Current Federal Tax Developments

Week of July 13, 2020

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CURRENT FEDERAL TAX DEVELOPMENTS
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Contents

SECTION: FFCRA
2020 FORMS W-2 WILL CONTAIN INFORMATION ON FFCRA LEAVE PAID

Citation: Notice 2020-54, 7/8/20

Under the sick pay provisions enacted as part of the Families First Coronavirus Relief Act (FFCRA), a self-employed individual can qualify for a refundable tax credit if the self-employed individual meets the tests to qualify for such relief. However, such relief is reduced to the extent the self-employed person receives qualified sick pay as an employee.

Obviously, the IRS will need information on such sick pay on a per employee basis in order to apply this rule. As well, employees likely will also not have a record of such pay. So in Notice 2020-54[1] the IRS has provided that employers will provide such information on Form W-2 for 2020.

The Notice provides:

> In order to provide self-employed individuals who also receive wages or compensation as employees with the information they need to properly claim any qualified sick leave equivalent or qualified family leave equivalent credits for which they are eligible, this notice requires employers to report to employees the amount of qualified sick leave wages and qualified family leave wages paid to the employees under sections 7001 or 7003 of the Families First Act, respectively.[2]

General Guidance

The employer must separately provide information to the employee regarding:

- Sick pay under Division E of the FFCRA (EPSLA) pursuant to Act §5102(a)(1), (2) or (3) of that division which are generally paid when COVID-19 directly impacts the employee in a manner described in the Act;
- Sick pay under EPLSA pursuant to Act §5102(a)(4), (5) or (6) of that division which are paid when COVID-19 impacts a member of the employee's family in a manner described in the Act; and
- Qualified family leave wages under Division C of the FFCRA, named the Family and Medical Leave Expansion Act (EFMLEA) pursuant to Act §3102(b).[3]

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[1] Notice 2020-54, July 8, 2020, https://www.irs.gov/pub/irs-drop/n-20-54.pdf (retrieved July 8, 2020)

[2] Notice 2020-54, Section III

[3] Notice 2020-54, Section III

The information will be provided either in Box 14 of the Form W-2 or in a separate statement.[4]

The self-employed individual will use this information as follows:

> Self-employed individuals claiming qualified sick leave equivalent or qualified family leave equivalent credits must then report these qualified sick leave and qualified family leave wage amounts on Form 7202, *Credits for Sick Leave and Family Leave for Certain Self-Employed Individuals*, included with their income tax returns, and reduce (but not below zero) any qualified sick leave or qualified family leave equivalent credits by the amount of these qualified leave wages.[5]

Reporting Qualified Sick Leave Wages

The Notice provides the following detailed information regarding what the employer is to report and how it is to be reported when qualified sick leave wages are paid:

> In addition to including qualified sick leave wages in the amount of wages paid to the employee reported in Boxes 1, 3 (up to the social security wage base), and 5 of Form W-2 (or, in the case of compensation subject to the RRTA, in the amount of RRTA compensation paid to the employee reported in Boxes 1 and 14 of Form W-25), employers must report to the employee the following type and amount of the wages that were paid, with each amount separately reported either in Box 14 of Form W-2 or on a separate statement:
>
> - the total amount of qualified sick leave wages paid for reasons described in paragraphs (1), (2), or (3) of section 5102(a) of the EPSLA; in labeling this amount, the employer must use the following, or similar, language: "sick leave wages subject to the $511 per day limit;" and
>
> - the total amount of qualified sick leave wages paid for reasons described in paragraphs (4), (5), or (6) of section 5102(a) of the EPSLA; in labeling this amount, the employer must use the following or similar language: "sick leave wages subject to the $200 per day limit."
>
> If a separate statement is provided and the employee receives a paper Form W-2, then the statement must be included with the Form W-2 provided to the employee, and if the employee receives an electronic

[4] Notice 2020-54, Section III

[5] Notice 2020-54, Section III

> Form W-2, then the statement shall be provided in the same manner and at the same time as the Form W-2. [6]

Reporting Qualified Family Leave Wages

Similar rules apply to reporting qualified family leave wages. The Notice provides:

> In addition to including qualified family leave wages in the amount of wages paid to the employee reported in Boxes 1, 3 (up to the social security wage base), and 5 of Form W-2 (or, in the case of compensation subject to RRTA, in the amount of RRTA compensation paid to the employee reported in Boxes 1 and 14 of Form W-2), employers must separately report to the employee the total amount of qualified family leave wages paid to the employee under the EFMLEA either in Box 14 of Form W-2 or on a separate statement. In labeling this amount, the employer must use the following, or similar, language: "emergency family leave wages." If a separate statement is provided and the employee receives a paper Form W-2, then the statement must be included with the Form W-2 sent to the employee, and if the employee receives an electronic Form W-2, then the statement shall be provided in the same manner and at the same time as the Form W-2.[7]

Model Language for Employee Instructions

Employees may very well have questions about this information, so employers may wish to provide instructions to the employees regarding this item to hopefully reduce calls to whomever handles payroll issues on the matter. The IRS provides the following model language in the Notice that can be used to provide such instructions:

> Included in Box 14, if applicable, are amounts paid to you as qualified sick leave wages or qualified family leave wages under the Families First Coronavirus Response Act. Specifically, up to three types of paid qualified sick leave wages or qualified family leave wages are reported in Box 14:
>
> - Sick leave wages subject to the $511 per day limit because of care you required;
> - Sick leave wages subject to the $200 per day limit because of care you provided to another; and
> - Emergency family leave wages.
>
> If you have self-employment income in addition to wages paid by your employer, and you intend to claim any qualified sick leave or qualified

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[6] Notice 2020-54, Section III

[7] Notice 2020-54, Section III

family leave equivalent credits, you must report the qualified sick leave or qualified family leave wages on Form 7202, *Credits for Sick Leave and Family Leave for Certain Self-Employed Individuals*, included with your income tax return and reduce (but not below zero) any qualified sick leave or qualified family leave equivalent credits by the amount of these qualified leave wages. If you have self-employment income, you should refer to the instructions for your individual income tax return for more information.[8]

SECTION: PPP LOAN
NEW LAW EXTENDS PPP LOAN PROGRAM THROUGH AUGUST 8, 2020

Citation: S.4116, 7/4/2020

In a surprising development, the Congress extended the PPP loan program through August 8, 2020 in S.4116.[9] The President signed the bill into law on July 4, 2020.

Under the Paycheck Protection Program Flexibility Act and the CARES Act the PPP program was to terminate on June 30, 2020. However, late in the day on June 30, the U.S. Senate took up a bill introduced by Senator Cardin, ranking member of the U.S. Senate Committee on Small Business and Entrepreneurship, passing the bill by unanimous consent. The bill was then sent to the House of Representatives who also passed the bill unanimously on July 1, sending the bill to the President for his signature.

The bill extends the PPP program through the date that Congress is scheduled to adjourn for its August recess. This bill was passed just before Congress adjourned for the Fourth of July, providing time for the Senate Republicans to develop a proposed new bill that would be used to negotiate with the House who has already passed a Democratic developed bill (the HEROES Act).

Note that this bill does not allow businesses that had already obtained a PPP loan to obtain another one, but rather allows those qualified businesses that did not obtain a PPP loan additional time to apply. The passage may indicate that rising numbers of COVID-19 cases in a number of states may have convinced Congress that they had to be seen as doing something before leaving town, and that they also expect to eventually negotiate another package to deal with the impact of COVID-19 on the economy.

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[8] Notice 2020-54, Section III

[9] S.4116, July 1, 2020, https://www.congress.gov/bill/116th-congress/senate-bill/4116/text (retrieved July 1, 2020)

SECTION: 139
FAQ ADDRESSES TAX TREATMENT OF CARES PROVIDER RELIEF PAYMENTS

Citation: "Frequently Asked Questions about Taxation of Provider Relief Payments," IRS Website, 7/6/2020

The IRS released a very short FAQ to provide two answers related to the taxation of provider relief payments from the Provider Relief Fund created by the CARES Act.[10]

The web page describes the program as follows:

> The Coronavirus Aid, Relief, and Economic Security Act (CARES Act), enacted on March 27, 2020, appropriated $100 billion for the Public Health and Social Services Emergency Fund (Provider Relief Fund). The Paycheck Protection Program and Health Care Enhancement Act, enacted on April 24, 2020, appropriated an additional $75 billion to the Provider Relief Fund. This funding will be used to reimburse eligible health care providers for health care-related expenses or lost revenues that are attributable to the COVID-19 pandemic. See https://www.hhs.gov/provider-relief/index.html for more information about the Provider Relief Fund.

Taxpayers who receive these funds may wonder about their tax status—are these payments taxable income or not?

Section 139 Does Not Apply

Following the declaration of the national emergency, a number of commentators have pointed out the special exclusion from income for certain payments related to emergency relief found at IRC §139. Some providers have posited that these payments seem "like" a relief payment related to COVID-19 and thus should be non-taxable. But the FAQ points out an issue with that view in Question 1:

> **Q1: May a health care provider that receives a payment from the Provider Relief Fund exclude this payment from gross income as a qualified disaster relief payment under section 139 of the Internal Revenue Code (Code)?**
>
> A: No. A payment to a business, even if the business is a sole proprietorship, does not qualify as a qualified disaster relief payment under section 139. The payment from the Provider Relief Fund is includible in gross income under section 61 of the Code.

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[10] "Frequently Asked Questions about Taxation of Provider Relief Payments," IRS Website, July 6, 2020, https://www.irs.gov/newsroom/frequently-asked-questions-about-taxation-of-provider-relief-payments (retrieved July 10, 2020)

Tax Exempt Health Care Provider

The IRS also provides guidance to tax exempt health care providers who receive such payments, indicating that generally such payments will not subject the entity to tax—but with an exception for entities with unrelated businesses:

> **Q: Is a tax-exempt health care provider subject to tax on a payment it receives from the Provider Relief Fund?**
>
> A: Generally, no. A health care provider that is described in section 501(c) of the Code generally is exempt from federal income taxation under section 501(a). Nonetheless, a payment received by a tax-exempt health care provider from the Provider Relief Fund may be subject to tax under section 511 if the payment reimburses the provider for expenses or lost revenue attributable to an unrelated trade or business as defined in section 513.

SECTION: 280F
DEPRECIATION LIMITS FOR AUTOS PLACED IN SERVICE IN 2020 RELEASED BY THE IRS

Citation: Revenue Procedure 2020-37, 7/8/20

The IRS has published the revised depreciation limits for vehicles under IRC §280F(d)(7) in Revenue Procedure 2020-37.[11] The limits on depreciation for such assets are adjusted for inflation each year.

For passenger automobiles acquired after September 27, 2017 and placed in service during 2020, the limitation on depreciation if §168(k)'s bonus depreciation applies is:

- 1st tax year - $18,000
- 2nd tax year - $16,100
- 3rd tax year - $9,700
- Each succeeding year - $5,760.[12]

For such a passenger automobile where §168(k)'s bonus depreciation rules do not apply, including when the taxpayer has elected not to have them apply or for vehicles acquired on or before September 27, 2017, the limits are:

- 1st tax year - $10,100

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[11] Revenue Procedure 2020-37, July 8, 2020, https://www.irs.gov/pub/irs-drop/rp-20-37.pdf (retrieved July 8, 2020)

[12] Revenue Procedure 2020-37, Table 1

- 2nd tax year - $16,100
- 3rd tax year - $9,700
- Each succeeding year - $5,760.[13]

The revenue procedure also includes a table to determine the lease inclusion amount under Reg. §1.280F-7(a) for passenger automobiles with a lease term beginning in 2020.[14]

SECTION: 512
IRC §265(A)(1) DOES NOT BAR CHARITABLE CONTRIBUTION DEDUCTION UNDER UNRELATED BUSINESS INCOME TAX

Citation: CCA 202027003, 7/2/20

The issue of the application of IRC §265(a)(1) and how it bars a deduction has been widely discussed with relation to the PPP loan program. But the IRS looked at the section again in CCA 202027003[15] in relation to the deduction for charitable contributions under IRC §512(b)(10) for the unrelated business income tax.

The CCA has been issued to answer the following question:

> Whether under section 265(a)(1) of the Internal Revenue Code, the charitable contribution deduction allowed under section 512(b)(10) is allocable to tax-exempt income and therefore not deductible in calculating unrelated business taxable income under section 512(a)(1)?

IRC §512(b)(10) provides:

> (10) In the case of any organization described in section 511(a), the deduction allowed by section 170 (relating to charitable etc. contributions and gifts) shall be allowed (whether or not directly connected with the carrying on of the trade or business), but shall not exceed 10 percent of the unrelated business taxable income computed without the benefit of this paragraph.

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[13] Revenue Procedure 2020-37, Table 2

[14] Revenue Procedure 2020-37, Table 3

[15] CCA 202027003, July 2, 2020, https://www.irs.gov/pub/irs-wd/202027003.pdf (retrieved July 3, 2020)

The question involves the bar to deduction found at IRC §265(a)(1) which provides:

> **(a) General rule.** No deduction shall be allowed for—
>
> (1) **Expenses**
>
> Any amount otherwise allowable as a deduction which is allocable to one or more classes of income other than interest (whether or not any amount of income of that class or classes is received or accrued) wholly exempt from the taxes imposed by this subtitle, or any amount otherwise allowable under section 212 (relating to expenses for production of income) which is allocable to interest (whether or not any amount of such interest is received or accrued) wholly exempt from the taxes imposed by this subtitle.

Since the unrelated business income tax is applied to what is otherwise a charitable organization, the question arises whether the charity is making that contribution from non-UBI income that is exempted from tax—and if that would then bar the deduction under IRC §265(a)(1).

The memorandum concludes that answer is no. The memorandum begins by looking at how the courts have determined when a deduction is allocable to tax-exempt income:

> In order to determine if expenses are allocable to tax-exempt income for purposes of section 265(a)(1), courts have looked to whether the expenses were "intended to be covered" by tax-exempt income or whether the expenses would not exist "but for" the tax-exempt income. See *Induni v. Commissioner*, 990 F.2d 53 (1993); *Dalan v. Commissioner*, T.C. Memo. 1988-106. Similarly, Rev. Rul. 83-3 disallows expenses under section 265(a)(1) that were incurred for the purpose of earning or otherwise producing tax-exempt income and expenses that were incurred in carrying out the specific purpose to which the tax-exempt income is earmarked. 1983-1 C.B. 72, modified by Rev. Rul. 87-32, 1987-1 C.B. 131.

The memorandum then notes that, in order for an expenditure to be a deductible charitable contribution under IRC §170, it has to be a purely gratuitous transfer:

> In order to establish that a "contribution or gift" has been made under section 170, a taxpayer must show a voluntary and irrevocable transfer of ownership of money or property without the receipt of adequate consideration or a substantial return benefit. See *United States v. American Bar Endowment*, 477 U.S. 105, 116 (1986); see also *Transamerica Corp. v. United States*, 902 F.2d 1540 (Fed. Cir. 1990); *Singer Co. v. United States*, 449 F.2d 413 (Ct. Cl. 1971). In determining whether a taxpayer has made a contribution without the expectation of any return benefit or quid pro quo, the "external features of the transaction in question" are examined. *Hernandez v. Commissioner*, 490 U.S. 680, 690 (1989). In addition, the taxpayer is required to have charitable intent in making the contribution. See *American Bar Endowment*, 477 U.S. at 118.

Based on this analysis, the memorandum concludes that §265(a)(1) will not bar the deduction in this case:

> A charitable contribution is, by its nature, not allocable to any source of income, but instead arises from a donor's charitable intent to voluntarily transfer money or property without receiving any benefit in return. Consequently, section 265(a)(1) may not be applied to disallow Organization's charitable contribution deduction claimed in computing UBTI under section 512(a)(1).

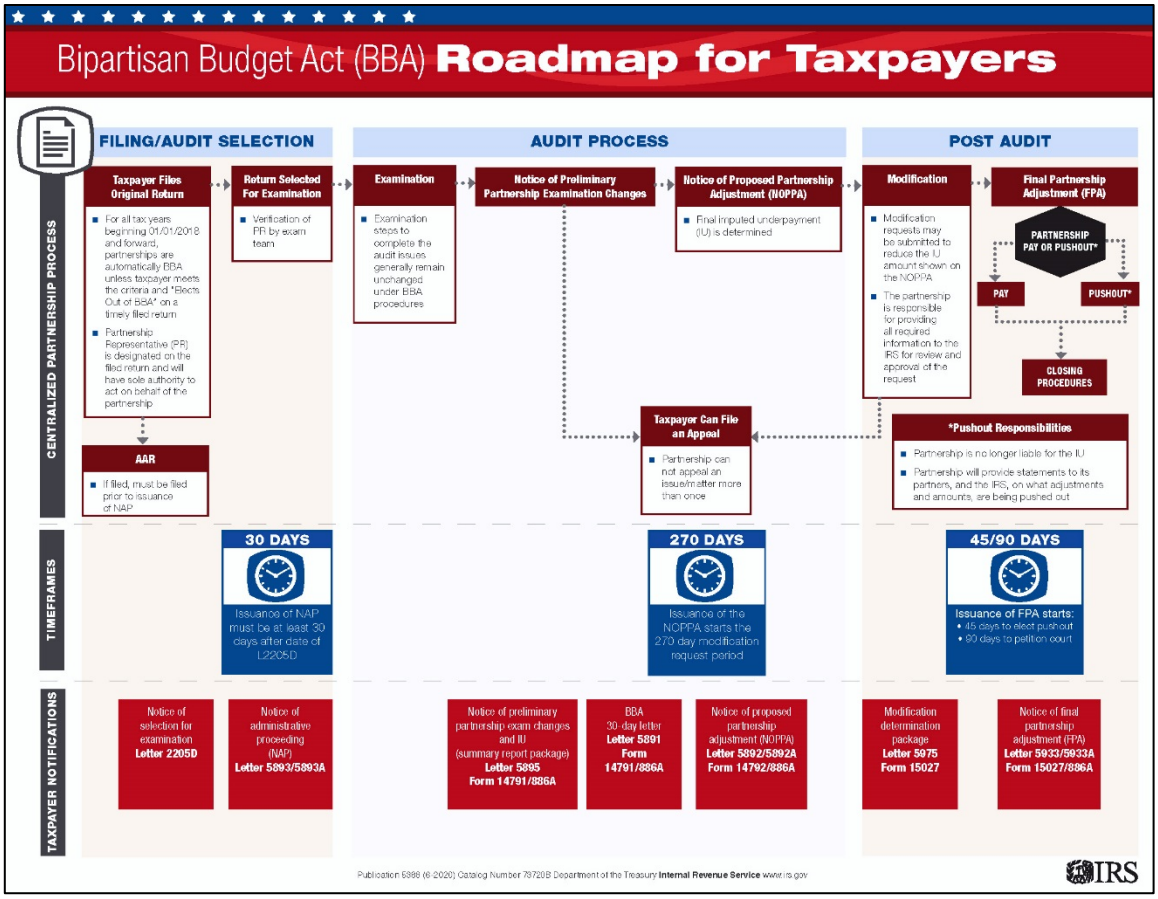
SECTION: 6221
FLOWCHART FOR BBA CPAR AUDIT REGIME PUBLISHED BY IRS

Citation: Publication 5388, Bipartisan Budget Act (BBA) Roadmap for Taxpayers, 6/30/20

The IRS has issued a flowchart outlining the processes in a Bipartisan Budget Act of 2015 partnership examination in Publication 5388, *Bipartisan Budget Act (BBA) Roadmap for Taxpayers.*[16]

The Bipartisan Budget Act of 2015 repealed the prior TEFRA partnership audit regime and added a new fully centralized partnership regime. The flowchart outlines the process once an examination gets underway, including elections available to the taxpayer once the IRS has issued the Notice of Proposed Partnership Adjustment.

[16] Publication 5388, *Bipartisan Budget Act (BBA) Roadmap for Taxpayers*, June 2020, https://www.irs.gov/pub/irs-pdf/p5388.pdf (retrieved July 11, 2020)


Bipartisan Budget Act (BBA) Roadmap for Taxpayers
FILING/AUDIT SELECTION
AUDIT PROCESS
POST AUDIT
CENTRALIZED PARTNERSHIP PROCESS
Taxpayer Files Original Return
For all tax years beginning 01/01/2018 and forward, partnerships are automatically BBA unless taxpayer meets the criteria and "Elects Out of BBA" on a timely filed return
Partnership Representative (PR) is designated on the filed return and will have sole authority to act on behalf of the partnership
Return Selected For Examination
Verification of PR by exam team
Examination
Examination steps to complete the audit issues generally remain unchanged under BBA procedures
Notice of Preliminary Partnership Examination Changes
Notice of Proposed Partnership Adjustment (NOPPA)
Final imputed underpayment (IU) is determined
Modification
Modification requests may be submitted to reduce the IU amount shown on the NOPPA
The partnership is responsible for providing all required information to the IRS for review and approval of the request
Final Partnership Adjustment (FPA)
PARTNERSHIP PAY OR PUSHOUT*
PAY
PUSHOUT*
CLOSING PROCEDURES
AAR
If filed, must be filed prior to issuance of NAP
Taxpayer Can File an Appeal
Partnership can not appeal an issue/matter more than once
*Pushout Responsibilities
Partnership is no longer liable for the IU
Partnership will provide statements to its partners, and the IRS, on what adjustments and amounts, are being pushed out
TIMEFRAMES
30 DAYS
Issuance of NAP must be at least 30 days after date of L2205D
270 DAYS
Issuance of the NOPPA starts the 270 day modification request period
45/90 DAYS
Issuance of FPA starts:
• 45 days to elect pushout
• 90 days to petition court
TAXPAYER NOTIFICATIONS
Notice of selection for examination Letter 2205D
Notice of administrative proceeding (NAP) Letter 5893/5893A
Notice of preliminary partnership exam changes and IU (summary report package) Letter 5895 Form 14791/886A
BBA 30-day letter Letter 5891 Form 14791/886A
Notice of proposed partnership adjustment (NOPPA) Letter 5892/5892A Form 14792/886A
Modification determination package Letter 5975 Form 15027
Notice of final partnership adjustment (FPA) Letter 5933/5933A Form 15027/886A
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