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Tax Liability

Law Yanking, Denying Passports for Tax Delinquency Draws Fire From Practitioners

Practitioners fear some Americans could be stranded abroad under new State Department authority to revoke or deny passports to people who owe the U.S. government more than \$50,000 in back taxes.

“This could leave a lot of people stranded,” Dennis Brager, a former IRS senior trial attorney who now heads Brager Tax Law Group APC in Los Angeles, said Dec. 7. “It’s a terrible idea.”

Signed into law by President Barack Obama Dec. 4, the Fixing America’s Surface Transportation Act (Pub. L. No. 114-94) requires the Internal Revenue Service to certify the tax delinquency to the State Department, which then would take action on those individuals’ passports (233 DTR G-4, 12/4/15).

While there’s a provision in the law that allows the passport to be granted for humanitarian reasons or emergency reasons, those aren’t clearly defined and could take a long time to resolve, Brager and other attorneys said.

Big Problems for Americans Overseas. They said the provision could cause big problems for U.S. taxpayers living overseas who may need to get home or travel to other countries, among others facing difficulties.

John Harrington, a former Treasury international counsel now with Dentons LLP in Washington, said Dec. 7 that “this new rule could be a bigger problem for Americans who live overseas than a comparable provision would be for citizens of other countries who live overseas.”

Because the U.S. has a worldwide income tax, Americans who reside outside the U.S. are more likely to get into tax disputes with their home country than citizens of other countries who are taxed only on a residence basis, Harrington said.

“So, the group of people who have the hardest time complying with U.S. tax rules and resolving U.S. tax disputes will be the group most adversely impacted by the new rule,” he told Bloomberg BNA.

Low Threshold? A major issue, practitioners said, is that the \$50,000 threshold is relatively low. “It’s not hard to imagine somebody getting to \$50,000 without too much trouble,” Brager said.

Kevin Packman, a partner with Holland & Knight LLP in Miami, called the threshold “incredibly low” in a Dec. 7 interview, adding that his typical client owes

more than that. He told Bloomberg BNA the passport provision in the new law may be unconstitutional. “It could apply to anybody,” he said. “That’s the insanity.”

Packman said the provision likely is “backwards”—he said removing the authority of the IRS and Treasury Department over tax matters by bringing in the State Department “seems absolutely ludicrous.”

Challenges to Certification. Although the law allows taxpayers to challenge their certification as delinquent, one practitioner said they should exercise caution in doing so.

Dianne Mehany, a member of Caplin & Drysdale in the firm’s international tax and tax controversy practice, said Dec. 7 that taxpayers in most cases can’t challenge their underlying tax liability. They can only argue that their delinquency certification by the IRS to the State Department is wrong.

In a process where taxpayers already have very little chance to explain their circumstances, “by the time you’ve done this, there is not much room for appeal at all,” Mehany, who practices in Caplin’s Washington office, told Bloomberg BNA.

Before they go this route, taxpayers should contact a U.S. tax attorney, who may be able to help them learn whether they do have standing to challenge their liability, Mehany said.

Installment Agreements. According to the document signed by Obama, one way taxpayers can escape the burden of the law is to enter into an installment agreement or an offer in compromise with the IRS to try to get their taxes paid.

Brager said that this might be “the best and easiest thing” taxpayers can do to hang onto their passports, but both he and Caplin’s Mehany said this is also an area where taxpayers should be cautious.

Mehany told Bloomberg BNA that some taxpayers may have standing to challenge the underlying liability, and that is something to consider before entering into an agreement with the IRS. In addition, they may be able to get penalties abated, but “you’ll lose that if you go into an installment agreement,” she said.

Limits for Some Taxpayers. However, she said, some taxpayers will have limited ability to do this because they haven’t paid attention to their U.S. tax liability at all. “You can’t just ignore everything, not do anything, and then just say ‘I don’t owe the money,’” Mehany said.

Both Brager and Mehany said this, too, is an area where legal advice can be crucial. “This once again puts

a premium on tax advisers giving appropriate advice to their clients,” Brager said.

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