Pepperdine Law Review

Volume 43 | Issue 1 Article 3

12-15-2015

Redefining "Peril"—Abating the Interest on a Tax Deficiency for Good Faith Reliance on IRS Publications

Brady Cox

Redefining "Peril"—Abating the Interest on a Tax Deficiency for Good Faith Reliance on IRS Publications

I. INTRODUCTION 126
II. BACKGROUND OF IRS TAX GUIDANCE AND THE IRS DUTY OF CONSISTENCY 127
A. *Sources of IRS Guidance* 128
1. Treasury Regulations 129
2. Internal Revenue Bulletin Guidance 130
3. Letter Rulings 131
4. Acquiescence Program 131
5. Legal Advice Program 132
6. Other Communications 133
B. *The IRS Consistency Duty Controversy* 135
C. *Objective Effects on the Taxpayer when the IRS Is Inconsistent* 141
III. CURRENT STATE OF THE LAW REGARDING RELIANCE ON IRS PUBLICATIONS 144
A. *Current Legal Consistency Duty for IRS Publications* 144
1. *Adler v. Commissioner* 145
2. *Green v. Commissioner* 146
3. *Neal v. Commissioner* & *Miller v. Commissioner* 147
B. *How Courts Currently Define Peril* 150
1. Liability for the Deficiency as Well as all Interest and Penalties 150
2. Liability for the Deficiency as Well as Interest but Penalties are Abated 154
a. Chien v. Commissioner 154
b. Allcorn v. Commissioner 155
3. Liability for the Deficiency but all Penalties and Interest Are Abated 157
IV. REDEFINING PERIL 160
A. *The Proposed Amendment to I.R.C. § 6404* 161
B. *Policy Arguments Against a Statutory Compromise* 163
C. *Policy Arguments for Statutory Compromise* 165
V. CONCLUSION 167

I. INTRODUCTION

Since 1913, the Internal Revenue Service (IRS) has compiled an extensive library of tax forms and accompanying instructions, as well as tax law guidebooks known as IRS publications.[1] With titles such as *How to Depreciate Property*,[2] *Tax Guide for Small Business*,[3] *1040 Instructions*,[4] and, most notably, *Your Federal Income Tax: For Individuals*,[5] many taxpayers understandably rely on these materials to provide the knowledge needed to comprehend the United States Tax Code and pay an accurate tax.[6] However, many, if not all, of these taxpayers would likely be startled to learn that their reliance on these IRS guidance materials is perilous.[7] That is, reliance upon these guidance materials will not support a taxpayer's tax treatment decisions if the IRS decides that the decisions were incorrect under substantive law. This leaves the taxpayer vulnerable to financial consequences such as tax deficiencies, penalties, and interest.[8] Thus, an ignorant taxpayer who turns to the IRS for guidance should do so with all the courage of a free-solo climber,[9] for she is "living dangerously."[10]

The United States Tax Court recently affirmed its standing on this

1. *Historical Highlights of the IRS*, IRS, http://www.irs.gov/uac/Historical-Highlights-of-the-IRS, (last updated Jan. 23, 2015). For the purposes of this Comment, the phrase "IRS publications" refers also to tax forms and their accompanying instructions, as they are essentially the same under the current state of the law. *See infra* Part II.A.6 and note 69.

2. IRS, DEP'T OF TREASURY, PUBLICATION 946: HOW TO DEPRECIATE PROPERTY (2015).

3. IRS, DEP'T OF TREASURY, PUBLICATION 334: TAX GUIDE FOR SMALL BUSINESS (2015).

4. IRS, DEP'T OF TREASURY, FORM 1040: U.S. INDIVIDUAL TAX RETURN (2015).

5. IRS, DEP'T OF TREASURY, PUBLICATION 17: YOUR FEDERAL INCOME TAX (2015).

6. *See infra* text accompanying notes 28, 75.

7. *See infra* note 189 and accompanying text. *See generally* Emily Cauble, *Detrimental Reliance on IRS Guidance*, 2015 WIS. L. REV. 421 (2015) (discussing the unreliability of IRS phone guidance).

8. *See infra* Part II.C.

9. A free-solo climber is one who climbs rocks or other structures without ropes or protective measures. *See* Stewart Green, *Free Soloing*, ABOUT.COM, http://climbing.about.com/od/dictionaryofclimbing/a/FreeSoloingDef.htm (last visited Sept. 16, 2015).

10. Janet Novack, *'Taxpayers Rely on IRS Guidance at Their Own Peril,' Tax Judge Rules*, FORBES (Apr. 18, 2014), http://www.forbes.com/sites/janetnovack/2014/04/18/taxpayers-rely-on-irs-guidance-at-their-own-peril-tax-judge-rules/.

decades-old rule in an order issued for the case *Bobrow v. Commissioner*,[11] thereby igniting the fairness ideals of taxpayers and tax professionals.[12] However, because the courts have not decisively concluded which financial consequences a taxpayer faces or escapes by relying on informal IRS guidance, "peril" remains undefined. Does the taxpayer face all three? Does she face the tax deficiency and the associated interest charges but escape the penalty? Does she face the deficiency but escape the penalty and interest?

This Comment answers these questions by looking at how the IRS, the courts, and the Internal Revenue Code (the Code) currently define peril and then offers a proposed statutory amendment to redefine peril in a way that compromises governmental interests of justice and taxpayer concerns of fairness. Part II gives a brief background of all the guidance that the IRS offers and the level of reliance a taxpayer can place on each, a broad description of the controversy on whether courts should enforce a duty of consistency on the IRS, and a description of the financial consequences a taxpayer may face when the IRS is inconsistent.[13] Part III describes the development of the case law surrounding the reliability of IRS publications and then explains how the courts currently define peril.[14] Part IV presents the proposed amendment to the Code as well as the criticisms it may face and the arguments for its enactment.[15] Part V concludes.[16]

II. BACKGROUND OF IRS TAX GUIDANCE AND THE IRS DUTY OF CONSISTENCY

A taxpayer relies on IRS guidance to determine her tax liability when she is unaware of how the tax law applies to her.[17] The IRS provides several types of guidance, each with a different level of legal reliability.[18] Before beginning a specific discussion on the law of reliance on IRS publications, it

11. Order Denying Reconsideration, Bobrow v. Comm'r, 107 T.C.M. (CCH) 1110 (2014) (No. 7022-11) [hereinafter Bobrow Order].

12. *See infra* note 319 and accompanying text.

13. *See infra* Part II.

14. *See infra* Part III.

15. *See infra* Part IV.

16. *See infra* Part V.

17. *See infra* note 95.

18. *See infra* note 28.

is important to understand both the concept of an IRS duty of consistency in regard to the guidance it offers and where IRS publications fall in relation to that duty. This Part will begin by classifying the major types of guidance that the IRS offers to assist taxpayers in determining the amount of tax they owe, and it will conclude with a general discussion of the controversy of placing a duty of consistency on the IRS and a listing of consequences a taxpayer may face when the IRS is inconsistent.

A. Sources of IRS Guidance

There are many sources a taxpayer may look to for guidance when filing a tax return.[19] However, "[n]ot all authorities are [considered] equal in value" by the IRS.[20] The authority of each type of guidance can be effectively categorized into two types: primary and secondary.[21] Primary authority includes the Code, "Treasury [R]egulations, . . . judicial decisions," and documents issued by the IRS.[22] Secondary "authorities explain (and sometimes criticize) primary authorities," through items such as tax law treatises and journal articles.[23] While the IRS finds secondary authorities to be, at most, persuasive, primary authorities can be further divided into sources that are (1) precedential, (2) persuasive, or (3) substantial authority.[24] Precedential sources are those that bind the IRS to treat the tax as the source instructs.[25] Persuasive authorities provide opinions on how the tax law should be interpreted.[26] Substantial authority sources, while rejected as precedential authority by the IRS, allow a taxpayer to defend her position against the imposition of tax penalties.[27]

Many of the documents the IRS and Treasury Department distribute

19. *See generally* GAIL LEVIN RICHMOND, FEDERAL TAX RESEARCH (9th ed. 2014) (providing an in-depth discussion of the many sources of information on federal tax law).

20. *Id.* at 7.

21. *See id.* at 6.

22. *Id.*

23. *Id.*

24. *Id.* at 7.

25. *Id.*

26. *Id.*

27. *Id.* at 8. This means that the IRS is not bound to treat the tax as the misguided source instructs, but a taxpayer who has relied on a substantial authority source may be able to escape the 20% penalty for substantial underpayment of tax. *See* I.R.C. § 6662(d)(2)(B) (2012); *see also infra* Part II.C.

exist to "giv[e] taxpayers guidance in interpreting the . . . Code."[28] The IRS does not consider all of this guidance, while primary authority, to be precedential[29] and gives each source of guidance varying levels of reliance that a taxpayer may place upon it.[30] These levels of reliance can be effectively organized into three categories: (1) sources that bind the government to treat the tax as the source instructs, (2) sources that constitute substantial authority and release a taxpayer from penalties,[31] and (3) sources that will not release a taxpayer from any tax deficiency or associated penalty.[32] The following subsections discuss the major types of guidance the IRS issues and the level of reliance a taxpayer may place upon it.

1. Treasury Regulations

Whether or not done intentionally, Congress leaves patches of ambiguity in the provisions of the Code that it creates.[33] It is up to the Treasury Department, including the IRS,[34] to fill in these ambiguous holes by creating "all needful rules and regulations."[35] Title 26 of the Code of Federal Regulations (Regulations), written by the Treasury Department, fulfills this demanding task with both "detailed rules" and "interpretation[s]

28. Mitchell Rogovin & Donald L. Korb, *The Four R's Revisited: Regulations, Rulings, Reliance, and Retroactivity in the 21st Century: A View from Within*, 46 DUQ. L. REV. 323, 324 (2008) (Korb, former IRS Chief Counsel, wrote this article to "describ[e] the kinds of guidance the [IRS] issues to the public and explain[] the reliance the public can place on each type of guidance.").

29. See *infra* Part II.B for a discussion on the policy for and against this position.

30. Rogovin & Korb, *supra* note 28, at 325 (differentiating between the value of these sources "represents a balance between the taxpayer's needs for information and the Service's needs for reasonable latitude in administering the tax law") (quoting Mitchell Rogovin, *The Four R's: Regulations, Rulings, Reliance, and Retroactivity: A View from Within*, FED. TAX GUIDE REP. (Dec. 3, 1965)). Courts also give some forms of IRS guidance more deference than others. RICHMOND, *supra* note 19, at 7; *see also infra* Part III.A.3 (discussing the holding in Miller v. Comm'r, 114 T.C. 184, 195 (2000) ("The authoritative sources of Federal tax law are the statutes, regulations, and judicial decisions . . . .")).

31. This refers generally to the accuracy-related penalty for substantial understatement of tax liability in I.R.C. § 6662. *See infra* Part II.C.

32. *See* RICHMOND, *supra* note 19, at 7–9.

33. *See* Rogovin & Korb, *supra* note 28, at 328 (citing Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 165 (2007)).

34. While creating Regulations is mainly the responsibility of the Treasury, the Office of the Associate Chief Counsel of the IRS is "responsible for drafting" them. *Id.* at 326 n.4.

35. I.R.C. § 7805(a).

of the . . . Code."[36] Furthermore, "[t]he Regulations are the most authoritative source for determining the meaning of the Code."[37] They are "the primary source for guidance" to both IRS personnel and taxpayers.[38] In planning their transactions, taxpayers can safely rely upon final or temporary Regulations—binding the IRS to the interpretations set forth therein.[39]

2. Internal Revenue Bulletin Guidance

The Internal Revenue Bulletin (IRB) is a collection of "guidance documents" the IRS publishes regularly.[40] It is comprised mainly of "revenue rulings, revenue procedures, and notices."[41] Revenue rulings are similar to judicial decisions, as they represent the result of the IRS resolving an issue with a taxpayer by applying its interpretation of the law to the taxpayer's specific factual circumstance.[42] Revenue procedures are statements of the IRS's "internal management practices," which keep the public informed of issues that may "affect[] the[ir] rights and duties" as taxpayers and warn of closely scrutinized transactions.[43] Notices are authoritative announcements "that may contain guidance that involves substantive interpretations of the . . . Code," which may be useful or helpful in circumstances where a revenue ruling or procedure would be inappropriate.[44] Although less formal than the Regulations,[45] IRB guidance

36. Rogovin & Korb, *supra* note 28, at 326–27.

37. *Id.* at 330.

38. *Id.* at 326.

39. *Id.* at 328–29 (stating that taxpayers can rely on the Regulations "in the same manner" as the Code itself). While there are exceptions, the general rule is that Regulations have no retroactive effect. *Id.* at 329–30.

40. Kristin E. Hickman, *IRB Guidance: The No Man's Land of Tax Code Interpretation*, 2009 MICH. ST. L. REV. 239, 240 (2009).

41. *Id.*

42. *See* IRS, DEP'T OF TREASURY, INTERNAL REVENUE MANUAL § 32.2.2.3.1 (2004) [hereinafter IRS MANUAL].

43. Rogovin & Korb, *supra* note 28, at 336–37; *see also* IRS MANUAL, *supra* note 42, § 32.2.2.3(2). However, since revenue procedures deal with the internal operations of the IRS, they are hardly "matters that affect . . . taxpayers, so they would generally not be useful in tax planning." Rogovin & Korb, *supra* note 28, at 338.

44. IRS MANUAL, *supra* note 42, § 32.2.2.3(3).

45. The Regulations are considered more formal than other types of guidance because of their required compliance with the Administrative Procedure Act. *See* Hickman, *supra* note 40, at 239–40, 250–51.

is generally accepted by the IRS as binding authority.[46] So long as the guidance is "on point" and has not been revoked, a taxpayer may safely rely upon it for planning purposes.[47]

3. Letter Rulings

The letter rulings program is "one of the largest . . . programs in the [g]overnment."[48] While rather costly,[49] it enables taxpayers involved in complicated financial situations to receive a direct statement of how the IRS would apply the Code to the taxpayer's financial situation.[50] A taxpayer can safely rely upon letter rulings the IRS issues to him directly, but the IRS strongly advises against relying upon letter rulings not received by the taxpayer.[51] However, the IRS may consider the use of an indirect letter ruling "in determining whether a taxpayer's position is supported by substantial authority" to avoid an underpayment penalty.[52]

4. Acquiescence Program

When the U.S. Supreme Court decides a tax issue, the IRS is required to follow the Court's ruling as "the law of the land."[53] However, the decisions of lower courts are binding on the IRS with respect to only the taxpayer and issues in the litigated case—the IRS will decide whether it will acquiesce

46. Rogovin & Korb, *supra* note 28, at 341.

47. *Id.* While the IRS has the authority to retroactively modify its position taken in revenue rulings, "it is the practice of the [IRS] to make revocation or modification . . . prospective only." *Id.* at 335.

48. *Id.* at 342. The IRS issues thousands of letter rulings each year. *Id.*

49. Fees range from $2,000 for lower income taxpayers to $18,000 for more complicated issues. Rev. Proc. 2014-1, 2014-1 I.R.B. 1 app. A § (A)(3).

50. IRS MANUAL, *supra* note 42, § 32.3.1.1(3). For a deeper discussion of the general letter rulings program, in which there are several different types of letter rulings with varying degrees of reliance, *see* Rogovin & Korb, *supra* note 28, at 342–53.

51. Rogovin & Korb, *supra* note 28, at 348. "Only in some unusual and very limited circumstances has a taxpayer been allowed to rely on letter rulings issued to another taxpayer." *Id.* (citing Int'l Bus. Machs. Corp. v. United States, 343 F.2d 914 (Ct. Cl. 1965)). Further, while initially meant to be prospective only, letter rulings can have retroactive effect "upon revocation [but] only in unusual circumstances." *Id.* at 347–48.

52. *Id.* at 348. However, the law says this applies only to "letter rulings issued after 1976." *Id.*; *see also infra* Part II.C (providing more information on the penalties a taxpayer faces for underpaying her taxes).

53. IRS MANUAL, *supra* note 42, § 4.10.7.2.9.8(2).

with the decision.[54] This means after a lower court decides an issue that is "adverse to the government,"[55] the IRS will announce whether it will follow the ruling and change the way it applies the Code in an internal document known as an Action on Decision (AOD).[56] This is the substance of the Acquiescence Program.[57] Because the revocation of an AOD is "generally retroactive," taxpayers are "warned that acquiescences are not to be relied upon in planning transactions."[58] AODs may, however, be relied upon as substantial authority to defeat an underpayment penalty.[59]

5. Legal Advice Program

The Office of Chief Counsel of the IRS (Chief Counsel) exists "to serve America's taxpayers . . . by providing . . . the highest quality legal advice . . . for the [IRS]."[60] The Chief Counsel advises its attorneys and IRS personnel on situations that the Code, courts, or other published guidance have not addressed.[61] While this legal advice is intended only for the IRS, taxpayers can access it because the Chief Counsel "is required . . . by the Code and . . . the Freedom of Information Act" to release it.[62] The IRS advises taxpayers against relying on this source of guidance for *any* purpose.[63] While it "may provide some insight into how the . . . Chief

54. *Id.* § 4.10.7.2.9.8(3). The IRS or the taxpayer may use lower court decisions "to *support* a position." *Id.* § 4.10.7.2.9.8(1) (emphasis added).

55. *Id.* § 4.10.7.2.9.8.1(1) ("It is the policy of the [IRS] to announce at an early date whether it will follow [adverse] holdings . . . .").

56. *Id.* These documents are also published in the IRB. *Id.* § 4.10.7.2.9.8.2(1).

57. *See generally* Rogovin & Korb, *supra* note 28, at 363–69 (discussing the history, need, and purposes of the Acquiescence Program).

58. *Id.* at 368. AOD's are "not . . . affirmative statement[s] of" the IRS's position; they are intended to be used with "[c]aution" by internal personnel and never by taxpayers. IRS MANUAL, *supra* note 42, § 4.10.7.2.9.8.1(1)–(2). Problems mainly arise when a taxpayer uses an acquiescence for an unintended purpose. Rogovin & Korb, *supra* note 28, at 367 (giving Dixon v. United States, 381 U.S. 68, 72–73 (1965), as an example).

59. Rogovin & Korb, *supra* note 28, at 369.

60. IRS MANUAL, *supra* note 42, § 30.1.1.1(1).

61. Rogovin & Korb, *supra* note 28, at 353. Similar to other types of IRS guidance, there are several subcategories of legal advice. *See id.* at 353–63.

62. *Id.* at 353.

63. *Id.* at 354. There is one form of legal advice provided by the Chief Counsel to the IRS that taxpayers may rely on as substantial authority: Technical Advice Memoranda. *See id.* at 354–56 (Technical Advice Memoranda "responds to a request for assistance [from the IRS Chief Counsel] on a technical or procedural question that arises during any proceeding before the Service.").

Counsel analyzes issues," it is "unlikely to predict the positions the [IRS] will take in litigation."[64]

6. Other Communications

In addition to the above sources, which may be considered more formal, the IRS provides several kinds of informal guidance.[65] This guidance, according to former IRS Chief Counsel Donald Korb, "reflect[s] the [IRS]'s strong commitment to helping taxpayers understand and meet their tax responsibilities."[66] It includes news releases, guidelines, directives, oral advice (over the phone, through seminars, and other education events), and publications.[67] Ironically, however, the IRS considers the informal guidance in this subsection, which is "disproportionately obtain[ed]" by "unsophisticated taxpayers,"[68] to be the least reliable.[69] The largest category of this type of unreliable guidance is IRS publications.[70]

Nevertheless, all other subcategories of legal advice may not be relied upon for "any issue." *Id.* at 356.

64. *Id.* at 359, 361.

65. *See id.* at 354. While many scholars consider the Regulations to be the only truly formal type of IRS guidance, for purposes of this Comment, all forms of guidance outside of this subsection will be considered to be formal, as they have a stronger authoritative purpose to the IRS than those within this subsection.

66. *Id.* at 373.

67. *Id.* at 369–73.

68. Cauble, *supra* note 7, at 427. The types of guidance discussed in the subsections above are generally only available to "sophisticated taxpayers" or their expert counsel; they are virtually inaccessible to the majority of taxpayers. *See id.* at 463–65. Cauble provides the following data from "a 2013 Taxpayer Attitude Study conducted by the IRS Oversight Board" as an example that supports this theory:

> [Ninety percent] of taxpayers with incomes lower than $15,000 reported that they were likely to use the IRS toll-free telephone service, and 81% of taxpayers with incomes equal to $75,000 or more reported that they were likely to use this service. Regarding informal advice provided by IRS walk-in centers, the disparity was even greater in that 86% of taxpayers with incomes lower than $15,000 reported that they were likely to use this service compared to only 61% in the case of taxpayers with incomes equal to $75,000 or more. Private letter rulings, by contrast, are likely issued almost exclusively to high-income taxpayers.

Id. at 464–65 (footnotes omitted) (citing IRS OVERSIGHT BOARD, IRS, 2013 TAXPAYER ATTITUDE SURVEY 12 fig.16, 13 fig.17 (2014)).

69. *See* Rogovin & Korb, *supra* note 28, at 369–73 (using phrases such as "should not" and "cannot" to describe taxpayer reliability on sources in this subsection).

70. For information and arguments on other types of informal advice see, e.g., Cauble, *supra*

Since the inception of the income tax, the IRS has been providing hundreds of tax forms, such as "the ubiquitous Form 1040," to assist "all taxpayers" pay an accurate tax.[71] The forms, their accompanying instructions, and other IRS publications exist to "explain the law in plain language for taxpayers and their advisors"[72] and assist in preparing tax returns.[73] In spite of this intended purpose, IRS forms and publications "contain few, if any, citations to authority," and if the IRS position within the document has been disputed, it is not indicated.[74]

While this subcategory of guidance is among the IRS's "primary forms of communication with the public about how to comply with the tax law," it is also among the least reliable.[75] The courts and the IRS agree that forms and publications are not included among "[t]he sources of authoritative tax law."[76] Taxpayers who choose to rely on these documents do so "at their peril"[77] and "cannot cite them as authority against a contrary IRS position."[78]

---

note 7 (discussing the reliability of oral advice over the phone). The publications described in this section should be distinguished from any type of published guidance heretofore mentioned.

71. Rogovin & Korb, *supra* note 28, at 371.

72. IRS MANUAL, *supra* note 42, § 4.10.7.2.8(1). The IRS has stated as part of its "Taxpayer Bill of Rights" that "[t]axpayers have the right to know what they need to do to comply with the tax laws. They are entitled to clear explanations of the laws and IRS procedures in all tax forms, instructions, [and] publications." *Taxpayer Bill of Rights*, IRS, http://www.irs.gov/Taxpayer-Bill-of-Rights (last updated Sept. 2, 2015).

73. Steve R. Johnson, *An IRS Duty of Consistency: The Failure of Common Law Making and a Proposed Legislative Solution*, 77 TENN. L. REV. 563, 572 (2010).

74. RICHMOND, *supra* note 19, at 187. There is no relation or coordination in the numbering systems between tax forms and publications and the Code or the Regulations. *Id.* ("For example, [I.R.C. §] 280A provides the rules governing deductions for an office in the taxpayer's home. Taxpayers compute the deduction on IRS Form 8829. The IRS explains the deduction rules in Publication 587.").

75. Rogovin & Korb, *supra* note 28, at 371; *see also supra* notes 68–69 and accompanying text. The irony of this paradox is the little scholarship that exists on this controversial and confusing subject. *See* Cauble, *supra* note 7, at 421 ("[E]xisting literature lacks a thorough discussion of why, as a policy matter, we allow taxpayers to rely on some forms of IRS guidance more than others."); *see also* Andy S. Grewal, King v. Burwell*: Where Were the Tax Professors?*, 2015 PEPP. L. REV. 43 (2015) (noting the lack of discussion from tax professors over a controversial Supreme Court case).

76. Rogovin & Korb, *supra* note 28, at 372 (citing Zimmerman v. Comm'r, 71 T.C. 367, 371 (1978)). For more information on the current state of law, *see infra* Part III.

77. *Id*. (citing Miller v. Comm'r, 114 T.C. 184, 195 (2000)). The reader should be aware that although the consequences of peril sound disastrous and far-reaching, the reality, which can be inferred from the relatively small amount of case law surrounding this issue, is that most forms and publications are accurate descriptions of the law that a taxpayer is able to rely upon without fear. The focus of this Comment is what peril a taxpayer faces in those rare occasions when guidance is not aligned with the correct interpretation of the tax code. *See infra* Parts III–IV.

This unintuitive concept allows the IRS to act inconsistently with the positions it takes, providing the foundation for a fierce controversy.

B. The IRS Consistency Duty Controversy

"Of all the agencies of the government, the worst offender against sound principles in the use of precedents may be the Internal Revenue Service."[79] The questions of whether courts should bind the IRS to any or all of the statements it makes and whether consequences should be imposed on a taxpayer who relies on statements subsequently disregarded by the IRS have been litigated frequently for generations.[80] Most of this controversy surrounds sources of guidance that are more formal in nature than IRS publications.[81] This section demonstrates that when the arguments involved in the controversy are extended to IRS publications, the arguments against the enforcement of an IRS duty of consistency prevail.

The reasons for enforcing some duty of consistency against the IRS can be generally summarized in two main arguments.[82] First, enforcing consistency lessens the complexity of the Code.[83] For taxpayers to pay an accurate tax, "they must be able to ascertain the law and predict its application with reasonable certainty."[84] While most taxpayers are honest and responsible,[85] the Code is a severely complicated, confusing, and often

78. RICHMOND, *supra* note 19, at 187.

79. Johnson, *supra* note 73, at 568 (quoting KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 8:12 (2d ed. 1979)).

80. *Id.* (stating "[i]t is impossible to know how often the IRS takes inconsistent positions"). The fiery debate of whether the IRS should have a duty of consistency was interestingly born out of over forty years of "misapplication" of the case International Business Machines Corp. v. United States, 343 F.2d 914 (Ct. Cl. 1965), which, while many assume otherwise, had less to do with a duty of consistency and more with an application of I.R.C. § 7805. Christopher M. Pietruszkiewicz, *Does the Internal Revenue Service Have a Duty to Treat Similarly Situated Taxpayers Similarly?*, 74 U. CIN. L. REV. 531, 535 (2005).

81. *See generally* Hickman, *supra* note 40, at 242 (discussing whether IRB guidance carries "the force of law"); Johnson, *supra* note 73, at 607–21 (arguing for a "weak duty" of consistency on the IRS in regards to regulations, revenue rulings, revenue procedures or IRS notices).

82. *See* Johnson, *supra* note 73, at 590–95.

83. *Id.* at 594.

84. *Id.*

85. Ninety-five percent "of taxpayers (i.e., the general public) [completely or mostly] agree that it is every American's civic duty to pay their fair share of taxes." 2013 TAXPAYER ATTITUDE SURVEY, *supra* note 68, at 5.

ambiguous.[86] The average taxpayer is unlikely to have the time or resources to research the law or hire private counsel to figure out how her situation fits within the provisions of the Code.[87] Even tax professionals run into trouble with the IRS regarding puzzling provisions of the Code.[88] When the IRS changes course on a tax matter from one position to another, taxpayers are frustrated in their attempts at "responsible tax planning."[89] The result of "maladministration, including IRS inconsistency," could be a decrease in dependable, self-reporting taxpayers.[90] In contrast, if the IRS is held to a duty of consistency, it may be encouraged to "think [its] positions through more carefully before taking an initial stance."[91]

Second, inconsistency goes against general notions of fairness and justice. A taxpayer is expected to "turn square corners when [he] deal[s] with the [IRS]."[92] In turn, "[i]t is no less good morals and good law that the [IRS] should turn square corners in dealing with the people."[93] Though Congress has given the Department of the Treasury a broad delegation to

86. "The federal tax code, which was 400 pages long in 1913, has swollen to about 70,000 [and] Americans now spend 7.6 billion hours a year grappling with [it, making] . . . the tax-compliance industry . . . six times larger than car-making." *The Joy of Tax*, THE ECONOMIST, Apr. 8, 2010, at 90.

87. Nearly 76% of taxpayers make less than $75,000 per year. *Table 1.1 All Returns: Selected Income and Tax Items, by Size and Accumulated Size of Adjusted Gross Income, Tax Year 2012*, IRS, http://www.irs.gov/file_source/pub/irs-soi/12in11si.xls (last visited Sept. 19, 2015). More than "82% of taxpayers prepared and efiled their [own] federal tax returns" in 2013. *2013 Tax Season (2012 Tax Year) efile Statistics*, EFILE, http://www.efile.com/efile-tax-return-direct-deposit-statistics/ (last visited Sept. 19, 2015).

88. *See, e.g.*, Bobrow v. Comm'r, 107 T.C.M. (CCH) 1110 (2014) (prominent tax lawyer); Davis v. Comm'r, 65 T.C. 1014 (1976) (tax scholar and professor).

89. Johnson, *supra* note 73, at 594.

90. *Id.* Currently, 39% of taxpayers are "very satisfied" with their interactions with the IRS; another 39% are "somewhat satisfied." 2013 TAXPAYER ATTITUDE SURVEY, *supra* note 68, at 7. In relating a taxpayer's duty of consistency to the duty that should be applied to the IRS, Professor Stephanie Hoffer notes: "The unifying principle at the heart of these arguments is that *inconsistent input produces bad output*." Stephanie Hoffer, *Hobgoblin of Little Minds No More: Justice Requires an IRS Duty of Consistency*, 2006 UTAH L. REV. 317, 345 (2006) (emphasis added).

91. Johnson, *supra* note 73, at 595. Johnson, while noting the plausibility of the argument, quickly refutes it because the IRS is already motivated against making thoughtless decisions by the "heat it endures when it takes controversial positions." *Id.*

92. *Id.* at 591 (quoting Rock Island, Ark. & La. R.R. Co. v. United States, 254 U.S. 141, 143 (1920)). This phrase means taxpayers are expected to be accurate and consistent in filing their tax returns. *See also* Hoffer, *supra* note 90, at 319–25 (discussing a taxpayers duty of consistency when dealing with the IRS).

93. Johnson, *supra* note 73, at 591 (quoting St. Regis Paper Co. v. United States, 368 U.S. 208, 229 (1961) (Black, J., dissenting)).

enforce the Code, it is "premised . . . on the need to 'ensure that . . . like cases will be treated alike.'"[94] While it is clear that the IRS, and the government in general, agrees with the broad principle of fairness[95] and, consequently, a measure of the consistency duty,[96] the dispute lies in how narrowly the duty should be applied and which forms of guidance should carry a duty of consistency.[97] If the consistency duty is applied to a taxpayer, it illuminates the unfairness inherent in inconsistent action.[98] It is very unlikely that the IRS, as well as most taxpayers,[99] would consider the following hypothetical to be fair: a taxpayer makes a tax representation one year, which the IRS relies on, but in a subsequent year she changes her tax representation, on a substantially similar transaction, to reflect a more beneficial tax outcome.[100] Likewise, "our notion of fair play is offended" when the IRS treats similarly situated taxpayers differently[101] and "ignore[s]

94. *Id.* (quoting Nat'l Muffler Dealers Ass'n v. United States, 440 U.S. 472, 477 (1979)).

95. The mission of the IRS is to "[p]rovide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and enforce the law *with integrity and fairness to all*." *The Agency, Its Mission and Statutory Authority*, IRS (emphasis added), http://www.irs.gov/uac/The-Agency,-its-Mission-and-Statutory-Authority (last updated Jan. 23, 2015). Also, Congress has "enacted a series of [laws]" to inform taxpayers of their rights and relieve any sense of unfairness or oppression. Johnson, *supra* note 73, at 591–92; *see also* Internal Revenue Service Restructuring and Reform Act of 1998, Taxpayer Bill of Rights 3, Pub. L. No. 105-206, 112 Stat. 685, 726–83 (codified as amended in scattered sections of 26 U.S.C.); Taxpayer Bill of Rights 2, Pub. L. No. 104-168, 110 Stat. 1452 (1996) (codified as amended in scattered sections of 26 U.S.C.); Technical and Miscellaneous Revenue Act of 1988, Omnibus Taxpayer Bill of Rights, Pub. L. No. 100-647, 102 Stat. 3342, 3730–52 (codified as amended in scattered sections of 26 U.S.C.).

96. For example, it is highly unlikely that the IRS would purposefully treat taxpayers unfairly.

97. *See* Johnson, *supra* note 73, at 580–90 (discussing the differences between a "strong duty," a "weak duty," and "no duty"). Johnson uses the following hypothetical as an example to illustrate this dispute: Two taxpayers, Adam and Eve, engage in essentially the same financial transaction, which is subsequently treated differently for tax purposes by the IRS—Eve owing significantly more taxes than Adam. *Id.* at 566. It is an easy case if "the IRS's position for Eve is incorrect under the substantive law," for the court will rule against the IRS, and Adam and Eve will be treated equally. *Id.* The difficult decision is when the IRS was substantively wrong when it determined Adam's taxes and therefore applied the law correctly when it determined Eve's taxes. *Id.* Which is the more fair solution: force the IRS to be consistent, thus allowing Eve to pay an incorrect amount of tax, or apply the correct interpretation of the law, forcing Eve to pay more tax than Adam when they engaged in essentially the same transaction? *Id.*

98. *See generally* Hoffer, *supra* note 90, at 319–26 (arguing that the values behind enforcing a taxpayer's duty of consistency should apply to enforcing a similar duty on the IRS).

99. *See supra* note 85.

100. *See* Hoffer, *supra* note 90, at 320.

101. *Id.* at 345.

prior assurances given to taxpayers."[102]

The arguments against enforcing a duty of consistency against the IRS lie behind three main themes: (1) enforcement discourages efficient tax administration; (2) enforcement goes against ideals of fairness and justice; and (3) enforcement violates the Constitution's separation of powers doctrine.[103] These arguments are presented here in a way to rebut the arguments in favor of imposing a duty of consistency on the IRS, with the final argument detailing how the American system of government actually prevents the use of informal guidance as a source of law. After considering the profound arguments made here against enforcing a duty of consistency, it is clear why reliance upon IRS publications cannot have precedential legal effect.[104]

First, enforcing a duty of consistency will discourage efficient tax administration.[105] As discussed above, some scholars believe enforcing a duty of consistency on the IRS would increase voluntary taxpayer compliance as well as encourage the IRS to evaluate its guidance materials more thoroughly before releasing them to the public.[106] However, enforcing a duty of consistency may actually have the opposite effect, especially in relation to less formal types of guidance such as publications.[107] Critics of a strong consistency duty[108] implore its supporters to consider its "effect . . . on the IRS's willingness to provide guidance."[109] If all guidance offered by the IRS is binding, the IRS may "cut back on the volume" of guidance that it provides.[110] This will hinder its mission to provide

102. LeCroy Research Sys. Corp. v. Comm'r, 751 F.2d 123, 127–28 (2d Cir. 1984) (noting that "there are judicially enforceable limits" on this discretionary power).

103. *See* Johnson, *supra* note 73, at 596. Johnson includes a fourth argument not discussed here: "resolving cases on consistency grounds could deprive the system of substantive contributions by the courts." *Id.*

104. In regards to more formal guidance, Johnson agrees that the arguments against enforcement are "theoretically" stronger than those for it. *Id.* at 595–604.

105. *Id.* at 599–600.

106. *See supra* notes 84–91 and accompanying text.

107. *See* Johnson, *supra* note 73, at 599 ("A rule of consistency would be particularly troublesome if it was triggered by . . . IRS [guidance] . . . lower in status than regulations, revenue rulings, revenue procedures, and notices.").

108. *See supra* note 97.

109. Johnson, *supra* note 73, at 599.

110. Cauble, *supra* note 7, at 462 (discussing the effect of binding the IRS to advice it provided over the phone). The Supreme Court has also aligned with this ideology, reasoning that a strong consistency duty would "discourage the IRS" from issuing guidance "in the first place." Johnson,

taxpayers with an accurate and accessible means of tax law compliance and therefore likely decrease the level of voluntary compliance, as most taxpayers will be forced to figure out the Code themselves.[111]

Second, enforcing a duty of consistency on the IRS will actually violate notions of fairness and justice. As seen above, the duty of consistency seems to arise mainly out of the notion of fairness to a taxpayer who has relied upon what the IRS has said is the law.[112] However, this duty "can be a blunt instrument, overcorrecting so that taxpayers are not simply made whole but receive windfalls."[113] Professor Steve Johnson argues that these windfalls occur in two ways.[114] First, a windfall occurs by allowing the "Happy Accident" taxpayer, who did not rely upon an IRS publication in calculating her tax liability but who "discovered the IRS's inconsistency . . . during trial preparation," to recover the same as the taxpayer who relied in good faith upon the IRS publication prior to any hint of litigation.[115] Second, there is a windfall even for taxpayers who rely upon inconsistent IRS guidance and are thereafter excused from a higher tax liability, which puts "the taxpayer in a better position than the law intended."[116] While the consistency doctrine mainly exists as a fairness argument, it appears to backfire in some instances.

Finally, even if "fairness trumps all countervailing policies," courts must consider whether it is constitutional to enforce fairness over what Congress intended.[117] The system of government established by the U.S. Constitution creates the strongest argument against enforcing a duty of consistency on the IRS, especially regarding IRS publications.[118] The Constitution created a specific structure for creating, enforcing, and interpreting the laws of our country.[119] Article I, Section 1 of the U.S. Constitution gives "[a]ll legislative Powers [to the] . . . Congress of the United States."[120] Thus, in

supra note 73, at 599 (citing, as an example, United States v. Caceres, 440 U.S. 741, 755–56 (1979)).

111. *See supra* notes 68, 96; *infra* Part IV.C.
112. *See supra* notes 84–91 and accompanying text.
113. Johnson, *supra* note 73, at 598.
114. *See id.* at 598–99.
115. *Id.* at 598.
116. *Id.* at 598–99.
117. *Id.* at 596.
118. *Id.* at 598.
119. *See* U.S. CONST. art. I, § 1; *id.* art. II, § 1, cl. 1; *id.* art. III, § 1, cl. 1.
120. *Id.* art. I, § 1. Section 8 specifically gives Congress the powers "[t]o lay and collect Taxes."

administrating and enforcing the tax law, the IRS is obliged to do so as Congress intended.[121] Subsequently, in deciding whether the IRS applied the tax law correctly and fairly, the courts may not "alter[] the outcome that Congress decreed."[122]

Therefore, when the IRS changes its application of a law to reflect a *less* accurate interpretation of the Code, judicial enforcement of a duty of consistency on the IRS is aligned with the purposes of the separation of powers doctrine.[123] However, when the IRS changes its application of a law to reflect a *more* accurate interpretation of the Code, judicial enforcement of a duty of consistency on the IRS is not aligned with the purposes of the separation of powers doctrine.[124]

It is difficult to see the IRS lead taxpayers one way, only to detach, change tracks mid-trip, and desert reliant taxpayers on the rails toward voluntary tax compliance.[125] However, it is more difficult to allow informal IRS guidance materials to bypass our system of government and dictate how the IRS administers and interprets tax law, especially when the guidance is incorrect.[126] In Johnson's words, "Sometimes the head must overrule the heart."[127] Therefore, because it is relatively clear that IRS publications

---

Id. art. I, § 8, cl. 1.

121. While Congress has delegated authority to the Treasury Department to create regulations for administering and enforcing the Code, the Treasury Department—and thus the IRS—does not have the ability to rewrite the plain meaning of the Code—an enumerated power limited to Congress. *See* Johnson, *supra* note 73, at 596 (citing I.R.C. §§ 385(a), 469(l), 1502, 7801(a), 7805(a) (2012)).

122. *Id.*

123. *See id.* at 598 ("[A] duty of consistency matters only in cases where the IRS's adjustment for the second taxpayer is correct under the substantive law."); *see also supra* note 96.

124. *See* Johnson, *supra* note 73, at 598. "Taxation is a matter of statutes, and equitable considerations cannot override the provisions of the statutes, nor always supply their omissions. Nevertheless honesty, good faith, and consistency are due in tax accounting. The right and wrong of things and equitable principles have a place in tax matters." *Id.* at 596 n.215 (quoting Alamo Nat'l Bank v. Comm'r, 95 F.2d 622, 622–23 (5th Cir. 1938)). This quote explains that, while fairness concerns cannot take the place for what Congress intended, there is room for fairness concerns in application of the Code.

125. Johnson rightly acknowledges that the "appeal of the 'strong duty' view derives from deeply felt and ennobling conceptions of fairness." *Id.* at 595. Johnson continues, "Human beings naturally aspire to see justice prevail, and only those who are morally dead can view with unruffled serenity instances where the IRS treats similarly-situated taxpayers differently." *Id.*

126. *See id.*

127. *Id.* Johnson demonstrates this by using the statute of limitations as an example. *Id.* The statute of limitations "undoubtedly thwart[s] justice in many cases but nonetheless persist[s] because other policy considerations situationally trump fairness." *Id.* Johnson quotes a Fifth Circuit case to extend this example to tax: "Taxation is a matter of statutes, and equitable considerations cannot

cannot justifiably supplant or replace the Code, this Comment will not argue for a judicial or statutory enforcement of a consistency duty on the IRS. Instead, it will argue for a change in the consequences a taxpayer faces when he relies on IRS publications for tax guidance.[128]

C. Objective Effects on the Taxpayer when the IRS Is Inconsistent

When the IRS is inconsistent between how it guides a taxpayer in an IRS publication and how it actually treats a tax calculation, the taxpayer suffers the consequences.[129] Those consequences can be reduced to any or all of the following negative scenarios: (1) an unexpected tax deficiency, (2) unexpected interest on the deficiency, and (3) unexpected penalties.[130] Each of these is qualified as "unexpected" because the taxpayer, following unreliable IRS guidance, believed her application of the law was in line with how the IRS would treat her financial situation. The following is a discussion of each of these scenarios and their objective effects on the taxpayer.

Looking first to the unexpected tax deficiency, Congress has delegated to the Secretary of the Treasury, and thus the IRS, the power to enforce the collection and imposition of taxes.[131] When a taxpayer claims an amount on her return as the tax she owes, the IRS has the power to determine whether that amount is deficient.[132] If the IRS determines the tax to be deficient, the IRS issues a statutory notice of deficiency to the taxpayer indicating the additional amount she is required to pay.[133] Therefore, a taxpayer who relies

override the provisions of the statutes, nor always supply their omissions." *Id.* at 596 n.215 (quoting Alamo Nat'l Bank v. Comm'r, 95 F.2d 622, 622–23 (5th Cir. 1938)).

128. *See infra* Part IV.

129. This is the current state of the law. For more information, *see* Part III. For a discussion on how the law should change to lessen the burden on the taxpayer, *see* Part IV.

130. *See infra* Part III.B.

131. I.R.C. § 7801 (2012).

132. *Id.* The Code defines a tax deficiency as the amount of taxes assessed by the IRS over which the taxpayer states that she owes on her return, less any "abatement, credit, refund, or other repayment." *Id.* § 6211. Basically, the deficiency is the additional tax that she owes as calculated by the IRS. *Id.*

133. IRS MANUAL, *supra* note 42, § 21.3.1.4.7. The statutory notice of deficiency is not an assessment, which is the statutory recording of the taxpayer's liability. *Id.* § 35.9.2.1.1. Instead, it is a notice of the IRS's intent to assess the tax, giving the taxpayer proper notice to dispute the deficiency. *Id.* § 4.8.9.2.2. The notice is issued only when amounts of underpayment are five dollars or more. *Id.* § 21.3.1.4.7. The IRS will also issue a notice when a taxpayer has overpaid her

on an IRS publication, which the IRS later acts inconsistently with, will be notified of any deficiency she may owe as the result of the miscalculation caused by her reliance on the IRS publication.[134] This is especially detrimental to a taxpayer who relies on an IRS publication to plan a complex financial transaction such as the sale of real property, as the taxpayer may have to pay out of pocket for taxes for which she was unable to plan.[135]

If the IRS determines that a taxpayer owes taxes, interest will accrue on the deficiency from the date that it is owed until the date that it is paid off.[136] This interest is not insignificant as it "is compounded daily" with rates that "broadly correspond[] to prevailing market rates of interest."[137] Interest is not automatically applied, however, and the Secretary of the Treasury is authorized under I.R.C. § 6404 to abate the interest under certain circumstances.[138] Presently, there are no code provisions allowing the abatement of interest on a deficiency caused by IRS inconsistency.[139] Thus, a taxpayer who relies on an IRS publication is statutorily liable for any interest that accrues on any underpayment of his taxes.[140]

Finally, when a taxpayer misreports and subsequently underpays the tax that the IRS determines she actually owes, resulting in the initial deficiency and corresponding interest discussed above, she may be liable for one of over 140 tax penalties.[141] The penalty most often applicable when the IRS is

---

tax by one dollar or more. *Id.* § 21.3.1.4.9.

134. However, the Treasury Department may choose not to pursue recovery of the deficiency "if [it] determines . . . that the administration and collection costs involved would not warrant collection of the amount due." I.R.C. § 6404(c). The Department may also abate a deficiency that "is excessive in amount." *Id.* § 6404(a).

135. Most taxpayers who use an IRS publication to miscalculate their tax liability may only receive a lesser tax refund than expected, as nearly 75% of tax returns receive some sort of refund. *2014 Filing Season Statistics*, IRS (Dec. 26, 2014), http://www.irs.gov/uac/Dec-26-2014.

136. I.R.C. § 6601(a).

137. Johnson, *supra* note 73, at 612 (citing I.R.C. §§ 1274(d), 6621(a)–(b)). The rate of interest on underpayment for January 2015 is 44%. I.R.C. § 6621(a)(2) (stating the calculation of the rate for underpayment); *see also* Rev. Rul. 2015-1, 2015-4 I.R.B. 331 tbl.1 (2015) (stating the applicable Federal Short-Term rate).

138. I.R.C. § 6404(c). For more discussion on this subject, see *infra*, Parts III.B.3, IV.

139. Johnson, *supra* note 73, at 612–13. Johnson's article proposes amending § 6404 to allow for the abatement of the taxpayer's liability for deficiency interest. *See id.* at 613–16. This Comment extends Johnson's proposal to IRS publications in Part IV.

140. Part III.B.3 discusses a case that abated the interest that a taxpayer owed for relying on an informal source of IRS guidance.

141. *See* IRS MANUAL, *supra* note 42, § 20.1.1.1.1(1) ("In 1955, there were approximately 14 penalty provisions in the Internal Revenue Code. There are now more than ten times that number.").

inconsistent is the "accuracy-related penalty on underpayments."[142] Under this provision, a taxpayer is liable for an additional 20%[143] of any "substantial understatement"[144] of the taxes that the IRS determines she owes.[145]

Taxpayers can escape or reduce this penalty by showing that "there is or was substantial authority for such treatment."[146] The Regulations state that determining whether there is substantial authority is an objective balancing act, weighing "the authorities supporting the treatment . . . in relation to the weight of authorities supporting contrary treatment."[147] If the supporting authorities weigh considerably more, there is substantial authority.[148] While some forms of IRS guidance do qualify as substantial authority for avoiding this penalty,[149] guidance such as publications and forms will not likely qualify as substantial authority because of their level of informality.[150]

Taxpayers can also escape or reduce this penalty by showing that "there was a reasonable cause [or basis][151] for [any underpayment], and that the taxpayer acted in good faith with respect to such portion."[152] Johnson

---

These penalties range from the broad categories of failure to file a tax return or pay tax, I.R.C. § 6651, and negligence, *id.* § 6662(c), to specific situations such as "excessive claims with respect to the use of certain fuels," *id.* § 6675.

142. I.R.C. § 6662. The term "underpayment" is defined in the Code the same way as a "deficiency." *See id.* § 6664(a); *see also supra* note 132.

143. The interest can climb as high as 40% for more serious infractions. *See* I.R.C. § 6662(h)(1), (i)(1), (j)(3).

144. An understatement is substantial if it is more than either 10% of the tax the IRS determines the taxpayer actually owes or $5,000, whichever is greater. *Id.* § 6662(d)(1)(A).

145. *Id.* § 6662(a). Interest accrues on any unpaid penalty the same as any underpayment of tax. *Id.* § 6601(e)(2). Generally, the interest on a penalty does not begin to accrue until twenty-one days after the IRS has notified the taxpayer. *Id.* § 6601(e)(2)(A). However, the interest on a penalty for the underpayment of tax begins to accrue starting on the day the related tax return is due. *Id.* § 6601(e)(2)(B); *see* IRS MANUAL, *supra* note 42, § 20.2.5.3(2).

146. I.R.C. § 6662 (d)(2)(B)(i).

147. Treas. Reg. § 1.6662-4(d)(3) (2012).

148. *Id.*

149. See Part II.A for a general discussion of the most common types of IRS guidance and which would qualify as substantial authority based on Korb's article. *See generally* Rogovin & Korb, *supra* note 28 (providing an in-depth discussion of many types of IRS guidance and their reliability, including their use as substantial authority).

150. *See* Rogovin & Korb, *supra* note 28, at 372.

151. I.R.C. § 6662(d)(2)(B)(ii) (stating that the underpayment will be reduced or eliminated by any amount for which there is factual support of a "reasonable basis" that is submitted with the tax return).

152. *Id.* § 6664(c)(1).

believes penalties would normally not apply in inconsistency cases because of this Code provision.[153] However, in *Bobrow v. Commissioner*, the Tax Court decided the accuracy-related penalty imposed against Bobrow for substantial underpayment of his tax was warranted even though he claimed to have relied upon IRS guidance, including the prior practices of the IRS.[154] Therefore, it is unsettled that simply relying on IRS guidance will amount to the reasonable cause and good faith needed to avoid this penalty.[155]

III. CURRENT STATE OF THE LAW REGARDING RELIANCE ON IRS PUBLICATIONS

The law surrounding the use of an IRS publication to protect a taxpayer against IRS inconsistency is currently judge-made law, since Congress has not addressed the issue of reliance on IRS guidance materials in the Code[156] and the Treasury Department has not yet included it in the Regulations. The origin of this law is fairly recent and has been followed nearly unanimously, including a few key cases that have tailored the rule to what exists today.[157] However, the nation's courts have failed to uniformly define the consequences a taxpayer may face for relying on informal IRS guidance such as publications.[158]

A. Current Legal Consistency Duty for IRS Publications

This subsection will chronologically detail the development of the law of reliance upon IRS publications from its first appearances in *Adler v. Commissioner*[159] and *Green v. Commissioner*[160] to its development in *Neal v.*

153. Johnson, *supra* note 73, at 612 n.321 (referring to inconsistency cases involving a "regulation, revenue ruling, or revenue procedure").

154. Bobrow v. Comm'r, 107 T.C.M. (CCH) 1110, 1116–17 (2014). For a thorough discussion of *Bobrow*, see Part III.B.1.

155. *See infra* Part III.B.

156. *But see* I.R.C. § 6404(f) (preventing the imposition of penalties on a taxpayer who has relied on written advice from the IRS given specifically to her); *id.* § 6110(k)(3) (disallowing the use of specific written determinations as precedential material). However, the materials referenced in these sections address the use of Letter Determinations, not IRS publications.

157. *See infra* Part III.A.

158. *See infra* Part III.B.

159. 330 F.2d 91 (9th Cir. 1964).

160. 59 T.C. 456, 457 (1972).

Commissioner[161] and *Miller v. Commissioner*.[162] *Adler* and *Green* establish the foundation for the rule by dealing with the issue of a taxpayer misinterpreting information in an IRS publication that was not necessarily misleading on its face.[163] *Neal* and *Miller* work together to expand the rule to prevent the taxpayer from succeeding by arguing that the IRS publication was legally misleading.[164]

1. *Adler v. Commissioner*

In the 1964 *Adler* case (*Adler II*), the petitioner, Irving Adler, sought to have the Ninth Circuit reverse the judgment of the Tax Court, which decided his $593 payment for dancing lessons was not a deductible medical expense.[165] Adler suffered from varicose veins in his left leg, and had heard at a lecture during his service in the Army that dancing was beneficial to alleviate its symptoms.[166] In making the determination that the cost of the dancing lessons was a deductible medical expense, Adler relied upon the definition of "medical expenses" found in the IRS Pamphlet *Your Federal Income Tax for Individuals*.[167]

In a very short opinion, the court affirmed the decision of the Tax Court, holding that Adler was unable to deduct the cost of his dancing lessons as a medical expense.[168] In response to Adler's defense of relying upon guidance from others and the IRS pamphlet, the court quickly stated that an "interpretation by taxpayers of the language used in government pamphlets [cannot] act as an estoppel against the government, nor change the meaning

161. 77 T.C.M. (CCH) 1610 (1999).
162. 114 T.C. 184 (2000).
163. *See infra* Part III.A.1–2.
164. *See infra* Part III.A.3.
165. *Adler*, 330 F.2d at 92. This erroneous deduction resulted in a tax deficiency of $124.53. *Id.*
166. Adler v. Comm'r, 22 T.C.M. (CCH) 965, 965 (1963), *aff'd*, 330 F.2d 91 (9th Cir. 1964).
167. *Id.* It is not clear from the opinion of the Ninth Circuit or the tax court how Adler reached his conclusion that the dance class costs were deductible as medical expenses through the use of this IRS pamphlet. *See id.* The information in this pamphlet is the same as what would be in IRS *Publication 17* today. *Compare* IRS, DEP'T OF TREASURY, PUBLICATION 17: YOUR FEDERAL INCOME TAX (1960), *with* PUBLICATION 17, *supra* note 5 (providing guidelines, tips, and examples for individuals in calculating federal income taxes). It is not surprising that court decisions on this subject begin to appear around this time, as the IRS began publishing this basic informative pamphlet in 1955. *See* IRS, DEP'T OF TREASURY, YOUR FEDERAL INCOME TAX (1955).
168. *Adler*, 330 F.2d at 93.

of taxing statutes."[169] The court equated reliance on these informal sources of guidance with Adler's reliance upon the word of the dance studio manager who supposedly told Adler he would be able to deduct the cost of the dancing lessons.[170] This rule addressed the scenario where the taxpayer is misled by his own mistaken interpretation of the language in an IRS publication—but what about when the IRS publication *is* the misleading source? The Tax Court in *Green* theorized what the outcome should be.[171]

2. *Green v. Commissioner*

In *Green*, the Tax Court addressed whether petitioner Thomas Green could deduct the "automobile expenses incurred . . . in driving between his Long Island residence and his Manhattan business office via various clients' Manhattan offices."[172] Green claimed that because he worked on projects for his employer at home and at the Manhattan office, his driving expenses fell within those described by the pamphlet *Your Federal Income Tax*,[173] which stated: "If you worked at two places in a day whether or not for the same employer, you may deduct the expense of getting from one such place to the other."[174] Green believed his home was a place of work under this definition and under the Regulations.[175]

In its decision, the Tax Court rejected Green's analysis and conclusion, holding instead that his costs in travelling to the Manhattan office were "nondeductible personal expenses."[176] The court reasoned that allowing

169. *Id.* Numerous circuits followed this rule, and none have rejected or challenged it. *See, e.g.*, Juister v. Comm'r, 875 F.2d 864 (6th Cir. 1989); CWT Farms, Inc. v. Comm'r, 755 F.2d 790 (11th Cir. 1985); LeCroy Research Sys. Corp. v. Comm'r, 751 F.2d 123 (2d Cir. 1984); Carpenter v. United States, 495 F.2d 175 (5th Cir. 1974).

170. *Adler*, 330 F.2d at 93. This is an unfortunate comparison, as one form of guidance came not only directly from the government, but from the agency in charge of collecting taxes, while the other came from someone with little-to-no knowledge of tax matters. *See id.* Adler subsequently argued this issue again before another tax court and lost on the same grounds. *See* Adler v. Comm'r, 25 T.C.M. (CCH) 339 (1966), *aff'd*, 330 F.2d 91 (9th Cir. 1964).

171. *See infra* note 188 and accompanying text.

172. Green v. Comm'r, 59 T.C. 456, 457 (1972).

173. This is the 1968 version of the same pamphlet mentioned in the *Adler* cases. *See supra* note 167.

174. *Green*, 59 T.C. at 458 n.6 (quoting IRS, DEP'T OF TREASURY, YOUR FEDERAL INCOME TAX (1968)).

175. *Id.* at 458 n.5.

176. *Id.* at 459.

such a broad interpretation of the statute would "facilitate ready evasion of the well-settled rule of law barring deduction of commuting expenses."[177] Further, the *Green* court broadened the rule established in *Adler II* to include situations where the IRS pamphlet is directly contrary to the statute, stating:

> In the first place, even if Your Federal Income Tax were construed to permit deduction of what would otherwise be nondeductible commuting expenses, it is clear that the sources of authoritative law in the tax field are the statute and regulations, and not informal publications such as Your Federal Income Tax.[178]

While the court here expanded the rule hypothetically, *Neal* and *Miller* dealt indirectly with what the court determined to be an ambiguous IRS publication.[179]

3. *Neal v. Commissioner* & *Miller v. Commissioner*

The court in *Neal* dealt with three tax issues, of which the most relevant to the discussion here is "[w]hether petitioner is entitled to dependency exemptions for . . . his [children]."[180] The petitioner, Terry Neal, and his previous wife divorced after having three children.[181] The court issuing the divorce decreed that Neal would be able to claim his youngest child "as a dependent for all income tax purposes" but was silent on how the other two children should be treated.[182] In the tax year following their divorce, Neal claimed a dependency exemption for all three of the children and continued to do so for the next two years.[183] Despite attaching what Neal believed were the necessary and proper forms to claim the dependency exemption, the IRS "disallowed the dependency exemptions on the ground that [Neal] had not established that he provided over one-half of the total support of any of the children."[184] In his defense, Neal argued that "he relied on IRS

177. *Id.* at 458; s*ee also* Treas. Reg. § 1.162-2(e) (2015) ("Commuters' fares are not considered as business expenses and are not deductible.").
178. *Green*, 59 T.C. at 458.
179. *See infra* notes 188–90 and accompanying text.
180. Neal v. Comm'r, 77 T.C.M. (CCH) 1610, 1610 (1999).
181. *Id.* at 1611.
182. *Id.*
183. *Id.*
184. *Id.*; *see* I.R.C. § 152(e)(2) (2012).

publications" for instructions on how to claim his children for the dependency exemption.[185]

The court rejected Neal's reliance argument, pointing out that the publications he claimed to have relied upon contained accurate requirements and instructions that "would certainly correspond to the statutory provisions of [the Code] and the [R]egulations thereunder."[186] The *Neal* court did not discuss the issue of reliance any further. However, a subsequent court in *Miller v. Commissioner* dealt with an identical issue and expanded the discussion that began in *Neal* on the reliability of IRS publications.[187]

The *Miller* court disagreed with the *Neal* court's conclusions on the unambiguity of the relevant IRS publications and instead stated "that the guidance [in the publications] given to taxpayers for the years at issue is less than clear and may even be misleading."[188] Nevertheless, despite this finding, the *Miller* court immediately ruled out any possibility of taxpayer reliance in the subsequent sentence: "[T]he fact that an IRS publication is unclear or inaccurate does not help the taxpayer. Well-established precedent confirms that taxpayers rely on such publications at their peril."[189] The court

185. *Neal*, 77 T.C.M. (CCH) at 1612–13.

186. *Id.* at 1613 (referring specifically to I.R.C. § 152(e)(2)).

187. Miller v. Comm'r, 114 T.C. 184, 194–95 (2000), *aff'd sub nom* Lovejoy v. Comm'r, 293 F.3d 1208 (10th Cir. 2002). It is odd that the *Miller* court takes up the issue of reliance on IRS publications because "[u]nlike the taxpayer in *Neal*, [the petitioner in *Miller*] does not rely on any IRS publication." *Id.* at 194.

188. *Id.* It seems that the *Miller* court refers to the same IRS publications that were discussed in *Neal*. It is not clear from the *Miller* court's opinion which IRS publications it is referring to, but they were likely *Publication 501*, which deals with exemptions and the standard deduction, and 504, which deals with divorced or separated individuals. *See Neal*, 77 T.C.M. (CCH) at 1610; *see also* IRS, DEP'T OF TREASURY, PUBLICATION 501 (Dec. 20, 2014), IRS, DEP'T OF TREASURY, PUBLICATION 504 (Dec. 30, 2014).

189. *Miller*, 114 T.C. at 194–95. Although the court did not cite it in the *Miller* opinion, the phrase "at their peril" appears to have originated with Caterpillar Tractor Co. v. United States, 589 F.2d 1040, 1043 (Ct. Cl. 1978). This case also dealt with the issue of whether the pamphlet or publication a taxpayer is relying upon contains guarantees of reliability. *Id.* There, the plaintiff, Caterpillar Tractor Company, sought to overturn the IRS's decision to reject its deductions for sales commissions it paid to a subsidiary company. *Id.* at 1041. The plaintiff claimed it made the deductions by following instructions in a guidebook published by the Department of the Treasury, and that this guidebook binds the government. *Id.* at 1043. However, the court held "[i]t is hornbook law that informal publications . . . are simply guides to taxpayers, and a taxpayer relies on them at his peril." *Id.*

The plaintiff contended further that the guidebook contained a guarantee from the Secretary of the Treasury "that the rules and procedures set forth in the Handbook would be followed by the Treasury until 'prospectively' modified by regulations or other publications." *Id.* While the court

finished by unequivocally stating, "Administrative guidance contained in IRS publications is not binding on the Government, nor can it change the plain meaning of tax statutes."[190] The *Miller* court sided with the *Neal* court in the end, holding that a taxpayer's asserted reliance on an IRS publication could not erase a tax deficiency.[191] This ruling affirms the hypothetical scenario raised by the earlier court in *Green*.[192] This broad rule has yet to be challenged and it "is the accepted law among the circuits."[193] However, the

---

rejected this argument, reasoning that the guarantee only applied to a specific portion of the guidebook that did not contain the instructions in question, it did not "reach the question of what effect, if any, such a guarantee might have on" whether a taxpayer relied on such materials. *Id.*

190. *Miller*, 114 T.C. at 195 (citing Zimmerman v. Comm'r, 71 T.C. 367, 371 (1978)), *aff'd*, 614 F.2d 1294 (2d Cir. 1979).

191. *Id.*; *see also Neal*, 77 T.C.M. (CCH) at 1610.

192. *See supra* note 178 and accompanying text.

193. CWT Farms, Inc. v. Comm'r, 755 F.2d 790, 804 (11th Cir. 1985); *see* United States v. Josephberg, 562 F.3d 478, 498 (2d Cir. 2009) ("IRS publications . . . do not have the force of law."); Osborne v. Comm'r, No. 96-1451, 1997 WL 327328, at *2 (6th Cir. June 12, 1997) ("[A]ny misimpressions that the taxpayers may have received from reading the IRS's publications have no bearing on the validity of the notice of deficiency issued by the IRS."); Johnson v. Comm'r, 620 F.2d 153 (7th Cir. 1980); Apollo Computer, Inc. v. United States, 32 Fed. Cl. 334 (1994), *rev'd on other grounds sub nom.* Hewlett-Packard Co. v. United States, 71 F.3d 398 (Fed. Cir. 1995). *But see* Gehl Co. v. Comm'r, 795 F.2d 1324, 1333 (7th Cir. 1986) (affirming that IRS handbooks "are simply guides" but refusing to give certain regulations effect because a pamphlet published by the Treasury Department assured taxpayers otherwise).

Considering the lack of division among the nation's courts regarding this rule, it is unsurprising that the Supreme Court has not considered this issue. *See, e.g.*, CWT Farms, Inc. v. Comm'r, 477 U.S. 903 (1986), *denying cert. to* 755 F.2d 790 (11th Cir. 1985). However, it has recently ruled on a similar issue in United States v. Woods, 134 S. Ct. 557 (2013). In this complex tax case, respondent business partners, Gary Woods and Billy Joe McCombs "participated in an offsetting-option tax shelter designed to generate large paper losses that they could use to reduce their taxable income." *Id.* at 558. Through a complex business venture and an "alchem[ic]" method of calculating "the tax basis of their interests in the partnerships," the respondents claimed roughly $45 million in ordinary taxable losses. *Id.* at 560–61. The IRS "did not treat the . . . losses as valid" because the respondents had "artificially overstat[ed their] basis in" a partnership that "had been formed and availed of solely for purposes of tax avoidance"—the partnerships "were shams." *Id.* at 561–62 (citations omitted).

The lower court agreed the partnerships were shams, but it declined to impose on respondents the "40[%] penalty for gross valuation misstatements." *Id.* at 558; *see also* I.R.C. § 6662(h) (2012). The Supreme Court, however, had "no difficulty" imposing the penalty because "the partners underpaid their taxes because they overstated their outside basis, and they overstated their outside basis because the partnerships were shams." *Woods*, 134 S. Ct. at 568. The respondents argued that the court should refer to Blue Books, collections of commentaries by "the Joint Committee on Taxation . . . on recently passed tax laws," which would "compel[] a different result." *Id.* The Court, without discussing the contents of the Blue Books and how they might change the result here, dismissed the argument. *Id.* While the Court acknowledged its past use of

courts have left an essential portion of this ruling wide open—what peril awaits taxpayers who are misled by IRS guidance?

B. How Courts Currently Define Peril

The above cases demonstrate the well-established and universally followed law that a taxpayer is unable to rely upon IRS publications for calculating her tax liability and planning financial transactions.[194] However, what have courts meant by the word peril?[195] That is, what objective consequences do taxpayers face for relying upon IRS publications?[196] How courts have defined peril so far can be simplified into three categories: (1) taxpayer is liable for the deficiency as well as all associated interest and penalties; (2) taxpayer is liable for the deficiency as well as associated interest but all penalties are abated; or (3) taxpayer is liable for the deficiency but all associated interest and penalties are abated. While the case law is very limited in this area,[197] each category will be discussed with a case that demonstrates the peril that ensued when the taxpayer relied on informal IRS guidance.

1. Liability for the Deficiency as Well as all Interest and Penalties

When a taxpayer is liable for the deficiency and all interest and penalties she faces the greatest financial peril. The recent case, *Bobrow v. Commissioner*, applies this devastating definition, levying over $61,000 on the taxpayer involved.[198] The issue in this case centered around whether the petitioners—married couple Alvan Bobrow, a tax attorney,[199] and Elisa

materials such as Blue Books, it refused to do so here and characterized the Blue Books as illegitimate "tool[s] of statutory interpretation." *Id.* (citations omitted). In view of how uniformly the courts have treated the use of IRS publications, it is likely the Supreme Court would rule similarly to how it has on the use of Blue Books.

194. *See supra* note 193.

195. *See supra* note 189.

196. For a general discussion of these objective effects, see Part II.C.

197. *See supra* note 77.

198. Bobrow v. Comm'r, 107 T.C.M. (CCH) 1110, 1111 (2014). This amount includes a tax deficiency of "$51,298 and an accuracy related penalty . . . of $10,260." *Id.* This amount does not include interest, which would have begun to accrue on the date the tax return was originally due. *See supra* note 136 and accompanying text. The final amount the Bobrows paid is unknown as they settled out of court. *See infra* note 216.

199. Bobrow is "a leader of Mayer Brown's tax practice and former General Tax Counsel

Bobrow—received taxable income from distributions of their individual retirement accounts (IRAs) and whether their underpayment of taxes warranted a 20% penalty under § 6662.[200]

Over a six-month period in 2008, the Bobrows made several distributions and contributions, known as rollovers, to three separate IRA accounts.[201] Believing they were complying with § 408(d)(3),[202] they repaid the first two distributions within sixty days of withdrawal and argued the third IRA was "effectively repaid within 60 days because" they requested the financial institution handling their IRAs to repay the full amount to her IRA.[203] The Commissioner argued only the first of the Bobrows' transactions was in compliance with § 408(d)(3) because that section limits the ability to rollover an amount between IRAs to once per year.[204] Using little authority,[205] the Bobrows argued that the statute "limitation is specific to each IRA maintained by a taxpayer and does not apply across all of a taxpayer's IRAs."[206]

The court agreed with the Commissioner.[207] Using the plain language of the statute and the legislative history of § 408(d)(3), it interpreted the statute to limit IRA rollovers to once per year.[208] The court also agreed with the Commissioner's assessment of the 20% penalty for a substantial

---

for CBS." Novack, *supra* note 10.

200. *Bobrow*, 107 T.C.M. (CCH) at 1111. The court also considered "whether petitioners were liable for an additional tax on early distributions from retirement plans," which it determined they were. *Id.*

201. Two of the IRAs belonged to Alvan Bobrow and the other IRA belonged to Elisa Bobrow. *Id.* at 1112.

202. I.R.C. § 408(d)(3) (2012) (requiring that any rollover amount distributed from a qualified retirement account be repaid to a qualified retirement account within sixty days of distribution).

203. *Bobrow*, 107 T.C.M. (CCH) at 1112. The Bobrows argued it was the financial institution's fault for failing to process their request accurately and in time. *Id.* at 1115.

204. *Id.* at 1114.

205. The Bobrows relied only upon I.R.S. Tech. Adv. Mem. 9010007 (Mar. 9, 1990) and *Zaklama v. Commissioner*, 104 T.C.M. (CCH) 760 (2012). Each of these sources states the principle that "that a taxpayer's use of funds between the time he takes a distribution from an IRA and the time he makes a repayment of the funds is irrelevant to determining whether the transaction qualifies as a rollover contribution." *Bobrow*, 107 T.C.M. (CCH) at 1113. The court found these sources irrelevant. *Id.*

206. *Bobrow*, 107 T.C.M. (CCH) at 1113.

207. *Id.* at 1113–14.

208. *Id.* The court also determined that any of the exceptions found in § 408 would also not apply to the Bobrows. *Id.* at 1115–16.

understatement of tax.[209] The court determined the Bobrows were not entitled to have the penalty reduced or eliminated under the substantial authority exception because they did not cite *any* authority for the positions they took, regardless of whether or not they relied upon any IRS publications.[210] Consequently, the court could not determine whether any authority they may have relied upon was substantial.[211] The court also refused to eliminate the penalty under the good faith exception because it considered Alvan Bobrow's position as "an attorney specializing in tax law" as a factor that weighed heavily against him.[212] Thus, the court upheld the determinations of the Commissioner and assessed both the tax deficiency and the 20% penalty on the Bobrows.[213]

The issue of whether the Bobrows could have relied upon an IRS publication in making their financial transactions did not come up until the Bobrows submitted a motion for reconsideration.[214] The Bobrows claimed in their motion that either "*Publication 590* should inform [the court's] interpretation of 408(d)(3)(B)" to reduce or eliminate their tax deficiency or, "at a minimum, *Publication 590* provides . . . reasonable cause for their position, sufficient to negate the [§] 6662 penalty."[215] In an order responding to the Bobrows' motion, the court denied both of their contentions regarding *Publication 590*.[216] The court relied on established

209. *Id.* at 1116–17.

210. *Id.* at 1116.

211. *Id.*

212. *Id.* at 1117. Here, the court analogized Bobrow to the petitioner in a similar case where the court "sustained the [§] 6662(a) penalty against a certified public accountant who held a master's degree in accounting with a major in tax." *Id.* (citing Argyle v. Comm'r, 98 T.C.M. (CCH) 259 (2009), *aff'd*, 397 Fed. App'x 823 (3d Cir. 2010)).

213. *Id.*

214. Bobrow Order, *supra* note 11. It is possible that the Bobrows could be defined as "Happy Accident" taxpayers, taking advantage of IRS inconsistency after the fact. *See* Johnson, *supra* note 73, at 598; *supra* Part II.B. *Publication 590* was also discussed extensively by the American College of Tax Counsel in their Amicus Brief filed in support of the motion for reconsideration. *See* Brief for American College of Tax Counsel as Amici Curiae Supporting Petitioners at 8–15, Bobrow v. Comm'r, 107 T.C.M. (CCH) 1110 (2014) (No. 7022-11) [hereinafter ACTC Brief].

215. Bobrow Order, *supra* note 11, at 2. Alternatively, they argued that proposed regulations "served as the basis for the relevant portion of *Publication 590*" and should be substantial authority to defeat the § 6662 penalty. *Id.* at 1–2.

216. *Id.* at 2. Ultimately, this order was moot because the IRS issued Announcement 2014-15, stating "that the IRS will follow the Court's decision in this case but will not enforce" the court's interpretation of § 408(d)(3) until January 2015, and the IRS agreed to apply their announcement to the Bobrows. *Id.*; *see also* IRS, DEP'T OF TREASURY, *Application of One-Per-Year Limit on IRA*

case law to affirm that the IRS's "published guidance is not binding precedent [and] taxpayers rely on IRS guidance at their own peril."[217] The court concluded without any additional analysis that "had petitioners argued reliance on *Publication 590* in their briefs, such an argument would not have served as substantial authority for the position taken on their tax returns."[218]

This recent ruling has the dimmest definition of peril—that reliance upon informal published IRS guidance will not protect the taxpayer from any additional deficiency, penalties, or, by implication, interest.[219] Although it is likely that Alvan Bobrow's self-asserted proficiency in tax law had some impact on the decision and *his* ability to rely upon an IRS publication,[220] the court did not directly answer the question of whether reliance upon an IRS publication could ever defeat the § 6662 penalty. The cases in the following subsection provide some guidance.

Rollovers, Announcement 2014-15 (2014). This reduced the Bobrows' tax liability and understatement penalty. Bobrow Order, *supra* note 11, at 2. It is unknown how much the Bobrows actually paid as they settled out of court with the IRS. *Id.*

217. Bobrow Order, *supra* note 11, at 2. *Publication 590* is clearly contrary to what the court ruled in *Bobrow*. *Publication 590* uses the following example to illustrate its interpretation of I.R.C. § 408(d)(3) (2012):

> You have two traditional IRAs, IRA-1 and IRA-2. You make a tax-free rollover of a distribution from IRA-1 into a new traditional IRA (IRA-3). You cannot, within 1 year of the distribution from IRA-1, make a tax-free rollover of any distribution from either IRA-1 or IRA-3 into another traditional IRA.
>
> However, the rollover from IRA-1 into IRA-3 does not prevent you from making a tax-free rollover from IRA-2 into any other traditional IRA. This is because you have not, within the last year, rolled over, tax free, any distribution from IRA-2 or made a tax-free rollover into IRA-2.

IRS, DEP'T OF TREASURY, PUBLICATION 590: INDIVIDUAL RETIREMENT ARRANGEMENTS (IRAS) 25 (Jan. 5, 2014). The IRS has released an updated version of *Publication 590* that instructs taxpayers that this practice is no longer acceptable; only one rollover per year is allowed. *See* IRS, DEP'T OF TREASURY, PUBLICATION 590-A: CONTRIBUTIONS TO INDIVIDUAL RETIREMENT ARRANGEMENTS (IRAS) 24 (Jan. 13, 2015).

218. Bobrow Order, *supra* note 11, at 2. The court also seemed to have a problem with the untimely mention of their reliance upon *Publication 590*. *Id.* ("Neither petitioners nor respondent raised *Publication 590* . . . in their opening briefs, reply briefs, or sur-reply briefs.").

219. *See supra* notes 216–18.

220. Cauble, *supra* note 7, at 430. Commenting on the *Bobrow* decision, Cauble believes "if the question addressed by the publication were not addressed by other sources, the taxpayer was less sophisticated, and the taxpayer could more convincingly demonstrate reliance on the publication, then the taxpayer would have a much stronger case for relief from penalties." *Id.* at 473.

2. Liability for the Deficiency as Well as Interest but Penalties are Abated

Certainly, the imposition of penalties could be considered the harshest definition of peril. Therefore, removing them from the definition would certainly lessen the unexpected load placed upon the unfortunate taxpayer who relied upon IRS publications. But, as seen above, reliance upon IRS publications is not always a sure pathway to immunity from penalties.[221] However, the courts have established some scenarios where a taxpayer was able to abate deficiency-related penalties, but not necessarily the associated interest.

a. Chien v. Commissioner

In *Chien v. Commissioner*, the IRS imposed a tax deficiency and accuracy-related penalties on the petitioner, Amy Yu-Wen Chien, in the amount of $14,868.[222] The inaccurate payment of tax by Chien was due to her failure to comply with a complex portion of the Code that required her to pay the self-employment tax on her income from her employer, which was an international organization.[223] Chien agreed to the tax deficiency but disputed the imposition of the accuracy-related penalty.[224]

Under § 3121(b)(15), income earned from performing services as an employee of an international organization is not considered "employment."[225] Thus, "employees" of international organizations are unpredictably subject to the *self-employment* tax.[226] In calculating her tax, Chien obtained information from various sources, including a coworker who was "conversant in taxation," materials from a presentation given by an IRS agent at her workplace, and the IRS *Instructions for Income Tax Return Form 1040*.[227] After review of these materials, Chien determined she did not

221. *See supra* Part III.B.1.

222. 104 T.C.M. (CCH) 385, 385 (2012). In this case, $12,315 was due to tax deficiencies and $2,553 was due to the accuracy-related penalty. *Id.*

223. *Id.* at 385, 388.

224. *Id.* at 386.

225. *Id.* at 388; *see also* I.R.C. § 3121(b)(15) (2012).

226. *See Chien*, 104 T.C.M. (CCH) at 388 (explaining how and why employees of international organizations are subject to the self-employment tax).

227. *Id.* at 386–88.

owe the self-employment tax.[228]

The court found for Chien and dismissed the accuracy-related penalties associated with her deficiency under the reasonable cause and good faith exception of § 6664(c)(1).[229] Citing the guidance found within Treas. Reg. § 1.6664-4(b)(1),[230] the court reasoned that because "Chien's inexperience was the reason she failed to understand" her liability for the self-employment tax, her actions were not unreasonable.[231] Regarding her reliance upon the instructions to Form 1040, the court did not determine whether the instructions were misleading but simply ruled that "Chien made an honest mistake" in her interpretation of the instructions.[232] The court here, however, was silent on whether Chien was still liable for any interest that had accrued on her deficiency.[233] *Allcorn* speaks more on this issue.

b. Allcorn v. Commissioner

As it will be discussed in the following subsection, and as *Allcorn v. Commissioner*[234] will demonstrate, interest abatement is very strict and very limited. The petitioner in *Allcorn*, Luther Herbert Allcorn III, faced a tax deficiency of $4,000, "a late payment penalty of $300[,] and interest of $214.19."[235] The deficiency was the result of Allcorn's error in reporting a $4,000 estimated tax payment he had made in an earlier filing.[236] Because of what Allcorn claimed were unclear instructions on Form 1040, he "was unsure where to report his $4,000 estimated tax payment" from his earlier filing, and thus added it to an incorrect line on the form.[237]

228. *Id.* at 386.

229. *Id.* at 389.

230. *Id.* This regulation is likely to apply broadly to all taxpayers who rely in good faith on IRS publications. *See* Treas. Reg. § 1.6664-4(b)(1) (2003) ("Generally, the most important factor is the extent of the taxpayer's effort to assess the taxpayer's proper tax liability. Circumstances that may indicate reasonable cause and good faith include an 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.").

231. *Chien*, 104 T.C.M. (CCH) at 387.

232. *Id.* at 389.

233. *See id.*

234. 139 T.C. 53 (2012).

235. *Id.* at 55.

236. *Id.* at 54.

237. *Id.* at 54, 57. Forms and their accompanying instructions fall into the same category as IRS publications. *See supra* Part II.A.6.

Subsequently, the IRS miscalculated his tax as well, adding the $4,000 payment he had already made to the total he reported on Form 1040, which already included the $4,000 tax payment.[238] Consequently, the IRS issued him an additional $4,000 refund.[239] Then, after discovering its error, the IRS issued Allcorn the deficiency notice.[240] "Apparently confused," Allcorn called the IRS and, after "receiv[ing] an explanation of how respondent had calculated [his] tax liability," Allcorn agreed to pay the deficiency but "disputed the penalty and interest."[241] The IRS approved Allcorn's request to abate the penalty but not the interest.[242]

Allcorn argued that the court had the authority to abate his interest liability because the erroneous refund he received and the delay in notifying him of the mistake were the fault of the IRS.[243] The court agreed with Allcorn that the IRS made mistakes in calculating his tax liability and could have prevented the erroneous refund.[244] However, the court engaged in a strict reading of the applicable statutes[245] and determined that because Allcorn made "mistake[s] on his Form 1040" the court *could not* abate the interest and deferred to the judgment of the Commissioner in denying the interest abatement.[246]

In a summary of the law to this point, a taxpayer who relies in good faith and with reasonable cause on IRS publications is likely to see the penalties associated with his deficiency abated.[247] It is much more difficult

238. *Allcorn*, 139 T.C. at 55.

239. *Id.* The IRS notified Allcorn of the mistake and issued the refund over one year later. *Id.* The refund totaled $5,179.52, of which petitioner was only entitled to $1,179.52. *Id.*

240. *Id.* This notification occurred yet another year later. *Id.*

241. *Id.*

242. *Id.*

243. *Id.* at 57.

244. *See id*. at 61–62 ("Petitioner's mistake was adding his estimated tax to his withholding amount on line 62 instead of entering it on line 63. Had respondent considered the entirety of petitioner's return at the same time, no adjustments would have been necessary.").

245. *See* I.R.C. § 6404(e)(1)–(2) (2012); *see also infra* Part III.B.3 (discussing § 6404).

246. *Allcorn*, 139 T.C. at 66–67; *see id*. at 57 ("This Court may order an abatement of interest *only* if we conclude that the Commissioner abused his discretion in failing to do so." (emphasis added)); *see also* I.R.C. § 6404(h); Chakoian v. Comm'r, 97 T.C.M. (CCH) 1844 (2009) (finding that oral advice from the IRS to file an offer-in-compromise regarding a disputed tax liability did not warrant interest abatement over the two year period that petitioners waited for a determination).

247. *See supra* notes 212–22 and accompanying text. Although not explicitly discussed by the court, it is likely that Bobrow's status as a tax attorney precluded his satisfaction of the good faith requirement.

for taxpayers with exceptional knowledge or skill, especially in regard to tax law, to abate penalties that result from reliance on IRS publications.[248] Finally, even a good faith taxpayer is unlikely to see the interest abated, including scenarios where the IRS makes clear mistakes in guiding the taxpayer.[249] But are there scenarios where the Commissioner could or should abate the interest? What can the courts force the Commissioner to do? And can reliance on IRS publications ever justify that enforcement?

3. Liability for the Deficiency but all Penalties and Interest Are Abated

While "interest is not a penalty [and] is intended only to compensate the Government for delay in payment of a tax,"[250] it can certainly feel like a penalty to the taxpayer.[251] The discretion to abate the interest associated with a tax deficiency is given and limited by I.R.C. § 6404.[252] This section states that the Commissioner may abate a tax or any liability associated with a tax, including interest, under the following scenarios: (1) the amount is excessively, erroneously, or illegally assessed,[253] (2) the amount "is assessed after the expiration of the" applicable statute of limitations,[254] (3) the amount is so small that the costs associated with its collection outweigh the benefits,[255] (4) the amount's assessment is attributable to math errors by the IRS,[256] (5) the amount is "attributable to erroneous written advice by the" IRS,[257] or (6) the "Secretary fails to contact [the] taxpayer."[258] While the abatement of interest can be attributable to any one of the above-mentioned scenarios, § 6404 also contains a provision that applies only to interest that is due "to unreasonable errors and delays by" the IRS.[259]

248. *See supra* notes 198–220 and accompanying text.
249. *See supra* notes 234–46 and accompanying text.
250. Avon Prods., Inc. v. United States, 588 F.2d 342, 343 (2d Cir. 1978).
251. *See supra* note 137 and accompanying text (noting the financial hazards a deficient taxpayer may face).
252. I.R.C. § 6404 (2012).
253. *Id.* § 6404(a)(1)–(2).
254. *Id.* § 6404(a)(3).
255. *Id.* § 6404(c).
256. *Id.* § 6404(d).
257. *Id.* § 6404(f).
258. *Id.* § 6404(g).
259. *Id.* § 6404(e).

As *Allcorn* demonstrated, the courts are reluctant to deal tolerantly with this section.[260] The courts generally will not override the Commissioner's judgment to refuse abatement of an interest liability unless one can "prove that the Commissioner exercised this discretion arbitrarily, capriciously, or without sound basis in fact or law."[261] *Harbaugh v. Commissioner* was a rare occurrence of a taxpayer succeeding in an action of this type by establishing reliance on an informal source of IRS guidance—oral advice[262]—and it appears to be in conflict with *Allcorn*.[263]

In *Harbaugh*, the petitioners, Stanley and Bonnie Harbaugh, faced a tax deficiency for nonpayment over a three-year period due to their inability to pay.[264] The Harbaughs contacted an IRS call center about how they could resolve the tax that they owed.[265] The IRS employee they spoke with proposed a compromise agreement with the Harbaughs over the phone to make installment payments to satisfy all of their tax liabilities.[266] The Harbaughs agreed and made the payments faithfully.[267] However, before finishing their last few payments, the Harbaughs received notice that their payments were being applied to a related penalty instead of their tax deficiency and associated interest.[268]

The court agreed with the Harbaughs that the IRS employee had misinformed them regarding the repayment of their tax liabilities.[269] The

260. *See supra* notes 243–46 and accompanying text.

261. Harbaugh v. Comm'r, 86 T.C.M. (CCH) 596, 597 (2003).

262. Oral advice is nearly identical in reliability value to that of IRS publications. *See supra* note 68 (discussing the reliability value of oral advice and its proximity to IRS publications).

263. *See supra* notes 243–46 and accompanying text; *see also* Larkin v. Comm'r, 108 T.C.M. (CCH) 328, 334 (2014) (finding that although the IRS did not follow the petitioner's directions in applying his tax payment, it did not amount to an "abuse of discretion" for the Commissioner to abate the interest).

264. *Harbaugh*, 86 T.C.M. (CCH) at 596. The inability to pay appears to have begun "with respect to a trust fund recovery penalty (the TFRP) under [§] 6672 for employment tax." *Id.*

265. *Id.* at 597.

266. *Id.*

267. *Id.* Before they began paying, the Harbaughs had to contact the IRS over the phone again because their first "statement showed balances of petitioners' liabilities that were inconsistent with petitioner's belief about what he owed as a result of the first call." *Id.* During this phone call, the IRS employee confirmed that at the end of their repayment period, the additional amounts would be removed. *Id.*

268. *Id.* The Harbaughs' payments were mainly applied to the TFRP, allowing interest to accrue not only on the TFRP but on the deficient income tax amounts as well. *Id.*

269. *Id.* at 598 ("The [IRS] employee did not clarify to petitioner that unassessed interest would continue to accrue during the installment period . . . ."). Before getting into this issue, the court

court also determined that the IRS employee had neglected to inform them that "unassessed interest would continue to accrue during the installment period."[270] The court decided that the acts of the IRS agent were "ministerial" in nature and thus found § 6404(e)(1)(A) satisfied.[271] The court concluded that the Commissioner "abused his discretion in refusing to abate interest that accrued during the period" whereby the Harbaughs were misled.[272]

Clearly, this ruling is contrary to *Allcorn*.[273] In *Allcorn*, while the petitioner had made a mistake in understanding his use of Form 1040, the deficiency was also caused by an IRS error made in a similar, if not more egregious, manner than the error in *Harbaugh*, as *Allcorn* dealt with miscalculation and negligence.[274] Ultimately, the court in *Allcorn* found that because an erroneous refund was involved, they had to follow the provisions of that section, which prohibit abatement of interest if the petitioner was at fault in any way.[275] However, the error involved is easily as "ministerial" as that in *Harbaugh* because the calculation and review of petitioners' tax return is a "procedural or mechanical act that does not involve the exercise of judgment or discretion, and . . . occurs during the processing of a taxpayer's case."[276]

---

determined that the compromise agreement was invalid as "the [IRS] employee did not have the authority to" bind the government. *Id.*; *see also* Cauble, *supra* note 7, at 462 (providing a summary of reasons why oral advice given by the IRS should not have a binding effect); *supra* Part II.B.

270. *Harbaugh*, 86 T.C.M. (CCH) at 598.

271. *Id.*; *see also* Treas. Reg. § 301.6404-2 (2012) ("Ministerial act means a procedural or mechanical act that does not involve the exercise of judgment or discretion, and that occurs during the processing of a taxpayer's case after all prerequisites to the act, such as conferences and review by supervisors, have taken place. A decision concerning the proper application of federal tax law (or other federal or state law) is not a ministerial act.").

272. *Harbaugh*, 86 T.C.M. (CCH) at 599. The court found this period to be the three-year term during which the Harbaughs made their installment payments under the belief of what the IRS employee had told them. *Id.* at 598–99. Once the IRS notified them of the mistake, however, the court determined the Harbaughs were liable for any subsequent interest. *Id.* at 599. The court determined they were also liable for the interest that had accrued in the period between their first and second communications with the IRS employee because "no erroneous or dilatory performance of a ministerial act by an employee of the IRS contributed to a delay or error in payment;" only their inability to pay prevented them from doing so. *Id.* at 598.

273. *See supra* notes 247–48 and accompanying text.

274. *See supra* notes 234–46 and accompanying text.

275. *See supra* notes 243–46 and accompanying text.

276. Treas. Reg. § 301.6404-2. If anything, oral advice is probably lesser in value as a ministerial act than actual mathematical miscalculation by the IRS.

This Comment's purpose is not to discuss the rightful use or interpretation of ministerial. However, this juxtaposition is presented to demonstrate the complex question courts face when deciding whether to abate the interest associated with a tax liability. The current law is strongly opposed to it.[277] But, as *Harbaugh* shows, there is not only room for expansion in § 6404, but support for it as well.[278] Perhaps a proposed amendment to this section is needed that will statutorily redefine peril to allow an escape of the interest associated with a tax deficiency for good faith reliance on IRS publications.

IV. REDEFINING PERIL

As the previous Part established, the case law is virtually unanimous—a taxpayer who relies on IRS publication for guidance in preparing his taxes does so at her peril, even if in good faith.[279] The courts have currently defined peril to mean the taxpayer is liable for the tax deficiency as well as associated interest.[280] The taxpayer is likely to escape any penalties related to her misstatement of tax so long as she relied on IRS publications in good faith.[281] This Comment has previously established that the policies and arguments against strictly binding the government to low-level, informal guidance publications substantially outweigh the policies and arguments for it.[282] Thus, assigning liability for tax deficiencies to the taxpayer for relying on IRS publications is a just consequence, despite the clearly inequitable undertones.[283]

However, this inequity is magnified when applied to taxpayers who rely in good faith on IRS publications for tax guidance.[284] Commenting on the *Bobrow* decision, one lawyer-blogger declared,

> No citizen should be expected to go beyond an official IRS tax publication and conduct research in the Internal Revenue Code and arrive at a conclusion different than the IRS published guidance.

277. *See supra* note 246 and accompanying text.
278. *See supra* text accompanying notes 271–74.
279. *See supra* note 189 and accompanying text; *see also supra* Part III.B.
280. *See supra* Part III.B.
281. *See supra* Part III.B.1–.2.
282. *See supra* Part II.B.
283. *See supra* Part II.B.
284. *See* ACTC Brief, *supra* note 214, at 17–20.

> More broadly, *what is the purpose of the numerous IRS publications* on qualified plans, 403(b) plans, armed forces tax issues, education benefits, health and medical tax benefits, and more, if taxpayers cannot rely on their contents regarding potentially critical tax issues?[285]

While it is clear that the IRS publications cannot establish official interpretations of the Code,[286] it is also clear that equity demands a compromise.[287] The compromise I propose is an amendment to I.R.C. § 6404(e)(1) that will allow for the abatement of interest on a tax deficiency attributable to good faith reliance on IRS publications. The ensuing subsection is a detailed description of that amendment followed by a discussion of the policy arguments for and against this proposal.

A. The Proposed Amendment to I.R.C. § 6404

IRS publications effectively have no value if a taxpayer cannot safely rely upon them for guidance.[288] A solution is needed to balance out both the purpose of the IRS—to collect accurate taxes from American citizens[289]—and the fairness that is demanded when the IRS is inconsistent between how it advises taxpayers to calculate their tax and how it actually treats those taxpayers' calculations.[290] The courts are limited under § 6404 from abating interest unless the Commissioner's decision not to do so is "arbitrar[y], capricious[], or without sound basis in fact or law."[291] Hence, for simplicity in implementation and operation, the solution must be a limited statutory amendment to § 6404.[292]

---

285. Todd Berghuis, *Tax Court Ruling and IRS Rollover Guidance Don't Add up*, ERISA NEWS (Feb. 19, 2014, 2:31 PM) (emphasis added), http://erisanews.blogspot.com/2014/02/tax-court-ruling-and-irs-rollover.html; *see also* ACTC Brief, *supra* note 214, at 17–20.

286. *See supra* note 121.

287. *See* Johnson, *supra* note 73, at 590–91.

288. *See supra* note 285 and accompanying text.

289. *See supra* note 116.

290. *See supra* Part II.B.

291. *See supra* note 251. The court in *Harbaugh* used this language to describe what amounts to "an abuse of discretion" by the Secretary or Commissioner in deciding whether to abate the interest. *See* I.R.C. § 6404(h)(1) (2012).

292. If the proposed solution was a new common law rule, it would require a much broader, more far reaching amendment to § 6404 in order to allow a court greater ability to administer interest

The amendment to § 6404 would eliminate a taxpayer's liability for interest associated with a deficiency caused by good faith reliance on a misleading IRS publication.[293] The amendment would be an addition to § 6404(e), which currently provides two scenarios in which the IRS can abate the interest associated with a tax deficiency.[294] Mirroring the current language of § 6404(e), the amendment would provide specifically as follows:

> I.R.C. § 6404(e)(3)—The Secretary shall abate the assessment of all interest associated with a deficiency which was caused by—
>
> (A) A taxpayer's good faith reliance on an IRS publication,[295] and
>
> (B) The IRS publication is erroneous or inconsistent with the plain meaning of the statute that caused the deficiency.

This amendment will not only grant the Commissioner more authority to abate the deficiency interest, but also require it.[296] This would give courts more oversight in determining whether the Commissioner's discretion was "without sound basis in fact or law."[297] Furthermore, the amendment would require the taxpayer to rely on the IRS publication in reporting his tax liability, and do so in good faith. This prevents the Happy Accident taxpayer from receiving a windfall from this amendment, in the form of an interest-free loan, by fortuitously discovering a misleading IRS publication *after* he has been notified of his deficiency.[298]

---

abatements itself. *See* I.R.C. § 6404(h)(1); *supra* note 275. This would extend far beyond the purpose of simply allowing interest abatement for relying on an IRS publication, so it is avoided here.

293. My proposed amendment was inspired by one Johnson proposed as a solution for taxpayer reliance on Regulations, revenue rulings, and revenue procedures. *See* Johnson, *supra* note 73, at 613.

294. I.R.C. § 6404(e)(1)–(2).

295. While beyond the purposes of this Comment, this amendment could easily be expanded to include all forms of IRS guidance that are misleading. *See* Cauble, *supra* note 7, at 428–35 (proposing solutions for taxpayer reliance on forms of IRS guidance such as oral advice).

296. Johnson notes that prior to the enactment of § 6404(h) in 1996, the courts held that the IRS's authority to abate interest "was not judicially reviewable." Johnson, *supra* note 73, at 613 n.325; *see also supra* notes 291–92. Now, because of § 6404(h), the IRS's discretion on interest abatement is limited. Johnson, *supra* note 73, at 613 n.325.

297. *See supra* note 261.

298. *See supra* notes 112–15 and accompanying text.

There are two foreseeable criticisms of this proposed amendment. First, one may argue the amendment is ambiguous as to what constitutes "good faith reliance" and the judiciary will likely be inconsistent in its application.[299] However, this can be easily remedied. This statute is purposely similar to § 6444(d), which provides an exception to the substantial underpayment penalty for a taxpayer who acted with reasonable cause and good faith.[300] As this Comment has shown, courts have determined that it is possible for taxpayers to use their reliance on a misleading IRS publication as evidence of reasonable cause and good faith to avoid tax penalties.[301] The courts should continue to consider a taxpayer's knowledge and skill, as well as her ability to access and understand additional tax materials, in determining whether she relied on the IRS publication in good faith.[302] This means that the taxpayers in *Bobrow* would likely not have seen a different result if this amendment existed prior to their case.[303]

There will also likely be criticisms that the amendment would result in decreased revenues resulting from interest charges. While it must be conceded that there would be some reduction of revenues related to these types of interest charges, it would be only temporary. In fact, it may actually increase revenues overall, as the number of voluntarily compliant taxpayers will grow because of their rising confidence in the IRS's ability to administer the Code.[304]

B. Policy Arguments Against a Statutory Compromise

As noted earlier in the Comment, the list of scholarship on this subject is short; it becomes virtually nonexistent when dealing specifically with IRS publications.[305] However, using the policy arguments discussed above,[306] this section will predict how those opposed to a statutory compromise would

299. Johnson also discusses the sustainability of his proposed amendment in regards to the "common law regime." Johnson, *supra* note 73, at 618–19.

300. I.R.C. § 6444(d) (2012).

301. *See supra* Part III.B.2.

302. *See* Cauble, *supra* note 7, at 471–74; *see also supra* Part III.B.1.

303. *See supra* note 220.

304. *See supra* notes 84–91.

305. *See supra* note 75.

306. *See supra* Part II.B.

likely dispute its implementation.[307] Of the three main policy arguments against enforcement of a general consistency duty on the IRS, only one is likely to provide much traction here.[308]

First, critics of a statutory compromise may argue that it would create inefficient tax administration by discouraging the IRS from providing guidance materials in the first place.[309] However, this outcome is much less likely if the taxpayer is still liable for the deficiency, since the interest itself is neither a tax nor a penalty but "is intended only to compensate the Government for *delay* in payment of a tax."[310] Further, because the compromise would only allow the abatement of interest, "the bite . . . would be moderated."[311] In fact, the opposite outcome may be true instead—the IRS may be encouraged to provide better guidance materials to avoid the delays associated with providing inaccurate guidance.[312]

If taxpayers are allowed to escape interest charges by relying on IRS publications with incorrect interpretations of the law, then the critics may argue that it is a violation of the separation of powers doctrine.[313] However, this argument is weak, since the compromise would not allow taxpayer reliance on the IRS publication to rewrite the tax as a strong duty would require,[314] but would instead only limit the IRS's ability to collect interest on a deficiency that was caused by its own misguidance.

The strongest argument critics would likely offer is the unfairness in the compromise's application, specifically the possibility of windfalls to taxpayers who stumbled upon the IRS guidance after being informed of their deficiency.[315] While the proposed amendment requires that taxpayers relied upon the IRS publication while calculating their tax liability, it will not prevent the courts from creating "doctrinal chaos."[316] A concession to the possible windfalls to undeserving taxpayers that may result from this

307. *See infra* text accompanying notes 309–18.
308. *See infra* notes 315–18 and accompanying text.
309. *See supra* notes 106–11 and accompanying text.
310. Avon Prods., Inc. v. United States, 588 F.2d 342, 343 (2d Cir. 1978) (emphasis added).
311. Johnson, *supra* note 73, at 618.
312. Compare this prediction with the arguments for and against a strong duty in Part II.B.
313. *See supra* notes 117–22 and accompanying text.
314. *See supra* notes 117–22 and accompanying text.
315. *See supra* notes 112–16 and accompanying text.
316. Johnson, *supra* note 73, at 621.

amendment's implementation is unavoidable.[317] However, the small cost of a few taxpayers taking advantage of this amendment is overshadowed by the great benefit to American morale that the vast majority of taxpayers, who are honest and want to pay an accurate tax, will receive.[318]

C. Policy Arguments for Statutory Compromise

Contrasting the above subsection, the policy arguments for creating a statutory compromise are abundant. After the *Bobrow* decision and order were released in early 2014, countless journalists and bloggers rallied against it.[319] Their contentions lie mainly with the unfair applications the ruling has on taxpayers and its implications on the administration of the American tax system.[320] However, several commentators argue chiefly for liberating a taxpayer who relies on IRS publications from all peril he faces when the IRS is inconsistent with that guidance.[321] Nevertheless, as has been established, the separation of powers doctrine clearly prohibits that far-reaching result.[322]

In order for any compromise to be effective, Johnson states it must (1) "have enough 'punch' that it has a noticeable impact on the IRS[,] . . . [(2)] relieve[] . . . the aggrieved taxpayer to a meaningful degree[,] . . . [a]nd . . . [(3)] the response must avoid unduly complicating sound tax administration."[323] The compromise I propose, an amendment to § 6404,

317. *See id.* at 598–99.

318. *See supra* note 85 and accompanying text; *see also* MICHAEL J. GRAETZ, 100 MILLION UNNECESSARY RETURNS: A SIMPLE, FAIR, AND COMPETITIVE TAX PLAN FOR THE UNITED STATES; WITH A NEW INTRODUCTION, 14–15 (2010) (explaining the effect a complex tax code has on honest tax payers).

319. *See, e.g.*, Berghuis, *supra* note 285; Rogers Laban, *IRS Publications Do Not Bind Courts — or the IRS*, CP AM. INT'L (Feb. 10, 2014), http://news.cpamerica.org/rogers/wtu/taxupdate2.asp?a=1557; Bill O'Malley, *The US Tax Court Changes the Game on IRA Rollovers*, MCGLADREY (Feb. 26, 2014), http://mcgladrey.com/content/mcgladrey/en_US/what-we-do/services/tax/tax-alerts/the-us-tax-court-changes-the-game-on-ira-rollovers.html; Michael D. Shelton, *IRA Rollover Rules: A "Bait & Switch"?*, SMITH HAUGHAY RICE & ROEGGE (Feb. 5, 2014), http://www.shrr.com/uploads/1/IRA%20Rollovers_shelton.pdf.

320. *See, e.g.*, O'Malley *supra*, note 319 ("It remains unclear why the IRS chose this time and this taxpayer to assert a position that runs contrary to more than 30 years of its own issued guidance.")

321. *See, e.g.*, Berghuis, *supra* note 285 ("Where, pray tell, is equity in this IRS Tax Court litigation, this disavowal of longstanding guidance to suit some short-term prosecutorial aim?").

322. *See supra* notes 117–22.

323. Johnson, *supra* note 73, at 616.

accomplishes each of these goals. First, as mentioned previously, the interest provisions of the Code were "conceived simply as 'compensation for the use or forbearance of money.'"[324] The proposed amendment would allow a taxpayer who relies on an IRS publication in good faith to shift this compensatory burden onto the IRS.[325] Although the taxpayer has made an error that allowed her "the use of money that the Government should have had the use of,"[326] it was substantially caused by reliance on an IRS publication. Thus, the proposed amendment would effectively move the "sting" associated with the delayed use of money to the party most responsible for the delay—the IRS.[327] Hopefully, this newfound pain will guide the IRS to use taxpayers' dollars to create more reliable publications.[328]

In line with the previous goal, the proposed amendment to § 6404 will relieve a taxpayer who relies on IRS publications "to a meaningful degree," but it will not "overcorrect the problem."[329] The taxpayer is still liable for the deficiency burden because "Congress is authorized to make the tax laws, not the courts" or the IRS through the guidance it offers.[330] And the deficiency is not a superficial burden, especially when the taxpayer has used an IRS publication to plan a complex transaction.[331] Thus, the burden for the mistaken tax calculation is equally balanced—the IRS takes the burden for the deficiency interest and the taxpayer pays the deficiency. The IRS would fulfill its ideals of "equity and good conscience"[332] by providing this

324. *Id.* at 619 (quoting Deputy v. Du Pont, 308 U.S. 488, 498 (1940)). Johnson discusses how the original purposes behind the interest provisions have eroded to become less about compensation and more about penalizing. *Id.* at 619–20. As the courts have already established that good faith reliance on IRS publications is likely enough to avoid statutory penalties, so too should that reliance be enough to defeat interest, which has become analogous to a statutory penalty. *See supra* notes 222–32 and accompanying text; *see also* Johnson, *supra* note 73, at 619–20.

325. *See* Johnson, *supra* note 73, at 616–17.

326. *Id.* at 619.

327. *See id.* at 616 (discussing how an effective solution should "both sting the IRS and meaningfully help the taxpayer").

328. *See* Berghuis, *supra* note 285 ("[H]ow can [the IRS] have spent uncounted taxpayer dollars over the life of this publication—a publication that now runs to 114 pages—for us to be told that its contents cannot be relied on by taxpayers?"); *see also supra* notes 314–21.

329. Johnson, *supra* note 73, at 616–17.

330. *Id.* at 596; *see also supra* notes 117–22 and accompanying text.

331. *See supra* Part II.C.

332. Berghuis, *supra* note 285.

"meaningful relief to the taxpayer."[333]

Finally, the amendment would not only avoid complicating tax administration but also considerably alleviate the burden of an already confusing tax system to both the taxpayer and the IRS.[334] Under the proposed amendment, the taxpayer would have to establish good faith reliance in order to avoid the interest liability. This requirement would not only prevent "Happy Accident" and other "bad faith" taxpayers from avoiding their interest liabilities, but also would discourage them from taking that position in the first place.[335] The IRS would therefore expend "less time and money" associated with these claims.[336] The amendment would also prevent the good faith taxpayer, a character trait of the majority of American citizens,[337] from feeling further discouraged with an already complex tax system. Unlike a "strong duty" of consistency, which would likely decrease the IRS's motivation and ability to produce guidance materials and discourage taxpayers from voluntarily complying with the tax code,[338] this "weak duty" proposal would increase the ability of the IRS to provide more accurate guidance materials[339] and, consequently, increase the level of voluntary, independent compliance among American taxpayers.[340]

V. CONCLUSION

The IRS issues varying types of guidance to assist taxpayers in paying their taxes, each with varying levels of reliability.[341] As far as IRS publications go, courts currently agree with the IRS that taxpayers cannot rely on IRS publications as dependable guidance in preparing their tax returns and planning financial transactions.[342] Further, the courts currently define the peril a taxpayer faces for doing so as facing responsibility for the

333. Johnson, *supra* note 73, at 617.
334. *See infra* note 349 and accompanying text.
335. *See* Johnson, *supra* note 73, at 617.
336. *Id.* at 618.
337. *See supra* note 85.
338. *See supra* notes 112–18 and accompanying text.
339. *See supra* notes 310–11 and accompanying text.
340. *See supra* Part II.B.1.
341. *See supra* Part II.A.
342. *See supra* Part III.A.

tax deficiency as well as any accrued interest.[343] Depending on the taxpayer, he may be able to escape the liability for any related penalties.[344]

The general policy arguments against enforcing a strong duty of consistency on the IRS are stronger than those for it and support placing responsibility for the tax deficiency on the taxpayer, especially considering that the separation of powers doctrine of the United States Constitution requires Congress to make the tax law, not the courts or the IRS through the guidance it offers.[345] However, those same arguments are not strong enough to support placing responsibility for the interest associated with the tax deficiency on the taxpayer.[346] The proposed amendment to § 6404 redefines peril to mean that a taxpayer who relies in good faith on an IRS publication is only liable for her tax deficiency, meaning she will be able to abate any related interest charges.[347] This amendment will both "sting" the IRS for providing faulty guidance that the taxpayer has relied on and meaningfully relieve the taxpayer of unnecessary burdens while still requiring her to comply with the Code.[348]

One thing is certain—the Code is a befuddled mess.[349] The issues in this Comment would surely be moot, or at least reduced in their applicability, if the Code was dramatically simplified. However, because the future of the Code is unpredictable, the nation is required to deal with it today. By enacting this Comment's proposed amendment to § 6404,

---

343. *See supra* Part III.B.

344. *See supra* Part III.B.2.

345. *See supra* notes 117–22, 330.

346. *See supra* Part IV.C.

347. *See supra* Part IV.A.

348. *See supra* Part IV.C.

349. *See generally* GRAETZ, *supra* note 318, at 3–16 (describing why we need tax reform). Graetz illustrates the nation's problematic tax code and its universal effects as follows:

> The truth is that our income tax is a mess. Today no matter what their income, Americans confront extraordinary complexity in filing their taxes. In 1940 the instructions to Form 1040 were about four pages long. Today the instruction booklet spans more than one hundred pages, and the form itself has more than ten schedules and twenty worksheets. The tax code contains more than seven hundred provisions affecting individuals and more than fifteen hundred affecting businesses—a total of more than 1.4 million words—making the tax law four times as long as *War and Peace* and considerably harder to parse. The tax regulations contain another 8 million words, filling about twenty thousand pages. . . . And both the code and the regulations grow fatter every year.

Id. at 14.

Congress can shift the consequences of the Code's complexity from the taxpayers to the entity responsible for its design and execution—the United States Government.

Brady Cox*

* J.D. Candidate, 2016, Pepperdine University School of Law; B.S. in Journalism, 2011, Utah State University. I would like to thank Professor Paul L. Caron for suggesting the topic for this Comment, Professor Steve R. Johnson for advising me on its direction, and the staff of *Pepperdine Law Review* for refining it. I'm very grateful for my parents, John and Karen Cox, and my in-laws, Becky and Scott Hunsaker, for providing the opportunity to be in law school. I most of all thank my wife Rachel and my son Jameson—none of this would be possible without your unending patience and support. I love you both.

This Comment received the 2015 Ronald M. Sorenson Memorial Writing Award for the *Pepperdine Law Review's* best student article.

* * *

* * *

* * *