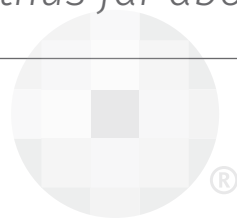


Here Comes the Tax Enforcement, There Go the Passports: Analyzing the Evolution of Section 7345 in Its First Five Years

By Hale E. Sheppard*

Hale E. Sheppard does the “heavy lifting” for readers by gathering, organizing, and analyzing all major sources available thus far about the implementation of Code Sec. 7345.



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I. Introduction

People have hunkered down in their homes for many months waiting for the Coronavirus to subside. As things start to normalize, they dream of getting away, perhaps traveling to a new, exotic, foreign destination. This sounds wonderful, of course, but it might be impossible for those who neglected their tax duties during their involuntarily hibernation. This is because Code Sec. 7345 authorizes the Internal Revenue Service (“IRS”), with the assistance of the State Department, to deprive individuals with seriously delinquent tax debts (“SDTDs”) of their passports. Stripping taxpayers of their passports decisively quashes international travel plans.

Congress passed Code Sec. 7345 in 2015, the IRS began enforcing it in 2018, and the courts started issuing decisions in 2020. In short, the issues concerning passport deprivation as a tool for tax collection are new and quickly evolving. This article, which is the latest in a series, does the “heavy lifting” for readers by gathering, organizing, and analyzing all major sources available thus far about the implementation of Code Sec. 7345.¹

II. Overview of Code Sec. 7345

Depriving tax debtors of U.S. passports to boost tax revenue is not a new idea, but it resurged thanks to a report by the Government Accountability Office (“GAO”)

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in 2011.² With respect to the scope of the problem, the GAO report indicated that, in less than one year, the State Department issued passports to approximately 225,000 individuals who owed the IRS over \$5.8 billion in taxes.³ This figure, while massive, was significantly understated.⁴ The GAO report concluded that, in order for the IRS to have a chance at collecting a larger portion of unpaid taxes, Congress should enact new legislation using U.S. passports as leverage.⁵ Congress took the GAO's advice and enacted Code Sec. 7345 as part of the Fixing America's Surface Transportation ("FAST") Act in late 2015.⁶ An overview of this tax provision is set forth below.

A. General Rule

If the IRS Commissioner determines that an individual taxpayer has an SDTD, he will send a "certification" to the Secretary of Treasury, who will notify the Secretary of State, who, in turn, will deny, revoke, or limit the U.S. passport of the individual. In other words, this is a multi-step process, involving three governmental players, namely, the IRS Commissioner, Secretary of Treasury, and Secretary of State.⁷

B. Definition of SDTD

The term SDTD generally means (i) a federal tax liability, (ii) of more than \$50,000, (iii) with respect to which the IRS has filed a Notice of Federal Tax Lien ("NFTL") or levied property, and (iv) the individual taxpayer has already exercised his administrative rights, such as participating in a Collection Due Process ("CDP") hearing, or has allowed them to lapse.⁸

C. Statutory Exclusions from SDTD Status

There are a number of so-called "statutory exclusions" from the definition of SDTD because they are expressly stated in the key statute, Code Sec. 7345. The following types of tax debts are *not* considered SDTDs: a debt that the taxpayer is paying pursuant to an Installment Agreement; a debt that the taxpayer has paid pursuant to an Offer-in-Compromise; a debt with respect to which the IRS has suspended collection activity because the taxpayer filed a request for a CDP hearing, and such hearing is still pending; and a debt of an individual who is seeking innocent spouse relief.⁹

D. Decertification

SDTD status is not necessarily permanent; the law allows for reversal of the SDTD certification in certain situations.

Many refer to this process as "decertification." The IRS must notify the State Department if any certification is later found to be erroneous, the individual "fully satisfies" the debt that triggered the certification in the first place, or if the debt is no longer an SDTD as a result of any "statutory exclusion."¹⁰ Put differently, the IRS is obligated to tell the State Department if the original certification was unwarranted, the individual completely pays off the SDTD, the individual enters into an Installment Agreement, the individual resolves matters through an Offer-in-Compromise, or the individual has properly sought innocent spouse relief from the liability.¹¹

E. Notifying the Taxpayer

Aside from notifying the Secretary of Treasury of important events, the IRS must inform the taxpayer, too. In particular, the IRS must "contemporaneously" notify the taxpayer of any SDTD certification, decertification, and the right to bring a civil suit to challenge the U.S. government, as explained below.¹²

F. Seeking Redress

Things will go wrong, of course, and when this happens, taxpayers have limited judicial relief. After the IRS has notified a taxpayer of the SDTD certification, the taxpayer can initiate a civil action against the U.S. government, either in the proper District Court or Tax Court, to determine whether the certification was erroneous from the outset, or whether the IRS has failed to properly decertify the taxpayer.¹³ A taxpayer's ability to seek judicial review is immediate: "The taxpayer is *not* required to file an administrative claim or otherwise contact the IRS to resolve the erroneous certification issue before filing suit in the Tax Court or District Court."¹⁴

In terms of remedies, if the relevant court sides with the taxpayer and rules that the certification was erroneous, then it can order the IRS to inform the State Department of this reality.¹⁵ The legislative history makes it clear that this is the *sole power* of the court, and "[n]o other relief is authorized."¹⁶ The IRS website indicates the same, stating that Code Sec. 7345 "does *not* provide the court authority to release a lien or levy or award money damages in a suit to determine whether a certification is erroneous."¹⁷

III. Other Statutory Changes

In addition to creating Code Sec. 7345, the FAST Act also introduced or modified several other tax provisions, some of which are examined below.¹⁸

A. New Warnings in Collection Notices

The FAST Act added new language to Code Sec. 6320, such that the IRS must include in its NFTLs information to taxpayers about passport matters. The old law generally required the IRS to send taxpayers an NFTL within five days after its filing explaining in “simple and non-technical terms” the amount of the liability, the right to request a CDP hearing and have a conference with the Appeals Office, and the procedures for seeking release of the lien.¹⁹ Now, NFTLs must also include data about Code Sec. 7345, certification of SDTDs, and the potential for denial, revocation, or limitation of passports.²⁰ The FAST Act made similar changes to Code Sec. 6331, thereby obligating the IRS to insert in its pre-levy notices information about potential passport issues.²¹

B. Discretion for Emergencies and Humanitarian Reasons

The FAST Act granted some discretion to the State Department in carrying out its mandates. It states that when the State Department receives an SDTD certification from the IRS, it generally cannot issue a passport to the relevant individual. However, exceptions can be made, and passports can be issued, in “emergency circumstances” and “for humanitarian reasons.”²²

Similarly, the FAST Act generally provided that the State Department will outright revoke an existing passport of an individual with an SDTD, but, in cases where the individual is already abroad at the time of the certification, the State Department can limit an existing passport or issue a new passport that only permits return travel to the United States.²³

C. Insulating Government Workers from Liability

The FAST Act expressly lets the Secretary of Treasury and Secretary of State (and any of their designees) off the hook for any actions taken in reliance on an SDTD certification from the IRS Commissioner. It states that these persons “shall *not* be liable to an individual for any action with respect to a certification by the [IRS Commissioner] under Section 7345.”²⁴ In other words, they can invoke the I-relied-in-good-faith-on-the-IRS defense.

IV. Initial Questions

Congress passed the FAST Act in late 2015, but guidance from the IRS did not emerge for approximately two

years. This delay triggered lots of questions for taxpayers and their advisors. Below is a partial list of the *initial* uncertainties.

A. Does the \$50,000 Threshold Include Penalties and Interest?

Code Sec. 7345 indicates that an SDTD is a federal tax liability that exceeds \$50,000, but it does not clarify the components of the calculation.²⁵ To find this answer, one must look to the legislative history. The congressional conference report states that an SDTD generally includes any “outstanding debt for federal taxes in excess of \$50,000, *including interest and any penalties*.”²⁶ Likewise, other reports state that an SDTD entails taxes and “interest and any penalties.”²⁷

B. Are “Assessable Penalties” Part of an SDTD?

Code Sec. 7345 explains that an SDTD is a “federal tax liability” greater than \$50,000, and the legislative history indicates that this term covers not only federal taxes, but also corresponding penalties and interest. What remained murky, though, was whether “assessable penalties” would be considered part of an SDTD.

The term “assessable penalties” refers to those items found in Code Sec. 6671 through Code Sec. 6725. For its part, Code Sec. 6671(a) expressly states that “assessable penalties” shall be paid by the taxpayer upon notice and demand by the IRS, and “shall be assessed and collected in the same manner as taxes.” It goes on to clarify that any reference in the Internal Revenue Code to the term “tax” shall include “assessable penalties.”²⁸

Let’s see how this might play out. Four categories of U.S. persons who are officers, directors, and/or shareholders of certain foreign corporations must file an annual Form 5471 (*Information Return of U.S. Persons with Respect to Certain Foreign Corporations*) with the IRS.²⁹ If a person fails to submit a Form 5471, files a late Form 5471, or provides a “substantially incomplete” Form 5471, then the IRS may assert a penalty of \$10,000 per violation, per year.³⁰ Because sophisticated individuals often must file *multiple* Forms 5471 per year, a non-compliant individual could find himself facing penalties in excess of \$50,000 very quickly. It was initially unclear whether unpaid “assessable penalties,” alone, could trigger an SDTD certification and thus deprive an individual of a passport.

C. Is \$50,000 an Aggregate or Annual Figure?

While Code Sec. 7345 states that the SDTD threshold is \$50,000, it does not specify whether (i) this is an aggregate figure, such that the IRS can total all outstanding taxes, penalties, and interest for all years and issue a certification if the amount exceeds \$50,000, or (ii) this is an annual figure, meaning that the IRS must determine this on a year-by-year basis and send a certification only if the liability for a particular year exceeds \$50,000.³¹

D. Can Partial Payments Eliminate SDTD Status?

Code Sec. 7345 explains that the IRS must notify the State Department in several situations, including where an individual taxpayer “fully satisfies” the debt that triggered the certification.³² Uncertainty remained as to whether a taxpayer could rid himself of the SDTD taint by making a partial payment that reduces the liability to below \$50,000.³³ For example, if a taxpayer owed the IRS a total of \$60,000 and then paid \$20,000 to reduce the balance to \$40,000, would this suffice to eliminate SDTD status?

E. Does Currently-Not-Collectible Status Affect the Analysis?

Another preliminary uncertainty centered on whether a taxpayer can purge the SDTD stigma if the IRS places him in currently-not-collectible (“CNC”) status.³⁴ According to a longstanding IRS Policy Statement, the IRS can place a taxpayer in CNC status “in order to remove it from active [collection] inventory” in situations where the taxpayer has no income or assets that the IRS can legally levy, or where the taxpayer has limited income or assets but levying them would create financial hardship for the taxpayer.³⁵

Certain tax professionals argued that if the IRS has determined that an individual is in such an economic bind that he should be deemed CNC, then, for purposes of Code Sec. 7345, the liability should no longer be considered an SDTD.³⁶ Other practitioners have placed a finer point on it, arguing that denying or revoking the passport of an individual in CNC status would not generate additional revenue for the IRS, would not enhance compliance on a broader scale, and would not accomplish anything other than creating a “debtor’s prison of the Dickensian era.”³⁷

F. How Will the Tax Court Handle Passport Cases?

The Tax Court prepared for the implementation of Code Sec. 7345 and the resulting litigation by issuing “proposed amendments” to the Tax Court Rules of Practice and Procedure in March 2016. These amendments contemplated the introduction of a new Title, called “Certification and Failure to Reverse Certification Action with Respect to Passports.” They also entailed new Rule 350, which expressly states that the Tax Court has non-exclusive jurisdiction over disputes focused on Code Sec. 7345 certifications and decertifications. One Tax Court judge pointed out that Congress, in passing Code Sec. 7345, did *not* specify the proper scope of review or proper standard of review for the Tax Court in these types of cases.³⁸

G. Does Applying for a Payment Alternative Suffice?

As explained above, there are several “statutory exceptions” to the general definition of SDTD. Among those exceptions are debts that a taxpayer is paying in a timely manner pursuant to an Installment Agreement, and debts that a taxpayer has satisfied through an Offer-in-Compromise. Practitioners identified the elephant in the room, which is that it takes the IRS many months to review all the financial data that taxpayers supply, confirm certain financial aspects with third parties, obtain approval from superiors, *etc.* Practitioners suggested two things in light of this reality. First, the IRS might develop a special system of expediting Installment Agreement and Offer-in-Compromise applications involving taxpayers who have been deprived of a passport under Code Sec. 7345.³⁹ Second, the IRS might postpone passport deprivation in situations where taxpayers have filed proper applications for an Installment Agreement or Offer-in-Compromise and are awaiting action by the IRS.⁴⁰

H. Can Taxpayers Avoid Litigation?

If taxpayers believe that the IRS is wrong about an SDTD certification or decertification, they have just one remedy; that is, they can start litigation against the IRS in either the Tax Court or proper District Court.⁴¹ The major problem here is that the proverbial wheels of justice tend to turn slowly, even in the most efficient judicial bodies. Certain practitioners underscored that, while giving taxpayers a way to seek relief is laudable,

litigation likely will trigger considerable expenses for the taxpayer and a “significant delay during which a taxpayer might be improperly denied the freedom to travel internationally for business or personal reasons.”⁴² Accordingly, practitioners proposed the introduction of some sort of accelerated administrative appeal before forcing a taxpayer to litigate.⁴³

I. Do Penalty Abatement Requests Affect SDTD Status?

The legislative history indicates that an SDTD is comprised of taxes, penalties, and interest, and the IRS has adopted this broad interpretation. Practitioners urged the IRS to exercise its discretion to not deny or revoke passports in cases where one component of the SDTD is a penalty, the taxpayer has filed a penalty abatement request, and the IRS has not yet responded to such request.⁴⁴

J. Will Help from the Taxpayer Advocate Service Change Things?

The National Taxpayer Advocate (“NTA”) claims that, as of October 2017, there were some 800 taxpayers with SDTDs who were already in the process of working with the Taxpayer Advocate Service (“TAS”) to resolve their tax-payment issues.⁴⁵ The IRS did not initially exempt such individuals from SDTD status. From the vantage point of the NTA, the unwillingness of the IRS to exclude this category of taxpayers shows “bizarre reasoning,” because the cases that the TAS accepts necessarily involve taxpayers with a “significant hardship,” and it “makes little sense” from the perspective of saving resources.⁴⁶ The NTA asked the IRS to reconsider its position, and threatened action in the meantime. Specifically, the NTA announced that, in order to “avoid this needless waste of resources,” she planned to issue Taxpayer Assistance Orders (“TAOs”) with respect to every taxpayer who was seeking help from the TAS in order to prohibit the IRS from making an SDTD certification to the State Department.⁴⁷

According to a memo issued by the NTA in April 2018, as well the annual NTA report to Congress for 2019, the TAS prevailed, at least partially. After making good on her word to issue TAOs in hundreds of cases, the IRS “eventually agreed” not to certify taxpayers who already had open files with the TAS when the IRS and State Department began implementing Code Sec. 7345.⁴⁸ However, the issue of whether *future* taxpayers who approach the TAS before receiving an SDTD certification can avoid this fate remained unresolved.⁴⁹

V. Rolling Guidance from the IRS

Congress introduced the FAST Act in late 2015, but the IRS did not issue *any* substantive guidance for approximately two years, and it has still not issued any regulations regarding Code Sec. 7345. The IRS has offered some administrative guidance, though, as examined below.

A. New Language in Collection Notices

The FAST Act added new language mandating that the IRS include information for taxpayers, in “simple and non-technical terms,” about the existence and effects of Code Sec. 7345. The IRS has attempted to meet this new duty by inserting candid warnings to taxpayers in its NFTLs and pre-levy notices.⁵⁰ The IRS included similar language in Publication 54, titled *Tax Guide for U.S. Citizens and Resident Aliens Abroad*.⁵¹

B. News Release

The IRS issued a news release in January 2018, putting taxpayers on notice that it would start implementing Code Sec. 7345 and “strongly encouraging” taxpayers with SDTDs to pay their tax debts to avoid losing their passports.⁵² The news release explained, without going into technicalities, that “a passport won’t be at risk” for various taxpayers, including those who are in bankruptcy, victims of a tax-related identify theft, in CNC status with the IRS due to financial hardship, located in a federal disaster area, serving in a combat zone, or attempting to resolve matters *via* an Installment Agreement or Offer-in-Compromise.

C. Notice 2018-1

At essentially the same time that it issued the news release, the IRS also revealed its first piece of published guidance about Code Sec. 7345. Unfortunately, it did not come in the form of a Revenue Procedure or detailed regulations. The IRS decided to issue Notice 2018-1, which added relatively little on the information front.

Notice 2018-1 is comprised of two segments, the first of which merely provides a basic summary of Code Sec. 7345. The other segment, labeled “Discussion,” provides a few bits of relevant data. First, in what comes as no surprise, the IRS tells delinquent taxpayers that they “should consider” resolving their issues by paying in full, entering into an Installment Agreement, or applying for an Offer-in-Compromise. Second, the IRS explains that the State Department generally will grant taxpayers a 90-day grace period to handle payment matters, but the

window may be shorter if there is an urgent need to travel internationally.⁵³ Finally, the IRS addresses taxpayer rights if there is a dispute about an SDTD certification. Notice 2018-1 explains that taxpayers are out of luck in terms of quick, inexpensive, administrative procedures. It confirms that taxpayers may *not* challenge a certification with the Appeals Office, but rather must file a lawsuit with the Tax Court or proper District Court.

D. Updated Internal Revenue Manual

The IRS, in preparation to start the SDTD certification process, updated and expanded the Internal Revenue Manual (“IRM”) in December 2017. Below is a discussion of new and/or important material from the IRM.

1. Components of an SDTD

The IRS added the following guidance in its IRM about the components of an SDTD. The IRM explained that the threshold of \$50,000 is the aggregate unpaid balance of assessment. It includes assessed taxes, penalties, and interest, but it does *not* include accrued-but-unassessed penalties and interest.⁵⁴

Importantly, unless an item falls into one of the statutory exclusions (*i.e.*, those identified by Congress) or one of the discretionary exclusions (*i.e.*, those identified by the IRS), the IRM clarified that an SDTD includes *all* tax assessments made under an individual’s Social Security Number, including individual income taxes, trust fund recovery penalties, business taxes for which the individual is personally liable, and other civil penalties.⁵⁵

Equally noteworthy for taxpayers in the international arena, the IRM indicated that the term SDTD does *not* include certain “non-tax liabilities,” such as FBAR penalties, because the IRS assesses them under Title 31 as a non-tax debt.⁵⁶

2. Full Payment Rule

The IRM confirms that once an SDTD has been certified, paying the account below the threshold of \$50,000 (or the appropriate threshold at the time of certification) will *not* result in a decertification.⁵⁷ In other words, after eclipsing the threshold, the taxpayer must fully pay the IRS, or satisfy one of the limited exclusions, in order to rid himself of the SDTD blemish.

3. Clarifying Existing “Statutory Exclusions”

If a taxpayer misses the deadline for filing a CDP hearing request to challenge an NFTL or pre-levy notice from the IRS, or if the taxpayer is ineligible to demand a CDP hearing for some other reason, the taxpayer generally

has the right to seek a so-called “Equivalent Hearing.”⁵⁸ The most important difference between a CDP hearing and an Equivalent Hearing is that a taxpayer can seek judicial review by the Tax Court if he is dissatisfied with the determination made by the IRS during a CDP hearing, but lacks such right after an Equivalent Hearing.⁵⁹ The updated IRM states that a pending request for an Equivalent Hearing (as opposed to a CDP hearing) will *not* prevent a liability from being labeled an SDTD.⁶⁰

4. Announcing New “Discretionary Exclusions”

As explained above, Congress identified several “statutory exclusions” to the definition of SDTD when it passed the FAST Act. However, the IRS did not identify its supplemental “discretionary exclusions” until about two years later, in the IRM. It announced that the IRS will omit the following categories of tax debts from the definition of SDTD: (i) debts that are in CNC status due to financial hardship, (ii) debts that resulted from identity theft, (iii) debts of taxpayers in bankruptcy, (iv) debts of deceased taxpayers, (v) debts included in a “pending” Installment Agreement, (vi) debts that the IRS is reviewing as part of a “pending” Offer-in-Compromise, (vii) debts with a pending adjustment with the IRS that will fully pay the tax liability, and (viii) debts of taxpayers located in a federal disaster area.⁶¹

The IRM warns that Installment Agreements or Offers-in-Compromise that a taxpayer makes solely for purposes of delaying IRS collection actions will *not* fall within the “discretionary exclusions.”⁶² The IRM further admonishes that it reserves the right to alter course later, stating that “[t]hese discretionary exclusion categories are subject to change in the future.”⁶³

5. Grace Period

The IRM confirms that, while it does not delay issuing an SDTD certification, the State Department will afford taxpayers some wiggle room. In particular, if an individual who has been certified by the IRS as having an SDTD applies for a new or renewal passport, the State Department will hold the application for 90 days in order to allow the taxpayer a chance to resolve any certification errors, make full payment, or enter into an acceptable payment alternative with the IRS.⁶⁴ In other words, the State Department intends to give taxpayers a 90-day grace period to straighten out tax-payment matters with the IRS.

6. Penalty Abatements as “Adjustments”

The IRM states that the IRS has discretion to request decertification (*i.e.*, removal of SDTD status) for various

reasons. Among them is when there is an “adjustment,” not a payment, to the taxpayer’s account that reduces the debt below the \$50,000 threshold.⁶⁵ The IRM describes the following scenario as one warranting decertification: The IRS assesses a liability of \$54,000, of which \$9,000 is attributable to a penalty; the IRS certifies the taxpayer as having an SDTD; the taxpayer submits a penalty abatement request on grounds that he had reasonable cause for the non-compliance; the IRS agrees and abates the \$9,000 penalty; and because the adjustment has resulted in a total liability of just \$45,000, the taxpayer is eligible for decertification.⁶⁶

The IRM cautions that not all penalty abatements will lead to SDTD decertification. It explains, for instance, that penalty abatement thanks to the IRS’s First-Time Abate Policy will not result in decertification, even if the adjusted liability is less than \$50,000.⁶⁷

7. Non-Filers and “Adjustments”

Some individual taxpayers forget or refuse to voluntarily file their Forms 1040 (*U.S. Individual Income Tax Returns*) and pay the corresponding Federal income taxes. When this occurs, the IRS generally utilizes the available data to prepare a so-called substitute for return (“SFR”) for the taxpayer.⁶⁸ Because of the manner in which the IRS prepares SFRs, they often reflect a tax liability that is higher than the taxpayer would have shown if he had simply prepared and filed his own Form 1040. The IRM indicates that the filing of a late Form 1040 by the taxpayer, after the issuance of an SFR by the IRS, might trigger an “adjustment” that eliminates SDTD status.⁶⁹

The IRM offers the following illustration of an acceptable downward adjustment: A taxpayer has a liability of \$66,000 based on an SFR; the IRS certifies an SDTD; the taxpayer is in the process of renewing his passport with the State Department; the taxpayer files an accurate Form 1040 for the relevant year that shows a liability of \$36,000 instead of \$66,000; and the IRS will decertify the taxpayer after it officially accepts the Form 1040 and adjusts its records accordingly.⁷⁰

8. “Expedited” Decertification

The IRM acknowledges that an “expedited” decertification process exists, but the IRS will only grant it in limited circumstances, where a taxpayer is eligible for decertification, his international travel is scheduled within 45 days or less, he has a pending application for a new or renewal passport, and he provides his passport application number.⁷¹

9. Dispute Resolution Measures

The IRM confirms that a taxpayer has no right to seek administrative review by the Appeals Office of an SDTD

certification and that his main remedy is going straight to litigation. The updated IRM states that the taxpayer is not obligated to file any administrative claim or otherwise contact the IRS to resolve SDTD issues before filing a suit in the Tax Court or proper District Court.⁷² Nevertheless, before starting litigation, taxpayers can attempt to resolve disputed certifications by personally visiting an IRS taxpayer assistance center, calling the number on the SDTD certification notice, or sending a written reply to such notice.⁷³

10. Comments on Division of Labor

Implementation of Code Sec. 7345 involves various players, with the primary two being the IRS Commissioner and Secretary of State. The IRM goes to considerable lengths to separate them and establish the division of labor. For example, the IRM states the following about the power dynamic:

The U.S. Department of State has the sole authority for denying, revoking, or limiting a U.S. passport of a certified individual. The IRS may request the U.S. Department of State to consider revoking a U.S. passport of a certified individual; however, *the decision to revoke a passport of a certified taxpayer lies solely with the U.S. Department of State.*⁷⁴

E. Chief Counsel Notice

The IRS released additional guidance, directed mainly toward IRS attorneys, in the form of Notice CC-2018-005 (“CCN”). It begins with a couple of obvious observations: This is a “new area of litigation” and “there are still many unanswered questions.”⁷⁵ The CCN then devotes some time to repeating the same information derived from other sources, already discussed above, such as Code Sec. 7345, legislative history, and various IRS authorities. Therefore, only the new data are examined below.

1. Sending Important Notices by Regular Mail

The notification process will not be a fast one. The CCN states that the IRS will notify taxpayers of SDTD certifications and decertifications “by regular mail.”⁷⁶ The IRS does not mention the use of certified mail, overnight mail, or special delivery arrangements for taxpayers living abroad. This, of course, might trigger disputes regarding receipt of notification, proper delivery of service, timeliness of Petitions filed with the Tax Court or Complaints filed with District Courts, *etc.*

2. No Access to the Appeals Office, Ever

The CCN clarifies that taxpayers challenging Code Sec. 7345 issues will never have a right to seek review by the Appeals Office. The IRS authorities reviewed above indicate that taxpayers have no ability to access the Appeals Office *before* filing litigation. The CCN builds on this notion, expressly stating that taxpayers will not get to present their side to the Appeals Office, even *after* getting started with the Tax Court.⁷⁷

3. No Disputing Underlying Liabilities

The IRS concludes that taxpayers *cannot* challenge the amount of the liability during litigation.⁷⁸ The CCN instructs IRS attorneys to swiftly dispense with Code Sec. 7345 cases where taxpayers question the underlying tax liability, by filing Motions to Dismiss for Failure to State a Claim or Motions for Summary Judgment on the Pleadings.⁷⁹ The CCN creates the impression that Code Sec. 7345 litigation should be straightforward, uncontroversial, and resolved rapidly *via* possible pre-trial Motions. Indeed, the CCN boldly predicts that “[m]ost actions under Code Sec. 7345(e) should be resolved using a motion for summary judgment.”⁸⁰ Based on the cases analyzed later in this article, that early guess was misguided.

4. Supposed Time Limits

In terms of timing, the CCN indicates that taxpayers will have six years from the date on which the IRS issues an SDTD certification, or six years from the date on which grounds for decertification exist, to bring an action in Tax Court or proper District Court.⁸¹

5. Parameters of Court Consideration

The IRS addresses scope and standard of judicial review. The CCN explains that the IRS bases SDTD certifications and decertifications solely on whether the tax modules in a particular taxpayer’s account satisfy the criteria in Code Sec. 7345, meet a “statutory exclusion,” or meet a “discretionary exclusion.” This leads to the following conclusions, extremely favorable to the IRS on both points, which surely will be the subject of litigation in the future:

Judicial review is thus logically limited to the computerized records of those modules. When review is confined to the administrative record, the standard of review is whether agency action was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” ... Accordingly, review [by the courts of Section 7345 cases] should be limited to the [IRS’s] records and whether the certification

or failure to reverse the certification was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”⁸²

F. Potential Future Changes Supported by IRS Watchdog

Currently, the issuance of SDTD certifications appears to be a routine, consistent, objective process. The IRS Commissioner informs the Secretary of State, on a weekly basis, of all newly certified individual taxpayers, period.⁸³ This might change in the future, though, if the IRS accepts a recommendation from its oversight body, the Treasury Inspector General for Tax Administration (“TIGTA”).

In a report analyzing the implementation of Code Sec. 7345, TIGTA indicated that the IRS was developing a “prioritization plan” for making “passport revocation referrals” to the State Department.⁸⁴ Interestingly, neither the IRS nor TIGTA seemed concerned about the lack of authority for doing so. The TIGTA report characterizes the circumstances as follows: “There is no law or regulation that directly authorizes the IRS to prioritize taxpayers to be referred to the State Department for revocation [of passports]; however, we believe that it is reasonable to provide the State Department with taxpayers for possible revocation to comply with the law.”⁸⁵

The TIGTA report goes on to explain that the IRS is in the process of drafting “revocation criteria,” which it plans to publish in the IRM upon completion.⁸⁶ In developing the applicable priorities and criteria, TIGTA encouraged the IRS to take into consideration factors that it traditionally uses to prioritize enforcement actions, including whether a taxpayer cannot pay the liability, can and will pay the liability, or can pay the liability but refuses to do so. The TIGTA report labels these the “can’t pay,” “will pay,” and “won’t pay” categories.⁸⁷ The TIGTA report warns that if the IRS declines to apply these traditional enforcement notions, then it could be neglecting to refer to the State Department taxpayers whose tax non-compliance is willful in nature.⁸⁸

VI. Lessons from Early Court Cases

The IRS has been busy since Congress enacted the FAST Act, certifying hundreds of individual taxpayers as having SDTDs, and essentially asking the State Department to prohibit them from traveling outside the United States.⁸⁹ Cases addressing Code Sec. 7345 are examined below in chronological order.

A. Wall

The facts in *Wall* are somewhat unclear because the taxpayer was advancing her case without legal representation, but it appears that she failed to file Forms 1040 for several years, the IRS prepared SFRs for her, she did not pay the resulting liabilities, so the IRS filed an NFTL, followed by a certification of SDTD.⁹⁰ The State Department then revoked her passport, and the taxpayer filed suit in the Court of Federal Claims. Soon thereafter, the DOJ filed a Motion, arguing that the taxpayer's case must be dismissed because the Court of Federal Claims does not have authority to decide it.

The Court of Federal Claims agreed with the DOJ and explained that, pursuant to express language in Code Sec. 7345, only the Tax Court and District Courts are empowered to decide cases involving SDTDs and passport revocations; the Court of Federal Claims simply cannot do so. It concluded with an important observation: "Like many of the individuals who bring their own cases in our court without the assistance of lawyers, [the taxpayer] appears to misunderstand the purpose of our court and the jurisdiction given to us by Congress."⁹¹

B. Maehr

The taxpayer in *Maehr* owed the IRS about \$250,000 with respect to Forms 1040 for 2003 through 2006, the IRS certified him as having an SDTD, and he voluntarily surrendered his passport.⁹² Later, the taxpayer filed an action in District Court seeking reinstatement of his passport, a declaration that Code Sec. 7345 is unconstitutional, and an award of legal fees and costs. The DOJ then filed a Motion with the District Court, asking it to dismiss the case.

The magistrate judge initially granted the Motion, the taxpayer objected, and the District Court issued an opinion as follows. It rejected all constitutional arguments raised by the taxpayer. First, the District Court explained that Code Sec. 7345 does not violate the Privileges and Immunities Clause in Article IV of the Constitution because that only applies to *state* actions, not *federal* actions. Second, the District Court determined, based on its review of several Supreme Court cases, that the Constitution does not grant the taxpayer a "fundamental right" to international travel. Consequently, the rules and restrictions created by Code Sec. 7345 are appropriate, as long as they are "rationally related" to a "legitimate government interest." The District Court supported the earlier analysis by the magistrate judge that the IRS has a legitimate interest in collecting tax debts and revoking passports relates to such interest. Finally, the District

Court agreed that Code Sec. 7345 did not violate the taxpayer's due process rights under the Fifth Amendment to the Constitution. In summary, the District Court found that the taxpayer "has not demonstrated a constitutional violation resulting from the revocation of his passport."⁹³

C. Ruesch

In *Ruesch*, the IRS assessed penalties of \$160,000 against the taxpayer for not filing certain international information returns related to foreign corporations, she did not pay such penalties, the IRS sent her a pre-levy notice, she filed a request for a CDP hearing, the IRS then issued an NFTL, she responded with another timely request for a CDP hearing, the IRS somehow failed to record the CDP hearing requests or grant them, and the IRS certified her as having an SDTD. The taxpayer filed a Petition with the Tax Court seeking a redetermination of the underlying penalties, a ruling that the IRS erred in issuing her a certification in the first place, and a further ruling that the IRS later erred in not decertifying her.⁹⁴

After Tax Court litigation had started, the IRS realized its error in not granting the taxpayer her CDP hearings, decertified her, and notified the State Department accordingly. The IRS then filed a Motion of Lack of Jurisdiction, arguing that the Tax Court is not empowered under Code Sec. 7345 to address the question of whether the underlying penalties were accurate. In this regard, the IRS also explained that it had taken steps to ensure that the taxpayer would receive the earlier CDP hearings that she requested with the appropriate Appeals Office, during which she can discuss the correctness of the penalties. The IRS also filed a Motion to Dismiss the other issues on grounds that they became "moot" when the IRS decertified the taxpayer. The Tax Court agreed with the IRS on all counts, as explained below.

With respect to the penalty matter, the Tax Court explained that Code Sec. 7345(e) creates narrow jurisdiction in passport cases: The only determination it can make is whether the SDTD certification was erroneous, and the only relief that it can provide is ordering the IRS to notify the State Department that a certification was erroneous. The Tax Court went on to explain that it could consider, for instance, whether a taxpayer's liability exceeds \$50,000, whether collection actions are suspended because of a pending CDP hearing, whether the taxpayer is properly paying the liability pursuant to a collection alternative, whether the debt has been fully satisfied, or whether the debt has become unenforceable because the relevant collection period has expired. However, emphasized the Tax Court, "[t]here is nothing the text of Section 7345 that

authorizes us to redetermine [a taxpayer's] underlying liability for the penalties the IRS has assessed.”

The Tax Court then offered some *dicta* about the limited circumstances under which it could ever decide the appropriateness of “assessable” penalties related to international information returns. The Tax Court explained that such matters fall outside of its deficiency jurisdiction, meaning that these would not be part of a Tax Court trial triggered by the IRS issuing a Notice of Deficiency to a taxpayer. The Tax Court then indicated that this leaves two options for taxpayers. First, they could wait for an NFTL or pre-levy notice, file a request for a CDP hearing, and if the Appeals Office issues an unfavorable Notice of Determination, then they could file a Petition with the Tax Court. Second, they could pay the penalties, file an administrative Claim for Refund, and if the IRS either disallows it or ignores it for more than six months, then they can file a Suit for Refund in the proper District Court.

Moving to the mootness matter, the Tax Court explained that the taxpayer properly invoked the jurisdiction of the Tax Court when she filed the Petition disputing the SDTD certification, which existed at the time. Later, the IRS conceded that its certification was improper because of the pending CDP hearing request, reversed the certification, and notified the State Department. The Tax Court determined that, because the taxpayer has already received all the relief that the Tax Court is empowered to grant in the first place, the case was “moot.”

The taxpayer disagreed, taking the position that the matter will not be moot until the IRS “unconditionally” removes the entire \$160,000 penalty and permanently withdraws the NFTL. The taxpayer based her argument on the notion that a “voluntary cessation” of an activity by the offending party, such as the IRS, does not necessarily render a case moot. The Tax Court rejected this argument because the two applicable conditions are satisfied. First, there is no reasonable expectation that the alleged violation will recur in the future, because the penalty issues are currently under review by the Appeals Office through a CDP hearing, and Code Sec. 7345 expressly prevents the IRS issuing an SDTD certification during that period. Second, interim events have eradicated the effects of the violation, namely, the decertification and notification to the State Department.

The taxpayer took one last try at persuading the Tax Court to consider the underlying penalties during the case related solely to passport revocation under Code Sec. 7345. The taxpayer argued, without citing any authority, that an SDTD can be certified by the IRS and then challenged by a taxpayer in Tax Court only once.

Consequently, suggested the taxpayer, the concept of *res judicata* would prevent her from disputing a certification *after* the CDP hearing, so the Tax Court should exercise its “judicial discretion” to decide the penalty issue immediately. The Tax Court flatly rejected this proposition based on the following reasoning:

A certification that a taxpayer has [an SDTD] is made at a particular time. If the IRS reverses an initial certification and subsequently makes a second certification, the correctness of the latter would depend on the facts existing at that time, e.g., whether the debt exceeded the \$50,000 liability threshold (as adjusted for inflation), whether the taxpayer was making payments pursuant to a collection alternative, or whether another statutory exception applied. Since the correctness of each certification would depend on the facts existing at the time it was made, *res judicata* would not prevent a taxpayer from challenging a later certification in this Court.

D. *Jones v. Mnuchin*

The taxpayer in *Jones v. Mnuchin* had a federal income tax liability over \$400,000 deriving from several years, so the IRS certified him as a person with an SDTD and then notified the State Department.⁹⁵ The taxpayer filed an action raising a long list of constitutional arguments, all of which the District Court rebuffed, as explained below.

The District Court first rejected the taxpayer's contention that Code Sec. 7345 violates the Ninth Amendment because, well, it contains no guarantees of any particular freedoms. Next, the District Court found nothing persuasive about the Privilege and Immunities Clause in Article IV, as it strictly applies to actions by certain *state* governments, not the *federal* government, of which the IRS is a part. The District Court then dispensed with supposed problems grounded in the First Amendment, as it simply has no application.

The District Court finally focused on attacks based on due process rights originating in the Fifth Amendment. This segment of the Constitution declares that no person shall be deprived of “life, liberty, or property without due process of law.” The District Court acknowledged that there is a constitutional right to travel, but unlike interstate travel, international travel is not “fundamental.” As a result, in order to withstand constitutional scrutiny, Code Sec. 7345 simply needs to be “rationally related” to a “legitimate government interest.” It is, concluded the District Court, thereby resolving the “substantive” due process issue in favor of the IRS.

The District Court was also in the IRS's corner when it came to "procedural" due process. The taxpayer argued that the certification, itself, was insufficient. The District Court pointed out that the taxpayer overlooked two earlier notices from the IRS, namely, the NFTL and the pre-levy notice. The IRS must provide both of these to taxpayers well before certifying an SDTD, and taxpayers have the right to demand a CDP hearing to contest procedural and certain substantive tax matters. The District Court indicated that the certification comes at the end of a series of opportunities for taxpayers to be heard about tax liabilities, and the overall notification process comports with the Fifth Amendment.

E. McNeil

The taxpayer in *McNeil* filed an action after the State Department denied his passport application because of an SDTD certification from the IRS.⁹⁶ The procedural history and pleadings in this case are convoluted, but suffice it to understand that the taxpayer ultimately asked the District Court to do two things: Determine that the IRS erred in issuing his certification, and make the IRS notify the State Department of its error.⁹⁷

The taxpayer argued that the District Court should rule in his favor because the IRS supposedly never notified him of the SDTD, despite the fact that the IRS's internal documents indicate that it sent two notices to the taxpayer. The District Court flatly rejected this argument because, even if the taxpayer managed to prove a negative (*i.e.*, that he never received a copy of the certification), receipt of proper notice is not a prerequisite to a valid certification under Code Sec. 7345.

The taxpayer further argued that the IRS was unable to supply copies of the Forms 1040 from which the relevant tax liabilities arise. The District Court again rebuffed the taxpayer, stating that even if the IRS had relied on faulty records in determining the SDTD and issuing the certification, the taxpayer cannot challenge the correctness of the underlying tax liability in an action under Code Sec. 7345. Hinting at the proverbial slippery slope, the District Court cautioned that accepting the taxpayer's theory would transform the limited waiver of sovereign immunity granted by Code Sec. 7345 into "a mechanism for challenging any number of aspects of an underlying [SDTD] or IRS monitoring and recordkeeping procedures." If Congress had intended to give taxpayers such a "powerful tool for scrutinizing the IRS," it would have empowered the Tax Court and District Courts with more remedies than just forcing the IRS to correct any erroneous certifications.

For these two reasons, the District Court upheld the DOJ's Motion to dismiss the taxpayer's case for not stating sufficient facts in his pleadings to constitute a valid claim.

F. Rowen

The relevant facts in *Rowen* are similar to those in other cases described above.⁹⁸ For more than two decades, the taxpayer did not pay his federal income taxes. The total balance was nearly \$500,000 by 2018, at which time the IRS certified the taxpayer as having an SDTD. The taxpayer responded by filing a Petition with the Tax Court. At that time, the State Department had *not* revoked the taxpayer's passport.

The taxpayer raised two main arguments in his defense. As in earlier cases, the taxpayer alleged that Code Sec. 7345 is unconstitutional on its face because it prohibits international travel in violation of the Due Process Clause of the Fifth Amendment. He further contended that Code Sec. 7345 contravenes his "human rights" under the Universal Declaration of Human Rights ("UDHR"). The Tax Court was unconvinced, ruling in favor of the IRS on both arguments.

Opening with candor, the Tax Court opined that the constitutional argument "has no merit" because Code Sec. 7345 does not prohibit international travel; it merely creates a process whereby the IRS may certify the existence of an SDTD to the Secretary of Treasury, who then transmits it to the Secretary of State. The Tax Court went on to explain that Code Sec. 7345 does not authorize any passport-related decisions, and the IRS does even not know whether a particular taxpayer has a valid passport or intends to apply for one when it issues an SDTD certification. The Tax Court then underscored one key fact, which is that, although the IRS issued a certification regarding the taxpayer, the Secretary of State never revoked his passport or took any other adverse actions toward him. The Tax Court ultimately dismissed this argument in the following manner: "In short, only the Secretary of State, not the [IRS] Commissioner, may revoke or deny a passport, and the Secretary of State's authority does not derive from Section 7345."

The Tax Court quickly dispensed with the taxpayer's second argument, which focused on the supposed human right of international travel pursuant to the UDHR. It rejected the notion that the UDHR creates any type of international law that is binding on the United States. The Tax Court also criticized the taxpayer for misapplying a Supreme Court case, which did not involve the UDHR, but rather a different international agreement altogether. Finally, as with the taxpayer's initial contention about the

supposed unconstitutionality of Code Sec. 7345, the Tax Court indicated that it did not, and would not, decide the scope of the UDHR or its applicability to the United States in this case because Code Sec. 7345 does not place any limits on international travel.

Notably, in a concurring opinion, one judge emphasized that the decision in *Rowen* does not prevent a constitutional challenge in a future case before the Tax Court to the entire tax collection mechanism created by the FAST Act, which would center on the interrelated authorities and actions by the IRS Commissioner, Secretary of Treasury, and Secretary of State. As noted in the concurring opinion, “[c]ertification has no other function than to open the door to adverse passport action, and an adverse passport action cannot occur unless and until the certification of a taxpayer’s [SDTD].” The concurring opinion explained that the Tax Court was able to easily avoid some of the thornier constitutional issues focused on passport-related actions by the Secretary of State in *Rowen* because the taxpayer expressly challenged only Code Sec. 7345, not other provisions created or altered by the FAST Act, and because the State Department had not actually revoked the taxpayer’s passport despite the earlier SDTD certification by the IRS.

G. Shitrit

The taxpayer in *Shitrit* did not file a Form 1040 for 2006 as required, so the IRS exercised its right to prepare an SFR for him using data it had received from third parties. The IRS then sent the taxpayer at his last known address in California a Notice of Deficiency, reflecting a total liability of about \$144,000. The Notice of Deficiency was returned to the IRS as undeliverable, and the IRS assessed the liability approximately six months later.

A decade passed, and the IRS assigned a Revenue Officer to collect the liability from 2006. It had increased significantly by that time due to penalties and interest charges. After not locating the taxpayer at various California addresses, the Revenue Officer issued an NFTL and pre-levy notice, both of which gave the taxpayer the right to

demand a CDP hearing. They were returned to the IRS as refused or unclaimed. However, soon thereafter, the taxpayer filed Forms 1040 for several years showing an address in Israel. In 2018, the IRS sent the taxpayer an SDTD certification in Israel with respect to 2006. In response to the certification, the taxpayer filed a Petition with the Tax Court alleging that he had been a victim of identity theft and that the liability for 2006 was inaccurate. The taxpayer asked the Tax Court to rule that he did not have an SDTD or any liability for 2006, the IRS failed to send the Notice of Deficiency to the proper address, and the IRS should refund any overpayments from other years that it “administratively offset” to reduce the liability for 2006.

While the case was pending with the Tax Court, the IRS determined that it could not clearly prove that it sent the Notice of Deficiency to the proper address. Therefore, it fully abated the liability from 2006, decertified the taxpayer, and notified the State Department and the taxpayer of its actions. The IRS then filed a Motion to dismiss the case, suggesting that the certification issue had become moot and that Tax Court has no authority in a case brought under Code Sec. 7345 to analyze an underlying tax liability or related claims for refund. Based on reasoning nearly identical to that in *Ruesch*, the Tax Court agreed to dismiss the matter.

VII. Conclusion

When the economic instability and other harms triggered by the Coronavirus will end is uncertain, but what is clear is that many people struggled with tax obligations in recent months, and the current presidential administration and IRS Commissioner are making enhanced tax enforcement a priority. Logically, then, more people will be deprived of passports in the near future, disputes will ensue, and details concerning Code Sec. 7345 will evolve. Taxpayers facing passport problems at the hands of the IRS and State Department would be wise to retain professionals experienced with tax collection procedures, Tax Court litigation, and the complex Code Sec. 7345 issues addressed in this article.

ENDNOTES

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¹ Hale E. Sheppard, *IRS Deprives Tax Debtors of U.S. Passports Under New Section 7345: Open Issues as Enforcement Begins in 2017*, J. TAX PRAC. & PROC., February-March 2017, at 27; Hale E. Sheppard, *IRS Starts Depriving Tax Debtors of Passports in 2018: New Guidance About Section 7345 and Future Tax Court Disputes*, J. TAX PRAC. & PROC., February-March 2018, at 37; Hale E.

Sheppard, *More IRS Guidance About Section 7345, Seriously Delinquent Tax Debts, and Passport Revocation: A Comprehensive Analysis*, J. TAX PRAC. & PROC., April-May 2018, at 19.

² U.S. Government Accountability Office, *Federal Tax Collection—Potential for Using Passport Issuance to Increase Collection of Unpaid Taxes*, GAO-11-272 (March 2011).

³ U.S. Government Accountability Office, *Federal Tax Collection—Potential for Using Passport*

Issuance to Increase Collection of Unpaid Taxes, GAO-11-272 (March 2011), at 4.

⁴ U.S. Government Accountability Office, *Federal Tax Collection—Potential for Using Passport Issuance to Increase Collection of Unpaid Taxes*, GAO-11-272 (March 2011), at 8.

⁵ U.S. Government Accountability Office, *Federal Tax Collection—Potential for Using Passport Issuance to Increase Collection of Unpaid Taxes*, GAO-11-272 (March 2011), at 16.

- ⁶ Fixing America's Surface Transportation Act. P.L. 114-94 (Dec. 4, 2015).
- ⁷ Code Sec. 7345(a). The Secretary of State has authority to revoke or deny U.S. passports in many circumstances. See, e.g., 8 USC 1504 (holder obtained passport illegally, fraudulently, or erroneously), 42 USC 652(k) (holder failed to pay child support), 22 USC 2714 (holder is a drug trafficker), 22 USC §2671(d)(3) (holder failed to pay repatriation loan), 22 USC 212(a) (holder convicted of sex tourism crime), and 22 CFR 51.60 (holder is a covered sex offender, subject to a felony arrest warrant, on parole and prohibited from leaving the United States, mandated to a mental institution, declared incompetent by a U.S. court, identified for extradition to a particular foreign government, a minor, identified in a restraint or apprehension order by the U.S. armed forces).
- ⁸ Code Sec. 7345(b)(1). The key amount, \$50,000, is subject to change. It increases annually for inflation and rounded to the nearest multiple of \$1,000. See Code Sec. 7345(f).
- ⁹ Code Sec. 7345(b)(2); See also Code Sec. 6159 (for rules about Installment Agreements), Code Sec. 7122 (for rules about Offers-in-Compromise), and Code Sec. 6015 (for rules about innocent spouse relief).
- ¹⁰ Code Sec. 7345(c)(1).
- ¹¹ Legislative history states that, "[i]n the case of a claim for innocent spouse relief, the decertification is only with respect to the spouse claiming relief, not both." See U.S. House of Representatives, 114th Cong., 1st Sess., Conference Report 114-357, December 1, 2015, at 532.
- ¹² Code Sec. 7345(d).
- ¹³ Code Sec. 7345(e)(1); U.S. Joint Committee on Taxation, *Technical Explanation of the Tax Technical Corrections Act of 2016*, JCX-91-16. The legislation amends Code Sec. 7345(e) to clarify that the party against whom an action Tax Court would be brought is the IRS Commissioner, and to provide a tie-breaker rule stating that the court first acquiring jurisdiction has sole jurisdiction (p. 6).
- ¹⁴ IRM 5.19.25.13 (Aug. 12, 2020).
- ¹⁵ Code Sec. 7345(e)(2).
- ¹⁶ U.S. Joint Committee on Taxation, *General Explanation of Tax Legislation Enacted in 2015*, JCS-1-16 (Mar. 2016), at 93.
- ¹⁷ See www.irs.gov/businesses/small-businesses-self-employed/revocation-or-denial-of-passport-in-case-of-certain-unpaid-taxes, as of February 19, 2107.
- ¹⁸ Subsection 32101(a) of the FAST Act creates Code Sec. 7345. The other relevant provisions originate in Subsections 32101(b) through Subsection 32101(f).
- ¹⁹ Code Sec. 6320(a)(3) before enactment of the FAST Act.
- ²⁰ Section 32101(b)(1) of the FAST Act; Code Sec. 6320(a)(3)(E).
- ²¹ Section 32101(b)(2) of the FAST Act; Code Sec. 6331(d)(4)(G).
- ²² Section 32101(e)(1) of the FAST Act.
- ²³ Section 32101(e)(2) of the FAST Act.
- ²⁴ Section 32101(e)(3) of the FAST Act.
- ²⁵ Code Sec. 7345(b)(1).
- ²⁶ U.S. House of Representatives, 114th Cong., 1st Sess., Conference Report 114-357, December 1, 2015, at 531 (emphasis added).
- ²⁷ U.S. Joint Committee on Taxation, *General Explanation of Tax Legislation Enacted in 2015*, JCS-1-16 (Mar. 2016), at 92.
- ²⁸ Code Sec. 6671(a); Reg. §301.6671-1(a).
- ²⁹ Code Sec. 6038; Reg. §1.6038-2; Code Sec. 6046; Reg. §1.6046-1; Code Sec. 6679; Reg. §301.6679-1; Instructions to Form 5471.
- ³⁰ Code Sec. 6038(b)(1); Reg. §1.6038-2(k)(1)(i); Code Sec. 6046(f); Reg. §1.6046-1(k).
- ³¹ See, e.g., John M. Colvin and Claire H. Taylor, *Owe the IRS? Passports at Risk Under New Code Sec. 7345*, J. TAX PRAC. & PROC., February–March 2016; Carol M. Luttati, *Revocation or Denial of Passports for Seriously Delinquent Tax Debts*, J. TAX PRAC. & PROC., June–July 2016, at 13.
- ³² Code Sec. 7345(c)(1).
- ³³ Kenneth M. Horwitz, *TSCPA Seeks Proposed Regs on Denial of Passports for Unpaid Taxes*, TAX NOTES TODAY, 134-17 (2016).
- ³⁴ For general information about CNC status and related IRS procedures, see IRM 5.16.1—*Currently Not Collectible* (Dec. 17, 2015) and IRM 5.19.17—*Campus Procedures for Currently Not Collectible and Offers in Compromise* (Dec. 7, 2015).
- ³⁵ IRM 1.2.14.114—*Policy Statement*, 5-71 (Nov. 19, 1980). In this context, "hardship" exists if the levy action by the IRS prevents the taxpayer from meeting necessary living expenses.
- ³⁶ See Kenneth M. Horwitz, *TSCPA Seeks Proposed Regs on Denial of Passports for Unpaid Taxes*, TAX NOTES TODAY, 134-17 (2016); John M. Colvin and Claire H. Taylor, *Owe the IRS? Passports at Risk Under New Code Sec. 7345*, J. TAX PRAC. & PROC., February–March 2016.
- ³⁷ John M. Colvin and Claire H. Taylor, *Owe the IRS? Passports at Risk Under New Code Sec. 7345*, J. TAX PRAC. & PROC., February–March 2016.
- ³⁸ James S. Halpern, *What Has the U.S. Tax Court Been Doing? An Update*, TAX NOTES, 1285 (May 30, 2016).
- ³⁹ See Kenneth M. Horwitz, *TSCPA Seeks Proposed Regs on Denial of Passports for Unpaid Taxes*, TAX NOTES TODAY, 134-17 (2016); John M. Colvin and Claire H. Taylor, *Owe the IRS? Passports at Risk Under New Code Sec. 7345*, J. TAX PRAC. & PROC., February–March 2016.
- ⁴⁰ See Kenneth M. Horwitz, *TSCPA Seeks Proposed Regs on Denial of Passports for Unpaid Taxes*, TAX NOTES TODAY, 134-17 (2016); John M. Colvin and Claire H. Taylor, *Owe the IRS? Passports at Risk Under New Code Sec. 7345*, J. TAX PRAC. & PROC., February–March 2016.
- ⁴¹ Code Sec. 7345(e)(1); U.S. Joint Committee on Taxation, *Technical Explanation of the Tax Technical Corrections Act of 2016*, JCX-91-16. The legislation amends Code Sec. 7345(e) to clarify that the party against whom an action Tax Court would be brought is the IRS Commissioner, and to provide a tie-breaker rule stating that the court first acquiring jurisdiction has sole jurisdiction (p. 6).
- ⁴² Kenneth M. Horwitz, *TSCPA Seeks Proposed Regs on Denial of Passports for Unpaid Taxes*, TAX NOTES TODAY, 134-17 (2016).
- ⁴³ Kenneth M. Horwitz, *TSCPA Seeks Proposed Regs on Denial of Passports for Unpaid Taxes*, TAX NOTES TODAY, 134-17 (2016).
- ⁴⁴ Kenneth M. Horwitz, *TSCPA Seeks Proposed Regs on Denial of Passports for Unpaid Taxes*, TAX NOTES TODAY, 134-17 (2016).
- ⁴⁵ National Taxpayer Advocate, *2017 Annual Report to Congress* (January 2018), at 11.
- ⁴⁶ National Taxpayer Advocate, *2017 Annual Report to Congress* (January 2018), at 11.
- ⁴⁷ National Taxpayer Advocate, *2017 Annual Report to Congress* (January 2018), at 11.
- ⁴⁸ Taxpayer Advocate Service, National Taxpayer Advocate memo to all personnel, regarding advocating for taxpayers facing passport revocation/denial, TAS-13-0418-0001 (Apr. 26, 2018); National Taxpayer Advocate, *2019 Annual Report to Congress*, at 220–221 (indicating that the TAS issued approximately 350 TAOs in 2019).
- ⁴⁹ Taxpayer Advocate Service, National Taxpayer Advocate memo to all personnel, regarding advocating for taxpayers facing passport revocation/denial, TAS-13-0418-0001 (Apr. 26, 2018).
- ⁵⁰ Letter 3172 (DO) Rev. 9-20-16; Notice CP 504. It states the following: "On December 4, 2015, as part of the Fixing America's Surface Transportation (FAST) Act, Congress enacted Section 7345 of the Internal Revenue Code, which requires the Internal Revenue Service to notify the State Department of taxpayers certified as owing a seriously delinquent tax debt. The FAST Act generally prohibits the State Department from issuing or renewing a passport to a taxpayer with a seriously delinquent tax debt. Seriously delinquent tax debt means an unpaid, legally enforceable federal tax debt of an individual totaling more than \$50,000 for which a Notice of Federal Tax Lien has been filed and all administrative remedies under IRC Section 6320 have lapsed or been exhausted, or a levy has been issued. If you are individually liable for a tax debt (including penalties and interest) totaling more than \$50,000 and you do not pay the amount you owe or make alternate arrangements to pay, or request a Collection Due Process hearing by [insert date], we may notify the State Department that your tax debt is seriously delinquent. The State Department generally will not issue or renew a passport to you after we make this notification. If you currently have a valid passport, the State Department may revoke your passport or limit your ability to travel outside the United States. Additional information on passport certification is available online at www.irs.gov/passports."
- ⁵¹ IRS Publication No. 54 (2016), at 2.
- ⁵² New Release IR-2018-7.
- ⁵³ Notice 2018-1 states the following in this regard: "When a certified taxpayer applies for a passport, the State Department, in general, will provide the applicant with 90 days to resolve

their tax delinquency ... before denying the application [for the passport]. If a taxpayer needs their passport to travel within those 90 days, the taxpayer must contact the IRS and resolve the matter within 45 days from the date of application so that the IRS has adequate time to notify the State Department.”

⁵⁴ IRM 5.1.12.27.2 (Dec. 20, 2017).

⁵⁵ IRM 5.1.12.27.2 (Dec. 20, 2017).

⁵⁶ IRM 5.1.12.27.2 (Dec. 20, 2017).

⁵⁷ IRM 5.1.12.27.2 (Dec. 20, 2017).

⁵⁸ Reg. §301.6320-1(i).

⁵⁹ Reg. §301.6320-1(i); *Kennedy*, 116 TC 255, 263, Dec. 54,315 (2001).

⁶⁰ IRM 5.1.12.27.2 (Dec. 20, 2017); IRM 5.1.12.27.3 (Dec. 20, 2017).

⁶¹ IRM 5.1.12.27.4 (Dec. 20, 2017). With respect to an Installment Agreement, it is not considered “pending” unless the taxpayer has completed and executed Form 9465, provided all necessary financial data, proposed a specific monthly payment amount, and maintained tax filing compliance in all years. See IRM 5.14.1.3. In the context of an Offer-in-Compromise, it is not “pending” unless the taxpayer has completed and executed Form 656, provided all necessary financial data, paid the application fee, and paid the mandatory 20 percent of the proposed settlement amount. See IRM 5.8.2.3.1.

⁶² IRM 5.1.12.27.4 (Dec. 20, 2017).

⁶³ IRM 5.1.12.27.4 (Dec. 20, 2017).

⁶⁴ IRM 5.1.12.27.7 (Dec. 20, 2017).

⁶⁵ IRM 5.1.12.27.8 (Dec. 20, 2017).

⁶⁶ IRM 5.1.12.27.8 (Dec. 20, 2017).

⁶⁷ IRM 5.1.12.27.8 (Dec. 20, 2017).

⁶⁸ Code Sec. 6020(b).

⁶⁹ IRM 5.1.12.27.8 (Dec. 20, 2017).

⁷⁰ IRM 5.1.12.27.8 (Dec. 20, 2017).

⁷¹ IRM 5.1.12.27.8 (Dec. 20, 2017).

⁷² IRM 5.1.12.27.9 (Dec. 20, 2017).

⁷³ IRM 5.1.12.27.8 (Dec. 20, 2017); IRM 5.19.1.5.19.10 (Dec. 26, 2017).

⁷⁴ IRM 5.19.25.2 (Aug. 12, 2020) (emphasis in original); See also IRM 5.19.25.11 (Aug. 12, 2020).

⁷⁵ Notice CC-2018-055 (Apr. 5, 2018).

⁷⁶ Notice CC-2018-055 (Apr. 5, 2018). See also Andrew Velarde, *IRS Tries to Assuage Concerns over Passport Revocation*, TAX NOTES TODAY, Doc. 2018-20322 (May 14, 2018).

⁷⁷ Notice CC-2018-055 (Apr. 5, 2018).

⁷⁸ Notice CC-2018-055 (Apr. 5, 2018).

⁷⁹ Notice CC-2018-055 (Apr. 5, 2018).

⁸⁰ Notice CC-2018-055 (Apr. 5, 2018).

⁸¹ Notice CC-2018-055 (Apr. 5, 2018).

⁸² Notice CC-2018-055 (Apr. 5, 2018).

⁸³ IRM 5.19.25.9 (Aug. 12, 2020).

⁸⁴ Treasury Inspector General for Tax Administration, *Implementation of the Passport Provisions of the FAST Act Was Generally Successful, and the Internal Revenue Service Is Working on Objective Criteria for Passport Revocation*, Report 2019-30-068 (Sept. 19, 2019).

⁸⁵ Treasury Inspector General for Tax Administration, *Implementation of the Passport Provisions of the FAST Act Was Generally Successful, and the Internal Revenue Service Is Working on Objective Criteria for Passport Revocation*, Report 2019-30-068 (Sept. 19, 2019), at 11.

⁸⁶ Treasury Inspector General for Tax Administration, *Implementation of the Passport Provisions of the FAST Act Was Generally Successful, and the Internal Revenue Service Is Working on Objective Criteria for Passport Revocation*, Report 2019-30-068 (Sept. 19, 2019), at 11.

⁸⁷ Treasury Inspector General for Tax Administration, *Implementation of the Passport Provisions of the FAST Act Was Generally Successful, and the Internal Revenue Service Is Working on Objective Criteria for Passport Revocation*, Report 2019-30-068 (Sept. 19, 2019), at 11.

⁸⁸ Treasury Inspector General for Tax Administration, *Implementation of the Passport Provisions of the FAST Act Was Generally Successful, and the Internal Revenue Service Is Working on Objective Criteria for Passport Revocation*, Report 2019-30-068 (Sept. 19, 2019), at 11-12.

⁸⁹ Jeffrey M. Glassman, *Current Developments, Corporate Tax Committee, ABA Section of Taxation, 2020 Mid-Year Meeting*, 2020 ABATAX-CLE 0201075 (Feb. 1, 2020).

⁹⁰ *Wall*, 946 F3d 117 (Dec. 31, 2019), 125 AFTR 2d 2020-317.

⁹¹ *Wall*, 946 F3d 117 (Dec. 31, 2019), 125 AFTR 2d 2020-317, at 2020-317 and 2020-318.

⁹² *Maehr*, DC-CO, 794 FedAppx 670 (2020), 125 AFTR 2d 2020-1093 (2020).

⁹³ *Maehr*, DC-CO, 794 FedAppx 670 (2020), 125 AFTR 2d 2020-1093 (2020), at 2020-1098. Academics predicted that taxpayers would raise various constitutional arguments to Code Sec. 7345, including supposed deprivation of due process, and lose. See Michael S. Kirsch, *Conditioning Citizenship Benefits on Satisfying Citizenship Obligations*, UNIV. ILLINOIS LAW REV. 1701 (2019).

⁹⁴ *Ruesch*, 154 TC 289 (2020).

⁹⁵ *Jones v. Mnuchin*, DC-GA, 127 AFTR 2d 2021-1092 (2021).

⁹⁶ *McNeil*, DC-CO, 127 AFTR 2d 2021-1242 (2021).

⁹⁷ *Ruesch*, 154 TC 289 (2020).

⁹⁸ *R. Rowen*, 156 TC No. 8, Dec. 61,847 (2021).

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