Wolters Kluwer
CCH

# Standard Federal Tax Reports
Taxes On Parade

Vol. 100, Issue No. 30, Report 29 July 18, 2013

## Inside this Issue



CCH CELEBRATES 100 YEARS IN TAX & ACCOUNTING

# Treasury, IRS Delay FATCA Withholding, Provide Other Guidance

◆ *Notice 2013-43, TDNR JL-2012*

Treasury and the IRS have provided revised timelines for implementing the *Foreign Account Tax Compliance Act* (FATCA). Withholding requirements scheduled to generally begin on withholdable payments made after December 31, 2013 are postponed to payments made after June 30, 2014. Additionally, the IRS provided guidance on due diligence on preexisting accounts, reporting and registration, the treatment of financial institutions located in jurisdictions that have signed intergovernmental agreements, and more.

■ ***CCH Take Away.*** The IRS in effect said, "If we really want this to be successful, the industry (banks, funds, insurance companies) needs more time," Laurie Hatten-Boyd, principal, International Corporate Services, KPMG LLP, Seattle, told CCH. "Considerations included: the proliferation of Model 1 intergovernmental agreements (IGAs), which need the foreign government to adopt implementing laws; the lack of final IRS forms and instructions in the W-8 series; and the need for harmonizing regulations involving current withholding requirements and the FATCA rules. Also, we have not seen the FFI (foreign financial institution) agreements, although we know the IRS is working on those and wants to get them out as soon as possible," Hatten-Boyd explained.

■ ***Comment.*** "Until the dust settles on jurisdictions that are considering IGAs, financial institutions in those jurisdictions are in a form of 'FATCA purgatory.' Those financial institutions are hesitant to take the steps on their own to comply with FATCA before knowing whether their jurisdiction of residence will enter into an IGA. Similarly, if major financial institutions from those jurisdictions register as participating FFIs, the jurisdictions may not have the same incentives to sign IGAs. This could inhibit the Treasury Department's goal of creating an international standard for the exchange of tax information for all financial institutions," Daniel Gottfried, partner, Hinckley, Allen & Snyder, LLP, Hartford, Conn., told CCH.

## Background

Under FATCA, foreign financial institutions (FFIs) generally must report information about financial accounts held by U.S. taxpayers as well as accounts held by foreign entities in which U.S. taxpayers hold a substantial ownership interest. Unless the FFI has entered into an agreement with the U.S. to report certain information with respect to U.S. accounts, FATCA requires withholding agents to withhold 30 percent of certain payments. Withholding also applies to certain payments made to some non-financial foreign entities.

The IRS issued final regs in early 2013 and described a phased implementation approach for FATCA beginning January 1, 2014 and continuing through 2017. Withholding agents, including participating FFIs, qualified intermediaries that assume

*Continued on page 2*

Route to: ___________ ___________ ___________ ___________ ___________

## FATCA

*Continued from page 1*

withholding responsibilities and others, would be required to begin withholding with respect to withholdable payments made after December 31, 2013. Certain grandfathered obligations outstanding on January 1, 2014 would be excepted. Due diligence for documenting payees and account holders by U.S. withholding agents and participating FFIs would be phased in during 2014 and 2015.

### Extension

In Notice 2013-43, the IRS described the six-month extension. Withholding agents generally will be required to begin withholding on withholdable payments made after June 30, 2014 instead of December 31, 2013. Taxpayers may rely on Notice 2013-43 pending revision of the final regs, the IRS explained. The IRS indicated it will revise the definition of grandfathered obligation to include obligations outstanding on July 1, 2014. Withholding on gross proceeds from sales of U.S. securities and passthru payment withholding are not covered by the extension, Treasury explained.

■ ***Comment.*** "The six-month extension seems to benefit all stakeholders. It gives Treasury more time to finalize its infrastructure for implementing FATCA while signing as many IGAs as possible; the extension gives jurisdictions that are considering IGAs a chance to complete their consideration and negotiation of IGAs; and importantly, it allows the FFIs to better understand the position of their jurisdiction of residence before taking steps to comply with FATCA," Gottfried told CCH.

■ ***Comment.*** "The IRS has not yet defined foreign passthru payments," Hatten-Boyd said. "However, because this withholding does not start until 2017; the IRS does not need to delay this date."

### New account opening procedures

Withholding agents generally will be required to implement new account opening procedures by July 1, 2014, or, in the case of a participating FFI, by the later of July 1, 2014 or the effective date of its FFI agreement. Treasury intends to make a similar change to the definition of pre-existing account in its model intergovernmental agreements.

### Intergovernmental agreements

Treasury has developed two types of IGAs to implement FATCA. Model I generally requires FFIs to report account information to their respective governments, which then provides this information to the IRS. Model 2 generally requires FFIs to report information directly to the IRS. According to Treasury, nine jurisdictions have entered into FATCA agreements with the U.S.

The IRS explained that a jurisdiction will be treated as having in effect an IGA if the jurisdiction is listed on Treasury's website as a jurisdiction that is treated as having an IGA in effect. These financial organizations will be be permitted to register on the FATCA registration website as a registered deemed-compliant FFI or participating FFI. A financial institution may designate a branch located in such jurisdiction as not a limited branch.

■ ***Comment.*** During a conference call with reporters on July 12, a Treasury official predicted that the extension will give the U.S. more time to enter into FATCA agreements with other countries. "Every additional country we bring on board means we are one step closer to winning the fight against offshore tax evasion," Treasury Deputy Assistant Secretary for International Tax Affairs Robert Stack told reporters.

### Due diligence

Under Notice 2013-43, an FFI agreement of a participating FFI that registers with the IRS on or before June 30, 2014 will carry an effective date of June 30, 2014. This effectively results in a six-month postponement of deadlines for completing due diligence on preexisting obligations, the IRS explained. The deadlines for completing due diligence on preexisting obligations will also be postponed by six months for withholding agents other than participating FFIs.

### Information reports

Under the final FATCA regs, a participating FFI is generally required to file information reports on its U.S. accounts for the 2013 and 2014 calendar years no later than March 31, 2015. The IRS indicated that reporting will be required only for 2014 (for U.S. accounts identified by December 31, 2014).

### Registration

Treasury and the IRS have an August 19, 2013 target date to launch an online FATCA registration site. However, no global intermediary identification numbers (GIINs) will be assigned until registrations are finalized in 2014, the IRS explained.

### Expiring QI, WP and WT agreements

All qualified intermediary agreements that would otherwise expire on December 31, 2013, will be automatically extended until June 30, 2014. The extension also applies to withholding foreign partnership and withholding foreign trust agreements that would otherwise expire on December 31, 2013.

### Foreign-targeted registered obligation rules

The IRS provided in Notice 2012-20 a limited transition rule that a withholding agent paying interest on an obligation issued in registered form after March 18, 2012, and before January 1, 2014, may apply the foreign-targeted registered obligation rules of Reg. §1.871-14(e) if the obligation satisfies the requirements of those rules. The transition rule will be extended to obligations issued before July 1, 2014, the IRS explained.

*References: FED ¶¶46,462, 46,464; TRC FILEBUS: 9,108.05.*

STANDARD FEDERAL TAX REPORTS (USPS 518000) (ISSN 0162-3494), TOP Edition published weekly, except for the week of Christmas by CCH, a part of Wolters Kluwer, 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.
©2013 CCH Incorporated. All Rights Reserved.

***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 Provides Transition Relief For PPACA's Delayed Employer Mandate And Reporting

◆ *Notice 2013-45*

Shortly after the Obama administration's recent announcement that employer reporting and employer shared responsibility payments under the *Patient Protection and Affordable Care Act* (PPACA) will not apply for 2014, the IRS issued much-anticipated guidance. The transition relief is intended to give employers and other reporting entities more time to adapt their systems as well as enable the IRS to issue more guidance.

- ***CCH Take Away.*** "For the first time, plan sponsors and insurers will need to develop a comprehensive system for reporting health insurance coverage to the IRS and participants," Elizabeth Dold, principal, The Groom Law Group, Washington, D.C., told CCH. "The one-year delay gives employers the extra time needed to consider these complex rules."
- ***Comment.*** The IRS reiterated that the transition relief does not affect the scheduled 2014 start dates for the Code Sec. 5000A individual shared responsibility requirement (the so-called "individual mandate") or the Code Sec. 36B premium assistance tax credit.

## Background

Beginning in 2014, the PPACA generally requires applicable large employers (defined as businesses with 50 or more employees) that do not offer health insurance to their employees that meets certain minimum standards to pay an assessable payment, called employer shared responsibility payments. Code Sec. 4980H(a) imposes an assessable payment where the employer fails to offer to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage (MEC) under an eligible employer-sponsored plan and any full-time employee is certified to the employer as having received a premium assistance tax credit or cost-sharing reduction. Code Sec. 4980H(b) imposes an assessable payment where the employer offers its full-time employees (and their dependents) the opportunity to enroll in MEC under an eligible employer-sponsored plan and one or more full-time employees is certified to the employer as having received a premium assistance tax credit or cost-sharing reduction.

The PPACA also imposes new information reporting requirements on employers and insurers. Code Sec. 6055 requires, beginning in 2014, health insurance issuers, sponsors of self-insured health plans, government agencies that administer

*Continued on page 4*

# Fifth Circuit Affirms That CFC Inclusions Taxed As Ordinary Income

◆ *Rodriguez, CA-5, July 5, 2013*

Affirming the Tax Court, the Court of Appeals for the Fifth Circuit has found that amounts reported as qualified dividend income by the owners of a controlled foreign corporation (CFC) were properly characterized as ordinary income. The court also rejected the taxpayer's argument that Code Sec. 951 inclusions under Subpart F should be deemed dividends.

- ***CCH Take Away.*** The court noted that the taxpayers, as the sole shareholders, could have caused a dividend to issue. They did not. If they had, the income in dispute would have qualified as dividend income, which could have been taxed at a more taxpayer-friendly 15 percent rate. Instead, they were taxed at their top 35 percent U.S. income tax rate.

## Background

The taxpayers were the sole owners of a company incorporated in Mexico, with a branch office in the U.S. The company was a CFC. In 2005, the taxpayers amended their 2003 U.S. returns to report an additional $1.5 million, attributable to their ownership of the CFC. On their 2004 return, they reported $1.4 million from the same source. According to the couple, the amounts were qualified dividend income.

The IRS disagreed with the taxpayers' characterization of the amounts as qualified dividend income. The IRS determined that the income attributable to the CFC should have been taxed as ordinary income rather than as qualified dividend income. The Tax Court ruled in favor of the IRS and the taxpayers appealed to the Fifth Circuit.

## Court's analysis

The court first noted that Code Sections 951 and 956 are intended to limit the deferral of taxes that would otherwise be owed to the U.S. Generally, CFC shareholders must include CFC-owned U.S. property as part of the their gross income. This minimizes tax deferrals because shareholders lose the ability to defer U.S. tax obligations by keeping the CFC's earnings abroad or by investing in property instead of repatriating income through the payment of dividends.

The court further observed that actual dividends require a distribution by a corporation and receipt by the shareholder. Code Sec. 951 inclusions involve no distribution, the court found.

Besides causing a dividend, the taxpayers also could have paid themselves a salary or invested the company's earnings elsewhere, each of these decisions would have had different tax consequences, the court found. The taxpayers, the court concluded, could not avoid their tax obligations because they now regretted the decisions they made about the income.

The court also found that the Code Sec. 951 inclusions were not deemed dividends. Congress specifically designates when Code Sec. 951 inclusions are to be treated as dividends, and Congress did not concerning the inclusions in dispute here.

*References: 2013-2 USTC ¶50,240; TRC INTLOUT: 9,250.*

©2013 CCH Incorporated. All Rights Reserved.

# IRS Chief Counsel Approves Interest Deduction By QSST Beneficiary On Note Provided To Purchase S Corp Stock

◆ *CCA 201327009*

IRS Chief Counsel has determined that a qualified subchapter S trust (QSST) can attribute interest paid on a note (used to purchase S corp stock) to the S corp portion of the QSST. Since the S corp portion of the QSST is treated as a grantor trust, the trust's beneficiary is entitled to the interest deduction.

■ ***CCH Take Away.*** Chief Counsel carefully analyzed the rules for QSSTs, for grantor trusts, and for interest deductions, concluding that the interest was fully deductible by the beneficiary of the trust. Planning strategies, however, should heed the court's analysis that required that the debt be fully traceable to the S stock acquisition and S corp income.

## Background

A QSST purchased S corp stock from a third party (not the beneficiary of the trust). The trust paid with a note and made timely payments on the note, including interest payments.

IRS field counsel noted that the portion of the trust holding the S corp stock is treated as a grantor trust. Field counsel asked whether the interest expense could be allocated to the grantor trust and deducted by the trust beneficiary on his personal income tax return.

## QSST

A QSST is a trust whose terms require that there be only one income beneficiary of the trust; that all of its income be distributed to one individual, and that any corpus be distributed only to the beneficiary.

Code Sec. 1361(c)(2) permits certain trusts to be shareholders of an S corp, such as a trust that is treated under Subpart E of the Tax Code as a grantor trust wholly owned by a U.S. citizen or resident. Under this rule, Code Sec. 1361(d) permits a trust electing to be a QSST to be treated as an S corp shareholder. Under Code Sec. 678, the beneficiary of the QSST is treated as the owner of the portion of the trust that holds the S corp stock. The beneficiary is treated as the S corp shareholder.

## Grantor trust

Code Sec. 1361(d)(1)(B) creates two portions within a QSST—one consisting of income, deductions and credits related to the S corp, and one consisting of all other income, deductions and credits of the trust (the non-S portion). The S portion is treated as a grantor trust of the beneficiary.

Under Code Sec. 163(h), interest on a debt is allocated in the same manner as the debt proceeds. Interest allocated to a trade or business is fully deductible.

## Conclusion

The debt incurred by the QSST was used to acquire the S corp stock. The interest expense is fully traceable to the purchase and to the income from the S corp business. Therefore, Chief Counsel concluded, the interest expense deduction is attributable to the S portion of the QSST and is deductible in full by the beneficiary.

*Reference: TRC ESTTRST: 36,100.*

---

# Transitional Relief

*Continued from page 3*

government-sponsored health insurance programs, and other entities that provide minimum essential coverage to file annual returns reporting information for whom minimum essential coverage is provided. Additionally, applicable large employers, which are required to meet the employer responsibility requirements, must file information returns reporting the terms and conditions of health coverage offered to employees under Code Sec. 6056.

■ ***Comment.*** Code Sec. 4980H(c)(4) provides that a full-time employee with respect to any month is an employee who is employed on average at least 30 hours of service per week. Legislation has been introduced in Congress, the *Forty Hours is Full Time Act* (Sen. 1188) to define a full-time employee under the PPACA as an employee who is employed on average at least 40 hours per week. Under proposed regs issued in 2012, the term week means any period of seven consecutive calendar days applied consistently by the applicable large employer.

## Transition relief

Information reporting under Code Sections 6055 and 6056 is optional for 2014, the IRS explained. No penalties will be imposed for failing to comply with these provisions for 2014. However, the IRS encouraged employers, insurers and other entities to voluntarily comply with the information reporting requirements. The IRS predicted that it will issue guidance under Code Secs. 6055 and 6056 during the summer of 2013. The IRS explained that the transition period will provide it with more time to dialogue with stakeholders with the goal of simplifying reporting under Code Sections 6055 and 6056.

■ ***Comment.*** "The delay is for everyone, but the government is encouraging voluntary reporting for 2014, as a practice run, to see how it works," Carrie Simons, associate, Benefits Consulting Group, Ropes & Gray LLP, Boston, told CCH.

## Impact on employer mandate

The IRS will use the information that employers report under Code Sec. 6056 to verify employer-sponsored coverage and to administer the shared employer responsibility provisions of Code Sec. 4980H. The transition relief from Code Sec. 6056 reporting by employers is expected to make it impractical to determine which employers would owe shared responsibility payments for 2014, the IRS explained. Therefore, no employer shared responsibility payments will be assessed for 2014.

*References: FED ¶46,461; TRC COMPEN: 45,450.*

# Taxpayers Can Take Ordinary Loss On Unpaid Notes But No Code Sec. 1341 Benefit, IRS Chief Counsel Determines

◆ *CCA 201328031*

IRS Chief Counsel has determined that two taxpayers can claim ordinary losses on unpaid notes that they had previously taken into income. As net operating losses (NOLs), they could be carried back. However, the Code Sec. 1341 claim-of-right look-back rules did not apply since their earlier overstatement of income of the notes presented an issue involving valuation rather than unrestricted rights.

■ ***CCH Take Away.*** A taxpayer who is required to repay in one year an item that was included as income in a prior year under a claim of right may take the greater of the tax reductions that would be realized by treating the restored item as a deduction in the year of its original inclusion in income or the year in which it was repaid.

## Background

In Year 1, a limited liability company (LLC), engaged in a business, sold all its assets to an unrelated corporation, which paid cash and two promissory notes (Notes A and B), payable in full by Year 4. Under Note B, the corporation would pay a portion of the note each year if its business met a financial target. The taxpayers, as pass-through members of the LLC, reported the maximum face value of the notes to determine the amounts realized from the assets. The buyer who gave the notes defaulted on Note A in Year 4. Furthermore, the buyer did not owe any amounts on Note B because the financial targets were not met.

## No Code Sec. 1341 benefits

Code Sec. 1341 would confer certain look-back tax benefits if the taxpayer previously included an item in income because the taxpayer appeared to have had an unrestricted right to the item, but that conclusion was later proved incorrect. Here, when the taxpayers included income from the notes in gross income, the taxpayers had an unrestricted right to the notes. While the default by the buyer decreased the value of the notes, Chief Counsel concluded that it did not affect the taxpayers' unrestricted rights in the notes. Thus, Code Sec. 1341 did not apply since the initial overstatement raised the issue of valuation and not unrestricted rights.

■ ***Comment.*** Chief Counsel did allow the taxpayers to claim deductions under Code Sec. 166 for ordinary losses on the unpaid portion of Note A. The taxpayers could also claim deductions for ordinary losses on Note B, under either Code Sec. 165 or Code Sec. 166 (bad debts).

*Reference: TRC NOL: 9,150.*

# D.C. Circuit Rejects IRS's Per-Bet Approach For Nonresident Alien Gambler

◆ *Park, CA-D.C., July 9, 2013*

Reversing the Tax Court, the Court of Appeals for the District of Columbia Circuit has found that a nonresident alien could subtract losses from his wins in the U.S. within a gambling session to arrive at per-session wins or losses. The court rejected the IRS's application of a per-bet rule and applied a per-session rule.

■ ***CCH Take Away.*** In AM 2008-011, IRS Chief Counsel had determined that a casual gambler, such as an individual who plays slot machines, recognizes a wagering gain or loss each time he or she redeems tokens. A casual gambler who enters a casino with $100 and loses the entire amount after playing slot machines has a wagering loss of $100, even though she may have had winning spins of $1,000 and losing spins of $1,000 during the course of play, Chief Counsel explained.

## Background

A South Korean citizen visited the U.S. where he frequently played slot machines at a casino in California. In 2006 and 2007, his gambling losses exceeded his winnings. The IRS determined that he had unreported gambling income in 2006 and in 2007.

■ ***Comment.*** The Tax Court had found that an income tax treaty between the U.S. and the nonresident alien's country (South Korea) did not provide, as some treaties provide, an exemption from tax with respect to U.S. gambling income.

## Court's analysis

The D.C. Circuit found that Code Sec. 871 taxes nonresident aliens for all interest, dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, and other fixed or determinable annual or periodical gains, profits, and income received from sources in the U.S. The court noted that the term "gains" also appears in Code Sec. 165(d) and the IRS has interpreted that provision on a per-session basis. Under the per-session basis approach, taxpayers do not treat every play or wager as a taxable event but can measure their gambling winnings and losses on a per-session basis.

■ ***Comment.*** Code Sec. 165(d) provides that losses from wagering transactions are allowed only to extent of the gains from such transactions.

The court found that the IRS's reading of gains under Code Sec. 165(d) is the most sensible interpretation of casino gambling gains. The per-session basis approach avoids the administrative and practical difficulties that would arise if slots players had to track the wins from every pull of the slot machine lever, the court explained. The per-session basis approach, the court concluded, should be applied to the nonresident alien under Code Sec. 871.

*References: 2013-2 USTC ¶50,423; TRC INTL: 3,650.*

©2013 CCH Incorporated. All Rights Reserved.

# Misclassified Employee Cannot Use Closed-Year FICA Overpayments To Pay Current Income Tax On Compensation

◆ *Karagozian, TC Memo. 2013-164*

The Tax Court has found that a taxpayer could not use the doctrine of equitable recoupment to offset his 2008 individual income tax liability with overpaid *Federal Insurance Contribution Act* (FICA) taxes from 2002-2007 tax years now closed by the statute of limitations. The prior-year FICA taxes that the taxpayer paid for tax years 2002 to 2007 when he was misclassified as an independent contractor were considered by the court to be separate transactions, separate items, and separate taxable events from his 2008 income tax deficiency.

■ ***CCH Take Away.*** The Tax Court found in favor of the IRS after reviewing several "fairness-based" arguments. These included, among others, applicable of the doctrine of equitable recoupment, as well as the mitigation relief provision under Code Sec. 6521(a).

## Background

The taxpayer's former employer misclassified him as a self-employed independent contractor for the 2002-2008 period, during which the taxpayer filed returns as self-employed and paid self-employment taxes. Although the 2002-2007 tax years were closed by the statute of limitations, the IRS assessed the taxpayer with an income tax liability for 2008, for which the taxpayer filed an amended Form 1040X as an employee. While the IRS allowed FICA overpayment for 2008 to offset the taxpayer's 2008 income tax liability, it did not permit offset for the 2002-2007 overpayments.

At the collection due process (CDP) hearing for the 2008 liability, the taxpayer argued that equitable recoupment and mitigation relief should apply since the 2008 income tax deficiency arose out of the "same transaction," that is, the misclassification of compensation (and, presumably, the denial of some offsetting deductions or other tax benefits from its treatment for income tax purposes as self-employment income).

## Court's analysis

Code Sec. 6214(b) provides for the doctrine of equitable recoupment. The doctrine can permit a taxpayer to raise a time-barred claim in order to reduce or eliminate tax owed on the timely claim. The claiming party must prove several elements, including: (1) the overpayment or deficiency for which recoupment is sought by way of offset is barred by an expired period of limitation; (2) the time-barred overpayment or deficiency arose out of the same transaction, item, or taxable event as the overpayment or deficiency before the court; (3) the transaction, item, or taxable event has been inconsistently subjected to two taxes; and (4) if the transaction, item, or taxable event involves two or more taxpayers, there is sufficient identity of interest between the taxpayers subject to the two taxes that the taxpayers should be treated as one.

The Tax Court found that the taxpayer had not met the requirements for the doctrine of equitable recoupment. The FICA overpayments from the 2002 through 2007 tax years were not part of the same transaction, item or taxable event as the 2008 tax deficiency. Also, the taxpayer's 2008 income was not subject to two taxes because the taxpayer's FICA tax had been correctly reassessed. The court quoted what it considered settled law, stating "The fact that a single tax determination may affect the taxes on two transactions does not convert the two transactions into a single one."

The Tax Court also found that Code Sec. 6521(a) mitigation did not apply. It observed that the provision refers to a change in the characterization of the same amount for the same year. Code Sec. 6521(a) mitigates the effect of an expired period of limitations by allowing, despite the limitations period's expiration, for one tax to be credited against another in certain cases in which self-employment income is incorrectly classified as wages and FICA taxes are paid, or in which wages are incorrectly classified as self-employment income and self-employment taxes are paid. But it does not allow a taxpayer to take prior year overpaid self-employment taxes and credit them against FICA taxes underpaid in a later year.

*References: CCH Dec. 59,583(M); TRC IRS: 51,056.15.*

## *IRS Issues Updated Static Mortality Tables For 2014 And 2015*

The IRS has issued updated static mortality tables to be used under Code Sec. 430(h)(3)(A) to calculate the funding target and other items for valuation dates occurring during calendar years 2014 and 2015. The agency also provided a modified unisex version of the mortality tables for use in determining minimum present value under Code Sec. 417(e)(3).

***Background.*** The IRS issued final regs in 2008 to set forth the methodology that the agency would use to establish mortality tables as provided under Code Sec. 430(h)(3)(A) to be used for participants and beneficiaries to determine present value or make any computation under Code Sec. 430. The IRS is required to revise the mortality tables at least every 10 years to reflect the actual mortality experience of pension plans and projected trends in that experience.

***Notice 2013-49.*** The static mortality tables that apply under Code Sec. 430(h)(3)(A) for valuation dates during 2014 and 2015 are included in Notice 2013-49. The IRS explained that the mortality tables were developed from the base rates, projection factors and weighting factors in Reg. §1.430(h)(3)-1, using the blending techniques described in the regs.

IRS also reported that it is aware of a current study by the Society of Actuaries to measure the actual experience and trends in mortality. The IRS requested comments on whether other studies of actual mortality experience of pension plans and projected trends of that experience are available and that should be considered for developing future mortality tables under Code Sec. 430(h)(3).

*Notice 2013-49, FED 46,459; TRC RETIRE: 30,556.*

# Tax Briefs

*Jurisdiction*
An individual was not entitled to dismiss the government's action seeking to reduce his outstanding tax liabilities to judgment. Contrary to the individual's contention, the court had subject matter jurisdiction under Code Sec. 7402 to enforce the tax laws.

*Haines, DC Wash., 2013-2 USTC ¶50,425; TRC IRS: 45,158.*

*Summons*
An individual's petition to quash an IRS third-party summons was dismissed for lack of subject matter jurisdiction. The government established its *prima facie* case for enforcement under *Powell*, which the individual failed to rebut.

*Whittington, DC Wash., 2013-2 USTC ¶50,428; TRC IRS: 21,300.*

A corporation's petition to quash IRS third-party summonses issued to two banks in connection with the corporation's tax assessments was properly denied and the summonses were ordered enforced.

*Action Recycling Inc., CA-9, 2013-2 USTC ¶50,422; TRC IRS: 21,108.*

An IRS summons directing an individual to appear, testify and produce documents relating to an investigation into her tax liability was ordered enforced to the extent the documents fell within the recordkeeping requirements of the Bank Secrecy Act, 31 USC §5311. The government established its prima facie case for enforcement under *Powell*, which the individual failed to rebut.

*Chen, DC Mass., 2013-2 USTC ¶50,421; TRC IRS: 21,414.*

*Income*
An individual's bank account under the name of his wholly owned corporation was used by the IRS to reconstruct his unreported wage income. The individual was permitted to deduct his gambling losses to the extent of his gambling winnings since he was in the trade or business of gambling during the years at issue.

*Hom, TC, CCH Dec. 59,582(M), FED ¶48,100(M); TRC INDIV: 6,266.*

*Deductions*
The government did not prove as a matter of law that a married couple failed to substantiate their charitable deduction for a contribution of stock to their family foundation. Although the couple did not have a contemporaneous written acknowledgment from the foundation, they submitted documents that appeared to show the couple did not receive any goods or services in return for the contribution.

*Pesky, DC Ida., 2013-2 USTC ¶50,431; TRC INDIV: 51,456.05.*

*FOIA*
An individual's Freedom of Information Act (FOIA) request was dismissed for lack of subject matter jurisdiction because he failed to exhaust his administrative remedies by filing a proper and perfected FOIA request. None of his five FOIA requests complied with the IRS regulations.

*Fields, DC Mich., 2013-2 USTC ¶50,424; TRC IRS: 9,502.*

*Liens and Levies*
The government was entitled to reduce to judgment an individual's federal income tax assessments and foreclose the tax liens on his property. The individual's attempt to establish his cost basis using an aggregate basis theory was rejected. There was no record that the bank withdrawal was used to open an account with a broker or used to purchase stock.

*Youngquist, DC Ore., 2013-2 USTC ¶50,417; TRC BUSEXP: 30,202.*

*Refund Claims*
A couple's action seeking refund of taxes, interest and penalties allegedly erroneously paid to the IRS was dismissed for lack of subject matter and personal jurisdiction because claim was untimely filed and barred under the three-year look-back period of Code Sec. 6511(a).

*Scoggins, DC La., 2013-2 USTC ¶50,429; TRC IRS: 36,052.05.*

*Continued on page 8*

## IRS Describes Procedures For Pilot Paperless Collection Appeals Program

The IRS recently announced a pilot program for Appeals employees to work collection appeals program (CAP) cases in an electronic environment. The pilot program is scheduled to begin in mid-July 2013 and end on September 30, 2013.

***Background.*** CAP provides an administrative appeal for certain collection actions. Taxpayers who file a CAP request may also be entitled to, and file for, a collection due process (CDP) or equivalent hearing if a CDP notice was issued. Under CAP, Appeals' administrative decision is final; under CDP, Appeals' determination may be appealed in court. Some issues are excluded from CAP, such as trust fund recovery penalties.

***Pilot program.*** The IRS explained that the decision to conduct the pilot on non-Field sourced CAPs was made based on the centralization of the four Campus Appeals Teams in Memphis. The case file will be received electronically and transmitted to employees via encrypted email. If the employee needs additional documents, the materials will be scanned electronically and incorporated into the case file. Cases will also be reviewed electronically. The IRS developed a step-by-step process to provide information and instructions to employees.

*AP-08-0713-02, TRC IRS: 15,106.05.*

©2013 CCH Incorporated. All Rights Reserved.

## Tax Briefs

*Continued from page 7*

A couple's refund suit was dismissed for lack of subject matter jurisdiction because they filed it within six months of the date they filed their administrative refund claim with the IRS.

*Pearson, DC Tex., 2013-2 USTC ¶50,426; TRC LITIG: 9,052.*

A corporation's refund claim was barred by Code Sec. 6512 because the corporation filed a Tax Court petition in response to a notice of deficiency regarding the same tax year. Moreover, penalties and interest paid prior to the Tax Court's decision could not have been collected in excess of the amount determined by the court within the meaning of Code Sec. 6512(a)(2).

*The Cheesecake Factory Inc., FedCl, 2013-2 USTC ¶50,416; TRC LITIG: 6,104.*

The U.S. Court of Federal Claims properly refused to reconsider its decision that it lacked subject-matter jurisdiction over limited partners' refund claims. The partners' claims were indistinguishable from those in *Prati*, CA-FC, 2010-1 USTC ¶50,386 and *Keener*, FedCl, 2009-1 USTC ¶50,152.

*Fillmore Equipment of Holland, Inc., CA-FC, 2013-2 USTC ¶50,415; TRC PART: 60,056.*

### *Collection Due Process*

The IRS Office of Appeals did not abuse its discretion in consulting only a transcript of an individual's account to verify an assessment of tax, notwithstanding the individual's reliance on a prior transcript to dispute the fact of the assessment. He failed to support his contention that no assessment had ever been made.

*Carothers, TC, CCH Dec. 59,584(M), FED ¶48,102(M); TRC IRS: 27,210.*

### *Tax Assessments*

A married couple's tax assessments were properly reduced to judgment. The couple's three offers-in-compromise tolled the statute of limitations on collection and they failed to demonstrate that they had reasonable cause for failure to pay.

*Meehan, CA-3, 2013-2 USTC ¶50,419; TRC IRS: 42,104.05.*

### *Deficiencies and Penalties*

A married couple was not liable for the fraud penalty for failure to disclose to the IRS an agreement to convey a property's development rights to a not-for-profit nature conservancy after it bought the not-for-profit's option to purchase the property.

*Pesky, DC Ida., 2013-2 USTC ¶50,430; TRC INDIV: 51,364.05.*

The government was not entitled to a summary determination that the president and part owner of a corporation was a responsible person who willfully failed to pay the corporation's payroll taxes for the period at issue. The government failed to show that the president had actual knowledge of the tax liability before paying other creditors before the government.

*Perrenod, DC Calif., 2013-2 USTC ¶50,427; TRC PAYROLL: 6,306.*

### *Bankruptcy*

A Chapter 13 debtor was not entitled to strip-down an IRS lien on his property. While the government's secured claim was limited to the total value of the debtor's possessions for purposes of plan confirmation, section 506(a) of the Bankruptcy Code did not authorize the Bankruptcy court to void the federal tax lien to the extent it exceeded that amount.

*In re P.J. Ryan, CA-7, 2013-2 USTC ¶50,418; TRC IRS: 57,106.15.*

### *Tax-Exempt Status*

Organizations that have activities that involve possible political campaign intervention or issue advocacy, and that have an application that has been pending for more than 120 days as of May 28, 2013, may receive a Letter 5228, *Application Notification of Expedited 501(c)(4) Option*. Letter 5228 provides an expedited process for these organization to apply for recognition of exemption under Code Sec. 501(c)(4).

*Letter 5228, FED ¶46,456; EXEMPT: 12,054.20.*

### *Retirement Plans*

For pension plan years beginning in July 2013, the IRS has released the 30-year Treasury weighted average interest rate, the permissible range of interest rates used to calculate current plan liability and to determine the required contribution under Code Sec. 412(l) for plan years through 2013.

*Notice 2013-46, FED ¶46,458; TRC RETIRE: 15,304.10.*

## *IRS Expands Oklahoma Disaster Relief*

The IRS has expanded relief for victims of tornadoes and severe storms in Oklahoma.

***Previous guidance.*** The IRS had previously suspended income limits for low-income housing projects that house displaced individuals (Notice 2013-40). The IRS had also suspended certain requirements under Code Sec. 142(d) for qualified residential projects financed with exempt facility bonds (Notice 2013-39).

***New guidance.*** Under Notice 2013-47, jurisdictions covered for relief purposes include the counties of Atoka, Canadian, Cleveland, Coal, Hughes, Latimer, LeFlore, Lincoln, McClain, Nowata, Okfuskee, Oklahoma, Okmulgee, Pittsburg, Pottawatomie , Pushmataha and Seminole.

*Notice 2013-47; FED ¶46,460; TRC BUSEXP: 57,302.20.*

## *Tenth Circuit Remands Challenge To PPACA*

The Tenth Circuit Court of Appeals has remanded a challenge to the *Patient Protection and Affordable Care Act*. Business owners could bring claims under the *Religious Freedom Restoration Act,* the court found. The owners had established a likelihood of success that their rights would be substantially burdened by the contraceptive-coverage requirement and they had standing. The Tenth Circuit instructed the district court to consider additional factors, including whether the harm alleged by the taxpayers would outweigh any harm to the non-moving party.

*Hobby Lobby Stores, Inc., CA-10; TRC COMPEN: 45,514.25.*