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From: [REDACTED]

Sent: Wednesday, April 08, 2015 1:53:29 PM

To: [REDACTED]

Cc: [REDACTED]

Bcc:

Subject: RE: Application of the civil fraud penalty on OID Scheme cases after Rand -- POSTS-109898-15

Hi

Nice speaking with you this morning. As I mentioned, the Rand opinion does not affect the validity of the advice we provided in the 2010 memo that you referenced concerning the application of the section 6663 civil fraud penalty to taxpayers who overstate withholding credits on a false Form 1099-OID (attached).

The case I mentioned, Feller v. Commissioner, is also attached here. The taxpayer in Feller, like the taxpayers you inquired about, overstated withholding credits. Treas. Reg. 1.6664-2(a) provides the following formula for calculating the amount of an underpayment: $W - (X + Y - Z)$, where W equals the amount of income tax imposed, X equals the amount shown as tax due on the return, Y equals amounts not so shown but previously assessed or collected without assessment, and Z equals the amount of any rebates made. Treas. Reg. 1.6664-2(c)(1) specifically provides that, in calculating the amount of an underpayment, the amount of tax shown as tax on a return (X) shall be decreased by the amount of any overstated withholding. As was the case in Feller, this decrease may result in a negative amount of tax shown. This decrease in the amount shown as tax on the return will give rise to or increase an underpayment of tax. See Treas. Reg. 1.6664-2(g), Example 3. An underpayment of tax is subject to the section 6662 or 6663 penalties, not the section 6676 penalty.

By contrast, the taxpayers in Rand didn't overstate their withholding; they claimed refundable credits, like the EITC and additional child credit, that were ultimately disallowed. The Court in Rand found that the regs provided no specific guidance on how refundable credits should be taken into account in calculating the amount shown as tax due on a return. In the Court's view, this absence of specific guidance mandated Rand's result. In fact, Rand discusses Feller at some length (see p. 383), distinguishing between overstated withholding credits, which the regs do address, and refundable credits, which the regulations do not specifically address.

Hopefully this answers your question, but if not, please give me a call and I would be happy to discuss this with you further.

Best,

Attachments:

PLR 201018002

Feller v. Commissioner 136 T.C. 497 (2010)

Rand v. Commissioner 141 T.C. 376 (2013)