

Don't Change the Rules: A Look At the Impact of Technical Advice Memoranda.

During the course of an audit, a taxpayer can request that the revenue agent handling the audit consult with the IRS national office for guidance on a particular issue. If the procedure is followed, the result will be the issuance of a technical advice memorandum or TAM. Treas. Reg. § 601.105(b)(5)(i)(a). The resulting TAM is then used to resolve the particular taxpayer's case. Treas. Reg. § 601.105(b)(5)(viii)(a).

What if the IRS changes its mind? Can it take a different approach in future years to an issue covered by a prior TAM? A recent district court case looked at this issue. *Netjets Large Aircraft, Inc. v. United States*, 2015 U.S. Dist. LEXIS 8746 (S.D. Ohio Jan. 26, 2015). Netjets offers fractional ownership of aircraft through a series of contracts creating a relationship that functions much like a charter aircraft service. The IRS had previously determined that its predecessor in interest was providing air passenger transportation services that were subject to the applicable excise tax on air passenger transportation under Section 4261 of the Code and had issued a TAM in that context. *Netjets*, 2015 U.S. Dist. LEXIS 8746, slip op. at *10-*14. That TAM provided for the tax to be imposed upon only one of the three fees that were charged under the fractional ownership arrangement. *Id.*, slip op. at *12-*14.

The recent case arose in the context of a refund claim; the IRS had sought to expand the scope of the fees that were subject to the tax, while Netjets sought to revisit the question whether it was subject to tax under Section 4261 at all. Since the IRS sought to expand the scope of the fees that were subject to the excise tax, the district court had to confront the impact of the prior TAM.

The district court concluded that the IRS was bound by the prior TAM because Netjets had relied upon it and the government had not gone through the steps necessary to revoke it. *Id.*, slip op. at *34-*36. The court relied upon two key regulatory provisions:

- *First*, it noted that the Treasury Regulation that provides for TAMs generally bars the retroactive application of a new TAM that revises the treatment of an issue under a prior TAM in a manner that is adverse to the taxpayer. *Id.*, slip op. at *34 (discussing Treas. Reg. § 601.105(b)(5)(viii)(b)).
- *Second*, the court pointed to the language of Revenue Procedure 2014-2, which generally bars the retroactive application of a new TAM where a taxpayer relied upon a prior holding that was more favorable. *Id.*, slip op. at *34-*35 (discussing Rev. Proc. 2014-2, § 13.03, 2014-1 I.R.B. 90 (2014)).

Against that background, the court had little difficulty determining that the IRS could not retroactively alter the manner in which the fractional ownership arrangement was taxed. *Id.*, slip op. at *36.

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