



OFFICE OF
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DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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MEMORANDUM FOR ASSOCIATE DISTRICT COUNSEL, SALT LAKE CITY

FROM: Senior Technician Reviewer, Branch 1
(Administrative Provisions and Judicial Practice)

SUBJECT: Significant Service Center Advice
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This responds to your request for Significant Advice in connection with a series of questions concerning the application of current section 6621(c) of the Internal Revenue Code (hot interest) and repealed section 6621(c) (tax motivated transaction interest).

Issues

1. Does the repeal of section 6621(c) of the Code, dealing with tax motivated transaction interest, necessarily stop any further tax motivated transaction interest from accruing after the repeal date on a previously assessed substantial underpayment ?
2. Can hot interest under the current section 6621(c) of the Code accrue simultaneously with tax motivated transaction interest under the former section 6621(c)?
3. Do the hot interest provisions of section 6621(c) apply to an increase in tax liability resulting from an adjustment of a partnership item? If so, what is the applicable date for the start of hot interest accrual?

Conclusions

1. The repeal of the former section 6621(c) regarding tax motivated transaction interest does not prohibit the continued accrual of tax motivated transaction interest after December 31, 1989 on a previously assessed substantial underpayment.

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2. It is possible for current section 6621(c) hot interest to simultaneously accrue with the former section 6621(c) tax motivated transaction interest. However, the requirements of both sections must be complied with for such a situation to arise.
3. Both the current section 6621(c) and the accompanying Treasury Regulations clearly contemplate the application of hot interest to an increase in tax liability resulting from an adjustment of a partnership item. In accordance with the Code and the regulation provisions, the applicable date for the accrual of hot interest on a partnership item is the 30th day after the date on which the Service sends the first letter or notice that notifies the taxpayer of an assessment of the tax, unless an earlier letter or notice of proposed assessment is sent, in which case it is the 30th day after that date. Also, if deficiency procedures apply, then the triggering date is the 30th day after the earlier of either (1) the date on which the Service sends the taxpayer a 30-day letter, or (2) the date on which the Service sends a deficiency notice under section 6212 of the Code (a 90-day letter). Furthermore, the regulations make clear that the 60-day package and the notice of a final partnership administrative adjustment (FPAA) cannot trigger the hot interest provisions. See section 301.6621-3(c) of the Procedure and Administration Regulations.

Overview

Prior to 1990, taxpayers found to have incurred a substantial underpayment due to a tax motivated transaction were subject to the heightened interest rate of 120% of the underpayment rate. A substantial underpayment was considered to be any amount that both exceeded one thousand dollars (\$1,000) and was attributable to at least one tax motivated transaction. See generally section 6621(c) (repealed 1989).

In 1989, Congress repealed section 6621(c) tax motivated transaction interest along with several other penalty provisions. The repealing statute specifically stated that it expressly applied to returns for which the due date (determined without regard to extensions) was after December 31, 1989. See Pub. L. No. 101-239, §7721(b), 103 Stat. 2399 (1989).

In 1990, Congress enacted The Omnibus Budget Reconciliation Act of 1990 which included a provision providing for what has become known as “hot interest”. This provision is codified in current section 6621(c) of the Code. The “new” section 6621(c) provides for an increase in the underpayment rate for large corporate underpayments. For purposes of this section, a large corporate underpayment is

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any underpayment by a C corporation exceeding one hundred thousand dollars (\$100,000). See section 6621(c)(3). The section increases the underpayment rate under section 6601 on any large corporate underpayment by two percentage points. The effective language of the statute mandates the application of the provision to interest accruing after December 31, 1990.

Discussion

Issue 1:

The former section 6621(c) was repealed in 1989. However, the effective language of the repealed provision for tax motivated transaction interest expressly limits the repeal to returns that possess a due date after December 31, 1989. In addition, the effective language explicitly states that the due date is to be determined without regard to any extensions granted to the taxpayer.

A concern has been raised that the effective language can be interpreted to prohibit any accrual of tax motivated interest for a case involving a return with a due date prior to January 1, 1990, but one to which interest is still accruing at the tax motivated transaction rate after December 31, 1989. However, the language of the statute does not bear this out. The effective language of the repealing statute¹ clearly indicates that the accrual of interest after December 31, 1989 is not prohibited for a case involving a return with a due date prior to December 31, 1989.

This reading of the effective language of the statute is also supported by the General Savings Statute. The General Savings Statute provides that a liability that originates under a subsequently repealed statute is preserved regardless of the later repeal of the act and may even be enforced by successive action pursuant to the statute.²

Furthermore, it is evident that the regulations under current section 6621(c) envision the continuing application of tax motivated interest to some transactions as

¹Pub. L. No. 101-239, §7721(b), 103 Stat. 2399 (1989).

The above amendment applies to returns the due date for which (determined without regard to extensions)is after December 31, 1989.

²1 U.S.C. §109 (1988).

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

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evidenced in the preamble to the final regulations for the current section 6621(c). The preamble contemplates the concurrent accrual of the current and the former section 6621(c) interest on the same transaction. See 57 Fed. Reg. 53550 (1992). Given the effective language of both provisions, it is clear that this kind of situation can only exist if the former section 6621(c) remained effective after the repeal date in certain situations.

Issue 2:

The hot interest provisions under the current section 6621(c) are effective for determining interest accruing after December 31, 1990. This effective language applies, regardless of the taxable year in which the underpayment arose. The former section 6221(c) remains effective for returns possessing a due date (determined without regard to extensions) of December 31, 1989 or earlier. Thus, it is possible for both the current and the former section 6621(c) provisions to apply to interest accruing after December 31, 1990.

This reading of the statute and the regulations is further supported by the preamble to the regulations. The simultaneous accrual of the previously repealed tax motivated transaction interest and hot interest is specifically contemplated in the preamble to the final Treasury Regulations. The preamble discusses the comment addressing whether or not both section 6621(c) sections could apply concurrently. In response to this request, the preamble discusses such a situation with a degree of specificity. Citing the effective dates of both the former and the current section 6621(c), the preamble clarifies that it is possible for both provisions to apply concurrently. Nevertheless, the preamble acknowledges that such a situation can only arise if all of the requirements of both provisions are met. See 57 Fed. Reg. 53550 (1992).

Issue 3:

Both the regulations and the preamble to the final Treasury Regulations make it clear that an increase in tax liability resulting from an adjustment of a partnership item is subject to the provisions of the current section 6621(c). The regulations under current section 6621(c) expressly address the application of hot interest to partnership items and address the triggering date for the accrual of hot interest on such items. The preamble to the regulations attempts to address the concerns of commentators on the relationship between the current section 6621(c) and TEFRA partnership procedures. Towards that end, the preamble makes it clear that partnerships are subject to the provisions of the current section 6621(c).

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In the Code, section 6621(c)(2)(A) specifically states that the applicable date for the beginning of hot interest accrual is the 30th day after the earlier of (1) the date on which the first letter of proposed deficiency which allows the taxpayer an opportunity for administrative review in the Internal Revenue Office of Appeals is sent, or (2) the date on which the deficiency notice under section 6212 is sent. Section 6621(c) further provides that if deficiency procedures do not apply to an underpayment, the applicable date for the accrual of interest will be the thirtieth (30th) day after the date that the Service sends the first letter of assessment or proposed assessment. See section 6621(c)(2)(B).

Section 301.6621-3(c)(4) specifically addresses how the applicable date rules under section 6621(c) apply to partnership items. The regulations expressly exclude 60-day letters, the notice of a final partnership administrative adjustment (FPAA), and notices of the beginning of partnership-level administrative proceedings from triggering hot interest. See Treasury Regulation section 301.6621-3(c)(4). Instead, the regulations specifically provide a general rule for the triggering date for hot interest with regard to partnership items which applies unless one of two caveats is applicable to the situation.

The general rule is set forth in the Treasury Regulations in section 301.6621-3(c)(4). The regulations expressly provide that the triggering date for the accrual of hot interest with respect to any partnership item is the 30th day after the date on which the Service sends the first letter or notice that notifies the taxpayer of an assessment of the tax, unless an earlier letter or notice of proposed assessment is sent, in which case it is the 30th day after that date. Also, if deficiency procedures apply, then the triggering date is the 30th day after the earlier of either (1) the date on which the Service sends the taxpayer a 30-day letter, or (2) the date on which the Service sends a deficiency notice under section 6212 of the Code (a 90-day letter). See Treasury Regulation section 301.6621-3(c)(2).

The preamble cites this rule and makes it clear that partnership items are subject to section 6621(c) hot interest. Therefore, it is the 30th day after the first letter or notice that notifies the taxpayer of an assessment of the tax is sent out that triggers the accrual of hot interest unless one of the caveats applies.

If you have any questions, please contact Laura C. Nash at (202)622-4910.