



Source: Daily Tax Report: News Archive > 2011 > June > 06/02/2011 > Tax Decisions & Rulings > Limitations Periods: Practitioners Say Ruling in 'Salman Ranch' Shows Regulation has Changed Landscape

106 DTR K-3

Limitations Periods

Practitioners Say Ruling in 'Salman Ranch' Shows Regulation has Changed Landscape

Despite the circuit split on the issue, tax practitioners have told BNA the U.S. Court of Appeals for the Tenth Circuit's ruling in *Salman Ranch Ltd. v. Commissioner* demonstrates that the Treasury Department's issuance of regulations applying the six-year limitations period to Son-of-BOSS tax shelters has changed the legal landscape (*Salman Ranch Ltd. v. Commissioner*, 10th Cir., No. 09-9015, 5/31/11).

The Tenth Circuit ruled May 31 that the extended six-year statute of limitations for issuing final partnership administrative adjustments applied to tax shelter transactions involving an overstatement of basis (105 DTR K-2, 6/1/11). A July 2009 ruling by the U.S. Court of Appeals for the Federal Circuit addressed the same Son-of-BOSS (bond option sales strategy) transaction, but that court found the extended limitations period did not apply (145 DTR K-2, 7/31/09).

However, the Federal Circuit revisited the issue when it decided *Grapevine Imports Ltd. v. United States* in March and found treasury regulations stating that the extended limitations period applies to an understatement of basis were controlling in the case (49 DTR K-5, 3/14/11).

'Legal Landscape Has Changed.'

The regulations—issued in response to the Federal Circuit's initial *Salman Ranch* ruling—state that an understatement of gross income that results from an overstatement of basis constitutes an omission from gross income for the purposes of tax code Section 6501(e)(1) (A), which extends the limitations period for issuing an FPAA from three to six years for omissions of gross income (239 DTR G-3, 12/15/10).

"I would say that the reasoning of the Federal Circuit's *Salman Ranch* opinion is still good law, but the bottom line result is not (or is no longer relevant) because the legal landscape has changed with the issuance of the Treasury regulations," wrote Alan I. Horowitz, a member with Miller & Chevalier in Washington, D.C., in a June 1 e-mail to BNA. "This point was already made in the Federal Circuit's *Grapevine* decision."

Judicial Tide Turning for IRS Regulations

Circuit courts have split as to the application of the extended limitations period to transactions involving an overstatement of basis. In addition to the Federal and Tenth Circuits, The U.S. Court of Appeals for the Seventh Circuit has issued an opinion upholding the application of the extended limitations period while the U.S. Courts of Appeal for the Fourth and Fifth Circuits have found that it does not apply to overstatements of basis.

Anthony P. Daddino said in a June 1 e-mail to BNA that the Tenth Circuit ruling is an indication that the judicial tides have turned for the Internal Revenue Service. Daddino is a partner with Meadows, Collier, Reed, Cousins, Crouch & Ungerman LLP in Dallas.

"After suffering harsh defeats on the validity of the new regulations regarding the six-year

limitations period in the Fifth Circuit and Fourth Circuit, the IRS has rebounded and scored significant victories in the Federal Circuit and now the Tenth Circuit,” Daddino said.

Robert W. Wood, of Wood & Porter in San Francisco, agreed.

“Obviously, this case is a taxpayer disappointment,” Wood said in a June 1 e-mail to BNA. “In contrast, the government should feel good to garner three appellate victories out of five. The way the wind is blowing suggests many of us will caution clients that overstated basis truly triggers six long years. I suppose that is becoming the rule in tax shelter cases and in regular old tax cases.”

Nature of Litigation May be Significant

Wood said he found it hard to divorce the extended limitations period question from the substance of the underlying cases, which involve Son-of-BOSS tax shelters. He said he believed the courts were having a hard time with the issue, as well.

“But I think the courts are more likely to extend *Chevron* deference to the regulations in this specific context than they would in a case involving a plain vanilla taxpayer,” Wood said.

Daddino said the U.S. Supreme Court's recent ruling in *Mayo Foundation for Medical Education and Research v. United States*, 79 U.S.L.W. 4015 (2011), has provided IRS with much-needed ammunition against taxpayer criticisms about the “fighting” nature of new regulations (8 DTR GG-1, 1/12/11).

“Citing *Mayo*, the Tenth Circuit rejected the taxpayer's argument that the IRS' issuance of the new regulations in response to ongoing litigation affected the regulations' validity,” Daddino said.

Initial 'Salman Ranch' Ruling Still Important

Despite the change in the legal landscape, Horowitz said the Federal Circuit's ruling in *Salman Ranch*—and similar rulings in the U.S. Courts of Appeal for the Fourth and Fifth Circuits—is still important. He explained that the ruling addresses both the issue of when the extended six-year statute of limitations comes into play and, more importantly, the broader question of the government's ability to change the law by issuing new Treasury regulations that apply to prior tax years.

“There is a strong possibility, however, that the Supreme Court will address these questions next year, in which case the *Salman Ranch* decision, itself, will just become a historical footnote,” Horowitz said.

Daddino said the Tenth Circuit's *Salman Ranch* ruling confirmed what many tax practitioners have already concluded: The validity of the new regulations is headed for the Supreme Court.

By J.P. Finet

Contact us at <http://www.bna.com/contact/index.html> or call 1-800-372-1033

ISSN 1522-8800

Copyright © 2011, The Bureau of National Affairs, Inc.. Reproduction or redistribution, in whole or in part, and in any form, without express written permission, is prohibited except as permitted by the BNA Copyright Policy. <http://www.bna.com/corp/index.html#V>