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Farm NOL Election Procedures Provided

Rev. Proc. 2021-14

The IRS has provided a procedure for making elections and revocations under Act Sec. 2303(e) of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (P.L. 116-136) for taxpayers with a net operating loss (NOL) for any tax year beginning in 2018, 2019, or 2020, all or a portion of which consists of a farming loss (farming loss NOLs). The procedure is effective on the date of its release, June 30, 2021.

Specifically, the procedure:

- prescribes when and how to make an election with regard to all NOLs of the taxpayer, regardless of whether the NOL is a farming loss NOL;
- provides that a taxpayer is treated as having made a deemed election under Act Sec. 2303(e)(1) of the CARES Act if the taxpayer, before December 27, 2020, filed one or more original or amended tax returns, or applications for tentative refund, that disregard the CARES Act amendments with regard to a farming loss NOL; and
- prescribes when and how to revoke an election made under Code Sec. 172(b)(1)(B)(iv) or (b)(3) to waive the two-year carryback period for the farming loss portion of a farming loss NOL incurred in a tax year beginning in 2018 or 2019.

TCJA Amendments to NOL Rules

The Tax Cuts and Jobs Act (TCJA) (P.L. 115-97) amended the NOL rules to provide that, with regard to NOLs arising in a tax year beginning after 2017, the amount allowed as an NOL deduction cannot exceed 80 percent of the taxable income computed without regard to any NOL deduction (the 80-percent limitation). The 80-percent limitation does not apply in the case of a non-life insurance company. The TCJA also eliminated NOL carrybacks, except that a two-year carryback period is allowed for the portion of an NOL that is a farming loss. Taxpayers entitled to this two-year carryback period may make an irrevocable election to waive it. A separate rule provides that any taxpayer entitled to an NOL carryback period may irrevocably elect to relinquish the entire carryback period with respect to that NOL for any tax year. The TCJA changes relating to loss carrybacks apply to NOLs arising in tax years beginning after 2017.

CARES Act Amendments to NOL Rules

The CARES Act temporarily suspended the 80-percent limitation so that it applies only to NOLs arising in tax years beginning after 2017 that are deducted in tax years beginning after 2020. In addition, it provided a five-year carryback period for any NOL arising in a tax year beginning after 2017 and before 2021. The two-year carryback period for farming losses does not apply to any such NOL.

CTRA 2020 Amendments to CARES Act

The COVID-related Tax Relief Act of 2020 (CTRA 2020), which was enacted as part of the Consolidated Appropriations Act, 2021 (CAA 2021) (P.L. 116-260) amended Act Sec. 2303 of the CARES Act by adding a new subsection (e), which took effect as if originally included in that CARES Act, to provide that a taxpayer with a farming loss NOL for any tax year beginning in 2018, 2019, or 2020, may make an election to disregard the CARES Act amendments.

If a taxpayer makes the election: (i) the 80-percent limitation applies to determine the NOL deduction for each tax year beginning in 2018, 2019, or 2020 to the extent the deduction is attributable to NOLs arising in tax years beginning after 2017, but the 80-percent limitation does not apply to determine the NOL deduction for any tax year beginning before 2018, (ii) the modified taxable income rule applies with regard to each tax year beginning in 2018, 2019, or 2020, and (iii) the NOL carryback period is determined under Code Sec. 172(b), as amended by the TCJA and effective prior to enactment of the CARES Act, for any NOL arising in any tax year beginning in 2018, 2019, or 2020.

An election to disregard the CARES Act amendments (an affirmative election) must be made in the manner prescribed by the IRS. Once made, an election is irrevocable. An affirmative election must be made by the due date, including extensions of time, for filing the taxpayer's tax return for the first tax year ending after December 27, 2020.

In the case of any taxpayer with a farming loss NOL that files a tax return before December 27, 2020, that disregards the CARES Act amendments, the taxpayer is treated as having made a deemed election (a deemed election) unless the taxpayer amends the return to reflect such amendments by the due date (including extensions of time) for filing the taxpayer's tax return for the first tax year ending after December 27, 2020.

A taxpayer can revoke an election made under Code Sec. 172(b)(1)(B)(iv) or (b)(3) to waive the two-year carryback period if the election (i) was made before December 27, 2020; and (ii) relates to the two-year carryback period for the portion of any farming loss NOL that is a farming loss arising in tax years beginning in 2018 or 2019.

Procedure for Making Elections to Disregard CARES Act Amendments

Affirmative election. A taxpayer with a farming loss NOL, other than a taxpayer making a deemed election described below, may make an affirmative election under Act Sec. 2303(e)(1) of the CARES Act if: (i) the farming loss NOL arose in any tax year beginning in 2018, 2019, or 2020; and (ii) the taxpayer:

- makes the affirmative election on a statement described below by the due date, including extensions of time, for filing the taxpayer's tax return for the first tax year ending after December 27, 2020; and
- attaches a statement to its tax return for the first tax year ending after December 27, 2020, that provides at the top: "The taxpayer elects under §2303(e)(1) of the CARES Act and Revenue Procedure 2021-14 to disregard the amendments made by §2303(a) of the CARES Act for taxable years beginning in 2018, 2019, and 2020, and the amendments made by §2303(b) of the CARES Act that would otherwise apply to any net operating loss arising in any taxable year beginning in 2018, 2019, or 2020. The taxpayer incurred a Farming Loss NOL, as defined in section 1.01 of Revenue Procedure 2021-14, in [list each applicable taxable year beginning in 2018, 2019, or 2020]." The taxpayer should also attach a copy of the statement to any original or amended tax return or application for tentative refund on which the taxpayer claims a deduction attributable to a two-year NOL carryback pursuant to the affirmative election.

Deemed election. A taxpayer is treated as having made a deemed election under Act Sec. 2303(e)(1) of the CARES Act if the taxpayer, before December 27, 2020, filed one or more original or amended tax returns, or applications for tentative refund, that disregard the CARES Act amendments with regard to a farming loss NOL. Special procedure is provided for certain taxpayers whose two-year carryback claims filed before December 27, 2020, were rejected. Generally, if such a taxpayer wants to continue to pursue those claims, the taxpayer should submit complete copies of their rejected applications or claims, including the original or amended tax returns for the tax years in which the NOLs arose, in the manner set forth in the procedure.

A taxpayer will not be treated as having made a deemed election if, for each tax year for which the taxpayer filed an original or amended tax return or an application for tentative refund that treated a farming loss NOL in a manner that disregards the CARES Act amendments, the taxpayer subsequently files either (i) an amended return by the due date, including extensions of time, for filing the taxpayer's tax return for the first tax year ending after December 27, 2020, or (ii) an application for tentative refund within the required time for filing such an application and also by the due date, including extensions of time, for filing the taxpayer's tax return for the first tax year ending after December 27, 2020. The amended return or application must properly reflect the treatment of

REFERENCE KEY

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

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each farming loss NOL under the CARES Act amendments.

Procedure for Revocation of Election Not to Apply the Two-year Carryback Period for Farming Losses

A taxpayer that elected under Code Sec. 172(b)(1)(B)(iv) or (b)(3) not to have the two-year carryback period apply to the farming loss portion of a farming loss NOL incurred in a tax year beginning in 2018 or 2019 may revoke that election, if the taxpayer:

- made that election before December 27, 2020;
- makes the revocation by the date that is three years after the due date, including extensions of time, for filing the return for the tax year the farming loss NOL was incurred; and
- attaches a statement to an amended return for the loss year that provides at the top: "Pursuant to section 4.01 of Rev. Proc. 2021-14 the taxpayer is revoking a prior §172(b)(1)(B)(iv) or §172(b)(3) election not to have the two-year carryback period provided by §172(b)(1)(B)(i) apply to the Farming Loss NOL, as defined in section 1.01 of Rev. Proc. 2021-14, incurred in the taxable year."

Consolidated Groups

The procedure provides special rules for consolidated groups for making an affirmative election, consequences of affirmative and deemed elections, and reliance on rules in Reg. §1.1502-21 regarding the application of the 80-percent limitation.

IRS Extends Leave-Based Donation Program Treatment

The Treasury and IRS have extended the treatment provided in Notice 2020-46, I.R.B. 2020-27, 7, to cash payments made to Code Sec. 170(c) organizations after December 31, 2020, and before January 1, 2022. Under leave-based donation programs, employees can elect to forgo vacation, sick, or personal leave in exchange for cash payments. An employer's donations under a leave-based donation program are not gross income or wages for the employees who surrendered leave so long as the donations are made in cash to a charitable organization for the relief for victims of the COVID-19 pandemic, before January 1, 2021. The extension is due to the ongoing COVID-19 pandemic.

Notice 2020-46, I.R.B. 2020-27, 7, is extended.

Notice 2021-42; IR-2021-142

Energy Credit Beginning-of-Construction Deadlines Modified

Notice 2021-41; IR-2021-138

The IRS modified and clarified the continuity requirement that applies to the beginning-of-construction test for qualified facilities under the renewable electricity production credit, and for energy properties under the energy credit.

Beginning of Construction Requirement

Both credits are limited to qualified facilities that begin construction (or operate) by the applicable deadline, which varies based on the type of the facility. Two safe harbors allow taxpayers to demonstrate that construction has begun:

- the Physical Work Test, and
- the Five Percent Safe Harbor.

Both methods require a taxpayer to satisfy a Continuity Requirement to show continuous progress towards completion of the facility once construction has begun. Taxpayers may rely on a Continuity Safe Harbor to satisfy the Continuity Requirement.

The IRS has issued several notices that extend the beginning of construction deadlines.

Extended Continuity Safe Harbor, Modified Continuity Requirement

This latest guidance provides three modifications to the Continuity Requirement rules.

First, if a qualified facility or energy property began construction under the Physical Work Test or the Five Percent Safe Harbor in calendar year 2016, 2017, 2018, or 2019, the Continuity Safe Harbor is satisfied if a taxpayer places the qualified facility or energy property in service by the end of a calendar year that is no more than six calendar years after the calendar year during which construction began.

Second, if construction began under the Physical Work Test or the Five Percent Safe Harbor in calendar year 2020, the Continuity Safe Harbor is satisfied if a taxpayer places the qualified facility or energy property in service by the end of a calendar year that is no more than five calendar years after the calendar year during which construction with respect to that qualified facility or energy property began.

Finally, for any qualified facility or energy property that does not rely on the Continuity Safe Harbor, the Continuity Requirement is satisfied if the taxpayer satisfies either the Continuous Construction Test or the Continuous Efforts Test. Thus rule applies to both the Physical Work Test and the Five Percent Safe Harbor.

No Private Letter Rulings and Determination Letters

The IRS will not issue private letter rulings or determination letters regarding the application of this notice, the modified IRS notices, or the beginning of construction requirement.

Effect on Other Documents

Notice 2013-29, Notice 2013-60, Notice 2014-46, Notice 2015-25, Notice 2016-31, Notice 2017-04, Notice 2018-59, Notice 2019-43, Notice 2020-41, and Notice 2021-5 are modified.

Penalty Relief for Certain Pass-through Forms

Notice 2021-39; IR-2021-140

Partnerships, S corporations, and U.S. persons with interests in foreign partnerships may rely on transition relief from penalties for tax years beginning in 2021 with respect to new Schedules K-2 and K-3. These schedules may be required for:

- Form 1065, U.S. Return of Partnership Income,
- Form 1120-S, U.S. Income Tax Return for an S Corporation, and
- Form 8865, Return of U.S. Persons With Respect to Certain Foreign Partnerships.

The IRS also released new draft instructions for Schedules K-2 and K-3. Comments are requested.

Reporting Requirement for Interests in Foreign Partnerships

For tax years beginning in 2021, two new forms may be required when a partnership files Form 1065 or Form 8865, or an S corporation files Form 1120-S (1) Schedule K-2, Partners' Distributive Share Items—International, and (2) Schedule K-3, Partner's Share of Income, Deductions, Credits, etc.

The IRS released final versions of these schedules on June 3 and 4, 2021, after receiving comments on draft versions it released in July of 2020.

Waived Penalties for Failing to File or Furnish Schedules K-2 and K-3

The IRS recognizes that a filer may not have systems or procedures in place to obtain information about its partners, shareholders, or the controlled foreign partnership (CFP) to determine whether and how it must file a part of Schedules K-2 and K-3.

Accordingly, for tax years beginning in 2021, penalties will not be imposed for incorrect or incomplete reporting on Schedules K-2 and K-3 if the partnership or S corporation establishes to the satisfaction of the IRS that it made a good faith effort to comply with the requirements to file or furnish the schedules. A Schedule K-2 or K-3 filer that does not establish that it made a good faith effort to comply with the new requirements is not eligible for this penalty relief.

Good Faith Effort to Complete Schedules K-2 and K-3

In determining whether a filer makes a good faith effort to complete Schedules K-2 and K-3, the IRS will take into account:

- the extent to which the filer has changed its systems, processes, and procedures for collecting and processing relevant information;
- the extent to which the filer has obtained information from partners, shareholders, or the CFP, or applied reasonable assumptions when information is not obtained; and
- the steps the filer has taken to modify the partnership or S corporation agreement or governing instrument to facilitate the sharing of information with partners and shareholders that is relevant to determining whether and how to file Schedules K-2 and K-3.

With respect to relevant information about partners, shareholders, or the CFP, the IRS will assess the effort the Schedule K-2/K-3 filer made to obtain this information and the reasonableness of any assumptions, taking into account the relationship between the Schedule K-2/K-3 filer and its partners, shareholders or the CFP. For example, the appropriate level of diligence and/or the reasonableness of an assumption may differ with respect to a partner that manages or controls the partnership, or a partner with a significant interest in the partnership, as compared to partners holding small interests for which there may not be the same ease of access to information. A Schedule K-2/K-3 filer may have made a good faith effort despite being unsuccessful in obtaining information from its partners, shareholders, or the CFP.

IRS Upgrades Child Tax Credit Payment Tool

The IRS has upgraded a key online tool to enable families to update their bank account information to receive their monthly child tax credit payments. This feature was added to the Child Tax Credit Update Portal (the portal), and any updates made by August 2, will apply to August 14 payments and subsequent payments for the rest of 2021.

Further, the IRS announced that families will receive their July 15 payment via direct deposit or check. The IRS has further encouraged taxpayers who have not updated their current bank account information to use the tool to ensure they receive payments in a timely manner. In addition, the IRS provided information to taxpayers on the manner in which to update their direct deposit information. Taxpayers are recommended to use the portal to check their eligibility to receive child tax credit payments through direct deposit. Following which, the taxpayers would be directed to change the bank account information available on the Service's file. In addition, the portal permits families to switch from receiving payments via paper checks to direct deposit, and also un-enroll from receiving monthly payments, to receive a lump sum when they file their 2021 income tax return.

Finally, the IRS reminded taxpayers that child tax credit payments will be up to $300 per month for each child under age six and up to $250 per month for each child ages six through 17. The IRS also reminded taxpayers that it will issue advance payments on July 15, August 13, September 15, October 15, November 15, and December 15.

IR-2021-143

Comments Requested

The IRS requests comments on the new draft instructions to Schedules K-2 and K-3 for tax years beginning in 2021. The IRS is especially in comments regarding:

- instances where the instructions do not provide sufficient guidance on how to complete the returns or where additional clarity is needed;
- suggestions for addressing structures and situations that make it difficult to determine certain information (for example, tiered partnership structures or publicly-traded partnerships; and
- reasonable assumptions Schedule K-2/K-3 filers could make in determining whether and how to complete Schedules K-2 and K-3 for tax years beginning after 2021, and whether these assumptions may differ between various parts of the Schedules K-2 and K-3.

Comments must be submitted in writing and should include a reference to Notice 2021-39. The IRS strongly encourages electronic comments submitted via the Federal eRulemaking Portal at https://www.regulations.gov (type IRS-2021-0006 in the search field on the regulations.gov homepage to find this notice and submit comments). However, to the extent practicable, the IRS will also consider paper comments it receives by mail.

Fund Transfers Were Distributions Valued at Face Amounts

M.R. Kelly, TC Memo. 2021-76, Dec. 61,888(M)

In consolidated cases, fund transfers were not loans but rather distributions valued at the face amounts. The taxpayer (1) bought and sold companies; (2) flipped loans; and (3) started his limited liability company (K1). The transfers were made to K1 and analyzed on being either bona fide loans or distributions. However, the taxpayer received other taxable distributions to the extent the loans were bona fide and the distribution amounts were the face values of the loans. These were funds transferred to the taxpayer and his other companies.

Denied Deductions

Next, the taxpayer's insolvency computation for one of the tax years at issue required the elimination of loans to him from his closely held companies. The taxpayer's cancellation of debt (COD) income was overstated and the insolvency amount was to be computed. The taxpayer was not entitled to a nonbusiness bad debt deduction one tax year. The taxpayer failed to answer whether the original debt was worthless, was consideration provided for debt forgiveness, and whether it was a gift from the taxpayer with stock options. This included denial of a deduction for forgiven loans made primarily to his brother and another entity. Moreover, K1 had no additional taxable income on the basis of deposits or other nontaxable sources. Further, another LLC of the taxpayer (V1) was not allowed to deduct interest on its airplane. The taxpayer did not establish that the airplane's surrender would qualify as a loan payment or that he made any payment of interest.

Approved Deductions

A building entity of the taxpayer was allowed deductions towards adjustments for the cost of goods sold. The other expense deductions at issue were properly reflected in the taxpayer's return. The taxpayer was also entitled to (1) a carryover loss, and the deduction was sustained to the extent allowable under Rule 155 computations; (2) passive activity loss deductions; and (3) suspended and unused passive activity losses.

Penalties and Reasonable Cause

The fraud penalty was not sustained for three tax years. Regardless of whether the loans were properly characterized, the evidence did not prove that the loan characterizations were made with fraudulent intent. Further if there was 25 percent omission from gross income, the Code Sec. 6662(a) penalty would apply for that tax year. Finally, the taxpayer failed to timely file Form 5471, Information Return of U.S. Persons With Respect to Certain Foreign Corporations. The taxpayer's accountant's lack of experience with Form 5471 was not fatal to a finding of reasonable reliance on him or his firm.

Taxpayer Advocate Report Cites IRS Difficulties Due to COVID-19

IR-2021-139

The National Taxpayer Advocate Erin M. Collins released her statutorily mandated mid-year report to Congress. The Advocate's report emphasized difficulties the IRS faced in performing its traditional work due to the COVID-19 pandemic and added responsibilities. This included making the three rounds of stimulus payments.

"This past year and the 2021 filing season conjure up every possible cliché for taxpayers, tax professionals, the IRS, and its employees," Collins wrote. "It was a perfect storm; it was the best of times and the worst of times; patience is a virtue; with experience comes wisdom and with wisdom comes experience;

out of the ashes we rise; and we experienced historical highs and lows," she added.

A historically high number taxpayers did not file their returns and receive their refunds. The IRS faced a backlog of over 35 million returns that required manual processing. Also, 167 million telephone calls were received; over four times as during 2019. The Service's employees could not keep pace with this massive volume of calls, resulting in the poorest service ever.

The report presented an assessment of the 2021 filing season and contained the IRS's responses to 73 administrative recommendations the Advocate made in her 2020 Annual Report to Congress. The IRS agreed to implement 48 recommendations in full or in part. The Advocate is required by statute to submit two annual reports to the House Committee on Ways and Means and the Senate Committee on Finance.

TAX BRIEFS

Business Acquisitions

A limited partnership 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 an advisor for services performed in the process of investigating or otherwise pursuing the acquisition completed pursuant to the agreement. However, the taxpayer engaged an accounting firm to prepare its income tax returns but it 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 202125003

Business Interest

A limited liability company (LLC) was granted a 60-day extension to make an election statement. The taxpayer was electing to qualify real property trades or businesses to be electing real property trades or businesses under Code Sec. 163(j)(7)(B). Moreover, it requested relief before the failure was discovered by the Service. The taxpayer reasonably relied on its hired tax professionals. However, the tax professionals failed to make the election. The taxpayers satisfied the requirements of Reg. §§301.9100-1 and 301.9100-3(b)(1) and, therefore, granting relief would not prejudice the government.

IRS Letter Ruling 202125005

Corporations

The IRS has issued a ruling discussing the federal income tax consequences of a proposed transaction. The taxpayer was a publicly traded domestic corporation that was the common parent of an affiliated group of corporations that filed a consolidated return. Further, the taxpayer's subsidiaries operated through branches in foreign countries. The proposed transaction involved various transfer of assets and liabilities of certain foreign branches of the taxpayer's subsidiaries, essentially resulting in a restructuring. The IRS stated that the transfer of assets in the proposed transaction would be treated as if the respective subsidiaries contributed the target assets to the corresponding foreign branch.

IRS Letter Ruling 202125001

Deductions

A union electrician who did multiple jobs was entitled to deductions in part for expenses. The IRS had disallowed all deductions for the taxpayer.

W. Geiman, TC Memo. 2021-80, Dec. 61,892(M)

Disaster Relief

An April 29, 2021, notice granting relief to victims of severe storms, flooding, landslides and mudslides that began on February 27, 2021, in parts of Kentucky was updated by the IRS on June 28, 2021, to include Ballard county.

Kentucky Disaster Relief Notice (KY-2021-01)

Economic Impact Payments

The IRS and Treasury released information on recipient numbers for the third round of Economic Impact Payments (EIPs) through June 3. They also provided a look at payments by state, income category, filing status, and other features. Payments will begin to be reduced for taxpayers making $75,000 or above in Adjusted Gross Income (AGI) ($150,000 for married filing jointly). The payments end at $80,000 for individuals ($160,000 for married filing jointly). More information can be found at https://www.irs.gov/coronavirus/economic-impact-payments.

IR-2021-136

IRS

The IRS has released email advice prepared in less than two hours by attorneys in the IRS's Office of Chief Counsel. In *Tax Analysts,* CA-DC, 2007-2 USTC ¶50,553, the Court of Appeals for the D.C. Circuit ruled that the IRS could not rely on its so-called "two-hour" rule to avoid disclosure of email sent to IRS field personnel. The documents constituted Chief Counsel Advice, which the IRS is required to publicly disclose under Code Sec. 6110. The items listed below were released as a result.

Chief Counsel Advice Memorandum 202125010; Chief Counsel Advice Memorandum 202125011; Chief Counsel Advice Memorandum 202125012; Chief Counsel Advice Memorandum 202125013; Chief Counsel Advice Memorandum 202125014; Chief Counsel Advice Memorandum 202125016; Chief Counsel Advice Memorandum 202125018; Chief Counsel Advice Memorandum 202125019

Liens and Levies

An individual, who was a software tester, was precluded from challenging his underlying tax liabilities during a collection due process (CDP) hearing and subsequently in the Tax Court. The taxpayer argued that he had no tax liability for the two tax years at issue and that the settlement officer (SO) had abused her discretion and erred in sustaining the notice of federal tax lien (NFTL). The taxpayer had two prior opportunities to contest his underlying liabilities for the two tax years at issue. However, he failed to avail the opportunities to dispute the existence or amount of the underlying tax liabilities in front of proper authorities. Moreover, the SO had conducted a thorough review of the taxpayer's account transcripts and verified that all applicable requirements were met with respect to the collection action. In addition, the taxpayer did not raise any issues at the CDP hearing beyond his underlying liabilities, nor did he pursue any collection alternatives. Therefore, the SO did not abuse her discretion in fulfilling her obligation under Code Sec. 6330(c)(3)(B) to consider any "issues raised" by the taxpayer during the CDP hearing.

A.B. Benson, TC Memo. 2021-78, Dec. 61,890(M)

A settlement officer's (SO's) determination to sustain the proposed collection action against an individual was not abuse of discretion. The taxpayer had sought a review of the determination by the IRS to uphold the filing of a notice of federal tax lien (NFTL).

Long, TC, Dec. 61,893(M)

A married couple's notice of deficiency was held to be timely. The taxpayer contended that the notice of deficiency issued for the tax year at issue was untimely because the six-year limitations period did not apply.

Pragias, TC, Dec. 61,894(M)

Micro-Captive Transactions

The IRS Chief Counsel ruled that the variant of the micro-captive insurance transactions promoted by an entity were the same as, or substantially similar to, the transaction of interest described in Notice 2016-66, I.R.B. 2016-47, 745. The Chief Counsel analyzed the taxpayer's situation by applying the five factors mentioned under section 2.01 of Notice 2016-66. The taxpayer satisfied all five factors namely, (1) the taxpayer marketed the micro-captive transaction to individuals with successful, closely held businesses conducted through one or more entities and the audits of the participants in the transactions confirmed that the transactions involved business owners who conducted a trade or business through one or more entities; (2) the transaction involved captives that entered into contracts directly with the insured, which the captive and the insured treated as insurance; (3) each transaction was organized around a captive with a Code Sec. 831(b) election and every captive that was selected for examination by the IRS had made a Code Sec. 831(b) election; (4) the participant examinations confirmed that, with a few exceptions, if there are multiple owners, then an owner or person related to that owner or insured directly or indirectly owned at least 20-percent of the voting power or value of the outstanding stock of the captive; and (5) neither the taxpayer nor any captive managed by the taxpayer paid claims or incurred claim administrative expenses in an amount greater than 70-percent of the premiums paid less dividends paid and therefore, it satisfied the loss-ratio test.

Field Attorney Advice 20211701F

Partnerships

The Court of Appeals for the Ninth Circuit affirmed the Tax Court's summary judgment because the IRS's final partnership administrative adjustment (FPAA) of an entity's partnership return for a tax year at issue was issued outside of the applicable three-year limitation period. The taxpayer's motion for summary judgment with respect to an untimely notice of FPAA was granted. During the tax year at issue, the taxpayer claimed that there was a sale of an 80.1-percent interest in the LLC to another entity in exchange for a treasury note. The taxpayer reported 19.99-percent of the gain rather than 100-percent. Since the taxpayer partially reported the tax consequences of this transaction, the six-year limitation period did not apply. The taxpayer did not "omit" an item of gain entirely but rather reported an incorrect amount. The court found the IRS's attempt to distinguish *Colony, Inc.*, 58-2 USTC ¶9593, 357 U.S. 28 (1958), and *Home Concrete & Supply, LLC,* SCt, 2012-1 USTC ¶50,315, as unpersuasive. Further, the IRS's invitation to rely on out-of-circuit authority predating *Home Concrete & Suppy, LLC* was also unpersuasive. Therefore, the Tax Court properly granted summary judgment.

Beverly, CA-9, 2012-1 USTC ¶50,171

Qualified Conservation Contributions

The Tax Court correctly determined that an entity did not comply with extinguishment proceeds requirement in a deed. The deed was not saved by the disputed provisions because they constituted an unenforceable condition-subsequent savings clause.

TOT Property Holdings, LLC, CA-11, 2021-1 USTC ¶50,172

Research Credit

The IRS Chief Counsel ruled that each of four tests under Code Sec. 41(d)(1) applied separately to each business component a taxpayer uses as the factual basis for their research credit claim. The application of the tests to business components and requirements did not change if a taxpayer uses a statistical sample under Rev. Proc. 2011-42, I.R.B. 2011-37, 318, to substantiate said claim. Finally, the application also did not change when the Service wants to audit a research credit claim.

Field Attorney Advice 20212501F

Tax Protest

An individual was taxable on wages received from her employer for the tax year at issue. The taxpayer was employed by a university and did not testify on the nature of her services. The taxpayer contended that her wages were not taxable because she was not engaging in the "exercise of Federal privileges."

J.K. Muhammad, TC Memo. 2021-77, Dec. 61,889(M)

Tax Shelter Penalties

In each of two cases, the IRS Chief Counsel issued rulings requested by an entity involved in the promotion of micro-captive insurance transactions and calculation of penalties for promoting abusive tax shelters. In the first case, the

Chief Counsel adjudged that the Code Sec. 6700 penalty calculation included a promoter's gross income derived from the organization or sale of a tax shelter after the formation of the tax shelter. The statute provided that the government is directed to assess a Code Sec. 6700 penalty that is 50 percent of the gross income derived or to be derived from the organization or sale of a tax shelter, if the organization or sale involved false or fraudulent statements. In the second case, the IRS Chief counsel ruled that there were two types of statements that fell within the statutory bar of Code Sec. 6700(a)(2)(A): (1) statements directly addressing the availability of tax benefits; and (2) those concerning factual matters that are relevant to the availability of the tax benefits. Further, the Code Sec. 6700 penalty calculation included a promoter's gross income derived from the organization or sale of a tax shelter after the formation of the tax shelter. Lastly, Code Sec. 6700 penalty can be asserted against the members, officers or employees of a promoter, in addition to asserting it against the promoter itself, provided that an individual organizer or seller of the micro-captive program made, or caused to be made, false or fraudulent statements that the individual knew or had reason to know were false or fraudulent as to the availability of tax benefits.

Chief Counsel Advice Memorandum 202125008; 202125009

Trust Fund Recovery Penalty

The government's motion for summary judgment on its counterclaims submitted in a case involving Trust Fund Recovery Penalties (TFRPs) was granted. The Secretary of the Treasury had assessed unpaid federal tax liabilities and TFRPs with respect to unpaid employment taxes of a limited liability company owned by an individual. The taxpayer also did not present any evidence that he was not the "responsible person" within the meaning of Code Sec. 6672, or that he did not act "willfully" in failing to collect or pay over the withheld taxes.

Lunnon, DC N.M., 2021-1 USTC ¶50,170

Unreported Income

An individual had unreported gross receipts. The taxpayer did not meet his burden of proving that the adjustments to his Schedule C gross income or other income were erroneous. In addition, the taxpayer was held liable for Code Sec. 6651(a)(1) additions to tax due to late-filing of returns.

Nurumbi, TC, Dec. 61,891(M)