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Proposed Regulations on Deduction for FDII and GILTI Issued

NPRM REG-104464-18

The Treasury and IRS have issued much anticipated proposed regulations on the Code Sec. 250 deduction, which allows U.S. corporate shareholders a deduction for:

- foreign-derived intangible income (FDII);
- global intangible low-taxed income (GILTI); and
- the section 78 gross-up attributable to GILTI.

These proposed regulations follow the issuance of proposed GILTI regulations in October, 2018 (NPRM REG-104390-18).

U.S. corporate shareholders can deduct, for tax years beginning after December 31, 2017, and before January 1, 2026, 50 percent with respect to their GILTI, and the amount treated as a dividend under Code Sec. 78 (the section 78 gross-up). FDII earned directly by a domestic corporation can be deducted at a rate of 37.5 percent, for tax years beginning after December 31, 2017, and before January 1, 2026. The deduction for GILTI is 37.5 percent, and the deduction for FDII is 21.875 percent, for tax years beginning after December 31, 2025.

Scope of Proposed Regs

The proposed regulations provide guidance for determining the amount of the Code Sec. 250 deduction allowed to a domestic corporation for its FDII and GILTI, and include:

- rules for determining the deduction amount, including rules for the taxable income limitation under Code Sec. 250(a)(2);
- general rules for computing a domestic corporation's FDII;
- rules for determining qualified business asset investment (QBAI), a component of the FDII computation;
- general rules for determining gross income included in gross foreign-derived deduction eligible income (gross FDDEI), a component of the FDII computation; and
- rules for determining gross FDDEI from the sales of property and provision of services, including provision to related parties.

Deduction for Individuals

The proposed regulations extend the Code Sec. 250 deduction for GILTI to an individual who elects to be taxed at corporate income tax rates under Code Sec. 962.

Ratio of FDDEI to DEI

A corporation's FDII is defined as its deemed intangible income (DII) multiplied by the corporation's foreign-derived ratio, which is the ratio of its FDDEI to its deduction eligible income (DEI).

The proposed regulations require a domestic corporation to allocate expenses to its gross FDDEI when determining the numerator of the foreign-derived ratio. The method is thought to provide the most accurate measure of the corporation's income that is foreign derived through the matching of expenses to gross income.

Foreign Military Sales and Services

The proposed regulation provide rules for applying Code Sec. 250 to foreign military sales and services. Foreign military sales or services to the U.S. government under the Arms Export Control Act that are for the ultimate benefit of a foreign government are treated as a sale of property or provision of services to a foreign person. The rule seeks to provide uniform tax treatment between the defense sector and other sectors of the U.S. economy for these sales.

Consolidated Groups

A consolidated group member's Code Sec. 250 deduction is determined by reference to the relevant items of all members of the same consolidated group. The rule is intended to ensure that the aggregate amount of the deductions allowed to members adequately reflects the income, expenses, gains, losses, and property of all members. The proposed regulations also address issues related to intercompany transfers.

Documentation

The proposed regulations describe the types of documentation that can be used to substantiate receipts that qualify as foreign-derived for purposes of FDII and the deduction. There are different types of acceptable documentation for different types of transactions. The proposed regulations provide that the list of acceptable documentation constitutes reasonable proof that a transaction is a FDDEI transaction.

Taxpayers with less than $10 million in gross receipts annually are subject to less stringent documentation requirements. Small transactions of less than $5,000 of gross receipts from a single recipient are also subject to less stringent documentation requirements.

Reporting

The proposed regulations require all taxpayers with a Code Sec. 250 deduction to file Form 8993, Section 250 Deduction for Foreign-Derived Intangible Income (FDII) and Global Intangible Low-Taxed Income (GILTI).

The IRS may request additional information on several existing forms (e.g., Forms 1065 (Schedule K-1), 5471, 5472 and 8865) if the filer has a Code Sec. 250 deduction. The proposed regulations do not detail the information required on Forms 5471, 5472, and 8993, leaving it to be prescribed by the forms and instructions.

Applicability Dates

The proposed regulations will generally apply to tax years ending on or after the date the proposed regulations are filed in the Federal Register. For tax years ending on or before that date, taxpayers may use any reasonable documentation maintained in the ordinary course of the taxpayer's business that establishes that a recipient is a foreign person, property is for a foreign use, or a recipient of a general service is located outside of the United States.

Comments

Written or electronic comments and requests for a public hearing must be

No Casualty Loss Deduction for Gambling Losses

An individual was not allowed to deduct his gambling losses as casualty losses under Code Sec. 165(c)(3). The taxpayer had been diagnosed with Parkinson's disease, and his doctor had prescribed Pramipexole. This drug helps Parkinson's patients control their movements, but can also affect the brain's executive function in a way that distorts risk/reward assessments. The taxpayer tried to deduct compulsive gambling losses for three separate tax years when he was taking the drug.

The court found it more likely than not that the taxpayer's compulsive gambling was a side effect of Pramipexole. The court noted that a small but noticeable number of patients who took Pramipexole suffered a disastrous loss of inhibition, and that the taxpayer had compulsively gambled only when his Pramipexole dose was at its maximum.

However, impulse control disorders (ICD) caused by Pramipexole did not fit the definition of "other casualty" for purposes of a casualty loss deduction. The court reiterated that physical damage to property is a prerequisite of a casualty loss deduction, and that the taxpayer's depleted bank accounts, and money he "left on the table" when he made certain bad real-estate deals, did not suffer any physical damage. Further, even if the onset of his ICD was sudden, unexpected, and unusual, the taxpayer's gambling losses grew gradually over time and were not sudden.

M.L. Mancini, TC Memo. 2019-16, Dec. 61,420(M)

REFERENCE KEY

USTC references are to ***U.S. Tax Cases***
Dec references are to ***Tax Court Reports***

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received by the date that is 60 days after publication in the Federal Register. Send submissions to: CC:PA:LPD:PR (REG-104464-18), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8:00 a.m. and 4:00 p.m. to: CC:PA:LPD:PR (REG-104464-18), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW, Washington, DC 20224. Alternatively, taxpayers may submit comments electronically via the Federal eRulemaking Portal at http://www.regulations.gov (REG-104464-18).

GOP House Tax Writer Cautions Against Raising Business Taxes for Infrastructure

The top GOP House tax writer is cautioning Democrats about raising taxes on businesses to fund infrastructure. At a House Ways and Means Committee hearing on March 6 to examine infrastructure, ranking member Kevin Brady, R-Tex., said that raising the corporate tax rate would be a mistake.

"I must caution that it would be a mistake to fund infrastructure by raising taxes on local businesses and corporations, making them uncompetitive in the global market," Brady said during opening statements. Brady also sent a letter to Chairman Richard Neal, D-Mass., urging against "new tax burdens" that would stifle economic growth.

Corporate Rate

Democrats have been floating proposals to raise the corporate tax rate from 21 to 24 percent to help fund infrastructure, according to Brady. However, Thomas J. Donohue, president and CEO, U.S. Chamber of Commerce, told lawmakers at the March 6 hearing that rolling back tax reform to pay for infrastructure should not be an investment strategy.

"Any proposal to pay for infrastructure by reversing the tax reforms that helped kick-start our economy is a non-starter for the business community and for many in Congress," Donohue testified. "Pulling back from tax reform to fund infrastructure would eliminate any opportunity for bipartisan support, thus guaranteeing no infrastructure package will become law," he added.

However, Neal stated that investment in infrastructure is a "win" for American business. "When we invest in infrastructure, it results in a significant economic multiplier – with each dollar spent, our nation becomes more competitive and prosperous," Neal said during opening statements.

Additionally, Neal said that he has been assured by Treasury Secretary Steven Mnuchin that lawmakers have "willing partners" in the Trump administration on infrastructure. To that end, any successful infrastructure legislation to reach the president's desk in the currently divided Congress must be bipartisan.

Gasoline Tax

Generally, the two panels of witnesses at the hearing appeared supportive of increasing gasoline and diesel excise taxes to help fund infrastructure. Indeed, the U.S. Chamber of Commerce is calling for a 25-cent increase to gasoline and diesel taxes. "The proposal would raise $394 billion over the next 10 years, which would be invested in our highways, bridges, and transit systems in a fiscally responsible fashion," Donohue testified.

House Transportation and Infrastructure Committee Chairman Peter A. DeFazio, D-Ore., also expressed support for raising gasoline taxes. "[B]y letting existing user fees – the gasoline and diesel tax - sit unadjusted for over 25 years, Congress has undermined this longstanding notion and shaken the stability of highway and transit funding in recent years," DeFazio said. "Since 1993, Federal gas and diesel taxes have lost over 40 percent of their purchasing power."

However, Marc Scribner, senior fellow at the libertarian think-tank Competitive Enterprise Institute (CEI), questioned both the proposal to increase the gasoline tax and claims of an infrastructure crisis. "In recent years, there have been increasing calls to increase federal fuel excise tax rates in order to address what many have called an infrastructure crisis," Scribner testified. "Contrary to a common narrative, infrastructure does not face a broad immediate crisis in the U.S.," he added.

A more nuanced approach outside status quo proposals should be taken to tackle infrastructure, according to Scribner. "Private infrastructure owned and managed by freight rail and telecommunications firms is generally of high quality and is improving without taxpayer support," he added. Moreover, Scribner told lawmakers that the federal government's role in infrastructure as a whole should be reassessed and deemphasized.

National Taxpayer Advocate Nina Olson Announces Retirement

Nina E. Olson, the National Taxpayer Advocate (NTA), has announced her decision to retire this summer from the esteemed NTA position at the IRS. Olson has served as taxpayers' "voice" within the IRS and before Congress for the last 18 years.

Olson will retire from the position of NTA on July 31, 2019, according to a recent NTA Blog post. "I am making the announcement now because I want to prepare the Taxpayer Advocate Service for a smooth transition, and I want to participate in the selection of my successor," Olson wrote.

Critical and Priority Items Lists

Olson outlined the following "critical items" she wants to accomplish before retiring:

- publish new IRM chapters on Taxpayer Assistance Orders and Taxpayer Advocate Directives;
- finalize a regulation governing the operations of Low Income Taxpayer Clinics (LITC); and
- regain the ability to hire attorney-advisors.

Additionally, Olson has created a list of "priority items" for the IRS, which IRS Commissioner Charles Rettig requested. The list includes:

- developing an automated economic hardship risk indicator;
- developing mandatory employee training on the Taxpayer Bill of Rights;
- developing guidance and training on the identification and public disclosure of Program Manager Technical Advice (PMTA) memoranda; and
- designing rights-based notices of deficiency, collection due process hearing notices, and math error notices.

"Underlying all my actions and plans as the National Taxpayer Advocate has been a recognition that the Taxpayer Advocate Service is more than an organization – however independent – within a bureaucratic federal agency," Olson wrote. "The Taxpayer Advocate Service is a concept – an idea. It represents the proposition that taxpayers have rights and protections before the awesome taxation powers of the United States."

Congress Talks Tax Extenders

Summary of the Tax Extender and Disaster Relief Act of 2019

Congressional tax writers on Capitol Hill are talking about tax extenders. While the Senate floats a bipartisan bill to revive nearly 30 expired tax breaks, a House panel has scheduled a hearing to examine such temporary tax provisions known as tax extenders.

Tax Extenders Hearing

The House Ways and Means Select Revenue Measures Subcommittee announced on March 5 that it will hold a hearing to examine temporary policy in the tax code. The subcommittee hearing is slated for March 12.

Several top House Republican tax writers have expressed the need for quickly passing a tax extenders bill. However, House Ways and Means Chairman Richard Neal, D-Mass., has indicated that public hearings need to come first before any changes are made to the tax code.

Senate Tax Extenders Bill

Across the Capitol, Senate Finance Committee (SFC) Chairman Chuck Grassley, R-Iowa, and ranking member Ron Wyden, D-Ore., have introduced the Tax Extender and Disaster Relief Bill of 2019 (Sen. 617), which would retroactively extend 29 expired tax breaks. The bill also includes certain disaster tax relief benefits.

"Congress needs to get out of this bad habit of regular retroactive extensions of these tax provisions," Grassley said in a recent press release. "The whole point of these federal tax incentives is to encourage certain behaviors, especially investments in alternative energies, energy efficiency and transportation. The best way to do that is ahead of time, not retroactively."

Likewise, Wyden criticized short-term tax policy but noted that taxpayers need the certainty the tax extenders bill would provide. "It's important this is a two-year bill covering 2019, and it includes key renewable energy incentives I'm proud to fight for," Wyden said. "Filing season for 2018 is already underway, so the Congress should act on this quickly."

Retiree Lump Sum Windows Now Permitted

Notice 2019-18

The IRS announced that it no longer plans to amend its required minimum distribution (RMD) regulations to prohibit a defined benefit from allowing still-living retirees to convert annuity payments into a lump sum payment. Notice 2015-49, I.R.B. 2015-30, 79, is superseded.

"Increase in Benefits" Exception

On July 9, 2015, the IRS announced plans to propose amendments to regulations to provide that the types of permitted benefit increases that count for these purposes are limited to those that increase the ongoing annuity payments, and do not include those that accelerate the annuity payments. The IRS provided transition relief.

Under the RMD rules, an employee's entire interest under a defined benefit plan must be paid in the form of periodic annuity payments for the employee's or beneficiary's life (or the joint lives) or a period determined based on their life expectancies. The regulations prohibit any change in the period or form of the distribution after it has commenced, except in limited circumstance. One circumstance is an increase in payments resulting from a plan amendment. Another circumstance is the death of the employee, at which point the beneficiary may convert the survivor portion of a joint and survivor annuity into a lump sum.

Several plan sponsors amended their plans to provide a limited period during which certain retirees currently receiving lifetime annuity payments may elect to convert their annuities into lump sums that are payable immediately. These arrangements are sometimes called lump sum risk-transferring programs, because longevity risk and investment risk are transferred from the plan to the retirees. The plans viewed the conversion rights as an increase in benefits resulting from a plan amendment.

No Amendments to RMD Regs

Now the IRS says it no longer plans to amend its RMD regulations. The Treasury Department and the IRS will continue to study the issue of retiree lump-sum windows. Until further guidance is issued, the IRS will not assert that a plan amendment providing for a retiree lump-sum window program causes the plan to violate the RMD rules, but will continue to evaluate whether the plan satisfies other applicable qualified plan requirements. During this period, the IRS will not issue private letter rulings with regard to retiree lump sum windows. However, if a taxpayer is eligible to apply for and receive a determination letter, the IRS will no longer include a caveat expressing no opinion regarding the tax consequences of such a window in the letter.

NTA: IRS Toll-Free Lines Inconsistent, Inaccurate

Statement of Nina E. Olson, March 7, 2019.

The IRS is providing inconsistent service and inaccurate tax law information by way of its toll-free lines, National Taxpayer Advocate (NTA) Nina Olson has said. Testifying at the March 7 House Ways and Means Oversight Subcommittee hearing, Olson told lawmakers that this year's level of service at the IRS is substantially below last year's level.

"The IRS has reported a 'Level of Service' (LOS) of 57 percent on its Accounts Management telephone lines and assistors have answered only 18 percent of taxpayer calls – both substantially below last year's levels," Olson told lawmakers. Additionally, Taxpayer Advocate Service (TAS) testers calling the IRS's toll-free lines with sample questions on tax reform have "received inconsistent service and inaccurate information," Olson said.

IRS Form 1040

The top Republican of the subcommittee highlighted the Republicans' view that the new IRS Form 1040 has been improved. "Of particular importance, is the revised Form 1040, which simplified filing taxes for many by reducing the number of lines taxpayers have to complete," ranking member Mike Kelly, R-Pa., said during opening statements. "The IRS estimates that only 25 million taxpayers used the simpler 1040 form in 2017, known as the 1040-EZ… this year nearly 47 million taxpayers will be able to complete the new postcard 1040, according to estimates from Ms. Olson's office," Kelly added.

However, Olson expressed concern with the complexity of the new Form 1040 and its six schedules. "For the majority of taxpayers who will have to complete additional schedules, the new form is likely to create more complexity," Olson told lawmakers. She did note, however, that for some taxpayers with less complicated returns, the shorter Form 1040 could provide simplification.

Preliminary Filing Season Data

Olson cautioned lawmakers about drawing concrete conclusions of the IRS's performance this early in the 2019 tax filing season. Olson noted that she was presenting preliminary data from only the first four weeks of the filing season.

Additionally, Olson told lawmakers that the number of tax returns received and processed thus far into the filing season is comparable to prior years. The number of taxpayers receiving refunds this filing season is on par with prior years as well, according to Olson.

Penalty Relief to Partnerships for Missing Negative Tax Basis Capital Account Information

Notice 2019-20

The IRS will waive penalties under Code Sec. 6722 and Code Sec. 6698 for certain partnerships that file and furnish Schedules K-1 to Form 1065 without reporting negative tax basis capital account information. The relief applies to partnerships that fail to report such information for the partnership's tax year that began after December 31, 2017, but before January 1, 2019.

Compliance Problems

Item L of Schedule K-1 to Form 1065 requires reporting of a partner's capital account. Generally, a partnership may report partner capital to a partner using:

- tax basis;
- Generally Accepted Accounting Principles (GAAP);
- Code Sec. 704(b) book; or
- some other method.

However, the 2018 Instructions for Form 1065 and Partner's Instructions for Schedule K-1 (Form 1065) to Item L now require a partnership that does not report tax basis capital accounts to its partners to report, on line 20 of Schedule K-1 using code AH, the amount of such partner's tax basis capital both at the beginning of the year and at the end of the year if either amount is negative. Certain partnerships, however, may be unable to comply timely with this new requirement.

Penalty Waiver

The IRS will waive penalties under Code Sec. 6722 for furnishing a partner a Schedule K-1, and under Code Sec. 6698 for filing a Schedule K-1 with a partnership return, that fails to report negative tax basis capital account information if *both* of the following conditions are met:

- the partner Schedules K-1 are timely filed (including extensions) with the IRS and furnished to the partners, and contain all other required information; and
- the partnership files with the IRS no later than 180 days after the six-month extended due date for the partnership's Form 1065 or, for a calendar year partnership, no later than March 15, 2020, a schedule setting forth certain information for each partner for whom the partnership is required to furnish negative tax basis capital account information.

The schedule must provide:

- the partner's name, address, and taxpayer identification number; and
- the amount of the partner's tax basis capital account at the beginning and end of the tax year at issue, in accordance with instructions and additional guidance posted by the IRS on IRS.gov.

The schedule should be sent to: 1973 North Rulon White Blvd., Ogden, UT 84404-7843, MS 4700, Attn: Ogden PTE.

To receive a penalty waiver, a partnership is not required to furnish amended Schedules K-1 to its partners or to file an administrative adjustment request under Code Sec. 6227, and partnerships should not delay issuing partner Schedules K-1 on account of Notice 2019-20. The timely furnishing (including extensions) of Schedules K-1 to partners is a requirement to be eligible for relief under this notice.

Tax Relief for Alabama Victims of Severe Storms, Tornadoes, Straight-Line Winds

IR-2019-31; AL-2019-01

Victims of the severe storms, tornadoes, and straight-line winds that took place on March 3, 2019 in Alabama may qualify for tax relief from the IRS. The president has declared that a major disaster exists in Alabama. The covered disaster area is Lee County.

The IRS has postponed certain deadlines for taxpayers who reside or have a business in the disaster area. For instance, certain deadlines falling on or after March 3, 2019 and before July 31, 2019, have been postponed to July 31, 2019. This includes deadlines for filing most tax returns (including individual, corporate, estate and trust income tax returns; partnership and S corporation returns; estate, gift and generation-skipping transfer tax returns; and employment and certain excise tax returns) or to make tax payments, including estimated tax payments, that have either an original or extended due date occurring on or after March 3, 2019 and before July 31, 2019.

The deadline relief includes 2018 individual income tax returns and payments normally due on April 15, 2019. It also includes the quarterly estimated income tax payments due on April 15, 2019, and June 17, 2019.

Unless an act is specifically listed in Rev. Proc. 2018-58, I.R.B. 2018-50, 990, the postponement of time to file and pay does not apply to information returns in the W-2, 1094, 1095, 1097, 1098, or 1099 series; Forms 1042-S, 3921, 3922 or 8027; or employment and excise tax deposits. However, penalties on deposits due on or after March 3, 2019, and before March 18, 2019, will be abated as long as the tax deposits were made by March 18, 2019.

Taxpayers in the covered disaster area can claim disaster-related casualty losses on their federal income tax return for either 2018 or 2019. Individuals may deduct personal property losses that are not covered by insurance or other reimbursements. Taxpayers claiming the disaster loss on their 2018 or 2019 return should write the disaster designation "Alabama, Severe Storms, Straight-line Winds and Tornadoes" at the top of their return so that the IRS can expedite processing of the refund. Taxpayers also should include the disaster declaration number, FEMA 4419, on any return.

The IRS will waive the usual fees and expedite requests for copies of previously filed tax returns for affected taxpayers. Taxpayers should add the assigned disaster designation at the top of Form 4506, Request for a Copy of Tax Return, or Form 4506-T, Request for Transcript of Tax Return, as appropriate, and submit it to the IRS.

IRS May Charge Return Preparer's Fee for PTINs

B. Montrois, CA-D.C., 2019-1 USTC ¶50,164

The IRS has the authority to charge tax return preparers a fee to obtain and renew preparer tax identification numbers (PTINs), the D.C. Circuit Court of Appeals has ruled. The court vacated and remanded a federal district court decision enjoining the IRS from charging PTIN fees (*sub nom Adam Steele*, DC D.C., 2018-1 USTC ¶50,104).

PTIN Requirement

Code Sec. 6109 specifically grants the IRS authority to require a tax return preparer to use an identifying number on prepared returns other than his or her social security number. Regulations were subsequently issued requiring a preparer to obtain a PTIN from the IRS for this purpose. The regulations also established a credentialing and registration system due to taxpayers' concerns of being poorly served by some preparers.

The IRS began charging preparers a $50 fee to obtain and renew PTINs to cover the cost of the new rules. The fee was reduced to $33 in wake of the appeals court's decision in *S. Loving*, CA-D.C., 2014-1 USTC ¶50,175, which invalidated the credentialing and registration system for preparers. A portion of the PTIN was to have been used for these purposes. A group of return preparers challenged the IRS's authority to require any fee for obtaining and renewing PTINs.

Lower Court

The federal district court upheld the IRS's requirement that preparers obtain a PTIN, but ruled that the IRS did not have authority to charge a fee. Under the Independent Offices Appropriations Act (IOAA), any assessment of a fee by a federal agency must relate to a specific benefit conferred to an identifiable set of users.

The district court stated that essentially any person can obtain a PTIN after *S. Loving*, so the PTIN program could no longer be said to benefit a particular set of individuals. The court issued an injunction barring the IRS from charging a fee for PTINs, and ordered the IRS to refund collected amounts.

Specific Benefit

The appeals court vacated the injunction, and ruled that the generation and maintenance of a PTIN database provides a specific benefit provided to tax return preparers: protecting tax return preparer's identities. PTINs allow preparers to use those numbers in place of their social security numbers on tax returns.

The IRS may charge a fee for this service under the IOAA. The return preparers' concerns that the fee is unreasonable is light of the invalidation of the credentialing and registration system pertain to the reasonableness of the fee amount, not the IRS's ability to assess it. The court remanded the case to the district court to address this issue.

IRS Issues FAQs on FATCA Procedures

FAQ 2019-2: FATCA – FAQs General

The IRS has updated its Frequently Asked Questions (FAQs) on FATCA (Foreign Account Tax Compliance Act) General Compliance.

Updated Q/A #23 addresses whether a withholding agent can be subjected to interest, penalties, or additions to tax, for the 2017 or 2018 calendar year (CY), for failing to withhold and report by March 15 of the subsequent year, on a payment of a dividend equivalent made with respect to a derivative referencing a partnership. The FAQ explained that a withholding agent would not be subject to interest, penalties, or additions to tax for the above transactions provided that the agent withholds and reports on Form 1042, Annual Withholding Tax Return for U.S. Source of Income for Foreign Persons, and Form 1042-S, Foreign Person's U.S. Source Income Subject to Withholding, with respect to the payment. The deadlines for the payments are September 17, 2018, for CY 2017, and September 16, 2019, for CY 2018.

In cases where the withholding agent withholds after March 15 of the subsequent year, the agent would need to file Forms 1042 and 1042-S or amended Forms 1042 and 1042-S by the aforementioned deadlines. This would be applicable if the dividend equivalent payments are the only payments reportable for the year. Further, when depositing the tax withheld for a dividend equivalent payment made in 2017 or 2018, the withholding agent must designate the payment as being made for the applicable calendar year in accordance with the instructions to Form 1042.

Q/A #24 is new, and addresses whether a partnership or trust that is permitted to withhold in CY 2019 with respect to a foreign partner's or beneficiary's share of undistributed income for the CY 2018 can designate the deposit of the withholding as for the CY 2018 and report the associated amount on the 2018 Forms 1042 and 1042-S. The FAQ explained that proposed regulations published in December 2018 will allow partnerships and trusts that withhold in a subsequent year to designate the deposit of the withholding as attributable to the preceding year and report the associated amount on Forms 1042 and 1042-S for the preceding year. The regulations also extend the due date for partnerships to file Form 1042-S until September 15 when it withholds the tax after March 15 of the subsequent year that it designates as deposited for the preceding year.

Further, the partnership or trust will also not be assessed any penalty associated with its reliance on the proposed regulations. Finally, if such a penalty is assessed, the partnership or trust may have the penalty abated.

The IRS's FATCA FAQ webpage is at https://www.irs.gov/businesses/corporations/frequently-asked-questions-faqs-fatca-compliance-legal.

TAX BRIEFS

Foreign Per Diems

The U.S. State Department has released a listing of maximum travel *per diem* allowances for travel in foreign areas. The rates apply to all government employees and contractors, and are effective as of March 1, 2019.

March Maximum Travel Per Diem Allowances for Foreign Areas

Foreign Tax Credit

Proposed regulations relating to the foreign tax credit, including the guidance implementing changes made by the Tax Cuts and Job Act, have been corrected (NPRM REG-105600-18). Written or electronic comments and requests for a public hearing were due by February 5, 2019.

NPRM REG-105600-18, Correction

Mailbox Rule

An untimely Tax Court petition was dismissed for lack of jurisdiction. The individual had mailed her petition through the U.S. Postal Service (USPS) using a private postage label printed from a website for buying postage. The court received and filed the taxpayer's petition 20 days after the date shown on the private postage label. However, the "timely mailed, timely filed" rule of Code Sec. 7502 was not applied because neither of the two USPS postmarks was dated within the 90-day period for the taxpayer to file her petition. The petition would be deemed filed on the date of its receipt (i.e., after the 90-day period had expired).

Jordan, TC, Dec. 61,419(M)

Marijuana Dispensary

A marijuana dispensary's petition to quash a third-party administrative summons was denied. The government met all the requirements under *Powell*. Further, the IRS has the authority to investigate whether a party is trafficking in controlled substances in order to apply Code Sec. 280E. The taxpayer failed to demonstrate that the IRS had issued the summonses in bad faith.

High Desert Relief, Inc., CA-10, 2019-1 USTC ¶50,163

Pension Contributions

"Director fees" paid by a pool design company to its owner, which he used for pension contributions, could not be deducted because they were not self-employment income. The claimed "director fees" were properly recharacterized by as "wages" and therefore were not deductible. Further, the individual could not successfully claim to be an employer.

Burbach, TC, Dec. 61,422(M)

Premium Tax Credits

The IRS properly determined that a married couple's tax liability should be increased by the amount of excess advance premium tax credits (APTCs) that were applied against their monthly health insurance premiums. Accordingly, the taxpayers did not qualify for the APTC for the tax year at issue, and the excess APTC payments made on their behalf were properly included in their tax liability.

Kerns, TC, Dec. 61,418(M)

Tribal Corporation

A tribal corporation of a federally-recognized Indian tribe was not liable for the unpaid employment taxes of its legally distinct corporate division, so the IRS could not collect the division's unpaid taxes from the tribal corporation. The tribal corporation's charter, issued by the Department of Interior (DOI) under section 17 of the Indian Reorganization Act (IRA sec. 17), allowed the corporation to create corporate divisions whose assets and liabilities were distinct from those of the corporation for federal tax purposes.

Blue Lake Rancheria Economic Development Corporation, 152 TC No. 5, Dec. 61,421