel focused on strategies for standing out at public speaking events, in meetings, and in other forums where effective communication skills are essential. Panelists included Kim Boylan, a partner at White & Case LLP; Candace Ewell, a tax director at PriceWaterhouseCooper; Sheryl Flum, a branch chief at the Internal Revenue Service Office of Chief Counsel; and Deborah S. Meland, the chief of the Civil Trial Section Eastern, at the Department of Justice's Tax Division.

### Young Tax Lawyer Events

by Mark Milton and Ryan Kelly

During the fall and winter, the FBA Section on Taxation's Young Tax Lawyers Group hosted a series of bi-monthly networking events at the Iron Horse Tap Room (September), Penn Quarter Sports Tavern (November), and Hill Country (January), all located in downtown Washington, D.C. The events were well attended by law students, young attorneys, and experienced tax practitioners from both the public and private sectors. The Young Tax Lawyers Group is also

planning a program in April called "An Evening with the Judiciary: Views from the Bench," which will feature a panel presentation by several federal judges. The presentation is aimed at providing practical tips for tax attorneys handling cases before the federal courts. Through these events, the current co-chairs of the Young Tax Lawyers Group, Ryan Kelly of Baker & McKenzie and Mark Milton of the Department of Justice Tax Division, are seeking to increase participation in the FBA's Section on Taxation among law students and young attorneys in the D.C. metropolitan area.

### Technical Programs

by Christine Hooks

On Oct. 30, 2012, the Section on Taxation hosted a Webinar entitled "*Historic Boardwalk Hall: Implications for Investments in Tax Credit Transactions*," which focused on the Third Circuit's decision in *Historic Boardwalk Hall, LLC v. Commissioner* and its implications for investors in tax credit transactions. Panelists included David Blair of Crowell & Moring LLP, Jeffrey Davis of Mayer Brown LLP, Allison Carmody of IRS Office of Associate Chief Counsel (Passthroughs and Special Industries), and Jerry Breed of Bryan Cave LLP. The panel discussed the court's application of substance-over-form principles to partnership interests, the court's reliance on *Castle Harbour* and *Virginia Historic*, implications for future cases, potential impact beyond *Historic Tax Credits*, and the potential for new IRS guidance.

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