



TAX TREATIES: A SECOND LOOK AT DISCRETIONARY TREATY BENEFITS

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In [September](#), we covered an interesting case

holding that judicial review is available if a taxpayer who does not clearly qualify for the benefits of a tax treaty makes a request for discretionary benefits that is denied. See [Starr Int'l Co. v. United States](#), No. 14-cv-01593, 2015 U.S. Dist. LEXIS 124844, at *2-*3 (D.D.C. Sept. 18, 2015) (*Starr I*). Last week, the *Starr* Court granted the government's motion for reconsideration and moderated its position slightly; as will be seen, judicial review is still available, but monetary relief is not. [Starr Int'l Co. v. United States](#), No. 14-cv-01593, 2016 U.S. Dist. LEXIS 12434, at *3-*4 (D.D.C. Feb. 2, 2016) (*Starr II*).

Starr International Company, the taxpayer, had moved its headquarters from Ireland to Switzerland, and its entitlement to a reduced tax rate on dividends was lost. Since the U.S.-Swiss tax treaty had a provision for the award of discretionary benefits, Starr applied for a reduced rate on its dividend income. *Starr I*, 2015 U.S. Dist. LEXIS 124844 at *4-*6. In an apparent violation of the treaty, the U.S. Competent Authority decided to deny treaty benefits without consulting the relevant Swiss authorities. *Id.*, at *8. In ruling on a motion to dismiss Starr's subsequent refund claim, the Court initially ruled that Starr could pursue a refund claim, reasoning that the decision to grant or deny discretionary benefits was not committed to agency discretion as there were meaningful standards to guide judicial review, *id.* at *18-*30, and holding that the decision to grant or deny discretionary benefits did not present a non-justiciable political question. *Id.* at *30-*35.

The government moved for reconsideration, setting the stage for *Starr II*. The government sought

to convince the court that Starr's refund claim should be dismissed because the Court could not force the IRS to consult with the relevant Swiss authorities or to direct that any such consultation reach a particular outcome. *Starr II*, 2016 U.S. Dist. LEXIS, at *2-*3. The result was a partial victory for the government.

The court reaffirmed its prior ruling that there were meaningful standards that could be applied to review the determination of the IRS that the taxpayer did not qualify for discretionary benefits and that the case did not present a political question. *Id.* at *6-*7. The government did succeed in persuading the court that it could not make a decision on what the result of a consultation between the Treasury Department and the relevant Swiss authorities should be. *Id.* at *9-*10. As a consequence, the court concluded that it could not award the taxpayer a tax refund. *Id.* at *13-*14.

But the taxpayer was not left without a remedy. The government had acknowledged that it would consult with the Swiss authorities if the prior denial of benefits were overturned. And the district court concluded that Starr could bring a claim under the Administrative Procedure Act to set aside the denial of discretionary benefits, a point which the government conceded. *Id.* at *15-*16. Accordingly, the court granted the taxpayer leave to amend its complaint to assert a claim under the APA challenging the denial of discretionary benefits as arbitrary and capricious.

If the court does determine that the prior denial of benefits was arbitrary and capricious, then it appears the IRS will have to re-examine the issue after consulting with the relevant Swiss authorities. If the result of that consultation is that no benefits are awarded, however, the logic of the court's ruling in *Starr II* suggests that further judicial review would not be available.



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