

No. A06-0468

STATE OF MINNESOTA
IN SUPREME COURT

Manpower, Inc.,

Relator,

vs.

Commissioner of Revenue,

Respondent.

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
LEGAL ISSUE.....	1
STATEMENT OF THE CASE.....	1
STATEMENT OF FACTS.....	2
SUMMARY OF ARGUMENT	5
ARGUMENT	6
I. STANDARD OF REVIEW	6
II. UNDER THE PLAIN MEANING OF MINN. STAT. § 290.01, SUBD. 5, MPF—A PARTNERSHIP CREATED UNDER THE FEDERAL CHECK- THE-BOX REGULATIONS—IS A DOMESTIC ENTITY WHOSE INCOME MUST BE INCLUDED IN MANPOWER’S COMBINED REPORT.....	6
III. MANPOWER’S PLAIN MEANING ANALYSIS AND RELATED ARGUMENTS SHOULD BE REJECTED BECAUSE THEY FAIL TO RECOGNIZE THE STATUTORY LANGUAGE GOVERNING THIS CASE.....	9
IV. MANPOWER’S POLICY ARGUMENTS CANNOT RELIEVE THE COMMISSIONER AND THE COURTS OF THE DUTY TO APPLY THE PLAIN MEANING OF GOVERNING MINNESOTA STATUTES.....	14

TABLE OF AUTHORITIES

	Page
FEDERAL CASES	
<i>Dover Corp. & Subsidiaries v. Comm’r</i> , 122 T.C. 324 (T.C. 2004).....	12, 19
STATE CASES	
<i>Caterpillar v. Comm’r of Revenue</i> , 568 N.W.2d 695 (Minn. 1997).....	13
<i>Chapman v. Comm’r of Revenue</i> , 651 N.W.2d 825 (Minn. 2002).....	6
<i>Gale v. Comm’r of Taxation</i> , 228 Minn. 345, 37 N.W.2d 711 (1949).....	12
<i>Green Giant Co. v. Comm’r of Revenue</i> , 534 N.W.2d 710 (Minn. 1995).....	8
<i>Hutchinson Tech., Inc. v. Comm’r of Revenue</i> , 698 N.W.2d 1 (Minn. 2005).....	passim
<i>Kersten v. Minnesota Mut. Life Ins. Co.</i> , 608 N.W.2d 869 (Minn. 2000).....	13
<i>Thiele v. Stich</i> , 425 N.W.2d 580 (Minn. 1988).....	15, 20
<i>Willmus v. Comm’r of Revenue</i> , 371 N.W.2d 210 (Minn. 1985).....	11
FEDERAL STATUTES & REGULATIONS	
I.R.C. § 702(a).....	5
I.R.C. § 7701(a)(3).....	3
I.R.C. § 7701(a)(4).....	10
I.R.C. § 7701 (a)(5).....	10
I.R.C. § 882 (b)(1).....	3

I.R.C. § 882 (b)(2).....	3
Treas. Reg. § 301.7701-1	3
Treas. Reg. § 301.7701-2	3
Treas. Reg. § 301.7701-3	3
Treas. Reg. § 301.7701-3(a).....	3
Treas. Reg. § 301.7701-3(b)(2)(i)(B).....	3
Treas. Reg. § 301.7701-3(c)(1)(i)	3, 4
Treas. Reg. § 301.7701-3(g)(1)(ii).....	1, 4, 8
Treas. Reg. § 301.7701-5	15, 16
Treas. Reg. § 301.7701-5(a)	14, 15, 20
Treas. Reg. § 301.7701-5(c)(1)	16

MINNESOTA STATUTES & LAWS

Minn. Stat. § 270C.07 (Supp. 2005)	17
Minn. Stat. § 271.10, subd. 1 (2004).....	6
Minn. Stat. § 290.01, subd. 5 (2004).....	passim
Minn. Stat. § 290.01, subd. 5(a) (2004)	7, 8, 9
Minn. Stat. § 290.17, subd. 4(f) (2004).....	passim
Minn. Stat. § 290.17, subd. 4(h) (2004).....	passim
Minn. Stat. § 645.08	8
Minn. Stat. § 645.16	13, 14
Minn. Stat. § 645.17(2)	11

OTHER AUTHORITIES

<i>Black's Law Dictionary</i> 447 (8th ed. 2004).....	12
Treasury Decision 9146 (January 30, 2006)	16

LEGAL ISSUE

Whether “a newly formed partnership” created by a federal Treasury Regulation is a domestic entity under Minnesota law, which defines “domestic,” in part, as created “under the laws of the United States.”

The Tax Court ruled in the affirmative.

Minn. Stat. § 290.01, subd. 5 (2004).

Minn. Stat § 290.17, subds. 4(f) & (h) (2004).

Treas. Reg. § 301.7701-3(g)(1)(ii).

Hutchinson Tech., Inc. v. Comm’r of Revenue, 698 N.W.2d 1 (Minn. 2005).

STATEMENT OF THE CASE

By Order dated December 17, 2004, Respondent Commissioner of Revenue (the “Commissioner”) assessed additional Minnesota corporate franchise tax against Relator Manpower, Inc. (“Manpower”) for tax years 1998 through 2000. On February 11, 2005, Manpower filed a Notice of Appeal in the Minnesota Tax Court. Manpower claimed that the Commissioner erred in disallowing for 1999 and 2000 (the “years in issue”) Manpower’s subtraction of the income of its subsidiary Manpower France (“MPF”), a French *Société à Responsabilité Limitée* (a “SARL”), from the net income of Manpower’s tax return (or “combined report”) for its unitary business. Manpower argued that MPF was a foreign entity and that accordingly, under Minn. Stat. § 290.17, subds. 4(f) and (h), MPF’s income must be excluded from Manpower’s Minnesota combined report. The Commissioner responded that when Manpower made a “check-the-box” election under federal Treasury Regulations, it reconstituted MPF as a

partnership. This “newly formed partnership” was thus a domestic entity under Minn. Stat. § 290.01, subd 5, which defines “domestic,” in part, as created “under the laws of the United States.” Accordingly, under Minn. Stat. § 290.17, subs. 4(f) and (h), MPF’s income must be included in Manpower’s combined report.¹

Manpower filed a motion for summary judgment in the Tax Court. On January 12, 2006, the Tax Court, the Honorable Sheryl A. Ramstad presiding, issued an Order denying Manpower’s motion and granting summary judgment to the Commissioner. The Order was entered on January 27, 2006. Pursuant to Manpower’s Petition, this Court issued a Writ of Certiorari on March 8, 2006.

STATEMENT OF FACTS

Manpower is a Wisconsin Corporation. App. 76.² Manpower specializes in permanent, temporary, and contract recruitment and employee assessment and training. App. 77. Manpower does business in Minnesota and is subject to Minnesota corporate franchise tax. App. 16-17.

Manpower is a multinational organization that has 4300 offices in 68 countries and territories. App. 77. One of Manpower’s foreign affiliates is MPF. App. 17, 77. MPF was established in France in 1956 as a French *Société à Responsabilité Limitée* (a “SARL”). App. 77. A SARL is a form of business entity similar to a Minnesota limited

¹ If MPF’s income was includable in Manpower’s combined report, its apportionment factors were likewise includable, and vice versa. For ease of reference, the Commissioner will refer only to income throughout this Brief, rather than to income and apportionment factors.

² “App.” refers to Manpower’s Appendix.

liability company. App. 17, 55. MPF has two members. App. 77. Manpower owns 99.3068% and Manpower U.K., P.L.C., a United Kingdom corporation, owns the remaining 0.6932%. App. 77. Manpower owns 100% of Manpower U.K. App. 77.

Manpower does not operate in France. App. 77. MPF does not operate in the United States. App. 77. Manpower and MPF, however, conduct a unitary business under Minn. Stat. § 290.17. App. 77.

Manpower is taxed as a corporation under Subchapter C of the Internal Revenue Code for United States federal income tax purposes. App. 77. As a SARL, MPF can elect to be classified as either a corporation or a partnership for federal income tax purposes. *See* Treas. Reg. §§ 301.7701-2, 301.7701-3(a) & 3(c)(1)(i).³

Before 1999, MPF made no affirmative election. App. 77-78. Because MPF was a SARL, it was therefore automatically classified as an association or corporation. *See* Treas. Reg. §§ 301.7701-2, 301.7701-3(b)(2)(i)(B).⁴ Accordingly, Manpower was not required or permitted to report the income or loss of MPF in Manpower's consolidated federal income tax return, and MPF's income was not subject to United States income taxation. *See* I.R.C. § 882 (b)(1) & (2) (providing that generally, "gross income"

³ Until December 31, 1996, a business entity's tax classification as a partnership or corporation was determined by a facts-and-circumstances test set forth in what are commonly known as the "Kintner regulations," which examined the entity for the presence of certain corporate characteristics. Effective January 1, 1997, the Treasury Department replaced the Kintner Regulations with the "Check-the-Box" regulations at issue here. Under these regulations, certain entities are automatically classified as corporations. Those entities that are not "per se corporations" may elect, depending upon the number of members, to be treated for federal tax purposes as a partnership, corporation or disregarded entity. *See* Treas. Reg. §§ 301.7701-1 to 301.7701-3.

⁴ I.R.C. § 7701(a)(3) defines the term corporation to include "associations."

includes only income which is derived from sources within the United States and which is effectively connected with the conduct of a trade or business within the United States). Similarly, Manpower was not required or permitted to report MPF's income in Manpower's Minnesota combined report, and MPF's income was not subject to Minnesota taxation. *See* Minn. Stat. § 290.17, subs. 4(f) & (h) (2004) (providing that income from foreign corporations and entities is not included in the income of a unitary business; only income of domestic corporations or other domestic entities is included).

On September 15, 1999, MPF elected to be taxed as a partnership for United States federal income tax purposes under Subchapter K of the Internal Revenue Code. App. 77, 81.⁵ MPF did so by completing a Form 8832, and checking a box stating that it was a "foreign eligible entity electing to be classified as a partnership." App. 77-78, 81, Treas. Reg. § 301.7701-3(c)(1)(i). The election was effective on July 13, 1999. App. 77, 81. Treas. Reg. § 301.7701-3(g)(1)(ii) describes the effect of such an election as follows:

If an eligible entity classified as an association elects under paragraph (c)(1)(i) of this section to be classified as a partnership, the following is deemed to occur: The association distributes all of its assets and liabilities to its shareholders in liquidation of the association, and immediately thereafter, the shareholders contribute all of the distributed assets and liabilities to a newly formed partnership.

Upon its election to be treated as a partnership, then, MPF SARL was deemed to have: (1) distributed all of its assets and liabilities to its shareholders in liquidation of the association, and (2) contributed all of the distributed assets and liabilities to a "newly

⁵ The election filed by MPF was signed by both of its shareholders. Because Manpower directly owns more than 99% of MPF's stock and owns 100% of the only other stockholder, Manpower controlled the election.

formed partnership.” The election required Manpower to include in its federal income its distributive share (98.3068%) of MPF’s income. *See* I.R.C. § 702(a) (providing, *inter alia*, that a partner shall report the distributive share of a partnership’s income).

On its 1999 and 2000 Minnesota tax returns, Manpower subtracted the income of MPF from its federal taxable income. App. 18. Manpower took the position that MPF was a foreign entity excluded from Manpower’s unitary business under Minn. Stat. § 290.17, subs. 4(f) and (h). App. 18. The Commissioner disallowed the subtraction. App. 18, 78.

SUMMARY OF ARGUMENT

When a taxpayer makes a federal “check-the-box” election to have a foreign association treated as a partnership, federal law declares that the existing association is “deemed” liquidated and a “newly formed partnership” is “deemed” created. Manpower made this election for its French subsidiary MPF. Because a “newly formed partnership” was formed under federal law by virtue of this election, MPF was a domestic entity under the plain meaning of Minn. Stat. § 290.01, subd. 5, which defines “domestic,” in part, as “created under the laws of the United States.” Accordingly, the tax court correctly determined that MPF’s income must remain in Manpower’s combined report.

ARGUMENT

I. STANDARD OF REVIEW

Review of tax court decisions is limited to whether the court had jurisdiction, whether its decision was justified by the evidence and in conformity with the law, or whether it committed any other error of law. *See* Minn. Stat. § 271.10, subd. 1 (2004); *Chapman v. Comm’r of Revenue*, 651 N.W.2d 825, 830 (Minn. 2002). This Court will “uphold the tax court’s ruling where sufficient evidence exists for the tax court to reasonably reach the conclusion it did.” *Hutchinson Tech., Inc. v. Comm’r of Revenue*, 698 N.W.2d 1, 6 (Minn. 2005) (internal quotation marks omitted). This Court reviews *de novo* the tax court’s conclusions of law, including its interpretation of statutes. *Id.*

Here, the tax court properly concluded as a matter of law that MPF was a domestic entity as defined by Minn. Stat. § 290.01, subd. 5, and that accordingly, the Commissioner properly included MPF’s income in Manpower’s combined report when determining Manpower’s Minnesota taxable net income. The decision of the tax court should be affirmed.

II. UNDER THE PLAIN MEANING OF MINN. STAT. § 290.01, SUBD. 5, MPF—A PARTNERSHIP CREATED UNDER THE FEDERAL CHECK-THE-BOX REGULATIONS—IS A DOMESTIC ENTITY WHOSE INCOME MUST BE INCLUDED IN MANPOWER’S COMBINED REPORT.

The question before this Court is whether MPF’s income must be included in Manpower’s combined report when determining Manpower’s Minnesota net income. The parties agree that Manpower and MPF are engaged in a unitary business under Minn.

Stat. § 290.17. The issue, then, is whether MPF is a “foreign entity” or a “domestic entity” under Minnesota law. Minn. Stat. § 290.17, subd. 4(f) provides in part:

The net income and apportionment factors ... of foreign corporations and other foreign entities which are part of a unitary business shall not be included in the net income or the apportionment factors of the unitary business. A foreign corporation or other foreign entity which is required to file a return under this chapter shall file on a separate return basis.

(emphasis added). Minn. Stat. § 290.17, subd. 4(h) provides:

For purposes of determining the net income of a unitary business and the factors to be used in the apportionment of net income ..., there must be included only the income and apportionment factors of domestic corporations or other domestic entities other than foreign operating corporations that are determined to be part of the unitary business pursuant to this subdivision, notwithstanding that foreign corporations or other foreign entities might be included in the unitary business.

(emphasis added). Under these provisions, if MPF is a *foreign* entity, its income is *not* included in Manpower’s net income. If MPF is a *domestic* entity, its income *must be* included in Manpower’s net income.

The terms “domestic entity” and “foreign entity” are not defined under Minnesota law. The parties agree, however, that in construing these terms, the Court should look to the analogous terms “domestic corporation” and “foreign corporation,” which are defined in Minn. Stat. § 290.01, subs. 5 and 5(a). As Manpower observes, the terms “domestic entity” and “foreign entity” appear in Minnesota’s tax laws only in Minn. Stat. § 290.17, subs. 4(f) and (h), along with the terms “domestic corporation” and “foreign corporation.” The adjectives “domestic” and “foreign” should thus have the same meaning when applied to a “partnership” or another type of “entity,” as they do when applied to a corporation.

Section 290.01, subd. 5, which defines “domestic corporation,” provides in relevant part as follows:

The term “domestic” when applied to a corporation means a corporation:

(1) created or organized *in the United States*, or *under the laws of the United States* or of any state, the District of Columbia, or any political subdivision of any of the foregoing but not including the Commonwealth of Puerto Rico, or any possession of the United States;...

(emphasis added). Correspondingly, Minn. Stat. § 290.01, subd. 5(a) provides: “The term ‘foreign,’ when applied to a corporation, means a corporation other than a domestic corporation.” By analogy then, an entity is “domestic” when it is created or organized *in the United States*, or *under the laws of the United States*.

The tax court properly found that MPF, as a check-the-box partnership, was a “domestic entity” because that “newly formed partnership” was created *under the laws of the United States*. Specifically, the check-the-box partnership was deemed to be “formed” when MPF elected to be taxed as a partnership for federal income tax purposes. Upon that election, MPF SARL was deemed to be liquidated, and a new partnership was deemed to be formed. *See* Treas. Reg. § 301.7701-3(g)(1)(ii). That partnership clearly was “created” under United States law—namely, the check-the-box regulations, or, more specifically, Treas. Reg. § 301.7701-3(g)(1)(ii) (the “Regulation”). Therefore, under the plain meaning of Minn. Stat. § 290.01, subd. 5, MPF is a domestic entity. *See Green Giant Co. v. Comm’r of Revenue*, 534 N.W.2d 710, 712 (Minn. 1995) (holding that “Where the statutory language is clear and unambiguous, courts must give effect to its plain meaning); *see also* Minn. Stat. § 645.08 (stating that “words and phrases are construed ... according

to their common and approved usage.”). MPF’s income must therefore be included in Manpower’s Minnesota Corporate Franchise Tax Returns for the years in issue. *See* Minn. Stat. § 290.17, subds. 4(f) & (h).

III. MANPOWER’S PLAIN MEANING ANALYSIS AND RELATED ARGUMENTS SHOULD BE REJECTED BECAUSE THEY FAIL TO RECOGNIZE THE STATUTORY LANGUAGE GOVERNING THIS CASE.

Manpower argues that because MPF was originally “created and organized” *in France* as a SARL under French law, MPF is not a “domestic” entity under Minn. Stat. § 290.01, subd. 5, and accordingly, is a “foreign” entity under Minn. Stat. § 290.01, subd. 5(a). As the tax court correctly observed, this argument focuses exclusively on geography—on *where* MPF was originally created and *where* it operates. It improperly ignores, however, the “remainder of the statutory definition that *how the entity was created* may also determine whether or not it is to be considered domestic.” Tax Court’s Order Granting Summary Judgment, slip op. at 10-11 (emphasis added), App. 23, 24. Although an entity is domestic if it is created or organized *in* the United States, it is *also* domestic if it is “created or organized ... *under the laws of the United States*....” regardless of where it was originally physically created or operates. *See* Minn. Stat. § 290.01, subd. 5.

As it did in the tax court, Manpower continues to ignore half of the statutory language it purports to interpret. Although Manpower includes the language “or under the laws of the United States” when it first sets forth the relevant text of Minn. Stat. § 290.01, subd. 5 (Manpower Br. at pp. 9-10), it then simply wishes that language away. Manpower does not address this language anywhere in its “plain meaning”

analysis (Arguments II & III), or when discussing comparable federal provisions (Argument IV).

Referring only to its preferred portion of section 290.01, subd. 5, for example, Manpower asserts that, “The question in this case, then, can be restated as being whether MPF was ‘created or organized in the United States... .’” Manpower’s Br. at p. 10. Manpower’s “plain meaning” analysis thus focuses exclusively on whether MPF was created or organized *in* the United States. Under its exclusively “geographical” approach, Manpower easily comes to the conclusion that because MPF was originally created or organized *in* France, it is not a domestic entity.

This “geographical” approach, however, ignores the alternative definition of a domestic entity that plainly governs here: an entity created or organized *under the laws of the United States*. When the question presented is properly phrased as whether MPF was created or organized “under the laws of the United States,” the answer, as the tax court properly concluded, is plainly yes.

Again focusing only on geography, Manpower observes that Minnesota’s definitions of “domestic corporation” and “foreign corporation” are parallel to definitions contained in the Internal Revenue Code. I.R.C. § 7701(a)(4) and § (5) provide:

(4) Domestic.--The term “domestic” when applied to a corporation or partnership means created or organized in the United States or under the law of the United States or of any State, unless, in the case of a partnership, the Secretary provides otherwise by regulations.

(5) Foreign.--The term “foreign” when applied to a corporation or partnership means a corporation which is not domestic.

Manpower goes on to cite a treatise, an Internal Revenue Service private letter ruling, and two federal cases for the proposition that the nationality of an entity under these federal definitions is determined by identifying the jurisdiction that grants the entity its charter. None of these authorities, however, directly interprets or applies the language at issue here: that a domestic corporation includes one “created or organized under the law(s) of the United States.” Moreover, none of these authorities supports Manpower’s claim that the nationality of an entity is determined *exclusively* by the nation that granted the entity its charter, despite events that are deemed to occur when the entity later “checks the box” under federal Treasury Regulations.

A statute, of course, must be construed so as to give effect to all of its provisions. *See* Minn. Stat. § 645.17(2) (stating that it is presumed that “The legislature intends the entire statute to be effective and certain.”). Because it flatly ignores the very language of the statute that governs this case, and upon which the tax court expressly relied, Manpower’s proposed “plain meaning” construction of Minn. Stat. § 290.01, subd. 5 violates this principle. To the contrary, Manpower proposes a construction that effectively writes the phrase “or under the laws of the United States” out of the statute. This is plainly improper.

Nor can Manpower successfully argue that the phrase “created or organized in the United States” means the same thing as the phrase “created or organized under the laws of the United States.” This construction makes the latter phrase superfluous. *See Willmus v. Comm’r of Revenue*, 371 N.W.2d 210, 213 (Minn. 1985) (holding that “[a] statute is to be construed as a whole so as to harmonize and give effect to all of its

parts.”); *see also Gale v. Comm’r of Taxation*, 228 Minn. 345, 349, 37 N.W.2d 711, 715 (1949) (holding that “A statute should be so construed that, if it can be prevented, no clause, word, or sentence will be superfluous, void, or insignificant.”) Obviously, the legislature intended that an entity would be considered domestic either if it were created or organized *in* the United States, or if it were created or organized *under the laws of the United States*, as was the MPF partnership. This Court must give effect to the entire statute.

Manpower’s argument that MPF remained a foreign entity after its check-the-box election also ignores the clear legal effect of that election. Under the Regulation, upon MPF’s election to be treated as a partnership for federal income tax purposes, MPF SARL was “deemed” to have liquidated and distributed its assets, and redistributed them to a “newly formed partnership.” As this Court has made clear, when something is “deemed” to have occurred, it is conclusively presumed to have occurred. *See Hutchinson*, 698 N.W.2d at 13; *accord Dover Corp. & Subsidiaries v. Comm’r*, 122 T.C. 324, 347-48 (T.C. 2004) (holding that deemed check-the-box liquidation is equivalent to actual liquidation); *see also Black’s Law Dictionary* 447 (8th ed. 2004) (“Deem” is defined as “[t]o treat (something) as if (1) it were really something else, or (2) it had the qualities that it does not have.”). Thus, MPF SARL, which was created and organized in France, was liquidated, and MPF, a partnership, was created exclusively under the treasury regulations—the laws of the United States. Therefore, under the plain meaning of Minn. Stat. § 290.01, subd. 5, MPF is a “domestic” entity.

In a sweeping overview of the historical development of Minnesota's "water's edge" approach to apportionment, Manpower argues that treating the MPF check-the-box partnership as a domestic entity is inconsistent with the legislature's intent that the income of foreign affiliates be "kept off" combined reports. *See generally* Manpower's Brief, Arguments I & III. As discussed above, however, under the plain meaning of Minn. Stat. § 290.01, subd. 5, MPF is clearly a domestic entity. Therefore, this Court should not reach these alleged issues of legislative intent, and should instead give effect to the statute's plain meaning. *See Kersten v. Minnesota Mut. Life Ins. Co.*, 608 N.W.2d 869, 874-75 (Minn. 2000) (holding that "When the language of [a] statute is plain and unambiguous, it manifests the legislative intent and [a court] must give the statute its plain meaning.").⁶

In any event, the conclusion that MPF is a domestic entity whose income must be included in Manpower's combined report is not inconsistent with the water's edge doctrine as set forth in *Caterpillar v. Comm'r of Revenue*, 568 N.W.2d 695 (Minn. 1997). That case makes clear that under Minnesota's combined reporting system, Minnesota may tax income earned across the water's edge as long as it is income earned by a "domestic" entity such as MPF. *See* 568 N.W.2d at 698-99.

In sum, under the plain meaning of Minn. Stat. § 290.01, subd. 5, which defines a domestic entity as one created under the laws of the United States, MPF, a partnership

⁶ *See also Hutchinson*, 698 N.W.2d at 8 (stating "We have repeatedly held that we must give effect to the plain meaning of statute text when it is clear and unambiguous. *E.g. Green Giant*, 534 N.W.2d at 712."); Minn. Stat. § 645.16 ("When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.").

deemed created under federal law, is domestic. Manpower's arguments to the contrary are inconsistent with the rules of statutory construction. Accordingly, the tax court properly concluded that Manpower must include MPF's income on its combined report.

IV. MANPOWER'S POLICY ARGUMENTS CANNOT RELIEVE THE COMMISSIONER AND THE COURTS OF THE DUTY TO APPLY THE PLAIN MEANING OF GOVERNING MINNESOTA STATUTES.

As previously discussed, "a newly formed partnership" that exists solely because a Treasury Regulation deems it to exist is a "domestic" entity under the plain meaning of Minn. Stat. § 290.01, subd. 5. Manpower advances several policy arguments to defeat this conclusion. Because neither the Commissioner nor the Court may implement policy considerations to overcome the plain meaning of laws, these arguments must fail. *See* Minn. Stat. § 645.16 (when words of law are clear, "the letter of the law shall not be disregarded under the pretext of pursuing the spirit").

Manpower alleges that the tax court erred by failing to recognize that "classification" and "nationality" are independent. *See* Manpower's Br. at 16-17. Although Manpower acknowledges (only once, and only obliquely) that MPF *qua* partnership was "formed" exclusively "under the laws of the United States," *see* Manpower's Br. at 26 ("the 'newly formed partnership' results *as a consequence* of federal tax law") (emphasis in original), Manpower asserts that this does not render MPF *qua* partnership "domestic" under Minnesota law. This is so, Manpower explains, because the Regulation does not *purport* to alter nationality. *See* Manpower's Br. at 26. Manpower then notes—with much apparent justification—that Treas. Reg. § 301.7701-5(a) specifically provides that "[t]he determination of whether an entity is

domestic or foreign is made independently from the determination of its corporate or non-corporate classification.” Manpower’s Br. at 26. This initially attractive line of reasoning does not withstand scrutiny.

First, Manpower’s claim that the Regulation does not purport to alter nationality is immaterial. As relevant here, Minnesota’s definition of “domestic” turns solely on whether an entity is created “under the laws of the United States.” See Minn. Stat. § 290.01, subd. 5. Since MPF exists *as a partnership* because the Regulation deems it so, MPF *qua* partnership is clearly domestic. The statute does not ask whether the United States law under which an entity is created has any particular purport. Consequently, there is no force to Manpower’s observation that in forming MPF *qua* partnership, the Regulation did not purport to alter nationality. It is sufficient that the Regulation (a) “formed” the partnership and (b) is a law of the United States. The tax court correctly applied the statute.

Second, Manpower’s reliance on Treas. Reg. § 301.7701-5(a) for the notion that classification and nationality are separate is misplaced. As an initial matter, the Court should not consider this argument because Manpower never cited section 301.7701-5(a) in the lower court, either in its written submissions or during oral argument. See *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (holding that the Court generally will not consider on appeal arguments not raised below).

More importantly, as Manpower acknowledges, “Treas. Reg. § 301.7701-5 technically does not apply to the years in issue.” Manpower’s Br. at 28, n.16. Indeed, the effective date of the cited regulation was August 12, 2004, whereas this case involves

tax years 1999-2000. This, perhaps, is why Manpower never cited section 301.7701-5(a) in the lower court. It is odd indeed for Manpower to suggest that the tax court erred by ignoring the force of a provision Manpower never cited and that is, in any event, inapplicable to the tax years in issue.

This Court should surely reject Manpower's implicit request to apply Treas. Reg. § 301.7701-5 retroactively. First, although Manpower notes that the subparts contained in the new regulation "clarify current law and do not change the outcome that would result under a proper application of the existing rules *as they apply to dually chartered entities*," *see* Manpower's Br. at 28 n.16 (emphasis added) (quoting Treasury Decision 9153, 69 Fed. Reg. 49809, at 49810 (Aug. 12, 2004)), Manpower acknowledges that this case *does not involve a dually chartered entity*. *See* Manpower's Br. at 27 n.15 ("MPF is not dually chartered."). Second, and more importantly, the regulation has a specific effective date. This alone indicates that the regulation is, and was intended to be, prospective only. *See* Treas. Reg. § 301.7701-5(c)(1). When the final regulation was published, moreover, the Treasury Department stated that, "Neither the temporary regulations nor these final regulations are retroactive." *See* Treasury Decision 9146, 71 Fed. Reg. 4815, at 4816 (January 30, 2006).

In what is actually a variant of its nationality argument, Manpower alleges that the Tax Court's decision is inconsistent with Revenue Notice 98-08 (the "1998 Notice" or "Notice"), in which the Commissioner identified one circumstance (not applicable here) where nationality would not follow classification. *See* Manpower's Br. at 30-31. For several reasons, however, the Notice cannot be used to attack the tax court's decision.

The 1998 Notice provides that: (1) when a foreign-eligible entity; (2) owned by a single C-corporation parent; (3) “checks the box” and thus elects to be disregarded as a separate entity for federal tax purposes (i.e., elects to be treated as a division of the parent C-corporation), the Commissioner “cannot recognize” the election because “Minnesota Statutes, § 290.17, subdivision 4(f), does not permit the net income or the apportionment factors of foreign ... entities to be included in [the] combined report” of its domestic parent. *See* Rev. Not. 98-08. Manpower correctly observes that the Notice “does not treat the deemed liquidation of the disregarded entity to be controlling for purposes of nationality.” *See* Manpower’s Br. at 31. This Court should conclude that the Notice is neither apposite nor controlling.

First, the 1998 Notice is inapplicable because it addressed facts different than those presented here. Indeed, neither of the factual predicates specified in the Notice is present in this case: (a) Manpower is not a single C-corporation parent; and (b) MPF did not elect to be disregarded as a separate entity.

Second, as Manpower acknowledges (Manpower’s Br. at p. 24, n. 14), revenue notices do not have the force of law, but are instead position statements issued by the Commissioner. *See* Minn. Stat. § 270C.07 (Supp. 2005). Thus, even if Manpower had cited the 1998 Notice to the tax court (Manpower did not), the court plainly would not have been required to square its holding with the administrative position statement contained in the Notice.

Third, the Court should conclude that neither the Commissioner nor the tax court could have enforced the policy concern underlying the 1998 Notice for the tax years in

issue. The position set forth in the Notice seeks to implement the State's water's edge policy by ensuring that the income of a (disregarded) foreign entity is not included in a domestic parent's combined report. Manpower cites the Notice by analogy: if a deemed entity *liquidation* does not control nationality under the Notice, then a deemed entity *formation* does not control nationality in this case. Even if Manpower could invoke the Notice by analogy, the policy underlying the Notice could not be enforced for the tax years in issue. This conclusion follows from *Hutchinson*, in which this Court applied the plain meaning of a statute to a "deemed" event.

In *Hutchinson*, this Court ruled that dividends "deemed" paid under a taxing statute must be treated as though they had actually been paid. *Hutchinson*, 698 N.W.2d at 12-13. Section 290.21, subdivision 4(a)(1), allowed a parent corporation to deduct 80% of the dividends it received from certain subsidiaries. *Id.* at 12. Subdivision 4(e), however, expressly denied this deduction for dividends "paid" by so-called FSC subsidiaries. *Id.* Under a separate provision, the net income of Hutchinson's FSC subsidiary was "deemed to be paid as a dividend" to Hutchinson. *Id.* Hutchinson argued that this dividend qualified for the 80% deduction because, although it was "deemed to be paid," it had not *actually* been "paid." *Id.* at 12-13.

This Court rejected Hutchinson's argument. "We agree with the tax court that the plain language of the relevant statutes leads to the conclusion that even dividends deemed paid by a FSC to its parent are excluded from the dividend-received deduction by subdivision 4(e)." *Id.* at 13. The governing statute specifically provided that a "deemed" dividend "shall be treated as a dividend under section 290.21, subdivision 4." *Id.*

(quoting Minn. Stat. § 290.17, subd. 4(g)). Moreover, the Court noted that “in our statutes the word ‘deemed’ appears to be treated as creating a conclusive presumption.” *Id.* (quoting *First Nat'l Bank of Mankato v. Wilson*, 47 N.W.2d 764, 767 (1951)).

The reasoning in *Hutchinson* renders the policy underlying the Notice unenforceable because implementation of that policy would ignore the force of the deemed event. *Hutchinson* held that an event “deemed” to occur must be conclusively presumed to have occurred, and must be treated as though it *actually* occurred. *Id.* at 13. In *Hutchinson*, accordingly, a “deemed” dividend was treated as actually “paid.” *Cf. Dover Corp. & Subsidiaries*, 122 T.C. at 347-348 (holding that deemed check-the-box liquidation is equivalent to actual liquidation). Here, likewise, a partnership deemed “formed” under United States law must be treated as actually formed under such law.

Having applied this approach, the *Hutchinson* Court then ruled that—by virtue of plain meaning—a statute expressly addressing dividends “paid,” equally applied to dividends “deemed” paid. Thus, as in *Hutchinson*, the plain meaning of a statute defining as “domestic” entities created “under the laws of the United States” must apply equally to entities “deemed” created under those laws. Under the reasoning of *Hutchinson*, neither the Commissioner nor the tax court was free to conclude that MPF remained “foreign” by ignoring that MPF *qua* partnership was deemed formed under United States law.

Two additional points are worth noting. First, the Commissioner recognizes the unenforceability of the policy underlying the 1998 Notice with significant reluctance. Allowing corporations to control nationality by controlling classification is undesirable for a taxing authority. Such control allows corporations to engage in substantial “tax

planning.” Where a parent corporation anticipates that a foreign affiliate will be profitable, it can place the income of the entity beyond state taxing jurisdiction by allowing it to remain “foreign.” Where, on the other hand, the parent anticipates that a foreign affiliate will sustain losses, it can bring the entity within the State’s taxing jurisdiction, thereby gaining access to valuable deductions. The Commissioner would prefer a neutral rule whereby nationality and classification are independent. Such a rule reduces “tax planning” opportunities, and treats both taxpayers and the Commissioner evenhandedly.

Second, Treas. Reg. § 301.7701-5(a) implements just the sort of neutral rule favored by the Commissioner. As of the effective date of this regulation, nationality and classification are plainly independent. Thus, for tax periods after August 12, 2004, the sort of tax planning mentioned above is no longer possible. For, as *Hutchinson* noted, the effect of this new regulation—expressly declaring that nationality and classification must be independently determined—flows down to the State level. See *Hutchinson*, 698 N.W.2d at 11. Consequently, although the policy underlying the Notice is not enforceable *for the tax years in issue*, it is essentially subsumed by Treas. Reg. § 301.7701-5(a) as of August 12, 2004.

Although Manpower is correct that the tax court’s decision is inconsistent with the policy underlying the 1998 Notice, that policy cannot overcome the plain meaning of Minnesota law to the facts presented. In any event, Manpower should not be allowed to challenge the lower court’s reasoning on a ground not raised below. See *Thiele*, 425 N.W.2d at 582.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Court affirm the decision of the tax court in all respects.

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