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Tax Management Memorandum™

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Through a Glass Darkly: *Sophy, Voss* and Statutory Interpretation of the Internal Revenue Code

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> For now we see through a glass, darkly: but then face to face: now I know in part, but then shall I know even as also I am known.
>
> 1 Corinthians 13:12. King James Version.

''Through a glass darkly'' is a familiar phrase to many. The words from Paul's letters to the Corinthians have been the touchstone for feature films,[2] novels[3] and even a Rolling Stones album (that one is ''Through the *Past* Darkly''[4]). The phrase is most familiar in this translation from the King James Version of the Bible, but subsequent translators have put their own stamp on Paul's idea. The New Revised Standard Edition of the Bible offers, ''Now we see in a mirror dimly.''[5] The New English Bible suggests, ''Now we see puzzling reflections in a mirror.''[6] The meaning of Paul's words, and the better translation, is left for a discussion about Biblical interpretation.

This article is about interpreting the Internal Revenue Code. One might expect the Internal Revenue Code to be an easier text to decipher — the original words are available in the original language and, for the most part, we can find the original authors.[7] But like Paul's looking glass and the many people who have translated his words, the Internal Revenue Code is susceptible to varying translations and interpretations. When we look closely, we do not all see the same thing in reflection.

The legal saga of Dr. Charles J. Sophy and George H. Voss and the tax position that lead them on this journey revolves around the plain meaning of one section of the Internal Revenue Code. Regardless of the outcome you prefer — per-taxpayer or per-residence — the plain meaning of the words in §163(h) are the basis for that conclusion and the interpretation that supports it. Four jurists peered into the glass and three different views emerged.[8] We will look over their shoulder to see what we might discover.

This article describes the underlying law, the factual background and examination of Dr. Sophy and Mr. Voss, their Tax Court cases, and the Ninth Circuit's appellate opinion.[9] The paper concludes with consideration of a possible challenge based on these competing interpretations and the difficulties present with a legislative solution.

THE LAW

Section 163 generally provides that payments of interest are deductible.[10] The Tax Reform Act of 1986 carved out a significant exception to that rule when it

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[1] The author thanks Brian Gardner, Esq., for his invaluable assistance in the preparation and completion of this article.

[2] *Sasom i en spegel* (Janus Films Oct. 16, 1961) (a film by Ingmar Bergman).

[3] Karleen Koen, *Through a Glass Darkly* (1986); Donna Leon, *Through a Glass*, Darkly (2006); Helen McCloy, *Through a Glass*, Darkly (1950); Gilbert Morris, *Through a Glass Darkly* (1999); Kathleen Norris, *Through a Glass Darkly* (1955).

[4] The Rolling Stones, *Through the Past, Darkly* (Big Hits Vol. 2) (Decca Records Sept. 12, 1969).

[5] 1 *Corinthians* 13:12 (New Revised Standard Version, 1989).

[6] 1 *Corinthians* 13:12 (New English Bible, 1961).

[7] Though in the case of the Internal Revenue Code, the author, Congress, is notoriously hard to pin down.

[8] Judge Mary Ann Cohen, U.S. Tax Court; Circuit Judges Jay S. Bybee, and Sandra S. Ikuta, U.S. Court of Appeals for the Ninth Circuit; and Senior Circuit Judge Michael J. Melloy, Eighth Circuit Court of Appeals, sitting by designation.

[9] *Sophy v. Commissioner*, 138 T.C. 204 (2012), *rev'd sub nom.*, *Voss v. Commissioner*, 796 F.3d 1051 (9th Cir. 2015).

[10] ''There shall be allowed as a deduction all interest paid or accrued within the taxable year on indebtedness.'' §163(a). All section references, unless otherwise stated, are to the Internal Revenue Code, and the regulations promulgated thereunder.

eliminated the deduction for personal interest.[11] The 1986 Act, however, did not completely eliminate the personal interest deduction. The 1986 Act preserved a few vestiges of the personal interest deduction with a definition of personal interest that explains what it is not.[12] The disallowance of a deduction for personal interest is an exception to the general rule that interest is deductible. The exceptions to that rule (disallowing a personal interest deduction) set the parameters for the deductible personal interest (the exceptions to the exception).

One of those exceptions is ''qualified residence interest.''[13] What we think of as the home mortgage interest deduction[14] — and what is routinely transposed from a Form 1098 onto line 10 of Schedule A for many taxpayers — is established under the law through a series of definitions, restrictions and limitations that spring from the qualified residence interest exception.

The home mortgage interest deduction was unlimited when it was first enacted.[15] The Revenue Act of 1987[16] amended §163(h)(3) to insert dollar limitations on the total amount of acquisition and home equity indebtedness eligible for the qualified residence interest deduction for tax years beginning in 1988.[17] These two amendments capping the deductibility of home mortgage interest are at the heart of the controversy here.

Section 163(h)(2) sets the baseline for personal interest by describing it as ''any interest allowable as a deduction under this chapter *other than*'' and proceeds to list six exceptions.[18] Section 163(h)(2)(D) is one of those exceptions. It excludes any ''qualified residence interest'' from the definition of personal interest.

''Qualified residence interest'' is the gateway to another sequence of definitions (the detail and general structure of which will become important later). ''Qualified residence interest'' is defined as:

> any interest which is paid or accrued during the taxable year on —
>
> > (i) acquisition indebtedness with respect to any qualified residence of the taxpayer, or
> >
> > (ii) home equity indebtedness with respect to any qualified residence of the taxpayer.[19]

This definition introduces two more terms into the home mortgage interest lexicon — ''acquisition indebtedness'' and ''home equity indebtedness.'' Please note the repeated use of the phrase ''qualified residence of the taxpayer'' in both subparagraphs.

''Acquisition indebtedness'' is defined as:

> (i) In general the term ''acquisition indebtedness'' means any indebtedness which —
>
> > (I) is incurred in acquiring, constructing, or substantially improving any qualified residence of the taxpayer, and
> >
> > (II) is secured by such residence.
>
> Such term also includes any indebtedness secured by such residence resulting from the refinancing of indebtedness meeting the requirements of the preceding sentence (or this sentence); but only to the extent the amount of the indebtedness resulting from such refinancing does not exceed the amount of the refinanced indebtedness.[20]

This definition again references ''qualified residence of the taxpayer'' and twice refers back to that

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[11] §163(h).

[12] For purposes of this subsection, the term ''personal interest'' means any interest allowable as a deduction under this chapter other than —

> (A) interest paid or accrued on indebtedness properly allocable to a trade or business (other than the trade or business of performing services as an employee),
>
> (B) any investment interest (within the meaning of subsection (d)),
>
> (C) any interest which is taken into account under section 469 in computing income or loss from a passive activity of the taxpayer,
>
> (D) any qualified residence interest (within the meaning of paragraph (3)),
>
> (E) any interest payable under section 6601 on any unpaid portion of the tax imposed by section 2001 for the period during which an extension of time for payment of such tax is in effect under section 6163, and
>
> (F) any interest allowable as a deduction under section 221 (relating to interest on educational loans).

§163(h)(2).

[13] §163(h)(2)(D).

[14] I use the phrase ''home mortgage interest deduction'' to describe the deduction for qualified residence interest paid on acquisition indebtedness and/or home equity indebtedness on a qualified residence as all of those terms are defined under §163 and the accompanying regulations.

[15] Tax Reform Act of 1986, Pub. L. No. 99-514, §511(b), 100 Stat. 2244.

[16] Revenue Act of 1987, Pub. L. No. 100-203, §10102(a), 101 Stat. 133-384.

[17] Congress has enacted various other amendments to section 163(h) though none are directly relevant to the issue presented here.

[18] *See* above n. 10.

[19] §163(h)(3)(A).

[20] §163(h)(3)(B).

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ISSN 0148-8295

language with the phrase "such residence." (Yes, this is already quite tedious but you will see that these phrases drew the attention of the court.)

As we continue in that direction, please consider the definition of "home equity indebtedness":

> (i) In general the term "home equity indebtedness" means any indebtedness (other than acquisition indebtedness) secured by a qualified residence to the extent the aggregate amount of such indebtedness does not exceed —
>
> > (I) the fair market value of such qualified residence, reduced by
> >
> > (II) the amount of acquisition indebtedness with respect to such residence.[21]

The definition of home equity indebtedness does not append the words "of the taxpayer" to "qualified residence" in either its introductory language or elsewhere. The parenthetical referencing acquisition indebtedness implies a connection between the two definitions, but we note the absence of the phrase "of the taxpayer" in this definition in anticipation of the Tax Court's discussion of this section.

Three definitions in and we still have not defined a pair of words we have seen throughout — "qualified residence." Qualified residence poses an interesting but not uncommon principle in the tax code, it is a singular phrase that encompasses more than one item.[22] To wit, two homes collectively can be a single qualified residence for purposes of the home mortgage interest deduction as demonstrated in the definition.

> (i) In general. The term "qualified residence" means —
>
> > (I) the principal residence (within the meaning of section 121) of the taxpayer, and
> >
> > (II) other residence of the taxpayer which is selected by the taxpayer for purposes of this subsection for the taxable year and which is used by the taxpayer as a residence (within the meaning of section 280A(d)(1)).
>
> (ii) Married individuals filing separate returns. If a married couple does not file a joint return for the taxable year —
>
> > (I) such couple shall be treated as 1 taxpayer for purposes of clause (i), and
> >
> > (II) each individual shall be entitled to take into account 1 residence unless both individuals consent in writing to 1 individual taking into account the principal residence and 1 other residence.[23]

As mentioned above, the limitations on the amount of deductible indebtedness were inserted into the statutory framework later. There are limitations specific to acquisition indebtedness and home equity indebtedness and the language of each (in the parenthetical) differs just a bit. The limitation on acquisition indebtedness follows the definition of that term:

> (ii) $1,000,000 limitation. The aggregate amount treated as acquisition indebtedness for any period shall not exceed $1,000,000 ($500,000 in the case of a married individual filing a separate return).[24]

The limitation on home equity indebtedness also follows its definition:

> (ii) Limitation. The aggregate amount treated as home equity indebtedness for any period shall not exceed $100,000 ($50,000 in the case of a separate return by a married individual).[25]

While the language of the two limitations is not identical it may be close enough to be considered parallel. The meaning of these two later added provisions is at the center of this interpretive struggle.

There are two other items of legal authority in play here — a Treasury regulation and an IRS Chief Counsel Advice. Reg. §1.163-10T, Qualified Residence Interest, is a temporary regulation that provides, among other things, the method for calculating the qualified residence interest when the secured debt exceeds the adjusted purchase price. The temporary regulation was promulgated on December 22, 1987, and follows the text of §163(h) as enacted with the 1986 Act. The temporary regulation does not address the indebtedness limits inserted into the law in the Revenue Act of 1987. However, the regulation is relevant because it is the basis for the formula defined in the IRS Chief Counsel Advice and for calculating interest paid on qualified debt in excess of the debt limitations.[26] To the extent that there is regulatory guidance about the mechanical application of §163(h)(3), it is contained in these regulations.

The application of those temporary regulations leads us to the final piece of the legal puzzle, the IRS

[21] §163(h)(3)(C).

[22] *See, e.g., Guardian Indus. Corp. v. Commissioner*, 143 T.C. 1, 9–12 (2014) (discussing the canon of statutory construction that the singular includes plural and its application in tax cases).

[23] §163(h)(4)(A).

[24] §163(h)(3)(B)(ii).

[25] §163(h)(3)(C)(ii).

[26] CCA 200911007.

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ISSN 0148-8295

Chief Counsel Advice issued on November 24, 2008, and released on March 13, 2009 (hereinafter ''CCA 200911007'' or ''the 2009 CCA''). In CCA 200911007, the Income and Tax Accounting branch of IRS Chief Counsel was asked about the application of the $1,000,000 limitation on acquisition indebtedness where the taxpayer is a partial owner of a residence for which total acquisition indebtedness exceeds $1,000,000.

Under the facts presented, one taxpayer owned a qualified residence subject to acquisition indebtedness of more than $1,000,000. There was no home equity indebtedness. The taxpayer shared the residence with another taxpayer but in year one was the sole owner of the property and solely responsible for the mortgage. In year two, the taxpayer transferred the property to himself and the second taxpayer as joint tenants, making the second taxpayer a co-owner of the property. The new co-owner also was added as an additional obligor on the mortgage. The new co-owner did not make mortgage payments until year three. In years one and two, the original owner deducted home mortgage interest up to the individual limit of $1,000,000. In year three, both co-owners paid interest on primary residence indebtedness and that indebtedness exceeded $1,000,000.

The field attorney asked for guidance on the application of the aggregate $1,000,000 debt limit for all three years. In years one and two, where a single taxpayer made 100% of the interest payments on the qualified residence, the aggregate limit in each year was $1,000,000. In year three, the taxpayers took the position that each co-owner was entitled to a separate indebtedness limitation of $1,000,000. The Chief Counsel's Office advised that the plain language of the statute does not support such an interpretation. Instead, the advisory opinion offered this interpretation of §163(h):

> Under §163(h)(3)(B)(i), acquisition indebtedness is defined, in relevant part, as indebtedness incurred in acquiring a qualified residence of the taxpayer — not as indebtedness incurred in acquiring taxpayer's portion of a qualified residence. The entire amount of indebtedness incurred in acquiring the qualified residence constitutes ''acquisition indebtedness'' under §163(h)(3)(A)(i). In this case, the amount of indebtedness incurred in acquiring Property exceeds $1,000,000. However, under §163(h)(3)(B)(ii), the amount treated as acquisition indebtedness for purposes of the qualified residence interest deduction is limited to $1,000,000 of total, ''aggregate'' acquisition indebtedness. This is evident from the parenthetical in §163(h)(3)(B)(ii) which limits the aggregate treated as acquisition indebtedness to $500,000 for a married taxpayer filing a separate return.

The next paragraph of the administrative guidance explained that when acquisition indebtedness exceeds the $1,000,000 indebtedness limitation, the rules in Reg. §1.163-10T(e) (to determine the amount of deductible interest when the secured debt exceeds the purchase price) should be applied to determine the limits of deductible interest. The advisory opinion concluded that the amount of qualified residence interest with respect to year three was determined by multiplying the amount of interest paid by a fraction: $1,000,000 over the amount of the indebtedness (''the 2009 CCA formula''), which might also be represented as such:

$$\frac{\$1{,}000{,}000}{\textit{amount of indebtedness.}}$$

BACKGROUND AND EXAMINATION

Dr. Charles Sophy and Bruce Voss purchased a home in Rancho Mirage, California as joint tenants in 2000. They financed the purchase with a $486,300 mortgage on the home. In 2002, Dr. Sophy and Voss refinanced the Rancho Mirage home with a new mortgage loan of $500,000 for which they were jointly and severally liable. The new loan was used to pay off the original mortgage on the Rancho Mirage home.

In 2002, Dr. Sophy and Voss purchased a second home in Beverly Hills, California. The second home was financed with a purchase money mortgage and also held it as a joint tenancy. In 2003, Dr. Sophy and Voss refinanced the Beverly Hills home with a new loan of $2 million, which was used to pay off the original mortgage on the second home. Dr. Sophy and Voss were jointly and severally liable for the refinanced mortgage. In 2003, Dr. Sophy and Voss took out a $300,000 home equity line of credit on the Beverly Hills home, for which they also were jointly and severally liable.

By 2006, Dr. Sophy and Voss were using the Beverly Hills home as their primary residence and the Rancho Mirage house as their second home. They continued to do so through 2007. In 2006, Dr. Sophy paid mortgage interest of $94,698 for the two residences and Voss paid $85,962. The total average balance for the three liabilities on the two homes (two mortgages and one home equity line of credit) in 2006 was $2,703,568. In 2007, the total average balance of the loans was $2,669,135 and Dr. Sophy paid mortgage interest of $99,901 while Voss paid $76,635.

Dr. Sophy and Voss both claimed home mortgage interest deductions under §163(h)(3) in 2006 and 2007. In 2006, both taxpayers claimed home mort-

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gage interest deductions of $95,396 on Schedule A.[27] In 2007, Dr. Sophy claimed a home mortgage interest deduction of $65,614 and Voss claimed $88,268. The filing status for the taxpayers in both years was single.

The Internal Revenue Service (IRS) examined the separate individual income tax returns of Dr. Sophy and Voss in 2006 and 2007. Both examinations resulted in notices of deficiency. The IRS adjusted the allowable home mortgage interest deduction downward in both notices of deficiency ''because your deduction for home mortgage interest exceeds the limits per the provisions of the Internal Revenue Code.''[28]

The IRS determinations applied the calculation in the 2009 CCA for two unmarried co-owners of a primary residence with acquisition indebtedness of more than $1 million. The CCA concluded that the

> amount of interest Taxpayer may deduct is determined by multiplying the amount of interest actually paid by Taxpayer on Taxpayer's qualified residence by a fraction the numerator of which is $1,000,000 and the denominator of which $V, the average balance of the outstanding acquisition indebtedness during the years in question.[29]

The IRS extended the formula set forth in the CCA to include the home equity indebtedness of Dr. Sophy and Mr. Voss. The IRS computed an applicable limitation ratio using $1.1 million ($1 million for the primary mortgages and $100,000 for the home equity loan) as the numerator and the entire average balance for the qualifying loans as the denominator. That ratio was then multiplied by the amount of interest paid by each petitioner and the product was the allowable amount of deductible interest.

Based on those calculations, the notice of deficiency issued to Dr. Sophy reduced his allowed mortgage interest deduction by $56,866 for 2006 and by $24,443 for 2007. Voss' notice of deficiency disallowed Schedule A mortgage interest expense of $60,421 in 2006 and $56,685 in 2007. The adjustments resulted in income tax deficiencies for Dr. Sophy in 2006 and 2007 of $19,613 and $6,799, respectively. Voss faced deficiencies of $16,918 and $15,872 for each respective tax year.

[27] The taxpayers later conceded that these amounts were incorrect by at least $10,131 because the total interest paid by both taxpayers in 2006 was only $180,660. *Voss v. Commissioner*, 796 F.3d 1051, 1055 (9th Cir. 2015).

[28] *Sophy v. Commissioner*, 138 T.C. 204, 206 (2012).

[29] CCA 200911007.

THE TAX COURT *(SOPHY V. COMMISSIONER)*

The taxpayers challenged the IRS determinations with petitions in the U.S. Tax Court and cases were consolidated for consideration.[30] The cases were submitted fully stipulated under Tax Court Rule 122. The court also ordered the parties to submit proposed computations for entry of decision.

There was no dispute that the petitioners' homes met the definition of qualified residence and that the mortgage interest paid was qualified residence interest. The sole issue for consideration was whether the IRS properly applied the limitations under §163(h)(3)(B)(ii) and §163(h)(3)(C)(ii) to reduce petitioners' claimed qualified residence interest deductions.

The taxpayers' contended that the §163(h)(3) limitations on deductible indebtedness applied on a per-taxpayer basis when co-owners are not married to one another. Under the taxpayers' construction, each individual taxpayer was entitled to deduct interest on $1 million of acquisition indebtedness and $100,000 of home equity debt for a total of $1.1 million of eligible indebtedness. Extending the taxpayers' position to its logical conclusion would result in two unmarried co-owners being eligible to deduct qualified residence interest on $2.2 million of indebtedness.[31]

The government argued that the limitations on home mortgage indebtedness were correctly applied on a per-residence basis without regard to the number of co-owners or their marital status. Accordingly, in the government's view, any number of co-owners would be limited collectively to an interest deduction on $1.1 million of indebtedness.[32]

The Tax Court identified the question as one of statutory interpretation and set forth several applicable legal principles of statutory interpretation. Among them, ''The words of a statute should be construed in their ''ordinary, everyday'' and plain meaning.'' *Crane v. Commissioner*, 331 U.S. 1, 6 (1947). The court also cited authority for the investigation of legislative history in the case of silent or ambiguous statutes, though the Court did not pursue that approach.[33]

[30] Tax Ct. R. 141(a).

[31] Presumably, the same logic would extend the total debt limitation to $3.3 million for three unmarried joint owners, $4.4 million for four unmarried joint owners, etc.

[32] Neither party in the Tax Court considered the application of the per-residence rule in the context of the definition of qualified residence, which, though singular, provides for two properties (or residences). *See* n. 21, above.

[33] The court did not reference the interpretive canon that provides that the singular may include the plural, despite that being

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ISSN 0148-8295

Following the positions adopted by the parties, the Tax Court framed the ultimate question for consideration as:

> whether the statutory limitations on the amount of acquisition and home equity indebtedness with which interest is deductible under §163(h)(3) are properly applied on a per-taxpayer or per-residence basis where co-owners are not married to each other.[34]

The court began by looking at the definitions of "acquisition indebtedness" and "home equity indebtedness" in §163(h)(3)(B)(i) and §163(h)(3)(C)(i). It found that the word "taxpayer" in the context of the definition was used only in relation to the qualified residence, specifically where it referenced the "qualified residence of the taxpayer." It further noted that "taxpayer" was not used in relation to the indebtedness. The court identified a similar construction in the definition of "home equity indebtedness" where it found the phrase "any indebtedness" was not qualified by language relating to an individual taxpayer.

The court then emphasized the phrase "with respect to any qualified residence" in reference to both acquisition indebtedness and home equity indebtedness in the definition of "qualified residence interest" in §163(h)(3)(A). The court added that the definition of "home equity indebtedness" includes the phrase "reduced by the amount of acquisition indebtedness *with respect to such residence*," emphasizing the italicized text. The court determined that the deductible indebtedness must be related to the qualified residence and that the repeated use of the phrases "with respect to such residence" and "with respect to any qualified residence" focused on the residence rather than the taxpayer.[35]

The court then found that because Congress used the phrase "any indebtedness" in the definition of acquisition indebtedness without qualifying language regarding an individual taxpayer "it appears that this phrase refers to the total amount of indebtedness with respect to a qualified residence and which is secured by that residence."[36] The court extended its analysis to conclude that when the statute limits the amount that may be treated as acquisition indebtedness

> it appears that what is being limited is the total amount of acquisition debt that may be claimed in relation to the qualified residence, rather than the amount of acquisition debt that may be claimed in relation to an individual taxpayer.[37]

The court extended a similar analysis to the term "home equity indebtedness" finding that the absence of qualifying language relating to an individual taxpayer

> appears to limit the total amount of home equity indebtedness that may be claimed in relation to the qualified residence itself, rather than the amount of home equity indebtedness that may be claimed in relation to an individual taxpayer.[38]

The taxpayers urged the court to consider the various references to the individual taxpayer in §163(h) as a basis for construing the debt limitations on a per-taxpayer basis. The court found that such an approach "reads too much into the indebtedness limitations."[39] The court noted that any reference to the individual taxpayer was "conspicuously absent" from the language of the indebtedness provisions and reaffirmed that when "taxpayer" is referenced, it is in relation to the qualified residence and not to the indebtedness.[40] The court then cited authority for the proposition that when

> Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely.[41]

The court proposed that the repeated use of phrases containing "residence"[42] in conjunction with terms that by their own definition must already be in rela-

that case in the definition of qualified residence. *See* n. 21, above.

[34] *Sophy v. Commissioner*, 138 T.C. 204, 209 (2012).

[35] The court does not mention that the phrase "with respect to any qualified residence" is immediately followed by "of the taxpayer" in both instances it references.

[36] *Sophy v. Commissioner*, 138 T.C. 204, 210 (2012).

[37] *Sophy v. Commissioner*, 138 T.C. 204, 211 (2012).

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Consol. Freightways Corp. of Del. v. Aetna, Inc. (In re Consol. Freightways Corp. of Del.)*, 564 F.3d 1161, 1165 (9th Cir. 2009). The language cited by the Tax Court appears in a Ninth Circuit opinion but was quoted from an opinion of the U.S. Supreme Court, *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002). The quotation is interesting because it refers to the intentional use of language in another section of the "same Act" not necessarily language in another section of the "same statute." The home mortgage interest deduction was established with the Tax Reform Act of 1986. The indebtedness limitations, however, were not part of that *Act*. They were added to §163(h)(3) with the Revenue Act of 1987. So the phrases and terms referenced by the Tax Court, while certainly part of the same statute, were not necessarily enacted contemporaneously, i.e., not in the same "Act," with the indebtedness provisions.

[42] The court specifically cited the statutory phrases "with respect to any qualified residence" and "with respect to such residence." *Sophy v. Commissioner*, 138 T.C. 204, 211 (2012).

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ISSN 0148-8295

tion to a qualified residence suggests that the references to ''residence'' might be superfluous. The court, however, was not inclined to pursue such a reading citing language from the Supreme Court's decision in *TRW, Inc. v. Andrews*[43] for the proposition that a statute ought to be construed so as to avoid making any part of it superfluous, void or insignificant. The court added that it should not construe a provision in isolation but rather as part of the statutory scheme in which it is embedded.[44] It concluded that rather than treat the repeated references to ''residence'' as surplusage, they should be viewed as points of emphasis directing focus on the residence rather than the taxpayer when it comes to the indebtedness provisions.

The court found further support for its per-residence interpretation in the parenthetical language addressing separately filing married taxpayers. In the court's view, the parentheticals restrict the respective home mortgage interest deductions to one-half of the total limits for married taxpayers electing to file separately. Consistent with its decision in *Pau v. Commissioner*,[45] the court found that the language used in these provisions suggests that co-owners who are married and file a joint return are limited to deductions on $1 million of acquisition indebtedness and $100,000 of home equity indebtedness.

Petitioners argued that the parenthetical restrictions were intended to create a ''marriage penalty'' and that they should not apply to unmarried co-owners. The court dismissed this argument based on the ''residence-focused language used throughout section 163(h)(3) and the absence of any reference to an individual taxpayer in the indebtedness provisions themselves.''[46]

The court reasoned that the parenthetical language was not a marriage penalty but rather was a ''specific allocation'' of the limitation amounts that must be used by married couples filing separate tax returns.[47] The court implied from this conclusion that unmarried co-owners could allocate the limitations among themselves differently.[48] Nonetheless, the unmarried co-owners were still subject to a per-residence limitation of $1 million for acquisition indebtedness and $100,000 for home equity indebtedness.

Finally, the court noted that although it relied on the language of the statute for its conclusion, ''nothing in the legislative history of §163(h)(3) suggests that Congress had any other intention.''[49] The court held that the indebtedness limitations with respect to a qualified residence in §163(h)(3)(B)(ii) and §163(h)(3)(C)(ii) are applied on a per-residence basis, limiting Dr. Sophy and Voss to interest deductions on aggregated indebtedness of $1.1 million.

THE NINTH CIRCUIT COURT OF APPEALS *(VOSS V. COMMISSIONER)*

As California residents, the taxpayers appealed the Tax Court decision in the Ninth Circuit.[50] An *Amicus Curie* brief was filed by the National Center for Lesbian Rights and joined by 11 law professors.[51] The Ninth Circuit reviewed the case *de novo*.[52] In a split decision the Ninth Circuit reversed the Tax Court.

Circuit Judge Bybee authored the majority opinion. The first two sections of the opinion describe the relevant law and pertinent facts. In the third section of

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[43] *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)).

[44] *Consol. Freightways Corp. of Del. v. Aetna, Inc. (In re Consol. Freightways Corp. of Del.)*, 564 F.3d 1161, 1165 (9th Cir. 2009).

[45] 73 T.C.M. 1819. The court specifically noted in a parenthetical that the *Sophy* ruling ''does not vary from the holding in *Pau* as to the application of the limitations to co-owners who are married to each other.'' *Sophy v. Commissioner*, 138 T.C. 204, 212 (2012).

[46] *Sophy v. Commissioner*, 138 T.C. 204, 212 (2012).

[47] Under this presumption, the purpose of the parenthetical language is to limit the deduction of married co-owners who elect to file separately and do not split the liability for the qualified indebtedness equally. These couples are forced into a 50/50 allocation for purposes of the deduction. For example, if spouses with total indebtedness in excess of $1.1 million split the liabilities 75/25 and elected to file separately, then the spouse who paid the greater share of the liability would have their interest deductions capped at total indebtedness of $825,000. The spouse responsible for 25% of the liabilities would only be able to deduct the amount of interest actually paid on the $275,000 of debt for which he or she was responsible. Thus, the specific allocation would deny this couple the benefit of deductions up the total $1.1 million despite having paid interest on indebtedness equal to that amount. The result creates not so much a marriage penalty as a ''filing status penalty'' for married couples that elect to file separately.

[48] The court's parsing of the parentheticals suggests that petitioners would be free to allocate their indebtedness in proportion to their respective payments. Under that application, Dr. Sophy would be allowed to deduct 52.42% of the interest paid and Voss would be able to deduct 47.58% in 2006. The next year, Dr. Sophy and Voss would be able to deduct 56.59% and 43.141%, respectively. Given that Dr. Sophy was in excess of the 50% limit in both years, the implication in the court's interpretation would not subject him to a limitation and together with Voss they would enjoy deductions up to the full $1.1 million limit.

[49] *Sophy v. Commissioner*, 138 T.C. 204, 213 (2012).

[50] §7482(b).

[51] Brief for Nat'l Center for Lesbian Rights et. al. as Amici Curiae Supporting Petitioners, *Voss v. Commissioner*, 796 F.3d 1051 (9th Cir. 2015).

[52] The Ninth Circuit standard for review of Tax Court is based on the statutory authority for appeal in §7482(a)(1) which provides for review in the same manner as civil cases tried in the district court without a jury. Factual findings of the Tax Court are reviewed for clear error and conclusions of law — including interpretation of the Internal Revenue Code — are *de novo*. *Suzy's Zoo v. Commissioner*, 273 F.3d 875, 878 (9th Cir. 2001).

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ISSN 0148-8295

the opinion the majority lays out its interpretation of the statute. The fourth and fifth sections address the government's arguments on appeal and the dissent's arguments, respectively. The sixth section of the opinion is the holding.

Having addressed the facts and law, we begin with the third section of the Ninth Circuit's opinion. It is presented in four parts. In the first part, the court frames the issue using the terminology adopted by the Tax Court. Do the debt limits in §163(h)(3)(B)(ii) and §163(h)(3)(C)(ii) apply per-taxpayer or per-residence when there are unmarried co-owners?[53]

The Ninth Circuit begins with the idea that ''section 163(h) is silent as to how the debt limits should apply in co-owner situations.''[54] The court speculates for a moment how Congress may have better crafted the statute, then returns to the task at hand by backing off of its original declaration. The court restates the condition of the statute, in that it ''is *mostly* silent about how to deal with co-ownership situations, but it is not *entirely* silent.''[55] [emphasis in original].

The Ninth Circuit turns to the parenthetical qualifiers (the ''not entirely silent'' part of the statute) embedded in the debt limitation paragraphs of section 163(h)(3)(B)(ii) and §163(h)(3)(C)(ii). These parentheticals addresses a common instance of co-ownership, i.e., married individuals filing separately.[56] The parentheticals provide half-sized (the Ninth Circuit's phrase) debt limits for spouses filing separate returns. The Ninth Circuit considered the phrase, ''in the case of a married individual filing a separate return,''[57] in the parenthetical and focused on the use of ''in the case of'' to describe the married individuals. It found this language important because it suggested that the parentheticals contain an exception to the general debt limit and not an illustration of how the general debt should be applied (which was part of the position adopted by the Tax Court). The phrase also implies a parallelism between the main clause and the parenthetical. Other than the different amounts of the debt limit, one should expect that a married individual filing a separate return should be treated the same as any other situation. The appellate panel further suggested that the parentheticals are relevant in interpreting the debt limitations of the main clauses.

The appellate court found three useful insights in the parentheticals. First, the parentheticals speak in what the panel calls ''per taxpayer terms.'' The parentheticals refer to married *individuals* even though these taxpayers often co-own their home and are jointly liable on any mortgage debt. The Ninth Circuit emphasized the use of the word individual in the parentheticals viewing it as a per-taxpayer approach. The per-taxpayer wording of the parentheticals coupled with the use of ''in the case of'' suggested to the appellate majority that the language of the main clause — in particular the phrase ''aggregate amount treated'' — should be read in a per-taxpayer manner.

The Ninth Circuit's second point was that the parentheticals *operate* in a per-taxpayer manner. The effect of the parenthetical limitations on separately filing spouses is to allow each filer a $550,000 limit so that the pair of separate filers is allowed the ''normal limit'' of $1.1 million, or the same limit allowed for a couple filing jointly. The limits do not subject the two separately filing spouses to a joint limit of $550,000, yet the court reasoned that would be the result under a per-residence reading of the rule. In which case, under a per-residence rule, separately filing spouses would be eligible for only one-half of the deduction available to individuals and jointly filing spouses.

The Ninth Circuit suggested such a result would be anomalous and that an interpretation that put joint and separate filing spouses in the same position would be more consistent with Tax Court jurisprudence. It also pointed out that the Tax Court adopted this operation of the parentheticals as well. The *Sophy* opinion interprets the parentheticals to limit separately filing spouses to ''acquisition indebtedness of $500,000 *each*'' and ''home equity indebtedness of $50,000 *each*.'' [emphasis by the Ninth Circuit][58] The appellate panel also referenced the Tax Court's opinion in *Bronstein v. Commissioner*,[59] which referred to debt limitations ''for *each spouse*'' [emphasis again by the Ninth Circuit]. Given that the debt limitations for separately filing spouses apply per spouse, it follows that the indebtedness limitations for unmarried individuals should also apply per unmarried individual.

Third, the majority asserts that the very inclusion of the parentheticals suggests that the debt limits apply per-taxpayer. The Ninth Circuit cites its own precedent for the proposition that statutes should not be interpreted in a way that renders a provision superfluous.[60] Under the Ninth Circuit reasoning, if the limits were meant to apply per-residence then the parentheti-

[53] *Voss v. Commissioner*, 796 F.3d 1051, 1057 (9th Cir. 2015).

[54] *Voss v. Commissioner*, 796 F.3d 1051, 1058 (9th Cir. 2015).

[55] *Id.*

[56] The IRS reported that it received 2,811,050 returns electing the filing status of Married Filing Separately for 2013. IR-News Rel. 2015-104.

[57] §163(h)(3)(B)(ii) and §163(h)(3)(C)(ii).

[58] *Sophy v. Commissioner*, 138 T.C. 204, 212 (2012). The *Sophy* language is consistent with earlier Tax Court jurisprudence. ''[T]he parenthetical indebtedness limitations of section 163(h)(3)(B)(ii) and (C)(ii) are $550,000 for each spouse filing a separate return.'' *Bronstein v. Commissioner*, 138 T.C. 382, 386 (2012).

[59] 138 T.C. 382 (2012).

[60] *Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710 F.3d

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ISSN 0148-8295

cals would be superfluous. Under a per-residence reading of the statute, there would be no distinction between a married couple filing jointly and a married couple filing separately who had debt in excess of the limit; they would both be capped at $1.1 million. The per-residence cap would be imposed regardless of filing status and language imposing specific $500,000 and $50,000 limits on spouses filing separately would be unnecessary. The court concluded that the parenthetical filing limits are in the statute to subject couples filing separately to the same debt limits as couples filing jointly.

The Ninth Circuit rejected the Tax Court's interpretation that the parentheticals were inserted to as a means of allocating the deduction between taxpayers. The parentheticals more likely were added to ensure that all married couples were treated the same under the general debt limitation, regardless of filing status. The court identified several other sections of the Internal Revenue Code that employ half-sized deductions for separate filing spouses.[61] The court reasoned that these provisions were in place for the same purposes as the parentheticals in §163(h)(3)(B)(ii) and §163(h)(3)(C)(ii) — to ''ensure that the separately filing spouses don't get double the benefit that jointly filing couples get.''[62] In sum, the court held that the language, purpose and operation of the parenthetical language suggested that §163(h)(3)'s debt limit provisions apply per-taxpayer, not per-residence.

The second part of the section addresses the Tax Court's rejection of the per-taxpayer construction. The Ninth Circuit conceded that the Tax Court's approach, to look beyond the debt limit provisions in an effort to understand how those provisions should apply, was reasonable. It was less persuaded by the Tax Court's determination that there was a general focus on the qualified residence in §163(h) and its emphasis on the conspicuous absence of references to the taxpayer in that section. The Tax Court focused on three definitions in the statute — ''qualified residence,'' ''acquisition indebtedness,'' and ''home equity indebtedness'' — and emphasized the references in these definitions to the qualified residence while noting that the taxpayer was only mentioned in reference to the residence and never with respect to the indebtedness. The Ninth Circuit found it only natural that a statute providing a deduction on qualified residence interest would focus on indebtedness with respect to that residence. It also found that the statute would change in meaning, or even make little sense, if the references to the qualified residence were omitted. The Ninth Circuit agreed with the Tax Court that some of the statutory language could be superfluous, e.g., ''with respect to any qualified residence,'' but also suggested that the same could also be said of other prepositional phrases that the Tax Court apparently did not consider, e.g., ''of the taxpayer.'' In total, if there was something to be drawn from those prepositional phrases, it was overcome by the clear implications of the married person parentheticals.

The Ninth Circuit then turned to the occasional omission of the word taxpayer. Setting aside the references to the taxpayer already in §163(h), the majority found few other references to the taxpayer throughout §163 and speculated that may be the case throughout the Code. On that sample, the Ninth Circuit concluded that the absence of taxpayer in the definition was not at all ''conspicuous'' and that any reasonable reader would gather that the statute refers to a taxpayer despite the lack of an explicit reference.

Taking a page from the Tax Court's approach, the third section of the majority opinion examined §163(h) for support of a particular reading of the statute. It found repeated references to the taxable year. The court urged that these references to the taxable period supported a per-taxpayer reading because ''residences do not have taxable years; only taxpayers do.''[63] It questioned how ''the aggregate amount treated as acquisition indebtedness for any period'' might be determined under the Tax Court's the per-residence interpretation. What if the co-owners had different tax years? Which co-owner's tax period controls? Would both tax periods have to be taken into account? The Ninth Circuit concluded that those questions are not as problematic when the aggregate amount is determined according to each individual taxpayer's accounting period.

The Ninth Circuit also had trouble squaring the Tax Court's per-residence interpretation with the definition of ''qualified residence.'' The definition of qualified residence allows for two homes to be qualifying residences. The second residence must meet the requirements of §280A, which places minimum personal use requirements and certain other limitations on the second home.[64] Given the rule, it is entirely possible for a vacation home, satisfying the qualified residence requirements, to be co-owned by individuals whose separate primary homes are also qualifying residences. Under the per-residence formulation the co-owners are connected for one residence but not for the other. The court speculated that co-owners would have to coordinate their tax returns to make sure that

946, 966 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 906 (2014).

[61] §22(c)(2)(A) (credit for the elderly or the disabled); §1202(b)(capital gains tax exclusion); §1211(b) (capital loss limitation).

[62] *Voss v. Commissioner*, 796 F.3d 1051, 1060 (9th Cir. 2015).

[63] *Voss v. Commissioner*, 796 F.3d 1051, 1063 (9th Cir. 2015).

[64] §280A(d).

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ISSN 0148-8295

the aggregate amount of qualified indebtedness did not exceed the respective limits. More likely, the IRS would have to monitor compliance for aggregate limits on a per-residence basis — attempting to connect taxpayers whose only connection is a shared mortgage liability. In all events, an aggregate per-taxpayer limit is less cumbersome from both a compliance and enforcement standpoint.

The fourth section of the Ninth Circuit's opinion addresses the government's arguments on appeal. The government argued that the per-taxpayer approach to the indebtedness limitations created a marriage penalty by allowing unmarried individuals a greater limit. Specifically, two unmarried individuals with qualifying indebtedness in excess of the aggregate $1.1 million limit would be subject to the limit if they married. Thus, the couple would incur a tax ''penalty'' upon marriage in the form of a reduced deduction.[65] The Ninth Circuit did not embrace the government's concern over this marriage penalty. It reasoned that Congress may have perfectly legitimate reasons for distinguishing between married and unmarried taxpayers, asserting that there may be offsetting benefits available to joint filers that balance the instances where a marriage penalty might apply. It returned to the proposition underlying its opinion that the likely intent of the parenthetical language was to prevent separately filing married couples from having a significant advantage over jointly filing married couples.

The fifth section of the Ninth Circuit's opinion addresses the dissent. The dissent adopted the holding of the Tax Court but did not adopt the Tax Court's rationale for that conclusion offering a third perspective on the interpretation of the statute. In opposition to both the Tax Court and the majority, the dissent maintained that the plain language of §163(h) does not offer a basis for the proper interpretation of the statute. The dissent suggested that we defer to the IRS's long-standing, reasonable interpretation of the statute as reflected in the 2009 CCA. The dissent also maintained that the 2009 CCA supports the same conclusion reached by the Tax Court, i.e., that the debt limitations are determined on a per-residence basis.

The majority opinion found the dissent's deference to the 2009 CCA misplaced. The dissent maintained that an agency determination is entitled to a ''measure of deference proportional to the '''thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.' ''[66] The majority countered that these factors were not present in the administrative guidance. The Ninth Circuit found that the CCA's interpretive analysis, consisting of a single paragraph, was not thorough or exhaustive. The majority also questioned the CCA's notion that the ''plain language of the statute'' governs the reading of the statute. Citing its own opinion, the briefs of the parties, and the Tax Court decision the Ninth Circuit court found that the language is anything but plain.[67] The CCA concluded that unmarried co-owners are ''limited to $1,000,000 of total 'aggregate' acquisition indebtedness.''[68] The Ninth Circuit found that this begs the question noting that the while the statute ''limits 'the aggregate amount treated' as acquisition or home equity debt, it does not say to whom or what the limits apply.''[69] The Ninth Circuit found that the CCA

> does not grapple with the statute's taxpayer specific definition of ''qualified residence'' or repeated references to a taxpayer's taxable year, nor does it explain how the married-person parenthetical is anything but surplusage under a per-residence reading of the statute.[70]

The majority also found that the six-year old CCA was the ''IRS's only pronouncement addressing how §163(h)(3)'s debt limits apply to co-owners.''[71] As such it was not an interpretation of long-standing duration or bolstered by other consistent IRS guidance on the same issue. For all of these reasons, the majority dismissed the credibility of the administrative guidance itself as well as the dissent's reliance on it.

The sixth and final section of the opinion set forth the Ninth Circuit's holding —

> We hold that 26 U.S.C. §163(h)(3)'s debt limit provisions apply on a per-taxpayer ba-

[65] The taxpayers also advanced a marriage penalty argument at the Tax Court. Given the disparate views on the interpretation of the parentheticals the ''penalty'' suggested in both instances might be better described as a ''filing status penalty'' — a much less onerous problem given the taxpayer's role in the election of filing status.

[66] *Voss v. Commissioner*, 796 F.3d 1051, 1071 (9th Cir. 2015) (Ikuta, J., dissenting) (citing *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2165–66, 2169 (2012) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (quoting *Skidmore*, 323 U.S. 134, 140 (1944)).

[67] Having inferred its interpretation from the language of the statute itself, without an examination of legislative history or other indicia of Congressional intent, it appears that the Ninth Circuit may have adopted a plain meaning interpretation of the statute itself. *Voss v. Commissioner*, 796 F.3d 1051 (9th Cir. 2015). *Compare United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989) (''The plain meaning of legislation should be conclusive'') and *Burlington Northern Railroad v. Oklahoma Tax Commission*, 481 U.S. 454, 461 (1987) (''Legislative history can be a legitimate guide to a statutory purpose obscured by ambiguity'').

[68] CCA 200911007.

[69] *Voss v. Commissioner*, 796 F.3d 1051, 1066 (9th Cir. 2015).

[70] *Id.*

[71] *Id.*

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ISSN 0148-8295

sis to unmarried co-owners of a qualified residence. We infer this conclusion from the text of the statute: By expressly providing that married individuals filing separate returns are entitled to deduct interest on up to $550,000 of home debt each, Congress implied that unmarried co-owners filing separate returns are entitled to deduct interest on up to $1.1 million of home debt each.[72]

Considerations

The Tax Court and the Ninth Circuit both examined the plain language of the statute but the two courts started at different points in the text and reached different conclusions.[73] The Tax Court's interpretation focused on a contextual reading of the statute and followed with a consideration of the specific language throughout the code section to support of its per-residence reading of the debt limitations. The Ninth Circuit began its inquiry with the two specific subsections that establish the debt limitations, finding persuasive language in the parenthetical phrases therein, and addressed the Tax Court's broader contextual argument only to distinguish it from its own conclusion. The dissent adopted a deferential stance to the agency interpretation, without offering a distinct rationale for analysis.

None of the writing judges delved into Congressional intent — and probably with good reason.[74] When the question of Congressional intent was presented to the University of Florida's Prof. Martin McMahon, Jr.,[75] he observed, ''I sincerely doubt that when section 163 was enacted in 1986 that Congress ever contemplated two unmarried people owning a house, let alone a house worth more than $1.1 million.''[76] Whether that was the case or not, it is unlikely that Congress expected the Ninth Circuit's result in *Voss* either when the home mortgage interest deduction was adopted or when the debt limitations were added. Though certainly advantageous to some individual taxpayers, the prospect that two unmarried co-owners might deduct twice as much home mortgage interest as married couples seems to be an unintended result.[77]

There, however, may be other implications in these decisions. As mentioned above, the National Center for Lesbian Rights filed an amicus brief with the Ninth Circuit, lead by Prof. Patricia Cain of the Santa Clara Law School and joined by 10 other law professors. The professors argued that §163(h)(3) should be allowed on a per-taxpayer basis and several points in the Ninth Circuit's majority opinion seem to have been influenced by the suggestions of the amici. The appellate court discussed the challenge presented by a definition of qualified residence that is at once both singular and plural but, because it largely adopted amici's primary position, it did not consider amici's alternative argument.[78] The amici argued in the alternative that the Tax Court's conclusion was not consistent with a per-residence reading of the statute. They argued that under the per-residence interpretation of the statute Dr. Sophy and Voss ''should aggregate the average debt outstanding on each of the two homes separately.''[79]

The alternative argument adopted the 2009 CCA formula and applied it to Dr. Sophy and Voss. Because the acquisition indebtedness on the Rancho Mirage home (approximately $460,000) did not meet the $1 million limitation threshold that residence — determined on a per-residence basis — was not subject to any limitation. The amici concluded that the parties should have been allowed to deduct all of the interest on that home. The total debt on the Beverly Hills home, in turn, was in excess of the indebtedness limitation and properly subject to the 2009 CCA limitation ratio formula. However, under a per-residence reading of the statute, the limitation formula should only consider the Beverly Hills debt in relation to the statutory indebtedness limit when calculating the percentage allowed for each taxpayer. The formula applied under examination, and ratified by the Tax Court, used the total aggregate debt to determine the percentage of allowable interest.[80] Amici's implicit argument is that if the debt limits apply per-residence

[72] *Voss v. Commissioner*, 796 F.3d 1051, 1068 (9th Cir. 2015).

[73] The Ninth Circuit did not characterize its interpretation specifically as a plain language reading of the statute, but it also made no mention of legislative history or Congressional intent.

[74] The Tax Court opinion indicated that there was nothing contrary to its position in the legislative history. *Voss v. Commissioner*, 138 T.C. 204, 213 (2012).

[75] The James J. Freeland Eminent Scholar, University of Florida Levin College of Law.

[76] *Debt Limitations for Mortgage Interest Deduction Applied on a Per-Taxpayer Basis*, 34 Tax Mgmt. Wkly. Rep. 1054 (Aug. 17, 2015).

[77] This result is more akin to an actual ''marriage penalty'' than the argument put forth by the government in its appellate brief. It is also the kind of result that makes news channel talk show producers giddy.

[78] *Voss v. Commissioner*, 796 F.3d 1051, 1063 (9th Cir. 2015).

[79] Brief for Nat'l Center for Lesbian Rights et. al. as Amici Curiae Supporting Petitioners at 14, *Voss v. Commissioner*, 796 F.3d 1051 (9th Cir. 2015).

[80] The Tax Court ratified this result but did not necessarily adopt it with specificity. The opinion ordered the parties to compute the liability for decision under Tax Court Rule 155. That computation did not occur because the taxpayers' lodged an appeal. Whether the parties might have adopted the calculation applied under examination or that proposed by the amici professors

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ISSN 0148-8295

then the calculation for determining the debt limit should also be applied per-residence. Under this analysis, Dr. Sophy and Voss should have been allowed to deduct approximately 57% of the interest on the Beverly Hills home and, as mentioned above, 100% of the interest paid on the Rancho Mirage mortgage — less than originally claimed but more than was allowed under examination.

The alternative argument becomes more interesting when you consider that the Tax Court is a court of national jurisdiction and Ninth Circuit's decision in *Voss* only applies to taxpayers in eight western states.[81] In every other state, the Tax Court's per-residence interpretation prevails.[82] We know the expected result under the facts presented here, but how might the argument apply if the Tax Court were presented with another scenario applying the per-residence rule?

Consider the hypothetical case of a 50-year old New York investment banker. He is divorced with no dependent children. His filing status is single. He owns two homes. One is a loft in Manhattan's Tribeca neighborhood. He acquired the loft with a $4 million mortgage. It is his primary residence under §121. He owns a second home in Long Beach Island on the New Jersey shore. He purchased that house with a $1.5 million mortgage. The second house is used as a residence by the taxpayer within the meaning of §280A. The taxpayer elects to treat the beach home as a ''qualified residence'' under §163(h)(4)(A)(i)(II). Together, the two homes are a qualifying residence under §163(h)(4)(A). In 2015, the taxpayer has an average balance of $3 million on the mortgage for the Tribeca home. The average indebtedness on the New Jersey home is exactly $1 million. The taxpayer calculates the home mortgage interest deduction for his 2015 return using the per-residence formula suggested by the *Voss* amici. He applies the 2009 CCA formula to determine the qualified residence interest limit on the Tribeca home ($1 million limit/$3 million acquisition debt) and deducts 33% of the mortgage interest paid. The taxpayer determines that the interest on the New Jersey note is 100% deductible per the same formula ($1million/$1 million) and deducts all of that interest. The taxpayer discloses the position on the return claiming substantial authority under the Tax Court's opinion in *Sophy v. Commissioner*. Has the single taxpayer filed an accurate return with regard to home mortgage interest?

This is only one of several open questions presented by this apparent split in authority. What if the taxpayer was a married couple filing jointly and the same facts regarding the residence, indebtedness, and location in the example above applied? Is the per-residence rule exclusive to unmarried co-owners or does it apply to all eligible taxpayers? Would the limitation rules be applied per-residence in accordance with the 2009 CCA formula? What about spouses filing separately with the same facts? Are the parenthetical limitations on those taxpayers per-residence? Would the 2009 CCA formula apply with a different numerator, e.g., $500,000?

It is unlikely that the Tax Court would amend its decision based on an administratively created formula, but that may not be the only argument. Certainly the Ninth Circuit and several tax professors thought not. We might not know the result today but if a patient, intrepid taxpayer came along — not unlike Dr. Sophy and Mr. Voss — maybe we could find out.

CONCLUSION

Paul may have been right. After looking into the glass he concluded, ''I know in part.''[83] And that is exactly what we have with the opinions in *Sophy* and *Voss* — a conclusion in part. We know the answer under these facts in California or Hawaii, but there are valid reasons to question ourselves in New York or Florida. It also seems that either interpretation — per-taxpayer or per-residence — might yield results that were not intended by Congress. The Tax Court and the Ninth Circuit both suggested that Congress could have written the words differently. But it did not and it also did not express the intent necessary to guide the words that might craft a solution.

In the end it reminds me of a song:

> Peter said to Paul / you know all those words we wrote
>
> Are just the rules of the game / and the rules are the first to go
>
> Girl in the War, Josh Ritter[84]

will never be known. Rule 155 does provide for a hearing by the court if the parties cannot agree to a computation.

[81] See §7482 and *Golsen v. Commissioner*, 54 T.C. 742 (1970). The Ninth Circuit encompasses the states of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington as well as the territories of Guam and the Northern Mariana Islands.

[82] Tax Court adheres its own precedent in the absence of contrary binding authority. *See, e.g., Metro Leasing & Development Corp. v. Commissioner*, 119 T.C. 8 (2002).

[83] These are Paul's words in at least one translation. 1 Corinthians 13:11, King James Version.

[84] Josh Ritter, The Animal Years (V2 Records, Mar. 20, 2006).

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ISSN 0148-8295