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TAX

Atkinson v. O'Neill, 867 F.2d 589
Per Curiam

Plaintiff, Atkinson, appealed the district court's granting of summary judgment for the defendants on the ground that defendants, employees of the Internal Revenue Service, were entitled to absolute and qualified immunity.

The Tenth Circuit affirmed, holding Atkinson sued the defendants in their official, rather than individual, capacity and therefore Atkinson sued the United States in essence. Since sovereign immunity was not waived, the suit was barred. The court awarded damages and double costs for Atkinson's legally frivolous appeal.

United States v. Cache Valley Bank, 866 F.2d 1242
Per Curiam

Plaintiff, United States, appealed the district court's ruling of summary judgment in favor of defendant, Cache Valley, after the government filed an action to enforce a tax lien against a taxpayer's account.

The Tenth Circuit reversed, holding that the government's tax lien had attached prior to Cache Valley's exercise of its right to offset the taxpayer's debt against the bank deposits, and therefore, Cache Valley took the deposits subject to the lien.

United States v. Church of World Peace, 878 F.2d 1281
Author: Judge Anderson

Petitioner, Church of World Peace ("Church"), turned over tax records to respondent, United States, pursuant to a district court order enforcing an Internal Revenue Service ("IRS") summons. The Tenth Circuit later set aside the enforcement order in its entirety and remanded. On remand, the Church moved for return of all records and copies thereof from the United States. The United States moved for enforcement of the summons to the extent of the copied documents in its possession. Both motions were denied. Both sides appealed.

The Tenth Circuit held that both of the appeals were moot since the Church had complied with the summons. Compliance with an IRS summons renders any appeal of a district court enforcement order moot. Taxpayers who have complied with a summons may adequately protect their asserted interest by challenging the IRS procedure if and when the government attempts to make further use of the information obtained by the summons.

Citizen Band Potawatomi Indian Tribe of Oklahoma v. Oklahoma Tax Commission, 888 F.2d 1303

Author: Judge McKay

Plaintiff, Citizen Band Potawatomi Indian Tribe of Oklahoma ("Tribe"), sought to enjoin defendant, Oklahoma Tax Commission ("Commission"), from enforcing a \$2.7 million tax assessment against the Tribe for cigarettes sold in a tribal convenience store. The store is located on land which is held in trust by the federal government for the Tribe. The Commission asserted a counterclaim for declaratory and injunctive relief. The Tribe moved to dismiss the counterclaim, contending that the district court lacked jurisdiction. The Tribe argued that it enjoys sovereign immunity and, therefore, cannot be sued unless it consents.

The Tenth Circuit reversed the district court's denial of the Tribe's motion to dismiss and remanded with directions to dismiss. The court held that the Tribe is immune from suit and the district court lacked jurisdiction to adjudicate the counterclaim. The court also reversed the district court's denial of the Tribe's request for injunction. Instead, the court issued a remand to the district court for an entry of a permanent injunction on behalf of the Tribe. The court held that because the convenience store is located on land over which the Tribe retains sovereign powers, the Commission had no authority to tax the store's transactions unless the Commission received an independent jurisdictional grant of authority from Congress.

United States v. Colorado, 872 F.2d 338

Author: Judge Tacha

Plaintiff, United States ("Government"), appealed a summary judgment granted in favor of defendant, State of Colorado ("State"), holding that the State's purchase of seized property at a tax sale did not extinguish state tax liens and that state tax liens retain priority over federal liens despite the State's failure to give notice to the Government prior to the sale. The Tenth Circuit affirmed.

The Government argued that the State's purchase of the property extinguished the State's senior lien by merging that lien with fee title to the property, thereby elevating the Government's lien to first priority. Merger occurs when a greater and a lesser estate coincide in the same person, without any intermediate estate, unless a contrary intent appears. Applying Colorado law, the Tenth Circuit ruled that the State's interest plainly supported its intent to preserve its lien.

The Government further contended that regardless of merger, I.R.C. § 7425 requires that the State should lose its senior lien priority for failure to give the Government notice of the sale. The court held that section 7425 merely prevents federal tax liens from being extinguished through sale of the underlying collateral, but does not otherwise alter federal priority rules. Federal law governs the priority of a tax

lien against other claims to property. Under federal law, the Government's lien is preserved and the State's lien remains senior to the Government's lien.

Eggleston v. Colorado, 873 F.2d 242

Author: Judge Tacha

Law enforcement officials seized property as proceeds of illegal drug trafficking. The federal Drug Enforcement Agency ("DEA"), the Internal Revenue Service ("IRS"), and the Colorado Department of Revenue ("CDR"), all made claims on the property.

The district court found the CDR's claim valid for the state income tax lien. The court, however, denied the liens for state sales tax and the Regional Transportation District tax because the state did not show the sale was retail rather than wholesale. The district court held the state income tax lien had priority over the federal lien because the state filed first. The DEA's claim was under 21 U.S.C. § 881 (1982). The district court denied the DEA's claim because the forfeiture did not relate back to the time of the offense.

In reversing the district court's ruling, the Tenth Circuit held that 21 U.S.C. § 881 (1982), provides for immediate forfeiture of all property at the time the illegal act is committed. The forfeiture divests all rights of subsequent lienholders except for innocent owners as provided in 21 U.S.C. § 881(a)(6) (1982). The court held the state of Colorado was not entitled to the sales tax portion because the innocent owner exception only applies to interest which vests before the illegal act. The sales tax did not exist until the vendor received value from the purchaser. Therefore, the Colorado Department of Revenue was not an innocent owner.

Estate of Bruning v. Commissioner, 888 F.2d 657

Per Curiam

Petitioner, Bruning, as personal representative of the decedent's estate, brought suit in the Tax Court against the Commissioner of Internal Revenue ("Commissioner"). Bruning sought a redetermination of a deficiency in estate tax asserted by the Commissioner. The Tax Court held that Bruning was entitled to an unlimited marital estate tax deduction. The Commissioner appealed, arguing that Bruning should be allowed only a limited marital deduction.

Affirming the Tax Court's decision, the Tenth Circuit permitted Bruning to claim an unlimited marital estate tax deduction. The court stated that the purpose of section 403(e)(3) of the Economic Recovery Tax Act of 1981 is to preserve the testator's intent, and the trust established under the decedent's will did not contain a maximum marital deduction formula clause. Thus, the testator's intent was to minimize estate taxes rather than to limit the amount of marital deduction. The testator's will, therefore, qualified for an unlimited marital deduction.

United States v. Hays, 877 F.2d 843

Author: Judge Ebel

The district court found that under Colorado's Uniform Partnership Act, one partner's agreement with the Internal Revenue Service ("IRS"), to pay the dissolved partnership's past-due employment taxes does not discharge the other partner from liability for those taxes. The court found that although the IRS negotiated with one partner, Hays, to pay the taxes, it never purported to release its claims against the second partner, Manley.

The Tenth Circuit upheld the district court's finding. The court concluded that the agreement between the IRS and Hays was not a "material alteration" in the nature of the already-due tax obligation. Rather, it was a simple forbearance on the IRS's part to collect the taxes. Moreover, liability was not discharged under general surety principles. The court reasoned that the IRS continued to reserve its rights against Manley throughout its negotiations with Hays. The court, therefore, held that because there was no material change in the underlying debt that Manley and Hays owed to the IRS, section 36(3) of the Uniform Partnership Act did not discharge Manley's liability.

Jackson v. Commissioner, 864 F.2d 1521

Author: Judge Tacha

Plaintiff Jackson's deduction for lease amortization and advertising expenses was disallowed by the tax court and penalties were imposed for failure to timely file returns.

The Tenth Circuit affirmed, holding that a taxpayer's legal capability to sell licensed goods, without actual efforts to sell them, was insufficient evidence to establish a legitimate business deduction. The court reasoned that the deduction did not meet the "carrying on of a trade or business" requirement. The court further held that a taxpayer's reliance upon his accountant's advice that he need not comply with the law because no penalty will occur is not a reasonable excuse for late filing.

Jay v. United States, 865 F.2d 1175

Author: Judge Bright, sitting by designation

Dissent: Judge McWilliams

The district court held defendant, Jay, personally liable as a matter of law for failure to pay taxes withheld from employee paychecks to the federal government. On appeal, Jay, the company comptroller, argued that he was not the responsible person for payment of the withholding taxes under I.R.C. § 6672. Rather, Jay claimed that the company president was the responsible person for directing Jay to pay creditors other than the federal government.

The Tenth Circuit reversed and remanded the case for a trial on the merits, finding that the record did not establish Jay's liability as a matter

of law. The jury must determine if Jay possessed enough authority to make him a responsible person for the payment of taxes.

Leder v. Commissioner, 893 F.2d 237

Author: Judge Tacha

Plaintiff's decedent, Leder, purchased an insurance policy two years prior to his death, naming his wife owner and beneficiary. Months before his death, Leder's wife transferred the policy to herself as trustee of an *inter vivos* trust. Leder satisfied all payments on the policy, and therefore, his wife gave no consideration. Defendant, Commissioner of Internal Revenue ("Commissioner"), determined that the proceeds of the policy were properly included in Leder's gross estate under the Internal Revenue Code, 26 U.S.C. § 2042. Leder's estate, however challenged the determination in tax court. The tax court held that the policy proceeds could not be included in Leder's gross estate under Internal Revenue Code, 26 U.S.C. § 2035(d), where the decedent never possessed any of the incidents of ownership in the policy under section 2042.

The Tenth Circuit affirmed the district court. The court reasoned that this is a statutory construction case of first impression regarding pertinent sections of the Economic Recovery Tax Act of 1981 ("ERTA"). Although section 2035(a), generally requires that any property transferred by the decedent within three years of death, for less than full consideration, be included in the decedent's gross estate, ERTA changed the law. ERTA added section 2035(d), for estates of decedents dying after 1981. The court held that the plain language of section 2035(d)(2), specifically cross-references the definition of "incidents of ownership" set out in section 2042. The court refused to apply the constructive transfer doctrine as judicial gloss. The court reasoned that under section 2042, payment of premiums is irrelevant in determining whether the decedent retained any "incidents of ownership" in the policy proceeds.

Pollei v. Commissioner, 877 F.2d 838

Author: Judge Seymour

Defendants, Pollei and Patrick, appealed a United States Tax Court decision upholding deficiencies assessed against their federal income tax return for 1981. At issue was whether Pollei and Patrick could deduct as "ordinary and necessary" business expenses, maintenance and operating costs arising from their use of personally-owned, unmarked police cars to travel between their residences and police headquarters when they were required to be on duty. The tax court concluded that such travel constituted nondeductible personal commuting. The Tenth Circuit reversed.

Since the tax court applied the law to undisputed facts, the court determined that *de novo* review was appropriate. The court found that because Pollei and Patrick were required to be on duty while traveling to

and from work, they were allowed to deduct maintenance and operating costs on the cars as "ordinary and necessary" business expenses.

Wall v. Commissioner, 875 F.2d 812

Author: Judge Logan

Plaintiff, Wall, appealed a decision of United States Tax Court holding that the Commissioner of Internal Revenue was not barred from issuing Wall a notice of deficiency almost six years after Wall had executed Form 872-A, an indefinite waiver of the three-year limitations period on income tax assessments. The issue on appeal was whether the Commissioner should be estopped to assess the deficiency because he made it within an allegedly unreasonable period of time after Wall had executed Form 872-A.

The Tenth Circuit agreed with the Tax Court's refusal to apply a reasonable time limitation to the validity of the indefinite waiver signed by Wall. The court stated that to rule otherwise would subject the courts to increased litigation to determine what time period constitutes "reasonable." The court also noted that Wall failed to execute Form 872-T, which would have terminated his waiver. In extreme cases, such as where twenty years has passed without contact with the taxpayer by the Internal Revenue Service, the court stated it might find the government is barred from issuing a notice of deficiency.