Current Federal Tax Developments

Week of July 12, 2021

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CURRENT FEDERAL TAX DEVELOPMENTS
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Contents

SECTION: 24
TAXPAYER ADVOCATE SERVICE WILL NOT ACCEPT STAND-ALONE ADVANCE CHILD TAX CREDIT CASES PER TAS MEMORANDUM

Citation: TAS-13-0721-0009, "Interim Guidance — Advance Child Tax Credit", 7/2/21

The IRS Taxpayer Advocate Service (TAS) has issued a memorandum (TAS-13-0721-0009)[1] which states that TAS will not accept most advance child tax credit (Adv. CTC) cases. The memorandum explains the advance child tax credit provision, found in the American Rescue Plan Act of 2021, as follows:

> Section 9611(a) of the American Rescue Plan Act, Public Law 117-2 (2021), signed into law on March 11, 2021, amended Internal Revenue Code (IRC) section 24 to create special rules for the Child Tax Credit (CTC) applicable to only calendar year 2021 and added new IRC section 7527A to provide for periodic advance payments of the CTC to eligible individuals in calendar year 2021. The Adv CTC payments will commence July 15, 2021 and end by December 31, 2021. During this time IRS programming will use tax year 2020 return data (or 2019, if 2020 is not available) to generate monthly payments totaling up to 50 percent of the taxpayer's projected 2021 CTC amount. Taxpayers who have not filed a 2020 or 2019 federal income tax return and do not have a filing requirement can use the "Child Tax Credit Non-filer Sign up Tool" on irs.gov to file a 2020 tax return. Eligible taxpayers who do not want to receive Adv CTC can elect to unenroll to decline the advanced payments using the CTC UP. The CTC UP also allows eligible taxpayers to check enrollment, and future updates will allow taxpayers to change other items such as address, bank information, and life event changes.[2]

The memorandum states:

> Under our current IRMs, TAS does not accept cases in which we cannot expedite or improve assistance to taxpayers. Consistent with this guidance, TAS will not accept stand-alone Adv CTC cases.[3]

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[1] TAS-13-0721-0009, "Interim Guidance — Advance Child Tax Credit", July 2, 2021 (released July 8, 2021), https://www.taxnotes.com/tax-notes-today-federal/credits/tas-not-accepting-most-advance-child-tax-credit-cases/2021/07/08/76rsp (retrieved July 8, 2021, subscription required)

[2] TAS-13-0721-0009, "Interim Guidance — Advance Child Tax Credit", July 2, 2021

[3] TAS-13-0721-0009, "Interim Guidance — Advance Child Tax Credit", July 2, 2021

More specifically, the memorandum provides:

> TAS will not accept cases involving stand-alone Adv CTC issues from any source, including congressional offices. Stand-alone Adv CTC issues include, but are not limited to:
>
> - Unenrollment
> - Use of the Non-Filer Sign-up Tool
> - Adv CTC payment inquiries
> - IRS Online Account accessibility, such as IRS username, ID.me, etc.[4]

Rather, the TAS expects taxpayers to access other IRS resources, noting:

> It is anticipated that IRS phone assistors will be able to help taxpayers make changes to their Adv CTC and the IRS will be rolling out a number of self-help tools over the next six months. The IRS Child Tax Credit Update Portal (CTC UP) allows taxpayers to check if they are enrolled and unenroll. The CTC UP will soon allow taxpayers to change their address or bank information and update information with life events such as adding an additional child or changing their income qualification. At this time, TAS cannot expedite resolution for these issues.[5]

However, this does not mean that cases with other issues that are preventing the taxpayer from receiving the advance child tax credit will not be taken on by the TAS simply due to there being an impact on qualification to receive the advance child tax credit:

> TAS will continue to accept cases meeting normal case criteria where the taxpayer is attempting to resolve a problem that is preventing the taxpayer from receiving Adv CTC. During the intake process, employees will review the taxpayer's account in IDRS along with IRM 21.6.3.4.1.24.2, Advance CTC, to determine if there are any Tax Module or Entity conditions that are postponing Adv CTC payments. Generally, resolution of these issues will allow the Adv CTC payments to begin, so in these situations TAS can accept the case to resolve the underlying Tax Module or Entity conditions that will in turn allow the Adv CTC payments. IRS programming will then recompute the monthly payment amounts based on the remaining number of months within the year. These situations are not considered stand-alone Adv CTC cases.[6]

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[4] TAS-13-0721-0009, "Interim Guidance — Advance Child Tax Credit", July 2, 2021

[5] TAS-13-0721-0009, "Interim Guidance — Advance Child Tax Credit", July 2, 2021

[6] TAS-13-0721-0009, "Interim Guidance — Advance Child Tax Credit", July 2, 2021

As well, the memorandum notes that TAS may change its position on dealing with stand-alone advance child tax credit cases:

> TAS will continue to monitor IRS developments in Adv CTC processing and will re-evaluate this determination as the situation changes.
>
> …
>
> TAS will continue to monitor IRS's implementation of the Adv CTC. The Deputy National Taxpayer Advocate may modify or rescind this guidance at any time by notifying TAS employees through the issuance of a TAS Welcome Screen article discussing the change in guidance.[7]

SECTION: 162
IRS AGENT'S TAX HOME REMAINED AT ASSIGNED WORK LOCATION DESPITE POTENTIAL HARDSHIP REASSIGNMENT

Citation: Warque v. Commissioner, TC Summary Opinion 2021-18, 7/8/21

Although employee business expenses generally were rendered nondeductible (at least temporarily) by the Tax Cuts and Jobs Act, a recent case on the concept of a "tax home" for an employee's away from home expenses is still relevant to those who work with employee benefits. In the case of *Warque v. Commissioner*,[8] an IRS agent unsuccessfully attempted to argue his tax home became Las Vegas when the agency agreed to place him on a list for potential hardship relocation to the Nevada City.

In 2009 Mr. Warque, who resided in Las Vegas, began working for the IRS as a revenue agent in Laguna Niguel, California. In 2014 Mr. Warque used a "hardship transfer" process within the agency to attempt to have his assignment moved to Las Vegas. The opinion describes the process and results as follows:

> In 2014 Mr. Warque applied for a hardship transfer from the IRS examination office in Laguna Niguel to the IRS examination office in Las Vegas, Nevada. Although the request was approved on April 11, 2014, he was never transferred. The request approval did not guaranty a new job placement or transfer. The approval was for hardship

[7] TAS-13-0721-0009, "Interim Guidance — Advance Child Tax Credit", July 2, 2021

[8] *Warque v. Commissioner*, TC Summary Opinion 2021-18, July 8, 2021, https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/revenue-agent%e2%80%99s-unreimbursed-employee-expense-deductions-denied/76rs2 (retrieved July 8, 2021)

eligibility. When approved, hardship eligibility puts the individual's name on a list for consideration. Mr. Warque's approval letter stated:

> This is to inform you that your hardship application has been approved. Your name has been updated in the Special Programs database on 04/11/2014. This does not mean you have a job placement offer at this time. However, you will be considered for future vacancies in your desired post of duty with the status of a hardship eligible.

Essentially if a job vacancy became available in the IRS examination office in Las Vegas, the relevant IRS employment office would first check the Special Placement Programs Report for any matches. If Mr. Warque's application was a match, the relevant employment office would request and receive his application. There was no guaranty that he would then receive the requested change to his post of duty location; further action was required.

Mr. Warque reapplied through the same process in 2015 and was again approved for hardship eligibility and placed on the list for consideration. Mr. Warque also applied in 2016, but that application was not approved. In 2017 he was temporarily authorized to change his post of duty to Las Vegas for a couple of months to care for his wife and newborn child. However, Mr. Warque never received a full-time hardship transfer to Las Vegas.[9]

Mr. Warque claimed employee business deductions on his tax returns for his travel expenses between Las Vegas and Laguna Niguel. For the years in question he argued that, due to the hardship relocation process, his tax home should be treated as Las Vegas once he was approved to be placed on that list.

The opinion gives the following summary of the law as it regards expenses related to travel away from home:

> Section 162(a)(2) expressly provides that expenses related to travel can be deducted if ordinary and necessary and incurred while the taxpayer is away from "home" in the pursuit of a trade or business. See *Barone v. Commissioner*, 85 T.C. 462, 465 (1985), aff'd without published opinion, 807 F.2d 177 (9th Cir. 1986). Traveling expenses, including amounts expended for meals and lodging and the use of "listed property" (as defined in section 280F(d)(4) and including passenger automobiles) may be deducted under section 162(a)(2) if they are: (1) ordinary and necessary; (2) incurred while away from home; and (3) incurred in pursuit of a trade or business. *Commissioner v. Flowers*, 326 U.S. 465, 470 (1946). The purpose of the "away from home" provision is to mitigate the burden of a taxpayer who, because of his or her trade or business, must maintain two places of abode and incur additional and duplicate living expenses. *Kroll v. Commissioner*, 49 T.C. 557, 562 (1968). For the purpose of section 162(a)(2), "home" is defined as the vicinity of a

[9] *Warque v. Commissioner*, TC Summary Opinion 2021-18, July 8, 2021

> taxpayer's principal place of employment rather than the location of the taxpayer's personal residence (i.e., the "tax home" might be in different locale from the residence). *Mitchell v. Commissioner*, 74 T.C. 578, 581 (1980). However, where the employment is for a temporary rather than indefinite or permanent period, taxpayers may use their personal residence locale as their tax home. See *Peurifoy v. Commissioner*, 358 U.S. 59, 60 (1958); *Kroll v. Commissioner*, 49 T.C. at 562-563. A business locale is considered temporary if the employment is such that "termination within a short period could be foreseen." *Albert v. Commissioner*, 13 T.C. 129, 131 (1949). Even if it is known that the employment will terminate within a fixed time, it is not temporary if it is expected to last for a substantial or indefinite duration. See *Wirt v. Commissioner*, 55 T.C.M. (CCH) at 1371.[10]

The opinion notes that the Ninth Circuit Court of Appeals has established a test that applies in that Circuit (which includes Nevada and California):

> The Court of Appeals for the Ninth Circuit established a test to determine whether a taxpayer's employment is temporary or permanent in *Harvey v. Commissioner*, 283 F.2d 491, 495 (9th Cir. 1960), rev'g and remanding 32 T.C. 1368 (1959). The test looks at whether "there is a reasonable probability known to * * * [the taxpayer] that he may be employed for a long period of time at his new station." *Id.* What constitutes a "long period of time" varies with the circumstances of each case. *Id.*[11]

The Court found that Mr. Warque's tax home remained in Laguna Niguel through the period of employment. First, when he accepted employment with the IRS he was aware the assignment to Laguna Niguel was permanent:

> Mr. Warque traveled from his personal residence in Las Vegas to his place of employment in Laguna Niguel. Mr. Warque began working in Laguna Niguel in 2009 knowing that it was a full-time nontemporary position.[12]

The Court did not find that the application for a hardship relocation changed that situation:

> This situation did not change when he applied for the hardship relocation. The hardship relocation approval letter clearly stated that there was no certainty that his duty station would be changed to Las Vegas. The approval was one of eligibility. The letter clearly stated that there was no guaranty he would be transferred. In fact he was not transferred. There could be no reasonable belief that the Laguna Niguel duty station changed to a temporary one in 2015 or earlier.[13]

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[10] *Warque v. Commissioner*, TC Summary Opinion 2021-18, July 8, 2021

[11] *Warque v. Commissioner*, TC Summary Opinion 2021-18, July 8, 2021

[12] *Warque v. Commissioner*, TC Summary Opinion 2021-18, July 8, 2021

[13] *Warque v. Commissioner*, TC Summary Opinion 2021-18, July 8, 2021

The opinion concludes that these expenses related to Mr. Niguel's personal preference to reside in Las Vegas rather than near his assigned work location:

> Mr. Warque's tax home for purposes of section 162(a)(2) was his Laguna Niguel place of employment. It was Mr. Warque's personal preference to maintain a personal residence in Las Vegas. Consequently, the traveling expenses Mr. Warque incurred for mileage, rent, car repair and maintenance, car inspection, and meals were not covered by the exception in section 162(a)(2) and are not deductible. See *Wirt v. Commissioner*, 55 T.C.M. (CCH) at 1371-1372.[14]

As was noted at the beginning of this article, employee business expenses are now barred from being deducted by IRC §67(g) added by the Tax Cuts and Jobs Act. But the issue still matters when looking at paying for employees' travel away from home or claiming such a deduction for self-employed individuals.

SECTION: 125
EMPLOYER HAD PROPERLY DEACTIVATED DEBIT CARD LINKED TO HEALTH FSA FOR LACK OF SUBSTANTIATION OF EXPENSES

Citation: Information Letter 2021-0003, 12/14/20

In an information letter issued in December of 2020 to the office of then-Senator Kelly Loeffler,[15] the IRS explained why the Senator's constituent was required to provide additional documentation to support that amounts paid with a debit card linked to her employer-sponsored health flexible spending account and that the employer had properly deactivated her card.

The letter explained the situation the constituent faced:

> I am responding to your inquiry dated November 16, 2020, on behalf of your constituent, * * *. * * * explained that a plan administrator, * * * (* * *), requested documentation to substantiate medical expenses paid with a debit card linked to a health flexible spending arrangement (FSA) under a Section 125 cafeteria plan. * * * also explained that * * * deactivated his wife's health FSA debit card after she did not provide the requested documentation. * * * asked if IRS can stop * * * from requesting documentation for medical expenses paid with the debit card linked to the health FSA.[16]

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[14] *Warque v. Commissioner*, TC Summary Opinion 2021-18, July 8, 2021

[15] Information Letter 2021-0003, December 14, 2020 (released June 25, 2021), https://www.irs.gov/pub/irs-wd/21-0003.pdf (retrieved July 9, 2021)

[16] Information Letter 2021-0003, December 14, 2020

The letter notes that expenses paid from a health FSA must be substantiated by a third party—the employee's assertion that the expenses were medical expenses is not sufficient:

> Medical expenses paid or reimbursed from a health FSA are excludible from gross income. Medical expenses paid or reimbursed from a health FSA must be verified by an independent third-party that substantiates the expenses. Substantiation for medical expenses includes information describing the service or product, the date of the service or sale, and the amount of the expense.[17]

In support of this position, a footnote to the letter refers to Revenue Ruling 2003-43 and Notice 2006-69.

For a debit card linked to a Section 125 plan health FSA, the IRS outlines the rules as follows:

> There are special rules for medical expenses reimbursed with a debit card. These rules take into account the information a debit card transaction provides. Some debit card transactions require additional information to fully substantiate that the expense is a medical expense. For example, a debit card transaction may collect information about the amount of the transaction, a general category of the merchant providing services, and the specific merchant providing the services, but may not identify the specific items or services provided in the transaction. If the information provided during the debit card transaction does not satisfy the substantiation requirements, the plan administrator must request additional information to substantiate the medical expense. The plan administrator must deactivate the debit card if the medical expense is not timely substantiated. For more information about debit card reimbursements, see IRS Publication 969, *Health Savings Accounts and Other Tax-Favored Health Plans* on IRS.gov at www.irs.gov/pub/irs-prior/p969--2019.pdf.[18]

The letter also notes that an employer may require stricter standards than those that are the minimum under the law:

> An employer's health FSA may impose more stringent standards to ensure that health FSAs are used only to pay or reimburse medical expenses. Also, your constituent may want to contact the employer or plan administrator to ask how his wife can submit a claim for reimbursement directly to the plan with the documentation that the plan requires.[19]

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[17] Information Letter 2021-0003, December 14, 2020

[18] Information Letter 2021-0003, December 14, 2020

[19] Information Letter 2021-0003, December 14, 2020

Although not discussed in the letter, it's key to note that under Section 125 the sponsor is the one responsible for assuring that the Section 125 plan meets the requirements to maintain tax favored status under the law.

Contrast this with a health savings account under IRC Section 223. In that case, the individual is the owner of the account in question and is responsible for its proper operation. Thus, an HSA may be linked to a debit card issued in the account holder's name without any need to substantiate the use of the funds for medical purposes to the custodian. Rather, the account holder is responsible, should the IRS come calling, to substantiate that the funds were used for medical purposes or face the tax consequences of being treated as taking a taxable distribution from the fund.

SECTION: 170
IRS EXPLAINS WHY 1099RS DON'T SPECIALLY REPORT QUALIFIED CHARITABLE DISTRIBUTIONS

Citation: Information Letter 2021-0007, 4/26/21

The justification for the way that IRA custodians are asked to report qualified charitable distributions (QCDs) under IRC §408(d) is explained by the IRS in Information Letter 2021-0007[20] addressed to Rep. Chip Roy of Texas.

The letter begins by explaining generally how the QCD rules work:

> Under Section 408(d)(8) of the Internal Revenue Code (Code), a taxpayer can exclude from gross income up to $100,000 of QCDs each year. Section 408(d)(8)(B) of the Code defines a QCD as a distribution from an IRA, whose owner is at least age 70½, made directly to one or more specified charitable organizations, provided the distribution would be includible in the IRA owner's gross income if it were made to the owner instead. Any deductions a taxpayer took for IRA contributions made during years they were 70½ or older, also reduce the amount available for QCDs.[21]

The letter to the Representative goes on to discuss the reporting on behalf of the custodian, as well as why the custodian will not identify the distribution as related to a QCD:

> Under the current rules, Form 1099-R doesn't have special reporting for QCDs. This is because an IRA trustee does not have first-hand knowledge to decide if a particular distribution meets all the conditions to be a QCD. For example, a trustee would not know:
>
> - If the taxpayer has already reached the $100,000 limit with QCDs from other IRAs,

[20] Information Letter 2021-0007, April 26, 2021 (released June 25, 2021), https://www.irs.gov/pub/irs-wd/21-0007.pdf (retrieved July 9, 2021)

[21] Information Letter 2021-0007, April 26, 2021

- If the distribution consisted of nontaxable money (an IRA trustee does not know if an IRA owner deducted IRA contributions), or

- If the charitable organization gave the taxpayer goods or services because of the contribution (which disqualifies a distribution from being a QCD).

In many cases, the trustee might not know if the recipient charitable organization is an eligible organization under Section 408(d)(8) of the Code.[22]

The letter then explains how the taxpayer reports the distribution, taking into account these issues the custodian would not be aware of but which the taxpayer does know:

> When a taxpayer files a paper Form 1040, they can say if part or all of an IRA distribution is a QCD by writing "QCD" next to line 4b. For electronically filed returns, a drop-down box gives the taxpayer a choice of "QCD," "HFD" — to indicate a transfer to a health savings account — and "ROLLOVER."[23]

SECTION: 262
IRS PROVIDES EXAMPLES OF NONDEDUCTIBLE LEGAL FEES IN INFORMATION LETTER

Citation: Information Letter 2021-0012, 4/23/21

In Information Letter 2021-0012[24] the IRS, while declining to provide the specific ruling the taxpayer requested, does provide specific examples of legal expenses that would not be deductible for income tax purposes.

The taxpayer's request is described as follows:

> This letter responds to your request, dated February 18, 2020, in which you are seeking a ruling on the deductibility of amounts you paid for legal services, rendered on your behalf in * * *, related to civil and criminal matters arising from your relationship with your former spouse, and the defense of your title to property claimed by your former spouse.[25]

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[22] Information Letter 2021-0007, April 26, 2021

[23] Information Letter 2021-0007, April 26, 2021

[24] Information Letter 2021-0012, April 23, 2021 (released June 25, 2021), https://www.irs.gov/pub/irs-wd/21-0012.pdf (retrieved July 9, 2021)

[25] Information Letter 2021-0012, April 23, 2021

The letter notes that "[u]nless expressly allowed by law, an individual's personal, living, and family expenses are not deductible."[26] The IRS cites IRC §262 in support of this statement.

The letter then lists the following types of legal fees as being nondeductible:

- Paid in connection with civil or criminal charges resulting from a personal relationship;
- Property claims or property settlements in a divorce; and
- Defense of one's title to property.[27]

The letter also notes that taxpayers who wish to obtain a formal ruling, which is what this letter is requesting, must apply and pay for a private letter ruling:

> This letter calls attention to general principles of tax law without applying them to a specific set of facts. Sec. 2.04 of Rev. Proc. 2021-1, I.R.B.1 (or its successor). This letter is intended for informational purposes only, does not constitute a letter ruling, and is not binding on the Internal Revenue Service. In order to receive a written response applying the tax law to your specific set of facts, you must request a private letter ruling.
>
> Section 7 of Revenue Procedure 2021-1 provides the general instructions for requesting a private letter ruling, which include the payment of the applicable user fee. Please note that we ordinarily do not issue a private letter ruling on any matter in which the determination requested is primarily one of fact. Sec. 6.02 of Rev. Proc. 2021-1.[28]

In this particular case, though, most advisers would suggest that applying for the formal ruling would likely be a waste of time and money unless there were additional facts that would make it less likely these would all be personal expenses. And even in that case, there may be questions about the value of such a ruling unless the taxpayer simply wanted an "insurance policy" due to concerns the position might be challenged by the IRS *and* the taxpayer plans to not take the position if the IRS rules the items aren't deductible.

[26] Information Letter 2021-0012, April 23, 2021

[27] Information Letter 2021-0012, April 23, 2021

[28] Information Letter 2021-0012, April 23, 2021