

## Steve Leimberg's International Tax Planning Email Newsletter Archive Message #17

Date:07-Mar-17

### Subject: Jim Counts on the State Department's Power to Cancel Passports for Taxpayers with Seriously Delinquent Tax Debt: What Practitioners Need to Know About the Why, When and How of Getting it Back

*"In 2015, legislation was enacted that permitted the Secretary of State to revoke or limit the issuance of a passport to a taxpayer with a 'seriously delinquent tax debt.' Of course, the State Department must receive information from the IRS to know which taxpayers have delinquent liabilities. Well, the IRS is now ready to begin the sharing information with the State Department, but the State Department is not yet ready to begin. Once the State Department is ready, the IRS will send weekly updates.*

*As a preliminary step, the IRS will issue a weekly list of taxpayers that meet the definition of having 'seriously delinquent tax debt.' To classify as 'seriously delinquent,' the debt must be greater than \$50,000 and meet other conditions. However, if a taxpayer with a delinquent debt has an installment payment plan in effect and is paying timely, such taxpayer will not be referred to the State Department. There are a few other conditions for which taxpayers with a debt will not be referred to the State Department. Once a taxpayer is certified as having such debt, the certification can be revoked upon meeting certain conditions.*

*Tax practitioners should advise their clients that their passport may be revoked if they owe more than \$50,000 in tax debt. Additionally, if a practitioner is confronted with a client that owes such a tax debt, the practitioner should determine if the taxpayer meets one of the exceptions to not be certified as owing a tax debt for the purpose of the State Department revoking their passport."*

With the summer travel season right around the corner, **Jim Counts** provides members with important commentary on legislation that allows the State Department to revoke or limit the issuance of a passport to a

taxpayer with a “seriously delinquent tax debt.” As he notes in his commentary, Jim believes this program could potentially expose tax professionals to errors and omissions liability if professionals do not advise certain clients of the risk that their passport could be revoked.

**James C. Counts II** is a solo practitioner in Hemet, CA where his practice is individual income taxes and providing fiduciary services. Mr. Counts is a CPA and CTFA (Certified Trust and Financial Advisor). He is the liaison to the California Employment Development Department for the California Society of CPAs. He represents California CPAs with the IRS National Public Liaison Tax Practitioner Group. Mr. Counts received his B.S. from California State University, Northridge.

Here is his commentary:

## **EXECUTIVE SUMMARY:**

In 2015, legislation was enacted that permitted the Secretary of State (“State Department”) to revoke or limit the issuance of a passport to a taxpayer with a “seriously delinquent tax debt.” Of course, the State Department must receive information from the IRS to know which taxpayers have delinquent liabilities. Well, the IRS is now ready to begin the sharing information with the State Department, but the State Department is not yet ready to begin. Once the State Department is ready, the IRS will send weekly updates.

The law states that the effective date is the date of enactment but the law does not give a date that the IRS is to begin sending lists of certified taxpayers to the State Department nor does the law state when the State Department is to begin revoking passports. Is the State Department delaying implementation of their systems and procedures for the purpose of delaying beginning this process? If so, it is not known when this program may begin.<sup>1</sup>

As a preliminary step, the IRS will issue a weekly list of taxpayers that meet the definition of having “seriously delinquent tax debt.” To classify as “seriously delinquent,” the debt must be greater than \$50,000 and meet other conditions. However, if a taxpayer with a delinquent debt has an installment payment plan in effect and is paying timely, such taxpayer will not be referred to the State Department. There are a few

other conditions for which taxpayers with a debt will not be referred to the State Department. Once a taxpayer is certified as having such debt, the certification can be revoked upon meeting certain conditions.

Tax practitioners should advise their clients that their passport may be revoked if they owe more than \$50,000 in tax debt. Additionally, if a practitioner is confronted with a client that owes such a tax debt, the practitioner should determine if the taxpayer meets one of the exceptions to not be certified as owing a tax debt for the purpose of the State Department revoking their passport.

## **FACTS:**

Congress passed and President Obama signed into law H.R. 22<sup>ii</sup> on December 4, 2015, which in part included Section 32101 – Revocation or denial of passport in case of certain unpaid taxes. Recently, the author received an update from the IRS on the Revocation or denial of passport in case of certain unpaid taxes program (hereinafter called the “Passport Program”).

Let me begin by reporting that the IRS is READY NOW to begin the Passport Program. Systems and methods are in place so that the IRS can begin certifying taxpayers as having a “seriously delinquent tax debt” (“SDTD”). The IRS is ready to send the list of taxpayers that they have certified to the Secretary of Treasury, which then will submit the list to the State Department. There is a delay in starting the Passport Program attributable to the State Department. While it is not known what is delaying the commencement of the Passport Program, a couple of factors likely apply.

To begin with, the State Department has to create systems within their department which includes deciding what to do in certain circumstances (more on this later). Also it is not clear how much of the change in personnel attributable to change in administration has delayed the implementation of the Passport Program from the State Department viewpoint. Is the new Secretary or the new staff reviewing decisions about the program or what?

The law gives the Secretary of State the power “...for action with respect to denial, revocation, or limitation of a passport...”<sup>iii</sup>

The author believes tax professionals SHOULD begin educating clients about the Passport Program NOW, so if a client should owe more than \$50,000 or is getting close to that amount they might consider one of the options (will be discussed below) to determine if they would qualify to keep from being certified or to see if they would qualify to begin a process that would delay or keep the client from being certified.

***ALERT:*** *The author believes this is a program that could expose the tax professional to professional errors and omission liability if the tax professional does not advise their client of the risk of their passport being revoked, if the taxpayer actually has “SDTD” and something could have been done to delay the IRS certifying the client to the Secretary of State as having SDTD or keep the client from being certified if the client should need their passport.*

### **What Does the Law State About the Passport Program?**

If the Secretary of the Treasury “...receives certification by the Commissioner of the Internal Revenue that an individual has a seriously delinquent tax debt, the Secretary shall transmit such certification to the Secretary of State for action with respect to denial, revocation, or limitation of a passport pursuant...”<sup>iv</sup>

As the author reviews later, the law allows the Secretary of State to grant waivers in certain situations. The law does not allow the IRS to avoid sending a taxpayer’s name and tax information to the Secretary of Treasury except in specific situations. The law states the Secretary of Treasury SHALL send to the Secretary of State the list of certified taxpayers. The Secretary of Treasury has no discretion to decide not to send a particular name to the Secretary of State.

### **What Is a SDTD?**

The term “seriously delinquent tax debt” means an unpaid, legally enforceable Federal tax liability of an individual: (A) which has been assessed, (B) which is greater than \$50,000, and (C) with respect to which (i) a notice of lien has been filed pursuant to section 6323 and the administrative rights under section 6320 with respect to such filing have been exhausted or have lapsed, or (ii) a levy is made pursuant to section 6331.”<sup>v</sup>

The IRS has determined that the \$50,000 debt limit applies to a total of all tax debt the taxpayer owes. The IRS will be including Trust Fund penalties and sole proprietorship payroll tax liabilities in the total debt of the taxpayer.

### **What Is NOT Included in SDTD?**

The law gives exceptions to what is “SDTD” as not including: “(A) a debt that is being paid in a timely manner pursuant to an agreement to which the individual is party under section 6159 or 7122, and (B) a debt with respect to which collection is suspended with respect to the individual (i) because a due process hearing under section 6330 is requested or pending, or (ii) because an election under subsection (b) or (c) of section 6015 is made or relief under subsection (f) of such section is requested.”<sup>vi</sup>

The author points out that when making payment of a debt under an approved installment agreement it requires “...being paid in a timely manner...” The author asked the IRS about this issue and was told that the taxpayer will not be certified as having “SDTD” until the taxpayer’s installment agreement is terminated in accordance with existing installment agreement procedures. The IRS also stated that no additional waivers will be granted.

When a taxpayer has a debt in total over the \$50,000 limit it will be to the potential benefit to the taxpayer for their tax professional representative to speed up the determination and filing requesting if the taxpayer qualifies for a due process hearing under IRC 6330 or seek innocent spouse relief under IRC 6015 (b), (c) or (f). Also, the taxpayer may wish to make every effort to get the liability under \$50,000 BEFORE the IRS certifies that they have “SDTD” so that the taxpayer then would not qualify to be certified by the IRS.

The law requires the taxpayer to pay in full their tax debt if the taxpayer has been certified to have “SDTD” unless the taxpayer meets one of the exceptions to not be certified (more on this later).

### **Once a Taxpayer Is on the Listing How Can They Get Off?**

If IRS’s certification that a taxpayer has “SDTD” is “...found to be erroneous or if the debt with respect to such certification is fully satisfied or ceases to be a seriously delinquent tax debt by reason...”<sup>vii</sup> then the

Secretary of State will be notified that the taxpayer meets one of the exceptions for not being certified. Additionally, the certification will be revoked if the taxpayer is paying timely on an approved installment agreement, an offer-in-compromise, or they requested a due process hearing or it is pending, or the taxpayer made an election under IRC 6015 (b) or (c), or the taxpayer was given relief under IRC 6015(f).<sup>viii</sup>

The IRS is required to give notice of the satisfaction of the debt or if it is no longer legally enforceable "...no later than the date required for issuing the certification of release of lien with respect to such debt under section 6325(a)" which is 30 days. If the taxpayer made an election under IRC 6015 (b) or (c) or requests relief under IRC 6015(f) then the IRS also has 30 days to provide notice. This 30 day notice limitation also applies if the taxpayer gets an approved installment agreement or an approved offer-in-compromise. Only in the case, if the certification was erroneous is the notice to be furnished to the Secretary of State "as soon as practicable after such finding."<sup>ix</sup>

The author was told that weekly updates would be sent to the State Department. It was not discussed whether the taxpayer or their representative should request the revoking of the certification or whether it would be done automatically, as well as whether the taxpayer or their representative could contact the IRS to expedite the processing of the revocation. Nor was it stated if the taxpayer's representative needs something else in a Form 2848 Power of Attorney, other than saying it covers the Form 1040. No indication was made as to what processing time would take once a taxpayer was identified as someone whose certification was revoked to actually show up on the list sent to the Secretary of State. It is not known how long it will take before the State Department will notify a taxpayer that they may again obtain a U.S. passport after they have been notified.

### **Will the Taxpayer Be Notified of Being Certified or De-Certified?**

The Commissioner will "contemporaneously" notify the taxpayer of either being certified or the reversal of the certification. At the same time, the taxpayer will be advised "... in simple and nontechnical terms of the right to bring a civil action..." in district court or Tax Court.<sup>x</sup>

### **When Can the Taxpayer Bring Civil Action Against the United States Regarding the Passport Program?**

The taxpayer may "... bring civil action against the United States in a district court of the United States or the Tax Court to determine whether the certification was erroneous or whether the Commissioner has failed to reverse the certification."<sup>xi</sup> The law does not allow nor require the taxpayer to go to an Appeal Hearing to make this certification determination. Taxpayers can go directly to district court or Tax Court.

"If the court determines that such certification was erroneous, then the court may order the Secretary to notify the Secretary of State that such certification was erroneous."<sup>xii</sup> It is not known if the court will review if a particular tax debt is correct (i.e. taxpayer does not owe that amount), or what they will consider in their review.

The author wishes to point out that the court is authorized to review the certification or reversal of the certification done by the IRS. Later, when discussing what the Secretary of State may do as to hardship issue, the court is not authorized by the law to review those decisions. No appeal process to the Secretary of State's determinations and procedures are provided for in the law. It is not known if either court would expedite the timing of the hearing and the issuance of their decision.

### **Is the \$50,000 Tax Debt Limitation Adjusted for Inflation?**

Annually beginning with the beginning of 2017, the amount is adjusted for inflation rounded to the nearest \$1,000. The adjustment is computed by using the Consumer Price Index (CPI) for all-urban consumers as published by the Department of Labor. The adjustment is computed by multiplying the \$50,000 limitation by the average of the CPI as of the close of the 12-month period ending on August 31 for the preceding calendar year exceeds the CPI for the calendar year for 2015.<sup>xiii</sup> The author checked to determine if there was a CPI adjustment for 2017 and the CPI did not change enough to make an adjustment. It is expected for 2018 there will be an adjustment in the dollar limitation. For CPI monthly amounts see Department of Labor, Bureau of Labor Statistics Table 24.<sup>xiv</sup>

### **Is the Taxpayer Given Notice of the Possible Revoking of Their Passport with a Notice of Lien or Notice of Levy?**

The law requires the IRS to modify the notice for lien and notice for levy sent to taxpayers to add information, "the provisions of section 7345

relating to the certification of seriously delinquent tax debts and the denial, revocation, or limitation of passports of individuals with such debts pursuant to section 32101 of the FAST Act.”<sup>xv</sup>

### **If a Taxpayer Is in a Combat Zone or the Hospital Due to Injuries Can Their Passport Not be Revoked or Limited?**

The law changed IRC Section 7508(a) time to be disregarded by adding “(3) Any certification of a seriously delinquent tax debt under section 7345.” Thus for “an individual serving in the Armed Forces of the United States, or serving in support of such Armed Forces ...”<sup>xvi</sup> basically designated as a “combat zone” or while hospitalized due to wounds, shall qualify for this time to be disregarded. Under IRC 7508(c) “The provisions of this section shall apply to the spouse of any individual entitled to the benefits of subsection (a).”<sup>xvii</sup>

Given that the purpose of this program is to revoke passports, it is possible that family members who are not the spouse may not be allowed to travel to and visit with a family member injured due to combat action and in a hospital outside of the United States if they have been certified to have “SDTD.” What is not known, is what the Secretary of State under the Secretary’s authority in emergency and humanitarian situations will do in this situation, as the Secretary may issue a passport (discussed later) to the taxpayer.

### **Can the Secretary of State Not Revoke a Passport for Emergency or Humanitarian Situations?**

The statute says the following: “...the Secretary of State may issue a passport, in emergency circumstances or for humanitarian reasons,  
...”<sup>xviii</sup>

Unfortunately, this law does not specifically authorize the Secretary of State to issue any written guidance such as what the Secretary of Treasury does in regulations or the IRS does in revenue procedures or revenue ruling. Without such written guidance, taxpayers may not have any idea when or why the Secretary of State will issue a passport for emergency or humanitarian reasons. Unless the Secretary of State issues some form of guidance, it will be difficult for taxpayers to know when they may or may not qualify for a passport, and under what circumstances.



## **What May the Secretary of State Do if the IRS Certified a Taxpayer As Having SDTD?**

The Secretary of State upon receiving a certification "... from the Secretary of Treasury, the Secretary of State shall not issue a passport to any individual who has a seriously delinquent tax debt ..." <sup>xix</sup> As it states, the State Department SHALL NOT ISSUE a passport. They may revoke a previously issued passport and they may allow a taxpayer outside of the United States to travel back to the United States.

Since many United States citizens permanently live outside the United States, one issue that is unclear is what the Secretary of State will do for these citizens if the IRS certifies they have "SDTD." Will their passport be revoked or given a limited time to return to the United States? Or, will the Secretary of State allow the citizen under the emergency or humanitarian exceptions to have a passport, whether limited or not, so that the citizen may remain at their permanent location?

As a note, the author has been told that when such a passport is allowed to be used to return to the United States, the taxpayer must notify the State Department when and how the taxpayer will be returning to the United States. While the author has not been told, it would seem likely that the State Department would notify the IRS when and where a taxpayer is returning to the United States, so if the IRS should wish to welcome the taxpayer back to the United States, they may meet them upon their arrival.

### **COMMENT:**

The author believes that tax professionals and taxpayers are not yet knowledgeable about the new Passport Program. Tax practitioners need to fully understand when a taxpayer may qualify for certification as having "SDTD." Practitioners should understand what may be done so the taxpayer does not qualify to be certified and what taxpayers may do to get off the certification list once they have been certified.

While a taxpayer currently may not have a tax debt due the IRS, the author advises practitioners to educate themselves and their clients on this program in case the client should later have tax debts that might exceed the dollar limitation for certification.

HOPE THIS HELPS YOU HELP OTHERS MAKE A POSITIVE DIFFERENCE!

*Jim Counts*

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**CITE AS:**

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**CITATIONS:**

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<sup>i</sup> Public Law 114-94 Sec. 32101(i).

<sup>ii</sup> <https://www.congress.gov/bill/114th-congress/house-bill/22/text/pl>.

<sup>iii</sup> 26 USC Sec. 7345(a).

<sup>iv</sup> 26 USC Sec. 7345(a).

<sup>v</sup> 26 USC Sec. 7345(b)(1).

<sup>vi</sup> 26 USC Sec. 7345(b)(2).

<sup>vii</sup> 26 USC Sec. 7345( c)(1).

<sup>viii</sup> 26 USC Sec. 7345(b)(2).

<sup>ix</sup> 26 USC Sec. 7345( c)(2).

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<sup>x</sup> 26 USC Sec. 7345(d).

<sup>xi</sup> 26 USC 7345(e)(1).

<sup>xii</sup> 26 USC 7345(e)(2).

<sup>xiii</sup> 26 USC 7345(f).

<sup>xiv</sup> See Table 24 at Page 86 at <https://www.bls.gov/cpi/cpid1701.pdf>.

<sup>xv</sup> 26 USC Sec. 7345(d).

<sup>xvi</sup> 26 USC Sec. 7508(a)(3).

<sup>xvii</sup> 26 USC Sec. 7508(c).

<sup>xviii</sup> 26 USC Sec. 7345(e)(1)(B).

<sup>xix</sup> 26 USC Sec. 7345(e)(A).