



2015 Federal Bar Association
Tax Law Conference

HOT TOPICS IN TAX LITIGATION:

**RECURRING ISSUES, SPECIAL ISSUES IN BANKRUPTCY
CASES, JUDICIAL PERSPECTIVES, AND RECENT TRENDS**

**MARCH 6, 2015
WASHINGTON, DC**

PANELISTS

- Honorable Victor Wolski, U.S. Court of Federal Claims
- Christopher Rizek, Member, Caplin & Drysdale
- Joseph Sergi, Senior Litigation Counsel, U.S. Department of Justice, Tax Division
- Andrew Strelka, Counsel, Miller & Chevalier
- Alex Sadler, Partner, Ivins, Phillips & Barker (moderator)

AGENDA

- Recurring issues in tax litigation
 - Choosing the right forum
 - Settling tax cases with the Tax Division and IRS
 - TEFRA issues
 - Refund claim sufficiency and variance problems
- Judicial perspectives on tax cases
- Litigating tax issues in bankruptcy court
- Recent trends and developments
 - Summons enforcement
 - Penalty litigation
 - E-discovery

FORUM SELECTION CONSIDERATIONS

	Tax Court	CFC	District Court
Prepayment	No	Yes	Yes
Precedent	<i>Golsen</i> rule	Federal Circuit	Circuit where TP resides/does business
Expertise	High (100%)	Varies (<10%)	Varies (<10%)
Adversary	IRS Chief Counsel	DOJ Tax Division	DOJ Tax Division/ US Attorney's Office
Jury trial	No	No	Yes
Discovery	Informal, collaborative, historically limited	Formal	Formal
Stipulations	Expected	Up to parties	Up to parties

SETTLING TAX CASES

- Tax Court cases
 - If no prior opportunity, the taxpayer may try to settle with IRS Appeals.
 - Settlement discussions between taxpayer and assigned Chief Counsel attorney can occur at any time; approval subject to internal delegations of settlement authority.
 - “In general, the Office of Chief Counsel regards all cases susceptible of settlement except those which involve negligible litigation hazards and cases designated for litigation.” IRM § 35.5.2.2 (08-11-2004).

SETTLING TAX CASES

- Refund suits
 - See Tax Division Settlement Reference Manual (rev. Sept. 2012) (www.doj.gov)
 - Trial attorney negotiates settlement terms and prepares settlement memorandum upon receipt of an offer.
 - “Trial Attorneys are the best informed about the facts and law applicable to their cases, and their settlement recommendations are accorded great weight. The Trial Attorney has primary responsibility for evaluating the litigation potential (and, thus, the settlement potential) of the case at every stage of the litigation. The Trial Attorney negotiates any proposed compromise....” Settlement Reference Manual p. iv.
 - IRS Chief Counsel views are obtained in all but SOP cases.

SETTLING TAX CASES

- Refund suits (cont'd)
 - The most important criterion from the government's perspective are its litigating hazards.
 - Ultimate settlement authority depends upon the amount of the government's concession.
 - Section Chiefs (up to \$500,000 + no IRS objection)
 - Office of Review (up to \$1.5 million + no IRS objection)
 - Assistant Attorney General (up to \$2 million)
 - Associate Attorney General (above \$2 million)

JOINT COMMITTEE REVIEW

- IRC § 6405 mandates that refunds in excess of \$2 million (including penalties and interest) with respect to income and other taxes be reported to the Joint Committee on Taxation.
 - Viewed as a way of improving tax administration.
 - “Of particular concern to the Joint Committee Staff are transactions in which taxpayers obtain unintended benefits.”
 - In such a case, the Joint Committee may recommend amendments to the Code, clarification or reconsideration of regulations or rulings, or published guidance.
 - “The Joint Committee Staff refund review also permits identification of issues that, as a technical matter, were not handled correctly by the Examination or Appeals.”

JOINT COMMITTEE REVIEW

- \$2 million jurisdictional amount (see IRM § 8.7.9)
 - Deficiencies in the same year and with respect to the same type of tax as potential refunds are applied as offsets.
 - Where multiple years are under Exam or Appeals jurisdiction, deficiencies in one year are offset potential refunds in another year.
 - Where a prior refund has been made, a later refund for the same year is not reportable unless it independently exceeds the threshold.
 - Refunds from court judgments are not reportable.
 - Tentative adjustments from carrybacks can be made prior to Joint Committee review.

JOINT COMMITTEE REVIEW

- IRC § 6405 provides only that no refund shall be made until after the expiration of 30 days from the date a report is submitted to the IRS.
- Nevertheless, the IRS and the Tax Division will not authorize an overpayment until the Joint Committee has advised whether it has any adverse criticism.
- The IRS and Tax Division are not statutorily required to comply with the Joint Committee's recommendation.

TEFRA ISSUES

- **Timing**
 - Service issues FPAA
 - Tax Matters Partner – 90 days to file petition in USDC, CFC, or USTC (IRC § 6226(a))
 - Notice Partner – 60 days to file petition following end of that period in any of the same forums (IRC § 6226(b))
- **Payment**
 - USTC (no payment required) vs. USDC/CFC (deposit required, IRC § 6626(e))
- **Collection**
 - Tax Court (collection stayed) vs. USDC/CFC (IRS may collect against non-filing partner)
- **Settlement**

CLAIM SUFFICIENCY & VARIANCE PROBLEMS

- History – *United States v. Felt & Tarrant Mfg. Co.*, 283 U.S. 269 (1931)
- Treas. Reg. §§ 301.6402-1 through 301.6402-7
- Development – the Federal Circuit
 - *Computervision Corp. v. United States*, 445 F.3d 1355 (Fed. Cir. 2006)
- Impact – no new factual representations and legal arguments, but additional evidence permissible where fair notice was given to the IRS
 - *Bayer Corp. v. United States*, 2012 WL 4339554 (W.D. Pa. 2012)

CLAIM SUFFICIENCY & VARIANCE PROBLEMS

- Amending the refund claim
 - Limitations period
 - *Larson v. United States*, 89 Fed. Cl. 363 (Fed. Cl. 2009)
 - *New England Mutual Life Ins. Co. v. United States*, 52 F.2d 1006 (Ct. Cl. 1931)
- Claim submission after denial (I.R.C. § 6676)
- Recognized exceptions to the variance rule
 - Informal claim doctrine
 - *United States v. Kales*, 314 U.S. 186 (1941)
 - *BNSF Ry. Co. v. United States*, 745 F.3d 774 (5th Cir. 2014)

CLAIM SUFFICIENCY & VARIANCE PROBLEMS

- Recognized exceptions to the variance rule (cont'd)
 - Waiver
 - *Angelus Milling Co. v. Comm'r*, 325 U.S. 293 (1945)
 - General Claim
 - *U.S. v. Andrews*, 302 U.S. 517 (1938)
 - “Germaneness”
 - *Bremis Bros. Bag Co. v. United States*, 289 U.S. 28 (1933)
 - Equitable Recoupment
 - *Bull v. United States*, 295 U.S. 247

CLAIM SUFFICIENCY & VARIANCE PROBLEMS

- Protective refund claims
 - *AmBase Corp. v. United States*, 731 F.3d 109 (2d Cir. 2013)
 - *Yamagata v. United States*, 114 Fed. Cl. 159 (2014)
 - *Cencast Servs., LP v. United States*, 94 Fed. Cl. 425 (2010), *aff'd*, 729 F.3d 1352 (Fed. Cir. 2013), *cert. denied*, 134 S. Ct. 2841 (2014)
 - *El Paso CGP Co. v. United States*, 748 F.3d 225, 226 (5th Cir. 2014)

JUDICIAL PERSPECTIVES

- Discovery disputes
 - Courts prefer parties to resolve them by themselves.
- Stipulations
 - Going beyond documents to facts
 - Legal issues?
- Expert witnesses
 - Disclosures/discovery
 - Expert reports and trial presentation of opinions

TAX LITIGATION IN BANKRUPTCY COURT

- No full pay, no juries, and no delays
- Creditors are high school students at lunch—where you sit matters
 - Secured
 - Priority
 - Unsecured general
 - 11 U.S.C. § 507
- Claims objection process
- § 505 motion: permissive subject matter jurisdiction
- *In re Holly's Inc.*, 172 B.R. 545 (Bankr. W.D. Mich. 1994)
- *In re Gilliam*, 428 B.R. 656 (Bankr. D.S.C. 2008)

Proof of Claim for
Internal Revenue Taxes
Department of the Treasury/Internal Revenue Service



RECENT TRENDS & DEVELOPMENTS: SUMMONS ENFORCEMENT UPDATE

- Revised LB&I IDR process
 - Less examiner discretion—one extension only
 - More automatic
 - Issue-specific
- Three-step IDR enforcement
 - Delinquency notice
 - Pre-summons letter
 - Summons
- Summons \neq IDR (*Powell* factors)
- Designated summons—IRC § 6503(j)
 - Statute of limitations tolling

RECENT TRENDS & DEVELOPMENTS: SUMMONS ENFORCEMENT UPDATE

- Summons enforcement jurisdiction
 - Petition to enforce – IRC § 7604
 - Petition to quash third-party summons – IRC § 7609
 - Intervention in third-party summons proceeding – IRC § 7609
- Where filed
- Statute of limitations
- Basic procedures
- Relief
- Appeals
- Failure to obey / contempt

RECENT TRENDS & DEVELOPMENTS: SUMMONS ENFORCEMENT UPDATE

- Taxpayer's right to an evidentiary hearing
 - *United States v. Clarke*, 134 S. Ct. 2361 (2014)
 - IRS auditing Dynamo's 2005-07 years
 - Dynamo refused 3rd statute extension
 - IRS issued 4 summonses prior to statute expiration
 - District court and 11th Circuit rulings
 - Supreme Court: "[T]he taxpayer is entitled to examine an IRS agent when he can point to specific facts or circumstances plausibly raising an inference of bad faith. Naked allegations of improper purpose are not enough."
 - Impact?
 - *United States v. Ali*, 2014 U.S. Dist. LEXIS 156548, 2014 BL 312569 (D. Md. Nov. 5, 2014)

RECENT TRENDS & DEVELOPMENTS: SUMMONS ENFORCEMENT UPDATE



- *United States v. Microsoft Corp.*, 2:14-mc-00117 (W.D. Wash. filed Dec. 11, 2014)
- *United States v. Craig Mundie*, 2:14-mc-00125 (W.D. Wash. filed Dec 22, 2014)
- *United States v. Jeffrey Raikes*, 2:14-mc-00126 (W.D. Wash. filed Dec. 22, 2014)
- *United States v. Steve Ballmer*, 2:14-mc-00127 (W.D. Wash. filed Dec. 22, 2014)
- *United States v. James Allchin*, 2:14-mc-00128 (W.D. Wash. filed Dec.22, 2014)
- *United States v. Jonathan Roskill*, 2:14-mc-00129 (W.D. Wash. filed Dec. 22, 2014)
- *United States v. Orlando Ayala*, 2:14-mc-00130 (W.D. Wash. filed Dec. 23, 2014)
- *United States v. Ernst & Young, LLP*, 2:14-mc-00131 (W.D. Wash. filed Dec. 23, 2014)
- *United States v. Microsoft Corp.*, 2:14-mc-00133 (W.D. Wash. filed Dec. 24, 2014)
- *United States v. Microsoft Corp.*, 2:14-mc-00134 (W.D. Wash. filed Dec. 24, 2014)
- *United States v. KPMG, LLP*, 2:14-mc-00136 (W.D. Wash. filed Dec. 31, 2014)
- *United States v. William Veghte*, 3:14-cv-05565 (N.D. Cal. filed Dec. 22, 2014)
- *United States v. Michelle Mathews*, 2:14-cv-09761 (C.D. Cal. filed Dec. 22, 2014)

RECENT TRENDS AND DEVELOPMENTS: PENALTY LITIGATION

- Penalties v. taxpayer
 - Substantial understatement
 - Reliance defense
 - Impact of *Canal Corp. v. Commissioner*, 135 T.C. 199 (2010)?
 - Valuation misstatement
 - IRC § 6707A
- Penalties/enforcement v. Practitioner
 - IRC § 6700; note partial payment rules in IRC § 6703
 - IRC § 7408
 - IRC §§ 6707 and 6708

RECENT TRENDS AND DEVELOPMENTS: E-DISCOVERY

- What counts as ESI?
- Tech-assisted review
- Rule 502 orders
- Clawback of 6103 information

Q&A

- Thank you!