



AMERICAN BAR ASSOCIATION

Tax Section

HYBRID 2022

MAY TAX MEETING

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IRS Exam – Reflections on Two Years of COVID

Administrative Practice

May 13, 2022

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The Panel

- **Holly Paz, Internal Revenue Service**
 - *Deputy Commissioner of LB&I*
- **Scott Irick, Internal Revenue Service**
 - *Director, SBSE Examination*
- **Abbey Garber, Holland and Knight**
 - *Partner, Tax Controversy and Litigation*
- **Henry Cheng, DLA Piper**
 - *Associate, Tax Controversy and Litigation*

- **Paige Braddy, Skadden Arps**
 - *Moderator*

Objectives

- After attending the session, the participant will be able to:
 - Understand Exam's innovations and challenges resulting from performing its functions during COVID
 - Identify Exam's current initiatives and priorities
 - Plan for Exam's return to office

Return to Office

- Return to office to occur in phases:
 - **April 24** IRS leadership to return
 - **May 8** Voluntary return for all employees
 - **June 25** Normal in-person operations for all employees
- Flexibility to continue
- Will be reviewing office space to determine if it should be reduced based on number of teleworkers
- Continued Use of Technology
 - Expanded use of digital communications
 - Document upload tool in place of mail or fax
 - Virtual reading rooms
 - Video conferencing – shift from zoom.gov to Microsoft Teams

Research Credit Refund Procedures

- On **September 17, 2021**, the IRS Office of Chief Counsel issued memorandum **20214101F**
- Additional requirements to make valid § 41 research credit refund claim on amended tax return:

1. Identify all the business components to which the Section 41 research credit claim relates for that year.
2. For each business component:
 - Identify all research activities performed;
 - Identify all individuals who performed each research activity; and
 - Identify all the information each individual sought to discover.
3. Provide the total qualified employee wage expenses, total qualified supply expenses, and total qualified contract research expenses for the claim year.

Research Credit Refund Procedures

- New requirements apply to any claims filed after January 10, 2022
- After January 10, one-year transition period:
 - 45 days to perfect a research credit claim for refund prior to final determination
- Failure to comply with new requirements will result in deficient or invalid refund claim; not reviewable by federal court
- See Chief Counsel Memorandum 20214101F (Oct. 15, 2021); LB&I interim guidance (LB&I-04-0122-0001) (Jan. 3, 2022); FAQ (Jan. 5, 2022)
- IRS expects to evaluate process once sufficient number of claims have been received

Rev. Proc. 94-69 Update

- In **2020**, IRS questioned the continuing viability of Rev. Proc. 94-69 and sought comments from taxpayers on if, and how, it should continue

Rev Proc 94-69

- Allows large corporate taxpayers who are under continuous audit to make affirmative disclosures at the start of an audit so they have an opportunity to disclose tax positions and avoid certain civil tax penalties
 - Provides a mechanism that allows taxpayers to informally “amend” a return without filling out all of the paperwork.
 - Allows IRS agents to focus the examination on the disclosed issues and incorporate the adjustments in the final computation from the audit
- On **February 25, 2022**, IRS announced that it will standardize the process for post-filing disclosures.

Rev. Proc. 94-69 Update

- IRS published new draft form (Form 15307, Post-Filing Disclosure for Specified Large Business Taxpayers) for eligible taxpayers seeking to make a post-filing disclosure
- The draft Form 15307 requires that taxpayers identify the number of disclosures and provide specific information about each disclosure, including:
 - Adjustment type
 - Timing
 - Effect of carryover
 - Description
 - Increase/decrease to taxable income or tax credits
 - Explanation of the item being disclosed
- Guidance project underway to identify new eligible population and set forth procedure

Stakeholder input on this draft form can be submitted through **June 3, 2022**, by sending comments to lbi.eef.form.15307@irs.gov

Economic Substance Doctrine Guidance

- On **April 22, 2022**, the IRS's Large Business & International (LB&I) Division issued a Memorandum for all LB&I and SB/SE examination employees relating to the assertion of the Economic Substance Doctrine and related penalties
- Changed level of approval required to assert application of economic substance doctrine and penalty:

- Executive approval is no longer required to raise the economic substance doctrine argument under Internal Revenue Code (IRC) 7701(o) (for LB&I) nor to assert the economic substance penalty under IRC 6662(b)(6) and 6662(i) (for LB&I and SB/SE).
- This does not remove the requirement that the penalties must be timely approved in writing by the immediate supervisor of the person who initially determines the penalty under IRC 6751(b).

Compliance Assurance Process (“CAP”)

- On August 23, 2021, the IRS announced that it was accepting applications for the 2022 CAP year along with a continuation of the temporary modification to the open return eligibility criteria.
- Modifications to application procedures:
 - 2022 CAP years to permit “two filed” open returns; likely to apply to 2023 CAP year
 - Must provide audited financial statements in accordance with US GAAP
 - New applicants required to complete Tax Control Framework (TCF) Questionnaire
- No immediate changes to the program planned
- Bridge Phase Taxpayers
 - Risk of noncompliance is low
 - Taxpayer remains in CAP
 - Intent is not to open a Bridge year for examination
- Surveys requesting feedback recently sent to CAP participants

BBA Partnership Audit Update

- Audits under the new BBA centralized partnership audit regime are fully underway
- What issues is Exam seeing? Taxpayers?
- Signing authority / Substitution of Partnership Representatives
 - POAs
 - Extensions
 - Substantial presence in US
- AARs
- How does exam raise procedural issues to counsel?

Fast Track Appeals Process

- Fast Track is a voluntary mediation program
 - An option for most disputes at Exam
 - Appeals mediator will facilitate settlement discussions
- Benefits of Fast Track:
 - Shorter time to case resolution
 - SB/SE: resolution within 60 days of accepted application
 - LB&I: resolution within 120 days of accepted application
 - Lower costs
 - More flexibility
- Campaign issues: Exam may settle these at Fast Track
- How does Exam approach Fast Track?
 - Training
 - Evaluation
 - Metrics

Penalty Approval Cases – 6751(b)

- Several cases at the Tax Court over the last two years
- Updated IRM in October 2020
- Recent Ninth Circuit Case reversed the Tax Court:
 - IRS did not comply with the supervisory penalty approval requirement before sending a taxpayer a 30-day letter proposing penalties
 - Section 6751(b)(1) requires written supervisory approval before assessment of a penalty or before the relevant supervisor loses discretion to approve the penalty assessment
 - *Laidlaw's Harley Davidson Sales Inc. v. Comm'r*, No. 20-73420 (9th Cir.), opinion issued March 25, 2022
- Practical effects at Examination phase

Initiatives and Priorities

- Hiring Initiatives
- Large Partnership Compliance Initiatives
- Other Compliance Priorities
- SB/SE Changes

For more information

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Questions?