

Department
of the
Treasury

Internal
Revenue
Service

Office of
Chief Counsel

Notice

CC-2010-001

November 23, 2009

Coordination of Docketed Tax Court
Cases Involving a Substantial
Omission of Income Resulting from
Subject: an Overstatement of Basis

Effective until further
Cancel Date: notice

Purpose

This notice provides direction for handling docketed Tax Court cases in which a taxpayer or entity has claimed an overstated basis in a sold asset resulting in an omission from gross income exceeding 25 percent of the income stated on the return.

Background

Under section 6501(e)(1)(A), if a taxpayer omits from gross income an amount properly includible therein that is in excess of 25 percent of the amount of gross income stated in the return, then tax may be assessed, or a proceeding in court for the collection of the tax may be begun without assessment, at any time within 6 years after the return was filed. Section 6501(e)(1)(A)(i) provides that, in the case of a trade or business, the term gross income means the total of the amounts received or accrued from the sale of goods or services (if those amounts are required to be shown on the return) prior to diminution by the cost of those sales or services. Section 6229(c)(2) addresses substantial omissions of income on partnership returns using language identical to that of section 6501(e)(1)(A).

In Bakersfield Energy Partners, LP v. Commissioner, 128 T.C. 207 (2007), aff'd, 568 F.3d 767 (9th Cir. 2009), the Tax Court held that the six-year assessment period did not apply to a basis overstatement. The Federal Circuit reached the same conclusion in Salman Ranch Ltd. v. United States, 573 F.3d 1362 (Fed. Cir. 2009), rev'g 79 Fed. Cl. 189 (2007), reh'g denied, Fed. Cir. No. 2008-5053 (Nov. 19, 2009). Other courts, however, held in the government's favor on this issue. See Home Concrete & Supply, LLC v. United States, 599 F.Supp.2d 678 (E.D.N.C. 2008); Brandon Ridge Partners v. United States, 2007-2 U.S.T.C. (CCH) ¶50,573, 100 A.F.T.R.2d (TIA) 5347 (M.D. Fla. 2007); Burks v. United States, No. 06-1747, 2009 WL 2600358 (N.D. Tex. June 13, 2008) (order granting in part motion for summary judgment), appeal docketed, No. 09-11061 (5th Cir. Oct. 26, 2009).

On September 24, 2009, Treasury and the Service issued temporary regulations to resolve the ambiguity, acknowledged to exist by both the Ninth and Federal Circuit Courts of Appeals, as to

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