



# FEDERAL TAX WEEKLY

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## Proposed Reliance Regs Flesh Out Prevailing Wage and Apprenticeship Requirements and Corrections for Bonus Energy and Business Credits

*Proposed Regulations, NPRM REG-100908-23; IR-2023-156; U.S. Department of the Treasury, IRS Release Guidance on Inflation Reduction Act Provision to Ensure Good-Paying Clean Energy Jobs, Expand Clean Energy Workforce*

Taxpayers may rely on proposed regulations that detail how to satisfy the prevailing wage and apprenticeship (PWA) requirements for bonus amounts that may apply to several energy and business credits. The regs also explain the correction and penalty provisions that allow taxpayers to claim the bonus credits even if they failed to satisfy the PWA tests. Comments are requested.

### PWA Requirements

The Inflation Reduction Act of 2022 (P.L. 117-169) provided bonus credits as part of several new and existing components of the general business credit. The initial credit amount is increased for taxpayers that satisfy the PWA requirements during the construction, alteration and repair of a credit facility.

The bonus credits apply to the following 11 credits, plus one deduction:

- the business credit component of the Code Sec. 30C Alternative Fuel Vehicle Refueling Property Credit;
- the Code Sec. 45 renewable electricity production credit;
- the Code Sec. 45L New Energy Efficient Home Credit (prevailing wage test only);
- the Code Sec. 45Q carbon sequestration credit;
- the Code Sec. 45U Zero-Emission Nuclear Power Production Credit (prevailing wage test only);
- the Code Sec. 45V Credit for Production of Clean Hydrogen;
- the Code Sec. 45Y Clean Electricity Production Credit;
- the Code Sec. 45Z Clean Fuel Production Credit;
- the Code Sec. 48 energy investment credit;
- the Code Sec. 48C Advanced Energy Project Credit;
- the Code Sec. 48E clean energy investment credit; and
- the Code Sec. 179D Energy Efficient Commercial Buildings Deduction (increased deduction).

The IRS previewed these proposed regs in Notice 2022-61.

## Prevailing Wage Requirements in General

In determining prevailing wages, the proposed regs largely incorporate the Davis-Bacon Act (DBA), as administered by the Wage and Hours Division of the Department of Labor (DOL), to the extent it is relevant and consistent with sound tax administration. However, the regs do not adopt the DBA's federal contracting provisions, or its exemptions for Tribal governments and the Tennessee Valley Authority. The definition of "employed" is also broader for the PWA tests than it is for other purposes of the Code.

Under the proposed regs, the taxpayer that claims the increased credit would be solely responsible for:

- making sure the PWA requirements are satisfied,
- keeping appropriate records, and
- the correction and penalty provisions and the good faith effort exception.

"Taxpayer" includes an applicable entity that elects to treat the credit as a federal tax payment under Code Sec. 6417, and an eligible taxpayer that elects to transfer the credit to an unrelated person under Code Sec. 6418. Thus, the PWA requirements apply to the eligible taxpayer, not the transferee taxpayer.

The proposed regs define several relevant terms, including applicable wage determination, laborer, mechanic, construction, alteration, repair, locality or geographic area (including DOL site of work definitions), and prevailing wage rate. The proposed regs generally adopt DOL rules that allow lower prevailing wage rates for apprentices.

## Prevailing Wage Determinations

The proposed regs would require taxpayers to use the general wage determination in

effect when the construction of the facility begins, but would not require taxpayers to update those rates during construction. However, consistent with DOL guidance under the DBA, a new general wage determination would be required when a contract is changed to include additional, substantial construction, alteration, or repair work, or to require work to be performed for an additional time period. Taxpayers would also need to update wage rates for alteration or repairs after the facility has been placed in service.

A general wage determination would be one issued and published by the DOL that includes a list of wage and bona fide fringe benefit rates determined to be prevailing for laborers and mechanics for the various classifications of work performed with respect to a specified type of construction in a geographic area. The proposed regulations would largely incorporate the definition of "wages" from 29 CFR 5.2 for the Prevailing Wage Requirements. This definition is not relevant in determining wages or compensation for other federal tax purposes.

The proposed regs would provide special procedures when a general wage determination does not provide applicable wage rates; as, for example, when no general wage determination has been issued for the geographic area, for the specified type of construction, or for a labor classification. According to the DOL, these situations should be rare. The taxpayer, contractor, or subcontractor would need to request a supplemental wage determination or prevailing wage rate for an additional classification from the DOL. However, taxpayers could not use these requests to split, subdivide, or otherwise avoid classifications in a general wage determination.

A request for a supplemental wage determination or a prevailing wage rate for an additional classification would need to include information consistent with the information that must be provided by a contracting agency when requesting

a project wage determination or a conformance for purposes of the DBA. After review, the Wage and Hour Division will notify the taxpayer as to the labor classifications and wage rates to be used. The proposed regulations would also adopt the review and appeal procedures available to any interested party under the DBA with respect to wage determinations generally.

If construction of a credit facility spans adjacent geographic areas, the prevailing wage rate would be the highest rate for each classification. For an offshore facility, taxpayers could rely on the general wage determinations in the geographic area closest to the area where the qualified facility will be located.

## Prevailing Wage Correction and Penalty Provisions

A taxpayer that fails to satisfy the PWA requirements may still qualify for the increased credit or deduction by satisfying correction and penalty provisions. The proposed regulations would provide that the obligation to make correction payments and pay the penalty would not become binding until the taxpayer files a return claiming the increased credit. The taxpayer generally would have to make correction payments to the underpaid workers before filing the return, and pay any penalty when the return is filed.

In addition, the taxpayer would have to make the correction and penalty payments within 180 days after the IRS makes a final determination that a taxpayer failed to satisfy the Prevailing Wage Requirements, which would come in the form of a notice sent by the IRS. Although deficiency procedures would not apply to the penalty payment, deficiency procedures would apply to any IRS disallowance of the increased credit.

Taxpayers that cannot locate the underpaid workers are not excused from the

### REFERENCE KEY

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

FEDERAL TAX WEEKLY, 2023 No. 36. Published by Wolters Kluwer, 2700 Lake Cook Road, Riverwoods, IL 60015.  
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correction requirements. The IRS expect that taxpayers will be able to establish correction payments by using existing state and tax withholding procedures. Taxpayers that underpay workers while waiting for a supplemental wage or additional classification determination would have 30 days after the determination to make correction payments. For purposes of credit transfers under Code Sec. 6418, the correction and penalty requirements would continue to apply to the eligible taxpayer, not the credit transferee.

For purposes of the increased correction and penalty amounts for intentional disregard of the PWA requirements, the proposed regs would provide that failures would be due to intentional disregard if they are knowing or willful, based on all relevant facts and circumstances. There would be a rebuttable presumption against intentional disregard if the taxpayer makes the correction and penalty payments before receiving a notice of an examination.

The proposed regs would provide limited penalty waivers when PWA failures are small in amount or occur in a limited number of pay periods. The penalty also would not apply with respect to a laborer or mechanic employed under a project labor agreement that meets certain requirements, if correction payments are made by the time the taxpayer claims the increased credit. The proposed regs would use the IRS's general enforcement discretion to allow taxpayers to correct limited failures to pay prevailing wages if the taxpayers pay the mechanics and laborers back wages and interest in a timely manner before claiming the increased credit.

## Apprenticeship Requirements

To satisfy the apprenticeship requirement, taxpayers must satisfy:

- the Labor Hours Requirement, by ensuring that the applicable percentage of the total labor hours are performed by qualified apprentices;
- the Ratio Requirement, by ensuring that any applicable apprenticeship-to-journeyworker ratio is satisfied on a daily basis; and
- the Participation Requirement, which is intended to prevent taxpayers from

satisfying the Labor Hours Requirement by only hiring apprentices to perform one type of work.

The proposed regs explain that the Labor Hours Requirement generally is subject to the Ratio Requirement, and the Participation Requirement applies in addition to those two requirements.

## Failure to Satisfy Apprenticeship Requirements

The proposed regs provide addition guidance regarding the good faith effort exception to the apprenticeship requirements when a taxpayer's request for a qualified apprentice is denied. The taxpayer may need to submit requests to multiple apprenticeship programs, and each request must include prescribed information. A taxpayer would have to submit a second request within 120 days of a first denial. The good faith exception would apply only to a particular denied request. A taxpayer that does not qualify for the good faith exception may be treated as satisfying the apprenticeship requirements by paying a penalty to the IRS. The proposed regs spell out how taxpayers determine correction amounts.

Failures to meet the Apprenticeship Requirements would be due to intentional disregard if they are knowing or willful under all relevant facts and circumstances. The proposed regulations provide a non-exhaustive list of relevant facts and circumstances.

The proposed regs would also provide that the penalty payment requirement for failures to meet the Labor Hours or Participation Requirement would not apply if a project labor agreement that meets certain requirements is in place. In addition, there would be a rebuttable presumption against intentional disregard if the taxpayer makes the penalty payments before receiving a notice of an examination.

As with the prevailing wage requirements, the proposed regs would provide that a penalty payment would remain the responsibility of the eligible taxpayer that transfers the increased credit under Code Sec. 6418. The obligation to meet the Apprenticeship Requirements would not be binding until the eligible taxpayer files

its return for the year the credit is determined or, if earlier, the transferee taxpayer files its return taking the transferred credit into account.

## Recordkeeping Requirements

The proposed regs would require taxpayers to establish compliance with the Prevailing Wage Requirements at the time a return claiming the increased credit is filed. These requirements are generally consistent with the recordkeeping requirements under the DBA regime. Taxpayers would also have to maintain and preserve sufficient payroll records to establish compliance.

Similarly, the proposed regs would require taxpayers subject to the Apprenticeship Requirements to maintain sufficient records to establish compliance with the Labor Hours, Ratio and Participation Requirements. It would be the responsibility of the taxpayer to maintain the relevant records for each apprentice engaged in the construction, alteration, or repair on the qualified facility, regardless of whether the apprentice is employed by the taxpayer, a contractor, or a subcontractor.

Finally, if an eligible taxpayer transfers any portion of a credit that includes the increased amount for satisfying the PWA requirements, these recordkeeping requirements would remain with an eligible taxpayer.

## Effect on Other Documents

The provisions of sections 3 and 4 of Notice 2022-61 would be obsoleted for facilities, property, projects, or equipment the construction, or installation of which begins after the date these regs are published as final.

## Proposed Applicability Date

The regs are proposed to apply to facilities, property, projects, or equipment placed in service in tax years ending after the date they are published as final, and the construction or installation of which begins after that date. However, taxpayers may rely on the proposed regs with respect to

construction or installation of a facility, property, project, or equipment beginning on or after January 29, 2023, and on or before the date the regs are published as final, provided that beginning after October 30, 2023, the taxpayer follows the proposed regulations in their entirety and in a consistent manner.

## Comments Requested

The IRS requests comments on the proposed regs, and a public hearing is scheduled for November 21, 2023, at 10 am EST. Comments and requests to speak at the hearing must be received by October 30, 2023, and requests to attend the

hearing must be received by November 17, 2023. Comments and requests may be mailed to the IRS, or they may be submitted electronically via the Federal eRulemaking Portal at <https://www.regulations.gov> (indicate IRS and Proposed Regulations, NPRM REG-100908-23).

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# Tax Treatment of Certain State Payments Clarified

*Notice 2023-56; IR-2023-158*

The IRS has provided guidance on the income tax treatment of payments made by states in 2023 and later years. In IRS News Release 2023-23, February 10, 2023, the IRS clarified the federal tax status of special payments made by 21 states in 2022 that were mainly related to the COVID-19 pandemic, with varying terms in the types of payments, payment amounts, and eligibility rules.

## State Tax Refunds

The exclusion of state income tax refunds is largely dependent on whether an individual itemized deductions and deducted the amount of state income tax paid. A

state income tax refund will be excluded from an individual's gross income if the person claimed the standard deduction for the tax year in which the state income tax was paid. On the other hand, an individual who itemized deductions and deducted the amount of state income tax paid will include a state income tax refund to the extent that the individual received a federal income tax benefit from the prior federal income tax deduction.

A similar rule applies to state property tax refunds.

## General Welfare Payments

Payments that are made under a state program for the promotion of the general welfare are not includible in federal income

tax. To be excluded as a payment for the general welfare, the payment must: (1) be made from a governmental fund; (2) be for the promotion of the general welfare, meaning based on individual or family need; and (3) not represent compensation for services.

## Comments Requested

The IRS requests comments on the application of these rules and on specific aspects of state payment programs or additional situations where federal guidance would be helpful. Comments should be submitted on or before October 16, 2023. Comments may be mailed to the IRS or submitted electronically via the Federal eRulemaking Portal at <https://www.regulations.gov>.

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# Many Businesses Must File Form 8300 Electronically Starting in 2024

*FS-2023-19; IR-2023-157*

The IRS announced that starting January 1, 2024, certain businesses will be required to electronically file Form 8300, Report of Cash Payments Over \$10,000, instead of filing a paper return. This will apply to any business that is required to file at least 10 information returns of one or more types other than Form 8300, such as Forms 1099 series and Forms W-2, in calendar year 2024.

The new requirement follows final regulations that lowered the threshold for

required e-filing of information returns required to be filed during calendar years beginning after December 31, 2023 (T.D. 9972).

Under the new requirement, for example, a business that files five Forms W-2 and five Forms 1099-INT in 2024 must e-file all of its information returns during the year, including any Forms 8300. However, if the business files fewer than 10 information returns of any type in 2024, it does not have to e-file the information returns and is not required to e-file any Forms 8300.

If a business files fewer than 10 information returns, it can still e-file Form 8300 if it chooses to do so.

A business may request a waiver from the e-filing requirement for information returns due to undue hardship. If granted, the e-filing waiver will automatically apply to all Forms 8300 during the calendar year. A business cannot request a waiver from e-filing for only Forms 8300.

An automatic religious exemption is also available if the technology required to e-file conflicts with the filer's religious beliefs.

# NTA Calls For New Approach To Supervisory Review Of Penalties

National Taxpayer Advocate Erin Collins is calling on the Internal Revenue Service to alter how it deals with supervisory review of penalties.

“The IRS’s approach to supervisory review of penalties is heavy-handed and burdensome on taxpayers,” Collins wrote in an August 29, 2023, blog post.

She noted that the while some penalties require supervisory approval before they can be assessed, the statute providing authority “is vague regarding the point at which this approval must occur,” which has led to conflicting decisions in the Tax Court about how they should be treated.

Collins noted that the IRS is currently working on the problem and has issued proposed regulations on the subject. A public hearing on this issue will be held on September 11, 2023.

“The proposed regulations succeeded in providing clarity, but it would be nice if they did so in a way that helps taxpayers rather than harming them.”

According to Collins, the proposed regulations set up a process by which a supervisory approval can be obtained anytime before the statutory notice of deficiency is issued for pre-assessment penalties subject to Tax Court review. For those penalties not subject to pre-assessment Tax Court review, they can be approved up until the time of assessment itself.

“The IRS’s proposed approach is problematic because the ability to raise potential penalties with taxpayers in the absence of oversight could lend itself to the improper assertion of penalties,” Collins wrote. “Practitioners and Congress expressed concerns that some IRS examiners may be tempted to propose a penalty with no real

intention of actually imposing it. Rather, the penalty is put forth as a bargaining chip to be negotiated away as part of the case resolution process. The IRS is quick to point out that this practice is unauthorized and is strongly discouraged. Nevertheless, the structure perpetuated in the proposed regulations does nothing to protect taxpayers from potential abuse.”

Collins stated that supervisory review “should occur before applicable penalties are communicated to the taxpayer in writing,” adding that the proposed regulations “provide the IRS with an excellent chance to reconsider its approach to supervisory review. This is an opportunity that the IRS has so far declined to embrace, but there is still time. I urge the IRS to reexamine its policy and I request that Congress consider clarifying the law to protect taxpayers’ rights.”

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## OPR Provides Information on Using Durable Power of Attorney in Tax Matters

The IRS Office of Professional Responsibility (OPR) has informed taxpayers that they can use a “durable power of attorney” to overcome a legally incompetent taxpayer’s inability to complete a Form 2848, Power of Attorney and Declaration of Representative, in tax matters. Durable powers of attorney created for estate planning or other purposes give taxpayers a designated agent or “attorney-in-fact” authority to make healthcare and financial decisions. Moreover, the Service informed taxpayers

that the durable power of attorney must be created before the physical or mental incompetency.

The requirements related to use of durable power of attorneys in federal tax matters are stated in Reg. §601.503(b), which can be found in Publication 216. For more information about using durable powers of attorney as a substitute for Form 2848 and about Form 56, taxpayers are requested to visit:

- National Taxpayer Advocate Blog: When to Use a Durable Power of Attorney to

Authorize Representation Before the IRS;

- IRS Office of Professional Responsibility: Can You Use that Durable Power of Attorney before the IRS? Form 2848 vs. Durable Power of Attorney;
- Form 2848, Power of Attorney and Declaration of Representative, and Instructions for Form 2848; and
- Publication 216, Conference and Practice Requirements

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## Florida Victims of Hurricane Idalia Granted Tax Relief

IR-2023-159

The president has declared a federal disaster area in Florida. The disaster is due to Hurricane Idalia that occurred on August

27, 2023. The disaster area includes 46 of Florida’s 67 counties.

Taxpayers who live or have a business in the disaster area may qualify for tax relief.

### Florida Filing Deadlines Extended

The IRS extended certain deadlines falling on or after August 27, 2023, and before

February 15, 2024 to February 15, 2024. This extension includes filing for most returns, including:

- individual, corporate, estate and trust income tax returns;
- partnership and S corporation income tax returns;
- estate, gift and generation-skipping transfer tax returns;
- the Form 5500 series returns;
- annual information returns of tax-exempt organizations, and
- employment and certain excise tax returns.

However, the extension does not include information returns in the Form W-2, 1094, 1095, 1097, 1098, or 1099 series or Forms 1042-S, 3921, 3922 or 8027.

## Florida Payment Deadlines Extended

Also, the relief includes extra time to make tax payments. This includes estimated tax payments due on or after August 27, 2023, and before February 15, 2024. Further, taxpayers have until February 15, 2024, to perform other time-sensitive actions due on or after August 27, 2023 and before February 15, 2024.

The IRS excused late penalties for employment and excise tax deposits due on or after August 27, 2023, and before September 11, 2023. But, the taxpayer must make the deposits by September 11, 2023.

## Casualty Losses

Affected taxpayers can claim disaster-related casualty losses on their federal

income tax return. Taxpayers may get relief by claiming their losses on their 2022 or 2023 return. Individuals may deduct personal property losses not covered by insurance or other reimbursements.

Taxpayers claiming a disaster loss on their 2022 or 2023 return should write the disaster designation “Florida, Hurricane Idalia” at the top of the return. This will allow the IRS to speed refund processing.

Also, the IRS will provide affected taxpayers with copies of prior year returns without charge. To get this expedited service, taxpayers should add the disaster designation at the top of Form 4506, Request for a Copy of Tax Return, or Form 4506-T, Request for Transcript of Tax Return, and submit it to the IRS.

# Alaska Victims of Flooding Granted Tax Relief

*Alaska Disaster Relief Notice (AK-2023-10)*

The president has declared a federal disaster area in Alaska. The disaster is due to flooding that began on May 12, 2023. The disaster area includes the regional educational attendance areas of:

- Bering Strait;
- Copper River;
- Kuspuk;
- Lower Kuskokwim;
- Lower Yukon; and
- Yukon Flats.

Taxpayers who live or have a business in the disaster area may qualify for tax relief.

## Alaska Filing Deadlines Extended

The IRS extended certain deadlines falling on or after May 12, 2023, and on or before October 31, 2023, to October 31, 2023. This extension includes filing for most returns, including:

- individual, corporate, estate and trust income tax returns;

- partnership and S corporation income tax returns;
- estate, gift and generation-skipping transfer tax returns;
- the Form 5500 series returns;
- annual information returns of tax-exempt organizations, and
- employment and certain excise tax returns.

However, the extension does not include information returns in the Form W-2, 1094, 1095, 1097, 1098, or 1099 series or Forms 1042-S, 3921, 3922 or 8027.

## Alaska Payment Deadlines Extended

Also, the relief includes extra time to make tax payments. This includes estimated tax payments due on or after May 12, 2023, and on or before October 31, 2023. Further, taxpayers have until October 31, 2023, to perform other time-sensitive actions due on or after May 12, 2023, and on or before October 31, 2023.

The IRS excused late penalties for employment and excise tax deposits due

on or after May 12, 2023, and before May 29, 2023. But, the taxpayer must make the deposits by May 29, 2023.

## Casualty Losses

Affected taxpayers can claim disaster-related casualty losses on their federal income tax return. Taxpayers may get relief by claiming their losses on their 2022 or 2023 return. Individuals may deduct personal property losses not covered by insurance or other reimbursements.

Taxpayers claiming a disaster loss on their 2022 or 2023 return should write the disaster designation “Alaska flooding” at the top of the return. This will allow the IRS to speed refund processing.

Also, the IRS will provide affected taxpayers with copies of prior year returns without charge. To get this expedited service, taxpayers should add the disaster designation at the top of Form 4506, Request for a Copy of Tax Return, or Form 4506-T, Request for Transcript of Tax Return, and submit it to the IRS.

# ABA, AICPA Request Clarification, Guidance Related to Sec. 6417

The American Bar Association and the American Institute of CPAs are asking the Internal Revenue Service to make additional clarifications and issue guidance related to the proposed regulations related to Code Sec. 6417, which allows certain taxpayers to elect to treat the amount of certain enumerated tax credits as payments of income tax.

In its August 14, 2023, letter to the IRS, ABA made four recommendations that address certain matters relevant to tax-exempt bonds and their relationship to applicable credits. They recommended that:

- The final regulations should clarify that certain governmentally owned single-member entities qualify as applicable

entities for the purposes of Code Sec. 6417;

- The final regulations should provide guidance for allocating proceeds of tax-exempt bonds and other funding sources for purposes of the reduction in applicable credits for tax-exempt bond financing under Code Sec. 45(b)(3);
- The final regulations should confirm the treatment of interim tax-exempt financing for purposes of the credit reduction; and
- The final regulations should clarify and update instructions to tax forms relevant to the Direct-Pay Election.

AICPA, in its August 14, 2023, letter, had a broader range of comments related to Code Sec. 6417. In its letter, the

organization recommended that IRS and the Treasury Department should, among other things:

- Consider an expedited process for the issuance of quick refunds for applicable entities eligible for direct pay;
- Provide additional clarity and simplify the pre-filing process;
- Consider allowing partnerships with all tax-exempt partners to be considered applicable entities;
- Provide further guidance on the definition of “restricted tax-exempt amount.”

To see the full comment letter submitted by the AICPA and other tax policy and advocacy comment letters submitted in 2023, see <https://us.aicpa.org/advocacy/tax/2023taxadvocacycommentletters.html>.

## TAX BRIEFS

### *Installment Agreements*

In a case of first impression, a court of appeals found that the IRS was prohibited from referring a case to the Department of Justice (DOJ), as long as levy is prohibited, such as while the taxpayers’ installment offer was pending. The taxpayers, however, did not demonstrate prejudice from the government’s premature referral needed to invalidate the referral and bar the collection action.

*Schiller, CA-2, 2023-2 ustc ¶150,224*

### *Liens and Levies*

An IRS settlement officer (SO) did not abuse his discretion in disallowing the proposed collection alternative to the proposed levy action issued against an individual. Moreover, the taxpayer failed to provide the requested financial information, i.e.

Form 433-A, by the stated original and extended deadlines.

*Lem, TC, Dec. 62,269(M)*

### *Limited Liability Company*

A limited liability company (LLC) treated as a partnership had its motion for reconsideration of the Tax Court’s order granted. The taxpayer sought sanctions under Code Sec. 6673(a)(2) because the RA provided a false declaration and attached a backdated lead sheet to that declaration.

*Lakepoint Land II, LLC, TC, Dec. 62,270(M)*

### *Notice of Deficiency*

The revised proposed stipulated decision was struck because the IRS’s reconstruction of the notice of deficiency (NOD) had created doubt as to whether the IRS

determined the accuracy-related penalty in the NOD sent to a corporation.

*Channels, Inc, TC, Dec. 62,268(M)*

### *Tax Refund*

The district court correctly dismissed for lack of subject matter jurisdiction and failure to state a claim an individual’s civil suit seeking a refund of income taxes. The individual advanced frivolous arguments.

*Swanson, CA-11, 2023-2 ustc ¶150,225*

### *Whistleblower Awards*

An individual’s whistleblower award case was dismissed by the Tax Court due to lack of jurisdiction. The IRS made no award determination—the IRS did not proceed with any administrative or judicial action based on information supplied by the individual.

*Katakis, TC, Dec. 62,271(M)*