"the extreme polarization of politics and media . . . and it's very hard for citizens to come together when they're operating from very different sets of information."

On the other hand, Williamson said, "There is a substantial body of rigorous research showing that, given better information, citizens can and do learn facts about taxes." Taxpayers tend to be knowledgeable, even savvy, about the parts of the tax code that their livelihoods and income depend on, she said.

Corrected tax information can also change taxpayers' attitudes, Williamson added. Research has shown that correct tax system information helped dispel misconceptions about the estate tax and flat-rate tax proposals, she said.

"While, anecdotally, we might remember the people we failed to reach or who seemed impervious to data, we should not extrapolate from those experiences to the citizenry as a whole," Williamson said.

"Taxpayers should stay away from anything that's not official information," Morgan advised. The safest path to filling in gaps in an individual's tax knowledge is to consult a tax professional, she said.

"The taxpayer is ultimately responsible for what they need to know," Morgan added. "And they need to know what they don't know, so they can find someone who does know." ■

IRS Pot Participation Guides Leave Practitioners Hungry for More

by Nathan J. Richman

State-legal cannabis businesses could use more detail on the IRS's thinking about applying inventory accounting rules and updates on the case law developments that occurred after its guides for examiners were developed, according to practitioners.

"The IRS is in the process of reviewing and updating the Marijuana Participation Guide to ensure the training information is as current as possible for our field examiners," an agency spokesperson said upon providing *Tax Notes* with the two "participant guides" used to train examiners on how to audit state-legal marijuana taxpayers. Practitioners say there's much work to be done.

The guides — one dated 2015 and another revised in 2017 — cover a wide range of information from the basics of the marijuana business including descriptions of different products (such as edibles, tinctures, and hashish), to audit techniques regarding gross receipts and cost of goods sold, to application of tax penalties.

Marc Claybon of Crowe LLP said that the 2015 guide provides a high-level overview and some information on how manufacturers can apply reg. section 1.471-11 to compute COGS, but with less depth than what he and other practitioners had been hoping for. "There was a lot of expectation that there would be a more detailed roadmap of the kinds of things that the IRS would be focused on, but this leaves it to a fairly high level of what many in the industry were doing on a daily basis anyway," he said.

> ***The industry needs a more formal policy position from the IRS and perhaps an update to the 2015 chief counsel memorandum in which the IRS laid out its position on COGS in the marijuana industry and how section 471 applies, Benda said.***

Jennifer E. Benda of Hall Estill had previously obtained both guides via a Freedom of Information Act request. She said the industry needs a more formal policy position from the IRS

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and perhaps an update to the 2015 memorandum (ILM 201504011) in which the IRS laid out its position on COGS in the marijuana industry and how section 471 applies.

James D. Thorburn of Thorburn Law Group LLC reiterated his assertion that the IRS is actively hiding from the public another document similar to the Internal Revenue Manual — an internal cannabis manual, if you will. He said his most recent attempt to obtain the document in a FOIA request was dismissed in March.

Pot Basics

Much of the new guidance practitioners are seeking involves an issue mostly particular to state-legal cannabis taxpayers — application of section 280E. That provision disallows any deduction, without restricting allowances for COGS, for any business engaged in trafficking substances as prohibited by the Controlled Substances Act.

The IRS's 2015 memo took the position that the section inventory rules dictate what outlays are COGS a cannabis taxpayer can use to reduce income and what are instead deductions section 280E disallows. Unlike most taxpayers, cannabis taxpayers must try to capitalize their costs to inventory — what would otherwise be an unfavorable delay — rather than immediately deduct, because late is better than never.

Another memorandum (ILM 202114019) released in April addresses reg. section 1.471-3 on reseller inventory. While that memo doesn't mention pot or section 280E, practitioners agreed that the permissive discussion of inventory capitalization implied it addressed cannabis taxpayers.

However, the 2021 memo only addressed resellers and not growers or vertically integrated businesses that can use the more expansive reg. section 1.471-11 rules, the latter of which are more prevalent in the industry, according to practitioners.

More to Add

The Tax Court and circuit courts have issued several notable rulings since 2017 that the updated guide should have addressed, according to Thorburn.

The 2017 guide only focuses on the first two major marijuana industry court cases: *Californians Helping to Alleviate Medical Problems Inc. v. Commissioner*, 128 T.C. 173 (2007), and *Olive v. Commissioner*, 792 F.3d 1146 (9th Cir. 2015) — both of which primarily involve when a taxpayer can separate its lines of business to stem the application of section 280E.

More recent cases such as *Alpenglow Botanicals LLC v. United States*, 894 F.3d 1187 (10th Cir. 2018), and *Patients Mutual Assistance Collective Corp. v. Commissioner*, 151 T.C. 176 (2018), have discussed COGS in ways the IRS needs to address, according to Thorburn. The Ninth Circuit affirmed the latter case on April 22.

Claybon said the age and corresponding lack of discussion on recent court cases are part of why the guides are underwhelming.

Benda said that she's seen the IRS change its position on capitalization of growing plants since it last revised the participant guide. "The IRS was proposing big adjustments if people hadn't capitalized their growing plants, but there are some special farmer rules and they have since conceded [that] those farmer rules apply, which means the growing plants don't have to be capitalized," she said.

> ***Benda said that she's seen the IRS change its position on capitalization of growing plants since it last revised the participant guide.***

This is the one time a taxpayer subject to section 280E can take a current deduction instead of settling for capitalization, Benda said.

Difficult Choice

The guides also have a section devoted to taxpayers asserting their Fifth Amendment privilege against self-incrimination on audit because the state-legal businesses could still be charged with federal drug crimes.

Claybon said that portion highlights the thoughtful approach the IRS is taking and combined with the sections on audit interviews, underscores the importance of a careful taxpayer approach from the beginning.

Benda called for an update to that portion of the guide to respond to recent case law,

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specifically *Feinberg v. Commissioner*, 916 F.3d 1330 (10th Cir. 2019), in which the court held that the taxpayers' refusal to provide documents under the Fifth Amendment left them unable to substantiate their COGS. This leaves taxpayers with a difficult problem of how to prove their tax returns are correct and address potential drug crime exposure, she said. Perhaps the best approach is to ask about a criminal referral under *United States v. Tweel*, 550 F.2d 297 (5th Cir. 1977), she added.

Thorburn, who litigated *Feinberg*, said he's trying a new argument in Tax Court that sets the Fifth Amendment privilege opposite the 16th Amendment's allowance of a tax on gross income rather than gross receipts. Gross income is gross receipts minus COGS.

Thorburn made the argument that taxpayers face unconstitutional conditions if they have to choose between the Fifth and 16th amendments in the related cases of *Sharp v. Commissioner*, No. 7196-19 (T.C. 2021), and *Foster v. Commissioner*, No. 7073-19 (T.C. 2021).

That difficulty is similar to the Fifth Amendment issues that arose in the gambling context, Thorburn added. For example, *Garner v. United States*, 424 U.S. 648 (1976), describes when and how a taxpayer can assert the Fifth Amendment privilege on a tax return in the context of a gambling prosecution involving tax returns as the government's evidence.

Thorburn noted that section 4424 prevents information provided regarding a gambling excise tax from being used in a nontax prosecution. Maybe Congress will eventually give the state-legal marijuana industry something similar, he said. ■

OPR Unveils More Practitioner Misconduct Decisions

by Kristen A. Parillo

The IRS Office of Professional Responsibility has released more disciplinary decisions issued after the agency stopped publishing them in 2014, giving practitioners insight on how the Circular 230 rules are being administered.

A final decision from October 2019 was posted to the IRS website May 4, while several others were posted over the last six months.

The IRS has taken steps to restore public access to OPR decisions in response to Tax Analysts' May 2020 Freedom of Information Act lawsuit filed in the U.S. District Court for the District of Columbia. Under section 10.72(d)(1) of Circular 230, all final decisions in disciplinary proceedings brought by OPR are "public and open to inspection," subject to protective measures set out in section 10.72(d)(4).

Final OPR decisions were published on the IRS website from 2007 until December 2014, when the Office of Chief Counsel warned OPR that posting final decisions might constitute disclosure of return information subject to section 6103 protections. In response to those concerns, OPR removed all final decisions from the IRS website.

Karen Hawkins, who was OPR director from April 2009 to July 2015 and is now a Tax Analysts board member, said in October 2015 that the intent had been to repost the decisions after they were redacted to address the section 6103 concerns.

Tax Analysts' lawsuit requested that the IRS repost the decisions that had appeared on its website before 2015, as well as publish all subsequent decisions.

The lawsuit is still pending, but in October 2020 the IRS posted several decisions rendered after 2015 that constitute final agency decisions within the meaning of section 10.72(d)(1) of Circular 230. The IRS redacted the decisions to protect private taxpayer and other third-party information as required by Circular 230, section 6103, and FOIA.

The IRS has since published post-2015 final decisions in six other cases:

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