



April 4, 2018

The Honorable David J. Kautter
Acting Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Mr. Douglas O'Donnell
Commissioner
Large Business & International Division
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: [Questions and Answers about Reporting Related to Section 965 on 2017 Tax Returns](#)

Dear Messrs. Kautter and O'Donnell:

The American Institute of CPAs (AICPA) appreciates the guidance posted by the Internal Revenue Service (IRS) on March 13, 2018 related to the reporting requirements for section 965¹ as amended by [Pub. L. No. 115-97](#), commonly referred to as the Tax Cuts and Jobs Act (TCJA). These Frequently Asked Questions (FAQs)² and associated sample statements provide assistance to taxpayers as they prepare and file their 2017 tax returns.

In reviewing the FAQs, we have identified areas that remain uncertain or require additional clarification to allow taxpayers to properly calculate, report and pay their tax liabilities related to section 965. Updated guidance in these areas is needed immediately, as taxpayers are required to make their initial payment and elections related to section 965 by April 17, 2018, the original return filing deadline. We have listed below specific fact patterns to illustrate some of the issues needing clarification, along with related recommendations.

Scenario #1 – Underpayment of Initial Installment of the Section 965 Tax Liability

A taxpayer submits a timely filed extension request and their initial section 965 installment payment by April 17, 2018 using the procedures outlined in Q10 of the FAQs. On or before October 15, 2018, the taxpayer files their completed tax return with the required attachments identified in Q3 and Q7 of the FAQs. The final calculation of the taxpayer's section 965 tax liability exceeds the estimated amount upon which their installment payment in April was based. The initial installment was reasonable based upon facts and information available to the taxpayer at the time it was submitted.

Recommendation

The IRS should treat the additional section 965 tax liability in a manner similar to a "deficiency" under section 965(h)(4). We suggest that the taxpayer make a payment of the appropriate

¹ Unless otherwise indicated, hereinafter, all section references are to the Internal Revenue Code of 1986, as amended, or to Treasury Regulations promulgated thereunder.

² ["Questions and Answers about Reporting Related to Section 965 on 2017 Tax Returns"](#) - IRS.gov website as of March 19, 2018.

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percentage of the additional amount of tax liability (8% per section 965(h)(1)(A)) and add the remaining tax liability to the remaining installment balance, as if the correct amount had been determined as of the April 17, 2018 extension request.

The AICPA further recommends that taxpayers have the ability to apply any overpayment of tax related to their regular 2017 tax liability to any underpayment of tax related to their section 965 installment liability. A statement attached to the return would allow the taxpayer to make this election to apply any overpayment.

Analysis

A taxpayer's calculation of their section 965 tax liability could require detailed information from multiple sources and numerous time-consuming calculations. Generally, this information was not previously required to prepare a taxpayer's annual tax return. As a result, there is a strong likelihood of an under or over estimate of the final section 965 tax liability.

An underpayment of the initial installment due in April 2018 would result from any underestimate of the section 965 tax liability. Given the complexities involved in the new calculation, penalizing a taxpayer who is making a reasonable effort to comply would not serve the purposes of effective tax administration.

The statute is silent on the treatment of the underpayment. The additional amount of tax due with the extended return potentially represents an "addition to tax" under section 965(h)(3), a "deficiency" under section 965(h)(4) or another liability defined in an unrelated code section. The AICPA believes that the treatment described in section 965(h)(4) covering "deficiencies" represents a fair and equitable solution for the treatment of the underpayment.

Additionally, the ability for a taxpayer to apply an overpayment of their regular tax liability reflected on their filed return to an underpayment related to their section 965 installment payment would reduce taxpayer burden and constitute effective tax administration.

Scenario #2 – Overpayment of Initial Installment of the Section 965 Tax Liability

A taxpayer submits a timely filed extension request and their initial section 965 installment payment by April 17, 2018 using the procedures outlined in Q10 of the FAQs. On or before October 15, 2018 the taxpayer files their completed tax return with the required attachments identified in Q3 and Q7 of the FAQs. The final calculation of the taxpayer's section 965 tax liability is below the estimated amount upon which their installment payment in April was based.

Recommendation

The IRS should provide taxpayers the option of having the section 965 installment payment overpayment refunded to them or make an election to apply it to one or more of the following current or future liabilities:

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- second installment payment of the section 965 tax liability due in April 2019;
- regular tax underpayment for 2017 reflected on their filed tax return; or
- 2018 estimated tax payments.

A taxpayer would indicate if an election is made by attaching a statement to the filed tax return.

Analysis

Many taxpayers with an overpayment of their section 965 tax liability will have other income tax payments due. Allowing them to apply their section 965 overpayment will reduce the administrative burden on both the IRS and taxpayers, by reducing the number of refund checks issued and payment vouchers processed.

Scenario # 3 – Unintentional Non-payment of Initial Installment of the Section 965 Tax Liability

A taxpayer owns an interest in a partnership with an investment in a “specified foreign corporation” as defined in section 965(e). The taxpayer is unaware that a section 965 inclusion amount exists for tax year 2017 until they receive their Schedule K-1 on September 15, 2018. As this is the only section 965 inclusion amount on taxpayer’s return, they did not make the initial installment payment related to the section 965 tax liability with their extension request in April.

Recommendation

If the only section 965 inclusion on a taxpayer’s return results from an interest in a partnership that provided the taxpayer with a Schedule K-1 after April 17, 2018, the IRS should permit the taxpayer to make their initial section 965 tax liability payment with their timely filed extended tax return.

We suggest treating the payment as though it was properly made by April 17, 2018, resulting in no additional interest or penalties if the taxpayer certifies that their section 965 inclusion amount results solely from a partnership (or other pass-through entity) interest from which they first received the necessary information on a Schedule K-1 issued after April 17, 2018.

Analysis

Similar to Scenario #1, a taxpayer in Scenario #3 will have made a good faith effort to fulfill their income tax filing and payment responsibility. Without the knowledge that a partnership in which they own an interest will report a section 965 inclusion amount to them prior to April 17, 2018, they have no basis upon which to estimate or even anticipate owing a section 965 tax liability. Fairness and equity dictate that in such a situation, the taxpayer is “held harmless” provided they rectify the situation in a timely and reasonable manner.

Scenario # 4 – Clarification of Required Calculations and Document Retention

In order to accurately calculate their net tax liability for the taxable year with all section 965 related amounts, a taxpayer will have certain tax attributes and deductions directly impacted by the section 965 inclusion amounts. Examples of potential items impacted include the section 199 deduction, foreign tax credits, losses (foreign, domestic, net operating, etc.) and general business credits. A taxpayer is only required to file a tax return showing the calculation of their net tax liability for the taxable year without the section 965 related amounts.

Recommendation

The IRS should encourage taxpayers to prepare a pro forma copy of their tax return showing the calculation of the net tax liability for the taxable year with all section 965 related amounts and retain the documentation until one year after the expiration of the extension of the limitation on the assessment period referenced in section 965(k).

Analysis

As a best practice, taxpayers should prepare and retain sufficient documentation to support the information reported on their tax returns. The section 965 inclusion, deduction and tax liability calculations represent an unusual and perhaps challenging event for most taxpayers. Therefore, it serves the interest of both the IRS and taxpayers for the IRS to provide guidance on the type of supporting documentation that is appropriate for taxpayers to maintain.

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The AICPA is the world's largest member association representing the accounting profession, with more than 418,000 members in 143 countries and a history of serving the public interest since 1887. Our members advise clients on federal, state and international tax matters and prepare income and other tax returns for millions of Americans. Our members provide services to individuals, not-for-profit organizations, small and medium-sized businesses, as well as America's largest businesses.

We appreciate your consideration of these comments and welcome the opportunity to discuss these issues further. If you have any questions, please contact me at (408) 924-3508, or Annette.Nellen@sjsu.edu; Philip Pasmanik, Chair, AICPA International Taxation Technical Resource Panel, at (212) 686-7160, ext. 122, or Philip.Pasmanik@hertzherson.com; or Jonathan Horn, Senior Manager – AICPA Tax Policy & Advocacy, at (202) 434-9204, or Jonathan.Horn@aicpa-cima.com.

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Sincerely,

A handwritten signature in black ink, appearing to read "Annette Nellen". The signature is fluid and cursive, with the first name "Annette" being more prominent than the last name "Nellen".

Annette Nellen, CPA, CGMA, Esq.
Chair, AICPA Tax Executive Committee