



ABA Subchapter S News



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▪ **Oral Arguments Presented in the Appeal of Tax Court Decision in *Vainisi v. Commissioner***

Last week, both counsels for the taxpayer and the government presented oral arguments to the 7th Circuit Court of Appeals in the case of *Vainisi v. Commissioner* (the TEFRA interest disallowance case for S corporation and QSub banks). Oral arguments were heard by Judges Posner, Sykes and Bauer. The judges, who had clearly read the briefs and had an understanding of the issue, spent a significant amount of time questioning both counsels and attempting to understand why the clear language of the statute should not triumph in this case.

The judges gave very little deference to the Tax Court's reasoning in applying the *de novo* standard on appeal. In effect, the Court did not consider the Tax Court's reasoning in reaching a decision in favor of the government, but rather, took a fresh look at the case. The judges focused on the plain language of the statute (**Section 1363(b)(4)**), which provides that the interest disallowance provision of **Section 291** of the Code (the "TEFRA haircut") should not apply to S corporation or QSub banks with a C history after three years. Furthermore, the Court did not seem to believe that the Regulation later promulgated under **Section 1361(b)(3)** relating to the application of bank specific rules to all banks should undercut the statute. The Court spent a significant amount of time trying to understand why the government thinks that the plain language of **Section 1364(b)(4)** exempting S corporation and Qsub banks from the application of **Section 291** after 3 years does not reflect the intent of Congress. The oral argument, which is now posted to the 7th Circuit Court of Appeals web site, can be accessed via the Court's home page at: <http://www.ca7.uscourts.gov> - click on the Past Week tab under oral arguments (the case is listed as *Doris Vainisi v. CIR*, case # is 09-3314). We expect a decision in this case within the next few months.



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