Wolters Kluwer

OCTOBER 8, 2020
ISSUE NUMBER 41

FEDERAL TAX WEEKLY

INSIDE THIS ISSUE

Final Regulations Reflect TCJA Changes to Entertainment and Meal Deductions 1

Final Regulations Released on Qualified ABLE Programs and Accounts 2

Congress Passes Extension of Highway Trust Fund; Other Trust Funds 3

IRS Issues Final Regulations on Wage Withholding, Redesigned W-4 3

IRS Extends Filing Deadlines, Penalty Relief for Health Coverage Reporting Forms 4

Final Regulations Address Sourcing Rules for Sales of Inventory Property 5

Final Regulations Issued on Hybrid Arrangements, FTC, and GILTI 6

Proposed Regulations Address Foreign Tax Credit Issues and Clarify FDII 7

Final Regulation Addresses Tax Withholding on Certain Periodic Retirement and Annuity Payments 7

Tax Briefs 8

Final Regulations Reflect TCJA Changes to Entertainment and Meal Deductions

T.D. 9925; IR-2020-225

Final regulations reflect the significant changes that the Tax Cuts and Jobs Act (TCJA) (P.L. 115-97) made to the Code Sec. 274 deduction for travel and entertainment expenses. These regulations finalize, with some changes, previously released proposed regulations, NPRM REG-100814-19.

Changes to Code Sec. 274 under the TCJA

For most expenses paid or incurred after 2017, TCJA:

- repealed the “directly related to a trade or business” and the business-discussion exceptions to the general disallowance of entertainment expense deductions;
- eliminated the general business expense deduction for 50 percent of entertainment (but not meal) expenses; and
- repealed the special substantiation rules for deductible entertainment (but not travel) expenses. Taxpayers may rely on the proposed regulations until they are finalized.

Entertainment Expenses

Among other things, Reg. §1.274-11:

- restates the statutory rules of Code Sec. 274(a), including the entertainment deduction disallowance rule for dues or fees to any social, athletic, or sporting club or organization;
- substantially incorporates the existing definition of “entertainment” from Reg. §1.274-2(b)(1); and
- confirms that the nine exceptions in Code Sec. 274(e) continue to apply to deductible entertainment expenditures.

The regulations also confirm that “entertainment” does not include food or beverages unless they are provided at or during an entertainment activity, and their costs are included in the entertainment costs.

Food and Beverage Expenses

As under the proposed regulations, Reg. §1.274-12 allows taxpayers to deduct 50 percent of business meal expenses if:

- the expense is an ordinary and necessary business expense;
- the expense is not lavish or extravagant; the taxpayer or an employee is present when the food or beverage is furnished;

- the food or beverage is provided to a current or potential business customer, client, consultant, or similar business contact; and
- food and beverages that are provided during or at an entertainment activity are purchased separately from the entertainment, or their cost is separately stated.

With respect to the fourth requirement listed above, the final regulations adopt the definition of "business associate" in Reg. §1.274-2(b)(2)(iii), but expands it to include employees. Thus, these requirements would apply to employer-provided meals to employees as well as non-employees. The final regulations also flesh out the fifth requirement listed above, and clarify that the separate charges for entertainment-related food and beverages must reflect their actual cost, including delivery fees, tips, and sales tax. Indirect expenses such as transportation to the food are not included in the actual cost.

Exceptions and Special Rules

Food or beverage expenses for employer-provided meals at an eating facility do not include expenses for the operation of the facility, such as salaries of employees preparing and serving meals, and other overhead costs. The final regulations apply the TCJA changes to the exceptions and special rules for deductible food and beverages in Code Sec. 274(e), (k) and (n), including:

- reimbursed food or beverage expenses;
- recreational expenses for employees;
- items available to the public; and
- goods or services sold to customers.

The final regulations also provide examples on several specific scenarios to illustrate the rules.

Final Regulations Released on Qualified ABLE Programs and Accounts

T.D. 9923; IR-2020-227

The Treasury and IRS have released final regulations that provide guidance for Achieve a Better Living Experience (ABLE) programs under Code Sec. 529A to help eligible individuals pay for qualified disability expenses. The regulations provide guidance on:

- the requirements for ABLE programs,
- requirements for establishing and contributing to an ABLE account for a designated beneficiary,
- rules regarding changes in the designated beneficiary of an ABLE account,
- rollover and transfers from one ABLE account to another, and
- federal gift and generation-skipping tax consequences of an ABLE account.

The final regulations adopt proposed rules issued in 2015 and 2019 with a few modifications.

Qualified ABLE Programs

A qualified ABLE program is a program established and maintained by a State, or agency or instrumentality of a State. Several factors are provided in the final regulations in determining whether a State, or its agency or instrumentality, is actively involved in the administration of the program. Among those factors is the nature and extent of the State's role in selecting and overseeing private contractors contracted to provide administrative or other services (for example, Community Development Financial Institutions (CDFIs)).

A qualified ABLE program may be maintained by two or more States or agencies or instrumentalities of a State in a consortium to offer broader investment choices, streamlined program administration, and lower fees for account holders. Consistent with legislation, the final regulations eliminate any reference to a residency requirement and a qualified program may allow an ABLE account to be established for an eligible individual regardless of his or her residence.

ABLE Accounts

An ABLE account is a tax-favored savings account established and owned by an eligible individual under a qualified ABLE program to pay qualified disability expenses of a designated beneficiary. The designated beneficiary of an ABLE account is the eligible individual who established and owns the ABLE account or who has succeeded the former designated beneficiary through a rollover distribution or change of beneficiary.

The final regulations provide that an ABLE account may be established on behalf of the eligible individual by his or

REFERENCE KEY

USTC references are to ***U.S. Tax Cases***
Dec references are to ***Tax Court Reports***

FEDERAL TAX WEEKLY, 2020 No. 41. Published by Wolters Kluwer, 2700 Lake Cook Road, Riverwoods, IL 60015.
© 2020 CCH Incorporated and its affiliates. All rights reserved.

her parent, legal guardian, or agent under a power of attorney. In addition, the regulations provide an expanded ordering rule of persons who may establish an ABLE account exercise signature authority over an individual's ABLE account if necessary.

A qualified ABLE program may provide a certification process that an individual is eligible for an ABLE account, under penalties of perjury. Certification may be made by verifying that the individual is eligible for benefits under title II or XVI of the Social Security Act and the disability giving rise to those benefits occurred before the date on which he or she attained age 26. The other method of satisfying the definition of an eligible individual is by obtaining a disability certification and filing it with the Secretary.

A designated beneficiary is generally limited to only one ABLE account at a time. Once an ABLE account is established, generally no account that is subsequently established for that beneficiary can be treated as an ABLE account except for rollover and transfer purposes, as well as the return of excess contributions. Under the final regulation, an eligible individual is not prohibited from establishing an ABLE account merely because he or she previously closed another ABLE account.

Distributions and Transfers

Distributions from an ABLE account are excluded from the designated beneficiary's gross income to the extent of his or her qualified disability expenses for the tax year. The final regulations maintain the expansive definition of qualified disability expenses, but the regulations do not provide either a comprehensive list of qualified disability expenses or a short list of expenses that would not satisfy that standard.

A qualified ABLE program may permit a successor designated beneficiary to be named during the lifetime of the designated beneficiary. If no successor designated beneficiary is named, the assets in the ABLE account are payable to the beneficiary's estate and subject to the Federal estate tax. Moreover, the final regulations permit a qualified ABLE program to limit successor designated beneficiaries to a sibling who is an eligible individual. If a successor designated beneficiary is not a sibling, the former designated beneficiary receives a deemed distribution of the amount transferred to the successor.

The final regulations continue to permit rollovers from ABLE account but do not require the use of a program-to-program transfer. A rollover may occur from a qualified tuition account under Code Sec. 529 to an ABLE account for the same designated beneficiary. However, upon a rollover or program-to-program transfer, all the attributes of the former ABLE account are applicable to the recipient account.

Federal Gift and GST Taxes

The final regulations provide that contributions to an ABLE account by a person other than the designated beneficiary are treated as completed gifts. Thus, no distribution from an ABLE account to the designated beneficiary is treated as a taxable gift. Also, neither gift nor GST taxes apply to the change of designated beneficiary of an ABLE account if the new designated beneficiary is an eligible individual who is a sibling of the former designated beneficiary.

Congress Passes Extension of Highway Trust Fund; Other Trust Funds

The Senate, on September 30, passed HR 8337, Continuing Appropriations Act, 2021 and Other Extensions Act, by a vote of 84 to 10. The bill, a continuing resolution to extend the deadline for setting 2021 appropriations to December 11, 2020, was previously passed by the House on September 23.

The bill includes the extension of certain provisions of the Internal Revenue Code set to expire on October 1, 2020. These provisions include the expenditure authority from the Highway Trust Fund, the Sport Fish Restoration and Boating Trust Fund, and the Leaking Underground Storage Tank Trust Fund. In all cases, expenditure authority is extended to October 1, 2021. The bill also includes transfers to the Highway Trust Fund and the Airport and Airway Trust Fund.

The president is expected to sign the bill into law before the 2020 fiscal year ends on September 30.

The text of HR 8337 can be found at https://docs.house.gov/billsthisweek/20200921/BILLS-116hr8337-SUS.pdf.

IRS Issues Final Regulations on Wage Withholding, Redesigned W-4

T.D. 9924

The IRS has issued final regulations that provide guidance for employers on federal income tax withholding from employees' wages. The final regulations:

- address the amount of federal income tax that employers withhold from employees' wages;
- implement changes made by the Tax Cuts and Jobs Act (TCJA) (P.L. 115-97); and
- reflect the redesigned Form W-4, Employee's Withholding Certificate, and related IRS publications.

TCJA Changes

The TCJA made many amendments affecting income tax withholding on employees' wages. The TCJA made many amendments affecting income tax withholding on employees' wages. After the TCJA was

© 2020 CCH Incorporated and its affiliates. All rights reserved.

enacted, the IRS issued guidance to implement the changes (for example, Notice 2018-14, I.R.B. 2018-7, 353; Notice 2018-92, I.R.B. 2018-51, 1038; Notice 2020-3, I.R.B. 2020-3, I.R.B. 2020-3, 330). The IRS updated Form W-4 and its instructions with significant changes intended to improve the accuracy of income tax withholding and make the withholding system more transparent for employees. It also released IRS Publication 15-T, Federal Income Tax Withholding Methods, which provides percentage method tables, wage bracket withholding tables, and other computational procedures for employers to use to compute withholding for the 2020 calendar year.

On February 13, 2020, the IRS published a notice of proposed rulemaking (REG-132741-17) to update the regulations under Code Sec. 3401 and Code Sec. 3402 to reflect the legislative changes, and expand the rules to accommodate changes necessary to fully implement the redesigned Form W-4 and its related computational procedures, along with most existing computational procedures that apply to 2019 or earlier Forms W-4.

The final regulations adopt the proposed regulations with a few revisions.

Form W-4

The final regulations do not require all employees with a 2019 or earlier Form W-4 in effect to furnish a redesigned Form W-4. Comments expressed concerns that the proposed regulations and the related forms, instructions, publications, and other IRS guidance would require employers to maintain two different systems for computing income tax withholding on wages: one for 2019 or earlier Forms W-4, and another for the redesigned Forms W-4.

In response, the IRS is acknowledging concerns with (1) instructions to the redesigned Form W-4 for employees with multiple jobs and (2) optional computational "bridge" entries permitted under the regulations and described in Publication 15-T that will allow employers to continue in effect 2019 or earlier Forms W-4 as if the employees had furnished redesigned Forms W-4.

The final regulations revise Reg. §31.3402(f)(4)-1(a) to provide that an employer's use of the computational bridge entries to adapt a 2019 or earlier Form W-4 to the redesigned computational procedures as if using entries on a redesigned Form W-4 will continue in effect such a Form W-4 that was properly in effect on or before December 31, 2019.

Lock-in Letters

The IRS issues a "lock-in" letter to notify an employer that an employee is not entitled to claim exemption from withholding, or is not entitled to the withholding allowance claimed on the employee's Form W-4. The lock-in letter prescribes the withholding allowance the employer must use to figure withholding. After the lock-in letter becomes effective, the IRS may issue a subsequent modification notice, but only after the employee contacts the IRS to request an adjustment to the withholding prescribed in the lock-in letter.

Under the final regulations, employers are not required to notify the IRS that they no longer employ an employee for whom a lock-in letter was issued. Further, the final regulations do not require the IRS to reissue lock-in letters or modification notices solely because of the redesigned Form W-4.

The final regulations revise Reg. §31.3402(f)(2)-1(g)(2)(iv) relating to lock-in letters. and Reg. §31.3402(f)(2)-1(g)(2)(vii) relating to modification notices, to provide that an employer may comply with a lock-in letter or modification notice that is based on a 2019 or earlier Form W-4, as required by the regulations, if the employer implements the maximum withholding allowance and filing status permitted in a lock-in letter or modification notice by using the computational bridge entries as set forth in forms, instructions, publications, and other IRS guidance to calculate withholding for such a Form W-4.

Estimated Tax Payments

The final regulations revise Reg. §31.3402(m)-1(d) to allow employees to take estimated tax payments into account, as long as the employee (1) follows the instructions to the IRS's Tax Withholding Estimator (available at https://www.irs.gov/individuals/tax-withholding-estimator) or IRS Publication 505, (2) is not subject to a lock-in letter or modification notice, and (3) does not request withholding from wages that falls below the pro rata share of income taxes attributable to wages determined under forms, instructions, publications, and other IRS guidance. The IRS intends to update its Tax Withholding Estimator and Publication 505 to reflect this rule.

IRS Extends Filing Deadlines, Penalty Relief for Health Coverage Reporting Forms

Health insurance providers (including employers and health insurance companies) now have until March 2, 2021, to provide individuals with Forms 1095-B, Health Coverage, or Forms 1095-C, Employer-Provided Health Insurance Offer and Coverage. This is a 30-day extension from the original due date of January 31, 2021.

The IRS also extended transition relief from late-filing penalties for reporting entities that can show they made good faith efforts to comply with reporting requirements for both individual statements and information returns that have missing or inaccurate taxpayer identification numbers and dates of birth, as well as other required information. In determining good faith, the IRS will take into account whether an employer or other coverage provider made reasonable efforts to prepare for reporting and providing the required information. Reporting entities that fail to file an information return or furnish a statement by the extended due dates are not eligible for relief. As this good-faith relief was intended to be transitional relief, this is the last year the Treasury Department and the IRS intend to provide this relief.

Notice 2020-76

Applicable Date

The final regulations generally apply on the date they are published in the Federal Register. Reg. §31.3402(f)(2)-1(g), regarding withholding compliance, applies as of February 13, 2020. Reg. §31.3402(f)(5)-1(a)(3), regarding the requirement to use the current version of Form W-4, applies as of March 16, 2020. The removal of Reg. §31.3402(h)(4)-1(b), regarding the combined income tax withholding and employee FICA tax withholding tables, applies on and after January 1, 2020.

Except for the removal of Reg. §31.3402(h)(4)-1(b), taxpayers may choose to apply the final regulations on and after January 1, 2020, and before their applicability date set forth in the regulations.

Final Regulations Address Sourcing Rules for Sales of Inventory Property

T.D. 9921

The IRS has issued final regulations that:

- modify the rules for determining the source of income from sales of inventory produced within the United States and sold outside the United States (or vice versa);
- provide new rules for sourcing income from sales of personal property (including inventory) by nonresidents that are attributable to an office or other fixed place of business maintained in the United States; and
- modify the rules for determining whether foreign source income is effectively connected with the conduct of a trade or business within the United States.

The final regulations reflect changes made by the Tax Cuts and Jobs Act (P.L. 115-97) (TCJA), which provided that the source of income from the sale of inventory produced in the United States and sold outside of the United States (or vice versa) is based on the location of production activities.

The final regulations are effective on the date they are published in the Federal Register.

Sourcing Rules for Inventory Sales

The final regulations generally retain the overall approach of proposed regulations published in 2019 (NPRM REG-100956-19), with certain revisions.

The TCJA amended Code Sec. 863(b) to provide that income from the sale or exchange of inventory property produced (in whole or in part) by a taxpayer within the United States and sold or exchanged outside the United States, or produced (in whole or in part) by the taxpayer outside the United States and sold or exchanged within the United States, is allocated or apportioned based solely on the production activities with respect to that inventory.

Under final Reg. §1.863-3(c)(2)(i) (as redesignated), where the taxpayer's production assets are located both within and outside the United States, the amount of income from sources outside the United States is determined by multiplying all the income attributable to the taxpayer's production activities by a fraction:

- The numerator of the fraction is the average adjusted basis of production assets that are located outside the United States.
- The denominator is the average adjusted basis of all the production assets located within and outside the United States.

Among other things, the final regulations also:

- incorporated in Reg. §1.863-3, Reg. §1.865-3, and Reg. §1.863-1(b)(3) the principles of Reg. §1.954-3(a)(4), which provides rules for determining when a corporation has manufactured, produced, or constructed personal property, except that rules regarding a "substantial contribution to the manufacturing of personal property" under Reg. §1.954-3(a)(4)(iv) do not apply;
- retained, with certain modifications, the rules for determining the portion of gross income from sales and production activities under Reg. §1.865-3(d), so that the 50/50 method continues to be the default method, and taxpayers can continue to elect the books and records method (note, however, that the books and records method election continues until revoked, and may not be revoked, without IRS consent, for any tax year beginning within 48 months of the end of the tax year in which the election was made);
- clarified that the adjusted basis of production assets for a tax year is determined under Reg. §1.863-3(c)(1)(ii)(B) by averaging the basis of the assets at the beginning and end of the year, but not if a change during the year would cause the average to "materially distort" the calculation for sourcing of income attributable to production activity;
- provided that the anti-abuse rule in Reg. §1.863-3(c)(3) (as redesignated) applies to transactions inconsistent with purposes of Reg. §1.863-3(b) or Reg. §1.863-3 (c); and
- added an example that the anti-abuse rule may cover acquisitions of domestic production assets by related partnerships (or their subsidiaries) with a principal purpose of reducing the transferor's U.S. tax liability by treating income from the sale of inventory property as subject to Code Sec. 862(a)(6) rather than Code Sec. 863(b).

Applicability Date

The final regulations generally apply to tax years ending on or after December 23, 2019. Taxpayers may apply the final regulations for any tax year beginning after December 31, 2017, and ending before December 23, 2019, provided that the taxpayer and all related persons apply the final regulations in their entirety, and continue

© 2020 CCH Incorporated and its affiliates. All rights reserved.

to apply them in their entirety for all subsequent tax years.

Alternatively, taxpayers may rely on the proposed regulations for any tax year beginning after December 31, 2017, and ending on or before the date of posting on the IRS website, provided that the taxpayer and all related persons rely on the proposed regulations in their entirety and have not applied the final regulations to any preceding year.

Final Regulations Issued on Hybrid Arrangements, FTC, and GILTI

T.D. 9922

The Treasury and IRS have issued final regulations on rules contained in the 2019 foreign tax credit proposed regulations (REG-105495-19) and the 2020 proposed hybrids regulations (REG-106013-19). These regulations cover:

- allocation and apportionment of deductions and creditable foreign income tax;
- definition of financial services income;
- foreign tax redeterminations;
- availability of foreign tax credits under the transition tax;
- application of the foreign tax credit limitation to consolidated groups;
- adjustments to hybrid deduction accounts to take into account certain inclusions in income by a United States shareholder;
- conduit financing arrangements involving hybrid instruments; and
- treatment of certain payments under the global intangible low-taxed income provisions.

Foreign Tax Credit

Highlighted below are some of the provisions contained in the final regulations that address the foreign tax credit.

The final regulations address the allocation of research and experimentation expenses to the Code Sec. 951A category for purposes of calculating the foreign tax credit limitation. The sales method is revised to provide that R &E expenses are allocated to income that represents the taxpayer's return on intellectual property and the gross income method is eliminated. The gross income method is no longer relevant because it allocates and apportions R&E expenditures to the GILTI category, and GILTI category gross income is not IP income to the U.S. taxpayer.

Foreign tax redeterminations (FTRs) of U.S. taxpayers are accounted for in the origin year under the final regulations and taxpayers must file an amended return reflecting changes to the U.S. taxpayer's tax liability. The statute of limitations is suspended with respect to the assessment of any additional U.S. tax liability that results from an FTR, and a civil penalty is imposed on taxpayers who fail to notify the IRS (through an amended return) of an FTR. To reflect the repeal of the pooling rules, taxpayers account for FTRs of foreign subsidiaries on an amended return that reflects revised foreign taxes deemed paid under Code Sec. 960 and any resulting change in the taxpayer's U.S. tax liability.

The Code Sec. 905(c) rules cover situations in which the FTR affects not only the amount of foreign tax credits claimed by taxpayer in the origin year, but also whether or not their CFC's income qualified for the high-tax exception under GILTI and subpart F.

When a U.S. partner makes a loan to the partnership, the partner's gross interest income is apportioned between U.S. and foreign sources in each separate category based on the partner's interest expense apportionment ratios. An identical rule for loans from the partnership to the partner is provided in the final regulations for loans from the partner to the partnership.

Hybrid Arrangements and GILTI

A Code Sec. 245A(a) dividends received deduction is denied with respect to hybrid dividend received by a U.S. shareholder from a controlled foreign corporation. In addition, hybrid dividends between CFCs with common shareholders or tiered hybrid dividends are treated as subpart F income. Taxpayers must maintain hybrid deduction accounts for tracking purposes under the regulations.

The final regulations address:

- adjustments to hybrid deduction accounts and provide new rules for reducing hybrid deduction accounts by reason of income inclusions attributable to subpart F, GILTI, and Code Secs. 951(a)(1)(B) and 956; and
- conduit financing arrangements by expanding the types of transactions classified as financing transactions to multiple-party financing arrangements using financial instruments that are equity under U.S. law, but debt under the tax law of the issuer's jurisdiction of residence or, if the issuer is not a tax resident of any country, the tax law of the country in which the issuer is created, organized or otherwise established.

The final GILTI regulations include a rule that addresses certain transactions involving disqualified transfers of property between related CFCs during the disqualified period that may have the effect of reducing GILTI inclusions due to timing differences between when income is included and when resulting deductions, such as depreciation expenses, are claimed. The disqualified period of a CFC is the period between December 31, 2017, which is the last earnings and profits measurement date under the Code Sec. 965 transition tax, and the beginning of the CFC's first tax year that begins after December 31, 2017, which is the first tax year with respect to which Code Sec. 951A is effective. The final regulations refine this rule to extend its applicability to other transactions for which similar timing differences can arise. An identical rule is provided for disqualified payments between related CFCs as was provided in the GILTI final regulations for disqualified transfers of property between related CFCs during the disqualified period.

Proposed Regulations Address Foreign Tax Credit Issues and Clarify FDII

Proposed Regulations, NPRM REG-101657-20

Proposed regulations provided guidance related to the foreign tax credit and foreign derived intangible income (FDII). The proposed rules on the foreign tax credit generally address the following:

- the disallowance of a credit or deduction for foreign income taxes with respect to dividends eligible for a dividends-received deduction;
- the allocation and apportionment of interest expense, foreign income tax expense, and certain deductions of life insurance companies;
- the definition of a foreign income tax and a tax in lieu of an income tax;
- transition rules relating to the impact on loss accounts of net operating loss (NOL) carrybacks allowed by the Coronavirus Aid, Relief, and Economic Security Act (P.L. 116-136);
- the definition of foreign branch category and financial services income; and
- the time at which foreign taxes accrue and can be claimed as a credit.

The proposed regulations also clarify certain rules for determining FDII, such as the definition of domestic and foreign oil and gas extraction income and the definition of electronically supplied service.

Overview of the Proposed Regulations

The proposed regulations address a variety of outstanding issues, most importantly with respect to the existing definition of an income tax. The proposed rules revise aspects of this definition, specifically the net gain requirements, in light of challenges that taxpayers and the IRS have faced in applying the rules.

In addition, the proposed regulations introduce a jurisdictional limitation for purposes of determining whether a foreign tax is an income tax in the U.S. sense. The foreign tax law must require a sufficient nexus between the foreign country and the taxpayer's activities or investment of capital or other assets that give rise to the income being taxed.

Comment: The clarifications and changes to the net gain requirement and the jurisdictional nexus requirement together are expected to restrict the creditability of foreign taxes.

Further, the proposed regulations address other issues raised in comments or resulting from legislation. For example, the proposed regulations clarify when contested taxes (that is, taxes owed to a foreign government which a taxpayer disputes) accrue for purposes of the foreign tax credit.

Comment: Overall, the proposed rules clarify which foreign taxes are creditable as income taxes, and, with respect to contested taxes, when they are creditable.

Proposed Applicability Dates

The proposed regulations generally apply to tax years beginning on or after the date the proposed regulations are published as final regulations. However, consistent with the prospective applicability date in the Code Sec. 250 regulations, the proposed FDII regulations would apply to tax years beginning on or after January 1, 2021.

Certain proposed rules, such as the proposed regulations under Code Sec. 367, among others, would apply to tax years ending on or after the date the proposed rules are filed in the Federal Register. Finally, Proposed Reg. §1.904(f)-12(j)(5) would apply to carrybacks of NOLs incurred in tax years beginning after December 31, 2017, which is consistent with the applicability date in P.L. 116-136 with respect to NOL carrybacks.

Final Regulation Addresses Tax Withholding on Certain Periodic Retirement and Annuity Payments

T.D. 9920; IR-2020-223

The IRS has issued a final regulation addressing tax withholding on certain periodic retirement and annuity payments under Code Sec. 3405(a), to implement amendments made by the Tax Cuts and Jobs Act (P.L. 115-97) (TCJA). The regulation affects payors of certain periodic payments, plan administrators that are required to withhold on such payments, and payees who receive such payments. The final regulation adopts, without modification, a proposed regulation that updated and replaced the provisions of three questions and answers with a new regulation regarding the default withholding rate on periodic payments made after December 31, 2020.

Withholding on Periodic Payments

Before the TCJA, if a withholding certificate (Form W-4P) was not in effect for a periodic payment, the default withholding rate on the payment was determined by treating the payee as a married individual claiming three withholding exemptions. The TCJA amended Code Sec. 3405(a)(4) so that the default withholding rate on such a periodic payment is instead determined under rules prescribed by the Treasury Secretary.

After the TCJA was enacted, the IRS issued three notices providing that, for calendar years 2018, 2019, and 2020, the default withholding rate on periodic payments

© 2020 CCH Incorporated and its affiliates. All rights reserved.

under Code Sec. 3405(a)(4) is based on treating the payee as a married individual claiming three withholding allowances (Notice 2020-3, I.R.B. 2020-3, 330; Notice 2018-92, I.R.B. 2018-51, 1038; Notice 2018-14, I.R.B. 2018-7, 353).

Under new Reg. §31.3405(a)-1, the default rate of withholding on periodic payments made after December 31, 2020, is determined in the manner described in the applicable forms, instructions, publications, and other guidance prescribed by the IRS.

Applicability Date

The final regulation applies to periodic payments made after December 31, 2020.

TAX BRIEFS

Captive Insurance Companies

The IRS has urged taxpayers to consult an independent tax advisor if they participated in a micro-captive insurance transaction. Such taxpayers should consider exiting the transaction and not reporting deductions associated with abusive micro-captive insurance transactions.

IR-2020-226

Conservation Easements

The IRS has released additional information to help address questions related to syndicated conservation easement (SCE) transaction initiative. Further, the IRS Chief Counsel has released Chief Counsel Notice 2021-001 (CC Notice), which contains information regarding Chief Counsel's settlement initiative for certain pending Tax Court cases involving abusive SCE transactions described in Notice 2017-10, I.R.B. 2017-4, 544.

CC Notice 2021-001, IR-2020-228

Credits

The IRS announced the amounts of unused low-income housing credit carryovers allocated to qualified states for calendar year 2020.

Rev. Proc. 2020-42

Foreign Travel

The U.S. State Department has released a listing of maximum travel *per diem* allowances for travel in foreign areas. The rates apply to all government employees and contractors, and are effective as of October 1, 2020.

October Maximum Travel Per Diem Allowances for Foreign Areas

Fringe Benefits

The IRS has released the applicable terminal charge and the Standard Industry Fare Level (SIFL) mileage rates for determining the value of noncommercial flights on employer-provided aircraft in effect for the second half of 2020 for purposes of the taxation of fringe benefits.

Rev. Rul. 2020-21

Passive Activity Losses

A married couple's real estate losses were passive activity losses for the purposes of Code Sec. 469. The husband did not materially participate in the short-term-rental activities because the taxpayers' time spent paying bills and preparing tax returns constituted investor activities that did not count towards the 100-hour requirement. Consequently, the taxpayers failed to show that the husband's participation in short-term-rental activities exceeded the participation of any other individuals in either of the tax years at issue.

Lucero, TC, Dec. 61,757(M)

Whistleblower Awards

The Whistleblower Office (WBO) did not abuse its discretion in determining that an individual's was not eligible for a whistleblower award. Further, the WBO did not abuse its discretion in determining not to forward the individual's Form 211 to the examining agent.

Neal, TC, Dec. 61,756(M)

A whistleblower's claim was rejected for lack of credible information on any federal tax violation. Moreover, the IRS did not abuse its discretion regarding the rejection.

Stevenson, TC, Dec. 61,758(M)