

Final Regulations: Alternative Simplified Credit Elections on Amended Returns

Attached are final regulations (TD 9712, published in the Federal Register on 2/27/15) relating to the election on an amended return of the alternative simplified credit ("ASC") determined under IRC § 41(c)(5). The final regulations adopt the same approach as temporary regulations issued last year (TD 9666), with some minor clarifications. Specifically, Treas. Reg. § 1.41-9(b)(2) provides:

A taxpayer may make an election under section 41(c)(5) for a tax year on an amended return, but only if the taxpayer has not previously claimed a section 41(a)(1) credit on its original return or an amended return for that tax year, and only if that tax year is not closed by the period of limitations on assessment under section 6501(a).

A taxpayer makes the ASC election by completing Section B Form 6765, "Credit for Increasing Research Activities." Generally, the ASC election or claim of a regular credit made by one member of a controlled group generally is binding on the other members of the same controlled group. Once made, an ASC election applies to the tax year for which made and all subsequent years, until that election is revoked by the taxpayer (or a member of its controlled group) claiming a regular credit determined under § 41(a)(1) on a timely filed (including extensions) original return for the year to which the revocation applies. As under the temporary regulations, an ASC election may not be revoked on an amended return. See Treas. Reg. § 1.41-9(b)(3).

Additionally, the Preamble to TD 9712 contains the following interpretive guidance:

- Period for making an ASC election on an amended return:
 - *Amended returns filed before assessment period under § 6501(a) is closed:* The temporary regulations (T.D. 9666) provided that ASC elections could be made on amended returns "before the period of limitations for assessment of tax has expired for that year." The final regulations clarify this rule

by specifying that taxpayers must make an ASC election on an amended return before the statute of limitations on assessment under § 6501(a) — which generally provides for a three-year assessment period — is closed. The assessment period under § 6501(a) may be closed even though the period during which the taxpayer may file a refund claim under § 6511 remains open. Nevertheless, the Treasury Department and IRS decided to retain the rule that ASC elections on amended returns must be made before the assessment period closes under § 6501(a), and no extensions of time may be granted under Treas. Reg. § 301.9100-3, because extending the period for elections beyond the limitations period for assessment ordinarily prejudices the interests of the government; but "[t]his requirement is mitigated by the fact that the period of limitations on assessment may be extended by agreement of the IRS and the taxpayer." See Preamble to TD 9712. Accordingly, amended returns electing the ASC can be filed for the three tax years preceding the current tax year and any other tax year that is open as a result of an exception in § 6501 to the general three-year limitations period.

- *Carry-forward credits from closed years:* The Preamble notes that the Treasury Department and IRS rejected the suggestion that taxpayers be allowed to make an ASC election for an earlier, closed year in an attempt to generate a carry-forward ASC credit to be utilized in a subsequent tax year for which the period of limitations for assessment of tax has not yet expired. According to the Treasury Department and IRS, "[t]o permit a taxpayer to make an ASC election for a tax year in which the period of limitations for assessment of tax has expired has the practical effect of permitting the taxpayer to make an ASC election on a return that cannot be amended." This aligns with the interpretation that Deloitte Tax historically has adopted with respect to attempts by taxpayers to make elections for closed tax years.

- *Interaction with § 280C Elections:* Statutory § 280C(c)(3) provides that to avoid a cutback of deductions otherwise allowed to account for a research credit claimed, a taxpayer must elect a reduced credit (generally equal to 65% of the credit amount determined under § 41) on its original timely filed return for the tax year at issue. In this regard, Treas. Reg. § 1.280C-4 provides that the Form 6765 attached to the original return must clearly indicate the taxpayer’s intent to make the reduced-credit election under § 280C(c)(3), regardless of whether any research credits are claimed by the taxpayer on its original return. Thus, to effectuate an election under § 280C(c)(3), taxpayers may simply check the reduced-credit box on line 17 of the Form 6765 attached to their original return, without deciding at that time whether to claim a regular credit or ASC for the taxable year (*i.e.*, the rest of the Form 6765 is blank when filed with the original return).

This approach is supported by the Preamble to TD 9712, which indicates: “A section 280C(c)(3) election on line 17 of Form 6765 made in a taxable year does not, in and of itself, constitute a credit claim under section 41(a)(1), and

accordingly does not preclude a taxpayer from making an ASC election on an amended return for that taxable year.” Thus, an amended return could subsequently be filed for that taxable year reporting an ASC in section B of the attached Form 6765 and that would be considered a valid election of the ASC for the taxable year at issue (as long as the amended return is filed within the assessment period under IRC § 6501(a)). On the other hand, the language in the Preamble suggests that a taxpayer who has merely checked the reduced-credit box on line 34 of a Form 6765 attached to its original return will be deemed to have effectuated an election under § 280C(c)(3)(C) for that tax year (the same as if the taxpayer had merely checked the reduced-credit box on line 17), but the taxpayer has not yet affirmatively claimed either a regular credit or ASC for that year. Therefore, if the taxpayer wants to actually claim an ASC for that year (and it has not previously made an ASC election that remains in effect from a prior year), it should file an amended return reporting an ASC to “perfect” its ASC election prior to the close of the statute of limitations on assessment of tax for the year at issue.

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