Nebraska District Court Holds That GIL 24-19-1 is Not Afforded Deference

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- Financial Institutions & Banking
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- Tax
- Litigation / Trial Practice
- 8th Circuit (incl. bankruptcy)

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Last week, the Lancaster County District Court granted the state’s motion to dismiss in COST v. Nebraska Department of Revenue. COST brought this declaratory judgment action to invalidate GIL 24-19-1, in which the department determined that earnings deemed repatriated under IRC § 965 are not eligible for the state’s dividends-received deduction and are thus subject to Nebraska corporate income tax. COST has until July 19, 2021, to appeal the judge’s decision.

The state’s motion was brought on procedural grounds, one of which was that the GIL is a guidance document and not a “rule” such that a declaratory judgment was not permitted under Nebraska law. COST argued that although the GIL is labeled a guidance document, it is in substance a rule because it establishes a legal standard and explicitly penalizes taxpayers that do not comply. The district court determined that the GIL is not a rule and granted the state’s motion. The district court did not address the substantive issue of whether 965 income is eligible for the dividends received deduction.

While on its face this decision may seem to be a taxpayer loss, the language of the judge’s order suggests otherwise. In finding that the GIL is not a “rule,” the judge...
determined that the GIL was a mere interpretation of the law that was not binding on the taxpayer and not entitled to any deference by the Nebraska courts. This strengthens an already strong taxpayer case on the merits.

The department’s position that 965 income is not eligible for the dividends-received deduction is inconsistent with the legislative history of the deduction and the nature of 965 income. The fact that a judge stated that this position is now afforded no deference only makes the taxpayer case stronger.

As a practical matter, taxpayers that have appealed assessments on 965 income should consider including the deference argument in their appeals, and taxpayers that have followed the GIL and paid tax on 965 income may consider filing refund claims. The substance of this issue will be litigated one way or another, and the district court’s finding that the GIL is not afforded deference can only help the taxpayer case.

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