

## TAX PROCEDURE, PENALTIES & CRIMES

Spring 2020

SYLLABUS

Law 647, Section 1

**Professor John Plecnik**  
**Cleveland-Marshall College of Law**

### **RECOMMENDED TEXT:**

Lathrope, *SELECTED FEDERAL TAXATION, STATUTES AND REGULATIONS* (2020 ed.)

You are responsible for reading the assigned provisions of the Internal Revenue Code and Income Tax Regulations, and you should always have a copy of them at hand during class. As such, it is advisable to purchase a hard copy of the Code and Regulations if you do not already own one. However, you may choose to save the money and print out the assigned provisions from Lexis or Westlaw.

### **CLASS MEETINGS:**

Monday & Wednesday, 4:30 p.m. to 5:45 p.m., Room LB 205

### **OFFICE HOURS:**

Monday & Wednesday, 10:45 a.m. to 12:00 p.m.

Office: Room LB 222

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I am in class on Mondays and Wednesdays from 9:00 a.m. to 10:40 a.m. and from 4:30 p.m. to 5:45 p.m. Outside of class, I should be in the office most of the time during Mondays and Wednesdays. You need **not** make an appointment to see me. Just stop by. If I am not in my office on those days, I am probably at a faculty lunch or committee meeting and will return shortly, so check back later.

**Come see me!** I have substantial office hours in order to provide ample opportunity for you to come see me when you have questions about the class material. If necessary, I will make special arrangements to meet with students outside the hours posted above. In addition, feel free to call or e-mail me with your questions.

## **COURSE OVERVIEW & OBJECTIVES:**

Tax Procedure, Penalties & Crimes is a three-credit course that provides a survey of tax procedure, including the rules for practice before the IRS under Circular 230 and various tax litigation issues. This course will also provide a survey of the tax penalties and tax crimes that transactional and controversy tax practitioners must regularly consider and manage in representing private and government clients. Transactional tax advisors need to consider penalties and crimes when structuring deals and preparing opinion letters to support those deals. Without an understanding of opinion letters and the penalty or crime risks to a client's proposed deal structure, a transactional tax attorney fails to adequately represent his client's interest. Indeed, this lawyer and the relevant law firm may themselves be at risk. Likewise, tax controversy attorneys must have a comprehensive understanding of penalties and crimes to effectively represent clients, whether in settlement negotiations, court or administrative proceedings. These attorneys must be able to identify the range of applicable penalties and crimes, address proof convincingly and understand relevant defenses.

Students in this class will examine relevant statutes, regulations and case law. The course will cover both the substantive law and procedural issues. Penalties addressed will include tax shelter, return preparer, responsible person, accuracy-related, delinquency and civil fraud. Crimes addressed will include tax evasion, false returns, false claims, and Klein conspiracies. Methods of proof and defenses to these penalties and crimes are, of course, critical to client representation and will therefore be covered.

## **CLASS ATTENDANCE & PREPARATION:**

The accreditation rules of the American Bar Association provide that law schools must announce and adhere to attendance requirements, which are examined for compliance during the septennial accreditation visits. I require that students miss no more than 2 weeks of a 14-week semester. Thus, for this class, students may miss no more than 4 classes without consequence. I consider "attendance" to encompass "adequate preparation" as well as physical presence. Thus, a failure to prepare adequately can constitute an absence.

Absence (or its equivalent—a failure to prepare) for more than 2 weeks of classes may result in a lower final grade (including the grade of "F" in egregious instances) or administrative withdrawal from the course **in my sole discretion**, depending on my evaluation of the equities of the situation that caused the excessive absences or lack of preparation.

The 2-week period is intended to account for the range of true emergencies that might arise, including personal and family illnesses, child-care problems, moot court and law review deadlines, outside work responsibilities, and employer interviews. Because such things inevitably arise unexpectedly, I highly encourage you to save what many students come to think of as "free days" for these purposes. You need not report to me the

reason for an absence; the function of the two-week period is to allow you to miss class, when necessary, without the need for me to evaluate the merits of the reason for your absence. I assume good faith on the part of students and that, when you are not in class, you have a good reason for the absence, such as illness or job interviews. You need not use the free days to observe religious holidays; such absences will constitute additional excused days if you give me notice in writing before the holiday. Please see me if absences or instances of lack of preparation begin to mount and put you at risk.

I will take attendance at the beginning of each class. **Please be in your seat ready to begin class promptly.** Attendance will be taken by roll call or by circulating the class roster for your signature. If you fail to reply during the roll call or if you fail to sign the attendance roster within the first fifteen minutes of the class, as applicable, you will be counted as absent. You will not be permitted to reply or sign the roster after class has been completed. Replying or signing the roster for another student is an Honor Code violation.

#### **CANCELLED CLASSES:**

I will make every effort to adhere to the scheduled class times. In the event I have to cancel a class, I will notify you by email.

#### **TAPE RECORDING OF CLASSES:**

Tape recording of classes is **not** permitted unless advance permission is obtained from me. Permission will be given only in the case in which a student knows in advance that he or she will miss a class and arranges for a colleague to tape it.

#### **EXAMINATION & GRADING:**

There will be one final examination at the end of the course. **The examination will be in-class, open book, and 3 hours in length.** We will discuss the examination in more detail later in the semester.

The examination grade normally will count for 100% of your final grade. Class participation, however, can move your grade to a higher grade category. As noted above, absences (including a failure to prepare) beyond the 2-week period may lower your final grade.

#### **DISABILITY ISSUES:**

If you have a disability for which you are or may be requesting an accommodation, please contact the law school administration.

## READING ASSIGNMENTS: \*

### 1. Introduction to Civil Tax Penalties

What is a “tax penalty”? How tax penalties relate to YOU—the tax practitioner. Who investigates/determines whether tax penalties should be asserted? Where to go (what to do) after civil penalties are asserted.

Reading: §§ 72(t), 6211-6214, 6532(a)(1), 7422(a)

28 U.S.C. § 1346

Flora v. U.S., 362 U.S. 145 (1957); Anderson v. Commissioner, T.C. Memo. 2009-44

### 2. The Tax Gap

What is the “Tax Gap”? How is the IRS using tax penalties to address the growing tax gap?

Reading: IRS Materials on the Tax Gap, <https://www.irs.gov/newsroom/the-tax-gap>

National Taxpayer Advocate, Preface, FY 2018 Objectives Report to Congress,  
[https://taxpayeradvocate.irs.gov/Media/Default/Documents/2018-JRC/JRC18\\_Volume1\\_Preface.pdf](https://taxpayeradvocate.irs.gov/Media/Default/Documents/2018-JRC/JRC18_Volume1_Preface.pdf)

Dave Rifkin, A Primer on the "Tax Gap" and Methodologies for Reducing It, 27 QUINNIPIAC L. REV. 375 (2009)

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\* Rather than assign material for specific days, this schedule is built around topics to be covered. This will provide flexibility in the schedule since some topics will take more time to cover than others. Many topics will take two or more classes to complete. I will announce the next reading assignment at the end of each class. Lastly, I reserve the right to amend this schedule and assign supplemental readings as the class goes forward.

**3. The "Frivolous Return Penalty"; the "Responsible Person Penalty"; and Withholding & Deposit Penalties**

Reading: §§ 6702; 6672; 6656, 6682

Treas. Reg. §§ 301.6672-1; 301.6656-1; 301.7430-5(f)

IRS Notice 2010-33

Ferguson v. U.S. (a.k.a. Musal), 484 F.3d 1068 (8th Cir. 2007)

**4. Failure to File and Failure to Pay**

Reading: §§ 6651, 6654; 6020(b); 6331(d); 6652, 6698, 6721

Treas. Reg. §§ 301.6651-1; 1.6654-1(a)(4), and -5

**5. Tax Shelter Penalties & Disclosure Provisions**

Reading: §§ 6011, 6111, 6112; 6700, 6707, 6707A, 6708; 6664; 6724; 7422(i)

Treas. Reg. §§ 1.6011-4; 301.6111-3; 301.6112-1; 301.6707-1

IRS CCA 200646016 (Nov. 20, 2006)

U.S. v. Gleason, 432 F.3d 678, 683 (6th Cir. 2005)

**6. Injunctions**

Reading: §§ 7402, 7407, 7408

U.S. v. Schiff, 379 F.3d 621 (9th Cir. 2004); SEC v. Mgmt Dynamics Inc., 515 F.2d 801 (2d Cir. 1975); U.S. v. Gleason, 432 F.3d 678 (6th Cir. 2005) [review]

## 7. Accuracy-Related Penalties

Negligence, disregard of rules and regulations, substantial understatements, substantial valuation misstatements, gross valuation misstatements, and accuracy-related penalty on underpayments with respect to reportable transactions

Reading: §§ 6662, 6662A; 6664, 6724

Treas. Reg. §§ 1.6662-2, -3, -4, -5 and -7; 1.6664-2, -4

Rev. Proc. 2011-13

U.S. v. Boyle, 469 U.S. 241 (1985); Neonatology Assoc., P.A. v. Commissioner, 115 T.C. 43 (2000)

## 8. Practice Before the IRS I

Return Preparer Penalties

Reading: §§ 6694, 6695; 6664, 6662(d)(2)(B)(ii); 6701, 6713, 7216(b)

Treas. Reg. §§ 1.6694-1, -2, -3; 1.6662-4(d)(3), (f); 1.6695-1; 301.7701-15; 301.7216-2 & -3

Rev. Proc. 2011-13 [review]

## 9. Practice Before the IRS II

OPR and Circular 230

Reading: **Circular 230, 31 C.F.R. part 10 (TD 9527)**,  
<https://www.irs.gov/pub/irs-pdf/pcir230.pdf>

**IRS summary of key Circular 230 provisions**,  
<https://www.irs.gov/newsroom/irs-provides-online-information-on-circular-230>

31 U.S.C. § 330

Loving v. IRS, 742 F.3d 1013 (D.C. Cir. 2014); Harary v. U.S., 555 F.2d 1113 (2d. Cir. 1977)

I.R.S., The Office of Professional Responsibility (OPR) At-A-Glance, <https://www.irs.gov/tax-professionals/the-office-of-professional-responsibility-opr-at-a-glance-1>

I.R.S., Frequently Asked Questions (FAQ's),  
<https://www.irs.gov/Tax-Professionals/Enrolled-Agents/Frequently-Asked-Questions-FAQs>

Kimberly Stanley, No Experience Necessary! -- Loving v. IRS and Tax Return Preparer Regulations, 2014 EMERGING ISSUES 7250 (2014).

## 10. Civil Fraud I

Proving an Underpayment: Direct and Indirect Methods of Proof

Reading: §§ 6651(f); 6663; 6664; 7454(i)

U.S. v. Marabelles, 724 F.2d 1374 (9th Cir. 1984); Holland v. U.S., 348 U.S. 121 (1954); U.S. v. Terrell, 754 F.2d 1139 (5th Cir. 1985); Taglianetti v. U.S., 398 F.2d 558 (1st Cir. 1968); Gleckman v. U.S., 80 F.2d 394 (8th Cir. 1935); U.S. v. Boulet, 577 F.2d 1165 (5th Cir. 1978)

## 11. Civil Fraud II

Finish/Recap Direct and Indirect Methods of Proof. Proving Fraudulent Intent.

Reading: §§ 6651(f); 6663

McGee v. Commissioner, 61 T.C. 249 (1973); Spies v. U.S., 317 U.S. 492 (1943); Stephenson v. Commissioner, 79 T.C. 995 (1982); Cheek v. U.S., 498 U.S. 192 (1991); McCarthy v. U.S., 394 U.S. 459 (1969)

## 12. Introduction to Criminal Tax & Title 26 Crimes and Defenses

What makes a case criminal instead of civil? Evolution of a civil case into a criminal one. Relationships within the IRS and Department of Justice. Relationship between the IRS and the Department of Justice.

Attempt to evade or defeat tax; failure to collect or pay over tax; failure to file return, supply information, or pay tax; fraud and false statements; aiding and abetting; and attempts to interfere with administration of internal revenue laws. Review methods of proof.

Reading: §§ 7201, 7202, 7203, 7206(1) and (2); 7212; 6531

**Neder v. U.S., 527 U.S. 1, 1-8, 16, 25-26 (1999); Spies v. U.S., [review]; Cheek v. U.S., [review]; U.S. v. Scharf, 558 F.2d 498 (8th Cir. 1977); U.S. v. Bishop, 412 U.S. 346 (1973); U.S. v. Reynolds, 919 F.2d 435, 435-437 (7th Cir. 1990); U.S. v. Schulman, 817 F.2d 1355 (9th Cir.1987); U.S. v. Smith, 424 F.3d 992, 996-999, 1009-1011 (9th Cir. 2005); U.S. v. Mitchell, 985 F.2d 1275, 1275-1279 (4th Cir. 1993)**

§§ 7701(a)(1); 6012, 6071, 6072, 6075(a) & (b), 6081(a), 7503; 6091; 6151, 6020; 6062, 6063, 6064, 6065

Treas. Reg. § 1.6050I-1(e)

18 U.S.C. §§ 3237(b), 3571

### **13. Title 18 Tax Crimes and Defenses**

False claims; Klein conspiracies; false statements; money laundering.

Reading: **18 U.S.C. §§ 287, 371, 1001, 1956 & 1957**

**U.S. v. Klein, 247 F.2d 908 (2d Cir. 1957)**

§ 6531

18 U.S.C. § 3282

Pinkerton v. U.S., 328 U.S. 640, 645-48 (1946); U.S. v. Gypsum Co., 438 U.S. 422, 464-65 (1978)



**14. Currency Reporting Requirements & Penalties**

Currency reporting requirements; penalties related to the currency reporting requirements Remaining time set aside for review.

Reading: § **6050I**

**31 U.S.C. §§ 5313, 5314, 5316, 5324**

**31 C.F.R. §§ 103.22, 103.27, 103.57, 103.59, 103.63**

Treas. Reg. § 1.6050I-1

31 U.S.C. §§ 5318A, 5331, 5332, 5340, 5341

31 C.F.R. §§ 103.11, 103.18, 103.23, 103.24, 103.25, 103.30,  
103.32, 103.51, 103.56, 103.90

§§ 6721, 6722, 7206(1)