

**Alert | Tax Audits, Litigation & Criminal Tax Defense**



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## **Protecting Your Potential Tax Refund Should the Affordable Care Act's Individual Mandate Be Determined Unconstitutional**

The U.S. Supreme Court has taken up the case of whether the Patient Protection and Affordable Care Act (ACA)'s individual mandate is unconstitutional. A decision on this issue is likely not to occur until next year but protecting a possible tax refund cannot wait.

A claim for a tax refund must be made no later than three years from the filing of the income tax return in question or the refund will be barred. This means that any refund for taxes paid pursuant to the ACA for the year 2016 by an individual or a trust is the earliest year for which a refund can be claimed, assuming the 2016 return was filed on extension so that the three-year period has not yet run out. Although any refund at this point is speculative, there may be a way to protect a possible refund by filing what is known as a protective claim for refund.

A protective refund claim is used when the events establishing the right to the refund are not yet determined, i.e., the refund is contingent on future events, in this case, the Supreme Court decision. For the protective claim to be effective, you must: (1) put the Internal Revenue Service on written notice that you are asking for a refund; and 2) explain in writing the circumstances under which the refund would be due so that the IRS knows you are making a claim and what it is about. If, and when, a decision of the Supreme Court overturns all or part of the ACA, and the decision affects taxes paid for the 2016 tax year,

the taxpayer “perfects” the protective claim by filing the actual refund claim on Form 1040X or 1041X, as appropriate.

Under the ACA, an additional Medicare tax of .9% on earned income of \$200,000 for single individuals and \$250,000 for married individuals filing jointly was due. If your income reached the relevant threshold, the additional Medicare tax should have been reported in your return on a Form 8959. In addition, the ACA imposed a 3.8% tax on net investment income for taxpayers earning these threshold amounts. This tax should have been reported in your return on a Form 8960.

Should the ACA be overturned in whole or in part, the Medicare tax and net investment income tax that was paid pursuant to the ACA may be refundable. This means that a taxpayer may wish to protect all years covered by the ACA for which the statute of limitations on refunds remains open. Filing a protective refund claim for the 2017 year before April 15 of next year (or the extended filing date) should also be considered prior to the refund expiration date and before the decision is rendered.

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