The Troubling Rise Of Injunction Suits

by Jeffrey A. Neiman and Derick Vollrath

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I. Introduction

April 1998 was a dark time for the IRS. That month, the Senate Finance Committee — under the direction of Republican Sen. William V. Roth Jr. of Delaware — took public testimony concerning abusive practices rampant within the IRS. The hearings were front-page news and — thanks to CNN and C-SPAN — appeared on televisions in homes throughout the country. Over four days, the public and its representatives heard horror story after horror story.

They heard of “paramilitary” style raids of small businesses, of bank accounts drained without recourse, and of innocent spouses held to account for their partners’ wrongdoings. They heard about their fellow citizens’ businesses and livelihoods erased overnight. In short, they heard about a tax bureaucracy run amok. Important internal and external controls on the IRS simply did not exist. The people were outraged and demanded change, and they got it.

In response to this popular outcry, Congress passed the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA ’98). Support was bipartisan. RRA ’98 passed by a vote of 96-2 in the Senate and 402-8 in the House. President Clinton signed it into law on July 23. On that day, the Los Angeles Times published an article that recounted the public mood:

President Clinton signed into law the most far-reaching reform of the Internal Revenue Service in four decades on
Wednesday, aiming to shatter the walls of a bureaucracy that had become so entrenched that it operated largely outside the control of the nation’s political system.

The new law, which grew out of a reform movement fueled by widespread public discontent with the agency’s abuse of power, would subject the IRS to greater outside oversight and impose new limits on its sweeping powers over individual Americans.

RRA ’98 contained many provisions designed to achieve this goal. It created the Treasury Inspector General for Tax Administration, an independent organization committed to overseeing the IRS.7 It also created the Office of the Taxpayer Advocate, an independent office within the IRS charged with ensuring its integrity.8 And it also reined in the IRS’s enforcement authority in an effort to curb abuse. For example, it ensured that only in special cases could bank accounts be subject to a continuous levy9 and it provided relief for innocent spouses impacted by their partners’ wrongdoings.10

Perhaps the most important feature of RRA ’98 was the culture change that it sought to effect throughout the IRS. As part of these efforts, the IRS’s core mission statement was changed to reflect that it ultimately serves the taxpayers rather than the treasury.11 As a result of RRA ’98, the IRS changed its mission statement from a focus on mere tax collection. Now, the IRS exists to “provide America’s Taxpayers top quality service by helping them understand and meet responsibilities and by applying the tax law with integrity and fairness to all.”12 As then-IRS Commissioner Charles O. Rossotti stated in an IRS press release announcing the change, “The mission statement reflects a new attitude at the IRS. Our top priority is putting the interest of the taxpayers first.”13

This culture change found its ultimate manifestation in the Taxpayer Bill of Rights. As observed by Nina E. Olson, the country’s first national taxpayer advocate within the IRS, “At their core, taxpayer rights are human rights.”14 Reflecting their importance, the IRS details these rights in a document that it has designated IRS Publication 1, which the agency sends to individual taxpayers when it initially contacts them about a potential enforcement matter.15

And in December 2015 Congress amended section 7803 to instruct the IRS commissioner to ensure that IRS employees “are familiar with and act in accord with” the TBOR. Under Publication 1 and section 7803, a taxpayer has the right to be informed, the right to quality service, the right to challenge the IRS’s position and be heard, the right to appeal an IRS decision, the right to finality, the right to privacy, the right to confidentiality, and the right to a fair and just tax system.16

RRA ’98 has achieved many of its goals. Persons subjected to civil IRS enforcement actions generally can resolve them fairly and discreetly. They need not expose their tax and financial issues to the public, and the IRS may not use the threat of public exposure as an intimidation tactic. Further, robust IRS administrative due process permits taxpayers notice of the issues in controversy and ordinarily allows for a determination on the merits or a compromise in the face of unclear law.

A. Overreliance on Injunction Sidesteps Reforms

But where Congress and the public have closed a door, the IRS has opened a window. Recent developments in IRS enforcement strategy threaten to undermine Congress’s reforms. Specifically, passage of RRA ’98 has coincided

7 RRA ’98 section 1103.
8 Id. at section 1102.
9 Id. at sections 3431-3433.
10 Id. at sections 3201-3202.
11 Indeed, RRA ’98 specifically instructed that the “Internal Revenue Service shall review and restate its mission to place a greater emphasis on serving the public and meeting taxpayers’ needs.” Id. at section 1002.
13 IR-98-59.
14 IRS, “Taxpayer Rights.”
15 See Internal Revenue Manual section 4.46.3.2.7(4), “Contacting the Taxpayer.” Contacted businesses receive a letter that includes “reference to a web link to access and download Publication 1.” Id. at section 4.46.3.2.7(1).
with an increase in the Justice Department Tax Division bringing, at the IRS’s behest, injunction actions against taxpayers in federal district court under section 7402. There are two situations in which the IRS employs injunction actions readily: cases involving tax preparers and cases involving the alleged promotion of abusive tax shelters.

However, the authority on which the IRS relies, specifically section 7402, does not limit injunction suits to these situations. 17

Unlike the IRS’s administrative civil remedies, injunction lawsuits proceed against businesses and individuals without warning and in publicly filed lawsuits. The suits are usually accompanied by press releases couched in damning terms and posted to the search-engine-friendly Justice Department website. 18 These press releases lead to stories in news outlets and are easily available to all who may search for the subject individuals or businesses on the internet. 19 Faced with these public and one-sided declarations, a defendant’s business is essentially extinguished without recourse. Often, the best an accused can hope for is to litigate under this cloud for years, eventually avoiding injunction and adverse legal judgment but never removing the stink of the public allegations leveled by the government.

Even more troubling, since 2014 the government has increasingly sought disgorgement in connection with its injunction suits. 20 In so doing, it seeks an order requiring the accused individuals and businesses to turn over to the government all the money that they have made from conduct associated with the government’s injunction claim. 21 Further, the government takes the position that no statute of limitations applies to disgorgement 22 and that any disgorgement it achieves is cumulative to the statutory penalties that the Internal Revenue Code provides. Accordingly, defendants can find themselves having to justify decades of past conduct or face financial ruin. In light of the catastrophic consequences of losing the case, injunction suit defendants sometimes consent to an injunction in exchange for a reduced disgorgement figure.

This report seeks to start a conversation about the appropriateness of the government’s increasing use of injunction actions. The rising use of injunction actions threatens to undermine the reforms that Congress attempted to implement through RRA ’98. In the face of such injunction actions, their subjects are often robbed of the meaningful opportunity to challenge the IRS’s actions that RRA ’98 sought to guarantee. This circumstance is largely a result of the unfair government pressures and procedures of the type that Congress sought to prohibit in 1998.

II. The Rise of Injunction and Disgorgement Actions

A. The Use of Injunction Actions Balloon

Section 7402(a) originated in Congress’s first major overhaul of the IRC, conducted in 1954. 23 In section 7402(a), Congress included the following language:

The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions writs and orders of injunction, and of ne exeat republica, orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or
appropriate for the enforcement of the internal revenue laws.

This provision has persisted unchanged since. But until around 1998 it was sparingly used. From enactment to 2000, Westlaw reports just 88 district court decisions referencing suits for injunction under section 7402(a).24

This changed after the introduction of RRA ’98. According to statistics compiled by the Administrative Office of the U.S. Courts, overall civil cases brought on behalf of the government have decreased from a high of 28,690 cases filed in the 12-month period ending March 31, 2001,25 to a low of 4,786 cases filed in the 12-month period ending March 31, 2018 (the latest period for which statistics are available). But over the same period, the number of reported decisions involving injunctions under section 7402 has increased. The chart above illustrates this trend.

Even more recently, the government has started using section 7402 to generate revenue by adding claims for disgorgement in connection with the injunction. From 1954, when section 7402 was enacted, until 2014, Westlaw reports just five district court cases involving section 7402 and containing the term “disgorgement” or its derivatives.26 Since 2015, however, there have been 41 such decisions,27 20 of which were issued in 2018.28

B. Section 7402 Injunction Suits Illustrated

In many significant ways, the text of section 7402 presents the government with a blank slate upon which to devise whatever enforcement mechanisms it sees fit. As one court put it, “the plain text of section 7402(a) provides a broad grant of authority to enter injunctions ‘as may be

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24 This number is returned by a Boolean search of Westlaw’s “All Federal” case law database for the string [(injunction OR enjoin!) & “7102(a)’] confined to the years 1954-2000 (inclusive) and filtered by district court decisions.

25 See Table C-2, “U.S. District Courts — Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During the 12-Month Period Ending March 31, 2001.”

26 This was determined by conducting a Boolean search in Westlaw’s “All Federal” case law database for the string [“7402” & disgorge!], and filtering by district court decisions and a date range of January 1, 1954, to December 31, 2014.

27 This was determined by altering the date range supra note 26 to include decisions from December 31, 2014, to the present.

28 This was determined by altering the date range supra note 26 to include decisions from 2018 only.
necessary or appropriate for the enforcement of the internal revenue laws . . . in addition to and not exclusive of any and all other remedies.”

In case law predating RRA ’98, courts emphasized the breadth and power of section 7402. The Eastern District of Wisconsin’s decision in the 1986 case of Kaun is illustrative. There, the court remarked that, “by its very terms, this statutory provision authorizes the federal district courts to fashion appropriate, remedial relief designed to ensure compliance with both the spirit and the letter of the Internal Revenue laws — all without enumerating the many, particular methods by which these laws may be violated or their intent thwarted.” Indeed, “Courts have invoked section 7402(a) to enter an injunction even where there was no violation of the internal revenue laws.”

Many cases in which the government has employed section 7402 injunctions are hardly sympathetic. Notably, the government uses section 7402 injunction actions to stamp out tax preparers that use unwitting and low-income taxpayers to generate patently false deductions and perpetrate an obvious fraud upon the Treasury. In Wray, for example, the government obtained a permanent injunction against a defendant who would prepare tax returns that included bogus Schedule C deductions, even though the taxpayers had no qualifying business activities. More recently, in the Middle District of Florida case of Mesadieu, the government obtained an injunction against a tax preparer whose “companies manipulate the Earned Income Tax Credit” by creating “fake businesses to list on the taxpayer’s Schedule C, such as a transport services business, hair salon, or barber shop,” even though “these taxpayer customers testified that no such businesses existed.”

In light of those egregious facts, it is easy to see why courts have concluded that broad authority under section 7402 sometimes makes enforcement sense. The factual issues implicated in these cases are clear, and the legal issues are well settled. Before filing the injunction suit, the clients of the return preparer usually have been investigated, and the clients often provide sworn statements about what substantiation, if any, they provided the return preparer for the claims that led to the problematic tax refunds. Further, the harm being caused by the rogue return preparer is ongoing, and the clarity of the issues allows the government to obtain immediate restraining orders and preliminary injunctions at the outset of the case.

But bad facts can make bad law, and in this case, they have. The courts interpreting the provision have articulated no limits that would confine section 7402 actions to these clear cases. The government has taken full advantage. Increasingly, it has initiated injunction lawsuits when the legal and factual issues at play are far from straightforward. For example, the IRS will label some transactions as “abusive tax shelters” and proceed against their promoters without obtaining clarity from the courts about the lawful treatment of the transaction. In such suits, the deck is stacked against the defendants. Given the public nature of the proceeding, much of the damage is already done merely by the government filing of the complaint.

Particularly instructive on this score is the use of section 7402 injunction actions in its attacks on charitable contribution deductions for the donation of conservation easements. Notably, on December 18, 2018, in the Northern District of Georgia, the government filed a complaint in Zak. This complaint asks the court to enjoin six defendants from organizing, promoting, or selling an allegedly abusive conservation easement syndication scheme, and to further disgorge all income that these defendants received from these transactions.

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29 United States v. ITS Financial LLC, 592 F. App’x 387, 394 (6th Cir. Nov. 21, 2014).
31 Id. at 409.
32 ITS Financial LLC, 592 F. App’x at 394.
33 United States v. Wray, No. 3:02-cv-360 (M.D. Tenn. 2002).
34 Id. (finding that the defendant “has completed a Schedule C for taxpayers, even though these taxpayers have not been engaged in a sole proprietorship or business activity generating information reportable on Schedule C; he has listed deductions which are not supported, or are not deductible under the Internal Revenue Code; and he has failed to provide a copy of the return to the taxpayer for whom it was prepared”).
36 Id. at 1117.
As is typical, the government accompanied the filing with an explosive press release. In it, the government labels the defendants’ business a “scheme” that involves “sham” transactions, lacks economic substance, and procures “grossly overvalued appraisals” of donated easements. Further, the press release states outright that the defendants engage in fraud. It reads as follows: “The Department of Justice is working with our partners in the Internal Revenue Service to shut down fraudulent conservation easement shelters, which in this case were based on willfully false valuations.” The release includes no caveat that these allegations are yet unproven. Such a disclaimer is common in press releases involving criminal indictments, which are issued only after a grand jury has concluded that probable cause exists to believe a crime occurred.

In responding to the complaint, the defendants vehemently dispute the government’s characterizations. The defendants protest in their responses that they went to “great lengths to ensure that all of their projects fully complied with the law” and that they use “independent qualified appraisals.” Further, they state that their projects are trusted by Financial Industry Regulatory Authority-registered independent broker dealers, that they obtained “legal opinion[s] regarding certain tax matters,” and that their businesses are otherwise aboveboard.

So who is correct? Unlike with the wholesale creation of bogus tax credits at issue in cases like Wray and Mesadieu, the answer in Zak is not straightforward. There is nothing inherently illegal about taking or marketing deductions for the donation of conservation easements. Rather, the IRC treats the donation of such easements as a noncash charitable contribution and permits a corresponding deduction from a donor’s taxable income. Faced with this reality, the IRS instead contends that the Zak defendants’ conduct is wrongful because they regularly employ appraisals that drastically overstate the values of these donated easements.

Yet the truth of this allegation is unclear. According to the Zak complaint, appraiser Claud Clark III is essential to the defendants’ alleged scheme. Clark, the complaint alleges, has regularly prepared appraisals of conservation easements that rely on inappropriate assumptions and dubious methods to improperly inflate the conservation easements’ value.

But a simple case law search reveals that Clark has fought this battle with the IRS before, and won. For example, he prepared an appraisal of a donated conservation easement for Kiva Dunes Conservation LLC. That conservation easement restricted a 140.9-acre portion of a residential real estate development to use as a golf course, a park, or an agricultural enterprise. Clark valued this easement at $30,588,235. But, upon audit, the IRS disallowed the deduction.

When Kiva Dunes brought the case to Tax Court, the IRS relied on its own expert and took the position that, although a deduction was appropriate, Clark had wildly overvalued it in that case. The IRS maintained that the donated easement was properly valued at only $1,210,000 rather than Clark’s $30,588,235 figure.

In June 2009 the Tax Court rendered its decision. It allowed the deduction and valued the conservation easement at $28,656,004. In so holding, the Tax Court explicitly held that Clark based his valuation on reasonable assumptions and employed a valid method. The Tax Court also rejected portions of the IRS expert’s valuation as unreliable. In all, the Tax Court accepted Clark’s valuation, adjusting it slightly only to account for overlooked improvements to the land and depreciation.

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39 Section 1-7.500 of the U.S. Justice Manual, applicable to Justice Department attorneys, states that “a news release issued before a finding of guilt should state that the charge is merely an accusation, and the defendant is presumed innocent until proven guilty.”
40 Id. at 55.
41 E.g., Kiva Dunes Conservation LLC v. Commissioner, T.C. Memo. 2009-145.
42 Zak, 1:18-cv-05774, at 21.
43 Id. at 55.
44 Kiva Dunes, T.C. Memo. 2009-145 (observing that petitioner’s deduction “was based on an appraisal prepared by petitioner’s expert in the instant case, Claud Clark”).
45 As the Kiva Dunes court observed, an easement’s fair market value can be “computed by subtracting [an appraiser’s] estimate of the after value of any enhancement from his estimate of the before value.” Kiva Dunes, T.C. Memo. 2009-145. The IRS’s expert appraised the lot’s value at $10,018,000 before the conservation easement was put in place, and at $8,808,000 afterwards. The easement’s market value is, thus, the difference of $1,210,000.
More recently, the Tax Court addressed appraisals prepared by Clark in Pine Mountain Preserve. There, the Tax Court valued a donated conservation easement in excess of the appraised value that Clark determined.

Accordingly, when the IRS took issue with one of Clark’s appraisals through its ordinary administrative procedures, Clark has prevailed. The process was time-consuming and expensive, of course. It took seven years to resolve the Kiva Dunes matter from the filing of the relevant return, but it afforded Clark and the easement’s donor a fair process. The administrative procedures required the IRS to specifically identify the allegedly problematic appraisal with particularity and gave Clark and the donor a fair opportunity to explain and defend their positions.

Through their section 7402 injunction and disgorgement action in Zak, however, the IRS and Justice Department confront Clark (along with his codefendants) on an entirely different battleground. The government’s complaint alleges that “Clark appraised at least 187 conservation easements between 2009 and 2016.” Further, “continually and repeatedly, Defendant Clark relied upon inappropriate assumptions, utilized inappropriate methodology, and used various techniques to improperly inflate the value of the conservation easements.”

But because the government now seeks relief under section 7402, rather than under the IRS’s administrative procedures, Clark finds himself at a significant disadvantage. Clark has not just one appraisal to defend. Rather, he must defend an undefined subset of 187 appraisals that he has prepared over the last 10 years. And although Clark’s ability to defend is relatively stunted, the stakes for Clark are far higher. Should the government obtain the relief it seeks, Clark will have to pay far more than a penalty related to the specific transactions at issue. Indeed, the government seeks an order requiring Clark to turn over every dollar that he has made appraising conservation easements over the past decade. Also, the court’s findings of facts and conclusions of law could bind Clark in any additional administrative penalty cases the IRS may choose to bring.

Finally, Clark has already suffered a significant loss. Without due process and recourse, the government has labeled him a fraud in its publicly filed complaint and accompanying press release. In doing so, the Justice Department has crippled Clark’s business. His attorneys represent in a recent motion to dismiss that “Clark’s business has slowed nearly to a stop,” in effect achieving a preliminary injunction by fiat that the government could not have obtained under the law.

The government’s use of section 7402 injunction suits is growing year over year, and this increase should trigger concern. As discussed in the next segment of this report, overreliance on section 7402 suits directly threatens the culture change that Congress sought to effectuate through RRA ’98.

III. Injunctions Threaten Congress’s 1998 Reforms

The threat that section 7402 injunction actions pose to Congress’s 1998 reforms is most evident when contrasted with the TBOR articulated in Publication 1 and codified in section 7803. As set forth in this report’s introduction, the TBOR constitutes the distillation of the culture change that Congress sought to bring about through RRA ’98. These rights are not merely aspirational. Since 2015 the IRC has explicitly instructed the IRS commissioner to ensure that its employees understand and honor these rights. The government’s increasingly aggressive use of section 7402 injunction actions, however, runs counter to this statutory command.

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47 Zak, 1:18-cv-05774, at 54–55.
48 Id. at 55.
49 See id. at 79.
50 Id. at 2.
51 See generally Publication 1 (rev. Sept. 2017); see also 143 Cong. Rec. H10001, H10037 (reflecting intent to make “one of the most fundamental changes in terms of changing the culture at the IRS”).

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A. The Right of Taxpayers to Be Informed

According to section 7803(a)(3)(A) and Publication 1, taxpayers have “the right to be informed.” As Publication 1 explains, this includes a taxpayer’s right “to know what they need to do to comply with the tax laws” and the right “to clear explanations of the laws and IRS procedures.”

Section 7402 injunction suits threaten this right in two important ways. The first and most obvious stems from pre-1998 judicial interpretations of the authority that section 7402 grants. As stated therein, section 7402 permits courts broad injunction authority “without enumerating the many, particular methods by which these [the revenue laws] may be violated or their intent thwarted.” Further, “Courts have invoked [section] 7402(a) to enter an injunction even where there was no violation of the internal revenue laws.” The courts’ pre-1998 treatment of this provision clashes with RRA ’98’s direction that the public should know what taxpayers must do to avoid IRS enforcement actions. And, to date, no court has recognized this conflict and sought to accordingly narrow section 7402’s application.

Second, even when the IRS and the Justice Department do bring suit, the precise conduct that a taxpayer must defend is often opaque. In Zak, for example, the government has alleged that over a 10-year period, Defendant Clark prepared 187 appraisals and “continually and repeatedly” relied upon unspecified “inappropriate assumptions” and used an undescribed “inappropriate methodology.” This allegedly combined to inflate some of his appraisals, although the government does not state which ones. Accordingly, Clark does not know what he is supposed to have done wrong or even his potential exposure under the government’s disgorgement claim. Clarity will come, if at all, only after expensive discovery procedures. This does not comport with a taxpayer’s right to know.

B. The Right to Challenge the IRS and Be Heard

Section 7803(a)(3)(D) and Publication 1 also describe a taxpayer’s “right to challenge the IRS’s position and be heard.” According to Publication 1, this includes not only a taxpayer’s right to appeal the IRS’s decisions to an independent tribunal, but also the right to raise timely objections and provide additional documentation in response to even proposed IRS actions.

Again, section 7402 injunction actions threaten this right. Unlike administrative actions, in which a taxpayer receives notice of the IRS’s proposed actions and may discuss them with a revenue agent or other IRS decision-maker before these actions are taken, filing an injunction suit is a fait accompli. Often, the first notice that an injunction defendant receives of the action is service of the complaint, or even worse, a call from the media in response to a government press release.

C. Privacy and Confidentiality

Section 7803 and Publication 1 also describe rights to privacy and confidentiality. Together, these rights stand for the proposition that, to the extent possible, an IRS enforcement action should not bleed into other areas of the taxpayer’s life. In explaining a taxpayer’s right to confidentiality, Publication 1 states that the IRS will not disclose information that a taxpayer provides to the IRS, unless permitted by law. Publication 1 also describes a taxpayer’s right to privacy as including the right to expect that any IRS inquiry or enforcement action will “be no more intrusive than necessary.” But section 7402 actions are, of course, extraordinarily intrusive. And not only are these suits public — they are publicized. The decision by the Justice Department to issue a damning press release to initiate its section 7402 injunction suits flies in the face of RRA ’98. It effectively destroys a defendant’s business and exacts a significant toll on his personal relationships without notice or recourse.

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52 Kaun, 633 F. Supp. at 409.
53 ITS Financial, 592 F. App’x at 395.
54 Zak, 1:18-cv-05774-AT, at 55.
55 Publication 1, at para. 4.
56 Id. at para. 8.
Importantly, such heavy-handed action is not necessary. Treasury permits the IRS to regulate practice before it through administrative procedures set forth in Treasury Circular 230 and the corresponding regulations. Through these procedures, the IRS Office of Professional Responsibility initially engages a wayward practitioner in discussion. And only if the practitioner disagrees with OPR’s proposed disciplinary actions will OPR file a complaint before an administrative law judge that may yield a public decision.58

Finally, it is not only injunction-action defendants that have their expectations of confidentiality threatened by injunction actions. When an injunction suit concerns a return preparer or alleged tax shelter promoter, there is a real risk that confidential tax information of nonparties will be revealed in the public record.

Notably, regarding Zak, the Northern District of Georgia’s Local Rule 3.3 requires all parties to file a “Certificate of Interested Persons and Corporate Disclosure Statement” that includes a “complete list of other persons, associations, firms, partnerships, or corporations having either a financial interest in or other interest which could be substantially affected by the outcome of this particular case.”59 This rule, absent a clarification from the court, can be read to require defendants to publicly file a list of participants in the conservation easement programs at issue. As the government’s suit attacks the validity of the referenced conservation easement donation transactions, these participants almost certainly have a “financial interest in or other interest that could be substantially affected by the outcome” of the case.

D. Claims for Disgorgement

Finally, among the more obvious rights enumerated in section 7803 and within Publication 1 is a taxpayer’s “Right to Pay No More Than the Correct Amount of Tax.” As Publication 1 explains, “taxpayers have the right to pay only the amount of tax legally due, including interest and penalties, and to have the IRS apply all tax payments properly.”

But section 7402 injunction actions threaten even this otherwise self-evident principle. The IRS and Justice Department have made clear their position that any disgorgement obtained is in addition to any penalties the IRC describes, and that the taxpayer is entitled to no offset.60

IV. Conclusion

Tax professionals, the courts, and the government all have an interest in a tax system that produces just outcomes through fair procedure and that honors the intent of Congress. As illustrated above, overuse of section 7402 injunction and disgorgement actions threatens this interest. This report concludes with recommendations for these stakeholders to consider, in an effort to start a conversation on this area of emerging significance in tax enforcement.

First, the courts, government attorneys, defense lawyers, and other tax practitioners should recognize the novel and aggressive nature of section 7402 claims for disgorgement. This is not “business as usual” for the IRS. Stakeholders should be mindful of this and approach these cases with attention and nuance that would perhaps not be necessary in the face of more settled law.

Second, government attorneys should be aware of the threat these suits present to the TBOR discussed above. IRS publications do not explicitly bind the Justice Department. But in section 7402 injunction actions, the Justice Department acts on behalf of the IRS as its client. It should, therefore, adhere to the TBOR principles that govern the IRS.

That approach would have concrete, practical ramifications. If the government evaluated its Zak suit in light of a taxpayer’s right to be informed of the IRS’s claims, it might have declined to base its suit upon unspecified unlawful conduct occurring over decades. Instead, in the interest of fairness, the government could identify specific transactions emblematic of the concerning conduct to take to trial. This would comport with

58 Id. at 31.
59 See Zak, 1:18-cv-05774-AT.
60 See ITS Financial, 592 F. App’x at 394.
Publication 1’s principle of not requiring defendants to guess at the specifics of the case against them.

Also, if the government sought to honor a taxpayer’s right to meaningfully challenge the IRS’s proposed actions and be heard, it might afford taxpayers the opportunity for a pre-suit conference and refrain from accompanying an injunction case with an inflammatory press release that prejudices a defendant in the public eye. And if the government considered a taxpayer’s right not to pay more than the correct amount of tax, it might refrain from seeking ruinous sums in disgorgement, in addition to statutory penalties. Regardless, government attorneys might not turn to section 7402 injunction suits as a first-line enforcement tool and instead reserve them for clear-cut cases of great public concern, after a pre-lawsuit investigation and pre-lawsuit conference far more substantial than required in the typical federal civil suit.

Finally, attorneys should key in on the standard governing section 7402 injunction and disgorgement suits. Courts should only enter injunction and disgorgement orders under section 7402 if “necessary or appropriate for the enforcement of the internal revenue laws.”\(^{61}\) Given the concerns identified in this report, and in light of the IRS’s strong administrative procedures, it is possible that injunction and disgorgement are rarely, if ever, required.

The IRS’s administrative procedures provide an avenue to obtain the relief sought, in a manner that is more fair to the taxpayer and more consistent with congressional intent. Attorneys defending section 7402 injunction suits should educate the courts on the IRS’s administrative procedures and consider arguing that the government’s requested injunctive and disgorgement relief should be denied in favor of requiring the IRS to pursue its administrative remedies. If the Justice Department and the IRS do not reconsider and revamp their injunction procedures to comport with RRA ’98, it may be necessary for Congress to step in again, as it did two decades ago.

\(^{61}\) Id. (citing section 7402(a)’s text).