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Please Address Reply to:

Executive Director
DEBORAH O. McKINNON

November 14, 2022

Submitted Electronically
IRS and REG-125693-19

CC: PA: LPD: PR (REG-125693-19)
Room 5203, Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC. 20044

RE: COMMENTS OF THE AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL ("ACTEC") ON PROPOSED REGULATIONS UNDER CODE SECTION 7803

Treasury Notice 87 Fed. Reg. 61544 (October 12, 2022) requested comments on proposed regulations (the "Proposed Regulations") that would amend existing Treasury Regulations issued under section 7803 of the Code.[1] The Proposed Regulations relate to resolution by the Internal Revenue Service Independent Office of Appeals ("Appeals") of Federal tax controversies both without litigation and related requests for referral to that office following the issuance of a Notice of Deficiency to a taxpayer by the Internal Revenue Service.[2] ACTEC appreciates the opportunity to comment on the Proposed Regulations, the text and structure of which reflect careful work on the part of Treasury and the Internal Revenue Service (together, "Treasury").

ACTEC is a nonprofit association of lawyers and law professors. Its more than 2,400 members are called "Fellows" and practice throughout the United States, Canada and other foreign countries with extensive experience in the preparation of wills and trusts, estate planning, and administration of trusts and estates of decedents, minors and incompetents. Fellows of ACTEC are elected to membership by their peers on the basis of professional reputation and ability in the fields of trusts and estates and on the basis of having made substantial contributions to those fields through lecturing, writing, teaching, and bar association activities. Fellows of ACTEC

[1] Unless otherwise stated, references in these Comments to "section(s)" or to "Code" are to the Internal Revenue Code of 1986, as amended. References in these Comments to "§" are to relevant sections of the Treasury regulations promulgated under the Code.

[2] 87 Fed. Reg. 55934 (September 13, 2022), Resolution of Federal Tax Controversies by the Independent Office of Appeals.

have extensive experience in providing advice to taxpayers on matters of transfer tax planning. ACTEC offers technical comments about the law and its effective administration but does not take positions on matters of policy or political objectives.

ACTEC's comments regarding the Proposed Regulations are set forth in the attached memorandum. If you or your staff would like to discuss the contents of this memorandum with the ACTEC Fellows who created it, please contact Stephanie Loomis-Price, who chaired the working group that prepared this memorandum, (737-256-6103, SLoomisPrice@perkinscoie.com), William I. Sanderson, Chair of ACTEC's Washington Affairs Committee (202-875-1743, wsanderson@mcguirewoods.com) or Deborah McKinnon, ACTEC Executive Director (202-684-8460, domckinnon@actec.org).

Respectfully submitted,

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ACTEC President 2022-2023

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on Proposed Regulations under Code Section 7803

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BACKGROUND

In section 1001(a) of the Taxpayer First Act of 2019, P.L. 116-25 (2019) ("TFA"), Congress added section 7803(e) to the Code, which formally established Appeals, § 7803(e)(1), with the authority to resolve federal tax controversies without litigation pursuant to § 7803(e)(3) in a resolution process that is generally available to all taxpayers per § 7803(e)(4). Congress recognized that the Service has operated an Office of Appeals for nearly a century and sought to undergird the appeal structure and public confidence by codifying the administrative appeals function, making that office's independence a statutory matter and providing guidelines for procedures in Appeals, with a mandate that the Appeals process be "generally available to all taxpayers." § 7803(e)(4).

EXECUTIVE SUMMARY OF ACTEC'S RECOMMENDATIONS

ACTEC's comments address the following aspects of the Proposed Regulations and are briefly summarized below:

1. Overview: Congress has mandated that the now-statutory Appeals process be "generally available." To be consistent with that policy, Appeals should be unavailable to taxpayers only where proper administration or coherent application of the Code so requires.

2. Proposed § 301.7803–2(c)(10): The exception involving criminal prosecutions for tax-related offenses should be confined so that Appeals would be unavailable only if the pending criminal matter pertained to the same subtitle of the Code as would be the subject of the appeal.

3. Proposed § 301.7803-2(c)(20): The exception that would disallow consideration by Appeals of a taxpayer's argument that a Treasury Regulation is invalid is generally a

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sound one, but the corresponding exception regarding invalidity of an Internal Revenue Service Notice or Revenue Procedure does not have the same basis and should be reconsidered.

4. Proposed § 301.7803-2(c)(23): The requirement to request consideration by Appeals pre-docketing in Tax Court should clarify existing exceptions.

5. Proposed § 301.7803-2(f)(1): The Proposed Regulations should explicitly clarify that taxpayers generally should be permitted to request consideration by Appeals either before or after docketing in Tax Court, but not both.

DISCUSSION

Overview

In creating statutory authority for Appeals, Congress enunciated its policy determination that the Appeals process be "generally available to all taxpayers, subject to reasonable exceptions that the Secretary may provide."[3] In identifying exceptions where consideration by Appeals would be unavailable, the Proposed Regulations largely follow understandable policies and reflect Treasury's familiarity with the Appeals process. Accordingly, ACTEC finds ample reason, rooted in logic and past practice, for the majority of these proposed exceptions. At the same time, based on our members' practical experience and analysis of the Code, we suggest that several of the proposed exceptions may not be necessary to, and may in fact hamper, proper administration of the Appeals process, particularly given the Congressional direction that Appeals be generally available.

Proposed § 301.7803-2(a): Functions of Independent Office of Appeals: The approach espoused in the Proposed Regulations appears to run counter to Congressional intent and the policy upon which the Independent Office of Appeals was founded. Appeals exists in order to resolve controversies without the need for expensive litigation, as well as to give taxpayers the confidence that their situations are being considered by a neutral and knowledgeable third party who is in a position to overcome potentially arbitrary or unreasonable positions taken by the Internal Revenue Service's Examination division ("Exam"). In some rare situations, litigation may be the best course in order to settle broadly applicable legal issues "once and for all." But the overwhelming number of tax controversies are generally believed to be better settled than tried. Exam may feel very strongly about a particular issue and may prefer to fight about it than to resolve it, but in just such a circumstance, the independence of Appeals may be most needed. Exam should have the confidence that, if a particular position is proper under the law, it will be upheld in Appeals. If Exam lacks that confidence in the Appeals process or in its arguments, perhaps the issue is better suited to consideration by Appeals in any event.

[3] House Ways and Means Committee Report (H. Rep. No. 116-39, Part I) to accompany H.R. 1957, Taxpayer First Act of 2019.

Proposed § 301.7803-2(c)(10): Criminal Prosecution Is Pending Against Taxpayer.

Proposed § 301.7803-2(c)(10) provides that consideration by Appeals is unavailable for a Federal tax controversy with respect to a taxpayer while a criminal prosecution or a recommendation for criminal prosecution is pending against the taxpayer for a tax-related offense other than with the concurrence of Chief Counsel and the Department of Justice, as applicable.

The policy behind this exception is understandable and should govern generally. We suggest that situations may arise where a taxpayer who is the subject of a criminal proceeding under one subtitle of the Code – typically income tax in Subtitle A – may have reason to pursue an administrative appeal of an assessment in another subtitle, such as gift tax in Subtitle B or excise tax in Subtitle D, where there is no criminal proceeding. Proposed § 301.7803-2(c)(10) would prohibit such a taxpayer from pursuing consideration by Appeals of, for example, gift tax assessments during the pendency of criminal prosecution proceedings related to income tax positions. And while proceedings related to matters arising under different subtitles is the clearest illustration, the same principle might apply to matters within a single subtitle that are completely unrelated to each other and do not involve common facts or tax transactions.

Proposed § 301.7803-2(c)(20): Challenges Alleging That a Notice or Revenue Procedure Is Invalid.

Proposed § 301.7803-2(c)(20) provides that consideration by Appeals is unavailable for any issue based on a taxpayer's argument that an Internal Revenue Service Notice or Revenue Procedure published in the Internal Revenue Bulletin is procedurally invalid unless there is an unreviewable decision from a Federal court invalidating the Notice or Revenue Procedure.

This exception tracks Proposed § 301.7803–2(c)(19), which similarly makes Appeals unavailable for any issue based on a taxpayer's argument that a Treasury Regulation is invalid.

We agree with the policy expressed in Proposed § 301.7803–2(c)(19), concerning Treasury Regulations, but with a caveat that "invalidity" should be further defined. For example, § 71 was changed effective in 2019 to make alimony non-deductible. Does this change in the law make the previously existing Treasury Regulations invalid? Or does the situation fit within the statement in the explanation that the Proposed Regulations would not prevent a taxpayer from arguing that a Treasury Regulation does not apply to their position? Similarly, where Treasury Regulations overlap in a given factual situation, would reconciliation of such a situation involve a determination that a regulation is invalid? Greater clarity on this point would be helpful both to taxpayers and to Appeals.

While the rationale behind the validity of Treasury Regulations is generally sound, we suggest that the rationale for this section of the Proposed Regulations does not support Proposed § 301.7803-2(c)(20), concerning Internal Revenue Service Notices and Revenue Procedures. A Treasury Regulation is not only the product of general policy determinations at the highest levels of Treasury, but also, in the case of legislative and interpretative Treasury Regulations, follows a publication and public comment process under the Administrative Procedures Act.

An Internal Revenue Service Notice or Revenue Procedure, however, does not go through the same robust approval process nor carry the same weight. Such pronouncements are published

after consideration by senior policy-makers in the Service but have not undergone the review and comment process that informs a Treasury Regulation. Notices and revenue rulings represent important authority but do not have the full review and level of authority of a Treasury Regulation. In addition, Notices and Revenue Procedures may become outdated, undercut by more recent legal and factual developments, or overruled or overlapped by other authorities. Consequently, we anticipate that there will be circumstances in which an argument against the validity of a Notice or Revenue Procedure might be necessary to clarify an issue before Appeals.

We note that the Proposed Regulations speak to "procedural invalidity" of a Notice or Revenue Procedure, but that the term "procedural invalidity" is not defined. If the intent is only that Appeals would not be allowed to consider whether a Notice or Revenue Procedure was properly adopted or promulgated, there would be little concern. If that is the case, we suggest that the intent should be stated more clearly. However, the Proposed Regulations could be read more broadly. To provide clarity to both Appeals and taxpayers, we suggest defining the term.

Finally, we would point out that this portion of the Proposed Regulations begins to intrude on the independence of Appeals, as addressed above regarding litigation positions.

Proposed § 301.7803-2(c)(23): Appeals Consideration is a Prerequisite to the Jurisdiction of Tax Court.

As a threshold matter, we note that the heading of this portion of the Proposed Regulations could imply that taxpayers must have their cases considered by Appeals in order to take their cases to Tax Court. Such an implication would, in many cases, be in direct conflict with statutory law, which only requires the issuance of a Notice of Deficiency in order to file in Tax Court. We recommend a clarified title.

More substantively, while this portion of the Proposed Regulations appears on its face to be reasonable - requiring the exhaustion of all administrative remedies before filing in Tax Court - the practicalities of the Exam process and the internal time limitations imposed on Exam by the Service in gift and estate tax cases could necessarily mean that this portion of the Proposed Regulations would be an insurmountable barrier in most estate and gift tax examinations. And it would not be sound policy to establish a prerequisite that could be circumvented by simply sending a letter requesting consideration by Appeals immediately upon the commencement of each audit.

Pursuant to the Appeals Judicial Approach and Culture Project ("AJAC") announced by the Service in late 2014, consideration by Appeals on a gift tax case requires that at least one year remains before the statute of limitations runs on the return in exam, and at least 270 days must remain before the statute runs on an estate tax return under consideration. Meanwhile, examinations routinely do not commence until a year or more after the filing of the return at issue. Thus, from a practical perspective, Exam often has less than one year to review the file, request additional information, render a preliminary position, and reconsider its positions based on any additional insights, facts, or arguments presented by the taxpayer, all before the AJAC window for sending the case to Appeals closes well before the statute of limitations runs.

Given recent workloads and staffing challenges at the Service, this very short window would, in the context of a broad reading of this portion of the Proposed Regulations, prohibit most

taxpayers whose gift or estate tax returns are in Exam from reaching Appeals. While there is currently no statutory requirement that taxpayers in the estate and gift tax context exhaust all administrative remedies before filing in Tax Court, in order to avoid confusion for both Appeals and taxpayers, we recommend explicitly indicating that there are exceptions to this portion of the Proposed Regulations.

Proposed § 301.7803-2(f)(1): One Opportunity for Consideration by Appeals.

The "one bite at the apple" rule is logical and reasonable. The Proposed Regulations do not appear to limit the opportunity for consideration by Appeals before or after a case is docketed (but not both). That said, in the interest of clarity, the exceptions delineated in subsection (2) should explicitly include the situation where the taxpayer and the Government have run out of time for consideration by Appeals prior to the expiration of the statute of limitations and a Notice of Deficiency being issued, thereby confirming that a taxpayer is permitted to have her case heard by Appeals either before or after a case is docketed (although not both).