Current Federal Tax Developments

Week of May 9, 2022

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SECTION 223
HDHP AND HSA INFLATION ADJUSTED NUMBERS RELEASED FOR 2023

Revenue Procedure 2022-24, 4/29/22

In Revenue Procedure 2022-24[1] the IRS has announced the inflation-adjusted amounts for Health Savings Accounts (HSAs) for 2023.

Contribution Limitations for 2023

The inflation adjusted contribution limitations for HSAs in 2023 will be:

- Individual with self-only coverage: $3,850 and
- Individual with family coverage: $7,750.[2]

High Deductible Health Plan Amounts for 2023

In order for an individual to make a contribution to a health savings account, he/she must have coverage under a qualifying high deductible health plan (HDHP) and no disqualifying coverage.

For 2023, an HDHP is a health plan with an annual deductible of:

- Not less than $1,500 for an individual with self-only coverage and
- Not less than $3,000 for an individual with family coverage.[3]

As well, total out-of-pocket expenses (other than premiums) cannot exceed $7,500 for self-only coverage or $15,000 for family coverage.[4]

Excepted Benefit HSA

In 2023 the maximum amount that may be made newly available for the plan year for an excepted benefit HSA under Treasury Reg. §54.9831-1(c)(3)(viii) is $1,950.[5]

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[1] Revenue Procedure 2022-24, April 29, 2022, https://www.taxnotes.com/research/federal/irs-guidance/revenue-procedures/irs-announces-2023-inflation-adjusted-amounts-for-hsas/7dfqm (retrieved May 3, 2023)

[2] Revenue Procedure 2022-24, April 29, 2022

[3] Revenue Procedure 2022-24, April 29, 2022

[4] Revenue Procedure 2022-24, April 29, 2022

[5] Revenue Procedure 2022-24, April 29, 2022

SECTION 1361
TRUSTEES FORGET TO PUT S SHARES INTO QSST TRUST, HAVE TO ASK FOR IRS PLR TO SAVE S STATUS

PLR 202218004, 5/6/22

S Corporations may be a popular form of doing business, but they are very fragile structures. The status can be lost in various ways, leading to the corporation becoming a C corporation, quite often a much less favorable tax structure for the entity. While a taxpayer can ask the IRS for relief with a finding that the termination of the status was inadvertent, this comes with a significant user fee and a significant amount of professional time to obtain the private letter ruling.

This situation confronted an S corporation that sought and obtained relief in PLR 202218004.[6]

Trusts Eligible to Be S Corporation Shareholders

S corporations must qualify at all times to be treated as a small business corporation under IRC §1361(b). A violation of any of the requirements results in a termination of S status[7] regardless of whether such a violation was intentional or wasn't done with "bad intent" to attempt to gain some tax advantage.

One of the key problems is having an S corporation end up with an ineligible shareholder. Quite often problems arise when a shareholder dies and the decedents' assets move to various trusts under their estate plan. Only certain trusts are eligible to hold S shares. IRC §1362(c)(2)(A) provides the list of trusts that are eligible S corporation shareholders:

- A trust all of which is treated (under subpart E of part I of subchapter J of this chapter) as owned by an individual who is a citizen or resident of the United States—that is, a *grantor trust*.
- A trust which was a grantor trust under the prior bullet immediately before the death of the deemed owner and which continues in existence after such death, *but only for the 2-year period beginning on the day of the deemed owner's death*.
- A trust with respect to stock transferred to it pursuant to the terms of a will, *but only for the 2-year period beginning on the day on which such stock is transferred to it*.
- A trust created primarily to exercise the voting power of stock transferred to it.

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[6] PLR 202218004, May 6, 2022, https://www.taxnotes.com/research/federal/irs-private-rulings/letter-rulings-%26-technical-advice/termination-of-s-corp-election-inadvertent/7dgjj (retrieved May 7, 2022)

[7] IRC §1362(d)(2)

- An electing small business trust (ESBT) where the *trustee* timely elects to have the ESBT rules apply or

- A qualifying subchapter S trust when the *beneficiary* timely elects to have the QSST rules apply.

An estate plan may be drafted to provide that the shares will be held in trust for various reasons (almost all of which have nothing to do with income tax benefits), but most often this will require the shares be moved into a qualifying trust before two years elapse (note the two year limit on holding shares in formerly grantor trusts on the grantor's death or in trusts established by the decedent's will). If the qualifying trust is meant to be an ESBT or QSST, a timely election must be made once the shares are transferred to the trust.

All too often these requirements are overlooked until, at some later date (perhaps when a potential buyer of the S corporation is having a due diligence review performed) the problem is noted and action must be taken—action that will require the private letter ruling request and resulting expense.

The Facts in This Case

In this PLR, the facts were as follows:

> The information submitted states that X was incorporated under the laws of State 1 on Date 1 and elected to be an S corporation effective Date 2. On Date 3, A, a shareholder of X, died. On Date 4, A's shares of X were transferred to Trust 1 pursuant to the terms of A's will. Trust 1 qualified as a permissible S corporation shareholder under § 1361(c)(2)(A)(iii) for a 2-year period beginning on Date 4, the day on which X stock was transferred to it.[8]

Up to this point all is well, but the 2-year clock has begun to run for action to be taken to get the shares out of this trust and into the hands of a qualifying shareholder. And that's where the problems arose.

> Pursuant to A's will, the trustees of Trust 1 were supposed to have transferred X stock to a separate trust (Trust 2) that was intended to be a qualified subchapter S trust (QSST) for the benefit of B because the governing provisions of Trust 1 did not satisfy the QSST requirements under § 1361(d)(3). However, the trustees of Trust 1 failed to transfer X stock to Trust 2 and B, the income beneficiary of Trust 2, failed to file a QSST election under § 1361(d)(2) for Trust 2. Consequently, on

[8] PLR 202218004, May 6, 2022

> Date 5, Trust 1 became an ineligible shareholder of X and X's S corporation election terminated.[9]

The stock ending up being inadvertently left in the original trust is not all of that unusual a situation, especially if the advisers originally involved in the estate plan aren't involved at the point the shareholder dies. But the result becomes a conversion of the S corporation to a C corporation.

Fixing the Problem and Obtaining the Letter Ruling

In this case, the problem was eventually noticed. To get relief the problem is going to have to be solved which requires that a private letter ruling be obtained. The PLR continues:

> In late Date 6, X learned that its S corporation election terminated on Date 5 and that Trust 1 was an ineligible shareholder. Subsequently, trustees of Trust 1 petitioned a State 2 court to modify the terms of Trust 1 to ensure it qualified as a QSST effective Date 4. On Date 7, the State 2 court approved the requested modification.[10]

At this point the proper structures are in place to solve the problem, but we have another issue:

> After Trust 1 was modified and before X stock was transferred to Trust 2 to effectuate the State 2 court-approved modification, X ceased to exist as a corporation following a reorganization on Date 8. [11]

In the best situation the reorganization would have been delayed until after the S status was restored (or at least until after the stock was moved to Trust 2), but likely in this case the transaction that would lead to the end of corporate status was already underway and other parties were unwilling or unable to delay the transaction.

The taxpayers provided a representation that the corporation and its shareholders, in their ignorance, continued to treat this as if it had continued to be an S corporation:

> X represents that at all relevant times, X and its shareholders have filed federal tax returns consistent with X being an S corporation. X represents that the termination of its S corporation election was inadvertent and was not motivated by tax avoidance or retroactive tax planning. X and its shareholders agree to make any adjustments

[9] PLR 202218004, May 6, 2022

[10] PLR 202218004, May 6, 2022

[11] PLR 202218004, May 6, 2022

> consistent with the treatment of X as an S corporation as may be required by the Secretary.[12]

Note that this problem did not just affect the trust and its beneficiaries. The termination of the S election would have impacted *all* of the shareholders, even if they were not aware that shares had been transferred to a trust at all, let alone that the trustees had failed to move shares to a qualified trust and timely obtain a QSST election from the beneficiary.

Note that even though the IRS may not have been harmed by this issue (the tax got paid as if the elections were made and stocks moved to the proper trusts), the taxpayer can't argue a "no harm, no foul" position on exam under the law. IRC §1362(f) and Reg. §1.1362-4 requires obtaining the consent of the IRS to be able to treat the termination as inadvertent.

As well, Revenue Ruling 93-79 provides specifically that a reformation of a trust will only be considered prospectively:

> Accordingly, the reformation of the Trust will not be recognized retroactively to cure the defective S corporation election filed by X. Because an ineligible trust held shares of X stock at the time X's S corporation election was filed, X was not a small business corporation on that date (as required by section 1362(a) of the Code) and on each day of 1992 before that date (as required by section 1362(b)(2)(B)(i)). Therefore, X never became an S corporation because the S corporation election filed by X on March 15, 1992, was ineffective. Furthermore, the provision of section 1362(b)(2) permitting certain otherwise ineffective elections to be effective for the following taxable year does not permit the election filed by X to be valid for the following taxable year, 1993, because X was not a small business corporation when the election was filed.[13]

Since the trust itself needed reformation, that is another issue that requires the IRS to grant relief, as the controlling ruling will not allow the taxpayer to consider the changes retroactively.

IRS Ruling

In this case, as is most often the case, the IRS has granted the request for retroactive relief.

> Based solely on the facts submitted and the representations made, we conclude that X's S corporation election terminated on Date 5 when

[12] PLR 202218004, May 6, 2022

[13] Revenue Ruling 93-79, November 13, 1993

> Trust 1 became an ineligible shareholder. We further conclude that the termination of X's S corporation election on Date 5 was inadvertent within the meaning of § 1362(f). Pursuant to the provisions of § 1362(f), X will be treated as continuing to be an S corporation from Date 5 until it ceased to exist as a corporation following the reorganization on Date 8, provided that X's S corporation election was valid and has not otherwise terminated under § 1362(d).[14]

SECTION 6015
DECISION OF IRS CCISO DOES NOT BIND CHIEF COUNSEL FOR INNOCENT SPOUSE RELIEF REQUEST RAISED IN TAX COURT DEFICIENCY PROCEEDING

DelPonte v. Commissioner, 158 TC No. 7, 5/5/22

The Tax Court ruled that the IRS Chief Counsel has the ultimate say on whether an individual qualifies for innocent spouse relief even though the Cincinnati Centralized Innocent Spouse Operation (CCISO) determined the taxpayer was entitled to relief when the request for relief initially arises as part of litigation in Tax Court.[15]

The case is interesting since the IRS itself disagreed over whether the taxpayer should be granted innocent spouse relief. As the Court notes:

> What concerns us is her effort to be relieved of her liability on the joint tax returns she filed with Goddard while they were married. The part of the IRS bureaucracy that usually handles these sorts of requests thinks she's entitled to relief. The IRS's lawyer disagrees. We must decide who speaks for the IRS.[16]

The Facts of the Case

The taxpayer had filed joint returns with her ex-husband for 1999, 2000 and 2001, years in which her attorney husband had attempted to shelter income received from selling tax shelters by using the same tax shelter strategy that he had sold. Unfortunately, the Tax Court did not find that the structure worked to save the taxes in

[14] Revenue Ruling 93-79, November 13, 1993

[15] *DelPonte v. Commissioner*, 158 TC No. 7, May 5, 2022, https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/chief-counsel-has-final-say-on-innocent-spouse-litigating-position/7dgdy (retrieved May 6, 2022)

[16] *DelPonte v. Commissioner*, 158 TC No. 7, May 5, 2022

question,[17] resulting in a large tax liability for which Ms. Delponte found herself jointly and severally liable for leading to this case.

The Court outlined how the situation developed, including noting that the situation continued for quite some time before Ms. Delponte was made aware of the issue:

> …[W]hen the first notice of deficiency arrived in late 2004, it was addressed to "William A. and Michelle Goddard." But DelPonte was kept in the dark about this notice. It had been sent to Goddard's law firm, and Goddard—who had by that time been living apart from DelPonte for a few years—never told her. He instead filed a petition on her behalf asserting that she was an "innocent spouse" under section 6015, apparently recognizing that he was solely responsible for the profits he had accumulated over the years and that it was only fair that he should be solely responsible for any large tax bill that might result.
>
> The IRS sent another notice of deficiency to Goddard's law firm in 2005 and three more in 2009. In response to each notice, Goddard filed a petition in which he asserted innocent-spouse relief on DelPonte's behalf without telling her.[18]

Ms. Delponte eventually did become aware of this potential multi-million dollar problem:

> It wasn't until November 2010 that DelPonte first became aware of the deficiencies asserted against her and the ongoing litigation before us. She promptly hired her own lawyer and ratified the petitions Goddard had filed.[19]

As will become clear, the fact that Ms. DelPonte was kept in the dark about this matter will lead to the key issue to be decided in this case. By the time she was aware of the issue, the matter was before the United States Tax Court and the issue was being raised in litigation.

By then the Tax Court had already ordered that the case be divided into the separate issues of whether there was a liability due and how much it was and, if there was tax due, if Ms. Delponte qualified for innocent spouse relief:

> We had in May 2010 already ordered that the litigation should be bifurcated so that we could first decide the amounts of the liabilities

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[17] See *Greenberg v. Commissioner*, 115 T.C.M. (CCH) 1403 (2018), *aff'd*, 10 F.4th 1136 (11th Cir. 2021), and *aff'd sub nom. Goddard v. Commissioner*, No. 20-73023, 2021 WL 5985581 (9th Cir. Dec. 17, 2021)

[18] *DelPonte v. Commissioner*, 158 TC No. 7, May 5, 2022

[19] *DelPonte v. Commissioner*, 158 TC No. 7, May 5, 2022

> owed and then address the issue of whether DelPonte qualified for innocent-spouse relief.[20]

At this point we get to the key issue here, as both the IRS Chief Counsel's office (which was handling the case) and the IRS's Cincinnati Centralized Innocent Spouse Operation (CCISO) became involved with the matter. As the Court describes the next few steps in the case:

> In April 2011 the Office of Chief Counsel referred DelPonte's claim for innocent-spouse relief to the IRS's Cincinnati Centralized Innocent Spouse Operation (CCISO) "to make a determination regarding [DelPonte's] entitlement to such relief." CCISO is the IRS unit that receives and processes most requests for innocent-spouse relief. Internal Revenue Manual (IRM) 25.15.3.3 (Dec. 12, 2016).4 Its determination letters are generally binding on the Commissioner and the spouse asking for relief, see IRM 25.15.18.1.1(2) (Mar. 20, 2019), but the referral letter that accompanied DelPonte's request asked CCISO to not issue a determination letter but instead "provide the results of [its] consideration directly to [the Office of Chief Counsel]."[21]

The CCISO did its work, concluding that it believed Ms. DelPonte qualified for innocent spouse relief:

> Having received the referral, CCISO reached out to DelPonte directly and instructed her to fill out and return a Form 8857, *Request for Innocent Spouse Relief*. DelPonte did just that, and after reviewing her paperwork, CCISO concluded in December 2011 that she should be granted relief for each of the years at issue.
>
> CCISO did what the Chief Counsel lawyer had asked. It did not send a determination letter to DelPonte, but instead sent a letter explaining its conclusion directly to the Office of Chief Counsel.[22]

The Chief Counsel's office, however, did not decide to follow this recommendation, but rather sought more information from Ms. DelPonte:

> Rather than accepting CCISO's conclusion and settling DelPonte's cases, the Office of Chief Counsel "decided that more information was needed . . . to allow [DelPonte] relief under I.R.C. [section] 6015." So in August 2012 the Office of Chief Counsel invited DelPonte to participate in a *Branerton* conference to exchange documents and

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[20] *DelPonte v. Commissioner*, 158 TC No. 7, May 5, 2022

[21] *DelPonte v. Commissioner*, 158 TC No. 7, May 5, 2022

[22] *DelPonte v. Commissioner*, 158 TC No. 7, May 5, 2022

> information "[i]n order for [CCISO] to properly evaluate [her] claim for relief." It also informed her that CCISO had already "rendered its decision in [her favor], but that [the Office of Chief Counsel] had overridden that decision." DelPonte declined the invitation; she argued that additional information would be superfluous because CCISO had already decided she was entitled to relief and that its decision was binding on Chief Counsel.
>
> Aside from some back-and-forth letters between DelPonte and Chief Counsel in which they argued the point, that's where things stood for many years.[23]

A *Branerton* conference is the Tax Court's informal discovery procedure, as described in the case of *Branerton Corp. v. Commissioner*, 61 T.C. 691 (1974).

The question that the Court was asked to answer is whether the Office of Chief Counsel was bound by the CCISO determination or if, rather, the Chief Counsel's office had the ultimate decision-making power in this case.

The Law Regarding Innocent Spouse Relief

Married taxpayers have the option, which most exercise, to file a joint income tax return under IRC §6013(a). A joint return eliminates the need to file two separate returns and, due to the tax rate tables available to those filing with that status, most often results, though not always, in a lower tax liability than if each spouse filed using the provisions governing married individuals filing a separate return.

However, there is a downside that most married couples likely don't know about until something goes wrong—each spouse becomes jointly and severally liable for any tax due for the year in question. However, from 1918 until 1971 there was no relief from this liability, no matter how unfair it might appear to tax a spouse who had no knowledge of, and did not benefit from, income that had led to an unexpected tax bill.

In this case, Ms. DelPonte was seeking relief under IRC §6015(c). The opinion notes that this relief requires:

> … the requesting spouse to:
>
> - be legally separated or divorced from the nonrequesting spouse at the time of election; and
> - have no actual knowledge of any items giving rise to a deficiency at the time she signed the return.[24]

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[23] *DelPonte v. Commissioner*, 158 TC No. 7, May 5, 2022

[24] *DelPonte v. Commissioner*, 158 TC No. 7, May 5, 2022

The matter can then come before the Tax Court in one of three ways:

- as an issue—usually called a "defense" even though raised by a petitioner—in a deficiency case;
- in an action to review the IRS's determination in a collection due- process (CDP) case, a new right also created by RRA 1998; or
- in a "stand alone" action in which we review the IRS's administrative determination made in response to a request for relief filed by a spouse directly with the IRS.[25]

In this case the matter came before the Tax Court under the first option—as part of a deficiency case. But regardless of the type of relief sought or how it came before the Tax Court, the opinion notes:

> …a requesting spouse has to navigate her way through the ever more detailed revenue procedures and regulations that the Secretary started to issue after section 6015's enactment. This journey begins with the Form 8857. T.D. 9003, 2002- 2 C.B. 294. The regulation requires a requesting spouse to file a Form 8857; submit a written statement containing the same information required by Form 8857; or "submit information in the manner prescribed by the Treasury and IRS in forms, relevant revenue rulings, revenue procedures, or other published guidance." Treas. Reg. § 1.6015-5(a). A requesting spouse can do this any time after the Commissioner sends her notice of an audit or a letter that tells her there may be an outstanding liability, *id.* para. (b)(5), but no later than two years after the Commissioner initiates collection activity, id. subpara. (1). A single claim can simultaneously request relief under section 6015(b), (c), and (f). *Id.* para. (a)(2).[26]

The issue arises with how the spouse seeks relief and the process underlying it. A spouse can simply request relief directly from the IRS rather than raising the issue first at trial. In this case, the opinion notes:

> We begin with the Code. Section 7803 creates the position of Commissioner of Internal Revenue, to whom are given broad powers to "administer, manage, conduct, direct, and supervise the execution and application of the internal revenue laws or related statutes," as well as any other "such duties and powers as the Secretary may prescribe." § 7803(a)(2). Regulations authorize the Secretary of the Treasury to delegate any function vested in him to the Commissioner, who is in

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[25] *DelPonte v. Commissioner*, 158 TC No. 7, May 5, 2022

[26] *DelPonte v. Commissioner*, 158 TC No. 7, May 5, 2022

> turn authorized to redelegate that function to an officer or employee under his direct or indirect supervision and control. Treas. Reg. § 301.7701- 9(b) and (c). The Secretary has of course for decades delegated to the Commissioner the responsibility of administering and enforcing the internal revenue laws, I.R.S. Treas. Order 150-10 (Apr. 22, 1982), which includes making determinations about whether a taxpayer is entitled to innocent-spouse relief under section 6015, see § 6015(e)(1)(A)(i), (5), (f).[27]

In this case, the IRS has delegated the issue to the CCISO:

> The Commissioner has redelegated the responsibility for processing most requests for innocent-spouse relief to the CCISO. IRM 25.15.7.1 (Sept. 1, 2006).[28]

But there exceptions to the CCISO's ultimate decision making responsibilities at the agency when a request is filed with the agency:

> There are some exceptions: In certain instances, as when there's an ongoing audit for the year for which the requesting spouse is seeking relief, the Field Examination unit conducting the audit has authority to make the determination. See IRM 25.15.6.1(4) (Mar. 21, 2008). Once CCISO (or the Field Examination unit) has made a preliminary determination, both the requesting spouse and the nonrequesting spouse can appeal the determination to the Office of Appeals. IRS Appeals is responsible for holding an appeals conference, reviewing the evidence, and issuing a "final determination." IRM 25.15.6.10.3 (June 19, 2017). Or maybe we should say a final administrative determination because if Appeals denies her request, a requesting spouse can petition our Court for a really truly final determination of her entitlement to relief. § 6015(e). We ourselves can make a determination of our own if CCISO or the Field Examiner doesn't act on a request within six months. § 6015(e)(1)(A).[29]

A separate set of procedures are outlined when the requesting spouse requests relief as part of a collection due process (CDP) hearing:

> There is a similarly complicated process when a spouse seeks relief as part of a CDP hearing. She has to first file a Form 12153, Request for a Collection Due Process or Equivalent Hearing (or other written and signed request), with IRS Appeals. IRM 5.19.8.4.2 (Nov. 1, 2007). That form allows her to check a box to claim innocent-spouse relief

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[27] *DelPonte v. Commissioner*, 158 TC No. 7, May 5, 2022

[28] *DelPonte v. Commissioner*, 158 TC No. 7, May 5, 2022

[29] *DelPonte v. Commissioner*, 158 TC No. 7, May 5, 2022

> and, if she does, instructs her to attach a Form 8857. See Form 12153 (Rev. Nov. 2006). IRS Appeals ordinarily sends the Form 8857 to CCISO to investigate the claim, see IRM 8.22.1.1.1.5.3 (Oct. 19, 2007), following the same procedures as it would in a stand-alone innocent spouse case, see IRM 8.22.2.2.11.3(6) (Jan. 1, 2006). A significant difference, though, is that Appeals retains jurisdiction over the case while CCISO investigates the claim. See *id.* 8.22.2.2.11.3(4). One consequence of this is that CCISO ordinarily doesn't make a final determination on what relief is appropriate. See IRM 8.22.2.2.11.3.1 and .2 (Mar. 11, 2009). CCISO instead recommends a determination to Appeals, which is itself responsible for making a final determination about what relief if any a taxpayer should get. *Id.*13 A disgruntled requesting spouse can once again petition us to try again. § 6015(e)(1)(A).[30]

But in this case we have a requesting spouse who raised the issue as an affirmative defense in a deficiency case brought before the Tax Court. Is CCISO still the party that makes a determination that will bind the IRS (including before the Tax Court) or does the matter now move to the Office of Chief Counsel.

IRC §7803 provides for the powers of the Office of Chief Counsel, and things begin to get complicated. The opinion notes:

> The Chief Counsel is right that he and his lawyers are responsible for the IRS's litigation decisions. Section 7803—the same section that's the source of the Commissioner's authority—also created the position of Chief Counsel, and authorized him to "perform such duties as may be prescribed by the Secretary, including the duty . . . to represent the Commissioner in cases before the Tax Court." § 7803(b)(2)(D). General Counsel Order No. 4 delegates to the Chief Counsel authority "in cases pending in the Tax Court . . . to decide whether and in what manner to defend, or to prosecute a claim, or to settle, or to abandon a claim or defense therein." See IRM 30.2.2–.6 (Aug. 11, 2004). This order also gives the Chief Counsel the authority to redelegate any of his authority to "any officer or employee in the Office of the Chief Counsel, and to authorize further redelegation of such authority." *Id.*[31]

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[30] *DelPonte v. Commissioner*, 158 TC No. 7, May 5, 2022

[31] *DelPonte v. Commissioner*, 158 TC No. 7, May 5, 2022

Does the Advice of CCISO Require the Chief Counsel to Concede the Taxpayer is Eligible for Innocent Spouse Relief?

The Tax Court concisely summarizes the matter as follows:

> The question we must answer, then, is whether DelPonte's request for innocent-spouse relief—and CCISO's consideration of that request—was like any claim in a case "pending in Tax Court," or more like an administrative request for innocent-spouse relief begun by filing a Form 8857 with CCISO.[32]

The taxpayer argues that the CCISO's position is the one that should bind the government:

> DelPonte argues that the Secretary has delegated authority to make a final determination to the administrative, not the litigating, side of the IRS. She has a textualist argument based on the regulations, numerous IRM provisions, the Chief Counsel's own written guidance, and even the instructions to the Form 8857. She also argues more purposively that her position is buttressed by the principles of horizontal equity and fundamental fairness. In short, she contends that it's only fair that a requesting spouse raising innocent-spouse relief for the first time in litigation should have CCISO make the determination, just as if she had raised it for the first time in a stand-alone request. According to her CCISO is the decider in chief, and Chief Counsel's job is only to defend CCISO's determination.[33]

However, the Chief Counsel's office argues that this is not the case:

> The Chief Counsel, on the other hand, argues that his office is responsible for deciding what positions the IRS takes in litigation, and that decision about whether to concede innocent-spouse relief is a litigating position. He of course may ask CCISO for its advice, but he says he gets the final say.[34]

The Chief Counsel argues that this has become a litigation decision, something that IRC §7803 provides is under the control of the Office of the Chief Counsel.

The Court looks at the history of innocent spouse claims to inform its decision:

> This is a question in which a page of history enlightens us more than a volume of logic. Taxpayers were raising innocent-spouse claims as

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[32] *DelPonte v. Commissioner*, 158 TC No. 7, May 5, 2022

[33] *DelPonte v. Commissioner*, 158 TC No. 7, May 5, 2022

[34] *DelPonte v. Commissioner*, 158 TC No. 7, May 5, 2022

> affirmative defenses in deficiency proceedings years before today's administrative processes for seeking relief even existed. Our jurisdiction to rule on those claims is part of our authority under section 6213(a) to redetermine a taxpayer's deficiency when she's received a notice of deficiency. See *Corson*, 114 T.C. at 363–64 ("In a deficiency proceeding, we may take into account all facts and circumstances relevant to ascertaining the correct amount of the deficiency, including affirmative defenses"). Our power in a deficiency case is not limited to the issues listed in the notice of deficiency—it includes issues raised in either the petition or answer or even those tried without objection. See *Ax v. Commissioner*, 146 T.C. 153, 160 (2016). Our jurisdiction to decide an issue in a deficiency case is not dependent on the Commissioner's having already made a determination on that issue administratively; all we need to get jurisdiction to decide is a timely filed petition and a valid notice of deficiency. *Butler v. Commissioner*, 114 T.C. 276, 288 (2000) (citing *Naftel v. Commissioner*, 85 T.C. 527, 533 (1985)). Once we have jurisdiction over a case where entitlement to innocent-spouse relief is an issue, the Commissioner must concede or settle it with a taxpayer if he doesn't want to litigate it. Section 7803(b)(2) and related delegation orders have long delegated those decisions to the Chief Counsel.[35]

However, the Court points out that the Chief Counsel can delegate decisions as well:

> But the Chief Counsel also has the power to redelegate authority granted to him. See IRM 30.2.2–.6.[36]

The taxpayer argues that just such a delegation took place for her type of case in Chief Counsel Notice CC-2009-021:[37]

> DelPonte argues in the alternative that Chief Counsel Notice CC-2009-021 (June 30, 2009) is just such a redelegation. That notice instructs attorneys in the Office of Chief Counsel to request CCISO "to make the determination" with respect to cases in which a taxpayer raises innocent-spouse relief for the first time in a deficiency petition. CC-2009-021, at 2. That notice also states: "If CCISO . . . determines the petitioner is entitled to relief, the case should be conceded . . . subject to the limitation that a nonrequesting spouse who is a party to the case must agree" with the determination. Id. at 4. If the

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[35] *DelPonte v. Commissioner*, 158 TC No. 7, May 5, 2022

[36] *DelPonte v. Commissioner*, 158 TC No. 7, May 5, 2022

[37] Chief Counsel Notice CC-2009-021, June 30, 2009, https://www.irs.gov/pub/irs-ccdm/cc-2009-021.pdf (retrieved May 7, 2022)

> nonrequesting spouse disagrees, then "the grant of relief must be defended throughout trial and briefing." *Id.*[38]

However, the Tax Court finds that the authority to delegate doesn't apply in this case:

> We can dispense with this argument quickly. Chief Counsel has authority to delegate functions only to an "officer or employee in the Office of the Chief Counsel," IRM 30.2.2–.6, and CCISO is not within the Office of the Chief Counsel, IRM 1.1.13.12.3.3 (Sept. 1, 2005). The plain language of this order gives the Chief Counsel no authority to delegate any of his functions to CCISO.[39]

But that's not the end of the issue if the contention is revised slightly which the Court considers:

> Even though Chief Counsel has responsibility to respond to requests for relief raised for the first time in a deficiency case, he has instructed his lawyers to adhere to CCISO determinations. Are his lawyers going rogue if they disregard this instruction? This is not an argument based on powers of delegation, but on what DelPonte identifies as a possible protection of the Due Process Clause—a requirement that the government follow the procedures that it establishes even if it didn't have to establish them in the first place.[40]

However, the Court finds in this case that the Chief Counsel attorneys have been following established procedures:

> We first address DelPonte's argument that CC-2009-021 instructs Chief Counsel attorneys to refer cases to CCISO for a "determination," not a "recommendation." She relies heavily on the text of CC-2009- 021—along with the Chief Counsel attorney's correspondence with her and CCISO—to argue that "determinations" cannot be disregarded by Chief Counsel attorneys. We, however, are not convinced that use of the word "determination" in the Chief Counsel notice or any other guidance is the same as what the regulation calls a "final administrative determination." See Treas. Reg. § 1.6015-5. We have long recognized that "the name or the label of a document does not control whether the document embodies a determination." *Wilson v. Commissioner*, 131 T.C. 47, 53 (2008).
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> In CC-2009-021, the Chief Counsel repeatedly uses "should" when instructing his attorneys on how to handle cases where CCISO

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[38] *DelPonte v. Commissioner*, 158 TC No. 7, May 5, 2022

[39] *DelPonte v. Commissioner*, 158 TC No. 7, May 5, 2022

[40] *DelPonte v. Commissioner*, 158 TC No. 7, May 5, 2022

> determines that relief should be granted, e.g., "[i]f CCISO . . . determines the petitioner is entitled to relief, the case ***should*** be conceded." CC-2009-021, at 4 (emphasis added). But he elsewhere uses the imperative "must" when describing how an attorney should proceed in different circumstances, e.g., "[i]f the nonrequesting spouse disagrees with the Service's determination to grant relief [to the requesting spouse], then . . . the grant of relief ***must*** be defended throughout trial and briefing." *Id.* (emphasis added). If Chief Counsel had wanted all his attorneys to accept CCISO's determinations in every case, he could easily have conveyed that desire by telling them they "must" do so. But he did not.[41]

The opinion also notes that a notice issued after the CCISO rendered its decision in this case provides additional support to the view that the use of "should" in CC-2009-021 means that the advice of CCISO does not always have to be followed:

> Chief Counsel Notice CC-2013-011 (June 7, 2013), issued after *Wilson*, 705 F.3d 980, confirmed that section 6015(e)(1)(A) provided for both a de novo standard and scope of review in section 6015(f) cases, and rendered both these older notices obsolete. This notice was published after CCISO had already rendered its decision on DelPonte's request, but we believe it is still helpful in understanding the Chief Counsel's guidance that was in effect. CC-2013-011 again requires that Chief Counsel attorneys request a determination from CCISO where a petitioner requests relief under any provision of section 6015. CC-2013-011, at 1–2. It also clarifies that "the trial attorney ***should, except in rare circumstances***, follow the determination made by CCISO that the petitioner is entitled to relief and settle the case in accordance with CCISO's determination." *Id.* at 3 (emphasis added). The "should" instead of a "must" means that in this context the CCISO's decisions are advisory, and that Chief Counsel attorneys get to make the final decision about the IRS's views on any particular request for innocent-spouse relief when a taxpayer seeks it in a deficiency case.[42]

The Court goes on to note that the Internal Revenue Manual clearly provides that the Chief Counsel retains full control of the issue:

> And let us zoom out to look one last time at the IRM. It says that if innocent-spouse relief is raised for the first time in a case already docketed in court, "[j]urisdiction is retained by . . . Counsel, and a request is sent to CCISO to consider the request for relief." IRM 25.15.12.25.2(1) (Nov. 9, 2007). It specifies that "Counsel . . . has

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[41] *DelPonte v. Commissioner*, 158 TC No. 7, May 5, 2022

[42] *DelPonte v. Commissioner*, 158 TC No. 7, May 5, 2022

> functional jurisdiction over the matter and handles the case and request for relief, and either settles or litigates the issue on its merits, as appropriate." Id. 25.15.12.25.2(3).[43]

But what about the taxpayer's claim that giving this result when the matter is first raised in litigation is fundamentally unfair?

> We finally address DelPonte's argument that principles of horizontal equity and "fundamental fairness" require that all taxpayers be entitled to a final determination of relief from CCISO, regardless of whether they first request relief in a petition for redetermination of a deficiency, in a stand-alone petition, or in a CDP hearing. She correctly points out that taxpayers often have no choice in when they are first able to request relief—her case is an excellent example. She believes that adopting the position of the Office of Chief Counsel would put requesting spouses who first raise innocent-spouse relief in a petition for redetermination of a deficiency in a materially worse position than all other requesting spouses because all other requesting spouses have the opportunity to appeal a denial of relief by CCISO to Appeals before starting a case with us as a last resort. Is it not unfair that some who seek relief can have a try at CCISO, Appeals, and Tax Court, but others get Tax Court alone? [44]

The Court wasn't persuaded by this argument either. The Court found two reasons why this argument could not prevail, the first being that the Chief Counsel's office in this case operates much the same as the Appeals officer in a CDP hearing:

> The first is its faulty premise—an Appeals officer who receives a request for innocent-spouse relief in a CDP hearing forwards the case to CCISO for processing but retains jurisdiction, see IRM 8.22.2.2.11.3(4), and makes the ultimate decision for the IRS about whether to grant relief, see IRM 8.22.2.2.11.3.1–.2. In that sense, the Appeals officer's role is very similar to that of the Chief Counsel attorney in deficiency cases—the difference, of course, being that the Appeals officer can make a final determination granting relief, whereas a Chief Counsel attorney can only decide not to argue that we should deny relief. So a requesting spouse who raises an innocent-spouse claim for the first time in a CDP hearing really gets only two levels of review—Appeals and us—not three. Requiring CCISO to have the opportunity to issue a final determination in cases where the requesting spouse raises an innocent-spouse claim for the first time in a deficiency petition would therefore not guarantee that all spouses be

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[43] *DelPonte v. Commissioner*, 158 TC No. 7, May 5, 2022

[44] *DelPonte v. Commissioner*, 158 TC No. 7, May 5, 2022

> treated equally regardless of when they request relief; it would merely make CDP cases the outlier.[45]

But, more to the point, the Court argues that it lacks authority to decide the case on this basis:

> The second and more important problem with this argument is that we have no power to adopt it. Congress gave us exclusive jurisdiction to redetermine the correct amount of a taxpayer's deficiency for a given tax year once the taxpayer receives a valid notice of deficiency and timely files a petition with us. See § 6213(a); Naftel, 85 T.C. at 532–33. Congress also gave the Chief Counsel the authority to litigate cases before us. § 7803(b)(2)(D). We cannot undo this statutory scheme by depriving either ourselves or the Chief Counsel of the powers it has given to us in the name of fairness.[46]

[45] *DelPonte v. Commissioner*, 158 TC No. 7, May 5, 2022

[46] *DelPonte v. Commissioner*, 158 TC No. 7, May 5, 2022