Current Federal Tax Developments

Week of April 20, 2020

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ACCOUNTING
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Contents

SECTION: PPP LOAN
SBA FINALLY ISSUES GUIDANCE ON SELF-EMPLOYED INDIVIDUALS AND PARTNERS UNDER THE PPP LOAN PROGRAM

Citation: "Business Loan Program Temporary Changes; Paycheck Protection Program – Additional Eligibility Criteria and Requirements for Certain Pledges of Loans", Interim Final Rule, Small Business Administration, 4/14/20

Although well after a large number of affected businesses had already applied for a loan under the Payroll Protection Program, the SBA has now released additional guidance that explains how the program works for Schedule C filers and partners in a partnership. A new interim final rule (IFR), "Business Loan Program Temporary Changes; Paycheck Protection Program – Additional Eligibility Criteria and Requirements for Certain Pledges of Loans," contains this information.[1]

Sole Proprietors vs. Partners

The new IFR has different rules for handling a PPP loan for sole proprietors and partners in a partnership.

For sole proprietors, the guidance provides generally:

> You are eligible for a PPP loan if: (i) you were in operation on February 15, 2020; (ii)you are an individual with self-employment income (such as an independent contractor or a sole proprietor); (iii) your principal place of residence is in the United States; and (iv) you filed or will file a Form 1040 Schedule C for 2019. … SBA will issue additional guidance for those individuals with self-employment income who: (i) were not in operation in 2019 but who were in

[1] "Business Loan Program Temporary Changes; Paycheck Protection Program – Additional Eligibility Criteria and Requirements for Certain Pledges of Loans", Interim Final Rule, Small Business Administration, April 14, 2020, https://home.treasury.gov/system/files/136/Interim-Final-Rule-Additional-Eligibility-Criteria-and-Requirements-for-Certain-Pledges-of-Loans.pdf, retrieved April 14, 2020

> operation on February 15, 2020, and (ii) will file a Form 1040 Schedule C for 2020. [2]

However, end up with a partner and the result is very different:

> However, if you are a partner in a partnership, you may not submit a separate PPP loan application for yourself as a self-employed individual. Instead, the self-employment income of general active partners may be reported as a payroll cost, up to $100,000 annualized, on a PPP loan application filed by or on behalf of the partnership. Partnerships are eligible for PPP loans under the Act, and the Administrator has determined, in consultation with the Secretary of the Treasury (Secretary), that limiting a partnership and its partners (and an LLC filing taxes as a partnership) to one PPP loan is necessary to help ensure that as many eligible borrowers as possible obtain PPP loans before the statutory deadline of June 30, 2020. This limitation will allow lenders to more quickly process applications and lower the burdens of applying for partnerships/partners. The Administrator has further determined that permitting partners to apply as self-employed individuals would create unnecessary confusion regarding which entity, the partner or the partnership, applies for partner and LLC member income, and would generate loan proceeds use coordination and allocation issues. Rent, mortgage interest, utilities, and other debt service are generally incurred at the partnership level, not partner level, so it is most natural to provide the funds for these expenses to the partnership, not individual partners.[3]

Impact on Other Assistance Programs

The guidance warns that filing for the PPP loan could impact the borrower's eligibility for certain other assistance programs:

> In addition, you should be aware that participation in the PPP may affect your eligibility for state-administered unemployment compensation or unemployment assistance programs, including the

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[2] "Business Loan Program Temporary Changes; Paycheck Protection Program – Additional Eligibility Criteria and Requirements for Certain Pledges of Loans", Interim Final Rule, Small Business Administration, Question 1.a.

[3] "Business Loan Program Temporary Changes; Paycheck Protection Program – Additional Eligibility Criteria and Requirements for Certain Pledges of Loans", Interim Final Rule, Small Business Administration, Question 1.a.

> programs authorized by Title II, Subtitle A of the CARES Act, or CARES Act Employee Retention Credits.[4]

Computing the Maximum Loan Amount

The IFR provides the following guidance for a self-employed person without employees to calculate the maximum loan amount:

> **Step 1:** Find your 2019 IRS Form 1040 Schedule C line 31 net profit amount (if you have not yet filed a 2019 return, fill it out and compute the value). If this amount is over $100,000, reduce it to $100,000. If this amount is zero or less, you are not eligible for a PPP loan.
>
> **Step 2:** Calculate the average monthly net profit amount (divide the amount from Step 1 by 12).
>
> **Step 3:** Multiply the average monthly net profit amount from Step 2 by 2.5.
>
> **Step 4:** Add the outstanding amount of any Economic Injury Disaster Loan (EIDL) made between January 31, 2020 and April 3, 2020 that you seek to refinance, less the amount of any advance under an EIDL COVID-19 loan (because it does not have to be repaid).[5]

The IFR continues on to describe items to be provided for the loan.

> Regardless of whether you have filed a 2019 tax return with the IRS, you must provide the 2019 Form 1040 Schedule C with your PPP loan application to substantiate the applied-for PPP loan amount and a 2019 IRS Form 1099-MISC detailing nonemployee compensation received (box 7), invoice, bank statement, or book of record that establishes you are self-employed. You must provide a 2020 invoice,

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[4] "Business Loan Program Temporary Changes; Paycheck Protection Program – Additional Eligibility Criteria and Requirements for Certain Pledges of Loans", Interim Final Rule, Small Business Administration, Question 1.a.

[5] "Business Loan Program Temporary Changes; Paycheck Protection Program – Additional Eligibility Criteria and Requirements for Certain Pledges of Loans", Interim Final Rule, Small Business Administration, Question 1.b.

bank statement, or book of record to establish you were in operation on or around February 15, 2020.[6]

For a self-employed person with employees, the IFR provides the following calculation to be used:

Step 1: Compute 2019 payroll by adding the following:

- Your 2019 Form 1040 Schedule C line 31 net profit amount (if you have not yet filed a 2019 return, fill it out and compute the value), up to $100,000 annualized, if this amount is over $100,000, reduce it to $100,000, if this amount is less than zero, set this amount at zero;

- 2019 gross wages and tips paid to your employees whose principal place of residence is in the United States computed using 2019 IRS Form 941 Taxable Medicare wages & tips (line 5c- column 1) from each quarter plus any pre-tax employee contributions for health insurance or other fringe benefits excluded from Taxable Medicare wages & tips; subtract any amounts paid to any individual employee in excess of $100,000 annualized and any amounts paid to any employee whose principal place of residence is outside the United States; and

- 2019 employer health insurance contributions (health insurance component of Form 1040 Schedule C line 14), retirement contributions (Form 1040 Schedule C line 19), and state and local taxes assessed on employee compensation (primarily under state laws commonly referred to as the State Unemployment Tax Act or SUTA from state quarterly wage reporting forms).

Step 2: Calculate the average monthly amount (divide the amount from Step 1 by 12).

Step 3: Multiply the average monthly amount from Step 2 by 2.5.

Step 4: Add the outstanding amount of any EIDL made between January 31, 2020 and April 3, 2020 that you seek to refinance, less the

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[6] "Business Loan Program Temporary Changes; Paycheck Protection Program – Additional Eligibility Criteria and Requirements for Certain Pledges of Loans", Interim Final Rule, Small Business Administration, Question 1.b.

> amount of any advance under an EIDL COVID-19 loan (because it does not have to be repaid).[7]

In this case the applicant must supply the following information:

> You must supply your 2019 Form 1040 Schedule C, Form 941 (or other tax forms or equivalent payroll processor records containing similar information) and state quarterly wage unemployment insurance tax reporting forms from each quarter in 2019 or equivalent payroll processor records, along with evidence of any retirement and health insurance contributions, if applicable. A payroll statement or similar documentation from the pay period that covered February 15, 2020 must be provided to establish you were in operation on February 15, 2020. [8]

Qualified Expenditures for a Self-Employed Person

Individuals who file a 2019 Schedule C can use the funds for the following purposes:

- Owner compensation replacement, calculated based on 2019 net profit as described in Paragraph 1.b. above.

- Employee payroll costs (as defined in the First PPP Interim Final Rule) for employees whose principal place of residence is in the United States, if you have employees.

- Mortgage interest payments (but not mortgage prepayments or principal payments) on any business mortgage obligation on real or personal property (e.g., the interest on your mortgage for the warehouse you purchased to store business equipment or the interest on an auto loan for a vehicle you use to perform your business), business rent payments (e.g., the warehouse where you store business equipment or the vehicle you use to perform your business), and business utility payments (e.g., the cost of electricity in the warehouse you rent or gas you use driving your business vehicle). You must have claimed or be entitled to claim a deduction for such expenses on your 2019 Form 1040 Schedule C for them to be a permissible use during the eight-week period following the first disbursement of the loan (the "covered period"). For example, if you did not claim or are not entitled to claim

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[7] "Business Loan Program Temporary Changes; Paycheck Protection Program – Additional Eligibility Criteria and Requirements for Certain Pledges of Loans", Interim Final Rule, Small Business Administration, Question 1.c.

[8] "Business Loan Program Temporary Changes; Paycheck Protection Program – Additional Eligibility Criteria and Requirements for Certain Pledges of Loans", Interim Final Rule, Small Business Administration, Question 1.c.

utilities expenses on your 2019 Form 1040 Schedule C, you cannot use the proceeds for utilities during the covered period.

- Interest payments on any other debt obligations that were incurred before February 15, 2020 (such amounts are not eligible for PPP loan forgiveness).

- Refinancing an SBA EIDL loan made between January 31, 2020 and April 3, 2020 (maturity will be reset to PPP's maturity of two years). If you received an SBA EIDL loan from January 31, 2020 through April 3, 2020, you can apply for a PPP loan. If your EIDL loan was not used for payroll costs, it does not affect your eligibility for a PPP loan. If your EIDL loan was used for payroll costs, your PPP loan must be used to refinance your EIDL loan. Proceeds from any advance up to $10,000 on the EIDL loan will be deducted from the loan forgiveness amount on the PPP loan.[9]

The Treasury and SBA felt the need to justify limiting some expenditures to those incurred in 2019 in the case of the self-employed and using 2019 as the sole period for measuring the maximum loan amount:

> The Administrator, in consultation with the Secretary, determined that it is appropriate to limit self-employed individuals' (who file a Form 1040 Schedule C) use of loan proceeds to those types of allowable uses for which the borrower made expenditures in 2019. The Administrator has determined that this limitation on self-employed individuals who file a Form 1040 Schedule C is consistent with the borrower certification required by the Act; specifically, that the PPP loan is necessary "to support the ongoing operations" of the borrower. The Administrator and the Secretary thus believe that this limitation is consistent with the structure of the Act to maintain existing operations and payroll and not for business expansion. This limitation on the use of PPP loan proceeds will also help to ensure that the finite appropriations available for these loans are directed toward maintaining existing operations and payroll, as each loan that is made depletes the appropriation. Finally, although the Act makes businesses in operation on February 15, 2020 eligible for PPP loans, the Administrator, in consultation with the Secretary, has determined that self-employed individuals will need to rely on their 2019 Form 1040 Schedule C, which provides verifiable documentation on expenses between January 1, 2019 and December 31, 2019. For individuals with income from self-employment from 2019 for which they have filed or will file a 2019 Form 1040 Schedule C, expenses incurred

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[9] "Business Loan Program Temporary Changes; Paycheck Protection Program – Additional Eligibility Criteria and Requirements for Certain Pledges of Loans", Interim Final Rule, Small Business Administration, Question 1.d.

between January 1, 2020 and February 14, 2020 may not be considered because of the lack of verifiable documentation on expenses in this period. [10]

Amounts Eligible for Forgiveness

Self-employed individuals, like other businesses, will be subject to the rule that 75% of any loan proceeds be used for payroll costs.[11]

With that limitation in mind, the costs eligible to be included in the forgiveness calculation are:

- Payroll costs including salary, wages, and tips, up to $100,000 of annualized pay per employee (for eight weeks, a maximum of $15,385 per individual), as well as covered benefits for employees ***(but not owners)***, including health care expenses, retirement contributions, and state taxes imposed on employee payroll paid by the employer (such as unemployment insurance premiums);

- Owner compensation replacement, calculated based on 2019 net profit as described in Paragraph 1.b. above, with forgiveness of such amounts limited to eight weeks' worth (8/52) of 2019 net profit, but excluding any qualified sick leave equivalent amount for which a credit is claimed under section 7002 of the Families First Coronavirus Response Act (FFCRA) (Public Law 116-127) or qualified family leave equivalent amount for which a credit is claimed under section 7004 of FFCRA;

- Payments of interest on mortgage obligations on real or personal property incurred before February 15, 2020, to the extent they are deductible on Form 1040 Schedule C (business mortgage payments);

- Rent payments on lease agreements in force before February 15, 2020, to the extent they are deductible on Form 1040 Schedule C (business rent payments); and

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[10] "Business Loan Program Temporary Changes; Paycheck Protection Program – Additional Eligibility Criteria and Requirements for Certain Pledges of Loans", Interim Final Rule, Small Business Administration, Question 1.d.

[11] "Business Loan Program Temporary Changes; Paycheck Protection Program – Additional Eligibility Criteria and Requirements for Certain Pledges of Loans", Interim Final Rule, Small Business Administration, Question 1.e.

- Utility payments under service agreements dated before February 15, 2020 to the extent they are deductible on Form 1040 Schedule C (business utility payments).[12]

The IFR explains the reasoning behind the limit on amounts of owner compensation payments as follows:

> The Administrator, in consultation with the Secretary, has determined that it is appropriate to limit the forgiveness of owner compensation replacement for individuals with self-employment income who file a Schedule C to eight weeks' worth (8/52) of 2019 net profit. This is most consistent with the structure of the Act and its overarching focus on keeping workers paid, and will prevent windfalls that Congress did not intend.
>
> Congress determined that the maximum loan amount is based on 2.5 months of the borrower's payroll during the one-year period preceding the loan. Congress also determined that the maximum amount of loan forgiveness is based on the borrower's eligible payments—i.e., the sum of payroll costs and certain overhead expenses— over the eight-week period following the date of loan disbursement. For individuals with self-employment income who file a Schedule C, the Administrator, in consultation with the Secretary, has determined that it is appropriate to limit loan forgiveness to a proportionate eight-week share of 2019 net profit, as reflected in the individual's 2019 Form 1040 Schedule C. This is because many self-employed individuals have few of the overhead expenses that qualify for forgiveness under the Act. For example, many such individuals operate out of either their homes, vehicles, or sheds and thus do not incur qualifying mortgage interest, rent, or utility payments. As a result, most of their receipts will constitute net income. Allowing such a self-employed individual to treat the full amount of a PPP loan as net income would result in a windfall. The entire amount of the PPP loan (a maximum of 2.5 times monthly payroll costs) would be forgiven even though Congress designed this program to limit forgiveness to certain eligible expenses incurred in an eight-week covered period. Limiting forgiveness to eight weeks of net profit from the owner's 2019 Form 1040 Schedule C is consistent with the structure of the Act, which provides for loan forgiveness based on eight weeks of expenditures. This limitation will also help to ensure that the finite appropriations are directed toward payroll protection, consistent with the Act's central objective. Finally,

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[12] "Business Loan Program Temporary Changes; Paycheck Protection Program – Additional Eligibility Criteria and Requirements for Certain Pledges of Loans", Interim Final Rule, Small Business Administration, Question 1.f.

> 75 percent of the amount forgiven must be attributable to payroll costs for the reasons specified in the First PPP Interim Final Rule.[13]

Documentation for Loan Forgiveness

The IFR provides the following with regard to documents that will need to be submitted for loan forgiveness:

> In addition to the borrower certification required by Section 1106(e)(3) of the Act, to substantiate your request for loan forgiveness, if you have employees, you should submit Form 941 and state quarterly wage unemployment insurance tax reporting forms or equivalent payroll processor records that best correspond to the covered period (with evidence of any retirement and health insurance contributions). Whether or not you have employees, you must submit evidence of business rent, business mortgage interest payments on real or personal property, or business utility payments during the covered period if you used loan proceeds for those purposes.
>
> The 2019 Form 1040 Schedule C that was provided at the time of the PPP loan application must be used to determine the amount of net profit allocated to the owner for the eight-week covered period. The Administrator, in consultation with the Secretary, determined that for purposes of loan forgiveness it is appropriate to require self-employed individuals to rely on the 2019 Form 1040 Schedule C to determine the amount of net profit allocated to the owner during the covered period for the reasons described in Paragraph 1.d. above.[14]

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[13] "Business Loan Program Temporary Changes; Paycheck Protection Program – Additional Eligibility Criteria and Requirements for Certain Pledges of Loans", Interim Final Rule, Small Business Administration, Question 1.f.

[14] "Business Loan Program Temporary Changes; Paycheck Protection Program – Additional Eligibility Criteria and Requirements for Certain Pledges of Loans", Interim Final Rule, Small Business Administration, Question 1.g.

SECTION: 168
REVENUE PROCEDURE ISSUED EXPLAINING ACCOUNTING METHOD CHANGE OPTIONS FOR QUALIFIED IMPROVEMENT PROPERTY

Citation: Revenue Procedure 2020-25, 4/18/20

The IRS has released guidance on dealing with the change in depreciation for qualified improvement property in Revenue Procedure 2020-25.[15]

Qualified Improvement Property Accounting Method Change

The procedure generally applies to qualified improvement property placed in service after December 31, 2017, in the taxpayer's 2018, 2019 or 2020 taxable. But it does not apply in the following situations:

- Qualified improvement property placed in service after December 31, 2017, by a taxpayer that made a late election, or withdrew an election, under § 163(j)(7)(B) (electing real property trade or business) or § 163(j)(7)(C) (electing farming business) for the taxable year in which the qualified improvement property is placed in service by the taxpayer, in accordance with Rev. Proc. 2020-22, 2020-18 I.R.B. 745 (April 27, 2020), released on www.irs.gov on April 10, 2020. Any changes to depreciation for such qualified improvement property, or other depreciable property, affected by the late election or withdrawn election under § 163(j)(7)(B) or 163(j)(7)(C) are made in accordance with sections 4.02 and 4.03, or 5.02 of Rev. Proc. 2020-22, as applicable; or

- Qualified improvement property for which the taxpayer deducted or deducts the cost or other basis of such property as an expense.[16]

The ruling views this a change in accounting method from a now impermissible method of accounting to a permissible one. As the ruling notes:

> A taxpayer changing the depreciation of qualified improvement property within the scope of this section 3 to the depreciation method, recovery period, and convention described in section 2.01(3) of this revenue procedure is changing from an impermissible method of accounting to a permissible method of accounting. Similarly, a change from not claiming to claiming the additional first year depreciation

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[15] Revenue Procedure 2020-25, April 17, 2020, https://www.irs.gov/pub/irs-drop/rp-20-25.pdf, retrieved April 17, 2020

[16] Revenue Procedure 2020-25, Section 3.01

> deduction under § 168(k) for qualified improvement property that is within the scope of this section 3 and is eligible for the additional first year depreciation deduction is a change from an impermissible method of accounting to a permissible method of accounting.[17]

If the qualified improvement property was placed in service in the taxable year immediately preceding the year of change (1-Year QIP), the procedure offers up the following options to accomplish the change:

- The taxpayer may change from the impermissible method of determining depreciation to the permissible method of determining depreciation for the 1-year QIP by filing a Form 3115 for this change in accordance with section 3.02(3)(b) of this revenue procedure, provided the § 481(a) adjustment reported on the Form 3115 includes the amount of any adjustment attributable to all property, including the 1-year QIP, subject to the Form 3115; or

- The taxpayer may change from the impermissible method of determining depreciation to the permissible method of determining depreciation for the 1-year QIP by filing an amended return or AAR in accordance with section 3.02(3)(a) of this revenue procedure.[18]

If the taxpayer decides to go the Form 3115/IRC §481(a) adjustment route for the 1-Year QIP property to accomplish the change or is looking to change methods on property outside the one year window, the taxpayer takes the following steps:

> A Form 3115 with the taxpayer's timely filed Federal income tax return or Form 1065 under the automatic change procedures in Rev. Proc. 2015-13. See section 6.03(1) of this revenue procedure for the procedures for making this change in method of accounting.

Alternatively, if a taxpayer goes the amended return route to correct the depreciation claimed on 1-Year QIP property, the following steps are taken:

> Except as provided in Rev. Proc. 2020-23, 2020-18 I.R.B. 749, (April 27, 2020), released on www.irs.gov on April 8, 2020, regarding the time to file amended returns by a partnership subject to the centralized partnership audit regime enacted as part of the Bipartisan Budget Act of 2015 (BBA partnership) for taxable years beginning in 2018 and 2019, a Federal amended income tax return or amended Form 1065 for the placed-in-service year of the qualified improvement property on or before October 15, 2021, but in no event later than the applicable period of limitations on assessment for the taxable year for which the

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[17] Revenue Procedure 2020-25, Section 3.02(1)

[18] Revenue Procedure 2020-25, Section 3.02(2)

> amended return is being filed. In the case of a BBA partnership that chooses not to file an amended Form 1065 as permitted under Rev. Proc. 2020-23 or that cannot file an amended Form 1065 because the placed-in-service year of the qualified improvement property is a taxable year that is not within the scope of Rev. Proc. 2020-23, the BBA partnership may file an AAR for the placed-in-service year of the qualified improvement property on or before October 15, 2021, but in no event later than the applicable period of limitations on making adjustments under § 6235 for the reviewed year as defined in § 301.6241-1(a)(8). This amended return or AAR must include the adjustment to taxable income for the change in determining depreciation of the qualified improvement property and any collateral adjustments to taxable income or to tax liability. Such collateral adjustments also must be made on original or amended Federal returns or AARs for any affected succeeding taxable years…[19]

Note that a taxpayer has until October 15, 2021 to make this decision to amend the 2018 return or go for the accounting method change and file Form 3115 with a §481(a) adjustment in 2019. Taxpayers will need to determine which year is the preferable year to make the change—and the decision may rest on how quickly the IRS could be expected to process a paper amended 2018 return. One advantage to an accounting method change for 2019 is that the return could be filed electronically and have an immediate effect either by reducing tax due with the return or leading to a tax refund being issued.

Elections Under IRC §168

The next section deals with elections under IRC §168(g)(7) and (k). These elections are generally permanent in nature, as described in the procedure:

> Section 1.168(k)-2(f)(5) provides that, in general, the § 168(k)(5) election, § 168(k)(7) election, and § 168(k)(10) election, once made, may be revoked only by filing a request for a private letter ruling and obtaining the written consent of the Commissioner of Internal Revenue (Commissioner) to revoke the election. Further, if a taxpayer timely filed its Federal income tax return or Form 1065 for the taxpayer's taxable year beginning in 2017 and ending on or after September 28, 2017, sections 4.03, 5.04, and 6.05 of Rev. Proc. 2019-33 provide special procedures to allow the taxpayer to revoke its § 168(k)(5) election, § 168(k)(7) election, and § 168(k)(10) election, respectively, made for such taxable year. As noted in section 2.02(1) of

[19] Revenue Procedure 2020-25, Section 3.02(3)(a)

> this revenue procedure, section 168(g)(7)(B) provides that the § 168(g)(7) election, once made, is irrevocable.

The election under IRC §168(g)(7) is described as follows:

> Section 168(g)(7) allows a taxpayer to make an election to depreciate under the ADS any class of property placed in service by the taxpayer during the taxable year (§ 168(g)(7) election). If the § 168(g)(7) election is made, the election applies to all property that is in the same class of property and placed in service in the same taxable year. However, for nonresidential real property and residential rental property, the election may be made separately for each property. Once made, the § 168(g)(7) election is irrevocable. See § 168(g)(7)(B). Section 301.9100-7T(a)(2) and (3) of the Procedure and Administration Regulations provide the time and manner of making the § 168(g)(7) election. Such election is made by the due date, including extensions, of the Federal income tax return or Form 1065, U.S. Return of Partnership Income, for the taxable year in which the property is placed in service by the taxpayer, and is made by attaching a statement to such return. The instructions to Form 4562, Depreciation and Amortization, provide that the § 168(g)(7) election is made by completing line 20 of Form 4562.[20]

The election under IRC §168(k)(5)(A) is described as follows:

> Section 168(k)(5)(A) allows a taxpayer to make an election to apply the special rules of § 168(k)(5) to one or more specified plants that are planted, or grafted to a plant that has already been planted, by the taxpayer in the ordinary course of its farming business, as defined in § 263A(e)(4) (§ 168(k)(5) election). The rules and procedures for making the § 168(k)(5) election are set forth in § 1.168(k)-2(f)(2). Pursuant to § 1.168(k)-2(f)(2)(ii), the § 168(k)(5) election is made by the due date, including extensions, of the Federal income tax return or Form 1065 for the taxable year in which the taxpayer planted or grafted the specified plant to which the § 168(k)(5) election applies, and is made in the manner prescribed on Form 4562 and its instructions. For specified plants planted, or grafted to a plant that was previously planted, by the taxpayer before the applicability date set forth in § 1.168(k)-2(h) for § 1.168(k)-2, section 4.05 of Rev. Proc. 2017-33, 2017-19 I.R.B. 1236, provides the time and manner for making the § 168(k)(5) election and such procedures are the same as in § 1.168(k)-2(f)(2)(ii). Further, if a taxpayer timely filed its Federal income tax return or Form 1065 for the taxpayer's taxable year

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[20] Revenue Procedure 2020-25, Section 2.02(1)

> beginning in 2017 and ending on or after September 28, 2017, sections 4.01(2) and 4.02 of Rev. Proc. 2019-33, 2019-34 I.R.B. 662, provide special procedures to allow the taxpayer to make a deemed § 168(k)(5) election or a late § 168(k)(5) election for a specified plant planted, or grafted to a plant that was previously planted, by the taxpayer after September 27, 2017.[21]

The election under IRC §168(k)(7) is described as:

> Section 168(k)(7) allows a taxpayer to make an election not to deduct the additional first year depreciation for any class of property that is qualified property placed in service during the taxable year (§ 168(k)(7) election). The rules and procedures for making the § 168(k)(7) election are set forth in § 1.168(k)-2(f)(1). Section 1.168(k)-2(f)(1)(ii) defines "class of property" for purposes of the § 168(k)(7) election. Under § 1.168(k)-2(f)(1)(ii), qualified improvement property is included in the 15-year property class and is not a separate class of property. However, qualified improvement property, as defined in § 168(k)(3) as in effect prior to amendment by the TCJA, acquired by the taxpayer after September 27, 2017, and placed in service by the taxpayer before January 1, 2018, is a separate class of property under § 1.168(k)- 2(f)(1)(ii)(D). Pursuant to § 1.168(k)-2(f)(1)(iii), the § 168(k)(7) election is made by the due date, including extensions, of the Federal income tax return or Form 1065 for the taxable year in which the qualified property is placed in service by the taxpayer, and is made in the manner prescribed on Form 4562 and its instructions. For qualified property placed in service by the taxpayer before the applicability date set forth in § 1.168(k)-2(h) for § 1.168(k)-2, section 4.04 of Rev. Proc. 2017-33 provides the time and manner for making the § 168(k)(7) election and such procedures are the same as in § 1.168(k)-2(f)(1)(iii). Further, if a taxpayer timely filed its Federal income tax return or Form 1065 for the taxpayer's taxable year beginning in 2017 and ending on or after September 28, 2017, sections 5.02(2) and 5.03 of Rev. Proc. 2019-33 provide special procedures to allow the taxpayer to make a deemed § 168(k)(7) election or a late § 168(k)(7) election for a class of property that is qualified property acquired by the taxpayer after September 27, 2017, and placed in service by the taxpayer during such taxable year.[22]

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[21] Revenue Procedure 2020-25, Section 2.02(2)

[22] Revenue Procedure 2020-25, Section 2.02(3)

The election under §168(k)(10) is described as follows:

> Section 168(k)(10) allows a taxpayer to make an election to deduct 50 percent, instead of 100 percent, additional first year depreciation for: (a) all qualified property acquired by the taxpayer after September 27, 2017, and placed in service by the taxpayer during its taxable year that includes September 28, 2017; and (b) all specified plants that are planted, or grafted to a plant that has already been planted, after September 27, 2017, by the taxpayer in the ordinary course of the taxpayer's farming business during its taxable year that includes September 28, 2017, if the taxpayer makes the § 168(k)(5) election for that taxable year (§ 168(k)(10) election). The rules and procedures for making the § 168(k)(10) election are set forth in § 1.168(k)-2(f)(3). Pursuant to § 1.168(k)-2(f)(3)(ii), the § 168(k)(10) election is made by the due date, including extensions, of the Federal income tax return or Form 1065 for the taxpayer's taxable year that includes September 28, 2017, and is made in the manner prescribed on the 2017 Form 4562 and its instructions. For qualified property placed in service, and specified plants planted, or grafted to a plant that was previously planted, by the taxpayer before the applicability date set forth in § 1.168(k)-2(h) for § 1.168(k)-2, section 6.02 of Rev. Proc. 2019-33 provides the time and manner for making the § 168(k)(10) election and such procedures are the same as in § 1.168(k)-2(f)(3)(ii). Further, if a taxpayer timely filed its Federal income tax return or Form 1065 for the taxpayer's taxable year beginning in 2017 and ending on or after September 28, 2017, sections 6.03(2) and 6.04 of Rev. Proc. 2019-33 provide special procedures to allow the taxpayer to make a deemed § 168(k)(10) election or a late § 168(k)(10) election for all qualified property acquired by the taxpayer after September 27, 2017, and placed in service by the taxpayer during such taxable year, or for all specified plants planted, or grafted to a plant that was previously planted, by the taxpayer after September 27, 2017.[23]

Time and manner of making a late § 168(g)(7), (k)(5), (k)(7), or (k)(10) election

This section applies to:

- A taxpayer that (a) placed in service depreciable property during its 2018, 2019, or 2020 taxable year, (b) timely filed its Federal income tax return or Form 1065 for the placed-in-service year of such depreciable property and such return was filed on or before April 17, 2020, (c) wants to make a § 168(g)(7) election, § 168(k)(5) election, or § 168(k)(7) election for such depreciable property, and (d) did not

[23] Revenue Procedure 2020-25, Section 2.02(4)

previously revoke or withdraw such election(s) in accordance with section 5.02 of this revenue procedure. The taxpayer makes the § 168(g)(7) election, § 168(k)(5) election, or § 168(k)(7) election in accordance with section 2.02(1), (2), or (3), respectively, of this revenue procedure or under section 4.02 of this revenue procedure; or

- A taxpayer that (a) timely filed its Federal income tax return or Form 1065 for the taxpayer's taxable year that includes September 28, 2017, (b) wants to make a § 168(k)(10) election for such taxable year, and (c) did not previously revoke a § 168(k)(10) election for such taxable year in accordance with section 5.02 of this revenue procedure. The taxpayer makes the § 168(k)(10) in accordance with section 2.02(4) of this revenue procedure or under section 4.02 of this revenue procedure.[24]

A taxpayer covered by this procedure may make a late election under IRC § 168(g)(7), (k)(5), (k)(7), or (k)(10) election in one of two manners:

- Except as provided in Rev. Proc. 2020-23 regarding the time to file amended returns by BBA partnerships for taxable years beginning in 2018 and 2019, a Federal amended income tax return or amended Form 1065 for the placed-in-service year of the property on or before October 15, 2021, but in no event later than the applicable period of limitations on assessment for the taxable year for which the amended return is being filed. In the case of a BBA partnership that chooses not to file an amended Form 1065 as permitted under Rev. Proc. 2020-23 or that cannot file an amended Form 1065 because the placed-in-service year of the property is a taxable year that is not within the scope of Rev. Proc. 2020-23, the BBA partnership may file an AAR for the placed-in-service year of the property on or before October 15, 2021, but in no event later than the applicable period of limitations on making adjustments under § 6235 for the reviewed year as defined in § 301.6241-1(a)(8). This amended return or AAR must include the adjustment to taxable income for the late election and any collateral adjustments to taxable income or to tax liability. Such collateral adjustments also must be made on original or amended Federal returns or AARs for any affected succeeding taxable years; or

- A Form 3115 with the taxpayer's timely filed original Federal income tax return or Form 1065 (a) for the taxpayer's first or second taxable year succeeding the taxable year in which the taxpayer placed in service the property, or (b) that is filed on or after April 17, 2020, and on or before October 15, 2021. The late § 168(g)(7), (k)(5), (k)(7), or (k)(10) election under this section 4.02(2) will be treated as a change in method of accounting with a § 481(a) adjustment only during this

[24] Revenue Procedure 2020-25, Section 4.01

limited period of time. The time and manner of making this late election are described in section 6.03(2) of this revenue procedure.[25]

Revoking or Withdrawing Certain Elections Under §168

This section applies to:

- A taxpayer that (a) placed in service depreciable property during its 2018, 2019, or 2020 taxable year, (b) made a § 168(k)(5) election or § 168(k)(7) election on its timely filed original Federal income tax return or Form 1065 for the placed-in-service year of such depreciable property and such return was filed on or before April 17, 2020, or made a § 168(k)(5) election or § 168(k)(7) election in accordance with section 4 or 5 of Rev. Proc. 2019-33, respectively, for the placed-in-service year of such depreciable property on or before April 17, 2020, and (c) wants to revoke such election. If the taxpayer revokes the § 168(k)(7) election in accordance with section 5.02(2) of this revenue procedure, the revocation applies to all property included in the class of property and placed in service during the same taxable year;

- A taxpayer that made a § 168(k)(10) election on its timely filed original Federal income tax return or Form 1065 for the taxpayer's taxable year that includes September 28, 2017, and such return was filed on or before April 17, 2020, or made a § 168(k)(10) election in accordance with section 6 of Rev. Proc. 2019-33 for the taxpayer's taxable year that includes September 28, 2017, on or before April 17, 2020, and that wants to revoke the § 168(k)(10) election. If the taxpayer revokes the § 168(k)(10) election in accordance with section 5.02(2) of this revenue procedure, the revocation applies to (a) all qualified property acquired by the taxpayer after September 27, 2017, and placed in service by the taxpayer during its taxable year that includes September 28, 2017, and (b) all specified plants that are planted, or grafted to a plant that has already been planted, after September 27, 2017, by the taxpayer in the ordinary course of the taxpayer's farming business during its taxable year that includes September 28, 2017, if the taxpayer made the § 168(k)(5) election for that taxable year; or

- A taxpayer that (a) placed in service depreciable property during its 2018, 2019, or 2020 taxable year, (b) made a § 168(g)(7) election on its timely filed original Federal income tax return or Form 1065 for the placed-in-service year of such depreciable property and such return was filed on or before April 17, 2020, and (c) wants to withdraw such election. If the taxpayer withdraws the § 168(g)(7) election in accordance with section 5.02(3) of this revenue procedure, the taxpayer will be treated as if the election was never made for all property included in the class of property and placed in service during the same taxable year. However, if the taxpayer withdraws the § 168(g)(7) election for an item of nonresidential real

[25] Revenue Procedure 2020-25, Section 4.02

property or residential rental property in accordance with section 5.02(3) of this revenue procedure, the taxpayer will be treated as if the election was not made for that specific item of nonresidential real property or residential rental property.[26]

A taxpayer covered by this section of the ruling is given consent revoke its §168(k)(5) election, §168(k)(7) election, or §168(k)(10) election, or consent to withdraw its §168(g)(7) election if the follows the procedures outlined.[27]

If a taxpayer who wishes to revoke a §168(k)(5), (7), or (10) election can do so by following either of the following procedures:

- Except as provided in Rev. Proc. 2020-23 regarding the time to file amended returns by BBA partnerships for taxable years beginning in 2018 and 2019, a Federal amended income tax return or amended Form 1065 for the placed-in-service year of the property on or before October 15, 2021, but in no event later than the applicable period of limitations on assessment for the taxable year for which the amended return is being filed. In the case of a BBA partnership that chooses not to file an amended Form 1065 as permitted under Rev. Proc. 2020-23 or that cannot file an amended Form 1065 because the placed-in-service year of the property is a taxable year that is not within the scope of Rev. Proc. 2020-23, the BBA partnership may file an AAR for the placed-in-service year of the property on or before October 15, 2021, but in no event later than the applicable period of limitations on making adjustments under §6235 for the reviewed year as defined in § 301.6241-1(a)(8). This amended return or AAR must include the adjustment to taxable income for the revocation of the §168(k)(5), (k)(7), or (k)(10) election and any collateral adjustments to taxable income or to tax liability. Such collateral adjustments also must be made on original or amended Federal returns or AARs for any affected succeeding taxable years; or

- A Form 3115 with the taxpayer's timely filed original Federal income tax return or Form 1065 (i) for the taxpayer's first or second taxable year succeeding the taxable year in which the taxpayer placed in service the property, or (ii) that is filed on or after April 17, 2020, and on or before October 15, 2021. The revocation of the § 168(k)(5), (k)(7), or (k)(10) election under this section 5.02(2)(b) will be treated as a change in method of accounting with a § 481(a) adjustment only during this limited period of time. The time and manner of making this revocation are described in section 6.03(2) of this revenue procedure.[28]

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[26] Revenue Procedure 2020-25, Section 5.01

[27] Revenue Procedure 2020-25, Section 5.02(1)

[28] Revenue Procedure 2020-25, Section 5.02(2)

A withdrawal of §168(7) election is accomplished as follows:

> A taxpayer within the scope of this section 5 may withdraw a § 168(g)(7) election by filing an amended Federal income tax return, amended Form 1065, or AAR, as applicable. Except as provided in Rev. Proc. 2020-23 regarding the time to file amended returns by BBA partnerships for taxable years beginning in 2018 and 2019, the Federal amended income tax return or amended Form 1065 for the placed-in-service year of the property must be filed on or before October 15, 2021, but in no event later than the applicable period of limitations on assessment for the taxable year for which the amended return is being filed. In the case of a BBA partnership that chooses not to file an amended Form 1065 as permitted under Rev. Proc. 2020-23 or that cannot file an amended Form 1065 because the placed-in-service year of the property is a taxable year that is not within the scope of Rev. Proc. 2020-23, the BBA partnership may file an AAR for the placed-in-service year of the property on or before October 15, 2021, but in no event later than the applicable period of limitations on making adjustments under § 6235 for the reviewed year as defined in § 301.6241-1(a)(8). This amended return or AAR must include the adjustment to taxable income for the withdrawal of the § 168(g)(7) election and any collateral adjustments to taxable income or to tax liability. Such collateral adjustments also must be made on original or amended Federal returns or AARs for any affected succeeding taxable years.[29]

Section 6 of the procedure has the detailed procedures for filing the necessary accounting method changes for this procedure.

The procedure also contains a modification to Revenue Procedure 2015-56 that details a safe harbor method accounting for determining whether expenditures paid or incurred to remodel or refresh a qualified building are deductible under § 162(a) of the Internal Revenue Code (Code), must be capitalized as improvements under § 263(a), or must be capitalized as the costs of property produced by the taxpayer for use in its trade or business under § 263A in Section 7 of the procedure.

[29] Revenue Procedure 2020-25, Section 5.02(3)

SECTION: 172
IRS ADDS MORE C CORPORATION GUIDANCE TO TENATIVE REFUND FAX TEMPORARY PROCEDURES FAQ

Citation: "Temporary procedures to fax certain Forms 1139 and 1045 due to COVID-19," IRS Website, 4/16/2020

The IRS has added additional information, primarily related to C corporation taxpayers, to the FAQ on the temporary procedures for filing Forms 1045 and 1139.[30]

The IRS first addresses whether a similar procedure will be set up for handling the amended corporate return form, Form 1120X. And the answer is simple—no.

> **8. Will the IRS be establishing a similar procedure for Form 1120X, Amended U.S. Corporation Income Tax Return?**
>
> No, the Form 1120X must be filed in accordance with existing form instructions. If a Form 1120X is faxed to the fax number noted above, it will not be accepted for processing.

Some taxpayers likely had a Form 1120X still under consideration by the IRS, or one they had mailed off before the Service Centers shut down. As well, taxpayers may discover issues that will need fixing when preparing the Form 1139 that would require using a Form 1120X. Those taxpayers are, essentially, out of luck until the IRS can start processing the paper Form 1120X.

> **9. What will happen if I filed a Form 1120X that has not been processed and I used those numbers in my Form 1139 filing?**
>
> Your Form 1139 must reflect your originally filed or previously processed amended return information. If your Form 1139 does not match your IRS account, the Form 1139 cannot be processed because the Form 1120X needs to be processed first. For example, if you gave a Form 1120X to your examination team, it has not been processed.
>
> Do not attempt to file an amended return at time of filing Form1139. Amended returns will not be acted upon when filed with Form 1139 through the temporary fax procedures.

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[30] "Temporary procedures to fax certain Forms 1139 and 1045 due to COVID-19," IRS Website, April 16, 2020 revision, https://www.irs.gov/newsroom/temporary-procedures-to-fax-certain-forms-1139-and-1045-due-to-covid-19 , retrieved April 17, 2020

This problem will also get in the way of corporations who have changes to make to prior years due to items contained in the CARES Act, such as the fix for qualified investment property lives and qualification for bonus depreciation. If those either increase a net operating loss or are the items that will generate a new net operating loss once they are taken into account, the business will not be able to take advantage of the fax option to file their Form 1139.

The FAQ goes on to deal with the issue of attempting to claim the accelerated access to unused corporate minimum tax credits. While the law provides the credits can be claimed via the tentative refund procedures, the Form 1139 does not provide an option to claim a refund based on the credit. The IRS deals with this as follows:

> **10. The current version of Form 1139 (2018) does not provide for tentative refunds for refundable prior year minimum tax credits. How should I complete the Form 1139 if I am only claiming tentative refunds of prior year minimum tax credits? How should I complete the 2018 Form 8827?**
>
> The following instructions apply for the 2018 Forms 1139 and 8827 to allow for the changes per CARES Act Section 2305(b).
>
> **Form 1139**
>
> - Include at the top of Form 1139, "Electing to Take 100% Refundable Credit Amount in 2018 - per CARES Act Section 2305(b)".
>
> - You should complete Lines 1(d) and 29 of the Form 1139. Leave Lines 1a through 1c and 2 through 28 blank.
>
> - Enter on Line 1(d), the minimum tax credit carryforward to 2019, as reported on the original Form 8827 Line 9. Disregard the instructions for Form 1139, Line 1(d) "Other".
>
> - Enter on line 29, the difference between the amount reported on the original 2018 Form 8827 Line 8(c) and the amount reported on the revised 2018 Form 8827 Line 8(c) as described below. Disregard the instructions for Form 1139, Line 29 "Overpayment of tax due to a claim of right adjustment under section 1341(b)(1)."
>
> **Form 8827**
>
> - Include at the top of 2018 Form 8827, "Electing to Take 100% Refundable Credit Amount in 2018 - per CARES Act Section 2305(b)."

- When completing Line 6 of the Worksheet for Calculating the Refundable Minimum Tax Credit Amount on 2018 Form 8827 replace "50%" in the instructions on Line 6 with "100%."

- Complete the remainder of 2018 Form 8827 according to the instructions.

11. Should I file the application for a tentative refund and claim both the NOL carryback and 100% refundable minimum tax credit on the same 2018 Form 1139 and how?

Yes, you should use the same Form 1139 for both claims.

- Complete Lines 1a through 1c and 2 through 28 as appropriate, following the existing Form 1139 instructions to report your NOL carryback.

- Enter on Line 1(d), the minimum tax credit carryforward to 2019, as reported on the original Form 8827 Line 9. Disregard the instructions for Form 1139, Line 1(d) "Other".

- Enter on Line 29, the difference between the amount reported on the original 2018 Form 8827 Line 8(c) and the amount reported on the revised 2018 Form 8827 Line 8(c) as described below. Disregard the instructions for Form 1139, Line 29 "Overpayment of tax due to a claim of right adjustment under section 1341(b)(1)."

Complete the 2018 Form 8827 as follows:

- Include at the top of 2018 Form 8827, “Electing to Take 100% Refundable Credit Amount in 2018 - per CARES Act Section 2305(b).”

- When completing Line 6 of the Worksheet for Calculating the Refundable Minimum Tax Credit Amount of the 2018 Form 8827 replace "50%" in the instructions on Line 6 with "100%."

- Complete the remainder of 2018 Form 8827 according to the instructions.

If you have a carryback of a net operating loss for the taxable year and are applying for a tentative carryback refund and a 100% refundable minimum tax credit tentative refund, ordering rules apply. You must take into account any adjustments made in applying for the tentative

carryback adjustment before determining the amount of the overpayment attributable to the 100% refundable minimum tax credit refund. (Treas. Reg. § 5.6411-1). Caution: adjustments to alternative minimum tax in the carryback years could affect the amount of the 100% refundable minimum tax credit allowed in 2018.

Finally, the FAQ adds a section on items to be included with a Form 1139 submitted via the fax program:

> **12. What documents should I attach to 2018 Form 1139 for a tentative refund for a 100% refundable minimum tax credit or the NOL carryback?**
>
> A. If you are only claiming a tentative refund for a net operating loss carryback, follow the existing instructions for Form 1139.
>
> B. If you are only claiming a refund for the minimum tax credit, you should attach (1) the first three pages of the originally filed or previously processed amended 2018 Form 1120, including Schedule J, (2) a copy of the originally filed 2018 Form 8827, (3) the first three pages of the revised 2018 Form 1120, reflecting the change with the 100% refundable minimum tax credit, and (4) the revised 2018 Form 8827.
>
> C. If you are claiming both a refund for the minimum tax credit and the NOL carryback, follow the existing instructions for Form 1139 for the NOL carryback and the instructions in (B) above for the 100% refundable minimum tax credit refund. Do not attempt to file an amended return at time of filing Form1139. Amended returns will not be acted upon when filed with Form 1139 through the temporary fax procedures.

SECTION: 6109
PROPOSED REGULATIONS TO SET PTIN USER FEE AT $21 PLUS $14.95 THIRD PARTY CONTRACTOR FEE

Citation: REG-117138-17, Proposed Reg. §300.12, 4/15/20

The IRS has released proposed regulations[31] that would set the IRS portion of the preparer tax identification number (PTIN) fee per application at $21, down from the current $33 level.

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[31] REG-117138-17, April 15, 2020, https://s3.amazonaws.com/public-inspection.federalregister.gov/2020-

The program had faced a legal challenge that temporarily suspended collection of the fee. As the preamble notes:

> In *Steele v. United States*, 260 F. Supp. 3d 52 (D.D.C. 2017), the United States District Court for the District of Columbia concluded that the Treasury Department and the IRS lacked the statutory authority to charge a PTIN user fee and enjoined the IRS from charging a PTIN user fee. The government filed an appeal and on March 1, 2019, the United States Court of Appeals for the District of Columbia Circuit reversed the district court's decision and lifted the injunction against charging the PTIN user fee. See *Montrois v. United States*, 916 F.3d 1056 (D.C. Cir. 2019) (holding that a PTIN provides tax return preparers a specific benefit by allowing them to provide an identifying number that is not a social security number on returns they prepare and stating that the permissible amount of the fee would be the same regardless of whether the specific benefit was instead the ability to prepare tax returns for compensation). The case is currently on remand in the United States District Court for the District of Columbia regarding the amount of the fee. Id. at 1068.[32]

The preamble continues to explain the new fees:

> Pursuant to the guidelines in OMB Circular A-25, the IRS has re-calculated its cost of providing PTINs. The IRS has determined that the full cost of administering the PTIN program going forward has been reduced to $21 per application or renewal, plus $14.95 payable directly to a third-party contractor. The government is authorized to charge a PTIN user fee under the IOAA because, in exchange for the fee, it provides a service by issuing and maintaining PTINs, which provide tax return preparers a specific benefit by allowing them to provide an identifying number that is not a social security number on returns and to prepare returns for compensation.[33]

The new fee structure will apply to applications for or renewals of a PTIN on or after 30 days after the regulations are published as final regulations in the *Federal Register*.[34]

08055.pdf?utm_campaign=pi+subscription+mailing+list&utm_source=federalregister.gov&utm_medium=email, retrieved April 15, 2020

[32] REG-117138-17, pp. 7-8

[33] REG-117138-17, p. 8

[34] Proposed Reg. §301.12(d)

SECTION: 6411
FAXES WILL BE USED TEMPORARILY TO FILE CARES ACT RELATED TENTATIVE CLAIMS FOR REFUNDS

Citation: "Temporary procedures to fax certain Forms 1139 and 1045 due to COVID-19," IRS Website, 4/13/20

The CARES Act added provisions allowing taxpayers to carry net operating losses from 2018 and 2019 back five years, potentially giving affected taxpayers access to much needed cash by filing a claim for refund. And the IRS has issued guidance allowing the Forms 1045 and 1139 to be used to claim the refunds under the tentative refund procedures.

But there is a problem—those forms cannot be filed electronically, and the IRS is not processing paper filed forms at this time, as all Service Centers have now been closed for an indefinite period of time. In order to address this issue, the IRS has released on its website temporary procedures for filing Forms 1045 and 1139 by fax.[35]

The guidance notes that *only* claims for refund under either §2303 or §2305 of the CARES Act will be processed under this procedure. The page describes those sections as follows:

- Section 2303 requires a taxpayer with a net operating loss arising in a 2018, 2019, or 2020 taxable year to carry that loss back to each of the five preceding years unless the taxpayer elects to waive or reduce the carryback; and

- Section 2305 modifies the credit for prior-year minimum tax liability of corporations, including to accelerate the recovery of remaining minimum tax credits of a corporation for its 2019 taxable year from its 2021 taxable year and to permit a corporation to elect instead to recover 100 percent of any of its remaining minimum tax credits in its 2018 taxable year.

The program, which begins on April 17, is described as follows:

> Starting on April 17, 2020 and until further notice, the IRS will accept eligible refund claims Form 1139 submitted via Fax to 844-249-6236 and eligible refund claims Form 1045 submitted via fax to 844-249-6237. Before then, these fax numbers will not be operational. We encourage taxpayers to wait until this procedure is available rather than

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[35] "Temporary procedures to fax certain Forms 1139 and 1045 due to COVID-19," IRS Website, April 13, 2020, https://www.irs.gov/newsroom/temporary-procedures-to-fax-certain-forms-1139-and-1045-due-to-covid-19 , retrieved April 13, 2020

> mail their Forms 1139 and 1045 since mail processing is being impacted by the emergency.

The IRS is also imposing a 100-page limit on the claims submitted:

> A maximum of 100 pages can be initially faxed to either of the fax numbers listed above. If additional documentation is required to be attached or deemed to be necessary, taxpayers will be notified during the processing of the Form 1139 or Form 1045.

The IRS notes the following changes from the normal hard copy procedures:

> Previously, these forms could be filed only via hard copy delivered through the USPS or by a private delivery service. There are well-established procedures for processing the hard copy forms in order to provide quick tentative refunds to taxpayers. A temporary procedure to accept these forms via fax permits us to make the relief in the CARES Act available to taxpayers before IRS processing centers are able to reopen. The procedures to process claims will remain the same – the only difference is to allow an additional method to file eligible refund claims.

The FAQ also deals with cases where taxpayers may have already mailed in a paper Form 1045 or 1139:

> Yes, if you previously mailed a hard copy of either of these forms that is an eligible refund claim (because it contains changes permitted by the AMT and NOL provisions of the CARES Act identified above) after March 27, 2020, you can now submit that same claim to the fax numbers stated above starting on April 17.

If a taxpayer submits an ineligible claim (one not authorized under the CARES Act provisions mentioned), it will be held and processed once normal operations resume.

The IRS also notes that the instructions for Forms 1045 and 1139 have outdated information regarding §965 years in the carryback period, instructions that will be corrected to agree with the law:

> Yes, you may disregard the instructions for Form 1139 and Form 1045 which prohibit taxpayers from using these forms to apply for refunds for 965 years. The instructions to these forms will be updated to reflect this change. However, please be aware that because the CARES Act added section 172(b)(1)(D)(iv) to provide that a taxpayer who has a carryback to a section 965 year is deemed to have made a section 965(n) election that limits the amount of the loss that can be carried back to each such year, an NOL can be carried back only to reduce income in excess of the amount of the net section 965(a) inclusion.

> The IRS expects to issue additional instructions on filing requests for tentative refunds for taxpayers with outstanding section 965(h) net tax liabilities, so that these requests and liabilities can be identified, routed, and tracked appropriately, and so that payment schedules can be adjusted to avoid unintentional or erroneous acceleration of deferred section 965(h) installment payments, delays in refunds, or other processing complications.

The IRS will *not* be establishing a similar procedure for filing Form 4466 "Corporation Application for Quick Refund of Overpayment of Estimated Tax," instead requiring taxpayers to follow the existing form instructions.

And the IRS ends by making it clear that the fax system is not something that they plan to make a permanent way to file these claims:

> No, accepting faxed versions of these forms that are normally delivered through the USPS or by a private delivery service is meant as a short-term measure to assist taxpayers in receiving refunds provided under the CARES Act as quickly as possible.

SECTION: 7502
PROCEDURES ISSUES FOR DEALING WITH FORMS 706 RETURNED FROM SERVICE CENTER CLOSED DUE TO COVID-19 OUTBREAK

Citation: "Frequently Asked Questions: Estate tax Form 706 deliveries returned due to COVID-19," IRS Webpage, 4/13/20

Some estate tax filings being sent to the IRS via private delivery services (PDS) got caught being in transit at the wrong time when the IRS closed its Kansas City Service Center due to the COVID-19 outbreak. When the packages arrived in Kansas City the Center was closed and, in many cases, the PDS returned the packages to the sender as undeliverable.

The IRS has issued an FAQ page on its website to explain to affected taxpayers how to deal with this situation.[36] The FAQ provides answers to three questions.

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[36] "Frequently Asked Questions: Estate tax Form 706 deliveries returned due to COVID-19," IRS Webpage, April 13, 2020, https://www.irs.gov/newsroom/frequently-asked-questions-estate-tax-form-706-deliveries-returned-due-to-covid-19, retrieved April 13, 2020

The first question looks generally at the issue of having a package with a Form 706 in transit that arrived at Kansas City after the Service Center had closed, one that the taxpayer believed was going to be covered by the "timely mailing as timely filing" rule under IRC §7502. The IRS makes the following initial suggestion if the taxpayer has received a notification of a failed delivery and observation:

> Ask the PDS to attempt delivery again to the Kansas City Service Center. In general, your return will be considered timely filed if the original mailing was timely postmarked, regardless of when delivery actually occurs. In the absence of receipt before the due date, timeliness will be based on the date recorded by the PDS.

All well and good to ask them to try and deliver the package again, but what if the PDS goes ahead and sends it back to the taxpayer? In that case the IRS suggests:

> Maintain the integrity of the original package (i.e., do not open it; just place it inside a new envelope or shipping box) and refile it. Keep the original proof of mailing along with the new proof of mailing and any record of the date the PDS attempted delivery for your records. In general, your Form 706 will be considered timely filed if the original mailing was timely postmarked. In the absence of receipt before the due date, timeliness will be based on the date recorded by the PDS.

Of course, the taxpayer may not realize the tax return is in the package or have not been aware of the guidance not to open the package—and, thus, the taxpayer has now opened the package. In that case the IRS suggests the following:

> Keep a copy of the original envelope with the date recorded by the PDS and any other documentation that would establish your original mailing date and the date that the PDS attempted delivery, so that proof will be available when needed. You should also keep a copy of the contents of the original package. Refile the entire package, including the original envelope and proof of mailing.