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STANDARD FEDERAL TAX REPORTS Taxes on Parade

INSIDE THIS ISSUE

IRS Speeds Assistance To Hurricane Victims; National Disaster Tax Relief Bill Introduced

IR-2017-143, 145, 149, 150, Notice 2017-47, FS-2017-11, VI-2017-01

As taxpayers recover from Hurricanes Harvey and Irma, the IRS continues to announce special relief measures. The agency also provided guidance to encourage leave donations, and posted tips about safeguarding business and personal tax and financial records. In Congress, a national disaster tax relief bill has been introduced. Disaster-related tax relief measures could be taken up in coming weeks.

- ***Take Away.*** At press time, the federal government has designated disaster areas related to Hurricane Irma. "Normally, taxpayers can claim a disaster loss in the year the loss occurred but Code Sec 165(i) allows an election for the preceding year if you live in a federally-declared disaster area," Jacob Oksman, Fox Rothschild LLP, New York, told Wolters Kluwer. This allows taxpayers to get an immediate refund, instead of having to wait until they file their return for the year of the loss.

Disaster relief

President Trump signed a Hurricane Harvey disaster relief bill (HR 601) on September 8. The measure does not include tax-related disaster relief measures, similar to ones passed after Hurricane Katrina. However, Rep. Kevin Brady, R-Texas, has indicated that some tax-related relief provisions may be taken up by Congress.

On September 5, Rep. Tom Reed, R-New York and Rep. Bill Pascrell, D-New Jersey introduced the bipartisan National Disaster Tax Relief Act of 2017 (HR 3679). The bill has been referred to the House Ways and Means Committee. The bill provides tax relief for major disasters, including some permanent tax disaster relief measures. The permanent proposals include a wage credit for specified disaster-damaged businesses, an enhanced medical expense deduction for qualified individuals, and other business and individual tax breaks.

Hurricane Irma

On September 8 and 12, the IRS announced disaster relief related to Hurricane Irma. Victims of Hurricane Irma in parts of Florida, Puerto Rico and the U.S. Virgin Islands may qualify for tax relief, including the postponement of certain deadlines before January 31, 2018.

The IRS also announced that it will not impose a penalty when dyed diesel fuel is sold for use or used on a highway in Florida as a result of Hurricane Irma. This relief is effective as of September 6, 2017 and runs through September 22, 2017, the agency explained.

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Disaster Relief

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- ***Comment.*** On September 11, Sen. Marco Rubio, R-Florida, wrote to IRS Commissioner John Koskinen about Hurricane Irma. "Hurricane Irma has forced many businesses to close their doors and devote significant resources to the rapid recovery of their buildings, equipment, and safety of their employees. In order to allow these businesses to continue to put safety and rebuilding efforts first, I ask that you extend the filing deadline for calendar year partnerships to January 31, 2018," Rubio wrote. Rubio also asked the IRS to assist taxpayers who had opened their homes to individuals displaced by the hurricane.

Leave donation programs

Leave donation programs allow employees to elect to forgo vacation, sick or personnel leave in exchange for cash payments an employer makes to a qualified charitable organization. The IRS explained that it will not assert that these cash payments, made to charitable organizations assisting Hurricane Harvey victims, are gross income or wages to the employee. The IRS will also not assert that an employer is permitted to deduct these cash payments exclusively under the rules of Code Sec. 170 rather than the rules of Code Sec. 162. The cash payments must be made before January 1, 2019.

- ***Comment.*** Employees who make a donation of leave cannot claim a charitable deduction.

Safeguarding records

Taxpayers can help themselves by keeping a duplicate set of key paper documents, including tax returns, financial statements, and insurance policies in a safe place. Paper documents should also be scanned into an electronic format. Electronic documents can easily be stored online.

Taxpayers may obtain back copies of previously-filed returns by filing Form 4506, Request for Copy of Tax Return. Taxpayers can also obtain transcripts, which show most line items in returns, through the agency's online tool, Get Transcript, filing Form 4506T-EZ, Short Form Request for Individual Tax Return Transcript, or Form 4506-T, Request for Transcript of Tax Return, or calling the IRS.

- ***Comment.*** The IRS instructed taxpayers to write the appropriate disaster designation, such as "Hurricane Harvey," or "Hurricane Irma" in red letters across the top of paper Forms 4506-T and 4506 to expedite processing and to waive the user fee.

The IRS also recommended that taxpayers photograph or videotape the contents of their primary residences, vacation homes and other locations where valuables may be located. Photographs and videos may help a taxpayer show the fair market value of valuables for insurance and casualty loss claims, the IRS explained.

FBAR filings

The *Surface Transportation and Veterans Health Care Choice Improvement Act of 2015* (2015 Transportation Act) provided for a new annual due date of April 15 for filing Reports of Foreign Bank and Financial Accounts (FBAR). The 2015 Transportation Act also provided a maximum six-month extension of the filing deadline. To implement the statute with minimal burden on filers, the Treasury Department's Financial Crimes Enforcement Network (FinCEN) previously announced that it would grant filers an automatic extension to October 15 each year.

On September 7, FinCEN announced that extension filers affected by Hurricane Harvey have until January 31, 2018 to file. FinCEN added that it will work with any FBAR filer who lives outside the Hurricane Harvey disaster area but whose records required to meet the deadline are located in the disaster area regardless of where the filer resides.

Form 5500

Administrators and sponsors of employee benefit plans subject to ERISA must file information about each plan every year on Form 5500, Annual Return/Report of Employee Benefit Plan. Form 5500 (along with all required schedules, statements, and attachments) is due by the last day of the seventh calendar month after the end of the plan year; that is July 31 for a calendar year plan, unless Form 5558, Application for Extension of Time to File Certain Employee Plan Returns was filed on or before the normal due date, exclusive of any extensions. A timely filed Form 5558 will extend the Form 5500 filing due date by 2 ½ months.

Now, the IRS has announced relief for qualified filers of Form 5500 affected by Hurricane Harvey. The deadline for these filers has been extended to January 1, 2018 for Forms 5500 with an original due date, or original due date with extensions, that occur between August 23, 2017 and January 31, 2018. The IRS also provided relief for Form 5500 filers in the U.S. Virgin Islands affected by Hurricane Irma.

- ***Comment.*** Along with the IRS, the U.S. Department of Labor (DOL) and the Pension Benefit Guaranty Corporation (PBGC) have also announced temporary wavers of certain requirements and deadlines related to retirement and health insurance plans for employers, employees and others who may have trouble meeting them due to the hurricanes.
- ***Comment.*** The IRS has a special telephone number to assist taxpayers in federally-declared disaster areas. The number is 1-866-562-5227.

Reference: TRC INDIV: 27,208.

REFERENCE KEY

FED references are to ***Standard Federal Tax Reporter***
USTC references are to ***U.S. Tax Cases***
Dec references are to ***Tax Court Reports***
TRC references are to ***Tax Research Consultant***

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IRS Announces Safe Harbor For Inadvertent Normalization Violations By Utilities

Rev. Proc. 2017-47

Utilities that inadvertently violate investment tax credit (ITC) and MACRS normalization rules may be eligible for a new safe harbor, the IRS has announced. Rev. Proc. 2017-47 applies to a taxpayer that changes its inconsistent practice or procedure to a consistent practice or procedure at the next available opportunity, which reverses the effect of the inconsistent practice.

- ***Take Away.*** The safe harbor is effective for tax years ending on or after December 31, 2016. However, the IRS will not challenge an inadvertent or inconsistent practice or procedure in an earlier tax year if the safe harbor requirements are satisfied in that tax year.

Background

Code Sec. 168(f)(2) provides that the depreciation deduction determined under section 168 does not apply to any public utility property does not use a normalization method of accounting. Utilities use normalization to reconcile the tax treatment of the ITC or accelerated depreciation of public utility assets with their regulatory treatment, the IRS explained. The taxpayer receives the benefit of the ITC accelerated depreciation in the early years of an asset's regulatory useful life. The taxpayer passes on the benefit to customers ratably over the regulatory useful life in the form of reduced rates.

Certain actions may inadvertently violate the normalization rules, the IRS explained. The taxpayer generally must change to a practice or procedure consistent with the normalization rules.

- ***Comment.*** The IRS used the example of a determination to reduce the taxpayer's cost of service by more than a ratable portion of the ITC would be an inconsistent determination.

Rev. Proc. 2017-47

Under Rev. Proc. 2017-42, the taxpayer generally must change its inconsistent practice or procedure to a consistent practice at the next available opportunity. The IRS explained that in the case of a taxpayer without a rate proceeding pending before the taxpayer's regulator, next available opportunity means the next rate proceeding. In the case of a taxpayer with a rate proceeding currently pending before the taxpayer's regulator, the next available opportunity means the currently pending proceeding, subject to certain activities.

Under the safe harbor, the IRS will not assert that a taxpayer's inconsistent practice or procedure violates the benefits of the ITC and/or accelerated depreciation. The taxpayer must alert the IRS that it has taken action under Rev. Proc. 2017-47 to change to a consistent practice or procedure at the net available opportunity.

References: FED ¶46,367; TRC DEPR: 6,154.

IRS Updates Roster Of CbC Jurisdictions

www.irs.gov

The IRS has updated its roster of jurisdictions with which the U.S. has signed a competent authority agreement (CAA) to implement country-by-country reporting. The updated roster reflects signed CAAs and CAAs in negotiation.

- ***Take Away.*** "A CAA generally must be in force with a foreign jurisdiction for CbC reports filed with the IRS by a U.S. MNE to satisfy the CbC reporting requirements under foreign law. This has raised concerns about the pace at which the IRS has concluded CAA negotiations with foreign jurisdictions," Michael Chittenden, Counsel, Miller & Chevalier Chartered, told Wolters Kluwer. "Many foreign jurisdictions that have adopted CbC reporting requirements under the OECD's BEPS Action 13 have done so with respect to reporting years beginning on or after January 1, 2016. Most of those countries have signed a multilateral CAA, but the United States has chosen instead to pursue bilateral CAAs with each foreign jurisdiction, likely due to U.S. concerns regarding the use of the information contained in the CbC reports and potential public disclosure of the information."

Background

CbC reporting is an outgrowth of the Organisation for Economic Co-operation and Development's (OECD) Base Erosion and Profit Shifting (BEPS) initiative. Parent entities of U.S. multinational enterprise (MNE) groups with $850 million or more of revenue in a previous annual reporting period will file Form 8975, Country-by-Country Report. The CbC report will be exchanged under bilateral CAAs between the U.S. and foreign jurisdictions.

Signed CAAs

The IRS reported that the U.S. has signed CAAs with Australia, Belgium, Brazil, Canada, Denmark, Estonia, Guernsey, Iceland, Ireland, Isle of Man, Italy, Jersey, Malta, Netherlands, New Zealand, Norway, Slovakia, South Africa, South Korea, and United Kingdom.

Negotiations

The U.S. is in negotiations with Colombia, Czech Republic, Finland, France, Germany, Hungary, India, Israel, Jamaica, Latvia, Liechtenstein, Lithuania, Luxembourg, Mauritius, Mexico, Poland, Portugal, Slovenia, Spain, and Sweden, the IRS reported. The IRS cautioned that taxpayers cannot be assured that negotiations will be concluded by the end of 2017.

Reference: TRC INTL: 18,150.

Chief Counsel Describes Payroll Credit For Increasing Research Expenses

AM-2017-003

IRS Chief Counsel, in generic legal advice, has described when a qualified employer may take into account the payroll tax credit for increasing research activities. The *Protecting Americans from Tax Hikes Act of 2015* (PATH Act) created the payroll credit aimed at start-ups with little or no income tax liabilities.

- ***Take Away.*** "The guidance is welcome news for taxpayers that can get the cash benefit of the payroll tax credit sooner as they reduce their payroll tax liability as payroll payments are made, instead of having to wait until the end of the quarter to receive the credit," Joe Stoddard, CPA, Partner, Eide Bailly LLP, National Tax Office, told Wolters Kluwer. "Many payroll companies have been struggling with the mechanics of how to apply the research credit to payroll taxes. The IRS memo should help further alleviate the challenges the payroll companies have been experiencing as they navigate the rules around this new provision and modify their systems to allow them to properly apply the credits."

Background

A qualified business during a tax year may elect to apply a portion of its research credit against the 6.2 percent payroll tax imposed on the employer's wage payments to employees. This payroll credit for research expenditures is limited to the lesser of: (a) the research credit for the tax year; (b) $250,000; or (c) the amount of the business credit for the tax year, including the research credit that may be carried forward to the tax year immediately after the election year.

Schedule B

Chief Counsel explained that if an employer is a semiweekly schedule depositor, it must complete Schedule B (Form 941), Report of Tax Liability for Semiweekly Schedule Depositors, and attach it to Form 941. Schedule B is also referred to as Record of Federal Tax Liability (ROFTL) for semiweekly schedule depositors. The IRS uses this information to determine if the employer made its federal employment tax deposits on time. Current Instructions for Schedule B describe the payroll tax credit.

Payroll credit

Employers, Chief Counsel explained, know the maximum amount of payroll tax credit potentially available for a quarter at the beginning of the quarter. This is because the return reflecting the payroll tax credit election on Form 6765, Credit for Increasing Research Activities, must have been filed before the quarter begins in which the employer can claim credit. However, the amount of the credit that is allowed for the quarter is limited to the employer Social Security tax on wages paid to the employer's employees during the quarter. Therefore, as the employer makes payments of wages from the beginning of the quarter for which the payroll tax credit is taken, the employer can take the payroll tax credit into account for purposes of the Schedule B and for purposes of deposit liability on the Form 941 or other employment tax return, provided the employer later files Form 8974, "Qualified Small Business Payroll Tax Credit for Increasing Research Activities," Chief Counsel explained.

Chief Counsel further explained that the payroll tax credit should be taken against deposit liabilities and reflected on Schedule B as the employer incurs liability for employer Social Security tax on wages paid in the quarter to which it applies, beginning with the first payment of wages in the quarter. "It would be counter to the purpose of the payroll tax credit to allow it as a credit only when the employer files its Form 941 for the quarter claiming the credit and not as the employer is paying wages during the quarter subject to employer Social Security tax," Chief Counsel stated.

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IRS Appeals Decision Striking Down PTIN Fees

The IRS has asked the Court of Appeals for the District of Columbia Circuit to reverse a lower court's ruling that the agency cannot charge fees for preparer tax identification numbers (PTINs) (*Steele, 2017-1* USTC *¶50,238*). The lower court upheld the PTIN requirement but struck down the fees.

Background. Individuals who are compensated for preparing, or assisting in the preparation of all or substantially all of any U.S. federal tax return, claim for refund, or other tax form submitted to the IRS, generally must obtain a PTIN. There are exceptions for preparers of certain forms and returns, including the Form W-2 series; Form W-7, Application for IRS Individual Taxpayer Identification Number; Form W-8BEN, Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding; Form 1098 series; and Form 1099 series.

Litigation. The preparers in *Steele* challenged the PTIN requirement. A federal district court found that the IRS may require the use of PTINs but enjoined the IRS from charging a user fee to issue or renew PTINs. According to the district court, the IRS may not charge fees for PTINs because this would be equivalent to imposing a regulatory licensing scheme and the IRS does not have this regulatory authority, the court held.

Appeal. Now, the IRS has appealed the district court's decision. The appeal was filed on September 6, 2017.

Notice of Appeal, Steele; TRC IRS: 6,106.05.

Audit Focused On Compensation, Not Worker Classification, Chief Counsel Determines

CCA 201735021

IRS Chief Counsel has determined that an IRS employment tax audit was not a worker classification audit. The focus of the audit was on compensation paid to a corporate officer and not whether the officer was an employee.

- ***Take Away.*** In this case, employment taxes were withheld on wages received by the corporate officer. However, the officer also received distributions, which the IRS sought to recharacterize as wages.

Background

A business entered into an agreement with a professional employer organization (PEO). Generally, the PEO took care of payroll, human resource activities and certain insurance functions. The PEO also filed all employment tax returns.

- ***Comment.*** The PEO's duties were limited to only those wages that were reported and verified by the taxpayer to the PEO for each pay period.

A, who served as a corporate officer, received wage payments through the PEO. These were reported on Form W-2, Wage and Tax Statement, issued by the PEO, under the PEO's EIN, and included on Forms 940 and 941 filed under the PEO's EIN. A also received distributions directly from the business reported on a Schedule K-1 (Form 1120S), Shareholder's Share of Income, Deductions, Credits, etc., issued under the taxpayer's EIN. The distributions were not reported by the busines to the PEO as wages so they were not included on the employment tax returns filed under the PEO EIN.

Eventually, the business no longer worked with the PEO. A received wages and a Form W-2 from the taxpayer. A also received distributions from the business, reported on Schedule K-1.

At some point, the IRS initiated an audit of the business. The IRS determined that the wages reported for A were unreasonably low. The IRS proposed to recharacterize the distributions received by A as wages.

Chief Counsel's analysis

Chief Counsel first explained that an employer-employee relationship must exist for employment taxes to apply. An officer who performs more than minor services and receives remuneration for his or her services is a considered an employee.

"When an employer has provided additional compensation to an employee, but has not subjected that compensation to withholding because it believes an exception from the definition of 'wages' or of 'employment' applies, the IRS will assess employment taxes under Code section 6201 against the portion of the payment that is being recharacterized as wages," Chief Counsel explained. "In contrast, a worker classification issue arises when a service recipient (employer) has classified an individual performing service as an independent contractor (or some other non-employee designation) and has not withheld employment taxes from compensation paid to the individual," Chief Counsel added.

Here, Chief Counsel determined that the business and the IRS did not dispute that A was an employee. A performed more than minor services for the business and had received compensation. The business treated A as an employee, Chief Counsel determined, as shown by the issuance of Forms W-2. Chief Counsel concluded that the IRS's audit was not worker classification.

Chief Counsel added that the use of a PEO did not affect its conclusion. "The dispute is not whether the corporate officer performed more than minor services for the taxpayer and received compensation for those services, that is, whether the corporate officer was an employee. Rather, the dispute is limited to the amount of compensation required to be treated as 'wages' paid to the corporate officer, including distributions paid directly by the taxpayer that did not flow through the PEO, for employment tax purposes, that is, whether the additional payments constitute wages, rather than distributions."

Reference: TRC COMPEN: 3,000.

Payroll Credit

Continued from page 4

- ***Comment.*** "The IRS recently released separate rules allowing for start-up companies to make the payroll tax credit election on an amended return for the 2016 tax year (as long as the amended return is filed by December 31, 2017, leading to a likely influx of research credit payroll tax elections as we near the end of 2017 and amplifying the importance of this additional guidance on the mechanics of the credit," Stoddard noted.

Reference: TRC BUSEXP: 51,184.

Over- And Underpayment Interest Rates Remain Same For Fourth Quarter 2017

The IRS has announced that the interest rates on overpayments and underpayments of tax for the calendar quarter beginning October 1, 2017, will remain unchanged. The rates will be:

- 4 percent for overpayments, other than corporations;
- 3 percent for overpayments by corporations (except 1.5 percent of the portion of a corporate overpayment exceeding $10,000);
- 4 percent for underpayments (except large corporations); and
- 6 percent for large corporate underpayments.

IR-2017-147, Rev. Rul. 2017-18; TRC PENALTY: 9,152.

IRS Reports Uptick In Contributions Of Easements, Noncash Contributions

Statistics of Income (SOI) Bulletin, Summer 2017

Contributions of easements grew significantly from 2013 to 2014, the IRS has reported. The agency also reported increases in many types of noncash charitable contributions for 2014, the most recent year for which statistics are available.

- ***Take Away.*** Several easement disputes have gone before appellate courts and the Tax Court this year. In August, the Fifth Circuit found in *BC Ranch II, L.P., 2017-2* USTC *¶50,306,* that a homesite adjustment provision did not prevent a conservation easement from satisfying the perpetuity requirement of Code Sec. 170(h)(2)(C) (*see the August 24, 2017 issue of this newsletter for details*). In June, the Tax Court held in *Ten Twenty Six Investors, Dec. 60,937(M),* that failure to record a conservation easement deed precluded a conservation easement deduction (*see the June 29, 2017 issue of this newsletter for details*).

Easements and other noncash contributions

The IRS reported an increase in noncash charitable donations. The number of returns with Form 8283, Noncash Charitable Contributions, attached rose 3.9 percent from 2013 to 2014. Taxpayers file Form 8283 when the amount of deductions for all noncash donations on Schedule A, Itemized Deductions, exceeds $500.

- ***Comment.*** The number of individual returns filed with Form 8283 increased from 7.7 million for 2013 to 8.0 million for 2014, the agency reported.

The IRS described some of the types of noncash donations. Easements increased from $1.1 billion in 2013 to $3.2 billion in 2014, reflecting an increase of 194.9 percent, the agency explained. Corporate stock donations increased 48.0 percent from $19.7 billion for 2013 to $29.2 billion for 2014. Donations of corporate stock have consistently represented the highest amounts of donations, the agency noted.

- ***Comment.*** Organizations that received noncash charitable contributions included, among others, arts groups, educational institutions, environment- and animal-related organizations, health and medical research organizations, religious organizations, and public and societal benefit organizations.

Higher-income taxpayers

Also for 2014, the IRS reported there were more than 6.2 million individual income tax returns with an AGI of at least $200,000. Some 6.3 million returns had an expanded income of $200,000 or more.

- *Reference: TRC IRS: 12,350.*

District Court Nixes Summons For Taxpayer-Attorney Emails; No Waiver Of Privilege

Owensboro Dermatology Assocs., DC-Ky., September 1, 2017

A federal district court has upheld a magistrate's decision not to enforce an IRS summons seeking mails between taxpayers and their legal counsel. The court rejected the government's argument that the taxpayers had waived their attorney-client privilege.

- ***Take Away.*** According to the government, the taxpayers had waived their attorney-client privilege by filing a petition in the Tax Court. "The taxpayers placed their attorney-client communications at issue in that case by asserting in their petition that they relied solely on the advice of counsel for all positions taken on the income tax returns for the 2012, 2013 and 2014 tax years."

Background

Two physicians formed a partnership to offer medical services. The individuals also formed a captive insurance company, which provided property and casualty insurance to the medical practice. This entity was subsequently dissolved and the physicians organized their own individual captive insurance companies,

During its examination, the IRS requested certain documents, including emails between the taxpayers and their attorneys. The taxpayers objected to turning over the emails and the IRS moved a federal district court to force them to comply. The taxpayers also filed suit in the Tax Court. The federal magistrate denied the government's motion.

Court's analysis

The district court found that the magistrate had relied on the Tax Court's decision in *Ad Investment 2000 Fund LLC, Dec. 59,880 (2014).* The Tax Court had explained in *Ad Investment* that if the taxpayers persist in their reasonable cause defense, it would be unfair to deprive respondent of knowledge of the contents of the opinions and the opportunity to put those opinions into evidence. "However, the assertion of the reasonable cause defense in a pleading does not lead to the automatic disclosure of privileged documents. It merely gives the IRS grounds to compel the production of documents subject to the attorney-client privilege."

Here, the district court found that the only proceeding where the taxpayers "arguably put communications at issue" was the litigation before the Tax Court. Therefore, the court held that the arguments by the government would be best presented to the Tax Court, "which possesses the power to compel disclosure if it determines that the privilege has been waived and disclosure is the necessary remedy." The district court upheld the magistrate's decision.

Reference: TRC IRS: 21,402.

Investment Advisor's Payment To Facilitate Merger Was Deductible Expense

LTR 201736002

The IRS has privately ruled that a "Support Payment" made by an LLC investment advisor to the shareholders of Target Corp. was a deductible Code Sec. 162 business expense that was not required to be capitalized under Code Sec. 263. The taxpayer correctly characterized the payments as a financial inducement commonly used to attract and retain investors.

- ***Take Away.*** Mergers and acquisitions are frequently a multi-party effort in which a variety of tax results can occur, depending upon each party's financial position. The latest letter ruling involved an investment advisory firm that had deep enough pockets to try to move target corporation shareholders into selling without any assurance that the deal would close. The IRS found that those expenses were immediately deductible.

Background

Taxpayer, an LLC, serves as an investment adviser to Acquirer. Under an investment management agreement (IMA), Acquirer agreed to pay Taxpayer a base fee based on Acquirer's total assets and an additional fee based on net investment income of realized capital gains.

Acquirer entered into a merger agreement to acquire Target, subject to the approval of Target's shareholders. In addition to payments per share from Acquirer and Target, Target's shareholders will receive a payment per share directly from Taxpayer (totaling the Support Payment) to approve the merger with Acquirer. As a result of the merger, Taxpayer expects that its future fees under the IMA will increase because of Acquirer's increase in asset size.

IRS analysis

Code Sec. 162. Taxpayer represents that the Support Payment is usual in its industry as investment advisors commonly provide financial inducements for the ordinary business reason of attracting and retaining investors in entities that they advise. Therefore, the IRS concluded that the Support Payment is an ordinary expense under Code Sec. 162. That conclusion was further supported by the financial return to the taxpayer based on its fee that will increase with the size of Acquirer's total assets.

Code Sec. 263. Although a payment may be characterized as an expense under Code Sec.162(a), it remains subject to the capitalization rules of Code Sec.263(a). Reg. §1.263(a)-4 provides that a taxpayer must capitalize amounts paid to create or enhances a separate and distinct intangible. Here, the Support Payment did not create an intangible. The IMA already existed, it was an agreement with Acquirer and not Target, and Taxpayer made the Support Payment with the mere hope and expectation of developing or maintaining a business relationship with Acquirer. Finally, because the IMA could be terminated by Acquirer with 60-days notice, the IMA did not provide Taxpayer a right to use property or to provide or receive services. Therefore, the Support Payment is not required to be capitalized.

Reference: TRC BUSEXP: 9,104.20.

Separate POA Designation Required For International Information Return Penalties

CCA 201736021

A Form 2848, "Power of Attorney and Declaration of Representative", that only lists a specific return, covers representation for penalties, payments, and interest related only to that tax return, according to IRS Chief Counsel. Specifically examining this rule as it relates to International Information Returns (IIR) that are attached to an income tax return or filed separately, Chief Counsel also determined when penalty representation would be allowed if a subsequent Form 2848 listed either the same or a different representative in connection with a particular IIR.

- ***Take Away.*** While enforcing the results of Form 2848, as applied to the scenarios under review, IRS Chief Counsel admitted that "we recognize that the current form instructions are not a paragon of clarity on this issue." The IRS Branch Chief (Procedure & Administration), who authored the latest CCA, suggested that it might be useful to amend the form instructions to specifically provide whether penalties associated with forms that are or should be attached to a certain "parent"tax return are within the scope of representation if line 3 of the Form 2848 lists only the parent form.

Background

Many international information returns (IIRs) are required to filed with the IRS, such as Form 3520, "Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts;" Form 5471, "Information Return of U.S. Persons With Respect To Certain Foreign Corporations;" Form 926, "Return by a U.S. Transferor of Property to a Foreign Corporation;" and Form 8865, "Return of U.S. Persons With Respect to Certain Foreign Partnerships." In some cases, the IIR should be attached to an income tax return; in other cases, they should be file with a different Internal Revenue Service Center. When an IIR is incomplete when filed, is filed late, or not filed at all, a civil penalty under the Code may apply

In the latest CCA, Chief Counsel addressed three related issues:

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POA

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(1) Form 2848 has designated a representative for a certain tax return, but not specifically with respect to the IIR that has given rise to penalties.
(2) Form 2848 has identified an income tax return to which an IIR is not required. For example, representation cover Form 1040 but not possible civil penalties under Code Sec. 6677 for failure to file Form 3520, and IIR.
(3) After filing Form 2848 that designates Representative A for Forms 1120 and 5471, the taxpayer submits a subsequent Form 2848 naming a different representative and listing only the Form 5471 --and not Form 1120.

Chief Counsel's analysis

IRS Chief Counsel concluded that penalty representation must be specifically authorized for IIR returns whether or not they are filed with the parent return:

For Issue #1, Forms 2848 that only list a specific tax return will cover representation for penalties, payments and interest related only to that specific tax return, not to other returns, regardless of whether the IIR was attached to the tax return specified in the Form 2848 when that return was filed.

For Issue #2, Chief Counsel's conclusion followed the same reasoning as for Issue #1: a Form 2848 that identifies an income tax return to which an IIR is not required to be attached when the Form 1040 is filed, does not give cover authorization to discuss penalties associated with the IIR.

For Issue #3, the subsequent Form 2848 that listed only Form 5471, will cover penalties only associated with Form 5471. Any discussions between the IRS and that representative related to Form 1120, or penalties associated with Form 1020, are not authorized.

Revised Instructions needed? Specifically relevant to its conclusion to Issue #1, Chief Counsel admitted that current Form 2848 and Instructions are not as clear as they could be based on their past 2012 and 2014 iterations but that their "intent" to otherwise avoid confusion over coverage makes the requirement of separate reference to penalty representation justified.

Although an IIR form required to be attached to an income tax reform cited in any given Form 2848 arguably should be automatically covered, the Chief Counsel reasoned that, practically speaking, that could cause confusion among IRS auditors at least in the case of Form 1120, to which many IIRs may be attached. "Without a specific description of the penalty involved, it would be difficult for the Service to determine exactly the scope of the taxpayer's authorization. We thus believe the intent of the 2014 revisions is to require the specific penalty to be listed on Form 2848 for representation to be authorized with respect to those penalties unrelated to the ones related to the Form 1120 itself."

Reference: TRC IRS: 3,208.10.

TAX BRIEFS

Deductions

A biotech scientist could not claim a bad debt deduction for his investment in a telehealth company. Of the 11 factors that the Court of Appeals for the Ninth Circuit uses to distinguish debt from equity, eight suggested his advances were investments, and the other three were neutral or only slightly in his favor. In fact, since he advanced more money to the company after the year at issue, he presumably had a reasonable hope of recovering his investments. He was also subject to an accuracy-related penalty.

Rutter, TC, CCH Dec. 61,009(M), FED ¶48,123(M); TRC BUSEXP: 48,052

An attorney and his wife could not deduct unsubstantiated car and truck, travel, meals and entertainment and utility expenses. Their documentary evidence was inadmissible because they did not submit it before trial. Even if the court had considered the taxpayers' inadmissible evidence, the records were rife with discrepancies, included duplicates and personal expenses, and did not adequately substantiate business purposes. The negligence penalty was imposed.

Rodriguez, TC, CCH Dec. 61,008(M), FED ¶48,122(M); TRC BUSEXP: 24,806

Quiet Title Claims

A trust's quiet title claim against the government was dismissed. The trust had, at most, a claim to a constructive trust over the property; therefore, its claim was not a perfected or choate property interest. Therefore, the federal tax lien had priority over a state lien that had not attached.

Wadsworth v. Talmage, DC Ore., 2017-2 USTC ¶50,329; TRC IRS: 48,100

Foreclosure

The government was entitled to reduce to judgment an individual's tax liability and to foreclose tax liens attached to his property. The IRS established its *prima facie* case, which the individual failed to rebut. In addition, the tax liens that attached to the individual's property were foreclosed and judicial sale of the property was ordered.

Kramer, DC Ohio, 2017-2 USTC ¶50,330; TRC IRS: 27,206.05

Collection Due Process

The IRS did not abuse its discretion in sustaining a final notice of intent to levy (FNIL) to collect a disabled army veteran's outstanding tax liability. The individual claimed that his assessment was incorrect because his Army pension should not be taxed. However, despite any merits to that claim, he had received a deficiency notice and failed to challenge the assessment in the Tax Court. Therefore, he could not contest his underlying tax liability in his collection due process (CDP) hearing.

Bruce, TC, CCH Dec. 61,007(M), FED ¶48,121(M); TRC IRS: 51,056.05