Wolters Kluwer

OCTOBER 20, 2022
ISSUE NUMBER 42

FEDERAL TAX WEEKLY

INSIDE THIS ISSUE

Social Security Wage Cap and Benefit Amounts Increase for 2023 1

IRS Expands Florida Dyed Diesel Fuel Penalty Relief 2

Final, Temporary, and Proposed Regulations Address Average Income Test for Low-Income Housing Credit...................................... 2

Updated Tangible Property Audit Technique Guide Released.................. 3

Final Regulations Amend Eligibility for Premium Tax Credit and More 3

IRS Free File Services Open Until November 17.. 4

IRS Announces Draft Changes to Uncertain Tax Position Forms 5

AICPA Comments on Passthrough Entity SALT Payment Deductions....... 5

IRS Chief Counsel Advice on Advance Payments of Annual Section 367(d) Inclusions 5

Taxpayers Who Haven't Filed 2021 Returns May Be Eligible for Valuable Credits.. 6

Tax Briefs 6

Social Security Wage Cap and Benefit Amounts Increase for 2023

Social Security Fact Sheet: 2023 Social Security Changes

For 2023, the Social Security wage cap will be $160,200, and social security and Supplemental Security Income (SSI) benefits will increase by 8.7 percent. These changes reflect cost-of-living adjustments to account for inflation.

Wage Cap for Social Security Tax

The Federal Insurance Contributions Act (FICA) tax on wages is 7.65 percent each for the employee and the employer. FICA tax has two components:

- a 6.2 percent social security tax, also known as old age, survivors, and disability insurance (OASDI); and
- a 1.45 percent Medicare tax, also known as hospital insurance (HI).

For self-employed workers, the Self-Employment tax is 15.3 percent, consisting of:

- a 12.4 percent OASDI tax; and
- a 2.9 percent Medicare tax.

OASDI tax applies only up to a wage base, which includes most wages and self-employment income up to the annual wage cap.

For 2023, the wage base is $160,200. Thus, OASDI tax applies only to the taxpayer's first $160,200 in wages or net earnings from self-employment. Taxpayers do not pay any OASDI tax on earnings that exceed $160,200.

There is no wage cap for Medicare tax.

Maximum Social Security Tax for 2023

For workers who earn $160,200 or more in 2023:

- an employee will pay a total of $9,932.40 in social security tax ($160,200 x 6.2 percent);
- the employer will pay the same amount; and
- a self-employed worker will pay a total of $19,864.80 in social security tax ($160,200 x 12.4 percent).

Additional Medicare Tax

Higher-income workers may have to pay an Additional Medicare tax of 0.9 percent. This tax applies to wages and self-employment income that exceed:

- $250,000 for married taxpayers who file a joint return;
- $125,000 for married taxpayers who file separate returns; and
- $200,000 for other taxpayers.

The annual wage cap does not affect the Additional Medicare tax.

Benefit Increase for 2023

A cost-of-living adjustment (COLA) will increase social security and SSI benefits for 2023 by 8.7 percent. The COLA is intended to ensure that inflation does not erode the purchasing power of these benefits.

IRS Expands Florida Dyed Diesel Fuel Penalty Relief

The IRS has announced that, in response to continued disruptions caused by Hurricane Ian, it will not impose a penalty when dyed diesel fuel with a sulfur content that does not exceed 15 parts-per-million is sold for use or used on the highway in the state of Florida. This penalty relief expands previously issued penalty relief, announced in IR-2022-169, that applied only to emergency vehicles. This penalty relief is available to any person that sells or uses dyed diesel fuel for highway use. In the case of the operator of the vehicle in which the dyed diesel fuel is used, the relief is available only if the operator or the person selling such fuel pays the tax of 24.4 cents per gallon that is normally applied to diesel fuel for highway use. Ordinarily, dyed diesel fuel is not taxed, because it is sold for uses exempt from excise tax, such as to farmers for farming purposes, for home heating use, and to local governments. The IRS will also not impose penalties for failure to make semimonthly deposits of tax for dyed diesel fuel sold for use or used in diesel powered vehicles on the highway in the state of Florida during the relief period. This relief is retroactive to September 28, 2022, and will remain in effect through October 19, 2022.

IR-2022-177

Final, Temporary, and Proposed Regulations Address Average Income Test for Low-Income Housing Credit

T.D. 9967; Proposed Regulations, NPRM REG-113068-22

Final, temporary, and proposed regulations provide guidance on the average income test that a low-income housing project must satisfy in order for buildings in the project to qualify for the low-income housing credit.

The temporary regs serve as the text of the proposed regs. The regulations finalize, with some changes, proposed regs that were issues on October 30, 2020 (NPRM REG- 119890-18).

Next Available Unit Rule

The final regulations modify the next available unit rule in the proposed regulations to make the application of the imputed income limit consistent with the other regulations. The regulations also provide that when multiple units are over-income in a project that has elected average income set-aside and has a mix of low-income and market rate units, the taxpayer does not need to comply with the rule in a specific order.

Set-Aside Requirements

The final regulations revise the IRS interpretation of the minimum set-aside requirement for the average income test. The taxpayer satisfies the average income test if at least 40 percent of the building's residential units are eligible to be low-income units and have designated imputed income limitations that collectively average 60 percent or less of median gross income (AMGI). Thus, it is no longer necessary to consider all low-income units in a project for residential rental.

To provide clarity on the definition of low-income unit for a project electing the average income test, the final regulations include a definition of "low-income unit" that takes into account whether the unit is a member of a group of units with a compliant average limitation. Thus, under the final regulations, a project for residential rental property meets the requirements of the average income test if the taxpayer's project contains a qualified group of units that constitutes 40 percent or more (25 percent or more in New York City) of the residential units in the project.

The final regulations rejected suggestions that units should be included in the applicable fraction computations on a unit-by-unit basis. Instead, the determination of a group of units taken into account in the applicable fractions for the buildings in a project follows the same approach as

REFERENCE KEY

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

FEDERAL TAX WEEKLY, 2022 No. 42. Published by Wolters Kluwer, 2700 Lake Cook Road, Riverwoods, IL 60015.
© 2022 CCH Incorporated and its affiliates. All rights reserved.

determining a group for purposes of the set-aside test. Once a qualified group of units in a project has been identified for a tax year, the applicable fraction for each building in the project is computed using the units that are in both the qualified group and the building at issue.

These changes mean that recapture rules and mitigation provisions that were included in the proposed regulations are no longer needed. Accordingly, they are not adopted in the final regulations.

Recordkeeping and Reporting Requirements

As a result of this additional flexibility regarding the qualified group of units used to satisfy the average income set-aside and the qualified group of units used to compute the applicable fraction, a taxpayer must separately identify units in the qualified group of units used for satisfying the average income set-aside, and units in the qualified group for purposes of the applicable fractions. Under the temporary regulations, the taxpayer may satisfy these requirements by recording the identifications in its books and records.

Under the temporary regulations, a taxpayer designates a unit's imputed income limitation by recording it in its books and records. The final regulations require the initial designation of a unit to be made no later than when it is first occupied as a low-income unit. The temporary regulations also require the designation to be communicated annually to the applicable housing agency, and allow the agency to waive any failure to comply with the recordkeeping and reporting requirements.

Taxpayers are also required to report specified information to housing agencies and maintain records in sufficient detail to establish the accuracy of the project's applicable fractions, the satisfaction of the average income set-aside, and compliance with credit requirements.

Changing Designations of Income Limits

The final regulations should allow greater flexibility in changes in unit designations than the proposed regulations did by providing housing agencies significant flexibility in determining procedures.

Comments Requested

The IRS determined that no notice is required with respect to the recordkeeping and reporting requirements in the temporary regulations. However, the proposed regulations request comments on all aspects of the temporary regs. Written and electronic comments, along with any request for a public hearing, must be received by Friday, December 9, 2022.

Effective Date

The final regulations recordkeeping and reporting requirements in the temporary regulations generally apply to tax years beginning after December 31, 2022. A taxpayer may choose to apply the regulations to tax years beginning after October 10, 2022, and before January 1, 2023, provided that the taxpayer chooses to apply Reg. §1.42-15 to the same tax year. For earlier tax years, taxpayers may rely on a reasonable interpretation of the statute in implementing the average income test.

Updated Tangible Property Audit Technique Guide Released

The IRS has released an updated Audit Technique Guide (ATG) on the capitalization of tangible property. The new ATG replaces the existing ATG issued in 2016. The new guide, from the Large Business & International Division (LB&I), addresses Reg. §1.263(a) and related regulations.

This ATG looks at the examination process with respect to tangible property, compliance considerations, units of property, amounts paid to acquire or produce property, de minimis safe harbor and improvement rules with respect to betterments, restorations, and new or different uses. It also covers certain safe harbors available to the taxpayer, special rules, and other relevant provisions. The guide looks at materials and supplies, leased property, disposition concepts and MACRS accounting rules, dispositions in general, MACRS disposition rules, general asset accounting rules, accounting method changes, as related to both capitalization and depreciation, and the LB&I directives related to tangible property.

The final regulations on tangible property capitalization were issued in 2013. Taxpayers were required to correct any prior method changes to comply with these regulations for tax years beginning on or after January 1, 2014.

Capitalization of Tangible Property Audit Technique Guide, IRPO ¶202,495

Final Regulations Amend Eligibility for Premium Tax Credit and More

T.D. 9968

The IRS issued final regulations to strengthen implementation of the Affordable Care Act by fixing the "family glitch." The rules amend eligibility for the premium tax credit (PTC) to allow family members of workers who are offered unaffordable family coverage to qualify for premium tax credits. The regulations also add a minimum value rule for family members of employees, based on the

© 2022 CCH Incorporated and its affiliates. All rights reserved.

benefits provided to the family members. This guidance would affect taxpayers who enroll, or enroll a family member, in individual health insurance coverage through a Health Insurance Exchange (Exchange) and who may be allowed a Premium Tax Credit for the coverage.

Premium Tax Credit Eligibility

The Premium Tax Credit would be determined based on an employee's share of the cost of covering the employee and the related individuals. The affordability rule for related individuals represented the better reading of the relevant statutes. This was consistent with Congress's purpose in the Affordable Care Act (ACA) (P.L. 111-148) to expand access to affordable health care coverage. The Treasury and the IRS stated that Code Sec. 36B(c)(2)(C)(i), including the flush language that follows Code Sec. 36B(c)(2)(C)(i)(II), was correctly interpreted to provide that the affordability test for a related individual is based on the cost of coverage for the employee and the related individual.

Unless a related individual is also employed by that employer, the related individual may not enroll in the employer's coverage on a self-only basis. Thus, the minimum essential coverage is what the related individual may enroll in, the family coverage offered by the employer. The affordability for employees is based on the employee's cost for self-only coverage. The affordability for family members is generally based on the amount an employee must pay to cover the employee and the related individuals included in the employee's family.

Cost of Coverage

The cost of covering individuals who are offered the coverage but are non-family members is not considered in determining whether the employee's family members have an offer of affordable employer coverage. Consequently, a non-family member would not need a determination of unaffordable coverage to enroll in an exchange (QHP) and be eligible for the Premium Tax Credit if the individual otherwise qualifies. A non-family member may enroll in a QHP and be eligible for the Premium Tax Credit, if the individual is otherwise eligible, by simply not enrolling in the offered employer coverage. The final regulations do not amend the affordability rule for employees. An individual with multiple offers of employer coverage seeking to enroll in a QHP with advance Premium Tax Credit would provide information to the applicable exchange concerning the required contribution for each coverage offer. The exchange would determine if at least one of the offers is affordable.

In this case, the advance Premium Tax Credit would not be allowed for the individual's exchange coverage. This process should minimize any burden or confusion relating to whether an individual with multiple offers has an affordable offer that would deny the individual the advance Premium Tax Credit and Premium Tax Credit for exchange coverage. For taxpayers for whom the advance Premium Tax Credit is not paid for their or their family's QHP coverage, the IRS will update the instructions for Form 8962, Premium Tax Credit (PTC), and Publication 974, Premium Tax Credit (PTC), to address multiple offers of employer coverage.

Minimum Value Rule

The final regulations provide a minimum value rule for related individuals that is separate from the minimum value rule for employees. It requires a plan's share of the total allowed costs of benefits provided to related individuals to be at least 60 percent. This minimum value rule for related individuals is not intended to require the use of a standard population for family members that is separate from the standard population for employees.

Further, an employer plan that provides minimum value to an employee also provides minimum value to related individuals if the scope of benefits and cost sharing including deductibles, co-payments, coinsurance, and out-of-pocket maximums under the plan are the same for employees

IRS Free File Services Open Until November 17

The IRS has informed taxpayers that the IRS Free File will remain open until November 17, 2022 for those who still need to file their 2021 tax returns. This includes taxpayers who qualify for the Child Tax Credit, Recovery Rebate Credit, or Earned Income Tax Credit but have not yet filed a 2021 tax return. Individuals and families can get these expanded tax benefits, even if they have little or no income from a job, business or other source. Therefore, taxpayers who do not normally need to file a tax return should do so this year, even if they have not been required to file in recent years. Taxpayers who requested the six-month filing extension should complete their tax returns and file on or before the October 17, 2022 deadline.

The IRS Free File provides two ways for taxpayers to prepare and file their 2021 federal income tax return online for free. These are:

- Traditional IRS Free File, which provides free online tax preparation and filing options on IRS partner sites. Individual taxpayers whose adjusted gross income (AGI) is $73,000 or less qualify for any IRS Free File partner offers. This option allows taxpayers to electronically prepare and file their federal income tax online, using guided tax preparation.
- For taxpayers who know how to prepare their own tax returns, and whose AGI is greater than $73,000, the Free File Fillable Forms option provides electronic federal tax forms.

The IRS has also reminded taxpayers that the fastest way to get a tax refund is to file electronically and choose direct deposit. However, prior year returns can only be filed electronically by registered tax preparers for the two previous tax years. Otherwise, taxpayers must print, sign and mail prior tax year returns.

IR-2022-179

and family members. The final regulations do not require a departure from the practice of computing minimum value for employees and related individuals based on the provision of benefits to a standard population that includes both employees and related individuals. The final regulations provide that an eligible employer-sponsored plan does not meet minimum value requirements unless it includes substantial coverage of inpatient hospital services and physician services.

Applicability Date

The final regulations apply for tax years beginning after December 31, 2022.

IRS Announces Draft Changes to Uncertain Tax Position Forms

The IRS has announced draft changes to the Schedule UTP and the UTP Instructions for 2022 Tax Year (processing year 2023). The IRS is requesting comments from taxpayers on the draft form and instructions. Certain corporations use Schedule UTP to report uncertain tax positions.

Some of changes to the form include:

- a new field has been inserted for the incremental dollar amount of the uncertain tax positions taken;
- for tax positions reported on Schedule UTP, rather than Form 8275, Disclosure Statement or Form 8275-R, Regulation Disclosure Statement, new columns will identify the rulings or regulation sections that are contrary to positions taken on the tax return; and
- more relevant examples are incorporated in the revised Schedule UTP instructions and enhanced guidance is provided on what constitutes an adequate disclosure.

A corporation filing Form 1120, U.S. Corporation Income Tax Return, 1120-F, U.S. Income Tax Return of a Foreign Corporation, 1120-L, U.S. Life Insurance Company Income Tax Return, or 1120-PC, U.S. Property and Casualty Insurance Company Income Tax Return, must file Schedule UTP, if (1) its total assets equal or exceed the applicable asset threshold for the tax year; and (2) the corporation records a liability for unrecognized tax benefits for a U.S. federal income tax position in audited financial statements.

The draft Schedule UTP and Schedule UTP Instructions for 2022 Tax Year (processing year 2023) are available at https://www.irs.gov/newsroom/irs-statement-about-uncertain-tax-positions-utp-reporting.

AICPA Comments on Passthrough Entity SALT Payment Deductions

The American Institute of CPAs has posted comments on guidance recently issued by the Internal Revenue Service regarding the deductibility of payments by partnerships and S corporations for certain state and local taxes.

The October 4, 2022, comment letter to the IRS "addresses PTE tax rulings pertaining to accrual basis taxpayers" and "highlights the confusion of the 'taxable year in which the payment is made' language." A catalog of AICPA comment letters can be found at https://us.aicpa.org/content/dam/aicpa/advocacy/tax/downloadabledocuments/56175896-aicpa-salt-deduction-pte-timing-letter-10-4-2022-submit.pdf.

AICPA recommends that Treasury and the IRS "issue guidance that provides that [Notice 2020-75] does not change, and Treasury and IRS did not intend to change, any section 461, or section 461 regulation, principles."

IRS Chief Counsel Advice on Advance Payments of Annual Section 367(d) Inclusions

IRS Advice Memorandum AM 2022-003

The IRS Chief Counsel has issued an advice on the advance payments of annual Code Sec. 367(d) inclusions in a case involving a domestic corporation that owned all the stock of a foreign corporation. The taxpayer had transferred intangible property, as defined in Code Sec. 367(d)(4), with an expected useful life of ten years to the foreign corporation solely in exchange for stock in the foreign corporation. As a result, the taxpayer took into account an annual inclusion under Code Sec. 367(d)(2)(A)(ii)(I) and Reg. §1.367(d)-1T(c)(1) with respect to the transferred intangible property.

The Chief Counsel held that Code Sec. 367(d) does not permit taxpayers to choose to make advance payments of annual inclusions under Code Sec. 367(d)(2)(A)(ii)(I) except in limited circumstances involving "other property or money" transferred by a transferee foreign corporation to a U.S. transferor in connection with an initial exchange of intangible property subject to Code Sec. 367(d).

© 2022 CCH Incorporated and its affiliates. All rights reserved.

Taxpayers Who Haven't Filed 2021 Returns May Be Eligible for Valuable Credits

IR-2022-178

The IRS has sent reminder letters to encourage over 9 million taxpayers and families who are potentially eligible for expanded tax benefits, but haven't yet filed a 2021 return, to review these valuable tax credits and claim them. The three tax credits include:

- ***Child Tax Credit (CTC):*** Families can claim this credit, even if they received monthly advance payments during the last half of 2021. The total credit can be as much as $3,600 per child.
- ***Earned Income Tax Credit (EITC):*** The law boosted the EITC for childless workers. There are also changes that can help low- and moderate-income families with children. The credit can be as much as $1,502 for workers with no qualifying children, $3,618 for those with one child, $5,980 for those with two children and $6,728 for those with at least three children.
- ***The Recovery Rebate Credit (RRC):*** Those who missed out on last year's third round of Economic Impact Payments (EIP3) may be eligible to claim the RRC. Often referred to as stimulus payments, this credit can also help eligible people whose EIP3 was less than the full amount, including those who welcomed a child in 2021. The maximum credit is $1,400 for each qualifying adult, plus $1,400 for each eligible child or adult dependent.

Besides the three credits above, taxpayers may also qualify for two other benefits with a tax return filed for 2021:

- ***Child and Dependent Care Credit:*** Families who pay for daycare so they can work or look for work can get a tax credit worth up to $4,000 for one qualifying person and $8,000 for two or more qualifying persons.
- ***A deduction for gifts to charity:*** Most tax filers who take the standard deduction can deduct eligible cash contributions they made during 2021. Married couples filing jointly can deduct up to $600 in cash donations and individuals can deduct up to $300 in donations. In addition, itemizers who make large cash donations often qualify to deduct the full amount in 2021.

These tax credits are available to taxpayers even if they have little or no income from a job, business, or other source. However, to claim the benefits, individuals and families who don't normally need to file a tax return should do so this year, even if they haven't been required to file in recent years.

The IRS reminds taxpayers that there is no penalty for a refund claimed on a tax return filed after the regular April 2022 tax deadline and the fastest and easiest way to get a refund is to file an accurate return electronically and choose direct deposit. The taxpayers can also visit ChildTaxCredit.gov/file to file a 2021 income tax return. Individuals whose incomes are below $12,500 and couples whose incomes are below $25,000 may be able to file a simple tax return to claim the 2021 Recovery Rebate Credit—which covers any stimulus payment amounts from 2021 they may have missed.

TAX BRIEFS

Bankruptcy

A married couple's motion to lift the stay of proceedings in Tax Court was denied. The enactment of 11 U.S.C. §1141(d)(5) created a limitation to the Tax Court's holding in *Moody* with respect to the effect under 11 U.S.C. §362(c) of a confirmation of a debtor's chapter 11 bankruptcy plan. Consequently, the automatic stay in this case continued pending satisfaction of 11 U.S.C. §362, including through 11 U.S.C. §1141(d)(5).

Cochran, TC, Dec. 62,116

Collections

A married couple was liable for tax for multiple tax years. The husband failed to pay employment and unemployment taxes. The husband was liable for trust fund recovery penalties (TFRPs). The government had not duly notified all parties of the foreclosure action, as required under Code Sec. 7403(c).

Aguinaldo, DC Hawaii, 2022-2 USTC ¶50,238

FATCA

The IRS has identified Sponsoring Entities that do not appear to have Sponsored Entities registered in the FATCA Registration System. The IRS will contact impacted Sponsoring Entities by posting a message on their FATCA registration system message board. The IRS will request that the Sponsoring Entities cancel their FATCA agreement if they do not meet the requirements for being a Sponsoring Entity of Sponsored FFIs and/or Sponsored Direct Reporting NFFEs. This also includes the requirement to have registered Sponsored FFIs and/or Sponsored Direct Reporting NFFEs.

Florida Disaster Relief

A September 29, 2022 notice granting relief to victims of Hurricane Ian that began on September 23, 2022, in parts of Florida was updated by the IRS on October 5, 2022, because, due to the federal holiday observance on October 10, the penalties on payroll and excise tax deposits due date changed to October 11, 2022.

Florida Disaster Relief Notice (FL-2022-19)

Partnership Distributions

An accounting firm recognized as a partnership distributed client-based intangible assets to two partners (P1 and P2) when they withdrew from the partnership. The partnership's special allocations of income to P1 and P2 lacked substantial economic effect. P1 and P2 had negative capital accounts for the tax year at issue. The partnership agreement included a qualified income offset (QIO). The IRS's determinations which disregarded the partnership's client distributions and redetermined allocations of ordinary income were dismissed.

Raymond & Company PLLC, TC, Dec. 62,117(M)

Royalties

In a highly redacted field attorney advice, the IRS Chief Counsel ruled on the character payments of royalties. It was held that income generated from certain redacted items was taxable ordinary income. Further, even if the income was a Code Sec. 1001(b) amount realized that generated taxable gains under Code Secs. 61(a)(3) and 1001, Code Sec. 1234A would not apply to treat that gain as capital gain because it applies only to gain or loss "attributable to the cancellation, lapse, expiration, or other termination of" certain rights and obligations. Moreover, the redacted item was an intangible asset, amortizable under Code Sec. 197 and treated as depreciable under Code Sec. 167. Therefore, the item would be excluded from the definition of capital asset.

Field Attorney Advice 20224001F

Tax Deficiency

The IRS's determination of deficiency against an individual was not arbitrary or erroneous as the IRS had produced evidence linking the taxpayer to an income producing activity. Further, the taxpayer was liable to pay addition to tax under Code Sec. 6651(a)(1) as he failed to prove that the untimely filing was due to reasonable cause and not willful neglect.

Schieder, TC, Dec. 62,115(M)

Tax-Exempt Organizations

An organization had its tax-exempt status revoked because it failed to establish that it was organized or operated exclusively for exempt purposes under Code Sec. 501(c)(3). The organization was a domestic nonprofit, public benefit corporation set up for charitable and educational purposes to aid poor and disadvantaged individuals. It provided programs designated to create home ownership to low income persons, eradicate homelessness, and educate underprivileged youth in the skills of rehabilitation and construction. It also provided credit and mortgage counselling services when needed. The organization's tax-exempt status under Code Sec. 501(c)(3) was revoked because its housing activity was not conducted in a manner that served charitable purposes and its net earnings had inured substantially to the benefit of its founder. Further, selling of low income homes to non-qualified buyers was not an exempt activity under Code Sec. 501(c)(3).

IRS Letter Ruling 202241007

© 2022 CCH Incorporated and its affiliates. All rights reserved.