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U.S. Tax Court: Treaty provisions do not allow foreign tax credit offset against net investment income tax

The U.S. Tax Court today issued an opinion holding that a taxpayer was not entitled to apply a foreign tax credit against her net investment income tax liability and rejected her claim that certain treaty provisions allowed the offset.

The case is: *Toulouse v. Commissioner*, 157 T.C. No. 4 (August 16, 2021). Read the Tax Court's [opinion](#) [PDF 91 KB]

Summary

The taxpayer (a U.S. citizen residing in a foreign country) filed a federal income tax return for 2013 claiming a carryover of her foreign tax credit for the taxes that she paid to France and Italy in prior years to offset the net investment income tax imposed under section 1411 for 2013.

The IRS assessed the net investment income tax (determined without the credit claimed by the taxpayer) as a math error and also assessed an addition to tax for a failure to pay a tax shown on a return.

The taxpayer did not pay the assessed amount, and the IRS issued notices of an intent to levy and a federal tax lien. The taxpayer filed a request for a collection review hearing and after the hearing, the IRS issued a notice of determination sustaining only the levy notice.

The taxpayer conceded that the statute does not allow a foreign tax credit against the net investment income tax under section 1411, but contended that treaty provisions (Article 24(2)(a) of the United States-France income tax treaty and Article 23(2)(a) of the United States-Italy income tax treaty) established independent bases for the credit as claimed.

Before the Tax Court, the parties filed cross-motions for summary judgment.

The Tax Court today issued an opinion denying the taxpayer's motion for summary judgment and held that the taxpayer was not entitled to use a foreign tax credit to offset the net investment income tax under section 1411 tax pursuant to the articles of the income tax treaties with France and Italy. The

Tax Court noted that, under section 901, a foreign tax credit can only be claimed against taxes imposed under Chapter 1 of the Internal Revenue Code; that there is no Code provision for applying a foreign tax credit against the net investment income tax (which is imposed under Chapter 2A); and that the treaties in question do not provide an independent basis for such a credit.

The court, however, found there were unresolved disputes of material fact with respect to the taxpayer's liability for the penalty assessed under section 6651(a)(2).

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