Overkill: A District Court Abates A Jeopardy Assessment.

Congress has given the IRS very potent collection remedies: once a tax is assessed by the IRS it can promptly impose liens on the taxpayer's property, it can seize property, it can levy against bank accounts and it can garnish wages, all without prior judicial process. The main safety valve is that the taxpayer can challenge the assessment by filing a petition with the tax court. There are also procedural safeguards that the taxpayer can invoke to challenge particular collection actions.

Congress has also given the IRS a nuclear option, the power to issue a jeopardy assessment under Section 6861 of the Internal Revenue Code if the government concludes that collection of a deficiency is in jeopardy. I.R.C. § 6861(a). The jeopardy assessment is particularly potent because it permits the IRS to immediately issue levies without prior notice to the taxpayer.

Given the impact that a jeopardy assessment can have, there are a series of basic safeguards: first, the standards are fairly strict; jeopardy assessments must rest upon a determination that

> (i) The taxpayer is or appears to be designing quickly to depart from the United States or to conceal himself or herself.
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> (ii) The taxpayer is or appears to be designing quickly to place his, her, or its property beyond the reach of the Government either by removing it from the United States, by concealing it, by dissipating it, or by transferring it to other persons.
>
> (iii) The taxpayer's financial solvency is or appears to be imperiled.

Treas. Reg. § 301.6851-1(a)(i)-(iii). The insolvency cannot be the result of the assessment itself.

Second, before a jeopardy assessment is made, the Office of Chief Counsel must approve it in writing. I.R.C. § 7429(a). The other safeguards are that the taxpayer can file an administrative appeal and that the taxpayer can seek judicial review of the jeopardy assessment under Section 7429(b) of the Code following that appeal. The district court will then review the IRS determination and assess whether the use of a jeopardy assessment was reasonable and whether the amount of the assessment was appropriate. I.R.C. § 7429(b)(3)(A).

Recently, the United States District Court for the Eastern District of Pennsylvania ruled on jeopardy assessments that the IRS made against former State Senator Vincent J. Fumo. *Fumo v. United States*, 2014 U.S. Dist. LEXIS 77082 (E.D. Pa. June 5, 2014). The case was a resounding win for the taxpayer, as the district court concluded that the use of a jeopardy assessment was nt reasonable.

Several factors drove the court's decision:

- While the IRS had cited transfers of large amounts of money between the taxpayer and his son, the court concluded that the explanation provided by the taxpayer was sufficient: as spelled out in detailed declarations, the transfers were driven by the fact that the son would be managing his father's financial affairs under a power of attorney, as the taxpayer was preparing to serve a prison term. *Fumo*, 2014 U.S. Dist. LEXIS 77082, slip op. at *58-*62.

- The IRS had also cited a series of real estate transactions in which the taxpayer had transferred property to his fiancée and his son, but the court excepted the taxpayer's explanation that the transfers were driven by the fact that estate and gift tax exemptions were due to expire. *Id.*, slip op. at *63. The fact that the taxpayer reported the transaction on gift tax returns also was inconsistent with an effort to hide his property from the IRS. *Id.*, slip op. at *63-*64. The court was also persuaded by the fact that the taxpayer retained an interest in many of the properties and that the IRS had been able to trace the transactions through public records. *Id.*, slip op. at *64.
- Another factor that the court emphasized was the passage of time: the IRS began investigating the taxpayer in 2009, but it issued the jeopardy assessment in 2012. *Id.*, slip op. at *79. In fact, the IRS had initially made a determination that a jeopardy assessment was not warranted, but then issued the jeopardy assessment several months later without any further action by the taxpayer. *Id.*, slip op. at *80-*82.
- The court also concluded that the taxpayer had not placed his property beyond the reach of the government, since the government knew who the transferees were and had issued nominee liens against them. *Id.*, slip op. at *85-*86.

Jim Malone is a tax attorney in Philadelphia; he focuses his practice on federal, state and local tax controversies.