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Tax Court Decisions on Section 6707A Penalty Deny Prepayment Forum and Extend Statute of Limitations

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"The best way to combat tax shelters is to be aware of them."[1] To ensure compliance with Regulations requiring disclosure to the IRS of "reportable transactions," Congress, in the American Jobs Creation Act of 2004 (AJCA),[2] mandated that a new penalty under Section 6707A be imposed on any person who fails to include, with any return or statement, required information with respect to a reportable transaction. The penalty applies without regard to whether the transaction ultimately results in any understatement of tax.[3] In back-to-back decisions handed down last December—*Smith,* 133 TC No 18, Tax Ct Rep Dec (P-H) 133.18, 2009 WL 4980885 , and *BLAK Investments,* 133 TC No 19, Tax Ct Rep Dec (RIA) 133.19, 2009 WL 4981301 (reviewed)—the Tax Court has issued some of the first judicial guidance with respect to the Section 6707A penalty. This article reviews the decisions and their impact on taxpayers against whom or which Section 6707A penalties are asserted.[4]

WHY SECTION 6707A?

In order to obtain a better awareness of abusive transactions, Treasury promulgated Temporary and Proposed Regulations under section 6011 in 2000, requiring certain taxpayers to disclose on their income tax returns that they had engaged in reportable transactions.[5] Although the Regulations originally applied only to corporate taxpayers and only with respect to a relatively narrow class of transactions, revisions made between 2000 and 2004 expanded their application to include noncorporate taxpayers and to broaden the categories of transactions that were reportable.[6] Until the enactment of the AJCA, however, there was no specific penalty for failing to disclose a reportable transaction. Further revisions to the Section 6011 Regulations have been made since the enactment of the AJCA.

The AJCA added Section 6707A, providing for penalties ranging from $10,000, in the case of a natural person who failed to disclose information regarding a reportable transaction other than a "listed transaction," up to $200,000, in the case of a taxpayer other than a natural person who failed to disclose a listed transaction. "Listed transaction" is defined in Section 6707A(c)(2) as a "reportable transaction which is the same as, or substantially similar to, a transaction specifically identified by the Secretary as a tax avoidance transaction for purposes of section 6011."[7]

The penalty is imposed regardless of whether the taxpayer's tax treatment of the undisclosed reportable transaction is ultimately sustained as a substantive matter, and there is no exception to the imposition of the penalty even if the taxpayer can demonstrate reasonable cause and good faith. [8] The Commissioner of Internal Revenue, acting personally, but not through a delegate, is authorized to rescind the penalty if the failure to disclose is not with respect to a listed transaction and "rescinding the penalty would promote compliance with the requirements of this title and effective tax administration." [9] The Code provides that the Commissioner's determination not to rescind a penalty may not be reviewed in any judicial proceeding. [10]

Although the legislative history of Section 6707A makes clear that a taxpayer may challenge other issues relating to the applicability of the penalty, such as whether a transaction is or is not a reportable transaction, no guidance is provided regarding the procedures that would govern judicial review of such issues. Section 6707A applies to any return or statement the due date for which is after 10/22/04, the AJCA's date of enactment. [11]

The Section 6707A penalty is not the only incentive for compliance with the reportable transaction rules that was added by the AJCA. A new paragraph (10) was added to Section 6501(c), under which the statute of limitations with respect to a listed transaction "as defined in section 6707A(c)(2)" (but not with respect to other reportable transactions) is extended if a taxpayer fails to include the required information with any return or statement. The statute of limitations with respect to such a transaction generally will not expire until one year after the date on which the Secretary of the Treasury is furnished with the required information. [12]

PREPAYMENT FORUM: IS THE BACK DOOR STILL OPEN?

In *Smith,* the Tax Court addressed the question of whether it had jurisdiction in a deficiency proceeding to redetermine a taxpayer's liability determined in a notice of assessment of Section 6707A penalties. The notice had been sent to an individual taxpayer who had allegedly failed to make the required disclosures concerning a listed transaction on his 2004, 2005, and 2006 returns. The notice sought the payment of $300,000 in Section 6707A penalties ($100,000 for each year).

The IRS had earlier sent the taxpayer a notice of deficiency seeking an aggregate of $133,974 in income tax, $5,708 in Section 6662 penalties, and $32,067 in Section 6662A penalties for 2003 through 2006. As is thus apparent, the asserted Section 6707A penalties greatly exceeded the total tax savings claimed by the taxpayer from the undisclosed listed transaction. [13] The taxpayer filed a petition with the Tax Court challenging the notice of deficiency and the notices of assessment, and the IRS filed a motion to dismiss for lack of jurisdiction and to strike as to the section 6707A penalties. The Tax Court granted the Service's motion.

Many of the provisions of the Code dealing with penalties are found in Chapter 68, "Additions to the Tax, Additional Amounts, and Assessable Penalties." Subchapter A of the chapter deals with "Additions to the Tax and Additional Amounts," and Subchapter B deals with "Assessable Penalties." Section 6707A is found within Part 1, "General Provisions," of Subchapter B, covering Sections 6671 through 6720C.

Section 6671(a) provides: "The penalties and liabilities provided by this subchapter shall be paid upon notice and demand by the Secretary, and shall be assessed and collected in the same manner as taxes. Except as otherwise provided, any reference in this title to 'tax' imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter."

Section 6213(a) prohibits assessment of a "deficiency" in income taxes until after a notice of deficiency has been sent to a taxpayer and, if the taxpayer files a petition with the Tax Court, the court's decision has become final. For many of the assessable penalties—but not Section 6707A—the Code provides explicitly that these "deficiency" procedures do not apply. Assessable penalties that do not contain such an explicit exclusion from the deficiency procedures can be divided into two categories:

- Where penalties relate to taxes that are not themselves subject to the deficiency procedures, such as employment taxes (including FICA, FUTA, and wage withholding) under Subtitle C, the courts have repeatedly and not surprisingly held that a taxpayer against whom such a penalty is asserted by the IRS is not entitled to the benefit of the deficiency procedures. [14]
- For assessable penalties under Subchapter B of Chapter 68 that are not explicitly excluded from the deficiency procedures, however, the Code's requirement that such penalties "be assessed and collected in the same manner as taxes" would seem at least to raise the possibility that the deficiency procedures—and, with them, the opportunity to obtain prepayment review of an asserted penalty in the Tax Court—could apply to penalties imposed with respect to taxes that are themselves subject to Section 6213(a) (i.e., income, estate, gift, and certain excise taxes).

When the Service moved to dismiss the taxpayer's petition, insofar as it related to the Section 6707A penalty, the Tax Court granted the motion and, in a brief opinion, made short shrift of the taxpayer's attempt to invoke the court's jurisdiction to redetermine the asserted penalty. [15] The court noted that certain assessable penalties in Subchapter B—but not Section 6707A—had been explicitly exempted by Congress from the deficiency procedures. Under the hoary Latin maxim of statutory construction, *expressio unius est exclusio alterius*, this fact alone, even in the absence of the mandate in Section 6671(a) that assessable penalties be assessed and collected in the same manner as taxes, would argue strongly in favor of applying the deficiency procedures where such an explicit exemption was not found. [16] Nevertheless, the Tax Court, without reference either to Section 6671(a) or to the Latin maxim, continued:

"Section 6707A's silence as to deficiency proceedings, however, does not vest this Court with jurisdiction. This Court and others have held that other penalties lacking such an explicit exemption are not subject to the deficiency procedures." In support of this statement, the Tax Court cited cases dealing with assessable penalties imposed with respect to employment taxes, which are not themselves subject to the deficiency procedures. [17]

The Tax Court then explored the definition of "deficiency" in Section 6211, which refers specifically to an excess of "tax" imposed over "tax" shown on a return, and concluded that Section 6707A penalties are not included within that definition. Indeed, the court noted, the penalty may be imposed even if there is an overpayment of tax. Thus, the Section 6707A penalty

was not "within our deficiency jurisdiction," and the portion of the taxpayer's petition relating to the penalty was dismissed. [18]

The court's insistence that it could not have jurisdiction if there was no asserted "deficiency" may well be correct. Nevertheless, the Tax Court's focus on the jurisdictional issue seems to have distracted it from the words of Section 6671(a) and their impact on this case. Thus, the court never addressed directly the argument that Section 6671(a) makes the Section 6707A penalty a "tax" for purposes of Section 6211, [19] that a failure to pay that penalty therefore gives rise to a "deficiency," and that such a deficiency is sufficient to invoke the procedures of Section 6213 and the jurisdiction of the Tax Court. While the reference in Section 6671(a) to payment "upon notice and demand" and indeed the Code's use of "assessable" to describe all the penalties in the subchapter might provide the basis for a reasoned counter-argument, the court's opinion fails to articulate adequately either side of the issue.

Having turned the taxpayer out of court on his effort to obtain preassessment review of the asserted penalty, the Tax Court then observed in footnote 6: "Though this Court is currently without jurisdiction, petitioners may have other avenues for judicial review. Petitioners may pay the penalties and seek recovery in a refund court.... In addition, we would presumably have jurisdiction to redetermine a liability challenge asserted by petitioners in a collection due process hearing."

The collection due process (CDP) regime under Section 6330 generally prohibits the levy (but not the assessment) of tax until the taxpayer's appeal to the Tax Court of any adverse result at an administrative hearing has been resolved. [20] During that administrative hearing and the subsequent appeal, the taxpayer may raise challenges to the existence or amount of the underlying liability if the taxpayer did not otherwise have an opportunity to dispute the liability. [21] Appeal of an adverse administrative determination is to the Tax Court, regardless of whether the Tax Court has jurisdiction of the underlying tax liability. [22] In cases involving challenges to the existence of a liability, the Tax Court's review is *de novo.* [23]

So what was achieved by the Tax Court's decision in *Smith*, other than strict adherence to a formalistic view of the court's jurisdiction? The Service will be able to assess the Section 6707A penalty against the taxpayer, but any attempt to collect the assessed penalty is likely to find its way right back onto the Tax Court's docket in the guise of a CDP case. So long as the taxpayer can summon the intestinal fortitude to refuse voluntary payment of an assessed liability, the same court (that could have decided the issue in a deficiency proceeding) will find itself deciding the same issue for the same parties just a few years later. Given that neither the words of the Code nor precedent in the Tax Court or the courts of appeals compelled the dismissal of the petition insofar as it related to the Section 6707A penalty, one can fairly question whether the court's resolution of this case was well-advised. [24]

DOES 6707A HAVE TO BE IN FORCE IN ORDER FOR IT TO APPLY?

In *BLAK Investments,* the Tax Court considered just how much of Section 6707A Congress intended to incorporate when it made reference to that section in another provision added by the AJCA to combat undisclosed listed transactions, Section 6501(c)(10).

Under Section 6501(c)(10), if a taxpayer fails to include on any return or statement for any tax year any information required under Section 6011 with respect to a listed transaction, "as defined in section 6707A(c)(2)," the time for assessment of tax with respect to the transaction does not expire before the date one year after the date on which the required information is furnished. [25] This provision applies only to listed transactions, and not to other categories of reportable transactions, and is effective for tax years with respect to which the period for assessing a deficiency had not expired before 10/22/04. [26] Section 6707A, by contrast, applies to any return or statement the due date for which is after 10/22/04.

BLAK Investments filed its return for the 2001 calendar year on 10/15/02, and the statute of limitations with respect to that year ordinarily would have expired three years later, on 10/15/05. Thus, the statute of limitations with respect to BLAK's return for 2001 had not expired before 10/22/04.

BLAK had engaged in a Son-of-BOSS listed transaction during 2001. [27] BLAK, as a noncorporate taxpayer, was not required under then-applicable Regulations promulgated under Section 6011 to disclose that transaction on its 2001 return. The Regulations were amended, however, effective 2/28/03 and, under the amended Regulations, BLAK should have disclosed the 2001 listed transaction on a statement attached to its 2002 return. BLAK filed its 2002 return on 10/15/03 but did not make the required disclosure on that return.

The IRS did not send a notice of FPAA to BLAK with respect to its 2001 return until 10/13/06. A petition was filed in the Tax Court, and BLAK moved for summary judgment on statute of limitations grounds. The Service contended that the statute of limitations, which ordinarily would have expired on 10/15/05, had been extended by operation of Section 6501(c)(10).

One of the requisites for the application of Section 6501(c)(10) was clearly present—the statute of limitations with respect to BLAK's 2001 return had not expired before 10/22/04. The Tax Court also concluded that BLAK had engaged in a transaction that met the Section 6707A definition of "listed transaction" during 2001 and had not disclosed that transaction as required by the Section 6011 Regulations. [28]

Nevertheless, Section 6707A clearly did not apply to impose a penalty for BLAK's failure to disclose, since neither BLAK's 2001 return (the return for the year in which the listed transaction actually occurred) nor BLAK's 2002 return (the return on which the required disclosure of the listed transaction should have been made) was due after 10/22/04. BLAK argued that a transaction to which Section 6707A in its entirety did not apply could not be considered a listed transaction "as defined in section 6707A(c)(2)." (After all, Section 6707A cannot define a term at a time at which the term is not "in" the Code.)

The Tax Court rejected BLAK's argument. The court asserted that acceptance of BLAK's argument "would render the express effective date of section 6501(c)(10) meaningless, violating the cardinal principle of statutory construction" that a court must "give effect, if possible, to every clause and word of a statute." If BLAK were correct, the court thought, the application of Section 6501(c)(10) would be limited to cases where the return on which the required disclosure

of the listed transaction should have been made was due after 10/22/04, thereby rendering meaningless the very different express effective date of Section 6501(c)(10).

This portion of the Tax Court's analysis seems misdirected. The court did not articulate any logical or grammatical reason that Section 6501(c)(10) could not be applied only to transactions for which the statute of limitations was open on 10/22/04 *and* as to which a disclosure under the Section 6011 Regulations was due after that date. [29] The Section 6011 Regulations do on occasion require disclosure of transactions occurring during a particular tax year on returns filed for subsequent tax years.

Compare, for example, two taxpayers: one entered into a transaction occurring during calendar year 2000, for which the return was due no later than 10/15/01; the other entered into a similar transaction during calendar year 2001, for which the return was due no later than 10/15/02. Assume that, under the Section 6011 Regulations, each of these transactions was required to be disclosed on returns for 2004 due on 10/15/05. [30] Both taxpayers will be subject to penalty under Section 6707A if that disclosure was not made. Under BLAK's reading of the Code, however, Section 6501(c)(10) would apply only to the second taxpayer, since the statute of limitations with respect to only that taxpayer's transaction was open on 10/22/04—the "express effective date" of Section 6501(c)(10), rather than being meaningless, would apply to prevent the reopening of the first taxpayer's statute of limitations.

The Tax Court's reference to the legislative history of Section 6501(c)(10) is perhaps slightly more persuasive. The court noted that the House Report on the AJCA stated that some taxpayers had been "employing dilatory tactics ... in an attempt to avoid liability because of the expiration of the statute of limitations." [31]

Although this language is far from definitive, a clearer understanding of Congress's intent could be derived from a press release—not ordinarily considered an authoritative source of legislative history!—in which Senators Grassley (R-Iowa) and Baucus (D-Mont.) stated that a proposal that they were then making to add a provision similar in effect to Section 6501(c)(10) was intended to apply to, and indeed provoked by, Son-of-BOSS listed transactions that had been implemented by "companies and high net worth individuals" in 2000. At that time, the Section 6011 Regulations already required disclosure of such transactions by corporate taxpayers. BLAK's reading of the Section 6501(c)(10) effective date would have caused that provision to fail to apply to some of the very situations that motivated its enactment. [32]

Finally, the court drew support from *Leslie*, 81 AFTR 2d 98-2153, 146 F3d 643 (CA-9, 1998), *aff'g* TC Memo 1996-86, RIA TC Memo ¶96086 , a Ninth Circuit decision that had also involved a cross-reference between Code provisions with differing effective dates. In that case, the court of appeals had held that, in applying the provision that made the cross-reference, only that provision's own effective date, and not the effective date of the provision to which reference was made, applied. The cross-reference in *Leslie* was considered to have been made merely "in the interest of expediency," but without intent to incorporate the other provision's effective date, and the Tax Court found the same was true here.

Two factors may best explain the Tax Court's unwillingness to accept BLAK's arguments. [33] First, there is a long tradition of reading statute of limitations provisions in favor of the government. [34] Second, and perhaps more important, the Tax Court has now had a long look at a significant number of cases involving Son-of-BOSS transactions [35] and has apparently formed the firm impression that such transactions are abusive. It would be unrealistic at this point to expect the Tax Court to read a statutory provision to bar the Service from collecting taxes due on such transactions, unless the provision was definitive and unambiguous.

THE ROAD AHEAD

The Tax Court has now had two opportunities to address Section 6707A, and each time it decided adversely to the taxpayer. The specific Section 6501(c)(10) question at issue in *BLAK Investments* may slowly die a natural death; as we get ever more distant from the tax years that were "open" on 10/22/04, it becomes less and less likely that the Service will attempt to assert deficiencies with respect to such years, even if, as a technical matter, Section 6501(c)(10) has applied to prevent the period of limitations from closing.

The court's insistence, however, in *Smith* that the Tax Court is unavailable as a prepayment forum to challenge asserted impositions of the penalty will be of continued significance. Looking more broadly, perhaps, it is not hard to sense a judicial animus toward the "tax shelters" and "listed transactions" at which Section 6707A is aimed. Trouble may be on the horizon for taxpayers whenever that provision enters the picture.

[1] H. Rep't No. 108-548, Part 1, 108th Cong., 2d Sess. 261 (2004).
[2] P.L. 108-357, 10/22/04, section 811.
[3] Section 6707A(f).
[4] An upcoming article will highlight an important discussion in one of these decisions—a discussion that may raise as many questions as it answers and that may have an impact far beyond the sphere of Section 6707A—regarding the proper procedure for a taxpayer to follow in asserting a statute of limitations defense to a notice of final partnership administrative adjustment (FPAA) issued under the TEFRA partnership audit procedures. The upcoming article also will consider some of the other issues raised by that decision.
[5] TD 8877, 2/28/00. See generally Gideon and Bowers, "The New Tax Shelter Disclosure Rules: Registration, List Maintenance, and Reporting," 92 JTAX 261 (May 2000).
[6] Under the current version of the Regulations, "reportable transactions" include "listed transactions," "confidential transactions," "transactions with contractual protection," "loss transactions," and "transactions of interest." Each of these terms is defined at length in the Regulations, and the Service has issued Revenue Procedures exempting certain "loss transactions" and "transactions with contractual protection" from the disclosure requirements. See Rev. Proc. 2004-66, 2004-2 CB 966 (loss transactions); Rev. Proc. 2007-20, 2007-1 CB 517 (transactions with contractual protection). See generally Lipton, Walton, and Dixon, "The World Changes: Broad Sweep of New Tax Shelter Rules in AJCA and Circular 230 Affect Everyone," 102 JTAX 134 (March 2005).
[7] Under Reg. 1.6011-4(b)(2), a "listed transaction is a transaction that is the same as or substantially similar to one of the types of transactions that the Internal Revenue Service (IRS) has determined to be a tax avoidance transaction and identified by notice, regulation, or other form of published guidance as a listed transaction." There are now 34 listed transactions, enumerated in Notice 2009-59, 2009-31 IRB 170.
[8] Compare, e.g., Sections 6657, 6662, 6662A, 6694(a), and 6712.
[9] Section 6707A(d). Guidance regarding when the penalty may be rescinded is in Rev. Proc. 2007-21, 2007-1 CB 613.
[10] Section 6707A(d)(2).
[11] AJCA, section 811(c).

[12] If the Secretary requests, pursuant to Section 6112, that a "material advisor" with respect to the transaction furnish a "list" of participants in the transaction, and the material advisor complies with the request, the statute of limitations may also expire one year after the list is furnished.

[13] Section 6662 imposes a 20% penalty on certain underpayments of tax, and Section 6662A imposes a 30% penalty on understatements of tax attributable to undisclosed listed transactions. The amount of understatement derived from dividing the asserted Section 6662A penalty by 30% is only $106,887. Because of this potential imbalance between the amount of understatement of tax attributable to an undisclosed listed transaction and the amount of Section 6707A penalty assessed with respect to such transaction, the National Taxpayer Advocate concluded that Section 6707A "as written can impose unconscionable hardship on taxpayers" and "raises significant constitutional concerns, including possible violation of the Eighth Amendment's prohibition against excessive government fines and due process protection." See National Taxpayer Advocate, *2008 Annual Report to Congress,* Vol. I, pages 419-422 (12/31/08). The Senate recently passed the Small Business Penalty Fairness Act of 2009, S. 2917, 111th Cong. (2009), under which Section 6707A would be amended to provide that the amount of the penalty under Section 6707A(a) for any reportable transaction would equal 75% of the decrease in tax shown on the return as a result of the transaction (or which would have resulted from the transaction had it been respected for federal income tax purposes), but with a minimum penalty of $5,000 in the case of a natural person and $10,000 for all other taxpayers. The maximum penalty in the case of a listed transaction would be $100,000 in the case of a natural person and $200,000 for all other taxpayers, and, in the case of any other reportable transaction, would be $10,000 in the case of a natural person and $50,000 for all other taxpayers. These changes to Section 6707A would be effective for penalties assessed after 2006.

[14] See, e.g., Medeiros, 77 TC 1255 (1981) (Section 6672 penalty for failure to pay over employment taxes withheld from employees); see also Williams, 131 TC 54 (2008) (foreign bank account reports (FBAR) penalty under 31 U.S.C. section 5321); Judd, 74 TC 651 (1980) (Section 6652 (part of Subchapter A of Chapter 68) penalty).

[15] The Tax Court prefaced its discussion with a few cryptic sentences: "Respondent asserts that petitioners may not seek a redetermination by this Court of the section 6707A penalty because it is an 'assessable penalty.' The label of 'assessable penalty,' however, does not automatically bar a taxpayer from using the deficiency procedures to challenge the liability."

At this point, the reader might fairly expect the Tax Court either to find that the deficiency procedures had properly been invoked by the taxpayer or to explain why this particular "assessable penalty" was not subject to those procedures. Nevertheless, the court continued: "An assessable penalty, *rather,* must be paid upon notice and demand and assessed and collected in the same manner as taxes" (emphasis added). It is difficult to understand the distinction that the court attempted to draw.

[16] The Tax Court also noted later in its opinion: "Moreover, most of the assessable penalty provisions that do not implicate deficiency proceedings concern a taxpayer's failure to file a return or provide other information similar to failing to disclose a reportable transaction under section 6707A" (footnote omitted). The court did not explain the relevance of this statement or why it supported the conclusion that deficiency proceedings were not available for Section 6707A penalties or, indeed, for any other assessable penalty relating to income taxes as to which the Code did not specifically exclude their application.

[17] See the cases cited in note 14, *supra.*

[18] The Tax Court also stated: "We note that this Court has never exercised jurisdiction over an assessable penalty that was not related to a deficiency, even absent Congress' explicitly circumscribing our jurisdiction." The court, however, pointed to no instance in which it had been *asked* to exercise jurisdiction over an assessable penalty like that imposed by Section 6707A, one that related to a tax that is itself subject to the deficiency procedures and that does not contain an explicit exemption from those procedures. Accordingly, the absence of precedent favorable to the Tax Court's exercise of jurisdiction is neither surprising nor persuasive.

[19] Either sentence of Section 6671(a), standing alone, could lead to this conclusion; taken together, the two sentences of that provision certainly provide a coherent basis for this position, but one that was not addressed by the court.

[20] Section 6330(e)(1). Under Section 6320(c), rules similar to those described in this paragraph (relating to levies and other collection actions) apply as well to CDP hearings relating to the imposition of liens on the taxpayer's property.

[21] Section 6330(c)(2)(B).

[22] Section 6330(d)(1).

[23] Sego, 114 TC 604 (2000). If the taxpayer did have a prior opportunity to dispute the liability, however, neither the administrative hearing officer nor the Tax Court on appeal will consider the issue. Sections 6330(c)(2)(B) and 6330(d); H. Rep't No. 105-599, 105th Cong., 2d Sess. 266 (1998); Goza, 114 TC 176 (2000). The *de novo* review in

"no prior opportunity to dispute" cases is in contrast to other CDP situations in which the Tax Court reviews the decision of the administrative hearing only for abuse of discretion. See Goza, *supra.*

[24] The Tax Court's opinion does not make clear on what basis the taxpayer argued that the Section 6707A penalty was inapplicable to him. There is no defense to the application of the penalty on the ground of "reasonable cause and good faith," and the Commissioner cannot rescind a Section 6707A penalty imposed with respect to a listed transaction on grounds of "promot[ing] compliance with the requirements of this title and effective tax administration." Moreover, in cases involving reportable transactions other than listed transactions, the Commissioner's failure to rescind the penalty on those grounds of "promot[ing] compliance with the requirements of this title and effective tax administration" is not subject to judicial review. Accordingly, even if the Smith case had involved a reportable transaction other than a listed transaction, the availability of a deficiency-like forum in the Tax Court in which to seek a redetermination of an assessment of a Section 6707A penalty would not have given the taxpayer much opportunity for a defense on the merits. This seems to militate in favor of allowing the Tax Court to dispose of such cases early in the process, rather than adding the complexity of compliance with the CDP rules.

[25] See also note 12, *supra*.

[26] AJCA, section 814(b).

[27] For a description of such transactions, see, e.g., Kligfeld Holdings, 128 TC 192 (2007).

[28] BLAK's arguments that the Section 6011 Regulations were invalid and/or inapplicable to BLAK's transaction, all of which were rejected by the Tax Court, will be discussed in next month's issue of The Journal.

[29] Similarly, the court's statement that "had Congress intended" to restrict the application of Section 6501(c)(10) to transactions for which a return or statement was due after 10/22/04 or to cases in which a taxpayer is subject to a Section 6707A penalty, "it could have done so expressly," seems purely conclusory. BLAK's argument was that Congress had done precisely that by inserting a cross-reference to Section 6707A in Section 6501(c)(10).

[30] A similar factual pattern was in fact involved in this case, although the required due date for the disclosure, which should have accompanied the return for the subsequent year (2002), was 10/15/03, a date prior to the enactment of the AJCA.

[31] H. Rep't No. 108-548, *supra* note 1, page 267.

[32] The pattern of interlocking effective dates for these provisions that was eventually included in the AJCA was modeled on an amendment to the Jumpstart Our Business Strength (JOBS) Act, S. 1637, 108th Cong. (2003), that had been proposed by Senators Grassley and Baucus months earlier. See S. Amend. 2645 to S. 1637 by Sens. Grassley and Baucus, reprinted in 150 Cong. Rec. No. 26, pages S2114, S2119 (3/3/04).

[33] As indicated in note 28, *supra*, the court also rejected all of the other arguments made by BLAK in connection with its summary judgment motion.

[34] A point that the court made with a citation to the Supreme Court's decision in E.I. DuPont de Nemours & Co. v. Davis, 264 US 456, 68 L Ed 788 (1924).

[35] See, e.g., 3K Investment Partners, 133 TC No 6, Tax Ct Rep Dec (RIA) 133.6, 2009 WL 2838384 ; Kligfeld Holdings, *supra* note 27; Bergmann, TC Memo 2009-289, RIA TC Memo ¶2009-289.