

*ONPOINT PUBLICATIONS – TALKING POINTS GUIDE*

*TOPIC:* \_\_\_\_\_

*TAX WEEK IN REVIEW – NOVEMBER 4, 2016*

# TALKING POINTS FOR TAX WEEK IN REVIEW NOVEMBER 4, 2016

## **Slide 1. Title Page – Tax Week in Review for Week Ending 11/4/2016**

### **Tax Related Legislation in the News This Week**

#### **Slide 2. H.R. 5386: Presidential Tax Transparency Act**

- Purpose: To amend the Federal Election Campaign Act of 1971 to require candidates of major parties for the office of President to disclose recent tax return information.
- In general, presidential nominees of a major political party would be required to release their tax returns for the previous three years within 15 days of receiving their party's nomination. If the nominee does not comply, the legislation allows the Federal Election Commission (FEC) to request the Department of the Treasury to release the returns.
- A "major-party" is defined as a party whose candidate received at least 25 percent of the popular vote in the previous presidential election.
- Currently, there are 3 bills with the same name that have been introduced – H.R. 5386, S. 2979 and S. 3348.

#### *Comments:*

*Apparently, Republican Presidential nominee Donald Trump's refusal to release his tax returns has raised enough concern that three bills have been introduced this year that would require nominees to do so in the future.*

*Since 1976, with the exception of Gerald Ford, major party presidential candidates have released one or more years of tax returns for public scrutiny. This is not a requirement, but in the wake of the scandals of the 1970's during the Nixon administration, presidential candidates have been making disclosures of their returns in an effort to restore the public's confidence in their elected officials.*

*During the Nixon presidency (1969 to 1974), the administration was rocked by the Watergate scandal as well as the conviction of Nixon's Vice President, Spiro Agnew, for federal income tax evasion. Agnew resigned from office and in exchange for a guilty plea, charges of political corruption (which included accepting bribes while serving as Vice President) were dropped. He was eventually fined \$10,000, disbarred from practicing law and served three years of probation. Nixon's involvement in Watergate prompted questions about his tax filings and he released copies of his returns for 1969 to 1972. Nixon resigned a year later in the wake of the Watergate scandal. For a fascinating look at the Nixon/Agnew tax story and its effect on our tax policy, read the account at [TaxHistory.org](http://TaxHistory.org): [President Nixon's Troublesome Tax Returns](http://TaxHistory.org)*

# TALKING POINTS FOR TAX WEEK IN REVIEW NOVEMBER 4, 2016

## Opinions, Decisions and Rulings Released This Week

### **Slide 3.** URGENT CARE NURSES REGISTRY, INC. V. COMMISSIONER, T.C. Memo. 2016-198

*Issue: Corporation lacked jurisdiction to proceed with actions against the IRS.*

- Corporate taxpayer (CT) was incorporated in the State of California in 2005. In 2008, T's corporate charter was suspended.
- CT filed *some* income and employment tax returns from 2009 through 2013. For missing returns, the IRS prepared substitute returns.
- In January, 2015 the IRS issued a Final Notice of Intent to Levy and Notice of Your Right to a Hearing. CT timely requested a collection due process (CDP) hearing.

**Slide 4.** *Let's review IRS procedures. Assuming your client has made no payments in response to a tax notice, what are the steps that the IRS will take to collect?*

1. *The IRS assesses the tax and sends the taxpayer a Notice of Tax Due and Demand for Payment (a tax bill). The taxpayer is usually given 10 business days to make payment. Typically, you may receive 2 such notices before the IRS proceeds to "collection actions."*
2. *Notice of Federal Tax Lien. Even if you have an installment agreement or have made some effort to pay, the IRS may still file a tax lien. This protects the government's interest in your assets. A lien is only filed after:*
  - *A liability has been assessed*
  - *A Notice and Demand for Payment has been issued.*
  - *You neglect to pay your debt within 10 business days.*
3. *Final Notice of Intent to Levy and Notice of Your Right to a Hearing. Both notices are issued at least 30 days before the levy action takes place.*
  - *Your right to a hearing and the final notice of intent to levy are usually sent at the same time. The IRS may give you this notice in person, leave it at your home or your usual place of business, or send it to your last known address by certified or registered mail, return receipt requested.*
4. *The taxpayer is given an opportunity to request that the case be considered by an Appeals Office provided that office has jurisdiction. If the taxpayer*

TALKING POINTS FOR TAX WEEK IN  
REVIEW NOVEMBER 4, 2016

*requests such consideration, the case will be referred to the Appeals Office, which will afford the taxpayer the opportunity for a conference.*

**Slide 5.**

- In June 2015 the settlement officer (SO) informed petitioner's representative that the IRS was informed that CT may no longer be in business. CT's representative submitted a copy of Form 966, Corporate Dissolution or Liquidation, and a certificate of dissolution.
- During a telephone CDP, the SO asked for additional documentation. The requested documents were not submitted and the SO closed the case, then issued a notice of determination.
- The IRS filed a motion to dismiss in response to CT's request for a court review. Without a valid corporate charter, CT lacked a legal standing as a taxpayer in California. Accordingly, CT lacked any legal standing to "prosecute or defend an action."

The full text can be read here: [T.C. Memo. 2016-198](#)

*Comment: Under Tax Court Rule 60(c) - Proper Parties, Capacity, the ability of a corporation to file a Tax Court petition is determined by the state law under which it was organized. (For individuals, it is determined by the individual's domicile.) As noted in the court records:*

*"In California, the board may suspend the "powers, rights [,] and privileges of a domestic taxpayer" if the corporation fails to pay "any tax, penalty, or interest, or any portion thereof, that is due and payable" at specified times. Once a corporation's powers have been suspended, it "may not prosecute or defend an action."*

## TALKING POINTS FOR TAX WEEK IN REVIEW NOVEMBER 4, 2016

### **Slide 6.** FITZPATRICK V. COMMISSIONER, T.C. Memo. 2016-199

*Issue: Was the taxpayer, due to her responsibilities for payroll checks of her husband's business, responsible for trust fund recovery penalties related to unpaid and unfiled payroll tax returns?*

- Taxpayer (T) was the spouse of a co-owner to a restaurant and wine bar. T's primary responsibility was to be caregiver to her disabled son, who suffered for a rare metabolic disorder called citrullinemia. T had neither the experience nor time to devote to the restaurant day-to-day operations.
- T was given the responsibility of:
  - Hiring the payroll service company for the restaurant (Paychex)
  - Initial opening of a corporate bank account, with signatory authority
  - Signing and delivering weekly payroll checks to the restaurant

### **Slide 7.**

- Other Responsible Parties:
  - T's spouse was a silent partner in the business, but also a full time employee outside of the restaurant, working in excess of 70 hours for a beverage distributor.
  - The 2<sup>nd</sup> business partner was to be the president and managing partner, but worked remotely, while working outside of the country for another beverage distributor.
  - The owners hired a general manager (GM) who was responsible for day to day operations, including tabulating and submitting the weekly payroll.

### **Slide 8.**

- Due to the GM's excessive spending, cash flow problems caused checks to bounce, including a payment to Paychex. The payroll service continued to process payroll information, issue checks and withdraw their service fee, but unknown to T, Paychex had terminated filing services no longer collected withholdings or file payroll tax returns.
- A Revenue Officer was assigned to investigate for unfiled payroll tax returns. Trust Fund Recovery Penalties were assessed and presented to the President, General Manager and T.

## TALKING POINTS FOR TAX WEEK IN REVIEW NOVEMBER 4, 2016

- The IRS believed T was a responsible person within the definition of Section 6671(b), having operated as a de facto officer due to her responsibilities with regard to the corporate bank accounts.
  - Based on prior rulings, the court found indications of a responsible party to include “the holding of corporate office, control over financial affairs, *the authority to disburse corporate funds*, stock ownership, and the ability to hire and fire employees.

### Slide 9.

*Let's review the meaning of Section 6671(b). IRS can require payment of payroll taxes and associated penalties with regard to “trust fund taxes,” which include payroll withholdings.*

- *Section 6672 allows the Commissioner to impose penalties on certain persons who fail to withhold and remit trust fund taxes, such as payroll taxes.*
- *Under Section 6671(b), a “responsible person” can include an officer or employee of a corporation who is under a duty to collect, account for, or pay over withheld taxes.*
- *Whether a person is a responsible person is a “matter of status, duty and authority, not knowledge.”*

### Slide 10.

- T argued that she did not have significant control over corporate affairs and lacked decision-making authority. Her duties were purely ministerial.
- Decision: The Court found that T lacked the authority and control to be held accountable for the taxes. Specifically:
  - T served only in support functions
  - T lacked authority to control financial affairs or control over fund disbursements.
  - T lacked the education and business experience to have played a significant role in the business
  - T was clearly not an officer, owner or employee.

*Comment: Both the owner/president and general manager successfully contested the assessments. The owner filed a request for abatement which was granted. The general manager was granted relief by the IRS Office of Appeals (Appeals). Under the circumstances, the Court was puzzled by the fact that the president and the general manager, both responsible for the actual day-to-day operations, evaded any personal responsibility for the penalties. Having made a predetermination of responsibility, the IRS*

TALKING POINTS FOR TAX WEEK IN  
REVIEW NOVEMBER 4, 2016

*agent failed to question the president and may have been intentionally misled by the general manager as to T's control of business matters.*

The full text can be read here: [T.C. Memo. 2016-199](#)

TALKING POINTS FOR TAX WEEK IN  
REVIEW NOVEMBER 4, 2016

**Slide 11.** COATES V. COMMISSIONER, T.C. Memo. 2016-197

*Issue: Is taxpayer entitled to a casualty loss deduction as reported on their 2010 tax return and does the penalty under Section 6662(a) apply?*

- T owned 700 acres of farmland in Oklahoma. Tract A consisted of 80 acres that included T's house and barns. Tract B consisted of 440 acres of woodlands. T had previously had Property A, plus 40 acres of B valued at \$677,000.
- In May 2010, Tracts A and B were heavily damaged by a tornado. Damages extended to T's house, barns, fencing and trees and 80% to 90% of the woodlands on Tract B.
- T received insurance compensation of \$168,000 and claimed a casualty loss of \$128,000 (\$148,000, less \$20,000 paid for the appraisal) on their 2010 tax return. T's determination of loss was the difference in FMV before and after the tornado.

**Slide 12.**

- IRS disallowed the loss, due to the validity of the determination of post-storm FMV of Tract B, which was calculated by T. IRS assessed additional taxes due, plus accuracy related penalties.
- Decision:
  - Though T is not a professional appraiser, as pointed out by the IRS, he did have extensive experience buying and selling land in his county. The Court found that T acted in good faith and was not negligent in determining his tax liability for 2010. Therefore, the accuracy related penalty did not apply.
  - With regard to the calculation of the loss deduction, Property B was recalculated as a zero allowance. See the comparative calculations below.

*Comment: Note that under Section 165(b), the amount of the allowed will be limited to the adjusted basis of the property. Taxpayer testified that he purchased property B from his mother, but he could not provide proof of the purchase or an amount. Records of various deeds did not include amounts nor the transfer tax stamps usually found for transfers in the county. Therefore, it is assumed that the transfer of Property B was a gift.*

The full text can be read here: [T.C. Memo. 2016-197](#)

TALKING POINTS FOR TAX WEEK IN  
REVIEW NOVEMBER 4, 2016

**Slide 13.**

COATES V. COMMISSIONER, T.C. Memo. 2016-197

<b>Property A</b>	T's Calculation	Tax Court Calculation
Adjusted Basis	\$500,000	\$210,000
FMV before casualty	660,000	660,000
FMV after casualty	450,000	450,000
Lesser of (a) decline in FMV and (b) adjusted basis	210,000	210,000
Less: Insurance reimbursement	-148,268	-148,268
<b>Loss before statutory limits</b>	<b>\$61,732</b>	<b>\$61,732</b>
<b>Property B</b>		
Adjusted Basis	\$247,000	\$0
FMV before casualty	528,000	528,000
FMV after casualty	440,000	440,000
Lesser of (a) decline in FMV and (b) adjusted basis	88,000	0
Less: Insurance reimbursement	0	0
<b>Loss before statutory limits</b>	<b>\$88,000</b>	<b>\$0</b>
<b>Total Loss before statutory limits</b>	<b>\$149,732</b>	<b>\$61,732</b>
<b>Less: Statutory Limits: \$100, plus 10% of AGI</b>	<b>-\$22,001</b>	<b>-\$22,001</b>
<b>Casualty Loss after Statutory Limits</b>	<b>\$127,731</b>	<b>\$39,731</b>

# TALKING POINTS FOR TAX WEEK IN REVIEW NOVEMBER 4, 2016

## In the News This Week

### **Slide 14. IR 2016-144: IRS, Security Summit Partners Expand Identity Theft Safeguards for 2017 Filing Season, Build on 2016 Successes**

The Internal Revenue Service, in partnership with state agencies and industry partners, announced that it has finalized plans for improving identity theft security measures for 2017. As described in the announcement:

*The 2017 focus revolves around “trusted customer” features that will help ensure the authenticity of the taxpayer and the tax return - before, during and after a tax return is filed. The additional protections will build on the 2016 successes that prevented fraudulent returns and protected tax refunds.*

### **Slide 15.**

For 2017, enhancements to security measures will include:

- New data elements transmitted by the tax industry with every tax return have been updated and expanded.
- The tax industry will share with the IRS and states 32 data elements from business tax returns, extending more identity theft protections to business filers as well as individuals.
- More than 20 states are working with the financial services industry to create their own version of a program that allows the industry to flag suspicious refunds before they are deposited into taxpayer accounts.
- The Form W-2 Verification Code initiative started by the IRS last year will expand to 50 million forms in 2017 from 2 million in 2016.
- The software industry will continue to enhance software password requirements for individuals and tax professional users, providing additional safety prior to filing.

The full text can be found here: [IR 2016-144](#)

## TALKING POINTS FOR TAX WEEK IN REVIEW NOVEMBER 4, 2016

### **Slides 16. IR 2016 – 145: IRS Warns Tax Professionals of New e-Services Email Scam**

The Internal Revenue Service announced warnings of email scams directed at tax professionals using government e-services. Per the notice:

*The subject line for the fraudulent email is “Security Awareness for Tax Professionals.” The “From” line is “Your e-Services Team.” It has both an IRS logo and an e-services logo that hyperlinks to a URL verified as a phishing site. The spoofing site poses as an e-services registration page.*

### **Slide 17.**

The IRS reminds all practitioners to:

- *Always use robust security software*
- *Use encryption software to protect taxpayer data*
- *Use strong passwords and change them often*
- *Learn to recognize phishing emails attempting to steal data*
- *Never click on links or download attachments from suspicious emails*
- *Beware of any communications claiming to be the IRS that are outside normal channels*

The full text can be read here [IR 2016-145](#).

### **Slides 18 Notice 2016-66: Transaction of Interest -- Section 831(b) Micro-Captive Transactions**

The Internal Revenue Service has announced new disclosure requirements for certain “micro-captive transactions.” For transactions entered into after November 1, 2016, captives and participants will be required to file Form 8886, Reportable Transaction Disclosure Statement.

Typically, a captive insurance company is an insurance company wholly owned by the company it insures or has common ownership with the insured. Insured companies make deductible premium payments for insurance contracts. However, the captive can make a Section 831(b) election and be taxed on its investment income alone.

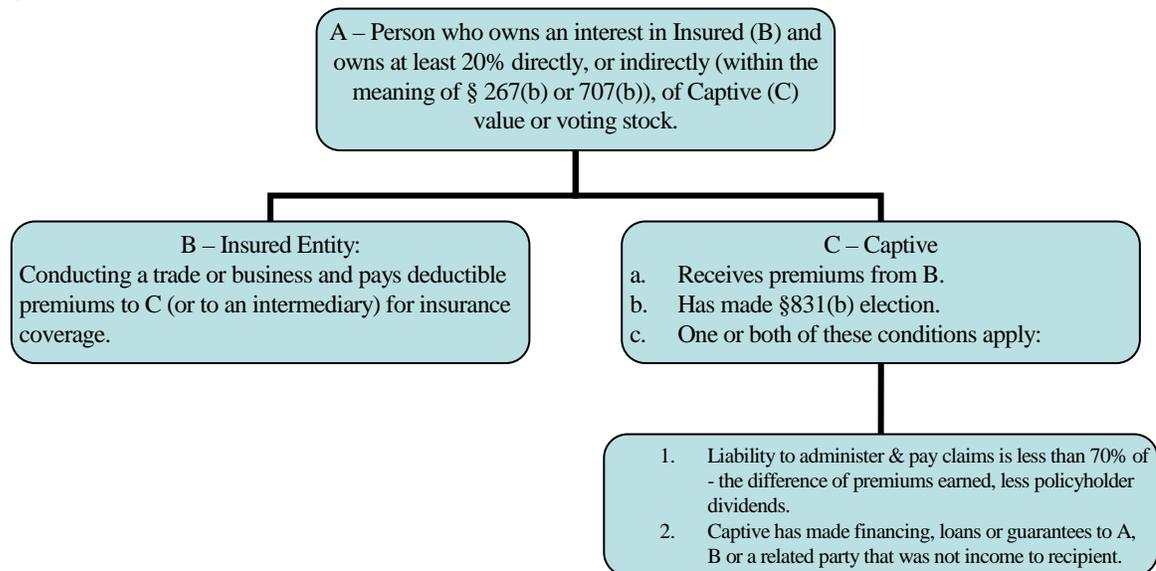
TALKING POINTS FOR TAX WEEK IN  
REVIEW NOVEMBER 4, 2016

**Slide 19.**

While insurance contracts are to be arms-length transactions, in abusive captives, the premiums are excessive to maximize the deduction. There is a potential for tax avoidance or evasion as the insured may seek coverage for events or circumstances that have little chance of occurring, allowing for an accumulation of earnings to be passed to the shareholders of the captive. The IRS is requiring disclosure in an effort to recognize how such transactions occur.

*The following would be a transaction of interest under Reg. 1.6011-4(b)(6).*

**Slide 20.**



The full text can be read here: [Notice 2016-66](#).