Wolters Kluwer

MARCH 16, 2023
ISSUE NUMBER 11

FEDERAL TAX WEEKLY

INSIDE THIS ISSUE

White House Seeks Increase in IRS Budget, Outlines Tax Policy To Cover It 1

Indexing Adjustments Provided for Employer Shared Responsibility Applicable Dollar Amounts 2

IRS Announces Successful Expansion of Digital Scanning Initiative 3

Yellen Defends White House Budget Before House Committee 4

Senate Confirms Werfel as IRS Commissioner 4

2023 RMD Reporting Guidance Provided 5

Advanced Nuclear Power Production Credit Guidance Issued 5

IRS Recommends Acquiescence in Taxation of Exports Case 5

Certified Professional Employer Organization Procedures Updated 6

Panelists Call for Enhancement of Low Income Housing Tax Credit 7

IRS Renews Employee Retention Credit Warning; OPR Provides Guidance Alert 7

Low Income Taxpayer Clinic Supplemental Grant Application Period Opens 8

Tax Briefs 9

White House Seeks Increase in IRS Budget, Outlines Tax Policy To Cover It

President Biden is looking to add $2.1 billion more to the Department of the Treasury budget over 2023 enacted levels, an increase that would give the agency $16.3 billion in discretionary budget authority, with the majority of those funds earmarked for the Internal Revenue Service.

"To ensure that taxpayers receive the highest quality customer service and that all Americans are treated fairly by the U.S. tax system, the Budget provides a total of $14.1 billion for the IRS, $1.8 billion, or 15 percent, above the 2023 enacted level," the White House stated in the budget document released on March 9, 2023.

On the same day, the Treasury Department released the so-called "Greenbook" which outlines the administration's revenue proposals for Fiscal Year 2024.

The budget document noted that the IRS budget includes "an increase of $642 million to improve the taxpayer experience and expand customer service outreach to underserved communities and the entire taxpaying public," the document states, adding that $290 million will be allocated to information technology modernization.

The budget document also notes that in "addition to the annual discretionary funding, the Budget proposes to maintain deficit reducing Inflation Reduction Act-funded initiatives in 2032 and beyond. This proposal builds on decades of analysis demonstrating that program integrity investments to enforce existing tax laws and increase revenues in a progressive way by closing the tax gap—the difference between taxes owed and taxes paid."

Wealthy Remain a Source for Additional Revenue

President Biden's fiscal year 2024 budget proposal includes a range of tax policy recommendations that continue the focus on getting the wealthiest individuals and corporations to pay their fair share of taxes while continuing the pledge to provide relief to low- and middle-income taxpayers.

According to the Greenbook, the tax policy proposal includes "reforms that would raise revenues, expand tax credits for workers and families, improve tax administration and compliance and make the tax system more equitable and efficient."

In summarizing the proposals for targeting the wealthiest of taxpayers, the Greenbook states that there would be an increase in income tax rates for the wealthiest, including changes to how capital gains and dividends are taxed for these people and the closing of loopholes that are used to avoid paying taxes.

For low- and middle-income taxpayers, there is a proposed expansion of the child tax credit and a move to permanently make it fully refundable, determined monthly, and payable in advance. Other proposed reforms include an expansion of the earned income tax credit, and making permanent the expansion of the health care premium tax credits introduced in the American Rescue Plan Act of 2021 and extended in the Inflation Reduction Act of 2022.

Corporate Tax Rates

Companies classified as a "C" corporation would see an increase in the corporate income tax rate to 28 percent from the current 21 percent.

Further, the "effective global intangible low-taxed income (GILTI) rate would increase from 14 percent under the proposal," the Greenbook states, although the document notes that it would go up to 21 percent assuming the Congress ultimately approves work by the Organisation for Economic Co-operation and Development (OECD) on a global corporate minimum tax.

The White House in the Greenbook described the increases as a "simple way to raise revenue to pay for the Administration's fiscal priorities. A corporate tax rate increase can also increase the progressivity of the tax system and help reduce income inequity."

President Biden will also be targeting an increase of the tax rate on corporate stock repurchases to 4 percent of the fair market value from the current one percent, with the Greenbook stating that stock repurchases "are tax-favored relative to dividends as a means of distributing corporate profits to shareholders. Increasing the excise tax on stock repurchases would reduce this disparity."

Changes to the way certain corporate distributions are taxed to make them more like dividends is another adjustment the White House is looking for in the coming year.

Other business taxation areas covered under the proposal include:

- limiting tax avoidance through inappropriate leveraging of parties to divisive reorganizations;
- limiting losses recognized in liquidation transactions;
- preventing basis shifting by related parities through partnerships; and
- strengthening limitation on losses for noncorporate taxpayers.

Indexing Adjustments Provided for Employer Shared Responsibility Applicable Dollar Amounts

The IRS has provided indexing adjustments for the applicable dollar amounts under Code Sec. 4980H(c)(1) and (b)(1). These indexed amounts are used to calculate the employer shared responsibility payments (ESRP). This guidance is effective for tax years and plan years beginning after December 31, 2023. The Department of Health and Human Services (HHS) published the premium adjustment percentage for 2024 on December 12, 2022, using the most recent National Health Expenditure Accounts (NHEA) income and premium data that was available at the time of publication. For calculation of the 2024 benefit year payment parameters, HHS used the NHEA Projections 2021-2030. For calendar year 2024:

- the adjusted $2,000 amount under Code Sec. 4980H(c)(1) is $2,970 ($2,000 x 1.4899877401 = $2,979.9754802 rounded down to $2,970), and
- the adjusted $3,000 amount under Code Sec. 4980H(b)(1) is $4,460 ($3,000 x 1.4899877401 = $4,469.9632203 rounded down to $4,460).

Rev. Proc. 2023-17

Corporations would also get a new tax credit to help their employees with children. The proposal would "increase the existing tax credit to 50 percent of the first $1 million of the qualified child care expenses for a maximum total credit of $500,000 per year," the Greenbook states. "The portion of the tax credit related to referral expenses would remain at 10 percent with a maximum amount of $150,000".

High-Income Taxpayers

High earners will face new taxes if the White House budget were to be adopted.

Among the changes are an increase in the net investment income tax (NIIT) rate and additional Medicare tax rate for high-income taxpayers. The Biden Administration would use this tax to shore up the Medicare.

"According to current projections from the Medicare trustees, the Hospital Insurance Trust Fund (HITF) will be exhausted in 2028," the Greenbook states. "Increasing the NIIT and additional Medicare tax for high-income taxpayers and devoting NIIT proceeds to the HITF will extend the life of the trust fund."

The White House is proposing to increase the additional Medicare tax rate by 1.2 percent for taxpayers with more than $400,000 in earnings, bringing the marginal Medicare tax rate to 5 percent for those exceeding the earnings threshold. Similarly, the NIIT rate would jump by 1.2 percent to 5 percent for those meeting the same threshold.

Overall, high-income earners would face an increase in the top marginal income tax rate under the proposal, a move that "would raise revenue and increase the progressivity of the tax system," the White House states in the Greenbook.

"The proposal would increase the top marginal tax rate to 39.6 percent," accelerating the time that increase is scheduled to go into effect from tax years beginning after December 31, 2025, to December 31, 2022, the Greenbook states. "The top marginal tax rate would apply to taxable income over $450,000 for married individuals filing a joint return, $400,000 for unmarried individuals (other than surviving spouses), $425,000 for head of household filers, and

REFERENCE KEY

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

FEDERAL TAX WEEKLY, 2023 No. 11. Published by Wolters Kluwer, 2700 Lake Cook Road, Riverwoods, IL 60015.
© 2023 CCH Incorporated and its affiliates. All rights reserved.

$225,000 for married individuals filing a separate return. After 2024, the thresholds would be indexed for inflation using the C-CPI-U, which is used for all current thresholds in the tax rate tables."

The taxation of capital income would also be reformed under the proposal.

"Preferential tax rates on long-term capital gains and qualified dividends disproportionately benefit high-income taxpayers and provide many high-income taxpayers with a lower tax rate than many low- and middle-income taxpayers," the Greenbook states. "The rate disparity between taxes on capital gains and qualified dividends on the one hand, and taxes on labor income on the other, also encourages economically wasteful efforts to convert labor income into capital income as a tax avoidance strategy."

To address this, a number of proposals were made. For those with taxable incomes of more than $1 million, long-term capital gains and qualified dividends would be taxed at ordinary rates, with 37 percent generally being the highest rate. It would also treat transfers of appreciated property by gift or death as realization events.

The proposal would also impose a minimum income tax on the wealthiest taxpayers, imposing "a minimum tax of 25 percent on total income, generally inclusive of unrealized capital gains, for all taxpayers with wealth (that is, the difference obtained by subtracting liabilities from assets) greater than $100 million.

The White House is also proposing changes in the design of the work opportunity tax credit to promote longer-term employment.

Support for Working Families

For low- and middle-income taxpayers, the Greenbook offers a number of proposals to help them.

The proposal would expand the child tax credit and make permanent its refundability and advanceability.

"Expanding the CTC and making it fully refundable will substantially reduce child poverty," the Greenbook states, citing the positive effect that was generating by this provision through in the American Rescue Plan Act. "Moreover, full refundability would help ensure that families that have been historically excluded from economic opportunities or experienced persistent poverty are fully included in the nation's future growth."

Beginning after December 31, 2022, and ending before January 1, 2026, the proposal would:

- increase the maximum credit per child to $3,600 for qualifying children under age 6 and to $3,000 for all other qualifying children;
- phase out the portion of the credit in excess of $2,000 with income in excess of $150,000 of modified AGI for married joint filers or surviving spouses, $112,500 for head of household filers, and $75,000 for all other filers, with a modified rule for large families; and
- increase the maximum age to qualify for the CTC from 16 to 17.

Eligibility and credit amounts would be determined monthly, rather than annually, and the "qualifying child" standard would be replaced with the "specified child" standard, as well as the establishment of presumptive eligibility.

The proposal also would make permanent the American Rescue Plan expansion of the earned income tax credit for workers without qualifying children.

"The permanent EITC for workers without children is relatively small and phases out at very low incomes," the Greenbook notes. "This credit would generate a net refund of about $87 after subtracting their Federal income tax. (The taxpayer would pay over $1,100 in Federal payroll taxes.) A larger EITC for workers without children would promote employment and reduce poverty for this group of workers. It would also increase the progressivity of the Federal tax system."

Another aid to the non-wealthy taxpayer proposed by the Biden Administration is making permanent the Inflation Reduction Act expansion of health insurance premium tax credits, as well as making the adoption tax credit refundable and allowing certain guardianship arrangements to qualify. It also would help working taxpayers by making permanent the income tax exclusion for forgiven student debt.

Other Proposals

The Greenbook also covers a number of other areas, including proposals that support housing; help the environment through elimination of fossil fuel preferences and eliminating the drawbacks on petroleum taxes that finance the Oil Spill Liability Trust Fund and Superfund, and imposing a digital asset mining energy excise tax.

It also covers changes to estate and gift taxation, closes a number of loopholes, modernizes rules (including digital asset rules), and includes provisions to help tax administration.

IRS Announces Successful Expansion of Digital Scanning Initiative

The IRS has announced the successful expansion of the digital scanning initiative also known as Digital Intake. The Service has already scanned more than 120,000 paper Forms 940 since the start of 2023, which is a twenty-fold increase compared to all of 2022. The digital scanning initiative will expand soon to include scanning of Forms 1040 as well as Forms 941. In addition to contracts with industry partners, the IRS is also working with Treasury's Bureau of the Fiscal Service and Lockbox Financial Agents to expand the reach of this work. Current scanning initiatives currently underway at the IRS cover:

- Digital Intake with Lockbox: Lockbox Financial Agents (FAs) are banks that specialize in payment processing. Each year, taxpayers send payments and associated forms to these Lockbox banks. The Lockbox project works to scan paper returns on-site, and e-file those returns.
- Digital Intake with Industry Partners: This process extracts machine-readable information from paper tax returns and then e-files those returns.

By providing a capability to scan and electronically process paper returns, the IRS will be able to shorten the processing time for taxpayers who file paper returns.

IR-2023-41

© 2023 CCH Incorporated and its affiliates. All rights reserved.

Yellen Defends White House Budget Before House Committee

Department of the Treasury Secretary Janet Yellen touted the deficit reducing aspects of the White House's proposed fiscal year 2024 budget proposal before the House Ways and Means Committee.

Yellen told committee members during a March 10, 2023, hearing about the budget that "with the proposed tax reforms, we estimate that this budget will deliver a deficit reduction of nearly $3 trillion over the next 10 years."

However, panel Republicans challenged the budget for increasing the nation's debt. Rep. Jodey Arrington (R-Texas) criticized the budget for adding $6 trillion to the nation's debt, saying that "even if I believe what you put on paper, you're taking off half of that, only half of the $6 trillion you've added, … [that] we're gonna help save the country by giving half the money that we borrowed on the backs of our children. I just don't believe it."

She noted the budget was constructed around the idea of fairness and said that the provisions "look for additional revenues to Americans with very high incomes, many of whom, in total, pay less taxes than a teacher or a firefighter. And through the President's budget, there are many proposals to make sure [for] the sake of tax fairness that those individuals … making $100 million or more should pay at least 25 percent of their full income in taxes."

Yellen also promoted making permanent the child tax credit that was part of the American Rescue Plan, noting that "it had a dramatic effect in lowering child poverty" and that the "great majority of families that received the child tax credit were working families. Others were seniors taking care of grandchild or sometimes children with disabilities."

She added that President Biden "believes that this something that should be in place permanently."

Yellen also defended her policy that there would be no increase in audits for those individuals and small businesses making $400,000 or less, but did clarify that the increase was in the proportion of audits, and in doing so she openly acknowledged that if there are more people added to the pool of those under the $400,000 threshold, maintaining and not increasing the portion of audits affecting that population could result in an increase in the actual number of people audited under the $400,000 threshold. But she reiterated that the proportion of audits of that population would not increase.

OECD Process Questioned

Yellen was also challenged on the work being done to implement a global corporate minimum tax, particularly that the Treasury Department is not working closely enough with Congress as it works through the negotiations.

She refuted that notion, saying that the agency has "consulted with this committee and with staff on a regular basis about these global negotiations. … Our staff is keeping committee staff well informed."

Yellen also refuted that the global corporate tax framework being negotiated by Oganisation for Economic Co-operation and Development will harm American corporations and taxpayers.

American stands "to gain substantially in pillar one because we're a very large market jurisdiction, and that means that we will get increased taxiing power," Yellen testified, adding that it likely will not have a negative impact on U.S.-based multinational corporations.

And while the OECD is building toward a 15 percent corporate minimum tax rate, the White House budget proposed a 21 percent minimum tax on corporations.

Yellen defended that by noting that many counties now impose no taxes, and with the OECD global corporate minimum tax in place, the gap, accounting for the budget proposal, shrinks from 15 percent to 6 percent, making it more attractive for companies to do business here and making it more attractive for American companies to produce more domestically.

She also noted that the United States is "the only country in the world that imposes any tax at all on foreign earnings of domestic corporations. No other country does that. And what the OECD agreement does is 137 countries agreed that they will start to do what we already do. And they will agree to impose a higher tax rate that we currently do."

Senate Confirms Werfel as IRS Commissioner

Daniel Werfel will take over as Internal Revenue Service Commissioner after being confirmed by the Senate on March 9, 2023.

The upper chamber of Congress voted 54-42 to approve Werfel's nomination. The bipartisan vote followed a similar bipartisan vote in the Senate Finance Committee on March 2, 2023, with three committee Republicans joining all the majority Democrats in advancing the nomination the full Senate for its consideration. Werfel's term as commissioner is scheduled to last until November 12, 2027.

Werfel's February 15, 2023, confirmation hearing with the Senate Finance Committee was met with little controversy or confrontation. His written answers to questions submitted by committee members can be found at on the Senate Finance Committee web site at Daniel Werfel Senate Finance Committee QFR's - February 24, 2023.

Werfel previously led the IRS in an acting commissioner role under President Obama from May 22, 2013, to December 23, 2013, taking over the agency after an Inspector General report highlighted alleged mismanagement and bias in determining the tax-exempt status for non-profit organizations. Werfel will take over the agency from his role as a managing director and partner at Boston Consulting Group, where

he runs the firm's global public sector practice. He also served as controller of the Office of Management and Budget in 2009 for four years under President Obama prior to taking over as acting commissioner.

2023 RMD Reporting Guidance Provided

Notice 2023-23

The IRS has issued guidance to financial institutions on reporting required minimum distributions (RMDs) for 2023 after the amendment to Code Sec. 401(a)(9) made by the SECURE 2.0 Act, P. L. 117-328. For an IRA owner who attains age 72 after December 31, 2022, and age 73 before January 1, 2033, the new required beginning date is April 1 of the calendar year following the calendar year in which the individual attains age 73, rather than April 1 of the calendar year following the calendar year in which the individual attains age 72. The following RMD reporting requirements apply to 2023 RMDs:

- If an IRA owner has an RMD due for 2023, the financial institution that is the trustee, custodian, or issuer maintaining the IRA must file a 2022 Form 5498, IRA Contribution Information, by May 31, 2023, and indicate by a check in Box 11 that an RMD is required for 2023. Alternatively, the financial institution may choose to provide further information in Box 12a (RMD Date) and Box 12b (RMD Amount).
- Additionally, under Notice 2002-27, 2002-1 CB 814, if an IRA owner has an RMD due for 2023, the financial institution must furnish a statement to the IRA owner by January 31, 2023, that informs the IRA owner of the date by which the RMD must be distributed and either provides the amount of the RMD or offers to calculate that amount upon request (RMD statement).

For IRA owners who will attain age 72 in 2023, the RMD statement required under Notice 2002-27 should not be sent, and the 2022 Form 5498 should not include a check in Box 11 or any entries in Box 12a or 12b.

The IRS notes that financial institutions have had only a short amount of time to change the their systems for furnishing RMD statements since the enactment of the SECURE 2.0 Act. As a result, the IRS will not consider an RMD statement provided to an IRA owner who will attain age 72 in 2023 to have been provided incorrectly if the IRA owner is notified by the financial institution no later than April 28, 2023, that no RMD is actually required for 2023.

The SECURE 2.0 Act has not changed the required beginning date for IRA owners who attained age 72 prior to January 1, 2023. Thus, the IRS has encouraged all financial institutions to remind IRA owners who have attained age 72 in 2022, and have not yet taken their 2022 RMDs, that they are still required to take those distributions by April 1, 2023.

Advanced Nuclear Power Production Credit Guidance Issued

Notice 2023-24

The IRS provided guidance on several issues related to the credit for producing electricity from advanced nuclear power facilities. The IRS also requested comments on the guidance. The guidance explains several issues related to the credit, including:

how to compute the credit;

- the amount of the unutilized national megawatt capacity limitation (NMCL);
- how to apply for allocations of the unutilized NMCL solely with respect to facilities that the Department of Energy (DOE) previously certified as "advanced nuclear facilities," and how the IRS will make the allocations; and
- how a qualified public entity may elect to transfer the credit to an eligible project partner.

The IRS intends to issue additional guidance regarding the procedures by which any unutilized NMCL will be allocated to a facility that did not receive a certification from the DOE as an advanced nuclear facility.

The IRS also requests comments on the guidance, especially with respect to the procedures for allocating the remaining unutilized NMCL; and the method for calculating the reference price for purposes of the phase-out of the credit. Comments may be submitted electronically or in writing by May 8, 2023. They should include reference to Notice 2023-24.

Notice 2013-68, 2013-46 I.R.B. 501, is obsoleted.

IRS Recommends Acquiescence in Taxation of Exports Case

AOD-2023-1

The IRS will acquiesce to an appeals court holding in *Trafigura Trading LLC v. United States*, CA-5, 2022-1 ustc ¶70,372. The corporation and its subsidiaries sought to recover seeking a refund of the Code Sec. 4611(b) excise taxes it had remitted and argued that the direct tax on exports violated the U.S. Constitution. The government argued that Code Sec. 4611(b) is a valid user fee rather than an impermissible

© 2023 CCH Incorporated and its affiliates. All rights reserved.

tax on exports because the Oil Spill Liability Trust Fund (OSLTF) pays for oil pollution cleanup costs and the exporter benefits from a liability cap related to oil spills.

The potential benefits provided by the OSLTF would not apply to land-based transportation. The taxpayer received no benefit for its payment for those oil exports. The Fifth Circuit stated this had the effect of land-locked states subsidizing port access states and that effect violated the intent of the Export Clause, which was to prevent Congress from raising a disproportionate amount of federal revenue from southern states. The court found this one issue dispositive. The Service disagreed with the court, both for its conclusion that the (1) fee was not fairly matched to the benefits received; and (2) use of a two-part test to determine that a charge based on quantity was automatically more like a tax than a user fee. Nonetheless, in the interest of sound tax administration, the Service would follow the decision in all circuits.

Therefore, the Service would no longer seek to collect the tax imposed by Code Sec. 4611(b)(1)(A) on domestic crude oil that is exported. Finally, the Service could have previously denied a taxpayer's refund claim for the tax imposed by Code Sec. 4611(b)(1)(A) for exported domestic crude oil because the tax was unconstitutional. If so, the taxpayer could file for audit reconsideration for any year that is still open under Code Sec. 6532(a).

Certified Professional Employer Organization Procedures Updated

Rev. Proc. 2023-18

The IRS has updated the procedures for applying to be a certified professional employer organization (CPEO), the requirements to remain certified, and the procedures for suspending and revoking certification. A professional employer organization (PEO) is an organization that enters into an agreement with a client to perform federal employment tax withholding, reporting, and payment functions related to workers performing services for the client. A CPEO is a PEO that has been certified by the IRS and meets certain requirements. This guidance consolidates the ongoing requirements articulated in prior guidance and the regulations under Code Sec. 3511 and Code Sec. 7705. It also reflects changes in the ongoing operations of the CPEO program, including updates to the IRS Online Registration System, and changes in response to comments and questions received from CPEOs and CPEO applicants.

The guidance clarifies and makes several substantive changes to procedures outlined in Rev. Proc. 2016-33 and Rev. Proc. 2017-14. Specifically, the guidance:

- expands and defines the role of the application submitter, to make application processing, document and information submission, and other communications regarding the CPEO applicant or CPEO more efficient, and clarifies who can be an application submitter;
- updates the procedures for a denial of CPEO certification and for the suspension and proposed revocation of a certification, and provides additional details on review by the IRS Office of Professional Responsibility (OPR), including rules prohibiting most communications between OPR and the IRS CPEO Program Office, and between OPR and the CPEO applicant or CPEO during OPR's review;
- provides information on how CPEOs should submit Form 8973, Certified Professional Employer Organization/Customer Reporting Agreement, unsigned by a client, for CPEOs that occasionally experience difficulty in obtaining a signature on Form 8973 from a client subject to a service agreement described in Reg. §31.3504-2(b)(2);
- provides additional details on the CPEO applicant's and CPEO's use of the IRS Online Registration System account, including a requirement that CPEO applicants and CPEOs that are members of a controlled group in which more than one member of the controlled group is a CPEO applicant or CPEO must create a controlled group license within the IRS Online Registration System;
- clarifies that, as part of an examination level attestation indicating that the CPEO or CPEO applicant failed to withhold or make deposits in certain immaterial aspects, the CPEO or applicant may include an explanation not only as to why the failures were immaterial, but also how the failures were addressed, if applicable; and
- updates the fingerprint procedures for responsible individuals, so that all responsible individuals are now required to submit fingerprints electronically using Fieldprint (https://www.fieldprint.com) or by another method permitted in the online application instructions.

All current responsible individuals have until June 1, 2023, to submit new fingerprints electronically.

The IRS may periodically update this guidance to improve CPEO program procedures. It has requested comments on this guidance and the administration of the CPEO program. Comments on whether additional guidance is needed due to ongoing changes in workforce practices that have in part resulted from the COVID-19 pandemic as those changes relate to the definition of work site or work site employee are specifically requested, and should be submitted by June 9, 2023.

Comments may be submitted in one of two ways: (1) Mail: Send paper submissions to CC:PA:LPD:PR (RP-2023-18), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington,

DC 20044. (2) Electronically: Submit electronic submissions via the Federal eRulemaking Portal at https://www.regulations.gov (indicate IRS and RP-2023-18) by following the online instructions for submitting comments.

This guidance is effective March 10, 2023.

Rev. Proc. 2016-33, I.R.B. 2016-25, 1034, and Rev. Proc. 2017-14, I.R.B. 2017-3, 426, are modified and superseded.

Panelists Call for Enhancement of Low Income Housing Tax Credit

Panelists convened to testify before the Senate Finance Committee called for enhancements of the low income housing tax credit as a means of making real estate more available and affordable.

During a March 7, 2023 hearing, Denise Scott, president of Local Initiatives Support Corporation, testified that the credit "has been responsible for the production of most of the affordable housing, and more than 50 percent of the households in tax credit properties are extremely low income families."

An overview of various tax policies was prepared for the hearing by the Joint Committee on Taxation and can be found at https://www.jct.gov/publications/2023/jcx-4-23/.

She suggested Congress could "spur the creation of over two million more rental units over the next decade by restoring the 12.5 percent increase to the formula for the allocated tax credits." That increase was enacted in 2018 but expired in 2021.

Sharon Wilson Geno, president of the National Multifamily Housing Council, recommended that the low income housing tax credit be expanded to capture more middle class families and build "off of the success of the low income housing tax credit."

However, Mark Calabria, senor advisor at the Cato Institute, urged a little restraint when it comes to using tax policy to stimulate the housing market.

"Most indicators suggest that rents would decline over the next 12-to-18 months," he testified before the committee. "So, I would just urge some cautiousness to thinking about adding stimulus to additional construction at a time when we are likely passing the peak of the cycle."

Wilson Geno said that the private market "simply cannot afford to provide housing in the amounts we need it in the lowest income tiers, and also the middle-income tier. So those tax incentives are incredibly useful."

Calabria also cautioned about offering any additional credits that are focused on the demand side of housing equation.

"We need to be cautious about adding demand subsidies that simply run up prices, which is how we've gotten the inflationary pressures we face today," he said.

IRS Renews Employee Retention Credit Warning; OPR Provides Guidance Alert

IR-2023-40

The IRS has issued a renewed warning urging taxpayers to carefully review the Employee Retention Credit (ERC) guidelines before trying to claim the credit as promoters continue pushing ineligible people to file. These promoters charge large upfront fees or a fee that is contingent on the amount of the refund.

Individuals and businesses can avoid this scheme by not filing improper claims in the first place. If a business filed an income tax return deducting qualified wages before it filed an employment tax return claiming the credit, the business should file an amended income tax return to correct any overstated wage deduction. Taxpayers are always responsible for the information reported on their tax returns. Improperly claiming the ERC could result in taxpayers being required to repay the credit along with penalties and interest.

To report tax-related illegal activities relating to ERC claims, taxpayers can fax or mail a completed Form 14242, Report Suspected Abusive Tax Promotions or Preparers, and any supporting materials to the IRS Lead Development Center in the Office of Promoter Investigations. Employers should also report instances of fraud and IRS-related phishing attempts to the IRS at phishing@irs.gov and Treasury Inspector General for Tax Administration at 800-366-4484.

OPR Alert on Tax Professionals' Role in ERC Compliance

The IRS Office of Professional Responsibility (OPR) has also issued an email alert to tax practitioners on their responsibilities under Circular 230, Regulations Governing Practice before the Internal Revenue Service, regarding the ERC. This is in response to practitioner requests for guidance to ensure they are meeting their responsibilities and the standards required to prepare and sign original tax returns, amended returns, or refund claims relating to ERCs. The alert comes in the wake of the ERC promoter efforts mentioned above.

© 2023 CCH Incorporated and its affiliates. All rights reserved.

OPR highlighted several Circular 230 provisions that are implicated when dealing with a client who has claimed or is seeking to claim an ERC:

- **Diligence as to accuracy**- Under section 10.22(a), practitioners who prepare tax returns have a duty of due diligence to inquire of their clients with sufficient detail to ascertain the information necessary to determine clients' eligibility for the ERC, and to claim the proper amount of the ERC on the clients' returns. While section 10.34(d) allows a practitioner to generally rely on information from the client in good faith and without verification, the practitioner must make reasonable inquiries of a client to confirm eligibility for the ERC. If information from the client appears to be incorrect, incomplete, or inconsistent with other facts the practitioner knows, the practitioner must make further inquiries. If the practitioner cannot reasonably conclude, consistent with these standards, that the client is or was eligible to claim the ERC, then the practitioner should not prepare an original or amended return that claims or perpetuates a potentially improper credit.
- **Standards for tax returns and other documents**- Standards in section 10.34 regarding tax returns and documents, affidavits, and other paper apply to the practitioner's activities in assisting or advising a client on the ERC. A practitioner acting as a preparer or adviser may determine that the client had previously claimed an excessive ERC. In addition to informing the client under section 10.21 of the "noncompliance, error, or omission" and any penalty or penalties that may apply, the practitioner should consider advising the client of the option of filing an amended return. The practitioner is not obligated to prepare the amended ERC claim unless asked by the client, and then only if the practitioner feels competent to do so.
- **Written advice**- Section 10.37(a)(3) allows practitioners in their advice to a client to rely on the advice of others only if reliance is reasonable under all the facts and circumstances. If the other adviser, who may have advised the client to claim the ERC, has a conflict because of the amount or character of the fee the adviser charged for the advice at the time, then the practitioner's reliance on that advice may not be reasonable. Practitioners should note that section 10.27 separately limits the circumstances in which an adviser, if a practitioner, may charge a contingent fee.

Low Income Taxpayer Clinic Supplemental Grant Application Period Opens

IR-2023-42

The IRS has announced that it will accept supplemental applications for Low Income Taxpayer Clinic (LITC) matching grants from all qualified organizations. The application period will run until April 18, 2023. The funding and the period of performance for the supplemental grant will be July 1 to December 31, 2023. This supplemental grant period is intended to award the additional grant funds that have been made available. Due to the additional funding, the LITC Program Office is expanding the types of qualified services an organization can provide. Specifically, under this expansion a qualified organization may receive a grant for referring low income taxpayers in a controversy with the IRS to a qualified representative instead of providing controversy representation directly to those taxpayers, or operating a pilot program to inform English as a second language (ESL) taxpayers about their taxpayer rights and responsibilities without also providing controversy representation.

Although a qualified organization is no longer required to provide both representation services and education services, organizations are still encouraged to provide both services if their resources allow. The LITC Program Office intends to allow organizations in future grant years to satisfy the representation component of the LITC mission through the referral of taxpayers to qualified representatives. It intends to treat grants to organizations that provide education to ESL taxpayers without also providing controversy representation as a pilot for the remainder of the 2023 grant year and will then assess whether to continue that approach in future years.

Applicants that want to be considered for 2024 grant year funding will need to apply for a separate grant when that application period opens on or about May 1, 2023. The states of Hawaii, Montana, Nevada, and North Dakota and the territory of Puerto Rico currently do not have LITCs. Arizona and Florida have LITCs that cover only part of those states. The IRS also provided a list of counties not covered in those states. The IRS is particularly interested in receiving applications from organizations that provide services in these underserved geographic areas. Applications must be submitted electronically at www.grants.gov by 11:59 p.m. Eastern time on April 18, 2023. The funding number is TREAS-GRANTS-052023-002. Copies of IRS Publication 3319, 2023 Grant Application Package and Guidelines, can be downloaded from IRS.gov or ordered by calling 800-829-3676. Questions about the LITC Program or grant application process can be addressed to the LITC Program Office by email at LITCProgramOffice@irs.gov.

TAX BRIEFS

Amortization

The IRS will not acquiesce to a tax court case holding in *Complex Media, Inc. v. Commissioner*, 121 TCM 1089, Dec. 61,817(M), T.C. Memo. 2021-14. The tax court had allowed a corporation to claim amortization deductions in respect of amortizable Code Sec. 197 intangibles for the tax years at issue.

Nonacquiescence Announcement 2023-2

Assessment

An individual, who had been indicted for false claims, wire fraud, and obstructing administration of internal revenue laws was not entitled to challenge the restitution-based assessment (RBA) made on him by the IRS. Moreover, the settlement officer did not abuse her discretion in sustaining the proposed collection actions because she verified that the taxpayer's restitution obligation had been properly assessed.

Dawveed, TC, Dec. 62,173(M)

Disaster Relief

A December 16, 2022 notice granting relief to victims of Hurricane Nicole that began on November 7, 2022, in parts of Florida was updated by the IRS on February 3, 2023, to clarify available relief. Among other things, individuals and corporations who had a valid extension to file their 2021 return due by October 17, 2022, now have until March 15, 2023, to file.

Florida Disaster Relief Notice (FL-2022-20)

Penalties

A C corporation's request for redetermination of penalties under Code Sec. 6663 was denied due to lack of jurisdiction. The taxpayer acknowledged that it did not exist during any part of IRS' examination of its consolidated return. Thus, having ceased to exist, the taxpayer lacked the requisite capacity to petition the Tax Court for redetermination of the deficiency.

Techtron Holding, Inc, TC, Dec. 62,175(M)

Research Credit

A parent company was denied a tax credit under Code Sec. 41. It failed to provide a principled way to determine the portion of employee activities that constituted elements of a process of experimentation.

Little Sandy Coal Company, Inc., CA-7

Whistleblower

The Tax Court lacked jurisdiction to review the IRS Whistleblower Office's denial of an informant's claim requesting a nondiscretionary award for the proceeds of the Offshore Voluntary Disclosure Initiative (OVDI). The informant's argument that either the creation of OVDI or taxpayers' participation in OVDI was a related action, which is a type of administrative or judicial action, was denied.

Shands, TC, Dec. 62,174

© 2023 CCH Incorporated and its affiliates. All rights reserved.