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Subject: 247(g)

Please find the following responses to the questions asked below:

Is the 10 percent a tax or a separate penalty with an interest component?

The 10% increase applicable to a disposition of property that had been contributed to an Alaska Native Settlement Trust and subject to the election under I.R.C. § 247(g) is a tax.

As with any case of statutory construction, we first examine the language of the statute itself. The dependent clause in § 247(g)(3)(C)(i)(III) “and increased by 10 percent of the amount of such increase” plainly refers back to the independent clause “the Settlement Trust shall pay any increase in tax resulting from such inclusion.” Since the independent clause refers to an “increase in tax,” we conclude that the dependent clause means the increase is the tax, including any applicable interest.

It is important to note that the legislative history of this provision refers to the additional 10 percent amount as a penalty. We think, however, that the language of the statute, which governs, is better read to interpret this amount as tax.

Even if the plain language analysis is unsatisfactory because the statute can be seen as ambiguous, we believe that Supreme Court precedent supports the view that the 10 percent increase in § 247(g)(3)(C)(i)(III) is a tax and not a penalty. In *National Federation of Independent Business v. Sebelius* (NFIB), the Court reasoned that, “if the concept of penalty means anything, it means punishment for an unlawful act or omission.” In NFIB, the Court found, “[w]hile the individual mandate clearly aims to induce the purchase of health insurance, it need not be read to declare that failing to do so is unlawful.”

Section 247(g)(3)(C)(i)(III) can be read as imposing an incentive to keep the contributed property within the Settlement Trust. Disposing of property contributed to the Settlement Trust is not illegal and the increase is not a penalty for unlawful

behavior. The 10 percent increase here is more an incentive and less a punishment for unlawful conduct. Accordingly, we conclude that the 10% increase applicable to a disposition of property that had been contributed to an Alaska Native Settlement Trust and subject to the election under I.R.C. § 247(g) is a tax.

What information must an electing trust provide to meet the statutory requirements (i.e., what is the definition of “reasonable particularity”)?

We have determined “reasonable particularity” can be informed by the language found in § 6039H(e)(2).

(e) Deductible contributions by Native Corporations to Alaska Native Settlement Trusts
 (2) Content of statement The statement described in paragraph (1) shall include—

- (A) the total amount of contributions to which the election under subsection (e) of section 247 applies,
- (B) for each contribution, whether such contribution was in cash,
- (C) for each contribution which consists of property other than cash, the date that such property was acquired by the Native Corporation and the adjusted basis and fair market value of such property on the date such property was contributed to the Settlement Trust,
- (D) the date on which each contribution was made to the Settlement Trust, and
- (E) such information as the Secretary determines to be necessary or appropriate for the identification of each contribution and the accurate inclusion of income relating to such contributions by the Settlement Trust. Since (E) is based on specific facts and circumstances of each contribution, the property must be described in such detail that allows the Service to distinguish the property described from other property not contributed or separately contributed.

In addition to looking at the section 6039H factors outlined above, section 170 and the regulations thereunder may also provide insight to what additional information should be requested under (E), in light of the property contributed (e.g., requirements for land, motor vehicles, boats, taxidermy, etc). We do not believe it is possible to specifically define “reasonable particularity” for all cases. Rather, what constitutes reasonable particularity will depend on the type of property. In general, the description of the property should be specific enough that we can identify the property that was transferred.

Please let us know if you have any further questions about the topics above.