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IRS Takes Liberal View Of New Under Age 27 Health Coverage Exclusion

◆ *IR-2010-53, Notice 2010-38*

The IRS has issued taxpayer-friendly guidance on the new extended exclusion from income for employer-provided health insurance for children under age 27. Additionally, employees may immediately make pre-tax salary reduction contributions for accident or health benefits under a cafeteria plan (including a health flexible spending arrangement) for children under age 27, even if the cafeteria plan has not yet been amended.

■ **CCH Take Away.** The health care reform package also requires group health plans and health insurance issuers providing dependent coverage of children to continue to make the coverage available for an adult child until age 26. "There are some differences between the application of the coverage requirement and the income exclusion," Kimberly Wilcoxon, employee benefits attorney, Thompson Hine, LLP, Cincinnati, told CCH. "First, the income exclusion is effective March 30, 2010 whereas the coverage requirement does not become effective until the first plan year beginning on or after September 23, 2010. Second, the coverage requirement applies only until the child turns age 26, whereas the income exclusion applies until the end of the tax year in which the child turns age 26."

Background

Before passage of the health care reform package, employer-provided health insurance coverage was generally excluded from income if the employee's child was under age 19 (or under age 24 if a student). The health care

reform package amended Code Sec. 105(b) to extend the exclusion from gross income for medical care reimbursements under an employer-provided accident or health plan to any employee's child who has not attained age 27 as of the end of the tax year. The amendment is effective March 30, 2010.

■ **Comment.** The March 30, 2010 effective date, Wilcoxon explained, provides an opportunity for plans to implement the new coverage requirement early or to change the taxation of insured group health coverage already being provided to adult children under state law.

■ **Comment.** Similar amendments were made for retiree health accounts in pension plans, voluntary employees' beneficiary associations (VEBAs), and deductions by self-employed individuals for health insurance.

The health care reform package did not amend the Code Sec. 106 exclusion for coverage under an employer-provided accident or health plan. According to the IRS, Congress did not intend to provide a broader exclusion in Code Sec. 105(b) than in Code Sec. 106. Regs under Code Sec. 106 will be amended retroactively to March 30, 2010 to provide that coverage for an employee's child under age 27 is excluded from gross income.

■ **Comment.** "Notably, health savings accounts and Code Sec. 105(c) (accidental coverage) are not included in the tax relief under the health care reform law or Notice 2010-38," Elizabeth Dold, principal, and Christine Keller, principal, The Groom Law Group,

Continued on page 2

Route to: _____

Updated COBRA Subsidy FAQs Highlight Reduction In Hours, Employee Notices

◆ www.dol.gov

The U.S. Department of Labor (DOL) recently posted updated frequently asked questions (FAQs) about COBRA premium assistance on its web site. The updated FAQs reflect the extension of the COBRA subsidy under the *Continuing Extension Act of 2010 (CEA)*.

■ **CCH Take Away.** COBRA premium assistance, originally enacted in the *American Recovery and Reinvestment Act of 2009 (2009 Recovery Act)*, has been extended several times. Each extension has imposed notification requirements on employers and plans. Generally, individuals who are involuntarily terminated from employment between September 1, 2008 through May 31, 2010, and who have not been provided a COBRA election notice, must receive a general *2009 Recovery Act* notice, updated to incorporate changes made by the *Defense Appropriations Act of*

2010 (2010 Defense Act), the *Temporary Extension Act of 2010 (TEA)* and the *Continuing Extension Act of 2010 (CEA)*.

CEA

The *CEA* extends eligibility for COBRA premium assistance through May 31, 2010. The *CEA* generally continues the eligibility framework set out in previous legislation. An assistance eligible individual may qualify for the COBRA subsidy if he or she:

- Has a qualifying event related to an involuntary termination of employment that occurred at any time from September 1, 2008 through May 31, 2010;
- Elects the coverage (within the appropriate timeframes); and
- Is ineligible for Medicare or coverage under any other group health plan.

Reduction in hours

The *TEA* added that an involuntary termination of employment is a qualifying

event for purposes of the COBRA subsidy if it was preceded by a qualifying event that was a reduction of hours. Under the *CEA*, an involuntary termination of employment on or after March 2, 2010 and on or before May 31, 2010 is a qualifying event for purposes of the COBRA subsidy if it was preceded by a qualifying event that was a reduction of hours any time from September 1, 2008 through May 31, 2010.

■ **Comment.** DOL explained that a reduction of hours is a qualifying event when the employee loses coverage because the employee, though still employed, is no longer working enough hours to satisfy the plan's eligibility requirements.

■ **Planning Note.** DOL emphasized that the COBRA subsidy does not end on May 31, 2010. New eligibility for COBRA premium assistance ends on May 31, 2010 (unless extended by Congress).

Exclusion

Continued from page 1

Washington, D.C., told CCH. "If adult children who do not otherwise satisfy the definition of dependents under Code Sec. 152(a) receive coverage through these arrangements, the benefit will generally be taxable."

Child

A child for purposes of the extended exclusion is an individual who is the son, daughter, stepson, or stepdaughter of the employee. A child includes an adopted individual and an eligible foster child.

■ **Comment.** The new age 27 standard replaces the lower age limits

that applied before passage of health care reform as well as the requirement that a child generally qualify as a dependent for tax purposes.

Tax year

The extended exclusion applies for reimbursements for health care of individuals who are not age 27 or older at any time during the tax year. The tax year is the employee's tax year.

■ **Planning Tip.** Employers may assume that an employee's tax year is the calendar year and may rely on the employee's representation as to the child's date of birth.

More provisions

The IRS also explained:

- A benefit will not fail to be a qualified benefit under a cafeteria plan (including a health FSA) merely because it provides coverage or reimbursements that are excludible under Code Sections 105(b) and 106 for a child who has not attained age 27 as of the end of the employee's tax year.
- Coverage and reimbursements under a plan for employees and their dependents that are provided for an employee's child under age 27 are not wages for FICA or FUTA purposes.

■ **Comment.** "Notice 2010-38 provides a rare exception to the requirement that cafeteria plans be amended prospectively," Wilcoxon told CCH. "Under Notice 2010-38, a cafeteria plan may permit employees to change their pre-tax plan elections immediately to pay for eligible adult child coverage on a pre-tax basis. However, the plan document does not need to be amended for this change until December 31, 2010."

References: FED ¶¶46,350, 46,351; TRC COMPEN: 45,056.

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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*

IRS/HHS Issue Average Premiums For Small Employer Health Insurance Tax Credit

◆ *Rev. Rul. 2010-13*

As promised, the IRS and the U.S. Department of Health and Human Services (HHS) have issued a key component of the new Code Sec. 45R small employer health insurance tax credit. The agencies have released the average premium for the small group market in each of the 50 states for the 2010 tax year.

■ **CCH Take Away.** The IRS and all agencies of the federal government are moving quickly to implement the provisions of the health care reform package that take effect in 2010. The IRS promised to announce the average premium for the small group market by the end of April. The small employer health insurance tax credit is being trumpeted as one of the most immediate and most beneficial incentives to small businesses. However, critics question if the credit will be as widely used as predicted because the employee threshold for the maximum credit is very low.

Background

The health care reform package (the *Patient Protection and Affordable Care Act* and the *Health Care and Education Reconciliation Act of 2010*) created the small employer health insurance tax credit. For 2010 through 2013, a maximum credit of 35 percent against qualified premium costs is available to employers that have no more than 25 full-time equivalent employees (FTEs) and pay average annual wages for the year of no more than \$50,000. Tax-exempt employers may be eligible for a maximum credit of 25 percent for 2010 through 2013.

■ **Comment.** The credit is reduced by 6.667 percent for each FTE in excess of 10 employees. The credit is also reduced by four percent for each \$1,000 that average annual compensation paid to the employees exceeds \$25,000.

Premiums

Only premiums paid by the employer under a qualifying arrangement are counted in calculating the small employer health insurance tax credit. Generally, the employer must not

pay less than 50 percent of the premium cost of the coverage. Additionally, the amount of an employer's premium payments that counts for purposes of the credit is capped by the premium payments the employer would have made under the same arrangement if the average premium for the small group market in the state (or an area within the state) in which the employer offers coverage was substituted for the actual premium.

■ **Comment.** The IRS previously explained that, if an employer pays only a portion of the premiums (but not less than 50 percent) and employees pay the remaining portion, the amount of premiums counted in calculating the credit is only the portion paid by the employer.

In April, the IRS announced that the average premium for the small group market in a state (or an area within the state) will be determined by HHS. Rev. Rul. 2010-13 provides the average premium for the

small group market in all 50 states. Average premiums reflect employee-only coverage and family coverage.

■ **Example.** For the 2010 tax year, ABC Co. has nine FTEs with average annual wages of \$23,000 per FTE. ABC pays \$72,000 in family health care premiums for those employees. In ABC's state (Massachusetts), the average small group market premium for family coverage is \$14,138 for 2010. ABC's amount (\$8,000 for each employee) does not exceed the average family premium for the small group market in Massachusetts.

■ **Comment.** HHS may provide additional average premium rates for the small group market in areas within a state for 2010. However, the sub-state rates will not be lower than the rates in Rev. Rul. 2010-13, the IRS advised.

References: FED ¶(to be reported); TRC COMPEN: 45,200.

Construction Firm May Not Defer Warranty-Type Income Using Percentage-Of-Completion Method; District Court Reversed

◆ *Koch Industries, Inc., CA-10, April 27, 2010*

Reversing a federal district court, the U.S. Court of Appeals for the Tenth Circuit has found that a construction company could not use the percentage-of-completion method (PCM) to defer income attributable to a warranty on a highway project. The court granted summary judgment to the government, finding that the long-term contract method under Code Sec. 460 cannot be used to defer tax on income received under a guaranty, warranty or maintenance agreement, and that the taxpayer's obligations came under the "warranty" umbrella.

■ **CCH Take Away.** The Tenth Circuit relied on the language of the regs and the principle that deferral provisions, such as Code Sec. 460, are to be construed strictly. The regs do not allow the PCM for a guaranty,

warranty or maintenance agreement. Since the taxpayer provided a warranty, the income could not be deferred, irrespective of how virtually certain performance on the warranty would be required, according to the Tenth Circuit. The district court had concluded that the "virtual certainty" that warranty work would have to be performed was directly relevant.

Background

The taxpayer, a highway construction company, agreed to build a road for a state. The taxpayer agreed to build a higher cost, longer lasting road made of special materials. To offset the higher initial cost, the taxpayer offered extended warranties that set out performance criteria. If these were not met, the taxpayer had to repair or replace the road or structure.

Continued on page 4

Sixth Circuit Rejects Arm's-Length Calculation Of FSC Tax Benefits

◆ *Proctor & Gamble, Co., CA-6, April 28, 2010*

Reversing a federal district court, the Sixth Circuit Court of Appeals has held that the IRS could not impose an arm's-length calculation on a taxpayer and a foreign sales corporation (FSC). The court further permitted the taxpayer's accrual-based method of accounting for purposes of combined taxable income (CTI) under the foreign sales corporation FSC rules.

■ **CCH Take Away.** The FSC regime exempted a portion of income derived from the export of U.S. products from U.S. income taxation. Congress repealed the FSC rules in 2000.

Background

The taxpayer, a U.S. corporation, produced items that its Canadian subsidiary sold in Canada. For tax purposes, the subsidiary paid another taxpayer-owned entity, the FSC, which was incorporated in Barba-

dos. The FSC remitted the payments to the taxpayer.

The IRS determined that the taxpayer had miscalculated its tax liability and imposed its own method of accounting. The IRS determined that the CTI calculation must approximate an arm's-length transaction.

The district court upheld the IRS's determination. It found that the CTI provision supersedes prevailing accounting practices, such as accrual-based accounting, to require a matching of all incomes and expenses.

Court's analysis

The Sixth Circuit rejected the IRS's arm's-length argument. The court accepted the taxpayer's claim that the FSC rules precluded the adoption of the arm's-length standard when, as in this case, the pass-through or partnership method, is applied to the transaction. The IRS had improperly imposed its own method of accounting.

The Sixth Circuit further found that the dis-

trict court erred in requiring matching of all incomes and expenses for every transaction included in the CTI calculation. Neither the statutory language nor the regs precluded accrual-based accounting, the court observed.

However, the Sixth Circuit found that the taxpayer had misapplied the FSC rules. The taxpayer failed to apportion the required percentage of profit to its FSC. Instead, it diverted a percentage of the gross receipts to the FSC as profit.

■ **Comment.** The district court relied on *General Dynamics Corp., CCH Dec. 51,961 (1997)*, in which the taxpayer proposed to exclude certain expenses from its CTI calculation. Here, the Sixth Circuit found that the taxpayer did not exclude any expenses but reported them in accordance with established accrual-based-accounting standards.

References: 2010-1 USTC ¶50,372; TRC INTLUT: 15,350.

PCM

Continued from page 3

The taxpayer received \$62 million for the warranties, using the PCM to defer income for a number of years. The IRS disallowed the PCM. The district court held for the taxpayer, finding that the agreement was not a true warranty as intended under the regs because of the

virtual certainty that some performance would be required, thereby creating significant performance obligations for the taxpayers.

Section 460

An accrual method taxpayer is generally taxable on an advance payment at the time of receipt. However, the long-term contract method under Code Sec. 460 is an excep-

tion to this rule. Taxpayers can use the PCM because of the difficulty of determining the profitability of a construction project until the contract is completed.

■ **Comment.** A long-term contract is any contract for the manufacture, building, installation, or construction of property that is not completed within the tax year.

Warranty

The regs make clear that performance under a guaranty, warranty, or maintenance agreement is not a long-term contract activity and is never necessary for the manufacture or construction of property under a long-term contract. The court found that the pavement and structure warranties are not long-term contracts, because they did not impose a fixed and definite obligation on the contractor to provide specific construction services.

There was no absolute certainty regarding the long-term construction work, if any, to be performed by the taxpayer.

References: 2010-1 USTC ¶50,362; TRC ACCTNG: 33,000.

IRS Plans Saturday Open House At Select Local Offices

Approximately 200 IRS offices across the country will open on Saturday, May 15 for five hours. The May 15 open house, "to help small businesses and individuals solve tax problems," is the second of an expected four Saturday events. The IRS indicated that at least one local office will be open in every state.

"Our goal is to resolve issues on the spot," IRS Commissioner Douglas Shulman said in a statement. According to the IRS, 88 percent of taxpayers who participated in the March 27, 2010 nationwide open house resolved their issues the same day.

■ **CCH Take Away.** An IRS spokesperson told CCH that taxpayers would be able to get assistance on certain matters at the open house that could not be addressed over the IRS's toll-free number, including: alien clearances; preparation of Form 2290; federal and state tax return preparation; offers in compromise; and examination and appeals related questions.

IR-2010-55

Facade Easement Not Entitled To Charitable Deduction; Mortgage Eliminated Perpetuity Protection

◆ *Kaufman, 134 T.C. No. 9, April 26, 2010*

The Tax Court recently denied a married couple's deduction for an otherwise qualified conservation façade easement on their home to a tax-exempt trust. A pre-existing mortgage on the home jeopardized the exempt entity's exclusive right "in perpetuity" to the easement. The financial strength of the homeowners left little likelihood of a bank repossession but was not enough to save the deduction.

■ **CCH Take Away.** These homeowners lost in testing the extent the exclusive right to the easement covered remote occurrences. The challenge would have been unnecessary with proper planning and a cooperative lender. In the case of most façade easements, homeowners in the past generally have complied with the regulations by getting the lenders to subordinate their rights in the property "to the right of the grantee, its successors or assigns, to enforce the conservation purposes of this easement in perpetuity." Unfortunately, this subordination may be more difficult to obtain during the current reluctance of lenders to stray from standard mortgage terms.

Background

The couple owned a home in a historic preservation district. They entered into an agreement under which they contributed an easement in the façade of the home and cash to the trust. They claimed a charitable deduction resulting from their contribution.

The IRS disallowed the taxpayers' deduction and also assessed accuracy-related penalties for negligence and substantial understatement of tax. The property interest conveyed as part of this contribution required protection in perpetuity, the IRS asserted. The home owned by the taxpayers was subject to a mortgage, there was an issue as to whether the façade easement contributed to the trust was preserved in perpetuity. Since the mortgage granted the bank a "prior claim" in all proceeds of condemnation and all insurance proceeds

resulting from casualty, hazard, or accident, the trust was prevented from exercising its right to a proportionate share of any such future proceeds, the IRS determined.

■ **Comment.** The easement contribution in this case was made in 2003. For contributions made after July 25, 2006, the *Pension Protection Act of 2006* provides that donated façade easements for certified historic structures must meet the following additional requirements: the easement must preserve the entire exterior of the building, including the front, sides, rear, and height of the building; the easement must prohibit any change to the exterior of the building that is inconsistent with the historical character of the exterior; and the donor and donee must enter into a written agreement certifying that the donee is a qualified organization with a purpose of environmental protection, land conservation, open space preservation, or historic preservation; and that it has the resources to manage and enforce the restriction and a commitment to do so.

Court's analysis

The court agreed with the IRS. It found that, as a matter of law, the mortgage encum-

bering the taxpayers' home and providing priority to the bank in any future proceeds disrupted the protection in perpetuity for the façade easement.

The taxpayers unsuccessfully argued that, despite the mortgage, the perpetuity requirement was fulfilled because there was still a chance the trust could obtain its proportionate share of any future proceeds. The court disagreed, ruling that the perpetuity requirement could not be fulfilled by merely showing the taxpayers would likely satisfy both the mortgage and the trust's rights to share in any future proceeds. The perpetuity protection requirement was not conditional, the court explained. Due to the lack of protection in perpetuity, the taxpayers' contribution failed to qualify as a qualified conservation contribution and they could not claim a charitable contribution deduction.

■ **Comment.** The court also found material issues of fact related to the accuracy-related penalties assessed against the taxpayers. They asserted a reasonable cause defense, with the desire to present testimony indicating they relied upon the advice of an accountant and had a good faith belief their contribution was a qualified conservation contribution.

References: CCH Dec. 58,197; TRC INDIV: 51,364.

Second Circuit Affirms Partner's Draws Subject To Continuing Levy

In a case of first impression, the Second Circuit Court of Appeals has found that a taxpayer's draws from a partnership were subject to continuing levy under Code Sec. 6331(e). The draws were advances on compensation.

Background. The managing partner of a law firm received periodic payments from the firm's funds. In 1996, the IRS informed the firm that it was levying against the partner's wages to satisfy an unpaid tax debt. The firm did not respond to the levy and the IRS filed suit in federal district court. The district court found that the firm had not shown reasonable cause for failing to comply.

Court's analysis. The Second Circuit rejected the firm's argument that the draws were not property or rights to property subject to Code Sec. 6331(e). The partner had a 60 percent interest in the firm's profits and the draws were advances on his annual share of the firm's profits. The Second Circuit further found that Code Sec. 6331(e) could reach the draws because they were compensation for services.

Moskowitz, Passman & Edelman, CA-2, 2010-1 USTC ¶50,371; TRC IRS: 51,064.

IRS Issues Interim Guidance On Direct Pay Option For Qualified Tax Credit Bonds

◆ Notice 2010-35

Treasury and the IRS have released interim guidance on the election by certain qualified tax credit bond issuers to receive a direct payment of the refundable tax credit under the *Hiring Incentives to Restore Employment (HIRE) Act*. Issuers may rely immediately upon the interim guidance until new forms are issued and formal guidance, including more comprehensive regs, are released.

■ **CCH Take Away.** The interim guidance covers claims for the refundable tax credit payment, required elections, and information reporting requirements for issuers. It also addresses compliance requirements for Build America Bonds (BABs). Treasury has been issuing a variety of press releases lately touting these bonds and the role that the Obama administration has played in helping communities nationwide through them.

Tax credit bonds

Tax credit bond investors may generally claim a credit against their personal tax liability under Code Sec. 54A. Effective for certain bonds issued after the March 18, 2010 date of the *HIRE Act's* enactment, issuers of tax credit bonds may elect to directly receive a portion of the tax credit for themselves; classifying them as “direct pay” tax credit bonds.

■ **Comment.** Although this election prevents the ordinary bondholder from covering some of the tax on the interest income through the credit, the issuer can offer higher yields. This election is especially beneficial, however, to issuers that intend to sell the bonds to investors with tax-exempt status or location in a foreign jurisdiction.

Forms

With the creation of the direct pay tax credit bond, Treasury and the IRS anticipate processing refundable credit

payment requests on bonds beginning with interest payment dates on or after September 1, 2010. The IRS intends to facilitate these requests through the revision of Form 8038-CP, Return for Credit Payments to Issuers of Qualified Bonds, the form currently used by issuers of BABs and recovery zone economic development bonds.

■ **Comment.** The IRS plans to begin processing revised Forms 8038-CP by July 12, 2010.

Before July 2010, the IRS also plans to post Form 8038-TC, Information Return for Tax Credit Bonds and Specified Tax Credit Bonds, to reflect the direct pay election on its web site. It anticipates processing this information return immediately after Form 8038-TC is released, since requests for refundable credit payments would otherwise be delayed. Form 8038-TC must be filed at least 30 days before the issuer requests the refundable credit payment on Form 8038-CP.

Interim guidance

Subject to change only after formal guidance is released, direct pay tax credit bond issuers are to rely on the following interim guidance.

■ **Bond premium limits.** The IRS intends to prohibit issuers from selling direct pay tax credit bonds for an issue price with a more than de minimis premium over the stated principal. This generally means the premium may not exceed 0.25 percent of the stated redemption price at maturity, multiplied by the number of complete years between the issue and maturity dates.

■ **Original issue discount.** Original issue discounts—the excess of a bond's stated redemption price at maturity over issue price—may not be treated as an interest payment when calculating refundable credit payments.

■ **Bond proceeds.** The IRS proposed two safe harbors against the general prohibition of using direct pay tax credit bond proceeds to refinance past debt issuances and reimburse certain expenditures.

References: FED ¶46,347;
TRC BUSEXP: 55,802.

No State Department Certification Necessary For Foreign Worker Wage Exclusion

The Code Sec. 893 income tax exclusion for wages of foreign government employees applied to a foreign national, according to a recent Tax Court ruling, even though the U.S. Department of State (the State Department) had not yet certified that U.S. workers in that foreign nation were subject to equivalent tax treatment. The individual had otherwise met the requirements for the exclusion and the certification, while eventually provided, was not necessary, the court held.

A foreign national worked in the U.S. as a security guard for the Embassy of the United Arab Emirates (UAE). He provided services similar to those performed by U.S. employees in the UAE, which imposed no income tax on those U.S. workers. The IRS imposed tax on the individual's wages. It found that, during the tax years at issue, the State Department had not certified that the UAE provided an equivalent tax exemption to U.S. workers in that country under Code Sec. 893(b). Under a 1991 policy, the State Department required foreign embassies to submit an application before it would issue such a certification. The embassy had not done so.

The Tax Court found that his wages were excluded from U.S. tax. He had met all requirements for the exclusion under Code Sec. 893(a). The plain language of that provision did not require certification by the State Department regarding the equivalent treatment of U.S. workers under Code Sec. 893(b) as a condition for the wage exclusion. Imposing such a condition, the court held, would run counter to the provision's legislative intent.

Abdel-Fattah, 134 T.C. No. 10, CCH Dec. 58,198; TRC INTL: 12,150.

Tax Briefs

Internal Revenue Service

The IRS has announced that application packages for the 2011 Tax Counseling for the Elderly (TCE) Program are now available. Applications must be filed by July 9, 2010.

Notice, FED ¶46,348; TRC IRS: 6,050.

Application packages for the 2011 Community Volunteer Income Tax Assistance (VITA) Matching Grant Program are now available from the IRS. The application deadline is July 9, 2010.

Notice, FED ¶46,349; TRC FILEIND: 18,050.

International

The countries that may require participation in, or cooperation with, an international boycott are: Kuwait, Lebanon, Libya, Qatar, Saudi Arabia, Syria, United Arab Emirates and the Republic of Yemen.

Boycott Notice, FED ¶46,352;

TRC INTL: 21,050.

The IRS has released a copy of the Competent Authority Agreement entered into by the competent authorities of the United States and Belgium 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.

Announcement 2010-27, FED ¶46,356;

TRC INTL: 18,126.

The IRS is requesting nominations for nine open positions on the Information Reporting Program Advisory Committee (IRPAC) for calendar year 2011. Nominations must be received on or before May 28, 2010.

IR-2010-54, FED ¶46,354.

The IRS has published the inflation adjustment factors and reference prices to be used in computing the renewable electricity production credit for calendar year 2010.

Notice 2010-37, FED ¶46,355;

TRC BUSEXP: 54,550.

Jurisdiction

The Court of Federal Claims lacked subject matter jurisdiction over an individual's complaint seeking money damages, return

of property, declaratory judgment and injunctive relief. The individual's constitutional claims were also dismissed because they were not money-mandating claims.

Leitner, FedCl., 2010-1 USTC ¶50,358;

TRC LITIG: 9,052.

Tax Crimes

An individual found guilty of tax evasion was not entitled to credit for acceptance of responsibility. The individual vigorously challenged his factual guilt with respect to all of the charges. Furthermore, his evasion of state taxes was relevant conduct.

Elia, CA-2, 2010-1 USTC ¶50,353;

TRC IRS: 66,462.10.

An individual was properly convicted of willfully attempting to evade income tax. The IRS was not required to issue a tax assessment in order to prove the existence of a tax deficiency.

Mellor, CA-8, 2010-1 USTC ¶50,363;

TRC IRS: 66,102.05.

An individual convicted of filing false documents with the IRS was not entitled to an acquittal or a new trial. Evidence established that the individual's claims of "zero" wages on his tax forms were false and wilfully made.

Hendrickson, DC Mich., 2010-1 USTC ¶50,368;

TRC IRS: 66,202.

Summons

An individual lacked standing to bring a petition to quash an IRS third-party summons requesting his financial records. The summons was issued in aid of collection of an assessment made against the individual; therefore, the individual was not legally entitled to notice and could not bring a proceeding to quash.

Sanders, DC Ariz., 2010-1 USTC ¶50,370;

TRC IRS: 21,106.

Income

The Tax Court properly upheld the IRS's determination of a truck driver's taxable income for several tax years and penalties for failure to file and failure to pay estimated tax. The IRS reconstructed the taxpayer's income based on Forms 1099-Misc filed by the delivery company and his bank deposits.

Byers, CA-8, 2010-1 USTC ¶50,357;

TRC FILEIND: 21,056.

Deductions

An individual was not entitled to deduct losses from her horse breeding and training activity. The activity was not engaged

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Supreme Court Declines To Hear *In Vitro* Medical Expense Deduction Case

The U.S. Supreme Court has declined to review a decision by the Court of Appeals for the First Circuit denying a medical expense deduction for costs related to a taxpayer's fathering of two children by way of *in vitro* fertilization.

■ **Comment.** While IRS Pub. 502 allows for the deduction of *in vitro* fertilization "to overcome an inability to have children," the difference in this case was that the taxpayer was not infertile. Instead, the *in vitro* procedure was performed in connection with two gestational carrier agreements.

The First Circuit had affirmed the Tax Court's finding that the *in vitro* expenses incurred by a father who was not infertile did not treat a medical condition or defect of the taxpayer. Nor did the procedure affect a structure or function of his body, according to the Tax Court. Rather, the procedures performed affected the bodies of the two gestational carriers. As to the father, the expenses were nondeductible personal expenses.

Magdalin, CA-1, cert denied April 26, 2010, 2010-1 USTC ¶50,150; TRC INDIV: 42,052.

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in with the actual and honest objective of making a profit.

Chandler, TC, CCH Dec. 58,202(M), FED ¶48,033; TRC BUSEXP: 15,100.

Anti-Injunction Act

Jurisdiction was lacking over an individual's complaint seeking injunctive relief from and damages for the IRS's allegedly unauthorized assessment of a trust fund recovery penalty against him. Sovereign immunity was not waived.

Marcello, DC Md., 2010-1 USTC ¶50,361; TRC IRS: 45,114.

Trial Practice

A domestic corporation's motion for a new trial was denied because the taxpayer failed to demonstrate that the court committed manifest error by selecting the wrong legal tests to analyze the transactions at issue.

Merck & Co., Inc., sub nom Shering-Plough, DC N.J., 2010-1 USTC ¶50,373; TRC SALES: 3,304.

Innocent Spouse Relief

An individual was not entitled to innocent spouse relief from joint and several liability in a case where the estate of her deceased husband satisfied all of the couple's income tax liabilities covered by the notice of Federal tax lien and levy notices. The surviving wife was not entitled to a refund of the joint tax liabilities paid by the estate.

Kaufman, TC, CCH Dec. 58,199(M), FED ¶48,030(M); TRC INDIV: 18,058.

Liens and Levies

Tax assessments against an individual were reduced to judgment and tax liens on real property were foreclosed. The individual was the true and beneficial owner of the property because the trusts were fictional entities, designed solely to assist the individual to avoid his tax liabilities.

Wesselman, DC Ill., 2010-1 USTC ¶50,356; TRC IRS: 45,158.

Federal tax liens on a corporation's accounts receivable had priority over an individual's interest in the funds arising out of a purchase and sale and security agreement. Warnings to the corporation, stating that

the IRS would undertake collection actions if the corporation did not comply with its requests, were not an agreement to refrain from the collection of tax liabilities.

Abercrombie & Fitch Stores, Inc. v. American Commercial Construction, Inc., DC Ohio, 2010-1 USTC ¶50,355; TRC IRS: 48,152.

A title insurance company was entitled to recover, through a wrongful levy action, certain premiums collected by the company's agent and levied on by the IRS. Under state (Florida) law, the government was not entitled to funds that the agent was holding in trust for the title insurance company.

Old Republic National Title Ins. Co., DC Fla., 2010-1 USTC ¶50,367; TRC IRS: 51,156.

Code Sec. 6332 insulated a private corporation and its payroll manager from suit arising from their compliance with an IRS levy. The employer and its payroll manager, as private parties complying with an IRS levy, were afforded statutory immunity from liability under Code Sec. 6332.

Bullock v. Bimbo Bakeries USA, DC Pa., 2010-1 USTC ¶50,369; TRC IRS: 51,052.

Collection Due Process

An IRS Appeals officer did not abuse her discretion in rejecting a couple's offer in compromise. There was no doubt about the collectibility of the couple's tax liabilities, based upon their assets and potential income.

Caney, TC, CCH Dec. 58,200(M), FED ¶48,031(M); TRC IRS: 42,120.

Tax Assessments

An individual's federal tax assessment and collection claims were barred by sovereign immunity and dismissed for lack of subject matter jurisdiction. Presumptive validity of the tax assessments was presented.

Clark, DC Calif., 2010-1 USTC ¶50,360; TRC LITIG: 9,056.

A tax assessment against a married couple was timely because the statute of limitations was tolled during a pending installment agreement. A conditional offer to pay included in the proposal was not a fatal flaw, and the IRS's failure to code the installment agreement as pending within 24 hours of receipt did not render the proposal void.

Austin, DC Mass., 2010-1 USTC ¶50,364; TRC IRS: 30,200.

Deficiencies and Penalties

The founder, shareholder and officer of a corporation was liable for the trust fund recovery penalty assessed against him in connection with the corporation's unpaid withholding taxes. The individual was a responsible person and acted willfully.

Erwin, CA-4, 2010-1 USTC ¶50,354; TRC PAYROLL: 6,306.

The vice president of a corporation was a responsible person liable for the trust fund recovery penalty assessed against her in connection with the corporation's unpaid withholding taxes. Despite knowledge of the tax deficiencies, she intentionally made payments to nongovernmental creditors.

In re Cobb, BC-DC Va., 2010-1 USTC ¶50,359; TRC PAYROLL: 6,306.

Income tax and civil penalty tax assessments against an individual were reduced to judgment, and federal tax liens encumbering his interest in property held by a nominee trust were foreclosed. Forms 4340, Certificates of Assessments and Payments, were presumptive evidence of the validity of the IRS's reconstruction of the individual's unreported and undocumented income.

Alexander, DC S.C., 2010-1 USTC ¶50,366; TRC IRS: 27,200.

Married nonfilers were liable for deficiencies and penalties. The Tax Court could not adjudicate their offset claim, they failed to substantiate their alleged net operating loss, and their belief that they did not owe taxes was not reasonable cause for failing to file returns and make timely tax payments. However, they were not liable for the failure to pay estimated tax penalty.

Soltan, TC, CCH Dec. 58,201(M), FED ¶48,032(M); TRC BUSEXP: 45,100.

Bankruptcy

A debtor couple's tax liabilities were excepted from bankruptcy discharge only with respect to the husband's unpaid taxes. Unpaid taxes with respect to the wife were discharged because the government did not establish that she understood the couple's financial condition or significantly influenced their spending.

In re Hawkins III, BC-DC Calif., 2010-1 USTC ¶50,365; TRC IRS: 57,158.