



September 17, 2018

The Honorable Steven T. Mnuchin
Secretary of the Treasury
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

The Honorable David J. Kautter
Assistant Secretary for Tax Policy
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Re: Application of 2017 Estimated Tax Payments to Section 965(h) Installment Obligations

Dear Messrs. Mnuchin and Kautter:

The American Institute of CPAs (AICPA) remains concerned with the negative impact on certain taxpayers of the decision by the Department of the Treasury (“Treasury”) and the Internal Revenue Service (IRS) regarding the application of overpayment resulting from 2017 estimated tax payments and extension payments.

The AICPA urges Treasury and the IRS to reverse the conclusion reached in [Q&A 13 and Q&A 14](#) posted to the IRS website on April 13, 2018 and explained in a [Chief Counsel Memorandum](#) (PMTA 2018-16) dated August 2, 2018. We believe that the IRS should permit taxpayers to request a refund or application to their 2018 estimated tax liability of the amount of their 2017 estimated tax payments which exceeds their 2017 regular income tax liability (exclusive of the tax amount calculated under section 965¹).

Background

It is common practice for taxpayers to take a conservative approach when estimating their tax liability for purposes of estimated tax payments or a payment submitted with an extension request. Taxpayers take this action to ensure timely payment of their ultimate tax liability with the intention of either applying the resulting overpayments towards the subsequent year’s estimated tax payments or requesting a refund.

In addition, taxpayers may have included payment for the estimated amount of their initial section 965(h) installment with their fourth quarter estimated tax payment in January 2018. The initial release of Section 965 FAQs by the IRS on March 13, 2018, which included Q&A 10, specifically required a separate payment for the initial section 965(h) installment liability. Compliant taxpayers who abided by this guidance submitted a second payment for that amount as instructed. They reasonably expected to have the ability to request a refund or direct the application of that additional and unexpected overpayment from their January estimated payment.

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

The IRS decision, announced via new FAQs on April 13, 2018, to treat all tax payments made for the 2017 tax year (estimated tax payments, extension payments, and amounts paid specifically to satisfy the initial section 965(h) installment) as a single pool of funds was inconsistent with Q&A 10 released on March 13, 2018. This FAQ required taxpayers to make two separate payments, one designated for their regular 2017 tax liability and one designated to cover their entire initial section 965(h) installment.

The IRS in a Chief Counsel Memorandum dated August 2, 2018 (PMTA 2018-16) explained their analysis of the applicable code sections which they believe required them to reach the conclusions in Q&A 13 and Q&A 14.

Analysis

Section 6402 describes an overpayment as “any payment in excess of that which is properly due.” For taxpayers making a valid election under section 965(h), only the first year’s installment of their section 965 liability is properly due. Therefore, the IRS, under section 6402(a), is allowed to either refund the overpayments or permit taxpayers to apply them to their 2018 estimated taxes.

Section 6403 relates to the application of overpayments for a tax payable in installments to future installments. Specifically, this provision applies only when a taxpayer has “**paid as an installment of the tax** more than the amount determined to be the correct amount of the installment” (emphasis added). The overpayments in question related to a taxpayer’s 2017 tax liability exclusive of the section 965(h) installment, which the IRS in Q&A 10 had required taxpayers to make a separate and specific payment using a separate and specific payment process.

A similar analysis of this situation was offered in correspondence submitted by the [Chamber of Commerce of the United States of America on August 21, 2018](#) and by Kirkland & Ellis LLP on behalf of Huntsman on August 14, 2018.

In addition, the IRS’s application of regular tax overpayment to an installment payment amount which is not legally due until a future date, is seemingly inconsistent with Congressional intent. Section 965(h) and the accompanying [Joint Explanatory Statement of the Committee of the Conference](#) (Conference Report) support allowing a taxpayer to pay in installments without any added interest or a requirement for estimated payments. Specific rules are included regarding the treatment of “deficiency” amounts – in general a “catch-up” payment for installments previously due and proration of the remainder to the subsequent future installments. In addition, provisions specifying circumstances that would constitute an acceleration triggering immediate payment of the remaining installments are included in the statute.

The National Taxpayer Advocate expresses similar concerns in [NTA Blog: IRS Administration of the Section 965 Transition Tax Contravenes Congressional Intent and Imposes Unintended Burden on Taxpayers](#), dated August 16, 2018.

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Recommendation

The AICPA urges the IRS to amend Q&A 13 and Q&A 14. Taxpayers should have the ability to direct the application of any overpayment resulting from their combined 2017 estimated taxes and 2017 extension payments in some combination of the following:

- Application to 2018 estimated tax liability (non-section 965 tax liability);
- Refund to the taxpayer in whole or partial amounts; or
- Application to one or more future section 965(h) installment payments.

Allowing taxpayers a choice in how taxpayers' tax payments are applied is permissible under the relevant Internal Revenue Code sections, consistent with the 8-year installment payment period enacted as part of code section 965(h) and necessary for the fair and sound administration of the tax system.

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We appreciate your consideration of these comments and welcome the opportunity to discuss these issues further. Please contact Philip Pasmanik, Chair, AICPA International Taxation Technical Resource Panel, at (212) 686-7160, ext. 156 or Philip.Pasmanik@hertzherson.com; Jonathan Horn, Senior Manager – AICPA Tax Policy & Advocacy, at (202) 434-9204 or Jonathan.Horn@aicpa-cima.com; or me at (408) 924-3508 or Annette.Nellen@sjsu.edu.

Respectfully submitted,



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

cc: The Honorable Orrin Hatch, Chairman, Senate Committee on Finance
The Honorable Ron Wyden, Ranking Member, Senate Committee on Finance
The Honorable Kevin Brady, Chairman, House Committee on Ways and Means
The Honorable Richard Neal, Ranking Member, House Committee on Ways and Means

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The Honorable Lafayette “Chip” G. Harter III, Deputy Assistant Secretary (International Tax Affairs), Department of the Treasury
Mr. Thomas West, Tax Legislative Counsel, Department of the Treasury
The Honorable David J. Kautter, Acting Commissioner, Internal Revenue Service
Mr. William M. Paul, Acting Chief Counsel, Internal Revenue Service
Mr. Thomas A. Barthold, Chief of Staff, Joint Committee on Taxation