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#11**VICTIMS OF TERRORIST ATTACKS: Amend IRC § 692 to Grant the President the Authority to Issue a Declaration That an Event Qualifies as a “Specified Terrorist Attack”****PROBLEM**

Congress added subsection (d) to Internal Revenue Code (IRC) § 692 in the aftermath of the September 11, 2001 terrorist attacks. The new provision, intended to provide tax exemption to victims of terrorist attacks, applies with respect to three enumerated events: the April 19, 1995 Oklahoma City bombing of the Alfred P. Murrah Federal Building; the September 11, 2001 attacks; and anthrax attacks occurring between September 11, 2001 and January 1, 2002. IRC § 692(d) has not been amended to take into account terrorist attacks that have occurred after September 11, 2001.

EXAMPLE

In 2003, Taxpayer X was killed in a terrorist attack. IRC § 692(d), enacted in 2002, provides tax exemption to victims of certain terror attacks. X would otherwise qualify for relief under IRC § 692(d), but the enumerated events do not include the terrorist attack that killed X. Thus, X is not eligible for relief under IRC § 692(d).

RECOMMENDATION

Amend IRC § 692(d) to grant the President the authority to issue a declaration that an event qualifies as a “specified terrorist attack.”

CURRENT LAW**Tax Relief Available for Victims of Terrorist Attacks Under IRC § 692**

Tax exemption for U.S. military personnel who die in wartime (*i.e.*, before the President proclaims termination of war) has been a part of the IRC since World War II.¹ The exemption, now applicable to death in Presidentially designated “combat zones,” is found in IRC § 692(a).²

- 1 Enacted as Supplement U to Chapter 1 (then § 421) of the Internal Revenue Code (IRC) by the Current Tax Payment Act of 1943, Pub. L. No. 78-68, § 8, 57 Stat. 126 (1943), granting tax exemption to those who died “on or after December 7, 1941, while in active service as a member of the military or naval forces of the United States,” until the termination of World War II as proclaimed by the President.
- 2 IRC § 692(a) applies to “any individual who dies while in active service as a member of the Armed Forces of the United States, if such death occurred while serving in a combat zone (as determined under section 112) or as a result of wounds, disease, or injury incurred while so serving.” Under IRC § 112(c)(2), the President designates whether an area is a “combat zone.” Tax exemption applies “with respect to the taxable year in which falls the date of his death, or with respect to any prior taxable year ending on or after the first day he so served in a combat zone.” Tax for such prior taxable years which is unpaid at the date of death “shall not be assessed, and if assessed the assessment shall be abated, and if collected shall be credited or refunded as an overpayment.” Subsection (b) of IRC § 692 was added in 1975 to provide rules for determining the date of death of an individual who was in missing status. See Pub. L. No. 93-597, § 4, 88 Stat. 1950 (1975).

Until 1984, Congress conferred similar tax relief to individuals who were killed in various hostile actions against the United States (rather than in combat zones) but it did so through separate legislation.³

In 1984, recognizing that the most recently designated combat zone was Vietnam (designated as such in 1964), yet Americans continued to die abroad in hostile actions directed against the United States, Congress amended IRC § 692.⁴ New subsection (c) provided tax exemption to U.S. military personnel or civilian employees of the federal government killed outside of the United States in a “terroristic or military action.”⁵

A “terroristic or military action” is defined as:

(A) any terroristic activity which a preponderance of the evidence indicates was directed against the United States or any of its allies, and

(B) any military action involving the Armed Forces of the United States and resulting from violence or aggression against the United States or any of its allies (or threat thereof).⁶

Neither IRC § 692 nor Treasury regulations under it explain who has the authority to determine whether a given event qualifies as a “terroristic or military action.”⁷

The relief available under IRC § 692(c) consists of exemption from tax for the year of death and for at least one prior year, and for any years in the period between the date of injury and the date of death.⁸ For example, someone who was injured and died in 1983 would be exempt from tax for 1983, the year of death, and 1982, the prior taxable year. Someone who was injured in 1983 and died from that injury two years later, in 1985, would be exempt from tax for 1985 (the year of death), for 1982 (the year that preceded the injury), for 1983 (the year of injury) and for 1984 (the year following the year of the injury that preceded the year of death).

In 1990, in the wake of the 1988 explosion of Pan American Flight 103 over Lockerbie, Scotland, Congress again enacted separate legislation to provide tax exemption for victims of terrorism who would

3 See Staff of J. Comm. on Tax'n, 107th Cong., *Technical Explanation of the “Victims of Terrorism Tax Relief Act of 2001,” as Passed by the House and the Senate on December 20, 2001* (JCX-93-01), at 2, Dec. 21, 2001.

4 Pub. L. No. 98-259, § 1, 98 Stat. 142 (1984); S. Rep. No. 98-364 at 3-4 (1984), noting that the legislation was intended to apply with respect to the bombing of the U.S. Embassy in Beirut, Lebanon, or as a result of the bombing of the U.S. Marine headquarters there, with respect to other U.S. personnel who were participating in a United Nations peacekeeping force when killed in Lebanon by land mines or snipers in 1982 or 1983 (or thereafter), with respect to the U.S. service personnel who died as a result of the government’s attempt to rescue the American hostages in Iran, and to U.S. service personnel who died in a military action in Grenada.

5 The Victims of Terrorism Tax Relief Act of 2001, Pub. L. No. 107-134, § 113(b), 115 Stat. 2427, 2435 (2002), discussed below, removed the requirement that death occur as a result of wounds or injury incurred while outside the United States.

6 IRC § 692(c)(2).

7 The same term is used without further definition in IRC § 7508A, which authorizes the IRS to postpone deadlines for performing certain acts with respect to taxes. However, related Treasury regulations appear to permit the Secretary to determine whether an event qualifies as “terroristic or military action.” See Treas. Reg. § 301.7508A-1(b), providing that “in the case of a taxpayer determined by the Secretary to be affected by a federally declared disaster (as defined in section 1033(h)(3)) or a terroristic or military action (as defined in section 692(c)(2)), the Secretary may specify a postponement period...” To date, three events have been listed in the Internal Revenue Manual (IRM) as qualifying for relief under IRC § 7508A as “terroristic or military action”: the April 19, 1995 attack, the September 11, 2001 attacks, and related anthrax attacks. See IRM 25.6.1.10.2.9.4, *Terroristic or Military Action* (May 17, 2004). As discussed below, these events are also covered by the terms of IRC § 692(d).

8 IRC § 692(c)(1), providing that “any tax imposed by this subtitle shall not apply—(A) with respect to the taxable year in which falls the date of his death, and (B) with respect to any prior taxable year in the period beginning with the last taxable year ending before the taxable year in which the wounds or injury were incurred.”

not qualify for relief under IRC § 692.⁹ Because Congress believed “there should be no doubt that all of the civilian victims of the bombing of Pan Am 103 should be accorded treatment comparable to those in the service of the government, including limited forgiveness from tax liability,” the 1990 legislation provides tax exemption to civilian victims who were not employees of the federal government.¹⁰

After the Lockerbie tragedy but prior to passage of the 1990 legislation, the President constituted the Commission on Aviation Security and Terrorism.¹¹ On May 15, 1990, the Commission submitted a report that contained a series of recommendations. With respect to tax benefits:

The Commission is persuaded that the definition of what constitutes an act of terrorism is best left to the Executive Branch. The Vice President’s 1986 Task Force report noted that terrorism is easier to describe than define — and legal definitions in this area can be inadvertently too expansive or restrictive. The Commission believes the President, or a board he might establish for this purpose, will know the right circumstances of terrorism when they occur.¹²

Thus, the Commission recommended that the President “seek legislation to authorize and permanently appropriate funds to provide monetary benefits and tax relief for any American victim of an act of terrorism.”¹³

In the 1990 legislation, Congress included a provision directing the President to submit to Congress “recommendations on whether or not legislation should be enacted to authorize the United States to provide monetary and tax relief as compensation to United States citizens who are victims of terrorism.”¹⁴ In carrying out this obligation, the President was authorized to “establish a board to develop criteria for compensation and to recommend changes to existing laws to establish a single comprehensive approach to victim compensation for terrorist acts.”¹⁵

The events that gave rise to the next amendment of IRC § 692 occurred on September 11, 2001. As Congressman Thomas, Chairman of the House Committee on Ways and Means, who sponsored a bill to amend the statute explained:

It would be ironic if we did not have this bill in front of us today, because what this bill basically does is take those provisions of the Tax Code already on the books which apply to the military and combat zones overseas or to private citizens who are attacked or are the subjects of terrorist attacks overseas and say, clearly, New York, the Pentagon, the Washington area, were combat zones, and that, therefore, it seems entirely appropriate that those provisions of the Tax Code which relieve tax responsibilities for individuals meeting a profile overseas ought to be brought here to our shores, and that, not just figuratively but

9 See Staff of J. Comm. on Tax’n, 107th Cong., *Technical Explanation of the “Victims of Terrorism Tax Relief Act of 2001,” as Passed by the House and the Senate on December 20, 2001* (JCX-93-01), at 2, Dec. 21, 2001; Aviation Security Improvement Act of 1990, Pub. L. No. 101-604, § 211, 104 Stat. 3066, 3085 (1990).

10 See 136 Cong. Rec. 33218 (Oct. 23, 1990) (Statement of Sen. Lautenberg, sponsor of S. 2822, enacted as the Aviation Security Improvement Act of 1990).

11 Exec. Order No. 12686, 54 Fed. Reg. 32629 (Aug. 4, 1989).

12 President’s Commission on Aviation Security and Terrorism, Report to the President, at 107 (1990), <https://ia600402.us.archive.org/28/items/PCASTreport/PCASTreport.pdf>.

13 *Id.*

14 Aviation Security Improvement Act of 1990, Pub. L. No. 101-604 § 211, 104 Stat. 3066, 3085 (1990).

15 *Id.*

literally in the Tax Code, the terrorist victims should be considered as though they were in a combat zone, which they were, and that they were subject to terrorist attacks, which they were. That basically was the genesis of the bill.¹⁶

The Victims of Terrorism Tax Relief Act of 2001, enacted in 2002 (the 2002 Act) added subsection (d) to IRC § 692. The new subsection provides tax exemption to “specified terrorist victims,” defined as any decedent:

(A) who dies as a result of wounds or injury incurred as a result of the terrorist attacks against the United States on April 19, 1995, or September 11, 2001, or

(B) who dies as a result of illness incurred as a result of an attack involving anthrax occurring on or after September 11, 2001, and before January 1, 2002.¹⁷

The relief available under IRC § 692(d) consists of exemption from tax for the year of death and at least one prior year, similar to the relief available under subsection (c).¹⁸ Unlike subsection (c), subsection (d) provides for a minimum benefit amount of \$10,000 that can be claimed as a tax refund; also unlike subsection (c), it does not limit relief for civilian victims to employees of the United States.¹⁹ There is no requirement that death occur as a result of wounds or injury incurred while outside the United States (and, as noted, the 2002 Act removed that requirement from subsection (c)).²⁰

In 2003, in the wake of the Space Shuttle Columbia disaster, Congress extended the tax exemption under IRC § 692(d) to astronauts who lose their lives on a space mission.²¹ Apart from a clerical amendment to subsection (a) of IRC § 692, the statute has not been amended since then.²²

16 147 Cong. Rec. 16940 (Sept. 13, 2001) (statement of Rep. Thomas), describing H.R. 2884, enacted after amendment as the Victims of Terrorism Tax Relief Act of 2001, Pub. L. No. 107-134, 115 Stat. 2427 (2002).

17 IRC § 692(d)(4), enacted by the Victims of Terrorism Tax Relief Act of 2001, Pub. L. No. 107-134, § 101, 115 Stat. 2427, 2428 (2002) (the 2002 Act). The reference to April 19, 1995 is to the bombing of the Alfred P. Murrah Federal Building in Oklahoma City, and was added to the pending legislation without explanation by the S. Comm. on Finance. See 147 Cong. Rec. 22812, 22829 (Nov. 16, 2001) (statement of Sen. Baucus, member of the S. Comm. on Finance, explaining the House version of the bill and the Senate amendment to it). The amendment also added the reference to the post-September 11 anthrax attacks.

18 See IRC § 692(d)(1), providing from tax exemption “(A) with respect to the taxable year in which falls the date of death, and (B) with respect to any prior taxable year in the period beginning with the last taxable year ending before the taxable year in which the wounds, injury, or illness referred to in paragraph (3) were incurred.”

19 IRC § 692(d)(2). If a decedent’s income tax for exempt years is less than \$10,000, he or she is treated as having made a payment of tax equal to the excess of \$10,000 over the amount of tax not imposed under subsection (d). The 2002 Act amended other sections of the IRC to provide tax benefits to victims of the 1995 and 2001 attacks: IRC § 101, to exclude certain death benefits from income; and IRC § 2201, to reduce estate taxes. Off-Code section 104 of the 2002 Act facilitates the treatment of payments by charitable organizations as exempt payments, while section 105 of the 2002 Act excludes cancellation of debt from income, but also did not amend the Code. The last two categories of relief are not available with respect to the 1995 attack. In addition to the specific tax relief for victims of the 1995 and 2001 attacks, the 2002 Act clarified and expanded prior law to provide tax benefits beyond exemption from income tax for victims of disaster and terrorist or military actions (e.g., IRC § 139 was enacted to exclude disaster relief payments from income).

20 Victims of Terrorism Tax Relief Act of 2001, Pub. L. No. 107-134, § 113(b), 115 Stat. 2427, 2435 (2002).

21 IRC § 692(d)(5), added by the Military Family Tax Relief Act of 2003, Pub. L. No. 108-121, § 110, 117 Stat. 1335, 1342 (2003). See Staff of J. Comm. on Tax’n, *General Explanation of Tax Legislation Enacted in the 108th Congress, Part Four: Military Family Tax Relief Act of 2003 (Public Law 108-121) (JCS-5-05)*, at 47 (Comm. Print 2005).

22 Tax Increase Prevention Act of 2014, Pub. L. No. 113-295, § 221(a)(67), 128 Stat. 4010, 4048 (2014), a deadwood provision removing a reference in IRC § 692(a)(1) to service in a combat zone after June 24, 1950.

Relief and Assistance for Victims of Disasters or Emergencies

The federal government has provided disaster relief, often through *ad hoc* congressional appropriations, since the earliest days of the Republic.²³ In 1950, the modern statutory framework emerged pursuant to which various forms of relief ensue when the President, at the request of a State governor, declares a major disaster area.²⁴ Currently, the Stafford Act authorizes a governor or chief executive of an affected Indian tribal government to request a declaration that a major disaster has occurred or an emergency exists.²⁵ The President is also authorized to declare an emergency in the absence of a gubernatorial request in some circumstances.²⁶

Disaster relief under the Stafford Act was available with respect to the April 19, 1995 and the September 11, 2001 attacks, as well as for the 2013 Boston Marathon attack.²⁷ However, an incident may not meet the definition of a major disaster, and the amount of damage it causes, when compared to state population and resources, may not meet required thresholds under the Stafford Act.²⁸ For example, the 2015 San Bernardino, California attack; the 2015 Charleston, South Carolina church shootings; the 2016 Orlando, Florida Pulse nightclub mass shooting; and the 2016 Ohio State University attack were not declared major disaster areas or emergencies.²⁹

23 For a description of the history of disaster relief, see Michele Landis Dauber, Forum: “Overtaken By a Great Calamity:” *Disaster Relief and the Origins of the American Welfare State: The Sympathetic State*, 23 Law & Hist. Rev. 387, 394 (2005).

24 See Disaster Relief Act of 1950, Pub. L. No. 81-875, § 2(a), 64 Stat. 1109 (1950).

25 The Disaster Relief Act of 1974, Pub. L. No. 93-288, 88 Stat. 143 (1974), renamed the Robert T. Stafford Relief and Emergency Assistance Act by Pub. L. No. 100-707, § 102, 102 Stat. 4689 (1988) (Stafford Act), codified at 42 U.S.C. §§ 5121-5207. 42 U.S.C. § 5170(a) provides: “All requests for a declaration by the President that a major disaster exists shall be made by the Governor of the affected State. ... Based on the request of a Governor under this section, the President may declare under this Act that a major disaster or emergency exists.” 42 U.S.C. § 5170(b) provides that the “Chief Executive of an affected Indian tribal government may submit a request for a declaration by the President that a major disaster exists.” 42 U.S.C. § 5191 has similar provisions for requesting a presidential declaration that an emergency exists. 42 U.S.C. § 5122 defines an emergency as a situation in which “Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States.” A major disaster is defined as “any natural catastrophe... or, regardless of cause, any fire, flood, or explosion, in any part of the United States, which in the determination of the President causes damage of sufficient severity and magnitude to warrant major disaster assistance under this Act to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby.”

26 42 U.S.C. § 5191(b) provides “The President may exercise any authority vested in him by [section 5192 or section 5193 of this title, *i.e.*, direct federal emergency assistance] with respect to an emergency when he determines that an emergency exists for which the primary responsibility for response rests with the United States because the emergency involves a subject area for which, under the Constitution or laws of the United States, the United States exercises exclusive or preeminent responsibility and authority. In determining whether or not such an emergency exists, the President shall consult the Governor of any affected State, if practicable. The President’s determination may be made without regard to subsection (a) of this section.” The President declared an emergency under this provision with respect to the April 19, 1995 attack on the Alfred P. Murrah Federal Building and the September 11, 2001 attack on the Pentagon; both emergency declarations were followed by a major disaster declaration. (The attack on the World Trade Center in New York was immediately declared a major disaster on September 11, 2001 and did not receive an emergency declaration designation.) The President also declared an emergency under this provision with respect to the 2003 Space Shuttle Columbia explosion. Bruce R. Lindsay, Congressional Research Service, *Stafford Act Assistance and Acts of Terrorism* 2, 9, <https://fas.org/sgp/crs/homesecc/R44801.pdf> (June 2, 2017).

27 Bruce R. Lindsay, Congressional Research Service, *Stafford Act Assistance and Acts of Terrorism* 12-14, <https://fas.org/sgp/crs/homesecc/R44801.pdf> (June 2, 2017).

28 *Id.* at 2-3, 5-6.

29 Of these four incidents, the 2016 Orlando Florida Pulse nightclub shootings is the only one in which the State governor requested a Stafford Act declaration. *Id.* at 12.

REASONS FOR CHANGE

IRC § 692 has been amended on an *ad hoc* basis in response to specific events. Each amendment expanded the categories of persons eligible for relief. Its initial application to military personnel was expanded with the addition of subsection (c) to include civilian employees of the federal government killed outside of the United States. Subsection (c) was then modified to extend relief to civilian employees of the United States whether or not they were killed abroad. Subsection (d) extended relief to civilians whether or not they were employees of the federal government. Similarly, the statute has been amended to expand the range of events that may give rise to relief. Its initial application to death caused during wartime was expanded to include death caused in a combat zone and, with the addition of subsection (c), to death caused by a “terroristic or military action.” Subsection (d) expanded relief to victims of a “specified terrorist attack” and expanded the relief to include a \$10,000 minimum benefit.

Since at least 1990, Congress has recognized the need for a more comprehensive approach to determining the tax benefits available to victims of terrorism, as opposed to *ad hoc* legislation.³⁰ It has also been acknowledged that the President may be best positioned to make determinations in this area.³¹ Giving the President authority to determine whether an event is a “specified terrorist attack” is consistent with the approach that applies to determinations of whether an event qualifies for disaster or emergency relief. Further, delegating this authority to the President may expedite relief to victims of “specified terrorist attacks” compared to the length of time needed for legislative action.

EXPLANATION OF PROVISION

The recommendation is to amend IRC § 692(d) to grant the President the authority to issue a declaration that an event qualifies as a “specified terrorist attack.” The change would make tax relief available without the need for amendments to IRC § 692 or for separate legislation. This approach is similar to Stafford Act procedures, although a determination that an event qualifies as a “specified terrorist attack” would not affect whether a determination has been made for purposes of the Stafford Act. Subsection (c) of IRC § 692, which provides more limited relief than subsection (d), would remain intact.

30 Aviation Security Improvement Act of 1990, Pub. L. No. 101-604 § 211, 104 Stat. 3066, 3085 (1990).

31 President’s Commission on Aviation Security and Terrorism, Report to the President 107 (1990), <https://ia600402.us.archive.org/28/items/PCASTreport/PCASTreport.pdf>.