

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE CHIEF FINANCIAL OFFICER
OFFICE OF TAX AND REVENUE



OTR REVENUE RULING 2007-02

Subject: Presidential Appointee Exception

Advice has been requested as to whether an officer of the executive branch of the U.S. government who was appointed by the President of the United States is subject to District of Columbia (“District”) income taxes under the following facts:

FACTS

Taxpayer is an officer of the executive branch of the U.S. government who was appointed by the President of the United States. The officer’s appointment was confirmed by the Senate. According to the federal act which governs the officer, the officer holds office for the designated term, unless removed before the end of the term *for cause* by the President. The officer resides in the District for 183 days or more during the taxable year.

ISSUE

Does an officer of the executive branch of the U.S. government under the above facts serve at the pleasure of the President of the United States, so that the officer is not considered a District resident for income tax purposes under D.C. Official Code § 47-1801.04 (17)?

CONCLUSION

An officer of the executive branch of the U.S. government under the above facts does not serve at the pleasure of the President of the United States because the officer can only be terminated for cause; therefore, the officer would be considered a resident of the District and subject to District income tax.

LEGAL ANALYSIS

Under D.C. Official Code § 47-1801.04(17), individuals who “. . . maintain a place of abode within the District for an aggregate of 183 days or more during the taxable year, whether or not such other individual is domiciled in the District,” are subject to District income taxes.

However, D.C. Official Code § 47-1801.04(17) provides an exception for:

[A]ny officer of the executive branch of such government whose appointment to the office held by him was by the President of the United States and subject to confirmation by the Senate of the United States and *whose tenure of office is at the pleasure of the President of the United States*, or any Justice of the Supreme Court of the United States, unless such officers or Justices are domiciled within the District at any time during the taxable year. In determining whether an individual is a "resident", such individual's absence from the District for temporary or transitory purposes shall not be regarded as changing his domicile or place of abode. (emphasis added).

The federal act which governs the officer in the instant case provides that the officer holds office for the designated term, unless removed before the end of the term *for cause* by the President. Case law, in effect, interprets the phrase "at the pleasure of the President" as serving at the appointed position on an "at-will" basis. *See generally, SEC v. Blinder*, 855 F.2d 677, 682 (10th Cir. 1988). In *Blinder*, the court analyzed the constitutionality of the Securities and Exchange Commission's ("SEC") power to commence a civil enforcement action in federal court. According to the Securities Exchange Act of 1934, the SEC consists of five members who are appointed by the President with the advice and consent of the Senate. *Id.* at 681. The act does not provide for the appointment of a chairman; however, following the Reorganization Act of 1949, the President could designate the chairman. The act does not contain language which expressly allows the President to remove the commissioners. However, for the purposes of the case, the *Blinder* court, accepted appellant's argument that "the President may remove a commissioner only for efficiency, neglect or duty or malfeasance in office" (internal quotations omitted). *Id.* The court concluded that "as the President has the power to choose the chairman of the SEC to serve an indefinite term, it follows that the chairman serves at the pleasure of the President." *Id.* Contrarily, "the President has the power to remove a commissioner [only] for inefficiency, neglect of duty, or malfeasance in office." *Id.* The court in *SEC v. Blinder* clearly outlines the distinction between appointees who serve at the President's pleasure (SEC chairman) and those who can only be terminated for cause (SEC commissioners).

US v. Wilson, 290 F.3d 347, 350 (D.C. Cir. 2002), further illustrates the contrast between appointees who serve at the pleasure of the President and those who can only be terminated for cause. In *U.S. v. Wilson*, former President Clinton appointed appellee to the United States Commission on Civil Rights expressly stating that the appointment was "for the remainder of the term expiring November 29, 2001." *Id.* at 350. Under 42 U.S.C.S. § 1975(c), all commissioners were required to be appointed for six years, irrespective of whether their predecessors had completed their terms or not. President Bush appointed another commissioner to succeed appellee following November 29, 2001. The court held that appellee's term had in fact expired on November 29, 2001 and "that the fixed terms of six years for members of the Commission ran with the calendar regardless of delay in appointment or the filling of mid-term vacancies." *Id.* at 361.

Although *U.S. v. Wilson* primarily analyzes the distinction between appointment terms which run with the person and those which run with the calendar, the court noted that:

The US Commission was first created in 1957, and as originally established was composed of six members serving open-ended terms at the pleasure of the President. Congress reauthorized and reorganized the Commission in 1983 by (. . .) dividing the appointment power between the President and Congress [and] establishing that the President could only remove members for neglect of duty or malfeasance.

Id. at 350.

Congress clearly sought to differentiate between appointments where members served at the will or pleasure of the President and those that could only be removed for cause.

Similarly, here, the governing federal act divides the appointment power between the President and Congress by requiring that the President establish cause before removing an officer. As the officer can only be removed from office for cause, the officer is ineligible to benefit from the Presidential appointee exception, which requires that the appointee serves at the pleasure of the President. Thus the appointee would be considered a resident and subject to District taxes.