

12/15/2011 WEBCAST: TAX UPDATE FOR INDIVIDUALS

I missed the 86(e) election. However, my client was issued a check for uncashed prior year checks. So maybe I am ok.

If the client received SS checks in prior years, but never cashed them, the SS benefits should presumably still have been reported as taxable income in those years. The client received the income in those years, and the SSA presumably issued a 1099 for those years. So the replacement check sent in a later year would not be taxable in that year. The sec. 86(e) election is for situations where the benefits were not received (and thus were not taxable) in the earlier year. In this situation, if the benefits were not reported as income in the years the checks were received, the solution would be to amend those returns.

What about the taxation military disability retirement?

Military retirement pay has its own special rules for certain types of disability benefits. Sec. 104 excludes amounts "received by an individual as disability income attributable to injuries incurred as a direct result of a terroristic or military action", a disability pension received "by reason of a combat-related injury" or "disability compensation from the Veterans' Administration." The VA is the best source of information on these exclusions.

Why am I missing this? The federal government does not recognize them as married, why are they forced to split their income because you are in community property state?

See CCA 201021050 discussed in last year's manual on the CD. The splitting of income mandated in this ruling was heavily lobbied for by Pat Cain and a group of Bay Area tax professionals. You can read about it on her blog.

What if CSV received exceeds life insurance coverage, for insured that died?

Not sure how this could happen under the usual life insurance contract. However, under sec. 101 "gross income does not include amounts received (whether in a single sum or otherwise) under a life insurance contract, if such amounts are paid by reason of the death of the insured."

Is the 5471 still required and is the 8938 in addition or instead of?

Duplicate reporting will apply in the case of many foreign entities. This will be discussed in Day 2.

If I own a principal home and a weekend house. Will I be able to get tax deductions for both houses' interest payments and property taxes?

Yes, with a limit of \$1.1 million of loans for deducting the mortgage interest.

Does this mean finally all option sales will finally be reported by financial institutions?

Option sales are not covered by new reporting rules until 2013.

Wash sale question: Will broker modify the basis of remaining shares by the amount of any disallowed wash sale loss?

Generally yes. Brokers are required to apply the wash sale rules in full, including the basis adjustment rules. I may have misspoken in my remarks—the disallowed loss is added to the Box 3 basis of the reacquired shares that result in the wash sale loss disallowance.

For 2011, do brokers have to wait to issue 1099 until the basis allocations have been made?

Customer copies of the 1099-B are due February 15. If basis numbers change, they'll be issuing amended forms, as they do now for qualified dividend changes.

Is there a substitute form 8949 for those day traders or are we going to have to enter all 1,000 sales?

What does a day trader do with 5,000 stock & option sales? some covered and some naked.

With no sec. 475 election in effect, the 8949 reporting obligation applies. Attach detail schedules and reconcile them to the 8949 totals as best you can. For day traders with a § 475 election, the transactions go on Form 4797—not Schedule D.

Form 8949 - with Schwab amounts on 1 line: do we attach/send in Schwab realized gain & loss schedule?

Yes—with the appropriate reconciling entries, as explained in the slide presentation.

Can we attach schedules using the 8453 in lieu of the 8949?

Yes, for e-filing.

Will any adjustment in gain/loss in column G get attention from IRS for a potential audit?

I doubt it, but who knows?

Stock reporting Question: Assume 500 transactions for a year and different adjustment codes apply for some of the transactions. but most of the reported results from the broker are ok. How to report this?

If all 500 transactions are reported on a single line, the net of all adjustments is reported as a single number in Column g. All applicable codes for the various adjustments are reported in Column b, separated by commas.

Is an RDP a related party for loss disallowance purposes?

An RDP is not a related party for federal sec. 267 purposes. For California tax purposes, the RDPs are spouses, so no losses would be recognized for sales between them.

What about publicly traded partnerships where you need to reclassify capital gain to ordinary income?

Basis reporting on publicly traded partnerships will begin in 2013. IRS has not addressed the issues involved yet.

Do you know if Schwab intends to provide the stock sale info in Excel?

Don't know.

For 2% shareholders, would they have to have S corp reimburse the premiums?

Not sure about the exact question here. See Notice 2008-1 in the 2007 TAXB Supplement on the CD for a discussion of the issues surrounding health insurance for S corp shareholders.

Taxpayer borrow money on home equity line then lent to s-corp for working capital. Can taxpayer treat as investment interest personally to offset interest income received from s-corp? All terms would be fair market and arms length. Taxpayer is 55% owner of s-corp.

Taxpayer can elect not to treat home equity debt as not secured by the home and instead trace the debt based on the use of the proceeds and characterize the interest expense accordingly. The character of interest on a loan to a corporation would be investment interest.

Dependency deduction: If a child is taking online college courses does this qualify as full time student? Or does the student have to attend a bricks and mortar institution?

If the child is considered to enrolled as a full-time student at the institution (i.e, carrying a full course load) she would be qualify under the dependent rules.

Where do you report business bad debt for a SMLLC (reports on 1040 sch C)?

Report it as a line item on the Schedule C.

Can we overreport 1099K's to avoid matching notices?

How about putting ALL receipts on Line 3a?

Not a good idea . . .

If you are not a real estate professional should you report vacation rentals, rented 7 days or less, on Sch. C?

Vacation rentals are reported on Schedule E by all taxpayers—whether or not real estate professionals. Vacation rentals are simply treated as trade/business activities for purposes of material participation testing only.

Do the grouping rules apply to the taxpayer that has numerous rental properties?

The real estate professional aggregation rules apply to all rental properties owned by the R.E.P. For a non-R.E.P. the aggregation rule doesn't apply. The activity grouping rules could be used to group rentals; however, there would be no reason for doing so, as the grouping would not change the passive character of the properties. (Material participation is irrelevant for rental properties owned by non-REPs.)

What if you can't pass the tests in the current year but in later years you are able to pass the tests (especially if you add another dealership). Are you saying you can't group them at that point?

Correct. Activity grouping is fixed in the first year the activities are owned. So the grouping has to be done (and disclosed for post-2010 activities) in the first year, whether it affects the passive status of the activities or not.

When determining material participation in an activity where the taxpayer spends more than 100 hours, whose hours are considered for determining if the taxpayer spends more than "anyone else"? Does it include employees, subcontractors, etc? Do you have any guidance on what to consider?

No boundaries—all of the above. The regs require comparison to “all individuals (including individuals who are not owners of interests in the activity)”

I have a basic question - In 2011, a 401(k) can be directly rolled over to a traditional IRA w/o penalty correct?

Yes.

Was that Note 4 of page 9-2 no longer apply? I.

Yes, in the paper manual. See the E-book for the corrected paragraph.

What about a retired cpa expired license that assist and review returns...?

Would have to go through the full registration process (including testing/CE) to get a PTIN, if he is preparing tax returns.

I am having an issue with CA Epay because the 2nd qtr at 40% is in excess of \$20k He is 98 and she is 82 they refuse to use epay and the opt out form did not work and yesterday the taxpayer advocate also said no. What can I do? They are being penalized for noncompliance.

Have them pay the penalty. It's their decision. If they stay below the thresholds for the next year, you can apply to have the requirement lifted.

Do we have any right to tell IRS to come back another day?

All you can do is negotiate the least inconvenient appointment date.

On the Roth conversion and the 2 year deferral. Can you go back and amend the return and claim the income in the conversion year, instead of using the 2 year deferral?

No. Sec. 408A(d)(3) provides that the election cannot be changed after the extended due date of the 2010 tax return.

Suspended losses. T/P has 2 rentals, a commercial building operating at a profit and a residential rental operating at a loss. The residential rental is sold in 2011 at a profit. Can the suspended losses on the residential rental be fully deducted in 2011. The T/P still owns the commercial building.

Yes. If the residential property is sold to an unrelated person in a fully taxable transaction, all suspended losses from that property are freed up—i.e., fully deductible.

Can a taxpayer take the 1st time homebuyer credit if he purchased the home from the estate of a related party (deceased cousin)?

The credit is no longer available. For prior years, the purchase from a cousin would be permitted, as a cousin is not a "related party" for this purpose. Also, estates of persons who are related parties are not treated as related parties for this purpose either.

Tom gave a quick example of how the IRS could apply the step transaction doctrine to interest tracing on a personal residence. Could you flesh out that example and throw it up on the website? Thanks!

The potential attack occurs more typically in margin accounts, where a taxpayer buys \$500,000 of stock on margin and then sells \$500,000 of other stock and

takes the proceeds of that sale out of the account. Thus the interest on the margin loan is claimed as investment interest, even though it could (using step transaction principles) be traced to the \$500,000 taken out of the account (which may have been used for personal purposes. Here's what the preamble to the 1.163-8T regulations says:

“The Service recognizes that some taxpayers will attempt to manipulate the tracing rules in the temporary regulations to maximize their interest deductions. For example, a sole proprietor may be able to maximize the amount of fully deductible interest expense allocated to trade or business expenditures by borrowing to pay business expenses and making personal expenditures from business receipts. Similarly, upper-income taxpayers may have sufficient liquidity to make business and investment expenditures from borrowed funds and personal expenditures from unborrowed funds. Finally, the fact that the allocation of interest expense is not affected by the use of any property to secure repayment of a debt may permit manipulation. For example, a taxpayer may use unborrowed funds to purchase an automobile for personal use, incur debt secured by that asset, and use the debt proceeds to replace the unborrowed funds.

“The Service therefore is considering rules to prevent abuses of the tracing method. For example, taxpayers whose gross income and total interest expense exceed specified amounts might be treated as having a minimum amount of personal interest. Alternatively, such taxpayers might be required to allocate interest expense based on pro rata apportionment. The rule that the security for a debt is irrelevant for purposes of allocating interest expense on the debt might be modified in certain cases involving debt secured by an asset and incurred within a short period of time after the purchase of the asset. The Service invites comment on these approaches and on other possible methods of preventing abuses of the rules in the temporary regulations.”

No such anti-abuse rules have been issued.

1/9/2012 Webcast: Tax Update for Individuals

if you filed a POA for a client in 2010 which covers 2010 through 2014 is the POA still valid or do you need to now file separate POA's for the taxpayer and spouse?

We have heard from CPAs at the seminar that they have been required to resubmit the POAs.

For e-filing, does the taxpayer have to be in the office to sign form 8879 or it can be done by mail?

The 8879 can be received from the client by mail.

Could you go over what is the requirement to be "qualified" as a "trader"?

Ideally, numerous (substantial), daily, short-term trades. The test is not black and white. Read the full text of the Kay decision discussed on Page 6-7 and 6-8.

Are long term care insurance premiums governed by the ERISA regulations, which would enable the C-Corp to discriminate and only cover employee/owners?

Premiums paid by an employer under a QLC insurance plan are generally not taxable to employees (Sec. 106(a)), and a third party QLC insurance plan is not a form of self-insurance that would fall under the IRC Sec. 105(h) self-insurance nondiscrimination rules.

What is an I-C DISC?

It is an Interest Charge Domestic International Sales Corporation. This is a special type of corporation that is not subject to federal income tax and that can receive commissions from a related exporter, resulting in deferred and reduced taxes to the exporter.

What documents do I need to gather for Sec 25 energy credit? In the past, my client would have told me that they purchased an item that qualified for \$XX credit, and sometimes they would send a copy of the invoice, yet the invoice does not show anything that says this item qualifies for energy credit.

As a matter of due diligence, you should obtain the manufacturer's certificate certifying that the purchased item is eligible for the credit, or other information from the client (written or verbal) allowing you to make this determination.

Solar credit carryover does not impact AMT?

The sec. 25D solar credit can offset the AMT.

If the different activities on K-1 are reported as one on the 1040 and the partnership purchases a new property, does the 1040 filer have to disclose the grouping?

Yes. If the partnership does not group its activities, then the partner can group or not group on the 1040. If the partnership subsequently adds a new activity, the partner will have to disclose the 1040 grouping of that activity with other activities on the 1040.

California does not conform to Professional Real Estate: Does CA conform to Grouping for 469 common ownership referred to on 6-24?

Yes. California conforms to the general grouping rules other than the special real estate professional rules.

Is the REP aggregation an annual election or does it run until the REP is no long valid?

The election is made only once and applies in every year thereafter in which the taxpayer qualifies as a REP.

Transfer of property to or from individual taxpayer to partnership/LLC would allow for a do-over grouping election, correct?

Yes. This appears to be true. If an individual transfers activities to a partnership that the individual had not previously grouped, the partnership could group these activities on its tax return, which would result in grouping of these activities on the individual's Form 1040.

I understand that "real estate professional" is broadly defined to include individuals whose primary business is real estate. Is this correct?

The definition is more specific than this. See the discussion on page 6-29.

Does the election to group activities have to be made in a timely filed return? Assume the activities first became eligible to be grouped in 2009.

Can the election be made if amended returns are filed for previous years?

For rental/business grouping.

The grouping must be done on the original return for the first year the activities are owned. You cannot go back and group now for 2009.

Re Rev Proc 210-13: If entities have been treated as grouped for the past few years, should a disclosure be made in 2011?

No disclosure is required for pree-2011 groupings unless/until an activity is added to the group.

Are short term rentals (i.e. vacation rentals not used by taxpayer) not reported on Schedule C?

No. Vacation rentals still go on Sch E, even though they are not treated as rentals for passive loss purposes.

Do related party rules apply to 'self rental'? (example would be S corp owned by sons paying rent on building owned by Mom & Dad.)

No. The recharacterization rules for rental losses on property rented to a business in which the taxpayer materially participate look only to direct ownership.

With regards to self-rental, is there a percentage test with regards as to how much of the property is used in the owners operating business?

No. If a building is rented in part to a business in which the building owner materially participates, while another part of the property is rented to another business in which the building does not materially participate, the self-rental recharacterization rule can be limited to the portion of the property rented to the owner's business. However, to divide the rental in this way, the owner must treat the two rental activities as separate activities for passive loss purposes—which would mean dividing the rental into two pieces and reporting them separately on Schedule E in this case. (Kucera v Commr, TC Summ 2001-18)

Do you expect institutions issuing 1099's filing extensions this year given all the changes? If so, what is the date that they are required to be issued including any extensions?

February 15 is the due date. I expect some will be late.

Will credit card merchants exclude the server tip included by a patron?

The gross receipts shown on the Form 1099-K will include tips. Restaurants will have to back this out as a reconciling item on their tax return.

Rev Proc relief is available only to "qualified investors", Has anything been done to provide relief to investors with indirect investments?

Situation where investors lend money to a financial services LLC that invests in a Ponzi scheme and is now unable to repay the indirect investor.

PLR 201114005 in Chapter 6 shows that the members of an LLC that invests in a fraud can take advantage of the Rev Proc as qualified investors. However, that relief does not extend to 3rd parties who lend money to the LLC.

Bogue case: What about the home office? Does he have an home office or not? lost connection for a few seconds!

Bogue did not have a qualifying home office.

I telecommute from CO to CA, and physically am in CA once a month. Are meals and lodging deductible when I am in CA? (I am in CO more than CA; the majority of my clients are in CA but I have clients in CO.)

The travel costs to California are deductible only if your "tax home" is in Colorado. This is a question of facts and circumstances. If you have a significant number of clients in Colorado, then you can argue that there is a business reason for maintaining your home there, making that your tax home.

Interest expense-2nd year-principal payments applied ratably to various loans?

If you look at Pub 936, the IRS lays out three methods for determining the average balance outstanding on multiple home mortgage loans, for purposes of allocating the aggregate interest for the year among them.

What is an O Election?

It is an election under Reg. sec. 1.163-1T(o)(5) to treat home mortgage debt as not secured by the residence—thereby disqualifying the debt from home mortgage debt treatment.

How does the O election affect the 108 exclusion of debt relief?

Not clear. The reg language says that the O election results in the debt not being secured for purposes of sec 163. The 108 exclusion for qualified principal residence indebtedness is tied to sec. 163, so if the O election disqualifies the debt under sec. 163, it arguably disqualifies it under sec. 108. Another reason the O election may be a bad idea.

What is the web address to check deductibility of charitable donations?

It is in the Chapter 5 materials.

<http://www.irs.gov/taxstats/charitablestats/article/0,,id=97186,00.html>

You could not use the medical reimbursement plan for a spouse in an S Corp 100% owned by husband and wife, could you?

Correct, Sec. 1372 requires 2% S corp shareholders to be treated like partners, rather than employees, for purposes of the exclusion of employee medical benefits from income.

How does this fit into the community property requirements? If it's community income can the spouse be an employee?

Although the spouse has a community interest in the other spouse's business, it is still possible to have an employee-employer relationship between the spouses for the business. The common law factors for determining employee-employer status still apply (direction and control).

How do you treat the cost of modifying a bathroom for \$25000 to put in a special sit in shower that is perscribed by a doctor given that it may increase the value of the home?

The taxpayer is entitled to a deduction for \$25,000, reduced by the increase in the value of the home, if any, caused by the addition of the shower.

Please repeat how to efile the forms when there are attachments of the detail.

The paper attachments are mailed to the IRS using form 8453.

How do you consider shares from dividend / capital gain reinvestments from 2011? Are they considered ST if clients receive reinvestments in 2011, and sold ALL holdings?

Yes. Shares acquired through dividend reinvestment plans have a holding period based upon the date the dividend was paid.

What does the taxpayer or CPA do when the broker statement does not include the basis?

Transactions reported on Form 1099-B without basis shown are reported on Schedule 8949 with Box B checked.

RDP SE tax - 50% to non-business earning spouse- does this conflict with the W2 reporting? What about the pension contribution? Would now the non-earning spouse be able to contribute?

The split of SE tax on Sch C/F income and FICA tax on wage income is not parallel for RDPs. The IRS says SE tax gets split, while FICA tax does not. An RDP who picks up 50% of community SE income from the other RDP should be able to make a retirement plan contribution with respect to that income.

RDPs: Head of household - If they have been filing HH, would you now treat them as single filers? How about the dependent children? What is your position on this? If we continue to report them as HH? Will this be a disclosure reporting requirement?

For federal tax purposes, the IRS treats RDPs as unmarried taxpayers. If an RDP has a qualifying dependent, he/she can file as a head of household, like other unmarried taxpayers.

Can you amend the return in which the lump sum was paid if you did not use 86(e) at the time the return was filed?

No. The 86(e) election must be made on the original return.

Does a foreign trustee of a California Trust have to file a 3520?

Read Notice 97-34. Form 3520 is filed by U.S. persons. If the trust fails to file Form 3520A, then the U.S. owner will be penalized regardless of whether the foreign trustee refused to help. The penalty exposure for noncompliance is all on the U.S. persons.

What about cell phones paid by an S Corporation to a greater than 2% shareholder?

Excludible. Under the sec 132 regs, partners and 2% S corp shareholders are treated as employees for purposes of the working condition fringe and de minimis fringe benefit exclusions.

An English movie star doing a film in the US is subject to FICA?

Yes, but they can apply for relief under the UK-US totalization agreement (they function similar to tax treaties). The UK movies star must apply, in England, for a certificate of coverage in order to continue paying into England's social security tax system. With the certificate of coverage, he/she is not required to pay U.S. social security taxes during the period in the U.S. (if under 5 years). Go to the Social Security Administration's website for details on this and other totalization agreements.

What if the NRA is not here and no bank accounts here anymore, how will the IRS collect?

They won't unless the NRA has any U.S. assets.

How many FBAR penalties have you seen being assessed?

We are still not seeing/hearing evidence of the routine imposition of FBAR penalties, but international compliance is in the middle of a big change. This has become a top priority of the IRS. As CPAs and EAs begin to routinely remind clients, in engagement letters, that they must file FBARs, the ability for the IRS to impose the severe "willful" FBAR penalties against noncompliant taxpayers increases, particularly if coupled with unreported income. The relatively small \$10,000 per year nonwillful penalty will start to look like a bargain.

Client has to pay % profit to Chinese company for referring the business. can this be business expense deduction, if so, is any special form to be filled out?

If this is a legitimate arm's-length referral fee, then it should be deductible as an ordinary business expense. No special form needed.

1/10/2012 Webcast: Business & Estate Tax Update

How about passive GP in a general partnership with K1 SE amounts. Are they subject to SE tax?

Yes. GPs are always subject to SE tax on partnership SE income, without regard to their participation in the partnership.

You mentioned that implementation of the new regs on repair/capitalization will create a 481(a) adjustment in 2012. This means that decisions I make when doing 2011 returns will impact 2012. For example, I expense something this year under the "old" rules knowing it will create a positive 481(a) adjustment in 2012 when I plan to have less income/more deductions or vice-versa. Is my understanding correct?

This is a tricky aspect of the new regulations. For most of the methods prescribed in the regs, the IRS apparently plans to effectively apply them retroactively through the accounting method change rules. We'll have a better handle on this issue once the Service issues the accounting method Rev. Proc. in process on this. It would seem at this point that for most of the methods, applying the rules on 2011 will arguably be a reasonable method of accounting for capital assets, given the fact that this has always been a gray area.

On the other hand, if a taxpayer takes a capitalization position at odds with the new regs on a 2011 tax return, then that position will be reversed through a 481(a) adjustment on the 2012 return (in full or in part, depending upon the method change rules in the Rev. Proc.)

Four specific rules in the new regs do apply to year prior to 2012:

- The de minimis rule for taxpayers with audited financials
- The pre-decisional cost rule for real estate purchases
- The specific classification of "inherent facilitative" costs
- The rule allowing expensing of employee compensation and overhead for asset acquisition departments.

Is interior painting after a tenant is vacated considered building refreshment and therefore not required to be capitalized?

Yes. Painting would be deducted.

What about exterior painting of the entire building due to normal wear and tear?

Expense.

Do you expect the State to conform to the new 263(a) Capitalization Regulations?

Yes. This is an interpretation of a statute with no fed/Cal differences, so conformity would be automatic.

What about a roof where you do not replace the membrane, but spray acoustic material that seals the leaks and extends the roof life for say 15 years?

This should not be considered a betterment under the examples in the regs. Expense.

Still a repair vs capital for roof top air conditioners if the rooftop units service one rental apt in a multi unit building (e.g. 20 units for 20 apts)

Yes. Unit of property is still the entire HVAC system.

However, if it were a condo project, each condo would be the unit of property, so then it would be a capital improvement for the condo by the condo owner. Moreover, for leased property, if the tenant makes an improvement to the HVAC system serving its portion of the building, then the tenant has to capitalize its expenditure.

Yet another confirmation, if I have a truck that has an engine that gets blown in year 2 that I need to capitalize as a restoration, I don't get to write off some portion of the original purchase price of the truck?

Correct.

Capital or Expense - Replace water heater in SFR Rental Property? Warranty is greater than 1 year.

The water heater would be considered a major component of the plumbing system under the qualitative test, just as the furnace is a major component of the HVAC system. They both perform discrete and critical functions.

I have a client who has an s corp, he and his wife are the only employees. They have a solo 401k pension plan that has assets over 250,000. He should have filed 5500ez for several years and has not. Is there any relief for late filing penalties?

Sorry, but this question does not relate to the course material, and we don't know the answer off the top of our heads.

What would be the result if through an act of eminent domain, a portion of a building was taken and a wall had to be moved and rebuilt.

The eminent domain taking would result in a reduction in basis for the portion of the building taken and the reconstruction necessitated should be capitalized under the restoration rule.

What about an entire structure?

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And another confirmation, for the de minimis rule, only Audited statements can be used and NOT Reviewed or compiled statements.

Correct.

Also, the \$100 is the maximum that we can write off (assume no applicable financial statements). We can't use a "facts and circumstances" to justify something like \$250 or \$500 that we've used in the past.

Correct, except that the preamble to the regs notes that in an audit, agents can always agree to settle a dispute allowing write-offs in certain situations.

What if a US resident invested in a US Partnership that has invested in a foreign partnership or entity, or has other foreign investments, even if there are no foreign bank accounts? Does that mean that individuals who have invested in US partnerships that have invested in PFICs are NOT required to Form 8938 with regard to these investments in PFICs? (Patricia)

First question: A U.S. individual need not report specified foreign financial assets (SFFAs) owned by a domestic entity such as a U.S. partnership. Beginning in 2012, the domestic entity may be required to file Form 8938 (and report SFFAs owned by the domestic entity) if certain conditions are met (see the Sec. 6038D proposed regulations).

Yes, this same concept would apply to a PFIC that is an SFFA of the domestic entity but not the individual partner. No Form 8938. Of course the partnership and the partner may be required to file Form 8621 for the PFIC.

What about the timeshares in Mexico where the client owns a 20 year timeshare purchased for \$40,000. Is this a SFFA, if the timeshare company is a Mexico company.

There are alternative structures under which a Mexican timeshare may be owned, but if it is simply a fractional interest in the real estate (like most timeshares), then that is not a foreign ENTITY so not an SFFA.

Keep in mind that foreign real estate (100% owned by a U.S. individual) is not an SFFA.

If it is an ownership interest in a foreign corporation or other foreign entity, then it is a SFFA.

What type of entity is a cell capitive offshore for these rules?

Generally a foreign corporation, subject to 8938 reporting.

Is an investment in a foreign partnership considered an "Other FFA"?

Yes.

Do you have to file a 8938 if an individual owns Real Estate in a foreign country?

Not if it is owned outright or through a disregarded entity. Foreign real estate is NOT an SFFA. Form 8938 is required when the foreign real estate is held by a foreign entity, such as a foreign corporation. The foreign corporation that holds the real estate is the SFFA. If a foreign trust holds the real estate, and the foreign trust is a grantor trust for U.S. tax purposes, then no Form 8938 is required because the grantor trust is a disregarded entity for purposes of Sec. 6038D and the only foreign asset owned by the grantor (U.S. individual) is real estate. The trust and grantor would need to file Forms 3520A and 3520, but not Form 8938.

And,...what about those SA Krugerands in a French based safe deposit box?

Per an IRS webcast on FBARs (TD F 90-22.1), a foreign safe deposit box is NOT a foreign financial account. Compare, if the U.S. person has an interest in a precious metals account at a foreign bank, that is a foreign financial account subject to FBAR reporting.

Other Foreign Financial Assets - is this category subject to the dollar thresholds? Does "ANY OTHER INVESTMENT" mean any dollar amount, even under the dollar thresholds for the SSSFA's? (patricia)

The filing thresholds (which depend upon income tax filing status) are based upon the sum total value (in U.S. dollars) of all specified foreign financial assets (accounts and other FFAs).

You are a partner in a partnership, which itself is invested in partnership that invest in foreign countries. The first partnership interest in the partnership is not a controlling interest. Do both partnerships as well as the individual have to file the 8938?

For 2011, only individuals are required to file the form 8938. A domestic entity such as a partnership may be required to report SFFAs owned by the partnership in 2012 (see the proposed regulations).

Please provide currency change website. Thanks

See the instructions for the Form 8938. It is listed there.

Found the CAMICO website. Do you have to be a member to obtain the recommended engagement letter language? The slides titled "Professional Responsibility and the Report of Foreign Bank and Financial Accounts" are from what source? What does CAMICO stand for?

CAMICO provides professional liability insurance for CPAs. Membership is required to access much of its material. The name "CAMICO" is derived from California Accountants Mutual Insurance Company.

Is Form 8938 extended to 10/15 along with extension of F1040, or is it the filing deadline of 6/30 as the FABR?

The Form 8938 is due with the Form 1040—it is part of the return and thus filed at the same time that the income tax return is filed (unlike the FBAR).

How does an individual's pending application for residency effect the need to file form 8938? Ie...if applied for, but not yet a resident, do they need to file? (ALcia)

Form 8938 is required in the year the nonresident alien becomes a U.S. resident under either the green card test or the substantial presence test. The reporting period covers SFFAs owned from the residency starting date through year end. The starting date is generally the date of arrival in the U.S. See Reg. Sec. 301.7701(b)-4. You will also find an example in the Form 8938 instructions.

I have clients that have an offshore trust with NO assets outside of the U.S. It was done for asset protection. Since there are no assets outside the U.S. we have not filed any information reporting forms such as 3520. Is that correct?

I agree that you will not be required to file Form 8938 in 2011 because your foreign grantor trust (a disregarded entity) has no SFFAs thus the U.S. grantor has no SFFAs. That said, I am not familiar with any exception from the filing of form 3520/3520A for a foreign grantor trust with all U.S. assets; for example, note that the income statement on Form 3520A, Part II asks for income from U.S. sources and foreign sources, and the instructions are clear that U.S. source interest income includes interest from U.S. Treasury bills, notes, bonds, U.S. Savings bonds, ALL ordinary dividends, etc.

UK NRA owns 100% US Delaware SMLLC so UK NRA files 1040NR to report DE activity on his schedule C. DE has no foreign accounts but UK NRA has foreign accounts. Does UK NRA need to file FBAR?

I assume that "UK NRA" is neither a U.S. citizen nor U.S. resident under the Internal Revenue Code. Nonresident aliens are not subject to FBAR reporting.

Just as a confirmation, if you have signature authority over a foreign account owned by a partnership for which the signor has no ownership interest, they still need to file an FBAR. Another confirmation, if you have a non-resident alien (i.e., non-citizen has a green card, but currently lives in a non-US country), they do NOT have to file a form 8938.

Yes to the first question and no to the second question. A non-citizen holding a U.S. green card is a U.S. resident (per IRC Sec. 7701(b)); therefore, the U.S. resident, owning SFFAs that exceed the threshold, must file Form 8938 even if they are living abroad. The only relief is that

a U.S. individual living abroad has a higher Form 8938 filing threshold, as discussed in the Form 8938 instructions. The “closer connection” test in Reg. Sec. 301.7701(b)-2 does not apply to a green card holder.

I have a new client who is a dual citizen and filing a Form 1040 for the 1st time in 2011. She has access to her mother's bank a/c in Italy, is she required to file? Where can I find guidance on this. I heard Gary say something about dual residency but was finishing up some other notes at that time. Thanks.

I gather that your new client is a U.S. citizen or U.S. resident. She is required to file an FBAR for her mother's bank account if she has signature authority over her mother's account (over \$10,000) and this sounds like signature authority. Read the Title 31 regulations which can be reached on our CD and the FinCen website.

Also see the IRS announcement regarding leniency for past nonfiling by dual citizens living abroad, on the Update page of our website

If you have one account that has multiple fixed deposits, do you report each fixed deposit separately, or can you just file the one main account with the total value?

The value of the account is reported (not individual deposits). Read the FBAR instructions and the Form 8938 instructions.

The client formed a foreign LLC and transferred the IRA into the foreign LLC. The beneficiary (the client) of the IRA is U.S. person, and the IRA is in a offshore account.

Question #1: Is Form 8832, entity classification form, required? I assume that foreign entity is 100% owned.

Assuming that foreign entity is not a per-se corporation for U.S. tax purposes, and assuming that the foreign entity provides limited legal liability to the U.S. owner, then the default is disregarded entity (read the Form 8832 instructions). If the default rule cannot be relied upon, then Form 8832 must be filed to elect the U.S. tax status of the entity. I do not understand how, if at all, a U.S. IRA can be transferred to a foreign entity, or if that transaction disqualifies the IRA, or violates another IRC Section, so do not read my answer as an endorsement of this odd transaction.

Question #2: Is the LLC required to file Form 8865, foreign partnership return, or Form 8858, information return for foreign disregarded entity?

If I assume that this foreign LLC is 100% owned and is treated like a disregarded entity, then Form 8858 is the form that the owner files. If two or more owners (a partnership), then Form 8865 is the proper form.

Question #3: Is Form 8939 is required? If yes, who is/are required to file? The LLC, the IRA or the individual?

Only individuals are required to file Form 8938 in 2011. In 2012, certain foreign entities must file (see the proposed regulations)

Is FBAR required if TP has (Canada) NR4-OAS - Non-resident old-age security payments?

We know that foreign social security payments are not SFFAs for purposes of Form 8938, but the FBAR regulations do not address this scenario. My best guess is that the mere receipt and right to foreign social security payments is not the same as a foreign financial account, but I am not familiar with any FBAR guidance on this issue.

If taxpayer put money into property in Mexico and does not have any "title" document do they have to file any foreign interest form? They do not appear to have an interest in a Mexican fideicomiso.

It is not a fideicomiso and they bought property without "any" title document? This does not sound like a foreign financial account (for FBAR purposes) and without more information it does not appear to be a SFFA for Form 8938 purposes.

I believe you said that the requirement is new to file where balance is <\$10,000, so no delinquent filing is needed, correct?

This is not a new FBAR filing requirement—the \$10,000 threshold still applies. The change is reporting the ownership of any foreign account on Form 1040 Schedule B, even if no FBAR required.

Must a grantor trust file an FBAR if it is not on title to the foreign bank account?

Yes, if it owns the account (even though title is in the name of say the grantor)

If you have a foreign trust, with a US Grantor, the trust does not file. Only the US Grantor (an individual) files, correct?

Yes, only U.S. persons file FBARs, so only the U.S. grantor will file an FBAR. FBAR duplicate filing occurs if the grantor trust is domestic

FBAR question: a client owns property in Honduras. Client periodically wires \$ to Honduras caretaker to pay local expenses. Client has no signature authority over caretaker's Honduras account. Does client need to file an FBAR for the bank account of the caretaker?

If the account is in fact owned by the caretaker and client does not have "signature authority", then I do not see an FBAR filing requirement.

What if parents who lives in China add US citizen name to their China account. does US person have to file FBAR

Yes, if the \$10,000 dollar threshold is exceeded.

So the single member LLC, should file 2 one under their social security number and one under their LLC.

Yes, one for the owner and one for the SMLLC.

If I have an investment in a partnership that has foreign assets, who is required to file the forms required for foreign accounts. If I have to file, how do I get the information needed to file if the partnership does not provide it.

An FBAR is required only if you are a more than 50% partners so as a controlling partner you hopefully can get the information.

Partners do not file Form 8938's with respect to SFFAs owned by domestic partnerships but domestic partnerships may be required to file Form 8938 beginning in 2012.

It doesn't appear that we'll discuss much in connection with Chapter 6 and private foundations. Nonetheless, perhaps you might address briefly the interplay between private foundations and PFIC's and form 8621. Are PF's required to follow the PFIC rules and pick up their share of income from PFIC's?

Some special rules do exist for tax-exempt organizations, but additional research is needed to determine the precise rules for private foundations. For example, per the Form 8621 instructions (Dec. 2011 version) regarding a tax-exempt shareholder, the rules of Sec. 1291 apply only if a dividend from the PFIC is taxable to the shareholder under Subpart F. A tax exempt organization not taxable under Sec. 1291, may not make a QEF election. Also, a tax-exempt organization that is a member of a domestic pass-through entity is not subject to a QEF election made by the pass-through entity.

Client owns two S corporations: One is a CA corp. which he sees patient 3 weeks during the month. The other one is a NV corp. which he sees patient 1 week during the month. Q: Since there is no NV taxes, does he have to pay CA taxes on any of the money he made in NV corp?

A California resident must pay tax on S corp income from S corporations operating in any state—not merely California source income.

Solar panels installed in January 2012 would not be eligible for the 30% tax credit, then?

The Sec. 30D 30% credit for solar equipment installed on a home (+ vacation home) is available through 2016.

When you are determining whether a 706 is needed, for the gross estate, does that include the surviving spouse's 50% portion of the community property?

No.

Is it ok not take any discount in valuation if there is no estate tax due on first spouse to die or small estates?

You must show FMV and if the FMV is a discounted value then that should be reflected. The IRS can insist on a discount if that is appropriate to reflect FMV (say for a 5% interest in a FLP).

For 8939 filing purposes if real property is entitled to step up but the available step up is not sufficient to equal fair value, can the step up be allocated to building and not to land?

I do not believe that the available Sec. 1022 guidance clearly answers this question one way or the other. Is the land a separate asset from the building? We know that land and building are typically treated as separate assets for income tax purposes because only the building can be depreciated so perhaps it is reasonable to treat them as separate assets for Sec. 1022 purposes. That is my best guess.

If you have a 6 million community property estate and first spouse dies in Sept 2011, half of the estate assets 3 million allocated to the deceased spouse is transferred to a bypass trust. Are the assets recorded in the gross estate of the form 706 of the deceased spouse the assets transferred to the bypass trust? Therefore the assets remaining with the surviving spouse are not included in the deceased spouse's orfm 706. Does this sound correct?

Yes. Assuming this is the only asset of the spouse first to die (\$3 million) and it goes into a bypass trust (no marital deduction), then the estate will use \$3 million of its \$5 million exclusion leaving \$2 million for the surviving spouse. You will need to file a Form 706 to assure that the surviving spouse gets to use the extra \$2 million.

So when our client's come in March and we then find out spouse died in March of last year we should have them sign off stating they didn't tell us of death and now the 706 is not timely filed.

Good idea.

What is the annual exclusion scheduled to be in 2013.

It will be either \$13,000 or will be inflation adjusted upwards.

Don't you get a reduction on the estate tax for the gift tax that would have been paid on adjusted taxable gifts if they were made in the year of death?

Gift tax payable on adjusted taxable gifts (post-1976) reduces the tentative estate tax. Gift tax paid within 3 years of death (the gift tax itself) is included in the gross estate (Sec. 2035) and also is creditable.

Do you need to make the election to opt out of bonus depreciation if you are electing to take Sec 179 on all additions for 2011?

No. Bonus depreciation may not be claimed for assets expensed under Sec. 179

For every eligible asset do I need to take 179 before taking bonus depreciation?

No. Sec. 179 expense is elective.

To which entities does the Simple Cafeteria plan apply and not apply?

All employers can set up a Simple Cafeteria plan for their employees. However, a partnership or LLC cannot cover its partners/members under the plan, and an S corporation cannot cover shareholders owning 2% or more of its stock.

California new jobs credit...does this also apply for Sub S corporations. How many years ago does this go back?

The credit applies to S corporations. It was first available in 2009, however it can be claimed on the originally filed return only.

Do part time employee is counted in those 20 or more computation.

Yes. All employees employed on the last day of the year count toward the 20-employee maximum.

12/16/ 2011 WEBCAST: TAX UPDATE FOR BUSINESSES/ESTATES

Are jobs credits available if you use employee leasing?

The FTB addressed this in a 2003 information letter (#20031106, available on the FTB website), concluding that jobs credits could be claimed by a company for leased employees, if under the terms of the leasing arrangement, the company would be considered the employer of the workers applying the common law rules (e.g., right to control/discharge etc.) and considering the responsibility for payroll taxes. The FTB concluded it could come down either way, depending upon the facts.

Under IRC sec. 414(n), leased workers are considered employees of the company they are providing services to (rather than the leasing company) for most employee benefits purposes of the Code—though not expressly for jobs credit purposes.

The Small Business Health Insurance credit specifically includes leased workers in the count of the number of employees working for a company, in determining eligibility for the insurance credit.

Therefore, it would appear there is a basis for claiming the jobs credits for leased employees—however, we have no experience with dealing with the IRS or FTB on this issue.

Is the sale-only apportionment factor election made annually? Or is it a permanent election once it is made?

The use of the single sales factor apportionment percentage is an annual election—i.e., the taxpayer can switch back and forth between the two methods from year to year.

Bonus depreciation - "acquired" cash basis - paid, can you elaborate on that? What does paid mean?

For a cash method taxpayer, “acquired” means paid for during the applicable window period. However, if an asset is placed in service during the window period and is paid for after (e.g., placed in service in December 2011, but not paid for until 2012) it will be treated as acquired in December 2011, if there is a binding contract to acquire the asset as of the end of 2011.

What if you sign a binding contract to acquire an asset inside the window, but do not place it in service until after 2011?

In this case the asset would be acquired in 2011, but not placed in service until 2012. Therefore it would not qualify for 100% bonus depreciation, as both conditions must be met. It would be limited to 50% bonus depreciation.

Not related to anything you have discussed yet, but I seem to be fighting attorneys on creating LLCs vs. S Corps. You can make an S Election for an LLC. What are your thoughts on this? The attorneys like the fact that there are no meeting or minute requirements and therefore want clients to start LLCs for service type businesses.

We also generally prefer LLCs (without a “check-the-box” election to be taxed as an S corporation), due to the greater flexibility of the partnership rules. The one advantage of the corporate form is the ability to limit salary payments (and thus payroll taxes) to the owners; however, this device is often abused by unrealistically low salaries and may be changed by statute.

What about a Delaware LLC owns real estate in Texas, manager is not a CA resident, but one of the other partners is a CA resident, assume just an investor with no ability to manage or make decisions, lets say only 1% owner, is this entity required to file in CA and pay the \$800?

Given that there are no management activities taking place in California, this would not subject the LLC to tax for “doing business” in California.

Please discuss the reporting requirements for US taxpayers that have investments in foreign hedge funds, foreign LBO funds, and foreign venture capital funds.

These funds are not considered foreign financial accounts for purposes of the FBAR (i.e., no reporting except for publicly traded mutual funds). However, in 2011, U.S. individuals will need to include such funds (owned directly) as foreign financial accounts for purposes of Sec. 6038D and the new Form 8938.

In 2012, a domestic entity (U.S. Corp or U.S. Partnership controlled by a U.S. individual or specified person) may also be required to file Form 8938 for these types of funds. Same for certain U.S. trusts. Take a look at the temporary and proposed regulations under Sec. 6038D.

So for example if you have a Dividend Reinvestment Plan account with Vodafone (a Canadian corporation) is that a foreign account?

I don't see an FBAR filing requirement because Vodafone is not a foreign financial institution, even if we conclude that the dividend reinvestment plan is a financial account. However, if Vodafone is not owned through a U.S. broker, then the Vodafone stock is a specified foreign financial asset for purposes of new Form 8938 for 2011.

US Partnership is owned 100% by UK Corp - The UK entities are effectively Shell Corp blockers with no activity in UK or assets other than interest in US Partnership - the US company has no foreign interests/operations, etc. does the US company need to file an FBAR for these UK corporate blockers even though there are no assets/operations?

If the U.S. partnership, itself, as a foreign financial account over \$10,000, then it must file an FBAR, but the U.S. partnership does not have a financial interest in a foreign financial account owned by one of its partners even if the partner is a more than 51% partner.

Is a note payable due to a 49% LLC member, which is a Canadian entity, subject to FBAR reporting?

No, this is a liability—not an asset. If it were a note receivable from a foreign person, it is not a “foreign financial account” so no FBAR. However, in 2011, it will be a specified foreign financial asset subject to Form 8938 reporting.

What about a loan to a US sub from a foreign parent?

The note from the foreign subsidiary is not a foreign financial account so no FBAR is required. Also, I see no Form 8938 filing requirement because the U.S. subsidiary is not an individual and even in 2012 is not owned 80% by a U.S. "specified person".

Publicly traded foreign partnerships- no reporting if through us broker?

Correct.

Do you use the same exchange rates for the FBAR and the 8938?

Yes, they both want you to use the Treasury Financial Management Service and both forms allow you to use the exchange rate on the last day of the year. Take a look at the form instructions.

Some foreign countries do not allow bank accounts held locally to be taken out of that country but can spend it there due to foreign exchange control do such funds have to be reported.

I can find no exception in the Title 31 regulations for bank accounts in countries that prevent currency from leaving the country. Therefore, yes, such accounts must be reported.

Regarding FBAR filing requirement, did you indicate that a Canadian RRSP may not be required to file. I believe you mentioned something about a trust with less than 50% interest. Almost all other reading I have done indicate that a FBAR is required for RRSPs over \$10,000.

Yes, I agree that an FBAR should be filed for a Canadian RRSP because for that trust the beneficiary does own over 50% (indeed 100%) of the account and the foreign trust itself will not file an FBAR. Also, the Canadian RRSP, while sort of the equivalent to a U.S. IRA is not in fact a U.S. IRA; therefore, it does not qualify for the FBAR filing relief that is available for a U.S. IRA.