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Federal Tax ADVISORY ■

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Two Supreme Court Tax Decisions

During the current term, the Supreme Court of the United States decided very few tax cases. Two of those seem quite limited in scope, until you delve under the surface.

Summons Enforcement

United States v. Clarke, 189 L. Ed. 2d 330 (2014), ruled that a federal district court cannot deny a taxpayer or summonsed party the opportunity to cross examine a revenue agent if the person "points to specific facts or circumstances plausibly raising an inference of bad faith" in issuing the summons. The Court reversed the decision in favor of the IRS because it assumed the lower court had applied an arbitrary rule without assessing the facts of the taxpayer's case.

On remand, the taxpayer will likely be able to show the facts necessary to raise the inference. Indeed, the taxpayer already had done so. It asserted that the agent issued the summons in retaliation for the taxpayer's refusal to again extend the statute of limitations, and also intended to use the summonsed information in the Tax Court case, rather than for its proper purpose to audit and make an assessment.

The chief counsel has claimed the ruling is a victory for the IRS because it requires some proof from the taxpayer prior to ordering an evidentiary hearing. However, the amount of proof is quite low. The Court's opinion in effect approved the assertion under oath of the facts stated above as sufficient for obtaining the hearing; on remand it is likely that the court will order a hearing because the taxpayer had already asserted under oath that the summons came shortly after refusing to extend the statute and that the Tax Court trial lawyers were the ones who were pursuing the summons discovery.

Therefore, the *Clarke* opinion stands for a substantial expansion of the tools available to taxpayers in resisting IRS summons, either to themselves or third-party record holders. As long as someone is willing to assert under oath some sort of bad faith on the part of an individual revenue agent in issuing the summons, the taxpayer can (1) at least delay the summons enforcement, and (2) put the agent on the stand to explain why there was no bad faith.

The Court's opinion did not address the law that it has uniformly enforced up to now that a summons can have dual purposes. Even if the summons is for a "bad purpose" it has been enforced when (1) the taxpayer actually is under audit, (2) the IRS does not have the information sought, and (3) the information may be relevant to the tax assessment. The information can also be relevant to fraud and be sought for the purpose of extending a statute of limitations on assessment that has already run.

Most corporate taxpayers will not be interested in picking fights with examining revenue agents who, in many cases, return to the same taxpayer year after year. However, individual taxpayers who can afford the litigation costs, like the taxpayers in the *Clarke* case, may find the expanded rights useful.

Waiver of Sovereign Immunity

Ford Motor Co. v. United States, 134 S. Ct. 510 (2013), ruled in favor of the taxpayer and remanded to the Sixth Circuit for reconsideration of the possibility that the court did not have subject matter jurisdiction to even rule against the taxpayer. That may not sound like a win for the taxpayer—but it was, though not necessarily on a tax issue.

The case has two important features. First, it reveals the view of the Justice Department that the district courts do not have refund action jurisdiction over a suit to recover overpayment interest when the taxpayer is not also seeking the tax that it overpaid because the IRS voluntarily refunded it without the interest.

This is an odd situation that perhaps cannot arise after the 2004 enactment of Section 6603 concerning deposits against tax liability. However, this case arose under earlier law when it appeared the taxpayer did not earn overpayment interest on a deposit while it was a deposit. This taxpayer converted the deposit to a payment and then received a refund of the payment, without interest for the period the payment was a deposit.

The Justice Department claimed that it always thought the trial court did not have jurisdiction, but did not say anything due to what it claimed was adverse Sixth Circuit precedent. When it did raise the point in its Supreme Court brief, the Court seized on it to vacate and remand.

The second important feature is the reason the Court agreed to hear the case: the claim that the trial court had applied the strict construction of a waiver of sovereign immunity (the tax refund statute) to a substantive provision (the overpayment interest statute). The opinion's remand instructions told the lower court to reconsider the issue.

The Chamber of Commerce of the United States had filed an amicus petition supporting the grant of the writ of certiorari. It argued that the case had broader significance, for all suits against the federal government involving a sovereign immunity waiver. It is likely that the Supreme Court agreed to hear the case because of that issue, indicating sympathy with the desire to expand the waiver of sovereign immunity generally, and not just in tax cases.

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