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IRS Releases Final Version Of HIRE Act Affidavit; Draft Of Revised Quarterly Payroll Tax Form

◆ IR-2010-43

The IRS has released a final version of Form W-11, Hiring Incentives to Restore Employment (HIRE) Act Employee Affidavit. Employers will use Form W-11 to confirm that a newly hired employee is a covered employee for purposes of the *HIRE Act's* tax incentives. The final version of Form W-11 tracks the draft version, issued earlier in April. The IRS also released a draft version of Form 941, Employer's Quarterly Federal Tax Return, to reflect the *HIRE Act*.

■ **CCH Take Away.** Employers are not required to file Form W-11 with IRS, effectively creating an honor system, Melissa Labant, CPA, manager, American Institute of Certified Public Accountants (AICPA), told CCH. Moreover, Form W-11 does not require that covered employees verify their previous unemployment by providing documentation, such as notice of layoff from a prior employer or receipt of unemployment insurance. "The *HIRE Act* is a significant incentive for employers," Labant noted, but employers cannot claim its benefits (payroll tax exemption and the new hire retention credit) unless the employee completes and signs Form W-11 or a similar statement.

■ **Comment.** "Employers should check with their payroll providers to claim the available exemption, and take the following steps," Elizabeth Dold, principal, The Groom

Law Group, Washington, D.C., told CCH. First, ensure that the employer is a qualified employer and identify qualified employees and track wages actually paid on or after March 19 (even if attributable for services prior to such date). If a tax-exempt employer, verify that the services are in furtherance of its tax-exempt purpose. Additionally, obtain certifications from such employees (under penalty of perjury) and retain in files (can use IRS Form W-11); and confirm that this relief is more valuable than the Work Opportunity Tax Credit, which will not be available for such wages for a one-year period.

Incentives

The *HIRE Act* provides a qualified employer with an exemption from having to pay its share of old-age, survivors and disability insurance (OASDI) taxes for a covered employee's employment from the day after March 18, 2010 through December 31, 2010. Qualified employers may also be able to credit of the lesser of \$1,000 or 6.2 percent of the wages paid during a required 52-week consecutive week period.

Covered employees

A covered employee for purposes of the *HIRE Act* is an employee who:

- Begins employment with a qualified employer after February 3, 2010 and before January 1, 2011;

Continued on page 2

Route to: _____

IRS Follows Up Reminder Letters With Visits To 2,000+ Return Preparers

◆ IR-2010-44

More than 2,000 return preparers received in-person visits from IRS personnel reminding them of their responsibilities to clients and the tax profession, the agency has announced. The IRS also has conducted 320 undercover visits to return preparers since the start of the 2010 filing season. The IRS highlighted its progress in boosting oversight of practitioners since the agency announced its new return preparer oversight initiative earlier this year.

- **CCH Take Away.** It appears that in-person filing season visits may become more common. The IRS reported that it will review the results of the visits this year to determine steps for future filing seasons.

Oversight initiative

In January, the IRS announced the results of a six-month study of the tax return preparer industry. All paid return preparers (regardless of their credentials) will be required to register with the IRS and use of a Preparer Tax Identification Number (PTIN) will be

mandatory. Return preparers will renew their registrations every three years. The IRS also intends to require unenrolled preparers to successfully complete continuing education and competency testing.

- **Comment.** The IRS issued proposed regs in March that would require PTINs for returns filed after December 31, 2010 (*see the April 1, 2010 issue of this newsletter for details*).

Letters and visits

The IRS contacted more than 10,000 return preparers by mail in January. The letters reminded preparers of their responsibilities to clients and discussed common return errors. According to the IRS, the letters were mailed to preparers with large volumes of specific tax returns where the IRS typically sees frequent errors. The IRS noted that simply receiving a letter was not an indication the preparer had problems.

- **Comment.** The letters were not individualized. All recipients received the same letter.

The letters were followed up by in-person visits by IRS personnel to approximately 2,400 return preparers. During the visits, IRS personnel discussed the issues described in the letter.

Enforcement

The IRS reported that it has secured 21 civil injunctions, 56 indictments and 25 convictions of return preparers so far in 2010. It appears, from materials posted on the IRS web site, many of these actions relate to improper or illegal return preparer activity prior to 2010.

DOJ activities

In related news, the U.S. Justice Department (DOJ) also highlighted its tax enforcement activities. DOJ reported that its Tax Division obtained nearly 500 civil injunctions to stop the promotion of tax scams and the preparation of fraudulent returns during fiscal year (FY) 2009. DOJ's Tax Division obtained 135 convictions and guilty pleas during FY 2009.

Reference: TRC IRS: 6,000.

HIRE Act

Continued from page 1

- Certifies by signed affidavit, or similar statement under penalties of perjury, that he or she has not been employed for more than 40 hours during the 60-day period ending on the date that the employee begins employment with the employer;
- Is not employed by the employer to replace another employee unless the other employee separated from employment voluntarily or for cause; and
- Is not related to the employer.

- **Comment.** Form W-11 notes that separation for cause may include downsizing.

Affidavit

Form W-11 asks the covered employee to provide the following information:

- Social Security Number;
- Name of employer; and
- First date of employment.

The covered employee must sign and date Form W-11. Employers may use a similar statement rather than Form W-11 but the statement must include the requisite information and be signed under penalties of perjury, the IRS explained.

Form 941

Most qualified employers will use Form 941 to claim payroll tax forgiveness for covered employees. The IRS has posted a draft version of revised Form 941 on its web site. Draft Form 941 asks employers to report the number of covered employees paid exempt wages and the amount of exempt wages paid to covered employees.

More HIRE Act guidance

The *HIRE Act* also includes a package of foreign account tax compliance provisions. The IRS has issued guidance under the *HIRE Act* on information reporting for shareholders of passive foreign investment companies (PFICs) (*see the article on page three for details*). Treasury and IRS officials have indicated that foreign account tax compliance guidance will be delivered over time as many of the provisions are not immediately effective.

References: FED ¶46,334; PAYROLL: 9,060.

Reference Key

FED references are to *Standard Federal Tax Reporter*
 USTC references are to *U.S. Tax Cases*
 CCH Dec references are to *Tax Court Reports*
 TRC references are to *Tax Research Consultant*

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IRS Plans Guidance On HIRE Act's PFIC Shareholder Reporting Requirements

◆ Notice 2010-34

The IRS recently announced that it is developing guidance to implement the new annual information return requirement for shareholders of passive foreign investment companies (PFICs) under the recently enacted *Hiring Incentives to Restore Employment (HIRE) Act*.

■ **CCH Take Away.** Sandra Soltis, partner, Blackman Kallick, LLP, Chicago, observed that under new Code Sec. 1298, a U.S. person who is a PFIC shareholder must file an annual report containing information required by the IRS. Since a PFIC shareholder only reports information required by the IRS, Code Sec. 1298(f) does not require any reporting until the IRS issues guidance. In effect, this provision is contingent upon IRS's instructions.

■ **Comment.** The PFIC rules were enacted in the *Tax Reform Act of 1986* to curb perceived improper offshore deferral of passive investment earnings. The IRS issued proposed PFIC regs in 1992. The IRS did not address in Notice 2010-34 when the proposed regs may be finalized or answer criticisms of the PFIC rules, such as the "once a PFIC, always a PFIC" rule.

Broad definition

In contrast to the subpart F rules, the PFIC rules apply to any U.S. person that directly or indirectly owns any stock in a foreign corporation that is a PFIC under either an income or asset test. A foreign corporation is a PFIC if:

- Seventy-five percent or more of its gross income for the tax year is passive income; or
- The average percentage of assets, by value, held by the corporation during the tax year that produce passive income or are held for the production of passive income is at least 50 percent of all assets held by the corporation during the tax year.

Generally, a U.S. taxpayer's ownership in a PFIC is subject to one of three taxing regimes. They are the default method for excess distributions from a PFIC, as well as dispositions of PFIC stock; the qualified electing fund (QEF) method; or the mark-to-market method.

■ **Comment.** Additional rules apply, such as a look-through rule and a controlled foreign corporation overlap rule.

■ **Example.** When ABC Inc. acquired South African mining company, XYZ Inc., shareholders received ABC shares and shares of a wholly owned XYZ subsidiary, XYZ Mines Inc, which appeared to be a PFIC at all relevant times, while ABC did not expect to qualify as a PFIC at the time of the acquisition. If a U.S. holder purchases stock in a company that becomes classified as a PFIC while the holder owns shares, the PFIC rules can subject the holder to significant and unanticipated federal income tax liabilities on

corporate actions involving the stock. As a result, receipt of XYZ Mines shares could be considered an excess distribution under the PFIC rules, generally taxed at the highest ordinary income tax rates, and subject to special calculation and interest charges.

Reporting

Until the IRS develops an annual information return, the agency instructed taxpayers required to file Form 8621, Return by a Shareholder of a Passive Foreign Investment Company or Qualifying Electing Fund, before enactment of the *HIRE Act* (March 18, 2010) to continue to file Form 8621 as directed in the Instructions to Form 8621. Shareholders of a PFIC that were not otherwise required to file Form 8621 annually prior to the enactment date of the *HIRE Act* are not required to file an annual report for tax years beginning before March 18, 2010, the IRS explained.

References: FED ¶46,330;
TRC INTLOUT: 18,202.

IRS Invites Comments On HIRE Act's Foreign Account Tax Compliance Provisions

The IRS is requesting comments on the foreign account tax compliance provisions in the new *Hiring Incentives to Restore Employment (HIRE) Act*. The *HIRE Act* includes a package of reforms to strengthen foreign account tax compliance.

■ **Hire Act changes.** Under the *HIRE Act*, a withholding agent must deduct and withhold a tax equal to 30 percent on any withholdable payment made to a foreign financial institution or to a non-financial foreign entity. The withholding tax is suspended if the foreign financial institution or a non-financial foreign entity agrees to certain disclosure and reporting requirements. The *HIRE Act* also imposes new disclosure requirements on individuals holding interests in specified foreign financial assets. Additionally, the *HIRE Act* extends the limitations period in certain cases of omission of income in connection with foreign assets, addresses information reporting requirements for U.S. shareholders of passive foreign investment companies (PFICs), and makes other changes.

■ **Comment.** Steven Toscher and Michel Stein, principals, Hochman, Salkin, Rettig, Toscher & Perez, P.C., Beverly Hills, Calif., noted that while the new disclosure provisions of the *HIRE Act* broaden reporting requirements, they also add duplication and complexity to an already complicated foreign financial account reporting regime.

Announcement 2010-22, FED ¶46,332; TRC EXPAT: 15,052.

IRS Finalizes Travel Expense Deduction Regs For State Legislators

◆ T.D. 9481

The IRS has issued final and temporary regs on the rules regarding the ability of state legislators to deduct their living expenses while away from home. The regs apply to any state legislator who makes an election under Code Sec. 162(h).

■ **CCH Take Away.** The final regs merely clarify the Code Sec. 162 special rules for deducting state legislators' deemed living expenses. The regs do not apply to, or limit, the deduction for actual travel expenses under Code Sec. 162 for other taxpayers. The regs apply to expenses paid or incurred, or deemed expended, under Code Sec. 162(h) in tax years beginning after April 8, 2010.

Background

Code Sec. 162(a) generally allows taxpayers to deduct ordinary and necessary expenses paid or incurred during the tax year in carrying on a trade or business, including travel expenses incurred while "away from home." State legislators can elect, under Code Sec. 162(h), to treat their principal place of residence within their legislative district as their "tax home." Under Code Sec. 162(h), a state legislator who makes the election can only deduct deemed living expensing during specified legislative days. The election deems a state legislator to be away from home during each legislative day in pursuit of a trade or business, therefore expending living expenses on each day.

Legislative day

A state legislator is deemed to be "away from home" for purposes of the deduction in pursuit of a trade or business on each legislative day. Under Code sec. 162(h), a "legislative day" is any day during the year on which:

- The legislature was in session (including any day in which the legislature was not in session for a period of four consecutive days or less); or
- The legislature was not in session but the physical presence of the individual

was formally recorded at a meeting of a committee of such legislature.

Final regs

The final regs further clarify when a taxpayer becomes a state legislator and ceases to be a state legislator. The regs also describe what activities constitute legislative activities for purposes of the

Code Sec. 162(h) deduction. Moreover, the regs clarify the concept of "in session" as any day where the legislator is expected to attend and participate with the assembled body of the legislature.

■ **Comment.** The regs obsolete Rev. Rul. 82-33.

*References: FED ¶47,011;
TRC BUSEXP: 24,120.10.*

IRS Chief Counsel Clarifies Code Sec. 199 Deduction For Licensing Of Product Reproduction

◆ CCA 201014050

IRS Chief Counsel has determined that a taxpayer's transfer of a non-commercial amount of its property to a licensee for reproduction did not change the fact that gross receipts from the license agreement related to the intangible right to reproduce property. For purposes of the Code Sec. 199 deduction, gross receipts derived from the licensing of the right to reproduce the taxpayer's product are not domestic production gross receipts (DPGR) because those gross receipts are derived from the license of an intangible, the right to reproduce the product.

■ **CCH Take Away.** Chief Counsel observed that the license arrangement was unusual in that for a licensee to exercise its intangible right to reproduce the taxpayer's product, the taxpayer had to provide non-commercial quantities (rather than a formula) of its product to the licensee. However, Chief Counsel concluded that the taxpayer's transfer of the property did not alter the fact that gross receipts from the license of an intangible are not DPGR.

Background

In the first scenario, the product containing X is produced in mass quantity for sale to distributors, which in turn sell the product containing X to end-users. The distributors and end-users have no right to reproduce the product containing X.

In the second scenario, the taxpayer enters into licensing agreements, which authorize the licensee to reproduce the product containing X. The licensees pay the taxpayer royalties and/or technology fees to reproduce product containing X in commercial quantities and sell it under the taxpayer's brand-name to end-users.

In the third scenario, the taxpayer also enters into licensing agreements, which authorize the licensee to reproduce the product containing X. The taxpayer transfers non-commercial quantities of the product containing X to the licensees. The agreements also allow the licensees to sell and distribute the product containing X to end-users under a non-taxpayer brand-name.

Chief Counsel's analysis

In scenario #1, Chief Counsel determined that taxpayer's activities in the first scenario would qualify as DPGR. The gross receipts derived from the sale of the product containing X are derived from the sale of tangible personal property by the taxpayer in the U.S.

In scenario #2, Chief Counsel determined that gross receipts from the licensing of the right to reproduce the product containing X are not DPGR because the gross receipts derived from the license of an intangible. In contrast, the taxpayer's gross receipts from the value of the product containing X provided to a licensee without the right to reproduce the product containing X are DPGR.

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Step Transaction Doctrine Inapplicable To Bargain Real Estate Sales; Full Charitable Deductions Allowed

◆ *Klauer, T.C. Memo. 2010-65*

The Tax Court has found that a Subchapter S corp was entitled to charitable contribution deductions over the course of three tax years due to its below-market-value sales of real property to a tax-exempt land preservation trust. Although the taxpayer eventually received the full value of its land over the course of three tax years, the taxpayer was not required under the step transaction doctrine to collapse the sales into one overall sale. Due to the uncertainty of each sale, the taxpayer was allowed a charitable deduction for each individual below-market-value sale.

■ **CCH Take Away.** Much like application of the economic substance or substance over form doctrines, the IRS's case for application of the step transaction doctrine has been highly

successful in many recent decisions because of the overriding influence of tax avoidance in many factual situations. In this case, however, it seems the IRS may have overreached.

Background

The taxpayer owned 700 acres of land overlooking Rio Grande Gorge and the Rio Grande River. The taxpayer entered into an option agreement with a land preservation trust for sale of the land. After several amendments to the agreement and a series of purchases, the taxpayer had received approximately \$15 million in consideration for its land, the fair market value of the land that the parties had originally agreed upon in the original option agreement.

However, as the trust was a Code Sec. 501(c)(3) tax-exempt entity throughout this period, the taxpayer reported charitable contribution deductions related to the sales for each tax year. The IRS completely disallowed these charitable contribution deductions.

Court's analysis

The court held that the step transaction did not apply under all three possible judicial tests. As a result, the taxpayer was entitled to its charitable deductions for each below-market sale. The most restrictive test, the "binding commitment" test, required that the taxpayer have

a commitment for the subsequent transactions at the time the first step was taken. This test was not satisfied because the trust heavily relied upon Congressional appropriations for its land acquisition projects and had to request funds every year. There was no guarantee that the trust would have been able to acquire any of the land when the parties first entered into the option agreement. Further, the option did not create an obligation for the taxpayer to sell the land to the trust or an obligation for the trust to buy the land from the taxpayer.

The "end result" test applied if the taxpayer intended to reach a particular result by structuring a series of transactions in a certain way. However, when the trust originally entered into the option contract, it informed the taxpayer that it was not in a financial position to be legally bound to buy all of the land (the taxpayer's alleged end result), due to its dependency upon Congressional appropriations.

The interdependence test applied where the taxpayer's individual steps in a series lacked reasoned economic justification standing alone and only had meaning as part of a larger transaction. However, the court held that this test also did not apply because the trust's exercise of one or more, but not all, of the options to purchase portions of the land was not "fruitless."

References: CCH Dec. 58,172(M); TRC CCORP: 39,158.

Code Sec. 199 Deduction

Continued from page 4

In scenario #3, the outcome would be the same as in scenario #2. The fact that the product containing X was sold under a non-taxpayer brand-name did not affect the outcome, Chief Counsel noted.

Alternative approach

Chief Counsel also reviewed whether X without the product in scenarios 2 and 3 could be deemed an intangible licensed to customers rather than the right to reproduce the product containing X. An example in the Code Sec. 199 regs provides that mass-produced books are tangible property but neither the rights to the underlying manuscript nor an online version of the book would be tangible property. In scenarios #2 and #3, Chief Counsel determined that the taxpayer was licensing property similar to the rights to the underlying manuscript in the example, as opposed to tangible mass-produced books, because it provided the product containing X in non-commercial quantities so that it can be produced in mass quantities by the licensees.

References: FED ¶(to be reported); TRC BUEXP: 6,104.

Full Tax Agenda Awaits Lawmakers

Congress returned from its spring recess on April 12 with a full agenda of pending tax bills. In what is expected to be a light session in April and May, lawmakers may address expired tax extenders, legislation providing small business tax relief and an extension of the 2009 federal estate tax.

Extenders. The House and Senate have approved different extenders bills (*H.R. 4213, the Tax Extenders Act* as passed by the House and amended by the Senate in the *American Workers, State and Business Relief Act*). It is unclear at press time if the House will take up the Senate version or if the two chambers will seek to reconcile their differences in a conference bill.

Small business. The Senate is expected to take up the House-passed *Small Business and Infrastructure Jobs Act (H.R. 4849)*. The bill would increase investments to small businesses to encourage hiring.

Estate tax. Senate Democrats are expected to renew their push to extend the 2009 federal estate tax through December 31, 2010. The House passed the *Permanent Estate Tax Relief Act (H.R. 4154)* in late 2009.

IRS Identifies “Single, Identifiable Property” For Telecommunications Company’s Casualty Loss

◆ TAM 201014052

The IRS recently clarified what is the single, identifiable property (SIP) for purposes of casualty losses incurred by a telecommunications company. The IRS determined that it would be reasonable to subdivide the taxpayer’s wire centers into building, central office equipment, and outside plant property.

■ **CCH Take Away.** In 2009, the IRS reported that some taxpayers have designated their entire utilities transmission and distribution system or their entire telecommunication system as the SIP. Because taxpayers’ damaged or destroyed properties have been subject to accelerated write-offs and may have been in service for significant periods of time, taxpayers often have a low tax basis in these assets. The determination of SIP is significant because the amount of casualty loss may exceed adjusted tax basis, depending on the size of the SIP involved. Furthermore, the SIP rule ensures that a taxpayer may not borrow basis from unharmed property to increase the amount of a loss deduction for an injury to other property. By defining their entire transmission and distribution system or telecommunications system as the SIP, taxpayers have a larger tax basis in computing their casualty loss deduction.

Background

A casualty affected an unspecified number of the taxpayer’s wire centers, negatively impacting its delivery of telecommunications services. The taxpayer claimed a casualty loss under Code Sec. 165. The taxpayer proposed that each wire center be treated as the SIP damaged by the casualty.

■ **Comment.** A wire center can refer to a central office or switch structure. Within the wire center, the central office acts as a control point or switching hub. Outside plant property includes the assets located

outside of the central office that link the central office to customers.

IRS analysis

Determining the SIP involves the application of a number of factors, the IRS noted. In a series of cases, mostly involving timber, courts have developed some of the factors that should be used in the SIP determination.

The factors include whether the nature and scope of the unit chosen is reasonable and practical and whether it reflects all the physical damage caused by the casualty. Additional factors include whether it is a unit whose utility derives from its functioning as a whole; whether it is separately treated for operational and management purposes; and whether it is a “commercially segmentable” unit likely to be bought or sold as such.

■ **Comment.** In TAM 200902011, the IRS summarized the timber cases and some of the factors that should be considered, noting that the nature of the casualty and the facts and circumstances of the particular case must be taken into account.

Here, the IRS determined that the wire centers could be divided into smaller functional groupings. The central office building, as a unit, serves to house and protect the equipment within the building. The central office equipment works together as the principal control point of the wire center, connecting customers to other customers. The outside plant property comprises a number of assets that can be configured in various ways depending on the individual characteristics of a wire center.

■ **Comment.** Additionally, the IRS has held that a taxpayer cannot take a casualty loss deduction and a business repair deduction as a result of the same casualty. Instead, the casualty loss is deductible under Code Sec. 165, and the cost of restoring the property to its pre-casualty condition must be capitalized under Code Sec. 263(a), rather than being currently deductible under Code Sec. 162.

References: FED ¶(to be reported); TRC BUSEXP: 30,212.

IRS Updates List Of Frivolous Tax Positions

◆ Notice 2010-33

The IRS has updated its list of frivolous positions that are subject to a maximum \$5,000 penalty under Code Sec. 6702. The IRS’s list consists of positions deemed frivolous by the courts or that have no basis for validity under existing law.

Frivolous positions

Anyone who makes a “specified frivolous submission” faces a \$5,000 (up from \$500) penalty. Positions that are “the same or similar” to positions on the IRS’s list are considered frivolous for purposes of the Code Sec. 6702(a) penalty imposed for filing a frivolous tax return and the Code Sec. 6702(b) penalty for a specified frivolous submission.

Previously identified frivolous positions include: The Fifth Amendment privilege against self-incrimination grants taxpayers the right not to file returns or the right to withhold all financial information from the IRS; the Sixteenth Amendment was not ratified, has no effect, contradicts the Constitution as originally ratified, lacks an enabling clause, or does not authorize a non-apportioned, direct income tax; and Federal Reserve Notes are not taxable income when paid to a taxpayer.

New additions

Notice 2010-33 identifies three additional frivolous positions:

■ Use of Form 1099-OID, Original Issue Discount, or other forms in the 1099

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Tax Briefs



Internal Revenue Service

For pension plan years beginning in April 2010, the IRS has released the corporate bond weighted average interest rate, the permissible range of interest rates used to calculate current plan liability and to determine the required contribution under Code Sec. 412(l) for plan years through 2010, and the current corporate bond yield curve and related segment rates for the purpose of establishing a plan's funding target under Code Sec. 430(h)(2).

*Notice 2010-36, FED ¶46,329;
TRC RETIRE: 15,304.05.*

International

The competent authorities of the United States and Belgium entered into an agreement regarding the types of pension plans established in either country that will generally correspond to a pension plan recognized for tax purposes in the other country.

*Competent Authority Agreement,
FED ¶46,335; TRC INTL: 18,126.*

Jurisdiction

A federal district court lacked jurisdiction over an individual's suit challenging his tax liability because the liability was previously litigated in the Tax Court. The Courts of Appeals have exclusive appellate jurisdiction over Tax Court decisions.

Ekpaha-Mensah, DC Pa., 2010-1 USTC ¶50,321; TRC LITIG: 9,052.

An individual's complaint seeking injunctive relief against various government agencies was properly dismissed for lack of subject matter jurisdiction. The individual's status as an American citizen or taxpayer was insufficient to confer on him standing to bring a lawsuit seeking to hold a government action or a statute unconstitutional in the absence of an articulated injury-in-fact that was distinct from the injury suffered by all such citizens or taxpayers.

*Schulz, CA-2, 2010-1 USTC ¶50,316;
TRC IRS: 45,152.*

Tax Crimes

A tax return preparer was properly convicted of and sentenced for aiding and assisting in the preparation of false tax returns. The district court erred in calculating the tax loss by extrapolating from a nonrandom sample of audited returns to determine the individual's offense level. However, the error was harmless because it did not result in a longer sentence.

*Mehta, CA-4, 2010-1 USTC ¶50,315;
TRC IRS: 66,204.*

Summons

An IRS summons requesting the vice-president of a corporation to appear, testify and provide documents and records in connection with an investigation into the corporation's tax liabilities was ordered enforced. The IRS established a prima facie case for summons enforcement under *Powell*, which the individual failed to rebut. The government showed that the summons was issued in good faith and for a legitimate purpose, the documents sought were relevant to that purpose, the IRS did not already have them and all requisite administrative steps had been followed.

*Delgado, DC Calif., 2010-1 USTC ¶50,318;
TRC IRS: 21,308.*

An individual's petition to quash an IRS third-party summons issued to a bank and seeking information and records pertaining

to the individual was dismissed for failure to properly effect service upon the government and because the matter was moot. The government was not properly served through the U.S. Attorney General because the individual only served the U.S. Attorney. Moreover, the summons was issued and responded to prior to the filing of the petition to quash.

*Breaux, DC La., 2010-1 USTC ¶50,319;
TRC IRS: 21,108.*

Income

The sole shareholder of an S corporation showed that he had deposited and reported an amount of income that the IRS claimed had not been taken into account as gross receipts when received. The taxpayer was also entitled to offset gross receipts with an additional, substantiated amount of the cost of goods sold. The taxpayer was not liable for an accuracy-related penalty for a substantial understatement of income tax because he took reasonable efforts to assess his tax liability and reasonably relied on the advice of a professional who maintained his books and records and filed his taxes.

*Derby, TC, Dec. 58,173(M),
FED ¶48,004(M); TRC BUSEXP: 24,800.*

Deductions

An individual taxpayer was entitled to a dependency exemption deduction, child tax

Continued on page 8

Filing Deadline Moved For Additional New Jersey Disaster Area Taxpayers

The IRS has extended return-filing and payment deadlines for victims of the severe storms and flooding that began on March 12, affecting the counties of Atlantic, Bergen, Cape May, Essex, Gloucester, Mercer, Middlesex, Monmouth, Morris, Passaic, Somerset, and Union in New Jersey. Persons who qualify for assistance have until May 11, 2010, to file returns (including 2009 individual tax returns), pay taxes (including estimated tax payments), and perform certain other time-sensitive acts otherwise due between March 12, 2010, and May 11, 2010. In addition, the IRS will abate penalties for failure to make timely employment and excise tax deposits due on or after March 12, 2010, and on or before March 29, 2010, if the taxpayer made these deposits by March 29.

New Jersey Storm and Flooding Victims, FED ¶46,331; TRC FILEIND: 15,204.25.

Tax Briefs

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credit, and head of household filing status for his two of his minor children because both children were qualifying children as defined by Code Sec. 24. The taxpayer was further eligible to file as a head of household because he was not married or a surviving spouse and maintained his home for more than one-half of the tax year as a principal place of abode for his qualifying children.

Gaitor, Jr., TC, CCH Dec. 58,177(M), FED ¶48,008(M); TRC FILEIND: 3,154.10.

Various Schedule C deductions allegedly paid during the construction of a bed-and-breakfast were not currently deductible because the taxpayer was not carrying on a trade or business at the time the expenses were paid. Unsubstantiated dependency exemptions and education credits were disallowed.

Wolfgram, TC, CCH Dec. 58,176(M), FED ¶48,007(M); TRC BUSEXP: 3,058.

Frivolous Returns

An individual who reported none of his wages on his return was liable for a frivolous return penalty. The penalty was correctly assessed because the taxpayer filed a purported income tax return, the return showing zero gross income and substantial tax withheld did not contain information on which the substantial correctness of the self-assessment could be judged, and the defects in the return were due to a frivolous position.

Lindberg, TC, CCH Dec. 58,174(M), FED ¶48,005(M); TRC PENALTY: 3,260.

Liens and Levies

In its action to enforce federal tax liens on residential real property, the government was entitled to the entry of default judgment against a bank, extinguishing the bank's lien on the property. The default judgment protected the government against interminable delay and continued uncertainty as to its rights because the bank did not seek relief from the entry or otherwise attempt to participate in the litigation.

Gunnison Alpine Contractors, Inc., DC Colo., 2010-1 USTC ¶50,323; TRC LITIG: 9,256.

An individual's complaint challenging an IRS levy placed on his wages was properly

dismissed because he only raised frivolous constitutional arguments. His claim that proper procedures for placing a levy on his wages were not followed was dismissed because he did not exhaust his administrative remedies with respect to this claim prior to filing suit.

Sherwood, CA-2, 2010-1 USTC ¶50,317; TRC IRS: 51,060.05.

Refund Claims

An individual's complaint alleging the nonreceipt of tax refunds was dismissed for failure to state a claim. A declaration signed by an IRS employee under penalty of perjury attested to her review of the individual's account and determined that he was not entitled to additional refunds. The individual failed to rebut evidence establishing that amounts due had already been remitted to him or used to offset other debts he owed.

Destin, DC N.J., 2010-1 USTC ¶50,320; TRC LITIG: 9,102.

The government's action to recover disallowed research and development credits and interest erroneously refunded to a married couple was not dismissed because it was timely instituted and the complaint was sufficiently pled. The government established the issuance and the amounts of the erroneous refunds, the timeliness of its action, and that the couple would be unjustly enriched by retaining the tax credits.

Goertz, DC Tex., 2010-1 USTC ¶50,322; TRC IRS: 33,312.05.

Frivolous Arguments

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series, or the filing of Form 56, Notice Concerning Fiduciary Relationship, to create an obligation on the part of the Treasury Department to make a monetary payment to the taxpayer. This position involves the taxpayer naming the Treasury Secretary or other government employee as a fiduciary of the taxpayer and requires the Treasury Department to honor a Form 1099-OID as a financial or redemption instrument.

- Claiming a refund of an amount of withheld income or other tax that is obviously false because it exceeds the

Deficiencies and Penalties

A taxpayer had wage and other income for four tax years as shown on returns prepared for him by the IRS pursuant to Code Sec. 6020(b). In addition, the IRS sustained its burden of production concerning the imposition of the failure to file and failure to pay penalties, and the failure to pay estimated tax penalty. Finally, sanctions were imposed by the Court because of the taxpayer's frivolous argument.

Ulloa, TC, CCH Dec. 58,175(M), FED ¶48,006(M); TRC FILEIND: 15,354.

Bankruptcy

Chapter 7 debtors were not entitled to reduce the value of an IRS tax lien attached to their personal property to the fair market value of that property. Chapter 7 debtors may not use the bankruptcy provisions to "strip down" nonconsensual federal tax liens on property to the value of the collateral.

In re Calderon, BC-DC N.C., 2010-1 USTC ¶50,324; TRC IRS: 57,106.15.

The IRS's claims were for taxes incurred by the debtor's estate and were filed before the bankruptcy trustee commenced distribution; therefore, they were not tardy and received first priority in distribution according to the bankruptcy law existing on the petition date.

In re Turner, BC-DC N.M., 2010-1 USTC ¶50,325; TRC IRS: 57,062.

taxpayer's income reported on his or her return or is disproportionately high compared to the income reported on the return or other supporting documents filed with the return.

- Claiming a tax refund based on purported advance payments to the taxpayer's employees of the Earned Income Tax Credit (EITC) as reported by the taxpayer on a filed Form 941, Employer's Quarterly Federal Tax Return, or other employment tax return, that reports wages, tips or other compensation amounts but leaves the remaining lines blank or reports zero as the amount.

References: FED ¶46,333; TRC PENALTY: 3,260.