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NOTE: As part of the transition to CeriFi, we ask that documentation be sent to CPLgrading@cerifi.com for processing of certificates going forward.

Attention Enrolled Agents: If you are an IRS Enrolled Agent and wish to get IRS credit for this course, be sure to enter your PTIN into your Checkpoint Learning profile before taking the course.

Attention NCRPs: This course does ***not*** qualify for AFSP professionals requiring "Federal Tax Law Update" credits.

Topics for future editions may include:

- Tangible Property Regulations
- Repair Regulations

EXECUTIVE SUMMARY

PART 1. CURRENT DEVELOPMENTS

EXPERTS' FORUM..... 3

Tax is a dynamic field of accounting with a constantly changing landscape. There are constant changes affecting tax practice. It is incumbent on practitioners to stay abreast of these developments, not only to advise current clients, but also potential new clients. This material covers some recent Congressional, judicial, and IRS updates.

Learning Objectives:

Upon completion of this segment, the user should be able to analyze current issues in taxation, including determining the best practices for engagement letters by the OPR, assessing the recent CP14 Notices for clients in certain disaster areas, and analyzing the transfer and/or direct deposits for certain energy-related tax credits. [*Running time 29:01*]

PART 2. INDIVIDUAL TAXATION

Nonresident Aliens (NRAs)..... 14

The determination of whether a person is a nonresident alien for tax purposes is an important analysis for any practitioner with a client that may or may not be considered a nonresident alien for tax purposes. Practitioners need to be cognizant of the basic rules applicable to that determination.

Learning Objectives:

Upon completion of this segment, the user should be able to analyze issues related to resident versus nonresident alien status for tax purposes, including determining the implication of U.S. citizenship, assessing the application of the green card test, and applying the substantial presence test. [*Running time 41:13*]

PART 3. BUSINESS TAXATION

Innocent Spouse Relief.....31

Practitioners are often faced with clients who have liabilities from a joint return and claim they were not involved in the business or investments of their spouse when they filed the return. Since the liabilities are joint and several on a joint return, practitioners need to be cognizant of relief provisions that may be available for a truly innocent spouse.

Learning Objectives:

Upon completion of this segment, the user should be able to analyze current tax issues, including assessing the application of traditional innocent spouse relief, determining the availability of the separation of the tax liability/ deficiency, and analyzing possible equitable relief. [*Running time 32:37*]

ABOUT THE SPEAKERS

Ian J. Redpath, JD, LLM, is a nationally recognized tax attorney and consultant from Buffalo, New York and is a principal in the Redpath Law Offices. Mr. Redpath has published numerous articles on contemporary tax issues and co-authored several books on tax topics. He has extensive national and international experience in developing, writing, and presenting professional CPE programs. In addition to his active tax practice, he serves as Chairman of the Department of Accounting and Director of Graduate Accounting Programs as well as Professor of Taxation and Forensic Accounting at Canisius College in Buffalo.

Renata Maroney, CPA, is a Senior Manager with Martin DeCruze in Stamford, CT. Renata has over fifteen years of broad professional experience in a variety of areas. Her focus is business and international tax, ranging from getting technology start-ups off the ground to tax planning for complex international transactions. She has extensive experience assisting clients with U.S. tax reporting and compliance for offshore assets and foreign accounts. Renata has worked extensively in the area of U.S. international tax reporting, including FBAR and Forms 5471, 8865, 8858, 8621, 5472, 1042.

Lawrence Pon is a Certified Public Accountant, Personal Financial Specialist, Certified Financial Planner, Enrolled Agent, United States Tax Court Practitioner, and Accredited Estate Planner in Redwood Shores, California. Mr. Pon has been in practice since 1986 and enjoys helping his clients reach their financial goals. He frequently speaks nationally on tax and financial planning topics to tax professionals, financial advisors, and the general public. Mr. Pon received his BS in Business Administration with emphasis in Accounting and Finance from the University of California, Berkeley and an MS in Taxation from Golden Gate University in San Francisco.

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Learning Objectives (Refer to executive summary)	
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Instructional delivery method	Group Live
Recommended CPE credit	3.0 Credits
Recommended field of study(ies) (Refer to executive summary)	
Program Level	Update
Prerequisites (Circle One)	• Basic Accounting and Auditing professional experience
	• Basic Tax professional experience
	• Basic Governmental professional experience
Advance preparation	None required
Course registration and, where applicable, attendance requirements (1)	

(1) Insert instructions for your students to register for the class and any other attendance requirements (e.g., bring your laptop, be prepared to work in groups, you will be required to sign in and sign out of the session, etc.)

PART 1. CURRENT DEVELOPMENTS

Experts' Forum

Experts' Forum is a popular feature in which we review recent developments in taxation. Ian Redpath begins this month with a discussion regarding the IRS update of its Status of Mission Critical Functions.

Let's join Ian.

A. IR-2023-123

Mr. Redpath

Hi, everybody, welcome to the program. I'm Ian Redpath. It is great to have you here again. This is the segment where we go over a number of things that have occurred since the last time we met, from the IRS, the courts, the legislature where relevant. This is our "what's going on." So, let's start right in.

We have IR-2023-123. Warning: talk to your clients. The IRS is giving a warning here that there is a new scam that is misleading a lot of people, so they are getting a lot of action on this particular scam. It is misleading people into believing that they are owed a refund. What they are getting is a letter that kind of mirrors the Internal Revenue Service. It gives a number to contact (which is not the Internal Revenue Service), and then they attempt to get confidential data from the client. If [clients] come to you and say, "Look, I got this," well, you will probably recognize it as a scam; but the average taxpayer or our clients are not necessarily going to know that is a scam. So, again, this is a good warning to our clients to say watch out for these types of things.

If you have a website where you post interesting information, things of that nature, I would certainly put this up as a warning; if you have a mass mailing to clients, again, you might want to warn them, because the IRS is concerned. They are seeing a lot of this new scam, which is, again, mirroring an IRS letter saying they need to contact them because they have a tax refund due, and then, seeking additional information to get their financial information.

B. June 27, 2023, Alert—Office of Professional Responsibility (OPR)

The Office of Professional Responsibility, at the end of June, issued an alert. That alert, I think, is really something that we all should pay attention to in practice. This alert is alerting practitioners to what the Office of Professional Responsibility is viewing as best practices in a number of areas.

One of the things that some of you may or may not do is spend a lot of time on your engagement letters. What should be in there? What shouldn't be in there? How should we approach engagement letters? Do we have a global engagement letter that covers all sorts of services? Do we have one that is just ongoing, [such as] "We are going to do tax services for you," and we continue from year to year with the same engagement letter? Engagement letters can be a great defense for us. They can also be a real problem if not properly drafted and not properly updated. Engagement letters are both a great shield, but they can be a sword for clients [who might claim] "Well, you never told me that you weren't going to prepare this." What are you preparing? Are you preparing the federal return, the state return, payroll returns? Are you doing other things, like filing the FBARs? Who is responsible for that? These are the types of things that you really need to detail. I encourage you to look at it.

In this alert, the IRS says that the following should be discussed—now, when they say *discussed*, then it becomes a *he said, she said*: he said this, she said this, he said this, I said that, they said this—those make good lawsuits, frankly; it should be in writing.

- The scope of the representation. Exactly what are you doing? What is it you are going to be doing for the client? And that should be in great detail, in the sense of [for example] which forms. Are you doing the FBARs?

Are you responsible for preparing FBARs for a client? Are you responsible for doing, for example, if you have international [clients], the 5471 or the 5472? Who is responsible for these types of things?

- The terms. What are the fees? What can be expected? How are you charging? Are you charging a flat rate? Are you charging on an hourly basis? And if you are charging on an hourly basis, do you have differential rates? [Are there] partners or staff? If so, how does that relate to the work that is being done? Who bears the ultimate responsibility for the return?
- The purposes or objectives. Just preparing a return may not be sufficient. And this becomes especially important if you get into an audit. You should have a special engagement letter for audit services (audit [meaning] your client got audited for tax purposes), not relying on that engagement you had to prepare the returns.
- Then, any actions to be taken during the representation, as well as
- When does the representation terminate? Having it just open-ended is not a good idea; there should be a specific period of time. So, it may be the tax returns for this period, but what is the representation period of time?

The OPR says this should all be memorialized in a comprehensive client engagement letter. Again, I'm going to advise you that I don't think it is wise to have a global one—just a "We are going to do accounting services," or "We are going to do tax services." Let's take, for example, the penalties that can apply to preparers. It can be as high as 75 percent of the fees on the engagement. Well, what are the fees? What was the engagement? You prepared financials? The financial statements? You needed to prepare those for the tax; so, therefore, the fees you charged for that relate to tax services, also (or at least partially)—and all of a sudden, the penalties got raised. So, having a global [is not best practice]. It is best to provide different letters of engagement for the different services. The same thing with consulting. What are you consulting on? Again, separate those. That is just best practice.

You should clearly communicate and regularly communicate with the client to manage their expectations. What are they expecting? Give them, the OPR says, timely written updates, and revise that engagement letter any time there are material developments that would affect that letter. That will help transfer the client's matter to another professional, or to someone else in your office should you retire or become incapacitated, or just have someone else working on the file. These things become very important. Also, you should establish in your engagement letter a clear policy for retention and disposition. How long do we keep it? What do we return to you, the client? What do we retain? How long do we retain it? And then, when do we destroy it? How? (We will shred it, for example.) What is our process for destruction? So, the return of client files and records, retention, and disposition have to be communicated to the client and should be in that engagement letter. There is a high potential risk in retaining client information—the potential of unnecessary disclosure. Best practices [include] implementing a data security and privacy plan that complies with your particular area of practice (in our case, tax). You can find a lot of information [on this]. The IRS provides a lot of data. I'm going to refer you to Publications 4557, 5293, and 1435. They all deal with it and will help you put something together. You should consider adopting a business continuity and disaster recovery plan that addresses what happens in the case of a natural disaster. We've had a hurricane, or we've had a tornado, or we've had floods. What happens in the case of a cyberattack? And as we recently found out, what do we do in the case of a pandemic? Again, that often should be part of the engagement letter.

The Office of Professional Responsibility says these are best practices. You should look at this in representing a client. I'm going to really encourage you to look at your engagement letters and make sure that they comply with what the Office of Professional Responsibility is saying are the best practices in this area. I've talked to many firms about this, and I've looked at a lot of engagement letters. Often, I have found that they just are not sufficient to protect the practitioner, so watch out for that. It is a major area and can often lead to misunderstandings and litigation.

C. IR-2023-121

Now, your client may or may not have gotten a letter or may be getting one. They may be getting the CP14 Notice from the IRS. If they got a CP14, it basically says that you have a balance due, you haven't paid it, and you have

21 days to pay it. Well, they sent these—and it is automated—they sent it out to people who were in states that have additional time because of various natural disasters. [The majority] affects California, but it also affects Alabama, Arkansas, Florida, Georgia, Indiana, Mississippi, and Tennessee. What the IRS said, essentially, is that "Yes, it says 21 days, but it doesn't mean that. That is just a standard letter that goes out."

So now, the IRS is sending out CP14CL, and your clients may be getting it at any time if they haven't already received it. Basically, that is going to say, "Never mind the CP14 you got. You don't have 21 days; you have additional time." Again, storms, the winds, the flooding, the landslides and mudslides, all of these things. The IRS has pointed out that these announcements include quarterly payroll tax returns and payroll deposits.

Again, if your client got a CP14 and is panicked because of the [21] days, thinking they had additional time, yes, and the IRS is acknowledging that if you are in those seven states. So, they should look for, if they haven't already gotten, a CP14CL, which will say there was a mistake—those [original notices] were just automated letters that went out.

D. IRC §51

Now, one thing to keep in mind and to talk to our clients about is Section 51, the Work Opportunity [Tax] Credit. That is a general business credit; but remember that it also applies to different categories of workers. It is equal to 40 percent of the first $6,000 of wages that are paid in their first year. So, it can be significant if they have worked at least 400 hours. The maximum credit, then, is $2,400. A 25-percent rate applies to individuals who perform fewer than 400 hours, but at least 120. There is a proposal in Congress to eliminate the 25-percent credit because there is a belief that this might encourage employers to hire part-time people.

Remember, there are ten targeted work groups—and this is often missed—we are in the summertime, and now summer is starting to close off, but summer youth employees [is one of those targeted groups]. Did your client hire someone during the summer? If they are (1) at least 16 years of age and under 18 on the hiring date or May 1, whichever is later; they (2) only perform services between May 1 and September 15; and they (3) reside in an empowerment zone, [they are considered qualified summer youth employees].

For the employer, there is a pre-screening and certification [requirement], but talk to your client and see if there was a credit that might have been available or is available for this year. You can carry back one [year] and forward 20.

E. Ann. 2023-18, 2023-30 IRB

Now, we have Announcement 2023-18. People have been wondering what is going on with the stock repurchase excise tax, because the IRS issued an announcement at the end of June to confirm that you are not required to pay the excise tax, to report anything, or to make any payments, until the regulations have been issued—which they have not.

The tax applies to repurchases of stock by a corporation after December 31 of 2022. That is when the excise tax kicked in. However, in Notice 2023-2, they said, "We are going to come up with proposed regs addressing this." They did give some procedures; and they said until the proposed regs are issued taxpayers can rely on the procedures in 2023-2.

So, there is a lot of confusion about what, exactly, are the due dates. Yes, it is due after December 31 but what, exactly, do we do? The IRS has said that until the proposed regs are published, the liability for the repurchase won't need to be reported until the date that the [Form] 720, Quarterly Federal Excise Tax Return, is due for the first full quarter *after* the regulations are published. There will be no failure to file or pay penalties that will apply. The new regulations will require corporations to keep very detailed records on these repurchases.

F. *Donald E. Swanson v. Commissioner*

TC Memo 2023-81

Now, we have an interesting case, *Donald Swanson*. This is a Tax Court Memo case, and a couple of things happened here. First, the individual operated a fishing charter activity and kept, literally, no records. The IRS came in and used the bank deposit method to reconstruct their income. The taxpayer disagreed with that method and the Court upheld it. They said the IRS used an appropriate method to determine unreported income, the bank deposits method.

In addition—this is just a warning, and we talked about it on a number of different programs—but this is a hobby. Why are hobby loss issues so important right now? Because until 2026, if the [IRS] can say it is a hobby, you get no deductions. The deductions are miscellaneous itemized, subject to the 2-percent floor, so you don't get any until 2026 because they've been suspended. The IRS picks up tax on all the income, but you get none of the deductions. It is a good reason to be a trade or business. If the IRS can say you're not a trade or business, all the income is taxed and none of the deductions can be taken—unless they are otherwise allowable, like interest or taxes that might otherwise be allowable under the Code.

So now, what happened here? Well, he starts a fishing charter business. He kept no records, he had no separate bank account, and he had no business plan. He didn't do anything—despite losing money year after year—he did nothing to try to change his business activities. On his side, he went out and he got a fishing license, he got commercial insurance, he began using an app to track his business income, and he did advertise with the Chamber of Commerce. But that wasn't sufficient to change anything; it didn't create any business. He had no clients. He purchased an airplane for his charter fishing business, and he incurred significant expenses in storing and operating it. He had no experience in running a fishing charter business, and he didn't consult any advisors. He spent almost no time on it. He also managed rental properties—which also generated losses. He spent his income from other sources to fund his activity, and he used the boat for his personal fishing trips. Boy, talk about going through the factors in Section 183, and the regs, and saying, "Okay, is there anything here that is in the favor of the taxpayer?" Yes, he got a license, he got insurance, and he did some nominal advertising with the Chamber; but that did not overcome all of the negatives.

Sit down with your clients. When they have a side hustle—I'll call it—make sure they have a log for their time because if you can get over the hobby loss, the next thing the IRS is going to do is come in and say, "It is a trade or business, but the taxpayer doesn't materially participate." So, you still are going to have to suspend the losses and deductions under the passive activity loss rules. [Having] detailed records, logbooks, and making sure that they are operating it as a true business will be very important in this determination.

G. Chief Counsel Advice 202325007

We have Chief Counsel Advice 202325007. In this, what we have is a taxpayer that incurred losses from worthless CFC stock (controlled foreign corporation stock) and then claimed that these were disaster losses.

The COVID disaster was declared on March 20 of 2020, and the entire United States was considered to be the area of the disaster. So, the taxpayer did a reorganization. They had one of the taxpayer's wholly owned subsidiaries. It was a sole shareholder of several CFCs that they say were worthless due to insolvency, and so, he said, "I'm going to treat these as disaster losses."

The Advice notes that for the loss to be a disaster loss, it has to occur in a disaster area and be attributable to the disaster. So here, the subsidiary's losses didn't occur in a COVID disaster area, and so you didn't even have to go to the question as to whether they were attributable to a federally declared disaster.

Now, the Chief Counsel points out that there is really no authority to pinpoint where the loss was sustained; however, they said this provision traditionally applies to things like hurricanes, floods, fires, things of that nature, in a discrete geographic area. Yes, there can be a financial impact of the damages resulting from the physical act

(the fire, the hurricane, etc.). However, they looked, and they said, "Where did this take place?" Substantially all the revenue was derived not from U.S. customers but from foreign customers. All their economic metrics, such as income, etc., and production was all outside the country. So really, it didn't happen in the United States. And they said, "Well, what else?" Does it really matter where their headquarters are? Does it really matter where the board of directors are, or where the shareholders are? That is not really relevant to whether a disaster [loss was sustained]. So, they said, "No, you can't take this."

H. TD 9975

We have a very interesting set of regs that came out on the Advanced Manufacturing Investment Credit, the elective payment, and the pre-filing requirements, TD 9975.

[Section] 6417 was put into the Code with the Inflation Reduction Act, as was 6418. Section 6417 essentially allows tax-exempt entities to be able to—and the word is *elective payment*—allows them to, essentially, get paid for the credit even though they have no tax. So, it is not a credit against any tax because they are tax-exempt entities. This applies to a number of different credits. There are seven eligible credits that this applies to, but it doesn't apply to nontaxable entities. So, let's say an entity has a lot of money—this is called monetizing tax credits—it has a lot of losses, or they are making a heavy investment, and they don't need the credit. They can sell the credit, but it has to be for cash. That is under Section 6418, and this is for tax years beginning after December 31, 2022. It has to be for cash.

Now, the IRS says the income is not taxable. This is going to be, essentially, exempt from income tax, but also will not be considered subject to the passive activity loss rules under [Section] 469. They also have a similar provision for Section 48D, which is credits dealing with semiconductors and semiconductor manufacturing equipment. So, it has very similar rules. The IRS also provides in the regs that there is a pre-filing registration requirement. In other words, before you do this, you have to register. The IRS provides basically the information that you will need; and you will have to do it on each of the items that are subject to the credit. So, just because it is one company who is doing more, they have to register each one. The registration is not available yet. Again, both the direct pay and the transferability apply to tax years beginning after December 31, 2022. This pre-registration is a requirement. You will be given a number, and that number has to go on the tax returns where this is being claimed. Now, if it is a tax-exempt entity, for example, filing a 990, they have to file a 990-T, and they will put the credit on there. The IRS warns that pre-registration—getting that number—does not mean you qualify. That is not saying you qualify; that is just giving you a number. Make sure [to understand] that is not the approval. So, I'll leave that for your reading, but it is a very important provision and will be applicable to a number of clients.

I. *Bond et al. v. U.S.,* 131 AFTR 2d ¶2023-758

Then, we have an interesting case of *Bond*. Now, one of the reasons this is interesting is Renata and I will be discussing non-resident aliens. In another program, we will be discussing the different types of income. In this particular case, we have an Australian national's refund complaint to recover their FICA taxes that the Australian company, the employer, collected from paychecks on behalf of the U.S. while Bond was temporarily assigned to the United States. Yes, he may have—and I'm just going to say may—he may have been right; but unfortunately, he did not take the prerequisite actions to actually claim the benefits of the treaty. So, he was trying to claim treaty benefits but didn't take the appropriate steps to claim the rights under the treaty. And as a result, they said, "Too bad. You're not getting the money back from the United States."

Well, a lot of things have happened over the last month. I want to thank you very much for joining me, and I hope you enjoy this and the rest of the programs. Please be safe.

Current Material: Experts' Forum

By Ian J. Redpath, JD, LLM

A. IR-2023-123

The IRS warned taxpayers about a new scam letter that misleads people into believing they are owed a tax refund. The letter includes fake contact information and a phone number and seeks a variety of sensitive personal information from taxpayers. This information could be used by identity thieves to obtain refund and other sensitive financial information.

B. June 27, 2023 Alert—Office of Professional Responsibility (OPR)

This alert provides the practitioner with a broad understanding of the OPR's best practices in a number of areas and heavily emphasizes the engagement and engagement letters. These should be followed starting when first engaged by the client. The practitioner should discuss all aspects of their representation with the client including:

- The scope of the representation,
- The terms of the representation (including fees),
- Purposes or objectives of the representation,
- Actions to be taken during the representation, and
- When the representation terminates.

Ideally, these should be memorialized in a comprehensive client engagement letter. Do not confuse comprehensive with global. Tax services should be separated from other services such as financial or consulting (other than on tax matters). The OPR recommends that the practitioner communicate clearly and regularly with the client to manage the client's expectations throughout the relationship. As the relationship progresses, the practitioner should provide timely written updates to the client and revise the engagement letter to reflect material developments.

The practitioner should establish a clear policy for the retention, disposition (including destruction), and return of client files and other records. This is best set forth in the engagement letter. Of course, best practices also include implementing a data security and privacy plan that complies with the rules applicable to the practitioner's practice. Practitioners can find information about data security and privacy plan rules in the following:

- IRS Publication 4557, *Safeguarding Taxpayer Data, A Guide for Your Business*;
- IRS Publication 5293, *Protect Your Clients; Protect Yourself, Data Security Resource Guide for Tax Professionals*; and
- IRS Publication 1345, *Handbook for Authorized IRS e-file Providers of Individual Income Tax Returns* (including "Safeguarding IRS *e-file*" in Chapter 2).

The OPR suggests that practitioners adopt a business continuity and disaster recovery plan that addresses certain events such as natural disasters, cyberattacks, and/or pandemics. Pertinent portions of these plans should be shared with clients by including them in the engagement letter.

C. IR-2023-121

The IRS is sending a special follow-up mailing to taxpayers affected by disasters to let them know that they have additional time to pay their taxes. The taxpayers received a CP14 Notice from the IRS in late May or June 2023 informing them they had 21 days to pay the balance due. These letters are automated and a legal requirement.

However, the letters were sent in error to those affected taxpayers and could have caused confusion. The vast majority of impacted taxpayers scheduled to receive the follow-up letter are in California, with smaller numbers of taxpayers in disaster areas in Alabama, Arkansas, Florida, Georgia, Indiana, Mississippi, and Tennessee. The IRS website has a Tax Relief in Disaster Situations webpage with current and prior-year announcements of tax relief. The IRS also updated the insert that will accompany upcoming CP14 balance-due notices to make it clearer that the payment date listed in the letter does not apply to those covered by a disaster declaration, and the disaster dates remain in effect.

D. IRC §51

The Work Opportunity Tax Credit (WOTC) is a general business credit provided under [51]. The WOTC is available for wages paid to certain individuals who begin work on or before December 31, 2025. The WOTC may be claimed by any employer that hires and pays or incurs wages to certain individuals who are certified by a designated local agency (sometimes referred to as a state workforce agency) as being a member of one of 10 targeted groups. In general, it is equal to 40 percent of up to $6,000 of wages paid to, or incurred on behalf of, an individual who: (1) is in their first year of employment; (2) is certified as being a member of a targeted group; and (3) performs at least 400 hours of services for that employer. As such, the maximum tax credit is generally $2,400. A 25-percent rate applies to wages for individuals who perform fewer than 400 but at least 120 hours of service for the employer.

One of the 10 targeted groups for the WOTC is qualified summer youth employees. Such an employee is one who: (1) is at least 16 years old but under 18 on the hiring date, or on May 1, whichever is later; (2) only performs services for the employer between May 1 and September 15 (was not employed prior to May 1), and (3) resides in an Empowerment Zone (EZ).

Note that there is a pre-screen and certification requirement, but the credit is certainly something to be considered for our clients.

E. Ann. 2023-18, 2023-30 IRB

The IRS confirmed that taxpayers are not required to report the new stock repurchase excise tax or to make any payments of such tax before the due date specified in upcoming regulations. The IRS initially issued guidance on this excise tax in Notice 2023-2, describing certain rules and procedures that the IRS intends to include in those proposed regulations. Until the proposed regulations are issued, the IRS said taxpayers may rely on the rules described in Notice 2023-2.

Because of some confusion about due dates, the IRS has clarified that for taxpayers with tax years ending after December 31, 2022, but before the date the proposed regulations are published, liability for the stock repurchase excise tax will not need to be reported until the date that the Form 720, *Quarterly Federal Excise Tax Return*, is due for the first full quarter after the regulations are published. The tax payment due date will be the same as the filing due date. There will be no penalty for late filing.

The new regulations will require corporations to keep complete and detailed records to establish the amount of any stock repurchases and to retain those records as long as they are material for tax administration purposes.

F. *Donald E. Swanson v. Commissioner*

TC Memo 2023-81

The Tax Court upheld the IRS's bank deposits reconstruction of the taxpayer's income for years for which he operated a fishing charter activity. Additionally, they held that the activity was a hobby under §183.

The taxpayer did not maintain complete records or a separate bank account for the activity, had no business plan, and failed to adjust operating methods despite continuous years of losses, which showed he did not conduct the activity

in a businesslike manner. Even though he obtained a fishing license and commercial insurance, began using an application to track his business income, and engaged in advertising with the Chamber of Commerce, most of these were simply necessary to comply with applicable laws. He had no clients nor income, but he purchased an airplane and incurred significant expenses related to storing and operating it. He did not consult any advisers, spent only limited time on the activity, managed rental properties which also generated losses in the years at issue, spent his income from other sources to fund the activity, and used his boat for personal fishing trips.

G. Chief Counsel Advice 202325007

The Chief Counsel determined that a taxpayer's losses from worthless CFC stock did not "occur in a federally declared disaster area." Therefore, the losses did not qualify as disaster losses. To qualify as a disaster loss under §165(i), the loss must both:

(1) Occur in a disaster area, and

(2) Be attributable to a federally declared disaster.

In this case, the subsidiary's losses did not occur in the COVID disaster area, so whether the subsidiary's losses were attributable to a federally declared disaster did not matter.

There is no authority directly on point that determines where a loss is sustained with respect to stock in a foreign corporation. However, disasters that give rise to a disaster loss deduction usually are triggered by an event, such as a hurricane, fire, flood, or drought, that resulted in a discrete geographic disaster zone. Chief Counsel analyzed various ways in which to determine where a loss related to worthless CFC stock is located, and determined they did not create a disaster area event.

H. TD 9975

The IRS issued temporary regulations to help taxpayers who are planning to monetize certain tax credits by making an elective payment election to treat certain tax credits as payments of federal tax or the transfer of credits.

Section 6417 was added by the Inflation Reduction Act (the IRA), allowing for the elective payment (also referred to as direct pay) of applicable credits. The IRA gives certain tax-exempt organizations, referred to as 'applicable entities,' access to the economic benefit of energy-related credits via elective payments. In addition, the applicable entities under §6417 also include certain taxable entities wishing to take advantage of the direct pay option for tax credits under Sections 45V, 45Q, or 45X.

Section 6418 provides taxpayers other than applicable entities to make an election to transfer all or a portion of 'eligible credits' to another taxpayer in exchange for cash. Eligible entities may begin transferring credits under §6418 for taxable years beginning after December 31, 2022.

Similar rules apply to the credit under §48D available for certain capital expenditures integral to the operation of the advanced manufacturing facility whose primary purpose is the manufacturing of semiconductors or semiconductor-manufacturing equipment.

The IRS released temporary regulations detailing pre-filing registration requirements for the elective payment and transfer of credits in §§48D, 6417, and 6418. These temporary regulations describe specific information and registration requirements for qualified taxpayers planning on taking advantage of the elective payment election and transferability election options.

These temporary regulations apply to taxable years ending on or after the date of publication in the Federal Register, scheduled for June 21, 2023. The temporary regulations under §§48D, 6417, and 6418 all expire on June 12, 2026. Both direct pay and transferability apply to taxable years beginning after December 31, 2022.

The temporary regulations provide that an applicable entity or a qualifying electing taxpayer must complete the mandatory pre-filing registration. After the IRS reviews the pre-filing registration, the IRS will then issue a registration number. A registration number is necessary to qualify for the elective payment election under

§§48D or 6417, or an election to transfer credits under §6418. The pre-filing registration must be completed electronically through an IRS electronic portal which is expected to be available by fall of 2023. Registration numbers are only valid for one year and for the taxable year for which the number is obtained.

In general, §6417 allows an applicable entity to make the election to treat any applicable credit as a payment against tax imposed by subtitle A (i.e., federal income taxes) for the applicable tax year in an amount equal to the credit. The following federal income tax credits are 'applicable credits' eligible for the elective payment under §6417(b).

- Alternative fuel vehicle refueling property credit under §30C;
- Renewable electricity production credit under §45;
- Zero-emission nuclear power production credit under §45U;
- Credit for qualified commercial clean vehicles determined under §45W (direct pay is only available for a subset of applicable entities for the qualified commercial vehicles credit);
- Clean electricity production credit determined under §45Y;
- Clean fuel production credit determined under §45Z;
- Energy credit under §48;
- Qualifying advanced energy project credit determined under §48C; and
- Clean electricity investment credit determined under §48E.

The following applicable credits also allow for entities other than applicable entities to elect into the direct pay provision for a period of time ('electing entities').

- Credit for carbon oxide sequestration under §45Q;
- Credit for production of clean hydrogen under §45V; and
- Credit for advanced manufacturing production under §45X.

Applicable entities are any organization exempt from the tax imposed by subtitle A, a state or political subdivision thereof, an Indian tribal government, an Alaska Native Corporation, the Tennessee Valley Authority, a corporation operating on a cooperative basis which is engaged in furnishing electric energy to persons in rural areas, or an agency or instrumentality of any U.S. territory governments, any states, the District of Columbia, or an Indian tribal government.

The proposed regulations provide that transferred credits are ineligible for the direct pay provision under §6417 and cannot be transferred more than once. The proposed regulations permit transferring credits through a broker as long as the broker does not take title to the transferred credit.

The transferor's proceeds from the sale of an eligible credit are tax-exempt income. The proposed regulations would treat the tax-exempt income resulting from an elective payment election by a partnership or an S corporation as arising from an investment activity and not from the conduct of a trade or business within the meaning of §469(c)(1)(A). In contrast, the proposed regulations would treat the eligible credit as earned in connection with the conduct of a trade or business for transferee taxpayers. As such, the transferred credit would be subject to passive limitation rules under §469 for transferee taxpayers.

I. *Bond, et al. v. U.S.,* 131 AFTR 2d ¶2023-758

The Court denied an Australian national's attempt to recover a refund of FICA taxes that his Australian employer withheld from his paychecks, on behalf of the U.S., while he was on a temporary assignment in the U.S. At the time, the taxpayer also was subject to an equivalent tax charged by Australia. Bond also was ordered to return a prior refund. Although the taxpayer was entitled to seek exemption from double taxation under the U.S.-Australia treaty/totalization agreement, he did not follow the prerequisite official certification procedure for exemption.

A. Discussion Problems

1) You have been asked by the partner in charge to determine if an engagement letter is appropriate for the firm. The firm generally has gone either on a "handshake" or issued a global engagement letter for any accounting-related services. What advice would you offer?

2) Your client has brought in a CP14 Notice telling them they have 21 days to pay certain taxes. They live in a federal disaster area in California. They are concerned because you had told them they had additional time.

3) You represent an entity that is considering investing in certain green energy projects that will generate tax credits. They currently have NOLs and do not foresee any tax liability in the near future. In addition, they need cash to pursue these ventures. What considerations should you bring up to the client?

Required:

Discuss the issues fairly presented in the above situations.

B. Suggested Answers to Discussion Problems

1) Reference should be made to the best practices set forth by the OPR. There should be a clear tax engagement letter that, at a minimum, addresses the matters set forth in the OPR Alert.

2) The CP14 was sent as an automatic letter. The IRS has acknowledged that the letter is incorrect for those in seven states, including California, that had declared disasters. The taxpayer should expect to receive a CP14CL.

3) The client may be able to take advantage of transferring the credit. First, a determination needs to be made that the credit is transferable. The taxpayer must complete the required pre-registration (once the online platform is available). The transfer must be for cash but will not be taxable income.

PART 2. INDIVIDUAL TAXATION

Resident vs. Nonresident

Determining whether an individual is a resident or nonresident alien for tax purposes is an important analysis for any practitioner. Ian Redpath and Renata Maroney discuss key issues related to resident and nonresident alien status of taxpayers. These include the impact of U.S. citizenship, application of the green card test, and calculations for the substantial physical presence test. It is important that practitioners be aware of the basic rules and communicate those to their clients.

Let's join Ian and Renata.

Mr. Redpath
Renata, welcome to the program.

Ms. Maroney
Glad to be here. Thank you for inviting me.

Mr. Redpath
Well, you're the guru on international tax. I think one of the things is that many of our viewers may be involved in it, and don't even know the extent to which they are involved—especially those people who live near the borders, whether it be the northern border or the southern border. Also, there are a lot of people now that are coming in and out of the country, and whether or not they actually become a resident, or a nonresident is really a work of art when you have to do that.

So, let's just kind of start in the beginning, I guess. Exactly, what does it matter? We actually have a slide we are going to pull up here as to why it matters. So, residency income tax—basically, why does this matter?

Ms. Maroney
I'm working for an East Coast-based CPA firm, so we see a lot of people coming and going. There is some sort of international connection, and the first question we always ask is, "Are you a resident in the U.S.?" Because if you are, then we know what to do—it is worldwide taxation of all income. There is a whole slew of international reporting forms, like the FBAR and 5471, that carry a lot of penalties. And also, we are just preparing the good old Form 1040 with graduated rates, deductions, credits, and whatnot.

Now, if someone comes in and says, "I'm just moving into the United States," and they actually are not a resident, the whole game completely changes because what we are looking at (to tax this person on in the U.S.) is only income derived from U.S. sources. That is a limited subset of income, versus worldwide income where it doesn't really matter where you earned it. You could earn it on Mars, and it is still taxable in the U.S.

Mr. Redpath
We'll talk to Elon Musk about earning it on Mars.

Ms. Maroney
I'm sure we'll get there.

Mr. Redpath
We'll have a treaty. We'll have a treaty with Mars as to how to tax the income.

Ms. Maroney

One day, I'm sure we will get there, yes. But for now, if someone is a nonresident, we are really looking at just the U.S.-source income which, then, we need to divide into two very broad buckets, ECI [effectively connected income] and FDAP [fixed, determinable, annual, or periodical]. And we will talk in the next program about it more because they are two completely different taxing regimes. One is flat 30 percent, and one is graduated rates. And then, we have to file Form 1040-NR, which kind of looks similar to 1040, but it is also very different. There are a lot of different nuances and rules that come into play with it.

So, there are two completely different taxing regimes that apply to U.S. residents and nonresidents, and that is why we really have to figure out, from the get-go, the very first question: "What is your immigration status? Are you a U.S. taxpayer, or are you a foreigner coming into the United States?"

Mr. Redpath

Another thing that I see—and we will talk about it a little bit—is there are people who are here but aren't here for tax purposes. They're physically in the United States; but, for tax purposes, they are not. For example, "What is your visa status?"—as you mentioned. You may be physically present; but, for tax purposes, you're not physically present. So, there is a lot of nuance to this.

One of the things that I come across because I live near the border of Canada is we get a lot of people who discuss, "Am I a resident" (and I'm just going to use that as a broad term) "of Canada for estate tax purposes, or am I a resident of the United States for estate tax purposes?" That is kind of a whole different program. We are not really going to get into that; but, just in general, what should our viewers know about estate tax for that purpose?

Ms. Maroney

I will start off with this. Residency for different purposes is determined differently. And one of the points of confusion I keep hearing all the time is [related to] people who come here with visas. The [Citizenship and] Immigration Services of the United States very clearly says, "You are a nonresident of the United States. You do not have permissions to do this, this, and [this] until you get a green card or citizenship."

And now, you are coming here to the meeting with them and say, "Hey, you are a resident for tax purposes." And they say, "What? I have to pay taxes as a resident even though the Immigration Service very clearly and insistently tells me I'm not a resident?" And you say, "Yes, that is how it works because residency for different purposes is determined under a different set of rules." So, immigration residency does not equal tax residency, and tax residency for income tax purposes is not equal to residency for estate tax purposes. Income tax rules are very objective. They depend on whether you have a green card or citizenship, or if you meet the day count (the 183-day test). Very objective.

The estate tax rules are super subjective. They depend on this concept of domicile—which is a fuzzy-wuzzy concept of where your true home is—and there is a whole slew of factors that go into determining it. There is no one factor that says you are a resident for estate tax purposes. So, it becomes a massive gray zone for people who are living in between two countries.

Mr. Redpath

And there is a special rule that allows the U.S. to bring you back if they believe that, within 10 years, if they believe that you changed your domicile to avoid estate taxes in the United States. They may still come and get you, even though you think you have dotted every i and crossed every t. So, that is very important when you have a client that might have a residence outside the United States.

I'm in New York and we are a rather high-taxed state. In New York, we have a lot of people who claim [Florida residency]. All I have to do is walk outside my office right now, and I'm going to see a number of Florida license

plates on cars; because for state tax purposes, they're trying to claim that they are Florida residents. Some of that argument is a bit the same as domicile. They look a lot at the same types of concepts.

You mentioned earlier that if you are a citizen of the United States, you pay tax on your worldwide income. It doesn't matter where you live; you can live anywhere in the world, and you pay tax on it. Also, if you are a resident of the United States, you are going to pay tax on your worldwide income. We don't have, as many countries have, this idea that source and residence are the [only] issues. We say, "No, it is source, residence, *and* citizenship." So, potentially, you will be taxed—you may never have been in the United States, ever, but if you are a citizen—in theory, you are taxed on your worldwide income. Of course, the IRS has to find out about it, but I will bet there are millions of people who have claimed U.S. citizenship but never pay U.S. taxes, because they have never been in the United States. They were born of U.S. parents, or maybe they were born in the United States. Technically, yes, they should be paying U.S. tax on that.

So, just in general, then, you mentioned two things. You mentioned a green card—which I believe is rose color; it's not even green anymore—but you mentioned a green card, and you also mentioned physical presence. People either call it the *physical presence test* or the *substantial presence test*. What does that mean? Let's start with the green card. What does that mean? You have got a green card. So what?

Ms. Maroney

Sure. So, if you are a citizen or a green card holder (I think the legal name for it is *permanent lawful resident*), if you have one of those two things, "tag, you're it"—you are paying taxes on your worldwide income. There is really no way to get out of it. I have seen some very aggressive lawyers try to argue tax treaty positions on a green card holder and try to get them out of the country; but that, I think, is very aggressive and could jeopardize their whole immigration status. Personally, I wouldn't recommend it.

Mr. Redpath

Well, as an example—I can give you a good example here, Renata. This is years ago. During the civil war in Lebanon when Beirut was, essentially, being kind of torn apart at the time, a U.S. jetliner, TWA at the time (which doesn't exist anymore), was being held by a Shiite militia group on the tarmac. They were holding it hostage on the tarmac. Well, somebody—maybe in the IRS—but somebody came up with a really smart idea. They said, "You know, the head of that militia group, his family resides in the United States. His kids are going to a private school here in the United States. He has a home in a very wealthy suburb here in the United States; and, by the way, he can come back and forth. He has a green card. So, we should go after him for tax evasion because he hasn't been filing U.S. income tax returns." It didn't scare him into releasing the hostages, but they actually came up with the idea that we should go after him for tax. We should file and indict him for tax fraud because he hasn't been filing U.S. tax returns. It was an interesting approach that they took when they said, "Hey, he's got a green card."

A lot of people like to keep that green card, even if they leave the United States. I had a client that moved back to Greece, but he kept his green card. He lived here, he worked here, but he retired, went back to Greece, but he kept that green card. He says, "Now, I can go back and forth without a problem. I don't have to worry about it. I can jump on a plane and fly whenever I want. I've got the green card." So, a lot of people [keep it], even if they leave the United States permanently. I had a similar case with someone from Israel who had a green card and just kept their green card, even though they moved back to Israel.

Ms. Maroney

Right, and really, the worldwide taxation continues until you officially surrender either your citizenship or green card, which is a process unto itself. As you mentioned, there might be clawbacks where the IRS still comes back after you, and there is an exit tax, so it is a process. There's no easy way to get out of the long reach of the IRS.

Mr. Redpath

And you also have your FinCEN problems, too, that can come up—*FBARs* is the common term. I have seen a few of those where the IRS has been very aggressive with that. In fact, I had to do a number of voluntary compliance [filings] when they had the program because people just hadn't [filed], saying, "I have these accounts offshore. I have them there because I used to live there. I grew up there." Okay, but you are still filing U.S. tax returns, you've still got your green card. The case I was mentioning in Greece is where the issue came up.

Ms. Maroney

Yes, that is always an issue. People leave the United States and think, I'm done with the IRS; and they don't realize that no, you're not. You really have to file worldwide income, you have to report all your foreign assets on FBARs and all kinds of different foreign disclosures, and there are massive penalties associated with it. So, there are always issues with people coming or going.

Mr. Redpath

What is the substantial presence test that you mentioned, or the physical presence test?

Ms. Maroney

That is the test that essentially just counts the number of days that you are in the United States. Key things to understand about it is that any partial day is counted as a full day. So, you landed at 11:50 p.m. at an airport in New York. You have been in the United States for 10 minutes on that day. It counts as a full day. It counts as an entire 24-hour period. The other thing is the reason why you came to the United States. Why you are here? For business, vacations, family, whatever it is, it doesn't really matter. Any day counts as a full day.

Mr. Redpath

And you can really come up with an issue here. I made an argument on a case. This was in Minnesota, and the IRS agent said, "You are not an S corp because you have a nonresident alien as an owner." And I said, "Well, wait a second. This person is not a legal resident under immigration, but they have been here for five years continuously." Living here—and they have been filing taxes, by the way; they were filing their 1040s. I said, "They are a resident." There isn't a nonresident alien, per se, as an owner if you are using tax law.

Ms. Maroney

Correct. Even though the term is exactly the same as used by Immigration Services and as used by the IRS—*nonresident alien*—the meaning is completely different. For immigration, it is very clear that anyone other than green card holders and citizenships are nonresidents. For the IRS, it is a completely different set of rules; and even illegal immigrants who have no paperwork whatsoever, they can still be tax residents in the United States under the IRS rules, under this 183-day test or substantial presence test.

Mr. Redpath

Yes, we have a slide on this. I guess we should say, first, that these are separate tests. If you have a green card, it is a slam dunk. You are a resident, and you have to file U.S. taxes. This is a second test. It is an "or"—a green card *or*. So, what is this test? Because where I see a lot of times people make mistakes is the first test that we have here is you have to be in the country for at least 31 days in that year.

Ms. Maroney

In the current year, correct.

Mr. Redpath

Can you kind of explain what this test is? This is a mathematical test. As you said, very objective. What is the test?

Ms. Maroney

There are two parts to it. One is you have to be in the country for 31 days so, essentially, a month in the current year at a minimum. And then, the second part of the test is you have to have, cumulative, 183 days over the last three years: the current year, previous year, and second previous year. Now, where a little bit of confusion comes in is that this test doesn't just sum up all the days. It applies a mathematical formula where you take all the days from the current year, you take one third of the days from the prior year, and then, one sixth of the days from the second prior year. So, the magic number there is around 120 to 123 or 124 days. If you spend that consistently every year in the United States, you become a resident under the substantial presence test; because, if you do the math and you go over this formula, it comes up to 183 days, and 120 days is only about four months out of the year. So, it is enough to spend four months (or a long summer) in the United States and you are a resident for tax purposes.

Mr. Redpath

Is this [similar to] a green card in that if you got a green card, you are a resident? Is this a test that you say you failed the test, or you passed the test—whichever way you want to look at it—and now you are a resident. Are you a resident forever once you meet that residency test? Or is it an annual test?

Ms. Maroney

It is an annual test. So, your residency can fluctuate, and I have an example about this.

Mr. Redpath

We have a slide up here with an example in 2020. Amy's job. Could you go over that with us?

Ms. Maroney

Sure. In 2020—and let's pretend the pandemic didn't happen—in 2020, Amy's job sent her on a rotation in the U.S. She spent pretty much the entire year in the United States but returned home in December 2021. During 2022, she returned to the U.S. just to visit some friends, have a vacation, and [see] old co-workers. She spent only 12 days in the United States. During 2023, she returned to the United States for a four-month-project working assignment, as sort of a follow up to her previous project in the United States.

So, what is her residency status in 2021, 2022, and 2023? Each year stands on its own, and we look at it: in 2021 she spent 348 days, so that is automatically more than 183 days. That is it—she meets the substantial presence test. We don't even have to ask about the other years.

Mr. Redpath

Right, because you are taking 100 percent of those days, so you are over 183.

Ms. Maroney

Yes, automatically she is in. Now, the next year, in 2022, she just came back for a quick vacation—12 days. For that, she doesn't meet the substantial presence test. Why did she fail the first part? She is not in the country for more than 31 days in the current year. So, we don't look back, and we don't start counting her previous days. We don't get onto the second formula; we stop there. She is not a resident for 2022.

Now for 2023, when she comes back for 123 days, that is when we need to get into the formula. So, for the first test, she is in the country for more than 31 days in the current year, so we are good there. And then, the second part, we have to go and do the math. We have to take 123 days, we have to take [four] days from the prior year (from 2022), and then we have to take [58] days from the second prior year (from 2021). Sum all of that up, and we have our 185 days. [Since] 185 days is more than 183, she is a resident for tax purposes.

Mr. Redpath

So, let me ask you a question here. The year 2022—and we are looking at our slide here with the answer to it. You already said that in 2022, because she wasn't in the country for at least 31 days, she is not a resident. But yet, for this test, for the next year's test, we still have to use those days, right?

Ms. Maroney

Correct.

Mr. Redpath

So, that is why, even though we didn't even look at it that year, those days are still going to count in the test for the next year. And the year after that, by the way, right?

Ms. Maroney

Correct. You could go down all the way to zero or just have one day, and it still counts. So, once you get into the borderline cases where someone is not spending—flat out, very clearly—more than 183 days in the current year, yes, you have to go through this entire formula and you have to count all the days; and, practically speaking, that is where the challenges come in. Trying to get people to provide their travel days and their calendars, particularly if people travel a lot, it becomes a more practical challenge to count the days.

Mr. Redpath

Well, how do we [get out of it]? I mean, we can't get out of our green card, generally—you mentioned sometimes people try to make the argument, but they have not been real successful at that. The substantial presence, though, I'm physically here, and I mention it as a lead-in that sometimes you are physically here, but you're not here. So, what are some of the exceptions to the physical presence test?

Ms. Maroney

There are essentially three main ways to get out of the physical presence test. One is to just say, "My day spent in the United States doesn't really count." In practice, it's limited in application because the circumstances are super specific. It doesn't have a very broad application.

Mr. Redpath

Well, let me give you an example. A close friend of mine is a Canadian. He's a colleague of mine. He works here, he comes in five days a week, but he is not *here*.

Ms. Maroney

Correct, because commuters from Canada or Mexico can exclude their days; but there is a narrow border region where that might apply. The other thing that I have seen is diplomats based in New York—I have some UN clients who come to work for the United Nations—those are excluded; they don't count as being in the U.S. Some of the foreign students coming in can also exclude their days and not be here for the substantial presence test.

Mr. Redpath

But that one, by the way, for our viewers, you have to determine what visa they're on because it doesn't apply to all visas.

Ms. Maroney

Correct, that is where visa type becomes important. So, that is one way to get out of it. The other way is to claim closer connection to a foreign country. And that has way broader applicability because it's not limited by special circumstances. You just, essentially, have to spend less than 183 days (so less than half of the year) in the United States in the current year. And you have to make an argument with the IRS saying that, "Yes, I spend a lot of time in the United States, but my true home"—this is where we get into the fuzzy-wuzzy concept of where my true

home is—"is really in a foreign country because my family is there, my houses are there, my cars and jewelry and paintings and collectibles, and my religious organizations. Everything is in a foreign country." It is a subjective test; it takes all of the different factors into account, and there is no one single [factor] that determines, okay, your closer connection is to a foreign country. It is an argument you make.

Mr. Redpath

Renata, that sounds like *domicile*.

Ms. Maroney

It essentially tries to get to the same concept of domicile. There is a form that you have to file, 8840, and it gives you a whole checklist of what the IRS looks at, the different factors. So, it is a little more standardized than your domicile determination for estate and gift tax purposes. But it is still a subjective argument that you have to make to the IRS; and the IRS can come back and disagree with it and say, "No, you are really more connected to the United States."

Mr. Redpath

So, I'm thinking now that if I have a client that comes in, and I have done the analysis from my perspective, and I say, "You are not a resident, so let's not do anything. You are not a resident here. We are not going to file anything." That would be pretty bad advice, wouldn't it?

Ms. Maroney

Yes. You do have to go through all the steps, and you have to show and claim that you are not a resident, if that is the thing you want to do. Because if the IRS come in, they will declare you a resident, they will tax your worldwide income, and they will force all the foreign disclosures upon you, which have massive penalties associated with them. You really don't want to be in that situation.

Mr. Redpath

Basically, as I'm understanding it, you have done the analysis and you say, "You don't meet the test." Let's take the example you had earlier where in 2022, [Amy] was only here for 12 days. I don't have to worry about that year. You don't pass the test. I don't have to file; you are not a resident. But if I do the test, and the next year she passed the test and is a resident, now I'm going to look at these, am I correct? And I say, "Well, I don't have to file. You are a resident though, so I'm going to file. But I'm also going to file Form 8843 or Form 8840 or Form 8833 to claim that, yes, we meet the physical presence test but, for [some] reason, days are excluded (because I was a commuter alien, or I was here on a medical condition, or I'm claiming a closer connection to a foreign country, or lastly, claiming treaty benefits). Am I correct that that's how you would do it?

Ms. Maroney

Correct. First, you determine whether or not you meet the substantial presence test; and if you do meet it, you see if there is any way to get out of it. I mentioned there are three ways to get out of it. One is just saying my days do not count. Second is to claim closer connection to a foreign country, essentially arguing that you are really domiciled in a foreign country. A third one is to claim tax treaty benefits; and that is a specific provision if your other country has a tax treaty with the United States. I think there are 67 treaties or so.

Mr. Redpath

Just yesterday, the Senate approved a tax treaty with, I believe, Chile. So, we have a new one.

Ms. Maroney

I guess 68 now. But you have to be from that country, be a resident in that country. And then, you have to argue and determine, where are you a resident more so—in the United States or in the foreign country? The interesting thing there is the mechanics of determining it are different from your domicile test because domicile tests look at an accumulation of factors. There is not a single one that says Country X is where you are really a resident.

With this test, you look at the factors in order. For example, the first one is usually the location of your permanent home. Where is your permanent home located? Your house that you live in is what determines where you are a resident. It is called the *tiebreaker rule*. Two countries sort of fight out where you are a resident.

Mr. Redpath

Let's say that we don't have [agreement between the countries] because I guess we could argue that. Could we go to competent authority if we have a treaty and we can't agree? Would competent authority apply?

Ms. Maroney

Sure. If you go through the tests—and there are four of them—and you still don't know and, say, you have a permanent home in both countries, and you have a central or vital interest in both countries, and both countries are sort of equal in every regard, the last step that you can do is apply for competent authority which is, essentially, like a mediation. The two countries will send their representatives, and they fight it out in sort of a mediation discussion which country gets to claim you as a resident. So, it is really a tiebreaker rule; one country gets to claim you as a resident, the other doesn't.

Mr. Redpath

But you have got to have a treaty, right? You have to have a treaty.

Ms. Maroney

Now, my caution with that is—yes, you have to have a treaty, and this only applies for income tax purposes. For any other tax purposes, it doesn't apply. For employment tax purposes, estate tax purposes, anything else other than income tax purposes, you are still a resident in the United States. So, it becomes very murky.

Mr. Redpath

What does a nonresident file? And in the year of change, what do you do?

Ms. Maroney

The residency usually starts or ends on the first day of your presence or the last day of your presence in the United States. You could have sort of like a part-year resident return, where someone came [here] in the middle of the year. So, for the first half of the year, they are a nonresident, and they should be filing form 1040-NR and just pay tax on the U.S.-source income. For the second half of the year, when they are a resident, they need to file Form 1040 and pay their worldwide income for the period that they were a resident. It's called a *dual-status return*. That is the official name of it.

One of these returns, either the resident or nonresident return, will act as a statement, as an attachment, to the main return that you file, and the main return will be determined on what [status] you are at the end of the year. So, if you came into the United States and you became a resident, your main return is Form 1040. If you left the United States and you are no longer a resident, your main form will be 1040-NR. We have a couple [examples].

Mr. Redpath

We have an example of a change of residence here with Bob. Could you go over this with us?

Ms. Maroney

Sure. Bob came into the U.S. in March 2023 with an investor visa, and he just stayed here. He didn't leave the country. He applied for a green card, and he received it in October 2023—let's assume immigration works that fast.

Mr. Redpath

That investment was rather large.

Ms. Maroney

Yes. Money buys you a lot of things, including green cards.

Mr. Redpath

And in some countries, it even buys you citizenship.

Ms. Maroney

Correct. So, what is Bob's residency status for 2023? Bob meets the substantial presence test because he spent more than 183 days—he came in March and didn't leave the country. His residency period starts on March 1 when he comes into the country. For the first [part] of the year, from January to February, he is a nonresident. He would file Form 1040-NR. For the other part of the year, from March to December, he is a resident, so he needs to file Form 1040. He is a dual-status taxpayer in that situation.

Mr. Redpath

We have another couple of examples here. We have Charles. What happened to Charles?

Ms. Maroney

Charles is a little bit different situation where he first received a green card on March 1, 2023, because he married a U.S. citizen. But then, the couple continued to live abroad, and they just moved into the U.S. in October 2023. So, what do we do there? Again, we look at the first day, either when the person moves into the United States, or they get their green card. In this case, we will start off our residence period as of March 1 because that is when the person got their green card. "Tag, you're it"—you are taxed on worldwide income from that period on. Now, in Charles's very specific circumstances where you marry a U.S. resident, you can make an election to, essentially, say that you are a full-year resident. That is beneficial a lot of times, because it allows you to file a joint return instead of married filing separately. It gives you standard deductions and everything else. So, if there is not a lot of income in the nonresident period, we consider the selection pretty carefully and seriously.

Mr. Redpath

We have another one, Diana, who again, got an investor visa. So, what is the story with Diana?

Ms. Maroney

Diana, another investor, moved to the United States in October, so towards the end of the year. She intends to stay in the United States and doesn't really plan on leaving; nor does she really plan on applying for a green card. So, what is her status in 2023 and 2024? In 2023, Diana doesn't meet the substantial presence test. She is here for less than 183 days, so she is just [going to file] 1040-NR for 2023. Now for 2024, she is a U.S. tax resident because she meets the substantial presence test, and her residency starts as of January 1. She will just file Form [1040] for 2024. So, that is the distinction. That is one of the scenarios where you don't really have a dual-status return in either 2023 or 2024, it is just a clean break between the nonresident period and resident period, which just happens to [fall] on December 31 or January 1.

Mr. Redpath

And as you point out here on our last bullet point, this also includes filing FBARs now, because she is filing the 1040 as a resident. So now, all the FBAR requirements kick in. There are a lot of things that have to be looked at.

If you don't apply these tests, you are really subjecting not only, I think, the client, but also, potentially, the preparer to some potential penalties here that could be significant for ignoring it. So, these tests are not something that you can simply kind of play fast and loose with. It's definitely not worth it. There is a lot of complication here—a lot more complication than people think.

Ms. Maroney

Yes, there is definitely a lot of nuance in counting the days, and there are certain elections that you can make; but they are, a lot of times, limited in circumstances. There is a lot of nuance in here.

Mr. Redpath

Renata Maroney, thank you very much for being here. There is just such an amount of complication here that we overlook quite often with clients. Especially, if you have a situation where people are coming in and out, maybe for work, and you represent a business client and/or, certainly, anyone who lives in a border type of community along the Mexican border or the Canadian border—which is quite a significant border—these issues come up constantly.

So, Renata, thank you for joining me. We are going to have you on another program where we are going to talk about what you had mentioned, this FDAP and the effectively connected income, and all the complications with that. So, Renata Maroney, thank you very much. Thanks for your input and thanks to our viewers.

Ms. Maroney

Thank you for having me.

Nonresident Aliens (NRAs)

By Ian J. Redpath, JD, LLM

A. Introduction

In order to properly assess an income tax on an individual, a taxing authority must have jurisdiction to do so. Internationally, the most common forms of jurisdiction are source and residence. Source makes sense because the income is generated in that country. The tax generally is collected via a withholding requirement on the U.S. payor. Usually, this is on a gross basis without any deductions. Residence jurisdiction, as the name implies, allows income tax on individuals who are residents of a country. This is often on a net basis through the normal methods of taxation, such as filing a return. The United States adds another jurisdiction and applies U.S. income tax on citizens of the United States, regardless of where they reside. The United States taxes its residents and citizens on their "worldwide" income. To avoid double taxation, there is a foreign tax credit or a deduction that may be taken for income taxes paid to a foreign jurisdiction. For the purposes of this material, we will be discussing residents and nonresidents rather than citizens.

If an individual is a nonresident alien (NRA), then only source jurisdiction applies. Only the U.S.-source income of nonresident alien individuals is subject to U.S. taxation. However, the U.S. may be able to tax the foreign-source income of a nonresident alien individual if that income is effectively connected with the conduct of a U.S. trade or business. The following chart summarizes the U.S. taxation:

	U.S. resident for tax purposes	**U.S. nonresident for tax purposes**
Tax base	Worldwide income	U.S.-source income
Tax rates	Graduated rates (10%-37%)	Flat 30% rate on investment ("FDAP") income and graduated rates on business ("ECI") income
Main tax form	Form 1040	Form 1040-NR
Additional reporting	Subject to foreign informational reporting (FBAR, 5471, 8621, etc.)	Subject to nonresident withholding (Forms 1042-S, 8805)
Residency certification	Form W-9	Form W-8BEN

B. Definition

The term "nonresident alien" (NRA) is used both by the United States Citizenship and Immigration Services (USCIS) and the IRS, but it has two different meanings. The status under immigration law may be relevant in applying the tests and exceptions for income tax purposes. Thus, a person can be an NRA for immigration purposes but a resident for tax purposes.

An NRA is an individual who is neither a citizen nor a resident of the United States. Citizenship is through one of two categories: nationality at birth or naturalization laws. Under the income tax law, residency is determined under one of two tests:

- Lawful permanent resident (citizenship or green card test)
- Substantial presence test (183-day test)

If either of the tests is met, the individual is considered a resident for income tax purposes. It should be noted that the above is for *income* tax. Other types of taxes can apply a different set of rules to determine the U.S. jurisdiction

to tax. For example, for gift and estate tax purposes, residency is determined under the subjective "domicile" test. This is an analysis of the taxpayer's connections to the U.S., such as place of abode, family, friends, banking, and community contacts. For income tax, it is an objective test looking at either immigration/citizenship status or presence in the U.S.

C. Citizenship

The XIV Amendment, Section 1, Clause 1, of the U.S. Constitution provides that all persons born in the United States are U.S. citizens. This is the case regardless of the tax or immigration status of a person's parents. In addition, a person born outside the United States may also be a U.S. citizen at birth if at least one parent is a U.S. citizen and has lived in the United States for a specified period. The USCIS web page on citizenship through parents contains detailed information for persons born outside the United States to a U.S.-citizen parent or parents. As result, it can come as a surprise to someone who physically has never been in the United States to find that they are, in fact, a U.S. citizen and subject to taxation on worldwide income. U.S. citizens residing abroad may qualify for the:

- Foreign Earned Income Exclusion,
- Foreign Housing Exclusion or Deduction, and
- Foreign Tax Credit or Deduction.

Section 349(a)(5) of the Immigration and Nationality Act (INA) [8 U.S.C. 1481(a)(5)] governs the right of a United States citizen to renounce abroad his or her U.S. citizenship. A person wishing to renounce his or her U.S. citizenship must voluntarily and with intent to relinquish U.S. citizenship:

- appear in person before a U.S. consular or diplomatic officer,
- in a foreign country at a U.S. Embassy or Consulate, and
- sign an oath of renunciation.

Renunciations abroad that do not meet the conditions described above have no legal effect. U.S. citizens can only renounce their citizenship in person, and cannot do so by mail, electronically, or through agents. The renunciation is irrevocable and may have no effect on U.S. tax or military service obligations. In addition, the act of renouncing U.S. citizenship does not allow persons to avoid possible prosecution for crimes which they may have committed or may commit in the future which violate United States law, or escape the repayment of financial obligations, including child support payments, previously incurred in the United States, or incurred as United States citizens abroad. It should be noted that if a person is not a dual citizen at the time of renunciation, they will be stateless.

The U.S. will continue to tax U.S.-source income for anyone who relinquished their U.S. citizenship within 10 years of deriving that income if they gave up their citizenship to avoid U.S. taxation. If the NRA lost U.S. citizenship within a 10-year period immediately preceding the close of the tax year, they must pay taxes on their U.S.-source income as though they were still U.S. citizens. This provision applies only if the expatriation had as one of its principal purposes the avoidance of U.S. taxes. There is an avoidance presumption if either of the following apply to the person:

- Average annual net income tax for the five taxable years ending before the date of loss of U.S. citizenship is more than $190,000 for 2023 ($178,000 for 2022) or
- Net worth as of that date is at least $2 million.

These provisions also apply to "long-term lawful permanent residents" who cease to be taxed as U.S. residents. A long-term permanent resident is an individual who is a lawful permanent resident of the United States in at least eight taxable years during the previous 15-year period. An exception applies to certain individuals with dual citizenship.

The United States will continue to treat individuals as U.S. citizens or residents until the taxpayers provide certain required information and an expatriation notice. Expatriates who are subject to the 10-year rule must file an information disclosure statement annually. If an expatriate is physically present in the United States for at least 31 days during a calendar year during the 10-year period, the individual is taxed as a U.S. citizen or resident.

D. Green Card Test

A noncitizen issued a green card is considered a U.S. resident on the first day the person is physically present in the United States after issuance. The green card is Immigration Form I-551. (Note that the cards no longer are green but are still referred to as a "green card." Status as a U.S. resident remains in effect until the green card has been revoked or the individual has abandoned lawful permanent resident status. Even if not residing in the United States, an individual with a green card is taxed on their worldwide income in the same manner as a citizen described above.

A person may abandon his/her claim to that green card status by filing Form I-407 with the USCIS. This form states that the person is voluntarily abandoning lawful permanent residence status. The form may be filed by mail. See the I-407 information on the USCIS website for instructions.

E. Substantial Physical Presence Test

The substantial presence test is an objective mathematical test involving actual physical presence in the United States. The test is based on the number of days spent in the U.S. and immigration status, for the most part, is not relevant. For this purpose, unless subject to an exception, any part of the day in the U.S. is counted as one full day. The purpose of the day, business, vacation, etc., does not matter. To meet the test, the taxpayer must spend:

- At least 31 days in the current year, and
- At least 183 days during the 3-year period, counting:
  - All the days they were present in the current year, plus
  - 1/3 of the days they were present last year, plus
  - 1/6 of the days they were present in the year prior to that.

A nominal presence of 10 days or less can be ignored in determining whether the substantial presence test is met. An individual who physically is present in the United States for at least 183 days during the calendar year is a U.S. resident for income tax purposes as they automatically pass the test.

Example: In 2020, Amy's job sent her on a rotation to the U.S. She returned to her country in December 2021, having spent 348 days in the U.S. During 2022, she returned to the U.S. for a 12-day vacation visiting old colleagues that had become friends. During 2023, she returned to the U.S. for a 4-month (123-day) work assignment (a follow up on the project she worked on in 2020–2021). She is not a citizen or green card holder. What is Amy's residency status in 2021, 2022, and 2023?

- 2021: Amy is a U.S. tax resident because she spent 348 days (which is more than 183 days) in the U.S.—it is not even necessary to consider the days spent in 2020.
- 2022: Amy is not a U.S. tax resident because she did not spend at least 31 days in the U.S. during 2022.
- 2023: Amy is a U.S. tax resident because she meets the 183-day test:

Year	Year	Actual days	Divide by	Days for the test
Current	2023	123	/ 1 =	123.0
1st prior	2022	12	/ 3 =	4.0
2nd prior	2021	348	/ 6 =	58.0
			Total:	185.0

There are certain exceptions for the substantial presence test. The taxpayer files Form 1040 for the year and the appropriate form to claim the exception. They are:

- Exclude days from the count (Form 8843),
- Claim closer connection to a foreign country (Form 8840), and
- Claim tax treaty tie-breaker rules on residency (Form 8833).

Under certain very specific and limited circumstances, days spent in the U.S. are not counted towards the 183-day test. Examples are:

- Diplomats (A or G visas) and NATO workers;
- International students on F, J, M, or Q visas;
- Commuters from Canada or Mexico;
- Professional athletes attending charitable events;
- People with medical conditions; and
- Days spent in a U.S. airport while in transit.

It is much more difficult to claim the closer connection to a foreign country exception. This is similar to the concept of domicile. To claim the exemptions, the taxpayer:

- Must be present in the U.S. for less than 183 days in the current year;
- Must maintain a tax home in a foreign country;
- Must not have applied for a green card;
- Must have a closer connection to that foreign country; some factors to consider (no one factor is determinative) include:
    - Location of permanent residence and family;
    - Location of personal belongings (cars, furniture, clothing, jewelry);
    - Professional, social, political, cultural, religious, or charitable affiliations; and
    - Residence indicated on various documents, including IRS residency certifications (W-9 or W-8BEN), driver's license, voting records, etc.

Income tax treaties have an article to limit tax residency to one country ("tie-breaker rules"). Each treaty will be a little bit different, so there is not always consistency among treaties. The U.S. model tax treaty, which is the starting point for the U.S. in treaty negotiations with another country, looks at the following factors in the order set forth below:

- Location of permanent home,
- Center of vital interests (personal and economic relations),
- Habitual abode,
- Individual's nationality, and
- If residency still cannot be determined, competent authorities of each country will debate and decide the case.

This, again, is similar to domicile. This will apply only if the U.S. has a current tax treaty with the other country. If there is no tax treaty, an individual could be considered a resident of two countries, applying their rules separately for their purposes. Note that tax treaty tie-breaker rules treat the individual as a nonresident solely for the purposes

of computing U.S. income tax liability. For other purposes, the individual will still be treated as a U.S. resident. Also, this is a federal concept. States have their own residency rules and usually do not honor U.S. tax treaties.

U.S. citizens cannot use treaty tie-breaker rules to become nonresidents for income tax purposes. In addition, claiming tax treaty tie-breaker rules can jeopardize U.S. immigration status. To claim the benefit, the taxpayer uses Form 8833. Note that the tax treaty tie-breaker rule treats the individual as a nonresident solely for the purposes of computing U.S. income tax liability. For other purposes, the individual will still be treated as a U.S. resident.

F. Years of Change

Generally, residency starts/ends on the first/last day of presence in the U.S. As a result, a person may have dual status ("part-year resident"). In that case, the practitioner should prepare Form 1040 for the resident period and Form 1040-NR for the nonresident period. File the main form based on residency at the end of the year and attach the other form as a statement.

Example: Bob arrived in the U.S. on March 1, 2023, with an investor visa and did not leave the country for the rest of the year. He applied for a green card which he received on October 1, 2023.

Question: What is Bob's residency status for U.S. income tax purposes for 2023?

Answer: Bob meets the substantial presence test for 2023 as he spent more than 183 days in the U.S. His U.S. residency period starts on March 1, the first day he arrived in the U.S. Therefore, he is a nonresident for the January–February period and a resident for the March–December period. He is a dual-status taxpayer. Bob needs to file Form 1040-NR for the January–February period and pay U.S. taxes on U.S.-source income (if any). He also needs to file Form 1040 for the March–December period and pay U.S. taxes on his worldwide income.

Example: Charles married a U.S. citizen and received a green card on March 1, 2023. The newlyweds moved to the U.S. on October 1, 2023.

Question: What is Charles's residency status for U.S. income tax purposes for 2023?

Answer: Charles does not meet the substantial presence test for 2023 as he spent less than 183 days in the U.S. However, his U.S. residency period starts on March 1 under the green card test. Therefore, he is a nonresident for the January–February period and a resident for the March–December period.

Charles has a special election that he can make to be treated as a U.S. resident for the entire year (which might be beneficial as it allows him and his wife to file a joint return in the U.S. and simplifies tax filings).

Example: Diana received an investor's visa and moved to the U.S. on October 1, 2023. She intends to stay in the U.S. for about five years and does not plan on applying for a green card.

Question: What is Diana's residency status for U.S. income tax purposes for 2023 and 2024?

Answer: Diana does not meet the substantial presence test for 2023 as she spent less than 183 days in the U.S. For 2023, she will need to file Form 1040-NR and pay taxes only on U.S.-source income.

Diana will meet the substantial presence test in 2024 and will be a U.S. tax resident for the full year. She will need to file Form 1040 and pay taxes on worldwide income, as well as file any foreign informational forms (FBAR, 5471, etc.). Diana will not have a dual-status return in either 2023 or 2024.

G. Conclusion

The determination of residency is a major issue for many taxpayers. Practitioners need to be aware of both the rules and the exceptions to properly deal with noncitizens. Caution should always be used to make sure the information is verifiable, especially with any exceptions to the substantial physical presence test.

A. Discussion Problems

You have several new clients that have come to you for advice regarding their potential U.S. tax liability.

1) Fillipa is 35 years old. She was born in the United States while her father was temporarily working in Chicago. She has not resided in the U.S. since she was six months old.

2) Saul, 75 years old, is an Israeli citizen and resides in Haifa. When he was ten years old, his family moved to the United States. At age 16, he was issued a green card. He left the U.S. at age 18 and has never returned. He still has his green card.

3) Gordon is a citizen and resident of Great Britain. In 2021, Gordon's job sent him on a rotation to the U.S. He spent 342 days in the U.S. During 2022, he returned to the U.S. for a 21-day vacation visiting old colleagues. During 2023, he returned to the U.S. for a 120-day work assignment. What is his residency status in 2021, 2022, and 2023?

Required:

Discuss all issues fairly presented by the facts above.

B. Suggested Answers to Discussion Problems

1) Since Fillipa is a U.S. citizen, she will be taxed by the United States on her worldwide income. It is not relevant that she does not reside in the U.S. This is a difference from the general source and residence jurisdiction. To mitigate double taxation, she ***may*** be eligible for a tax credit or deduction for foreign taxes paid.

2) Holding a green card makes a person a resident for tax purposes regardless of whether they reside in the United States. Saul must pay U.S. tax on worldwide income and ***may*** be eligible for a tax credit or deduction for foreign taxes paid.

3) In this situation, the substantial presence test must be applied. Based on that test:

   2021: Gordon is a U.S. tax resident because he spent 342 days in the U.S. That meets the 31-day and 183-day tests.

   2022: He is not a U.S. tax resident because he did not spend at least 31 days in the U.S. during 2022.

   2023: He is a U.S. tax resident because he meets both the 31-day and the 183-day tests:

2023: 120 × 100%	=	120
2022: 21 × 1/3	=	7
2021: 342 × 1/6	=	57
	Total: 184 days	

PART 3. BUSINESS TAXATION

Innocent Spouse Relief

When a spouse signs a tax return with a spouse as married filing jointly, they both become responsible for the taxes assessed for the year. Practitioners are often faced with a client that has liabilities from a joint return but claims they were not involved in the business or investments of their spouse when the return was filed. Practitioners should be cognizant of the innocent spouse relief provisions that may be available for a truly innocent spouse. Ian Redpath and Larry Pon discuss the types of relief, who may qualify, and how to request relief.

Let's join Ian and Larry.

Mr. Redpath
Larry, welcome to the program.

Mr. Pon
Hi, Ian.

Mr. Redpath
Always great to have you here. Always great to get your insight. When I was thinking about this topic, I kept thinking, you know what? We hear about innocent spouse relief, and there's different ways of looking at it and different things out there. All of a sudden, I thought, you know what? There is a lot of confusion out there as to what a truly innocent spouse can do; but there's also a lot of confusion about what is an innocent spouse. A lot of spouses think they're innocent, but [that's] not necessarily true. I know a lot of people don't even realize, unless you've done it. I think every practitioner should at least know that this is potentially in their arsenal. I'm not saying you may ever do one, but at least you should know that potentially this is out there. This is in the arsenal. You never know because a lot of times, it'll be more and more divorces taking place especially, and these issues come up after the divorce usually. What do you do? Well, at least having some knowledge of this and understanding that there's different ways of potentially getting relief for a spouse who is truly innocent. Really, what types of liabilities are we talking about here, Larry?

Mr. Pon
Well, first of all, let's talk about that. When you file a joint tax return, you're filing a joint tax return. Married filing jointly. You are jointly and severally liable for the taxes on the tax return. At the bottom of the form, you're signing under penalty of perjury that all the information on that tax return is true and correct. So, that's number one, is that you have a joint liability when you file a joint tax return. Now, however, what if there's missing information on that tax return—missing income or overstated deductions? That's when these cases come up. It's like, "Oh, I didn't know anything about that. I didn't know he had this extra source of income that wasn't reported on the tax return," or "I didn't know that he took too much in deductions, and I shouldn't be liable for that." So, that's when the question about innocent spouse might come up.

Mr. Redpath
Often, you have the situation where one spouse says to the other, "Here, sign here. Sign the return." It's even more so now when you're talking about electronic filing. You know, to the extent, does the spouse really understand it? Often, they'll just [say], "Yeah, okay. I'll sign it and send it in."

And if you have, for example, a Schedule C, how do you really know what your spouse is claiming? Or rental properties, or a Schedule E, a Schedule F, a Schedule C? Those are all areas where you see a lot of potential litigation in this innocent spouse [area]. Where the other spouse says, "Well, I signed the return, but I don't know

any of that stuff. I don't know what the business is. I don't know. I don't do anything with the rental properties. I don't know about these partnerships and things flowing through. I don't understand any of that."

Mr. Pon

I have cases where the husband would take a large distribution from an IRA account and did not report that on the tax return, and the wife didn't know about it. That could create an issue where there's an additional tax bill because you get a CP2000 from the IRS saying, "Hey, you owe us more money." And not just federal taxes, but also state taxes.

Mr. Redpath

Well, and that's something that I always keep in mind—that if you have a federal audit that is successful, you'll almost always have something from the state after. Those states [where you're] paying state income tax—you're probably going to get something from the state afterwards saying, "Oh, by the way, the federal [government] adjusted your return. Here's what they said." That's very common. Especially states like—you're in California; I'm in New York. You expect it. A lot of times, I tell my client, "Don't wait for that. Let's go to the state return right away and take care of it before that appears."

Surprisingly, I think, to many practitioners, because I've talked to practitioners about this, is the fact that there really are three different ways of obtaining relief. It's not [just] one—innocent spouse. It's three pathways. So, you're trying to get to the same ending. You're trying to get that spouse's personal liability for those taxes, penalties, and interest reduced or eliminated—potentially eliminated, maybe just reduced—but there's different paths to get to that ending. We filed the return; we headed in one direction. Now, if we want to claim that innocent spouse, there's three different paths to take. So, what are those paths? And then, we can talk about those paths.

Mr. Pon

Right, so there are three paths for innocent spouse relief, and IRS Publication 971 is very helpful. It's 22 pages long, and it spells out all the different ways and the requirements. Also, they have very helpful flow charts. So, if you follow on the flow chart—do I qualify? Which relief should I qualify for? And then the other resources. Form 8857—that's the form you file to claim innocent spouse relief; and we'll be talking about some of these requirements that are spelled out in the form.

So, there are three ways to apply for innocent spouse [relief]. Number one, the first one, is the traditional innocent spouse claim. That's the traditional way to go. That's number one. I think that's §6015(b).

Mr. Redpath

Yes, that's (b).

Mr. Pon

Then there's the split or allocation of the deficiency where you're going to allocate the liability, and that's §6015(c), right?

Mr. Redpath

(c), right. And sometimes that's referred to as the separate liability approach where, again, you're going to separate it.

Mr. Pon

The separate liability, right. And then the third one is, if you don't get 6015(b) or (c), the first two, then you go with a request for equitable relief. That's the third approach on applying for innocent spouse relief.

Mr. Redpath

Interestingly enough, you can apply for relief at the same time for the traditional or the separate, or split or allocation, but you can't apply for equitable relief with either one of those. Those two, you can apply in the alternative. "We want traditional; and if we can't have that, then at least give us a split." But you can't come in and say, "Oh, and then if not that, then give us equitable." That's a separate request.

Mr. Pon

Right, and if the IRS turns you down—if you get rejected on your innocent spouse relief—within 90 days, you can apply for a petition with the United States Tax Court. The advantage of tax court is you don't have to pay. You don't have to pay the liability until the decision has been made by the tax court, versus the other federal courts where you have to pay and then sue for a refund. So, it's a couple of different approaches here.

Mr. Redpath

And paying and then going in and asking for innocent spouse [relief] kind of goes against the whole concept of, "I'm not liable for it. I shouldn't have to pay it." That doesn't make a whole lot of sense, so yes, the tax court approach.

Mr. Pon

The reason they're applying for relief is they can't pay.

Mr. Redpath

Right, exactly. Well, or they just feel they don't owe it. "I mean, that was my spouse's issue, not mine. I didn't know anything about it. I shouldn't have to pay that."

Mr. Pon

And also, it depends on the fact pattern. There's a lot of cases we've read about drug dealers. Sometimes the spouse literally doesn't know about the spouse's drug dealing business or something like that. They're home, they're raising the kids, and they get whatever they need to pay the bills, but nothing extravagant. I think those cases are pretty good cases.

Mr. Redpath

Well, I think you said it right when you said, "nothing extravagant." Because the requirement is that the requesting spouse, the one who's requesting the relief, has to establish that when they signed the return (not after, but when they signed that return), they didn't know (and here's the word you used, which is important), or "had no reason to know" that there would be an understatement, and it would be inequitable to hold them liable for that deficiency. So that "didn't know or had no reason to know." So, I might not know you're engaged in drug dealing, my spouse, but that job you have working as a night watchman, and we have a Lamborghini, and we have our summer home. At some point, you go, "You had reason to know that something's wrong here." There's income that's not being reported. There's got to be money coming from somewhere. Unless it's an inheritance, and then you can prove it. "Oh, well, we have all this money because my spouse's family was wealthy. They passed away and left us a lot of money." Okay, so where is it invested? Just show us.

Mr. Pon

Yes, and you can't turn a blind eye. You can't just put on your blinders and just not look and not know. But if you had reason to know, [if] you benefited from that lifestyle, you probably have a good idea about it. So, you have to prove that you didn't have any knowledge of this at all at the time you signed the tax return.

Mr. Redpath

Yes, and the court starts with the presumption—and this is why the burden of proof is on the spouse who's requesting relief—they start with the idea that you had constructive knowledge of everything. You signed it. You signed it under penalty of perjury; therefore, you had constructive knowledge of everything in there. So, you've got to show that,

first [of all], the item that gave rise to the issue—for example, a Schedule C issue or your example of the IRA distributions—that [it's] an item that relates to your spouse, not to you, and that you didn't know about it or had no reason to know. And you gave a good example there, because if you're sitting there and your lifestyle doesn't relate to what you know the income coming in to be or the income that's being reported, you can't just play dumb. You can't turn a blind eye and say, "Well, how would I know? I don't know that you can't afford all of this on that salary. How would I know?" The blind-eye approach is never taken by the courts.

Mr. Pon

Form 8857 has some very specific questions that the IRS looks at [when] making this determination. First of all is, "What's your level of education?" And what they mean by *education* is not if you have a PhD or not. I mean, I know some really clueless PhDs. They might be highly educated. What they mean by *education* is are you aware of the financial consequences of that? Not a school education but being educated on finances. Understanding—do you reconcile the checkbook? I mean, do you understand? Like you said, if I'm working at a job, "Oh, I see the direct deposits of my paycheck." That's pretty clear. But if there's strange deposits coming in, and you're reconciling the checkbook, well, you might have reason to know about that. And they want to know—on the Form 8857, they ask about your involvement in the family business. If you're the CFO, you're the co-conspirator or you're totally aware of the financial affairs. That's what they want to know. Also, the presence of expenditures that appear lavish or unusual when compared to your past level of spending. So, like you said, you were driving a Toyota Corolla, and now you're driving a Lamborghini or whatever, a very expensive car. And then, you have a boat; you have a plane. You start having all kinds of assets that [don't] relate to your income. So, that could be a question.

Mr. Redpath

Yes, and again, is it the other person, the other spouse that's the one who's in charge of this? And are they deceitful in where that comes from? As you mentioned, it doesn't require you to have a PhD, but it's a basic understanding of financial affairs. And you mentioned that you used the term *taking advantage of the lifestyle*. Again, that's kind of the blind eye. I'm taking advantage of a lifestyle, even though I believe a reasonably prudent person would have to question how this lifestyle came from that amount of income.

Mr. Pon

Right. Then there [are] some special rules for the second method of claiming innocent spouse [relief]. It's a little different fact pattern here. If you're the spouse trying to claim relief on the separate allocation, then you've got to be divorced, legally separated, or living apart from the other spouse for at least 12 months if you're trying to claim the second approach.

Mr. Redpath

Right.

Mr. Pon

So, you're not sharing the home together anymore. You're living apart, but you're still married. Maybe you're still legally married or you might have past liabilities, and this is the relief you're trying to get.

Mr. Redpath

What about the separate or split allocation approach under §6015(c)? That's a second, and it can be applied as an alternative to the traditional. What is that?

Mr. Pon

Well, it's pretty similar standards where you have to show that you don't have actual knowledge of the errors on the tax returns, or the underreported income, or overstated deductions. In this case, if there is a dispute, the IRS does have the burden of proof under the second method, §6015(c). So, it's a little bit different than the first method.

Mr. Redpath

Again, in a basic innocent spouse [relief request], the basic burden is on the taxpayer; whereas, on this one, the burden shifts to the IRS to prove the knowledge here. But, what if there's a transfer? There's a rebuttable presumption that if an asset is transferred from the nonrequesting spouse to the requesting spouse during the 12-month period [after] mailing of the first letter of proposed deficiency, this isn't going to apply. I mean, you're not going to be able to say, "Hey, I got these assets, but now I can request [relief]."

Mr. Pon

Exactly. You can't be moving assets around. That's not a good look.

Mr. Redpath

Right. Again, we mentioned requesting this relief. What exactly, again, do we have to do? I know you mentioned the forms, but how do we go about requesting the relief?

Mr. Pon

Yes, you request relief on the Form 8857. Answer all those questions. Somehow, you have to provide evidence that, "Yes, I'm living a normal lifestyle here. I have no knowledge or involvement with what's causing this tax liability, and it's inequitable for me to be held to that, held to the tax bill."

Mr. Redpath

Now, there's a revenue procedure on the equitable relief. So, the equitable relief, that's (f), §6015(f). And Rev. Proc. 2013-34 talks about the qualifications. What are the qualifications, and how might they differ a little bit from the other two that we talked about?

Mr. Pon

Rev. Proc. 2013-34 is very specific and, I find, very helpful. It's a nice guide for us to walk through. They've got seven threshold requirements that you've got to meet. Number one is that the requesting spouse had to file a joint return for the year they're filing for relief. So, number one, you filed a joint return, and relief is not available under Section 6015(b) or (c)—the first two that we talked about.

Mr. Redpath

Which actually could mean that you were denied that relief.

Mr. Pon

Exactly. Then you go for this relief, and it's got to be timely filed. And no assets were transferred between the spouses as part of a fraudulent scheme, so don't start moving things around. And the nonrequesting spouse did not transfer disqualified assets to the requesting spouse, so none of that. And the requesting spouse did not knowingly participate in the filing of a fraudulent joint return. And absent any certain enumerated exceptions that [are] listed here, the tax liability for which the requesting spouse seeks relief is attributable to an item of the nonrequesting spouse. So, it's got nothing to do with me; it's the other spouse.

Mr. Redpath

Right, it's their Schedule C, their distribution.

Mr. Pon

So, it could be the drug-dealing income. It could be [Form] 1099-R for that big IRA distribution. But you didn't see the benefit from the IRA distribution, so where did the money go? We've had cases where we find out the other spouse had a girlfriend, and that's where the money went. He bought a house for her. He bought a car for her. Well, the requesting spouse did not benefit from that because she didn't get the new car or the condo. So, you know, never a dull moment.

Mr. Redpath

Right. And that's why they're now divorced. They're looking for innocent spouse relief because one of them had a boyfriend or girlfriend. If you read a lot of the cases, that's actually a very common situation. There are really seven things that they're going to look at, and not one factor is determinative. It's kind of facts and circumstances, but obviously marital status. Economic hardship—to have to pay this is going to create an economic hardship. The reason to know—knew or reason to know. Obviously, the legal obligation is going to be there to pay it. A significant benefit. Did you get a significant benefit? And we've talked about different issues there. Mental or physical health? There's been a number of cases where the courts have kind of hung on maybe there's not a lot of other issues here that favor innocent spouse [relief], but this person has dementia. This person has Alzheimer's that is severe. This person has terminal cancer, and we're going to provide equitable relief. That last one—I've seen a number of cases, especially in the Alzheimer's/dementia area, where the courts have put some weight onto that particular factor.

Mr. Pon

There's an interesting case about someone in a coma. How would she know, right? She's in a coma or a vegetative state.

Mr. Redpath

Absolutely. So now, you mentioned the request for relief, the [Form] 8857; if it's denied, you can go to the tax court, right?

Mr. Pon

Right. You can file a petition with the tax court. That's where we see a lot of these cases, is the tax court cases.

Mr. Redpath

And, of course, the tax court review is de novo, so they're going to start it from fresh. They're not going to go and presume the IRS is correct. They're starting and saying, "We're looking at this fresh. We're going to take a different set of eyes on the same facts, and we're not bound by what the IRS said. We're not even going to be tainted by what the IRS said, because we're going to look at this fresh." So, that's a great option that you have, looking at that review. But the review is not totally de novo in the sense that it's based upon the "administrative record"—what has been established at the time the determination was made. What is the administrative record within the IRS? What was presented? What is there? What is known? Or any additional newly discovered or previously unavailable evidence. And you go, "Well, what does that mean, *newly discovered*? I guess that means that they had no way that they would have possibly known; and all of a sudden, this came up through some way that was impossible to figure out prior, and it's just newly discovered. Now, in a criminal case—you know, having been a former DA—that's exactly pretty much the case. There's no way you could have, using any reasonable care, you could have discovered this in the past. But these aren't criminal cases. This is the tax court, and this is looking at that.

And we have an interesting case. It's a 2023 case. It's *Chaney Thomas*; rather, it's *Chaney Thomas v. Commissioner*. It's 160 T.C. No. 4. Boy, this is an interesting case. The tax court says it's a case of first impression, it's the first time they've had to rule on what could constitute newly discovered evidence that would be admissible as evidence in an innocent spouse case under §6015. So, can you fill us in on what happened here? Because it's a very interesting case, and this is a warning to all of our clients.

Mr. Pon

Exactly—a warning to all of our clients. It's interesting to me because I'm located in the San Francisco Bay Area. She is here in San Francisco, the Bay Area here. Basically, she and her husband owed some back taxes. Then subsequently, Mr. Thomas passed away, so she thought, "Well, I should apply for innocent spouse relief to not have to pay his liability." So, that's the relief that she sought. She applied for innocent spouse relief. The IRS said no. Then she went to tax court, and the interesting thing about that is she was representing herself. And, like you said, the IRS presented their administrative record, but during the trial, they found these blog posts from 2016 to 2022 about her lifestyle and her relationship to her late husband, her business, her assets, what she was doing. You learn a lot about her just by looking at her blog posts.

Mr. Redpath

Basically, it torpedoed her claim for innocent spouse relief.

Mr. Pon

Exactly, but what she was trying to do was to make that information not admissible in this tax court case. That's what she was trying to do because she said, "Hey, they're not relevant, and they're not admissible because they're newly discovered. It's evidence that came up after the case was filed."

Mr. Redpath

I would think, if this were a criminal case, I could see the court saying, "That's not admissible because using reasonable due diligence, you could have found those posts. The posts that were pre the petition. You could have found those."

Mr. Pon

Right.

Mr. Redpath

Now, the question would be then, whether or not due diligence would require looking at her posts or blog? You know, I could see that as a legitimate argument, but what they kind of focused on here was the fact that it really doesn't matter. They just found it. They, factually and actually, by an objective standard, newly discovered it.

Mr. Pon

Right. The tax court held that the blogs posted to the internet by a spouse before but discovered after the filing of the court petition are newly discovered and admissible as evidence in a spouse case under Section 6015(e)(7)(B). This is a cautionary warning to all of our clients about this. And it's not only for innocent spouse cases, but all kinds of cases too. For example, the state can look at your social media if you're claiming not to be a resident of a state, but here you are in California. Well, the state of California is going to say, "You're in California." Or in this case here, "You're living a pretty darn good lifestyle with you and your husband before he passed away." But this is interesting. This is the first time the court interpreted the meaning of *newly discovered evidence*.

Mr. Redpath

Yes, and I was surprised, frankly, that this is the first time they've ever dealt with that question, what's *newly discovered*? You know, the internet, blogging, posting, things of that nature. I had a situation—it was actually a not-for-profit—and things that they were saying on their own website didn't comply with what their purpose was to get their §501(c)(3) status. The IRS came in and said, "You know what? Why on your website are you saying this, when here's your purpose on your [Form] 990? When you filed for tax-exempt status on your [Form] 1023, this is what you said your purpose is; but this is what you say you're doing. What's going on here? Because that's not why you got your tax-exempt status." So, this was an argument that we had to make. With not-for-profits, I call it the down-and-dirty audit, where they compare what you say on your website to your [Form] 990. They don't have to go anywhere.

Mr. Pon

That's right. And I think this is an interesting case because it wasn't an innocent spouse case per se. It's all about evidence, information, and how credible are you in terms of submitting your innocent spouse claim. So, if you're helping your clients with the Form 8857, read it very carefully. Take a skeptical eye. My suggestion is pretend you're the IRS. You're reviewing this claim. Would you process it? Would you allow it? Does it make sense? I mean, besides the emotional part of it. A lot of times, it's very emotional saying, "It's not fair. It's not fair." But we've got to look at the revenue procedure guidance and all the guidance we get from the IRS about, did you know, when you knew it, or are you getting the advantage of it?

Mr. Redpath

And, I think, the blind eye. The IRS comes in all the time and says, "Look, come on. I mean, seriously, you should have known. You had to know that the amount of money that was on that tax return you signed couldn't sustain the type of lifestyle you had. You can't turn a blind eye to that."

Mr. Pon

I had an ex-husband of a client. She made all the money; he didn't really work. Then, they owed back taxes, and—I think at the prodding of his new girlfriend—he filed for innocent spouse [relief]. And, rightfully, the IRS denied him, so I agree with that. Oh, by the way, if you do file a [Form] 8857, the IRS will notify the nonrequesting spouse.

Mr. Redpath

Yes.

Mr. Pon

However, there's a box to check on the form if you're a victim of domestic abuse, so you can let them know about that. Of course, they'll know who it's coming from, but there [are] some boxes to check to indicate that. And hopefully, there's some sensitivity involved. But, you know, do your best to provide a credible claim.

Mr. Redpath

That's a great point, Larry, that they do notify. Because remember, in secret, all of a sudden, I'm the other spouse, and I find out that, "Oh, you're not jointly and severally liable anymore? It's all on me?" That's something. And number two, as you said, for protection, you can claim that you're an abused spouse and you need the protection. Therefore, under those circumstances, they won't notify. Now, they're not just going to always take your word for it. It's going to take a little more than just checking the box if they want to question whether or not you really are entitled to that protection.

Mr. Pon

And that's where you get the district attorney's office involved, or the police department, police reports, and all those other third parties. The more third-party evidence you have, the more helpful the claim is.

Mr. Redpath

Larry, thank you very much for your input. As I said, this is an area that you may not be involved in a lot, but what happens is it's something that all of our viewers need to know. [They need to know] that this is out there, this potential relief, to adequately advise our clients, because these situations come up. We may decide, "No, you're not entitled to it. No, we're not going to get it." But we should at least be able to advise our clients that there's this potential. And on the other side, we may want to be able to advise our clients that, "Hey, your spouse might be requesting." Divorces get pretty nasty sometimes, and I've heard this thrown out a lot. "Oh, well, we're just going to apply for innocent spouse relief."

Larry, great program. Thank you for being here. I'll have you again soon.

Mr. Pon

All right, thank you, Ian.

Innocent Spouse Relief

By Ian J. Redpath, JD, LLM

A. Introduction

When a taxpayer signs a return with a spouse as married filing jointly, they become responsible for the taxes assessed for the year. This includes any additional amounts assessed after the return is filed, including penalties and interest. [§6013(d)(3)] In some circumstances, one spouse is shocked to find what is owed and not paid. The innocent spouse relief provisions were expanded in 1998. To deal with an "innocent spouse," §6015 provides three types of potential relief:

- the "traditional" innocent spouse claim,
- the separate liability (split/allocation), and
- a request for equitable relief.

While the first two may be requested together, equitable relief is a stand-alone request and cannot be combined with a request for the other two. The timing differs for the relief requests, so it is important that practitioners are cognizant of the applicable rules.

B. Traditional Innocent Spouse Relief

Section 6015(b) is the traditional mechanism used to claim innocent spouse relief. It remains a viable tool to relieve a spouse from joint and several liability when the liability is due to tax items attributable to the other spouse, for example on a Schedule C. To obtain relief, it must be established that, at the time the spouse requesting relief (the requesting spouse) signed the return, they did not know and had no reason to know that there was a possible understatement and that it would be inequitable to hold that spouse liable for any deficiency.

A taxpayer signing a return is deemed to have constructive knowledge of its contents. As a result, the requesting spouse has the burden of proof of establishing that they did not know and had no reason to know of the facts giving rise to the error. This is not limited to the knowledge of the tax consequences, which could be a defense for most taxpayers. The standard applied to determine if the requesting spouse knew or had reason to know of the understatement is what a reasonably prudent taxpayer would have known or had reason to know. It is not subjective to the requesting spouse [*Briley*, T.C. Memo. 2019-55]. It is a facts-and-circumstances test. The factors the IRS and the courts will apply when making this decision include the following:

1. The requesting spouse's level of education.
2. The requesting spouse's involvement in the family's business and financial affairs.
3. The presence of expenditures that appear lavish or unusual when compared to the family's past levels of income, standard of living, and spending patterns.
4. The culpable spouse's evasiveness and deceit concerning the couple's finances [*Hayman*, 992 F.2d 1256, 1261 (2d Cir. 1993); *Butler*, 114 T.C. 276, 284 (2000)].

The first factor is not a degree-related inquiry, but rather focuses on the spouse's sophistication in understanding matters related to finances and tax. While the person's level of education in general may be looked at, it is not at all determinative. [*Wang*, T.C. Memo. 2014-206] An understanding and/or involvement in the family's financial affairs and/or business weighs heavily against a requesting spouse as does whether the family's lifestyle exceeds what could be reasonably expected from what is reported on the return.

Perhaps the most important thing the court will look at is whether the requesting spouse significantly benefited, directly or indirectly, from the understatement of tax. A *significant benefit* is any benefit in excess of normal support. The receipt of property, which could include life insurance proceeds, by the requesting spouse is beyond normal support if traced to items omitted from gross income and attributable to the nonrequesting spouse. [Reg. §1.6015-2(d)]

C. Separation (Split or Allocation) of the Deficiency

Another path for an innocent spouse relief is provided in §6015(c). In essence, the requesting spouse will be liable only for the tax related to the requesting spouse's separate income and deductions at the time the return was filed. The requesting spouse's deficiency is determined by allocating the deficiency by the ratio of the net amount of the erroneous items allocable to the requesting spouse divided by the net amount of all erroneous items. To qualify, the requesting spouse must:

- be divorced or legally separated, or
- be living apart from his or her spouse during the 12 months preceding the request for relief, and
- lack actual knowledge of the facts involving the erroneous item or items. (The IRS has the burden of proving the requesting spouse had actual knowledge of these items.)

A surviving spouse can make this election if their spouse died more than 12 months before the election.

The IRS and the court will not grant innocent spouse relief if spouses transferred assets to each other as part of a fraudulent scheme to avoid tax or the payment of tax. A rebuttable presumption is established that an asset transfer from the nonrequesting spouse to the requesting spouse during the 12-month period before the mailing date of the first letter of proposed deficiency (whether a 30-Day Letter or a Notice of Deficiency) is a disqualified asset transfer, but this presumption will not apply to any transfer pursuant to a decree of divorce or separate maintenance or a written instrument incident to such a decree [§6015(c)(4)(B)(ii)].

D. Making the Request

Individuals may assert both a "traditional" innocent spouse claim and an election to split/allocate the deficiency at the same time or separately. To request relief, use Form 8857, Request for Innocent Spouse Relief. The request may also be made once a liability is proposed during an examination, as part of a petition to the U.S. Tax Court for a redetermination of the IRS's assessment of tax, and as part of a Collection Due Process Hearing.

The IRS must contact the spouse or former spouse; there are no exceptions, even for victims of spousal abuse or domestic violence. The IRS will inform the spouse or former spouse that the requesting spouse has filed Form 8857 and will allow the nonrequesting spouse to participate in the process. In addition, if the relief requested is from joint and several liability on a joint return, the IRS must also inform the nonrequesting spouse of its preliminary and final determinations regarding the requested relief. To protect the taxpayers' privacy, the IRS will not disclose personal information (such as current name, address, phone number(s), or information about the requesting spouse's employer, income, or assets). If there are concerns about privacy or the privacy of others, redact or black out personal information in the material submitted. Requesting spouses should note that if there is a petition to the tax court, their spouse or former spouse may see the personal information.

The relief must be requested no later than two years after the date that the IRS begins collection activity [§6015(b)(1)(E) and (c)(3)(B)]. A collection activity is a §6330 notice; an offset of a refund of the requesting spouse; the filing of a suit by the United States against the requesting spouse for the collection of the joint tax liability; or the filing of a claim by the United States in a court proceeding in which the requesting spouse is a party or that involves property of the requesting spouse [Regs. §1.6015-5(b)(2)(i)]. It does not include a Notice of Deficiency, the filing of a Notice of Federal Tax Lien, or a demand for payment of tax.

E. Equitable Relief

The third approach to obtain innocent spouse relief is to request equitable relief under §6015(f). This will allow relief for unpaid tax or a deficiency when it would be equitable to do so and relief is unavailable using the other two methods. This method allows relief for amounts owed when the return was filed. Rev. Proc. 2013-34 provides seven requirements that must be met to obtain relief:

1. The requesting spouse filed a joint return for the tax year for which relief is sought.
2. Relief is not available to the requesting spouse under §6015(b) or (c).
3. The claim for relief is timely filed.
4. No assets were transferred between the spouses as part of a fraudulent scheme.
5. The nonrequesting spouse did not transfer disqualified assets to the requesting spouse.
6. The requesting spouse did not knowingly participate in the filing of a fraudulent joint return.
7. Absent certain enumerated exceptions, the tax liability from which the requesting spouse seeks relief is attributable to an item of the nonrequesting spouse.

This is a facts-and-circumstances test. The requesting spouse must show that it would be inequitable to hold the requesting spouse liable for the deficiency. The IRS considers factors such as—

1. marital status;
2. economic hardship;
3. in the case of an understatement, knowledge or reason to know of the items giving rise to the understatement or deficiency;
4. legal obligation;
5. significant benefit;
6. compliance with income tax laws;
7. mental or physical health; and
8. any other factor relevant to the determination.

This is an overall test, so no single factor is determinative [Rev. Proc. 2013-34].

A request for equitable relief can be filed during the period that the IRS can collect the tax under §6502 or, if the tax has been paid, during the time when the taxpayer may submit a claim for refund or credit of such payment under §6511. It is not to be submitted in conjunction with the other forms of innocent spouse relief. The claim is made in the same manner as traditional innocent spouse and separation/split relief using Form 8857.

F. Appeals

If a request for innocent spouse relief is denied, the requesting spouse is entitled to an administrative appeal by petitioning the U.S. Tax Court within 90 days after the date of the IRS's notice of final determination denying the relief. If the IRS has not made a determination in a timely manner, the requesting spouse can petition the tax court six months after the date the request for relief is filed.

The tax court's review is de novo. A de novo review means that the court decides an issue without deference to the IRS's previous determination. However, it is based on the prior administrative record established at the time of the determination and any additional newly discovered or previously unavailable evidence.

G. Social Media—*Thomas v. Commissioner*
T.C. NO. 4 (2/13/2023)

This case serves as a great warning to clients who may consider innocent spouse relief. The IRS denied Ms. Thomas innocent spouse relief. At the time, the IRS was unaware of a number of social media posts made by Ms. Thomas that were prejudicial to her claim for innocent spouse relief. As a result, these posts were not a part of the administrative record when the determination to deny her claim for relief was made. She appealed the IRS determination to the U.S. Tax Court.

The general rule is that the trial at the tax court is de novo based on the prior administrative record and any additional newly discovered or previously unavailable evidence. The IRS introduced personal blog posts written by Ms. Thomas between 2016 and 2022 as evidence of her assets, lifestyle, business, and relationship with her late husband. Ms. Thomas objected to the inclusion of these blog posts and filed a motion to strike since these blog posts were not part of the previous administrative record. She did not allege that they were irrelevant, only that they were not admissible in the tax court proceeding as "newly discovered." She alleged that they were not newly discovered as the IRS could have discovered them in the administrative proceedings had they used reasonable due diligence. The tax court rejected her argument that the IRS would have discovered them by using "due diligence," asserting that the IRS did not have such an obligation in establishing the administrative record. The court held that the blogs posted to the internet by her before, but discovered after, the filing of the tax court petition are "newly discovered" and admissible as evidence in an innocent spouse case under §6015(e)(7)(b).

This is the first time the court has interpreted the meaning of the term "newly discovered" in the context of this statute. It is a clear message concerning the use of social media, especially in divorce cases. It can also be relevant in the case of a deceased spouse or former spouse.

H. Conclusion

IRS Publication 971, *Innocent Spouse Relief*, explains each type of relief, who may qualify, and how to request relief. This is a very important tool for accountants, especially those dealing with clients who are going or have gone through a divorce or marital discord. In addition, it is important when dealing with the death of a spouse or former spouse and tax liabilities remain outstanding.

A. Discussion Problems

You have a new client, Pierre, who has just gone through a very nasty divorce from his spouse. At the start of their marriage, Pierre and his spouse were engaged in a business that became very lucrative. Both Pierre and his spouse have MBAs and provided equal participation in the business. Once they had their first child, they mutually agreed that Pierre would reduce his participation in the business and be the primary caregiver for their child. After the birth of their second child, two years later, it was decided that Pierre would leave the business and become a full-time stay-at-home dad to care for the children. The children are now 18 and 16. Pierre and his ex-wife filed joint returns during their entire marriage. The IRS is now asserting large deficiencies for unreported income from the business. Pierre is looking for possible relief as he claims ignorance of the unreported income.

Required:

Based on the facts above, what relief might be available for Pierre?

B. Suggested Answers to Discussion Problems

Section 6015 provides three types of potential relief: the "traditional" innocent spouse claim, the separate liability (split/allocation), and a request for equitable relief. The relief is requested using Form 8857. The timing of the request for the traditional and separate liability are the same, but the timing is different for an equitable relief request. There is going to have to be significant inquiry into Pierre's knowledge of the unreported income.

1) For traditional innocent spouse relief, the requesting spouse has the burden of proof of establishing that they did not know and had no reason to know of the facts giving rise to the error. The standard applied to determine if the requesting spouse knew or had reason to know of the understatement is what a reasonably prudent taxpayer would have known or had reason to know. The factors the IRS and courts will consider when making this determination include—

    1. the requesting spouse's level of education;
    2. the requesting spouse's involvement in the family's business and financial affairs;
    3. the presence of expenditures that appear lavish or unusual when compared to the family's past levels of income, standard of living, and spending patterns; and
    4. the culpable spouse's evasiveness and deceit concerning the couple's finances.

2) Section 6015(c) may be requested at the same time as the traditional relief. It is asking that the liability be separated or allocated based on Pierre's income. To qualify, the requesting spouse must:

    - be divorced or legally separated, or
    - be living apart from his or her spouse during the 12 months preceding the request for relief, and
    - lack actual knowledge of the facts involving the erroneous item or items. (The IRS has the burden of proving Pierre had actual knowledge of these items.)

The IRS and court will not grant relief if spouses transferred assets to each other as part of a fraudulent scheme or to avoid tax or the payment of tax. A rebuttable presumption is established that an asset transfer from the nonrequesting spouse to the requesting spouse during the 12-month period before the mailing date of the first letter of proposed deficiency (whether a 30-Day Letter or a Notice of Deficiency) is a disqualified asset transfer, but this presumption will not apply to any transfer pursuant to a decree of divorce or separate maintenance or a written instrument incident to such a decree.

3) A claim for equitable relief may be made if the other two methods are unavailable. Rev. Proc. 2013-34 provides seven threshold requirements for relief and eight factors the IRS will look at in making the determination. It is a facts-and-circumstances test.

GLOSSARY OF KEY TERMS

Community Property— Community property is a system of property law adopted in a number of states whereby the property of a married couple is deemed to be owned in common as marital partnership. Currently, the states with such a law on the books are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin.

FDAP—Fixed, Determinable, Annual, or Periodical

Form 720— Quarterly Federal Excise Tax Return

Form 1040-NR—U.S. Nonresident Alien Income Tax Return

Form 5471—Information Return of U.S. Persons With Respect to Certain Foreign Corporations

Form 8833—Treaty-Based Return Position Disclosure Under Section 6114 or 7701(b)

Form 8840—Closer Connection Exception Statement for Aliens

Form 8843—Statement for Exempt Individuals and Individuals With a Medical Condition

Form 8857—Request for Innocent Spouse Relief

Innocent Spouse Relief—In some cases, a spouse (or former spouse) will be relieved of the tax, interest, and penalties on a joint tax return. Three types of relief are available to married persons who filed joint returns. Innocent Spouse Relief is one of the three types of relief (in addition to separation of liability relief and equitable relief). IRS Publication 971 explains who may qualify for innocent spouse relief and how to obtain it.

Joint and Several—A legal phrase used in definitions of liability, meaning that an obligation (to pay or to perform) may be enforced against all liable parties jointly or against any one of them separately.

Nonresident Alien—A person who is not a U.S. citizen and does not live in the United States, or lives in the United States under a nonresident visa, or does not meet the substantial presence test. A nonresident alien return is filed on Form 1040-NR. See IRS Publication 519, *U.S. Tax Guide for Aliens*.

Resident Alien—A citizen of another country who lives in the United States and/or has resident status by law or visa, or passes the substantial presence test. For tax purposes, a resident alien is generally under the same rules as a U.S. citizen. See IRS Publication 519, *Tax Guide for Aliens,* for more information.

CUMULATIVE INDEX 2023

BY TOPIC

BY CITATION

BY SPEAKER

Choose the best response and record your answer in the space provided on the answer sheet.

1. According to Ian Redpath, the IRS is warning people about what in IR-2023-123?

   A. A list of problems that often occur in practitioners' engagement letters
   B. The penalties for erroneously claiming worthless controlled foreign corporation stock as disaster losses
   C. The fact that additional time from natural disasters does not apply to the 21-day deadline in a CP14 Notice
   D. A fraudulent letter promising a refund from the IRS and used to get an individual's personal information

2. According to Ian Redpath, which of the following is a best practice related to engagement letters?

   A. Keep discussions about scope and other issues verbal rather than committing them to writing in the engagement letter.
   B. Use global engagement letters for each client to minimize work and make engagements more efficient.
   C. Include the issues listed by the Office of Professional Responsibility (OPR) in the engagement letter to shield against a lawsuit.
   D. Keep information about retention and disposition out of the engagement letter to ensure more flexibility.

3. According to Ian Redpath, what is the maximum amount taxpayers can claim under the Work Opportunity Tax Credit (IRC Sec. 151)?

   A. $1,500.
   B. $2,400.
   C. $4,000.
   D. $6,000.

4. According to Ian Redpath, why did the IRS use the bank deposits method in *Donald E. Swanson v. Commissioner*?

   A. To determine whether an activity was a hobby or a business
   B. To determine whether the taxpayer materially participated in an activity
   C. To reconstruct the taxpayer's unreported income
   D. To confirm income reported by the taxpayer

5. According to Ian Redpath, what can tax-exempt entities do under IRC Sec. 6417?

   A. Receive an elective payment for a tax credit even though they do not pay tax.
   B. Qualify for elective payments by fulfilling the pre-registration requirements.
   C. Pinpoint the geographic area in which COVID-19 disaster losses occurred.
   D. Trade an eligible tax credit for property in a like-kind exchange.

Continued on next page

6. According to Ian Redpath and Renata Maroney, who is taxed on their worldwide income instead of only income derived from sources within the United States?

   A. Residents of the United States
   B. Nonresidents of the United States
   C. Individuals who are planning to move to the United States in the near future
   D. Individuals who are physically in the United States but are not here for tax purposes

7. According to Ian Redpath and Renata Maroney, how is residency determined for income tax purposes?

   A. Only citizens or residents with green cards are considered residents for income tax purposes.
   B. Residency for income tax purposes is defined using the concept of domicile for those who live between two countries.
   C. If individuals are not physically present in the country, they do not pay income taxes as a resident.
   D. Residency for income tax purposes is determined under different rules than those used for immigration or estate taxes.

8. According to Ian Redpath and Renata Maroney, what test for determining status is based on the number of days the individual is physically present during a three-year period?

   A. Visa
   B. Tax home
   C. Substantial presence
   D. Green card

9. According to Ian Redpath and Renata Maroney, what happens when someone applies for *competent authority* to determine their residency?

   A. Treaty benefits, instead of the substantial presence test, will determine that individual's residency.
   B. Representatives from two countries come together to determine which country claims that individual as a resident.
   C. Residency will be determined based on the location of that individual's true home.
   D. The individual will be exempt from all Foreign Bank and Financial Accounts (FBAR) requirements.

10. According to Ian Redpath and Renata Maroney, when an individual files a *dual-status return*, how is the main tax return (i.e., Form 1040 or Form 1040-NR) determined?

    A. The main tax return is always determined by the individual's residential status at the end of the tax year.
    B. The main tax return is always determined by the individual's residential status at the beginning of the tax year.
    C. Form 1040 is always considered to be the main tax return when it is filed for a specific tax year.
    D. Form 1040-NR is always considered the main tax return if the individual lived outside of the country for part of the year.

Continued on next page

11. According to Ian Redpath and Larry Pon, what two types of innocent spouse relief can be filed for at the same time?

    A. Traditional and equitable
    B. Traditional and split allocation
    C. Split allocation and equitable
    D. None of these types can be filed for simultaneously.

12. According to Ian Redpath and Larry Pon, what is one advantage of petitioning the United States Tax Court after being turned down for innocent spouse relief?

    A. Taxpayers do not have to pay the liability until the court makes its decision.
    B. Taxpayers are guaranteed to receive at least a portion of the relief.
    C. The requesting spouse's request is protected from the nonrequesting spouse.
    D. The extravagance of the taxpayer's lifestyle will not be considered.

13. According to Ian Redpath and Larry Pon, who has the burden of proof in traditional and split allocation innocent spouse cases?

    A. The requesting spouse always bears the burden of proof in an innocent spouse case.
    B. The requesting spouse has the burden of proof using the traditional method, and the IRS has the burden of proof under the split allocation approach.
    C. The requesting spouse has the burden of proof under the split allocation approach, and the IRS has the burden of proof when the traditional method is used.
    D. The IRS always bears the burden of proof in an innocent spouse case.

14. According to Ian Redpath and Larry Pon, what is Form 8857 referring to when it asks about the requesting spouse's level of education?

    A. The highest level that individual completed in school (high school, college, etc.)
    B. The subjects that individual majored in at school
    C. The types of continuing education or special interests that individual pursues
    D. The level of understanding that individual has about finances

15. According to Ian Redpath and Larry Pon, when an innocent spouse case goes to the tax court, how it is approached?

    A. The court approaches it totally fresh without referring to anything that came before.
    B. The court approaches it fresh, but the case is based on prior administrative record.
    C. The case is based on prior administrative record, and no newly discovered information is allowed.
    D. The court is beholden to the IRS's decision unless there is strong, newly discovered evidence to the contrary.

CPE Network®
Tax Report
Volume 36, Issue 7 **AUGUST 2023**

Subscriber Survey

Evaluation Form

Please take a few minutes to complete this survey related to the **CPE Network® Tax Report** and return with your quizzer or group attendance sheet to **CPLgrading@cerifi.com**. All responses will be kept confidential. Comments in addition to the answers to these questions are also welcome. Please send comments to **CPLgrading@cerifi.com.**

How would you rate the topics covered in the August 2023 **CPE Network® Tax Report?** Rate each topic on a scale of 1–5 (5=highest):

	Topic Relevance	**Topic Content/ Coverage**	**Topic Timeliness**	**Video Quality**	**Audio Quality**	**Written Material**
Experts' Forum	|_____|	|_____|	|_____|	|_____|	|_____|	|_____|
Nonresident Aliens (NRAs)	|_____|	|_____|	|_____|	|_____|	|_____|	|_____|
Innocent Spouse Relief	|_____|	|_____|	|_____|	|_____|	|_____|	|_____|

Which segments of the August 2023 issue of **CPE Network® Tax Report** did you like the most, and why?

Which segments of the August 2023 issue of **CPE Network® Tax Report** did you like the least, and why?

What would you like to see included or changed in future issues of **CPE Network® Tax Report**?

Are there any other ways in which we can improve **CPE Network® Tax Report**?

How would you rate the effectiveness of the speakers in the August 2023 **CPE Network® Tax Report**? Rate each speaker on a scale of 1–5 (5 highest):

	Overall	Knowledge of Topic	Presentation Skills
Ian Redpath	_____	_____	_____
Renata Maroney	_____	_____	_____
Lawrence Pon	_____	_____	_____

Which of the following would you use for viewing **CPE Network® Tax Report?** DVD ☐ Streaming ☐ Both ☐

Are you using **CPE Network® Tax Report** for: CPE Credit ☐ Information ☐ Both ☐ _____

Were the stated learning objectives met? Yes ☐ No ☐ _____

If applicable, were prerequisite requirements appropriate? Yes ☐ No ☐ _____

Were program materials accurate? Yes ☐ No ☐ _____

Were program materials relevant and contribute to the achievement of the learning objectives? Yes ☐ No ☐ _____

Were the time allocations for the program appropriate? Yes ☐ No ☐ _____

Were the supplemental reading materials satisfactory? Yes ☐ No ☐ _____

Were the discussion questions and answers satisfactory? Yes ☐ No ☐ _____

Were the audio and visual materials effective? Yes ☐ No ☐ _____

Specific Comments: _____

_____

Name/Company _____

Address _____

City/State/Zip _____

Email _____

Once Again, Thank You…

Your Input Can Have a Direct Influence on Future Issues!

CPE Network®

CPE Group Attendance Sheet

Firm/Company Name: _____

Account #: _____

Location: _____

Program Title: CPE Network Tax Report,August 2023 Date: _____

Name	Email	Total Hrs	IRS PTIN ID (if applicable Tax only)	Sign In	Sign Out

I certify that the above individuals viewed and were participants in the group discussion with this issue/segment of the CPE Network® newsletter, and earned the number of hours shown.

Instructor Name: _____ Date: _____

E-mail address: _____

License State and Number: _____

Group Study PO Box 115008, Carrollton, TX 75011 -5008 Fax (888) 286.9070 CPLgrading@thomsonreuters.com

CPE Network/Webinar Delivery Tracking Report

Course Title	
Course Date:	
Start Time:	
End Time:	
Moderator Name, Credentials, and Signature Attestation of Attendance:	
Delivery Method:	Group Internet Based
Total CPE Credit:	3.0
Instructions:	During the webinar, the moderator must verify student presence a minimum of 3 times per CPE hour. This is achieved via polling questions. Sponsors must have a report which documents the responses from each student. The timing of the polling questions should be random and not made known to students prior to delivery of the course. Record the polling question responses below. Refer to the CPL Network User Guide for more instructions. Partial credit will not be issued for students who do not respond to at least 3 polling questions per CPE hour.
Brief Description of Method of Polling	Example: Zoom: During this webinar, moderator asked students to raise their hands 3 times per CPE hour. The instructor then noted the hands that were raised in the columns below.

			First CPE Hour			CPE Hour 2			CPE Hour 3			FOR TR USE ONLY
First Name	Last Name	Student Email	Poll 1	Poll 2	Poll 3	Poll 1	Poll 2	Poll 3	Poll 1	Poll 2	Poll 3	Certificate Issued?

CHECKPOINT LEARNING NETWORK

CPE NETWORK®
USER GUIDE

REVISED May 1, 2023

Welcome to CPE Network!

CPE Network programs enable you to deliver training programs to those in your firm in a manageable way. You can choose how you want to deliver the training in a way that suits your firm's needs: in the classroom, virtual, or self-study. You must review and understand the requirements of each of these delivery methods before conducting your training to ensure you meet (and document) all the requirements.

This User Guide has the following sections:

- **"Group Live" Format:** The instructor and all the participants are gathered into a common area, such as a conference room or training room at a location of your choice.
- **"Group Internet Based" Format:** Deliver your training over the internet via Zoom, Teams, Webex, or other application that allows the instructor to present materials that all the participants can view at the same time.
- **"Self-Study" Format:** Each participant can take the self-study version of the CPE Network program on their own computers at a time and place of their convenience. No instructor is required for self-study.
- **Transitioning From DVDs:** For groups playing the video from the online platform, we suggest downloading the video from the Checkpoint Learning player to the desktop before projecting.
- **What Does It Mean to Be a CPE Sponsor?:** Should you decide to vary from any of the requirements in the 3 methods noted above (for example, provide less than 3 full CPE credits, alter subject areas, offer hybrid or variations to the methods described above), Checkpoint Learning Network will not be the sponsor and will not issue certificates. In this scenario, your firm will become the sponsor and must issue its own certificates of completion. This section outlines the sponsor's responsibilities that you must adhere to if you choose not to follow the requirements for the delivery methods.
- **Getting Help:** Refer to this section to get your questions answered.

IMPORTANT: This User Guide outlines in detail what is required for each of the 3 formats above. Additionally, because you will be delivering the training within your firm, you should review the Sponsor Responsibilities section as well. To get certificates of completion for your participants following your training, you must submit all the required documentation. (This is noted at the end of each section.) Checkpoint Learning Network will review your training documentation for completeness and adherence to all requirements. If all your materials are received and complete, certificates of completion will be issued for the participants attending your training. Failure to submit the required completed documentation will result in delays and/or denial of certificates.

IMPORTANT: If you vary from the instructions noted above, your firm will become the sponsor of the training event and you will have to create your own certificates of completions for your participants. In this case, you do not need to submit any documentation back to Thomson Reuters.

If you have any questions on this documentation or requirements, refer to the "Getting Help" section at the end of this User Guide **BEFORE** you conduct your training.

We are happy that you chose CPE Network for your training solutions. Thank you for your business and HAPPY LEARNING!

“Group Live” Format

CPE Credit

All CPE Network products are developed and intended to be delivered as 3 CPE credits. You should allocate sufficient time in your delivery so that there is no less than 2.5 clock hours:

50 minutes per CPE credit TIMES 3 credits = 150 minutes = 2.5 clock hours

If you wish to have a break during your training session, you should increase the length of the training beyond 2.5 hours as necessary. For example, you may wish to schedule your training from 9 AM to 12 PM and provide a ½ hour break from 10:15 to 10:45.

***Effective November 1, 2018:** Checkpoint Learning CPE Network products ‘group live’ sessions must be delivered as 3 CPE credits and accredited to the field(s) of study as designated by Checkpoint Learning Network. Checkpoint Learning Network will not issue certificates for “group live” deliveries of less than 3 CPE credits (unless the course was delivered as 3 credits and there are partial credit exceptions (such as late arrivals and early departures). Therefore, if you decide to deliver the “group live” session with less than 3 CPE credits, your firm will be the sponsor as Checkpoint Learning Network will not issue certificates to your participants.

Advertising / Promotional Page

Create a promotion page (use the template after the executive summary of the transcript). You should circulate (e.g., email) to potential participants prior to training day. You will need to submit a copy of this page when you request certificates.

Monitoring Attendance

You must monitor individual participant attendance at “group live” programs to assign the correct number of CPE credits. A participant’s self-certification of attendance alone is not sufficient.

Use the **attendance sheet.** This lists the instructor(s) name and credentials, as well as the first and last name of each participant attending the seminar. The participant is expected to initial the sheet for their morning attendance and provide their signature for their afternoon attendance. If a participant arrives late, leaves early, or is a “no show,” the actual hours they attended should be documented on the sign-in sheet and will be reflected on the participant’s CPE certificate.

Real Time Instructor During Program Presentation

"Group live" programs must have a **qualified, real time instructor while the program is being presented.** Program participants must be able to interact with the instructor while the course is in progress (including the opportunity to ask questions and receive answers during the presentation).

Elements of Engagement

A "group live" program must include at least one element of engagement related to course content during each credit of CPE (for example, group discussion, polling questions, instructor-posed question with time for participant reflection, or use of a case study with different engagement elements throughout the program).

Make-Up Sessions

Individuals who are unable to attend the group study session may use the program materials for self-study either in print or online.

- If the print materials are used, the user should read the materials, watch the video, and answer the quizzer questions on the CPE Quizzer Answer Sheet. Send the answer sheet and course evaluation to the address listed on the answer sheet and the CPE certificate will be mailed or emailed to the user. Detailed instructions are provided on Network Program Self-Study Options.
- If the online materials are used, the user should log on to her/his individual Checkpoint Learning account to read the materials, watch the interviews, and answer the quizzer questions. The user will be able to print her/his/their CPE certificate upon completion of the quizzer. (If you need help setting up individual user accounts, please contact your firm administrator or customer service.)

Awarding CPE Certificates

The CPE certificate is the participant's record of attendance and is awarded by Checkpoint Learning Network after the "group live" documentation is received (and providing the course is delivered as 3 CPE credits). The certificate of completion will reflect the credit hours earned by the individual, with special calculation of credits for those who arrived late or left early.

Subscriber Survey Evaluation Forms

Use the evaluation form. You must include a means for evaluating quality. At the conclusion of the "group live" session, evaluations should be distributed and any that are completed are collected from participants. Those evaluations that are completed by participants should be returned to Checkpoint Learning Network along with the other course materials. While it is required that you circulate the evaluation form to all participants, it is NOT required that the participants fill it out. A preprinted evaluation form is included in the transcript each month for your convenience.

Retention of Records

Regardless of whether Checkpoint Learning Network is the sponsor for the "group live" session, it is required that the firm hosting the "group live" session retain the following information for a period of five years from the date the program is completed unless state law dictates otherwise:

- Record of participation (Group Study Attendance sheets; indicating any late arrivals and/or early departures)
- Copy of the program materials
- Timed agenda with topics covered and elements of engagement used
- Date and location of course presentation
- Number of CPE credits and field of study breakdown earned by participants
- Instructor name and credentials
- Results of program evaluations.

Finding the Transcript

Note: DVDs no longer ship with this product effective 3/1/2023.

When the DVD is inserted into a DVD drive, the video will immediately begin to play and the menu screen will pop up, taking the entire screen. Hitting the Esc key should minimize it to a smaller window. To locate the pdf file of the transcript either to save or email to others, go to the start button on the computer. In My Computer, open the drive with the DVD. The Adobe Acrobat files are the transcript files. If you do not currently have Adobe Acrobat Reader (Mac versions of the reader are also available), a free version of the reader may be downloaded at:

- https://get.adobe.com/reader/

The entire transcript is also available as a pdf in the Checkpoint Learning player in the resource toolbox at the top of the screen, or via the link in the email sent to administrators.

Requesting Participant CPE Certificates

When delivered as 3 CPE credits, documentation of your "group live" session should be sent to Checkpoint Learning Network by one of the following means:

Mail: Thomson Reuters
PO Box 115008
Carrollton, TX 75011-5008

Email: **CPLgrading@tr.com**

Fax: 888.286.9070

When sending your package to Thomson Reuters, you must include ALL of the following items:

Form Name	Included?	Notes
Advertising / Promotional Page		Complete this form and circulate to your audience before the training event.
Attendance Sheet		Use this form to track attendance during your training session.
Subscriber Survey Evaluation Form		Circulate the evaluation form at the end of your training session so that participants can review and comment on the training. Return to Thomson Reuters any evaluations that were completed. You do not have to return an evaluation for every participant.

Incomplete submissions will be returned to you.

“Group Internet Based” Format

CPE Credit

All CPE Network products are developed and intended to be delivered as 3 CPE credits. You should allocate sufficient time in your delivery so that there is no less than 2.5 clock hours:

50 minutes per CPE credit TIMES 3 credits = 150 minutes = 2.5 clock hours

If you wish to have a break during your training session, you should increase the length of the training beyond 2.5 hours as necessary. For example, you may wish to schedule your training from 9 AM to 12 PM and provide a ½ hour break from 10:15 to 10:45.

***Effective November 1, 2018:** Checkpoint Learning CPE Network products ‘group live’ sessions must be delivered as 3 CPE credits and accredited to the field(s) of study as designated by Checkpoint Learning Network. Checkpoint Learning Network will not issue certificates for “group live” deliveries of less than 3 CPE credits (unless the course was delivered as 3 credits and there are partial credit exceptions (such as late arrivals and early departures). Therefore, if you decide to deliver the “group live” session with less than 3 CPE credits, your firm will be the sponsor as Checkpoint Learning Network will not issue certificates to your participants.

Advertising / Promotional Page

Create a promotion page (use the template following the executive summary in the transcript). You should circulate (e.g., email) to potential participants prior to training day. You will need to submit a copy of this page when you request certificates.

Monitoring Attendance in a Webinar

You must monitor individual participant attendance at “group internet based” programs to assign the correct number of CPE credits. A participant’s self-certification of attendance alone is not sufficient.

Use the **Webinar Delivery Tracking Report.** This form lists the moderator(s) name and credentials, as well as the first and last name of each participant attending the seminar. During a webinar you must set up a monitoring mechanism (or polling mechanism) to periodically check the participants’ engagement throughout the delivery of the program.

In order for CPE credit to be granted, you must confirm the presence of each participant **3 times per CPE hour and the participant must reply to the polling question**. Participants that respond to less than 3 polling questions in a CPE hour will not be granted CPE credit. For example, if a participant only replies to 2 of the 3 polling questions in the first CPE hour, credit for the first CPE hour will not be granted. (Refer to the Webinar Delivery Tracking Report for examples.)

Examples of polling questions:

1. You are using **Zoom** for your webinar. The moderator pauses approximately every 15 minutes and ask that participants confirm their attendance by using the "raise hands" feature. Once the participants raise their hands, the moderator records the participants who have their hands up in the **webinar delivery tracking report** by putting a YES in the webinar delivery tracking report. After documenting in the spreadsheet, the instructor (or moderator) drops everyone's hands and continues the training.
2. You are using **Teams** for your webinar. The moderator will pause approximately every 15 minutes and ask that participants confirm their attendance by typing "Present" into the Teams chat box. The moderator records the participants who have entered "Present" into the chat box into the **webinar delivery tracking report**. After documenting in the spreadsheet, the instructor (or moderator) continues the training.
3. If you are using an application that has a way to automatically send out polling questions to the participants, you can use that application/mechanism. However, following the event, you should create a **webinar delivery tracking report** from your app's report.

Additional Notes on Monitoring Mechanisms:

1. The monitoring mechanism does not have to be "content specific." Rather, the intention is to ensure that the remote participants are present and paying attention to the training.
2. You should only give a minute or so for each participant to reply to the prompt. If, after a minute, a participant does not reply to the prompt, you should put a NO in the webinar delivery tracking report.
3. While this process may seem unwieldy at first, it is a required element that sponsors must adhere to. And after some practice, it should not cause any significant disruption to the training session.
4. **You must include the Webinar Delivery Tracking report with your course submission if you are requesting certificates of completion for a "group internet based" delivery format.**

Real Time Moderator During Program Presentation

"Group internet based" programs must have a **qualified, real time moderator while the program is being presented.** Program participants must be able to interact with the moderator while the course is in progress (including the opportunity to ask questions and receive answers

during the presentation). This can be achieved via the webinar chat box, and/or by unmuting participants and allowing them to speak directly to the moderator.

Make-Up Sessions

Individuals who are unable to attend the "group internet based" session may use the program materials for self-study either in print or online.

- If print materials are used, the user should read the materials, watch the video, and answer the quizzer questions on the CPE Quizzer Answer Sheet. Send the answer sheet and course evaluation to the address listed on the answer sheet and the CPE certificate will be mailed or emailed to the user. Detailed instructions are provided on Network Program Self-Study Options.
- If the online materials are used, the user should log on to her/his individual Checkpoint Learning account to read the materials, watch the interviews, and answer the quizzer questions. The user will be able to print her/his CPE certificate upon completion of the quizzer. (If you need help setting up individual user accounts, please contact your firm administrator or customer service.)

Awarding CPE Certificates

The CPE certificate is the participant's record of attendance and is awarded by Checkpoint Learning Network after the "group internet based" documentation is received (and providing the course is delivered as 3 CPE credits). The certificate of completion will reflect the credit hours earned by the individual, with special calculation of credits for those who may not have answered the required amount of polling questions.

Subscriber Survey Evaluation Forms

Use the evaluation form. You must include a means for evaluating quality. At the conclusion of the "group live" session, evaluations should be distributed and any that are completed are collected from participants. Those evaluations that are completed by participants should be returned to Checkpoint Learning Network along with the other course materials. While it is required that you circulate the evaluation form to all participants, it is NOT required that the participants fill it out. A preprinted evaluation form is included in the transcript each month for your convenience.

Retention of Records

Regardless of whether Checkpoint Learning Network is the sponsor for the "group internet based" session, it is required that the firm hosting the session retain the following information for a period of five years from the date the program is completed unless state law dictates otherwise:

- Record of participation (Webinar Delivery Tracking Report)
- Copy of the program materials
- Timed agenda with topics covered
- Date and location (which would be "virtual") of course presentation
- Number of CPE credits and field of study breakdown earned by participants
- Instructor name and credentials
- Results of program evaluations

Finding the Transcript

Note: DVDs are no longer shipped effective 3/1/2023

When the DVD is inserted into a DVD drive, the video will immediately begin to play and the menu screen will pop up, taking the entire screen. Hitting the Esc key should minimize it to a smaller window. To locate the pdf file of the transcript either to save or email to others, go to the start button on the computer. In My Computer, open the drive with the DVD. It should look something like the screenshot below. The Adobe Acrobat files are the transcript files. If you do not currently have Adobe Acrobat Reader (Mac versions of the reader are also available), a free version of the reader may be downloaded at:

- https://get.adobe.com/reader/

Alternatively, for those without a DVD drive, the email sent to administrators each month has a link to the pdf for the newsletter. The email may be forwarded to participants who may download the materials or print them as needed.

Requesting Participant CPE Certificates

When delivered as 3 CPE credits, documentation of your "group internet based" session should be sent to Checkpoint Learning Network by one of the following means:

Mail: Thomson Reuters
PO Box 115008
Carrollton, TX 75011-5008
Email: CPLgrading@tr.com

Fax: 888.286.9070

When sending your package to Thomson Reuters, you must include ALL the following items:

Form Name	Included?	Notes
Advertising / Promotional Page		Complete this form and circulate to your audience before the training event.
Webinar Delivery Tracking Report		Use this form to track the attendance (i.e., polling questions) during your training webinar.
Evaluation Form		Circulate the evaluation form at the end of your training session so that participants can review and comment on the training. Return to Thomson Reuters any evaluations that were completed. You do not have to return an evaluation for every participant.

Incomplete submissions will be returned to you.

“Self-Study” Format

If you are unable to attend the live group study session, we offer two options for you to complete your Network Report program.

Self-Study—Print

Follow these simple steps to use the printed transcript and DVD:

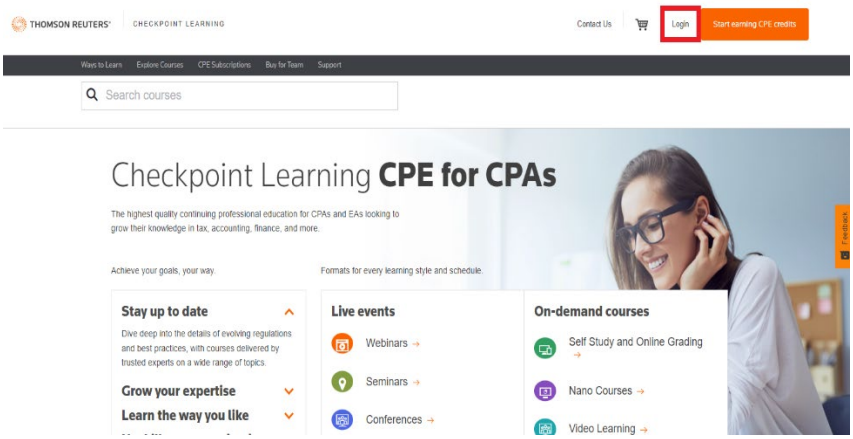
- Watch the DVD.
- Review the supplemental materials.
- Read the discussion problems and the suggested answers.
- Complete the quizzer by filling out the bubble sheet enclosed with the transcript package.
- Complete the survey. We welcome your feedback and suggestions for topics of interest to you.
- Mail your completed quizzer and survey to:

  Thomson Reuters
  PO Box 115008
  Carrollton, TX 75011-5008

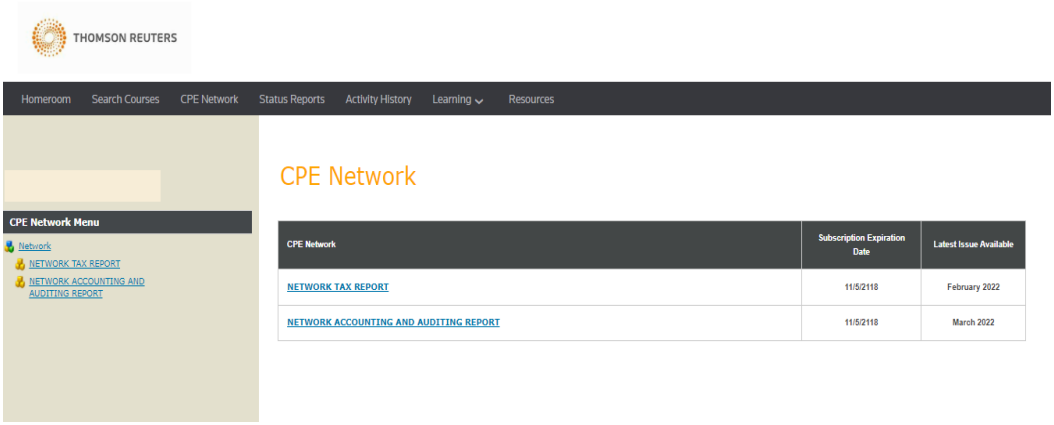
Self-Study—Online

Follow these simple steps to use the online program:

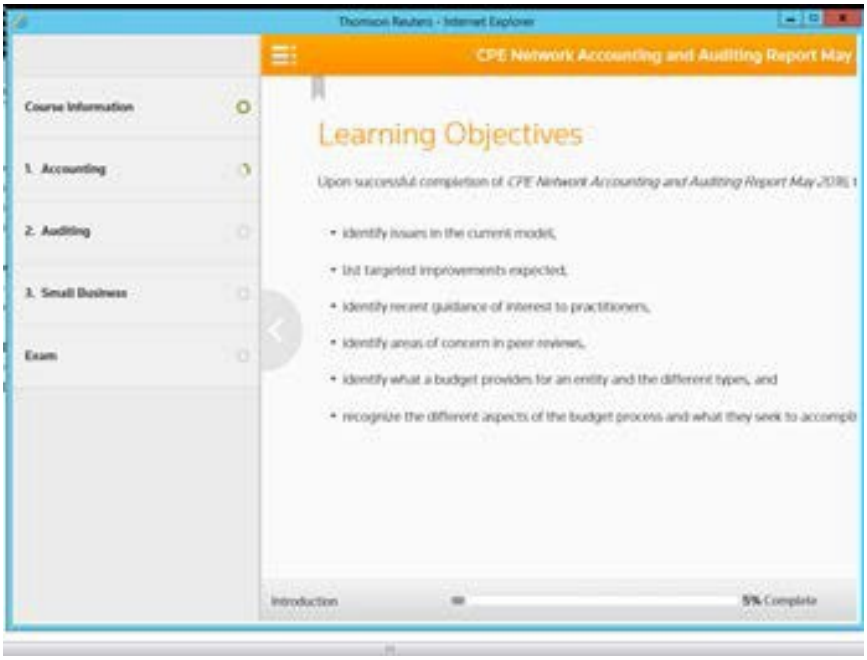
- Go to www.checkpointlearning.thomsonreuters.com .
- Log in using your username and password assigned by your firm’s administrator in the upper right-hand margin (“Login or Register”).



- In the **CPE Network** tab, select the desired Network Report and then the appropriate edition.

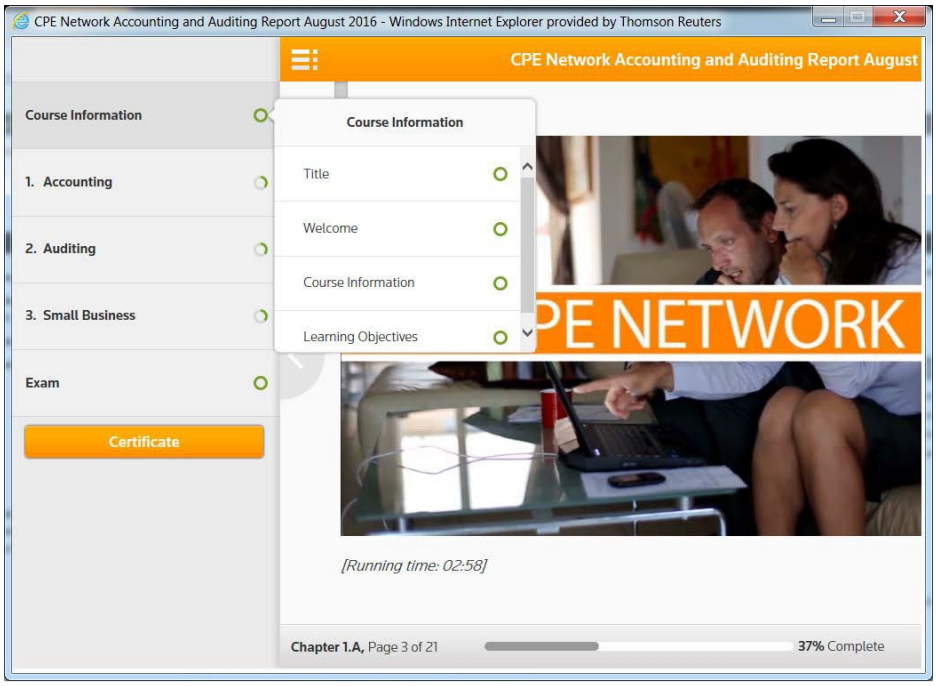


The Chapter Menu is in the gray bar at the left of your screen:



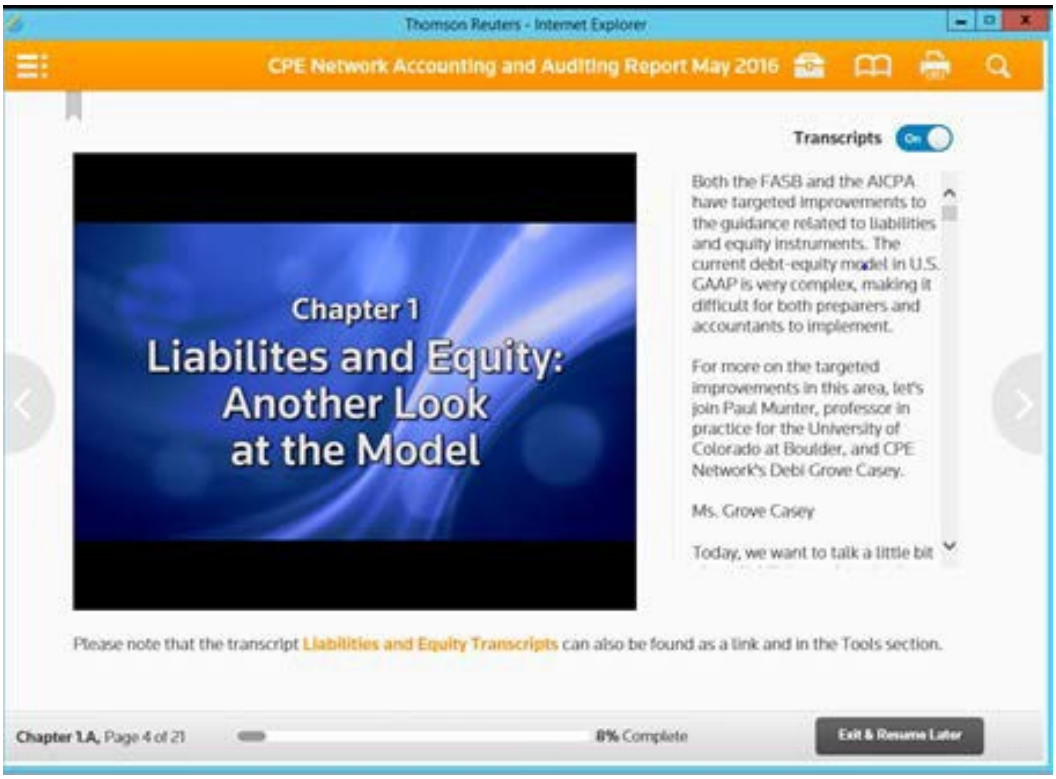
Click down to access the dropdown menu and move between the program Chapters.

- **Course Information** is the course Overview, including information about the authors and the program learning objectives

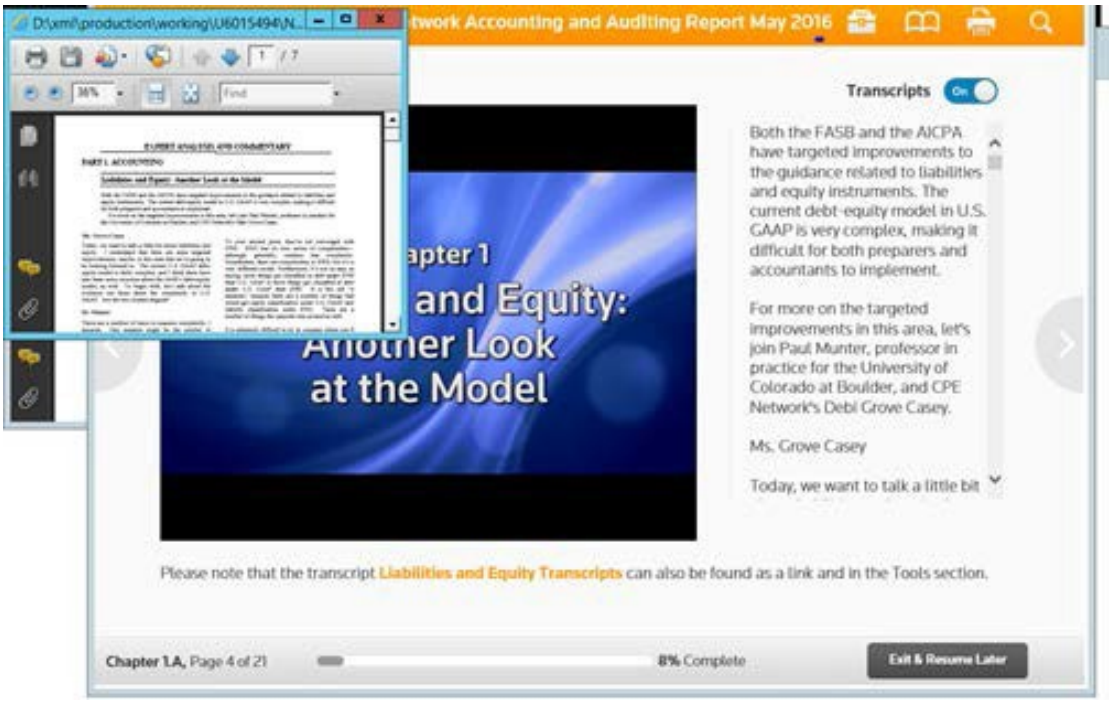


- **Each Chapter is now self-contained.** Years ago, when on the CPEasy site, the interview segments were all together, then all the supplemental materials, etc. Today, each chapter contains the executive summary and learning objectives for that segment, followed by the interview, the related supplemental materials, and then the discussion questions. This more streamlined approach allows administrators and users to more easily access the related materials.

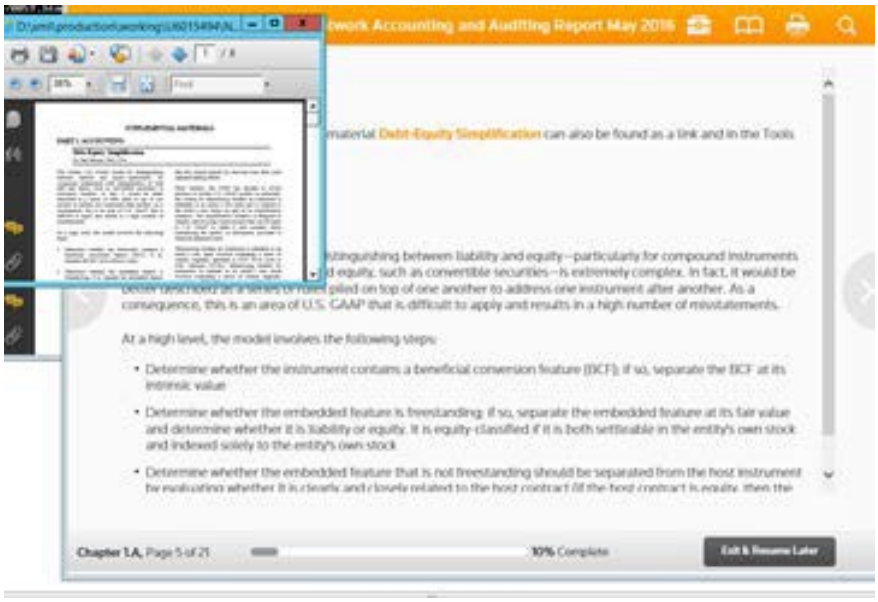
Video segments may be downloaded from the CPL player by clicking on the download button. Tip: you may need to scroll down to see the download button.



Transcripts for the interview segments can be viewed at the right side of the screen via a toggle button at the top labeled **Transcripts** or via the link to the pdf below the video (also available in the toolbox in the resources section). The pdf will appear in a separate pop-up window.

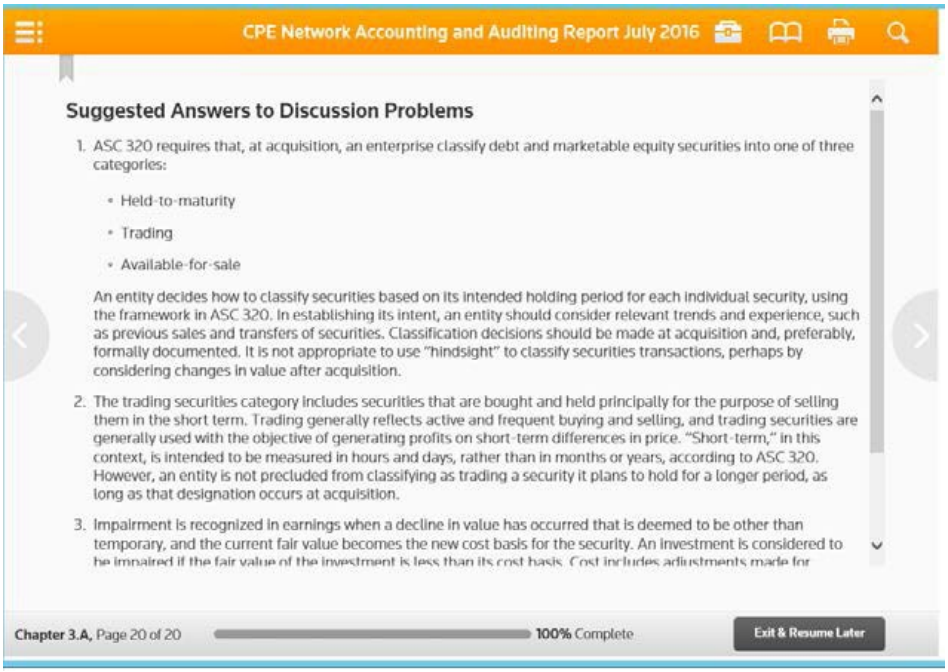


Click the arrow at the bottom of the video to play it, or click the arrow to the right side of the screen to advance to the supplemental material. As with the transcripts, the supplemental materials are also available via the toolbox and the link will pop up the pdf version in a separate window.



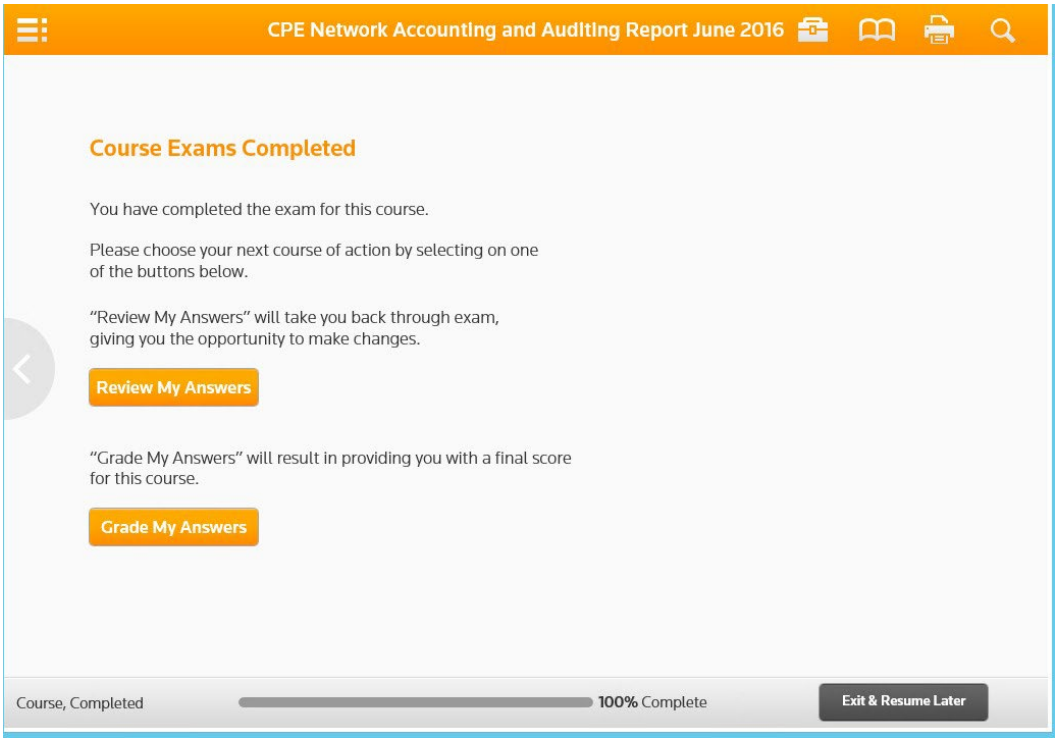
Continuing to click the arrow to the right side of the screen will bring the user to the Discussion p roblems related to the segment.

The Suggested Answers to the Discussion Problems follow the Discussion Problems.



The **Exam** is accessed by clicking the last gray bar on the menu at the left of the screen or clicking through to it. Click the orange button to begin.

When you have completed the quizzer, click the button labeled **Grade or the Review button**.



- Click the button labeled **Certificate** to print your CPE certificate.
- The final quizzer grade is displayed and you may view the graded answers by clicking the button labeled **view graded answer**.

Additional Features Search

Checkpoint Learning offers powerful search options. Click the **magnifying glass** at the upper right of the screen to begin your search. Enter your choice in the **Search For:** box.

Search Results are displayed with the number of hits.

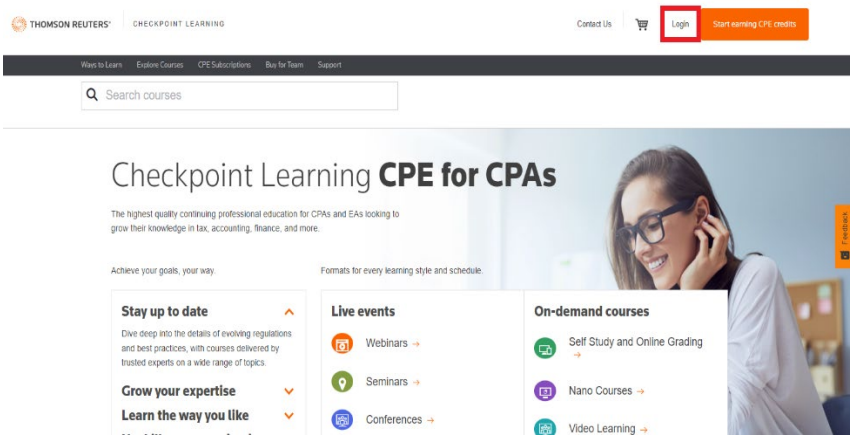
Print

To display the print menu, click the printer icon in the upper bar of your screen. You can print the entire course, the transcript, the glossary, all resources, or selected portions of the course. Click your choice and click the orange **Print**.

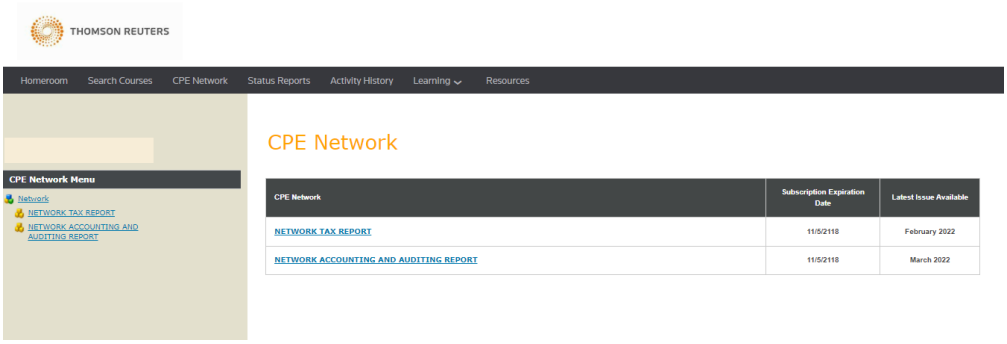
Transitioning From DVDs

Follow these simple steps to access the video and pdf for download from the online platform:

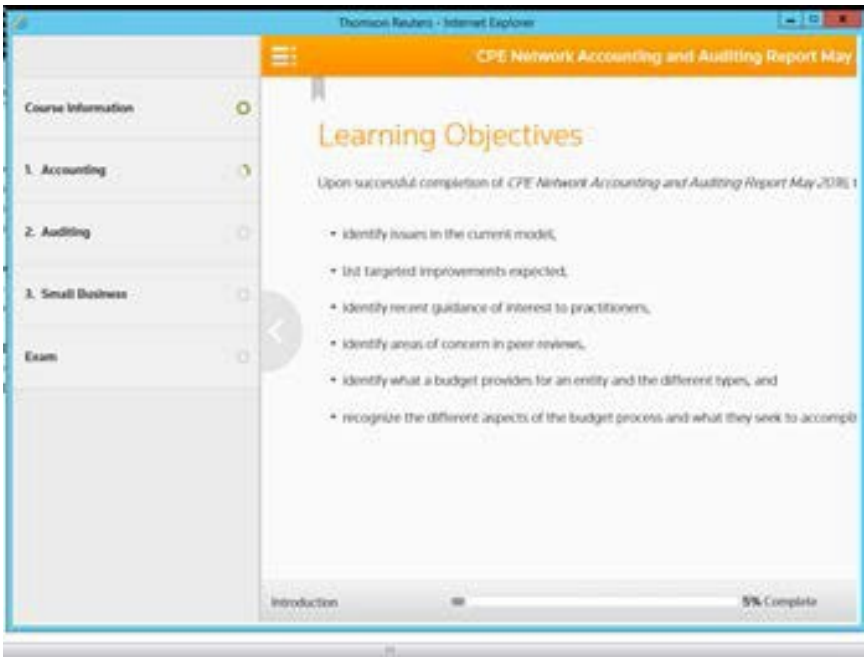
- Go to www.checkpointlearning.thomsonreuters.com .
- Log in using your username and password assigned by your firm's administrator in the upper right-hand margin ("Login").



- In the CPE **Network** tab, select the desired Network Report by clicking on the title, then select the appropriate edition.



The Chapter Menu is in the gray bar at the left of your screen:



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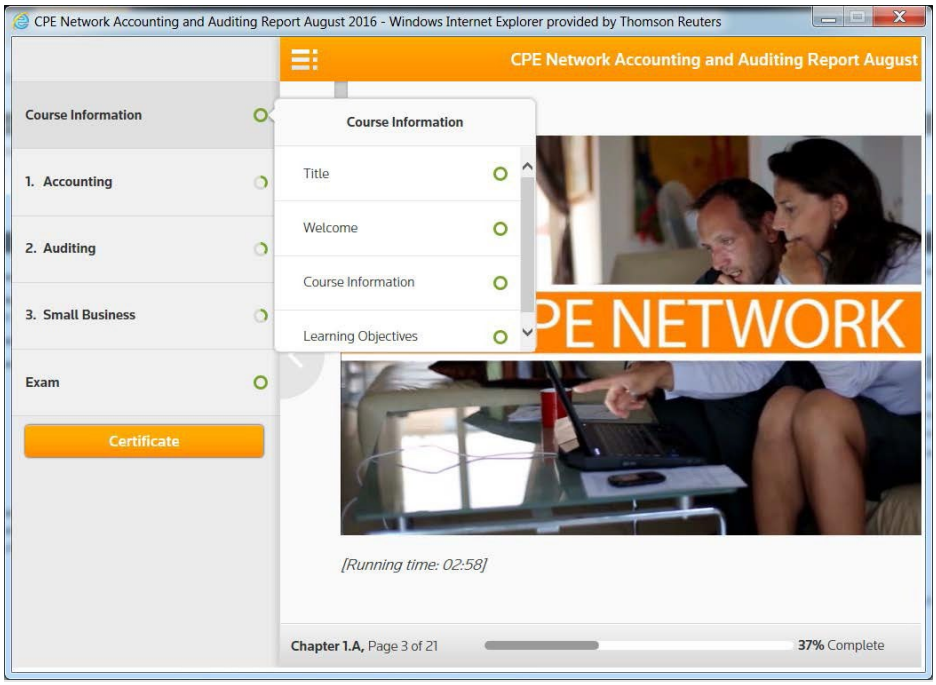
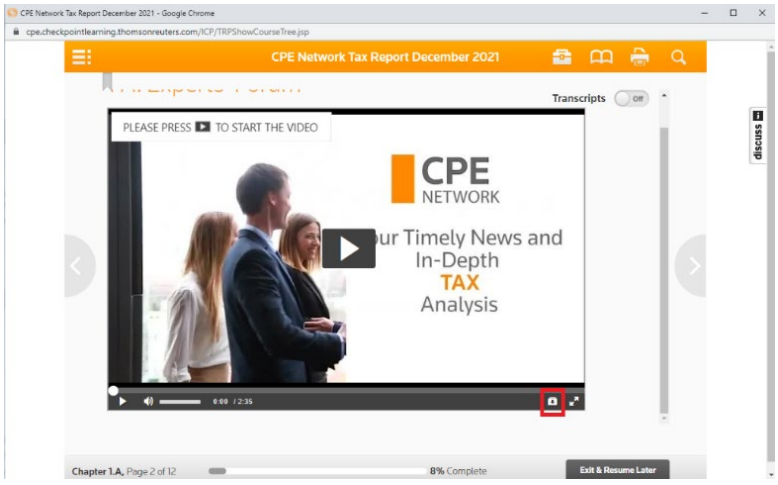


- Each Chapter is self-contained. Each chapter contains the executive summary and learning objectives for that segment, followed by the interview, the related supplemental materials, and then the discussion questions.



Video segments may be downloaded from the CPL player by clicking on the download button noted above. You may need to use the scroll bar to the right of the video to see the download button. **Tip: You may need to use the scroll bar to the right of the video to see the download button.**

PDFs may be downloaded from either the course toolbox in the upper right corner of the Checkpoint Learning screen or from the email sent by CPENetworkgroupstudy.

What Does It Mean to Be a CPE Sponsor?

If your organization chooses to vary from the instructions outlined in this User Guide, your firm will become the CPE Sponsor for this monthly series. The sponsor rules and requirements noted below are only highlights and reflect those of NASBA, the national body that sets guidance for development, presentation, and documentation for CPE programs. **For any specific questions about state sponsor requirements, please contact your state board. They are the final authority regarding CPE Sponsor requirements.** Generally, the following responsibilities are required of the sponsor:

- Arrange for a location for the presentation
- Advertise the course to your anticipated participants and disclose significant features of the program in advance
- Set the start time
- Establish participant sign-in procedures
- Coordinate audio-visual requirements with the facilitator
- Arrange appropriate breaks
- Have a real-time instructor during program presentation
- Ensure that the instructor delivers and documents elements of engagement
- Monitor participant attendance (make notations of late arrivals, early departures, and “no shows”)
- Solicit course evaluations from participants
- Award CPE credit and issue certificates of completion
- Retain records for five years

The following information includes instructions and generic forms to assist you in fulfilling your responsibilities as program sponsor.

CPE Sponsor Requirements

Determining CPE Credit Increments

Sponsored seminars are measured by program length, with one 50-minute period equal to one CPE credit. One-half CPE credit increments (equal to 25 minutes) are permitted after the first credit has been earned. Sponsors must monitor the program length and the participants’ attendance in order to award the appropriate number of CPE credits.

Program Presentation

CPE program sponsors must provide descriptive materials that enable CPAs to assess the appropriateness of learning activities. CPE program sponsors must make the following information available in advance:

- Learning objectives.
- Instructional delivery methods.
- Recommended CPE credit and recommended field of study.
- Prerequisites.
- Program level.
- Advance preparation.
- Program description.
- Course registration and, where applicable, attendance requirements.
- Refund policy for courses sold for a fee/cancellation policy.
- Complaint resolution policy.
- Official NASBA sponsor statement, if an approved NASBA sponsor (explaining final authority of acceptance of CPE credits**).**

Disclose Significant Features of Program in Advance

For potential participants to effectively plan their CPE, the program sponsor must disclose the significant features of the program in advance (e.g., through the use of brochures, website, electronic notices, invitations, direct mail, or other announcements). When CPE programs are offered in conjunction with non-educational activities, or when several CPE programs are offered concurrently, participants must receive an appropriate schedule of events indicating those components that are recommended for CPE credit. The CPE program sponsor's registration and attendance policies and procedures must be formalized, published, and made available to participants and include refund/cancellation policies as well as complaint resolution policies.

Monitor Attendance

While it is the participant's responsibility to report the appropriate number of credits earned, CPE program sponsors must maintain a process to monitor individual attendance at group programs to assign the correct number of CPE credits. A participant's self-certification of attendance alone is not sufficient. The sign-in sheet should list the names of each instructor and her/his credentials, as well as the name of each participant attending the seminar. The participant is expected to initial the sheet for their morning attendance and provide their signature for their afternoon attendance. If a participant leaves early, the hours they attended should be documented on the sign-in sheet and on the participant's CPE certificate.

Real Time Instructor During Program Presentation

"Group live" programs must have a qualified, real time instructor while the program is being presented. Program participants must be able to interact with the real time instructor while the course is in progress (including the opportunity to ask questions and receive answers during the presentation).

Elements of Engagement

A "group live" program must include at least one element of engagement related to course content during each credit of CPE (for example, group discussion, polling questions, instructor-posed question with time for participant reflection, or use of a case study with different engagement elements throughout the program).

Awarding CPE Certificates

The CPE certificate is the participant's record of attendance and is awarded at the conclusion of the seminar. It should reflect the credit hours earned by the individual, with special calculation of credits for those who arrived late or left early. Attached is a sample *Certificate of Attendance* you may use for your convenience.

CFP credit is available if the firm registers with the CFP board as a sponsor and meets the CFP board requirements. IRS credit is available only if the firm registers with the IRS as a sponsor and satisfies their requirements.

Seminar Quality Evaluations for Firm Sponsor

NASBA requires the seminar to include a means for evaluating quality. At the seminar conclusion, evaluations should be solicited from participants and retained by the sponsor for five years. The following statements are required on the evaluation and are used to determine whether:

1. Stated learning objectives were met.
2. Prerequisite requirements were appropriate.
3. Program materials were accurate.
4. Program materials were relevant and contributed to the achievement of the learning objectives.
5. Time allotted to the learning activity was appropriate.
6. Individual instructors were effective.
7. Facilities and/or technological equipment were appropriate.
8. Handout or advance preparation materials were satisfactory.
9. Audio and video materials were effective.

You may use the enclosed preprinted evaluation forms for your convenience.

Retention of Records

The seminar sponsor is required to retain the following information for a period of five years from the date the program is completed unless state law dictates otherwise:

- Record of participation (the original sign-in sheets, now in an editable, electronic signable format)
- Copy of the program materials
- Timed agenda with topics covered and elements of engagement used
- Date and location of course presentation
- Number of CPE credits and field of study breakdown earned by participants
- Instructor name(s) and credentials
- Results of program evaluations

Appendix: Forms

Here are the forms noted above and how to get access to them.

Delivery Method	Form Name	Location	Notes
"Group Live" / "Group Internet Based"	Advertising / Promotional Page	Transcript	Complete this form and circulate to your audience before the training event.
"Group Live"	Attendance Sheet	Transcript	Use this form to track attendance during your training session.
"Group Internet Based"	Webinar Delivery Tracking Report	Transcript	Use this form to track the 'polling questions' which are required to monitor attendance during your webinar.
"Group Live" / "Group Internet Based"	Evaluation Form	Transcript	Circulate the evaluation form at the end of your training session so that participants can review and comment on the training.
Self Study	CPE Quizzer Answer Sheet	Transcript	Use this form to record your answers to the quiz.

Getting Help

Should you need support or assistance with your account, please see below:

Support Group	Phone Number	Email Address	Typical Issues/Questions
Technical Support	800.431.9025 (follow option prompts	checkpointlearning.techsupport@thomsonreuters.com	• Browser-based • Certificate discrepancies • Accessing courses • Migration questions • Feed issues
Product Support	800.431.9025 (follow option prompts	checkpointlearning.productsupport@thomsonreuters.com	• Functionality (how to use, where to find) • Content questions • Login Assistance
Customer Support	800.431.9025 (follow option prompts	checkpointlearning.cpecustomerservice@thomsonreuters.com	• Billing • Existing orders • Cancellations • Webinars • Certificates