Premium Tax Credit: Emerging Issues

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I. Introduction

The Premium Tax Credit became available for the first time in calendar year 2014. Nearly a year and a half later, approximately 160 petitions involving the Premium Tax Credit have been filed in the Tax Court. As of April 27, none of the cases had been set for trial.[1] The Tax Court may not address any substantive Premium Tax Credit issues for another year or longer. Nevertheless, taxpayers, tax preparers, and health care assisters are seeking legal guidance now. Advocates are seeking strategies to address problems with this new system of subsidizing and providing health insurance. This outline identifies possible issues that may be raised in future deficiency litigation involving the Premium Tax Credit.

II. Background

Section 36B makes an advanceable and refundable credit available to eligible taxpayers to offset the cost of individual market health insurance obtained through the ACA's affordable insurance exchanges.[2] The Premium Tax Credit (PTC) amount is based on the difference between a benchmark premium and a taxpayer's expected contribution amount.[3] The taxpayer's expected contribution varies by income, so that lower-income households receive a much higher PTC.[4]

Advance payments of the PTC (APTC) are available through exchanges when a taxpayer enrolls in health insurance. An APTC determination made by the exchange is only an estimate of PTC eligibility. The taxpayer's final PTC amount is claimed on a federal income tax return and allowed or disallowed by the Service like any other income tax credit. Anyone who receives APTC must file a tax return to reconcile the advance payments with the PTC actually due to the taxpayer.[5] Excess advance payments are treated as additional income tax liability.[6] PTC not taken in advance could also be refunded and then subsequently disallowed.

The Service's determinations related to PTC eligibility are subject to the same deficiency procedures available to other refundable income tax credits under section 6211(b)(4). When a notice of

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[1] Phone conversation with Linda E. Mosakowski, SB Assistant Division Counsel (Pre-filing), IRS Office of Chief Counsel.

[2] Exchanges are also known as Marketplaces. An exchange may take several different forms. In 2016 there are 13 State-based Exchanges; 4 Federally-supported Exchanges; 7 State-Partnership Exchanges; and 27 Federally-facilitated Exchanges. *See*, *State Health Insurance Marketplace Types*, Kaiser Family Foundation, at kff.org/health-reform/state-indicator/state-health-insurance-marketplace-types/.

[3] I.R.C. 36B(b)(2); Treas. Reg. § 1.36B-3.

[4] I.R.C. 36B(b)(3)(A); Treas. Reg. § 1.36B-3(g)(2).

[5] Treas. Reg. § 1.36B-4.

[6] Section 36B(f)(2); Treas. Reg. § 1.36B-4(a)(1)(i).

deficiency is timely appealed, the Tax Court has jurisdiction to determine the proper Premium Tax Credit allowable under Section 36B.[7]

III. Common Taxpayer Complaints and Problems

For the past two tax seasons Vermont Legal Aid has advised individual taxpayers, tax preparers, and health care assisters on PTC issues.[8] Vermont has a state-based exchange, Vermont Health Connect (VHC). Most of Vermont Legal Aid's clients dealt with VHC but some had issues with the federal exchange or another state exchange. Based on our experience with about four hundred consultations on APTC reconciliation problems plus many more educational consultations, we know that many people are confused by the APTC reconciliation process, many have disputes with an exchange that affect their tax liability, and many are upset with the results of APTC reconciliation. Other problems affecting the PTC involve questions of marital status, filing status, and entitlement to dependency exemptions.

Taxpayer problems and complaints relating to reconciliation include:

- Errors in APTC determinations, particularly where too much APTC was paid
- Forms 1095-A showing APTC continuing after taxpayer requested termination
- Forms 1095-A showing APTC continuing for more than one month after taxpayer stopped paying
- Forms 1095-A showing that a reported change of income was not processed by the exchange, or was not processed correctly
- Errors in household composition requiring allocation of APTC among taxpayers
- Situations of perceived unfairness when unexpected income during the year requires repayment of all APTC without limitation
- Situations of perceived unfairness involving the obligation to reconcile APTC paid for dependents, regardless of the circumstances of their enrollment
- Situations of perceived unfairness relating to marital status or tax filing status
- Multiple or conflicting forms 1095-A
    - In one case, VHC's system generated 25 forms 1095-A for a taxpayer and her husband for their 2014 coverage

Taxpayers are particularly upset when an APTC overpayment or other problem occurs because of exchange error or because of error by a navigator or assister.[9] These situations are often quite sympathetic. Unfortunately, because of the Tax Court's limited jurisdiction taxpayers will likely find

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[7] I.R.C. §§ 6213(a); 6211(b)(4).

[8] Vermont Legal Aid's Office of the Health Care Advocate maintains a consumer helpline which received 4,695 calls in the last fiscal year. *See*, vtlegalaid.org/health-care-advocate-project. In addition, VLA's Low-Income Taxpayer Clinic provides advice and representation to low-income taxpayers and technical assistance to other service providers.

[9] "Assister" is a catchall term that encompasses navigators, certified application counselors, and others who assist consumers with exchange enrollment and related issues. *See*, Health Affairs, *Health Policy Brief: Navigators and Assisters* (Oct. 31, 2013), *available at* healthaffairs.org/healthpolicybriefs/brief.php?brief_id=101.

the Court unable to address these complaints unless they can be framed in terms of the correct PTC amount.[10]

IV. Household Size and Dependency Exemptions

a. Deficiency litigation involving dependency exemptions will affect any PTC claimed on the tax return.[11]

b. Premium Tax Credit (PTC) financial eligibility is based on the tax household's income compared to the federal poverty line (FPL) for that household size. The federal poverty line varies with the size of the household. A parent who releases or loses the dependency exemption will see an increase in her health insurance premiums if she has PTC-subsidized health insurance, because her household size will drop, causing her household income as a percent of the FPL to increase. Conversely, a parent who gains a dependency exemption will see a decrease in her health insurance premiums.

c. A taxpayer's relationship to the federal poverty line also affects her eligibility for cost-sharing subsidies.

d. <u>Example</u>: Julie, a 35-year-old single parent with one child, will earn $30,000 in 2015. Julie is not offered health insurance by her employer. (Figures are based on nationwide average QHP premiums for 2015; actual figures vary by zip code.)

The Dependency Exemption's Effect on a Single Parent's Health Care Costs		
	Julie claims her child	**Julie does not claim child**
Income as %FPL for PTC	191% FPL	257% FPL
Premium Tax Credit	$1,394	$675
Julie's share of monthly silver premium	$148	$208
Annual out of pocket limit	$2,250	$6,600
Actuarial value of silver plan	87%	70%

e. For affected taxpayers, the newfound importance of the dependency exemption may prompt Tax Court petitions in some cases that otherwise would have been dropped. For most low-income taxpayers, the dependency exemption is worth relatively little money on its own. Many taxpayers who mistakenly claim a qualifying child who is actually a qualifying relative will drop their case upon learning what they would need to prove to win a qualifying relative dependency exemption, and comparing it to the dollar amount that effort would shave off their tax bill.

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[10] The Tax Court is a court of limited jurisdiction. I.R.C. § 7442.

[11] The consequences of releasing a dependency exemption can be investigated using the Health Insurance Marketplace Calculator developed by the Henry J. Kaiser Family Foundation. *See* kff.org/interactive/subsidy-calculator/. The Kaiser Family Foundation health reform website also contains Frequently Asked Questions, including a general description of how PTC is calculated. *See*, kff.org/health-reform/faq/health-reform-frequently-asked-questions/#question-how-do-the-premium-tax-credits-work.

V. Filing Status

a. Section 36B(c)(1)(C) provides that a taxpayer considered married within the meaning of section 7703 must file a joint return to qualify for a Premium Tax Credit.
b. Taxpayers with non-resident alien spouses must be careful.
    i. A taxpayer who is considered unmarried for Head of Household purposes under section 2(b)(2)(B) because his or her spouse is a non-resident alien may not be considered unmarried under section 7703.
c. Temporary treasury regulations at § 1.36B-2T(b)(2)(ii) deem the joint filing requirement of section 36B(c)(1)(C) satisfied if the taxpayer certifies on the return that:
    i. The taxpayer is living apart from his or her spouse; and
    ii. The taxpayer is unable to file a joint return due to domestic abuse or spousal abandonment.
d. Domestic abuse "includes physical, psychological, sexual, or emotional abuse, including efforts to control, isolate, humiliate, and intimidate, or to undermine the victim's ability to reason independently." Temp. Reg. §§ 1.36B-2T(b)(2)(iii).
e. Spousal abandonment requires the inability to locate one's spouse. "…a taxpayer is a victim of spousal abandonment for a taxable year if, taking into account all facts and circumstances, the taxpayer is unable to locate his or her spouse after reasonable diligence." § 1.36B-2T(b)(2)(iv).
    i. <u>Case Example</u>: Ms. Lime was abandoned by her spouse in December 2015. In February 2016, he contacted her and provided an address and phone number in another state. Ms. Lime does not appear to meet spousal abandonment criteria for her 2015 tax return.

VI. Reconciliation of APTC for Dependents

a. The taxpayer who claims an exemption for a dependent must reconcile any APTC paid for that individual. Temp. Reg. § 1.36B-4T(a)(1)(ii)(A).
    i. If advance payments are made for an individual whose personal exemption goes unclaimed, the person who attested to the exchange that they would claim the exemption must reconcile the APTC. Temp. Reg. § 1.36B-4T(a)(1)(ii)(C).
b. As in existing dependency exemption disputes, section 6103 will frustrate taxpayers and taxpayer representatives. Section 6103 prevents the Service from disclosing the return information of another taxpayer, including the identity of another taxpayer and the amount of APTC reconciled by that taxpayer.
c. <u>Case Example</u>: Mr. Sky filed his 2015 tax return and was surprised to receive Letter 12C from the IRS requesting Forms 8962 and 1095-A in order to process the return. Unbeknownst to him, his ex-wife had enrolled their son in an exchange plan. Mr. Sky does not get along with his ex-wife. She will not disclose any information to him about her tax return or share a copy of the Form 1095-A. Mr. Sky does not know how many of his ex-wife's other children were on the insurance plan with his son.
    i. If the parents could communicate, they could choose any allocation percentage between zero and 100 percent, and theoretically they could maximize their joint tax benefits from the APTC. Temp. Reg. § 1.36B-4T(a)(1)(ii)(B)(2).

ii. The IRS won't tell Mr. Sky what figures (if any) his ex-wife reported on her Form 8962.
iii. Mr. Sky should eventually be able to get the numbers he needs from his ex-wife's Form 1095-A from the IRS. He will be told to try the exchange and his ex-wife first. *See*, I.R.M. 21.6.3.4.2.16.4.1, *Disclosure of Taxpayer Data* (10-01-2015).

VII. Exchange Failure to Terminate Coverage

a. Voluntary Termination
   i. Exchanges must permit enrollees to terminate coverage voluntarily. 45 C.F.R. § 155.430(b)(1)(i). Individuals must provide at least 14 days' notice, unless the issuer and exchange agree to accept less. 45 C.F.R. § 155.430(d)(1)(i), -(d)(2)(iii).
   ii. Notwithstanding the general 14-day notice standard, APTC can only be terminated on the first day of a calendar month. 45 C.F.R. §§ 155.430(d)(1)(ii); 155.330(f)(1)(iii).
   iii. Effective May 9, 2016, Health and Human Services (HHS) regulations require exchanges to permit retroactive terminations in certain circumstances, including situations where technical errors prevented the enrollee from terminating coverage earlier. *See*, HHS Notice of Benefit and Payment Parameters for 2017, 81 Fed. Reg. 12,203, 12,344 (March 8, 2016).
   iv. <u>Case Example</u>: Ms. Orange was surprised to receive a Form 1095-A for 2015, because she did not think she had VHC insurance that year. The form showed coverage and APTC for January and February, but no premiums paid. Ms. Orange did have VHC insurance in 2014, and all premiums were paid that year. She says that she called VHC in December 2014 to report a new job and find out what her new premiums would be. When told the amount, she decided to cancel her insurance. Ms. Orange claimed the call center representative told her the 2015 plan would be cancelled if she didn't pay her January premium. VHC records showed a call from Ms. Orange in January 2015, but not in December 2014. Ms. Orange does not feel she should have to repay APTC for coverage she didn't want and didn't know she had. She is adamant that she called in December and says her VHC records have plenty of other mistakes to show they are not reliable.
      1. Was a binder payment of the first month's coverage required before the 2015 plan could be lawfully effectuated? The call center representative may have believed that was the case.
         a. HHS clarified recently that binder payments are not required to renew existing coverage for another calendar year, and removed language suggesting otherwise from the regulations. *HHS Notice of Benefit and Payment Parameters for 2017*, 81 Fed. Reg. 12,203, 12,311 (Mar. 8, 2016); 45 C.F.R. § 156.270(d).
         b. Does the answer to this question matter in a Tax Court deficiency proceeding? Does it affect the amount of advance payments required to be reconciled? *See*, I.R.C. 36B(f).

        2. Even if January 2015 coverage was effective without a payment, can Ms. Orange be required to repay two months of APTC? See discussion of nonpayment grace periods, below.

b. Termination for Nonpayment
   i. For individuals receiving APTC, exchanges and issuers must terminate coverage for nonpayment of premiums upon exhaustion of a three-month grace period. 45 C.F.R. §§ 155.430(b)(2)(ii)(A); 156.270(c)(1); 156.270(g).
   ii. If a taxpayer exhausts the grace period, the issuer is required to return the APTC it received for the second and third months of the grace period, and terminate coverage effective the last day of the first grace period month. 45 C.F.R. §§ 156.270(e)(2), -(g); 155.430(d)(4).
   iii. <u>Case Example</u>: Mrs. Green had no idea there was any problem with her health insurance until January 2016, when she received a bill with no APTC applied. Then she received her 2015 Form 1095-A showing coverage and APTC all 12 months, but premium payments stopping in June 2015. Mrs. Green says she sent a payment and thought she was all set for the rest of the year. VHC has no record of the payment. It was likely sent without a contact ID, possibly without the invoice. Mrs. Green speaks and reads very little English.
      1. By not following the grace period rules, did the exchange and issuer effectively accept a lower premium? Could Mrs. Green claim PTC for the entire year, and argue that the premium amount was the amount of APTC?
      2. Do the IRS or the Tax Court have any ability to enforce HHS regulations in the context of an individual taxpayer's case? An argument based on the correct calculation of the PTC under the circumstances would likely have greater chance of success.
      3. In 2014 and 2015, VHC and its issuers were not following the grace period rules. Many Vermont taxpayers received forms 1095-A with more than one month of APTC shown after premium payments stopped. Does this fact matter in the context of a tax case?

VIII. Overlap with other Minimum Essential Coverage

a. The PTC may only be claimed for months in which an individual is not eligible for most types of minimum essential coverage (MEC). I.R.C. § 36B(c)(2)(B). There are certain exceptions and safe harbors, but generally an individual cannot be eligible for or enrolled in employer-sponsored insurance (ESI) or Medicare and claim a PTC for that month.
b. An individual who enrolls in ESI is not eligible for PTC, even if the insurance is unaffordable or fails to provide minimum value. The only exception in the regulations is where the enrollment was automatic and the individual quickly terminates the enrollment. Reg. § 1.36B-2(c)(3)(vii).
c. <u>Case Example</u>: Mr. Mauve's employer backdated his coverage, causing an overlap with APTC. Mr. Mauve enrolled in VHC with APTC during open enrollment. He found out in March 2015 that his employer's insurance would cover him retroactive to January 1, 2015. Mr. Mauve promptly cancelled his VHC insurance. He did not realize the overlap

was a problem until he went to have his 2015 tax return prepared. Form 1095-A shows APTC for January through March 2015. Form 1095-B shows enrollment in employer-sponsored coverage all year. Mr. Mauve is a seasonal, full-time worker. He thinks his employer probably figured out late that they had to offer him 2015 coverage to avoid an employer shared responsibility payment.

   i. To avoid repaying his 2015 APTC, Mr. Mauve could argue that he was not actually eligible for ESI until the middle of March, when his employer decided to offer him coverage.
   ii. There is no published guidance on this issue.

d. <u>Case Example</u>: Mr. Peach enrolled with his wife in 2014. In April 2014 he called to cancel his coverage, but keep his wife enrolled. Mr. Peach knew that he would be eligible for Medicare on May 1 and did not want double coverage. Exchange call center records show that Mr. Peach called in multiple times to make sure that his coverage had been terminated. However, the exchange failed to effectuate the change until August. Form 1095-A shows that Mr. Peach received coverage and tax credits from January – July. Mr. Peach enrolled in Medicare effective May 1. So far, the exchange has refused to change Form 1095-A or retroactively correct the account.
   i. Mr. Peach is not eligible for APTC for the months he also had Medicare Part A coverage.
   ii. Does the fact that HHS regulations were violated affect the correct amount of PTC under section 36B?

IX. Timely Payment of Premiums

a. A PTC may only be claimed for a month in which the taxpayer has paid his share of the health insurance premium. I.R.C. § 36B(c)(2)(A)(ii).
b. The Treasury regulations impose a time limit on this payment. Regulation section 1.36B-3(c)(1)(ii) provides that the taxpayer's share of the premiums must be paid by the "unextended due date for filing the taxpayer's income tax return for that taxable year."
c. The regulation provides no exceptions to this requirement. However, sometimes late payment is not the taxpayer's fault.
d. <u>Case Example</u>: Mr. and Mrs. Brown reported a change of income in June 2015. Mrs. Brown called VHC several times after that to find out what premium to pay going forward. For July, August, and September she received the same invoice as in prior months. In October, November, and December 2015, she received invoices showing $0 due. The Browns received three forms 1095-A for 2015, and the numbers did not make sense to them. They called VHC and asked for a review of their account. They also went to a navigator who called VHC several times in February and March and was told that the review was pending. On April 18, 2016, the Browns received a bill from VHC for over $1,000.
   i. Do the Browns have an argument under Section 36B that their premiums were in fact fully paid for PTC purposes, based on the timely payment of all invoices received prior to the tax filing deadline?
e. <u>Case Example</u>: Ms. Lilac sent her payment for December 2014 coverage on Dec. 1, 2014 and VHC erroneously applied it to her 2015 case. Ms. Lilac had paid by money order and

did not keep a copy. Form 1095-A shows that she did not pay her premium in December, but she received APTC for that month. Ms. Lilac called VHC when she received her Form 1095-A. Due to high call volume and technical difficulties, VHC did not move the check back to Ms. Lilac's 2014 account until May 2015. To her surprise and anger, VHC told Ms. Lilac it could not update Form 1095-A to show the payment, because the 2014 premium was technically paid after April 15, 2015.[12]

    i. If VHC does not issue a corrected form, Ms. Lilac will need to convince the IRS or the Tax Court that she actually paid her premium on time.

X. Form 1095-A Disputes

a. In some cases, taxpayers and assisters have reported being unable to obtain proof of coverage from their exchange.[13]
    i. Case Example: Mr. Gray was told there was no record of his enrollment and no Form 1095-A could be generated for him. He had received an insurance card and had had an expensive procedure paid for. Mr. Gray had paid very little for his coverage and needed to reconcile APTC. The taxpayer had called the exchange several times regarding this.
    ii. Case Example: Ms. Crimson had exchange coverage for additional months not included on Form 1095-A. She received APTC for those months, according to her invoices. This was confirmed on the phone by Ms. Crimson's health insurance company, but the exchange cannot find a record of those coverage months. The exchange will not correct the Form 1095-A.
b. If the insurance company can provide proof of coverage and APTC, a taxpayer could claim a PTC based on those records, and appeal any disallowance.
c. Note that section 6041(d) does not apply to Affordable Care Act information returns, which are filed pursuant to sections 6055, 6056, and 36B. Section 6041(d) is frequently cited by taxpayers disputing forms 1099-C and 1099-MISC. Section 6041(d) shifts the burden of production upon evidence of a "reasonable dispute" if the taxpayer has cooperated with the Service.
d. Taxpayers can shift the burden of proof in Tax Court under section 7494 only upon production of "credible evidence" and evidence of cooperation with the Service. This is a more difficult standard for taxpayers to meet than section 6041(d)'s "reasonable dispute."
e. It is possible for a taxpayer to convince the Tax Court that an information return is incorrect simply based on the preponderance of the evidence presented at trial, without any shifting of the burden of production or persuasion. *See, e.g.*, *Ebert v. Comm'r*, T.C. Memo. 2015-5.

[12] Vermont Legal Aid eventually persuaded VHC to issue a corrected Form 1095-A showing the December payment. However, the taxpayer was unable to obtain this result on her own, which suggests it could be a problem for other unrepresented taxpayers.
[13] None of these cases so far have involved VHC.