January 25, 2016

The Honorable John Koskinen
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC  20224

Re: Comments in Response to Consistency of Income Tax Basis Rules

Dear Commissioner Koskinen:

Enclosed please find comments in response to the consistency of income tax basis rules (“Comments”). These Comments are submitted on behalf of the American Bar Association Section of Taxation and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

The Section of Taxation would be pleased to discuss the Comments with you or your staff if that would be helpful.

Sincerely,

George C. Howell, III
Chair, Section of Taxation

Enclosure

CCs: Karen Schiller, Commissioner (Small Business/Self Employed), Internal Revenue Service
Hon. William Wilkins, Chief Counsel, Internal Revenue Service
Erik Corwin, Deputy Chief Counsel (Technical), Internal Revenue Service
Curtis Wilson, Associate Chief Counsel (Passthroughs & Special Industries), Internal Revenue Service
Theresa Melchiorre, Attorney, Office of the Associate Chief Counsel (Passthroughs & Special Industries), Internal Revenue Service
Hon. Mark Mazur, Assistant Secretary (Tax Policy), Department of the Treasury
Emily McMahon, Deputy Assistant Secretary (Tax Policy), Department of the Treasury
These comments (“Comments”) are submitted on behalf of the American Bar Association Section of Taxation (the “Section”) and have not been approved by the House of Delegates or Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

Principal responsibility for preparing these comments was exercised by Stacey Delich-Gould of the Section’s Fiduciary Income Tax Committee (“FIT”) and Benjamin G. Carter and Hannah W. Mensch of the Section’s Estate and Gift Taxes Committee (“EG”). The Comments were reviewed by David A. Berek, Chair of FIT, and Laura Hundley, Chair of EG. The Comments were further reviewed by John Bergner, Council Director for FIT and EG, Jeanne L. Newlon of the Section’s Committee on Government Submissions, and Peter H. Blessing, the Section’s Vice Chair (Government Relations).

Although the members of the Section of Taxation who participated in preparing these Comments have clients who might be affected by the federal tax principles addressed by these Comments, no such member or the firm or organization to which such member belongs has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these Comments. Additionally, while the Section’s diverse membership includes government officials, no such official was involved in any part of the drafting or review of these Comments.

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Date: January 25, 2016
EXECUTIVE SUMMARY

On July 31, 2015, President Obama signed into law the Surface Transportation and Veterans Health Care Choice Improvement Act of 2015 (hereinafter the “Highway Bill”).\(^1\) Section 2004 of the Highway Bill enacted sections\(^2\) 1014(f) and 6035, which implemented new income tax basis consistency rules for taxpayers acquiring property from a decedent and new information reporting requirements for executors of estates. On August 21, 2015, the Internal Revenue Service (the “Service”) announced February 29, 2016 as the initial due date for each statement required by section 6035 (a “Valuation Statement”) to be filed with the Service or furnished to a beneficiary of an estate.\(^3\)

Sections 1014(f)(4) and 6035(b) permit the Secretary of the United States Treasury (the “Secretary”) to issue Regulations to help interpret these new rules. Section 7805(a) provides generally that the Secretary will prescribe all needful rules and regulations for the enforcement of the Code, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue. Section 7805(b)(2) provides that regulations may apply retroactively if they are issued within eighteen months of the date of the enactment of the statutory provision to which they relate.

We suggest the Service adopt Regulations to address the following issues, as more fully described below:

1. Clarification as to the obligation, if any, to submit Valuation Statements for estates below the applicable exclusion amount that file federal estate (and generation-skipping transfer) tax returns, Form 706 (“FET Return”), solely to elect portability;

2. General clarification regarding the discrepancy between when an executor is required to file an FET Return and when the beneficiary is required to use the income tax basis reported (i.e., only with respect to property whose inclusion in the decedent’s estate increased the liability for the tax imposed);

3. Format of the Valuation Statement;

4. Appropriate recipient of a Valuation Statement when the estate beneficiary is a trust;

5. Clarification as to the obligation to send a Valuation Statement to a beneficiary who only receives cash from an estate;

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\(^2\) References to a “section” herein are to a section of the Internal Revenue Code of 1986, as amended (hereinafter, the “Code”), unless otherwise indicated, and references to the “Regulations” are to the Treasury Regulations promulgated thereunder.

6. Clarification as to the obligation of an executor to send a Valuation Statement to himself or herself if the executor also is a beneficiary of the estate;

7. Clarification as to the obligation to send a Valuation Statement to a beneficiary of income in respect of a decedent (“IRD”);

8. Clarification as to how to report the value of tangible personal property on a Valuation Statement;

9. Guidance as to reporting obligations if the executor cannot identify the recipient of certain assets within the thirty day post FET Return deadline;

10. Guidance for situations where the income tax basis is specifically permitted to be higher than the estate tax value;

11. Guidance as to specific penalties applicable to an executor who fails to comply with reporting requirements;

12. Confirmation that the reference in section 1014(f)(3) to “basis of property” should be interpreted as “value of property”;

13. Confirmation that under section 6035(a), the term “executor” includes an administrator of an intestate estate;

14. Guidance as to when an adjustment is deemed to be made for purposes of section 6035(a)(3)(B); and

15. Guidance as to what the executor should do, if anything, if the income tax basis of property changes from the fair market value for federal estate tax purposes.
DISCUSSION

I. Background and Introduction.

Generally, the income tax basis of property “in the hands of any person acquiring the property from a decedent or to whom the property passed from a decedent” is the fair market value of the property at the date of the decedent’s death.\(^4\)

New Section 1014(f)

Section 1014(f) provides rules requiring that the income tax basis of certain property acquired from a decedent may not exceed the value of that property as finally determined for federal estate tax purposes, or if not finally determined, the value of that property as reported on a Valuation Statement made under section 6035.\(^5\) However, this rule regarding consistency will only apply to property whose inclusion in the gross estate increases the estate tax liability for the estate.\(^6\)

The value of property is considered to be finally determined if:

1. The value of such property is shown on an FET Return and such value is not contested by the Service within the statute of limitations;

2. The value is specified by the Service and such value is not timely contested by the executor of the estate; or

3. The value is determined by a court or pursuant to a settlement agreement with the Service.\(^7\)

New Section 6035

Section 6035 imposes new reporting requirements for the value of property included in a decedent’s gross estate for federal estate tax purposes.

The executor of any estate required to file an FET Return under section 6018(a) must furnish, both to the Secretary and the person acquiring any interest in property included in the decedent’s gross estate for federal estate tax purposes, a statement identifying the value of each interest in such property as reported on such return and such other information with respect to such interest as the Secretary may prescribe (i.e., a Valuation Statement).\(^8\)

Each person required to file an FET Return under section 6018(b) must furnish, both to the Secretary and each other person who holds a legal or beneficial interest in the

\(^4\) I.R.C. § 1014(a)(1).
\(^5\) I.R.C. § 1014(f)(1).
\(^6\) I.R.C. § 1014(f)(2).
\(^7\) I.R.C. § 1014(f)(3).
\(^8\) I.R.C. § 6035(a)(1).
property to which such return relates, a Valuation Statement identifying the information described above.9

Each Valuation Statement required to be furnished must be furnished at such time as the Secretary may prescribe, but in no case at a time later than the earlier of (i) the date which is 30 days after the date on which the FET Return was required to be filed (including extensions, if any) or (ii) the date which is 30 days after the date the FET Return is filed.10

II. Open Issues and Comments.

1. Clarification as to Obligation to Submit Valuation Statements for Estates Below the Applicable Exclusion Amount that File FET Returns Solely to Elect Portability

We respectfully request guidance on whether an executor must furnish Valuation Statements to each of an estate’s beneficiaries and to the Secretary under section 6035 if the executor for such estate files an FET Return for the sole purpose of claiming the decedent’s unused applicable exclusion amount for the benefit of his or her surviving spouse (the “deceased spousal unused exclusion amount”11 or “DSUEA”).

Section 6035 requires an executor to provide Valuation Statements to each of the estate’s beneficiaries and the Secretary only if the executor is required to file an FET Return under section 6018(a).12 Section 6018(a) states that an executor must file an FET Return upon the death of a (1) U.S. citizen or resident with a gross estate in excess of the decedent’s basic exclusion amount in effect under section 2010(c) for the calendar year of such decedent’s death and (2) a nonresident not a citizen of the United States if that part of such decedent’s gross estate situated in the United States exceeds $60,000.13

For certain married decedents, the executor may elect to file an FET Return for that decedent’s estate even though not otherwise required because the gross estate thresholds under section 6018(a) are not met. Specifically, a surviving spouse may utilize the DSUEA of his or her last deceased spouse but only if the executor of the deceased spouse’s estate files an FET Return and makes an election on such return to claim the DSUEA of the deceased spouse.14 For ease of reference, we will use the phrase “Small Estate with Portability” to refer to a decedent’s estate for which an FET Return is filed to claim DSUEA but which, due to the value of the assets of the estate, would not otherwise require the filing of an FET Return under section 6018(a).

9 I.R.C. § 6035(a)(2).
12 I.R.C. § 6035(a).
13 I.R.C. § 6018(a).
On its face, it appears that section 6035(a) does not require an executor of a Small Estate with Portability to furnish each of the estate’s beneficiaries and the Secretary with Valuation Statements. Section 6035(a) obligates the executor to provide Valuation Statements only if the executor is “required to file a return under section 6018(a).” Because a Small Estate with Portability does not require an FET Return based on the value of the gross estate (i.e., the stated requirement for an FET Return under section 6018(a)), it appears the executor of such estate need not provide Valuation Statements under section 6035(a).

Yet, a broader interpretation of “required” under section 6035(a) leaves some room for doubt as to the executor’s obligation to provide Valuation Statements for a Small Estate with Portability. While an executor is not required to elect to claim the decedent’s DSUEA for the surviving spouse, the executor is required to file an FET Return if the executor wishes to claim such DSUEA. Thus, an FET Return for a Small Estate with Portability is “required” to claim such DSUEA, albeit not based on the valuation thresholds under section 6018(a).

Based on the above, we would respectfully request clarification as to whether an FET Return filed for a Small Estate with Portability triggers an executor’s obligations under section 6035 to provide Valuation Statements to each of the estate’s beneficiaries and the Secretary.

2. General clarification regarding the discrepancy between when an executor is required to file an FET Return and when the beneficiary is required to use the income tax basis reported (i.e., only with respect to property whose inclusion in the decedent’s estate increased the liability for the tax imposed).

It appears that certain situations can arise in which an executor must furnish Valuation Statements under section 6035 to each of the estate’s beneficiaries and the Secretary even though the estate’s beneficiaries would not appear to be bound by the consistency of income tax basis provisions of section 1014(f).

Section 1014(f)(2) provides that the consistent income tax basis regime only applies “to any property whose inclusion in the decedent’s estate increased the liability” for the federal estate tax. Thus, if the estate is required to file a return under section 6018(a) or (b), but is not subject to tax because of the marital or charitable deduction, then no asset in the estate would increase the liability for the estate tax, because there is no estate tax. In that case, the estate’s beneficiaries would not be bound by the consistency in income tax basis regime. However, the executor in such case appears to be required to furnish Valuation Statements to each of the estate’s beneficiaries and the Secretary under section 6035(a). Draft Form 8971, discussed, below, seems to confirm this interpretation by providing a column on Schedule A where the executor must
indicate whether the asset increased the estate tax value, but we respectfully request guidance confirming this conclusion.¹⁵

3. Format of the Valuation Statement

On December 18, 2015, the Service published a preliminary draft of Form 8971, which, once approved, will be the format required to satisfy the executor’s responsibility for filing Valuation Statements.¹⁶ Per the draft Form 8971, executors will be required to submit Form 8971 with a copy of each competed Schedule A to the Service. Only Schedule A of Form 8971 should be provided to the relevant estate beneficiary, but the executor is required to retain copies of all forms for the estate’s records.

We respectfully request detailed instructions to supplement the final version of Form 8971. In addition to the open items discussed in these Comments, it would be helpful if Instructions to Form 8971 addressed the following issues:

- Part II of Form 8971:
  - What is the definition of “property” and are there any exceptions?
  - Does “Date of Service” reflect the date the executor mails the form to the estate beneficiary? Is any specific type of mailing required to corroborate this date?

- Schedule A of Form 8971:
  - Does each estate beneficiary need to receive a new copy of Form 8971 if there is a supplemental filing, even if it does not affect the specific estate beneficiary?
  - What should an executor send if the executor does not have full information at the time of the filing?
  - Do appraisals (or any additional information) need to be attached to the Schedule A when sent to the estate beneficiary?

4. Appropriate recipient of a Valuation Statement when the estate beneficiary is a trust

Section 6035(a)(1) requires an executor who must file an FET Return under section 6018(a) to furnish Valuation Statements to the Secretary and to “each person

¹⁵ As discussed in section I.2, above, similar questions would apply for a Small Estate with Portability if the Service were to issue guidance that the executor of such estate must provide Valuation Statements to the Service and the estate’s beneficiaries.

¹⁶ In delaying the filing deadline for such statements until February 29, 2016, Notice 2015-57 also stated that executors required to file the statement “should not do so” until the issuance of forms or further guidance.
acquiring any interest in property included in the decedent’s gross estate. . . .” In simple terms, the bolded language refers to the “beneficiaries” of the decedent’s gross estate. However, decedents often leave property in trust for one or more beneficiaries, rather than devising the property outright and free of trust. Section 6035 does not state whether the executor must distribute Valuation Statements in such case directly to the beneficiaries of the trust or just to the trustee. Therefore, we respectfully request guidance as to who must receive the Valuation Statement with a beneficial interest in a trust.

In the interest of administrative efficiency, we respectfully suggest that the executor should only be required to provide the trustee with the Valuation Statement and rely on the trustee to provide the Valuation Statement to the appropriate trust beneficiaries if and when trust property is distributed in kind to a beneficiary. This approach eliminates the potentially complicated task for the executor of identifying the appropriate beneficiaries to receive notice (i.e., current versus remainder beneficiaries), without compromising the policy of providing income tax basis information to the beneficiaries actually impacted by a sale of inherited property. Ultimately, the income tax basis information from the Valuation Statement is only relevant to the party that holds the asset. If the trustee sells the asset, the tax reporting obligation rests with the trustee, even if the gain flows outs to the beneficiaries as part of “distributable net income.”

5. Clarification as to obligation to send a Valuation Statement to a beneficiary who only receives cash from an estate

While section 6035 does not except any class of assets from the reporting regime, we believe that the practical realities of estate administration dictate that an exception should exist when an estate beneficiary receives cash from an estate. When an estate beneficiary receives cash, it seems unnecessary for an executor to furnish an information statement, as there is no income tax basis change. In the interests of efficiency, we respectfully request that guidance be issued which exempts cash bequests and bequests that are funded with cash from the section 6035 information reporting regime.

17 I.R.C. § 643(a).
6. **Clarification as to obligation of executor to send a Valuation Statement to himself or herself if the executor is also a beneficiary of an estate**

Section 6035(a)(1) provides that an executor must furnish, “both to the Secretary and the person acquiring any interest in property included in the decedent’s gross estate for federal estate tax purposes” the Valuation Statements. An executor may also be a beneficiary of the estate. We request guidance on whether such executor needs to formally provide Valuation Statements to himself or herself for property received from an estate. In the interest of administrative efficiency, we would suggest that requiring an executor to do so would not provide the executor with any additional information that he or she would not already have from having submitted the FET Return for the estate.

7. **Clarification as to obligation to send Valuation Statement to a beneficiary of Income in Respect of a Decedent (“IRD”)**

We request guidance on whether a Valuation Statement must be provided to an estate beneficiary receiving income in respect of a decedent (“IRD”). IRD “refers to those amounts to which a decedent was entitled as gross income but which were not properly includible in computing his taxable income for the taxable year ending with the date of his death or for a previous taxable year under the method of accounting employed by the decedent.”\(^{18}\) IRD retains the same income tax characteristics for the recipient as it would have had if it were payable to the decedent.\(^{19}\)

The Valuation Statement is intended to list the fair market value for estate tax purposes of a decedent’s property so that the recipient of that property can, for example, properly use such value as the income tax basis for the inherited property when calculating gain or loss upon a future sale of the property. However, IRD assets do not receive a new income tax basis at death equal to fair market value and are instead taxed as received.\(^{20}\)

The fair market value for estate tax purposes of an IRD asset is relevant for purposes of calculating the section 691(c) income tax deduction for estate tax attributable to IRD. However, the fair market value information on an IRD asset that might be contained on a Valuation Statement would not be sufficient for the recipient to calculate the section 691(c) deduction. The Valuation Statement would not include sufficient information to compute the deduction, such as the total estate tax paid by the decedent or the fair market value of the entire estate.

Therefore, we respectfully suggest that the guidance should clarify that section 6035 does not require the preparation and submission of Valuation Statements to report the fair market value of an IRD asset.

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\(^{18}\) Reg. § 1.691(a)-1(b).

\(^{19}\) IRC § 691(a)(3).

\(^{20}\) IRC § 1014(c).
8. **Clarification as to treatment of tangible personal property for valuation purposes**

Decedents often make many specific bequests of tangible personal property (e.g., items of jewelry, furniture, etc.) or give away items of *de minimis* value (e.g., clothing, pots/pans, etc.). It is common practice to lump such items together and provide one value. For example, an executor may group articles of personal property contained in the same room, none of which has a value in excess of $100, in reporting their fair market value on the FET Return.\(^{21}\) However, it is unclear from the new statutory language and draft Form 8971 whether this would be permitted. We respectfully request guidance clarifying this issue.

9. **Guidance as to reporting obligations if executor cannot identify the recipient of certain assets within the 30 day post FET Return deadline**

It is not unusual for an executor to file an FET Return without being able to identify which specific assets will be distributed to each beneficiary within thirty days of the FET Return filing. This is a common situation when assets are being divided between a credit shelter trust and a marital trust. Although the new statutory language makes it clear that an executor has a duty to send some information within thirty days of the FET Return being filed, we respectfully request guidance as to what information an executor must provide in the situation where the beneficiaries of estate property cannot be identified within such period.

10. **Guidance for situations where the income tax basis is specifically permitted to be higher than the estate tax value**

New section 1014(f) provides that the income tax basis of any property to which subsection (a) applies “shall not exceed – (A) in the case of property the final value of which has been determined for purposes of chapter 11 on the estate of such decedent, such value, and (B) in the case of property not described in subparagraph (A) and with respect to which a statement has been furnished under section 6035(a) identifying the value of such property, such value.”

The language quoted in the paragraph above conflicts with existing provisions under federal income tax law permitting income tax basis upon death to be greater than the finally determined federal estate tax value. Specifically, income tax basis following death can exceed the value reported on the FET Return when a decedent dies owning (1) a partnership or limited liability company interest subject to debt\(^ {22}\) and/or (2) real property subject to non-recourse debt.\(^ {23}\) In addition, under section 1014(e), a beneficiary’s income tax basis in property received from a decedent could be greater than the value reported on the FET Return if the beneficiary gifted the property to the decedent within one-year of the decedent’s death, and the beneficiary’s adjusted income

\(^{21}\) Reg. § 20.2031-6(b).
\(^{22}\) See Reg. § 1.742-1.
\(^{23}\) See Reg. § 20.2053-7.
tax basis at the time of the gift was greater than the value of the property at the time of 
the decedent’s death. We respectfully request guidance resolving the conflict between 
the provisions of section 1014(f) and existing federal income tax law.

11. Guidance as to specific penalties applicable to an executor who fails to 
comply with reporting requirements

Sections 6721 and 6722 provide penalties for the failure to file correct FET 
Returns or Valuation Statements, and the new statutory language appears to apply such 
penalties to the executors who fail to file the required Valuation Statements. Generally, 
the penalty for the failure to file a correct FET Return or Valuation Statement is $250, 
with the maximum penalty of $3,000,000 for all failures during a calendar year. However, if the failure is due to “intentional disregard,” the penalty is the greater of (1) 
$500 or (2) “ten percent of the aggregate amount of the items required to be reported 
correctly.”24 (For FET Returns or Valuation Statements required before 
December 31, 2016, the amounts are slightly different.25) There is also a mechanism for 
waiving the penalties if the failure is attributable to reasonable cause.26

It is unclear how this regime will apply to the consistency in income tax basis 
regime and we request guidance on this topic. For example, if the executor does not file 
Form 8971, or the executor completes only some portion of Form 8971, or the executor 
does not send supplemental statements – will there be penalties applied for each failure or 
will the filing of Form 8971 be treated collectively for purposes of the penalty regime?

Furthermore, even if no federal estate tax is due and section 1014(f) does not 
apply, the executor appears to still be subject to the section 6035 information reporting 
requirements without any exceptions to the penalty regime. This appears to be the case 
even though no penalty would be imposed for failure to file the FET Return itself in a 
timely manner because no tax was due. We request guidance that would correct the 
discrepancy from the various penalty provisions.

24 I.R.C. §§ 6721(e), 6722(e).
25 Prior to the amendment of sections 6721 and 6722 in 2015, the general penalty was $100 with a 
$1,500,000 maximum, and the intentional disregard penalty was the greater of (1) $250 or (2) 10% of the 
aggregate amount of the items required to be reported correctly. I.R.C. §§ 6721, 6722 (prior to amendment 
26 I.R.C. § 6724(a).
12. **Confirmation that reference in section 1014(f)(3) to “basis of property” should be interpreted as “value of property”**

Section 1014(f)(3) states that for purposes of section 1014(f)(1), the “basis of property has been determined for purposes of the tax imposed by chapter 11.” Procedurally, the amount “determined for purposes of the tax imposed by chapter 11” under section 1014(f)(1) is the fair market value of the estate’s property, which value in turn is used to set the income tax basis of such property. We would suggest that the Service confirm this procedural distinction, consistent with the intent of the statutory language.

13. **Confirmation that under section 6035(a), the term “executor” includes an administrator of an intestate estate**

Section 6035(a) requires the “executor” to submit Valuation Statements to each of the estate’s beneficiaries and the Secretary under the circumstances described in section 6035. On its face, it would appear that, pursuant to section 2203, an “executor” would include an administrator. However, the Service issued Regulation § 20.6018-2 to elaborate on who must file the FET Return despite the language of section 2203. For that reason, we would suggest confirmation that, for purposes of section 6035(a), the same principles for who is an executor expressed in Regulation § 20.6018-2 (and section 2203) apply to cause an administrator of an intestate estate to qualify as an “executor” for purposes of the obligations under section 6035.

14. **Guidance as to when an adjustment is deemed to be made for purposes of section 6035(a)(3)(B)**

Section 6035(a)(3)(B) states that in the case of an “adjustment” to the information required for the Valuation Statement after the statement has been filed, a supplemental Valuation Statement must be filed not later than the date which is thirty days after such “adjustment” is made.

Certain instances of “adjustments” seem apparent, such as a change in fair market value as a result of (1) the resolution of an audit of an FET Return or (2) a final judicial determination of fair market value for federal estate tax purposes. Still, absent a statutory definition of adjustment, we would respectfully request guidance as to when an adjustment is deemed to be made.

15. **Guidance as to what the executor should do, if anything, if the income tax basis of property changes from the fair market value for federal estate tax purposes**

To satisfy the requirements of section 6035(a), the executor will presumably be required to send Form 8971 to the Service and the accompanying Schedule A to the Service and each respective estate beneficiary. As noted above, Schedule A lists the “estate tax value” for such property under column “E” and gives specific notice to the estate beneficiary that “You have received this schedule to inform you of the value of property you received from the estate of the decedent named above.”
However, if the value of the property changes after the date of death, the estate tax value may not be the relevant income tax basis that should be used by the estate beneficiary. This could be the case, for example, if the asset (a) is an interest in a pass-through entity, (b) has been depreciated by the estate, (c) was used to fund a pecuniary bequest, or (d) was a passive activity that accumulated suspended losses.

We suggest that the executor should not have ongoing responsibility under section 6035 to provide information relating to income tax basis changes after the date of death to the estate beneficiaries or to the Service, and request guidance affirming this. In addition, we suggest that the final Form 8971 should alert the beneficiary of the possibility that there may be changes to the income tax basis after date of death and each estate beneficiary should consult with their tax preparer to make this determination.