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Obama Signs Highway Bill Revising Return Due Dates, Making Other Compliance Changes

Surface Transportation and Veterans Health Care Choice Improvement Act of 2015

President Obama signed the *Surface Transportation and Veterans Health Care Choice Improvement Act of 2015* (P.L. 114-41) on July 31. The Act revises some return due dates, overrules the Supreme Court's decision in *Home Concrete, 2012-1* USTC *¶50,315,* revises the employer shared responsibility requirements in the *Affordable Care Act* (ACA), and includes other tax compliance measures. Although the highway and transportation funding portion of the Act is temporary, the tax compliance measures are permanent.

- ***Take Away.*** The American Institute of Certified Public Accountants (AICPA) started the process to realign the return due dates some 10 years ago, Melissa Labant, CPA, director of tax advocacy, AICPA, told Wolters Kluwer. "Workload compression has been a major issue for our members," Labant explained. "The revisions are a very welcomed change. They set up a more logical flow of information, particularly for individuals who rely on information from pass-through entities."
- ***Comment.*** "The IRS needs to act quickly to provide guidance on some of the bill's changes," Dustin Stamper, director, Washington National Tax Office, Grant Thornton, LLP, told Wolters Kluwer. "Any estate tax return filed after July 31 must now comply with the new reporting requirements on asset values, so the IRS will either need to provide transition relief or quickly create reporting procedures," Stamper noted.

Return due dates

The Act provides that the due date for partnerships to file Form 1065, U.S. Return of Partnership Income and Schedule K-1s, Partner's Share of Income, will move from April 15 to March 15 (or to the 2½ months after the close of its tax year for fiscal-year taxpayers). Under the Act, the filing deadline for regular C corporations moves from March 15 (or the 15th day of the 3rd month after the end of its tax year) to April 15 (or the 15th day of the 4th month after the end of its tax year).

- ***Comment.*** For C corporations with tax years ending on June 30, the filing deadline will remain at September 15 until tax years beginning after December 31, 2025, when it will become October 15. An automatic six-month extension will be available for C corporations, except for calendar-year C corporations through 2025, during which an automatic five-month extension until September 15 will generally apply.

FBAR. The Act shifts the due date for the FBAR (Report of Foreign Bank and Financial Accounts, FinCEN Form 114) from June 30 to April 15 with a maximum extension of a six-month period ending October 15.

Exempt organizations. Under the Act, the maximum extension for the returns of exempt organizations filing Form 990 (series) is an automatic six-month period ending on

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November 15 for calendar year filers. The maximum extension for returns of exempt organizations required to file Form 4720 is an automatic six-month period beginning on the due date for filing the return (without regard to any extensions).

- ***Comment.*** The automatic six-month extension for exempt organizations makes the filing process more efficient, Labant noted.

More returns. Among other changes, the Act directs the IRS to modify its regs to allow a maximum extension of 3½ months on Form 5500, Annual Return/Report of Employee Benefit Plan; and 5½ months on Form 1041, U.S. Tax Return for Estates and Trusts.

Overstatement of basis

In *Home Concrete,* the Supreme Court ruled that an overstatement of basis does not result in an omission of income for statute of limitations purposes. Under the Act, the six-year limitations period applies where any overstatement of basis results in a substantial omission (25 percent or more) of income. The Act is effective for all returns for which the normal assessment period remained open as of the date of enactment and for returns filed after that date.

- ***Comment.*** The issue had arisen in a number of cases, most notably in "Son of BOSS" tax shelter cases where the taxpayer overstates basis in a partnership interest, resulting in an understatement of income.

Affordable Care Act

The Act revises the ACA's employer shared responsibility requirements ("employer mandate"). Under the Act, an individual is not taken into account for purposes of the ACA's employer shared responsibility requirements for applicable large employers (ALEs) if the individual has coverage under TRICARE or a VA health care program. This Act provides that this treatment may be applied retroactively, to months beginning after December 31, 2013.

- ***Comment.*** The ACA's employer shared responsibility requirements only affect ALEs. Transition relief is available for 2015.

Mortgage reporting

Mortgage servicers file Form 1098, Mortgage Interest Statement, to report certain information to the IRS. Included in the Act are additional reporting requirements for mortgage servicers, including the amount of the outstanding mortgage principal, the address (or description of property without an address) of the property, and loan origination date. The additional reporting requirements apply to returns and statements the due date for which (determined without regard to extensions) is after December 31, 2016.

Stepped-up basis

The Act requires consistency between estate tax value and the "stepped-up basis" of assets acquired from a decedent. Executors of large estates will be required to disclose to the IRS information identifying the value of each interest received.

More provisions

Pension funds. The Act extends through 2025 the ability of qualified employers to transfer excess pension assets to fund retiree health benefits and retiree life insurance.

Military veterans. Under the Act, a veteran's eligibility to contribute to a health savings account (HSA) is not affected by receipt of medical care for a service-connected disability.

Fuel taxes. The Act uniformly imposes taxes on liquefied natural gas (LNG), liquefied petroleum gas (LPG), and compressed natural gas (CNG) on an energy-equivalent basis.

Highway funding. The highway and transportation funding portion of the Act, authorizing expenditure authority for the Highway Trust Fund, runs through October 29, 2015. The Act extends expenditure authority for the Leaking Underground Storage Tank Fund and the Sport Fish Restoration and Boating Trust Fund.

Long-term bill

The temporary nature of the Act means that lawmakers will try before October 29 to pass a multi-year highway and transportation funding bill. Any long-term bill is expected to include revenue offsets, but a hike in the federal gas tax appears, for now, to be off the table.

The Senate has approved a multi-year highway and transportation funding bill (HR 22) that revokes or denies U.S. passports to individuals with seriously delinquent tax debts and authorizes private contractors to engage in tax collection. The House has approved a bill (HR 3038) to fund highway and transportation though 2015, utilizing some of the same offsets as in the just-passed bill. President Obama has proposed a six-year transportation plan that raises $41 billion by tightening restrictions on corporate inversions.

For more details and analysis of the Surface Transportation and Veterans Health Care Choice Improvement Act of 2015, see the CCH Briefing, Surface Transportation Act of 2015: Tax Provisions; and 2015 Tax Legislation: Law, Explanation and Analysis on IntelliConnect.

REFERENCE KEY

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

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Final Partnership Regs Add Flexibility In Determining Partner's Distributive Share When Interests Change During Year

TD 9728

The IRS has issued final regs under Code Sec. 706(d) to address how to allocate partnership items among partners whose interests in the partnership change during the partnership's tax year. Among its changes, the final regs set forth an expanded scope of the varying interest rule, which requires that partners' distributive shares of partnership tax items for a tax year must take into account the varying interests of the partners in the partnership during the tax year.

- ***Take Away.*** The final regs make significant modifications that allow partnerships greater flexibility when a partner's interest changes during the tax year. Prior rules required partnerships to use either the interim closing method or the proration method throughout the year. They can now switch between the two when a partner's interest changes.

Varying interests rule

The final regs provide for the application of the varying interests rule when a partner's interest changes during the tax year, whether by reason of a disposition of the partner's entire interest in the partnership or a disposition of less than the partner's entire interest in the partnership. At the same time, the final regs carve out from the varying interests rule certain partnerships with contemporaneous partners who are partners for the entire partnership tax year and certain service partnerships.

The final regs have expanded the contemporaneous partner exception to apply to allocations of partnership items among partners who were partners for an entire segment of a partnership's tax year. The service-partnership exception, too, has been expanded to cover partnerships in which capital is not a material income-producing factor.

Methods and conventions

Partnerships that apply the varying interests rule may use one of two methods: the interim-closing-of-the-books method and the proration method. For each partnership tax year in which a partner's interest varies, the 2009 proposed regs provided that the partnership must use the same method to take into account all changes occurring within that year. In response to comments, however, the final regulations allow partnership to use both methods and alternate between the two.

The final regs introduce the concept of "segments" and "proration periods" into which partnerships must divide their tax year if the varying interests rule applies to them. Under the interim-closing method, the partnership divides the partnership year into segments—based on the dates partners dispose of or acquire interests in the partnership "variations", and allocates items realized during those segments among the partners based on their partnership interests during that segment. A partnership that uses the proration method divides the tax year into "proration periods" and pro rates tax items based on those periods.

Extraordinary items

The final regs also provide a list of "extraordinary items." An extraordinary item of a partnership is one that must be allocated based on the partners' interests in the partnership when the extraordinary item arises, without regard to which method or convention the partnership uses. The proposed regs had nine. The final regs add two more. First, a partnership may treat items as extraordinary items for a tax year if, for that tax year, there is an agreement of the partners to consistently treat such items as extraordinary items. Second, the IRS may designate additional items as extraordinary in published guidance.

Small item exception

The final regs also add a small item exception where the total of all items in a particular class of extraordinary items is less than five percent of a partnership's gross income (as computed with certain modifications) or gross expenses and losses. For the exception to apply, the aggregate amount of the partnership's qualifying small items must be less than or equal to $10 million.

References: FED ¶47,025; TRC PART: 24,112.10.

Proposed Partnership Regs Would Add To Changes Made In Determining Partner's Distributive Share

NPRM REG-109370-10

Proposed regs have been issued in tandem with the final regs (TD 9728, *see preceding article in this newsletter*). These proposed regs would provide further changes to the determination of partners' distributive shares when a partner's interest varies during the partnership's tax year.

- ***Take Away.*** These proposed regs are based largely on suggestions arising from 2009 proposed regs that the IRS determined required further vetting before joining the final regs.

Proposals

The new proposed regs would add two additional "extraordinary items," as well as broadening what may constitute an allocable cash-basis item and requiring a look-through rule for tiered partnerships.

Performance of services. The new proposed regs would add as an additional extraordinary item any deduction for the transfer of an interest in the partnership in connection with the performance of services. The regs would provide that

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Tax Court Strikes Down Regs On Stock Options Under Cost-Sharing Arrangement

Altera Corporation and Subsidiaries, 145 TC No. 3

In consolidated cases the Tax Court has found that final regs under Code Sec. 482 requiring controlled entities entering into cost-sharing agreements to share stock-based compensation costs are invalid. The court struck down the regs under the reasoned decision-making standard in *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29 (1983).*

- ***Take Away.*** The court held the regs would be invalid even if it concluded that *Chevron U.S.A., Inc., 467 U.S. 837 (1984)* supplied the ultimate standard of review. *Chevron* step 2 incorporates the reasoned decision-making standard of *State Farm,* the court found.
- ***Comment.*** In *Xilinx Inc., 125 T.C. 37 (2005),* the Tax Court held that, under cost-sharing regs issued in 1995, controlled entities entering into qualified cost sharing agreements need not share stock-based compensation costs because parties operating at arm's length would not do so. Final regs issued in 2003 require controlled parties entering into cost-sharing agreements to share stock-based compensation costs.

Background

The taxpayer, the parent of an affiliated group of corporations, entered into a cost-sharing agreement for research and development expenses with a subsidiary. The parent licensed to the subsidiary the right to use and exploit, everywhere except the U.S. and Canada, all of the parent's intangible property relating to programmable logic devices (PLDs) and programming tools that existed before the cost sharing agreement (pre-cost sharing intangible property). The subsidiary paid royalties in each year from 1997 through 2003.

Court's analysis

The court first noted that in the preamble to the final regs, Treasury and the IRS explained that requiring stock-based compensation to be taken into account for purposes of qualified cost-sharing agreements is consistent with the legislative intent underlying Code Sec. 482 and with the arm's length standard. In order for a qualified stock based compensation agreement to reach an arm's length result consistent with legislative intent, it must reflect all relevant costs, including the cost of compensating employees for providing services related to the development of the intangibles under the agreement.

- ***Comment.*** Whether a transaction produces an arm's length result generally will be determined by reference to the results of comparable transactions under comparable circumstances, the court observed. The arm's-length standard always requires an analysis of what unrelated entities do under comparable circumstances.

The court further found that the Code Sec. 482 regs were legislative rules rather than interpretive rules. Interpretive rules, the court stated, explain preexisting substantive law. Legislative rules create rights, impose obligations, or effect a change in existing law and have the force of law. In determining if a rule is interpretive or legislative courts do not need to accept an agency characterization of the rule, the court noted.

Based on *State Farm,* the court found that the validity of the regs turned on whether Treasury reasonably concluded that it is consistent with the arm's length standard. The preamble to the regs offered only Treasury's belief that unrelated parties entering into qualified cost sharing agreements would generally share stock-based compensation costs. Treasury, however, failed to provide a reasoned basis for reaching this conclusion from any evidence in the administrative record, the court found.

The court concluded that Treasury's explanation for its decision was counter to the evidence before it. Treasury failed to rationally connect the choice it made with the facts and failed to respond to significant comments when it issued the final rule.

References: Dec. 60,354; TRC INTL: 15,052.05.

Partnerships

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such deduction is treated as occurring immediately before the transfer or vesting of the partnership interest that results in compensation income for the person who performs the services.

Publicly-traded partnerships (PTPs). The new proposed regs also provide that items of fixed or determinable annual or periodic income (FDAP) paid by a PTP to nonresident aliens or foreign corporations and subject to Code Sec. 1441 withholding may be treated as extraordinary items if the partners agree to consistently treat all such items as extraordinary items for that taxable year. This provision within the proposed regs is a "reliance" reg, which taxpayers may follow until final regs are published.

Allocable cash basis items. The new proposed regs would consider any item of income, gain, loss, or deduction that accrues over time and that would, if not allocated as an allocable cash basis item, result in the significant misstatement of a partner's income, to be an allocable cash basis item. Such items as rebate payments, refund payments, insurance premiums, prepayments, and cash advances could otherwise result in the significant misstatement of a partner's income.

Tiered partnerships. The new proposed regs provide rules on applying the varying interest rule to tiered partnerships. Generally, they would require partners in an upper-tier partnership to look through that partnership. However, a *de minimis* exception applies.

References: FED ¶49,658; TRC PART: 24,112.10.

IRS Provides Economic Performance Safe Harbor For Routine Service Contracts; Automatic Accounting Method Change Rules Apply

Rev. Proc. 2015-39

The IRS has provided a safe harbor under which accrual-basis taxpayers may treat economic performance as occurring on a ratable basis for ratable service contracts. The IRS also indicated that additional safe harbors may be developed.

- ***Take Away.*** This new safe-harbor should prove useful immediately for year-end strategies by accrual-basis taxpayers that are currently negotiating contracts for regular services that extend into 2016. Done right to fit under the definition of ratable service contracts, a full deduction in the current 2015 tax year may be taken for certain 2015 payments, even for services not performed until 2016.

Background

Regs under Code Sec. 461 provide that, under an accrual method of accounting, a liability is incurred, and generally taken into account for federal income tax purposes, in the tax year in which (1) all the events have occurred that establish the fact of the liability, (2) the amount of the liability can be determined with reasonable accuracy and (3) economic performance has occurred with respect to the liability. "All the events" have occurred that establish the fact of the liability when (1) the event fixing the liability occurs, whether that is the required performance or other event, or (2) the payment is due, whichever happens earliest. However, economic performance must still occur with respect to the liability.

Code Sec. 461(h)(2)(A)(i) provides that if the liability of a taxpayer arises out of the provision of services to the taxpayer by another person, economic performance occurs as the person provides those services. There are two exceptions to this general rule that allow a taxpayer to accelerate the accrual of a liability into a year prior to the year that the economic performance requirement is satisfied: the 3 ½ months-of-payment rule and the recurring item exception. The recurring item exception applies if all the events have occurred that establish the fact of the liability, the liability is recurring in nature, and the accrual of the liability in the earlier tax year results in a better matching of liability to related income.

New safe harbor

The new safe harbor applies to an accrual method taxpayer with liabilities arising out of payment for the provision of services to the taxpayer under a Ratable Service Contract. Under the safe harbor method of accounting for Ratable Service Contracts, a taxpayer may treat economic performance as occurring on a ratable basis over the term of the service contract. A contract is a Ratable Service Contract if:

(1) The contract provides for similar services to be provided on a regular basis, such as daily, weekly, or monthly;

(2) Each occurrence of the service provides independent value, such that the benefits of receiving each occurrence of the service is not dependent on the receipt of any previous or subsequent occurrence of the service, and;

(3) The term of the contract does not exceed 12 months.

Accounting method change

A change in the treatment of ratable service contracts to conform to the safe harbor method is a change in method of accounting to which Code Secs. 461 and 481 and regulations apply. A taxpayer wanting to change the method of accounting must use the automatic change procedures in Rev. Procs. 2015-13 and -14, as modified to now include the economic performance safe harbor for ratable service contracts (automatic accounting change number 220.

Additional safe harbors coming?

The IRS is considering expanding the current ratable service contract safe harbor. It has requested comments by November 15, 2015, regarding when economic performance occurs for liabilities arising from: (1) deliverable-type services that are not completed on a periodic basis, (2) multiple services that are not separately priced, and (3) ratable service contracts that are longer than one year.

References: FED ¶46,369; TRC ACCTNG: 21,302.10.

Farming Corp Could Deduct Packing Materials In Year Purchased

Agro-Jal Farming Enterprises, Inc., 145 TC No. 5

A farming corporation using the cash-method of accounting could deduct the cost of field-packing materials for its produce in the year purchased, even though the materials might not be used until the following year, the Tax Court has found. The court emphasized that the pre-2014 capitalization rules that applied to this case were not a bar to the deduction.

- ***Take Away.*** Under the final "repair regs" under Reg. §1.162-3, a different paradigm now exists for taxpayers like those similarly situated before the Tax Court in this case. The cost of acquiring material and supplies is generally deducted in the tax year the materials or supplies are first used or consumed. However, these current regs now include exceptions for "incidental materials and supplies" as well as, among others, a $200 per-item threshold for materials and supplies and the creation of a de minimis safe harbor.

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Tax Court Describes Computation Of NIMCRUT Remainder Interest

Estate of Schaefer, 145 TC No. 4

The value of the remainder interest of a net income with makeup charitable remainder unitrust (NIMCRUT) would be calculated using the greater of five percent or the percentage reflected in the trust document, the Tax Court has found. Because the value of the remainder interests did not equal 10 percent of the property's net fair market value as required by Code Sec. 664(d)(2), the estate tax charitable deduction was denied.

- ***Take Away.*** A CRUT has two types of beneficiaries: an income beneficiary and a remainder beneficiary. Generally, an income beneficiary is limited to distributions from the CRUT of a fixed percentage of the net fair market value of its assets, at least annually, for a term of years or for the lifetime of the income beneficiary. After the period for these payments ends, the remainder beneficiary, which in the case of a CRUT would be a charitable organization, receives what remains.

Background

The decedent formed two charitable remainder unitrusts in 2006 (Trust I and Trust II). The trusts provided for distributions to the income beneficiaries during the "Unitrust Period" payable in quarterly installments. The payments equaled the lesser of the net trust accounting income for the tax year or a percentage, 11 percent for Trust 1 and 10 percent for Trust 2, of the net fair market value of the trust assets, valued annually. The Unitrust Period for each trust commenced on the first day property was transferred into the trust and terminated on the date preceding the date of the death of the last income beneficiary or 20 years from the first date of the Unitrust Period, whichever would be later. At the end of the Unitrust Period the remainder of the principal and income in each trust would be distributed to a charitable organization.

The decedent died in 2007. One of his sons became the income beneficiary of Trust I and another son became income beneficiary of Trust II.

The IRS determined that the estate was not allowed a charitable contribution deduction for the values of the remainder interests of the trusts. According to the IRS, the trusts did not meet the requirement that the value of the charitable remainder interest be at least 10 percent of the net fair market value of the property on the date of contribution.

Court's analysis

After finding that Code Sec. 664(e) was ambiguous, the court looked to Rev. Rul. 72-395, which provided a sample trust provision similar to the instant case. The sample provided that the trustee would pay the lesser of the trust income from the tax year or a fixed percentage of the net fair market value of the trust assets, and allowed the trustee to make catch-up distributions for past years when the trust income was less than the fixed percentage.

The IRS explained that notwithstanding the net income makeup provision, the computation of the charitable deduction would be determined on the basis that the regular unitrust amount would be distributed in each tax year of the trust.

The court found Rev. Rul. 72-395 persuasive. The court concluded that the value of the remainder interest of a NIMCRUT must be calculated using the greater of five percent or the fixed percentage stated in the trust instrument. Here, the estate would be required to use an annual distribution amount of 11 or 10 percent of the net fair market value of the trust assets when valuing the remainder interests of Trust I and Trust II.

- ***Comment.*** The estate and the IRS had stipulated that the estate would not be entitled to a charitable contribution deduction if the remainder interests are valued using this method. As a result, the court sustained the denial of the charitable contribution deduction.

References: Dec. 60,356; TRC ESTGIFT: 45,204.

Costs

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Background

Reg. §1.162-3, as it existed at the relevant time, applied. That reg allowed a deduction for materials and supplies in the amount they were actually used and consumed. However, that provision continued, "provided that" the cost of those materials and supplies had not been previously deducted.

Court's analysis

The Tax Court agreed with the taxpayer's position that the "provided that" language in then Reg. §1.162-3 meant that the costs could not be deducted in a later year if they had been deducted in an earlier year. This reading of the reg thus impliedly permitted deduction in the earlier year as long as it was not taken again later.

The materials were not "on hand" and, therefore, not governed by the portion of the regs relied upon by the IRS. "On hand" under those regs included "present possession" and "about to appear" and "does not extend so far as to include supplies for which delivery is still months away or yet to be made."

References: Dec. 60,358; TRC FARM: 9,050.

TAX BRIEFS

Internal Revenue Service

The IRS and Treasury have released the fourth-quarter update to their 2014-2015 Priority Guidance Plan, as well as the 2015-2016 Priority Guidance Plan, which contains 277 projects that are IRS priorities during the 12-month period from July 2015 through June 2016 (the plan year). Projects on the 2015-2016 plan will provide guidance on a variety of issues important to individuals and businesses, including international taxation, health care and implementation of legislative changes.

Treasury and IRS 2014-2015 Priority Guidance Plan Fourth Quarter Update, FED ¶46,371; Treasury and IRS 2015-2016 Priority Guidance Plan, FED ¶46,372; TRC IRS: 12,350

Disaster relief

The IRS has updated disaster relief for victims of severe storms, tornadoes, straight-line winds, and flooding in Oklahoma to include the counties of Adair, Cherokee, Coal, Delaware, Garvin, Hughes, Lincoln, Logan, Love, Murray, Ottawa and Pontotoc.

Oklahoma Disaster Relief Notice Updated (HOU-04-2015), FED ¶46,332; TRC FILEIND: 15,204.25

Refunds

A *pro se* individual's refund claim was dismissed for lack of jurisdiction. The individual failed to show that she filed a timely administrative claim for refund with the IRS under Code Sec. 7422(a) before filing the suit.

Ellis Warren, DC Mich., 2015-2 USTC ¶50,415; TRC LITIG: 9,052

The IRS was not entitled to dismiss an individual's refund claim for failure to exhaust administrative remedies. Although the individual did not allege to have filed a formal request for a due process hearing or refund, he did not concede failing to do so. Therefore, it was inappropriate to dismiss the individual's claims.

Lewis, DC Ill., 2015-2 USTC ¶50,410; TRC IRS: 33,150

Jurisdiction

A federal district court lacked jurisdiction over an individual's refund claim and she failed to state a wrongful disclosure claim for which relief could be granted. The individual failed to pay outstanding tax assessments in full before filing suit.

Komlo, DC Pa., 2015-2 USTC ¶50,409;

A married couple's petition seeking review of a Tax Court decision was dismissed for lack of jurisdiction. Their notice of appeal was untimely because it was not filed within 90 days from the Tax Court's decision.

Peery, CA-6, 2015-2 USTC ¶50,403; TRC LITIG: 6,960.05

Liens and levies

An individual's claim contesting an IRS levy on a note payable to the individual's ex-husband was dismissed. Three of the four children were adults over the age of 18 and the funds were intended for college expenses, not child support. Moreover, the ex-husband separately paid monthly child support for the single minor child.

Callahan v. the Chicago Series of Lockton Companies, DC Ill., 2015-2 USTC ¶50,414; TRC IRS: 48,158.05

The government was entitled to reduce to judgment federal tax liens and penalties assessed against an individual and foreclose its tax liens against property held by the individual's son as his nominee. The son failed to support his argument that he was a co-owner with the taxpayer and not merely a nominee titleholder.

McFarland, DC Miss., 2015-2 USTC ¶50,406; TRC IRS: 45,160

A federal district court properly dismissed as untimely an individual's wrongful levy claim. The individual's argument that the limitations period was tolled because the property was never sold was rejected because the limitation period under Code Sec. 6532 runs from the date of the levy. Moreover, equitable tolling did not apply because the individual failed to show that circumstances prevented her from timely commencing the second suit or that she pursued her remedies diligently.

Mottahedeh, CA-2, 2015-2 USTC ¶50,405; TRC IRS: 51,154.20

An individual's action challenging the validity of the IRS's lien imposed upon his property was dismissed for lack of subject matter jurisdiction. The Tax Court, not the

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IRS Identifies More Issues For "Cadillac Plan" Regs

The IRS has identified additional issues under Code Sec. 4980I, the so-called "Cadillac Plan" excise tax added by the Affordable Care Act, to supplement issues previously identified in Notice 2015-16. The IRS intends to issue proposed regs, which will provide further opportunity for comment. The Code Sec. 4980I excise tax applies to tax years beginning after December 31, 2017.

Background. Under Code Sec. 4980I, a 40 percent excise tax is imposed on any excess benefit provided to an employee. An excess benefit, the IRS explained, is the excess, if any, of the aggregate cost of the applicable coverage of the employee for the month over the applicable dollar limit for the employee for the month. Applicable coverage is generally coverage under any group health plan. In Notice 2015-16, the IRS requested comments on, among other topics, the definition of applicable coverage and the determination of the cost of applicable coverage.

Additional issues. In Notice 2015-52, the IRS requested comments on a number of issues, including application of aggregation rules to Code Sec. 4980I, cost of applicable coverage, age and gender adjustment to dollar limits, and notice and payment. The IRS noted that it is considering two alternative approaches to determining the identity of the person that administers the plan benefits.

Notice 2015-52; ¶46,370; TRC HEALTH: 9,302.

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federal district court, has exclusive jurisdiction over income tax deficiencies and liens relating to those deficiencies.

Peng, DC Nev., 2015-2 USTC ¶50,404; TRC LITIG: 6,136.25

The government was properly entitled to reduce to judgment an individual's federal income tax assessments and foreclose the tax liens on his property. The individual failed to produce records to substantiate his burden of proving the cost basis in each stock he purchased from a broker.

Youngquist, CA-9, 2015-2 USTC ¶50,413; TRC BUSEXP: 30,202

Business expenses

A freelance graphic designer was not entitled to deduct her claimed business expenses because they were unsubstantiated. The taxpayer also failed to show a nexus between her automobile, office, repair, supplies, Internet, and cellphone expenses and her graphic designing business. Penalties imposed for failure to timely file and pay tax and to make estimated payments.

Lau, TC, CCH Dec. 60,359(M), FED ¶48,069(M); TRC BUSEXP: 3,100

Penalties

The IRS's refusal to disclose anything about the basis for its decision to impose FBAR penalties on an individual was arbitrary and capricious. The IRS did not simply fail to disclose the memorandum, it opposed the individual's motion to compel its disclosure. The IRS also offered no explanation for its apparent policy not to explain the assessment of FBAR penalties to citizens, and in particular for its apparent policy not to put that explanation in writing or for its steadfast refusal to disclose the memorandum until it was left with no other options. Because the IRS should not profit by imposing penalties without explaining them, the IRS's assessment of interest and other charges on top of its previously unexplained penalties were void.

J. Moore, DC Wash., 2015-2 USTC ¶50,411; TRC FILEBUS: 9,322.10

Limitations Period

The Claims Court properly concluded that the three-year statute of limitations applies unless the "taxpayer" intends to evade tax. The claims court properly rejected the government's argument that the "intent to evade" was imputed to the taxpayer from the criminal behavior of its attorney. Moreover, since the government conceded that neither the partnership nor any of its partners acted with the intent to evade tax, summary judgment in favor of the partnership was proper.

BASR Partnership, CA-FC, 2015-2 USTC ¶50,412;

The Tax Court properly held that an illegal bookie was liable for the taxes assessed by the IRS, that his plea agreement did not bar a civil action for unpaid taxes and that the limitations period had not run. The statute of limitations did not bar the government from bringing a civil action against the individual because the limitations period never began to run. The plea agreement did not bar civil tax collection proceedings because it expressly allowed for such proceedings and judicial estoppel did not prevent the government from initiating a civil tax proceeding because it was the individual who took the position that he had no tax liability.

Kaplan, CA-8, 2015-2 USTC ¶50,408; TRC IRS: 30,102

Settlements

The Tax Court did not abuse its discretion by refusing to set aside a settlement between an estate and the IRS regarding an estate tax deduction. The estate knowingly and voluntarily entered into the settlement agreement with the IRS and resolution of a later lawsuit by the decedent's children contesting the disposition of the estate did not constitute a mutual mistake of fact at the time the settlement was entered into with the IRS.

Billhartz, CA-7, 2015-2 USTC ¶50,402; TRC IRS: 39,150

Collection

An IRS settlement officer (SO) did not abuse her discretion by sustaining the IRS's proposed collection action and rejecting a tax preparer's offer in compromise. The individual was not entitled to raise his underlying liability for tax preparer penalties for the two tax years at issue because he had a prior opportunity to do so. Moreover, the SO did not abuse her discretion by refusing the individual's offer in compromise (OIC) because the individual failed to comply with the OIC requirements.

Abu-Dayeh, TC, CCH Dec. 60,357(M), FED ¶48,067(M); TRC IRS: 6,150

Affordable Care Act

An Indian tribe's action seeking injunctive and declaratory relief exempting it from the large-employer mandate of the Patient Protection and Affordable Care Act (PPACA) (P.L. 111-148) was dismissed for lack of subject matter jurisdiction. The Anti-Injunction Act (AIA) barred the suit because the large-employer mandate is a "tax."

Northern Arapaho Tribe v. S. Burwell, DC Wyo., 2015-2 USTC ¶50,401; TRC HEALTH: 6,052

IRS Releases Updated Static Mortality Tables For 2016

The IRS has issued updated static mortality tables for use by defined benefit pension plans. The updated mortality tables apply for purposes of calculating the funding target and other items for valuation dates occurring during calendar year 2016. The IRS also provided a modified unisex version of the mortality tables for use in determining minimum present value under Code Sec. 417(e)(3).

The IRS is required to revise the mortality tables used under Code Sec. 430(h)(3)(A) at least every 10 years, to reflect the actual mortality experience of pension plans and projected trends in that experience. The mortality rates, the IRS explained, are developed from the base mortality rates, projection factors, and weighting factors in Reg. §1.430(h)(3)-1(d), using the blending techniques described in the preamble to the regs.

- ***Comment.*** The IRS reported that it is considering comments received in response to Notice 2013-49, and expects to issue proposed regs revising the base mortality rates and projection factors in Reg. §1.430(h)(3)-1.

Notice 2015-53; FED ¶46,373; TRC RETIRE: 30,556.

PRACTITIONERS' CORNER

A Look At The Foreign Account Tax Compliance Act, One Year After It Took Effect

The Foreign Account Tax Compliance Act (FATCA), enacted in 2010, authorizes the U.S. government to obtain information from foreign financial institutions on their foreign accounts that have U.S. owners. While portions of the law do not take effect until later years, the basic reporting requirements took effect July 1, 2014. Wolters Kluwer recently interviewed two KPMG experts on FATCA – Manal Corwin and Michael Plowgian. This article is the second part of a two-part series on that interview. The first part of the interview appeared in the July 30, 2015 issue of this newsletter.

Manal Corwin *is the national leader of the International Tax practice of KPMG LLP and principal in charge of International Tax Policy in KPMG's Washington National Tax practice. She was Deputy Assistant Secretary for International Tax Affairs in the Office of Tax Policy at the Treasury Department and worked extensively on the Foreign Account Tax Compliance Act.*

Michael Plowgian *is a principal in the International Tax group of the Washington National Tax practice of KPMG LLP. He was a senior advisor with the Organisation for Economic Co-operation and Development (OECD) and an attorney advisor with the Office of the International Tax Counsel at the U.S. Department of the Treasury, where he was responsible for regulatory and other guidance under U.S. international tax provisions, including FATCA.*

Intergovernmental Agreements (IGAs)

Wolters Kluwer: Could domestic confidentiality laws that inhibit the collection of information continue to be a problem?

Plowgian: Absolutely. However, if the IGA is signed and ratified, its requirements become a treaty obligation of the partner jurisdiction, which would provide a legal basis for foreign financial institutions (FFIs) to collect information and report it. I don't think there's really an issue once the IGA is put into effect, although there may need to be some cleanup in domestic law in certain jurisdictions to make that clear.

Corwin: That's why the IGAs were so important where domestic law would have prohibited the sharing of information by the FFIs. In most cases, reporting information to their own governments would have been already authorized, or in many cases the governments would have leeway to ask for more information without passing a new law. In cases where they need to pass legislation, they could either pass a domestic law, or the IGA itself could serve as the domestic law necessary for the collection and sharing of the information.

Wolters Kluwer: There's the thought that some of the IGA countries are signing on begrudgingly and that some of the enforcement will be along that vein. Is there any credence to that?

Plowgian: There certainly is a concern about how partner jurisdictions implement the IGA, but the IGA builds in some enforcement mechanisms. The IRS can designate a financial institution (FI) in that jurisdiction as a nonparticipating FFI if the FFI is not complying with its obligations under the IGA. It certainly was contemplated that there had to be a way to enforce reporting even once the IGA was in place. There are a number of back checks that can be provided as well. The IRS will receive and is receiving the Forms 8938, where account holders are reporting on themselves about their foreign financial assets. That can be matched against what the IRS is receiving from the FFIs to provide a check as to what the FFIs are doing, and vice versa. The system was designed to provide that cross-check.

> *"The fact of reporting, and the fact that financial institutions across the globe are signed on to do the reporting, has to serve as a deterrent to people who intend to hide money in bank accounts. FATCA is part of an environment that is clearly increasing compliance of U.S. taxpayers."*
> *Manal Corwin and Michael Plowgian, KPMG, LLP*

One other point is that the Organisation for Economic Co-operation and Development's common reporting standard (CRS) involves the same types of obligations on implementing governments and their financial institutions. The G20 has directed the global forum to monitor countries' implementation and enforcement of the CRS, so there will be some external validation of what each country is doing to implement these obligations. That provides a further check on what countries are doing.

Corwin: There were two types of concerns in the context of the IGA. First, you might have the government not actually doing what it contracted to do, in which case you terminate the IGA. A more difficult problem and a more common concern is where you have a couple of financial institutions that are not being cooperative within the jurisdiction, and maybe the jurisdiction itself is not ultimately being that cooperative in enforcing reporting by the recalcitrant institution.

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WASHINGTON REPORT *by the Wolters Kluwer Washington News Bureau*

Lawmakers release draft of innovation box legislation

Reps. Charles Boustany, R-La., and Richard Neal, D-Mass., on July 29 released a discussion draft of innovation box legislation, a lower tax rate on income derived from intellectual property, designed to attract and retain research and development (investment and intellectual property) in the U.S. The concept has attracted the interest of House Ways and Means Chair Paul Ryan, R-Wis., as part of his plan to enact international tax reform legislation. "This is just one piece of international tax reform, but it's an important one," Ryan said.

Boustany and Neal indicated that U.S.-based multinational corporations are under increasing pressure to move more innovative development and production activities offshore. Providing an innovation box approach in the tax code would give U.S. companies a competitive edge in foreign enterprises. President Obama's economic advisor, Jason Furman, said the administration supports an expanded research and development credit that directly encourages investments in new innovation.

House lawmakers seek removal of Koskinen

House Oversight and Government Reform Committee Chair Jason Chaffetz, R-Utah, along with 20 members, have asked President Obama to remove IRS Commissioner John Koskinen from office. In a letter to the president, the committee outlined its findings to date of its investigation into the IRS's targeting of certain Code Sec. 501(c)(4) groups seeking tax-exempt status. "Mr. Koskinen should no longer be the IRS commissioner. We have asked the president to remove Mr. Koskinen from office," Chaffetz said. "At best, Commissioner Koskinen was derelict in his duties to preserve agency records. At worst, he and the IRS engaged in an orchestrated plan to hide information from Congress," he said.

The IRS released a statement. "The record is clear that the IRS and Commissioner Koskinen have been cooperative and truthful with the numerous investigations underway. The agency has produced more than 1-million pages of documents in support of the investigations, provided 52 current and former employees for interviews and participated in more than 30 congressional hearings on these issues."

GAO reviews IRS FY 2016 budget request

Due to the size of the IRS's budget and the importance of its service and compliance programs for taxpayers, the Government Accountability Office (GAO) reviewed the agency's fiscal year (FY) 2016 budget request and the effects of recent budget reductions. The GAO aimed to analyze staffing and program changes; budget-cut absorption and related coordination; assess the performance of the IRS's information technology (IT) investments; and recommend changes to enable the IRS to be as effective despite the cutbacks.

The GAO had reported in February 2015 that the IRS's FY 2015 appropriations of $10.9 billion and staffing levels of 81,279 full-time equivalents (FTEs) continued a decline that has occurred over recent years and fell below FY 2009 levels. In order to assess the effect of the tightened budget on the IRS, the GAO selected business units with large declines in obligations in terms of both dollar amount and percent, from FY 2010 to FY 2014.

The GAO reported that the IRS requested $3.2 billion for information technology (IT) investments. This accounted for 23 percent of its budget request for FY 2016. However, the IRS provided inaccurate data on actual obligations to date for major IT investments in its congressional justification (CJ) for FY 2016. As a result, Congress does not have accurate, reliable and complete data on IT investments to inform its budget decisions or aid in its oversight. Additionally, the IRS did not use standard definitions for lifecycle cost and projected useful life of the current asset or explain the terms in a way that could be understood and used.

To enable the IRS to function effectively despite budget constraints, the GAO developed recommendations and matters for congressional consideration that could have financial implications if implemented. The IRS made progress implementing many recommendations, GAO reported.

IRS, SSA highlight employer reporting under ACA

The *Affordable Care Act* (ACA) requires an applicable large employer (ALE) to offer its full-time employees and their dependents minimum essential coverage that is affordable and provides minimum value. To assist ALEs, the IRS and the Social Security Administration (SSA) have highlighted in the Summer 2015 edition of the SSA/IRS Reporter the employer reporting requirements under the ACA. The agencies reported that, while employers should already be tracking the data required to determine their status under the ACA and complete the new ACA reporting forms, they may not have determined whether the payroll, human resources (HR), or benefits department will be responsible for the filings. Regardless of which department ultimately completes the forms, they will have to coordinate the process as each of them may control the system housing some of the data to be reported.

According to the IRS and SSA, payroll, HR and the benefits departments will have to synchronize their operations in order to provide coverage in a hassle-free manner. While payroll will have data on the W-2 wages or rate of pay to ascertain the affordability of the offered coverage if the employer relies on one of the affordability safe harbors, HR or benefits will likely have the data on the lowest-cost, self-only minimum value coverage the employer offered. Beyond this basic calculation, these departments must be able to work together. For instance, HR may determine if a full-time new hire was in a waiting period before an offer of coverage was made, while a time and attendance system may help decide if an employee with shifting schedules qualified as full-time during the reporting period.

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The IGAs addressed this potential issue by having the IRS flag the concern to the IGA partner and letting the IGA partner jurisdiction follow-up with the financial institution in the first instance. There are time periods associated with it. After that, if the institution continues to be a problem, and either the jurisdiction isn't being cooperative in enforcing the IGA or the jurisdiction has tried to enforce the penalties and wasn't successful, most of the IGAs preserve the right of the IRS to treat that financial institution as noncompliant and to get them off the compliant list or put them on a list that shows that they are recalcitrant, so that there can be withholding with respect to that institution without the need to terminate the IGA. So it means that institutions have an incentive to comply or a disincentive to not comply.

Withholding

Wolters Kluwer: Is it correct that withholding under FATCA will not start until 2017? Or could there be withholding before that?

Plowgian: No, withholding began July 1, 2014, and is being phased in. I have heard of some withholding occurring already. Not a massive amount, but there is some withholding on US source FDAP payments. *[Editor's note: FDAP refers to fixed, determinable, annual or periodical (FDAP) income, subject to withholding under Code Sec. 1441.]* I think that people were concerned that there could be massive amounts of withholding starting in July of last year but, to this point, what we've seen, or at least what I'm aware of anecdotally, is very limited.

Corwin: For 2017 maybe you're thinking of the passthru payment date, which is very different. Straight withholding could potentially kick in right when it all started and remains a possibility under current rules.

Wolters Kluwer: But as some foreign institutions are designated as noncompliant, then withholding may kick in? Or are there other measures that would apply?

Plowgian: Withholding would be the measure that applies if a financial institution is designated as nonparticipating. But there is a built-in 18-month period for resolving issues of noncompliance within Model 1 IGA jurisdictions. If the IRS notifies the partner jurisdiction that one of its financial institutions is not complying, there is an 18-month period to try to resolve that before the financial institution will be designated as nonparticipating.

Wolters Kluwer: Do you think that is it all a misunderstanding, as the Taxpayer Advocate said recently in a report, that some U.S. workers overseas are being denied local bank accounts because the financial institution is concerned about all the paperwork and the liability of withholding?

Plowgian: I think that does happen, but I do think there is a lot of misunderstanding among both financial institutions and customers. When we dug into the claim that financial institutions were closing accounts or refusing to open accounts because of FATCA, it turns out in many cases that it had to do with other reporting requirements or regulatory requirements. But anecdotally, I have heard of financial institutions refusing to open an account for a U.S. person and pointing to FATCA as the reason.

The CRS, though, ought to mitigate that because financial institutions will have to put into place these types of due diligence and reporting systems in any event, regardless of whether they have U.S. account holders. But I do think that there is some confusion in the marketplace as to what FATCA requires and that you do end up with these sorts of unfortunate incidents.

Wolters Kluwer: What about gross proceeds or passthru payments in 2017?

Corwin: What the IGAs contemplated is that the countries would revisit the need to have passthru payment withholding as we got closer to that date, based on compliance. The thought was that if there were significant adoption by countries of the reporting obligations and the exchange of information, the need for passthru payments, which was intended to be a backstop for FIs who refusing to comply and avoided withholding by indirectly investing through participating FIs. With significant buy-in, this is less of a threat, but it is out there as something to visit.

Plowgian: For both gross proceeds withholding and passthru payments withholding, I think that everybody is hoping that there isn't any withholding. We're already seeing in some circumstances FIs refusing to do business with nonparticipating financial institutions, because they don't want to deal with the headache, and certainly they don't want to deal with gross proceeds or passthru payment withholding. As we get more of the IGAs signed and in force, and FIs get their processes implemented, I think we're going to see more of that (i.e. participating financial institutions refusing to do business with nonparticipating financial institutions). I think that gross proceeds and passthru payments are not intended to create much in the way of actual withholding, but do provide quite a stick to incentivize FIs and governments to come online.

Compliance Impact

Wolters Kluwer: Perhaps it is too early to ask -- has FATCA increased compliance among U.S. taxpayers with foreign assets?

Corwin: I think that it is difficult to assess, since it just started, but certainly the fact of reporting, and the fact that financial institutions across the globe are signed on to do the reporting, has to serve as a deterrent to people who intend to hide money in bank accounts. I don't think it's been in place long enough to do an actual assessment.

Plowgian: I would add that FATCA is part of an environment that is clearly increasing compliance of U.S. taxpayers. You have had all the IRS enforcement efforts over the past 7 to 10 years, the Department of Justice actions, and the IRS offshore voluntary disclosure initiative. Some pretty significant numbers have been involved in those initiatives. I think that FATCA is part of that environment, which is certainly leading to better compliance by U.S. taxpayers. But I would agree with Manal that FATCA has not been in place long enough to assess its effectiveness per se.

COMPLIANCE CALENDAR

■ August 7
Employers deposit Social Security, Medicare, and withheld income tax for August 1, 2, 3, and 4.

■ August 10
Employees report tips of $20 or more earned in July.

■ August 12
Employers deposit Social Security, Medicare, and withheld income tax for August 5, 6 and 7.

■ August 14
Employers deposit Social Security, Medicare, and withheld income tax for August 8, 9, 10, and 11.

■ August 19
Employers deposit Social Security, Medicare, and withheld income tax for August 12, 13, and 14.

TRC TEXT REFERENCE TABLE

The cross references at the end of the articles in Wolters Kluwer Federal Tax Weekly (FTW) are text references to 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 21,104.05	345	FILEBUS 9,108.30	306	IRS 27,212	307
ACCTNG 21,302.10	373	FILEBUS 9,458.05	334	IRS 33,150	360
ACCTNG 33,100	362	FILEBUS 9,458.05	358	IRS 33,402	317
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EXEMPT 12,252	324	IRS 3,058	347	RIC 6,054.05	337
FARM 9,050	373	IRS 18,306	305	SALES 51,150	316
FILEBUS 6,106.20	320	IRS 21,414	361	SCORP 352.35	363

CONFERENCES

August 17–21: The Tax Executives Institute, Inc. hosts its Federal Tax Course, Level II, in Colorado Springs. Topics covered will include core corporate tax compliance issues, advanced tax planning, tax research, as well as the fundamentals of financial accounting for taxes. Visit *www.tei.org* for more information.

August 26: The Texas Society of CPAs holds a mid-year federal tax update in Austin. Visit *www.tscpa.org* for more information.

August 26-27: The Illinois Society of CPAs hosts the 35th Annual Midwest Accounting and Finance Showcase. Visit *www.icpas.org* for more details.

August 26–27: The National Association of Tax Professionals (NATP) presents its 2015 Tax Forums and Expo in Las Vegas. Sessions will cover the *Affordable Care Act,* small business taxation, tax planning for higher-income individuals, representation before the IRS, and more. For more information or to register, visit *www.natptax.com*.

September 10-12: The Federal Bar Association hosts its annual convention in Salt Lake City. More details are available at *www.fedbar.org.*

September 17–19: The American Bar Association Section of Taxation will host its 2015 Joint Fall CLE Meeting in Chicago. Panel discussions will feature the latest federal tax policies, initiatives, regulations, legislative forecasts and planning ideas. For more information or to register, visit *americanbar.org*.

September 24: The New York State Society of CPAs (NYSSCPA) presents a health care conference in New York. Visit www.*nysscpa.org* for more information.