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Bipartisan Infrastructure Bill Passes Senate

On August 1, 2021, the text of the long-negotiated bipartisan infrastructure bill was released. The $1.2 trillion Infrastructure Investment and Jobs Act checks in at 2,702 pages, and provides funding for roads, bridges, mass transit, broadband, water, and wastewater. The bill is the result of a weekslong negotiation between the White House and a bipartisan group of senators, and follows a 66-28 vote in the Senate on Friday, July 30 to begin debate on the bill.

Senate leadership was hoping to pass the bill by the end of the week of August 2. Objections over the cost of the bill by Senator Bill Hagerty (R-Tenn.) prevented the bill from being voted on over the August 7-8 weekend. The Senate voted late August 8, to proceed with the bill.

As *this Issue went* to press, the Senate passed the bill by a vote of 69-30. It is not clear when the House will take up the bill.

Tax Changes Included

The original infrastructure proposal from President Biden, the American Jobs Plan, was significantly more expensive, and included some tax-related changes to fund the higher priced proposal. These changes in the original proposal included an increase in the corporate tax rate and increased funding for the IRS to improve enforcement activities. During the course of the bipartisan negotiations, both of these proposals were dropped.

However, the bill text released does include some tax changes related to infrastructure. These include:

- An extension of highway taxes to 2028 and highway trust fund expenditure authority to 2026;
- Inclusion of qualified broadband projects and carbon dioxide capture facilities among the other types of projects for which private activity bonds can be issued; and
- A return of the exception for water and sewage disposal utilities from the rule requiring a corporation to recognize contributions in aid of construction (removed by the Tax Cuts and Jobs Act of 2017).

The bill also includes tax-related changes unrelated to infrastructure, including:

- Expansion of information reporting requirements to cryptocurrency brokers and imposition of penalties on brokers failing to satisfy the requirements;
- Termination of the employee retention credit for employers closed due to COVID-19 after September 30, 2021; and
- Changes to the extension of tax deadlines due to declared disasters and service in a combat area, as well as expansion of extension authority to taxpayers impacted by wildfires.

Next Steps

Meanwhile, Senate Democrats have been working on a larger bill to pass in conjunction with the Infrastructure Investment and Jobs Act using the budget reconciliation process. This bill would include many of the proposals of Biden's American Jobs Plan dropped from the infrastructure bill as well as the proposals of his American Families Plan. The bill would likely include significant tax changes and is strongly opposed by GOP members of the Senate, thus necessitating the use of the reconciliation process to avoid garnering 60 votes to pass the legislation.

Before work can begin on the larger reconciliation bill, the Senate must first pass a budget resolution to kick off the process. A $3.5 trillion budget blueprint was released by Senate Democrats on August 9. Senate Majority Leader Chuck Schumer (D-N.Y.) has indicated his desire to pass that resolution as well before the chamber leaves for its August recess, planned to begin after the week of August 9.

The text of the Infrastructure Investment and Jobs Act can be found at https://www.portman.senate.gov/sites/default/files/2021-08/Infrastructure%20Investment%20and%20Jobs%20Act.pdf.

Guidance for Claiming Employee Retention Credit in Third and Fourth Quarters of 2021

Notice 2021-49; IR-2021-165

The IRS has issued guidance for employers claiming the employee retention credit under Code Sec. 3134, enacted by section 9651 of the American Rescue Plan Act of 2021 (ARP), P.L. 117-2, which provides a credit for wages paid after June 30, 2021, and before January 1, 2022. The guidance amplifies previous notices which addressed the employee retention credit under section 2301 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), P.L. 116-136, as amended by sections 206 and 207 of the Taxpayer Certainty and Disaster Tax Relief Act of 2020, P.L. 116-260.

In general, eligible employers can claim a refundable employee retention credit against the employer share of Social Security tax equal to 70 percent of the qualified wages they pay to employees after December 31, 2020, through June 30, 2021. Qualified wages are limited to $10,000 per employee per calendar quarter in 2021. Thus, the maximum employee retention credit available is $7,000 per employee per calendar quarter, for a total of $14,000 for the first two calendar quarters of 2021. Under Code Secs. 3134(a) and (b)(1)(A), these limits continue to apply in the third and fourth calendar quarters in 2021.

The guidance explains changes made to the employee retention credit for the third and fourth calendar quarters of 2021, including:

- making the credit available to eligible employers that pay qualified wages after June 30, 2021, and before January 1, 2022;
- expanding the definition of eligible employer to include "recovery startup businesses";
- modifying the definition of qualified wages for "severely financially distressed employers"; and
- providing that the credit does not apply to qualified wages taken into account as payroll costs in connection with a shuttered venue grant under section 324 of the Economic Aid to Hard-Hit Small Businesses, Non-Profits, and Venues Act, or a restaurant revitalization grant under section 5003 of the ARP.

The guidance also provides guidance on several miscellaneous issues with respect to the employee retention credit for both 2020 and 2021, including:

- the definition of full-time employee and whether that definition includes full-time equivalents;
- the treatment of tips as qualified wages and the interaction with the Code Sec. 45B credit;
- the timing of the qualified wages deduction disallowance and whether taxpayers that already filed an income tax return must amend that return after claiming the credit on an adjusted employment tax return; and
- whether wages paid to majority owners and their spouses may be treated as qualified wages.

Highlights of some of the items addressed in the guidance are summarized below.

Recovery Startup Businesses

A separate credit limit under Code Sec. 3134(b)(1)(B) applies to "recovery startup businesses." A "recovery startup business" is an employer (i) that began carrying on any trade or business after February 15, 2020; (ii) for which the average annual gross receipts of the employer for the three-tax-year period ending with the tax year that precedes the calendar quarter for which the credit is determined does not exceed $1,000,000; and (iii) that is not otherwise an eligible employer due to a full or partial suspension of operations or a decline in gross receipts. For an eligible employer

REFERENCE KEY

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

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that is a recovery startup business, the amount of the credit allowed under Code Sec. 3134(a) (after application of the limit under Code Sec. 3134(b)(1)(A)) for each of the third and fourth calendar quarters of 2021 cannot exceed $50,000.

The determination of when a recovery startup business "began carrying on a trade or business" is made in the same manner as for purposes of Code Sec. 162. It is appropriate for the term "qualified wages" to include wages paid by a recovery startup business. In the third and fourth calendar quarters of 2021, a recovery startup business that is a small eligible employer may treat all wages paid with respect to an employee during the quarter as qualified wages. Whether an employer is a recovery startup business is determined separately for each calendar quarter.

IRS Reminds Taxpayers Using Heavy Vehicles of August 31 Deadline

The IRS reminded taxpayers who registered, or are required to register, large trucks and buses to file Tax Year 2021 Form 2290, Heavy Highway Vehicle Use Tax Return. The deadline to file and pay is August 31, 2021, for vehicles used on the road during July 2021. The filing deadline is not tied to the vehicle registration date. Regardless of the vehicle's registration renewal date, taxpayers must file Form 2290 by the last day of the month following the month in which the taxpayer first used the vehicle on a public highway during the taxable period.

The highway use tax applies to highway motor vehicles with a taxable gross weight of 55,000 pounds or more. Taxpayers unsure if they must file can use the IRS online tool. The "Understanding Form 2290 – Heavy Highway Vehicle Use Tax" recorded webinar athttps://www.irsvideos.gov/Business/FilingPayingTaxes/UnderstandingForm-2290HeavyHighwayVehicleUseTaxes is also available. More information can be found at https://www.irs.gov/businesses/small-businesses-self-employed/trucking-tax-center.

IR-2021-164

Qualified Wages

The rules in Notice 2021-20 for determining the average number of full-time employees continue to apply in the third and fourth calendar quarters of 2021. However, Code Sec. 3134(c)(3)(C) provides a different rule for qualified wages paid by "severely financially distressed employers." For the third and fourth calendar quarters of 2021, an eligible employer with gross receipts that are less than 10 percent of the gross receipts for the same calendar quarter in calendar year 2019 (or 2020, if the employer was not in existence in 2019) is a severely financially distressed employer.

Further, the rules for determining whether an employer is an eligible employer based on a decline in gross receipts also apply, in the third and fourth calendar quarters of 2021, for determining whether an eligible employer is a severely financially distressed employer based on the 10 percent threshold. For the third and fourth calendar quarters of 2021, a severely financially distressed employer that is a large eligible employer may treat all wages paid to its employees during the quarter in which the employer is considered severely financially distressed as qualified wages.

Claiming the Credit

Notice 2021-20 and Notice 2021-23 set forth the rules for claiming the employee retention credit in 2020 and the first and second calendar quarters in 2021, respectively. These rules, including the rules pertaining to claiming an advance and relevant limitations, continue to apply for the third and fourth quarters in 2021.

Reporting

Eligible employers will report their total qualified wages and the related health insurance costs for each quarter on their employment tax returns (Form 941) for the applicable period. If a reduction in the employer's employment tax deposits is not sufficient to cover the credit, certain employers may receive an advance payment from the IRS by submitting Form 7200, Advance Payment of Employer Credits Due to COVID-19.

Effect on Other Documents

Notice 2021-20, I.R.B. 2021-11, 922 and Notice 2021-23, I.R.B. 2021-16, 1113, are amplified.

2021 Luxury Auto Depreciation Caps and Lease Inclusion Amounts Issued

Rev. Proc. 2021-31

The IRS has issued the luxury car depreciation limits for business vehicles placed in service in 2021 and the lease inclusion amounts for business vehicles first leased in 2021.

Luxury Passenger Car Depreciation Caps

The luxury car depreciation caps for a passenger car placed in service in 2021 limit annual depreciation deductions to:

- $10,200 for the first year without bonus depreciation
- $18,200 for the first year with bonus depreciation
- $16,400 for the second year
- $9,800 for the third year
- $5,860 for the fourth through sixth year

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Depreciation Caps for SUVs, Trucks and Vans

The luxury car depreciation caps for a sport utility vehicle, truck, or van placed in service in 2021 are:

- $10,200 for the first year without bonus depreciation
- $18,200 for the first year with bonus depreciation
- $16,400 for the second year
- $9,800 for the third year
- $5,860 for the fourth through sixth year

Excess Depreciation on Luxury Vehicles

If depreciation exceeds the annual cap, the excess depreciation is deducted beginning in the year after the vehicle's regular depreciation period ends.

The annual cap for this excess depreciation is:

- $5,860 for passenger cars and
- $5,860 for SUVS, trucks, and vans.

Lease Inclusion Amounts for Cars, SUVs, Trucks and Vans

If a vehicle is first leased in 2021, a taxpayer must add a lease inclusion amount to gross income in each year of the lease if its fair market value at the time of the lease is more than:

- $51,000 for a passenger car, or
- $51,000 for an SUV, truck or van.

The 2021 lease inclusion tables provide the lease inclusion amounts for each year of the lease.

The lease inclusion amount results in a permanent reduction in the taxpayer's deduction for the lease payments.

Vehicles Exempt from Depreciation Caps and Lease Inclusion Amounts

The depreciation caps and lease inclusion amounts do not apply to:

- cars with an unloaded gross vehicle weight of more than 6,000 pounds; or
- SUVs, trucks and vans with a gross vehicle weight rating (GVWR) of more than 6,000 pounds.

So taxpayers who want to avoid these limits should "think big."

TTB Establishes and Proposes New Viticultural Areas

Effective August 2, 2021, the following viticultural areas are established by the Alcohol and Tobacco Tax and Trade Bureau:

- Goose Gap in Benton County, Washington is located within the existing Yakima Valley and Columbia Valley viticultural areas (T.D. TTB-170); and
- Ulupalakua on the island of Maui, Hawaii (T.D. TTB-171).

Proposed Viticultural Areas

Proposals are made by petitions filed with the Alcohol and Tobacco Tax and Trade Bureau to establish:

- Paulsell Valley in Stanislaus County, California (TTB Notice 202); and
- Rocky Reach in portions of Chelan and Douglas Counties, Washington will be located within the existing Columbia Valley viticultural area (TTB Notice 203).

Comments may be submitted in writing or through the TTB Internet website. The due date for comments on Notices 202 and 203 is September 13, 2021.

Viticultural area names are used to describe the origin of wine for labeling and advertising.

Treasury Decisions, Alcohol and Tobacco Tax and Trade Bureau, TTB-170, 86 FR 34952, July 1, 2021; TTB-171 86 FR 34955, July 1, 2021; and Notices, No. 202, Alcohol and Tobacco Tax and Trade Bureau, 86 FR 37265, July 15, 2021; No. 203, Alcohol and Tobacco Tax and Trade Bureau, 86 FR 37260, July 15, 2021

Individual Not Eligible for Installment Agreement; Decision to Uphold Lien Determination Not Abuse of Discretion

M.T. Belair, 157 TC —, No. 2, Dec. 61,910

An individual was not found eligible for an installment agreement which she had requested during a collection due process (CDP) hearing. The IRS had filed a notice of federal tax lien (NFTL) with respect to her federal income tax for three tax years at issue. The taxpayer contended that a former U.S. attorney's failure to pay judgment money had led to her filing the delinquent tax returns by the time of the CDP hearing. Further, the taxpayer contended that the appeals officer had failed to adhere to IRS mission statements in failing to acknowledge an allegedly "illegitimate" and "corrupt" former U.S. attorney.

However, the appeals officer did not abuse his discretion because he determined that the IRS had followed the requirements of applicable law and administrative procedure in filing the NFTL. Further, the notice of determination noted that the liabilities were duly assessed and the requisite notices were timely mailed to the taxpayer. In addition, the appeals officer had explained to the taxpayer that she must provide the signed delinquent returns and Form 433-A within 21 days, but she failed to do so by that deadline or by the time of the CDP hearing. Lastly, the appeals officer had performed a balancing test, concluding that the NFTL did balance the

needs of collection with the concerns of the taxpayer. Accordingly, the appeals officer did not abuse his discretion in finding the taxpayer ineligible for an installment agreement and the IRS' motion for summary judgment was granted.

Security Summit Highlights Identity Theft Risk Related to Unemployment

IR-2021-163

The IRS Security Summit partners outlined how tax professionals can assist clients who were victims of unemployment compensation fraud schemes that targeted state workforce agencies in 2020 and 2021. Unemployment compensation fraud was reported as one of the more common identity theft schemes that emerged in 2020 as criminals exploited the COVID-19 pandemic and the resulting economic impact. The U.S. Department of Labor's Inspector General estimated that approximately $89 billion in unemployment compensation was lost in 2020 due to fraud.

Further, unemployment compensation is taxable income on federal taxes, although Congress waived the tax for 2020 for many people. States report compensation to the individual and to the IRS by using the Form 1099-G. However, due to fraud and identity theft, many taxpayers received Forms 1099-G for compensation they did not receive. Some taxpayers received forms from multiple states.

The Security Summit highlighted the following steps for tax professionals to undertake to assist their clients who were victims of the unemployment compensation fraud scheme.

- 1. File a Form 14039, Identity Theft Affidavit, only if an e-filed tax return is rejected because the client's Social Security number has already been used. Do not file the IRS Form 14039 to report unemployment compensation fraud to the IRS.
- 2. Report the fraud to state workforce agencies, and request a corrected Form 1099-G. Each state has its own process for reporting unemployment compensation fraud. The U.S. Department of Labor has created an information page with all state contacts and other information at DOL.gov/Fraud.
- 3. File a tax return reporting only the actual income received. State workforce agencies may not be able to timely issue a corrected Form 1099-G. Even if the client has not received a corrected Form 1099-G, report only wages and income received and exclude any fraudulent claims.
- 4. Consider an IRS Identity Protection PIN. Clients receiving Forms 1099-G are identity theft victims whose personal information could be used for additional criminal activities, such as filing fraudulent tax returns. All taxpayers who can verify their identities can now obtain an Identity Protection PIN to protect their SSNs.
- 5. Follow Federal Trade Commission recommendations for identity theft victims. Taxpayers should consider steps to protect their credit and other actions outlined by the FTC. The DOL also includes this information on its DOL.gov/fraud page.
- 6. Finally, tax professionals' business clients can also assist in fighting unemployment compensation fraud by responding quickly to state notices about employees filing jobless claims, especially when it has no record of those employees.

Finally, individuals have been advised to retain any records of fraud reports to states.

WBO Determination Constituted Abuse of Discretion

B.L. Rogers, 157 TC —, No. 3, Dec. 61,911

The IRS Whistleblower's Office (WBO) abused its discretion in determining that an individual was not entitled to a whistleblower's award. The informant submitted nine claims for a whistleblower award under Code Sec. 7623 to the WBO. The claim asserted that certain individuals conspired to commit grand theft through conversion of the assets of the informant's mother. Following a review of the informant's claim, a classifier from the IRS operating division recommended that the claim be rejected as it failed to meet the threshold criteria set out in the regulations under Code Sec. 7623. Subsequently, the WBO issued a letter to the informant purporting to reject the claim on an alternative ground, stating that the claim had been rejected because the IRS decided not to pursue the information provided.

The informant timely appealed under Code Sec. 7623(b)(4) to the Tax Court. The IRS filed a motion for summary judgment and argued that the WBO's determination should be classified as a rejection and that it did not represent an abuse of discretion. However, the record did not establish whether the action satisfied the monetary thresholds specified under Code Secs. 7623(b)(5)(A) and (B). The court held that the threshold set out in Code Sec. 7623(b)(5)(A) was not a jurisdictional requirement, but rather created an affirmative defense that should have been placed in the answer and proved by the IRS. Further, since the IRS did not plead in its answer that the action failed to satisfy the monetary threshold, that section did not preclude the court from considering the case on its merits.

While the WBO's letter purported to reject the informant's claim, the rationale

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included in the letter was associated with a denial, rather than a rejection, under the regulations. Given the rational included in the WBO's letter, neither the letter alone, nor the letter coupled with the administrative record provided a coherent account of the WBO's determination that was consistent with the regulations. Thus, the WBO's determination was an abuse of discretion. The mere involvement of a classifier from the IRS operating division in the WBO's determination did not preclude the court from reviewing the WBO's determination.

Plans Retroactively Adopted After the End of the Plan Year Have No 2020 Form 5500 Filing Requirement

The IRS has clarified in Employee Plans News, August 6, 2021, at https://www.irs.gov/retirement-plans/employee-plans-news, the filing requirements for retroactively adopted plans. If an employer adopts a plan during the employer's 2021 tax year (but not later than the due date, including extensions, for filing the employer's 2020 tax return):

- and elects to treat the plan as having been adopted as of the last day of the employer's 2020 tax year,
- then the plan sponsor will not be required to file a Form 5500 with respect to the plan for the plan year that begins during the employer's 2020 tax year (references to Form 5500 include the Form 5500-SF and Form 5500-EZ unless otherwise noted).

Instead, the first Form 5500 required to be filed with respect to the plan will be the 2021 Form 5500. However, the plan sponsor will be required to check a box on the 2021 Form 5500 indicating that the employer elects to treat the plan as retroactively adopted as of the last day of the employer's 2020 tax year.

Additionally, if the plan is a defined benefit plan, the employer will be required to attach a 2020 Schedule SB to the 2021 Form 5500 or Form 5500-SF, in addition to a 2021 Schedule SB. The instructions for the 2021 Form 5500 will further explain the filing requirements for plans adopted retroactively.

The IRS has anticipated that similar rules will apply to the retroactive adoption of a plan pursuant to section 201 of the SECURE Act after an employer's 2021 tax year.

TAX BRIEFS

Deductions

The Tax Court did not depart from its previously held ruling that disallowing deductions for ordinary an necessary business expenses under Code Sec. 280E did not violate the Eighth or Sixteenth Amendment. The taxpayer grew, produced and sold medical marijuana products.

Today's Health Care II LLC, TC, Dec. 61,909(M)

Enhanced Oil Recovery Credit

The IRS has issued the inflation adjustment factor for use in determining the enhanced oil recovery credit under Code Sec. 43. The inflation adjustment factor for calendar year 2021 is 1.7849. The enhanced oil recovery credit for qualified costs paid or incurred in 2020 is determined without regard to the phase out for crude oil price increases. The GNP implicit price deflator to be used for calendar year 2021 is 113.586.

Notice 2021-47

Liens and Levies

A settlement officer (SO) did not abuse her discretion in sustaining the rejection of an offer-in-compromise (OIC) proposed by a married couple during their collection due process (CDP) hearing. The SO conducted a thorough review of the account transcripts provided by the taxpayers and verified that all applicable requirements were met.

Abraham, TC, Dec. 61,912(M)

Refunds

A taxpayer's claim for refund based on a loss incurred through a bad debt from advances made to a partner was untimely. The advances were not debt and, therefore, the extended statute of limitations period for filing refunds for bad business debts did not apply.

Devine, FedCl, 2021-2 USTC ¶50,200