Wolters Kluwer

FEDERAL TAX WEEKLY

APRIL 16, 2015
ISSUE NUMBER 16

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IRS Announces Penalty Relief For Taxpayers With Incorrect Forms 1095-A; Updates FAQs

Notice 2015-30, www.irs.gov

Taxpayers who had received incorrect or delayed Forms 1095-A, Health Insurance Marketplace Statement, may qualify for penalty relief, the IRS has announced. Taxpayers may be eligible for relief from the Code Sec. 6662 accuracy-related penalty and other penalties. The IRS also posted updated FAQs about the incorrect/delayed Forms 1095-A on its website.

- **Take Away.** Although the IRS was not responsible for the incorrect Forms 1095-A, the agency has worked closely with the U.S. Department of Health and Human Services (HHS) to help affected taxpayers, Kristin Esposito, CPA, Tax Technical Manager, American Institute of Certified Public Accountants (AICPA), told Wolters Kluwer. The penalty relief is only available for the 2014 tax year for returns filed by April 15 or returns properly extended, Esposito explained. Esposito added that the amount of penalties would likely have been small, nonetheless, the relief is welcomed.
- **Comment.** Wolters Kluwer asked the U.S. Department of Health and Human Services (HHS) how many individuals have yet to receive corrected Forms 1095-A. "We have provided updated 1095-A Forms to the vast majority of consumers who were notified that they needed a corrected form," an HHS spokesperson told Wolters Kluwer.

Background

The *Patient Protection and Affordable Care Act* (PPACA) requires individuals and their dependents to carry minimum essential coverage or make a shared responsibility payment, unless exempt. The PPACA also created the Health Insurance Marketplace. Coverage obtained through the Marketplace satisfies the minimum essential coverage requirement of the PPACA.

Individuals who obtained coverage through the Marketplace in 2014 received Form 1095-A in early 2015. According to HHS, some 800,000 individuals received Forms 1095-A containing incorrect data. HHS has been issuing corrected Forms 1095-A to affected individuals.

- **Comment.** Individuals use the information on Form 1095-A to complete Form 8962, Premium Tax Credit (PTC), which is filed with their income tax return if they want to claim the Code Sec. 36B premium assistance tax credit or if they received premium assistance through advanced payment of the credit made to their insurance provider. The Code Sec. 36B credit is only available to individuals who obtained coverage through the Marketplace.
- **Comment.** In many cases, errors related to the premium for the second lowest cost Silver plan (referred to as the "benchmark plan") in the individual's Marketplace, HHS reported. Taxpayers use the benchmark plan to calculate the amount of their Code Sec. 36B credit.

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AICPA Renews Challenge To IRS Annual Filing Season Program

***AICPA*, DC Cir. No. 14-05309**

The American Institute of Certified Public Accountants (AICPA) has renewed its court challenge to the IRS's Annual Filing Season Program (AFSP). The AICPA recently appealed a district court decision holding that the association lacked standing to bring the case.

- **Take Away.** After the D.C. Circuit struck down the IRS's Registered Tax Return Preparer (RTRP) program in *Loving, 2014-1* USTC *¶50,175,* the IRS launched the AFSP. The AFSP generally calls for preparers to complete continuing education requirements and obtain a preparer tax identification number (PTIN). On its website, the IRS describes the AFSP as "being intended to recognize and encourage the voluntary efforts of unenrolled tax return preparers to increase their knowledge and improve their filing season competency through continuing education."

Background

In 2014, the AICPA challenged the AFSP in federal district court (*AICPA, DC D.C., 2014-2* USTC *¶50,488*). The AICPA argued that the AFSP was nearly identical to the RTRP program and, therefore, outside the agency's authority to regulate return preparers.

The IRS countered that the AICPA lacked standing to bring the action. The district court agreed with the IRS. The district court found that the AICPA was unable to show any likely injury to it or its members and dismissed the action.

Appeal

In its appeal, the AICPA stated, among other arguments, that it adequately pleaded that it has standing to challenge the AFSP. The AICPA told the court that it had established its standing by pleading sufficient theories of how the AFSP injures the association's members. The AFSP, the AICPA argued, imposes new administrative burdens on its members: a cognizable injury. AICPA members also suffer lost hours from employees complying with AFSP, another injury. The AICPA asked the appeals court to reverse the lower court's decision or, alternatively, vacate the lower court's decision and remand for application of the correct legal standard.

Reference: TRC IRS: 3,200.

Form 1095-A

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Prior relief

Shortly after HHS reported the issuance of the incorrect Forms 1095, Treasury announced relief. Affected taxpayers, Treasury explained, will not need to refund any overpayment resulting from information on an incorrect Form 1095-A. Affected taxpayers also not need file amended returns and the IRS will not pursue the collection of any additional taxes from these individuals based on updated information in the corrected forms.

Penalty relief

In Notice 2015-30, the IRS recognized that taxpayers affected by errors or delays in their Forms 1095-A may be unable to file a return accurately reflecting their tax liability by the April 15, 2015 deadline. Taxpayers may need to seek extensions of time to file an accurate return and may also be unable to determine the amount of tax they should pay at the time of their extension request to avoid liability for the Code Sec. 6651(a)(2) failure to pay penalty. Accordingly, the IRS provided relief from penalties under Code Sections 6651(a)(2), 6651(a)(3), 6654(a), and 6662(a) for qualified taxpayers.

The IRS will abate for the 2014 tax year the Code Sec. 6651(a)(2) penalty and the Code Sec. 6651(a)(3) penalty, and will waive the Code Sec. 6654(a) penalty for taxpayers who received a delayed Form 1095-A or a Form 1095-A that the taxpayer believes to be incorrect if the taxpayer timely files his or her 2014 return, including extensions. The IRS also will not impose the Code Sec. 6662 accuracy-related penalty on any portion of an underpayment resulting from the receipt of an incorrect or delayed Form 1095-A.

Additionally, to be eligible for the Code Sec. 36B credit, taxpayers must be enrolled in a qualifying health care plan. The IRS reported that some taxpayers who were not enrolled in a qualifying plan during 2014 erroneously received a Form 1095-A and may have used it to file their return. To be eligible for the relief in Notice 2015-30, these affected taxpayers must amend their 2014 income tax return by April 15, 2016 to reflect that they were not eligible to claim the Code Sec. 36B credit and pay any additional tax liability due, the IRS explained.

FAQs

In its FAQs, the IRS described five scenarios where taxpayers may benefit from filing an amended 2014 Form 1040 based on a corrected Form 1095-A. Additionally, the IRS reminded taxpayers who filed 2014 returns and did not include Form 1095-A information (to reconcile advance payments of the Code Sec. 36B credit) that they should file an amended return.

References: FED ¶46,302; TRC FILEIND: 15,352.

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***

FEDERAL TAX WEEKLY, 2015 No. 16. 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.

LLC Non-Member Manager May Sign Power Of Attorney In Certain Circumstances, Chief Counsel Advises

AM 2015-004

IRS Chief Counsel has issued an advice memorandum addressing the question of who can grant a power of attorney (POA) that is sufficient for an IRS employee to solicit documents and discuss details of a partnership-level proceeding with the individual granted power of attorney. Chief Counsel advised that a nonmember manager of an LLC may sign a power of attorney to establish whether it would be appropriate or helpful for the IRS to secure certain partnership item information from the individual designated in the power of attorney.

- **Take Away.** Chief Counsel also stated that a general partner or LLC member-manager may sign a power of attorney for purposes of a partnership-level examination conducted under the rules of the *Tax Equity and Fiscal Responsibility Act of 1982* (TEFRA). Next, the memorandum states that a limited partner or LLC member may sign a power of attorney for purposes of securing and disclosing certain partnership information.

Background

Generally, a limited partner or LLC member who is not a manager cannot act for the entity and may only execute a power of attorney in his or her individual capacity. To the extent that a manager of an LLC has no ownership interest, that manager is not treated as a "partner" to whom partnership return information may be disclosed under Code Sec. 6103(e)(6).

Chief Counsel's analysis

Chief Counsel advised that the IRS can make inquiries and disclose details of a TEFRA partnership-level examination to any person who is a party to the examination, or who has authority to represent a party in such an examination. A POA from a partner of the partnership allows the IRS to solicit and discuss partnership-level issues with the person appointed. Under Reg. §601.503(c), only someone duly authorized by state law to act for and bind an entity can execute a POA in the name of the entity.

Chief Counsel stated that a general partner, or a member-manager of a limited liability company (LLC), can sign a POA for purposes of a partnership-level TEFRA examination, or for other partnership-related tax purposes. Chief Counsel also determined that even though a limited partner or a nonmember manager of an LLC are not generally "partners" to whom disclosure of partnership return information is authorized, a limited partner or nonmember manager of an LLC may still have limited access to the partnership's or LLC's books and records.

Code Sec. 6103(k)(6) authorizes the IRS to solicit documents and discuss details of partnership-level examinations with any individual it reasonably believes would be helpful or appropriate in obtaining information to determine partnership items, Chief Counsel noted. In such cases, a power of attorney obtained from a nonmember manager of an LLC taxed as a partnership during the taxable year at issue could be helpful in establishing the reasonableness and appropriateness of the IRS soliciting and discussing partnership-level issues with the person appointed.

Reference: TRC IRS: 3,208.10.

Chief Counsel Clarifies Assessment Period For Code Sec. 6694(a) Penalty On Amended Return Position

CCA 201514008

A three-year period would apply for assessment of the Code Sec. 6694(a) penalty on a return preparer who prepared an amended return seeking a refund based on a meritless position, Chief Counsel has determined. In the event the preparer would pay the penalty, the preparer would need to file a refund claim within three years of the date of payment, Chief Counsel added.

- **Take Away.** If a return or claim for refund includes an understatement of liability due to an unreasonable position, the preparer is liable for an understatement penalty. Under Code Sec. 6694(a), the penalty for each return or claim of refund is the greater of $1,000 or 50 percent of the income derived (or to be derived) by the return preparer with respect to the return or claim that results in an understatement of liability due to a position if the return preparer knew (or reasonably should have known) of the position.

Background

A return preparer prepared a client's amended return (Form 1040X, Amended U.S. Income Tax Return) for tax year 2011. The client's amended return reflected an overpayment and included a claim for refund. However, the purported overpayment was based on an incorrect and meritless position. The client's amended return was filed on April 15, 2015.

- **Comment.** The limitations period on refunds for tax year 2011 expires the later of later of April 15, 2015 (three years following the filing of the 2011 return) or two years following payment of 2011 tax.

Chief Counsel's analysis

Chief Counsel first noted that the Code Sec. 6694(a) regs divide reporting positions into

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U.S. Resident Not Excused From FBAR Penalty For Foreign Accounts; Amended Returns Under OVDP No Protection

Moore, DC Wash., April 1, 2015

An individual was liable for a civil penalty for each of four years because he failed to file Reports of Foreign Bank and Financial Accounts (FBARs), a federal district court has found. Because he ignored the instructions for Form 1040, Schedule B, and did not disclose his interest in the foreign accounts to his preparer, he lacked reasonable cause for the failure.

- **Take Away.** The years in question range from 2005 to 2008. The taxpayer began to timely file FBARs in 2009 after learning of the IRS's Offshore Voluntary Disclosure Program (OVDP). After learning about the program, the taxpayer amended six years of tax returns to report income for each of those years from his foreign accounts. Nevertheless, the IRS recommended the maximum penalty ($10,000) for the taxpayer's non-willful failure to file an FBAR for each of the four years at issue.

Background

The IRS is responsible for enforcing 31 U.S.C. §5314 of the *Bank Secrecy Act*, which requires a person residing in the United States who has foreign accounts totaling more than a threshold amount at any time during the year to report them to the IRS by June 30 of that year on Form TD F 90-22.1 (now known as the FinCEN Form 114, Report of Foreign Bank and Financial Account, or FBAR). A person has reasonable cause for failing to file an FBAR when the failure is committed despite an exercise of ordinary business care and prudence.

Court's analysis

The district court found that the taxpayer, a U.S. resident who had kept a bank account with a branch of a Swiss bank located in the Bahamas from 1989 until 2003, did not have reasonable cause for failing to file the FBAR for 2005 through 2008. Although the individual claimed that he asked a Bahamian law firm about the tax implications of incorporating and running a business in the Bahamas while a U.S. citizen, he did not point to any advice he received that made him believe he was free from any obligation to report the business's account to the IRS.

Furthermore, during the years when he prepared his own returns, the taxpayer ignored the question on Form 1040, Schedule B, asking whether he had an interest in or signature authority over a foreign financial account. The court found that this showed a lack of exercise of ordinary business care or prudence. During the years when the taxpayer hired a tax return preparer, the evidence showed that he answered "no" to the question on the preparer's tax organizer asking whether he had an interest or signature authority over a foreign financial account.

For all these years, the taxpayer admitted that he had understood that he owned more than 50-percent of the stock of a corporation that owned a foreign bank account. The court noted that the fact that the taxpayer appeared to have ignored these questions on Schedule B and the tax organizers suggested the taxpayer had actually committed a willful failure to file—a higher violation than the one at issue.

References: 2015-1 ustc ¶50,258; TRC FILEBUS: 9,322.10.

Filing Season Ends With Self-Prepared Returns Showing Uptick

In the final days of the filing season, the IRS reported a significant number of last-minute filers. The agency also reminded taxpayers to look first for answers to their questions online.

Returns. As of April 3, the most recent date for which statistics are available, the IRS had received 99 million returns. Approximately 37 million returns were e-filed by individuals using home-based software, reflecting an increase of 4.5 percent over the same time last year. Tax professionals e-filed 52.9 million returns, reflecting a decrease of 2.5 percent compared to the same time last year, the IRS reported.

www.irs.gov; TRC FILEIND: 15,200.

Penalty

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two categories in describing the standards against which the return preparer's conduct is measured. For positions other than those relating to tax shelters and reportable transactions, the Code Sec. 6694(a) penalty applies when the return or refund claim includes an understatement of tax liability that is due to an undisclosed position for which the return preparer did not have substantial authority, or due to a disclosed position for which there is no reasonable basis. For tax shelters or reportable transactions, a more likely than not standard applies.

Chief Counsel further explained that the Code Sec. 6694(a) penalty must be assessed within three years after the return or claim for refund with respect to which the penalty is assessed was filed. Any claim for refund of overpayment of a Code Sec. 6694(a) penalty must be filed within three years from the time of payment of the penalty.

Here, Chief Counsel determined that the IRS would have three years; that is, until April 15, 2018, to assess the Code Sec. 6694(a) penalty against the preparer. If the preparer pays the penalty, the preparer would need to file a refund claim within three years, Chief Counsel determined. The preparer's entitlement to a refund would turn on whether he can show the penalty was incorrectly determined or that he had reasonable cause and acted in good faith, Chief Counsel added.

Reference: TRC IRS: 27,210.15.

Partner's Nonresident State Taxes Deductible Only As Itemized Deduction, Tax Court Finds

Cutler, TC Memo. 2015-73

The Tax Court has upheld the IRS's determination that nonresident state income taxes paid by a partner in a law firm would be deductible only as itemized deductions. The court rejected the taxpayer's argument that the payments would be deductible as unreimbursed partnership expenses.

- **Take Away.** The taxpayer's approach deducted the payments "above the line." The IRS countered that the payments could only be deducted below the line (as itemized deductions). The IRS's treatment effectively increased the taxpayer's self-employment tax and alternative minimum tax.

Background

The taxpayer was a partner in a law firm, where he had management authority. The firm earned income sourced in Illinois, Michigan, Missouri, Oregon, and Virginia. The taxpayer worked in Missouri. The taxpayer did not perform services or work for clients in any of these five states but paid state nonresident income taxes on the firm's income sourced in those states.

The taxpayer reported this income and claimed deductions for state nonresident income taxes as unreimbursed partnership expenses (on Schedule E) for 2007, 2008 and 2009. The IRS determined that the taxpayer had to deduct the state nonresident income taxes as itemized deductions (on Schedule A).

- **Comment.** The taxpayer deducted Missouri resident income taxes on his Form 1040s, Schedules A.

Court's analysis

The court first found that generally deductions are allowed above the line if they are attributable to a trade or business carried on by the taxpayer, if the trade or business does not consist of the performance of services by the taxpayer as an employee. The expenses must be directly, and not merely remotely, connected with the conduct of a trade or business, the court added.

In *Tanner, 45 TC 145 (1965), Dec. 27,616,* the court found that a taxpayer could not take above-the-line deductions for West Virginia income tax he paid on his share of net income earned by an accounting firm of which he was a partner. In *Strange, 114 TC 206 (2000), Dec. 53,822,* the court disallowed above the line deductions for state nonresident income taxes paid on net royalty income from oil and gas wells. The taxpayer argued that Virginia's nonresident taxes were entity-level taxes because they were imposed on the firm directly. More generally, the taxpayer claimed that all the state taxes in question were entity-level taxes because they were imposed constructively on the firm.

The court found that the taxpayer, as a partner in the firm, had the authority to direct the firm's operations in the five states. This authority provided a nexus between the taxpayer and the five states, the court held.

Additionally, the court rejected the taxpayer's argument that taxes imposed by one of the states would be deductible from gross income because they were imposed on the taxpayer's gross income and not on his net business income. The court found that the taxpayer's reliance on IRS regulations was misplaced. A state law, the court found, provided for the calculation of state taxable income by comparison of the net amount of income from the sources within the state with the net amount of income from all sources. The court concluded that the taxpayer could only deduct the state taxes as itemized deductions.

References: Dec. 60,286(M); TRC INDIV: 45,116.

Tax Court Denies Deductions For Donations Of Household Items Made In Batches Of Less Than $250

Kunkel, TC Memo. 2015-71

The Tax Court has rejected a married couple's claim that their donations to charity did not require a contemporaneous written acknowledgment because they were made in batches below the $250 threshold. The court found it implausible that they had made the purported donations on nearly 100 distinct occasions in one year.

- **Take Away.** The taxpayers claimed that some donations of household items were picked up by a charity, which left undated, blank "doorknob hangers" at their residence. The court found these doorknob hangers, commonly used by many charities when picking up donations, were not specific to taxpayer, did not describe the property contributed, and were not contemporaneous written acknowledgments.

Background

The taxpayers reported $42,000 in charitable contributions: $5,000 in cash and $37,000 in noncash donations. The taxpayers made donations of books, clothing, furniture, and other household items to four nonprofit organizations (one church and three service organizations).

In some cases, the taxpayers took household items to the charities in batches, which they claimed were worth less than $250 because they thought this eliminated the need to get receipts. Other times, the taxpayers received generic, undated doorknob hangers that did not list or describe the property.

For income tax purposes, the couple estimated the value of their donated prop-

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IRS Explains Application Of Excise Tax To Gift Cards For Air Transportation

PMTA 2015-001

The IRS, in Program Manager Technical Assistance (PMTA), has explained how the 7.5-percent excise tax on air transportation applies to different types of gift cards used to purchase taxable transportation. The IRS also clarified that the tax applies to service charges and fees that must be paid "to get on the plane," but does not apply to separate service charges that are not necessary to obtain the air transportation.

- **Take Away.** Code Sec. 4261(a) imposes the tax on each segment of commercial air transportation flown within the U.S. The tax supports the Airport and Airway Trust Fund. The tax is scheduled to expire after September 30, 2015.

Background

In Scenario 1, a commercial airline provides regularly scheduled flights. A purchaser pays for a prepaid gift card from the airline, stated in dollars. The card can only be used to pay for commercial flights provided by the airline and cannot be refunded for cash. The card itself does not state a fare or itinerary and does not entitle the holder to air transportation.

In Scenario 2, an operator owns an aircraft and operates flights paid for with a prepaid flight card. A seller sells the flight cards, which provide a fixed number of flying hours, to a purchaser. A flight or "jet" card typically offers, for a fixed price, 25 hours of flight time on a specific type of aircraft operated by the third party operator. The seller, acting as agent for the purchaser, books charter flights with the operator. Once a flight is booked, the operator charges seller for the flight, and seller must pay the operator within 30 days. The jet card's cost to the purchaser includes the transportation excise tax, based on the card's total cost.

The jet card is valid for 12 months after it is sold to the purchaser and locks in the hourly air rate for one year. After 12 months, the purchaser can use the card, but the hourly rate is no longer locked in. The card is nonrefundable.

Scenario 1

The gift card does not entitle the holder to board an airplane and is not required as a condition of obtaining air transportation. The gift card is similar to the gift certificates described in Rev. Rul. 56-157, except that it is not redeemable for cash and it is limited to a single airline. As a result, the excise tax does not apply to the purchase of the gift card. The tax is imposed when the purchaser uses the gift to purchase transportation from the airline, the IRS explained.

Scenario 2

In this case, the jet card entitles the purchaser to get on a flight and is essentially a ticket substitute. Therefore, the tax is imposed when the purchaser buys the jet card from the seller, and the seller must collect the tax at that time, the IRS explained.

- **Comment.** Under Rev. Ruls. 73-508 and 80-31, the tax is imposed on mandatory charges that must be paid to get on an airplane. These charges include the security charge imposed by the federal government as a condition of obtaining air transportation, but do not include a service charge that is optional and that is imposed by an airline for allowing a different person to use the ticket.

Reference: TRC EXCISE: 9,102.05.

Donations

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erty. The IRS disallowed all of the couple's claimed noncash contributions. The taxpayers appealed to the Tax Court for relief.

Court's analysis

The court first noted that taxpayers carry the burden of proving their entitlement to their claimed noncash charitable contribution deductions. Contributions to qualified charitable organizations are allowed only if the taxpayer satisfies statutory and regulatory substantiation requirements. For all contributions of $250 or more, a taxpayer generally must obtain a contemporaneous written acknowledgment from the donee.

Additional substantiation requirements are imposed for contributions of property with a claimed value exceeding $500 or $5,000. Similar items of property must be aggregated in determining whether gifts exceed the $500 and $5,000 thresholds. The term similar items of property means property of the same generic category or type, such as clothing, jewelry, furniture, electronic equipment, household appliances, or kitchen items. Additionally, no deduction is allowed for any contribution of clothing or a household item unless the property is in good used condition or better, the court found.

The court found it implausible that the taxpayers had made their donations in batches worth less than $250. This would assume that they had made these donations on 97 different occasions, the court found. The court further found that the taxpayers had no recollection as to which items were donated to which charity. Additionally, the court found that the couple offered no evidence that the household items were in good used condition or better. The court concluded that the couple did not provide a contemporaneous written acknowledgment from any of the charitable organizations.

- **Comment.** The court noted photos of the donated items would be one form of evidence.

The court also upheld the accuracy-related penalty. The court was not persuaded by the couple's testimony that they reasonably and in good faith believed they had satisfied the substantiation requirements for their donations to the charitable organizations.

References: Dec. 60,284(M); TRC FILEIND: 15,304.15.

TAX BRIEFS

Jurisdiction

An individual's refund claim was dismissed for lack of jurisdiction because he failed to timely file a petition for redetermination after he was sent a deficiency notice. A taxpayer is only entitled to a redetermination if he refuses to pay the assessed tax and files a petition with the Tax Court within 90 days of receiving the notice of deficiency.
Greene, DC Ariz., 2015-1* USTC *¶50,261; TRC LITIG: 6,106

An individual's complaint seeking damages for violation of his constitutional rights by an IRS employee for tax collection activities performed in her official capacity was dismissed for lack of subject matter jurisdiction. The individual failed to establish that he exhausted his administrative remedies prior to filing suit.
Reeves v. Conway, DC Fla., 2015-1* USTC *¶50,260; TRC IRS: 45,114

An individual's complaint seeking damages for alleged violations of his constitutional rights by various IRS employees during assessment and collection proceedings was dismissed for lack of jurisdiction. The individual failed to show that the agents violated a clearly established constitutional right during their assessment or collection of his taxes.
Perkins, DC Wis., 2015-1* USTC *¶50,254; TRC LITIG: 9,254.05

A federal tax lien had priority over a financial institution's deed of trust on a couple's property. The mortgagee was not entitled to equitable subrogation because when the prior loan was released, no lien existed on the property and a subsequent recording of the trust deed could not revive the released lien.
Tolin, DC Mo., 2015-1* USTC *¶50,253; TRC IRS: 48,150

Summons

An IRS summons issued to a CPA regarding an individual's tax liabilities was ordered enforced and the taxpayer was not entitled to be present at the CPA's examination. The taxpayer's privilege was already adequately protected by the CPA; therefore, it was not necessary for the taxpayer to be present at the examination.
McEligot, DC Calif., 2015-1* USTC *¶50,263; TRC IRS: 21,350

Deductions

An insurance company was properly entitled to deduct guaranteed dividends credited to certain policyholders during the tax years at issue. The company firmly established its fixed and absolute liability for the guaranteed dividends in the year they were adopted by the company's board of directors, which satisfied the requirements of the "all-events test" under Reg. §1.461-1(a)(2).
Massachusetts Mutual Life Insurance Company, CA-FC, 2015-1* USTC *¶50,265; TRC ACCTNG: 12,050

The Tax Court committed harmless error in imposing an adverse inference against an individual for failing to present a witness to corroborate the testimony that a corporation joined a qualified settlement fund (QSF) under Code Sec. 468B due to pressure from a tobacco manufacturer. There was sufficient competent evidence to prove the corporation voluntarily joined the QSF for monetary gains, rather than at the behest of the manufacturer.
Suriel, CA-11, 2015-1* USTC *¶50,264; TRC LITIG: 6,958

A couple was not entitled to a mortgage interest deduction for real property they allegedly owned in Syria. The couple could not show that they were the legal or equitable owners of the property. The couple was liable for the accuracy-related penalty under Code Sec. 6662 on the portion of the underpayment of their tax attributable to negligence.
Al-Soufi, TC, Dec. 60,281(M), FED ¶47,991(M); TRC INDIV: 48,400

Tax Credits

Gas conditioning equipment located in two fuel cell facilities were part of a "fuel cell power plant" pursuant to Code Sec. 48(c)(1)(C) and, therefore, they were eligible for a section 1603 grant as a qualified fuel cell property under section 1603(d)(2). The gas conditioning equipment constituted an integral part of the fuel cell power plant because it was necessary to the facilities' intended operation on anaerobic digester biogas.
RP1 Fuel Cell, LLC, FedCl, 2015-1* USTC *¶50,262; TRC BUSEXP: 51,102.20

TEFRA

A partnership was subject to the unified partnership procedural rules of the Tax Equity and Fiscal Responsibility Act of 1982 (P.L. 97-248) (TEFRA), as the small partnership exception to the TEFRA

IRS Reminds U.S. Citizens And Resident Aliens with Foreign Assets Of FBAR/Other Requirements

The IRS has reminded U.S. citizens and resident aliens, including those with dual citizenship who have lived or worked abroad during all or part of 2014, that they may have a U.S. tax liability and are likely required to file a U.S. tax return. The IRS also outlined the filing requirements for nonresident aliens who received income from U.S. sources in 2014 and for U.S. citizens and resident aliens who have received worldwide income.

FBARs. One requirement that may affect certain taxpayers is the requirement to file the FBAR. Taxpayers with an interest in, or signature or other authority over, foreign financial accounts whose aggregate value exceeded $10,000 at any time during 2014 must file with the Treasury Department Financial Crimes Enforcement Network (FinCEN) Form 114, Report of Foreign Bank and Financial Accounts (FBAR).

Canadian retirement plans. The IRS also discussed the filing requirements for taxpayers with interests in certain types of Canadian retirement plans and those who relinquished their U.S. citizenship or ceased to be lawful permanent residents of the United States during 2014.
IR-2015-70; TRC FILEBUS: 9,104.

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rules did not apply. The prohibition on passthrough ownership does not contain a *de minimis* exception.
***Brumbaugh*, TC, Dec. 60,278(M), FED ¶47,988(M); TRC PART: 60,054**

Tax Fraud

An individual was not shown by the IRS to have committed fraud. Therefore, the three-year statute of limitations as to deficiencies assessed against him was expired and, therefore, the taxpayer was not liable for deficiencies or fraud penalties.
***Jacoby*, TC, Dec. 60,280(M), FED ¶47,990(M); TRC PENALTY: 6,164**

Liens and Levies

An individual's action for damages against the IRS for levying his bank account while his installment agreement with the IRS was pending was dismissed. The individual failed to file an administrative claim with the IRS prior to filing the damages action.
***Goldsmith*, DC Nev., 2015-1 USTC ¶50,266; TRC IRS: 45,114**

An IRS Appeals officer's determination to uphold the filing of a federal tax lien against an individual was sustained and a substantial delay penalty was imposed. The individual raised the same frivolous arguments he raised in a previous case; therefore, the IRS's determination was sustained and another delay penalty was imposed.
***Kanofsky*, TC, Dec. 60,283(M), FED ¶47,993(M);**

The IRS was denied summary judgment in a levy proceeding because there was an issue of fact whether the notices of deficiency were properly mailed to the individual taxpayer. The U.S. Postal Service Forms 3877 were defective. As a result, the IRS did not establish that the notices were properly mailed.
***Knudsen*, TC, Dec. 60,282(M), FED ¶47,992(M); TRC IRS: 51,056.20**

A married couple's tax and penalty assessments were reduced to judgment and tax liens were foreclosed on property held by a purported family trust. The government established its *prima facie* case against the couple, which they failed to rebut. The transfers to the trust were null and void and, therefore, the federal tax liens attached to the property.
***Green*, DC Okla., 2015-1 USTC ¶50,259; TRC IRS: 45,158**

The widow of a deceased tax debtor failed to show that she had an interest in property subject to federal tax liens at the time the IRS assessed the decedent's tax liability. Even if the widow had an interest in the property at the time the IRS assessed the taxes, the government could enforce the liens by selling the entire property.
***Johnson*, DC Wash., 2015-1 USTC ¶50,257; TRC IRS: 45,158**

Federal tax liens had priority over a financial institution's mortgage on a tax debtor's real property because the ambiguous property description in the mortgage did not give constructive notice to other creditors under state (New Hampshire) law. The bank's mortgage was improperly recorded and, consequently, remained inchoate when the federal tax liens arose.
***U.S. Bank National Association v. H.J. Bickford*, DC N.H., 2015-1 USTC ¶50,255; TRC IRS: 48,158.10**

Deficiencies and Penalties

A married couple's assertion that the statute of limitations expired before the IRS mailed notices of deficiency for the two tax years at issue was rejected because they failed to establish that for those years they were *bona fide* residents of the U.S. Virgin Islands (U.S.V.I.). The couple failed to meet their burden of showing that summary adjudication was warranted and a trial was required to determine whether the limitations period expired before the deficiency notices were mailed.
***Cooper*, TC, Dec. 60,285(M), FED ¶47,995(M); TRC INTL: 24,100**

Bankruptcy

A debtor couple had standing to object to a settlement under which a bank withdrew its objection to an untimely IRS proof of claim and the IRS agreed to take a reduced amount from the estate. The debtors had a pecuniary interest in the settlement because it left them with a large nondischargeable post-petition obligation to the IRS while allowing the IRS's claims would leave them with very little post-petition tax liability.
***In re Zumbach*, BC-DC Iowa, 2015-1 USTC ¶50,256; TRC IRS: 57,062**

Litigation Costs

An individual's claim for administrative and litigation costs was denied because the IRS's positions were substantially justified. The individual did not provide all of the relevant information to prove his claims for more than three years after the deficiency notice was issued. Further, it was not until several months after the IRS filed its answer that the individual's attorney provided proof of the individual's insolvency, which made the debt forgiveness and settlement proceeds excludible from income.
***Baldwin*, TC, Dec. 60,279(M), FED ¶47,989(M); TRC LITIG: 3,154.05**

Identity Theft Victims Continue To Experience Long Delays For Refunds, TIGTA Reports

Despite an improvement in the average number of days the IRS took to resolve tax account problems arising from stolen identity refund fraud, victims of identity theft continued to experience delays and errors in receiving their refunds, according to a new report from the Treasury Inspector General for Tax Administration (TIGTA). After conducting a study of 100 identity theft tax accounts resolved in Fiscal Year (FY) 2013, TIGTA found that identity theft victims experienced long delays, up to an average of 278 days, in which their identity theft issues were resolved.

TIGTA issued several recommendations, including that the IRS analyze identity theft case reassignments and revise inventory management processes to reduce case reassignments. TIGTA also suggested that the IRS develop a comprehensive identity theft training course to ensure that assistors are capable of handling complex cases, and develop better processes and procedures to ensure accuracy. In response, the IRS stated that it has added and strengthened protections in its processing systems and continued, in this tax season, to make progress in stopping identity theft and other fraudulent refunds.

TIGTA Rep. No. 2015-40-024; TRC IRS: 66,304.

PRACTITIONERS' CORNER

Prospects Improve For Tax Legislation

There has been no shortage of tax bills introduced since the beginning of 2015, some new and some that have been previously offered over the course of the past few years. The bills represent markers for lawmakers who will use them to negotiate their inclusion, or some of the proposals therein, when tax writers begin to undertake serious tax reform negotiations. As Congress returns to work after a two-week recess, tax legislation is likely to come to the forefront.

Tax extenders

Tax extenders will need to be addressed as the *Tax Increase Prevention Act of 2014* merely extended the incentives through 2014. Democrats and Republicans generally agree that the research tax credit should be made permanent, but they split on things such as tradeoffs from enhancing the earned income credit (EIC) and other credits aimed at families. Extension of enhanced Code Sec. 179 expensing, as well as bonus depreciation, is also discussed frequently.

Family incentives

President Obama has proposed tripling the cap on the child and dependent care credit for those with children under five years of age from 35 percent to 50 percent, up to $6,000 per child. A bicameral group of lawmakers on March 4 introduced a series of bills aimed at cutting taxes for middle income taxpayers. Specifically, the Senate and House Democrats introduced legislation to enhance the EIC, child tax credit, American Opportunity Tax Credit (AOTC) and the child and dependent care Credit, plus create a new incentive for working parents.

Estate tax

The House Ways and Means Committee on March 25 approved legislation (HR 6) to repeal the estate tax. Democrats on the committee balked at repealing the estate tax. The bill is expected to come up for a vote in the House in April.

- **Comment.** Witnesses at a March 18 House Ways and Means Select Revenue Measures Subcommittee hearing on the estate tax testified that they were struggling as viable enterprises under the tax and the impact it has on their productivity and ability to keep their workers employed. Some Democrats on the Senate Finance panel said they were interested in carving out small family farms and ranches which are asset rich and cash poor. Meanwhile, Sen. Charles Grassley, R-Iowa managed to add a complete repeal of the estate tax in the Senate budget proposal – a non-binding agreement.

"As Congress returns to work after a two-week recess, tax legislation is likely to come to the forefront."

Small businesses

The House on February 13 passed the America's Small Business Tax Relief Bill (HR 636), which would expand and make permanent enhanced small business expensing under Code Sec. 179. The bill makes permanent after 2014 the $500,000 allowance for the expensing of qualified property and the $2 million threshold after which the amount of the allowance is reduced. Both amounts are indexed for inflation for tax years beginning after 2015. The enhanced treatment is also made permanent for computer software and qualified real property (qualified leasehold improvement property, restaurant property, and retail improvement property).

PPACA

House lawmakers on January 6 approved the Hire More Heroes Bill of 2015 (HR 22), which would permit an employer, when determining whether it must provide health care coverage to its employees under the Patient Protection and Affordable Care Act (PPACA) to exclude employees who have coverage under a healthcare program administered by the Department of Defense (DOD). On January 8, the House approved the Save American Workers Bill of 2015 (HR 30), which would alter the calculation under the PPACA of the number of full-time equivalent employees for the purposes of determining which employers are subject to penalties. In February, the House passed HR 596 to repeal the PPACA.

In the Senate, Finance Chair Orrin Hatch, R-Utah, and Health, Education, Labor and Pensions (HELP) Chair Lamar Alexander, R-Tenn., along with 20 other senators, in January introduced the American Liberty Restoration Bill (Sen 203), which would repeal the PPACA's individual mandate. In February, Hatch along with Sen. Richard Burr, R-N.C., and House Energy and Commerce Chair Fred Upton, R-Mich., unveiled the Patient Choice, Affordability, Responsibility, and Empowerment (CARE) Bill, which would cap the exclusion for employer-provided health coverage, and provide a targeted tax credit to help buy health care.

International

In a January letter to House Democratic members, House Minority Leader Nancy Pelosi, D-Calif., stated that corporate inversions would remain a priority for House Democrats in 2015. A bicameral group of lawmakers subsequently introduced legislation to tighten restrictions on corporate tax inversions, limiting the ability of U.S. companies to lower their U.S. taxes by

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WASHINGTON REPORT *by the Wolters Kluwer Washington News Bureau*

Congress returns to work with tax bills on the agenda

Congressional lawmakers have returned to Capitol Hill after a two-week recess. Tax legislation is expected to move as early as this week. In the House, GOP leaders have indicated that the chamber will take up a number of tax-related bills. These include the Taxpayer Bill of Rights Act of 2015 (HR 1058), the IRS Email Transparency Act (HR 1152), the Taxpayer Knowledge of IRS Investigations Act (HR 1026), the Ensuring Tax Exempt Organizations the Right to Appeal Act (HR 1314), the IRS Bureaucracy Reduction and Judicial Review Act (HR 1295), the Prevent Targeting at the IRS Act (HR 709), the Fair Treatment for All Gifts Act (HR 1104), the Contracting and Tax Accountability Act of 2015 (HR 1562), the Federal Employee Tax Accountability Act of 2015 (HR 1563), the State and Local Sales Tax Deduction Fairness Act of 2015 (HR 622) and the Death Tax Repeal Act of 2015 (HR 6).

A Senate committee, meanwhile, will be hearing from IRS Commissioner John Koskinen this week. The Senate Homeland Security Committee has scheduled a hearing on April 15 to discuss the IRS's challenges in implementing the Patient Protection and Affordable Care Act (PPACA).

Koskinen repeats warning about budget cuts

Significant budget reductions are degrading the IRS's ability to enforce the nation's tax laws, Commissioner John Koskinen cautioned again on April 8. The agency has largely absorbed recent budget reductions by shrinking its workforce but levels of staffing are insufficient for it to deliver on its mission, he said. Koskinen spoke at the Brookings Institution in Washington, D.C.

The IRS is operating with significantly fewer resources both in terms of money and personnel this year compared to recent past years, Koskinen said. The agency's fiscal year (FY) 2015 budget reflects a $346-million cut from FY 2014 In response, the IRS has reduced enforcement, customer service and spending on business systems modernization, he added. "We are operating with antiquated business systems. We have very old technology running along with new technology."

According to Koskinen, customer service has declined because of budgetary constraints. "Our telephone level of service at the start of the filing season was around 54 percent; now it is around 40 percent." The IRS has 2,000 fewer employees answering phone calls compared to prior years, Koskinen noted.

Looking ahead, Koskinen said that IRS needs to interact with taxpayers as soon as possible. "We have already made significant improvements in technology." Taxpayers have used the Where's My Refund online tool some 187-million times, he reported. Without online services, taxpayers would need to contact the IRS by telephone or in person, he added. "We need to find ways to move more people online and out of the channels of calling us or walking into Taxpayer Assistance Centers." The negative impacts of underfunding extend to business-side taxpayers as well, Koskinen reported. "We have fewer examiners who understand complex issues." Overall, the loss of revenues to the federal government may reach $2 billion, he said.

IRS Criminal Investigation highlights activities

The IRS Criminal Investigation (CI) Division recently released its annual report, reflecting significant accomplishments and enforcement actions taken in fiscal year (FY) 2014. The 40-page report summarizes a wide variety of CI activity and includes case summaries on a range of tax crimes, money laundering, public corruption, terrorist financing and narcotics trafficking financial crimes.

"We are incredibly proud of our conviction rate," said CI Chief Richard Weber in a statement. "As a federal law enforcement agency, that conviction rate reflects the pride of our agents and the quality of our case work. We are the best financial investigators in the world and I am extremely proud of our special agents and professional staff." Weber added that CI will remain focused on "finding and investigating great cases that make a real difference in compliance of our nation's tax laws."

CRS reviews renewable energy tax incentives

In a new report, the Congressional Research Service (CRS) has review federal tax incentives for renewable energy. CRS reported that starting in 2008, the federal government incurred outlays associated with excise tax credits for biodiesel and renewable diesel. The tax credits for alcohol fuels, including ethanol, expired at the end of 2011, while the tax credits for biodiesel and renewable diesel expired at the end of 2014. After 2014, under current law, there are no projected costs associated with tax incentives for renewable fuels. Expired tax incentives may be extended, however, as part of a tax extenders bill, CRS noted.

CRS concluded that, relative to production levels, federal financial support for renewable energy exceeds support for fossil sources of energy, despite the fact that the majority of energy produced in the U.S. continues to come from fossil energy sources. "In recent years, the majority of energy tax incentives have served to benefit renewable energy resources," CRS reported. "However, since the primary tax provisions supporting renewables have expired, tax-related support for renewables has fallen in recent years, and is projected to continue to decline."

Groups express concerns about Form 1023-EZ

Some nonprofit organizations recently expressed concerns with new IRS Form 1023-EZ. The IRS developed Form 1023-EZ to streamline the process to obtain tax-exempt status. According to the IRS, the new form has been widely used and has reduced the time it takes to grant tax-exempt status. However, the National Association of State charity Officials and others have cautioned that the new form could be burdensome on states.

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combining with a smaller foreign business and moving their tax address overseas.

Sen. Sheldon Whitehouse D-R.I., and Rep. Lloyd Doggett, D-Texas, a senior member of the House Ways and Means Committee, on January 13 introduced the Stop Tax Haven Abuse Bill. The bill aims to close a number of offshore tax loopholes, eliminates tax incentives for U.S. companies to move jobs and operations offshore, and modifies rules on corporate inversions for businesses dodging U.S. taxes.

Also in January, Sens. Rand Paul, R-Ky., and Barbara Boxer, D-Calif., announced plans to introduce legislation, the Invest in Transportation Bill of 2015, which would provide a tax incentive for companies to bring back to the U.S. a portion of the estimated $2 trillion in foreign earnings that are being held overseas. The funds would be used to extend the Highway Trust Fund. Obama recently proposed similar legislation with a one-time 14 percent tax on repatriated funds.

- **Comment.** Senate Budget Committee ranking member Bernie Sanders, I-Vt., requested President Obama use his executive authority to close what he termed the "worst corporate tax loopholes."

Charitable giving

A number of bills would impact charitable organizations and taxpayers making gifts to charity. In the House, the Make Permanent S Corporation Charitable Contributions Bill of 2015 (HR 630), would make permanent certain rules regarding basis adjustments to stock of S corporations making charitable contributions of property. The Make Permanent IRA Charitable Contribution Bill of 2015 (HR 637) would make permanent the rule allowing certain tax-free distributions from IRAs for charitable purposes.

The Conservation Easement Incentive Bill of 2015 (HR 641), sponsored by Rep. Mike Kelly, R-Pa., would permanently extend the higher deduction limits and potential 15-year carry forward of conservation easement gifts. The Fighting Hunger Incentive Bill of 2015 (HR 644), sponsored by Rep. Tom Reed, R-N.Y. provides incentives for businesses to contribute excess inventory to local food banks and pantries by permanently extending a food-inventory donation provision in the Tax Code.

- **Comment.** These bills have been approved by the House and now await action in the Senate. The Senate's leaders have not given any indication when the chamber may take up the bills, if at all.

Administration's proposals

In his fiscal year (FY) 2016 federal budget, President Obama called renewing some previous tax proposals along with proposing new ones targeted to businesses and individuals. The President also urged Congress to increase funding for the IRS by nearly $2 billion. Some of the newer proposals include:

Foreign earnings. A one-time tax of 14 percent on untaxed foreign earnings that U.S. companies have accumulated overseas. In March, the Obama administration offered this route as a way to fund infrastructure spending.

Capital gains/dividends. An increase of the top long-term capital gains and qualified dividends tax rate from 20 percent to 24.2 percent, which long with the existing 3.8 percent net investment income (NII) tax, would push the top effective long-term capital gains and qualified dividends tax rate up to 28 percent.

Itemized deductions. The President proposed, as in past years, to limit the value of itemized deductions and other tax preferences to 28 percent.

Second earner credit. A new "second earner" tax credit of up to $500 for qualified couples where both spouses work would be created under the President's proposal.

Corporate tax rate. Consistent with earlier proposals, the President's budget would reduce the corporate tax rate to 28 percent, with a 25 percent effective rate for domestic manufacturing.

Small business stock. The President renewed his proposal to permanently extend the 100 percent exclusion from tax by a non-corporate taxpayer for capital gains realized on the sale of qualified small business stock.

Business incentives. The President's budget would make permanent and enhance the research tax credit, the Work Opportunity Tax Credit, Indian Employment Credit, and the Production Tax Credit.

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.

Tax reform

House Ways and Means Chair Paul Ryan, R-Wisc. recently said that he is not averse to a piecemeal approach to passing tax related proposals as long as they lead comprehensive tax reform. Senate Finance Committee Chair Hatch and Ryan both agree, however, that there is a small window – the end of the year to be exact - to enact some of the tax reform proposals offered by lawmakers. Moving tax reform in 2016 would be more challenging because of the campaign season for the next presidential election.

Some of the current tax measures introduced either in committee or in the chambers are consider non-controversial and stand the best chance of passage this year. Both Democrats and Republicans have said there is room for compromise on some aspects of tax reform, especially in the area of business tax reform. Under that scenario, the White House might be willing to lower the corporate tax rate in exchange for expansion of tax provisions, such as the child tax credit and the EIC. House Speaker John Boehner, R-Ohio, and Senate Majority Leader Mitch McConnell, R-Ky., have indicated they may be open to increasing tax incentives for families.

Behind the scenes talks between the White House and GOP staffers about tax reform appear to be continuing. Both sides, however, have released few details, other than indicating that discussions have taken place. More details may be released before summer. In May, the Senate Finance Committee is expected to unveil its comprehensive tax reform proposals, which could help jumpstart negotiations.

COMPLIANCE CALENDAR

■ **April 20**
Employers deposit Social Security, Medicare, and withheld income tax for April 11, 12, 13, and 14.

■ **April 22**
Employers deposit Social Security, Medicare, and withheld income tax for April 15, 16, and 17.

■ **April 24**
Employers deposit Social Security, Medicare, and withheld income tax for April 18, 19, 20, and 21.

■ **April 29**
Employers deposit Social Security, Medicare, and withheld income tax for April 22, 23, and 24.

■ **May 1**
Employers deposit Social Security, Medicare, and withheld income tax for April 25, 26, 27, and 28.

■ **May 6**
Employers deposit Social Security, Medicare, and withheld income tax for April 29, 30, and May 1.

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.

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FROM THE HELPLINE

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

Q When is an employee considered highly compensated for purposes of applying the nondiscrimination rules to a qualified retirement plan?

A An employee is generally considered highly compensated if she (1) was a five-percent owner at any time during the current or preceding year, or (2) had compensation from the employer in excess of the limit specified under Code Sec. 414(q)(1), with adjustments for inflation. For 2015 that limit is $120,000. *See TRC RETIRE: 3,210.30 for more information.*

Q For purposes of deducting costs for acquiring and maintaining a uniform that is a condition of employment, what is considered to be clothing adaptable for general wear?

A The cost and upkeep of a uniform, including laundering and cleaning, are deductible only if the uniform is required as a condition of employment and is not adaptable to general wear. The determination of what is adaptable for general wear is determined on a case by case basis. *See TRC INDIV: 36,202.10.*

In addition, the deduction for the cost related to uniforms is claimed as a miscellaneous itemized deduction on Form 1040, Schedule A. This means that a portion of the cost related to such a uniform would only be deductible if it, plus the total of all other miscellaneous itemized deductions, was more than two-percent of the taxpayer's adjusted gross income. *See TRC INDIV: 39,100.*