Ninth Circuit Holds that Providing a Delinquent Return to an IRS Agent on Request Isn't Filing the Return

by Robert S. Horwitz

When a taxpayer who has not filed a tax return is contacted by an IRS agent, the taxpayer will be requested to give the delinquent return to the agent. Internal Revenue Manual 4.12.1.7.2.1 (10-05-2010) states that the IRS agent is to "[a]dvise the taxpayer to deliver the returns promptly to the examiner along with a written statement explaining why they did not timely comply with filing requirements." If you have a client in this situation, advise her it is best to not to listen to this particular request by the IRS agent. Instead, the client should first either e-file the delinquent returns or send them by certified mail to the appropriate IRS service center and then provide the IRS agent with a copy of the duly filed return. The reason is that, according to the Ninth Circuit, a taxpayer who complies with an IRS agent's request for a delinquent return has not legally filed a return with the IRS unless and until the IRS agent has sent it to the appropriate service center. Thus, the statute of limitations for examination of that return will continue to remain open indefinitely. This is what the taxpayer learned in *Seaview Trading, LLC v. Commissioner*, ___ F.4th ___ 2021 WL 2442606 (9th Cir., March 10, 2023).

Seaview Trading, LLC, was partnership for tax purposes that had its principal place of business in California. For 2001, it claimed a $35.5 million loss from a tax shelter transaction, which it admitted was not an allowable loss. In July 2005, a revenue agent contacted Seaview and informed it that the IRS had no record of its 2001 partnership return having been filed. The agent requested a retained copy of the return plus proof of mailing. Seaview's CPA faxed a retained copy of the 2001 return and a certified mailing receipt for an envelope mailed to the Ogden Service Center. Seaview initially claimed that its 2001 return was mailed to the IRS in the same envelope along with a return for a related entity. There was no evidence, however, that the IRS ever received Seaview's 2001 return. In July 2007 Seaview's counsel mailed a copy of the same return to an IRS Chief Counsel attorney. Neither the IRS agent nor the Chief Counsel attorney forwarded the 2001 return to the Ogden Service center.

In October 2010, the IRS issued a Notice of Final Partnership Administrative Adjustment (FPAA) to Seaview for 2001. Seaview filed a petition with the Tax Court. It conceded it was not entitled to the loss but claimed that the FPAA was barred by the statute of limitations because it was not issued within three years of Seaview's 2001 return being filed, as required by IRC §6229(a)(1) as then in effect.

Seaview argued that it filed its 2001 return either in 2005 when the return was faxed to the IRS agent or in 2007 when it was mailed to the IRS attorney, both of which occurred more than three years before the FPAA was issued. The provisions for filing partnership returns under TEFRA were contained in IRC §6230(i), which provided that a partnership return "shall be filed ... at such place as may be prescribed in regulations" and Treas. Reg. §1.6031(a)-(1)(e), which stated

(1) Place for filing. The return of a partnership must be filed with the service center prescribed in the relevant IRS revenue procedure, publication, form, or instructions to the form (see § 601.601(d)(2)).

(2) Time for filing. The return of a partnership must be filed on or before the date prescribed by section 6072(b).

The service center where Seaview's return was required to be filed was the Ogden Service Center. The Tax Court held that since Seaview's 2001 return was not sent to Ogden in conformity with the regulation, it had not been filed. The Tax Court noted that if the IRS agent or attorney had forwarded the return to Ogden, Seaview's return would have been filed and the statute of limitations would have started ticking. However, as neither the IRS agent nor the attorney had forwarded the return to Ogden, it was not legally filed and the statute of limitations remained open. Initially, a three-judge panel of the Ninth Circuit reversed the Tax Court. After granting *en banc* review of that reversal, the Ninth Circuit affirmed the Tax Court.

The Ninth Circuit began its analysis by noting that limitations periods barring tax collection are "strictly construed in favor of the government" and that there must be "meticulous compliance by the taxpayer with all named conditions in order to secure the benefits of the limitation." According to the Court, a condition to starting the period of limitations was filing a partnership return "at such place as may be prescribed in regulations." The regulations required Seaview's return to be filed at the service center prescribed in the instructions, which was Ogden. Seaview "did not meticulously comply with the regulation's place for filing requirement" because its 2001 return was never forwarded to the designated place for filing." So "its is not entitled to claim the benefit of the three-year limitations period.

The Ninth Circuit found that its conclusion is consistent with cases from other circuits and the Tax Court. The case it focused on was *Allnutt* v. Commissioner, 523 F.3rd 406 (4th Cir. 2008). There, the taxpayer's CPA firm prepared delinquent returns for the taxpayer and directed him to hand carry the original to the district director and a copy to district counsel. The taxpayer carried a copy to district counsel's office and gave to district counsel's secretary, who stamped it received and sent it to IRS special procedures which stamped it but did nothing further. He took the envelope with the other copy to the building housing the district director, who was at lunch. He gave it to a random individual in a hallway who said he was authorized to accept returns and would give the envelope to the district director. Several months later this return was received by the service center. The IRS issued a notice of deficiency within 3 years of the return being received at the service center but more than three years after the taxpayer hand delivered copies. The Fourth Circuit held that while hand delivering a return to the district director was filing under the applicable regulation, giving a copy to an unidentified individual in the IRS building was not "meticulous compliance." Thus, the returns were filed on the date they were received by the service center and the notice of deficiency was timely. The Ninth Circuit described the case as one where the taxpayer gave his delinquent return to a person not authorized to accept hand carried returns.

Seaview argued the regulation only applied to timely returns, and not late returns and that its faxing to a revenue agent and mailing to a counsel attorney were filing. The Ninth Circuit

said that the regulations don't distinguish between timely and late returns and contain no carve out for late returns. Thus, the requirement that TEFRA partnership returns be filed at the service center listed in the instructions was applicable to Seaview's return.

Seaview pointed to three IRS documents, claiming that they supported its interpretation. The first was a Chief Counsel Advice, which dealt with a regulation that allowed filing a return by either mailing it to the service center or hand delivering it to the district director and held delivery to a revenue officer was consistent with the regulation. According to the Ninth Circuit this CCA did not support Seaview's position. The second was a IRM provision that examiners should advise taxpayers to deliver delinquent returns "promptly to the examiner" and instructs IRS personnel to send delinquent returns to the appropriate service center. The Ninth Circuit noted that the IRM, even if it applies to a revenue agent, confers no rights on a taxpayer and thus Seaview could not rely on it. The third was Policy Statement 5-133, which states that delinquent returns will be accepted rather than rejected as late. According to the Ninth Circuit, this did not override the regulation. Thus, the Tax Court's decision was affirmed.

Judge Bumatay dissented, stating that the *en banc* panel's opinion throws the "tax system into disarray" because for over 20 years the IRS has been telling taxpayers they can file late returns with requesting IRS officials and has encouraged taxpayers to file delinquent returns "directly with the revenue officer instead of mailing to the appropriate Service Center."

The dissent noted that the IRS has not promulgated any regulations concerning how to file late returns and that the *en banc* opinion "grant[s] a disturbing unilateral power to individual government employees to determine whether a return is 'filed.'"

According to the dissent, the government has two conflicting positions on where to file delinquent returns: a "public position" that a late return can be filed with a requesting IRS agent and a "litigation position" that it must be filed with the designated service center. Judge Bumatay would hold that a late partnership return is filed for statute of limitation purposes (a) when an IRS official authorized to obtain and receive delinquent returns informs a partnership that its return hasn't been filed and requests the return, (b) the partnership provides the returns in the manner requested, and (c) the IRS official receives the returns. Thus, he would have upheld the three-judge panel.

Judge Bumatay pointed out that neither the Code nor the regulations define "file" or "filed." Also, there was a regulatory gap, since the regulations only deals with the time and place a return must be filed, not with the place for filing delinquent returns, and cites to IRC §6091(b)(4) and Treas. Reg. §1.6091-2(d)(i), which allow filing of returns other than by mailing to a service center. He fails to note that these provisions concern returns by persons other than corporations and by corporations and estate tax returns and the regulation states it applies to individuals, corporations, estates and trusts. The TEFRA partnership provisions and the TEFRA regulations specifically address the filing of partnership returns. The regulations do not specifically contain procedures for filing late partnership returns.

The dissent cited *United States v. Hanson*, 2 F.3d 942 (9th Cir. 1993), for the proposition that a return was filed when the taxpayer "mailed the forms" to the IRS. *Hanson* was a criminal

case where the taxpayer mailed an admittedly false return to the IRS. He claimed that the return was not filed because it was not fully processed. The Ninth Circuit rejected this claim, stating "A return is 'filed' at the time it is delivered to the IRS." I do not see how this supports the dissent. There is nothing in *Hanson* to indicate the returns were mailed to any place other than the service center. Further, the case deals with an individual income tax return, not a TEFRA partnership return.

The dissent finally noted that the IRS documents relied on by Seaview disagreed with the *en banc* opinion's interpretation of the Code and regulations. While the majority was correct that these documents are not binding it ignored that "such rulings do reveal the interpretation put upon the statute by the agency charged with the responsibility of administering the revenue laws." *Hanover Bank v. Commissioner*, 369 U.S. 672, 686 (1962). The IRS documents should not have been so easily disregarded by the majority.

A few comments. First, the regulation states that the partnership return "must be filed" with the service center and "must be filed" on or before the due date. This would imply that a return received after the due date or at a place other than the service center cannot be filed. This is an absurdity. Returns are filed late and are accepted and processed by the IRS, as recognized by Policy Statement 5-133. In my view, if a partnership return can be filed late and accepted, there is no good reason why a delinquent return cannot be filed in a manner designated by the IRS in a CCA or a policy statement.

Second, if the regulatory provisions on place of filing and time for filing are to be treated separately, as the majority, the majority reading is correct, the sole place for filing a TEFRA partnership return was with the service center designated in the partnership return instructions.

Third, currently timely partnerships of more than 100 partners are required to file electronically, and partnerships with less than 100 partners are to file with either the Kansas City Service Center (if they have less than $10 million in assets) and with the Ogden Service Center (if they have more than $10 million in assets). The current regulation governing the filing of partnership returns, Treas. Reg. 1.6031-1(e), states that "The return of a partnership must be filed with the service center prescribed in the relevant IRS revenue procedure, publication, form, or instructions to the form (see § 601.601(d)(2))." Thus, under the Ninth Circuit's holding in Seaview Trading, if a partnership is contacted by a revenue agent stating the partnership return has not been filed, it should be mailed to the appropriate service center. But there is a problem. Normally, a return for a past due year cannot be efiled. The IRS only accepts for e-filing a return for the current tax year. And the instructions for filing partnership returns require e-filing for partnerships of more than 100 partners. Would a delinquent return mailed to the service center for such a partnership be accepted for filing? Or would the delinquent return have to be provided to an IRS employee who requests the return? In the Ninth Circuit, the answer now appears to be – all of the above.