

Current Federal Tax Developments

Week of March 7, 2022

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Table of Contents

Section: Circular 230 IRS Proposes Raising Enrolled Agent Renewal Fee to \$140..... 5

Section: 62 Justice Department Asks Court to Dismiss Staking Refund Claim Case on
Grounds the Matter Has Been Rendered Moot..... 6

Section: 6654 Relief to Be Granted to Farmers and Fishermen Unable to File by March 1
Due to Issues With Form 7203..... 9

SECTION: CIRCULAR 230

IRS PROPOSES RAISING ENROLLED AGENT RENEWAL FEE TO \$140

Citation: REG-114209-21, 87 F.R. 11366-11371, 3/1/2022

In proposed regulations¹ the IRS would increase the initial and renewal user fee for enrolled agents from \$67 to \$140.² The same increase would apply to enrolled retirement plan agents.³

The preamble to the proposed regulations justifies the increase based on increased costs since the fees were last raised:

As required by the IOAA and the OMB Circular, the RPO completed its 2021 biennial review of the enrollment and renewal user fees associated with enrolled agents and enrolled retirement plan agents. As discussed in section D of this preamble, during its review the RPO took into account the increase in labor, benefits, and overhead costs incurred in connection with providing services to individuals who enroll or renew enrollment as enrolled agents and enrolled retirement plan agents since the user fee was last changed in 2019. The increase took into account additional staffing that allows RPO to provide a higher quality of service to individuals seeking to enroll or renew enrollment. The RPO also took into account a re-allocation of certain labor costs in their methodology. The RPO determined that the full cost of administering the program for enrolled agents and enrolled retirement plan agents has increased from \$67 to \$140 per application for enrollment or renewal. The proposed fee complies with the directive in the OMB Circular to recover the full cost of providing a service that confers special benefits on identifiable recipients beyond those accruing to the general public.⁴

Comments on the proposed regulations must be received by May 13, 2022.⁵

On the same day the IRS finalized regulations⁶ increasing the user fee to \$99 for each part of the special enrollment examination for enrolled agents.⁷ The fee increase is

¹ REG-114209-21, 87 F.R. 11366-11371, March 1, 2022, <https://www.taxnotes.com/research/federal/proposed-regulations/proposed-regs-increase-user-fees-for-enrolled-agents/7d77b> (retrieved March 5, 2022)

² Proposed Regs. §300.5(b) and 300.6(b)

³ Proposed Reg. §300.10(b)

⁴ REG-114209-21, 87 F.R. 11366-11371, March 1, 2022

⁵ REG-114209-21, 87 F.R. 11366-11371, March 1, 2022

⁶ T.D. 9962, 87 F.R. 11295-11297, March 1, 2022, <https://www.taxnotes.com/research/federal/treasury-decisions/final-regs-increase-user-fee-for-enrolled-agent-exam/7d76y> (retrieved March 5, 2022)

⁷ Reg. §300.4(b)

effective for the enrolled agent special enrollment examination that occur on or after March 31, 2022.⁸

SECTION: 62

JUSTICE DEPARTMENT ASKS COURT TO DISMISS STAKING REFUND CLAIM CASE ON GROUNDS THE MATTER HAS BEEN RENDERED MOOT

Citation: Memorandum in Support of United States' Motion to Dismiss, Joshua Jarrett et al. v. United States, Case No. 3:21-cv-00419, United States District Court Middle District of Tennessee, 2/28/22

A number of those with an interest in the taxation of virtual currencies, in particular those looking at the taxation of staking, had voiced excitement back in February over an announcement that the IRS had made a settlement offer in a case brought by Joshua Jarrett.⁹

As a news article authored by Cheyenne Ligon on the *CoinBase* website noted:

In December 2021, attorneys for the IRS wrote to Jarrett and his wife's attorneys to inform them the IRS had been "authorized and directed to schedule an overpayment of \$3,793, plus statutory interest."¹⁰

Some took this news to suggest that there was now binding guidance that made staking income nontaxable.

However, it was important to note that while this offer was made in December of 2021, the "news" broke in February from information provided by the plaintiff whom, it was later noted, had rejected the offer. Many of the articles on this issue relied heavily on comments from the acting executive director of the Proof of Stake Alliance, an industry group that Ms. Ligon noted was involved in funding the lawsuit¹¹ and, presumably, involved in the decision to take the offer public even as the taxpayers were rejecting (or at least attempting to reject) the offer.

⁸ Reg. §300.4(d)

⁹ Cheyenne Ligon, "IRS Offers Tezos Staker Refund on Rewards Tax in Break From Current Policy," *CoinDesk* web site, February 3, 2022, <https://www.coindesk.com/policy/2022/02/03/irs-offers-tezos-staker-refund-on-rewards-tax-in-break-from-current-policy/> (retrieved March 5, 2022). Cheyenne's articles in this area were the best this author ran into, providing key details, such as the relationship of those being quoted to the case and the fact that the offer was in the process of being rejected.

¹⁰ Cheyenne Ligon, "IRS Offers Tezos Staker Refund on Rewards Tax in Break From Current Policy," *CoinDesk* web site, February 3, 2022

¹¹ Cheyenne Ligon, "IRS Offers Tezos Staker Refund on Rewards Tax in Break From Current Policy," *CoinDesk* web site, February 3, 2022

In a follow-up article, Ms. Ligon noted the concerns expressed by many in the crypto-tax community regarding this development, and had the following quote from Seth Wilks, director of TaxBit:

“What happened is the IRS simply came out and said ‘Look, the issue before the court is whether or not you get a refund, and if we give you a refund the case is dead in the water – it just goes away,’” Wilks told CoinDesk. “And so, from a precedent-setting standard, there is no court ruling, there’s nothing to stand behind it.”¹²

This week the Justice Department confirmed Mr. Wilk’s suspicions on the reason for the settlement, filing a motion in the case to have it dismissed as being moot.¹³

The Memorandum begins by stating:

Plaintiffs Joshua and Jessica Jarrett sought a refund of \$3,793, plus statutory interest, for their 2019 federal income taxes. The United States authorized and delivered the requested refund, with interest, to the Jarretts’ counsel on February 14, 2022. This action therefore presents no case or controversy: it is moot. It should be dismissed under Rule 12(b)(1) of the Federal Rules of Civil Procedure.¹⁴

The government’s argument is that as this presents a case asking for \$3,793 plus interest from the government, if the government agrees to pay back that amount there is no longer any relief being requested for the Court to grant. The government argues:

What Plaintiffs really seek at this point is an advisory opinion. And since this Article III court lacks jurisdiction to issue advisory opinions, this action must be dismissed under Fed. R. Civ. P. 12(b)(1) for lack of jurisdiction.¹⁵

The memo continues:

Here, the United States granted a full refund of the amount the Jarretts asked for in the Complaint, with interest and without receiving anything in return. It was not an offer to compromise the case with each party giving up something. Thus, there is nothing left to adjudicate: Plaintiffs sued for a refund and received a full refund. When the United States tenders full payment of a refund — even during litigation — no case or controversy remains and the refund

¹² Cheyenne Ligon, “Crypto Tax Pros Throw Cold Water on Staking Excitement,” *CoinDesk* web site, February 9, 2022, <https://www.coindesk.com/policy/2022/02/09/crypto-tax-pros-throw-cold-water-on-staking-excitement/> (retrieved March 5, 2022)

¹³ Memorandum in Support of United States’ Motion to Dismiss, *Joshua Jarrett et al. v. United States*, Case No. 3:21-cv-00419, United States District Court Middle District of Tennessee, February 28, 2022, <https://www.taxnotes.com/tax-notes-today-federal/cryptocurrency/refund-suit-moot-government-says-motion-dismiss/2022/03/02/7d7fw> (subscription required, retrieved March 5, 2022)

¹⁴ Memorandum in Support of United States’ Motion to Dismiss, *Joshua Jarrett et al. v. United States*, Case No. 3:21-cv-00419, United States District Court Middle District of Tennessee, February 28, 2022

¹⁵ Memorandum in Support of United States’ Motion to Dismiss, *Joshua Jarrett et al. v. United States*, Case No. 3:21-cv-00419, United States District Court Middle District of Tennessee, February 28, 2022

8 Current Federal Tax Developments

claim is moot. *Drs. Hill & Thomas Co. v. United States*, 392 F.2d 204, 205 (6th Cir. 1968); *Christian Coalition, Inc. v. United States*, 662 F.3d 1182, 1192 (11th Cir. 2011) (refund claim moot where “IRS returned all of the disputed taxes shortly after this litigation began.”).¹⁶

Specifically, the government argues that the plaintiffs have no ability to force the Court to issue a ruling on *why* the refund is being granted:

Despite obtaining the full relief they ask for in their Complaint, the Jarretts believe this is still a “live” case or controversy because the Court has not yet ruled on whether staking rewards are taxable as income when received. They suggest in their letter that they can simply refuse the refund for which they sued in order to “vindicate their rights.” Dkt. No. 37. The Jarretts essentially argue they can continue this case to force the United States to explain why it granted the refund and then obtain an advisory opinion from the Court about those reasons. Not so. *Roberts v. United States*, No. 71-H-40, 1971 WL 428, at *1 (S.D. Tex. Oct. 20, 1971) (“The Court is not empowered to decide moot questions or abstract propositions, or to declare rules of law to be applicable in future cases but which are not in issue in the case in chief. As a result of the defendant's gesture in tendering the moneys which were the subject of the suit, there is no longer a case or controversy before this Court[.]”).¹⁷

The government argues as well that this case does not meet the limited exception to mootness that the matter is “capable of repetition yet evading review” as this is the first case the taxpayers have brought so there is no history of repeated cases escaping review. Nor, argues the government, does this case meet the “voluntary cessation exception” since the IRS has agreed to close any inquiry into the tax return in question for these taxpayers.¹⁸

Unfortunately, I’ve seen some commentary that has overreacted to this motion in a similar, but opposite, manner as happened with the announcement of the IRS offer to refund back in February. In this case the Justice Department’s action does not establish that staking is taxable income, that the IRS will take the position such items are taxable income in the future, nor even that this case cannot move forward—rather, it is a request that the Court dismiss the case, a request the Court will eventually take up at a later date.

I suspect that the Justice Department will prevail in their motion, but even if they don’t we may not get anything near a precedential ruling in this matter unless this case progresses outside the District Court in Tennessee to at least the U.S. Court of Appeals. So, unless the IRS actually issues guidance on the matter, those wanting absolute clarity on the taxation of staking aren’t likely to be satisfied anytime soon. For even if the

¹⁶ Memorandum in Support of United States’ Motion to Dismiss, *Joshua Jarrett et al. v. United States*, Case No. 3:21-cv-00419, United States District Court Middle District of Tennessee, February 28, 2022

¹⁷ Memorandum in Support of United States’ Motion to Dismiss, *Joshua Jarrett et al. v. United States*, Case No. 3:21-cv-00419, United States District Court Middle District of Tennessee, February 28, 2022

¹⁸ Memorandum in Support of United States’ Motion to Dismiss, *Joshua Jarrett et al. v. United States*, Case No. 3:21-cv-00419, United States District Court Middle District of Tennessee, February 28, 2022

Justice Department prevails on this motion, that merely means there will be no ruling on the proper tax treatment of the transaction made in this case.

SECTION: 6654

RELIEF TO BE GRANTED TO FARMERS AND FISHERMEN UNABLE TO FILE BY MARCH 1 DUE TO ISSUES WITH FORM 7203

Citation: “IRS update regarding recent electronic filing challenges in connection with Form 7203, S Corporation Shareholder Stock and Debt Basis Limitations,” IRS News Release IR-2022-49, 3/3/22

As many of us are very aware, many tax software providers have had real problems getting their systems up and running to handle filings of 2021 returns on both the federal and state level. The IRS added a number of new forms this year related to passthrough entities (including the Schedules K-2 and K-3 that have consumed so much professional time these past couple of months due to IRS clarification of the instructions) and a large number of states have instituted brand new passthrough entity taxes that mainly took effect this year, with the required forms and instructions being issued late by many state taxing agencies.

All of this created a lot of new coding to be done to provide support for these forms and returns, more than the vendors would normally face. With much of the guidance coming late in 2021 or into the first couple of months of 2022, there also was not a lot of time to get all of this new code written and tested. The vendors have ended up having to delay when they would be able to transmit impacted returns.

Unfortunately, these delays created an issue for taxpayers who are farmers and fishermen. Under IRC §6654(i), qualifying farmers and fishermen are only required to make one payment of estimated income taxes and, so long as they file their tax return by March 1 of the following year, can make that entire payment with the tax return. In a News Release announcing special relief this year, the IRS notes these rules:

Qualifying farmers and fishermen are those who are not subject to an addition to tax for failing to pay the required estimated tax installment payment by January 15, 2022, if they file their returns and pay the full amount of tax reported on the return as payable by March 1, 2022.¹⁹

Unfortunately, a number of tax software vendors were not yet able to electronically file new Form 7203, *S Corporation Shareholder Stock and Debt Basis Limitations* by March 1. The

¹⁹ “IRS update regarding recent electronic filing challenges in connection with Form 7203, S Corporation Shareholder Stock and Debt Basis Limitations,” IRS News Release IR-2022-49, March 3, 2022, <https://www.irs.gov/newsroom/irs-update-regarding-recent-electronic-filing-challenges-in-connection-with-form-7203-s-corporation-shareholder-stock-and-debt-basis-limitations> (retrieved March 5, 2022)

10 Current Federal Tax Developments

new form is required to be filed by many, if not most, individuals who hold stock in an S corporation with their 2021 income tax return.²⁰

Thus, if a software provider was not able to electronically file a return with that form by March 1, the farmer or fisherman either had to file the tax return on paper, something the IRS and most practitioners strongly discourage due to the huge backlog of unprocessed returns from prior years, or face the prospect of paying an underpayment of estimated tax penalty for not having paid the minimum single estimated tax payment due by January 15.

The news release notes:

The IRS is aware of a third-party software issue affecting qualifying farmers and fishermen attempting to electronically file Forms 7203.²¹

The news release promises that relief will be forthcoming for those who electronically file their return and pay the tax due by the original unextended due date:

Due to these challenges, the Treasury Department and the IRS intend to issue a notice providing penalty relief for qualifying farmers and fishermen filing Forms 7203 if they electronically file their 2021 tax return and pay in full any tax due by April 18, 2022, or by April 19, 2022, for those qualifying farmers and fishermen who live in Maine or Massachusetts.²²

Presumably, the IRS will issue a formal notice or other guidance giving implementation details for requesting this relief.

²⁰ See Ed Zollars, "Formal Draft of Proposed Form 7203 to Report S Corporation Stock and Debt Basis on Form 1040 Released," *Current Federal Tax Developments* website, October 23, 2022, <https://www.currentfederaltaxdevelopments.com/blog/2021/10/23/formal-draft-of-proposed-form-7203-to-report-s-corporation-stock-and-debt-basis-on-form-1040-released> (retrieved March 5, 2022)

²¹ "IRS update regarding recent electronic filing challenges in connection with Form 7203, S Corporation Shareholder Stock and Debt Basis Limitations," IRS News Release IR-2022-49, March 3, 2022

²² "IRS update regarding recent electronic filing challenges in connection with Form 7203, S Corporation Shareholder Stock and Debt Basis Limitations," IRS News Release IR-2022-49, March 3, 2022