



# TaxNewsFlash

United States



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## U.S. Tax Court: Partnership engaged in U.S. trade or business based on activities of asset manager

The U.S. Tax Court today held that a partnership was engaged in the conduct of a U.S. trade or business based on the activities of its asset manager, and was also a “dealer in securities” subject to the mark-to-market accounting rules of section 475.

The case is: *YA Global Investments, LP v. Commissioner*, 161 T.C. No. 11 (November 15, 2023). Read text of the Tax Court’s [opinion](#) [PDF 703 KB] (133 pages)

### Summary

The taxpayer, a partnership, provided funding to portfolio companies in exchange for stock, convertible debentures, promissory notes, and warrants. Because the taxpayer had no employees, it hired a Delaware limited liability company to manage its assets and serve as its tax matters partner. The taxpayer could impose restrictions from time to time on the management of its assets with appropriate notice to the asset manager. As part of the transactions in which the taxpayer acquired securities from portfolio companies, those companies paid fees to both the taxpayer and the asset manager.

For each of 2006, 2007, and 2008, the taxpayer filed Form 1065, U.S. Return of Partnership Income, but did not file Form 8804, Annual Return for Partnership Withholding Tax (Section 1446). The taxpayer was advised by the accounting firm that prepared its returns that it was not engaged in a U.S. trade or business.

By execution of a series of Forms 872–P, Consent to Extend the Time to Assess Tax Attributable to Partnership Items, the IRS and the taxpayer agreed to extend until March 31, 2015, for each of the years in issue, the period of limitation on the assessment of “any federal income tax attributable to the partnership items of the partnership . . . against any partner.”

On March 6, 2015, the IRS issued notices of final partnership administrative adjustment (FPAAs) for taxable years that included 2006 through 2008. The FPAAs reflected the IRS’s determination that the taxpayer was engaged in the conduct of a trade or business in the United States during those years because the asset manager acted as the taxpayer’s agent and its activities could be attributed to the taxpayer. The IRS further determined that all of the taxpayer’s taxable income was effectively connected with that trade or business (ECI), and that the taxpayer was liable for withholding tax under section 1446 on the portion of the taxpayer’s ECI allocable to its foreign partners. The IRS also

determined that the taxpayer was a “dealer in securities” subject to the mark-to-market accounting rules under section 475.

The Tax Court upheld the FPAAAs, finding that the taxpayer and the asset manager did not establish that the relationship between them was other than an agency, and consequently, the activities of the asset manager could be attributed to the taxpayer for purposes of determining whether the taxpayer was engaged in the conduct of a U.S. trade or business. In particular, the court found that the taxpayer’s ability to give interim instructions to the asset manager regarding the management of the taxpayer’s account demonstrated a relationship of agent and principal rather than service provider and recipient. The court further found that the activities that the asset manager conducted on the taxpayer’s behalf were continuous, regular, and engaged in for the primary purpose of income or profit. In addition, the court found that the taxpayer had not established that the activities that the asset manager conducted on the taxpayer’s behalf were limited to either the management of investments or trading in stocks or securities. The court also agreed with the IRS that the taxpayer was a “dealer in securities,” and thus subject to the mark-to-market rule under section 475(a)(2).

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