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By Christopher E. Pulick

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Reliance on Preparer to Avoid Penalties: Although the preparer gave taxpayers a summary of the items that would be included on their electronically filed return, taxpayers did not see the return until it was accepted by the IRS. Taxpayers were aware they had received taxable Social Security benefits in prior years, but did not detect any errors in the summary of income items. In upholding the imposition of the Section 6662(a) substantial understatement penalty, the Tax Court stated that taxpayers "did not rely in good faith on [the preparer] because they did not examine their return before it was submitted to the IRS. As a result they failed to ensure that all of their income items, particularly their taxable Social Security benefits, were included on the return." *Estate of Edsel Stiel*, TC Memo 2009-278 (Tax Ct.).

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Procedure—Seizure of Taxpayer's Residence: The IRS issued chief counsel advice involving the seizure of a residence owned by a taxpayer who is serving a lengthy prison sentence and is renting the home. Under IRC Sec. 6334(a)(13), the principal residence of the taxpayer "within the meaning of [IRC Sec.] 121," is exempt from levy unless a judge approves the levy in writing. Reg. 1.121-1(b) defines a *principal residence* for Section 6334 (levy) purposes, and uses a facts and circumstances test to determine whether a residence is a taxpayer's "principal residence." Here, the taxpayer (1) was not living at the residence, (2) received all of his correspondence at the prison, and (3) rented the home to an unrelated third party. The fact that taxpayer meets the two-out of-five years test under IRC Sec. 121(a) is irrelevant. Therefore, the Revenue Officer need not seek judicial approval before levying on the residence. CCA 200947036 .

Procedure—Tour of Taxpayer's Business Premise: Internal Revenue Manual (IRM) IRM 4.10.3.3 says that examiners should conduct a tour of the business site during examinations of all business entities. However, the underlying statutory authority [IRC Sec. 7605(a)] merely provides the authority for the IRS to set the time and place of the examination "as are reasonable under the circumstances." while the implementing regulations [Reg. 301.7605-1(d)(3)(iii)] state that the IRS "may visit the taxpayer's place of business or residence to establish facts that can only be established by direct visit, such as inventory or asset verification." According to emailed chief counsel advice, the Revenue Agent (RA) should not inspect the taxpayer's facilities "if the questions she has are easily answered by other means. But if the inspection provides the RA with a sense of the business operation (scope, size, complexity) that cannot be obtained elsewhere, the RA may inspect the premises." CCA 200949048 .

Employee Benefits—Transportation Fringes: Rev. Rul. 2006-57 (2006-2 CB 911) provided guidance to employers on the use of smartcards, debit or credit cards, or other electronic media to provide qualified transportation fringes under IRC Sec. 132(a)(5) and 132(f) . The ruling's effective date, initially set for 1/1/08, was previously delayed to 1/1/10. Because some transit systems "need additional time to complete the process of adapting their technology to achieve compatibility with the requirements for vouchers," the IRS has delayed the ruling's effective date to 1/1/11. Nevertheless, employers and employees can rely on this ruling for transactions occurring before 1/1/11. Notice 2009-95, 2009-52 IRB .

Penalties—Preparer Taking Electronic Refund: IRC Sec. 6695(f) prohibits a practitioner from endorsing or negotiating a tax refund check on behalf of a taxpayer. Given that this provision uses the term *negotiate*, it is acceptable to look to outside sources, such as the Uniform Commercial Code and banking laws, to interpret that term. Those sources state that electronic transfers are treated as negotiable instruments. Therefore, an IRS emailed chief counsel advice concluded that IRC Sec. 6695(f) prohibits a tax return preparer from exercising control of a taxpayer's electronic tax refund. CCA 200950042 .

Procedure—Reporting Sales of Securities: Proposed regulations (found in REG-101896-09) provide rules under IRC Secs. 6045, 6045A , and 6045B for reporting basis and other information by stock brokers and mutual fund companies. The proposed regulations implement a provision in the Energy Improvement and Extension Act of 2008 and describe who is subject to a reporting requirement, which transactions are reportable, and what information needs to be reported. The IRS also published a draft version of the 2011 Form 1099-B (Proceeds from Broker and Barter Exchange Transactions) that stock brokers and mutual fund companies will use. According to News Release 2009-118, the form will report the cost or other basis of stock and mutual fund shares sold or exchanged during the year, and whether the gain or loss is long-term or short-term. The news releases adds that: "The expanded Form 1099-B , to be first used for calendar-year 2011 sales, must be filed with the IRS and furnished to investors in early 2012."

Procedure—Return of Tax Deposit: Historically, taxpayers have made a deposit to stop the accrual of interest on an unassessed tax liability while retaining the right to go to Tax Court. According to a recent chief counsel notice, when a taxpayer requests the return of an excess Section 6603 deposit, the amount attributable to the *disputable tax* would earn interest from the deposit date to the date returned, but any excess amount would not be subject to interest under IRC Sec. 6611 . For example, assume that a taxpayer makes a \$1.2 million deposit on disputable tax of \$1 million, and the IRS assesses \$900,000 upon resolving the dispute. The taxpayer is entitled to Section 6603 interest on the \$100,000 difference between the disputable tax and the amount assessed, but is not entitled to interest under IRC Sec. 6603 or 6611 on the \$200,000 difference between the amount deposited and the disputable tax. CC-2010-002.

Tax Return Disclosure Rules: The IRS issued two revenue rulings discussing tax return preparers' liability for penalties under IRC Secs. 7216 and 6713. The first ruling allows preparers to use tax return information to inform taxpayers of law

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changes that may impact their tax liability, or to disclose tax return information listed in Reg. 301.7216-2(n) to third party providers of general business and economic information. The second ruling discusses disclosures to a professional liability insurance carrier to obtain or maintain professional liability insurance coverage, or to promptly and accurately report a claim or potential claim against the preparer. Rev. Rul. 2010-4, 2010-4 IRB and Rev. Rul. 2010-5, 2010-4 IRB .

Penalty—Reportable Transactions: IRC Sec. 6707A authorizes a penalty of \$10,000 (\$100,000 for listed transactions) for persons who do not include information about a reportable transaction with the appropriate tax return. In this case, the IRS determined deficiencies and accuracy-related penalties against taxpayer for three years and separately sent notices of assessment of a \$100,000 Section 6707A penalty for each year. Since the Tax Court "has never exercised jurisdiction over an assessable penalty that was not related to a deficiency" and the Section 6707A penalty does not depend upon a deficiency, the Tax Court found that the Section 6707A penalty is not within its deficiency jurisdiction. Therefore, the IRS can assess and collect the penalty without issuing a notice of deficiency. *Sydney Smit* h, 133 TC No. 18 (Tax Ct.).

Procedure—Disclosure Authorizations: IRC Sec. 6103 requires taxpayers to give consent before tax return information can be disclosed. The time period for taxpayer disclosure authorizations required under IRC Sec. 6103 to be received by the IRS has been extended from 60 days to 120 days according to this notice. The filing period is being eased because the 60 day period proved burdensome, especially to institutions that assist taxpayers in their financial matters. This notice applies to all authorizations executed on or after 11/20/09. Notice 2010-8, 2010-3 IRB .

Procedure—Blind Trusts: In general, assets placed in a blind trust will not be considered a financial interest of an individual for conflict of interest purposes if certain requirements are met, including giving the trustee the power to prepare personal income tax returns for the individual. However, the IRS has eliminated the requirement in Rev. Proc. 80-59 (1980-2 CB 855) that the individual receive advance permission from the IRS for the trustee to make the income tax return. Now, eligible individuals must submit a letter requesting permission for the trustee to make the income tax return on the individual's behalf and a power of attorney with the tax return. Rev. Proc. 2010-11, 2010-2 IRB .

Procedure—Changes to Tax Forms and Publications: During busy season, taxpayers and practitioners can go to www.irs.gov/formspubs/article/0,,id=109875,00.html for changes to tax forms, publications, and other tax products. For example, a 1/5/10 entry clarifies when filers of information returns can truncate a payee's Social Security Number (SSN) or other identification number on paper payee statements for 2009 and 2010. Filers cannot truncate a payee's identification number on (1) forms filed with the IRS or a state or local government; (2) payee statements furnished electronically; or (3) payee statements not in the Form 1098, Form 1099, or Form 5498 series. Furthermore, the filer's identification number cannot be truncated.

Reporting Corporations' Uncertain Tax Positions: To work more efficiently and to help large case examiners prioritize issues for examination, the IRS is developing a schedule to be filed with Form 1120 and other business tax returns providing (1) a concise description of each uncertain tax position for which the taxpayer or a related entity has recorded a reserve in its financial statements; and (2) the maximum amount of potential federal tax liability attributable to each uncertain tax position, determined without regard to the taxpayer's analysis of the likelihood of prevailing on the merits. The schedule will be filed by businesses that have a financial statement prepared under FIN 48 (FASB ASC 740) or similar accounting standards reflecting uncertain tax positions and that have assets over \$10 million, and will be published "as quickly as possible." Otherwise, the IRS says that it will abide by its longstanding policy of restraint on requesting tax accrual workpapers. IRS Ann. 2010-9, 2010-7 IRB .

Procedure—Offer in Compromise: This Small Business/Self-employed (SBSE) Division memo provides guidance on obtaining additional review of real property valuations in offer in compromise cases. The purpose of the additional review is to confirm the value of the real property and ensure that the reasonable collection potential has been properly determined, not to replace the current financial analysis and review procedures. Offers that meet the following criteria will be referred to a special group in Austin, Texas for an additional review: (1) the taxpayer has individual tax liabilities; (2) the difference between the amount offered by the taxpayer and the reasonable collection potential determined by the IRS is solely attributable to a disagreement on the taxpayer's equity in real property; and (3) there are no other issues in the case that would independently justify rejection of the offer. SBSE-05-0110-004.

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Direct Rollover Not Subject to 60-day Deadline: After ending her employment with Company A, the taxpayer in this letter ruling began working for Company B. She eventually decided to roll her funds in Company A's retirement plan directly into a plan sponsored by Company B. She received a check payable to Company B, FBO the taxpayer, that she deposited into Company B's plan. The IRS concluded that taxpayer received a *direct rollover* under IRC Sec. 401(a)(31) because she lacked control over the check. Furthermore, her Form 1099-R exhibited Code G in box 7, with no federal income tax withheld. Therefore, taxpayer did not receive a distribution subject to the 60-day rollover requirement. Ltr. Rul. 201005057 .

Procedure—Mailing Address Changes for Some Taxpayers: Taxpayers in Maine, Maryland, Massachusetts, New Hampshire, Vermont, Virginia, and the District of Columbia will now send their tax returns to the Kansas City Service Center in Kansas City, Mo. Taxpayers in Indiana and Michigan will send their tax returns to the Fresno Service Center, in Fresno, California, while taxpayers in Alabama will send their tax returns to the Austin Service Center in Austin, Texas. Taxpayers who e-file will not be affected by the address changes, and those who file paper returns will receive the correct addresses on the labels inside the tax packages they receive in the mail. News Release IR-2010-16 .

Penalties—Failure to Deposit Payroll Taxes: Taxpayer consulted its CPA to determine whether it could issue one paycheck at the end of the year to eliminate the processing of unnecessary payrolls. Finding no language in IRS Circular E, "Employer's Tax Guide," prohibiting the use of an annual payroll, the CPA concluded that taxpayer could use an annual payroll. Taxpayer lent funds to its sole shareholder and employee during 2006 that were satisfied at the end of 2006 with compensation that was duly reported on Form 941 (Employer's Quarterly Federal Tax Return) for the quarter at issue. Although taxpayer may have been "ill advised," the Tax Court said that this is "not the standard for a reasonable cause determination." Taxpayer "exercised the requisite ordinary business care and prudence in seeking the advice of [the CPA] even if his advice was wrong." *Ken Ryan, Inc.* , TC Summ. Op. 2010-18 (Tax Ct.).

Procedure—Release of Levy: Under IRC Sec. 6331(k)(2) , a levy cannot be made while an offer to enter into an installment agreement is pending. The IRS noted in this emailed chief counsel advice that when the Revenue Officer issued the levy, he was unaware of Appeals Office efforts to establish an installment agreement with the taxpayer that would include the tax period covered by the levy. The issuance of the levy established taxpayer's right to be notified of his

Income Tax—Canadians Emigrating to U.S.: Double taxation sometimes arose under the prior version of Article XIII of the Convention between the U.S. and Canada with Respect to Taxes on Income and Capital when Canadian residents paid Canadian departure tax upon emigrating to the U.S. This was because they couldn't elect to be liable for U.S. income tax on a deemed disposition of their property if they were not U.S. citizens before they ceased to be a resident of Canada, and would not otherwise have been subject to U.S. federal income tax on a disposition of the property. Under new Article XIII, the election is available whether the individual was a U.S. citizen before ceasing to be a resident of Canada, or otherwise would have been subject to U.S. federal income tax on a disposition of property. The IRS has now provided guidance for taxpayers who want to make the election. Rev. Proc. 2010-19, 2010-13 IRB .

Procedure—Foreign Bank and Financial Accounts: The IRS announced that persons who have signature authority over but no financial interest in a foreign financial account, or who have a financial interest in or signature authority over a foreign commingled fund, have until 6/30/11 to file Form TD F 90-22.1 , "Report of Foreign Bank and Financial Accounts," for 2010 and earlier calendar years for these foreign accounts. See Notice 2010-23 , 2010-11 IRB, supplementing Notice 2009-62, 2009-35 IRB 260 .

Procedure—Payee's Name on Refund Check: According to this legal memo, the IRS typically issues a joint income tax return refund in the names of both spouses, leaving them to divide the proceeds. However, a refund check can be issued in one spouse's name if requested on an injured spouse claim or the (former) spouse submits a copy of the divorce decree allocating the refund. Refund checks are typically issued without taking the death of a taxpayer into account because a duly appointed executor or administrator has the power to endorse a check issued to a decedent and then ensure the proper distribution of the refund. If the refund is due on a joint tax return, the surviving spouse must also endorse the check as co-payee. IRM 4.4.3.6 provides procedures to follow when a refund is to be issued to someone other than the taxpayer in whose name the tax was paid. ILM 201012033 .

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Procedure—Taxpayer with Two Identification Numbers: The taxpayer in this program manager technical assistance is an undocumented worker who used someone else's Social Security Number (SSN) to obtain employment. He then requested an Individual Taxpayer Identification Number (ITIN) and filed a return using the ITIN. The IRS processed the return under the ITIN, even though it was accompanied by a Form W-2 containing the SSN. The tentative disallowance of the federal income tax withholding credit claimed on the return (until the IRS can determine if the taxpayer truly earned the wages) and requests for documentation of the credit is a business decision rather than an action dictated by IRC Secs. 31 or 6109. While there may be a burden on ITIN holders to produce documentation to receive the credit, and some ITIN holders may choose not to respond to the IRS's requests, those consequences must be balanced against the loss of revenue from allowing the credit without verification. PMTA 2009-161.

Taxpayer Change of Address: The IRS updated its guidance on how taxpayers inform the IRS of address changes to be used for notices and documents that must be sent to the taxpayer's "last known address." The IRS generally will use the address on the most recently filed and processed return as the address of record. Taxpayers must give clear and concise written notification of an address change when moving after the return was filed or when establishing a separate residence after a joint tax return is filed. However, the IRS will automatically update a taxpayer's address of record based on a new address the taxpayer provides to the U.S. Postal Service. Rev. Proc. 2010-16, 2010-19 IRB , which supersedes Rev. Proc. 2001-18, 2001-1 CB 708 , and is effective on 6/1/10.

Penalties—Return Preparer Penalty: In this emailed chief counsel advice, the IRS noted that the Section 6694(a) penalty can apply to an undisclosed position if there was no substantial authority for the position on the date the return is deemed prepared or on the last day of the tax year to which the return relates. The authorities to consider in determining whether there was substantial authority are described in Reg. 1.6662-4(d)(3)(iii) . Although an IRS Coordinated Issue Paper (CIP) is not an appropriate authority to consider in determining whether substantial authority existed, the Code sections and revenue procedures cited in the CIP are appropriate authorities to consider along with any other relevant authority (including cases and proposed, temporary, and final regulations) listed in the regulation. CCA 201016078 .

NOL Carryback and PAL Rules: According to IRC Sec. 469(e)(2) , the passive losses of a closely-held C corporation can offset passive activity income and active business income, but cannot offset portfolio income. The taxpayer in this letter ruling was a closely-held C corporation for the first three years of its existence and earned portfolio income. Taxpayer generated a Net Operating Loss (NOL) in Year 4. Due to an ownership change in Year 4, taxpayer ceased to be closely held (i.e., was no longer owned by five or fewer individuals holding more than 50% in value either directly or indirectly). Nevertheless, IRC Sec. 469 did not prevent taxpayer from carrying back the NOL from a year when it was not a closely-held C corporation to offset portfolio income earned in years when it was closely held. Ltr. Rul. 201017007 .

Procedure—Levy on Education Savings Accounts: According to Internal Revenue Manual 5.11.6.2 (which deals with funds in pension or retirement plans), the taxpayer "may be able to withdraw money in a lump sum from a plan. If the taxpayer has the right to do so, a levy can reach that right." Following this same logic, a recent emailed chief counsel advice states that "as a legal matter, Coverdell ESAs and 529s are not exempt from levy. But [there] are differences between the two types of accounts, so the [revenue officer] needs to be mindful of who the taxpayer is and what property rights, if any, he has." For example, a person setting up a Coverdell ESA lacks the right to withdraw the funds, while the same person setting up a 529 can withdraw the funds (with tax consequences). CCA 201017044 .

Procedure—Business Information Reporting: Effective for payments made after 2011, newly enacted IRC Sec. 6041(h) requires businesses that pay more than \$600 during the year to corporate providers of property and services to file an information report with each provider and the IRS. According to recent comments by IRS Commissioner Doug Schulman, the IRS will look for opportunities to minimize burden and avoid duplicative reporting. Specifically, he said that the IRS plans to use its "administrative authority to exempt from this new requirement business transactions conducted using payment cards such as credit and debit cards. These transactions will already be covered by reporting requirements on payment card processors, so there is no need for businesses to report them as well. So, whenever a business uses a credit or debit card, there will be no new burden under the new law." News Release IR-2010-68 .

IRS Whistleblower Program: Legislation in 2006 made significant changes to the whistleblower program, and required the establishment of a Whistleblower Office within the IRS. According to new guidance in the Internal Revenue Manual (IRM), if

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the whistleblower *planned and initiated* the actions that led to the underpayment of tax or the violation of the tax laws, the Whistleblower Office may reduce the award. If the whistleblower is convicted of criminal conduct arising from his or her role in planning and initiating the action, the Whistleblower Office will deny any award. All relevant factors, including the value of the information furnished in relation to the facts developed by the investigation of the violation, will be taken into account in determining whether an award will be paid under IRC Sec. 7623(b) , and if so, the amount of the award. See IRM 25.2.2 (6-18-2010), which is available at www.irs.gov .

Procedure—California Resident's Offer in Compromise: Taxpayer, a California resident, submitted an Offer in Compromise (OIC) under IRC Sec. 7122 . Taxpayer's Registered Domestic Partner (RDP) possesses assets that would significantly increase the reasonable collection potential of the OIC, and the Revenue Officer wanted to include the assets in figuring taxpayer's reasonable collection potential. Based on California state law, an IRS attorney concluded that the Revenue Officer can consider the RDP's assets when deciding whether to accept the OIC. State law determines whether there is a property interest [*U.S. v. Craft* , 89 AFTR 2d 2002-2005 (2002)], and California law provides that both domestic partners have an equal interest and liability in the community property. CCA 201021049 .

Procedure—Statute of Limitations for Assessment: A six-year statute of limitations for assessment applies under IRC Sec. 6501(e) when a taxpayer omits from gross income an amount that's greater than 25% of the amount of gross income stated in the return. In chief counsel advice, the IRS concluded that in computing gross income for this purpose, the total amount received or accrued from the sale of goods or services is not reduced by returns and allowances. While the IRS admits there is no case law that definitively provides a conclusion in this case, it says its determination is based on a plain reading of the statute. CCA 201023053 .

Employee Benefits—Leave Donation Programs: Employer-sponsored leave-based donation programs are agreements whereby employees agree to forego accumulated leave if their employer donates cash equal to the value of that leave to charitable organizations. Under these programs, the employees do not include the value of the foregone leave in gross income or wages, and the employer deducts its payments to the charities as business expenses. The IRS has approved employer-sponsored leave-based donation programs in two instances: Notice 2001-69, 2001-2 CB 491 (9/11) and Notice 2005-68, 2005-2 CB 622 (Hurricane Katrina). The current 2009–2010 Priority Guidance Plan does not include a project addressing employer-sponsored leave-based donation programs for the Haiti Earthquake. INFO 2010-0057.

Employee Benefits—Transit Passes and Qualified Parking: This IRS information letter addresses issues on the use of transit passes and qualified parking by employees via smartcards, including whether (1) unused amounts may be rolled-over month-to-month, (2) employer provided transportation benefits may be used by nonemployees, and (3) employers offering transit passes as a salary supplement may request employees to refund unused amounts. In 2010, an employer is entitled to exclude up to \$230 per month of such benefits from an employee's gross income and wages. INFO 2010-146.

Procedure—CPA Disbarred for Failing to Exercise Due Diligence: Under Circular 230, Sec. 10.22, practitioners must exercise due diligence in preparing tax returns and in determining the correctness of oral and written representations made to clients and the IRS. On 7/6/10, the IRS Office of Professional Responsibility (OPR) announced that it had won an agency appeal of its disbarment of a CPA who, among other things, failed to exercise due diligence in preparing the tax returns of a corporation and its shareholders. OPR Director Karen Hawkins noted that practitioners cannot ignore the implications of information already known, and must make reasonable inquiries if the information furnished by a client appears to be incorrect or incomplete. Here, it was "inconceivable that [the shareholders] could pay their living expenses based on the income reported on their returns." News Release IR-2010-82 .

Procedure—Fraudulent Filing of Information Returns: IRC Sec. 7434(a) authorizes a civil action for damages against a person who willfully files a fraudulent information return with the IRS. In this case, defendant filed a Form 1099-C reporting her cancellation of an unpaid debt allegedly owed by her former son-in-law, who filed suit for damages under IRC Sec. 7434 . An Illinois District Court stated that plaintiff's arguments failed because he did not prove that defendant filed the form with fraudulent intent: "at a bare minimum, [plaintiff's] repeated email assurances that he was on the brink of repaying [defendant] for the outstanding debts gave her ample basis for a good-faith belief that he had, in fact, promised to repay her . . . she merely reported the cancellation of a debt that she honestly—and indeed, correctly—believed that she was owed." *Cavoto v. Hayes* , 105 AFTR 2d 2010-XXXX (DC N. Ill.).

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Procedure—Constitutional Right against Self-incrimination: Taxpayer refused to comply with an IRS summons to testify and produce documents related to her tax liability for 2001 and 2002, asserting her Fifth Amendment right not to incriminate herself. A California District Court found that she "face[d] a real and substantial hazard of self-incrimination if she were to comply with the IRS's summons, and accordingly [her] claim of privilege under the Fifth Amendment [was] valid. The government is aware that [she] failed to file tax returns in the years 2001–2002 and 2004–2008. Any testimony . . . by questioning or production of documents, indicating that she received income in any amount during those tax years could therefore be used to prove that she was required to file a tax return and thereby subject [her] to criminal liability for failure to file a tax return [under IRC Sec.] 7203." *U.S. v. Shadley*, 106 AFTR 2d 2010-XXXX (D.C. E. Dist. Calif.).

Procedure—Comedian Sinbad Liable for Unpaid Taxes: The IRS can seize assets held by a third party to satisfy a taxpayer's tax debt if the third party is an *alter ego* or *nominee* of the taxpayer. This theory was applied in a recent case where a California District Court found that comedian Sinbad (David) Adkins had unpaid income tax liabilities exceeding \$8 million for 1998–2006. It then found that Michael Adkins held bare legal title to real property as nominee for Sinbad, and a lien for the unpaid taxes attached to the property as of the dates of assessment. The court allocated proceeds of a future sale of the property to various parties, including the mortgage holder, the IRS and California Franchise Board, and the local homeowner's association. *U.S. v. Adkins*, 106 AFTR 2d 2010-XXXX (D.C. Cent. Cal.).

Procedure—Payment Card Reporting Rules: Final regulations under IRC Sec. 6050W (see TD 9496) require banks and other payment settlement entities to report gross credit and debit card payments a merchant receives during the year to the IRS and the merchant, effective for calendar years beginning after 12/31/10. In part, the final regulations (1) provide relief from duplicate reporting for transactions that would otherwise be reportable under IRC Sec. 6041 (reporting payments of \$600 or more) and IRC Sec. 6050W; and (2) amend existing regulations for the failure to file penalty, the failure to furnish correct payee statements, and backup withholding. Regs. 1.6041-1, 1.6050W-1, 1.6050W-2, 31.3406(a)-2, 31.3406(b)(3)-5, 31.3406(d)-1, 31.6051-4, 301.6721-1 and 301.6722-1.

Procedure—Tax Court Deadline Determined from FedEx Label: The 90th day after the IRS mailed a notice of deficiency to the taxpayer was 7/19/09. The Tax Court petition, which was sent by FedEx Express (FedEx), was received and filed by the Tax Court on 7/23/09. The envelope containing the petition had a customer-generated label inside a clear plastic pouch on the envelope, and a FedEx-generated label on the outside of the pouch. According to Notice 97-26 (1997-1 CB 413), if an envelope has a label generated and applied by a FedEx employee, the date marked on that label is treated as the postmark date. Since the FedEx-generated label listed "21JUL09" as the ship date, the petition was not timely filed and taxpayer's case was dismissed for lack of jurisdiction. *Rogelio Martinez*, TC Summ. Op. 2010-117 (Tax Ct.).

Penalties—Failure to File Early IRA Distribution Form: The 6% tax on excess IRA contributions is reported on Form 5329 [Additional Taxes on Qualified Plans (Including IRAs) and Other Tax-Favored Accounts]. According to informal IRS emailed advice and IRM 4.4.14.2.8, if the Form 5329 has not been filed, the Section 6651(a)(1) failure to file penalty and the Section 6651(a)(2) failure to pay penalty must be considered. If the delinquency penalty applies, accuracy-related penalties should not be assessed against the excise tax. CCA 201034024.

Procedure—Foreign Account Reporting and Disclosure: The IRS issued preliminary guidance on high priority issues under IRC Secs. 1471 – 1474, which were added by the HIRE Act and require foreign banks to report and disclose accounts with U.S. owners. Effective for payments after 12/31/12, a withholding agent must deduct and withhold tax on withholdable payments made to Foreign Financial Institutions (FFIs). This notice addresses (1) obligations that are grandfathered (exempt) from withholding (e.g., any obligation outstanding on 3/18/12); (2) the definition of an FFI (any financial institution that is a foreign entity); (3) the collection of information and identification of persons by financial institutions; and (4) the information FFIs must report to the IRS about their U.S. accounts. Notice 2010-60, 2010-37 IRB.

Procedure—Tax Practitioner's Privilege: Under IRC Sec. 7525, tax advice given to clients by Federally Authorized Tax Practitioners (FATPs) is privileged, which means that FATPs cannot be forced to testify against their clients regarding those communications. The Committee Reports clarify that IRC Sec. 7525 extends the attorney-client privilege to tax advice furnished by FATPs, but only to the extent the advice would be privileged if between a taxpayer and an attorney. Therefore, it's interesting to note that a New York District Court recently held that plaintiffs in a lawsuit over the promotion of a tax shelter did not waive the attorney-client privilege when their son "received email communications from counsel, which he then

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provided to his parents." The parents were not proficient in the use of email, and regularly relied on the son to send and receive emails for them. *Green v. Beer*, 106 AFTR 2d 2010-XXXX (D.C. S. N.Y.).

Income Tax—Economic Substance Codification: The IRS issued interim guidance on the codification of the economic substance doctrine by the Health Care and Education Reconciliation Act of 2010. Effective for transactions entered into on or after 3/31/10, IRC Sec. 7701(o)(1) mandates the use of a conjunctive two-prong test to determine whether a transaction has economic substance. According to this notice, the IRS will continue to rely on relevant case law under the common-law economic substance doctrine in applying the two-prong conjunctive test, and will analyze when the economic substance doctrine applies the same as it did under prior law. To the dismay of many practitioners, the IRS added that it will not issue general administrative guidance on the types of transactions to which the economic substance doctrine does or does not apply. Notice 2010-62, 2010-40 IRB .

Penalties—Transactions Lacking Economic Substance: The IRS issued guidance on the 20% accuracy-related penalty under IRC Sec. 6662(b)(6) (disallowance of claimed tax benefit because transaction lacks economic substance), which increases to 40% in the case of undisclosed transactions lacking economic substance. Except for reportable transactions, the adequate disclosure requirement of IRC Sec. 6662(i) will be satisfied if timely made on Form 8275 (Disclosure Statement) or 8275-R (Regulation Disclosure Statement), or as otherwise prescribed in forms, publications, or other guidance subsequently published by the IRS. To ensure the consistent imposition of this new penalty, any proposal to impose a Section 6662(b)(6) penalty at the examination level must first be approved by the appropriate Director of Field Operations. Notice 2010-62 , 2010-40 IRB, and IRS Memo LMSB-20-0910-024.

Procedure—Allocation of Couple's Estimated Tax Payment: A married couple (now undergoing a divorce) submitted a payment of tax with their Form 4868 extension request. Since they couldn't agree on how the payment should be allocated, the IRS intends to allocate the payment by considering each spouse's tax liability, as required by Reg. 1.6654-2(e)(5)(ii) . The husband's CPA contended that the funds were the husband's sole property and should be returned to him. In rejecting this argument, IRS counsel noted that the proper method for apportioning the funds depends on whether the payment is a joint estimated tax payment or an overpayment. Since the "simple act of sending in [a] check . . . does not call into existence a tax overpayment," the payment was properly treated as an estimated tax payment, and was properly allocated under the relevant provisions of the estimated tax regulations. CCA 201035023 .

Procedure—Form 1099 Information Reporting Requirements: Effective 1/1/12, IRC Sec. 6041(h) will require businesses that pay more than \$600 during the year to corporate providers of property and services to file an information return. A 9/15/10 Congressional Research Service Report ("Economic Analysis of the Enhanced Form 1099 Information Reporting Requirements") cites estimates that the new requirements will raise \$17.1 billion over 10 years. However, the Report notes that "it is very difficult to project the effects of information reporting enhancements." While empirical evidence "tends to show that small businesses do in fact bear higher costs for tax compliance . . . when compared to larger businesses," small businesses may be able to avoid at least part of any additional costs because (1) they will not have to distinguish between goods and services, or between corporate and non-corporate firms, which would reduce compliance costs; (2) most businesses have an accounting system in place "which presumably would lessen the additional burden of enhanced information reporting;" and (3) the IRS has indicated its intent to mitigate the burden where duplicative reporting may occur (e.g., by exempting transactions that would normally require a 1099-MISC but are carried out using a credit or debit card).

Procedure—Reporting Receipt of Cash: The issue in this program manager technical advice is whether a person who receives a check exceeding \$10,000 in the course of a trade or business and cashes rather than deposits the check must file Form 8300 (Report of Cash Payments Over \$10,000 Received in a Trade or Business). In concluding that the transaction is not reportable under IRC Sec. 6050I , the IRS notes that a personal check is not *cash* under Reg. 1.6050I-1(c)(1) . Therefore, the person receiving the personal check is not a *recipient of cash* for Section 6050I reporting purposes. The subsequent cashing of the check was not a receipt of cash for the underlying event (the relevant transaction), nor did it relate to the underlying transaction between the payer and recipient. The cashing of the check was a separate act by the recipient at a check casher. PMTA 2010-012.