



# FEDERAL TAX WEEKLY

## INSIDE THIS ISSUE

GAO: IRS Faced Multiple Challenges During 2021 Tax Filing Season .....	1
Recovery Rebate Credit FAQs Updated .....	1
Nonconventional Source Fuel Reference Price for 2021 Issued.....	2
Inflation Adjustment and Reference Prices for Renewable Energy Production Credit Released.....	2
Temporary Relief from Superfund Chemical Taxes Penalty Provided.....	3
Letters Going Out to Taxpayers Missing Qualified Opportunity Fund Information .....	3
IRS to Send Notices to Help Payers Correct Backup Withholding Errors.....	4
Employment Tax Relief Denied: Founder Was a Statutory Employee ..	4
Employment Tax Relief Denied: Nurses Were Improperly Characterized as Independent Contractors .....	5
Taxpayers Urged to Use IRS Tax Withholding Estimator Tool.....	5
IRS Dispels Common Tax Refund Myths .....	6
IRS Reminds Taxpayers of Steps to Take in Identity Theft Cases .....	6
Tax Briefs .....	7

## GAO: IRS Faced Multiple Challenges During 2021 Tax Filing Season

*GAO Report: Tax Filing—2021 Performance Underscores Need for IRS to Address Persistent Challenges (GAO-22-104938)*

The Government Accountability Office (GAO) has issued a report on IRS' performance during the 2021 tax filing season. The report assessed IRS' performance during the 2021 filing season on: (1) processing individual and business income tax returns; and (2) providing customer service to taxpayers. GAO analyzed IRS documents and data on filing season performance, refund interest payments, hiring and employee overtime. GAO also interviewed cognizant officials.

### Report Findings

GAO found that the IRS faced multiple challenges and struggled to respond to an unprecedented workload that included delivering COVID-19 relief. The IRS began the 2021 filing season with a backlog of 8 million individual and business returns from the prior year. The IRS reduced the backlog of prior year returns, but in December 2021, had about 10.5 million returns to process from 2021. The IRS suspended and reviewed 35 million returns with errors primarily due to new or modified tax credits. GAO found that some categories of errors occur each year, however, the IRS does not assess the underlying causes of taxpayer errors on returns. Additionally, the IRS paid nearly \$14 billion in refund interest in the last 7 fiscal years, with \$3.3 billion paid in fiscal year 2021. However, the IRS does not identify, monitor, and mitigate issues contributing to refund interest payments.

### Recommendations

GAO made six recommendations, including that the IRS should assess reasons for tax return errors and refund interest payments and take action to reduce them; modernize its "Where's My Refund" application; address its backlog of correspondence; and assess its in-person service model. The IRS agreed with four recommendations and disagreed with two. The IRS said its process for analyzing errors is robust and that the amount of interest paid is not a meaningful business measure.

## Recovery Rebate Credit FAQs Updated

*FS-2022-26; IR-2022-82  
 FS-2022-27; IR-2022-83*

The IRS has updated the frequently asked questions (FAQs) for the 2020 and 2021 Recovery Rebate Credit (RRC).

## Updates to 2020 FAQs

The FAQs for 2020 update Topic E, Receiving the Credit on a 2020 tax return and: (1) modify Questions 1, 4, 5, and 8; and (2) add new Questions 9 and 10. Individuals who did not qualify for or did not receive the full amount of the third Economic Impact Payment (EIP) may be eligible to claim the 2021 RRC on their 2021 tax year information. Third EIPs are different than the monthly advance Child Tax Credit payments that the IRS disbursed from July through December 2021.

## Updates to 2021 FAQs

The 2021 FAQs are updated for Questions 1, 5, 8, and 9 in Topic F: Receiving the Credit on a 2021 Tax Return. Individuals who did not qualify for or did not receive the full amount of the third Economic Impact Payment (EIP) may be eligible to claim the 2021 RRC based on their 2021 tax year information. Further, third EIPs Payments are different than the monthly advance Child Tax Credit payments that the IRS disbursed from July through December 2021.

## Filing Requirements

Most eligible individuals already received their EIPs and won't include any information about their payment when they

## Nonconventional Source Fuel Reference Price for 2021 Issued

The IRS has published the reference price under Code Sec. 45K(d)(2)(C). The credit period for the nonconventional source production credit under Code Sec. 45K ended on December 31, 2013, for facilities producing coke or coke gas (other than from petroleum based products). However, the reference price continues to apply in determining the amount of the enhanced oil recovery credit under Code Sec. 43, the marginal well production credit for qualified crude oil production under Code Sec. 45I, and the percentage depletion in case of oil and natural gas produced from marginal properties under Code Sec. 613A. The reference price for calendar year 2021 is \$65.90.

*Publication of Nonconventional Source Production Credit Reference Price for Calendar Year 2021*

file. However, individuals who are missing stimulus payments should review the information on the RRC page to determine their eligibility and whether they need to claim a RRC for tax year 2021. To claim any remaining credit for 2021, eligible individuals must file a 2021 tax return. Taxpayers who did not receive all of their first and second EIPs in 2020 can receive those amounts only by filing a 2020 tax return or amending a previously filed return and claiming the 2020 RRC.

## 2020 and 2021 Information Must Be Separate

Filers must not mix information from their 2020 and 2021 tax years. They

should not include any information regarding the first and second EIPs received in 2020 or the 2020 RRC on their 2021 return. They will need the total of the third payment received to accurately calculate the 2021 RRC when they file their 2021 tax returns. Individuals can view this information in their Online Account. Finally, the IRS reminded taxpayers that the fastest way to receive a tax refund is to file electronically and have it direct deposited into a financial account. Taxpayers with an income of \$73,000 or less can file their federal tax returns electronically for free through the IRS Free File Program.

## Inflation Adjustment and Reference Prices for Renewable Energy Production Credit Released

*Credit for Renewable Electricity Production and Publication of Inflation Adjustment Factor and Reference Price for Calendar Year 2022*

The IRS has published inflation adjustment factor and reference prices for

determining the credit for renewable electricity production for calendar year 2022 sales of kilowatt hours of electricity produced in the U.S. or a U.S. possession from qualified energy resources. For calendar year 2022, the credit for refined coal

production and Indian coal production have expired.

The inflation adjustment factor for qualified energy resources is 1.8012. The reference price for facilities producing electricity from wind is 4.09 cents per kilowatt

### REFERENCE KEY

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

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hour. The reference prices for facilities producing electricity from closed-loop biomass, open-loop biomass, geothermal energy, municipal solid waste, qualified hydropower production, and marine and hydrokinetic renewable energy have not been determined for calendar year 2022.

## Phaseout Limits

For electricity sold during calendar year 2022, the renewable electricity production credit is not subject to a phaseout under Code Sec. 45(b)(1) for electricity produced from wind. This is because the 2022 reference price for electricity produced from wind, 4.09 cents per kilowatt hour, does not exceed 8 cents multiplied by the inflation adjustment factor (1.8012). The phase-out of the credit also does not apply to electricity sold in 2022 and produced from closed-loop biomass, open-loop biomass, geothermal energy, municipal solid waste, qualified hydropower production, and marine and hydrokinetic renewable energy.

## Temporary Relief from Superfund Chemical Taxes Penalty Provided

The IRS has provided temporary relief for the third and fourth calendar quarters of 2022, and the first calendar quarter of 2023, regarding the failure to deposit penalties imposed by Code Sec. 6656 as those penalties relate to the Superfund chemical taxes. The Infrastructure Investment and Jobs Act (IIJA) (P.L. 117-58) (November 15, 2021) reinstated the Code Secs. 4661 and 4671 excise taxes on the Superfund chemical taxes, effective July 1, 2022. Also, during the first, second, and third calendar quarters of 2023, the IRS will not withdraw a taxpayer's right to use the deposit safe harbor rules of §40.6302(c)-1(b)(2) of the Excise Tax Procedural Regulations for failure to make required deposits of Superfund chemical taxes if certain requirements are met.

*Notice 2022-15*

## Credit Amount Adjustments

The credit for renewable electricity production for calendar year 2022 under Code Sec. 45(a) is 2.7 cents per kilowatt hour on the sale of electricity produced from the qualified energy resources of wind, closed-loop biomass, geothermal energy. The credit is 1.4 cents per

kilowatt hour on the sale of electricity produced in open-loop biomass facilities, small irrigation power facilities, landfill gas facilities, trash facilities, qualified hydropower facilities, and marine and hydrokinetic renewable energy facilities.

# Letters Going Out to Taxpayers Missing Qualified Opportunity Fund Information

*IR-2022-79*

Taxpayers who may need to take additional actions related to Qualified Opportunity Funds (QOFs) should begin receiving letters from the IRS in April. Taxpayers who attached Form 8996, Qualified Opportunity Fund, to their return may receive Letter 6501, Qualified Opportunity Fund (QOF) Investment Standard. This letter lets them know that information needed to support the annual certification of investment standard is missing, invalid or the calculation isn't supported by the amounts reported. If they intend to maintain their certification as a QOF, they may need to take

additional action to meet the annual self-certification of the investment standard requirement.

To correct the annual maintenance certification of the investment standard, taxpayers should file an amended return or an administrative adjustment request (AAR). If an entity that receives the letter fails to act, the IRS may refer its tax account for examination. Additionally, taxpayers may receive Letter 6502, Reporting Qualified Opportunity Fund (QOF) Investments, or Letter 6503, Annual Reporting Of Qualified Opportunity Fund (QOF) Investments. These letters notify them that they may not have properly followed the instructions for Form 8997,

Initial and Annual Statement of Qualified Opportunity Fund (QOF) Investments. This may happen if it appears that they may not have properly followed the requirements to maintain their qualifying investment in a QOF with the filing of the form.

Finally, if these taxpayers intend to maintain a qualifying investment in a QOF, they can file an amended return or an AAR with a properly completed Form 8997 attached. Failure to act will mean those who received the letter may not have a qualifying investment in a QOF and the IRS may refer their tax accounts for examination.

# IRS to Send Notices to Help Payers Correct Backup Withholding Errors

IR-2022-87

The IRS informed taxpayers that it will send Notices CP2100 and CP2100A notices to financial institutions, businesses, or payers who filed certain types of information returns that do not match IRS records, beginning mid-April 2022. These information returns include:

- Form 1099-B, Proceeds from Broker and Barter Exchange Transactions
- Form 1099-DIV, Dividends and Distributions
- Form 1099-G, Certain Government Payments
- Form 1099-INT, Interest Income
- Form 1099-K, Payment Card and Third-Party Network Transactions
- Form 1099-MISC, Miscellaneous Income

- Form 1099-NEC, Nonemployee Compensation
- Form 1099-OID, Original Issue Discount
- Form 1099-PATR, Taxable Distributions Received from Cooperatives
- Form W-2G, Certain Gambling Winnings

These notices inform payers that the information return is missing a Taxpayer Identification Number (TIN), has an incorrect name or a combination of both. Each notice has a list of payees or the persons receiving certain types of income payments with identified TIN issues. Taxpayers need to compare the accounts listed on the notice with their account records and correct or update their records, if necessary. This can also include correcting backup withholding on payments

made to payees. The notices also inform payers that they are responsible for backup withholding. Payments reported on these information returns are subject to backup withholding if:

- The payer does not have the payee's TIN when making the reportable payments.
- The payee does not certify their TIN as required for reportable interest, dividend, broker and barter exchange accounts.
- The IRS notifies the payer that the payee furnished an incorrect TIN and the payee does not certify its TIN as required.
- The IRS notifies the payer to begin backup withholding because the payee did not report all of its interest and dividends on its tax return.

## Employment Tax Relief Denied: Founder Was a Statutory Employee

*The Redi Foundation, Inc., T.C. Memo. 2022-34, Dec. 62,038(M)*

A corporation was not entitled to relief from employment taxes pursuant to section 530 of the Revenue Act of 1978 because the founder of the corporation satisfied the definition of a statutory employee under Code Sec. 3121(d)(1). The founder incorporated a Code Sec. 501 tax-exempt corporation (the taxpayer) to serve as a vehicle to offer seminars on real estate development and served as a member of the board of directors and a corporate officer of the taxpayer. The founder had complete control over all aspects of the seminars and received compensation pursuant to an unwritten contract. From the taxpayer's incorporation, the taxpayer did not file any employer tax returns reporting any payments to the founder as salary or wages for services provided by or on behalf of the taxpayer as an employee.

### Statutory Employee

At trial, the taxpayer failed to produce credible evidence that the founder worked for or was engaged by the taxpayer in a capacity other than as an officer. The only items in the record that suggested a separate independent contractor relationship were the Form 1099-MISC reporting nonemployee compensation and the founder's own testimony that stated that he served the taxpayer in a dual capacity. However, the taxpayer failed to carry its burden of establishing that the founder served in a dual capacity as the court saw no clear distinction between the founder's dual roles as a corporate officer and his provision of services to the corporation.

Additionally, the record was clear that the founder performed significantly more than "minor services" for the taxpayer. Therefore, the taxpayer was not allowed to avail itself of the exception in Reg. §§31.3121(d)-1(b) and 31.3401(c)-1(f).

Further, given the weight of the evidence establishing the extensive services provided by the founder to the corporation and payments he received in the nature of compensation for those services, the court did not accept the taxpayer's characterization of the payments as royalties. Finally, the taxpayer's contention that the founder could not be its employee because the taxpayer could not control him was unconvincing. The right to control is a common law classification factor, and the taxpayer's attempt to rely on it as determinative of statutory employee status was misplaced.

### Penalties

The taxpayer was liable for additions to tax for failure to timely file the required employment tax returns and failure to timely pay the amount shown as tax in the substitute tax returns for three quarters. The taxpayer did not argue that it

had reasonable cause and submitted no credible evidence that it exercised ordinary business care and prudence in its failure to file its employment tax returns. While

the taxpayer made vague references in its post-trial briefs to having previously consulted with tax counsel regarding the tax treatment of the founder's compensation,

such statements were insufficient to establish reasonable cause as it was unsupported by evidence.

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## Employment Tax Relief Denied: Nurses Were Improperly Characterized as Independent Contractors

*Pediatric Impressions Home Health, Inc., T.C. Memo. 2022-35, Dec. 62,039(M)*

A home healthcare corporation misclassified its nurses as independent contractors. It was not entitled to relief from employment taxes pursuant to section 530 of the Revenue Act of 1978 because it failed to establish that it had maintained substantive consistency with its classification of its nurses.

The taxpayer hired nurses to provide at-home private duty nursing services to children with special needs. For the tax years at issue, the taxpayer changed its worker classification of the nurses from employees to independent contractors. Following an examination of the taxpayer's returns, the IRS determined the taxpayer had not properly classified the nurses.

### Employment Relationship

In determining the nurses' employment status, the Tax Court used a nonexhaustive list of five factors, namely: (1) the degree of control exercised by the taxpayer; (2) the degree to which the nurses' opportunity for profit or loss is determined by the taxpayer; (3) the extent of the relative investments of

the nurses and the taxpayer; (4) the permanency of the relationship; and (5) the skill and initiative required in performing the job. The taxpayer possessed and exercised significant control over the nurses, including hiring and firing, setting hours and work schedules, assigning patients, ensuring attendance at required training, mandating how the nurses reported and potentially performed their work in accordance with a patient's plan of care, and supervising the nurses. The nurses were normally hired on a permanent basis and were integral to the taxpayer's business. The nurses had no meaningful capital investment in the job as the taxpayer provided all necessary supplies and equipment. The nurses also bore no risk of loss and had no opportunity for profit outside of their wages and occasional incentive or performance bonuses, which the record did not show was common or substantial. Thus, the nurses were not in business for themselves as a matter of economic reality during the periods at issue.

### Section 530 Relief

With respect to the section 530 relief, the taxpayer had previously exercised

approximately the same amount of control over nurses that it had classified as employees as it later did over nurses it classified as independent contractors. Moreover, it even treated some nurses as employees before changing their classification to contractors. Thus, the taxpayer failed to establish that it had maintained substantive consistency with its employee classification. Furthermore, it made no attempt to address how the change in classification of several nurses satisfied the historic treatment requirement of section 530.

### Penalties

The taxpayer was subject to additions to tax, failure to deposit penalty and accuracy-related penalties. The taxpayer presented little evidence to support the finding of reasonable cause to abate either the additions to tax or the penalties. The taxpayer's administrator, president, and sole shareholder, testified that she decided to change the classification of its workers on the advice of a certified public accountant, but she failed to offer any evidence to support this claim.

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## Taxpayers Urged to Use IRS Tax Withholding Estimator Tool

*IR-2022-81*

The IRS urged taxpayers to use the IRS Tax Withholding Estimator tool (the tool) to ensure they are having the right amount of tax withheld from their pay during 2022. The tool offers workers, self-employed individuals and retirees who have wage

income a user-friendly resource for effectively tailoring the amount of income tax withheld from wages. Taxpayers can use the results from the tool to determine if they should complete a new Form W-4, Employee's Withholding Certificate, and submit it to their employer. Checking withholding tax can:

- ensure the right amount of tax is withheld and prevent an unexpected tax bill or penalty at tax time; and
  - determine whether to have less tax withheld up front, thereby boosting take-home pay and reducing any refund at tax time.
- The IRS recommends checking withholding at least once a year. For taxpayers



who have just finished filling out their 2021 returns, now is a good time to do it. Taxpayers can also use the tool right after a major life change including marriage, divorce or the birth of a child. Additionally, IRS recommends that taxpayers gather their most recent pay statements, information for other sources of income, and their

most recent income tax return to help prepare the tool's results accurately.

The IRS urged taxpayers still working on their 2021 returns to ensure they have all their year-end statements in hand before filing. This includes Letter 6419, 2021 Total Advance Child Tax Credit (AdvCTC) Payments, and Letter 6475,

Economic Impact Payment (EIP) 3 End of Year. Alternatively, taxpayers can also check their Online Account to access information on their AdvCTC payments and EIPs. Taxpayers should e-file and choose direct deposit to help with faster delivery of refunds.

## IRS Dispels Common Tax Refund Myths

IR-2022-80

The IRS addressed the following common myths about tax refunds:

- **Myth 1: Calling the IRS or visiting an IRS office speeds up a refund.** The best way to check the status of a refund is online through the "Where's My Refund?" tool. Taxpayers can also call the automated refund hotline at 800-829-1954.
- **Myth 2: Taxpayers need to wait for their 2020 return to be processed before filing their 2021 return.** Taxpayers generally will not need to wait for their 2020 return to be fully processed to file their 2021 tax returns. They should file when they are ready. Individuals with unprocessed 2020 tax returns, should enter zero dollars for last year's Adjusted Gross Income (AGI) on their 2021 tax return when filing electronically.
- **Myth 3: Taxpayers can get a refund date by ordering a tax transcript.** Ordering a tax transcript will not inform taxpayers of the timing of their tax refund, nor will it speed up a refund being processed.

Taxpayers can use a transcript to validate past income and tax filing status for mortgage, student and small business loan applications and to help with tax preparation.

- **Myth 4: "Where's My Refund?" must be wrong because there is no deposit date yet.** While the IRS issues most refunds in less than 21 days, it is possible a refund may take longer for a variety of reasons. Delays can be caused by simple errors including an incomplete return, transposed numbers, or when a tax return is affected by identity theft or fraud.
- **Myth 5: "Where's My Refund?" must be wrong because a refund amount is less than expected.** Different factors can cause a tax refund to be larger or smaller than expected. The IRS will mail the taxpayer a letter of explanation if these adjustments are made.
- **Myth 6: Calling a tax professional will provide a better refund date.** Contacting a tax professional will not speed up a refund. Tax professionals cannot move up a refund date nor do

they have access to any special information that will provide a more accurate refund date.

- **Myth 7: Getting a refund this year means there is no need to adjust tax withholding for 2022.** Taxpayers should continually check their withholding and adjust accordingly. Adjusting tax withholding with an employer is easy and using the Tax Withholding Estimator tool can help taxpayers determine if they are withholding the right amount from their paycheck.

As of the week ending April 1, the IRS has sent out more than 63 million refunds worth over \$204 billion. The IRS reminded taxpayers the easiest way to check on a refund is the "Where's My Refund?" tool. This tool can be used to check the status of a tax return within 24 hours after a taxpayer receives their e-file acceptance notification. Taxpayers should only call the IRS tax help hotline to talk to a representative if it has been more than 21 days since their tax return was e-filed, or more than six weeks since mailing their return.

## IRS Reminds Taxpayers of Steps to Take in Identity Theft Cases

FS-2022-25; IR-2022-78

The IRS reminded identity theft victims of important steps they should take to protect themselves from tax fraud. By requesting Identity Protection (IP) PINs from the Get an IP PIN tool, taxpayers can prevent thieves from claiming tax refunds in their names. An IP PIN helps prevent

the misuse of their Social Security number or Individual Taxpayer Identification Number (ITIN) on federal income tax returns. The IRS may automatically assign an IP PIN if it determines the taxpayer is a victim of tax-related identity theft.

Further, the IRS informed taxpayers how to handle tax-related identity theft. In most tax-related identity theft cases,

the IRS identifies a suspicious tax return and pulls it for review. The IRS then sends a letter to the taxpayer and won't process the tax return until the taxpayer responds. The IRS identified three types of letter it may send to taxpayer to verify their identity. If the taxpayer receives any of these letters, they don't need to file a Form 14039, Identity Theft Affidavit. Instead,

they should follow the instructions in the letter.

Additionally, the IRS explained that taxpayers may need to submit a Form 14039 if they suspect tax-related identity theft and have not heard from the IRS. The

IRS provided a list of possible tax-related identity theft situations. Lastly, the IRS informed taxpayers that they do not need to report incidents of non-tax-related identity theft to the IRS but should take steps to protect themselves against the type of

identity theft they have experienced. The IRS provided a list of potential evidence of non-tax-related identity theft. Victims of non-tax-related identity theft do not need to file Form 14039.

## TAX BRIEFS

### *Exclusions from Income*

The value of airline tickets provided to a married couple's adult relatives were not excludable from gross income as "no additional cost services" under Code Sec. 132(a)(1). Further, the tickets did not qualify as de minimis fringe benefits whose value was excludable under Code Sec. 132(a)(4).

*Mihalik, TC, Dec. 62,040(M)*

### *Generation Skipping Tax*

The IRS issued rulings on the generation skipping transfer (GST) tax consequences of a proposed merger between certain trusts. The grantors of three identical trusts proposed to merge two trusts, into the third trust. The beneficiaries in each trust were identical and the distribution, dispositive, and trustee power provisions of each trust were substantially similar, including the termination provisions. The merger would not shift a beneficial interest in the

trust to any beneficiary who occupies a lower generation than the person or persons who held the beneficial interest prior to the modification, and the modification would not extend the time for vesting of any beneficial interest in the trust beyond the period provided for in the original trust. Therefore, the proposed merger would not affect the trust's GST tax exempt status and would not cause any distributions to become subject to GST tax.

*IRS Letter Ruling 202215015*

### *Per Diem Rates*

The U.S. State Department has released a listing of maximum travel *per diem* allowances for travel in foreign areas. The rates apply to all government employees and contractors, and are effective as of April 1, 2022.

*April Maximum Travel Per Diem Allowances for Foreign Areas*

### *Tax Evasion*

The Court of Appeals for the Fifth Circuit affirmed a married couple's motion for a new trial. The taxpayers had previously been indicted on five counts of attempted tax evasion and five counts of filing false tax returns. The Court of Appeals had affirmed the taxpayers' convictions and sentences. Subsequently, the wife filed a motion for a new trial under Federal Rule of Criminal Procedure 33 based on alleged newly discovered evidence of testimony from their attorney and the subsequent tax fraud convictions of their accountant and attorney. However, the district court determined that the new evidence was insufficient to warrant a new trial.

*C. Bolton, CA-5 2022-1 ustc ¶150,136*