

Miscellaneous Recommendations

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

Present Law

The IRS, as a federal agency, is required to properly maintain and manage its records under the Federal Records Act¹⁸⁶ and to provide access to these records to the public under the Freedom of Information Act.¹⁸⁷ However, the IRS is not required to publish a historical analysis of its tax administration programs and policies.

Reasons for Change

A documented history of the IRS's programs and policies would assist Congress, the agency itself, and the public. It would assist Congress by helping Members and staff gain a fuller understanding of the IRS's successes and failures, so future legislation can be developed in a manner that plays to the agency's strengths and helps to address the agency's weaknesses. It would help the IRS more effectively assess its programs, reduce redundant efforts, and share knowledge within the agency. In addition, an IRS historian could assist the public by promoting a more accountable and transparent IRS.¹⁸⁸

During the early 1990s, the IRS made an administrative decision to hire an IRS historian. However, the relationship was tense, and the individual who held the position subsequently told Congress that the IRS undermined her work and fought transparency, concluding that "the IRS shreds its paper trail, which means there is no history, no evidence, and ultimately no accountability."¹⁸⁹ The IRS eliminated the position and never hired a historian again.

There are at least 29 federal offices of history operating in the executive, judicial, and legislative branches.¹⁹⁰ Government historians serve various roles, such as researching and writing for publication and internal use, editing historical documents, preserving historical sites and artifacts, and providing historical information to the public through websites and other media.¹⁹¹ Historians are generally required to be objective and accurate in preparing histories that can be controversial.¹⁹² For example, the Historian of the Department of State is required to publish a documentary history of the foreign policy decisions and actions of the United States, including facts providing support for, and alternative views to, policy positions ultimately adopted without omitting or concealing defects in policy.¹⁹³ Historians in federal agencies serve an important role, and because

186 44 U.S.C. §§ 3101-3107.

187 5 U.S.C. § 552.

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

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

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

191 *Id.*

192 See, e.g., 22 U.S.C. § 4351(a).

193 *Id.*

more U.S. citizens interact with the IRS than with any other federal agency, the public interest and potential benefit in learning from the agency's successes and failures are particularly high.

Recommendation

Add a new subsection to IRC § 7803 to establish the position of IRS historian within the IRS. The IRS historian should have expertise in federal taxation and archival methods, be appointed by the Secretary of the Treasury in consultation with the Archivist of the United States, report to the Commissioner of Internal Revenue, and have access to IRS records, including tax returns and return information (subject to the confidentiality and disclosure provisions of IRC § 6103). The IRS historian should be required to report IRS history objectively and accurately, without omitting or concealing defects in policy.¹⁹⁴

¹⁹⁴ For additional background, see National Taxpayer Advocate 2011 Annual Report to Congress 582-586 (Legislative Recommendation: *Appoint an IRS Historian*).

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

Present Law

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

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

IRC § 104(b)(2) clarifies that the exclusion from gross income in IRC § 104(a)(4) applies to an amount received by reason of a combat-related injury, or if the individual, upon application, would be entitled to receive disability compensation from the Department of Veterans Affairs. IRC § 104(b)(3) defines “combat-related injury.”

To obtain a credit or refund, a taxpayer must file a timely claim. IRC § 6511(a) provides generally that a taxpayer must file a claim for credit or refund within 3 years from the time the tax return was filed or 2 years from the time the tax was paid, whichever period expires later.

In 2016, Congress passed the Combat-Injured Veterans Tax Fairness Act (the “Act”).¹⁹⁵ In a findings section, the Act states: “Since 1991, the Secretary of Defense has improperly withheld taxes from severance pay for wounded veterans, thus denying them their due compensation and a significant benefit intended by Congress.” Recognizing that the period of limitation for filing a claim for credit or refund to recover overwithheld tax had long since expired for most tax years since 1991, the Act created an exception from the general period of limitation.

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

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

Reasons for Change

Notwithstanding that the IRC’s definition of “military or naval forces of the United States” includes the Coast Guard, the Act was drafted in a manner that excludes veterans of the Coast Guard from its scope. More specifically, Section 3(a) of the Act directed the Secretary of Defense to identify DSP paid after January 17, 1991, that should have been excluded from gross income, but it did not direct the Secretary of Homeland

¹⁹⁵ Pub. L. No. 114-292, 130 Stat. 1500 (2016).

Security, to whom the Coast Guard reports, to identify affected Coast Guard veterans and DSP amounts from which taxes were withheld.

The result is that similarly situated Coast Guard veterans with combat-related injuries are not eligible for the relief provided by this Act. We believe the exclusion of Coast Guard veterans was inadvertent and that members of the Coast Guard should be provided the same additional time to file a claim for credit or refund as other veterans of the “military or naval forces of the United States.”

Recommendation

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

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

Present Law

Under IRC § 3402(p), the IRS is authorized to accept withholding agreements. Specifically, IRC § 3402(p)(3) authorizes the Secretary to promulgate regulations to provide for withholding from any type of payment that does not constitute wages¹⁹⁶ if the Secretary finds withholding would be appropriate and the payor and recipient of the payment agree to such withholding. However, the provision specifically states that the Secretary must find the withholding would be appropriate “under the provisions of [IRC chapter 24, Collection of Income Tax at Source on Wages].”

IRC chapter 24 addresses collection of taxes at the source with respect to employees (*e.g.*, wage withholding). Although current regulations provide that the Secretary may issue guidance by publication in the Internal Revenue Bulletin describing other payments for which withholding under a voluntary withholding agreement would be appropriate,¹⁹⁷ the only such guidance that has been issued to date is Notice 2013-77, dealing with dividends and other distributions by an Alaska Native Corporation.¹⁹⁸

Reasons for Change

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

The absence of withholding on payments to independent contractors also has a negative impact on revenue collection. IRS National Research Program studies show that tax compliance is substantially lower among workers whose income taxes are not withheld.¹⁹⁹

This problem is increasing as more workers are choosing to work in the so-called “gig economy.” To reduce the risk that they will not save enough money to pay their taxes, some independent contractors would prefer that taxes be withheld throughout the year, as they are for employees. There is a legitimate debate about the circumstances under which withholding should be required. However, the National Taxpayer Advocate believes there should be no disagreement that workers and businesses should have the option to enter into voluntary withholding agreements when both parties agree to do so.

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

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

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

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

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

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

Recommendations

Amend IRC § 3402(p) to clarify that when voluntary withholding agreements are entered into by parties who are not in an employer-employee relationship, the IRS may not consider the existence of a voluntary withholding agreement as a factor in worker classification disputes. In addition, direct the Secretary to evaluate the benefits of agreeing not to challenge worker classification arrangements when a voluntary withholding agreement is in place.²⁰⁰

²⁰⁰ For legislative language generally consistent with this recommendation, see Small Business Owners' Tax Simplification Act, H.R. 3717, 115th Cong. § 9 (2017).