

FEDERAL TAX WEEKLY

INSIDE THIS ISSUE

| | |
|--|---|
| Procedural Vote on Bipartisan Infrastructure Deal Fails; Latest Agreements Have Minimal Tax Impact..... | 1 |
| IRS Issues Proposed Electronic Filing Requirements for Specified Returns and Other Documents..... | 2 |
| IRS Highlights New Features of Tax Pro Account..... | 3 |
| Married Individuals Who Receive Substantially Identical Notices of Certification May File Joint Petition... | 3 |
| IRS Discusses Reverse Clawback Provisions in Cost Sharing Arrangements..... | 4 |
| Victims of Michigan Severe Storms, Flooding and Tornadoes Granted Tax Relief..... | 4 |
| 2.2 Million EIPs Disbursed Under American Rescue Plan..... | 5 |
| Security Summit Launches Protect Your Clients; Protect Yourself Summer Campaign; Benefits of Multifactor Authentication Highlighted..... | 5 |
| Tax Briefs..... | 5 |

Procedural Vote on Bipartisan Infrastructure Deal Fails; Latest Agreements Have Minimal Tax Impact

On July 21, 2021, Senate Majority Leader Chuck Schumer (D-N.Y.) forced a procedural vote to begin debate on the infrastructure bill that is currently being negotiated by members, in line with a framework agreed to between the White House and a bipartisan group of senators last month. The vote failed to garner the 60 votes needed to begin debate.

Schumer forced the vote as a way to spur negotiations on the part of some GOP members of the Senate. However, many of those members, including those in the bipartisan group, stated that the procedural vote was premature, that the group was making progress and rescheduling the vote to the week of July 26 would likely see a successful result.

Tax-Related Changes Removed

The contents of the package have changed since the agreement was first reached in June. The initial agreement included relatively few tax changes; most notable was a significant increase in IRS funding to allow for increased and more efficient enforcement activities. This improvement in enforcement would allow for part of the costs of the infrastructure bill to be paid for by closing the tax gap, or the amount of revenue the IRS should have in excess of the amount of revenue it actually has.

While the contents of the infrastructure deal are not yet fully known, and no proposed legislative text has yet been released, it is believed the increase in IRS funding was removed during negotiations, with many believing the provisions will instead be included in the Democrats' reconciliation bill expected late in the year. That bill is expected to include many of the proposals from President Biden's initial infrastructure proposal, as well and numerous other tax changes from Biden's American Jobs Plan and American Families Plan. A timeline for that bill has not been established yet, but many Democrats see it as essential to have the larger reconciliation bill passed shortly after the more broadly accepted infrastructure bill.

Path Forward

The failure of the procedural vote does not forestall any future activity on the infrastructure bill. Schumer, knowing that the vote was going to fail, switched his vote to no, allowing him to bring up the procedural vote again under Senate rules. A group of 11 GOP senators, led by lead negotiator Rob Portman (R-Ohio), issued a statement to say they will support beginning debate the week of July 26.

It is not expected that any significant tax changes will be added back in during the ongoing negotiations.

IRS Issues Proposed Electronic Filing Requirements for Specified Returns and Other Documents

NPRM REG-102951-16

The IRS has proposed regulations that would amend the rules for filing electronically and affects persons required to file partnership returns, corporate income tax returns, unrelated business income tax returns, withholding tax returns, certain information returns, registration statements, disclosure statements, notifications, actuarial reports, and certain excise tax returns.

The proposed amendments reflect changes made by the Taxpayer First Act of 2019 (TFA), P.L. 116-25, and are consistent with the TFA's emphasis on increasing electronic filing.

The IRS is also withdrawing proposed regulations (REG-102951-16) published in the Federal Register on May 31, 2018, that would amend the rules for determining whether information returns must be filed electronically.

Electronic Filing

Amendments are proposed to:

- income tax regulations under Code Secs. 1461 and 1474, which provide that persons required to deduct and withhold tax are liable for such tax; and Code Sec. 6050I, which requires persons to report information about financial transactions to the IRS;
- pension excise tax regulations under Code Sec. 6011, which require persons to report information for certain excise taxes related to employee benefit plans;
- regulations under Code Secs. 1474, 6011, 6012, 6033, 6057, 6058, and 6059, for determining whether returns must be filed using magnetic media; and

- regulations under Code Sec. 6011 to remove the option available to a person required to report certain excise taxes on Form 4720, Return of Certain Excise Taxes Under Chapters 41 and 42 of the Internal Revenue Code, to designate a Form 4720 filed by a private foundation or trust as that person's return if the foundation is reporting the same transaction.

Under Code Sec. 6011(e) and related regulations, filers are already required to file returns and statements electronically if, during a calendar year, they are required to file 250 or more returns. Eight related proposed rules would lower the 250-return threshold as authorized by Code Sec. 6011(e), as amended by section 2301 of the TFA. A filer can request that the IRS waive the electronic-filing requirement if the filer's cost to comply with the rule would cause a financial hardship, and the IRS routinely grants meritorious hardship waiver requests.

Under Code Sec. 6050I and related regulations, filers are required to file Form 8300, Report of Cash Payments Over \$10,000 Received in a Trade or Business, if, in the course of their trade or business, they receive more than \$10,000 in cash in one transaction or in two or more related transactions. The related proposed rule would require filers of Forms 8300 to file those forms electronically if such filers are also required to file returns electronically under Reg. §§301.6011-2(b)(1) and (2). The Treasury Department and the IRS expect filers of Form 8300 to use FinCEN's BSA E-Filing System, which is free, requiring only an internet connection.

Under Code Sec. 6011(e)(4) and related regulations, financial institutions defined in Code Sec. 1471(d)(5) already

are required to electronically file Forms 1042-S, Foreign Person's U.S. Source Income Subject to Withholding. The related proposed rule would extend this filing requirement to Forms 1042, Annual Withholding Tax Return for U.S. Source Income of Foreign Persons, filed by the same financial institutions.

Under Code Sec. 6011(h), as amended by section 3101 of the TFA, organizations required to file annual returns relating to any tax imposed by Code Sec. 511 must file those returns in electronic form. A proposed regulation implements this statutory requirement.

Under Code Sec. 6033(n), as amended by section 3101 of the TFA, organizations required to file returns under Code Sec. 6033 must file those returns in electronic form. Proposed regulations implement this statutory requirement.

Seven proposed regulations would require electronic filing for certain returns not currently required to be filed electronically. Because electronic filing has become more common, accessible, and economical, the economic impact of these proposed rules on small entities is expected to be insignificant. If the cost to comply with these electronic-filing requirements would cause a financial hardship, an entity may request a waiver, and the IRS routinely grants meritorious hardship waiver requests.

Comments Requested

The proposed rules are scheduled to be published in the Federal Register on July 23, 2021, and available online at [federalregister.gov/d/2021-15615](https://www.federalregister.gov/d/2021-15615), and on [govinfo.gov](https://www.govinfo.gov). Written or electronic comments must be received by September 21, 2021,

REFERENCE KEY

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

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the date that is 60 days after the date the proposed rules are published in the Federal Register. Comments may be submitted electronically at www.regulations.gov (indicate IRS and REG-102951-16), or by mail.

The public hearing is being held by teleconference on September 22, 2021, at 10 a.m. EST. Requests to speak and outlines of topics to be discussed at the public hearing must be received by September 21, 2021. If no outlines are received by that date, the public hearing will be cancelled. Requests to attend the public hearing must be received by 5:00 p.m. EST on September 20, 2021.

Married Individuals Who Receive Substantially Identical Notices of Certification May File Joint Petition

M.F. Garcia, 157TC —, No. 1, Dec. 61,903

In a case of first impression, a married couple who had each received separate but substantially identical notices of certification regarding denial, revocation, or limitation of an individual's passport under Code Sec. 7345 arising from the same tax liability were allowed to file a joint petition challenging the correctness of the IRS's certifications in the same manner as in a deficiency case under Tax Court Rule 34(a)(1).

The IRS had certified the taxpayers' liability to the U.S. Secretary of State as a "seriously delinquent tax debt" under Code Sec. 7345(b) and issued to the taxpayers separate (but substantially identical) notices of certification. The taxpayers filed a joint petition challenging the correctness of the certifications made by the IRS, urging that the Service had failed to consider an offer-in-compromise they had

IRS Highlights New Features of Tax Pro Account

The IRS has launched a new feature that will give taxpayers digital control over who can represent them or view their tax records. This is a groundbreaking step in the agency's expansion of electronic options for taxpayers and tax professionals. Further, the new feature, one of many recent enhancements to the Online Account for individuals, will allow individual taxpayers to authorize their tax practitioner to represent them before the IRS with a Power of Attorney (POA) and to view their tax accounts with a Tax Information Authorizations (TIA).

This new digital authorization option will be a much faster process as it would allow the IRS to reduce its current Centralized Authorization File (CAF) inventory and to focus on authorization requests received through fax, mail or the Submit Forms 2848 and 8821 Online, all of which require IRS personnel to handle. To connect with their tax professionals, taxpayers can either login to their Online Account using their IRS username and password or they must create an account after passing a one-time identity verification process. Taxpayers who cannot validate their identities cannot use this option, and their tax professional must use the fax, mail or online submission process. However, the IRS will be announcing a new process for this application later this year. Moreover, tax professionals have been advised to use their IRS usernames and passwords to access the Tax Pro Account or create an account after verifying their identities.

Additionally, the IRS announced that the initial launch of the Tax Pro Account represented the first release of the tool. Over time, additional functionality would be added for taxpayers and tax professionals that would increase the options for electronic interactions. Currently, the digital authorization process is available only to individual taxpayers, not businesses or other entities. Also, tax professionals must be in good standing with the IRS and already have a CAF number prior to making requests through Tax Pro Account. To initiate the authorizations, tax professionals must enter their personal information and their clients' personal information exactly as it appears on IRS tax records. Finally, the feature is available only to those with addresses in the United States.

IR-2021-154

previously submitted. The IRS later discovered that the offer-in-compromise was processable and remained pending, and so determined that the pendency of their offer suspended collection of their tax debt so that the debt was not "seriously delinquent." The IRS accordingly reversed its certifications as erroneous and so notified the Secretary of State.

The Tax Court determined that neither Code Sec. 7345 nor the Tax Court Rules expressly authorized the joint filing of a petition in a passport case. While the Tax Court rules governing collection due process cases—which are virtually identical those governing passport certification cases—do not address the possibility of joint filing, the court observed that married taxpayers have routinely filed joint petitions in such cases. Thus, the taxpayers' joint petition was held to be valid.

However, the Tax Court ruled that the taxpayers' challenge in that respect was moot, because the IRS had reversed its certifications as erroneous and so notified the Secretary of State. Thus, there remained no justiciable case or controversy. Because the taxpayers received all the relief that the statute authorized the Tax Court to grant, the court stated that it could afford them no further remedy at this time.

In addition, the taxpayers contended that the IRS had made errors in processing their offer-in-compromise and delayed in examining their amended return. They further requested the Tax Court to determine whether the rejection of their offer-in-compromise was in error and afford them declaratory relief. However, the Tax Court did not have authority under Code Sec. 7345(e) to address the merits of the taxpayers' offer-in-compromise.

IRS Discusses Reverse Clawback Provisions in Cost Sharing Arrangements

IRS Advice Memorandum AM 2021-004

The IRS Chief Counsel's Office discussed issues relating to transfer pricing examinations of stock based compensation (SBC) costs involving taxpayers' cost sharing agreements under which they did not contract to share SBC costs (NonSBC CS agreements) and included reverse claw-back provisions in their contracts. The current regulations for cost sharing arrangements (CSAs) treat SBCs as intangible development costs (IDC). In connection with litigation in *Altera Corp. & Subs. v. Commissioner*, Dec. 60,354, 145 T.C. 91, certain taxpayers amended their agreements to stop sharing SBC and to include reverse clawback provisions and require taxpayers who excluded SBC from their cost pools to include the previously excluded SBC amounts in those pools upon the occurrence of a triggering event. Upon the occurrence of the triggering

event, the cost sharing participants would become obligated to make a true-up to reflect the sum of SBC costs that should have been shared in prior years. The IRS addressed reverse clawback provisions in NonSBC CS agreements that obligate cost sharing participants to true-up unshared SBC costs from prior years in the year of the triggering event.

Accordingly, under Reg. §1.482-7(i)(2), the IRS may make allocations to adjust the results of a cost sharing transactions (CST) so that the results are consistent with an arm's length result, including any allocations to make each controlled participant's IDC share equal to that participant's RAB share. Further, if the IRS makes an allocation to adjust the results of a CST, the allocation will be reflected for tax purposes in the year in which the IDCs were incurred. If the IRS adjusts the results of a CST for a taxable year to account for SBC costs, that adjustment should be treated as reducing

the amount of any reverse claw-back true-up obligation by a corresponding amount, thereby avoiding an overpayment of the SBC costs. Moreover, if allocations to adjust the result of a CST in the year the IDCs were incurred were not possible for certain years, the IRS may make other adjustments, if necessary, to reflect the contract or to ensure that the NonSBC CS agreement produces results that are consistent with an arm's length result within the meaning of Reg. §1.482-1(b)(1). Additionally, if a taxpayer disregards a reverse claw-back clause in a NonSBC CS Agreement (or modifies the clause to modify, defer or remove the obligation to make a true-up payment in accordance with the contract), the IRS may make appropriate allocations in the year the true-up is or would have been triggered to produce results consistent with the unmodified contract or otherwise to reflect an arm's length result.

Victims of Michigan Severe Storms, Flooding and Tornadoes Granted Tax Relief

MI-2021-01

The president has declared a federal disaster area in Michigan. The disaster is due to severe storms, flooding and tornadoes that began on June 25, 2021. The disaster area includes Washtenaw and Wayne counties.

Taxpayers who live or have a business in the disaster area may qualify for tax relief.

Michigan Filing Deadlines Extended

The IRS extended certain deadlines falling on or after June 25, 2021, and before November 1, 2021, to November 1, 2021. This extension includes filing for most returns, including:

- individual, corporate, estate and trust income tax returns;

- partnership and S corporation income tax returns;
- estate, gift and generation-skipping transfer tax returns;
- the Form 5500 series returns;
- annual information returns of tax-exempt organizations, and
- employment and certain excise tax returns.

However, the extension does not include information returns in the Form W-2, 1094, 1095, 1097, 1098, or 1099 series or Forms 1042-S, 3921, 3922 or 8027.

Michigan Payment Deadlines Extended

Also, the relief includes extra time to make certain tax payments. This includes

estimated tax payments due on or after June 25, and before November 1, 2021. Further, taxpayers have until November 1, to perform other time-sensitive actions due on or after June 25, and before November 1, 2021.

The IRS excused late penalties for employment and excise tax deposits due on or after June 25 and before July 12, 2021. But, taxpayers were required to make the deposits by July 12, 2021.

Casualty Losses

Affected taxpayers can claim disaster-related casualty losses on their federal income tax return. Taxpayers may get relief by claiming their losses on their 2020 or 2021 return. Individuals may deduct personal property losses

not covered by insurance or other reimbursements.

Taxpayers claiming a disaster loss on their 2020 or 2021 return should write the disaster designation “Michigan - Severe Storms, Flooding and Tornadoes” at the top of the return. This will allow the IRS to speed refund processing.

Also, the IRS will provide affected taxpayers with copies of prior year returns without charge. To get this expedited service, taxpayers should add the disaster designation at the top of Form 4506, Request for a Copy of Tax Return, or Form 4506-T, Request for Transcript of Tax Return, and submit it to the IRS.

2.2 Million EIPs Disbursed Under American Rescue Plan

The IRS, Treasury and Bureau of the Fiscal Service announced disbursing more than 2.2 million additional Economic Impact Payments (EIPs) under the American Rescue Plan (ARP) (P.L. 117-2). The IRS will continue to disburse Economic Impact Payments on a weekly basis. Ongoing payments will be sent to eligible taxpayers for whom the Service previously did not have information to issue a payment but who recently filed a tax return, as well to people who qualify for plus-up payments.

The IRS has provided an online Non-Filer tool to allow individuals who were not required to file (and not filed) a return for 2020 to file a simplified tax return. Taxpayers can check the Get My Payment tool, at <https://www.irs.gov/coronavirus/get-my-payment>, to see the payment status of these payments. Additional information on EIPs is available at <https://www.irs.gov/coronavirus/economic-impact-payments>.

IR-2021-157

Security Summit Launches “Protect Your Clients; Protect Yourself” Summer Campaign; Benefits of Multifactor Authentication Highlighted

IR-2021-155

The Security Summit partners launched the annual 2021 “Protect Your Clients; Protect Yourself” summer campaign with the theme “Boost Security Immunity: Fighting Against Identity Theft”. Further, the IRS, state tax agencies and the tax industry have urged tax professionals to step up their efforts to protect client data and to use multi-factor authentication to protect them against identity and data theft.

“Using the multi-factor authentication feature available on tax preparation products is one of the easiest and cheapest security measures any tax pro can

take. It’s offered for free by the tax software providers. As people continue to get vaccines, we urge tax professionals as well as taxpayers to boost their security immunity and help in the battle against identity theft,” IRS Commissioner Chuck Rettig remarked.

Based on reports to the IRS in 2020, many tax professionals whose client data was stolen failed to use multifactor authentication and the feature could have prevented some of the thefts. Besides multifactor authentication, tax professionals should also use:

- anti-virus software for scanning existing files and drives on computers and mobile phones;

- a firewall to shield digital devices from external attacks;
- backup software/services to protect data;
- drive encryption to secure computer locations where sensitive files are stored; and
- secure Virtual Private Networks.

The IRS has also recommended tax professionals to create a data theft response plan, which includes contacting the IRS Stakeholder Liaisons to report a theft. Finally, tax professionals can get help with security recommendations by reviewing IRS Publication 4557 and Identity Theft Central pages, at <https://www.irs.gov/identity-theft-central>.

TAX BRIEFS

Corporations

A business entity was granted a 60-day extension to file an amended tax return for electing the safe harbor treatment of its success-based fees under Rev. Proc. 2011-29, I.R.B. 2011-18, 747, to deduct a portion of success-based fees it incurred as part of an acquisition transaction. An

acquirer company had acquired all the issued and outstanding stock of the taxpayer via acquisition of the outstanding equity of the taxpayer’s former common parent company. As a result of the acquisition transaction, the parent company’s consolidated return group terminated and its entities, including the taxpayer, joined

the acquirer company’s consolidated return group. The taxpayer had engaged a tax advisor to prepare its tax returns who inadvertently failed to include the required election statements. 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 202129002

Deductions

Taxpayers failed to establish that they could claim Schedule F gross receipts and expense deductions related to a cannabis venture. The taxpayers failed to produce credible evidence to support deductions for greenhouse rent, utilities, and depreciation. Adequate records to support car and truck expenses was also not produced. No evidence was submitted to establish that the venture received gross receipts. The taxpayers were liable for accuracy related penalties.

Berger, TC, Dec. 61,901(M)

Liens and Levies

The Court of Appeals for the Federal Circuit affirmed that the Federal Claims Court lacked jurisdiction over an individual's claim. On appeal, the Court of Appeals for the Federal Circuit found that the taxpayer identified no other basis for the Claims Court to exercise jurisdiction over his claim. The Claims Court concluded that it lacked jurisdiction to hear the taxpayer's tax refund claim because the taxpayer failed to satisfy the first prerequisite to tax refund jurisdiction, the full payment rule. Moreover, the Claims Court lacked jurisdiction over the taxpayer's wrongful levy claim because exclusive jurisdiction lied in the U.S. District Court.

Schroeder, CA-FC, 2021-2ustc ¶50,189

Loss Deductions

An individual was denied a deduction from a failed investment. The taxpayer investment in two limited liability companies (LLCs) that financed films. The taxpayer later abandoned his interests in the LLCs and claimed a refund for losses on his previously-filed tax returns. The losses could not be carried back because the taxpayer's investments were capital assets. The taxpayer was a passive investor who lacked any control over the LLCs' assets or business. Also, the losses were not the result of operating a trade or business.

Swartz, DC N.Y., 2021-2ustc ¶50,195

Offer-in-Compromise

An IRS Settlement Officer's (SO's) decision to reject an estate's Offer-In-Compromise (OIC) and sustain the IRS' lien action was not abuse of discretion. The SO's actions were not arbitrary or capricious, especially where the record

showed that the SO acted diligently in considering the estate's concerns by consulting with the IRS' Collection Division and Office of Chief Counsel in reaching his conclusion.

Lee, Est., TC, Dec. 61,905(M)

S Corporations

An S corporation was granted a 120-day extension to file Form 8869, Qualified Subchapter S Subsidiary Election, to elect to treat its subsidiary as a qualified subchapter S subsidiary (QSub) under Code Sec. 1361. The taxpayer inadvertently failed to timely file Form 8869.

IRS Letter Ruling 202128003

Summons

An order of enforcement of summonses was rightly issued to a married couple as part of a criminal investigation. The IRS was investigating the taxpayers' quarterly and annual tax returns, and the summonses sought records for the same. The taxpayers failed to disprove the government's prima facie case for enforcement and did not meet the burden necessary to demonstrate an abuse of process.

Gaetano, CA-6, 2021-2ustc ¶50,193

Tax-Exempt Organizations

An entity did not qualify for tax exempt status under Code Sec. 501(a). The taxpayer did not qualify for exemption under Code Sec. 501(a) because it failed to demonstrate that it operated exclusively for charitable, scientific or other exempt purposes. The entity's intended activities to design and to construct prototype machinery were the type of activities excluded from the definition of scientific research.

New World Infrastructure Organization, TC, Dec. 61,904(M)

In each of three cases, an organization's request for tax-exempt status were denied under Code Sec. 501(c)(3). In the first case, the organization promoted various civic activities for the betterment of city. The second organization developed and distributed open source software, organized conferences on open source software and participated in government and industry funded research and development programs. Further, the third organization provided affordable research tools. However, all three organizations were neither organized nor operated exclusively for tax-exempt purposes and they worked for substantial nonexempt purposes.

Therefore, the requirements of the organizational and operational tests were not met.

IRS Letter Ruling 202129015; IRS Letter Ruling 202129016; IRS Letter Ruling 202129017

Tax Refunds

The district court denied the government's motion to dismiss a complaint regarding tax refunds. The company (taxpayer) submitted an amended return that stated an overpayment and requested that amount to be refunded. The amended return was sufficient to state a claim for relief.

Premier Tech, Inc., DC Utah, 2021-2ustc ¶50,191

The district court denied the government's motion to dismiss a complaint regarding a tax refund that was disallowed by the IRS. The government waived the specificity requirements of formal notice by the taxpayer under Reg. §301.6402(b)(1) when it investigated the refund claim and disallowed it on its merits. The taxpayer's claim was dismissed for failure to state a claim, based insufficient facts, but leave to amend the claim was granted.

Intermountain Electronics, Inc., DC Utah, 2021-2ustc ¶50,192

Theft Losses

Taxpayers were not entitled to a passthrough theft loss deduction stemming from a Ponzi scheme involving the solicitation of loans for short-term promissory notes. The taxpayers failed to establish the value of the notes before the loss so could not substantiate the deduction. The taxpayers also failed to establish that there was no reasonable prospect of recovery. Finally, the safe harbor provision of Rev. Proc. 2009-20 for taxpayers who experience losses from criminally fraudulent investment schemes did not apply. The taxpayers were not qualified investors with qualified investments.

Vennes, TC, Dec. 61,906(M)

Unreported Income

A married couple and their law corporation, which was taxed as a C Corporation, had unreported gross receipts and unreported dividend income for numerous tax years at issue. The taxpayers' law corporation marketed six tax-reduction strategies that produced millions in revenue but it paid no income tax for years.

Ernest S. Ryder & Associates, Inc., TC, Dec. 61,900(M)