

Swallows Holding Update

By Kathryn Morrison Sneade*

Recently, the Third Circuit reversed the Tax Court's 2006 decision in *Swallows Holding v. Commissioner*, and upheld the validity of Treasury Regulations promulgated under section 882 that require a foreign corporation to file timely returns to receive the benefit of deductions otherwise allowed. See *Swallows Holding Ltd. v. Commissioner*, 515 F.3d 162 (3d Cir. Feb. 15, 2008), *rev'g* 126 T.C. 96 (2006). The Service victory was not unexpected—the dissenting judges in *Swallows Holding* offered a more satisfying explanation of the law than the majority did, as I noted in a previous Point to Remember on this topic. See Kathryn J. Morrison, *Are Timely Filed Returns a Prerequisite for Foreign Corporation Expense Deductions*, 25 ABA SECTION OF TAXATION NEWSQUARTERLY 13 (Summer 2006).

The Tax Court, relying mainly on the analysis set forth by the Supreme Court in *National Muffler Dealers Association v. United States*, 440 U.S. 472 (1979), held that the regulations under section 882 were invalid to the extent that they imposed a timing requirement. The majority of the Tax Court, which took the position that a plain reading of section 882 showed that the statute included no timely filing requirement, noted that the result would be the same under a *Chevron* analysis. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Supreme Court applied a two-prong

analysis to determine the validity of agency regulations: (1) if the statutory language is clear and unambiguous, the agency must give effect to the unambiguously expressed intent of Congress; and (2) if the statutory language is ambiguous, the agency may “fill the gap” with a reasonable regulation.

The dissenting Tax Court judges disagreed with the majority's conclusion that the statute unambiguously precludes the imposition of a timing requirement, and took the position that the regulations reasonably filled a gap in the statute and therefore were valid under *Chevron*. Unlike the majority's decision, the

dissent's decision was consistent with cases decided by the Board of Tax Appeals and the Fourth Circuit, which imposed limitations on taxpayers' ability to claim deductions based on delinquent returns. See, e.g., *Taylor Securities v. Commissioner*, 40 B.T.A. 696 (1939). In 2006, I predicted that circuit courts reviewing the regulations might choose to adopt this approach. The Third Circuit, in reversing the Tax Court's decision, has done just that, holding that the regulations at issue reasonably interpret an ambiguous statute and are therefore valid. ■

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FROM THE CHAIR *continued from page 3*

has slowed. I encourage all Committee Chairs to review the Internal Revenue Service and Treasury business plan to identify projects worthy of a submission from the Section. It is most important that the Section continue regular and ongoing submissions to the Internal Revenue Service and the Treasury.

Distinguished Service Award

Congratulations to M. Carr Ferguson, Jr., who will receive the Section's Distinguished Service Award at the May 2008 meeting. Carr Ferguson's distinguished

career began in 1954 when, after graduating from Cornell Law School, he served for five years in the Tax Division of the Department of Justice as a trial attorney and special assistant to the Attorney General. After his term at Justice, Carr earned an LL.M. from New York University School of Law, and, for the next 17 years, was a professor of law at Iowa, Stanford, and New York University law schools. From 1968-1977, he was of counsel for Wachtell, Lipton, Rosen & Katz, and from 1977-1981, he went back to Justice to serve as the Assistant Attorney General in charge of the Tax Division. Carr currently serves as senior counsel in Davis, Polk

& Wardwell's Tax Department, where his practice includes tax controversies, and federal and international taxation of corporations and individuals. In addition to his extensive trial experience, Carr has argued tax appeals in most of the Federal Courts of Appeal and the U.S. Supreme Court. Carr has been active in the Tax Section for many years and served as Section Chair in 1993-94. It will be an honor and pleasure for me to present the Section's 2008 Distinguished Service Award to Carr this May. ■