Rand Timeline and Update

In 2009 and 2010, Chief Counsel IRS issued Service Center Advice providing that the IRS could impose the accuracy related penalty found in 6662(a) on refundable credits including the “negative tax” created in those situations in which the refund exceeded the tax owed. The IRS began imposing this penalty wholesale in all refundable credit cases. Prior to the advice rendered in 2009, scattered cases existed in which the IRS had imposed the penalty on taxpayers claiming refundable credits.

In 2011, the Rand case began with Andy Roberson representing the taxpayer pro bono through a referral from the Center for Economic Progress in Chicago. The Rand case involved both frozen and non-frozen refunds. The IRS sought advice from the National Office on the issue.

In 2012, Chief Counsel IRS issued a Service Center Advice providing that the IRS should not impose the accuracy related penalty in refundable credit cases in which the IRS froze the refundable part of the credit. The IRS began a program of abating the credits assessed during the preceding three years. A TIGTA report stated that it abated penalties in more than 200,000 cases.

In 2013, the Tax Court ruled that IRS could not impose IRC 6662(a) penalty on refundable credits to the extent that the credit creates “negative tax” Rand v. Commissioner, 141 T.C. 376 (2013) The IRS appealed the Rand decision to the 7th Circuit, but the appeal was later dismissed with prejudice.

In July 2014, the IRS issued Chief Counsel Notice 2014 - 007 stating that Chief Counsel was abandoning the position it had taken in Rand and would no longer impose the 6662(a) penalty on the negative tax portion of refundable credits. The IRS, however, did not stop imposing the 6662(a) penalty on taxpayers with the Rand facts.

In December 2014, Andy Roberson went to the IRS for the annual meeting between the ABA and the IRS to request that the IRS abate the penalties on all of the Rand cases. The IRS said no because it would require too many resources.

In July 2015, the IRS finally stopped imposing the 6662(a) penalty on taxpayers with the Rand facts.

In August 2015, TIGTA came out with a report (2015-10-059) on penalty abatement that happened to involve a review of abatements during the response to the 2012 Chief Counsel Advice allowing the report to provide a window on the number of cases involved. The TIGTA report stated that the abatements were approximately $215 million.

In December 2015, Keith Fogg went to the IRS for the annual meeting between the ABA and the IRS to request that the IRS abate the penalties on all of the Rand cases in the same manner it had done for the cases with frozen refunds described in the TIGTA report. The IRS said no because it would require too many resources; however, the IRS indicated that it would abate the penalty on the cases in which it was imposed after Chief Counsel Notice 2014-007. Chief Counsel and the IRS would continue to abate the penalty on any case in which the taxpayer specifically brought it to their attention in Tax Court or in the administrative process.
The next day after the annual meeting between the ABA and the IRS, Congress passed the PATH Act which contained, to the surprise of those in the LITC community, a provision, section 209(a), reversing the outcome in the Rand case and reversing it retroactively for any year for which assessment remained open at the time of the legislation. As a result of the legislation, the IRS began again to impose the penalty again on “negative tax” resulting from refundable credits and did not engage in a program to reverse the penalty assessments made during the year after it had conceded the issue. Chief Counsel Notice 2016-004 issued shortly after the passage of the PATH Act sets out the new IRS position and reversed the prior Notice on this subject.

In February 2016, Carl Smith noticed an order written by Judge Halpern in the case of Galloway v. Commissioner in which the Court asked for additional briefing on the impact of the PATH legislation and its retroactive impact because the legislation’s cite to the American Opportunity Credit provision in the Code cited to the wrong subsection. Carl brought the order to the attention of Keith. Keith reached out to Mr. Galloway to see if he wanted representation and assistance in responding to the Court’s order. Keith also reached out to Andy Roberson to see if he wanted to assist in the case.

In March 2016, Keith began contacting other LITCs to seek any Rand cases they might have pending in their inventory. No viable cases were found.

In April 2016, the Harvard Federal Tax Clinic with major assistance from Andy and McDermott Will & Emery associate Denise Mudigere, filed a brief on behalf of Mr. Galloway, arguing, inter alia, that the retroactive application of the penalty as written in the PATH Act was unconstitutional. After two more sets of briefs, it became clear that due to an erroneous refund in the Galloway case, the Rand issue was not necessary to the disposition of the case.

In July 2016 students at the Harvard Federal Tax Clinic traveled to DC for three days and researched the Court’s files looking for Rand cases where the year in which the penalty was imposed predated the PATH Act passage. Twenty-five cases were identified. The Harvard Federal Tax Clinic reached out to these 25 unrepresented individuals and began working with other LITCs around the country to represent them to contest the penalty and potentially to contest the underlying liability as well.

By November 2016, it became clear that Chief Counsel would concede the penalty issue rather than litigate it.

In December 2016, we believe there remain several hundred thousand cases in which an assessment of the 6662(a) penalty for the negative tax portion of a refundable credit remains on the books of the IRS. Many, probably a majority of these assessments at this point, involve years in which the assessment period was closed at the time of the passage of the PATH Act. These assessments are bad. If you encounter one of these assessments in a collection case, the IRS should abate the penalty if you bring it to their attention. For assessments alleged made valid by the PATH Act the Harvard Federal Tax Clinic with the assistance of Andy and Denise remain available to litigate the constitutional issue should the right case exist.

For links to documents referenced here go to http://procedurallytaxing.com/ and search for Rand.