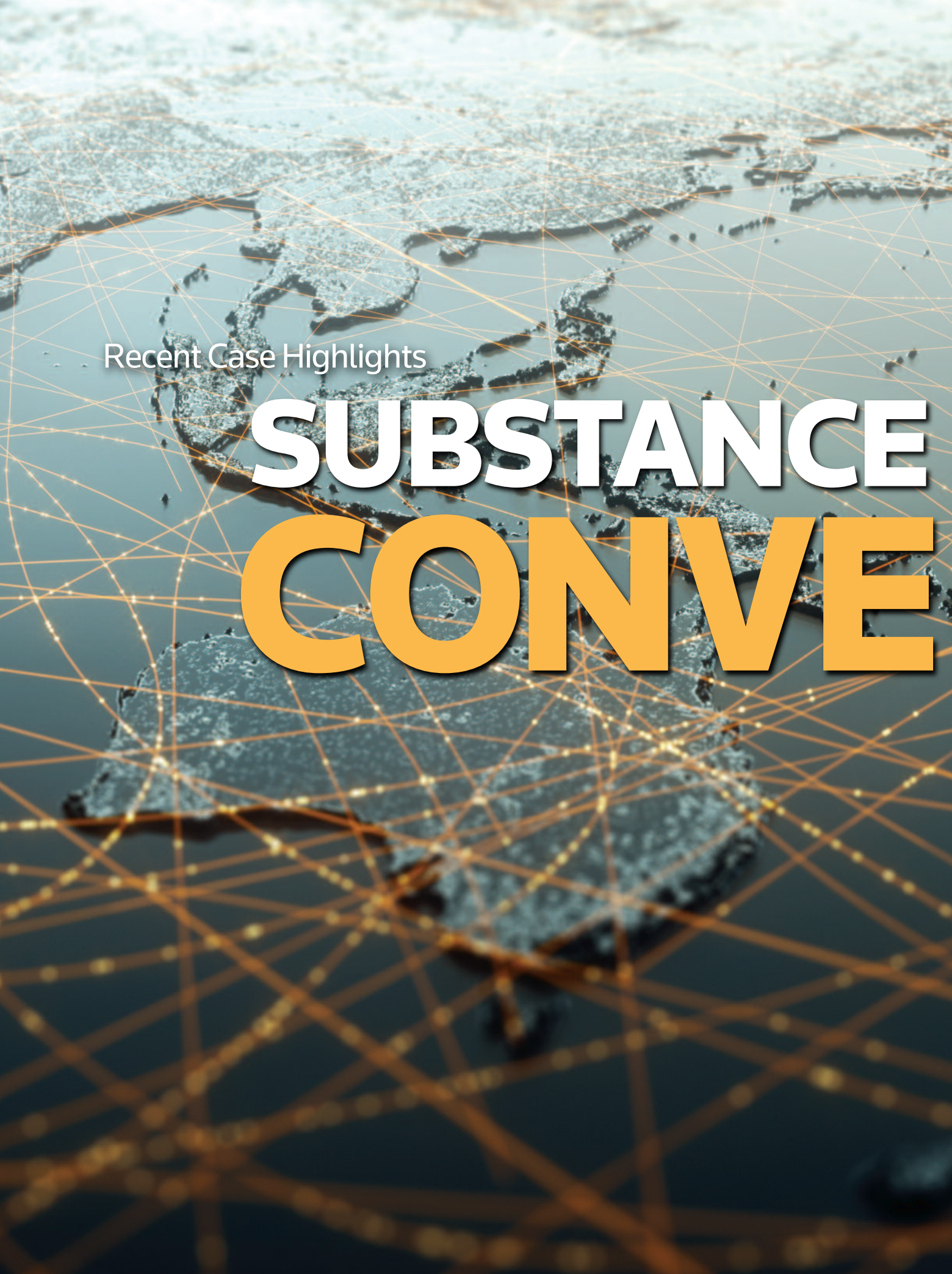
Recent Case Highlights
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The IRS imposes taxes on income earned by U.S. individuals outside the United States, unless an exception applies. Section 911, which establishes the foreign earned income exclusion ("FEIE"), constitutes one such exception.

HALE E. SHEPPARD, ESQ

& PROCEDURE RGENCE in International Tax Disputes

Globalization is triggering more tax disputes with the Internal Revenue Service ("IRS"), and winning such clashes requires knowledge of *both* substantive international tax law and complicated procedures. A good example is *Mattson v. United States*, a recent case with lots of interesting elements. It involves U.S. citizens working overseas, claims for special tax benefits for expatriates, the effect of Closing Agreements with the IRS, novel interpretations of treaties, refund actions and, of course, procedural twists.[1] Using *Mattson* as a starting point, this article shows how two disciplines previously thought to be unrelated, international tax and tax procedure, often converge in modern battles with the IRS.

Overview of the Foreign Earned Income Exclusion

A taxpayer's "gross income" generally encompasses "all income from whatever source derived."[2] The IRS, therefore, imposes taxes on income earned by U.S. individuals outside the United States, unless an exception applies.[3] Section 911, which establishes the foreign earned income exclusion ("FEIE"), constitutes one such exception. This provision allows individuals who meet requirements focused on residency or physical presence in a foreign country to exclude from their gross income certain "foreign earned income."[4] This term encompasses various types of foreign-source income (*e.g.*, wages, salaries, professional fees, and other compensation) attributable to services performed by a taxpayer in a foreign country.[5] These tax benefits can be significant, with eligible expatriates able to exclude nearly $108,000 from their gross income in 2020.[6]

A qualified individual for purposes of Section 911 is one whose "tax home" is in a foreign country, and who is a bona fide resident of a foreign country for at least one full year, or who is present in a foreign country for at least 330 full days during a year.[7] A qualified individual must file a Form 2555 (Foreign Earned Income) with his Form 1040 (U.S. Individual Income Tax Return) or Form 1040X (Amended U.S. Individual Income Tax Return), as appropriate, to claim the FEIE.[8] Once a taxpayer makes such election for a particular year, it applies to all subsequent years, until revoked.[9]

Overview of Closing Agreements

The IRS can enter into a Closing Agreement with any taxpayer, concerning any tax, for any period.[10] The rationales for the IRS to conclude a matter via a Closing Agreement are expansive. Specifically, the IRS can utilize a Closing Agreement in any case where there appears to be a benefit in having it "permanently and conclusively closed," or if the taxpayer presents "good and sufficient reasons" for a Closing Agreement, and the IRS will not sustain any disadvantage.[11] The IRS, in its sole discretion, decides whether the requisite criteria have been satisfied in a particular situation.[12] The IRS uses different types of Closing Agreements depending on the circumstances, with the main ones being Form 866 (Agreement as to Final Determination of Tax Liability) and Form 906 (Closing Agreement as to Final Determination Covering Specific Matters).[13] With respect to finality, a Closing Agreement generally is "final and conclusive;" the IRS cannot reopen any of the matters covered, and in any subsequent lawsuit, action or proceeding, a Closing Agreement shall not be annulled, modified, set aside, or disregarded.[14] There are exceptions, of course. The general rules are inapplicable where the taxpayer engaged in fraud, malfeasance, or misrepresentation of material fact.[15]

The IRS warns its personnel about the permanence of Closing Agreements, explaining that "[b]ecause of the finality with which [Closing Agreements] are imbued, it is extremely important that they be carefully drafted."[16] The IRS further admonishes that, in the case of a dispute with a taxpayer regarding a Closing Agreement, the courts might consider other evidence, but the focus will be on the specific language of the Closing Agreement itself.[17] The IRS also emphasizes to its troops that they should prepare Closing Agreements "with great caution" because any ambiguities will be resolved against the drafter, the IRS.[18]

A recent Tax Court decision featured a primer on contractual principles, as they apply to Closing Agreements. The Tax Court provided the following guidance: Closing Agreements generally are final, conclusive, and binding on the parties; Closing Agreements may not be annulled, voided, modified, disregarded or rescinded, unless there is a showing of fraud, malfeasance, or misrepresentation of material fact; Closing Agreements are strictly construed to encompass only the issues expressly addressed therein; Recitals in a Closing Agreement are explanatory and provide insight regarding the intent of the parties, but they are not substantive provisions; Closing Agreements are contracts and thus subject to the normal rules of contract interpretation; Closing Agreements are interpreted according to the intent of the parties at the time they contracted; Closing Agreements must be read as a whole, taking into account the context; and Courts cannot consider extrinsic evidence (i.e., anything beyond the mere words of the Closing Agreement) to determine intent, except in situations where the language of the Closing Agreement creates ambiguity.[19]

Overview of Tax Refund Actions

Taxpayers sometimes overpay their taxes and, well, they want their money back. Seeking a refund from the IRS is a surprisingly complicated process. The first step to recouping cash from the IRS is for a taxpayer to file a timely Claim for Refund.[20] A taxpayer normally must file a Claim for Refund within three years of the time that he filed the relevant tax return (regardless of whether such return was filed timely or late), or within two years of the time that he paid the relevant taxes, whichever period expires later.[21] Practitioners often call these the "Three-Year Period" and the "Two-Year Period," respectively. Even if a taxpayer files a timely Claim for Refund, and even if he ultimately prevails, he can only recover certain amounts. Strict, unique rules exist in this regard. In particular, if the taxpayer files a Claim for Refund within the Three-Year Period, then the refund will not ex-

Hale E. Sheppard, Esq (B.S., M.A., J.D., LL.M., LL.M.T.) is a Shareholder in the Tax Controversy Section and Chair of the International Tax Section of Chamberlain Hrdlicka. Hale specializes in tax audits, tax appeals, and tax litigation. You can reach Hale by phone at (404) 658-5441 or by e-mail at hale.sheppard@chamberlainlaw.com.

1 *Mattson v. United States*, 127 AFTR 2d 2021-1539 (Ct. Fed. Claims April 15, 2021). The author obtained and reviewed various documents concerning this case in preparing the article, including the exhibits to the Complaint filed July 31, 2019, Answer and Additional Defense filed October 30, 2019, Reply in Further Support of the Motion to Dismiss the Complaint filed April 24, 2020; Supplemental Reply Brief in Support of the Motion to Dismiss the Complaint filed November 4, 2020, and Response to Supplemental Reply Brief filed November 23, 2020.

2 Section 61(a).

3 Sections 1, 11, 641, 701, and 7701(b)(1); Treas. Reg. § 1.1-1(b); *Specking v. Commissioner*, 117 T.C. 95, 101-102 (2001).

4 Section 911(a); Treas. Reg. § 1.911-1(a); Section 911(a); Treas. Reg. § 1.911-1(a); Section 911(c); Treas. Reg. § 1.911-4.

A Closing Agreement generally is "final and conclusive"

ceed the amount that the taxpayer paid during the three years immediately before the date on which the taxpayer filed the Claim for Refund, "plus the period of any extension of time for filing the return."[22] However, if the taxpayer files a Claim for Refund within the Two-Year Period, then the amount of refund allowed by the IRS will not surpass the amount that the taxpayer paid during the two years preceding the date on which the taxpayer filed the Claim for Refund.[23]

Claims for Refund, in addition to being filed with the IRS in a timely manner, must meet a list of requirements. For instance, they must explain in sufficient detail the factual, legal, tax, and/or procedural grounds on which the taxpayer deserves a refund, contain a written declaration of accuracy made under penalties of perjury, utilize the correct IRS form, address only one type of tax for one tax period, and be filed with the proper IRS Service Center.[24] A Claim for Refund must contain several things, including a statement of the grounds for the refund, "verified by a written declaration that it is made under the penalties of perjury."[25] The regulations warn that any Claim for Refund that fails to comport with this requirement "will not be considered for any purpose" as a Claim for Refund.[26]

A taxpayer generally executes his own Claim for Refund, but others can do so on his behalf. This occurs, for instance, where an individual files his Form 1040, later dies, and then the executor of his estate files a Claim for Refund.[27] This could also happen when an attorney or accountant decides to complete and file a Claim for Refund for the taxpayer. The regulations allow such representatives to submit

5 Section 911(b)(1)(A); Section 911(d)(2)(A).
6 IRS Publication 54, Tax Guide for U.S. Citizens and Resident Aliens Abroad (2020), pg. 20.
7 Section 911(d)(1). A "tax home" is generally "the vicinity of the taxpayer's principal place of employment and not where his or her personal residence is located." *See* Section 911(d)(3); *Mitchell v. Commissioner*, 74 T.C. 578, 581 (1980).
8 Treas. Reg. § 1.911-7; Treas. Reg. § 1.911-7(a)(2)(i).
9 Section 911(e)(1); Treas. Reg. § 1.911-7(a)(1).
10 Section 7121(a); Treas. Reg. § 301.7121-1(a); Treas. Reg. § 601.202(a).
11 Treas. Reg. § 301.7121-1(a); Treas. Reg. § 601.202(a)(2).
12 Revenue Procedure 68-16, Section 3.01.
13 Treas. Reg. § 601.202(b); Revenue Procedure 68-16, Sections 6.01 and 6.02; IRM § 8.13.1.2.1 (5-25-2018).
14 Section 7121(b); Treas. Reg. § 301.7121-1(c).
15 Section 7121(b).
16 Revenue Procedure 68-16, Section 7.01.
17 Revenue Procedure 68-16, Section 7.02.
18 IRM § 8.13.1.2.1(1) (5-25-2018).
19 *Crandall v. Commissioner*, T.C. Memo 2021-39.
20 Section 6511(a).
21 Section 6511(a); Treas. Reg. § 301.6511(a)-1(a).
22 Section 6511(b)(2)(A); Treas. Reg. § 301.6511(b)-1(b)(i).
23 Section 6511(b)(2)(B); Treas. Reg. § 301.6511(b)-1(b)(ii).
24 Section 6402(a); Treas. Reg. § 301-6402-2.
25 Treas. Reg. § 301.6402-2(b)(1).
26 Treas. Reg. § 301.6402-2(b)(1).
27 Treas. Reg. § 301.6402-2(e).

Aerial view of Pine Gap on the outskirts of Alice Springs in central Australia.
REUTERS

a Claim for Refund in certain circumstances, but warn that they must enclose a valid Form 2848 (Power of Attorney).[28] The Form 2848 contains explicit instructions in this regard. For starters, Line 5a on the front page of Form 2848 tells taxpayers to identify the specific acts their representatives are authorized to take, such as "sign a return."[29] The corresponding instructions state that, "unless specifically provided in the [Form 2848], this authorization does *not* include . . . the power to sign returns."[30] The instructions go on to clarify that, if a taxpayer wants to enable his representative to file a return for him, including a Claim for Refund, then he must check the proper box in Line 5a of Form 2848 and include a statement disclosing the specific justification under the regulations.[31]

A taxpayer can file a Claim for Refund, later recognize its shortcomings, and then fix matters before the IRS has rendered a decision. The IRS explains that a taxpayer can remedy a defect by filing an amendment or supplement, which, together with the materials in the initial Claim for Refund, adequately describe the grounds for the refund and comply with all other requirements.[32] Things can function the other way around, too. For example, instead of the taxpayer discovering flaws with the initial Claim for Refund and swiftly "perfecting" it by filing an amendment or supplement, the IRS can choose to overlook the deficiencies and process the Claim for Refund anyway. The IRS acknowledges that this happens with surprising frequency: "If a refund claim does not contain a sufficient statement of grounds and facts indicating the basis of the claim, it will still be treated as a valid claim if the [IRS] considers the claim on its merits and is thereby deemed to have waived the defect. Similarly, if a claim is defective because it does not meet one of the other requirements set forth in the regulations (*e.g.*, if the claim is on the wrong form), the [IRS] will be deemed to have waived the defect if it is clear that the [IRS] understood the particular claim advanced by the taxpayer and considered it."[33]

The courts have long held that an "informal" Claim for Refund will suffice, provided that it is in writing, includes a request for refund for specific tax periods, informs the IRS of the basis for the refund, and provides sufficient information to allow the IRS to examine the Claim for Refund.[34] The courts have recognized that informal claims come in many varieties, including letters by taxpayers to the IRS, objections noted on the backside of checks to the IRS, oral statements by taxpayers recorded by IRS personnel, and demands presented on incorrect forms.[35]

If the IRS formally denies a Claim for Refund (fully or partially) by issuing a Notice of Disallowance, then the taxpayer can seek immediate help from the courts by initiating a Suit for Refund in the

proper District Court or Court of Federal Claims ("CFC").[36] The taxpayer can also file a Suit for Refund if the IRS simply ignores the taxpayer, failing to respond to his Claim for Refund for at least six months.[37] Relevant law confirms that only District Courts and the CFC, not the Tax Court, can decide refund cases.[38]

Two more points are important here. First, the law mandates that a prerequisite to a Suit for Refund with the courts is the previous filing of a valid Claim for Refund with the IRS. It clarifies that taxpayers cannot file a Suit for Refund "until a claim for refund or credit has been duly filed with the [IRS]."[39] Second, before filing a Suit for Refund, the taxpayer generally must pay the entire amount in dispute.[40]

Analysis of the Case

With this basic understanding of the key issues under our belts, we now turn to *Mattson*. The Joint Defense Facility Pine Gap is a satellite surveillance base operated by the U.S. and Australian governments. In 1966, the two governments executed an agreement regarding various aspects of Pine Gap, including how U.S. individuals working there would be taxed ("Pine Gap Agreement").[41] Article 9(1) of the Pine Gap Agreement states the following:

> Income derived wholly and exclusively from performance in Australia of any contract with the United States Government in connection with the facility by any person or company (other than a company incorporated in Australia being a contractor, sub-contractor, or one of their personnel, who is in or is carrying on business in Australia solely for the purpose of such performance, *shall be deemed not to have been derived in Australia, provided that it is not exempt, and is brought to tax, under the taxation laws of the United States.*

The IRS and Australian tax authorities developed procedures in the 1980s designed to alleviate tax complexity and compliance burdens for U.S. individuals working at Pine Gap. Such procedures allow U.S. individuals to avoid being subjected to income taxes in Australia and the need to file tax returns in Australia. To obtain these benefits, taxpayers must sign a Closing Agreement with the IRS, which mandates, among other things, that the U.S. individuals will report on their annual Forms 1040 all income made at Pine Gap, will forego the FEIE with respect to such income, and will enclose a copy of the Closing Agreement with their Forms 1040. The IRS emphasizes that (i) entering into a Closing Agreement with the IRS is optional, not required, (ii) neither the IRS nor the taxpayer can revoke a Closing Agreement once it takes effect, and (iii) if a taxpayer signs a Closing Agreement (to avoid Australian taxes) and also claims the FEIE (to avoid U.S. taxes on income earned in Australia), then any refund issued by the IRS constitutes an "erroneous refund," must be repaid, and could trigger penalties.[42]

Main Facts of the Case. The taxpayers in *Mattson*, a married couple, lived in Australia and worked for the Raytheon Company at Pine Gap. In connection with their employment, the taxpayers executed a Closing Agreement with the IRS in 2015, which specifically prohibited them from claiming the FEIE in connection with their work at Pine Gap. Based on other Tax Court cases involving similar issues, the Closing Agreement presumably contained the following understandings and duties:

> WHEREAS, prior to the execution of this closing agreement, the said taxpayer voluntarily agrees to waive his or her right to any election under Code Section 911(a) for the income specified herein for the taxable period(s)
>
> NOW IT IS HEREBY DETERMINED AND AGREED for federal income tax purposes that . . .
>
> the said taxpayer shall not at any time during or after his or her presence in Australia make any election under Code Section 911(a) with respect to income paid or provided to said taxpayer as consideration for services performed for the employer at [Pine Gap] in Australia; and
>
> the said taxpayer irrevocably waives and foregoes any right that he or she may have to make any election under Code Section 911(a) with respect to income paid or provided to said taxpayer as consideration for services performed for the employer at [Pine Gap] in Australia; and
>
> the said taxpayer agrees to attach a copy of this closing agreement to his or her United States Income Tax Return.[43]

In April 2017, the taxpayers filed their Form 1040 for 2016 and did *not* attempt to benefit from the FEIE. This was consistent with the terms of the Closing Agreement. Later, the taxpayers hired a U.S. law firm ("Law Firm"), which prepared a Claim for Refund, a Form 1040X, this time seeking tax relief under the FEIE. A statement attached to the Claim for Refund provided the following justifications for the change of heart:

> Taxpayer is taking the position that his remuneration for dependent personal services performed for that Nation Security Defense Contracting Company, Raytheon Company, is de facto government service given the extensive FBI and security clearances required and the principal-agent relationship between the United States government and Raytheon Company. On that basis, the United States has exclusive taxing rights to this income. The

28 Treas. Reg. § 301.6402-2(e); Treas. Reg. § 1.6012-1(a)(5) (explaining that when an agent files a return for a taxpayer it must be accompanied by a "properly completed" Form 2848 authorizing such agent to represent the taxpayer in preparing, executing, and filing the return).

29 Form 2848 (Power of Attorney and Declaration of Representative) (Rev. January 2021), pg. 1.

30 IRS Instructions for Form 2848 (Rev. January 2021), pg. 2 (emphasis added).

31 IRS Instructions for Form 2848 (Rev. January 2021), pg. 6.

32 IRS General Counsel Memorandum 38786.

33 Id.

34 *See, e.g.*, *United States v. Kales*, 314 U.S. 186, 195 (1941); *Miller v. United States*, 949 F.2d 708, 711 (4th Cir. 1991); *D'Amelio v. United States*, 679 F.2d 313 (3rd Cir. 1982).

35 *See, e.g.*, *United States v. Kales*, 314 U.S. 186, 195 (1941); *Crenshaw v. Hecka*, 237 F.2d 372 (4th Cir. 1956); *Stevens v. United States*, 2007 WL 2556592 (N.D. Cal. 2007); IRS General Counsel Memorandum 38786.

36 Section 6532(a)(1); Treas. Reg. § 301.6532-1(a); Section 7422(a).

37 Id.

38 28 U.S.C. § 1346(a)(1)

39 Section 7422(a); Treas. Reg. § 301.6402-2(a)(1).

40 *Flora v. United States*, 362 U.S. 145 (1960). *See also Rocovich v. United States*, 933 F.2d 991 (Fed. Cir. 1991) (explaining that payments made after the filing of a Suit for Refund will not rectify the issue).

41 Agreement between the Government of the Commonwealth of Australia and the Government of the United States of America relating to the Establishment of a Joint Defense Space Research Facility, Australian Treaty Series 1966 No. 17 (Dec. 9, 1966).

42 www.irs.gov/individuals/international-taxpayers/foreign-earned-income-exclusion-and-the-pine-gap-facility

43 This language derives from a Closing Agreement described in *Abeyta v. Commissioner*, T.C. Summary Opinion 2005-244, which also involves tax issues related to Pine Gap.

> Australian Tax Office may not tax his salary. Furthermore, any purported Closing Agreement to the contrary is invalid as being secured under duress in violation of basic principles of contract law; it is further invalid for failing to comply with regulations promulgated by the U.S. treasury. Taxpayer is now claiming the [FEIE].[44]

The Claim for Refund also enclosed a Form 8833 (Treaty-Based Return Position Disclosure), indicating that the Australian wages were not taxable in the United States thanks to Article 19 of the income tax treaty between the United States and Australia ("Treaty").[45] This provision, centered on treatment of "governmental remunerations," states the following:

> Wages, salaries, and similar remuneration, including pensions, paid from funds of one of the [United States], of a state or other political subdivision thereof, or of any agency or authority of any of the foregoing for labor or personal services performed as an employee of any of the above in the discharge of governmental functions to a citizen of [the United States] shall be exempt from tax by [Australia].[46]

According to the Claim for Refund, the attached statement, Form 8833, and other materials, the taxpayers believed that they were entitled to claim the FEIE on the following grounds: (i) The Pine Gap Agreement and its Article 9(1), enacted in 1966, was superseded by the Treaty, signed in 1983; (ii) Employees of private defense contracting companies, like the taxpayers working for the Raytheon Company, are exempt from tax in Australia under Article 19 of the Treaty; and (iii) The Closing Agreement that the taxpayers signed with the IRS is invalid because it was signed under duress and/or it contains material misrepresentations about tax duties.[47] The taxpayers did not personally sign the Claim for Refund; only one attorney at the Law Firm did so. Moreover, the attorney did not enclose a Form 2848 with the Claim for Refund authorizing the attorney, or anyone else at the Law Firm, to sign and file the Claim for Refund.

In November 2018, the Law Firm sent the IRS a Form 2848 indicating that three of its attorneys were authorized to represent the taxpayers generally. The Form 2428 had a few problems, though. The taxpayers never even signed the Form 2848; rather, one of the attorneys initialed it for them, thereby authorizing herself to act for the taxpayers. Additionally, the Form 2848 failed to check the box on Line 5a indicating that the attorneys at the Law Firm had the power to "sign a return," such as a Claim for Refund, for the taxpayers.

In April 2019, the IRS sent a Letter 569 to the taxpayers, indicating that the IRS "proposed to disallow" the Claim for Refund because its records showed that the taxpayers were employees of the Raytheon Company in Australia, they might have entered into a Closing Agreement with the IRS waiving their right to claim the FEIE, the waiver covers income paid by the Raytheon Company, and the Pine Gap Agreement liberates taxpayers from Australian income taxes and filing duties in exchange for not claiming the FEIE. The next month, May 2019, the Law Firm sent a letter to the IRS seeking review by the Appeals Office of the Letter 569. The IRS then sent the taxpayers a second Letter 569, confirming that the IRS "proposed to disallow" the Claim for Refund for the same reasons set forth in the first Letter 569.

Soon thereafter, on July 31, 2019, the Law Firm started a Suit for Refund by filing a Complaint with the CFC on behalf of the taxpayers. At some point *after* the commencement of the Suit for Refund, the IRS issued the taxpayers a formal Notice of Disallowance of their Claim for Refund. The U.S. Department of Justice ("DOJ"), which handles tax refund litigation, filed a Motion with the CFC in March 2000 asking it to dismiss the case altogether because the CFC supposedly lacked jurisdiction to consider it in the first place.

Main Positions of the Parties. The DOJ took the position that the CFC lacked authority to hear the case at all because the taxpayers neither personally signed the Claim for Refund for 2016 nor enclosed

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44 2016 Form 1040X, Statement 1, filed for the taxpayers.

45 Double Taxation on Income Convention between the United States of America and Australia (1983); Technical Explanation of the Convention between the Government of the United States of America and the Government of Australia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income (1983).

46 2016 Form 1040X, Form 8833 (Treaty-Based Return Position Disclosure under Section 6114 or 7701(b)), filed for the taxpayers.

47 *Allen et al v. Northrop Grumman, AECOM General Dynamics, and Raytheon Company*, U.S. District Court, Northern District of TX, Case 3:19-cv-00491-K, Class Action Original Complaint (Feb. 26, 2019) (suit filed by the Law Firm involving allegation of improper disclosure by the IRS of confidential data related to employment and tax issues of various U.S. individuals working at Pine Gap).

48 Section 6061(a)

49 Section 6065; Treas. Reg. § 1.6065-1(a).

50 Treas. Reg. § 301.6402-2(b)(1); Treas. Reg. § 301.6402-2(e); Treas. Reg. § 601.503(a)(6).

51 Although the CFC did not dwell on this issue of statutory interpretation in *Mattson*, it is important to note that federal courts have consistently held that that when Congress uses the terms "shall" and "must," it is giving a command, imposing a mandatory duty, and creating an obligation that leaves no room for administrative discretion. *See, e.g., Middle Rio Grande Conservancy Dist. v. Babbitt*, 206 F. Supp. 2d 1156, 1176 (N.M. 2000) ("[W]hen a statute uses the word 'shall', Congress has imposed a mandatory duty upon the subject of the command."); *Commonwealth of Pa. v. Weinberger*, 367 F. Supp. 1378, 1381 (D.C. 1973) ("Statutory language that an official 'shall' perform an act has been repeatedly held to be mandatory in nature."); *Campbell v. Pan American World Airways, Inc.*, 668 F. Supp. 139, 142 (E.D. N.Y. 1987) ("*Will*, like *shall*, is a mandatory word."); *In re Davenport*, 175 B.R. 355, 358 (E.D. Ca. 1994) ("There is perhaps no less ambiguous word used in statutes than 'shall.'); *Keith v. Rizzuto*, 212 F.3d 1190, 1193 (10th Cir. 2000) ("It is a basic canon of statutory construction that use of the word 'shall' indicates a mandatory intent."); *Lexecon Inc. v. Milberg*, 523 U.S. 26, 35 (1998) ("The [statute's] instruction comes in terms of the mandatory "shall," which normally creates an obligation impervious to judicial discretion."); *In re Barbieri v. Raj Acquisition Corp.*, 199 F.3d 616, 619 (2nd Cir. 1999) ("The term 'shall,' as the Supreme Court has reminded us, generally is mandatory and leaves no room for the exercise of discretion by the trial court."); *McMullen v. United States*, 50 Fed. Cl. 718, 725 (2001) ("As a matter of statutory construction, the word 'may' usually connotes permissive discretion, as opposed to the word 'shall,' which connotes a mandatory task."); *Ace Prop. & Cas. Ins. Co. v. Federal Crop Ins. Corp.*, 357 F. Supp. 2d 1140, 1150 (S.D. Iowa 2005) ("The term 'shall' is mandatory in nature."); *International Data Products Corp. v. United States*, 64 Fed. Cl. 642, 650 (2005) ("It is well settled that 'shall' indicates a command."); *Association of Civilian Technicians v. Federal Labor Relations Auth.*, 22 F.3d 1150, 1153 (D.C. 1994) ("The word 'shall' generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive."); *Plaut v. Spendthrift Farm, Inc.* 1 F. 3d 1487, 1490 (6th Cir. 1993) ("Where the word 'shall' appears in a statutory directive, "Congress could not have chosen stronger words to express its intent that [the specific action] be mandatory."); *Forest Guardians v Babbitt*, 174 F.3d 1178, 1187 (10th Cir. 1999) ("The Supreme Court and this circuit have made it clear that when a statute uses the word 'shall,' Congress has imposed a mandatory duty upon the subject of the command."); *United States v. Myers*, 106 F.3d 936, 941 (10th Cir. 1997) ("It is a basic canon of statutory construction that use of the word 'shall' indicates a mandatory intent.").

The signature verification obligations relating to Claims for Refund are statutory in nature, not regulatory

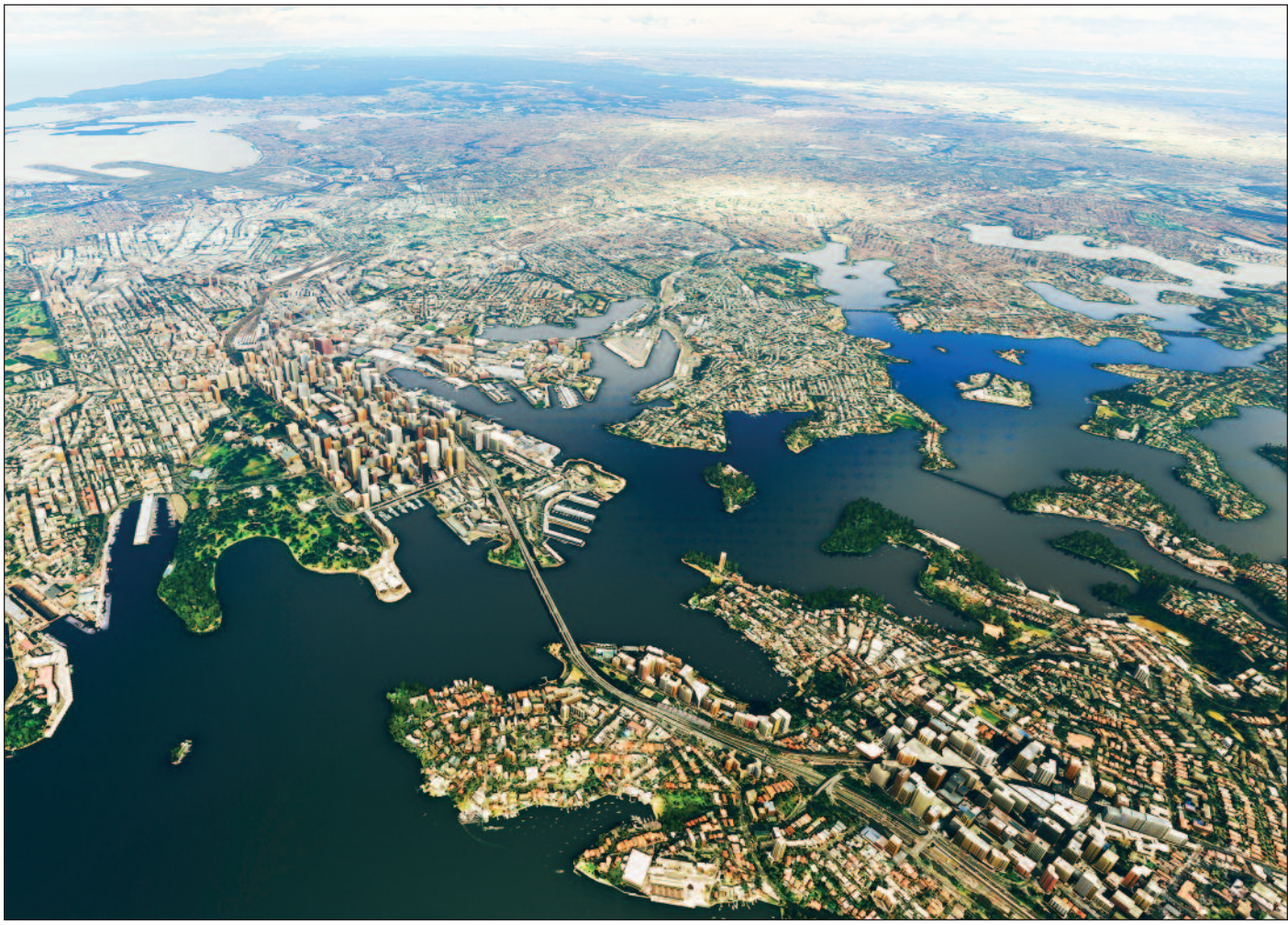
an appropriate Form 2848 with it. The taxpayers do not dispute those facts because, well, how could they? Instead, they argue that the Claim for Refund was valid nonetheless because the IRS supposedly waived the technical problems when it examined the substance of the Claim for Refund. The taxpayers contend, alternatively, that they first filed an "informal" Claim for Refund and later perfected it.

Analysis by the Court. The CFC held in favor of the DOJ with respect to the following three arguments.

1. Claims for Refund and Signing Requirements. The CFC began by pointing to various tax provisions and regulations requiring a taxpayer to file a valid Claim for Refund as a precondition to filing a Suit for Refund, and emphasizing that personal execution of certain documents by the taxpayer is key. For instance, the CFC cites Section 7422, which states that taxpayers cannot file a Suit for Refund until after a Claim for Refund "has been duly filed with the [IRS], according to the provisions of law in that regard, and the regulations of the [IRS] established in pursuance thereof." The CFC then highlights Section 6061, which generally states that any return, statement or other document that must be filed with the IRS "shall be signed in accordance with the forms and regulations" created by the IRS.[48] Next, the CFC mentions Section 6065, which demands that any return, declaration, statement, or other document required to be filed with the IRS "shall contain or be verified by a written declaration that it is made under the penalties of perjury."[49] The CFC points out that, when it comes to Claims for Refund, they "must be verified by a written declaration that is made under the penalty of perjury," they must enclose a valid Form 2848, and the Form 2848 must reflect a "clear expression of the taxpayer's intention concerning the scope of authority granted to the recognized representative(s)."[50] Finally, the CFC explained that several courts have previously examined the question of whether the IRS can waive the signature verification requirement for Claims for Refund. They determined that, no, the IRS cannot do so because such obligation is statutory (*i.e.*, derived from legislation enacted by Congress), not regulatory (*i.e.*, originating in regulations or other administrative guidance issued by the IRS).

The CFC effortlessly dispensed with the first argument by the taxpayers, applying the law described above. It concluded that "the undisputed facts in this case make it clear" that the taxpayers did not file a valid Claim for Refund, such that the CFC lacks jurisdiction.

2. Inapplicability of the Waiver Doctrine. With respect to the secondary position of the taxpayers, the response by the CFC was that it had already been asked and answered, thank you very much. The CFC acknowledged that the Supreme



Court has held that the IRS can waive certain deficiencies in a Claim for Refund by taking action on it, but it cannot ignore "statutory" requirements. The CFC then explained that the signature verification obligations relating to Claims for Refund are statutory in nature, not regulatory. The CFC went on to underscore that the tax provisions relevant in *Mattson* state that taxpayers "must," "shall" or "are required to" take particular actions, like personally signing Claims for Refund or expressly empowering representatives to do so on their behalf.[51] The CFC also pointed out that it had previously ruled that the signature verification duty is statutory and thus not susceptible to waiver by the IRS "in several cases that are essentially identical."[52] Finally, as an homage to judicial precedent, the CFC explained that two different Courts of Appeals have arrived at the same exact conclusion.[53]

3. Rejection of the Informal Claim for Refund Argument. The fallback position for the taxpayers was that they filed a timely "informal" Claim for Refund with the IRS. The DOJ urged the CFC to discard that argument because of one critical issue, timing. The taxpayers could not benefit from the "informal" Claim for Refund, unless they had "perfected" it with the IRS before the issuance of the Notice of Disallowance, and thus before the start of a Suit for Refund. This clearly did not occur, as various documents that the taxpayers filed with the CFC indicated they intended to file "an amendment" to the Claim for Refund that "cures all defects."

The CFC sided with the DOJ, explaining that it was "not persuaded" by the contention that the "informal" claim doctrine "revives" the Claim for Refund for 2016 because the taxpayers did not file an amended Claim for Refund to correct the deficiencies before commencing the Suit for Refund.[54]

Interesting and Obscure Issues

Mattson provoked other interesting issues that were not addressed by the CFC.

No Strangers to Tax Issues Concerning Pine Gap. *Mattson* focused on the FEIE, but other tax issues pertinent to U.S. individuals working at Pine Gap are not new to the IRS or the courts. More than a decade ago, the Tax Court entertained a series of cases involving taxpayers attempting to exclude from their gross incomes amounts for housing provided by employers in connection with their work at Pine Gap.[55] The details in each case vary, but the basic facts are similar. The taxpayers, as a condition of their employment with government contractors, signed Closing Agreements with the IRS prohibiting them from claiming the FEIE in connection with wages derived from work at Pine Gap. In addition

to paying the taxpayers a salary, the government contractors supplied "assigned housing," at no cost, near Pine Gap. The taxpayers received annul Forms W-2 (Wage and Tax Statement), reflecting their salaries, along with Forms 1099-MISC (Miscellaneous Income), showing the value of the rent for the unpaid housing.

The taxpayers in *Mattson* did not file Claims for Refund to reduce U.S. taxes on their wages. However, they did take steps to avoid taxation on the free housing. The taxpayers advanced the position they could exclude the value of the unpaid rent, shown on Forms 1099-MISC, under Section 912 or Section 119. The former pertains to certain "allowances," such as cost-of-living allowances, received by civilian employees of the U.S. government. The latter deals with certain "lodging" provided by an employer under certain circumstances. The Tax Court denied the exclusions related to Pine Gap because the taxpayers were not working for the U.S. government, thereby rendering them ineligible for Section 912, and the lodging supplied was not located on the "business premises" of the employers, ruling out the benefits of Section 119.

Substantive Tax Issues Left Unresolved. The CFC never reached the substantive tax issues in *Mattson*, and the parties did not submit complete arguments on such issues, because the CFC ruled that the taxpayers failed to file a proper Claim for Refund in the first place. Nevertheless, we have a good idea of where the taxpayers and the IRS diverge. As explained above, one can assemble the position of the taxpayers from the Claim for Refund, the statement attached to it, Form 8833, and other materials produced by the Law Firm. They believe that they have the right to claim the FEIE because (i) the Pine Gap Agreement supposedly was superseded by the Treaty, such that Article 9(1) of the former, on which the FEIE prohibition is based, became moot, (ii) employees of private defense contractors, like the Raytheon Company, supposedly are exempt from tax in Australia thanks to Article 19 of the Treaty, and (iii) the Closing Agreement that the taxpayers signed with the IRS supposedly is invalid.

The IRS has a completely different perspective, of course, rejecting all three arguments by the taxpayers. First, the IRS summarizes its stance on Article 9(1) of the Pine Gap Agreement as follows:

> Pursuant to the Pine Gap Agreement, Australia exempts your [Pine Gap] employment income from Australia tax if you are in Australia solely to work at [Pine Gap] and that income is not exempt, and is brought to tax, in the United States. If you exclude your [Pine Gap] employment income from your U.S. gross income under the [FEIE], however (and thereby exempt that income from U.S. tax), that income is assessable in Australia under Australian tax law. Under ordinary tax principles, your employer would withhold and remit U.S. and Australian income taxes on your behalf throughout the year to the IRS and [Australian Tax Office], respectively, as appropriate. Then, you would file individual income tax returns with the IRS and [Australian Tax Office] annually to pay additional taxes due or claim a refund, depending on your tax situation, including whether you claim the [FEIE] for your [Pine Gap] employment income.[56]

The IRS disagrees about the effect of Article 19 of the Treaty, too. It explains that Article 19 only applies to individuals paid by the U.S. government, not to those paid by contractors to the U.S. government, like the Raytheon Company.[57] The IRS goes on to reject the notion that the Treaty, enacted in 1983, somehow rendered the earlier Pine Gap Agreement void.

> If an international agreement does not contain language addressing the impact of an earlier agreement, provisions of the earlier international agreement, if it has not been terminated or suspended, apply to the extent they are consistent with provisions in the later agreement. In other words, where possible, treaties should be read harmoniously with other later enacted international agreements and domestic law… The Treaty and the Pine Gap Agreement operate in harmony with one another. As a result, the Treaty does not nullify the Pine Gap Agreement, which provides an exemption from Australian income tax when [Pine Gap] employment income is taxed by the United States.[58]

Finally, the IRS disagrees with the contention, advanced by the taxpayers, that the Closing Agreement that they signed in 2015 is somehow invalid now. The IRS explains that, according to applicable law, the taxpayers and the IRS are essentially stuck with the agreement, and it cannot be revoked:

> The closing agreement applies for the U.S. taxable year(s) listed in the closing agreement as the taxable period(s) covered by the closing agreement. Pursuant to the closing agreement's terms and section 7121 of the Internal Revenue Code, a closing agreement that is properly executed by a taxpayer and an IRS official is a final agreement and may not be reopened, except in the event of fraud, malfeasance, or misrepresentation of material fact.[59]

Conclusion

Mattson did not resolve the substantive issues centered on the FEIE, the Pine Gap Agreement, the Treaty, and the Closing Agreement signed with the IRS. This does not necessarily diminish the value of the case, though. Despite the fact that the CFC dismissed the case on technical issues, it still serves as a memorable illustration of how taxpayers and their advisors must possess a solid understanding of *both* fundamental international tax concepts and tax procedure if they intend to successfully wrangle with the IRS. ●

[52] Citing *Gregory v. United States*, 149 Fed. Cl. 719 (2020), *Brown v. United States*, 151 Fed. Cl, 530 (2020), and *Quattrini v. United States*, 127 AFTR 2d 2021-1287 (Ct. Fed. Cl. 2021). *See also Hall v. United States*, 125 AFTR 2d 2020-1849 (Ct. Fed. Cl. 2020), *Clark v. United States*, 126 AFTR 2d 2020-5444 (Ct. Fed. Cl. 2020), and *Dixon v. United States*, 147 Fed. Cl. 469 (2020).

[53] *Mattson v. United States*, 127 AFTR 2d 2021-1539 (Ct. Fed. Claims April 15, 2021), footnote 4 (explaining that it was unnecessary for the CFC to resolve whether the IRS investigated the merits of the Claim for Refund since it ruled that the IRS cannot waive the signature verification duty anyway).

[54] *Mattson v. United States*, 127 AFTR 2d 2021-1539 (Ct. Fed. Claims April 15, 2021), footnote 4.

[55] *Abeyta v. Commissioner*, T.C. Summary Opinion 2005-44; *Hargrove v. Commissioner*, T.C. Memo 2006-159 (this was a consolidated action grouping four different cases); *Nielsen v. Commissioner*, T.C. Summary Opinion 2007-53; *Middleton v. Commissioner*, T.C. Memo 2008-150.

[56] Question/Answer 3. www.irs.gov/individuals/international-taxpayers/foreign-earned-income-exclusion-and-the-pine-gap-facility

[57] Question/Answer 2. www.irs.gov/individuals/international-taxpayers/foreign-earned-income-exclusion-and-the-pine-gap-facility

[58] Question/Answer 2. www.irs.gov/individuals/international-taxpayers/foreign-earned-income-exclusion-and-the-pine-gap-facility

[59] Question/Answer 6. www.irs.gov/individuals/international-taxpayers/foreign-earned-income-exclusion-and-the-pine-gap-facility