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VIA Federal eRulemaking Portal

March 28, 2011

INTERNAL REVENUE SERVICE
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

ATTENTION: Ms. Kristen N. Witter

Re: Comments on Proposed Treasury Regulations
Section 301.7632-1(a)
CC: PA: LPD: PR (REG-131151-10)

Dear Ms. Witter:

We write to comment on proposed regulations under Section 7632 of the Internal Revenue Code ("IRC") that were published in the Federal Register on January 18, 2011 (the "Proposed Regulations"). The Proposed Regulations address the definition of "proceeds of amounts collected and collected proceeds" for purposes of IRC s. 7632.

We commend the Internal Revenue Service ("IRS") for the substantial advances that the Proposed Regulations made to encourage and appropriately reward individual whistleblowers who report tax misconduct to the IRS's whistleblower office. Specifically, we praise the clarifications provided by the Proposed Regulations that "collected proceeds" includes situations where, as a result of the whistleblower's information, the taxpayer's (i) overpayment credit balance is reduced and (ii) claim for refund is denied. We submit that you retain those clarifications in the final regulations, their being within the spirit and intent of IRC s. 7632.

The following are our specific comments:

1) Refund Claims. Proposed Regulation Section 301.7632-1(a)(2): "amounts collected *prior to receipt of the information* if the information provided results in the denial of a claim for refund that otherwise would have been paid." (Emphasis Added).

   We suggest you delete the words "prior to receipt of the information" as is immaterial when the information is provided so long as it is the cause of the "collected proceeds" attributable to the refund claim. We submit that including those additional words may, unnecessarily and unintentionally, generate disputes between whistleblowers and the IRS.

For example, suppose a whistleblower's information leads to an IRS audit and assessment. The taxpayer pays the taxes and files a refund claim, which the IRS successfully contests. The whistleblower provided the information *before* the taxpayer pursued the refund claim and should be entitled to an appropriate reward. Arguably, that whistleblower's reward entitlement would be unclear under the present wording, a condition eliminated without loss of meaning by striking the superfluous words.

2) Criminal Sanctions. Proposed Regulation Section 301.7632-1(a)(2): "tax penalties and interest."

We suggest you clarify that "penalties" includes criminal penalties and sanctions by specifically adding "including criminal penalties and sanctions" to the existing phrasing. Although this seems self-evident from the statutory language, the Internal Revenue Manual ("IRM") excludes criminal sanctions from the whistleblower award amount. See IRM 25.2.2.1.7.

Also, we suggest you clarify that amounts paid to whistleblowers as a consequence of criminal sanctions should be paid without duplication of corresponding civil amounts and vice versa--the whistleblower should be only rewarded once for the same collected proceeds even if the collection comes from criminal and civil sources. For example, "restitution" is frequently ordered in criminal tax cases, which component acts as a partial or complete proxy for civil taxes otherwise owed by the target taxpayer.

3) Net Operating Losses offsets/denial. Proposed Regulations Section 301.7632-1(a)(2) does not address situations involving Net Operating Losses (NOLs). We submit that whistleblowers should be rewarded currently where the whistleblower's information results in:

(a) full or partial denial of a taxpayer's claimed NOL (for example, under IRC s. 382); and

(b) the taxpayer's using an NOL to offset taxable income attributable to the whistleblower's information,

even if the whistleblower's information does not result in a current inflow of dollars to the Treasury from a tax payment.[1] The fiscal effect, however, is that the Taxpayer reduces a valuable tax attribute, which will accelerate its taxable income recognition that creates a current value for Treasury.

The described NOL situations are contextually different in that, in the first, the NOL itself may be the subject of the whistleblower submission, while in

[1] Though it may be obvious from the context, we are focusing on situations where the taxpayer does not have an actual tax liability, or the liability is reduced due to the NOL, perhaps where the NOL is denied before the taxpayer can use it, or the NOL is used to reduce or eliminate the taxpayer's liability for a particular year.

the second, the taxpayer uses an NOL to reduce the tax liability attributable to the whistleblower's information. However, we suggest this difference is not meaningful. In both situations the whistleblower's information has resulted in the reduction or elimination of a valuable tax attribute that, absent the whistleblower's information, the taxpayer could have used to offset against "other" taxable income and thereby reduce its overall tax liability.

We submit that the described NOL situations are analogous to the "overpayment credit balance" situation contained in Proposed Regulation Section 301.7632-1(a)(2) and should be treated consistently therewith. Economically, it is difficult to meaningfully distinguish between the value created for Treasury on the one hand by transfer of portion of an "overpayment credit balance" from, on the other, reduction of taxpayer's NOL. We suggest doing so would elevate form over substance.

Furthermore, we respectfully submit that the Congressional policy underlying the 2006 amendment to IRC s.7872 supports extending the definition of "collected proceeds" to encompass (A) NOL reduction directly and (B) taxpayers' using NOLs to offset their tax liability. Congress intended to encourage whistleblowers to come forward to help the IRS discover and pursue tax avoidance and evasion schemes that it might be unable to discover and prevent without that assistance. Denying illegal NOL usage as one instance, and compensating whistleblowers for information that leads to the taxpayer's use of NOLs to offset its tax liability as another, are objectives consistent with, and perhaps mandated by, that Congressional intent.

Since the financial crisis of 2008/9, there appears to be an industrial scale proliferation of trafficking in NOLs (and other tax credits) involving hundreds of millions of dollars of otherwise unusable tax benefits as certain US taxpayers sell or otherwise transfer tax attributes that they themselves cannot use to taxpayers who might be able to use those attributes to reduce their tax liabilities (*if* the tax attribute transfer were legitimate). The schemes that have come to our attention would not withstand scrutiny for various reasons including threshold IRC s. 382 review.

On the other hand, many of the transferred tax attributes are wrapped up in well-disguised structures to add a veneer of legitimacy, which will be difficult, if not impossible, for the IRS to detect and unravel without the assistance of knowledgeable whistleblowers. In some cases, aggressive taxpayers are acquiring more than one set of tax attributes on the theory that if one fails (or conceded to the IRS on examination to settle the case), the other will do the job – a sort of tax risk diversification measure. Surely, these are precisely the kind of industrial scale tax avoidance/evasion techniques that Congress intended IRC s. 7678 to aid the IRS in capturing?

We suggest that without reward potential for reporting these NOL strategies, knowledgeable whistleblowers will not come forward to report malfeasance directly involving NOLs. Moreover, knowledgeable insiders will not report

other aggressive tax planning if he or she believes the resultant tax liability will be offset by a taxpayer's NOLs which are not included within the definition of "collected proceeds."

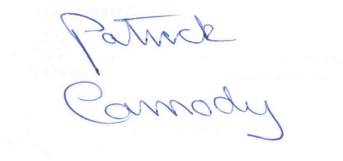
An equally compelling argument applies to other tax attributes such as foreign tax credits under IRC s. 901 et seq., and low-income housing credits under IRC s. 42 et seq., as examples.

The calculation methodology specifics may be appropriate for the IRM rather than final regulations, but we mention it here as it is an important component of the interaction of NOL/tax credit reduction and definition of "collected proceeds." To avoid disputes and prolonged appeals we suggest the reward calculation methodology used for NOL denial/usage should be kept as simple as possible. One possibility to consider might be to base the reward calculation on the greater of the (1) taxpayer's actual tax liability and (2) product of (X) amount of the denied/used NOL and (Y) taxpayer's effective tax rate calculated before application of NOLs and other tax credits.

Regardless of the complexity of integration of NOL/credits within the definition of collected proceeds, we urge you to address the issues NOLs/tax credits present, and not 'reserve' in the final regulations. Illegal trafficking and usage of NOLs and tax credits is rampant now, and knowledgeable whistleblower input will assist the IRS greatly in fighting this new tax avoidance/evasion theme before it gains more traction. However, knowledgeable whistleblowers will come forward to help only if "collected proceeds" attributes a reward to NOL and tax credit denial/usage independent of the target taxpayer's tax liability in cases where the information does not generate a current tax liability.

Please feel free to contact the undersigned if you would like clarification or to discuss further any aspect of the foregoing for which you think our input might be helpful.

Respectfully Submitted,



Patrick Carmody

Encls.