Current Federal Tax Developments

Week of September 14, 2020

Edward K. Zollars, CPA
(Licensed in Arizona)

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CURRENT FEDERAL TAX DEVELOPMENTS
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Current Federal Tax Developments

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SECTION: STATE TAX
TAXPAYER'S DOMICILE REMAINED IN CALIFORNIA DESPITE TAKING A POSITION IN MALAYSIA

Citation: In the Matter of the Appeal of Mazur, California OTA Case No. 19064883, 2020-OTA-263P, Pending Precedential, 7/23/20

A state level decision in the case of *In the Matter of the Appeal of Mazur*, California OTA Case No. 19064883[1] has a discussion of the concept of *domicile*, a key concept used by many states as either the single or one of the tests available to determine if an individual must file an income tax return as a resident of the state.

In states with an income tax, residents generally are required to pay tax to the state on all income for the year, whether or not it is sourced to the state, while nonresidents generally only pay tax on income that can trace its source to the state. But whether someone is or is not a resident isn't necessarily a simple item to determine.

A concept often used by a state to determine who is a resident is *domicile*. The concept is one that has developed over centuries[2] but roughly looks at a person's "permanent home" which remains in place until the individual clearly establishes a new permanent home. The state of New Jersey, in its instructions to its resident tax form, has the following definition:

> A domicile is the place you consider your permanent home – the place where you intend to return after a period of absence (e.g., vacation, business assignment, educational leave). You have only one domicile, although you may have more than one place to live. Your domicile does not change until you move to a new location with the intent to establish your permanent home there and to abandon your New Jersey domicile. Moving to a new location, even for a long time, does not change your domicile if you intend to return to New Jersey. Your home, whether inside or outside New Jersey, is not permanent if you maintain it only for a temporary period to accomplish a particular purpose (e.g., temporary job assignment).[3]

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[1] *In the Matter of the Appeal of Mazur*, California OTA Case No. 19064883, 2020-OTA-263P, Pending Precedential, July 23, 2020

[2] You can find a long discussion and citations to various sources on the topic at the Wikipedia page on Domicile (law) at https://en.wikipedia.org/wiki/Domicile_(law)

[3] *New Jersey Resident Return (NJ-1040) Booklet*, 2019, p. 4, https://www.state.nj.us/treasury/taxation/pdf/current/1040i.pdf (retrieved September 11, 2020)

In this case California is the state in question, and having a California domicile is one of the ways a taxpayer may end up being treated as a California resident. As the opinion notes:

> Thus, the statutory definition of "resident" contains two alternative tests, the satisfaction of either one leads to a conclusion that the individual is a resident of this state. In determining residency for an individual not domiciled in California, the inquiry is whether the individual is in California "for other than a temporary or transitory purpose." (R&TC, § 17014(a)(1).) But for an individual domiciled in California, the inquiry is whether the individual "is outside [California] for a temporary or transitory purpose." (R&TC, § 17014(a)(2).) "The key question under either [test] is whether the taxpayer's purpose in entering or leaving California was temporary or transitory in character." (*Appeal of Berner* (2001-SBE-006-A) 2002 WL 1884256.)[4]

Thus, if the taxpayer is not domiciled in California, he could not be a resident since he was no longer in California, one of the requirements for a person not domiciled in California to be treated as a California resident for tax purposes.

A taxpayer has only a single domicile at a time, though that doesn't mean different states won't interpret the concept differently enough to avoid having two states both find an individual is domiciled in that state. For California the opinion describes a view that is very similar to that found in the New Jersey instructions cited earlier, as well as the view of many states:

> Domicile is defined as the one location where an individual has the most settled and permanent connection, and the place to which an individual intends to return when absent.5 (*Appeal of Bragg*, *supra*; Cal. Code Regs., tit. 18, § 17014(c).) An individual who is domiciled in California and leaves the state retains his or her California domicile as long as there is a definite intention of returning to California, regardless of the length of time or the reasons for the absence. (Cal. Code Regs., tit. 18, § 17014(c).)[5]

In a footnote, the opinion expands a bit more on this concept.

> Defined another way, domicile refers to the place where individuals have their "true, fixed, permanent home and principal establishment, and to which place [they have], whenever [they are] absent, the intention of returning." (Cal. Code Regs., tit. 18, § 17014(c).) Domicile "is the place in which [individuals have] voluntarily fixed the habitation of [themselves and their] family, not for a mere special or limited purpose, but with the present intention of making a permanent home, until some unexpected event shall occur to induce [individuals] to adopt some other permanent home." (*Ibid.*)[6]

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[4] *In the Matter of the Appeal of Mazur*, California OTA Case No. 19064883, 2020-OTA-263P, pp. 3-4

[5] *In the Matter of the Appeal of Mazur*, California OTA Case No. 19064883, 2020-OTA-263P, p. 4

[6] *In the Matter of the Appeal of Mazur*, California OTA Case No. 19064883, 2020-OTA-263P, p. 4 Footnote 5

Changing a domicile involves more than simply leaving the state. As the opinion continues:

> In order to change domicile, a taxpayer must: (1) actually move to a new residence; and (2) intend to remain there permanently or indefinitely. (*Appeal of Bragg*, *supra*; see also *Noble v. Franchise Tax Bd.* (2004) 118 Cal.App.4th 560, 568 [noting these two elements as indispensable to accomplishing a change of domicile].)

It is also not sufficient for a taxpayer to merely claim he/she had the required intent to change domicile—objective evidence will be considered to either bolster or call into question such an assertion.

> Intent is not determined merely from unsubstantiated statements; the individual's acts and declarations will also be considered. (*Appeal of Bragg, supra*; see also *Noble v. Franchise Tax Bd.*, supra, 118 Cal.App.4th at pp. 567-568.)[7]

The burden is on the taxpayer asserting a change in domicile to clearly show such a change has taken place:

> A domicile once acquired is presumed to continue until it is shown to have been changed. (*Appeal of Bailey* (76-SBE-016) 1976 WL 4032.) The burden of proof as to a change of domicile is on the party asserting such change. (*Appeal of Bragg, supra.*) If there is doubt on the question of domicile after presentation of the facts and circumstances, then domicile must be found to have not changed. (*Ibid.*)[8]

In this case the taxpayer certainly left the state, ending up in Malaysia. As the opinion notes:

> In February 2013, appellant-husband moved from California to Malaysia for the purpose of employment as a Product Marketing/Business Development Manager for Symmid Corporation SDN BHD (Symmid).
>
> M. Mazer (appellant-wife) did not accompany appellant-husband to live in Malaysia and continued to live at appellants' home in California during 2013. She remained a domiciliary and resident of California during the 2013 tax year. Appellants also have an adult daughter who remained in California.
>
> In March 2014, appellant-husband ceased his employment with Symmid and returned to the home that he shared with appellant-wife in California. In total, appellant-husband was in Malaysia for 13 months.[9]

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[7] *In the Matter of the Appeal of Mazur*, California OTA Case No. 19064883, 2020-OTA-263P, p. 4

[8] *In the Matter of the Appeal of Mazur*, California OTA Case No. 19064883, 2020-OTA-263P, p. 5

[9] *In the Matter of the Appeal of Mazur*, California OTA Case No. 19064883, 2020-OTA-263P, pp. 1-2

The taxpayers' position was that while M. Mazer was a California resident, L. Mazer was not a California resident. Thus, the Mazers subtracted ½ of Mr. Mazer's wages from Malaysia (his community share of the income—California is a community property state).

The opinion, looking at the facts of the case, determined that L. Mazer was still domiciled in California. The opinion notes:

> It is undisputed that appellant-husband's domicile prior to leaving for Malaysia in February 2013, was California. Accordingly, his place of domicile for 2013 will be presumed to be California unless he can show that it has changed. (*Appeal of Bailey*, *supra*.) Appellants, on their part, contend that appellant-husband abandoned his California domicile and intended to make Malaysia his permanent home. While appellant-husband's physical presence was in Malaysia, we must examine whether he intended to remain there permanently or indefinitely. (See *Appeal of Bragg*, *supra*.) Thus, we will examine appellant-husband's acts to determine whether they show that he intended to abandon his old California domicile and establish a new one in Malaysia. (See *Appeal of Berner*, *supra*.)
>
> While appellant-husband lived and worked in Malaysia, appellant-husband's actions do not indicate he intended to abandon his old domicile and establish a new one. Appellant-wife remained in California at their marital abode that was maintained in his absence, the address of which was used on their 2013 California tax return. The maintenance of a marital abode is a significant factor in resolving the question of domicile. (*Appeal of Bailey*, *supra*.) Appellants contend that appellant-wife was in California merely to facilitate the transition to Malaysia. However, appellants provide no evidence to indicate any steps taken to move appellant-wife to a new permanent home in Malaysia. In addition, after his employment in Malaysia concluded, appellant-husband returned to the home that was retained in California. An expectation of returning to one's former place of abode defeats the acquisition of a new domicile. (*Appeal of Addington* (82-SBE-001) 1982 WL 11679.)
>
> To summarize, appellant-husband was domiciled in California prior to leaving the state for an employment-related contract expected to last two years and during that period of employment, appellant-wife continued to maintain a home in California, which appellant-husband returned to at the conclusion of his out-of-state employment. These facts indicate that appellant-husband's domicile did not change from California to Malaysia. (See *Appeal of Addington*, *supra*; Cal. Code Regs., tit. 18, § 17014(c).)[10]

Under California law the taxpayer could still avoid being a California resident, despite being domiciled in California, if he was in Malaysia for other than a temporary or

[10] *In the Matter of the Appeal of Mazur*, California OTA Case No. 19064883, 2020-OTA-263P, p. 6

transitory purpose. The opinion notes the tests for being out of state for a temporary or transitory purpose:

> Whether an individual is outside California for a temporary or transitory purpose is a question of fact to be determined by examining all the circumstances of each particular case. (Cal. Code Regs., tit. 18, § 17014(b); see *Appeal of Addington, supra*.) The determination cannot be based solely on the individual's subjective intent but instead must be based on objective facts. (*Appeal of Berner, supra*.)
>
> An absence for a specified duration of two years or less, and not indefinitely, has been held to be only temporary and transitory. (*Appeal of Crozier* (92-SBE-005) 1992 WL 92339.) However, a stay of less than two years will not automatically indicate a temporary or transitory purpose if the reason for the shortened stay is not inconsistent with an intent that the stay be long, permanent, or indefinite. (*Ibid.*) An absence for employment or business purposes which would require a long or indefinite period to complete is not temporary or transitory. (*Ibid.*) An "indefinite period," however, is not one of weeks or months but one of "substantial duration" involving a period of years. (*Ibid.*)[11]

The opinion, in making this decision, looks to the level of connection the taxpayer has with the area where he/she is residing vs. connections to California. As the opinion continues:

> For one thing, such contacts constitute an important measure of the benefits and protections the taxpayer has received from the laws and government of California. (*Ibid.*) Further, such contacts provide objective indicia of whether the taxpayer entered or left this state for temporary or transitory purposes. (*Ibid.*) Where a California domiciliary leaves the state for employment purposes, it is particularly relevant to determine whether, upon departure, the taxpayer substantially severed his or her California connections and then took steps to establish significant connections with his or her new place of abode, or whether the California connections were maintained in readiness for his or her return. (*Appeal of Harrison* (85-SBE-059) 1985 WL 15838.)[12]

Citing the case of *Appeal of Bragg* (2003-SBE-002) 2003 WL 21403264, the opinion provides the following criteria to be used to determine where a taxpayer has the closest connection:

> Registrations and filings with a state or other agency, including:
>
> - Homeowner's property tax exemption
> - Automobile registration
> - Driver's license

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[11] *In the Matter of the Appeal of Mazur*, California OTA Case No. 19064883, 2020-OTA-263P, p. 6

[12] *In the Matter of the Appeal of Mazur*, California OTA Case No. 19064883, 2020-OTA-263P, p. 7

- Voter registration/participation history
- Address used and state of residence claimed on federal/state tax returns

Personal and professional associations, including the state of the taxpayer's:

- Employment
- Children's school
- Bank and savings accounts
- Memberships in social, religious, and professional organizations
- Use of professional services, such as doctors, dentists, accountants, and attorneys
- Maintenance/ownership of business interests
- Professional license(s)
- Ownership of investment real property
- Presence/connections/residency as indicated by third-party affidavits/declarations

Physical presence and property, including:

- Location and approximate sizes and values of residential real property
- Where the taxpayer's spouse and children reside
- Taxpayer's telephone records (i.e., the origination point of taxpayer's telephone calls)
- Origination point of the taxpayer's checking account/credit card transactions
- Number/general purpose (vacation, business, etc.) of days the taxpayer spends in California versus other states[13]

In this case the administrative law judge (ALJ) concludes that the factors indicate clearly that far too many close connections remained with California.

[13] *In the Matter of the Appeal of Mazur*, California OTA Case No. 19064883, 2020-OTA-263P, pp. 7-8

The ALJ notes that the nature of his employment doesn't suggest that the assignment was necessarily intended to be permanent, based on the evidence submitted:

> In addition, appellant-husband's optionally renewable contract does not necessarily indicate that his employment was for a permanent or indefinite term. (See *Appeal of Purkins* (84-SBE-081) 1984 WL 16160; see also *Appeal of Milos* (84-SBE-042) 1984 WL 16121 [taxpayer held to be California resident based on connections after accepting six-month extensions repeatedly over four years].) Appellants provide no evidence indicating that appellant-husband's employment in Malaysia was expected to last indefinitely and, as the Bragg factor discussion below illustrates, the evidence indicates that his employment and stay in Malaysia was for a temporary and transitory purpose. (See *Appeal of Milos, supra*.) Without further evidence in support, we cannot find the contract term providing that it "may be renewable" is sufficient on its own to establish that appellant-husband's employment was for an indefinite period of substantial duration. Given the above, we find that appellant-husband's two-year employment contract indicates that his absence from California was for a temporary and transitory purpose. (*Appeal of Crozier, supra*.)[14]

While the opinion states that the mere fact the taxpayer only remained in Malaysia for 13 months before returning to California is not necessarily clear evidence of a lack of a permanent or indefinite term when the work commenced, it is a practical problem. Agents are more likely to press the issue of residency when the taxpayer's stay in the new location is of short duration with a return to the original state afterward, as it is reasonable to expect that it's far more likely the underlying facts will continue to show close ties to the old home state.

The taxpayer's connections outside of work also were more closely tied to California. The opinion notes:

> During the time period appellant-husband was in Malaysia for purposes of employment, he did establish connections there, including his apartment lease, vehicle, vehicle registration, and had bills mailed to his Malaysian address. However, these connections were contingent on his employment with Symmid and paid for by his employer. While he had a vehicle provided by Symmid, he did not obtain a Malaysian driver's license, and although he changed his mailing address to Malaysia, the apartment was in the name of Symmid, and the bills sent to his apartment were paid for by Symmid. It has been held that housing, meals, and vehicles provided by an employer as a "matter of job convenience" are not necessarily significant connections. (*Appeal of Stephens* (85-SBE-083) 1985 WL 15861; see also *Appeal of Keeling* (85-SBE-124) 1985 WL 15895.) Similarly, appellant-husband's connections to Malaysia based on his employment existed only so long as he could fulfill his contractual obligations. We find this tends to show that the connections were, like his contract, of limited duration, and not

[14] *In the Matter of the Appeal of Mazur*, California OTA Case No. 19064883, 2020-OTA-263P, p. 8

significant, particularly given that no other evidence was provided indicative of a permanent move.

In addition, appellants do not provide evidence that appellant-husband substantially severed his California connections. Appellant-wife lived in California and they continued to maintain their ownership of a house and vehicle in California. Appellants provide no evidence showing steps taken by appellant-wife to move to Malaysia or to move their permanent home from California. Furthermore, once his employment ended in Malaysia, appellant-husband immediately went back to his home in California, which was maintained in readiness for his return. Because appellant-husband's connections with Malaysia were only those provided by his employer as a matter of job convenience and not significant, and he made no attempt to sever his substantial connections with California, we find that his presence in Malaysia was for a temporary or transitory purpose. (See *Appeal of Milos, supra*.) Therefore, we find that appellant-husband was a resident of California in 2013 and subject to tax on his entire taxable income, including his income earned in Malaysia.[15]

SECTION: 274
HIGH-LOW AND OTHER SPECIAL PER DIEM RATES FOR 2020/2021 FISCAL YEAR PUBLISHED BY THE IRS

Citation: Notice 2020-71, 9/11/20

The special per-diem rates for the fiscal year running from October 1, 2020 to September 30, 2021 has been released in Notice 2020-71.[16] The special rates governed by this Notice are:

- The special transportation industry meal and incidental expenses (M&IE) rates,
- The rate for the incidental expenses only deduction, and
- The rates and list of high-cost localities for purposes of the high-low substantiation method.[17]

The special meals and incidental expense rates for the transportation industry for the period from October 1, 2020 to September 30, 2021 are $66 for any locality of travel in the continental United States (CONUS) and $71 for any locality outside the continental United States (OCONUS).[18]

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[15] *In the Matter of the Appeal of Mazur*, California OTA Case No. 19064883, 2020-OTA-263P, pp. 9-10

[16] Notice 2020-71, September 11, 2020, https://www.irs.gov/pub/irs-drop/n-20-71.pdf (retrieved September 11, 2020)

[17] Notice 2020-71, Section 1

[18] Notice 2020-71, Section 3

The rate for incidental expenses for the period from October 1, 2020 to September 30, 2021 for the incidental expenses only deduction is $5 per day.[19]

For those using the high-low substantiation method, the rates will be $292 for any high cost locality and $198 to any other location within CONUS (which is a decrease from the prior year). Of that amount, $71 is treated as paid for meals and incidentals to a high cost locality and $60 for travel to any other locality within CONUS.[20]

The list of high cost localities can be found at Section 5.2 of the Notice.

The notice indicates that the following localities have been added to the list for the 2020/2021 fiscal year:

> Los Angeles, California; San Diego, California; Gulf Breeze, Florida; Kennebunk/Kittery/Sanford, Maine; Virginia Beach, Virginia.[21]

As well, the following locations are having modifications made to the portion of the year they qualify for high cost status for the 2020/2021 fiscal year:

> Sedona, Arizona; Monterey, California; Santa Barbara, California; District of Columbia (see also Maryland and Virginia); Naples, Florida; Jekyll Island/Brunswick, Georgia; Boston/Cambridge, Massachusetts; Philadelphia, Pennsylvania; Jamestown/Middletown/Newport, Rhode Island; Charleston, South Carolina.[22]

Finally, the following localities have been removed from the high cost list for 2020/2021:

> Midland/Odessa, Texas; Pecos, Texas.[23]

SECTION: 5000A
MEDICAID COVERAGE LIMITED TO COVID-19 TESTING AND DIAGNOSTIC SERVICES IS NOT MINIMUM ESSENTIAL COVERAGE FOR PREMIUM TAX CREDIT PURPOSES

Citation: Notice 2020-66, 9/9/20

In Notice 2020-66[24] the IRS provided that Medicaid coverage limited to COVID-19 testing and diagnostic services does not constitute minimum essential coverage. The

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[19] Notice 2020-71, Section 4

[20] Notice 2020-71, Section 5.1

[21] Notice 2020-71, Section 5.3.a

[22] Notice 2020-71, Section 5.3.b

[23] Notice 2020-71, Section 5.3.c

[24] Notice 2020-66, September 9, 2020, https://www.irs.gov/pub/irs-drop/n-20-66.pdf (retrieved September 10, 2020)

issue is important in determining if a taxpayer qualifies for a premium tax credit under IRC §36B.

The Notice explains the interaction of minimum essential coverage and the premium tax credit:

> Section 36B and § 1.36B-3(a) of the Income Tax Regulations provide that a taxpayer is allowed a premium tax credit only for months that are coverage months for individuals in the taxpayer's family, as defined in § 1.36B-1(d). Under § 1.36B-3(c)(1)(ii), a coverage month for an individual includes only those months the individual is not eligible for minimum essential coverage, except coverage in the individual market.
>
> Minimum essential coverage is defined in section 5000A(f) of the Code and generally includes coverage under government-sponsored programs, including Medicaid coverage under title XIX of the Social Security Act. However, the Treasury Department and the IRS have determined that certain health care coverage providing limited benefits is not minimum essential coverage under a government-sponsored program. See § 1.5000A-2(b)(2).[25]

Effective for tax years beginning in or after 2020, the Notice provides:

> The Treasury Department and the IRS have determined that Medicaid coverage limited to COVID-19 testing and diagnostic services under section 6004(a)(3) of the Families First Act is not minimum essential coverage under a government-sponsored program. Thus, an individual's eligibility for this coverage for one or more months does not prevent those months from qualifying as coverage months for purposes of determining eligibility for the premium tax credit under section 36B.[26]

SECTION: 6011
IRS ADDS 6 MORE FORMS TO LIST THAT TEMPORARILY CAN BE SIGNED WITH DIGITAL SIGNATURES

Citation: "IRS adds six more forms to list that can be signed digitally; 16 now available," IR 2020-206, 9/10/20

The IRS has announced an additional six forms that will qualify for electronic signatures, in addition to the forms originally announced as eligible for this program on August 28.[27]

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[25] Notice 2020-66, Section 2

[26] Notice 2020-66, Section 3

[27] "IRS adds six more forms to list that can be signed digitally; 16 now available," IR 2020-206, September 10, 2020, https://www.irs.gov/newsroom/irs-adds-six-more-forms-to-list-that-can-be-signed-digitally-16-now-available (retrieved September 10, 2020); Memorandum from Susan B. Lough, Issued August 28, 2020,

The new forms added to the list are:

- Form 706, U.S. Estate (and Generation-Skipping Transfer) Tax Return;
- Form 706-NA, U.S. Estate (and Generation-Skipping Transfer) Tax Return;
- Form 709, U.S. Gift (and Generation-Skipping Transfer) Tax Return;
- Form 1120-ND, Return for Nuclear Decommissioning Funds and Certain Related Persons;
- Form 3520, Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts; and
- Form 3520-A, Annual Information Return of Foreign Trust With a U.S. Owner.

These forms join the following forms originally on the list to qualify for electronic signatures:

- Form 3115, Application for Change in Accounting Method;
- Form 8832, Entity Classification Election;
- Form 8802, Application for U.S. Residency Certification;
- Form 1066, U.S. Income Tax Return for Real Estate Mortgage Investment Conduit;
- Form 1120-RIC, U.S. Income Tax Return For Regulated Investment Companies;
- Form 1120-C, U.S. Income Tax Return for Cooperative Associations;
- Form 1120-REIT, U.S. Income Tax Return for Real Estate Investment Trusts;
- Form 1120-L, U.S. Life Insurance Company Income Tax Return;
- Form 1120-PC, U.S. Property and Casualty Insurance Company Income Tax Return; and
- Form 8453 series, Form 8878 series, and Form 8879 series regarding IRS e-file Signature Authorization Forms.

These forms will be accepted with digital signatures so long as they are mailed on or before December 31, 2020.

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modified September 10, 2020, "Temporary Deviation from Handwritten Signature Requirement for Limited List of Tax Forms," https://www.irs.gov/pub/irs-utl/updated-dcse-web-signature-memorandum.pdf (retrieved September 10, 2020)

The forms are ones that generally cannot be filed electronically and, thus, are normally mailed with the taxpayer's pen and ink signature.

The memorandum, which retained its August 28, 2020 date but was simply revised to add the new forms, has the following information regarding the types of electronic signature technologies that can be used for this program:

> Electronic and digital signatures appear in many forms when printed and may be created by many different technologies. No specific technology is required for this purpose during this temporary deviation.[28]

SECTION: 6015
TAXPAYER FIRST ACT PROVISION ONLY APPLIES TO TAX COURT PETITIONS FILED AFTER JULY 1, 2019

Citation: Sutherland v. Commissioner, 155 TC No. 6, 9/8/20

The Tax Court had to determine what Congress meant with unclear wording of an effective date provided for in the Taxpayer First Act in the case of *Sutherland v. Commissioner*, 155 TC No. 6.[29] While most readers are not going to be trying cases before the Tax Court that were filed before July 1, 2019, the case reminds those who represent taxpayers in innocent spouse cases in Appeals that Congress has attempted to incentivize taxpayers to cooperate in the Appeals process rather than decide to attempt to go straight to Tax Court in innocent spouse cases.

The case in question involves an application for innocent spouse relief by Ms. Sutherland. The basic facts of Ms. Sutherland's situation are described by the Court as follows:

> In 2010 petitioner's husband was indicted for tax crimes. He pleaded guilty, and as part of his plea agreement he was required to submit delinquent tax returns for 2005 and 2006 (among other years). Petitioner avers that she did not have an independent filing obligation for 2005 or 2006 but believed she was required to file joint returns with her husband. She signed the returns, as he requested, in the courthouse cafeteria less than an hour before his sentencing on June 29, 2011.
>
> On September 1, 2016, petitioner filed a Form 8857, Request for Innocent Spouse Relief, for 2005 and 2006. On that form she stated that she had signed the returns during a "confusing and emotional" period, that the returns had been prepared by her husband's accountant with no input from her, and that she simply signed the

[28] Memorandum from Susan B. Lough, Issued August 28, 2020, modified September 10, 2020, "Temporary Deviation from Handwritten Signature Requirement for Limited List of Tax Forms," Footnote 1

[29] *Sutherland v. Commissioner*, 155 TC No. 6, https://www.ustaxcourt.gov/UstcInOp2/OpinionViewer.aspx?ID=12314 (retrieved September 8, 2020)

> returns as instructed. She did not mark the box on the Form 8857 indicating that she had any mental or physical health problems at that time, believing that a "yes" answer would have required that she secure a medical diagnosis.[30]

After the IRS denied her initial request for relief, Ms. Sutherland filed for an Appeals conference. Her representative decided that the Appeals Officer (AO) was not applying the standard the representative believed was appropriate to evaluate the claim for relief and that a decision against the taxpayer was a forgone conclusion at this level regardless of what was provided to the AO.[31]

The representative also knew that, at the time of the conference, at the Tax Court the taxpayer would be provided with a *de novo* scope of review[32]—that is, the Court would analyze the case anew, and the taxpayer would be able to present additional evidence in that proceeding. The representative concluded there was no need to continue to provide information to the AO. Doing so would only serve to delay the inevitable need to file a petition in the U.S. Tax Court to seek the result the taxpayer desired.[33]

However, after the petition was filed and before the case came before the Court, the U.S. Congress intervened. In the Taxpayer First Act, Congress provided in new IRC §6015(e)(7) the following rule that applied to Tax Court cases brought for innocent spouse relief:

> (7) **Standard and scope of review** Any review of a determination made under this section shall be reviewed de novo by the Tax Court and shall be based upon—
>
> > (A) the administrative record established at the time of the determination, and
> >
> > (B) any additional newly discovered or previously unavailable evidence.

Act Section 1203(b) provided the amendment "shall apply to *petitions or requests filed or pending* on or after the date of the enactment of this Act." That date of enactment was July 1, 2019.

The key issue was how to interpret the effective date—if, in fact, it applied to petitions that had been filed but not yet decided, the taxpayer would be unable to produce additional evidence to the Tax Court. The question was whether the phrasing should be read to apply both "filed" and "pending" to petitions and requests, or whether only the "filed" term modified petitions, with "pending" modifying requests.

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[30] *Sutherland v. Commissioner*, 155 TC No. 6, p. 5

[31] *Sutherland v. Commissioner*, 155 TC No. 6, p. 5

[32] *Porter v. Commissioner*, 132 TC 203, 206-210 (2009)

[33] *Sutherland v. Commissioner*, 155 TC No. 6, pp. 5-6

The opinion notes:

> On its face the effective date provision is ambiguous. "[P]etitions or requests filed or pending" could mean "petitions filed or pending, or requests filed or pending." Alternatively, it could mean "petitions filed or requests pending." If the former reading is adopted, so that "pending" modifies both "petitions" and "requests," subsection (e)(7) likely would apply here because this case was pending in this Court when the amendment was enacted. If the latter meaning is adopted, so that "pending" modifies only "requests" and "filed" modifies only "petitions," subsection (e)(7) would not apply. Petitioner's request for innocent spouse relief had been resolved by the IRS, and hence was not "pending," on or after July 1, 2019. And her petition to this Court was filed before that date.[34]

The Court illustrates how the phrase could be read in two ways in the following examples:

> For example, assume a municipal ordinance that is effective for "cars or boats parked or docked" at a city marina after a specified date. This provision would logically be interpreted to refer to "cars parked or boats docked." That is because each adjective comfortably modifies only one noun.
>
> On the other hand, assume a sales tax that is effective for "cars or trucks sold or leased" after a specified date. Unless the context suggested otherwise, this provision would likely be interpreted to refer to "cars sold or leased, or trucks sold or leased." Both adjectives comfortably modify both nouns, and it would be odd to have different tax treatment for similar transactions involving similar vehicles.[35]

The Court concludes that, looking at how the word "pending" has previously been applied (or not applied) in relation to petitions in the IRC, that the second interpretation is the appropriate one:

> We have discovered no instance in which Congress, either in the Code or in an uncodified effective date provision, has used the phrase "petition(s) pending" when referring to ongoing matters in our Court. And interpreting Act sec. 1203(b) to refer to "petitions filed [in this Court] or requests pending [with the IRS]" on or after the effective date makes logical sense in light of the statutory context.[36]

As well, the Court found that applying both "filed" and "pending" to both petitions and requests would render the word filed superfluous, a result that courts avoid accepting absent no other reasonable way to resolve the issue:

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[34] *Sutherland v. Commissioner*, 155 TC No. 6, p. 10

[35] *Sutherland v. Commissioner*, 155 TC No. 6, p. 11

[36] *Sutherland v. Commissioner*, 155 TC No. 6, p. 11

> The universe of "petitions or requests pending" on or after July 1, 2019, is the same as the universe of "petitions filed or pending" and "requests filed or pending" on or after that date. Put simply, this alternative reading leaves no work for the word "filed" in the effective date provision, in direct conflict with our established practice of giving effect "to every clause and word of a statute." See, e.g., *Klein v. Commissioner*, 149 T.C. 341, 355 (2017) (citing *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004), and *Negonsott v. Samuels*, 507 U.S. 99, 106 (1993)).[37]

The Court concludes that Ms. Sutherland will be allowed to introduce her evidence in the Tax Court proceeding, since her petition was filed before July 1, 2019.

But it is important to note that the law has changed, and in the future taxpayers will not be able to decide it is best to delay producing information to the Appeals Officer, rather bringing it forward to the Tax Court. As the opinion notes:

> By amending the statute to provide that this Court's review would be limited to the administrative record (apart from previously unavailable or newly discovered evidence), Congress incentivized taxpayers to cooperate with the IRS by building a complete record during the administrative process.[38]

SECTION: 6501
TAXPAYER'S FAILURE TO INCLUDE IP PIN ON RETURN, TRIGGERING E-FILE REJECTION, DID NOT DELAY THE BEGINNING OF THE RUNNING OF THE STATUTE OF LIMITATIONS

Citation: Fowler v. Commissioner, 155 TC No. 7, 9/9/20

The Tax Court considered the question in the case of *Fowler v. Commissioner*,[39] 155 TC No. 7 of the impact of a taxpayer electronically filing a tax return without a required IP PIN on the running of the statute of limitations on the time for the IRS to assess tax.

The taxpayer in this case had his identity compromised in 2013 and the IRS claims the agency sent the taxpayer an IP PIN in late December 2013. However, the taxpayer claims that he did not receive the IP PIN by the October 15, 2014 date on which he timely attempted to file his 2013 income tax return.[40]

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[37] *Sutherland v. Commissioner*, 155 TC No. 6, p. 15

[38] *Sutherland v. Commissioner*, 155 TC No. 6, p. 17

[39] *Fowler v. Commissioner*, 155 TC No. 7, September 9, 2020, https://www.ustaxcourt.gov/UstcInOp2/OpinionViewer.aspx?ID=12321 (retrieved September 9, 2020)

[40] *Fowler v. Commissioner*, 155 TC No. 7, p. 4 Footnote 4

The Court describes the taxpayer's first attempt to file his 2013 return as follows:

> Petitioner efiled the 2013 Form 1040 on October 15, 2014 (October 15 submission). Petitioner electronically signed (e-signed) Form 8879, IRS e-file Signature Authorization, to authorize Bennett Thrasher, LLP, a certified public accountancy firm, to file a return on his behalf in its capacity as an electronic return originator (ERO). Jeffrey J. Call, a partner at Bennett Thrasher, e-signed the 2013 Form 1040 with a Practitioner Personal Identification Number (PIN) and transmitted it directly to respondent on October 15, 2014. Mr. Call received a Submission ID, a "globally unique 20 digit number assigned to electronically filed tax returns". Pub. 1345, at 56. Respondent's software received the October 15 submission that same day and sent Mr. Call a rejection notice, citing code "IND181" for failure to provide a valid Identity Protection Personal Identification Number (IP PIN) with the efiled return.[41]

The taxpayer and preparer attempted to solve the issue by sending in a paper copy of the return less than two weeks after the rejection:

> Petitioner again submitted a 2013 Form 1040 on October 28, 2014 (October 28 submission). Mr. Call prepared a paper 2013 Form 1040 with the same information as the October 15 submission, and petitioner used DocuSign to sign the jurat. On October 28, 2014, Bennett Thrasher mailed the 2013 Form 1040 with petitioner's DocuSign signature stamp to the IRS Service Center in Austin, Texas, via U.S. Postal Service (USPS) Certified Mail with Return Receipt. The USPS delivered the October 28 submission to the IRS on October 30, 2014. The return receipt confirms that an IRS employee, Sandra Douds, signed for the package. Petitioner received a letter in December 2014 notifying him that the IRS had not received his 2013 return.[42]

Finally, in 2015 the taxpayer, having obtained a new IP PIN, did manage to electronically file his 2013 tax return with the IRS in April of 2015:

> Mr. Call efiled a 2013 Form 1040 on behalf of petitioner a third time on April 30, 2015 (April 30 submission). Petitioner obtained an IP PIN from the IRS on or before April 30, 2015, and it was included in the April 30 submission. With the exception of the IP PIN, the tax information in the April 30 submission was identical to the information in the first and second submissions. The IRS' software reviewed and accepted the April 30 submission on the same day.[43]

The IRS issued a notice of deficiency to the taxpayer on April 5, 2018, less than three years after the date of the successful electronic filing, but more than three years after

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[41] *Fowler v. Commissioner*, 155 TC No. 7, pp. 3-4

[42] *Fowler v. Commissioner*, 155 TC No. 7, pp. 4-5

[43] *Fowler v. Commissioner*, 155 TC No. 7, p. 5

the date the taxpayer had first attempted to electronically file the return and after the taxpayer had followed up with a paper tax return containing the same information.[44]

The taxpayer argued that the IRS was too late—the statute of limitations for the agency to assess tax against the taxpayer expired three years after the return had been filed and thus the assessment after that date was not valid under IRC §6501. The taxpayer argued that either the statute began on October 15, 2014 when the first electronically filed return was submitted or, at the worst, on October 30, 2014 when the agency received the paper return filed in response to the rejection of the electronically filed return.

The IRS argued that the rejected return did not count as a return for starting the tolling of the statute as the IP PIN is a required part of the signature[45] and that the second return, being signed by an unauthorized means, was not a valid return[46]—thus, the statute did not begin to run until April 30, 2015 when an electronic return was submitted with the IP PIN.

The Tax Court noted that a taxpayer's delivery of a document purporting to be a return starts the statute of limitations under IRC §6501 if:

- The document filed purports to be a return and provides sufficient data to calculate the tax liability;
- The taxpayer made an honest and reasonable attempt to satisfy the requirements of the tax law; and
- The taxpayer executes the document under penalty of perjury.[47]

The Tax Court quickly concludes that the taxpayer had met the first two standards—the taxpayer had submitted a return with sufficient information to calculate the tax and had made an honest and reasonable attempt to satisfy the requirements of the law.[48]

The true dispute arose under the third standard—did the taxpayer properly execute the document under penalties of perjury. The IRS asserted that only on the third attempt did the agency receive a return that was properly signed, since a proper signature for an electronic return requires an IP PIN if the taxpayer has had one issued.

The Tax Court disagreed that the IP PIN makes up part of the signature:

> Respondent argues that the October 15 submission failed to satisfy the signature requirement because it did not include an IP PIN. This

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[44] *Fowler v. Commissioner*, 155 TC No. 7,pp. 5-6

[45] *Fowler v. Commissioner*, 155 TC No. 7, p. 11

[46] *Fowler v. Commissioner*, 155 TC No. 7, p. 8, Footnote 8

[47] *Fowler v. Commissioner*, 155 TC No. 7, p. 9, citing *Beard v. Commissioner*, 82 T.C. 766, 777 (1984), *aff'd* 793 F.2d 139 (6th Cir. 1986)

[48] *Fowler v. Commissioner*, 155 TC No. 7, pp. 10-11

> argument does not persuade us because the IP PIN is separate from the signature guidance the Secretary has issued.[49]

The Tax Court looks to IRS guidance and finds nowhere does the agency inform taxpayers or EROs that the IP PIN is part of the signature:

> Despite the authority delegated in section 6061, there is little regulatory guidance as to what constitutes a valid signature. Section 1.6061-1(a), Income Tax Regs., provides only that each individual "shall sign" his income tax return. Section 1.6695-1(b)(2), Income Tax Regs., directs a signing tax return preparer to "electronically sign the return in the manner prescribed by the Commissioner in forms, instructions, or other appropriate guidance." We therefore look to the instructions to the 2013 Form 1040 itself. Under the heading "IRS e-file: Electronic Return Signatures!", the instructions state that the taxpayer "must sign the return electronically using a personal identification number (PIN)", either a Self-Select PIN or a Practitioner PIN. 2013 Form 1040 Instructions, at 73 (emphasis added). Here, Mr. Call included a Practitioner PIN on petitioner's efiled return in accordance with the instructions.[50]

The Court goes on to note:

> In this case, whereas the 2013 Form 1040 Instructions definitively identify the Self-Select PIN and the Practitioner PIN as the means of signing an electronic return, they provide no explicit indication that the IP PIN is part of the signature. See 2013 Form 1040 Instructions, at 73; see also IRS Publication 4164, *Modernized e-File (MeF) Guide for Software Developers and Transmitters: Processing Year 2014* (Rev. 12-2013), at 16-17, 177-187 (hereinafter Pub. 4164) (addressing signature method and IP PIN in different sections and giving no indication that IP PIN is part of signature requirement); IRS Publication 17, *Your Federal Income Tax for Individuals* (Nov. 26, 2013), at 8-9 (same).[51]

Some may be concerned because the IP PIN box does appear near the signature line on the printed version of the Form 1040, but the Court didn't find that clearly indicated the IP PIN was a required part of the signature:

> The IP PIN appears within the "Sign Here" section of the 2013 Form 1040 itself, but so do other elements of the return that are not fundamental to a *Beard* signature. See, e.g., *Hulett v. Commissioner*, 150 T.C. at 68 (finding a return validly executed even though it omits taxpayers' daytime phone number, which is requested in the "Sign Here" section); *Estate of Temple v. Commissioner*, 67 T.C. 143, 164 (1976) (finding the absence of one spouse's signature on 1966 Form 1040 does not itself prevent return from being joint return, even though the

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[49] *Fowler v. Commissioner*, 155 TC No. 7, p. 11

[50] *Fowler v. Commissioner*, 155 TC No. 7, p. 12

[51] *Fowler v. Commissioner*, 155 TC No. 7, pp. 12-13

> 1966 Form 1040, like the 2013 Form 1040, provides in the "Sign Here" section that both spouses must sign a joint return).[52]

The Court concludes the taxpayer justifiably relied on the IRS instructions in signing the form, and that the IRS cannot now claim reliance on its own documents wasn't justified.[53]

The IRS did refer to the Internal Revenue Manual to justify its position, noting that it provides that if an electronic return is filed with a missing or incorrect IP PIN the return will be rejected, but the Court states "[a]n IP PIN does not become part of the signature requirement simply because respondent's software will reject an efiled return without it." The Court goes on to note that the Modernized e-File (MeF) system rejects returns for a number of errors that won't cause the return to fail to meet the three pronged test for beginning the running of the statute.[54]

The Court also rejects the IRS position that the IP PIN is needed to authenticate the return—that is, be sure the person claiming to sign the return is really the taxpayer. The Court notes the IRS's own internal guidance states that an e-signature may not itself be sufficient to authenticate a return. As well, since the taxpayer filed via an ERO, the ERO is directed to verify the taxpayer's identity, causing the Court to observe that "[i]t is not obvious to us why this requirement does not make the IP PIN superfluous in petitioner's case."[55]

The court notes that a return must also be "properly filed" to start the running of the statute—did the taxpayer's method of filing comply with the IRS's prescribed filing requirements.[56] But the Court did not agree with the IRS's view that failing to include the IP PIN violated this requirement, finding a return is filed when it is physically delivered to the proper IRS office—and that delivery can be by electronic filing.[57]

> We find there is no genuine dispute that petitioner delivered the October 15 submission to respondent. Petitioner submitted with his motion an affidavit signed by Jeffrey Call, who stated that he submitted a 2013 Form 1040 to respondent on behalf of petitioner. See *Caulkins v. Commissioner*, T.C. Memo. 1984-504, 48 T.C.M. (CCH) 1182, 1186 (1984) ("[F]undamental agency law provides that the actions of the tax preparer (agent) are imputed to the taxpayer (principal)."). Petitioner also provided Bennett Thrasher's transmission log, which included the 20-digit Submission ID given to an efiler after submitting a return. Most significantly, respondent acknowledges that petitioner submitted a return on October 15, 2014, when he states in his response to petitioner's cross-motion for summary judgment that petitioner "first attempted to e-file his 2013 income tax return on

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[52] *Fowler v. Commissioner*, 155 TC No. 7, p. 13

[53] *Fowler v. Commissioner*, 155 TC No. 7, p. 13

[54] *Fowler v. Commissioner*, 155 TC No. 7, p. 14

[55] *Fowler v. Commissioner*, 155 TC No. 7, p. 15

[56] *Fowler v. Commissioner*, 155 TC No. 7, p. 15

[57] *Fowler v. Commissioner*, 155 TC No. 7, p. 17

> October 15, 2014, but his e-filing attempt was unsuccessful because he failed to include his IP PIN on the return."[58]

The Court concludes:

> Where a taxpayer properly files a required return, the taxpayer has satisfied all his duties to trigger the statute of limitations. Respondent has many tools to determine the appropriate liability, but he must use these tools within the prescribed limitations period. We simply see no reason to allow respondent to toll the statute of limitations where petitioner properly filed a return.[59]

Because the Court decided the first filing attempt began the running of the statute, the Court did not move on to decide what some might have been more interested in—would the use of DocuSign to sign the paper return have been deemed an acceptable method of signing in this case.[60]

While this case is favorable to the taxpayer, one area of concern is that, in the end, the Tax Court based the decision on IRS instructions, something that the IRS can much more easily revise than regulations. It's not clear if the IRS had stated that an IP PIN was part of the required signature in the instructions to Form 1040 if the result would still have been in favor of the taxpayer, so advisers should take care to note if the IRS revises those instructions in the future.

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[58] *Fowler v. Commissioner*, 155 TC No. 7, pp. 17-18

[59] *Fowler v. Commissioner*, 155 TC No. 7, p. 19

[60] *Fowler v. Commissioner*, 155 TC No. 7, p. 8