2021 NEW DEVELOPMENTS

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INTRODUCTION

This publication is produced by the Land Grant University Tax Education Foundation. The Land Grant University Tax Education Foundation is pleased to provide the *National Income Tax Workbook* to approximately 29,000 tax practitioners in tax schools taught in 32 states. This publication supplements the *2021 National Income Tax Workbook*. It includes new procedures, guidance, and legislation that were adopted in late 2021 and are important for filing 2021 tax returns. It also includes corrections and clarifications for material in the *2021 National Income Tax Workbook*.

The *2022 National Income Tax Workbook* and supplemental publications and courses will provide a comprehensive discussion of these changes. Please visit our website at taxworkbook.com for more information about online courses and tax workshops near you.

NOTE: These summaries have been edited and appear in a condensed form. Tax practitioners should read the entire original text before relying on it.

Agricultural and Natural Resource Issues

Notice 2021-55
I.R.C. § 1033

The IRS has announced that farmers and ranchers who were forced to sell livestock due to drought may have an additional year to replace the livestock and defer tax on any gains from the forced sales under I.R.C. § 1033(e). Section 1033(e)(1) provides that a sale or exchange of livestock (other than poultry) held by a taxpayer for draft, breeding, or dairy purposes in excess of the number that would be sold following the taxpayer's usual business practices is treated as an involuntary conversion if the livestock is sold or exchanged solely on account of drought, flood, or other weather-related conditions.

Generally, gain from an involuntary conversion is recognized only to the extent the amount realized on the conversion exceeds the cost of replacement property purchased during the replacement period. If a sale or exchange of livestock is treated as an involuntary conversion and is solely on account of drought, flood, or other weather-related conditions that result in the area being designated as eligible for assistance by the federal government, the replacement period ends 4 years after the close of the first tax year in which any part of the gain from the conversion is realized. The IRS may extend this replacement period on a regional basis if the weather-related conditions that resulted in the area being designated as eligible for assistance by the federal government continue for more than 3 years.

The Appendix to the notice contains a list of counties that experienced exceptional, extreme, or severe drought conditions during the 12-month period ending August 31, 2021. The 12-month period ending on August 31, 2021, is not a drought-free year for an applicable region that includes any county on this list. Accordingly, for a taxpayer who qualified for a 4-year replacement period for livestock sold or exchanged on account of drought and whose replacement period is scheduled to expire at the end of 2021 (for a calendar year taxpayer), the replacement period will be extended if the applicable region includes any county on this list. This extension will continue until the end of the taxpayer's first tax year ending after a drought-free year for the applicable region.
[Notice 2021-55, 2021-41 I.R.B. 461]

Business Entities

Corporations

T.D. 9954
I.R.C. § 301

The IRS issued final regulations that update existing regulations under section 301 to reflect statutory changes made by the Technical and Miscellaneous Revenue Act of 1988. The regulations provide that the amount of a distribution of property made by a corporation to its shareholder is the fair market value of the distributed property. The fair market value of distributed property is determined as of the date of the distribution. The basis of property received in a distribution to which section 301 applies is the fair market value of the property.
[T.D. 9954]

Business Issues

Credits

Infrastructure Investment and Jobs Act § 80604
I.R.C. § 80604

The Infrastructure Investment and Jobs Act (IIJA) enacted on November 15, 2021, retroactively repeals the fourth quarter employee retention credit (ERC) for some employers. For wages paid after September 30, 2021, only a recovery startup business can claim the ERC. A recovery startup business is an employer that began carrying on a trade or business after February 15, 2020 and had average annual gross receipts of $1,000,000 or less for the 3 tax years ending with the tax year before the calendar quarter in which the employer claims the ERC. Effective for calendar quarters beginning after September 30, 2021, section 80604 of the Infrastructure Act amended the definition of recovery startup business under section 3134(c)(5) of the Code to remove the requirement that a recovery startup business not otherwise be an eligible employer due to a full or partial suspension of operations or a decline in gross receipts.
[Infrastructure, Investment and Jobs Act, Pub. L. No. 117-58, § 80604]

Notice 2021-65

I.R.C. § 3134

The IRS issued guidance for employers regarding the retroactive termination of the ERC. Notice 2021-65 applies to employers that paid wages after September 30, 2021 and received an advance payment of the ERC for those wages or reduced employment tax deposits in anticipation of the credit for the fourth quarter of 2021, but are now ineligible for the credit due to the change in the law. The notice also provides guidance regarding how the rules apply to recovery startup businesses in the fourth quarter of 2021.

Employers who Received Advance Payments

Generally, employers that are not recovery startup businesses and received advance payments for fourth quarter wages of 2021 will avoid failure-to-pay penalties if they repay those amounts by the due date of their applicable employment tax return that includes the fourth quarter of 2021.

Employers who Reduced Employment Tax Deposits

Employers that reduced deposits on or before December 20, 2021, for wages paid during the fourth calendar quarter of 2021 in anticipation of the ERC and that are not recovery startup businesses will not be subject to a failure to deposit penalty with respect to the retained deposits if

1. the employer reduced deposits in anticipation of the ERC, consistent with the rules in Notice 2021-24;
2. the employer deposits the amounts initially retained in anticipation of the ERC on or before the relevant due date for wages paid on December 31, 2021 (regardless of whether the employer actually pays wages on that date). Deposit due dates will vary based on the deposit schedule of the employer; and
3. the employer reports the tax liability resulting from the termination of the employer's ERC on the applicable employment tax return or schedule that includes the period from October 1, 2021, through December 31, 2021. Employers should refer to the instructions to the applicable employment tax return or schedule for additional information on how to report the tax liability.

Due to the termination of the ERC for wages paid in the fourth quarter of 2021 for employers that are not recovery startup businesses, failure to deposit penalties are not waived for these employers if they reduce deposits after December 20, 2021. If an employer does not qualify for relief under this notice, it may reply to a notice about a penalty with an explanation and the IRS will consider reasonable cause relief.
[Notice 2021-65, 2021-51 I.R.B. 880]

Deductions

Notice 2021-63

I.R.C. § 274

Notice 2021-63 provides guidance regarding the temporary 100% deduction for expenses that are paid or incurred after December 31, 2020, and before January 1, 2023, for food or beverages provided by a restaurant for purposes of I.R.C. § 274(n)(2)(D). In particular, the notice sets forth a special rule that allows a taxpayer to treat the meal portion of a per diem rate or allowance as being attributable to food or beverages provided by a restaurant.

Rev. Proc. 2019-48, 2019-51 I.R.B. 1392 provides rules for taxpayers that choose to use a per diem rate to substantiate, under I.R.C. § 274(d) and Treas. Reg. § 1.274-5, the amount of ordinary and necessary business expenses paid or incurred while traveling away from home for lodging, meal, and incidental expenses; meals and incidental expenses only; or incidental expenses only. Taxpayers that follow the rules in Rev. Proc. 2019-48 are deemed to meet the substantiation requirements in section 274(d) for the applicable travel expenses. Solely for purposes of section 274(n)(2)(D), a taxpayer that properly applies the rules of Rev. Proc. 2019-48 may treat the meal portion of a per diem rate or allowance paid or incurred after December 31, 2020, and before January 1, 2023, as being attributable to food or beverages provided by a restaurant.
[Notice 2021-63, 2021-49 I.R.B. 835]

Rev. Proc. 2021-48

Certain eligible Paycheck Protection Program (PPP) loan recipients and entities may need to determine when tax-exempt income resulting from the forgiveness of a PPP loan is received or accrued to apply federal tax provisions for which the amount of gross receipts is relevant. For example, certain eligible recipients and entities may need to determine when such tax-exempt income is included in gross receipts under I.R.C. § 448(c) (gross receipts test) or § 6033 (returns by exempt organizations).

Rev. Proc. 2021-48 provides that taxpayers may treat amounts that are excluded from gross income (tax-exempt income) in connection with the forgiveness of PPP loans as received or accrued (1) as eligible expenses are paid or incurred, (2) when an application for PPP loan forgiveness is filed, or (3) when PPP loan forgiveness is granted. To the extent tax-exempt income resulting from the forgiveness of a PPP loan is treated as gross receipts under a particular federal tax provision, this revenue procedure applies for purposes of determining the timing and, to the extent relevant, reporting of such gross receipts.
[Rev. Proc. 2021-48, 2021-49 I.R.B. 835]

Rev. Proc. 2021-49
I.R.C. §§ 704, 705, 1502

Rev. Proc. 2021-49 provides guidance for partnerships and consolidated groups regarding amounts excluded from gross income and deductions relating to the PPP and certain other COVID-19 relief programs. More specifically, the revenue procedure provides guidance for partners and their partnerships regarding allocations under I.R.C. § 704(b) and the corresponding adjustments to be made with respect to the partners' bases in their partnership interests under I.R.C. § 705. This revenue procedure also provides guidance under I.R.C. § 1502 and Treas. Reg. § 1.1502-32 regarding the corresponding basis adjustments for stock of subsidiary members of consolidated groups as a result of tax-exempt income arising from certain forgiven PPP loans, grant proceeds, or subsidized payment of certain principal, interest, and fees.
[Rev. Proc. 2021-49, 2021-49 I.R.B. 838]

Rev. Proc. 2021-50

Rev. Proc. 2021-50 allows eligible BBA partnerships to file amended Forms 1065, U.S. Return of Partnership Income, and furnish amended Schedules K-1 on or before December 31, 2021, to adopt the guidance set forth in Rev. Procs. 2021-48 and 2021-49, if certain requirements are met.

[Rev. Proc. 2021-50, 2021-49 I.R.B. 844]

Ethics

Due Diligence

C.C.A. 202125009

I.R.C. § 6700

The IRS Chief Counsel concludes that there are two types of false or fraudulent statements that fall within the statutory bar of the I.R.C. § 6700 penalty against a promoter of abusive tax shelters. The penalty applies to statements directly addressing the availability of tax benefits and those concerning factual matters that are relevant to the availability of the tax benefits.

In addition, the Chief Counsel concludes that the section 6700 penalty calculation includes a promoter's gross income derived from the tax shelter promotion after the formation of the tax shelter. The penalty can be asserted against the members, officers, or employees of a promoter, to the extent that an individual organizer or seller made, or caused to be made, false or fraudulent statements about the availability of tax benefits and the individual knew or had reason to know those statements were false or fraudulent.

[C.C.A. 202125009]

Individual Tax Issues

Credits

IRS FAQs and Fact Sheet 2021-218

I.R.C. § 24

In Frequently Asked Questions and Fact Sheet 2021-218, the IRS has provided information and clarification on the child tax credit (CTC) and the advance CTC. Advance CTC payments are early payments from the IRS of 50% of the estimated amount of the CTC that a taxpayer may properly claim on his or her 2021 tax return. If the IRS processed the taxpayer’s 2019 or 2020 tax return, these monthly payments were made in July through December 2021, based on the information contained in the prior-year’s return

When the taxpayer files his or her 2021 tax return during the 2022 tax filing season, the taxpayer must compare the total amount of the advance CTC payments received in 2021 with the amount of the CTC as calculated on the 2021 tax return. If the amount of the CTC exceeds the total amount of the advance CTC payments, the taxpayer can claim the remaining credit on the 2021 tax return. If the total amount of advance CTC payments exceeds the CTC calculated on the 2021 return, the taxpayer may have to repay some or all of that excess payment as additional income tax.

In January 2022, the IRS will send taxpayers Letter 6419 to provide the total amount of advance CTC payments that were disbursed in 2021. The taxpayer does not qualify for any repayment protection and must repay all excess advance CTC if his or her 2021 MAGI is at or above the following amounts (based on the 2021 filing status):

- $120,000 MFJ or QW

- $100,000 HoH
- $80,000 Single or MFS

The taxpayer qualifies for full repayment protection and does not have to repay any excess amount if his or her main home was in the United States for more than one-half of 2021 and his or her 2021 MAGI is at or below the following amounts (based on the 2021 filing status):

- $60,000 MFJ or QW
- $50,000 HoH
- $40,000 Single or MFS

If the taxpayer qualifies for repayment protection, the amount of tax liability from excess advance CTC payments is reduced by up to the full repayment protection amount. The full repayment protection amount is $2,000, multiplied by the number of qualifying children that the IRS took into account in determining the IRS's initial estimate of the advance CTC payments, minus the number of qualifying children properly taken into account in determining the allowed CTC on the 2021 tax return.

Example 1.1 Calculating the Repayment Protection Amount

Alan and Janet Henderson properly claimed three qualifying children on their 2020 tax return. They claim only one qualifying child on their 2021 tax return. They can receive up to $4,000 in repayment protection ($2,000 for each excess qualifying child) if they otherwise qualify.

The taxpayer's repayment protection amount is reduced as MAGI exceeds the threshold for full repayment protection.

Example 1.2 Phased Out Repayment Protection

The facts are the same as in Example 1.1. Alan and Janet's 2021 joint tax return reports $75,000 MAGI, which exceeds the applicable $60,000 MAGI by 25%. Their $4,000 potential full repayment protection amount is reduced by 25% to $3,000.

[IRS FAQs and Fact Sheet 2021-218]

Deductions

Hewitt v. Commissioner

I.R.C. § 170

The United States Court of Appeals for the Eleventh Circuit overturned a Tax Court memorandum opinion determining that the taxpayers were not entitled to carryover the charitable contribution deduction for the donation of a conservation easement. The Tax Court had found that the deed subtracted the value of post-easement improvements before determining the donee's share of the extinguishment proceeds and failed to allocate the extinguishment proceeds in accordance with Treas. Reg. § § 1.170A-14(g)(6), which does not permit the value of post-easement improvements to be subtracted from the proceeds before determining the donee's share.

The Court of Appeals held that Treasury violated the procedural requirements of the Administrative Procedures Act (APA) in enacting that regulation. The court concluded that the Commissioner's interpretation of Treas. Reg. § 1.170A-14(g)(6)(ii), to disallow the subtraction of the value of post-donation improvements to the easement property from the extinguishment proceeds allocated to the donee is arbitrary and capricious and therefore invalid under the APA's procedural requirements.
[*Hewitt v. Commissioner*, citation pending]

IRS Issues

FAQs

I.R. 2021-202
I.R.C. § 6662

The IRS updated its process for certain frequently asked questions (FAQs) on newly enacted tax legislation. The update is intended to address concerns regarding transparency and the potential impact on taxpayers when FAQs are updated or revised and to clarify when taxpayers can rely on FAQs for penalty protection. Significant FAQs on newly enacted tax legislation, as well as any later updates or revisions to these FAQs, will now be announced in a news release and posted on IRS.gov in a separate fact sheet.

These fact sheet FAQs will be dated to enable taxpayers to confirm the date on which any changes to the FAQs were made. Additionally, prior versions of fact sheet FAQs will be maintained on IRS.gov to ensure that, if a fact sheet FAQ is later changed, taxpayers can locate the version they relied on if they later need to do so. In addition to significant FAQs on new legislation, the IRS may apply this updated process in other contexts, such as when FAQs address emerging issues.

If a taxpayer relies on any FAQ (including FAQs released before this guidance) in good faith and that reliance is reasonable, the taxpayer will have a reasonable cause defense against any negligence penalty or other accuracy-related penalty if the FAQ is not a correct statement of the law as applied to the taxpayer's particular facts. The following legend will be added to fact sheet FAQs:

> These FAQs are being issued to provide general information to taxpayers and tax professionals as expeditiously as possible. Accordingly, these FAQs may not address any particular taxpayer's specific facts and circumstances, and they may be updated or modified upon further review. Because these FAQs have not been published in the Internal Revenue Bulletin, they will not be relied on or used by the IRS to resolve a case. Similarly, if an FAQ turns out to be an inaccurate statement of the law as applied to a particular taxpayer's case, the law will control the taxpayer's tax liability. Nonetheless, a taxpayer who reasonably and in good faith relies on these FAQs will not be subject to a penalty that provides a reasonable cause standard for relief, including a negligence penalty or other accuracy-related penalty, to the extent that reliance results in an underpayment of tax. Any later updates or modifications to these FAQs will be dated to enable taxpayers to confirm the date on which any changes to the FAQs were made. Additionally, prior versions of these FAQs will be maintained on IRS.gov to ensure that taxpayers, who may have relied on a prior version, can locate that version if they later need to do so.

[I.R. 2021-202]

Taxpayer Advocate Service

Memorandum for Taxpayer Advocate Service Employees
I.R.C. § 7803, I.R.M. § 13.1.7

The National Taxpayer Advocate (NTA) issued interim guidance on accepting cases under Taxpayer Advocate Service (TAS) case criteria 9, public policy. If the NTA determines that a compelling public policy warrants assistance to an individual or group of taxpayers, he or she can designate the issue as meeting case criteria 9. Under this authority the NTA has authorized the following four issues for acceptance under criteria 9 (when the case does not meet TAS Criteria 1 through 8):

1. Cases involving the tax-exempt status of organizations subject to an IRS automatic revocation of the organization's tax-exempt status for failure to file an annual return or notice for 3 consecutive years
2. Cases involving any tax account-related issue referred to TAS from a congressional office, except for economic impact payment issues, issues involving the exclusion of unemployment compensation received in tax year 2020 by taxpayers who filed their tax year 2020 return prior to implementation of the American Rescue Plan Act of 2021, and advance CTC issues
3. Cases involving revocation, limitation, or denial of a passport under I.R.C. § 7345
4. Cases that have been referred to a private collection agency for collection of a federal tax debt under I.R.C. § 6306

Virtual Currency

IIJA § 80603
I.R.C. § 6045

The IIJA imposes information reporting requirements for digital assets. Brokers must report the sale or exchange of digital assets. The reporting rules will apply to returns required to be filed, and statements required to be furnished, after December 31, 2023.
[Infrastructure, Investment and Jobs Act, Pub. L. No. 117-58, § 80603]

New Legislation

Notice 2021-46
ARPA § 9501

Notice 2021-46 provides additional guidance on the provision in the American Rescue Plan Act of 2021 that provides temporary premium assistance for Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) continuation coverage. This notice expands on guidance in Notice 2021-31, 2021-23 I.R.B. 1173. The questions addressed include availability of the premium assistance to individuals eligible for an extension who had not elected it; whether premium assistance for vision or dental-only coverage ends due to eligibility for other health coverage that does not include vision or dental benefits; availability of premium assistance under a state statute that limits continuation coverage to government employees; whether employers may claim the premium assistance tax credit if the SHOP exchange requires

employers to pay COBRA premiums; and which party may claim the premium assistance tax credit in situations involving parties other than an insurer or former common law employer providing the COBRA coverage.
[Notice 2021-46, 2021-33 I.R.B. 303]

Withholding and Estimated Taxes

COVID Tax Tip 2021-99

The Coronavirus, Aid, Relief and Economic Security (CARES) Act allowed employers to defer the deposit and payment of the employer's share of social security taxes and it allowed self-employed individuals to defer payment of certain self-employment taxes. The deferral applied to those taxes for the period March 27, 2020 through December 31, 2020. Employers must pay 50% of the amount eligible to be deferred by December 31, 2021 and the remaining deferred tax by December 31, 2022. If any portion of the employer's share of social security tax is not deposited or paid by the applicable date, penalties and interest will apply.

The IRS has provided guidance for how to repay the deferred taxes when an employer uses a third-party payer that files aggregate Forms 941, Employer's Quarterly Federal Tax Return and 943, Employer's Annual Federal Tax Return, under its own employer identification number (EIN). This includes a non-certified professional employer organization and a third-party payer designated as an agent by an employer submitting Form 2678, Employer/Payer Appointment of Agent. Third-party payers that reported their clients' deferred deposit and payment of the employer's share of social security taxes must have attached a Schedule R, Form 941, Allocation Schedule for Aggregate Form 941 Filers, to their aggregate returns in 2020. They must list all clients who are deferring deposits of the employer's share of social security tax on the Schedule R.

Employers should coordinate with their third-party payer to pay deferred taxes owed by the December 31, 2021 and December 31, 2022 due dates. If an employer used the services of a third-party payer to report the deferred deposit and payment of any portion of its share of social security taxes during the payroll tax deferral period, the employer is solely liable for payment of the deferred taxes. Whenever possible, the employer should provide the deferred tax amount to the third-party payer that reported the deferred taxes so that the third-party payer can pay the deferred taxes to the IRS by the applicable due date.
[COVID Tax Tip 2021-99]

P.M.T.A. 2021-07

Coronavirus Aid, Relief, and Economic Security Act (CARES Act) § 2302(a)(2)

In a Program Manager Technical Advice, IRS Office of Chief Counsel discusses what happens if an employer that deferred payment of its employment taxes does not make the deferred payments by the statutory deadlines. The memorandum concludes that if amounts are not deposited by the applicable installment due date, the deferral of the deposit due date is invalidated for all of the employer's deferred I.R.C. § 3111(a) or 3221(a) tax, not just the remaining delinquent portion. The memorandum also concludes that the resulting I.R.C. § 6656 penalty for failure to deposit taxes is applicable to the entire deferred amount, assuming that no exception to the penalty applies.
[P.M.T.A. 2021-07]

C.C.A. 202129007

A Chief Counsel Advice Memorandum considers whether a taxpayer can designate the payment allocation when the taxpayer makes a quarterly federal tax deposit, attributable to a specific payroll, or whether the payment must be applied in the best interests of the government. The memo concludes that a taxpayer can designate a voluntary payment, but for such designation to be proper the request or designation for the application of the payment must be specific, in writing, and made at the time of the payment. A taxpayer has no right to designate payments resulting from enforced collection measures.

If a taxpayer submits a voluntary partial payment when there are assessments for more than one tax period and does not provide specific written instructions as to the application of the partial payment, then the payments will be applied in a manner serving the best interests of the government. The payment will generally be applied to satisfy the liability for successive periods in descending order of priority until the payment is absorbed and is applied to non-trust fund taxes first.

Pursuant to Policy Statement 5-14 [I.R.M. § 1.2.1.6.3], to the extent partial payments exceed the non-trust fund portion of the tax liability, they are deemed to be applied against the trust fund portion of the tax liability. Once the non-trust fund and trust fund taxes are paid, the remaining payments will be considered to be applied to assessed fees and collection costs, assessed penalties and interest, and accrued penalties and interest to the date of payment.
[C.C.A. 202129007]

Notice 2021-53

Families First Act, I.R.C. §§ 3131, 3132

The IRS has issued guidance on 2021 W-2 reporting for qualified sick and family leave wages paid to employees in 2021. Employers will be required to report these amounts either on Form W-2, Box 14, or on a separate statement and must separately state amounts paid in the first quarter, and amounts paid in the second and third quarters.
[Notice 2021-53, 2021-39 I.R.B. 438]

T.D. 9953

I.R.C. §§ 3131, 3132, 3134

The IRS has issued temporary and proposed regulations that authorize the assessment of any erroneous refund of employment tax credits authorized by the American Rescue Plan Act of 2021. Any refund of these credits paid to a taxpayer that exceeds the credit amount the taxpayer is allowed is an erroneous refund, and the regulations authorize the assessment and collection of any erroneous refund of the credits in the normal course of processing the applicable employment tax returns.
[T.D. 9953, 2021-39 I.R.B. 430]

2021 NATIONAL INCOME TAX WORKBOOK UPDATES, CLARIFICATIONS, CORRECTIONS

P. 144	For gifts made after December 31, 1976, see I.R.C. § 1015(d)(6), which details how gift tax paid increases basis.
P. 178	The facts are the same as in Example 4.3**4**.
P. 303	Form 31**1**5
P. 312	($**2**7,380 for MFJ)
P. 335	The **payer** must send the withheld funds to the IRS, and failure to do so could result in imposition of the withholding tax on the **payer**.
P. 378	Total AIME $**6**,000
P. 441	Generally, a worker is an independent contractor if the person for whom the worker performs services **does not have** the right to control and direct the worker.
PP. 469-472	Nonrefundable portion (Worksheet 1, line 3j and Form 941-X line 18) is $3,720 and refundable portion (Worksheet 1, line 3k and Form 941-X line 26) is $11,280.
P. 475	If a business started after February 15, 2020, can show a reduction of gross receipts in quarters three or four of **2021** (Note that under the IIJA, the ERC is available in the fourth quarter of 2021 for only recovery startup businesses.)
P. 478	Same as quarters one and two, **2021** (Note that under the IIJA, the ERC is available in the fourth quarter of 2021 for only recovery startup businesses.)
P. 513	$111,001-$138,000 (S, HoH), $222,001-$276,000 (MFJ); $138,001-$165,000 (S, HoH), $276,001-$330,000 (MFJ); $165,001-$500,000 (S, HoH), $330,001-$750,000 (MFJ), $88,001-$411,999 (MFS); $412,000 or above (MFS)
P. 524	**At** full retirement age