Vol. 11 Issue 2

December 2018

Journal of the CPA Practitioner

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Remember to check out our Members Benefits on go.nccpap.org

President's Address, October 25, 2018

Dear Colleagues:

It is my great pleasure to be making this, my first address as President of NCCPAP.

It was 29 years ago when I started working for my father, Manuel Fishman. Almost immediately, I started to attend CPE programs, beginning with the all-day tax updates held by the Nassau/Suffolk Chapter. Most of what was being presented was way over my head – I really did not understand a lot, but it was important for me to hear, and to learn. As I went back to school to take the courses needed so I could take the CPA exam, as I was working and attending CPE programs, a lot of the information from the CPE programs began to have relevance to what I was doing, both at work and at school. As I got to those final courses, there was so much I had learned from the practice of Accounting, and from the CPE programs, it made those last classes very easy for me to deal with.

Once I passed the exam, I immediately got involved in NCCPAP – serving on Chapter committees, and eventually getting involved at the National level. When I was first getting involved, I was told "as much as you get involved, you will get back that much and more." This has proved to be so true. When I had questions on how to deal with certain situations for my clients, there has always been someone in NCCPAP for me to reach out to. As my involvement grew, as I moved up within NCCPAP, I have repaid those who helped me by helping those who have reached out to me with their questions. Even today, there is still so much to learn, both by helping others and asking for help. That is what makes this organization so valuable, so necessary, to those of us in the profession today, because no one knows everything.

As I assume the office of NCCPAP President, I stand on a pinnacle. But I do not stand there alone. I stand on the shoulders of those who have preceded me as NCCPAP President – Ed Kliegman, Alan Feldstein, Carol Markman, Bob Goldfarb to name a few. They, and all the others who have been President of NCCPAP before and after them, have put this organization on the path to where we are today. Because of all their efforts, NCCPAP is well known in Washington DC. As an organization, we participate at the NPL meetings, the IRS Security Summit, have testified before Congressional committees and assisted in the drafting of tax legislation. But this is just the end result. It is you, our members, who make this possible. You see where there is an issue to bring to the attention of Congress, to the IRS, and its gets done. We have had many successes over the years in getting changes to the tax code, to regulations, to tax forms.

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Price per issue: $2.50 ©2017 NCCPAP -ISSN 2152-4661

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Letter from the Editor

Dear Readers:

At the last meeting NCCPAP ushered in a new era with new officers. Congratulations to Neil Fishman and his team on becoming the new NCCPAP leadership.

It's a time for a new beginning. We should all be re-dedicating ourselves to NCCPAP's success. We are a unique organization. Actually, we're less like a membership organization and more like a large firm where you can just knock on the door of a colleague and get an answer to almost any issue: audit, tax, and ethics. We stand with each other during tough personal times as well as professional challenges. It's important that we keep NCCPAP strong.

Since we're turning over a new page in NCCPAP history, we're trying to strengthen and grow the value of the Journal. As such we ask for your participation. The Journal has a new leadership structure. Steve Mankowski is now chair of the Journal Committee and Mary Feeney Bonawitz is the publisher. Let's support them with renewed vigor. If you'd like to help us, by writing articles, being an editor or otherwise helping, please contact Steve smankowski@mankowskicpa.com or Mary mfbonawitz@verizon.net and get on board.

Let's make NCCPAP greater than ever!

Happy holidays

Frimette

PRESIDENT'S ADDRESS, OCTOBER 25, 2018

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So in closing, I ask you, our members to keep doing this. But not just this, get involved as much as you can – serve on committees, both on the chapter and national levels. When you get a call from a fellow NCCPAP member, give them a few minutes and help them out. I know most of us already do this, so please, just keep doing it. If you see something you feel needs to be addressed in Washington, let us know. We may ask you to give a little time to work on it, but there are members who will help you do this. I do not ask you to do anything I have not done myself, nor will I ask you to do anything that has not been asked of me.

Thank you.

Neil H. Fishman, CPA

Newly elected NCCPAP president Neil Fishman honoring
immediate past president Steve Mankowski at our annual meeting
in West Palm Beach, Florida, on October 25, 2018

ISSUES COMMITTEE UPDATE

The NCCPAP Issues Committee held its quarterly meeting on October 25th. The Committee had several issues to discuss on a variety of topics. The committee discussed many important issues affecting our members. While some of these issues related to the state of New York, they are likely to spread to other states as well.

New York has passed perhaps the most comprehensive sexual harassment regulations for employers in the country. The rules provide that all employers had to by October 9, 2018, regardless of size, adopt a sexual harassment policy that conforms with the standards set forth in the regulations. New York does have a model policy on the web that employers may use, tailor and adopt.

Furthermore, New York requires all employees, and those who supervise any employee, to complete sexual harassment training as specified in the regulations by October 9, 2019. Thereafter, such training must be repeated annually.

As an organization, NCCPAP will work to coordinate these training sessions for its members to have easy access to. When these sessions are available, NCCPAP will notify its members.

As individual practitioners, we need to evaluate how we advise our clients on this matter. A practitioner should note, unless they also happen to be an attorney, they are not qualified to design a sexual harassment policy for their clients nor are they qualified to conduct sexual harassment training. Practitioners should limit their advice solely to educating their clients as to the existence of these regulations and providing referrals to attorneys if so requested by their clients.

The NY legislature has also overwhelmingly passed an expansion of the Family Leave Act to cover bereavement for the death of certain relatives. Relatives for this purpose includes spouses, children, stepparents, in-laws, grandparents and grandchildren. The expansion awaits the governor's signature. If signed into law, starting 1/1/2020, there will be 10 weeks of allowed leave and by 1/1/2021, 12 weeks. The weeks do not have to be consecutive nor do they have to occur immediately after the death of a relative.

If signed into law, practitioners should discuss with their clients the potential impact on their businesses and how to plan for it.

The committee discussed the potential impact of the progression across the country of the legalization of cannabis. As practitioners, this is perhaps a potential untapped accounting market that we can be on the forefront of. That being said, with cannabis not being legal yet nationally nor in many states, practitioners should first discuss the matter with their insurance company and legal counsel if they decide to venture into this specialty area.

The committee had a brief discussion as to records retention in an electronic environment. Having client records in electronic format does not change your records retention period. Electronic records of a client that you have access to must be purged according to your records retention policy. They cannot and must not simply kept indefinitely. Most every state has a records retention policy requirement for CPAs that must be adhered to.

Finally, the committee discussed working in conjunction with the Tax Committee as to the effects of many states adopting economic nexus standards and its effect on the profession. This issue will be studied more and brought to Washington as part of our annual agenda in May, as there is proposed legislation at the federal level to make nexus standards uniform amongst the states.

by Mark A. Stewart Jr., CPA, 2017-2018 National Chair, Issues Committee,
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The New World of Debt Versus Equity Financing: Time for an Update in Advising Clients

Introduction

In a 2011 article in this journal, Davis and Fried argued that the tax code was encouraging firms to choose debt over equity. Since interest payments are tax deductible, they lower the cost associated with debt financing. In contrast, dividend payments are not tax deductible. Thus, dividends are subjected to double-taxation, since they are distributed by the firm from after-tax earnings and then subjected to a further tax on the individual who receives the dividend. In 2017 there were many changes made to the tax code. One of the important changes was the taxation of dividends versus interest. We analyze these changes and show that starting in 2018, the tax code has generally moved to an encouragement of dividends versus interest expense. In many instances, for tax purposes a firm will be in a better position if they choose equity financing rather than debt financing. This new reality requires a CPA to rethink the guidance she provides her client regarding the client's capital structure decision.

Methodology

We modelled a firm whose operating income (before taxes and interest) was between $10,000 and $20,000,000 (in $10,000 intervals). For each income level we compared 11 strategies, paying out interest from 0% to 100% of net income (in 10% intervals). We then calculated the firm's corporate tax (using Table 1) on the net income (operating income minus interest). We then assumed the firm pays its net income after tax as a dividend. We assumed one financier receives all the firm's dividend and interest payments. We then calculated the financier's tax on the interest and dividends received, using Tables 2 and 3 and also including a 3.8% Net Investment Income Tax on the amount of income over $200,000. We assumed the financier was single, had no other income, and that the dividend was a Qualified Dividend. This gave us the cash left for the financier as interest and dividend income received minus total tax paid.

For each income level of the firm, we calculated the optimal ratio of interest to dividends. We also calculated the percentage difference between the optimal strategy and the worst strategy. Finally, we calculated the percentage difference between the optimal strategy and a 100% interest strategy.

Results for 2017

Table 4 summarizes the results. The first two columns show the corporate income levels and optimal strategy. The third column shows the percentage loss from deviating from a 100% interest strategy. The final column shows the percentage loss to the financier from using the worst strategy. For most of the income levels the optimal strategy is 100% interest. Only for the $20,000-$50,000 income level is the optimal strategy 50% or less interest. But in no case is the difference between the optimal strategy and the 100% interest strategy more than 1%. It is thus possible to summarize that in 2017 there was never a significant advantage to deviating from a 100% interest strategy. Furthermore, the penalties for using a poor strategy (which almost always turned out to be paying 100% dividends) could be very steep, between 12% and 24% for all corporate incomes over $110,000.

Methodology for 2018

We repeated the methodology for 2017, making the following changes. Instead of using Table 1 for the corporate tax rates, we used the new corporate tax rate of 21%. Instead of using Tables 2 and 3 for individual taxes, we used Tables 5 and 6 for the individual rates. And instead of calculating the percentage difference between the optimal strategy and the 100% interest strategy, we calculated the percentage difference between the optimal strategy and a 0% interest (100% dividend) strategy.

Results for 2018

Table 7 summarizes the results. The larger the income, the lower is the optimal percentage of interest paid out and the lower the penalty for using a non-optimal strategy. Furthermore, for amounts over $660,000, there is little difference (2% -3%) between **any** of the strategies, which means that for large corporate incomes, the tax code is basically neutral between interest and dividends. The main reason for this change is that the corporate tax rate dropped from the 35%-38% range to 21%, making the interest deduction much less valuable.

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The New World of Debt versus Equity Financing: Time for an Update in Advising Clients

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Tax Deductibility of Interest

The tax code introduced new limitations on the tax deductibility of interest expense. Any interest expense that exceeds 30% of a taxpayer's "adjusted taxable income" is not deductible (for 2018-2021 this is defined as net income before interest, depreciation, amortization and depletion, for 2022 and on, depreciation and amortization are subtracted). To model these new limitations, we looked at the effect of making 50% and 100% of the interest expense non-deductible.

Table 8 summarizes the results for making 50% of the interest non-deductible. For all net incomes except for $10,000-$40,000 and $120,000-$250,000, the optimal strategy is 0% interest. For the exceptions, the optimal strategy can vary between 20% and 80%, but the difference between the optimal strategy and paying 0% interest is never more than 1%. The penalty for using a poor strategy (100% interest) varies between 4% and 15% for corporate incomes over $260,000. This means that if interest is only 50% deductible, generally speaking, for corporate incomes of over a quarter million dollars, the tax code is favoring a dividend payout over an interest payout.

This effect is even more pronounced in Table 9 when 100% of the interest is not deductible. For all levels of net income, the optimal strategy is 0% interest. And a high payout of interest can lead to a high (9%-27%) penalty. Thus, if interest is not deductible, the tax code is strongly favoring a dividend payout over an interest payout.

Conclusion

Our broad conclusion is that until 2017, choosing an all debt payout as opposed to paying a dividend was always a tax minimizing strategy. The tax code has now shifted the incentives, so that from 2018 and on, the tax minimizing strategy is to pay out dividends instead of interest. Our conclusion is based on the specific assumptions we made in our model. A CPA should reexamine the dividends versus interest payout ratios of each client. The optimal decision requires considering the specific circumstances of each individual client.

Table 1: 2017 Corporate Tax Rates

Over	Tax	Plus	Of amount over
$0	-	15%	$0
50,000	7,500	25%	50,000
75,000	13,750	34%	75,000
100,000	22,250	39%	100,000
335,000	113,900	34%	335,000
10,000,000	3,400,000	35%	10,000,000
15,000,000	5,150,000	38%	15,000,000
18,333,333	-	35%	0

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The New World of Debt Versus Equity Financing: Time for an Update in Advising Clients

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Table 2: 2017 Long term Capital Gains and Qualified Dividends Tax Rates

From	To	Rate
$0	37,950	0%
37,951	418,400	15%
418,401		20%

Table 3: 2017 Ordinary Income tax rates for a single taxpayer

Over	Tax	Plus	Of amount over
$0	-	10%	$0
9,325	933	15%	$9,325
37,950	5,226	25%	$37,950
91,900	18,714	28%	$91,900
191,650	46,644	33%	$191,650
416,700	120,910	35%	$416,700
418,400	121,505	39.60%	$418,400

Table 4: Optimal strategies 2017

Corporate Income	Optimal % Interest	% Difference between the optimal strategy and the 100% interest strategy	% Difference between the optimal strategy and the worst strategy
$10,000	100%	-	5%
$20,000-$50,000	20%-50%	0%-1%	1%-3%
$60,000-$100,000	100%	-	2%-10%
$110,000-$1,260,00	70%-90%	0%-2%	12%-24%
$1,270,000-$20,000,000	100%	-	13%-15%

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The New World of Debt Versus Equity Financing: Time for an Update in Advising Clients

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Table 5: 2018 Long term Capital Gains and Qualified Dividends Tax Rate

From	To	Rate
$0	38,700	0%
38,701	426,700	15%
426,701		20%

Table 6: 2018 Ordinary Income tax rates for a single taxpayer

Over	Tax	Plus	Of amount over
$0	-	10%	$0
9,525	953	12%	$9,525
38,700	4,454	22%	$38,700
157,500	32,090	32%	$157,500
200,000	45,690	35%	$200,000
500,000	150,690	37%	$500,000

Table 7: Optimal strategies 2018

Corporate Income	Optimal % Interest	% Difference between the optimal strategy and the 0% interest strategy	% Difference between the optimal strategy and the worst strategy
$10,000-$280,000	60%-100%	6%-14%	6%-14%
$290,000-$660,00	30%-50%	2%-6%	3%-6%
$670,000-$4,110,00	10%-20%	0%-2%	2%-3%
$4,120,000-$20,000,000	0%	-	2%-3%

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The New World of Debt versus Equity Financing: Time for an Update in Advising Clients

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Table 8: Optimal strategies 2018, 50% interest non-deductible

Corporate Income	Optimal % Interest	% Difference between the optimal strategy and the 0% interest strategy	% Difference between the optimal strategy and the worst strategy
$10,000-$40,000	20%-80%	0%-1%	1%
$50,000-$110,00	0%	-	1%-3%
$120,000-$250,000	60%-80%	0%-1%	1%-3%
$260,000-$20,000,000	0%	-	4%-15%

Table 9: Optimal strategies 2018, 100% interest non-deductible

Corporate Income	Optimal % Interest	% Difference between the optimal strategy and the 0% interest strategy	% Difference between the optimal strategy and the worst strategy
$10,000-$20,000,000	0%	-	9%-27%

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[1] America's Debt Wish, Perverse Unintended Consequences – How the Tax Code is Damaging the US Economy", Harry Z. Davis and Abraham N. Fried, Journal of the CPA Practitioner, June / July 2011, p. 9–10.

[2]. When 50% of the interest is non-deductible, the firm cannot pay 90% or 100% interest, since the interest payments plus the tax payments exceed the income, so we eliminated those two strategies. When 100% of the interest is non-deductible, the firm cannot pay even 80%, so we also eliminated that strategy.

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Sellers with No Physical Presence Can Now Be Required to Collect State Sales and Use Taxes

On June 21,2018, the United States Supreme Court, in *South Dakota vs. Wayfair,* overturned the fifty-year-old physical presence nexus standard required for states to impose a sales/use tax collection responsibility on remote sellers. Specifically, the Court overruled its earlier *Quill* and *National Bella Hess* decisions, which had held that remote sellers could not be compelled to collect sales and use taxes in states where they did not have physical presence. In a 5-4 decision, the Court, in *Wayfair*, held that the physical presence standard established in its earlier decisions was incorrect. Accordingly, states are no longer prohibited from requiring remote sellers from collecting sales/use taxes simply because they lack physical presence, but they are still prohibited from imposing a sales/use tax collection responsibility on remote sellers that lack substantial nexus as required by the Court's 1977 *Complete Auto Transit* Decision. In *Wayfair*, the Court did not define what that new nexus standard is aside from clarifying that it no longer requires physical presence and noting provisions in South Dakota's laws that appear to meet that standard. Specifically, the Court noted that South Dakota's laws contain the following provisions:

- Remote vendors with no physical presence are only required to collect South Dakota sales/use tax if their sales in the State exceed $100,000 or constitute 200 or more separate transactions. Thus, remote sellers with insufficient "economic" nexus are not required to comply.
- South Dakota's laws at issue do not apply retroactively.
- South Dakota has adopted the Streamlined Sales and Use Tax Agreement to standardize and reduce compliance costs.
- South Dakota's laws will not be implemented until all remaining Commerce Clause claims have been addressed.

The Court's decision in *Wayfair* seems to validate South Dakota's law though the case has been remanded to the South Dakota Supreme Court to address remaining questions. The Wayfair decision also potentially validates sales/use tax economic nexus laws in other states particularly those that have already modeled their laws after those of South Dakota. Some states have broadly worded nexus statutes that require sales/use tax collection to the extent constitutionally permissible. Such states may be able to implement and enforce South Dakota type economic nexus standards without needing to change any of their statutes. Many states will require changes to their statutes to take advantage of the *Wayfair* ruling.

Some states either have or may in the future enact sales/use tax economic nexus laws that are less restrictive than those of South Dakota. Such laws are still potentially subject to constitutional challenge, but it remains unclear what the actual standards are. For example, more than $100,000 in sales is sufficient but $50,000 in sales may also be. South Dakota had adopted the Streamlined Sales and Use Tax Agreement, but it is not clear that the decision would have been different if it had not.

It is still too early to tell how individual states will specifically react to the *Wayfair* ruling. Some have issued statements indicating that are aware of the decision and are studying the implications. However, remote sellers should anticipate a substantial increase in the number of jurisdictions that can legally require them to collect sales/use tax.

As has been the situation since *Quill*, Congress has the authority to act to a set a clear sales/use tax nexus standard. It could fully reverse *Wayfair* and definitively re-establish the physical presence standard. It could also establish clear economic nexus thresholds and/or definitively impose simplification requirements on states that wish to impose sales/use tax responsibilities on remote sellers. Numerous Congressional proposals have been presented in recent years, but none have been enacted into law. It is unclear whether and to what extent the *Wayfair* decision will motivate Congress into action.

With the United States Supreme Court having overturned the physical presence standard, taxpayers should review the potential impact on their sales/use tax compliance process. Specifically, remote sellers that have relied on lack of physical presence as their defense against sales/use tax collection will need to re-evaluate their sales/use tax compliance responsibilities as well as their readiness to meet any resulting increase in compliance burden.

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Sellers with No Physical Presence Can Now Be Required to Collect State Sales and Use Taxes

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The following are a few questions taxpayers should ask with respect to states in which they are not currently collecting sales/use tax:

- How should the states be prioritized?
  While there could be a technical compliance requirement in every state, priority should be given to states with the highest potential exposure.

- Does the state have an enacted statute that requires remote sellers lacking physical presence to collect sales tax?
  What is the state's nexus standard (e.g., minimum sales or transaction threshold) and does the taxpayer meet that standard?
  Is the enacted statute now effective? If not, what is required for it to be effective and what is the anticipated effective date?
  Is the enacted statute retroactive?
  How does the state's nexus statute compare to that of South Dakota? Does the state's statute offer substantially less to protect against unreasonably burdening remote sellers? If a state statute is potentially unconstitutional, does it make business sense to still comply?

- For each additional jurisdiction, what will the policy be for collecting sales/use tax on specific products and services?
  What products and services are subject to sales/use tax and how are they defined?
  What exemptions and/or exclusions exist and what is required to substantiate them?
  What policy will be adopted when the taxability of a product or service is unclear and what is needed to justify corresponding taxability decisions to taxing authorities and to customers?
  What process/system is needed to ensure that state and local sales/use taxes are consistently collected at the correct rates?

- How will additional compliance requirements be met?
  What additional sales/use tax systems and resources are needed?
  Does it make sense to outsource the sales/use tax function?
  What IT changes will be needed to meet any additional data collection requirements and to integrate current IT systems with the needs of sales/use tax systems and/or outside sales/use tax providers?

While it remains unclear when states will, based on the *Wayfair* decision, begin enforcing laws requiring remote vendors lacking physical presence to collect sales/use tax, we recommend that taxpayers begin now to determine the likely future impact on their sales/use tax collection requirements and begin putting systems and processes in place to address them.

by Michael Goldfine, CPA and David Olivier

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Cash Balance Defined Benefit Plans

Professionals of highly profitable business are generally looking for larger tax deductions and accelerated retirement savings with minimal costs for employees, so a Cash Balance Plan working in coordination with an already established 401 (k) Profit Sharing Plan may be the perfect solution for your practice. Current tax legislation is encouraging many professionals to adopt this type of plan arrangement as part of their pension programs.

A Cash Balance Plan is a “tax qualified” retirement plan, similar to a 401(k) Profit Sharing Plan in that it allows for tax deductible contributions and deferral of taxes, as well as creditor protection under Employee Retirement Income Security Act (ERISA).

While assets of a Cash Balance Plan are invested in a single pooled investment account, each participant has an account, similar to a 401(k) Profit Sharing Plan, that is record kept by the plan actuary, who generates annual participant statements, so that employees know what they have accumulated in the plan.

Participants’ account balances in a Cash Balance Plan grow annually in two ways:

1. The employer’s contribution, which is a percentage of compensation or a flat dollar amount based on a formula specified in the plan document, and;
2. An annual interest credit, which is a guaranteed rate of return, independent of the plan's investment performance. The guaranteed rate varies each year but is generally equal to the yield on 30-year Treasury bonds, which has hovered close to 5% in recent years.

Advantages of Cash Balance Defined Benefit Plans

- The opportunity for larger tax-deductible contributions for partners than permitted by 401(k) Profit Sharing Plans.
- As an enhancement to an existing pension program, it attracts competent employees and serves to increase retention.

Contributions required for Cash Balance Defined Benefit Plans are generally less volatile from year to year and allow lower costs for employees than Traditional Defined Benefit Plans.

- Tiered levels of benefits are attractive to partnerships who desire different levels of contributions for partners and employees.
- Many employees seem to understand the account balance concept and appreciate the value of an account balance more than the value of the promise of an annuity payable in the future.
- Cash Balance Plan assets are portable on termination of employment in that vested balances can be paid as lump-sum distributions, which can be rolled over to an IRA or another qualified retirement plan. When a participant terminates employment, they are eligible to receive the vested portion of their account balance. The vesting schedule required for Cash Balance Plans is a so called 3 year “cliff” vesting schedule whereby accounts are not vested for the first two years of service but are fully vested after 3 years of completed service.

Good Candidates for Adopting a Cash Balance Plan

Professionals who desire to contribute more than $50,000 annually to their retirement accounts.

Many professionals neglect their personal retirement savings while they are building their practice and often have a need to catch up on years of retirement savings. Adding a Cash Balance Plan allows rapidly accelerated savings with pre-tax contributions that can range from $100,000 to $220,000, depending on the demographic mix of eligible participants.

Business already contributing 3-4% of compensation to employees and willing to contribute more.

While Cash Balance plans are often established to primarily benefit key members of the practice or other highly compensated employees, the plan normally requires a minimum contribution of between 7% and 9% of compensation pay for staff in the Cash Balance plan or a separate Profit Sharing 401(k) plan.

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Cash Balance Defined Benefit Plans

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Business practice which has demonstrated consistent profit patterns.

Because a Cash Balance Plan is a pension plan with required annual contributions, a consistent cash flow and profit is important to its continuation.

Professionals over 40 years of age who desire to "catch up" or accelerate their pension savings.

Contributions allowed for partners and required for employees in Cash Balance plans are dependent on the demographic mix of eligible employees and work best with the majority of eligible employees being relatively younger than owners. Therefore, older owners generally accelerate their retirement savings faster.

Other Considerations

- Profit Sharing Plans on their own allow flexibility for contributions to vary from year to year depending on profitability, but Cash Balance Plans require amendment in order to accommodate the need for different levels of contributions. There is a restriction on the frequency of amendments unless a valid economic reason exists.

- If profits are not expected to support its Cash Balance Plan contribution, then the plan can be amended to accommodate either a lower level of contribution or no contribution at all.

- Any amendment reducing or freezing contributions must be adopted 30 days before employees complete 1,000 hours. Amendments for increases to contributions must be adopted within two and a half months following the end of a plan year.

- Qualified plans' assets are protected from creditors in the event of bankruptcy. The anti- alienation provision of ERISA states that "each pension plan shall provide that benefits provided under the plan may not be assigned or alienated", which means that the assets in a qualified plan are not available to creditors. Since professionals and business owners often consider asset protection a premium, it is very advantageous to accrue retirement savings in an asset-protected vehicle, like a qualified plan. These plans provide a means for business owners and partners to move assets from their businesses to a pension plan. Once in the qualified plan, these assets are then protected from creditors as a "nest egg" for retirement or to pass on to heirs.

Cash Balance Defined Benefit Plans can enhance the effectiveness of the company's retirement program, but they must be designed thoughtfully and managed professionally using state of the art technology and processes, effective communication and education for your employees.

Consultative guidance by professionals such as enrolled actuaries, certified pension and employee benefit consultants are essential to help you get the most out of the Cash Balance Defined Benefit Plan as part of your retirement program.

by Robin S. Weingast

Robin S. Weingast is president of Robin S. Weingast and Associates, Inc., an employee benefit consulting firm established in 1982, comprised of an association of pension attorneys, enrolled actuaries, certified pension consultants and qualified plan administrators. She is an associate of the ASPPA College of Pension Actuaries (ACOPA), formerly known as the American Society of Pension Professionals and Actuaries (ASPPA), while maintaining esteemed membership in several organizations such as the National and Women's Life Underwriters (NALU and WLUC), Top of the Table, and the International Association of Financial Planners (IAFP).

Tax Filing for Illegal Immigrants – Why and How

Illegal immigrants in the U.S. may be required to file a federal tax return. Even more oddly, they may *want* to file a federal tax return. This fact often surprises people, but for various reasons, many illegal immigrants will find that they can benefit from filing a U.S. tax return. They are often hesitant to do so because they are frightened that their presence in the U.S. will be discovered by immigration authorities and because they are intimidated by the complex forms and procedures. This article addresses the various benefits to filing, the legal protections which help guard against presence detection, and technical issues involved with filing correctly.

An illegal immigrant may find it necessary or desirable to file a return, whether or not the person is legally required to file. For example, if an illegal alien ever goes before an immigration court a history of filing tax returns will help the person's case (Blanco, 2017). Also, if a child is born in the U.S. and has two illegal immigrant parents or has only one living or known parent, and that parent is an illegal immigrant, the child may need the parent(s) to provide tax returns filed for prior years in order to complete a FAFSA or other financial aid application (Federal Student Aid, 2017). Finally, if a person had taxes withheld from wages during the year a return must be filed if the person wishes to claim any refund due from those taxes.

There is a common misconception that illegal aliens are never required to file tax returns because they are not citizens or not legally residing in the U.S.. However, Internal Revenue Code Section 6012 requires "[every individual having. . . gross income which equals or exceeds the exemption amount" to file a tax return. This requirement applies to worldwide income for U.S. citizens and U.S. resident aliens. It also applies to most U.S. source income of nonresident aliens. The taxability of income of a U.S. national who is not also a U.S. citizen will depend on the national's status as a resident alien or nonresident alien. There are some exceptions to these rules, but all exceptions in the tax code are income-based and not related to citizenship or legal status in the U.S.. Other exceptions may be provided for in specific tax treaties. A list of these treaties and a summary of their benefits may be found in I.R.S. Publication 901, "U.S. Tax Treaties."

Another common misconception is that filing a tax return with the I.R.S. will trigger an investigation by immigration authorities, since all agencies involved are U.S. government agencies. However, I.R.C. §6103 generally prohibits disclosure of taxpayer information, even to other federal agencies. Exceptions apply in limited cases: state agencies responsible for tax administration may request federal tax information (I.R.C. §6103(d), n.d.); law enforcement agencies may obtain information via court order for investigation and prosecution of non-tax criminal laws (I.R.C. §6103(i), n.d.); the I.R.S. may voluntarily disclose limited information to third parties if necessary to allow the I.R.S. to obtain information that is not otherwise reasonably available (I.R.C. §6103(k)(6), n.d.); and information may be disclosed to the Social Security Administration for the limited purpose of allowing it to perform its lawful functions related to Social Security tax, FICA tax, self-employment tax, and tax withholding (§6103(l), n.d.).

When an illegal alien decides to file a tax return, the first step is applying for an Individual Taxpayer Identification Number ("ITIN") by filing I.R.S. Form W-7. The I.R.S. issues ITIN numbers to individuals to use as identifying numbers when filing taxes. The numbers are only issued to individuals who are not eligible to apply for a Social Security number, which would include illegal aliens. A person does not have to be lawfully present in the U.S. to receive an ITIN.

Once the ITIN is received, it is important to determine the proper tax form to file. To do this, a person must determine whether he/she is a "resident alien" or "nonresident alien" for tax purposes. This status is not linked to a person's designation as "lawfully present" or "not lawfully present" in the country, rather, the primary determinate of this status is the length of time the person has been living in the United States. The main reason it is important to make this distinction is because resident aliens will file a Form 1040, Form 1040A, or Form 1040EZ; nonresident aliens will file a Form 1040NR or Form 1040NREZ. Each form is different and some deductions and credits are not available to filers of "NR" type returns. Also, the status will determine which sources of a person's income are subject to U.S. tax.

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Tax Filing for Illegal Immigrants – Why and How

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Generally, a person will be considered a U.S. resident for tax purposes if he/she meets the substantial presence test for the calendar year. Per I.R.C. §7701(b)(3), to meet this test, the person must be physically present in the United States for at least: (1) 31 days during the calendar year, and (2) 183 days during the 3-year period that includes the current tax year and the two immediately preceding tax years. However, note that in criteria 2, this is not a straight-forward count of days; the days a person was present in the U.S. are prorated for the two prior years. The days present in the year immediately preceding the current one must be multiplied by 1/3, and the days present for the second year prior to the current year must be multiplied by 1/6. When calculating the days of presence, the number of days is rounded down to the nearest number and only whole days are counted.

Certain days cannot be included in the count at all, such as days when a person was in transit to or from the U.S. or the days a person was in the U.S. on visitor or exempt status. A complete list of these rules and types of days which do not qualify for the substantial presence test are found in I.R.S. Publication 519 (2017).

An example of the substantial presence test calculation follows: assume a person was physically present in the U.S. on the following days: the current year (“Year 20X3”) 120 days, the year immediately preceding the current one (“Year 20X2”) 365 days, and the second year prior to the current year (“Year 20X1”) 180 days. The person would be deemed to have been present for only 271 days, not the actual total of 665. The calculation is as follows: Year 20X3 120 days x 100% = 120 days; Year 20X2 365 days x 1/3 = 121 days; Year 20X1 180 days x 1/6 = 30 days; 120 days + 121 days + 30 days= 271 days.

If a person does not meet the substantial presence test but still wishes to be treated as a U.S. resident for the current year, an alternative “First Year” test is provided in I.R.C. §7701(b)(4). To qualify under this exception all of the following must be true: (1) the person is not considered a U.S. resident for the current year or for the immediately preceding year; (2) the person meets the Substantial Presence Test in the year immediately following the current year (see the preceding paragraphs); (3) the person is present in the U.S. at least 31 consecutive days in the current year; (4) the person is present in the U.S. for at least 75% of the “testing period”, which begins on the first day of the 31-consecutive-day period (mentioned in list item 3) and ends on the last day of the current year, though five days during this period are allowed for absence and not counted against a person in the calculation of the 75% requirement. If all of the criteria are met, the person will be considered a resident for the part of the year that the person was in the country.

Even if a person meets the substantial presence test or the alternative “First Year” test, he/she can still be treated as a nonresident alien if the person meets all of the following criteria: (1) the person is present in the United States for less than 183 days during the calendar year, (2) the person maintains a tax home in a foreign country during the year, and; (3) has a closer connection during the year to one foreign country in which the person maintains a tax home than to the United States. As with most tax rules, this exception has its own exceptions, and should be reviewed by anyone in this situation.

Residency status will impact the tax form filed, types of income subject to tax, filing statuses, and whether or not certain deductions and credits are available. If a person is considered to be a nonresident alien, he/she will file a version of a 1040NR return. In this case, filing status choices are generally limited to a form of “single”, “married”, or “qualifying widow(er)”, and the rules for choosing the status are simple. The nonresident is subject to tax only on some U.S. source income, but will be ineligible to claim some deductions and credits available to resident aliens.

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Tax Filing for Illegal Immigrants – Why and How

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If a person is filing as a resident alien, the person will use a version of the regular form 1040. The person may choose any filing status available to U.S. citizens: "single", "married filing jointly", "married filing separately", "head of household", and "qualifying widow(er)". However, there is a special exception. If a person who has been a resident alien for the entire year is married to a nonresident alien, the filing status of "married filing jointly" is not available unless the couple elects to have the nonresident alien treated as a resident alien (Internal Revenue Code 6013, n.d.). Since nonresident aliens are subject to U.S. tax on only certain forms of income earned inside the U.S., whereas resident aliens are subject to tax on their worldwide income, it is important to determine whether or not the nonresident alien spouse has income outside of the U.S., and if he/she does, if the benefits of filing as a resident alien outweigh any tax that would be assessed. Using a "married filing jointly" status allows a couple to claim the maximum standard deduction and increases the amount of money that the taxpayer is allowed to make before the Child Tax Credit and Additional Child Tax Credit begin to phase out, thus maximizing the tax benefit. However, if the nonresident alien spouse has income that the couple does not want to subject to U.S. tax, then the resident alien must file a tax return and claim "head of household" status. This will result in a lower standard deduction and lower threshold for phase out of some credits.

Once residency status is determines, the majority of the hard work is done and completion of the return is only a matter or reporting income and using the forms to calculate tax. It can be complex to synthesize all of the data to determine which classification applies to a person, which form to file, which filing status is most advantageous, and how to begin the entire process. By careful study and application, a qualified tax practitioner can help settle the confusion and lead the client's tax return process to a successful conclusion.

by Dr. Tiffany Cossey, CPA, JD, LLM, Breech School of Business, Drury University.
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Chapter Update from Lynne Marcus, CPA — President, Florida Chapter

On November 8, we had an all-day event in cooperation with the South Florida Chapter of the Association. At The Fraud Conference, each organization had a speaker for a two hour presentation, and the Internal Revenue Service also had presentations from CID, TIGTA, Appeals, and Stakeholder Liaison. The conference was a great success and we thank all involved.

Chapter Update from Mark A. Stewart Jr., CPA — President, Westchester Rockland,

We have commenced our special three-part tax series, which began on October 18th, continued on November 28th, and will end on December 5th.

The Business Tax Update on October 18th was very informative and we thank our speakers for great presentations. We had as high an attendance for this event as we have had in many years. The board was thrilled to see so many new faces there.

November 28th was the Tri-State Tax Update. All our favorites returned to us from past years including Alan Preis, Lou Schatz, Tim Noonan and Jennifer White. The Tri-State is vitally important this year as the taxing agencies in the tri-state are coming up with all sorts of new rules to combat and adjust to federal tax law changes and the Wayfair decision.

Finally, December 5th was the Individual Tax Reform update, covering all aspects of tax reform on individuals. As mentioned in previous newsletter updates, Rex Logemann has retired from speaking nationally and is being replaced by Mark Merric. Mr. Merric is a national recognized speaker and did a wonderful job in continuing the superb presentations that AES puts on for our chapter each year.

WELCOME NEW MEMBERS

Martha A Berghahn, CPA Sparta, NJ
Ashley H. Ensley, CPA Forth Worth, TX
Jack B. Goldhaber, CPA Forest Hills, NY
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Richard J. Stoller, CPA Plainview, NY
Denisa Tova Syosset, NY
Warren Vandewater Jr., CPA North Bellmore, NY
Lori Wilson, CPA Huntington, NY

Thank you to all our new members and thank you to all members who renewed their dues. We appreciate your support and commitment to NCCPAP.

Spread the news to your friends and colleagues—Our 40th Anniversary Special for new members in 2018 is $125 for the first year. Call the National office at (516) 333-8282 to become a member at this special rate.

2019 WINTER CONFERENCE

Monday-Wednesday, January 7, 8, & 9, 2019
Embassy Suites by Hilton Fort Myers-Estero
10450 Corkscrew Commons Drive
Estero, FL 33928

Register for the conference and make sure not to miss our two CPE seminars on Monday, January 7.

Our featured speakers are:
Renee Rampulla, CPA, CGMA, 2 CPE A&A
and
Sanford Zinman, CPA, 2 CPE Tax

Upcoming National Meetings

May 8, 9, & 10, 2019 Washington, DC. Our Capitol Hill meeting where we present our Congressional and IRS Agendas.

August 2019 Summer Conference in Houston, Texas

October 23, 24, & 25, 2019 NCCPAP's 40th Anniversary and Fall Conference in Woodbury, NY

National Conference of CPA Practitioners, Inc.

22 Jericho Turnpike, Suite 110,
Mineola, New York 11501

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Board members taking the oath of office.

from left to right, David Rothfeld, Scott Cheslowitz, Barry Zalk, Mark A. Stewart, Jr., Stuart Lang, Lynne Marcus, Mary Duff, William Oricchio, and Kenneth Hauptman