

# FEDERAL TAX WEEKLY

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## AICPA Requests More Clarity on 1040 Virtual Currency Question

The American Institute of CPAs is asking the Internal Revenue Service to provide more clarity on the question regarding virtual currency the agency included on the draft version of Form 1040 for tax year 2022.

In an August 29, 2022 letter to the agency, AICPA ask that the IRS “clarify the meaning of virtual currency,” suggesting the agency make the definition of virtual currency as stated in the draft of the Form 1040 for tax year 2022 consistent with other IRS guidance.

It also asked the agency to remove the question about “digital assets” that is proposed to be on the first page of the Form 1040 “until this term has been defined in final regulation under section 6045.” And once the definition is finalized, AICPA suggested the question be simplified.

In its current draft form, the Form 1040 asks: “At any time during 2022 did you (a) receive (as a reward, award, or compensation); or (b) sell, exchange, gift, or otherwise dispose of a digital asset (or a financial interest in a digital asset)?”

AICPA suggested the language be changed to a simple yes/no question asking, “At any time during 2022, did you have a taxable event involving virtual currency?” as well as adding elements to the instructions to better clarify the information request.

The organization noted that gifting virtual currency may not necessarily result in a taxable event, adding some potential confusion to the question as it is proposed on the current draft, as well as raising other concerns with the wording of the draft question.

Finally, AICPA asked for clarification on whether a taxpayer needs to answer ‘yes’ if a dependent had a virtual currency event but does not have a filing requirement.

“We recommend the instructions specify that a virtual currency event of a child, or dependent claimed on the return does not require the individual filer to answer ‘yes,’” the letter states. “The instructions should also state that an individual filer who otherwise does not have a filing obligation is not required to file Form 1040 just to answer ‘yes’ to the virtual currency question.”

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## AICPA Requests Working From Home Guidance

The American Institute of CPAs is requesting that the Internal Revenue Service provide guidance that covers those who work from home.

In an August 25, 2022, letter to IRS Commissioner Charles Rettig and Department of the Treasury Assistant Secretary (Tax Policy) Lily Batchelder, AICPA outlined a number of areas that would benefit from guidance given the current work environment that has many people working from home due to the COVID-19 pandemic and companies opting to maintain those arrangements as the pandemic’s impact wanes.

The organization states in the letter that “many employers are considering permanent work arrangements involving significant increases in remote work by employees. There is no set arrangement to which employers are migrating, but rather the business needs and employer cultures are resulting in varied arrangements. For example, some employers intend to maintain offices and require employees to work from the office a limited number of days. Other employers are converting to hoteling arrangements and are only requiring a very limited number of days in the office, if any. Under many of these arrangements, both the employer and the employee view the employee’s residence as the main location at which the employee performs work”.

AICPA adds that notwithstanding the lack of guidance, “employers are formulating workplace policies including fringe benefit policies, and taking positions both as to income inclusion and reporting and as to deductions. To provide all taxpayers applicable rules to be consistently applied,

## IRS Clarifies Instructions for Form 8996

The IRS has clarified that qualified opportunity zone businesses should not file Form 8996. Form 8996 is filed only by qualified opportunity funds.

The 2022 Instructions for Form 8996, Qualified Opportunity Fund, will make it clear that a qualified opportunity zone business should not file Form 8996.

*IRS Post-Release Changes to Tax Forms, Instructions, and Publications* <https://www.irs.gov/forms-pubs/clarification-of-instructions-for-form-8996-informing-qualified-opportunity-zone-businesses-not-to-file-form-8996>

the AICPA is requesting updated guidance and offering recommendations regarding the taxation of payments related to today’s work arrangements. In addition, given that many employers have established policies and positions based on reasonable interpretations of existing guidance, the AICPA requests that the formulation of guidance also take into account any necessary transitional relief to facilitate compliance.”

The organization is asking for updating to current tax guidance as well as providing recommendations for work from home arrangements.

The current tax guidance area covers five areas, including gross income/exclusions from gross income; away from home; tax home; pursuit of a trade or business; and daily transportation expenses related to principal place of business.

In the recommendations area, AICPA looks at the principal place of business; work arrangements (employer-location based, remote, and hybrid); pursuit of a trade or business; and non-travel expenses incurred while working remotely.

## Pension Plan Exaction a Tax, Not a Penalty; Written Supervisory Approval Not Required

*K.I. Grajales, CA-2, 2022-2USTC ¶150,213*

The Second Circuit, affirming the Tax Court, held that an individual was not entitled to treat the exaction under Code Sec. 72(t) as a penalty within the meaning of Code Sec. 6751(c) that requires written supervisory approval under Code Sec. 6751(b).

The IRS contended that the taxpayer was subject to a 10-percent “exaction” for early distributions she made from her pension plan. The taxpayer argued that the exaction is not a tax but is, rather, a penalty, an additional amount, or an

addition to tax within the meaning of Code Sec. 6751(c) that, under Code Sec. 6751(b)(1), requires written approval by the immediate supervisor of the relevant IRS official.

The Court of Appeals first considered the construction of the statutory provision under Code Sec. 72(t). The taxpayer argued that the language of Code Sec. 72(t) indicated that the exaction was not calculated like regular income tax because it used the amount includible in gross income again to add 10 percent to the taxpayer’s tax and it was a separate exaction based on income that has already been taxed. However, the

Court rejected this argument as the provision clearly signalled that the taxpayer’s tax became greater, not that the additional charge transformed into something different.

The terms “penalty”, “additional amount” and “addition to tax” do not appear in Code Sec. 72(t). Like various other taxes, the exaction is calculated differently than regular income tax, but that did not make it a penalty. Further, at least six separate provisions explicitly refer to the exaction as a tax. Moreover, the plain language of Code Sec. 72(t) properly considered in the context of the tax code

### REFERENCE KEY

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

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established that the exaction was a tax. The exaction did not cease to be a tax simply because it discourages or even definitely deters certain activities. The Court affirmed the Tax Court decision as the exaction was a tax and not a penalty within the meaning of Code Sec. 6751(c). Accordingly, Code Sec. 6751(b) did not apply; the IRS was not required to obtain written supervisory approval; and the taxpayer was liable for the exaction.

Affirming the Tax Court, Dec. 61,811, 156 T.C. No. 3.

## California Viticultural Area Established

Effective September 14, 2022, the Gabilan Mountains viticultural area located in Monterey and San Benito Counties, California is established by the Alcohol and Tobacco Tax and Trade Bureau. The Gabilan Mountains viticultural area is located entirely within the existing Central Coast viticultural area. It also entirely encompasses the existing Mt. Harlan and Chalone viticultural areas.

Viticultural area names are used to describe the origin of wine for labeling and advertising.

*Treasury Decision, TTB-184, Alcohol and Tobacco Tax and Trade Bureau, 87 FR 49986, August 15, 2022*

## Failure to Instruct Jury Harmless; Evasion Conviction Affirmed

*J.D. Pieron, CA-6, 2022-2USTC ¶150,221*

The Sixth Circuit, affirming the district court, found the government proved that an individual committed an affirmative act that constituted evasion or attempted evasion of tax. The government presented evidence of such acts within the limitations period. The taxpayer was found to have submitted false information in his (1) Foreign Bank Account Report; and (2) Form 433-F, Collection Information Statement.

The taxpayer argued that the district court should have instructed the jury that it could convict him only if it found that

he committed an evasive act within the five-year limitations period, after January 9, 2012. Most of the alleged actions took place before that date and the circuit court found that instruction likely would have focused both the jury's attention and the parties' presentations at trial. However, the court concluded that any error as to the district court's failure to give the instruction was harmless. In closing arguments, the government emphasized the forms in 2012 and 2014. Although in closing arguments, the government also emphasized several instances of evasive conduct before January 9, 2012 the Sixth Circuit found no reason to think that the jury might

have overlooked the 2012 and 2014 forms or otherwise found them non-evasive. Moreover, the circuit court found that in the context of the trial record as a whole, the jury had every reason to think that the taxpayer's August 2012 Foreign Bank Account Report was evasive as well. Nor did the taxpayer demonstrate that he suffered any prejudice from the government's mid-trial production of documents relating to his Form W-8BEN, Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding and Reporting (Individuals).

Unpublished opinion affirming a DC Mich. opinion, 2018-2 ustc ¶50,502.

## Taxpayers Urged to Develop Natural Disaster Emergency Preparedness Plans

*IR-2022-156*

The IRS has reminded taxpayers to develop emergency preparedness plans due to the upcoming hurricane season and the ongoing threat of wildfires in some parts of the country. September is declared as the National Preparedness Month. The IRS advised taxpayers to:

- secure critical documents such as tax returns, birth certificates, deeds, titles, and insurance policies inside waterproof containers in a secure space;

- duplicate and scan key documents for backup storage on electronic media that provide security and easy portability, such as a flash drive, a CD, or in the cloud;
- reconstruct records after a disaster for tax purposes, getting federal assistance or insurance reimbursement; and
- record all property, especially expensive and high value items—the IRS disaster-loss workbooks in Publication 584 and Publication 584-B can help individuals and businesses compile lists of belongings or business equipment.

In addition, the IRS recommends the following for employers:

- employers should create an Electronic Federal Tax Payment System account at EFTPS.gov to monitor their payroll tax deposits and receive email alerts; and
- employers who use payroll service providers should check the payroll service provider's fiduciary bonds as they could protect the employer in the event of default by the provider.

Taxpayers who have lost some or all their records during a disaster can visit the

IRS's Reconstructing Records webpage. In addition, taxpayers residing in a federally declared disaster can check for the available disaster tax relief on the IRS Tax Relief in Disaster Situations or Around the Nation webpages.

The IRS automatically identifies taxpayers located in the covered disaster area and applies filing and payment

relief. Taxpayers affected by a disaster can contact the IRS at 866-562-5227 to speak with an IRS specialist trained to handle disaster-related issues. Further, taxpayers affected by a disaster outside of a federally declared disaster area may qualify for disaster relief. This includes taxpayers who are not physically located in a disaster area but who have records

essential for filing or payment deadlines postponed during the relief period that are located in a covered disaster area. In addition, a special rule allows both individuals and businesses to choose to deduct uninsured or unreimbursed disaster losses on either the tax return for the year the disaster occurred, or the return for the previous year.

## TAX BRIEFS

### Assessment

An individual was not entitled to a copy of the summary record of assessment upon request as the government had already provided Form 4340, Certificate of Assessments, Payments, and Other Specified Matters, which satisfied the requirements of Code Sec. 6203. Form 4340 created a presumption that a summary record of assessment was validly executed and certified, and production of the actual summary record neither added to nor detracted from the parties' claims or defenses.

*E.K. Howe IV, DC Ida., 2022-2 USTC ¶150,219*

### Conservation Easement

The IRS was not entitled to a partial summary judgment motion regarding the disallowance of a conservation easement deduction on the grounds that the easement's conservation purpose was not "protected in perpetuity." However, the court granted the IRS motion regarding penalty approval. The revenue agent (RA) secured supervisory approval from his immediate supervisor before the taxpayer was notified about the penalties. Accordingly, the approval was timely and the requirements of Code Sec. 6751(b)(1) were met.

*Sparta Pink Property, LLC, TC, Dec. 62,099(M)*

### Delinquent Return

A taxpayer husband failed to establish he was so ill that he was unable to file a tax return. An IRS settlement officer (SO) did not abuse her discretion in sustaining the collection action. The SO correctly

determined that additions to tax, not qualifying for abatement, should be included in taxpayers' balance due.

*Remisovsky, TC, Dec. 62,100(M)*

### Lawsuit Settlement

The settlement payment received by a married couple from the husband's employer was not excludable from their gross income under Code Sec. 104(a)(2). The taxpayers contended that the husband's settlement payment was received on account of physical injuries or physical sickness. However, the settlement agreement contained no terms indicating that the employer had issued the settlement payment on account of the husband's physical injuries or physical sickness.

*Dern, TC, Dec. 62,101(M)*

### Penalties

The Tax Court ruled a married couple's understatement of income tax on their original returns exceeded 10 percent of the required tax. Thus, these understatements were substantial and subject to Code Secs. 6662(a) and (b)(2) accuracy-related penalties. Further, the taxpayers' amended returns were not qualified amended returns under Treas. Reg. §1.6664-2(c)(3)(i)(D). They were filed after the service of a John Doe summons. Finally, the six-year statute of limitations for assessment under Code Sec. 6501(e)(1)(A) was suspended by Code Sec. 7609(e) because of the issuance of the summons.

*Lamprecht, TC, Dec. 62,102(M)*

### Premium Tax Credit

A married couple was entitled to claim the premium assistance tax credit (PTC) under Code Sec. 36B for the final four months of the tax year at issue. The taxpayers were not allowed to claim the PTC for the first eight months because the taxpayers had enrolled in that coverage through the husband's former employer, rather than through an exchange established under the Affordable Care Act (ACA), (P. L. 111-148); therefore, they did not fulfil the requirements under Code Sec. 36B(c)(2)(A).

*Sek, TC, Dec. 62,098(M)*

### Research Credit

The IRS's Chief Counsel ruled that five contracts were funded activities. In each contract, the payment was not contingent on the success of the research. The taxpayer did not retain substantial rights to use or exploit the results of its research. Therefore, the taxpayer was not entitled to a Code Sec. 41 research credit.

*Field Attorney Advice 20223401F*

### Tax Liens

The IRS could foreclose tax liens against stock held in the taxpayer's name. The taxpayer did not effectuate a sale of his restricted stock to intervenors. The transferees did not follow the restrictions imposed on the stock certificates; and they were not reflected in the company's books.

*Shipley, DC Calif., 2022-2 USTC ¶150,218*