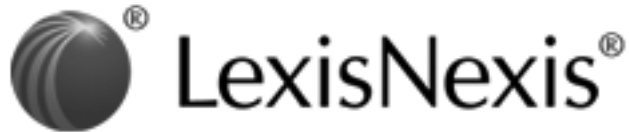


Time of Request: Monday, December 28, 2015 10:44:00 EST
Client ID/Project Name:
Number of Lines: 168
Job Number: 1825:542977213

Research Information

Service: Terms and Connectors Search
Print Request: Current Document: 1
Source: Tax Analysts Tax Notes Today
Search Terms: plecnik

Send to: 4, Law school
LAW SCHOOL LEXIS.COM LINK FROM LEXIS ADV
9443 SPRINGBORO PIKE
MIAMISBURG, OH 45342-4425



1 of 7 DOCUMENTS

Copyright © 2015 Tax Analysts
Tax Notes Today

DECEMBER 28, 2015, MONDAY

DEPARTMENT: News, Commentary, and Analysis; News Stories

CITE: 2015 TNT 248-1

HEADLINE: #1 2015 TNT 248-1 IRS'S USE OF EITC BAN CAUSES CONCERN ABOUT OTHER CREDITS. (Section 24 -- Child Credit) (Release Date: DECEMBER 23, 2015) (Doc 2015-28260)

CODE: *Section 24* -- Child Credit;
Section 25A -- HOPE Scholarship Credits;
Section 32 -- Earned Income Credit

ABSTRACT: President Obama signed a bill into law December 18 that gives the IRS authority to extend use of a ban on claims of the earned income tax credit to a pair of other credits, and based on the agency's use of the EITC ban, some advocates for low-income taxpayers are voicing concerns.

SUMMARY: Published by Tax Analysts(R)

President Obama signed a bill into law December 18 that gives the IRS authority to extend use of a ban on claims of the earned income tax credit to a pair of other credits, and based on the agency's use of the EITC ban, some advocates for low-income taxpayers are voicing concerns.

The Consolidated Appropriations Act, 2016 (P.L. 114-113) made some tax provisions, including expansions of the EITC, child, and American opportunity tax credits, permanent. It also extended to the child and American opportunity tax credits the existing two-year ban on subsequent EITC claims for taxpayers who improperly claim the EITC because of reckless or intentional disregard of the rules and the 10-year ban for improper claims because of fraud.

National Taxpayer Advocate Nina Olson told Tax Analysts the IRS must improve its procedures for using the bans.

"Because of the serious consequences of a mistake -- denying taxpayers significant credits to which they otherwise would be entitled -- the IRS has an obligation to do better," Olson said. "It is also important that the Office of Chief Counsel publish formal guidance on this, preferably a regulation, so that representatives of low-income taxpayers can have the opportunity to comment on the proposed regulation."

Olson raised concern about the IRS's use of the EITC ban in her 2013 annual report to Congress. In 2011 the IRS imposed the two-year EITC ban on more than 5,000 taxpayers and did so contrary to chief counsel guidance almost 40 percent of the time by banning taxpayers who simply did not respond to requests for substantiation of their claims,

according to her report. Further, in a random sample of two-year ban cases, the IRS automatically imposed the ban without any determination 15 percent of the time, the report said.

Olson has called for guidance on the ban before. In a policy recommendation memo to IRS Commissioner John Koskinen attached to her fiscal 2015 objectives report, Olson called for directing the IRS Wage and Investment Division to issue guidance regarding the application of the two-year ban.

The EITC ban is difficult for the IRS to administer effectively, and the agency doesn't, Villanova University School of Law professor Leslie Book said. The ban is hard to administer because the overwhelming majority of examinations of returns is by correspondence and because understanding a taxpayer's mental state is time- and resource-intensive, he said. For a variety of reasons, including fear of the government, transience, and literacy, many thousands of taxpayers the agency examines and proposes penalties on fail to respond to IRS correspondence or cannot respond, he said.

"The legislation fails to reflect the on-the-ground reality of the IRS's administration of existing penalties," he said.

AUTHOR: Tax Analysts van den Berg, David

GEOGRAPHIC: United States

REFERENCES: Subject Area:

Credits;
Tax system administration;
Fraud, civil and criminal;
Return preparation

TEXT:

Release Date: DECEMBER 23, 2015

Published by Tax Analysts(R)

President Obama signed a bill into law December 18 that gives the IRS authority to extend use of a ban on claims of the earned income tax credit to a pair of other credits, and based on the agency's use of the EITC ban, some advocates for low-income taxpayers are voicing concerns.

The Consolidated Appropriations Act, 2016 (P.L. 114-113 (Doc 2015-28019)) made some tax provisions, including expansions of the EITC, child, and American opportunity tax credits, permanent. It also extended to the child and American opportunity tax credits the existing two-year ban on subsequent EITC claims for taxpayers who improperly claim the EITC because of reckless or intentional disregard of the rules and the 10-year ban for improper claims because of fraud. (Prior coverage (Doc 2015-27882).)

National Taxpayer Advocate Nina Olson told Tax Analysts the IRS must improve its procedures for using the bans.

"Because of the serious consequences of a mistake -- denying taxpayers significant credits to which they otherwise would be entitled -- the IRS has an obligation to do better," Olson said. "It is also important that the Office of Chief Counsel publish formal guidance on this, preferably a regulation, so that representatives of low-income taxpayers can have the opportunity to comment on the proposed regulation."

Olson raised concern about the IRS's use of the EITC ban in her 2013 annual report to Congress (Doc 2014-518). In

2011 the IRS imposed the two-year EITC ban on more than 5,000 taxpayers and did so contrary to chief counsel guidance almost 40 percent of the time by banning taxpayers who simply did not respond to requests for substantiation of their claims, according to her report. Further, in a random sample of two-year ban cases, the IRS automatically imposed the ban without any determination 15 percent of the time, the report said.

Olson has called for guidance on the ban before. In a policy recommendation memo to IRS Commissioner John Koskinen attached to her fiscal 2015 objectives report (Doc 2014-17589), Olson called for directing the IRS Wage and Investment Division to issue guidance regarding the application of the two-year ban.

The EITC ban is difficult for the IRS to administer effectively, and the agency doesn't, Villanova University School of Law professor Leslie Book said. The ban is hard to administer because the overwhelming majority of examinations of returns is by correspondence and because understanding a taxpayer's mental state is time- and resource-intensive, he said. For a variety of reasons, including fear of the government, transience, and literacy, many thousands of taxpayers the agency examines and proposes penalties on fail to respond to IRS correspondence or cannot respond, he said.

"The legislation fails to reflect the on-the-ground reality of the IRS's administration of existing penalties," he said.

Mary Michelle Gillum, low-income taxpayer clinic director with the Legal Aid Society of Middle Tennessee and the Cumberlands, also criticized the IRS's use of the EITC ban. She said that "as low-income taxpayer clinic clinicians or any experienced tax advocate can attest, the IRS does not provide taxpayers with appropriate notice when they plan to impose the bans on taxpayers claiming the EITC." Gillum said IRS examiners often deny eligible taxpayers the EITC primarily because the evidence the taxpayers produce does not fall within the limited number of traditional evidence documents examiners expect, and they decide to impose the bans despite taxpayers producing credible evidence of their eligibility.

"While IRS Appeals does a fair job of ferreting out and overturning erroneous denied claims, most taxpayers eligible for the EITC, CTC, or AOTC do not know how to request appeals," she said. "By the time the taxpayers actually realize a ban has been placed on their EITC, they no longer have jurisdiction to petition their case in the United States Tax Court."

Ban Extension a Compromise

Congress first expanded the EITC and the child tax credit in 2009 as part of an economic stimulus bill and continued the expansions through 2017 as part of the January 2013 fiscal cliff deal. The American opportunity tax credit replaced the HOPE scholarship credit for tax years 2009-2012. Congress also extended it through 2017 as part of the fiscal cliff deal. (Prior coverage (Doc 2012-26907).)

Robert Greenstein, founder and president of the Center on Budget and Policy Priorities, said the expansion of the ban was a compromise for making the enhancements of the three credits permanent.

"That simply would not have happened without the program integrity package, and I think from the outset the provision in question or one that would have gone even farther was really one of the things that some of the tax negotiators, particularly on the Republican side, very much wanted," he said.

The issue for the CBPP, Greenstein said, isn't so much the penalties themselves as their application, and the organization is concerned about criticisms Olson and Book have made about the IRS's use of the bans.

"It would very much be our hope that, particularly with their expansion to two more credits, the IRS improve its procedures to try to make sure it is not applying the penalty in cases where it shouldn't because someone made an error but it wasn't a willful error," he said.

It's possible some improvements have already happened. John Wancheck, coordinator of the CBPP's Earned Income Tax Credit Outreach Campaign, noted that the number of two-year bans the IRS has imposed has dropped considerably. The IRS assessed 1,800 two-year penalties in fiscal 2015, compared with 4,700 in fiscal 2014, he said.

"This makes us wonder whether IRS has indeed responded to some of Nina's criticisms in terms of its internal procedures," Greenstein said. "Those numbers suggest they might have made some improvements."

Another possibility, Wancheck said, is that the agency's budget has been reduced to the point where it has fewer examination resources to document the need for the penalties than it used to.

Fraud, the standard for the 10-year ban, isn't applied often -- it's a high standard with a strong definition, said John Plecnik of Cleveland State University's Cleveland-Marshall College of Law. The issue is with the standard for reckless or intentional disregard of the rules, he said. The IRS treats that standard "like the Supreme Court treats pornography -- we know it when we see it," he said.

There are no regulations under *section 32(k)* defining the standard for recklessness or intentional disregard of the rules, case law is sparse, and the IRS has not issued any guidance on the point, Plecnik wrote in a 2014 *Tax Notes* article about the EITC ban ("Reckless Means Reckless: Understanding the EITC Ban," *Tax Notes*, Feb. 24, 2014, p. 847 (Doc 2014-2409)).

"We have not essentially figured out as a tax bar how to apply 32(k) and its ban appropriately to the earned income tax credit," Plecnik told Tax Analysts. "And to extend it to the child tax credit and the American opportunity tax credit before we've agreed on the definition of reckless -- the standard of conduct that triggers the penalty -- I think it's irresponsible."

Absent IRS action, the best option clinics and taxpayers have for challenging application of the bans and the definition of recklessness is in Tax Court, Plecnik said. He said he would want a clinic to file a regular case, not a small case, when making a challenge. There have been small cases on these issues, but not a regular case with all issues being raised to the court so that the judge on the case or the full court can address the really significant issue of when applying the ban is appropriate, he said.

A clinic could win a challenge based solely on legislative history of *section 32(k)* from 1997, Plecnik said. He said that based on that history, he believes Congress intended the same definition of reckless or intentional disregard in *section 6662* to apply to *section 32(k)*, which contains the EITC ban.

"I would be shocked if the Tax Court did not agree with the legislative history," he said. "It's a pretty clear-cut case."

Improper Payments and Math Error Authority

While several observers expressed concern about the expansion of the tax credit ban, Chris Edwards of the Cato Institute welcomed it, noting the issue of improper EITC payments.

"I'm in favor of any IRS efforts to tighten the administration of the refundable credits," he said. "People don't have a right to them, they are spending handout programs. Also, the EITC has had an enormous error and fraud rate of more than 20 percent for three decades now, so it's obvious that Congress and the IRS ought to try new approaches to cutting down this huge annual waste of billions of dollars."

The improper payment rate has faced congressional scrutiny. In September the Senate Finance Committee said in announcing (Doc 2015-21382) an October 1 hearing that the EITC, along with Medicare and Medicaid, was involved in

76 percent of all improper payments in fiscal 2014. Citing IRS figures, U.S. Comptroller General Gene L. Dodaro said in his testimony (Doc 2015-22013) that the EITC's improper payment rate for fiscal 2014 was 27.2 percent and that nearly \$ 18 billion of improper payments were made.

Under the new law, the IRS will also have math error authority to use in reviewing returns of taxpayers who have been banned from claiming any of the three refundable credits for the length of the taxpayer's ban, Plecnik said. While taxpayers can appeal an IRS determination to revise their return based on math error authority under *section 6213*, many low-income taxpayers don't read or understand mail they get from the IRS, and so they may lose their 60-day appeal window, Plecnik said. In that case, he said, the only way they can get their money back is to sue for a refund, which requires them to pay the tax upfront. For many poorer taxpayers, that's "functionally impossible," he said.

"So many taxpayers are never even going to get to Tax Court, particularly because of this math error authority," he said.

The IRS's resources are limited, and for the agency to have to go through a full examination process to deny the EITC to someone hit with a penalty who then claims the credit anyway "consumes resources when it's really a flag situation," Wancheck said.

Audits have always been required to deny EITC claims, whether or not either the two- or 10-year ban is imposed, he said. Under previous law, the IRS would have to conduct another audit of an EITC claim filed during the disallowance period, but now it may use math error authority to deny that subsequent claim. The agency did previously have authority to reject claims subject to recertification if the taxpayer failed to file the recertification form, Wancheck said.

Provided the penalty is correctly imposed on the taxpayer, the use of math error authority the legislation calls for isn't inappropriate, Greenstein said. "I'm much less concerned about that than about trying to make sure the penalty is applied where it should be but not applied where it shouldn't be in the first place," he said.

***** Print Completed *****

Time of Request: Monday, December 28, 2015 10:44:00 EST

Print Number: 1825:542977213

Number of Lines: 168

Number of Pages: 5

Send To: 4, Law school
LAW SCHOOL LEXIS.COM LINK FROM LEXIS ADV
9443 SPRINGBORO PIKE
MIAMISBURG, OH 45342-4425