'Repair' Regs Likely Delayed Until Fall, Treasury Official Says

by George White

Proposed regulations under section 263(a) -- the so-called repair regs package -- will likely include a mix of final, temporary, and proposed regs, Eric Lucas, attorney-adviser in Treasury's Office of Tax Legislative Counsel said March 5. It is unlikely, however, that the final reg package will be out by June 30, the end of the IRS/Treasury business plan year, he said, adding that a fall release date is more probable. (For prior coverage, see *Doc 2010-2000* or *2010 TNT 18-5*.)

Susan Grais of Ernst & Young, who joined Lucas in speaking at the 34th annual Federal Bar Association Section on Taxation Tax Law Conference in Washington, noted another aspect of the repair reg project. A recent IRS Large and Midsize Business Division directive designated as a Tier I issue taxpayer changes in method from capitalizing to deducting repair and maintenance costs, and IRS officials at the conference said the large number of method changes has led LMSB to take a closer look at taxpayers' factual representations. (For LMSB-04-0110-001, see *Doc 2010-1657* or *2010 TNT 15-64*.)

Addressing transaction costs under reg. section 1.263(a)-5, IRS officials said that a long-standing dispute between taxpayers and the IRS has been over what documentation is required by the regulation. Although the regulation includes time records merely as one example of sufficient documentation, it's clear that some examining agents have taken the position that time records are necessary for claiming the deduction.

Officials said they hope a recent technical advice memorandum has put this debate to rest by ruling that "other records" -- in this case, an accountant's spreadsheet of costs -- must be considered by examining agents. Both Treasury and IRS officials said that published guidance on this issue will clarify that time records are not the only acceptable documentation and will be released fairly soon, perhaps by June 30. (For TAM 201002036, see *Doc 2010-938* or *2010 TNT 11-29*.)

A recent legal memorandum concerning a taxpayer's bonus compensation plan ruled that the taxpayer could not accrue at year-end a liability for bonuses to be paid in the following year. IRS officials indicated that the taxpayer's plan failed partly because the accrued amounts could revert to the employer in some circumstances, such as when an otherwise eligible individual was not an employee in the following year when the bonus was to be paid. (For ILM 200949040, see *Doc 2009-26609* or *2009 TNT 232-20*.)

Leslie Schneider of Ivins, Phillips and Barker pointed out that a common arrangement in many bonus plans provides that the accrued pool of bonuses does not revert to the employer if an individual is no longer employed, but rather the latter's bonus is simply added to the bonus pool to be spread among all eligible employees. Schneider noted that such plans are consistent with the holding in *Washington Post Co. v. United States* (405 F.2d 1279, Ct. Cl. 1969).

An IRS official indicated his agreement with the holding in *Washington Post*, but Carol Conjura of KPMG LLP pointed to old rulings (presumably Rev. Rul. 72-34, 1972 C.B. 132 and Rev. Rul. 76-345, 1976-2 C.B. 134) reflecting the IRS's disagreement with the *Washington Post* decision.

The gift card issue is still under consideration, according to Treasury officials. The sticking point continues to be that, in many fact patterns, the entity issuing the gift card is not the same entity supplying the goods to the card holder. (For prior coverage, see *Doc 2009-2743* or *2009 TNT 54-8*. For related commentary, see *Doc 2009-18248* or *2009 TNT 166-11*.)

Another hot topic, said a Treasury official, is the treatment of nonshareholder contributions under section 118. He indicated that guidance on "smart-grid" investment grants by the Energy Department may be coming in the next few weeks.