Wolters Kluwer

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IRS Provides More Guidance For Broker Reporting Of Debt Instruments, With Staggered Effective Dates

◆ *TD 9713, NPRM REG-143040-14*

The IRS has issued final, temporary and proposed regs on information reporting by brokers under Code Secs. 6045 and 6049. The guidance addresses a variety of issues on the reporting of income and basis for "covered securities," including debt instruments and options.

■ ***Take Away.*** "Overall, these are good regulations," Stevie Conlon, senior director and tax counsel, Wolters Kluwer Financial Services, told *Federal Tax Weekly.* "A significant change is to require reporting for OID on tax exempt bonds. Another big item is to reverse the presumption for market discount accrual," Conlon said.

■ ***Comment.*** "The different effective dates will be confusing to investors and will generate some frustration and extra work for brokers. Most important, the regulations are a disappointment because there is no delay in the rules for more complex debt that take effect in 2016," Conlon said.

Background

Code Sec. 6045 requires broker reporting of gross proceeds, adjusted basis, and the character of gain or loss on the sale of covered securities. Code Sec. 6049 requires the reporting of interest payments, including accruals of original issue discount (the excess of a debt instrument's payments at maturity over the amount paid for the instrument at issue). The IRS issued final and temporary regs in 2013.

The new final regs require a payor to report amortizable bond premium on both taxable and tax-exempt debt, and to report acquisition premium on taxable debt, acquired on or after January 1, 2014. This was included in the 2013 temporary regs and conforms the rules for reporting interest income on debt acquired at a premium, to the rules for reporting these instruments' basis. This is needed to reconcile the interest income reported to a customer with the adjusted basis reported to the customer on a sale of the instrument.

Delayed effective date

The 2013 final regs were generally effective January 1, 2014 for options and less complex debt instruments. For certain complex debt instruments, the regs did not require basis reporting until January 1, 2016. For debt issued or requiring payments in a foreign currency, the 2013 final basis reporting regs apply to debt acquired on or after January 1, 2016.

However, reporting of gross proceeds and basis for certain options on debt, including options on debt in a foreign currency, began January 1, 2014. To reconcile these provisions, the final regs delay until January 1, 2016 the reporting of proceeds and basis for options on debt in a foreign currency.

Broker transfers

Code Sec. 6045A requires reporting for covered securities transferred to another broker, so that the transferee broker has the information needed to determine a customer's adjusted basis and the character

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Route to: ______ ______ ______ ______ ______

IRS Finalizes Procedures For Nonprofit Hospitals To Correct Nonwillful Violations Under Code Sec. 501(r)

◆ *Rev. Proc. 2015-21*

The IRS has finalized a revenue procedure that allows tax-exempt hospitals to correct and disclose violations that are not willful or egregious for purposes of Code Sec. 501(r). The IRS explained that it will not treat the violations that are corrected and disclosed as a failure to comply with the additional requirements for hospitals to qualify as tax-exempt organizations under Code Sec. 501(c)(3).

■ ***Take Away.*** "There is always a transition period to figure out what will comply with the rules," Nancy Ortmeyer Kuhn, director, Jackson & Campbell, P.C., Washington, D.C., told Wolters Kluwer. "The examples in Sec. 6 [of Rev. Proc. 2015-21] seem to give hospitals a longer grace period and a second chance to comply with Code Sec. 501(r), assuming the hospital adopted a report or policy. This will be helpful to hospitals," she said.

■ ***Comment.*** "The requirements of Sec. 501(r) are onerous. This procedure allows some wiggle room and gives more comfort to hospitals that inadvertent violations will not subject them to an excise tax or to revocation," Kuhn said.

Background

The *Patient Protection and Affordable Care Act* (PPACA) imposed additional requirements that charitable hospitals must satisfy to maintain their tax-exempt status:

- Conducting a community health needs assessment (CHNA): Code Sec. 501(r)(3);
- Establishing and disclosing financial assistance policies: Code Sec. 501(r)(4);
- Limiting charges to needy individuals: Code Sec. 501(r)(5); and
- Following reasonable billing and collection practices: Code Sec. 501(r)(6).

The IRS issued final regs under Code Sec. 501(r) at the end of 2014 (TD 9708). The final regs are effective for the hospital's first tax year beginning after December 29, 2015. For prior years, a hospital may relay on a reasonable good faith interpretation of the statutory requirements.

Revenue procedures

The regs provided for two categories of correction:

- Under Reg. §1.501(r)-2(b) an error or omission that is minor and either inadvertent or due to reasonable cause and the hospital corrects the omission or error promptly after discovery. Correction must include establishing or revising procedures to promote overall compliance with Code Sec. 501(r).
- Under Reg. §1.501(r)-2(c), a failure that is neither willful nor egregious will be excused if the hospital corrects and makes disclosure in accordance with IRS guidance.

In Notice 2014-3, the IRS provided a draft revenue procedure that provided

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Broker Reporting

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of any gain. Under the 2013 regs, a broker did not have to provide a transfer statement for a Code Sec. 1256 (mark-to-market) option, such as a nonequity option or a dealer equity option.

In response to comments that this information is needed, the temporary regs extend reporting to transfers of these options on or after January 1, 2016, listing the data that must be provided. The temporary regs also correct the omission of a requirement to report the date through which the transferring broker made adjustments to a debt instrument.

Tax-exempt obligations

The 2013 final regs required brokers to report basis of a debt instrument, including a tax-exempt obligation. However, a broker does not have to report OID on these obligations, for purposes of Code Sec. 6049.

To improve consistency between OID reporting and basis reporting, the temporary regs require that a payor report the daily portions of OID on these obligations. The payor also must report amortized acquisition premium (which offsets OID) on these obligations. The 2015 regs apply to obligations acquired or after January 1, 2017.

Elections

The holder of a debt instrument is permitted to make a number of elections that affect how basis is computed. To minimize the need for reconciliation between information reported by a broker to both a customer and the IRS and the amounts reported on the customer's tax return, a broker is required to take into account certain customer elections.

The temporary regs, unlike the current rules, require that a broker ignore the election to treat all interest as OID, in reporting a customer's adjusted basis in a debt instrument. A customer is no longer required to notify the broker that the customer has made or revoked this election.

In addition, a broker must take into account the election to accrue market discount on a constant yield method, unless notified that the customer has not made the election. The temporary regulations reverse the assumption adopted in 2013. Because this method is more taxpayer-favorable, the IRS explained that it expects that more customers will use this method and will no longer need to notify their brokers of the election.

References: FED ¶¶47,010, 49,641; TRC FILEBUS 9,252.

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*

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IRS To Provide Transition Relief For ABLE Accounts Established Before Guidance Issued

◆ *Notice 2015-18*

The IRS has announced that it will provide transition relief for Achieving a Better Life Experience (ABLE) accounts authorized by the *Tax Increase Prevention Act of 2014* (TIPA). The IRS assured states that may soon enact enabling legislation, before guidance is issued, that ABLE accounts may still qualify under Code Sec. 529A even though the legislation or the account documents do not fully comply with subsequent guidance.

■ ***Take Away.*** "States normally cut off benefits if the individual has other resources, but Sec. 529A essentially exempts those dollars from this cutoff," Brian Whitlock, tax partner, Plante & Moran PLLC, Chicago, told Wolters Kluwer. "But funds in a special needs trust (and in an ABLE account) go back to the state on the disabled person's death. People of means doing advance planning will prefer a supplemental needs trust, where, on the disabled person's death, the funds can be passed on to another family member," Whitlock said.

■ ***Comment.*** "The definition of special needs (for which funds can be spent) is very restrictive. It would be nice if it was broader. A supplemental needs trust for a disabled person that is somewhat functional can provide for simple pleasures. The ABLE account doesn't do that," Whitlock said.

ABLE accounts

ABLE accounts are tax-favored accounts maintained for beneficiaries who are blind or disabled. The accounts are analogous to QTPs. Contributions (which must be in cash) to an account are not deductible, but income accrues tax-free in the account, and may be distributed to the beneficiary tax-free if the distribution is used to pay qualified expenses.

Congress described the requirements for ABLE accounts in detail, in Code Sec. 529A. There are some important differences between ABLE accounts and 529 plans. Contributions to a 529 plan are unlimited under federal tax law, whereas contributions to an ABLE account are limited to the annual gift tax exclusion ($14,000 in 2015) (although multiple individuals can contribute to the same account for the same year). The designated beneficiary must establish that s/he is blind or disabled.

The beneficiary must be a resident of the state establishing the program or a contracting state that lacks a program but provides access to another state's program. Furthermore, the beneficiary of an ABLE account must establish the account and be the owner of the account. Only one ABLE account can be established for a qualified beneficiary, whereas multiple 529 accounts can be set up for the same person.

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Nonprofit Hospitals

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correction and disclosure procedures under which certain failures to meet the requirements of Code Sec. 501(r) would be excused. The IRS finalized the correction procedures in Rev. Proc. 2015-21, effective March 10, 2015.

Rev. Proc. 2015-21 provides that minor omissions and errors in the first category will not be considered failures to comply with Code Sec. 501(r). Hospitals do not need to follow the correction and disclosure procedures that apply to the second category of failures.

■ ***Comment.*** "Even though the examples of minor and inadvertent violations are trivial, the concept is still helpful," Kuhn said.

The revenue procedure defines a willful failure as a failure due to gross negligence, reckless disregard, or willful neglect. An egregious failure is a very serious failure, based on the impact and the number of persons affected. Willfulness or egregiousness will depend on all the facts and circumstances. Correction and disclosure of a failure will indicate that the failure was not willful, a change from Notice 2014-3.

■ ***Comment.*** "The IRS stated several times that timely correction and disclosure is a factor in determining willfulness," Kuhn said. "The IRS strongly implied that disclosure would protect an organization from a finding that its violations were willful; I doubt that the IRS would find a violation willful if it were corrected early. The penalty for a willful violation would be revocation," she said.

Correction and disclosure

Rev. Proc. 2015-21 sets out several correction principles and provides examples of violations that may be corrected. All affected individuals should be restored to their appropriate position, even if the violation occurred in a prior year or a closed year. Correction should be reasonable and appropriate, and should occur promptly after discovery. The hospital should establish practices and procedures to facilitate overall compliance and should revise existing procedures if needed.

Disclosure requires reporting particular information on a timely Form 990 for the year that the failure is discovered. An organization that does not file a 990 can still report the information on a 990 or provide the information on a web site. Disclosure requires:

- A description of the failure, its cause, location, date, number of occurrences, number of persons affected, and dollars involved;
- A description of the correction, including how affected individuals were restored to their appropriate position; and
- A description of the practices or procedures established or revised, or an explanation why no changes were needed.

References: FED ¶46,273; TRC EXEMPT: 3,154.

Tax Court Finds IRS Does Not Bear Burden Of Production On Code Sec. 72(t) Additional Tax

◆ *El, 144 TC No. 9*

The Tax Court has held that the IRS does not bear the initial burden of production with regard to the Code Sec. 72(t) additional tax. The court found that the amount was not a penalty, addition to tax, or additional amount under Code Sec. 7491(c), but was instead a tax.

■ ***Take Away.*** Code Sec. 7491(c) provides that the IRS has the burden of production in any court proceeding with respect to the liability of any individual for any penalty, addition to tax, or additional amount imposed. What these terms have in common is that they refer to amounts that are assessed and collected as taxes but are not themselves taxes or surtaxes, the court found. The burden of production with respect to taxes and surtaxes is generally on the taxpayer, the court noted.

Background

The taxpayer participated in an employer-sponsored retirement plan. The taxpayer took several loans from his retirement savings. The loans totaled approximately $13,000. The retirement plan determined that some of the loan proceeds were taxable and issued Form 1099-R, Distributions From Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc., for 2009. The taxpayer did not file a return for 2009.

Court's analysis

The court first found that generally a loan from a qualified retirement plan to a participant is a taxable distribution in the year received. However, a loan is not a taxable distribution in certain circumstances. Unless an exception applies, an additional 10 percent tax applies to early distributions (before the participant reaches age 59 1/2) from a retirement plan under Code Sec. 72(t)(1).

The court further found that the Code Sec. 72(t) additional tax is a tax and not a penalty, addition to tax, or additional amount within the meaning of Code Sec. 7491(c). Code Sec. 72(t) refers to the exaction that it imposes as a tax and not a penalty, addition to tax, or additional amount. Other provisions in the Tax Code, the court noted, refer to the additional tax under section 72(t) using the term tax. Additionally, most penalties and additions to tax are in subtitle F, chapter 68 of the Code.

The court concluded that the burden of production with respect to the additional tax was on the taxpayer. Here, the taxpayer failed to show he was not liable for the additional tax.

References: Dec. 60,251; TRC INDIV: 6,054

ABLE Accounts

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Guidance

Congress directed Treasury and the IRS to issue guidance on ABLE accounts within six months. The guidance should address the following issues, among other things:

- The enforcement of the limit of one account per eligible individual;
- The information required to open an account;
- A definition of qualified disability expenses; and
- Disability certifications and determinations.

Congress directed the IRS to issue regs or other guidance by June 19, 2015. ABLE accounts must be authorized by a state, similar to qualified tuition programs (QTPs). While Treasury and the IRS are currently working on guidance, some accounts may be set up before guidance is issued.

In Rev. Proc. 2015-18, Treasury and the IRS indicated that they do not want the lack of guidance in early 2015 to discourage states from enacting enabling legislation and creating ABLE programs. Accordingly, the government assured states creating an ABLE program in accordance with Code Sec. 529A, and individuals establishing accounts in accordance with state law, that the accounts will qualify under Code Sec. 529A even if they do not "fully comport with the guidance when it is issued." The government will also provide sufficient time for making changes to satisfy the guidance.

Rev. Proc. 2015-18 also provides notice of certain important ways in which the government anticipates that Code Sec. 529A guidance will differ from 529 guidance:

- The 529A guidance will provide that the owner of the ABLE account must be the designated beneficiary (Code Sec. 529A(e)(3)); and
- A person with signature authority over an ABLE account, who is not the designated beneficiary of the account, cannot have or acquire a beneficial interest in the account, and must administer the account for the account's designated beneficiary.

Other features

The disability or blindness of the qualified individual must have occurred before the individual attains age 26. The individual must be entitled to benefits under the *Social Security Act,* or the individual must provide a disability certification that satisfies IRS requirements. Amounts in an ABLE account below $100,000 cannot be included to determine the individual's eligibility for federal means-tested programs. An individual can designate the account's investments twice a year.

■ ***Comment.*** "Congress was very short-sighted to impose the age restriction. For example, war-injured should be qualified beneficiaries," Whitlock said.

Rollovers are permitted tax-free within 60 days to another account for the same individual or a sibling of the individual. However, there cannot be more than one qualified rollover within a 12-month period. Qualified expenses are spelled out in the statute but can be augmented in IRS guidance. No portion of an ABLE account can be pledged as security for a loan. Amounts left over in an account after the beneficiary dies must be transferred to the state.

References: FED ¶46,272; TRC INDIV: 30,550.

IRS Updates PTC/ITC Guidance To Reflect Extension Under TIPA

◆ *Notice 2015-25*

The IRS has issued guidance extending the date by which a taxpayer must commence construction of a qualified facility in order to be eligible for either the Code Sec. 45 renewable electricity production tax credit (PTC) or the Code Sec. 48 energy investment tax credit (ITC). The new guidance reflects the one-year extension of the credits enacted under the *Tax Increase Prevention Act of 2014* (TIPA). In addition, the guidance provides that taxpayers who began construction of a facility prior to January 1, 2015, have until January 1, 2017 to place it in service for purposes of satisfying the continuous construction test or continuous efforts test.

■ ***Take Away.*** The IRS requires that once a taxpayer begins construction, it must either maintain a program of continuous construction or continuous efforts, Greg Jenner, partner, Stoel Rives LLP, Washington, D.C., told Wolters Kluwer. "In its pre-TIPA guidance, the IRS explained if the taxpayer began construction before 2013, so long as it placed the facility in service by the end of 2015, the IRS would automatically deem the taxpayer to have continuous construction."

■ ***Comment.*** "The open question was what if you began construction in 2013? Do you get an extra year or not [to place the project in service]?" Jenner explained. "This Notice answers this question in favor of taxpayers. If you began construction in 2013, you get an extra year through the end of 2016 to place the project in service." Most of the projects affected are related to the billion-dollar wind energy industry, Jenner said.

Background

Prior to TIPA's enactment on December 19, 2014, Code Secs. 45(d) and 48(a)(5) required that construction of a qualified facility begin before January 1, 2014. TIPA, however, extended by one year the date by which construction of a qualified facility described in Code Sec. 45(d) must begin to be eligible for the PTC or ITC.

Section 3.02 of Notice 2013-60 further provided that if a facility was placed in service before January 1, 2016, the facility would be considered to satisfy the continuous construction test or the continuous efforts test.

Updated guidance

Notice 2015-25 replaces all references to "January 1, 2014" in Notices 2013-29, 2013-60, and 2014-46, as they relate to the date by which construction must begin on a facility, with "January 1, 2015." It also extends the placed in service date provided in Section 3.02 of Notice 2013-60 until January 1, 2017. The substantive guidance in the prior notices will continue to apply.

■ ***Comment.*** Jenner stated that while most wind projects that began construction in 2013 would have met the original January 1, 2016 deadline, "when you're dealing with big projects, things can go wrong. This extension gives the projects a greater margin for error. There will also be some projects that might have started construction in 2013, but because of the uncertainty surrounding the placed-in-service date had trouble obtaining financing. Now they have an extra year."

References: FED ¶46,275; TRC BUSEXP: 54,552.20.

IRS Revises FATCA Reporting For Certain Foreign Retirement, Pension And Savings Accounts

◆ *Update to Instructions, Form 8938*

In an update to the Instructions for Form 8938, Statement of Specified Foreign Financial Assets, the IRS has revised the reporting requirements for certain foreign retirement, pension and savings accounts. If these accounts are located in jurisdictions with intergovernmental agreements under the *Foreign Account Tax Compliance Act* (FATCA), they need not be reported, the IRS explained.

■ ***Take Away.*** "Although the final reporting regulations mandate prospective Form 8938 reporting for foreign pension plans covered by model IGAs, it is helpful that this requirement was not clarified retroactively. This avoids the $10,000 reporting penalty, along with the onerous process of correcting prior tax returns," Elizabeth Thomas Dold, principal, The Groom Law Group, Chartered, Washington, D.C., told Wolters Kluwer. "There is also a list of IGA agreements (and effective dates) available at http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA-Archive.aspx for individuals to make sure any foreign plan assets not previously reported would have been covered by an IGA," Dold noted.

Background

Specified individuals, which include U.S citizens, resident aliens, and certain nonresident aliens that have an interest in specified foreign financial assets and meet the reporting threshold for the aggregate value of their specified foreign financial assets, must file Form 8938. For Form 8938 purposes, a specified foreign financial asset is any financial account maintained by a foreign financial institution, subject to certain exceptions. A specified foreign financial asset also includes other foreign financial assets held for investment that are not in an account maintained by a U.S. or foreign financial institution.

Intergovernmental agreements

Since enactment of FATCA in 2010, the U.S. has entered into agreements with foreign jurisdictions to implement the statute's reporting requirements. There are different

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Tax Court Finds Refundable Credits Not "Overpayments" Of State Income Tax

◆ *Maines, 144 TC No. 8*

The Tax Court has rejected a married couple's argument that refundable state credits were excluded from federal taxation. The court found that the state's characterization of the credits as overpayments was not controlling for federal tax purposes.

■ ***Take Away.*** Three state tax credits were at issue in this case: a real property tax credit; an investment credit; and a wage credit. All three were intended to encourage economic activity and job creation. Generally, the credits would be claimed against a corporate taxpayer's franchise tax, or, in the case of a pass-through entity, claimed as a credit against state income tax on personal returns.

■ ***Comment.*** The tax benefit rule generally provides that if a taxpayer receives a tax benefit from an item in a prior year because of a deduction, and the taxpayer subsequently recovers the money in a latter year, the money is treated as taxable income to the taxpayer.

Background

The taxpayers were partners and shareholders in businesses that qualified for the three state tax credits. The taxpayers claimed the credits on their state income tax returns. The state allowed the claimed credits and refunded significant amounts to the taxpayers. The state referred to the payments made from claiming the credits as overpayments.

Court's analysis

The court first noted the general rule that a state income tax refund is added to a taxpayer's federal taxable income in the year it is received if the taxpayer took a deduction for state income tax payments for a preceding year. In this case, the taxpayers took no deduction on their federal income-tax returns for the years at issue for state income tax paid in the preceding year, the court found.

The court agreed with the taxpayers that the state referred to the credits as overpayments. Federal tax law, the court found, looks to substance rather than form.

■ ***Comment.*** The court noted that the taxability of the refundable portion of a state tax credit is implied by the holding in *Tempel, 136 TC 341 (2011),* where the court found that credits do not increase a donor's wealth, as long as they are used to offset or reduce the donor's own state tax responsibility.

The court found that the state investment credit and the state wage credit were not refunds of previously paid state taxes deducted under federal law. Instead, they were effectively transfers to the taxpayers from the state of taxpayer subsidies. The state real estate credit, on the other hand, was a tax refund; a refund of previously paid property taxes. Further, the court rejected the taxpayer's argument to treat the state payments as a return of capital or as payments from a social benefit program.

References: Dec. 60,248; TRC INDIV: 16,310.

FATCA

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types of model agreements. A Model 1 intergovernmental agreement (IGA) provides a framework for reporting by foreign financial institutions to their respective governments, followed by the exchange of information with the IRS. A Model 2 IGA provides a framework for direct reporting by foreign financial institutions to the IRS, supplemented by information exchanged between the foreign jurisdiction and the U.S.

■ ***Comment.*** Last year, the IRS announced that jurisdictions that reached IGAs in substance with the U.S. would be treated as having IGAs in effect until the end of 2014.

Temporary reporting relief

For tax years beginning on or before December 12, 2014, if the jurisdiction in which a financial account is maintained has an IGA in effect, or is treated as having an IGA in effect, on or before the last day of the taxpayer's tax year, retirement and pension accounts, non-retirement savings accounts, and accounts satisfying conditions similar to those described in Reg. §1.1471-5(b)(2)(i) that are excluded from the definition of financial account in the IGA are not required to be reported on Form 8938, the IRS explained. For tax years beginning after December 12, 2014, any retirement and pension accounts, non-retirement savings accounts, and accounts satisfying conditions similar to those described in Reg. §1.1471-5(b)(2)(i) that are excluded from the definition of financial account in an applicable IGA must be reported by the taxpayer on Form 8938.

Reference: TRC INTLOUT: 36,000.

Over- And Underpayment Interest Rates Remain Same For Second Quarter 2015

The IRS has announced that the interest rates on overpayments and underpayments of tax for the calendar quarter beginning April 1, 2015 will remain unchanged. The rates will be:

- 3 percent for overpayments, in cases other than corporations;
- 2 percent for overpayments in the case of a corporation (except 0.5 percent for the portion of a corporate overpayment exceeding $10,000); and
- 3 percent for underpayments (except 5 percent for large corporate underpayments).

■ ***Comment.*** The Tax Code provides that the rate of interest on over- and underpayments of tax is to be determined on a quarterly basis. The interest rates for the second quarter 2015 are computed by using the federal short-term rate based on daily compounding determined during January 2015.

IR-2015-49; Rev. Rul. 2015-05; FED ¶¶46,280, 46,281; TRC PENALTY: 9,152.

Tax Briefs

Internal Revenue Service

The IRS has released a fact sheet providing information on a taxpayer's right to privacy. The taxpayer has the right to expect that any IRS inquiry, examination or enforcement action will comply with the law and be no more intrusive than necessary.

FS-2015-13, FED ¶46,274; TRC IRS: 12,350

International

The Financial Crimes Enforcement Network (FinCEN) has issued proposed rules that would prohibit covered U.S. financial institutions from opening or maintaining correspondent or payable-through accounts for Banca Privada d'Andorra (BPA) as a foreign financial institution of primary money laundering concern.

FinCEN Proposed Regulations (RIN 1506-AB30), FED ¶49,642; TRC FILEBUS: 9,324

Jurisdiction

An organization lacked standing to challenge Rev. Rul. 2007-41, 2007-1 CB 1421, because it did not seek or intend to seek exemption under Code Sec. 501(c)(3) and failed to show any circumstances under which that ruling would apply to it.

Freedom Path, Inc., DC Tex., 2015-1 USTC ¶50,227; TRC EXEMPT: 3,200

Summons

An individual's petition to quash and dismiss the government's action to enforce an IRS administrative summons requesting him to appear, testify and produce documents was denied. Code Sec. 7602 empowered the IRS to issue the summons to the individual and require him to testify under oath.

Chaffee, DC Mich., 2015-1USTC ¶50,231; TRC IRS: 21,108

Income

An individual's payment from an LLC entity was compensation subject to self-employment tax. The individual provided services to the entity that facilitated tax shelter transactions. The individual's primary responsibility was to sign binders of formation and organizational documents for the shelter entities.

Chai, TC, CCH Dec. 60,250(M), FED ¶47,960(M); TRC INDIV: 6,052

A taxpayer's motion to alter or amend a judgment was denied. Since the taxpayer treated the farm as rental property for economic and tax purposes, she was not able claim post-trial that the farm used the property for free in order to decrease her income tax liability.

Estate of Harold Stuller, DC Ill., 2015-1 USTC ¶50,224; TRC LITIG: 9,100

Cost Basis

A limited liability company (LLC) was not entitled to include future nuclear decommissioning liabilities that it assumed upon purchase in the basis of the acquired nuclear power plants. The liabilities did not satisfy the economic performance test under Code Sec. 461(h)(1) and (4) because the LLC did not add to the decommissioning funds or incur any decommissioning liabilities in the year of purchase.

AmerGen Energy Company, LLC, CA-FC, 2015-1USTC ¶50,230; TRC ACCTNG: 12,050

Deductions

The Tax Court properly denied a partnership's charitable contribution deduction for a conservation easement because the easement was not a qualified real property interest under Code Sec. 170(h)(2)(C). The easement agreement permitted the grantor to change the boundaries of the conservation area; therefore, the easement was not an interest in an identifiable, specific piece of property.

Balsam Mountain Investments, LLC, TC, CCH Dec. 60,252(M), FED ¶47,962(M); TRC INDIV: 51,364.05

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IRS Reflects One-Year Extension Of Empowerment Zone Designations

The IRS has issued guidance reflecting the one-year extension of the termination date for empowerment zone designations under Code Sec. 1391 enacted under the *Tax Increase Prevention Act of 2014* (TIPA). The guidance provides that any nomination for an empowerment zone that has a current termination date of December 31, 2013, is now deemed to have a termination date of December 31, 2014, unless the nominating entity affirmatively declines the extension in writing, the IRS explained.

Empowerment zones. Businesses operating in economically-challenged areas of the country that are designated as "empowerment zones" may claim certain tax benefits, including special tax-exempt bond financing, a 20-percent empowerment zone employment credit, increased Code Sec. 179 expensing, and more.

■ ***Comment.*** Originally, the nomination of all empowerment zones had a termination date of December 31, 2009. This termination date was extended first by the *Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010*, then by the *American Taxpayer Relief Act of 2012*, and now by TIPA.

Written notification. Any nominating entity wishing to decline extension of the empowerment zone nomination must do so affirmatively by sending written notification to the IRS by May 11, 2015. Otherwise, the nomination of that empowerment zone will be deemed extended through December 31, 2014.

Notice 2015-26, FED ¶46,276; TRC BUSEXP: 57,054.

Tax Briefs

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Tax Credits

A couple's permanently and totally disabled 20 year old daughter did not qualify for the child tax credit (CTC) under Code Sec. 24. Further, the couple's CTC claim was a mathematical error and the IRS appropriately sent a correction notice to the couple. The couple had the option of requesting an abatement or filing a refund claim with the IRS and then initiating a Code Sec. 7422 refund claim. Therefore, they were not deprived of due process or access to the courts.

Polsky, DC Pa., 2015-1 USTC ¶50,229; TRC INDIV: 57,452

A single individual was not entitled to an Earned Income Tax Credit (EITC) for the tax year at issue. The individual's income exceeded the statutory maximum for claiming the credit.

M. Abdi, TC, CCH Dec. 60,249(M), FED ¶47,959(M); TRC INDIV: 57,252

Liens and Levies

Federal tax liens were superior to a law firm's claim to interpleaded funds from a taxpayer's retirement accounts. The firm's claim that it was entitled to the funds under Code Sec. 6332(a) since the funds were subject to attachment or execution was rejected because Code Sec. 6332(a) does not determine the priority of competing liens. Further, the firm failed to show that the funds resulted from a judgment or settlement of a claim or cause of action obtained or procured by its representation of the tax debtor. Finally, the doctrine of laches did not bar the government's ability to recover the funds. The government was not subject to laches in cases involving the enforcement of tax liens.

Morgan Stanley Smith Barney, LLC, DC Mich., 2015-1 USTC ¶50,225; TRC IRS: 48,158.20

Collection Due Process

The IRS did not abuse its discretion in denying a partner's request for abatement of interest relating to income tax deficiencies arising from his participation in partnership tax shelters. The taxpayer failed to demonstrate unreasonable errors and delays by the IRS in performing any ministerial or managerial acts.

Coleman, CA-9, 2015-1 USTC ¶50,226; TRC IRS: 33,402

The IRS abused its discretion with respect to its denial of a sole proprietor's request to abate accrued interest on his deficiency for a specific period of time. The IRS's failure to communicate with the taxpayer concerning the deficiencies of his proposed installment agreement was unfair under the facts and circumstances.

King, TC, CCH Dec. 60,243(M), FED ¶47,953(M); TRC IRS: 33,410

Tax Assessments

Assessments for income and employment taxes against an individual and his corporation were reduced to judgment and tax liens against the individual's entireties property were foreclosed. The government's Forms 4340 were presumptive proof of the tax liability, which the individual failed to rebut except for one period.

Graham, DC N.Y., 2015-1 USTC ¶50,228; TRC IRS: 45,160

Deficiencies and Penalties

A notice of deficiency against married individuals was not barred by judicial or equitable estoppel, or by the statute of limitations. The "duty of consistency" was not applicable to the taxpayers' position. Genuine issues of material fact precluded summary judgment for the taxpayers.

LeCompte III, TC, CCH Dec. 60,246(M), FED ¶47,956(M); TRC LITIG: 3,054

An individual who was a long-distance truck driver was allowed some itemized deductions and denied others. He was liable for a penalty based on substantial understatement of tax liability, although not for a penalty based on negligence in view of his reasonable efforts to comply with the law.

Howard, TC, CCH Dec. 60,245(M), FED ¶47,955(M); TRC BUSEXP: 3,060.20

Offer-in-Compromise

A settlement officer did not abuse her discretion in declining an individual's request of an offer-in-compromise; therefore, the IRS's levy action was sustained. The taxpayer failed to submit Form 656, supporting financial data, and the required partial payment, despite being informed of the need to submit them.

Depree, TC, CCH Dec. 60,247(M), FED ¶47,957(M); TRC IRS: 42,120

Bankruptcy

The IRS was not entitled to relief from a bankruptcy court's order that estopped it from asserting that an individual's tax debts were not discharged, thereby establishing its liability for unlawful collection practices. Although the IRS's claim that its attorney suffered from dementia at the time of the ruling would normally amount to excusable neglect, the IRS failed to timely file its motion to vacate the judgment.

W.C. Murphy, DC Me., 2015-1USTC ¶50,223; TRC LITIG: 9,254.05

Tax Court

The Tax Court issued a supplemental opinion to correct determinations in an earlier opinion (*Hartland Management Services, Inc., et al,* 109 TCM 1040, Dec. 60,209(M), TC Memo 2015-8).

Hartland Management Services, Inc., TC, CCH Dec. 60,244(M), FED ¶47,954(M); TRC IRS: 30,254.30

Discount Factor Tables

The IRS has released five corrections to Rev. Proc. 2014-59, I.R.B. 2014-47, 843, which prescribes the loss payment patterns and discount factors for the 2014 accident year. These factors are used to compute discounted unpaid losses under Code Sec. 846. The corrected discount factors and language will not be applied adversely with respect to tax returns filed on or before March 12, 2015.

Rev. Proc. 2015-24, FED ¶46,278;

Retirement Plans

For pension plan years beginning in March 2015, the IRS has released the 30-year Treasury bond weighted average interest rate, the unadjusted segment rates, Highway and Transportation Funding Act of 2015 (HATFA) (P.L. 113-159) adjusted rates, the MAP-21 adjusted rates and the minimum present value segment rates.

Notice 2015-24, FED ¶46,277; TRC RETIRE: 15,304.10

IRS's Initial "Cadillac Plan" Excise Tax Announcement Lays Out Possible Roadmap For Future Guidance

The IRS's recent announcement that it is exploring the development of guidance under new Code Sec. 4980I (the so-called "Cadillac plan") tax has generated many questions about the reach and scope of the future guidance. In Notice 2015-16, the IRS described potential approaches to the definition of applicable coverage, the determination of the cost of applicable coverage, and the application of the annual statutory dollar limit to the cost of applicable coverage. This Practitioners' Corner highlights some of the areas covered by Notice 2015-16 as the IRS begins the process of developing guidance on this new excise tax.

■ ***Comment.*** Shortly after the IRS issued Notice 2015-16, Sen. Orrin Hatch, R-Utah, asked Treasury Secretary Jacob Lew if the Obama administration is considering any delay or modification of Code Sec. 4980I. Hatch asked Lew to respond by March 11. So far, Hatch has not released Lew's response.

New excise tax

The *Patient Protection and Affordable Care Act* (PPACA) created the Code Sec. 4980I excise tax to help fund health care reform. The PPACA delayed the effective date of the provision. Code Sec. 4980I is effective for tax years beginning after December 31, 2017.

Code Sec. 4980I imposes a 40 percent excise tax on any "excess benefit" provided to an employee. An excess benefit is the excess, if any, of the aggregate cost of the applicable coverage of the employee for the month over the applicable dollar limit for the employee for the month. Applicable coverage for purposes of the excise tax is coverage under any group health plan made available to the employee by an employer which is excludable from the employee's gross income under Code Sec. 106, or would be so excludable if it were employer-provided coverage (within the meaning of Code Sec. 106).

■ ***Comment.*** For a self-employed individual, coverage under any group health plan providing health insurance coverage is treated as applicable employer-sponsored coverage if a deduction is allowable under Code Sec. 162(l) with respect to all or any portion of the cost of the coverage.

"In Notice 2015-16, the IRS described potential approaches to the definition of applicable coverage, the determination of the cost of applicable coverage, and the application of the annual statutory dollar limit to the cost of applicable coverage."

Similarly situated employees

In Notice 2015-16, the IRS outlined the approach it is considering for purposes of determining the groups of similarly situated employees. The initial groups of similarly situated employees would be determined by aggregating all employees covered by a particular benefit package provided by the employer. The employees enrolled in each different benefit package would be grouped separately. Benefit packages would be considered different based upon differences in health plan coverage; there may be more than one benefit package provided under a group health plan. Employees would be grouped by the benefit packages in which they are enrolled, rather than the benefit packages they are offered. After aggregating all employees covered by a particular benefit package, the employer would disaggregate the employees within the group covered by the benefit package based on whether an employee had enrolled in self-only coverage or other-than-self-only coverage.

■ ***Comment.*** The IRS explained that if employees are provided a choice between a standard and a high option (such as an option with lower deductibles and copays), employees covered under the high option would be grouped separately from employees covered under the standard option. Additionally, the IRS reported it is considering permitting (but not requiring) further disaggregation based on distinctions that have traditionally been made in the group insurance market.

Applicable premium

The rules for computing the applicable premium for Code Sec. 4980I are to reflect the rules for computing the applicable premium for COBRA coverage, the IRS explained. There are two methods for self-insured plans to compute the COBRA applicable premium: the actuarial basis method and the past cost method. A plan must use the actuarial basis method unless the plan administrator elects to use the past cost method and the plan is eligible to use that method. The COBRA applicable premium must be determined for a 12-month determination period, and must be determined before the beginning of such period. Further, plans and employers must operate in

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Washington Report

by the Wolters Kluwer Washington News Bureau

SFC seeks public input about tax reform

Senate Finance Committee (SFC) Chair Orrin G. Hatch, R-Utah, and ranking member Ron Wyden, D-Ore., are seeking public input into comprehensive tax reform. “By opening up our bipartisan working groups to public input, we hope to gain a greater understanding of how tax policy affects individuals, businesses, and civic groups across our nation,” Hatch and Wyden said in a statement. “In doing so, we will also equip our working groups with valuable input, and we hope these suggestions will help guide the groups through the arduous task of putting forth substantive ideas to reform the Tax Code in each of their areas.” The SFC website explains how taxpayers can go about sending tax reform comments to the committee.

Business leaders says tax reform is top priority

Tax reform remains a top priority for the business community, according to the 2015 Tax Policy Forecast Survey recently released by Miller and Chevalier Chartered and the National Foreign Trade Council. Almost half of survey participants (49 percent) predicted that tax reform will be enacted in 2017, after the next presidential election. If and when tax reform does happen, 53 percent of survey participants indicated the most important issue to address would be tax rates.

“The business community tells us that the high statutory rates are a major drag on international competitiveness relative to foreign-based businesses and serve as a signature barrier to the U.S. as an investment location,” Miller and Chevalier member Marc Gerson, a former majority tax counsel to the House Ways and Means Committee, said. “Further, their concern surrounding revenue offsets appears well founded in light of the large number of revenue offsets that have been proposed in the context of tax reform proposals, including those in President Obama’s fiscal year (FY) 2016 budget plan. Additionally, in an increase of 10 percent from last year, nearly a quarter of respondents have told us that taxation of international operations is their highest concern in 2015.”

Lawmakers hear of “epidemic” of refund fraud

Witnesses at a March 12 Senate Finance Committee (SFC) hearing told lawmakers that refund fraud is an epidemic problem and growing rapidly. “It currently represents one of the easiest means available for fraudsters to monetize stolen identity information,” Mike Alley, commissioner of the Indiana Department of Revenue, said.“"We are all aware of the increased vulnerability we face for protection of identity information, ” Alley added.

Caroline Ciraolo, acting assistant attorney general, Tax Division of the U.S. Department of Justice, told the SFC how pervasive the practice of using stolen Social Security numbers to file returns showing a false refund claim is. “The refunds are then electronically deposited or sent to an address where the offender can access the refund,” she explained. Ciraolo said these scams are usually implemented in early January, before taxpayers are expected to file their returns, with the goal of taking advantage of the IRS’s efforts to pay out refunds quickly. “While the IRS has invested substantial efforts and resources to address identity theft concerns, those victimized face months, if not years, of overwhelming paperwork, credit problems and inconvenience,” she added.

A 2014 Government Accountability Office (GAO) report found that identity thieves stole more than $5.2 billion from the IRS in 2013, an increase of $1.6 billion from the previous year. Tax-related identity theft has comprised the largest share of identity theft consumer complaints to the Federal Trade Commission (FTC) for the past five years.

Senate bill would regulate unenrolled preparers

Senate Finance Committee member Bill Nelson, D-Fla., has introduced the Identity Theft and Tax Fraud Prevention Bill of 2015, which would authorize the IRS to regulate unenrolled preparers. The bill also includes proposals to curb tax return-related identity theft and strengthen consumer protections, such as expanded use of the IRS’s identity protection personal identification number (IP PIN). The bill would require paid tax return preparers to verify client identity.

“In *Loving v. IRS,* the D.C. Circuit ruled that the IRS did not have the authority to regulate paid tax-return preparers. This has enabled bad apples in the industry to disserve their customers and, in some cases, engage in tax-related identity theft. The bill amends the law to make it clear that the IRS has the authority to regulate all paid tax return preparers,” Nelson said in a statement.

IRS warns of individual mandate payment scams

The IRS has posted a consumer alert on its website reminding taxpayers that individual shared responsibility payments under the *Patient Protection and Affordable Care Act* (PPACA) are made to the agency and not to return preparers. “In some cases, return preparers have told taxpayers to make the shared responsibility payment directly to them, even though the taxpayer had Medicaid or other health coverage and would not need to make a shared responsibility payment at all. In some parts of the country, unscrupulous return preparers are targeting taxpayers with limited English proficiency and, in particular, those who primarily speak Spanish,” the IRS cautioned.

Practitioners' Corner

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good faith compliance with a reasonable interpretation of the statutory requirements.

- ***Comment.*** The IRS reported that it is considering whether to allow the use of different methods from year to year but expressed concerns about allowing an employer to use the past cost method only for years in which claims are unusually low, and on whether allowing the use of different methods from year to year would cause administrative concerns or raise other issues.
- ***Comment.*** The IRS observed that the cost of applicable coverage could be determined by reference to the cost of similar coverage available elsewhere, such as coverage through the PPACA Health Insurance Marketplace.

Dollar limits

The PPACA also set forth per-employee baseline dollar limits. For 2018, the per-employee baseline dollar limits are $10,200 per employee for self-only coverage and $27,500 per employee for other-than-self-only coverage. The dollar limits apply on a monthly basis. The baseline dollar amounts are indexed for inflation for tax years after 2018. Moreover, the baseline dollar amounts are subject to age and gender adjustments, if applicable. An additional amount is added to the baseline dollar amounts for an individual who is a qualified retiree or who participates in a plan sponsored by an employer the majority of whose employees covered by the plan are engaged in a high-risk profession or employed to repair or install electrical or telecommunication lines.

Employees engaged in a high-risk profession encompass law enforcement personnel, individuals engaged in fire protection activities, emergency medical technicians and other first-responders. Individuals whose primary work is longshore work and individuals engaged in the construction, mining, agriculture (not including food processing), forestry, and fishing industries, may also be deemed to engage in a high-risk profession. A retiree with at least 20 years of employment in a high risk profession is also eligible for the increased threshold, the IRS explained.

- ***Comment.*** Many of these high risk occupations are covered by public employee plans, which tend to have higher costs.

An employee may simultaneously have coverage to which the self-only dollar limit applies and coverage to which the other-than-self-only dollar limit applies. This would be the case where an employee may have self-only major medical coverage and supplemental coverage (such as an HRA) that covers the employee and the employee's family. One potential approach would provide that the applicable dollar limit for an employee would depend on whether the employee's primary coverage/major medical coverage is self-only coverage or other-than-self-only coverage. Another potential approach would apply a composite dollar limit using the ratio of the cost of the self-only coverage and the cost of the other-than-self-only coverage provided to the employee.

Excluded coverage

Various types of coverage are expressly excluded by the PPACA as being treated as applicable coverage, including: coverage only for accident, or disability income insurance, or any combination thereof; coverage issued as a supplement to liability insurance; liability insurance, including general liability insurance and automobile liability insurance; workers' compensation or similar insurance; automobile medical payment insurance; and credit-only insurance. The PPACA also authorizes the IRS to exclude other coverage where benefits for medical care are secondary or incidental to other insurance benefits. Coverage through an on-site medical clinic generally is deemed applicable coverage.

- ***Comment.*** The IRS indicated that future regs will likely provide that employer contributions to health savings accounts (HSAs) and Archer medical savings accounts (Archer MSAs), including salary reduction contributions to HSAs, are included in applicable coverage, and employee after-tax contributions to HSAs and Archer MSAs are excluded from applicable coverage.
- ***Comment.*** The IRS also indicated that future regs will likely treat on-site medical clinics that only offer de minimis medical care to employees as not providing applicable coverage for purposes of the excise tax.

Payment

A coverage provider must pay the Code Sec. 4980I excise tax on its applicable share of the excess benefit with respect to an employee for any tax period. A coverage provider for these purposes includes:

- The health insurer, if the applicable employer-sponsored coverage consists of coverage under a group health plan which provides health insurance coverage;
- The employer, in the case of contributions to an employer-sponsored Health Savings Account (HSA) or Medical Savings Account (MSA); and
- The person that administers plan benefits (including the plan sponsor if the plan sponsor administers benefits under the plan) in the case of any other applicable employer-sponsored coverage.
    - ***Example.*** Inez is employed by ABC Co. and is covered under a fully-insured health care policy covering major medical with a value of $35,000. Inez elects family coverage. For 2018, Inez's adjusted threshold amount is $27,500 (hypothetically-speaking for purposes of this example). The amount subject to the excise tax would be $7,500 ($35,000 less the threshold of $27,500). ABC Co., the IRS explained, would report $7,500 as taxable to the insurer, which would calculate and remit the excise tax to the IRS.

Penalty. If the employer reports to insurers and plan administrators (as well as the IRS) a lower amount of insurance cost subject to the excise tax than required, the employer is subject to a penalty equal to any additional excise tax that each such insurer and administrator would have owed if the employer had reported correctly, increased for interest from the date that the tax was otherwise due to the date paid by the employer. This may occur, for example, if the employer undervalues the aggregate premium and thereby lowers the amount subject to the excise tax for all insurers and plan administrators (including the employer when acting as plan administrator of a self-insured plan), the IRS noted. The penalty may be waived if the employer can show that the failure is due to reasonable cause and not to willful neglect.

Compliance Calendar

■ March 20
Employers deposit Social Security, Medicare, and withheld income tax for March 14, 15, 16, and 17.

■ March 25
Employers deposit Social Security, Medicare, and withheld income tax for March 18, 19, and 20.

■ March 27
Employers deposit Social Security, Medicare, and withheld income tax for March 21, 22, 23, and 24.

■ March 31
Employers electronically file Forms 1097, 1098, 1099, 3921, 3922, and W2G with the IRS for certain payments made during 2014.

Employers electronically file copies of all the Forms W-2 issued for 2014.

Payors electronically file copies of all the Forms W-2G, Certain Gambling Winnings, issued for 2014.

■ April 1
Employers deposit Social Security, Medicare, and withheld income tax for March 25, 26, and 27.

TRC Text Reference Table

The cross references at the end of the articles in CCH Federal Tax Weekly (FTW) are text references to CCH Tax Research Consultant (TRC). The following is a table of TRC text references to developments reported in FTW since the last release of New Developments.

ACCTNG 21,104	67	FILEIND 15,250	116	IRS 6,050	73
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FILEBUS 9,252	133	INTL 36,000	137	SALES 45,202	112
FILEIND 15,200	91	INTLOUT 3,302	87	SALES 45,350	89

From the Helpline

The following questions have been answered recently by our "CCH Tax Research Consultant" Helpline (1-800-344-3734).

Q If an employer had previously sponsored a Simplified Employee Pension (SEP) plan from January 1–June 30th, 2014, but the plan was "closed" as of June 30 at which point the business started a new SIMPLE IRA, may the employer still make a contribution to the original SEP plan, even though it is "closed?"

A A SIMPLE plan can be the only plan for the plan year for which the SIMPLE plan becomes effective. So that would preclude a contribution to the SEP, even though the SEP ended mid-year. (The only exception is for collectively bargained plans.) Also, SIMPLE plans can only be maintained on a calendar year basis. *See TRC RETIRE: 63,552 and Notice 98-4 for more information*.

Q Has the annual exclusion for gift tax purposes changed for 2015?

A No. Although the per-donee annual exclusion amount for gift tax purposes is adjusted for inflation each year, the adjustment factor has not been high enough for the past several years to precipitate an increase. Therefore the inflation-adjusted annual exclusion amount for gifts made in 2015 remains $14,000, the same as it was for calendar years 2014 and 2013. However, the estate and gift tax applicable exclusion, which may be used to offset otherwise taxable gifts, increased from $5,340,000 in 2014 to $5,430,000 for 2015 based upon the applicable adjustment factor. *See TRC ESTGIFT: 6,050*.