IRS issues proposed regs. on 100% bonus depreciation

TCJA changes also include that eligible property does not have to be new.

The IRS issued proposed regulations providing guidance on Sec. 168(k), which was amended by P.L. 115-97, known as the Tax Cuts and Jobs Act (TCJA), to increase the allowable first-year depreciation deduction for qualified property from 50% to 100%.

The TCJA extended and modified bonus depreciation, allowing businesses to immediately deduct 100% of the cost of eligible property in the year it is placed in service, through 2022. The amount of allowable bonus depreciation is then phased down over four years: 80% will be allowed for property placed in service in 2023, 60% in 2024, 40% in 2025, and 20% in 2026. (For certain property with long production periods, the above dates will be pushed out a year.)

The TCJA also removed the rule that made bonus depreciation available only for new property and extended the period in which certain other property (including plants and films, television, and live theatrical productions) will qualify for 100% depreciation. These new rules generally apply retroactively to property acquired or placed in service after Sept. 27, 2017.

The proposed regulations describe and clarify the statutory requirements that must be met for depreciable property to qualify for the additional first-year depreciation deduction provided by Sec. 168(k). Further, the proposed regulations instruct taxpayers how to determine the additional first-year depreciation deduction and the amount of depreciation otherwise allowable for this property. Because the TCJA substantially amended Sec. 168(k), the proposed regulations update existing regulations in Regs. Sec. 1.168(k)-1 by providing a new section at Prop. Regs. Sec. 1.168(k)-2 for property acquired and placed in service after Sept. 27, 2017, and make conforming amendments to the existing regulations.

Following amended Sec. 168(k)(2), the proposed regulations provide that depreciable property must meet four requirements to be qualified property:

- The depreciable property must be of a specified type;
- The original use of the depreciable property must commence with the taxpayer, or used depreciable property must meet the acquisition requirements of Sec. 168(k)(2)(E)(ii);
- The depreciable property must be placed in service by the taxpayer within a specified time or must be planted or grafted by the taxpayer before a specified date; and
- The depreciable property must be acquired by the taxpayer after Sept. 27, 2017.

Although the IRS said the regulations would apply to qualified property placed in service (or planted or grafted) during or after the taxpayer's tax year that includes the date the regulations are published as final in the *Federal Register*, it also is allowing taxpayers to rely on the proposed rules for property placed in service or planted or grafted after Sept. 27, 2017, by the taxpayer during tax years ending on or after Sept. 28, 2017.

- REG-104397-18

— By Sally P. Schreiber, J.D., a JofA *senior editor.*

Schoolteacher's failure to file FBAR results in $800,000 penalty

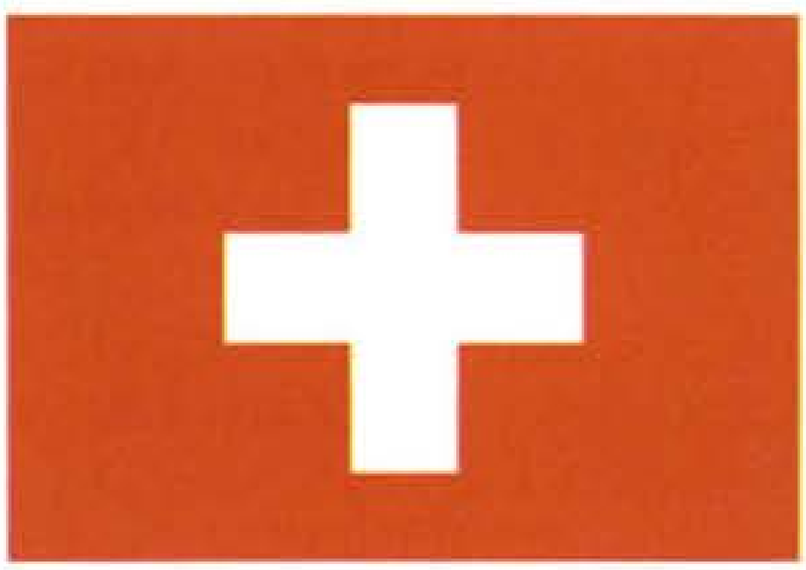
The Court of Federal Claims holds that actions and failure to inquire into reporting requirements for a foreign account by a taxpayer who had made a 'quiet disclosure' showed willfulness.

The Court of Federal Claims ruled that a taxpayer's failure to file FinCEN Form 114, *Report of Foreign Bank and Financial Accounts* (FBAR), was willful, as she concealed her income and avoided learning of her reporting requirements, and her actions reached the standard for reckless disregard for the law. Also, it held that the penalty of one-half of the balance of her unreported financial account was properly assessed.

Facts: In 1999, Mindy Norman, a schoolteacher, signed documents to open a numbered bank account, which concealed her income and financial information, with Union Bank Switzerland (UBS). In 2000, she further concealed her financial information from U.S. authorities by signing to waive her right to invest in U.S. securities.

In 2008, Norman transferred her funds from UBS after being informed it would no longer provide offshore banking and would assist the U.S. government in identifying U.S. clients who may have engaged in tax fraud.

In addition to concealing her financial information, Norman did not



TOP: IMAGE BY ELIZAVETA MUKHINA/ISTOCK; BOTTOM: IMAGE BY MEHMETBUMA/ISTOCK attempt to find out her reporting requirements.

Norman claimed on her 2007 tax return not to have a foreign account. In 2009, rather than apply to the Offshore Voluntary Disclosure Program, which provided for a reduction in FBAR penalties, Norman filed a "quiet disclosure" through her Swiss accountant by filing amended tax returns and FBARs for the years 2003–2008 without notifying the IRS or admitting violating 31 U.S.C. Section 5314.

In 2013, the IRS assessed an $803,530 penalty for a willful failure to file an FBAR in connection to the Swiss bank account she had in 2007, which was 50% of the unreported balance in her account. Norman paid the penalty and sued for a refund.

Issues: Pursuant to 31 U.S.C. Section 5314(b), a U.S. citizen with an interest in or control over one or more foreign financial accounts with an aggregate value above $10,000 at any time during a calendar year generally is required to file an FBAR on or before April 15 (June 30 in 2007) of the following year. Under 31 U.S.C. Section 5321(a)(5)(A), the IRS may assess an inflation-adjusted "civil money penalty on any person who violates ... any provision of section 5314," which currently generally may not exceed $12,459 ($10,000 in 2007) per nonwillful violation. Under 31 U.S.C. Sections 5321(a)(5)(C) and 5321(a)(5)(D)(ii), the maximum inflation-adjusted penalty for each willful violation involving a failure to report the existence of an account is the greater of $124,588 ($100,000 in 2007), or 50% of the balance in the account at the time of the violation.

A person who knowingly or recklessly fails to file an FBAR willfully violates 31 U.S.C. Section 5314. A willful violation may be proved by inference from action intended to conceal sources of income and financial information and from a conscious effort to avoid learning about reporting requirements (*Sturman*, 951 F.2d 1466 (6th Cir. 1991)).

The issues decided were whether Norman willfully violated 31 U.S.C. Section 5314 by knowingly or recklessly failing to file an FBAR in 2007 and if the penalty assessed was appropriate.

Holding: The court held that Norman willfully violated 31 U.S.C. Section 5314, as she "acted to conceal her income and financial information, and also that she either recklessly or consciously avoided learning of her reporting requirements." It did not find Norman's testimony credible and rejected her claim that she did not know of her duty to report her foreign income until 2009 and did not willfully fail to file an FBAR. It held that when she signed her 2007 tax return, she was "put on inquiry notice of the FBAR requirement" but did not seek more information. The court stated that "simply not reading the return does not shield Ms. Norman from the implications of its contents." It ruled that her:

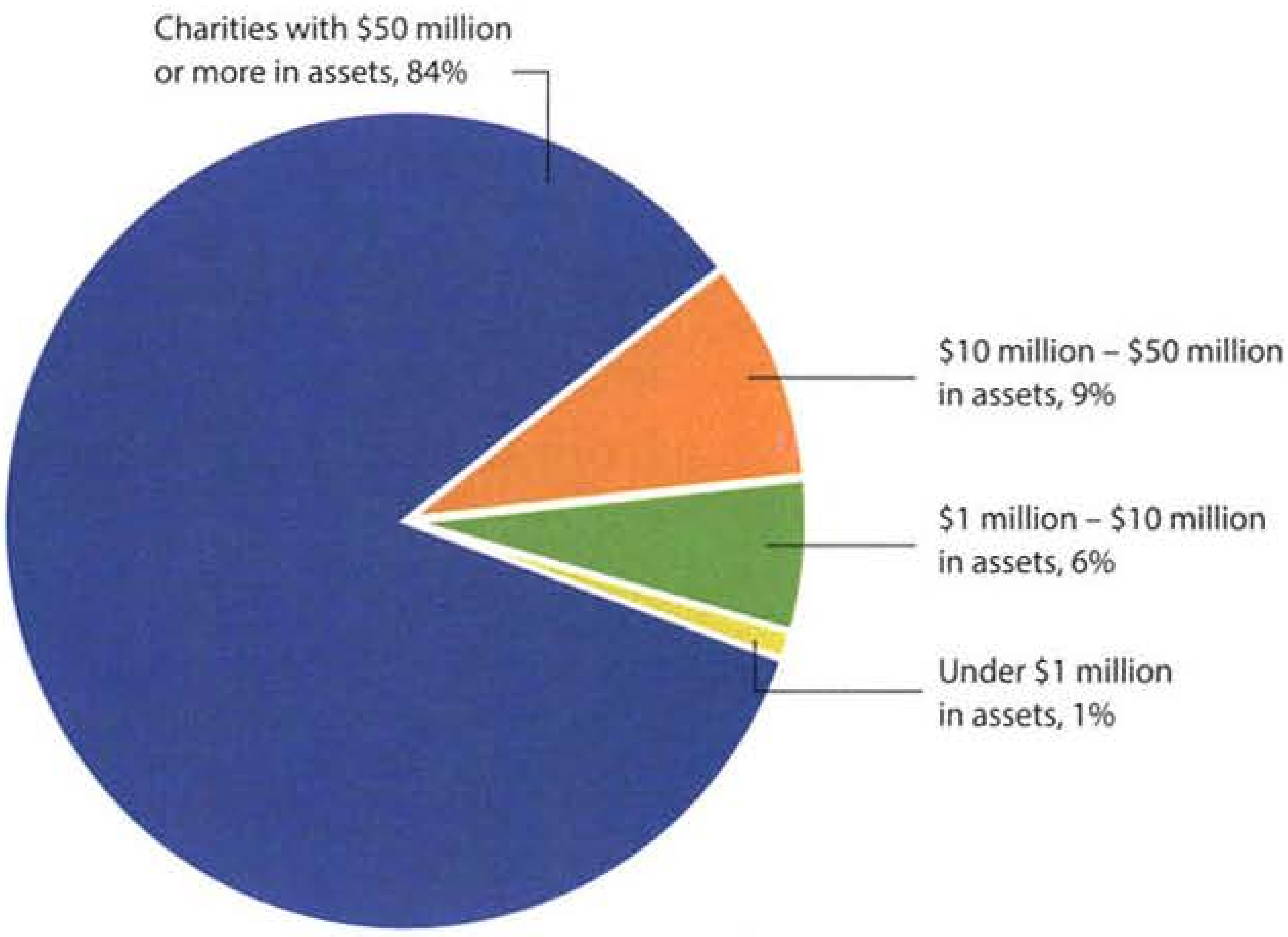
> repeated and admitted lack of care in (1) filing inaccurate official tax documents without any review, (2) signing foreign banking documents without any review, and (3) later providing false sworn statements both to the IRS and to this Court, both with and without review, reaches the standard of reckless disregard for the law required to constitute a willful violation of § 5314.

The court rejected Norman's post-trial argument relying on a recent district court case, *Colliot*, No. AU-16-CA-01281-SS (W.D. Tex. 8/16/18), that a regulation adopted before an amendment to 31 U.S.C. Section 5321 in 2004 capped the maximum penalty at $100,000. The Court of Federal Claims held that Congress clearly ▶

Largest charities hold lion's share of assets

Shares of nearly $3.8 trillion in assets held by Sec. 501(c)(3) organizations, by asset size of organization, for tax year 2015. The 7,613 charities each having at least $50 million in assets held 84% of all assets; the 116,878 charities with under $1 million in assets held just 1%.

Excludes private foundations, most churches and other religious organizations, and most organizations with less than $50,000 in receipts.



Source: IRS Tax Statistics, Form 990 Returns of 501(c)(3) Organizations.

raised the maximum penalty when it amended 31 U.S.C. Section 5321, which rendered the regulation invalid. Thus, the penalty assessed under 31 U.S.C. Section 5321 in the amount of 50% of her account's balance was appropriate, the court held.

■ *Norman*, No. 15-872T (Fed. Cl. 7/31/18)

— By Mark Aquilio, CPA, J.D., LL.M., professor of accounting and taxation, St. John's University, Queens, N.Y.

Tax Court grants innocent spouse relief from taxes on embezzled funds

The taxpayer's subsequent knowledge of the embezzlement prevents relief for a second tax year.

The Tax Court granted innocent spouse relief from tax liabilities for one year for which evidence showed a husband was unaware of his wife's embezzlement of funds omitted from income reported on their return. The court denied relief, however, for the following year, during which the wife was convicted of the embezzlement.

Facts: The taxpayer, Rick E. Jacobsen, an employee and home inspection business owner with no formal business education, relied on his wife, Tina Lemmens, an accountant for a local blood bank, to manage the family's personal finances as well as those of his

home inspection business, because of her training as an accountant. Jacobsen also received veteran's disability benefits and suffered from post-traumatic stress disorder.

In June 2011, Lemmens was arrested for embezzling approximately $485,000 from her employer over several years, including 2010 and 2011, the tax years in issue. Before her arrest, Jacobsen never reviewed the couple's bank or credit card statements. Jacobsen did not become aware of the embezzlement until Lemmens's arrest. She was convicted in November 2011 and sentenced in January 2012. The couple divorced in 2015.

For the 2010 tax year, Jacobsen gave Lemmens his tax information, and she hired a paid preparer. Jacobsen never saw the return, which was filed before Lemmens's arrest. For 2011, Jacobsen himself provided the couple's tax information to the same preparer.

The IRS examined the returns after the embezzlement trial. For both years, the embezzlement income accounted for some of the adjustments. Representing himself before the Tax Court, Jacobsen requested relief for the taxes from the income from the embezzlement only and associated accuracy-related penalties for 2010 and 2011.

Issues: Sec. 6013(d)(3) provides that each spouse is jointly and severally liable for tax on a joint return.

A requesting spouse may be entitled to relief from joint and several liability under Sec. 6015 if certain conditions are met. A requesting spouse may be relieved of liability from an understatement of tax attributable to the other spouse under Sec. 6015(b). Under Sec. 6015(c), a requesting spouse may have his or her liability for a deficiency limited to the portion of the deficiency allocated to him or her. Sec. 6015(f) allows relief if it would be inequitable to hold the requesting spouse liable.

More specifically, Sec. 6015(b)(1) provides innocent spouse relief if all of the following conditions are met: (1) A joint return was filed for the year in issue; (2) the return contains an

IMAGE BY NATALIIA OMELCHENKO/ISTOCK