Miscellaneous Recommendations

#52 EXCLUDE TAXPAYERS IN SPECIFIED CIRCUMSTANCES FROM THE REQUIREMENT TO PROVIDE A SOCIAL SECURITY NUMBER FOR THEIR CHILDREN TO CLAIM THE CHILD TAX CREDIT

Present Law

The Tax Cuts and Jobs Act (TCJA) amended Internal Revenue Code (IRC) § 24 to require taxpayers claiming the Child Tax Credit (CTC) to provide a Social Security number (SSN) for all qualifying children.[210]

IRC § 1402(g) exempts members of certain religious faiths from the requirement to pay self-employment tax. An individual may apply for an exemption from the self-employment tax requirements:

> … if he is a member of a recognized religious sect or division thereof and is an adherent of established tenets or teachings of such sect or division by reason of which he is conscientiously opposed to acceptance of the benefits of any private or public insurance which makes payments in the event of death, disability, old-age, or retirement or makes payments toward the cost of, or provides services for, medical care (including the benefits of any insurance system established by the Social Security Act).

To claim the exemption, the individual must file an application on IRS Form 4029, Application for Exemption From Social Security and Medicare Taxes and Waiver of Benefits.[211]

Reasons for Change

The requirement under IRC § 24 that children claimed for purposes of the CTC have SSNs was intended to prevent taxpayers whose children do not have SSNs from improperly or fraudulently claiming the CTC. However, the provision is having the unintended effect of disqualifying several taxpayer populations whose dependents do not have SSNs due to unique circumstances but who otherwise meet the requirements for the credit, including:

- Taxpayers who do not apply for SSNs due to their deeply held religious beliefs, most notably the Amish;
- Taxpayers whose adopted children have not yet received SSNs; and
- Taxpayers who were unable to obtain SSNs because their child was born and died in the same or consecutive tax years.

Prior to the TJCA amendment, IRC § 24 only required the taxpayer to provide a taxpayer identification number for a qualifying child to claim the CTC, and the IRS provided administrative relief to allow the credit for individuals who did not have a taxpayer identification number for their dependent(s) due to their deeply held religious beliefs. Specifically, taxpayers whose dependents did not have SSNs due to the parents' deeply held religious beliefs were allowed the credit if they indicated on the return that they had an approved Form 4029 establishing that they met the requirements under IRC § 1402(g).

210 TCJA, Pub. L. No. 115-97, 131 Stat. 2054 (Dec. 22, 2017) (codified at IRC § 24(h)(7)).
211 IRC § 1402(g).

In certain circumstances, the IRS would request additional information from the taxpayer to prove the age, relationship, and residence of the dependent. Further, the language in the CTC prior to the TCJA permitted the IRS to allow the credit for taxpayers whose adopted child only had an Adoption Taxpayer Identification Number (ATIN), which is a tax identification number issued for use while waiting to receive an SSN. Now, the IRS is no longer providing administrative relief to allow the CTC if the qualifying child lacks an SSN, unless the taxpayer's child was born and died in the same or consecutive tax years.[212]

Recommendation

- Amend IRC § 24(h)(7) to allow a taxpayer to claim the CTC with respect to a child who does not have an SSN if the child meets all other eligibility requirements for the credit, and if the taxpayer:
    - Is a member of a recognized religious group and meets the requirements under IRC § 1402(g);
    - Adopted a child and provides an ATIN for the qualifying child; or
    - Had a child that was born and died in the same or consecutive years.

212 The IRS Office of Chief Counsel has opined that the IRS is legally prohibited from allowing the CTC if a qualifying child lacks an SSN because of religious or conscientious based objections. *See* Program Manager Technical Advice (PMTA), Administration of the Child Tax Credit for Objectors to Social Security Numbers, POSTS-117474-18, PMTA 2019-2 (Mar. 29, 2019). For an in-depth discussion regarding TAS's disagreement with this advice, see *The Tax Filing Season: Hearing Before the H. Subcomm. on Government Oversight of the H. Comm. on Ways and Means*, 116th Cong. 22-27 (2019) (testimony of Nina E. Olson, National Taxpayer Advocate); National Taxpayer Advocate 2020 Objectives Report to Congress 48 (Area of Focus: *TAS Will Urge the IRS to Reconsider Its Position on the Application of the Religious Freedom Restoration Act to the Social Security Requirement Under IRC § 24(h)(7), Which Has the Effect of Denying Child Tax Credit Benefits to the Amish and Certain Other Religious Groups)*; and National Taxpayer Advocate, NTA Blog, *The IRS's Position on the Application of the Religious Freedom Restoration Act to the Social Security Requirement Under Internal Revenue Code § 24(h)(7) Has the Effect of Denying Child Tax Credit Benefits to the Amish and Certain Other Religious Groups* (June 26, 2019), https://taxpayeradvocate.irs.gov/IRS_Position_on_the_Application_of_the_Religious_Freedom_Restoration_Act_to_the_Social_Security_Requirement_Has_the_Effect_of_Denying_Child_Tax_Credit_Benefits_to_Amish_and_Other_Religious_Groups?category=Tax News. *See also* Internal Revenue Manual 3.12.3.26.17.6, TIN Requirements (EC 287) (Apr. 15, 2019).

#53 ALLOW MEMBERS OF CERTAIN RELIGIOUS SECTS THAT DO NOT PARTICIPATE IN SOCIAL SECURITY AND MEDICARE TO OBTAIN REFUNDS OF THEIR REMITTED EMPLOYMENT TAXES

Present Law

Internal Revenue Code (IRC) § 3101 imposes a tax on wages paid to employees to fund old-age, survivors, and disability insurance (Social Security) and hospital insurance (Medicare) pursuant to the Federal Insurance Contributions Act (FICA).[213] FICA tax is paid half by the employer and half by the employee.

IRC § 1401 imposes a comparable tax on self-employed individuals pursuant to the Self-Employment Contributions Act (SECA). SECA tax is paid entirely by the self-employed individual.

Members of the Amish community sought exclusions from these taxes because the tenets of their religion prohibit them from accepting social insurance benefits. In response, Congress enacted IRC § 1402(g), which exempts self-employed individuals who are members of certain religious faiths from the requirement to pay SECA tax. An individual may apply for an exemption from paying SECA tax by filing IRS Form 4029, Application for Exemption From Social Security and Medicare Taxes and Waiver of Benefits:

> … if he is a member of a recognized religious sect or division thereof and is an adherent of established tenets or teachings of such sect or division by reason of which he is conscientiously opposed to acceptance of the benefits of any private or public insurance which makes payments in the event of death, disability, old-age, or retirement or makes payments toward the cost of, or provides services for, medical care (including the benefits of any insurance system established by the Social Security Act).

Congress subsequently enacted IRC § 3127 to exempt employers from paying their portion of FICA tax under IRC § 3111, provided that both the employer and the employee are members of the same recognized religious sect, both the employer and the employee are adherents of established tenets or teachings of the sect, and both the employer and employee file and receive approval for exemption from their respective portions of FICA tax.[214] The employer and employee each may receive approval by filing IRS Form 4029.[215]

IRC § 6413(b) requires the IRS to refund any overpayment of a taxpayer's FICA tax.

Reasons for Change

The current exemptions under IRC §§ 1402(g) and 3127 do not extend to members of recognized religious sects who work for employers that are not members of the same or any religious sect. As a result, members of these sects pay for Social Security and Medicare benefits that their religious beliefs prohibit them from

213 Under IRC § 3101, a tax of 6.2 percent is imposed on employee wages to fund old age, survivors and disability insurance, and an additional tax of 1.45 percent is imposed to fund hospital insurance. In certain circumstances, employee wages are subject to an additional 0.9 percent tax to further fund hospital insurance (Additional Medicare Tax). Employers are generally required to withhold FICA taxes from their employees' wages under IRC § 3102(a).

214 IRC § 3127 establishes the requirements for employers and employees who are members and adherents of the same religious sect to be exempt from their respective FICA tax obligations as required under IRC §§ 3101 and 3111. If the employer is a partnership, all partners of that partnership must be members of and adhere to the tenets of the same recognized religious sect. All partners of the partnership must apply and be approved individually for the exemption. Treas. Reg. § 31.3127-1(a).

215 For more information regarding the Form 4029 exemption application for members of recognized religious sects, see IRS Publication 517, Social Security and Other Information for Members of the Clergy and Religious Workers (Jan. 17, 2019).

accepting. The National Taxpayer Advocate believes that result is inequitable. The rationale for exempting self-employed Amish workers and Amish employees of Amish employers, as the law currently provides, applies equally with respect to Amish employees who are working for non-Amish employers.

This inequity can be resolved by amending IRC § 6413 to allow employees who are members of a recognized religious group and work for an employer who is *not* a member of a recognized religious group to file a refund claim for their portion of remitted FICA tax. Amish leaders have expressed a preference for allowing Amish employees of non-Amish employers to recover the employee's portion of the FICA tax through a refund claim, rather than by exempting the employee from paying the FICA tax in the first instance, to avoid imposing an additional recordkeeping burden on employers.[216]

Recommendation

- Amend IRC § 6413 to allow employees who meet the definition of "a member of a recognized religious sect or division thereof" in IRC § 1402(g) to claim a credit or refund of the employee's portion of FICA taxes withheld from their wages.[217]

216 Meeting between TAS and Amish leaders (Aug. 16, 2019).

217 For legislative language generally consistent with this recommendation, see AMISH Act, H.R. 2714, 116th Cong. (2019).

#54 REQUIRE THE IRS TO SPECIFY THE INFORMATION IT NEEDS IN THIRD PARTY CONTACT NOTICES

Present Law

Internal Revenue Code (IRC) § 7602(c)(1) generally requires the IRS to give taxpayers notice before contacting third parties (*e.g.*, banks, employers, employees, vendors, customers, friends, and neighbors) about them. The IRS may provide this third-party contact (TPC) notice only if it intends to make a TPC during the period specified in the notice, which may not exceed one year. Generally, the IRS must send the notice at least 45 days before making the TPC.

IRC § 7602(c)(3) waives the TPC notice requirement if (i) the taxpayer has authorized the contact; (ii) the IRS determines for good cause that notice would jeopardize the IRS's tax collection efforts or may involve reprisal against any person; or (iii) there is a pending criminal investigation. No law expressly requires the IRS to let the taxpayer know what specific information it needs (or needs to verify) before contacting third parties.

Reasons for Change

The TPC notice requirement was enacted as part of the IRS Restructuring and Reform Act of 1998 (RRA 98). The Senate report accompanying the bill explained that "taxpayers should have the opportunity to resolve issues and volunteer information before the IRS contacts third parties."[218] The House-Senate conference report accompanying RRA 98 noted that "in general" the TPC notice could "be provided as part of an existing IRS notice."[219] On the basis of the conference report, the IRS believed it could satisfy the TPC notice requirement by including generic language in Publication 1, Your Rights As a Taxpayer, even if it sent the taxpayer Publication 1 long before it intended to make a TPC.[220]

Section 1206 of the Taxpayer First Act (TFA) amended IRC § 7602(c) to require that the IRS provide the TPC notice only when it intends to make a TPC and that it provide the notice at least 45 days in advance of making the contact.[221] In a section entitled "Reasons for Change," a House report to the TFA quoted testimony from a former IRS official who noted that the then-existing TPC notice requirement was "useless and does not effectively apprise taxpayers that such contact will be made, to whom it will be made, or that the taxpayer can request a third party contact report from the IRS." The House report said TPCs "may have a chilling effect on the taxpayer's business and could damage the taxpayer's reputation in the community." It said the change would "provide taxpayers more of an opportunity to resolve issues and volunteer information before the IRS contacts third parties."[222] Indeed, if the TPC notice were included "as part of an existing IRS notice" such as Form 4564, Information Document Request, which requests information from the

218 S. Rep. No. 105-174, at 77 (1998).

219 H. Rep. No. 105-599, at 277 (1998) (Conf. Rep.).

220 Pub. 1 provides, in relevant part, "we sometimes talk with other persons if we need information that you have been unable to provide or to verify information we have received." The U.S. Court of Appeals for the Ninth Circuit held that Pub. 1 did not satisfy the requirement in the case before it and doubted whether, standing alone, it could ever satisfy the former statutory requirement that the IRS provide "*reasonable notice in advance*." *J.B. v. United States*, 916 F.3d 1161, 1172 n.15 (9th Cir. 2019). The court noted: "Congress specifically referred to Publication 1 three times in the 1998 Restructuring Act … However, it did not refer to Publication 1 by name in § 7602(c)." *Id*. at 1170. The Ninth Circuit also stated that the exceptions to the TPC notice requirement would have been unnecessary if the IRS were not required to reveal enough information to permit the taxpayer to "impede the contact by jeopardizing tax collection efforts, retaliating against third parties, or interfering in a pending criminal investigation." *Id*. at 1168.

221 Pub. L. No. 116-25, 133 Stat. 981 (2019).

222 H. Rep. No. 116-39, at 44-45 (2019).

taxpayer, the new 45-day period would give the taxpayer a realistic opportunity to avoid a TPC that seeks new information by providing the information requested on the form.

However, the IRS does not specify what information it needs with the TPC notice.[223] Thus, the way the IRS has implemented the provision does not give taxpayers more of an opportunity to volunteer information than before the TFA was enacted. In fact, because the TFA removed a prior requirement that the notice be reasonable, the IRS seems to interpret the TFA as having watered down the notice requirements[224] — which we believe is the opposite of what Congress intended. Consistent with the Senate report accompanying RRA 98, the House report accompanying the TFA, and the taxpayer's *right to confidentiality*, the National Taxpayer Advocate believes the IRS's request for information should be included with the TPC notice, which is how the IRS implemented the requirement for a time after the enactment of RRA 98 for some types of TPCs.[225]

Recommendation

- Amend IRC § 7602(c) to clarify that the IRS must tell the taxpayer what information it needs (or needs to verify), if any, and give the taxpayer a reasonable opportunity to provide the information (or verification of it) before contacting a third party, unless doing so would be pointless or an exception applies.

223 See, *e.g.*, IRS, Interim Guidance on Third-Party Contact Notification, SBSE-04-0719-0034 (July 26, 2019).

224 Although the House report suggests Congress intended to strengthen the TPC notice requirement rather than weaken it, we understand the IRS believes it is no longer required to provide "reasonable notice in advance," as interpreted by the Ninth Circuit, because those words were deleted by the Taxpayer First Act.

225 For further discussion, see National Taxpayer Advocate 2015 Annual Report to Congress 123 (Most Serious Problem: *Third Party Contacts: IRS Third Party Contact Procedures Do Not Follow the Law and May Unnecessarily Damage Taxpayers' Businesses and Reputations*); National Taxpayer Advocate 2018 Objectives Report to Congress 98 (Area of Focus: *IRS Third Party Contact (TPC) Notices Should Be More Specific, Actionable, and Effective*).

#55 INCREASE THE INDIVIDUAL LOW INCOME TAXPAYER CLINIC GRANT CAP AND INDEX IT FOR INFLATION

Present Law

Internal Revenue Code (IRC) § 7526 authorizes the Secretary, subject to the availability of appropriated funds, to make grants to provide matching funds for the development, expansion, or continuation of Low Income Taxpayer Clinics (LITCs). The LITC program was authorized as part of the IRS Restructuring and Reform Act of 1998 (RRA 98) to provide representation to low-income taxpayers involved in controversies with the IRS, including audits, appeals, collection matters, and tax litigation, and to provide education about taxpayer rights and responsibilities in multiple languages for taxpayers who speak English as a second language.[226] If a clinic charges a fee, it must not charge more than a nominal amount for services.

IRC § 7526(c)(1) imposes an annual aggregate limitation of $6 million for LITC grants "[u]nless otherwise provided by specific appropriation."

IRC § 7526(c)(2) imposes an annual limitation on grants to a single clinic of $100,000.

IRC § 1(f) prescribes rules for the annual indexing of tax brackets based on the Consumer Price Index for all-urban consumers (CPI) and the Chained Consumer Price Index for All Urban Consumers (C-CPI-U).

Reasons for Change

The LITC program has proven to be an effective and low-cost means to provide assistance to low-income taxpayers. During grant year 2019, the LITC Program Office awarded grants to 131 organizations in 46 states and the District of Columbia.[227] Many clinics recruit attorneys and certified public accountants to accept cases on a *pro bono* basis. By using their grants to coordinate and leverage the volunteer contributions of tax professionals in this way, these clinics often provide services worth far more than the dollar value of the grants they receive. In 2019, volunteers provided over 56,000 hours of service to LITCs.[228]

As a result, the LITC program has attracted broad bipartisan support since its inception, and Congress increased the annual funding level by specific appropriation since 1998. In fiscal year 2019, the funding level was set at $12 million — double the amount specified in IRC § 7526(c)(1).[229]

However, the annual limitation of $100,000 on grants to individual clinics has never been increased. Since RRA 98 was enacted in July 1998, inflation has increased by about 58 percent.[230] Therefore, despite the increase in aggregate program funding, clinics are effectively operating with substantially less grant money today than they were in 1998. Some clinics, such as clinics that are responsible for large geographic areas or sizeable taxpayer populations, could make productive use of additional funds.

In relative terms, the doubling of aggregate program funding without any increase in the amounts that may be provided to individual clinics is undermining Congress's original intent and preventing the efficient allocation of grant dollars. To ensure congressional intent is met now and in the future, the National Taxpayer Advocate

226 Pub. L. No. 105-206, § 3601, 112 Stat. 685, 774 (1998).

227 IRS Pub. 5066, Low Income Taxpayer Clinics December 2019 Program Report 5 (Dec. 2019).

228 *Id*.

229 Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, Div. D, Title I, 133 Stat. 13, 144 (2019).

230 *See* Bureau of Labor Statistics, CPI Inflation Calculator, https://data.bls.gov/cgi-bin/cpicalc.pl (last visited Dec. 11, 2019).

recommends Congress increase the per-clinic annual cap from $100,000 to $150,000 and index it for inflation in future years.[231]

Recommendation

- Amend IRC § 7526(c)(2) to increase the annual clinic funding limitation to $150,000 and index the limitation to rise with inflation in future years pursuant to the rules prescribed in IRC § 1(f).

231 The recently enacted Taxpayer First Act of 2019 added IRC § 7526A, authorizing a funding program for the Volunteer Income Tax Assistance program. *See* Pub. L. No. 116-25 (2019). The statute is modeled after IRC § 7526 but does not contain an annual limitation on grants to a single program.

#56 ESTABLISH THE POSITION OF IRS HISTORIAN WITHIN THE INTERNAL REVENUE SERVICE TO RECORD AND PUBLISH ITS HISTORY

Present Law

The IRS, as a federal agency, is required to properly maintain and manage its records under the Federal Records Act[232] and to provide access to these records to the public under the Freedom of Information Act.[233] However, the IRS is not required to publish a historical analysis of its tax administration programs and policies.

Reasons for Change

A documented history of the IRS's programs and policies would assist Congress, the agency itself, and the public. It would assist Congress by helping Members and staff gain a fuller understanding of the IRS's successes and failures, so future legislation can be developed in a manner that plays to the agency's strengths and helps to address the agency's weaknesses. It would help the IRS more effectively assess its programs, reduce redundant efforts, and share knowledge within the agency. In addition, an IRS historian could assist the public by promoting a more accountable and transparent IRS.[234]

During the early 1990s, the IRS made an administrative decision to hire an IRS historian. However, the relationship was tense, and the individual who held the position subsequently told Congress that the IRS undermined her work and fought transparency, concluding that "the IRS shreds its paper trail, which means there is no history, no evidence, and ultimately no accountability."[235] The IRS eliminated the position and never hired a historian again.

There are at least 29 federal offices of history operating in the executive, judicial, and legislative branches.[236] Government historians serve various roles, such as researching and writing for publication and internal use, editing historical documents, preserving historical sites and artifacts, and providing historical information to the public through websites and other media.[237] Historians are generally required to be objective and accurate in preparing histories that can be controversial.[238] For example, the Historian of the Department of State is required to publish a documentary history of the foreign policy decisions and actions of the United States, including facts providing support for, and alternative views to, policy positions ultimately adopted without omitting or concealing defects in policy.[239] Historians in federal agencies serve an important role, and because more U.S. citizens interact with the IRS than with any other federal agency, the public interest and potential benefit in learning from the agency's successes and failures are particularly high.

232 44 U.S.C. §§ 3101-3107.

233 5 U.S.C. § 552.

234 *See, e.g.*, 22 U.S.C. § 4351(a), which states in pertinent part: "Volumes of this publication [Foreign Relations of the United States historical series] shall include *all records* needed to provide a comprehensive documentation of the major foreign policy decisions and actions of the United States government, including the facts which contributed to the formulation of policies and records providing supporting and alternative views to the policy position ultimately adopted." (Emphasis added).

235 *See Practices & Procedures of the Internal Revenue Service: Hearings Before the S. Comm. on Finance*, 105th Cong. 35 (Sept. 23-25, 1997) (statement of Shelley Davis, former IRS Historian).

236 Society for History in the Federal Government, *History at the Federal Government*, http://www.shfg.org/history-at-fedgov#agencies (last visited on Nov. 13, 2018).

237 *Id*.

238 *Id*.

239 *Id*.

Recommendation

- Add a new subsection to Internal Revenue Code (IRC) § 7803 to establish the position of IRS historian within the IRS. The IRS historian should have expertise in federal taxation and archival methods, be appointed by the Secretary of the Treasury in consultation with the Archivist of the United States, report to the Commissioner of Internal Revenue, and have access to IRS records, including tax returns and return information (subject to the confidentiality and disclosure provisions of IRC § 6103). The IRS historian should be required to report IRS history objectively and accurately, without omitting or concealing defects in policy.[240]

240 For additional background, see National Taxpayer Advocate 2011 Annual Report to Congress 582-586 (Legislative Recommendation: *Appoint an IRS Historian*).

#57 AMEND THE COMBAT-INJURED VETERANS TAX FAIRNESS ACT OF 2016 TO ALLOW VETERANS OF THE COAST GUARD TO FILE CLAIMS FOR CREDIT OR REFUND FOR TAXES IMPROPERLY WITHHELD FROM DISABILITY SEVERANCE PAY

Present Law

Internal Revenue Code (IRC) § 61(a)(1) provides that compensation for services is includable in gross income. Severance payments generally are treated as compensation and therefore subject to taxation.

IRC § 104(a)(4) provides an exclusion from gross income for payments received for personal injuries or sickness resulting from active service in the armed forces.

IRC § 104(b)(2) clarifies that the exclusion from gross income in IRC § 104(a)(4) applies to an amount received by reason of a combat-related injury, or if the individual, upon application, would be entitled to receive disability compensation from the Department of Veterans Affairs. IRC § 104(b)(3) defines "combat-related injury" as a personal injury or sickness that occurred "as a direct result of armed conflict, while engaged in extrahazardous service, or under conditions simulating war; or which is caused by an instrumentality of war."

To obtain a credit or refund, a taxpayer must file a timely claim. IRC § 6511(a) provides generally that a taxpayer must file a claim for credit or refund within three years from the time the tax return was filed or two years from the time the tax was paid, whichever period expires later.

In 2016, Congress passed the Combat-Injured Veterans Tax Fairness Act (the "Act").[241] In a findings section, the Act states: "Since 1991, the Secretary of Defense has improperly withheld taxes from severance pay for wounded veterans, thus denying them their due compensation and a significant benefit intended by Congress." Recognizing that the period of limitation for filing a claim for credit or refund to recover overwithheld tax had long since expired for most tax years since 1991, the Act created an exception from the general period of limitation.

Specifically, the Act directed the Secretary of Defense (i) to identify disability severance pay (DSP) that was not considered gross income pursuant to IRC § 104(a)(4) and from which the Secretary improperly withheld tax and (ii) to send notices to all affected veterans notifying them of their eligibility to receive credits or refunds and providing instructions for filing amended tax returns. It further provided that veterans who received DSP from the Department of Defense may file timely claims for credit or refund within one year from the date of the notice sent by the Secretary of Defense or by the date the period of limitations described in IRC § 6511(a) expires, whichever is later.

IRC § 7701(a)(15) defines the terms "military or naval forces of the United States" and "Armed Forces of the United States" to include "all regular and reserve components of the uniformed services which are subject to the jurisdiction of the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, or the Secretary of the Air Force [as well as] the Coast Guard."

241 Pub. L. No. 114-292, 130 Stat. 1500 (2016).

Reasons for Change

Notwithstanding that the IRC's definition of "military or naval forces of the United States" includes the Coast Guard, the Act was drafted in a manner that excludes veterans of the Coast Guard from its scope. More specifically, Section 3(a) of the Act directed the Secretary of Defense to identify DSP paid after January 17, 1991, that should have been excluded from gross income, but it did not direct the Secretary of Homeland Security, to whom the Coast Guard reports, to identify affected Coast Guard veterans and DSP amounts from which taxes were withheld.

Like members of the services within the Department of Defense, members of the Coast Guard often face perilous circumstances and potential injuries as they perform their mandated duties. For example, the Coast Guard is responsible for maintaining a "state of readiness to assist in the defense of the United States, including when functioning as a specialized service in the Navy pursuant to [14 USC] section 103."[242] We believe the exclusion of Coast Guard veterans was inadvertent and that members of the Coast Guard should be provided the same additional time to file a claim for credit or refund as other veterans of the "military or naval forces of the United States."

Recommendation

- Amend Section 3(a) of the Combat-Injured Veterans Tax Fairness Act of 2016 to provide that the severance payments specified under Section 3(a) include those paid by the Secretary of Homeland Security (or predecessor) and to require the Secretary of Homeland Security to notify veterans of the Coast Guard about disability severance pay from which taxes were withheld.

242 14 USC § 102.

#58 AUTHORIZE INDEPENDENT CONTRACTORS AND SERVICE RECIPIENTS TO ENTER INTO VOLUNTARY WITHHOLDING AGREEMENTS WITHOUT RISK THAT THE AGREEMENTS WILL BE USED TO CHALLENGE WORKER CLASSIFICATION DETERMINATIONS

Present Law

Under Internal Revenue Code (IRC) § 3402(p), the IRS is authorized to accept withholding agreements. Specifically, IRC § 3402(p)(3) authorizes the Secretary to promulgate regulations to provide for withholding from any type of payment that does not constitute wages if the Secretary finds withholding would be appropriate and the payor and recipient of the payment agree to such withholding.[243] However, the provision specifically states that the Secretary must find the withholding would be appropriate "under the provisions of [IRC chapter 24, *Collection of Income Tax at Source on Wages*]."

IRC chapter 24 addresses collection of taxes at the source with respect to employees (*e.g.,* wage withholding). Although current regulations provide that the Secretary may issue guidance by publication in the Internal Revenue Bulletin describing other payments for which withholding under a voluntary withholding agreement would be appropriate,[244] the only such guidance that has been issued to date is Notice 2013-77, dealing with dividends and other distributions by an Alaska Native Corporation.[245]

Reasons for Change

Unlike employees, whose wage payments are subject to federal income tax withholding, independent contractors are generally responsible for paying their own income taxes. Independent contractors are required to make four estimated tax payments during the year. However, many contractors fail to make estimated tax payments for a variety of reasons and therefore face penalties under IRC § 6654. Some have difficulty saving money and finish the year with substantial tax liabilities they cannot afford to pay. As a result, they face additional penalties and interest charges, and they may face IRS collection action, including liens and levies.

The absence of withholding on payments to independent contractors also has a negative impact on revenue collection. IRS National Research Program studies show that tax compliance is substantially lower among workers whose income taxes are not withheld.[246]

This problem may be increasing as more workers are choosing to work in the so-called "gig economy." To reduce the risk that they will not save enough money to pay their taxes, some independent contractors would prefer that taxes be withheld throughout the year, as they are for employees. There is a legitimate debate about the circumstances under which withholding should be required. However, the National Taxpayer Advocate believes workers and businesses should have the option to enter into voluntary withholding agreements when both parties agree to do so.

For many businesses, withholding on payments to independent contractors will not impose additional burden. In addition to paying independent contractors, most large companies have full-time employees, such as administrative staff, so they already have procedures in place to withhold. We understand some businesses are reluctant to withhold due to concern the IRS may use the existence of a withholding agreement to challenge

243 Payments made when a voluntary withholding agreement is in effect are treated as if they are wages paid by an employer to an employee for purposes of the income tax withholding provisions and related procedural provisions of subtitle F of the IRC.

244 *See* Treas. Reg. § 31.3402(p) -1(c).

245 Notice 2013-77, 2013-50 I.R.B. 632.

246 Government Accountability Office (GAO), GAO-17-371, *Timely Use of National Research Program Results Would Help IRS Improve Compliance and Tax Gap Estimates* (Apr. 18, 2017), https://www.gao.gov/products/GAO-17-371.

the worker classification arrangement. This concern would be addressed if the IRS is restricted from citing the existence of a voluntary withholding agreement as a factor in worker classification disputes. Indeed, the IRS could, on a case-by-case basis, provide a safe-harbor worker classification in which it affirmatively agrees not to challenge the classification of workers who are a party to such agreements at all, since these agreements will ensure the IRS collects the full amount of income taxes due.

Recommendations

- Amend IRC § 3402(p) to clarify that when voluntary withholding agreements are entered into by parties who do not treat themselves as engaged in an employer-employee relationship, the IRS may not consider the existence of such agreements as a factor when challenging worker classification arrangements.
- Direct the Secretary to evaluate the benefits of agreeing not to challenge worker classification arrangements when voluntary withholding agreements are in place.[247]

247 For legislative language generally consistent with this recommendation, see Small Business Owners' Tax Simplification Act, H.R. 3717, 115th Cong. § 9 (2017).