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# AICPA® TaxSection

## Tax Section E-Alert

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March 27, 2009

### Tax News You Can Use

#### Small Business COBRA/Payroll Tax Credit: Notice Required by 4/18 and Some Problems

In the last E-Alert, we reported on a provision in the ARRA that requires employers to pay 65% of the COBRA health care coverage for employees who were involuntarily terminated between September 1, 2008 and December 31, 2009 and to recover this cost from the government through a credit on their quarterly payroll tax return. We want to pass along some additional information.

Employers must send notices by April 18th to employees who were terminated during this period, whether voluntarily or involuntarily and whether or not enrolled in COBRA, to inform them of this benefit, even if they were voluntarily terminated. Substantial per-employee and per day penalties apply for failing to do so, and the Department of Labor has provided [model notices](#) for employers.

Readers have raised several issues with us, and we're seeking IRS guidance. Some employers may have cut employees to the point where payroll taxes are insufficient to recover their required COBRA subsidy, and employers are uncertain as to how they will be made whole for this Congressionally mandated cost, possibly by making the credit refundable or allowing the COBRA costs to be carried forward to take credits against future payroll tax returns.

Another issue is whether the general exception for small employers, those with fewer than 20 employees, still applies. Generally, the new law applies to businesses with 20 or more employees. However, 40 states extend COBRA-like benefits to companies with fewer employees, and it is unclear whether these state laws will interact with the ARRA provisions to require smaller employers to subsidize COBRA insurance. Finally, some have questioned whether employers whose benefit plans already provide COBRA subsidies can base their payroll tax credit on the total employer subsidy or just on the additional amount paid to reach 65% of the cost. It appears that it may be the latter which could encourage employers to drop their voluntary subsidy. We'll keep you informed as we get information from the IRS.

**[FREE Infocast: Economic Stimulus Act: The "Must Know" Payroll and COBRA Regulations](#)**

Tuesday, April 07, 2009 – 2:00 - 3:30 PM ET

#### Foreign Bank Accounts Reminder

##### Income Tax Return Questions:

AICPA reminds tax practitioners that when gathering information for Form 1040s (and Form 1041s, 1065s, 1120s, etc.), to ask clients about the existence of foreign bank accounts and, if appropriate, disclose the information on Schedule B even if the client has no reportable interest or dividends and would not otherwise fill out the Schedule B. Line 3 Other Information (Schedule G of Form 1041, Line 9 of Schedule B of Form 1065, and Line 6a of Schedule N of Form 1120).

Taxpayers who are currently filing Form 5471, Form 8858, Form 8865 or Form 3520 may also be subject to FBAR reporting requirements (see below). If the questions on Schedule B of the Form 1040 Part III are left blank, it may be considered an incomplete return and the statute of limitations will remain open.

##### Practitioner Should Notify Clients of FBAR:

Tax practitioners with clients with foreign bank accounts should notify clients of their responsibility to file the "Report of Foreign Bank and Financial Accounts" (Treasury Form TD F 90-22.1, referred to as FBAR) on or before June 30, 2009. IRS has released a new [Form TD F 90-22.1](#), which should be used for 2008 filings and later years. Significant changes have been made to the form so the practitioner should read the instructions carefully.

Practitioners should also check their tax return software programs to make

## **New Small Business NOL Carryback Election Required by 4/17**

ARRA allows electing small businesses with a 3-year (2006, 2007 and 2008) average of gross receipts of \$15 million or less and a current year (taxable years either ending or beginning in 2008) net operating loss to choose a carryback period for that loss of either 3, 4, or 5 years at the taxpayer's option. While the \$15 million test is measured (and aggregated with related entities) at the entity level (corporation, partnership, sole proprietor), the partner, S corporation shareholder, or individual will actually make the election on its return and decide how many years the NOL will go back. The individual cannot, however, take an NOL if his/her share of a passthrough entity's NOL does not cause that individual to also have an overall NOL on Form 1040. [Revenue Procedure 2009-19](#) has the details on making the election and filing returns for taxpayers in various situations. The law provides specific time requirements for making the election. If no prior NOL election had been filed, the election must be filed by April 17, 2009. If the taxpayer had previously filed a return the deadline is the later of the due date of the return with extensions, or April 17, 2009. Taxpayers who previously elected a 2-year carryback can revoke that election, but this also must be made by April 17, 2009.

## **Nexus — New Mexico Taxes Dell Computer Gross Receipts**

New Mexico's Court of Appeals has [ruled](#) that Dell Catalog Sales, LP, which operates out of Texas and has no physical presence with New Mexico, owes the New Mexico gross receipts tax on computer sales. The court analyzed the claims under both state statute and the Federal Constitution's Commerce Clause.

The statutory dispute focused on the interpretation of "...selling property in New Mexico," language found in the state's gross receipts statute. The Court rejected both the government's and Dell's interpretations, opting instead to look first at legislative intent and then to a Hellerstein & Hellerstein treatise for guidance. The Court reasoned that legislative intent was to protect in-state business from "unfair competition" that would result if similar property were imported to the state without paying the same tax. The Court cited the treatise for its conclusion that taxing the property at the place it is consumed is the best way to accomplish this legislative objective. The Court noted that if the statutory language had specified that a sale occurred at the time of title transfer or some other specific point in the selling process, then the Court might not have reached this result.

The Court also allowed the imposition of New Mexico's gross receipts tax under its Commerce Clause analysis saying that "substantial nexus" (the fourth prong of *Complete Auto*) had been achieved through a third-party company called BancTec, which provided a significant number of in-home computer repair services to Dell's New Mexico customers. The record established that the repair service contracts were purchased by 75 percent of Dell's New Mexico customers and that almost 1,300 service calls were made in New Mexico. The Court

sure the new version of the form is being used for all FBARs filed in 2009 or later, even if the FBAR is being filed for a prior year. We note that the return must be RECEIVED by June 30, not mailed by that date, and recommend sending it in Certified Mail, Return Receipt Requested as proof of the receipt date.

### Expanded Scope of FBAR:

According to the new form instructions, beginning for the 2008 tax year, the new FBAR requirements apply to persons in and doing business in the U.S. Therefore, a non-resident alien working in the U.S. (as an employee or independent contractor) may be subject to the new 2009 FBAR filing requirement because that individual is "in and doing business" in the U.S. and has signing or other authority over foreign financial accounts. A foreign corporation which is in and doing business in the United States is also considered a U.S. person.

Previously, nonresidents did not have to file, but with this 2009 form, persons in, and doing business in, the United States must file FBARs, whether or not they are nonresidents. This means that many nonresidents who do business in the U.S. (Canadians, for example) may have to disclose their foreign bank account information. [The IRS website](#) -and [this article](#) has more information on the "doing business in the U.S." requirement.

The IRS website indicates that persons who are merely visiting or who sporadically conduct business in the United States are not in and doing business in the United States for FBAR reporting purposes and provides the following examples of persons who do not have to file FBARs:

- Persons who are not citizens or residents and who are engaged in a business but who only occasionally visit the United States to meet customers or

reasoned that under previous Supreme Court rulings (notably *Tyler Pipe*) these facts would have been more than sufficient to indicate that these service contracts represented a significant factor in Dell's ability to establish and maintain a market in New Mexico. Without BancTec's significant role in Dell's sales, the Commerce Clause would have likely prohibited application of the New Mexico gross receipts tax.

### **IRS Generous with Madoff Victims**

On March 17, the IRS provided generous guidance to help victims of Ponzi-type schemes.

[Revenue Ruling 2009-09](#) holds that the losses are theft losses and provides guidance on the character, timing, and amount of the loss deduction. The revenue ruling clarifies that these fraudulent investment losses are not subject to limitations that are applicable to "personal" casualty and theft losses. The loss is deductible as an itemized deduction, but is not subject to the 10 percent of AGI reduction or the \$100 reduction that applies to many casualty and theft loss deductions.

The amount of the theft loss includes the investor's unrecovered investment – including income as reported in past years. The ruling concludes that the investor generally can claim a theft loss deduction not only for the net amount invested, but also for the so-called "fictitious income" that the promoter of the scheme credited to the investor's account and on which the investor reported as income on his or her tax returns for years prior to discovery of the theft.

Some taxpayers believe that they should be able to amend prior year returns that reported fictitious income, and some practitioners have advocated filing protective claims for refund for open years. The safe-harbor revenue procedure is conditioned on taxpayers not amending prior year returns. This is a strategic decision that the taxpayer and adviser have to make based on individual facts. The advantage to using the safe harbor is that you will not have to wait to determine if you will recover any of the loss before filing the theft loss claim but instead will simply be required to include any future recoveries in income.

A theft loss deduction that creates a net operating loss for the taxpayer can be carried back as much as 5 years and forward up to 20 years.

The IRS has not provided guidance yet regarding losses in IRAs invested in Madoff funds, and normally, these would not have been included in income and would not have a basis for a loss. However, given the generosity of the IRS in the above revenue ruling and procedure, who knows?

[Revenue Procedure 2009-20](#) provides an optional safe harbor method for eligible taxpayers to deduct theft losses. It provides a uniform approach for determining the time and amount of the theft loss and allows taxpayers to avoid having to prove how much income reported from the scheme was fictitious.

business associates.

- Artists, athletes, and entertainers who are not citizens or residents of the United States and who only occasionally come to the United States to participate in exhibits, sporting events, or performances.
- A person who is not a United States citizen or resident and who visits the United States to manage his personal investments, such as rental property, and conducts no other business.

The AICPA Tax Division will continue to discuss this issue and our concerns with this new requirement with the IRS.

For more information and AICPA resources on the FBAR, [click here](#).

## **Tax Section Member Benefits**

### **Free Webcast on IRS Ponzi Guidance**

Tax Section members can attend a free PFP Section webcast on IRS Guidance for Madoff victims.

#### **Presenters:**

Bob Keebler, CPA.MST.DEP  
Michael Goller, Esq.,

**Date:** Monday, March 30 2009

**Time:** 1:00 - 2:00 PM ET

CPE will be offered post-seminar for a nominal fee. [Click here to register](#).

The revenue procedure generally permits taxpayers who invested in fraudulent investment arrangements to deduct in the year of discovery 95 percent of their net investment less the amount of any actual recovery in the year of discovery and the amount of any recovery expected from private or other insurance, such as that provided by the Securities Investor Protection Corporation. A special rule applies to investors who are suing persons other than the promoter. These investors compute their deduction by substituting "75 percent" for "95 percent" in the formula above.

Tax Section Member Service Contact Information Members can update their records and ask questions about Tax Section member benefits at 800-513-3037 or [taxsection@aicpa.org](mailto:taxsection@aicpa.org).

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