MISSED OPPORTUNITIES – TAX COURT SHOWS NO MERCY FOR INDIRECT PARTNER

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DECISION

In a recent memorandum,[1] the Tax Court ruled that an indirect partner is not able to challenge the tax liability of a partnership after the period provided in Code §§6226(a) and (b) despite a lack of notification from the tax matters partner. In other words, under the facts at hand, the taxpayer in *Allen R. Davison III v. Commr.* missed the chance for pre-payment litigation over the merits of a tax assessment. The case highlights the necessity of timely raising any defense a taxpayer may have.

PETITIONS AND APPEALS

Pursuant to Code §§6226(a) and (b), within 90 days of the mailing of a final partnership administrative adjustment ("F.P.A.A."), a tax matters partner[2] may file a petition with the Tax Court or other referenced Federal court for readjustment of the partnership items. If the tax matters partner fails to file such a petition, any notice partner may file a petition for readjustment within 60 days after the 90-day period has closed.

In this case, no petition was ever filed. The two F.P.A.A.'s at issue therefore became binding and conclusive upon the taxpayer, allowing the I.R.S. to make the computational adjustments to his income.

In his reply brief, the taxpayer contended that he was not notified of these F.P.A.A.'s until after the statutory period for timely appealing the determinations had already passed. In response, the court analyzed Code §6223(a),[3] which states that the Commissioner must give partners notice of the beginning of administrative proceedings and the resulting F.P.A.A. However, the taxpayer in Davison was not a partner in either of the partnerships that were audited. Rather, he held an indirect interest in these entities through his interest in an intermediate partnership. The taxpayer did not argue, nor did the record reflect, that the I.R.S. was informed that the taxpayer was an indirect partner within the meaning of Code §6223(c)(3).

Under Code §6223(h)(2), the tax matters partner of the intermediate partnership was required to forward copies of the F.P.A.A. to the taxpayer. Furthermore, in any event:

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1 *Allen R. Davison III v. Commr.*, T.C. Memo. 2019-26 (4/3/19)

2 For a detailed discussion of the role of the tax matters partner, see "Corporate Matters: Partner Representative and the New Partnership Audit Regime," *Insights* 5, no. 2 (2018).

3 Code §6223, as applicable here, has since been amended. This reference and later references to Code §6223 refer to the section before it was amended by BBA sec. 1101(c), 129 Stat. at 627.

> The failure of a tax matters partner, a pass-thru partner, the representative of a notice group, or any other representative of a partner to provide any notice or perform any act . . . [such as an appeal to an F.P.A.A.] does not affect the applicability of any proceeding or adjustment . . . to such partner.[4]

Because the taxpayer indirectly held interests in two partnerships and Code §6223(c)(3) is of no avail here, the court ruled that the I.R.S. was not required to provide him an individual notice of the F.P.A.A.

Note that the Tax Court's review of an Appeals determination under Code §6330(c)(3) is limited to the issues that a taxpayer raises before Appeals.

In Davison, the court stated that if a taxpayer had an earlier opportunity to dispute a liability, the liability cannot be contested in a Collection Due Process or Equivalent Hearing or thereafter in the Tax Court. According to the court, the case law is clear. The taxpayer is precluded from challenging the existence or the amount of underlying income tax liabilities if there was opportunity to challenge the partnership items that were reflected on the two F.P.A.A.'s.

A SPECIAL CASE?

At first, it may seem that the I.R.S. was harsh in determining that the taxpayer missed his chance to contest the F.P.A.A. for the two partnerships he held indirectly through another partnership. However, it does not seem so harsh when the identity of the taxpayer is understood.

The taxpayer, Allen R. Davison III, was the son of Allen R. Davison II, who represented his son in this case. The father is a licensed C.P.A. and member of the Nebraska bar, who, in May 2010, was permanently barred from promoting a variety of tax fraud schemes. He was required by the Justice Department to provide a list of all clients from 2005 through 2010 and to continue doing so as long as he continued to provide tax advice.

The partnerships that were the subject of this case were most likely among the tax shelters crafted by the taxpayer's father. So, it is no surprise that the I.R.S. may have a particular interest in this case.

[4] Sec. 6230(f); *Kimball v. Commr.*, T.C. Memo. 2008-78, slip op. at 9.