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Supreme Court Rebuffs IRS: Basis Overstatement Not Omission From Gross Income For SOL

◆ *Home Concrete & Supply, LLC, Sup. Ct., April 25, 2012*

The Supreme Court has resolved a split among the circuits by concluding that an overstatement of basis does not result in an omission of income for statute of limitations (SOL) purposes. The outcome was controlled by the Court's 1958 decision in *Colony (58-2 USTC ¶9593)*. As a result, the IRS has three years, rather than six, to act against taxpayers that overstate basis.

■ ***CCH Take Away.*** The Supreme Court has spoken -- the statute is clear and the regulations are improper. "But it is difficult to understand the state of the law regarding deference to regulations after this decision," Matthew Lerner, partner, Steptoe & Johnson, LLP, Washington, D.C., told CCH.

■ ***Comment.*** "The procedural twists and turns of this issue are remarkable," Todd Welty, partner and U.S. head of Tax Controversy and Litigation for SNR Denton, Dallas, told CCH. "At the trial court and appellate levels, the taxpayers had the upper hand. In response to a series of losses, the IRS issued unprecedented regulations" (that would apply the six-year statute of limitations to an overstatement of basis), "overturning judicial decisions in which the IRS was the losing party-litigant. Probably the most controversial aspect of this case, was how far Treasury could go in issuing regulations. Effectively, Treasury intended to render the trial courts' role meaningless by issuing the retroactive regulations. This is one of the important undercurrents in the case," Welty said.

Background

Under Code Sec. 6501(a), the IRS ordinarily must assess a deficiency against a taxpayer within three years after the return was filed. In *Home Concrete*, the IRS failed to act within three years of the filing of the return. Under Code Sec. 6501(e)(1)(A), the three-year period is extended to six years if a taxpayer "omits from gross income an amount properly includible therein" which exceeds 25 percent of the amount of gross income shown on the return. Since the IRS issued a deficiency notice within such six-year period, the statute would have applied as long as the taxpayer was treated as having omitted gross income. The issue was whether the taxpayer should be treated as having omitted gross income when the taxpayer overstated its basis in property sold, thereby understating the gain realized on the sale.

■ ***Comment.*** The issue has arisen in a number of cases, most notably in "Son of BOSS" tax shelter cases where the taxpayer overstates basis in a partnership interest, resulting in an understatement of income. The IRS failed to act within three years of the filing of the return, but issued

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Route to: ____________ ____________ ____________ ____________ ____________

Basis Overstatement

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a notice to the taxpayer before the six-year statute had elapsed.

A district court found that an overstatement of basis triggered the six-year statute of limitations. However, on appeal (*Home Concrete, CA-4, 2011-1 USTC ¶50,207*), the Fourth Circuit concluded that the plain meaning of "omit" clearly meant to leave out or to fail to mention. Since the taxpayers had not left out their transaction (and had in fact provided its details on their return), the three-year statute of limitations applied.

IRS regs

While litigating the statute of limitations issue, the IRS issued final regs providing that an overstatement of basis that resulted in an understatement of income was an omission from gross income under Code Sec. 6501(e)(1)(A). The IRS argued that under *National Cable & Telecommunications Assn. v. Brand X Internet Services, 545 U.S. 967, S.Ct. (2005)*, the agency had the authority to issue regs. The Supreme Court had found that a court's prior judicial construction of a statute trumps agency regs only if the court held that its construction follows from the unambiguous terms of the statute.

■ ***Comment.*** In *Brand X*, Justice Scalia was concerned about the mischief that could be created by giving an agency the power to change a trial court decision by regulation, Welty said. Scalia recognized that *Brand X* opened the door to this type of post-trial regulation. In *Home Concrete*, Scalia said that he would overrule that part of the *Brand X* opinion, Welty observed.

■ ***Comment.*** Lerner explained that the Court's four-person plurality cites the *Brand X* decision, which appears to allow regulators to act unless a court has determined that a statute is unambiguous. The plurality even notes that the Supreme Court in *Colony* held that the original statute was "not unambiguous," which would seem to indicate that Treasury is free to issue regulations interpreting the statute differently than the Court. However, the plurality then fails to follow *Brand X*, which would seem to justify the IRS's rulemaking in this case, but does not overrule or distinguish *Brand X*, Lerner said. Justice Scalia, in his concurrence, recognizes the dilemma, Lerner said, and would have merely held that the Supreme Court's opinion in *Colony* (limiting the statute to three years for an omission) was controlling, based on taxpayers' settled expectations of a three-year statute of limitations. Although it is not stated by the plurality, one might conclude that the tests for a lack of ambiguity are different for *Chevron, 467 U.S. 837, S.Ct. (1984),* (the statute on its face) and *Brand X* (the statute plus the traditional tools of statutory interpretation, like legislative history).

Colony controls

One of the issues for the Supreme Court was whether to give deference to the agency's regs. The Court rejected them as inconsistent with its decision in *Colony*. "In our view, *Colony* has already interpreted the statute, and there is no longer any different construction that is consistent with *Colony* and available for adoption by the agency," Justice Breyer wrote.

■ ***Comment.*** Lerner pointed out that the Court failed to address the question of the deference to be given to regs issued during litigation. Lerner previously commented to CCH that one court, the Fifth Circuit, has stated that deference to what appears to be nothing more than an agency's convenient litigating position is "entirely inappropriate."

■ ***Comment.*** "Several Supreme Court decisions say that if a statute is ambiguous, an agency can issue regulations that are entitled to deference," Welty said. In *Colony*, the Supreme Court noted that the statute at issue was not unambiguous, but resolved the case in favor of the taxpayer after using traditional rules of statutory construction. "In *Home Concrete*, the plurality opinion effectively held that pre-*Chevron* opinions—such as *Colony*— construing a statute as ambiguous are not controlling. Indeed, pre-*Chevron* findings of ambiguity are themselves ambiguous," Welty said. "For an agency's regulations to receive *Chevron* deference, a pre-*Chevron* finding of ambiguity must be coupled with gap filling authority."

Remand

On April 30, the Supreme Court remanded a number of cases for reconsideration in light of *Home Concrete*. They are: *Beard (2011-1 USTC ¶50,176)*; *Grapevine Imports Ltd. (2011-1 USTC ¶50,264)*; *Salman Ranch Ltd. (2009-2 USTC ¶50,528)*; *Intermountain Insurance Services of Vail LLC (2011-2 USTC ¶50,468)*; and *UTAM Ltd. (2011-2 USTC ¶50,467)*.

■ ***Comment.*** The Supreme Court also denied certiorari to several petitions filed by the government challenging other lower court decisions related to the regs.

References: 2012-1 USTC ¶50,315; TRC PART: 60,352.10.

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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 Enhance Employee Deduction For Local Lodging Expenses Incurred In Trade Or Business

◆ *NPRM REG-137589-07*

The IRS has issued proposed reliance regs allowing an employee to treat local lodging expenses as working condition fringe benefits or accountable plan reimbursements and allowing an employer to treat expenses as deductible business expenses. The IRS also provided a new safe harbor.

■ ***CCH Take Away.*** "This is welcome news and is a very good tool for employers," Marianna Dyson, member, Miller & Chevalier Chartered, Washington, D.C., told CCH. "The IRS has recognized that there are situations where the demands of the job require that employees should be reimbursed because of business exigencies," Dyson said. "The IRS is trying to put some contours to the problem. It is making a distinction – the deduction applies to circumstances that do not happen routinely." A deduction may not be available merely because the employee works overtime and is too tired to go home, she added.

Background

Under current regs, employees may be able to deduct expenses for job-related travel away from home, but generally cannot deduct lodging expenses for the costs of staying in the locality where they work. If the employer reimburses the employee or pays for the lodging expenses directly, the employer in most cases can deduct the payments as compensation expenses, but the employee has to recognize the payments as compensation income.

■ ***Comment.*** There can be tax consequences for the employer, Dyson said. If an expense was reclassified as compensation, instead of a nontaxable fringe benefit, "there is a real risk to the employer" of owing payroll taxes, she noted. Plus, the employer may have secondary liability for the employee's income taxes, she said.

In the preamble to the regs, the IRS explained that the following reasons for using local lodging are considered personal, not business-related: a weekend at a luxury hotel provided by the employer, lodging to avoid a long-distance commute; lodging because the employee must work overtime; housing for a recently-relocated employee; or lodging for the employee's indefinite personal use. In these circumstances, the expenses are not deductible by the employee, and treated as compensation if paid by the employer.

Reliance regs

In 2007, the IRS announced in Notice 2007-47 that it would amend the current regs to change the treatment of local lodging. At that time, the IRS indicated without elaboration that, until it amended the regs, it would not challenge an employee's deduction for local lodging if the lodging was temporary and was "necessary" for the employee to participate in a business function of the employer.

Now, the IRS has now proposed to amend its regs under Code Sections 162 (trade or business expenses) and 262 (personal expenses). Instead of disallowing all local lodging expenses, the new regs provide that the expenses are deductible if incurred in carrying on a taxpayer's trade or business, based on all the facts and circumstances. .

■ ***Comment.*** These regs will open up a lot of discussion about what is a legitimate lodging expense; employers need to think about this judiciously, Dyson said.

While the proposed regs are not effective until issued as final regs, the IRS provided that taxpayers can rely on them now if they are claiming a deducting for expenses incurred during a tax year for which the statute of limitations is still open.

Safe harbor

The proposed regs also provide a safe harbor for an employee to deduct local lodging expenses if:

- The lodging is necessary for the individual to participate fully in or be available for a bona fide business meeting, conference, training activity or other function;
- The period of lodging does not exceed five calendar days and does not recur more frequently than once per calendar quarter;
- The employer requires the employee to remain at the activity or function overnight; and
- The lodging is not lavish or extravagant and does not provide significant personal pleasure, recreation or benefit.

References: FED ¶49,529; TRC BUSEXP: 24,052.

IRS Unveils 2013 Inflation-Adjusted Amounts For Health Savings Accounts

◆ *Rev. Proc. 2012-26*

The IRS has released the inflation-adjusted amounts for health savings accounts (HSAs) in 2013. Amounts are increased for changes in the cost-of-living adjustment (COLA). The 2013 COLA increased based on the April 1, 2011 to March 31, 2012 measurement period and as such the 2013 HSA amounts have also increased.

■ ***CCH Take Away.*** Individuals can maintain a HSA in connection with a high-deductible health plan (HDHP) defined under Code Sec. 223(c)(2)(A). The individual cannot be covered by another plan that is not an HDHP. HDHPs generally have lower premiums, making them attractive, but provide less coverage than non-HDHPs. Individual contributions to an HSA are deductible,

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IRS Releases Flurry Of PPACA Guidance Describing Minimum Value And Plan/Employer Reporting

◆ *Notices 2012-31, 32, 33*

The IRS has issued guidance describing possible approaches to determining if an employer-sponsored health plan provides minimum value under the Patient Protection and Affordable Care Act (PPACA). The agency also requested comments on how to implement reporting of health care coverage by employers, issuers and other entities to the IRS as required by the PPACA after 2013.

CCH Take Away. "Despite the looming uncertainty regarding the constitutionality of the health care reform law and the impending Supreme Court decision on the matter, the IRS and the U.S. Department of Health and Human Services (HHS) are operating business as usual and have issued several pieces of PPACA-related guidance," Todd Solomon, partner, McDermott, Will & Emery, LLP, Chicago, told CCH. "Notably, the IRS has requested comments on several of PPACA's informational reporting requirements that will apply to employers that sponsor self-insured plans, persons who provide minimum essential coverage, and large employers that are required to meet the shared employer responsibility requirements of PPACA, which will become effective for 2014 and will be reported in 2015." *For more details on the Supreme Court's review of the PPACA, see the April 5, 2012 issue of this newsletter.*

Background

Beginning in 2014, the PPACA imposes a penalty on individuals who fail to ensure that they and their dependents have minimum essential health coverage. Generally, a plan fails to provide minimum value if the plan's share of the total allowed costs of benefits under the plan is less than 60 percent of such costs. If employer-provided coverage fails to provide minimum essential coverage, individuals may qualify for a new health insurance premium tax credit (the Code Sec. 36B credit) to help them obtain health insurance coverage purchased through an Affordable Insurance Exchange.

The PPACA also provides special rules for large employers. Generally, a large employer will be subject, beginning after December 31, 2013, to an assessable payment if any full-time employee is certified to receive a premium assistance tax credit and either the employer does not offer full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an employer plan or the employer offers full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage that either is unaffordable; or does not provide minimum value. A large employer is generally one that employed an average of at least 50 full-time employees on business days during the preceding calendar year subject to certain exceptions.

Minimum value

In Notice 2012-31, the IRS described three potential approaches to determine if an employer-sponsored plan provides minimum value. The first method would utilize an actuarial value calculator or minimum value calculator created by HHS and Treasury. The second method would provide an array of designed-based safe harbors in the form of checklists. Under the third method, plans with nonstandard features that preclude the use of the calculators without adjustments could obtain an appropriate certification by a certified actuary.

The IRS requested comments on the possible approaches, including (not an exhaustive list).

- The actuarial value or minimum value calculators;
- Terms to include in the safe harbor checklists; and
- Standards/safeguards for independent actuarial value certifi cation.

Reporting

The PPACA (new Code Sec. 6055) generally imposes reporting on health insurance issuers, sponsors of self-insured plans, and government agencies. Additionally, new Code Sec. 6056(a) generally imposes reporting on large employers (employers that employed an average of 50 full-time employees on business days during the preceding calendar year subject to certain exceptions). These reporting requirements are scheduled to take effect beginning in 2014 (with the first information returns filed in 2015).

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Health Savings Accounts

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with the contribution limits tied to changes in the cost of living. Amounts in the HSA can be used for the account beneficiary, the beneficiary's spouse, and dependents.

2013 limits

For calendar year 2013, the annual contribution limit for an individual with self-only coverage under an HDHP is $3,250, up from $3,100 for calendar year 2012. The corresponding limit for an individual with family coverage under an HDHP is $6,450 for calendar year 2013, up from $6,250 for calendar year 2012.

High-deductible health plan

For calendar year 2013, an HDHP is defined as a health plan with an annual deductible that is not less than $1,250 for self-only coverage and $2,500 for family coverage. These amounts increased from $1,200 and $2,400, respectively, for calendar year 2012.

The annual limit on out-of-pocket expenses under an HDHP for self-only coverage is $6,250 for 2013, up from $6,050 for 2012. The annual limit on out-of-pocket expenses for family coverage under an HDHP is $12,500 for 2013, up from $12,100 in 2012.

References: FED ¶46,335; TRC INDIV: 45,064.15.

Agencies Seek Comments On Use Of Stop Loss Insurance

◆ *Request for Information Regarding Stop Loss Insurance, April 25, 2012*

The IRS and the U.S. Departments of Health and Human Services (HHS) and Labor (DOL) have requested information about the use of stop loss insurance by group health plans and their plan sponsors. Self-insured plans can purchase stop-loss insurance to mitigate the risk of unexpectedly large medical claims.

■ ***CCH Take Away.*** In 2011, DOL reported that six in 10 private and public sector workers covered by employer-provided health care were under a self-insured plan. Between 2000 and 2008, the percentage of group health plans filing a Form 5500 that reported having stop-loss insurance ranged from 23 percent to 27 percent for self-insured plans, DOL explained.

Background

In a self-insured health plan, the plan sponsor generally directly funds the health benefits for its covered enrollees. A plan sponsor may choose to purchase stop-loss insurance coverage that insures the plan sponsor (or plan) against unexpectedly large claims.

Under a stop-loss insurance plan, the plan sponsor pays the claims of the covered workers up to a specified threshold. Attachment points may be set based on a per-participant amount or an aggregate plan amount. If the plan's claims exceed the attachment point, the stop-loss policy reimburses the plan sponsor or plan for any excess claims, the agencies explained.

Request for information

According to the agencies, some commentators have suggested that small employers with healthier employees may self-insure and purchase stop loss insurance policies with relatively low attachment points to avoid being subject to certain consumer protection requirements while exposing themselves to little risk. The agencies cautioned that this practice could impair the risk pool and increase premiums in the fully insured small group market, including small business health exchanges (after 2013) under the Patient Protection and Affordable Care Act (PPACA).

The agencies requested comments on (not an exhaustive list):

- How common is the use of stop loss insurance in connection with self-insured arrangements?
- What are common attachment points for stop loss insurance policies, and what factors are used to determine attachment points?
- Are employee-level (specific) attachment points or group-level (aggregate) attachment points more common?
- How do insurers work with small employers to integrate stop loss insurance protection with self-insured group health plans?
- What are the administrative costs?
- Is stop loss insurance more prevalent in certain industries or sectors?
- What type of entities issue stop loss insurance?
- How do states regulate stop loss insurance?

Reference: TRC SALES: 51,358.

PPACA

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■ ***Comment.*** Large employers are also required to provide full-time employees with a statement detailing the contents of the information return.

In Notice 2012-32 and Notice 2012-33, the IRS requested comments on how to implement these reporting requirements, including how to (not an exhaustive list):

- Determine when an individual's coverage begins and ends;
- Minimize duplicative reporting; and
- Submit returns electronically.

■ ***Comment.*** Reporting under Code Sec. 6055 and Code Sec. 6056 is separate from the disclosure of the cost of employer-provided health insurance on an employee's Form W-2.

References: FED ¶¶46,351, 46,352, 46,353; TRC COMPEN: 45,228.

IRS Issues Proposed Regs On Disclosure Of Return Information For Health Insurance Programs

The IRS has issued proposed regs on the disclosure of return information to determine eligibility for the Code Sec. 36B health insurance premium assistance tax credit and related purposes under the Patient Protection and Affordable Care Act (PPACA).

Background. The PPACA authorizes the IRS to disclose certain return information to the U.S. Department of Health and Human Services (HHS) to verify eligibility for the Code Sec. 36B health insurance premium tax credit and other PPACA purposes. Treasury and the IRS issued proposed regs on the Code Sec. 36B credit in 2011. Eligibility for the credit is based on a number of factors, including income, family size and filing status.

Disclosure. The IRS explained that disclosure of return information for the Code Sec. 36B credit and related PPACA purposes will be limited to taxpayer identity, filing status, the number of individuals for which a deduction under Code Sec. 151 was allowed (family size), modified adjusted gross income, and the tax year to which the information relates. The IRS added that if a taxpayer's modified adjusted gross income is unavailable, the agency would disclose the taxpayer's adjusted gross income to HHS.

■ ***Comment.*** "The proposed regulations set forth a practical approach for providing available tax-related data from the IRS to HHS in determining eligibility for the programs and advance payments," Elizabeth Dold, principal, The Groom Law Group, Chartered, Washington, D.C., told CCH. This includes identity theft protections and explanations of data limitations intended to facilitate alternative means to verify such data.

NPRM REG-119632-11, FED 49,531; TRC IRS: 9,152.

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Couple's Use Of Replacement Property As Residence Does Not Preclude Nonrecognition

◆ *Reesink, TC Memo. 2012-118*

A married couple who used replacement property in a like-kind exchange as their personal residence nonetheless had investment intent when they acquired the property, the Tax Court has found. The court held that the couple qualified for nonrecognition under Code Sec. 1031. However, settlement proceeds from a family dispute were not excludible from income under Code Sec. 104(a)(2).

■ ***CCH Take Away.*** The court noted that the couple had successfully engaged in a previous like-kind exchange. Two years before this transaction, they had sold investment real estate in one city and used the proceeds to purchase investment real estate in another city in the same state.

Background

In 2005, the husband and his brother sold an apartment building and each received $700,000. The husband took an additional $60,000 in settlement of litigation against his brother.

After the sale, the couple searched for real estate in a different city as investment property. They bought a single family home in that city. They intended to rent the house but could find no renters. The couple eventually sold their primary residence and moved into the replacement property. According to the IRS, the couple did not hold the replacement property with investment intent.

Court's analysis

The court agreed with the IRS that investment intent must be a taxpayer's primary motivation for holding the exchanged property for the property to qualify as held for investment for purposes of Code Sec. 1031. However, the court found that the couple had investment intent when they acquired the replacement property.

The couple had advertised for renters and had placed fliers in the community inviting persons to visit the property. Their decision to end their efforts to rent the property came after six months of fruitless searching for renters. The couple also testified that they had intended to remain in their principal residence until their children completed high school. The children were still in high school when the couple moved to the replacement property. The court further found that the couple had not made the purchase of the replacement property contingent on the sale of their principall residence.

■ ***Comment.*** The court distinguished *Goolsby, TC Memo. 2010-64.* In that case, the taxpayers had made the purchase of the replacement property contingent on the sale of their former personal residence.

The court further found that the couple could not exclude the $60,000 settlement proceeds from income under Code Sec. 104(a)(2). The couple failed to persuade the court that the payment was made on account of physical injuries or physical sickness. Additionally, the court upheld a portion of the accuracy-related penalty imposed by the IRS.

References: CCH Dec. 59,034(M); TRC SALES: 30,206.05.

Fifth Circuit Upholds Denial Of Valuation Misstatement Penalty In Son-Of-BOSS Case

◆ *Bemont Investments, LLC, CA-5*

The Fifth Circuit has upheld a district court's ruling in consolidated cases denying the IRS's application of the 40-percent penalty for a partnership's gross valuation misstatement of loss where tax shelter losses were disallowed. Because the losses were disallowed in full, the taxpayer's actual tax liability was unaffected by the misstated amounts and the 40-percent penalty for gross overvaluation misstatements could not apply.

■ ***CCH Take Away.*** In October 2011, the IRS issued AOD-2011-02 stating it would not acquiesce to a Ninth Circuit Court of Appeals decision precluding the 40-percent penalty after the entire deduction was disallowed *(Keller, 2009-1 USTC ¶50,246)*. Also in 2011, the IRS Chief Counsel Notice issued CC-2012-001, directing its attorneys to continue pursuing gross valuation misstatement penalties in abusive tax shelter cases and to oppose taxpayers' offers to make concessions on the merits, which might preclude the penalties.

Background

The taxpayer reported a $151 million foreign-currency loss on its 2011 tax return, which was based on an inflated basis in currency swaps in the amount of $202.5 million. The district court found that the taxpayer's use of the swap was an abusive tax shelter and imposed a 20-percent penalty for negligent underpayment of tax. The district court denied application of the 40-percent penalty for gross valuation misstatements. It found that only one penalty can apply. The IRS appealed.

Court's analysis

Sec. 6662 imposes a 20-percent penalty on any underpayment of tax attributable

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IRS Jettisons Final And Proposed Regs After Repeal Of Three Percent Government Withholding

◆ *TD 9586, NPRM REG-151687-10*

Final and proposed regs on three percent government withholding have been removed, the IRS recently announced. The agency removed the final and proposed regs to reflect repeal of three percent government withholding in 2011.

- ***CCH Take Away.*** Three percent government withholding was intended to boost tax collection as third-party reporting has historically contributed to higher rates of compliance. Almost immediately after passage, state and local governments as well as business groups protested the additional burden the requirement would place on them. Compliance costs, they argued, would outweigh the benefits to the federal government. In November 2011, President Obama signed the 3% Withholding Repeal and Job Creation Act (3% Withholding Act).

Background

The Tax Increase Prevention and Reconciliation Act of 2005 (TIPRA) imposed three percent withholding on payments for goods and services to contractors made by federal, state and local governments (Code Sec. 3402(t)). Under TIPRA, government withholding was scheduled to apply to payments made after December 31, 2010.

The American Recovery and Reinvestment Act of 2009 (2009 Recovery Act) delayed the effective date to payments made after December 31, 2011. Congress subsequently passed the 3% Withholding Act.

Removal of regs

The IRS issued final regs on three percent government withholding in May 2011 (TD 9524). The final regs delayed the effective date to payments made after December 31, 2012. The final regs also required the government entity to report the amount of the payment and the amount withheld on Form 1099-MISC. Payments under a certain monetary threshold (generally $10,000) were exempt from mandatory withholding.

The IRS explained that the 3% Withholding Act repealed government withholding before it became effective. As a result, the agency removed the regs issued under Code Sec. 3402(t) and related sections. The IRS also made conforming amendments to certain regs to reflect the removal of the Code Sec. 3402(t) regs. Additionally, the IRS reported that it was removing proposed regs issued at the same time as the final regs (NPRM REG-151687-10)

References: FED ¶47,024; TRC FILEBUS: 18,410.

Tax Briefs

Internal Revenue Service

The Tax Court did not err in its computation of an individual's tax liabilities and penalties for several tax years. The IRS's calculations were presumed correct and the taxpayer failed to rebut the presumption.

Jordan, CA-6, 2012-1 USTC ¶50,317; TRC INDIV: 6,050.

Tax Crimes

A married couple was properly convicted of failing to pay over trust fund taxes, but their sentences were remanded because the enhancement for abuse of position of trust was improper. The district court properly admitted evidence that established the couple's responsibility for paying their corporation's taxes and their failure to do so. The evidence was probative of their willfulness and was not so prejudicial as to substantially outweigh its probative value.

DeMuro, CA-3, 2012-1 USTC ¶50,313; TRC IRS: 66,154.

Summons

An IRS summons directing an individual to appear, testify and produce documents relating to an investigation into her corporate tax liabilities was ordered enforced. The government established its *prima facie* case for enforcement under *Powell*.

Bladow, DC Calif., 2012-1 USTC ¶50,318; TRC IRS: 21,300.

An individual's request for attorney's fees after the IRS withdrew its petition to enforce its summons to him was properly denied because the IRS's litigating position was substantially justified. The IRS sought enforcement of the summons only after the individual failed to properly respond to it and when the IRS obtained the summoned information from other sources, it properly withdrew its enforcement request.

Jones, CA-9, 2012-1 USTC ¶50,316; TRC LITIG: 3,154.05

Deductions

An individual's failure to keep adequate records and his inability to substantiate claimed expenses resulted in the disallowance of a number of business deductions, including moving expenses, wages paid, utilities, rental expenses, repairs, legal expenses, advertising, and miscellaneous office-related expenses. The taxpayer was subject to accuracy-related penalties based on negligence and possibly on substantial understatement of income tax.

Olagunju, TC, CCH Dec. 59,035(M), FED ¶48,049(M); TRC BUSEXP: 3,200.

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Tax Briefs

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Collection Due Process

A partner's request for interest abatement and relief from collection actions relating to deficiencies arising from his participation in partnership tax shelters was denied. He claimed the abatement of interest due to unreasonable errors and delays by the IRS. The IRS's decision on how to proceed in the litigation required the exercise of judgment; therefore, it was not a ministerial act.

Coleman, TC, CCH Dec. 59,032(M), FED ¶48,046(M); TRC PART: 60,352.05.

Deficiencies and Penalties

A couple's Tax Court petition alleging that the determinations in the notice of deficiency they received were in error and that they should not be held liable for accuracy-related penalties was dismissed for lack of prosecution. The couple was liable for fraud penalties.

Branson, TC, CCH Dec. 59,040(M), FED ¶48,054(M); TRC PENALTY: 6,104.

An individual taxpayer was liable for additions to tax for failing to file a return and failing to timely pay her income tax for the tax year at issue. She provided a receipt for the purchase of the return-preparation software she claimed was used to file the return but there was no proof that the return had been mailed and the tax due had been paid.

McHaney, TC, CCH Dec. 59,036(M), FED ¶48,050(M); TRC IRS: 27,210.05.

The IRS Appeals office properly determined that an individual was liable for delay penalties. The self-assessment shown on an individual's returns was substantially incorrect and his failure to explain why he filed so many returns for the tax year at issue reflected his intent to delay.

Umoren, TC, CCH Dec. 59,033(M), FED ¶48,047(M); TRC PENALTY: 3,260.

Offer-in-Compromise

The IRS Appeals Office did not abuse its discretion by rejecting an individual's offer-in-compromise (OIC) as a collection alternative during a Collection Due Process (CDP) hearing. The settlement officer did not abuse her discretion in rejecting the individual's OIC in favor of a part payment installment agreement (PPIA) because the individual's dissipated assets were sufficient to pay his liability in full.

L.E. Tucker, CA-D.C., 2012-1 USTC ¶50,312; TRC IRS: 42,056.10.

Bankruptcy

The receiver of a consolidated group's insolvent banking subsidiary was entitled to intervene in a bankruptcy trustee's action for a refund of taxes based on net operating losses generated by the subsidiary. The Claims Court had jurisdiction under Code Sec. 7422 because the receiver complied with the jurisdictional requirements by filing an alternative return under Reg. §301.6402-7.

Claybrook, FedCl, 2012-1 USTC ¶50,314; TRC CCORP: 45,158.10.

Alimony

An individual could not deduct payments made to his former spouse as alimony because the payments were nonmodifiable. The award provided for a total amount of lump-sum alimony, payable in monthly payments. The divorce judgment made no mention of termination of the obligation prior to completion of the payments.

Rood, TC, CCH Dec. 59,038(M), FED ¶48,052(M); TRC INDIV: 21,206.

Innocent Spouse

A requesting spouse was not entitled to equitable relief from joint and several liability for tax liabilities of a copier service she and her ex-husband had owned and operated. She failed to introduce evidence that her ex-husband misappropriated funds intended to pay their tax liability and she used business funds for personal expenses.

Nunez, TC, CCH Dec. 59,037(M), FED ¶48,051(M); TRC INDIV: 18,058.15.

Penalty

Continued from page 6

to a "substantial valuation misstatement" and a 40-percent penalty if the underpayment is attributable to a "gross valuation misstatements." Under Code Sec. 6662(h), a gross valuation misstatement occurs when the value or adjusted basis of any property claimed on a return is 200 percent or more of the amount determined to be the correct value or adjusted basis.

The Fifth Circuit upheld the district court's finding with respect to the 40-percent penalty. It found that the IRS had treated the swap transactions as a sham lacking economic substance and created for no business purpose other than to avoid tax and disallowed in full the amount of purported loss generated from the transactions. As such, the valuation overstatement that would have resulted from the deduction did not affect the taxpayer's actual tax liability because the inflated deduction had been disallowed. The 40-percent penalty, therefore, could not apply, the Fifth Circuit concluded.

References: 2012-1 USTC TT 50,319; TRC PART: 60,550.

IRS Updates Average Home Purchase Prices For Issuers Of Mortgage Bonds And Credit Certificates

The IRS has updated the average residential purchase prices used by issuers of mortgage bonds and issuers of mortgage credit certificates. Rev. Proc. 2012-25 provides that the current nationwide average purchase price is $214,000, representing a decrease from last year's amount of $220,000. The IRS also provides average area purchase price safe harbors for residences in statistical areas in each state, the District of Columbia, and U.S. possessions. Rev. Proc. 2012-25 is effective April 25, 2012.

- ***Comment.*** Issuers can rely on the purchase price safe harbors or nationwide purchase price limitation for commitments to provide financing or issue mortgage credit certificates for residences generally purchased on or after April 25, 2012.

Rev. Proc. 2012-25, FED ¶46,350; TRC SALES: 51,358.