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Standard Federal Tax Reports
Taxes On Parade

Vol. 96, Issue No. 23, Report 22 May 21, 2009

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IRS Issues Withholding Adjustment Option For Pension Plans To Offset Making Work Pay Credit

◆ *IR-2009-50, www.irs.gov*

Responding to concerns from pension plans and pensioners, the IRS has announced a new withholding adjustment option. The option allows pension plans to adjust withholding to offset the Making Work Pay credit. At the same time, the IRS updated its web site to again remind individuals to adjust their withholding if they anticipate having too little tax withheld because of the Making Work Pay credit.

■ ***CCH Take Away.*** "The relief does address the problem that pensioners were likely to have under-withholding issues at tax time because the Making Work Pay Credit is generally not available. Unfortunately, providers cannot simply continue to use the pre-April 1 withholding tables, but need to take an additional programming step to make this work with the new adjustment tables," Elizabeth Dold, an employee benefits attorney with the Groom Law Group, Washington, D.C., told CCH. "The added complication comes when some pensioners have already adjusted their W-4P forms to increase their withholdings; now, if the new adjustment tables are also used (which are optional), those individuals will be in an over-withholding situation, unless they again file a new Form W-4P. But in the end, we do get to the right result."

■ ***Comment.*** The IRS intends to update its online version of Publication 15-T, New Wage Withholding and Advance Earned Income Credit Payment Tables, in the near future, to include the withholding adjustment option.

Background

The *American Recovery and Reinvestment Act of 2009 (2009 Recovery Act)* provides a refundable Making Work Pay credit of 6.2 percent of earned income, up to $400 for single taxpayers and up to $800 for married couples filing joint returns, for qualified individuals. The Making Work Pay credit is technically claimed by taxpayers when they file their 2009 and 2010 returns. However, Congress wanted to accelerate the credit, so it is being delivered in increments through reduced payroll withholding in 2009 and 2010.

The IRS directed employers to implement the revised withholding tables as of April 1, 2009. However, pension payments are not considered earned income for purposes of the Making Work Pay credit. Consequently, a pensioner with no earned income is ineligible for the credit and may not have enough tax withheld from his or her pension payment.

Optional method

Tables in Notice 1036-P, Additional Withholding for Pensions for 2009, explain how to calculate optional additional withholding amounts for pension payments. The withholding amounts may be added to the amount of withholding determined from

Continued on page 2

Route to: ____________ ____________ ____________ ____________ ____________

IRS Provides Guidance To RICs, REITs On Self-Determination For Deficiency Dividend Procedures

◆ *Rev Proc. 2009-28*

The IRS has released guidance to regulated investment companies (RICs) and real estate investment trusts (REITs) on when Form 8927, Determination Under Section 860(e)(4) by a Qualified Investment Entity, will be treated as a self-determination for purposes of Code Sec. 860 deficiency dividend procedures. The new guidance uses principles under Code Sec. 7502 (timely mailing is timely filing) to establish the date of determination.

■ ***CCH Take Away.*** Taxpayers should consider requesting a return receipt or other comparable evidence of actual receipt by the IRS since Form 8927 is considered a "determination" for Code Sec. 860(e) purposes only if it is delivered to the IRS. If a taxpayer fails to provide proof of actual delivery, prima facie evidence of delivery is the same as prima facie evidence of a document's delivery under Code Sec. 7502(c) and Reg. §301.7502-1(e).

Background

Code Sec. 860's deficiency dividend procedures provide that, if a determination is made that results in an adjustment of a RIC's or REIT's income or dividends paid deduction, the entity may pay a deficiency dividend. The procedure enables the entity to avoid automatic disqualification as a special tax entity or being taxed on deficiency dividends.

The *American Jobs Creation Act of 2004* expanded a Code Sec. 860 "determination" to provide for RIC and REIT self-determinations in 2004. However, no guidance was issued at the time regarding the date of determination for self-determinations, the contents of such statements or how the taxpayer was to attach the statement to a return. Under deficiency dividend procedures, the date of determination is a crucial date for RICs and REITs for complying with deficiency dividend procedure requirements. For example, the date of determination controls the timeliness of some acts the RIC and REIT must perform.

New guidance

Rev. Proc. 2009-28 provides that if a RIC or REIT properly completes Form 8927 and files it according to applicable IRS instructions, the form will be treated as a statement of self-determination and therefore a "determination" under Code Sec. 860(e)(4). To qualify as a Code Sec. 860(e) determination, Form 8927 must be properly delivered to the IRS.

Rev. Proc. 2009-28 provides that if Form 8927 is sent by U.S. mail or a private delivery service (PDS), the date of determination is the postmark date determined using principles of Reg. §301.7502-1(c). If the Form 8927 is filed with the IRS by any other means, the date of the determination is the date the form is received by the IRS.

■ ***Comment.*** The new guidance is effective July 1, 2009.

References: FED ¶46,370; TRC RIC: 6,106.

Pension Withholding

Continued from page 1

the percentage method, the wage bracket method or any other allowable method. The percentage method, the wage bracket method, or other allowable method when combined with this procedure constitutes an allowable alternative withholding method for pensions and annuities, the IRS explained.

■ ***Example.*** If the pension payment (before subtracting withholding allowances) is over $1,273 but not over $6,153 for a monthly payment period, the additional withholding amount is $44.40 for payees using the single withholding rate schedule.

■ ***Comment.*** The withholding method is optional. Pension plans do not have to use it; they may continue to use the revised withholding table.

■ ***Planning Note.*** Some pension recipients may have already submitted a Form W-4P, Withholding Certificate for Pension or Annuity Payments, to adjust their withholding. The IRS recommended that pension plans contact these individuals to determine if the recipient still wants the additional withholding.

Outreach

Besides pension recipients, individuals with more than one job and married couples whose combined income may put them in a different tax bracket may want to adjust their withholding to offset the Making Work Pay credit. Dependents who work but who are ineligible for the credit due to their dependent status and nonresident aliens, and some resident aliens, who do not have valid Social Security numbers and who are ineligible for the credit, may also need to adjust their withholding.

■ ***Comment.*** The Social Security Administration, Department of Veterans Affairs and Railroad Retirement Board are currently distributing one-time economic recovery payments of $250 to qualified individuals. The Making Work Pay credit is reduced by the amount of any economic recovery payment.

References: FED ¶46,368; TRC RETIRE: 42,700.

STANDARD FEDERAL TAX REPORTS (USPS 518000) (ISSN 0162-3494), TOP Edition published weekly, except for the week of Christmas by CCH, a Wolters Kluwer business, 4025 W. Peterson Ave., Chicago, Illinois 60646-6085. Subscription rate $2,528 per year. Taxes on Parade sold separately, subscription rate $153 per year for the TOP Edition. Periodicals postage paid at Chicago, Illinois, and at additional mailing offices. **POSTMASTER:** SEND ADDRESS CHANGES TO STANDARD FEDERAL TAX REPORTS, 4025 W. PETERSON AVE., CHICAGO, IL 60646-6085. Printed in U.S.A.
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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*

Reliance Regs Allow Employers In Economic Distress To Reduce Or Suspend 401(k)/403(b) Nonelective Contributions

◆ *NPRM REG-115699-09*

The IRS has issued reliance regs that allow employers suffering from a substantial business hardship to reduce or suspend safe harbor nonelective contributions to a 401(k) plan or a 403(b) plan (tax-sheltered annuity). The proposed regs are designed to provide employers with an alternative to terminating their safe harbor plans.

■ ***CCH Take Away.*** "This is good guidance that was needed," Jason Bortz, Davis & Harman, LLP, told CCH. "There were reports of employers with financial problems as a result of the downturn that were terminating their safe harbor nonelective contribution plans because termination was the only way to suspend the contributions. Plan termination seemed a bit extreme, particularly given the anomalous treatment of safe harbor matching contribution plans where mid-year suspension is possible," Bortz indicated.

Nondiscrimination tests

A 401(k) plan must meet two nondiscrimination tests: the actual deferral percentage (ADP) test in Code Sec. 401(k)(3), and the actual contribution percentage (ACP) test in Code Sec. 401(m)(2). Employer contributions include qualified matching contributions and qualified nonelective contributions. A 403(b) plan must meet the ACP test.

The Tax Code provides safe harbor alternatives for meeting both the ADP and the ACP tests. One safe harbor is based on matching contributions; another applies to nonelective contributions.

Electing a safe harbor

Employers are supposed to adopt the use of a safe harbor before the beginning of the plan year. Generally, a plan cannot switch from a safe harbor to the normal ADP/ACP tests after the plan year begins. However, existing rules allow a plan using the matching contribution safe harbor to suspend or reduce contributions after the plan year has begun. Existing rules do not provide a comparable option for plans using the nonelective contribution safe harbor.

Requirements for relief

The proposed regs give plans the option to suspend or reduce nonelective contributions, similar to the option to suspend or reduce matching contributions. An employer electing nonelective contribution relief must:

- Suffer a substantial business hardship;
- Provide a supplemental notice to all employees of the effect of reducing contributions, the effective date of the change, and the procedures for employees to change their elections;
- Not reduce or suspend safe harbor nonelective contributions until 30 days after the later of the supplemental notice to employees or the amendment of the plan;
- Give employees a reasonable opportunity prior to the reduction of nonelective contributions to change their CODA elections and their employee contribution elections;
- Amend the plan to require that it satisfy the applicable nondiscrimination test for the year of the reduction; and
- Ensure that the plan satisfies the safe harbor matching contribution requirements for amounts deferred until the plan is amended.

■ ***Comment.*** "The proposed regulations generally conform the treatment of both types of safe harbor plans, " Bortz told CCH. "The one notable distinction is that the proposed regulations condition suspension for nonelective safe harbor plans on a showing of substantial business hardship, but the final regulation on the matching contribution safe harbor plans does not have this limitation. I'm a bit skeptical of the distinction, which

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Government Moves To Allow First-Time Homebuyer Credit As Down Payment

The U.S. Department of Housing and Urban Development (HUD) may soon allow individuals to use the first-time homebuyer tax credit as a down payment on a home purchase. HUD Secretary Shaun Donovan recently said that the Federal Housing Administration (FHA) will shortly announce a new policy on the "monetization" of the credit.

■ ***CCH Take Away.*** "The First Time Homebuyer Credit is available only for a completed purchase. A purchaser cannot receive an advance payment of the credit before claiming the credit on a federal income tax return. However, the credit does not preclude taxpayers from securing down payment assistance through any legally available means," an IRS spoksperson told CCH.

Temporary credit. The first-time homebuyer credit reaches $8,000 for qualified individuals purchasing a home before December 1, 2009. First-time homebuyers who purchase a home in 2009 can claim the credit on either a 2008 tax return or a 2009 tax return.

Bridge loans. "We want to enable consumers to access the tax credit funds when they close on their home loans so that the cash can be used as a down payment," Donovan said in Washington, D.C. on May 12. FHA will permit FHA-approved lenders and HUD-approved nonprofits, as well as state and local governmental entities, to monetize the tax credit through short-term bridge loans, Donovan explained.

■ ***Comment.*** "The next step is to see how FHA-approved lenders use HUD's new guidelines to actually monetize the tax credit for first-time home buyers and structure the payback provisions of the loans," a spokesperson for the National Association of Home Builders (NAHB) explained.

www.hud.gov/news, TRC INDIV: 57,950.

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Reversing Tax Court, Ninth Circuit Allows Attorneys' Fees Fronted By Third-Party

◆ *Morrison, CA-9, May 13, 2009*

In a case of first impression, the U.S. Court of Appeals for the Ninth Circuit has found that a taxpayer "incurs" legal fees as required by Code Sec. 7430 even if those fees are paid initially by a third party and even if the taxpayer assumes only a contingent obligation to repay them. The decision widens a split among the courts of appeal over the recovery of litigation costs when a taxpayer's obligation to repay fees is contingent on the taxpayer's successful recovery of fees under the statute.

■ ***CCH Take Away.*** "The Ninth Circuit opinion strikes the correct note in upholding the limited rights that taxpayers have in this area. A taxpayer who wins his or her case already faces significant obstacles in attempting to recover his or her costs in bringing the case," Larry Sherlock, partner, Chamberlain, Hrdlicka, White, Williams & Martin, Houston, told CCH. "Those obstacles (exhaustion of administrative remedies, substantial justification of the IRS's incorrect position, net worth requirements, reduced rate of recovery) were specifically placed in the statute by Congress and protect the IRS from having to pay fees except where its assertions have seriously prejudiced the taxpayer's financial position."

Litigation costs

The taxpayer and his former employer won a dispute with the IRS over whether certain loans made by the company to shareholders were taxable as constructive dividends. The Tax Court, however, awarded attorneys' fees to the employer under Code Sec. 7430 but not to the taxpayer. The employer had paid all of the litigation costs and the Tax Court found that the taxpayer did not "incur" any attorneys' fees under Code Sec. 7430.

Legal standard

The Ninth Circuit disagreed with the Tax Court. When a third party who has no direct interest in the litigation pays fees on behalf of a taxpayer, the taxpayer incurs the fees so long as he assumes an absolute obligation to repay the fees, regardless of whether he or she successfully moves for an award under Code Sec. 7430 or a contingent obligation to pay the fees in the event that he or she is able to recover them under Code Sec. 7430.

■ ***Comment.*** "Tax attorneys may in the future agree to be compensated solely, or partially out of the proceeds of attorneys' fees awards without worrying that their largess may itself result in no fees being awarded," Dennis Brager, partner, Brager Tax Law Group, Los Angeles, told CCH. Nevertheless, Brager warned that the Ninth Circuit ruling is not binding in cases where the taxpayer doesn't reside in the Ninth Circuit. "In the rest of the country the Tax Court may continue to follow its own prior ruling pursuant to the *Golsen* rule," he observed.

"Stand-in litigant"

The Ninth Circuit further found no "stand-in litigant" problem. In Code Sec. 7430 cases, the party seeking recovery has been selected by the IRS for audit, indicating that it was the government, and not the taxpayer, who initiated litigation producing the fees. There is no risk that an award of fees to a third-party would encourage unrelated third-parties to bring litigation against the government through "self-selected stand-in litigants."

■ ***Caution.*** Brager further commented that it is noteworthy that the Ninth Circuit remanded the case to the Tax Court for further proceedings since it was unclear to what extent the employee had a legal obligation to reimburse his employer for the legal fees incurred. "Practitioners need to be careful when drafting retainer agreements to make sure that it meets the tests imposed by the Ninth Circuit," he concluded.

References: FED ¶(to be reported); TRC LITIG: 3,156.

401(k)/403(b)

Continued from page 3

is not explained in the preamble to the regulations."

Substantial business hardship

The option to reduce contributions is available to a business that would suffer a substantial business hardship if it continued to make required contributions. To determine hardship, the IRS will look at the following factors:

- Whether the employer is operating at an economic loss;
- Whether there is substantial unemployment or underemployment in the concerned trade or business and industry;
- Whether the sales and profits of the concerned industry are depressed or declining; and
- Whether it is reasonable to expect that the plan will be continued only if the funding relief is granted.

Effective date

The IRS will allow taxpayers to rely on the proposed regs until final regs are issued. Final regs that are more restrictive will not be applied retroactively. The regs are otherwise proposed to apply to plan amendments (to reduce or suspend contributions) adopted after May 18, 2009.

■ ***Comment.*** "Some employers may have gone ahead and suspended already, simply because of dire financial straits," Bortz said. "The regulations may be relied upon now but not for prior periods. I don't really understand the rationale since the statute has not changed. Maybe [the IRS] will let employers get to the same result through EPCRS."

References: FED ¶49,421; TRC RETIRE: 27,152.

Tax Court Lacks Jurisdiction In Redetermination Proceeding To Consider If Taxes Were Discharged

◆ *Ferguson, CA-5, May 12, 2009*

The Court of Appeals for the Fifth Circuit has found that the Tax Court has no jurisdiction in a deficiency proceeding to determine if tax liability has been discharged in bankruptcy. The Fifth Circuit affirmed the Tax Court's ruling.

■ ***CCH Take Away.*** The court's decision effectively requires a taxpayer to wait to raise the issue of dischargeability until the IRS issues a notice of levy and a Collection Due Process (CDP) hearing takes place. In a CDP hearing, a taxpayer may challenge the existence or amount of the underlying tax liability if the person did not receive a statutory notice of deficiency for the tax liability, or did not otherwise have an opportunity to dispute the tax liability. The Tax Court has jurisdiction over appeals from a CDP hearing.

Background

A married couple filed a joint return for 2000 in December 2001, two months beyond the extended deadline. The husband had filed for bankruptcy in 1999 and was discharged in 2004.

The IRS determined that the taxpayers owed $23,000 in taxes, a 10 percent filing penalty of $2,300, and a 20 percent underpayment penalty of $4,600. The Tax Court upheld the IRS determinations.

The taxpayers also contended that their 2000 tax liability had been discharged in bankruptcy. The Tax Court concluded it did not have jurisdiction in a deficiency proceeding to determine whether the taxes were discharged.

Jurisdiction

The Fifth Circuit found that the Tax Court's jurisdiction is limited by statutory grants in the Tax Code and other laws. In *Graham, 75 TC 389 (1980),* the Tax Court held that it did not have jurisdiction, in redetermining a tax deficiency, to allow or disallow a claim against the taxpayer's bankruptcy estate for federal taxes or to discharge taxes as a bankruptcy court would.

The Fifth Circuit also examined the legislative history of the *Bankruptcy Reform Act of 1978.* The legislative history could suggest that the Tax Court may have jurisdiction to decide whether a debtor had been discharged from personal liability for a tax debt. However, Congress did not amend the Tax Code to give the Tax Court this authority in a deficiency proceeding. Consequently, the Tax Court did not err when it declined to adjudicate whether the couple's tax debt had been discharged in bankruptcy.

Losses denied

The Fifth Circuit also affirmed the Tax Court's holding on losses claimed by the taxpayers. The bankruptcy trustee did not abandon farm property used as collateral for a loan in 2000. The lender foreclosed on the property in 2001, after the automatic bankruptcy stay was lifted, not in 2000.

The Fifth Circuit also upheld the imposition of the late-filing and accuracy-related penalties against the taxpayers. The fact that the taxpayers' records had been subpoenaed was no excuse. The taxpayers could have timely filed based on available information, or could have retained copies of the records.

References: FED ¶(to be reported); TRC LITIG: 6,132.

Compensation Under Employment Agreement Before Corporation Went Public Not Subject To $1 Million Deduction Limit

◆ *LTR 200919020*

The IRS has ruled that compensation paid by a publicly-held corporation under an employment agreement that took effect before the corporation went public will not be subject to the $1 million deduction limit on compensation paid under Code Sec. 162(m). The reliance period under regs had not yet expired when the compensation was paid.

Background

Before the corporation went public, it entered into the employment agreement with the Executive. The terms of the Agreement were documented in a filing with the Securities and Exchange Commission. The agreement provided for a base salary, bonuses, stock options and restricted stock.

$1 million limit

Under Code Sec. 162(m)(1) , no deduction is generally allowed for employee remuneration with respect to any covered employee to the extent that the amount of remuneration for the tax year exceeds $1 million. Regs exclude any compensation paid under a plan or agreement that existed when the corporation was not publicly held.

The regs further provide that compensation paid from the exercise of a stock option or stock appreciation right (SAR) or from the substantial vesting of restricted property is exempt from the limit until the expiration of the "reliance period," the earliest of four events occurring after the company goes public. These events include the expiration of the plan or agreement; the plan's material modification; the issuance of all employer stock and compensation allocated under the plan; or the first shareholder meeting that elects directors after the close of the year in which the corporation went public.

IRS analysis

The IRS ruled that compensation paid under the agreement is not subject to the $1 million deduction limit if paid before the reliance period expires. Stock-based compensation is not subject to the limit if the compensation was granted before the end of the reliance period.

References: FED ¶(to be reported); TRC COMPEN: 12,356.15.

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IRA Distribution For Higher Education Expenses Does Not Modify Election For Substantially Equal Periodic Payments

◆ *Benz, 132 TC No. 15*

The Tax Court has found that a premature individual retirement account (IRA) distribution to pay for education expenses was not a modification of the taxpayer's previous election to receive a series of substantially equal periodic payments from the IRA. Because the election was not considered modified, the taxpayer was not liable for the 10 percent early withdrawal penalty. The IRS had argued that a taxpayer who elects to receive a series of substantially equal periodic payments is prohibited from receiving *any* other distributions within the first five years of the election, regardless of whether the subsequent distribution would qualify for another statutory exception (other then death or disability).

■ ***Comment.*** The court's decision is especially timely in light of today's current economic climate, when taxpayers may have an eye towards taking distributions from their retirement accounts to pay certain expenses. While withdrawals from traditional IRAs are always subject to tax because the amounts previously had been deductible, lifting the early withdrawal penalty on taxpayers already pressed to tap their IRAs early through using the periodic distribution rule allows taxpayers another layer of flexibility. While hardship per se is not one of the statutory exceptions for IRA withdrawals, payment of health insurance while unemployed, of medical insurance in excess of 7.5 percent of adjusted gross income, and upon disability, in addition to higher education, are among the permitted early withdrawals under Code Sec. 72(t). Early distributions of up to $10,000 from an IRA by qualified first-time homebuyers are also exempt from the tax on early distributions.

Background

The taxpayer, who was under age 59½, elected to receive IRA distributions through a series of substantially equal periodic payments. She elected to receive an annual fixed distribution of $102,311.50 to be made on January 15 of each year for a period based on her life expectancy. On January 15, 2004 she received a $102,311.50 distribution from her IRA as she had elected.

During that same year, however, she also received two additional distributions from the IRA to pay her son's higher education expenses: a $20,000 distribution in January 2004 and a $2,500 distribution in December 2004. The taxpayer reported all the IRA distributions totaling $124,811.20 on her individual tax return but did not pay a 10 percent early IRA withdrawal penalty. The IRS issued a notice of deficiency, concluding that $89,590 distributed from the taxpayer's IRA was subject to the 10 percent additional tax on early distributions.

Penalty and exceptions

In general, unless an exception applies, IRA distributions made before an individual reaches age 59 ½ are considered "premature distributions" and subject to a 10 percent penalty tax in addition to being included in income. A number of exceptions apply, including one for distributions made as part of a series of substantially equal periodic payments made for the life or life expectancy of the IRA owner. Another exception applies for distributions made to pay for qualified higher education expenses.

Taxpayers may be liable for the 10 percent penalty tax if the distribution method for making the periodic payment is modified within five years from the date the first distribution is made (for reasons other then death or disability). The tax applies if the method changes from the method requiring equal payments to a method that does not qualify for the exception to the tax.

No modification

The Tax Court determined that a distribution satisfying the statutory exception for high education expenses under Code Sec. 72(t)(1) is not a modification of a series of substantially equal periodic payments. Accordingly, the court found that the taxpayer's distribution for higher education expenses was not a modification and as such, the five-year rule prohibiting modifications (except in the case of death or disability) was not violated.

The court pointed to the language of Code Sec. 72(t)(2)(E), which recognizes that a taxpayer may qualify for more than one statutory exception to the 10 percent penalty; specifically, it provides that the amount of distributions attributable to higher education expenses does not take into account distributions allowed under the periodic payments exception of Code Sec. 72(t)(2)(A).

Moreover, the court found that a modification occurs for purposes of the additional penalty tax when the method for determining the periodic payments changes to an impressible method, as opposed to a change in the amount to which the method is applied.

References: CCH Dec ¶57,810; TRC RETIRE: 66,454.05.

Special CCH Tax Briefing Analyzes Obama Administration Tax Proposals

The Obama administration has released much-anticipated details about its proposed tax cuts and revenue raisers, which CCH has summarized in a Special Tax Briefing, Treasury Releases "Green Book" of Tax Proposals. The Treasury Department's General Explanations of the Administration's Fiscal Year 2010 Revenue Proposals, also known as the "Green Book," describe the administration's tax agenda in considerable detail and project their costs over a ten-year span.

The latest CCH Tax Briefing may be found on the CCH IntelliConnect and the CCH Tax Research networks.

IRS Announces 2010 Inflation Adjustments For Health Savings Accounts

◆ *Rev. Proc. 2009-29*

The IRS has announced that the annual limit on deductible contributions to a health savings account (HSA) will rise to $3,050 for 2010, up from a limit of $3,000 for 2009. This limit applies to an individual with self-only coverage under a high-deductible health plan (HDHP).

The annual limit for deductible contributions for an individual with family coverage under a HDHP will rise to $6,150 for 2010, up from $5,950 for 2009. The deduction limits for self-only and family coverage are indexed for inflation.

■ ***CCH Take Away.*** HDHPs coupled with HSAs have been touted as an affordable solution for employers to manage health care costs. Distributions from an HSA that are used for qualified medical expenses are tax-free, making HSAs extremely taxpayer-friendly. Premiums for HDHPs are lower than for comprehensive health insurance, and employees enrolled in an HDHP arguably have more control over their health care dollars.

Other HDHP requirements

A HDHP must have a deductible of a stated minimum for both individual and family coverage. The plan also must limit out-of-pocket expenses paid by the individual or family members for covered benefits.

These limits are also indexed for inflation. For 2010, an HDHP must have an annual deductible of at least $1,200 for a plan providing individual coverage, and $2,400 for family coverage. These amounts increased from $1,150 and $2,300, respectively, for 2009.

The HDHP must cap out-of-pocket expenses (including deductibles, copayments, and other amounts, but not premiums) at $5,950 for a plan providing self-only coverage, and at $11,900 for family coverage. These amounts increased from $5,800 and $11,600, respectively, for 2009.

References: FED ¶46,369; TRC INDIV: 42,452.05.

Tax Briefs

Tax Crimes

An individual could not appeal the sentence imposed on him following his conviction because he had knowingly and voluntarily entered a guilty plea and waived his right to appeal. The sentence enhancement for the individual's leadership role was not excepted from the appellate waiver because the sentence was within the guideline range.

Ahmad, CA-3, 2009-1 USTC ¶50,371; TRC IRS: 66,202.

Summons

An individual's petition to quash an IRS third-party summons was denied because he advanced only frivolous tax protestor arguments. The government established its *prima facie* case for enforcement, which the individual failed to disprove. Further, his petition to quash was untimely.

Maxwell, DC Tenn., 2009-1 USTC ¶50,378; TRC IRS: 21,108.

Exemptions

An individual was not entitled to claim a dependency exemption for his son because the child was not his qualifying child. Therefore, he was also not entitled to claim the earned income credit, head of household filing status or the child tax credit.

Irions, TC, CCH Dec. 57,811(M), FED ¶48,038(M); TRC INDIV: 57,254.

Deductions

Depreciation deductions and a disabled access credit claimed by married taxpayers with respect to pay telephones and an automatic teller machine (ATM) in connection with marketing programs were disallowed. The benefits and burdens of owning the phones and ATM were not transferred to the taxpayers, and they were not required to comply with the Americans with Disabilities Act. The negligence penalty was imposed.

Snyder, TC, CCH Dec. 57,812(M), FED ¶48,039(M); TRC BUSEXP: 54,352.

An individual's purported purchase of pay telephones gave her only bare legal title to them and, thus, did not give rise to depreciation, business expense deductions, the disabled access credit, or business income that was reportable on Schedule C.

Loveland, TC, CCH Dec. 57,813(M), FED ¶48,040(M); TRC BUSEXP: 54,352.

An individual who invested in pay phones and automatic teller machines could not claim deductions for depreciation and legal and professional services. He did not have the benefits and burdens of ownership of the property and was not engaged in a trade or business with respect to the activities. He was also not eligible to claim the disabled access credit.

Doherty, TC, CCH Dec. 57,814(M), FED ¶48,041(M); TRC BUSEXP: 54,352.

A couple was denied deductions for educator expenses, a charitable contribution of a donated automobile and depreciation and other expenses related to two residential rental properties in the absence of adequate substantiation. A deduction for contributions to an IRA account for three tax years was also denied. Delay sanctions were not imposed.

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Tax Briefs

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Basalyk, TC, CCH Dec. 57,815(M), FED ¶48,042(M); TRC INDIV: 51,450.

Injunctions

A return preparer was permanently enjoined from promoting an abusive mining development scheme and preparing returns fraudulently claiming mining development deductions for customers who had not incurred mining development expenses. Injunctive relief was necessary because he would likely, unless enjoined, continue to prepare false returns.

Camp, Jr., DC Wash., 2009-1 USTC ¶50,377; TRC IRS: 6,200.

A certified public accountant (CPA) was permanently enjoined from preparing returns claiming that mariners were entitled to deductions for meal expenses while on board a ship, even though no meal expenses were incurred. The injunction was necessary because the CPA continued to claim the deductions in spite of clear contradictory authority.

Kapp, CA-9, 2009-1 USTC ¶50,376; TRC IRS: 6,200.

Discovery

A lawyer who was not a government employee could not rely on Code Sec. 6103 to support his blanket refusal to respond to his former client's discovery requests. Code Sec. 6103 applies only to government officers and employees.

Alpert v. Riley, DC Tex., 2009-1 USTC ¶50,381; TRC IRS: 9,050.

Liens and Levies

An individual's wrongful levy suit was barred by the statute of limitations because it was filed more than nine months from the date of the levy on her bank account. *Res judicata* precluded her from relitigating claims that involved the same parties and raised the same issues that she had or could have presented in earlier suits.

Clark, DC Ga., 2009-1 USTC ¶50,374; TRC IRS: 51,150.

Jurisdiction was lacking over a couple's claim for damages for the government's failure to release tax liens and for unauthorized collection activities because they failed to exhaust all administrative remedies prior to filing their claim. Also, the *Anti-Injunction Act* barred their request for removal of the liens.

Emerson, DC Ohio, 2009-1 USTC ¶50,384; TRC IRS: 45,114.

Collection Due Process

An IRS Appeals officer did not abuse his discretion by sustaining a notice of federal tax lien issued to collect an individual's unpaid tax liability. The officer determined that statutory and administrative requirements had been met and that the collection action would be no more intrusive than necessary. The individual was precluded from challenging the underlying tax liability.

Freije, CA-7, 2009-1 USTC ¶50,373; TRC IRS: 51,056.

Tax Assessments

The government's action to reduce to judgment tax assessments against a couple who had been granted a discharge and whose bankruptcy case was closed was not referred to a bankruptcy court. The government's case was not related to and did not arise out of the bankruptcy case.

Coney, Jr., DC La., 2009-1 USTC ¶50,382; TRC IRS: 57,150.

Deficiencies and Penalties

In finding that the owners of three companies and their employee were responsible persons, the court followed proper procedures. Therefore, they were not entitled to reconsideration, an amended judgment or a new trial.

Davis, Sr., DC La., 2009-1 USTC ¶50,375; TRC LITIG: 9,254.

Financial statements submitted by an individual were incomplete and did not provide credible documentation of her expenditures in support of her claimed deductions. Accuracy-related penalties were imposed.

Akers, CA-2, 2009-1 USTC ¶50,372; TRC INDIV: 48,450.

Failure to Prosecute

The Tax Court did not abuse its discretion when it dismissed an individual's petition for failure to prosecute. His disagreement with a court ruling did not exempt him from his obligation to proceed.

Tuka, CA-3, 2009-1 USTC ¶50,379; TRC LITIG: 6,954.10.

Bankruptcy

A debtor in Chapter 11 bankruptcy did not have a valid basis for a setoff claim based on the settlement of a judgment against the debtor's obligor. The settlement of the judgment against the obligor for failure to comply with an administrative levy was a personal judgment and did not reduce or change the obligor's liability to the debtor for unpaid invoices.

In re Process Pipe Fabricators, Inc., BC-DC Okla., 2009-1 USTC ¶50,380; TRC IRS: 45,168.

IRS Extends Disaster Relief For Alabama Storm Victims; Updates Notices For Other States

The IRS has extended return-filing and payment deadlines for victims of the severe storms, flooding and tornadoes in several counties in Alabama, which were declared federal disaster areas on March 25, 2009. Persons who qualify for assistance have until May 26, 2009 to file returns, pay taxes and perform other time-sensitive acts otherwise due between March 25, 2009 and May 26, 2009. Taxpayers who reside or have businesses located outside of the covered disaster areas must request relief by calling the IRS disaster hotline (1-866-562-5227).

The IRS also updated notices released in April granting relief to victims of:

- Severe storms and tornadoes in Arkansas;
- Severe storms, flooding, tornadoes and straight-line winds in Florida; and
- Severe storms and flooding in Georgia and North Dakota.

AL-2009-45, ND-2009-34, AR 2009-07, FL 2009-34, FED ¶¶46,339, 46,352, 46,355, 46,356, 46,367; TRC FILEIND: 15,204.