2017 TAXA Supplement

NOTE – This document continues to be updated through mid-January 2018. You might want to just use it online rather than print it. Also, the links are live. For more on P.L. 115-97, Tax Cuts and Jobs Act (HR 1, 12/22/17), see the updates links at http://mntaxclass.com and the slides for Chapter 1.

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Errata – Corrections to the Outline or Slides

While we work hard to be complete and accurate, a mistake can happen.

Page 1-13 on PL 115-63 and Charitable Contributions

PL 115-63 on disaster relief for the three hurricanes does not allow a deduction above the line for charitable contributions. Instead, it relaxes the percentage limitations for certain contributions made before 2018.

Page 1-12 – P.L. 115-97 (12/22/17) Changes Medical Threshold for 2017 and 2018

This is not a mistake because the long outline was completed in October. At that time, the law provided that all individuals, regardless of age, would be subject to a 10% of AGI threshold for the medical deduction. The Tax Cuts and Jobs Act (P.L. 115-97 (12/22/17) changed this threshold for all individuals. With tax reform, for 2017 and 2018, the medical threshold is 7.5% of AGI for both regular tax and AMT. It becomes 10% in 2019 and thereafter.

Chapter 1: New Law and Related Guidance

Tax Reform P.L. 115-97 (12/22/17)

See links to bills and Joint Committee on Taxation summaries at http://21stcenturytaxation.blogspot.com/2017/11/tax-reform-links-and-examples.html. [also has links to show the history of the legislation starting when H.R. 1 was introduced by the House Ways and Means Committee on 11/2/17.]

and see Gary's update to the Conference report to show what was enacted - http://mntaxclass.com/files/0McBrideLinkedConferenceAgreementwithByrd.pdf.

IRS Clarifies Effective Date on New Prohibition on Roth IRA Conversion

PL 115-97 prohibits a conversion from a traditional IRA to a Roth IRA from being recharacterized (converted back). The Act states that this is effective for tax years beginning after 12/31/2017. Thus, it is not clear if it literally means the conversion or for a 2017 tax return, which could be recharacterized by the extended due date making the effective date for such returns 10/15/18. In an online FAQ posted 1/23/18, the IRS states:

> "**How does the effective date apply to a Roth IRA conversion made in 2017?**
>
> A Roth IRA conversion made in 2017 may be recharacterized as a contribution to a traditional IRA if the recharacterization is made by October 15, 2018. A Roth IRA conversion made on or after January 1, 2018, cannot be recharacterized. For details, see "Recharacterizations" in Publication 590-A, Contributions to Individual Retirement Arrangements (IRAs)."

Tax Reform and Prepayment of Schedule A Taxes

Tax reform results in individuals only being able to deduct a maximum of $10,000 of state taxes as an itemized deduction for 2018 through 2025. This can be a combination of income or sales tax, plus property taxes. If MFS, the maximum is $5,000. This led to many people suggesting deducting 2018 state and local taxes in 2017 to maximize the deduction. There are at least two issues with prepaying 2018 state and local income taxes in 2017:

1. Most likely, most, if not all, individuals have no 2018 state or local income tax liability as 12/31/17 so there is no possible deduction. Some argue that the 12-month prepayment

rule of Reg. 1.263(a)-4(f) allows the deduction, but there must still be a liability (rather than a deposit or made up liability) before this rule can be used.

NOTE: The above was confirmed when the conference bill and explanation released on 12/15/17 specified that state or local income taxes paid in 2017 are treated as paid on 12/31/18. See article and links at http://21stcenturytaxation.blogspot.com/2017/12/2018-state-taxes-not-deductible-in-2017.html, and Section 164 as amended by PL 115-97.

2. Many individuals are likely in AMT for 2017 so won't benefit from a higher state tax deduction on the 2017 return.

So, what about real property taxes for 2018? Was this an oversight that P.L. 115-97 only referred to state and local income taxes? Perhaps. The two issues listed above still apply. Another issue is that the tax collector might not accept the tax payment so won't treat it as a 2018 liability. For example, in response to many questions received from property owners on how to pay their 2018 real property taxes by 12/31/17, the Los Angeles Assessor and Tax Collector issued a joint press release stating that is it not possible to do so. The release does say that the second installment for 2017 (due in 2018) can be paid by the end of the year. But per the release, regarding 2018 taxes in 2017:

> "**Important notes**: Property owners may not pre-pay their 2018-2019 property taxes in December 2017. The 2018-2019 property tax bills against which these pre-payments would be credited will not be generated and mailed until September/October 2018.
>
> The Assessor does not accept payments; this is solely a function of the Tax Collector. All payments submitted to the Assessor will be returned."

In contrast, Montgomery County, Maryland issued a press release saying they would accept prepayments of 2018 taxes, preferably by mail. They also advise property owners to consult their tax adviser regarding the tax treatment (12/26/17 press release).

In New York, Governor Cuomo issued Executive Order 112 (12/22/17) to allow counties and collecting officers to college property taxes early. See the details for the EO and actions of the counties to determine if this means 2018 taxes were actually assessed in 2017.

12/27/17 UPDATE: On 12/27/17, the IRS released IR-2017-210 to remind taxpayers (and preparers) that "prepaid real property taxes may be deductible in 2017 if assessed and paid in 2017." The full text follows:

> "IR-2017-210, Dec. 27, 2017
>
> WASHINGTON - The Internal Revenue Service advised tax professionals and taxpayers today that pre-paying 2018 state and local real property taxes in 2017 may be tax deductible under certain circumstances.
>
> The IRS has received a number of questions from the tax community concerning the deductibility of prepaid real property taxes. In general, whether a taxpayer is allowed a deduction for the prepayment of state or local real property taxes in 2017 depends on whether the taxpayer makes the payment in 2017 and the real property taxes are assessed prior to 2018. A prepayment of anticipated real property taxes that have not been assessed prior to 2018 are not deductible in 2017. State or local law determines whether and when a property tax is

assessed, which is generally when the taxpayer becomes liable for the property tax imposed.

The following examples illustrate these points.

Example 1: Assume County A assesses property tax on July 1, 2017 for the period July 1, 2017 – June 30, 2018. On July 31, 2017, County A sends notices to residents notifying them of the assessment and billing the property tax in two installments with the first installment due Sept. 30, 2017 and the second installment due Jan. 31, 2018. Assuming taxpayer has paid the first installment in 2017, the taxpayer may choose to pay the second installment on Dec. 31, 2017, and may claim a deduction for this prepayment on the taxpayer's 2017 return.

Example 2: County B also assesses and bills its residents for property taxes on July 1, 2017, for the period July 1, 2017 – June 30, 2018. County B intends to make the usual assessment in July 2018 for the period July 1, 2018 – June 30, 2019. However, because county residents wish to prepay their 2018-2019 property taxes in 2017, County B has revised its computer systems to accept prepayment of property taxes for the 2018-2019 property tax year. Taxpayers who prepay their 2018-2019 property taxes in 2017 will not be allowed to deduct the prepayment on their federal tax returns because the county will not assess the property tax for the 2018-2019 tax year until July 1, 2018.

The IRS reminds taxpayers that a number of provisions remain available this week that could affect 2017 tax bills. Time remains to make charitable donations. See IR-17-191 for more information. The deadline to make contributions for individual retirement accounts - which can be used by some taxpayers on 2017 tax returns - is the April 2018 tax deadline.

IRS.gov has more information on these and other provisions to help taxpayers prepare for the upcoming filing season."

Tax Reform and Withholding Tables and Form W-4 for 2018

IRS Announcement at 12/13/17 – "The IRS is continuing to closely monitor the pending legislation in Congress, and we are taking the initial steps to prepare guidance on withholding for 2018. We anticipate issuing the initial withholding guidance (Notice 1036) in January reflecting the new legislation, which would allow taxpayers to begin seeing the benefits of the change as early as February. The IRS will be working closely with the nation's payroll and tax professional community during this process."

Observation: W-4 Forms likely need to be modified and refiled by many individuals because there is no longer a dependency exemption. That exemption is replaced by a $2,000 child credit if a child is under age 17 (up to $1,400 is refundable) and a $500 non-dependent credit (nonrefundable). Thus, the dependency answer on an employee's existing W-4 filed with an employer does not translate to a child credit. While the existing W-4 form asks about the child tax credit, changes in eligibility will require getting new information from employees.

IRS Announcement at 12/26/17 – "The IRS is working to develop withholding guidance to implement the tax reform bill signed into law on December 22. We anticipate issuing the initial withholding guidance in January, and employers and payroll service providers will be encouraged to implement the changes in February. The IRS emphasizes this information will be designed to work with the existing Forms W-4 that employees have already filed, and no further action by taxpayers is needed at this time.

Use of the new 2018 withholding guidelines will allow taxpayers to begin seeing the changes in their paychecks as early as February. In the meantime, employers and payroll service providers should continue to use the existing 2017 withholding tables and systems."

New Withholding Tables and FAQs

In early January 2018, the IRS issued updated wage withholding tables for 2018 due to change in rates by the Tax Cuts and Jobs Act (P.L. 115-97 (12/22/17)). The IRS also issued a set of FAQs about withholding tables.

See IR-2018-05 (1/11/18) - Updated 2018 Withholding Tables Now Available; Taxpayers Could See Paycheck Changes by February; and Notice 1036.

The FAQs include the following:

"**Q: Will people need to fill out a new W-4 form right now?**

A: No, the new withholding tables are designed to minimize taxpayer burden as much as possible and will work with the Forms W-4 that workers have already filed with their employers to claim withholding allowances. The IRS is working on revising the Form W-4 to more fully reflect the new law and provide taxpayers information to determine whether they need to adjust their withholding.

Q: Is the IRS working on a new Form W-4 to reflect the new tax law?

A: Yes. The IRS continues to work on more detailed withholding information, which will be available soon in Publication 15 and related publications. In addition, the IRS is working on revising the Form W-4 to more fully reflect the new law and providing taxpayers information to determine whether they need to adjust their withholding. The IRS is also revising the withholding tax calculator on IRS.gov to help employees who wish to update their withholding in response to the new law or other changes in their personal circumstances in 2018. The IRS anticipates this calculator should be available by the end of February.

Q: Should people check their withholding after the new 2018 Form W-4 and the withholding calculator are available?

A: Yes. It's always a good idea for people to check their withholding status. The IRS encourages all taxpayers to check their withholding when the new information is available in February. The IRS will help educate taxpayers about the new withholding guidelines and the calculator. The effort will be designed to help workers ensure that they are not having too much or too little tax taken out of their pay.

Q: Are some taxpayers at risk of being under-withheld on their taxes with the changes to the withholding tables?

A: Some people have more complicated tax situations and face the possibility of being under-withheld. For example, people who itemize their deductions, couples with multiple jobs or individuals with more than one job a year will be encouraged to review their tax situations. The IRS will be encouraging people – particularly those with more than one income in their household—to check their withholding. The IRS is updating the 2018 Form W-4 and the IRS.gov withholding calculator to help with this process."

Social Security Wage Base for 2018 Updated

On 11/27/17, the Social Security Administration released an updated 2018 figure for the wage base. The new figure is $128,400 (rather than $128,700 as first announced by SSA). The amount was updated based on updated wage data.

Retirement Plan Inflation Adjustments for 2018 – Update for Notice 2017-64

On 10/27/17, the IRS announced – "*This document provides a revised factor for adjusting a participant's high-3 compensation limitation under section 415(b)(1)(B) of the Code for plan years beginning on or after January 1, 2018. The revision is necessary due to the Bureau of Labor Statistics' adjustment of the CPI-U for the months of July and August 2016, which are used in the calculation of the factor. After taking into consideration the adjustments made by the BLS, the factor is 1.0197.*

Notice 2017-64 provides a listing of dollar limitations applicable to qualified retirement plans as adjusted for cost-of-living adjustments for 2018."

Notice 2018-06 (12/22/17) – Additional Time to File Forms 1095-B and 1095-C for 2017 – But Doesn't Delay Filing of 1040s

Per the IRS (12/22/17) – "Notice 2018-06 extends the due dates for certain 2017 information reporting requirements for insurers, self-insuring employers, and certain other providers of minimum essential coverage under section 6055 and for applicable large employers under section 6056. Specifically, this notice extends the due date for furnishing to individuals the 2017 Form 1095-B, Health Coverage, and the 2017 Form 1095-C, Employer-Provided Health Insurance Offer and Coverage, from January 31, 2018, to March 2, 2018. This notice also extends transitional good-faith relief from section 6721 and 6722 penalties to the 2017 information reporting requirements under sections 6055 and 6056."

In addition, per Notice 2018-06, "In view of this automatic extension, the provisions under Treas. Reg. §§ 1.6055-1(g)(4)(i)(B)(1) and 301.6056-1(g)(1)(ii)(A) allowing the Service to grant an extension of time of up to 30 days to furnish Forms 1095-B and 1095-C will not apply to the extended due date."

The due date for filing the forms with the IRS remains 2/28/18 (or 4/2/18 if filed electronically). If more time is needed to get the forms to the government, use Form 8809.

Individuals do not have to wait to get their Form 1095-B and/or 1095-C to file their return but can rely on other information they have about their coverage.

Paper Filing After 11/18/17 for 2016 Returns

In IR-2017-183 (10/31/17), the IRS announced that the e-filing system closed 11/18/17 for 2016 returns. After this date, paper returns must be filed instead. "The federally declared disaster areas include hurricane and tropical storm victims in Georgia, Florida, Puerto Rico, the Virgin Islands and parts of Texas, Louisiana and South Carolina, as well as wildfire victims in parts of California." Victims have until 1/31/18 to file their 2016 returns. [See additional information in the McBride/Nellen updates outline from CalCPA.]

Leave-Based Donations for California Wildfires and Hurricanes

Notice 2017-48 (9/5/17) & Notice 2017-52 (914/17), Notice 2017-62 (10/6/17) & Notice 2017-70 (11/9/17) – An employee will not be considered to have income if they have their employer cash our vacation, sick or personal leave to use for donations to §170(c) organizations for relief of victims of Hurricane Harvey and Tropical Storm Harvey (Notice 2017-48), Hurricane Irma (Notice 2017-52), Hurricane and Tropical Storm Maria (Notice 2017-62) and the California Wildfires (Notice 2017-70) before 1/1/19. No charitable contribution may be claimed by the employee for the donation. Employees are not treated as having actual or constructive receipt income from these leave-based donations. The employer may treat the transfer as a §162 business deduction. "Cash payments to which this guidance applies need **not** be included in Box 1, 3 (if applicable), or 5 of the Form W-2.-2."

IRS Relief for Victims of Southern California Wildfires and Floods - CA-2018-01 (1/17/18)

On 1/17/18, the IRS issued an announcement about relief for wildfire and flood victims in specified Southern California counties (CA-2018-01 (1/17/18)). Excerpt:

> "Victims of the wildfires, flooding, mudflows and debris flows that took place beginning on Dec. 4, 2017 in parts of California may qualify for tax relief from the Internal Revenue Service.

The President has declared that a major disaster exists in the State of California. Following the recent disaster declaration issued by the Federal Emergency Management Agency, the IRS announced today that affected taxpayers in certain California counties will receive tax relief.

Individuals who reside or have a business in Los Angeles, San Diego, Santa Barbara and Ventura Counties may qualify for tax relief.

The declaration permits the IRS to postpone certain deadlines for taxpayers who reside or have a business in the disaster area. For instance, certain deadlines falling on or after Dec. 4, 2017 and before April 30, 2018, are granted additional time to file through April 30, 2018. This includes 2017 individual income tax returns normally due on April 17, 2018. It also includes the fourth quarter estimated tax payment normally due on Jan. 16, 2018.

In addition, penalties on payroll and excise tax deposits due on or after Dec. 4, 2017, and before Dec. 19, 2017, will be abated as long as the deposits were made before Dec. 19, 2017.

If an affected taxpayer receives a late filing or late payment penalty notice from the IRS that has an original or extended filing, payment or deposit due date that falls within the postponement period, the taxpayer should call the telephone number on the notice to have the IRS abate the penalty.

The IRS automatically identifies taxpayers located in the covered disaster area and applies automatic filing and payment relief. But affected taxpayers who reside or have a business located outside the covered disaster area must call the IRS disaster hotline at 866-562-5227 to request this tax relief."

§956 and Hurricane-Damaged Property – Notice 2017-68

Per the IRS (10/27/17): "Notice 2017-68 announces that obligations of a United States person received in exchange for certain property that was located in an area designated by FEMA as subject to damage from Hurricane Irma or Hurricane Irma will be considered to qualify for the exception from United States property in section 956(c)(2)(C) and Treas. Reg. §1.956-2(b)(1)(v) if repaid by March 31, 2018."

Qualified Employer Plans and Hurricane Maria and California Wildfires – Announcement 2017-15 (1/31/17)

Per IRS: "Announcement 2017-15 providing relief to victims of Hurricane Maria and the recent California wildfires, which caused damage to Puerto Rico, the U.S. Virgin Islands and parts of California. It permits easier access to funds held in workplace retirement plans and in IRAs, for the period beginning September or October 2017 and ending March 15, 2018. The relief provided in the announcement is in addition to the relief already provided by the IRS pursuant to News Releases CA-2017-06, VI-2017-02 and PR-2017-02."

Safe Harbor Methods for Measuring Loss for Homes and Personal Belongings Including For 2017 Hurricanes – Rev. Proc. 2018-08 and Rev. Proc. 2018-09

Per the IRS (IR-2017-202 (12/13/17):

> "As part of a wider effort to help victims of natural disasters, the Internal Revenue Service today issued guidance providing safe harbor methods that individuals may use in determining the amount of their casualty and theft losses for their homes and personal belongings, including losses from recent hurricanes.
>
> Revenue Procedure 2018-08 provides safe harbor methods that individual taxpayers may use in determining the amount of their casualty and theft losses for their homes and personal belongings. Four of the safe harbor methods may be used for any qualifying casualty or theft loss, and three are specifically applicable only to losses occurring as a result of a Federally declared disaster.
>
> For instance, one of the safe harbor methods allows a homeowner to determine the amount of loss, up to $20,000, by obtaining a contractor estimate of repair costs. Another safe harbor method allows a homeowner to determine the amount of loss resulting from a Federally declared disaster using the repair costs on a signed contract prepared by a licensed contractor. The guidance also provides a handy table for determining the value of personal belongings damaged, destroyed or stolen as a result of a Federally declared disaster.
>
> Revenue Procedure 2018-09 provides a safe harbor method under which individuals may use one or more cost indexes to determine the amount of loss to their homes as a result of Hurricane and Tropical Storm Harvey, Hurricane Irma and Hurricane Maria (2017 Hurricanes). The cost indexes provide tables with cost per square foot for Texas, Louisiana, Florida, Georgia, South Carolina, Puerto Rico and the U.S. Virgin Islands (2017 Disaster Area).
>
> The safe harbor methods detailed in Revenue Procedure 2018-08 are effective on Dec. 13, 2017; the safe harbor method detailed in Revenue Procedure 2018-09 is effective for losses that are attributable to the 2017 Hurricanes and that arose in the 2017 Disaster Area after August 22, 2017. IRS Publication 547 provides more information on casualty and theft losses. If people want to explore claiming these losses by filing an original or amended return for Tax Year 2016, the IRS has also issued a new revision of the 2016 Form 4684 and 2016 Instructions for Form 4684. The 2017 revision of Form 4684, its instructions and any additional information will be available before the start of the filing season at IRS.gov/Form4684.
>
> To help taxpayers navigate casualty loss issues, the IRS has created a special web page: Tax Law Provisions for Disaster Areas, with additional information for disaster victims."

Chapter 2: Expiring Tax Provisions

Tax Reform and Expiring Provisions

Each January, the Joint Committee on Taxation issues a report on the provisions that expire that year and beyond. The report to be released in January 2018 should be very useful in highlighting the numerous temporary provisions included in P.L. 115-97 (12/22/17), the Tax Cuts and Jobs Act. Look for it at http://www.jct.gov (usually noted in the list in the right margin of the webpage).

A More Temporary Federal Tax Law

A comparison of the number of temporary items listed in the Joint Committee on Taxation's January 2017 versus January 2018 list of expiring provisions follows:

Year	2017 JCT Report	2018 JCT Report
2016	36	34*
2017	2	1**
2018	1	3
2019	10	9
2020	1	1
2021	4	3
2022	2	2
2023	1	1
2024	0	0
2025	1	23
2026	0	2
2027	0	1
TOTAL	**58**	**80**

Also see this 1/21/18 blog post.

Possible Extenders Bill for 2017 and 2018 – S. 2256

On 12/20/17, Senator Hatch introduced S. 2256, Tax Extender Act of 2017. It would renew many of the provisions that expired 12/31/16 that are not otherwise addressed by tax reform (such as repeal of 199). This bill might be considered in January 2018. Until we know for sure, it is likely to delay the start of the filing season as the bill affects many 2017 tax forms.

JCT Releases Updated Expiring Provisions Report

On 1/10/18, the Joint Committee on Taxation released JCX-1-19, List Of Expiring Federal Tax Provisions 2016-2027. It includes the provisions in P.L. 115-97 that expire such as 25 individual changes that expire at 12/31/25. It also lists 42 items that expired at 12/31/16.

Chapter 3: Gross Income, Exclusions, and Deferrals

PLR 201743011 (10/30/2017)--No COD Income When Employer Waived Employee Repayment of Pension Overpayment

Facts:

You worked for Employer from Date 1 until your retirement on Date 2. While you were employed by Employer, you made after-tax contributions to the Pension Plan. 1 Due to your years of service as an Employee, you became eligible to receive payments from the Pension Plan, which the Department administers.

You began receiving payments from the Pension Plan on Date 3. You included in your gross income each year on your federal income tax return the taxable portion of the pension payments you received during that year. In accordance with Notice 88-118, 1988-47 I.R.B. 9, and § 72(b), you used the simplified safe harbor method to determine the tax-free and taxable portions of your pension payments from the Pension Plan.

On Date 4, you received a letter from the Department informing you that your pension was going to be reduced in the future due to systematic errors made years ago. The Department's calculations showed that you received a total overpayment of $x due to errors in the calculation of your benefit. The Department has the discretion to waive past overpayments if certain criteria are satisfied. The Department determined you satisfied the criteria for automatic waiver of the collection of the overpayment. You represent that the Department would furnish you a Form 1099-C, Cancellation of Debt , for ———- to reflect its waiver of collection of the $x overpayment.

IRS Conclusion:

Ordinarily, you would be obligated to repay the amount of the $x pension overpayment. The Department, however, waived the collection of the overpayment, which it is authorized to do. The $x discharge of indebtedness is not gross income under §61 because you accounted for all your pension payments under the Pension Plan (including the $x overpayment) under Notice 88-118 as you received them.

PLR 201742017 (10/20/2017) -- Court Ordered Injunction Barring Collection of Financial Institution Debt Was Not a Debt Discharge Reporting Event

As the result of a class action lawsuit, because the financial institution's ("Entity") collection notice to defaulting debtors was deficient under state law, a state court ordered the Entity to write-off loan deficiencies. "Subsequently, Entity and the class entered into a settlement agreement which included, inter alia, a provision requiring Entity to write-off deficiency balances owed by the class."

Per the IRS:

> In this case, the Court's order barred Entity from collecting the deficiency balances. Entity and the class did not arrive at an agreement to discharge the indebtedness, nor did Entity decide to discharge the indebtedness, within the meaning of section 1.6050P- 1(b)(2). Because none of the identifiable events listed in section 1.6050P-1(b)(2) occurred, Entity is not required to report [no Form 1099-C) these write-offs.

Implicitly, no COD income was generated.

No 1099 Required for State Payments for Promotion of General Welfare – PLR 201743010 (10/27/17)

PLR 201743010 (10/27/17) - The IRS ruled that payments to "support the continued residence of individuals with an intellectual or a developmental disability, in their own homes or their families' homes, and to prevent placement in an institution "are for the promotion of general welfare and are therefore excludable from the individual's gross income. Accordingly, the Agency is not required by § 6041 to file information returns reporting payments made by the Program."

The IRS also stated that "§6041 only requires reporting of payments in excess of $600 which are includible in the recipient's gross income." Also see Reg. 1.6041-1(f).

Regarding the "general welfare exclusion," the IRS stated:

> "Under § 61(a), except as otherwise provided in subtitle A, gross income includes all income from whatever source derived. The Internal Revenue Service has consistently concluded, however, that certain payments to individuals by governmental units under legislatively provided social benefit programs for the promotion of the general welfare of the public (*i.e.*, based on need) are not includible in a recipient's gross income (general welfare exclusion).
>
> To qualify under the general welfare exclusion, payments must (i) be made from a governmental fund, (ii) be for the promotion of general welfare (i.e., generally based on individual or family needs such as housing, education, and basic sustenance expenses), and (iii) not represent compensation for services. *See, e.g.*, Rev. Rul. 57- 102, 1957-1 C.B. 26, (general welfare exclusion applies to payments to the blind); Rev. Rul. 78-46, 1978- 1 C.B. 22 (general welfare exclusion applies to debt forgiveness for public safety officers killed in the line of duty); Rev. Rul. 75-246, 1975-1 C.B. 24 (general welfare exclusion applies to amounts paid in connection with job training for economically disadvantaged); and Rev. Rul. 63-136, 1963-2 C.B. 19 (general welfare exclusion applies to payments made under government grant for retraining individuals for better job skills). *Compare* Rev. Rul. 76-131, 1971-1 C.B. 16 (general welfare exclusion does not apply to bonuses paid by state to long-time residents as not based on need) *with* Rev. Rul. 98-19, 1998-1 C.B. 840 (general welfare exclusion applies to relocation payments made by city to residents to move from flood-damaged residence to another residence)."

Chapter 4: Deductions

2018 Mileage Rates – Notice 2018-03 (12/14/17)

Notice 2018-03 (12/1417) and IR-2017-204 (12/14/17) announce the updated mileage rates that start on 1/1/18. These rates are:

- 54.5 cents/mile for business travel (up 1 cent from 2017)
- 18 cents/mile for medical or moving (up 1 cent from 2017)
- 14 cents/mile for charitable (fixed by statute)

Disgorgement Fees and §162(f) – CCA 201748008 (11/17/17)

In CCA 201748008 (11/17/17) , the IRS states that disgorgement payments for violating federal securities law is non-deductible per §162(f). This is the same holding of CCA 201619008. It also relates to Kokesh v. SEC, 137 S. Ct. 1635 (2017) where the IRS was asked about the treatment of the payments. Per the IRS:

“The characterization of a payment for purposes of section 162(f) depends on the origin of the liability giving rise to it, not the ultimate use of the funds. Bailey v. Commissioner, 756 F.2d 44, 47 (6th Cir 1985); Nacchio v. United States, 824 F.3d 1370, 1380-1381 (Fed. Cir. 2016), cert. denied, 582 U.S. ___ (2017). Courts have held that section 162(f) prohibits a deduction for civil penalties "imposed for purposes of enforcing the law and as punishment for the violation thereof," and courts have also held that some payments, although labeled as "civil penalties," are deductible if "imposed to encourage prompt compliance with a requirement of the law or as a remedial measure to compensate another party." Waldman v. Commissioner, 88 T.C. 1384, 1387 (1987), aff’d without opinion, 850 F.2d 611 (9th Cir. 1988); Stephens v. Commissioner, 905 F.2d 667, 672-673 (2d Cir. 1990); see also Southern Pacific Transp. Co. v. Commissioner, 75 T.C. 497, 646-654 (1980). It is important to clarify that the correct analysis involves whether the payment was “a remedial measure to compensate another party,” not whether the payment was “a compensatory or remedial measure.” See Stephens, 905 F.2d at 673. The word “remedial” is not in the statute or the regulations. The fact that a payment is “remedial” does not by itself determine the tax treatment; the tax treatment depends on whether the payment is more punitive or compensatory. If a payment serves both a nondeductible purpose and a deductible purpose, it is necessary to determine which purpose the payment primarily serves.”

The IRS also noted that §162(f) does not solely address fines that are punitive. “The scope of “punitive” in this context includes the purpose of enforcing the law by deterring the proscribed conduct in the future: “Thus, it is clear that, if the deduction of a civil fine (or similar penalty) is to fall within the proscription of section 162(f), the fine must be one which punishes and/or deters.” … Therefore, a payment imposed primarily for purposes of deterrence and punishment is not deductible under section 162(f).”

In Kokesh, the USSC held that “disgorgement imposed as a sanction for violating a federal securities law was a penalty for purposes of the 5-year statute of limitations in 28 U.S.C. § 2462 (applicable to an action for the enforcement of any civil fine, penalty, or forfeiture). In its analysis, the Supreme Court stated that “SEC disgorgement . . . bears all the hallmarks of a penalty: It is imposed as a consequence of violating a public law and it is intended to deter, not to compensate.” ... The Court also stated that “courts have consistently held that `[t]he primary purpose of disgorgement orders is to deter violations of the securities laws by depriving violators of their ill-gotten gains.’”… Because, as the Supreme Court held, disgorgement payments are penalties and are not compensatory, section 162(f) prohibits a deduction under section 162(a) for an amount paid as disgorgement for violating a federal securities law.”

Notice 2017-73 - IRS Seeking Comments on Donor-Advised Funds

Per the IRS (12/4/17): “Notice 2017-73 describes approaches that the Department of the Treasury and the Internal Revenue Service are considering to address certain issues regarding donor advised funds of sponsoring organizations and requests comments on those approaches.”

“SECTION 1. PURPOSE This notice describes approaches that the Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) are considering to address certain issues regarding donor advised funds (DAFs) of sponsoring organizations and requests comments on those approaches. Specifically, the Treasury Department and the IRS are considering developing proposed regulations under § 4967 of the Internal Revenue Code (Code) that would, if finalized, provide that: (1) certain distributions from a DAF that pay for the purchase of tickets that enable a donor, donor advisor, or related person under § 4958(f)(7), to attend or participate in a charity-sponsored event result in a more than incidental benefit to such person under § 4967; and (2) certain distributions from a DAF that the distributee charity treats as fulfilling a pledge made by a donor, donor advisor, or related person, do not result in a more than incidental benefit under § 4967 if certain requirements are met. In addition, the Treasury Department and the IRS are considering developing proposed regulations that would change the public support computation for organizations described in §§ 170(b)(1)(A)(vi) and 509(a)(1) and in § 509(a)(2) to prevent the use of DAFs to circumvent the excise tax rules applicable to private foundations under Chapter 42 of the Code. This notice requests comments [by 3/5/18] regarding the issues addressed in the notice as well as certain other issues.”

Chapter 5: Losses

AOD 2017-07 10/16/2017) – IRS Nonacquiescene on Two PAL REP Issues In *Stanley v. U.S.* (DC AR) (11/12/2015)

Full text of IRS AOD (in italics):

1) *Was Roy E. Stanley (Taxpayer) a "5-percent owner" (within the meaning of §§ 469(c)(7)(D)(ii) and 416(i)(1)(B) of the Internal Revenue Code) of Lindsey Management Co., Inc.?*

2) *Did Taxpayers (Taxpayer husband and wife filing jointly) appropriately "group" the aggregated rental real estate activity with other non-rental trade or business activities under §1.469-4?*

Discussion:

In 2009 and 2010, Taxpayer was President Emeritus of Lindsey Management Co., Inc. ("LMC"), a property management company that manages apartment complexes, golf courses, and commercial properties in Arkansas and surrounding states. For 2009 and 2010, Taxpayers reported as non-passive the income and losses from their ownership interests in these entities, as well as from their directly-owned rental real estate. The IRS reclassified the income and losses from these entities as passive. Taxpayers argued that Taxpayer qualified as a real estate professional for purposes of § 469(c)(7) and that they materially participated in their aggregated rental real estate activity. Taxpayers further contended that they should be allowed to treat all of their rental real estate and non-rental trade or business activities such as the golf courses as a single "grouped" activity under §1.469-4.

5-Percent Owner Rule

We disagree with the court's finding to the extent that it implies that mere possession of a stock certificate, disregarding any other conditions, restrictions or other limitations on the rights of the possessor with respect to the stock, constitutes ownership for purposes of §469(c)(7), and to the extent it found the Taxpayer to own the stock given the particular conditions, restrictions and other limitations on the rights of the Taxpayer with respect to the stock. For purposes of determining whether Taxpayer qualified as a real estate professional under § 469(c)(7), personal services performed by the Taxpayer as an employee are not treated as performed in a real property trade or business unless the Taxpayer is a "5-percent owner" (as defined in § 416(i)(1)(B)) of the employer. The court found that the evidence presented by Taxpayers (primarily a stock certificate) was sufficient to show that Taxpayer held ten percent of the stock of LMC for tax years 2009 and 2010. The court noted that Taxpayer's ownership of the stock was acknowledged by employment agreements that memorialized the understanding between the parties that Taxpayer would relinquish his stock upon full retirement. The court noted that it construed the evidence as a legal issue of what may constitute or substantiate ownership, but also noted that in the event it may be construed as an issue of evidentiary sufficiency, the Taxpayer had shown his ownership by a preponderance of the evidence.
However, we believe that considering all the rights held by the Taxpayer, including the conditions on those rights, Taxpayer was not a "5-percent owner" of LMC, because his right to receive the 10-percent "Percentage Salary" (as it was referred to pursuant to the terms of the employment agreements dated 1/17/94 (including addenda)) and 3/24/08 lacked the indicia of an "entrepreneurial stake" that was the impetus of the 5-percent owner requirement for purposes of § 469. Taxpayer provided nothing more than his "time and labor" (that is, his work as an employee at LMC) in exchange for the Percentage Salary; he received no consideration when he relinquished his right to the

Percentage Salary when he retired and terminated employment with LMC. Furthermore, the employment agreements put restrictions on the entitlement of Taxpayer and his estate to the Percentage Salary, including a limited time period to continue to receive such Percentage Salary after the occurrence of disability or death, and the requirement to relinquish his 10-percent ownership interest upon full retirement. The employment agreements do not contain any provisions requiring Taxpayer to receive consideration for relinquishing the 10-percent ownership interest, and Taxpayer received no consideration. This evidences that the applicable provisions made the Taxpayer's right to the Percentage Salary more akin to a type of compensation or benefit of his employment relationship than an indication of stock ownership in LMC. Accordingly, we believe that the arrangement that Taxpayer had with LMC may properly be characterized as Taxpayer having been permitted by LMC and LMC's other shareholders to temporarily hold the stock for the period of his employment as a means of measuring and paying additional compensation, rather than as Taxpayer having owned the stock as a means of measuring and paying the

Taxpayer a portion of any increase in value of the corporation (and having the Taxpayer experience some type of economic loss upon any decrease in value of the corporation).
Grouping Rental Real Estate Activities of Real Estate Professionals With Non- Rental Activities

The court reasoned that, read in context, §1.469-9(e)(3)(i) bars "grouping" of rental real estate activities with other types of activities only for purposes of determining material participation and does not categorically bar a real estate professional from "grouping" rental real estate with non-rental trade or business activities for other purposes of §469, "including for purposes of determining passive activity loss and credit." The court reasoned that this section appears to apply to "grouping" for purposes of determining material participation or, perhaps, to aggregating rental activities pursuant to §1.469-9(g). Accordingly, the court found that Taxpayers were not categorically prohibited from "grouping" their aggregated rental real estate activity with their other non-rental trade or business activities under § 1.469-4(d)(1).

We believe the court incorrectly interpreted the "for purposes of this section" language in §1.469-9(e)(3)(i) to determine that this rule only applies for purposes of applying §469(c)(7) and, more specifically, only for determining whether a taxpayer materially participates in a rental real estate activity. The court never reconciled the language in §1.469-9(e)(3)(i) with the regulatory language in §1.469-9(e)(1) or the statutory language in §469(c)(7)(A)(ii) from which the regulatory language is derived, both of which make clear that those rules apply for all purposes of §469. With respect to the statutory language in particular, the phrase "this section" necessarily refers to §469 generally and not to a particular subsection such as §469(c)(7). We believe the statute and regulations require real estate professionals to demonstrate material participation in their rental real estate activities through work they perform directly in the rental real estate activities, and not simply by virtue of the work performed in their other real property trades or businesses (such as real estate construction or development *businesses). Otherwise, §469(c)(7)(A)(ii) would serve no purpose. The rules in §1.469-9(e)(1) and (3)(i) simply reiterate this statutory prohibition.*

In this case, Taxpayers desired to "group" the aggregated rental real estate activity with interests in adjacent golf courses, in order for Taxpayer's work performed in managing the rental real estate to count towards meeting the material participation requirements for the golf courses. Determining whether a taxpayer materially participates in a trade or business activity is the central inquiry in determining whether a taxpayer's losses and credits from that activity will be subject to limitation under §469. From this initial determination all other consequences under §469 will follow. Accordingly, we believe there is no statutory or regulatory foundation for the court's finding that taxpayers that qualify as real estate professionals under §469(c)(7) generally are permitted to "group" their rental real estate activities with other non-rental trade or business activities "for other purposes of §469" beyond determining material participation in the rental real estate activities.

Certain Deteriorating Concrete Foundations – Rev. Proc. 2017-60 (11/22/17)

Per the IRS (11/22/17): "Revenue Procedure 2017-60 provides a safe harbor that allows an individual to deduct the amounts paid to repair damage to his or her personal residence caused by deteriorating concrete foundations containing the mineral pyrrhotite."

§280A and Use as a Residence - *Okonkwo*, No. 16-71020 (9th Cir., 12/11/17)

Okonkwo, No. 16-71020 (9th Cir., 12/11/17), unpublished – The 9th Circuit Court affirmed the Tax Court decision that no deductions were allowed for their rental property because their daughter who was the tenant did not pay fair rent. Following is a summary of the 2015 Tax Court opinion.

§280A and Use as a Residence – *Okonkwo*, TC Memo 2015-181 (9/14/15) – H&W had a principal residence in Bel Air in Los Angeles. In 1997 they built a single-family residence in Woodland Hills. Once built, they tried for about four years to sell it. After that, from 2002 through 2006, they rented it for $6,000 per month to an unrelated party. From 2007 through early 2010, H&W's daughter lived in the home but only paid $2,000 per month. During this time, they also tried to sell the home.

Deductions for 2008 included mortgage interest on the Bel Air home of about $101,000 and a loss of about $158,000 on the Woodland Hills home. This loss was reported as passive on Form 8582.

When their CPA prepared the 2009 and 2010 returns, he asked why the rental income was much lower and learned that the daughter was living in the home. For these years, he reported the rental receipts on Schedule C and claimed losses of about $85,000 and $107,000 for these years. The return indicated that H&W were in the construction business. Per H&W, their CPA suggested amending the 2008 return to match the treatment on the 2009 and 2010 returns and H&W received a refund of almost $9,000.

The IRS disallowed the Schedule C deductions and found losses to be passive, and assessed penalties under §6662.

At issue was application of §280A. The court found the Woodland Hills home to be used as a residence because of the use by their daughter at less than fair rental is attributable to them. Thus, per §280A(c)(5), deductions cannot exceed rental income (the excess deductions are carried forward). The exception at §280A(d)(3) for rental to a family member did not apply because the rent charged was not fair rental.

H&W argued unsuccessfully that they are real estate developers and the daughter lived in the house because their insurance policy required that the house be occupied.

The court waived the §6662 penalty related to the rental deficiency due to good faith reliance on their CPA. However, the portion attributable to excess mortgage interest deduction claimed on Schedule C was not waived.

Chapter 6: Filing Status, Dependents, Credits and Kiddie Tax

Chapter 7: ACA – New Figures and Other Developments

Notice 2017-74 – Affordability Exemption When No Bronze Plan Available

Per the IRS (12/6/17): "Notice 2017-74 provides that Individuals who are not eligible for coverage under an eligible employer-sponsored plan and who lack access to affordable coverage should not be denied the use of the affordability exemption under § 5000A(e)(1) and § 1.5000A-3(e) merely because they reside in an area served by a Marketplace that does not offer a bronze-level plan. Consequently, for purposes of the affordability exemption under § 5000A(e)(1) and § 1.5000A-3(e), if an individual resides in a rating area served by a Marketplace that does not offer a bronze plan, the individual generally should use as his or her applicable plan the lowest cost metal-level plan available in the Marketplace serving the rating area in which the individual resides."

Chapter 8: IRAs and Qualified Retirement Plans

Fish, (CA 9 10/19/2017) -- IRA UBTI Losses Are Not Deductible By IRA Owner

Full Text of the Ninth Circuit's brief opinion:

> The only issue on appeal is whether Fish may deduct unrelated business taxable income ("UBTI") losses sustained by two partnerships held in an IRA from his personal taxable income. Although IRAs are generally tax-exempt, they are "subject to the taxes imposed by section 511" on UBTI of organizations in which they invest. I.R.C. § 408(e)(1); see I.R.C. §511. The Tax Code provides that UBTI losses may be carried forward or backward to deduct against gains within an IRA. See I.R.C. §512(b)(6); see also Treas. Reg. § 1.512(b)–(1)(e)(1) ("The net operating loss deduction provided in section 172 shall be allowed in computing unrelated business taxable income."). But, the Code does not provide for the pass-through of UBTI losses to an IRA beneficiary's personal tax return. See I.R.C. §§ 511–13. We therefore affirm the judgment of the Tax Court.

Notice 2017-72 – 2017 Required Amendments List for Qualified Retirement Plans

Per the IRS (12/5/17): Notice 2017-72 contains the 2017 Required Amendments List for individually designed qualified retirement plans. The list identifies certain changes in qualification requirements that became effective in 2017 that may require a retirement plan to be amended in order to remain qualified, and establishes the date by which any necessary amendment must be made."

Notice 2017=75 - Guidance Under Section 409A for Pre-2009 Section 457A Deferrals

Per the IRS (12/8/17): "Notice 2017-75 provides guidance on the application of §§ 409A and 457A. Specifically, this guidance addresses the transition provisions enacted as part of § 457A that generally provide that amounts deferred and attributable to services before January 1, 2009, that would otherwise have been subject to inclusion in income under § 457A, are includible in gross income in the later of the last taxable year beginning before 2018 or the date of vesting. This notice provides that service recipients may accelerate distributions to pay federal and state taxes on amounts includible in 2017 and after without violating § 409A."

Chapter 9: California – Major Developments Affecting Individuals

MyFTB Changes

Per the FTB's November 2017 newsletter (verbatim):

> MyFTB Changes Coming January 2, 2018

MyFTB

> The MyFTB Tax Preparer registration role will be renamed to Tax Professional. This

change better aligns this role.
Professional ID numbers valid for registration include:

- Preparer Tax Identification Number (PTIN)
- California Certified Public Accountant (CPA)
- California State Bar Number
- Enrolled Agent (EA) new

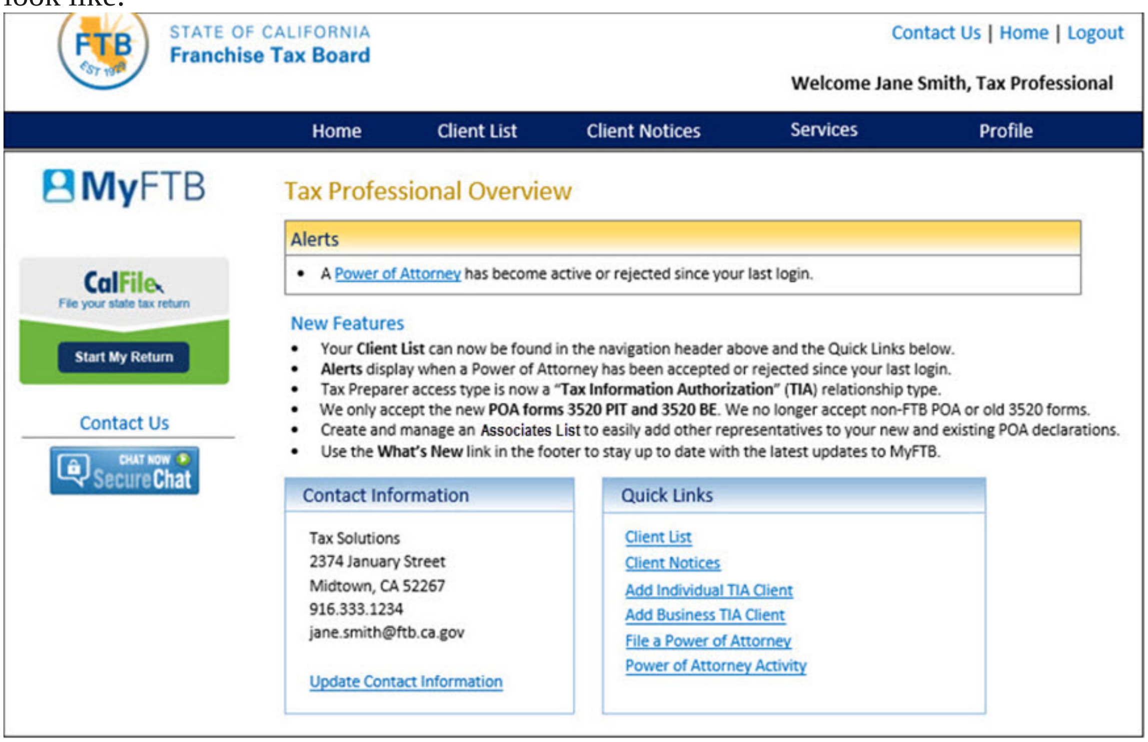
EFIN and CTEC will no longer be allowed as registration numbers.

Tax Information Authorization

The "Tax Preparer" access type will be renamed to Tax Information Authorization (TIA) throughout MyFTB. TIA is a new formal relationship for authorized representatives that we will recognize starting January 2, 2018. MyFTB will now display **TIA** as the relationship type. Tax professionals can establish a TIA in MyFTB (using the Add Individual TIA Client or Add Business TIA Client pages) or by mailing FTB 3534, Tax Information Authorization to FTB.

Tax Professional Homepage

Tax Professionals will have a new homepage called the **Tax Professional Overview**. This title matches the renamed registration role. Here's what the new home page will look like:



Some of the new features on the homepage include:

- **Alerts** displaying when a POA declaration has become active or been rejected. The POA link navigate to the POA Activity page.

- **New Features** highlighting the newest changes in MyFTB.
- **Contact Information** displaying your preferred contact information, if provided or the most recent information we have available. This includes an **Update Contact Information** link you update your contact information.
- **Quick Links** takes you to the most commonly used pages or tasks, you can:
- Navigate to the **Client List** page
- Navigate to **Client Notices** page for your Power of Attorney clients
- **Add Individual TIA Client** or **Add Business TIA Client** pages
- "TIA" has been added to this action to align with the new TIA relationship that will be established when adding a client.
- **File a Power of Attorney Declaration**
- View **Power of Attorney Activity**

Power of Attorney Activity
From your homepage, you can link to the **Power of Attorney Activity** page from either the **Alert** or **Quick Link** sections. This page displays up to 200 of the most recent declarations that became active or were rejected in the last 60 days. Only POA declarations processed after January 2, 2018 will display on this page.

Power of Attorney Activity

The following table displays POA declarations recently approved or rejected by FTB.

Show Filter

Date	Client Name	Description	Action
02/14/2018	Johnson, James	POA Declaration 250000000 set to Active status.	View POA
01/18/2018	ACME Management Inc	POA Declaration 240000000 rejected.	View POA
01/03/2018	Adams, Joseph	POA Declaration 230000000 set to Active status.	View POA

In December's MyFTB Corner Tax News article we will cover the following MyFTB changes coming January 2, 2018:

- Client List page
- Power of Attorney wizard
- Statuses for Power of Attorney and Tax Information Authorization relationships

MyFTB POA Changes

Per the FTB's December 2017 newsletter (verbatim):

New Power of Attorney and Tax Information Authorization Forms will be released on December 13, 2017.

On January 2, 2018, we will start using the new Power of Attorney and Tax Information Authorization forms, listed below. These forms will be released on December 13, 2017 to give you time to get your client's authorization before filing season, if needed.

Power of Attorney
The Power of Attorney (POA) declaration gives you authority to receive information and act on behalf of your client for the year(s) listed on the declaration.
New Power of Attorney Forms

- FTB 3520 PIT - Individual or Fiduciary Power of Attorney Declaration
- FTB 3520 BE – Business Entity or Group Nonresident Power of Attorney Declaration
- FTB 3520 RVK – Power of Attorney Declaration Revocation

We will no longer:

- Process non-FTB POA declaration forms or prior versions of FTB 3520 after January 1, 2018.
- Automatically revoke declarations with overlapping tax years. FTB 3520 RVK can be used to revoke declarations.

Exceptions
We will process the following forms:

- Military Durable declarations can be submitted without a completed 3520 PIT or 3520 BE, although we recommend on of the new forms be attached for faster processing
- General/durable declarations when submitted with a complete 3520 PIT or 3520 BE attached

Current POAs filed prior to January 2, 2018
All POA forms received prior to January 2, 2018 will be processed. In addition, all active declarations will retain the same privileges and will remain in effect until revoked or expired.

All Power of Attorney declarations filed after January 1, 2018 will expire six years from the signature date.

How to Submit a Power of Attorney Declaration
POA declarations can be established by:

- MyFTB – use MyFTB to enter the POA declaration information and upload the completed FTB 3520 PIT or FTB 3520 BE; the declaration will be rejected during processing if other forms are uploaded.
- Mail – mail FTB 3520 PIT or FTB 3520 BE to us at the below address.

  POA/TIA UNIT
  FRANCHISE TAX BOARD
  PO BOX 2828
  RANCHO CORDOVA CA 95741-2828

Note: Estate and Trusts and 540NR Group Nonresident Return are unable to have a MyFTB account at this time. However, for tax professionals, both entity types will display on the Client

List and POA representatives will be able to view their notices.

Tax Information Authorization
The Tax Information Authorization (TIA) is a new relationship recognized by FTB starting January 2, 2018. It gives representatives authority to receive *information only* for all tax years.

New Tax Information Authorization Forms

- FTB 3534 – Tax Information Authorization
- FTB 3535 – Tax Information Authorization Revocation

Duration
Tax Information Authorizations expire 13 months from the signature date or the date the TIA client was added in MyFTB.

How to Submit a Tax Information Authorization
TIA relationships can be established by:

- **MyFTB** – use MyFTB to add a TIA client, just as you do today. When using MyFTB, do not upload FTB 3534. Retain a copy for your records. Do not mail it to us.
- **Mail** – mail FTB 3534 to us (to the same address listed above).

FTB Legal Ruling 2017-02 (10/16/17) - IRC §6038D, NRAs and California Law

FTB Legal Ruling 2017-02, Conformity to Federal Information Filing Requirements Relating to Certain Foreign Financial Assets [Internal Revenue Code section 6038D] (10/16/17) provides various examples of how California conforms to the foreign financial asset reporting of IRC §6038D including filing of Form 8938. The ruling uses three scenarios to address this issue: "Whether California's conformity to federal information filing requirements relating to certain foreign financial assets imposed by Internal Revenue Code (IRC) section 6038D applies to nonresident aliens."

The rulings reminds readers of a 2015 California conformity law change: "In 2015, AB 154 (Stats. 2015, ch. 359) amended Revenue and Taxation Code (RTC) section 19141.5 to add subdivision (d), which conforms California to IRC section 6038D without any modifications. RTC section 19141.5(d)(2) imposes a penalty determined in accordance with IRC section 6038D." The ruling notes that it does not appear that California intends to impose a "broader filing requirement" than is provided by §6038D and federal regulations.

SITUATION ONE
Airi is a nonresident alien, who has an information filing requirement with his federal tax return imposed by IRC section 6038D because he holds foreign financial assets that exceed the reporting threshold and is a specified individual required to file under Treasury Regulation

section 1.6038D-1(a)(2) for the 2017 taxable year. Assume Airi also had California source income for the 2017 taxable year, and thus has an income tax return filing requirement in California.

HOLDING -- SITUATION ONE
Airi has an information filing requirement with his California income tax return imposed by RTC section 19141.5(d) for the 2017 taxable year because Airi has an information filing requirement with his federal income tax return imposed by IRC section 6038D, and has an income tax return filing requirement in California. Treasury Regulation section 1.6038D-2 provides that the information required to be furnished with the federal income tax return is IRS Form 8938, "Statement of Specified Foreign Financial Assets." Therefore, Airi is required to attach a copy of the IRS Form 8938 that he filed with the IRS to his California income tax return for the 2017 taxable year.[3] *A minimum penalty of $10,000 may be imposed by the FTB for failing to provide a copy of the filed IRS Form 8938 with his California income tax return, unless it can be shown that the failure was due to reasonable cause and not willful neglect.*

SITUATION TWO
Assume the same facts as Situation One, except that Airi does not have any California source income for the 2017 taxable year, and thus does not have an income tax return filing requirement in California.

HOLDING -- SITUATION TWO
Airi does not have an information filing requirement with his California income tax return under RTC section 19141.5(d) for the 2017 taxable year because Airi does not have an income tax return filing requirement in California for the 2017 taxable year.

SITUATION THREE
Assume the same facts as Situation One, except that Airi does not have an information filing requirement with his federal income tax return imposed by IRC section 6038D because Airi is not a specified individual required to file under Treasury Regulation section 1.6038D-1(a)(2).

HOLDING -- SITUATION THREE
Airi does not have an information filing requirement with his California income tax return under RTC section 19141.5(d) for the 2017 taxable year because Airi does not have an information filing requirement with his federal income tax return imposed by IRC section 6038D.

College Access Tax Credit Program – Significant changes and reminders

a. AB 490 (Chapter 527; 10/6/17) College Access Tax Credit – Extends the credit for five years, through 2022. Also, starting in 2017, "the aggregate amount of credit that may be allocated and certified pursuant to this section, Section 12207, and Section 23687 shall be an amount equal to five hundred million dollars ($500,000,000)" (rather than $500 million per year). FTB analysis - AB 490.

b. Applications to claim the credit for 2017 must be made by Thursday, November 30, 2017 at 5 pm, with the payment made by 12/31/17.

The credit amount for 2017 (and beyond) is 50%. As of 4/3/17, there is $500 million available to be claimed for 2017. In the first three years, despite $500 million allocated for each year, only the following amounts were claimed:

2014 $3,751,393

2015 $8,231,253

2016 $5,369,369

The application form and additional information is provided at the California Treasurer's website at http://treasurer.ca.gov/cefa/catc/.

On the federal return, individuals claim the donation amount as an itemized deduction. For California, only a 50% credit is claimed (no deduction). The percentage amounts differ for corporations. See above website.

Per the Treasurer's CEFA information, as described in the Assembly Floor Analysis to AB 490 (9/6/17):

> "According to CEFA, nearly $3.8 million in tax credits for 355 taxpayers (from about $6.2 million in contributions) were allocated and certified for tax year 2014. As such, tax year 2015 began with approximately $996 million in available credits, with nearly $8.2 million in tax credits for 328 taxpayers (from about $13.8 million in contributions) allocated and certified over the tax year. Tax year 2016 began with approximately $1.4 billion in available tax credits, with nearly $5.4 million in tax credits for 213 taxpayers (from about $9.9 million in contributions) allocated and certified over the tax year."

Once granted by the Treasurer, the credit is claimed on the income tax return using Form 3592.

TAXABLE YEAR **2016** **College Access Tax Credit** CALIFORNIA FORM **3592**

Attach to your California tax return.

Name(s) as shown on your California tax return	☐ SSN or ITIN ☐ CA Corporation no. ☐ FEIN
	California Secretary of State file number
Name of Credit Owner	☐ CA Corporation no. ☐ FEIN
	California Secretary of State file number

Available Credit

1 a	Credit amount issued by California Educational Facilities Authority (CEFA). See instructions	1a	00
b	Credit certificate number		
2	Pass-through College Access Tax Credit from Schedule K-1 (100S, 541, 565, or 568). See instructions	2	00
3	**Total current year credit.** Add line 1 and line 2	3	00
4	Credit carryover from prior year(s). See instructions	4	00
5	Total available College Access Tax Credit. Add line 3 and line 4	5	00
6 a	**Credit claimed.** Enter the amount of the credit claimed on the current year tax return. See instructions. (**Do not** include any assigned credit claimed on form FTB 3544A.)	6a	00
b	Total credit assigned. Enter the total amount from form FTB 3544, column (g). If you are not a corporation, enter -0-. See instructions	6b	00
7	Credit carryover available for future years. Add line 6a and line 6b, subtract the result from line 5	7	00

Estimated Tax Payments and Reminders

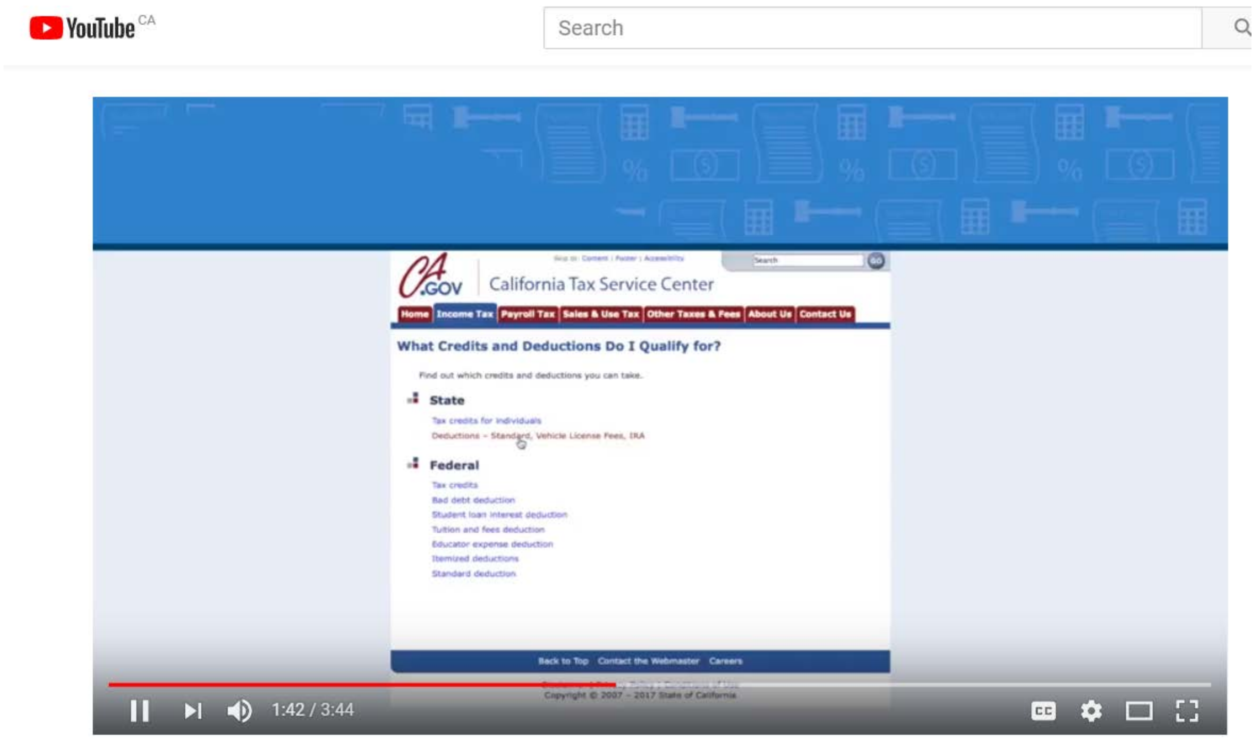
The FTB's November 2017 newsletter, explains and reminds about two aspects of estimated tax payments:

a) Third quarter – generally, there is no third quarter payments because 30% is required for the first and last quarter and 40% for the second quarter. However, if someone hasn't paid enough in for the first and second quarter, a third quarter payment can be made.

b) Taxpayers who want a reminder email about estimated tax payments can sign up for them at https://www.ftb.ca.gov/aboutFTB/Subscription_Services/index.asp.

FTB's Video for Gig Workers

A 5-minute video helps explain tax basics for gig workers and other independent contractors.



Tax News Live: CA State Income Tax

The above website: http://www.taxes.ca.gov/small_business_assistance_center/.

FTB Resources on Real Estate Withholding

The FTB has updated Publication 1016 on real estate withholding (Sept. 2017; 12 pages) and has a website to assist taxpayers with knowing when they are required to withhold or their proceeds will have withholding. In Pub 1016, the FTB restates the legal authority for withholding:

"California Revenue and Taxation Code (R&TC) Section 18662 and the related regulations require withholding of tax at source from the sale or exchange of California real estate. All California residents, nonresident individuals, and non-California business entities are subject to withholding requirements unless certain exceptions specified in R&TC Section 18662, subdivision (e)(3), are met."

FTB also reminds us that this is a prepayment of income tax rather than a separate, additional tax on the transaction.

Pub 1016 summarizes the withholding requirement as follows:

"Withholding Requirement California law requires real estate withholding whenever a transfer of title on California real property occurs. Examples:

- Sales or transfers of real property (including gifts and exchanges)
- Leaseholds/options
- Short sales
- Easements

- Personal property sold with real property (if not stated separately)
- Vacant land

Withholding is the responsibility of the buyer or QI, but it may be performed by the REEP on the buyer's behalf. Whoever remits the payment, the buyer, QI, or the REEP, completes Form 593 and Form 593-V."

Disaster Relief Guidance from FTB and CDTFA

FTB on wildfires - https://www.ftb.ca.gov/Archive/AboutFTB/Press/2017/09-10132017.shtml

FTB 2017 disasters - https://www.ftb.ca.gov/individuals/disaster.shtml

CDTFA guidance on tax relief for businesses - https://www.cdtfa.ca.gov/news/17-29.htm.

EDD 2018 Household Employer's Guide – DE 8829

See http://www.edd.ca.gov/pdf_pub_ctr/de8829.pdf.

2017 Legislative Activities

Per the FTB (Nov. 2017), the following tax bills became law in 2017 (see the Tax B supplement for legislation relevant to businesses).

- AB 94 Modifies the requirements for federally tax-exempt veterans' organizations to apply for a California income and franchise tax exemption.
- AB 97 Appropriates for the support of State government for the 2017/2018 fiscal year.
- AB 102 Creates the California Department of Tax and Fee Administration.
- AB 103 Requires FTB to contact the Attorney General before employing in-house counsel or contracting with outside counsel.
- AB 111 Requires a state entity, or its designee, to conduct criminal background checks on employees, contractors, or vendors that have access to federal tax information, and reduces the minimum contribution amount requirement for voluntary contribution funds for the 2017 calendar year.
- AB 129 Requires FTB to disclose specified information of individual taxpayers to the Scholarshare Investment Board.
- AB 131 Provides technical clarification for the California Earned Income Tax Credit (CA EITC):
    - Revised minimum voluntary contribution amount requirement for 2017.

  - Makes clarifying and conforming changes regarding the transfer of duties from the State Board of Equalization (Board) to the Office of Tax Appeals (Office).

- AB 149 Establishes Habitat for Humanity Voluntary Tax Contribution Fund and allows a taxpayer to make a voluntary contribution to the fund on their California personal income tax return.
- AB 280 Establishes the Rape Kit Backlog Voluntary Tax Contribution Fund and allows a taxpayer to make a voluntary contribution to the fund on their California personal income tax return.
- AB 434 Requires state agencies, including the Franchise Tax Board, to post certification that the agency's Internet website is in compliance with specified accessibility standards.
- AB 454 (Chapter 655; 10/11/17) Conforms to the federal exclusion from gross income of certain amounts received by wrongly incarcerated individuals. [Conforms to IRC provision for tax years beginning before on or after 1/1/18.]
- AB 461 Excludes from gross income student loan debt that is canceled or repaid under the Income Contingent Repayment plan, the Pay As You Earn Repayment plan, and the Revised Pay As You Earn Repayment plan as administered by the U.S. Department of Education.
- AB 490 Extends the sunset date for the College Access Tax Credit and the repeal date by five years.
- AB 519 Establishes the California Senior Citizen Advocacy Fund and allows a taxpayer to make a voluntary contribution to the fund on their California personal income tax return.
- AB 571 Modifies the definition of farmworker housing and the applicable percentage for the Low-Income Housing Credit.
- AB 846 Establishes the California YMCA Youth and Government Voluntary Tax Contribution Fund and allows a taxpayer to make a voluntary contribution to the fund on their California personal income tax return.
- AB 1031 Establishes the Native California Wildlife Rehabilitation Voluntary Tax Contribution Fund and allows a taxpayer to make a voluntary contribution to the fund on their California personal income tax return.
- AB 1593 Expands reporting of use tax on resident individual income tax returns.
- AB 1717 Clarifies that use tax can be reported on an original return, regardless of the date the return is filed.*
- AB 1720 Continues an alternative electronic communication method with the FTB, by extending the repeal date by seven years.
- SB 2 This act imposes a fee of $75 on the recording of certain county-recorded documents including tax liens, to fund the California Homes and Jobs Trust Fund.
- SB 61 Renames Emergency Food Assistance Program Fund as the Emergency Food for Families Voluntary Tax Contribution Fund, extends the sunset date by seven years, and

specifies a fixed minimum annual contribution amount of $250,000 for the renamed Fund to remain on the return.

- SB 85 For Every Kid Counts College Savings Match Grant Program, requires FTB to provide an applicant's tax return information to the Scholarshare Investment Board to verify eligibility.
- SB 106 Modifies the California Earned Income Tax Credit (EITC) by including, in the definition of earned income, net earnings from self-employment, consistent with federal law, and also increases the maximum Annual Gross Income phase-out amounts.
- SB 440 Among other items, renamed (1) the "California Breast Cancer Research Fund" as the "California Breast Cancer Research Voluntary Tax Contribution Fund," and (2) the "California Cancer Research Fund" as the "California Cancer Research Voluntary Tax Contribution Fund," and extended the sunset date for these funds by seven years.
- SB 503 Renames and extends the sunset date for the Keep Arts in Schools and Protect Our Coast and Oceans Funds, and modified provisions of the renamed funds.
- SB 813 Expands Voluntary Disclosure Program (VDP) to allow out-of-state partnerships with non-resident partners, and out-of-state administered trusts to participate in the VDP. This act also provides penalty relief for admitted VDP applicant S-corporations and limited liability companies, from the failure to file penalty.

*Purpose per author (6/30/17):

> "Background. On occasion, taxpayers make underreporting errors while preparing their income tax returns. In the case of underpayment of income tax, SB 858 requires FTB to apply use tax amounts paid with the return to amounts owed to the FTB. After taking the use tax to satisfy amounts owed to the FTB, the FTB notifies the BOE so that the BOE can send a tax shortage notice to the taxpayer. In these instances, the taxpayer would usually receive a billing from both the BOE and FTB. Taxpayers who were reporting and remitting their use tax obligation were subject to late payment penalties from the BOE as a result of the payment order on the income tax return.
>
> The Assembly Committee on Revenue and Taxation introduced AB 2758 in 2014 to correct this problem by ensuring that highly conscientious taxpayers who self-report use tax liability would no longer face late BOE payment penalties when underreporting errors occurred on their income tax returns. Unfortunately, the payment order established by AB 2758 only applies to returns that are "timely filed." In other words, the problem that AB 2758 attempted to correct still applies to tax returns depending on when they are filed. This bill removes the phrase "timely filed" from the definition of an "acceptable return." Revising the definition of an acceptable return ensures that use tax reported on a tax returns gets used to satisfy the use tax obligation even when the return is not "timely filed.""

Cannabis Activities

FTB Interested Parties Meeting - The FTB is holding an interested parties meeting about cannabis guidance on 12/5/17.

FTB website on cannabis business income taxes - https://www.ftb.ca.gov/businesses/cannabis-business-tax.shtml.

CDTFA website on cannabis activities - http://www.cdtfa.ca.gov/industry/cannabis.htm.

EDD website - http://www.edd.ca.gov/Payroll_Taxes/Cannabis_Industry_Payroll_Tax_Reporting.htm.

Chapter 10: Practice and Procedure

IRS and Government Shutdown

Per the IRS FY2018 Lapsed Appropriations Contingency Plan (Filing Season), about 44% of IRS employees fall into the essential category and remain working during the shutdown.

IRS SERVICEWIDE SUMMARY OF SHUTDOWN IMPACT

This IRS Shutdown Contingency Plan (Filing Season) for fiscal year 2018 reflects a total of **35,076** employees (**43.5%** of the total employee population of 80,565 as of 01/06/2018) who are designated as "excepted/exempt" and would be retained in the case of a shutdown.

1.	Estimated time to complete shutdown of "non-excepted" activities	Up to half a workday
2.	Total number of employees expected to be employed prior to implementation of the shutdown plan (direct and reimbursable)	**80,565** (as of 1/6/2018)
3.	Total number of "excepted/exempt" employees authorized to be retained under this plan:[1]	**35,076** (43.5% of total employees)
	• Compensated by other than annual appropriations [A1 & A2]	0
	• Necessarily implied by law [A3]	973
	• Employees engaged in the protection of life and property (including law enforcement activities) [B]	33,981
	• Employees performing shutdown activities > ½ day [C]	122

IRM Change – IRS Asking for Representative's Personal Information

A change was noted in the IRM for early January 2018 to address a security concern. Per the revision to IRM 21.1.3.3, effective 1/3/18, the IRS will likely ask a taxpayer representative (per Form 2848 or 8821) for their SSN and date of birth as part of a verification process.

See "IRS asking for taxpayer representatives' personal information," *Journal of Accountancy*, 1/9/18.

New Acting Commissioner

On 10/26/17, President Trump announced the appointment of David Kautter to be Acting Commissioner of the IRS upon the completion of John Koskinen's term ending on 11/12/17. Kautter, a long-time partner with EY, was a partner with and leader of RSM's Washington National Tax group prior to his appointment as Assistant Secretary for Tax Policy on 8/3/17. He also served four years as managing director of the Kogod Tax Center at American University between EY and RSM.

> **President Donald J. Trump Announces Intent to Designate David Kautter to the Internal Revenue Service**
>
> **David Kautter of Virginia to be the Acting Commissioner of Internal Revenue.** This designation will become effective on November 13, 2017. Mr. Kautter was confirmed on August 3, 2017, to be the Assistant Secretary of the Treasury, Tax Policy.

Treasury Secretary Mnuchin stated: "I look forward to having David Kautter as Acting Commissioner of the IRS. David will provide important leadership while we wait to confirm a permanent Commissioner," said Secretary Mnuchin. "Assistant Secretary Kautter has had an illustrious 40-year career in tax policy, and I am confident that the IRS and the American people will benefit from his experience and insight."

Also per the Treasury Secretary's 10/26 announcement: "Kautter joined Treasury as Assistant Secretary for Tax Policy in August 2017. He will continue to carry out his Assistant Secretary duties, including working on tax reform, while serving as Acting Commissioner. Deputy Commissioners Kirsten Wielobob and Jeff Tribiano will continue to run the day-to-day operations of the IRS, both reporting to David."

Source: Senate Confirmation Hearing 7/18/17

Observations: IRC Section 7803 addresses appointment, duties and qualifications for the IRS Commissioner position. The term lasts five years, but per the statute, started on 11/13/97, and "each subsequent term shall begin on the day after the date on which the previous term expires." Because Koskinen was appointed late, he only served a four-year term. A commissioner may be reappointed for an additional term. The statute also states the "among other qualifications" the Commissioner is to "have a demonstrated ability in management." Section 7803 also covers the appointment and duties of the Chief Counsel, National Taxpayer Advocate, and Treasury Inspector General for Tax Administration (TIGTA).

E-Services Change Starting 12/10/17 – Secure Access

Per the IRS (12/9/17): "All e-Services users,

Starting Dec. 10, 2017, all e-Services users must register through a new, more rigorous identity proofing process called Secure Access.

Any e-Services user who has not previously created a Secure Access account through Get Transcript Online, IP PIN tool, View Balance or by exception processing in recent days must validate their identity through this more rigorous process. This also includes all TIN Matching users and users who received Letter 5903 last December and authenticated by telephone.

This new process is not optional on the part of the IRS or its online users. We apologize for the short notice, but as you know we've been planning this move for more than a year. The IRS must make this change to meet federal information system standards. Additionally, cybercriminals increasingly are targeting tax professionals to steal e-Services usernames and passwords, putting taxpayer data at risk.

In recent years, we authenticated each e-Services user individually. When you registered for e-Services, you were asked for your name, address, social security number, your date of birth, adjusted gross income and filing status. That limited amount of information no longer is enough to meet federal information system standards. Users will continue to be authenticated as individuals."

See instructions at https://www.irs.gov/individuals/important-update-about-your-eservices-account.

IRS Mobile App + Social Media

See links and resources such as Twitter, YouTube Facebook, and Tumblr - https://www.irs.gov/newsroom/taxpayers-and-tax-preparers-can-connect-with-the-irs-over-social-media. [Tax Tip 2017-93 (12/19/17)]

More LB&I Compliance Campaigns Announced

On 11/3/17, the LB&I Division announced 11 more compliance campaigns. They are:

1) Form 1120-F Chapter 3 and Chapter 4 Withholding
2) Swiss Bank Program
3) Foreign Earned Income Exclusion
4) Verification of Form 1042-S Credit Claimed on Form 1040NR
5) Agricultural Chemicals Security Credit
6) Deferral of Cancellation of Indebtedness Income
7) Energy Efficient Commercial Building Property
8) Corporate Direct (Section 901) Foreign Tax Credit (FTC)
9) Section 956 Avoidance
10) Economic Development Incentives
11) Individual FTC (Form 1116)

For information on all LB&I Compliance Campaigns - https://www.irs.gov/businesses/large-business-and-international-compliance-campaigns.

Update on *Steele* Case and PTIN Fees – 12/18/17

Court response 12/18/17: The District Court for DC denied the government's request to stay the earlier holding. See Thomson Reuters, "Court denies stay of order that enjoined IRS from charging PTIN fees," 12/26/17.

Delinquent Debts and Passport Denial or Revocation

Per the IRS website on this topic, the IRS expects to start notifying the State Department in January 2018 of individuals with seriously delinquent tax debts.

IRS Advisory Council Issues 2017 Annual Report

IRSAC released its 2017 report in November. Per the IRS announcement (IR-2017-188 (11/15/17):

"The Internal Revenue Service Advisory Council (IRSAC) today issued its annual report for 2017, including numerous recommendations to the IRS on new and continuing issues in tax administration.

Report recommendations cover numerous topics including:

- Adequate Funding for the IRS
- W-2 Verification Codes
- The Private Debt Collection Program
- The Large Business & International Examination Process
- Establishment of Minimum Standards of Competence for All Tax Practitioners and Tax Return Preparers, and
- Third-Party Application Programming Interfaces

The IRSAC is a federal advisory committee that reports to the IRS Commissioner. IRSAC provides an organized public forum for the discussion of relevant tax administration issues. Members of the committee convey public perception and offer constructive observations regarding current and proposed IRS policies, programs as well as procedures."

Issue one identified by IRSCA is the need for adequate funding of the IRS. The report includes the following observation:

> "Regrettably, overall funding for the IRS has decreased dramatically—by approximately $1 billion—since FY2010, even though the requirements imposed by Congress have expanded during the same period. The agency's increased workload is attributable not only to population growth and economic expansion, but to the enactment of the Patient Protection and Affordable Care Act (ACA), the Foreign Account Tax Compliance Act (FATCA), and other complex laws, which spawned the need for guidance and educational outreach as well as enforcement initiatives to ensure compliance. The consequences of the cutbacks have not been minor or hypothetical. They undeniably affect every facet of the agency's work."

Criminal Investigation 2017 Annual Report Released (12/20/17)

Per the IRS announcement on release of this CID report (IR-2017-208 (12/20/17)):

> ““We have the same number of special agents—around 2,200—as we did 50 years ago,” said Don Fort, Chief, CI. “Financial crime has not diminished during that time– in fact, it has proliferated in the age of the Internet, international financial crimes and virtual currency. Despite these challenges, we continue to do amazing work, investigating some of the most complicated cases in the agency’s history. Criminals would be foolish to mistake declining resources for a lack of commitment in this area.”
>
> The annual report is released each year for the purpose of highlighting the agency’s successes while providing a historical snapshot of the make-up and priorities of the organization.”

Chapter 11: International Tax and Foreign Financial Asset Reporting

U. S. v. Bussell, (CA 9 10/25/2017) – Ninth Circuit Determines that Taxpayer Was Liable For $1.2 Million For Failing to Disclose Foreign Account

Per the Ninth Circuit:

> In June 2013, the IRS assessed an approximately $1.2 million penalty against Bussell for failing to disclose her financial interests in an overseas account on her 2006 tax return, which she was required to report in 2007. Bussell did not pay the penalty, and the government filed suit. Bussell previously had been criminally charged for concealing financial assets in 2002. On appeal, Bussell admits that she willfully failed to disclose her financial interests in her overseas account on her 2006 tax return, but she raises several arguments seeking reversal of the district court's summary judgment ruling.

Presumably, the penalty was for willfully failing to file an FBAR. The Ninth Circuit, affirming the district court, summarily rejected all of the taxpayer's arguments including the contention that the imposition of the penalty violated the U.S. Constitution's excessive fines, due process, and ex post facto clauses.

FINCEN Notice October 19, 2017 -- FBAR Extension to 1/1/2018 for California Wildfire Victims

The Treasury Department Financial Crimes Enforcement Network (FinCEN) announced that California wildfire victims in affected areas of California have until Jan. 31, 2018 (instead of October 15, 2017) to file their Report of Foreign Bank and Financial Accounts (FBAR) for the 2016 calendar year.

Chapter 12: Looking Forward: Tax Reform & New Economy

October Budget Resolution Approves $1.5 Trillion Cost for Tax Reform

H.Con. Res. 71 approved by House and Senate allows up to $1.5 trillion cost for tax reform. That is, tax reform can add $1.5 trillion to the debt. Key actions and votes:

a. 10/5/17 – passed in House by 219-206

b. 10/19/17 – passed in Senate by 51-49

c. 10/26/17 – Senate amendment passed in House by 216-212

See:

- House Budget Committee summary and explanation of 11/7/17
- House Budget Committee news on Senate-Passed Budget Resolution (10/24/17)

Observations: The passage of the budget with the $1.5 trillion for tax reform was slim in both House and Senate. A $1.5 trillion deficit over ten years divided among the 325, 365,000 people in the U.S. comes out to $4,610 per person or $461 per year per person.

Tax Reform Legislation of Fall 2017

See links in Chapter 1 slides + links at http://www.mntaxclass.com.

Virtual Currency – Coinbase Summons

11/28/17 – The final decision was issued (Case 3:17-cv-01431-JSC (ND CA)) and the court ordered Coinbase to produce the following:

"Coinbase is ORDERED to produce the following documents for accounts with at least the equivalent of $20,000 in any one transaction type (buy, sell, send, or receive) in any one year during the 2013 to 2015 period:

(1) the taxpayer ID number,

(2) name,

(3) birth date,

(3) address,

(4) records of account activity including transaction logs or other records identifying the date, amount, and type of transaction (purchase/sale/exchange), the post transaction balance, and the names of counterparties to the transaction, and

(5) all periodic statements of account or invoices (or the equivalent)

The court also noted concerns with the IRS original broad summons: “where, as here, the Government seeks records for thousands of account holders through a John Doe summons, the courts must ensure that the Government is not collecting thousands and thousands of personal records unnecessarily. Moreover, if the Government later determines that it needs more detailed records on a taxpayer, it can issue the summons directly to the taxpayer or to Coinbase with notice to a named user—a process preferable to a John Doe summons.”