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SENT VIA E-MAIL ATTACHMENT

May 6, 2024

Mr. Andres Garcia
Internal Revenue Service
United States Tax Court
11111 Constitution Avenue NW, Room 6526
Washington, D.C. 20224
e-mail: pra.comments@irs.gov

**RE: Comment Request on IRS Financial Disability Procedure under Rev.
Proc. 99-21 Regarding Section 6511(h); OMB Control No. 1545-1649**

Thank you for the opportunity to submit comments responding to the Internal Revenue Service (“IRS” or “Service”) publication in the Federal Register “Comment Request for Refunds and Credit; Periods of Limitations; Financial Disability” on March 6, 2024.¹ The Tax Clinic at the Legal Services Center of Harvard Law School submits the following comments on behalf of our Clinic and the communities we serve.

We welcome the IRS’s interest in optimizing its approach to financial disability requests that toll the section 6511(a) statute of limitations for refund and credits claims. Although the call for comments focuses on information collection under

¹ Proposed Collection; Comment Request for Refunds and Credits; Periods of Limitations; Financial Disability, 89 Fed. Reg. 45 (proposed Mar. 6, 2024).

the Paperwork Reduction Act of 1995, we respond principally to the stated interest in comments that address “ways to enhance the quality, utility, and clarity of the information to be collected.”² Therefore, our Clinic provides the IRS with recommendations on optimizing its approach to 6511(h) financial disability claims.

Clinic & Comment Background

The Tax Clinic at Harvard Law School (“the Clinic”) was founded in 2015 by Professor Keith Fogg, who spent over thirty years at the Internal Revenue Service (“IRS”) in the Office of Chief Counsel. The Clinic is currently directed by Audrey Patten, who has over a decade of experience providing legal services to underserved communities. Clinic staff work with low- and moderate-income taxpayers from the Greater Boston area and nationwide to provide legal services related to issues before the IRS and Tax Court.³

Our clients regularly face systemic challenges that are interconnected with, and expand beyond, their tax concerns. Many speak English only as a second language, and poverty, homelessness, domestic violence, and food insecurity are just a few of the other challenges our clients face while dealing with their tax cases. Some of the most extreme client challenges involve life-threatening mental and physical health conditions. Often, individuals in these situations are almost completely unable to independently address their tax situation, whether due to the psychological weight of their condition or near-total physical incapacitation.

² *Id.*

³ Tax Litigation Clinic, *Legal Services Center of Harvard Law School* (last accessed Apr. 31, 2024), <http://www.legalservicescenter.org/students-clinics/federal-tax-clinic/>.

Prior to the introduction of section 6511(h), taxpayers whose incapacities kept them from making credit, refund, or overpayment claims either within three years of filing or two years of payment, as stated under section 6511(a), had no statutory recourse. Taxpayers turned instead to the equitable tolling doctrine articulated by the Supreme Court in *Irwin v. Department of Veteran Affairs*.⁴ In the 1997 case *Brockamp v. U.S.*, the estate of a taxpayer with dementia attempted to get an IRS refund for a \$7,000 pre-payment for a tax return that was never filed by arguing that the taxpayer was incapacitated. There, the Supreme Court rejected equitable tolling for section 6511 refund cases because the statute expressed “time limitations in unusually emphatic form.”⁵

Congress quickly moved to remedy this interpretation of section 6511 by adding section 6511(h) in the Internal Revenue Service Restructuring and Reform Act of 1998.⁶ 6511(h) allows a taxpayer to avoid the statute of limitations requirements under 6511(a) if they are “unable to manage [their] financial affairs my reason of a medically determinable physical or mental impairment of the individual which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.”⁷ Showing this “financial disability” requires showing “proof of existence” and does not apply when “any other person is authorized to act on behalf of such individual in financial matters.”⁸

⁴ *Irwin v. Veterans Administration*, 498 U.S. 89 (1990).

⁵ *United States v. Brockamp*, 519 U.S. 347 (1997).

⁶ Am. Bar Assoc. Section of Taxation, Comment Letter on Information Collection under Revenue Procedure 99-21 (Feb. 1, 2018) [hereinafter ABA Comment].

⁷ 26 U.S.C. § 6511.

⁸ *Id.*

The IRS narrowly interpreted section 6511(h) in Revenue Procedure 99-21.⁹ The Service places high requirements on proving financial disability. As a result of Rev. Proc. 99-21, the IRS and judicial system appear to have limited the number of eligible taxpayers who could benefit from the Internal Revenue Code’s financial disability exception.

Given our Clinic’s interest in serving at-risk taxpayers, including the financially disabled, we recommend the following changes to current IRS policies and procedures related to section 6511(h) claims. These suggestions build on similar advocacy for broadening the scope of financial disability claims. Indeed, one of the Taxpayer Advocate Service’s *2013 Legislative Recommendations to Congress* was to “broaden relief from timeframes for filing a claim for refund for taxpayers with physical or mental impairments.”¹⁰ The American Bar Association Section of Taxation also responded to an IRS call for comments in 2018 by making similar recommendations on 6511(h).¹¹

Comment 1: Clearly Identifying Physical and Mental Impairments.

Section 6511(h) requires a taxpayer show a “medically determinable physical or mental impairment” which could be expected to result in death or lasts for at least 12 months. Rev. Proc. 99-21 does not define or provide any examples of qualifying “physical or mental impairment.” It is widely recognized that this language is drawn from the Social Security Amendments of 1956 for determining receipt of Social Security Disability Insurance. However, the Social Security Administration provides a detailed “Listing of Impairment[s]” likely to meet the statutory

⁹ Rev. Proc. 99-21, 1999-17 IRB 18.

¹⁰ I.R.S., Taxpayer Advocate Service, 2013 Annual Report to Congress 302-310 [hereinafter TAS Report].

¹¹ ABA Comment *supra* note 6.

standards for disability and notes that “[i]f you have a severe medically determinable impairment(s) that does not meet a listing, we will determine whether your impairment(s) medically equals a listing.”¹²

The IRS provides no such guidance for taxpayers seeking to decide whether their condition meets the requirements of “physical or mental impairment.” Rather, under Rev. Proc. 99-21 the taxpayer asks a physician to make a written statement indicating “the physician’s medical opinion that the physical or mental impairment was or can be expected to result in death, or that it has lasted (or can be expected to last) for a continuous period of not less than 12 months.” As the ABA Tax Section’s Comment notes, this requirement places the burden of showing a physical or mental impairment squarely on the taxpayer’s physician.

Such an informal process for determining impairment is unproductive for both the IRS and the taxpayer. At an administrative level, the Service is now responsible for answering taxpayer questions about what qualifies as a statutorily approved condition, which leaves it liable to making contestable margin calls. IRS officers must also individually screen each case of financial disability without a baseline guide for qualifying impairments.¹³ Taxpayers are similarly left with little information about whether their circumstances might apply to 6511(h) and have limited capacity to clearly communicate to medical professionals why they might need a letter addressed to the IRS.¹⁴

¹² SOCIAL SECURITY ADMIN., DISABILITY EVALUATION UNDER SOCIAL SECURITY: LISTING OF IMPAIRMENTS- ADULT LISTINGS (PART A).

¹³ ABA Comment *supra* note 6.

¹⁴ *Id.*

These concerns are not merely academic. In *Pleconis v. I.R.S.*, a plaintiff claimed that he was financially disabled because of several back surgeries and a heart condition.¹⁵ The court ruled against his claim in part because “though the surgeries Plaintiff underwent between June 2001 and September 2004 imposed physical limitations on him, his orthopedic surgeon testified that Plaintiff could perform non-physical work and that the surgeries did not affect his mental abilities.”¹⁶ Had the IRS provided the taxpayer with a list of eligible impairments, a case like *Pleconis* may not have needed to be litigated.

We therefore recommend the IRS curate a list of medical conditions that qualify as “physical or mental impairments” under section 6511(h) requirements. This suggestion is based on a similar recommendation from the ABA Tax Section’s comments, with the notable addition that the Service could rely on the Social Security Administration’s “Listing of Impairment” as a viable baseline.¹⁷ This addition would reduce the likelihood of edge-case impairments claims making becoming issues for judicial resolution, and it would provide both the Service and taxpayers with a clear understanding of the financial disability exception’s scope.

Comment 2: Reducing the Proof Requirements for 6511(h).

The Clinic joins other scholars and institutions in advocating for the IRS to reduce its proof requirements for showing financial disability. Namely, we suggest the IRS broaden its interpretations of “medically determinable” and “proof of the existence thereof” for financial disability. Rev. Proc. 99-21 narrowly defines

¹⁵ *Pleconis v. I.R.S.*, 2011 WL 3502057 (D.N.J. Aug. 10, 2011).

¹⁶ *Id.*

¹⁷ ABA Comment *supra* note 6.

“proof of existence” for financial disability as “a written statement by a physician” which describes the taxpayers’ impairment and a “medical opinion that the physical or mental impairment prevented the taxpayer from managing the taxpayer’s financial affairs.”¹⁸ There are two major problems with this interpretation.

First, the current procedure unnecessarily limits individuals qualified to make a “medically determinable” showing of financial disability exclusively to physicians, and courts have therefore adopted this interpretation.¹⁹ However, section 6511(h) itself only requires “proof of the existence thereof is furnished in such form and manner as the Secretary may require,”²⁰ and other agencies like the Social Security Administration permits evidence of disability provided by an “acceptable medical source,” including psychologists and physicians.²¹

To maximize financially disabled taxpayers’ ability to pursue claims under 6511(h), we support the ABA Tax Section and Taxpayer Advocate Service in their request to include psychologists as individuals able to make “medically determinable” opinions under Rev. Proc. 99-21.²² We also encourage the IRS to consider an even broader definition of medical professional for those unable to afford treatment by a psychologist or physician. This could involve including nurse practitioners and medically trained social workers under Rev. Proc. 99-21.

¹⁸ Rev. Proc. 99-21, 1999-17 IRB 18.

¹⁹ See, e.g., *Green v. Comm’r*, T.C. Memo. 2009-15.

²⁰ 26 U.S.C. § 6511.

²¹ Carlton Smith, *Does Rev. Proc. 99-21 Validly Restrict Proof of Financial Disability, for Purposes of Extending the Refund Claim SOL, to Letters From Doctors of Medicine and Osteopathy? Part 2*, TAX NOTES (June 25, 2015) <https://www.taxnotes.com/procedurally-taxing/does-rev-proc-99-21-validly-restrict-proof-financial-disability-purposes-extending-refund-claim-sol/2015/06/25/7h6jp>.

²² See TAS Report *supra* note 10; ABA Comment *supra* note 6.

Second, Rev. Proc. 99-21 places the burden of showing “that the physical or mental impairment prevented the taxpayer from managing the taxpayer’s financial affairs” on a written physician’s statement. In *Redondo v. U.S.*, the Court of Appeals for the Federal Circuit affirmed this interpretation when a physician’s statement that a condition “made managing his daily living, finances, etc. extremely difficult” was found to be inadequate to show financial disability because it “failed to specifically state that [the taxpayer] was “prevented” from managing his financial affairs.”²³

Such a stringent requirement “represent an abdication of responsibility” by making medical professionals responsible for determining an individual’s capacity to manage their financial affairs providing opinions on medical conditions.²⁴ As the Taxpayer Advocate Service has recognized, this requirement “may unnecessarily deter professionals from providing such a letter.”²⁵ Further, agencies that deal more regularly with disability determinations do not require physicians to make causal determinations that a medical condition causes a non-medical incapacity. For example, to receive Social Security Disability Insurance (“SSDI”), the Social Security Administration requires physical or mental impairment proof from an “acceptable medical source” and will then consider various evidence to determine whether the impairment affected ability to work, including welfare agency employees, educational personnel, and caregivers or relatives.²⁶

²³ *Redondo v. United States*, 542 F. App’x 908 (Fed. Cir. 2013).

²⁴ Bruce A. McGovern, *New Provision for Tolling the Limitations Periods for Seeking Tax Refunds: Its History, Operation and Policy, and Suggestions for Reform*, 65 MO. L. R. 4, 797, 868 (2000).

²⁵ TAS Report *supra* note 10 at 310.

²⁶ Smith, *supra* note 21.

We recommend the IRS employ the SSDI method for showing financial disability, under which a medical professional would still provide an opinion for physical or mental impairment under section 6511(h) requirements but would not need to determine their inability to handle financial affairs. This approach has been previously suggested by other advocates.²⁷

At a more general level, Rev. Proc. 99-21 does not provide any alternatives for showing evidence of financial disability beyond providing a written statement from a physician. The discriminatory results of this evidentiary requirement could be manifold. Physically and mentally disabled individuals—who already face higher risks of homelessness and poverty than other populations—are required to find a physician willing to provide a specific statement of financial disability.²⁸ Given the economic, social, and educational barriers to finding adequate medical care, many such individuals may be unable to adequately prove their financial disability to the IRS under Rev. Proc. 99-21.

The ABA Tax Section has therefore suggested, and our Clinic agrees, that the IRS should “Permit All Credible Evidence of Facts and Circumstances to Establish the Elements of Financial Disability After a Health Condition is Established by Medical Evidence.”²⁹ This addition would both allow the IRS to understand the circumstances behind each taxpayer’s claim and reduce the burden on disabled taxpayers to find a medical professional willing to fulfill IRS evidentiary requirements. It also aligns with a recommendation by Professor Keith Fogg that

²⁷ See T. Keith Fogg & Rachel E. Zuraw, *Financial Disability for All*, 62 CATH. U. L. REV. 965 (2013); ABA Comment *supra* note 6; McGovern *supra* note 24.

²⁸ Nanette Goodman et al., *Financial Inequality: Disability, Race, and Poverty in America*, NATIONAL DISABILITY INSTITUTE at 12, <https://www.nationaldisabilityinstitute.org/wp-content/uploads/2019/02/disability-race-poverty-in-america.pdf>.

²⁹ ABA Comment *supra* note 6.

“[r]ather than focus on the specific language of the expert, whether it is a medical opinion or the circumstance of domestic violence, the standard [for financial disability] should take an approach focused on gathering the facts and applying those facts to the basis for relief.”³⁰

Comment 3: Allowing Taxpayers to Contest Representation from an Authorized Party.

The First Circuit’s recent ruling in *Stauffer v. I.R.S.* sheds light on another area where the Service can encourage the judicial system to interpret section 6511(h) more broadly. Under the statute, “An individual shall not be treated as financially disabled during any period that such individual’s spouse or any other person is authorized to act on behalf of such individual in financial matters.”³¹ Rev. Proc. 99-21 takes an uncompromising position on what qualifies as a person “authorized to act on behalf of such individual” by requiring that a taxpayer submit a written statement to the effect that “no person, including the taxpayer's spouse, was authorized to act on behalf of the taxpayer in financial matters during the period described in paragraph (1)(d) of this section.”³²

The *Stauffer* decision regarding authorized actors reveals the weaknesses of this position. There, the court held that the estate of an elderly and mentally ill father whose son had Power of Attorney (“PoA”) and who had both orally revoked the PoA and drafted unsent notices to that effect was unable to waive the section 6511(a) statute of limitations. The court reasoned this was because “by urging us to

³⁰ Fogg & Zuraw, *supra* note 27 at 1000.

³¹ 26 U.S.C. § 6511.

³² Rev Proc. 99-21

adopt the “duty” and “constructive knowledge” requirements, the estate asks us to interpret the term “authorized” in S6511(h)(2)(B) beyond its plain and unambiguous meaning [according to Black’s Law Dictionary]. And this we cannot do.”³³ The result was the estate’s inability to collect a \$137,403 overpayment.

We encourage the Service to adopt a more lenient definition of “person authorized to act” to encourage courts to adopt a similar position. As one critic has argued, “*Stauffer* could have easily interpreted “authority” as actual as opposed to theoretical authority under a common usage theory” to preserve the spirit of section 6511(h)’s intention to avoid harsh results like those under *Brockamp*.”³⁴ The result feels particularly unjust given that financially disabled individuals are likely to face mental or physical conditions that make them vulnerable to legal authority abuses.

We recommend the IRS amend Rev. Proc. 99-21 Section 4(2) to allow taxpayers to show that, even if they had granted authority during a financial disability, the authorized individual either failed to exercise their authority or did not do so in good faith. This addition would help vulnerable taxpayers present unique situations more holistically IRS agents to reduce formalistic results like *Stauffer*.³⁵

Conclusion

We reiterate our thanks for the opportunity to submit comments on the IRS’s call for comments related to section 6511(h) financial disability. We hope you will

³³ Rev. Proc. 99-21, 1999-17 IRB 18.

³⁴ Casey Epstein, *No Toll for the Taxpayer: Financial Disability, Statute of Limitations Refund Tolling, and Courts’ Strict Application of Authority*, MINN. L. R. (Oct. 22, 2019).

³⁵ See McGovern *supra* note 24.

consider our recommendations as a desire to ensure that financially disabled taxpayers are provided a just opportunity to pursue their statutory rights.

Respectfully Submitted,

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