USING SECTION 7428 TO RESOLVE EXEMPT STATUS CONTROVERSIES

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An organization can use the declaratory judgment provisions of Section 7428 to end a prolonged controversy with the IRS over tax-exempt status.

IRS examinations of tax-exempt organizations can be, and often are, long, arduous processes that can span several years. This is especially true of examinations that result in proposed adverse determinations. During IRS examinations it is important that tax-exempt organizations have the benefit of all available tools and strategies that can be used to exert a greater level of control over the duration of the examination and the administrative appeals process. In some cases the Service's own administrative delays can be used to the advantage of organizations facing potential adverse determinations.

A new strategy adds another arrow to the quiver of tax-exempt organizations subjected to unending IRS examinations regarding their exempt status. They can seek declaratory judgments from the United States Tax Court using a relatively unique interpretation of that court's subject matter jurisdiction over requests for declaratory judgments under Section 7428.

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Background

Pursuant to Section 7428, courts have subject matter jurisdiction to issue a declaratory judgment pertaining to an organization's continued qualification for tax-exempt status under Section 501(c)(3). However, under the most conservative understanding of Section 7428, they can do so only after the Service has issued a final adverse determination letter (FADL) and the organization has exhausted all of the administrative remedies available within the Service. In these situations, courts have traditionally held that their jurisdiction over the case is limited to the periods examined by the Service during its examination.

This understanding of the jurisdictional scope of Section 7428 provides little comfort to organizations subjected to extremely long examinations; so long that the facts and law have significantly changed and now differ from those examined by the Service. During such long examinations, the Service essentially is able to hold organizations hostage by refusing to issue a FADL, subjecting them to the strain and expenses of a perpetual examination. Additionally, this understanding of jurisdiction gives the Service unilateral authority to manipulate the facts

that would be considered by a court in a declaratory judgment case by selectively opening for examination only those periods that support the Service's position regarding revocation.

Recognizing these extreme hardships, the author's firm recently filed two petitions for declaratory judgment in which it sought to challenge this overly conservative interpretation of Section 7428. The author's firm sought declaratory judgments from the Tax Court on behalf of two clients whose cases had lingered in the Service's administrative appeals process for more than six years without the issuance of a FADL or any true efforts by the Service to reach a non-adverse resolution. Also, recognizing that the facts and law at the time that the petitions were filed were significantly different from those during the periods examined by the Service, the petitions filed with the Tax Court sought a declaratory judgment regarding the exempt status of each organization for periods subsequent to the examination, in addition to those examined by the Service.

The petitions filed by the author's firm are significant because they introduce an very different interpretation of subject matter jurisdiction under Section 7428. This interpretation does three things:

1. It provides organizations with a mechanism for removing perpetual examinations from the Service's purview by seeking a judicial determination on the issue.
2. It permits a greater number of organizations to seek the judicial remedies provided by Section 7428 by potentially removing the financial hardships associated with receiving a FADL as necessary requirement of obtaining a declaratory judgment.
3. It allows organizations to use proposed revocation letters to address any and all potential exemption issues identified during the examination and seek a judicial ruling based on the revised and improved facts presented in the periods after the issuance of the proposed revocation letter.

As of now, the issues and analysis discussed in this article rest largely in the realm of legal theory. While the author's firm litigated these issues in Tax Court, the cases were settled prior to the issuance of a final decision by the court. However, though these cases failed to result in the desired precedent, there is much to be learned from the court's consideration of these petitions and the Service's strategy throughout the litigation.

The issue

The cases involved two organizations that had each been under examination for nearly a decade, with each organization having received a proposed adverse determination letter more than six years before a Tax Court petition was filed. The extreme duration of these examinations was due partly to delays and retirements within the IRS, and partly to the efforts of the organizations to address the Service's concerns. Specifically, the organizations identified and addressed potential areas of noncompliance—including those discussed in the revenue agent's report (RAR) as the basis for the proposed adverse determination—making the changes necessary to come into compliance with the standards expressed by the Service in the RAR. Despite these efforts, however, the changes made by the organizations did not have the intended effect of hastening non-adverse resolutions to the examination and administrative review process. Rather, these efforts merely caused an indefinite extension of the Service's internal review process, resulting in an administrative stalemate.

A new strategy adds another arrow to the quiver of tax-exempt organizations.

On the one hand, the Service was unwilling to consider any non-adverse resolution, such as a closing agreement, because of what it believed to be substantial issues discovered during its examination. On the other hand, the Service was hesitant to issue a FADL due to the potential litigating hazards presented by organizations, which had used the information in the RAR to resolve any and all compliance issues developed during the IRS examinations and, as such, were compliant with each of the requirements necessary for recognition of tax-exempt status. Essentially, these organizations found themselves in the unfavorable position of having to endure the expense and strain of an unending IRS examination and appeals process while dealing with diminished funds and grants resulting from the public perception about the unresolved examination. Moreover, because it refused to issue a FADL, the Service was depriving these organizations of the congressionally granted right to obtain a relatively prompt judicial review of a final adverse determination regarding their tax-exempt status.

Compounding the harm of the Service's administrative delays was the fact that, even if a court had subject matter jurisdiction over this issue, it would have been the Service's position that the scope of the court's jurisdiction was limited to the periods examined by the Service. Therefore, by expressly refusing to consider any factual information relating to periods after

those examined—even in situations where the Service acknowledged that the substantial organizational changes brought the organization into compliance with the requirements necessary for recognition of tax-exempt status—the Service was effectively precluding any court from ever considering such facts in making its own determination regarding the continued qualification of these organizations for recognition of tax-exempt status.

To relieve these organizations of the substantial burdens of a perpetual IRS examination, the author's firm decided to remove the review of these cases from the Service's purview by filing a petition seeking a declaratory judgment from the Tax Court regarding the tax years examined by the Service and each tax year subsequent to those examined.

Law and analysis

During long examinations, the Service essentially can hold organizations hostage by refusing to issue a Final Adverse Determination Letter.

There were two primary jurisdictional hurdles that could have thwarted obtaining the requested relief. First, the court could have ruled that it lacked that requisite subject matter jurisdiction to grant the requested relief in either case because the Service had not issued a 90-day letter—frequently referred to as the "ticket to Tax Court." Second, even if the court determined that it had subject matter jurisdiction to issue a declaratory judgment, it could have ruled that the scope of its jurisdiction was limited to only those years actually examined by the IRS.

The general jurisdictional requirements of Section 7428. Under Section 7428, the United States Tax Court, the United States District Court for the District of Columbia, and the United States Court of Federal Claims have concurrent jurisdiction to issue a declaratory judgment in the case of an actual controversy with respect to a determination or the Service's failure to make a determination regarding the continued qualification of an organization described in Section 501(c)(3).

To meet the jurisdictional requirements for obtaining a declaratory judgment under Section 7428(a), there must be (1) an actual controversy (2) involving a determination or a failure to make a determination by the Secretary of the Treasury (3) with respect to an organization's initial or continuing qualification or classification as an exempt organization."[1] Additionally, Section 7428(b) provides that a declaratory judgment will not be issued unless the court "determines that the organization involved has exhausted administrative remedies available to it within the Internal Revenue Service."

An organization generally is deemed to have exhausted its administrative remedies as of the earlier of (1) the notice of a final determination or (2) the expiration of the 270-day period. On the second point, Section 7428(b)(2) specifically provides that an organization "shall be deemed to have exhausted its administrative remedies with respect to a failure by the Secretary to make a determination with respect to such issue at the expiration of 270 days after the date on which the request for such determination was made if the organization has taken, in a timely manner, all reasonable steps to secure such determination." In *BBS Associates,* 74 TC 1118 (1980), noting the Service's failure to issue a determination of tax-exempt status after 21 months, the court concluded that the applicant organization had exhausted its administrative remedies after an "inordinately long delay by the [Service] in processing the petitioner's application and arriving at a final determination."[2]

As such, it is clear that once an organization actually receives a FADL, it will have met the jurisdictional requirements for obtaining a declaratory judgment under Section 7428 for the periods under examination. Additionally, it is clear that the court will have subject matter jurisdiction under Section 7428(b)(2) when an organization files a new Form 1023 after its tax-exempt status is revoked, if the Service does not make a determination within 270 days. Another question is less clear, however. Even if the Service has failed to issue a final adverse determination, can an organization satisfy the jurisdictional requirements for obtaining a declaratory judgment for the periods under examination *and* for the periods subsequent to those examined?

Obtaining a declaratory judgment prior to the issuance of a final adverse determination letter. As discussed above, to obtain a declaratory judgment, Section 7428 requires (1) an actual controversy, (2) the Service's failure to make a determination with respect to an organization's request for a determination, and (3) the exhaustion of all administrative remedies available within the Service.

Actual controversy. Courts generally have interpreted the "actual controversy" requirement to mean that "the power to issue declaratory judgments does not extend to advisory opinions on

[1] Gladstone Foundation (hereinafter "Gladstone"), 77 TC 221, 226 (1981).

[2] BBS Associates, 74 TC 1118, 1122 (1980).

[3] AHW Corp, 79 TC 390, 397 (1982).

abstract or hypothetical facts, which do not involve any case or controversy."[3] As such, courts have determined that they lack jurisdiction over cases in which the Service has "not spoken finally with regard to [the] petitioner's status."[4] Therefore, if the Service recognizes an organization as exempt, there generally is "no actual controversy which gives rise to judicial review unless the IRS directly determines that the organization is no longer exempt."[5]

While a final adverse determination is generally required for an actual controversy to exist, courts have noted that an "exception to this requirement ... exists when jurisdiction is invoked under Section 7428(a)(2) on the ground that respondent has failed to make a determination as to initial or continuing qualification."[6] Further, in *Gladstone,*[7] the Tax Court specifically found that the Section 7428(a)(2) exception applied both to organizations seeking a determination regarding initial qualification for exempt status and to organizations seeking a determination regarding continued qualification of exempt status, noting that "Congress clearly intended that declaratory judgment actions as to tax-exempt status ... be available remedies for revocation cases where final determinations were made and where there has been a failure to make a determination."[8] Thus, according to the *Gladstone* court, Congress intended to provide a judicial remedy to an organization if the Service has failed to issue a final determination regarding either the initial or continuing qualification for exempt status.

In *Gladstone*, the court found the existence of an actual controversy with respect to an organization's continuing qualification for exempt status where the Service initiated proceedings to revoke the classification of an organization's tax-exempt status through the issuance of a proposed revocation letter.[9] Thus, an actual controversy may exist where an organization, even one that is already recognized as exempt, requests a determination regarding its continuing qualification and does not receive such a determination from the Service.

In *Anclote Psychiatric Center,* 98 TC 374 (1992) the Tax Court considered an organization that was the subject of a prolonged examination and had not received a final or a proposed revocation letter. The Tax Court determined that, where the organization received notice that the Service's National Office had reviewed and approved the Service's proposed adverse determination through the issuance of a technical advice memorandum, the final revocation was inevitable. Once the issuance of the final adverse determination became inevitable, the court noted that "[t]here can be no other conclusion but that an actual controversy existed."[10]

Like the petitioner in *Anclote*, organizations that have received a proposed revocation from the IRS, have had their Appeals Conferences of Right, and have been informed that the Appeals Division will uphold the proposed revocations, have reached the point where the "final revocation is inevitable." Thus, an actual controversy will exist.

However, while the courts in *Gladstone* and *Anclote* found an actual controversy once the Service issued a proposed revocation and the final determination became inevitable, it is notable that each of these courts ruled that it had jurisdiction to issue a declaratory judgment under the Section 7428(a)(2) exception discussed in *AHW Corp.* and *Founding Church of Scientology*—i.e., that the Service failed to make a determination regarding the organization's exempt status. Therefore, organizations seeking a declaratory judgment prior to the receipt of a final adverse determination must demonstrate that they requested a determination regarding their continued qualification for tax-exempt status and that the Service did not make a final determination with respect to such request.

Courts have determined that they lack jurisdiction over cases in which the Service has 'not spoken finally with regard to [the] petitioner's status.'

[4] *Id.* at 377.

[5] Urantia Foundation, 77 TC 507, 513 (1981). See also High Adventure Ministries, 80 TC 292 (1983) (the mere threat of a notice of proposed revocation does not give rise to an actual controversy); Founding Church of Scientology of Washington, D.C., 69 AFTR2d 92-1385 (1992) (holding that there was no actual controversy where an organization sought a declaratory judgment after the Service issued the organization a no change letter upon completion of its examination); and AHW Corp., *supra* note 2 (the court lacked jurisdiction to issue a declaratory judgment with respect to whether an organization recognized as exempt could engage in a particular activity without jeopardizing its exempt status).

[6] AHW Corp., note 2, at 398. See also, Founding Church of Scientology ("An actual controversy may exist when the IRS fails to make a determination, see I.R.C. § 7428(a)(2), so long as the petitioner/plaintiff waits 270 days after the date on which the request for such determination was made").

[7] Note 1, *supra.*

[8] *Id*. at 229 (citing Staff of the Joint Committee on Taxation, *General Explanation of the Tax Reform Act of 1976* (hereinafter, "the Blue Book"), page 403.

[9] Gladstone, *supra* note 1 at 226. ("Although petitioner retained its nonprivate foundation status throughout the administrative process, its continuing classification is unquestionably in issue.")

[10] Anclote Psychiatric Center, 98 TC 374, 378.

Failure to make a determination with respect to a request for a determination. For a court to have jurisdiction to make a declaratory judgment due to the Service's failure to make a determination pursuant to Section 7428(a)(2), an organization must first make a request for such a determination. This usually is done by submitting a Form 1023, "Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code."

In *New York County Health Services Review Organization, Inc.*, 45 AFTR2d 80-1552 (DC N.Y., 1980) (hereinafter *NYCHSRO*), after noting that the Service's procedures required taxpayers to request determinations by submitting a Form 1023, the district court ruled that "[u]ntil such time as the Service either rules on plaintiff's Form 1023 request for determination, or fails to act on such a request within 270 days of its filing, this Court lacks subject matter jurisdiction."[11]

Once the issuance of the final adverse determination became inevitable, '[t]here can be no other conclusion but that an actual controversy existed.'

The ruling in *NYCHSRO* was based on the procedures for obtaining a determination to which Section 7428 applies as provided by Rev. Proc. 77-21, 1977-1 CB 586. Rev. Proc. 77-21, which has since been superseded by Rev. Proc. 2013-9, 2013-2 IRB 255, provided that organizations seeking determinations regarding their tax-exempt status were required to follow the procedures of Rev. Proc. 72-4 regarding the filing of a Form 1023.[12] However, Rev. Proc. 72-4, 1972-1 CB 706, since superseded by Rev. Proc. 2013-9, generally provides that a ruling or determination letter recognizing exemption will not be issued if an issue involving the organization's exempt status is in pending litigation or under consideration within the Service.[13]

As such, the court in *NYCHSRO* determined that it lacked subject matter jurisdiction under Section 7428(a)(2) unless the taxpayer received an adverse ruling regarding a determination requested pursuant to Rev. Proc. 72-4. However, the revenue procedure under which taxpayers were to request a determination necessary for the court's jurisdiction precluded organizations such as the New York County Health Service Review Organization from obtaining the determination required by the court's decision. Therefore, reading the ruling in *NYCHSRO* in conjunction with Rev. Proc. 2013-9, it appears as though the court will lack jurisdiction over the intervening periods until such time as the taxpayer requests and receives a determination that the Service's internal procedures will not allow the IRS to make.

In *Gladstone*, the Tax Court had a different interpretation of this requirement, finding that "Congress clearly intended that declaratory judgment actions as to tax-exempt status ... be available remedies for revocation cases where final determinations were made and where there has been a failure to make a determination."[14] As Rev. Proc. 2013-9 precludes the Service from making determinations on the continuing qualification of organizations whose status is under consideration by the Service, it is inconsistent with Congressional intent and thus is inapplicable to requests from organizations whose exempt status is under consideration by the Service. Based on its understanding of Congressional intent, the *Gladstone* court determined that, where an organization filed a written protest to a proposed revocation that contained a written statement in support of its continued exemption, the organization had made a request for a determination.[15]

The *Gladstone* court specifically considered the decision in *NYCHSRO* and rejected that court's determination that courts lack jurisdiction to issue a declaratory judgment until an organization files a new Form 1023. Noting that the filing of another Form 1023 would be wasteful where "the organization has substantially complete[d the] administrative process by protest and appeals,"[16] the Tax Court determined that such a requirement would provide no additional value, only additional delay, stating that the "respondent's position would not change, but petitioner would suffer additional delays in obtaining a final ruling from a court."[17]

Exhaustion of administrative remedies within the Service. Although the 270-day period creates a presumption that an organization has exhausted

[11] New York County Health Services Review Organization, Inc., 45 AFTR2d 80-1552 (DC N.Y., 1980) at 80-1553.

[12] Rev. Proc. 77-21, 1977-1 CB 586, section 3.01.

[13] See Rev. Proc. 72-4, 1972-1 CB 706, section 5.04. Rev. Proc. 72-4 has been superseded multiple times; its most recent iteration is Rev. Proc. 2013-9, which provides a similar standard for issuing final determination letters in section 4.04. The most significant difference in the relevant sections of these procedures is the additional language of Rev. Proc. 2013-9 section 4.04, which provides that "[i]f the Service declines to issue a determination or ruling to an organization seeking exempt status under § 501(c)(3), the organization may be able to pursue a declaratory judgment under § 7428 provided that it has exhausted its administrative remedies."

[14] Gladstone, *supra* note 1 at 229, citing the Blue Book at page 403 (emphasis added).

[15] See also Anclote, *supra* note 10 at 381 ("a written protest to a proposed revocation is a 'request for a determination' within the meaning of section 7428(b)(2)").

[16] Gladstone, *supra* note 1 at 253.

[17] *Id.*

its administrative remedies, the expiration of 270 days alone does not satisfy the jurisdictional requirements for a declaratory judgment.[18] An organization must have also taken, "in a timely manner, all reasonable steps to secure a ruling or determination."[19] When determining whether an organization has exhausted its administrative remedies under this standard, the courts have looked both to the organization's initial request for a determination and to its subsequent requests for the Service to take action.

In *Gladstone*, the petitioner filed a timely protest letter, communicated regularly with the Service, and submitted all documents requested by the Service in an expeditious manner. The Service, however, argued that the organization had not exhausted its administrative remedies because the Service had not issued a final determination letter prior to the filing of the petition. Taking notice of the petitioner's cooperation with the Service and the Service's failure to act within 29 months of receiving the protest letter, the court ruled that Section 7428 "was intended to provide a remedy for hardships caused by undue administrative delays."[20] Similarly, in *Anclote*, the court determined that an organization "took all reasonable steps to secure a determination"[21] where the record did not indicate that the organization failed to timely submit any requested information and had reached the point at which it had no more administrative appeals available within the Service.

Facts from tax years after those examined under Section 7428. For organizations that are subject to prolonged examinations and administrative review processes, it is important for the court to have jurisdiction over both the periods actually examined and each subsequent period. This is necessary so that the organization can protect itself from the possibility that the Service will intentionally exclude certain facts that do not support the basis for the proposed adverse determination as discussed in the RAR. Moreover, because such changes would have been made during periods subsequent to the issuance of the proposed revocation, it is likely that such changes will have been made in direct response to the issues raised in the RAR. Therefore, it will be important for the organization that the court be able to consider the revised activities, which likely would substantially weaken the Service's position regarding revocation.

Though the exact question regarding the scope of a court's review has never truly been analyzed, it is notable that the Code is silent with respect to the periods over which a court has subject matter jurisdiction. Absent any specific statutory provision limiting the periods for which a court has jurisdiction over a matter, courts have looked to the general requirements for jurisdiction when deciding whether they have subject matter jurisdiction over a particular period. Thus, in the situation of an organization that has requested a determination through the filing of a written protest, the issue of whether a court will have jurisdiction over a particular period is not determined on the basis of whether the period was examined by the Service. Rather, a determination as to whether a court has jurisdiction over the periods subsequent to the periods examined should be based on (1) whether there is an actual controversy regarding the continued recognition of an organization's tax-exempt status and (2) whether the organization exhausted its administrative remedies with respect to its request for a determination.

It is important for the court to have jurisdiction over both the periods actually examined and each subsequent period.

Whether an actual controversy exists over periods subsequent to those examined. The Service's prospective application of an adverse determination is clear. When the Service revokes its recognition of an organization's tax-exempt status, it announces two things. First, that the organization is no longer recognized as an organization exempt from tax. Second, that the organization must file Forms 1120 for all periods subsequent to the effective date of the revocation unless and until the organization reapplies and is again recognized as an organization described in Section 501(c)(3). Similarly, because recognition of tax-exempt status is applied prospectively beginning no later than the date of the request, a request in year one is a request for all subsequent years until a determination is received and, if applicable, subsequently revoked.

Generally, Section 501(a)(1) provides that an organization described under Section 501(c) "shall be exempt from income tax under this

[18] See Prince Corp., 67 TC 318 (1976) (rejecting the petitioner's argument that the Code creates a *per se* test for exhaustion of administrative remedies based on the mere lapse of 270 days); Clawson, TCM 1993-174 (even where the Service made an adverse determination, the court lacked jurisdiction to issue a declaratory judgment because the taxpayer did not exhaust its administrative remedies where the taxpayer failed to protest the proposed revocation); McManus, 93 TC 79 (1981) (even where the Service made an adverse determination, the court lacked jurisdiction to issue a declaratory judgment because the taxpayer did not take any steps to obtain a favorable ruling after making the initial request for a determination).

[19] Reg. 601.201(n)(7)(v)(b).

[20] Gladstone, *supra* note 1 at 236.

[21] Anclote, *supra* note 10 at 383.

subtitle." Reg. 1.501(a)(1) notes that "Section 501(a) provides an exemption from income taxes for organizations which are described in section 501(c)." Thus, it is clear that Congress, not the Service, grants tax-exempt status under Section 501(c). However, to be treated as an organization described in Section 501(c)(3), the Code requires organizations to notify the Service of their qualification for such status.

Section 508(a)(1) provides that no organization will be treated as an organization described in Section 501(c)(3) "unless it has given *notice* to the Secretary, in such manner as the Secretary may by regulations prescribe, that it is applying for *recognition* of such status." (Emphasis added.) As such, the Service's application and determination process is not the process by which an organization becomes entitled to tax-exempt status; such entitlement was created by Congress. Rather, the application and determination process is merely the administrative process through which an organization *notifies* the Service that it wishes to be *treated* as an organization whose tax-exempt status was granted by Congressional authority.

The Code is silent with respect to the periods over which a court has subject matter jurisdiction.

Through the promulgation of regulations and administrative guidance, the Service has established the procedures by which an organization must notify the Service of its desire to be recognized as an organization described in Section 501(c)(3). Reg. 1.508-1(a)(2) provides that an organization must file "a properly completed and executed Form 1023" that is submitted "within 15 months from the end of the month in which the organization was organized." The regulations also provide an automatic 12-month extension to the 15-month period within which to file the notice required under Section 508.[22]

The regulations provide that, unless notice is provided to the Service within the required period, "[n]o organization shall be exempt from taxation under section 501(a) by reason of being described in section 501(c)(3)."[23] Therefore, if an organization files its Form 1023 within 27 months of the end of the month in which it is organized, it will be treated as a tax-exempt organization described in Section 501(c)(3) for its entire existence. However, if an organization files a Form 1023 more than 27 months after the end of the month in which it was organized, it will generally be treated as exempt as of the date on which it submitted its Form 1023. The regulations do provide equitable relief in certain situations.

Reg. 301.9100-3(a) gives the Service the ability to grant a discretionary extension of time to make an election when "the taxpayer provides evidence to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and the grant of relief will not prejudice the interests of the Government." Evidence that a taxpayer acted reasonably and in good faith includes evidence that the taxpayer both:

1. Failed to make the election because of intervening events beyond the control of the taxpayer.[24]
2. Reasonably relied on the written advice of the Service.[25]

The regulations provide that relief will prejudice the interests of the government if the "granting of relief would result in a taxpayer having a lower tax liability in the aggregate for all tax years affected by the election than the taxpayer would have had if the election had been timely made."[26]

In addition to the regulations, the Service annually publishes administrative guidance pertaining to the notification requirements of Section 508(a). In Rev. Proc. 2013-9, the Service has provided administrative guidance with respect to the manner in which it will process and review applications for recognition of exempt status. As discussed above, section 4.04 (entitled "No letter if exempt status issue in litigation or under consideration within the Service") provides that a determination letter will not ordinarily be issued while an organization's tax-exempt status is the subject of litigation or internal review, such as an examination.

The Code and the regulations provide that, upon receipt of a FADL, an organization will not be recognized as exempt for any period subsequent to the applicable date of the revocation until it files the required notice with the Service. However, based on Rev. Proc. 2013-9, the Service will not review or process a Form 1023 until the issue is no longer under internal review or the subject of litigation.[27] As such, the Service's procedural rules for processing

22 Reg. 301.9100-2(a)(2)(iv).

23 Reg. 1.508-1(a)(1).

24 Reg. 301.9100-3(b)(ii).

25 Reg. 301.9100-3(b)(iv).

26 Blue Book at 402.

27 This is consistent with information provided in discussions with the Service and with the Service's processing of the multiple Forms 1023 filed by the author's firm on behalf of clients in preparation of making this argument in litigation.

Forms 1023 preclude organizations subject to a proposed revocation from seeking a determination in the manner proscribed. This essentially precludes such organizations from obtaining recognition of exempt status for any period subsequent to the periods examined and prior to the final resolution of the case, including all litigation under Section 7428. Through the development and implementation of administrative procedures that preclude its review of a Form 1023 prior to the issuance of a final determination letter and the conclusion of litigation relating to that determination, the Service has effectively usurped Congress' authority to grant tax-exempt status under Section 501(a). Further, to the extent that an adverse determination is applied prospectively to periods for which an organization cannot request a determination, the Service's determination with respect to prior periods is a final and unreviewable determination for each period subsequent to those examined.

The abusive effect of the Service's unauthorized expansion of power is compounded because it deters taxpayers from availing themselves of their congressionally created right to judicial review of an adverse determination pursuant to Section 7428. Because the Service will not process Forms 1023 submitted by organizations whose exemption is the subject of litigation, an organization seeking a declaratory judgment under Section 7428 prolongs the period for which it is unable to obtain a determination from the Service, potentially causing additional harm by extending the period for which the organization is deemed to be revoked with no possibility of administrative or judicial review. This is especially concerning in light of the legislative history, which demonstrated that Section 7428 was added to the Code in response to the Supreme Court's warnings about the significant harm and potential for abuse that could result from the Service's unrestrained authority to make determinations regarding the tax-exempt status of public charities.

In discussing the newly enacted Section 7428, the Staff of the Joint Committee on taxation referred to the U.S. Supreme Court's decision in *Bob Jones University,* 416 U.S. 725, 33 AFTR2d 74-1279 (1974). According to the Joint Committee staff:

> The degree of bureaucratic control that, practically speaking, has been placed in the Service over those in petitioner's position [i.e., the position of Bob Jones University] is susceptible to abuse, regardless of how conscientiously the Service may attempt to carry out its responsibilities.... Accordingly, the Congress agreed to provide in this Act for a declaratory judgment procedure under which an organization can obtain a judicial determination of its own status as a charitable, etc., organization.[28]

This statement of the Joint Committee staff, in setting out the very purpose of Section 4728, stands in contrast to the Service's position. The Service's argument—that a court lacks subject matter jurisdiction to issue a declaratory judgment under Section 7428 if the judgment being sought relates to periods for which an organization is revoked and cannot obtain administrative review—runs contrary to the very purpose of the law as explained by the Joint Committee explanation.

Even if the Service's procedures did not prevent organizations whose exempt status is the subject of litigation or IRS review from obtaining a determination, it would be unnecessary for organizations protesting a proposed revocation to file a Form 1023 for a court to have jurisdiction under Section 7428. As noted above, the Tax Court in *Gladstone* stated that requiring an organization to file a duplicative Form 1023 "would be wasteful."[29] The court determined that such duplicative filings were unnecessary because:

> [W]here an original Form 1023 is on file for the organization, the organization has substantially completed the administrative process by protest and appeal. A new Form 1023 would only supply the same information. If a new Form 1023 was required to be filed and an adverse determination was attained therefrom, the organization would be required to complete another protest and appeal procedure before it would be deemed to have exhausted its administrative remedies. Of what value is this additional appeal procedure where it is simply a rehashing of the same issues and facts involved in the first appeal procedure initiated as a result of the proposed revocation? The respondent's position would not change, but petitioner would suffer additional delays in obtaining a final ruling from a court.[30]

Exhaustion of administrative remedies available within the IRS. In addition to requiring either a determination or the failure to make a determination, as noted above, Section 7428(b)(2) provides that a declaratory judgment will not be issued unless the court "determines that the organization involved has exhausted administrative remedies available to it within the Internal Revenue Service."

In determining whether Section 7428 grants jurisdiction over periods subsequent to those examined, courts have primarily focused on

A determination letter will not ordinarily be issued while an organization's tax-exempt status is the subject of litigation or internal review.

[28] Blue Book at 402.

[29] Gladstone, *supra* note 1 at 234.

[30] *Id.*

whether the taxpayer had exhausted its administrative remedies for such periods. In *Synanon Church,* 557 F Supp 1329, 51 AFTR2d 83-979 (DC D.C., 1983), the court noted that an adverse determination granted the court jurisdiction upon exhaustion of the organization's administrative remedies, and that the adverse determination "does not serve as a final decision eliminating any requirement for plaintiff to seek further administrative relief. Rather, it shifts the burden of taking further action to restore its exempt status."[31] As such, the court determined that "if plaintiff believes that it should be declared exempt for its activities in [the periods subsequent to those examined], it should petition for exempt status for those years."[32] Once Synanon Church exhausted all of its administrative remedies for those periods, the court would have jurisdiction with respect to the Service's determination. Thus, pursuant to *Synanon Church*, for a court to have jurisdiction to make a declaratory judgment over any period subsequent to the periods examined by the Service, an organization must request a determination from the Service and exhaust its administrative remedies with respect to such request for each period.

The Service's argument runs contrary to the very purpose of the law as explained by the Joint Committee explanation.

As discussed above, during the appeal of a proposed adverse determination and the pendency of litigation on a FADL, the Service is administratively unable to process, review, or issue a determination on any Form 1023 filed prior to the issuance of the FADL and the conclusion of any court proceeding brought under Section 7428. As such, the requirement for exhaustion noted by the court in *Foundation of Human Understanding.,* 104 AFTR2d 2009-5424 (Fed. Cl. Ct., 2009), that "if plaintiff believes that it should be declared exempt for any tax year subsequent to those which formed the subject of defendant's audit, 'it should petition for exempt status for those years,'"[33] is moot because the procedures established by Rev. Proc. 2013-9 preclude the consideration of any "petition for exempt status" during the pendency of the litigation or appeals process.

Additionally, because the internal procedures established by Rev. Proc. 2013-9 preclude the Service from making a determination with respect to a Form 1023 during the pendency of the IRS appeals and litigation, there will be no determination to appeal and no administrative remedy available to the organization. Moreover, upon issuance of a final adverse determination and the conclusion of any court proceeding brought under Section 7428, one or more years subsequent to the years examined by the Service will have closed by the time the Service is finally able to process a Form 1023. As such, the taxpayer will be unable to request a ruling for the revoked years never examined by the Service, and the Service will be unable to issue a determination with respect to such years. Thus, it is a procedural impossibility for an organization to secure a determination from the Service with respect to any tax year beginning after the years actually examined by the Service and ending prior to the conclusion of any court proceeding brought under Section 7428, including all appropriate appeals.

Under the circumstances discussed above, the substantial harm created by the procedural obstacles to obtaining a ruling on a Form 1023 cannot be remedied by the relief provided in Reg. 301.9100-3 because it would be inappropriate for the Service to grant a revoked organization relief under that regulation. Even if the organization acted reasonably and in good faith, because its failure to timely file a Form 1023 was a result of events beyond its control,[34] and based on oral and written statements made by the Service,[35] the available relief would be prohibited because it would prejudice the interest of the government.

As discussed above, the Service's authority to grant relief under Reg. 301.9100-3 is limited to extending the 27-month period within which an organization can file a Form 1023 to the date on which it actually filed its new Form 1023. Upon granting such an extension, a favorable

[31] Synanon Church, 557 F Supp 1329, 51 AFTR2d 83-979, 83-982 (DC D.C., 1983). See also Foundation of Human Understanding, 104 AFTR2d 2009-5424 (Fed. Cl. Ct., 2009) (following Synanon Church and stating "[b]ecause the IRS's revocation was not a final and prospective determination, the Synanon court concluded that the plaintiff had not fulfilled the § 7428(b)(2) requirement that a taxpayer exhaust all available administrative remedies before filing suit for declaratory judgment," and holding that "if plaintiff believes that it should be declared exempt for any years subsequent to those which formed the subject defendant's audit, 'it should petition for exempt status for those years.'"). *Id.* at 2009-5431.

[32] Synanon Church, *supra* note 31 at 51 AFTR2d at 83-982.

[33] Foundation of Human Understanding, *supra* note 32 at 104 AFTR2d 2009-5431.

[34] Reg. 301.9100-3(b)(ii).

[35] Reg. 301.9100-3(b)(iv).

[36] IRM 35.3.2.1(3). See also IRM 35.3.8.2(1) ("Although jurisdictional motions may be filed at any time, if possible, such motions should be filed within 45 days after service of the petition"); and IRM 35.3.2.2(1) (Providing that a motion to dismiss for lack of jurisdiction "should be filed with the court, if possible, before the answer due date").

determination on the organization's application would result in its treatment as an organization described in Section 501(c)(3) for all periods since the organization's creation. This relief would prejudice the government by effectively reversing the Service's prior revocation, which was the event that necessitated the taxpayer's request for relief under Reg. 301.9100-3. Therefore, with respect to Forms 1023 filed after the issuance of a FADL, it is inappropriate for the Service to grant relief under Reg. 301.9100-3 because the "granting of relief would result in a taxpayer having a lower tax liability in the aggregate for all tax years affected by the election than the taxpayer would have had if the election had been timely made."

Pursuant to the process that it has implemented to administer Section 508(a), the Service is procedurally unable to make a determination with respect to a Form 1023 submitted by an organization for any period subsequent to an examination until the issuance of the FADL and the conclusion of all judicial proceedings. Therefore, unlike the situations considered by the courts in *Synanon* and *Foundation for Human Understanding*, an adverse determination regarding periods examined by the Service is a final determination for all subsequent periods until the conclusion of litigation on the matter.

The burden placed on a taxpayer is not the burden of obtaining a determination that the Service is administratively incapable of providing. Rather, the taxpayer's burden is simply to exhaust all administrative remedies respecting the Service's final determination. However, because Rev. Proc. 2013-9 precludes a taxpayer from obtaining a determination regarding the exempt status for such periods, there are no administrative appeals available respecting the Service's determination. The fact that there are no administrative appeals available to the taxpayer, in this situation, is empirical evidence "that the organization involved has exhausted administrative remedies available to it within the Internal Revenue Service" as required by Section 7428(b)(2).

In *Synanon* and *Foundation of Human Understanding*, the courts held that, for a court to have subject matter jurisdiction over a tax period, an organization had to request a ruling and exhaust all administrative remedies available within the Service. As a taxpayer subjected to prolonged examination and appeals processes will have filed a protest to a proposed revocation, pursuant to the Tax Court decisions in *Gladstone* and *Anclote*, it will have made a "request for a determination" for purposes of Section 7428. As the Service's internal procedures provide organizations subject to a proposed revocation with no administrative remedies other than the appeals process for the years examined, and no administrative remedies at all with regard to years subsequent to those examined, such an organization will have necessarily exhausted all available remedies by virtue of the passage of more than 270 days from the filing of the protest. Such an organization will have made a request for a determination and exhausted all of the administrative remedies available with respect to the periods subsequent to the Service's examination in addition to the periods actually examined by the Service. Therefore, the organization will have satisfied all jurisdictional requirements to obtain a declaratory judgment with respect to both the periods under examination and the periods subsequent to those examined by the Service.

Results

As previously discussed, the cases filed by the author's firm were settled prior to a final decision by the court. As such, the theories and arguments presented in this article lack the desired precedential authority and remain subject to interpretation. However, the manner in which the cases were handled by the Office of Chief Counsel and the Tax Court adds to the credibility of the arguments presented and does not diminish the usefulness of this approach. Specifically, once a petition was filed:

1. Neither the Service nor the Tax Court challenged the court's jurisdiction over the underlying issues presented by the case
2. Within a year of filing a petition, the Service agreed to enter into a closing agreement that it had turned down multiple times in the four years prior to litigation.

Neither the IRS nor the Tax Court questioned the court's jurisdiction over this matter. Though not precedential in any way, the best indication of the strength of the jurisdictional arguments supporting petitions filed under the theories discussed in this article was the Service's reaction to the petitions. The Internal Revenue Manual (IRM) is very clear about timing for raising jurisdictional issues in Tax Court cases, stating that a "jurisdictional defect should be raised in a motion to dismiss for lack of jurisdiction as soon as the jurisdictional defect is discovered."[36]

Whether employer-provided lodging is located 'on the business premises' has generated substantial litigation.

There were two such jurisdictional defects that should have been raised by the Service in the petitions filed by the author's firm. First, neither petitioner received an adverse determination prior to filing a petition for declaratory judgment in Tax Court.[37] Second, both petitioners sought a determination for periods outside the scope of the proposed adverse determination.[38] However, without regard to the requirements of the Service's own IRM, the Service decided not to raise any jurisdictional issues at any point during the litigation of either case.

The real benefit to tax-exempt organizations was the Service's reaction to the petitions.

Not only did the Service fail to raise any questions respecting the court's jurisdiction over the relief requested in the petition, but the court also failed to question its own jurisdiction over such matters. Thus, there is anecdotal evidence supporting the proposition that the Tax Court had jurisdiction to grant the relief requested in the petitions.

A non-adverse settlement. The failure of the Service to question the court's jurisdiction over the petitions filed by the author's firm supports the jurisdictional arguments made in this argument. However, such support is more academic than practical and of little use to most tax-exempt organizations. The real benefit to tax-exempt organizations was the Service's reaction to the petitions. In both cases, rather than litigate issues when it was unsure of its probability of success and wary of the consequences of losing, the Service decided to enter into favorable closing agreements that continued to recognize each organization as exempt.

Every organization is different, and an organization that repeatedly and continually violates the requirements of Section 501(c)(3) will be less likely to obtain a favorable agreement with the Service. However, for organizations that have used the information contained in a proposed revocation letter as a guide for bringing themselves into compliance with the requirements of the Code, as interpreted by the Service, it appears that the litigating hazards may prompt the IRS to enter into a closing agreement.

The benefit of an expanded interpretation of Section 7428

The strategies discussed above can provide organizations with a means to exert greater control over IRS examinations, possibly reaching quick, non-adverse resolutions to exceptionally long examinations. The most significant benefits resulting from the use of these strategies include:

1. Control over the duration of an examination.
2. The admissibility of evidence from years subsequent to those examined by the IRS.
3. Eliminating the taxpayer's burden of proof during an examination.
4. Possibly enjoining the Service from issuing a final adverse determination during pendency of litigation.

Control over duration and review. As discussed above, the genesis of this strategy was the extreme length of the Service's administrative review process in its examinations and the adverse impact caused by the Service's delays. This strategy will give tax-exempt organizations a method of exacting some control over the duration of an examination, permitting taxpayers to decide for themselves when to end the examination process.

Another advantage is that this strategy will provide practitioners with control over who within the Service has the administrative jurisdiction to review the case. For instance, if a possible settlement of an issue is stymied by an uncooperative Appeals Officer, this strategy will allow the taxpayer to remove the case from the jurisdictional purview of the Appeals Division by filing a petition in Tax Court and conferring jurisdiction on the Office of Chief Counsel, thereby removing the primary obstacle to a settlement.

Better use of the RAR. If Section 7428 is understood to confer subject matter jurisdiction over periods subsequent to an examination, then organizations that receive a proposed adverse determination can use the information in the RAR as a guide for bringing themselves into compliance with the Service's desired practices. If, prior to the issuance of a FADL, an organization is able to address and resolve each of the grounds for revocation discussed in the RAR, judicial consideration of the revised activities will render the Service's position as discussed in the RAR moot. This will also provide taxpayers with greater control over

[37] See IRM 35.3.8.2(1)(b). ("If no determination has been made regarding the petitioner's qualification for tax-exempt status, the "a motion to dismiss for lack of jurisdiction is proper.")

[38] See IRM 35.3.2.6(1). ("If petitioner attempts to place in controversy a year or tax in which the statutory notice did not determine a deficiency, a jurisdictional motion with respect to the case should be filed.")

their future because it will allow them to see the manner in which the Service would prefer they operate, then make a decision as to whether it is in the organization's best interest to make the changes necessary to comport its activities with the Service's desired practices before undertaking the burden and expense of litigation.

Additionally, if the organization is willing and able to make the changes necessary to bring itself into compliance with the Service's position as provided by the RAR, it may be able to enter into a closing agreement resulting in prospective recognition of its tax-exempt status without ever receiving a FADL. If periods subsequent to an IRS examination are considered by a court, addressing the issues raised in the RAR will substantially increase the litigating hazards of a case, increasing the probability of settlement at the appeals level. This will result in two substantial benefits. First, it will prevent the issuance of the FADL resulting in continuous recognition of tax-exempt status. Second, unlike a subsequent Form 1023, which would be subject to public disclosure, a closing agreement would be a confidential document preventing the public disclosure of the Service's negative impression of the organization's prior activities.

Burden of proof in court. The Service's position in a notice of deficiency or determination letter generally is afforded the presumption of correctness, thereby imposing the burden of proof on the taxpayer. However, to the extent that there is no final determination, there is no position to presume to be correct. As briefly discussed in the Tax Court's concurring opinion in *Gladstone*, by seeking a judicial remedy before the issuance of a FADL, taxpayers can effectively relieve themselves of this burden in litigating the exemption matter.[39]

Enjoining a final adverse determination during the litigation. The final potential benefit of this strategy is the most significant and the most uncertain. If an organization removes the determination regarding its tax-exempt status from the Service's purview by filing a petition seeking a declaratory judgment before the issuance of a FADL, it can be argued that the court, not the Service, will have the sole jurisdictional authority to make a final determination regarding the organization's tax-exempt status. As such, it may be possible for the taxpayer to enjoin the Service from issuing a FADL during the pendency of litigation.[40]

Courts generally have deemed efforts to enjoin the Service from making a determination, such as revocation of tax-exempt status, to be an attempt to restrain the assessment or collection of income taxes. As such, Section 7421(a), the Anti-Injunction Act, generally prohibits efforts to enjoin the Service from issuing a FADL unless there are extraordinary circumstances or there is a specific statutory exception permitting the requested relief. Thus, there is an extremely high standard for obtaining a preliminary injunction against the Service's issuance of FADL.

For purposes of the Anti-Injunction Act, the Supreme Court has determined that extraordinary circumstances permitted injunctive relief where the taxpayer could demonstrate both that because of the Service's action "the taxpayer would suffer irreparable injury," and "that under no circumstances could the Government ultimately prevail."[41] A determination regarding the "extraordinary circumstance" exception requires a decision on the underlying merits of the case making it difficult to satisfy this standard in a preliminary hearing. Therefore, to obtain a preliminary injunction against the issuance of a FADL, an organization will likely be required to demonstrate that the requested relief meets a statutory exclusion from the Anti-Injunction Act.

An organization should consider including language in its protest that specifically requests a determination regarding ongoing recognition of its exempt status.

With respect to petitions for declaratory judgment, two possible statutory exceptions to the Anti-Injunction Act would permit a preliminary injunction. First, as Section 7428 is expressly exempted from the Declaratory Judgment Act's general prohibition on declaratory judgments in tax cases, Section 7428 provides a statutory exception from the Anti-Injunction Act under the coterminous interpretation of those statutes. Second, depending on the procedural status of the case, the court may enjoin the Service from issuing an FADL pursuant to

[39] Gladstone, *supra* note 1 at 237.

[40] In one of the cases litigated by the author's firm, the Tax Court held a hearing on a motion for preliminary injunction seeking to restrain the issuance of a FADL during the pendency of the litigation. The issue remains unsettled, however, because the Tax Court failed to rule on the motion in the more than seven months that elapsed before that case was settled and the parties filed a joint motion to dismiss the case.

[41] Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 7, 9 AFTR2d 1594 (1962).

the Administrative Procedure Act if the Service failed to follow its own procedures.[42]

Section 7428 exception to the Anti-Injunction Act. Petitions for declaratory judgment brought under Section 7428 are expressly excluded from the Declaratory Judgment Act's general prohibition on declaratory judgments in tax cases. The Declaratory Judgment Act states:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under *section 7428 of the Internal Revenue Code of 1986* ... any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.[43]

It may be beneficial for the organization to file a complete Form 1023 with the Service during the pendency of its administrative appeals process.

Applicable case law holds that the Declaratory Judgment Act is coextensive and coterminous with the Anti-Injunction Act, such that an action brought under one statute will not preclude the relief afforded by the other.[44] Therefore, where a taxpayer seeks a declaratory judgment under the Section 7428 exception to the Declaratory Judgment Act, the Anti-Injunction Act will not prevent the court from granting the injunctive relief sought by the organization. Any other outcome would produce the anomalous result of a court having jurisdiction to enter declaratory relief under Section 7428 but lacking the authority to enforce its order under the Anti-Injunction Act.

In *Cohen*, 650 F.3d 717, 727-31, 108 AFTR2d 2011-5046 (CA-D.C., 2011), the D.C. Circuit held that the Anti-Injunction Act and Declaratory Judgment Act are coterminous, such that a court could grant declaratory relief in an action allowed under the Anti-Injunction Act notwithstanding the Declaratory Judgment Act's general prohibition on declaratory judgments in tax cases.[45] To support its ruling, the D.C. Circuit found that "an injunction of a tax and a judicial declaration that a tax is illegal have the same prohibitory effect on the federal government's ability to assess and collect taxes."[46] Thus, where a party seeks an injunction and declaratory relief, the relief sought is "singular, as equitable relief, and not separate, as an injunction and declaratory judgment."[47] Otherwise, "[a] non-coterminous reading of the two statutes thus poses an insurmountable obstacle. The court would not have jurisdiction to provide declaratory relief but could effectively do so anyway."[48]

Although no court has directly addressed the converse situation—i.e., whether a suit allowed under the Declaratory Judgment Act also allows a court to enter injunctive relief seemingly barred by the Anti-Injunction Act—the rationale in *Cohen* and the result in *Perlowin* support a court's authority to enter injunctive relief in declaratory judgment cases. In such cases, if the court declares that an organization is an organization described in Section 501(c)(3), the court will need to order injunctive relief to restrain the Service from revoking the organization's tax-exempt status. Thus, the relief sought by organizations in declaratory judgment cases is "singular, as equitable relief, and not separate, as an injunction and declaratory judgment."[49]

The Administrative Procedure Act exception to the Anti-Injunction Act. The Administrative Procedure Act, 5 U.S.C. sections 701-708, allows persons "suffering legal wrong because of an agency action" to seek "judicial review."[50] In turn, section 5 of the Administrative Procedure Act states that "[o]n such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings."[51] Therefore, if the issuance of a FADL would cause the Service to violate its own published administrative procedures, a court may grant relief under the Administrative Procedures Act notwithstanding the general prohibitions of the Anti-Injunction Act.

Suggestions for implementing this strategy

While the strategies discussed in this memo can provide substantial benefits to a multitude of tax-exempt organizations subjected to extremely long

[42] 5 U.S.C. section 705.

[43] 28 U.S.C. section 2201(a).

[44] Cohen, 650 F.3d 717, 727-31, 108 AFTR2d 2011-5046 (D.C. Cir., 2011); Perlowin v. Sassi, 711 F.2d 910, 911, 52 AFTR2d 83-5654 (CA-9, 1983), ("[t]he Declaratory Judgment Act is coextensive with the Anti-Injunction Act despite the broader language of the former. If suit is allowed under the Anti-Injunction Act, it is not barred by the Declaratory Judgment Act").

[45] Cohen, *supra* note 44 at 650 F.3d 730 (internal quotations and citations omitted).

[46] *Id*.

[47] *Id*.

[48] *Id*.

[49] Cohen, *supra* note 44 at 650 F.3d 731 (internal quotations and citations omitted).

[50] 5 U.S.C. section 702.

[51] 5 U.S.C. section 705.

examinations, implementation of these strategies should begin well in advance of filing a petition for a declaratory judgment.

The ultimate success of this strategy requires a demonstration that the organization made a request for determination and that it exhausted all of its administrative remedies within the Service. Therefore, an organization should consider including language in its protest that specifically requests a determination regarding the ongoing recognition of its tax-exempt status. To this end, in addition to requesting a conference with the Appeals Division, a protest to a proposed revocation should state that the organization requests a determination regarding its continued recognition as an organization described in Section 501(c)(3).

Also, to demonstrate the exhaustion of administrative remedies, it is recommended that the organization maintain a record of its efforts to obtain a ruling, including copies of all information provided to the Service after the close of the examination, because such information may not be a part of the administrative record. Additionally, an organization should periodically supplement the administrative record by submitting explanations and documentation demonstrating that the organization's activities are compliant with the Section 501(c)(3) requirements.

With respect to the scope of the court's jurisdiction, it may be beneficial for the organization to file a complete Form 1023 with the Service during the pendency of its administrative appeals process. As previously discussed, Rev. Proc. 2013-9 generally does not permit the Service to make a determination regarding the exempt status of an organization that is subject to an examination or litigation. When litigating the case, however, the court will likely find a written statement from the Service informing the taxpayer that it would not process the Form 1023 to be the most compelling evidence that the Service would not process a Form 1023.

Alternatively, if the Service reviews the Form 1023 and the organization has undertaken the necessary effort to revise its practices in a manner that addresses the concerns raised in the RAR, there will be a substantial likelihood of receiving a successful determination on the application. This will create substantial litigating hazards in the Service's case, and may negate the need for the organization to challenge the Service's proposed revocation.

As a final matter, it is should be noted that the use of this strategy may affect an organization's choice of venue for bringing a declaratory judgment action. Section 7428 confers jurisdictional authority to issue declaratory judgments regarding qualification for Section 501(c)(3) status on the U.S. District Court for the District of Columbia, the U.S. Court of Federal Claims, and the Tax Court. As a practical matter, however, given the *Gladstone* and *Anclote* decisions, the Tax Court offers the most favorable precedent respecting the court's jurisdiction over declaratory judgment cases brought before the issuance of a FADL. Also, the Tax Court may be a better venue for an organization that intends to file a petition in the hope of obtaining a closing agreement. Tax Court cases are tried by the IRS Office of Chief Counsel, while cases in district court and the Court of Federal Claims are tried by the Tax Division of the Department of Justice. In the experience of the author's firm, attorneys from the IRS Office of Chief Counsel often have a better relationship with the Tax-Exempt and Government Entities Division, which may expedite potential settlement discussions.

Conclusion

Through the use of the strategies discussed above, organizations subject to proposed revocations that have taken the necessary steps to address issues raised in the Service's RAR may be able to compel the Service to agree to a quick and non-adverse resolution to the examination. This will add another arrow to the quiver of tax-exempt organizations subjected to unending IRS examinations. ■

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