Wolters Kluwer

Federal Tax Weekly

Issue Number 5 CCHGroup.com January 29, 2015

Inside this Issue

Obama Proposes Tax Reforms For Individuals, Education And More

◆ *2015 State of the Union Address*

President Obama unveiled some new tax reform proposals during his 2015 State of the Union address. The President called for increasing tax rates on capital gains and dividends, consolidating and reforming education tax breaks, enhancing the earned income credit (EIC) and the child and dependent care credit, and expanding retirement savings vehicles.

■ ***Take Away.*** "This year's SOTU was slightly different than past years in that the White House released some details of proposals before the address but there remain many questions," Edward Karl, CPA, vice president taxation, AICPA, told Wolters Kluwer. The AICPA, Karl explained, aims for clarity in any tax law changes. Additional details are expected to be released in Treasury's "green book" in February, including past proposals such as filing deadline reform, Karl noted.

■ ***Comment.*** "The President's proposals are unpopular with Republicans and have little chance of being enacted as long as the GOP controls Congress," Dustin Stamper, director, Washington National Tax Office, Grant Thornton, LLP, told Wolters Kluwer. "I was surprised the speech did not dedicate more time to business tax reform, where he might find some common ground with Republicans," Stamper observed.

Capital gains/dividends

Under the *American Taxpayer Relief Act of 2012* (ATRA), qualified capital gains and dividends are subject to tax at a 0, 15, or 20 percent rate depending on the taxpayer's ordinary income tax rate for the year. President Obama proposed to raise the 20 percent rate to 28 percent.

■ ***Comment.*** The current 20 percent rate applies to taxpayers in the highest tax bracket.

Families

President Obama proposed to triple the maximum child and dependent care credit for qualifying families with children under age five. Qualifying families could claim a 50-percent credit for up to $6,000 of expenses per child under age five. Temporary enhancements to the earned income credit (EIC) would be made permanent under the President's plan and the credit would be expanded to qualifying taxpayers without children and noncustodial parents. President Obama also proposed a new second earner tax credit of up to $500 for families in which both spouses work and eliminating child care flexible spending accounts.

■ ***Comment.*** House Speaker John Boehner, R-Ohio, indicated on January 25 that he is open to exploring an increase in the child and dependent care credit, which could emerge as one area of compromise between the White House and the GOP-controlled Congress.

Education

As in past years, President Obama proposed to make permanent the American Opportunity Tax Credit (AOTC), which is scheduled to expire after 2017. The President's plan would also increase the refundable portion of the AOTC to $1,500, make a partial credit available to

Continued on page 50

Route to: ____________ ____________ ____________ ____________ ____________

IRS Provides Penalty Relief For Excess Advance Payments Of Premium Tax Credit

◆ *Notice 2015-9*

The IRS has announced much-anticipated penalty relief for taxpayers who, after reconciling advance payments of the Code Sec. 36B premium assistance tax credit, discover they have a balance due. The penalty relief is only available for the 2014 tax year.

■ ***Take Away.*** The IRS reminded taxpayers that any underpayments of the Code Sec. 5000A individual shared responsibility requirement are excluded from this relief because the underpayments are not subject to the Code Sec. 6651(a)(2) penalty or the Code Sec. 6654(a) penalty.

Background

Individuals who obtain health insurance coverage through the PPACA Marketplace may be eligible for the Code Sec. 36B credit. The credit is payable in advance to insurers. Individuals who receive advance payments of the Code Sec. 36B credit must reconcile their payments using Form 8962, Premium Tax Credit, which will be filed with their return. If a taxpayer's actual allowable credit shown on his or her return is less than the advance credit payments, the difference, subject to certain caps, will be subtracted from any refund or added to any balance due.

Penalties

Taxpayers who have a balance due on their 2014 returns resulting from reconciliation of their advance credit payments and the actual allowable credit may not be able to pay by the due date, generally April 15, the IRS explained. They would be liable for the Code Sec. 6651(a)(2) penalty for failure to pay. Taxpayers also may find that their estimated tax payments were understated, exposing them to the Code Sec. 6654(a) estimated tax penalty.

Relief

Generally, taxpayers must be otherwise current with their filing and payment obligations; have a balance due for the 2014 tax year due to excess advance payments of the credit; and report the amount of excess advance credit payments on their timely filed return, including extensions, to qualify for relief from the Code Sec. 6651(a)(2) penalty. The IRS will waive the Code Sec. 6654 penalty if the taxpayer is otherwise current with his or her filing and payment obligations; and the taxpayer reports the amount of the excess advance credit payments on a timely filed return, including extensions.

■ ***Comment.*** Taxpayers who receive notice of a Code Sec. 6651(a)(2) penalty related to the credit should advise the IRS in writing that they are eligible for relief. The IRS also described how to apply for Code Sec. 6654 penalty relief.

References: FED ¶46,235; TRC HEALTH: 3,318.

Tax Reform

Continued from page 49

part-time students and consolidate the Lifetime Learning and higher education tuition deduction into the AOTC. All eligible students would be able to claim the AOTC for up to five years.

The President also proposed to repeal tax incentives going forward for Coverdell Education Savings Accounts and to repeal the student loan interest deduction under Code Secs. 62(a)(17) and 221 for new borrowers. Additionally, earnings on new contributions to 529 plans would no longer be tax exempt.

■ ***Comment.*** The proposed changes to 529 plans have already generated opposition in the House. Republican lawmakers have said they will introduce legislation to preserve the current tax treatment of 529 plans along with clarifying that laptops/computers are qualified expenditures.

Retirement

President Obama proposed to provide additional tax relief to small businesses that newly offer a retirement plan, such as a 401(k) plan, or who start automatically enrolling workers in their plan. If an employer does not provide a retirement plan, the President's plan would require them to offer their workers an automatic IRA savings vehicle. Tax credits would be available to qualified businesses to help offset initial administrative costs. Additionally, the President's plan would prohibit contributions to and accruals of additional benefits in tax-preferred retirement plans and IRAs once balances are approximately $3.4 million.

■ ***Comment.*** Part-time workers would have more access to retirement savings plans if they worked for the employer for at least 500 hours each year for three or more years.

Stepped-up basis

Under the stepped-up basis rules, the income tax basis of property acquired from a decedent at death is generally stepped up (or stepped down) to equal its value as of the date of the decedent's death. President Obama proposed to generally repeal stepped-up basis for inherited assets. Certain personal property would be exempt.

Financial institutions

The President's proposal would impose a seven basis point fee on the liabilities of large U.S. financial firms. Generally, these would be firms with assets over $50 billion.

FEDERAL TAX WEEKLY, 2015 No. 5. FEDERAL TAX WEEKLY is also published as part of CCH Tax Research Consultant by Wolters Kluwer, 4025 W. Peterson Avenue, Chicago, IL 60646-6085. Editorial and Publication Office, 1015 15th St., NW, Washington, DC 20005.

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*

Real Estate Financing Not A Real Property Trade Or Business Under Code Sec. 469, Chief Counsel Concludes

◆ *CCA 201504010*

IRS Chief Counsel has concluded that a real estate broker is engaged in a real property trade or business under Code Sec. 469. However, a mortgage broker who is a broker of financial instruments is not engaged in a real property trade or business.

■ ***Take Away.*** The issue is significant under Code Sec. 469, passive activity losses (PALs) limited, and Code Sec. 1411, net investment income (NII) tax. A person in a real property trade or business may be treated as a real estate professional, if other conditions are met. This treatment will enable the taxpayer to avoid the PAL limitations and the NII tax on income from rental real estate.

Relevant law

Code Sec. 469 generally disallows the use of losses from a passive activity to offset other income. Code Sec. 1411 imposes a surtax on income from passive activities. Generally, a rental activity, including rental real estate activities, is treated as a passive activity. However, the rental real estate activities of a "real estate professional" are not a passive activity.

Under Code Sec. 469, a person is a real estate professional if the taxpayer materially participates in the activity and performs in real property trades or businesses. The latter condition is satisfied if the taxpayer performs more than half of his/her personal services in real property businesses and performs more than 750 hours of services during the year in real property businesses (for both, in which the taxpayer materially participates).

Real property trades or businesses are listed in Code Sec. 469(c)(7)(C) and include "real property brokerage".

Background

Taxpayer X is a state licensed real estate agent and works full-time for a real estate brokerage firm. X is not a licensed broker under state law. X brings together buyers and sellers of real property, negotiating sales contracts and other agreements between these parties.

Taxpayer Y is a state licensed mortgage broker. Under state law, Y's business is a real property brokerage business. Y markets mortgage loans and brings together lenders and borrowers.

Chief Counsel's analysis

Chief Counsel concluded that X, a real estate agent, may be engaged in a real property trade or business, but that Y, a mortgage broker, is not in a real property trade or business.

Chief Counsel noted that federal law, not state law, governs the meaning of federal tax terms. Chief Counsel looked to legislative history and principles of statutory construction to interpret these provisions.

Chief Counsel pointed out that "finance operations" were included in an unenacted version of the provisions defining real property trade or business, but were not in the final bill. This indicated that Congress did not intend for financing activities to be treated as real property brokerage.

Relying on dictionary definitions, Chief Counsel stated that real estate includes the business of selling land and buildings, and that brokerage is the business of helping others buy and sell property. According to the Chief Counsel, the definition of real property brokerage is to bring together buyers and sellers of real property. This definition does not include brokering financial instruments or financing real property by bringing together lenders and borrowers.

Reference: TRC BUSEXP: 33,106.40.

IRS To Include Charter School Employees In Proposed Code Sec. 414(d) Regs

◆ *Notice 2015-7*

The IRS recently announced that it anticipates including rules for charter school employees who participate in state and local government retirement plans in proposed regs under Code Sec. 414(d). The IRS also provided transition relief for the period before final regs are issued.

■ ***Take Away.*** More than 40 states and the District of Columbia allow the chartering of independent public schools. Charter schools, the IRS noted, are treated as public schools, but are not subject to governmental control in the same manner as traditional public schools.

Background

A governmental plan under Code Sec. 414(d) generally encompasses a plan established and maintained for its employees by the federal government or a state or local government. In 2011, the IRS issued an advance notice of proposed rule making (ANPRM) describing guidance under consideration that would set forth rules relating to the determination of whether a retirement plan is a governmental plan within the meaning of Code Sec. 414(d).

After releasing the ANPRM, the IRS received comments from the charter school community, from among other stakeholders. Charter schools expressed concern that the framework described in the ANPRM would deter state or local retirement systems from permitting charter school employees to participate in their retirement systems.

Notice 2015-7

The IRS explained in Notice 2015-7 that future guidance under Code Sec. 414(d) would take into account the nature of public charter schools, their governance structure, the movement of teachers between traditional public schools and charter public schools, and the relationship between public charter schools and their governing authorities. Generally, a

Continued on page 52

Tax Court Finds Payment To Egg Donor For Pain And Suffering Is Taxable

◆ *Perez, 144 TC No. 4*

A taxpayer's compensation for pain and suffering from her voluntary decision to be an egg donor was not excludible as damages under Code Sec. 104(a)(2), the Tax Court has found. The court rejected the taxpayer's interpretation of "damages" under Code Sec. 104(a)(2).

■ ***Take Away.*** The court emphasized that the case did not require it to decide whether human eggs are capital assets. It did not require the court to figure out how to allocate basis in the human body, or the holding period for human-body parts, or the character of the gain from the sale of those parts.

Background

The taxpayer entered into a contract with an agency to be an egg donor. The contract between the taxpayer and the agency provided that a fee would be paid for her time, effort, inconvenience, pain, and suffering in donating her eggs. The contract also provided that the taxpayer would assume all medical risks. The contract specifically provided that the fee did not constitute payment for the taxpayer's eggs.

The taxpayer also entered into a similar contract with the intended parents. That contract also provided that payment was in consideration for all of her pain, suffering, time, inconvenience, and efforts.

After signing the contracts, the taxpayer began a regiment of tests and examinations, including hormonal injections. The injections often bruised and hurt the taxpayer. The procedures also resulted in headaches, nausea, and fatigue.

The taxpayer argued that the payments she received were not taxable because they compensated her only for pain and suffering. The IRS disagreed and the taxpayer appealed to the Tax Court.

Court's analysis

The court found that Reg. §1.104-1(c) used to require payments excluded under Code Sec. 104(a)(2) be received through prosecution of a legal suit or action based upon tort or tort type rights, or through a settlement agreement entered into in lieu of such prosecution. As amended in 2013, the regs exclude from gross income the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness. In TD 9573, the IRS determined that the tort-type rights test was intended to distinguish damages for personal injuries from, for example, damages for breach of contract. The taxpayer challenged the IRS's definition of damages to encompass a lawsuit or threat of one as a condition of excluding damages from taxable income.

The court found that the taxpayer had a legally recognized interest against bodily invasion. The injury she incurred, the court held, was within the scope of the medical procedures to which she had consented. Any physical pain was a byproduct of performing a service contract. The payments were compensation for services and not to compensate her for some unwanted invasion against her bodily integrity.

■ ***Comment.*** The court looked to *Green, 74 T.C. 1229 (1980),* among other cases. In *Green,* the court held that the taxpayer who sold blood plasma was engaged in the sale of tangible property rather than the performance of services.

References: Dec. 60,218; TRC INDIV: 33,402.

Charter Schools

Continued from page 51

state or local retirement system that covers employees of a public charter school would not fail to be a governmental plan within the meaning of §414(d) if certain conditions are satisfied.

Transition relief

When regs under Code Sec. 414(d) are finalized, they would apply prospectively and include a delayed effective date, the IRS predicted. Transition relief under Notice 2015-7 provides that a state or local plan that covers charter school employees for the period before the effective date of the final regs will not fail to be a governmental plan within the meaning of Code Sec. 414(d). Broader transition relief is expected to be part of proposed regs under Code Sec. 414(d), the IRS added.

■ ***Comment.*** The IRS did not set out a timetable for issuance of proposed or final regs.

References: FED ¶46,234; TRC RETIRE: 69,352.

Phone Scams, Phishing Top IRS's Annual "Dirty Dozen" Tax Scams

The IRS has cautioned taxpayers about phone scams where criminals impersonate agency personnel and demand immediate payment of fictitious tax liabilities on threat of arrest, deportation, or loss of a business or driver's license. Phone scams topped the annual "Dirty Dozen" list of tax scams published by the IRS for the 2015 filing season.

■ ***Comment.*** The Treasury Inspector General for Tax Administration (TIGTA) in a recent report stated that, since October 2013, it has become aware of 3,000 victims who have reportedly paid over a total of $14 million as a result of scam artists.

Phishing scams, involving fake emails or websites looking to steal personal information that criminals can use to commit identity theft, also made the annual list. The IRS urged taxpayers to report phishing and other suspicious emails to the agency at *phishing@irs.gov.*

IR-2015-5, IR 2015-6; TRC IRS: 66,304.

IRS Explains Application Of Consolidated Group SRLY Provisions After Parent Elects To Reattribute NOLs

◆ *FAA 20150301F*

IRS Chief Counsel in Field Attorney Advice (FAA) has addressed the application of the separate return limitation year (SRLY) rules to a consolidated group that includes bankrupt members and nonbankrupt members. The FAA also addressed the parent corporation's ability to make a reattribution election regarding its subsidiary's net operating losses (NOLs).

■ ***Take Away.*** The FAA explained these rules in the bankruptcy context.

Background

The transactions involved a parent corporation, B; a disregarded entity, Company E; and a subsidiary corporation A. B owned E, which in turn owned A. E was bankrupt; A and B were not bankrupt.

Chief Counsel's analysis

Issue 1. Because E was a disregarded entity, B was treated as the owner of E's assets (including its A stock) and liabilities. Since B was not personally liable on E's liabilities, the liabilities were nonrecourse to B. Therefore, Chief Counsel concluded, the discharge of E's liabilities in bankruptcy should be treated as a taxable sale of E's assets by B, in exchange for release of E's liabilities. The discharge does not give rise to cancellation of indebtedness income.

Issue 2. A parent may elect under Reg. §1.1502-36(d) to reattribute a subsidiary's NOLs to the extent of the subsidiary's attribute reduction amount. Therefore, B can elect to reattribute A's NOLs up to A's attribute reduction amount. Because this reattribution is a nondeductible, noncapital expense, B's basis in A's stock must be reduced by this amount. The reduction of B's basis in A's stock is necessary to prevent the consolidated group from recognizing an inappropriate loss.

Issue 3. If a higher-tier subsidiary is insolvent, the losses of a lower-tier subsidiary that it owns (A) may only be reattributed if the losses exceed certain limits. However, this rule only applies to members of the consolidated group. A disregarded entity is not a corporation and therefore is not a member of the group. Thus, the insolvency limitation does not apply in this case and does not limit the amount of A's losses that B may reattribute.

Issue 4. The IRS concluded that since A is not in bankruptcy, its tax attributes are not property of the bankruptcy estate, and the bankruptcy rules' automatic stay does not apply. Therefore, B is not prevented from making an election to reattribute A's NOLs.

Reference: TRC CONSOL: 47,000.

AFRs Issued For February 2015

◆ *Rev. Rul. 2015-3*

The IRS has released the short-term, mid-term, and long-term applicable interest rates for February 2015.

Applicable Federal Rates (AFR) for February 2015

Short-Term	Annual	Semiannual	Quarterly	Monthly
AFR	.48%	.48%	.48%	.48%
110% AFR	.53%	.53%	.53%	.53%
120% AFR	.58%	.58%	.58%	.58%
130% AFR	.62%	.62%	.62%	.62%
Mid-Term				
AFR	1.70%	1.69%	1.69%	1.68%
110% AFR	1.87%	1.86%	1.86%	1.85%
120% AFR	2.04%	2.03%	2.02%	2.02%
130% AFR	2.21%	2.20%	2.19%	2.19%
150% AFR	2.56%	2.54%	2.53%	2.53%
175% AFR	2.98%	2.96%	2.95%	2.94%
Long-Term				
AFR	2.41%	2.40%	2.39%	2.39%
110% AFR	2.66%	2.64%	2.63%	2.63%
120% AFR	2.90%	2.88%	2.87%	2.86%
130% AFR	3.14%	3.12%	3.11%	3.10%

Adjusted AFRs for January 2015

Period for Compounding	Annual	Semiannual	Quarterly	Monthly
Short-term adjusted AFR	.46%	.46%	.46%	.46%
Mid-term adjusted AFR	1.39%	1.39%	1.39%	1.39%
Long-term adjusted AFR	2.41%	2.40%	2.39%	2.39%

The Code Sec. 382 adjusted federal long-term rate is 2.41%; 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 2.68%; 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 January 1, 2015, shall not be less than 9%; and the Code Sec. 7520 AFR for determining the present value of an annuity, an interest for life or a term of years, or a remainder or reversionary interest is 2.0%.

References: FED ¶46,233; TRC ACCTNG: 36,162.05.

Tax Court Denies IRS Summary Judgment In TFRP Case; Issue Of Notice By IRS In Dispute

◆ *Lee, 144 TC No. 3*

The Tax Court has rejected the IRS's motion for summary judgment in a trust fund recovery penalty (TFRP) case. The issue of whether the agency had properly issued notice to the taxpayer was a material fact in dispute.

■ ***Take Away.*** The court appeared to favor the taxpayer's argument that he did not receive notice. The court found support in the record for the taxpayer's argument that he had a history of diligently replying to the IRS's correspondence.

Background

The taxpayer served as CEO of a corporation. In 2009, the IRS requested to meet with the taxpayer and another company official about the company's unpaid payroll taxes (a 4180 interview). The taxpayer declined to meet with the IRS at that time.

■ ***Comment.*** A 4180 interview is held to determine if a person is a responsible person for purposes of the TFRP.

In 2010, the taxpayer did meet with the IRS. According to the agency, the revenue officer hand delivered notice (Letter 1153, Proposed Assessment of Trust Fund Recovery Penalty) proposing assessment of trust fund recovery penalties against the taxpayer and advising the taxpayer of his right to challenge the assessment before an Appeals officer. The taxpayer did not challenge the proposed assessment and the IRS subsequently assessed a TFRP against the taxpayer. Sometime later, the taxpayer requested a collection due process hearing. The hearing officer sustained collection.

The taxpayer appealed to the Tax Court, arguing that a monetary payment had not been applied to the employment tax liability. The court remanded the case for a supplemental hearing. A new hearing officer sustained the collection action. Again, the taxpayer appealed to the Tax Court.

■ ***Comment.*** The taxpayer repeatedly claimed that he was unaware of the Letter 1153. The IRS determined that the taxpayer had received Letter 1153 and the taxpayer chose not to exercise his appeal rights. In response to a Letter 1153, a responsible person can agree with the assessment, appeal the proposed assessment or provide no response.

Court's analysis

The court first found that a TFRP may be imposed on any person who is a responsible person and who wilfully failed to collect and pay over employment taxes. To provide for proper notice of the assessment of trust fund penalties, Code Sec. 6672 authorizes the IRS to personally serve the notice on the responsible person.

Here, the IRS had determined that the taxpayer was a responsible person for purposes of the TFRP. The hearing officers (at the original and supplemental hearings) verified that the agency had satisfied all requirements of any applicable law or administrative procedure for collecting the trust fund recovery penalties, the court found. Proper notice is one requirement for assessing, and therefore collecting, the TFRP.

However, the court found that the issue of whether the taxpayer had received a Letter 1153 presented a genuine dispute of material fact. The record was insufficient for the court to decide, on a motion for summary judgment, if a Letter 1153 had been served on the taxpayer. The IRS did not provide the court with a copy of the letter. Neither did the IRS provide the court with a statement from the revenue officer. The record, the court found, contained only a copy of the Integrated Collection System History Transcript on the day after the meeting was held, stating that Letter 1153 had been served on the taxpayer at the meeting.

■ ***Comment.*** The IRS did not argue that a Letter 1153 had been mailed to the taxpayer but claimed that it had been given to the taxpayer in person.

References: Dec. 60,215;
TRC IRS: 45,164.05.

Steel Racking Structure Used By Storage Company Qualifies As Real Property For REIT Purposes

◆ *LTR 201503010*

The IRS has determined that steel racking structures are assets described in Rev. Rul. 71-220 and Rev. Rul. 75-424 that qualify as real property for purposes of Code Sec. 856. The IRS concluded that the steel racking structures qualified as real property for purposes of Code Sec. 856.

■ ***Take Away.*** Recent regs started giving the definition of real property for REIT purposes a broader definition and the IRS has followed that lead in a series of recent letter rulings. REIT conversions and spinoffs have become a favorite in some circles of the investment community to increase underlying share value.

Background

Code Sec. 856(c)(2) provides that at least 95-percent of a REIT's gross income must be derived from a group of passive sources including dividends, interest, and rents from real property. Code Sec. 856(c)(3) further provides that at least 75 percent of a REIT's gross income must be from certain passive *real estate* related sources including "rents from real property."

■ ***Comment.*** Reg. §1.856-3(b)(1) further defines "real estate assets" to include real property. Reg. §1.856-3(d) goes on to define real property as including "land or improvements thereon, such as buildings or other inherently permanent structures thereon" and "interests in real property."

Continued on page 56

Tax Briefs

International

An individual who lived and worked part of each of the years at issue in Russia could not exclude income under the foreign earned income exclusion. His ties to the U.S. were stronger than those to Russia, so his "abode" was in the U.S. However, he reasonably relied on a tax professional to prepare his returns and was not subject to accuracy-related penalties.

Evans, TC, CCH Dec. 60,214(M), FED ¶47,924(M); TRC EXPAT: 12,052.05

Jurisdiction

An individual's petition challenging a levy notice was properly dismissed for lack of subject matter jurisdiction. The IRS did not issue a notice of determination to the individual; therefore, the Tax Court lacked jurisdiction to hear his petition.

Nabaya, CA-4, 2015-1USTC ¶50,145; TRC LITIG: 6,136.25

An individual's complaint seeking damages for alleged violation of his constitutional rights by various IRS employees was dismissed for lack of subject matter jurisdiction. The individual's claims for damages against the IRS employees for actions taken in their official capacity were effectively a suit against the United States, and he failed to show that the government had waived its sovereign immunity.

Zajac, III v. Clark, DC Fla., 2015-1USTC ¶50,143; TRC IRS: 21,100

Tax Crimes

A 36-month sentence imposed upon a tax preparer for willfully aiding and abetting in the preparation and filing of false tax returns was proper. Although the PSR did not explain mathematically how it arrived at the tax loss figure, the court did its own calculation and arrived at a loss amount that was close to the PSR total.

Kennedy, CA-6, 2015-1USTC ¶50,142; TRC IRS: 66,204

Tax Credits

The builder-operator of an open-loop biomass facility was entitled to reimbursement only for the portion of the cost that was fairly allocable to the production of electricity; not for the total cost of the facility. The taxpayer's argument that it was entitled to an award equal to 30 percent of the eligible cost basis of the entire facility was rejected.

W.E. Partners II, LLC, FedCl, 2015-1USTC ¶50,144; TRC BUSEXP: 54,554

Deductions

An individual who made substantial payments to his wife before and after their divorce could not deduct the payments as alimony because the payments were not under a divorce or separation instrument. Further, the taxpayer was subject to an addition to tax for failing to timely file his return for the year at issue. He failed to show reasonable cause for his failure.

Milbourn, TC, CCH Dec. 60,216(M), FED ¶47,926(M); TRC INDIV: 21,204

False Tax Returns

A CPA willfully filed fraudulent information returns with respect to a settlement he made with two former partners of his firm and he was liable for the minimum statutory penalty for each violation of Code Sec. 7434. Considering the CPA's experience, intelligence and tax expertise, his attempt to mislead his expert to extract a legal opinion in his favor proved that he knew the returns were fraudulent and his decision to file those returns was, therefore, willful.

Pitcher v. Waldman, CA-6, 2015-1USTC ¶50,147; TRC LITIG: 3,052

Liens and Levies

A divorced ex-wife was entitled to recover attorney's fees from the government under Code Sec. 7430. The government's position that its liens against the husband attached to the wife's property because they accrued before a deed transferring the property pursuant to the couple's divorce was not substantially justified.

Baker, DC N.H., 2015-1USTC ¶50,148; TRC LITIG: 3,154

A settlement officer did not abuse her discretion to sustain the proposed levy against an

Continued on page 56

IRS Tax Tip Spotlights Premium Tax Credit

Taxpayers who received an advance payment of the Code Sec. 36B premium assistance tax credit for 2014 must file return and reconcile the advanced payment received with the actual premium tax credit to which they are entitled, the IRS reminded taxpayers in a new tax tip. The IRS has developed new Form 8962, Premium Tax Credit (PTC).

Form 1095-A. A taxpayer who obtained coverage through the PPACA Marketplace will receive a Form 1095-A, Health Insurance Marketplace Statement, by early February. This form will provide taxpayers will all the information they need to report their health insurance information for premium tax credit purposes, the IRS explained. The form includes:

- The name of the insurance company;
- Dates of coverage;
- Amount of monthly insurance premiums for the plan in which the taxpayer and his/her family enrolled; and
- Any amount of advance premium assistance tax credit payments made during the year.

Repayment. If a taxpayer received a greater amount of advance payments than he or she was entitled to receive for 2014, the taxpayer must repay some or all of this excess when filing the return, subject to certain caps.

IRS Health Care Tax Tip 2015-03; TRC HEALTH: 3,000.

Tax Briefs

Continued from page 55

individual taxpayer. The taxpayer had failed to submit requested financial information; therefore, the settlement officer denied the taxpayer's requested collection alternative.

Witmyer, TC, CCH Dec. 60,221(M), FED ¶47,931(M); TRC IRS: 51,056.25

A determination maintaining a notice of federal tax lien against an individual was sustained. The taxpayer failed to respond to the IRS's motion for summary judgment, despite a court order to do so, and so waived his right to contest any assertions in the motion. The SO's determination was not an abuse of discretion and the IRS's motion for summary judgment was granted.

Medairy, Jr, TC, CCH Dec. 60,220(M), FED ¶47,930(M); TRC IRS: 51,056.20

Collection Due Process

An IRS settlement officer (SO) abused his discretion in sustaining proposed levy against an estate. The SO's focus on the estate's valuation was misplaced in a CDP proceeding in which the underlying liability was not at issue.

Sanfilippo Est., TC, CCH Dec. 60,219(M), FED ¶47,929(M); TRC IRS: 51,056.25

Offer-in-Compromise

An IRS settlement officer did not abuse his discretion to proceed with collection and in denying the taxpayers' offer-in-compromise. The taxpayers had not made the required periodic payments during the consideration of their offers; therefore, they had not complied with the provisions of Code Sec. 7122.

Garber, TC, CCH Dec. 60,217(M), FED ¶47,927(M); TRC IRS: 51,056.25

Bankruptcy

An IRS levy issued to a Chapter 13 trustee seeking to collect disbursements owed to a creditor in a pending bankruptcy proceeding violated the automatic stay under 11 USC §362. The funds held by the trustee for distribution to creditors were property of the estate. Accordingly, the IRS must first obtain relief from the automatic stay before seeking to enforce levies against creditors.

In re Allen, et. alia, BC-DC Tenn., 2015-1USTC ¶50,149–2015-1USTC ¶50,159; TRC IRS: 57,054

REIT

Continued from page 54

Here, the taxpayer was a storage company that leased space in its facilities for storing cartons and other physical items. It requested several rulings from the IRS relating to whether its income, assets, and distribution of income to shareholders met the qualifications for REIT status under Code Secs. 856 through 860.

IRS analysis

The IRS determined that the corporation's steel racking structures qualified as real property for purposes of Code Sec. 856 and therefore were "real estate assets" for purposes of the test under Code Sec. 856(c)(4). The IRS noted that the structures were inherently permanent: they were anchored to the floor and they were designed to accommodate extreme weight. The IRS also determined that the corporation's storage contract intangibles were real estate assets since they are associated only with the storage element of the contracts. They were inseparable from and inextricably tied to the real property.

In addition, the IRS issued other determinations in response to the corporation's requests, including:

- Payments received by the company from storage customers were rents from real property under Code Sec. 856(d);
- Rents received by the company from a taxable REIT subsidiary (TRS) for leasing of space in connection with the TRS's provision of services to the company's storage customers also would be treated as rents from real property under Code Sec. 856(d); and
- Reimbursement payments received under cost-sharing arrangements between the company and a TRS were not gross income for purposes of Code Secs. 856(c)(2) and (c)(3).

Reference: TRC RIC: 6,056.05.

AICPA Recommends Expansion Of Section 9100 Relief

In a letter to House and Senate tax writers, the American Institute of Certified Public Accountants (AICPA) recommended that lawmakers expand Section 9100 relief. Section 9100 relief should be available to all tax elections, the AICPA urged.

Background. A Tax Code section or regs typically sets the time for filing a tax election. If a taxpayer fails to make a timely election, certain extensions and administrative relief options are available if the taxpayer can obtain Section 9100 relief under Treas. Reg. §§ 301.9100-1 through -3. Generally, taxpayers must show that they acted reasonably and in good faith.

Expansion. The AICPA told lawmakers that Section 9100 relief is currently unavailable to requests for extensions of the time fixed by the Tax Code for making an election or applications for relief from statutory deadlines. The AICPA recommended that lawmakers make Section 9100 relief to all tax elections, whether prescribed by regulation or statute. The AICPA identified 26 elections, including the election to treat certain costs of a qualified film or television production as an expense and the election to claim a reduced credit for research activities.

- ***Comment.*** "We do not believe taxpayers are likely to abuse or exploit hindsight, as the IRS would continue to have discretion as to whether to grant relief for each specific request that is made in good faith and is reasonable," the AICPA told lawmakers.

AICPA Letter to Congress, January 23, 2015; TRC IRS: 6,106.

Double Taxation, BEPs Issues Headline Upcoming TCPI Conference

The Tax Council Policy Institute (TCPI) is holding its 16th Annual Tax Policy and Practice Symposium February 12–13, 2015 in Washington, D.C., on "How Taxes Matter: The Globalization of Tax Policy and Implications for U.S. Economic Growth and Investment." Wolters Kluwer CCH will publish articles based on this year's symposium in the June 2015 issue of TAXES, the Tax Magazine. Wolters Kluwer recently spoke with Pam Olson, Washington National Tax Services leader and U.S. deputy tax leader of PricewaterhouseCoopers LLP and former Assistant Treasury Secretary (Tax Policy), this year's program manager for the event, and Lynda K. Walker, Esq., Executive Director and General Counsel of TCPI.

Policy and practice

Walker: The mission of TCPI, a nonprofit 501(c)(3) organization formed in 1997, is to promote and facilitate education and discussion on sound Federal tax policy and to provide a better understanding of the Federal tax system. Through our upcoming Symposium we're trying to give tax executives and practitioners something to go away with, in terms of knowledge of how to deal with the current tax environment and whatever may be coming. Our planning committee for this program—consisting of chief tax officers from 29 leading corporations, and senior tax practitioners from nine of the country's most respected firms—reinforces that practical focus.

Globalization of tax policy

Wolters Kluwer: The symposium will focus on the globalization of tax policy. What does this mean?

Olson: From a corporate perspective, companies are increasingly global in their operations. They have supply chains, operation centers, and centers of excellence around the globe that serve markets around the globe. Companies need goods and services to cross borders with a minimum of friction. It is oftentimes the case that geographical borders are irrelevant to companies except for tax purposes. The title of the symposium reflects the fact that business operates on a global basis and, because of that, tax systems around the world increasingly interact with each other. And so we have a rise in cross-border disputes between governments regarding which government gets to tax how much of a particular transaction or a particular company's profits. The disputes increase the risk of double taxation. Of course, the OECD [Organisation for Economic Co-operation and Development] and some governments have also identified concerns about a risk of double non-taxation.

The globalization of tax policy concept is based on the reality of global business operations, and of the fact that tax systems are one of the things that create advantages or disadvantages for investment, for operations and for headquartering companies. Globalization is something that we've been aware of for a long time, but it's become increasingly important to understand it and consider its impact on tax policy.

Current strategies

Wolters Kluwer: You mentioned that the Symposium will also discuss various steps that businesses can take now before the perfect world is established.

Walker: The value of this particular Symposium is that we have on the programs a wonderful mix of professionals who are running the tax departments in global companies as well as the practitioners who are advising them, government officials who are charged with writing, interpreting and enforcing these laws, and others from around the globe—academics and economists—who are studying how all of these things interact and impact business decisions. We attempt to provide participants with a sense of what the state of play is, both in the context of current proposals, but more importantly how people are adapting to them and how they are managing the policy changes that are occurring right now and that are expected to occur in the future. What we get in terms of feedback repeatedly is that a large part of the conference's value is to take away some sense of how people are operating currently, given uncertainty in the tax environment.

BEPS is flavoring every discussion today about the global economy, how the global economy should be taxed, and how companies should manage in the meantime.

International dialogue

Olson: The whole BEPS [Base Erosion and Profit Shifting] project has fostered an intense dialogue among countries that have not previously participated in OECD projects. The dialogue that's been fostered is unlike dialogues we have seen previously because it is more far-reaching and encompasses more disparate views. Given all the inter-relationships cross-border, interconnectedness, etc., that exist in the

Continued on page 59

Washington Report

by the CCH Washington News Bureau

Lew urges bipartisan cooperation on tax reform

"Our entire Tax Code needs to be overhauled," Treasury Secretary Jack Lew said on January 21 in Washington, D.C. "The best way to achieve reform today is to start with pro-growth business tax reform that protects and strengthens the middle class, lowers rates, simplifies the system, levels the playing field, and eliminates unfair and inefficient loopholes," Lew said.

"The President's plan (Framework for Business Tax Reform) eliminates dozens of tax breaks and loopholes and, without adding to our deficits, reduces the top corporate tax rate," Lew said. Additionally, the President's plan would move the U.S. to a more hybrid tax system. "We would create a new minimum tax on foreign earnings and make it simpler for a business to bring income back to the U.S. It would also tighten the rules so that companies cannot use accounting techniques to avoid paying taxes, such as shifting profits to low-tax countries," Lew explained.

"There is a growing bipartisan consensus in Washington on how to achieve business tax reform, and we have a unique opportunity now to get this done," Lew said. "I look forward to continuing conversations with Senate Finance Committee Chair Orrin Hatch, R-Utah, and House Ways and Means Committee Chair Paul Ryan, R-Wisc., to make progress on reform. I am encouraged that there is a broad interest in a bipartisan discussion."

Hatch aims for tax reform bill before year-end

Senate Finance Committee (SFC) Chair Orrin Hatch, R-Utah, said on January 23 that his goal is to mark up tax reform legislation by the end of 2015. Speaking in Washington, D.C., Hatch said the SFC is already fully engaged in a tax reform effort with the recent creation of five working groups that will look at all the areas of the tax system with an eye toward producing a comprehensive tax reform bill. The groups are expected to propose policy solutions and legislative language by the end of May, Hatch indicated.

"Though there are disagreements about the details, there is bipartisan support for tax reform in Congress," Hatch said. "Indeed, members of both parties have expressed their support for a tax overhaul. And, I believe there is real momentum to get something done on tax reform this year, if we remain committed."

Senate bill would repeal PPACA individual mandate

Legislation (the American Liberty Restoration Bill, Sen. 203) has been introduced in the Senate to repeal the *Patient Protection and Affordable Care Act's* (PPACA) individual shared responsibility requirement (individual mandate). The individual mandate took effect in 2014.

"How can we continue to enforce the individual mandate when the law does not clearly ensure that millions of Americans are allowed to receive subsidies to help cover the cost," Sen. Lamar Alexander, R-Tenn., said in a statement. The Supreme Court is scheduled to hear oral arguments in *King v. Burwell, 2014-2* USTC *¶50,367* on March 4. The taxpayers in *King* challenged IRS regs extending the Code Sec. 36B premium assistance tax credit to individuals who obtain health insurance through federally-facilitated Marketplaces. The taxpayers argue that the PPACA makes the credit available to individuals who obtain coverage through state-run Marketplaces but not to individuals with coverage through the federally-facilitated Marketplaces.

IRS identifies common errors with education incentives

John Dickinson, senior tax analyst, IRS Refundable Credits Administration, recently identified some common errors with claims for the American Opportunity Tax Credit (AOTC) and Lifetime Learning credit during an IRS webinar. First, the student did not attend college or a university or other post-secondary educational institution. Second, the student did not pay qualified education expenses or the expenses they claimed did not qualify for the credit or benefit. And, finally, the student was a nonresident alien.

"The AOTC adds another layer of complexity. We see many instances where the AOTC was claimed for more than four tax years," Dickinson said. "You would be surprised how many claims we get for children under the age of 17," another IRS official added. "So let me emphasize, it can't be a grade school, middle school or high school . . . it must be a post-secondary educational institution."

Legislation introduced to expand 529 plans

Rep. Lynn Jenkins, R-Kansas and Rep. Ron Kind, D, Wisc., have introduced legislation to expand Code Sec. 529 plans. The representatives predicted that their bill would modernize 529 plans by allowing qualified students to use funds to purchase a computer. The bill also removes all distribution aggregation requirements and would permit re-deposit of refunds from colleges without taxes or penalties. "As the representative of 14 colleges and universities across western and central Wisconsin, one of my top priorities is working to keep college affordable," Rep. Kind said in a statement.

Practitioners' Corner

Continued from page 57

business world today, it seems like it will be essential for governments and business to continue a robust dialogue when the project is concluded.

Walker: There seems to have been a shift or evolution in the way many countries view their tax function as it relates to their economy and the importance of attracting and sustaining business operations within their borders, while balancing such with the necessity of funding their fisc to support commitments necessary to maintain a civilized society. A real exponential change in awareness is occurring and is needed from both the government and the private sector to figure out how both governments and business can effectively function while meeting their respective goals going forward.

Corporate tax reform

Wolters Kluwer: How important is U.S. corporate tax reform at this point?

Olson: There's a need for the system to be more competitive. I think we're so far out of step with other governments with our high rate that change is essential. Some would say we have a porous base, but as a practical matter I think that our base is pretty broad.

Certainly, one of the things that is curious about the U.S. is our maintenance of a worldwide system, while most other countries have moved to a territorial system. And they're true territorial systems. The governments focus their attention on the income that's generated within the government's borders. It really puts U.S. companies trying to compete with companies from other jurisdictions at a disadvantage. It makes it much more costly for them to move their cash around and to plan as efficiently as possible.

Wolters Kluwer: Should the focus of tax reform be on a territorial system?

Walker: We have a system that's very taxpayer-particular, so any change is likely to affect each business differently. There is not a way to just achieve the right revenue number and competitive impact by a few simple strokes of the pen—eliminating some things and broadening the base while lowering the rate—otherwise we would not still be debating tax reform. You don't necessarily come out where all companies will be in a better position with their capital flow simply by broadening the base and lowering the rates. Therein lies the problem.

Olson: Different companies are hit by the base broadeners in different ways. If everybody was affected the same way, there wouldn't be much point in tackling tax reform. [Treasury Secretary] Jack Lew said that there's a lot of growth that is believed to be lost to inefficiencies in the tax system that stems from the time that we spend on taxes, as well as the distorted investment decisions that various provisions in the Code encourage. What you want to try to do with the tax reform process is to get the Tax Code out of those investment decisions.

Value Added Tax (VAT)

Olson: One of the things we have on the agenda is case studies. We're going to look at Canada and the U.K., to see what lessons we can learn from other countries' experience.

Wolters Kluwer: Those examples seem to imply that some sort of a VAT is a good thing.

Walker: Most other countries have a VAT in place, so it's part of their structure in a way that it's not in this country.

Olson: From the standpoint of economists looking at what's the most efficient system, most would settle on having a consumption tax of some sort as a more efficient way of raising revenue. Of course, the U.S. has sales taxes at the state level, but it's a much smaller part of the government's revenue base than it is in other countries. It's hard, looking forward, to see how we collect enough in tax revenue from our current tax bases to satisfy the obligations and the promises that we've made, without looking at the possibility of another revenue stream like a value-added tax to cover the difference.

Walker: If VAT options gained traction this year it would be a significant shift for U.S. policy. That is a political issue for the policymakers to grapple with. I suspect going forward in the broader tax reform debate, however, we'll see every effort made to look at all possible revenue alternatives, including new systems or structures.

Double taxation

Walker: I think it's important to note that the way our current system works, our companies expect to pay their fair share while not being subject to double taxation or triple taxation. The BEPS project stakeholders are very focused on making certain from the government's perspective that nontaxation doesn't occur, while from the business side of the equation, elimination of the risk of double taxation is critical.

Olson: From the company's perspective, that's the real risk they see. Most countries, maybe every country, has a need for additional tax revenue. So they look at the global companies and they say, we want to make sure we're getting our fair share of the global profit pool, and the governments start making contradictory and inconsistent claims for the same profit dollars. Companies just want to pay tax once on the same profit. They're stakeholders to a certain extent. Obviously if there are big differences in tax rates—like if it's 20 percent in the U.K., but it's 39.1 percent in the U.S.—a company is better off if the U.K. has a greater share of its profit than the U.S. does. But the company is going to do what it's required to do under the laws of the U.S. and the laws of the U.K. and what the transfer pricing rules say about how profits should be split between the two governments. The companies just don't want to end up paying tax on the same profit to both governments.

Wolters Kluwer: Any closing comments about the conference?

Olson: BEPS is flavoring every discussion today about the global economy, how the global economy should be taxed, and how companies should manage in the meantime. I think that we'll serve up a variety of topics aimed at these questions.

Walker: The overall purpose of the conference is to evaluate the role that tax policy is taking in driving economic growth worldwide. We believe that participants are going to find the conversations within each session very interesting, lively and practical.

More information about the conference is available at www.tcpi.org.

Compliance Calendar

■ January 30
Employers deposit Social Security, Medicare, and withheld income tax for January 24, 25, 26, and 27.

■ February 2
Employers must provide Forms W-2 to employees; businesses must provide Forms 1098 and 1099 to payees reporting non-compensation payments.

■ February 4
Employers deposit Social Security, Medicare, and withheld income tax for January 28, 29, and 30.

■ February 6
Employers deposit Social Security, Medicare, and withheld income tax for January 31, February 1, 2, and 3.

■ February 10
Employees who received $20 or more in tips during January report them to their employers using Form 4070.

■ February 11
Employers deposit Social Security, Medicare, and withheld income tax for February 4, 5, and 6.

TRC Text Reference Table

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

ACCTNG 15,252.15	30	FILEBUS 9,104.20	601	IRS 42,106	600
ACCTNG 21,104	40	FILEBUS 9,108	599	IRS 45,164.05	54
ACCTNG 21,110	602	FILEIND 15,200	37	IRS 57,150	18
ACCTNG 33,204.15	589	HEALTH 3,000	55	IRS 60,052	14
ACCTNG 36,162.05	53	HEALTH 3,150	39	IRS 66,304	52
BUSEXP 18,950	5	HEALTH 3,318	50	PAYROLL 3,404.15	42
BUSEXP 24,506.05	598	HEALTH 9,118	4	REAL 6,050	5
BUSEXP 33,106.40	51	INDIV 24,050	20	RETIRE 6,064.05	19
BUSEXP 48,154	29	INDIV 33,402	52	RETIRE 30,404.10	591
BUSEXP 51,102.30	43	INDIV 51,364.05	30	RETIRE 30,566	28
BUSEXP 54,158.30	39	INTL 3,754.25	6	RETIRE 42,174.45	41
COMPEN 3,110.20	42	INTL 33,054.25	15	RETIRE 42,454	590
COMPEN 33,152.10	26	INTL 36,000	586	RETIRE 51,052.20	599
COMPEN 36,350	27	INTL 36,052	28	RETIRE 51,102.05	587
COMPEN 45,228	7	IRS 3,060	603	RETIRE 66,456	592
CONSOL 47,000	53	IRS 3,200	27	RETIRE 66,750	2
EXEMPT 3,102	590	IRS 3,204.30	601	RETIRE 69,352	51
EXEMPT 3,154	15	IRS 6,106	56	RETIRE 75,104.15	31
EXEMPT 12,054	32	IRS 12,200	17	RIC 6,056.05	54
EXEMPT 12,102.05	32	IRS 12,300	4	SALES 36,350	3
EXEMPT 12,252.15	16	IRS 24,106	600	SALES 48,056	19

Monthly Quizzer

The following questions (with answers at the bottom of the column) will help you review some of the more important developments in CCH Federal Tax Weekly during the past month.

Q1. In his 2015 State of the Union address, President Obama called for:

(a) Increasing employee access to retirement plans
(b) Consolidating education tax breaks
(c) Enhancing the earned income credit (EIC)
(d) All of the above

Q2.The National Taxpayer Advocate predicted that the IRS's customer service functions will not be affected by cuts to the agency's budget. *True or False?*

Q3.What is the maximum 2015 fair market value amount for businesses using the cents-per-mile valuation rule to calculate business usage of employer-provided passenger automobiles?
(a) $5,000
(b) $2,500
(c) $16,000
(d) None of the above

Q4.The IRS issued final regs under Code Sec. 501(r) on the additional requirements for nonprofit hospitals to maintain their tax-exempt status.*True or False?*

Answers:
Q1. *(d), See Issue #5, page 49.*
Q2. *False, See Issue #4, page 40.*
Q3. *(c), See Issue #3, page 26.*
Q4. *True, See Issue #2, page 15.*