complying with these regulations was extended. Service providers must provide fee disclosures to plan fiduciaries by April 1, 2012, and calendar year plans must provide fee disclosures to participants by May 31, 2012.

Hybrid Pension Plans. In Notice 2011-85, 2011-44 I.R.B. 605, the Service postponed the effective date for certain final regulations governing cash balance and other hybrid plans, extended the deadline for adopting certain hybrid plan amendments, and formalized the special timing rule for ERISA section 204(h) notices [*see* Announcement 2009-82, 2009-2 C.B. 720]. On October 31, 2011, PBGC issued proposed rules (76 Fed. Reg. 67105) for valuing benefits under a terminating cash balance plan.

2012 Cost-of-Living Adjustments. In News Release IR-2011-103, Oct. 20, 2011, the Service announced retirement plan cost-of-living increases for 2012. The maximum elective deferral under 401(k) and similar plans increases from $16,500 to $17,000; the maximum annual pension under a qualified defined benefit plan increases from $195,000 to $200,000; and the maximum annual addition under a qualified defined contribution plan increases from $49,000 to $50,000. The maximum IRA contribution continues to be $5,000. Additional catch-up contributions may be made by individuals aged 50 or older. The Service also announced the 2012 limits for qualified transportation fringe benefits and medical savings accounts. Rev. Proc. 2011-52, 2011-45 I.R.B. 701; News Rel. 2011-104. Social Security beneficiaries will receive a 3.6% COLA, the first since 2009, and the Social Security taxable wage base increases from $106,800 to $110,100. SSA News Release, www.ssa.gov/pressoffice/pr/2012cola-pr.html. Unless extended, the 2011 employee tax rate of 4.2% will revert to 6.2% on March 1, 2012 (and the 4.2% pre-March rate would apply to no more than $18,350 of covered wages).

Supreme Court

Pension Plans. In *CIGNA Corp. v. Amara*, 131 S. Ct. 1866 (May 16, 2011), the Court unanimously vacated the lower court's award of additional pension benefits as a remedy for the employer's failure to communicate accurately the effects of its conversion of a traditional pension plan to a cash balance plan. The Court (1) ruled that ERISA section 502(a)(1)(B) did not authorize rewriting of the plan to provide more generous benefits, consistent with the misstatements concerning the effects of the conversion, and (2) rejected the argument that misstatements in the plan's summary plan description were "terms of the plan" that could be enforced under that section. Justice Breyer's majority opinion discusses possible remedies for fiduciary misrepresentations in terms that could significantly impact the administration of ERISA plans and communications between plan fiduciaries and plan participants.

Health Care Reform. On November 14, 2011, the Court agreed to hear a challenge to the constitutionality of the 2010 health care reform legislation. *State of Florida v. U.S. Dept. of Health and Human Services*, 2011 US LEXIS 8094, 8225, 8248, 8269. The Court has scheduled 5½ hours of oral argument in March 2012. In the most recent federal appeals court decision, the D.C. Circuit upheld the Act by a 2-1 majority. *Seven-Sky v. Holder*, 2011 U.S. App. LEXIS 22566 (D.C. Cir. Nov. 8, 2011).

Lower Courts

The Second Circuit followed other circuits in adopting the *Moench* presumption of prudence, first articulated in *Moench v. Robertson*, 62 F.3d 553 (3d Cir. 1995), as the standard of review for employer stock drop claims. *In re Citigroup ERISA Litigation*, 2011 WL 4950368 (2d Cir. 2011); *Gearren v. McGraw-Hill Cos., Inc.*, 2011 WL 4952628 (2d Cir. 2011). ■

Don't Forget to Review the Interest

By T. Angie Napier*

Taxpayers often overlook the interest computations at the close of an examination by the Service or at the settlement of a case with Appeals. There are often opportunities to reduce the net interest payable to the Service. However, taxpayers and their representatives may mistakenly rely on the interest bill received from the Service at the conclusion of their case without checking it for accuracy.

How complicated can it be to calculate deficiency and overpayment interest? Actually, it is quite complex. Did you know that a taxpayer can close an examination with no tax due, and yet owe deficiency interest? This article addresses just a few of the common interest benefits that are available and should be considered.

Revenue Ruling 99-40, 1999-40 I.R.B. 441 (Oct. 1999), offers the most common benefit that should be considered. Under this taxpayer-favorable ruling, taxpayers can reduce deficiency interest for a period of up to one year. This ruling should be considered when there is a new tax deficiency and a credit-elect on the original return of the deficiency year. A "credit-elect" is an overpayment of taxes on an income tax return that has been credited to estimated taxes for the taxpayer's following year. I.R.C. § 6402(b). The new deficiency could be self-assessed on an amended return or could be the result of an unfavorable adjustment at

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the close of an examination or at the settlement of a case with Appeals. Once a new tax deficiency is identified, the second step is to determine if there was a credit-elect on the original income tax return for the deficiency year.

For example, consider a taxpayer under examination who agrees to an adjustment resulting in tax of $15,000 for Year One. On the original Year One income tax return, the taxpayer overpaid income taxes by $10,000. This payment was credited as an estimated tax payment to Year Two. In our example, if the taxpayer did not utilize the $10,000 to satisfy any of the estimated tax payments in Year Two, then the taxpayer can suspend deficiency interest for a period of one year on up to $10,000 of the new tax deficiency. This is a time value of money concept. The taxpayer did not need the credit-elect to satisfy any of the estimated tax payments in Year Two and yet did not receive overpayment interest from the Service on this credit-elect. This benefit must be proactively requested by the taxpayer; in a majority of cases, the Service does not volunteer to give taxpayers this benefit.

As mentioned, the Service limits the suspension of deficiency interest to a maximum time of one year for taxpayers requesting the benefit of Revenue Ruling 99-40. This taxpayer-favorable ruling did not specifically address the issue of a taxpayer that is consistently overpaid and year-after-year credits its overpayment to the following tax year. Taxpayers have sought relief under the time value of money concept and argued that the deferral of deficiency interest should not be limited to one year. The most recent case on point is *FleetBoston Financial Corporation v. United States*, 483 F.3d 1345 (Fed Cir. 2007), where the Service had examined the income tax returns for FleetBoston and assessed deficiencies for tax years 1984 and 1985. FleetBoston had credit-elects on the original returns for 1984 and 1985 that were not needed to satisfy the estimated tax payments for the following year. FleetBoston continued to credit-elect its overpayment on its original income tax returns until tax year 1991, when FleetBoston received a refund of its overpayment. FleetBoston argued that the Service had use of the overpayments each year, without paying overpayment interest. The U.S. Court of Appeals rejected the broad time value of money arguments brought by FleetBoston and focused on the statutory construction of certain interest provisions. The court held that a tax is considered "paid" for purposes of calculating interest only out of funds from the taxpayer's tax account at the Service for that particular tax year. FleetBoston had argued that a tax should be considered "paid" out of all funds held by the Service as long as the funds were not needed to satisfy the taxes due for that particular tax account.

Another interest benefit which must be proactively requested from the Service is interest netting under section 6621(d). Interest netting allows the use of a net interest rate of zero for overlapping periods of equivalent tax overpayment and tax underpayment. This concept eliminates the rate differential between overpayment interest (interest paid by the Service) and deficiency interest (interest paid by taxpayers). The rate differential can be as high as 4.5%. Taxpayers and their representatives should review their interest computations for opportunities to reduce interest using interest netting. Taxpayers should file Form 843, Claim for Refund and Request for Abatement, to request interest netting.

A third interest issue to consider is "hot interest" under section 6621(c). Hot interest kicks in when a corporation has a large corporate underpayment (greater than $100,000) that remains unpaid for 30 days after the issuance of a 30-day letter or a balance due notice. Hot interest is an increase in the deficiency interest rate by two percentage points. It is important for taxpayers and their representatives to check the rates being applied in the deficiency interest computation. Hot interest may not be applicable to your client, but the Service may be computing deficiency interest at the hot interest rate if the taxpayer's account has been mistakenly coded that hot interest is applicable. This can be reviewed by checking the applicable rates being used in the deficiency interest computation against the timing of the 30-day letter and other correspondence from the Service. It is important to note that the balance due threshold of $100,000 is determined without consideration of any interest, penalties, or additions to tax. I.R.C. § 6621(c)(2)(B)(iii). For example, your client may have received a balance due notice from the Service with an amount due of $110,000. The balance includes $70,000 in tax; the remainder of the balance is penalties. This balance due notice alone should not trigger hot interest as the tax due is less than $100,000. The deficiency interest rates should be reviewed to ensure that the Service has not erroneously triggered hot interest rates.

There are many more opportunities to reduce the net interest payable to the Service. Other events which cause complexity and interest opportunities include carrybacks of net operating losses, net capital losses, and of credits. Representatives should periodically review their client's interest computations to ensure accuracy. A triggering event for the review of interest can be the close of an examination or the settlement of a case with Appeals. ■