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Sen. Schumer Targets Build Back Better Passage Before Christmas

Senate Majority Leader Charles Schumer is still targeting passage of the Build Back Better Act before the end of the year, although it becomes more challenging to meet that deadline as each day passes.

In a December 6 letter to his Democratic colleagues in the Senate, Schumer (D-N.Y.) said that the "goal in the Senate is to pass the legislation before Christmas and get it to the president's desk."

Schumer said that various committees are currently working on technical edits and ensuring that bill (H.R. 5376), as passed by the House of Representatives on November 19, conforms to Senate rules for passing a reconciliation bill. However, it is unlikely that the bill will move to the floor without some substantive changes as Sen. Joe Manchin (D-W. Va.) has not endorsed the bill, citing concerns on some of the provisions including tax and climate change proposals. With an even split among the Senate membership and no Republicans expected to vote for passage, Democrats must have their entire caucus on board to pass the bill, with Vice President Harris (D) casting the tiebreaking vote.

Tax provisions addressing the deductions for state and local taxes on federal income tax returns also raised concerns among some Senate Democrats, setting the stage for further changes that would extend the time needed to get final passage and send the bill to the White House.

Once all the changes are made, the Congressional Budget Office will need to analyze the revenue and spending provisions in the final version and issue a score, a process that could take up to a few weeks.

If the Senate version has any substantive changes from the version that passed in the House, that would add time to getting it to the president's desk for signature, as the House would need to either vote on the version passed by the Senate or hold a conference committee to work out the differences between the two versions, sending a new version back to each chamber for passage.

Schumer also highlighted a number of other near-term legislative priorities, including addressing the debt limit and passing voting rights legislation and the National Defense Authorization Act, all of which when combined with the work still needed on Build Back Better before it can be voted on, makes passage before Christmas a significant challenge.

IRS Guidance on Retroactive Termination of COVID-19 Employee Retention Credit

Notice 2021-65

The IRS has issued guidance for employers on the retroactive termination of the COVID-19 employee retention credit against the employer's share of Medicare tax. The Infrastructure Investment and Jobs Act (P.L. 117-58) amended Code Sec. 3134 so that for most employers the credit applies only to wages paid before October 1, 2021. If the employer is a recovery startup business, the credit continues to apply to wages paid before January 1, 2022.

The guidance applies to employers that:

- paid wages after September 30, 2021,
- either received an advance payment of the credit for those wages, or reduced employment tax deposits in anticipation of the credit for the fourth quarter of 2021, but
- are ineligible for the credit due to the change in the law.

Advance Payments

Employers that are not recovery startup businesses but received advance payments of the employee retention credit for fourth quarter wages of 2021 can avoid failure to pay penalties if they repay those amounts by the due date of their applicable employment tax returns. Failure to repay the advance payment by the due date may result in the IRS imposing failure to pay penalties.

Reduced Employment Tax Deposits

Employers that reduced deposits on or before December 20, 2021, for wages paid during the fourth calendar quarter of 2021 in anticipation of the employee retention credit but are not recovery startup businesses will not be subject to a failure to deposit penalty for the retained deposits if they:

- reduced deposits in anticipation of the credit, consistent with the rules in Notice 2021-24;
- deposit the amounts initially retained in anticipation of the credit on or before the relevant due date for wages paid on December 31, 2021, regardless of whether the employer actually pays wages on that date; and
- report the tax liability resulting from the termination of the credit on the applicable employment tax return or schedule that includes the period from October 1, 2021, through December 31, 2021.

Failure to Deposit Penalty Waiver

Due to the termination of the employee retention credit for wages paid in the fourth quarter of 2021 for employers that are not recovery startup businesses, the IRS will not waive failure to deposit penalties for employers that reduce deposits in anticipation of the employee retention credit after December 20, 2021.

Reasonable Cause Relief

Employers that do not qualify for relief under this guidance can reply to an IRS penalty notice with an explanation. The IRS will consider reasonable cause relief.

Effect on Other Documents

This guidance modifies Notice 2021-49, IRB 2021-34, 316, and Notice 2021-24, IRB 2021-18, 1122.

IRS Releases New Form 8918, Material Advisor Disclosure Statement

The IRS has released a new version of Form 8918, Material Advisor Disclosure Statement, to include 2D barcodes. After June 1, 2022, the IRS will accept only the latest version of Form 8918 (Rev. November 2021). The IRS will accept prior versions of Form 8918 through June 1, 2022. After that date, the IRS will reject prior versions of the form. The IRS would accepts completed Form 8918 and related attachments by fax to 844-253-5607. Alternatively, Form 8918 may be mailed to: Internal Revenue Service, OTSA Mail Stop 4915, 1973 Rulon White Blvd., Ogden, UT 84201. Taxpayers may refer to this statement for more information about Form 8918.

Retirees Reminded to Take Required Minimum Distributions by December 31

IR-2021-245

The IRS has reminded retirement plan participants and individual retirement account owners that required minimum distributions (RMDs) should be taken by December 31. Further, individuals who reached 70 1/2 in 2019, (70th birthday was June 30, 2019 or earlier) and did not have an RMD due for 2020, will have to take one by December 31, 2021. Individuals who reach 72 in 2021 (and their 70th

REFERENCE KEY

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

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birthday was July 1, 2019 or later) have their first RMD due by April 1, 2022.

The required distribution rules apply to:

- Owners of traditional Individual Retirement Arrangements (IRAs)
- Owners of traditional Simplified Employee Pension (SEP) IRAs
- Owners of Savings Incentive Match Plans for Employees (SIMPLE) IRAs
- Participants in various workplace retirement plans, including 401(k), Roth 401(k), 403(b) and 457(b) plans

Roth IRAs do not require distributions while the original owner is alive. The RMD is based on the taxpayer's life expectancy and their account balance. Often, a trustee will use Form 5498, IRA Contribution Information, to report the RMD to the recipient. For most taxpayers, life expectancy used to calculate the RMD is based on Uniform Lifetime Table III in Publication 590-B, Distributions from IRAs. Individuals can use online worksheets to figure the RMD.

An IRA owner or beneficiary who received an RMD in 2020 had the option of returning it to their account or other qualified plan to avoid paying taxes on that distribution. A 2020 RMD that qualified as a coronavirus-related distribution may be repaid over a 3-year period or have the taxes due on the distribution spread over three years. A 2020 withdrawal from an inherited IRA could not be repaid to the inherited IRA but may be spread over three years for income inclusion. Taxpayers can find frequently asked questions, forms and instructions and easy-to-use tools at IRS.gov.

IRS Seeks Applicants for Electronic Tax Administration Advisory Committee

The IRS announced seeking qualified applicants for nomination to the Electronic Tax Administration Advisory Committee (ETAAC). The IRS was looking for up to 10 qualified individuals who will serve three-year terms beginning in September 2022. Applications would be accepted through January 31, 2022. Further, applicants would need experience in such areas as state tax administration, cybersecurity and information security, tax products and implementation of customer service initiatives.

The nominations of qualified applicants can be made by letter and received by themselves or from organizations. Applicants should complete the ETAAC application. The ETAAC is an organized public forum for discussion of issues in electronic tax administration, such as prevention of identity theft and refund fraud.

IR-2021-244

Fifth Circuit: FBAR Penalty Applies Per Account, Not Per Form

A. Bittner, CA-5, 2021-2 USTC ¶50,242

The U.S. Court of Appeals for the Fifth Circuit has held that each failure to report a qualifying foreign account on the annual Report of Foreign Bank and Financial Accounts (FBAR) constituted a separate reporting violation subject to penalty. This means that the penalty applies on a per-account basis, not a per-form basis. The Fifth Circuit disagreed with a recent Ninth Circuit panel that adopted a per-form interpretation (*J. Boyd,* CA-9, 2021-1 USTC ¶50,112).

Background

U.S. citizens and residents must keep records and/or file reports when the person makes a transaction or maintains a relation for any person with a foreign financial agency (31 USC 5314). Each person with a financial interest in a financial account in a foreign country must report the relationship to the IRS for each year the relationship exists by providing specified information on and filing the FBAR. The FBAR generally must be filed by June 30 of each calendar year for foreign financial accounts over $10,000 maintained during the previous calendar year (31 C.F.R. §§1010.350, 1010.306). If the person fails to file the FBAR, the IRS can impose a penalty of up to $10,000 for non-willful violations, unless the violation was due to reasonable cause (31 USC 5321).

Here, the taxpayer non-willfully failed to report his interests in multiple foreign bank accounts on annual FBAR forms for several years. The government assessed $2.72 million in civil penalties against the taxpayer: $10,000 for each unreported account each year for five years. The district court found the taxpayer liable and denied his reasonable cause defense, but reduced the assessment to $50,000 because it determined that the $10,000 maximum penalty attached to each failure to file an annual FBAR, not to each failure to report an account.

FBAR Penalty Per Account

The Fifth Circuit ruled that the text, structure, history, and purpose of the relevant statutory and regulatory provisions showed that the "violation" of 31 USC 5314 contemplated by the 31 USC 5321 penalty was the failure to report a qualifying account, not the failure to file an FBAR. Therefore, the $10,000 penalty cap applied on a per-account basis, not per-form basis.

The circuit court agreed with the government that the district court erred in determining what constituted a "violation" under 31 USC 5314 by focusing on the regulations under section 5314 to the exclusion of section 5314 itself. Section 5314 does not create the obligation to "file a single report", stated the Fifth Circuit, but instead gives the Treasury Secretary discretion to prescribe how to fulfill the statute's requirement of reporting qualifying accounts.

The circuit court observed that by authorizing a penalty for any "violation of … any provision of section 5314," as opposed to the regulations under section 5314, section 5314 "naturally reads" as referring to the statutory requirement to report each account, not the regulatory requirement to file FBARs in a particular manner. Further, the circuit court stated that the reasonable cause exception for non-willful violations was framed in terms of "the transaction" and "the account," and thus it also "naturally reads" as excusing the failure to report a transaction or account, not the failure to file an FBAR.

Reasonable Cause Claim Rejected

The Fifth Circuit concluded that the taxpayer, a sophisticated business professional, did not exercise ordinary business care and prudence in failing to fulfill his reporting obligations. The taxpayer conceded that he put no effort into ascertaining and fulfilling his reporting obligations, and the court observed that his business savvy made his failure to inquire about his reporting obligations even more unreasonable.

Affirming in part, reversing in part, vacating and remanding a DC Texas opinion, 2020-2 USTC ¶50,144.

IRS Prepares Taxpayers for Upcoming Filing Season

IR-2021-243

The IRS has encouraged taxpayers to take important actions this month to help them file their tax returns in 2022, including special steps related to Economic Impact Payments and advance Child Tax Credit payments. As a part of a series of reminders to help taxpayers get ready for the upcoming tax filing season, the IRS highlighted a special page the outlines the steps taxpayers can take to make the tax filing season easier.

Advance Child Tax Credit Payments

The IRS advised families who received advance payments to compare the advance Child Tax Credit payments that they received in 2021 with the amount of the Child Tax Credit that they can properly claim on their 2021 tax return. Taxpayers who received less than the amount for which they're eligible can claim a credit for the remaining amount of Child Tax Credit on their 2021 tax return. Similarly, taxpayers who received more than the amount for which they're eligible may need to repay some or all of the excess payment when they file. Additionally, eligible families who did not get monthly advance payments in 2021 can still get a lump-sum payment by claiming the Child Tax Credit when they file a 2021 federal income tax return next year. This includes families who don't normally need to file a return.

The IRS announced that it would send Letter 6419 in January 2022 with the total amount of advance Child Tax Credit payments taxpayers received in 2021. Taxpayers should keep this and any other IRS letters about advance Child Tax Credit payments with their tax records.

Economic Impact Payments and Recovery Rebate Credit

Individuals who failed to qualify for the third Economic Impact Payment (EIP) or did not receive the full amount may be eligible for the Recovery Rebate Credit based on their 2021 tax information. Accordingly, these individuals will need to file a 2021 tax return, even if they do not usually file, to claim the credit. Further, individuals will also need the amount of their third EIP and any Plus-Up Payments received to calculate their correct 2021 Recovery Rebate Credit amount when they file their tax return.

Charitable Deduction Changes

Finally, taxpayers who do not itemize deductions may qualify to take a charitable deduction of up to $600 for married taxpayers filing joint returns and up to $300 for all other filers for cash contributions made in 2021 to qualifying organizations.

FinCEN Issues Proposed Rules for Reporting Under Corporate Transparency Act

A proposed rule by the Financial Crimes Enforcement Network (FinCEN) division of the Treasury Department that outlines the reporting requirements for beneficial ownership information could also serve to help combat tax evasion.

The notice of proposed rulemaking (NPRM), published December 8 in the Federal Register, enacts provisions of the Corporate Transparency Act that was passed as part of the National Defense Authorization Act for fiscal year 2021. It outlines who must report beneficial ownership information, when they must report, and what information they must provide.

In highlighting the need for these regulations, Treasury Secretary Janet Yellin said that current laws make the United States a haven for money laundering and tax fraud.

"Since Andrew Jackson, individual states have been free to set their own rules for incorporating companies, and since the early 20th Century, some states have allowed anybody to establish a shell company without disclosing who really owns it, what we term 'the beneficial owner.' This is about to change," she said December 9 during the State Department-sponsored Summit for Democracy.

The NPRM states that proposed regulations "describe highly useful information that reporting companies are encouraged, but not required, to provide. This additional information would support efforts by government authorities and financial institutions to prevent money laundering, terrorist financing, and other illicit activities such as tax evasion."

FinCEN noted in the NPRM that a "Treasury study based on a statistically significant sample of adjudicated IRS cases from 2016–2019 found legal entities were used in a substantial proportion of the reviewed cases to perpetrate tax evasion and fraud. According to federal prosecutors and law enforcement, large-scale schemes that generate substantial proceeds for perpetrators and smaller white-collar cases alike routinely involve shell companies."

To help combat this, FinCEN is looking for more clear information on who the beneficial owners are. According to a fact sheet, the proposed rules are expected to cover a wide range of domestic entities created by a filing of a document with a secretary of state or similar office under the law of a state or Indian tribe, including "limited liability partnerships, limited liability limited partnerships, business trusts (a/k/a/ statutory trusts or Massachusetts trusts), and most limited partnerships, in addition to corporations and limited liability companies (LLCs), because such entities appear typically to be created by a filing with a secretary of state or similar office."

The NPRM proposes to define a beneficial owner as an individual who either exercises substantial control over a reporting company or owns or controls at least 25 percent of the ownership interest of a reporting company.

Beneficial ownership information "can add valuable context to financial analysis in support of law enforcement and tax investigations," the NPRM states.

Comments on the NPRM are due February 7, 2022.

FinCEN also released an Advance Notice of Proposed Rulemaking (ANPRM) to request public comments on a potential rule to address the vulnerability of the U.S. real estate market to money laundering and other illicit activity. The systemic money laundering vulnerabilities presented by the U.S. real estate sector, and consequently, the ability of illicit actors to launder criminal proceeds through the purchase of real estate, threatens U.S. national security and the integrity of the U.S. financial system. The ANPRM also reflects the concerns highlighted in the newly released U.S. Government Strategy on Countering Corruption. More information can be found at https://www.fincen.gov/news/news-releases/fincen-launches-regulatory-process-new-real-estate-sector-reporting-requirements.

TAX BRIEFS

Innocent Spouse Relief

The Tax Court had jurisdiction for some of the tax years in issue regarding innocent spouse relief where the full payment of the tax liability was not made. For the remaining tax years, the district court had jurisdiction because there was a valid refund suit. The taxpayer (wife) filed Form 8857, Request for Innocent Spouse Relief, requesting relief from joint liability and waited six months, and filed a petition seeking that relief.

Coggin, TC, Dec. 61,961

Practice Before IRS

The IRS's Office of Professional Responsibility has published the names of attorneys, certified public accountants (CPAs), enrolled agents, enrolled actuaries, enrolled retirement plan agents and appraisers who have been disbarred from practice before the IRS, have consented to suspensions from practice, have been placed under suspension from practice under the expedited proceeding provisions, or have consented to the issuance of a censure.

Announcement 2021-16

Supreme Court Docket

A petition for review was denied in the following case affirming a district court's decision to grant summary judgment in favor of the government, enforcing the IRS assessment of a penalty for a willful violation.

Rum, CA-11, 2021-1 USTC ¶50,132