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## Inside this Issue



# Treasury, IRS Issue FATCA Regs Package

◆ *TDNR JL-2296, Treasury Fact Sheet, TD 9657, NPRM REG-130967-13*

Treasury and the IRS have issued two large sets of final, temporary and proposed regs to round out the guidance to implement reporting and withholding under the *Foreign Account Tax Compliance Act* (FATCA). One set (TD 9657) provides amendments to the final FATCA regs issued in January 2013 (TD 9610). The other set (TD 9658) coordinates FATCA with existing regimes (*see article in this newsletter for more details*).

■ ***CCH Take Away.*** Although the government will issue additional guidance and continue to revise IRS forms, this latest package of regs is the "last substantial package of rules" and provides the "last big step" to implementing FATCA, a Treasury official said during a news conference in Washington, D.C. There are no further plans to delay the July 1, 2014 effective date for FATCA withholding, the official emphasized.

■ ***Comment.*** "We also need final forms, including Forms 8966 and W-8," Laurie Hatten-Boyd, principal, International Tax group, Washington National Tax practice, KPMG LLP, told CCH. "The lack of forms creates a lot of uncertainty. Taxpayers cannot be compliant without final forms. The industry had repeatedly asked for 18-24 months to implement compliance; the IRS decided six months was sufficient, and now is not even providing that," Hatten-Boyd said.

■ ***Comment.*** Treasury continues to negotiate intergovernmental agreements (IGAs) with foreign governments to implement FATCA for financial institutions in foreign jurisdictions.

## Background

FATCA was enacted in 2010 and targets tax evasion by U.S. taxpayers with assets in other countries by requiring foreign financial institutions (FFI) to identify and provide information on their accounts held by U.S. owners and by foreign entities with substantial U.S. owners. U.S. financial institutions must withhold a portion (generally 30 percent) of certain payments made to FFIs and nonfinancial foreign entities (NFFEs) that do not comply with FATCA's disclosure and reporting requirements.

## Chapter 4 amendments

The amendments to the final FATCA regs provide over 50 changes to the 2013 final regs. According to Treasury, the changes do not impose any additional regulatory requirements; rather, they clarify the final regs and reduce compliance burdens. The changes coordinate the FATCA regs with the temporary regs published under chapters 3 and 61 and Code Sec. 3406, and further harmonize the final regs with the IGAs.

■ ***Comment.*** The regulations provide some helpful changes, Hatten-Boyd said: retaining grandfathered status for obligations unless the withholding agent has actual knowledge of a material modification; eliminating, at least in part, the so-called "eyeball" test prospectively only (permitting continued reliance on pre-existing accounts that were documented under that rule); pro-

*Continued on page 2*

Route to: ______ ______ ______ ______ ______

# Treasury, IRS Issue Regs To Coordinate Reporting And Withholding Regimes With FATCA

◆ *TD 9658, NPRM REG-134361-12*

Treasury and the IRS have issued a second set of regs that coordinate the due diligence, reporting and withholding requirements of the *Foreign Account Tax Compliance Act* (FATCA) with existing rules that apply the same type of requirements under chapters 3 and 61 and Code Sec. 3406. The regs integrate and conform the pre-FATCA regimes with FATCA's requirements, providing one streamlined approach while recognizing the separate objectives of each set of rules.

■ ***CCH Take Away.*** "We have been waiting for these conforming regulations; they impact how U.S. withholding agents do what they do – identifying whether a person is a U.S. taxpayer or foreign person," Debbie Pflieger, principal, Financial Services Organization, Ernst & Young LLP, told CCH. "These conforming regulations are incredibly relevant to just about every U.S. "financial institution." Not just big banks, but small banks and branches (who may have students or other foreign account holders), asset management companies, and insurance companies. There is a lot that can be done under the final regs package, but taxpayers cannot finish implementing the requirements without final versions of the forms," Pflieger observed.

■ ***Comment.*** Chapter 61 and Code Sec. 3406 address reporting and backup withholding requirements for payments to U.S. persons (U.S. non-exempt recipients); chapter 3 imposes withholding and reporting on payments to non-U.S. persons.

## Identification of payees

Documentation is central to identifying payees and applying the withholding requirements. The requirements for withholding agents and FFIs under FATCA differ somewhat from requirements for withholding agents under chapter 3 and for payors and middlemen under chapter 61. The regs remove inconsistencies.

■ ***Comment.*** "Determining foreign status is a big deal," Pflieger noted. "Suppose a foreign person has a U.S. address; the withholding agent has to determine U.S. or foreign status. The withholding agent has to consider what is required to document and prove a person's foreign status, and has to obtain an explanation in writing why a U.S. address was used. This can be challenging. Under Code Sec. 1441, IRS would not allow the use of checklists. Now, the regulations allow the use of checklists."

## Withholding requirements

The regs provide rules to ensure that payments are not subject to withholding under both chapter 3 and FATCA, or under both Code Sec. 3406 (backup withholding) and FATCA. The regs allow participating FFIs to satisfy FATCA by electing to continue performing backup withholding at a 28 percent rate.

*References: FED ¶47,014;*
*TRC FILEBUS: 9,108.*

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## FATCA Package

*Continued from page 1*

viding a 30-day grace period for reconciling anti-money-laundering and FATCA information; permitting the electronic transmission of versions of Form W-8; and eliminating the noncorporate attribution rules for determining membership in an expanded affiliated group.

According to Treasury, other key changes include:

- Direct reporting to the IRS, rather than to withholding agents, by NFFEs regarding their substantial U.S. owners for those entities that make such an election (by registering as a direct reporting NFFE on the IRS FATCA portal);
- Treating disregarded entities (DEs) as branches of FFIs, and clarifying the treatment of a DE that is treated as a branch;
- Allowing more special purpose debt securitization vehicles to be treated as deemed-compliant FFIs; and
- Providing transitional rules, by delaying until January 1, 2017, the requirement to withhold on payments made by a secured party to certain collateral arrangements.

## Future guidance

The government plans to issue more guidance: proposed regs describing the verification requirements of sponsoring entities; and a revenue procedure revising the FFI agreement to conform to the temporary regs. The IRS will also revise the FFI agreement to clarify that a participating FFI may elect to apply backup withholding under Code Sec. 3406, rather than chapter 4, only if it complies with the information reporting rules under chapter 61 and Code Sec. 3406.

*References: FED ¶¶ 46,270, 46,271, 47,013;*
*TRC FILEBUS: 9.108.*

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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*

# Agencies Finalize PPACA's 90-Day Waiting Period Limitation For Employer Health insurance Coverage

◆ *TD 9656, NPRM REG-122706-12*

The IRS and the U.S. Departments of Health and Human Services (HHS) and Labor (DOL) have issued final regs implementing the 90-day waiting period limitation under the *Patient Protection and Affordable Care Act* (PPACA). The agencies also released proposed regs to clarify a reasonable and bona fide employment-based orientation period for purposes of the 90-day limitation.

■ ***CCH Take Away.*** "The proposed "orientation period" may be a welcome development for many employers, as it may provide some needed administrative flexibility," Tamara Killion, principal, The Groom Law Group Chartered, Washington, D.C., told CCH. Killion also observed that "many employers had questions about how the 90-day waiting period would apply to rehired employees, which the final rule answers - essentially permitting employers to reapply a waiting period to rehires if it would be reasonable under the circumstances."

## Background

The PPACA generally requires, for plan years beginning on or after January 1, 2014, that an otherwise eligible employee (or dependent) cannot wait more than 90 days before coverage becomes effective. The agencies issued proposed reliance guidance several years ago. The proposed regs described the waiting period for purposes of the 90-day period and application of the 90-day period to variable hour employees in certain situations.

## Final and proposed regs

The agencies reiterated in the final regs that a group health plan, and a health insurance issuer offering health insurance coverage, cannot apply a waiting period that exceeds 90 days. If, under the terms of the plan, an individual can elect coverage that becomes effective on a date that does not exceed 90 days, the coverage is treated as complying with the 90-day limitation, the agencies explained. The plan or issuer will not be considered to have violated the limitation period merely because individuals may take additional time, beyond the 90-day period, to elect coverage, the agencies added.

The final regs also track the approach of the proposed regs in applying waiting periods to variable hour employees where a specified number of hours of service per period is a plan eligibility condition. Similarly, the final regs adopt the treatment described in the proposed regs for cumulative hours-of-service requirements, which use more than solely the passage of a time period in determining whether employees are eligible for coverage. Additionally, the final regs describe application of the 90-day limitation period to former employees who are re-hired and to multiemployer plans, and make conforming changes to existing regs.

***Orientation period.*** Several commentators requested clarification on application of the 90-day limitation period with Code Sec. 4980H, the agencies reported. Code Sec. 4980H generally requires, in the case of full-time employees of applicable large employers, that health benefits begin by the first day of the fourth calendar month in which the employee begins employment. The final regs, the agencies explained, provide that after an individual is determined to be otherwise eligible for coverage, any waiting period may not extend beyond 90 days and all calendar days are counted beginning on the enrollment date, including weekends and holidays. However, a requirement to successfully complete a reasonable and bona fide employment-based orientation period may be imposed as a condition for eligibility. The simultaneously released proposed regs set forth one month as the maximum length of any orientation period.

■ ***Comment.*** The final regs apply to plan years beginning on or after January 1, 2015. Taxpayers may rely on the new proposed regs at least through the end of 2014, the agencies explained.

*References: FED ¶¶47,012, 49,610; TRC HEALTH: 9,102.*

## *IRS Reviewing Court's Decision To Strike Down RTRP Program*

The IRS continues to assess the scope and impact of *Loving, CA-D.C., 2014-1* USTC *¶50,175,* the agency has reported on its website. In *Loving,* the D.C. Circuit found that the IRS's registered tax return preparer (RTRP) program exceeded the agency's statutory authority.

***Background.*** Three unenrolled preparers challenged the IRS's RTRP program. The unenrolled preparers argued that the RTRP program was outside the scope of the agency's authority to regulate the practice of individuals before it. In 2013, a district court enjoined the IRS from requiring unenrolled preparers to pass a competency exam, satisfy continuing education requirements and meet other conditions in order to prepare returns for compensation. The IRS appealed to the Court of Appeals for the District of Columbia Circuit, which ruled against the agency (*see the February 20, 2014 issue of this newsletter for details*).

■ ***Comment.*** The IRS's mandatory preparer tax identification number (PTIN) requirement is not affected by the D.C. Circuit's decision. All individuals who prepare returns (subject to some exceptions) for compensation must have and use a PTIN.

***IRS statement.*** "Taxpayer reliance on paid return preparers and effective tax administration are inextricably linked to quality return preparation," the IRS announced on its website on February 21. "As we assess the scope and impact of the court's decision and determine our way forward, our focus on improved competency will continue." The IRS did not elaborate on what future steps it may take.

*www.irs.gov; TRC IRS: 3,204.30.*

# Federal Circuit Upholds Denial Of Overpayment Interest For Time Before Taxpayer Submitted Required Attachments

◆ *Deutsche Bank, CA-FC, February 18, 2014*

Affirming the Court of Federal Claims, the Court of Appeals for the Federal Circuit has found that failure to include required attachments caused a taxpayer's return to be nonprocessible. As a result, the IRS was correct in denying a refund of accrued interest for the time before the taxpayer filed the return with the required attachments.

■ ***CCH Take Away.*** A taxpayer claiming a refund is entitled to interest on overpayment when the refund is issued more than 45 days after the initial due date for filing the return or the actual return filing date, whichever occurs later. A return must be "processible" to be treated as filed.

## Background

The taxpayer obtained an extension to file its 1999 return, which it timely filed on or before September 15, 2000. The taxpayer reported a total tax of $106 million and a payment of $188 million, including a credit of $13 million for taxes withheld at the source. The taxpayer received one Form 8805 (Foreign Partner's Information Statement of Section 1446 Withholding Tax) and five Forms 1042-S (Foreign Person's U.S. Source Income Subject to Withholding) from six withholding agents. However, the taxpayer did not attach Forms 8805 and 1042-S to its return. The IRS returned the taxpayer's return as unprocessed. The taxpayer resubmitted the return with the attachments.

The taxpayer filed an amended return in March 2002. In response to the amended return, the IRS issued a refund. The IRS also paid $5 million in overpayment interest for the period from January 1, 2001 to November 14, 2002. The IRS did not pay overpayment interest, as requested by the taxpayer for the period March 15, 2000 to December 31, 2000. The IRS determined that the taxpayer's original return had been nonprocessible and the taxpayer was entitled to interest only from January 1, 2001. The taxpayer sought relief in the Claims Court.

The Claims Court ruled against the taxpayer. The Claims Court found that the taxpayer's original return had not been processible because it did not include all required documentation and, by itself, did not contain sufficient information to allow mathematical verification of tax liability.

## Court's analysis

The court first found Code Sec. 6011 provides that taxpayers must make a return according to the forms and regs prescribed by the IRS and must include information required by forms or regs. The IRS required that Forms 8805 and 1042-S be attached to the taxpayer's return. Indeed, this requirement appeared on the face of the forms and in their instructions; and on the original return and its instructions, the court found.

The court next reviewed if the taxpayer's original return was processible without the required forms. According to the taxpayer, the IRS could mathematically verify the overpayment using the total withholding credit reported on the original return. Additionally, the taxpayer stressed that the IRS had received copies of Forms 8805 and 1042-S from the withholding agents.

The court found that the taxpayer's original return did not contain sufficient information to permit the mathematical verification of tax liability. The amount of overpayment and the interest due on an overpayment could not be determined without calculating the amount of tax payments already made by the taxpayer. Mathematical verifiability requires sufficient information to permit IRS to recalculate and corroborate the mathematics and data reported by the taxpayer. Without the information on individual withholding credits, IRS could not recalculate and corroborate the mathematics and data reported by the taxpayer, the court concluded.

■ ***Comment.*** The court noted that the taxpayer had made a mathematical error on its original return in calculating the total withholding credit.

*References: 2014-1 USTC ¶50,183; TRC PENALTY: 9,110.*

## *IRS Releases 2014 List Of "Dirty Dozen" Tax Scams*

The IRS has issued its annual "Dirty Dozen" tax scam list that warns taxpayers against common fraudulent filing schemes. The list for 2014 includes: identity theft, phishing, false promises of free money from inflated refunds, other return preparer fraud, hiding income offshore, impersonation of charitable organizations, the use of false income, expenses or exemptions, frivolous arguments, falsely claiming zero wages or use of a false Form 1099, abusive tax structure, and misuse of trusts.

■ ***Comment.*** "Taxpayers should be on the lookout for tax scams using the IRS name," IRS Commissioner John Koskinen said in a statement. "These schemes jump every year at tax time. Scams can be sophisticated and take many different forms. We urge people to protect themselves and use caution when viewing e-mails, receiving telephone calls or getting advice on tax issues."

***Filing season update.*** The IRS also released updated 2014 tax filing season statistics showing that as of February 14, 2014, there had been a 15 percent increase in tax refunds issued compared to the same time last year. Additionally, the average refund amount so far this filing season is $3,211, an increase of $190 compared to the same period last year.

*IR-2014-16, FS-2014-5; TRC IRS: 66,304.*

# Health Care Tax-Exempt Was Not An "Educational Organization" For Code Sec. 514 Purposes

◆ *TAM 201407024*

The IRS has concluded in a technical advice memorandum that a parent corporation's primary purpose was not the operation of schools, but the coordination of and fundraising for an integrated health care system. Therefore the parent corporation was not an "educational organization" under Code Sec. 170(b)(1)(A)(ii). Because it was not an educational organization, it was also not a "qualified organization" under Code Sec. 514(c)(9) that could exclude its income from debt-financed real property from its unrelated business taxable income (UBTI).

■ ***CCH Take Away.*** The parent corporation already had Code Sec. 501(c)(3) tax-exempt status and had been classified as a publicly supported organization under Code Sec. 509(a)(1) and Code Sec. 170(b)(1)(A)(vi). However, the parent corporation argued its operation of schools qualified it to be a Code Sec. 170(b)(1)(A)(ii) educational organization exempt from the requirement to report unrelated income from debt-financed real property. Although the IRS did not ultimately rule in favor of the parent, it did say that an organization described under Code Sec. 170(b)(1)(A)(vi) could also be described as an educational organization under Code Sec. 170(b)(1)(A)(ii) *if it met the requirements.*

## IRS analysis

Whether or not the parent corporation was an educational organization under Code Sec. 170(b)(1)(A)(ii) depended on the parent's primary function, the IRS determined. The IRS found that the primary purpose of the parent was not the presentation of formal instruction in its schools, but the operation of an integrated health group practice. The parent therefore should have reported the UBTI from its debt-financed real property.

■ ***Comment.*** The IRS noted in its summary of the factual background that the parent's schools represented only 13 percent of the parent's total functional expenses; fewer than 20 percent of the parent's employees were attributed to the educational program; and educational revenues constituted just six percent of the parent's total revenue.

The IRS determined that the parent's facts were similar to those from two revenue rulings—Rev. Rul. 56-262, and Rev. Rul. 58-433—in which the organizations provided some educational training or instruction, but were primarily organized to conduct disease research or to collect and preserve coins and medals and maintain a museum or library. The IRS noted that neither organization from these revenue rulings constituted an educational organization under Code Sec. 170(b)(1)(A)(ii). "Only those "educational organizations" organized primarily for, and engaged in, the presentation of formal education in the instructive sense constitute "educational organizations" within the meaning of § 170(b)(1)(A)(ii) of the Code," the IRS determined

*References: FED ¶47,389; TRC EXEMPT: 18,252.*

# TIGTA Urges IRS To Improve Oversight Of Employee Long-Term Taxable Travel

◆*TIGTA Ref. No. 2014-IE-R005*

Some IRS executives have failed to comply with the agency's rules for long-term taxable travel, the Treasury Inspector General for Tax Administration (TIGTA) recently reported. Nearly all of the travel reviewed by TIGTA involved travel to the agency's headquarters in Washington, D.C.

■ ***CCH Take Away.*** For travel expenses to be deductible they must be ordinary and necessary, incurred while away from home, and incurred in pursuit of a trade or business. However, an individual's temporary work assignment can effectively become his or her new tax home depending on factors such as the amount of time spent at the location of the assignment.

## Background

In fiscal year (FY) 2011, the IRS had 351 executives who received $4.8 million in travel reimbursements. The number of executives grew to 373 in FY 2012 but travel reimbursements fell to $4.7 million, TIGTA reported. Generally, IRS managers must authorize long-term taxable travel and employees must report their travel. The agency's policy, TIGTA reported, is intended to ensure that the agency withholds appropriate taxes from an employee's travel reimbursements.

■ ***Comment.*** IRS employees may receive an income tax reimbursement allowance to reimburse employees for federal, state and local income taxes paid on long-term taxable travel reimbursements. However, employees would not be reimbursed for FICA or Medicare taxes.

## TIGTA's findings

TIGTA discovered that the IRS did not have sufficient controls in place to ensure that managers and employees properly identified and reported long-term taxable travel. The agency initiated a pilot program in 2011, which identified 60 employees who failed to correctly classify their travel as long-term taxable travel. The pilot program also identified two IRS executives with travel that should have been classified as long-term taxable travel, TIGTA reported. TIGTA, in its review, discovered additional executives whose travel should have been classified as long-term taxable travel.

■ ***Comment.*** In the cases in the pilot program, the IRS apparently recalculated the employees' tax withholdings to take into account the long-term taxable travel.

*Reference: TRC BUSEXP: 24,118.10.*

# IRS, DOJ Ratchet-Up Criminal Prosecutions, Identity Theft Protections

◆ *IR-2014-18, www.doj.gov*

Criminal investigations launched by the IRS increased by 12.5 percent in fiscal year (FY) 2013 compared to FY 2012, the agency reported in its just-released Criminal Investigation (CI) Annual Report. At the same time, the U.S. Department of Justice (DOJ) announced that it has prioritized the investigation and prosecution of criminals engaged in stolen identity refund fraud.

■ ***CCH Take Away.*** Email scams, known as "phishing" are very prevalent during the filing season and taxpayers need to remember that IRS never communicates by email, Kristin Esposito, CPA, technical manager, American Institute of Certified Public Accountants (AICPA), told CCH. Esposito cautioned that taxpayers should not open these bogus emails or reply with any personal information, such as bank account numbers.

## IRS CI

IRS CI investigates criminal violations of the Tax Code and related financial crimes. Along with identity theft, CI investigates cases of return preparer fraud, abusive tax schemes, employment tax evasion, illegal gaming activities, and more. In FY 2013, the IRS reported that CI initiated 5,314 cases and recommended 4,364 cases for prosecution. Convictions rose more than 25 percent compared to the prior year. The conviction rate for FY 2013 was 93 percent, the agency added

## Identity theft

DOJ cautioned that stolen identity refund fraud cases are growing in complexity. Identities are stolen in one location, fraudulent tax returns are electronically filed from another place, refunds are directed to a different location, and checks are cashed yet another place, DOJ explained. DOJ reported that it filed nearly 600 indictments or informations in FY 2013 charging some 900 defendants with stolen identity refund fraud.

■ ***Comment.*** The AICPA has been advocating restricting access to Social Security's Death Master File, Esposito told CCH. Criminals have used the Death Master File to obtain Social Security numbers and other personal information and file fraudulent returns.

*Reference: TRC IRS: 66,304.*

## *AFRs Issued For March 2014*

◆ *Rev. Rul. 2014-8*

The IRS has released the short-term, mid-term, and long-term applicable interest rates for March 2014.

### Applicable Federal Rates (AFR) for March 2014

| | Annual | Semiannual | Quarterly | Monthly |
|---|---|---|---|---|
| **Short-Term** | | | | |
| **AFR** | **.28%** | **.28%** | **.28%** | **.28%** |
| **110% AFR** | **.31%** | **.31%** | **.31%** | **.31%** |
| **120% AFR** | **.34%** | **.34%** | **.34%** | **.34%** |
| **130% AFR** | **.36%** | **.36%** | **.36%** | **.36%** |
| **Mid-Term** | | | | |
| **AFR** | **1.84%** | **1.83%** | **1.83%** | **1.82%** |
| **110% AFR** | **2.02%** | **2.01%** | **2.00%** | **2.00%** |
| **120% AFR** | **2.21%** | **2.20%** | **2.19%** | **2.19%** |
| **130% AFR** | **2.39%** | **2.38%** | **2.37%** | **2.37%** |
| **150% AFR** | **2.77%** | **2.75%** | **2.74%** | **2.73%** |
| **175% AFR** | **3.23%** | **3.20%** | **3.19%** | **3.18%** |
| **Long-Term** | | | | |
| **AFR** | **3.36%** | **3.33%** | **3.32%** | **3.31%** |
| **110% AFR** | **3.69%** | **3.66%** | **3.64%** | **3.63%** |
| **120% AFR** | **4.04%** | **4.00%** | **3.98%** | **3.97%** |
| **130% AFR** | **4.38%** | **4.33%** | **4.31%** | **4.29%** |

### Adjusted AFRs for March 2014

| | Annual | Semiannual | Quarterly | Monthly |
|---|---|---|---|---|
| **Short-term adjusted AFR** | **.28%** | **.28%** | **.28%** | **.28%** |
| **Mid-term adjusted AFR** | **1.84%** | **1.83%** | **1.83%** | **1.82%** |
| **Long-term adjusted AFR** | **3.36%** | **3.33%** | **3.32%** | **3.31%** |

The Code Sec. 382 adjusted federal long-term rate is 3.36%; the long-term tax-exempt rate for ownership changes during the current month (the highest of the adjusted federal long-term rates for the current month and the prior two months) is 3.56%; the Code Sec. 42(b)(2) appropriate percentages for the 70% and 30% present value low-income housing credit are 7.60% and 3.26%, respectively, however, the appropriate percentage for non-federally subsidized new buildings placed in service after July 30, 2008, and before January 1, 2014, shall not be less than 9%; and the Code Sec. 7520 AFR for determining the present value of an annuity, an interest for life or a term of years, or a remainder or reversionary interest is 2.2%.

*References: FED ¶46,269; TRC ACCTNG: 36,162.05.*

# LLC's Swap Of Improved Real Estate For Vacant Land Qualifies As Like-Kind Exchange; Replacement Property From Related Party OK

◆ *LTR 201408019*

An LLC's like-kind exchange of a fee interest in improved real estate (relinquished property) for a long-term lease of a tract of vacant land with planned improvements (replacement property) met the requirements of the qualified intermediary and exchange accommodation titleholder safe harbor rules under Code Sec. 1031. Therefore the LLC successfully avoided the recognition of gain upon the conveyance of relinquished property and the receipt of the replacement property, the IRS determined.

■ ***CCH Take Away.*** Reg. §§1.1031(k)-1(g)(4)(i) and (ii) and Rev. Proc. 2000-37 provide a safe harbor for acquiring replacement property using a qualified intermediary. The IRS will not challenge the qualification of replacement or relinquished property or the treatment of the exchange accommodation titleholder (EAT) as the beneficial owner for Code Sec. 1031 purposes if certain requirements are met. The latest ruling shows that such "parking transactions" are allowed despite having a related party provide part of the replacement property as long as none of the related parties cash out within two years of the last transfer in the series.

## Background

The taxpayer, an LLC electing to be taxed as a partnership, entered into an agreement to sell its fee interest in a retail building to an unrelated third party using a qualified intermediary (QI) who was not the taxpayer. The taxpayer also entered into a qualified exchange accommodation agreement (QEAA) under which the exchange accommodation titleholder (EAT), as beneficial owner, would temporarily hold the sublease of the replacement property (an outdated office building scheduled to be demolished), construct improvements using funds advanced to it by the taxpayer, and then transfer the sublease of the property directly to the taxpayer for a term in excess of 30 years.

## IRS analysis

The IRS determined that the fact that a related party provided a part of the replacement property did not violate either Code Sec. 1031(f)(1) or (4) because the taxpayer was exchanging property with the QI, who is not a related person, and because there was no cashing out by any of the related parties within two years of the last transfer in the series of transactions.

■ ***Comment.*** The taxpayer was a related party to the owner of the replacement property. The taxpayer was partly owned by two entities that were in turn wholly owned by another party, "LP." LP also owned a percentage of the entity that had originally leased out the replacement property to one of LP's wholly owned subsidiaries.

The IRS also determined that the taxpayer had satisfied all the requirements of Reg. §§ 1.1031(k)-1(g)(3) and (4) relating to the actual and constructive receipt of money or other property for purposes of Code Sec. 1031. The titleholder of the replacement property also qualified as the beneficial owner for purposes of the Rev. Proc. 2000-37 safe harbor.

However, the IRS determined that if improvements to the replacement property were not completed within the exchange period, gain would be recognized to the extent of any boot received in the exchange. Likewise, if the cost of the improvements to the replacement property was less than the sale proceeds of the relinquished property and the taxpayer did not timely identify and acquire the additional like-kind replacement property, then the taxpayer would receive the remaining funds as boot subject to recognition as gain.

*Reference: TRC SALES: 30,614.*

## District Court Nixes Challenge To Code Sec. 36B Premium Assistance Tax Credit Regs

Another federal district court has upheld the IRS's final regs on the Code Sec. 36B premium assistance tax credit. The U.S. District Court for the Eastern District of Virginia found that Congress did not intend to limit the Code Sec. 36B credit to individuals in state-run Marketplaces.

■ ***Comment.*** In January, the U.S. District Court for the District of Columbia upheld the Code Sec. 36B regs in a similar case (*Halbig, 2014-1* USTC *¶50,138*) (*see the January 23, 2014 issue of this newsletter for details*).

***Background.*** Qualified taxpayers may be eligible for Code Sec. 36B credits to offset the cost of health insurance obtained through a Marketplace. Generally, the credit may be available to individuals and families whose household income is between 100 and 400 percent of the federal poverty line for their family size. The IRS issued regs allowing eligible individuals enrolled in state-run and federally-facilitated Marketplaces to claim the credit.

***Court's analysis.*** The court rejected the taxpayers' argument that Congress wanted to exclude individuals in federally-facilitated Marketplaces from the Code Sec. 36B credit. Looking at the entire PPACA framework, the court found that Congress made no distinction between state-run and federally-facilitated Marketplaces for purposes of determining eligibility for the credit. The court noted that the PPACA imposed the same reporting requirements for the credit on all Marketplaces and that federally-facilitated Marketplaces would effectively be performing an empty act by reporting unnecessary information.

*King, DC-Va., February 18, 2014; 2014-1* USTC *¶50,184; TRC HEALTH: 3,300.*

# Tax Briefs

*Internal Revenue Service*

State and local housing credit agencies that allocate low-income housing tax credits and states and other issuers of tax-exempt private activity bonds have been provided with a listing of the proper population figures to be used when calculating: (1) the 2014 calendar-year population-based component of the state housing credit ceiling under Code Sec. 42(h)(3)(C)(ii); (2) the 2014 calendar-year private activity bond volume cap under Code Sec. 146; and (3) the 2014 exempt facility bond volume limit under Code Sec. 142(k)(5).

*Notice 2014-12, FED ¶46,272; TRC SALES: 51,218.*

*Liens and Levies*

A federal district court lacked subject matter jurisdiction over a limited liability company's (LLC's) wrongful levy claim against the IRS, to determine the LLC's superior rights over the property or to enjoin the IRS from forcing a judicial sale under Code Sec. 7403. Contrary to the LLC's assertion, the property at issue was never subject to an IRS levy. The appropriate forum for contesting the tax liens on the property and rights over that property was in the lien foreclosure action and not through a wrongful levy action.

*Steward, DC Mass., 2014-1 USTC ¶50,181; TRC IRS: 51,156.*

*Refund Claims*

An individual's claim for a tax refund from the Virgin Islands Bureau of Internal Revenue (VIBIR) was denied because he failed to show he made a payment to the VIBIR. The IRS determined that the individual was not a bona fide Virgin Islands resident for the tax year at issue and denied the VIBIR's cover over request for the funds the individual sent to the IRS. The VIBIR did not have the payment the individual wanted refunded. Moreover, the VIBIR's right to request cover over from the IRS was not the equivalent of having the funds.

*Patterson, DC V.I., 2014-1 USTC ¶50,185; TRC EXPAT: 12,054.*

*Collection Due Process*

An IRS Appeals officer did not abuse his discretion when evaluating a couple's proposed installment agreement. The Appeals officer sought to evaluate the couple's assets; however, the facts regarding an investment account kept changing. The couple, who had deficiencies from multiple years, had initially sent a check based on lottery winnings, but they subsequently stopped payment on the check. He gave the couple many opportunities to explain discrepancies in their reported assets; however, the couple did not avail themselves of the opportunity.

*Arede, TC, CCH Dec. 59,833(M), FED ¶47,949(M); TRC FILEIND: 21,154.40.*

*Bankruptcy*

The chief financial officer of a bankrupt airline was liable for the Code Sec. 6672 penalty for willful failure to pay over excise taxes collected from passengers. The CFO's claim that his failure to pay over the excise taxes was not willful because the airline's funds were encumbered due to its bankruptcy was rejected. The airline's operating expenses did not have a higher priority than the payment of the taxes under 11 USC Sec. 503(b)(1)(A)-(B). The airline's funds were not encumbered by its bankruptcy and the payment deferral granted by the Air Transport Safety and Stabilization Act (P.L. 107-42).

*Nakano, CA-9, 2014-1 USTC ¶50,182; TRC PENALTY: 3,150.*

The IRS was ordered to turn over levied funds to a debtor. The IRS served the levy on the debtor's employer before he filed his bankruptcy petition. However, the IRS received the funds after the petition was filed and did not seek or obtain relief from the automatic stay before depositing the funds. The IRS failed to show that it was entitled to relief under section 362(d)(1) of the Bankruptcy Code.

*In re Reisbeck, BC-DC Mont., 2014-1 USTC ¶50,180; TRC IRS: 57,054.10.*

*Return Preparers*

The IRS has issued a fact sheet offering taxpayers suggestions on how to choose a tax return preparer. The IRS stresses that, because the taxpayer is responsible for his or her return, even if it is prepared by another, it is extremely important to choose a preparer wisely. Tips offered by the IRS include checking to make sure the preparer has a Preparer Tax Identification Number (PTIN), checking the history of the preparer, including disciplinary actions, history with the Better Business Bureau, and appropriate agency information, and making sure the preparer offers e-file.

*FS-2014-5, FED ¶46,267; TRC IRS: 6,100.*

## *IRS Corrects Revenue Procedure To Allow Expedited Handling Of EO Determination Letter Requests*

The IRS has corrected a mistake in Rev. Proc. 2014-4 with respect to the expedited handling of determination letter requests. In Rev. Proc. 2014-4, the IRS changed the rule so that expedited handling would not be available for any determination letters. However, the IRS has stated that this was a mistake: only the expedited handling of EP determination letter requests has ended. Expedited handling is still available for EO determination letter requests. The correction is effective as of January 2, 2014, the effective date of Rev. Proc. 2014-4. Rev. Proc. 2014-4 has been modified accordingly, the agency explained.

*Rev. Proc. 2014-19, FED ¶46,268.*