

# Expanding Math Error Authority Could Worsen 2 Tax Systems Issue

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By Nathan J. Richman

A budget line-item proposal to provide the IRS with more flexible correctable error authority would likely exacerbate the differences between how sophisticated and unsophisticated taxpayers experience the tax system, according to practitioners.

President Trump's fiscal 2018 [budget proposal](#) contains [two line items](#) held over from Obama-era [budget proposals](#): one would increase tax return preparer oversight and the other would "provide more flexible authority for the IRS to address correctable errors."

But in practice, the burden of that expansion of authority would fall disproportionately on poorer taxpayers with less access to knowledgeable tax advice, explained practitioners, including Nancy Abramowitz, director of the Janet R. Spragens Federal Tax Clinic at American University.

While there was no Treasury green book for the 2018 budget proposal, the fiscal 2017 Treasury [green book](#) states that the correctable error authority proposal would repeal the specific grants of authority for the IRS to use math error authority beyond computational errors, including the incorrect use of IRS tables, and provide a new category of correctable error authority. The new category would replace the specific legislative grants of authority to use expedited assessment procedures with regulatory authority vested in Treasury.

Normally, under section 6213, the IRS has to send a taxpayer a notice of deficiency before it can assess that deficiency. The notice triggers a 90-day window for the taxpayer to petition the Tax Court for a determination of the correct tax liability before that liability has to be paid. If the taxpayer does not petition the Tax Court, the remaining options are to pay the tax and seek a refund, which could include a refund suit in either a district court or the Court of Federal Claims, or to wait for the IRS to try to collect on the assessment and request a collection due process hearing. Unfavorable results in CDP hearings also offer a way into the Tax Court, but [there are restrictions](#) on the extent to which the underlying tax liability can be challenged.

Under section 6213(b), the IRS can bypass most of the restrictions on assessment for deficiencies "arising out of mathematical or clerical errors." Section 6213(g)(2) provides a list of 17 qualifying situations, ranging from arithmetic errors to omission of required information such as a taxpayer identification number.

The [tax extenders bill](#) enacted late in 2015 [expanded math error authority](#) to include denials of the earned income tax credit, the American Opportunity Tax Credit, and the child tax credits because of the two- and 10-year bans on subsequent claims following disallowances based on reckless disregard of the rules or fraud, respectively.

The 2017 green book description of the proposal suggests three broad areas for Treasury to apply the new flexible regulatory approach, which would replace the legislative list in section 6213(g)(2). Correctable error authority would include errors caused by the taxpayer exceeding the lifetime limit for a credit or deduction, the taxpayer failing to include statutorily required documents with the return, and “the information provided by the taxpayer [not matching] the information contained in government databases,” according to the 2017 green book.

If the error is one of the specified math errors, the IRS can correct it and proceed to assessment after providing notice of the error to the taxpayer. Under section 6213(b)(2), the taxpayer has 60 days from the sending of a math error notice to protest and receive normal assessment procedures such as an audit and a notice of deficiency. If the taxpayer doesn't protest the math error notice within the 60 days, the IRS may proceed directly to assessment.

If the corrected error reduces a refund rather than creating a debt for the IRS to collect, the taxpayer will not have the opportunity to request CDP procedures in response to a collection action and will only be able to disagree with the IRS action using a refund suit.

The Treasury Inspector General for Tax Administration [has suggested](#) that correctable error authority would help the IRS address the persistently high error rate in the EITC and the additional child tax credit that always seems to [rankle Congress](#). In 2015 Inspector General J. Russell George [told Congress](#) that correctable error authority combined with access to the Department of Health and Human Services' National Directory of New Hires could have prevented \$2 billion in questionable EITC claims for tax year 2012. IRS Commissioner John Koskinen has [touted the proposal](#) as a way to deal with fraudulent income tax refund claims.

## You Shall Not Pass

Abramowitz said the proposal would contribute to a two-tiered tax system experienced differently by sophisticated and unsophisticated taxpayers. A sophisticated taxpayer will likely have a knowledgeable return preparer or access to other methods of challenging an IRS determination, but an unsophisticated taxpayer might not act out of confusion and suddenly end up with the tax assessed, she said. The burden of correctable error authority would fall on the unsophisticated and the poorest of the poor, she said.

Abramowitz said that the recent expansion of math error authority to the two- and 10-year bans on claiming credits following negligent and fraudulent claims has already pushed the authority beyond mere “math errors.” Although correction of simple math errors is one thing, expanded correctable error authority that includes facts and circumstances inquiries would not be compatible with the [taxpayer bill of rights](#), she said. “If you are denying somebody [a tax benefit] on the grounds that you have perceived or interpreted facts and circumstances in a certain way and you don't give them the opportunity to challenge that . . . you've clearly deprived them of the rights they are entitled to under the statute,” she said.

For the poorest taxpayers, the process is already abbreviated by correspondence and automated examinations, Abramowitz said, adding that she has seen notices of deficiency issued 30 days after the April 15 due date. Often those taxpayers cannot get IRS Appeals to

review their files unless and until they manage to file a petition in the Tax Court, which carries a \$60 fee, she said. And the really unlucky taxpayers do not even get a notice of deficiency to enable them to go to Tax Court, she added.

Christine Speidel, director of the low-income tax clinic at Vermont Legal Aid Inc., said the broad discretion the IRS could receive under the correctable error proposal is concerning. The possibility of the IRS making corrections based on the likelihood that a return is incorrect because of a discrepancy between the return and a government database is especially notable because those databases are not always accurate, she said. "Low-income taxpayers in particular will be harmed if they only have 60 days to respond in writing in order to get their deficiency procedures and all of the due process protections that come along with that," said Speidel, who also chairs the American Bar Association Section of Taxation's Pro Bono and Tax Clinics Committee.

Speidel said that often the taxpayers who come to her for help do so only after receiving a notice of deficiency. "In many of those cases, the taxpayer is eligible for the benefits that they claimed; they just weren't sure how to prove that to the Service or they misunderstood the audit notice," she said. The proposal to use math error authority on fact-specific issues such as the EITC is problematic, she said.

Math error authority is useful for clear-cut situations like lifetime limits on credits, Speidel said. "If there is a 100 percent chance that the return is incorrect, then that is fine. Math error is efficient and a good use of resources in that case," she said. However, in more fact-specific cases, using the expedited procedures can be very shortsighted, she said, adding that that is particularly true for more mobile low-income households whose makeup often changes, because government databases are more likely to be outdated for those taxpayers.

Speidel said that any efficiency gains from allowing correctable error authority to be used for summary assessments in EITC and other fact-intensive cases may be illusory because of later reversal rates or qualified claimants losing the benefit by failing to respond to the correctable error notice. In the short term, the savings reflected in the budget line item "would probably come from unsophisticated taxpayers who don't understand the notice or don't receive the notice in time or don't get around to responding to the notice in the 60-day period," and taxpayers will either be harmed or the IRS will have to spend a lot of time and money fixing the situation later, she said.

If Congress is concerned with programs that have a high improper payment rate, it should give the IRS the resources to perform the necessary examinations, even if only by correspondence, Speidel said. Appropriating money for more service center personnel to conduct those examinations may cost more in the short run but could yield significant benefits in three to five years from both reduced remedial work and increased taxpayer education, she said. "Theoretically, the Service could use the examination process to educate people about the rules and to prevent people from improperly claiming credits," she said.

Because collection due process provides a backstop to claims only if the IRS is seeking to collect from the taxpayer and not if the IRS declines to pay out a refundable credit, a taxpayer missing out on the 60-day correctable error window will have to instead file a refund claim to fight that denial in district court, Speidel said. Not only are those refund suits much more expensive for the taxpayer, likely requiring a lawyer in a situation when the Tax Court is

accustomed to pro se taxpayers, but also “the district courts don’t have the same taxpayer-friendly approach that the U.S. Tax Court has, which is so important in allowing low-income taxpayers who can’t afford attorneys access to the court,” she said.

Guinevere Moore of Johnson Moore LLC said increased correctable error authority would be “a terrible, terrible idea that is going to be extremely detrimental to low-income taxpayers and, quite frankly, medium- and potentially large-income taxpayers as well.”

While the underlying logic of making simple mathematical adjustments without the IRS expending the resources that would be required in a full audit is persuasive and comparable to previously litigated partnership item adjustments, this is different, she said. Moore noted that the IRS regularly makes mistakes in its determinations and Congress provided a prepayment forum for challenging IRS determinations in the Tax Court for a reason. A refund suit is a much more cumbersome remedy for a taxpayer even beyond the requirement to pay the tax before getting into court, she said.

Document matching is an issue beyond the EITC, Moore said. “I’ve personally represented clients who have been issued 1099s that are wrong or the fact that they even got a 1099 was wrong,” she said. A taxpayer incorrectly receiving a Form 1099 because of a typo in the Social Security number might end up having to pay a very large tax bill in order to file a refund suit disputing the matching error under the proposal, she said.

Moore said that in her practice, she often sees errors in the underlying databases that would be used for matching.

Unsophisticated taxpayers already frequently miss the 90-day deadline for filing a Tax Court petition following a notice of deficiency, and that would likely be worse for the 60-day abatement window, Moore said.

Instead of risking taxpayer procedural rights in the name of efficiency, Moore suggested acting on the other tax budget line-item proposal to impose standards on tax return preparers. “If return preparers who are just return preparers have more to lose and are held to a different standard, we would see a lot less EITC abuse,” she said.

Francine J. Lipman of the William S. Boyd School of Law, University of Nevada, Las Vegas, said that math error authority is good for dealing with errors like failing to calculate the alternative minimum tax, if it applies, or arithmetic mistakes. “But when you start to expand it, which is what this appears to be doing, giving the government flexibility beyond this fairly narrow math error correction, it really starts to get into due process, especially for individuals who already suffer from some due process issues and access-to-tax-justice issues,” she said. Low-income taxpayers are often transitory and can miss the notice, she said, adding that the notices don’t always succeed at explaining what is happening to taxpayers.

Lipman said it is a myth that all of the errors associated with those credits are fraud. She said that mere lack of response from a taxpayer can be categorized as an error without regard to the appropriateness of the credits claimed. She said that the extent to which legislators are influenced by the myth that all overpayments are due to fraud or are verified overpayments is very frustrating.

The change is moving in the wrong direction, and the millions of dollars to be raised by the provision likely comes from “tax credits for working poor families with children,” Lipman said. That hurts everyone by reducing the investment in those children, which could be the difference between them ending up as taxpayers or as societal costs, she said.

“This is another tax on the poor [and] working families,” Lipman said. Like check cashing fees and rent-to-own stores, expanded correctable error authority regarding refundable credits could become another example of how expensive it is to be poor, she said. One of the costs of shifting the societal support system from social services offices to the tax system is moving the administration costs from the whole of society to the taxpayer claiming the benefits, she said. “This is almost unconscionable,” she said, citing return preparation fees, increased requirements on those claiming the tax credits for those with low incomes, and tax system complexity.

The IRS and the Taxpayer Advocate Service declined to comment. However, National Taxpayer Advocate Nina Olson has previously [expressed concern](#) over the proposed expansion of math error authority when the Obama administration suggested it. The IRS’s current use of math error authority has also made the list of most serious problems [in her annual reports](#) to Congress.

Abramowitz said that while IRS budgets and personnel are understandable problems, “at some point, when you erode faith in the system or perceived fairness in the system, it comes home to roost on the enforcement side.” Not only do taxpayers think they have been treated unfairly, but the lack of personal interaction misses the chance to educate the taxpayers about their errors so they can avoid them in the future, she said. “At some point, a greater investment in process is, I think, its own reward,” she said.