



FEDERAL TAX WEEKLY

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Senate Democrats Announce Agreement for Human Infrastructure

Democrats on the Senate Budget Committee announced an agreement on a \$3.5 trillion package for “human” infrastructure on July 13, 2021. This budget resolution along with the \$600 billion bipartisan plan falls short of the \$6 trillion figure Budget committee Chair Sen. Bernie Sanders (D-Vt.) and other progressive Democrats have pushed for. However, Senate Majority Leader Chuck Schumer (D-N.Y.) assured reporters that the resolution includes President Biden’s major proposals for American families, such as universal pre-K for 3- and 4-year old children, childcare, and community college, as well as climate and housing programs.

Tax Implications

The budget resolution proposes an extension of the child tax credit as expanded under the American Rescue Plan, the earned income tax credit, and modifications to the child and dependent care tax credits. These tax benefits will be offset with increased corporate and international taxes, as well as taxes on the wealthy. Conversely, tax increases on small business, family farms, and families with income under \$400,000 per year are prohibited. In addition, increased funding to the IRS will generate revenue through greater compliance and enforcement of the tax code.

Next Steps

Democrats need the support of all 50 Senate Democrats to pass this bill. In the meantime, moderate Democrats continue to work on a \$1 trillion bipartisan package for “hard” infrastructure. Schumer considers the bipartisan proposal on a “dual track” with this package. The Senate has a goal for passing both before the August recess.

EPCRS Correction Programs Updated

Rev. Proc. 2021-30

The IRS has updated the correction programs for sponsors of retirement plans that are intended to satisfy the requirements of Code Secs. 401(a), 403(a), 403(b), 408(k), or 408(p), but have not met these requirements for a period of time. The Employee Plans Compliance Resolution System (EPCRS), permits plan sponsors to correct these failures and continue to provide their employees with retirement benefits on a tax-favored basis. The components of EPCRS include the Self-Correction Program (SCP), the Voluntary Correction Program (VCP) and the Audit Closing Agreement Program (Audit CAP).

This revenue procedure is generally effective July 16, 2021; however, the extension of the sunset of the safe harbor correction method (from December 31, 2020, to December 31, 2023) is effective January 1, 2021. Also, effective January 1, 2022, (1) VCP submissions may not be submitted on an anonymous basis; (2) anonymous pre-submission conference requests may be submitted under VCP; and (3) barring some exceptions, Audit CAP sanctions must be paid using the Pay.gov website.

EPCRS Changes

This update includes the following:

- it expands guidance on the recoupment of overpayments;
- it eliminates the anonymous submission procedure under VCP, effective January 1, 2022;
- it adds an anonymous, no-fee, VCP pre-submission conference procedure, effective January 1, 2022;
- it extends the end of the SCP correction period for significant failures by one year (which has the result of also extending the safe harbor correction method for Employee Elective Deferral Failures lasting more than three months but not beyond the extended SCP correction period for significant failures);
- it expands the ability of a Plan Sponsor to correct an Operational Failure under SCP by plan amendment; and
- it extends by three years the sunset of the safe harbor correction method available for certain Employee Elective Deferral Failures associated with missed elective deferrals for eligible employees who are subject to an automatic contribution feature in a Code Sec. 401(k) plan or Code Sec. 403(b) Plan (from December 31, 2020, to December 31, 2023).

In addition, plan sponsors may provide overpayment recipients the option of repaying an overpayment in a single sum

Refunds Sent for Unemployment Income Overpayments

The IRS announced it was issuing another round of refunds this week to nearly 4 million taxpayers who overpaid their taxes on unemployment compensation received last year. The refund average is \$1,265, which means some will receive more and some will receive less. Refunds by direct deposit were to begin July 14 and refunds by paper check on July 16. The Service previously issued refunds for unemployment compensation exclusion in May and June. It will continue to issue refunds throughout the summer.

The American Rescue Plan Act of 2021 (ARP) (P.L. 117-2) excluded up to \$10,200 in 2020 unemployment compensation from taxable income calculations. The exclusion applied to individuals and married couples whose modified adjusted gross income was less than \$150,000. Most taxpayers need not take any action and there is no need to call the IRS. However, if, as a result of the excluded unemployment compensation, taxpayers are now eligible for deductions or credits not claimed on the original return, they should file a Form 1040-X, Amended U.S. Individual Income Tax Return.

IR-2021-151

payment, through an installment agreement, or through an adjustment in future payments. Further, two new overpayment correction methods, the funding exception correction method and the contribution credit correction method, have been added. Additionally, the update has set forth the new funding exception correction method, which provides that corrective payments are not required for a plan subject to Code Sec. 436, and a new contribution credit correction method.

The other modifications to Rev. Proc. 2019-19 include the following:

- eliminating the condition previously set forth that required a plan amendment that increased a benefit, right, or feature to apply to all participants eligible to participate under the plan;
- increasing the threshold for certain de minimis amounts from \$100 to \$250 for which a plan sponsor is not required to implement correction;
- extending the end of the SCP correction period for significant failures from the last day of the second plan year following the plan year for which the failure

occurred to the last day of the third plan year following the plan year for which the failure occurred (which has the result of also extending the safe harbor correction method for Employee Elective Deferral Failures lasting more than three months but not beyond the extended SCP correction period for significant failures);

- adding an option, effective January 1, 2022, for Plan Sponsors to request a no-fee anonymous VCP pre-submission conference under specified circumstances;
- eliminating the anonymous submission procedure which permits submission of a Qualified Plan, Code Sec. 403(b) Plan, SEP, or SIMPLE IRA Plan under VCP without initially identifying the applicable plan, the Plan Sponsor, or the Eligible Organization, effective January 1, 2022, and making revisions to reflect the elimination of this procedure;
- requiring that Audit CAP sanctions be paid through the Pay.gov website (instead of by certified check or cashier's check) beginning January 1, 2022; and

REFERENCE KEY

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

FEDERAL TAX WEEKLY, 2021 No. 30. Published by Wolters Kluwer, 2700 Lake Cook Road, Riverwoods, IL 60015.
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- revising the sunset of the safe harbor correction method to extend by three years (from December 31, 2020, to December 31, 2023) available for certain Employee Elective Deferral Failures associated with missed elective deferrals for eligible employees who are subject to an automatic contribution feature in a Code Sec. 401(k) plan or Code Sec. 403(b) plan.

Request for Comments

The Treasury Department and the IRS have invited comments to be submitted in writing by October 14, 2021. Comments may be submitted in one of two ways: (1) electronically via the Federal eRulemaking Portal at Regulations.gov; or (2) by mail to: Internal Revenue Service, Attn: CC:PA:LPD:PR (Revenue Procedure 2021 30), Room 5203, P.O. Box 7604, Ben Franklin Station, Washington, D.C. 20044. The Treasury Department and the IRS will continue to update the EPCRS, in whole or in part, from time to time, including further improvements to EPCRS based on comments received.

This revenue procedure modifies and supersedes Rev. Proc. 2019-19, I.R.B. 2019-19.

CTC Automatic Payments Being Sent

FS-2021-10; IR-2021-150

The IRS announced that eligible families would automatically begin receiving monthly child tax credit (CTC) payments starting July 15. These payments cover half of the credit families will likely qualify to receive when they file their 2021 federal income tax return. Each payment will be up to \$300 per month for each child under age 6 and up to \$250 per month for each child ages 6 to 17. The IRS will issue advance CTC payments on July 15, August 13, September 15, October 15, November 15, and December 15.

Current Plan Liability Rates Set for July 2021

For pension plan years beginning in July 2021, the IRS has released:

- the 30-year Treasury bond weighted average interest rate,
- the unadjusted segment rates,
- the adjusted rates, and
- the minimum present value segment rates.

Corporate Bond Rate

The three 24-month average corporate bond segment rates applicable for July 2021 (without adjustment for the 25-year average segment rate limits) are as follows:

- 1.20 for the first segment rate,
- 2.73 for the second, and
- 3.42 for the third

July 2021 Adjusted Segment Rates

The July 2021 adjusted segment rates for plan years beginning in 2020 are:

- 4.75 for the first,
- 5.50 for the second, and
- 6.27 for the third.

The rates for plan years beginning in 2021 are:

- 4.75 for the first,
- 5.36 for the second, and
- 6.11 for the third.

July 2021 Pre-ARP Adjusted Segment Rates

The July 2021 Pre-ARP adjusted segment rates for plan years beginning in 2020 are:

- 3.64 for the first,
- 5.21 for the second, and
- 5.94 for the third.

The rates for plan years beginning in 2021 are:

- 3.32 for the first,
- 4.79 for the second, and
- 5.47 for the third.

30-Year Treasury Weighted Average

For plan years beginning in July 2021, the 30-year Treasury weighted average securities rate is 2.22, with a permissible range of 1.99 to 2.33.

The rate of interest on 30-year Treasury securities for June 2021 is 2.16 percent.

The minimum present value segment rates under Code Sec. 417(e)(3)(D) for June 2021 are:

- 0.63 for the first segment rate,
- 2.70 for the second, and
- 3.32 for the third.

Notice 2021-44

- Eligible families would have:
 - filed either a 2019 or 2020 federal income tax return;
 - used the Non-Filers tool to register for an economic impact payment (EIP) during 2020; and

- already registered for the advance CTC using the Non-filer Sign-up Tool
 - Taxpayers unsure of their eligibility can:
 - check qualification using the CTC Eligibility Assistant;
 - register with the IRS using the Non-filer Sign-up Tool. Alternatively, file a return with the IRS; and/or
 - check status of their monthly payments and update information using the CTC Update Portal
- The American Rescue Plan (ARP) (P.L. 117-2) raised the maximum CTC in 2021 to \$3,600 for children under the age of

6 and to \$3,000 per child for children between ages 6 and 17. Before 2021, the credit was worth up to \$2,000 per eligible child.

The new maximum credit is available to taxpayers with a modified adjusted gross income (AGI) of \$75,000 or less for singles, \$112,500 or less for heads of household and \$150,000 or less for married couples filing a joint return and qualified widows and widowers. Modified AGI is the amount shown on Line 11 of their 2020 Form 1040 or 1040-SR. Above these income thresholds, the extra

amount above the original \$2,000 credit; either \$1,000 or \$1,600 per child — is reduced by \$50 for every \$1,000 in modified AGI.

The credit is fully refundable for 2021. This means eligible families can avail themselves of it even if they owe no federal income tax. Before 2021, the refundable portion was limited to \$1,400 per child. More information can be found at <https://www.irs.gov/credits-deductions/advance-child-tax-credit-payments-in-2021>.

Individuals Were Corporation's Employees

Blossom Day Care Centers, Inc., Dec. 61,898(M), T.C. Memo. 2021-086; Blossom Day Care Centers, Inc., Dec. 61,899(M), T.C. Memo. 2021-087

In consolidated cases, two individuals of a corporation (taxpayer) (B1) were legally classified as employees. This made B1 liable for employment tax (FICA) and unemployment tax (FUTA) relating to wages paid to said employees. The employees (1) were corporate officers; (2) provided substantial services far beyond minor services; (3) directly and indirectly received remuneration for their services; (4) were substantial shareholders of B1; and (5) had check-signing authority. B1 was involved in day care centers.

FICA and FUTA Liabilities and Penalties

B1 was liable for FICA and FUTA taxes as the employees had additional wage income from B1. B1 was also liable for (1) a failure to deposit penalty under Code Sec. 6656 and (2) accuracy related penalties under Code Sec. 6662(a) with respect to the FICA and FUTA tax liabilities. B1 did

not contest the substance of the penalties, except insofar it disagreed with classification of said employees and determination of liabilities.

Adjustment of Gross Receipts

The court affirmed that B1's gross receipts were be readjusted. An IRS revenue agent (RA) found discrepancies between cash received and deposited.

Reporting of Capital Gains

B1 failed to report capital gain income on the (1) recapture of a prior-year depreciation on two vehicles and gain on the trade-in of a third vehicle; and (2) transfer of real property. B1 did not prove that either the vehicles were predominantly used in a qualified business.

Deductions

Among other deductions, B1 failed to demonstrate its entitlement to the claimed vehicle

depreciation. B1 did not maintain mileage logs or any other records in connection with its use of the vehicles reported on its depreciation schedules. However, B1 was entitled to additional business expense deductions and management fees. These amounts reflected total purchases from businesses specializing in early education or childcare-related equipment, activities or material.

Addition to Tax and Fraud and Accuracy Related Penalties

B1 was liable for the addition to tax. It did not allege, and the evidence did not show, that its untimely filing was due to reasonable cause. Next, the IRS did not meet the burden to show fraudulent intent necessary for the imposition of penalties. B1 overstated its receipts for two tax years and consented to extend IRS's time to assess tax. B1's recording and reporting of the expenses indicated an acknowledgment of their personal nature and an intention to repay. Finally, B1 was liable for accuracy-related penalties. B1 did not argue that it had reasonable cause for its underpayments.

Dismissal of Tax Refund Complaint Affirmed

J.A. Lindsay, CA-5, 2021-2 USTC ¶150,184

The Court of Appeals for the Fifth Circuit affirmed a district court's decision to

dismiss an individual's complaint regarding a refund of tax penalties paid for three tax years at issue. The taxpayer was incarcerated during the tax years at issue.

Accordingly, the taxpayer executed a universal power of attorney (POA) appointing a third party as his attorney in fact. The attorney had complete control of the

taxpayer's bank accounts and retained full authority to manage his affairs. While incarcerated, the taxpayer directed the attorney to file his tax returns and pay his taxes. The attorney assured the taxpayer that he filed the taxpayer's returns and paid the taxes, however, the attorney actually embezzled large amounts from the taxpayer. Therefore, the taxpayer's tax returns for the tax years at issue were not timely filed, nor were his taxes or estimated taxes timely paid. The taxpayer discovered the attorney's malfeasance and revoked the POA during the last tax year at issue. Subsequently, the taxpayer sued

the attorney for embezzlement and was awarded damages. Once the taxpayer was released from prison, he filed all his delinquent tax returns and paid the taxes owed, plus interest and penalties.

Later, the taxpayer unsuccessfully sued the IRS to recover penalties that he paid for filing late tax returns and making late tax payments for the tax years at issue. The taxpayer alleged that he was entitled to the reasonable cause exception to the otherwise mandatory penalties. However, the district court granted the IRS's motion to dismiss the complaint for failure to state a claim upon which relief can be granted

under Federal Rule of Civil Procedure 12(b)(6). On appeal, the taxpayer contended that he sufficiently pled reasonable cause under the Code. The court disagreed and held that the taxpayer failed to demonstrate reasonable cause. The taxpayer could have used ordinary business care and prudence to assure that his taxes were filed and paid, much like he conducted when he employed a certified public accountant. However, the taxpayer failed to act with such care.

Affirming an unreported DC Tex. opinion.

IRS Highlights Website and Online Tools

IR-2021-147

The IRS reminded taxpayers that their website (www.irs.gov) provides millions of visitors with the answers they need to fit their busy summer schedules. Taxpayers who requested an extension to October 15 or missed the May 17 deadline can still prepare and e-file tax returns for free with the IRS Free File tool. Further, taxpayers can view, download or print tax products, and do the following:

- Use the "File" tab on the home page for most federal income tax needs. Access the Interactive Tax Assistant tool that can answer many tax law questions.
- See their tax account with the View Your Account tool. With this, they can find information such as a payoff amount, the balance for each tax year owed, up to 24 months of their payment history and key information from their current tax year return as originally filed.
- Use the Get Transcript tool to view, print or download their tax transcripts after the IRS has processed the return.
- Find the most up-to-date information about tax refunds using the Where's My Refund? tool on the IRS website and on the official IRS mobile app, IRS2Go.

Taxpayers can start checking on the status of their refund 24 hours after the IRS acknowledges receipt of an e-filed return.

Additionally, many pages on the IRS website are now available in Spanish, Vietnamese, Russian, Korean, Haitian, Creole, and Chinese—simplified and traditional. Earlier this year, the agency posted a Spanish language version of Form 1040 PDF and the related instructions.

Assistive Technology

Moreover, at the online Alternative Media Center (AMC), taxpayers can find a variety of accessible products like screen reading software, refreshable Braille displays, and screen magnifying software. These products include tax forms, instructions, and publications that can be downloaded or viewed online as Section 508 compliant PDF, HTML, eBraille, text, and large print. However, every product is not available in all formats. For example, tax forms are not available as HTML. To request paper copies of tax forms, instructions or publications in Braille or large print, taxpayers must call the tax form telephone number at 800-829-3676.

Coronavirus Tax Relief Information

Further, the IRS has published ready-to-use articles, e-posters, videos, and much more on the website about Economic Impact Payments, the Recovery Rebate Credit, and the Advance Child Tax Credit. The IRS placed a special emphasis on partnering with organizations that work with groups focusing on veterans, homeless and low-income taxpayers as well as non-English speaking audiences to share information. In all, the IRS worked with thousands of partners across the country reaching organizations representing hundreds of millions of taxpayers.

IRS Tax Withholding Estimator

Finally, the IRS Tax Withholding Estimator helps employees assess their income tax, credits, adjustments and deductions and determine whether they need to change their withholding by submitting a new Form W-4, Employee's Withholding Allowance Certificate. However, taxpayers should remember that, if needed, they should submit their new W-4 to their employer, not the IRS.

Identity Theft Awareness Campaign Announced

IR-2021-152

The IRS, state tax agencies, and the tax industry announced the annual campaign to raise awareness among tax professionals about data security. Continuing an effort to battle tax-related identity theft, the 2021 campaign begins as the number of data thefts reported by tax professionals to the IRS continued to climb. There have been 222 data theft reports this year from tax professionals to the IRS as of June 3, 2021, outpacing the rate of 211 in 2020 and 124 in 2019. Each report can impact hundreds of taxpayers and threaten the tax professional's business.

Identity thieves and fraudsters were especially active last year and this year as they used the COVID-19 pandemic, the nationwide teleworking practices, and the economic downturn as fuel for a variety of scams and schemes to steal money and identities. Further, tax professionals have been key targets of criminal syndicates that are tech-savvy, tax-savvy, and well-funded. These scammers either trick or hack their way into tax professionals' computer systems to access client data. They use stolen data to file fraudulent tax returns that make it more difficult for the IRS and the states to detect because the fraudulent returns use real financial information.

The Security Summit was formed in 2015 to "take its own shot" at fighting against identity theft. The Summit partners made great inroads against tax-related identity theft, dramatically reducing confirmed identity theft returns and saving billions in tax dollars. During the next five weeks, the Security Summit partners aim to highlight a series of simple actions that tax professionals can take to better protect client data from theft. Some of the recommendations made by the Security Summit to tackle identity theft include:

AFRs Issued For August 2021

Rev. Rul. 2021-14

The IRS has released the short-term, mid-term, and long-term applicable interest rates for August 2021.

Applicable Federal Rates (AFR) for August 2021

| Short-Term | Annual | Semiannual | Quarterly | Monthly |
|------------------|--------|------------|-----------|---------|
| AFR | 0.19% | 0.19% | 0.19% | 0.19% |
| 110% AFR | 0.21% | 0.21% | 0.21% | 0.21% |
| 120% AFR | 0.23% | 0.23% | 0.23% | 0.23% |
| 130% AFR | 0.25% | 0.25% | 0.25% | 0.25% |
| Mid-Term | | | | |
| AFR | 1.00% | 1.00% | 1.00% | 1.00% |
| 110% AFR | 1.10% | 1.10% | 1.10% | 1.10% |
| 120% AFR | 1.20% | 1.20% | 1.20% | 1.20% |
| 130% AFR | 1.30% | 1.30% | 1.30% | 1.30% |
| 150% AFR | 1.51% | 1.50% | 1.50% | 1.50% |
| 175% AFR | 1.76% | 1.75% | 1.75% | 1.74% |
| Long-Term | | | | |
| AFR | 1.89% | 1.88% | 1.88% | 1.87% |
| 110% AFR | 2.08% | 2.07% | 2.06% | 2.06% |
| 120% AFR | 2.27% | 2.26% | 2.25% | 2.25% |
| 130% AFR | 2.45% | 2.44% | 2.43% | 2.43% |

Adjusted AFRs for August 2021

| | Annual | Semiannual | Quarterly | Monthly |
|-------------------------|--------|------------|-----------|---------|
| Short-term adjusted AFR | 0.14% | 0.14% | 0.14% | 0.14% |
| Mid-term adjusted AFR | 0.76% | 0.76% | 0.76% | 0.76% |
| Long-term adjusted AFR | 1.44% | 1.43% | 1.43% | 1.43% |

The Code Sec. 382 adjusted federal long-term rate is 1.44%; the long-term tax-exempt rate for ownership changes during the current month (the highest of the adjusted federal long-term rates for the current month and the prior two months) is 1.58%; the Code Sec. 42(b)(2) appropriate percentages for the 70% and 30% present value low-income housing credit are 7.33% and 3.14%, respectively, however, the appropriate percentage for non-federally subsidized new buildings placed in service after July 30, 2008, shall not be less than 9%; and the Code Sec. 7520 AFR for determining the present value of an annuity, an interest for life or a term of years, or a remainder or reversionary interest is 1.2%.

- Using a multi-factor authentication to protect tax preparation software accounts.
- Signing up clients for Identity Protection PINs. The IRS now offers IP PINs to all taxpayers who can verify their identities online, on the phone with an IRS employee after filing a Form 15227, or in person.
- Helping clients fight unemployment compensation fraud.
- Avoiding spear phishing scams. Thieves take time to craft personalized emails to entice tax professionals to open a link embedded in the email or open an attachment. For 2020, tax pros were especially vulnerable to spear phishing scams from thieves posing as potential clients.

■ Knowing the signs of identity theft. There are many signs that tax pros should be aware of such as multiple clients suddenly receiving IRS letters requesting confirmation that they filed a tax return deemed suspicious. Tax professionals may see e-file acknowledgments for far more tax returns than they filed. Computer cursors may move seemingly on their own. More information on these tips will be available every Tuesday over the five-week

period that began July 20. Moreover, the summer series also coincides with the annual IRS Nationwide Tax Forums, which are being held virtually this summer. The 2021 Forums feature three webinars focused on cyber- and information security that will be live streamed as follows:

■ “Cybersecurity for Tax Professionals – Advanced Session,” presented by the American Coalition for Taxpayer Rights, July 28 at 2 p.m. ET.

■ “Helping You and Your Clients Steer Clear of Fraud and Scams,” presented by the Treasury Inspector General for Tax Administration, Aug. 4 at 11 a.m. ET.

■ “IRS Criminal Investigation: Deeper Dive into Emerging Cyber Crimes and Crypto Tax Compliance,” Aug. 5 at 11 a.m. ET.

Finally, taxpayers can find more information about the IRS Nationwide Tax Forum at www.IRSTaxForum.com.

TAX BRIEFS

Corporate Reorganizations

The IRS ruled that the steps of a target corporation’s reorganization each would be treated as occurring in pursuance of a plan of reorganization. The proposed transactions included acquiring and establishing entities. The taxpayer would not prolong the proposed transactions under the plan of reorganization and will proceed with the proposed transactions in a commercially reasonable manner in accordance with the direction of regulators.

IRS Letter Ruling 202128001

Entity Classification

An entity was granted a 120 day extension to file a Form 8832, Entity Classification Election, to elect to classify as a foreign partnership. The taxpayer met the requirements of Reg. §§301.9100-1 and 301.9100-3.

IRS Letter Ruling 202128005

Exempt Organizations

An organization was denied tax-exempt status under Code Sec. 501(c)(4). The organization was incorporated as a domestic nonprofit mutual benefit corporation. However the organization did not operate exclusively for the promotion of social welfare. Further, the organization’s net earnings inured to the benefit of its association members. Additionally, the organization was not primarily engaged in promoting the common good and general welfare of the people of the community. The

common areas of the organization’s property were enclosed in a fenced and gated property. Only the organization’s members and its guests were permitted to enter and use the amenities. Since the public was restricted from accessing common areas of the property, the organization did not primarily further the exempt purpose under Code Sec. 501(c)(4).

IRS Letter Ruling 202128009

Litigation Costs

Two individuals were entitled to statutory award of attorney’s fees. The taxpayers were victims of a fraudulent investment scheme. Following extensive proceedings before the court and on appeal, the taxpayers obtained a refund of their federal income taxes based on their losses. Subsequently, the taxpayers sought sanctions against the government in the form of attorney’s fees or under Rule 11 of the Rules of the United States Court of Federal Claims (RCFC) or, in the alternative, an award of attorney’s fees pursuant to the fee-shifting statute applicable to tax refund suits. The taxpayers’ motion for sanctions was procedurally improper and was denied on that basis. However, in the alternative, the court concluded that an award of attorney’s fees was proper in this case under Code Sec. 7430.

Adkins, FedCl, 2021-2 ustrc ¶150,181

An individual was entitled to reasonable litigation costs. Once the litigation regarding his outstanding tax liabilities concluded,

the taxpayer filed a motion for costs in the Tax Court. In deciding whether the government’s position was substantially justified, the court relied on *United States v. Johnson*, 920 F.3d 639. The IRS contended that its position was substantially justified overall even though, in its initial response to the taxpayer’s motion, it previously conceded that at least one substantive issue and its related costs were not substantially justified. The court concluded that the IRS failed to prove that the position of the government was substantially justified under the *Johnson* standard. Further, since the IRS had otherwise conceded that the taxpayer was a prevailing party, the taxpayer was entitled to an award under Code Sec. 7430. Additionally, the taxpayer contended that he was entitled to an enhancement of the statutory rate because it would have been impossible to retain qualified counsel at the statutory rate and because of the difficulty of the issues presented in this case. However, this did not justify a departure from the statutory rate and the taxpayer failed to prove his entitlement to such a departure.

Morreale, TC, Dec. 61,902(M)

Pension Plans

A retirement plan’s use of substitute mortality tables was approved for computing the subpopulations specified in the plan for a period of five years, beginning with the plan year commencing January 1. Determinants such as the development

of substitute mortality rates and whether they would sufficiently reflect the mortality experience of the applicable plan populations were considered in granting the approvals. Further, actuarial information was required to be attached to Schedule SB when filing Form 5500, Annual Return/Report of Employee Benefit Plan, for the plan years for which the substitute mortality tables would be used. Finally, the circumstances in which the use of the substitute mortality tables would terminate before the end of the prescribed period are described under Code Sec. 430(h)(3)(C)(ii), Reg. §1.430(h)(3)-2(c)(3), Rev. Proc. 2017-55, I.R.B. 2017-43, 373, and Section 303(h)(3)(C)(ii) of the Employment Retirement Income Security Act.

IRS Letter Ruling 202128008

Qualified Electing Funds

Two companies were granted consents to make retroactive qualified electing fund (QEF) elections with respect to their investments in a foreign company. In both the cases, the taxpayer was a domestic limited liability company (LLC) that acquired an interest of less than 10 percent in a foreign company. In each case, the taxpayer engaged an accountant to prepare its Form 1065, U.S. Return of Partnership Income, for the tax year at issue. Subsequently, the foreign company informed a member of the taxpayer that it had become a passive foreign investment company (PFIC). However, the taxpayer failed to timely make a QEF election. The taxpayers reasonably relied on a qualified tax professional, within the meaning of Reg. §1.1295-3(f)(2) and granting consent would not prejudice the interests of the government, as provided in Reg. §1.1295-3(f)(3). Finally, in both cases, the taxpayers were required to comply with the rules under Reg. §1.1295-3(g) regarding the time and manner for making the retroactive QEF elections.

IRS Letter Ruling 202128002; IRS Letter Ruling 202128007

Real Estate Investment Trusts

An entity and its subsidiary were granted a 90-day extension to make an election to be treated as a taxable real estate investment trust (REIT) subsidiary (TRS). The

taxpayer elected to be treated as a REIT beginning with the tax year at issue. The taxpayer owned real property through its ownership of (i) a series of single-member limited liability companies that were treated as disregarded entities from their owner for federal income tax purposes, and (ii) a series of limited liability companies that were intended to be treated as taxable REIT subsidiaries (TRS) of the taxpayer. The TRS entities were in turn comprised of a subsidiary and two other related entities. The taxpayer's sponsor relied on an accounting firm to ensure that all significant tax matters, including making the necessary TRS election, were properly handled in a timely manner. However, the accounting firm was under the assumption that the sponsor had engaged external counsel to prepare tax-related filings. The misunderstanding and gaps in coordination and communication resulted in the sponsor inadvertently failing to timely file a Form 8875, Taxable REIT Subsidiary Election, on behalf of the taxpayer. Upon discovering this error, the taxpayer's accounting firm requested a private letter ruling. Finally, the taxpayer acted reasonably and in good faith and, therefore, granting relief would not prejudice the government's interests.

IRS Letter Ruling 202128006

Refunds

A district court correctly determined that it lacked jurisdiction over a married couple's claim for refund of taxes. The taxpayers sought a refund of a deposit that was made for an offer in compromise. The district court granted the government's motion to dismiss and found that the court lacked subject matter jurisdiction because the taxpayers had not fully paid their tax liabilities in full for each tax year that they had defaulted. The taxpayers appealed the district court's dismissal of their claim. The taxpayers' claim, seeking the return of their payment, which the IRS applied to their outstanding tax liability was a claim for a partial refund of their taxes. The taxpayers' arguments to the contrary were unconvincing. The IRS had the authority to retain the payment and treat it as a tax payment without accepting the taxpayers' compromise offer. Additionally, the taxpayers'

argument that the district court needed to recalculate their correct tax liability to determine whether they fully paid their taxes was rejected. The relevant question was whether the taxpayers fully paid the assessed amounts, not whether they fully paid the *correctly* assessed amounts.

Potts, CA-9, 2021-2 USTC ¶150,186

Self-employment Tax

A married couple was not entitled to tax benefits owing to the husband's status as a pastor. The taxpayers failed to allege that they applied for or obtained the requisite approval for exemption from income taxes under the Self Employment Contributions Act (SECA). The taxpayers asserted that they were not required to apply for, or obtain, the approval of the IRS to invoke the Code Sec. 1402 exemption. However, the taxpayers' complaint failed to plead that the pastor had taken a vow of poverty. Coupled with the taxpayers' admission that they did not file an application for exemption pursuant to Code Sec. 1402(e), the taxpayers' complaint failed to state a claim that plausibly entitled them to relief. Therefore, the government's motion for judgment on the pleadings was granted.

Arensmeyer, FedCl, 2021-2 USTC ¶150,185

Success-based Fees

A business entity was granted a 60-day extension to make a safe harbor election under Rev. Proc. 2011-29, I.R.B. 2011-18, 747, to deduct a portion of success-based fees it incurred as part of a transaction. The taxpayer incurred transaction costs including success-based fees related to the merger of the taxpayer, its parent, and certain disregarded entities. This fee was paid to a financial advisor for services performed in the process of investigating or otherwise pursuing the acquisition completed pursuant to the agreement. However, the taxpayer inadvertently failed to attach the required election statement to its originally filed tax return. The taxpayer fulfilled the requirements of Reg. §§301.9100-1 and 301.9100-3 and acted reasonably, in good faith; therefore, granting the relief did not prejudice the interests of the government.

IRS Letter Ruling 202128004