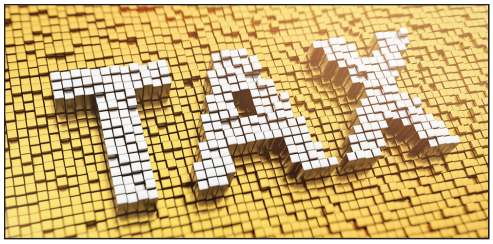

Tax News and Industry Updates

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Inside This Issue

Clean Vehicle Credits Fact Sheet

Cross References

- https://www.irs.gov/pub/taxpros/fs-2022-42.pdf
- FS-2022-42

The IRS recently issued a fact sheet on their website that addresses frequently asked questions related to new, previously-owned, and qualified commercial clean vehicles. The facts sheet answers questions on the following topics.

- Topic A: Eligibility Rules for the New Clean Vehicle Credit
- Topic B: Income and Price Limitations for the New Clean Vehicle Credit
- Topic C: When the New Requirements Apply to the New Clean Vehicle Credit
- Topic D: Eligibility Rules for the Previously-Owned Clean Vehicles Credit
- Topic E: Income and Price Limitations Previously-Owned Clean Vehicles
- Topic F: Claiming the Previously-Owned Clean Vehicles Credit
- Topic G: Qualified Commercial Clean Vehicles Credit

To view or download the fact sheet (a PDF document), go to the following web address:
https://www.irs.gov/pub/taxpros/fs-2022-42.pdf

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List of Manufacturers of Qualified Clean Vehicles

Cross References

- https://www.irs.gov/credits-deductions/manufacturers-and-models-for-new-qualified-clean-vehicles-purchased-in-2023-or-after

One of the new requirements to claim an up to $7,500 tax credit on the purchase of a clean vehicle, effective for 2023, is that the clean vehicle must:

- Have undergone final assembly in North America, and
- Not exceed a manufacturer suggested retail price (MSRP) of $80,000 for vans, sport utility vehicles, and pickup trucks, or $55,000 for other vehicles.

To see if a specific vehicle meets the assembly requirements:

- Note the vehicle's Vehicle Identification Number (VIN),
- Go to the Department of Energy's web page on Electric Vehicles with Final Assembly in North America: https://afdc.energy.gov/laws/electric-vehicles-for-tax-credit
- Use the VIN Decoder tool under "Specific Assembly Location Based on VIN."

The IRS has recently published a list of qualified manufacturers that have indicated that their vehicles are currently eligible for a credit provided other requirements are met. Use the following web address to see which

manufacturers are on the list, and check back later for updated information:

https://www.irs.gov/credits-deductions/manufacturers-and-models-for-new-qualified-clean-vehicles-purchased-in-2023-or-after

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IRS Extends Lookback Period for Refund Claims

Cross References

• Notice 2023-21

A taxpayer must file a claim for credit or refund within three years from the time the taxpayer's return was filed or two years from the time the tax was paid, whichever period expires later. When a taxpayer files a claim within three years of filing the tax return, the lookback period is equal to three years plus the period of any extension of time for filing the return. Otherwise, the lookback period is two years.

For a calendar-year taxpayer, withheld and estimated income taxes are deemed paid on the due date of the tax return. Thus for example, withheld and estimated taxes for the 2019 calendar-year are deemed to have been paid on April 15, 2020, the due date for filing the 2019 tax return. If a taxpayer filed for an extension for his or her 2019 tax return, the lookback period is three years from October 15, 2020, the due date for filing the 2019 tax return on extension. A taxpayer thus would have until April 15, 2023, or October 15, 2023 to file for a claim for credit or refund of taxes withheld or paid through estimates for the 2019 tax return, depending on whether or not an extension was filed.

On March 13, 2020, the President of the United States issued an emergency declaration in response to the ongoing COVID-19 pandemic. As a result, the IRS postponed certain federal tax return filing and payment obligations that were due to be performed on or after April 1, 2020, and before July 15, 2020, to July 15, 2020. (Notice 2020-23)

Similarly, Notice 2021-21 postponed the due date for both filing federal income tax returns in the Form 1040 series with an original due date of April 15, 2021, and making federal income tax payments in connection with one of these forms, to May 17, 2021.

Taxpayers who timely filed their tax returns by the postponed due dates provided in Notice 2020-23 and Notice 2021-21 have three years from the date of filing their return for each year to timely file a claim for credit or refund for that year.

Although these two notices postponed certain return filing due dates, those notices did not extend the time for filing the returns because a postponement is not an extension. As a result, the postponements did not lengthen the lookback periods under IRC section 6511(b)(2)(A) for taxpayers who otherwise did not file for an extension. Accordingly, absent the relief granted in Notice 2023-21, taxpayers who did not file for an extension of time for filing a return must file a claim for credit or refund by April 15, 2023 (for 2019 tax returns) or April 15, 2024 (for 2020 tax returns).

The IRS has determined that affected taxpayers with a due date postponed by Notice 2020-23 or Notice 2021-21 should be granted relief in the form of disregarding the beginning lookback period relating to the tax for which the return filing or payment due date was postponed.

Example: *Jared is a calendar-year filer with a 2019 federal income tax return due date of April 15, 2020. He did not file for an extension of time to file his 2019 tax return. Jared's employer withheld income taxes from his wages throughout 2019. These withheld income taxes are deemed paid on April 15, 2020. The due date for filing his Form 1040 was postponed by Notice 2020-23 to July 15, 2020. As a result, Jared timely filed his 2019 Form 1040 on June 22, 2020. Under the relief granted by Notice 2023-21, Jared now has until June 22, 2023 to file a claim for credit or refund of his withheld income taxes that are deemed paid on April 15, 2020.*

Similar relief is granted for tax return filing due dates postponed by Notice 2021-21.

The relief provided for in Notice 2023-21 is automatic. Affected taxpayers do not have to call the IRS, file any form, or send letters or other documents to receive this relief.

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Accountable Plan or Unreimbursed Business Expenses

Cross References

• *Simpson,* T.C. Memo. 2023-4

When an S corporation is operated out of the shareholder's residence, it is typical that the shareholder/employee is reimbursed for office in home and travel expenses under and accountable plan. The shareholder/employee incurs and pays the expenses and then submits receipts to his/her S corporation for reimbursement. The S corporation then deducts the payments as business expenses and the reimbursements are excluded from the shareholder/employee wages.

If there is no accountable plan, then the S corporation treats the reimbursement as taxable shareholder/employee wages and the shareholder/employee treats the expenses as unreimbursed employee business expenses, subject to the 2% AGI limitation for miscellaneous itemized deductions (which currently are not deductible).

The taxpayers in this case were husband and wife who were equal shareholders of a wholly owned S corporation. They operated their business out of an office in their home. The taxpayers claimed that they had an accountable plan with their S corporation. Thus, reimbursements from their S corporation for their office in home and travel expenses should not be included in their gross income. The IRS claimed that they did not have an accountable plan and therefore reimbursements should be treated as wages and expenses should be treated as unreimbursed employee business expenses.

The court noted that the rules for an accountable plan fall under IRC section 62(a)(2)(A). To qualify as an accountable plan, such plan must meet the following requirements.

1) Reimbursements must only be for business expenses that are allowable as deductions that are paid or incurred by the employee in connection with the performance of services as an employee of the employer.
2) Each business expense must be substantiated to the payor within a reasonable period of time.
3) Reimbursements for travel, entertainment, use of a passenger auto or other listed property, or other business expenses governed by IRC section 274(d) must meet the strict substantiation requirements of IRC section 274(d) and related regulations.
4) Reimbursements not subject to IRC section 274(d) requires information to be submitted to the payor that is sufficient to enable the payor to identify the specific nature of each expense and to conclude that the expense is attributable to the payor's business activities.
5) Any amount reimbursed in excess of the expenses substantiated must be returned to the payor within a reasonable period of time.

IRC section 62(c) further clarifies that an arrangement will not be treated as a reimbursement or other expense allowance arrangement for purposes of IRC section 62(a)(2)(A) if it:

1) Does not require the employee to substantiate the expenses covered by the arrangement to the person providing reimbursement, or
2) Provides the employee the right to retain any amount in excess of the substantiated expenses covered under the arrangement.

At trial, the taxpayer's sister who was vice president of the tax preparation firm that prepared the S corporation tax returns testified that the S corporation had an unwritten accountable plan. The taxpayer affirmed in his testimony that, although he may have discussed an accountable plan with his accountants, his S corporation did not have any formal thing.

The court noted that while an accountable plan does not necessarily have to be in writing, there must be, at the very least, some extrinsic evidence that indicates that such a plan exists. For example, if the taxpayers engaged in a formal process whereby they collected all relevant documentation to substantiate the purported expenses and then reimbursed themselves from the corporate account with the exact amounts associated with the expenses, such evidence might be sufficient to corroborate the existence of an unwritten accountable plan.

The court stated the record here notably lacks any such occurrence. Aside from the taxpayer and his sister's testimony regarding their subjective intent to establish an accountable plan, there is no evidence in the record to suggest that the S corporation required the taxpayer to substantiate his expenses or return any amounts received that exceeded those expenses. In fact, the taxpayer testified that with respect to instances in which he transferred money from the S corporation to his personal account, such occurrences could have been for a reimbursement as well as a distribution. Moreover, of the numerous documented transfers between the S corporation's checking account and the taxpayer's checking account, there are no records that identify the purpose of any specific transfer.

Thus, there is no credible evidence in the record to indicate that the S corporation had an accountable plan that meets all the requirements under the regulations. Because the S corporation did not have an accountable plan, all expenses incurred personally by the taxpayer in connection with his employment with his S corporation are considered unreimbursed employee business expenses.

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New Industry Tip Reporting Program

Cross References

- IR-2023-19, February 6, 2023
- Notice 2023-13

The IRS has issued Notice 2023-13, which contains a proposed revenue procedure that would establish the Service Industry Tip Compliance Agreement (SITCA) program, a voluntary tip reporting program between the IRS and employers in various service industries. The IRS is issuing this guidance in proposed form to provide an opportunity for public comment.

The proposed SITCA program is designed to take advantage of advancements in point-of-sale, time and attendance systems, and electronic payment settlement methods to improve tip reporting compliance. The proposed program would also decrease taxpayer and IRS administrative burdens and provide more transparency

and certainty to taxpayers. The proposed program includes several features.

- The monitoring of employer compliance based on actual annual tip revenue and charge tip data from an employer's point-of-sale system, and allowance for adjustments in tipping practices from year to year.
- Participating employers demonstrate compliance with the program requirements by submitting an annual report after the close of the calendar year, which reduces the need for compliance reviews by the IRS.
- Participating employers receive protection from liability under the rules that define tips as part of an employee's pay for calendar years in which they remain compliant with program requirements.
- Participating employers have flexibility to implement employee tip reporting policies that are best suited for their employees and their business model in accordance with the section of the tax law that requires employees to report tips to their employers.

The intent of the SITCA program is to serve as the sole tip reporting compliance program for employers in various service industries and would replace the following programs.

- Tip Rate Determination Agreement (TRDA)
- Tip Reporting Alternative Commitment (TRAC)
- Employer designed TRAC (EmTRAC)

The IRS is continuing to explore opportunities within the gaming industry and, as such, this program does not impact the existing Gaming Industry Tip Compliance Agreement (GITCA) program.

The proposed revenue procedure provides that for employers with any of these existing agreements, such agreements would remain in effect until the earlier of:

1) The employer's acceptance into the SITCA program,
2) An IRS determination that the employer is noncompliant with the terms of their TRDA, TRAC or EmTRAC agreement, or
3) The end of the first full calendar year after the final revenue procedure is published in the Internal Revenue Bulletin.

Anyone interested in providing feedback to the proposed SITCA program should follow the instructions in the notice and reply by May 7, 2023.

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FBAR Penalty

Cross References

- *Bittner,* U.S. Supreme Court, February 28, 2023

The U.S. Supreme Court has reversed a 5th Circuit Court of Appeals decision on how the FBAR penalty applies. The circuit court ruled that the law imposes a penalty on the failure to report a qualifying account, not the failure to file an FBAR. As a result, the court of appeals stated the $10,000 penalty cap applies on a per-account, not a per-form basis. The U.S. Supreme Court ruled that the $10,000 maximum penalty for the non-willful failure to file an FBAR report accrues on a per-report, not a per-account basis.

Each person with a financial interest in a financial account in a foreign country is required to file with the Secretary of the Treasury a *Report of Foreign Bank and Financial Accounts (FBAR)* on or before June 30 of each year with respect to foreign financial accounts exceeding $10,000 maintained during the previous calendar year. The FBAR report discloses information about each qualifying foreign account. A person who fails to report when required may be subject to a penalty of up to $10,000 for a non-willful violation. For a willful violation, the maximum penalty increases to the greater of $100,000 or 50% of the amount of the transaction, when the violation involves a transaction, or the balance in the account at the time of the violation.

The taxpayer in this case was born in Romania, but immigrated to the United States and was naturalized in 1987. In 1990, he returned to Romania where he became a successful businessman and investor. He maintained dozens of bank accounts in Romania, Switzerland, and Liechtenstein. He was unaware that as a U.S. citizen, he was required to report his interests in certain foreign accounts. Consequently, he never filed FBARs while living in Romania.

He returned to the U.S. in 2011. Upon learning of his reporting obligations, he hired a CPA who filed FBARs for the years 2007 to 2011. Penalties for years prior to 2007 had expired due to the statute of limitations. His FBARs disclosed all foreign bank account information and balances.

In June 2017, the IRS assessed $2.72 million in penalties for non-willful violations, $10,000 for each unreported account from 2007 to 2011 (61 accounts in 2007, 51 in 2008, 53 in 2009, 53 in 2010, and 54 in 2011).

The taxpayer sued the government arguing that his violations were due to reasonable cause and therefore could not be penalized under 31 U.S.C. section 5321, that the maximum penalty allowed for a non-willful reporting violation is $10,000 per annual FBAR form, and that

the penalties as assessed violated the excessive fines clause of the 8th Amendment to the U.S. Constitution.

The District Court held that the $10,000 maximum penalty for a non-willful violation applies on a per-form basis. Having thus interpreted the statute, it deemed the 8th Amendment defense moot. The court also rejected the reasonable-clause defense and ordered the taxpayer to pay $50,000 ($10,000 for each year from 2007 to 2011). Both the government and the taxpayer appealed the decision to the 5th Circuit Court of Appeals. The 5th Circuit ruled in favor of the government. The taxpayer appealed the decision to the U.S. Supreme Court.

The Supreme Court noted that 31 U.S.C. section 5314 does not speak of accounts or their number but rather the legal duty to file reports which must include various kinds of information about an individual's foreign transactions or relationships. Violation of section 5314's reporting obligation is binary. One files a report in the way and to the extent the Secretary of the Treasury prescribes, or one does not. Multiple willful errors may establish a violation of section 5314 but even a single mistake, willful or not, constitutes a section 5314 violation. The only distinction the law draws between a report containing a single mistake and one containing multiple mistakes concerns the appropriate penalty.

Section 5321 (of 31 U.S.C.) authorizes the Secretary of the Treasury to impose a civil penalty of up to $10,000 for any violation of section 5314. The non-willful penalty provision does not speak in terms of accounts but rather pegs the quantity of non-willful penalties to the quantity of violations. Section 5314 provides that a violation occurs when an individual fails to file a report consistent with the statute's commands. Multiple deficient reports may yield multiple $10,000 penalties, and even a seemingly simple deficiency in a single report may expose an individual to a $10,000 penalty. But penalties for non-willful violations accrue on a per-report, not a per-account basis.

Willful violations do tailor penalties to accounts. Section 5321 specifically addresses a subclass of willful violations that involve a failure to report the existence of an account or any identifying information required to be provided with respect to an account. In such cases, the Secretary of the Treasury may impose a maximum penalty of either $100,000 or 50% of the balance in the account at the time of the violation, whichever is greater.

The government argued that because Congress explicitly authorized per-account penalties for willful violations, the Court should infer that Congress meant to also do so for non-willful violations. The Court stated the government's interpretation defies a traditional rule of statutory construction. When Congress includes particular language in one section of a statute and omits it from a neighbor, the Court normally understands that difference in language to convey a difference in meaning.

Here the statute twice provides evidence that when Congress wished to tie sanctions to account-level information, it knew exactly how to do so. Section 5321(a)(5)(C) and (D)(ii) provides penalties for certain willful violations on a per-account basis. Section 5321(a)(5)(B)(ii) states a person may invoke the reasonable cause exception only on a showing of per-account accuracy. In contrast, the statute does not state that the Secretary of the Treasury may impose non-willful penalties on a per-account basis.

The Court ruled that the non-willful failure to file a legally compliant report is one violation carrying a maximum penalty of $10,000.

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