



TaxNewsFlash

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AOD: IRS nonacquiescence, “all events” test in shoppers’ reward program

An Action on Decision (AOD) appearing in the Internal Revenue Bulletin 2016-40 (dated October 3, 2016) states that the IRS Commissioner does not acquiesce to a decision of the Third Circuit in “Giant Eagle, Inc. v. Commissioner.”

The U.S. Court of Appeals for the Third Circuit in May 2016 reversed a decision of the U.S. Tax Court, and concluded that the taxpayer was entitled to deductions for anticipated customer redemptions of gasoline discounts under a shoppers’ reward program because the “all events” test had been satisfied. *Giant Eagle, Inc. v. Commissioner*, No. 14-3961 (3d Cir. May 6, 2016).

The AOD that appears in [IRB 2016-40](#) [PDF 131 KB] explains that in reference to an opinion of a circuit court, a “nonacquiescence” indicates that the IRS will not follow the holding on a nationwide basis. However, the IRS will recognize the precedential impact of the opinion on cases arising within the venue of the deciding circuit (here, the Third Circuit).

Third Circuit’s decision

As previously described in [TaxNewsFlash-United States](#), the taxpayer operated a chain of retail supermarkets, pharmacies, gas stations, and convenience stores. The taxpayer offered a fuel rewards program, providing customers a 10-cents per-gallon discount on gas for every \$50 spent on qualifying groceries. According to the rewards program brochure, the fuel discounts expired on the last day of the month, three months after they were earned. However, the taxpayer did not end the promotion or revoke any accumulated discounts in 2006 or 2007.

The taxpayer claimed deductions of approximately \$3.5 million and \$313,000 on its corporate income tax returns for 2006 and 2007, respectively, for discounts its

customers had accumulated but not yet applied to fuel purchases at the year-end. The taxpayer computed the deduction by:

- Determining the number of outstanding accumulated discounts by dividing the total dollar amount spent at the supermarkets on discount-qualifying items by 50
- Then multiplying the number of discounts by \$0.10 to determine the face value of the discounts

The taxpayer's formula included steps that referred to the historical redemption rate.

The IRS disallowed the deductions, and the taxpayer petitioned the U.S. Tax Court and asserted that: (1) the discounts accumulated but not applied by year-end satisfied the "all events" test because the taxpayer's liability became fixed on issuance of the discounts; or alternatively (2) the accrued discounts were to be treated as sales-accompanying trading stamps or premium coupons.

The Tax Court rejected both arguments and concluded that the deductions did not satisfy the "all events" test because the customers' purchase of gasoline was a condition precedent to their redemption of the gas discounts earned at checkout. The Tax Court also concluded that the fuel discounts were not covered by the provisions in Reg. section 1.451-4(a)(1), relating to trading stamps and coupons, because the gas discounts were not redeemable in merchandise, cash or other property pursuant to Rev. Rul. 78-212.

The Third Circuit reversed and remanded the case to the Tax Court with instructions to grant judgment in favor of the taxpayer on the ground that the claimed deductions were permissible under the "all events" test. The Third Circuit's discussion examined the elements of the "all events" test, which is met if all events have occurred which determine the fact of liability, and the amount of the liability can be determined with reasonable accuracy, and concluded that the only issue was whether the "fact of liability" was fixed at year's end. In other words, the question was whether before the year-end, the taxpayer had become liable to pay the fuel discount to its customers who had purchased qualifying groceries under the program.

After examining decisions of the U.S. Supreme Court and other federal courts of appeals, the Third Circuit held that for purposes of the fixed-liability prong of the "all events" test, it did not matter whether the total amount of the taxpayer's anticipated liability or the identity of all the customers who eventually applied discounts toward gas purchases could be conclusively identified at year's end. Also, noting that there was an "extremely remote and speculative possibility" that the amount of the taxpayer's claimed deductions would overstate the value of the rewards that customers ultimately redeemed, the Third Circuit found that the taxpayer had significantly mitigated that risk by tracking its customers' monthly redemption rates and had offset the deductions to account for non-redeemers.

A dissenting opinion concluded that the taxpayer's liabilities were not determined until the fuel rewards were redeemed and, thus, that all events had not occurred.

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