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Treasury, IRS Unveil Proposals To Broaden Retirement Payout Options

◆ *NPRM REG-115809-11, NPRM REG-110980-10, Rev. Rul. 2012-3, Rev. Rul. 2012-4, RIN 1210-AB08, www.treasury.gov*

Treasury and the IRS have proposed a comprehensive guidance package to increase the number and availability of retirement payout options. Proposed regs encourage defined benefit plans to offer a split option to avoid participants having to make a "cash or annuity" decision upon retirement. Another set of proposed regs promotes deferred longevity annuities. Revenue rulings clarify how the 401(k) plan spousal protection rules apply when employees choose longevity annuities and how defined benefit (DB) plan participants can purchase annuities. At the same time, the U.S. Department of Labor (DOL) issued long-awaited final rules on certain plan fee disclosures.

■ ***CCH Take Away.*** "The longevity guidance is a major step forward, and from a policy perspective will be very helpful," Kent Mason, partner, Davis & Harman LLP, Washington, D.C., told CCH. "With fewer people having a pension plan at work, and more people just having a defined contribution plan, we have a very significant challenge facing us that many individuals will outlive their private retirement savings."

■ ***Comment.*** "This first wave of guidance provides welcome clarification to long-standing IRS provisions, with respect to the use of more traditional annuity products within defined contribution plans," Elizabeth Dold, principal, The Groom Law Group, Washington, D.C., told CCH. "The impact of the qualified joint and survivor annuity (QJSA) rules (and the timing of spousal consent) and the required minimum distribution (RMD) relief is helpful for plan administration, and supports the use of products designed to help ensure a participant does not outlive their retirement funds."

Background

In 2009, President Obama outlined plans to promote automatic enrollment in employer-sponsored retirement plans, reform the saver's credit and take other actions to boost retirement savings. Treasury and DOL subsequently held hearings and meetings on a wide variety of topics related to retirement security. The latest guidance package aims to minimize the risk of individuals outliving their retirement savings or unnecessarily limiting their retirement spending because of fear of outliving their savings, Treasury explained. Additionally, the private-employer pension system has moved away from lifetime retirement payments to single-sum cash payments, Treasury noted.

■ ***Comment.*** According to Treasury, a 65-year old female is projected to have an even chance of living past 86. A 65-year old male is projected to have an even chance of living past 84. "We are increasingly running the risk of outliving our assets," J. Mark Iwry, deputy assistant secretary (retirement and health policy, Treasury, told reporters at a news conference in Washington, D.C.

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Route to: ____________ ____________ ____________ ____________ ____________

Retirement Guidance

Continued from page 1

Partial annuity option

Final regs under Code Sec. 417(e) would be amended to permit defined benefit plans to simplify the treatment of certain optional forms of benefit paid partly in the form of an annuity excepted from the minimum present value requirements of Code Sec. 417(e)(3) and partly in a more accelerated form. One portion of the benefit would be a stream of lifetime income and the remaining portion as a lump-sum. If a participant selects two different distribution options with respect to separate portions of the bifurcated accrued benefit, the two different distribution options would be treated as two separate optional forms of benefit for purposes of Code Sec. 417(e)(3).

According to Treasury, the change would streamline the calculation of partial annuities. Statutorily prescribed actuarial assumptions would be required to apply only to the portion of the distribution being paid as a lump sum; the remaining portion of the benefit (the partial annuity) would be determined using the plan's regular conversion factors.

■ ***Comment.*** "Many employers viewed the law as unclear regarding partial annuitization, so they did not offer a partial annuity. The proposed regulations address this problem by clarifying that partial annuitization is a workable alternative," Mason told CCH.

The proposed regs do not require plans to offer partial annuitization. The changes under the proposed regs would apply to distributions with annuity starting dates in plan years beginning after the publication date of the final regs.

Longevity annuities

Proposed regs would facilitate the purchase of longevity annuities by participants in defined contribution plans, Code Sec. 403(b) plans, individual retirement annuities and accounts (IRAs) under Code Sec. 408, and eligible governmental Code Sec. 457 plans. Longevity annuities, Treasury explained, enable employees to use a portion of their account balances to gain lifelong retirement income beginning at age 80 or 85.

The required minimum distribution (RMD) rules, Treasury observed, are viewed as an impediment to longevity annuities. RMDs generally are minimum amounts that a retirement plan account owner must withdraw annually starting with the year that he or she reaches 70 ½ years of age or, if later, the year in which he or she retires. Treasury has proposed to modify the RMD rules to facilitate a plan participant's purchase of a deferred annuity scheduled to commence at an advanced age, such as age 80 or 85, using a portion of the participant's account. Prior to annuitization, the participant would be permitted to exclude the value of a qualified longevity annuity contract (QLAC) from the account balance used to determine RMDs. The proposed regs also carry reporting and disclosure requirements for QLACs.

■ ***Comment.*** To prevent use of the longevity option as an estate planning deferral technique, the proposed regs would cap the amount of retirement benefits allowed to be used for longevity premiums at 25 percent of the participant's account balance, with an overall $100,000 ceiling. Treasury estimated that the $100,000 cap would buy an annuity that pays out between $26,000 and $42,000 annually, depending on the actuarial assumptions, survivor options and based on a three percent interest rate.

Annuity purchase option

Rev. Rul. 2012-4 is intended to clarify that employees receiving lump-sum cash payouts from their employer's 401(k) plan can be offered the option of purchasing an annuity from the employer's defined benefit plan, if the employer offers a defined benefit plan. Treasury predicted that the proposal would give employees access to the defined benefit plans' relatively low-cost annuity purchase rates.

Spousal protection

Rev. Rul. 2012-3 is intended to clarify uncertainty as to how the 401(k) plan spousal protection rules apply when employees choose deferred annuities from their plans. According to Treasury, some plans may want to offer annuity options but are dissuaded by the task of administering the spousal consent rules. Rev. Rul. 2012-3, Treasury explained, identifies plan and annuity terms that will automatically protect spousal rights without requiring spousal consent before the annuity begins.

■ ***Comment.*** *See separate articles in this issue for further details about Rev. Rul. 2012-3 and Rev. Rul. 2012-4.*

DOL final rules

DOL issued final rules under ERISA requiring that certain service providers to Code Sec. 401(k) plans disclose information about compensation and potential conflicts of interest. DOL explained that the final rules require disclosures of direct and indirect compensation received by service providers in connection with the services they provide, subject to certain thresholds. Generally, service providers must expect to receive $1,000 or more in compensation and provide certain fiduciary or registered investment advisory services.

■ ***Comment.*** DOL also intends to require service providers at a future date to furnish a guide or tool to assist plans in identifying the disclosures.

■ ***Comment.*** *See separate article in this issue for further details about the DOL final rules.*

References: FED ¶¶46,263, 46,264, 49,519, 49,520; TRC RETIRE 42,202.05.

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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 Approves Retirement Plan Spousal Provisions To Facilitate Annuity Benefits

◆ *Rev. Rul. 2012-3*

The IRS has provided guidance on the spousal consent requirements when a plan participant purchases a deferred annuity contract under a profit-sharing plan, such as a 401(k) arrangement. Generally, the spouse's consent for a waiver can wait until just before the annuity starting date in situations in which the annuity is revocable.

■ ***CCH Take Away.*** Code Secs. 401(a)(11) and 417 generally require that the spouse of a plan participant be entitled to benefits from the plan, unless the spouse agrees to the participant's choice of a different benefit. The guidance allows plans to provide deferred annuities and other benefits while protecting the spouse's rights.

Facts

In Situation 1, the employer sponsors a qualified profit-sharing plan that includes a 401(k) arrangement. The plan provides for elective deferrals and matching employer contributions. Participants have several investment options for their accounts, including a deferred annuity contract issued by an insurance company. No other annuity options are available under the plan.

The amount payable under the deferred annuity contract is fixed on the annuity starting date (after the participant retires or reaches age 65). Amounts invested in the deferred annuity can be transferred to other investments at any time before the annuity begins. A contract pays benefits as a life annuity, but the participant can elect, at any time before the annuity starting date, to take a single-sum payment.

Forms of payment

If no other form is elected, payment will be made as a straight life annuity. If the participant is married, payment will be a 50 percent qualifying joint and survivor annuity (QJSA). If the participant elects a life annuity other than a joint and survivor annuity the spouse must consent.

If the participant dies before the annuity starting date, the plan provides that the spouse will receive a death benefit based on all of the amounts attributable to elective deferrals and matching contributions. Amounts not invested in a deferred annuity contract are payable in full to the surviving spouse on the participant's death (QPSA).

A participant invests his or her benefits in the deferred annuity contract, and retires at age 65.

Variations

In Situation 2, a participant who invests amounts in a deferred annuity contract cannot transfer those amounts out of the contract or take the amounts as a single-sum payment. The amount payable under the deferred annuity contract on the annuity starting date is fixed on the date of the investment.

In Situation 3, the participant can elect to have no benefits paid under a deferred annuity from matching contributions if the participant dies before the annuity starting date. The spouse must consent to this election.

Rulings

In Situation 1, the plan described in the ruling is not subject to the qualified joint and survivor annuity requirements (QJSA) and the qualified pre-retirement survivor annuity (QPSA) requirements because amounts attributable to the investment in the deferred annuity contract are payable in full to the surviving spouse on the participant's death prior to the annuity starting date, the IRS determined.

Because the participant does not elect a life annuity until his or her annuity starting date, the plan is not subject to the QPSA requirements before that date. However, at the annuity starting date, the plan is subject to the QJSA requirements unless the participant has previously elected another form of payment.

In Situation 2, the plan is generally subject to the QJSA and QPSA requirements. The terms of the plan satisfy the QPSA requirement; however, the plan must obtain spousal consent to waive a QJSA. In Situation 3, the QJSA/QPSA requirements apply, and the participant must obtain spousal consent to waive the QPSA, the IRS concluded.

References: FED ¶46,263; TRC RETIRE: 42,202.05.

IRS Greenlights Rollovers From Profit-Sharing Plans Into Defined Benefit Plans For Annuity Benefits

◆ *Rev. Rul. 2012-4*

The IRS has issued guidance "that provides a road map for offering employees the option of transferring (or rolling over) some or all of their 401(k) plan payouts to the [employer's] defined benefit plan in exchange for an immediate annuity from that plan." The guidance is part of a package of regs and revenue rulings released by the Treasury and IRS to give employees more flexibility to receive a portion of their retirement benefits as a lifetime annuity.

■ ***CCH Take Away.*** According to a Treasury Fact Sheet, the ruling clarifies how an employer could offer employees a "low-cost" annuity from the employer's existing defined benefit (DB) plan, as an alternative to the lifetime income options available under the employer's defined contribution (DC) plan (such as a 401(k) plan). The ruling addresses when this alternative is permissible and how the rules apply.

■ ***Comment.*** Rev. Rul. 2012-4 makes clear that employees receiving a lump sum from a 401(k) (DC) plan can transfer some or all of those amounts to the employer's DB plan (provided the employer is willing).

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DOL Final Rules Require New Fee Disclosures From Retirement Plan Service Providers

◆ *RIN 1210-AB08, www.dol.gov*

The U.S. Department of Labor (DOL) has issued much-anticipated final rules under ERISA that impose new disclosure obligations on covered service providers to certain retirement plans. The final rules, DOL explained, apply to ERISA-covered defined benefit (DB) and defined contribution (DC) plans and carry a delayed effective date of July 1, 2012.

- ***CCH Take Away.*** "More plan sponsors and participants will now have access to standardized information on plan fees that can help them better understand their plan-related costs and make informed investment decisions," a spokesperson for The Vanguard Group told CCH.

Service providers

DOL explained that the final rules require covered service providers to provide responsible fiduciaries with information to assess the reasonableness of total compensation received by the covered service provider. Additionally, covered service providers must identity potential conflicts of interest.

Generally, the final rules apply to covered service providers that expect to receive at least $1,000 in compensation for services to a covered plan. Covered service providers may include investment advisers registered under federal or state law and ERISA fiduciary service providers to a covered plan or to a plan asset vehicle in which the plan invests.

- ***Comment.*** The final rules do not apply to simplified employee pension plans (SEPs), SIMPLE retirement accounts, IRAs or certain annuity contracts and custodial accounts described in Code Sec. 403(b). DOL indicated that it intends to provide disclosure requirements for welfare benefit plans in the future.

Reasonable estimate

The final rules, DOL explained, address industry concern over how to itemize indirect payments that are subject to fluctuating revenue or rebates from 401(k) sponsors. The final rules state that a record keeper can provide a reasonable estimate of cost accompanied by an explanation of how the cost was calculated.

Effective date

The final rules take effect on July 1, 2012. DOL provided a delayed-effective date to give providers time to comply with the requirements. Service providers who are not in compliance on July 1, 2012 will be in violation of ERISA's prohibited transaction rules, and they may be subject to excise tax penalties, DOL cautioned.

Rollovers

Continued from page 3

Facts

An employer maintains a profit-sharing plan (Plan A) and a DB plan (Plan B), both qualified under Code Sec. 401(a). Under Plan B, the accrued benefit from employer contributions is forfeited on the participant's death.

Plan B will accept a direct rollover from Plan A from an employee or former employee who terminates employment after age 55 with at least 10 years of service. To accept a rollover, Plan B requires that the individual elect to start receiving benefits from Plan B on a single annuity starting date for all of the individual's benefits under Plan B, including the additional benefit from the rollover.

Actuarial equivalent

The individual elects to receive the benefit attributable to the rollover in the form of an annuity from Plan B. The annuity amount is the actuarial equivalent of the amount rolled over, based on the applicable interest rate and mortality table under Code Sec. 417(e).

- ***Comment.*** The revenue ruling will be a safe harbor for plans that wish to adopt this approach to providing benefits.

If the participant dies before the annuity starting date, the benefit equal to the amount rolled over will be paid from Plan B to the participant's beneficiary. If the participant did not waive a pre-retirement survivor annuity, then the death benefit will be paid as a life annuity to the surviving spouse.

- ***Comment.*** Under Code Sec. 411, the accrued benefit derived from an employee's contributions must be nonforfeitable. The ruling concludes that the rollover from Plan A to Plan B is treated as a distribution from Plan A to the participant, followed by a contribution to Plan B. Thus, the accrued benefit derived from the rollover must be nonforfeitable.

Rulings

Rev. Rul. 2012-4 provides rulings on the application of three particular plan requirements to a rollover from a DC plan to a DB plan. The IRS ruling concludes that:

- A qualified DB plan that accepts a direct rollover from a qualified DC plan maintained by the same employer does not violate Code Secs. 411 (nonforfeitability) or 415 (limitations on benefits);
- If the DB plan provided an annuity calculated using a less favorable actuarial basis than required by Code Sec. 411(c), the plan would violate Code Sec. 411(a); and
- If the DB provided an annuity using a more favorable actuarial basis, the excess benefit would be treated as benefits from employer contributions and would be subject to the Code Sec. 415(b) limits.

References: FED ¶46,264; TRC RETIRE: 42,460.05.

IRS Describes "Taxable Medical Device" Under HCERA's Excise Tax

◆ *NPRM REG 113770-10*

The IRS has issued proposed regs describing what is a "taxable medical device" for purposes of the excise tax imposed by the Health Care and Education Reconciliation Act of 2010 (HCERA). The IRS has linked the definition to sections 201(h) and 510(j) of the Federal Food, Drug & Cosmetic Act (FFDCA) and their accompanying regulations, with which device manufacturers should already be familiar.

■ ***CCH Take Away.*** "The IRS is generally using a facts and circumstances approach to determine whether a device is subject to tax, but has also created a broad safe harbor that would specifically exempt a large number of categories of devices," Dustin Stamper, manager, Washington National Tax Office, Grant Thornton, LLP, told CCH. "It appears that the IRS considers this a working definition. The safe harbor is helpful, but the IRS acknowledged that a facts and circumstances test for such a wide array of devices creates challenges."

Background

HCERA imposes an excise tax on the total revenues of a company that manufactures medical devices. The excise tax is effective after 2012.

Medical device

Generally, the proposed regulations use the Food and Drug Administration (FDA) definition of "medical device," but also clarify that a taxable medical device is one intended for humans and one not generally purchased by the public at retail for individual use. The IRS indicated it will apply a facts and circumstances analysis to determine whether a device is of a type generally purchased by the public at retail.

For purposes of the medical device excise tax, a device defined in section 201(h) of the FFDCA that is intended for humans means a device that is listed as a device with FDA under section 510(j) of the FFDCA and 21 CFR Part 807. If a device is not currently listed, but the FDA adds it later, then that device will be deemed to have been listed as a device with the FDA as of the date the FDA notifies the manufacturer or importer in writing that corrective action with respect to listing is required.

■ ***Comment.*** Christopher Ohmes, partner, Ernst & Young, National Tax Office, commended the IRS's choice to follow existing FDA regulations rather than a market-based approach, stating that such guidance has created a workable framework for determining what is taxable. "This is going to be a complex tax to implement," Ohmes told CCH. "Probably the most difficult thing for tax payers to deal with is extracting the right information from their systems to be able to calculate and pay the tax."

Retail exemption

The proposed regs provide that "taxable medical device" does not include medical devices generally purchased by the general public at retail for individual use. The IRS explained that it will use a facts and circumstances analysis to evaluate whether a taxable medical device falls under the retail exemption.

Reference: TRC EXCISE: 6,162.05.

Tax Court Denies First-Time Homebuyer Credit Because Of Continued Partial Use Of Old Principal Residence

◆ *Foster, 138 TC No. 4*

The Tax Court has denied the Code Sec. 36 first-time homebuyer credit to a couple that put their prior home up for sale and claimed they moved out of it within the required three-year period to qualify as a first-time homebuyer under the rules. The Tax Court viewed the taxpayer's continued partial use of the home as their residence, enough to bar their claim to the homebuyer credit.

■ ***CCH Take Away.*** Code Sec. 36 and Reg. §1.121-1 state that whether property is used as a principal residence depends on all the facts and circumstances. The couple's continued use of the house demonstrated that they had not abandoned it as their principal residence, according to the Tax Court.

Background

The taxpayers bought a house ("old house") in 1974 and listed it for sale in February 2006. They rented an apartment on June 1, 2007; finalized the sale of the old house on June 6, 2007; and purchased a new house on July 28, 2009. They claimed the homebuyer credit on their joint 2008 federal tax return.

Before they rented an apartment, the taxpayers spent considerable time at the wife's parents' house. They did not pay rent or utilities at the parents' house.

Between February 2006 and June 6, 2007, the taxpayers continued to use the old house (which was still furnished), by listing it as their address on their joint federal tax return; maintaining utility services; frequently staying at the house overnight; hosting holiday parties at the house; accessing the Internet, and receiving bills and correspondence.

Court's analysis

Under Code Sec. 36, a first-time homebuyer includes an individual who did not own a principal residence for three years prior to the date of purchase of a principal residence. Taxpayers were eligible for the credit if they did not own a principal residence after July 27, 2006, three years before they purchased a residence in 2009. The

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IRS Determines Power Purchase Agreement Is Capital Asset

◆ *LTR 201203003*

A power purchase agreement (PPA) was a Code Sec. 1221 capital asset, the IRS has determined in a recently released letter ruling. Gain from the assignment of the PPA qualified for capital gain treatment.

■ ***CCH Take Away.*** Transactions involving intangible property may produce capital gain or loss under special rules for intangible assets or general capital gain or loss rules. Generally, taxpayers must amortize over 15 years the capitalized costs of "section 197 intangibles" acquired after August 10, 1993. Taxpayers must amortize these costs if they hold the section 197 intangibles in connection with their trade or business or in an activity engaged in for the production of income.

Background

Power Company was incorporated with two stockholders. One of the stockholders merged into Sub A, a wholly-owned subsidiary of Parent. The Power Company, and Sub A entered into a PPA (the "original PPA"). They subsequently entered into a new power purchase agreement (the "new PPA"), which they intended would supersede and replace the original PPA. The new PPA was intended to be in effect as long as the Power Company had a license from the federal government to generate power.

Parent underwent a divisive reorganization. Sub A transferred its stock in Power Company, and assigned its rights under the new PPA to Sub B. Sub B transferred the stock in Power Company and assigned the rights under the new PPA to the taxpayer, which was wholly owned by Sub B. The taxpayer agreed to sale its stock in Power Company to Buyer. The taxpayer also assigned its rights under the new PPA to Buyer.

IRS analysis

The IRS first determined that Code Sec. 1221 provides that capital gain or loss is generated upon a sale or exchange of a capital asset. A capital asset for purposes of Code Sec. 1221 is property held by the taxpayer, regardless of whether it is connected with the taxpayer's trade or business, unless the property meets an exception. One exception applies to property of a character which is subject to the allowance for depreciation provided in Code Sec. 167.

The IRS noted that some courts have held that certain licenses do not have a limited useful life because there is a high probability of renewal. Here, the Power Plant had a high degree of probability that its license would be renewed. Therefore, the IRS determined that the new PPA, because it was coterminous with Power Company's license for the Power Plant, also had an indeterminable useful life for depreciation purposes.

The IRS next looked if the new PPA would be characterized as property of a character subject to depreciation under Code Sec. 167 if it is an amortizable Code Sec. 197 intangible. Sub A acquired the right to purchase energy from the Power Plant under the original PPA before August 10, 1993. Therefore, the right was not an amortizable Code Sec. 197 intangible in the hands of Sub A. The right also was not an amortizable Code Sec. 197 intangible in the hands of Sub B and the taxpayer, the IRS determined.

Reference: TRC SALES: 24,000.

Homebuyer Credit

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taxpayers owned their old house until June 6, 2007, but claimed that they ceased using it as their principal residence in February 2006. The court disagreed.

Citing the regs under Code Sec. 121, the court noted that relevant factors include the address on a taxpayer's tax returns and the taxpayer's mailing address for bills and correspondence. Here, the couple continued to use the old house as their residence. Furthermore, they did not pay rent or contribute to the cost of utilities at the parents' house. Based on all the facts and circumstances, the old house remained the taxpayers' principal residence after July 27, 2006, less than three years before they purchased another home, the court concluded.

References: CCH Dec. 58,929; TRC INDIV: 57,952.

IRS, DOJ Crackdown On Identity Theft

The IRS and the U.S. Department of Justice (DOJ) launched a nationwide crackdown against identity theft in January. The initiative targeted identity thieves in 23 states. The IRS also updated its website materials about protecting personal information from identity thieves.

Refund fraud. Identity thieves will fraudulently file a tax return and claim a refund using a stolen Social Security number (SSN). Typically, identity thieves attempt to get fraudulent refunds early in the filing season, the IRS reported.

■ ***Comment.*** IRS Deputy Commissioner for Services and Enforcement Steven Miller told reporters that the crackdown was timed to coincide with the start of the filing season. "We have seen an increase (in identity theft) and we are concerned."

Nationwide sweep. IRS and DOJ took action against more than 100 individuals suspected of identity theft in January. Overall, 939 criminal charges were included in numerous indictments, the agencies reported. The IRS also visited money services businesses and check cashing operations to make sure these businesses were not facilitating identity theft.

Website information. On its website, the IRS has developed a new page on identity theft: Special Identity Theft Enforcement Efforts – 2012. The page highlights the agency's anti-identity theft activities and alerts taxpayers about precautions they can take to avoid identity theft.

IR-2012-13, TRC FILEBUS: 9,320.

Tax Briefs

Internal Revenue Service

The IRS has announced changes to Publication 1187, Specifications for Filing Form 1042-S, Foreign Person's U.S. Source Income Subject to Withholding, Electronically; Publication 1220, Specifications for Filing Forms 1097, 1098, 1099, 3921, 3922, 548 and W-2G, Electronically; and Publication 1239, Specifications for Filing Form 8027, Employer's Annual Information Return of Tip Income and Allocated Tips, Electronically.

Announcement 2012-6, FED ¶46,269; TRC FILEBUS: 12,302.

Victims of severe storms, tornadoes, straight-line winds and flooding that took place on January 22, 2012, in parts of Alabama may be entitled for tax relief. Chilton and Jefferson counties were declared federal disaster areas, and individuals who reside in or have a business in these counties may qualify for relief. The IRS has postponed until March 22 certain deadlines falling on or after January 22, and on or before March 22.

Alabama Disaster Relief Notice, FED ¶46,267; TRC FILEIND: 15,204.25.

An IRS revenue agent abused his discretion in denying a couple's request for an abatement of interest for the tax years at issue. The errors made by the revenue agent were the result of negligence and not misconduct.

Hancock, TC, CCH Dec. 58,935(M), FED ¶47,949(M); TRC PENALTY: 9,056.20.

Jurisdiction

The Claims Court lacked subject matter jurisdiction over an individual's due process claims and over his untimely filed refund claims for six tax years at issue. The Court also lacked jurisdiction over his refund claim for a tax year at issue because he had already filed a refund petition in the Tax Court for the same tax year and on the same facts and events.

Zack, FedCl, 2012-1 USTC ¶50,174; TRC IRS: 36,052.05.

Tax Crimes

An attorney was properly convicted and sentenced for willful tax evasion and for filing false income tax returns. His claim that he relied upon a qualified tax professional was without merit because he failed to provide full information to his return preparers. Later-made tax payments were not considered in sentencing.

Jones, CA-5, 2012-1 USTC ¶50,172; TRC IRS: 66,058.15.

Summons

An individual's petition to quash IRS third-party summonses seeking records from five banking institutions in connection with an investigation whether the individual may have committed tax and other related offenses was denied, and the summonses were ordered enforced.

Looby, DC Neb., 2012-1 USTC ¶50,178; TRC IRS: 21,300.

An IRS summons was ordered enforced because the government established a *prima facie* case for enforcement that was not rebutted. The summons was issued in good faith and for a legitimate purpose.

Bacon, DC Calif., 2012-1 USTC ¶50,176; TRC IRS: 21,308.

Deductions

A married couple was denied deductions for expenses claimed to be incurred in the wife's trucking business due to lack of substantiation, and was subject to a penalty based on underpayment of tax. They claimed that their records were destroyed but did not attempt to reconstruct those records, and so failed to meet recordkeeping requirements.

Colvin, TC, CCH Dec. 58,930(M), FED ¶47,944(M); TRC BUSEXP: 24,806.

Anti-Injunction Act

An individual's complaint seeking injunctive relief, refund of taxes garnished from her wages and damages for the IRS's alleged illegal collection action was dismissed for lack of subject matter jurisdiction. The Anti-Injunction Act barred her claims and the government did not waive sovereign immunity.

Music, DC Ga., 2012-1 USTC ¶50,179; TRC IRS: 45,114.

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Talks Continue On Payroll Tax Cut Extension

House and Senate negotiators continue to seek bipartisan agreement to extend the employees-side payroll tax cut after February 29, 2012. Members of the Payroll Tax Cut Conference Committee have met several times in recent weeks to discuss funding for an extension of the payroll tax cut through the end of December 2012, Medicare payment amounts, and unemployment benefits. Committee members are reportedly also considering an extension of 100 percent bonus first-year depreciation for qualified property through the end of 2012. However, efforts to attach other expired tax extenders to the payroll tax cut bill appear to have stalled.

Aviation excise taxes. The House and Senate have approved conference reports to the Federal Aviation Administration (FAA) Modernization and Reform Bill (HR 658). The FAA bill renews a number of aviation excise taxes, including excise taxes on commercial airline fuel.

Highway Trust Fund. The House Ways and Means Committee approved the American Energy and Infrastructure Jobs Financing Bill of 2012 (HR 3864), which would extend the Highway Trust Fund's expenditure authority through September 30, 2016 and the six fuel and motor vehicle excise taxes that feed into the fund through September 30, 2018.

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Tax Briefs

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Frivolous Arguments

Despite being sanctioned previously, an individual ignored the Tax Court's warnings regarding the meritless nature of his claims and continued to maintain his frivolous position on appeal.

Dykema, CA-8, 2012-1 USTC ¶50,180; TRC LITIG: 3,152.

Liens and Levies

The IRS's determination to collect an individual's income tax liability by levy was upheld, because the individual failed to designate any specific facts in dispute that would indicate that there was a genuine issue for trial. There was no abuse of discretion by the IRS Appeal Office.

Tucker, TC, CCH Dec. 58,934(M), FED ¶47,948(M); TRC IRS: 51,056.15.

Collection Due Process

An IRS settlement officer did not abuse her discretion in sustaining a proposed collection activity against a couple who did not request that the officer consider collection alternatives, failed to provide requested financial information or file all required tax returns, and only disputed the underlying tax liability in their Collection Due Process hearing request.

Delon, TC, CCH Dec. 58,937(M), FED ¶47,951(M); TRC IRS: 51,056.15.

Deficiencies and Penalties

An individual was not liable for the fraud penalty for two tax years at issue. He had used company funds for his personal use; however, his intent was to safeguard company funds from a judgment collection.

Avenell, TC, CCH Dec. 58,936(M), FED ¶47,950(M); TRC PENALTY: 6,158.

The Tax Court properly denied a wife's motion for a reduction of deficiencies imposed on her and her husband with the alleged overpayments resulting from excess collections of the earlier years' liabilities and properly imposed additions to tax and penalties.

Smith, CA-10, 2012-1 USTC ¶50,177; TRC LITIG: 9,254.

The IRS's deficiency determination was sustained against an individual who failed to report interest income on his tax return, and he was liable for an accuracy-related penalty for a substantial understatement of income tax. The taxpayer conceded that he should have included the interest payments in his gross income.

Brown, TC, CCH Dec. 58,932(M), FED ¶47,946(M); TRC INDIV: 12,050.

The IRS Appeals Office did not abuse its discretion in assessing deficiencies and initiating a collection action relating to an individual's outstanding federal tax liabilities. The settlement officer did not fail to consider collection alternatives to the proposed levy because none were presented by the individual.

Byers, TC, CCH Dec. 58,931(M), FED ¶47,945(M); TRC IRS: 45,104.

Bankruptcy

A parent company's revocation of its S corporation status subsequent to the filing of the bankruptcy petition by its debtor, a qualified subchapter S subsidiary (QSub), terminated its QSub status, which resulted in post-petition transfer of the debtor's property from the bankruptcy estate in violation of section 362 of the Bankruptcy Code.

In re The Majestic Star Casino, LLC, BC-DC Del., 2012-1 USTC ¶50,175; TRC IRS: 57,054.10.

Statute of Limitations

Two limited partners' motion for reconsideration of their statute of limitations and penalty interest claims was denied. The partners failed to show any intervening change in controlling legal authority or that the reconsideration was necessary to prevent manifest injustice.

Northcutt, FedCl, 2012-1 USTC ¶50,181; TRC LITIG: 9,254.

Dependency

The noncustodial parent of a minor child was not entitled to the child's dependency exception; therefore, she was also not entitled to head of household filing status, the child tax credit or the increased earned income tax credit based on an individual with one child. The father of the child had primary custody of the child and the child resided with the father for more than one-half of the year.

Philemond, TC, CCH Dec. 58,933(M), FED ¶47,947(M); TRC FILEIND: 6,168.10.

IRS Updates Payment Card Reporting FAQs

The IRS has updated its online frequently asked questions (FAQs) about payment card (merchant card) reporting. The updated FAQ discusses independent contractors.

Reporting. The Housing Assistance Tax Act of 2008 enacted Code Sec. 6050W, which requires information returns to be made by certain payors with respect to payments made in settlement of payment card (merchant card) transactions and third party payment network transactions. Reporting is done on new Form 1099-K, Merchant Card and Third-Party Payments. Payment settlement entities must furnish a "payee statement" showing the information reported to the IRS on Form 1099-K to each participating payee.

- ***Comment.*** Statements must be provided by the reporting entity to the payee by January 31 of the year following the calendar year for which the return was made. The first payee statements were due by January 31, 2012.

Independent contractors. The IRS noted that questions have arisen about independent contractors. If a worker at a trade or business is an independent contractor, and the independent contractor swipes merchant payment cards on behalf of the trade or business in the normal course of business (in other words, the trade or business, not the independent contractor, receives the proceeds), should the trade or business report payments to the worker on Form 1099-K or Form 1099-MISC? The IRS explained that the business should continue to report payments made to independent contractors on Form 1099-MISC as it has done in the past. No Form 1099-Ks should be issued.

www.irs.gov, FED ¶46,268; TRC FILEBUS: 9,320.