

## IRS Backtracks on Penalties and Seeks to Settle Case Involving Backdated Documents

OCTOBER 2, 2023

On September 7, 2023, the IRS and the taxpayer in *Lakepoint Land II, LLC v. Commissioner* filed a Joint Motion for Continuance of Trial (Motion). In the Motion, the parties jointly requested the Tax Court to remove the case from the special trial session scheduled to commence in Atlanta, Georgia, on October 2, 2023, explaining that they had reached a basis for settlement on all issues in the case.

The parties outlined the relevant procedural history, noting that the Court granted, in part, Petitioner's Motion to Impose Sanctions. The parties further noted that the Court had determined that the IRS is liable for fees and expenses incurred by the taxpayer, with the amount to be determined at a later date, [which we discussed in a prior post](#).

In an attempt to salvage its reputation specifically before the Court in this case and more broadly before the public, the IRS emphasized in the Motion that it "is committed to fairness, candor, and transparency in its interactions with taxpayers and the courts." The IRS continued that it holds "itself to the highest standards of integrity," which "is critical to maintaining confidence in the agency's work and enabling it to carry out its mission on the taxpayers' behalf." Although it is not entirely clear that it would have been permitted to do so under the circumstances, the IRS informed the Court that it "does not intend to continue pursuing penalties in this case." The IRS lastly informed the Court that it will be conducting a review of its syndicated easement cases "to ensure that the evidentiary record about supervisory approval is properly presented and that the agency pursues or continues to pursue penalties only where appropriate."

The parties requested the Court to order them to file a Stipulation of Settled Issues (or equivalent document) within 30 days of the Court granting the Motion. The Court granted the Motion on September 8, 2023, and ordered the parties to file a status report or proposed stipulated decision by October 13, 2023.

### TAKEAWAYS

In the Tax Court's Memorandum Opinion filed on August 29, 2023, the Court found:

[R]espondent's counsel knew or should have known, no later than November 2, 2022, that his representations made to this Court were less than accurate and lacked candor and that RA Brooks's Declaration was false. Under ABA Model Rule 3.3, respondent's counsel has an ongoing obligation to correct

these misrepresentations of fact but failed to do so. Rather than correcting this material misrepresentation found in respondent’s Motion for Partial Summary Judgment, respondent’s counsel sought to pivot and present additional evidence on an alternative legal theory without withdrawing or conceding the original legal theory for why summary adjudication was appropriate here. Furthermore, no other remedial action was taken with the Court to correct the error until April 10, 2023, which was after this Court had issued its Order granting respondent’s Motion.

T.C. Memo. 2023-111, at \*11-12.

Read in context, the IRS’s statements in the Motion resemble a PR maneuver to save face in the eyes of the Court and the public. While the backdated penalty lead sheet is problematic in and of itself, the IRS, along with trial counsel, exacerbated the issue by doubling down and misleading both the Court and the taxpayer as to the timing and knowledge of the backdated document. Moreover, when this strategy was no longer feasible, IRS “counsel sought to pivot and present additional evidence on an alternative legal theory,” the implication rhetorically being: “What difference is it if the Court and the taxpayer were misled? The IRS should win anyway.”

IRS trial counsel have historically enjoyed a position of deference and credibility in the eyes of the Tax Court. The prolonged suppression of the fact that the document was backdated, coupled with IRS counsel’s attempt in *Lakepoint* to pivot upon discovery to avoid the consequences, suggests that the government’s enjoyment of such deference and credibility has allowed it to sink to a position of complacency, if not apathy.

The backdated document issue could not come at a worse time for the IRS, which is currently facing challenges by congressional Republicans to rescind funding provided to the agency by the Inflation Reduction Act of 2022 (IRA). After roughly 25% of the IRA funding was rescinded as part of the Fiscal Responsibility Act of 2023 (this year’s debt ceiling deal), the IRS has been eager to demonstrate progress at the agency to convince Congress not to claw back the remainder.

*Lakepoint* demonstrates that everyone makes mistakes. The combined behavior of the revenue agent and the manager, compounded by IRS counsel’s actions, shines a light on the potentially disturbing trend of IRS agents who, aided by IRS counsel, may attempt to hide consequential procedural mistakes behind a cloak of government privilege and cherry-picked partial documentation. While the egregious conduct of the IRS agents and counsel in *Lakepoint* was discovered and addressed, there could be other instances of such conduct across the country that are never revealed. Thus, while the IRS’s representation that it has undertaken a review of its cases to ensure that the agency pursues penalties only where appropriate is both welcome and noteworthy, taxpayers should remain diligent in asserting their right to conduct full and complete discovery to ensure that the situation that occurred in *Lakepoint* does not go undiscovered should it happen to them.

We will continue to monitor these developments. For more information or to discuss further, please contact the authors or your Winston relationship attorney.

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## Authors

[Susan Elizabeth Seabrook](#)

[James N. Mastracchio](#)

[Karl Kurzatkowski](#)

[Nicholas Netland](#)

[Zachary C. Weit](#)

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Susan Elizabeth Seabrook



James N. Mastracchio



Karl Kurzatkowski



Nicholas Netland



Zachary C. Weit

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