

## ACTION ON DECISION

**Subject:** Giant Eagle, Inc. v. Commissioner, 822 F.3d 666 (3rd Cir. 2016), rev'g T.C. Memo 2014-146

**Issue:** Whether all events fixing a liability for federal income tax purposes have occurred when discount fuel purchase coupons are issued to a customer for retail grocery purchases or when those coupons are later redeemed by the customer for a discount on the purchase of fuel.

**Discussion:** Taxpayer operated a promotional program that allowed participating customers who purchased groceries at Taxpayer's supermarkets to accumulate discounts toward subsequent purchases of fuel at its wholly-owned service stations. For every \$50 in groceries purchased from Taxpayer, customers qualified for a reduction in price of ten cents per gallon on a future purchase of fuel. The discount coupons expired three months after the last day of the month in which they were issued and could not be redeemed in cash.

Taxpayer deducted the estimated costs of redeeming the discount coupons that were unexpired and unredeemed at the end of each year at issue based on the statistical likelihood that customers would use their discount coupons by purchasing fuel before the coupons automatically expired. The Service denied the deduction because the liability for the outstanding discount coupons did not satisfy the all events test under I.R.C. § 461(h) and Treas. Reg. § 1.461-1(a)(2), as not all events had occurred to establish the fact of the liability. Taxpayer timely petitioned the Tax Court, challenging the deficiency determination.

The Tax Court held that the claimed deduction for the discount coupons did not satisfy the all events test because the purchase of fuel was a condition precedent to customers' redemption of the coupons. Taxpayer appealed to the Third Circuit.

The Third Circuit reversed the Tax Court, holding that Taxpayer's liability for unredeemed discount coupons was fixed when a customer purchased groceries. The court reasoned that, because Taxpayer's rewards program created a unilateral contract under Pennsylvania contract law with each customer upon the customer's purchase of groceries, Taxpayer was legally bound to honor unexpired discount coupons.

The Service's position is that Taxpayer's liability for its unredeemed discount coupons is not fixed before the customer purchases fuel. This case is controlled by the Supreme Court's opinion in United States v. General Dynamics Corp., 481 U.S. 239 (1987), holding that a taxpayer may not "deduct an estimate of an anticipated expense, no

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matter how statistically certain, if it is based on events that have not occurred by the close of the taxable year.” Id. at 243-44. Although a customer’s purchase of \$50 worth of groceries obligated Taxpayer to provide a ten-cent-per-gallon discount on a future purchase of gasoline, the discount itself was not absolute until the customer actually purchased gasoline.

Additionally, in holding Taxpayer had a fixed liability for federal income tax purposes upon issuance of the discount coupons, the Third Circuit misconstrued cases permitting the deduction of a liability that was unconditionally fixed at a point prior to payment. See United States v. Hughes Properties, Inc., 476 U.S. 539 (1986) (deduction permitted for annual increase in progressive jackpot payoff amounts because the anticipated liability was unconditionally fixed under Nevada law); Lukens Steel Co. v. Commissioner, 442 F.2d 1131 (3d Cir. 1971) (liability fixed under a collective bargaining agreement to a trust fund to pay supplemental unemployment benefits to taxpayer’s employees, the taxpayer’s contingent liability for which could not be canceled); Mass. Mutual Life Ins. Co. v. United States, 782 F.3d 1354 (Fed. Cir. 2015) (amount to be paid was absolutely guaranteed, and the only uncertainty at the end of the year was who would ultimately receive the absolutely guaranteed amount). In all these cases, the taxpayer was permitted to deduct a liability where the amount of the liability was unconditionally fixed. The only contingency in these cases was the identity of the individual or individuals who would receive payment from the taxpayer or the point in time when the payment would be made. In contrast, the Pennsylvania law relied upon by the Third Circuit did not fix the amount to be paid by Taxpayer; it only created the contractual obligation to pay in the event the discount coupons were redeemed with the purchase of fuel.

Accordingly, the Service will not follow Giant Eagle. Although we disagree with the decision of the court, we recognize the precedential effect of the decision to cases appealable to the Third Circuit, and therefore will follow it with respect to cases within that circuit, if the opinion cannot be meaningfully distinguished. We do not, however, acquiesce to the opinion and will continue to litigate our position in cases in other circuits.

**Recommendation:** Nonacquiescence

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