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Highlights

Despite Government Shutdown, Tax Filing Season Starts January 28: The IRS has announced that despite the government shutdown, the 2019 tax filing season will begin on Monday, 1/28/19. The agency maintains the position that it has the authority to pay refunds despite a lapse in annual appropriations, and the Office of Management and Budget (OMB) agrees. For most taxpayers, the deadline to file 2018 tax returns is Monday, 4/15/19. However, taxpayers living in Maine or Massachusetts have until 4/17/19 due to the Emancipation Day holiday. News Release IR 2019-1.

IRS Provides Section 199A Safe Harbor for Rental Real Estate: In a Notice that includes a proposed Revenue Procedure, the IRS has provided a safe harbor under which a rental real estate enterprise will be treated as a trade or business for purposes of the Qualified Business Income (QBI) deduction. To qualify for the safe harbor, (1) separate books and records must be maintained for each enterprise; (2) 250 or more hours of rental services must be performed; and (3) contemporaneous records must be maintained. The safe harbor does not apply to real estate used by the taxpayer as a residence under IRC Sec. 280A or real estate rented under a triple net lease. An enterprise that fails safe harbor requirements may still qualify as a trade or business under the regulations. Taxpayers may rely on the safe harbor, which generally applies to tax years ending after 12/31/17, until the proposed Revenue Procedure is published in final form. Notice 2019-7.

IRS Releases Final and Proposed Regulations on Qualified Business Income Deduction: The IRS has released final regulations on the new Qualified Business Income (QBI) deduction under IRC Sec. 199A. The final rules adopt many of the provisions found in regulations proposed by the IRS in August 2018, with certain revisions in response to comments. In addition, the IRS has issued proposed regulations (REG-134652-18) that provide guidance on previously suspended losses, regulated investment companies, charitable remainder trusts, and split interest trusts. The final regulations are effective when published in the Federal Register. However, for tax years ending in calendar year 2018, taxpayers may rely on the final regulations (in their entirety) or the August 2018 proposed regulations (in their entirety). The additional proposed regulations would apply to tax years ending after the date they are adopted as final. However, taxpayers may rely on the rules pending their finalization. Regs. 1.199A-1 through -6 and 1.643-1; Prop. Regs. 1.199A-3 and -6.

IRS Waives Penalty for Underpayment of Estimated Income Tax: The IRS has announced that it will waive the Section 6654 penalty for the underpayment of estimated income tax for certain individuals who would otherwise be required to make estimated payments on or before 1/15/19. The waiver is limited to individuals whose total withholding and estimated tax payments equal or exceed 85% of the tax shown on their 2018 returns. (The usual percentage threshold is 90%.) Taxpayers should complete Part I of Form 2210 (Underpayment of Estimated Tax by Individuals, Estates, and Trusts) to determine if the waiver applies. If it applies, taxpayers should check the waiver box (Part II, Box A) and include the statement "85% Waiver" with the return. Notice 2019-11 and News Release IR 2019-3.

Other Current Releases

Foreign Reporting—IRS Issues Final Regulations on Deemed Repatriation Tax: Under IRC Sec. 965, which was added by the Tax Cuts and Jobs Act (TCJA), U.S. shareholders of a specified foreign corporation are subject to a deemed repatriation tax. This is accomplished by increasing the foreign corporation's Subpart F income by the greater of (1) the accumulated post-1986 earnings and profits of the corporation determined as of 11/2/17 or (2) the accumulated post-1986 earnings and profits determined as of 12/31/17. Recently, the IRS released final regulations implementing the deemed repatriation tax. The final rules retain the basic approach and structure of proposed regulations issued in August 2018, with certain revisions. Specifically, the final regulations provide rules on (1) the participation exemption to included income; (2) disregarded transactions; (3) foreign tax credits, elections, and payments; and (4) consolidated group rules. Regs. 1.962-2, 1.965-1 through -9, and 1.986(c)-1.

Health Care—Additional ACA Hardship Exemptions Can Be Claimed without Certification: In a recent Notice, the IRS has identified additional hardship exemptions from the Section 5000A individual shared responsibility payment that may be claimed for the 2018 tax year without obtaining an exemption certificate from the Health Insurance Marketplace. A taxpayer is eligible for a hardship exemption for at least the month before, the months during, and the month after one of the following events occurs: (1) the taxpayer experiences an unexpected increase in essential expenses that prevents him or her from obtaining coverage under a qualified health plan; (2) the expense of purchasing a qualified health plan would have caused the taxpayer to experience serious deprivation of food, shelter, clothing, or other necessities; or (3) the taxpayer has experienced other circumstances that prevent him or her from obtaining coverage under a qualified health plan. Notice 2019-5.

Income Tax—IRS Provides Methods for Calculating W-2 Wages for QBI Deduction Limitation: For certain taxpayers, the deduction for Qualified Business Income (QBI) is limited to the greater of (1) 50% of the W-2 wages paid by the business or (2) 25% of the W-2 wages paid by the business plus 2.5% of the unadjusted basis of the business's qualified property. In a recent Revenue Procedure, the IRS has provided three methods for calculating W-2 wages for purposes of this limitation. The first method (the unmodified box method) allows for a simplified calculation, while the second and third methods (the modified Box 1 method and the tracking wages method) provide greater accuracy. After computing W-2 wages under one of these methods, taxpayers must determine the extent to which the W-2 wages are properly allocable to QBI. The Revenue Procedure, which applies to tax years ending after 12/31/17, also may be used in computing the required reduction of the QBI deduction for certain specified agricultural and horticultural cooperative patrons. Rev. Proc. 2019-11.

IRS Releases 2018 Version of Publication 502: The IRS has released the 2018 version of Publication 502 (Medical and Dental Expenses), which outlines the medical expenses taxpayers may deduct on their federal income tax returns. The updated publication is substantially similar to its 2017 counterpart. However, relevant dollar amounts, such as the standard mileage rate for medical purposes, have been revised to reflect 2018 inflation adjusted values. Also, the publication reflects the 7.5%-of-AGI threshold for deducting unreimbursed medical expenses and the elimination of Form 1040A for the 2018 tax year. Publication 502 does not account for certain differences in the rules for reimbursing expenses under health FSAs, HSAs, or HRAs. The publication is available at www.irs.gov/pub/irs-prior/p502--2018.pdf .

IRS Releases Final Form 8990 and Instructions for 2018: The IRS has released the final version of the 2018 Form 8990 [Limitation on Business Interest Expense Under Section 163(j)] and final instructions for that form. The form incorporates changes made by the Tax Cuts and Jobs Act (TCJA) and the recently issued proposed regulations under IRC Sec. 163(j). Unless an exclusion from filing applies (e.g., "small business" taxpayers with average annual gross receipts of $25 million or less for the three prior tax years), the form must be filed by a taxpayer with business interest expense, a disallowed business interest expense carryforward, or current year or prior year excess business interest expense. The form is available at www.irs.gov/pub/irs-pdf/f8990.pdf .

IRS Releases Final Form 8994 and Instructions: The IRS has released the final version of the 2018 Form 8994 (Employer Credit for Paid Family and Medical Leave) and final instructions. The new form is used to figure the employer credit under IRC Sec. 45S, as added by the Tax Cuts and Jobs Act (TCJA), and incorporates guidance on the credit issued in Notice 2018-71. The instructions provide optional worksheets to calculate the applicable percentage of wages paid to qualifying employees during the period the Section 45S requirements are met, and to apply the percentage to wages to determine the amount of the credit. Eligible employers, including partnerships and S corporations, must file the form to claim the credit. If the taxpayer's only source for the credit is passed through from a partnership or S corporation, the credit is reported directly on Form 3800 (General Business Credit). Form 8994 is available at www.irs.gov/pub/irs-pdf/f8994.pdf .

IRS Releases Updated Government Shutdown Contingency Plan: The IRS has released its *Lapsed Appropriations Contingency Plan* for fiscal year 2019, which details necessary adjustments of excepted positions and personnel during the current government shutdown. According to the plan, 46,052 of the IRS's 80,265 employees (57.4% of the workforce) will be called back to work without pay (except for 809 employees who will be compensated by other than annual appropriations). Activities directed at implementing the Tax Cuts and Jobs Act are not affected by the lapse in appropriations because the bill provided funding through 9/30/19. The updated contingency plan is available at home.treasury.gov/system/files/266/IRS-Lapse-in-Appropriations-Contingency-Plan_Filing-Season_2019-01-15.pdf .

IRS Releases Updated Version of Form 8862: Taxpayers file Form 8862 (Information to Claim Certain Credits After Disallowance) to demonstrate their eligibility for the earned income credit, child tax credit, additional child tax credit, or American opportunity tax credit after the credit has been denied for any reason other than a math or clerical error. Recently, the IRS released an updated version of the form to reflect changes made by the Tax Cuts and Jobs Act. Specifically, the form expands the credit recertification requirements to the new $500 nonrefundable credit for other dependents. Also, the form reflects the new Social Security number requirement for the child tax credit and the additional child tax credit. Individual taxpayer identification numbers or adoption taxpayer identification numbers may be used to claim the credit for other dependents. The updated Form 8862 is available at www.irs.gov/pub/irs-pdf/f8862.pdf .

IRS Reopens Transcript Service Despite Government Shutdown: Despite the government shutdown, the IRS has resumed processing requests for transcript information made through the Income Verification Express Service (IVES) program. This is a fee-based program used primarily by mortgage lenders to confirm a borrower's income during the loan application process. Transcripts requested through IVES will be delivered to a secure mailbox based on information reported on Form 4506-T or Form 4506T-EZ . However, the IRS cautions users that it may take longer than the standard 72-hour turnaround time to process requests. Also, the IRS will resume other user fee-based services, such as issuing letters certifying residency in the U.S. and responding to requests for photocopies of tax returns. The IRS's statement is available at www.irs.gov/newsroom/irs-statement-irs-reopens-ives-some-fee-based-programs .

Penalties—Taxpayer Subject to Willful FBAR Penalty in Excess of Regulatory Cap: For the years at issue, the taxpayer owned investment accounts in Switzerland and France. She didn't report any investment income from the accounts on her returns, nor did she file Reports of Foreign Bank and Financial Accounts (FBARs). After learning about the IRS's efforts to uncover secret foreign accounts, the taxpayer applied to the Offshore Voluntary Disclosure Program (OVDP). However, she decided to withdraw from the program and "take her chances" after seeing the proposed penalty. The IRS responded by imposing a willful failure to file penalty of $697,229—an amount greater than the regulatory maximum of $100,000. The Court of Federal Claims upheld the penalty, concluding that the taxpayer's reckless conduct amounted to a willful failure to file. Also, the Court found that 2004 revisions to the statute effectively nullified the regulatory cap. *Alice Kimble*, 122 AFTR 2d 2018-7109 (Ct. Fed. Cl.).

Procedure—IRS Clarifies Sequestration of Refundable Corporate AMT Credits: For tax years beginning before 2018, corporations may elect under IRC Sec. 168(k)(4) to forego bonus depreciation and accelerate their use of prior-year minimum tax credits. The IRS has announced that refunds issued to corporations claiming refundable minimum tax credits are subject to sequestration. As such, refund payments processed on or after 10/1/18 and on or before 9/30/19 will be reduced by the 6.2% sequestration rate, irrespective of when the IRS received the original or amended return. However, for tax years beginning after 2017, refund payments due to refundable minimum tax credits under IRC Sec. 53(e) will not be subject to sequestration. For more information, see www.irs.gov/newsroom/effect-of-sequestration-on-the-alternative-minimum-tax-credit-for-corporations-fiscal-year-2019 . [**Editor's Note:** IRC Sec. 168(k)(4) was repealed by the Tax Cuts and Jobs Act for tax years beginning after 12/31/17.]

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