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Advisory Committee Calls for IRS Accountability, Impartiality in Recommendations

IR-2023-120

The IRS Electronic Tax Administration Advisory Committee(ETAAC) in a series of recommendations to the agency and Congress is looking for improvements in agency accountability as well as stressing the agency needs to remain impartial. The committee, in its annual report released June 28, 2023, made 26 recommendations through which it "advises Congress to provide timely tax legislation and consistent multi-year funding while it urges the IRS to prioritize IRS website modernization and search engine optimization," ETAAC noted in a statement. The full report can be found at the IRS website.

The report notes that Congress "has made a substantial investment in the IRS, and with that investment, it is crucial to ensure ongoing accountability in the appropriate utilization of funds."

ETAAC also states in the report that it is "crucial to emphasize that the IRS should not be used an extension of any political arm, including Congress, the White House, and Treasury. … To preserve the trust and confidence of taxpayers, it is imperative that tax administration remains independent and insulated from partisan influence, allowing it to operate in a manner that promotes the best interest of the taxpayers and the nation as a whole." "We believe that these recommendations, if implemented, will contribute to a more streamlined, efficient, and taxpayer-centric system," the report states.

The committee recommends that Congress and the IRS:

- improve and increase regulation and oversight of paid tax preparers;
- improve the communication, marketing, and accessibility of existing free tax filing programs before investing in an IRS Direct eFile platform; and
- ensure any Direct eFile platform adheres to security standards established in the current Free File program.

Specific recommendations to the IRS include:

- improving the online experience;
- providing Form 1099-NEC data to states on an expedited basis;
- updating Form 1099-K and educational material to enable easy compliance;
- improving education on information reporting filing obligations to increase compliance;
- developing key metrics to measure customer service and taxpayer experience; and
- enhancing transparency in the tax return processing and tax issue resolution.

Petition for Certiorari Granted in Mandatory Repatriation Tax Case

The U.S. Supreme Court has granted certiorari in the case of *C.G. Moore, CA-9, 2022-1 ustc ¶50,165*. The Court of Appeals for the Ninth Circuit has allowed the taxation of a married couple on earnings from a controlled foreign corporation (CFC) under the Code Sec. 965 transition tax (referred to as the Mandatory Repatriation Tax (MRT)), even though the earnings were not distributed. The taxpayers argued that the MRT is an unapportioned direct tax in violation of the Constitution's Apportionment Clause and that income needs to be realized to be taxed.

Background

The MRT, created by the Tax Cuts and Jobs Act (TCJA) (P.L. 115-97), modified Subpart F by classifying controlled foreign corporation (CFC) earnings after 1986 as income taxable in 2017. Under this revised version of Subpart F, U.S. taxpayers owning at least 10% of a CFC are taxed on the CFC's profits after 1986 at either 15.5 percent for earnings held in cash or eight percent otherwise. The MRT imposed this tax regardless of whether the CFC distributed earnings.

Court of Appeals

The Court of Appeals held that the MRT was consistent with the Apportionment Clause. The Court observed that courts have consistently upheld the constitutionality of taxes similar to the MRT notwithstanding any difficulty in defining income, that the realization of income does not determine the tax's constitutionality, and that there is no constitutional ban on Congress disregarding the corporate form to facilitate taxation of shareholders' income.

According to the Court of Appeals, because Subpart F only applies to U.S. persons owning at least 10% of a CFC, the MRT builds upon a preexisting liability attributing a CFC's income to its shareholders, and taxpayers were, and continue to be, treated as individuals who have some ability to control distribution.

The Court of Appeals also held that although the MRT was retroactive, it did not violate the Fifth Amendment's Due Process Clause. The tax served the legitimate purpose of preventing CFC shareholders from never having to pay taxes on undistributed earnings. The tax accomplished this legitimate purpose by accelerating the effective repatriation date of the earnings to a date following the passage of the Tax Cuts and Jobs Act,

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Final Regulations Address Reference Rate Transition for Foreign Bank Interest Expense

T.D. 9976

Final regulations provide the replacement rate for the interbank offer rate (IBOR) presently used in the published rate election in Reg. §1.882-5(d)(5)(ii)(B). Foreign banks can use this rate to determine the interest expense amount that is attributable to their excess U.S.-connected liabilities and allocable to income that is effectively connected with the conduct of a trade or business within the United States (ECI). The final regulations are in response to the discontinuance of IBORs, such as the London Interbank Offered Rate (LIBOR) and other IBORs.

Background

Foreign corporations may deduct interest expenses in determining taxable ECI. Certain interest expense items are directly allocable to a foreign corporation's ECI, but a three-step interest expense allocation formula in Reg. §1.882-5 is applied to interest expense that is not directly allocable.

When a foreign corporation has excess U.S.-connected liabilities, the interest rate that applies is generally the corporation's average U.S.-dollar borrowing cost on all U.S.-dollar liabilities other than its U.S.-booked liabilities. However, a foreign corporation that is a bank may elect to use a published average 30-day LIBOR for the year instead of determining its average U.S.-dollar borrowing cost.

Interbank offered rates, such as LIBOR and other IBORs, are being discontinued. In March 2021, the administrator of LIBOR announced that publication of

REFERENCE KEY

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

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the overnight, one-month, three-month, six-month, and 12-month U.S. dollar LIBORs (USD LIBORs) would cease after the LIBOR publication on June 30, 2023.

Rate Transition for Foreign Bank Interest Expense

The final regulations replace the 30-day IBOR rate presently referenced by Reg. §1.882-5(d)(5)(ii)(B) with the Secured Overnight Financing Rate (SOFR) of the same tenor, plus a fixed spread adjustment. The regulations reflect a comment that recommended finalizing the regulation using the one-month term SOFR plus a static spread adjustment of 0.11448% as recommended by the Alternative Reference Rate Committee (ARRC) and codified in the LIBOR Act (enacted in December 2021).

If a taxpayer fails to file a timely return or incorrectly determines that it did not have excess U.S.-connected liabilities, the final regulations require the Director of Field Operations in an examination to use the published rate to calculate the taxpayer's interest expense with respect to excess U.S.-connected liabilities. This is intended to reduce the administrative burden of calculating the actual rate for both the IRS and taxpayers.

Transitional Rule

For a tax year that begins before and ends after the USD LIBOR cessation date of June 30, 2023, a taxpayer that makes the published rate election available under Reg. §1.882-5(d)(5)(ii)(B) must calculate a blended published rate average for the tax year, which uses the 30-day USD LIBOR for the portion of its tax year ending on June 30, 2023, and the one-month Term SOFR, plus static spread adjustment, for the portion of its tax year beginning on July 1, 2023.

Effective Date

The final regulations apply to tax years ending after June 30, 2023.

Final Electronic Filing Regs Corrected

The IRS has corrected final regulations related to electronic-filing requirements for specified returns and other documents, (T.D. 9972). The final regulations reflect changes made by the Taxpayer First Act (TFA) and are consistent with the TFA's emphasis on increasing electronic filing. This correction is applicable beginning February 23, 2023.

T.D. 9972, Correcting amendment

IRS Provides Transitional Guidance on Stock Repurchase Excise Tax

Announcement 2023-18

The IRS has announced that taxpayers will not be required to report the new Code Sec. 4501 excise tax on stock repurchases during a covered corporation's tax year on any returns filed with the IRS, or to make such tax payments, before the time specified in the forthcoming regulations previously announced in Notice 2023-2, I.R.B. 2023-3, 374.

Moreover, there will be no addition to tax under Code Sec. 6651(a) or any other provision for failure to file a return reporting the stock repurchase excise tax, or for failure to pay the tax, before the time specified in the forthcoming regulations.

The forthcoming regulations also will require covered corporations to keep complete and detailed records to establish accurately any amount of stock repurchases (including repurchases made after 2022, but before the forthcoming regulations are published) and to retain these records as long as their contents may become material.

Notice 2023-2

The stock repurchase excise tax applies to repurchases made after 2022. The IRS has provided initial guidance on the excise tax in Notice 2023-2, which announces that the Treasury Department and the IRS intend to issue forthcoming regulations on the application of the stock repurchase excise tax. The guidance also describes certain rules for determining the excise tax amount and for reporting and paying the tax that are expected to be included in the forthcoming regulations. Taxpayers may rely on these rules until the publication of the forthcoming regulations.

Specifically, Notice 2023-2 provides that the forthcoming regulations are expected to provide that (i) the excise tax will be reported once per tax year on the Form 720, Quarterly Federal Excise Tax Return, that is due for the first full quarter after the close of the taxpayer's tax year, (ii) the deadline for payment of the excise tax will be the same as the filing deadline, and (iii) no extensions will be permitted for reporting or paying the excise tax.

For taxpayers with a tax year ending after 2022, but prior to publication of the forthcoming regulations, the regulations are expected to provide that any liability for the excise tax for such tax year will be reported on the Form 720 that is due for the first full quarter after the date of publication of the forthcoming regulations, and that the deadline for payment of the excise tax is the same as the filing deadline.

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Publications Explaining Actuarial Valuation Tables Revised

The IRS has issued revised Publication 1457, Actuarial Valuations Version 4A, Publication 1458, Actuarial Valuations Version 4B, and Publication 1459, Actuarial Valuations Version 4C (Rev. June 2023). The publications provide examples for using actuarial factors for certain income, gift, or estate tax valuations of future interests.

The examples use actuarial factors from tables that are referenced in the Publications and can be found on the IRS website at https://www.irs.gov/retirement-plans/actuarial-tables.

IRS Sends Special Disaster Area Follow-up Mailing

IR-2023-121

The IRS has been sending a special follow-up mailing to taxpayers in several states affected by disasters to reassure them that they have extra time to file and pay their taxes. This new mailing will be sent in the next few weeks to residents in California, Alabama, Arkansas, Florida, Georgia, Indiana, Mississippi, and Tennessee which are designated disaster areas that received the CP14 notice in late May and June from the IRS. While the earlier mailings were sent out as a legal requirement, the current mailings called CP14CL reiterate that taxpayers have until later this year to timely pay under the disaster declaration. The letter in English and Spanish includes additional information to help taxpayers understand the disaster relief they have received.

The IRS has also updated the insert that will accompany upcoming CP14 balance-due notices to make it clearer that the payment date listed in the letter does not apply to those covered by a disaster declaration, and the disaster dates remain in effect. The plain language insert, which is in English and Spanish, includes a special QR code that takes people to the IRS Disaster page.

TAX BRIEFS

Activities Not Engaged in for Profit

An individual, who operated a fishing charter activity, did not operate it with a requisite profit intent. Because the taxpayer did not maintain complete business records, did not have a business plan, and did not respond to losses by changing how he conducted his fishing charter activity, he did not conduct the activity in a business-like manner.

Swanson, TC, Dec. 62,238(M)

Assessments

The statutory period for assessing tax attributable to partnership items of a partnership (P1) was not open under Code Sec. 6229(e) with respect to an indirect partner (I1) on the date the P1's notice of final partnership administrative adjustment (FPAA) was issued. The items that flew to I1 were P1's partnership items determined in P1's FPAA.

American Milling, LP, TC, Dec. 62,240(M)

Conservation Easement

A limited liability company's (LLC's) conservation easement deduction was limited to its adjusted basis in the property on which the easement was granted.

Glade Creek Partners, LLC, TC, Dec. 62,239(M)

Service of Complaint

An individual did not serve an operational original complaint regarding her overpayment of taxes' claim. The taxpayer incorrectly blamed the United States Marshals Service (USMS) for not serving the original claim.

Tallent, DC Tenn., 2023-2 USTC ¶50,196

Understatement Due to Unreasonable Positions

A district court ruled that genuine issues of material fact pervade the question of whether an individual and her tax services companies (taxpayers) fraudulently misrepresented Schedule C expenses and Household Help (HSH) statuses and thus understated liability under Code Sec. 6694(a) and (b). Further, the factual record remained disputed on whether taxpayers properly relied in good faith on customer representations.

Powell, DC Mich., 2023-2 USTC ¶50,194

Supreme Court Docket

A petition for review was denied in the following case:

J.D. Pieron, CA-6—The government proved that an individual committed an affirmative act that constituted evasion or attempted evasion of tax. The government presented evidence of such acts within the limitations period. The taxpayer submitted false information in his (1) Foreign Bank Account Report; and (2) Form 433-F, Collection Information Statement. Further, the district court's decision not to give a taxpayer's proposed

instruction neither affected nor substantially swayed the verdict. The jury had every reason to think that the taxpayer's Foreign Bank Account Report was evasive as well. Finally, the taxpayer did not identify a single regulation that the IRS failed to follow. Nor did the taxpayer demonstrate that he suffered any prejudice from the government's mid-trial production of documents relating to his Form W-8BEN, Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding and Reporting (Individuals).

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