

# Denver Law Review

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Volume 68  
Issue 4 *Tenth Circuit Surveys*

Article 37

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February 2021

## Tax

Denver University Law Review

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### Recommended Citation

Denver University Law Review, Tax, 68 Denv. U. L. Rev. 739 (1991).

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## TAX

*First Nat'l Bank in Albuquerque v. Commissioner*, 921 F.2d 1081

Author: Judge Anderson

In a complicated transaction in 1979, plaintiff, First National Bank in Albuquerque ("Bank"), sold its old office building to a real estate partnership. This partnership then conveyed the property to the City of Albuquerque ("City"), who then leased it back. The City issued redevelopment bonds to finance the renovation of the old bank building, and the real estate partnership's lease payments were equivalent to amount of the bond. The Bank elected to treat the sale of the property as an installment sale. In 1980, the Bank received cash from the bond money that satisfied the debt owed to the Bank by the real estate partnership. Defendant, Commissioner of the Internal Revenue ("Commissioner"), after an audit, determined that the Bank disposed of its installment obligations after the City provided the bond money, and increased the Bank's taxable income by \$1,062,000. The tax court found in favor of the Commissioner, and the Bank appealed.

The Tenth Circuit upheld the tax court, saying that the bonds were in the nature of a commercial loan, and *a fortiori* do not qualify for installment sale treatment. The Bank was paid with the cash from the bond proceeds, which terminated the installment sale and caused the Bank to realize taxable income.

*United States v. Collins*, 920 F.2d 619

Author: Judge Baldock

Defendant, Collins, was convicted by a jury on three counts of federal income tax evasion. Collins claimed that the jury was improperly instructed on good faith, which was one of the necessary elements of the charge, and that his sixth amendment right to counsel was violated when the district court revoked the *pro hac vice* of his privately retained counsel.

The Tenth Circuit affirmed the conviction. First, the court held that the instructions given to the jury were unambiguous and proper. Second, the court stated that no procedural due process violation occurred, because Collins was given notice and an opportunity to show cause why his attorney's *pro hac vice* status should not be revoked. Finally, the court reviewed the pleadings submitted by Collins' attorney and upheld the revocation of the *pro hac vice* status. The court affirmed that the public interest in maintaining and conducting an orderly trial outweighed Collins' right to the counsel of his choice.

*Dillingham v. Commissioner*, 903 F.2d 760

Author: Judge Brorby

The estate of Dillingham ("Dillingham") appealed the decision of the tax court which held that the estate was subject to a statutory notice of deficiency in estate taxes. On appeal, Dillingham argued that: (1) the tax court should have imposed the burden of proof on the Commissioner of Internal Revenue ("Commissioner") to demonstrate the applicability of the six-year statute of limitations of I.R.C. § 6501(e)(2) rather than the expired three-year limitation of I.R.C. § 6501(a)(2); and (2) the Commissioner failed to sustain the burden of proof.

The Tenth Circuit affirmed the tax court's decision. The court found that the Commissioner had the burden to establish that the alternate six year statute of limitation period applied rather than the expired three-year period. The court, however, also found that the Commissioner met his burden by establishing that Dillingham had "dominion and control" over the disputed checks. Finally, the court declined to apply the "relation back doctrine" to this situation of noncharitable gifts.

*Faber v. United States*, 921 F.2d 1118

Author: Judge Tacha

The Internal Revenue Service ("IRS") served a third party summons on American Savings, requesting bank records held in the name of plaintiff, Faber. The district court dismissed Faber's petition to quash the summons. On appeal, Faber argued the district court erred in dismissing his motion because the form of the summons was invalid and, therefore, it could not initiate the twenty-day limit on a motion to quash.

The Tenth Circuit ruled that the district court properly dismissed Faber's motion to quash for lack of jurisdiction. The court explained that a taxpayer's motion to quash an IRS's third party summons must be filed within twenty days from the date notice is sent or personally served. Faber, however, failed to file his motion within the twenty-day time period. Moreover, since there was no basis for jurisdiction, the court did not reach the merits of Faber's claim that the summons was invalid.

*United States v. Hallmark*, 911 F.2d 399

Author: Judge Anderson

Defendant, Hallmark, was convicted of twelve counts of willfully falsifying tax returns relating to his wagering activity in violation of 26 U.S.C. § 7206(1). Hallmark appealed, arguing that: (1) the federal excise tax on wagering is an unconstitutional exercise of Congress' enumerated powers; (2) the statute authorizing the use of pen registers or trap and trace devices is unconstitutional, and evidence gathered against him by means of such a device is, therefore, inadmissible; and (3) the evidence produced at trial was insufficient to support the jury's guilty verdict.

The Tenth Circuit affirmed the convictions. The court found the federal excise tax on wagering activity is a constitutional exercise of Congress' power to lay and collect taxes. Moreover, the court noted that the Supreme Court previously rejected the argument that the tenth amendment restricts Congress' power to tax. In addition, the constitutional requirement of uniformity was not violated because the tax applies uniformly to the states. Second, the court held that installation and use of a pen register and trap and trace device is not a search requiring a warrant pursuant to the fourth amendment. Furthermore, the court's approval of using this device did not harm Hallmark. Finally, the court found overwhelming evidence in the record to support Hallmark's conviction.

*Hurst v. United States Dep't of Educ.*, 901 F.2d 836  
Per Curiam

Defendant, Department of Education ("DOED"), filed a counterclaim against plaintiff, Hurst, for the balance due on her defaulted student loan. The district court granted Hurst's motion for summary judgment, and DOED subsequently appealed. DOED asserted that its claim was still viable because the six year statute of limitations to enforce student loan obligations is not applicable to counterclaims in litigation brought by the debtor.

The Tenth Circuit affirmed the decision of the district court. The court ruled that the six year statute of limitations precluded DOED from asserting a counterclaim for the loan balance. The court explained that under principles of federal limitations law, a counterclaim for affirmative relief is subject to the operation of pertinent statutes of limitation. The court also ruled that other federal laws expressly make an exception to the statute of limitations for counterclaims. The governing statute for recovery of student loans, however, does not make such an exception. 20 U.S.C. § 1091(a). Moreover, no exception shall be constructively read into the statute. The court also indicated that the Internal Revenue Service may use its administrative offset remedy to legally enforce student debt beyond the six year period because such actions are not DOED legal proceedings.

*James v. Commissioner*, 899 F.2d 905  
Author: Judge Logan

Defendants were investors in joint ventures that purchased computer systems already leased to industrial corporations. The investors took deductions on their personal income tax returns for depreciation and for fees to the seller. Moreover, they took investment tax credits for the purchase of the computer systems. Plaintiff, Commissioner of Internal Revenue, disallowed the credits and deductions, finding that the transactions had no basis except for tax reduction. The tax court unanimously agreed, and the investors appealed.

The Tenth Circuit affirmed, holding the computer investments to

be "shams," lacking in economic substance. The court explained that no pre-tax profit could reasonably have been expected from the purchase. Moreover, the court found that the net result of the various agreements between the seller and joint venturers was to keep the joint venturers at the break-even point. Accordingly, the venturers merely purchased tax benefits, not true ownership. Since the only practical economic effect of the transactions was the creation of tax losses, the court held the tax court's conclusions reasonable. Thus, the decision of the tax court was affirmed.

*Jefferson Bank and Trust v. United States*, 894 F.2d 1241

Author: Judge Bohanon, sitting by designation

Plaintiff, Jefferson Bank and Trust (the "Bank"), brought suit for wrongful levy to secure the return of \$93,880, which was paid to the Internal Revenue Service ("IRS"). The district court granted summary judgment for the Bank and the United States appealed. On appeal, the government contended that the Bank had a perfected security interest in the taxpayer's checking accounts, and that the Bank's interests were choate at the time the IRS filed its tax liens.

On *de novo* review, the Tenth Circuit affirmed the district court's judgment. The court concluded that a perfected security interest was created under common law because title to the taxpayer's deposit was transferred to the bank. This, in turn, created an assignment, which, according to the court, is a security interest protected under local law. Second, the court ruled that the amount of the Bank's lien against the account was established and definite at the time the government filed its tax lien. Therefore, the Bank's security interest was choate at the time the tax lien was filed. Furthermore, the Bank's interest was "first in time" and, therefore, prevailed over the government's interest. Accordingly, summary judgment was proper.

*Lonsdale v. United States*, 919 F.2d 1440

Author: Judge Anderson

Plaintiffs, Eugene and Patsy Lonsdale, commenced this suit against the United States seeking to prevent Internal Revenue Service ("IRS") levies on their wages and a credit union account for unpaid income taxes. On appeal, they argued: (1) the government had no power to tax wages and, therefore, lacked the right to collect unpaid income taxes; (2) the IRS had no power to impose levies because Treasury Department orders delegating such power were not published in the Federal Register; and (3) the IRS forms did not satisfy the requirements of the Paperwork Reduction Act.

First, the Tenth Circuit held that this suit was barred by the Anti-Injunction Act, 26 U.S.C. § 7421(a), which states no suit for the purpose of restraining the collection of any tax shall be maintained in any court. Furthermore, the court rejected the Lonsdales' attempt to frame their contest as a quiet title action in order to garner jurisdiction under 28

U.S.C. § 2410. In addition, none of the general jurisdiction statutes cited by the Lonsdales waived the government's sovereign immunity. The court explained that the taxpayer must find an explicit waiver of sovereign immunity. Second, the court held that the Administrative Procedures Act does not require that the Treasury Department orders be published in the Federal Register. Accordingly, the court held the Lonsdales' publication arguments to be meritless. Finally, the court ruled that any alleged failure to comply with the Paperwork Reduction Act provides no basis for avoiding the levies imposed on the Lonsdales.

*City Vending of Muskogee, Inc. v. Oklahoma Tax Comm'n*, 898 F.2d 122  
Per Curiam

Plaintiff, City Vending of Muskogee, Incorporated ("CVM"), challenged two tax assessments imposed by the Oklahoma Tax Commission ("OTC"). The district court determined that it lacked jurisdiction to consider CVM's claims. The district court reasoned that 28 U.S.C. § 1341 precluded its review of the state tax assessments. CVM subsequently appealed. Specifically, CVM argued that since the OTC held that it did not have authority to determine the constitutional issues asserted, and since no other court considered the merits of CVM's constitutional challenges, no tribunal of competent jurisdiction adjudicated the constitutionality of the initial state tax assessment. Thus, CVM argued that the district court should have addressed the issue. OTC, on the other hand, argued that since no state court addressed CVM's constitutional claims, CVM was bound by OTC's determination.

The Tenth Circuit affirmed the district court's determination. The court found that ordinarily, § 1341 precludes a federal court from determining tax assessments under state law where state courts are available to make such determinations. Section 1341, however, does not preclude such a determination where federal courts have jurisdiction under the bankruptcy code. This is true unless the amount and legality of the tax was contested before and adjudicated by a judicial or administrative tribunal. The court also acknowledged that in the context of a bankruptcy proceeding, a federal court may have jurisdiction to review a state tax assessment where the taxpayer failed to pursue state remedies. Two policies support federal court jurisdiction in state tax matters: (1) prompt resolution of a debtor's tax liability, where that liability has not been determined prior to bankruptcy proceedings; and (2) protection of creditors from the dissipation of the estate when the debtor fails to challenge the assessment before commencing bankruptcy or where the debtor challenges the assessment through state proceedings which have not been decided at the time bankruptcy is filed. The court then ruled that OTC's first tax assessment was not void because CVM's constitutional claims were not addressed. Thus, OTC did not act beyond the scope of its jurisdiction. In the second tax assessment, however, OTC did address the constitutional claim, and CVM did not pursue re-

view. Accordingly, the judgment was final under Oklahoma law, prior to commencement of bankruptcy proceedings.

*National Collegiate Athletic Ass'n v. Commissioner*, 914 F.2d 1417

Author: Judge Seymour

During the annual "Final Four Tournament," defendant, National Collegiate Athletic Association ("NCAA"), contracted to publish a program which included a substantial amount of advertising. NCAA received a percentage of the net revenues from sales of the program. Plaintiff, Commissioner of Internal Revenue, charged that the money received was unrelated business taxable income and sued for taxes owed. The tax court ruled that the revenue was unrelated business taxable income, not excluded from tax as a royalty.

On *de novo* review, the Tenth Circuit reversed. In determining whether revenue was unrelated business taxable income, the court applied a statutory three part test: (1) income from a trade or business; (2) regularly carried on by the organization; and (3) not substantially related to the organization's exempt functions. NCAA conceded that its program advertising was a trade or business not substantially related to its exempt purpose. Consequently, the only question remaining was whether the trade or business was regularly carried on by the NCAA. In deciding this question, the court's first step was to consider the normal time span of the activity. The court concluded that the tournament must be considered the actual time span of the business activity sought to be taxed. Accordingly, since the tournament lasted only a few weeks, it did not constitute the regular carrying on of a trade or business. The court, however, stated that its analysis was not finished. It was required to determine whether activities which are intermittently conducted are nevertheless regularly carried on by virtue of the manner in which they are pursued. The court concluded that the advertising was sufficiently infrequent to preclude a determination that the NCAA's administrative business was regularly carried on. Thus, the revenues were not unrelated business taxable income.

*Schmidt v. King*, 913 F.2d 837

Per Curiam

Plaintiff, Schmidt, brought a quiet title action pursuant to 28 U.S.C. § 2410 against defendants, United States and Internal Revenue Service ("IRS"). Schmidt sought damages for the IRS's assessment and collection of taxes, and seizure and sale of his property. He also sought injunctive and declaratory relief to prevent future collection activities. The district court denied the IRS's motion for summary judgment, holding that it had jurisdiction over Schmidt's claim of improper notice and demand requisite to a valid tax lien. The district court held that there was proper notice, and Schmidt appealed on the merits.

The Tenth Circuit held that the district court lacked jurisdiction to consider the action. The court reasoned that although § 2410 waives

the United States' sovereign immunity for quiet title actions, the waiver does not apply when such actions seek to collaterally attack the merits of a tax assessment.

*Security Pacific Mortgage Corp. v. Choate*, 897 F.2d 1057

Author: Judge Bohanon, sitting by designation

Plaintiff, Security Pacific Mortgage Corporation ("Security Pacific"), appealed the district court's order granting summary judgment in favor of defendant, United States. Several tax liens existed on the subject property, and Security Pacific instituted public trustee foreclosure proceedings on that property without giving notice to the Internal Revenue Service ("IRS"). Security Pacific argued that its failure to give notice to the IRS did not extinguish its lien.

The Tenth Circuit reversed and remanded. In Colorado, the intent to preserve a lien is controlling. If that intent is not express, it will be inferred by the court. The court, applying Colorado law, inferred that Security Pacific did not intend its lien to be extinguished. Therefore, Security Pacific's lien retained its priority over the federal tax lien.

*Tavery v. United States*, 897 F.2d 1032

Author: Judge Logan

Defendant, Tavery, appealed the district court's partial grant of summary judgment for the government. The district court based its decision on the theory of collateral *estoppel*. Moreover, Tavery appealed the dismissal of the remainder of her complaint seeking refund of income taxes paid. On appeal, Tavery argued she was not in privity with her husband for purposes of applying *res judicata* and collateral *estoppel* in litigation concerning their joint and several income tax liability. Furthermore, Tavery argued that the Internal Revenue Service ("IRS") cannot issue separate notices of deficiency to spouses who have filed joint returns.

The Tenth Circuit reversed the district court's decision on two alternate grounds. First, the court ruled that the doctrine of collateral *estoppel* could not apply. The court reasoned that it previously vacated the tax court's decision concerning the husband's liability. Since this decision considered the same issues for which Tavery sought relief, there could be no collateral *estoppel*. Alternatively, the court held that tax claims against spouses who file a joint tax return are separate and distinct for *res judicata* purposes. Finally, the IRS may issue separate notices of deficiency to spouses who have filed a joint return.

*Woodbury v. Commissioner*, 900 F.2d 1457

Author: Judge Seymour

Plaintiff, Commissioner of Internal Revenue, found that defendant, Woodbury, had tax deficiencies. The tax court denied Woodbury's petition for review, and Woodbury appealed. Specifically, Woodbury ar-

gued that his election to use the fifty percent method in calculating his charitable contribution deduction was invalid. Thus, he argued he was not bound by his initial calculation. In the alternative, Woodbury argued his decision to employ the fifty percent method was revocable.

The Tenth Circuit ruled that Woodbury made a valid election to use the fifty percent method. The court explained that Woodbury substantially complied with the election requirements. In particular, Woodbury provided a supplemental worksheet to his tax return which clearly and unambiguously indicated his charitable contribution deduction was calculated pursuant to the fifty percent method. Furthermore, Woodbury was not entitled to revoke his election simply because the fifty percent method was less financially advantageous than another method.

*Oklahoma Tax Comm'n v. Wyandotte Tribe*, 919 F.2d 1449

Author: Judge McKay

Plaintiff, Oklahoma Tax Commission ("Commission"), originally filed suit in state district court to enjoin defendant, Wyandotte Tribe of Oklahoma ("Tribe"), from operating a convenience store on tribal property until the Tribe paid state taxes. The Tribe filed suit in federal district court to enjoin the enforcement of state tax laws. The state court action was removed to federal court, and the cases were consolidated for trial. When the Tribe moved to dismiss its federal court action, the Commission moved to remand the remaining state action back to state court. The district court denied both motions. On appeal, the Tenth Circuit held that the Tribe's motion to dismiss its federal court action should be granted and then remanded the Commission's action to the district court. The Commission again moved to remand back to state court, and the Tribe moved to dismiss based on sovereign immunity. The district court refused remand and granted the Tribe's motion for dismissal. The Commission appealed the denial of its motion to remand the action to state court for lack of federal jurisdiction. In the alternative, the Commission appealed the district court's dismissal of the case based on the court's finding that the Tribe was immune from suit.

The Tenth Circuit reversed the district court's decision, denying the Commission's motion to remand to state court. Absent express authorization from Congress, an action brought in state court may not be removed to federal court unless the action may have been brought there originally. The court held that the issue of Indian taxation did not present a substantial federal question because the Commission's claim of right to tax the Tribe arose under state law. The court further held that a tribal immunity defense does not convert a suit arising under state law into one which arises under federal law. Concluding that the district court did not have jurisdiction over the suit, the court vacated the judgment dismissing the action, and remanded to the district court with directions to remand the case to the state court.