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IRS Issues Final Regs On Grantmaking To Foreign Organizations

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Final regs describe how grants made to foreign organizations may be qualifying distributions. The final regs allow a good faith determination based on written advice by a tax practitioner. The IRS also clarified the use of grantee affidavits.

- **Take Away.** In proposed regs issued in 2012, the IRS expanded the class of advisors upon whose advice foundations may ordinarily rely in making good faith determinations beyond the attorneys for the grantor and grantee. The expanded group includes certified public accountants (CPAs), attorneys, and enrolled agents (EAs) subject to the requirements of Circular 230.

Background

To avoid certain excise taxes, a private foundation generally must make a minimum level of qualifying distributions each year and avoid making taxable expenditures. Generally, a foundation may treat grants for charitable purposes to foreign organizations as qualifying distributions if the foundation makes a good faith determination that the foreign organization is a public charity (among other requirements).

- **Comment.** The IRS refers to this rule, which gives assurance to foundations meeting the rule that their grants to foreign organizations will be considered to be qualifying distributions and not taxable expenditures, as the "special rule."

The final regs affirm the expansion of advisors under the proposed regs. A qualified tax practitioner may include an attorney serving as a foundation's in-house counsel, as well as a foundation's outside counsel, the IRS explained. A CPA or attorney must be licensed in a state, territory, or possession of the U.S., and an EA must be enrolled by the IRS.

The final regs also provide that a determination based on the written advice of a qualified tax practitioner ordinarily will be considered as made in good faith if the foundation's reliance meets the requirements of Reg. §1.6664-4(c)(1). However, a foundation may not rely on written advice if it knows, or has reason to know, that relevant facts were not disclosed to the qualified tax practitioner or that the written advice is based on a representation or assumption that the foundation knows, or has reason to know, is unlikely to be true.

- **Comment.** The final regs do not allow the opinion of foreign counsel, standing alone, to satisfy the written advice requirement. However, the advice of foreign counsel may be part of the process of making a good faith determination, the IRS explained.

Written advice, the IRS explained, must be "current" to serve as acceptable basis for a determination. Written advice will be considered current if, as of the date of the distribution, the relevant law on which the advice was based has not changed since the date of the

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Chief Counsel Recommends Changes To Tax Court Rules

Chief Counsel Letter to Tax Court, September 11, 2015

IRS Chief Counsel has submitted recommendations to the Tax Court on revisions to some of the court's rules. Chief Counsel touched on small tax cases, imperfect petitions, filing fees, and more.

- **Take Away.** "Many of these comments are designed to minimize confusion and provide efficiency for the Tax Court and the government, along with maximizing the effective use of resources," Mark Allison, member, Caplin & Drysdale, Chartered, New York, told Wolters Kluwer. "Several years ago, the rule changes for small cases were intended to bring those cases in line with regular cases. In hindsight, the government may feel it has created more burdens on pro se taxpayers and itself," Allison said.

Small tax cases

In cases under Code Sec. 7463 (disputes involving $50,000 or less), Chief Counsel recommended that the IRS be allowed to file a general denial of the allegations of the petition. This general denial would include the name, telephone number, and address of an IRS Chief Counsel attorney who may be contacted regarding the case; and the time-frame within which it may be expected that the taxpayer will be contacted by the Appeals or Settlement Officer assigned to the case. Formal answers would still be required in cases where the IRS would be required to make affirmative allegations.

- **Comment.** It is not clear if the proposed change would be for all small cases or only for small cases where the taxpayer is pro se, Allison observed.

Imperfect petitions

The IRS is required to respond to imperfect petitions as if the petition were fully in compliance with the court's rules. Chief Counsel noted that imperfect cases are often subsequently dismissed for failure to comply with the court's rules or orders. Chief Counsel recommended that the court provide that a response to an imperfect petition would not be required pending the possible curing of the defect or the dismissal of the case.

Additionally, Chief Counsel recommended that when petitions are filed that are not signed, lack an attached notice of deficiency or other notice of determination, or otherwise are not in compliance with the court's rules concerning the content of a petition, the court direct the taxpayer to cure the defect(s) or face dismissal.

Fees

The Tax Court requires the payment of a filing fee at the time of the filing of the petition. Chief Counsel recommended that when the filing fee is not paid, the Tax Court direct the taxpayer to pay the fee, request a waiver, or face dismissal. Chief Counsel asked that the IRS not be required to answer or otherwise respond to the petition until the taxpayer complies with the court's directions.

Reference: TRC LITIG: 6,058.

Grants

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written advice and the factual information on which the advice was based is from the organization's current or prior year, or (2) if there is written advice that an organization satisfied the public support requirements under either Code Sec. 170(b)(1)(A)(vi) or Code Sec. 509(a)(2), based on a five-year support test, for the grantee's two years immediately following the end of the five-year test period Generally, it will be reasonable to rely on written advice of a qualified tax practitioner if the advice and underlying facts are no more than two years old.

Affidavits

Under current regs, a foundation is considered to make a good faith determination if the determination is based on an affidavit of the grantee or on an opinion of counsel of either the grantor or the grantee. The affidavit or opinion must set forth sufficient facts concerning the operations and support of the grantee for the IRS to determine that the grantee would be likely to qualify as a public charity or an operating foundation.

The final regs clarify the role of a grantee affidavit. A grantee affidavit may be used by the foundation as part of its basis for making a good faith determination. Grantee affidavits, standing alone, will no longer be considered sufficient basis on which a foundation may form a determination.

Transition period. The IRS provided a transition period. During the transition period, foundations may distribute grants in accordance with the former regs regarding the use of grantee affidavits and opinions of counsel of the grantor or grantee.

- **Comment.** The final regs generally apply to distributions made after September 25, 2015.

References: FED ¶47,037; TRC EXEMPT: 24,410.

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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Taxpayer Assistance Order Application Tolls Limitations Period For Third-Party Wrongful Levy Suit

Rothkamm, CA-5, September 21, 2015

The Court of Appeals for the Fifth Circuit has found that a district court erroneously decided an individual third-party's application for a Taxpayer Assistance Order (TAO) did not toll the statute of limitations period for filing suit for wrongful levy under Code Sec. 7426(a)(1). Even though the levy on the individual's account was to collect tax assessed against her husband rather than the individual herself, she nevertheless met the definition of "taxpayer" for purposes of the TAO statute under Code Sec. 7811.

- **Take Away.** Two of the three judges on the panel found that the individual's application for a TAO tolled the nine-month statute of limitations period under Code Sec. 6532(c) for filing a civil suit, which would have ensured her administrative claim was timely for purposes of tolling the statute of limitations period again, ensuring that her wrongful levy lawsuit was also timely filed in court.

Background

On March 6, 2012, the IRS issued a notice of intent to levy against a certificate of deposit account owned by the individual to satisfy certain tax liabilities owed by her husband. In mid-April 2012, the individual applied for a TAO from the Office of the Taxpayer Advocate. The Office closed the case on October 2012 without being able to offer assistance; the individual filed an administrative request for wrongful levy in May 2013; and—after the IRS denied the administrative claim—she filed suit in court in September 2013. The nine-month statute of limitations would have expired in January 2013, absent any tolling.

Code Sec. 7811(a)(1) authorizes the Office of the Taxpayer Advocate to issue a Taxpayer Assistance Order upon receiving an application filed by a *taxpayer* (if the taxpayer meets the other requirements of the statute). Code Sec. 7811(d)(1) generally applies to toll the running of any statute of limitations for certain "actions" described in Code Sec. 7811(b) from the time the taxpayer files an application for the optional TAO until a decision is reached.

- **Comment.** Code Sec. 7811(b)(1) provides that the TAO may require the IRS "to release property of the taxpayer levied upon" within a specified time period. The dissent noted that subparagraph (b)(1) does not use the word "action," unlike Code Sec. 7811(b)(2). It would not have extended the tolling provision of Code Sec. 7811(d) to encompass the IRS's levy.

The district court found that the individual did not meet the definition of "taxpayer" under Code Sec. 7811(a), and even if she had, Code Sec. 7811(d) would not have tolled the statute of limitations period for purposes of filing the wrongful levy claim.

Court's analysis

The Fifth Circuit found that Code Sec. 7811, governing when the National Taxpayer Advocate may issue a TAO, extended to third-parties against whose accounts the IRS had placed a levy to pay for another's tax liabilities. The Fifth Circuit found that the term "taxpayer" in the statute is not limited to only the person against whom a tax is assessed, pointing out that Code Sec. 7701 provides broadly that "taxpayer" means any person subject to any internal revenue tax. Therefore, the individual was a "taxpayer" for purposes of the TAO statute. The Fifth Circuit also found that the plain language of Code Sec. 7811(d) provides that the statute of limitations period is tolled, via subsection (b)(1), for actions "to release property of the taxpayer levied upon."

- **Comment.** The dissent cautioned that the majority had created a new tolling rule, which could be confusing to taxpayers looking to calculate deadlines ahead of time.

References: 2015-2 USTC ¶50,488
TRC IRS: 30,220.

U.S. Signs Competent Authority Arrangements with FATCA Partners Australia And U.K.

The U.S. has signed Competent Authority Arrangements (CAA) with Australia and the United Kingdom, two jurisdictions with which the U.S. has entered into intergovernmental agreements (IGAs) under the *Foreign Account Tax Compliance Act (FATCA).*

Background. FATCA generally requires U.S. financial institutions to withhold a portion of certain payments made to foreign financial institutions (FFIs) that do not agree to identify and report information on U.S. account holders. Generally, jurisdictions may permit their FFIs to enter into agreements with the IRS or they can themselves enter into IGAs with the U.S. The U.S. signed IGAs with Australia (2014) and the U.K. (2012) to implement FATCA.

Agreements. A CAA is a bilateral agreement between the U.S. and another jurisdiction to clarify or interpret treaty provisions. The CAAs with Australia and the U.K. reflect implementation of FATCA under the IGAs with those jurisdictions. The IRS reported that it anticipates more CAAs will be signed with FATCA IGA jurisdictions in coming months, following Australia and the U.K.

- **Comment.** "The signing of these Competent Authority Arrangements marks another significant milestone in the international effort to gain proper reporting of offshore accounts and income," IRS Commissioner John Koskinen said in a statement. "Together in partnership with other tax authorities, we are demonstrating how far we have come in the fight against offshore tax evasion," he added.

IR-2015-108; TRC IRS: 9,108.

IRS Nonacquiesces In Appeals Court Decision That Excluded CRP Payments To Nonfarmers From Self-Employment Tax

AOD-2015-2

The IRS has announced its nonacquiescence in the Eighth Circuit Court of Appeals decision in *Morehouse, 2014-2* USTC *¶50,471*. The Eighth Circuit had held that payments to a nonfarmer under the U.S. Department of Agriculture's Conservation Reserve Program (CRP) paid for the use of the taxpayer's farmland and should be excluded from self-employment taxes under Code Secs. 1401 and 1402. The IRS will continue to litigate the issue unless the case is in the Eighth Circuit and involves the same facts.

- **Take Away.** To be earnings from self-employment, income must be derived from a trade or business. However, rentals from real estate are excluded from self-employment income. The Tax Code does not define "rentals from real estate." Although the AOD stated that the taxpayer was a nonfarmer, the IRS asserted that the CRP payments did not qualify as rent and were properly characterized as earnings from self-employment.

- **Comment.** Congress amended Code Sec. 1402 in 2008 to provide that CRP payments are not earnings from self-employment if paid to Social Security benefit recipients in a year beginning after December 31, 2007. This provision does not apply to this case. The IRS asserted that the 2008 amendment, by excluding only some CRP payments from self-employment income, suggested that payments to farmers and nonfarmers alike are self-employment income unless paid to Social Security recipients.

Background

The taxpayer inherited 1,200 acres of land, and enrolled several hundred acres in the CRP. The taxpayer entered into a contract with the USDA to implement an approved conservation plan on the land. According to the AOD, the taxpayer engaged in his duties under the contract either directly or through a third-party that he hired. He received CRP payments of more than $37,000 for both 2006 and 2007.

The taxpayer reported the payments on Schedule E as rents. The IRS treated them as self-employment income that should have been reported on Schedule F, Profit or Loss From Farming.

IRS analysis

The Tax Court in *Morehouse, Dec. 59,568 (2013),* concluded that the taxpayer was engaged in a trade or business of participating in the CRP, with the primary intent of making a profit. The Tax Court also rejected the view that the CRP payments were rentals from real estate, citing the Sixth Circuit opinion in *Wuebker (2001-1* USTC *¶50,254*, where the court held that taxpayers receiving CRP payments retained control and free access to their land and that the CRP restrictions were not "use" by the USDA.

The Eighth Circuit reversed. It rejected the trade or business analysis. It characterized the CRP payments as made for the use of the taxpayer's property and therefore as rent from the farmland. Citing IRS Revenue Rulings 60-32 and 65-149 as support, the court said that payments to a nonfarmer were rentals from real estate and should be treated differently from payments to a farmer. *Wuebker* was distinguishable because it involved a farmer.

The IRS disagreed with the Eighth Circuit's analysis that drew a line between CRP payments to farmers and nonfarmers. The IRS also disagreed with the court's holding that the CRP contract provided for rent because it gave the government use and occupancy of the taxpayer's property.

The IRS noted that in *Wuebker*, the court stated that "rentals from real estate" must be interpreted based on its ordinary or natural meaning. An owner in the CRP program does not relinquish control of the land to the USDA, and the USDA does not engage in any activities with respect to the land that involve use.

References: FED ¶46,411; TRC INDIV: 63,452.10.

IRS Will Temporarily Accept Prior Versions Of VCP Forms

The IRS has announced on its website that plan sponsors may temporarily use prior versions of revised forms to apply to the Voluntary Correction Program (VCP). The agency has updated Form 8950, Application for Voluntary Correction Program (VCP) under the Employee Plans Compliance Resolution System (EPCRS) (Instructions); and Form 8951, Compliance Fee for Application for Voluntary Correction Program (VCP).

Background. The IRS offers a number of voluntary correction programs, which are all covered under EPCRS. The VCP is one such program. A VCP submission must include completed Forms 8950 and 8951. A VCP submission must include a description of the failures, and a description of the proposed methods of correction. Following receipt of a VCP submission, the IRS determines if the plan meets submission and eligibility requirements. If the plan does, the IRS will contact the plan to review proposed corrections and administrative procedures.

Revised forms. The IRS reported that it will continue to accept the prior versions of Forms 8950 and 8951 through January 1, 2016 (although the agency explained that it will prefer plan sponsors use the updated versions of these forms). Plan sponsors that use the prior versions must list the NAICS business code for the plan sponsor in their cover letter, the IRS explained. The IRS also may request additional information or clarification for applications filed on prior versions during their review process.

www.irs.gov; TRC PLANRET: 12,058.302.

Fifth Circuit Upholds Requirement To Capitalize, Not Deduct, Production-Related Costs

Frontier Custom Builders, CA-5, September 16, 2015

The Fifth Circuit Court of Appeals has affirmed the Tax Court's holding that a home builder was required to capitalize certain indirect costs of producing real property. The taxpayer sought to deduct substantial amounts of compensation that it paid to its chief executive officer (CEO).

- **Take Away.** The taxpayer bore the burden to refute the IRS position. No method of accounting may be used if the IRS believes it does not clearly reflect income. The IRS has been given broad discretion to determine what accounting methods satisfy this standard. According to the Tax Court, the IRS's position on an accounting method must be upheld unless it is plainly arbitrary and clearly unlawful as an abuse of discretion. In this case, the taxpayer failed to present sufficient evidence to show that most of the CEO's time was spent on deductible activities.

Capitalized costs

Under Code Sec. 263A and Reg. §1.263A-1, a taxpayer must capitalize all costs allocated to the production of property, including real property. Capitalizable product costs may not be deducted from income. Production includes constructing, building, developing or improving property. Costs of production include indirect costs, which in turn include service costs. Service costs relate to a particular service department or function within a business. Capitalizable service costs must directly benefit the taxpayer's production activities or be incurred because of these activities.

Court's analysis

The taxpayer designs, builds (through contractors) and sells custom homes and improvements on real property. The IRS determined that most of the amounts deducted by the taxpayer in 2005, in particular the compensation paid to its CEO, were capitalizable service costs.

The taxpayer lacked any contemporaneous records to demonstrate how many hours the CEO spent on various activities. The Tax Court dismissed the CEO's testimony at trial as self-serving and agreed with the IRS that the compensation paid to the CEO should be capitalized.

The Fifth Circuit agreed that the IRS's calculation method was not an abuse of discretion. Although many of the CEO's hours were spent managing the company, a substantial portion related to production. The CEO's activities included designing homes that were later produced; creating the processes and procedures for building homes; selecting developers and subcontractors; meeting weekly with production managers regarding production timelines, and evaluating the production managers' productivity reports.

References: 2015-2 USTC ¶50,487;
TRC ACCTNG: 15,204.

Married Couple Not Entitled To Interest Abatement; IRS's Denial Not Abuse Of Discretion

Foote, TC Memo. 2015-187

The Tax Court has found that IRS Appeals did not abuse its discretion by denying a married couple's request for the abatement of interest on income tax deficiencies from five tax years. First, the court found it lacked jurisdiction to review the abatement issue with respect to four of the tax years: the IRS had never issued a final determination not to abate interest for that period. The Tax Court found that the couple had failed to allege a ministerial or managerial error or delay with respect to the period for which the IRS had issued a final determination not to abate interest.

- **Take Away.** While conducting the audit, the IRS encountered numerous delays, mainly due to the taxpayers' failure to timely respond to IRS correspondence, their repeated postponements of meetings, their failure to produce requested documents, and their first CPA's arrest, among other reasons.

Background

Under Code Sec. 6404, the IRS may abate interest on any deficiency attributable, in whole or in part, to any unreasonable error or delay by an IRS officer or employee in performing ministerial or managerial tasks. The Tax Court defined "ministerial" and "managerial" tasks with reference to prior case law. A "ministerial act," it found, is a procedural or mechanical act that does *not* involve the exercise of judgment or discretion.

Court's analysis

The Tax Court first found it had jurisdiction to review the IRS's failure to abate interest only after it had mailed a notice of final determination not to abate interest under Code Sec. 6404. The IRS had not issued a notice of final determination not to abate interest for the period from September 1995 to November 1999. Therefore, the Tax Court reviewed only the interest abatement request only with respect to the period November 1999 through February 2011.

Ultimately, the Tax Court found that the married couple was not entitled to the abatement of interest accruing on their tax deficiencies. The IRS had not abused its discretion by denying abatement. The six errors the couple claimed were "ministerial" were not ministerial for purposes of Code Sec. 6404: the cited tasks necessarily required the use of judgment and discretion."

References: Dec. 60,413(M);
TRC PENALTY: 9,056.20.

Tax Court Upholds Denial Of NOL Carryforwards; Taxpayer Failed To Adequately Substantiate Claims

Jasperson, TC Memo. 2015-186

The owner of an S corp has failed to persuade the Tax Court that he adequately substantiated his claimed net operating losses (NOLs). The taxpayer's evidence, the Tax Court found, fell short of showing that the S corp had incurred NOLs, he had sufficient basis in his S corp shares, and the losses were properly carried forward.

- **Take Away.** The court emphasized that taxpayers must maintain adequate records to substantiate their claimed NOLs. In this case, the taxpayer submitted hundreds of accounting records from an electronic database as replacements for source documents, which the court found did not provide adequate substantiation. Moreover, the taxpayer did not provide his individual returns from the years of the claimed NOLs.

Background

The taxpayer formed a wholly-owned S corp in 1998. The S corp reported losses of $750,000 in 2005 and $238,000 in 2006. After applying the losses against his individual income, the taxpayer apparently calculated NOLs on his individual tax returns for these years. The taxpayer subsequently carried forward the alleged NOLs to tax years 2008–10 to offset his reported income for those years. The IRS disallowed the claimed NOLs.

Court's analysis

The court first found that an NOL generally must first be carried back two years and then carried forward 20 years. A taxpayer who makes an election can waive the carryback requirement and carry forward the NOL. This election must be made on timely filed returns for the years the NOLs are incurred. A taxpayer claiming an NOL must file with its return a statement setting forth the amount of the NOL deduction claimed and all material and pertinent facts relative thereto, including a detailed schedule showing the computation of the NOL.

Here, the court found that the taxpayer did not show that he had made elections on his 2005 and 2006 individual returns to waive the carryback requirement for his claimed NOLs. The taxpayer also did not provide evidence of whether the net operating losses were absorbed in prior years. The court could not, on the record before it, verify the amounts of the claimed NOLs. The taxpayer did not provide any source documents to prove the losses. Furthermore, he did not accurately account for his basis in his S corp.

- **Comment.** The court noted that it was unable to determine if the taxpayer elected to waive the initial two-year carryback requirement for NOLs because his individual tax returns for 2005 and 2006 were not in the record.

References: Dec. 60,412(M); TRC BUSEXP: 45,150.

Payments To Provider For Core Services Do Not Trigger Code Sec. 6050W Reporting

LTR 201539025

The IRS has determined that payments a taxpayer made to a provider for core services did not impose Code Sec. 6050W reporting obligation on the taxpayer a third party settlement organization (TPSO) for purposes of Code Sec. 6050W reporting. However, the taxpayer was subject to information reporting under Code Sec. 6041.

- **Take Away.** Code Sec. 6050W requires payment settlement entities to file an information return for each calendar year with respect to payments made in settlement of reportable payment transactions. Code Sec. 6050W covers two types of transactions: payment card transactions and third party network transactions. A payment settlement entity in the payment card context is a merchant acquiring entity; in the third party network context, it is a TPSO.
- **Comment.** A TPSO is a central organization that has the contractual obligation to make payments to the participating payees of third party network transactions.

Background

The taxpayer entered into agreements with its customers. Under these agreements, the taxpayer made payments to certain providers. Payments were made by credit card or debit card. The taxpayer received Forms 1099-K for these transactions from various merchant acquiring entities or electronic payment facilitators.

- **Comment.** The taxpayer acknowledged that these transactions between it and its customers were payment card transactions subject to information reporting under Code Sec. 6050W.

The taxpayer also entered into agreements with providers. Its customers were not parties to these agreements. The taxpayer paid providers on a monthly or twice monthly basis, typically by automated clearinghouse network or other electronic funds transfer. These payments to the providers, the IRS determined, were payments for the core service that the taxpayer provided to its customers.

IRS analysis

The IRS determined that the taxpayer was not a TPSO. The taxpayer's primary function was not the facilitation of the settlement. The payments between the taxpayer and its customers and the payments be-

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District Court Finds Jurisdiction To Review IRS's Denial Of Discretionary Treaty Benefits

Starr International Co., DC-D.C., September 18, 2015

A federal district court has concluded that it has jurisdiction to review the IRS's decision to deny discretionary treaty benefits under the U.S.–Swiss Tax Treaty. The taxpayer sought a lower tax rate (15 percent) than the 30 percent statutory rate on dividends paid to a foreign company by a U.S. company.

- **Take Away.** A federal agency's decision is not subject to judicial review if the decision is committed exclusively to the agency's discretion by law (in this case, the tax treaty). The court found that there is a strong presumption favoring judicial review of agency decisions and that the treaty did not reflect an unambiguous intent to foreclose judicial review.

Background

The company was a major stockholder in a U.S. insurance company and received millions of dollars in dividends annually. In 2004, the company moved from Bermuda to Ireland. The U.S.–Ireland Tax Treaty automatically reduced the tax rate on dividends by half, a benefit that was not available in Bermuda. The company then moved its headquarters to Switzerland, for the alleged purpose of protecting its assets from an insurance company lawsuit.

The taxpayer did not qualify for automatic treaty benefits under the U.S.–Switzerland Treaty for 2007, so it requested discretionary benefits. The IRS, as Competent Authority, denied benefits for 2007, although it subsequently granted benefits for 2008.

The company sued for a refund. It claimed the IRS abused its discretion because the company was not treaty shopping; the IRS failed to consult with the Swiss competent authority; and the IRS had no legal basis for issuing a 2008 refund while denying a 2007 refund. The IRS claimed that its decision was nonreviewable because it was committed to agency discretion and because it involved a political question.

Court's analysis

The U.S.–Swiss Tax Treaty grants automatic benefits for dividends where, for example, the Swiss company performed significant business in Switzerland or is listed on a recognized stock exchange. Otherwise, a Swiss company may request discretionary benefits from the U.S., which may consult with Switzerland. The Treasury Department's Technical Explanation said that this was a limitation-on-benefits provision to prevent treaty shopping, i.e., moving to Switzerland solely to obtain a lower tax rate under the treaty.

The court rejected both IRS arguments. Judicial review is not available if there is no law to apply and no judicially manageable standard exists. While the treaty terms were open-ended, the Technical Explanation and Treasury testimony before the Senate provided meaningful standards for review to determine whether the company was treaty shopping. Furthermore, the IRS denial of benefits did not involve foreign policy considerations and therefore was not a political question.

References: 2015-2 USTC ¶50,496; TRC LITIG: 9,252.05.

6050W Reporting

Continued from page 6

tween the taxpayer and its providers were not directly linked. Because the taxpayer was not a TPSO, the taxpayer did not have a reporting obligation under Code Sec. 6050W in this situation.

The IRS further determined that the taxpayer was subject to reporting under Code Sec. 6041 for the payments to providers. The payments made by the taxpayer to the providers fell within at least one of the categories of payments in Code Sec. 6041, including rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable gains, profits, and income. The payments to the providers also did not fit within any of the exceptions in Reg. § 1.6041-3.

Reference: TRC FILEBUS: 9,320.

IRS Announces Disaster Relief For California Fire Victims

The IRS has announced disaster relief for victims of the Valley and Butte fires that took place beginning on September 12, 2015, in parts of California. President Obama has declared Lake and Calaveras counties as federal disaster areas. Certain federal tax deadlines falling on or after September 12, 2015, and on or before January 15, 2016 have been postponed to January 15, 2016 for individuals and/or businesses within those areas.

- **Comment.** Currently there are two identical bills in the House and Senate (National Disaster Tax Relief Act of 2015 (HR 3110; Sen 1795)) to provide permanent disaster tax relief including: a longer property replacement period; a five-year net operating loss carryback period; authorized withdrawal of qualified retirement account funds to pay for disaster-related expenses; and more. At present Congress is required to authorize disaster tax relief after each disaster. In letters to lawmakers, AICPA Tax Executive Committee Chair Troy Lewis wrote about the permanent tax relief provision. "We believe these provisions will provide taxpayers with certainty, fairness and the ability to promptly receive the relief they need after a natural disaster, while significantly reducing the administrative burdens on the IRS to react to unexpected disasters."

SAC-2015-06, FED ¶46,412; TRC FILEIND: 15,204.25.

TAX BRIEFS

Internal Revenue Service

The IRS has scheduled an October 27, 2015, hearing on proposed regulations clarifying the application of Code Sec. 7704(d)(1)(E) with respect to qualifying income from exploration, development, mining or production, processing, refining, transportation, and marketing of minerals or production, processing, refining, transportation, and marketing of minerals or natural resources.

Notice of Hearing, NPRM REG-132634-14, 2015FED ¶46,413; TRC PART: 3,254.05

Jurisdiction

A *pro se* individual's wrongful levy claim against the IRS was dismissed for lack of subject matter jurisdiction. The individual's challenge to the IRS's assessment process did not constitute collection activity under Code Sec. 7433.

Walcott, DC Colo., 2015-2 USTC ¶50,486; TRC IRS: 45,114

Income

A taxpayer was an insurance company within the meaning of Code Sec. 831(c) and the company's "residual value insurance" contracts were insurance contracts for federal income tax purposes. From the perspective of the lessors and finance companies, these contracts shifted a significant level of the risk of financial loss to the insurer.

R.V.I. Guaranty Co., Ltd. & Subsidiaries, TC, Dec. 60,408, FED ¶48,118; TRC FILEBUS: 3,056

Deductions

A lobbyist was denied unsubstantiated deductions, but was allowed others, and he was conditionally subject to an substantial understatement penalty. The court allowed some home office expenses, but denied amounts deducted as "miscellaneous" expenses, as well as the claimed travel expenses for lack of substantiation.

Young, TC, Dec. 60,415(M), FED ¶48,125(M); TRC BUSEXP: 24,800

An individual was not entitled to deduct an entire net operating loss carryback based on a substantial write down of properties held by the taxpayer's solely-owned S corporation. The properties were not worthless to the S corporation at the end of the tax year. Moreover, the IRS disallowed a portion of an interest expense deduction.

Tucker, TC, Dec. 60,411(M), FED ¶48,121(M); TRC BUSEXP: 39,102

Collection Due Process

An individual could not challenge the way the IRS applied his payments because he did not properly raise the issue during his Collection Due Process (CDP) hearing. Moreover, the settlement officer (SO) did not abuse her discretion by holding the hearing via correspondence or by failing to consider collection alternatives.

Au, TC, Dec. 60,409(M), FED ¶48,119(M); TRC IRS: 51,056.15

Deficiencies and Penalties

A married couple, the president and vice-president of a demolition company, were responsible persons for purposes of the trust fund recovery penalty (TFRP). The couple had financial control of the company and acted willfully by paying other creditors before paying unpaid obligations to the IRS. The wife displayed reckless indifference by relying on her husband.

Troost, DC Tex., 2015-2 USTC ¶50,489; TRC PAYROLL: 6,306

An individual's petition for redetermination of a deficiency was properly dismissed because it was untimely. The taxpayer's argument that U.S. Postal Service (USPS) tracking data was not accurate was rejected. The tracking date reflected the date the envelope entered the U.S. mail system and demonstrated that the petition was not timely mailed. Accordingly, the "postmark" upon which the taxpayer relied was superseded by USPS tracking data, which in turn served as a "postmark."

Tilden, TC, Dec. 60,414(M), FED ¶48,124(M);TRC IRS: 27,158

A Chapter 7 debtor, who was the chief financial officer of a limited liability company (LLC) that managed a hospital, was liable for the trust fund recovery penalty (TFRP). The debtor sat on the hospital's board and he exercised significant control over the hospital's financial affairs. The debtor failed to demonstrate that the hospital's funds were unavailable to pay the outstanding obligations to the IRS.

In re Cherne, DC Ida., 2015-2 USTC ¶50,491; TRC PAYROLL: 6,306.05

A small partnership was not entitled to a refund of a late-filing penalty because some of its partners failed to timely file their individual tax returns. The IRS's position in Rev. Proc. 84-35, 1984-1 CB 509, that the reasonable cause exception to the Code Sec. 6698 penalty requires all partners in a small partnership to timely file their individual income tax returns, was consistent with the legislative history of the statute.

Battle Flat, LLC, DC S.D., 2015-2 USTC ¶50,490; TRC PART: 18,162.10

Estates and Trusts

A decedent's estate could not deduct a charitable contribution because the estate did not "permanently set aside" the funds for a charitable contribution under Code Sec. 642(c)(2). The possibility that the funds would go to noncharitable beneficiaries was not "so remote as to be negligible" under Reg. §1.642(c)-2(d). The estate could not "permanently set aside" funds as a matter of law because there was active litigation, the result of which might distribute the estate's funds to noncharitable beneficiaries.

Dimarco Est., TC, Dec. 60,410(M), FED ¶48,120(M); TRC ESTGIFT: 45,052.05

False Tax Returns

Two individuals were properly convicted and sentenced for conspiracy to defraud and preparing false tax returns. The evidence established beyond a reasonable doubt that the individuals had an agreement to defraud the U.S.

Allen, CA-4, 2015-2 USTC ¶50,484; TRC IRS: 66,204

Bankruptcy

The IRS's proof of claim in a Chapter 13 case was disallowed because the adjustments to the debtor's taxable income for the tax year at issue were unwarranted.

In re Trojanowski, BC-DC N.C., 2015-2 USTC ¶50,487; TRC INDIV: 21,450