

MVP: Mayer Brown's Brian W. Kittle

By Dylan Moroses

Law360 (October 26, 2023, 1:03 PM EDT) -- Mayer Brown LLP's Brian Kittle secured several significant decisions for his clients in transfer pricing and partnership controversy matters, earning him a spot among Law360's 2023 Tax MVPs.

His biggest cases:

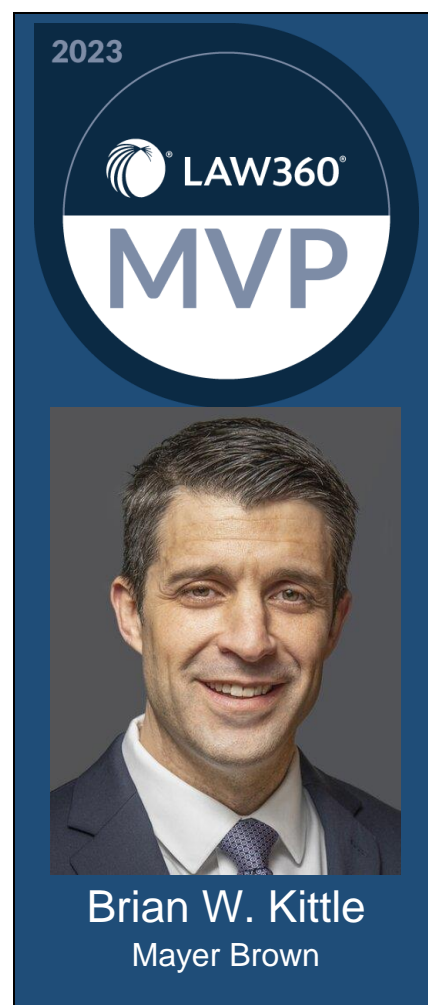
Kittle represented Eaton Corp. in its dispute with the Internal Revenue Service over the validity of an advanced pricing agreement between the company and the government.

In general, an APA is negotiated between a corporation and its home country's tax authority — and sometimes a foreign authority — on the pricing of assets that generate income across borders. In Eaton's case, the IRS had contended it had the authority to cancel two APAs that applied to Eaton's 2001-2005 and 2006-2010 tax years.

According to the agency's court filings, Eaton incorporated transfer prices on its 2005-2008 tax returns that were more than \$165 million higher than the amounts the company reported in its 2005-2008 APA annual reports, producing an equivalent reduction in income. In defending the decision to cancel the APAs, the IRS argued on appeal that Eaton's errors constituted material conduct that fell under the cancellation subsection of the revenue procedures that governed the agreements.

In the case before the Sixth Circuit, a three-judge panel rejected the government's contention that the IRS' decision to cancel Eaton's APAs was supported by the company's calculation errors and incorrect numbers on its tax returns.

Citing revenue procedures incorporated by the APAs, the panel found that the requirement for Eaton to ensure correct calculations fell under the agency's ability to enforce agreements, but not to cancel them. The panel's opinion largely upheld rulings from the U.S. Tax Court, which found that the IRS abused its discretion in scrapping the APAs and couldn't claim 40% penalties for Eaton's self-reported corrections.



The panel's decision, written by U.S. Circuit Judge John B. Nalbandian, also disagreed with the IRS' argument that Eaton needed to show that the cancellation was "plainly arbitrary," instead finding that the agency had the burden to defend its decision under contract law principles.

Kittle said that the appeals court's ruling in the Eaton case does provide some limitation to the government's discretion regarding when it can cancel advance pricing agreements.

"I think, at the end of the day, what the court seemed to be most troubled by was that a taxpayer in the lower court, in which the lower court found, was able to show that the cancellation wasn't grounded on legitimate reasons," Kittle said.

Kittle also represented Cross Refined LLC in a case in 2022 where the D.C. Circuit found the members of the company can claim tax credits for the business's production activities. The appeals court determined that Cross Refined counted as a legitimate partnership despite its inability to turn a profit without the tax benefits.

Cross Refined LLC's members — AJG Coal Inc., Fidelity Investments and Schneider Electric — can share in the tax credits under Internal Revenue Code Section 45(c)(7)(A) because they intended to carry out a business and all had stakes in the enterprise, the D.C. Circuit said in a published opinion. It affirmed a ruling from the U.S. Tax Court determining that Cross Refined was a bona fide partnership, despite misgivings from the IRS that it shouldn't count as one because it couldn't turn a profit without the tax benefits.

Kittle said that the Cross Refined dispute is significant because it may forecast what the government will focus resources on in the enforcement and litigation space.

In work outside the courtroom, Kittle also represents taxpayers that are working with the IRS to resolve matters prior to litigation through their exam and appeals process, and he noted the agency is paying close attention to partnership issues.

"We expect to be seeing a lot of challenges in the future based on what the government has said recently, with respect to its intent to audit and examine large partnerships," Kittle said. "We do expect that we'll see a lot of challenges to partnerships."

His biggest challenges:

Kittle said that both the Eaton and Cross Refined cases were quite different and presented unique fact patterns.

"It was a process of really ... immersing myself, and my team had to immerse themselves in the facts of both cases, really understand those cases, as well as the facts and the different legal doctrines that were in play," Kittle said.

Kittle noted that, in both cases, his team at Mayer Brown worked with different co-counsel at Skadden Arps Slate Meagher & Flom LLP in seamless fashion.

"There was a lot of collaboration between, I would say, some of the best legal minds in this particular area of law, as well as great collaboration with a very hands-on and wonderful set of clients who were very passionate ... and supported us throughout the entire process," Kittle said.

His advice for younger attorneys:

Collaboration, the ability to learn from others and continue learning, is something Kittle said will be invaluable to young attorneys looking to enter tax law.

"It's really key for younger people: Who to ask?" Kittle said. "You really need to be surrounded by a team of very talented people."

-- As told to Dylan Moroses. Additional reporting by Natalie Olivo and Theresa Schliep.

Law360's MVPs of the Year are attorneys who have distinguished themselves from their peers over the past year through high-stakes litigation, record-breaking deals, and complex global matters. A team of Law360 editors selected the 2023 MVP winners after reviewing more than 900 submissions.