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The Necessity of Tax Opinions, not Bulletproof Vest

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Abstract

Perhaps at some point you have secured a "tax opinion." The reasons for doing so vary, but usually involve a significant transaction. Often there is not enough time to get an advance ruling from the IRS as to the tax treatment of the transaction. Sometimes the law is unclear or the positions of the Treasury and the courts are in conflict, and you feel you should proceed with the transaction and argue your position upon examination. In order to keep taxpayers from taking frivolous positions, substantially underreporting income, and then running the audit lottery that their position might not be discovered, the Internal Revenue Code contains steep penalties to discourage such action. Section 6662 includes penalties of 20% for valuation overstatement, 20% for substantial understatement of income tax, 20% for negligence, and 40% for gross valuation/basis overstatement. No penalties are imposed if the taxpayer can show that there was substantial authority for the position and it acted in good faith. Generally, a "tax opinion" from a tax professional, be it an attorney or CPA, is secured to demonstrate that the taxpayer sought the advice, which confirmed the validity of its position, and it relied on the opinion. A recent case in the District Court of Connecticut reviewed criteria as to the scope and nature of what a tax opinion should contain, and also considered the level of sophistication of the taxpayer in determining its right to rely on the tax opinion. Although this case involved a tax shelter, the Court's analysis of the tax opinion at issue should sound an alarm to corporate counsel and other executives who secure tax opinions in significant transactions in an effort to avoid tax penalties, as well as the law firms that provide those opinions.

Keywords: Tax Opinion, Bulletproof Vest

1.0 INTRODUCTION

Our firm focuses on *researching* the latest tax issues *and developing* sophisticated legal solutions. Because these topics tend to be fairly new or complex, that means our proposed legal solution will likely not yet be tested in the courts. Nevertheless, it will have substantial legal authority to back it up. What do this mean for you as the taxpayer looking for a sophisticated solution that your current tax team cannot offer? It means you should secure a Tax Opinion. A Tax Opinion will shield you from exposure to penalties. For example, our firm takes the position that there is no CFC Downward Attribution as a result of the repeal of Section 958(b)(4). We have substantial legal authority for this tax solution, but we're certainly not going to provide that free of charge. What should you do as the diligent taxpayer? Contact our firm to secure a written legal opinion, also known as a Tax Opinion, so that you can take this position on your U.S. federal income tax return without the risk of penalties. Hop topics include Renewable Energy Credits, Monetization Installment Sale, Tax-Free Corporate Reorganization, Debt vs Equity Matters, True Leases, Downward Attribution, California State Tax, and New York State Tax.

In a recent 2018 federal court case, a company, Alternative Carbon Resources LLC, was assessed $39 million in penalties despite the fact that the company called the IRS for advice, contacted their local attorney for advice, and even paid for a consultation with a nationally recognized tax attorney. Why would the court uphold $39 million in penalties despite all of the actions taken by the taxpayer in that case? Because the taxpayer did not get a formal tax opinion. The United States Code of Federal Regulations, Title 31, Part 10, regulates the practice of federal tax law before the Internal Revenue Service. Section 10.37 establishes the "requirements for written advice." In other words, Section 10.37 explains to practitioners how to issue what we in the legal community informally refer to as "Tax Opinions," which is written legal advice on international and federal tax matters including ancillary state tax matters.

Section 10.37(a) sets the standards, which require an attorney to make reasonable efforts to identify and ascertain facts, reasonably consider all facts they should know, apply law and authorities to the facts, and not take into account the likelihood of examination by the IRS. However, Section 10.37(a) also permits the attorney to make reasonable factual and legal assumptions, reasonably rely on facts, representations, statements, findings, and agreements provided by the client as long as the attorney does

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not know or should not have reasonably known they were incorrect, incomplete, or inconsistent.[4] In other words, do your job as an attorney, but that doesn't mean you have to investigate every minor detail and fact. For example, if the client says he is not a U.S. citizen, there is no requirement for an attorney to insist on the production of a birth certificate as well as birth certificates of parents to confirm his citizenship status, especially since that would be a question of law under immigration and nationality laws.

An attorney can simply rely on a client's statement that he or she is not a U.S. citizen; perhaps just verbally ask whether they were born in the U.S. since many are unaware of birthright citizenship in the U.S. You get the point. Be reasonable and diligent; do you job. It is also important to know the "scope" of the opinion. The "scope" of an opinion letter refers to the level of authority the opinion issuer is providing. In other words, how confident is the practitioner? There are various levels of authority. A "Will Opinion" means the issuer has absolutely no doubt whatsoever that the legal position would be accepted by both the IRS and any federal judge that reviews the case.

A "Should Opinion" generally means that, if contested by the Service, the position advanced has a 70 percent to 85 percent chance of succeeding on the merits. A "More Likely Than Not Opinion" means that, if contested by the Service, the position advanced has a greater than 50 percent chance of succeeding on the merits. A "Substantial Authority Opinion" means that, if contested by the Service, the position advanced has a greater than 35 percent but less than 50 percent chance of succeeding on the merits; in other words, it is not likely to prevail in court. A "Reasonable Basis Opinion" means the issuer is limiting the opinion to the possibility that, if challenged by the Internal Revenue Service, the tax position advanced has a 20 percent to 35 percent chance of succeeding on the merits; in other words, you can take the legal position but it is substantially likely to *not* be upheld in court.

It is important to note that determining the "chance of success on the merits" is determined by the relative weight of authorities supporting or not supporting the legal position advanced, and this standard is measured objectively by reviewing and applying the pertinent or relevant authorities to the facts at hand. Section 6662 allows the IRS to impose an accuracy-related penalty if the IRS can show that the taxpayer was either negligent or the legal position resulted in a substantial understatement of income tax. Having a formal tax opinion with a mere confidence level of a "reasonable basis" or greater avoids these penalties.

2.0 COMPLICATED FACT PATTERN

Tax cases usually involve complicated fact patterns and detailed analyses of obscure tax regulations and previously decided cases. The recent decision in *Long Term Capital Holdings*[1] does not disappoint - it has all of that and more. The facts in this case involved complicated transactions, involving high-basis, low-value preferred stock which resulted from a series of prearranged transactions related to the acquisition of nine cross-border leasing transactions, five of which involved master or wraparound leases of computer equipment and four which involved the sale/leaseback of trucks. The preferred shares were worth approximately $1 million and had a claimed tax basis of more than $100 million. At issue was a reported long term capital loss claimed by a partnership of about $100 million on the sale of the preferred stock. Understanding the facts involved in this case is not nearly as important as understanding the impact of the Court's analysis of the taxpayer's circumstances and actions in dealing with the transaction. Although this was a tax shelter case, its impact may well apply to normal corporate transactions that have nothing to do with tax shelters.

2.1 How the Court Viewed the Transaction

Upon sifting through the facts, the Court concluded that LTC had no business purpose for engaging in the transaction other than tax avoidance, and the transaction itself did not have economic substance beyond the creation of tax benefits. The Court concluded that the transaction was a tax shelter for purposes of the understatement penalty. This meant that penalties applied unless the taxpayer had both "substantial authority" and a reasonable belief that "more likely than not" the basis of the preferred shares was as claimed. Tax regulations provide that substantial authority exists if the weight of the authorities supporting the treatment is substantial in relation to the weight of authorities supporting contrary treatment. They also provide that a taxpayer is considered reasonably to believe that the tax treatment of an item is more likely than not the proper treatment if the taxpayer reasonably relies in good faith on the opinion of a professional tax advisor, if that opinion is based on the tax advisor's analysis of the pertinent facts and authorities and unambiguously states that the tax advisor concludes that there is a greater than 50% likelihood that the tax treatment of the item will be upheld if challenged by the IRS.

2.2 Tax Opinions Secured

As is true in most tax shelter transactions, the partnership insisted upon a tax opinion to protect against civil penalties. Accordingly, the partnership obtained separate tax opinions from two prominent law firms. LTC engaged Sherman & Sterling, which had advised on the underlying lease transactions, for an opinion that the preferred stock in the hands of the contributing partner had a high basis. It also retained King & Spalding to provide an opinion that the high basis in the preferred stock carried over to the LTC partnership.

2.3 Penalties Asserted

Having found that LTC was not entitled to claim a loss on the sale of the preferred shares, the Court turned its attention to the matter of penalties. It focused on the 40% penalty for gross valuation/basis overstatement under IRC §6662(a), (b)(3), and (h). In the alternative, it considered the 20% penalty for valuation overstatement, and the 20% penalty for substantial understatement of income tax under IRC §6662(a) and (b).

2.4 Reliance On Opinions

LTC contested the penalties on the ground that it relied on the legal opinions of Sherman & Sterling and King & Spalding and that reliance satisfied the reasonable cause exception to those penalties set forth in IRC §6664(c)(1). Since the Court did not need to reach a conclusion on the issues addressed in the Shearman & Sterling opinion, it focused on the King & Spalding opinion and concluded that LTC was not justified in relying on this opinion to avoid penalties for a number of reasons, which it proceeded to analyze in detail.

3.0 COURT'S ANALYSIS OF THE OPINION

King & Spalding's written opinion was furnished to the LTC more than eight months after LTC filed the partnership return. The Court found that there was no reliable basis in the record from which to conclude what, if any, opinions from King & Spalding LTC actually received prior to filing its return. Even if an opinion was communicated verbally, there was inadequate evidentiary basis for accurately determining what the verbal opinion consisted of and what analysis supported it. The Court refused to "relate back" the written advice provided by King & Spalding in January, 1999 to the April 15, 1998 filing date of the return. While the Regulations provide that verbal advice may be relied upon to avoid the penalty, the Court's opinion demonstrates the danger in so doing - a failure of proof at trial. The lesson here is to make sure you have received and read the tax opinion before the return is filed.

The Court then dissected the analysis in King & Spalding's written opinion and found that even if it had been received prior to the filing of the tax return, it was inadequate in a number of respects. It observed that the opinion stated, in its opening paragraph, that it was part of a litigation strategy in anticipation of future litigation over the claimed losses, which caused the Court to suggest that its timing and stated purpose cast doubt upon it serving as a reasoned opinion on the application of the tax law to the facts for client guidance in tax reporting. The Court criticized King & Spalding's opinion because it made no effort to demonstrate factually or analytically why it was reasonable to rely on assumptions and representations made by LTC that it had entered into the transaction for business purposes other than tax avoidance; that it reasonably expected to derive a material pre-tax profit from the transaction; and that there was no pre-existing agreement on the part of the contributing partner to sell its partnership interest to LTC.

The Court noted that the opinion failed to demonstrate that the advice was based on the law related to the actual transaction at hand and not based on unreasonable assumptions. The Court also observed that the opinion failed to address any Second Circuit authority, even though that is the circuit in which LTC resided at the time the return was filed. It noted that there was little, if any, legal analysis of the economic substance of the transaction, and what little there was stemmed from a directive from the taxpayer to assume that the transaction had business purpose and that there was a reasonable expectation of profit. In criticizing the opinion for its analysis of cases on the issue of the application of the step transaction doctrine, it suggested that this was an example of selective discussion of authority which gave it the appearance of an advocacy piece, not a balanced reasoned opinion with the objective of guiding a client's decisions.

3.1 What This Means For The Future

From a reading of this case, one easily concludes that this was a sophisticated taxpayer in a very sophisticated financial business. And its executives were fully capable of understanding complicated financial transactions, including the area of taxation. The Court's discussion of LTC's right to rely on the opinion suggests that the Court imposed a very high standard upon this particular taxpayer to understand the transaction and its business and tax impact. It seemed to place upon those executives the burden to read and understand all the cases cited by its tax advisor in the tax opinion, to make sure that the tax advisor had cited all the relevant cases and other authorities and analyzed them correctly, and to find all the cases or other authorities that might be pertinent to the issues covered by the opinion that the tax adviser did not cite and determine whether they should have been cited. This appears to place a totally unreasonably burden on taxpayers, even sophisticated taxpayers in tax shelter cases, in order to establish good faith reliance on the tax adviser's legal opinion.

This case is a lesson, as well as an omen, for taxpayers hoping to rely on a legal opinion to avoid an accuracy related penalty. Although the same criteria might not be placed on taxpayers with less sophisticated management, how can one determine where to draw the line? This Court has set a high bar, and legal advisors should take notice that their written opinions should contain a complete analysis of the facts, as well as the law.

The IRS appears to believe it has found gold in this opinion. Citing this case, Chief Counsel recently issued a directive to all IRS Appeals Officers and Chief Counsel staff attorneys[2] that henceforth tax cases cannot be settled by trading a taxpayer's concession to a tax adjustment for the IRS concession of the asserted penalties on the general grounds of "hazards of litigation." Instead, the Appeals Officer or attorney must submit separate hazards of litigation analyses supporting the proposed settlement of the tax issues and of the penalty issues.

4.0 ACCURACY-RELATED PENALTY FOR NEGLIGENCE

Section 6662(c) defines negligence to include "any failure to make a reasonable attempt to comply" with tax laws. In other words, the only requirement to avoid a finding of negligence is having reasonable basis for taking the legal position. As explained above, reasonable basis is a very easy standard to meet; at least for experienced attorneys with sophisticated legal research tools. Some have quantified the standard to require 20% of legal authorities to support a proffered legal position. Others have theorized that even a legal position with zero legal support but an 11% legal chance of success on the merits has reasonable basis if it is a good faith attempt to change existing law since, if at least one Supreme Court Justice was convinced, that would unquestionably qualify as being reasonable, and, being that there are 9 United States Supreme Court Justices, one-ninth is quantified as 11%.

The reasonable basis standard is not satisfied by a return position that is merely arguable or a colorable claim, and it is a significantly higher standard than "not frivolous" or "not patently improper." Reasonable basis requires reliance on legal authorities and not on opinions rendered by tax professionals; however, a court may certainly examine the authorities relied upon in a tax opinion to determine if a reasonable basis exists. In other words, it's the quality and thoroughness of a Tax Opinion that makes it valuable; the audience for the Tax Opinion is the federal judge that would be reviewing the case.[10]

4.1 Accuracy-Related Penalty for Substantial Understatement of Tax

Any legal position resulting in a substantial understatement of tax is exempt from the Section 6662 Accuracy-Related Penalty if it was adequately disclosed in the tax return and there is reasonable basis for the legal position. Since we have already exhaustively analyzed reasonable basis above, the key here is "adequate disclosure." IRS Form 8275 was specifically created to accomplish adequate disclosure when the legal position a taxpayer is taking is not adequately disclosed elsewhere in the return.

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4.2 Good-Faith Reasonable Cause Exception

Furthermore, 6664(c[1]1) explains that "no penalty shall be imposed under section 6662 or 6663 with respect to any portion of an underpayment if it is shown that there was a *reasonable cause* for such portion and that the taxpayer acted in *good faith* with respect to such portion." Case law generally sets forth the following three requirements in order for a taxpayer to use "reliance on a tax professional" to avoid liability for a Code section 6662(a) penalty: (1) the adviser was a competent professional who had sufficient expertise to justify reliance; (2) the taxpayer provided necessary and accurate information to the tax adviser; and (3) the taxpayer actually relied in good faith on the adviser's advice. Courts have grappled with this issue for decades. Merely turning matters over to a tax professional without more discussion, however, will not suffice.

However, assuming substantive discussion and expert determination, oral advice that no tax liability was incurred or that there was no liability for a return is reasonable cause. There is also no need to get a second opinion. Even an informal opinion from a reputable attorney has been held to be sufficient to avoid the Section 6662 penalty. However, you need to confirm that the tax advisor is disinterested in the matter and not peddling a tax shelter. Whether reasonable cause exists is a "question of fact decided on a case-by-case basis." The most important factor is the extent of the taxpayer's effort to assess the taxpayer's proper tax liability, judged in light of the taxpayer's experience, knowledge, and education. The taxpayer bears the burden of demonstrating reasonable cause and that the IRS assessment was incorrect.

5.0 CONCLUSION

This brings us to the point of this article. In a recent case from the United States Court of Federal Claims, Alternative Carbon Resources LLC was assessed $39 million in penalties despite the fact that the company called the IRS for advice, contacted their local attorney for advice, and even paid for a consultation with a nationally recognized tax attorney. The federal court concluded that, because the taxpayer did not secure a Tax Opinion for a transaction involving a large sum of money, the taxpayer acted neither reasonably nor in good faith.

This is a warning to all taxpayers. You cannot use free consultations to get informal advice with the hope of relying on that to avoid tax penalties. Securing a formal written Tax Opinion is the only guarantee against tax penalties because that's the exhaustive process by which we thoroughly analyze all relevant facts and law.

References

[1] *See Alternative Carbon Res., LLC v. U.S.*, 137 Fed. Cl. 1 (2018).

[2] 31 C.F.R. § 10.37.

[3] 31 C.F.R. § 10.37(a)(2)(i)-(vi).

[4] 31 C.F.R. § 10.37(a)(3).

[5] Reasonable basis is defined in (b)(3) of the regulations as follows: Reasonable basis is a relatively high standard of tax reporting, that is, significantly higher than not frivolous or not patently improper. The reasonable basis standard is not satisfied by a return position that is merely arguable or that is merely a colorable claim. If a return position is reasonably based on one or more of the authorities set forth in § 1.6662–4(d)(3)(iii) (taking into account the relevance and persuasiveness of the authorities, and subsequent developments), the return position will generally satisfy the reasonable basis standard even though it may not satisfy the substantial authority standard as defined in § 1.6662–4(d)(2). (See § 1.6662–4(d)(3)(ii) for rules with respect to relevance, persuasiveness, subsequent developments, and use of a well-reasoned construction of an applicable statutory provision for purposes of the substantial

[1] 1Long Term Capital Holdings, et al., v. United States. 94 AFTR2d 2004-5666; 2004-2 USTC ¶50,351; August 27, 2004.
2Chief Counsel Notice 2004-36 (September 22, 2004).

understatement penalty.) In addition, the reasonable cause and good faith exception in § 1.6664–4 may provide relief from the penalty for negligence or disregard of rules or regulations, even if a return position does not satisfy the reasonable basis standard. Treas. Reg. § 1.6662–3.

[6] *See* Treas. Reg. § 1.6662-4(d)(3)(iii).

[7] *See* IRC § 6662(c).

[8] *See* Pederson v. C.I.R., 105 T.C.M. 1365 (2013). Treas. Reg. § 1.6662-3(b)(3).

[9] *See Klamath Strategic Inv. Fund, LLC v. U.S.*, 472 F. Supp. 2d 885, 901 (E.D. Tex. 2007), *aff'd sub nom.*, 568 F.3d 537 (5th Cir. 2009) (quoting Treas. Reg. § 1.6662-4(d)(3)(iii)).

[10] Thus, even "Reasonable Basis Opinions" are valid and can allow a taxpayer to run the 3-year statute of limitations to lawfully avoid taxation as long as there is adequate disclosure in the return, which will be explained below.

[11] *See* IRC § 6662(d)(2)(B)(ii)(I)-(II).

[12] *See 106 Ltd. v. C.I.R.*, 684 F.3d 84 (D.C. Cir. 2012) (it is unreasonable to rely on the advice of a tax attorney who was a tax shelter promoter and not independent counsel); *Stobie Creek Investments, LLC v. U.S.*, 82 Fed. Cl. 636, *aff'd*, 608 F.3d 1366 (Fed. Cir. 2010); *Neonatology Associates, P.A. v. C.I.R.*, 115 T.C. 43 (2000) *aff'd*, 299 F.3d 221 (3d Cir. 2002) (taxpayers did not establish that they received advice from competent professional who had sufficient expertise to justify reliance); *Brown v. C.I.R.*, 693 F.3d 765 (7th Cir. 2012) (taxpayers did not make reasonable efforts to determine their tax liability and made no effort to research legal basis for their position or to obtain opinion from accountant or tax attorney until IRS challenged their position); *Kim v. C.I.R.*, 679 F.3d 623 (7th Cir. 2012) (taxpayer could not take advantage of "reasonable basis" exception to substantial-understatement penalty, where taxpayer did not show what information he had furnished to his accountant or whether accountant had competently analyzed taxpayer's situation).

[13] *See Southgate Master Fund, L.L.C. ex rel. Montgomery Capital Advisors, LLC v. U.S.*, 659 F.3d 466 (5th Cir. 2011) (partnership acted with reasonable cause in relying on tax opinions issued by a law firm and an accounting firm; partnership disclosed all pertinent facts to firms and it carried out transactions consistently with their opinions); *Romanowski v. C.I.R.*, T.C. Memo. 2013-55 (2013) (married taxpayers reasonably and in good faith relied on professional advice from tax attorney and return preparer when deducting expenses; preparer advised them expenses were deductible, and preparer was independent and experienced CPA to whom taxpayers provided all requested information); *Rawls Trading, L.P. v. C.I.R.*, T.C. Memo. 2012-340 (2012) (corporate taxpayers relied in good faith on advice of accountant in relation to income tax liability for transactions); *Blackwood v. C.I.R.*, T.C. Memo. 2012-190 (2012) (married taxpayers acted with reasonable cause and in good faith when they excluded from their gross income $100,000 settlement payment that wife received where taxpayers relied on advice of counsel that settlement was excludable from gross income); *Ajah v. C.I.R.*, T.C. Summ. Op. 2010-90 (2010) (non-precedential) (passive rental real estate Code provisions represented complex area and, although one taxpayer was attorney running her own firm, she was not tax attorney and thereby sought guidance and advice and relied upon their accountant's analysis of the relevant documents and information); *Longoria v. C.I.R.*, T.C. Memo. 2009-162 (2009) (taxpayer acted reasonably and in good faith, relied on advice of CPA in reporting settlement payment as nontaxable income); *Perkins v. C.I.R.*, T.C. Memo. 2008-41 (2008) (court concluded that petitioner demonstrated that she actually relied in good faith on advice of her attorneys and therefore demonstrated reasonable cause and good faith for the underpayment); *Mezrah v. C.I.R.*, T.C. Memo. 2008-123 (2008) (reasonable, good faith reliance on accountant who misclassified passive activity losses as ordinary losses where taxpayers lacked tax background); *Klamath Strategic Inv. Fund, LLC v. U.S.*, 472 F.

Supp. 2d 885 (E.D. Tex. 2007) *aff'd*, 568 F.3d 537 (5th Cir. 2009) (not liable for penalty where there was substantial authority for partnerships to rely on opinions rendered by tax professionals; reasonable cause exception was established by partners' good faith reliance on the advice of qualified tax attorneys and accountants); *Litman v. U.S.*, 78 Fed. Cl. 90 (Ct. Fed. Cl. 2007) (reasonable cause and good faith reliance on tax advice prevented imposition of negligence penalty on taxpayer); *Thrane v. C.I.R.*, T.C. Memo. 2006-269 (2006) (taxpayer reasonably relied in good faith on tax return preparer's professional expertise); *Smith v. C.I.R.*, T.C. Memo. 2007-154 (2007) (relied in good faith upon the tax advice given by accountant when self-preparing tax return).

[14] *See Broker v. U.S.*, CIV. A. 00-1930 (E.D. Pa. 2000) (taxpayer showed reasonable cause where he relied on his CPA's advice that the taxpayer would owe no federal taxes for the year in question, and that he did not need to make any estimated tax payments); *also see Estate of Liftin v. U.S.*, 111 Fed. Cl. 13 (2013) (counsel advised estate's executor that estate tax return could be filed late without incurring penalty; therefore advice was reasonable cause; however, counsel's advice that estate could delay filing until it could submit accurate return was not reasonable cause for estate's delay in filing, and estate's nine-month delay in filing return without reasonable cause subjected the estate to maximum late-filing penalty). But see Estate of Young v. U.S., 110 A.F.T.R.2d 2012-7065 (D. Mass. 2012) (CPA's advice that it would be "better" to file late could not excuse its failure to meet a known filing deadline); *Russell v. C.I.R.*, T.C. Memo. 2011-81 (2011) (Court found that taxpayer's testimony that her advisor advised her to file late tax return after waiting for losses from her husband's business to be calculated, so as to avoid filing "fraudulent" or "perjurious" return, was not credible, and thus held that taxpayer did not establish reasonable cause based on reliance on such advice).

[15] *See Hollingsworth v. C.I.R.*, 86 T.C. 91 (1986); *Furman v. C.I.R.*, T.C. Memo. 1998-157 (1998) (taxpayers had reasonable cause for failing to file where they relied on advice of attorney that returns were not necessary).

[16] *See Estate of Paxton v. C.I.R.*, 86 T.C. 785 (1986); *U.S. v. Red Stripe, Inc.*, 792 F. Supp. 1338 (E.D.N.Y. 1992); *Neptune Mut. Ass'n, Ltd., of Bermuda v. U.S.*, 13 Cl. Ct. 309 (1987) *aff'd in part, vacated in part*, 862 F.2d 1546 (Fed. Cir. 1988); *Burruss Land & Lumber Co., Inc. v. U.S.*, 349 F.Supp. 188 (W.D. Va. 1972); *McMahan v. C.I.R.*, 114 F.3d 366 (2d Cir. 1997).

[17] *See U.S. v. Boyle*, 469 U.S. 241 (1985); *Thomas v. C.I.R.*, T.C. Memo. 2001-225 (2001).

[18] *See C.I.R. v. American Ass'n of Engineers Employment*, 204 F.2d 19 (7th Cir. 1953).

[19] *See Van Dyke v. C.I.R.*, T.C. Memo. 1983-190 (1983); *also see New Phoenix Sunrise Corp. v. C.I.R.*, 132 T.C. 161 (2009) *aff'd*, 408 Fed. Appx. 908 (6th Cir. 2010) (obtaining a written tax opinion from a well-respected law firm that developed and was marketing a transactions did not amount to reasonable cause and good faith; attorneys were promoters rather than independent counsel).

[20] *Stobie Creek*, 608 F.3d at 1381.

[21] Treas. Reg. § 1.6664–4(b)(1).

[22] *U.S. v. Boyle*, 469 U.S. 241, 245 (1985); *Conway v. U.S.*, 326 F.3d 1268, 1278 (Fed. Cir. 2003).

[23] *See Alternative Carbon Res., LLC v. U.S.*, 137 Fed. Cl. 1 (2018).