Wolters Kluwer

OCTOBER 15, 2015
ISSUE NUMBER 42

FEDERAL TAX WEEKLY

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Obama Signs PACE Act, Amends ACA Definition Of Small Group Market

Protecting Affordable Coverage for Employees (PACE) Act, P.L. 114-60

President Obama has signed into law the *Protecting Affordable Coverage for Employees Act,* (PACE Act) which allows states to keep the current definition of a small group market as 50 or fewer employees. The PACE Act was passed by a voice vote in the House on September 28 and a voice vote in the Senate on October 1 and is effective on enactment (October 7, 2015).

- **Take Away.** "The PACE Act gives states leeway to decide if they want to reshuffle a business with between 51 and 100 employees back into the large group market or include them in the definition of small employer for the small group health insurance market," Kris Esposito, senior technical manager, tax advocacy, American Institute of Certified Public Accountants (AICPA), told Wolters Kluwer. The PACE Act does not make any changes to the Affordable Care Act's (ACA) employer shared responsibility provision (also known as the "employer mandate"), Esposito explained.

Background

Prior to passage of ACA, the *Public Health Service Act* defined a small employer in connection with a group health plan with respect to a calendar year and a plan year, as an employer who employed an average of at least two but not more than 50 employees on business days during the preceding calendar year and who employs at least 2 employees on the first day of the plan year. The ACA revised this threshold. Employers with 51 to 100 employees are treated as small employers for purposes of health insurance markets but states have the option to treat them as large employers until January 1, 2016. After December 31, 2015, plans with 51 to 100 employees would be subject to the ACA's small group health plan rules, including essential health benefits (such as emergency services, hospitalization, rehabilitative services), certain rating rules, and more.

- **Comment.** The expanded definition was projected to have variable effects on mid-size employers, with some experiencing lower premiums while others seeing their premiums increased. Higher premiums could result from more comprehensive benefit requirements.

After passage of the ACA, the U.S. Department of Health and Human Services (HHS) announced a temporary transition policy. Generally, insurers in the small group market would be able to renew policies notwithstanding the ACA's reforms. This transition policy, however, would be implemented by states at their discretion. In response, lawmakers proposed a bipartisan legislative fix: the PACE Act.

- **Comment.** In September, the U.S. House Committee on Energy and Commerce reported that 34 states had taken advantage of the transition policy.

PACE Act

The PACE Act amends the *Public Health Service Act* to redefine small employer as one with 50 or fewer employees for purposes of the small group health market. The PACE Act gives states

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Tax Court Affirmed: Joint Venture Not Valid Partnership; Income Attributable Solely To Taxable "Partner"

DJB Holding Corp, CA-9, October 7, 2015

The Ninth Circuit Court of Appeals has affirmed a Tax Court decision holding that a joint venture was not a valid partnership because one of the two purported partners did not contribute anything to the partnership. As a result, the partnership's entire income was entirely allocable to the other partner, a taxable corporation that operated an asbestos environmental remediation business.

The Ninth Circuit also agreed that proceeds from a noncompetition agreement were income to the taxable corporation. Finally, the court affirmed that the taxpayers were liable for accuracy-related penalties.

- **Take Away.** The party that failed to qualify as a partnership was itself a partnership. This partnership was ultimately owned by two employee stock ownership plans (ESOPs), each established for the benefit of an individual who actually ran the business. By allocating a substantial amount of "partnership" income to the two ESOPs, the income would escape taxation until it was ultimately distributed by the ESOP in later years. The IRS may have challenged the transaction with this tax avoidance arrangement in mind.

Background

Two individuals established and operated an environmental remediation company (WCI). The individuals were concerned that they would be held personally liable for the cost of any projects the company failed to complete. To shield themselves from this risk, they interposed several entities (holding companies, S corporations, partnerships and the ESOPs) between themselves and WCI.

One of the entities was a partnership (WB Partners) owned by holding companies that were each owned by one of the two individuals (W and B). To win a large remediation contract, WCI had to post a large bond. WCI and WB Partners formed a joint venture in which WCI would do the work and WB Partners would supply financial guarantees. Under the partnership agreement, WCI received 30 percent of the profits; WB Partners would receive 70 percent. WCI later reduced WB Partners' share of income from the contract to 50.4 percent.

Before the remediation contract was completed, WCI sold its assets to an outside party for $5.4 million. As part of the sale, WCI, W and B entered into a noncompetition agreement. The asset purchase agreement allocated $3.4 million to the noncompetition agreement. The latter proceeds were reported as income of WB Partners.

No partnership

The Ninth Circuit affirmed that the joint venture was not a valid partnership. Ultimately, the court concluded that WB Partners was not a bona fide partner because it did not contribute anything to the partnership. As a result, the income earned by the joint venture was in fact entirely taxable to WCI, the corporation that actually operated the business.

The Tax Court had weighed the eight factors cited in *Luna, 42 TC 1067 (1984)* and concluded that there was no partnership. The parties violated the terms of the agreement, by allocating a 50.4 percent share to WB Partners, instead of a 70 percent share, and did not conduct themselves like a partnership. The reduction in the partners' share demonstrated that they exercised no control over income and capital, unlike a bona fide partner, and that the parties did not intend to share profits and loses as partners would.

Furthermore, WB partners contributed nothing of value to the joint venture because the performance bond was based on the net worth of WCI, W and B as related entities. WB Partners performance guaranty had marginal value. If the joint venture had not existed, WB Partners would still be ob-

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PACE Act

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the option to expand the definition to include employers with up to 100 employees for purposes of the small group health market.

Cafeteria plans

Code Sec. 125(f)(3) generally allows certain qualified health plans to be offered through cafeteria plans. Generally, a qualified health plan (QHP) provided through a health insurance Marketplace is not a qualified benefit that may be offered through a cafeteria plan. If an employer is a qualified employer offering employees the opportunity to enroll in a QHP through a health insurance Marketplace in a group market, the QHP may be offered through a cafeteria plan. Generally, a qualified employer is one with not more than 100 employees. The PACE Act may therefore have consequences for any employers with between 51 and 100 employees that were planning to take advantage of this provision after they became "small employers" after January 1, 2016.

Reference: TRC HEALTH: 15,100.

REFERENCE KEY

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

FEDERAL TAX WEEKLY, 2015 No. 42. FEDERAL TAX WEEKLY is also published as part of CCH Tax Research Consultant by Wolters Kluwer, 4025 W. Peterson Avenue, Chicago, IL 60646-6085. Editorial and Publication Office, 1015 15th St., NW, Washington, DC 20005.

OECD Releases Final Package Of Measures For Base Erosion And Profit Shifting (BEPS) Project

OECD/G20 BEPS Project, 2015 Final Reports

The Organisation for Economic Co-operation and Development (OECD) has released its final package of measures to address base erosion and profit shifting (BEPS) activities. The BEPS project aims to develop proposals to close gaps in international tax rules that allow corporate profits to escape taxation through double non-taxation, or to be shifted to low tax countries where there is little economic activity.

- **Take Away.** "Base erosion and profit-shifting affects all countries," OECD Secretary-General Angel Gurria said in a statement. "The measures we are presenting today represent the most fundamental changes to international tax rules in almost a century. When fully implemented, these measures will render BEPS-inspired tax planning structures ineffective," Gurria said.

BEPS

According to the OECD, BEPS activities generate revenue losses of $100–240 billion annually, amounting to 4–10 percent of global corporate income tax revenues. The OECD started the BEPS project in 2013, with a target date of October 2015.

"No single rule or provision is the root cause of BEPS," the OECD explained. "It is the interplay among different rules that generates BEPS: domestic laws and rules which are not coordinated across borders, international standards which have not always kept pace with the changing global business environment, and [the] lack of data and information."

The BEPS package offers individual governments a series of new measures to implement through domestic law changes, the OECD explained. The OCED identified 15 key areas. The final BEPS package addresses:

- Country-by-country reporting, including transfer pricing documentation, which will give countries a global picture of multinational enterprises;
- Treaty shopping, to stop the use of branches and conduit companies to divert investments;
- Disclosure of aggressive tax planning and harmful tax practices, especially involving intellectual property;
- Transfer pricing rules for intangibles and the transfer of risks, to prevent taxpayers from sheltering profits in low-tax jurisdictions;
- Permanent establishments, to curb arrangements that avoid having a taxable presence in a country;
- Limits on interest deductions and other payments to curb base erosion;
- Hybrid mismatches through the use of complex financial instruments and entities that are treated differently in the resident and the home country;
- Controlled foreign corporations; and
- The digital economy and data analysis.

The final report also addresses dispute resolution and development of a multilateral treaty instrument. Nearly 90 countries are working on a multilateral instrument that would enable the incorporation of tax-treaty related BEPS measures into existing bilateral treaties.

Next steps

The measures were discussed at an October 8 meeting of the G20 finance ministers and will be presented at a November meeting with G20 leaders. After that, the OECD's focus will shift to designing a framework for monitoring BEPS and supporting implementation of the measures. Individual countries will then consider how to implement the BEPS recommendations under their own tax systems.

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Partnership

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ligated to provide W and B's guaranties, as the owners of Partners. WB Partners' guaranty was superfluous.

Other issues

The court found that WB Partners was not entitled to any income from the noncompetition agreement. Ordinarily, when a sale includes a noncompetition agreement, the proceeds allocated to that agreement are income to the persons who promise not to compete. The noncompete agreement applied to B, W and WCI. WCI was the only party who ever performed remediation services. B and W were personally bound by the agreement; their agreement did not involve WB Partners. Thus, WB partners was not entitled to any share.

- **Comment.** The court noted that W and B would be entitled to a share of the income from the noncompete agreement, but they did not make that claim in court.

References: 2015-2 USTC ¶50,509; TRC PART: 3,100.

IRS Correction Of Temporary Notional Principal Contracts Regs Includes Later Effective Date

The IRS has issued "corrected" temporary regulations on the treatment of nonperiodic payments made or received pursuant to certain notional principal contracts. These amendments change the applicability date of the embedded loan rule for the treatment of nonperiodic payments` from November 4, 2015, to the later of January 1, 2017, or six months after the date of publication of the Treasury decision adopting these rules as final regulations in the *Federal Register.*

- **Comment.** The changes were the result of comments by taxpayers that compliance with the new rules affecting broker-dealers and other swap participants would take more time. IRS officials are also encouraging additional feedback before final regulations are issued.

TD 9719, Correcting Amendment; TRC SALES: 45,254.05.

Lender Not Required To Report Discharge Of Debt Resulting From Settlement Of Class Action

LTR 201540009

The IRS has concluded in a private letter ruling that a lender was not required to issue Form 1099-C, Cancellation of Debt, when it settled a class action lawsuit by agreeing to write off debt balances owed by members of the class. The IRS determined that the write-offs occurred by operation of state law, not because of an "identifiable event" that triggers reporting under Code Sec. 6050P and Reg. §1.6050P-1.

- **Take Away.** The ruling does not discuss the income tax consequences of the settlement to the class members. Ordinarily, the cancellation of indebtedness (COI) results in taxable income under Code Sec. 61, unless the income is excluded under Code Sec. 108. One possibility is that the debtors do not realize COI income because, under state law, there was no debt: the ruling indicates that the violation of state law found by the court and admitted by the lender "means that the deficiency balances never accrued in the first place and [taxpayer] is barred from recovering any deficiency balances."

Background

The taxpayer (lender) was a financial institution that extended credit to consumers. The taxpayer was sued in a class action, alleging that its pre-sale notices (issued to a debtor before selling an asset of the debtor to collect on the debt) violated state law notice requirements. The plaintiffs sought damages and an injunction collecting lender from collecting the outstanding balances.

The court found that the pre-sale notice violated state law. The parties then signed an agreement to settle the entire lawsuit. The court approved the settlement and enjoined taxpayer from collecting the balances on the debts. The agreement acknowledged that the notices violated state law and that state law barred the taxpayer from collecting on the debts.

IRS analysis

Code Sec. 6050P requires an entity to report a discharge of debt exceeding $600, for each person whose debt is discharged, as well as the date of discharge and the amount discharged. Under the regs, a discharge occurs on the occurrence of an "identifiable event," whether or not actual discharge has already occurred. Two identifiable events in the regs are:

- An agreement by the parties to discharge the debt for less than full consideration; or
- A decision by the creditor to discontinue collection activity and discharge the debt.

The IRS determined that the discharge in this case did not result from an identifiable event described in the regs because the debt was discharged by operation of state law, not because of the parties' agreement to settle the litigation, and not because of the creditor's decision or policy to discontinue collection activity. The IRS noted that under state law the lender would be barred from recovering any debt balances, whether or not the creditor agreed to discharge the debt. Accordingly, the write-off of the debts for the class was triggered by operation of state law, not by the parties' agreement.

Reference: TRC SALES: 12,452.

BEPS

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- **Comment.** "Everyone has a stake in reversing base erosion and profit-shifting," Gurria said. "Swift implementation by governments will ensure a more certain and more sustainable international tax environment for the benefit of all."
- **Comment.** "It remains to be seen whether the final recommendations will be implemented in a way that will be consistent with the intended consensus," Manal Corwin, national leader of international tax, KPMG LLP, said. "While the U.S. might be slow to adopt or decide not to adopt some of the OECD recommendations, the initiative can be expected to have a significant impact on U.S. multinationals with overseas operations in jurisdictions that are early adopters," Corwin, former deputy assistant Treasury secretary for tax policy for international tax affairs, said.
- **Comment.** "U.S. companies will need to follow closely the developments in the countries where they operate, both changes in international tax laws and the impact of such changes on the administration of tax rules," Barbara Angus, leader of strategic international tax policy, Ernst & Young, LLP, said. "And changes in foreign tax systems will have an impact on their U.S. tax profile as well."

Congressional concerns

Rep. Paul Ryan, R-Wis., chair of the House Ways and Means Committee, was critical of the project. "Trillions of dollars of American capital are locked out of the United States and, as a result, U.S. companies are being targeted by governments eager to tax away their earnings. This proposal will only increase the pressure for American businesses to move overseas." Ryan and Senate Finance Committee Chairman Orrin Hatch, R-Utah, recently wrote to Treasury. The lawmakers previously questioned Treasury's approach to BEPS.

- **Comment.** "It's likely that Capitol Hill will view the BEPS recommendations with skepticism, particularly with respect to whether Treasury has the legal authority to implement country-by-country reporting," Jon Traub, managing principal, tax policy, Deloitte Tax LLP, said.

Reference:TRC INTL: 18,102.10.

IRS Collection Suit Time-Barred; Notice And Demand Letter Restarted Limitations Period

Godley, Jr., DC-N.C., September 29, 2015

A federal district court has found that the IRS was barred from collecting estate taxes because the limitations period had expired before it filed suit to collect the tax. The IRS had restarted the limitations period that had been suspended by the estate's Code Sec. 6166 election by sending a notice and demand letter.

- **Take Away.** The IRS sent three letters. The court found that the second letter constituted a notice and demand for purposes of restarting the statute of limitations period. Its language mirrored language in *Estate of Adell, TCM, Dec. 59,655(M)*, which the court found persuasive.

Background

Although Code Sec. 6502(a) generally provides the IRS with 10 years to collect a tax after it is assessed, exceptions exist whereby this 10-year period may be suspended. One such exception exists under Code Sec. 6166 for certain estates that consist largely of interests in a closely held business. Code Sec. 6166 allows an estate consisting of a closely held business to elect to pay deferred estate taxes over a 15-year period, generally in up to 10 equal annual installments, with the first installment being made no later than the fifth anniversary of the due date of the estate's Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return.

Code Sec. 6166(g)(3)(A) states, however, that if an installment payment is missed, then the unpaid portion of the tax payable in installments shall be paid upon notice and demand. The notice and demand must inform the estate that the installment election will be terminated in order to start the running of the statute of limitations.

Here, the decedent passed away in 1990, leaving behind an estate that included two closely held businesses. The estate elected under Code Sec. 6166 to pay the estate tax in installments and made one payment of a portion of the tax due. After it missed a payment, the IRS sent documents in 2001, 2002, and 2003 to the estate requesting payment of the tax due. The government did not file suit to collect the estate tax liability until September 2013.

Court's analysis

The court first found that a notice and demand must communicate to an estate that its Code Sec. 6166 election will be terminated in order to trigger the statute of limitations. Because the 2002 notice stated that the installment agreement was in default and the estate's account was in danger of being accelerated, the 2002 notice alerted the estate to the potential termination of the election.

When the estate did not make the payment by the deadline asserted in the 2002 notice, the installment payment election was terminated, the unpaid liability was due immediately, and the 10-year statute of limitations began to run. It ultimately expired in 2012. Therefore, the government's collection action, which was commenced in 2013, was barred by the statute of limitations.

References: 2015-2 USTC ¶60,690; TRC ESTGIFT: 51,162.20.

IRS Provides Relief For South Carolina Flood Victims

The IRS has announced disaster relief for taxpayers that live or do business in the South Carolina counties of Berkeley, Calhoun, Charleston, Clarendon, Darlington, Dorchester, Florence, Georgetown, Horry, Kershaw, Lee, Lexington, Orangeburg, Richland, Sumter and Williamsburg who were affected by the recent flooding. The relief postpones various tax filing and payment deadlines that occurred starting on October 1, 2015, until February 16, 2016.

This relief includes the October 15 extension deadline for filing 2014 individual income tax returns and making tax payments, the January 15, 2016, deadline for making quarterly estimated tax payments, and the November 2, 2015, and February 1, 2016, deadlines for quarterly payroll and excise tax returns. The IRS will abate any interest, late-payment or late-filing penalty that would otherwise apply.

In addition, the IRS is waiving late deposit penalties for federal payroll and excise tax deposits normally due on or after October 1, and before October 16, if the deposits are made by October 16, 2015.

- **Comment.** The IRS also warned taxpayers about fake charity scams emerging due to the severe flooding in South Carolina and neighboring states.

IR-2015-112, SC-2015-71; IR-2015-114; FED ¶¶46,420, 46,422; TRC FILEIND: 15,204.25.

IRS Releases Adjusted Applicable Dollar Amount For Health Insurance Plan Fee

The IRS has announced the adjusted applicable dollar amount to be multiplied by the average number of covered lives for purposes of the fee imposed by Code Secs. 4375 and 4376 on the issuer of a specified health insurance policy for policy years and plan years that end after September 30, 2012, and before October 1, 2019. Based on the percentage increase in the projected per capita amount of the National Health Expenditures published by HHS on July 22, 2015, the applicable dollar amount that must be used to calculate the fee imposed for policy years and plan years that end on or after October 1, 2015, and end on or before October 1, 2016, is $2.17.

- **Comment.** The fee helps fund the Patient-Centered Outcomes Research Institute (PCORI).

Notice 2015-60; TRC EXCISE: 13,054.

Payments Exceeding $10,000 On Serial Loans From Pawnbroker Trigger Reporting

CCA201540013

IRS Chief Counsel has determined that multiple, successive loans made by a pawnbroker to the same person, and secured by the same property, were related transactions for purposes of Code Sec. 6050I. As a result, the pawnbroker had to aggregate cash payments received on the series of loans and report the payments when the total for the year exceeded $10,000.

- **Take Away.** Any person who is paid over $10,000 in cash in the same year must report the payment(s) on Form 8300, Report of Cash Payments Over $10,000 Received In a Trade or Business. If transactions, such as a series of loans, are related, reporting is triggered under Code Sec. 6050I once total cash payments on the loans exceed the threshold. The seriatim loans here were related transactions because each subsequent loan was used to repay the principal owed on the prior loan.
- **Comment.** The IRS was conducting a compliance check for Form 8300.

Background

A licensed pawnbroker was in the business of lending money to persons who pawn (pledge) personal property as security for the loan. Under state law, the redemption period for each loan was four months, and the maximum interest rate was four percent per month. If the borrower did not repay the debt on time, the broker could sell the collateral.

- **Comment.** Pawn loans were nonrecourse, so the pawnbroker had no right to collect against the borrower; recovery was limited to proceeds from the collateral.

In some cases, a customer with an existing loan, who could not repay the loan at the end of the term, would agree to a new loan, so that the customer would not forfeit the collateral. The new, seriatim loan was secured by the same collateral and was used to repay the prior loan. The amount of the new loan (assuming no repayments of principal) was the same as the prior loan.

The borrower would pay interest and finance charges owed on the prior loan, and that loan would terminate when the new loan takes effect. Each loan in a series had its own number and the customer obtains a separate pawn ticket.

- **Example.** The broker makes a loan of $7,000, receiving jewelry as collateral. Fees and interest over the loan period total $1,250. At the end of the term, the borrower pays the $1,250 and obtains a new loan for $7,000 on the same terms. The new loan is used to repay the prior loan. This may be repeated until the principal is repaid. Ultimately, the borrower may pay total principal, interest and fees that exceed $10,000.

Statute

Code Sec. 6050I applies to the receipt of cash in one transaction or in two or more related transactions. A transaction is an underlying event, such as a loan or payment on a loan, that triggers the payment of cash to the recipient. Cash includes foreign currency as well as a cashier's check or bank draft, but does not include a person check. Multiple payments within one year are aggregated. Once the total exceeds $10,000, the recipient must file a return with 15 days.

Related transactions are defined as transactions between a payer and recipient within 24 hours. Transactions more than 24 hours apart are related if the recipient should know that each transaction is one of a series of related transactions.

Chief Counsel's analysis

The pawnbroker stated that the loans are not related transactions because they are "legally separate" under state law. Chief Counsel that the loans are related. They were seriatim loans; the existence of the debt from the first loan carried over and was the reason for the second loan. The amount and terms of the new loan were in direct relation to its predecessor. Each new loan allowed the prior loan to be retired. The paperwork and formalities of the transactions were irrelevant to Form 8300 reporting.

Reference:TRC FILEBUS: 9,322.

FATCA FAQ Addresses Withholding Agreements For Withholding Foreign Partnerships And Trusts

The IRS has issued guidance on the effective dates of withholding agreements entered into by withholding foreign partnerships (WPs) and withholding foreign trusts (WTs). The guidance is included in frequently asked questions on the IRS website concerning the *Foreign Account Tax Compliance Act* (FATCA).

FAQ-9 of the General FAQs provides that for calendar years after 2014, if a WP's or WT's application for WP or WT status is submitted on or after April 1, the agreement is not effective until January 1 of the calendar year following the year of the application. The IRS cited Rev. Proc. 2014-47, which describes WP and WT agreements.

If an entity submits an WP or WT application on or after April 1, but does not receive any payments between January 1 of the year submitted and the date of approval, the agreement will be effective on the date that the entity receives a WP-EIN (employer identification number). This treatment depends on the entity obtaining a GIIN (Global Intermediary Identification Number) within 90 days after approval.

FATCA FAQ, www.irs.gov; TRC FILEBUS: 9,108.

Upon Reconsideration, Tax Court Finds Corporation's Solvency In One Tax Year Does Not Affect Transferees' Liability

Kardash, Sr., TC Memo. 2015-197

The Tax Court has found, upon reconsideration, that a corporation was not insolvent during one of the tax years at issue in a case involving transferee liability arising from fraudulent conveyances as defined under state law. Nevertheless, the transfers themselves remained constructively fraudulent. Therefore the Tax Court's initial finding of transferee liability was unchanged.

- **Take Away.** When a transferee of property is found liable for the transferor's tax, any deficiency may be assessed against the transferee in the same manner as against the transferor. Generally, a person is liable as a transferee only if the person is liable in equity as a transferee. Whether a transferee is liable in equity is determined by the law of the state in which the transfer occurred. A transferee is liable in equity if he would be liable under local law to creditors of the taxpayer, generally because transfer was a fraudulent conveyance where the transferee gave inadequate consideration for the transfer and the transfer rendered the transferor insolvent.

Background

The state uniform fraudulent transfer act that applied to this case provided that a transfer is fraudulent if the debtor did not receive reasonably equivalent value and the debtor was insolvent at the time of the transfer or became insolvent as a result of the transfer. The Tax Court previously had found two minority shareholders of a corporation liable as transferees for an insolvent corporation's federal tax debts for three tax years.

Upon a motion for reconsideration, the petitioners argued that the Tax Court incorrectly found that the corporation had been insolvent in 2005. Therefore, the transfers were not fraudulent for that year and they should not have been liable in equity as transferees, they argued.

Court's analysis

The Tax Court granted the motion for reconsideration, finding that they had raised valid concerns regarding the corporation's valuation and the federal income tax liabilities for the years at issue. Upon reviewing the facts, the Tax Court found that the corporation had not become actually insolvent until January 2006. However, the transfers were still constructively fraudulent: they were part of a series of transactions involving the shareholders that were not for reasonably equivalent value and led to the corporation's insolvency. Therefore, the corporation's solvency for 2005 did not alter the Tax Court's decision in *Kardash v. Commissioner, TC Memo. 2015-51, Dec. 60,261(M),* that the petitioners were liable as transferees.

The shareholders also argued that the Tax Court had erred by not finding that the transfers to them were part of a deferred compensation plan. The Tax Court ruled, however, that the corporate document they relied upon to support their argument made no mention of deferred compensation. The payments themselves did not meet the criteria as outlined in the document anyway.

References: Dec. 60,423(M); TRC IRS: 60,102.

TAX BRIEFS

Internal Revenue Service

The IRS has announced the allocation to qualified states of previously unused low-income housing credit authority for calendar year 2015.

Rev. Proc. 2015-49, FED ¶46,424; TRC BUSEXP: 54,220.10

The Commissioner has delegated authority to the Director, Low Income Taxpayer Clinic Program Office, Taxpayer Advocate Service, to authorize students at Low Income Taxpayer Clinics (LITCs) and Student Tax Clinic Programs (STCPs) to practice before the IRS if they are directly supervised by an individual authorized to practice before the IRS.

CDO No. 25-18 (Rev. 2), FED ¶46,423; TRC IRS: 3,208

The IRS has extended until November 16, 2015, the comment period for proposed regulations (NPRM REG-115452-14) relating to disguised payments for services under Code Sec. 707(a)(2)(A).

Comment Period Extended for NPRM REG-115452-14, FED ¶46,421;

For pension plan years beginning in October 2015, the IRS has released the 30-year Treasury bond weighted average interest rate, the unadjusted segment rates, adjusted rates and the minimum present value segment rates.

Notice 2015-71, FED ¶46,425; TRC RETIRE: 15,304.10

Jurisdiction

The Court of Federal Claims lacked subject matter jurisdiction over an individual's refund claims. The individual failed to exhaust his administrative remedies or to satisfy the full-payment rule.

Goines, FedCl, 2015-2 USTC ¶50,511; TRC LITIG: 9,052

An individual's action against his employer seeking damages for unlawfully withholding taxes from his wages was properly dismissed for failure to state a claim for which relief could be granted.

Schagunn v. Gilland, CA-9, 2015-2 USTC ¶50,508; TRC PAYROLL: 6,252

A couple's claim seeking damages for the IRS's allegedly illegal levy of their wages was dismissed for failure to state a claim.

Wright v. Bassett Healthcare Network, DC N.Y., 2015-2 USTC ¶50,503; TRC IRS: 45,114

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Tax Briefs

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Liens and Levies

The government was entitled to reduce to judgment taxes assessed against an individual and foreclose tax liens on trust properties held as individual's nominee. The individual failed to rebut the correctness of the tax assessment.

Enright, DC Fla., 2015-2 USTC ¶50,513; TRC IRS: 45,158

The government was entitled to foreclose liens on a community property and distribute the proceeds from the sale according to the security interests. The court found that, considering the amount of tax owed and the time the IRS has spent trying to collect, the foreclosure sale of the property was an appropriate remedy.

Davis, Sr., DC La., 2015-2 USTC ¶50,512;

The government was entitled to reduce to judgment an individual's federal tax liabilities and foreclose federal tax liens on ten real properties, nine of which were held by the individual's nominee. The individual admitted that despite the transfer of the properties, she continued to exercise dominion and control over them.

Hounsom, DC Fla., 2015-2 USTC ¶50,502; TRC IRS: 45,160

Refund Claims

A married couple was not entitled to refunds for two tax years. The letter from their attorney to the IRS auditor asked for audit reconsideration and could not be construed as withdrawing their consent to an assessment without a deficiency notice.

Lua, FedCl, 2015-2 USTC ¶50,510; TRC IRS: 27,208

A decedent's estate was not entitled to a refund for the tax years at issue. The estate failed to substantiate an S corporation's charitable deductions that passed through to the decedent for the years at issue. In addition, it failed to provide information about the "rental" activity, failed to substantiate that actual losses were incurred and that the returns properly represented the tax effects of the purported rental activities and failed to verify that passive activity losses carried over from prior years.

Cape, DC Wis., 2015-2 USTC ¶50,505; TRC INDIV: 51,450

Collection Due Process

The Appeals officer (AO) did not abuse her discretion by refusing to consider a married couple's collection alternative because the taxpayers were not current with their estimated tax payments. Their lack of compliance rendered them ineligible for a collection alternative other than full payment.

Friedman, TC, Dec. 60,422(M), FED ¶48,132(M); TRC IRS: 51,056.25

An Appeals officer's determination to proceed with collection by levy of an individual's unpaid federal taxes was not an abuse of discretion, the Tax Court properly imposed sanctions for frivolous arguments and the Court of Appeals imposed a frivolous appeal penalty. The individual previously raised the same argument and was warned that his position was frivolous.

Ruhaak, CA-7, 2015-2 USTC ¶50,507; TRC LITIG: 6,816

The IRS did not abuse its discretion by determining that a corporation's ESOP was not qualified under Code Sec. 401(a) and that the trust was not exempt under Code Sec. 501(a). The ESOP exceeded the contribution limits under Code Secs. 401(a)(16) and 415(c) and failed to follow the plan terms by not obtaining a proper valuation of the stock for any plan year.

Dna Pro Ventures, Inc. Employee Stock Ownership Plan, TC, CCH Dec. 60,421(M), FED ¶48,131(M); TRC LITIG: 7,052

Innocent Spouse

An individual was not entitled to equitable innocent spouse relief because he had actual knowledge of the improper omissions of income from the joint returns and he was a significant contributing cause of those omissions. The individual voluntarily signed Form 4549, Income Tax Examination Changes, after his wife was prosecuted for tax evasion.

Williams, TC, Dec. 60,424(M), FED ¶48,134(M); TRC INDIV: 18,056.05

Employment Taxes

An individual failed to show that he was not a responsible person as a matter of law under Code Sec. 6672. There was sufficient circumstantial evidence to indicate that the individual controlled the company during the period that the employment taxes went unpaid and there was a genuine issue of material fact whether the individual had the requisite intent under Code Sec. 6672

Appelbaum, DC N.C., 2015-2 USTC ¶50,504; TRC PAYROLL: 6,306.05

FOIA

The Treasury Inspector General for Tax Administration (TIGTA) conducted an adequate search for documents responsive to a nonprofit organization's Freedom of Information Act (FOIA) request. TIGTA provided declarations from two of its employees that it conducted comprehensive inquiries and searches for the requested documents from various offices.

Cause of Action, DC D.C., 2015-2 USTC ¶50,501; TRC IRS: 9,502

Supreme Court Denies Certiorari To Indirect Partners Trying To Opt Out Of TEFRA Proceeding

The U.S. Supreme Court has denied a petition for review of a partnership examination case decided by the Court of Appeals for the Ninth Circuit. The Ninth Circuit's decision stands: taxpayers could not opt out of a *Tax Equity and Fiscal Responsibility Act* (TEFRA) partnership proceeding unless they elected to have all of their partnership items treated as nonpartnership items.

Circuit Court's analysis. The Ninth Circuit reversed the Tax Court, holding that the taxpayers could *not* elect to opt out of the partnership proceeding for their indirect interests in the partnership. It reasoned that Code Sec. 6223(e)(3), which provides that a partner may elect to have partnership items treated as nonpartnership items for purposes of an administrative proceeding, was an "all or nothing" rule, meaning that unless the partner elects to have all partnership items treated as nonpartnership items there is not a valid election. The statute was clear and unambiguous and did not permit a partner to bifurcate the election by treating an indirect interest differently from a direct interest.

JT USA, LP, CA-9, certiorari denied October 5, 2015; 2014-2 USTC ¶50,504; TRC PART: 60,054.

PRACTITIONERS' CORNER

IRS And Practitioners React To Growing Identity Theft Problem

The following Practitioners' Corner article is adapted from the latest Wolters Kluwer Tax Briefing, "Identity Theft Update." The full Tax Briefing appears on IntelliConnect.

The volume and magnitude of identity theft incidents have grown to an alarming extent. Last year, more than 9.9 million Americans were victims of identity theft, a crime that cost them roughly $5 billion. Tax-related identity theft crimes have risen dramatically. TIGTA reports that 2,416,773 taxpayers were affected by identity theft in 2013, nearly double the number of victims in 2012, nearly quadruple the number in 2011, and nearly ten times the number in 2010. Predictions are for another round of increases when 2014 and 2015 tax-year return statistics come in, although the IRS and practitioners are now reacting more aggressively to stem the tide.

Identity theft–statutory reaction

Identity theft is a particular kind of fraudulent misrepresentation, involving the unauthorized use of another's personal identification information that is most often accompanied by larceny. Tax-related identity theft most commonly occurs when an individual uses another taxpayer's Social Security number (SSN) to commit: (1) "refund-related" identity theft, by filing a false tax return and obtaining a fraudulent refund; or (2) "employment-related" identity theft, by obtaining a job, and leaving the unpaid income tax bill on the victim's account.

Until recently, the judicial focus was on the fraud committed, and was unaffected by whether or not a person's identification information had been utilized in the fraud. It was not until the very end of the 20th Century that federal and state governments enacted laws to levy separate and additional penalties for fraud committed using stolen identity information. In many instances, the commission of fraud is no longer required, as states have criminalized the unauthorized possession, purchase, sale, or distribution of personally identifiable information.

Tax preparer penalties for client information disclosure. To prevent the release of personal identification information that might be used by identity thieves, Code Sections 6713 and 7216 provide for monetary and criminal penalties on unauthorized disclosures or use of taxpayer information by a person engaged in the business of preparing or providing services in connection with tax return preparation. States similarly impose civil and/or criminal penalties against certified public accountants (CPAs) and other tax preparers who fail to properly protect their clients' personal information.

"Tax-related identity theft crimes have risen dramatically."

Enforcement developments

The IRS estimated that during the 2013 filing season alone, over 5 million tax returns were filed using stolen identities, claiming approximately $30 billion in refunds. The IRS was able to stop or recover over $24 billion of that total, or approximately 81 percent of the fraudulent claims. The collaboration between the IRS, the Department of Justice Tax Division (DOJ-Tax) and other federal agencies have contributed to this success.

DOJ-Tax, Directive 1441 specifically focuses on identity theft in the context of fraudulent tax refunds and provides for a streamlined investigation and prosecution process. Directive 1441 also addresses Stolen Identity Refund Fraud (SIRF), in which perpetrators typically file false returns electronically, early in the tax filing season so that the IRS receives the false SIRF return before legitimate taxpayers have time to file their returns. The SIRF perpetrators arrange to have the refunds electronically transferred to debit cards or delivered to addresses where they can steal the refund out of the mail.

DOJ-Tax established an Advisory Board of experienced prosecutors to develop and implement uniform national policies for fighting SIRF crimes. By example, the Division works closely with the IRS to quickly share information obtained from SIRF investigations and prosecutions, which the IRS can use to make it more difficult for the schemes to be successful by blocking the false claims for refunds from being paid.

Validation efforts. On June 11, 2015, the IRS joined representatives of tax preparation and software firms, payroll and tax financial product processors, and state tax administrators to announce a collaborative effort to combat identity theft and refund fraud. The new measures include steps to validate taxpayer and tax return information at the time of filing.

On August 12, 2015, in an effort to curb the ability of tax identity thieves to obtain fraudulent refunds by filing false returns early in the filing season, the IRS issued temporary regulations which eliminated an automatic deadline extension that had been available to companies filing their employees' Form W-2s.

- **Comment.** The idea behind this move was to expedite the filing of Forms W-2 to ensure they are available as early in the filing season as possible. The IRS needs to see the Form W-2 in order to maximize its identity theft and refund fraud detection processes.

The next day, the IRS issued Announcement 2015-22, which clarified that indi-

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WASHINGTON REPORT *by the Wolters Kluwer Washington News Bureau*

House speaker vote could impact tax legislation

At press time, the front runner to be the next Speaker of the House, Rep. Kevin McCarthy, R-Calif, has dropped out of race just as Congress begins a week long Columbus Day recess. Some House GOP members are encouraging Rep. Paul Ryan, R-Wisc., the chair of the House Ways and Means Committee, to run for the speaker's job. Under Ryan, the House Ways and Means Committee has approved a number of stand-along bills making permanent some of the tax extenders, including the research tax credit, the state and local sales tax deduction, and others. Ryan has also shown an interest in international tax reform.

International tax reform/ highway talks at standstill

Negotiations between House Ways and Means Committee Chair Paul Ryan, R-Wisc., and Sen. Charles Schumer, D-N.Y., over using international tax reform to pay for a long-term highway bill have reached a standstill, according to aides for both lawmakers. The deadline for funding the highway bill is October 29 and the two lawmakers disagree over how much funding derived from revamping international tax reform would go to the Highway Trust Fund.

According to an aide for Ryan, the House Transportation and Infrastructure Committee has been advised to move forward with its own transportation bill, which would not include funds from international tax reform. According to an aide for Schumer, the senator is pushing for a deal that would allot a large portion of the funds derived from international tax reform to highway and infrastructure development. Schumer and Sen. Rob Portman, R-Ohio, were co-chairs of the international tax reform working group initiated by Senate Finance Committee Chair Orrin Hatch, R-Utah, and ranking member Ron Wyden, D-Ore.

House panel examines education and tax policy

The high of higher education prompted the House Ways and Means Oversight Subcommittee on October 7 to examine whether federal tax policy has an impact on the rising costs of higher education. Brian Galle, a Georgetown University professor of law, focused on the relationship between federal tax law and the spending and endowment policies of U.S. colleges and universities, the compensation of top college and university administrators, and both of those and the costs of higher education. "Federal tax policies intended to underwrite charitable activity have had the inadvertent effect of encouraging donors and the institutions they support to postpone the expenditure of donated dollars," Galle said.

Koskinen warns of increasing threat from cyber-criminals

In a recent letter to Sen. Ron Wyden, D-Ore., IRS Commissioner John Koskinen said that reductions in taxpayer service and enforcement activities, as well as growing cybersecurity threats, undermine confidence in the tax system. Koskinen was replying to a request from Wyden to describe the agency's work to curb cybercrime.

"The threat of stolen identity refund fraud and cyber-attacks against our systems poses a unique and growing challenge," Koskinen said. Ensuring the security of taxpayers' personal information is a paramount concern. Koskinen warned that cybercrime is rapidly increasing in frequency and sophistication. "The stolen identity refund fraud paradigm has shifted over recent years from small-time endeavors that sought to steal personal identities one-by-one to complex, large-scale multinational criminal enterprises stealing millions of identities through massive data breaches. To many of these organizations, stolen identity refund fraud has become more profitable and less risky than traditional criminal pursuits."

TIGTA reviews IRS's handling of Social Security numbers

In a new report, the Treasury Inspector General for Tax Administration (TIGTA) evaluated the IRS's progress in redacting or masking information related to Social Security numbers (SSNs) in taxpayer correspondence. TIGTA discovered that limited progress has been made by the IRS to reduce the unnecessary use of SSNs on forms, letters and notices sent to taxpayers to help them understand and meet their tax obligations.

TIGTA reported that the IRS suspended work on the forms, letters and systems components of its SSN Elimination and Reduction Program in September 2011 to focus on other components of the program with its limited funding. Funding needed to upgrade computer systems to process barcoded notices will not be available in 2016 because the IRS has deemed other projects more critical, TIGTA warned.

IRS does not always revoke PTINs, TIGTA reports

The Treasury Inspector General for Tax Administration (TIGTA) has found that, while the IRS has established processes and procedures to ensure that paid tax return preparers meet the requirements to obtain and renew a Preparer Tax Identification Number (PTIN), the Service did not revoke PTINs from preparers who are not compliant with their filing and payment obligations and may owe in excess of $360 million. TIGTA initiated the audit to evaluate the effectiveness of the IRS's processes to ensure that preparers meet the requirements to obtain and renew a PTIN.

TIGTA reported that the Return Preparer Office (RPO) has established processes and procedures to ensure that individuals assigned a PTIN were at least 18 years of age, were not using identifying information associated with a deceased individual, and correctly reported professional credentials. This program was designed to ensure that preparers have a basic competency level and adhere to professional standards. TIGTA noted that there were 3,001 preparers who self-reported a felony conviction on their application; 87 reported a crime related to federal tax matters. In addition, the Return Preparer Office has identified 3,055 preparers who failed to file returns for one or more tax years and eight preparers who failed to file returns for five years. Overall, nearly 700,000 individuals have been assigned a PTIN, according to TIGTA.

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viduals who receive identity protection services because their personal information may have been compromised in a data breach need not include in gross income the value of the identity protection services provided by an organization that experienced the data breach.

Identity theft deterrance—best practices

There are simple and worthwhile precautions that individuals can take to minimize the vulnerability of personally identifiable information. And should identity theft prove inevitable, even despite best practices, following tips such as reviewing monthly bank statements, obtaining a credit report at least once a year, etc., will allow an individual to notice fraudulent activity when it begins, which is key to a swift response that will contain the extent of the fraud and minimize the damage.

Some best practices for protecting personally identifiable information include:

- Secure personal information in the home and workplace. This includes shredding documents that contain personally identifiable information, such as bank statements.
- Protect personal computers using firewalls, antivirus software, and security patches.
- Secure wireless networks.
- Create strong passwords and frequently change them.
- Double-check a website's URL before entering any personal information. For example, confirm that a page that appears to be a government website is followed by .gov.
- Do not close a browser before logging out of a website.
- Encrypt and password protect sensitive documents.
- Check for a "lock" icon on the status bar of your Internet browser, which means your information should be safe when it's transmitted.
- Set online account settings that send an email or text message if someone attempts to log on to an account from an unrecognized computer or change a password.
- Put passwords on all of your credit card and bank accounts.
- Consider identity theft detection services, which include Lifelock and IdentityForce.

Identity theft—indicators and responses

People are generally familiar with the multitude of signs of non-tax related identity theft, including unfamiliar credit card charges, unexpected cards arriving, and overdrawn bank accounts. However, individuals may be less familiar with the signs of tax-related identity theft.

According to the Taxpayer Advocate Service (TAS), the most common indicators that an individual is a victim of tax-related identity theft are:

- A taxpayer attempts to file a return electronically, but the IRS rejects the return stating that another return with the taxpayer's SSN has already been filed;
- A taxpayer receives an IRS notice indicating that wages were received from an establishment at which the taxpayer never worked;
- A taxpayer receives a letter from the IRS indicating either that: (1) a return has already been filed, when the taxpayer has not yet filed a return; or (2) multiple returns have been filed; or
- A taxpayer receives a balance due notice, refund offset notice, or collection actions taken against the taxpayer regarding a year for which no return was filed or refund received.

Once an individual learns that his or her personally identifiable information has been compromised, there are certain steps that one can immediately take in order to prevent, or at least contain, fraudulent misuse.

- File a report with the Federal Trade Commission.
- File Form 14039 with the IRS.
- Contact the IRS Identity Protection Specialized Unit at (800) 908-4490.
- Immediately replace lost or stolen government identification (such as, passport, driver's license).
- Immediately replace lost or stolen credit, debit, and charge cards.
- Immediately change logins, passwords, and PINs for compromised accounts.
- Obtain a current credit report.
- Call the fraud departments at any credit card, cell phone, or other businesses where accounts may have been compromised to get records regarding the identity theft.
- Challenge liability for any unauthorized transactions.
- Freeze or close the accounts at issue so that charges may only be approved with the individual's authorization.
- Contact the credit reporting agencies and have a Fraud Alert added to your credit report.
- Send a copy of the completed Identity Theft Report to the credit reporting agencies and request that each block any fraudulent transactions from appearing on a credit report.

There are additional steps that a victim of tax-related identity theft should take to correct the individual's tax account and prevent further misuse.

- Complete an FTC Identity Theft Affidavit.
- Bring the completed FTC Identity Theft Affidavit to the local police department, and file a police report.
- File an online complaint with the FBI's Internet Crime Complaint Center (IC3) at *www.ic3.gov*.
- Create an Identity Theft Report by combining Identity Theft Affidavit with police report.
- File IRS Form 14039 Identity Theft Affidavit and select the box that states "I am a victim of identity theft AND it is affecting my federal tax records."
- Contact the IRS Identity Protection Specialized Unit by phone at (800) 908-4490.
- If an IRS Letter 5071C is received, the taxpayer's identity may have been compromised. Recipients must verify their identities by calling the number on the letter, or by using the IRS's online Identity Verification tool, available online at: *https://idverify.irs.gov*.
- If an IRS Letter CP01A or CPO1F is received, the taxpayer has been identified as a possible identity theft victim and may request an IP PIN to further protect the taxpayer's account from tax-related identity theft.

COMPLIANCE CALENDAR

■ October 16
Employers deposit Social Security, Medicare, and withheld income tax for October 10, 11, 12, and 13.

■ October 21
Employers deposit Social Security, Medicare, and withheld income tax for October 14, 15, and 16.

■ October 23
Employers deposit Social Security, Medicare, and withheld income tax for October 17, 18, 19, and 20.

■ October 28
Employers deposit Social Security, Medicare, and withheld income tax for October 21, 22, and 23.

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

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

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.

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FROM THE HELPLINE

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

Q An individual Form 1040 filer receives dividends from a private company in a foreign nation. The individual is a dual citizen of both the U.S. and this foreign nation, but resides in the US. How should these dividends be reported on form 1040?

A A U.S. citizen is subject to tax on income from all sources, including dividends from foreign sources unless except by tax treaty. Foreign dividends are treated the same as dividends from U.S. corporations on the individual's Form 1040, unless exempt under a tax treaty regardless of whether the recipient receives a Form 1099 from the foreign corporation or not. Dividend income is reported on line 9 of Form 1040 and taxed at ordinary income tax rates unless it is a qualified dividend received from a U.S. corporation or qualified foreign corporation. For this purpose, a qualified foreign corporation is one incorporated in a U.S. possession, its stock is readily tradable on an established securities market in the United States, or is eligible for benefits of any income tax treaty between the United States and the foreign country in question. *See TRC INTL: 100.*

Q What is the current rule for the spouse of a decedent who wants to use the decedent's applicable estate tax exclusion?

A The basic exclusion amount, which depends on the calendar year of the decedent's death, is the amount exempted from estate tax. The basic exclusion amount for a surviving spouse who dies after December 31, 2010, can include a deceased spousal unused exclusion (DSUE) amount. The DSUE amount is the lesser of: the basic exclusion amount, or the last deceased spouse's basic exclusion amount, minus the amount with respect to which the tentative tax is determined on the estate of that spouse. *See TRC ESTGIFT: 51,060.05.*