



American Institute of CPAs
1455 Pennsylvania Avenue, NW
Washington, DC 20004-1081

August 1, 2013

Mr. Daniel I. Werfel
Principal Deputy Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

The Honorable William J. Wilkins
Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Ms. Lisa Zarlenga
Tax Legislative Counsel
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Mr. Curtis G. Wilson
Associate Chief Counsel for
Passthroughs and Special Industries
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: Comments on [REG-130507-11](#) relating to guidance under section 1411, as added by the Health Care and Education Reconciliation Act of 2010, regarding net investment income tax as relevant to section 736 payments from partnerships (12/5/2012)

Dear Messrs. Werfel, Wilkins, and Wilson, and Ms. Zarlenga:

The American Institute of Certified Public Accountants (AICPA) submits the comments below in response to the above mentioned proposed regulations published on December 5, 2012, regarding guidance on the new section 1411 net investment income (NII) tax as relevant to payments from partnerships. Section 1411 imposes a tax on unearned income on investments of certain individuals, estates, and trusts, whose income is above the statutory threshold amounts.

The AICPA is the world's largest member association representing the accounting profession, with nearly 386,000 members in 128 countries and a 125-year heritage of serving the public interest. Our members advise clients on federal, state and international tax matters and prepare income and other tax returns for millions of Americans. Our members provide services to individuals, not-for-profit organizations, small and medium-sized businesses, as well as America's largest businesses.

Recommendations

The AICPA recommends that with respect to section 736(b)(2) payments from partnerships, the final regulations regarding section 1411 should provide that:

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1. Such payments from service partnerships are not NII under section 1411(c)(1)(A) if the service partner “materially participated” in the service partnership for any prior three years under the standards of Treas. Reg. § 1.469-5T(a)(6).
2. A payment received by a partner of a nonservice partnership is not subject to section 1411 on section 736(b)(2) payments if the partner “materially participated” under any of the other six provisions of Treas. Reg. § 1.469-5T(a) at the date of retirement.
3. Section 736(b)(2)(A) payments paid to a successor in interest are not NII under section 1411(c)(1)(A) if such payments would not have been NII if paid to the partner while such partner was alive, based upon the above two provisions.
4. The AICPA further recommends that section 736(a) guaranteed payments, exempt from self-employment tax under section 1402(a)(10), are also not NII under section 1411(c)(1)(A), if such recipient partner “materially participated” under the standards of section 469 and the regulations thereunder at the time of retirement from the partnership.

The above treatment conforms with gain recognized on an installment sale of a passthrough entity, such that the character is determined based upon the person’s participation in the entity for section 469 purposes. The final section 1411 regulations should be consistent with the installment sales rules of passthrough entities – the date of determination of “material participation” is the retirement date. If a partner has retired, the partner will not be participating in the future. The character of the income should be determined at the retirement date (as would an installment sale). If a partner is considered “materially participating” at retirement or death, the continued income stream should retain the character of not being NII.

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We welcome the opportunity to discuss these comments or to answer any questions that you may have.

I can be reached at (304) 522-2553, or jporter@portercpa.com; or you may contact William O’Shea, Chair, AICPA Partnership Tax Technical Resource Panel, at (202) 758-1780, or woshea@deloitte.com; or Eileen Sherr, AICPA Senior Technical Manager, at (202) 434-9256, or esherr@aicpa.org.

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Sincerely,

A handwritten signature in black ink, appearing to read "Jeffrey A. Porter". The signature is fluid and cursive, with the first name "Jeffrey" being the most prominent.

Jeffrey A. Porter, CPA
Chair, Tax Executive Committee

cc: Ms. Melissa Liquerian, Chief Branch 2, Office of the Associate Chief Counsel for Passthroughs and Special Industries, Internal Revenue Service
Ms. Donna M. Young, Deputy Associate Chief Counsel (Passthroughs and Special Industries), Internal Revenue Service
Mr. David Kirk, Attorney, Office of the Associate Chief Counsel for Passthroughs and Special Industries, Internal Revenue Service
Ms. Adrienne Mikolasheck, IRS Office of Chief Counsel for Passthroughs and Special Industries, Internal Revenue Service