CHECKPOINT LEARNING

Contact us at: 2395 Midway Rd., Carrollton, TX 75006
checkpoint learning.cpecustomerservice@tr.com
800.431.9025

CPE NETWORK
TAX REPORT

JULY 2023 VOLUME 36, ISSUE 6

NOTE: DVDs are no longer being manufactured. Video may be viewed/downloaded from your Checkpoint Learning account. See the user guide for more information on how to download the video and about credit for online meetings.

Attention Enrolled Agents: If you are an IRS Enrolled Agent and wish to get IRS credit for this course, be sure to enter your PTIN into your Checkpoint Learning profile before taking the course.

Attention NCRPs: This course does ***not*** qualify for AFSP professionals requiring "Federal Tax Law Update" credits.

Topics for future editions may include:

- Innocent Spouse Relief
- Repair Regulations

EXECUTIVE SUMMARY

PART 1. CURRENT DEVELOPMENTS

EXPERTS' FORUM..... 4

Tax is a dynamic field of accounting with a constantly changing landscape. There are constant changes affecting tax practice. It is incumbent on practitioners to stay abreast of these developments, not only to advise current clients, but also potential new clients. This material covers some recent Congressional, judicial, and IRS updates.

Learning Objectives:

Upon completion of this segment, the user should be able to analyze current issues in taxation, including assessing the status of Form 941-X filings, analyzing the review from a Tax Court small case, and analyzing possible corrections to treatment of SECURE 2.0 conservation contributions. [*Running time 27:42*]

PART 2. INDIVIDUAL TAXATION

Tax Authority..... 15

The ability to determine the level of authority when doing tax research is essential for any practitioner. It is relevant to both specific return positions and in tax planning. Practitioners need to be cognizant of the levels of authority for various sources.

Learning Objectives:

Upon completion of this segment, the user should be able to analyze current tax issues, including determining the level of authority to avoid penalties, evaluating the sources of primary authority, and assessing the use of a citator. [*Running time 47:44*]

PART 3. BUSINESS TAXATION

Worker Classification 35

There are significant tax consequences arising from the classification of a worker as an employee or independent contractor, including payroll tax issues, types of compensation, and deductions available. Additionally, there may be numerous issues that are not tax related, including overtime pay under the Fair Labor Standards Act and statement unemployment and workers' compensation. Employers often find it necessary or advantageous to use independent contractors for some types of work. This can be less costly, avoiding benefits and more flexible than hiring employees. Likewise, an independent contractor can establish his or her own pension plan and has greater ability to deduct work-related expenses. Some of the downfalls include the service recipient being subjected to liability for payroll taxes and trust fund penalties under IRC Section 6672 imposed on any responsible person and potential disqualification of employee benefit plans. For the worker, there may be liability for self-employment taxes and denial of certain business-related deductions. It is important that practitioners be cognizant of the issues to properly advise clients and avoid the many large pitfalls.

Learning Objectives:

Upon completion of this segment, the user should be able to analyze issues related to worker classification, including applying the categories of control, applying the 20 common law factors, and assessing the potential for Section 530 relief. [*Running time 32:31*]

ABOUT THE SPEAKERS

Ian J. Redpath, JD, LLM, is a nationally recognized tax attorney and consultant from Buffalo, New York and is a principal in the Redpath Law Offices. Mr. Redpath has published numerous articles on contemporary tax issues and co-authored several books on tax topics. He has extensive national and international experience in developing, writing, and presenting professional CPE programs. In addition to his active tax practice, he serves as Chairman of the Department of Accounting and Director of Graduate Accounting Programs as well as Professor of Taxation and Forensic Accounting at Canisius College in Buffalo.

Shannon Jemiolo, CPA, PhD is an Assistant Accounting Professor at Canisius College in Buffalo, New York, where she also maintains an active tax consulting business. She holds a Bachelor's degree from West Virginia University and a Ph.D. from the University of Oklahoma. Prior to receiving her Ph.D., Shannon worked at in the tax division of PricewaterhouseCoopers and specialized in corporate tax, mergers and acquisition, and corporate restructuring. Shannon has written numerous articles on personal/corporate tax compliance and corporate social responsibility and has presented her tax research at national conferences around the country.

Ed Renn, JD, focuses his practice on domestic and international private client matters which includes U.S. and international estate planning, income maximization strategies, FLP and LLC planning, wealth preservation, business succession planning, international tax planning for entities and individuals, trust structures, estate administration, qualified Opportunity Zone Planning, and planning for single and multi-family offices. Ed frequently utilizes sophisticated life insurance strategies in both income and transfer tax planning. Ed is a frequent speaker, has co-authored several books, and has been featured in many articles on estate and tax planning topics.

Be sure to include the completed sheet when you request certificates for this event.

Title of Course (Enter full title)	
Date of Class (MM/DD/YYYY)	
Time (Enter time of class)	
Location (Enter location of class)	

Learning Objectives (Refer to executive summary)	
Program Description (Refer to executive summary)	
Instructional delivery method	Group Live
Recommended CPE credit	3.0 Credits
Recommended field of study(ies) (Refer to executive summary)	
Program Level	Update
Prerequisites (Circle One)	• Basic Accounting and Auditing professional experience
	• Basic Tax professional experience
	• Basic Governmental professional experience
Advance preparation	None required
Course registration and, where applicable, attendance requirements (1)	

(1) Insert instructions for your students to register for the class and any other attendance requirements (e.g., bring your laptop, be prepared to work in groups, you will be required to sign in and sign out of the session, etc.)

PART 1. CURRENT DEVELOPMENTS

Experts' Forum

Experts' Forum is a popular feature in which we review recent developments in taxation. Ian Redpath begins this month with a discussion regarding the IRS update of its Status of Mission Critical Functions.

Let's join Ian.

A. IRS Updated Status of Mission-Critical Functions Webpage

Mr. Redpath

Hi, everybody, welcome to the program. I am Ian Redpath. This is the segment where we go over a number of things that have happened with the Service and Congress and the Courts since the last time we met, last month. A number of interesting things are going on. Let's jump right in; but let me tell you, this is going to be a little bit shorter segment than normal because we have such interesting segments coming up that we wanted to make sure that we had plenty of time for those. So, buckle up, here we go.

First, the IRS has updated its status of mission-critical functions webpage to say, "Hooray—we are doing better than we did last year!" They have a much smaller inventory of unprocessed individual returns and employer returns, including amended, paper, and those requiring corrections. From year to year, 2022 to 2023 (the 2021 returns to the 2022 returns for filing seasons), they are ahead of the game.

That being said, Form 941s—not the same. They have 1.3 million unprocessed 941 returns, [down from] 3.4 million unprocessed 941s on the same date last year. So, they are doing better. The 941s are doing a lot better; however, Form 941-Xs [are not]. A year ago, they had 287,000 unprocessed 941-Xs. Currently, they are running at almost a million—938,000 unprocessed 941-Xs. So, if the client is wondering what is going on, there you go. Why? Well, we are going to talk about that a little bit later, but most of that relates to the ERC issues—of course, we did a program on what is going on with the ERCs right now—and that's what is putting the IRS significantly behind at this time.

B. *Gardner DDS PA TM v. Commissioner*

CA 10, 131 AFTR 2d ¶2023-636

Now, we have an interesting case, only in the sense that it is something to remind everyone about. *Gardner DDS PA TM v. Commissioner*, this is a 10th Circuit Court of Appeals [case]. Well, what happened here was, there was an appeal from a Tax Court decision; and, of course, the Appeals Court said, "We don't even have jurisdiction; we can't hear your appeal."

Why? They had filed in the small Tax [Court]. It was a small claims case—a small Tax Court case. Small Tax Court cases, if you choose to go that more informal route, (1) they are not precedent; even though they may be published as summary opinions, they are not precedent, and (2) you can't appeal. They are not reviewable. So, they filed in small claims, and the small tax case was decided against them. They now want to appeal it. Well, you had to make that decision before you decided to file.

Just because it fits into the jurisdiction of a small tax case ($50,000 or less for a year in tax), that doesn't mean you have to, and that is one of the things to consider. If you do file as a small case, then you are giving up that right to appeal. It will not be reviewable. So, even though they felt they had a good case and that they shouldn't have lost at the Tax Court level, they can't appeal it. The 10th Circuit just summarily said, "We do not have any jurisdiction over this."

C. *Cardiovascular Center LLC v. Commissioner*

TC Memo 2023-64

Now, kind of a lead in, we have a new case that came out. It is a Tax Court Memo case involving *Cardiovascular Center LLC* (a single member LLC) *v. Commissioner*, and this kind of [fits] in with our discussion with Ed Renn on employee classification. This was a medical practice, an LLC, and the IRS determined that their medical assistants and the office manager were employees; they were not independent contractors for the period of time that was under review.

This is an excellent case because it goes over all the factors that have to be looked at. Now, did they say every factor was that important? No, they said not every factor is of vital importance. They also said there is not one factor that is going to be determinative. They looked at all the factors, but what did they really look at? They looked at control, and they said the taxpayer exercised significant control over the assistants and the manager. It was a sole member. The [taxpayer] supervised, set office procedures, controlled the pay, and supplied the tools of the trade to complete the duty. There was no opportunity for profit outside of what they were paid here. They were integral to the taxpayer's business, and they had been there for a significant period of time. So, they said, basically, looking at all of the factors and looking at the overall level of control, they were, in fact, employees.

Janine Smith worked with the doctor in his practice as the office manager and as a registered health information technolog[ist], and the four others were medical assistants. They were paid biweekly, they filled out time sheets, and they were paid hourly. If they did work more than 70 hours, they were paid overtime which, certainly, the Department of Labor would say, as an employee, you would have to pay them overtime; if they are independent contractors, you're not paying them overtime because you are hiring them to complete the job. Interestingly enough, though, Smith had a kind of a crazy thing—Smith wasn't issued any regular paychecks. Rather, what happened was, Kresock (who was the doctor) paid her personal bills, including mortgage payments on homes titled in her name, and they resided together. So, basically, he was paying all her personal expenses and running them through the business.

Again, everybody was supervised. None of them had realized a profit outside the job. There were no formal agreements as to their status or how they would be paid. Interestingly enough, the company did not file 1099-MISC (now it would be the 1099-NEC); they didn't file W-2s, Wage and Tax Statements; they didn't report the compensation; and they didn't file any employment returns (Form 940). Basically, they didn't file anything during that period of time.

The Tax Court looked at all the factors and said, "Clearly, they were not independent contractors." They looked at the degree of control, the investments in facilities, for example, the opportunity for profit, whether the principal can discharge (which he clearly could), the work as a regular part of the business and in the importance of the business, the relationship they were creating, and the permanency (they had worked there for years). They looked at all the factors and, as an overall, they said they are employees.

So, now—and again [Section 530 relief is discussed in a later segment this month] with Ed Renn—the Section 530 relief [request] came back and said no. [The taxpayer claimed], "530 relief—we should be able to qualify." Well, here is the problem. To qualify for 530 relief, you have to have treated the worker, not as an employee, but treated them as a self-employed person. That is the historic requirement. [Additionally,] you have to have filed all the federal tax returns and information returns for the periods based on showing that they were not employees. That is the consistency requirement. Well, they didn't file anything. So, basically, they didn't meet a requirement for 530 relief because they never properly reported them as being self-employed individuals. They should have been giving them, regularly, the 1099-MISC (now the 1099-NEC, Nonemployee Compensation).

D. *Frank W. Bibeau v. Commissioner*

TC Memo 2023-66

Frank Bibeau v. Commissioner, another Tax Court Memo case. This is an interesting one—interesting because it was a novel approach in dealing with self-employment tax. A Native American tribe member and an attorney, he claimed that, based upon the 1837 treaty between the United States and the Chippewa Nation, there was a guarantee that tribe members had the right to "hunt, fish, and gather wild rice" on tribal lands. He said that protected him from having to pay self-employment tax or, in fact, any tax, on a modest living. He has the right to a modest, tax-free living, and practicing law would fit in the modern-day treatment of "hunt, fish, and gather wild rice." The Tax Court didn't buy that one.

The alternate argument was that he wasn't liable because there was no treaty between the Chippewa and the United States that granted the government the right to tax tribal members on their income. No, that is off base, also. So, an interesting approach to self-employment from Mr. Bibeau, but the Tax Court didn't agree with him.

E. Revised Form 941-X and Instructions Issued

Just a reminder that we have a revised 941-X and instructions. Also, we already talked about the significant backlog there is on this; but make sure that you are using the new 941-X if you are, in fact, going to file. The recent Inspector General for Tax Administration report shows that, although 95 percent of the total deferred social security tax has been paid, there are about 384,314 employers that still owe about $6 billion of deferred payroll tax and are going to be subject to collection actions. Again, amended returns can be filed until 2024, and that can impact that amount of deferral and, of course, the amount of any penalty.

The IRS has, again, cautioned and issued warnings about the fraudsters—and the big-money fraudsters—with what they call the ERC (Employee Retention Credit) mills. They are finding a significant number of 941-Xs that, just, are wrong. They don't qualify; they aren't eligible. This scam made the "Dirty Dozen" for 2023 list of tax scams. They list them up with the so-called offer-in-compromise mills that we have heard about over the years.

That doesn't mean that there are not legitimate companies out there. There are legitimate companies, and there is the ability to get the ERC, but you have to be careful. Fraudsters are rampant on that— contacting clients directly, or clients hear about it on the news. I just ran into an individual the other day. He is not a client of mine. I don't want him to be a client of mine, but he seems to want me to represent him. He said, "I just hired this group, and they have told me now that I am going to get over $1 million in ERC credits. They have looked it all over." I don't know, maybe he will; but I told him I wasn't going to be reviewing it for him.

Right now, the IRS says that they are processing about 20,000 ERC claims per week—per week! If you recall from our conversation with Karen Davis on these, even her law firm got a statement from one of the mills that looked like it was from the IRS, and it was saying, "You are entitled to $700 (and some) thousand." I have had emails from a number of accountants saying, "My client," (in one case) "had received $250,000 to $300,000 already in checks." She said, "They are not entitled to it. We continue to look at it, and we looked at it at that time when we initially filed, and we still [maintain that] they are not."

I had another interesting one that I just looked at for someone who actually did qualify, and they did get back some money; but what the mill didn't do was amend their income tax returns—because you have to change the wages. They didn't look at the integration; they just applied and took a substantial sum of money for it.

Remember the 941-X. Use the new, revised form, and it will show an April date as being the revision date.

F. *Schlapfer v. Commissioner*

TC Memo 2023-65

We have another case out here, *Schlapfer*. This was an interesting one because the taxpayer disclosed a gift. The taxpayer was engaged in the Offshore Voluntary Disclosure Program; and in their packet, they included a gift tax return. In the gift tax return, they showed they had made a gift of a CFC's (Controlled Foreign Corporation's) stock. Now, that was for 2006, and it was a policy of life insurance. The policy owned stock—the insurance owned stock in a European marketing company which was previously owned by Schlapfer.

Schlapfer assigned ownership of the policy to his aunt and uncle, which was, essentially, the stock in the CFC. Now, his disclosure—in 2013, he submitted a disclosure—and he included a gift tax return for 2006 where he said he had made this gift of the stock, not the insurance. He also attached a protective filing notice that stated that the taxpayer made the gift in 2006 but that he wasn't subject to U.S. gift tax as he did not intend to reside permanently in the U.S. until he obtained his citizenship in 2008. So, he reported the transfer as a gift. In 2012, you were required to disclose the disregarded entity, so he treated it like that.

Well, the IRS first concluded that he made the gift in 2007, not 2006. They prepared a substitute return and then, in 2019, they issued a deficiency notice based upon that. Generally, there are three years from the filing of the gift tax return to assess additional tax. If a return isn't filed, or if the gift is not adequately disclosed, then the IRS can do it at any time.

What happened here was, the Court said that was adequate disclosure. It provided sufficient and detailed information to alert the IRS and the agents to the nature of the transaction so they could make a decision whether to select that return for audit, to audit that issue. They were reasonably informed and so, therefore, the statute started to run when they provided that return for the 2006 year. Now, yes, it was provided with the packet; but they said that still was adequate disclosure to the IRS.

G. *Berenblatt v. Commissioner*

160 TC No. 14

Berenblatt, a Tax Court case—interesting first impression. The Tax Court had to address whether a whistleblower's discovery request was appropriate here. Basically, the individual provided information. They were interviewed on an abusive tax shelter along with 100 other people. They claimed that they were entitled to a recovery as a whistleblower. So, what they did is, they filed with the Whistleblower Office (WBO) a Form 211. Form 211 is an application for award for providing original information that led to the IRS collection and that it was instrumental. Well, the IRS denied it; and the agent in charge of the investigation said, "We did not need this information. We already had the information. It didn't provide us with anything that assisted us or that led to us getting a recovery."

The Tax Court denied the request. They said they are only going to allow discovery at completing the designated records when the whistleblower makes a "significant showing" that there is material in the IRS's possession that indicates (1) bad faith on the IRS's part, or (2) that the record is incomplete. They didn't make any showing—certainly not a significant showing—but probably no showing of bad faith or an incomplete record.

So, their request for discovery [was] looking to see what the IRS had—what information. "Show us the information you had prior to what we gave you." And [the Court] said the IRS's determination is presumptively correct ,and you haven't shown that there is any indication of bad faith or that the records that you have seen are incomplete.

H. Updated Form 656 Package

Another updated version of a form—the IRS's updated release of Form 656. That is the Offer in Compromise packet. There is a new release, so make sure that you are using the new packet. That new packet would be entitled as the April packet.

I. The Electronic Communication Uniformity Act

Senate Bill 1338

Interesting, Marsha Blackburn and Catherine Cortez Masto, bipartisan, have introduced Senate Bill 1338. The bill is going to apply, if it passes, as a patch to payments or documents sent after December 31, 2024, and the IRS has to provide guidance. The proposal, why it is interesting, is to avoid penalties. The "mailbox rule" that payments are deemed made when they are mailed does not apply to electronic payments. So, when you make an electronic payment through the Electronic Federal Tax Payment System, it cautions taxpayers that the payments must be scheduled by 8 p.m. Eastern Time the day before the due date to be considered timely—or 28 hours earlier than allotted for mail payments. Well, a lot of people don't realize that, and they go in, they make their payment, and then they get penalized.

Business taxpayers and individuals can make same-day payments if the amount is under $1 million; but it has to be submitted before 3 p.m. Eastern time on a business day. Again, what they are saying is that is not enough time. They want to go by the date that it is submitted, not the date that the IRS receives it or that the IRS credits the account. So, we will see what happens with that.

J. Simplify Automatic Filing Extensions Act of 2023 (SAFE)

In addition, we have a bipartisan bill, Simplifying Automatic Filing Extensions Act of 2023 (SAFE). This is bipartisan legislation in the House, but it has a good chance. What this wants to do is to allow requesting a six-month extension to file your taxes. You automatically qualify, but you can avoid any penalties if you pay an estimated amount equal to 125 percent of the prior year. So, regardless of what your tax actually ends up being [on] the return at the end (when you actually file it after your extension), as long as you paid in 125 percent of the prior year, you can avoid any penalties.

So, there are two situations which, really, are going to be very beneficial for taxpayers should they pass. And they are both bipartisan—one in the House, and one in the Senate. It appears that there is going to be some significant support for both of those provisions.

K. Tax Writers Preparing SECURE 2.0 Technical Corrections Bill

Lastly, the tax writers are preparing the technical corrections bill for Secure 2.0. Section [102], the small employer credit for startup costs. The section could be read to subject additional credit for employer contributions to the dollar limit that applies to startup. That wasn't the intent; they want to change that.

Section 107 is the increased age for required minimum distributions. They said it could be read to increase the age from 73 to 75 for individuals who turn 74 (rather than 73) after December 31, 2032. That wasn't the intent. The intent is to change that.

Significantly, Section 601 permits SIMPLE IRAs and SEPs to include a Roth provision. They said that could be read to require contributions to the SIMPLE or the SEP to be included in determining whether you have exceeded the contribution limit that applies to Roths. It wasn't Congress's intent that those apply (that the SIMPLE or SEP contributions be considered for that purpose) to the Roth limits. Again, to be changed.

Then, Section 603, the catch ups. If the participant's wages from the employer-sponsored plan exceed $145,000 for the preceding calendar year, they could be read to disallow catch-up contributions, whether pre-tax or Roth, beginning in 2024. Congress didn't intend that—to disallow the catch-up contributions, or to modify how the contributions are to be made. It was their intent to require catch-up contributions [for participants] whose wages from the employer sponsoring the plan exceed [$145,000] to be made to the Roth on a Roth basis, and to permit other participants to make up on either pre-tax or Roth. So, just to limit, if you are over [$145,000] to having to—if you want to make a catch up—make it on a Roth. Again, the intent of their writing is to correct that.

Thank you for joining me today, and please be safe.

Current Material: Experts' Forum

By Ian J. Redpath, JD, LLM

A. IRS Updated Status of Mission-Critical Functions Webpage

The IRS announced that, as of mid-May, it has a smaller inventory of unprocessed individual and employer returns compared to the same time in 2022. As of May 6, there were 4.3 million unprocessed individual returns, which includes returns for tax years 2022 and 2021; 2.1 million of those need error correction or other special handling, and the 2.2 million others are paper returns awaiting review. Comparatively, on May 6, 2022, there were 9.8 million unprocessed individual returns, the vast majority of those being paper (7.2 million).

On May 11, 2023, the IRS had 1.3 million unprocessed Forms 941, Employer's Quarterly Federal Tax Return, while there were 3.4 million unprocessed Forms 941 on the same date last year. However, there are more unprocessed Forms 941-X, with approximately 938,000 as of May 10, 2023, compared to 287,000 in 2022. This is mainly due to the increase in ERC-related claims.

B. *Gardner DDS PA TM v. Commissioner*

CA 10, 131 AFTR 2d ¶2023-636

The taxpayer's appeal from a Tax Court order in a small tax case was dismissed. Small tax cases are not subject to review. If the decision is made to have a case determined by the Tax Court as a small tax case, there is no appeal. This could have been avoided by having the case not determined as a small tax case in the beginning. That is a decision that needs to be made upon filing the Tax Court Petition.

C. *Cardiovascular Center LLC v Commissioner*

T.C. Memo 2023-64

The Tax Court upheld the IRS's determination that medical assistants and the officer manager of a medical practice were employees, not independent contractors. The Court looked to the overall common-law factors and determined that the assistants and manager were common-law employees. Those factors included that the taxpayer exercised significant control and supervision. The office set all the procedures, controlled the amounts paid, and provided the supplies that were required to complete their jobs. They had no opportunity for profit outside of wages or related payments. They were integral to the taxpayer's business and stayed with the taxpayer for several years. Also, the taxpayer did not qualify for the Revenue Act of 1978 Section 530 safe harbor relief because it did not establish reasonable basis for not treating workers as employees and failed to file Forms 1099-MISC consistent with independent contractor treatment.

The practice was owned by a sole practitioner. Janine Smith worked at Cardiovascular Center LLC (CVC) with Dr. Kresock in his medical practice as the office manager and as a registered health information technologist. The four others were medical assistants. They were paid on a biweekly basis with a cashier's check signed by Kresock, pursuant to an "employee" time sheet they signed, and which was approved by Smith. The workers were paid on an hourly wage and received "overtime" when required. Smith was not issued a paycheck; Dr. Kresock instead paid her personal bills, including mortgage payments on homes titled in her name. Dr. Kresock and Smith resided together.

CVC did not file or furnish Forms 1099-MISC, Miscellaneous Income, or W-2s, Wage and Tax Statement, reporting the compensation paid to the workers, nor did it file any associated employment tax returns [Form 940, Employer's Annual Federal Unemployment (FUTA) Tax Return, and Form 941, Employer's Quarterly Federal Tax Return] for the tax periods at issue.

To qualify for the Section 530 relief, a taxpayer must: (1) not have treated the worker as an employee for tax purposes (historic treatment requirement); (2) must have filed all federal tax returns (including information returns) with respect to the worker for periods after 1978 on a basis showing the worker's treatment as a non-employee (reporting consistency requirement); (3) must have had a reasonable basis for not treating the worker as an employee (reasonable basis requirement); and (4) must not have treated as an employee any individual holding a position "substantially similar" to that of the worker in question (substantive consistency requirement). Since no Forms 1099-MISC (not 1099-NEC) were issued, the relief was not available.

D. *Frank W. Bibeau v. Commissioner*

TC Memo 2023-66

The taxpayer was an attorney and a member of the Chippewa tribe. He claimed he was not liable for self-employment tax based on an 1837 Chippewa treaty, which guaranteed the tribe's right to "hunt, fish, and gather wild rice" on tribal lands. He claimed that gave him the right to make a "modest, tax-free living." Additionally, he argued that he was not liable for tax because there was no treaty wherein the tribe granted the United States the right to tax tribal members or their income from any activity. The Court found both arguments unavailing.

E. Revised Form 941-X and Instructions Issued

Employers use Form 941-X to correct errors on a previously filed Form 941 for incorrectly reported wages, tips, and other compensation; income tax withheld from wages, tips, and other compensation; taxable Social Security wages; taxable Social Security tips; taxable Medicare wages and tips; and taxable wages and tips subject to Additional Medicare Tax withholding. The IRS has been processing about 20,000 ERC credit claims per week, "but that was not enough to keep up with the demand because more come in," and stated that there is still ERC eligibility through 2025. "This is a growing target, not a stable one," the IRS explained, but said that since tax filing season is over, the IRS aims to double the rate of processed claims from 20,000 to 40,000 or more.

The April 2023 revised version of Form 941-X was issued by the IRS on May 25, 2023, and must be used for all future filings.

F. *Schlapfer v Commissioner*

TC Memo 2023-65

The Court determined that the taxpayer properly disclosed a gift of controlled foreign corporation (CFC) stock to the IRS when he included a gift tax return reporting the transfer with his Offshore Voluntary Disclosure Program (OVDP) disclosure packet. Therefore, the period to assess the gift tax began when the return was filed, and the IRS is barred from assessing any gift tax because it sent the deficiency notice after the limitations period ended. The return reported that transfer of the stock but, in reality, it was the life insurance policy that owned the stock. The Court did not find this to be a substantial defect. In 2013, Schlapfer submitted a disclosure packet to the IRS's OVDP. In this packet, he included a Form 709 (gift tax return) for 2006. This return informed the IRS that Schlapfer made gifts of EMG stock to his mother, aunt, and uncle. Attached to the Form 709 was a protective filing notice that stated the taxpayer made a gift of CFC stock in 2006 but that he was not subject to U.S. gift tax as he did not intend to reside permanently in the U.S. until he obtained his U.S. citizenship in 2008. Note: Schlapfer reported the transfer as a gift of CFC stock rather than as a gift of the insurance policy because the 2012 OVDP instructions required taxpayers to disregard certain entities that hold underlying assets, and he believed that the policy was such an entity.

After Schlapfer's gift tax return was examined, the IRS concluded that he made the gifts in 2007, not 2006, and prepared a substitute gift tax return for 2007. In October 2019, the IRS issued a deficiency notice to Schlapfer based on the substitute return. A disclosure is adequate if it is sufficiently detailed to alert the Commissioner and his agents as to the nature of the transaction so that the decision as to whether to select the return for audit may be a reasonably informed one. All the OVDP disclosure documents taken together substantially complied with the adequate disclosure

requirements. While Schlapfer may have failed to describe the gift in the correct way, he provided enough information to identify the underlying property that was transferred. The Court found this to be an adequate disclosure; and, therefore, the statute of limitations commenced when it was received by the IRS.

G. *Berenblatt v Commissioner*

160 TC No. 14

The Tax Court addressed when whistleblower discovery requests are appropriate. The Court determined that such requests are appropriate when there is a "significant showing" that the IRS possesses materials (1) indicative of bad faith on the IRS's part in connection with the case, or (2) indicating that the designated record omits material the Whistleblower Office (WBO) actually considered (directly or indirectly) or that otherwise falls under a category of documents listed in the regulations as part of the administrative record.

Berenblatt was one of over 100 people the IRS interviewed as part of an investigation into an abusive tax shelter. That investigation allowed the IRS to recover a lot of money from institutional and individual taxpayers. Berenblatt submitted to the WBO a Form 211, claiming the information he provided in his interview was instrumental to the IRS's recoveries. The WBO denied the award based on an affidavit from the primary IRS investigator that the IRS already knew Berenblatt's information before his interview and, therefore, it did not lead to any recoveries.

After Berenblatt filed a petition to review the WBO's determination, he asked the Court to compel the IRS to produce various documents and respond to interrogatories covering periods both before and after his 2007 interview. Berenblatt argued that the information he sought would prove he was entitled to a whistleblower award. With one exception, the IRS adequately answered Berenblatt's interrogatories. The Court ordered the IRS to answer the one question that was not adequately answered as Berenblatt made a limited showing that the administrative record was incomplete regarding this one question and the exception for attorney work product and the deliberative process privilege did not apply. The Tax Court also determined that the IRS's compilation of the administrative record in a whistleblower case is presumptively correct absent clear evidence to the contrary. As a result, the Court will only allow discovery aimed at completing the designated record when the whistleblower makes a "significant showing" that there is material in the IRS's possession indicative of bad faith on the IRS's part or of an incomplete record. Since Berenblatt did not make a "significant showing" of bad faith or an incomplete record in connection with the rest of his discovery requests, the Court denied his motion to compel.

H. Updated Form 656 Package

The IRS has released an April 2023 version of Form 656, Offer in Compromise booklet. Form 656 contains everything a taxpayer needs to know about submitting an offer in compromise (OIC) to the IRS. Taxpayers should download and use the April 2023 version of the OIC booklet to avoid processing delays.

I. The Electronic Communication Uniformity Act

Senate Bill 1338

The Bill is a proposal to apply the mailbox rule to electronic payments and filings to prevent taxpayers from being hit with late penalties when payments and documents are submitted electronically on or before the due date but received after the date. Section 7502 states that mailed tax payments or documents are deemed timely if postmarked and sent by midnight on the due date, even if received and processed later. This is known as the "mailbox rule." The mailbox rule is inapplicable to electronically transmitted IRS payments. While the Treasury has the statutory authority to issue regulations applying the mailbox rule to electronic filings, the Department cannot do so for electronic payments. Its Electronic Federal Tax Payment System (EFTPS) cautions taxpayers that payments must be scheduled by 8:00 p.m. ET the day before the due date to be considered timely—or 28 hours earlier than allotted for mailed payments. The EFTPS explains that funds from payments will hit taxpayers' bank accounts on the date selected for settlement. Business taxpayers and individuals can make same-day payments if the amount is under $1 million and submitted before 3:00 p.m. ET on a business day—notably more restrictive than the leeway given to paper mail.

J. Simplify Automatic Filing Extensions Act of 2023 (SAFE)

SAFE is a bipartisan bill proposed in the House. The SAFE Act would allow taxpayers requesting a six-month extension to file their federal taxes to automatically qualify and avoid a penalty if they pay an estimated amount equal to 125 percent of their previous year's liability.

K. Tax Writers Preparing SECURE 2.0 Technical Corrections Bill

A bipartisan bill containing some technical corrections to the language of the SECURE 2.0 Act will soon be ready for introduction in both chambers of Congress, according to the Chairmen and Ranking Members of the two tax-writing committees in a May 23 letter to Treasury Secretary, Janet Yellen, and IRS Commissioner, Daniel Werfel.

Following is a breakdown of the provisions requiring correction:

- §102, which increases the credit for small employer pension plan startup costs ("startup credit"), in part by allowing eligible employers a credit for a portion of employer contributions made to the plan. This section could be read to subject the additional credit for employer contributions to the dollar limit that otherwise applies to the startup credit. However, Congress intended the new credit for employer contributions to be in addition to the startup credit otherwise available to the employer.

- §107, which increases the age at which required minimum distributions from a retirement plan are required to begin, could be read to increase the applicable age from age 73 to age 75 for individuals who turn 74 (rather than 73) after December 31, 2032, which is inconsistent with Congressional intent.

- §601, which permits SIMPLE IRA plans and SEP plans to include a Roth IRA, could be read to require contributions to a SIMPLE IRA or SEP plan to be included in determining whether an individual has exceeded the contribution limit that applies to contributions to a Roth IRA. However, Congress intended that no contributions to a SIMPLE IRA or SEP plan (including Roth contributions) be considered for purposes of the otherwise-applicable Roth IRA contribution limit.

- §603, which requires catch-up contributions under a retirement plan to be made on a Roth basis, for tax years beginning after 2023, if the participant's wages from the employer sponsoring the plan exceeded $145,000 for the preceding calendar year, could be read to disallow catch-up contributions (whether pre-tax or Roth) beginning in 2024. However, Congress did not intend to disallow catch-up contributions nor to modify how the catch-up contribution rules apply to employees who participate in plans of unrelated employers. Rather, Congress's intent was to require catch-up contributions for participants whose wages from the employer sponsoring the plan exceeded $145,000 for the preceding year to be made on a Roth basis and to permit other participants to make catch-up contributions on either a pre-tax or a Roth basis.

A. Discussion Problems

1) Your client has filed a Form 941-X claiming an Employee Retention Credit (ERC). It has been months without any word from the IRS. Your client is getting concerned.

2) Another client's attorney filed a Tax Court action in the small case division. You do not agree with the Court's decision.

3) Carlos has come to you with questions about certain retirement changes made by SECURE 2.0 and how they impact him. In reading the law, you are unsure how to interpret a couple of provisions as they do not seem to meet the intent of Congress.

Required:

1) What would you advise your client regarding the Form 941-X filing?

2) What would you advise your client about the Tax Court decision that you believe is clearly erroneous?

3) How do you respond to Carlos about some ambiguous parts of SECURE 2.0?

B. Suggested Answers to Discussion Problems

1) The IRS is significantly behind in processing Forms 941-X; there is a backlog of over 900,000 returns. This does not mean the claim is invalid, just that the IRS is experiencing processing delays. If you did not review the client's ERC claim, then you should advise the client as to what is happening and also inform them that the income tax return has to be amended.

2) Unfortunately, even if the decision is clearly erroneous, there is no review or appeal of small cases. That is a downside to the less formal process.

3) Currently, there is bipartisan legislation proposed to make technical corrections to SECURE 2.0. A review of that proposal may address the inconsistencies. Presumably, there will be some corrective legislation.

PART 2. INDIVIDUAL TAXATION

Tax Authority

Tax research is at the heart of tax compliance and planning. Both taxpayers and practitioners may be liable for a variety of penalties depending on each set of facts. The determination of the level of authority is essential for any practitioner and is relevant to a return position or in tax planning. Ian Redpath and Shannon Jemiolo discuss tax authority and the level of research and professional analysis required of practitioners.

Let's join Ian and Shannon.

Mr. Redpath

Shannon, welcome to the program.

Ms. Jemiolo

Hi, Ian. Thanks so much for having me.

Mr. Redpath

Always great to have you here, and I think we have an interesting program today. You and I were talking about this. You have a PhD in accounting. Of course, I have a background as a tax lawyer and an LLM in tax. So, we have kind of a crossover here. I always feel that the accountant, what they do as far as research, is probably as, if not more, important than what I do. I say that because when someone contacts me to defend a position they took, well, that position has already been taken. I can't turn around and go, "Oh, no, no, no, no, no, that was an installment sale. Oh, no, no, no, no, no, no, no, we're going to change that. That really wasn't cash they got in the like-kind exchange. We're going to change the facts. We're going to change how we took our position." My job then becomes trying to defend what was already done.

Yet, lawyers spend three years essentially doing research, learning how to do research, learning to analyze authorities. And in most accounting programs—unless you're like yourself or you're at the graduate level—they don't have the research background. You get research at the graduate level, but most accounting programs, that might be a chapter that we run right through quickly; or there's one chapter versus three years; or, like yourself, at least a year that you're constantly doing research. I think this is one of the real drawbacks in accounting education. The staff person comes out, and when I talk to staff, most of them—and I do programs around the country for firms on tax research—it's usually, "There's the computer. Go research this." That's how they learn it. I'm going to ask you a question right off the top. I haven't asked you this question, so I'd be really interested in the answer because I hear a lot from younger people. I'm dating both of us here, Shannon; but for this case, you're not a younger person either.

Ms. Jemiolo

I know. It hurts.

Mr. Redpath

Just for this question. It's Google—that's where we do our tax research, right? We just do a Google search, and Mr. Google or Ms. Google or Mrs. Google or whatever Google—Google gives us the answer. So, we're done talking for today, is that correct?

Ms. Jemiolo

Yes, that's all we need.

Mr. Redpath

Okay, we're done. Shannon, thanks for joining me today.
Boy, that's a mistake, isn't it?

Ms. Jemiolo

The Googling everything?

Mr. Redpath

Yes.

Ms. Jemiolo

Oh my goodness. The number of students who think that qualifies as actual research and use what they find on there from whatever source as authority backing up their writing is astounding.

Mr. Redpath

Yes, and it's a disaster waiting to happen. Yes, we have all of these secondary sources out there, but the actual training tends to be, "Here. There's the computer. Go figure it out." And I don't totally blame someone who has no background in how to use, for example, RIA, CCH, or Bloomberg. I can see a lot of times they're going to go, "Well, it's easy. I just type it into Google, and an answer comes up. It must be the right answer." As you said, we always know Google would never give you something that wasn't correct and up to date, right? This is probably up to date as [of] this morning. These are kind of the issues.

So, what we're going to focus on then is, what are the authorities? Because when you're asked to look at something, what does that mean? What is the authority? And kind of start with the idea that, if you're taking a return position, if you have *substantial authority*—generally believed to be a 40% chance of success if you were audited—then you don't have to disclose. If you have a reasonable basis, which is a third, you have to disclose the [Form] 8275 or 8275-R. And, you know, Shannon, we did a program on that, the penalties that can apply. But you know what? I never have sat down and said, "Oh my gosh, I had a 39.96 chance of success." It's professional judgment, right? You're still stuck with analyzing for and against and coming up with an answer. Yes, there's a regulation: 1.6662-4(d)(3)(iii). There you go. That's the last time I'll cite something. That's substantial authority and it lists a whole series of things, but it doesn't say just because you found a court case, you win. It says you've got to analyze everything that's out there. I had someone tell me once, he said, "I got this great case"—an accountant—and I said, "Oh, great." It was from a bankruptcy court in Texas, and they were in New York. I'm going, "I hope you've done a lot more research than this."

Ms. Jemiolo

Yes, but you're right. I remember, before I went for my PhD, I worked in public accounting, and I didn't have a background in tax research. I remember, I started in public accounting, and my first assignment was to do a memo for a client [that] involved tax research. My senior walked me through CCH and a little bit of how to go through it, but I turned the first draft in to the manager, and I don't know how she didn't laugh in my face. It was awful.

Mr. Redpath

Right. And you worked with Price Waterhouse, right?

Ms. Jemiolo:

I did. And, yes, she was very kind in not just outright mocking me. But no, it's not necessarily something you come away with the knowledge of from an undergraduate education—even sometimes graduate.

Mr. Redpath

Right. And I think—kind of to set the stage—I have many times told a client, "You can't afford to be right. Yes, I think you're right. Yes, I can defend this position, but guess what? It's going to cost you more than it's worth. Maybe we don't take that position." But also, when you're looking at this, sometimes you have to say, "Okay, how much money's on the table?" I looked at a publication from the government, and the publication, yes, it answered my question. Is it really worth doing more research? Because it's going to be maybe $1,000, and it's going to cost $5,000

of research. So, you do sometimes say, "Yes, I can live with that answer. I can live with that answer, and look at the types of things that are out there." So, I think that's something you always have to look at. When a client sees research on the bill, their first response is, "Well, you're supposed to know all this stuff." Because they know you're supposed to know everything about the tax code, right? Everything about the law. I started memorizing the code and the regs, and I think I'm up to Section 102. I think. Somewhere around there.

Ms. Jemiolo

That's impressive.

Mr. Redpath

Not bad. Nobody knows everything there is to know about tax, but your client thinks you do, and they don't want to pay you to learn. And so, often research is a loss leader. You can't—you know, it's taken me a lot of time, and sometimes you've got to be honest with the client that, "Hey, this is a very complicated issue." And sometimes it's, "Hey, can we live with this? It's a $900 item. It's going to cost three times that." For what, to save 900 bucks? I've had that conversation many times with clients. Only one client I ever had said, "I don't care what it costs. I'm not paying the government an extra penny." I loved that guy. I loved it—my favorite client ever.

So, let's look at—just in general, because we don't want to go through all of it—but in general, what does the law say—in the regs, I should say—what things [can we] look at? There's a whole list in the regulation of what is substantial authority, but, in general, what would that be?

Ms. Jemiolo

Absolutely. The crown jewel of everything is the Internal Revenue Code. It's our first stop, but it doesn't always answer every question. And sometimes the answers are a little bit murky. From there, we have our regulations. Final is ideal, but if we don't have those—temporary, proposed, just something current that we can rely on to stand in its place. Any kind of revenue ruling or rev[enue] procedures. Tax treaties, to an extent. The Treasury Department comes out with different explanations. The Internal Revenue Service comes out with some different information through their bulletins and through their website. So, those things are helpful. They may not all be primary authority, but they are at least helpful in figuring out what we're trying to formulate—our plan to be for taking these different positions. And then court cases are a huge one.

Mr. Redpath

If you understand, and we're going to talk about that.

Ms. Jemiolo

Very true.

Mr. Redpath

Not all court cases are created equally. There's no question about that. I have found, with all the changes—the tax code keeps changing and changing, and the IRS can't keep up with all the regs. They can't even process returns, let alone write regs. I have found very helpful, in areas that are new… I went through an audit, brand new law, and I took a position that the position was correct, in my belief, because I used the committee reports and said, "This is what Congress intended. This is what they said. This is what we did. There are no regulations, so here's the intent of Congress. We followed the intent of Congress."

The only thing you have to be careful of is—with QIP, the *qualified improvement property*—the committee reports said that the property was to qualify for bonus depreciation, but that's not how they wrote the law. When they wrote the law, they failed to change it from 39 years to 15 years, and the court said, "Hey, we can't do anything because it's clear in the law." So, even though the committee report for this section said it should qualify, they forgot to change it. So, you do come up with those, but usually the explanations are outstanding when there are no other things to look at. I think we overlook those quite often.

One of the things where the AICPA differs from the IRS is with treatises and articles, things of that nature. Shannon, you and I have published a number of articles, and we know how brilliant they are.

Ms. Jemiolo
Oh yes!

Mr. Redpath
Obviously everybody should be following them. That should be enough, right? Shannon and Ian said. You give that when you go in for your audit, and you're done, right?

Ms. Jemiolo
All the authority you need right there.

Mr. Redpath
Right there. But what does the IRS say relative to that as substantial authority?

Ms. Jemiolo
The IRS is very short and sweet on this. They are not authority.

Mr. Redpath
Right. Even though the AICPA says you can take a position on it, remember that the IRS does not. Might help you in looking at it, but it does not create a level of substantial authority.

So, what are—you mentioned the words primary and secondary—what are primary sources of the law? What does that mean, primary source, and why is it important?

Ms. Jemiolo
First off, I'll answer the second question. Why is it important? Primary authority is so important because *primary authority* is what the IRS is really looking for whenever you're defending a position. This is what the IRS is going to consider substantial authority to defend your case. As far as different sources of this, I mean, the Constitution, for one, although it's not super helpful with tax matters. Besides that, legislative history materials, any kind of statutes like the Internal Revenue Code, things that have been published by an arm of government, treasury regs, IRS pronouncements, judicial decisions, and treaties to an extent.

Mr. Redpath
Treaties, kind of, yes.

Ms. Jemiolo
Like a little asterisk there.

Mr. Redpath
Well, they're helpful in certain circumstances. That's the teaser. We'll have people come back later to get the rest of it.

So, what are common secondary sources? This, I think, is where we get into questions, especially with staff people. What is that? Because I looked at the explanation in CCH, RIA, whatever, and isn't that authority?

Ms. Jemiolo
Some of the secondary sources, to me, because of where they're coming from, almost feel like they should be primary sources. I'm thinking about IRS publications specifically. They're by the IRS. Why are these not primary authority?

But they're not. They're considered secondary authority. Similarly, legal periodicals, like you were talking about earlier; legal opinions; other materials that come out, whether from practitioners or from somebody higher up than us. Those things are secondary sources, which provide great insight to us in trying to figure out what the law is trying to get at, but the IRS is not going to take those as primary or substantial authority.

Mr. Redpath

I'll be honest, I've looked at the explanation in RIA, and I've said, "Yes, I can live with that. Okay, yes, I can live with that." And sometimes I'm researching that, and I look at that, and I go, "Yes, I agree with that. Not only will I live with it, but I can agree with it. We agree." But I think what people have to understand is, if it's an important issue, you can't just look at the explanation and go, "Oh, I can't do this because the explanation's set." I look at the explanation, and I go, "Okay, if I agree with it, great." It's just kind of a pat on the back. If I don't agree with it, I don't assume I'm wrong. I continue to do more research. I have found situations where certain explanations are wrong. I'm not going to say totally wrong, but they didn't provide enough background to be correct for my issue. I actually contacted one of the publishers, and I said, "Look, here's the information. This is wrong." And they changed it.

Ms. Jemiolo

Oh, good!

Mr. Redpath

Because the information was incorrect. I mean, it was maybe correct 80% of the time. But I didn't have that 80%, and I had done enough research that I knew what they were saying was incorrect. So, just watch out. Don't always assume that what that says is correct.

Now, we do have a pronouncement where the IRS has said—and this is IR-2021-202—where they came out and said, "You know what? We know we don't have regulations. One of the ways we're going to keep up to date is by doing these FAQs." And they said, "You know what? You can rely on an FAQ in taking a position. You're not going to get penalized." Not being penalized does not mean you're correct. It just means that if you do lose, they're not going to penalize you.

So, let's start off. I always like to tell staff people doing the research that, "You know what, this is an ongoing process." So, if somebody comes in and says, "**Ms. Jemiolo**, here's my fact pattern," if you haven't done the research before in this area, you might not even know what questions to ask. Maybe I've done research in that, and I know. Let's say somebody comes in and says, "I'm being offered a position. I have a job, and I'm going to get housing." Well, do I know, was it a condition of employment? If I haven't done research, I probably don't know that's an issue. Is it on the premises or nearby? There's a lot of questions. If you haven't done it before, you may not know that, hey, I've got all these questions that I have to ask. So, now you've got to prepare your client. "I may have to come back with you." So, it's ongoing. You do more research. Oh, I didn't ask these questions. Don't assume!

Ms. Jemiolo

Yes.

Mr. Redpath

So, now you go back to the client with the questions, right? "Oh, what about this? What about that?" If you prepared them in advance, they're not going to think, "Oh, why do you keep coming back and asking me things?" Don't we have that book of knowledge, right?

Ms. Jemiolo

Oh yes. But no, you're right. I think, sometimes, the hardest part about tax research is figuring out what is the question. Because you start off in one direction, and the farther you get down that rabbit hole, the more you realize that's not really the question. The question's over here.

Mr. Redpath

Honestly—and I'll be the first one to admit this—I had two circumstances just like that. One with a major tech company. I went in. I met with their tax people in this particular area. I gave them an answer, and they looked at me and went, "Really? We never thought of that." I acted like I was brilliant, and I billed them like I was brilliant; but I just had, for whatever reason, I had looked at the question differently. I was taking a different focus, and so, when I looked at it, it was like, "Oh." So, when they looked at that, I was like, "Yes." Kind of group think. They were all talking about it, but they were all coming up with a group think. And so, I just happened to look at it differently.

But I also had a situation where, literally, I knew the answer. I was going to tax court. I knew what it was. It was clear. It's obvious, but I was afraid that the tax court judge may say to me, "Well, what's your authority for that?" Obviously, everybody knows that. Everyone knows that one. I could not find it. Literally, I spent hours. I couldn't find it. I literally woke up in the middle of the night, and I went, "Oh my gosh," and ran down to my computer. There it was. Took me 30 seconds. I was focusing the question incorrectly. I just wasn't asking the computer the right question. So, it took me literally 30 seconds in the middle of the night. I went, "What? Oh my gosh. Why didn't I…?" Boom—there it was, right? Came right up. So, you're right, focusing the question becomes a major issue. I mean, if the question is too broad, you might come up with 5,000 hits. Not going to help you.

So, let's start with some of the things that the government comes out with. Regulations—there's three types. Can you fill us in on those?

Ms. Jemiolo

Yes, the government can come out with three different types of regulations, each one serving a different purpose. First is the *procedural* type; these are just housekeeping really. *Interpretive* are interesting because these are where they're rephrasing or they're elaborating on what was in committee reports or what was published in the code. So, a little bit more information for us. Then, the third type is the *legislative* type. This one's going to allow the Treasury Department itself to determine the details of the law.

Mr. Redpath

With a regulation, there's this concept called deference. The *Chevron* case goes back to 1945. What does *deference* mean to us doing tax research?

Ms. Jemiolo

You were talking earlier about percentages and sitting and thinking about exact weights. You were kind of getting a deference, I felt like there. *Deference* is talking about, you have all these different sources of authority, and which one do you weigh heavier than the other. So, *deference* is how much weight the court should give to the agency's interpretive regulations here.

Mr. Redpath

And if [the IRS is] interpreting their own regulations—so interpreting their own regs—there's a case called *Auer* (A-U-E-R), and that deference says unless it's plainly erroneous or inconsistent, their interpretation is going to be upheld. *Chevron* basically says if the statute is ambiguous, we're going to defer to the IRS as long as the IRS's interpretation is reasonable.

Ms. Jemiolo

Got a lot of latitude.

Mr. Redpath

Well, okay, but we have to [stop] and remember that challenging a regulation can be a significant burden to overcome.

Ms. Jemiolo

Absolutely.

Mr. Redpath

Now, you and I actually wrote an article concerning the APA [Administrative Procedure Act] issues that are coming up in the conservation easement. So, what is the new toy out there for the lawyers in challenging regulations and notices?

Ms. Jemiolo

No, the Administrative Procedure Act. No, you're right. There was a case that ended up getting thrown out because, what, they hadn't sent a letter by a specific due date?

Mr. Redpath

And in another case, they said, "Well, you didn't provide enough information to show that you looked at all the comments. You didn't respond to every comment that was made." I mean, attorneys are fighting this, and they're attacking all of these regulations, these notices. They're saying, "Well, you didn't follow the APA. You didn't follow the APA." The courts are getting inundated with challenges on the APA. So, if our viewers see that in their research, be aware of what's going on.

The IRS does other things, right? Revenue rulings, revenue procedures, technical advice, memorandums—what are all these things?

Ms. Jemiolo

Revenue rulings are things that the IRS puts out. They're official pronouncements of the national office of the IRS. And these are really helpful because they provide examples of how the IRS would apply a law to a specific fact pattern or situation. Which is nice, right? If you're in that same situation, now you have an example. This is how the IRS would treat it, so you know what that is.

Mr. Redpath

And it's binding on the IRS as long as they haven't declared it obsolete or superseded it.

Ms. Jemiolo

Exactly, yes. Now, as far as revenue procedures go, these ones deal with the internal management practices and procedures of the IRS. They're published weekly through the Internal Revenue Bulletin. But again, these provide some guidance to taxpayers, and IRS personnel too, right? Because they need some insight into this and how to handle routine tax matters. Now, private letter rulings are one of my personal favorites because they're binding only to the taxpayer that they were issued to. They do still give some good insight. These are where you can, for a fee, write to the IRS before you go through with the transaction, lay out the details for them, and go ahead and get their opinion on how they would treat this transaction before you do it. That way, when you do do it, and they come back fighting you, you say, "Ha, ha! You already said I could."

Mr. Redpath

And you know what, it's really just kind of a negotiation. The private letter rulings that I've looked for, which primarily, in the reorganization issues, it's like, "Okay, we can't do this." I had one, we said, "Look, we can't do this because there were some crazy things in the organizational documents, in the state law." And the IRS came back—I got the phone call from them and [they said], "Okay, well, did you think about this? Well, if you do this, this, and this." And I said, "Well, we can't do that." "Well, then, you're going to have to do this." And basically, it came out and said, "Okay, as long as you do this, this, this, and this, we're going to say it's a valid reorg." Okay, great. My client and my malpractice carrier were very happy because I had a letter ruling. We could do what we were doing. Otherwise, I was going to recommend doing it. But if we got audited, I don't know. I mean, I knew that there were some potential issues.

You mentioned cost. The IRS just came out with—last year, they came out with the S corporation, with the self-correction. In there, they said just to get inadvertent termination relief, which is a letter ruling, that the average cost is about $38,000 to get inadvertent termination relief.

Ms. Jemiolo

Oh my!

Mr. Redpath

When you said it cost money to get letter rulings—they charge a fee. You're probably hiring a lawyer to do it—they're going to charge a fee. It's not a freebie just to go and get a letter.

Ms. Jemiolo

Absolutely.

Mr. Redpath

And then determination letters are—that's like, okay, tax-exempt status, right? We've already set up the organization, recognize us. Or pensions. Are we complying with ERISA? Are we complying with the IRS code? Technical advice memorandums are kind of like letter rulings in the audit process. The last one I did, the auditor and I just disagreed on an issue. We couldn't move forward. I felt she was misinterpreting the IRS's own position. I asked for technical advice. Wrote a memo. She sent it on, it came back, and we were done. And again, it was binding on them. We also have internal memorandum like chief counsel advices and internal legal memorandums. The IRS says these are not precedent. We're giving you our position, but not precedent. Then, we have notices that come out all the time, especially in transitional guidance.

What about other things? Specifically the audit technique guides, which I think are really not used enough by practitioners. I'm surprised how many times I mention them to practitioners, [and] they don't even know what they are, let alone that they exist. The audit manual, I don't think that has as much help. But those audit technique guides, the ATGs, what are they and why should we be looking at them?

Ms. Jemiolo

Oh, their guides? I think that they're so helpful because they help to break it out into issue and sector. So, if you're talking about, "I am trying to audit this hobby loss. What do I do?" There's not a technique guide for that. If you're trying to audit a sector—a used-car dealership or something like that—you can find an audit technique guide that provides technique guidance for how to go about that kind of an entity.

Mr. Redpath

Yes. I was doing a program—it was funny, because I was doing a program on tax research for a large regional firm; this was down in Missouri—and it was funny because we were talking, and one of the partners sat in on part of it. He goes, "You know, I'm going on an audit on this particular client." And I said, "I think there's an audit technique guide. Have you looked at it?" He goes, "No." So, [he] pulled it off—this was at lunch—he pulled it off, and I said, "I guarantee you, the auditor is going to go question by question, right through that." It was a two-day program. The next day, he came; he says, "You were right. It was like a checklist of everything." I said, "So, why are these important?" Because the IRS decided that practitioners know more than their agents do, that [they] know more than the revenue agent who's coming out there. So, this is to train them. When you read them, understand that it's referring to what the agent is supposed to be looking at. But what does that tell us? Well, people will often use it for an audit. It's going to tell me, what is the plan? What are they looking for in the audit so I can prepare for the audit?

But I look at it the other way too. If I'm structuring a transaction, I want to know what the IRS [is] going to be looking for. What are they going to say? It'll say, "If you find this, then you should look here. If you find this, ask for these documents." It tells them what documents to look for, so I know what they're looking for. I know what their position is because it details their legal position—code sections, court cases, everything that they're going to need. I don't

have to agree with it, but it's nice to know the other side's game plan. So, I look at it from the other side. I look at it and go, "Yes, it's really helpful in the audit." If my client comes in with an audit notice, I'm going to look and see—do we have one? But I look at it when I'm structuring—do we have it? You mentioned sector. If I have used car dealers as clients, I want that on my shelf. I want to know exactly the issues that the IRS finds in that sector.

I can't overstate how do you get them. You go to the IRS website—www.irs.gov. You just type in "audit technique guides." It'll come up with an alphabetical list, and there are so many. Some are specific. Alaska gold placer mines—I don't have a lot of clients that do that. The Port of Houston—I don't have clients at the Port of Houston. But I do have clients that have hobby losses. I've been involved in those. So, as you said, it's audit; it's issue and sector. I think they're incredibly important to use.

Now, the courts. Fill us in on the courts because we have three courts of *original jurisdiction*, meaning that originally hear federal tax cases.

Ms. Jemiolo

We do: the U.S. Tax Court, the U.S. District Courts, and the U.S. Court of Federal Claims.

Mr. Redpath

And why would we choose one over the other?

Ms. Jemiolo

It depends, right? The usual accounting answer. It depends on what your issue is [and] how much authority you think you have for it. For example, [a] U.S. District Court is the only one of those three that has a jury trial. If you have something that you think maybe people will be a little bit more sympathetic towards, that might not be a bad route. On the other hand, if you have something that's very technically sound, you've got those primary sources—the U.S. Tax Court, there's no jury. You have a judge.

Mr. Redpath

But if it's a highly technical issue, I might want that.

Ms. Jemiolo

Exactly.

Mr. Redpath

I might want a judge who is familiar with these technical issues to do that. Criminal has to go to [a] district court. They're the only one that has jurisdiction. But then the claims court…

The distinction for a lot of clients is the tax court only hears issues. They don't really render a decision other than, yes, this is deductible; no, it's not—you guys figure it out. If you can't figure it out, come back and we'll do it, but we don't normally do that. We just decide, yes, this is deductible; no, this is not; yes, that was a hobby. But you don't have to pay. You['ve] got 90 days—and by the way, that 90 days, the courts have said that's hard and fast. You don't have to pay the tax to go there. But if you want to go to either one of the other courts—[a] district court or the claims court—you have to pay the tax, then sue the United States government. So versus commissioner, tax court.

Ms. Jemiolo

Yes.

Mr. Redpath

Versus the United States of America—I want my money back. But you've got to pay. A lot of clients say, "I can't afford to pay that assessment to go to court." Now the tax court, they have the small claims—$50,000 or less. I refer to that as the Judge Judy of cases. But what is the memorandum docket versus the regular docket? Because, for most cases, I often look and go, "Well, why is this on this docket, not the other?" So, what technically is the difference?

Ms. Jemiolo

The *memorandum docket* is for established issues of law, things that have come up before. If it's a new issue, a novel issue, something original, it goes onto the *regular docket*.

Mr. Redpath

But they're the same level of precedent, right? I can rely on either one the same.

Ms. Jemiolo

Oh, yes.

Mr. Redpath

What about a summary opinion though?

Ms. Jemiolo

Summary opinion is whenever you have small tax cases. They're unique. These ones are not going to be allowed to be used as precedents in any other cases.

Mr. Redpath

And they're not precedent. You're not allowed. I mean, you can't cite a case as precedent.

Ms. Jemiolo

Right.

Mr. Redpath

Actions on decisions. Now we used to talk about acquiescence and non-acquiescence. Now it's called basically *action on decisions* because it covers everything, but what does that mean? If we get an action on decision or AOD, and it says, "Oh, we acquiesce to this case," or it says, "No, we don't acquiesce to this case." What does that mean for us doing research?

Ms. Jemiolo

It's basically the IRS saying whether or not they're agreeing to follow or, kind of, not agreeing to follow. They're warning the taxpayers. So, when they say that they're doing a non-acquiescence, they're warning the taxpayers that, while they aren't appealing, they don't agree with that lower court decision.

Mr. Redpath

Yes, and sometimes it's because they don't believe that case is strong enough. Well, maybe your case is strong enough. Maybe that's the one they think they can win. Maybe they don't feel they can win in your jurisdiction, so they don't want to set a precedent. What they're telling you is—I look at it as, beware of dog. You may jump that fence and there's no dog there, or you may jump that fence and find one very angry pit bull who's coming after you. So, beware of dog. We're just warning you not to follow it, but that doesn't mean you can't. You can certainly follow it.

Now, appeals and the Golsen rule. This becomes really confusing when we talk about, "Okay. I found a court case. I found a tax court case. I must win, right?" What is the Golsen rule?

Ms. Jemiolo

The Golsen rule—I almost said Gorsen—the Golsen rule says that the tax court is going to interpret decisions based on the circuit where the taxpayer resides. But, if there haven't been any decisions in that circuit that are applicable, then the court's going to get to apply its own interpretation to the facts and circumstances according to the Internal Revenue Code.

Mr. Redpath

If you're in New York and you find a tax court case, you'd better look at where it is. If it's from California, it might be good, but you still have more research to do because California is a different circuit. In 180 miles—so you're in Buffalo—from 180 miles, you can go from Buffalo [to] Erie to Cleveland. 185 miles downtown to downtown. You can have a tax court case where everything's identical—same facts, everything—and the judge rules against the taxpayer. And then go to Erie the next day—same exact facts—the tax [court] rules in favor of the taxpayer. And then in Cleveland, the next day—same facts, everything—a different decision. Same judge, everything's the same, except the decision. Splits it in Cleveland. Why? Well, because New York is the second circuit, Erie is the third circuit, and Cleveland is the sixth circuit. If the circuit courts have ruled on an issue, the court has to follow that—the lower court, which includes the Golsen rule, the tax court. So, while it's a national court, it's limited to what the [circuit] courts say.

The classic case is the *Schleier* case. Schleier was a pilot for United Airlines. Schleier was grounded at age 50. United had a ruling [that] said at age 50, you can't fly a plane. Tell that to Sully, the guy that landed the plane on the East River there—I think it was the Hudson or the East—off Manhattan. He was much older than 50. But [United] said you're grounded. So, the pilots' association brought a class-action suit. They were located in Illinois, so it was brought in the federal court in Illinois. One verdict—they said there's no medical evidence to show that pilots should be grounded at age 50. One verdict, one amount of money, but it was a class action, so it's divided. The pilots live all over the country, so the IRS starts attacking it because the pilots' association said, "This is tax-exempt income under Section 104 of the code." The IRS challenged it. Well, they won in some circuits; they lost in some circuits. Wait a second. One set of facts, one verdict, one amount of money—everybody's exactly the same except where you live. So, if you live here, it's taxable. If you live here, it's not. That is the craziest thing for people to understand. You've got to follow the precedent in your jurisdiction, and they're not always the same.

The Supreme Court stepped in. So, the Supreme Court, unfortunately for the pilots, said it's taxable income. Same thing with hobby—I'm sorry—with home office. The Supreme Court finally stepped in and said, "Okay, if you have administrative," they overturned the interpretation of the courts. How often does the Supreme Court do that, though, where we can really look at a Supreme Court case?

Ms. Jemiolo

Oh, the Supreme Court loves taxes! Kidding. No, the Supreme Court takes very, very few tax cases.

Mr. Redpath

Yes, and by the way, there are 13 circuits. One of the things I always find interesting, though, is the federal circuit, that's a separate circuit. So, let's say I know I'm going to lose in the second circuit, which is where you are and where I am in New York. If I bring a case in the tax court, I'm going to lose because they're going to follow the Golsen rule. If I bring it in the district court, they have to follow the second. Ah, I can still pay and go to the claims court because they appeal to the federal circuit. So, I have another option that I might have to go there if, let's say the federal circuit has never ruled, or they've ruled in favor of the taxpayer. Oh, I'm telling the client, "Pay. We're going there because if we go here, we're going to lose." So, that's an interesting thing.

One of the things we always have to pay attention to, though—and I throw this out—the citator. Shannon, what is the citator? Why is it important, and why are we not done with our research until we've done our citating?

Ms. Jemiolo

Oh goodness. The *citator* lists out everything. It lists out all the legal documents and court cases and just everything that you need for research. But it does so in a way to where, if this particular court case has been overturned or moved on to appeal, it tells you that. So, you know.

Mr. Redpath

How do I know there's been an action on decision that's been declared last week? I've got to citate it. Google doesn't citate it.

Ms. Jemiolo:

Exactly. It tells you, basically, the sources that you found, are they still good to rely on?

Mr. Redpath

Yes. And again, where are they from? Is there other precedent on this issue in a different circuit? Maybe I found a case in my favor, and I citate it, and I find out this case has been cited in the dissent in a number of other cases, and other cases have said, "Hey, that's just bad law." I need to know that because it's going to give me every time this has been cited. Anytime it's been in a court case, by the IRS, [the citator is] going to pop it up and say, "Here. This is where it is." This is how I know, is this revenue ruling still valid? [Has] this revenue ruling been declared obsolete? Has it been superseded? You can't do legal research without using the citator. No possible way. And Google is not being a citator.

Treatises—we said we'd get there. Treaties, rather—not treatises, treaties. There's this last-in-time rule. What does that mean? I had a case in Israel, and the treaty was clear. My colleague in Israel was like, "Okay, here's the answer." And I'm going, "Hold on. That may not be the answer." Why is that, and what is this last-in-time rule?

Ms. Jemiolo

So, the last-in-time rule. You have all of these treaties, and some of these treaties have pieces of them that can be overridden by the country's internal tax code. So, for us in the States, we have this last-in-time rule where we're going to view the treaty and the IRC as being [on] equal footing. To the extent that they differ on opinion, the last one enacted wins.

Mr. Redpath

By the way, other countries—every other country in the world says a treaty is a contract. Our model treaty, tax treaty, they're called *conventions*. Our model treaty uses the terms *contracting states*, yet we say it's not a contract. The reason is that the Constitution—you mentioned that earlier—the Constitution says the supreme law of the land [includes] statutes and treaties. It doesn't put one above the other. It says *and*. That means that they are equal. And therefore, if they conflict, the Foreign Investment and Real Property Tax Act overrode every treaty we had in existence at the time. Didn't overwrite all of it, just one provision of it. Every other country says, "Hey, it's a contract, so unless we change the treaty, we have to go by the treaty." But not in the United States. Unfortunately, you've got to tell—when you're doing international, you've got to look at the treaty. You've got to look at internal law. Then, you've got to say which was last, and that's what you apply.

Shannon, an awful lot here, but I think we've given a lot of guidance to people in doing tax research. It's a thankless task that has to be done. A lot of time spent doing it. I wish we had the golden ticket, and we could say, "Here's what you do, and that's all you need to do. Here it is. We gave you the key; you're all done." Doesn't work that way, does it?

Ms. Jemiolo

No. Or it'd be nice even if we had that knowledge of everything in the universe.

Mr. Redpath

But at least the knowledge we do have may tell us where to start doing our tax research.

Ms. Jemiolo

Exactly. I may not know everything about tax, but I know how to research.

Mr. Redpath

Right. I have often used this comment. People will say, "Well, in the real world"—and you've heard this from students, I'm sure, Shannon—"In the real world, you just look it up." But if you don't understand the concept, what do you look up? You just don't go to the book of knowledge. You have to know what to research. Yes, in the real world, you look it up, but you have to know what you're talking about before you can just look it up.

Ms. Jemiolo

Yes, getting back to figuring out the question.

Mr. Redpath

One takeaway, Google's off the table, right?

Ms. Jemiolo

Yes.

Mr. Redpath

Okay. Let's get that one out there clear. Shannon Jemiolo, thank you very much for your insight. Really appreciate it. It's great to have—we can take the two sides, the law and accounting; but this is where we cross over, right? This is where the law and accounting—we're in the same position when we're doing research. Shannon, thank you very much for joining me.

Tax Authority

By Ian J. Redpath, JD, LLM

A. Introduction

Tax research is at the heart of tax compliance and planning. Both taxpayers and practitioners may be liable for a variety of penalties depending on the particular situation involved. There are also a number of ethical guidelines that must be followed to avoid penalties. Penalties may be applicable by statute, the AICPA, and/or Circular 230. In addition, any standards set by various state societies must also be looked at when determining whether to take a position on a tax return. The following standards generally apply:

- More likely than not (>50% chance—generally tax shelters)
- Substantial authority (40–45% chance)
- Realistic Possibility (33.33% chance)
- Reasonable basis (20–25% chance)
- Not frivolous / Patently improper / Merely arguable or colorable (< 20% chance)

In order to determine a position or planning opportunity, practitioners must use research and professional analysis to determine if a standard is met.

To take a position on a return or in planning requires an understanding of the sources of tax law. There are both primary and secondary sources. Practitioners often mistake secondary sources for primary sources. Only primary sources and the practitioner's professional judgment should form the basis of an opinion on a return position or in planning. Primary sources of tax law include information from all three branches of government: legislative (or statutory), executive (regulations), and judicial (cases). In addition, a citator must be used to make sure the information located and analyzed by the practitioner is current.

If a practitioner determines that there is at least substantial authority for the position, then no disclosure is required. While attempts are made to quantify what constitutes substantial authority, it ultimately is a professional judgment based on a review of the law and authority both for and against. This is the same as determining if there is a reasonable basis for a position that required disclosure.

The regulations provide guidance as to what authorities should be considered when determining if substantial authority or a reasonable basis exists. Except for special cases, only the following are authority for purposes of determining whether there is substantial authority for the tax treatment of an item [§1.6662-4(d)(3)(iii)]:

- applicable provisions of the Internal Revenue Code and other statutory provisions;
- proposed, temporary, and final regulations construing such statutes;
- revenue rulings and revenue procedures;
- tax treaties and regulations thereunder, and Treasury Department and other official explanations of such treaties;
- court cases;
- Congressional intent as reflected in committee reports, joint explanatory statements of managers included in conference committee reports, and floor statements made prior to enactment by one of a bill's managers;

- General Explanations of tax legislation prepared by the Joint Committee on Taxation (the Blue Book) [Note: *U.S. v. Woods*, 571 U.S. 31 (2013) – U.S. Supreme Court held the Blue Book to *not* be a legitimate tool of statutory interpretation.];
- private letter rulings and technical advice memoranda issued after October 31, 1976;
- actions on decisions and general counsel memoranda issued after March 12, 1981 (as well as general counsel memoranda published in pre-1955 volumes of the Cumulative Bulletin)
- Internal Revenue Service information or press releases; and
- notices, announcements and other administrative pronouncements published by the Service in the Internal Revenue Bulletin.

Practitioners must make a qualitative decision considering all the facts and circumstances applicable to the position as well as the authority both for and against the taxpayer's position. If it is determined that there is not at least substantial authority but there is a reasonable basis, then the return position must be disclosed to the IRS if taken.

B. Statutory Sources

The Constitution provides for taxation in Article I, Sections 7, 8, and 10; and the 16th Amendment allows Congress to tax income from whatever source derived. The result of this grant of power is the Internal Revenue Code as well as the various tax treaties with other nations.

Federal tax legislation generally should originate in the House of Representatives, where it is first considered by the House Committee on Ways & Means. Once approved by this committee, the proposed bill is referred to the entire House of Representatives for approval or rejection. Approved bills are sent to the Senate, where they are considered by the Senate Committee on Finance. After approval by this committee, the bill is sent to the entire Senate. Assuming no disagreement between the House and Senate, passage by the Senate results in referral to the President for approval or veto. If the bill is approved or if the President's veto is overridden, the bill becomes law and part of the Internal Revenue Code (the Code).

If the House and Senate bills differ, they are referred to the Joint Conference Committee, which includes members of both the House Committee on Ways & Means and the Senate Committee on Finance. Each of these committees provides committee reports, which are a great source for determining the intent of Congress. They can help when there is new legislation (since the IRS is behind in its regulatory writing on new laws) and also when challenging an IRS regulation.

C. Regulatory and Other IRS Authority/Guidance

Regulations are the highest level of authority issued by the Service. They appear in the Federal Register. Regulations can be proposed, temporary, or final.
Proposed regulations are not authority, but reliance regulations may be relied on when taking a position. Generally, if taxpayers follow a proposed regulation, they may not win, but they can avoid penalties. Temporary regulations are generally issued to deal with new legislation when the IRS believes guidance is needed. They are generally valid for three years but are often renewed, and they usually appear in Q&A format. There are three types of final regulations:

- Procedural—"housekeeping-type" instructions.
- Interpretive—rephrase or elaborate on committee reports and the Code.
- Legislative—allow the Treasury Department to determine the details of law.

Procedural regulations are what they sound like and are seldom challenged. Legislative regulations note where Congress has delegated its legislative powers. Overturning a legislative regulation is like overturning a statute. The

Code provision will contain language delegating authority to the Secretary of the Treasury who delegates the power to the IRS to make regulations under that section.

Interpretative regulations are the IRS's interpretation of the statute. The courts have imposed the concept of deference in challenging an interpretive regulation. Deference is used to determine how much weight courts should give to the agency's interpretive regulations. The Supreme Court held in 1945 in *Chevron* that courts should defer to the agency's interpretation of an ambiguous statute as long as the interpretation is reasonable. The focus is on "ambiguous." When the IRS is interpreting its own ambiguous regulations, it will be upheld unless it is "plainly erroneous or inconsistent with the regulation." This is *Auer* deference.

A recent series of cases have challenged regulations and notices on grounds of failure to follow the Administrative Procedure Act. There has been some success in the courts in having regulations declared invalid.

Revenue rulings are issued by the National Office of the IRS and provide the IRS's position as it relates to a specific set of facts. Practitioners must determine if their client's facts fall within the contemplation of the revenue ruling. Like regulations, they provide the IRS's interpretation of the tax law. They are binding on the IRS until superseded, revised, modified, or made obsolete.

Revenue procedures deal with the internal management practices and procedures of the IRS. A taxpayer's failure to follow a revenue procedure can result in unnecessary delay or, in a discretionary situation, can cause the IRS to decline to act.

Private letter rulings (PLRs) are issued to a particular taxpayer regarding the facts and circumstance of that taxpayer's transaction. They are binding on the IRS only in relation to the taxpayer they are issued to; however, they can be used to eliminate penalties.

Determination letters are similar to PLRs and are generally issued in areas such as seeking recognition of tax-exempt status or pension plans. They are not published and serve no precedential value.

Technical advice memoranda are issued by the National Office, generally during the process of an audit. The agent must request assistance on an item. Again, they are binding on the IRS only in relation to the taxpayer they are issued to.

Notices are issued when immediate guidance is needed by taxpayers and tax practitioners. Typically, this guidance is transitional while the IRS works on permanent guidance on the particular topic.

A variety of internal memoranda that constitute the working law of the IRS also are released but not officially published. They include chief counsel advice (CCAs) and internal legal memoranda (ILMs). The IRS indicates that they may not be cited as precedents by taxpayers but explain the IRS's position on various issues.

Treasury decisions (TDs) are issued by the Treasury Department to announce new regulations, amend or change existing regulations, or announce the position of the government on selected court decisions.

Significant FAQs on newly enacted tax legislation, as well as any later updates or revisions to these FAQs, will now be announced in a news release and posted on the IRS website in a separate fact sheet. These fact sheet FAQs will be dated so taxpayers can confirm the date on which any changes to the FAQs were made. Additionally, prior versions of fact sheet FAQs will be maintained on the IRS website to ensure that, if a fact sheet FAQ is later changed, taxpayers can locate the version they relied on if they later need to do so. In addition to significant FAQs on new legislation, the IRS may apply this updated process in other contexts, such as when FAQs address emerging issues. To address concerns about the potential application of penalties to taxpayers who rely on an FAQ, the IRS announced that if a taxpayer relies on any FAQ (including FAQs released prior) in good faith and that reliance is reasonable, the taxpayer will have a "reasonable cause" defense against any negligence penalty or other accuracy-related penalty if it turns out the FAQ is not a correct statement of the law as applied to the taxpayer's particular facts [IR-2021-202, October 15, 2021].

The IRS also provides practitioners with other helpful guidance, including the audit technique guides (ATGs). The ATGs are guidance to the agents on auditing certain issues (e.g., hobby losses) or industry sectors (e.g., used-car dealerships).

D. Judicial Sources

Once a taxpayer has exhausted the remedies available within the IRS (i.e., no satisfactory settlement has been reached at the agent level or through the Independent Office of Appeals), the dispute can be taken to the federal courts. There are generally three possible trial courts with jurisdiction to hear tax cases: the U.S. Tax Court, the U.S. District Courts, and the U.S. Court of Federal Claims. Bankruptcy courts can hear cases related to a bankruptcy, but they are units of the district courts. Appeals are made to one of the U.S. Courts of Appeal and occasionally to the U.S. Supreme Court.

Determining the court in which a taxpayer should commence an action depends on many factors—primarily where the taxpayer resides. Our system requires the lower courts to follow the precedent of the appellate court where the taxpayer resides. One confusing aspect of the court system is that, unless the Supreme Court has ruled, the same tax law can be applied differently in different parts of the country based on how the courts in a particular circuit have ruled (*splits*). Thus, a case from California may not have much precedential value for a taxpayer in New York. The Tax Court is a national court; but under the *Golsen Rule*, the Tax Court will follow the precedent, if any, for the circuit in which the taxpayer resides.

It should be noted that the Court of Federal Claims is under the U.S. Court of Appeals for the Federal Circuit, which is separate, so a taxpayer whose residence circuit is unfavorable to a position may have the option of going to the Court of Federal Claims to commence an action. It should be noted that the taxpayer need not pay the tax to challenge the IRS in the Tax Court but must do so for the other courts and then sue the United States for a refund.

The Tax Court has a small claims division that is less formal. The summary judgments are not precedential, and there is no appeal. The jurisdiction is cases where the amount of tax for any one year is $50,000 or less. There are also two dockets: the memorandum docket for established issues of law, and the regular docket for new or novel issues of law. For precedential purposes, they are the same.

The IRS will, on occasion, issue an Action on Decision (AOD) on a court case. This used to be limited to the Tax Court and is still used that way most often, but AODs can be issued in relation to any trial court. The IRS can do the following in an AOD:

- Acquiesce—agree to follow
- Non-acquiesce—warn taxpayers that they are not appealing but do not agree with the lower court's decision

The following is a summary of the trial courts discussed above:

Issue	U.S. Tax Court	U.S. District Courts	U.S. Court of Federal Claims
Number of judges per court	19	Varies	16
Payment of deficiency before trial	No	Yes	Yes
Jury trial available	No	Yes	No
Types of disputes	Tax cases only	Most criminal and civil issues	Claims against the United States
Jurisdiction	Nationwide	Location of taxpayer	Nationwide
IRS acquiescence policy	Yes	Yes	Yes
Appeal route	U.S. Courts of Appeals	U.S. Courts of Appeals	U.S. Court of Appeals for the Federal Circuit

It should be noted that the Supreme Court hears very few tax cases. They require a writ of certiorari or permission of the court to hear the appeal. Generally, the Supreme Court will only intervene when there is a split in the circuits, the issue is important enough to resolve nationally, or the lower court has not followed a Supreme Court precedent.

An indispensable research tool is a legal citator. One can be found on any major tax research data base. A citator is an index of legal materials. With a citator service, a legal researcher can generate a list of materials that cite a specific source or document. Citators help to determine whether a primary law source, such as a case or a statute, is still valid law. The citator allows users to determine the impact the citing document has on a case or a statute (positive, negative, affirm, overturn, question, etc.) and see the depth of treatment the citing resource gives to that case or statute. It will also help users find additional primary and secondary sources.

E. Secondary Sources

The use of secondary sources can be important in finding possible solutions or lead to finding primary sources. Thomson Reuters Checkpoint Edge and CCH AnswerCorrect include explanations and analyses of the primary source materials. Also, tax journals and periodicals may shorten the research time needed to resolve a tax issue. An article relevant to the issue at hand may provide the references needed to locate the primary sources of tax law that apply (e.g., citations to judicial decisions, regulations, and other IRS pronouncements).

F. Treaties

Tax treaties (conventions) are agreements between two countries related to tax issues of residents. There are often definitions of how and what income will be taxed in each country as well as provisions to reduce double taxation. Most income tax treaties contain what is known as a *saving clause*, which prevents a citizen or resident of the United States from using the provisions of a tax treaty in order to avoid taxation of U.S. source income. If the treaty does not cover a particular kind of income or if there is no treaty between a country and the United States, taxpayers must pay tax on the income in the same way and at the same rates as any U.S. resident.

The Constitution provides that treaties and statutes are the supreme law of the land. Since they are of equal weight, how is a conflict resolved? The courts have adopted a “last in time” rule. The last treaty or Code section adopted will apply. These conflicts are called *treaty overrides*.

G. Conclusion

Tax research is incredibly important at every level of tax practice. It applies to both compliance and planning. Practitioners must become cognizant of the various authorities and be able to weigh the level of authority. At the end of the process, professional judgment is needed.

A. Discussion Problems

Your client has a number of tax issues, and you are unclear what the law is related to the position to be taken on the return. You believe that there could be a high probability of an audit and have advised the client of such. You are beginning your research.

Required:

1) Discuss the penalty standards to avoid the implication of penalties if your position is not sustained.

2) Discuss the various sources of primary authority.

3) Discuss the use of the citator.

B. Suggested Answers to Discussion Problems

1) To avoid penalties after doing research and evaluating the levels of authority both for and against, you must conclude that there is substantial authority (a 40–45% chance or more) and no disclosure is needed or a reasonable basis (a 20–25% chance up to substantial authority) with proper disclosure of the position. Anything below that, then the position should not be taken. Making this determination requires professional judgment in analyzing the relevant authority.

2) Primary authority can come from statutes, the IRS, and the courts. While not primary authority, audit technique guides (ATGs) are a great source of information on the IRS analysis of either an issue or an industry segment.

3) A citator allows you to find different authority that may or may not agree with one of your primary authorities. It also allows you to determine if there is an action on decision (AOD), which is important when determining the IRS's position on a case or the current validity of such things as a revenue ruling. It also allows you to be sure your research is up to date.

PART 3. BUSINESS TAXATION

Worker Classification

Significant tax consequences can arise from the classification of a worker as an employee or as an independent contractor. Payroll tax issues, types of compensation, and deductions available are all impacted by a worker's classification and may impact both the organization and the individual. Ian Redpath and Ed Renn discuss key issues related to worker classification.

Let's join Ian and Ed.

Mr. Redpath

Ed, welcome to the program.

Mr. Renn

Great to be here, Ian.

Mr. Redpath

Always great to have you. We haven't had you on for a while, so it is great to have you back. We have a really interesting topic today, one that I think is overlooked far too often but can have some major implications for our clients. Yesterday, I got an email from you—which was quite timely—related to today's topic. Nike seems to have some potential issues, not just in the United States, but across the world, they're going to go after them right in this wheelhouse. So, that may be a good place to say, if a big company like Nike is making a problem, what about Ma and Pa? Are they making that problem? So, can you fill us in? What is going on with Nike right now? Now, this is just an allegation. We are not saying that it is true, but what is going on right now with Nike?

Mr. Renn

They're suggesting that there is a half a billion dollars of exposure—probably $370 million of it or so is in the U.S., and the rest is in a few European countries. It all comes down to independent contractor status: whether payroll taxes are being paid properly, whether they are getting paid time off, vacation leave, sick leave, and health insurance. All those benefits come into play. We see this with various states in terms of how they classify "gig workers;" and to the extent that any of our audience has clients that are using gig workers, this is something to pay a lot of attention to.

You think of this as a little bit of a historical backwater, but between the rise of the gig worker and the federal requirements in terms of providing health insurance for employees if you have more than 50 employees this is a very big deal, and it's a very, potentially, expensive mistake.

Mr. Redpath

Yes, the thing is (we were talking off camera), I always say nothing matters until something happens. And when something happens—as you mentioned—all of a sudden someone, you or your spouse, gets cancer, and now you don't have health insurance. You want health insurance, so what about that nice health insurance policy that the company you have been working for over the last 10 years as an independent contractor has? Or your pension? I'm getting ready to retire; I don't have a pension. Well, wait a second. What about that 401(k)? If I was an employee, I would be participating in it. Or I get laid off—do I get unemployment? .There are all of these issues that we don't think about. And if we are misclassifying, what about discrimination testing on some of our fringe benefits? Are we excluding a whole group of employees from our discrimination testing? We just think about this as a FICA issue or a self-employment tax issue. It is not. It is much broader than that, isn't it?

Mr. Renn

It is. It really is, and I think the Biden administration in the last year or two has said they want this to be a focus. It's not that hard; it's not that mathematical. I think it is something you could train an agent to do relatively quickly. The other thing, Ian, I know you know this, and I am sure most of our audience does as well, but there are the IRS issues, there are the Department of Labor issues, and then, all 50 states and all the territories have their own set of rules. So, they're not interchangeable; you may be an employee for one purpose and not an employee for another. There are the statutory employees out there—those rare breeds—real estate agents are out of everything; life insurance agents, if they work for one company, probably are subject to payroll taxes and probably fringe benefits, but they are otherwise independent; bread delivery; soft drink delivery. Those sorts of folks all might come within the statutory-employee exception. But that is a flip note.

For our purpose today, I really think we want to talk about those independent contractors who, maybe, aren't all that independent. And perhaps, I think gig workers are going to be a real pressure point in the next few years.

Mr. Redpath

Yes, I think you are right. And I can see, at least regulatory, I wouldn't be surprised to see gig workers at a minimum brought into that statutory-employee category. We may have to do that because there has been a major focus, as you mentioned. There has been a major focus on the self-employment tax/FICA issues. We see it a lot in S corps. There's a lot of discussion about how much revenue the government believes they are losing on that.

You mentioned the Department of Labor; and there are some things going on, because they came out with a set of rules, and then the courts came in and said no.

Mr. Renn

No, they don't work.

Mr. Redpath

We're vacating your rules on independent contractor status, but don't look at anything technical. They kind of take a "what is the economic reality?" test; but it is different than what [the IRS] would look at.

Mr. Renn

It is different. It is possible to have one determination on the IRS side and a different one at the Department of Labor. Usually not, but it can happen.

Mr. Redpath

Yes, they do look at some different things. I think the key that some of our viewers should take is, and I will use this example, I had a case—and this was the IRS—the IRS came in and said these people are all employees, and it was a category. I was thinking maybe we might use [Section] 530 as the argument, but we couldn't even get there because the auditor kept saying, "But the state said they were employees." And I kept saying, "But it's a different set of rules." Now, he might have been right. I wasn't going to tell him that, but he might have been right. But not because the state found the person to be [an employee]. So, don't get caught up in that. Just because the state may say something, or just because the Department of Labor may say something, don't get caught up in that [being] an automatic slam dunk. It is pretty persuasive, but I have had situations where IRS auditors have just relied on the fact that there was an interpretation by the state, or by the Department of Labor. It really should be starting from scratch and applying the IRS rules.

Mr. Renn

The flip side of that is also true. Just because the IRS makes a determination, that's not necessarily binding on the state agencies or the Department of Labor. You think you are done because the IRS said you are fine, but somebody else may come along and take a different position.

Mr. Redpath

It is crazy. I mentioned to you I had a situation where it was a weekend soccer tournament—a weekend tournament—and the state came in and said all of the referees were employees for that weekend for state purposes. And then, that was the Department of Labor, so they had to kick in and they ended up having to kick in for unemployment—all for a weekend. It was kind of a ridiculous determination to be made but, nonetheless, they did it.

The IRS has—and I think everyone, if not familiar, has heard the term—the 20 common-law rules because we have been talking about those for, it seems like forever, the 20 common-law rules as the test. Now, the IRS came out with three factors: behavioral control, financial control, and relationship as three factors of control. Now, the last one is the relationship of the parties, which still kind of gets into control. Did these eliminate the 20 common-law rules from a practical standpoint?

Mr. Renn

Well, they have really sort of, rather than eliminated them, I would say they have just categorized them. If you look at behavioral control, it [includes] a lot of individual items from the old 20 common-law rules. Who gives the worker instructions? Does the worker need training? Are there set hours for work? Is full-time work required, or can you work 10 hours a week for Ian and 10 hours a week for Ed? Who orders or sequences the work? Is there a procedure? Is there a way it has to be done? Does the employee have to give oral or written reports about what they've done? Typically, if it is a less-skilled profession, they will say that the default is generally towards [being an] employee. Do you have a uniform? Do you drive a truck that has a label on it? Do you have something that says, "I work for Ian Redpath, Inc."? That usually suggests that you are an [employee], where if you are walking around with something that says "Ian Redpath, PC," and you think you are an independent contractor inside of a bigger business—a Fortune 500 company somewhere—that is probably a pretty good indication that you are an independent contractor.

These things kind of cut both ways. Sometimes, a factor that indicates something—like when we talk about financial control—the ability to make a profit, well, you can be an independent contractor that doesn't make a heck of a lot of money, or you can be an independent contractor that doesn't have to invest a lot of resources into your business. If you do, that's a good indication of independent contractor status, but the absence of that doesn't necessarily mean that you are not. Just like when we talk about relationships, the existence of participation in health insurance, vacation plans, employee benefits like pensions or profit sharing, and 401(k) plans, those are all pretty good indications of employee status; but the absence of them doesn't mean that you are an independent contractor. You might be an employee who just doesn't get benefits.

So, you have to be a little thoughtful about this, but most of this stuff is common sense. I think if you spend a little time on these materials, you can end up with a pretty good sense of how it ought to come out. Now, there are going to be some things that are really borderline and gray, and you are not really sure what is going to happen. But, in a lot of cases, you can look at the situation and say, "Yes, they are really employees," or "We should do a couple more things to make it absolutely crystal clear that they're independent contractors."

Mr. Redpath

Yes, and just because you have a reimbursement plan, that doesn't mean that the supposed independent contractor has the ability to have a loss. I have often seen this argument: not can you make a profit, but can you have a loss? What do you have invested in the business, and can you really lose anything? Well, if you are an employee, you can lose your job and you can lose your salary; but if you are an independent contractor, you are responsible for the expenses. You're not going to be reimbursed for those; you have a possibility of creating a loss. The absence of a profit, I think, is maybe a little less important than the absence of the ability to have a loss.

Mr. Renn

I think that's fair. The reality in that space is if you really do have the ability to make a profit, you are probably fine in that you are not being subsidized in the event that your costs are higher. I agree.

Mr. Redpath

One of the things you mentioned, in none of these factors—they're common sense because there isn't a dollar amount—there is no objective standard anywhere in here; it is all subjective. Many companies, we talked about Nike when we started off; you would think that Nike has a large enough legal staff and accounting staff that they would have gone through this and had this buttoned up every which way. We're going to talk later about Microsoft and the *Vizcaino* case. You would think Microsoft would have these things buttoned up every which way. Yet, we find out that Nike may not and, certainly, Microsoft did not. So, now, you think about "Ma and Pa, Inc." or "Ma and Pa, LLC." Do they have everything buttoned up? And often, [people think] it is simple—I have heard this so many times, "All you need to do to be an independent contractor is incorporate. Set up a corporation, and you can be an independent contractor." Well, okay, that might be a factor; but, in and of itself, that is not determinative, and I have heard it so many times. "Oh, all you have to do is incorporate or set up an LLC and you are automatically going to be an independent contractor."

Mr. Renn

The one thing we should really make clear here is there are 20 tests, but it is not like if you satisfy 11 of them, you win. This is [about] facts and circumstances. They are going to look at all of them. No single factor is determinative. One agent might come up with one answer on one set of facts, and another agent come up with a totally different answer on the same set of facts. It, really, is common sense and I think to a certain extent—in the close cases—I think a good advocate, a good explanation of the fact pattern, might tip the balance for the client. So, I think if there are big enough numbers here, by all means, use somebody who has some expertise in this.

Independent-contractor factors that really stick out: do you really work for a number of employers—[excuse me] not employers—are you being paid by a number of entities? Do you advertise? It is not a determinative factor, but do you have a state license, or are you depending on the entity you are working for to cover your licensing?

If you think about it, an employee is subject to the "what they are going to do and how they are going to do it" test. An independent contractor, if I get hired by a client, I'm an independent contractor as far as they are concerned (to a certain extent). They are going to tell me what they want me to do; but they are not going to tell me how [I'm] going to do it. They are not going to tell me what process I have to use. We may or may not have a discussion about the timeframe in which it is going to get done, that kind of thing. But as an independent contractor, does the person really have independent judgment? Can they do it their way? Is the client, or the person paying for the service, interested in more than the ultimate end product? How intimately involved is the product in the actual mainstream production of what the business that is doing the paying is engaged in? If I am flipping hamburgers in a hamburger stand, I'm probably an employee. If I'm designing a marketing campaign, or structuring a legal structure, or doing a tax return, maybe I'm an independent contractor.

Mr. Redpath

Well, at one time, in some industries—and the construction industry was the classic—the person had never worked for anyone else, and every job they had ever gone on was with one company. That company was supplying the hammers, the jobs, and the [workers] were all independent contractors. A lot of general contractors, at one time, had zero employees. Other than the management staff, everyone else was an independent contractor.

Mr. Renn

Yes, and in states where we have seen mandatory health insurance for 100 percent of a workforce that are employees, we have seen a real movement to people sort of going back to that approach—that an awful lot of the on-site construction folks have been labeled independent contractors. You're not providing them with any benefits, and you're not paying 7.45 percent on taxable wage base to the government. There is a cost savings here, and there is an administrative savings here, because you are probably not doing any withholding at all on them unless there is a problem with the W-9 or something like that. It is pretty simple. There is a cost savings, and the cost of benefits can't be underestimated. There are a lot [of companies doing this] out there. The IRS has guessed that there is about $140 billion worth of folks who are misclassified, so it is not a small problem.

Mr. Redpath

No, that is a lot of people. So, what happened with Vizcaino and Microsoft? That's kind of the classic to look at. Maybe Nike will be the classic next time.

Mr. Renn

Yes, it was more than 20 years ago but, effectively, this is in the late '90s, "Gogotech." Employees were hard to find, and to some extent, they hired some of these guys. I think there were seven or eight employees. They had all been with Microsoft for more than two years when the suit got filed, I think all but one. Realistically, they said, "We come into the same office as the employees, we have the same bosses as the employees, and we're doing the same tasks and doing the same jobs as the employees." The only difference was, if you were a Microsoft employee, you got paid by payroll; and if you were one of these independent contractors, you got paid somewhere else. But it really sounded, Ian, like they were doing the same work and it was just a different economic deal. They signed papers that said they were independent contractors and [Microsoft] said they weren't going to get benefits. The IRS came in and decided that they were all employees. Then, the employees sued and said, "Hey, I wasn't in the stock purchase plan, and I wasn't in the 401(k) plan. Those are valuable benefits, and I should have them." And they won. This was at a point in time where—I didn't really look at the chart—but I have a feeling that Microsoft stock was going pretty much in one direction in the late '90s, and it was probably straight up. The shares that they were supposed to buy [into] two or three years before the lawsuit got settled were probably far more valuable on the date that they compromised—or actually won—than they would have been along the way. So, there was a lot of appreciation that the company had to give them.

Again, a lot of times, with startups, with new companies, people are trying to be really creative. They're coming up with creative products, they're trying to work in a new economic environment, and they're trying to be accommodating. Increasingly, I know my law firm is bending over backwards to make working from home work for people. People move around, and there is not necessarily as much geographic proximity to your employer as there used to be; people work in isolated locations for weeks at a time, and then come into the office for a week, that kind of thing. It happens. I think some of this is just a lack of advice. It seems reasonable. The HR departments are told, *be flexible, be flexible, be flexible*; and they don't necessarily have the accounting or the legal staff around to say that might be a problem.

So, again, if it looks and smells like a gig worker, this might be something that is worth pointing out to a client.

Mr. Redpath

What about the Voluntary Classification Settlement Program (VCSP)? Can you kind of summarize that one for us, at least to look at?

Mr. Renn

Yes, it is great. It's a great program if it works for you. It has limitations. Basically, you go to the IRS and you say, "Look, I'm a contractor. I have always treated my sheetrock guys as independent contractors. My lawyer (my accountant, somebody) told me this might not be the greatest idea ever. I want to come clean." So, by going in voluntarily, you pay a fraction of the tax you otherwise would have paid for your last year. And, going forward, you have a clean bill of health. You have made the transfer from independent contractor to employee. You have to keep treating them as employees from there on in, but it's very neat, and it's very clean. Now, you have to have some requirements. You have got to be consistent in your treatment; you have to have done your 1099 filings for those folks; and your tax filings have to be up to date. I think if you are no more than six months late on the 1099, you're probably okay; but if you just didn't do them, you are not going to be able to use VCSP. The IRS will decide whether or not you're in the program; and then, they will basically send you a closing agreement and a bill; and at least going forward and for the years you have disclosed, you are okay.

Now, there is a hole here. There is a donut hole and maybe it is a donut hole you can drive a truck through. The state agencies aren't bound by this determination; and the employees can still say, "I always thought I was an employee.

Where is that health insurance? Where is that 401(k) contribution? Where is my overtime?" Whatever they want to get animated about, there is always the possibility that this gives rise to a suit; but it is a clean program in terms of correcting the problem prospectively.

I don't think that the IRS swears on a stack of Bibles that if they reject your VCSP program, it does not immediately result in an audit. You may get audited, but it is independent. You could always make the decision to make the change yourself without the blessing of the program—which means you would have continued exposure. The nice thing about this is, as far as the government is concerned, you cut off the exposure for prior years; but that doesn't cut it off for state purposes or for the purposes of the employee. So, Ian, it's a two-page form. It is really not hard. It is worth considering, and it is worth debating the pros and cons.

Mr. Redpath

Yes, 8952 is the form on it. You can't be under audit, though.

Mr. Renn

No, you can't be under audit. There is another IRS-provided mechanism, the SS-8, which is about a four-page form, and that can be done by either an employer or an employee to determine status. Do I have employees, or do I have independent contractors? Ninety percent of those forms are filed by employees; and the vast majority of the determinations are that the person is an employee, not an independent contractor. If you get notice that one of your employees or workers has filed that form and you decide, "I don't stand much of a chance here; let's cut this thing off at the pass," you can still go into VCSP.

Mr. Redpath

Also, there is Form 8919. This one always concerns me because, basically, the requirement for an employee—or for an individual who claims they are being misclassified—is that they have filed an SS-8. I always wonder, when the IRS gets the 8919 even though no SS-8 has been filed—but now you have someone claiming that this employer is misclassifying—for some reason, I think there is going to be a flag go off somewhere in the IRS computer system to say, "Hey, maybe you better look at this."

Mr. Renn

Yes, I agree with you. I think maybe, prior to the employee retention tax credit industry that we have seen arise in the last couple of years, you always figured that mismatch would make somebody ask, "Hey, where is the social security supposed to come from?" If the employer filed the SS-8, that form wouldn't get filed. But if the employee was trying to take the position of, "I'm not an independent contractor, I'm an employee," and the employer should be kicking in 7.45 percent of taxable wage base, and more on the hospital tax, yes, it would make sense to go ahead and file that form. And it is certainly going to get [the employer's attention]. I have never had an employer that got that form that [it didn't.] It always gets their attention. It's time to talk about the problem.

Mr. Redpath

To finish up today, we have Section 530. Now, people run to the Code and try to find Section 530 of the Code. It is not Section 530 of the Code; it's Section 530 of the Revenue Act of 1978, but we always call it Section 530. I don't know how many times I have had people say, "I don't know what you are talking about. [Code Section] 530?"

Mr. Renn

"I can't find that [in the Code]. That is not what it says."

Mr. Redpath

It is Section 530 of the Revenue Act of 1978. Basically, what is this and why should we look at it?

Mr. Renn

Well, it's the idea that if the norm in your industry is to treat someone as an independent contractor, that determination should be respected. The important thing about 530 is if, on its face, you can prove that you meet the tests (it's on a *prima facie* basis, so just on first appearances), it shifts the burden of proof to the IRS. So, it is a real win here for the employer, but you need to be able to show that it is the norm in your industry.

Your industry (the segment) can be as little as 25 percent, and it can really be smaller than that. It is a long-standing practice, which typically means 10 years. Again, [you should have] business records reflecting that you intentionally adopted this practice. There is a geographic scope argument that gets made here. Do we look at the miners in my county or do we look at the miners on a national basis? Usually, the preference is a narrower metropolitan or smaller geographic vicinity; but if not a lot of people do what your client does, maybe we have to look at it on a national basis. You can get proof after the fact. Nobody makes the decision that I am going to make my people an independent contractor and surveys everybody else in the industry when you make that decision. But if it is a big enough deal, [taking] a census now showing that most people in your industry actually treat folks as ICs (independent contractors) is something that you can do. The IRS wants to be involved in how you conduct that survey; and that probably makes sense because if it is going to be the winner for you, make sure you are doing it the way you are going to do it. That is not going to be a costless exercise; you are not doing that for one or two employees. It has got to be a big deal.

Mr. Redpath

I think if you have a Microsoft type of situation where you are treating some people as employees and some people as independent contractors that are in the same area (same type of job), you have a problem.

Mr. Renn

Yes, that is a bad factor. Consistency is really important—that you consistently treat this person [the same as that person]. If they were employees two years ago and they are doing the same thing and they are independent contractors today, or half of the people doing this job are independent contractors and half are employees, [that is a] very bad factor. There is usually a consistency requirement here that your employee has been treated in a consistent manner, and that the same people doing the same jobs are generally treated in a consistent manner.

[Section] 530 is very useful if you really have an industry where things generally have been done as independent contractors. Now, the factors don't really support that determination, but that economic reality is the norm in the industry. It's certainly worth looking at.

Mr. Redpath

One last thing I should mention is, we don't think of this, but I actually had several cases in the Southern District of New York that went criminal [for] failing to withhold.

Mr. Renn

Yes, that's fair. The penalties for misclassification are pretty significant. The VCSP penalties are much more modest, but those are for non-willful scenarios. For willful scenarios, it gets worse, and you are right, it can cross the line to criminal.

Mr. Redpath

Right, and they felt this was a willful scenario. Now, the one was only about $5.5 million, and they were saying that, over the short period of time they were auditing, they thought that was significant. So, they decided to go criminal—and that is always out there, too, so it is not something that you should just take lightly. I think it's really important to look at and especially (at least) to alert clients to it.

Ed, I really want to thank you for being here. A lot of great insight and a lot of things our clients need to look at. Ed, thanks a lot for being here. We will have you on again.

Mr. Renn

Happy to be here. Take care.

Worker Classification

By Ian J. Redpath, JD, LLM

A. Introduction

There are significant tax consequences arising from the classification of a worker as an employee or independent contractor, including payroll tax issues, types of compensation, and deductions available. Additionally, there may be numerous issues that are not tax related, including overtime pay under the Fair Labor Standards Act, state unemployment, and workers' compensation. Employers often find it necessary or advantageous to use independent contractors for some types of work. This can be less costly by avoiding benefits and more flexible than hiring employees. Likewise, an independent contractor can establish his or her own pension plan and has a greater ability to deduct work-related expenses. Some of the downfalls include the service recipient being subjected to liability for payroll taxes and trust fund penalties under IRC §6672 imposed on any responsible person, and potential disqualification of employee benefit plans. For the worker, there may be liability for self-employment taxes and denial of certain business-related deductions.

The determination of whether a worker is an employee or an independent contractor generally is made under a facts-and-circumstances test and attempts to measure the degree of control exercised by the person employing the worker. A special safe harbor rule under §530 of the Revenue Act of 1978 allows a service recipient to treat a worker as an independent contractor.

B. Fair Labor Standards Act (FLSA)—Department of Labor

An employment relationship under the FLSA must be distinguished from a strictly contractual relationship. In the application of the FLSA, an employee, as distinguished from an independent contractor, is one who, as a matter of economic reality, follows the usual path of an employee and is dependent on the business which they serves. The employer-employee relationship under the FLSA is tested by economic reality rather than technical concepts. On a number of occasions. the Supreme Court has indicated that no single rule or test exists for determining status for purposes of the FLSA. The Court has held that it is the total activity or situation which controls.

Certain factors are immaterial in determining whether there is an employment relationship. Such facts as the place where work is performed, the mode of pay, the absence of a formal employment agreement, or whether an alleged independent contractor is licensed by a state or local government are not considered to have a bearing on determining whether an employment relationship exists.

State Departments of Labor may have differing rules to establish an employee relationship for state-law purposes. These can vary significantly from the federal rules and may cover, among other things, unemployment contributions, pay, and benefits.

C. Federal Common-law Test

Section 3121(d)(2) defines the term "employee" for social security taxes to include any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an employee. Section 3401, however, does not define "employee" for purposes of an employer's federal income tax withholding obligations, but regulations under §3401 incorporate the common-law test.

The regulations provide that an employer-employee relationship generally exists if the person contracting for services has the right to control not only the result of the services, but also the means by which that result is accomplished. [Reg. §31.3401(c)-(1)(b)] It is not necessary that the employer actually control as long as it has the right to control the manner in which the services are performed, rather it is sufficient that the employer have a right to control based on a facts-and-circumstances determination. [*Gierek v. Commissioner*, 66 T.C.M. 1866 (1993)]

The IRS has identified three categories of inquiry that are relevant in determining whether the requisite control exists under the common-law test. The factors under these three categories are: (1) behavioral control; (2) financial control; and (3) relationship of the parties. The inquiries are as follows:

- Behavioral: Does the company control or have the right to control what the worker does and how the worker does his or her job?
- Financial: Are the business aspects of the worker's job controlled by the payer? (These include things like how the worker is paid, whether expenses are reimbursed, who provides tools/supplies, etc.)
- Type of Relationship: Are there written contracts or employee-type benefits (i.e., a pension plan, insurance, vacation pay, etc.)? Will the relationship continue and is the work performed a key aspect of the business?

The key is to look at the entire relationship, consider the degree or extent of the right to direct and control, and to document each of the factors used in coming up with the determination. This is simply taking the former 20 common-law tests and grouping them for analysis.

In 1987, the IRS developed a list of 20 factors related to the degree of control that may be examined in determining whether an employer-employee relationship exists. [Rev. Rul. 87-41, 1987-1 C.B. 296] The weight given to each factor varies, depending on the type of business and the circumstances in which the services are performed. Factors other than those on the IRS's list also may be relevant. The 20 factors identified by the IRS are as follows:

1. Instructions
2. Training
3. Integration
4. Services Rendered Personally
5. Hiring, Supervising, and Paying Assistants
6. Continuing Relationship
7. Set Hours of Work
8. Full Time Required
9. Doing Work on Employer's Premises
10. Order or Sequence Set
11. Oral or Written Reports
12. Payment by Hour, Week, Month
13. Payment of Business and/or Traveling Expenses
14. Furnishing of Tools and Materials
15. Significant Investment
16. Realization of Profit or Loss
17. Working for More Than One Firm at a Time
18. Making Service Available to General Public
19. Right to Discharge
20. Right to Terminate

D. Form SS-8 and Form 8919

If, after reviewing the three categories of evidence, it is still unclear whether a worker is an employee or an independent contractor, Form SS-8, *Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding*, can be filed with the IRS. The form may be filed by either the business or the worker. The IRS will review the facts and circumstances and officially determine the worker's status. It may take up to six months to get a determination.

Workers who believe they are being misclassified and who do not want to pay self-employment taxes may file Form 8919. While a precondition is the filing of an SS-8, it places the company receiving the services in a bad light and is a matter that may give rise to suspicion by the IRS.

Generally, individuals who follow an independent trade, business, or profession in which they offer services to the public are not employees. Courts have recognized that a highly educated or skilled worker does not require close supervision; therefore, the degree of day-to-day control over the worker's performance of services is not particularly helpful in determining the worker's status. Courts have considered other factors in these cases, tending to focus on the individual's ability to realize a profit or suffer a loss as evidenced by business investments and expenses.

E. Section 530 of the Revenue Act of 1978

This section generally allows a taxpayer to treat a worker as not being an employee for employment tax purposes but not income tax purposes, regardless of the worker's actual status under the common-law test, unless the taxpayer has no reasonable basis for such treatment or fails to meet certain requirements. The relief provided to an employer by Section 530 was extended permanently by the Tax Equity and Fiscal Responsibility Act of 1982. A reasonable basis is considered to exist if the taxpayer reasonably relied on (1) past IRS audit practice with respect to the taxpayer, (2) published rulings or judicial precedent, (3) long-standing recognized practice in the industry of which the taxpayer is a member, or (4) if the taxpayer has any "other reasonable basis" for treating a worker as an independent contractor. The taxpayer must not have treated the worker as an employee for any period after 1978. It must be consistent with the treatment on any federal tax return, including information returns. Additionally, the taxpayer, or a predecessor, must not have treated any worker holding a substantially similar position as an employee for purposes of employment taxes after 1977. It does not apply to a worker who, pursuant to an arrangement between the taxpayer and another person, provides services for such other person as an engineer, designer, drafter, computer programmer, systems analyst, or other similarly skilled worker engaged in a similar line of work. [IRC §1706] See Rev. Rul. 87-41.

F. *Vizcaino v. Microsoft Corporation*, 97 F.3d 1187 (CA-9, 1996)

In *Vizcaino*, the Ninth Circuit held that the eight plaintiffs, workers whom Microsoft originally hired as independent contractors, were entitled to benefits under Microsoft's 401(k) plan (the Savings Plus Plan or SPP) and Microsoft's Employee Stock Purchase Plan (ESPP). Microsoft originally hired the plaintiffs to work on specific projects. Seven of the eight workers had worked for Microsoft for at least two years. When the IRS reclassified the plaintiffs as employees, the workers sought certain Microsoft employee benefits. Microsoft admitted that the workers were common-law employees who rendered personal services to Microsoft, but defended their exclusion from the SPP on the grounds that these employees were not "on the United States payroll of the employer" but rather they were paid through the accounts payable department and not through the payroll department.

The Court found that the plaintiffs were entitled to participate as employees in both Microsoft's SPP and its ESPP.

When they were hired, the workers were told that they would not be eligible for employee benefits and signed agreements stating they were independent contractors who were responsible for providing their own benefits. The factors influencing the Court were that the plaintiffs worked on site, shared the same supervisors, performed the same functions, and worked the same core hours as the regular employees though they, unlike regular employees, were not paid through the payroll department but rather by the accounts payable department.

G. Voluntary Classification Settlement Program

Under the Voluntary Classification Settlement Program (VCSP), an employer can agree with the IRS to reclassify independent contractors to employees for employment tax purposes for future tax periods. Partial relief is available for federal employment taxes. To participate in the program, the taxpayer must meet certain eligibility requirements and apply to participate in the VCSP by filing Form 8952, *Application for Voluntary Classification Settlement Program*, and enter into a closing agreement with the IRS. The program applies to taxpayers who currently are treating their workers, or a class or group of workers, as independent contractors or other nonemployees and want to prospectively treat the workers as employees. To participate, a taxpayer must consistently have treated the workers to be reclassified as independent contractors or other nonemployees, including having filed all required Forms 1099 for the workers to be reclassified under the VCSP for the previous three years. Additionally, the taxpayer cannot be currently under employment tax audit by the IRS, and the taxpayer cannot be currently under audit concerning the classification of the workers by the Department of Labor.

H. Statutory Employees or Independent Contractors

For federal tax purposes, certain real estate agents and direct sellers are treated for all tax purposes as not being employees. [IRC §3508] Others apply only for specific purposes; for example, full-time life insurance salesmen are treated as employees for social security tax and employee benefit purposes [IRC §§3121(d)(3)(B) and 7701(a)(20)], and certain salesmen are treated as employees for social security tax purposes. [IRC §3121(d)(3)(D)]

I. Conclusion

The proper classification of workers is important for a business, whether a local corner store or a large multinational company. The implications go beyond payroll taxes and include issues involving state unemployment and workers' compensation, the Department of Labor, the Fair Labor Standards Act, Title VII, and the Americans with Disabilities Act. Improper classification could jeopardize the fringe benefit programs of a company. As a result, care must be taken to understand the rules to help clients avoid major pitfalls.

A. Discussion Problems

Your client, Jane, has several businesses with different types of workers. She primarily uses independent contractors in order to save money on, among other things, fringe benefits, FICA match, state unemployment and workers' compensation payments, and overall compliance cost. She has a small group of workers that she treats as employees and provides them with health insurance and group term life insurance.

In one of Jane's businesses, a bakery, another set of workers works full time in various positions, from bakers to floor sweepers. Jane requires the bakery workers to arrive at 5:00 a.m. and work an eight-hour day. She mandates when they take lunch and breaks. She also provides them with the tools necessary to perform their work functions. Each morning, she provides the "daily baking schedule" of what and when certain goods are to be made during the day, which may include special orders. Time off is limited to only three weeks a year at a time approved by her. She pays them on an hourly basis. She does have employees who work as sales staff in the bakery. Jane considers all of her bakery workers to be independent contractors.

Jane has another business in which she treats the workers as independent contractors. She believes this is correct because it is the industry standard to treat that type of worker as an independent contractor. She has consistently treated all of them, and all prior workers doing similar services, as independent contractors. Your client is concerned because a friend in the same business was audited, and the IRS said the friend's workers were employees and not independent contractors.

Required:

1) What is the appropriate inquiry to determine the status of Jane's bakery workers?

2) If the IRS is correct about her friend's business, should your client start treating the workers as employees?

3) If your client has misclassified the workers, is there any relief?

B. Suggested Answers to Discussion Problems

1) The appropriate inquiry for the bakery workers is the facts-and-circumstances test. First, the three categories of control should be analyzed: behavioral control, financial control, and the type of relationship. Reference should be made to the 20 common-law rules. It appears that Jane has far too much control of her bakery workers to classify them as independent contractors and is, therefore, misclassifying them. If she is unclear, she could file an SS-8 and ask the IRS for a determination. However, this could subject Jane to significant penalties for the misclassification. She should consider filing under the VCSP to obtain some partial relief from penalties.

2) Assuming it is standard industry practice and that Jane has consistently treated all such workers as independent contractors, she would appear to be eligible to continue to do so under §530 relief. This is despite the fact that they may be employees under the facts-and-circumstances tests.

3) The most common relief provisions would be §530 relief or applying to participate in the VCSP.

GLOSSARY OF KEY TERMS

Common Law Employee—An individual who is deemed to be an employee through application of the IRS 20-Factor Test or other applicable right of control test from applicable jurisdiction.

Form 211—Application for Award for Original Information.

Golsen Rule—Under the rule articulated in Golsen v. Commissioner of Internal Revenue, the Tax Court may render different decisions, based on identical situations, for taxpayers that are differentiated only by the geographical area in which the Tax Court case is decided. Golsen v. Commissioner is a case in which the United States Tax Court stated the principle that where the court of appeals to which an appeal would be made in a given case has already established a rule of precedent for a legal issue to be decided by the Tax Court, the Tax Court will follow the decision of that court of appeal.

Independent Contractor—An independent contractor is a taxpayer who contracts to do work according to his own methods and who is not subject to control except as to the results of such work. An employee, by contrast, is subject to the control of the employer as to the methods to be used to obtain the desired results.

Primary Authority—Actual tax law as set forth in the Internal Revenue Code, Treasury Regulations, enacted legislation, and court documents.

Secondary Authority—Materials that explain or summarize the law, but do not have the force of law. Secondary authorities include materials published by the IRS such as the Internal Revenue Manual, Revenue Rulings, Revenue Procedures, and Private Letter Rulings, as well as treatises, tax periodicals, commentaries, encyclopedias, and guidebooks produced by commercial publishers and tax professionals.

Section 530 Relief—Under this section of the Revenue Act of 1978, an employer can continue to pay a worker as an independent contractor for employment tax purposes if the business: (1) has historically treated the worker's occupation (and similar occupations) in this manner, (2) has complied with certain information return filing requirements, and (3) has a reasonable basis for doing so.

Voluntary Classification Settlement Program (VCSP)—The VCSP is a program developed by the IRS that allows taxpayers to voluntarily reclassify their workers as employees for future tax periods for employment tax purposes. Under the VCSP, a taxpayer will pay 10 percent of the amount of employment taxes that would have been due on compensation paid to the workers being reclassified for the most recent tax year, calculated under the reduced rates of section 3509(a) of the Internal Revenue Code. In addition, the taxpayer will not be liable for any interest and penalties on the payment under the VCSP and will not be audited for employment tax purposes for prior years with respect to the worker classification of the workers.

CUMULATIVE INDEX 2023

BY TOPIC

BY CITATION

BY SPEAKER

Choose the best response and record your answer in the space provided on the answer sheet.

1. According to Ian Redpath, the IRS has reported which of the following regarding unprocessed tax returns?

   A. The number of unprocessed Forms 941 has increased to almost one million.
   B. The number of unprocessed Forms 941-X has increased to almost one million.
   C. The number of unprocessed Forms 1040 has increased to almost one million.
   D. The number of unprocessed returns has decreased in all areas.

2. According to Ian Redpath, which of the following appeal cases did the Tax Court refuse to hear due to lack of jurisdiction?

   A. *Cardiovascular Center LLC v. Commissioner*
   B. *Frank W. Bibeau v. Commissioner*
   C. *Gardner DDS PA TM v. Commissioner*
   D. *Schlapfer v. Commissioner*

3. According to Ian Redpath, which of the following cases involved misclassification of workers?

   A. *Cardiovascular Center LLC v. Commissioner*
   B. *Frank W. Bibeau v. Commissioner*
   C. *Gardner DDS PA TM v. Commissioner*
   D. *Schlapfer v. Commissioner*

4. According to Ian Redpath, in which of the following did the taxpayer incorporate a novel approach in an attempt to avoid self-employment tax?

   A. *Berenblatt v. Commissioner*
   B. *Frank W. Bibeau v. Commissioner*
   C. *Gardner DDS PA TM v. Commissioner*
   D. *Schlapfer v. Commissioner*

5. According to Ian Redpath, in which of the following cases did the Tax Court deny recovery for a whistleblower?

   A. *Berenblatt v. Commissioner*
   B. *Frank W. Bibeau v. Commissioner*
   C. *Gardner DDS PA TM v. Commissioner*
   D. *Schlapfer v. Commissioner*

6. According to Ian Redpath and Shannon Jemiolo, substantial authority for a return position is generally considered to have approximately what percentage of success if audited?

   A. 10%
   B. 25%
   C. 40%
   D. 65%

7. According to Ian Redpath and Shannon Jemiolo, which percentage of success if audited would most likely be deemed to be ***reasonable basis*** for a return position?

   A. 5% – 10%
   B. 10% – 15%
   C. 20% – 30%
   D. 50% – 75%

8. According to Ian Redpath and Shannon Jemiolo, which of the following requires disclosure for a return position?

   A. Primary Authority
   B. Reasonable Basis
   C. Reasonable Doubt
   D. Substantial Authority

9. According to Ian Redpath and Shannon Jemiolo, which of the following is ***not*** one of the three types of regulations?

   A. Interpretive
   B. Judicial
   C. Legislative
   D. Procedural

10. According to Ian Redpath and Shannon Jemiolo, which of the following is ***not*** one of the courts of original jurisdiction?

    A. U.S. Court of Federal Claims
    B. U.S. District Courts
    C. U.S. Tax Court
    D. U.S. Supreme Court

11. According to Ian Redpath and Ed Renn, which of the following is correct regarding the IRS's 20 Factor Test?

    A. A worker must meet all 20 factors to qualify as an employee or independent contractor.
    B. A worker must meet at least 15-18 factors to qualify as an employee or independent contractor.
    C. A worker must meet at least 11-14 factors to qualify as an employee or independent contractor.
    D. The facts and circumstances of each case determine the weight assigned to each factor, and no one factor is determinative.

12. According to Ian Redpath and Ed Renn, which of the following is correct regarding the Voluntary Classification Settlement Program?

    A. Qualification for this program impacts worker status on both the state and federal level.
    B. Qualification for this program generally results in higher tax paid by the organization.
    C. Application for this program is voluntary and is subject to certain requirements.
    D. Application for this program cannot be filed until after the IRS has initiated an audit of the company's records.

13. According to Ian Redpath and Ed Renn, which of the following is correct regarding Form SS-8?

    A. It must be filed by the IRS on behalf of a worker or the organization for which they work.
    B. It must be filed by the worker rather than the organization for which they work.
    C. It must be filed by an organization rather than someone who works for the organization.
    D. It can be filed by either a worker or the organization for which they work.

14. According to Ian Redpath and Ed Renn, which of the following is correct regarding Section 530 of the Revenue Act of 1978?

    A. It allows a worker to be classified as an independent contractor if it is the norm for the industry in which they work.
    B. It allows a worker to choose between employee or independent contractor status.
    C. It allows an organization to choose between employee or independent contractor status for each worker.
    D. It allows each state to dictate guidelines for employee or independent contractor status within their state.

15. According to Ian Redpath and Ed Renn, which of the following is used to apply for the VCSP?

    A. Form 941
    B. Form 941-X
    C. Form 8919
    D. Form 8952

CPE Network®
Tax Report
Volume 36, Issue 6 **JULY 2023**

Subscriber Survey

Evaluation Form

Please take a few minutes to complete this survey related to the **CPE Network® Tax Report** and return with your quizzer or group attendance sheet to 2395 Midway Road, Carrollton, Texas 75006, Attn: Managing Editor. All responses will be kept confidential. Comments in addition to the answers to these questions are also welcome. Please send comments to **CPLgrading@thomsonreuters.com.**

How would you rate the topics covered in the July 2023 **CPE Network® Tax Report?** Rate each topic on a scale of 1–5 (5=highest):

	Topic Relevance	Topic Content/ Coverage	Topic Timeliness	Video Quality	Audio Quality	Written Material
Experts' Forum	_____	_____	_____	_____	_____	_____
Tax Authority	_____	_____	_____	_____	_____	_____
Worker Classification	_____	_____	_____	_____	_____	_____

Which segments of the July 2023 issue of **CPE Network® Tax Report** did you like the most, and why?

Which segments of the July 2023 issue of **CPE Network® Tax Report** did you like the least, and why?

What would you like to see included or changed in future issues of **CPE Network® Tax Report**?

Are there any other ways in which we can improve **CPE Network® Tax Report**?

How would you rate the effectiveness of the speakers in the July 2023 **CPE Network® Tax Report**? Rate each speaker on a scale of 1–5 (5 highest):

	Overall	**Knowledge of Topic**	**Presentation Skills**
Ian Redpath	_____	_____	_____
Ed Renn	_____	_____	_____
Shannon Jemiolo	_____	_____	_____

Which of the following would you use for viewing **CPE Network® Tax Report?** DVD □ Streaming □ Both □

Are you using **CPE Network® Tax Report** for: CPE Credit □ Information □ Both □ _____

Were the stated learning objectives met? Yes □ No □ _____

If applicable, were prerequisite requirements appropriate? Yes □ No □ _____

Were program materials accurate? Yes □ No □ _____

Were program materials relevant and contribute to the achievement of the learning objectives? Yes □ No □ _____

Were the time allocations for the program appropriate? Yes □ No □ _____

Were the supplemental reading materials satisfactory? Yes □ No □ _____

Were the discussion questions and answers satisfactory? Yes □ No □ _____

Were the audio and visual materials effective? Yes □ No □ _____

Specific Comments: _____

_____

Name/Company _____

Address _____

City/State/Zip _____

Email _____

Once Again, Thank You…

Your Input Can Have a Direct Influence on Future Issues!

CPE Network®

CPE Group Attendance Sheet

Firm/Company Name: _____

Account #: _____

Location: _____

Program Title: CPE Network Tax Report, July 2023 Date: _____

Name	Email	Total Hrs	IRS PTIN ID (if applicable Tax only)	Sign In	Sign Out

I certify that the above individuals viewed and were participants in the group discussion with this issue/segment of the CPE Network® newsletter, and earned the number of hours shown.

Instructor Name: _____ Date: _____

E-mail address: _____

License State and Number: _____

Group Study PO Box 115008, Carrollton, TX 75011 -5008 Fax (888) 286.9070 CPLgrading@thomsonreuters.com

CPE Network/Webinar Delivery Tracking Report

Course Title	
Course Date:	
Start Time:	
End Time:	
Moderator Name, Credentials, and Signature Attestation of Attendance:	
Delivery Method:	Group Internet Based
Total CPE Credit:	3.0
Instructions:	During the webinar, the moderator must verify student presence a minimum of 3 times per CPE hour. This is achieved via polling questions. Sponsors must have a report which documents the responses from each student. The timing of the polling questions should be random and not made known to students prior to delivery of the course. Record the polling question responses below. Refer to the CPL Network User Guide for more instructions. Partial credit will not be issued for students who do not respond to at least 3 polling questions per CPE hour.
Brief Description of Method of Polling	Example: Zoom: During this webinar, moderator asked students to raise their hands 3 times per CPE hour. The instructor then noted the hands that were raised in the columns below.

			First CPE Hour			CPE Hour 2			CPE Hour 3			FOR TR USE ONLY
First Name	Last Name	Student Email	Poll 1	Poll 2	Poll 3	Poll 1	Poll 2	Poll 3	Poll 1	Poll 2	Poll 3	Certificate Issued?

CHECKPOINT LEARNING NETWORK

CPE NETWORK®
USER GUIDE

REVISED May 1, 2023

Welcome to CPE Network!

CPE Network programs enable you to deliver training programs to those in your firm in a manageable way. You can choose how you want to deliver the training in a way that suits your firm's needs: in the classroom, virtual, or self-study. You must review and understand the requirements of each of these delivery methods before conducting your training to ensure you meet (and document) all the requirements.

This User Guide has the following sections:

- **"Group Live" Format:** The instructor and all the participants are gathered into a common area, such as a conference room or training room at a location of your choice.
- **"Group Internet Based" Format:** Deliver your training over the internet via Zoom, Teams, Webex, or other application that allows the instructor to present materials that all the participants can view at the same time.
- **"Self-Study" Format:** Each participant can take the self-study version of the CPE Network program on their own computers at a time and place of their convenience. No instructor is required for self-study.
- **Transitioning From DVDs:** For groups playing the video from the online platform, we suggest downloading the video from the Checkpoint Learning player to the desktop before projecting.
- **What Does It Mean to Be a CPE Sponsor?:** Should you decide to vary from any of the requirements in the 3 methods noted above (for example, provide less than 3 full CPE credits, alter subject areas, offer hybrid or variations to the methods described above), Checkpoint Learning Network will not be the sponsor and will not issue certificates. In this scenario, your firm will become the sponsor and must issue its own certificates of completion. This section outlines the sponsor's responsibilities that you must adhere to if you choose not to follow the requirements for the delivery methods.
- **Getting Help:** Refer to this section to get your questions answered.

IMPORTANT: This User Guide outlines in detail what is required for each of the 3 formats above. Additionally, because you will be delivering the training within your firm, you should review the Sponsor Responsibilities section as well. To get certificates of completion for your participants following your training, you must submit all the required documentation. (This is noted at the end of each section.) Checkpoint Learning Network will review your training documentation for completeness and adherence to all requirements. If all your materials are received and complete, certificates of completion will be issued for the participants attending your training. Failure to submit the required completed documentation will result in delays and/or denial of certificates.

IMPORTANT: If you vary from the instructions noted above, your firm will become the sponsor of the training event and you will have to create your own certificates of completions for your participants. In this case, you do not need to submit any documentation back to Thomson Reuters.

If you have any questions on this documentation or requirements, refer to the "Getting Help" section at the end of this User Guide **BEFORE** you conduct your training.

We are happy that you chose CPE Network for your training solutions. Thank you for your business and HAPPY LEARNING!

“Group Live” Format

CPE Credit

All CPE Network products are developed and intended to be delivered as 3 CPE credits. You should allocate sufficient time in your delivery so that there is no less than 2.5 clock hours:

50 minutes per CPE credit TIMES 3 credits = 150 minutes = 2.5 clock hours

If you wish to have a break during your training session, you should increase the length of the training beyond 2.5 hours as necessary. For example, you may wish to schedule your training from 9 AM to 12 PM and provide a ½ hour break from 10:15 to 10:45.

***Effective November 1, 2018:** Checkpoint Learning CPE Network products ‘group live’ sessions must be delivered as 3 CPE credits and accredited to the field(s) of study as designated by Checkpoint Learning Network. Checkpoint Learning Network will not issue certificates for “group live” deliveries of less than 3 CPE credits (unless the course was delivered as 3 credits and there are partial credit exceptions (such as late arrivals and early departures). Therefore, if you decide to deliver the “group live” session with less than 3 CPE credits, your firm will be the sponsor as Checkpoint Learning Network will not issue certificates to your participants.

Advertising / Promotional Page

Create a promotion page (use the template after the executive summary of the transcript). You should circulate (e.g., email) to potential participants prior to training day. You will need to submit a copy of this page when you request certificates.

Monitoring Attendance

You must monitor individual participant attendance at “group live” programs to assign the correct number of CPE credits. A participant’s self-certification of attendance alone is not sufficient.

Use the **attendance sheet.** This lists the instructor(s) name and credentials, as well as the first and last name of each participant attending the seminar. The participant is expected to initial the sheet for their morning attendance and provide their signature for their afternoon attendance. If a participant arrives late, leaves early, or is a “no show,” the actual hours they attended should be documented on the sign-in sheet and will be reflected on the participant’s CPE certificate.

Real Time Instructor During Program Presentation

"Group live" programs must have a **qualified, real time instructor while the program is being presented.** Program participants must be able to interact with the instructor while the course is in progress (including the opportunity to ask questions and receive answers during the presentation).

Elements of Engagement

A "group live" program must include at least one element of engagement related to course content during each credit of CPE (for example, group discussion, polling questions, instructor-posed question with time for participant reflection, or use of a case study with different engagement elements throughout the program).

Make-Up Sessions

Individuals who are unable to attend the group study session may use the program materials for self-study either in print or online.

- If the print materials are used, the user should read the materials, watch the video, and answer the quizzer questions on the CPE Quizzer Answer Sheet. Send the answer sheet and course evaluation to the address listed on the answer sheet and the CPE certificate will be mailed or emailed to the user. Detailed instructions are provided on Network Program Self-Study Options.
- If the online materials are used, the user should log on to her/his individual Checkpoint Learning account to read the materials, watch the interviews, and answer the quizzer questions. The user will be able to print her/his/their CPE certificate upon completion of the quizzer. (If you need help setting up individual user accounts, please contact your firm administrator or customer service.)

Awarding CPE Certificates

The CPE certificate is the participant's record of attendance and is awarded by Checkpoint Learning Network after the "group live" documentation is received (and providing the course is delivered as 3 CPE credits). The certificate of completion will reflect the credit hours earned by the individual, with special calculation of credits for those who arrived late or left early.

Subscriber Survey Evaluation Forms

Use the evaluation form. You must include a means for evaluating quality. At the conclusion of the "group live" session, evaluations should be distributed and any that are completed are collected from participants. Those evaluations that are completed by participants should be returned to Checkpoint Learning Network along with the other course materials. While it is required that you circulate the evaluation form to all participants, it is NOT required that the participants fill it out. A preprinted evaluation form is included in the transcript each month for your convenience.

Retention of Records

Regardless of whether Checkpoint Learning Network is the sponsor for the "group live" session, it is required that the firm hosting the "group live" session retain the following information for a period of five years from the date the program is completed unless state law dictates otherwise:

- Record of participation (Group Study Attendance sheets; indicating any late arrivals and/or early departures)
- Copy of the program materials
- Timed agenda with topics covered and elements of engagement used
- Date and location of course presentation
- Number of CPE credits and field of study breakdown earned by participants
- Instructor name and credentials
- Results of program evaluations.

Finding the Transcript

Note: DVDs no longer ship with this product effective 3/1/2023.

When the DVD is inserted into a DVD drive, the video will immediately begin to play and the menu screen will pop up, taking the entire screen. Hitting the Esc key should minimize it to a smaller window. To locate the pdf file of the transcript either to save or email to others, go to the start button on the computer. In My Computer, open the drive with the DVD. The Adobe Acrobat files are the transcript files. If you do not currently have Adobe Acrobat Reader (Mac versions of the reader are also available), a free version of the reader may be downloaded at:

- https://get.adobe.com/reader/

The entire transcript is also available as a pdf in the Checkpoint Learning player in the resource toolbox at the top of the screen, or via the link in the email sent to administrators.

Requesting Participant CPE Certificates

When delivered as 3 CPE credits, documentation of your "group live" session should be sent to Checkpoint Learning Network by one of the following means:

Mail: Thomson Reuters
PO Box 115008
Carrollton, TX 75011-5008

Email: **CPLgrading@tr.com**

Fax: 888.286.9070

When sending your package to Thomson Reuters, you must include ALL of the following items:

Form Name	Included?	Notes
Advertising / Promotional Page		Complete this form and circulate to your audience before the training event.
Attendance Sheet		Use this form to track attendance during your training session.
Subscriber Survey Evaluation Form		Circulate the evaluation form at the end of your training session so that participants can review and comment on the training. Return to Thomson Reuters any evaluations that were completed. You do not have to return an evaluation for every participant.

Incomplete submissions will be returned to you.

“Group Internet Based” Format

CPE Credit

All CPE Network products are developed and intended to be delivered as 3 CPE credits. You should allocate sufficient time in your delivery so that there is no less than 2.5 clock hours:

50 minutes per CPE credit TIMES 3 credits = 150 minutes = 2.5 clock hours

If you wish to have a break during your training session, you should increase the length of the training beyond 2.5 hours as necessary. For example, you may wish to schedule your training from 9 AM to 12 PM and provide a ½ hour break from 10:15 to 10:45.

***Effective November 1, 2018:** Checkpoint Learning CPE Network products ‘group live’ sessions must be delivered as 3 CPE credits and accredited to the field(s) of study as designated by Checkpoint Learning Network. Checkpoint Learning Network will not issue certificates for “group live” deliveries of less than 3 CPE credits (unless the course was delivered as 3 credits and there are partial credit exceptions (such as late arrivals and early departures). Therefore, if you decide to deliver the “group live” session with less than 3 CPE credits, your firm will be the sponsor as Checkpoint Learning Network will not issue certificates to your participants.

Advertising / Promotional Page

Create a promotion page (use the template following the executive summary in the transcript). You should circulate (e.g., email) to potential participants prior to training day. You will need to submit a copy of this page when you request certificates.

Monitoring Attendance in a Webinar

You must monitor individual participant attendance at “group internet based” programs to assign the correct number of CPE credits. A participant’s self-certification of attendance alone is not sufficient.

Use the **Webinar Delivery Tracking Report.** This form lists the moderator(s) name and credentials, as well as the first and last name of each participant attending the seminar. During a webinar you must set up a monitoring mechanism (or polling mechanism) to periodically check the participants’ engagement throughout the delivery of the program.

In order for CPE credit to be granted, you must confirm the presence of each participant **3 times per CPE hour and the participant must reply to the polling question**. Participants that respond to less than 3 polling questions in a CPE hour will not be granted CPE credit. For example, if a participant only replies to 2 of the 3 polling questions in the first CPE hour, credit for the first CPE hour will not be granted. (Refer to the Webinar Delivery Tracking Report for examples.)

Examples of polling questions:

1. You are using **Zoom** for your webinar. The moderator pauses approximately every 15 minutes and ask that participants confirm their attendance by using the "raise hands" feature. Once the participants raise their hands, the moderator records the participants who have their hands up in the **webinar delivery tracking report** by putting a YES in the webinar delivery tracking report. After documenting in the spreadsheet, the instructor (or moderator) drops everyone's hands and continues the training.
2. You are using **Teams** for your webinar. The moderator will pause approximately every 15 minutes and ask that participants confirm their attendance by typing "Present" into the Teams chat box. The moderator records the participants who have entered "Present" into the chat box into the **webinar delivery tracking report**. After documenting in the spreadsheet, the instructor (or moderator) continues the training.
3. If you are using an application that has a way to automatically send out polling questions to the participants, you can use that application/mechanism. However, following the event, you should create a **webinar delivery tracking report** from your app's report.

Additional Notes on Monitoring Mechanisms:

1. The monitoring mechanism does not have to be "content specific." Rather, the intention is to ensure that the remote participants are present and paying attention to the training.
2. You should only give a minute or so for each participant to reply to the prompt. If, after a minute, a participant does not reply to the prompt, you should put a NO in the webinar delivery tracking report.
3. While this process may seem unwieldy at first, it is a required element that sponsors must adhere to. And after some practice, it should not cause any significant disruption to the training session.
4. **You must include the Webinar Delivery Tracking report with your course submission if you are requesting certificates of completion for a "group internet based" delivery format.**

Real Time Moderator During Program Presentation

"Group internet based" programs must have a **qualified, real time moderator while the program is being presented.** Program participants must be able to interact with the moderator while the course is in progress (including the opportunity to ask questions and receive answers

during the presentation). This can be achieved via the webinar chat box, and/or by unmuting participants and allowing them to speak directly to the moderator.

Make-Up Sessions

Individuals who are unable to attend the "group internet based" session may use the program materials for self-study either in print or online.

- If print materials are used, the user should read the materials, watch the video, and answer the quizzer questions on the CPE Quizzer Answer Sheet. Send the answer sheet and course evaluation to the address listed on the answer sheet and the CPE certificate will be mailed or emailed to the user. Detailed instructions are provided on Network Program Self-Study Options.
- If the online materials are used, the user should log on to her/his individual Checkpoint Learning account to read the materials, watch the interviews, and answer the quizzer questions. The user will be able to print her/his CPE certificate upon completion of the quizzer. (If you need help setting up individual user accounts, please contact your firm administrator or customer service.)

Awarding CPE Certificates

The CPE certificate is the participant's record of attendance and is awarded by Checkpoint Learning Network after the "group internet based" documentation is received (and providing the course is delivered as 3 CPE credits). The certificate of completion will reflect the credit hours earned by the individual, with special calculation of credits for those who may not have answered the required amount of polling questions.

Subscriber Survey Evaluation Forms

Use the evaluation form. You must include a means for evaluating quality. At the conclusion of the "group live" session, evaluations should be distributed and any that are completed are collected from participants. Those evaluations that are completed by participants should be returned to Checkpoint Learning Network along with the other course materials. While it is required that you circulate the evaluation form to all participants, it is NOT required that the participants fill it out. A preprinted evaluation form is included in the transcript each month for your convenience.

Retention of Records

Regardless of whether Checkpoint Learning Network is the sponsor for the "group internet based" session, it is required that the firm hosting the session retain the following information for a period of five years from the date the program is completed unless state law dictates otherwise:

- Record of participation (Webinar Delivery Tracking Report)
- Copy of the program materials
- Timed agenda with topics covered
- Date and location (which would be "virtual") of course presentation
- Number of CPE credits and field of study breakdown earned by participants
- Instructor name and credentials
- Results of program evaluations

Finding the Transcript

Note: DVDs are no longer shipped effective 3/1/2023

When the DVD is inserted into a DVD drive, the video will immediately begin to play and the menu screen will pop up, taking the entire screen. Hitting the Esc key should minimize it to a smaller window. To locate the pdf file of the transcript either to save or email to others, go to the start button on the computer. In My Computer, open the drive with the DVD. It should look something like the screenshot below. The Adobe Acrobat files are the transcript files. If you do not currently have Adobe Acrobat Reader (Mac versions of the reader are also available), a free version of the reader may be downloaded at:

- https://get.adobe.com/reader/

Alternatively, for those without a DVD drive, the email sent to administrators each month has a link to the pdf for the newsletter. The email may be forwarded to participants who may download the materials or print them as needed.

Requesting Participant CPE Certificates

When delivered as 3 CPE credits, documentation of your "group internet based" session should be sent to Checkpoint Learning Network by one of the following means:

Mail: Thomson Reuters
PO Box 115008
Carrollton, TX 75011-5008
Email: CPLgrading@tr.com

Fax: 888.286.9070

When sending your package to Thomson Reuters, you must include ALL the following items:

Form Name	Included?	Notes
Advertising / Promotional Page		Complete this form and circulate to your audience before the training event.
Webinar Delivery Tracking Report		Use this form to track the attendance (i.e., polling questions) during your training webinar.
Evaluation Form		Circulate the evaluation form at the end of your training session so that participants can review and comment on the training. Return to Thomson Reuters any evaluations that were completed. You do not have to return an evaluation for every participant.

Incomplete submissions will be returned to you.

“Self-Study” Format

If you are unable to attend the live group study session, we offer two options for you to complete your Network Report program.

Self-Study—Print

Follow these simple steps to use the printed transcript and DVD:

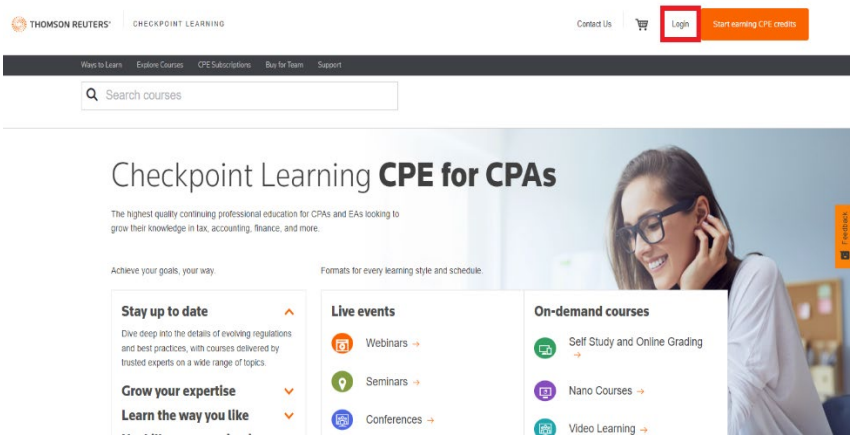
- Watch the DVD.
- Review the supplemental materials.
- Read the discussion problems and the suggested answers.
- Complete the quizzer by filling out the bubble sheet enclosed with the transcript package.
- Complete the survey. We welcome your feedback and suggestions for topics of interest to you.
- Mail your completed quizzer and survey to:

  Thomson Reuters
  PO Box 115008
  Carrollton, TX 75011-5008

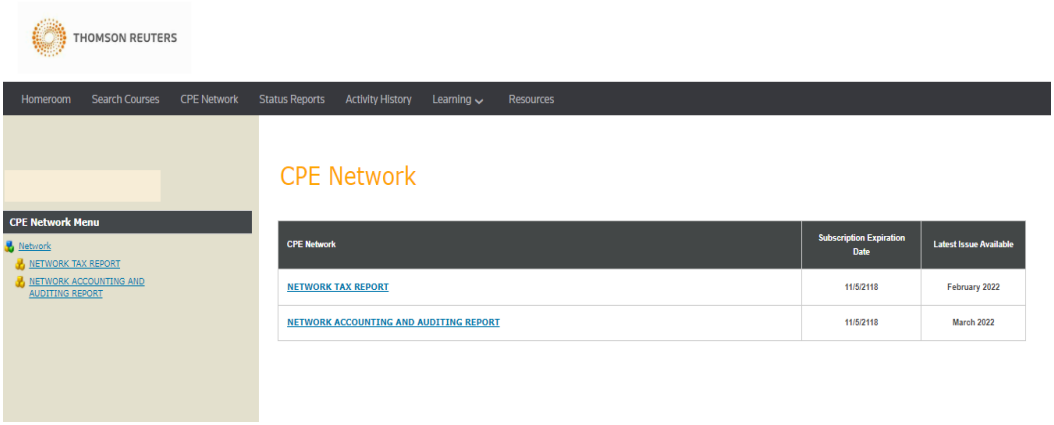
Self-Study—Online

Follow these simple steps to use the online program:

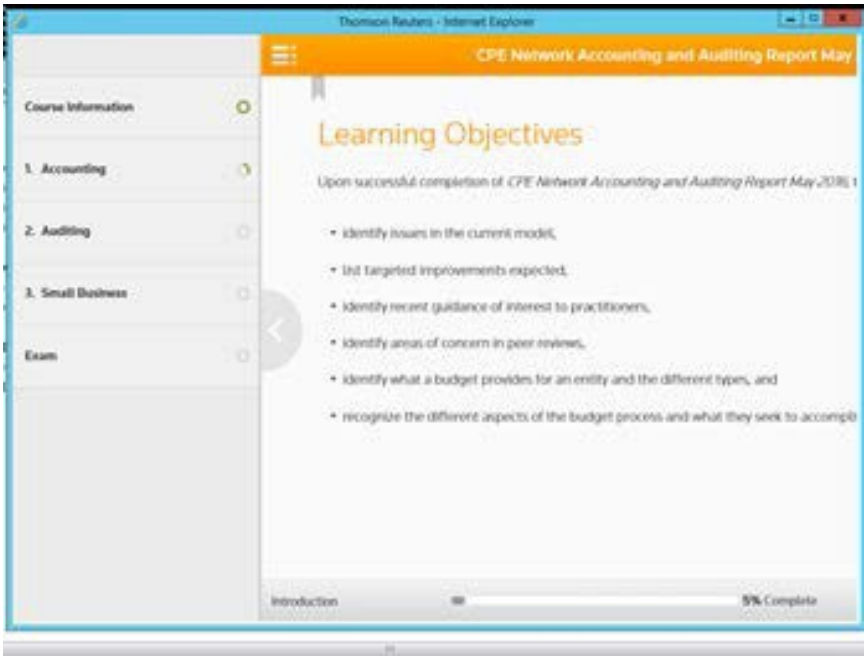
- Go to www.checkpointlearning.thomsonreuters.com .
- Log in using your username and password assigned by your firm’s administrator in the upper right-hand margin (“Login or Register”).



- In the **CPE Network** tab, select the desired Network Report and then the appropriate edition.

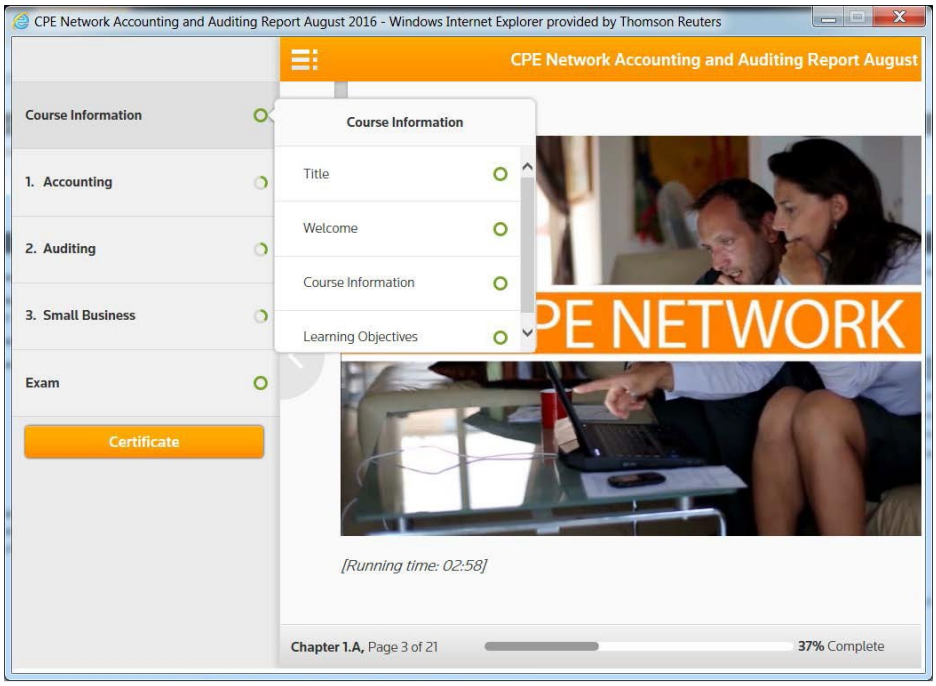


The Chapter Menu is in the gray bar at the left of your screen:



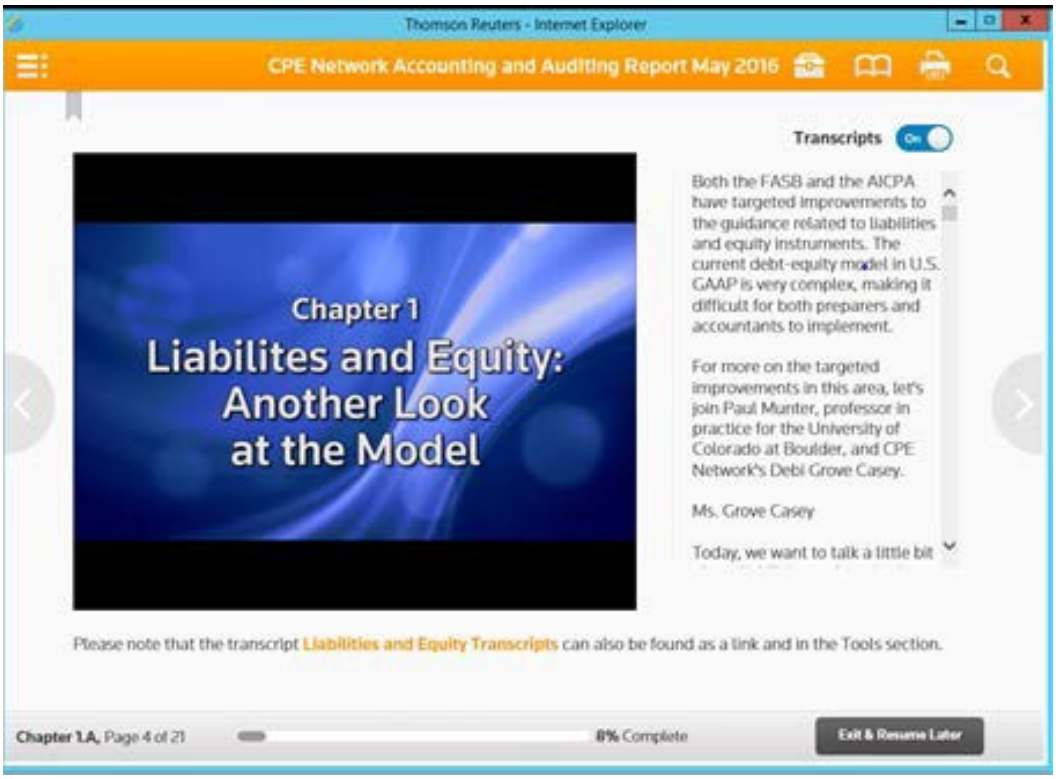
Click down to access the dropdown menu and move between the program Chapters.

- **Course Information** is the course Overview, including information about the authors and the program learning objectives

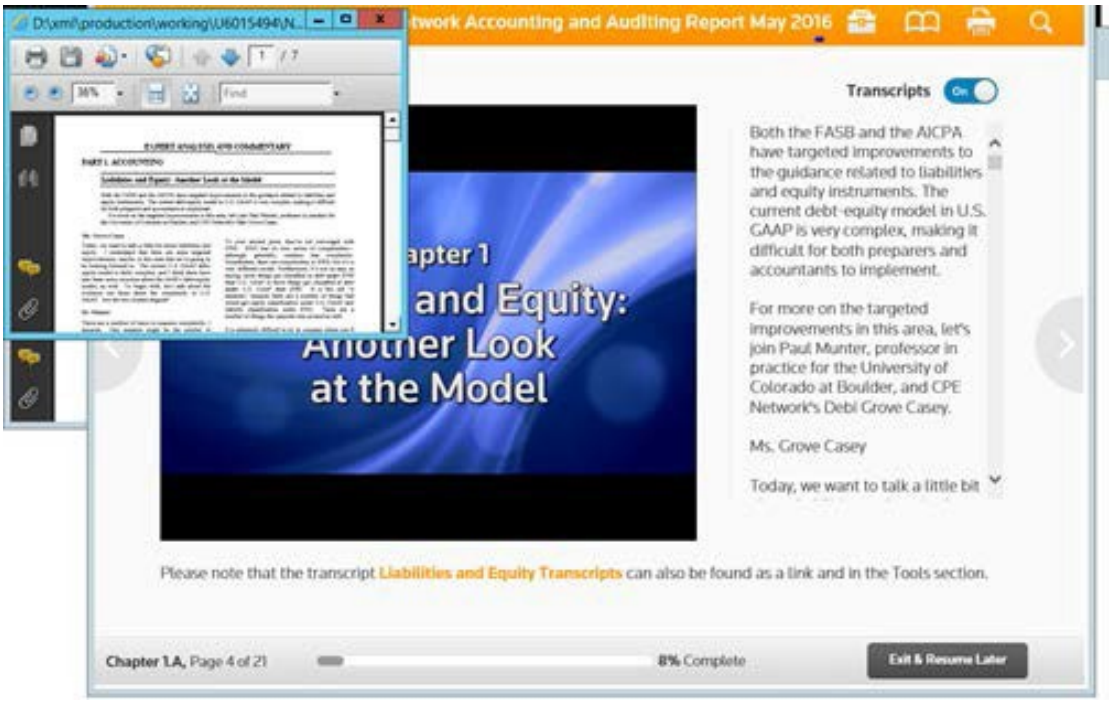


- **Each Chapter is now self-contained.** Years ago, when on the CPEasy site, the interview segments were all together, then all the supplemental materials, etc. Today, each chapter contains the executive summary and learning objectives for that segment, followed by the interview, the related supplemental materials, and then the discussion questions. This more streamlined approach allows administrators and users to more easily access the related materials.

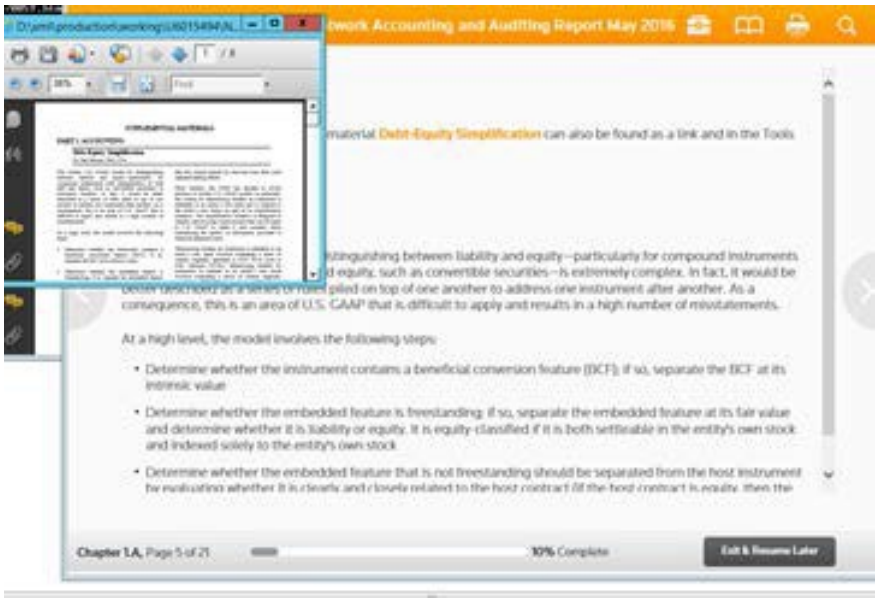
Video segments may be downloaded from the CPL player by clicking on the download button. Tip: you may need to scroll down to see the download button.



Transcripts for the interview segments can be viewed at the right side of the screen via a toggle button at the top labeled **Transcripts** or via the link to the pdf below the video (also available in the toolbox in the resources section). The pdf will appear in a separate pop-up window.

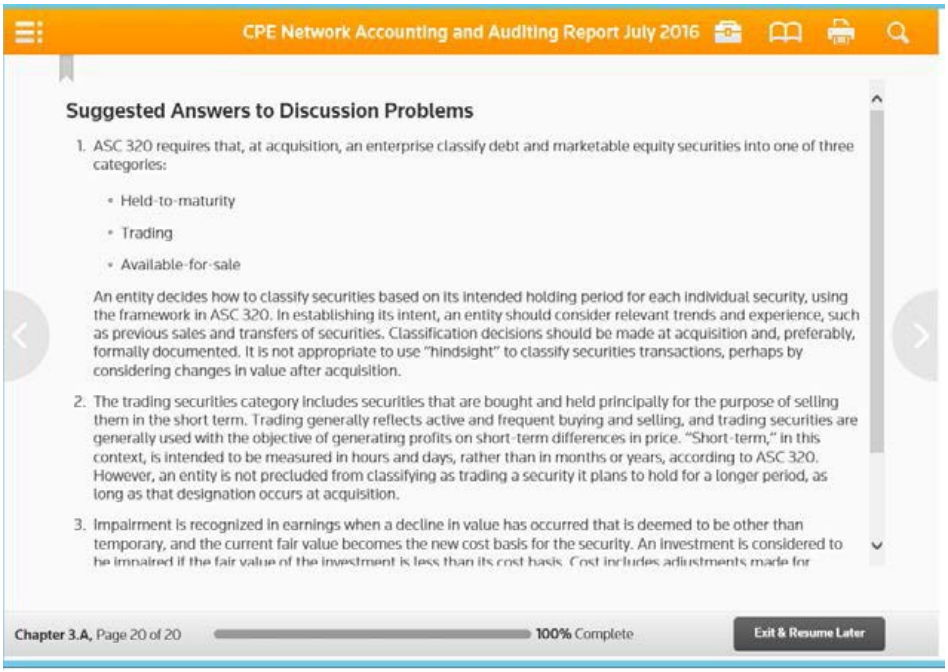


Click the arrow at the bottom of the video to play it, or click the arrow to the right side of the screen to advance to the supplemental material. As with the transcripts, the supplemental materials are also available via the toolbox and the link will pop up the pdf version in a separate window.



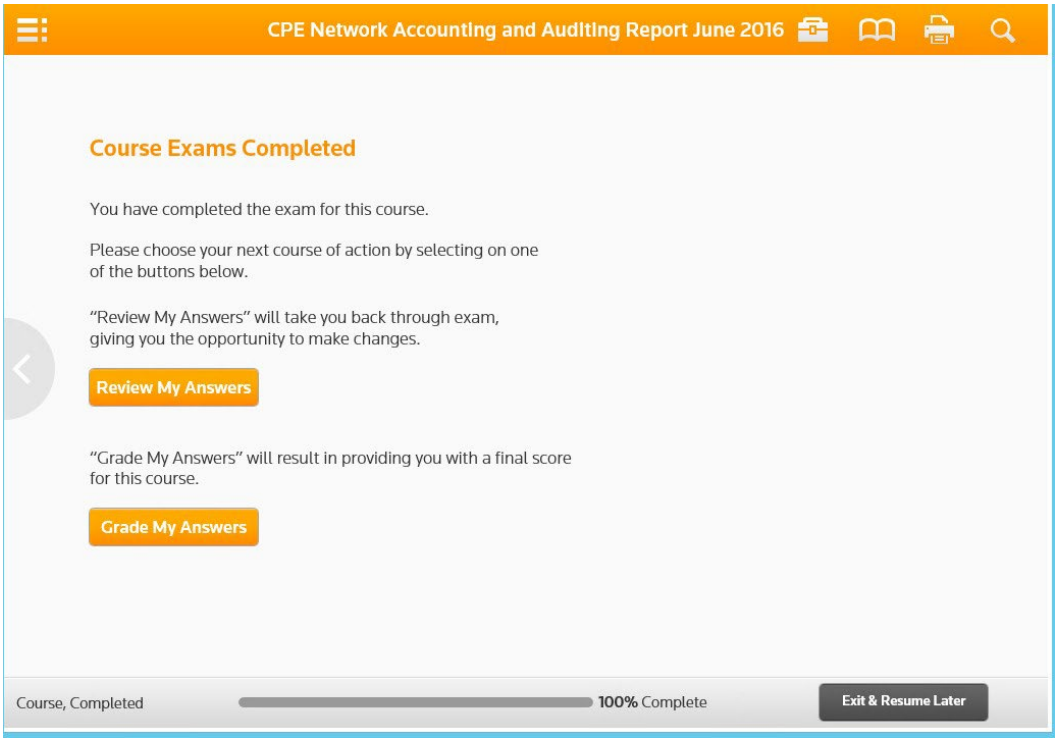
Continuing to click the arrow to the right side of the screen will bring the user to the Discussion p roblems related to the segment.

The Suggested Answers to the Discussion Problems follow the Discussion Problems.



The **Exam** is accessed by clicking the last gray bar on the menu at the left of the screen or clicking through to it. Click the orange button to begin.

When you have completed the quizzer, click the button labeled **Grade or the Review button**.



- Click the button labeled **Certificate** to print your CPE certificate.
- The final quizzer grade is displayed and you may view the graded answers by clicking the button labeled **view graded answer**.

Additional Features Search

Checkpoint Learning offers powerful search options. Click the **magnifying glass** at the upper right of the screen to begin your search. Enter your choice in the **Search For:** box.

Search Results are displayed with the number of hits.

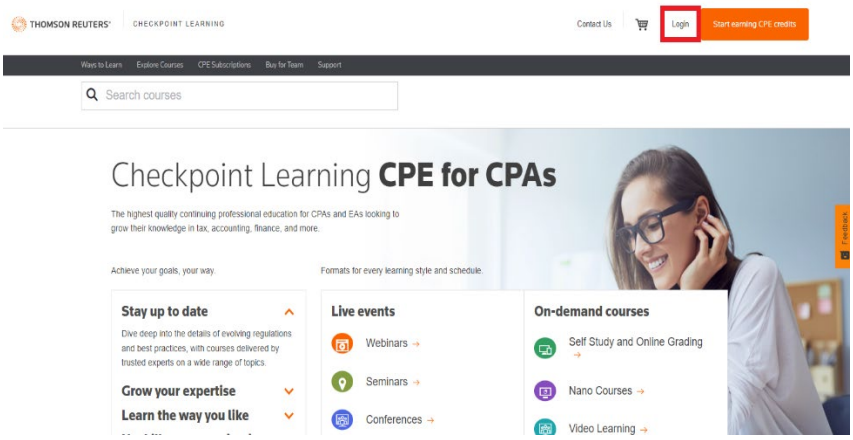
Print

To display the print menu, click the printer icon in the upper bar of your screen. You can print the entire course, the transcript, the glossary, all resources, or selected portions of the course. Click your choice and click the orange **Print**.

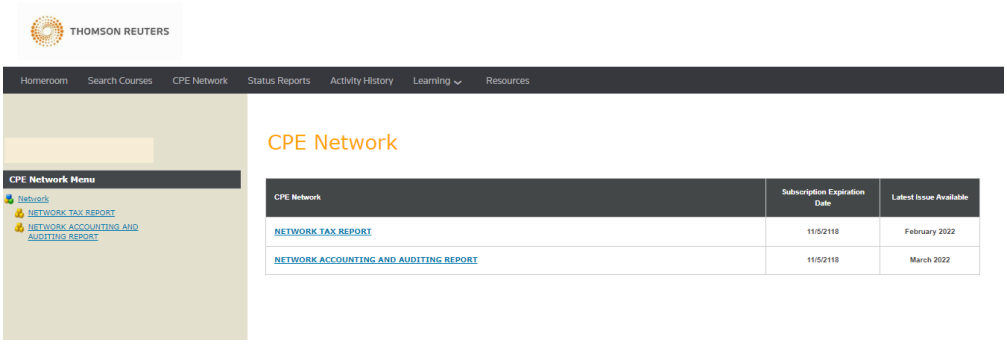
Transitioning From DVDs

Follow these simple steps to access the video and pdf for download from the online platform:

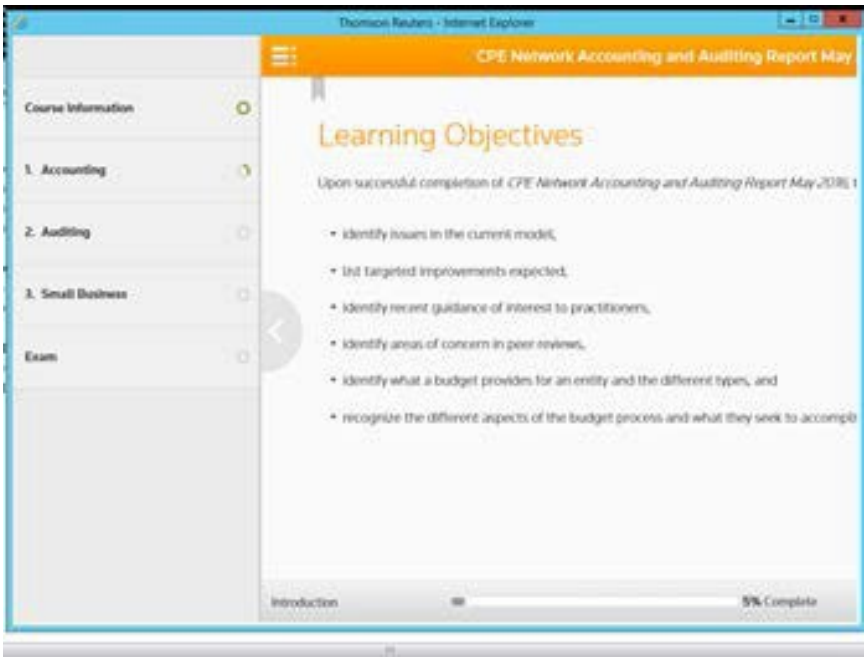
- Go to www.checkpointlearning.thomsonreuters.com .
- Log in using your username and password assigned by your firm's administrator in the upper right-hand margin ("Login").



- In the CPE **Network** tab, select the desired Network Report by clicking on the title, then select the appropriate edition.

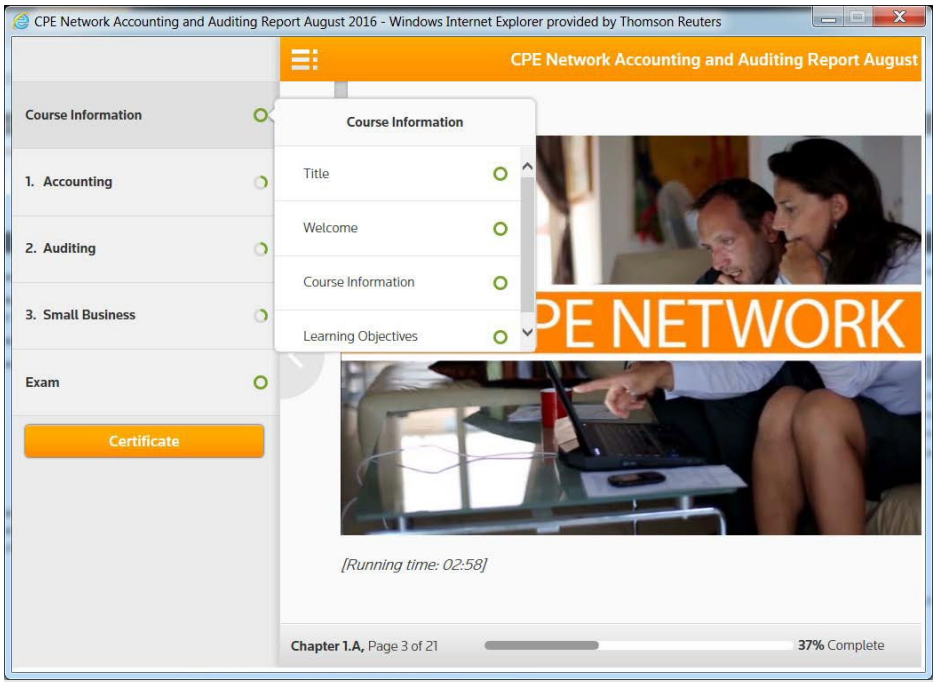


The Chapter Menu is in the gray bar at the left of your screen:

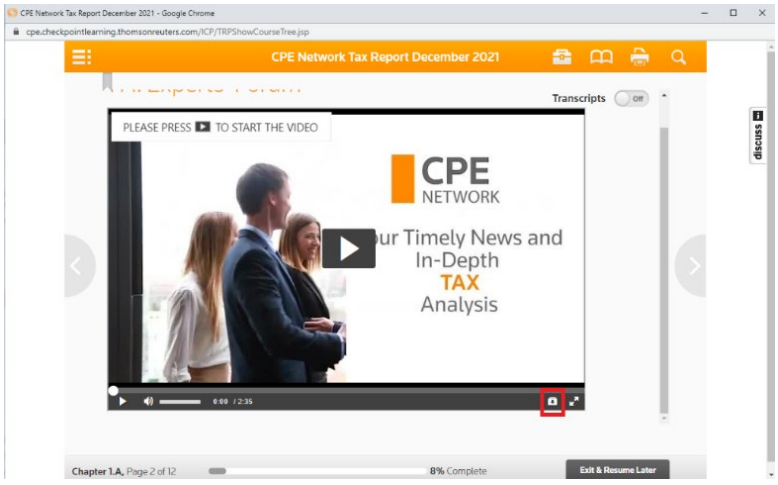


Click down to access the dropdown menu and move between the program Chapters.

- **Course Information** is the course Overview, including information about the authors and the program learning objectives



- Each Chapter is self-contained. Each chapter contains the executive summary and learning objectives for that segment, followed by the interview, the related supplemental materials, and then the discussion questions.



Video segments may be downloaded from the CPL player by clicking on the download button noted above. You may need to use the scroll bar to the right of the video to see the download button. **Tip: You may need to use the scroll bar to the right of the video to see the download button.**

PDFs may be downloaded from either the course toolbox in the upper right corner of the Checkpoint Learning screen or from the email sent by CPENetworkgroupstudy.

What Does It Mean to Be a CPE Sponsor?

If your organization chooses to vary from the instructions outlined in this User Guide, your firm will become the CPE Sponsor for this monthly series. The sponsor rules and requirements noted below are only highlights and reflect those of NASBA, the national body that sets guidance for development, presentation, and documentation for CPE programs. **For any specific questions about state sponsor requirements, please contact your state board. They are the final authority regarding CPE Sponsor requirements.** Generally, the following responsibilities are required of the sponsor:

- Arrange for a location for the presentation
- Advertise the course to your anticipated participants and disclose significant features of the program in advance
- Set the start time
- Establish participant sign-in procedures
- Coordinate audio-visual requirements with the facilitator
- Arrange appropriate breaks
- Have a real-time instructor during program presentation
- Ensure that the instructor delivers and documents elements of engagement
- Monitor participant attendance (make notations of late arrivals, early departures, and “no shows”)
- Solicit course evaluations from participants
- Award CPE credit and issue certificates of completion
- Retain records for five years

The following information includes instructions and generic forms to assist you in fulfilling your responsibilities as program sponsor.

CPE Sponsor Requirements

Determining CPE Credit Increments

Sponsored seminars are measured by program length, with one 50-minute period equal to one CPE credit. One-half CPE credit increments (equal to 25 minutes) are permitted after the first credit has been earned. Sponsors must monitor the program length and the participants’ attendance in order to award the appropriate number of CPE credits.

Program Presentation

CPE program sponsors must provide descriptive materials that enable CPAs to assess the appropriateness of learning activities. CPE program sponsors must make the following information available in advance:

- Learning objectives.
- Instructional delivery methods.
- Recommended CPE credit and recommended field of study.
- Prerequisites.
- Program level.
- Advance preparation.
- Program description.
- Course registration and, where applicable, attendance requirements.
- Refund policy for courses sold for a fee/cancellation policy.
- Complaint resolution policy.
- Official NASBA sponsor statement, if an approved NASBA sponsor (explaining final authority of acceptance of CPE credits**).**

Disclose Significant Features of Program in Advance

For potential participants to effectively plan their CPE, the program sponsor must disclose the significant features of the program in advance (e.g., through the use of brochures, website, electronic notices, invitations, direct mail, or other announcements). When CPE programs are offered in conjunction with non-educational activities, or when several CPE programs are offered concurrently, participants must receive an appropriate schedule of events indicating those components that are recommended for CPE credit. The CPE program sponsor's registration and attendance policies and procedures must be formalized, published, and made available to participants and include refund/cancellation policies as well as complaint resolution policies.

Monitor Attendance

While it is the participant's responsibility to report the appropriate number of credits earned, CPE program sponsors must maintain a process to monitor individual attendance at group programs to assign the correct number of CPE credits. A participant's self-certification of attendance alone is not sufficient. The sign-in sheet should list the names of each instructor and her/his credentials, as well as the name of each participant attending the seminar. The participant is expected to initial the sheet for their morning attendance and provide their signature for their afternoon attendance. If a participant leaves early, the hours they attended should be documented on the sign-in sheet and on the participant's CPE certificate.

Real Time Instructor During Program Presentation

"Group live" programs must have a qualified, real time instructor while the program is being presented. Program participants must be able to interact with the real time instructor while the course is in progress (including the opportunity to ask questions and receive answers during the presentation).

Elements of Engagement

A "group live" program must include at least one element of engagement related to course content during each credit of CPE (for example, group discussion, polling questions, instructor-posed question with time for participant reflection, or use of a case study with different engagement elements throughout the program).

Awarding CPE Certificates

The CPE certificate is the participant's record of attendance and is awarded at the conclusion of the seminar. It should reflect the credit hours earned by the individual, with special calculation of credits for those who arrived late or left early. Attached is a sample *Certificate of Attendance* you may use for your convenience.

CFP credit is available if the firm registers with the CFP board as a sponsor and meets the CFP board requirements. IRS credit is available only if the firm registers with the IRS as a sponsor and satisfies their requirements.

Seminar Quality Evaluations for Firm Sponsor

NASBA requires the seminar to include a means for evaluating quality. At the seminar conclusion, evaluations should be solicited from participants and retained by the sponsor for five years. The following statements are required on the evaluation and are used to determine whether:

1. Stated learning objectives were met.
2. Prerequisite requirements were appropriate.
3. Program materials were accurate.
4. Program materials were relevant and contributed to the achievement of the learning objectives.
5. Time allotted to the learning activity was appropriate.
6. Individual instructors were effective.
7. Facilities and/or technological equipment were appropriate.
8. Handout or advance preparation materials were satisfactory.
9. Audio and video materials were effective.

You may use the enclosed preprinted evaluation forms for your convenience.

Retention of Records

The seminar sponsor is required to retain the following information for a period of five years from the date the program is completed unless state law dictates otherwise:

- Record of participation (the original sign-in sheets, now in an editable, electronic signable format)
- Copy of the program materials
- Timed agenda with topics covered and elements of engagement used
- Date and location of course presentation
- Number of CPE credits and field of study breakdown earned by participants
- Instructor name(s) and credentials
- Results of program evaluations

Appendix: Forms

Here are the forms noted above and how to get access to them.

Delivery Method	Form Name	Location	Notes
"Group Live" / "Group Internet Based"	Advertising / Promotional Page	Transcript	Complete this form and circulate to your audience before the training event.
"Group Live"	Attendance Sheet	Transcript	Use this form to track attendance during your training session.
"Group Internet Based"	Webinar Delivery Tracking Report	Transcript	Use this form to track the 'polling questions' which are required to monitor attendance during your webinar.
"Group Live" / "Group Internet Based"	Evaluation Form	Transcript	Circulate the evaluation form at the end of your training session so that participants can review and comment on the training.
Self Study	CPE Quizzer Answer Sheet	Transcript	Use this form to record your answers to the quiz.

Getting Help

Should you need support or assistance with your account, please see below:

Support Group	Phone Number	Email Address	Typical Issues/Questions
Technical Support	800.431.9025 (follow option prompts	checkpointlearning.techsupport@thomsonreuters.com	• Browser-based • Certificate discrepancies • Accessing courses • Migration questions • Feed issues
Product Support	800.431.9025 (follow option prompts	checkpointlearning.productsupport@thomsonreuters.com	• Functionality (how to use, where to find) • Content questions • Login Assistance
Customer Support	800.431.9025 (follow option prompts	checkpointlearning.cpecustomerservice@thomsonreuters.com	• Billing • Existing orders • Cancellations • Webinars • Certificates