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# **IRS Insights** | A closer look

## Supreme Court to hear challenge to section 965 transition tax

The Supreme Court has agreed to hear a constitutional challenge to the Section 965 transition tax. If the Supreme Court invalidates the Section 965 transition tax, taxpayers may be entitled to a refund but only if they filed a protective refund claim before the applicable refund statute of limitations expired.

### Section 965 transition tax

As part of the Tax Cuts and Jobs Act of 2017, Congress enacted the Section 965 transition tax. In general, Section 965 required US shareholders to pay a one-time transition tax on the untaxed foreign earnings of certain specified foreign corporations as if those earnings had been repatriated to the United States. The Section 965 tax liability was generally applicable in the 2017 and/or 2018 tax years. However, taxpayers could elect to pay their Section 965 tax liability in eight yearly installments.

### Supreme Court to hear constitutional challenge

On June 26, 2023, the United States Supreme Court agreed to hear a case that challenges the constitutionality of the transition tax. *Moore v. United States*, No. 22-800, (36 F.4th 930 (9th Cir. 2022)), cert. granted (US June 26, 2023). In the case, the taxpayers argue that Section 965 violates the Constitution because it is a direct tax on unrealized income.

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### Implications of potential invalidation

If the Supreme Court invalidates the tax, taxpayers are entitled to a refund of the Section 965 transition tax only if their refund statute of limitations is still open. Accordingly, taxpayers may want to file protective refund claims to keep the statute of limitations open if they believe their statute will expire before the Supreme Court decides the case.

Unfortunately, the refund statute of limitations has likely closed for most taxpayers to file refund claims for their transition tax inclusion year because taxpayers usually have to file a refund claim within three years of filing the tax return. However, some taxpayers' 2017 or 2018 refund statute of limitations may still be open if they have previously extended the IRS's assessment statute (e.g., the 2017 or 2018 tax year is under audit).

Additionally, some taxpayers may still be able to file a refund claim for part of the transition tax. Taxpayers can file refund claims within two years of making payments. Thus, if a taxpayer made a Section 965 installment payment within the past two years, the taxpayer could file a refund claim for those payments.

### Conclusion

Taxpayers with open refund statute of limitations for the transition tax inclusion year (2017 or 2018 depending on specific facts) may want to consider filing protective refund claims based on the outcome of the Supreme Court decision in *Moore*.

## IRS offers relief for estimated tax payments for new corporate alternative minimum tax

In June 2023, the IRS announced penalty relief for corporations that did not pay estimated tax related to the new corporate alternative minimum tax (CAMT).

### CAMT background

The Inflation Reduction Act (P.L. 117-169) created the CAMT, which generally applies to large corporations with more than $1 billion of average annual adjusted financial statement income. The CAMT imposes a 15% minimum tax on the adjusted financial statement income. The CAMT applies to taxable years beginning after December 31, 2022.

The CAMT is subject to section 6655's estimated payment tax rules, which generally require corporations to make estimated payments four times a year consisting of 25% of the required annual payment. Under section 6655(e), the amount of the required installment is the annualized income installment or adjusted seasonal installment for those corporations that establish that such amount is lower than 25% of the required annual payment.

### Notice 2023-42

On June 7, 2023, the IRS released Notice 2023-42 (the "Notice"), which grants penalty relief for corporations that do not pay estimated tax related to the CAMT for taxable year that begins after December 31, 2022, and before January 1, 2024 (the "covered year").

Per the Notice, the IRS will waive section 6655 penalties with respect to a corporation's CAMT liability for the covered year. Thus, the corporation's required installment of estimated tax need not include an amount attributable to its CAMT liability. This does not change the corporation's requirement to timely pay the CAMT, and section 6651 failure to pay penalties will apply if the CAMT is not paid by the unextended due date.

Additionally, affected taxpayers must still file Form 2220, *Underpayment of Estimated Tax by Corporations*, with their federal income tax return, even if they do not owe any estimated tax penalty. Taxpayers must complete the form without including the CAMT liability from Schedule J of Form 1120, *US Corporation Income Tax Return*. Additionally, taxpayers must also include an amount of estimated tax penalty on Line 34 of their Form 1120, even if the amount is zero. Failure to follow the instructions in the Notice could result in affected taxpayers receiving a penalty notice that will require an abatement request to apply the relief provided by the Notice.

## District Court upholds IRS denial of charitable contribution deduction as assignment of income and due to lack of sufficient contemporaneous written acknowledgment

In *Keefer v. United States*,[1] the District Court granted partial summary judgment in favor of the government and held the Internal Revenue Service properly denied a charitable deduction stemming from the donation of a 4% limited partnership interest to a private foundation (the "Foundation") to establish a donor-advised fund ("DAF").

### Background

Kevin Keefer indirectly held a limited partnership interest in a limited partnership ("LP"), which owned and operated a single hotel in Los Angeles, California. In April 2015, LP was approached by a Real Estate Investment Trust ("REIT") that expressed interest in acquiring the hotel and exchanged a nonbinding letter of intent ("LOI") with LP for the deal. LP did not sign the LOI and continued to search for other interested buyers.

Before finalizing any sale of LP, Mr. Keefer converted a portion of his indirect interest into a direct 4% interest and then donated that interest to the Foundation establishing a DAF. Mr. Keefer executed the documents that had been provided by the Foundation to establish

the DAF ("DAF Packet") on June 8, 2015. In connection with the donation, Mr. Keefer commissioned an appraisal of the donated interest in mid-June 2015. While the appraisal described the appraiser's qualifications, it did not include the appraiser's tax identification number. The appraisal concluded that the fair market value of the donated interest was $1.26 million.

On July 2, 2015, REIT and LP signed the sales contract, and the sale of the hotel closed on August 11, 2015.

In early September, the Foundation provided Mr. Keefer with a letter acknowledging the donation (the "Acknowledgement Letter").

Mr. Keefer, and his wife, timely filed their 2015 federal income tax return claiming a $1.26 million charitable contribution deduction for the donation to the DAF. The Form 8283, *Noncash Charitable Contributions*, filed as part of their 2015 federal income tax return, included the appraiser's tax identification number, a copy of the appraisal, the DAF Packet, and the Acknowledgment Letter.

In the summer of 2019, the IRS denied the charitable deduction and increased the Keefers' 2015 tax liability by $423,304 plus penalties and interest. The IRS asserted that the Keefers did not have a contemporaneous written acknowledgment ("CWA") from the donee showing the DAF had "exclusive legal control over the assets contributed" and had failed to include the appraiser's identifying number.

The Keefers paid the additional liability and filed a claim for refund in November 2019, which was denied in March 2020, as untimely. The suit in District Court followed.

### Court's ruling

Both parties moved for summary judgment, and the court ultimately concluded that (1) the Keefers' refund claim was timely, (2) the Doctrine of Variance did not bar their claims, (3) the donation was an anticipatory assignment of income, (4) the IRS properly denied the charitable deduction because the Keefers' CWA did not meet the requirements of sections 170(f)(8) and (18), and (5) the Keefers were not entitled to a refund of their 2015 taxes. A discussion of only the assignment of income and CWA issues follows below.

### Anticipatory assignment of income

The government argued that the donation to the Foundation made just before the sale of the hotel to REIT was to close amounted to an anticipatory assignment of income, which required the Keefers to recognize the income from the sale rather than merely deduct the value of the noncash asset as a charitable contribution.

Recognizing that taxpayers cannot escape tax on earned income by assigning said income to another party, the court noted that "'the crucial question is whether the [donated] asset itself, or merely the income from it, has been transferred.'" Under the test established in *Humacid Co. v. Commissioner*,[2] "courts will respect the form of a donation of appreciated stock if the donor (1) gives the property away absolutely and parts with title thereto (2) before the property gives rise to income by way of a sale."

The Keefers argued that their donation met both prongs of the *Humacid* test and claimed that the sale of the hotel to REIT remained uncertain in June when they assigned the 4% partnership interest in LP to the Foundation. The government, however, argued that the hotel sale was "practically certain" at the time of the donation and that "the Keefers carved out and retained a portion of the partnership asset by oral agreement."

The Keefers executed the DAF Packet on June 18, 2015, at which time, the hotel was not yet under contract. The sales contract was signed on July 2, 2015, and even then, REIT has 30 days to review the property and withdraw from the deal. As such, the court found that absent any binding obligation to close, "the deal was not 'practically certain' to go through," and the presence of the pending sale did not render the donation an anticipatory assignment of income.

The court did, however, conclude that the Keefers had carved out a partial interest in the 4% partnership interest when they donated it causing them to fail the first prong of the *Humacid* test. Specifically, there was an oral agreement between Mr. Keefer and the Foundation that the Foundation would receive 4% of the proceeds from the sale of the hotel as opposed to other partnership assets not covered by the sale. The government argued, and the court concurred, that this oral agreement demonstrated that the Keefers "did not donate a true partnership interest." Instead, they effectively donated 4% of the net cash from the sale of one of LP's, which "is the classic assignment of income."

**Contemporaneous written acknowledgment**

While the court's determination that the transfer to the Foundation was an anticipatory assignment of income and that no deduction would be allowed for the contribution, the court went on to also find that the lack of a CWA that met the requirements of sections 170(f)(8) and (18) would have also been grounds upon which to deny the deduction.

The Keefers argued that, taken together, the Acknowledgement Letter and DAF Packet, constituted a statutorily sufficient CWA. On the contrary, the government contended that multiple documents could not be used to piece together a compliant CWA unless the documents included a merger clause. Additionally, neither document offered by the Keefers stated that the Foundation had "exclusive legal control" over the donated assets.

The court agreed with the government and concluded that the CWA was not in compliance with the statutory requirements; moreover, the doctrine of substantial compliance is inapplicable. As such, the IRS properly denied the charitable deduction. The court found that the DAF Packet did not constitute a CWA because it was issued before the donation took place and with no binding requirement that a donation be made, it didn't serve as an acknowledgment of anything. Moreover, the Acknowledgment Letter could not be used to supplement the DAF Packet as there were no references to the DAF or the DAF Packet. Because section 170(f)(8) requires "strict compliance," and the Acknowledgement Letter, which the court deemed to be the CWA, did not "reference the Keefer DAF or otherwise affirm [the Foundation]'s exclusive legal control, as required by section 170(f)(18)," the CWA did not meet the necessary statutory requirements.

**Conclusion**

For taxpayers looking to donate to a DAF, attention must be paid to ensure that proper documentation is received from the charitable organization, or they risk having the charitable deduction disallowed. While the donee is generally not required to record or report the information provided on the CWA to the IRS, the burden falls on the donor to ensure the CWA they received from the donee meets the strict compliance requirements of sections 170(f)(8) and (18).

## Supreme Court rules on notice required for third-party bank account summons

Recently, the Supreme Court ruled that third-party account holders could not challenge an IRS bank account summons on the basis that the taxpayer did not have a legal interest or title in the account.[3]

**Third party summons**

The IRS has the authority to issue a summons to a third party for information about a taxpayer.[4] A third party can challenge a summons only if the IRS was required to notify them of the summons.[5] Generally, the IRS has to notify anyone named in the summons.[6] But there are several exceptions to this general rule.[7] One exception is the "issued in aid of collection" exception.[8] Under that exception, the IRS does not have to notify persons named in the summons if the IRS issued the summons to "aid in the collection" of an assessment or judgment made against the person with respect to whose liability the summons is issued.[9]

Before the Supreme Court ruling, there was a circuit split on when the "issued in aid of collection" exception applies. In the Ninth Circuit, the exception applied only if the taxpayer (i.e., the person whose tax liability was being collected) had an interest in the account being summonsed.[10] That is, there must be an employment, agency, or ownership relationship between the taxpayer and the third party.[11] Whereas in the Sixth Circuit, the exception applied even if the taxpayer did not have any interest in the account being summonsed.[12]

**Supreme Court decision**

In *Polselli v. IRS*, the taxpayer owed $2 million in assessed federal income taxes. As part of its search for assets to pay the debt, the IRS issued summonses for bank accounts owned by the taxpayer's wife and attorneys. The IRS did not notify the wife or attorneys about the summonses; however, the banks did. The wife and attorneys subsequently filed motions to quash the summonses. The District Court found that the wife and attorneys did not have standing to quash the summonses under the "aid in collection" exception.[13] The Sixth Circuit agreed.[14]

The Supreme Court granted certiorari to decide whether third parties can challenge a summons even if the taxpayer does not have an interest in the account or recorded being summonsed. Because the plain language of section 7609 does not contain the "legal interest" limitation, the Supreme Court rejected such a narrow reading of the exception. Following this rationale, the Supreme Court also rejected the argument that the exception applies only to summonses that "directly advance" the IRS's collection assets to satisfy the liability.[15] The Supreme Court once again opted for the plain meaning of the Code and stated that even if a summons itself does not result in direct, collectible assets, it may nonetheless "help" the IRS find such assets.

### Conclusion

Based on the foregoing, the Supreme Court held that third-party account holders could not challenge an IRS bank account summons even if the taxpayer did not have a legal interest or title in the account.[16]

## Court holds that signature defects in a claim for refund do not raise jurisdictional issues

In *Lonnie Cooper v. United States*,[17] the taxpayer brought a refund suit to recover a late-filing penalty assessed in connection with his 2014 Form 1040, *US Individual Income Tax Return*. In deciding the case, the US Court of Federal Claims relied on binding precedent establishing that a signature verification defect on a refund claim does not raise jurisdictional issues.[18]

### Background

The taxpayer's CPA timely filed Form 4868, *Application for Automatic Extension of Time to File US Individual Income Tax Return*, which extended the taxpayer's Form 1040 deadline to October 15, 2015. The taxpayer remitted an estimated tax payment of $630,550 in July 2015 and was overpaid for the 2014 tax year. As his extended deadline approached, the taxpayer became concerned that his return would not be timely filed. The CPA incorrectly advised the taxpayer that "there would not be a late filing penalty" because the taxpayer's 2014 tax obligation had been paid in full prior to the extended filing deadline. The taxpayer's 2014 tax return was eventually filed in June 2016, eight months after the extended deadline. The IRS subsequently assessed a late-filing penalty in the amount of $95,117.50 and collected the penalty amount from the taxpayer's 2014 overpayment.

The taxpayer, in response to the penalty assessment and through his attorney, filed Form 843, *Claim for Refund and Request for Abatement*. The taxpayer's attorney signed the Form 843 both as the preparer and under penalties of perjury on behalf of the taxpayer. The IRS denied the taxpayer's claim for refund and his subsequent appeal. The taxpayer then brought suit in the Court of Federal Claims to recover the late-filing penalty.

Relying on the decision in *Brown v. United States*,[19] the government filed a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim, arguing that signature verification of a claim for refund is a jurisdictional prerequisite for a "duly filed" claim.[20] The government argued that because the taxpayer did not sign the Form 843 himself and further failed to submit Form 2848, *Power of Attorney and Declaration of Representative*, with his Form 843 authorizing his attorney to sign the refund claim on his behalf, the taxpayer's claim was not a valid refund claim. During discovery, the taxpayer denied failing to submit the Form 2848 with his refund claim and produced a copy that he alleges was submitted with his Form 843. The government ultimately withdrew its motion to dismiss for failure to state a claim and filed a second motion to dismiss pursuant to Rule12(b)(1) for lack of subject-matter jurisdiction—citing the same grounds for dismissal—and relying on the precedent preceding *Brown*.

The taxpayer did not contest the government's position that any filing defects related to his refund claim raised a jurisdictional issue, but he continued to dispute that he failed to submit the Form 2848 with his Form 843 when it was initially filed. He also disputed the government's contention that the Form 2848 did not authorize his attorney to sign and verify the refund claim on his behalf.

### Court's rulings

In ruling on the government's second motion to dismiss, following the binding precedent set in *Brown*, the Court determined that any signature verification defect in the taxpayer's refund claim does not raise a jurisdictional question.

Although its second motion to dismiss was premised on Rule 12(b)(1), the government included an alternate ground for dismissal in a footnote at the end of its reply requesting that the Court alternatively consider dismissing the case for failure to state a claim. The Court determined that dismissal for failure to state a claim could only be achieved by a motion for judgement on the pleadings, but judgement on the pleadings was not appropriate because there was a material fact in dispute – i.e., whether the taxpayer included a Form 2848 with his claim for refund. The Court did, however, determine that Form 2848, its instructions, IRS publications, and other guidance materials did not require the taxpayer's Form 2848 to specifically identify Form 843 or specifically authorize the

taxpayer's attorney to sign the Form 843 to grant such authorization. Instead, the taxpayer's Form 2848 broadly authorized his attorney "to receive and inspect [the taxpayer's] confidential tax information and *to perform acts that [he could] perform* with respect to the tax matters" identified on the form.[21] Accordingly, the Court denied the government's motion to dismiss and ordered the parties to submit a joint status report with their proposed schedule for further proceedings.

**Conclusion**

The Court here held that a Form 2848 does not have to specifically identify Form 843 or specifically authorize a representative to sign Form 843 for it to be valid to convey that authorization. Nonetheless, to try to avoid protracted disputes with the IRS regarding the validity of a refund claim, care should be given to the drafting of the Form 2848.

## US Tax Court holds that IRS assessment was untimely following adequate disclosure of gift

In *Ronald Schlapfer v. United States*,[22] the US Tax Court granted the taxpayer's Cross-Motion for Summary Judgment and determined that the taxpayer substantially complied with the adequate disclosure requirements when he filed Form 709, *United States Gift (and Generation-Skipping Transfer) Tax Return*, for the 2006 tax year. As such, the three-year period of limitations to assess gift tax expired before the IRS issued its notice of deficiency.

**Background**

In 2002, the taxpayer formed a Panamanian corporation to manage and hold certain investments. On July 7, 2006, the taxpayer applied for a universal life insurance policy, the stated purpose of which was to create and fund a policy that his mother, aunt, and uncle could use to benefit the taxpayer's nephews. The application listed the taxpayer as the owner. His mother, aunt, and uncle were listed as the insured lives; and the taxpayer and his wife were listed as the primary beneficiaries. Following the issuance of the policy in September 2006, the taxpayer transferred the stock of the Panamanian corporation to a bank account held in the name of the insurance policy.

The taxpayer eventually substituted his mother, aunt, and uncle as the policyholders. While the steps required to complete this substitution occurred in 2007, the taxpayer asserted that he had instructed the insurance company to transfer ownership of the policy as soon as it was issued, and that a scrivener's error was made on the part of the insurance company resulting in him originally being named as the policyholder.

In 2012, the taxpayer entered the Offshore Voluntary Disclosure Program ("OVDP"). His disclosure submission was made on November 30, 2013, which included, among other things, Forms 5471, *Information Return of US Person with Respect to Certain Foreign Corporations*, for the 2004, 2005, and 2006 tax years; Form 709 for the 2006 tax year; and an Offshore Entity Statement detailing the establishment of the Panamanian corporation and the taxpayer's interest in it through July 2006.

The gift reported on the Form 709 stemmed from the assignment of the insurance policy to the taxpayer's mother, aunt, and uncle. However, the gift reported by the taxpayer was the stock in the Panamanian corporation, rather than the insurance policy.

On June 4, 2014, after reviewing the Form 709, the revenue agent responsible for certifying the taxpayer's voluntary disclosure issued an Information Document Request related to the gift. The taxpayer maintained his assertion that he had instructed the insurance company to transfer ownership of the policy as soon as it was issued. He ultimately agreed to a revised gift date of September 22, 2006.

In early 2016, the IRS opened an examination of the taxpayer's 2006 Form 709. In August 2016, the IRS issued Form 3233, *Report of Gift Tax Examination*, and concluded that there was no taxable gift in 2006 because the taxpayer had made an incomplete transfer. Instead, the IRS's view was that the gift had been made in 2007. The taxpayer refused to concede that the gift was made in 2007 and withdrew from the OVDP. The IRS subsequently prepared a substitute gift tax return for 2007 and issued a notice of deficiency for 2007 determining a gift tax liability of $4,429,949 plus additions to tax in the amount of $4,319,200.

**Law and analysis**

Generally, the IRS has three years after a gift tax return is filed to assess any gift tax.[23] Section 6501(c)(9), however, provides that the IRS may assess gift tax at any time for any gift of property, the value of which is required to be shown on a gift tax return, that is not shown on such a return. This exception applies *unless* the gift is otherwise adequately disclosed. "A disclosure is 'adequate' if it is 'sufficiently detailed to alert the Commissioner and his agents as to the nature of the transaction so that the decision as to whether to select the return for audit may be a reasonably informed one.'"[24]

The IRS argued that strict compliance with the adequate disclosure regulations was required for a gift to be deemed adequately disclosed. Treas. Reg. § 301.6501(c)-1(f)(2), however, provides that transfers reported on a gift tax return will be considered adequately disclosed if the return (or a statement attached to the return) includes, as relevant here:

i. A description of the transferred property and any consideration received by the transferor;
ii. The identity of, and relationship between, the transferor and each transferee;
iii. A detailed description of the methodology used to determine the fair market value of the property transferred.

Additionally, Treas. Reg. § 301.6501(c)-1(f)(5) states that "[a]dequate disclosure of a transfer that is reported as a completed gift . . . will commence the running of the period of limitations for assessment of gift tax . . .

even if the transfer is ultimately determined to be an incomplete gift." As such, the court was focused on whether the taxpayer's disclosure was adequate and not whether the gift was complete.

Determining whether strict or substantial compliance is required turns on whether the requirement relates "to the substance or essence of the statute."[25] If the requirement is essential, then strict adherence to all regulatory requirements is a precondition to satisfying the statute. Alternatively, if the requirement is "procedural or directory in that [it is] not of the essence of the thing to be done . . . [it] may be fulfilled by substantial . . . compliance."[26]

The IRS also argued that in determining whether the taxpayer adequately disclosed the gift, the court should not look beyond the Form 709.

The Tax Court determined that while the taxpayer's 2006 Form 709 did not "strictly" comply with the adequate disclosure requirements, he had "substantially" complied with the requirements because he provided sufficient detailed information to alert the IRS to the nature of the gift. This determination was reached, in large part, because the court looked beyond the description of the gift included on the 2006 Form 709 and also considered the accompanying information the taxpayer included as part of his OVDP submission.

**Conclusion**

The court held that the taxpayer had substantially complied with the adequate disclosure requirements when he filed Form 709 and that the IRS could not assess additional gift tax as it failed to issue the notice of deficiency within the three-year statutory period. While the unique facts present in this case aided the court in finding that the adequate disclosure requirements had been met, the decision demonstrates the importance of providing full and adequate disclosure of all gifts – including the use of supplemental statements and other documents to substantiate the value and nature of the gift.

## Endnotes

1. *Keefer v. United States*, No. 3:20-cv-0836, 2022 U.S. Dist. LEXIS 118271 (N.D. Tex. July 6, 2022).

2. 42 T.C. 894 (1964).

3. *Polselli v. IRS*, 143 S. Ct. 1231 (2023).

4. I.R.C. § 7609.

5. I.R.C. § 7609(b)(1).

6. I.R.C. § 7609(a)(1).

7. I.R.C. § 7609(c)(2).

8. I.R.C. § 7609(c)(2)(D).

9. I.R.C. § 7609(c)(2)(D). This exception also applies when the IRS issued the summons to help collect the liability at law or in equity of any transferee or fiduciary of any person against which an assessment or judgment has been made.

10. *Polselli v. IRS* at 1236 (2023).

11. Id.

12. Id.

13. Id. at 1233.

14. Id.

15. Id. at 1237.

16. Id. at 1240.

17. 165 Fed. Cl. 531 (2023).

18. 22 F.4th 1008 (Fed. Cir. 2022).

19. *Id.*

20. I.R.C. § 7422(a).

21. 165 Fed. Cl. At 539 (emphasis added).

22. TC Memo 2023-65 (May 22, 2023).

23. *See* section 6501(a).

24. *Thiessen v. Commissioner*, 146 T.C. 100, 114 (2016)(quoting *Estate of Fry v. Commissioner*, 88 T.C. 1020, 1023 (1987)).

25. *Bond v. Commissioner,* 100 T.C. 32, 41 (1993) (quoting *Taylor v. Commissioner*, 67 T.C. 1071, 1077 (1977)).

26. Id. (quoting *Taylor*, 67 T.C. at 1077-78).

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