BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of:	)	
	)	
ALASKA SLEEP CLINIC	)	
	)	OAH No. 20-0621-TAX
Corporate Net Income Tax	)	

DECISION AFTER RECONSIDERATION

I. Introduction

Alyeska International, Inc. is an Alaska C Corporation that does business as Alaska Sleep Clinic (ASC). It operates testing facilities related to the diagnosis and treatment of sleep disorders. This case is about whether ASC is subject to Alaska Corporate Net Income Tax.

For 2016, 2017, and 2018, ASC claimed an exemption from state income tax as an eligible "qualified small business," basing its claim on Alaska Statute 43.20.012(a)(3) and the federal provision it references, 26 U.S.C. § 1202(e). Very broadly, this exemption is not available to businesses providing services in the "field of health." Based on that exclusion, the Tax Division disallowed the claimed exemption and demanded payment of tax for the years at issue, together with interest and penalties. Revenue Appeals Officer Stanley Blodgett upheld most aspects of this outcome in an Informal Conference Decision (ICD) issued June 18, 2020, reversing only the assessment of failure-to-timely-pay penalties.[1] ASC appealed the unfavorable rulings in the ICD to the Office of Administrative Hearings.

At bottom, this case turns on whether ASC operates in the "field of health." In a colloquial sense, it certainly does. However, in the federal law that controls the outcome of this case, "field of health" has a specialized meaning. Whether ASC fits within the specialized meaning is a closer question.

To address this question and provide full information on ASC's business model, a short evidentiary hearing was held on March 5, 2021. Following supplemental briefing, the record closed on March 29, 2021. Issuance of a decision based on those proceedings was delayed by the pandemic.[2] After an initial decision was issued in January 2022, proceedings in connection with a motion for reconsideration have led to this slightly revised final decision.

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[1] The ICD left in place the penalties for underpayment of estimated tax in each year (for which there is no discretionary exception), as well as the assessment of interest.

[2] An emergency call to assist another tribunal in clearing a one-year backlog of pandemic-related unemployment claims caused delay in other case categories.

As explained below, the record in this case shows that ASC does operate in the "field of health" and, accordingly, owes Alaska Corporate Income Tax.

II. Factual Findings

A. How ASC Operates[3]

Broadly, there are three categories of institutions where sleep studies are conducted. First, there are hospital-based sleep labs. Second, there are physician-owned sleep labs in which the physicians refer patients to their own lab and then treat them based on the test results. Third, there are independent diagnostic testing facilities. ASC fits the third category, which seems to be the least common.

ASC's central function is to conduct sleep studies of various kinds and produce reports on those studies, which consist, in ASC's words, of "analyzed and 'scored' data."[4] The reports are used by physicians (who are either not affiliated with ASC or are working outside the scope of their affiliation) to make diagnoses, determine whether or not to treat the patient, and choose what treatment might be appropriate. ASC does not perform any of those post-report functions, nor does it recommend how they should be performed. It supplies information and pre-diagnostic analysis.

The sleep studies at ASC are conducted by polysomnographic technologists. This profession typically requires up to a year of training, with practitioners commonly obtaining a national certification or working under the supervision of a technologist with certification. Certification of the overseeing technologist is required for this work to be eligible for reimbursement by some payers, including Medicare and Medicaid.[5] The profession is not licensed by the State of Alaska.

The polysomnographic technologists who work at ASC receive significant in-house training on the particular software and equipment used by ASC. Any training and experience from other sleep clinics is helpful but not wholly transferable to ASC, and vice versa.

Some of the studies are conducted at home, in which a case a technologist issues the appropriate equipment to the patient. A large number of studies are conducted overnight at an ASC facility, however. The technologist takes the patient's blood pressure, attaches electrodes to the patient, attaches an oxygen saturation monitor, and then monitors the patient and the proper

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[3] These findings are based on the testimony of Mauricio Reinoso and Brent Fisher and inferences that can be drawn therefrom, except as otherwise attributed.

[4] A.R. 011; *see also* A.R. 065 ("We perform . . . analysis and interpretation").

[5] In addition to Fisher testimony on cross-examination, *see* 42 C.F.R. § 410.33(c).

functioning of the sensors over the course of the test. The monitoring of the patient (as opposed to the testing equipment) is at a very basic level; for example, if apnea causes the patient's oxygen saturation to fall below a threshold set by an ASC protocol, the patient is woken up. There does not seem to be any discretion for the technologist to change the test in response to things the technologist observes.

Apart from the medical director discussed below, ASC employs no physicians nor any other medical professionals with a formal diagnostic role. For accreditation, ASC is required to (and does) have a physician medical director. Its medical director is fellowship-trained and board-certified in two fields related to sleep medicine. This role is not a full-time job. The medical director's role is to oversee the quality of testing at ASC. The medical director does not see patients at all while working for ASC, nor does he manage any patient's care while working in that capacity. With that said, he does have a medical practice of his own, not corporately affiliated with ASC, and from time to time doctors referring patients to ASC will engage him as a consulting physician to help them interpret results. Billings to patients for that service always occurs through his medical practice, not ASC. He also confers (without separate charge) about testing choices, as we will see below.

ASC is structured in such a way that it cannot self-refer patients, nor can patients refer themselves for testing. Instead, patients ordinarily come to the clinic by virtue of a referral from a physician not employed by ASC. ASC is not, however, a wholly passive participant in the referral process. Because ASC has an internationally prominent website, a number of patients do attempt to self-refer. ASC acts as a "facilitator" for such patients by, in its words to the auditors, "freely guide[ing] the individual through the continuum of care."[6] In addition, about 8 percent of ASC referrals come from a pediatric sleep specialist contracted to ASC.[7]

The referring physician sends the patient to have a particular test performed. Here, however, ASC's medical director[8] performs another role, one that will assume some importance in this case, and he performs this additional role in his capacity as person ASC employs by contract. He reviews each set of referrals every morning to be sure the patient—as described in the referral form and accompanying medical records—is appropriate for the study selected. Sometimes the medical director talks to the referring physician to explain that a particular testing

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6 A.R. 012.

7 *See* A.R. 031-032. He is the Pediatric Medical Director of ASC.

8 The medical director identified at hearing was Dr. Mauricio Reinoso. However, the record suggests that other physicians perform medical director duties at times or in particular contexts. *See* A.R. 020, 031-032.

choice is inappropriate. He does not view this as consulting on the patient, and there is no separate billing by ASC or by the director's medical practice for this function (the cost of the function is therefore subsumed in the ASC charge for testing). I infer, however, that the function is professional in nature and that its availability is part of what makes ASC an attractive place to refer patients.[9] It is a professional screening function that goes well beyond anything one would expect in, for example, a lab filling orders for blood tests.

ASC markets itself for its professional skill. "At Alaska Sleep Clinic," its website declares, "our staff has the training, skill and expertise necessary to diagnose and treat your sleep disorder."[10] The website speaks of the "seasoned know-how" to "handle the subtle science of diagnosis and treatment."[11] It repeatedly refers to ASC's availability to "consult with" the patient's doctor, specifying that ASC will "call" the referring physician both to consult and to request information it has identified as being necessary.[12] To some extent, this is promotional puffery, but it is not wholly empty of content. ASC wants patients to know that it employs a knowledgeable staff who will be part of the process of making choices about how to diagnose and address a highly complex set of potential disorders.

ASC has another function that should be touched on briefly. As a relatively small part of its business, it sells durable medical equipment related to sleep. It sells the equipment to anyone presenting a valid prescription from a doctor, even if the underlying sleep testing was not conducted at ASC. ASC technologists show the patient how to use the equipment prescribed, in accordance with its manual, but they do not recommend equipment to providers or to patients. In general, the equipment ASC sells is available from a wide range of durable medical equipment suppliers, including Internet sellers.

B. History of ASC's Tax Exemption Claim

As will be discussed more fully below, there is preferential federal income tax treatment for gains from the C Corporation stock of certain qualified small businesses (QSBs) as defined in § 1202 of the Internal Revenue Code (IRC). In 2012, a group of Alaskans, some of whom later became investors in ASC, spearheaded an effort to exempt § 1202 QSBs in Alaska from Alaska's

9 This inference is made, in part, on the basis of A.R. 070.
10 A.R. 069.
11 *Id*.
12 A.R. 070.

Corporate Income Tax.[13] The exemption was enacted and codified in AS 43.20.012(a)(3), taking effect July 1, 2012.[14]

Relying on the new exemption, the founding investors organized Alyeska International, Inc. in 2015 as a C Corporation. Had the exemption not been available, they would have chosen another form such as an LLC, because Alaska's corporate income tax is substantial. At some point prior to issuance of stock, a majority of the directors endorsed a resolution providing that the corporation should be managed so as to be an eligible QSB under IRC § 1202.[15] Since approximately that time, Alyeska International, Inc. has done business as ASC and has operated ASC's facility. It claimed exemption from state taxation as an eligible IRC § 1202 QSB in its tax years corresponding to calendar years 2016, 2017, and 2018, the tax years at issue in this case.

ASC also reports, through testimony in this proceeding, that it "checked the box" as an exempt QSB in a state tax filing for calendar year 2015.[16] There is no other information in the record regarding a 2015 filing. Alyeska International, Inc. was not organized as a corporation until partway through 2015.[17] There is no information about whether it had any income in 2015. There is no definitive information about when it succeeded to ownership of ASC or when it began to operate ASC, although it seems likely that both events occurred about April 1, 2015.[18]

In referring to "the record" above, I refer to testimonial and documentary record assembled through the *de novo* hearing in March 2021. As it happens, the documentary portion of that record consists only of the materials gathered for preparation of the ICD. In this *de novo* proceeding both parties were free to offer additional exhibits, but neither did so.

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13 Testimony of Allan Johnston. Mr. Johnston's testimony is treated herein as factual testimony. The motion to qualify Mr. Johnston as an expert in entrepreneurship and new business development, which was taken under advisement at hearing, need not be ruled on because Mr. Johnston did not offer any expert opinions that bear on the issues in this case.

14 §§ 6-7 ch. 51 SLA 2012.

15 A.R. 048. This "unanimous consent," which was supplied by the corporation, is not signed by all directors and is undated. It therefore does not fully establish that the resolution was duly adopted. It appears to predate stock issuance and therefore presumably was prepared in early 2015. It reserves the right to take further actions that would not be consistent with QSB status, if the attendant "management restrictions are too limiting."

16 Testimony of Brent Fisher (direct).

17 Johnston and Fisher testimony; *see also* commerce.alaska.gov/cbp/main/search/entities. Although the testimony suggested the formation date of Alyeska International, Inc., I independently accessed the publicly available database published by the Department of Commerce, Community and Economic Development to confirm my understanding of the testimony. In the initial decision issued in this case, parties were afforded an opportunity to object to my taking notice of this information by making an offer of proof of contrary information through the reconsideration process. Neither did so.

18 *See* A.R. 018.

III. Analysis

A. Standard of Review and Burden of Proof

The standards for decision in AS 43.05.435 and 43.05.455(c) apply to this case. Questions of fact are resolved anew by a preponderance of the evidence. ASC has the burden of proof to establish the facts needed to support a decision in its favor.

As to questions of law, the administrative law judge is to "resolve a question of law in the exercise of [his] independent judgment."[19] At the same time, the ALJ must "defer to the Department of Revenue as to a matter for which discretion is legally vested in the Department of Revenue, unless not supported by a reasonable basis."[20] These standards regarding legal questions are intended to track the normal approach to review taken by appellate courts, including the deference owed to the agency on certain matters of state statutory or regulatory interpretation.[21] The significant legal questions that arise in this case relate to federal law, and they do bring with them any deference to the department.

B. Does ASC's 2015 Election Preclude Revisiting Eligible QSB Status in 2016-2018?

ASC leads off with a problematic argument based purely on state law. ASC did not advance this argument at the informal conference level.

Since the 2012 amendment, AS 43.20.012(a)(3) has provided that Alaska's Corporate Net Income Tax does not apply to most Alaska corporations that meet the requirements to be an eligible QSB in IRC § 1202(e).[22] A related provision, AS 43.20.012(c), stipulates that "whether a corporation qualifies under (a)(3) of this section *shall be determined on the first day of the tax year for which the corporation claims it qualifies under (a)(3) of this section*" (italics added).

ASC has seized on the italicized language as a complete bar to Revenue's questioning of ASC's eligibility. It notes that it "checked the box" for the QSB exemption on its 2015 return, a return for which the tax year is now closed. In the words of ASC's counsel: "The DOR cannot come back in later years and deny what was explicitly allowed for prior years when the statute says the determination of qualification will be in the first day of the first year."[23]

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19 AS 43.05.435(2).

20 AS 43.05.435(3).

21 *See State, Dep't of Revenue v. DynCorp and Subsidiaries,* 14 P.3d 981, 984 (Alaska 2000).

22 Although not relevant in the present case, it should be noted here that some QSBs eligible under federal law would not qualify for this exemption under state law. *See* AS 43.20.012(d)(3) (adding exclusions for construction, transportation, utility, and fisheries businesses).

23 Opening Statement of F. Steven Mahoney, March 5, 2021, at 7:10-7:30.

ASC has fallen short of carrying its factual burden of proof to establish the most rudimentary basis for this kind of claim. Without context for the 2015 return, one cannot even be certain whether Alyeska International operated ASC during that year. Moreover, counsel's claim that Revenue "explicitly allowed" a 2015 QSB election is wholly unsupported by evidence. Perhaps, for all we know, the only "explicit" thing that occurred was that Alyeska International checked a box on a return and Revenue failed to challenge it—possibly because there was nothing of substance to challenge.

The argument is also fatally implausible as a matter of law. If, in 2015, QSB eligibility had to be determined "on the first day of the tax year," then 2015 was fundamentally different from 2016, because on the first day of 2015 Alyeska International had not been formed and had not acquired ASC. 2016 would be the first year for which eligibility could be evaluated in the context that obtained in that year and later years. And to the extent that ASC contends that Revenue had to actually *make* a formal tax ruling on January 1, 2016, that interpretation of the statute is foreclosed by the principle that a reading of a statute, even if consistent with its literal language, may be excluded if it would lead to an absurd result.[24] It cannot be that AS 43.20.012(c) required the Department of Revenue to rule on a factually complex matter relating to a corporation's structure on a New Year's Day that fell before that corporation had yet filed a single return (note that the prior year's return was not yet due). Revenue might not even know that the exemption was being asserted.

What AS 43.20.012(c) surely means is that eligible QSB status, and hence exemption from that year's state tax, is to be determined *as of* the first day of each year in which the exemption is claimed. Nothing Revenue has done, or that it seeks to do in this appeal, is inconsistent with that common-sense reading.

C. Parameters for Determining If ASC Was an Eligible QSB on January 1 of the Tax Years in Question

1. Criteria for the Tax Exemption

To be exempt from income taxation in Alaska, ASC had to meet the following criteria on January 1 of each tax year in question:

- Be a corporation incorporated in or authorized to do business in Alaska;[25]
- Be a QSB under IRC § 1202;[26]

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24 *See, e.g., Martinez v. Cape Fox Corp*, 113 P. 3d 1226, 1230 (Alaska 2005).
25 AS 43.20.012(a)(3) and (d)(1).
26 AS 43.20.012(a)(3) and (d)(3).

- Meet the "active business requirement" of IRC § 1202(e);[27] and
- Not be a construction, transportation, utility, or fisheries business.[28]

The first and last criteria are plainly met and are not at issue. The second criterion is also conceded and met: under the relevant IRC provision, a QSB is simply a domestic C corporation with gross assets under $50 million that meets certain reporting requirements.[29] This case turns on the third criterion, the "active business requirement" that, when met, makes a QSB into an *eligible* QSB under § 1202.

2. Framework for the Active Business Requirement

To meet the "active business requirement," at least 80 percent of the corporation's assets must be used in conducting a "qualified trade or business."[30] The 80 percent threshold is not at issue here; the great majority of this corporation's assets are used in the operation of a sleep clinic, and the remainder in the operation of an allied medical equipment dispensary. The only question in this case is whether ASC's operation is a "qualified trade or business."

Two preliminary observations should be made before we turn to the merits of that question. First, insofar as there is any evidence in the record, ASC's operation has been consistent from 2016 onward. Hence there is no need to examine whether it was the same on January 1 of a particular year in contrast to some later point in the year, or whether it was the same in 2016 in contrast to 2017 or 2018. Second, the references to IRC § 1202 in Alaska Statute are specifically keyed to that provision as it existed on January 1, 2012. However, none of the relevant language in § 1202 has changed since that date; all interpretations of that provision since that time are interpretations of the language Alaska has adopted.

In § 1202, "qualified trade or business" is defined in the negative; that is, it is any trade or business that is *not* on the list of exceptions. One of the exceptions is "any trade or business involving the performance of services in the field[] of health."[31]

3. Aids for Interpreting "Field of Health"

The phrase "field of health" in § 1202 is a term of art that has generated a small body of interpretive material. The interpretation is purely a question of federal law. The parties to this case have referred at times to state principles of interpretation, but these have no application

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27 AS 43.20.012(a)(3)
28 AS 43.20.012(d)(3).
29 26 U.S.C. § 1202(d).
30 26 U.S.C. § 1202(e)(1).
31 26 U.S.C. § 1202(e)(3)(A).

where a state law's test is whether a business "meets" a certain federal requirement.[32] With that said, a key state canon is matched in federal law: the canon that where there is uncertainty, exclusions from income must be narrowly construed (that is, against the taxpayer) when interpreting tax laws.[33] In federal law, § 1202 operates as an exclusion from taxable income.[34]

To aid in interpreting the key phrase, we have two main resources. The first, and most directly applicable, is a series of IRS private letter rulings (PLRs) applying exactly that phrase from § 1202 in the context of other health-related businesses. While not binding or precedential, PLRs are an excellent indication of how a particular federal provision is being applied to the broader population of taxpayers.

Second, there is the ancestry of this particular phrase in federal law. It first appeared in 1986 in 26 U.S.C. § 448, which provided that a corporation performing the bulk of its activities in "the field[] of health" could be a "personal services corporation."[35] The IRS then promulgated a definition of the statutory phrase in IRS regulation 26 C.F.R. § 1.1448-1T(e)(4)(ii), which has been further elucidated in several court decisions. The phrase's important role in § 448, and the regulation's definition of the phrase as it appeared there, were well-known and longstanding at the time § 1202 was enacted, and seem to have informed the use of the same language in the more recent tax provision. The § 448 usage is widely regarded—including by the IRS—as being coterminous in enough respects with the phrase in § 1202 that interpretations from the regulation provide useful guidance.[36]

We should note briefly that there is a potential third source of interpretation. The same "field of health" terminology has recently been referenced in a statutory descendant of § 448 and § 1202, the Tax Cuts and Jobs Act provision codified at 26 U.S.C. § 199A. This has been defined (in much the same way as in the § 448 regulation) in regulation 26 C.F.R. § 199A-5(b)(2)(B)(ii). However, little interpretive material has yet been issued in connection with this new iteration.[37]

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32 In this instance, Alaska did not "adopt" federal law and import its language into state law, as it did in AS 43.20.021(a). Instead, it required the taxpayer to "meet" a federal standard.

33 *See Commissioner of Internal Revenue v. Schleier*, 515 U.S. 323, 328 (1995).

34 26 U.S.C. § 1202(a)(1). It also functions as an exclusion in state law, but in a different way.

35 Sec. 801, P.L. 99-514, 26 U.S.C. § 448(d)(2)(a).

36 *See* Treasury Decision 9847, 84 F.R. 2952 (Feb. 8, 2019) ("The Treasury Department and the IRS believe it is appropriate to look to the definitions provided in [26 C.F.R. § 1.1448] because guidance under section 1202 is limited.").

37 *See generally* Adam J. Tutaj, "Everything Old is New Again: Tracing the Origins of What Constitutes the "Field of Health" for purposes of Code Sec. 199A," CCH Journal of Passthrough Entities (July-Aug. 2019) (martindale.com/matter/asr-2519985.MTFN.pdf).

4. Longstanding Usage of the Phrase "Field of Health"

Let us start with the definition of "field of health" in § 1.1448-1T(e)(4)(ii), since it set the stage for the later interpretations involving § 1202. In this regulation the IRS set out to define "field of health" in a context where, if "substantially all" of a corporation's activities were connected with providing "services" in that field, the corporation could be a "qualified personal services corporation." The definition read:

> **(ii)** ***Meaning of services performed in the field of health.***
> For purposes of paragraph (e)(4)(i)(A) of this section, the performance of services in the field of health means the provision of medical services *by physicians, nurses, dentists, and other similar healthcare professionals.* The performance of services in the field of health does not include the provision of services not directly related to a medical field, even though the services may purportedly relate to the health of the service recipient. For example, the performance of services in the field of health does not include the operation of health clubs or health spas that provide physical exercise or conditioning to their customers. [italics added]

By incorporating the "by . . . healthcare professionals" language in this definition, the regulation immediately placed quite a narrow interpretation on it. This was in keeping with the purpose of 26 U.S.C. § 448, which had listed the "field of health" and several other fields (law, architecture, athletics, and so on) in an effort to eliminate a certain type of taxpayer from preferential tax treatment. More specifically, as a federal court observed in *Chickasaw Ambulance Service v. United States*[38]:

> Based on [the] legislative history and commentary, it appears clear that Congress wanted to stop professional individuals from incorporating, or using their corporate status, in order to obtain lower graduated corporate tax rates, when Congress believed that professional individuals should be paying the higher individual income tax rates. Furthermore, Congress did not see any reason why qualified personal service corporations, who were being paid largely for their mental or intellectual skill, needed to accumulate capital for future corporate investment.

The *Chickasaw* court went on to make the following observation about § 1.1448-1T(e)(4)(ii):

> These legislative purposes suggest that the phrase "other similar healthcare professionals" should be interpreted narrowly to protect companies performing personal services in the field of health which are not trying to use their corporate structure to avoid paying the higher individual income tax rates they would pay if not incorporated.

To translate: the "field of health" language was in a provision intended to keep entities trading primarily on professional skill from getting a special tax break aimed at entities that

[38] No. C97-2094 MJM (N.D. Iowa 1999) (published at casetext.com/case/chickasaw-ambulance-serv-v-united-states).

needed to accumulate capital for reinvestment. But it should not be used to sweep in entities that do health-related things but are not at all similar to professional corporations.

Caselaw applying the § 1.1448-1T(e)(4)(ii) definition has been forced to bridge a vast no man's land between services provided by physicians, nurses, and the like, on the one hand, and health spas, on the other. One case attempting to do this was *Zia-Ahmadi v. C.I.R.,*[39] a 2017 U.S. Tax Court decision. The court evaluated a company called Sound Diagnostic, whose employees were sonographers performing diagnostic (not therapeutic) ultrasound inside various cardiology clinics. Although the sonographers did not have to be licensed to practice their craft, they did ordinarily need to have two years of formal training in an associate degree program, and the company as a whole needed accreditation from the American College of Radiology, which the court characterized as "a professional medical society." The court focused on these skill and accreditation requirements to find sonographer work "more similar" to that of doctors and nurses than to that of health spa employees, and it concluded the company was operating in the "field of health."[40] The *Zia-Ahmadi* holding is very similar to the view taken in FSA 1993-919, an IRS Field Service Advice memorandum from a quarter century earlier: it found that x-ray technicians who needed 24 months of specialized training were "the professional equivalent of nurses" and hence were performing "in the field of health." Likewise in this vein is IRS Tax Advice Memorandum 922204 (Jan. 8, 1992),[41] finding physical therapists to be professionals at this level.

A similar focus on the level of training required is found in another U.S. Tax Court case, *W.W. Eure, M.D., Inc. v. C.I.R.*[42] That case related to a business that administered radiation therapy to patients. The court elucidated the regulatory phrase "similar healthcare professionals" as conveying "the need for advanced education and training 'similar' to what is required of physicians, nurses, and dentists"—that is, "advanced education and intellectual training,"[43] and it found that the taxpayer had not been able to prove that its radiation technologists did not require such training. For that reason and others (notably, this was a business directly administering to patients sophisticated treatments that had been prescribed by its owner-physician), the court easily found the company to be in the "field of health."

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39 T.C. Summ. Op. 2017-39 (U.S.T.C. 2017).

40 In post-hearing briefing, ASC attempts to distinguish *Zia-Ahmadi* on the basis that the sonographers performed their work inside medical offices. However, this was not a factor in the Tax Court's holding of interest, which is found in Part II-B-2 of the Discussion section of the opinion, and does not ordinarily seem to play a role in "field of health" analysis under §§ 448 and 1202.

41 Reprinted at bradfordtaxinstitute.com/Endnotes/TAM_9222004.pdf.

42 2007 T.C. Memo 124 (U.S.T.C. 2007).

43 *Id*. at 10-11.

At the other end of the spectrum was *Chickasaw Ambulance Services v. United States*, the case quoted previously for its discussion of Congressional purpose. That court found that Emergency Medical Technicians (EMTs) were not "similar" to doctors or nurses. It focused on the fact that they could attain proficiency with a few hundred hours of training, without a high school diploma or any other academic credentials, and on the fact that their professional practice is not "dominated by mental or intellectual job requirements." Therefore, an ambulance service using EMTs was not in the "field of health."

5. Letter Rulings Directly Applying the § 1202 Language

The first letter ruling interpreting "field of health" in § 1202 is PLR 201436001. The taxpayer in that ruling researches, tests, and manufactures drugs and consults on manufacturing problems. The Service observed:

> Company is not in the business of offering service in the form of individual expertise. Instead, Company's activities involve the deployment of specific manufacturing assets and intellectual property assets to create value for customers. Essentially, Company is a pharmaceutical industry analogue of a parts manufacturer in the automobile industry. Thus, although Company works primarily in the pharmaceutical industry, which is certainly a component of the health industry, Company does not perform services in the health industry within the meaning of § 1202(e)(3).

A key observation in this first letter ruling interpreting the new section was the distinction between being "a component in the health industry" and being in "the field of health." The IRS made clear from the beginning that "field of health," like the same phrase in § 448, would be interpreted as a term of art, not according to casual usage, would be considerably narrower than what the average citizen might regard as the healthcare field, and would be related to whether the business was marketing individual professional skill.

The second important letter ruling, PLR 201717010, involved a testing lab, a business much more akin to ASC's than that of the drug manufacturer in the 2014 ruling. The taxpayer there performs a patented laboratory test to detect presence and levels of a substance, supplying reports with that information to healthcare providers. Results are not interpreted for or discussed with patients, nor are diagnosis or treatment discussed with providers. There is no contact with patients at all except for billing and, very occasionally, furnishing a copy of the test result. The lab director must be a medical professional, but personnel are unlicensed non-professionals needing about a year of nontransferable training and general scientific training at the associate

degree level.[44] In finding this company to be engaged in a "qualified trade or business," the IRS highlighted the following factors:

- Technicians performing the work are not licensed, and their skills are not significantly transferrable.
- There is essentially no contact with patients apart from billing.
- The company "does not provide health care professionals with diagnosis or treatment recommendations."
- Its sole function is to "provide healthcare providers with a copy of its laboratory report."
- No revenue is earned "in connection with the patients' medical care."

The third letter ruling of interest is PLR 2021144026.[45] This taxpayer develops and sells software to assist medical providers in optimizing treatments and medication for their patients. The company performs no tests and has no patients, but the patients use the software as part of their interaction with their medical provider. The software generates reports for use by the provider. The reports do not diagnose conditions or recommend treatment. In finding this company to be engaged in a "qualified trade or business," the IRS highlighted the following factors:

- Since the reports did not diagnose or recommend treatment, they were "an asset" to be used by health providers, rather than health services in themselves.
- Individual expertise is not the primary value being furnished to customers.
- The company "is not aware of and does not discuss the diagnoses or treatment by healthcare providers."
- Its sole function is to "provide tools . . . and reports."

D. Evaluation of Whether ASC Operates "In the Field of Health"

Revenue asserts that the determination of whether something is in the "field of health" is as simple as can be. If the service is "medically necessary"—and hence reimbursable by Medicare and Medicaid—it follows that it must be medical, and therefore it must be in the "field of health."[46] Of course, ASC's services are for a medical purpose and it is quite important to ASC

[44] The general educational requirement is drawn from 42 C.F.R. § 493.1489, which apparently applies to the PLR 201717010 lab since the ruling references a need to comply with a different 42 C.F.R. § 493 requirement.
[45] This 2021 ruling, which was issued after briefing and argument were complete in this case, is found at irs.gov/pub/irs-wd/2021144026.pdf .
[46] DOR Supplemental Closing Argument at 1-2.

for them to be found "medically necessary" so that they will be paid for. Revenue would end the analysis there.

Revenue's simplistic view of the "field of health" language is not a mainstream view, however. PLR 201717010 involved a lab testing for levels of a substance in patients to assist doctors in making diagnoses, a service at the core of what health insurers, including Medicare and Medicaid, routinely reimburse. Yet the IRS did not even touch on the language of medical reimbursement in its analysis, and it found these lab services to be outside the "field of health." Similarly, one can surmise that the manufacturer in PLR 201436001 strives to produce drugs that are "medically necessary," but this circumstance had no bearing on the Service's ruling that it is not in the "field of health."

This is, in fact, a close case. It is made particularly close by the long history of drawing the boundaries of the "field of health" primarily by focusing on the professional status of those who do the core of the taxpayer's work. This unquestionably remains a central part of the determination, as demonstrated by PLR 201717010. The difficulty is created by the fact that ASC's polysomnographic technologists fall on the spectrum at the break point between what the prior cases have considered health professionals as opposed to non-professional workers in the health industry. The spectrum is summarized in the following table:

Primary workers used by business	**Credentials needed**	**Services in "field of health?"**	**Source**
Physicians	Doctorate plus licensure	Yes	26 C.F.R. § 1.1448-1T(e)(4)(ii)
Physical Therapists	Graduate of board-certified school, plus licensure	Yes	TAM 922204
Nurses	Associate's equivalent or higher, plus licensure	Yes	26 C.F.R. § 1.1448-1T(e)(4)(ii)
Radiation technologists	Court assumed "advanced education and intellectual training" like nurses	Yes	*W.W. Eure, M.D., Inc. v. C.I.R.*
X-ray technicians	24 months formal training in AMA/AOA-accredited program,	Yes	FSA 1993-919

	possible licensure		
Sonographers	Associate's level degree, no license but facility accredited	Yes	*Zia-Ahmadi v. C.I.R.*
Polysomnographic technologists	*Up to 1 year non-degree training. National certification available and is needed for billing*	*?*	*THIS CASE*
Lab techs	Up to 1 year in-house training, no license or credential. Associate degree equivalent general scientific training needed.	No	PLR 201717010
EMTs	Several hundred hours, no license	No	*Chickasaw Ambulance Services v. U.S.*

At bottom, is ASC an operation that is being compensated in large part for the "mental and intellectual skill" of its employees (to use the language of the *Chickasaw* court)? Unusual factors particular to ASC answer that question in this case.

First, there is the medical director's role. ASC's director does something *in his capacity as an ASC contractor* that goes well beyond what one would expect of the medical director of, say, a lab doing blood tests. For every patient, he reviews the referral form and accompanying medical records to ensure that the patient is appropriate for the study selected. Sometimes he talks to the referring physician to explain that a particular testing choice is inappropriate. There is no separate billing for this; the expert review is simply part of the service ASC provides. As commendable as it is that ASC performs this review, it moves the needle appreciably in the direction of professional services. Part of the overall package that ASC provides to every patient is this screening by a physician with an extremely high level of specialized training.

Second, and relatedly, there is the way ASC markets itself to referring physicians and their patients. ASC assures them that it has the "seasoned know-how" to "handle the subtle science of diagnosis and treatment."[47] It promises that ASC will be there to "consult with" the patient's doctor, and will "call" him or her both to consult and to request information it has identified as being necessary.[48]

[47] A.R. 069.
[48] A.R. 070.

Third, there is the long-term, multidimensional, interpersonal nature of ASC's interaction with patients. Indeed, in a fair number of cases, it is ASC that has linked the patient with the doctor in the first place, having used its "facilitator" role to "freely guide the individual through the continuum of care."[49] Again, this is a far cry from a lab dutifully following an order to run a blood test—even a sophisticated one—and report a number, or an ambulance service rushing a patient to the hospital and then moving on to the next emergency call. It is a business trading on its mastery of what it calls a "subtle science"—mastery that it is willing to share, and does share, with referring physicians.

ASC is right, of course, that the study of sleep disorders is a "subtle science." ASC is not merely reporting a number to physicians. To be useful, the right test needs to be chosen, and to ensure that this occurs ASC provides a records review by a double board-certified, fellowship trained sleep specialist physician. The test itself typically needs fairly skilled monitoring over the course of many hours, and an analytical report has to be prepared that is more than a snapshot of a blood level or other parameter. The company has the personnel to do these tasks well, but in doing so it engages in a level of professional service that puts it inside § 1202's "field of health."

In reaching this result, I am mindful that ASC had the burden of proof in this proceeding. I also apply the federal interpretive canon that in doubtful cases, exclusions from income are to be narrowly construed (that is, against the taxpayer) when interpreting tax laws,[50] and the related principle that "exemptions from taxation . . . must be unambiguously proved."[51] Section 1202's exclusion operates in an unusual way, defining the exclusion in the negative by creating carve-outs from the exclusion for particular fields, such as the "field of health," that are not to be excluded. What this means is that ASC must prove unambiguously that it is not operating in the "field of health."

ASC has asked this tribunal to push the boundary for eligible QSBs to the farthest outpost it has ever been pushed—or, conversely, to write the tightest restriction on § 1202's "field of health" that has ever been written in a published case or formal ruling. It has fallen short of making a fully persuasive case to do this. The work of its polysomnographic technologists, in conjunction with the role of its medical director and the overall guidance it provides to patients

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49 A.R. 012.

50 *See Schleier*, *supra*, at 328.

51 *United States v. Wells Fargo Bank*, 485 U.S. 351, 354-355 (1988).

and practitioners, is akin to that of the sonographers in *Zia-Ahmadi* rather than the lab techs in PLR 201717010. The ICD must be upheld.[52]

IV. Conclusion

The taxpayer, Alyeska International, Inc. dba Alaska Sleep Clinic, is not exempt from Alaska Corporate Net Income Tax under AS 43.20.012(a)(3). The taxpayer has challenged no other aspects of the decision below as modified by Appeals Officer Blodgett. Accordingly, the Informal Conference Decision dated June 18, 2020 is affirmed.

DATED: April 25, 2022.

By: *Signed*
Name: Christopher Kennedy
Title: Administrative Law Judge

NOTICE

This is the hearing decision of the Administrative Law Judge under Alaska Statute 43.05.465(a). Unless reconsideration is ordered, this decision will become the final administrative decision 60 days from the date of service of this decision.[53]

A party may request reconsideration in accordance with Alaska Statute 43.05.465(b) within 30 days of the date of service of this decision.

When the decision becomes final, the decision and the record in this appeal become public records unless the Administrative Law Judge has issued a protective order requiring that specified parts of the record be kept confidential.[54] A party may file a motion for a protective order, showing good cause why specific information in the record should remain confidential, within 30 days of the date of service of this decision.[55]

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska Statute 43.05.480 within 30 days of the date this decision becomes final.[56]

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]

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[52] ASC has suggested this result will be harsh, and is a sense it is. The company's corporate vehicle was chosen exclusively to take advantage of AS 43.20.012(a)(3), with its tie-in to §1202. And yet in making that choice in 2015, the company and its advisors surely must have known they were taking an aggressive tax position.

[53] AS 43.05.465(f)(1).

[54] AS 43.05.470.

[55] AS 43.05.470(b).

[56] AS 43.05.465 sets out the timelines for when this decision will become final.