

US Court of Federal Claims Allows Foreign Tax Credit Against Net Investment Income Tax

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The US Court of Federal Claims has published an opinion in [Christensen v. United States](#), allowing a US citizen residing in France a foreign tax credit (FTC) against the net investment income tax (NIIT) under the [France-United States Income and Capital Tax Treaty \(1994\)](#).

Under the facts analysed by the Court, an American married couple living in France had US source and foreign source passive income, in addition to earned income. The couple paid French taxes, including tax on a capital gain credited against their US capital gains tax. The IRS disallowed the use of the remaining French taxes paid on the gain to offset the US taxpayers' NIIT (charged at a rate of 3.8%).

On their amended return, the US taxpayers took a treaty-based return position and claimed a refund for the NIIT paid related to their foreign source investment income, and subsequently filed a complaint with the Claims Court seeking a refund.

The Court first determined that deference is not afforded to the US interpretation provided in the IRS technical explanations regarding the interpretation of the [France-United States Income and Capital Tax Treaty \(1994\)](#) as those non-binding documents do not include the French government's interpretation. Further, the Court stated that there was no evidence substantiating a shared interpretation by the signatory governments.

The Court then proceeded to distinguish those FTCs that are statutory and those that are treaty based. Based on this distinction, the Court determined that, while under US statutory law an FTC is not allowed against the NIIT, as the NIIT is not within Chapter 1 of the Internal Revenue Code, paragraph 2(b) of article 24 of the [France-United States Income and Capital Tax Treaty \(1994\)](#) allows a FTC independent of the restrictions under [Sections 27](#) and [901\(a\)](#) of the IRC. Thus, the Court held that taxpayers may assert the treaty-based FTCs against US income taxes outside of Chapter 1, including for IRC [Section 1411](#).

Considering that US tax treaties with other countries have similar provisions to the one interpreted by the Court in *Christensen v. United States*, the Court's decision could mean refund opportunities for taxpayers who have been denied FTCs against their NIIT.

