New IRS Enforcement Campaign to Stop Tax Violations by Nonresident Aliens Renting and Selling U.S. Real Property

HALE E. SHEPPARD, ESQ.

In light of the IRS's new "compliance campaign," nonresident aliens and those involved with foreign owners of U.S. real property would be wise to contact experienced tax/legal professionals in order to explore the options for proactively rectifying any issues with the IRS on the most beneficial terms available.

The good news is that large numbers of foreign investors are injecting money into the U.S. economy by buying real property. The bad news is that many are not paying the correct amount of U.S. income taxes when they rent or sell such property. The IRS is hyper-aware of this problem and several others, thanks to three reports issued by the Treasury Inspector General for Tax Administration ("TIGTA") over the past decade. The IRS, following its normal playbook, announced a "compliance campaign" in March 2020 designed to correct the situation.

This article begins by explaining the unique U.S. tax rules applicable to nonresident aliens ("NRAs") renting U.S. real property, as well as those pertaining to sales of such property. After establishing that foundation, the article discusses the contents of the three TIGTA reports, focusing on the extent of the tax non-compliance and its causes. Next, the article provides more details about the IRS's new compliance and related enforcement efforts. The article concludes by exploring various options potentially available to NRAs who want to approach the IRS proactively to resolve matters on the most favorable terms possible.

Taxation of Rental Income from U.S. Real Property Held by NRAs

To appreciate the significance of this article, one must first have a basic understanding of the tax rules related to rental

HALE E. SHEPPARD, ESQ. (B.S., M.A., J.D., LL.M., LL.M.T.) is a Shareholder in the Tax Controversy Section and Chair of the International Tax Section at Chamberlain Hrdlicka. Hale defends individuals and businesses during tax audits, tax appeals, and Tax Court litigation, involving both domestic and international issues. You can reach Hale by phone at (404) 658-5441 or by e-mail at hale.sheppard@chamberlainlaw.com.

real property, located in the United States, that is held by an NRA.

Overview of General Rules

Passive income (including rental income), generated by U.S. sources, not connected with a U.S. trade or business, and received by an NRA generally is subject to a 30-percent income tax rate on the *gross* amount of income.[1] This means that the so-called withholding agent (normally the renter, lessee, or property manager) must reserve a significant portion of the total income and send it to the IRS, as opposed to the NRA. By comparison, the IRS taxes an NRA who is engaged in a U.S. trade or business at the normal graduated/progressive rates on *net* income, that is, after taking into account business-related deductions.[2]

Special rules exist for certain rental real estate. Section 871(d) provides that an NRA who obtains income from U.S. real property held for the production of income, which is not already treated as income connected with a U.S. trade or business for some reason, can elect to treat all such income (including rental income) as effectively connected income.[3] The main benefits for an NRA of making the Section 871(d) election are that he can (i) essentially convert the passive renting of U.S. real property into an active trade or business for tax purposes, (ii) avoid a flat tax rate of 30 percent on gross income, effectuated by tax withholding at source, and (iii) claim a multitude of tax deductions related to the property. Once an NRA makes a Section 871(d) election for one year, it remains in effect for all later years, unless the IRS gives the NRA permission to revoke it.[4]

An NRA who makes the Section 871(d) election reports income and deductions related to the U.S. real property on Schedule E (*Supplemental Income and Loss from Rental Real Estate, Royalties, Partnerships, S Corporations, Estates, Trusts, REMICs, etc.*) to Form 1040NR (*U.S. Nonresident Alien Income Tax Return*).

The IRS simplifies and summarizes the relevant rules for NRAs in its Publication 519:

> If you have income from real property located in the United States that you own or have an interest in and hold for the production of income, you can choose to treat all income from that property as income effectively connected with a trade or business in the United States. The choice applies to all income from real property located in the United States and held for the production of income and to all income from any interest in such property. This includes income from rents . . . . You can make this choice only for real property income that is not otherwise effectively connected with your U.S. trade or business. If you make the choice, you can claim deductions attributable to the real property income and only your net income from real property is taxed.[5]

Passive income (including rental income), generated by U.S. sources, not connected with a U.S. trade or business, and received by an NRA generally is subject to a 30-percent income tax rate on the *gross* amount of income.

Here is another example, provided by the IRS, of how making a Section 871(d) election could financially benefit an NRA. If an NRA received $36,000 of gross rental income from U.S. property during a year and did not make a Section 871(d) election, then such income would be subject to income tax of $10,800 (i.e., 30 percent x $36,000). On the other hand, if the NRA were to make the election, then gross rental income would be reduced by mortgage interest, depreciation, management fees, taxes, insurance expenses, etc., and the remaining net income amount would be taxed at the graduated/progressive rates, which might be below 30 percent.[6]

Detail about the Section 871(d) Election

Section 871, like many tax provisions, is vague about how to make the relevant election, merely stating that it "may be made only in such manner and at such time as the [IRS] may by regulations prescribe."[7] The corresponding regulations explain the election procedure in the following manner:

> An election made under this section without the consent of the [IRS] shall be made for a taxable year by *filing with the income tax return* required under Section 6012 and the regulations thereunder for such taxable year a *statement* to the effect that the election is being made. This statement shall include (a) a complete schedule of all real property, or any interest in real property, of which the taxpayer is titular or beneficial owner, which is located in the United States, (b) an indication of the extent to which the taxpayer has direct or beneficial ownership in each such item of real property, or interest in real property, (c) the location of the real property or interest therein, (d) a description of any substantial improvements on any such property, and (e) an identification of any taxable

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1 Section 871(a).

2 Section 871(b); Section 873.

3 Section 871(d); Reg. 1.871-10. Please note that many bilateral tax treaties to which the United States is a party contain a similar net-income election option. See, e.g., Article 6(5) of the U.S. Model Treaty for 2016, which states the following: "A resident of a Contracting State who is liable to tax in the other Contracting State on income from real property situated in the other Contracting State may elect for any taxable year to compute the tax on such income on a net basis as if such income were business profits attributable to a permanent establishment in such other State. Any such election shall be binding for the taxable year of the election and all subsequent taxable years, unless the competent authority of the Contracting State in which the property is situated agrees to terminate the election." Treaty issues and the related Form 8833 (Treaty-Based Return Position Disclosure under Sections 6114 or 7701(b)) are not addressed in this article.

4 Section 871(d)(1); Section 871(d)(3); Reg. 1.871-10(a).

5 IRS Publication 519 (01/19/2017), *U.S. Tax Guide for Aliens*, pg. 21.

6 TIGTA Report No. 2017-30-048 (08/23/2017), *Additional Controls Are Needed to Help Ensure that Nonresident Alien Individual Property Owners Comply with Tax Laws*, pg. 5.

7 Section 871(d)(3).

year or years in respect of which a revocation or new election under this section has previously occurred.[8]

In addition to making a proper, timely Section 871(d) election with the IRS, the NRA must adequately inform the withholding agent (e.g., the renter, lessee, or property manager) of his current tax stance. The NRA does this by supplying the withholding agent a Form W-8ECI (*Certificate of Foreign Person's Claim that Income Is Effectively Connected with the Conduct of a Trade or Business in the United States*), which notifies such agent that the rental income should be exempt from the standard 30-percent withholding.[9] If the NRA does not make a Section 871(d) election, then he must provide the withholding agent with a Form W-8BEN (*Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding and Reporting – Individuals*), thereby confirming that the gross rental income will be subject to 30-percent withholding in the United States, or some lower rate contemplated by treaty.[10]

Cases dealing directly, and substantively, with the Section 871(d) election are scarce.

Need for a Timely Tax Return

Generally, an NRA cannot claim deductions unless he files a true, accurate, and timely Form 1040NR.[11] This includes deductions related to rental real estate that become available to NRAs after making a Section 871(d) election. The concept of what "timely" filing means is unique in this context. If an NRA filed a Form 1040NR for the previous year, or if the current year is the first for which the NRA is required to file a Form 1040NR, then the NRA must file it within 16 months of the due date.[12] However, if the current year is not the first year for which the NRA was required to file a Form 1040NR and the NRA did not file a Form 1040NR for the previous year, then the deadline for the current year is, the earlier of, 16 months from the due date or the date on which the IRS mails a notice to the NRA advising him that Forms 1040NR have not been filed and that he may not claim most deductions and/or credits.[13]

Summing It All Up

Cases dealing directly, and substantively, with the Section 871(d) election are scarce. One of the few is *Espinosa*, 107 TC 146 (1996), which does a good job of summarizing the tax/legal standards and applying the facts.

The taxpayer in *Espinosa* was an NRA. He owned two rental properties in the United States. They both produced rental income, but, after taking into account the relevant expenses, each property showed a net loss. The taxpayer was required to file a Form 1040NR annually but failed to do so.

The IRS sent the taxpayer a letter in November 1992, inquiring about Forms 1040NR and indicating that the IRS would prepare substitute for returns ("SFRs") based on the available data if he did not voluntarily file by December 1992. The taxpayer did not so file. In January 1993, the IRS sent another letter to the taxpayer saying that it would prepare SFRs if he refused to file Forms 1040NR within 20 days. Again, the taxpayer did not react. The result of this inaction was a notice from the IRS in March 1993 advising the taxpayer that it had prepared SFRs, without giving him the benefit of any deductions.

Later, in October 1993, the taxpayer actually filed all outstanding Forms 1040NR, which reflected net losses from the two rental properties. Each Form 1040NR contained a Section 871(d) election. In January 1994, the IRS issued a Notice of Deficiency covering four years, (i) ignoring the late Forms 1040NR filed by the taxpayer, along with the Section 871(d) election enclosed with the first one, (ii) using the SFRs to determine the taxes due, and (iii) asserting delinquency penalties and estimated tax penalties. The taxpayer filed a timely Petition with the Tax Court to dispute the Notice of Deficiency.

The taxpayer in *Espinosa* acknowledged to the Tax Court that Section 874(a) disallows deductions in situations where taxpayers do not file timely Forms 1040NR. He nevertheless argued that filing Forms 1040NR after the IRS sent multiple notices inquiring about the missing Forms 1040NR, but before the IRS issued a Notice of Deficiency, constitutes a timely filing, such that he should be entitled to all the deductions warranted after making a Section 871(d) election. The Tax Court rejected the taxpayer's position, regardless of the harsh outcome, on the following grounds:

> We hold in the circumstances of this case that the submission of returns by [the NRA] after [SFRs] had been prepared by [the IRS], and after [the NRA] had been notified that no deductions are allowable but prior to the issuance of the notice of deficiency, is insufficient to avoid the sanction of Section 874(a). We recognize that the application of Section 874(a) in this case may appear draconian. That result, however, flows from the nature of the statute. As we have suggested, were we to hold otherwise, we essentially would reward [the NRA] for ignoring the repeated requests [by the IRS] that he comply with the filing requirements of the Code.[14]

Taxation of Sales Proceeds from U.S. Real Property by NRAs

The preceding segment of this article explained the rules related to NRAs *renting* U.S. real property, while the focus here is on duties where NRAs *sell* such property.

Overview

Congress passed the Foreign Investment in Real Property Tax Act ("FIRPTA") in 1980, which it later supplemented with the Deficit Reduction Act and the Protecting Americans from Tax Hike Acts.[15] Together, these laws impose income tax on foreign persons selling U.S. real property interests, which the IRS collects by essentially "deputizing" U.S. withholding agents, against their will, to retain and remit to the IRS a certain percentage of the gross sales proceeds.[16] How much

must be withheld depends on various factors, including whether the seller is an NRA or foreign entity, the amount of the sale, the year of the sale, and the character of the property (i.e., commercial or residential). The current withholding percentage, when dealing with NRA sellers, ranges from $0 to 15 percent of the gross sales proceeds.[17] The legislative history from several decades ago explains the need for withholding:

> A major problem with FIRPTA under prior law was that it could often be easily evaded. Since the tax was not due until a tax return was filed after the end of the year, a foreign person could sell his or her U.S. real estate, take the proceeds out of the United States, and since he or she was beyond the jurisdiction of the United States, not pay any tax to the United States on the sale. Moreover, through nominees and foreign corporations established in tax havens, he or she could reinvest these untaxed proceeds back in the United States with impunity. Requiring the persons with control over the amount paid to withhold tax is the method used to ensure collection of tax on other payments of income to foreign persons, and is used by almost all countries.[18]

The IRS still stands behind the utility of withholding (and over-withholding) taxes on sales proceeds destined for foreign sellers for the same reasons:

> The purpose [of enacting Section 1445] was to impose a withholding tax on the anticipated taxes due on any capital gain from the sale of a U.S. real property interest by a foreign seller. This is generally the only way the [IRS] has to ensure the collection of these taxes. Once the foreign seller and the sale proceeds leave the United States, it is often difficult for the IRS to enforce collection of any delinquent taxes due. When this happens, the foreign sellers may be able to evade payment of taxes.[19]

FIRPTA serves as an incentive for foreign sellers to file tax returns with the IRS, which means Forms 1040NR in the case of NRAs, in order to report income from the sale and to claim credits (and possibly a refund) for any taxes already withheld and remitted to the IRS by the U.S. withholding agent.

Filing and Processing Forms 8288 and Forms 8288-A

Transactions subject to FIRPTA, unsurprisingly, trigger various filing requirements with the IRS. The two main returns for buyers of U.S. real property from foreigners are Form 8288 (*U.S. Withholding Tax Return for Dispositions by Foreign Persons of U.S. Real Property Interests*) and Form 8288-A (*Statement of Withholding on Dispositions by Foreign Persons of U.S. Real Property Interests*).[20] Buyers must complete and file Form 8288, enclosing Form 8288-A, within 20 days of the transfer of the relevant property and remit the taxes withheld.[21] If the buyer violates these duties, then the buyer becomes liable for the taxes, as well as any penalties and interest charges.[22] To put things into perspective, buyers filed 19,817 Forms 8288 in 2017, which represents tax withholding of approximately $1.6 billion.[23]

Buyers must send Forms 8288 and Forms 8288-A to a special FIRPTA Unit, where a tax examiner enters the data into the so-called FIRPTA Database.[24] The goal of the FIRPTA Database is to allow the IRS to verify the tax credits later claimed by the foreign sellers when they file their Forms 1040NR, often demanding a refund because of excessive withholding. If a Form 8288-A received by the FIRPTA Unit is incomplete or not attached to a Form 8288, or if there is a mismatch between the sales proceeds and amount of taxes withheld shown on Form 8288-A and Form 8288, then the tax examiner sends a letter to the buyer seeking missing data or clarification. If the buyer does not respond to the letter, the tax examiner simply inputs into the FIRPTA Database the information, perhaps inaccurate, as stated on Form 8288-A.[25]

Third Parties Must File Form 1099-S

In addition to buyers filing Forms 8288 and Forms 8288-A, their Settlement Agents (i.e., the persons responsible for closing real estate transactions, such as title and/or escrow companies) must file Forms 1099-S (*Proceeds from Real Estate Transactions*) with the IRS.

Form 8288-B to Seek Withholding Waiver or Reduction

A buyer or foreign seller can apply for a so-called Withholding Certificate, which allows for a complete exemption from, or reduction of, tax withholding.[26] They apply by filing a Form 8288-B (*Application for Withholding Certificate for Dispositions by Foreign Persons of a U.S. Real Property Interests*) with the FIRPTA Unit.[27] Timing is important here. If the Form 8288-B is submitted *on or before* the date of the property transfer *and* the IRS issues a Withholding Certificate indicating that the foreign seller is exempt from tax withholding, then the buyer does not need to file Form 8288.[28] However, if the Form 8288-B is filed *after* the transfer *or* if the Withholding Certificate

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8 Reg. 1.871-10(d)(1)(ii). See also IRS Publication 519, pg. 21.

9 Section 1441(c).

10 Section 1441(a).

11 Section 874(a); Reg. 1.874-1(a); Reg. 1.874-1(b).

12 Reg. 1.874-1(b)(1). The due date is set forth in Section 6072(c).

13 Reg. 1.874-1(b)(1).

14 Espinosa, 107 TC 146, 158 (1996).

15 Subtitle C of Title XI of the Omnibus Reconciliation Act of 1980, Public Law 96-499; Tax Reform Act of 1984, Public Law 98-369; Consolidated Appropriations Act of 2016, Public Law 114-113.

16 Section 1445.

17 Section 1445(a).

18 U.S. Joint Committee on Taxation JCS-41-84 (12/31/1984), *General Explanation of the Revenue Provisions of the Deficit Reduction Act of 1984*, pg. 406.

19 TIGTA Report No. 2014-30-051 (09/03/2014), *Additional Actions Are Needed to Help Ensure Taxpayer Compliance with the Foreign Investment in Real Property Tax Act*, pg. 1.

20 Copy A of Form 8288-A is filed with the IRS, Copy B goes to the foreign person subject to tax withholding, and Copy C is retained by the U.S. withholding agent.

21 Reg. 1.1445-1(c)(1); Reg. 1.1445-5(b)(5)(i).

22 Reg. 1.1445-4(f)(4); Reg. 1.1445-1(e)(2)(i) and (ii).

23 TIGTA Report No. 2020-40-014 (03/09/2020), *Millions of Dollars in Discrepancies in Tax Withholding Required by the Foreign Investment in Real Property Tax Act Are Not Being Identified or Addressed*, pg. 2.

24 Reg. 1.1445-1(c)(1).

25 TIGTA Report No. 2020-40-014, *supra* note 23, pg. 3.

26 Section 1445(b)(4); Reg. 1.1445-3(a).

27 Rev. Proc. 2003-35.

28 Reg. 1.1445-1(c)(2)(i)(A) and (B).

only provides for a reduced withholding rate, then the buyer must file a Form 8288 and attach the Withholding Certificate.

Filing Forms 1040NR to Claim Tax Refunds

Foreign sellers are keen to claim their tax credits for the amounts forcibly withheld by the U.S. withholding agents and remitted to the IRS pursuant to FIRPTA. As indicated above, in the case of foreign individuals, they do so by filing a Form 1040NR and attaching a copy of the Form 8288-A stamped/approved by the IRS.[29] If the tax liability shown on Form 1040NR is less than the amount previously withheld, then the NRA gets a refund.[30] This process involves big numbers: NRAs filed 17,201 Forms 1040NR for 2017 alone, claiming tax credits of approximately $540 million.[31]

The IRS tries to avoid errors in the FIRPTA context, of course. Tax examiners located in the group known as IRS Error Resolution are charged with verifying 100 percent of the tax credits claimed on Forms 1040NR. They do so by matching the tax credits claimed on Forms 1040NR, filed by NRAs, with the corresponding information available in the FIRPTA Database derived from Forms 8288-A and Withholding Certificates filed by the buyers. In situations where an NRA files a Form 1040NR claiming a credit/refund and there is no relevant information in the FIRPTA Database, the IRS still allows the tax credit, provided that the NRA can provide supporting documentation for the figures, such as a Settlement Statement from the transaction.[32] Notably, the IRS issued guidance in 2010 stating that foreign sellers should get the tax credits, as long as they provide supporting documentation, even if the buyers have not filed Form 8288, have not filed Form 8288-A, and have not paid the taxes to the IRS.[33]

Analysis of Three TIGTA Reports

TIGTA has issued three separate reports over the past decade criticizing different aspects of IRS enforcement of rules related to NRAs renting or selling U.S. real property. Such reports are dense and full of statistics, as one would expect. Only those aspects germane to this article are discussed below.

First TIGTA Report – Issued in 2014

The First TIGTA Report analyzed the issues from the perspective of Form 1099-S and concluded that the IRS needed much improvement:

> IRS management cannot provide assurance that foreign sellers subject to the FIRPTA are in compliance because they have been unsuccessful in their attempts to identify transactions that are subject to the law. Our analysis of Form 1099-S data indicates that there may be *significant noncompliance* with the FIPRTA filing and payment requirements.[34]

TIGTA reviewed thousands of Forms 1099-S, filed by Settlement Agents, and identified transactions involving sellers who were NRAs. In 53 percent of such transactions, the buyer had not filed a Form 8288 or Form 8288-A, and nobody had filed a Form 8288-B seeking a Withholding Certificate. This translated into about $513 million of real property transactions on which NRAs might have avoided U.S. income tax.[35]

Another problem identified in the First TIGTA Report was allowing NRA sellers to claim excessive tax credits, which precipitated erroneous refunds. The most pronounced problem was approval of credits in situations where NRAs did not present adequate supporting documentation to the IRS, such as a Settlement Statement. TIGTA calculated the financial effect over five years, concluding that the oversights by the IRS, in terms of unwarranted credits, could deprive the country of nearly $12.8 million in tax revenues.[36]

The First TIGTA Report also devoted significant attention to the lack of follow-through by the IRS, after it had either (i) denied a Form 8288-B from a foreign seller soliciting an exemption from tax withholding or (ii) issued a Withholding Certificate authorizing only a partial reduction in tax. TIGTA found that buyers did not file Forms 8288 and did not withhold any taxes in 27 percent of the situations where the IRS denied Forms 8828-B and in eight percent of the cases where the IRS granted only partial tax reductions. Extrapolating over five years, TIGTA estimated that such non-compliance initiated by foreign sellers, coupled with no enforcement by the IRS, would result in $44.8 million in unpaid taxes.[37] The First TIGTA Report went on to explain that the IRS already had in place a computer process capable of identifying instances where buyers did not file Forms 8288 after the IRS had rejected Forms 8288-B by foreign sellers.[38] However, the IRS had dropped the ball, so to speak:

> [IRS management] discovered that the report needed to identify those buyers that did not file a Form 8288 after the Form 8288-B was denied was not generating. As a result, IRS personnel did not follow up with these buyers to ensure their compliance. In addition, a lack of procedures to follow up on Form 8288-B requests that were approved for a reduced withholding amount prevented the IRS from identifying non-compliance in this area of the population. Without stronger monitoring or procedural controls, the IRS cannot ensure buyer compliance with Form 8288 filing and FIRPTA withholding payment requirements.[39]

Second TIGTA Report – Issued in 2017

The Second TIGTA Report paints a bleak picture of U.S. tax compliance by NRAs holding U.S. rental property. It begins by clarifying the magnitude of the issue; NRAs have purchased a significant amount of U.S. real property in recent years, a large portion of which generates rental income. The Second TIGTA Report indicated that NRAs purchased $34.8 billion in 2013, $45.5 billion in 2014, $54.4 billion in 2015, and $43.5 billion in 2016.[40]

Main categories of non-compliance. The Second TIGTA Report identified four principal problems.

First, TIGTA discovered that a considerable number of NRAs were claiming net income treatment on the annual Forms 1040NR, despite the fact that they never made a proper Section 871(d) election. TIGTA studied a number of first-time Forms 1040NR reporting rental income and expenses on Schedule

E. The Section 871(d) election is only made the first year and then remains in effect, unless later revoked with the permission of the IRS. Of the Forms 1040NR analyzed, only 32 percent of the NRAs included a Section 871(d) election, and only six of the elections were complete. The remaining 68 percent deducting expenses related to U.S. rental property did not enclose a Section 871(d) election with their Forms 1040NR. Based on these statistics, TIGTA estimated that approximately 12,000 NRAs failed to comply with the Section 871(d) regulations in just one year.[41]

What does all this mean from an economic perspective? According to the Second TIGTA Report, the NRAs who inappropriately acted as if they had made a Section 871(d) election (when this was not the case) reported gross rental income of $1.78 million in one year. They then improperly reduced this gross amount by $1.88 million in rental expenses, the result of which was that 58 percent of the non-compliant NRAs paid no U.S. income tax or they got a tax refund. In reality, because of their failure to make a proper Section 871(d) election, the NRAs should have been subject to the flat 30-percent tax on gross income, which would have yielded the IRS approximately $534,000 in taxes (i.e., 30 percent of $1.78 million).[42] When these figures were projected over the entire population, TIGTA estimated that the IRS loses about $56 million per year.[43]

Second, TIGTA learned that some NRAs are double-dipping, taking inconsistent tax positions in order to acquire two improper benefits. This is made possible, according to the Second TIGTA Report, because the IRS's systems do not adequately input or track the data about U.S. rental property that is supplied to the IRS on the first-year Section 871(d) election statement. The initial benefit for certain NRAs is that they deduct rental expenses annually and subject the remaining net income to the graduated/progressive tax rates. The additional benefit comes when the property is later sold. Some unscrupulous NRAs conveniently forget to reduce their basis in the property by the amount of the depreciation expenses that they took over the years, thereby diminishing the total gain when they sell the property. In short, some NRAs recognize the Section 871(d) election (even if they did not properly claim it) for purposes of reducing annual taxes on rental income and then fail to acknowledge such election when it comes time to sell.[44]

FIRPTA serves as an incentive for foreign sellers to file tax returns with the IRS in order to report income from the sale and to claim credits (and possibly a refund) for any taxes already withheld.

Third, some NRAs never file Forms 1040NR, never notify withholding agents that they should be subject to a 30 percent tax rate on gross income, and thus never pay any U.S. income taxes on rental income. Putting numbers to this phenomenon, TIGTA calculates that 13 percent of NRAs with U.S. real property simply fail to file Forms 1040NR, which triggers approximately $61 million in unreported rental income annually.[45]

Fourth, many withholding agents (i.e., renters, lessees, and property managers) are doing a deplorable job of collecting taxes on behalf of the IRS and of meeting their information-reporting duties. Withholding agents must file Forms 1042-S (*Foreign Person's U.S. Source Income Subject to Withholding*) for each tax year in which rent is paid to NRAs, even when the NRA is exempt from withholding. They must also file Form 1042 (*Annual Withholding Tax Return for U.S. Source Income of Foreign Persons*) if taxes were actually withheld from the rental payments and remitted to the IRS. The Second TIGTA Report indicates that non-compliance in this area is rampant. Indeed, only 3.6 percent of the NRAs owning U.S. real property who reported rental income and expenses on Schedule E of their Forms 1040NR were supported by a corresponding Form 1042-S filed by the withholding agent.[46]

Solutions – action items for the IRS. The Second TIGTA Report identified a few proposals for enhancing compliance by NRAs, which the IRS embraced. Those ideas included (i) revising Form 1040NR, such that taxpayers can make the Section 871(d) election there by simply checking a box, (ii) creating a legal presumption that reporting of rental income and expenses on Schedule E to Form 1040NR constitutes an election, and (iii) implementing a "compliance initiative" to address the problems caused by NRAs who do not properly report U.S. rental income.[47]

Third TIGTA Report – Issued in 2020

NRAs caused most of the non-compliance described in the Second TIGTA Report, but the problems addressed in the Third TIGTA Report are attributable to the IRS.

Problems caused by IRS procedures and personnel. TIGTA took a sampling from the FIRPTA Database and identified, for just one year, approximately 3,000 buyers of real property from foreign persons for which the tax withholding did not match the taxes assessed. The IRS

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29 Reg. 1.1445-1(f)(1); Reg. 1.1445-5(b)(7).
30 Reg. 1.1445-1(f)(1).
31 TIGTA, *supra* note 23, pg. 4.
32 Reg. 1.1445-1(f)(3)(i).
33 Chief Counsel Advisory 201028040 (07/16/2010).
34 TIGTA, *supra* note 19, pg. 4 (emphasis added).
35 *Id.*, pgs. 8-9.
36 *Id.*, pg. 17.
37 *Id.*, pg. 19.
38 *Id.*, pg. 20.
39 *Id.*, pg. 20.
40 TIGTA, *supra* note 6, pgs. 2-3.
41 *Id.*, pgs. 7-8.
42 *Id.*, pgs. 8-9.
43 *Id.*, pg. 9.
44 *Id.*, pgs. 11-12.
45 *Id.*, pgs. 18-19.
46 *Id.*, pgs. 15-16.
47 *Id.*, pg. 20.

divides these inconsistences into two categories, situations where the withholding figures on Forms 8288 and Forms 8288-A were inexplicably different, and those where buyers simply failed to file Form 8288 or Form 8288-A.[48] These discrepancies triggered sizable figures, with indications of a potential tax shortfall eclipsing $688 million.[49] The Third FIRTA Report pointed to errors and omissions by tax examiners in the FIRPTA Unit, as well as the issuance of inconsistent guidance by the IRS, as the main causes of the problem.[50]

TIGTA also analyzed Forms 8288 filed for 2017 and 2018, and found that the IRS had not assessed more than $264 million in withholding taxes due under FIRPTA. TIGTA pointed to two major triggers, one of which was the IRS allowing foreign sellers to benefit from a tax reduction or exemption, even though an application for a Withholding Certificate (i.e., Form 8288-B) was not filed with the IRS *on or before* the property transfer, as required. The second cause was more mundane, i.e., processing errors by tax examiners.[51]

Next, TIGTA turned its attention to Forms 1040NR filed by NRAs claiming a tax credit for amounts withheld at source upon the property sale. It determined that, because of errors by tax examiners, NRAs might have received more than $60 million in tax credits, in 2017 alone, to which they were not legally entitled.[52]

Finally, TIGTA examined Forms 1099-S filed by Settlement Agents, which revealed that a considerable number of buyers of real property from NRAs neglected to file Forms 8288. It estimated potential tax loss to the IRS, based on the statistical sample, at approximately $22 million each year.[53]

Solutions – action items for the IRS. The Third TIGTA Report features several recommendations to the IRS, many of which focus on increased training of tax examiners, improved processes, etc. A few of the recommendations, though, center on actions against NRAs who benefitted from improper FIRPTA implementation. For instance, in response to a recommendation from TIGTA about credit recovery, the IRS warned that it would review relevant Forms 1040NR, information in the FIRPTA Database, Withholding Certificates, and Settlement Statements to identify NRAs who received excessive credits and/or refunds. The IRS indicated its intention to seek recoupment of the related amounts through deficiency procedures in situations where the assessment-period remains open.[54]

The First TIGTA Report analyzed the issues from the perspective of Form 1099-S and concluded that the IRS needed much improvement.

IRS Launches Compliance Campaign

It comes as no surprise that, after TIGTA issues three reports identifying enforcement shortcomings when it comes to NRAs renting or selling U.S. property, the IRS announced a new "compliance campaign" in March 2020.[55] This latest effort by the IRS supplements existing enforcement activities focused on NRAs and their possible violations in terms of tax credit claims, deductions, and treaty-based positions.[56] It also is consistent with another "FIRPTA campaign under development," as subtly mentioned in the Third TIGTA Report.[57] A flood of IRS audits usually begins soon after the introduction of a compliance campaign, and NRAs with non-compliance related to U.S. real property should expect nothing different.

Proactive Options for Taxpayers

In light of the IRS's burgeoning compliance campaign, most NRAs, except perhaps those with extreme risk tolerances or complete ignorance of the current environment, will be analyzing their options for rectifying issues with the IRS, on the most favorable terms possible, before an audit or investigation begins.

Possibilities for NRAs with Rental Income Issues

The primary targets of the IRS's new enforcement likely will be (i) NRAs who are claiming net income treatment on their annual Forms 1040NR without first making a proper Section 871(d) election, and (ii) NRAs who do not file Forms 1040NR, do not provide Forms W-8BEN to allow tax withholding on gross income, and, thus do not pay U.S. income taxes on the rental income they receive. Several possible options are addressed below.

Solutions for NRAs who filed Forms 1040NR but made no election. NRAs claiming net income treatment on their annual Forms 1040NR without making a proper Section 871(d) election have two main possibilities.

Making a late election pursuant to the regulations: NRAs might file Forms 1040X to make the Section 871(d) election retroactively, without seeking advanced permission from the IRS. The regulations provide detail about the time-period during which an NRA can make a late Section 871(d) election, as follows:

> [An NRA] may, for the first taxable year for which the election under this section is to apply, make the initial election at any time before the expiration of the period prescribed by Section 6511(a), or by Section 6511(c) if the period for assessment is extended by agreement, for filing a claim for credit or refund of the tax imposed by chapter 1 of the Code for such taxable year. This election may be made without the consent of the [IRS].[58]

What does this mean, exactly? Generally, a claim for refund or credit generally must be filed by a taxpayer within three years from the time that the relevant tax return was filed (regardless of whether the relevant tax return was timely filed or late), or within two years from the time that the relevant taxes were paid, whichever period expires

later.[59] Here is an example of how this might function. If an NRA filed Form 1040NR for Year 1 on October 15 of Year 2 and was oblivious to the need to attach a statement making a Section 871(d) election, he would have until October 15 of Year 5 to file an amended Form 1040NR enclosing the late election for Year 1. Since it is effective for all subsequent years, the retroactive election for Year 1 would allow net income treatment in Year 2, Year 3, and so forth.

Making a late election via Section 9100 relief: If an NRA is unable to file a retroactive election to cover all affected years because the first Form 1040NR was filed beyond the general refund period, or if the NRA wants the explicit, advanced blessing of the IRS, another option exists: Seeking a private letter ruling ("PLR") from the IRS National Office pursuant to Reg. 301.9100-3. This is commonly known as getting "Section 9100 relief."

The IRS has discretion to grant reasonable extensions for filing certain elections.[60] The regulations provide that extension requests "will be granted" when the taxpayer establishes that (i) the taxpayer acted reasonably and in good faith, and (ii) granting the extension will not prejudice the interests of the U.S. government.[61] These phrases have special meanings within the context of Section 9100 relief, of course, and a deep dive into the relevant requirements exceeds the scope of this article.

Solutions for NRAs who did not file Forms 1040NR. As indicated earlier in this article, Section 874(a) generally deprives an NRA of the deductions related to U.S. rental property unless he files a timely Form 1040NR.[62] The IRS can waive the timely filing duty, though, if the NRA demonstrates that he acted reasonably and in good faith.[63] The IRS considers the following factors in making its decision: (i) whether the NRA voluntarily approaches the IRS before it discovers the missing Form 1040NR; (ii) whether the NRA was aware of his ability to file a "protective" Form 1040NR; (iii) Whether the NRA filed Forms 1040NR for earlier years; (iv) whether, after exercising reasonable diligence, the NRA was understandably unaware of the duty to file Form 1040NR; (v) whether the failure to file Form 1040NR was due to intervening events beyond the NRA's control; and (vi) whether other mitigating or exacerbating factors exist.[64] The regulations provide several examples about how these rules function, including the following two, which emphasize the importance of non-compliant NRAs approaching the IRS proactively.[65]

> *Example (1). [NRA] discloses own failure to file.* In Year 1, A became a limited partner with a passive investment in a U.S. limited partnership that was engaged in a U.S. trade or business. During Year 1 through Year 4, A incurred losses with respect to A's U.S. partnership interest. A's foreign tax advisor incorrectly concluded that because A was a limited partner and had only losses from A's partnership interest, A was not required to file a U.S. income tax return. A was aware neither of A's obligation to file a U.S. income tax return for those years nor of A's ability to file a protective return for those years. A had never filed a U.S. income tax return before. In Year 5, A began realizing a profit rather than a loss with respect to the partnership interest and, for this reason, engaged a U.S. tax advisor to handle A's responsibility to file U.S. income tax returns. In preparing A's U.S. income tax return for Year 5, A's U.S. tax advisor discovered that returns were not filed for Year 1 through Year 4. Therefore, with respect to those years for which applicable filing deadlines [had passed], A would be barred [under Section 874(a)] from claiming any deductions that otherwise would have given rise to net operating losses on returns for these years, and that would have been available as loss carryforwards in subsequent years. At A's direction, A's U.S. tax advisor promptly contacted the appropriate examining personnel and cooperated with the [IRS] in determining A's income tax liability, for example, by preparing and filing the appropriate income tax returns for Year 1 through Year 4 and by making A's books and records available to an [IRS] examiner. A has met the standard . . . for waiver of any applicable filing deadlines.
>
> *Example (5). IRS discovers [NRA's] failure to file.* In Year 1, A, a computer programmer, opened an office in the United States to market and sell a software program that A had developed outside the United States. Through A's personal efforts, U.S. sales of the software produced income effectively connected with a U.S. trade or business. A had extensive experience conducting similar business activities in other countries, including making the appropriate tax filings. A, however, was aware neither of A's obligation to file a U.S. income tax return for those years, nor of A's ability to file a protective return for those years. A had never filed a U.S. income tax return before. Despite A's extensive experience conducting similar business activities in other countries, A made no effort to seek advice in connection with A's U.S. tax obligations. A failed to file either U.S. income tax returns or protective returns for Year 1 and Year 2. In November of Year 3, an [IRS] examiner asked A for an explanation of A's failure to file U.S. income tax returns. A immediately engaged a U.S. tax advisor, and cooperated with the [IRS] in determining A's income tax liability, for example, by preparing and filing the appropriate income tax returns for Year 1 and Year 2 and by making A's books and records available to the examiner. A did not present evidence that intervening

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[48] TIGTA, *supra* note 23, pg. 6.
[49] *Id.*, pg. 6.
[50] *Id.*, pgs. 6-8.
[51] *Id.*, pgs. 9-12. See also Reg. 1.445-3.
[52] TIGTA, *supra* note 23, pg. 12.
[53] *Id.*, pg. 13.
[54] *Id.*, 13.
[55] Velarde, "Latest LB&I Campaign Targets Nonresident Rental Income," Federal Tax Notes Today, Document No. 2020-11378 (03/26/2020).
[56] https://www.irs.gov/businesses/corporations/lbi-active-campaigns.
[57] TIGTA, *supra* note 23, pg. 32.
[58] Reg. 1.871-10(d)(1)(i).
[59] Section 6511(a); Reg.301.6511(a)-1(a).
[60] Reg. 301.9100-1(c).
[61] *Id.*
[62] Section 874(a); Reg. 1.874-1(a); Reg. 1.874-1(b).
[63] Reg. 1.874-1(b)(2).
[64] Reg. 1.874-1(b)(2)(i).
[65] Reg. 1.874-1(b)(3).

events beyond A's control prevented A from filing a return, and there were no other mitigating factors. A has not met the standard . . . for waiver of any applicable filing deadlines.

Possibilities for NRAs with U.S. Property Sales Issues

Judging from the Third TIGTA Report, the IRS likely will focus its scrutiny on (i) NRAs who did not file Forms 1040NR, did not notify the property buyer or Settlement Agent that they were subject to withholding, and thus did not pay any U.S. income tax on the sales proceeds, and (ii) NRAs who benefitted from reduced tax liabilities or received a refund by claiming excessive tax credits on Forms 1040NR. NRAs in this situation might consider whether they can voluntarily approach the IRS in one of the manners discussed below.

Filing qualified amended returns. NRAs who filed a Form 1040NR claiming questionable tax credits related to FIPRTA withholding might consider filing a qualified amended return ("QAR").[66]

In situations where a tax underpayment is attributable to one of several things, the IRS generally can assert an accuracy-related penalty equal to a percentage of the tax underpayment.[67] The standard penalty is 20 percent of the underpayment amount.[68] In the case of an individual taxpayer, an "underpayment" generally means the difference between the tax liability that the taxpayer reported on his Form 1040 and the tax liability that should have been reported, if the taxpayer had completed his Form 1040 correctly.[69] For instance, where the taxpayer's true tax liability was $100,000 but he only reported $80,000 on his Form 1040, then the IRS ordinarily could assert a penalty of $4,000 (i.e., a $20,000 tax understatement multiplied by 20 percent).[70]

A little-known mechanism exists whereby a taxpayer can reduce or eliminate the tax "underpayment" *after* filing the original Form 1040 with the IRS. This is called a QAR. In essence, if a taxpayer files a Form 1040 and later realizes that it resulted in a tax underpayment, he has a limited opportunity to submit a QAR to rectify the situation. The purpose of the QAR rules was "to encourage voluntary compliance by permitting taxpayers to avoid accuracy-related penalties by filing a [Form 1040X] before the IRS begins an investigation of the taxpayer or the promoter of a transaction in which the taxpayer participated."[71]

According to the regulations, for purposes of determining the applicability or size of accuracy-related penalties, the tax liability shown on the original Form 1040 includes the amount of additional tax reflected on the QAR.[72] Modifying the basic example noted above, if the taxpayer filed a Form 1040 showing a tax liability of $80,000 but subsequently submitted a QAR indicating a revised liability of $100,000, then no "underpayment" would exist, and the IRS would thus have no grounds for asserting an accuracy-related penalty.[73]

A Form 1040X will *not* be a QAR, unless the NRA files it before *any* of the following:[74]

- The date on which the IRS contacts the taxpayer concerning a civil examination or criminal investigation with respect to the relevant tax return.[75]
- The date on which the IRS contacts "any person" concerning a tax shelter promoter investigation under Section 6700 for an activity with respect to which the taxpayer claimed any tax benefit directly, or indirectly through an entity, plan, or arrangement.[76]
- In the case of items attributable to a pass-through entity (i.e., partnership, subchapter S corporation, estate, trust, regulated investment company, real estate investment trust, or real estate mortgage investment conduit), the date on which the IRS first contacts the pass-through entity in connection with the civil examination of the relevant return, such as Form 1065 (*U.S. Return of Partnership Income*).[77]
- The date on which the IRS serves a summons relating to the tax liability of a person, group, or class that includes the taxpayer (or a pass-through entity of which the taxpayer is a partner, shareholder, beneficiary, or holder of a residual interest in a real estate mortgage investment conduit) with respect to an activity for which the taxpayer claimed any tax benefit on his Form 1040, directly or indirectly.[78]
- The date on which the IRS announces a settlement initiative to compromise or waive penalties, partially or completely, with respect to a listed transaction, and the taxpayer participated in the listed transaction during the relevant year(s).[79]

One of the biggest challenges for taxpayers is convincing the IRS and/or the courts that the Form 1040X they file constitutes a QAR, as this term is narrowly defined.[80] For example, in *Perrah*, TCM 2002-283, the Tax Court rejected QAR status because the Forms 1040X were filed with the Service Center after the IRS had commenced an examination of the taxpayer. Likewise, in *Wilkerson*, TC Summ. Op. 2004-99, the Tax Court refused to classify Forms 1040X as QARs when the taxpayer filed them with the Appeals Office after the IRS issued a Notice of Deficiency and after the taxpayer filed a Petition with the Tax Court. Finally, in *Bergmann*, 137 TC 136 (2011), the Tax Court held that the taxpayer had not filed QARs because, by the time the Forms 1040X reached the IRS, it had already started a promoter investigation and issued summonses related to the pertinent transactions and years.[81]

Approaching the IRS under newest disclosure program. Another potential option for NRAs, particularly those who intentionally declined to file Forms 1040NR in the first place and those who took steps to subvert the U.S. tax system after the IRS rejected their Form 8288-B seeking a withholding exemption, might be to participate in the updated voluntary disclosure practice ("UVDP").

The IRS introduced the UVDP in late 2018 as it terminated the long-standing Offshore Voluntary Disclosure Program.[82] The UVDP applies to all types of taxes, including income, gift, estate, employment, excise, etc.,

and it covers both international and purely domestic matters. According to the IRS, the objective of the UVDP is "to provide taxpayers concerned that their conduct is willful or fraudulent, and that may rise to the level of tax and tax-related criminal acts, with a means to come into compliance with the law and potentially avoid criminal prosecution."[83] The settlement terms under the UVDP are not terribly beneficial to taxpayers from a financial perspective, but participation should achieve one key goal, avoidance of criminal sanctions.

UVDP cases generally cover the most recent six closed tax years, though exceptions exist. For instance, if the IRS and taxpayer cannot resolve a case by mutual agreement, then the Revenue Agent "has discretion to expand the scope to include the full duration of the noncompliance and may assert maximum penalties under the law with the approval of management."[84] Conversely, in situations where the non-compliance lasted fewer than six years, the scope can be limited to just those years with issues.[85]

Generally, the IRS will assert a civil fraud penalty, equal to 75 percent of the tax liability, to the one year during the disclosure period with the highest tax liability.[86] In "limited circumstances," Revenue Agents may apply the civil fraud penalty to more than one year, up to all six years, "based on the facts and circumstances of the case."[87] Additionally, Revenue Agents can impose civil fraud penalties "beyond six years" if taxpayers fail to cooperate and resolve the audit by agreement.[88] Taxpayers are "not precluded" from seeking an accuracy-related penalty of 20 percent of the tax liability, instead of a civil fraud penalty at 75 percent. However, given the purpose of the UVDP, the acceptance of lesser penalties by the IRS will be "exceptional," and taxpayers must present "convincing evidence" to justify a reduction.[89]

The Second TIGTA Report paints a bleak picture of U.S. tax compliance by NRAs holding U.S. rental property.

Contrary to the harsh stance by the IRS regarding the disclosure period and tax-related penalties, taxpayers might be able to escape sanctions for unfiled information returns. The IRS will not automatically assess these under the UVDP.[90]

Making a "quiet disclosure." One more potential option for non-compliant NRAs, which was unavailable in the past, might be to make a "quiet disclosure" with the IRS, filing all outstanding Forms 1040NR and paying all corresponding taxes and interest charges.

The IRS has warned taxpayers since it began introducing its recent wave of voluntary disclosure programs back in 2009 *not* to circumvent such programs by making a so-called "quiet disclosure." This essentially means taxpayers proactively resolving issues with the IRS by filing Forms 1040X and/or information returns, without officially participating in a recognized disclosure program, with hopes that the IRS will process the returns in the regular course, not start an audit, and not impose penalties. The IRS repeatedly announced in prior years that it planned to identify and harshly sanction attempted "quiet disclosures."[91] With the recent introduction of the UVDP, though, the IRS changed course, telling taxpayers that they can now make "quiet disclosures," provided there is no risk

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66 Page 57 of IRS Instructions for Form 1040NR (2019) states the following: "How Do You Amend Your Tax Return? File Form 1040-X to change a return you already filed. Also, use Form 1040-X if you filed Form 1040-NR and you should have filed Form 1040 or 1040-SR, or vice versa. Generally, Form 1040-X must be filed within 3 years after the date the original return was filed or within 2 years after the date the tax was paid, whichever is later." Page 4 of IRS Instructions for Form 1040X (rev. Jan. 2020) states the following: "Purpose of Form: Use Form 1040-X to do the following. Correct Form 1040, 1040-SR, 1040EZ, 1040NR, or 1040NR-EZ."

67 Section 6662(a).

68 Section 6662; Section 6662(b).

69 Section 6664(a); Reg. 1.6664-2(a). The definition of "underpayment" is considerably more complicated, but a simplified and abbreviated version suffices to make the critical points in this article.

70 Section 6664(c)(1). Penalties would not apply if the "underpayment" is due to "reasonable cause" and the taxpayer acted in good faith.

71 T.D. 9186, 03/02/2005, Preamble, Background.

72 Reg. 1.6664-2(c)(2).

73 *Id.* The ability to eliminate an underpayment by filing a QAR is unavailable where the position taken on the Form 1040 triggering the underpayment was fraudulent.

74 Reg. 1.6664-2(c)(3)(i).

75 Reg. 1.6664-2(c)(3)(i)(A).

76 Reg. 1.6664-2(c)(3)(i)(B). This criterion applies "regardless of whether the IRS ultimately establishes that such person violated Section 6700." See T.D. 9186, Preamble, Explanation of Provisions.

77 Reg. 1.6664-2(c)(3)(i)(C). The term "pass-through entity" is defined, by cross-reference, in Reg. 1.6662-4(f)(5).

78 Reg. 1.6664-2(c)(3)(i)(D)(1).

79 Reg. 1.6664-2(c)(3)(i)(E).

80 To follow the evolution of the QAR criteria, see TD 8381, 12/31/1991, Notice 2004-38, 05/24/2004, TD 9186, 03/02/2005, and TD 9309, 01/09/2007.

81 There are several other cases in which the courts declined to grant taxpayers the benefit of QAR status. See, e.g., Perry, TCM 2016-172 (taxpayer filed relevant Form 1040X after the IRS notified her of an examination); Plantyr, TCM 2017-240 (taxpayer filed Form 1040X after start of examination); Scully, TCM 2013-229 (taxpayer filed Forms 1040X and otherwise changed tax positions during the trial); Sampson, TCM 2013-212 (taxpayer filed relevant Forms 1040X after the IRS notified him of an examination).

82 IRS Memorandum LB&I-09-1118-014 (11/20/2018).

83 *Id.*

84 *Id.*

85 *Id.*

86 *Id.* For taxpayers filing Forms 1040X, the fraud penalty derives from Section 6663, while for those filing late Forms 1040, it originates in Section 6651(f).

87 *Id.*

88 *Id.*

89 *Id.*

90 *Id.*

91 See, e.g., Stack and Andres, "Expedited Opt-Out Needed for OVDI Participants Who Owe No Tax," 2012 Tax Notes Today 21-12 (01/30/2012) (stating that the taxpayer "is worried that requesting retroactive treaty relief through the letter ruling process could be deemed a quiet filing, [the taxpayer] decides to enter the OVDI."); Goulder, "Quiet Disclosures Get No Love from IRS," 2010 Tax Notes Today 90-1 (05/11/2010); Sapirie, "Charges Against HSBC Bank Bermuda Client Raise Quiet Disclosure Questions," 201 Tax Notes Today 98-1 (05/20/2011); U.S. Government Accountability Office, "IRS Has Collected Billions of Dollars, but May Be Missing Continued Evasion," GAO-13-318 (2013) (explaining that IRS intends to increase efforts to identify and penalizes taxpayers making "quiet disclosures").

of criminality.[92] The IRS stated the following in this regard:

> Voluntary disclosure is a long-standing practice of the IRS to provide taxpayers with criminal exposure a means to come into compliance with the law and potentially avoid criminal prosecution . . . This memorandum [announcing the UVDP] updates that voluntary disclosure practice. *Taxpayers who did not commit any tax or tax related crimes and do not need the voluntary disclosure practice to seek protection from potential criminal prosecution can continue to correct past mistakes using the procedures mentioned above or by filing an amended or past due tax return.* When these returns are examined, examiners will follow existing law and guidance governing audits of the issues.[93]

NRAs caused most of the non-compliance described in the Second TIGTA Report, but the problems addressed in the Third TIGTA Report are attributable to the IRS.

Tax professionals were suspicious about this drastic reversal of position by the IRS, so they asked pointed questions of a high-ranking IRS official during a recent tax conference. Such official confirmed that the IRS changed its earlier position and indicated that the normal look-back period for "quiet disclosures" will be six years, just like submissions under the UVDP.[94]

Conclusion

This article demonstrates that significant non-compliance related to the renting and selling of U.S. real property by NRAs has been occurring for many years. The IRS, thanks to the three TIGTA reports, is fully aware of the issues now. The IRS ushered in a new "compliance campaign" in March 2020 to address the problem, which surely will feature widespread audits of potentially non-compliant NRAs. Because applicable law allows the liability for failure to withhold and remit tax to the IRS to spread to others, it would not be surprising if the IRS's budding enforcement efforts were to center on non-compliant U.S. buyers and Settlement Agents, too. Cognizant of these realities, NRAs and others involved with foreign owners of U.S. real property would be wise to contact tax/legal professionals experienced in this area in order to explore the options for proactively rectifying issues with the IRS on the most beneficial terms available.

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92 IRS Memorandum LB&I-09-1118-014 (11/20/2018).

93 *Id.* (emphasis added).

94 Velarde, "Noncooperation in Voluntary Disclosure Won't Blindside Taxpayer," Tax Analysts Document 2019-9094 (03/12/2019) (comments by John Cardone, Director of Withholding and International Individual Compliance, LB&I Division).