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Progress Limited in Methodology to Keep Audit Rates Stable for Those Making Less Than $400k

The Internal Revenue Service has made limited progress in developing a methodology that would help the agency meet the directive not to increase audit rates for those making less than $400,000 per year, the Treasury Inspector General for Tax Administration reported.

On August 26, 2024, TIGTA reported that while the IRS has stated it will use 2018 as the base year to compare audit rates against, the agency "has yet to calculate the audit coverage for Tax Year 2018 because it has not finalized its methodology for the audit coverage calculation."

The Treasury Department watchdog added that while the agency "routinely calculates audit coverage rates, the IRS and the Treasury Department have been exploring a range of options to develop a different methodology for purposes of determining compliance with the Directive" to not increase audit rates for those making less than $400,000, which was announced in a memorandum issued in August 2022.

The Directive followed the passage of the Inflation Reduction Act, which provided supplemental funding to the IRS that, in part, would be used for compliance activities primarily targeted toward high wealth individuals and corporations. Of the now nearly $60 billion in supplemental funding, $24 billion will be directed towards compliance activities.

TIGTA reported that the IRS initially proposed to exclude certain types of examinations from the coverage rate as well "waive" audits from the calculation when it was determined that there was an intentional exclusion of income so that the taxpayer would not exceed the $400,000 threshold.

The watchdog reported that it had expressed concerns that the waiver criteria "had not been clearly articulated and that such a broad authority may erode trust in the IRS's compliance with the Directive."

It was also reported that the IRS is not currently considering the impact of the marriage penalty as part of determining the audit rates of those making less than $400,000.

"When asked if this would be unfair to those married taxpayers, the IRS stated that the 2022 Treasury Directive made no distinction between married filing jointly and single households, so neither will the IRS," TIGTA reported.

Treasury Recovers $172 Million From Wealthy Non-Filers

IR-2024-233

The U.S. Department of the Treasury announced it has recovered $172 million from 21,000 wealthy taxpayers who have not filed returns since 2017.

The Internal Revenue Service began pursuing 125,000 high-wealth, high-income taxpayers who have not filed taxes since 2017 in February 2024 based on Form W-2 and Form 1099 information showing these individuals received more than $400,000 in income but failed to file taxes.

"The IRS had not had the resources to pursue these wealthy non-filers," Treasury Secretary Janet Yellen said in prepared remarks for a speech in Austin, Texas. Now it does [with the supplemental funding provided by the Inflation Reduction Act], and we're making significant progress. … This is just the first milestone, and we look forward to more progress ahead.

This builds on a separate initiative that began in the fall of 2023 that targeted about 1,600 high-wealth, high-income individuals who failed to pay a recognized debt, with the agency reporting that nearly 80 percent of those with a delinquent tax debt have made a payment and leading to more than $1.1 billion recovered, including $100 million since July 2024.

2024 Tax Policies of the Major Presidential Candidates: Wolters Kluwer Tax Briefing Now Available

On November 5, 2024, Americans will determine whether Vice President Kamala Harris or former President Donald Trump will serve as President of the United States for the next four years. The candidates hold disparate opinions on the best way to run the Unites States, which includes tax policies. Looming large over the decision is the impending expiration of the Tax Cuts and Jobs Act after 2025.

Since 1913, Wolters Kluwer has provided tax professionals with the most comprehensive, ongoing, practical, and timely analysis of the federal tax law. In the spirit of this tradition, Wolters Kluwer is providing you with a complete analysis of the tax policy positions of the two major presidential candidates.

Wolters Kluwer's Tax Briefing highlighting the tax policies of Vice President Kamala Harris and former President Donald Trump is now available at: https://engagetax.wolterskluwer.com/2024-candidate-proposals. This Wolters Kluwer Tax Briefing alerts tax practitioners and their clients to what the future of United States tax policy may hold, depending upon the outcome of the election.

FBAR Penalties Are Subject to Excessive Fines Clause Review

Schwarzbaum, CA-11, 2024-2 USTC ¶50,190

The Eleventh Circuit Court of Appeals held that Foreign Bank and Financial Accounts (FBAR) civil penalties are in substantial measure punitive in nature, and therefore are subject to review under the Eighth Amendment's excessive fines clause.

Excessive Fines Clause

The court determined that the purpose of the FBAR penalty, at least in part, is to inflict punishment. While FBAR penalties are capped at $10,000 for a nonwillful violation, they increase to the greater of $100,000 or 50 percent of the account balance for a willful violation. A willful violation of the FBAR statute thus has a ceiling limited only by the size of the violator's bank account, regardless of the corresponding tax liability or the time or cost spent by the government to remediate the problem. Further, the FBAR penalty is severe: if imposed for willful violations over a series of years, it could consume an entire account of any size in two years. Also, Congress has stated that the design and purpose of the FBAR penalties is to deter violations of the reporting requirement.

The court declined to follow a First Circuit determination that the excessive fines clause does not apply to FBAR penalties (*M. Toth*, CA-1, 2022-1 USTC ¶50,144).

Application to Taxpayer's Penalties

The court reviewed the FBAR penalties against each of the taxpayer's foreign accounts one by one, and examined each penalty in proportion to each violation rather than the cumulative total. A $100,000 penalty levied against one of the accounts in each of the three tax years at issue was constitutionally excessive, because the penalty was several times larger than the amount held in the account on the assessment date, and the account balance never exceeded $16,000 in each year.

There were no proportionality problems with the penalties imposed on the

REFERENCE KEY

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

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taxpayer's other accounts. Penalties of $100,000 were not disproportionate for accounts that were closed and/or had unknown balances on the assessment date, but that had known maximum balances ranging from $672,185 to over $15.6 million, or for an account that had a negative balance on the assessment date but a maximum balance of over $15 million.

For the remaining accounts, each of which held millions of dollars, penalties equal to 50 percent of the account balance on the assessment date were not disproportionate under the court's excessive fines clause analysis. The taxpayer was in the class of persons at whom the FBAR penalty statute was principally directed, Congress did not view the reporting offense as trivial when it made "willfulness" the state of mind for the FBAR's heightened civil penalties (the same as for the FBAR statute's criminal penalties), and Congress sought to deter precisely the harm for which the taxpayer was culpable.

Affirming in part, reversing in part and remanding an unreported DC Fla. decision.

IRS Updates Premium Tax Credit Table, Required Contribution Percentage

The IRS has updated the applicable percentage table used to calculate an individual's premium tax credit and required contribution percentage for plan years beginning in calendar year 2025. This percentage is used to determine whether an individual is eligible for affordable employer-sponsored minimum essential coverage, as well as to determine whether an individual is eligible for an exemption from the individual shared responsibility payment due to a lack of affordable minimum essential coverage. For plan years beginning in 2025, the required contribution percentage under Code Sec. 36B is 9.02 percent. The IRS and the Treasury Department have determined that the failsafe exception described in Code Sec. 36B(b)(3)(A)(ii)(III) applies for calendar year 2025, and no additional adjustment under Code Sec. 36B(b)(3)(A)(ii)(II) is required for calendar year 2025. The guidance is effective for tax years and plan years beginning after December 31, 2024.

Rev. Proc. 2014-37, I.R.B. 2014-33, 363 is supplemented.

Rev. Proc. 2024-35

Proposed Regs for Clean Electricity Investment Credit Address Low-Income Community Bonus Credit Allocation

Proposed Regulations, NPRM
REG-108920-24

Proposed regulations would govern allocations of low-income communities bonus credits under the environmental justice capacity limitation provisions of the clean electricity investment credit. These regulations are proposed to apply to qualified facilities placed in service after December 31, 2024, and during tax years ending after the date the final regulations are filed for public inspection by the Office of the Federal Register.

Comments are requested.

Low-Income Communities Program for Clean Electricity Investment Credit

The Inflation Reduction Act of 2022 (P.L. 117-169) added the clean electricity investment credit for qualified facilities and energy storage technology placed in service after December 31, 2024. The credit effectively replaces the energy investment credit, which applies to qualified facilities only if construction begins before 2024.

The clean electricity investment credit includes a bonus credit for eligible property in qualified facilities that receive allocations of environmental justice capacity limitation from the IRS. The facility must have a maximum net output of less than five megawatts, and be placed in service within four years after receiving an allocation. Under this Clean Electricity Low-Income Communities Bonus Credit Amount Program, the credit rate increases:

- by 10 percentage points for a qualified facility located in a low-income community or on Indian land (Categories 1 and 2, respectively); and
- by 20 percentage points for a qualified facility that is part of a qualified low-income residential building project or a qualified low-income economic benefit project (Categories 3 and 4, respectively).

General Program Guidance

Under the proposed regs, the bonus credit would not apply if the facility is placed in service before being awarded an allocation of capacity limitation. The proposed regs would also provide threshold definitions of relevant terms, including each of the four facility categories; the five-megawatt capacity limit; eligible property; location; and financial benefits.

After finalizing the proposed regs, the IRS will provide the procedures for the 2025 program in a revenue procedure published in the Internal Revenue Bulletin. Procedures for future years also will be provided in guidance published in the Internal Revenue Bulletin. The IRS expects that many of the procedural aspects of the allocation program will be similar to the Low-Income Communities Bonus Credit Program under the energy investment credit for 2023 and 2024.

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Qualified Facilities

The proposed regs would clarify that qualified facilities must be non-combustion and gasification qualified facilities (non-C&G facilities) that the IRS has determined have a greenhouse gas (GHG) emissions rate of not greater than zero. An emissions rate table for eligible non-C&G facilities will be published annually in the Federal Register or the Internal Revenue Bulletin. Consistent with proposed regs for the clean electricity production and investment credits, the following types or categories of qualified facilities are categorically non-C&G facilities with a GHG emissions rate that is not greater than zero:

- Category 1—wind facilities, including small wind properties;
- Category 2—hydropower facilities, including retrofits adding power production to non-powered dams, conduit hydropower, hydropower using new impoundments, and hydropower using diversions such as a penstock or channel;
- Category 3—marine and hydrokinetic facilities;
- Category 4—solar facilities, including photovoltaic and concentrating solar power;
- Category 5—geothermal facilities, including flash and binary plants;
- Category 6—nuclear fission and nuclear fusion facilities; and
- Category 7—waste energy recovery property (WERP) that derives energy from qualified energy sources, including geothermal or solar waste heat recovery such as from a district geothermal heating system, and waste heat recovery such as from a nuclear reactor dedicated to heat production for an industrial facility.

Categories 3 and 4

For Category 3 and Category 4 facilities, the proposed regs provide detailed rules for determining and sharing the financial benefit. The IRS proposes to reserve allocations for low-income residential building projects (Category 3) exclusively for applicants that would equitably allocate at least 50 percent of the financial value of the electricity produced by the facility to low-income occupants.

The proposed regs would require a Category 4 facility to serve multiple qualifying low-income households. At least 50 percent of the facility's total output would have to be assigned to those households, and each would have to receive a bill credit discount rate of at least 30 percent. The proposed would also provide rules for identifying and verifying low-income households.

Allocation Program

Under the proposed regs, the IRS intends to announce how the annual capacity limitation would be allocated across the four facility categories in future guidance published in the Internal Revenue Bulletin. The IRS could reallocate these amounts as needed.

At least 50 percent of the capacity limitation in each category would be reserved for facilities meeting additional selection criteria relating to ownership and geographic factors. The procedure for using these additional selection criteria will be provided in guidance published in the Internal Revenue Bulletin.

- The ownership criteria would favor facilities owned by a Tribal enterprise, an Alaska Native Corporation, a Native Hawaiian Organization, a renewable energy cooperative, or a qualified tax-exempt entity.
- The geographic criteria, which would not apply to Category 2 facilities, would favor facilities located in a Persistent Poverty County (PPC) or in certain census tracts identified on the Climate and Economic Justice Screening Tool (CEJST),

The proposed regs would also provide special rules for small-scale residential solar facilities, which are expected to represent a significant portion of Category 1 facilities. These rules would reserve part of the Category 1 capacity limitation for behind the meter (BTM) facilities, including rooftop solar.

Application and Selection Process

Under the proposed regs, applications for a capacity limitation allocation would be evaluated according to the procedures specified in guidance published in the Internal Revenue Bulletin. As with the Low-Income Communities Bonus Credit Program for the energy investment credit, the IRS expects this process to include one or more initial application windows in which applications received by a certain time and date would be evaluated together, followed by a rolling application process if capacity limitation is not fully allocated to the initial applicants. The IRS would deprioritize review of applications for certain facilities that share a point of interconnection with other facilities that use the same technology and are owned by the same taxpayer if, in the aggregate, the facilities would exceed the five-megawatt maximum capacity limit.

Applicants would be required to submit information, documentation and attestations to demonstrate a project's eligibility and viability. Details would be provided in future guidance published in the Internal Revenue Bulletin for each program year. A facility that receives an allocation would also have to report to the Department of Energy (DOE) when the eligible property is placed in service and provide final eligibility information. DOE would then provide a recommendation to the IRS regarding whether the facility is eligible to retain its allocation.

The proposed regs would also provide rules and procedures for revoking an allocation if a facility ceases to qualify before it is placed in service; and for recapturing the credit is a facility ceases to qualify after it is placed in service.

Comments and Public Hearing

Comments must be received within 30 days after the proposed regs are published in the Federal Register, which was scheduled for September 3, 2024. A public hearing on the regs is scheduled for October 17, 2024, at 10 a.m. EST. Requests to attend the hearing must be received by 5 p.m. on October 15, 2024.

Commenters are strongly encouraged to submit comments and requests to speak at the public hearing through the Federal eRulemaking Portal at https://www.regulations.gov (indicate IRS and REG-108920-24). Paper submissions may also be mailed to the IRS.

Comments Requested on Saver's Match Contribution Implementation

Notice 2024-65; IR-2024-232

The IRS has issued a request for comments regarding the implementation of Saver's Match contributions, a provision introduced by the SECURE 2.0 Act of 2022. Saver's Match contributions are designed to improve retirement savings for low- to moderate-income individuals by allowing the Secretary of the Treasury to make matching contributions to qualifying retirement accounts on behalf of eligible individuals.

Under the SECURE 2.0 Act, these contributions will begin for tax years starting after December 31, 2026. The IRS seeks public input to facilitate the implementation and to reduce administrative burdens for stakeholders, including individuals, tax preparers, and retirement plan administrators.

The Saver's Match allows for contributions by the Treasury Department to eligible individuals' retirement savings accounts, based on the amount those individuals contribute to their retirement plans, such as Code Sec. 401(k) or IRA accounts. The maximum Saver's Match contribution is 50 percent of up to $2,000 in retirement savings contributions, amounting to a potential $1,000 contribution.

The IRS notice requests comments on numerous aspects of the credit, such as the eligibility criteria for individuals to receive Saver's Match contributions, methods for designating an account to receive the contributions, and administrative processes to ensure accurate distribution of the funds. The IRS also identified recovery taxes on early distributions and reporting and disclosure requirements as outstanding issues.

The IRS is requesting public comments on various operational elements of the program, including potential barriers for individuals making qualified retirement savings contributions and how to best communicate the availability of the Saver's Match. Comments may be submitted electronically or via mail by November 4, 2024.

IRS Reminds Taxpayers of September 16 Estimated Tax Payment Deadline, Declares Extensions for Disaster-Affected Areas

IR-2024-231

The IRS has reminded taxpayers whose income is not subject to withholding that the third quarter estimated tax payment deadline is September 16, 2024. This includes self-employed individuals, retirees, investors, sole proprietors, partners, and S corporation shareholders who are expected to owe $1,000 or more, as well as corporations anticipating $500 or more in tax liability. The final payment for 2024 is due on January 15, 2025. To avoid penalties, taxpayers are required to pay at least 90 percent of the current year's tax or 100 percent of the previous year's tax.

The pay-as-you-go system requires taxes to be paid as income is earned throughout the year. This can be done through withholding from paychecks, pensions, or government payments like Social Security, or by making quarterly estimated tax payments. Employees can submit a new Form W-4 to their employer to adjust withholding if necessary. The Interactive Tax Assistant and Form 1040-ES are available for individuals to determine their estimated tax obligations, while corporations can refer to Publication 542 for detailed information. All income must be reported, including earnings from part-time jobs, documented on Form 1099-K.

The IRS recommends making electronic payments via IRS Direct Pay, Online Account, or the IRS2Go app for security and convenience. Other options include credit/debit cards and the Electronic Federal Tax Payment System (EFTPS). Corporations are required to use electronic funds transfer for all federal tax deposits. Taxpayers in disaster-affected areas of 17 states, Puerto Rico, and the Virgin Islands may qualify for extended deadlines. Depending on the region, these deadlines extend to November 1, 2024, or February 3, 2025. For further assistance, taxpayers can utilize tools and resources available 24/7 on the IRS website.

Taxpayers Urged to Prepare for Natural Disasters During National Preparedness Month

IR-2024-229

The IRS has urged taxpayers to take proactive steps in preparing for potential natural disasters with the peak of hurricane season coinciding with a heightened wildfire risk in the West. In observance of National Preparedness Month this September, the IRS highlighted the importance of developing and updating emergency preparedness plans for 2024.

Taxpayers are advised to secure vital documents, such as tax returns, birth certificates, and insurance policies, in waterproof and fireproof containers. Additionally, the IRS recommended creating digital copies of these documents

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and storing them in secure online locations. Maintaining a comprehensive inventory of personal and business property, including photographs or videos, can prove invaluable when filing claims for insurance or tax benefits following a disaster.

Employers should ensure that their payroll service providers have fiduciary bonds in place, offering protection against potential service provider defaults. The IRS encourages the use of the Electronic Federal Tax Payment System (EFTPS) for making federal tax deposits and business tax payments, especially in the event of a disaster that could disrupt normal business operations.

In the wake of a federal disaster declaration, the IRS may provide tax relief to taxpayers. Those residing in disaster areas are automatically identified and granted the appropriate relief. Those outside the disaster area, including individuals involved in relief efforts, may also qualify by contacting the IRS disaster hotline. For further guidance, taxpayers should consult IRS Publication 547 available on IRS.gov.

IRS Enhances Online Tools for Clean Energy Tax Incentives

IR-2024-230

The IRS has significantly improved its online tools, using funding from the Inflation Reduction Act (IRA), to facilitate taxpayers in accessing clean energy tax credits. These modernized tools are designed to streamline processes, improve compliance, and mitigate fraud. A key development is the IRS Energy Credits Online (ECO) platform, a free, secure, and user-friendly service available to businesses of all sizes. It allows taxpayers to register, submit necessary information, and file for clean energy tax credits without requiring any specialized software. The platform also features validation checks and real-time monitoring to detect potential fraud and enhance customer service.

In November 2023, the IRS announced a significant enhancement to the ECO platform. Qualified manufacturers could submit clean vehicle identification numbers (VINs), while sellers and dealers were enabled to file time-of-sale reports completely online. Additionally, the platform facilitates advance payments to sellers and dealers within 72 hours of the clean vehicle credit transfer, significantly reducing processing time and enhancing the overall user experience.

In December 2023, the IRS expanded the ECO platform's capabilities to accommodate qualifying businesses, tax-exempt organizations, and entities such as state, local, and tribal governments. These entities can now take advantage of elective payments or transfer their clean energy credits through the ECO system. This feature allows taxpayers who may not have sufficient tax liabilities to offset to still benefit from the available tax credits under the IRA and the Creating Helpful Incentives to Produce Semiconductors (CHIPS) Act.

The IRS's move towards digital transformation also led to the creation of an online application portal for the Qualifying Advanced Energy Project Credit and Wind and Solar Low-Income Communities Bonus Credit programs in partnership with the Department of Energy. The portal, which launched in June 2023, simplifies the submission and review processes for clean energy projects, lowering barriers for taxpayers to participate in these incentives.

These advancements reflect the IRS's commitment to modernizing taxpayer services, focusing on efficiency, and enhancing the overall user experience. Looking ahead, the IRS is poised to continue leveraging technology to further improve processes and support taxpayers in utilizing clean energy tax incentives.

TAX BRIEFS

Business Expenses

An individual was not entitled to deduct the cost of goods sold (COGS) and other business expenses reported by her due to lack of substantiation.

Kalk, TC, Dec. 62,499(M)

Dual Consolidated Losses

The IRS has issued a correction to the proposed regulations that address dual consolidated losses and the treatment of certain disregarded payments. The IRS is accepting written or electronic comments which must be received by October 7, 2024. Further, requests for a public hearing must be submitted as prescribed in the "Comments and Requests for a Public Hearing" section of the notice of proposed rulemaking.

Proposed Regulations, NPRM REG-105128-23, Correcting Amendment

Foreign Currency Gains and Losses

The IRS has issued a correction to the proposed regulations concerning the timing for making and revoking certain foreign currency gain and loss elections. The IRS is accepting written or electronic comments which must be received by October 18, 2024. Further, requests for a public hearing must be submitted as prescribed in the "Comments and Requests for a Public Hearing" section of the notice of proposed rulemaking.

Proposed Regulations, NPRM REG-111629-23, Correction

Foreign-Derived Intangible Income and Global Intangible Low-Taxed Income

The IRS Chief Counsel ruled services provided by a taxpayer to the U.S. government when the recipient is not located within the U.S., may qualify as services provided to any person not located within the U.S.

for purposes of Code Sec. 250(b)(4)(B). Therefore, consulting services provided by a domestic corporation to a U.S. Department of Defense military base in a foreign country were services provided to any person not located within the United States and the income derived from these services qualifies as foreign-derived deduction eligible income under Code Sec. 250(b)(4)(B).

Chief Counsel Advice Memorandum 202436009

IRS

The IRS has released email advice prepared in less than two hours by attorneys in the IRS's Office of Chief Counsel. In Tax Analysts, CA-DC, 2007-2 USTC ¶50,553, the Court of Appeals for the D.C. Circuit ruled that the IRS could not rely on its so-called "two-hour" rule to avoid disclosure of email sent to IRS field personnel. The documents constituted Chief Counsel Advice, which the IRS is required to publicly disclose under Code Sec. 6110. The items listed below were released as a result.

Chief Counsel Advice Memorandum 202436011; Chief Counsel Advice Memorandum 202436012

S Corporations

An individual owned more than 50-percent of an S Corporation that she began with her former husband. Therefore, she had to recognize her share of the corporation's net income.

Veeraswamy, TC, Dec. 62,500(M)

Statute of Limitations

In consolidated cases, the IRS failed to establish that the returns for the tax years at issue were filed with the intent to evade tax. Therefore, the determinations against the taxpayers were barred by the statute of limitations.

Hoyal, TC, Dec. 62,502(M)

In consolidated cases involving the flow of income between individuals, a trust, and related entities, the IRS's determinations and adjustments were barred by the statute of limitations. Additionally, the IRS failed to establish by clear and convincing evidence that the individual taxpayer fraudulently failed to file his tax return. Accordingly, the addition to tax under Code Sec. 6651(f) for a fraudulent failure to file did not apply.

Scenic Trust Dennis Simpson, TC, Dec. 62,503(M)

Tax-Exempt Organizations

Five organizations had their tax-exempt status revoked under Code Sec. 501. In the first four cases, the organizations failed to show that they operated exclusively for exempt purposes under Code Sec. 501(c)(3). The fifth organization failed to provide information verifying its continued qualification for exempt purposes under Code Sec. 501(c)(8).

IRS Letter Ruling 202436013; IRS Letter Ruling 202436014; IRS Letter Ruling 202436015; IRS Letter Ruling 202436016; IRS Letter Ruling 202436017

Tax Court Jurisdiction

An individual filed a petition challenging a notice of deficiency based on his disagreement with the IRS's determination. Thus, the taxpayer invoked the Tax Court's jurisdiction. The Tax Court did not abuse its discretion in denying a request to extend the taxpayer's time to respond. The first CP2000 notice was mathematically calculated through electronic means and did not need written supervisory approval.

Johnson, CA-5, 2024-2 USTC ¶50,191

Viticultural Areas

A proposal to establish the Rancho Guejito American Viticultural Area (AVA) in San Diego County, California has been made by a petition filed with the Alcohol and Tobacco Tax and Trade Bureau. The proposed AVA is located entirely within the existing South Coast AVA and would partially overlap the existing San Pasqual Valley AVA. Comments may be submitted in writing or through the TTB Internet website. The due date for comments on Notice 233 is October 28, 2024. Viticultural area names are used to describe the origin of wine for labeling and advertising.

Notice,No. 233, Alcohol and Tobacco Tax and Trade Bureau, 89 FR 70149, August 29, 2024

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