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Inside this Issue

Withholding Tables For Making Work Pay Credit May Cause Millions To Underpay; IRS Disputes Forecast

◆ *Notice 2009-91, TIGTA 2010-41-002*

Revised withholding tables for the Making Work Pay Credit (MWPC) may still leave more than 15 million taxpayers confronted with reduced refunds or higher tax liabilities when they file their 2009 returns, according to the Treasury Inspector General for Tax Administration (TIGTA). Taxpayers with more than one job, pension recipients, and individuals who work and receive Social Security benefits are most likely to be negatively affected.

In related news, the IRS has released modified rules for determining income tax withheld from wages performed by nonresident alien employees in the U.S. The modified rules reflect, among other things, that nonresident aliens are ineligible for the MWPC.

■ ***CCH Take Away.*** "Individuals should project now their year-end tax situation and adjust their withholding," David Sands, CPA, past chair of the relations with IRS committee of the New York State Society of CPAs, told CCH. "If an individual is expecting a year-end bonus, for example, there may be time to take corrective action."

■ ***Comment.*** The IRS has also issued early release copies of the 2010 Percentage Method Income Tax Withholding and Advance Earned Income Credit Payment Tables, which will appear in Publication 15 (Circular E), Employer's Tax Guide. The withholding allowance amounts by payroll period are unchanged from 2009.

MWPC

The MWPC generally provides a refundable credit of up to $400 for single individuals and up to $800 for married couples filing joint returns for 2009 and 2010. The MWPC is calculated at a rate of 6.2 percent of earned income. The MWPC phases out for single individuals with modified adjusted gross income (MAGI) in excess of $75,000 and for married couples filing joint returns with MAGI in excess of $150,000.

The IRS issued updated withholding tables earlier this year to implement the MWPC. Employers generally began using the revised withholding tables as of April 1, 2009.

At-risk taxpayers

TIGTA identified seven groups of taxpayers at risk for being negatively impacted by the MWPC:

Multiple jobs. TIGTA projected that 2.5 million single individuals with more than one job could owe taxes if the taxpayer had not adjusted his or her withholding. TIGTA also projected that the MWPC could negatively affect 4.2 million married couples filing jointly where both spouses work or one spouse has multiple jobs.

Pension recipients. Approximately 6.3 million pensioners could owe taxes or owe more in taxes because of the MWPC despite the IRS having issued optional adjustment procedures for pension plans.

Older workers. Nearly 700,000 individuals who receive Social Security and also work may be negatively affected by the MWPC. The amount of any MWPC must be reduced

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Route to: _____ _____ _____ _____ _____

Comprehensive Final Regs Update Requirements For ESPPs

◆ *T.D. 9471*

Final regs that prescribe the requirements for options issued under an employee stock purchase plan (ESPP) were recently issued by the IRS.

■ ***CCH Take Away.*** There are nine statutory requirements for ESPPs. The regs incorporate all the rules from existing regs and provide comprehensive rules under Code Sec. 423. ESPPs are designed to benefit rank-and-file employees, unlike incentive stock options, which are used as executive compensation. Nevertheless, they benefit employers in offering a deferred compensation package at little immediate cost outlay.

■ ***Comment.*** The IRS simultaneously issued final reporting regs (T.D. 9470) under Code Sec. 6039 for incentive stock options and options issued under an ESPP. *See the story on Page 3 of this newsletter.*

Plan offerings

The plan and each offering must be in writing or in electronic form. The provisions of Code Sec. 423 may be satisfied by the terms of the plan or of an offering made under the plan. If the plan is inconsistent with the ESPP requirements, the option may still qualify for special tax treatment if the offering complies with Code Sec. 423 and the regs.

More than one offering may be made under a plan. The terms of each offering need not be identical, as long as the offering satisfies the regs. When a parent corporation adopts an ESPP, it may establish separate offerings under the plan for various subsidiaries.

The terms of each offering may provide different exclusions of employees. Permissible exclusions include part-time employees (less than 20 hours per week or no more than five months per year); employees who have worked for less than two years; and highly compensated employees.

Shares

Generally, a plan cannot grant more than $25,000 in shares (fair market value) for each calendar year, determined on the date of grant of the options. If the maximum number of shares is not fixed until the date the option is exercised, the date of exercise will be treated as the date of grant.

The $25,000 share limit increases for each calendar year that an option is outstanding. The proposed regs required that the options had to be exercisable as well as outstanding.

Shareholder approval

ESPPs need stockholder approval 12 months before or after the plan is adopted. New approval is needed if the shares change or the granting corporation changes. The stockholders of a subsidiary corporation include the parent corporation.

References: FED ¶47,039; TRC COMPEN: 21,052.

MWPC

Continued from page 1

by one-time payments of $250 under the *2009 Recovery Act* to recipients of Social Security and certain other government programs.

Dependents. Individuals who may be claimed as dependents are ineligible for the MWPC. TIGTA projected that 1.6 million working dependents may be liable for repaying the MWPC.

■ ***Comment.*** "TIGTA's report reflects what many pension practitioners feared: a large number of pensioners may owe taxes (or refunds reduced) as a result of the MWPC adjustment to the withholding tables. The MWPC simply does not extend to pension and IRA payments," Elizabeth Dold, principal, The Groom Law Group, Chartered, Washington, D.C., told CCH. "TIGTA makes the same recommendation as pension practitioners have sought all year – allow the use of the old withholding tables and avoid the complexities of the special adjustment, but the IRS continues to reject this approach."

■ ***Comment.*** The IRS disputed TIGTA's 15.4 million projection, noting that TIGTA did not take into account those taxpayers who have adjusted their withholding for the MWPC.

■ ***Comment.*** Taxpayers should ask the IRS to abate any estimated tax penalty from the MWPC," Marsha Rubin, CPA, CFP, Pennsylvania Institute of CPAs, told CCH. "Taxpayers should explain in writing why the penalty should be abated. First, however, taxpayers have to know to ask for penalty relief."

Nonresident aliens

Notice 2009-91 modifies the rules for employers to calculate income tax withholding for nonresident aliens to offset the MWPC and the standard deduction. Effective for wages paid on or after January 1, 2010, employers must make two modifications, the IRS explained.

Employers will need to add an amount to wages before determining withholding under the wage bracket or percentage method to offset the standard deduction. Employers also must determine an additional amount of withholding from a separate table applicable only to nonresident aliens to offset the MWPC that is factored into the general tables now in use for U.S. taxpayers.

References: FED ¶46,527; TRC PAYROLL: 3,124.

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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*

IRS Finalizes Information Reporting Rules For Stock Transfers Under ISOs/ESPPs

◆ *TD 9470*

The IRS has issued final regs governing information return reporting by corporations upon the transfer of stock under either an incentive stock option (ISO) or an employer stock purchase plan (ESPP). The final regs reflect heightened reporting requirements under the *Tax Relief and Health Care Act of 2006 (TRHCA).* They generally track the proposed regs but with some important modifications. However, the final regs add another year to the delay in requiring information reporting to the IRS, postponing the effective date until 2010.

■ ***CCH Take Away.*** One theme echoes throughout the final regs. Corporations must provide employees with sufficient information to calculate their tax obligations upon disposition of the shares acquired by the exercise of a statutory option. Information reporting to employees on ISOs and ESPPs is not postponed.

■ ***Comment.*** The IRS simultaneously issued final regs (T.D. 9471) on the requirements for an ESPP under Code Sec. 423. *See the article on Page 2 of this newsletter.*

Background

TRHCA generally requires corporations to file an information return with the IRS following a stock transfer if the transfer is made in connection with the exercise of an incentive stock option or under an ESPP where the option price is between 85 and 100 percent of the value of the stock. *TRHCA* applies to stock transfers occurring on or after January 1, 2007. In NPRM REG-103146-08, the IRS waived the obligation to file an information return for 2008 stock transfers. The final regs waive reporting to the IRS for 2009 but require reporting to employees.

■ ***Comment.*** Corporations must provide each person identified in the information return with a written payee statement by January 31 of the following calendar year.

Transfers under ESPP

The final regs modify the proposed regs to provide that a transfer of legal title to a recognized broker or financial institution immediately following the exercise of an option is treated as the first transfer of legal title for purposes of filing. For employees whose shares are immediately deposited into a brokerage account following the exercise of an option, the exercise of the option and the first transfer of legal title are treated as occurring on the same date.

In other cases, an employer may issue a stock certificate directly to an employee or register the shares in the employee's name on its record book. Issuance of the certificate or registration is not considered the first transfer of legal title of the stock acquired by the employee, the IRS explained. The employer would be required to file a return and furnish an information statement to the employee with respect to the first transfer of the legal title of the stock acquired by the employee.

■ ***Comment.*** The employer's requirement would kick-in, for example, when the employee sells the stock or transfers the stock to a brokerage account established on behalf of the employee.

Exercise price

Commentators on the proposed regs noted that the exercise price under an ESPP may not be known on the date of grant. If the exercise price per share of an option is not fixed or determinable on the date of grant, corporations must identify on the return and information statement the exercise price per share determined as if the option were exercised on the date of grant.

References: FED ¶47,038; TRC PENALTY: 3,204.05.

Voluntary Offshore Disclosures Top 14,000, Shulman Reports

More than 14,700 individuals disclosed unreported offshore accounts to the IRS under its recent compliance initiative, Commissioner Douglas Shulman announced on November 17. Shulman's announcement coincided with the release of the criteria used by the United States and Switzerland to select accounts at Swiss banking giant UBS AG for possible disclosure to the IRS. Shulman declined to reveal how many UBS accounts held by U.S. taxpayers the Swiss government has disclosed to date.

■ ***Comment.*** "The agreement with UBS and the Swiss government can be seen as the nail in the coffin of secret offshore banking," Daniel Gottfried, attorney, Day Pitney, LLP, Hartford, Conn., told CCH. "It was largely accomplished by the U.S. government's ability to sell to the European nations our style of worldwide tax compliance and our general belief that tax compliance is a moral issue."

Flood of requests. The IRS's offshore voluntary compliance initiative ended in October. At that time, Shulman said approximately 7,500 taxpayers had requested to participate in the initiative, which offered a reduce penalty framework in exchange for full disclosure. "The IRS was flooded (with requests to participate) in the final days of the initiative." Some UBS accountholders also came forward under the initiative, Shulman said. However, he did not identify the exact number.

UBS criteria. When the UBS agreement was finalized in August, the U.S. and Switzerland postponed revealing the criteria used to select accounts for possible disclosure until November. There are a number of criteria for different types of accounts, Shulman explained. One scenario addresses accounts with more than one million Swiss francs (approximately $990,000).

www.irs.gov

Tax Court Allows Broad Definition Of "Supplies" Qualifying For Research And Experimentation Credit

◆ *TG Missouri Corp., 133 T.C. No. 13*

In a case of first impression, the Tax Court has found that the cost incurred by a manufacturer to purchase production molds to which it added design and engineering modifications before selling them to customers could be counted as expenses that increased its research credit. Rejecting the IRS's narrow view of what constitutes "supplies" qualifying for the research credit, the court held that the Code Sec. 41(b)(2)(C) exclusion of depreciable property from "supplies" did not apply since the molds were not depreciable in the hands of the taxpayer.

■ ***Comment.*** The Tax Court's taxpayer-friendly decision is not only a distinct victory for the taxpayer in the case, but for similarly-positioned manufacturers that customize products for their customers through unique services. Widespread interest in this case itself was evident from the court's recognition in its opinion of an amicus brief filed by a defense contractor.

Background

The taxpayer developed and produced production molds for automobile parts. In some situations, the taxpayer contracted with third-parties to build the production molds that it would then modify for its customers. The taxpayer maintained ownership of the molds and depreciated them in some cases; in other cases the taxpayer sold the molds to customers.

The taxpayer included the costs of the production molds purchased from third parties and eventually sold to customers as research expenses for purposes of computing its Code Sec. 41 research credit. The IRS maintained that the costs associated with the molds did not qualify as research expenses. The IRS asserted that the molds sold to customers were not supplies, but as "assets of a character subject to depreciation;" they were subject to expensing under Code Sec. 174 and, therefore, not part of the amount qualifying for the research credit.

Court's analysis

Rebuffing the IRS, the Tax Court found that the production molds in question were not assets "of a character" subject to the allowance for depreciation for purposes of Code Sections 41(b)(2)(C) and 174(c). The taxpayer properly included the costs of the production molds it purchased from third-party toolmakers as the cost of supplies, under Code Sec. 41(b)(2)(C), in calculating its research credit, the court held.

The Tax Court held that the character of the property in the hands of the taxpayer is controlling. According to the court, the phrase "property of a character subject to the allowance for depreciation" in both Code Sections 41(b)(2)(C) and 174(c) refers to property depreciable in the hands of the taxpayer, and is not just a reference to the character of the property itself. As such, the court concluded that the production molds sold to customers were not assets of a character subject to the allowance for depreciation by this particular taxpayer for purpose of those Code sections. Further, the taxpayer did not have to treat the molds over which it maintained ownership similarly to the ones for which it transferred ownership.

References: CCH Dec. 57,991; TRC DEPR: 3,504.

Payroll Company Entitled To Greater FUTA Credit Than Amount Determined By IRS

◆ *Cencast Services LP, Fed Cl, November 2, 2009*

The Court of Federal Claims has granted a partial summary judgment motion that increased the State Unemployment Insurance (SUI) tax credit a payroll services company could claim against its federal unemployment (FUTA) tax liability. The IRS had misstated the amount of the credit in determining the company's FUTA taxes.

■ ***CCH Take Away.*** In the underlying case, the IRS claimed that the payroll company was not the common-law employer of workers used by several movie production companies. If the production companies were the true employers, the FUTA tax wage base would be applied to each production company, rather than to the single payroll company. This would increase the total wage base substantially. The higher wage base would generate a higher SUI credit.

■ ***Comment.*** The FUTA wage base was $7,000 per employer for the years at issue, 1991-1996, and remains at $7,000 for 2009. The FICA (Social Security) wage base was $50,000 per employer for 1991-1996 and is now $106,800. The gross FUTA tax rate is 6.2 percent and is made up of two components: a permanent gross tax rate of 6.0 percent, and a temporary surtax rate of 0.2 percent. Since employers can generally claim a credit of up to 5.4 percent against FUTA tax liability for state unemployment taxes paid during the year, however, most employers end up paying a net effective federal unemployment tax rate of only 0.8 percent.

Background

The taxpayer provided payroll services to movie companies and paid the employer's share of FICA and FUTA taxes due on employees used by the movie companies. The payroll company claimed to be the sole employer and paid the employment taxes based on a single wage base per employee. It claimed that the FUTA tax wage base totaled $2.2 billion for all employees and that its SUI tax credit (5.4 percent of the wage base) was $119 million.

The IRS claimed that the movie companies were the employers and that a separate wage base applied for each movie company. The court had concluded that the payroll company's control over the workers' pay was not

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IRS Issues Interim Guidance On Certification Procedures For Code Sec. 30D Plug-In Vehicle Credit

◆ *Notice 2009-89*

The IRS has released interim guidance, pending issuance of final regs, on the procedures that vehicle manufacturers must follow in order to certify that a vehicle is eligible for the new qualified plug-in electric drive vehicle credit under Code Sec. 30D. The guidance will apply to vehicles acquired after December 31, 2009, and defines when a vehicle is "acquired" for purposes of certifying its eligibility. The procedures apply for a vehicle manufacturer to certify to the IRS that a motor vehicle of a particular make, model, and year satisfies the requirements that must be met to claim the credit, as well as the credit amount permitted with respect to that vehicle.

■ ***Comment.*** The Code Sec. 30D electric plug-in vehicle credit was originally enacted under the *Emergency Economic Stabilization Act of 2008* and was substantially modified by the *American Recovery and Reinvestment Act of 2009 (2009 Recovery Act)* for vehicles acquired after December 31, 2009. For vehicles purchased after February 17, 2009 and before 2012, taxpayers can claim a 10 percent credit under Code Sec. 30 for an electric drive low-speed vehicle, motorcycle, and three-wheeled vehicle. The maximum amount of the credit is $2,500. In addition to the credit, the *2009 Recovery Act* also provided other incentives for buying a new vehicle, including the deduction for state and local sales and excise taxes paid on the purchase of a new car, light truck, motor home, or motorcycle.

Interim guidance

The guidance provides that, for purposes of the Code Sec. 30D plug-in vehicle credit, a vehicle is considered "acquired" when title to the vehicle passes under state law. The guidance also addresses conditions under which taxpayers purchasing eligible vehicles may rely on the manufacturer's certification for purposes of claiming the credit.

Checklist

The interim guidance also provides a checklist of 17 items that a manufacturer's certification must include. The certification must be submitted to the IRS, which will review and acknowledge the certification within 30 days of receipt.

References: FED ¶46,528; TRC INDIV: 58,008.

FUTA

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sufficient, by itself, to demonstrate that it was the employer. The determination of the true employer was still being litigated.

Based on its premise that the movie companies were the employers, the IRS applied a separate $7,000 wage base to each company and increased the total FUTA tax wage base to $2.9 billion for the years at issue. The IRS claimed that the taxpayer owed a deficiency of $43.6 million, based on the increased FUTA wage base. However, the IRS did not increase the maximum SUI credit. The payroll company claimed that the maximum tentative SUI tax credit was $157 million and that the actual SUI credit was $131 million.

SUI credits

An employer's federal unemployment tax liability is reduced by amounts paid for state unemployment insurance (SUI). The employer can claim two tentative SUI credits:

- The tentative credit for the amount of money actually contributed to the SUI fund; and
- The "good faith" credit for the amount that the employer's contribution rate was less than the lower of the state's highest rate and a 5.4 percent rate.

The allowable credit is the lesser of the total tentative credits or the credit based on the 5.4 percent rate.

The court agreed with the taxpayer that the actual SUI credit, based on the IRS's increased wage base, was $131 million. The taxpayer had claimed $119 million on its FUTA return. Therefore, the taxpayer was entitled to an additional credit of $12.3 million, and the IRS's asserted deficiency was reduced $12.3 million, to $31.3 million.

References: FED ¶(to be reported); TRC PAYROLL: 9,104.

No Nominees On EIN Applications, IRS Warns

The IRS recently reminded taxpayers that it will not accept nominees being listed as principal officers, general partners, grantors, owners, and trustors in the Employer Identification Number (EIN) application process. Taxpayers that have submitted the names of nominees on their EIN applications should provide the IRS with the correct information by letter, the agency advised on its web site.

Nominees, the IRS explained, are temporarily authorized to act on behalf of entities during the formation process. However, EIN applications require that taxpayers disclose the name and Taxpayer Identification Number (TIN) of the true principal officer, general partner, grantor, owner or trustor. This individual or entity, which the IRS refers to as the "responsible party," controls, manages or directs the applicant entity and the disposition of its funds and assets.

The IRS instructed taxpayers to send a letter providing the name and TIN of the correct responsible party. Taxpayers should not submit a second EIN application, the IRS noted. The IRS will confirm receipt of the updated information.

www.irs.gov, TRC FILEBUS: 12,106.

Fifth Circuit Upholds IRS's Substance-Over-Form Attack On Intermediary Transaction Shelter

◆ *Enbridge Energy Company, CA-5, November 15, 2009*

The U.S. Court of Appeals for the Fifth Circuit recently upheld a major decision applying the substance-over-form doctrine to an intermediary tax shelter scheme (often referred to as a "midco" transaction). The court found that the transaction was designed solely for the purpose of avoiding taxes and presented no non-tax business purpose. The court also upheld the imposition of a 20 percent penalty on the taxpayer due to underpayment of taxes.

■ ***Comment.*** Intermediary transactions have been designated by the IRS as "listed transactions." Notice 2008-20 defined the key components of an intermediary tax shelter.

Midco transaction

The taxpayer at issue sought to purchase the assets of a competing owner and operator of natural gas pipelines. However, the competitor wished to engage in a direct stock sale. To settle this disagreement, an investment bank engaged by the parties created a shell corporation to obtain a loan secured by the taxpayer and purchase the target's stock. The taxpayer then purchased the target corporation's assets from the shell corporation. As a result of using the intermediary shell corporation, the taxpayer claimed a cost-basis in the target assets and claimed large deductions based on depreciation of those amounts. The IRS disallowed the deductions claimed by the taxpayer resulting in a $5.4 million tax liability. A federal district court upheld the liability, ruling that the transaction was a midco transaction, the abusive tax shelter described in Notice 2001-16.

Appellate analysis

The Fifth Circuit agreed with the IRS, as well as the lower court, and applied the substance over form doctrine to the taxpayer's transaction. "The uncontroverted evidence supports the district court's conclusion that this was a sham conduit transaction, and that [the taxpayer] is not entitled to claim a stepped-up basis for assets it purchased," the court held. While the taxpayer obtained the services of a bank to facilitate the transaction, the bank formed a special purpose vehicle to actually buy the target stock and sell the assets to the taxpayer. The court held that the special purpose vehicle was "merely an intermediary without a bona fide role in the transaction." The court also rejected all three purported business reasons asserted by the taxpayer for using the midco transaction rather than a direct purchase of the assets.

References: FED ¶(to be reported); TRC SALES: 3,150.

AFRs Issued For December

Rev. Rul. 2009-38

The IRS has released the short-term, mid-term, and long-term applicable interest rates for December 2009.

Applicable Federal Rates (AFR) for December 2009

Period for Compounding				
Short-Term	**Annual**	**Semiannual**	**Quarterly**	**Monthly**
AFR	0.69%	0.69%	0.69%	0.69%
110% AFR	0.76%	0.76%	0.76%	0.76%
120% AFR	0.83%	0.83%	0.83%	0.83%
130% AFR	0.90%	0.90%	0.90%	0.90%
Mid-Term				
AFR	2.64%	2.62%	2.61%	2.61%
110% AFR	2.90%	2.88%	2.87%	2.86%
120% AFR	3.16%	3.14%	3.13%	3.12%
130% AFR	3.44%	3.41%	3.40%	3.39%
150% AFR	3.97%	3.93%	3.91%	3.90%
175% AFR	4.64%	4.59%	4.56%	4.55%
Long-Term				
AFR	4.17%	4.13%	4.11%	4.09%
110% AFR	4.59%	4.54%	4.51%	4.50%
120% AFR	5.02%	4.96%	4.93%	4.91%
130% AFR	5.44%	5.37%	5.33%	5.31%

Adjusted AFRs for December 2009

Period for Compounding	Annual	Semiannual	Quarterly	Monthly
Short-term adjusted AFR	0.86%	0.86%	0.86%	0.86%
Mid-term adjusted AFR	2.25%	2.24%	2.23%	2.23%
Long-term adjusted AFR	4.14%	4.10%	4.08%	4.07%

The Code Sec. 382 adjusted federal long-term rate is 4.14%; 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 4.16%; the Code Sec. 42(b)(2) appropriate percentages for the 70% and 30% present value low-income housing credit are 7.79% and 3.34%, 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%; and the Code Sec. 7520 AFR for determining the present value of an annuity, an interest for life or a term of years, or a remainder or reversionary interest is 3.2%.

References: FED ¶(to be reported); TRC ACCTNG: 36,162.05.

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International

The Treasury Department has published a current list of countries that may require participation in, or cooperation with, an international boycott.

Boycott Notice, FED ¶46,525; TRC INTL: 21,050; TRC INTL: 21,050.

Jurisdiction

The Tax Court had no jurisdiction to review an individual taxpayer's petition challenging the IRS's denial of her innocent spouse relief request where the petition was filed more than 90 days after the final notice of determination was mailed.

Gormeley, TC, CCH Dec. 57,983(M), FED ¶48,210(M); TRC INDIV: 18,052.20.

Tax Crimes

An individual convicted of attempting to evade his individual income taxes was not entitled to a judgment of acquittal or a new trial. The government properly utilized the net worth and expenditures method to prove his tax evasion.

Fox, DC N.J., 2009-2 USTC ¶50,724; TRC IRS: 66,106.05.

Summons

An IRS third-party summons issued to the founder and equity partner of a law firm in furtherance of the IRS's investigation into the suspected promotion of abusive tax shelters by one of the firm's employees was ordered enforced. The IRS' investigation satisfied the good-faith test under *Powell*, which the attorney failed to rebut, and the attorney could not claim a blanket attorney-client privilege with respect to the documents requested.

Bernhoft, DC Wis., 2009-2 USTC ¶50,730; TRC IRS: 21,304.

Income

A rug dealer, who operated his business as a wholly owned C corporation in some years and as a single-member limited liability company (LLC) in other years, had unreported constructive dividend income, unreported officer's compensation from the corporation, and additional income from the LLC, and the corporation had unreported gross receipts. Checks made payable to the corporation that were deposited in his personal accounts were constructive dividends; he offered insufficient evidence to refute this determination.

Enayat, TC, CCH Dec. 57,988(M), FED ¶48,215(M); TRC INDIV: 6,050.

FOIA

A corporation was denied access to a majority of requested government documents related to the release of a revenue ruling due to the deliberative process privilege. The privilege applied because of the potential chilling effect such a release would have on frank communication between policymakers.

General Motors Corp., DC Mich., 2009-2 USTC ¶50,726; TRC LITIG: 9,156.10.

Statute of Limitations

A final partnership administrative adjustment (FPAA) issued to a partner of a defunct partnership was timely despite the expiration of the statutory limitation period for assessment for the partner as an individual because the partner had agreed to extend the assessment period.

LVI Investors, LLC, TC, CCH Dec. 57,985(M), FED ¶48,212(M); TRC PART: 60,350.

Motions to Vacate

An individual did not demonstrate any unusual circumstances or substantial error of fact or law that would justify vacating a prior decision. The individual was a victim of an investment scheme but was not entitled to a theft-loss deduction due

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Request For Certification Insufficient To Claim WOTC, Claims Court Finds

Employees must be certified by state or local agencies that they are members of targeted groups for employers to claim the Work Opportunity Tax Credit, the Federal Claims Court has held. Individuals are not automatically members of a targeted group when an employer requests certification.

- ***CCH Take Away.*** *The American Recovery and Reinvestment Act of 2009 (2009 Recovery Act)* added two new targeted groups to the WOTC: disconnected youth and unemployed veterans. Transition relief expired on October 17, 2009 for securing certification for unemployed veterans and disconnected youth who began work on or after January 1, 2009 and before September 17, 2009.

Between 1998 and 2001, the taxpayer hired individuals who it believed qualified for the WOTC. The taxpayer did not investigate the individuals' eligibility but relied on information provided by the individuals. The taxpayer subsequently requested that state and local agencies certify the individuals as members of targeted groups. State and local agencies reviewed and denied approximately 3,000 requests for certification from the taxpayer.

- ***Comment.*** The individuals merely checked a box on a form provided by the taxpayer to describe their status.

In 2005, the taxpayer filed suit for a refund. The taxpayer argued that the mere request for certification is sufficient to claim the WOTC. The court disagreed.

The court found that Congress intended state or local agencies to certify an individual's eligibility for the WOTC. Under the statute, a member of a targeted group is an individual who is certified by the designated agency. The frequent references to the certification requirement in the statute were evidence of Congressional intent, the court concluded.

Manor Care, Inc., 2009-2 USTC ¶50,725; TRC BUSEXP: 54,262.

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to remaining prospects of recovery and a question over restitution payments.

Vincentini, TC, CCH Dec. 57,986(M), FED ¶48,213(M); TRC INDIV: 54,256.

Liens and Levies

Federal tax liens assessed against a debtor's spouse and recorded against real property solely owned by the debtor were invalid. The government failed to prove that the debtor and two trusts held title to the property as nominees or alter egos of the non-debtor spouse.

In re Callahan, BC-DC Mass., 2009-2 USTC ¶50,735; TRC IRS: 48,106.10.

An LLC's priority lien did not merge with the fee title when it acquired real properties pursuant to a nonjudicial foreclosure, and junior federal tax liens were not elevated to priority status. Furthermore, the LLC's technical noncompliance with the notice requirements of Code Sec. 7425 was insufficient to elevate the subordinate tax liens to priority status.

Mountaineer Investments, L.L.C., DC Miss., 2009-2 USTC ¶50,732; TRC IRS: 45,166.

An IRS settlement officer did not abuse her discretion in rejecting a taxpayer's offer-in-compromise and upholding the filing of a federal tax lien against the taxpayer's home after he defaulted on an installment payment agreement. The IRS may withdraw a tax lien but failure to withdraw a lien is not an abuse of discretion.

Stinchcomb, TC, CCH Dec. 57,990(M), FED ¶48,217(M); TRC IRS: 51.056.

Injunctions

A preliminary injunction requiring compliance with pre-existing tax obligations was issued against a corporation and its president under Code Sec. 7402. Issuance of the injunction did not require establishment of the traditional equitable prerequisites because the injunction derived from the court's statutory authority, not its equitable powers.

Dykeman Family Corporation, DC Wis., 2009-2 USTC ¶50,733; TRC LITIG: 9,256.

Collection Due Process

The Tax Court properly dismissed an individual's petition appealing a Collection Due Process (CDP) determination. The taxpayer failed to comply with the court's standing pretrial order and failed to appear for trial.

Key, CA-4, 2009-2 USTC ¶50,736; TRC LITIG: 6,456.15.

The conduct of an individual's Collection Due Process (CDP) hearing and review of his offer-in-compromise by the same IRS officer was not improper. The settlement officer did not abuse his discretion by rejecting an individual's offer-in-compromise because the individual had not timely filed his tax return at the time of the offer.

Hartmann, CA-3, 2009-2 USTC ¶50,734; TRC IRS: 42,120.

An IRS Appeals officer did not abuse his discretion by denying a face-to-face conference and sustaining the filing of a federal tax lien. The taxpayer failed to call in to the scheduled telephone conference, did not provide his financial information, or a valid tax return for a recent tax year.

Granger, TC, CCH Dec. 57,989(M), FED ¶48,216(M); TRC IRS: 48,058.15.

Tax Assessments

The government's complaint seeking to reduce to judgment an individual's unpaid federal tax liabilities was properly filed within the 10-year limitations period from the date of the first assessment as reflected in the Certificates of Assessments and Payments. The IRS's filing of a substitute return on behalf of the individual did not start the limitations period on assessment and collection.

Tanchak, CA-3, 2009-2 USTC ¶50,728; TRC IRS: 27,200.

Deficiencies and Penalties

Abatement of all interest relating to an individual's federal income tax deficiencies was not appropriate since the IRS did not commit a ministerial error or delay where the underlying decision did not mention statutory interest. Code Sec. 6404(a) did not apply act since the interest related to the assessment of income tax.

Kersh, TC, CCH Dec. 57,992(M), FED ¶48,219(M); TRC PENALTY: 9,050.

The public protection clause of the Paperwork Reduction Act (PRA) of 1995 did not relieve a married couple of their obligation to pay accrued interest and penalties on their overdue tax returns.

Willis, CA-5, 2009-2 USTC ¶50,729; TRC FILEIND: 15,208.

A bankruptcy court properly found that a corporation's director, shareholder and secretary-treasurer was a responsible person liable for the trust fund penalty. The individual had effective control over the corporation's financial affairs and her failure to pay over the taxes was willful.

Noronha, CA-6, 2009-2 USTC ¶50,727; TRC PAYROLL: 6,306.05.

A married couple who agreed to immediate assessment and collection of any increase in tax and penalties by signing a Form 4549, Income Tax Examination Changes, could not later contest that deficiency in the Tax Court.

Ulrich, CA-9, 2009-2 USTC ¶50,723; TRC IRS: 27,208.

Fees and Costs

An individual could not seek damages and attorney's fees for allegedly improper collection action by the IRS under Code Sec. 6335 because that provision applies only to administrative levies under Code Sec. 6331. The seizure of the individual's real property was not an administrative seizure, but pursuant to a court-ordered foreclosure and sale.

Maassen, DC Iowa, 2009-2 USTC ¶50,731; TRC IRS: 51,202.05.

Despite the ultimate finding in an earlier decision that the taxpayer was entitled to equitable relief as an innocent spouse, the IRS's position in the administrative and litigation proceedings that relief was substantially justified based on her participation in an effort to make herself and her husband collection proof.

Wiener, TC, CCH Dec. 57,987(M), FED ¶48,214(M); TRC LITIG: 3,154.102.

Tax Exempt Status

An association was denied status as a tax-exempt organization under Code Sec. 501(c)(3) because it did not offer sufficient evidence that it would operate exclusively for exempt purposes and that no part of the net earnings would inure to the benefit of a private shareholder or individual.

Ohio Disability Association, TC, CCH Dec.57,993(M), FED ¶48,220; TRC EXEMPT: 12,050.