

FEDERAL TAX WEEKLY

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Overwhelming Support For U.S.-Chile Tax Treaty In Senate

A tax treaty between the United States and Chile received near unanimous support in the Senate, paving the way for its final ratification.

In a 95-2 vote on June 22, 2023, the Senate voted to approve the treaty. Only Sen. Rand Paul (Rake.) and Sen. Josh Awhile (Rome.) voted against the treaty. It passed the Senate Foreign Relations Committee by a 20-1 vote earlier in June. The treaty had been signed back in 2010, but the ratification by the Senate has been held up by Sen. Paul since 2012.

Under the treaty, U.S. citizens and residents will be able to take as a credit against their U.S. income tax any taxes paid or accrued to Chile. U.S. businesses owning at least 10 percent of a Chile-based company will be able to take a deduction on dividends earned from the Chilean company.

The treaty language notes that it is “generally consistent with existing U.S. tax treaty policy,” although it does contain “a number of variations from the current U.S. Model Income Tax Convention that reflect particular aspects of Chilean law and treaty policy, the interaction of U.S. and Chilean law, and U.S.-Chile economic relations.”

IRS Has Made Little Progress On Amended Return Backlog, NTA Reports

IR-2023-119

The Internal Revenue Service has made progress on clearing out the backlog of paper original returns in the wake of the COVID-19 pandemic, but the backlog of unprocessed amended returns remains an issue for the agency, National Taxpayer Advocate Erin Collins reported.

In the NTA Objectives Report to Congress for Fiscal Year 2024, released June 21, 2023, Collins reported that as of April 22, 2023, there were 2.6 million unprocessed paper tax returns, down from 13.3 million unprocessed paper returns from the same date one year earlier.

“The IRS caught up in processing paper-filed original Forms 1040 for individuals and various business returns; refunds were generally issued quickly; and taxpayers calling the IRS were much more likely to get through – and with substantially shorter wait times,” Collins reported. “Overall, the difference between the 2022 filing season and the 2023 filing season was like night and day.”

However, for those who have filed amended returns, the backlog numbers tell a different story.

The backlog of unprocessed amended paper tax returns on April 22, 2023, was 3.4 million returns, down only 200,000 returns from the same date one year ago. Part of the delay stems from the fact that while the IRS accepts amended individual returns (Forms 1040-X)

electronically, the agency processes the forms manually.

“This creates delays in both data intake and the issuance of refunds,” Collins stated. “As of the end of the filing season, it was taking the IRS about seven months to process Forms 1040-X.” She attributed the ongoing backlog of amended individual returns to the agency’s prioritization of telephone customer support over paper processing.

On the business side, delays were attributed to processing of amended returns with Employee Retention Credit claims and the amount of fraud the ERC claims have generated.

“The influx of fraudulent claims has put the IRS between a rock and a hard place,” Collins wrote. “If the IRS pays out claims quickly without taking the time to review them individually, it will be making some payments to individuals potentially engaged in fraud. If it takes the time to review claims individually, legitimate businesses who need the funds Congress

IRS Reminds Taxpayers About Form 1120-W

The IRS has reminded taxpayers that the Form 1120-W, Estimated Tax for Corporations and the instructions for the same, are now historical. Form 1120-W was last revised and released in 2021. Further, the Service will be updating Publication 542, Corporations, U.S Corporation Income Tax Return and the instructions for the tax returns of other corporations that used Form 1120-W in past years to include guidance on determining a corporation's estimated tax payments.

authorized to help them say afloat may not receive them in time.”

Another area where a backlog persists is in the amount of unprocessed taxpayer correspondence and accounts management cases, with the backlog dropping to 5 million on April 22, 2023, from 5.3 million on April 22, 2022.

“Because of the Treasury Department’s decision to prioritize telephone service over paper processing, the IRS has not made much progress in reduction its AM inventories over the past year,” Collins noted, adding that for victims of identity

theft, “the delays have been particularly long and frustrating. The average cycle time for Identity Theft Victim Assistance cases closed in April 2023 was 436 days – nearly 15 months. That’s about three months longer than the 362-day cycle time in April 2022”.

The report also highlighted other issues that the agency needs to address. Collins identified two areas where the agency needs to provide clear and timely guidance – the federal tax treatment of special state tax refunds or payments in more than 20 state and Form 1099-K reporting requirements.

Individual’s Electronically Filed Petition Dismissed as Untimely

A.J. Sanders, 160TC —, No. 16, Dec. 62,230

An individual who had electronically filed a petition to seek redetermination of tax deficiency eleven seconds after midnight of the due date had his petition dismissed as untimely. The Tax Court’s electronic filing system (DAWSON) was held to be a filing location for the purposes of Code Sec. 7451, and this location was available at all times on the day the taxpayer’s petition was due.

Untimely Petition

The taxpayer alleged that he had encountered problems when electronically filing his petition and that those problems caused the petition to be untimely. The taxpayer had set up an account to electronically file the petition through DAWSON and had downloaded the necessary PDF forms to his Android mobile phone, but he was unable to fill out the forms on his phone. Subsequently, he was finally

able to switch to his Windows computer shortly before midnight but was slowed down by having to send the filled out forms from his phone to his email to be downloaded to his computer. Moreover, the taxpayer had to refer to the instructions several times. However, DAWSON remained operational for other users at all relevant times. Since the petition was not received by the tax court until eleven seconds after midnight, it was not timely under Code Sec. 6213(a).

REFERENCE KEY

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

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DAWSON as Filing Location

The taxpayer contended that DAWSON system errors prevented him from filing his petition at or before midnight and claimed protection under Code Sec. 7451. However, DAWSON, as a filing location, was not inaccessible or otherwise unavailable to the general public on the taxpayer's last filing date. Code Sec. 7451 was inapplicable because the difficulties experienced by

the taxpayer such as his inability to fill out PDF forms on his phone were irrelevant. The forms were completed separately and were not a part of DAWSON's filing portal.

Mailbox Rule and Equitable Tolling Inapplicable

The Tax Court held that the mailbox rule was not applicable to electronic filing.

Further, the doctrine of equitable tolling was not applicable in the taxpayer's case because the filing deadline was jurisdictional under Code Sec. 6213. Congress has limited the Tax Court's deficiency jurisdiction to only those cases in which a petition has been timely filed and the tax court has not been given the authority to extend the deadline in Code Sec. 6213 by equitable tolling.

IRS Modifies Applicability of HDHP Relief

Notice 2023-37

In light of the end of the COVID-19 public health emergency, the Treasury Department and the IRS have released guidance modifying prior guidance regarding benefits related to testing for and treatment of COVID-19 that can be provided by a high deductible health plan (HDHP). Specifically, the relief described in Notice 2020-15, which provides that a health plan will not fail to be a HDHP if it provides benefits related to the testing and treatment of COVID-19 prior to the satisfaction of a deductible, applies only with respect to plan years ending on or before December 31, 2024.

For subsequent plan years, a high deductible health plan (HDHP) is not permitted to provide health benefits associated with testing for and treatment of COVID-19 without a deductible, or with a deductible below the minimum deductible (for self-only or family coverage) for an HDHP.

Preventive Care Safe Harbor

Generally, an HDHP is not permitted to provide benefits for any year until the minimum deductible for that year is satisfied. However, an HDHP may provide preventive care benefits without a deductible, or

with a deductible below the minimum annual deductible. The preventive care safe harbor described in Notice 2004-23, I.R.B. 2004-15, 725 includes screening services but generally not any service or benefit intended to treat an existing illness, injury, or condition, such as the flu. The guidance clarifies that the preventive care safe harbor therefore does not include screening for COVID-19. If COVID-19 testing were to be recommended with an "A" or "B" rating by the USPSTF, then that testing would be considered preventive care under Code Sec. 223(c)(2)(C).

Notice 2004-23, I.R.B. 2004-15, 725 is clarified and Notice 2020-15, I.R.B. 2020-14, 559, is modified.

Inflation Adjustment and Reference Prices for Renewable Energy Production Credit Released

Credit for Renewable Electricity Production and Publication of Inflation Adjustment Factor and Reference Price for Calendar Year 2023

The IRS has published inflation adjustment factor and reference prices for determining the credit for renewable electricity production for calendar year 2023 sales of kilowatt hours of electricity produced in the U.S. or a U.S. possession from qualified energy resources.

The inflation adjustment factor for qualified energy resources is 1.8909. The reference price for facilities producing electricity from wind is 3.74 cents per kilowatt hour. The reference prices for facilities producing

electricity from closed-loop biomass, open-loop biomass, geothermal energy, solar energy, municipal solid waste, qualified hydropower production and marine and hydrokinetic renewable energy have not been determined for calendar year 2023.

Phaseout Limits

For electricity sold during calendar year 2023, the renewable electricity production credit is not subject to a phaseout under Code Sec. 45(b)(1) for electricity produced from wind. This is because the 2023 reference price for electricity produced

from wind, 3.74 cents per kilowatt hour, does not exceed 8 cents multiplied by the inflation adjustment factor (1.8909). The phase-out of the credit also does not apply to electricity sold in 2023 and produced from closed-loop biomass, open-loop biomass, geothermal energy, solar energy, municipal solid waste, qualified hydropower production and marine and hydrokinetic renewable energy.

Credit Amount Adjustments

The credit for renewable electricity production for calendar year 2023 under

Code Sec. 45(a) is 2.8 cents per kilowatt hour on the sale of electricity produced from the qualified energy resources of wind, closed-loop biomass

and geothermal energy. The credit is 1.4 cents per kilowatt hour on the sale of electricity produced in open-loop biomass facilities, landfill gas facilities, trash

facilities, qualified hydropower facilities and marine and hydrokinetic renewable energy facilities.

Office of Chief Counsel Releases Guidance on New Signature Block

Chief Counsel Notice CC-2023-001

The Office of Chief Counsel has advised all Chief Counsel employees of a necessary modification to the signature block on all documents signed and filed with the Tax Court, correspondence sent to the Department of Justice and other recipients and other documents prepared on behalf of the Chief Counsel, effective immediately. This notice

supersedes CC Notice 2022-001, Chief Counsel Signature Block.

The notice provides the new signature block that should be used on all documents to be filed with the Tax Court that are signed and dated after June 6, 2023. Further, a similar signature block should be used on all other documents and correspondence signed and dated after June 6, 2023, for which the appropriate titular authority is the Chief Counsel. Additionally, if a

Tax Court document has been signed by a taxpayer or taxpayer's representative but has not been sent to or e-filed with the Tax Court before June 6, 2023, the document need not be re-executed. Instead, a sticker with the new Acting Chief Counsel signature block may be affixed over the old signature block before scanning. For other documents, the signature page should be modified and re-executed to reflect the new signature block.

Proposed Regulations Modify Corporate Bond Yield Curve Used By Defined Benefit Plans

Proposed Regulations, NPRM REG-124123-22

The IRS issued proposed regulations that specify how to construct the corporate bond yield curve used to derive the interest rates for present value calculations under defined benefit plans. These calculations are used to determine the plan's minimum required contribution and the present value of annuity benefits. The proposed method would also be used by insurance companies to discount unpaid losses and estimated salvage recoverable.

Defined benefit plans that are not multi-employer plans must meet the minimum funding requirements of Code Sec. 430. To meet these requirements, plans must calculate the present value of benefits using

three interest rates: the first segment rate for benefits payable within 5 years, the second segment rate for benefits payable within 15 years, and the third segment rate for benefits payable after 15 years. Under Code Sec. 430(h)(2)(C), each segment rate is determined for a month based on the corporate bond yield curve for the month, subject to interest rate stabilization rules. Plan sponsors may also elect to use the corporate bond yield curve, instead of the three segment rates, to determine the plan's minimum required contribution.

Notice 2007-81 describes the current methodology used to develop the corporate bond yield curve, which plans can use to project interest rates in future months. Monthly IRS notices set forth the

corporate bond yield and the segment rates for the month.

The proposed regulations provide a methodology for determining the corporate bond yield curve that is generally the same as Notice 2007-81, with two changes:

- An additional adjustment factor that takes into account a "hump adjustment variable" that peaks at 20 years maturity, and
- A more narrow exclusion from the bond data set for callable bonds.

The proposed regulations also reflect the interest rate stabilization rules and eliminate transition rules that applied to plan years beginning before 2010.

The proposed rules would apply for months that begin more than 15 days after the date final regulations are issued.

Former Treasury Official Says Tax Code Fails To Meet Ideals

Mark Mazur, former assistant secretary for Tax Policy U.S. at the Department of the Treasury, told members of the House Budget Committee that the current tax code does not meet four key ideals.

During a June 22, 2023, House Budget Committee hearing, Mazur described four main criteria that should be used to evaluate the tax code: its adequacy for generating revenue; the code's minimization of

distortions; whether its equitable; and its simplicity.

"Those are the ideals," Mazur testified. "Our system falls short on all four dimensions."

In terms of adequacy, Mazur noted that the last time the federal budget was balanced, the revenue raised was about 20 percent of gross domestic product.

“Since then, as a country we have decided to increase spending on things like national defense, and demographically, we have way more retirees than we used to have who claim benefits from Social Security, Medicare, Medicaid, and so on,” he said. “And so, if we’re serious about balancing the budget, we’d be looking at something above 20 percent of GDP, not below.”

Mazur added that in 2022, revenues reached “a one-time apparition” of 19.6 percent of GDP. “That would be a good start if we were able to maintain that.”

To emphasize the point that the adequacy of revenue generation was off, he used himself as an example, noting that comparing 1988 to 2018, while his inflation-adjusted income rose nearly 50 percent, his effective tax rate decreased by about 2 percentage points to 19 percent.

“So, I was paying less to the federal government for the services that I was getting, which are roughly the same level of services 30 years later, even though my income was substantially higher,” Mazur testified, adding that it “doesn’t seem like a strategy for getting the budget balanced.”

In terms of making the tax code more equitable, Mazur suggested that Congress could “rebalance the tax code so that higher income people pay a larger share

of their income taxes. And that could be through payroll taxes for Social Security and Medicare, or through income taxes. You could look at the preferential rate on capital gains and dividends. There was a lower rate put on dividends that was supposed to account for the 35 percent corporate tax rate. It did not get changed when the corporate tax rate went to 21 percent.”

Mazur also took a shot at Child Tax Credits, which he noted can fill in the income gaps for families with children, but is no help to those without, but who may still need the assistance.

“I’d be much more in favor of increasing the minimum wage than increasing the Child Tax Credit by a similar amount,” he testified.

TAX BRIEFS

Asset Allocations

Multiple taxpayers cited no legal authority on whether indemnities associated with certain cash grants were part of grant-eligible basis. The incremental consideration paid for the anticipated cash grants under the American Recovery and Reinvestment Act of 2009 was not basis allocable to Class V tangible property.

Alta Wind I Owner Lessor C, FedCl, 2023-1 USTC ¶150,190

Cancellation of Debt Income

An individual, who owned and operated a body sugaring business, was entitled to exclude cancellation-of-indebtedness income under the insolvency exception under Code Sec. 108(a)(1)(B).

White, TC, Dec. 62,234(M)

Carbon Dioxide Sequestration Credit

The IRS has released the inflation adjustment factor for the credit for carbon dioxide (CO₂) sequestration under Code Sec. 45Q for 2023. The inflation adjustment factor is 1.3471, and the credit is \$26.94 per metric ton of qualified CO₂ under Code Sec. 45Q(a)(1), and \$13.47

per metric ton of qualified CO₂ under Code Sec. 45Q(a)(2). The aggregate amount of qualified CO₂ taken into account for purposes of Code Sec. 45Q was 75,000,000 metric tons based on the most recent annual reports filed with the IRS.

Notice 2023-46

Disaster Losses

The IRS Chief Counsel ruled that losses sustained by a subsidiary with respect to stock in three controlled foreign corporations (CFCs) did not occur in a federally declared disaster area under Code Sec. 165(i)(1). Therefore, the losses did not qualify as disaster losses under Code Sec. 165(i). Locating a loss sustained with respect to stock in a foreign corporation under Code Sec. 165(i) based on the location of the place of sale or disposition was inappropriate.

Chief Counsel Advice Memorandum 202325007

Fraudulent Transfers

A married couple committed fraudulent transfers. The transfers occurred between spouses, who are classified as insiders under

Florida law. Taxpayer husband executed the transfers mere months after the Service issued a notice of unpaid tax liabilities threatening a levy on the taxpayers’ bank accounts and seizure of property.

Williams, DC Fla., 2023-1 USTC ¶150,187

Liens and Levies

A settlement officer (SO) did not abuse her discretion by determining that an individual’s liabilities were appropriately assessed and that the IRS’ Notice for Federal Tax Lien (NFTL) filing should be sustained.

Hyde, TC, Dec. 62,233(M)

The IRS’s did not abuse its discretion by sustaining the Notice of Federal Tax Lien (NFTL) filing against an individual.

Seggerman, TC, Dec. 62,235(M)

Net Operating Losses

An individual was not entitled to deduct the net operating loss (NOL) carryover that was claimed on his tax return. Further, the taxpayer was liable for additions to tax under Code Sec. 6651(a)(1) for failure to timely file.

Bryan, Jr, TC, Dec. 62,231(M)

Nonconventional Source Production Credit

The IRS has published the reference price under Code Sec. 45K(d)(2)(C). The credit period for the nonconventional source production credit under Code Sec. 45K ended on December 31, 2013, for facilities producing coke or coke gas (other than from petroleum based products). However, the reference price continues to apply in determining the amount of the enhanced oil recovery credit under Code Sec. 43, the marginal well production credit for qualified crude oil production under Code Sec. 45I, and the percentage depletion in case of oil and natural gas produced from marginal properties under Code Sec. 613A. The reference price for calendar year 2022 is \$93.97.

Notice 2023-49

Tax Refunds

Multiple airline pilots (taxpayers) were denied refunds for Federal Insurance Contributions Act (FICA) taxes paid at the time of their retirements. The taxpayers failed to timely file their refunds. Therefore, the court lacked jurisdiction to consider any of their tax refund suits.

Anderson, FedCl, 2023-1 ustr ¶150,189

Tax Returns

In consolidated cases, one of the taxpayers (T1) did not sign his Form 1040 or authorize an agent to sign it on his behalf.

Parducci, TC, Dec. 62,232(M)

Unreported Income

A married couple, who had received incentive stock options from the husband's former employer, had underreported their net long-term capital gain income. The

taxpayers also failed to properly substantiate those business expense deductions. Further, the taxpayers failed to submit credible evidence to support their entitlement to loss deduction related to their Indian food catering business.

Kamal, TC, Dec. 62,237(M)

Whistleblower Awards

An individual's whistleblower awards case was dismissed because the IRS Whistleblower Office (WBO) did not proceed with any administrative or judicial action based on the individual's information.

Raffaelli, TC, Dec. 62,236(M)