CCH a Wolters Kluwer business

Standard Federal Tax Reports Taxes On Parade

Vol. 99, Issue No. 1, Report 1 January 5, 2012

Inside this Issue

IRS Instructs Employers To Implement Payroll Tax Cut Extension....................1

IRS Issues Comprehensive Repair And Capitalization Regs......................2

IRS Updates Ruling Requests And More..3

Online System Temporarily Down For New PTINs...................................3

Deficiency Notice Did Not Require Partner-Level Determination...............4

IRS Issues Guidance On HARP Refinancing...4

VPFC/Share-lending Agreements Are Taxable Sales................................5

IRS Releases Final Form 8938............5

Deadline Extended For DC Plan Opinion/Advisory Letter Applications....6

Tax Court Upholds Levy Against CFO.......................................6

Tax Briefs..7

IRS Chief Counsel Recommends Acquiescence In Gambling Decision......8

IRS Directs Quick Implementation Of Two-Month Payroll Tax Cut

◆ *P.L. 112-78, IR-2011-124, JCX-58-11*

Employers should implement the just-passed two-month extension of the employee-side payroll tax cut as soon as possible, the IRS has instructed. The Temporary Payroll Tax Cut Continuation Act of 2011, approved by Congress on December 23 and signed by President Obama the same day, extends the employee-side payroll tax cut through the end of February 2012. The House and Senate have appointed conferees to negotiate an extension of the payroll tax cut through the end of 2012. Congress did not, however, take any action on other expiring incentives, such as the tax extenders.

■ ***CCH Take Away.*** Higher-income individuals may be surprised by the immediate impact of the new law, Adam Lambert, CPA, managing director, Grant Thornton, LLP, New York, told CCH. "Individuals earning $220,200 or more a year will be capped out for the reduction in January. Anyone making over $110,100 will be capped out before March 1, 2012." If the payroll tax cut is extended, lawmakers could make it retroactive to January 1, 2012 so individuals do not cap out, Lambert explained. "In this instance, employers and third party vendors would likely need to make further adjustments to their systems to refund any Social Security tax that was overwithheld prior to a full year extension of the rate reduction. Regardless of the method used to refund the employees with the overwithheld tax, employers will (1) need to make an adjustment on their Form 941 to obtain and reflect the refunded portions previously remitted to the IRS, and (2) may either need to provide the employees with these funds while awaiting the refund from the IRS or have the employees face a delay in receiving a refund of the overwithheld Social Security taxes."

Implementation

The IRS instructed employers to implement the reduced employee-side OASDI payroll tax rate of 4.2 percent as soon as possible in 2012 but no later than January 31, 2012. For any Social Security tax over-withheld during January 2012, employers should make an offsetting adjustment in employees' pay as soon as possible but no later than March 31, 2012, the IRS advised.

Recapture

The Joint Committee on Taxation explained that the new law includes a recapture provision, which applies only to those individuals who receive more than $18,350 in remuneration during the two-month period. The Social Security wage base for 2012 is $110,100, and $18,350 represents one-sixth of the full-year amount. The recapture tax would be payable in 2013 when the individual files his or her income tax return for the 2012 tax year.

■ ***Planning Note.*** The House Ways and Means Committee reported that the recapture provision will only apply if the payroll tax reduction is not extended through the end of 2012.

Continued on page 2

IRS Issues Comprehensive Repair And Capitalization Regs; Provides Bright-Line Tests, Safe Harbors

◆ *IR-2011-126, TD 9564, NPRM REG-168745-03*

Just before the New Year, the IRS released much-anticipated temporary and proposed regs on the capitalization of tangible property (so-called "repair regs"). The regs, the IRS explained, are intended to clarify and expand existing standards for capitalization of specific expenses associated with tangible property and provide some bright-line tests for applying the standards.

■ ***CCH Take Away.*** "Historically, there has been a lot of controversy over repair and maintenance costs," Susan Grais, partner, Business Tax Services, Ernst & Young LLP, told CCH. "The regs are an ambitious effort to address [this] area of the law. The regs affect retail, manufacturing, real estate, oil and gas, utilities, and others – everyone who uses tangible property."

Background

Under Code Sec. 263(a), amounts paid to acquire, produce, or improve tangible property generally must be capitalized. The IRS issued proposed regs in 2006 that attempted to carve out certain repairs and maintenance exceptions. Those proposed regs were further refined in 2008. Now, the IRS has issued new regs, not only making further changes but also making the regs "temporary regs," binding on both taxpayers and the government. The temporary regs are generally effective for expenditures made in tax years beginning on or after January 1, 2012.

Materials and supplies

The temporary regs generally track the definition of materials and supplies in the 2008 regs and provide an alternative optional method of accounting for rotable and temporary spare parts, along with an election to treat certain materials and supplies under the de minimis rule of Reg §1.263(a)-2T.

Repairs

The temporary regs also generally track the treatment of repairs under the 2008 regs. A taxpayer is permitted to deduct amounts paid to repair and maintain tangible property provided such amounts are not required to be capitalized under Code Sec. 263(a) or any other provision of the Tax Code or regs.

■ ***Comment.*** "To determine whether payments are repairs or capital expenditures, taxpayers must first look at the unit of property. The regs add clarity regarding a unit of property, " Grais said.

Rentals/leased property

The temporary regs reflect the existing rule in Reg. §1.162-11(a) that provides a taxpayer may amortize the cost of acquiring a leasehold over the term of the lease. The temporary regs also revise the rule in Reg. §1.162-11(b) that provides that the cost of erecting a building or making a permanent improvement to property leased by the taxpayer is a capital expenditure and is not deductible as a business expense.

Acquire/produce tangible property

The temporary regs generally track the 2008 regs in the treatment of amounts paid to acquire or produce units of tangible property. Generally, acquisition and production costs must be capitalized. The temporary regs also address moving and reinstallation costs; work performed prior to placing property into service; and transaction costs. Additionally, the temporary regs modify the de minimis rule in the 2008 regs.

Amounts to improve property

The temporary regs retain the approach in the 2008 regs for determining the unit of property and for determining whether there is an improvement to the unit of property. The temporary regs also retain some of the simplifying conventions in the 2008 regs.

Accounting method

The IRS reported it anticipates issuing additional guidance to advise taxpayers regarding how to obtain automatic consent to change to a method of accounting provided in the temporary regs for tax years beginning on or after January 1, 2012. These automatic consent requests may be filed beginning with taxpayers' 2012 returns. Taxpayers may not request a change to a method described in the temporary regs on their 2011 returns, the IRS advised.

References: FED ¶¶46,217, 47,007, 49,515; TRC BUSEXP: 9,150.

Payroll

Continued from page 1

■ ***Comment.*** The IRS explained it will issue additional guidance "as needed" to implement the two-month extension, including revised employment tax forms and instructions.

Extenders

Effective January 1, 2012, a number of popular but temporary tax incentives expired. They include (not an exhaustive list) the research tax credit, transit benefits parity, the state and local sales tax deduction, the higher education tuition deduction, and more. The alternative minimum tax (AMT) "patch" also expired after December 31, 2011.

■ ***Comment.*** In December 2011, a draft package of extenders circulated in the Senate. The draft bill focused primarily on now-expired energy incentives, such as incentives for biodiesel production and grants for energy property in lieu of tax credits.

Reference: TRC PAYROLL: 9,052.

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 $3,855 per year. Taxes on Parade sold separately, subscription rate $235 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.

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 Issues 2012 Updates For Ruling Requests, Technical Advice, No-Rule Procedures

◆ *Rev. Procs. 2012-1 through 2012-8*

The IRS has published its annual revisions to the general procedures for ruling requests, technical advice memoranda (TAM), determination letters, and user fees, as well as areas on which the Associate Chief Counsel offices will not rule. The new and revised procedures are generally effective beginning January 3, 2012, with the exception of certain user fees, which apply at the beginning of February, and the procedures governing determination letters for certain employee plans.

- ***CCH Take Away.*** The IRS updates these procedures annually at the beginning of each year. They are comprehensive and supersede the 2011 revenue procedures on these issues.

Annual Updates

The revenue procedures include the following guidance:

- ***Rev. Proc. 2012-1:*** letter rulings, closing agreements, determination letters, information letters, and oral advice issued by the offices of the Associate Chief Counsel;
- ***Rev. Proc. 2012-2:*** technical advice issued by the Associate Chief Counsel to directors and, upon request, to IRS field offices on matters under audit;
- ***Rev. Proc. 2012-3:*** the areas for which the Associate Chief Counsel offices will not issue letter rulings or determination letters;
- ***Rev. Proc. 2012-4:*** letter rulings and other advice to the public, issued by the Commissioner, Tax Exempt and Government Entities (TE/GE) on employee plans (EP) and exempt organizations (EO);
- ***Rev. Proc. 2012-5:*** technical advice issued to IRS field offices by the Commissioner, TE/GE, on EP and EO matters;
- ***Rev. Proc. 2012-6:*** determination letters issued to the public on the qualified status of certain pension, profit-sharing, stock bonus, annuity and employee stock ownership plans (ESOPs) and on the status for exemption of any related trusts or custodial accounts under Code Sec. 501(a);
- ***Rev. Proc. 2012-7:*** subject areas on which the Associate Chief Counsel (International) will not issue advance letter rulings or determination letters without unique and compelling circumstances;
- ***Rev. Proc. 2012-8:*** user fees for advice issued to the public on EP and EO matters.

Changes

The IRS made a handful of substantive changes to this year's revenue procedures that include more specific procedural rules, as well as additions and subtractions to its no-rulings lists and fee schedules. Here is a non-exhaustive list:

Rev. Proc. 2012-1. In Rev. Proc. 2012-1, the IRS updated its schedule of user fees related to requests for letter rulings, closing agreements, determination letters, and information letters, received after February 4, 2012. The procedures have added a new tax treaty limitation of benefits.

Advance rulings. In Rev. Proc. 2012-3, the IRS explained that following issues have been added to those for which advance rulings will not be issued: (1) issues regarding who is the producer of refined coal for purposes of claiming the renewable electricity production credit under Code Sec. 45; (2) issues regarding whether the economic substance doctrine is relevant to any transaction or whether any transaction complies with Code Sec. 7701(o). Additionally, the following issues have been added to those for which advance rulings will not currently be issued: (1) issues regarding whether the sale of oil or gas or any product derived from oil or gas is a bulk sale (or a sale in very large quantities to commercial or industrial users) under Code Sec. 613A(d)(2); (2) issues regarding whether a completed transaction can be rescinded for federal income tax purposes.

EP determination letters. The changes to the determination letter filing procedures in Rev. Proc. 2012-6 eliminate certain elective demonstrations regarding coverage and nondiscrimination requirements and provide that only employers that have made limited modifications to a pre-approved volume submitter plan may file Form 5307, Application for Determination for Adopters of Master or Prototype or Volume Submitter Plans. The IRS reported that it will revise the language of opinion and advisory letters to clarify the circumstances in which these letters are equivalent to a determination letter.

TE/GE. Rev. Proc. 2012-8 provides a general update to its user fee program for tax exempt and governmental entities. The revised procedures describe when electronic fund transfers will be utilized for the payment of user fees; a new address for hand-delivered requests; a reorganized fee schedule section for opinion letters on master and prototype plans and determination letters; and more.

References: FED ¶¶46,219; 46,220, 46,221, 46,222, 46,223, 46,224, 46,225, and 46,226; TRC IRS: 3,056.05.

Online System Temporarily Unavailable For New PTINs

The IRS online preparer tax identification number (PTIN) system will not process new PTIN applications during the period December 26, 2011 to January 9, 2012, the agency has announced on its website. However, preparers may renew existing PTINs during this time.

The IRS instructed new preparers who want to prepare returns before January 9, 2012, to create an interim PTIN, following procedures posted on its website *(www.irs.gov)*. Preparers obtaining an interim PTIN must register for a permanent PTIN before January 18, the agency advised.

www.irs.gov, TRC IRS: 3,200.

Tax Court Finds Deficiency Notice Did Not Require Partner-Level Determination

◆ *Thompson, 137 TC No. 17*

A divided Tax Court has found that computing a taxpayer's income tax deficiency arising from the adjustments finalized in a partnership-level proceeding did not require any partner-level determinations, and assessing or collecting the deficiency was not subject to deficiency procedures that would give the court jurisdiction. The court further found that errors in the notice of deficiency did not constitute a determination under Code Sec. 6212(a).

■ ***CCH Take Away.*** The IRS acknowledged errors in the deficiency and made corresponding assessment abatements. The IRS, nonetheless, successfully argued that the notice of deficiency was invalid and the court lacked jurisdiction over the case because the changes to the taxpayer's liability shown on the notice were computational adjustments that are not subject to deficiency procedures.

Background

The taxpayer formed a limited liability company (LLC) to facilitate a Son of BOSS transaction. For its tax year ending December 31, 2001, the LLC made all partnership allocations to the taxpayer. In 2005, the IRS issued a FPAA to the LLC for 2001. The taxpayer, as the tax matters partner of the LLC, challenged the FPAA in a partnership-level proceeding.

In 2008, the IRS issued a notice of deficiency to the taxpayer relating to his 2001 individual return. The taxpayer filed a petition in the Tax Court and the IRS moved to dismiss. According to the IRS, the case should be dismissed for lack of jurisdiction because no valid statutory notice of deficiency had been sent to the taxpayer with respect to tax year 2001, nor had the IRS made any other determination that would confer jurisdiction on the Tax Court.

Court's analysis

The court first observed that its jurisdiction turned on three issues: whether an affected items notice of deficiency issued in the absence of a need for partner-level determinations is void ab initio; (2) whether an erroneous computational adjustment, which both was made and can be corrected without partner-level determinations, constitutes an additional determination rendering valid the notice containing it; and (3) whether any partner-level determinations are required, in petitioners' case, to properly reflect the treatment of partnership items made in the partnership-level proceeding.

The court found that in the absence of a need for partner-level determinations, Code Sections 6211 through 6216 do not apply. Consequently, whatever notice the IRS may inappropriately issue, it cannot trigger the restraints on assessment of Code Sec. 6213(a). The court further found that if a notice, on its face, purports to give proper effect to the treatment of a partnership item, then the resulting determination is a computational adjustment within the meaning of Code Sec. 6231(a)(6).

Additionally, the court noted that it had found in 2006 that a profit motive was absent at the partnership-level. That decision also redetermined the partnership income to be zero, while leaving undisturbed the allocation of all partnership items to the taxpayer. The court found it arrived at these conclusions without the need for partner level determinations" within the meaning of Code Sec. 6230(a)(2)(A)(i). Consequently, the court concluded that it lacked jurisdiction over the taxpayer's income tax deficiency.

■ ***Comment.*** The court also found that the accuracy-related penalty could be directly assessed as a computational adjustment and did not require partner-level determinations.

Dissenting opinions

One dissent noted that the amount of tax determined in the notice of deficiency was incorrect. However, the conclusion that the deficiency determined in the notice was incorrect would not invalidate the notice of deficiency. Another dissent questioned if the majority's decision would cause inconsistent treatment between partners.

References: CCH Dec. 58,843; TRC PART 60,060.

IRS Issues Guidance On HARP Mortgage Refinancing And REMICs/REITs

New IRS guidance clarifies the effect of mortgage refinancing on real estate mortgage investment conduit (REMIC) and real estate investment trust (REIT) qualification for purposes of the Home Affordable Refinance Program (HARP).

HARP. Individuals unable to obtain traditional refinancing may be eligible to refinance their mortgages through HARP. The IRS anticipates that REMICs, which are securitization vehicles for mortgages, will hold HARP mortgages.

New guidance. The IRS provided a safe harbor reporting method that an eligible REMIC may use to report information regarding REMIC assets to residual interest holders. For purposes of a REMIC's reporting obligation to residual interest holders under Reg. §1.860F-4(e)(1)(ii), an "eligible REMIC" whose asset percentage is less than 95 percent, but at least 80 percent, need only specify on Schedule Q (Form 1066) that the percentage for that category was at least 80 percent.

Additionally, the IRS provided a safe harbor regarding the extent to which a REIT investment in a regular or a residual interest in certain REMICs may be treated as a real estate asset for purposes of Code Sections 856(c)(4)(A) and 856(c)(5)(B) and the extent to which interest from that investment may be treated as derived from interest on an obligation secured by a mortgage on real property or on an interest in real property for purposes of Code Section 856(c)(3)(B).

Rev. Proc. 2012-14, Notice 2012-5; FED ¶¶46,208, 46,209; TRC RIC: 6,072.05.

VPFC/Share-lending Agreements Were Taxable Sales, Tenth Circuit Affirms

◆ *Anschutz Company, CA-10, December 27, 2011*

Affirming the Tax Court, the Court of Appeals for the Tenth Circuit has found that transactions involving variable prepaid forward contracts (VPFC), incorporating a share-lending agreement, constituted a current taxable sale of the underlying stock. The court rejected the taxpayer's claim that the transactions were open transactions.

■ ***CCH Take Away.*** Generally, a forward contract is an agreement that anticipates the actual delivery of a commodity on a specified future date. The court described the VPFC as a species of forward contract, which often involves a counterparty, frequently a financial institution, and a shareholder who owns stock that has appreciated significantly but does not want to sell the stock because the sale would trigger a tax liability.

Background

The taxpayer was the sole shareholder of an S corp. The S corp was the sole shareholder of a qualified subchapter S subsidiary. The subsidiary and an investment bank entered into transactions involving VPFCs and share-lending agreements.

The subsidiary ultimately received payments under the VPFCs of more than $350 million as well as approximately $23 million under the share lending agreements. The taxpayer treated the transactions as open transactions and not as closed sales of stock. The taxpayer did not report gains or losses from the stock transactions on his return.

The IRS determined that the transactions were closed transactions and the subsidiary was liable for Code Sec. 1374 built-in gains tax. The IRS further determined that the built-in gain flowed to the taxpayer. The taxpayer appealed to the Tax Court, which ruled in favor of the IRS.

Court's analysis

The Tenth Circuit first found that whether a sale occurred turns on whether there has been a transfer of the benefits and burdens of ownership. With respect to stock transactions, courts have considered whether the purchaser bears the risk of loss and opportunity for gain; which party receives the right to any current income from the property; whether legal title has passed; and whether an equity interest was acquired in the property.

Here, the court found that the pledged shares carried with them all the incidents of ownership. The taxpayer had agreed that the investment bank would have the right to transfer the shares.

The court noted that the subsidiary and the investment bank treated the transactions as executory contracts for the sale of the shares rather than current sales of the shares. However, the court found that the taxpayer knew the investment bank would take possession of the shares and transfer them to third parties.

Additionally, the court found that the S corp had effectively exchanged its ownership rights in the pledged stock for, among other benefits, an upfront cash payment. The investment bank, in turn, had the right to use the pledged stock as it saw fit. All these factors, the court concluded, supported a sale.

Code Sec. 1058

The court also rejected the taxpayer's claim that the transactions fell under what the taxpayer described as a Code Sec. 1058 safe harbor. The transactions, the court found, did not ensure that the subsidiary would receive amounts equivalent to all interest, dividends, and other distributions to which the subsidiary was otherwise entitled on the pledged stock. The transactions also effectively reduced the risk of loss and opportunity for gain in the pledged shares.

References: 2012-1 ustc ¶50,117; TRC SALES 3,304.

IRS Releases Final Form 8938, Statement Of Specified Foreign Financial Assets, And Instructions

The IRS has posted a final version of Form 8938, Statement of Specified Foreign Financial Assets, and Instructions, on its website.

■ ***Comment.*** The IRS advised in the Instructions that it anticipates issuing regs that will require specified domestic entities to file Form 8938 if the entity is formed or availed of to hold specified foreign financial assets and the value of those assets exceeds the appropriate reporting threshold. However, until the regs are issued, only individuals may be required to file Form 8938, according to the IRS.

Background. The Foreign Account Tax Compliance Act (FATCA) imposed new reporting requirements on specified individuals with specified foreign financial assets. In response, the IRS developed Form 8938. Taxpayers will use Form 8938 to report specified foreign financial assets if the total value of the specified foreign financial assets is more than the appropriate filing threshold and other criteria are satisfied, the IRS explained.

Instructions. The Instructions for Form 8938 describe specified individuals for purposes of Form 8938, specified foreign financial assets, filing thresholds, exceptions to filing, and more. Form 8938 is to be attached to the taxpayer's return and filed by the due date of the return including extensions. Form 8938 reporting applies for specified foreign financial assets in which the taxpayer has an interest in taxable years starting after March 18, 2010. For most individual taxpayers, this means they will start filing Form 8938 with their 2011 income tax return, the IRS explained.

■ ***Comment.*** Filing Form 8938 does not relieve a taxpayer from filing Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts (FBAR), if the taxpayer is required to file the FBAR, the IRS reminded taxpayers.

www.irs.gov, TRC FILEBUS: 9,108.

IRS Extends Deadline To Submit Opinion/Advisory Letter Applications For Pre-approved Defined Contribution Plans

◆ *Ann. 2012-3*

The IRS has announced that the deadline to submit on-cycle applications for opinion and advisory letters for pre-approved contribution plans for the plans' second six-year amendment cycle has been extended. The extended deadline is April 2, 2012.

■ ***CCH Take Away.*** "This is a much needed two-month extension for restating pre-approved, defined contribution documents and filing for opinion and advisory letters," Elizabeth Dold, principal, The Groom Law Group, Chartered, Washington, D.C., told CCH. "With Revenue Procedure 2011-49 (and related LRMs) issued so late in the year, providers were scrambling to meet the January 31, 2012 deadline," Dold explained.

Background

Every individually designed plan qualified under Code Sections 401(a) or 403(a) has a regular, five-year remedial amendment cycle, staggered and spread over five-year periods, so that different categories of plans have different cycles. As a result, plan sponsors may apply for new determination letters generally only once every five years to continue to have a letter on which to rely.

Additionally, every pre-approved plan generally has a regular, six-year remedial amendment cycle. Every pre-approved plan must be submitted to the IRS for a new opinion or advisory letter every six years, during the applicable on-cycle submission period at the beginning of the plan's six-year cycle.

Under Rev. Proc. 2007-44, the nine-month applicable on-cycle submission period for sponsors and practitioners maintaining defined contribution mass submitter plans was scheduled to end on October 31, 2011. In Rev. Proc. 2011-49, the IRS extended the submission deadline to submit applications for opinion and advisory letters for sponsors and practitioners maintaining defined contribution mass submitter plans from October 31, 2011 to January 31, 2012.

Extension

The extension in Ann. 2012-3, the IRS explained, applies to the deadline for submitting on-cycle applications for opinion and advisory letters for mass submitter lead plans, word-for-word identical plans, master and prototype plan minor modifier placeholder applications and non-mass submitter defined contribution plans. Rev. Proc. 2011-49 and Rev. Proc. 2007-44 are modified to reflect the extension.

References: FED ¶46,207;
TRC RETIRE: 52,052.20.

Tax Court Upholds Proposed Levy, Overturns Filing Of Tax Lien

◆ *Conway, 137 TC No. 16*

The Tax Court has upheld a proposed levy against one taxpayer for Trust Fund Recovery Penalties (TFRPs). However, it overturned a notice of federal tax lien (NFTL) filed against another taxpayer for the same taxes.

■ ***CCH Take Away.*** After the IRS assesses taxes, Code Sec. 6303 requires that the IRS give notice and demand for payment. Once it provides notice and demand, the IRS may take collection actions, such as a lien or levy. The question was whether the IRS pursued the prerequisite collection action before it issued notice and demand.

Background

Taxpayer A was the chief executive officer (CEO) of an airline; Taxpayer B was its chief financial officer (CFO). The IRS determined that the CEO and the CFO were both responsible for the airline's failure to pay the taxes and could be held liable for them. The taxpayers conceded their liability but contested the IRS's efforts to collect the taxes.

The IRS assessed the taxes against the CEO and the CFO on March 28, 2006. On May 18, 2006, the IRS notified the CEO it was attempting to collect unpaid taxes, without specifying the amounts due, the type of tax, or the relevant periods. On May 26, the IRS filed an NFTL. On June 6, 2006, the IRS sent Form 3552, Notice of Tax Due, to the CEO, although the form was dated March 28, 2006. The form described the taxes due in detail.

The IRS sent the CFO a final notice of intent to levy on May 22, 2006. The notice specifically described the period, amounts, and type of taxes. On June 6, 2006, the IRS also sent Form 3552 to the CFO.

An Appeals Officer (AO) determined that both the lien and the levy notice were premature. The Appeals Manager overruled the AO, concluding that the failure to issue notice and demand did not invalidate either the NFTL or the levy.

Lien overturned

Under Code Sec. 6303, the IRS must give notice and demand for payment within 60 days of assessing taxes. In the CEO's case, the May 18 letter was not a valid notice because it lacked specificity. The May 26 NFTL also was not a valid notice. The court rejected the IRS's argument of constructive notice and its argument that the lien could be both a notice and a lien. Since the lien preceded the notice given June 6, it was premature and should have been withdrawn. Appeals' approval of the NFTL was an abuse of discretion.

Levy upheld

In the CFO's case, the May 22 levy notice could serve as notice and demand for payment because it provided specificity. The IRS was not required to give notice on Form 3552. Because this notice was issued within 60 days of the March 28 assessment, it was a valid notice. The court therefore upheld the proposed levy.

References: CCH Dec. 58,834;
TRC IRS: 51,056.15.

Tax Briefs

Internal Revenue Service

The IRS released the general rules for filing, and IRS and Social Security Administration (SSA) requirements for reproducing, paper substitutes for Form W-2, Wage and Tax Statement, and Form W-3, Transmittal of Wage and Tax Statements, for wages paid during the 2011 calendar year.

Rev. Proc. 2011-62, FED ¶46,215; TRC FILEBUS: 12,052.10.

The IRS issued general requirements and conditions for the development, printing, and approval of all substitute tax forms to be acceptable for filing in lieu of official IRS-produced and distributed forms.

Rev. Proc. 2011-61, FED ¶46,214; TRC FILEBUS: 12,250.

The IRS set forth the requirements for using IRS forms to file 2011 information returns, preparing acceptable substitutes of the official forms, and using official or acceptable substitute forms to furnish information to recipients.

Rev. Proc. 2011-60, FED ¶46,213; TRC FILEBUS: 12,052.10.

The IRS suspended certain requirements under Code Sec. 42 for certain low-income housing credit properties in Iowa.

Notice 2012-7, FED ¶46,206; TRC BUSEXP: 54,200.

International

A windfall tax imposed by the U.K on privatized utilities was not a creditable foreign income tax for purposes of the foreign tax credit.

PPL Corporation, CA-3, 2012-1 USTC ¶50,115; TRC INTLOUT: 3,104.

An over-the-counter foreign currency option contract entered into by a limited liability company wholly owned by a married couple was not a "foreign currency contract" as defined in Code Sec. 1256(g)(2).

Wright, TC, CCH Dec. 58,838(M), FED ¶47,905(M); TRC SALES: 48,100.

Jurisdiction

An individual's action for damages, declaratory and injunctive relief for alleged unauthorized collection actions was properly dismissed for lack of subject matter jurisdiction.

Clark, CA-9, 2012-1 USTC ¶50,116; TRC IRS: 9,206.15.

Limited partners' statute of limitations and penalty refund claims involved partnership items that could only be litigated in partnership proceedings; therefore, their claims were dismissed for lack of subject matter jurisdiction.

Acute Care Specialists II, Ltd., DC Ill., 2012-1 USTC ¶50,106; TRC PART: 60,056.

Tax Crimes

A tax return preparer was properly convicted for aiding and assisting in the preparation of false tax returns.

Cadet, CA-2, 2012-1 USTC ¶50,112; TRC IRS: 66,204.

Summons

An IRS summons directing an individual to appear, testify and produce documents relating to an investigation of his federal tax liabilities was ordered enforced.

Warrior, DC Calif., 2012-1 USTC ¶50,108; TRC IRS: 21,300.

The IRS's *ex parte* petition for leave to serve a John Doe summons on the California Board of Equalization (BOE) seeking information about nonspouse related party property transactions that may be subject to federal gift or generation-skipping transfer tax was granted.

In the Matter of the Tax Liabilities of John Does, DC Calif., 2012-1 USTC ¶50,104; TRC IRS: 21,150.

Income

An individual's settlement from an employment discrimination lawsuit was taxable income.

Ahmed, TC, CCH Dec. 58,841(M), FED ¶47,908(M); INDIV: 33,402.10.

Deductions

A self-employed limousine driver underreported his gross income for two tax years at issue based on an analysis of his bank deposits, which showed significant, unexplained deposits that exceeded his reported income for those years.

Diallo, TC, CCH Dec. 58,847(M), FED ¶47,914(M); TRC ACCTNG: 206.05.

An individual who operated a landscaping business could deduct only a portion of his claimed business expenses because he failed to substantiate the claimed expenses.

Bell, TC, CCH Dec. 58,842(M), FED ¶47,909(M); TRC FILEBUS: 12,200.

An individual was not entitled to deduct the expenses of his photography activity because he did not engage in the activity for profit.

Wilmot, TC, CCH Dec. 58,839(M), FED ¶47,906(M); TRC BUSEXP: 15,150.

An individual, who initially failed to file returns for the tax years at issue as a tax protestor, was only able to claim a portion of the investment-interest expenses that he claimed for the tax years at issue.

Thompson, TC, CCH Dec. 58,837(M), FED ¶47,904(M); TRC INDIV: 48,050.

An individual could not deduct various expenses incurred while he was a partner in a law partnership because the taxpayer could not show any indirect expenses for which reimbursement was expressly denied by the partnership.

McLauchlan, TC, CCH Dec. 58,835(M), FED ¶47,902(M); TRC INDIV: 36,054.10.

Anti-Injunction Act

An action filed by a faction of an Indian tribe seeking to enjoin a state (California) entity from releasing funds held in a trust for the tribe to the IRS pursuant to two tax levies was dismissed.

Continued on page 8

Tax Briefs

Continued from page 7

Alturas Indian Rancheria v. California Gambling Control Commission, DC Calif., 2012-1 USTC ¶50,120; TRC IRS: 45,152.

Liens and Levies

An IRS Appeals officer did not abuse his discretion by sustaining the filing of a federal tax lien against an individual because the lien was necessary to protect the government's interest in the individual's property.

Hughes, TC, CCH Dec. 58,840(M), FED ¶47,907(M); TRC IRS: 48,058.25.

An employee's complaint against his employer for negligently complying with an incorrect tax levy and garnishing his wages was dismissed.

Gust v. US Airways, DC N.C., 2012-1 USTC ¶50,110; TRC IRS: 51,060.05.

An LLC's quiet title and wrongful levy action against the government was properly dismissed.

Turcar, LLC, CA-6, 2012-1 USTC ¶50,109; TRC IRS: 51,156.

An individual's unpaid taxes, penalties, fees, and interest were reduced to judgment.

Hiatt, DC Wash., 2012-1 USTC ¶50,107; TRC IRS: 45,158.

A car dealership's unlawful collection actions claim for failure to release federal tax liens was properly dismissed.

Don Johnson Motors, Inc., CA-5, 2012-1 USTC ¶50,103; TRC IRS: 48,202

Deficiencies and Penalties

The limited co-guardians of an estate failed to establish that an individual's former spouse's use of funds from the couple's joint bank account resulted in a theft loss.

Moragne Est., TC, CCH Dec. 58,846(M), FED ¶47,913(M); TRC INDIV: 54,104.

The IRS was not required to make partner-level determinations in the calculation of a married couple's income tax deficiency that arose from adjustments finalized in a partnership-level proceeding.

Thompson, TC, CCH Dec. 58,843, FED ¶47,910; TRC PART: 60,308.

The IRS has announced its nonacquiescence to the Tax Court's decision in *W. Norris*, 102 TCM 26, Dec. 58,694(M), TC Memo. 2011-161.

Nonacquiescence Announcement, FED ¶46,211; TRC IRS: 30,052.

Bankruptcy

A couple's tax liabilities were nondischargeable in bankruptcy under 11 U.S.C. 523(a)(1)(B)(ii) because they failed to file tax returns more than two years before they filed their bankruptcy petition.

In the Matter of Pansier, CA-7, 2012-1 USTC ¶50,113; TRC IRS: 57,158.

Tax-Exempt Status

The IRS provided guidance on current refunding issues that refund outstanding prior bond issues that qualify for tax-exempt bond financing under certain disaster relief bond programs.

Notice 2012-3, FED ¶46,210; TRC BUSEXP: 57,302.

Corporations

Individual shareholders of a corporation were determined to be liable under Wisconsin law as transferees with respect to their respective shares of the corporation's unpaid federal tax liability.

Feldman, TC, CCH Dec. 58,844(M), FED ¶47,911(M); TRC IRS: 60,050.

Trusts

A trust was not liable as a transferee for the assessed federal income tax liabilities, penalties and interest of four corporations to which it sold stock in order to pay its estate tax liability.

Frank Sawyer Trust of May 1992, TC, CCH Dec. 58,845(M), FED ¶47,912(M); TRC IRS: 60,150.

Partnerships

Limited partners' motion for reconsideration of the Claims Court's decision in *Prati*, FedCl, 2008-1 USTC ¶50,307 (Prati I) was denied.

Fournier, FedCl, 2012-1 USTC ¶50,105; TRC LITIG: 9,254.

Employment

The Social Security Administration announced that the contribution and benefit base for 2012 remuneration and self-employment income is $110,100. Also, the domestic employee coverage threshold amount for 2012 has been determined to be $1,800.

Notice 2011-102, FED ¶46,212; TRC PAYROLL: 3,106.

The finance vice president/director of a corporation was liable for trust fund recovery penalties assessed against her in connection with the corporation's unpaid employment taxes.

Jimenez, DC Calif., 2012-1 USTC ¶50,119; TRC PAYROLL: 6,306.05.

A corporation was liable for employment taxes, penalties and interest in connection with payments to its statutory employee.

Western Management, Inc., CA-FC, 2012-1 USTC ¶50,111; TRC PAYROLL: 3,150.

The Tax Court upheld the IRS's determination that a chief executive officer (CEO) was liable for employment tax liabilities owed by the corporation.

Morgan, TC Memo. 2011-290, Dec. 58,836(M); TRC IRS: 48,058.25.

IRS Chief Counsel Recommends Acquiescence In Gambling Decision

IRS Chief Counsel has recommended acquiescence to the Tax Court's decision in *R. Mayo, CCH Dec. 58,524.* The Tax Court held that the limitation on wagering losses in Code Sec. 165(d) applies to persons in the trade or business of gambling; therefore, they may not deduct wagering losses in excess of wagering gains. However, a gambler's business expenses are not losses from wagering transactions subject to that limitation and are deductible under Code Sec. 162(a).

AOD-2011-06; FED ¶46,205, TRC BUSEXP: 30,256