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Obama Signs Bill Repealing Government Withholding; Expanding WOTC For Veterans

◆ *HR 674*

President Obama signed the *3% Percent Withholding Repeal and Job Creation Act of 2011 (2011 Repeal Act)* on November 21. The bill had passed unanimously in the Senate on November 10 and again unanimously in the House on November 16. Along with repealing three percent government withholding, the new law enhances the Work Opportunity Tax Credit (WOTC) to cover more military veterans, expands the IRS's continuous levy authority, revises the definition of modified adjusted gross income (AGI) for the Code Sec. 36B credit, and more.

■ ***CCH Take Away.*** "The AICPA strongly supported HR 674 and efforts to repeal the three percent withholding requirement," Edward Karl, vice president, taxation, AICPA, told CCH. "The overwhelming votes by the House and Senate demonstrate the widespread support for repeal," Karl observed. Karl also noted that lawmakers recognized the burdens that compliance placed on taxpayers.

Government withholding

Three percent government withholding was originally passed by Congress in 2005 as part of the *Tax Increase Prevention and Reconciliation Act (TIPRA)*. Government withholding was scheduled to apply to payments made after December 31, 2010. The *American Recovery and Reinvestment Act of 2009 (2009 Recovery Act)* delayed the effective date to payments made after December 31, 2011. The IRS issued final regs in 2011 that delayed the effective date to payments made after December 31, 2012.

The *2011 Repeal Act* repeals three percent government withholding as if it had never been enacted. As a result, the new law negates the effective date of government withholding under the *2009 Recovery Act.*

■ ***Comment.*** "Repeal brings great relief to all parties, including the reporting community, who was struggling to understand the full scope of the reporting and withholding provision, and address numerous implementation issues, especially in light of the time-consuming and costly system changes envisioned and the tenuous state of the economy and government budgets," Elizabeth Dold, principal, The Groom Law Group, Chartered, Washington, D.C., told CCH.

Veterans

The *2011 Repeal Act* includes a Returning Heroes Tax Credit and a Wounded Warriors Tax Credit, both of which were proposed by President Obama in his American Jobs Act as enhancements to the WOTC. Employers may be eligible for a Returning Heroes Tax Credit of up to $5,600 per employee if they hire a veteran of the U.S. Armed Forces who has been unemployed for six months or more. Employers that hire veterans who have been unemployed more than four weeks but less than six months

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Route to: ______ ______ ______ ______ ______

Temporary Regs Address Potential Abuse In All Cash D Reorgs

◆ *TD 9558, NPRM REG-101273-10*

The IRS issued final, temporary and proposed regs to prevent a corporation involved in an all cash D reorganization from recognizing an inappropriate loss. The regs amend 2009 regs (T.D. 9475) that allow a shareholder to designate the share of stock to which the basis of a nominal share of stock will attach.

■ ***CCH Take Away.*** The IRS issued the 2009 regs in response to comments that in a transaction involving cash and a nominal share of stock, the mechanics of preserving basis of the shares of the stock surrendered, in the basis of the stock of the issuing corporation, were unclear. The IRS became aware that the 2009 regs could be interpreted to allow a corporation to allocate the basis of the nominal share to an actual share of stock owned by someone else. This actual share could then be sold to recognize a loss.

D reorg

Under Code Sec. 368(a)(1)(D), a transfer by a corporation (transferor) of its assets to another corporation (transferee) is not taxable if, immediately after the transfer, the transferor or its shareholders control the transferee corporation. As part of the transaction, stock of the transferee corporation must be distributed in a tax-free transaction under Code Secs. 354, 355 or 356 (the "distribution requirement").

The 2009 regs treat the transaction as a tax-free D reorganization where the transferee does not issue any stock in the transaction, because the issuance of stock would be a meaningless gesture. The distribution requirement is satisfied if the same persons own, directly or indirectly, all of the stock of the transferor and the transferee in identical proportions.

The transferee is deemed to issue a nominal share of stock, in addition to the cash or other property exchanged for the transferor's assets. The nominal share is then deemed to be distributed by the transferor to its shareholders.

■ ***Example.*** P Corp owns all the stock of TR Corp and TE Corp. TR sells all its assets to TE for cash. TE will be deemed to issue a nominal share of TE stock to TR, and TR will be deemed to transfer the nominal share of TE stock to P. The transaction is an all cash D reorg. The nominal share is treated as nonrecognition property and substituted basis property. The nominal share preserves any remaining basis in TR.

New regs

According to the IRS, some taxpayers have maintained that these rules could be interpreted to allow an inappropriate allocation of basis by persons that do not own actual shares of stock in the issuing (transferee) corporation. The basis of the nominal share would be allocated to an actual share of stock of the issuing corporation owned by someone else before the nominal share is deemed to be further transferred.

■ ***Example.*** P Corp owns all the stock of X Corp and Y Corp. X Corp owns all the stock of T Corp. X has a $150 basis in T stock. T sells all its assets to Y for $100 cash and liquidates. Y is deemed to issue a nominal share of Y stock to T, and T will be deemed to distribute the nominal share of Y stock to X. X has a basis of $50 in the nominal share of Y stock. The nominal share is transferred to P. P's basis in the Y stock should be zero; however, some maintain that X can allocate the $50 of basis to an actual share of Y owned by P before the distribution of the nominal share. This could allow P to claim an inappropriate loss.

The temporary regs provide that if an actual shareholder of the issuing corporation is deemed to receive a nominal share of the issuing corporation, the actual shareholder must designate the share of stock of the issuing corporation to which the basis of the nominal share will apply.

References: FED ¶¶47,055, 49,506; TRC REORG: 18,052.15.

Repeal

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may be eligible for a credit of up to $2,400 per employee.

The Wounded Warriors Tax Credit rewards employers that hire unemployed veterans with service-connected disabilities. Employers that hire a veteran who has a service-connected disability and who has been looking for work for six months or more may be eligible for a credit of up to $9,600 per employee. Employers that hire a veteran who has a service-connected disability and who has been unemployed for six months or less may be eligible for a credit of up to $4,800.

The Returning Heroes Tax Credit and the Wounded Warriors Tax Credit are available to employers from the date of enactment of the new law (November 21, 2011) through 2012. The new law also allows tax-exempt employers to benefit from the credits for hiring veterans.

■ ***Comment.*** The *2011 Repeal Relief Act* also extends the WOTC for unemployed veterans who receive food stamps through 2012.

Continuous levy

The IRS may continuously levy under Code Sec. 6331(h). The levy may attach to up to 100 percent of the payment due in the case of payments due to a vendor of goods or services sold or leased to the federal gov-

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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*

Partnership/COD Regs Provide Safe Harbor, Nonrecognition Treatment For Debt-Equity Swaps

◆ *TD 9557*

The IRS has issued final cancellation-of-debt regs under Code Sec. 108(e)(8) on the tax consequences of the transfer of a partnership interest to a creditor in exchange for debt owed by the partnership. The regs have some taxpayer-favorable provisions but generally deny a bad debt deduction to creditors in the transaction.

■ ***CCH Take Away.*** Many provision in the final regs are beneficial, James Sowell, principal, KPMG LLP, Washington, D.C., told CCH. "The use of liquidation value is helpful, [and] the government took some steps [to facilitate its use], such as the elimination of the capital account requirement," Sowell noted. The decision not to trigger gain to the partnership on the transaction will assist taxpayers who want to enter into workouts, Sowell indicated.

Liquidation value

Code Sec. 108(e)(8) was amended to provide that if a debtor partnership transfers a capital or profits interest in the partnership to a creditor, the partnership is treated as satisfying the debt with cash equal to the fair market value of the partnership interest. The amount by which the indebtedness exceeds the fair market value of the interest is the amount of cancellation of debt (COD) income that is included in the partnership's income.

■ ***Comment.*** A share of the COD income will be taxable to each partner unless the partner can claim an exclusion under Code Sec. 108 (such as, for bankruptcy or insolvency).

The government made an important pro-taxpayer decision to treat the interest's liquidation value as its fair market value. Liquidation value is the amount of cash the creditor would receive if, immediately after the transfer, the partnership sold all of its assets for cash at their fair market value, and then liquidated.

■ ***Comment.*** Liquidation value does not take into account the partnership interest's lack of liquidity or its being a minority interest, factors that would ordinarily reduce the value of the interest, Sowell commented. By providing a higher value, the amount of COD income is reduced.

Conditions on liquidation value

While eliminating the capital account requirement, the government retained three other conditions on the use of liquidation value:

- The creditor, debtor (partnership) and the partners must all treat the fair market value of the debt as being equal to the liquidation value (the "consistency requirement");
- The transaction must be at arm's-length; and
- An anti-abuse requirement.

In the final regs, the consistency rule also requires that the partnership apply a consistent valuation method to all equity issued in any debt-for-equity exchange that is part of the same overall transaction. The arm's-length requirement was broadened to allow debt-for-equity exchanges where the creditor is an existing partner or other party related to the partnership, as long as the transaction reflects terms that would apply to an arm's-length transaction.

The anti-abuse rule restricts a partnership redemption or a partner's purchase of the interest, subsequent to the debt-for-equity exchange, that has a principal purpose of the partnership avoiding COD income. The final regs contain a cryptic statement that general tax law principles may apply (and potentially recharacterize the transaction) if the fair market value of the interest does not equal the value of the debt.

■ ***Example.*** A partnership transfers an interest to a creditor for a debt worth $500. As part of a prearranged transaction, the creditor agrees to sell the interest to another partner at a discount, for $300. The regs would collapse the transaction and treat the partnership as having COD income of $200.

No bad-debt deduction

Under both the proposed and the final regs, Code Sec. 721 applies to the debt-for-equity transaction. The creditor will not recognize a loss or a bad-debt deduction on the exchange. Commenters proposed that the transaction be bifurcated, so that creditors could take an immediate loss as a bad-debt deduction. However, the government rejected this approach. Thus, the creditor's

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Repeal

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ernment. The new law expands the IRS's continuous levy authority to encompass payments to a federal vendor for property in addition to goods and services.

Code Sec. 36B credit

The *Patient Protection and Affordable Care Act (PPACA)* provides a premium assistance tax credit (Code Sec. 36B credit) to qualified individuals who obtain insurance through a health insurance exchange after 2013. Under the new law, individuals must include the portion of Social Security benefits excluded from gross income in their calculation of modified adjusted gross income for purposes of the Code Sec. 36B credit and certain other federal health care programs.

More provisions

The new law also:

- Directs Treasury to prepare a report on the tax gap and government contractors;
- Extends IRS-Department of Veterans Affairs (VA) information sharing; and
- Enhances job training programs for veterans.

For more details and analysis of the new law, see CCH's Tax Briefing: Three Percent Withholding Repeal and Job Creation Act on CCH IntelliConnect and the CCH Tax Research Network.

Reference: TRC: COMPEN: 6,608.

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TIGTA Highlights Challenges Confronting IRS In FY 2012

◆ *TIGTA*

The Treasury Inspector General for Tax Administration (TIGTA) recently highlighted some of the management and performance challenges confronting the IRS for fiscal year (FY) 2012. According to TIGTA, the challenges include: Keeping taxpayer data secure ; tax compliance initiatives; modernization; implementing major tax law changes; fraudulent claims and improper payments; providing quality taxpayer service operations; human capital; globalization; taxpayer protection and rights; and achieving program efficiencies and cost savings.

■ ***CCH Take Away.*** IRS Deputy Commissioner Steve Miller recently told Congress that the agency is stepping-up its efforts to combat identity fraud in the upcoming filing season. *See the November 10, 2011 issue of this newsletter for details.*

Identity theft

TIGTA reported that identity theft continues to be a significant problem for taxpayers and the IRS. Identity thieves are filing fraudulent tax returns and obtaining refunds, but the IRS usually does not become aware of a problem until after the legitimate taxpayer files a tax return. As such, effectively authenticating legitimate taxpayers is a pressing challenge for the IRS as it develops and implements updates to its mission-critical systems and processes.

Tax compliance

TIGTA also reported that the underreporting of individual income tax, employment tax, corporate income tax, and estate and excise taxes is estimated at $285 billion, and accounts for the largest portion of the $345 billion tax gap. TIGTA stated the IRS faces challenges in enforcing compliance from businesses, individuals, tax-exempt entities, and tax return preparers.

Modernization

Since January 2011, the IRS has implemented new versions of the current Customer Account Data Engine, the Modernized e-File system, and the Account Management Services system. Additionally, the IRS has continued making progress in preparing for the deployment of the Customer Account Data Engine 2 system.

Return preparers

TIGTA also reported that the IRS will face challenges implementing its return preparer oversight initiative. The IRS instituted a preparer tax identification number (PTIN) requirement for all paid preparers in 2010 and is scheduled to launch its registered tax return preparer examination before year-end 2011. Additionally, the IRS will require registered tax return preparers to complete continuing education requirements at a future time.

According to TIGTA, currently, the IRS does not have a sufficient management information system to gather data on individuals who prepare federal tax returns for compensation. Further, the IRS will need to ensure that taxpayers understand the new requirements and the importance of using only registered preparers to prepare their tax returns.

Foreign accounts

TIGTA reported that the number of taxpayers that conduct international business transactions, including individuals, businesses, and tax-exempt organizations, continues to grow. “The IRS is still challenged by a lack of information reporting on many cross-border transactions,” TIGTA observed.

In response, the federal government has taken actions to better coordinate international tax compliance issues. TIGTA noted that the IRS realigned and expanded its international efforts under its Large Business and International Division. The 2009 and 2011 offshore voluntary disclosure initiatives encouraged taxpayers with hidden offshore assets and income to come back into the tax system, TIGTA found.

“One of the biggest challenges currently facing the IRS is the implementation of the Foreign Account Tax Compliance Act (FATCA),” TIGTA reported. Under FATCA, a U.S. taxpayer with financial assets outside the United States will be required to report those assets to the IRS. In addition, foreign financial institutions will be required to report to the IRS certain information about financial accounts held by U.S. taxpayers or by foreign entities in which U.S. taxpayers hold a substantial ownership interest, TIGTA explained.

Reference: TRC IRS: 3,000.

Regs

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loss will be deferred until the creditor disposes of its partnership interest, and the loss will be a capital loss, rather than an ordinary loss.

■ ***Comment.*** “I didn’t think it was the right call,” Sowell said of the nonrecognition approach. The creditor can still take a partial bad-debt deduction in advance of the exchange, but this has limited utility and is not a favorable result, he said.

Recognition of income

The nonrecognition approach of Code Sec. 721 will not apply to an exchange of a partnership interest for a debt that represents unpaid rent, royalties, or interest on indebtedness (including accrued original issue discount). Thus, the creditor will have ordinary income on this transaction. The final regs limit this approach only to items that accrued after the creditor began to hold the debt. Thus, a creditor that acquired the indebtedness from another creditor would not have ordinary income for items that accrued during the prior creditor’s holding period. However, the partnership will not have to recognize gain or loss on the transaction, a taxpayer-favorable result.

The government indicated that it is issuing proposed regs under Code Sec. 453B to require a creditor to recognize gain or loss where the creditor contributes an installment obligation to the partnership, even though existing rules do not treat the contribution as a disposition.

References: FED ¶47,054; TRC PART: 9,052.15.

IRS Withdraws Proposed Estate Tax Alternative Valuation Regs; Intends To Expand Use Of Six-Month Valuation Method

◆ *NPRM REG-112196-07*

The IRS has withdrawn issued proposed regs under Code Sec. 2032 issued in 2008. The IRS reported in new proposed regs that it intends to expand the use of the six-month alternate valuation date for calculating estate taxes.The new regs replace more restrictive proposed regs issued in 2008.

■ ***CCH Take Away.*** The alternate valuation date is six months after the decedent has died. Under the prior proposed regs, the estate could use the alternate valuation date if the estate's value had declined following death due to market conditions, but not due to other post-death events. The new regs provide several exceptions that allow the consideration of post-death events for valuing the estate.

Background

Under Code Sec. 2032, the executor may elect to value the gross estate may be determined by valuing property disposed of within six months of death on the date the property is distributed, sold, exchanged, or otherwise disposed of. Under the election, property that is retained at the six-month date may be valued as of that date. Code Sec. 2032(a)(3) provides that any interest that is affected by the mere lapse of time is includible at its value on the date of death (instead of a later date), but the value may be adjusted for any difference as of the later date that is not due to the mere lapse of time.

The 2008 proposed regs limit the use of the alternate valuation date to reductions based on market conditions, not other post-death events. The preamble to the 2008 regs noted two court cases. One decision, *Flanders, DC-Calif. (1972)*, did not allow the value to be reduced when the estate granted a conservation easement in the property.

The other decision, *Kohler, TC (2006)*, allowed a valuation discount for post-death restrictions imposed on closely-held stock. The IRS disagreed with this decision, and the 2008 proposed regs reflected its disagreement.

New regs

The new regs would make irrelevant, for valuing the property on the transaction date or the six-month date, the extent of the estate's participation in the post-death events. The valuation of property on the transaction date comprehends all possible transactions by which the property ceases to form a part of the gross estate.

This includes the exchange of interests in an entity for one or more different interests in the same entity or in an acquiring or resulting entity. In this case (assuming the fair market values of the interests exchanged are equal), the transaction will not be treated as an exchange, and the estate may use the six-month alternate valuation date to value the interest received.

Another provision would allow the use of the six-month alternate valuation date by an estate that receives a distribution from a business entity, bank account, or retirement trust, where that property is includible in the gross estate. The regs require that the value of the interest before the distribution equal the value of the distributed property and the value of the interest immediately after the distribution.

Conservation easements

Under Code Sec. 2031(c), the post-death grant of a conservation easement is effective for estate taxes on the date of death. The proposed regs would provide that this event will not result in a distribution, sale, exchange or other disposition of the property under Code Sec. 2032. Thus, the estate can value the fair market value of the property as if the easement had taken effect before death. Accordingly, the estate can value the property on the date of death and on the alternate valuation date.

Other provisions

The new regs propose an aggregation rule for the portions of property disposed of during the alternate valuation period and that remain in the gross estate on the six-month date. The regs also propose a special rule to use in determining the portion of a trust includible under Code Sec. 2036 in the gross estate on the alternate valuation date, because of a retained interest.

Reference: TRC ESTGIFT: 36,050.

IRS Makes Buyout, Early Out Offers To 5,400 Employees

The IRS has made buyout and early out offers to approximately 5,400 employees, a spokesperson recently told CCH. The agency reportedly will accept as many as 1,600 buyouts and early outs.

■ ***Comment.*** IRS Commissioner Douglas Shulman has have indicated the agency is preparing for possible budget cuts. Shulman told the AICPA National Tax Conference in Washington, D.C. on November 9 that the agency is "engaging with Capitol Hill so lawmakers understand the consequences of budget cuts to the IRS."

On November 4, 2011, Shulman announced the buyouts/early outs in a memorandum to IRS employees. "Because employee-related expenses account for the vast majority of our budget, we must reduce our workforce if our final budget is reduced by the amounts now being discussed in Congress. Last year, we were able to achieve the needed workforce reduction through attrition, but this year we will need to use some new tools," Shulman said. Shulman explained that the buyouts and early outs were two new tools to reduce expenses.

In a November 8, 2011 memorandum to employees, Beth Tucker, deputy commissioner, operations support, and Steve Miller, deputy commissioner, services and enforcement, explained that the federal Office of Personnel Management (OPM) approved the buyouts (Voluntary Separation Incentive Payments) and early outs (Voluntary Early Retirement Authority). According to Tucker and Miller, the IRS is not, at this time, "making offers in core taxpayer service functions and tax enforcement operations." Employees who accept a buyout or early out will go off the payroll by December 31, 2011.

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Chief Counsel Describes How Taxpayers Under Examination Can Change Accounting Method For Advance Payments

◆ *CCA 201145013*

IRS Chief Counsel has explained how a taxpayer under examination, wanting to change its method of accounting for advance payments under Rev. Proc. 2011-14, may satisfy the requirement to file a copy of the application with the IRS during the 90- and 120-day window periods.

■ ***CCH Take Away.*** The IRS Large Business and International Division (LB&I) recently issued a directive to employees outlining how to proceed in examination cases where taxpayers have made a change of accounting method for advance payments. LB&I indicated that examiners will not assert that the taxpayer's present method of accounting for advance payments is not a proper deferral method under Rev. Proc. 2004-34 solely on the grounds that the taxpayer failed to obtain consent for the change. *See the November 17, 2011 issue of this newsletter for details.*

Background

Rev. Proc. 2004-34 allows taxpayers a limited deferral beyond the tax year of receipt for certain advance payments. Generally, taxpayers may defer to the next succeeding tax year the inclusion in gross income for federal income tax purposes of advance payments in the tax year of receipt

Rev. Proc. 2011-14 provides that a taxpayer may apply for consent to change accounting method by Filing Form 3115 and, in limited circumstances, filing a statement, in lieu of Form 3115. The application must be filed in duplicate.

■ ***Comment.*** The original application (Form 3115 or a statement in lieu of Form 3115) is attached to the taxpayer's income tax return implementing the change in accounting method. A copy of the application (Form 3115 or a statement in lieu of Form 3115) is submitted to the IRS Ogden Service Center.

Chief Counsel analysis

Chief Counsel noted that Section 15.11 of the Appendix to Rev. Proc. 2011-14 waives the requirement to file an application on Form 3115 and authorizes a statement, in lieu of Form 3115, for certain changes. Section 15.11 of the Appendix to Rev. Proc. 2011-14 also waives the requirement to file a duplicate application.

Rev. Proc. 2011-14, Chief Counsel explained, provides that a taxpayer under examination may file an application to change a method of accounting only if the taxpayer is in a 90-day or 120-day window

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December 2011 AFRs Issued

◆ *Rev. Rul. 2011-31*

The IRS has released the short-term, mid-term, and long-term applicable interest rates for December 2011.

Applicable Federal Rates (AFR) for December 2011

	Annual	Semiannual	Quarterly	Monthly
Short-Term				
AFR	.20%	.20%	.20%	.20%
110% AFR	.22%	.22%	.22%	.22%
120% AFR	.24%	.24%	.24%	.24%
130% AFR	.26%	.26%	.26%	.26%
Mid-Term				
AFR	1.27%	1.27%	1.27%	1.27%
110% AFR	1.40%	1.40%	1.40%	1.40%
120% AFR	1.53%	1.52%	1.52%	1.52%
130% AFR	1.66%	1.65%	1.65%	1.64%
150% AFR	1.92%	1.91%	1.91%	1.90%
175% AFR	2.23%	2.22%	2.21%	2.21%
Long-Term				
AFR	2.80%	2.78%	2.77%	2.76%
110% AFR	3.08%	3.06%	3.05%	3.04%
120% AFR	3.37%	3.34%	3.33%	3.32%
130% AFR	3.64%	3.61%	3.59%	3.58%

Adjusted AFRs for December 2011

	Annual	Semiannual	Quarterly	Monthly
Short-term adjusted AFR	.45%	.45%	.45%	.45%
Mid-term adjusted AFR	1.69%	1.68%	1.68%	1.67%
Long-term adjusted AFR	3.55%	3.52%	3.50%	3.49%

The Code Sec. 382 adjusted federal long-term rate is 3.55%; 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 3.55%; the Code Sec. 42(b)(2) appropriate percentages for the 70% and 30% present value low-income housing credit are 7.47% and 3.20%, respectively, however, the appropriate percentage for non-federally subsidized new buildings placed in service after July 30, 2008, and before December 31, 2013, shall not be less than 9%; 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 1.6%; and the applicable rate of interest for 2012 for purposes of Code Secs. 846 and 807 is 2.89%.

References: FED ¶46,545, ACCTNG: 36,162.05

District Court Finds No Bankruptcy Tolling For Lender Liability Statute of Limitations

◆ *GE HFS Holdings, Inc., DC-FLa.*

A federal district court has found that the IRS could not collect unpaid employment taxes it asserted against a third-party lender in a bankruptcy adversary proceeding, which dated from more than 10 years before the present action was initiated. The IRS unsuccessfully argued that a bankruptcy tolling provision had suspended the limitations period on assessment and collection of taxes. The court found that a 10-year statute of limitations period governed, and that the government had missed the 10-year period for filing suit.

■ ***CCH Take Away.*** The court noted that the liability of a partner for partnership taxes is different from a lender's liability under Code Sec. 3505. Accordingly, the court declined to apply the holding of *Galletti, 541 U.S. 114 (2004),* which stated, "nothing in the Code requires the IRS to duplicate its efforts by separately assessing the same tax against individuals or entities who are not the actual taxpayers but are . . . liable for payment of the taxpayer's debt."

Background

Code Sec. 3505(b) imposes liability on lenders, who supply funds to an employer for the specific purpose of paying wages and have actual notice or knowledge that such employer does not intend to or will not be able to make timely payment or deposit of tax, for a sum equal to the taxes (together with interest) which are not paid over to the United States by such employer with respect to such wages.

Reg. §31.3505-1(d)(1) provides that the IRS must bring any action against a third-party lender under Code Sec. 3505(b) within 10 years of the date on which the IRS assesses the underlying employer for the unpaid withholding taxes. The parties may extend the statute of limitations by executing a written agreement before the expiration of the 10-year period.

The IRS acknowledged that it had not brought suit within the 10-year period nor had it entered into a written stipulation with the taxpayer to extend the time for filing suit. The IRS argued that the taxpayer's bankruptcy reorganization under Chapter 11, however, suspended the statute of limitations.

Court's analysis

The court found that Reg. §31.3505-1(d)(1) was unambiguous, and that the government had neither brought suit within the 10-year period nor extended it by written agreement. Further, it noted that had Treasury intended to further elongate the limitations period by inserting a bankruptcy tolling provision, it could have done so when amending the regulations in 1995, but did not. Accordingly, the court found that the IRS's action with respect to the employment taxes within the closed limitations period was time-barred.

Reference: TRC IRS: 45,202.

Tax Briefs

Internal Revenue Service

The IRS has announced the allocation to qualified states of previously unused low-income housing credit authority for calendar year 2011.

Rev. Proc. 2011-57, FED ¶46,546; TRC BUSEXP: 54,220.10.

The IRS has announced that it acquiesces in the holding of *R.G. O'Donnabhain*, 134 TC 34, Dec. 58,122. The IRS also announced that it does not acquiescence in the decision of the Court of Appeals for the Third Circuit in *A.I. Appleton, Jr.*, CA-3, 2011-1 USTC ¶50,429.

Acquiescence Announcement, FED ¶46,547; TRC INDIV: 42,052.

Jurisdiction

An individual lacked standing to appeal a federal district court's order reducing his outstanding tax liabilities to judgment and foreclosing federal tax liens on a real property the court determined was held by his ex-wife as his nominee. The individual failed to demonstrate that the court could redress any injury to him; therefore, the court lacked jurisdiction to hear his appeal.

Wilson, CA-10, 2011-2 USTC ¶50,717; TRC IRS: 45,160.

Summons

An individual's petition to quash an IRS third-party summonses seeking records from a bank and a limited liability company in connection with the investigation of his tax liabilities was denied. The government established its *prima facie* case for enforcement, which the individual failed to rebut.

Mayley, DC S.C., 2011-2 USTC ¶50,716; TRC IRS: 21,108.

Income

A married couple's taxable income was determined using the net worth and expenditures method because they failed to maintain proper books and records from which their federal tax liabilities could be computed. Additions to tax for fraud were imposed on the husband, who was a CPA, but not on the wife.

Powerstein, TC, CCH Dec. 58,813(M), FED ¶48,233(M); TRC ACCTNG: 3,154.

An individual was required to recognize his unreported income from his farming and bricklaying businesses. A portion of his Social Security benefits was required to be reported. A depreciation deduction applied to the cost of a tractor but not to the cost of a car that he used only for per-

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Tax Briefs

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sonal reasons. He was entitled to deduct an estimate of business expenses. Late-filing and failure to pay estimated tax penalties were imposed.

West, TC, CCH Dec. 58,814(M), FED ¶48,234(M); TRC COMPEN: 6,066.

Liens and Levies

A married couple was precluded from contesting the tax liability on which a filed lien and a proposed levy were based because the IRS issued a deficiency notice to the couple who failed to timely file a petition contesting the notice in the Tax Court. Further, the Appeals officer's determination to sustain the proposed collection action was not an abuse of discretion since the taxpayers did not provide any information necessary to consider collection alternatives.

Ahmad, TC, CCH Dec. 58,811(M), FED ¶48,231(M); TRC IRS: 51,056.05.

Collection Due Process

A taxpayer could not dispute his underlying tax liability at his Collection Due Process hearing because he was sent a deficiency notice and he failed to timely file a petition in the Tax Court contesting the notice. Moreover, the IRS settlement officer did not abuse her discretion by denying the taxpayer's offer-in-compromise because the taxpayer did not submit the required Form 656, Offer in Compromise, or propose defined settlement terms.

Waring, TC, CCH Dec. 58,812(M), FED ¶48,232(M); TRC IRS: 51,056.

Deficiencies and Penalties

Married taxpayers were determined to have underreported their income from their construction business for the years at issue. The couple also had unreported capital gains from their property exchanges. The accuracy-related penalty was imposed.

Licha, TC, CCH Dec. 58,817(M), FED ¶48,237(M); TRC IRS: 30,150.

Bankruptcy

A debtor couple's claims for damages and attorney's fees based on the IRS's violation of the discharge injunction were denied because they failed to file an administrative claim with the IRS prior to filing suit; therefore the court lacked jurisdiction over those claims.

In re Kight, BC-DC Fla., 2011-2 USTC ¶50,715; TRC IRS: 45,114.

Stipulations

An individual was bound by her stipulations that she owned certain businesses that resulted in tax liability. She was not entitled to a net operating loss carryover or Code Sec. 1231 losses and she did not pay her tax liability by abandoning her property. She was required to change accounting methods to the accrual method but was not required to make a Code Sec. 481 adjustment for one tax year. Penalties were imposed.

Penland, TC, CCH Dec. 58,816(M), FED ¶48,236(M); TRC BUSEXP: 45,050.

Statute of Limitations

An individual who was an indirect partner in a tax shelter validly agreed to extend the applicable limitations period. He failed to prove that he was unduly influenced to sign the extension consents by one of his partners.

Chai, TC, CCH Dec. 58,815(M), FED ¶48,235(M); TRC PART 60,352.30.

Retirement Plans

Cost-of-living adjustments (COLAs) that affect pension plan dollar limitations and other retirement-related provisions have been released by the IRS, effective January 1, 2012. In general, many of the pension plan limitations will change for 2012 because the increase in the cost-of-living index met the statutory thresholds that trigger their adjustment.

Notice 2011-90, FED ¶46,548; TRC COMPEN: 27,252.10.

The IRS has released the tier 2 Railroad Retirement Tax Act tax rates for 2012 for railroad employees, employers and employee representatives, respectively. For 2012, the tier 2 tax rate on employees is 3.9 percent of compensation and the tier 2 tax rate on employers and employee representatives is 12.1 percent of compensation.

Notice, FED ¶46,544; TRC PAYROLL: 9,052.

Partnerships

A tax matters partner (TMP) made the jurisdictional deposits required by Code Sec. 6226(e)(1) in good faith; therefore, the government's motion to dismiss the TMP's petitions challenging Final Partnership Administrative Adjustments (FPAAs) issued to three partnerships was denied provided that the TMP supplement his deposits. That the deposits were incorrect or a small fraction of the government's proposed deposits did not demonstrate the TMP calculated the deposit in bad faith.

Gail Vento, LLC, DC V.I., 2011-2 USTC ¶50,718; TRC PART: 60,552.

Indian Tribes

The IRS has requested comments on the application of the general welfare exclusion to benefits provided under Indian tribal government programs, including, housing, cultural, education and Elder programs. Written comments should be submitted on or before February 13, 2012, to the Internal Revenue Service, CC:PA:LPD:PR (Notice 2011-94), Room 5203, P.O. Box 7604, Ben Franklin Station, Washington, D.C. 20044, or electronically to Notice.Comments@irscounsel.treas.gov.

Notice 2011-94, FED ¶46,543; TRC INDIV: 33,350.

The IRS has provided a safe harbor for Indian tribes to establish trusts to receive distributions of gaming revenues under the Indian Gaming Regulatory Act (IGRA) for tribal members who are minors or legally incompetent.

Rev. Proc. 2011-56, FED ¶46,542; TRC INDIV: 33,510.

Method

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(and in other limited circumstances). Both the 90-day and 120-day window periods require a taxpayer to file a copy of its application with the national office or the Ogden Service Center as applicable.

Reference: TRC ACCTNG: 21,302.10.