Office of Chief Counsel
Internal Revenue Service
memorandum

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subject: Section 1359 Application

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

ISSUES

I.R.C. § 1359(b)(2) states that a qualifying vessel-operator's application for non-recognition of gain must be made at such time and manner "as the Secretary may by regulations prescribe." The Secretary has not prescribed regulations. Must the Service nonetheless consider a qualifying vessel operator's application?

CONCLUSIONS

The Service must consider a qualifying vessel operator's application because the regulations contemplated under section 1359(b)(2) specify how, not whether, the statute shall apply.

BACKGROUND

Section 1359 was enacted by section 295 of the American Jobs Creation Act of 2004, Pub. L. No. 108-357, 118 Stat. 1418 (2004). The legislative history accompanying the American Jobs Creation Act states as follows with regard to section 1359:

> Generally, if an *[sic]* qualifying vessel operator sells or disposes of a qualifying vessel in an otherwise taxable transaction, at the election of the

> operator no gain is recognized if a replacement qualifying vessel is acquired during a limited replacement period except to the extent that the amount realized upon such sale or disposition exceeds the cost of the replacement qualifying vessels *[sic]*. Generally, in the case of the replacement of a qualifying vessel that results in the nonrecognition of any part of the gain under the rule above, the basis of the replacement vessel is the cost of such replacement property decreased in the amount of gain not recognized.

H.R. Conf. Rep. No. 108-755, at __ (2004), reprinted in 2004 U.S.C.C.A.N. 1341, 1427.

The legislative history further states that the purpose of section 295 of the American Jobs Creation Act of 2004 is to provide American shippers the opportunity to be competitive with their otherwise tax-advantaged foreign competitors. H.R. Rep. No. 108-548(I), at 177 (2004).

Section 1359(a)[1] provides that a qualifying vessel operator may elect not to recognize certain gain on an otherwise taxable disposition of a qualifying vessel if the qualifying vessel operator acquires a replacement qualifying vessel "during the period specified in subsection (b)." That time period begins one year before the qualifying vessel is disposed of and ends "(1) 3 years after the close of the first taxable year in which the gain is realized, or (2) subject to such terms and conditions as may be specified by the Secretary, on such later date as the Secretary may designate on application by the taxpayer." I.R.C. § 1359(b).

Subsection (b) also states that the "application shall be made at such time and in such manner as the Secretary may by regulations prescribe." Id. To date, the Secretary has issued no regulations, nor any other form of guidance, prescribing the time and manner in which a taxpayer shall make the election, and has specified no terms and conditions for an application made under section 1359(b)(2). You have asked whether, when a taxpayer acquires a replacement qualifying vessel after the period specified in section 1359(b)(1) has expired,[2] the Service must consider the taxpayer's application made under section 1359(b)(2).

LAW AND ANALYSIS

[1] The text of section 1359(a) is as follows:

> In general.—If any qualifying vessel operator sells or disposes of any qualifying vessel in an otherwise taxable transaction, at the election of such operator, no gain shall be recognized if any replacement qualifying vessel is acquired during the period specified in subsection (b), except to the extent that the amount realized upon such sale or disposition exceeds the cost of the replacement qualifying vessel.

[2] In practice, when taxpayers acquire replacement qualifying vessels within the period specified in section 1359(b)(1), they simply file tax returns on which they do not recognize the gain on the vessels disposed of.

"A tax statute is self-executing if the regulations referred to in the statute deal only with how, not whether, the tax is to be applied." Sundance Helicopters, Inc. v. United States, 104 Fed. Cl. 1, 11 (2012) (citing Occidental Petroleum Corp. v. Commissioner, 82 T.C. 819, 829 (1984)); see also Int'l Multifoods Corp. v. Commissioner, 108 T.C. 579, 587 (1997); Estate of Neumann v. Commissioner, 106 T.C. 216, 219 (1996). "The absence of regulations is not an acceptable basis for refusing to apply the substantive provisions of a section of the Internal Revenue Code." Int'l Multifoods Corp, 108 T.C. at 587 (citing Estate of Neumann, 106 T.C. at 221; H Enters. Int'l, Inc. v. Commissioner, 105 T.C. 71, 82 (1995); First Chicago Corp. v. Commissioner, 88 T.C. 663, 669 (1987), aff'd, 842 F.2d 180 (7th Cir.1988); Occidental Petroleum Corp., 82 T.C. at 829).

To determine whether a statute is self-executing, "the Tax Court has looked for explicit language supporting such a conclusion, has considered legislative history, and has considered whether the statute can be applied without further explication in a regulation." Temsco Helicopters, Inc. v. United States, 409 F. App'x 64, 67 (9th Cir. 2010) (citing Francisco v. Commissioner, 119 T.C. 317, 322–23 (2002), aff'd on other grounds, 370 F.3d 1228, 1230 n.1 (D.C. Cir. 2004)). Although not always explicitly analyzing these factors, courts have found statutes to be self-executing where the statutes provided as follows:

- "'The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of this chapter, including . . . regulations . . . providing for the application of this chapter in the case of transferors who are [non-resident aliens].'" See Estate of Neumann, 106 T.C. at 217–18, 221 (quoting section 2663; applying the statute in the case of a non-resident alien and holding that the regulations contemplated reflected "a 'how' characterization").

- "'The Secretary shall prescribe such regulations as may be necessary or appropriate to prevent the avoidance of those provisions of this title [dealing with certain tax elements] . . . through the use of related persons . . . .'" See H Enters., 105 T.C. at 79, 81–82 (quoting section 7701(f); applying the provisions to related corporations because nothing in the language of the statute or the legislative history foreclosed application to related persons in absence of regulations).

- "[I]f the Transportation Tax is not collected from the purchaser, 'under regulations prescribed by the Secretary,' the carrier shall pay the tax to the government." See Temsco Helicopters, 409 F. App'x at 67 (quoting section 4263(c); determining that the language of the statute set a straightforward requirement that was not contradicted by the legislative history, and that there was already a procedure for computing the tax and paying it to the government).

- "'The Secretary shall prescribe regulations under which items of tax preference shall be properly adjusted where the tax treatment giving rise to such items will not result in the reduction of the taxpayer's tax under this subtitle for any taxable years.'" See Occidental Petroleum Corp., 82 T.C. at 819, 829 (quoting section 58(h); holding that "the failure to promulgate the required regulations can hardly render the new provisions of section 58(h) inoperative").

A tax statute is not self-executing if the language of the statute provides that it "shall apply only to the extent provided in regulations prescribed by the Secretary." See Alexander v. Commissioner, 95 T.C. 467, 473 (1990) (discussing the application of section 465(b)(3) to activities described in 465(c)(3)(A)). In Alexander, the court noted that the legislative history, which stated that section 465(b)(3) "shall apply only to the extent provided in regulations prescribed by the Treasury," supported its interpretation. See id. at 473 n.7.

Here, unlike the statute in Alexander, section 1359(a) does not specify that it will apply "only to the extent provided in regulations." Cf. id. at 473. The contemplated regulations are therefore more accurately characterized as indicating "how," rather than "whether," the section applies. See Estate of Neumann, 106 T.C. at 221. Moreover, the legislative history does not indicate that regulations are intended to be a prerequisite to application of section 1359(a). See H.R. Conf. Rep. No. 108-755, at __, reprinted in 2004 U.S.C.C.A.N. 1341, 1427; see also H Enters., 105 T.C. at 82–84 (supporting application of a statute where legislative history indicated Congress did not intend otherwise). Additionally, the language of section 1359(a) sets a straightforward requirement: a taxpayer may elect not to recognize gain on a qualifying vessel replaced during the period specified in section 1359(b). See Temsco Helicopters, 409 F. App'x at 67 (applying statute absent regulations where statute set straightforward requirement).

Section 1359(b)(1) also sets a straightforward requirement: the period during which the replacement qualifying vessel must be acquired shall end "3 years after the close of the first taxable year in which the gain is realized." Or, under section 1359(b)(2), subject to terms and conditions as the Secretary may specify, "on such later date as the Secretary may designate on application by the taxpayer."

The legislative history does not differentiate between paragraphs (b)(1) and (b)(2): it states only that "no gain is recognized if a replacement qualifying vessel is acquired during a limited replacement period." The language of paragraph (b)(1) creates a minimum period, and the language of paragraph (b)(2) creates an extended period, "as the Secretary may designate." Neither the legislative history nor the language of section 1359 provides that paragraph (b)(2) will apply "only to the extent provided in regulations." Cf. Alexander, 95 T.C. at 473.

By not allowing a taxpayer to apply for an extended time under section 1359(b)(2) because the Service has not prescribed the time and manner for the application, the Service would thwart the clear congressional intent—to allow taxpayers to make an election. See Occidental Petroleum Corp., 82 T.C. at 829 ("[T]he failure to promulgate the required regulations can hardly render the new provisions . . . inoperative."). Thus, the Service should consider a qualifying vessel-operator's application under section 1359(b)(2) even though the Service has not prescribed the time and manner for the application.

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