



FEDERAL TAX WEEKLY

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Tax Gap Closer to \$1 Trillion – IRS Commissioner Rettig

The gap between taxes owed and taxes collected by the Internal Revenue Service could be approaching \$1 trillion, IRS Commissioner Charles Rettig told members of the House Committee on Oversight and Reform’s Government Operations Subcommittee as he advocated for more funding for the agency.

During an April 21, 2022, hearing of the subcommittee, Rettig noted updated tax gap figures for the three-year period of 2012-2014, along with projections through 2019, will be released this summer. However, those projections do not account for the growth in cryptocurrency, which could be widening the tax gap beyond the current calculations and projections.

“What is not in those estimates is virtual currencies, and there is over a \$2 trillion market cap for virtual currencies,” Rettig testified before the committee. “Last year, there was over \$14 trillion in transactions in virtual currencies and the United States, if you view relative GDP, is somewhere between 35 and 43 percent of that \$14 trillion.”

He said that knowledge generated from John Doe summons activity in these space reveals “that the compliance issues in the virtual currency space are significantly low.”

“The tax gap estimates that the IRS prepares are based on information that the IRS is able to determine, not information that we know is out there but we are not able to determine,” Rettig said, adding that the agency is trying to get more information about virtual currencies through adding questions on the Form 1040, first on Schedule L and then moving it to page one of the Form 1040 last year “to try to enhance compliance.”

He added that the agency is looking to get more into that area.

The comments on the tax gap and the need to be able to tackle compliance in the cryptocurrency space underscores the agency’s need for more funding as requested in the White House budget request for fiscal year 2023.

In his written testimony submitted to the committee, Rettig noted that the agency “can no longer audit a respectable percentage of large corporations, and we are often limited in the issues reviewed among those we do audit. These corporations can afford to spend large amounts on legal counsel, drag out proceedings and bury the government in paper. We are, quite simply, ‘outgunned’ in our efforts to assure a high degree of compliance for these taxpayers.”

He wrote that it is “unacceptable” that corporations and the wealthiest individuals have such an advantage to push back on the nation’s tax administrator.

“We must receive the resources to hire and train more specialists across a wide range of complex areas to assist with audits of entities (taxable, pass-through and tax-exempt) and individuals (financial products; engineering; digital assets; cross-border activities; estate and gift planning; family offices; foundations; and many others),” his written testimony states.

Rettig wrote that the agency current has fewer than 2,000 revenue officers, “the lowest number of field collection personnel since the 1970s,” to handle more than 100,000 collection cases in active inventory.

He continued: “In addition to our active inventory, we have over 1.5 million cases (more than 500,000 of which are considered high priority) awaiting assignment to these same 2,000 revenue officers. We have classified roughly 85 percent of those cases as high priority, many of which involve delinquent business employment taxes.”

The lack of funding is also hampering criminal investigations.

“Much like other operating divisions in the IRS, CI is close to its lowest staffing level in the past 30 years. With fewer agents, we have fewer cases and fewer successful convictions,” he stated in the written testimony.

Much of this also is compounded by the ancient IT infrastructure at the agency, another reason Rettig advocated during the hearing for more funding.

“Limited IT resources preclude us from building adequate solutions for efficiently matching or reconciling data from multiple sources,” he wrote. “As a result, we are often left with manual processes to analyze reporting information we receive.”

Retting specifically highlighted the Foreign Account Tax Compliance Act, which Congress enacted in 2010 but, according to Retting, has yet to appropriate the funding necessary for its implementation.

“This situation is compounded by the fact that when we do detect potential non-compliance or fraudulent behavior through manually generated FATCA reports, we seldom have sufficient funding to pursue the information and ensure proper compliance,” he wrote. “We have an acute need for additional personnel with specialized training to follow cross-border money flows. They will help ensure tax compliance by improving our capacity to detect unreported accounts and income generated by those accounts, as well as the sources of assets in offshore accounts.”

Current Plan Liability Rates Set for April 2022

For pension plan years beginning in April 2022, the IRS has released:

- the 30-year Treasury bond weighted average interest rate,
- the unadjusted segment rates,
- the adjusted rates, and
- the minimum present value segment rates

Corporate Bond Rate

The three 24-month average corporate bond segment rates applicable for April 2022 (without adjustment for the 25-year average segment rate limits are as follows):

- 0.87 for the first segment rate,
- 2.67 for the second, and
- 3.29 for the third.

April 2022 Adjusted Segment Rates

The April 2022 adjusted segment rates for plan years beginning in 2021 are:

- 4.75 for the first,
- 5.36 for the second, and
- 6.11 for the third.

The rates for plan years beginning in 2022 are:

- 4.75 for the first,
- 5.18 for the second, and
- 5.92 for the third.

April 2022 Pre-ARP Adjusted Segment Rates

The April 2022 Pre-ARP adjusted segment rates for plan years beginning in 2021 are:

- 3.32 for the first,
- 4.79 for the second, and
- 5.47 for the third.

30-Year Treasury Weighted Average

For plan years beginning in April 2022, the 30-year Treasury weighted average securities rate is 2.09, with a permissible range of 1.88 to 2.20.

The rate of interest on 30-year Treasury securities for March 2022 is 2.41 percent.

The minimum present value segment rates under Code Sec. 417(e)(3)(D) for March 2022 are:

- 2.44 for the first segment rate,
- 3.71 for the second, and
- 3.94 for the third.

Notice 2022-16

REFERENCE KEY

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

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Petition for Certiorari Denied in SALT Cap Case

The U.S. Supreme Court has denied certiorari in *J. Yellen*, CA-2, 2021-2 USTC ¶50,224. In that case, the Court of Appeals for the Second Circuit affirmed the district court's judgment that the cap on the federal income tax deduction for money paid in state and local taxes (SALT) is constitutional. Prior to the cap, taxpayers could deduct from their taxable income all the money they paid in state and local income and property taxes.

Four states, namely, New York, Connecticut, New Jersey and Maryland, brought a claim against the government alleging that the \$10,000 cap on the federal income tax deduction for money paid in state and local taxes, enacted as part of the Tax Cuts and Jobs Act (P.L. 115-97) (TCJA), violated the Constitution. Further, the states argued that the state and local tax deduction was constitutionally mandated, or alternatively that the cap violated the tenth amendment because it coerced them to abandon their preferred fiscal policies. The district court held that the states had standing and that their claims were not barred by the Anti-Injunction Act (AIA).

2022 IRS Nationwide Tax Forum to Begin on July 19

The IRS announced that the 2022 IRS Nationwide Tax Forum (the forum) will be held virtually over five weeks starting July 19, with a series of live-streamed webinars every Tuesday, Wednesday and Thursday. It will continue through August 18. The forum is the IRS' marquee outreach event to the tax professional community. The virtual format allows experts from the IRS and its association partners to educate and update the tax professional community on tax law, professional ethics and many other topics. The IRS encouraged tax professionals to register now to take advantage of the forum. Registration enables attendees to participate in all of the live webinars earning up to 28 continuing education credits.

Further, the forum will feature a keynote address from Commissioner Charles P. Rettig, a plenary session with tax law and publications updates and multiple sessions on high-interest topics. This year four seminars will be offered both in English and Spanish. Tax professionals who register by 5 p.m. Eastern Time on June 15, qualify for an early bird rate of \$240 per person. The standard rate starting June 16, will be \$289. Members of some IRS national partner associations qualify for a discount of \$10 off the early bird rate if they register by June 15. The IRS provided a list of the IRS national partner associations qualifying for this discount.

Finally, the IRS informed that registration at the forum includes access to the Virtual Expo. The Virtual Expo provides an opportunity to visit with exhibitors representing dozens of commercial leaders in tax software and financial services, as well as leading national associations and several key IRS offices.

[IR-2022-90](#)

However, the district court concluded that the claims lacked merit. The states' allegations that the cap decreases the frequency and price at which taxable real estate transactions occur by measurably increasing the cost of those transactions reflect specific lost tax revenues and suffice to support

standing. Moreover, the exception in *South Carolina v. Regan*, 84-1 USTC ¶9241, 465 U.S. 367, 373 (1984), applied to the facts of this case, therefore, the court held that the AIA did not foreclose its review of the states' claim.

Filing Deadline for Petition to Review CDP Determination Nonjurisdictional, Eligible for Equitable Tolling

P.C. Boechler, SCt, 2022-1 USTC ¶150,142

The Supreme Court reversed and remanded a Court of Appeals decision and held that Code Sec. 6330(d)(1)'s 30-day time limit to file a petition for review of a collection due process (CDP) determination is an ordinary, nonjurisdictional deadline subject to equitable tolling in appropriate cases. The taxpayer had requested and received a CDP hearing before the IRS's Independent Office of Appeals pursuant to Code Sec. 6330(b), but the Office sustained the proposed levy. Under Code Sec. 6330(d)(1), the taxpayer had 30

days to petition the Tax Court for review. However, the taxpayer filed its petition one day late. The Tax Court dismissed the petition for lack of jurisdiction and the Court of Appeals for the Eighth Circuit affirmed, agreeing that Code Sec. 6330(d)(1)'s 30-day filing deadline is jurisdictional and thus cannot be equitably tolled.

Nonjurisdictional Nature of Filing Deadline

The Supreme Court analyzed the text of Code Sec. 6330(d)(1) and stated that the

only contention is whether the provision limits the Tax Court's jurisdiction to petitions filed within the 30-day time-frame. The taxpayer contended that it referred only to the immediately preceding phrase of the provision: a "petition [to] the Tax Court for review of such determination." and so the filing deadline was independent of the jurisdictional grant. The IRS, on the contrary, argued that "such matter" referred to the entire first clause of the sentence, which includes the deadline and granting jurisdiction only over petitions filed within that time. However, the Supreme Court

held the nature of the filing deadline to be nonjurisdictional because the IRS failed to satisfy the clear-statement rule of the jurisdictional condition. It also stated that where multiple plausible interpretations exist, it is difficult to make the case that the jurisdictional reading is clear. Moreover, Code Sec. 6330(e)(1)'s clear statement—that “[t]he Tax Court shall have no jurisdiction . . . to enjoin any action or proceeding unless a timely appeal has been filed”—highlighted the lack of such jurisdictional clarity in Code Sec. 6330(d)(1).

Equitable Tolling of Filing Deadline

The Supreme Court remanded the case to the Court of Appeals for the Eighth Circuit to decide whether the taxpayer was entitled to equitable tolling of the filing deadline. However, the Supreme Court did emphasize that Code Sec. 6330(d)(1) did not expressly prohibit equitable tolling, and its 30-day time limit was directed at the taxpayer, not the court. Further, the deadline mentioned in the provision was not written in an emphatic form or with

IRS Announces 2022 Funding for Low Income Taxpayer Clinic Grant Recipients

The IRS announced that over \$12.1 million in matching grants were awarded to 131 organizations across the country for development, expansion or continuation of qualified Low Income Taxpayer Clinics (LITCs). This amount was awarded for the 2022 grant year, which runs from January 1 to December 31, 2022. The IRS awards matching grants of up to \$100,000 per year to qualifying organizations through the LITC Program. This is a federal grant program administered by the Taxpayer Advocate Service, which is led by the National Taxpayer Advocate Erin M. Collins. Further, LITCs, their employees and volunteers are independent from the IRS.

Additionally, qualified organizations awarded LITC grants provide pro bono representation in tax disputes and tax-related education to low-income taxpayers or those who speak English as a second language (ESL). They also identify and advocate on issues that impact these taxpayers. Taxpayers can find a complete list of 2022 grant recipients, their location and the amounts awarded by the IRS, at https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2022/04/04.14.2022_2022-LITC_Grant_Recipients_and_Amounts-FINAL.pdf. Further, more information about LITCs and their work is available in IRS Publication 5066, LITC Program Report. Finally, IRS Publication 4134, Low Income Taxpayer Clinic List, provides information about LITCs by their geographic area.

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detailed and technical language, nor was it reiterated multiple times. The IRS' argument that tolling the Code Sec. 6330(d)(1) deadline would create much more uncertainty, was rejected. The Supreme

Court concluded that the possibility of equitable tolling for relatively small number of petitions would not appreciably add to the uncertainty already present in the process.

IRS Provides Guidance for Late Elections Regarding Depreciable Indian Reservation Property, Depreciable Biofuel Plants, and Qualified Film, TV, and Theater Productions

Rev. Proc. 2022-23

The IRS has provided guidance for making several late elections including: a Code Sec. 168(j)(8) election not to use the recovery periods that apply to qualified Indian reservation property; a Code Sec. 168(l)(3)(D) election not to apply bonus depreciation to second generation biofuel plants; and a Code Sec. 181 election to deduct, instead of capitalize, qualified film, television, or live theatrical productions costs. In addition, the guidance amends Rev. Proc. 2022-14 to treat these late elections as a change in method of accounting with an adjustment in taxable income (a Code Sec. 481(a) adjustment) for a limited period of time.

Taxpayer Certainty and Disaster Tax Relief Act of 2019

On December 20, 2019, the Taxpayer Certainty and Disaster Tax Relief Act of 2019 (P.L. 116-94) retroactively extended the application of the separate MACRS depreciation recovery period for Indian reservation property under Code Sec. 168(j), bonus depreciation for second generation biofuel plants under Code Sec. 168(l)(2), and the election under Code Sec. 181 to expense qualified film, television, or live theatrical productions costs through December 31, 2020. Prior to the enactment of P.L. 116-94, those provisions

were only effective through December 31, 2017. Subsequent legislation has extended the separate recovery period for Indian reservation property and the election to expense qualified live theatrical production costs. However, the scope of this guidance only pertains to tax years ending in 2018 and 2019.

Late Elections

According to the guidance, taxpayers may make a late Code Sec. 168(j)(8), Code Sec. 168(l)(3)(D), or Code Sec. 181 election for the 2018 or 2019 tax years by filing either:

1. An amended income tax return or amended partnership return, Form 1065, for the placed-in-service year of the property (for Code Sec. 168(j)(8) or Code Sec. 168(l)(3)(D) elections) or the applicable tax year (for Code Sec. 181 elections) before December 31, 2022, but not later than the applicable period of limitations on

assessment for the amended return's tax year, or

2. A Form 3115 with the taxpayer's first or second timely filed original income tax return or Form 1065 that is filed after April 19, 2022.

The guidance provides separate instructions for partnerships subject to the centralized partnership audit regime enacted

as part of the Bipartisan Budget Act of 2015 (BBA partnerships). The guidance also clarifies that Reg. §§ 1.181-1 and 1.181-2 also apply to qualified live theatrical productions for purposes of making the late election. Congress added live theatrical productions to Code Sec. 181 after the most recent amendment to the regulations.

IRS Reminds Tax-Exempt Organizations about May 16 Filing Deadline

IR-2022-93

The IRS reminded tax-exempt organizations about the May 16, 2022, filing deadline for many of them. Those tax-exempt organizations that operate on a calendar-year basis have to file the following returns with the IRS:

- Form 990-series annual information returns, including Form 990, Return of Organization Exempt From Income Tax, Form 990-EZ, Short Form Return of Organization Exempt from Income Tax and Form 990-PF, Return of Private Foundation.
- Form 990-N, Electronic Notice (e-Postcard) for Tax-Exempt Organizations Not

Required to File Form 990 or Form 990-EZ.

- Form 990-T, Exempt Organization Business Income Tax Return.
- Form 4720, Return of Certain Excise Taxes Under Chapters 41 and 42 of the Internal Revenue Code.

Further, the IRS informed that organizations filing a Form 990, 990-EZ, 990-PF or 990-T for calendar-year 2021 must file their returns electronically. Private foundations filing a Form 4720 for calendar-year 2021 must file the form electronically. Charities and other tax-exempt organizations can file these forms electronically through an IRS authorized e-file provider. Organizations eligible to submit Form

990-N must do so electronically and can submit it through Form 990-N on IRS.gov. Additionally, the IRS reminded organizations that if an organization's return is incomplete or the wrong return for the organization, it will be rejected. Common errors include missing or incomplete schedules.

Finally, the IRS informed that tax-exempt organizations can request a six-month automatic extension by filing Form 8868, Application for Extension of Time to File an Exempt Organization Return. In situations where tax is due, extending the time for filing a return will not extend the time for paying tax.

IRS Informs Taxpayers about Extensions of Time to File Tax Returns

IR-2022-88; IR-2022-91

The IRS informed taxpayers requesting an extension that they will have until Monday, October 17, 2022, to file a return. However, taxes are still owed by April 18, 2022, despite the extension. An easy way to get the extra time is through IRS Free File. Taxpayers can electronically request an extension on Form 4868, Application for Automatic Extension of Time To File U.S. Individual Income Tax Return. An extension of time to file will also automatically process when taxpayers select Form 4868 and pay all or part of their

taxes electronically by April 18 using their Online Account, Direct Pay, the Electronic Federal Tax Payment System (EFTPS) or a debit, credit card or digital wallet. Disaster victims, taxpayers serving in combat zones and those living abroad automatically have longer to file. Other taxpayers can get an extension by submitting a request for an automatic extension.

Further, the victims of the December 2021 tornadoes and flooding in Arkansas, Illinois, Kentucky and Tennessee have until May 16, 2022, to file their 2021 returns and pay any tax due. Same goes for the victims of

Colorado wildfires and straight-line winds that began December 30. In addition, victims of severe storms, flooding and landslides that began on February 4 in Puerto Rico will have until June 15, 2022, to file and pay. The IRS automatically provides filing and penalty relief to taxpayers with an IRS address of record located in a federally declared disaster area when at least one area qualifies for FEMA's Individual Assistance program. In some cases, relief is also available to people living outside the disaster area if, for example, they have a business located in the disaster area.

Additionally, military service members and eligible support personnel serving in a combat zone have at least 180 days after they leave the combat zone to file their tax returns and pay any tax due. Combat zone extensions also give affected taxpayers more time for a variety of other tax-related actions, including contributing to an IRA. Further, U.S. citizens and resident aliens who live and work outside the U.S. and Puerto Rico have until June 15, 2022, to file their 2021 tax returns and pay any tax due. The June 15 deadline also applies to members of the military on duty outside the U.S. and Puerto Rico who do not qualify for the longer combat zone extension. Lastly, the deadline to submit 2021 tax returns or an extension to file and pay tax owed is April 18. Taxpayers in Maine or Massachusetts have until April 19.

Limiting Penalties and Interest

The IRS encouraged taxpayers who missed the April 18 tax-filing deadline to file as soon as possible. Taxpayers who owe and

missed the deadline without requesting an extension should file quickly to limit penalties and interest. Taxpayers who do not owe taxes can file their 2021 tax return and claim the Child Tax Credit (CTC) for tax year 2021 anytime until April 15, 2025, without any penalty. Families in Puerto Rico will also be eligible to claim the CTC, which has been expanded to provide up to \$3,600 per child. Further, members of the military who served or are currently serving in a combat zone, support personnel in combat zones, taxpayers outside the U.S. and some disaster victims automatically qualify for an extension to file and pay.

Additionally, the IRS encouraged taxpayers to use electronic filing options including IRS Free File. The IRS informed taxpayers that the only way to get a refund is to file a tax return. Further, there are a few credits that allow taxpayers to receive money beyond what they owe. These include the Earned Income Tax Credit, Child and Dependent Care Credit and CTC. Generally, the IRS issues nine out of 10 refunds in less than 21 days for taxpayers who e-file and

choose direct deposit. However, some tax returns may require additional review or take longer.

Further, the IRS informed that an extension to file is not an extension to pay. Penalties and interest apply to taxes owed after April 18 and interest is charged on tax and penalties until the balance is paid in full. Even if taxpayers cannot afford to immediately pay the full amount of taxes owed, they should file a tax return to reduce possible filing penalties. Taxpayers may qualify for penalty relief if they have filed and paid timely for the past three years and meet other important requirements. Further, taxpayers can pay quickly and securely via their Online Account, IRS Direct Pay, debit or credit card or digital wallet or they can apply online for a payment plan. Additionally, the IRS informed taxpayers that it offers tips to help taxpayers choose a tax professional to assist in tax return preparation. Finally, the IRS informed taxpayers that they have fundamental rights under the law that protect them when they interact with the IRS. The Taxpayer Bill of Rights presents these rights in 10 categories.

IRS Reminds Employers of Penalty Relief Related to Claims for Employee Retention Credit

IR-2022-89

The Treasury Department and the IRS have received requests from taxpayers for relief from penalties arising when additional income tax is owed because the deduction for qualified wages is reduced by the amount of retroactively claimed employee retention tax credit (ERTC), but the taxpayer is unable to pay the additional income tax because the ERTC refund payment has not yet been received.

Further, the Treasury and the IRS are aware that this situation may arise, partly,

due to the IRS' backlog in processing adjusted employment tax returns on which the taxpayers claim ERTC retroactively. An employer must reduce its income tax deduction for the ERTC qualified wages by the amount of the ERTC for the tax year in which such wages were paid or incurred. Taxpayers who claimed the ERTC retroactively and filed an amended income tax return have an increased income tax liability but may not yet have received their ERTC refund.

Finally, the IRS reminded taxpayers that they may be eligible for relief from penalties for failing to pay their

taxes if they can show reasonable cause and not willful neglect for the failure to pay. Taxpayers may also qualify for administrative relief from penalties for failing to pay on time under the IRS' First Time Penalty Abatement program if they:

- Did not previously have to file a return or had no penalties for the three prior tax years;
- Filed all currently required returns or filed an extension of time to file; and
- Paid or arranged to pay any tax due.

Tax Court Had Jurisdiction to Decide Application of VCSP for Computing Employment Tax Liability

Treece Financial Services Group, 158 TC, Dec. 62,042; Treece Investment Advisory Corp., TC, Dec. 62,043(M)

The Tax Court had jurisdiction in an employment tax case to determine whether the Voluntary Classification Settlement Program (VCSP) applied for computing a corporation's employment tax liability. The taxpayer had submitted Form 8952, Application for Voluntary Classification Settlement Program (VCSP), which was denied by the IRS because the taxpayer was under an employment tax examination.

Jurisdiction Over Whether VCSP Applied

The Tax Court has jurisdiction under Code Sec. 7436(a) to determine: (1) whether an individual providing services to a person is that person's employee for purposes of subtitle C; (2) whether the person, if an employer, is entitled to relief under section 530 of the Revenue Act of 1978; and (3) the proper amounts of employment taxes which relate to the IRS' determination concerning worker classification. Because the denial of the taxpayer's eligibility for VCSP directly affected the amounts of tax, the procedures for judicial review of the IRS' determinations logically contemplated review of such a denial as one element of the determination. Therefore, the IRS' motion to partially dismiss for lack of jurisdiction was denied.

AFRs Issued for May 2022

Rev. Rul. 2022-9

The IRS has released the short-term, mid-term, and long-term applicable interest rates for May 2022.

Applicable Federal Rates (AFR) for May 2022

	Annual	Semiannual	Quarterly	Monthly
Short-Term				
AFR	1.85	1.84%	1.84%	1.83%
110% AFR	2.03%	2.02%	2.01%	2.01%
120% AFR	2.22%	2.21%	2.20%	2.20%
130% AFR	2.40%	2.39%	2.38%	2.38%
Mid-Term				
AFR	2.51%	2.49%	2.48%	2.48%
110% AFR	2.76%	2.74%	2.73%	2.72%
120% AFR	3.01%	2.99%	2.98%	2.97%
130% AFR	3.27%	3.24%	3.23%	3.22%
150% AFR	3.77%	3.74%	3.72%	3.71%
175% AFR	4.41%	4.36%	4.34%	4.32%
Long-Term				
AFR	2.66%	2.64%	2.63%	2.63%
110% AFR	2.92%	2.90%	2.89%	2.88%
120% AFR	3.20%	3.17%	3.16%	3.15%
130% AFR	3.46%	3.43%	3.42%	3.41%

Adjusted AFRs for May 2022

	Annual	Semiannual	Quarterly	Monthly
Short-term adjusted AFR	1.40%	1.40%	1.40%	1.40%
Mid-term adjusted AFR	1.90%	1.89%	1.89%	1.88%
Long-term adjusted AFR	2.01%	2.00%	2.00%	1.99%

The Code Sec. 382 adjusted federal long-term rate is 2.01%; the long-term tax-exempt rate for ownership changes during the current month (the highest of the adjusted federal long-term rates for the current month and the prior two months) is 2.01%; the Code Sec. 42(b)(1) appropriate percentages for the 70% and 30% present value low-income housing credit are 7.60% and 3.26%, respectively, however, under Code Sec. 42(b)(2), the appropriate percentage for non-federally subsidized new buildings placed in service after July 30, 2008, shall not be less than 9%; and the Code Sec. 7520 AFR for determining the present value of an annuity, an interest for life or a term of years, or a remainder or reversionary interest is 3.0%.

Was There an Employment Tax Audit?

The taxpayer contended that it had met all requirements under Announcement 2012-45, I.R.B. 2012-51,724, for participation in the VCSP. However, the IRS contended

that the taxpayer's sole corporate employee's misclassification as a nonemployee was uncovered as the result of an employment tax audit. Whether there was an employment tax audit was a dispute of material fact, and therefore the taxpayer's motion for summary judgment was denied.

Butane Ineligible for Alternative Fuel Mixture Credit

Philadelphia Energy Solutions Refining and Marketing, LLC, FedCl, 2022-1 USTC ¶70,374

The Court of Federal Claims has held that butane is not an alternative fuel for the purposes of the alternative fuel mixture credit.

Background

Philadelphia Energy Solutions Refining and Marketing, LLC (PES) filed a tax-refund suit seeking over \$550 million in alternative fuel mixture credits for mixing butane with gasoline. The suit was filed after receiving no response from the IRS to its refund claim. The alternative fuel mixture credit provides certain producers of alternative fuel mixtures a credit against the excise tax on certain traditional fuels including gasoline.

The Court looked at whether butane: 1.) qualifies as “liquefied petroleum gas” and is therefore an alternative fuel, which means that PES produced an alternative fuel mixture and is entitled to the credit;

or 2.) is a taxable fuel for purposes of the alternative fuel mixture credit and therefore excluded from the statutory definition of an alternative fuel making PES ineligible for the credit. Because the statute’s terms make clear that butane is not an alternative fuel for the purposes of the alternative fuel mixture credit, the Court held in favor of the government.

Court Analysis

According to Code Sec. 6426(a)(2), the Code Sec. 6426(d) alternative fuel credit is allowed against the excise tax imposed on alternative fuels by Code Sec. 4041. And, according to Code Sec. 6426(a)(1), the Code Sec. 6426(e) alternative fuel mixture credit is allowed against the excise tax on taxable fuels imposed by Code Sec. 4081. This credit applies to “any alternative fuel mixture for sale or use in a trade or business of the taxpayer.”

The Government argued that because butane is taxed under Code Sec. 4081, it is statutorily excluded from the definition

of alternative fuel. PES insisted that Code Sec. 6426 clearly states that butane is a liquefied petroleum gas, and therefore butane is an alternative fuel for purposes of the alternative fuel mixture credit.

To qualify for the Code Sec. 6426(e) alternative fuel mixture credit, a fuel mixture must include both a taxable fuel and an alternative fuel. According to the Court, this does not require any great legal reasoning. Code Sec. 6426(e)(2) requires a “mixture” of an “alternative fuel” and a “taxable fuel.” This leads to the conclusion that an “alternative fuel” is distinct from a “taxable fuel,” and both must be present for the credit to apply. Butane is gasoline for purposes of Code Sec. 4083 and is therefore taxable under Code Sec. 4081. Accordingly, both gasoline and butane are taxable fuels for purposes of Code Sec. 6426(e). Because butane is a taxable fuel, it cannot also be an alternative fuel for Code Sec. 6426(e). Also, the inclusion of liquefied petroleum gas in the Code Sec. 6426(d) definition of alternative fuel does not make butane an alternative fuel.

TAX BRIEFS

Estate Tax

A decedent’s estate was allowed to challenge an estate tax liability even though the executors signed an IRS Form 890 agreeing to an immediate assessment of estate tax. Form 890 was not a binding agreement and the estate was not equitably estopped from challenging the assessments.

Lax, DC N.Y., 2022-1 USTC ¶60,734

FBAR

The government abused its discretion in setting civil penalties against an individual for her failure to report foreign bank accounts by filing Reports of Foreign Bank and Financial Accounts. The government erroneously determined

penalties against the taxpayer based on a bank statement that was introduced into evidence.

Hughes, DC Calif., 2022-1 USTC ¶150,141

A district court held, in a case of first impression in the Eleventh Circuit, that the penalty for a non-willful violation of the requirement to report financial interests in foreign bank accounts applies on a per-account basis, rather than a per-year or per-form basis, as argued by the taxpayer. The court concluded that the violation referred to in the penalty is the failure to report each interest, not the failure to file the form.

Hadley, DC Fla., 2022-1 USTC ¶150,139

Gross Income

An individual failed to report income from two of his employers and raised frivolous arguments. The taxpayer was not liable for a penalty under Code Sec. 6673. The taxpayer made no frivolous claims in previous cases.

Bindel, TC, Dec. 62,044(M)

Passive Activity Losses

A married couple did not qualify as real estate professionals within the meaning of Code Sec. 469(c)(7), in connection with their two rental properties. Because neither taxpayer established that the 750-hour requirement for the tax years was met, neither taxpayer qualified as a real estate professional. Accordingly, the real estate rental

activities were passive activities regardless of whether the taxpayers materially participated in those activities. Therefore, the IRS' determination of disallowing the passive activity losses was sustained.

Sezonov, TC, Dec. 62,045(M)

Recordkeeping

A married couple failed to provide cogent evidence that an S corporation's gross receipts were overstated. The taxpayers failed to show that S corporation and taxpayer husband had sufficient bases to claim pass-through losses from a partnership.

Kohout, TC, Dec. 62,041(M)

Statute of Limitations

The Federal Circuit held that the Court of Federal Claims lacked jurisdiction over an individual's refund suit because the complaint was not filed within two years of the IRS disallowing the claims. The taxpayer mailed her complaint within the two-year limitations period, but it was received after the expiration of the period. Because the mailbox rule does not apply to filings with any court other than the Tax Court, the complaint was not considered timely filed, and the court lacked jurisdiction.

Weston, CA-FC, 2022-1 USTC ¶150,137

Unauthorized Disclosures

A taxpayer could not claim actual damages based on the IRS's concession that it made an unauthorized disclosure of a taxpayer's tax return information. The IRS gave notice of an adverse determination in a CDP hearing to the taxpayer's former attorney, instead of current counsel of which it had notice. The taxpayer failed to adequately establish that her claimed actual damages were caused in fact by the IRS's unauthorized disclosure. It was, however, possible and permissible for the plaintiff to recover punitive damages.

Castillo, DC N.Y., 2022-1 USTC ¶150,140