

Current Federal Tax Developments

Week of November 15, 2021

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CURRENT FEDERAL TAX DEVELOPMENTS
WEEK OF NOVEMBER 15, 2021
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Published in 2021 by Kaplan Financial Education.

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SECTION: TAS FOR NOW, THE TAXPAYER ADVOCATE SERVICES WILL NO LONGER INTERVENE IN CASES INVOLVING SOLELY DELAYED PROCESSING OF AMENDED RETURNS

Citation: “NTA Blog: IRS Delays in Processing Amended Tax Returns Are Impacting TAS’s Ability to Assist Taxpayers,” NTA Blog, 11/10/21

The IRS Taxpayer Advocate Service (TAS) has announced that, for now, TAS will no longer assist taxpayers who are experiencing processing delays for amended income tax returns.¹

The TAS blog explains:

Under our current procedures, TAS does not accept cases in which we cannot meaningfully expedite or improve case resolution for taxpayers. Amended returns fall into this category. Due to the broad impact of COVID-19, the IRS has faced significant challenges in all its return processing operations. Unfortunately, until the IRS processes a tax return, TAS cannot assist the taxpayer. For that reason, TAS will not accept new cases **solely** involving the processing of an individual or business amended return. TAS will continue to monitor IRS developments in amended return processing and will reevaluate this determination as the situation changes.²

The blog notes that if the case involves more than just the delayed processing of the return, if the situation meets the general criteria for TAS cases they will intervene:

However, TAS will continue to accept new cases if the primary issue meets TAS case acceptance criteria per IRM 13.1.7,³ Taxpayer Advocate Service (TAS) Case Criteria, and includes the processing of an individual or business amended return as a secondary issue.⁴

¹ “NTA Blog: IRS Delays in Processing Amended Tax Returns Are Impacting TAS’s Ability to Assist Taxpayers,” NTA Blog, November 10, 2021, <https://www.taxpayeradvocate.irs.gov/news/nta-blog-irs-delays-in-processing-amended-tax-returns-are-impacting-tass-ability-to-assist-taxpayers/>

² “NTA Blog: IRS Delays in Processing Amended Tax Returns Are Impacting TAS’s Ability to Assist Taxpayers,” NTA Blog, November 10, 2021.

³ https://www.irs.gov/irm/part13/irm_13-001-007

⁴ “NTA Blog: IRS Delays in Processing Amended Tax Returns Are Impacting TAS’s Ability to Assist Taxpayers,” NTA Blog, November 10, 2021.

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The blog also notes that TAS recognizes this is a serious problem for many taxpayers, even if they are unable to speed resolution of the issue.

We recognize that many taxpayers whose amended returns the IRS has not processed have been waiting for their refunds for months. Some are experiencing financial hardships and desperately need the funds. Most are confused, frustrated, and concerned that the delay may mean they did something wrong. The IRS reports that its Where's My Amended Return⁵ tool indicates that a taxpayer's amended return was received within three weeks of filing. Taxpayers can use the tool to track the status of their return. This tool is available on IRS.gov and can provide the status of amended returns for the current tax year and up to three prior tax years. One caveat – the tool cannot provide the status of amended returns with a foreign address, business tax amended returns, carryback applications, and amended returns processed by a specialized unit. If you are looking for updated information on IRS operations and backlogs, the IRS has created a dashboard⁶ that it is regularly updating.⁷

The blog concludes with TAS noting steps they have taken to move this systematic issue towards resolution:

Although TAS cannot assist in individual cases, we have been advocating within the IRS for systemic steps to reduce the processing backlog. On November 9, 2021, I issued a Taxpayer Advocate Directive (TAD) directing the IRS to complete processing all backlogged amended tax returns by December 29, 2021, or provide a detailed plan for completing processing the backlog. My TAD also directed the IRS to provide weekly updates to TAS on the progress in processing these returns and to post weekly updates on IRS.gov. Although the law authorizes the Commissioner or Deputy Commissioner to modify or rescind this order, the IRS must provide a written explanation, and then I would report on the issue in my Annual Report to Congress. TAS is continuing to work collaboratively with the IRS to expedite the processing of these returns.

⁵ <https://www.irs.gov/filing/wheres-my-amended-return>

⁶ <https://www.irs.gov/newsroom/irs-operations-during-covid-19-mission-critical-functions-continue>

⁷ NTA Blog: IRS Delays in Processing Amended Tax Returns Are Impacting TAS's Ability to Assist Taxpayers," NTA Blog, November 10, 2021

SECTION: 1

INFLATION ADJUSTED AMOUNTS ISSUED BY IRS FOR 2022

Citation: Revenue Procedure 2021-45, 11/10/21

Having already released the annual inflation adjusted retirement numbers in Notice 2021-61, discussed in an earlier article,⁸ the IRS has now released Revenue Procedure 2021-45⁹ that contains most of the other inflation adjusted numbers for 2022 taxes.

As the numbers relate to the law as it existed at the date of publication of the procedure, something that could change based on pending Congressional action, the procedure contains the following warning:

This revenue procedure sets forth inflation-adjusted items for 2022 for various provisions of the Internal Revenue Code of 1986 (Code), as amended, as of November 10, 2021. To the extent amendments to the Code are enacted for 2022 after November 10, 2021, taxpayers should consult additional guidance to determine whether these adjustments remain applicable for 2022.¹⁰

The numbers are arranged by IRC Section number in this annual publication of inflation adjusted numbers. Some of the key figures are discussed below.

Kiddie Tax: The amount of unearned income used to reduce the net unearned income reported on the child's return that is subject to the "kiddie tax," is \$1,150 for 2022. As well the Procedure notes "[t]he same \$1,150 amount is used for purposes of § 1(g)(7) (that is, to determine whether a parent may elect to include a child's gross income in the parent's gross income and to calculate the "kiddie tax"). For example, one of the requirements for the parental election is that a child's gross income is more than the amount referenced in § 1(g)(4)(A)(ii)(I) but less than 10 times that amount; thus, a child's gross income for 2022 must be more than \$1,150 but less than \$11,500."¹¹

Maximum Capital Gains Rate. The procedure provides the following brackets for capital gain rates purposes for 2022.

For taxable years beginning in 2022, the Maximum Zero Rate Amount under § 1(h)(1)(B)(i) is \$83,350 in the case of a joint return or surviving spouse (\$41,675 in the case of a married individual filing a separate return), \$55,800 in the case of an

⁸ Ed Zollars, CPA, "Cost of Living Retirement and Fringe Benefit Amounts for 2022 Published by the IRS," *Current Federal Developments Website*, November 4, 2021, <https://www.currentfederaltaxdevelopments.com/blog/2021/11/4/cost-of-living-retirement-and-fringe-benefit-amounts-for-2022-published-by-the-irs>

⁹ Revenue Procedure 2021-45, November 10, 2021, <https://www.taxnotes.com/research/federal/irs-guidance/revenue-procedures/irs-releases-inflation-adjusted-items-for-2022/7cld7?h=2021-45>

¹⁰ Revenue Procedure 2021-45, November 10, 2021

¹¹ Revenue Procedure 2021-45, Section 2.02, November 10, 2021

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individual who is a head of household (§ 2(b)), \$41,675 in the case of any other individual (other than an estate or trust), and \$2,800 in the case of an estate or trust. The Maximum 15-percent Rate Amount under § 1(h)(1)(C)(ii)(I) is \$517,200 in the case of a joint return or surviving spouse (\$258,600 in the case of a married individual filing a separate return), \$488,500 in the case of an individual who is the head of a household (§ 2(b)), \$459,750 in the case of any other individual (other than an estate or trust), and \$13,700 in the case of an estate or trust.¹²

Adoption. The procedure provides the following numbers related to the adoption credit for 2022.

For taxable years beginning in 2022, under § 23(a)(3) the credit allowed for an adoption of a child with special needs is \$14,890. For taxable years beginning in 2022, under § 23(b)(1) the maximum credit allowed for other adoptions is the amount of qualified adoption expenses up to \$14,890. The available adoption credit begins to phase out under § 23(b)(2)(A) for taxpayers with modified adjusted gross income in excess of \$223,410 and is completely phased out for taxpayers with modified adjusted gross income of \$263,410 or more. See section 3.19 for the adjusted items relating to adoption assistance programs.¹³

The related numbers for adoption assistance programs for 2022 are provided as follows.

For taxable years beginning in 2022, under § 137(a)(2), the amount that can be excluded from an employee's gross income for the adoption of a child with special needs is \$14,890. For taxable years beginning in 2022, under § 137(b)(1) the maximum amount that can be excluded from an employee's gross income for the amounts paid or expenses incurred by an employer for qualified adoption expenses furnished pursuant to an adoption assistance program for adoptions by the employee is \$14,890. The amount excludable from an employee's gross income begins to phase out under § 137(b)(2)(A) for taxpayers with modified adjusted gross income in excess of \$223,410 and is completely phased out for taxpayers with modified adjusted gross income of \$263,410 or more.¹⁴

¹² Revenue Procedure 2021-45, Section 2.03, November 10, 2021

¹³ Revenue Procedure 2021-45, Section 2.04, November 10, 2021

¹⁴ Revenue Procedure 2021-45, Section 2.19, November 10, 2021

Alternative Minimum Tax: The exemption amounts for the alternative minimum tax for 2022 are:

- Joint Returns or Surviving Spouses - \$118,100
- Unmarried Individuals (other than Surviving Spouses) - \$75,900
- Married Individuals Filing Separate Returns - \$59,050
- Estates and Trusts - \$26,500

The exemptions start to phase out in 2022 at:

- Joint Returns or Surviving Spouses – begins at \$1,079,800, completely phased out at \$1,552,200
- Unmarried Individuals (other than Surviving Spouses) – begins at \$539,900, completely phased out at \$843,500
- Married Individuals Filing Separate Returns – begins at \$539,900, completely phased out at \$776,100
- Estates and Trusts – begins at \$88,300, completely phased out at \$194,300¹⁵

Classroom Expenses of Elementary and Secondary School Teachers. The amount of expenses allowed as an above the line deduction that consists of expenses paid or incurred by an eligible educator in connection with books, supplies (other than nonathletic supplies for courses of instruction in health or physical education), computer equipment (including related software and services) and other equipment, and supplementary materials used by the eligible educator in the classroom is \$300 for 2022.¹⁶

Standard Deduction. The base standard deductions for 2022 are:

- Married Individuals Filing Joint Returns and Surviving Spouses (§ 1(j)(2)(A)) - \$25,900
- Heads of Households (§ 1(j)(2)(B)) - \$19,400
- Unmarried Individuals (other than Surviving Spouses and Heads of Households) (§ 1(j)(2)(C)) - \$12,950

¹⁵ Revenue Procedure 2021-45, Section 2.11, November 10, 2021

¹⁶ Revenue Procedure 2021-45, Section 2.13, November 10, 2021

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- Married Individuals Filing Separate Returns (§ 1(j)(2)(D)) - \$12,950¹⁷

The standard deduction for an individual claimed as a dependent in 2022 can exceed the greater of:

- \$1,150 or
- The sum of \$400 and the person's earned income.¹⁸

The additional standard deduction for those who are aged 65 or greater or those who are blind is \$1,400. This additional deduction is increased to \$1,750 if the individual is also unmarried and not a surviving spouse.¹⁹

Cafeteria Plans: For plan years beginning in 2022, the dollar limitation for voluntary employee salary reductions for contributions to health flexible spending arrangements is \$2,850. If the cafeteria plan permits the carryover of unused amounts, the maximum carryover amount is \$570.²⁰

Maximum Income for Qualifying Relative. For 2022, the maximum gross income for any qualifying relatives to be able to be claimed as a dependent is \$4,400.²¹

Section 179 Numbers. For 2022, the following key numbers apply to IRC §179 expensing:

- Maximum cost of property for which a §179 election is made: \$1,080,000
- Limit on costs for sports utility vehicle taken into account under IRC §179: \$27,000
- The amount available for §179 expensing is phase out beginning when total §179 property placed in service during the year exceed \$2,700,000.²²

§199A Qualified Business Income Numbers. For 2022, the threshold amount and end of the phase in range are:

- Married Individuals Filing Joint Returns – threshold amount is \$340,100 and the phase-in range ends at \$440,100

¹⁷ Revenue Procedure 2021-45, Section 2.13(1), November 10, 2021

¹⁸ Revenue Procedure 2021-45, Section 2.13(2), November 10, 2021

¹⁹ Revenue Procedure 2021-45, Section 2.13(3), November 10, 2021

²⁰ Revenue Procedure 2021-45, Section 2.16, November 10, 2021

²¹ Revenue Procedure 2021-45, Section 2.24, November 10, 2021

²² Revenue Procedure 2021-45, Section 2.25, November 10, 2021

- Married Individuals Filing Separate Returns – threshold amount is \$170,050 and the phase-in range ends at \$220,050
- All Other Returns - threshold amount is \$170,050 and the phase-in range ends at \$220,050.²³

Small Accounting Methods. For 2022, the maximum gross receipt level to qualify for various benefits under the small accounting methods of the Tax Cuts and Jobs Act (cash basis of accounting, exemption from §163(j) interest rules, non-§471(c) inventory methods, exemption from §263A, and treatment as a small contractor) is \$27,000,000.²⁴

Excess Business Loss. For 2022, the limit for an excess business loss under IRC §461(l) is \$270,000 (\$540,000 for joint returns).²⁵

Foreign Earned Income Exclusion. For 2022, the foreign earned income exclusion is \$112,000.²⁶

Unified Credit Against Estate Tax. The basic exclusion amount for decedents dying in 2022 is \$12,060,000.²⁷

Annual Exclusion for Present Interest Gifts. The annual exclusion for a gift of a present interest in 2022 will be \$16,000.²⁸

Qualified Small Employer Health Reimbursement Arrangement (QSEHRA). The limit on reimbursement for an employer plan to qualify as an QSEHRA is \$5,450 (\$11,050 for family coverage).²⁹

SECTION: 475 REQUEST TO MAKE LATE §475(F)(1) ELECTION DENIED BY IRS

Citation: PLR 202145015, 11/12/21

A trader generally executes an extremely large number of trades during the year attempting to take advantage of very short-term variations in the prices of securities. While some find this pursuit profitable, many find that their ability to harvest those short-term gains doesn't exist, and while discovering this fact they encounter significant losses. Unfortunately, by default these losses are capital losses, resulting in only being

²³ Revenue Procedure 2021-45, Section 2.27, November 10, 2021

²⁴ Revenue Procedure 2021-45, Section 2.31, November 10, 2021

²⁵ Revenue Procedure 2021-45, Section 2.32, November 10, 2021

²⁶ Revenue Procedure 2021-45, Section 2.39, November 10, 2021

²⁷ Revenue Procedure 2021-45, Section 2.41, November 10, 2021

²⁸ Revenue Procedure 2021-45, Section 2.41, November 10, 2021

²⁹ Revenue Procedure 2021-45, Section 2.62, November 10, 2021

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able to deduct \$3,000 per year of such losses against other income—and all too often such traders have losses that are well in excess of such limits, running to five or six figure losses.

There is some relief available. IRC §475(f)(1) provides in part:

(1) Traders in securities

(A) In general

In the case of a person who is engaged in a trade or business as a trader in securities and who elects to have this paragraph apply to such trade or business--

(i) such person shall recognize gain or loss on any security held in connection with such trade or business at the close of any taxable year as if such security were sold for its fair market value on the last business day of such taxable year, and

(ii) any gain or loss shall be taken into account for such taxable year.

Proper adjustment shall be made in the amount of any gain or loss subsequently realized for gain or loss taken into account under the preceding sentence.

With this election in place, the losses are no longer capital losses and can lead to a net operating loss for the year.

In Private Letter Ruling 202145015 a taxpayer is looking to make this election after encountering significant losses in the second year of his trading activity, after having shown income in the first year.

The time for making the election is set by the IRS pursuant to authority provided by IRC §7805(d). Revenue Procedure 99-17 outlines how and when the election is to be made. The PLR describes these provisions as follows:

Rev. Proc. 99-17, 1999-1 C.B. 503, sets forth the requirements for making an election under § 475(f). Under section 5.03 of that revenue procedure, a taxpayer must file an election statement not later than the due date (without regard to any extension) of the original federal income tax return for the taxable year immediately preceding the election year and must attach the statement either to that return or, if applicable, to a request for an extension of time to file that return. Section 5.04 of Rev. Proc. 99-17 sets forth the requirements for the statement. The statement must describe the election being made, the first taxable year for which the election is effective, and, in the case of an election under § 475(f), the trade or business for which the election is made. Section 4 of Rev. Proc. 99-17 provides that an election under § 475(f) determines the method of accounting that an electing taxpayer is required to use for federal income tax purposes for securities subject to the election. Once a valid election is made, the taxpayer is required

to use a mark-to-market method of accounting under § 475. Section 4 of Rev. Proc. 99-17 also provides that if a taxpayer fails to change the taxpayer's method of accounting to comply with the election, then the taxpayer is on an impermissible method.

Section 6.01 of Rev. Proc. 99-171 provides that a change in a taxpayer's method of accounting is a change in method of accounting to which the provisions of § 446 and §481 and the regulations promulgated thereunder apply. Section 6.03 of Rev. Proc. 99-17 generally provides that if a taxpayer changes its method of accounting under section 6.01 of Rev. Proc. 99-17, the taxpayer must take into account the net amount of the § 481(a) adjustment over the applicable period.³⁰

Obviously, the taxpayer did not timely make the election, but since the timing of the election is set by the IRS, not provided for in the statute, the IRS can grant relief for such late filing. In this case, such a request would be made under Reg. §301.9100-1 and 3. As the PLR notes, the regulations provide “[g]enerally, a taxpayer must provide sufficient evidence to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and that the grant of relief will not prejudice the interests of the Government.”³¹

The PLR goes on to describe the tests that will be applied under Reg. §301.9100-3:

Section 301.9100-3(b)(3) provides rules as to when a taxpayer is deemed to have not acted reasonably and in good faith. Section 301.9100-3(b)(3)(iii) provides that a taxpayer is deemed to have not acted reasonably and in good faith if specific facts have changed since the due date for making the election that make the election advantageous to a taxpayer. In such a case, the Service will grant relief only when the taxpayer provides strong proof that the taxpayer's decision to seek relief did not involve hindsight.

Section 301.9100-3(c) provides that the Commissioner will grant a reasonable extension of time to make a regulatory election only when the interests of the Government will not be prejudiced by the granting of relief. Section 301.9100-3(c)(1)(i) provides that the interests of the Government are prejudiced if granting relief would result in a taxpayer having a lower tax liability in the aggregate for all taxable years affected by the election than the taxpayer would have had if the election had been timely made (taking into account the time value of money).

Section 301.9100-3(c)(2) provides special rules for accounting method regulatory elections. Section 301.9100-3(c)(2)(ii) provides that the interests of the Government are deemed to be prejudiced except in unusual and compelling circumstances if the accounting method

³⁰ PLR 202145015, November 12, 2021, <https://www.taxnotes.com/research/federal/irs-private-rulings/letter-rulings-%26-technical-advice/taxpayer-can%e2%80%99t-make-late-mark-to-market-election/7clk2?h=202145015>

³¹ PLR 202145015, November 12, 2021

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regulatory election for which relief is requested requires an adjustment under § 481(a) (or would require an adjustment under § 481(a) if the taxpayer changed to the method of accounting for which relief is requested in a taxable year subsequent to the taxable year the election should have been made).³²

A major problem with getting relief for this election is the fact that a taxpayer who follows the rules will have to make his/her election very early in the year where the treatment will first apply, while one making the election following the year end will automatically have the advantage of knowing the actual results for the year. So a late electing taxpayer is, by the very nature of the election, gaining an advantage for having failed to follow the law if the IRS grants relief. Not unexpectedly, the IRS is very reluctant to grant relief for this late election.

In this case, the ruling explained the situation as follows:

In late Year 1, certain * * * were sold, which resulted in Husband recognizing gain under § 1231 of the Code. Husband used his share of the sales proceeds to fund two investment accounts. One account was held in Husband's name. The other account was held in the name of Partnership. Partnership was formed on Date 2. Partnership is a State limited liability corporation treated as a partnership for federal income tax purposes. Partnership uses a calendar year as its taxable year. Partnership is owned by Husband and Company. Taxpayer represents that pursuant to a partnership agreement all items attributable to Partnership's trading activities are allocated to Husband. Taxpayer represents that Husband became a day-trader in late Year 1. Taxpayer represents that Husband engaged in trading activity on behalf of Taxpayer, and through and on behalf of Partnership, from late Year 1 through Year 2.³³

The taxpayer pleads that even though his election is late, he thought he'd get ordinary loss treatment and wasn't aware of the need to make the election:

Taxpayer represents that Husband believed that gain or loss from the trading activities would be treated as ordinary gain or loss. Specifically, Taxpayer represents that Husband believed that losses from his trading activities in Year 2 could be carried back as ordinary losses to Year 1 to offset the § 1231 gains in Year 1. Taxpayer represents that Husband was unaware of the mark to market election under § 475(f). Taxpayer engaged the services of Law Firm in Date 3. Taxpayer represents, that at this time, Taxpayer became aware of the § 475(f) election requirement and of the procedure supporting a request to make a late § 475(f) election.³⁴

The IRS rarely grants this relief and the IRS did not find that this was one of those highly unusual cases where relief is warranted. First, the IRS notes that the agency did

³² PLR 202145015, November 12, 2021

³³ PLR 202145015, November 12, 2021

³⁴ PLR 202145015, November 12, 2021

not find that the taxpayer presented evidence that he had acted reasonably and in good faith:

To make a timely § 475(f)(1) election for Year 1 or Year 2, Taxpayer had to make the § 475(f)(1) election by Date 4 for Year 1, or by Date 5 for Year 2. Date 4 and Date 5 are the respective due dates of Taxpayer's federal income tax returns (without regard to extensions) for each taxable year immediately preceding Year 1 and Year 2.

Taxpayer's request for relief under § 301.9100-3 was not made until Date 1. Taxpayer's request for a late filing of the § 475(f)(1) election was made with the benefit of y months of hindsight for Year 1, and z months for Year 2. Husband continued to trade during late Year 1 and Year 2. Taxpayer gained a benefit from hindsight because Taxpayer was able to determine the effect of a § 475(f)(1) election with the benefit of knowing Husband's trading results for Year 1 and Year 2. Moreover, Taxpayer failed to provide strong proof showing that its decision to seek relief to make a late election did not involve hindsight. Accordingly, under § 301.9100-3(b)(3), Taxpayer is deemed to have not acted reasonably and in good faith.³⁵

The ruling also finds that the interests of the Government would be prejudiced if the relief was granted:

Under § 301.9100-3(c)(2)(ii), the interests of the Government are deemed to be prejudiced, except in unusual and compelling circumstances, if the accounting method regulatory election for which relief is requested requires an adjustment under § 481(a) (or would require an adjustment under § 481(a) if the taxpayer changed to the method of accounting for which relief is requested in a taxable year subsequent to the taxable year the election should have been made). Taxpayer has not presented unusual and compelling circumstances for its failure to timely make a § 475(f)(1) election.

Since a § 475(f)(1) election is an accounting method regulatory election that requires a § 481(a) adjustment, the interests of the Government are deemed to be prejudiced because Taxpayer has failed to present unusual and compelling circumstances to justify granting the requested relief.³⁶

Thus, the IRS denied relief to the taxpayer.

For those who have followed the IRS rulings in this area, that result is not surprising—in fact, the very rare IRS ruling granting relief is what is found truly shocking. But we are shocked very, very rarely in this area.

³⁵ PLR 202145015, November 12, 2021

³⁶ PLR 202145015, November 12, 2021

