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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

DATED: November 20, 1998

MEMORANDUM TO:

FROM: ELIZABETH G. BECK
SENIOR TECHNICAL REVIEWER CC:INTL:6

SUBJECT:

This Field Service Advice responds to your memorandum dated August 28, 1998. Field Service Advice is not binding on Examination or Appeals and is not a final case determination. This document is not to be cited as precedent.

LEGEND:

A =

Docket No. A =

Opinion A =

Issue A =

Taxable Year 1 =
Taxable Year 2 =
Taxable Year 3 =

Date 1 =

Appellate Court A =

ISSUE(S):

Whether the Commissioner should join petitioner, A, in requesting the United States Tax Court to either (1) enter final judgment under Federal Rule of Civil Procedure (FRCP) 54(b) on Issue A in Opinion A or (2) certify Opinion A under Tax Court Rule 193 for interlocutory appeal.

CONCLUSION:

No. Since all issues affecting a single taxable year as well as the notice of deficiency have not been resolved, judgment may be not entered on a "claim" as required by FRCP 54(b). Also, certification for interlocutory appeal under Tax Court Rule 193 is inappropriate because (1) Issue A is not "unsettled," but even if it were, is not "serious" and (2) an immediate appeal of Opinion A would not materially advance the ultimate termination of the litigation.

FACTS:

A, a U.S. corporation, filed a petition in Docket No. A with the United States Tax Court, contesting income tax liabilities relating to its Taxable Years 1 through 3. On Date 1, the Tax Court issued Opinion A upholding the Commissioner's position on Issue A.

Because there are other unresolved, unrelated issues before the Tax Court in Docket No. A, a year or more may pass before the Tax Court is in a position to file its decision. Meanwhile, A wants to expedite the appeal of Opinion A. A proposes that the Commissioner file a joint motion requesting the Tax Court to either (1) enter final judgment under FRCP 54(b) on Issue A in Opinion A or (2) certify Issue A for interlocutory appeal under Tax Court Rule 193.

LAW AND ANALYSIS:

Final Judgment under FRCP Rule 54(b)

In relevant part, Rule 54(b) of the Federal Rules of Civil Procedure states that:

> when more than one claim for relief is presented in an action . . ., the court may direct the entry of a final judgment as to one or more but fewer than all of the claims . . . only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

There is no similar rule in the Tax Court for entering a final judgment for fewer than all of the claims in an action. Rule 1(a) of the Tax Court Rules, however, states in relevant part that:

> where in any instance there is no applicable rule of procedure, the Court of the Judge before whom the matter is pending may prescribe the procedure, giving particular weight to the Federal Rules of Civil Procedure to the extent that they are suitably adaptable to govern the matter at hand.

In a tax case, a cause of action can be defined as the group of claims relating to an entire taxable year. *See Commissioner v. Sunnen*, 333 U.S. 591, 598 (1948); *Shepherd v. United States*, 147 F.3d 633, 635 (7th Cir. 1998).

Although the term “claim” is often used synonymously with “issue,” these two concepts are somewhat different when applied to tax cases. This difference can be illustrated by the application of estoppel to tax cases. Like Rule 54(b), estoppel’s ultimate focus is finality of judgments. There are two similar, but distinctive, doctrines involving estoppel -- *res judicata* and collateral estoppel. The doctrine of *res judicata* is alternatively referred to as “claim preclusion.” The doctrine of collateral estoppel is alternatively referred to as “issue preclusion.” For the doctrine of *res judicata* (i.e., claim preclusion) to apply, both the issues and the tax years involved in the earlier and later proceedings must be identical. In contrast, for collateral estoppel (i.e., issue preclusion), different tax years may be involved, but the issue to be resolved in the later proceeding must be identical to that in the earlier proceeding. *See Freytag v. Commissioner*, 110 T.C. 35, 44 (1998) (citing *Hemmings v. Commissioner*, 104 T.C. 221, 231 (1995)).

In this case, A would like to treat Issue A as a claim. Under the estoppel comparison, however, the question involving Issue A is merely one issue in a larger claim. Issue A is not treated as a claim for purposes of applying the doctrine of *res judicata*. Instead, the concept of claim is broadly read, i.e., to encompass the entire taxable year. This reading is consistent with the cases that have discussed using Tax Court Rule 1(a) in order to incorporate Rule 54(b).

For example, in *Shepherd v. Commissioner*, supra, taxpayer filed an action in Tax Court relating to 1991 through 1995. Taxpayer, however, had received a notice of deficiency only with respect to the 1993 year. The Tax Court dismissed the action as it related to the other years. While the 1993 year was pending in Tax Court, taxpayer appealed the dismissal of the remaining years. The Seventh Circuit Court of Appeals dismissed the appeal because the Tax Court had not entered a Rule 54(b)-type order. The Seventh Circuit reasoned that Rule 54(b) should apply to Tax Court decisions (pursuant to Tax Court Rule 1(a)). Even in *Shepherd*, however, the

Rule 54(b) order would have applied to the dismissed years, and not to issues within one year.

The question of issues and claims for purposes of a tax case was also addressed in *Houston Industries Inc. v. United States*, 78 F.3d 564 (Fed. Cir. 1996). *Houston Industries* was a refund suit involving several issues, two relating to taxpayer's 1983 tax year and four relating to taxpayer's 1984 tax year. In granting a partial summary judgment, the Court of Federal Claims decided one issue relating to both tax years, leaving the remaining issues undecided. The Court of Federal Claims certified the appeal of this issue under Rule 54(b). The government challenged the Rule 54(b) certification on the basis that the granting of a motion for partial summary judgment was not a final disposition of one or more claims. The government argued that

> [the taxpayer's] tax liability for a particular tax year constituted a single claim and argued that FRCP 54(b) did not authorize the court to enter a final judgment when all issues concerning the amount of the tax refund for a single year had not been decided.

Houston Industries, 78 F.3d at 566. Thus, the Federal Circuit was presented with the issue of "whether all issues affecting a tax refund for a single tax year must be litigated before judgment may be entered on a 'claim' pursuant to FRCP 54(b)." *Id.* The court relied in part on an estoppel analysis, noting the Supreme Court's statement in *Commissioner v. Sunnen*, 333 U.S. at 598, that:

> Income taxes are levied on an annual basis. Each year is the origin of a new liability and of a separate cause of action. Thus if a claim of liability or non-liability relating to a particular tax year is litigated, a judgment on the merits is res judicata as to any subsequent proceeding involving the same claim and the same tax year.

Houston Industries, 78 F.3d at 567, 568.

The Federal Circuit in *Houston Industries* also looked to the reasoning in *Favell v. United States*, 22 Cl. Ct. 132 (1990), for guidance. In *Favell*, the Claims Court treated the "claim" in a refund action as "whether or not a given plaintiff is entitled to a tax refund" for a particular tax year or tax years. *Favell*, 22 Cl. Ct. at 141. Similarly, the "claim" in any Tax Court action can be stated as the redetermination of a deficiency, notice of which has been properly given to the petitioner.

For these reasons, a Rule 54(b) order for Opinion A should be opposed by the Commissioner.

<u>Interlocutory Appeal Under Tax Court Rule 193</u>

Tax Court Rule 193, in relevant part, states:

> For purposes of seeking the review of any order of the Tax Court which is not otherwise immediately appealable, a party may request the Court to include, or the Court on its own motion may include, a statement in such order that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation.

Thus, under T.C. Rule 193, a party may file a motion seeking review of any Tax Court order, which is not immediately appealable, i.e., interlocutory.

For an interlocutory appeal, the Tax Court must first certify the appeal and the appellate court, after timely application, must accept the appeal. I.R.C. § 7482(a)(2). Certification by the Tax Court does not guarantee that the appellate court will hear the appeal. The appellate court, or in this case Appellate Court A, may deny the appeal for any reason, including docket congestion. See *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 475 (1978); *Katz v. Carte Blanche Corp*., 496 F.2d 747, 754 (3rd Cir.), cert. denied, 419 U.S. 885 (1974) (construing 28 U.S.C. § 1292(b) which section 7482(a)(2) paraphrases). Accordingly, the granting of an interlocutory appeal is discretionary with each court and not a matter of right. Once leave to appeal is granted, the appellate court is not restricted to deciding the legal question which the trial judge viewed was controlling. *Katz,* 496 F.2d at 754. See also United States v. Stanley, 483 U.S. 669, 676-77 (1987)(construing section 1292(b)).

For an interlocutory appeal, the Tax Court must certify that:

1. A controlling question of law is present;

2. Substantial grounds for difference of opinion are present; and

3. The appeal may materially advance the ultimate termination of the litigation.

I.R.C. § 7482(a)(2). Failure to meet any one of the three requirements is grounds for denial of certification. *Kovens v. Commissioner*, 91 T.C. 74, 77 (1988), aff'd without published opinion, 933 F.2d 1021 (11th Cir. 1991).

Subsection 7482(a)(2) provides an exception to the "final judgment" rule, which would limit Tax Court appeals to those from final Tax Court decisions. Both the final judgment rule and section 7482 "reflect the strong policy in favor of avoiding

piecemeal review and its attendant delay and waste of time." *Kovens,* 91 T.C. at 78. As explained by the Tax Court in *Kovens,* the primary goals sought t be achieved through these exceptions are:

> (1) to alleviate hardship by providing an opportunity to review orders of the trial court before they irreparably modify the rights of litigants; (2) to provide supervision of the development of the law by providing a mechanism for resolving conflicts among trial courts on issues not normally open on final appeal; and (3) to avoid waste of trial time at the trial court level through an opportunity to review orders before fruitless litigation and wasted expense.

Id., 91 T.C. at 76-77. <u>See</u> <u>also</u> *General Signal Corp. v. Commissioner*, 104 T.C. 248 (1995)(appeal to Second Circuit); *Katz v. Carte Blanche Corp.*, 496 F.2d at 756. Only "exceptional" circumstances will justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment. <u>See</u> *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978) and *Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 25 (2d Cir. 1990).

Generally, the trial court judge certifies the appeal as he or she is most familiar with the litigation and should not be inclined to countenance dilatory actions. In reaching its determination to certify, the court must not only weigh the policies favoring the "final judgment" rule but also consider the primary goals of subsection 7482(a)(2).

With these general guidelines in mind, an analysis of each requirement as applied to Opinion A is in order. In interpreting the requirements of subsection 7482(a)(2) requirements, one looks not only to those cases dealing with this section, but also to those dealing with 28 U.S.C. § 1292(b) because subsection 7482(a)(2) paraphrases, almost verbatim, section 1292(b)'s operative provisions. *Kovens*, 91 T.C. at 77.

<u>Controlling Question of Law</u>:

The first subsection 7482(a)(2) criteria is that a controlling question of law be present. Generally speaking, it is the easiest criteria to meet. In determining the presence of a controlling question of law, one must distinguish between a clear legal issue and an issue that requires the application of findings of facts to existing law. *Kovens*, 91 T.C. at 79. Interlocutory appeals are not to be used as devices to second guess the application of facts, as found by the trial court, to the appropriate law. <u>Id.</u>

> A controlling question of law has been interpreted to mean more than a question which if decided erroneously would lead to a reversal on

> appeal but entails a question of law which is serious to the conduct of the litigation.

Id. citing to *Katz v. Carte Blanche Corp.*, 496 F.2d at 755. In the instant case, we believe that Issue A is a controlling question of law.

Substantial Grounds for Difference of Opinion:

The second criteria is that substantial grounds for difference of opinion must be present. In order to satisfy the second requirement, the question involved must present a serious and unsettled legal issue. *Kovens*, 91 T.C. at 80; See *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 547 (1949). Tax Court opinions which discuss this requirement have primarily focused upon whether the issue was "unsettled." These opinions can be divided into two situations, i.e., those where there is existing case law and those where there is not.

Where there is existing case law, the Tax Court has generally refused certification, where the appellate case law supported its ruling, was distinguishable or was not controlling. *Kovens*, supra, issue settled by U.S. Supreme Court and other courts - no unsettled issue); *Allbright v. Commissioner*, T.C. Memo. 1990-154 (appellate court's present view consistent with Tax Court - no "unsettled" issue); *Fleischer v. Commissioner*, T.C. Memo. 1992-470 (appellant's case did not apply and another circuit court supported Tax Court position - no unsettled issue); *Eastern States Cas. Co. v. Commissioner*, T.C. Memo. 1991-559 (appellant's case not from controlling appellate court and no other appellate court opinions on legal issue - no unsettled issue).

Even where there is no existing case law, the Tax Court has also denied a motion for interlocutory appeal. In *Gibbons International, Inc. v. Commissioner*, T.C. Memo. 1988-466, the Tax Court determined there was no showing of a substantial ground for difference of opinion, observing that no legal authority supporting taxpayer's position was found and the court had carefully and fully considered tax-payer's legal and factual arguments in a previous opinion. The *Gibbons* situation may be equated with the instant case. Issue A is an issue of first impression and Opinion A thoroughly discussed the parties' legal and factual arguments.

Even if the issue were considered "unsettled," the legal question must also be "serious." The "serious" part of this requirement seems to address the importance of the issue to the instant litigation or litigation in general, i.e., whether the question is of a magnitude to justify an exception to the traditional "finality" rule. See *Boughton v. Cotter Corp.*, 10 F.3d 746, 752 (10th Cir. 1993). In *Boughton*, appellant asserted that a legal issue concerning a discovery order was important because it had asserted the same question in other litigation. The Tenth Circuit

Court of Appeals rejected this argument, particularly because the dispute could be adequately reviewed on direct appeal from a final judgment. Id. But see *Falik v. United States*, 343 F.2d 38 (2d Cir. 1965) (certification granted where importance to administration of revenue laws on which district courts differed and failure to allow appeal may moot the issue); *Brown v. Bullock*, 294 F.2d 415 (2d Cir. 1961) (certification granted where issue of first impression in circuit, avoidance of lengthy trial and precedential value for large number of other suits). The importance of an issue to a large number of other suits is not, however, relevant. *General Signal*, supra, citing to *Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 2124 (2d Cir. 1990). . Under this criteria, we do not believe Issue A should be considered "serious."

Materially Advance the Ultimate Termination of Litigation:

The third criteria is that an appeal must materially advance the ultimate termination of the litigation. *Kovens*, 91 T.C. at 80. This criteria goes to the intended purpose of interlocutory appeals to achieve an equitable balance between the harm to litigants and the efficiencies of trial. Subsection 7482(a)(2) has been viewed by the Tax Court to be primarily a "means of expediting litigation by permitting appellate consideration during the early stages of litigation of legal questions which, if decided in favor of the appellant, would end the lawsuit." *General Signal Corp. v. Commissioner*, 104 T.C. 248 (1995) citing to *United States v. Woodbury*, 263 F.2d 784, 787 (9th Cir. 1959)). Hence, the Tax Court as well as other courts analyze the nature and timing of the underlying order to be appealed in light of this intended purpose.

In the instant case, the third criteria cannot be met because the facts are somewhat comparable to those in *General Signal*, supra. In *General Signal*, the taxpayer moved for certification for interlocutory appeal of an issue tried and decided before the Tax Court. The case was not ripe for final appeal because a net operating loss carryback (NOL) from a subsequent year was at issue and unresolved and no final decision could be entered by the court. The parties believed the NOL issue would not be resolved for at least another year. In the meantime, taxpayer maintained that, not only its case, but also three other cases before the Tax Court would benefit from the appeal. In this case, Issue A has been tried and decided, and the status of the remaining issues prevent a final decision for a year or more. There is no showing that other cases will be impacted.

The Tax Court in *General Signal* rejected all of these arguments, finding that the appeal did not have the potential to materially advance the ultimate termination of the litigation before the court. The court's determination was based upon the fact that (1) the appeal issue had been tried and decided, (2) the remaining NOL issue may be tried, and (3) the appeal issue was factually distinct and separable from NOL issue. It concluded that "an interlocutory appeal at this stage would have no effect on the disposition of the NOL issue, and would merely result in piecemeal

appeals of the same case." In short, the court viewed the appeal as merely an attempt to seek early review of adverse ruling in a difficult situation, which it held was not the purpose of section 7482(a)(2). Moreover, the Tax Court held that the impact of the legal question on other litigation before the Tax Court was not a consideration under this criteria. Id. citing to *Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 2124 (2d Cir. 1990). In the present case, even this factor is missing.

In this case, the immediate appeal of Issue A would not affect the remaining, unrelated issues. Thus, such appeal would not materially advance the ultimate termination of the litigation. Moreover, we believe that Opinion A correctly resolves Issue A. Accordingly, we recommend that any motion filed by A pursuant to Rule 193 should be opposed.

If you have any further questions, please call Branch 6 at (202) 874-1490 .

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