

CHECKPOINT LEARNING

Contact us at: 2395 Midway Rd., Carrollton, TX 75006
checkpoint.learning.cpecustomerservice@tr.com
800.431.9025

CPE NETWORK TAX REPORT

JULY 2022

VOLUME 35, ISSUE 6

EXECUTIVE SUMMARY	1
EXPERT ANALYSIS AND COMMENTARY	
PART 1. CURRENT DEVELOPMENTS	
Experts' Forum.....	3
SUPPLEMENTAL MATERIALS	
Current Material: Experts' Forum	11
A. Audit Report No. 2022-40-035	11
B. IRS Operations During COVID-19: Mission-Critical Functions Continue.....	11
C. IRS Statement on Information Returns	11
D. ABA Tax Conference: Holly Paz, Deputy Commissioner of the IRS's Large Business and International (LB&I) Division.....	11
E. ABA Tax Conference: Mark Cottrell, Branch Chief for Procedure and Administration Within Chief Counsel's Office	12
F. Notice 2022-28, 2022-23 IRB	12
G. Employee Plans News	12
H. <i>Balle-Tun v. Zeng & Wong, Inc.</i> , DC CO, 129 AFTR 2d ¶2022-663	12
I. OECD Released Public Consultation Document March 22	12
J. Program Manager Technical Advice 2022-004.....	12
K. <i>Adams & Boyle, P.C., et al. v. Slatery III, et al.</i>	13
L. <i>In Re: Moore</i> , Bkcty Ct OH, 129 AFTR 2d ¶2022-654	13
M. <i>In Re: Johnson</i> , Bkcty Ct VA, 129 AFTR 2d ¶2022-633	13
N. <i>Michael J. Rogerson v. Commissioner</i>	13
O. <i>Seaview Trading, LLC v. Commissioner</i>	13
P. <i>Warren K. Jackson and et vir. v. Commissioner</i>	14
Q. LB&I-04-0422-0014: Interim Guidance Memorandum on Economic Substance Doctrine and Related Penalties.....	14
R. e-News for Tax Professionals 2022-17	14
S. <i>Gregory J. Podlucky, et ux. v. Commissioner</i>	14
T. <i>Michelle DelPonte v. Commissioner</i>	15

GROUP STUDY MATERIALS

A. Discussion Problems	17
B. Suggested Answers to Discussion Problems	18

PART 2. INDIVIDUAL TAXATION

Cryptocurrency.....	19
---------------------	----

SUPPLEMENTAL MATERIALS

Virtual/Crypto Currency	27
A. Introduction.....	27
B. What is Virtual Currency	27
C. Increased Scrutiny.....	28
D. Non-Fungible Tokens (NFTs)	29
E. Other Reporting.....	30
F. Conclusion	31

GROUP STUDY MATERIALS

A. Discussion Problems	33
B. Suggested Answers to Discussion Problems	34

PART 3. BUSINESS TAXATION

Trust Fund Liabilities.....	35
-----------------------------	----

SUPPLEMENTAL MATERIALS

Trust Fund Taxes	45
A. Introduction.....	45
B. Amounts of Withholding.....	45
C. Trust Fund Recovery Penalty	45
D. IRC §3505—Lender Liability	46
E. Criminal Exposure—IRC §7202	46
F. Assessment Procedures	46
G. Miscellaneous Issues.....	47
H. Voluntary Classification Settlement Program	47
I. Conclusion.....	48

GROUP STUDY MATERIALS

A. Discussion Problems	49
B. Suggested Answers to Discussion Problems	50

GLOSSARY OF KEY TERMS.....

CUMULATIVE INDEX 2022

CPE QUIZZER

Note: Beginning with the March 2023 edition of the Network programs, DVDs will no longer be shipped by Thomson Reuters. Videos will be available for download or streaming only. For customers wishing to adopt an online only format sooner, please contact your customer representative.

Note: During the current COVID-19 crisis, direct person-to-person contact can be reduced by forwarding this to participants and reminding others that the video is also available online through the CPL player. Additionally, video/discussion/Q&A may be shared via Teams, Zoom, or other conferencing-type software. Participants may submit the quiz for self-study credit, or Group Internet Based credit (similar to a webinar) is now available. Consult the user guide at the end of the newsletter for instructions on how to earn credit in this manner.

Note: While video/discussion/Q&A may be shared via Teams, Zoom, or other conferencing-type software, you must have each of your participants submit the quiz for self-study credit. Refer to the User Guide for best practices.

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:

- Employee Retention Credit
- Loss Limitations



THOMSON REUTERS®

EXECUTIVE SUMMARY

PART 1. CURRENT DEVELOPMENTS

Experts' Forum..... 3

The tax law is dynamic, and practitioners are constantly being confronted by changes through the Courts, the IRS, and Congress. This segment covers some of those recent changes.

Learning Objective: Upon completion of this segment, the user should be able to analyze current issues in taxation, including analyzing partnership audits by the IRS, assessing the need for approval of economic substance audits, and determining the authority to approve innocent spouse relief. [Running time 36:59]

PART 2. INDIVIDUAL TAXATION

Cryptocurrency..... 19

The popularity and value of virtual currency, also called cryptocurrency, has grown significantly. The “urban myth” is that this is “not money,” so there is nothing to declare. It has been used by some to avoid tax as a form of “tax shelter” similar to the concept of an offshore account. Beginning in 2014, the IRS started issuing guidance regarding virtual currency and, of course, the taxation of it. It is important that practitioners be aware of the nuances of virtual currency and the need to educate clients.

Learning Objective: Upon completion of this segment, the user should be able to analyze issues related to virtual currency, including determining the tax treatment of virtual currency as compensation for services, evaluating the tax treatment of sales and exchanges of virtual currency, and applying the reporting requirements for virtual currency transactions and accounts. [Running time 34:50]

PART 3. BUSINESS TAXATION

Trust Fund Liabilities..... 35

The federal payroll tax is reported on Form 941 and divided into three parts. The first two parts consist of withholding from an employee's wages for their taxes and Social Security. The third part relates to the employer's contribution to the Social Security tax. The term “trust fund taxes” refers to amounts that are

withheld from an employee by an employer for income and FICA taxes. These are to be remitted to the government by the employer. The employer is deemed to hold these withheld amounts in trust for the United States government. Failing to pay over the trust fund portion can result in significant penalties and possible personal liability—civil and/or criminal. It is important to be aware of the issues to properly advise clients in this area.

Learning Objective: Upon completion of this segment, the user should be able to analyze issues related to payroll taxes, including determining the make-up of payroll taxes, analyzing the trust fund recovery penalty, and evaluating methods to mitigate the trust fund penalty. [Running time 43:26]

ABOUT THE SPEAKERS

Ian J. Redpath, JD, LL.M., 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.

Shannon Jemiolo, CPA, PhD is an Assistant Accounting Professor at Canisius College in Buffalo, New York, where she also maintains an active tax consulting business. She holds a Bachelor's degree from West Virginia University and a Ph.D. from the University of Oklahoma. Prior to receiving her Ph.D., Shannon worked at in the tax division of PricewaterhouseCoopers and specialized in corporate tax, mergers and acquisition, and corporate restructuring. Shannon has written numerous articles on personal/corporate tax compliance and corporate social responsibility and has presented her tax research at national conferences around the country.

Gary Bluestein, JD a partner in the law firm of Andreozzi Bluestein LLP, focuses his practice exclusively on tax representation. He previously served as a Senior Attorney for the IRS and a Special Assistant United States' Attorney, represented the IRS in the U.S. Tax and Bankruptcy Courts, served on several National Task Forces addressing IRS enforcement issues, and received numerous Special Act Merit Awards. Gary has taught Tax Practice & Procedure at the University at Buffalo School of Law and in the Canisius College's Master in Tax Program. He is a member of the Erie County Bar Association, the Tax Committee, and the Bankruptcy Committee. He also serves on the Planning Committee for the University at Buffalo School of Management Tax Institute. Gary frequently lectures and writes on a variety of topics relating to tax representation for numerous local and national professional groups and has published articles in the Thompson Reuters Tax Practice Series and the Erie County Bar Bulletin.

Be sure to include the completed sheet when you request certificates for this event.

Title of Course (Enter full title)	
Date of Class (MM/DD/YYYY)	
Time (Enter time of class)	
Location (Enter location of class)	
Learning Objectives (Refer to executive summary)	
Program Description (Refer to executive summary)	
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.)

© 2022 Thomson Reuters/Tax & Accounting. Thomson Reuters, Checkpoint Learning, and the Kinesis logo are trademarks of Thomson Reuters and its affiliated companies. All rights reserved. This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional service. If legal advice or other expert assistance is required, the services of a competent professional person should be sought.

—From a Declaration of Principles jointly adopted by a *Committee of the American Bar Association* and *Committee of Publishers and Associations*.

PART 1. CURRENT DEVELOPMENTS

Experts' Forum

This month, we join Ian Redpath for Experts' Forum, a popular feature in which we review recent developments in taxation. We begin with a discussion about an audit report by the Treasury Inspector General for Tax Administration. The audit evaluated whether the IRS timely and accurately processed individual paper and electronically filed tax returns during the 2022 filing season.

Let's join Ian.

A. Audit Report No. 2022-40-035

Mr. Redpath

Hi, everybody. Welcome to the program. I'm Ian Redpath with Network Tax, and this is the segment where we go over a lot of updates as to what's happened in tax since the last time we spoke, and there's been a lot coming from Congress, coming from the IRS, coming from the courts, and coming from other areas like the Treasury Inspector General.

Let's start right there with the Treasury Inspector General's report; and this is Audit Report No. 2022-40-035. And the Treasury Inspector General for Tax Administration has been highly critical of the Internal Revenue Service and the service that they have been providing. They have come out and they found significant staffing shortages. Anybody who's tried to call the IRS knows that. Or maybe even if you have a case sitting out there or trying to find out what's happened to an amended return, you're very well aware of the fact that the IRS has had significant staffing shortages. And they said it's just ridiculous the amount

of backlog in inventory, and the IRS cannot keep up with it. There are some 8.4 million individual return transactions that remain to be processed, and that was as of the end of 2021. And the audit notice said that there are 8 million cases that are still in the IRS case management, and that is a 33% increase in unprocessed tax returns, 61% increase in the number of amended returns that have yet to be processed. As of the report, which was March of 2022, they had only hired 9.5% of their hiring goal, which obviously is extremely low. And for those of you who have been on hold like me, they're very frustrating; but they said that they answered 2.7 million calls and provided what the Treasury Inspector General says is only a 19.5% level of service within the 24-minute average speed of answer that the IRS is supposed to have. 24-minute average speed must not include the hours that I've been on there waiting. They report that 7.4 million calls were just simply answered with automation. So, significant problems!

B. IRS Operations During COVID-19: Mission-Critical Functions Continue

And of course, it doesn't get any better. The IRS has updated their Operations During COVID-19 Mission-Critical Function, and this was May 17th. The IRS updated that there's still 12 million unprocessed, original, and amended income tax returns and 3.8 million unprocessed, original, and amended payroll tax returns. Significant backlog. 9.8 million unprocessed individual income tax returns as of May. And there are 7.2 million paper returns that are still in process. And another 2.6 million unprocessed individual [returns] requiring some correction—an error correction or other special handling. And right

now, the IRS for this purpose is taking up to 120 days to process those and issue any refunds. Significant! Right now, they're saying that it's taking the IRS more than 20 weeks to process amended returns. And as I mentioned, as of May, 3.4 million unprocessed 941s and about 300,000 unprocessed 941-Xs.

C. IRS Statement on Information Returns

The IRS has had to respond to a prior Treasury Inspector General report where the IRS was, again, criticized. And in a statement that the IRS issued in May, the IRS said that, "Yes, I guess you're right." They responded, which they were asked to do. And they responded and said because of their inability to process the backlog of paper-filed tax returns, which is contributing to their management problems, the IRS has destroyed an estimated 30 million paper-filed information documents. And that's what they're admitting to as of March—30 million information returns. I guess the good side is, it's kind of hard to do

a matching of any information returns filed on paper if the IRS is throwing them away. I'm not sure we want to rely on that, of course, as an audit position; but clearly, the IRS is having significant problems. And again, they have admitted destroying 30 million information returns. This has not gone past Congress. And Bill Pascrell, the Democrat from New Jersey, the Chair of the House Ways and Means Oversight Committee has called for Chuck Rettig, the Commissioner of the IRS, to resign. It hasn't happened; but there's just a significant amount of problems with the Internal Revenue Service right now.

D. ABA Tax Conference: Holly Paz, Deputy Commissioner of the IRS's Large Business and International (LB&I) Division

There was an ABA tax conference, and at the tax conference—and this is something we really do have to pay consideration. For years, the IRS has been telling us, "We're going to audit partnerships, we're going to audit partnerships, we're going to audit partnerships," but they've never really done it. They've focused in on basis issues primarily. Again, part of that was the pre-BBA. Then, with the BBA partnerships and the centralized partnership audit rules, beginning in 2018, unless there's an opt-out of that regime, the audit takes place at the partnership level. It makes it easier; they can just come in and audit. They can audit all aspects of the partnership much easier than going with the individual and working their way up and then to the other partners. They can simply audit it and assess additional tax at the partnership level. Then, the partnership has the option of pushing that out to the partners.

Now, Holly Paz, the deputy commissioner for the IRS's Large Business and International Division, acknowledged that they have not been able to keep up with auditing of partnerships. One of the reasons is the lack of expertise. In prior programs, we've discussed the fact that Senator Wyden has a wide-ranging proposal in the Senate to totally change the taxation of partnerships. Senator Wyden says they are just too complicated, they are far too complicated for practitioners, and they are far too complicated for the Internal Revenue Service. That's something that we've talked about in other programs; and we should be following that because there is some bipartisan support to change that.

Holly Paz has acknowledged and said that they have hired 40 experienced tax people from legal and accounting firms and are intensifying the training of their existing staff. Now, interestingly enough, 22%—and that's kind of a low number because it's not what the IRS expected—only 22% of partnerships opted out of the BBA regime. They expected it to be much higher. Now, that could be because people aren't quite sure about the BBA, they're not quite sure about the opt-out. They just really didn't know what to do on that and have just let it continue. Remember, if you don't make a positive opt out—and there's a question on the 1065 to opt out—then you are in there and you have to name the partnership representative. And one of the things I would say to you is to make sure that you cover yourself and that the partners know the importance and all of the power that partnership representative has. Remember, the partnership representative can bind the partnership and all the partners. This is not the old tax matters partner. And I think to cover yourself, you should provide something to them, acknowledging that they understand the powers of the person that they are naming as a partnership representative if, in fact, they don't opt out of the BBA partnership returns.

Now, one of the things, and in prior programs, we've talked about the changes in capital account reporting. We also talked about the fact that there's more information on partnership debt. And all of this is an attempt by the Internal Revenue Service to provide greater detail on what the basis might be of the particular partner, especially if you're flowing through, for example, losses. It will also help them with the at-

risk. And there's several questions. There's questions on the K-1 and questions on the 1065 regarding at-risk. Are you aggregating for at-risk? Are you aggregating for 469? So, these are all questions that are put there to provide more information so that there's less need for staffing. Let the computers look for potential areas to get money in partnerships. So, this is something that they're doing. Their artificial intelligence has tools to identify the potential targets for revenue. That's what they're doing; and this has all been a part of it leading up to where we are right now.

But they have hired more staff. Interestingly, they're going to accounting firms and law firms to hire experienced people. If you may recall from another

program, we mentioned that the CBO, Congressional Budget Office, when they scored the Biden proposal, the proposed budget, there was to put more money into the IRS. And one of the things that they said is the IRS has lost a significant number of highly trained people; and therefore, for this to be successful in providing additional revenue, the IRS is going to have to bring in qualified—highly, they used—qualified and experienced people. So, this is kind of following what the CBO had said in general.

E. ABA Tax Conference: Mark Cottrell, Branch Chief for Procedure and Administration Within Chief Counsel's Office

Now, we have another interesting comment that came out of the ABA Conference and the IRS Chief Counsel's Office. We've spoken before about the *Boechler v. Commissioner* case. That was the Collection Due Process case that went to the Supreme Court. And the Supreme Court said that equitable tolling can apply. So, if you miss the filing deadline, it's not jurisdictional, meaning the court can't hear the case. It allows the court to decide, is there reasonable cause that you missed the deadline and allow you to file late? Now, that was addressing the Collection Due Process filing rules.

Of course, every commentator has been looking at it and saying this should apply to any tax court rules then. So, for example, the 90-day letter. At the ABA Conference, they said they really aren't looking at the Supreme Court's decision as essentially not binding. Interestingly enough, they said, "Well, we're not sure

we agree with it," but they certainly said, "But we definitely believe that it doesn't apply to any other filing deadlines like the 90-day letter." And in support of that issue of jurisdiction, they've cited a tax court case in May of 2022, where the tax court said the 90-day period is jurisdictional, there is no equitable tolling, and that *Boechler* is limited to CDP, Collection Due Process, appeals cases.

Interesting, but if you're thinking that it should apply, at least understand the Chief Counsel's Office of the Internal Revenue Service is saying as far as other deadlines to file in the tax court, most especially the general 90-day letter, we don't believe equitable tolling applies. And then, a recent tax court case followed that. Whether it'll be appealed—maybe it's going to be appealed and go up to the Supreme Court because the IRS is adamant about this.

F. Notice 2022-28, 2022-23 IRB

In Notice 2022-28, some employers have been providing for leave-based donation payments...before the end of the year. And then, it will provide for money, what you're giving up for your leave, to be given to organizations in support of victims of Russia's invasion of the Ukraine. And what this notice says is, if you have a program like that, employers should not include that in the income; it should not be included in Boxes 1, 3,

or 5 of the electing employee's W-2. Also, the employees do not get a deduction. They don't pick up the income; they don't get the deduction. However, the employer is able to deduct the qualified employer leave-based donation payments under 170, or 162 if the employer meets other restrictions as just a general business deduction—so either a charitable or it could be a general business deduction.

G. Employee Plan News

Employee Plan News has, this is interesting now because the 5300, *Application for Determination of Employee Benefit Plans*, it now, as of the end of June, no more paper. June 30th, 2022 was the last date to file on paper. It now must be filed electronically. And this notice provides, for example, only one PDF, less than 15 megabytes can be attached. And so, it goes on and tells you what to do with the remaining documents,

where to fax them. They're supposed to be submitted by fax to the IRS. It gives you all of the additional information, so you may want to look at that. It also talks about the \$0 user fee; but the general user fee has gone up. It is now \$2,700 for the general, and that's \$4,000 for multiple-employer plans. And the IRS notes that employers should review Rev. Proc. 2022-4 for the procedures, fees, and requesting any letter rulings.

H. *Balle-Tun v. Zeng & Wong, Inc.*, DC CO, 129 AFTR 2d ¶2022-663

We have an interesting case now coming out of the District Court in Colorado, *Balle-Tun v. Zeng & Wong, Inc.* And interestingly enough, what this was is that the employer fraudulently—willfully, fraudulently—filed with the IRS false W-2s underreporting taxpayers' wages. And so, these employees are suing the

employer. Well, this was dismissed. [The court] said you can't sue under the Code, Section 7434. You might be able to sue under another provision, but you can't sue [under] that. You have no standing to sue. That would be the IRS bringing an action, not the employees.

I. OECD Released Public Consultation Document March 22

Now, cryptocurrency, obviously a big issue that's been going on. We've talked about it in a number of programs. But the OECD has released another public consultation document on crypto banking issues relative to the OECD. Now, the OECD, Organization for Economic Cooperation and Development, and it is proposing a whole new framework for cryptocurrency.

One of the things that it does is provide for a slightly different definition; and that definition of a virtual asset could be significant. This is just throwing out a proposal; but it's something that is being scrutinized heavily by a number of different countries, and it lays out a whole range of what they would like to see the countries involved adopt.

J. Program Manager Technical Advice 2022-004

Now, there is a Program Manager Technical Advice, 2022-004. This is interesting because Chief Counsel's office clarified that tax-exempt business leagues' pension and health benefits plan for its members did not further its exempt purpose; therefore, it was unrelated trade or business income. This is not unusual for organizations to have different types of fringe benefits that they have their members who are able to participate in. And they said, "That's fine. You can do this, but it is going to be UBIT. It's going to be subject to tax because it's not furthering your interest."

Now, there is a previous letter ruling, 201246039. And the IRS had issued a favorable ruling to a business league that provided the benefits to its members. The IRS stated that the business league providing the pension to its members did not benefit any private person and providing the benefits did not adversely

affect the league's exempt status. This seems to take a different opinion, and that's why I think it's important to look at. They seem to be trying to make some very fine distinctions here. They noted that, unlike the activities that are described in a couple of prior revenue rulings, Revenue Ruling 73-452 and 76-410, the business league's activities were not directed at enhancing the perception of the industry or fulfilling the state-imposed obligation. It appears that what that they're trying to say is, essentially, this business league was kind of set up for that purpose. It wasn't really serving any other purpose, and this essentially allowed it to be competing against other entities providing those types of insurance. So, if you have any business league clients or not-for-profits that have this, I certainly would look at it. It doesn't mean they can't have it; it just means it's unrelated business income. Again, something to look at if you have anyone in there.

K. *Adams & Boyle, P.C., et al. v. Slatery III, et al.*DC TN

We have a case out of the district court in Tennessee, *Adams & Boyle, PC*. Interesting case because the district court, what had happened was there was a lawsuit; but the plaintiffs were represented by counsel pro bono. Well, they won, and the court ordered significant attorney fees. Well, they weren't charging, so the question is, is that income to the plaintiffs when they received an award that included attorney fees that

they never paid? Obviously, the attorneys are going to get the attorney fees. There's no question about that. But the court said, "No, that's not income to the plaintiffs. They don't have to report it as income. Simply, it was pro bono. The award of attorney fees, the attorney fee award will go to the attorneys. It's not income to the plaintiffs."

L. *In Re: Moore, Bkcty Ct OH, 129 AFTR 2d ¶2022-654*

Now, bankruptcy. We've talked in previous programs about bankruptcy, how important bankruptcy issues are. And in *Moore*, a bankruptcy court in Ohio, *In Re: Moore*, the Chapter 7 trustee objected to the taxpayer's exemption for his self-directed IRA—this was an exempt asset—and argued that it lost its qualification as an exempt asset because they engaged in a prohibited transaction. But what the court said is this wasn't a

prohibited transaction because essentially what happened here is that the individual's transactions—it was a self-directed IRA, so therefore it was not a prohibited transaction for a self-directed IRA. It was a prohibited transaction if it had not been self-directed; but, as a self-directed IRA, it was not a prohibited transaction. Therefore, it was exempt.

M. *In Re: Johnson, Bkcty Ct VA, 129 AFTR 2d ¶2022-633*

And in another interesting bankruptcy case, *In Re: Johnson*—this comes out of a bankruptcy court in Virginia—they had filed tax returns, but then they didn't. Some years, they didn't file tax returns. And the IRS then made assessments for the years they hadn't filed tax returns, prepared substitutes for returns under Section 6020. They filed claiming those were

dischargeable. This was a Chapter 13. They said, "These are dischargeable debts." And [the court] said, "No, a substitute for return does not qualify as a return. And therefore, the ones you filed returns for, yes, those can be dischargeable, but not the ones that you're relying on the substitute for returns. That is not a return that triggers the statute for assessment."

N. *Michael J. Rogerson v. Commissioner*TC Memo 2022-49

We have another case, *Michael Rogerson v. the Commissioner*. This is a tax court case; and you have an individual who has an aerospace activity and also is renting or chartering yachts. So, interestingly enough, what they decided to do was try... The yachts were per se, passive. So they tried to take their aerospace activity and say, "Well, that's passive too, so we can offset the losses and free up all those passive losses from the yachting." They argued. And we've talked about this in a number of cases now, this new argument of everything violates the APA, the Administrative Procedures Act. They didn't buy that; the court said no.

But here's what was interesting is they said, even if it was true, and even if the 5 out of 10 tests didn't apply to his aerospace business as passive, the general rule of the statute of 469 says regular, continuous, and substantial. And since he was the CEO, he was involved in all aspects of the aerospace industry. Everything—sales, customer relations, the accounting. Clearly, as regular, continuous, and substantial, this was not passive. Regardless, we don't even need to look at the regulations; so his arguments about the regs being invalid didn't matter. So, keep in mind the general rule does apply.

O. *Seaview Trading, LLC v. Commissioner*

CA 9, 129 AFTR 2d ¶2022-650

And then, we have an interesting case, *Seaview Trading, LLC*, the ninth circuit. This was interesting. The partnership believed that they had filed a return. The IRS contacted them. They sent a return, a copy of the return, to the IRS. The IRS later asked for another copy. They sent that. Now, the IRS says, "You never filed a return to trigger the statute." The court came down and the court said, and this is the Ninth Circuit Court of Appeals, said, "Yes, looking at the *Beard* case and the *Beard* tests, this provided the information that is needed. Yes, it wasn't filed at the service center. The taxpayer believed that they had filed one at the service

center." So what the IRS said was, "Well, it's not a return if you don't file it at the service center, as you were required to."

And the court said, "Wait a second. They thought they had. They sent you a copy as you directed twice. That triggers the start of the statute. That is a return. That provides you with the information necessary to determine their income. It meets the requirements under *Beard* as a return." And so, they told the IRS, "Look, you can't rely on 'filed at the service center.'"

P. *Warren K. Jackson and et vir. v. Commissioner*

TC Memo 2022-50

Our next case is a warning. *Warren K. Jackson v. the Commissioner*, a Tax Court case. And what happened here was the IRS... determined to proceed with a levy. And there was a request for installment, which was rejected. There were some issues at the CDP hearing. However—and here's the warning—taxpayers sought to dispute their underlying liabilities. However, they

didn't raise those at the CDP hearing. Therefore, moving forward, they're precluded. You can't bring it up if you didn't raise it at the CDP hearing; so if you're going to appeal from a CDP hearing, you can't raise new issues. Keep in mind you can't keep something in your hip pocket. You've got to raise it here, or you may lose that opportunity to do it. So, keep that in mind.

Q. *LB&I-04-0422-0014: Interim Guidance Memorandum on Economic Substance Doctrine and Related Penalties*

Another one, and this is within the IRS, LB&I, Large Business and International, 04-0422-0014 is interim guidance. However, what this does is the economic substance doctrine under Section 7701 or penalties asserted for underpayments that are transactions lacking economic substance, what the IRS has done with this is the IRS has said that there is no longer a need for agency examiners to get executive approval to

raise this economic substance doctrine and penalties during an audit. They may raise it without having any prior approval. Now, this does not change the requirement under Section 6751 that penalties have to be approved in writing by the immediate supervisor. That hasn't changed. What has changed is that they can now raise substance over form, the economic substance, without prior approval within the IRS.

R. *e-News for Tax Professionals 2022-17*

If you're doing an offer in compromise, if you're in collection and you are filling out the 433-A or -B, Form 656, *Offer in Compromise*, has now been updated, so we have a new updated form. Also, the local standards for collection. You get to take the lesser of your actual expense, or the local standards of things like housing, utilities, significant amount of local

standards. Those have all been updated; and so, the standards are now updated. And so, if you're filling out those forms, the IRS has said make sure you're using the updated 656 or 433-A or -B. And that again, the expenses have been updated.

S. *Gregory J. Podlucky, et ux. v. Commissioner*

TC Memo 2022-45

Now we have the *Gregory Podlucky v. the Commissioner*, another tax court case. Here, the wife was denied innocent spouse relief. Interesting case to read. What was happening—the husband was a CPA, was siphoning money off. He also had a beverage company to finance their lavish lifestyle. The husband had directed the scheme; but the wife couldn't show that any portion of the understatement wasn't attributed to

her. She had a crucial role in the whole scheme. She had authority over the shell company account that those funds were diverted, signed over a hundred checks on that account. This included millions of dollars in jewelry that benefited her personally, so she certainly had knowledge or reason to know. So looking at her involvement and all the personal benefit, they denied her that relief.

T. *Michelle DelPonte v. Commissioner*

158 TC No. 7

The DelPonte case, which is a regular tax court case, is an interesting case with innocent spouse relief in that the IRS Chief Counsel said... IRS Chief Counsel, this case is in the Tax Court. The IRS Chief Counsel has the final authority to concede or settle innocent spouse in any deficiency proceeding, even if the IRS's Cincinnati Central Innocent Spouse Operation has already informally determined that the petitioner was entitled to it. So, what happened was that the IRS Cincinnati Centralized Innocent Spouse Operation said, "Yes, we should give innocent spouse relief." This matter is in the court. The final determination for innocent spouse relief is with the Chief Counsel. So, an interesting case.

Well, a lot of things have gone on and a lot of subtle changes. This is one of those months where a lot of changes are rather subtle but could affect a number of our clients. I want to thank you for joining me, and we'll see you next time. Please be safe.

SUPPLEMENTAL MATERIALS

Current Material: Experts' Forum

By Ian J. Redpath, JD, LLM

A. Audit Report No. 2022-40-035

The Treasury Inspector General for Tax Administration (TIGTA) issued an audit that evaluated whether the IRS timely and accurately processed individual paper and electronically filed tax returns during the 2022 filing season. The audit found that "significant staffing shortages continue to hamper the IRS's efforts to address backlog inventories and affect the IRS's ability to ensure that current-year tax returns are processed

timely." Some 8.4 million individual tax returns and transactions remained to be processed as of the end of 2021, the audit noted, adding that more than 8 million cases remained in case management. There is also an issue with phone response time for the IRS.

B. IRS Operations During COVID-19: Mission-Critical Functions Continue

The IRS reported that it is opening mail within normal timeframes but that it still has 12 million unprocessed original and amended individual income tax returns and 3.8 million unprocessed original and amended payroll tax returns. This backlog includes both current- and prior-year returns, the majority of which are paper returns waiting to be reviewed and processed. The other unprocessed individual returns require error correction or other special handling; and they are taking up to 120 days to correct, process, and issue any refunds. The

IRS reported it had 2.2 million unprocessed amended individual income tax returns. According to the IRS, it can take more than 20 weeks to process amended returns. The IRS had 3.4 million unprocessed Forms 941. In addition, the IRS had 287,000 unprocessed Forms 941-Xs.

C. IRS Statement on Information Returns

The IRS admitted destroying about 30 million paper information returns filed in 2020 due to system constraints that required the agency to process the documents by the end of the calendar year in which they were filed. It plans to process all those it receives in

2022. U.S. Rep. Bill Pascrell, Jr., Chair of the House Ways and Means oversight subcommittee, called for replacing IRS Commissioner, Chuck Rettig.

D. ABA Tax Conference: Holly Paz, Deputy Commissioner of the IRS's Large Business and International (LB&I) Division

The IRS is working to increase and strengthen its partnership examinations, according to Holly Paz. She indicated that LB&I hired about 40 people with partnership expertise a year ago, is trying to bring in additional experienced staff, and current LB&I employees will undergo training this summer in dealing with partnerships. This is part of a centralized partnership audit regime which took effect in January 2018. Only 22% of partnerships elected to opt out in 2020. She also noted that Small Business/Self-

Employed Division (SB/SE) auditors have begun to use machine learning and artificial intelligence as a tool for identifying potential audit targets.

E. ABA Tax Conference: Mark Cottrell, Branch Chief for Procedure and Administration Within Chief Counsel's Office

The IRS Chief Counsel's Office considers the 90-day filing deadline in U.S. Tax Court jurisdictional despite the Supreme Court holding collection due process (CDP) filing deadlines to be subject to equitable tolling. (*Boechler PC v. Commissioner of Internal Revenue*. In a recent deficiency case, *Hallmark Research Collective*

v. Commissioner, Tax Court Chief Judge Maurice Foley dismissed a petition filed one day late. The taxpayer filed a motion to vacate, citing *Boechler*. The Tax Court on May 3 ordered the IRS to file a response by June 2. This matter will probably go to the Supreme Court.

F. Notice 2022-28, 2022-23 IRB

The IRS said employer leave-based donation payments by an employer before January 1, 2023 to §170(c) organizations and to aid victims of Russia's invasion of Ukraine will not be treated as gross income or wages of the employer's employees. Employers should not include the amount of qualified employer leave-based donation payments in Box 1, 3 (if applicable), or 5 of

an electing employee's Form W-2. Electing employees are not eligible to claim a charitable contribution deduction for the value of the forgone leave that funds qualified employer leave-based donation payments. An employer may deduct qualified employer leave-based donation payments under either §170 or, if applicable, §162.

G. Employee Plans News

The IRS announced that beginning June 1, 2022, Form 5300, *Application for Determination for Employee Benefit Plan*, can be submitted electronically. The IRS will continue to accept paper versions of Form 5300

through June 30, 2022. Employers should review Rev. Proc. 2022-4 for the latest procedures and user fees for determination letter requests.

H. *Balle-Tun v. Zeng & Wong, Inc.*, DC CO, 129 AFTR 2d ¶2022-663

A magistrate judge dismissed taxpayers'/former restaurant employees' §7434 claim that their employer willfully filed false Forms W-2 underreporting taxpayers' wages. While their allegations implied

damages to the IRS, they did not show any damages to themselves from the wage underreporting, so they had no standing to sue under §7434.

I. OECD Released Public Consultation Document March 22

The OECD outlined its global tax transparency agenda to promote the reporting and exchange of information between countries regarding so-called crypto-assets and financial account information. The OECD defines a crypto-asset differently than the Financial Action Task Force's definition of a virtual asset. The document

also lays out proposals for changes to the OECD's common reporting standard (CRS) relating to cryptocurrency. Over 100 jurisdictions have implemented the CRS to participate in the automatic exchange of identifying information of financial account holders and their balances.

J. Program Manager Technical Advice 2022-004

According to the Chief Counsel's Office, a business league's activity of providing pension and health benefits to its members is not substantially related to the league's exempt purpose, which is the promotion of

a particular industry and the common interests of its members. Thus, it is unrelated trade or business income to the organization. In PLR 201246039, the IRS issued a favorable ruling to a business league that provided

pension and health benefits to its eligible members stating that it did not benefit any private person and did not adversely affect the league's exempt status. However, on different issues, it states that it does not further the business league's exempt purposes and it creates unrelated business taxable income (UBTI). The activities are different than in Rev. Rul. 73-452 and

Rev. Rul. 76-410. The pension and health benefit activities relieved its members of the necessity of securing those services commercially and the expense and burden of separately providing for and managing their own health and pension benefits, resulting in a convenience or economy to the members.

K. *Adams & Boyle, P.C., et al. v. Slatery III, et al.*

DC TN

The court determined that attorney fees award to plaintiffs in a case in which counsel represented them pro bono did not constitute gross income to them.

L. *In Re: Moore, Bkcty Ct OH, 129 AFTR 2d ¶2022-654*

A Chapter 7 trustee's objection to the taxpayer's bankruptcy exemption for his self-directed IRA was overruled. The trustee's argument that the IRA lost its qualification when taxpayer engaged in indirect

prohibited transactions under §4975 failed since certain distributions taxpayer made to himself were not prohibited transactions, but rather were allowed distributions and were properly reported in income.

M. *In Re: Johnson, Bkcty Ct VA, 129 AFTR 2d ¶2022-633*

IRS substitute returns prepared under §6020(b) were excepted from discharge in a Chapter 13 case based on 11 USCS 523(a)(1)(B)'s exception for unfiled returns. Substitute returns do not qualify as returns for these purposes.

N. *Michael J. Rogerson v. Commissioner*

TC Memo 2022-49

The taxpayer ran an aerospace business activity through various entities and also had yachts he intended to charter. He was not allowed to offset his aerospace activity income with losses from the yacht chartering activity. The yacht chartering was per se passive rental activity, whereas aerospace activity was nonpassive. His arguments that Reg. §1.469-5(j)(1) was not properly at issue, the regulation was substantively

invalid because it contradicted §469, and that it is invalid as it violates the APA were meritless. The Court noted that taxpayer's involvement in his aerospace activities clearly qualified as material participation under §469(h)'s regular-continuous-substantial test when considering his role as CEO and that he was involved in all aspects of the aerospace business, from accounting and finance to sales and customer relations.

O. *Seaview Trading, LLC v. Commissioner*

CA 9, 129 AFTR 2d ¶2022-650

The partnership believed it had timely filed its partnership return to the appropriate service center. An IRS agent later claimed it had not been received; so the

partnership faxed a copy to the agent. The Court ruled that the faxed copy is a filed return sufficient to trigger the assessment period such that FPAA, which the IRS

issued more than three years thereafter, was time-barred. It ruled that §6031 regulations, requiring return filing to be at a service center, applied only to *timely*

returns, not delinquent returns such as the return at issue here. Even though belated, the return qualified as a "return" under the *Beard* test.

P. Warren K. Jackson and et vir. v. Commissioner

TC Memo 2022-50

In summary judgement, the Court upheld the IRS's administrative determination to proceed with levy for married taxpayers' outstanding self-reported tax debts plus penalties and interest and rejection of an installment agreement request. Taxpayers sought to use this case to dispute their underlying liabilities for certain penalties and interest, but did not properly raise

same during the CDP hearing and thus were barred from doing so now. Also, the settlement officer properly discharged all his obligations under §6330(c) in not considering the installment proposal because taxpayers were not current with their estimated tax obligations and failed to provide requested financial information.

Q. LB&I-04-0422-0014: Interim Guidance Memorandum on Economic Substance Doctrine and Related Penalties

The IRS has released an interim guidance memo that removes the need for agency examiners to obtain executive approval to raise the economic substance doctrine and related penalties during an audit. According to the memo, executive-level approval is no longer required to raise the economic substance

doctrine argument or assert the related penalties. The guidance related to the penalties was changed to align them with other assessable penalties that don't require executive approval. It does not affect the need for immediate supervisor approval for penalties under §6751.

R. e-News for Tax Professionals 2022-17

The IRS has updated Form 656 and the accompanying booklet. This is used to obtain an offer-in-compromise (OIC). A compromise is an agreement between a taxpayer and the IRS that settles a tax liability for payment of less than the total amount determined and assessed. The booklet contains all the forms needed by an individual or business to submit an OIC. The offer must be submitted using the most current version of the booklet (Rev. 4-2022) to avoid issues with processing. The IRS also encourages use of the IRS's OIC Pre-Qualifier Tool to verify eligibility prior to filing.

The IRS also updated its collection financial standards (CSF), effective as of April 25, 2022. The IRS uses the CFS to determine a taxpayer's ability to pay a delinquent tax liability when reviewing the taxpayer's proposed payment agreement or OIC. A taxpayer is allowed to deduct from their income the monthly amounts listed for their family size in the CFS for their necessary living expenses. Necessary living expenses are expenses that are necessary to provide for a taxpayer's (and his or her family's) health and welfare and/or production of income. There are various types of standards that may apply.

S. Gregory J. Podlucky, et ux. v. Commissioner

TC Memo 2022-45

A spouse was denied innocent spouse relief under §6015(b). Her husband, a CPA and business owner, took money from his beverage company to finance their lavish lifestyle. She played a crucial role in the scheme, including having authority over the shell company

account through which the funds were diverted. She signed over 100 checks on that account, which were made out to various vendors for various items, including millions of dollars in luxury jewelry benefitting her personally. Similarly, she was

considered to have knowledge or reason to know of understatements. Her claim that because the jewelry was in a secret room on company property, it belonged to the company, was not credible. She was clearly involved and personally benefited from the funds.

T. *Michelle DelPonte v. Commissioner*

158 TC No. 7

The Court determined that IRS Chief Counsel has the final authority to concede or settle an innocent spouse defense in a deficiency proceeding, even if the IRS's Cincinnati Centralized Innocent Spouse Operation (CCISO) informally determined that the petitioner was entitled to that relief. The petitioner raised innocent-spouse relief as an affirmative defense in her deficiency proceeding based on deficiencies generated by her husband's business as a tax shelter promoter. Chief Counsel referred Michelle's innocent spouse request to CCISO. CCISO concluded that Michelle was entitled to innocent spouse relief. Chief Counsel was not happy with CCISO's determination and asked her to provide more information. She refused and moved for summary judgment. The Court agreed with Chief Counsel's position, noting that under §7803(b)(2) and various delegation orders, Chief Counsel has the authority to concede or settle any issue with a taxpayer. CCISO merely provided a nonbinding recommendation.

GROUP STUDY MATERIALS

A. Discussion Problems

Required:

Address the issues raised in these three independent situations.

1. Your firm has a large number of partnerships. Your clients have had few audits over the years. Are there any concerns going forward? Discuss what is happening within the IRS on partnership audits.
2. Your client is involved in an audit, and the auditor is raising an economic substance issue. You know the auditor has not received any executive-level approval. Discuss how to proceed with this audit on the economic substance issue.
3. Your client is in Tax Court, and the CCISO has recommended that he be granted innocent spouse relief. Will the IRS concede on this issue in Court?

B. Suggested Answers to Discussion Problems

1. The IRS is placing significant importance on partnership audits. This has increased with the centralized partnership audit regime that came into effect in 2018. The IRS has been hiring more experienced auditors for this purpose and training existing staff. Additionally, there will be greater use of machine learning and artificial intelligence to identify audit targets.
2. The IRS has amended its procedures and no longer requires executive-level approval to pursue economic substance arguments or assert related penalties in audits. This does not impact penalties under §6751 that require immediate supervisor approval.
3. The IRS may, but is not required to, concede simply because the CCISO has recommended granting innocent spouse relief. It is a determination of the Chief Counsel.

PART 2. INDIVIDUAL TAXATION

Cryptocurrency

Cryptocurrency is also known as virtual currency or digital assets. Since its popularity and value have grown significantly in recent years, it has become a target area for the IRS and has become even more significant with the 2021 tax returns. It is important that tax practitioners become knowledgeable about how cryptocurrency works and the tax rules that apply. Care must be taken to educate and evaluate any clients with a position in virtual currency.

Let's join Ian Redpath and Shannon Jemiolo as they discuss issues related to cryptocurrency.

Mr. Redpath

Shannon. Welcome to the program.

Ms. Jemiolo

Hi, Ian. Thank you so much for having me.

Mr. Redpath

It's always great to have you. Love having you here. We have a real interesting topic today and it almost seems like it's changing daily when we hear about cryptocurrency. It's always in the news, but it seems like it's always in the news for the IRS too. They always seem to have something to say about cryptocurrency. Really, what are we talking about here? Because people have heard the term and what exactly is this term cryptocurrency? What does that mean? Because I've heard these terms, cryptocurrency, virtual currency, digital currency now from the IRS. So, are these all the same? And what is this?

Ms. Jemiolo

They are essentially all the same. There are a few outliers, but for the most part you can use them interchangeably. Virtual currency, cryptocurrency is, I mean, it's really just that. It's currency that's electronic. So, you pay money to buy this virtual currency; and the virtual currency is stored in a virtual wallet, much like regular currency would be. The key difference though, is that from the IRS's perspective and why we've been seeing it so much in the news recently, is that from an IRS perspective, virtual currency is not currency. It's going to be treated as property, which causes just so many other issues to crop up with it.

Mr. Redpath

Well, I believe that El Salvador has actually said it's going to be treated as actual currency.

Ms. Jemiolo

Yes. They adopted it. They adopted Bitcoin, which is one of the most prominent, right now, cryptocurrencies. They adopted it as a national currency.

Mr. Redpath

I know that we have a number of athletes that have been asking to be at least partially paid in Bitcoin or other cryptocurrency—kind of the broad term. Bitcoin may be the most famous, but there are other currencies out there. From a lay person out there because a lot of our viewers, they're not technology people and I don't want you to get into the weeds here. But there's all of these things out there. We hear about blockchain technology, and then hard forks, and air drops, and all of these types of things. Can you give us kind of the layman's view of what that all means?

Ms. Jemiolo

Absolutely, and stop me if I start getting too into the weeds. I love this stuff. Cryptocurrency, one of the big benefits of it, and one of the reasons why it's taken off so much—you have dollars in your wallet, you walk down the street, you could get robbed, and that money's gone for good. Cryptocurrency is significantly more secure. So, how cryptocurrency is stored, it's what's called cryptography; or most people have probably heard of it, like you've said, as blockchain. Essentially how blockchain works, you can think about a million different computers that are all chained together electronically. So each computer is viewed as a block, hence blockchain. It's a chain of blocks. And how these transactions, how your Bitcoin or whatever virtual currency you're using is stored, every single block in that chain stores data. Which means maybe somebody can hack into one of those computers, maybe they can hack into hundreds of them. But unless they're able to access everyone on that chain, you cannot change those transactions. You can't get this money stolen from you.

Mr. Redpath

Okay. So in some respects, as you said, it's a little more secure.

Ms. Jemiolo

It is. It is significantly more secure.

Mr. Redpath

How is it valued? Because I know that we've heard and I know right now we're, nothing's doing real well as we're speaking today, the stock market. But how is that valued? How do we determine what this value is with, say Bitcoin? Is it just throwing something up in the air; or how is it valued?

Ms. Jemiolo

Well, it's not much more than that. It's much like a stock. You have a lot of people who are buying and selling and trading these digital currencies and that's how the stock price is getting formed.

Mr. Redpath

Is this buying and selling? I know there are companies out there, much like a Merrill Lynch in currency, that sell various cryptocurrencies. So you have them. But when you're getting this cryptocurrency, what are you getting? I mean, what do I have? How do I know what I have? Because somebody has said, this is what you have?

Ms. Jemiolo

So, when it comes down to it, you are going to work with a broker or some kind of cryptocurrency company who will give you access to your virtual wallet for a fee. Once you have that virtual wallet, it's really a lot like if you were going out there to buy a stock. You would hand over your money, you would deposit your money, and you would have it converted over into an equivalent value at that moment of your cryptocurrency. So that would become what you've paid for it—it's your basis. But from there, what we've been seeing with these cryptocurrencies, really since their start, has been a great deal of volatility. The prices, the values of these change very rapidly, which can lead to a lot of tax consequences for an unsuspecting taxpayer.

Mr. Redpath

Absolutely. I've heard this term, "mining." I don't think it's people walking around with lights on their hard hats.

So, what exactly does mining mean? People mine in cryptocurrency or mining in Bitcoin. What does that mean, to mine?

Ms. Jemiolo

When they're talking about mining, companies have very complex tasks, very large tasks. An easy way to get these done is to split them up into a lot of very small tasks, small tasks that one person on one computer could theoretically do and finish. And so, that's really what mining is. To mine for cryptocurrency, it's you're using your computer to do these series of tasks; and in doing so, you'll get rewarded with cryptocurrency.

Mr. Redpath

Okay. It's interesting that one of the things that has been really an area that the IRS has been going after is people are, especially in crowdsourcing, in the gig economy, a lot of people are getting paid in Bitcoin. And I think there's a general concept if you talk to people outside of accountants, tax accountants, there's kind of this belief out there that, well, that's nothing. I got paid in Bitcoin, but since I didn't get money, so what? And by the way, how's the IRS going to know? The IRS can actually track better Bitcoin than they can cash under the table. Isn't that correct?

Ms. Jemiolo

Yes.

Mr. Redpath

So, it's still taxable, isn't it?

Ms. Jemiolo

It is absolutely still taxable. And that's an issue that, as a tax practitioner, I've been running into with a lot of my clients where it's not so much that they're actively trying to evade taxes or hide something from the IRS. It's that they aren't even aware that these types of transactions do represent a taxable transaction. Having Bitcoin, having this virtual value, even though it's not tangible, even though it's not necessarily in your bank account or on your person, it doesn't make it less real from the IRS's perspective.

Mr. Redpath

Well, it's not Monopoly money, but I think people think that. They think it's fake money. It's not really money. It's something else. It really doesn't mean anything.

Until I convert it to dollars. If I convert it to dollars, then it means something, but not until then. But, certainly you mention a lot of athletes now are trying to get paid. That's income, that's just salary. It doesn't matter if you're getting paid in Bitcoin or in cash, it's still salary. So, then it has to be reported. I think the significance, if we're looking at it from a practitioner standpoint, the IRS is making it extremely clear. Look what they did. First, they moved the question that was on Schedule B. They moved it right under the header on the 1040. And then in 2021, they changed it. They used to say, acquire an interest. Now they say, dispose of an interest.

Ms. Jemiolo

I love that change of wording.

Mr. Redpath

Yes. It can mean a lot. And then, the instructions really don't go into a lot of things. All of these things are issues that you have to report. If you have any of these interests in anything, you have an interest in cryptocurrency. I had someone tell me they, because they told me, "No, I don't have any cryptocurrency. I have no cryptocurrency. I have no cryptocurrency." Then they said, "You know what? I did this thing, that was a thing that they gave me a thing and I think I have \$5 in cryptocurrency somewhere." It was one of those, where this was what they got, but I went, "Well, then you do have an interest in a cryptocurrency account. So, what's happened with it?" "I don't know. I've never looked at it."

Ms. Jemiolo

Yes.

Mr. Redpath

I said, "Well, you better start looking at that, and we better decide how to report this."

Ms. Jemiolo

When we see that a lot, especially what you're talking about, sounds a lot like a term that you threw out a little bit ago, air drops. A lot of these cryptocurrency exchanges are trying to promote their cryptocurrency to get more people to buy into it and use it. And one of their ways that they're doing to try to market it is by airdropping or gifting. I'm not sure if that's the best word to use for it, but they're giving people free, whatever their cryptocurrency is, very small amounts,

just to try to stimulate some interest in it. And exactly like what you were saying, these are things that a lot of taxpayers aren't necessarily thinking about—I got \$5 in whatever crypto—but that doesn't make it less relevant for tax purposes.

Mr. Redpath

Right, absolutely. So now we know that the IRS is really highlighting it as they put it up onto the front page on the 1040, right under the header. But I think we need to look at it historically, because the IRS has really had issues. What is Bitcoin? What is cryptocurrency in general? And I use Bitcoin because that was really one of the first major ones on the market that the IRS had to address.

Ms. Jemiolo

Yes. It's still the fan favorite as far as valuation of cryptocurrencies, I think. Right now, we're looking at about \$2 trillion in crypto value, and almost half of that is just Bitcoin.

Mr. Redpath

Well, \$2 trillion, hold on a second.

Ms. Jemiolo

Oh goodness!

Mr. Redpath

That was 10 minutes ago. 10 minutes ago it was \$2 trillion. Who knows what it is today? Probably not more. Probably not more. That's been a problem. Really, the IRS's kind of approach to it, an attack started in 2014. Can you kind of give us a history of where the IRS is? And then we can get to what we really need to talk about our clients; because in 2023, we've got some things to look at.

Ms. Jemiolo

Yes, absolutely. In 2014, the IRS really had to first start addressing what do we do with cryptocurrency. 2014, the IRS decided that cryptocurrency was going to be viewed, not as currency, but as a form of property. And as property, any general tax principles applied to property would apply to crypto. So if your cryptocurrency was being received as payment for goods or services, same as if it were any other property you would be receiving, it's going to be income when you receive it based on the fair market value at the time.

And as far as the taxpayer who's using that crypto to pay, they'll recognize a gain or a loss on the sale or the disposal of that crypto based on whatever the value received for it was.

Mr. Redpath

So, if it's the athlete, it's a W-2, right? I mean they still should be getting a W-2 for that, for the value at the time that it was obtained. Now I just, this tax season, someone who didn't have any cryptocurrency by the way, at least when I asked them. Then, when I explained, all of a sudden got an 8949. Pages and pages and pages of an 8949, and they're all small, but they all added up. And literally not a lot, but just it's pages and pages of 8949s to carry over to the Schedule D from these cryptocurrency transactions. And a lot of people when you talk to them, they, "Yes, I have the cryptocurrency, but oh, I don't know what... Transactions? What do you mean? How do I track them? Where do I get that information from?" Now, there are programs out there that actually will track all of this.

Ms. Jemiolo

Yes, there are.

Mr. Redpath

For a fee. For a fee, they'll do this. But it becomes very difficult because as you said, people don't quite understand what exactly this cryptocurrency is. You mentioned, we had that Notice 2014-21. And that's the notice that we've kind of been dealing with; and again, that's the one that talks about property, that it's a property transaction. So, it's a property transaction, okay; I'll go along with that. So, when have you sold them? When are you reporting something? So, it's property and then what?

Ms. Jemiolo

So, how this works, the real emphasis on when we get to report it, is when we have dominion and control over the currency. Now, because of these virtual wallets and a lot of times the lag that comes whenever you go to transfer it between two parties, dominion and control can happen at a different time, a little bit farther down. And because of the volatility that we see with the valuations, the prices of these cryptocurrencies, can have a huge impact on the tax liability that comes out of these transactions, what the fair market value works out being, and how it impacts basis. The most readily

example I can think of—Bitcoin. I know we're talking about it so much, but it's just such a big player in the cryptocurrency game.

Bitcoin in 2017, August of 2017, they did a hard fork. Now, a hard fork again, without getting too technical with it, a hard fork is just where it's kind of like a corporate spinoff. They decide to change the protocols of their blockchain. So, you end up having two blockchains coming out of this. Two different paths that you can go down with it. So, Bitcoin did this. And when they do it, people who have the old currency will get a little bit of the new currency too. And then, hopefully, the idea being that they eventually switch over to this new path, the new blockchain. Bitcoin did one of these hard forks back in August 2017. When they did it, so they created this Bitcoin cash. Now, at the time that they did this in August of 2017, all of their Bitcoin holders received a Bitcoin cash token, and it was currently valued at \$340. So, on that date, had they received dominion and control over that currency, they had been recognizing ordinary income of \$340 for that coin received. If there was a lag though, and we saw this happen with quite a few of the holders, by December of 2017, so just a few months difference, that Bitcoin cash token? That was worth about \$4,400.

Mr. Redpath

Wow!

Ms. Jemiolo

About a \$4,000 swing in the tax liability coming out of that hard fork.

Mr. Redpath

Yes. I mean, and these are things that you don't necessarily... You have no control over that. That's being done by the company, correct?

Ms. Jemiolo

Right. And it's all about when does it actually hit your virtual wallet and when do you truly have control over it? When can you use it?

Mr. Redpath

So, let's go back to that crowdsourcing that we talked about. This has been kind of controversial. What the IRS's stance? Because crowdsourcing has just been very popular. What's the IRS's stance on money raised through crowdsourcing?

Ms. Jemiolo

The IRS, in a legal memo they published in 2020, they ended up taking the position that if the taxpayer receives any kind of virtual currency—and here's the keyword here—it has to be convertible virtual currency in exchange for performing one of these crowdsourcing tasks, that taxpayer's going to have been compensated with property. And it's going to have to be reported on their income tax return as ordinary income and possibly subject to self-employment tax.

Mr. Redpath

Okay. There's another one we're not going to think about, right? It's potential self-employment tax. But what about if I'm raising money for my company through crowdsourcing? Or what if I say, "I'm raising money for the victims of X, Y, Z tragedy." What about those? Because you see those all the time too, and they can be paid in cryptocurrency.

Ms. Jemiolo

And right now, it's still a little bit of a gray area. The IRS has come out to say that it's going to be based on a facts-and-circumstances type situation. And a lot of these, generally speaking, if we're talking about crowdfunding, if it's being donated to a charitable organization, a registered nonprofit, it's going to be able to be treated as a charitable donation, as property. So you will likely still need to have appraisals, which could cause some issues. It could be classified as a gift; but if the contributor is viewed as receiving anything of value from this transaction, it's going to be pushed in as taxable income. It'll be treated as a basic business transaction.

Mr. Redpath

Like a quid pro quo situation with a charitable contribution.

Ms. Jemiolo

Exactly. And since a lot of these crowdfunding campaigns tend to take a pretty conservative position, they treat the transfer as a sale. That taxable income scenario is almost more likely than not.

Mr. Redpath

Okay. Now, here's another issue that I hear a lot, and it's always questionable. The IRS has, I think, temporarily clarified it with a notice, that 2020-2, they

clarified this. And it's interesting because it could change tomorrow with the way cryptocurrency is, but the FBAR. I mean, we're talking about things that are on a blockchain of computers. How do we know if it's a foreign account holding Bitcoin, and is that subject to FBAR reporting?

Ms. Jemiolo

So far, it is not reportable for FBAR.

Mr. Redpath

Now, you used that word, 'so far.' I did hear you say that. So, what's your thought on that?

Ms. Jemiolo

Yes. Just looking forward. Right now, it's not required. It's not reportable on that Form 114 so long as the account is holding purely virtual currency. Now, if the account holds virtual currency and something else, some kind of real currency, it's going to get brought into it. But this is why I said, 'so far.' It's probably going to be coming down as an amendment to the regulations for that Bank Secrecy Act. These cryptocurrency things have gotten so big. It's going to force their hand, I believe, in the future.

Mr. Redpath

Well, that leads us to another area because I think that, and if we're not prepared for it, we talk about it that you really need to, and I've talked to a lot of accountants and said, "You better be changing your client organizer, client input sheets, whatever you call them, because you've got to start asking a lot of questions about cryptocurrency." Because if you just have a question about, do you have an account in cryptocurrency, you may very well get a "No," when the reality is, it's a "Yes."

What we do need to prepare for, I think, is the fact that our clients are going to be getting significantly more reporting. Where do we stand on that? And I believe it starts in 2023, correct, the new reporting requirements?

Ms. Jemiolo

Yes.

Mr. Redpath

What are the new reporting requirements that are going to come in?

Ms. Jemiolo

The Infrastructure Investment and Jobs Act extended our reporting requirements for cryptocurrency in ways where we're going to see these reported much like if a taxpayer were buying and selling stocks or bonds, something else. It's going to be a very similar-looking form. So, brokers are going to have increased reporting requirements for these cryptocurrency transactions. It's going to be effective as of December 31st, 2022. So, January 1st, 2023. So starting next tax year, they're going to be, these brokers are going to be required to record the transactions, track basis, and send out a form very similar to that 1099-B, if not on that form itself. So, they'll be reporting to both the taxpayer and the IRS, names, addresses, phone numbers of the customers, the proceeds from the sale, capital gains and losses, the holding period, all of that.

Mr. Redpath

I remember when this came in and kept being postponed because the investment houses were saying, "Oh, we can't track basis. We can't do all of this." And now, I'm hearing the same thing in the crypto industry. They're saying, "Well, this is going to be such a burden on us." In my view, it's going to be helpful as a practitioner because when I talk to clients about, "What's your basis in this?" "What? I don't know." Okay. How do we track that particular transaction? And literally, if you have a lot, unless you have something tracking all of this, it's literally impossible for the client to say, unless they're highly sophisticated, to give you, well, this is the basis. This is what it is. These hard forks took place or had an airdrop, and it becomes very difficult. So, I see this as a real advantage from a practitioner's standpoint. We've got the information, we know it's been reported to the IRS, here we go. And we have some protection then based upon what we're provided. And that's the information that they gave us. There's also another reporting requirement, right, that \$10,000 that we think about?

Ms. Jemiolo

Yes.

Mr. Redpath

What's going to happen there?

Ms. Jemiolo

As it was already, if you were engaged in a trade or business and you received cash in excess of \$10,000 within one single transaction, you were required to file

Form 8300. The Infrastructure Investment and Jobs Act, again, they expanded this out too, to include cryptocurrency. So now, same kind of thing, if you receive more than \$10,000 worth of cryptocurrency in a single exchange or transaction, you'll again be required to file that same Form 8300 to show that. Like you said, definitely not Monopoly money.

Mr. Redpath

And I think what's going to happen with that is—and this is one that people don't always think about—is there's the suspicious activity report. And I had a client that I represented in a criminal case. Well, what was happening was \$9,800, \$9,900, \$9,800, \$9,700. Well, what happened was, it didn't fit the 8300, but it was a suspicious activity and this had continued. And so they sent to the IRS a suspicious activity report. Next thing they know, there's a knock on the door. It's a special agent who wants to talk to them about all of these transactions that were taking place. And I can see the same issue could come up here, too, with this suspicious activity report; because I think that's got to be considered kind of part of the reporting on that \$10,000. Because you just can't go with \$9,900, \$9,800, \$9,950. You can't keep cutting under that just to avoid it. So a lot more.

Now, there's another thing that's coming up. And this is kind of another area that we would call the wild west, which cryptocurrency has been, and that are these NFTs or non-fungible tokens. And I was shocked when I saw, for example, that Dorsey. Dorsey has as a non-fungible token, his first tweet. The first tweet that was sent out on Twitter, there's a gif. One of the original gif's that came out. But you have entertainers like Snoop Dogg, and these people who are getting into this. Artwork, people are putting artwork on these non-fungible tokens as a way of... You can be engaged in an art collection and you have nothing but these non-fungible tokens. The IRS is going to go after them. What are these non-fungible tokens? What are things we should be looking at with our clients on this?

Ms. Jemiolo

As you said, these are still very much the wild west. How the IRS is going to treat these, it's still really in its infancy. It's not quite as well developed as what we see with cryptocurrency. These NFTs though, like you said, they are electronic files of artwork. And I think the gif you were talking about was [Nyan] Cat, the cat that was flying with rainbows behind him.

Mr. Redpath

Yes.

Ms. Jemiolo

Right now, best indications are that the IRS is going to be treating these like artwork, like collectibles, like property. So chances are we're going to see something pretty similar to how cryptocurrency is being treated currently.

Mr. Redpath

So people are doing things like songs, artworks, as you said, the gifs. Dorsey has a non-fungible token. So, people are buying these tokens and then that allows them to, in essence, allow use of that for, I'm sure, royalties. It's a whole, exactly how this is all going to work out, but the IRS has really come out now and said, "We're looking at these closely." But like you said, it looks like it's going to be collectibles, that they'll be treated like property, and I'm assuming a collectible.

So, at least right now it would be the 28% maximum rate when you dispose of those, assuming you held them long term. So, now we're going to get into all of those issues. Are the same people selling cryptocurrency going to be engaging in NFTs? Either you can buy an NFT or you can get Bitcoin, or you can buy Ethereum or that type of thing. As you said, we're in the infancy now. But the IRS has recently come out and said, "You know what? We're going to be looking at these very closely." Right now, it looks like property, but exactly what these are. So I agree with you. I think it's going to be treated like it's the underlying, whatever the underlying thing is, music, artwork, whatever.

Ms. Jemiolo

Given what we've seen with cryptocurrency and how relatively quickly the IRS jumped onto it and started handing out rules, this is going to be something that tax practitioners are going to want to get out in front of for their clients. Much better for the tax practitioner to know about these before the IRS, right?

Mr. Redpath

Right.

Ms. Jemiolo

Especially given what we saw back in 2019 with cryptocurrency. The IRS had already started sending out letters to taxpayers that they suspected may have

been under, or just simply not, reporting cryptocurrency transactions. It's not a letter you want your client to get for one of these NFTs without you knowing about it.

Mr. Redpath

Yes. And I think, again, there's a good reason right now to change or add to your client organizers, your client input sheets, whatever you call them to ask about the NFTs. Because again, people have a hard enough time trying to figure out what virtual currency or cryptocurrency is, let alone now here's this other thing. So if you're asking them, do you have any cryptocurrency, their mind may be thinking something totally different than have you purchased an interest. So actually, you could have something; let's say that I know Snoop Dogg has sold some things on there. Well, you could have 20 people owning that. You could have a hundred people, 300 people who have an interest in that particular... It's not like buying the rights to it. It's not like going and buying the... "Okay, I've got artwork. I've got a Rembrandt. I'm going to put it up on my wall. I have an artwork that I own some interest in somewhere on the internet." Am I kind of right about that? Is that kind of how it's going to be?

Ms. Jemiolo

Yes. It's a little crazy to wrap your mind around when you haven't been following them for a while.

Mr. Redpath

So, I think that's the next area to look at are the NFTs. And again, I'd make sure that when we're talking to our clients, and it's never too late to get ahead of this, because we're going to have to start knowing about it because we know the IRS is going after it. To get ahead of it, talk to our clients now, and again, revise anything that needs to be revised, like an organizer to include these NFTs, knowing the IRS has a target on these. They're going to go after these. How they do it? I totally agree with you. I think they're just going to say, "Hey, it's property. You're going to treat it like property, just like we did cryptocurrency. And you're going to report the transaction as a property transaction." So, you sold your 1/12 1st interest in this work of Snoop Dogg. It's property. What's your basis? And I could see them extending the reporting requirements also to NFTs.

Ms. Jemiolo

Oh yes, absolutely.

Mr. Redpath

I think the structure's there; they're just going to apply it, I think.

Ms. Jemiolo

I agree.

Mr. Redpath

So any other things that we should be telling our viewers they need to watch out for now?

Ms. Jemiolo

Just one other thing, because I've gotten this question from a lot of parents during this past year, when I start bringing up cryptocurrency. Anybody who has kids between the ages of five and 20 are probably dealing with this—Robux and V-bucks, two types of virtual currency that exist within games. Robux is in ROBLOX, V-bucks is in Fortnite. So, extremely popular games. For a little while, these were actually lumped into this taxable framework. 2019, the IRS came out and said that because neither one of those are convertible into hard currency. Right? You pay money into the game. You can't cash that money back out. It's gone.

Mr. Redpath

Okay.

Ms. Jemiolo

Because it's not convertible, it's not going to be viewed as income. So, big sigh of relief from parents across the country, I think, that they aren't going to be having to track their children's video game transactions.

Mr. Redpath

Shannon, thank you very much. Great program. Glad to have you here. We'll have you back soon. Thanks, Shannon.

Ms. Jemiolo

Thank you so much.

SUPPLEMENTAL MATERIALS

Virtual/Crypto Currency

By Ian J. Redpath, JD, LLM

A. Introduction

The popularity and value of virtual currency, also called cryptocurrency or digital assets, has grown significantly. The "urban myth" is that this is "not money," so nothing to declare. It has been used by some to avoid tax as a form of "tax shelter" similar to the concept of an offshore account. Taxpayers often do not understand that virtual currency is not "anonymous" and the IRS has the ability to "track" it. Beginning in 2014, the IRS started issuing guidance on virtual currency and, of course, the taxation of it. In March 2022, President Biden signed an executive order

requiring the Secretary of the Treasury to submit a report to the President on the future of digital assets and their role in payment systems.

More than 6,700 different virtual currencies are publicly traded. The total value of all cryptocurrencies is in the trillions of dollars. While some countries (for example, China) have banned cryptocurrencies, others have embraced it (such as El Salvador, which in 2021, adopted Bitcoin as a national currency).

B. What is Virtual Currency

Virtual currency is a digital representation of value, while a representation of the U.S. dollar or a foreign currency (real currency) functions as a unit of account, a store of value, or a medium of exchange. Some virtual currencies are convertible, which means that they have an equivalent value in real currency or act as a substitute for real currency. The IRS uses the term "virtual currency" to describe the various types of convertible virtual currency that are used as a medium of exchange, such as digital currency and cryptocurrency. Regardless of the label applied, if a particular asset has the characteristics of virtual currency, it will be treated as virtual currency for federal income tax purposes. It is a digital representation of value that is stored and transacted only through designated software, mobile or computer applications, or through dedicated digital wallets. The transactions are conducted through secure, dedicated networks on the internet. It is convertible into traditional currency (fiat). It also can be used as payment for goods and services if the seller accepts it. Companies such as Microsoft, Overstock, and Tesla will allow payment in Bitcoin. While Amazon currently does not accept virtual currency, gift cards can be purchased from some vendors with virtual currency and used on Amazon.

Cryptography is used to secure transactions that are digitally recorded on a distributed ledger, such as a blockchain. Units of virtual currency are generally called coins or tokens. The distributed ledger

technology uses independent digital systems to record, share, and synchronize transactions, the details of which are recorded in multiple places at the same time with no central data store or administrative functionality.

A hard fork occurs when a virtual currency's network protocol changes so that one group of network participants adopts the new protocol, while another group of network participants follows the old protocol, or one that is substantially different from the new protocol. In other words, the two protocols are incompatible with each other, and thus so are the networks. This is also called a chain split because there are now two virtual currencies. Generally, those who held coins, or tokens, prior to the hard fork retain those same coins in the same wallet and are issued new coins in a new wallet from the new crypto network equal to the number of coins they held at the moment of the chain split. Hard forks are analogous to a corporate spin-off; though not for tax reporting purposes, of course.

Airdrops are typically tokens, or coins, that are distributed gratis to individuals who participate in a community. Airdrops are primarily used for marketing and promotional purposes to raise awareness of a cryptocurrency.

The tax result is the same whether a taxpayer receives virtual currency via an airdrop or a hard fork. In almost every country, it's considered taxable at some point.

To buy virtual currencies, a person will need a digital "wallet" to hold the currency. Generally, wallets are created through an account on an exchange. At that

point, a person can transfer traditional currency to buy virtual currency such as Bitcoin or Ethereum.

C. Increased Scrutiny

In 2019, the IRS put a question regarding virtual currency on Schedule 1. For 2020, they moved that question to the header on the first page of Form 1040 and Form 1040-SR. In 2021, they revised this question by changing "acquire" an interest to "dispose" of an interest in virtual currency.

- A transaction involving virtual currency includes, but is not limited to: The receipt of virtual currency as payment for goods or services provided;
- The receipt or transfer of virtual currency for free (without providing any consideration) that does not qualify as a bona fide gift;
- The receipt of new virtual currency as a result of mining and staking activities;
- The receipt of virtual currency as a result of a hard fork;
- An exchange of virtual currency for property, goods, or services;
- An exchange/trade of virtual currency for another virtual currency;
- A sale of virtual currency; and
- Any other disposition of a financial interest in virtual currency.

A transaction involving virtual currency does *not* include the holding of virtual currency in a wallet or account, or the transfer of virtual currency from one wallet or account owned or controlled by a taxpayer to another wallet or account owned or controlled by the same taxpayer.

Transactions may require reporting as ordinary income as compensation or as a capital asset transaction on Form 8949 and Schedule D of Form 1040. In Notice 2014-21, 2014-IRB 938, the IRS indicated that virtual/crypto currency was a form of property and general tax principles apply. If received as payment for

goods or services, it is income when received based on its fair market value (FMV) at the time. Taxpayers recognize a gain or loss on the sale or disposition of virtual currency based on the value received. The character of the gain or loss is dependent on how the taxpayer holds the property. The emphasis is on the time the taxpayer has "dominion and control" over the currency. A taxpayer has dominion and control over the virtual currency when the taxpayer has the ability to transfer, sell, exchange, or otherwise dispose of the virtual/crypto currency. The tax basis is established based on the fair market value at that time. If the taxpayer cannot exercise dominion and control over the newly created virtual currency, then the taxpayer does not recognize gross income until it is actually or constructively received. Once the taxpayer is able to exercise dominion and control (typically when the cryptocurrency exchange credits the taxpayer's account with the new virtual currency), then the taxpayer must recognize income on the date it was constructively received based on the fair market value of the crypto at that time.

Example: One of the most prominent hard forks to date was the spin-off of Bitcoin Cash (BCH), from Bitcoin (BTC) in August of 2017. Bitcoin holders received 1 BCH coin for 1 BTC coin. At the time of the fork, 1 BTC was worth approximately \$2,800 and 1 BCH was worth approximately \$340. Applying Revenue Ruling 2019-24, a taxpayer who held 1 BTC at the time of the hard fork would recognize \$340 of ordinary income, but only if the taxpayer was able to "exercise dominion and control" over the BCH. Because of the price fluctuation of virtual currency, if the taxpayer custodies 1 BTC coin at a crypto exchange and his/her account was not credited until December 20, 2017, then there would have been recognized income of approximately \$4,355 (the price of BCH on that date). That's a nearly \$4,000 difference from the date of the hard fork.

"Property" treatment causes both valuation and tracking issues. Websites differ on the value. Value changes on a moment-to-moment basis. Businesses using this technology have to account for thousands of transactions taking place in seconds.

Example: The taxpayer agreed to sell widgets for a price of \$100,000 but agreed to take payment in the form of Bitcoin. The FMV of the Bitcoin accepted as payment was in fact \$105,000 when received; the \$105,000 is considered to be the sale price. The basis of the Bitcoin in the hands of the seller will be \$105,000. If the taxpayer later sells or exchanges that Bitcoin when the FMV is \$115,000, the taxpayer will be considered to have sold the Bitcoin for \$115,000, recognizing a capital gain of \$10,000. This is long-term or short term based on the holding period for that Bitcoin.

One item not specifically addressed in Notice 2014-21 was how taxpayers should report virtual currency they received from a hard fork or airdrop. Specifically, Revenue Ruling 2019-24, 2019-44 IRB 1004, states that virtual currency received from a hard fork or airdrop is to be reported by the taxpayer as gross income, which will generally be treated as ordinary income.

In December 2019, IRS stated on its website that Robux and V-Bucks were examples of convertible virtual currencies subject to the new disclosure requirement. However, in February 2020, the IRS softened its position, stating that transacting in virtual currencies as part of a game that do not leave the game environment (not convertible into traditional currency) would not be income nor require a taxpayer to indicate this on their tax return.

In IR-2019-125, the IRS announced they have begun sending letters (Letters 6174/6174-A) to taxpayers that may have failed to report income and pay the resulting tax from virtual currency transactions and/or did not report their transactions properly.

Many digital platforms allow individuals or entities to "crowdsource" jobs by using the internet to outsource assignments to an undefined and often large group of other individuals or entities. This facilitates microtasking or subdividing larger tasks into smaller tasks and distributing the tasks via online crowdwork platforms. In Chief Council Advice 202035011, the IRS took the position that if the taxpayer receives

convertible virtual currency for performing the task, then the taxpayer has been compensated with property. The convertible virtual currency received must be reported on the taxpayer's income tax return as ordinary income and may be subject to self-employment tax.

In Information Letter 2016-0036 (June 24, 2016), the IRS attempted to address whether the "receipts" from crowdfunding are taxable as income. Section 61(a) provides that all accessions to wealth are in fact income unless Congress has provided a specific exclusion. Reg. §1.451-2 sets out the constructive receipt doctrine, which provides that when a taxpayer obtains dominion and/or control of an asset, he has in fact ascended to wealth. Only when the "wealth" is not under the taxpayer's control is it not considered income; however, at the moment the taxpayer has control of the wealth, it will become income unless §61 provides a specific exemption. The IRS indicated that "generally, money received without an offsetting liability (such as a repayment obligation), that is neither a capital contribution to an entity in exchange for a capital interest in the entity or a gift, is includable in income." An equity interest of the venture is received in return for the contribution. To further define what is taxable and what is not, the IRS indicated the following will never be taxable:

- Loans that must be repaid,
- Capital contributed to an entity in exchange for an equity interest in the entity, or
- Gifts made out of a detached generosity and without a "quid pro quo."

However, the IRS went on to say that not all voluntary transfers without a "quid pro quo" are in fact gifts for federal income tax purposes. This leaves the door open for a significant amount of post-transactional second guessing in the absence of a clear indication of the intention of the parties. The IRS closed with a statement that each crowdfunding effort's taxable status would be a facts and circumstances test controlled by statutory requirements.

D. Non-Fungible Tokens (NFTs)

On April 28, the Joint Chiefs of Global Tax Enforcement (J5) issued an intelligence bulletin containing best practices for taxpayers who have, or are planning to buy, NFTs. NFTs can be anything digital,

including drawings, music, or other items that can be considered art. They have been described as an evolution of fine-art collecting, only digital.

While money and virtual/crypto currencies are "fungible," meaning they can be traded or exchanged for one another, NFTs cannot. Because they hold a value primarily set by the market and demand, they can be bought and sold just like other physical types of art. An NFT's unique data makes it easy to verify and validate its ownership and the transfer of tokens between owners. They are unique cryptographic tokens that exist on a blockchain and cannot be replicated. NFTs can represent real-world items like artwork and real estate. "Tokenizing" these real-world tangible assets makes buying, selling, and trading them more efficient while reducing the probability of fraud.

An NFT is created, or "minted," from digital objects that represent both tangible and intangible items, including:

- Graphic art
- GIFs

- Videos and sports highlights
- Collectibles
- Virtual avatars and video game skins
- Designer sneakers
- Music

So, instead of getting an actual oil painting to hang on the wall, the buyer gets a digital file. Artists no longer have to rely on galleries or auction houses, instead; the artist can sell it directly to the consumer as an NFT, which also lets them keep more of the profits. In addition, artists can program in royalties so they'll receive a percentage of sales whenever their art is sold to a new owner. Brands like Charmin and Taco Bell have auctioned off themed NFT art to raise funds for charity. Twitter co-founder, Jack Dorsey, sold his first ever tweet as an NFT for more than \$2.9 million.

E. Other Reporting

A growing question is whether virtual currencies are reportable for Form 114, *Report of Foreign Bank and Financial Accounts (FBAR)*. FinCEN Notice 2020-2 stated that FBAR regulations do not define a foreign account holding virtual currency as a type of reportable account. [See 31 CFR §1010.350(c).] Thus, a foreign account holding virtual currency is not reportable on the FBAR unless it is a reportable account under 31 CFR §1010.350 because it holds reportable assets besides virtual currency. However, FinCEN intends to propose an amendment to the regulations implementing the Bank Secrecy Act (BSA) to include virtual currency as a type of reportable account. At this time, these changes have not been implemented.

While generally transactions in virtual currency will be reported on Form 8949 and Schedule D, if a person received any virtual currency as compensation for services or disposed of any virtual currency that was held for sale to customers in a trade or business, it must be reported as any other income of the same type (for example, W-2 wages on Form 1040 or 1040-SR, line 1, or inventory or services from Schedule C on Schedule 1). The Bi-Partisan Infrastructure Investment and Jobs Act of 2021 (IIJA) expanded cryptocurrency reporting requirements in order to stop the perceived underreporting of cryptocurrency transactions.

The IIJA expanded the definition of brokers to include persons responsible for regularly effectuating transfers of any digital asset which is recorded on a cryptographically secured distributed ledger or any similar technology. It defines digital asset as "any digital representation of value which is recorded on a cryptographically secured distributed ledger or any similar technology as specified by the Secretary." As a result of this change, brokers will have increased reporting requirements for cryptocurrency transactions effective for transactions entered into after December 31, 2022. Cryptocurrency brokers will be required to record transactions, tracking them for customers and the IRS, similar to the way stock and bond brokers currently do via Form 1099-B. They will be required to disclose the names, addresses, and phone numbers of their customers, the gross proceeds from sales, and any capital gains or losses. Thus, a digital asset acquired on or after January 1, 2023, would be a covered security, and brokers would be required to report a customer's basis and gain or loss when the customer sells or exchanges the digital asset.

Section 6050I requires that any person engaged in a trade or business that receives cash in excess of \$10,000 in a single transaction or in related transactions must file Form 8300, *Report of Cash Payments Over \$10,000 Received in a Trade or Business*. The IIJA expands the

scope of this section to include required reporting of digital assets. As a result, individuals engaged in a trade or business will be required to report cryptocurrency

transactions over \$10,000 using Form 8300. The reporting requirements are effective for transactions entered into as of January 1, 2023 or later.

F. Conclusion

Virtual currency is a target area for the IRS and has taken on even greater significance with the 2020 return. It is important that practitioners become knowledgeable about how virtual currency works and the tax rules that apply. Care must be taken to educate and evaluate any clients with a position in virtual currency.

A. Discussion Problems

Your client, Carla Springs, is a famous professional soccer player living and playing soccer in the United States. She has heard that she can avoid paying tax on part of her salary by being paid in virtual/crypto currency. As a result, she had her employer pay two-thirds of her 2021 salary in Bitcoin. Each pay period, her employer diverted two-thirds of her check to purchase Bitcoin that was then put in her virtual wallet. In doing an investigation, you found that the currency underwent a hard fork on July 1, 2021. At the time, her "old" currency had a value of \$100,000 US, and the "new" currency had a value of \$120,000 US. The "new" currency was available in her wallet on that date. The value of her virtual currency has increased about 20% in 2021. She tells you that the employer did not withhold anything on the amounts that went into Bitcoin.

Required:

1. Address the tax treatment of the salary diverted into Bitcoin.
2. Address the tax treatment of the hard fork.
3. Address the reporting requirements for the virtual/crypto currency.

B. Suggested Answers to Discussion Problems

1. While there is an "urban" myth that virtual currency is a "tax shelter," the fact that Carla is receiving compensation for services makes the value taxable as ordinary income. The form of payment is not relevant. Virtual/crypto currency is considered property; and the fair market value of the property (it would equal what was paid for the Bitcoin) is taxable. In addition, it would be subject to FICA as wages.
2. The hard fork can be looked at as an exchange of property. Because it went into Carla's wallet, she has dominion and control; and thus, she will recognize a capital gain of \$20,000. The gain will be short-term since she has not held the property for the long-term holding period. Carla's basis in the Bitcoin at that point will be \$120,000.
3. Having the virtual currency will require answering "Yes" to the question on page 1 of the Form 1040. The amounts received as compensation would be reported as salary. A discussion should be had with the employer about the FICA. In any event, Carla is still responsible for paying her portion of the FICA. The hard fork will be reported on Form 8949 and Schedule D as a short-term capital gain.

PART 3. BUSINESS TAXATION

Trust Fund Liabilities

Federal payroll tax is divided into three parts and reported on Form 941. The term "trust fund taxes" refers to amounts withheld from an employee by an employer for income and FICA taxes. Great care must be taken to understand and properly comply with all aspects of the payroll trust fund tax rules. Ian Redpath and Gary Bluestein discuss trust fund liabilities and potential penalties for failure to comply with the trust fund rules.

Let's join Ian Redpath and Gary Bluestein as they discuss this important topic.

Mr. Redpath

Gary, welcome to the program. It's great to have you back again.

Mr. Bluestein

Thank you.

Mr. Redpath

You give us a lot of insight. You mentioned in another program that we did, you mentioned that you're a former IRS counsel; so people should know that you've seen it from both sides in your practice. You were formerly with the IRS, and then you saw the light and came over to the good guy's side. And this is an area that is so difficult, because there's a lack of understanding exactly what we're talking about, because you hear payroll tax as a general comment of payroll tax.

As a lead in, we're seeing a lot of problems right now with COVID, where people in their businesses, they said, "You know what? I've got to make payroll. You know what? I've got to buy inventory. If I don't, I'm going out of business. If I don't make payroll, I'm not going to have any employees. I'm trying to pay my employees, and maybe I got a PPP loan. I still have other... Oh, I've got that amount of money out here, that trust fund, so I'm just going to borrow, I'm just going to use that, pay my employees, so we don't go out of business, buy inventory. Really, I'm going to pay it back. I'm going to make sure it gets paid back."

Of course, in good faith or not, often it doesn't get paid back; but there is that temptation, especially as businesses are going under, that there's these trust fund taxes out there. And on a second side, I had a client who called me and said, "What's going on? The IRS, they're coming after me for payroll taxes." I said, "Okay. Did you pay them?" He says, "Well, I have a payroll

service." I said, "Okay," and he goes, "But that person's taken off. Don't know where they are. Don't have a phone number, and they never paid the payroll taxes." So their payroll service provider had split town, apparently with the taxes for them. So, there's so much potential liability out here in so many varied ways. What exactly are payroll taxes, and what are the requirements here that our practitioners should be looking at?

Mr. Bluestein

Okay. Well, I know your audience is mostly accountants. When I talk to attorneys, they don't know this; but accountants probably for the most part have a total understanding of this.

Mr. Redpath

Well, they'll have a total understanding after you're done, Gary. Okay?

Mr. Bluestein

Okay. Well, they'll understand this part. Payroll taxes are reported on a Form 941 normally; and there's three parts of the payroll tax. You have your withholding from the employees for their taxes, and withholding for their social security, and then you've got the employer's contribution. The company, the corporation, let's say, for example, it's liable for all three parts; and when it's not paid, interest and penalties immediately start to accrue.

However, because the first two parts, the withholding part, is held in trust for the government, the IRS can also not only go against the corporation. They can go against individuals. They can pierce the corporation. It's an exception to insulated liability, and they can go against individuals for the trust fund portion of the payroll tax. In order for them to do that, they have to

show two things. They have to show that the person who they're going after was responsible for the payroll tax, which isn't hard to do, and I'll go over those factors, and that they willfully failed to remit the tax; and willful isn't hard either for them to show.

Now, you brought up two things in the opening of this, and it's correct. First of all, because payroll tax is paid quarterly usually, a lot of troubled businesses, understandably, they've got to pay that vendor at the door. They've got to pay the creditors who are barking at them immediately, and they postpone paying timely the payroll tax. Not a good thing to do. A really bad idea, because a lot of people don't have an understanding how bad a creditor the IRS is to have. Not only are they the most powerful creditor with collection, unlike any other private creditor; and trust fund taxes that I'm describing can never be discharged in bankruptcy, unlike other debt; but thirdly, and probably the most concerning, is, unlike other creditors that you can stiff, you don't pay the trust fund tax, it can be a felony.

Now, this surprises a lot of people. There's two statutes that are involved. The Internal Revenue Code Section 6672 says that, if you are a responsible person who willfully fails to remit the trust fund tax, you are personally liable for the amount not remitted. [Section] 7202 starts out the same way, and if I had a PowerPoint, I'd do a breakdown of the beginning of both statutes, and they're identical. It says, if you're a responsible person who fails to remit the payroll tax, but instead of saying you're liable for it, it says you're guilty of a felony punishable by up to five years in prison for each count. The problem that we face as practitioners is those two statutes are virtually identical, other than the penalty part, and it's total prosecutorial discretion to decide whether they're just going to get money from you or they're going to put you in jail and get money from you, and it can be very difficult to represent somebody in that situation.

Now, many moons ago, as you said, Ian, I used to work on the other side, the dark side. I was an attorney for the IRS. And at that time, they rarely would ever prosecute anybody for not remitting trust fund; and I remember going after some very large cases with revenue officers. My job was to help them, and I did talk to my boss at that time and say, "There's this criminal statute. Why don't we do that? These people are really running up hundreds of thousands, millions of dollars in flipping companies." And my boss at the time said, "There's no

jury appeal. It seems like debtors' prison. We don't like those kinds of cases." Most tax crimes were fraudulent income tax returns.

That was then. This is now. Things have dramatically changed. Probably, I would guess now about seven, eight years ago, the IRS and the Department of Justice decided to make their number one priority emphasizing criminal prosecution for failure to remit payroll taxes. Well, that was a wake-up call for all of us practitioners, because now what used to be a civil matter could be a criminal matter, so people have to be aware. This is not a creditor you want to stiff; and they're probably not going to go after a case that's under \$100,000 in liability. But I've had cases in the hundreds of thousands and millions of dollars that were civil before. Now, I think they might be criminal.

Mr. Redpath

Gary, my experience has been that, and I don't mind it, because of what is going on today, but jumping into criminal right away; and the first thing you hear is from a criminal investigation, you get a special agent who's dealing with it. At least, you know it's criminal; and you know how to conduct yourself. My concern today is the fact that there seems to be these parallel investigations going on; and they're using this, in my mind, I look at it as they're using the civil process in order to build a criminal case. And here's where the accountant has an issue, because you may not be, and probably aren't nor should you be necessarily totally familiar with criminal procedure, criminal law and procedure. And you may very possibly provide information that essentially the government just simply has to introduce that and guilt is proven. And so, it's this eggshell audit type of approach, but it's putting you in that position where what do I do?

Well, the first thing I would say is, when you have a payroll tax case like this, call an attorney, get some advice on it, and not necessarily just an attorney. Someone who is familiar, because if you're just a criminal attorney that does criminal law—some people would say all attorneys are criminal, so we'll avoid that one—but they may give you an answer without understanding the tax aspects of it. And like I think you've said, what do you do? Do you cooperate? Do you not cooperate? If you don't cooperate, it's going to go criminal probably. If you cooperate, maybe it's going to go criminal and you've already given them the information to convict your client. Boy, what a difficult situation that accountants are put in here, as well as attorneys.

Mr. Bluestein

Absolutely. It's become a very serious catch-22, and the way it works normally, in the civil arena, when there's, let's take an example, a corporation has significant debt problems and they run up significant payroll tax liability, a revenue officer will be assigned to the case and they'll go out to investigate. And not only are they going to try to collect from the company, and they can, if you don't work something out like a payment agreement or do something to control that, or file a corporate bankruptcy, they're going to start seizing assets of the company. So, that's a collection problem. But simultaneously, they're also going to investigate who can be a responsible person. Under 6672, there could be multiple responsible people. And it's joint and several liability, meaning the IRS can go after each one of them for 100% of it, anybody they deem to be both responsible and willful. So, let's talk about those categories; and then I'm going to touch on what you just said regarding the criminal exposure.

Mr. Redpath

Gary, just before we get there, I just want to clarify one thing for our viewers. What we're talking about here is the trust fund portion, the amount that you've collected from the employee, so the withholding, the FICA, the employee share. We're not talking about the employer's share.

Mr. Bluestein

Correct, and because that is held in trust for the government, the IRS takes that quite seriously. They still have to give credit to the employees for their withholding. But they don't have the money, because the employer kept it, paid net payroll; and that is a big problem for the IRS. That's why they do take it so aggressively.

Now, once they investigate, they're going to look first at who's responsible. If you're a shareholder or an officer of the company, you may be a top candidate. Doesn't necessarily mean you are responsible. It could depend on what your position is with the corporation and what your duties are. They're going to look at things like did you have signature authority? Did you sign checks? Did you review payroll tax returns? Did you make decisions of which creditors get paid and which creditors don't get paid? Did you hire and fire? What management control did you take?

What they do is there's this form that they use called a 4180 form, that the revenue officer will require your client to fill out. Not only to determine these factors of responsibility, but also the second requirement—did you willfully fail to remit the tax? Just because you're responsible doesn't mean you're liable. They've got to show you willfully failed to remit it. Now, that sounds like, well, that's a hard thing for them to do. It isn't. It basically comes down to you knew the taxes had to be paid and you didn't pay. It's not a very high standard for the IRS.

Mr. Redpath

Gary, if I can point out one of the things that they will look at and make this argument, is to say, "Well, you knew the taxes were due and oh, by the way, you paid your payroll, you paid your other creditors. Obviously, that was willfully."

Mr. Bluestein

You made a conscious decision. Exactly! And that's why a lot of people don't realize willful is not hard for them to say or to show; but that is where we fight a lot on this, and we get the opportunity for our client. We'll argue with the revenue officer and say, "If we can say he is not a responsible party, that's number one." For example, I had a case involving a situation where they went after a bookkeeper. You don't have to be an owner of the company or an officer to be held liable. If you're a person who has responsibility over the payroll tax or over the payroll and the payroll tax, you can be liable, even with no ownership.

Before I give you my example, I'll give you a Second Circuit case that was devastating many years ago that really illustrated this. The case involved a controller who had no ownership interest at all in the company; and he went to his boss and said, "Look, we can't afford payroll. We have to stop." And the boss said, "No, just pay the net payroll." He goes, "That's not legal. I can't do that." And the boss said, "Well, do it or you're fired," so he paid net payroll. Well, the IRS went after him personally for this trust fund tax; and it was a huge amount of money, hundreds of thousands of dollars, can't be discharged in bankruptcy, and his fight was, "First of all, I'm not a responsible person." They said, "Sure, you are. You control the payroll. You don't have to be an owner." Then he said, "Yes, but I wasn't willful. I was just doing what I was told." And he had another argument that was pretty strong. He said, "Under New York Department of Labor, it would have

been criminal not to give these employees their pay. I had to give them net payroll." The court held, "Number one, following orders is not a defense. You should have quit. Number two, we don't care what New York law says. This is federal law. It's superior to New York law," And they held him liable.

I had a case probably about 15 years ago that involved a bookkeeper who made about 20 grand a year for this company. And the IRS assessed her, proposed an assessment against her for three-hundred-and-eighty-something-thousand-dollars, because they said, "You were responsible and willful in failing to pay the payroll tax." I fought that case and fortunately I won. But the bottom line is, you don't have to be an owner. You could be just an accountant. Accountants have been held liable who got too involved in their client's business. So, as an accountant, you've got to be careful, and you don't want to be on the signature card, because then you're a target right off the bat. The IRS is always going to get that signature card when they start their investigation, to see who has check-writing authority. And if you've signed checks, you're definitely a target.

Mr. Redpath

Gary, I was mentioning to you when we were off camera, I had a case that they were going after the brother-in-law. It was a corporation; but its sole owner, one shareholder, he ran the business. The only time his brother-in-law ever was involved in the business, he did nothing, except he would write checks for payroll and for paying any bills when the owner, his brother-in-law, went on vacation. So, the IRS came and said, "Well, you're a responsible person. You've got signature authority. You were writing these checks. Guess what? You were paying bills. You should have known the taxes were due." Ultimately, the owner ended up paying, so they didn't end up collecting anything from him, but they went after him.

Mr. Bluestein

Exactly. So, let's talk about what do you do when you've got a case like I had or Ian just pointed out, where they're going after somebody civilly, and you think they're wrong? Well, what they're going to do before they can assess the tax against your client, they have to issue what's called a 60-day letter; it's Form 1153. And it's called a 60-day letter because you have 60 days to file a protest. And by doing that, you get to go to an independent appeals officer and explain why your client either is not responsible or not willful. And

it's very important to timely do that; because if you do, the appeals office has a lot of discretion and they can settle the case, they can give up the case. Often, there's multiple quarters. There's times where we reach the settlement where we've agreed to some of the quarters.

It's a critical thing to timely file that protest. Not only is it giving you an opportunity to challenge the liability, but here's another benefit. As I said, it's joint and several liability. I've had situations where I'm representing one person from a defunct company who's not speaking to the other shareholders. They don't even like each other anymore. Well, the IRS is going after everybody. By filing that protest, I've froze collection. It hasn't been assessed yet; but they're going after the other people. If they can collect it from the other people, that's great for my guy even if I can't get him off the hook, ultimately, because it's getting paid. Also, interest starts to run against the responsible person after it's assessed. By filing that protest, I'm not only getting a chance to challenge the liability, but I'm stopping accrual of interest. There is no penalties on the trust fund penalty, they call it. They don't add penalties, but they do run interest. So it's very critical to file a timely protest.

Now, let's say your client comes to you too late or you lose at appeals. What's your remedy then? Then, it gets more difficult. The only remedy you have to challenge it after that is you can pay the liability for one employee for one quarter, and file a claim for refund. Then, the IRS will probably deny it; and then you have the right to sue them in district court or the court of claims to challenge the determination. Costly proposition, so it's much better to try to file a timely protest and win at appeals or at least get a good settlement. So, that's critical.

And here's another thing that's incredibly critical for an accountant to advise their client who's got a troubled business. The business is still going, but hanging by a thread, which is often the case. This is so important. If you make a voluntary payment to the IRS, you can designate it to where you want. If you don't designate it or they levy it, or it's on an installment agreement payment, they put it where they want. So, how does the IRS allocate payments? I've had clients who could owe 10 quarters. What the IRS is going to do is take that money and they're going to put it on the non-trust fund first. Now, they used to, in the old days, when I was there, they put it on non-trust fund all the way down to 10 quarters. They changed that, fortunately, many years

ago, because it was so unfair. What they do now is they'll put it to non-trust fund, trust fund, and trust and penalties. And then they go to the next quarter. I'd rather have it only go to trust fund, because if it pays the non-trust fund and the company folds, that doesn't help my client. They're going after them for the trust fund. And that's why the IRS purposely wants to put it on the non-trust fund, because they know they have the individual as a source to go after. So what you want to do is you take every penny that you can send to the IRS, and you designate it all the way down to every quarter. Trust fund only, trust fund only, trust fund only. And I've had cases where I've gotten the trust fund paid off with money the company had, and the company went under, and the person at least could walk away and not have any debt to the IRS; because the non-trust fund and the interest and penalties owed by the company die with the corporation or the LLC. So, that is so critical to designate; and people miss it all the time.

Mr. Redpath

And how is that done, Gary?

Mr. Bluestein

Okay. It's very important. You can do a cover letter. You spell it all out, what quarters you're designating it to. And you say trust fund only. And then on the front and the back of the check, we write, "Apply to," and you say the quarters, "Trust fund only." And that proper designation, they have to do it. If you don't do that, they will put it to the non-trust fund first. So, that is one of the basic, most critical things that's missed all the time. We have a lot of people who could have gotten a fresh start if they would have done that. Now, if I know, if I've got a client whose company is really failing, I'll say, "Okay. Let's get every penny we can. Collect all the accounts receivables you can get your hands on. Sell things if you have to. And then, let's pay off the trust fund." Then, at least you can get a fresh start.

Now, let's say they say, "Yes, but I have all these creditors that I have personal guarantees." Personal guarantees can be discharged in bankruptcy. The trust fund tax cannot be. So, you want to designate those payments. And here's another thing. Let's say the company is struggling, but it's going to survive, and the revenue officer has assessed it. You lost or it wasn't fought, and the individual owes a trust fund liability also. It's one liability. So, if they collect the trust fund from you, that's going to decrease the total liability of the company. If the company pays down the trust fund,

it's going to decrease your liability; because it can only collect the trust fund once, even though they can go against multiple people or the company and multiple people. So, if you have a trust fund liability and the revenue officer's attacking you and you want to pay it or you have to pay it, don't pay it directly if you can avoid it as an individual. Let the company pay it and let the company designate it. Make sure you designate it to trust fund only. And why? Because, if you pay it individually, you get no deduction for it. If the company pays it, they get a deduction for it. So, that's often another missed strategy. So, there's a lot of things to do to soften the blow of a big trust fund liability.

Mr. Redpath

One of the things I wanted to mention, Gary; and you mentioned this, and I want to go back to it, because I think it's really important. You have people that come in, maybe it's a family business, and you've been doing their taxes for years, and now there's this trust fund question that comes up. The reality is you may have conflicting interests, and there may be a conflict of interest that comes up, and that's really something that you have to look at. The Circular 230 section 10.29 deals with that, but you also have to look at the Code of Professional Conduct, the Statements on Standards and Tax Services for the AICPA. You have to look and say what's applicable here? I've had clients where they said, "No, we want you to represent us. We want you to do it." And I said, "Okay, here's a waiver. You've sought legal counsel. I told you." It's really got to be detailed, because you really need to protect yourself. And if I'm an accountant—and I'll put my accountant hat on now—I'm going to want to call an attorney to say, "Make sure I'm protected." Because again, these people may very well have family, but they have conflicting interests on who's a responsible person.

Mr. Bluestein

Absolutely. And I've had that situation several times. One time really blew up in my face. I had an individual come to me who owned a business; and he was very upset because he found out after about a year and a half that his CFO was taking the 941 forms and throwing them in a drawer, and wasn't filing them. What his motive was, I wasn't sure. Maybe he didn't want the boss to know how bad finances were. But anyway, eventually, the IRS catches up and comes after the company and the owner individually for the trust fund. So, this guy was furious, and I'm talking to him, and I'm looking at the situation. I said, "Well, unlike many of

my clients, your company's going to survive. So, you have to pay this. Maybe I can do something about the penalties."

And he was so livid that this guy did this to him, whom he had fired, and he tried to blame the IRS. My client says to me, "Isn't it the IRS's fault for not telling me these returns weren't being filed?" And I'm like, "You're not going to get very far with that argument." So, I said, "No, that's not going to work, but what I could maybe do for you, did your CFO sign anything?" He goes, "Of course, he did." I go, "Well, I suspect they're going after him too, as a responsible person. Maybe I can talk to him. Maybe we can work out something where he contributes some of the money, since it is his fault, to get rid of some of the penalties." And the guy said, "That would be great. If he'd pay half of it, I'd be really happy. Half the penalties, at least." So I said, "Okay." So I called the guy up and I said, "My name's Gary Bluestein. I'm an attorney representing your former employer. I suspect you may also have a tax problem. But before I go any further, ethically, I have to say to you, if you're represented by an attorney, I need to talk to your attorney." And he said, "Well, I do have an attorney." And I said, "Well, actually, that's good. I'd much rather talk to your attorney to discuss what maybe we can do. Who's your attorney?" And then he proceeded to tell me the name of my partner. And I had no idea that she was representing this other person; because it didn't get picked up in a conflict check. I dropped the phone. I didn't even know what to say. And I just picked it up off the floor and said, "I'll call you back." I walked into her office and said, "Are you representing so and so?" And she goes, "Yes." And I said, "Well, I'm representing his employer. What's going on in your case?" And she says, "I can't tell you." She wouldn't talk to me about it. That was an ugly situation. And Ian's right on that. It fortunately worked out... Well, it didn't work out so well, actually. My partner got the other guy off the hook somehow; and she never would tell me how she did that because she put up a wall between us on this. I was able to get a penalty abatement for the guy though. So, the client was satisfied.

The point is, that's one example. I had another uglier example actually, where I was representing multiple parties. And although I had conflict waivers, conflict waivers are only good if there isn't a conflict that can't be overcome. After a while, they started fighting; and it got really ugly, and I had a real problem, and we had to refer two of them to other lawyers. So, you have to be aware of that ethical bind. It can happen. With that said,

Ian alluded to the bigger problem I have. So, I've outlined the civil aspect; and it's pretty straightforward of the strategies and what you've got to do. And there's lots of case law to try to determine different fact patterns, and who's responsible, and who isn't. I could go on and on with war stories of civil cases. I will give one before I go to the criminal subject.

I had a situation where this woman came to me, and she was set up. There were these construction guys told her that they were going to hire or train her the business. They wanted to have a union and non-union business. And they set her up in one of the businesses. They ended up not paying any payroll, but she was the president and small shareholder of this company and the payroll... I mean they didn't pay any payroll tax. And of course, the IRS comes after her. She comes to me and I'm looking at this, and I'm like, "You're the only person on the signature card. You're dead in the water. There's nothing I can do." And since it can't be discharged in bankruptcy, I said, "Let's look at an offer in compromise." But she had a lot of equity in her property. That's a formula they follow. It wasn't working very well. So, I had no choice but to try to fight this determination. As she explained to me more about the situation, I realized she was set up; and there were other employees there that said she did absolutely nothing. So, when the revenue officer came for what's called a 4180 interview, before he came, I did a Freedom of Information Act request. And I got the other 4180 interviews of these other people who set her up. And I could show that there were things they said that were misstatements or outright lies. So, I had that in my hand. But in addition, when he came to my office to interview my client, I had five witnesses who were going to attest, tell him that she had nothing to do with really running the company. She was just playing solitaire, basically, while she was there. Anyway, the revenue officer comes into the door. I knew him for years. And he said, "Gary, this is a formality. Obviously, she's liable." I'm like, "Well, why don't you keep an open mind before you make your decision?" And I opened up the conference room door; and he was surprised to see all those people there. And we had a mini trial, and they all testified in effect saying what her function really was, or non-function was. And by the time he left—well, before he left—he said, "You surprised me. You've convinced me she's not liable." And I believe he went after the other people. But the point is you have to prepare for this 4180 interview as best as you possibly can; because this is your chance to convince the revenue officer to drop it. And if you can do that, it's a huge victory.

Now, with that said, shifting to the criminal aspect. Sometimes, though, that 4180 interview is a real problem. Because now that they've criminalized not paying your trust fund taxes, and we don't know which case they're going to decide to make an example out of, we don't know whether to do that 4180 interview. Because what this form is, it goes through a series of questions that are geared to determine is your client responsible and willful, and who else might be? So, it's an admission, basically, to a crime, because if the answers aren't good, your client is putting in writing and signing an affirmation that this is true, that they could have been willful or responsible. And not only are they setting themselves up potentially for a civil liability, but now it can be used for a criminal liability. And Ian, you were right on when you talked about the parallel investigations, and just a brief history on that.

Many, many years ago, there was a case called Tweel out of the Fifth Circuit. And it was a great case. It was a case that held that the IRS abused their power, because what in effect they did, they were doing an audit, an income tax audit, and they were being very aggressive with an accountant who got suspicious with some of the questions they were asking. And he asked point blank, "Is there a criminal investigation going on?" And they lied to him and said, "No." There actually was a massive criminal investigation going on. So he said, "Okay." And he was very cooperative. And he gave them a lot of information. Well, they used all that information to convict the taxpayer. And they appealed, and the Fifth Circuit held that was abusive. They lied, they misled this accountant, and they threw out the conviction. The IRS was very upset with that. And for many years after that, they were very careful to keep criminal and civil separate. So, if there was a civil case and they felt it should go criminal, you wouldn't hear from the civil people anymore. And that was always a bad sign. If, all of a sudden, there was silence, it was scary. That meant they might have referred it criminally.

That's not the case anymore, because many years ago they decided, you know what? Tweel? They've limited it to where the IRS does what they call Tweel trickery, was the words. And a lot of cases have followed that. And as long as they don't outright lie to you, they can do a parallel investigation. I agree with Ian. I think it should be unconstitutional, because what happens is the civil division is demanding. They're not just asking; they're demanding answers to questions, and they're

demanding information. There's two things a revenue officer will do when you owe tax, whether it's trust fund, or income tax, or whatever.

Well, first, they're going to do demand of financial form. It's called a 433-A collection information statement, or a 433-B for a business. That's signed under penalty of perjury. And you have to list all of your assets. That's a very powerful collection tool for them. Then, with trust fund, they're going to demand what I just alluded to, this 4180 interview, which is also signed by the taxpayer. And you're admitting to facts. If you don't give that information, the revenue officer can get very aggressive, and they can seize your assets. They will file liens, and they put a practitioner and their client in a situation that you have to cooperate or the business could be totally shut down.

The problem is, now that they're criminalizing it, you don't know that the criminal investigation at the same time isn't looking into your client criminally. And their Internal Revenue Manual says, when the criminal investigation division decides they're going to go forward with the case, they can at any point go to the revenue officer, who's the civil guy, and say, "Turn over everything to us." So in effect, they've gotten to a situation where they can use a civil agent who has incredible power to force answers to get information, and then use it in a criminal case. And that is really a problem. There's serious problems with that constitutionally, in my opinion. And I think Ian agrees with me. If the criminal investigation division went out on their own, everybody knows, if the cops show up, you shouldn't talk to them. Get a lawyer; and you would say, "I want to talk to my lawyer." So, they're getting around that by doing this in a way, because they've got a civil agent doing all their work, and not only getting information, but having the ability to force this information with the threat of seizure of assets.

Mr. Redpath

And if you don't cooperate, number one, there's potential liability for not cooperating, for obstructing the IRS, but also, you turn around and they're going to go criminal. I mean, I've heard some attorneys say, "Well, take the fifth amendment on everything, refuse to answer anything," and, okay. Well, it's going to go criminal. So, you're in a catch-22.

Mr. Bluestein

Exactly right. There's two problems. First of all, if you do that, you take the aggressive approach and stonewall them, the revenue officer is going to get upset and he's

going to be more aggressive in collection. So, you may have just caused the loss of this guy's business. And there may never have been a criminal problem. So, maybe that was the wrong thing to do. Additionally, as you just said, one of the factors they use for a criminal referral is lack of cooperation. So, because you didn't cooperate, you might have caused the criminal referral. On the other hand, you don't want to be that idiot practitioner, where some criminal lawyer down the road is saying, "Oh my God, you handed your client over to them on a silver platter. And there was already a criminal investigation going on."

So, one thing you can do, and there's not a lot to do, but there's one thing you can do, if you feel it's a large case. They're not going to usually do a criminal case for under 100 grand probably. But if there's multiple quarters and it's a significant dollar amount, you can say to a revenue officer, and this is what a lot of practitioners have suggested. You can ask point blank, "Is there a parallel investigation or a criminal investigation going on?" The Internal Revenue Manual says, because of Tweel, they shouldn't lie. What it says is, "But don't tell them the answer either, if there is." So what does that mean? It means, if they refuse to answer, you know the answer. I still have a problem with that, because do I want to go to a civil revenue officer who may not be thinking criminal at all, and say, "Is there a criminal case?" Did I just put that idea into his head? Could he say, "Why? Should there be?" There's no good answer to this; and nobody has a good answer to this. I do a lot of national seminars with some really amazing speakers. One in particular, who's one of the best I've ever heard, his solution to this was to refuse in all cases—well, I think he's blanketed this statement—all situations to do a 4180 interview. And I get where he is coming from, but like I said, the downside of that is you're going to get the revenue officer very angry. He's going to be more aggressive. And in theory, that could cause potentially a criminal referral, and certainly cause more aggressive collection action against the company. So, that's what we're up against when we're dealing with the criminal scenario.

I think Ian alluded to this also. If you have a large dollar case, it would be a good idea to bring in an attorney and put yourself under a Kovel letter. Just as a side note, all of you who are accountants, if you're a CPA or an enrolled agent, you are considered a federal practitioner. And under the Internal Revenue Code, you have privilege with your client. The problem with that privilege is it's in some ways less than useless. It's

actually dangerous. Why is that? Because the federal practitioner privilege only applies to cases that are federal civil tax cases.

It doesn't apply in a state case or another federal agency; but most importantly, it doesn't apply if the tax case turns criminal. Then, it goes poof and disappears, but that's when you need it. So, it's a very bad privilege. All it does is make you potentially liable; because a lot of accountants I've talked to don't understand it. It's not your privilege. It's your client's. You can't waive it without the client's permission. So, you could be sued if you say something you shouldn't have said in a civil scenario; and anything you say can then be used against your client in a criminal matter. Plus, you could be subpoenaed in front of a grand jury or a criminal trial to testify against your own client if they told you things that could hurt them.

So, when you're looking at an eggshell audit—it could be an income tax audit or a large trust fund tax liability that in itself on its face can be criminal—you might want to use what's called Kovel. And what you've got to do is find an attorney who knows what Kovel is. And if they don't, find another attorney. What it is, is based on a Second Circuit case many, many years ago that's been adopted all over the country. Attorney-client privilege applies in a criminal case. So, if an accountant works for the law firm, you can still do all the accounting work you were going to do, get paid for it, but you work under the umbrella of the attorney-client privilege. Then, to some extent, you are protected in a criminal case.

Mr. Redpath

And you bill the attorney for your services. You don't bill the client. You make sure that there's a wall there that you're working for the attorney, because there's all sorts of cases where people have said, "Well, the reality is I work for this person." Well, I'm sorry. You don't. You work for the attorney if you want Kovel to apply.

Mr. Bluestein

And there's a letter that we use, that's called a Kovel letter, that lays out all the terms of your engagement. And it specifically says you're not to disclose any information to the government; because the IRS special agents will come to the accountant and start wanting to talk to them and asking them questions. So, you want to be protected in that situation.

The bad thing about this trust fund, as I said, is it's almost a slam dunk for the government to prove, whether it's civil or criminal. If you are a responsible person who willfully didn't remit the tax, it's the same, pretty much standard. Now, I've talked to many criminal lawyers who don't do tax work, and they say, "Well, the burden of proof's different." That's true. In a criminal case, the burden of proof is higher. It's beyond a reasonable doubt as opposed to a civil case. But the reality is it's really not so different in this unique area, because this willfulness and responsible determination are the same. And if you read some of the criminal cases, it's shocking. I've even read criminal cases that cite civil cases to support the conviction. And there was a real ugly case involving, in California, a nursing home, where the guy argued he just didn't have the money to pay and he couldn't throw the people out on the street, and they upheld that conviction. They said, "You still willfully didn't remit the payroll taxes."

Mr. Redpath

Yes, it's a terrible area. It's something that you've got to enter into cautiously. I think, as you've said many times today, practitioners have to be very leery of just jumping in and working in something, especially if they've never handled a case that has any complexity. Gary, thanks for your input today. This was really great. Gave a lot of things for our viewers to look at. And I appreciate your insight and hope to have you again on another program soon. So Gary Bluestein, thank you very much for being here today.

Mr. Bluestein

Thank you for having me, Ian. Appreciate it.

SUPPLEMENTAL MATERIALS

Trust Fund Taxes

By Ian J. Redpath, JD, LLM

A. Introduction

The federal payroll tax is reported on Form 941 and divided into three parts. The first two parts consist of withholding from an employee for income taxes and FICA. The third part relates to the employer's contribution to FICA. The employer is liable for all three parts. However, an individual may be liable in certain circumstances. The term "trust fund taxes" refers to amounts that are withheld from an employee

for income and FICA taxes. The employer is deemed to hold these amounts in trust for the government. Failing to pay over the trust fund portion can result in significant penalties and possible personal liability—civil and/or criminal. In order to collect from the individual members of the LLC, they must be assessed the Trust Fund Recovery Penalty. [See IRM 5.1.21.7.]

B. Amounts of Withholding

The income tax withholding is based upon the combination of the employee's income and exclusions claimed by the employee. The employer will withhold based on the income, allowances claimed, and the appropriate amount from the IRS published withholding guidance.

The employee's FICA has two parts:

- Social Security Portion: 6.2% up to \$147,000
- HI (Medicare portion): 1.45 with no base

In addition, there is what is referred to as Obamacare (ACA) Tax: .09% additional HI portion on earned

income over \$250,000 (MFJ) or \$200,000 (Single). Note that the employer must withhold if the individual earns \$200,000 regardless of filing status.

If too much FICA is withheld, it can be treated as a prepayment of the taxpayer's income tax. The employer matches the FICA, except for the ACA Tax, and takes a business deduction. Self-employed individuals or partners will be subject to Self-Employment Tax. The rates are the same as the combined employee/employer FICA; and a deduction is taken on Schedule 1 line 15 of Form 1040 for one-half of the Self-Employment Tax, not including the ACA Tax.

C. Trust Fund Recovery Penalty

An employer is required to withhold federal income taxes and Social Security taxes from their employee's wages pursuant to IRC §3402(a) and IRC §3102(a). These withheld funds are referred to as "trust fund taxes." When an employee fails to withhold and/or remit the trust fund taxes to the government, IRC §6672 provides for personal liability by individuals responsible to collect and pay over the taxes. In order to hold an individual liable under IRC §6672, the IRS must show two elements: (i) the party being assessed is the person required to collect, truthfully account for, and pay over the taxes; and (ii) the party must "willfully" have failed to ensure that the withholding taxes were paid. The penalty is a joint and several liability equal to 100% of the amount owed. The IRS can pursue the employing

entity and any of the individuals deemed to be responsible persons. They can only collect the total due one time. However, they can go after the deepest pocket and force that person to seek contribution from the others.

- **Responsible Persons**

The determination of who is responsible is fact specific. Normally, this would include officers, directors or shareholders, or employees of the corporation. The mere holding of a title does not make a person a responsible person. Non-owners of an entity can be held liable for the trust fund taxes; however, under Policy Statement P5-14, non-owner employees who act

under the dominion and control or in a ministerial capacity, without exercising independent judgment, will normally not be deemed to be responsible. The penalty will not be imposed on volunteers of tax-exempt organizations serving in an honorary capacity, if not part of daily financial operations and lacking knowledge that would make them a responsible person. However, if no one would be liable, then this exception will not apply. [IRM 5.7.3.3.1]

- **Willfulness**

Even if the criteria to find an individual "responsible" exists, in order to be liable under IRC §6672, it also has to be determined that the individual "willfully" failed to remit the payroll taxes. Willfulness is defined as "intentional, deliberate, voluntary, reckless, knowing, as opposed to accidental." The IRS must show that the individual was aware of or should have been aware of

the outstanding tax liability, but intentionally disregarded the law or was plainly indifferent with the requirements. [IRM 5.7.3.3.2] A willful failure results when an individual is aware of the unpaid trust fund taxes and consciously pays other creditors. [*Grant v. U.S.*, 958 Fd.2d 363 (3rd Cir. 1992) and see also Rev. Rul. 54-158, 1954-1 CB 247]

- **Reasonable Cause**

Although there is not full agreement among the circuits, several Circuit Courts have recognized a defense to assertion of the trust fund liability based on "reasonable cause." For example, in *Newson v. United States*, 431 Fd.2d 742 (5th Cir. 1970), the Court stated that the absence of reasonable cause can be part of the test for determining whether the responsible person's failure to pay over the taxes was "willful." [See also *Finley v. United States*, 123 Fd.3d 1342 (10th Cir. 1977).]

D. IRC §3505—Lender Liability

A little-known twist is IRC §3505 that provides for third-party liability to a lender who provides funds for payment of "net payroll." Subsection (a) and §3505 provides that where there is direct payment of wages paid by a lender, the lender is liable for the trust fund portion of the payroll taxes attributable to such wages. The liability includes interest on the day the employer's return was due. The code holds that a lender is liable if

they supply funds that are utilized by the employer for "net payroll." This liability does not arise if the loan was simply a grant of an "ordinary working capital loan." IRC §3505(b) limits the maximum liability to 25% of the amount advanced specifically for wages. A liability under this section is limited to trust fund taxes and does not include the matching FICA, penalties, etc.

E. Criminal Exposure—IRC §7202

IRC §7202 provides for criminal exposure. The Ninth Circuit has held that there is no need to show ability to pay in order to find a defendant guilty of willfully failing to remit payroll taxes. [*United States of America v. Easterday*, 564 Fd.3rd 1004 (9th Cir. 2009). See also the holding of the Fifth Circuit in *United States v. Tucker*, 686 Fd.2d 230 (5th Cir. 1982) and *United States v. Ausmus*, 774 Fd.2d 722 (6th Cir. 1985).] There is a

six-year statute to bring an action pursuant to §7202. [*United States v. Blanchard*, 618 Fd.3d 562 (6th Cir. 2010) and *United States v. Watley*, 105 A.F.T.R.2d (RIA) 1741] It should be noted that the language of IRC §6672 for civil liability, and the language of IRC §7202, making an individual guilty of a felony, are virtually identical.

F. Assessment Procedures

In order for the government to hold an individual liable under IRC §6672, a 60-day letter (Form 1153) must be issued after a Revenue Officer has made a determination that the individual is in fact both "responsible" and "willful" in relation to the failure to pay payroll taxes. The letter is referred to as a "60-Day

Letter" since it provides for 60 days to file a written protest. By filing a protest and challenging one or both of the elements, the individual is entitled to a pre-assessment Appeals Conference. There are significant advantages in filing an Appeal, since the liability cannot be assessed until the Conference is completed

and a decision is rendered. Often, a settlement can be reached where the Appeals Officer will eliminate at least a portion of the liability. No interest runs on the liability until it is actually assessed. While the liability is joint and several, it can only be collected once.

If an individual facing potential trust fund liability still has control of an ongoing business, any payments made on delinquent payroll taxes should be specifically designated to "trust fund only." As long as the payment is voluntary, the payment can be specifically designated to the best interest of the client [IRM 5.7.4.3.]; otherwise, the IRS will apply it in its best interest. [Rev. Proc. 2002-26, 2002-1 CB 746] Payments are applied to successive periods in descending order of priority. It is generally applied to tax, non-trust fund, trust fund, fees, penalties, and interest until the payment is exhausted. Designation of payment is the most critical strategy in reducing the exposure of the responsible party with regard to a failing business that has outstanding payroll taxes. The words "Form 941" and the quarter to be applied to should be clearly identified with the statement "apply to trust fund only" on the front of the check, the back of the check, and in the cover letter.

In order to hold a responsible person liable under IRC §6672, the penalty must be assessed against the deemed responsible party within three years from the due date

of the 941s. In this instance, the 941 is deemed due on April 15 of the year following the year of each quarter at issue. If the return is filed after the April 15 deadline, limitation periods for the return will not expire until three years after the actual date of filing. If there is a fraudulent return or no return is filed, there is no statute of limitations. Pursuant to the Taxpayer's Bill of Rights II, the three-year statute of limitations will not expire before 90 days after the date of the mailing of the 60-day notice; or if there is a timely protest of the proposed assessment, the statute of limitations will not expire less than 30 days after the IRS makes a final administrative determination on the protest. Protest is timely if it is mailed on or before the 60th day.

Although bankruptcy can be a useful tool in "discharging" the non-trust fund portion of the payroll tax if the return in question was due more than three years prior to the bankruptcy petition [Bankruptcy Code §507(a)(8)(D) and §523(a)], the trust fund portion of the liability will always qualify as a "priority tax." Therefore, it will not be dischargeable, pursuant to Bankruptcy Code §507(a)(8)(C). Chapter 11 or Chapter 13 may allow a favorable payment plan for those taxes. If the trust fund exposure is still exceedingly high, an individual Offer in Compromise could be explored. This is often easier than a corporate Offer in Compromise.

G. Miscellaneous Issues

The Form 4180 Interview with the Revenue Officer is a first attempt to eliminate the assertion of a trust fund liability against your client. Although each case is extremely fact specific, there are legions of reported opinions on virtually every fact pattern. Providing favorable cases that are similar to the fact pattern of your client often goes a long way in convincing the IRS to not assert the liability against your client.

Additionally, providing independent evidence favorably addressing the factors set forth in Form 4180 in relation to responsibility and/or willfulness may convince the Revenue Officer to relieve your client of liability. Affidavits or actual testimony of witnesses that support the fact that your client is acting in a ministerial capacity or was not in control of the finances of the business would be an example.

H. Voluntary Classification Settlement Program

If you have a client that is currently treating workers as non-employees that should properly be considered employees, consideration should be given to the IRS's Voluntary Classification Settlement Program. Apply using Form 8952. The benefits of the program are that the employer will pay 10% of employment tax liability that may have been due on compensation paid to workers for the most recent tax year and no interest or penalties on the liability.

I. Conclusion

The issue of payroll taxes has a myriad of potential pitfalls for employers. Great care must be taken to understand and properly comply with all aspects of the payroll trust fund tax rules.

GROUP STUDY MATERIALS

A. Discussion Problems

Your client, Harvey Jones, is the President and CEO of JonesCo. He is also the majority stockholder. Harvey informs you that the business has had a major downturn and he has been unable to obtain new financing. In order to keep the business open, he has not been remitting the payroll taxes but rather using the funds to pay for new inventory and to pay the employees. He expects business will pick up within the year; or, hopefully, he will be able to get financing and can pay the government. He says that since he will have to pay interest on the unpaid amounts, it is like a loan. He believes this is reasonable since it is the only liquid source to pay for inventory and payroll; otherwise, many people will lose their jobs.

However, Harvey is concerned because a business owned by his good friend recently underwent a payroll tax audit; and the IRS is going after his friend personally and also threatening criminal action.

Required:

Discuss all issues fairly raised by the facts, including:

1. the make-up of payroll taxes,
2. the trust fund recovery penalty, and
3. methods to mitigate the penalty.

B. Suggested Answers to Discussion Problems

1. The federal payroll tax is reported on Form 941 and divided into three parts. The first two parts consist of withholding from an employee's wages for their taxes (income and FICA) and Social Security. The third part relates to the employer's contribution to the Social Security tax. The employer is liable for all three parts of the tax plus the accrual of interest and penalties when the amount is not timely paid. If the business is a sole proprietorship or partnership, the individual would be liable for all three parts of the payroll tax. The term "trust fund taxes" refers to amounts that are withheld from an employee by an employer for income and FICA taxes. These are to be remitted to the government by the employer. The employer is deemed to hold these withheld amounts in trust for the United States government. Failing to pay over the trust fund portion can result in significant penalties and possible personal liability—civil and/or criminal—for any person found to be a responsible person.
2. The trust fund penalty on a responsible person is equal to 100% of the amounts due the government. In order to hold an individual liable under IRC §6672, the IRS must show two elements: (i) the party being assessed is the person required to collect, truthfully account for, and pay over the taxes; and (ii) the party must "willfully" have failed to ensure that the withholding taxes were paid. Harvey is clearly a responsible person. However, in order to be liable under IRC §6672, it also has to be determined that he "willfully" failed to remit the payroll taxes. Willfulness is defined as "intentional, deliberate, voluntary, reckless, knowing, as opposed to accidental." The IRS must show that he was aware of or should have been aware of the outstanding tax liability, but intentionally disregarded the law or was plainly indifferent regarding the requirements. [IRM 5.7.3.3.2] This appears to be the situation as he knowingly did not pay the government in order to pay other creditors or bills. It is a question to be determined by the Court if he acted with reasonable cause; but he would most likely fail in that argument.
3. In order to mitigate the penalties, consideration should be given to designating any corporate

payments for delinquent payroll taxes to "trust fund only." As long as the payment is voluntary, the payment can be specifically designated to the best interest of the client. The words "Form 941" and the quarter to be applied to should be clearly identified with the statement "apply to trust fund only" on the front of the check, the back of the check, and in the cover letter. Other consideration could be given to bankruptcy and/or an Offer in Compromise.

GLOSSARY OF KEY TERMS

Airdrop—Airdrops are typically crypto tokens, or coins, that are distributed gratis to individuals who participate in a community. They are primarily used for marketing and promotional purposes to raise awareness of a cryptocurrency. (Receipt of virtual currency via an airdrop is treated as gross income.)

Cryptocurrency/Virtual Currency—Cryptocurrency is a type of unregulated digital currency that is only available in electronic form. It is stored and transacted only through designated software, mobile or computer applications, or through dedicated digital wallets, and the transactions occur over the internet through secure, dedicated networks.

Eggshell Audit—Eggshell audit is not a formal term but is commonly used to describe a situation in which a taxpayer is facing a civil tax audit and could potentially be referred for criminal prosecution.

Hard Fork—A hard fork, as it relates to blockchain technology, occurs when a cryptocurrency's network protocol (the rules that describe how the network should operate) changes such that one group of network participants adopts the new protocol, while another group of network participants follows the old protocol. In other words, the two protocols are now incompatible with each other, and thus by extension, so are the networks. A hard fork is also commonly referred to as a chain split because there are now two cryptocurrencies post the fork event. (Receipt of virtual currency via a hard fork is treated as gross income.)

Infrastructure Investment and Jobs Act—Public Law No. 117-58, also known as the Bipartisan Infrastructure Framework, was signed into law by President Biden on November 15, 2021 and includes approximately \$1.2 trillion in spending to include funding for broadband access, clean water, electric grid renewal, and transportation and road provisions, along with tax-related provisions.

Non-Fungible Token (NFT)—Non-fungible tokens are unique cryptographic tokens that exist on a blockchain and cannot be replicated. They can be anything digital such as artwork, music, and tweets.

Offer in Compromise—The IRS has the ability to “compromise” a civil or criminal tax liability after assessment and before referral to the Department of Justice. The taxpayer may seek a compromise based on doubt as to collectibility, doubt as to liability, or to promote effective tax administration. The process is known as offer in compromise (OIC) and constitutes an agreement between a taxpayer and the IRS to accept less than full payment.

Virtual Currency/Cryptocurrency—Virtual currency is a type of unregulated digital currency that is only available in electronic form. It is stored and transacted only through designated software, mobile or computer applications, or through dedicated digital wallets, and the transactions occur over the internet through secure, dedicated networks.

CUMULATIVE INDEX 2022

BY TOPIC

Topic	Month–Page	Topic	Month–Page
10-Year Rule.....	May-17	Foreign Digital Assets	May-6
4180 Form.....	July-37	Form 114.....	July-23
4180 Interview	July-40	Form 656.....	Jan-4, July-8
ABA Letter to IRS Commissioner.....	Jan-6	Form 941.....	July-35
ABA Tax Meeting	Mar-4	Form 990.....	Feb-5
Administrative Adjustment		Form 1024.....	Feb-6
Request (AAR)	May-38	Form 1045.....	Feb-6
Amortization Method.....	Jun-18	Form 1153.....	July-38
Annuitization Method.....	Jun-18	Form 2441.....	Mar-15
Audit Lottery	Jan-34	Form 5300.....	Feb-4, July-6
Audit Report No. 2022-40-035	July-3	Form 5329.....	Jun-23
Audits of Corporations.....	Jan-33	Form 7203.....	Mar-45
Bankruptcy.....	Jun-31	Form 8300.....	Mar-46, July-24
Basic Exclusion	Jun-7	Form 8606.....	Jun-17
Billionaire Tax	May-7	Form 8867.....	Mar-50
Capital Account	Feb-17	Form 8962.....	Mar-15
Centralized Partnership Audit Rules.....	May-33	Form 8978.....	May-37
Change in Method of Accounting.....	Mar-4	Form 8986.....	May-37
Chapter 7.....	Jun-32	Form UTP	Jan-38
Chapter 11.....	Jun-32	FTC Complaint.....	May-5
Chapter 13.....	Jun-32	Ghost Rule	May-17
Circular 230	Jan-34	Injunctive Relief	May-5
Crypto Banking.....	July-6	Inside Basis.....	Feb-17
Cryptocurrency	Jun-7, July-19	Intuit	Jun-3
Debt Forgiveness Income	Jun-37	IRS Operations	July-3
Designated Beneficiaries	May-17	Joint and Last Survivor [Expectancy] Table.....	Jun-19
Digital Currency	July-19	Kovel Letter.....	July-42
Donor-Advised Fund	Jun-3, 11	Non-Fungible Tokens (NFT).....	Jun-6, July-24
Due Diligence	Mar-23,44	Offer in Compromise.....	Jun-34
Durable Power of Attorney.....	May-6	Opportunity Zones	Jun-7
Eggshell Audits.....	Jan-36, July-42	Outside Basis	Feb-17
Eligible Designated Beneficiary	May-17	Partnerships	July-4
Equitable Tolling	Mar-4	Payroll Tax	July-35
Employee Plan News.....	July-6	Push-Out Election.....	May-34
Employment Tax Determination	Mar-3	Qualified Intermediary	Jun-4
False Advertising.....	Jun-3	Refund Recoupments.....	Jan-4
FBAR Reporting.....	July-23	Required Beginning Date	May-22
Five-Year Rule.....	May-17		

Topic	Month–Page	Topic	Month–Page
Required Minimum		Tax-basis Capital Account.....	Feb-18
Distributions (RMD).....	Feb-7, May-17, 18, Jun-18	Tax Subsidy for Sport Stadium	
Schedule 8812.....	Mar-16	Construction.....	May-3
Schedule B.....	Mar-47	Transactional Approach.....	Feb-19
Schedule D.....	Mar-47	Trust Fund Taxes.....	July-35
Schedule H.....	Mar-17	TurboTax.....	May-5
SEPP.....	Jun-18	Uniform Lifetime Table.....	Jun-19
Single Life Expectancy Table.....	Jun-19	Virtual Currency.....	July-19
Stretch IRA.....	May-17	Wyden Proposal.....	Feb-17
Subchapter K.....	Feb-17		

BY CITATION

Citation	Month–Page	Citation	Month–Page
Adams & Boyle, P.C., et al. v.		IRS Announcement 2022-6.....	May-3
Slatery III, et al.	July-7	IRS Fact Sheet 2022-20.....	May-8
Aspro, Inc. v. Commissioner.....	Jun-4	IRS Publication 5186.....	Jan-6
Balle-Tun v. Zeng & Wong, Inc.,.....	July-6	IRS v. Howard D. Juntoff.....	May-7
Blommer v. Commissioner.....	Jan-7	Jeremy E. Porter v. Commissioner.....	May-5
Boechler, PC, SCt Docket No. 20-1472.....	Jun-8	Josepha Castillo v. U.S.....	Jun-8
Chief Counsel Advice 202204007.....	Mar-7	LB&I-04-0422-0014.....	July-8
Chief Counsel Advice 202204008.....	Mar-6	Mann Construction Inc. v. U.S.....	May-4
Christian Sezonov, et ux. v. Commissioner.....	Jun-8	Mark A. and Vanessa C. Kelly,	
Clary Hood, Inc. v. Commissioner.....	May-4	Debtors.....	Feb-6, Mar-6, 10
David F. and Tammy K. Hewitt v.		Michael J. Rogerson v. Commissioner.....	July-7
Commissioner.....	Feb-8	Michelle DelPonte v. Commissioner.....	July-9
Debra Jean Blum v. Commissioner.....	May-6	New York v. Yellen.....	Jun-9
Douglas Mihalik, et ux. v. Commissioner.....	Jun-9	Notice 2021-64.....	Jan-5
Field Attorneys 20221101F.....	Jun-5	Notice 2022-1 ...	Feb-4, Mar-4, 9, May-9, Jun-4, July-4
Gregory J. Podlucky, et ux. v. Commissioner	July-9	Notice 2022-6.....	Jun-17
Hadsell v. U.S.....	Jan-4	Notice 2022-8.....	Mar-4
H.R. 6806.....	May-3	Notice 2022-23.....	Jun-4
In Re: Johnson.....	July-7	Notice 2022-28.....	July-5
In Re: Moore.....	July-7	Oakbrook Land Holdings, LLC	
IR-2021.....	Feb-35	v. Commissioner.....	May-7
IR-2021-255.....	Feb-3	Pickens Decorative Stone LLC	
IR-2022-2.....	Feb-6, Mar-6, 10, May-11,	v. Commissioner.....	May-8
	Jun-5, July-5, 12	Private Letter Ruling 202147015.....	Jan-6

Citation	Month–Page	Citation	Month–Page
Private Letter Ruling 202205022.....	Mar-6	Section 4942.....	Jun-3
Program Manager Technical Advice 2022-004	July-6	Section 4960.....	Feb-5
Proposed Reg. §20.2010-1(c)(3).....	Jun-7	Section 5314.....	Jan-3
Revenue Procedure 2021-53.....	Jan-6	Section 6033.....	Jun-5
Revenue Procedures 2022-1	Feb-4	Section 6330.....	Jun-37
Revenue Procedure 2022-13.....	Mar-3	Section 6672.....	July-36
Revenue Procedure 2022-14.....	Mar-4	Section 6751B	Jan-7
Revenue Ruling 2021-20	Jan-4	Section 7202.....	July-36
Revenue Ruling 2022-2	Feb-3, Mar-3, 9, May-9	Section 7431.....	Jun-8
Revenue Ruling 2022-7	May-8	Section 7701A26.....	Jan-6
Sand Investment Co., LLC v. Commissioner	Jan-7	SECURE 2.0	May-17
Sauter v. Commissioner.....	Jan-6	SECURE Act.....	May-17
SBSE-05-1021-0063	Jan-4	TC Memo 2022-15.....	May-4
Seaview Trading, LLC v. Commissioner	July-8	TC Memo 2022-22.....	May-8
Section 42(b)(3).....	Jan-4	TC Memo 2022-25.....	May-5
Section 72(t).....	Jun-17	TC Memo 2022-36.....	Jun-9
Section 121	Jan-17	TC Memo 2022-38.....	Jun-8
Section 263	Jan-20	TC Memo 2022-40.....	Jun-8
Section 301	Jan-6	TC Memo 2022-45.....	July-9
Section 403(b) Pre-Approved Plans	Mar-4	TC Memo 2022-49.....	July-7
Section 704(c).....	Feb-17	TC Memo 2022-50.....	July-8
Section 754 Election.....	Feb-17	Treece Investment Advisory Corp., v. Commissioner	Jun-8
Section 1250	Jan-22	U.S. v. Bittner.....	Jan-3
Section 1398	Jun-37	U.S. v. Page.....	Jan-7
Section 1446(a).....	Jun-5	Warren K. Jackson and et vir. v. Commissioner	July-8

BY SPEAKER

Speaker	Month	Speaker	Month
Bluestein, Gary	Jun-July	Mathew, Shiny Rachel	Jan-Feb
Davis, Karen	Mar	O'Sullivan, Brian.....	Feb
Jemiolo, Shannon.....	July	Pon, Lawrence.....	May-Jun
Lickwar, Robert C.	Jan, Mar, May	Redpath, Ian	Jan-Mar, May-July

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

1. According to Ian Redpath, which of the following addresses the treatment of leave-based donation payments?
 - A. e-News for Tax Professionals 2022-17
 - B. LB&I-04-0422-0014
 - C. Notice 2022-28
 - D. Program Manager Technical Advice 2022-004

2. According to Ian Redpath, in which of the following cases did the court rule that employees had no right to sue their employer for filing false W-2s with the IRS and underreporting wages?
 - A. *Adams & Boyle, P.C., et al. v. Slatery III, et al.*
 - B. *Balle-Tun v. Zeng & Wong, Inc.*
 - C. *Michael J. Rogerson v. Commissioner*
 - D. *Seaview Trading, LLC v. Commissioner*

3. According to Ian Redpath, in which of the following cases did the court rule that, although plaintiffs were represented by counsel pro bono, the attorney fees awarded to the plaintiffs did **not** have to be reported by the plaintiffs as income?
 - A. *Adams & Boyle, P.C., et al. v. Slatery III, et al.*
 - B. *Balle-Tun v. Zeng & Wong, Inc.*
 - C. *Michael J. Rogerson v. Commissioner*
 - D. *Seaview Trading, LLC v. Commissioner*

4. According to Ian Redpath, which of the following cases is a warning of sorts that new issues **cannot** be raised upon appeal of a CDP hearing?
 - A. *Adams & Boyle, P.C., et al. v. Slatery III, et al.*
 - B. *Balle-Tun v. Zeng & Wong, Inc.*
 - C. *Michael J. Rogerson v. Commissioner*
 - D. *Warren K. Jackson and et vir. v. Commissioner*

5. According to Ian Redpath, in which of the following cases is it noted that IRS Chief Counsel has the final authority to concede or settle innocent spouse relief in any deficiency proceeding?
 - A. *Adams & Boyle, P.C., et al. v. Slatery III, et al.*
 - B. *Michael J. Rogerson v. Commissioner*
 - C. *Michelle DelPonte v. Commissioner*
 - D. *Warren K. Jackson and et vir. v. Commissioner*

Continued on next page

6. According to Shannon Jemiolo, which of the following is accurate regarding the potential theft of cryptocurrency compared to cash?
 - A. Cryptocurrency is significantly less secure than cash.
 - B. Cryptocurrency is slightly less secure than cash.
 - C. Cryptocurrency is equally as secure as cash.
 - D. Cryptocurrency is significantly more secure than cash.
7. According to Ian Redpath and Shannon Jemiolo, cryptocurrency is generally classified as which of the following?
 - A. Bond
 - B. Cash
 - C. Property
 - D. Stock
8. According to Ian Redpath and Shannon Jemiolo, which of the following terms generally refers to the fact that cryptocurrency is stored on a series of computers?
 - A. Airdrop
 - B. Blockchain
 - C. Hard fork
 - D. NFT
9. According to Ian Redpath and Shannon Jemiolo, which of the following is correct regarding FinCEN Notice 2020-2?
 - A. Currently, FBAR regulations indicate that FBAR reporting is **not** required for a foreign account holding **only** Bitcoin.
 - B. FBAR regulations indicate that FBAR reporting will be required in 2025 for a foreign account holding **only** Bitcoin.
 - C. FBAR regulations indicate that FBAR reporting will be required in 2028 for a foreign account holding **only** Bitcoin.
 - D. FBAR regulations indicate that FBAR reporting will be required in 2030 for a foreign account holding **only** Bitcoin.
10. According to Ian Redpath and Shannon Jemiolo, which of the following would most likely qualify as an NFT?
 - A. Apartment building
 - B. Interest in a tweet
 - C. Interest in Bitcoin
 - D. Rembrandt painting

Continued on next page

11. According to Ian Redpath and Gary Bluestein, for the IRS to pursue collection from an individual for the trust fund portion of payroll taxes, they must show that the individual is which of the following?
 - A. Careless and negligent
 - B. Negligent and responsible
 - C. Responsible and willful
 - D. Willful and careless
12. According to Ian Redpath and Gary Bluestein, which of the following is correct regarding discharge of trust fund liability through bankruptcy?
 - A. Trust fund taxes can be discharged through Chapter 7 bankruptcy.
 - B. Trust fund taxes can be discharged through Chapter 11 bankruptcy.
 - C. Trust fund taxes can be discharged through Chapter 13 bankruptcy.
 - D. Trust fund taxes cannot be discharged through bankruptcy.
13. According to Ian Redpath and Gary Bluestein, a taxpayer must file a protest with the IRS Office of Appeals within how many days from the date a Form 1153 is issued?
 - A. 30 days
 - B. 60 days
 - C. 6 months
 - D. 1 year
14. According to Ian Redpath and Gary Bluestein, what is the maximum number of individual taxpayers the IRS can pursue in order to collect trust fund taxes owed by a corporation?
 - A. There is no maximum.
 - B. One
 - C. Ten
 - D. One hundred
15. According to Ian Redpath and Gary Bluestein, which of the following is recommended for a CPA concerned that the IRS may file criminal charges against his client for unpaid trust fund taxes?
 - A. A 4180 interview
 - B. A Kovel letter
 - C. An amended Form 941
 - D. An amended Form 1065

Subscriber Survey Evaluation Form

Please take a few minutes to complete this survey related to the **CPE Network® Tax Report** and return it by mail to 2395 Midway Road, Carrollton, Texas 75006, Attn: Managing Editor. All responses will be kept confidential. Comments in addition to the answers to these questions are also welcome. Please send comments to CPLgrading@thomsonreuters.com.

How would you rate the topics covered in the July 2022 **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	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>
Cryptocurrency	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>
Trust Fund Liabilities	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>

Which segments of the July 2022 issue of **CPE Network® Tax Report** did you like the most, and why?

Which segments of the July 2022 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 July 2022 **CPE Network® Tax Report**? Rate each speaker on a scale of 1–5 (5 highest):

	Overall	Knowledge of Topic	Presentation Skills
Ian Redpath	<input type="text"/>	<input type="text"/>	<input type="text"/>
Shannon Jemiolo	<input type="text"/>	<input type="text"/>	<input type="text"/>
Gary Bluestein	<input type="text"/>	<input type="text"/>	<input type="text"/>

Which of the following would you use for viewing CPE Network® A&A 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®

Firm/Company Name: _____

Account #:

Location:

Program Title: _____

Date: _____

[illegible]

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:

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 <u>3</u> 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.

[illegible]

CHECKPOINT LEARNING NETWORK

CPE NETWORK[®]

USER GUIDE

REVISED SEPTEMBER 3, 2021

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.
- **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!**

Copyrighted Materials

CPE Network program materials are copyrighted and may not be reproduced in another document or manuscript in any form without the permission of the publisher. As a subscriber of the **CPE Network Series**, you may reproduce the necessary number of participant manuals needed to conduct your group study session.

“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

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/>

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

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 (“Sign In or Register”).



the answer company

THOMSON REUTERS

CHECKPOINT LEARNING

Contact Us



Sign In or Register

Home

Search Courses

Products & Services

Support



Search courses

Need to get up to speed on
new revenue standards?

We can help.

Virtual Conference: Nov. 13 – 14

Register Now

Move forward

Checkpoint Learning provides training and tools to keep you and your team up to date and looking forward in an industry full of change and opportunity.



Webinars

Fit learning into your schedule with instructor-led webinars ranging from one to eight hours.

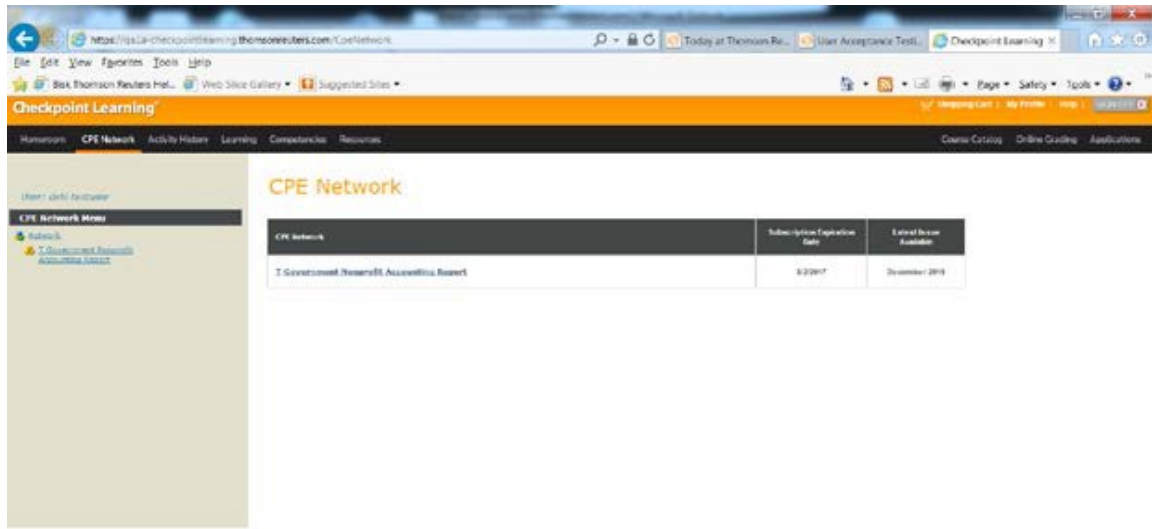


Seminars and conferences

In-person networking, dynamic instructors, nationwide locations plus vacation destinations.

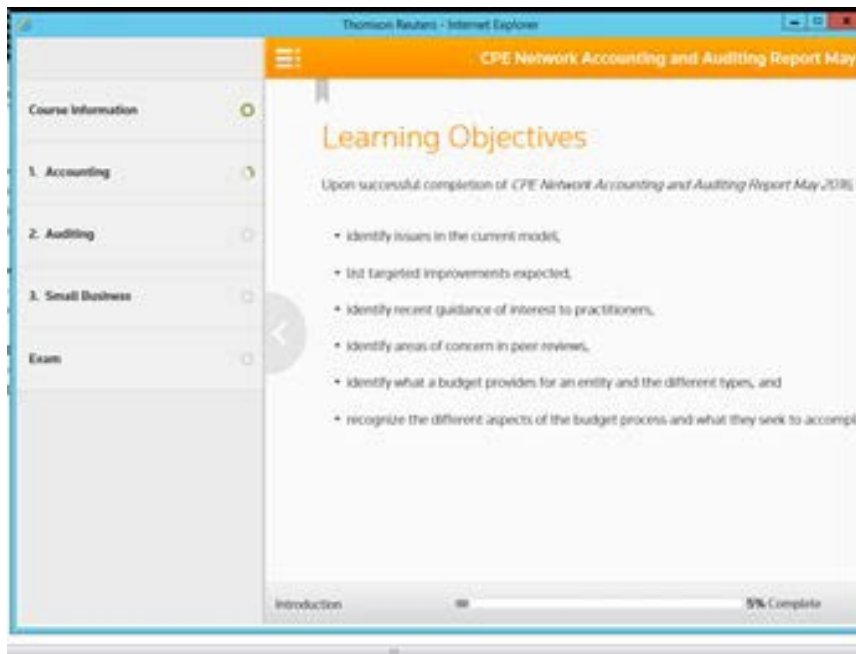


- In the **Network** tab, select the Network Report for the month desired.



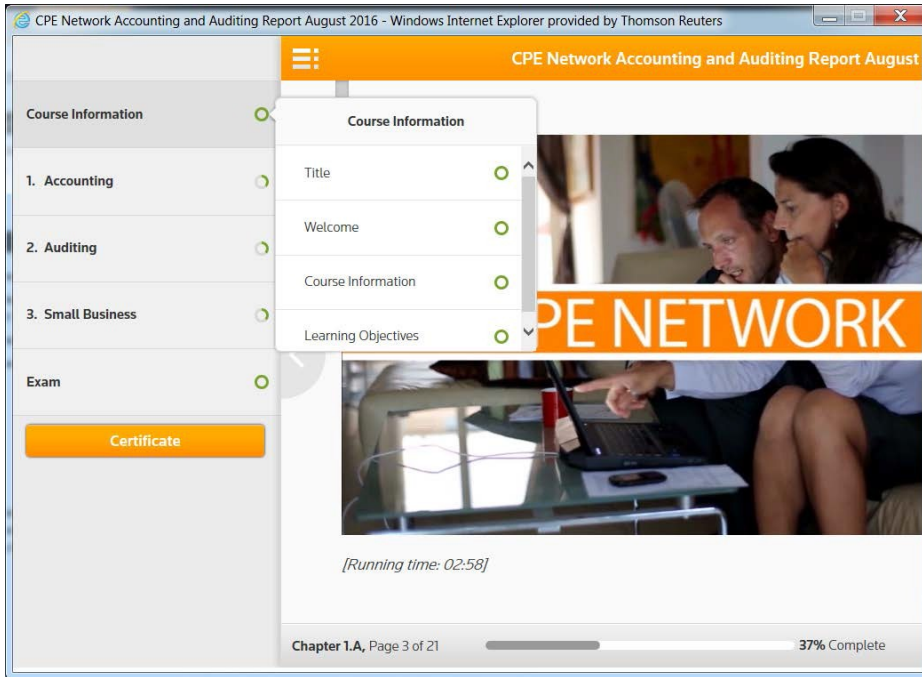
<https://go1a-checkpointlearning.thomsonreuters.com/CpeNetwork/CpeNetworkDetails/PageSubscriptionId=177994>

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

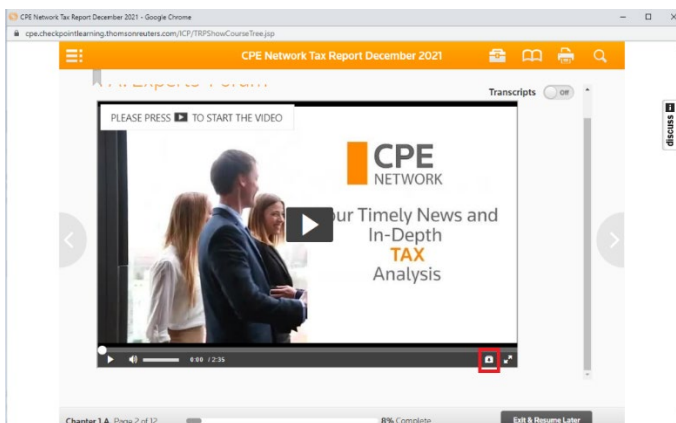


Click down to access the dropdown menu and move between the program Chapters.

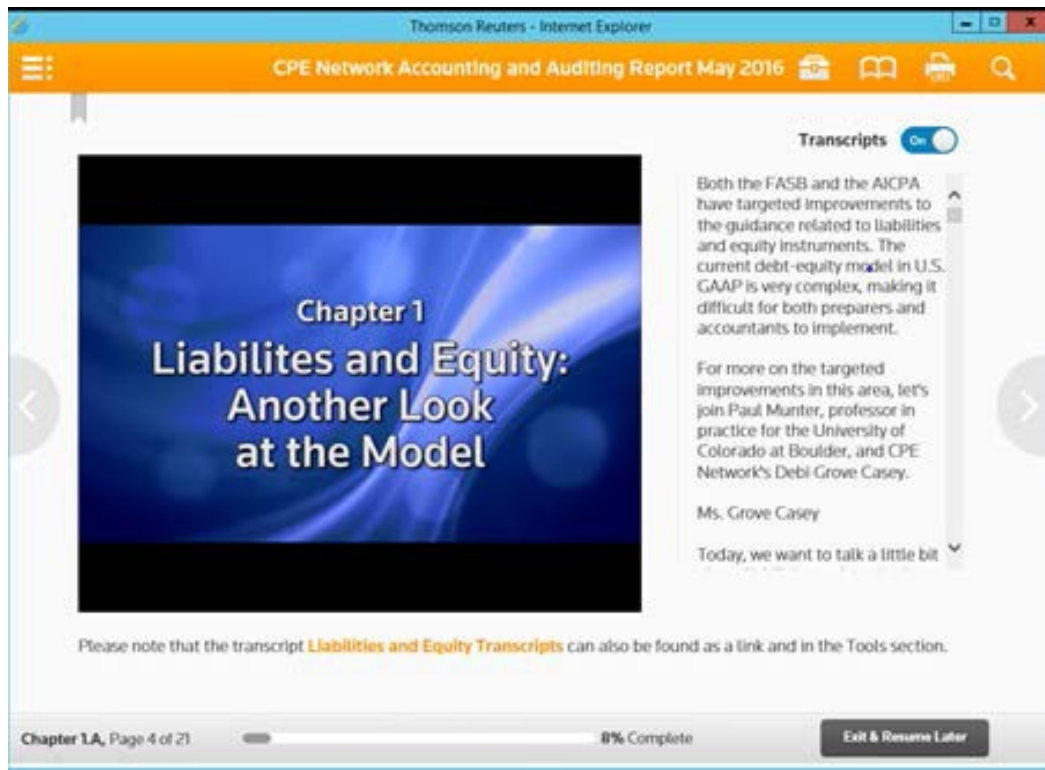
- **Course Information** is the course Overview, including information about the authors and the program learning objectives



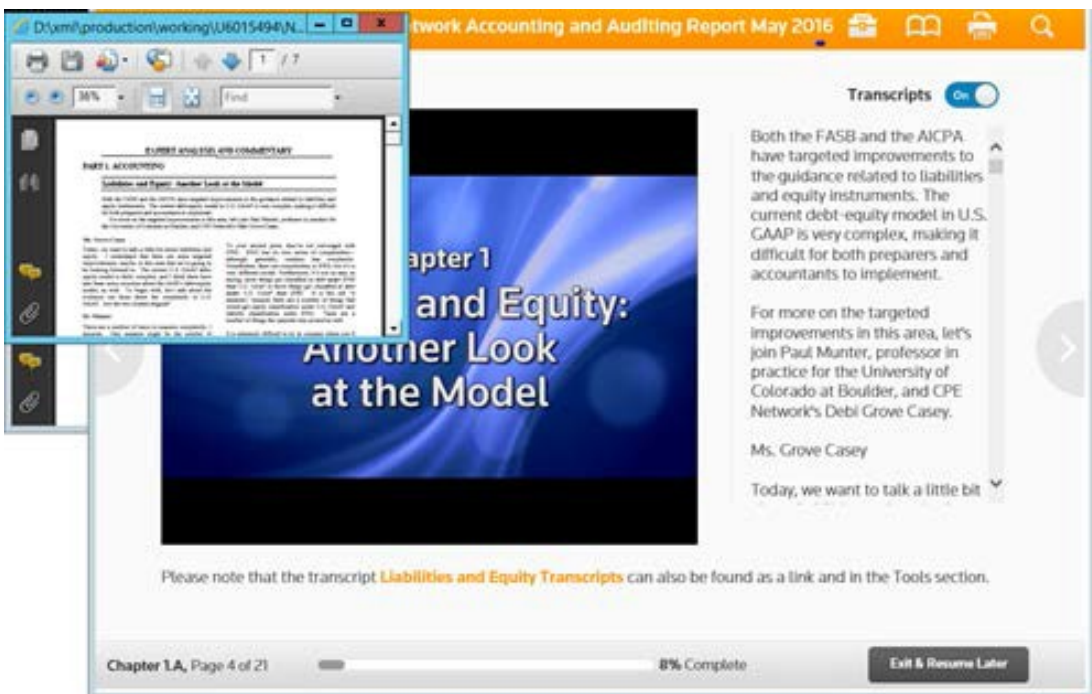
- **Each Chapter is now self-contained.** Years ago, when on the CPEasy site, the interview segments were all together, then all the supplemental materials, etc. Today, each chapter contains the executive summary and learning objectives for that segment, followed by the interview, the related supplemental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



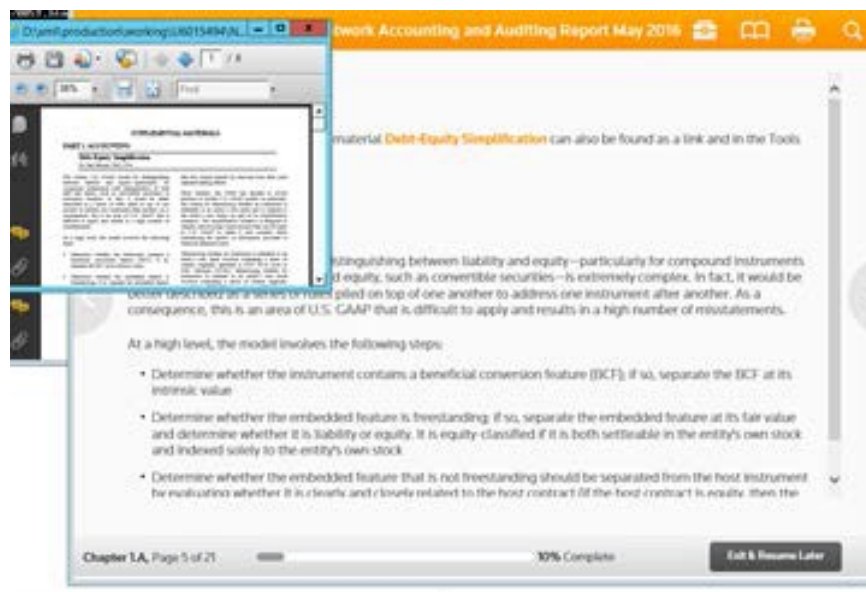
Video segments may be downloaded from the CPL player by clicking on the download button.



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 problems related to the segment.

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

The screenshot shows a web interface for the CPE Network Accounting and Auditing Report July 2016. The header is orange with a menu icon, title, and icons for a briefcase, book, printer, and search. The main content area is titled "Suggested Answers to Discussion Problems" and contains three numbered items:

1. ASC 320 requires that, at acquisition, an enterprise classify debt and marketable equity securities into one of three categories:
 - Held-to-maturity
 - Trading
 - Available-for-sale

An entity decides how to classify securities based on its intended holding period for each individual security, using the framework in ASC 320. In establishing its intent, an entity should consider relevant trends and experience, such as previous sales and transfers of securities. Classification decisions should be made at acquisition and, preferably, formally documented. It is not appropriate to use "hindsight" to classify securities transactions, perhaps by considering changes in value after acquisition.
2. The trading securities category includes securities that are bought and held principally for the purpose of selling them in the short term. Trading generally reflects active and frequent buying and selling, and trading securities are generally used with the objective of generating profits on short-term differences in price. "Short-term," in this context, is intended to be measured in hours and days, rather than in months or years, according to ASC 320. However, an entity is not precluded from classifying as trading a security it plans to hold for a longer period, as long as that designation occurs at acquisition.
3. Impairment is recognized in earnings when a decline in value has occurred that is deemed to be other than temporary, and the current fair value becomes the new cost basis for the security. An investment is considered to be impaired if the fair value of the investment is less than its cost basis. Cost includes adjustments made for

The bottom of the screen shows a progress bar at 100% Complete, the text "Chapter 3.A, Page 20 of 20", and an "Exit & Resume Later" button.

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.

The screenshot shows a web interface for the CPE Network Accounting and Auditing Report June 2016. The header is orange with a menu icon, title, and icons for a briefcase, book, printer, and search. The main content area is titled "Course Exams Completed" and contains the following text:

You have completed the exam for this course.

Please choose your next course of action by selecting on one of the buttons below.

"Review My Answers" will take you back through exam, giving you the opportunity to make changes.

Review My Answers

"Grade My Answers" will result in providing you with a final score for this course.

Grade My Answers

The bottom of the screen shows a progress bar at 100% Complete, the text "Course, Completed", and an "Exit & Resume Later" 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**.

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	<ul style="list-style-type: none">• Browser-based• Certificate discrepancies• Accessing courses• Migration questions• Feed issues
Product Support	800.431.9025 (follow option prompts)	checkpointlearning.productsupport@thomsonreuters.com	<ul style="list-style-type: none">• Functionality (how to use, where to find)• Content questions• Login Assistance
Customer Support	800.431.9025 (follow option prompts)	checkpointlearning.cpecustomerservicet@thomsonreuters.com	<ul style="list-style-type: none">• Billing• Existing orders• Cancellations• Webinars• Certificates