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IRS Announces Relief from Filing Penalties for Certain Taxpayers Affected by COVID-19

Notice 2022-36; IR-2022-155

The IRS announced broad-based penalty relief for taxpayers affected by the COVID-19 pandemic. The relief applies to failure to file penalties and certain international information return (IIR) penalties with respect to tax returns for tax years (TY) 2019 and TY 2020, filed on or before September 30, 2022. Relief is also provided to banks, employers and other businesses from certain information return penalties with respect to TY 2019 returns filed on or before August 1, 2020, and with respect to TY 2020 returns that were filed on or before August 1, 2021.

The relief will also help the IRS focus resources on processing backlogged tax returns and tax correspondence.

In response to the COVID-19 pandemic, the IRS issued a series of notices and other guidance to provide relief to affected taxpayers, including:

- postponing the due date for certain Federal income tax payments (Notice 2020-17, I.R.B. 2020-15, 590);
- expanded relief postponing the due date for filing Federal income tax returns originally due April 15, 2020, to July 15, 2020, among other things (Notice 2020-18, I.R.B. 2020-15, 590); and
- postponing the due date for filing Federal income tax returns in the Form 1040 series and making certain Federal income tax payments that were originally due on April 15, 2021, due on May 17, 2021 (Notice 2021-21, I.R.B. 2021-15, 986.

Waiver and Abatement of Certain Penalties

The IRS will not impose penalties with respect to specifically identified tax returns for TY 2019 and TY 2020, filed on or before September 30, 2022. The relief will be automatically applied-taxpayers do not have to request relief.

The IRS will not impose additions to tax under Code Sec. 6651(a)(1) for failure to file the following income tax returns:

- Form 1040, U.S. Individual Income Tax Return, and others in the series;
- Form 1041, U.S. Income Tax Return for Estates and Trusts, and others in the series;
- Form 1120, U.S. Corporation Income Tax Return, and others in the series;
- Form 1066, U.S. Real Estate Mortgage Investment Conduit (REMIC) Income Tax Return; and
- Form 990-PF, Return of Private Foundation or Section 4947(a)(1) Trust Treated as Private Foundation and Form 990-T, Exempt Organization Business income Tax Return (and Proxy Tax under Code Sec. 6033(e)).

Further, certain penalties will not be imposed under Code Secs. 6038, 6038A, 6038C, 6038F [6039F] and 6677 for failure to timely file several IIRs, such as Form 5471, Information Return of U.S. Persons With Respect to Certain Foreign Corporations.

Comment. Note that the Notice refers to Code Sec. 6038F, which does not exist. The context indicates that the reference should be to Code Sec. 6039F. The IRS may issue a correction.

Certain penalties will not be imposed under Code Sec. 6698(a)(1) and (2) for failure to timely file and show the required information on a Form 1065, U.S. Return of Partnership Income.

Certain penalties will not be imposed under Code Sec. 6699(a)(1) and (2) for failure to timely file and show the required information on a Form 1120-S, U.S. Income Tax Return for an S corporation.

In addition, the IRS will not impose the penalties under Code Sec. 6721(a)(2)(A) for failure to timely file any information return as defined under Code Sec. 6724(d)(1) that includes (1) 2019 returns that were filed on or before August 1, 2020, with an original due date of January 31, 2020, February 28, 2020 (if filed on paper) or March 31, 2020 (if filed electronically) or March 15, 2020; and (2) 2020 returns that were filed on or before August 1, 2021, with an original due date of January 31, 2021, February 28, 2021 (if filed on paper) or March 31, 2021 (if filed electronically) or March 15, 2021.

Exceptions

The penalty relief does not apply to any penalties not listed. Additionally the penalty relief does not apply to returns for which the penalty for fraudulent failure to file under Code Sec. 6651(f) or the penalty for fraud under Code Sec. 6663 apply. The penalty relief also does not apply to penalties in an accepted offer in compromise

Current Plan Liability Rates Set for August 2022

For pension plan years beginning in August 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 August 2022 (without adjustment for the 25-year average segment rate limits are as follows):

- 1.27 for the first segment rate,
- 2.99 for the second, and
- 3.51 for the third.

August 2022 Adjusted Segment Rates

The August 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.

August 2022 Pre-ARP Adjusted Segment Rates

The August 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 August 2022, the 30-year Treasury weighted average securities rate is 2.19, with a permissible range of 1.97 to 2.30.

The rate of interest on 30-year Treasury securities for July 2022 is 3.10 percent.

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

- 3.67 for the first segment rate,
- 4.67 for the second, and
- 4.73 for the third.

Notice 2022-35

REFERENCE KEY

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

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under Code Sec. 7122 or any penalty settled in a closing agreement under Code Sec. 7121 or finally determined in a judicial proceeding.

NTA Applauds IRS Move To Provide Late Filing Penalty Relief

National Taxpayer Advocate Erin Collins applauded the Internal Revenue Service's decision to provide late-filing penalty relief to taxpayers who filed late tax returns for tax years 2019 and 2020.

"The IRS has taken a major step in providing broad, taxpayer-favorable relief from late-filing penalties for 2019 and 2020 tax years," Collins said in an August 24, 2022 blog post, adding that the agency " deserves substantial credit for its willingness to listen to Congress, stakeholders, and TAS [Taxpayer Advocate Service], and undertake a bold step requiring significant administrative effort and resources to benefit all taxpayers affected by the pandemic".

Kentucky Disaster Notice Updated

An August 1, 2022 notice granting relief to victims of severe storms, flooding, landslide and mudslide that began on July 26, 2022, in parts of Kentucky was updated by the IRS on August 22, 2022, to include Lee, Lincoln and Powell counties counties.

Kentucky Disaster Relief Notice (KY-2022-06)

Tuition Debt Relief Will Not Be Taxable Income

The recently announced tuition debt relief program will not add to the tax burden of individuals who are able to take advantage of the program, the White House said.

"Thanks to the American Rescue Plan, this debt relief will not be treated as taxable income for the federal income tax purposes," the White House stated in an August 24, 2022, fact sheet describing the latest tuition debt relief program.

According to the fact sheet, the new program will provide up $20,000 in debt cancellation to Pell Grant recipients with loans held by the Department of Education and up to $10,000 in debt cancellation to non-Pell Grant recipients. The program is open to borrowers with individual incomes of up to $125,000 or up to $250,000 for married couples.

"No high-income individual or high-income household – in the top 5 percent of incomes – will benefit from this action," the fact sheet states.

Federal student loan payments will continue to be paused through the end of 2022.

The American Rescue Plan, signed into law in March 2021, allows an individual to exclude from gross income the amount of qualified student loans cancelled or discharged from 2021 through 2025. Qualified student loans include loans for post-secondary education provided by the government or educational institutions; private education loans, and original and refinanced loans from tax-exempt organizations with a public service requirement; and refinanced loans. The exclusion does not apply to private education loans from tax-exempt organizations if the discharge is on account of services provided to the lending organization.

IRS Issues Final Rule Under No Surprises Act

T.D. 9965

The IRS has released final rules under the No Surprises Act which includes certain disclosure requirements relating to information that group health plans, and health insurance issuers offering group or individual health insurance coverage, must share about the qualifying payment amount (QPA) under the interim final rules issued in July 2021, titled Requirements Related to Surprise Billing; Part I (July 2021 interim final rules). Additionally, the Service has finalized select provisions under the October 2021 interim final rules, titled Requirements Related to Surprise Billing; Part II (October 2021 interim final rules), to address certain requirements related to consideration of information when a certified independent dispute resolution (IDR) entity makes a payment determination under the Federal IDR process. These final rules are effective on November 17, 2022, for plan years or policy years beginning on or after January 1, 2022.

Information to be Shared About Qualifying Paying Amount

The IRS has added a definition for the term "downcode" to 26 CFR 54.9816-6, 29 CFR 2590.716-6, and 45 CFR 149.140; and final rules under 26 CFR 54.9816-6(d), 29 CFR 2590.716-6(d), and 45 CFR 149.140(d) to require additional information about the QPA that must be provided with an initial payment or notice of denial of payment, without a provider, facility, or provider of air ambulance services having to make a request for this information, in cases in which the plan or issuer has downcoded the billed claim. These final rules also specify that, if a QPA is based on a downcoded service code or modifier, in addition to the information already required to be provided with an initial payment or notice of denial of payment, a plan or issuer must provide a statement that the service code or modifier billed by the provider, facility,

or provider of air ambulance services was downcoded; an explanation of why the claim was downcoded, including a description of which service codes were altered, if any, and which modifiers were altered, added, or removed, if any; and the amount that would have been the QPA had the service code or modifier not been downcoded.

Payment Determinations Under Federal IDR Process

Although the QPA is a quantitative figure, the amount that best represents the value of the qualified IDR items and services may be more or less than the QPA due to additional circumstances that are not easily quantifiable such as the care setting or the teaching status of the facility. It, therefore, is reasonable to ensure that certified IDR entities consider the QPA, a quantitative figure, and then consider the additional, likely-qualitative factors, when determining the out-of-network rate.

In determining which offer to select during the Federal IDR process under these final rules, the certified IDR entity must consider the QPA for the applicable year for the same or similar item or service and then must consider all additional information submitted by a party to determine which offer best reflects the appropriate out-of-network rate, provided that the information relates to the party's offer for the payment amount for the qualified IDR item or service that is the subject of the payment determination (and does not include information that the certified IDR entity is prohibited from considering in making the payment determination under Code Sec. 9816(c)(5)(D)).

Rates Used in Computing Special Use Value Issued

A listing of the average annual effective interest rates on new loans under the Farm Credit System has been issued by the IRS. The rates are used in computing the special use value of farm real property for which an election is made under Code Sec. 2032A. The rates may be used by estates that value farmland under Code Sec. 2032A as of a date in 2022.

Rev. Rul. 2022-16

Phase-In Period for Dividend Equivalent Payment Regulations Extended Further

Notice 2022-37

Taxpayers have been provided with additional guidance for complying with the Code Sec. 871(m) regulations on dividend equivalent payments for 2023, 2024, and 2025. The Treasury Department and the IRS intend to amend the regulations to delay the effective/applicability date of certain rules. The phase-in period provided in Notice 2020-2, I.R.B. 2020-3, 327, has also been extended.

Dividend Equivalent Payments

A dividend equivalent amount is essentially an amount directly or indirectly determined by reference to a U.S. dividend. Code Sec. 871(m) treats dividend equivalent payments as U.S. source dividends. These payments are subject to 30-percent withholding (or a lower treaty rate) if received by a nonresident alien or foreign corporation.

The Code Sec. 871(m) regulations include final and temporary regulations under Code Secs. 871(m), 1441, 1461, and 1473.

Phase-in Year for Delta-One and Non-Delta-One Transactions Extended

The effective/applicability date for the specified notional principal contract (NPC) rules under Reg. §1.871-15(d)(2) and the specified equity-linked instrument (ELI) rules under Reg. §1.871-15(e) will be revised. These rules will not apply to any payment made with respect to any non-delta-one transaction issued before January 1, 2025.

The IRS will take into account the extent to which the taxpayer or withholding agent made a good faith effort to comply with the Code Sec. 871(m) regulations in enforcing those regulations:

- for any delta-one transaction in 2017 through 2024; and
- for any non-delta-one transaction that is a Code Sec. 871(m) transaction under Reg. §1.871-15(d)(2) or (e) in 2025.

Further, the period when the IRS will take into account the extent to which a qualified derivatives dealer (QDD) made a good faith effort to comply with the Code Sec. 871(m) regulations and the relevant provisions of the 2017 Qualified Intermediary (QI) Agreement and the 2023 QI Agreement (anticipated to apply beginning January 1, 2023) is extended through 2024.

The IRS is considering providing guidance that a QDD will be considered to satisfy the obligations that apply specifically to a QDD under its QI Agreement(s) for years before 2025 if the QDD makes a good faith effort to comply with the relevant provisions of the 2017 QI Agreement and the 2023 QI Agreement, each to the extent applicable to the QDD.

Simplified Standard for Determining Combined Transactions Extended

The period during which the simplified standard under Notice 2016-76, I.R.B. 2016-51, 834, applies for withholding agents to determine whether transactions

entered into were combined transactions is extended to include 2023 and 2024. Transactions entered into in 2017 through 2024 that are combined under the simplified standard will continue to be treated as combined for future years. They will not stop being combined transactions by applying Reg. §1.871-15(n) (the combined transactions rule in the regulations), or by disposing of less than all of the potential Code Sec. 871(m) transactions that are combined under this rule.

Transactions entered into in 2017 through 2024 that are not combined under the simplified standard will not become combined transactions by applying Reg. §1.871-15(n) to them in future years, unless a reissuance or other event causes the transactions to be retested to determine whether they are Code Sec. 871(m) transactions.

Phase-In Relief for QDDs Extended

For QDDs, Reg. §1.871-15(q)(1), Reg. §1.871-15(r)(3), and Reg. §1.1441-1(b)(4)(xxii)(C) will be amended so that a QDD will not be subject to tax on dividends and dividend equivalents received in 2023 and 2024 in its equity derivatives dealer capacity or withholding on those dividends (including deemed dividends). A QDD will be required to compute its Code Sec. 871(m) amount using the net delta approach beginning in 2025.

A QDD will remain liable under Code Sec. 881(a)(1) for tax on dividends and dividend equivalents that it receives in any other capacity, and on any other U.S. source FDAP payments that it receives (whether or not in its equity derivatives dealer capacity). A QDD is also responsible for withholding on dividend equivalents it pays to a foreign person on a Code Sec. 871(m) transaction.

A QDD does not have to perform a periodic review with respect to its QDD activities for 2023 or 2024. Treasury and the IRS anticipate incorporating into the 2023 QI Agreement the waiver of a QDD's periodic review and the other transitional provisions for QDDs for 2023 and 2024.

Transition Rules Extended

Withholding agents may apply the qualified securities lender (QSL) transition rules described in Notice 2010-46, I.R.B. 2010-24, 757, for payments made in calendar years 2023 and 2024.

Anti-Abuse Rule

The anti-abuse rule in Reg. §1.871-15(o) will continue to apply during the phase-in years. This means that a transaction that would not otherwise be treated as a Code Sec. 871(m) transaction (including as a result of the new guidance) might still be a Code Sec. 871(m) transaction under the anti-abuse rule.

Taxpayer Reliance

Taxpayers and withholding agents can rely on the new guidance before the Treasury and IRS amend theCode Sec. 871(m) regulations or issue other guidance.

Listing Published of Parties Disbarred or Suspended from 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. Attorneys, CPAs, enrolled agents, enrolled actuaries and enrolled retirement plan agents are barred from accepting assistance from, or assisting, any disbarred or suspended practitioner if the assistance relates to a matter constituting practice before the IRS; further, they cannot knowingly aid or abet another person to practice before the IRS during the period of that person's suspension, disbarment or ineligibility.

Announcement 2022-17

Closing Agreement Between Individual and IRS Was Valid and Enforceable; No Malfeasance or Misrepresentation Found

C.H. Smith, 159 TC —, No. 3, Dec. 62,096

A closing agreement between an individual and the IRS was held to be valid and enforceable. In the closing agreement, the taxpayer had waived his right to elect to exclude foreign earned income under Code Sec. 911(a). However, after filing his tax returns without making the election, the taxpayer filed amended returns making the election, and the IRS issued refunds. Consistent with the closing agreement, the IRS later issued a notice of deficiency to the taxpayer, disallowing the foreign income exclusion elections.

Validity of the Closing Agreement

The taxpayer argued that the agreement was invalid because the IRS official who executed it, i.e. the Director, Treaty Administration, in the IRS Large

Business and International Division, did not have the authority to do so. However, the Director, Treaty Administration, is an official within LB&I who assists the Director, Treaty and Transfer Pricing Operations Practice Area, in coordinating treaty administration across the IRS. Consistent with that role, Delegation Order 4-12 granted the Director, Treaty Administration, the authority to act as "competent authority" under the tax treaties with respect to specific applications of such treaties, including the authority to sign "other agreements" on behalf of the Commissioner, LB&I. Therefore, the Director, Treaty Administration, acted within her delegated authority when she signed the closing agreement because she was acting as competent authority with respect to a specific application of the 1982 Treaty.

Absence of Malfeasance or Misrepresentation of Fact

In addition, the taxpayer argued that the closing agreement should be set aside because the IRS committed malfeasance by disclosing confidential tax return information in violation of Code Sec. 6103 when it participated in an arrangement in which the taxpayer entered into the closing agreement through his employer. However, the IRS did not ask the taxpayer to enter into a closing agreement when it transmitted the form agreement to the employer. The form agreement, therefore, was not an IRS request for a closing agreement, nor was it background information related to such a request. Further, the form agreement was not return information obtained by any IRS officials; it was a document created by IRS officials in the ordinary course of their duties and did not include, nor was it premised upon, any particular underlying information obtained from the taxpayer.

Moreover, the taxpayer contended that the closing agreement contained material misrepresentations in its recitals. However, the first recital was a legal conclusion regarding the application of U.S. treaty obligations and Australian domestic law to U.S. employees, while the second was an entirely accurate statement of the express terms of joint defence facility, where the taxpayer worked. Neither qualified as a misrepresentation of material fact. Finding no malfeasance or misrepresentation, the tax court deemed it appropriate to grant the IRS' motion of partial summary judgment.

TAX BRIEFS

Business Deductions

The patent infringement litigation defense expenses incurred by a drug company were tax deductible under Code Sec. 162(a). The court applied the origin of the claim test first, ascertaining the nature and character of the expenditures, and then applied Reg. §1.263(a)-4 to assess whether the expenses fell within the category of expenses the regulation required the taxpayer to capitalize.

Actavis Laboratories, FL, Inc., FedCl., 2022-2 USTC ¶50,210

Charitable Contribution Deductions

The Tax Court's reliance on Reg. §1.170A-14(g)(6)(ii), which required a deed of easement to account for the possibility of unexpected changes to the property that would undermine the continued use of the property for conservation purposes, was invalidated. The appeals court agreed with *Hewitt v. Commissioner*, CA-11, 2022-1 USTC ¶50,102 in finding that the IRS's interpretation of the regulation was arbitrary and capricious. It further violated the APA's procedural requirements. Therefore, the court of appeals followed *Hewitt* , which invalidated the regulation upon which the Tax Court relied, in disallowing the taxpayer' charitable contribution deduction.

Glade Creek Partner, LLC, CA-11, 2022-2 USTC ¶50,209

Controlled Foreign Corporations

In a highly redacted field attorney advice, the IRS Chief Counsel ruled on whether the provisions of the United States—Mexico Income Tax Convention (the Convention) relieved a taxpayer of the obligation to file Forms 5471, Information Return of U.S. Persons With Respect to Certain Foreign Corporations, reporting the information required under Code Sec. 6038 and whether the taxpayer had reasonable cause for the failure to timely file Forms 5471. The taxpayer relied exclusively on the advice of his tax advisors who had extensive skill, knowledge and experience in the international tax area. Thus, the taxpayer had reasonable cause for not filing Form 5471, including reliance on tax advisors, the complexity of the tax area and the dispute whether there was an obligation.

Field Attorney Advice 20223302F

Partnerships

The Court of Appeals affirmed a district court's decision to grant a motion to dismiss a partnership's complaint against the IRS for lack of subject matter jurisdiction. The relief sought by the taxpayer's suit restrained the IRS from assessing and collecting those taxes, and accordingly, it was barred by the Anti-Injunction Act.

Hancock County Land Acquisitions, LLC, CA-11, 2022-2 USTC ¶50,206

A corporation was required to raise a supervisory penalty approval issue in a partnership-level proceeding, not in a partner's subsequent collection proceeding.

Warner Enterprises, Inc., TC, Dec. 62,095(M)

A partnership's (P2) sham status was a partnership item of P2. Because another partnership's (P1) outside basis in P2 was

affected by that partnership item, P1's outside basis in P2 was an affected item. The timeliness of a notice of deficiency depended on the above. The determination that P2 was a sham factors into P1's computation of its gain or loss on the sale of its P2 interest.

Sarma, CA-11, 2022-2 USTC ¶50,207

In consolidated cases, a partnership (P1) and a lender's (L1) joint venture did not constitute a partnership for tax purposes. The IRS' contention that L1 had a single interest properly characterized as equity was rejected. The appreciation interest payment was not a payment to a partner.

Deitch, TC, Dec. 62,097(M)

Return Preparer Penalties

The IRS Chief Counsel advised that the IRS should assess a penalty under Code Sec. 6694(b) against a non-signing tax return preparer for advising its client to take the return position that a "reserve for estimated liabilities" may be excluded from income. The position that the non-signing tax return preparer advised to take was contrary to well-settled law applicable to the facts and circumstances. The non-signing tax return preparer properly could employ the reserve method of accounting, the same method it used for financial accounting purposes, and include income items net of the estimated cost of its anticipated discounts and disputed claims. The taxpayer's conformity with its accrual method used for financial accounting purposes did not create a presumption that its tax accrual method clearly reflected income.

Field Attorney Advice 20223301F

Tax Crimes

An appeals court found no reasonable probability that a jury verdict was substantially affected by any failure to give necessary instructions. The district court committed no reversible error in not instructing the jury on two counts that the government had to prove at least one act of evasion or interference within the limitations period.

Brollini, CA-9, 2022-2 USTC ¶50,205