



# FEDERAL TAX WEEKLY

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## Treasury Names Douglas O'Donnell Acting Commissioner of IRS

The Department of the Treasury named Douglas O'Donnell acting commissioner of the Internal Revenue Service.

Currently, O'Donnell serves as the IRS Deputy Commissioner for Services and Enforcement. He is a 36-year veteran of the agency, which began in 1986 as a revenue agent.

By naming an interim commissioner, the White House does not need to engage in the confirmation process with the U.S. Senate, which could be a challenge depending on the outcome of the midterm elections.

"Deputy Commissioner O'Donnell has dedicated his career to serving American taxpayers through every level of the agency," Treasury Secretary Janet Yellen said in a statement. "His commitment to improving the experience of the American taxpayer will guide his and the agency's work as they continue their efforts to propel the IRS forward during a critical period of modernization."

While at the IRS, O'Donnell has previously served as commissioner of the IRS Large Business and International Division for six years and as the U.S. Competent Authority, in addition to numerous other leadership roles within the agency.

In a separate statement, current IRS Commissioner Charles Rettig noted that O'Donnell will "work closely with our agency's senior leaders and Deputy Commissioner for Operations Support Jeff Tribiano to continue work on the Inflation Reduction Act provisions, including efforts related to IRS transformation, implementation of green provisions and other new tax law."

O'Donnell will take over for Rettig when he steps down from the top spot in the agency on November 12, 2022.

"I want to thank Commissioner Rettig for his tireless service to the American people across two administrations, and his leadership of the IRS during the difficult and unique challenges posed by COVID-19," Secretary Yellen said of the outgoing commissioner.

## 4,000 New IRS Customer Service Representatives Hired

*IR-2022-191*

The IRS has passed a milestone of hiring 4,000 new customer service representatives to help answer phones and provide other services in a bid to prepare for the 2023 tax filing season. This is part of a much wider IRS improvement effort tied to the Inflation Reduction Act funding approved in August. The IRS continues working hard on implementing the landmark 10-year legislation, and updates on other improvement areas will be provided in the near future.

The Service is aiming to hire another 1,000 customer service representatives by the end of the year, bringing the total of new hires to 5,000. Many employees will be in place for the start of the 2023 tax season, and others will join as their training is

completed in the following weeks. Almost all of their training will be completed by Presidents Day 2023; traditionally the period when the IRS sees the highest phone volumes. The IRS anticipates phones will be answered at a much higher level during

the 2023 filing season. In addition to the phone representatives, the IRS is working to hire additional personnel throughout the agency, not just in taxpayer service areas but in Information Technology and compliance positions.

## Tax Gap Reaches Nearly \$500 Billion, IRS Reports

The Internal Revenue Service is estimating the tax gap on tax years 2014-2016 to be \$496 billion, an increase of more than \$58 billion from the prior estimate.

“The increase in the tax gap estimates reflects that the IRS needs to do more, both in improving taxpayer service as well as working to improve tax compliance,” IRS Commissioner Charles Rettig said in a statement, adding that the recent funding in the Inflation Reduction Act “will help the IRS in many ways, increasing taxpayer education, significantly improving services to all taxpayers and focusing on

high-income/high-wealth non-compliance in a fair and impartial manner supporting compliant taxpayers.”

IRS published a report on the new estimate on October 28, 2022.

According to the report, the estimated net compliance rate is 87 percent, defined as tax paid voluntarily and timely plus enforced and other late payments divided by the total true tax. The voluntary compliance rate, which is the amount of tax paid voluntarily and timely divided by the total true tax is estimated to be 85.0 percent.

The tax gap includes three components, including:

- nonfiling (tax not paid on time by those who do not file on time) - \$39 billion;
- underreporting (tax understated on timely filed returns) - \$398 billion; and
- underpayment (tax that was reported on time, but not paid on time) - \$59 billion.

The report estimates that \$68 billion of the tax gap will eventually be paid.

The IRS also reported that the tax gap for years 2017-2019 is projected to increase to \$540 billion.

## Treasury Outlines Path to Equitable Clean Energy Economy

The Department of the Treasury outlined how the Inflation Reduction Act’s tax incentives will support the building of an equitable clean energy economy.

In a fact sheet issued October 26, 2022, the Treasury Department highlighted four key areas the tax policy built on the Inflation Reduction Act will drive clean energy:

- the IRA will provide targeted incentives to drive investment and create opportunity in communities across the country;
- the IRA will encourage clean energy project developers to meet strong labor standards, so that the benefits of building a clean energy economy are felt by workers making it happen;

- the IRA will lower the costs of energy-saving property improvements and rooftop solar installation, saving working families and small businesses money on their monthly utility bills and empowering families and businesses to shield themselves from volatile fossil energy prices; and

- The IRA allows state, local, and Tribal governments, as well as non-profit organizations and other tax-exempt entities, such as rural electric co-operatives, to receive certain tax credits as payments, expanding the range of actors that will have a direct incentive to invest in their communities.

According to the fact sheet, the law will “provide bonuses for investing in

low-income communities, as well as in communities that have historically depended on the energy sector for jobs and economic activity.”

To help incentivize this, the IRA modifies and extends the clean energy Investment Tax Credit “to provide a 30 percent credit for qualifying investments in wind, solar, energy storage, and other renewable energy projects that meet prevailing wage standards and employ a sufficient portion of qualified apprentices from registered apprenticeship programs.”

It also modifies and extends the Renewable Energy Production Tax Credit “to provide a credit of 2.5 cents per kilowatt-hour in 2021 dollars (adjusted for

### REFERENCE KEY

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

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inflation annually) of electricity generated from qualified renewable energy sources.”

Other tax credits extended and/or expanded include the Energy Efficient Home Improvement Credit, the Residential Clean Energy Credit, and the Energy Efficient Commercial Buildings Deduction.

These incentives were discussed as part of an October 26, 2022, virtual roundtable hosted by Treasury Secretary Janet Yellen, during which she “emphasized that the Inflation Reduction Act provides long-term clarity and certainty for the clean energy sector, and underscored Treasury’s commitment to work expeditiously to provide guidance so that investments can move forward and our climate and economy can realize the benefits of the law as quickly as possible.”

## Inflation Reduction Act Changes Affect Form 720-X

The IRS has announced changes to Form 720-X, Amended Quarterly Federal Excise Tax Return, affected by the Inflation Reduction Act of 2022. The changes include:

- retroactively reinstating the Code Sec. 6426 alternative fuel and alternative fuel mixture credits for fuel sold or used through December 31, 2024 (the credits previously expired on December 31, 2021);
- removing liquefied hydrogen from the definition of alternative fuel under Code Sec. 6426 for purposes of the alternative fuel credit and the alternative fuel mixture credit, for fuel sold or used after December 31, 2022; and
- providing the new Code Sec. 6426 sustainable aviation fuel mixture credit for sales or uses after December 31, 2022.

Taxpayers can claim the alternative fuel mixture credit for the first and second calendar quarters of 2022 on Form 720-X. They can follow the instructions in Notice 2022-39, I.R.B. 2022-40. However, taxpayers cannot claim the alternative fuel credit for the first, second, and third calendar quarters of 2022 on Form 720, Quarterly Federal Excise Tax Return, or Form 720-X. More information can be found at <https://www.irs.gov/businesses/small-businesses-self-employed/fuel-tax-credits>.

## IRS Issues Fact Sheet on Hobby vs. Business Income

FS-2022-38

The IRS has issued a fact sheet related to differentiating between taxpayers’ hobbies and businesses. There are several factors that taxpayers should consider when making the determination and the IRS provides resources to help.

The following information is available on [IRS.gov](https://www.irs.gov) to help a taxpayer

determine if their hobby qualifies as a business:

- Business Activities
- Five Things to Remember about Hobby Income
- Earning side income: is it a hobby or a business?

If taxpayers aren’t trying to make a profit with their hobby, business, or investment activity, they can’t use a loss from the

activity to offset other income. The limit on not-for-profit losses applies to individuals, partnerships, estates, trusts, and S corporations. It doesn’t apply to corporations other than S corporations. If taxpayers receive income from an activity that is carried on with no intention of making a profit, they must report the income they receive on Schedule 1, Form 1040, line 8.

## Taxpayers May Receive Form 1099-K for Transactions Above \$600

IR-2022-189

The IRS has reminded taxpayers who are earning income from selling goods and/or providing services that they may receive Form 1099-K, Payment Card and Third-Party Network Transactions, for payment card transactions and third-party payment network transactions of more than \$600 for the year. Before 2022, Form 1099-K was issued for third party payment network transactions only if the total number of transactions exceeded 200 for the year and the aggregate amount of these

transactions exceeded \$20,000. However, now, a single transaction exceeding \$600 can trigger a 1099-K. The Service emphasized that money received through third-party payment applications from friends and relatives as personal gifts or reimbursements for personal expenses is not taxable. Taxpayers can access Form 1099-K, its instructions and a set of answers to frequently asked questions on the IRS web site.

In addition, the Service reminded taxpayers that they must pay income tax either through withholding or estimated

tax payments. Taxpayers should use estimated tax payments to pay other taxes such as self-employment tax and the alternative minimum tax. IRS Publication 17, Your Federal Income Tax (for Individuals), provides general rules to help taxpayers pay the income taxes they owe. Additional helpful information is available in Chapter 5, Business Income, of Publication 334, Tax Guide for Small Business; Publication 525, Taxable and Nontaxable Income, and on the IRS website at Understanding Your Form 1099-K.

# IRS Urges Tax Preparers to Renew Their 2022 PTINs Before December 31

IR-2022-190

The IRS has urged active tax return preparers to renew their Preparer Tax Identification Numbers (PTINs) because all current PTINs will expire by December 31, 2022. Tax return preparers with a 2022 PTIN should use the online renewal process and failure to have and use a valid PTIN may result in penalties, as the tax preparers need to include a valid PTIN as the identifying number on any return the file with the IRS. Renewal or obtaining a PTIN for 2023, will cost a non-refundable fee of \$30.75.

PTINs can be renewed or applied for online through [IRS.gov/taxpros](https://www.irs.gov/taxpros) or through the paper option, Form W-12, IRS Paid Preparer Tax Identification Number (PTIN) Application and Renewal. Further, The online PTIN system has a new look and feel, including dynamic application design, mobile friendliness, multi year renewals, and expanded support channels.

The IRS has also urged non-credentialed tax preparers to enroll in its Annual Filing Season Program and take continuing education courses to increase their knowledge and improve their filing

## Applicable Terminal Charge and SIFL Rates for Determining Value of Noncommercial Flights on Employer-Provided Aircraft Issued

The IRS has released the applicable terminal charge and the Standard Industry Fare Level (SIFL) mileage rates for determining the value of noncommercial flights on employer-provided aircraft in effect for the second half of 2022 for purposes of the taxation of fringe benefits. Further, in March 2020, the Coronavirus Aid, Relief, and Economic Security (CARES) Act (P.L. 116-136) was enacted, directing the Treasury Department to allot up to \$25 billion for domestic carriers to cover payroll expenses via grants and promissory notes, known as the Payroll Support Program (PSP). Therefore, the IRS has provided three SIFL rates: (1) the Unadjusted SIFL Rate; (2) the SIFL Rate Adjusted for PSP Grants; and (3) the SIFL Rate Adjusted for PSP Grants and Promissory Notes. The value of a flight is determined under the base aircraft valuation formula by multiplying the SIFL cents-per-mile rates applicable for the period during which the flight was taken by the appropriate aircraft multiple provided in Reg. §1.61-21(g)(7) and then adding the applicable terminal charge.

For flights taken during the period from July 1, 2022, through December 30, 2022, the terminal charge is \$44.18, and the SIFL rates are: \$.2417 per mile for the first 500 miles, \$.1843 per mile 501 through 1,500 miles, and \$.1771 per mile over 1,500 miles. Moreover, for flights taken during the period from July 1, 2022, through December 30, 2022, the terminal charge is \$44.97, and SIFL rate adjusted for PSP grants are: \$.2460 per mile for the first 500 miles, \$.1875 per mile 501 through 1,500 miles, and \$.1803 per mile over 1,500 miles. Finally, for flights taken during the period from July 1, 2022, through December 30, 2022, the terminal charge is \$46.83, and SIFL Rate Adjusted for PSP Grants and Promissory Notes are: \$.2562 per mile for the first 500 miles, \$.1953 per mile 501 through 1,500 miles, and \$.1878 per mile over 1,500 miles.

*Rev. Rul. 2022-19*

season readiness by December 31, 2022. Program participants are then included in a public directory of return preparers with credentials and select qualifications on the IRS website, which helps taxpayers find preparers in their area. Moreover, the IRS has encouraged non-credentialed return preparers to consider becoming an enrolled agent which is an

elite certification issued by the IRS to tax professionals who demonstrate special competence in federal tax planning, individual and business tax return preparation and representation matters. According to the IRS, enrolled agents have unlimited representation rights, allowing them to represent any client before the IRS on any tax matter.

## TAX BRIEFS

### *Claim of Right*

A trust (T1) was not the appropriate taxpayer to file a claim for refund. T1 filed a refund claim on the basis of flowthrough income it received as a partner of an LLC (L1). Both the capital gain and interest income that

T1 received as a partner were partnership items.

*O'Neill Trust, TC, Dec. 62,120(M)*

### *Discovery and Enforcement*

The IRS was entitled to initiate enforcement proceedings regarding the summonses

issued by the agency to an individual, in her capacity as the treasurer of a corporation. The district court concluded that the IRS had established the four necessary requirements, establishing its good faith to obtain enforcement of the summonses.

*Almeleh, DC Ariz., 2022-2 usrc ¶150,245*

### Employment Tax

The IRS Chief Counsel ruled that in-home care payments to the service providers, whether related or not, are generally remuneration for employment. A 2002 Field Service Advisory (FSA) was still valid if there was an employment relationship, including between a parent and child/related parties. Code Sec. 131 payments to individual care providers are generally like any other wages/compensation for services that are subject to FICA and FUTA, unless a specific exception applies. This includes the parent-child exception under Code Secs. 3121(b)(3)(B) and 3306(c)(5). Finally, the taxpayer could not choose to opt out of a statutory exclusion. The exclusion applied, unless there was an exception to it, such as under Code Sec. 3121(b)(3)(B)(i) – (iii).

*Chief Counsel Advice Memorandum*  
202243009

### Notice of Deficiency

The IRS was entitled to issue a deficiency notice to a married couple after issuing them the amount of the excess advance premium tax credit (APTC) benefit that was applied against their monthly health insurance premium.

*Manzillo, TC, Dec. 62,119(M)*

### Practitioner Priority Service

The IRS has initiated a pilot program that requires Practitioner Priority Service callers to repeat phrases before being transferred to an IRS representative. This pilot uses speech recognition to help ensure a live person is calling and not a mechanical device (e.g., to screen out "robocalls"). The IRS intends to improve customer service by reducing unnecessary wait times through this new process.

### Self-Dealing Loan

The IRS Chief Counsel held that interest that has accrued during closed years are included in the loan balance to compute the amount involved for the deemed acts of self-dealing in open years.

*Chief Counsel Advice Memorandum*  
202243008

### Tax Deficiency

The Tax Court did not err in sustaining a deficiency determination. The taxpayer failed to pay income tax liabilities on their

due date or estimated tax. The Tax Court did not err in determining additions to tax for failure to timely file tax returns. The Tax Court also imposed a statutory penalty under Code Sec. 6673 for pursuing a frivolous position after the taxpayer was warned.

*Lloyd, CA-9, 2022-2 USTC ¶50,244*

### Supreme Court Docket

A petition for review was filed/denied/granted in the following case: In Re Grand Jury (CA-9)—The Court of Appeals for the Ninth Circuit affirmed the federal district court order holding a company and law firm in contempt for failure to comply with grand jury subpoenas related to a criminal investigation of one of its clients (the owner of the company). The law firm provided legal advice to its client regarding the tax consequences of the client's expatriation under Code Sec. 877A, as well preparing several of the client's individual income tax returns. In response to the subpoenas, the law firm produced over 1,700 records, exceeding 20,000 pages, but withheld others based on the attorney-client privilege and work-product doctrine. The government moved to compel production of the withheld documents. The Ninth Circuit held that the "primary-purpose test" applies to attorney-client privilege claims for dual-purpose communications (for example, legal advice and tax advice). The court found that the D.C. Circuit had applied a test that assesses whether obtaining or providing legal advice was "one of the significant purposes of the communication," rather than the primary purpose of the communication." However, it declined to adopt that approach and affirmed the district court's finding that the predominant purpose of the disputed communications was not to obtain legal advice. Dkt. 21-1397. Cert. granted 10/3/2022.

A petition for review was filed/denied/granted in the following case:

Ampersand Chowchilla Biomass, LLC, CA-FC—Two LLCs were not entitled to receive additional grants issued to entities that placed in service specified energy property during the statutory time period. The Court of Appeals concluded that the applicable statute and corresponding regulation do not require facilities to produce power at ideal or near-ideal production levels to be placed in service. Further, the trial

court's finding that the facilities' intended use did not include operating at 90 to 95 percent capacity or any of the other stringent requirements asserted by the LLCs was not clearly erroneous. The evidence in the record supported the trial court's conclusion. Finally, the Court of Appeals considered the findings made by the Court of Federal Claims regarding the five-factor test used to determine when the facilities achieved their specifically assigned function and were placed in service. However, the Court of Federal Claims did not clearly err in finding that all five factors indicated that the facilities were placed in service outside of the statutory time window.

A petition for review was denied in the following case:

*Combs, CA-9, 2022-2 USTC ¶50,241*—The Tax Court did not err in determining that an author who performed in one-person comedy shows received constructive dividends attributable to personal expenses that an entity paid on his behalf. The taxpayer owned 100 percent of the entity, maintained authority over its checking and credit card accounts and was integrally linked to the sole source of its income producing activity. The taxpayer failed to provide any evidence concerning the entity's earnings and profits during the tax years at issue and thus failed to prove that the entity lacked sufficient earnings and profits to support dividend treatment at the shareholder level. Further, the taxpayer failed the two-part test which was applied to determine whether the entity's expenditures constituted constructive dividends because he presented unsorted voluminous documentation in which personal living expenses were not clearly distinguished from legitimate business expenses. The taxpayer was held liable for additions to tax because he failed to file his federal income tax return on time and did not provide a reasonable cause to do so. Further, the taxpayer was held liable for accuracy-related penalties for negligence because he purposefully participated in a scheme to reduce his income tax by improperly treating personal living expenses as business deductions. The taxpayer was held liable for additions to tax because he failed to file his federal income tax return on time and did not provide a reasonable cause to do so. Dkt. 21-1528. Cert. denied 10/03/2022.