

# NewsNotes

## UNMARRIED TAXPAYERS AND THE FIRST-TIME HOMEBUYER CREDIT • GUIDANCE ON UNBUNDLING TRUST FEES • “HOT STOCK” RULE ELIMINATED FOR CERTAIN REORGS. • NEW MATERIAL ADVISER REPORTING RULES • [BOX] IRS ISSUES REVISED SUBPART F CONTRACT MANUFACTURING REGS.

### FROM THE IRS

#### IRS Explains How Unmarried Taxpayers Allocate First-Time Homebuyer Credit

The IRS has issued Notice 2009-12, explaining how the Sec. 36 first-time homebuyer credit should be allocated between unmarried taxpayers who buy a principal residence together.

Sec. 36 was added to the Code last year by the Housing and Economic Recovery Act of 2008, P.L. 110-289. It gives first-time homebuyers a refundable credit of 10% of the purchase price of the home, up to \$7,500 (\$3,750 for married taxpayers filing separately). The credit phases out for homebuyers with modified adjusted gross income (AGI) between \$75,000 and \$95,000 (between \$150,000 and \$170,000 for joint filers). The credit applies for both regular tax and AMT purposes.

To be eligible, a taxpayer must be a first-time homebuyer, defined as an individual (and, if married, the individual's spouse) who has not had a present ownership interest in a principal residence during the three-year period ending on the date the principal residence is purchased (Sec. 36(c)(1)). Unmarried individuals may jointly purchase a residence and allocate

the \$7,500 credit between them (Sec. 36(b)(1)(C)).

In the notice, the Service explains that if two or more taxpayers who are not married purchase a principal residence and otherwise satisfy the Sec. 36 requirements, the first-time homebuyer credit may be allocated between the taxpayers using any reasonable method. The IRS says a “reasonable method” is any method that does not allocate any portion of the credit to a taxpayer who is not eligible to claim that portion.

A reasonable method includes allocating the credit based on the taxpayers' contributions toward the purchase price of the residence as tenants in common or joint tenants or the taxpayers' ownership interests in a residence as tenants in common. The notice provides several examples of how this allocation could work.

#### Guidance on Unbundling Trust Fees Extended

In February 2008, the IRS announced that for tax years beginning before January 1, 2008, nongrantor trusts and estates would not be required to unbundle their fiduciary fees to determine what portion is subject to the Sec. 67(a) 2% threshold for itemized deductions

(Notice 2008-32). The Service has now extended that treatment to tax years beginning before January 1, 2009 (Notice 2008-116).

Prop. Regs. Sec. 1.67-4(c) requires that trust administrative fees that include both unique and nonunique expenses (as listed in the proposed regulation) must be unbundled to identify the amount of each.

Notices 2008-32 and 2008-116 state that for the applicable years investment advisory costs and other costs subject to the 2% threshold that are integrated as part of one fee paid to the trustee or executor need not be unbundled by nongrantor trusts and estates. For tax years beginning before January 1, 2009, taxpayers may deduct the full amount of any bundled fiduciary fee. However, taxpayers must treat payments by fiduciaries to third parties for expenses that are subject to the 2% threshold separately from otherwise bundled fees.

### REGULATIONS

#### Regulations Eliminate “Hot Stock” Rule for Certain Reorgs.

On December 15, 2008, the IRS issued final, temporary, and proposed regulations that generally hold that the so-called hot stock rule is inapplicable in

reorganizations where a subsidiary is a member of the distributing corporation's separate affiliated group (DSAG) (T.D. 9435, REG-150670-07).

Before the issuance of these regulations, under the hot stock rule of Sec. 355(a)(3)(B), controlled corporation stock acquired within five years of the distribution of such stock in a transaction in which gain or loss was recognized would be treated as boot. However, this treatment could conflict with the Sec. 355(b)(3)(A) rule that members of a corporation's separate affiliated group (SAG) will be treated as one corporation for purposes of determining whether a corporation meets the active trade or business requirements of Sec. 355(b)(2)(A).

For example, if a distributing corporation acquired all of a controlled corporation's stock in a taxable transaction that qualified as an expansion of the distributing corporation's existing trade or business under the SAG regime, and later distributed all such stock within five years of the acquisition in an unrelated transaction, the distribution would satisfy the active trade or business requirement but could be fully taxable under the hot stock rule.

Therefore, the temporary regulations generally provide that controlled stock acquired by the DSAG within the pre-distribution period in a taxable transaction constitutes hot stock, except if the controlled corporation is a DSAG member at any time after the acquisition (but prior to the distribution of controlled).

The regulations also address distributions among members of a DSAG. According to the regulations' preamble, "transfers of controlled stock owned by DSAG members immediately before and immediately after the transfer are disregarded and are not treated as acquisitions for purposes of the hot stock rule."

The temporary regulations exempt from the hot stock rule transactions in which a distributing corporation acquires controlled stock from a member of its own affiliated group. However, the IRS says it will continue to study the impact of such transfers.

The final and temporary regulations were effective December 15, 2008.

The IRS is also contemplating further guidance, which would be in addition to, rather than a replacement for, the temporary and final regulations.

Look for more on these regulations in next month's Tax Clinic.

## New Material Adviser Reporting Rules

The IRS has issued proposed regulations relating to the reporting rules for material advisers (REG-160872-04). Sec. 6707 contains penalty provisions for failure to timely file a return under Sec. 6111(a) or for filing a false or incomplete return with respect to a reportable transaction. For reportable transactions other than listed transactions, the Sec. 6707 penalty is \$50,000; for listed transactions, the penalty is the greater of \$200,000 or 50% of the gross income the material adviser makes from providing advice on the transactions (75% if the failure was intentional).

The proposed regulations clarify that the IRS can assess the Sec. 6707 penalty against each material adviser who is required to file a return under Sec. 6111, even if multiple material

advisers have a duty to file under the same transaction.

Under the proposed regulations, a material adviser will not be considered to have filed an incomplete Form 8918, Material Advisor Disclosure Statement, if he or she completes the form to the best of his or her ability and knowledge after exercising reasonable efforts to obtain the required information. However, a Form 8918 will be considered intentionally incomplete and subject to the increased Sec. 6707 penalty if it omits information required to be provided under the regulations and contains a statement that the omitted information will be provided upon request.

The proposed regulations give material advisers an opportunity to correct problems with Form 8918 by filing a "true and complete" return with the IRS before the earlier of the date that any taxpayer files a Form 8886, Reportable Transaction Disclosure Statement, identifying the material adviser with respect to the reportable transaction in question, or the date the IRS contacts the material adviser concerning the reportable transaction.

The proposed regulations would be effective when finalized.

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## IRS Issues Revised Subpart F Contract Manufacturing Regs.

By Eileen Reichenberg Sherr, CPA, M. Tax., AICPA, Washington, DC

In late December 2008, the IRS issued final, temporary, and revised proposed regulations on contract manufacturing (T.D. 9438). The final regulations define "manufacturing" and cover how the subpart F foreign base company sales income (FBCSI) rules apply to controlled foreign corporations (CFCs) that hire a "contract manufacturer." The temporary regulations adopt, with modifications, proposed changes to the subpart F branch rules and affect CFCs that conduct selling, purchasing, or manufacturing operations outside their country of incorporation.

These new regulations, which revise the proposed effective date, generally apply to CFC tax years beginning after June 30, 2009. The temporary regulations will expire on or before December 23, 2011. Taxpayers generally may apply the final and temporary regulations, in their entirety, retroactively to all their open tax years. Comments on the temporary regulations are due to the IRS by March 30, 2009; please e-mail any thoughts to [esherr@aicpa.org](mailto:esherr@aicpa.org).

The IRS and Treasury responded quickly to public comments received on the February 27, 2008, proposed regulations (including AICPA comments, available at <http://tinyurl.com/AICPAcomments>). U.S.-based multinational companies that sell products overseas should review their structures in light of the new regulations to identify possible new opportunities and reduced risks.