Current Federal Tax Developments

Week of April 12, 2021

Edward K. Zollars, CPA
(Licensed in Arizona)

ACCOUNTING
CONTINUING EDUCATION

KAPLAN

CURRENT FEDERAL TAX DEVELOPMENTS
WEEK OF APRIL 12, 2021

Published in 2021 by Kaplan Financial Education.

Printed in the United States of America.

Current Federal Tax Developments

Kaplan Financial Education

Contents

SECTION: 36B
IRS ISSUES GUIDANCE ON 2020 ADVANCE PREMIUM TAX CREDIT FORM 1040 FILINGS

Citation: "IRS suspends requirement to repay excess advance payments of the 2020 Premium Tax Credit; those claiming net Premium Tax Credit must file Form 8962," IR-2021-84, 4/9/21

The American Rescue Plan Act of 2021 added IRC §36B(f)(2)(B)(iii) that provided that taxpayers are not required in tax year 2020 to repay advance premium tax credits received in excess of the premium tax credit they actually qualified for. In IR-2021-84[1] the IRS described the procedures that taxpayers will use to deal with this retroactive change in the law, one enacted after some taxpayers had filed 2020 tax returns paying back the excess advance premium tax credit.

As the news release described the provision:

> The American Rescue Plan Act of 2021 suspends the requirement that taxpayers increase their tax liability by all or a portion of their excess advance payments of the Premium Tax Credit (excess APTC) for tax year 2020. A taxpayer's excess APTC is the amount by which the taxpayer's advance payments of the Premium Tax Credit (APTC) exceed his or her Premium Tax Credit (PTC).[2]

No Need to File Form 8962 if the Form Shows Excess Advance Premium Tax Credit

Form 8962, *Premium Tax Credit*, serves two purposes on the tax return of a taxpayer who received health insurance through a Health Insurance Marketplace:

- The form determines how much premium tax credit the taxpayer qualifies for based on their income and
- It determines if the taxpayer is due a credit against taxes in excess of the advance premium credits received or if the taxpayer must repay amounts when the taxpayer's actual premium tax credit is less than the amount of any advance credit the taxpayer was paid.

---

[1] "IRS suspends requirement to repay excess advance payments of the 2020 Premium Tax Credit; those claiming net Premium Tax Credit must file Form 8962," IR-2021-84, April 9, 2021, https://www.irs.gov/newsroom/irs-suspends-requirement-to-repay-excess-advance-payments-of-the-2020-premium-tax-credit-those-claiming-net-premium-tax-credit-must-file-form-8962 (retrieved April 9, 2021)

[2] "IRS suspends requirement to repay excess advance payments of the 2020 Premium Tax Credit; those claiming net Premium Tax Credit must file Form 8962," IR-2021-84, April 9, 2021

As the release notes:

> Eligible taxpayers may claim a PTC for health insurance coverage in a qualified health plan purchased through a Health Insurance Marketplace. Taxpayers use Form 8962, *Premium Tax Credit* to figure the amount of their PTC and reconcile it with their APTC. This computation lets taxpayers know whether they must increase their tax liability by all or a portion of their excess APTC, called an excess advance Premium Tax Credit repayment, or may claim a net PTC.
>
> Taxpayers can check with their tax professional or use tax software to figure the amount of allowable PTC and reconcile it with APTC received using the information from Form 1095-A, Health Insurance Marketplace Statement.[3]

The IRS first deals with taxpayers whose 2020 returns have not yet been filed. First, the IRS provides that if those taxpayers find that Form 8962 shows a payment is due, the taxpayers are not to file that form with their tax return:

> The Internal Revenue Service announced today that taxpayers with excess APTC for 2020 are not required to file Form 8962, Premium Tax Credit, or report an excess advance Premium Tax Credit repayment on their 2020 Form 1040 or Form 1040-SR, Schedule 2, Line 2, when they file.[4]

The IRS provides some additional details in an additional fact sheet issued at the same time as the release:

> **If taxpayers have excess APTC for 2020:** They should not file Form 8962 when they file their 2020 tax return and they should not include an amount on Form 1040 or Form 1040-SR. Schedule 2, Line 2. The IRS will process that tax return without Form 8962 and will not add any excess advance Premium Tax Credit repayment amount to the 2020 tax liability. The taxpayer should disregard notices from the IRS asking for a missing Form 8962 if they have excess APTC for tax year 2020.[5]

However, taxpayers who are claiming a net premium tax credit will still need to attach Form 8962 to their returns:

> The process remains unchanged for taxpayers claiming a net PTC for 2020. They must file Form 8962 when they file their 2020 tax return. See the Instructions for Form 8962 for more information. Taxpayers

---

[3] "IRS suspends requirement to repay excess advance payments of the 2020 Premium Tax Credit; those claiming net Premium Tax Credit must file Form 8962," IR-2021-84, April 9, 2021

[4] "IRS suspends requirement to repay excess advance payments of the 2020 Premium Tax Credit; those claiming net Premium Tax Credit must file Form 8962," IR-2021-84, April 9, 2021

[5] "More details about changes for taxpayers who received advance payments of the 2020 Premium Tax Credit," FS-2021-08, April 2021, https://www.irs.gov/newsroom/more-details-about-changes-for-taxpayers-who-received-advance-payments-of-the-2020-premium-tax-credit (retrieved April 9, 2021)

> claiming a net PTC should respond to an IRS notice asking for more information to finish processing their tax return.[6]

The Fact Sheet provides the following more specific guidance in this case:

> If individuals are claiming net PTC on Form 1040 or 1040-SR, Schedule 3, Line 8: They must file Form 8962 with their return and report net PTC on Line 26. Taxpayers are eligible to claim net PTC if:
>
> - They are allowed a PTC for 2020 but were not eligible for, or chose not to receive the benefit of, APTC at enrollment in Marketplace coverage for 2020, or
>
> - They received the benefit of APTC for 2020 but their PTC allowed for 2020 is more than the APTC paid on their behalf for 2020.
>
> The IRS needs the information on Form 8962 to process the tax return for taxpayers claiming a net PTC. If they have net PTC and receive a letter asking for more information, they should respond to the notice so that the IRS can finish processing their 2020 tax return and, if applicable, issue any refund due.[7]

Taxpayers Who Previously Filed Their Return

The IRS release also deals with the case where a taxpayer had already filed a return showing a payment due for the advance premium tax credit. As with the unemployment exclusion, the IRS is asking those who believe they are due a refund due to this provision not to file an amended return, as the IRS plans to automatically issue refunds to those taxpayers:

> Taxpayers who have already filed their 2020 tax return and who have excess APTC for 2020 do not need to file an amended tax return or contact the IRS. The IRS will reduce the excess APTC repayment amount to zero with no further action needed by the taxpayer. The IRS will reimburse people who have already repaid any excess advance Premium Tax Credit on their 2020 tax return. Taxpayers who received a letter about a missing Form 8962 should disregard the letter if they have excess APTC for 2020. The IRS will process tax returns without Form 8962 for tax year 2020 by reducing the excess advance premium tax credit repayment amount to zero.
>
> Again, IRS is taking steps to reimburse people who filed Form 8962, reported, and paid an excess advance Premium Tax Credit repayment amount with their 2020 tax return before the recent legislative changes were made. Taxpayers in this situation should not file an amended

---

[6] "IRS suspends requirement to repay excess advance payments of the 2020 Premium Tax Credit; those claiming net Premium Tax Credit must file Form 8962," IR-2021-84, April 9, 2021

[7] "More details about changes for taxpayers who received advance payments of the 2020 Premium Tax Credit," FS-2021-08, April 2021

> return solely to get a refund of this amount. The IRS will provide more details on IRS.gov. There is no need to file an amended tax return or contact the IRS.[8]

The Fact Sheet provides guidance on four different situations that those who have already filed may find themselves in:

> Taxpayers who have already filed their 2020 tax return and who have excess APTC do not need to file an amended tax return or contact the IRS. Instead, taxpayers should follow the below procedures:
>
> **If a taxpayer has excess APTC, filed their return with Form 8962 and it's still being processed:** The IRS will reduce the excess advance Premium Tax Credit repayment amount the taxpayer reported on their 2020 Form 1040 or Form 1040-SR, Schedule 2, Line 2, and Line 29 of Form 8962 to zero and process their return. There is no need to contact the IRS. If a taxpayer receives a IRS letter about excess APTC for tax year 2020, they should disregard the letter.
>
> **If a taxpayer has excess APTC and filed their return without Form 8962:** The individual might have received a letter from the IRS. If they have excess APTC for 2020, they should disregard the IRS letter asking for a missing Form 8962. The IRS will continue processing the 2020 return without Form 8962. If the taxpayer didn't get a letter about a missing Form 8962, the IRS will process the 2020 without Form 8962. If they didn't file a Form 8962 but still reported an excess advance Premium Tax Credit repayment amount on their return, the IRS will reduce it to zero and process the return. There is no need to contact the IRS.
>
> **If a taxpayer paid an excess APTC repayment amount when they filed their return with Form 8962:** Individuals in this situation should not file an amended tax return to get a refund of this amount. The IRS is taking steps to reimburse taxpayers who filed Form 8962, reported, and paid an excess advance Premium Tax Credit repayment amount with their 2020 tax return before the recent changes made by the American Rescue Plan Act of 2021. Individuals in this situation should not file an amended return solely to get a refund of this amount. The IRS will provide more details soon.
>
> **If a taxpayer is claiming net PTC and filed their return without Form 8962:** They will receive a letter from the IRS asking for a completed Form 8962. Taxpayers claiming a net PTC must file Form 8962 when they file their 2020 tax return. If they filed a 2020 tax return and claimed a net PTC but did not file Form 8962 with their return, they should respond to the IRS notice they received or will soon receive. The IRS may need more information to process their 2020 return if there's an amount claimed on Form 1040 or 1040-SR,

[8] "IRS suspends requirement to repay excess advance payments of the 2020 Premium Tax Credit; those claiming net Premium Tax Credit must file Form 8962," IR-2021-84, April 9, 2021

> Schedule 3, Line 8. Individuals are eligible for net PTC for 2020 if their PTC for 2020 is more than the APTC paid for health insurance coverage and the coverage of their family members for 2020, or if they are allowed a PTC for 2020 and were not eligible for APTC, or chose not to receive the benefit of APTC, at enrollment in their health plan for 2020.
>
> If individuals have net PTC for 2020, they should review and respond to the IRS notice so that the IRS can finish processing their 2020 tax return and, if applicable, issue any refund due.

No Impact on Other Tax Years

The release also reminds taxpayers this law change does not have any impact on other tax years:

> As a reminder, this change applies only to reconciling tax year 2020 APTC. Taxpayers who received the benefit of APTC prior to 2020 must file Form 8962 to reconcile their APTC and PTC for the pre-2020 year when they file their federal income tax return even if they otherwise are not required to file a tax return for that year. The IRS continues to process prior year tax returns and correspond for missing information. If the IRS sends a letter about a 2019 Form 8962, we need more information from the taxpayer to finish processing their tax return. Taxpayers should respond to the letter so that the IRS can finish processing the tax return and, if applicable, issue any refund the taxpayer may be due.[9]

SECTION: 61
IRS ILLUSTRATES APPLICATION OF HARD FORK RULING TO 2017 BITCOIN HARD FORK

Citation: CCA 202114020, 4/9/21

In CCA 202114020[10] the IRS outlines the impact of two different situations involving 2017's hard fork of Bitcoin that created Bitcoin Cash and allocated one unit of Bitcoin Cash for each unit of Bitcoin held by a taxpayer.

---

[9] "IRS suspends requirement to repay excess advance payments of the 2020 Premium Tax Credit; those claiming net Premium Tax Credit must file Form 8962," IR-2021-84, April 9, 2021

[10] CCA 202114020, April 9, 2021, https://www.irs.gov/pub/irs-wd/202114020.pdf (retrieved April 9, 2021)

Analysis of Prior IRS Guidance on Hard Forks

The guidance begins by noting the facts related to the hard fork that created Bitcoin Cash:

> On August 1, 2017, at 9:16 a.m., EDT (13:16, UTC), block 478,558 on the Bitcoin block chain was mined. This was the last common block shared by both the Bitcoin and Bitcoin Cash distributed ledgers. Immediately following the mining of block 478,558, Bitcoin miners began mining a block that continued to follow Bitcoin's protocols but was incompatible with Bitcoin Cash's protocols. At the same time, Bitcoin Cash miners began mining a block that followed the Bitcoin Cash protocol but was no longer compatible with Bitcoin's protocols. Beginning at this date and time, holders of Bitcoin Cash were, in general, able to engage in Bitcoin Cash transactions that would not be reflected in the Bitcoin distributed ledger and would have no effect on their Bitcoin holdings.[11]

The IRS, in a footnote to the ruling, points out that some individuals holding Bitcoin in major exchanges did not have immediate access to the Bitcoin Cash:

> Some taxpayers holding Bitcoin through hosted wallets at cryptocurrency exchanges did not have dominion and control of the new Bitcoin Cash at the time of the hard fork. For example, the cryptocurrency exchange, Coinbase, began supporting Bitcoin Cash on December 19, 2017. Prior to that date Coinbase's customers were unable to buy, sell, receive, transfer, or exchange Bitcoin Cash through their Coinbase accounts. *See Buy, sell, send and receive Bitcoin Cash on Coinbase*, COINBASE (Dec. 20, 2017), available at https://blog.coinbase.com/buy-sell-send-and-receive-bitcoin-cash-on-coinbase-65f1b2c7214b.[12]

This memorandum looks at the issue of what impact, if any, does such delayed access in the case of a hard fork have on the taxpayer's recognition of income from the hard fork.

The IRS begins an analysis of the tax impact of this situation by applying the general income rules applicable to IRC §61(a)(3) to a hard fork:

> Section 61(a)(3) provides that, except as otherwise provided by law, gross income means all income from whatever source derived, including gains from dealings in property. Under § 61, all gains or undeniable accessions to wealth, clearly realized, over which a taxpayer has complete dominion, are included in gross income. See *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955). A taxpayer owning a cryptocurrency that undergoes a hard fork has received gross income under § 61 if the hard fork results in a new cryptocurrency and the taxpayer actually or constructively receives the new cryptocurrency as a

[11] CCA 202114020, BACKGROUND, April 9, 2021

[12] CCA 202114020, FOOTNOTES, Footnote 1, April 9, 2021

> result of the hard fork. I.R.C. § 61; Treas. Reg. § 1.451-2; Rev. Rul. 2019-24.[13]

The discussion goes on next to discuss Revenue Ruling 2019-24 that applied this principal directly to a hard fork:

> Revenue Ruling 2019-24 applies the general principles of § 61 to conclude that the receipt of a new cryptocurrency following a hard fork results in income. Specifically, the ruling includes in the facts an airdrop following a hard fork as an example of how a taxpayer could receive new cryptocurrency from a hard fork. The specific means by which the new cryptocurrency is distributed or otherwise made available to a taxpayer following a hard fork does not affect the Revenue Ruling's holding.[14]

Taxpayer Who Had Personal Control Over Bitcoin Private Key at Time of Hard Fork

The first situation the IRS looks at involves a case where the taxpayer had control over the private key to the distributed ledger address for 1 unit of Bitcoin:

> **Situation 1**
>
> A had sole control over the private key to a distributed ledger address that, as of August 1, 2017, at 9:16 a.m., EDT, held 1 unit of Bitcoin. Following the hard fork, A's distributed ledger address continued to hold 1 unit of Bitcoin while also holding 1 unit of Bitcoin Cash. At that time, A had the ability to initiate a transaction to dispose of some or all of A's Bitcoin Cash holdings.[15]

In that situation, the CCA comes to the conclusion that the taxpayer must immediately recognize income by looking at the fair market value of the new virtual currency received:

> A received 1 unit of Bitcoin Cash at the time of the hard fork and had dominion and control over that unit as evidenced by A's ability to sell, exchange, or transfer the Bitcoin Cash. A has ordinary income in the 2017 taxable year equal to the fair market value of the Bitcoin Cash as of August 1, 2017, at 9:16 a.m., EDT. A can determine the Bitcoin Cash's fair market value using any reasonable method, such as adopting the publicly published price value at a cryptocurrency exchange or cryptocurrency data aggregator.[16]

---

[13] CCA 202114020, DISCUSSION, April 9, 2021

[14] CCA 202114020, DISCUSSION, April 9, 2021

[15] CCA 202114020, FACTS, April 9, 2021

[16] CCA 202114020, DISCUSSION, April 9, 2021

Taxpayer Had Bitcoin on an Exchange That Did Not Immediately Provide Access to Bitcoin Cash

In the second situation, the taxpayer has the Bitcoin on deposit in an exchange at the time of the hard fork:

> **Situation 2**
>
> B is a customer of CEX, a cryptocurrency exchange that provides hosted wallet services. As of August 1, 2017, at 9:16 a.m., EDT, B owned 1 unit of Bitcoin, which was held by CEX in a hosted wallet. CEX had sole control over the private key to a distributed ledger address that, as of August 1, 2017, at 9:16 a.m., EDT, held 100 units of Bitcoin. According to CEX's off-chain, internal ledger, one unit of the 100 units of Bitcoin was owned by B.
>
> After the hard fork, CEX's distributed ledger address continued to hold 100 units of Bitcoin while also holding 100 units of Bitcoin Cash. CEX, however, was uncertain of Bitcoin Cash's security and long-term viability and chose not to support Bitcoin Cash at the time of the hard fork. As a result, B was unable to buy, sell, send, receive, transfer, or exchange any Bitcoin Cash through B's account with CEX, and CEX did not update its internal ledger to reflect that B owned any Bitcoin Cash. On January 1, 2018, at 1:00 p.m., EDT, CEX initiated support for Bitcoin Cash, allowing B to buy, sell, send, receive, transfer, or exchange Bitcoin Cash, including part or all of the 1 unit in B's account.[17]

In this case, the IRS finds the taxpayer did not have taxable income immediately upon the hard fork, but rather only later when granted access to the Bitcoin Cash:

> B did not have dominion and control over any Bitcoin Cash at the time of the hard fork, and therefore did not receive any income from the hard fork at that time. On January 1, 2018, at 1:00 p.m., EDT, CEX initiated support of Bitcoin Cash, allowing B — for the first time — to sell, transfer, or exchange B's 1 unit of Bitcoin Cash. B has ordinary income in the 2018 taxable year equal to the fair market value of the Bitcoin Cash as of January 1, 2018, at 1:00 p.m., EDT. B can determine the fair market value by consulting CEX's pricing data. If CEX lacks such information, B can use any other reasonable method.[18]

[17] CCA 202114020, FACTS, April 9, 2021

[18] CCA 202114020, DISCUSSION, April 9, 2021

SECTION: 108
IRS NOTES NONACQUIESENCE WITH COURT HOLDING AN INTEREST IN A DEFINED BENEFIT PENSION PLAN WAS NOT AN ASSET FOR INSOLVENCY TEST

Citation: Action on Decision AOD 2021-01, 4/9/21

In Action on Decision AOD 2021-01 the IRS announced that the agency will not acquiesce in a decision that treated an interest in a defined benefit pension plan in which the taxpayer only had rights to monthly payment was not an asset for computation of the insolvency exception to the exclusion of cancellation of debt income from tax under IRC §108(a)(2).

The case in question is the case of *Schieber v. Commissioner*, TC Memo 2017-32. As the court opinion noted:

> The sole issue in this case is whether the Schiebers' interest in a California Public Employees' Retirement System (CalPERS) defined benefit pension plan is considered an asset in determining (1) whether they were insolvent on June 30, 2009, the date the debt was canceled, and (2) the amount of their insolvency.[19]

The Tax Court held that this asset should not be counted in determining if the taxpayer was solvent at the time the debt was cancelled:

> [T]he IRS contends the Schiebers' interest in the pension plan should be considered an asset because they can use their monthly payments to pay liabilities. But the test in *Carlson v. Commissioner*, 116 T.C. at 104-105, is whether the asset gives the taxpayer the ability to pay an "immediate tax on income" from the canceled debt—not to pay the tax gradually over time. In Carlson, we held that a commercial fishing license could be an asset because the license could be used, in combination with other assets, to immediately pay the income tax on canceled-debt income. *Id.* By contrast, the Schiebers' interest in the

---

[19] *Schieber v. Commissioner*, TC Memo 2017-32, February 9, 2017, https://app.dawson.ustaxcourt.gov/documents/2ceba57c-165d-4af0-8198-c52f02178f88?AWSAccessKeyId=ASIA6IROMRYRLJ6W7IVS&Expires=1618058051&Signature=oNeAp4eicPsFxqWHBp0c63IPHgw%3D&x-amz-security-token=IQoJb3JpZ2luX2VjEDQaCXVzLXdlc3QtMSJGMEQCIBzcYflhwQqnYuvoernHX290g8fgyQLO8JarEpb3aP3WAiA%2BzH66ZolG8iQ9moyy%2FpfwlSk7Ck3gRfV2jSRehuDnvSrcAQiN%2F%2F%2F%2F%2F%2F%2F%2F%2F%2F8BEAAaDDk4MDQyMzU3NzEyMiIMvySLpI7lE7wfhe55KrAB5WhfiSCSEYNIHeD8766EJPnUd4MZDllBau7P8NYe%2B5jJdKahRyRwsJGUUMv4XyHdqKc0f8%2BhjBQo5Dgl7scc%2FvWrON1O7sODuwjXK3rGTzS0SPcqhXH%2FixJfSBn8lomJGHrGbx%2FkLabyrLwjdnNP3NXm0A%2F2CseiPNfgXKuEwWfDdQ6KwkBNJP3wfDKUb2VltNUf%2Bxd7vvevqQ%2BT%2BR5VpxuoLndBC3eCjncj4iPIsWYwk5bGgwY64QFvHBrd5yH9vxtBO29r1h4qc0aAiZLFmOVUDEDD6I1MK3dD9DAS%2BIb9Zc5C5tZDlJXH4qY%2BRAMlMuiv1ihrcTEd4KuhajMravGYI51URg%2Bh4xZ5wF69QIPUe4FbfwebN6Eakk5dfNFRrSmLB4NrFQlUJtYOS%2FphMMgCNbWME%2BLwWe3PvrS%2Fz21yKjEg26iR2u5X5JezJmrdhjRzsSqJnVBbA5rMDRlzCfHVQ5hGKluG81SHS7nBDgqkr%2Fk5TG1ObpX3IC7C9rY%2FWRDdeKveHgN%2F3nM7aWOR%2Bzh5RGw1Y9QwqSY%3D (retrieved April 10, 2021)

> pension plan cannot be used to immediately pay the income tax on canceled-debt income. Therefore, we hold that the Schiebers' interest in the pension plan is not an asset within the meaning of section 108(d)(3).[20]

In a footnote, the Tax Court considered and rejected the IRS argument that the Court's prior decision in the *Shepherd* case supported including this asset in computing the taxpayer's solvency.

> The IRS contends that *Shepherd v. Commissioner*, T.C. Memo. 2012-212, a nonprecedential case, supports its view that the Schiebers' interest in the CalPERS pension plan is an asset. The taxpayer in Shepherd was a township employee who had a pension with the New Jersey Public Employees Retirement System. Id., slip op. at 12. The Court found that he could borrow from his pension against his accumulated contributions. Eat 13-14. It held that the amount that he could borrow was an asset under sec. 108(d)(3). Eat 14. The Schiebers, by contrast, could not borrow from the pension. Shepherd is therefore distinguishable.[21]

The IRS has now decided to go on the record with its disagreement with this decision by noting its nonacquiesence. The AOD describes the impact of such a holding as follows:

> "Nonacquiescence" signifies that, although no further review was sought, the Service does not agree with the holding — of the court and, generally, will not follow the decision in disposing of cases involving other taxpayers. In reference to an opinion of a circuit court of appeals, a "nonacquiescence" indicates that the Service — will not follow the holding on a nationwide-basis. However, the Service will recognize the precedential impact of the opinion on cases arising within the venue of the deciding circuit.[22]

Thus, the IRS is putting taxpayers and advisers on notice that the agency will be willing to challenge a position that relies on this case where a taxpayer has only a right to a current monthly payout from the retirement plan, but no current right to otherwise access funds in the plan.

Specifically, the AOD holds:

> The Commissioner does NOT ACQUIESCE in the following decision:
>
> ***Schieber v. Commissioner*, T.C. Memo. 2017-32, T.C. Docket No. 21690-14.[23]**

---

[20] *Schieber v. Commissioner*, TC Memo 2017-32, February 9, 2017

[21] *Schieber v. Commissioner*, TC Memo 2017-32, February 9, 2017

[22] Action on Decision AOD 2021-01, April 9, 2021

[23] Action on Decision AOD 2021-01, April 9, 2021

In a footnote the IRS provides the specific holding it will not follow:

> Nonacquiescence to the holding that an interest in a defined benefit pension plan is not an asset for purposes of applying the insolvency exclusion in I.R.C. § 108.[24]

SECTION: 274
IRS DETAILS RESTAURANT BUSINESS MEAL EXPENSES ELIGIBLE FOR 100% DEDUCTION

Citation: Notice 2021-25, 4/8/21

The IRS released guidance in Notice 2021-25[25] to deal with the temporary allowance of a 100% deduction for restaurant business meal expenses under IRC §274(n)(2)(D) that was added to the law in December of 2020 by the Taxpayer Certainty and Disaster Tax Relief Act of 2020 (TCDTRA).

Temporary Full Deduction Relief

The Notice describes the TCDTRA's temporary relief as follows:

> Section 274(n)(2) provides exceptions to the 50-percent limitation of deductions for food or beverage expenses. Section 210(a) of the Act added § 274(n)(2)(D) to the Code, which provides a temporary exception to the 50-percent limitation for expenses for food or beverages provided by a restaurant. Section 274(n)(2)(D) applies to amounts paid or incurred after December 31, 2020, and before January 1, 2023.[26]

The purpose of this Notice is described as follows:

> To provide certainty to taxpayers in determining whether § 274(n)(2)(D) applies, this notice explains when the temporary 100-percent deduction applies and when the 50-percent limitation continues to apply.[27]

Definition of a Restaurant

One key item to note is that the food or beverage must be provided by a *restaurant*. The Notice provides information on what will qualify as a restaurant for these purposes:

> For this purpose, the term "restaurant" means a business that prepares and sells food or beverages to retail customers for immediate

---

[24] Action on Decision AOD 2021-01, April 9, 2021

[25] Notice 2021-25, April 8, 2021, https://www.irs.gov/pub/irs-drop/n-21-25.pdf (retrieved April 8, 2021)

[26] Notice 2021-25, SECTION II

[27] Notice 2021-25, SECTION II

> consumption, regardless of whether the food or beverages are consumed on the business's premises.[28]

The definition would allow a full deduction for amounts paid to a business that was selling food solely for take-out, such as a drive-through only business.

However, the Notice excludes food or beverages purchased from a business that primarily sells prepackaged food or beverages not for immediate consumption. The Notice provides the following examples of such businesses:

- Grocery store;
- Specialty food store;
- Beer, wine, or liquor store;
- Drug store;
- Convenience store;
- Newsstand; or
- A vending machine or kiosk.[29]

Food or beverage acquired from any of those businesses will be subject to the 50% deduction limit unless qualified for another exception from that limitation.[30]

The Notice also provides that an employer may not treat as a restaurant:

- Any eating facility located on the business premises of the employer and used in furnishing meals excluded from an employee's gross income under § 119, or
- Any employer-operated eating facility treated as a de minimis fringe under § 132(e)(2), even if such eating facility is operated by a third party under contract with the employer as described in § 1.132-7(a)(3).[31]

[28] Notice 2021-25, SECTION III

[29] Notice 2021-25, SECTION III

[30] Notice 2021-25, SECTION III

[31] Notice 2021-25, SECTION III

SECTION: 6654
CAN A TAXPAYER APPLY AN EXTENSION PAYMENT IN 2021 THAT RESULTS IN AN OVERPAYMENT TO THE FIRST QUARTER ESTIMATED TAX PAYMENT FOR 2021?

Citation: Notice 2021-21, 3/29/21

Let's start this article by noting that this is an issue that likely costs more in wasted time to research and resolve than the dollars that might be saved by finding the tax payment can be pushed back a month. But many advisers are stressing quite a bit over trying to answer this question: "If a taxpayer pays money with an extension filed on May 17, ends up with an overpayment when the return is finally filed and applies the amount to the 2021 return, will that overpayment be treated as paid as part of the first estimate due on April 15?"

Some advisers have gotten used to "beefing up" the payment with extensions, expecting the taxpayer to be overpaid when the return is completed. That expected overpayment is meant to cover the first estimated tax payment due for the following year. Two reasons are offered for going this route:

- It eliminates the need to prepare both an extension and an estimated tax voucher at the original due date, as well as allowing the taxpayer to make a single payment and
- It provides some protection to the client from a failure to pay penalty and interest on the return being extended if it turns out there's more income than expected (albeit at the potential cost of now incurring some underpayment of estimated tax penalty on the following year's return).

Recently Michael Busa, CPA posting to a discussion on NJCPA's Connect site stated he had read an article that pointed to Rev. Rul. 99-40 to indicate that this strategy won't work. In particular, the ruling contains language that states:

> [I]f an overpayment of income tax for a taxable year occurs on or before the due date of the first installment of estimated tax for the succeeding taxable year, the overpayment is available for credit against any installment of estimated tax for such succeeding taxable year and will be credited in accordance with the taxpayer's election. If the overpayment occurs after the due date of the first installment of estimated tax for the succeeding taxable year, it may be credited only against an installment of estimated tax due on or after the date the overpayment was made. Under these circumstances, section 6655(b)(3) provides that a payment of estimated tax by a corporation is credited against unpaid required installments in the order in which the installments are required to be paid. Section 6654(b)(3) provides the same rule for individuals.[32]

[32] Revenue Ruling 99-40

That paragraph was part of the supporting analysis for that particular Revenue Ruling, so technically it isn't formally holding this out—just saying the IRS already told us this.

The document that provides support for that conclusion is Rev. Rul. 77-475 which was revoked then reinstated by the IRS in the mid-1980s. The relevant part of Rev. Rul. 77-475 provides:

> If an overpayment of income tax for a taxable year occurs on or before the due date of the first installment of estimated tax for the succeeding taxable year, the overpayment is available for credit against any installment of estimated tax for such succeeding taxable year and will be credited in accordance with the taxpayer's election.
>
> If the overpayment occurs after the due date of the first installment of estimated tax for the succeeding taxable year, it may be credited only against an installment of estimated taxes due on or after the date the overpayment was made.[33]

The ruling was dealing with a situation that doesn't exist any longer—the ability for a corporation to pay the tax it expects be due on extension in two installments. Specifically, these were the facts in question:

> On March 15, 1977, X, a calendar year corporation, filed a Form 7004, Application for Automatic Extension of Time to File Corporation Income Tax Return, showing a tentative 1976 income tax liability of 6x dollars and elected to pay the tax in installments by depositing 3x dollars as the first installment. On June 15, 1977, X deposited 3x dollars as the second and final installment payment of the tentative 1976 income tax liability. X then requested and was granted an additional three month extension of time to file. On September 15, 1977, X filed a Form 1120, U.S. Corporation Income Tax Return, for 1976 on which it reported an income tax liability of 4x dollars. X elected to apply the 2x dollar overpayment shown on the return as a credit against its 1977 estimated income tax.[34]

The ruling holds that the overpayment of 2x dollars could not be applied to the first estimate in this case. Note that since the second installment payment was 3x dollars, the entire overpayment related to funds paid after the due date of the first quarter estimated tax payment. But also note that the original due date of the corporate return was on the date the first estimate was due.

Note that the ruling that reinstated Rev. Rul. 77-475 also modified it (Rev. Rul. 84-58). That later ruling technically controls the situation and it states:

> For returns filed after December 31, 1983, the Service will apply overpayments arising on or before the due date of a return against the first installment payment of the next year's estimated tax, unless the

[33] Revenue Ruling 77-475

[34] Revenue Ruling 77-475

> taxpayer notifies the Service that the overpayment should be applied against another installment.[35]

But this year we have a bit of a quirk—the actual due date of the Form 1040 for 2020 now occurs one month after the due date for the first 2021 estimated tax payment. So what if the taxpayer, between timely 2020 estimated tax payments and tax withholding, had enough paid in at April 15 to have paid off the entire 2020 tax liability and enough left over to cover what would otherwise be an underpayment on the first quarter 2021 estimate?

Unfortunately, it appears the IRS can argue the overpayment in this case occurs at May 17, 2021 (the due date for the 2020 return under Notice 2021-21) even though the government had the funds on hand at all times and the taxpayer *could* have filed early in tax season, received the cash refund, and then paid the first estimate at April 15, 2021—a situation that puts the government in a worse cash flow position than if that taxpayer had applied the overpayment. But it appears the fact the taxpayer *could* have filed back in February and gotten the cash isn't relevant.

It's also not clear what happens if the taxpayer had sent in the return electronically prior to April 15, applying the overpayment to the following year. Normally a return filed prior to April 15 is treated as having been filed on April 15, and the overpayment would have come into existence on that date. But with the pushing back of the due date to May 15, which may have occurred *after* the taxpayer filed their return, it seems possible the IRS could argue that the overpayment is no longer available to offset against the first quarter estimate.

In this case, though, I think the taxpayer has a reasonable argument that he/she did not take advantage of the postponement of the due date granted by the IRS under the authority of IRC §7508A in any form, and thus should not be required to apply Notice 2021-21 to the overpayment in question. At least I believe enough support exists to allow the taxpayer to take this position on the 2021 return when computing an underpayment of estimated tax for the first quarter of 2021. Whether that support is sufficient to avoid requiring disclosure is something the adviser preparing the 2021 return will need to decide, though arguably there seems little harm in making the disclosure.

Now, since many of you won't like the answers implied in this article, you can have fun building the counter-arguments. Of course, if you actually take the position you can apply a May 17 payment on a Form 4868 eventually for the first quarter estimate and the IRS challenges the position, you should remind the client about the cost of fighting the IRS to get rid of the $40 of underpayment penalty the agency will be after. Sure, the amount can be more, but until the taxpayer's payment gets to multiple six figures range I don't see how the math works out that the cost of fighting would possibly be less than the penalty being asserted by the government.

We could get lucky—the IRS might announce that overpayments resulting from payments made with extensions filed on May 17, 2021 will count against first quarter estimates, though given the IRS's reason for not extending the estimate date I wouldn't count on it. As well, and maybe more likely, the IRS might just not challenge the issue

[35] Revenue Ruling 84-58

when 2021 returns are filed. But right now it appears far from sure that taxpayers who rely on such overpayments will not end up with notices asking for underpayment penalties on 2021 returns.