



TAX TREATIES: DENIAL OF DISCRETIONARY TREATY BENEFITS IS SUBJECT TO JUDICIAL REVIEW

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The United States has entered into tax treaties with a variety of countries, and the arrangements provide for tax benefits, such as preferential rates, that would otherwise not be available. The Internal Revenue Code is subject to the provisions of tax treaties: “[t]he provisions of this title shall be applied to any taxpayer with due regard to any treaty obligation of the United States which applies to such taxpayer” I.R.C. § 894(a)(1). See *also* Treas. Reg. § 1.894-1(a). Treaties and the Code stand on an equal footing. I.R.C. § 7852(d)(1)

Some treaties provide that the Secretary of the Treasury has discretion to grant treaty benefits to foreign taxpayers even if they do not meet all of the criteria spelled out in the treaty. Recently, a district court looked at an interesting question: if the Secretary of the Treasury denies discretionary treaty benefits to a taxpayer, is the denial subject to judicial review? The answer was an emphatic yes. *Starr Int’l Co. v. United States*, No. 14-cv-01593 (CRC), 2015 U.S. Dist. LEXIS 124844 (D.D.C. Sept. 18, 2015).

Starr International Company, the taxpayer, was the largest shareholder of insurance giant AIG. Starr moved its headquarters from Bermuda to Ireland in 2004 to take advantage of preferential withholding rates on its dividends from AIG. *Starr*, 2015 U.S. Dist. LEXIS 124844 at *4. Later, Starr moved its headquarters to Switzerland, apparently to protect its assets from a suit initiated by AIG, a decision that took the taxpayer outside the U.S.-Irish tax treaty. 2015 U.S. Dist. LEXIS 124844 at *5. Similar benefits were available under the U.S.-Swiss treaty, but Starr did not meet all of the criteria; consequently it sought discretionary benefits. *Id.* at *5-*6.

Specifically, in 2007, Starr sought discretionary benefits by applying to the U.S. Competent Authority, the IRS Deputy Commissioner (International) of Large and Mid-Size Business Division of the IRS. In March 2010, Starr filed a protective refund claim as well. *Id.* at *6 In October 2010, Starr was advised that its request for discretionary benefits was denied, although a treaty-based refund was granted for the 2008 tax year. *Id.* at *7.

When Starr filed suit over its refund claim for 2007, the government moved to dismiss, arguing that judicial review of the denial of discretionary benefits was unavailable because the decision was one that was committed to the agency's discretion. Alternatively, the government asserted that the issue represented a non-justiciable political question. The court rejected both arguments.

The *Starr* court began its analysis by determining whether the committed-to-agency-discretion exception to judicial review even applied to a tax refund case. While acknowledging that this exception is specifically set forth in the Administrative Procedure Act, the court noted that the provision merely codified a broader principle that courts should not review agency action when they "lack judicially manageable standards by which to evaluate it." *Id.* at *12 (quoting [Oryszak v. Sullivan](#), 576 F.3d 522, 526 n.3 (D.C. Cir. 2009)). Next, the court noted that the committed-to-agency-discretion exception had been applied to tax matters, specifically in the context of interest abatement claims. *Id.* at *13-*14.

On the merits, however, the *Starr* court concluded that the committed-to-agency-discretion exception did not apply. Initially, the court concluded that the action at issue was not inherently unreviewable as it did not involve an inherently discretionary function, such as a decision to prosecute, and did not place the court in the position of "second-guessing executive branch decision[s] involving complicated foreign policy matters." *Id.* at *19-*20 (quoting [Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State](#), 104 F.3d 1349, 1353 (D.C. Cir. 1997)).

Next, the *Starr* court considered whether the relevant treaty and the circumstances surrounding it provided clear evidence of an intent to preclude judicial review. In that context, the court determined that the Technical Explanation associated with the treaty clarified the applicable legal standard to be applied by the Treasury Department in evaluating requests for discretionary benefits by focusing attention on whether "treaty shopping" was involved. *Id.* at *23. The same concern was also highlighted by testimony before the Senate Foreign Relations Committee indicating that the IRS would focus on treaty shopping. In the court's view, the fact that this background was provided as part of the ratification process suggested that "[t]he Senate . . . likely did not intend to allow the IRS to grant or deny benefits willy nilly." *Id.* at *25. Consequently, while there was some support for the government's position, the court held that the evidence suggesting that judicial review was not intended was far too weak to overcome the normal presumption that it is available. *Id.* at *25-*26.

The *Starr* court concluded its analysis of whether the committed-to-agency-discretion exception applied by determining that the Technical Explanation and related background to the treaty gave rise to a judicially manageable standard that would guide review: whether the principal purpose of an applicant was improper treaty shopping. *Id.* at *30.

After resolving whether the committed-to-agency-discretion exception applied, the *Starr* court made short work of the political question, an outcome that is hardly surprising in light of its holding that a

judicially manageable standard of review was available. *Id.* at *30-*34.

While the government may elect to pursue an appeal, this is a thorough and persuasive opinion.



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