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April 3, 2020

Hon. Charles P. Rettig
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: COVID-19 Response

Dear Commissioner Rettig:

Enclosed please find a preliminary set of questions and recommendations regarding the response to the COVID-19 crisis. These comments are submitted on behalf of the 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 these comments with you or your staff.

Sincerely,

Tom Callahan
Chair, Section of Taxation

Enclosure

cc: Hon. David Kautter, Assistant Secretary (Tax Policy), Department of the Treasury
Krishna P. Vallabhaneni, Tax Legislative Counsel, Department of the Treasury
Jeffrey Van Hove, Senior Advisor, Office of Tax Policy, Department of the Treasury
Hon. Michael J. Desmond, Chief Counsel, Internal Revenue Service
Sunita Lough, Deputy Commissioner, Services and Enforcement, Internal Revenue Service

**AMERICAN BAR ASSOCIATION
SECTION OF TAXATION**

**Preliminary Comments on the Impact on
Taxpayers of the COVID-19 Emergency**

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 Mary I. Slonina. The following individuals provided substantial assistance in drafting these Comments: Leslie Book, Jennifer Breen, Jeremiah Coder, Keith Fogg, Sarah Lora, Larry Sannicandro, Caleb Smith, Christine Speidel, Martha Steinman, David Strong, Jeanne Sullivan, Patrick Thomas and Shamik Trivedi.

These Comments were reviewed by Lisa Zarlenga of the Section’s Committee on Government Submissions and by Eric Sloan, the Section’s Vice Chair of Government Relations.

Although members of the Section may have clients who might be affected by the federal tax principles addressed by the Comments, no member who has been engaged by a client (or who is a member of a firm or other organization that has been engaged by a client) to make a government submission with respect to, or otherwise to influence the development or outcome of, one or more specific issues addressed by the Comments has participated in the preparation of the portion (or portions) of the Comments addressing those issues. Additionally, while the Section’s diverse membership includes government officials, no such official was involved in any part of the drafting or review of the Comments.

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Date: April 3, 2020

EXECUTIVE SUMMARY

These Comments respond to the request by the Department of Treasury (“**Treasury**”) and the Internal Revenue Service (the “**Service**”) for input regarding tax-related issues arising as a result of the coronavirus disease 2019 (“**COVID-19**”) emergency. We appreciate the swift response of Treasury and the Service in issuing guidance that addresses the extraordinary COVID-19 related obstacles and challenges facing taxpayers and their advisors. In that regard, we want to recognize and applaud the hard work of Treasury and Service employees in this time of crisis. Although our recommendations address the most immediate issues we have identified to date, we will provide additional comments in subsequent letters.¹

We commend Treasury and the Service for their prompt action to provide COVID-19 guidance, including Notice 2020-18,² the frequently asked questions on Notice 2020-18 (the “**FAQs**”),³ Notice 2020-20,⁴ Notice 2020-22,⁵ the People First Initiative guidance in IR-2020-59,⁶ the guidance contained on the Service’s website “Deadlines Extended for 403(b) Plans and Pre-Approved Defined Benefit Plans,”⁷ and the addition of Reporting FAQ 4 on the Service’s website “FATCA – FAQs General.”⁸ In addition to addressing this guidance, these Comments recommend further action intended to alleviate the burden on taxpayers and tax practitioners and to assist the Service in fulfilling its mission of efficient tax administration. Our recommendations fall in the following discrete categories:

- Guidance related to disaster provisions;
- Expansion of filing and payment due date relief;
- Additional areas for relief from due dates or other time sensitive acts;
- Postponement of Service enforcement activities; and
- Utilization of available technology during the COVID-19 emergency.

¹ These Comments also do not address the implementation of the Families First Coronavirus Response Act or the Coronavirus Aid, Relief, and Economic Security Act (the “**CARES Act**”).

² See <https://www.irs.gov/pub/irs-drop/n-20-18.pdf>.

³ See <https://www.irs.gov/newsroom/filing-and-payment-deadlines-questions-and-answers>.

⁴ See <https://www.irs.gov/pub/irs-drop/n-20-20.pdf>.

⁵ See <https://www.irs.gov/pub/irs-drop/n-20-22.pdf>.

⁶ See <https://www.irs.gov/newsroom/irs-unveils-new-people-first-initiative-covid-19-effort-temporarily-adjusts-suspends-key-compliance-program>.

⁷ See <https://www.irs.gov/retirement-plans/deadlines-extended-for-403b-plans-and-pre-approved-defined-benefit-plans>.

⁸ See <https://www.irs.gov/businesses/corporations/frequently-asked-questions-faqs-fatca-compliance-legal#reporting>.

As a preliminary matter, as Treasury and the Service consider future COVID-19 guidance and relief, including addressing the specific recommendations contained in these Comments, we make the following overarching recommendations:

- *Automatic grants of relief.* Automatic grants of relief are the most helpful form of relief to taxpayers. Taxpayers who are eligible for relief may not request it for a number of reasons, including that they are unaware of the relief, they are overwhelmed with other challenges, they face structural or financial barriers in applying for the relief, or the businesses, organizations, or individuals they are relying on for assistance are themselves overwhelmed or unavailable. We believe Treasury and the Service can most efficiently provide relief to taxpayers by announcing broadly applicable policies that are automatically applied based on internally available information.
- *Use of guidance upon which taxpayers may rely.* We recommend that, whenever possible, the Service and Treasury use notices and other published guidance to provide the relief. The Service can supplement that guidance as needed with FAQs, as it did in the case of Notice 2020-18. In that regard, it would be helpful for the Service to supplement that guidance with widely disseminated explanations (on the Service website and in press releases). This will increase the likelihood that all taxpayers, especially unrepresented taxpayers, can more easily learn about relief provisions available to them. Finally, it is important that taxpayers be able to rely on this information in ordering their affairs. Thus, even if the Service is not able to provide such guidance in published form, we respectfully request that the Service continue to follow this advice in subsequent taxpayer examinations.

COMMENTS

I. General Background Authority of Treasury and the Service in Context of an Emergency Declaration

On March 13, 2020, President Trump issued Presidential Proclamation 9994⁹ proclaiming the COVID-19 outbreak in the United States as a national emergency under the National Emergencies Act, beginning March 1, 2020. In addition, on that same date, the President issued an emergency declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (the “**Stafford Act**”) in which he declared COVID-19 a national emergency (the “**Emergency Declaration**”). The Emergency Declaration instructed the Secretary of the Treasury (the “**Secretary**”) “to provide relief from tax deadlines to Americans who have been adversely affected by the COVID-19 emergency, as appropriate, pursuant to section 7508A(a).”¹⁰

Section 7508A provides Treasury and the Service with authority to postpone deadlines under the internal revenue laws for up to one year for taxpayers determined by the Secretary to be affected by a federally declared disaster as defined in section 165(i)(5)(A). Section 165(i)(5) defines the term “federally declared disaster” to mean “any disaster subsequently determined by the President of the United States to warrant assistance by the Federal Government under the Robert T. Stafford Disaster Relief and Emergency Assistance Act,” which, as discussed, the President declared on March 13.

The Secretary is granted broad authority to postpone deadlines for up to one year for many types of acts, including filing returns, paying taxes, filing a petition with the U.S. Tax Court (“**Tax Court**”), filing claims for a refund, assessment and collection of taxes, or “any other act required or permitted under the internal revenue laws specified by the Secretary.”¹¹ The Secretary is also granted the authority to disregard, for up to one year, the amount of any interest or penalties and the amount of any credit or refund.¹² Finally, the Secretary is granted the authority to disregard, for up to one year, an action required by a pension or other employee benefit plan, or any sponsor, administrator, participant, beneficiary, or other person with respect to such plan affected by a disaster or action described in section 7508A, and the plan may not be treated as failing to be operated in accordance with the terms of the plan solely as the result of disregarding any such period.

⁹ Proclamation No. 9994 (Mar. 13, 2020), 85 Fed. Reg. 15337 (Mar. 13, 2020).

¹⁰ Unless indicated otherwise, all “section” references are to the Internal Revenue Code of 1986, as amended (the “Code”), and all “Treas. Reg. §” references are to the Treasury regulations promulgated under the Code, all as in effect (or, in the case of proposed regulations, as proposed) as of the date of these Comments.

¹¹ Section 7508A(a)(1); section 7508(a)(1).

¹² Section 7508A(a)(2), (a)(3).

In addition, the Code provides for a mandatory extension period for the activities specified in section 7508A(a) for the period of the incident,¹³ plus 60 days in certain circumstances with respect to taxpayers whose principal place of residence or business or records necessary to meet the deadline are located in the disaster area, individuals injured as a result of the disaster, and relief workers.¹⁴ In the case of employee benefit plans or persons with respect to such plans, the mandatory extension period applies to (i) making contributions to a qualified retirement plan (within the meaning of section 4974(c)) under section 219(f)(3), 404(a)(6), 404(h)(1)(B), or 404(m)(2), (ii) making distributions under section 408(d)(4), (iii) recharacterizing contributions under section 408A(d)(6), and (iv) making a rollover under section 402(c), 403(a)(4), 403(b)(8), or 408(d)(3).

Treasury and the Service have used the Emergency Declaration as the basis for several recent administrative actions, including Notice 2020-18, in which Treasury and the Service used the President's invocation of the Stafford Act's authority to declare a national emergency as grounds to apply section 7508A to extend the nationwide due date for filing certain federal income tax returns and making federal income tax payments from April 15, 2020 until July 15, 2020, and Notice 2020-20, in which Treasury and the Service used that authority to extend the due date for federal gift and generation skipping transfer taxes.

II. Guidance Related to Disaster Provisions

A number of Code provisions provide relief to taxpayers when they are affected by disasters. For example, section 139(a) provides for the exclusion from gross income of amounts received as a "qualified disaster relief payment"; and section 165(i) allows a taxpayer to elect to claim a deduction for a disaster loss in the year preceding the year in which the loss is sustained. The relief provided by these sections is available only to the extent attributable to a "federally declared disaster" as defined in section 165(i)(5).

Although Treasury and the Service have treated the Emergency Declaration as a sufficient basis for invoking section 7508A, some have raised questions about whether the declaration of an "emergency" under the Stafford Act is the same as the declaration of a "disaster" under the Stafford Act. For this reason, we recommend that Treasury and the Service confirm that the Emergency Declaration constitutes a "federally declared disaster" within the meaning of section 165(i)(5)(A), thus triggering relief provisions tied to the definition in section 165(i)(5).

Relatedly, we respectfully recommend as follows with respect to section 7508A:

- Consideration should be given regarding whether additions or changes to Revenue Procedure 2018-58,¹⁵ which contains a list of postponed actions for

¹³ The Federal Emergency Management Agency ("FEMA") website reflects emergency declarations in all states, territories/possessions, and tribal lands with an incident period beginning January 20, 2020.

¹⁴ Section 7508A(d).

¹⁵ 2018-50 I.R.B. 990.

affected taxpayers that arise from section 7508A, are necessary or appropriate in light of the Emergency Declaration and the COVID-19 crisis.

- Additional guidance should be provided addressing the circumstances in which the mandatory extension provision of section 7508A(d) applies.

Within the context of section 165(i), it also would be helpful for the Service to clarify what losses the Service will consider to constitute “casualty losses” to the extent those losses arise from or are attributable to the COVID-19 emergency. This could include a revision to Revenue Procedure 2016-53.¹⁶

As guidance is limited,¹⁷ there are also a number of unanswered questions that arise in applying section 139, including the meaning of “reimburse or pay reasonable and necessary personal, family, living or funeral expenses incurred as a result of a qualified disaster” in section 139(b)(1). For example, what expenses qualify? During what time period? Is there a limit on the amount that can be excluded?

III. Expansion of Filing and Payment Due Date Relief

In Notice 2020-18, the Service announced special federal income tax return filing and payment relief in response to the COVID-19 emergency, generally allowing a taxpayer with an income tax return due on April 15, 2020 or an income tax payment due on April 15, 2020 to file and pay on or before July 15, 2020. This notice was followed by Notice 2020-20, in which the Service announced additional relief by allowing a taxpayer with a federal gift tax or generation-skipping transfer tax payment due on April 15, 2020 to file and pay on or before July 15, 2020. The Service has also posted FAQs and responses with respect to Notice 2020-18 on the Service’s website. Notice 2020-18 and Notice 2020-20 provide relief to a wide range of taxpayers, particularly individual taxpayers and corporate taxpayers operating on a calendar year, and the Section recommends that the Service exercise its full statutory authority under section 7508A to postpone the filing and payment due dates for *all other tax returns, information returns, and payments* that are due between April 15, 2020 and July 15, 2020 and that are not otherwise covered by the two notices. We further recommend that this expanded postponement period apply both to original due dates and to extended due dates. The COVID-19 emergency is impacting the ability of taxpayers, free tax preparation sites, low-income taxpayer clinics, and other tax professionals, including in-house and external tax professionals, to meet important deadlines during this time, and we believe even more fulsome relief is necessary and appropriate.

If our recommendation that *all* information returns be granted the relief described above is not adopted, then we respectfully recommend that FAQ 10 and Notice 2020-18 be modified or clarified such that relief is extended to information returns that are not “stand

¹⁶ 2016-44 I.R.B. 530.

¹⁷ See Rev. Rul. 2003-12, 2003-3 I.R.B. 283; see, e.g., Notice 2006-10, 2006-5 I.R.B. 386 (providing section 139 treatment to payments made to Federal employees in reimbursement for evacuation expenses due to Hurricane Katrina).

alone,” *i.e.*, that are included with income tax returns with respect to which relief has been granted. For example, income tax returns for taxpayers that are covered by Notice 2020-18 could potentially include an information return that is required to be filed with an income tax return (*e.g.*, Form 5471 (Information Return of U.S. Persons With Respect To Certain Foreign Corporations), Form 5472 (Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business)).

In the same vein, we also recommend that the Service clarify whether Notice 2020-18 covers statutory and regulatory elections where the due date is determined by the due date of the taxpayer’s income tax return (*e.g.*, a mark-to-market election under section 475).

We also note that the COVID-19 emergency began for certain portions of the country before the March 13, 2020 Emergency Declaration. Indeed, Presidential Proclamation 9994 declared the emergency as of March 1, 2020, and the incident period indicated on FEMA’s website is January 20, 2020. We respectfully recommend that relief be extended to those earlier-affected taxpayers.

IV. Additional Areas for Relief from Due Dates or Other Time Sensitive Acts

Aside from tax return and payment deadlines, the Code, regulations, and other administrative guidance provide for a myriad of due dates for specific filings and time sensitive acts. As with the discussion above, we recommend that the Service grant the broadest possible postponement to *all* such filings and acts. Below is a non-exclusive list of items Section members have identified as having required deadlines or time sensitive acts that might be challenging to meet during the COVID-19 emergency for taxpayers.

- Claims for credit or refund of any tax.
 - Notice 2020-18 FAQ 22 states that the notice “does not extend relief to any filings” for taxable year 2016. Therefore a return claiming a refund for the 2016 tax year, which is due on April 15, 2020 (per section 6511), is not extended.
 - Notice 2020-18 FAQ 23 explicitly excludes Form 4466 (Corporation Application for Quick Refund of Overpayment of Estimated Tax).
- Election filings (*e.g.* Form 8832 (Entity Classification Election), Form 2553 (Election by a Small Business Corporation), Form 8023 (Elections Under Section 338 for Corporations Making Qualified Stock Purchases)).
- Deadlines with respect to Form 3115 (Application for Change in Accounting Method).

- Deadlines for section 1031 like-kind exchanges (*e.g.*, time periods provided in Revenue Procedure 2000-37,¹⁸ for qualified exchange accommodation arrangements, were postponed by Notice 2001-68¹⁹).
- Deadlines for section 1033 involuntary conversions.
- Deadlines with respect to qualified opportunity zones in sections 1400Z-1 and 1400Z-2, and related Regulations.
- Clarification on the due date for 2019 FinCEN Form 114 (Report of Foreign Bank and Financial Accounts).

V. Postponement of Service Enforcement Activity

We commend the Service for its People First Initiative, as announced in IR-2020-59, and the fact that the Service is taking steps to postpone certain compliance actions, including: suspending field collection activities; suspending automated liens and levies; refraining from starting new field, office, and correspondence audits; and not forwarding delinquent accounts to private debt collection.

IR-2020-59 provides a helpful starting point, and the Section encourages the Service to develop the People First Initiative further to reflect a broader system of enforcement relief given the extreme limitations many taxpayers are facing now and likely to face in the coming months. To that end, the Section respectfully recommends that the Service implement additional measures for relief with respect to other aspects of the tax controversy. Examples of such additional measures include:

- Pause examination activity for a few months during the period of greatest stress and when taxpayers will have the most difficulty accessing tax assistance because representatives may not be taking new clients or may be significantly delayed in doing so because of remote contact protocols. We believe the pause should include correspondence examination activity, especially with respect to the earned income tax credit, as taxpayers may not be able to gather requested substantiation as many schools and other businesses are closed or operating on an emergency basis only.
- Postpone or provide a grace period to file a protest with the Independent Office of Appeals (“Appeals”) upon the issuance of a 30-day letter or other denial, such as an offer in compromise and preliminary determinations regarding spousal relief under section 6015.

¹⁸ 2000-40 I.R.B. 308.

¹⁹ 2001-47 I.R.B. 504.

- Postpone or provide a grace period to file a Form 12153 (Request for Collection Due Process or Equivalent Hearing) upon the issuance of a notice of federal tax lien or levy.
- Provide instructions to Service employees to take a broad interpretation of reasonable cause upon the showing of specific, unavoidable burdens by taxpayers grappling with the COVID-19 emergency who fail to timely file certain tax returns or forms and fail to timely make certain payments, resulting in penalties. Treasury and the Service could also consider providing a list of documents that could show reasonable cause due to the COVID-19 emergency.
- Provide special considerations for taxpayers who have tested positive for COVID-19, particularly individual taxpayers and sole proprietorships.
- Advise Service employees, including revenue agents, revenue officers, Appeals officers (inclusive of settlement officers), to allow reasonable, additional time for taxpayers to submit requested information and documents, as each situation requires. We note the Large Business and International (“LB&I”) Memorandum (LB&I-04-0320-00007), issued March 25, 2020, that generally suspends the Information Document Request Enforcement Process through July 15, 2020, as applicable to LB&I examinations.
- Advise Service employees to continue to follow guidance issued during the COVID-19 crisis in subsequent taxpayer examinations.

Lastly, the Service has discretion to not offset a tax refund to cover a previous federal tax debt.²⁰ In tandem with the stimulus checks provided by the CARES Act, offset bypass could provide powerful, targeted relief to those most in need. We recommend the Service provide relief from refund offset due to federal tax debt for all taxpayers with gross income less than 250 percent of the federal poverty line. In addition, we recommend the Service bypass refund offsets for returns claiming the earned income credit or additional child tax credit. Currently, the Taxpayer Advocate Service (“TAS”) assists with offset bypass refund (“OBR”) claims for individual taxpayers facing exigent circumstances. However, the tollfree number for TAS has been taken offline, and TAS local offices are busy meeting the demand of many struggling taxpayers and the challenges involved in remote work. TAS employees would be overwhelmed if they were required to individually request OBR for each eligible low-income taxpayer. A blanket policy of suspending refund offsets would enable TAS to focus on the many other taxpayer issues. Further, most low-income taxpayers are not aware of the OBR process and without Low Income Taxpayer Clinics (“LITCs”) and Volunteer Income Tax Assistance (“VITA”) sites to inform them, they likely will not know to request this assistance from TAS.

²⁰ Section 6402(a); I.R.M. 21.4.6.5.5 (09-22-2017), Hardship Refund Request.

VI. Utilize Available Technology During the COVID-19 Emergency

A significant component of the public health response to COVID-19 has been to promote social or physical “distancing.” This has resulted in many individuals, both taxpayers and tax professionals, working from home without access to printers, scanners, fax machines, and other technology generally available in their offices. Taxpayers and tax professionals may also face undue burdens in obtaining mail from locations outside of their home (e.g., offices, low-income taxpayer clinics, universities) and also face burdens in physically filing registered or certified mail submissions to the Service. This has and will continue to create significant difficulties in obtaining manual, wet-ink signatures on numerous documents due to the Service that require a manual signature.

On March 27, 2020, the Deputy Commissioner for Services and Enforcement issued a memorandum to all Services and Enforcement employees, providing approval for employees to accept images of signature and digital signature on documents related to the determination or collection of tax liability, such as extensions of statute of limitations on assessment or collection, waivers of statutory notices of deficiency, and consents to assessment, closing agreements, and “any other statement or form needing the signature of a taxpayer or representative traditionally collected by IRS personnel outside of standard filing procedures” (e.g., a power of attorney).²¹ The memorandum also allows for procedures to send documents through a Service established secured messaging system, such as SecureZip. The memorandum makes significant allowances for the provision of signature images and digital signatures on a number of documents filed with the Service, but the memorandum does not encompass the universe of documents that are required to be filed with the Service.

We recommend that, until normal business operations resume after the COVID-19 emergency, the Service broadly permit the approved signature methods under Internal Revenue Manual (“IRM”) Exhibit 10.10.1-1 for the filing of tax returns and any other forms or the submission of documents to the Service that otherwise require a manual signature. The alternatives to the manual signature requirement could include using a signature pad; using a stylus device; using a scanned or digitized image of a handwritten signature; or other duplicated signatures. In this regard, we recommend that this approach be adopted by all parts of the Service, including TAS, Appeals, and the Office of Chief Counsel.²²

* * *

²¹ NHQ-01-0320-0001. It is within the Service’s authority to ease these signature requirements. Section 6061(b)(3) instructs Treasury to “publish guidance,” as appropriate, to define and implement a waiver of the manual signature requirements.

²² If deemed appropriate, the Service could require ratification of document signed with an alternative signature method once the COVID-19 emergency ends.