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Federal Taxation: Refund Suit: Full Payment Prerequisite

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CONCLUSION

In spite of the restrictions placed on the hot cargo clause by the Supreme Court, the clause still has considerable vitality. Union representatives, especially in the trucking and construction fields, will continue to utilize it to preserve their traditional sentiment against working with non-union articles or personnel. Two factors tend to support this conclusion. Primarily, few secondary employers will dishonor their collective bargaining agreement when they must later bargain with the same representatives of what is usually, though not always, a union shop. Another consideration which must be developed more fully by union leadership is the fact that only the freedom to strike is denied the union by §8(b)(4)(A); the union retains its other powers to persuade the employer to abide by his contract. To these employers who seek to negate the affect of an existing hot cargo clause more latitude is given. Since the union must appeal directly to the secondary employer to enforce the provision, his decision in most circumstances will control as to whether there will be a valid secondary boycott. Assuming that the union makes its request properly and the there is acquiescence, the primary employer's only recourse will be found in common carrier situations. In such cases the primary employer may, relying on *Galveston*,[18] claim before the Interstate Commerce Commission that secondary employer is engaging in a discriminatory practice.

RICHARD PERRY

Federal Taxation—Refund Suit—Full Payment Prerequisite— Taxpayer suffered losses on the sale of certain commodities and futures and reported them as ordinary losses. The Commissioner of Internal Revenue characterized the transactions as capital losses, levying a deficiency assessment in the amount of $28,908.60, including interest. After making two payments totaling $5,058.54, taxpayer submitted a claim for refund of that amount which was disallowed by the Commissioner. Petitioner then challenged the correctness of the deficiency by bringing the present suit for refund under 28 U.S.C. §1346 (a) (1). The United States moved to dismiss for want of jurisdiction and for failure to state a claim upon which relief could be granted. The District Court for the District of Wyoming felt that because petitioner had not paid the full amount of the deficiency he should not maintain the action. But because the Court of Appeals had not resolved the question, the case was decided on its merits for the United States. On taxpayer's appeal to the Court of Appeals for the 10th Circuit, the judgment was vacated and the case remained with instructions to dismiss for failure of the complaint to state a claim.

[18] *Ibid.*

On certiorari, the Supreme Court of the United States *held:* A taxpayer must pay the full amount of an income tax deficiency before challenging its correctness by an action for refund in the United States district court. *Walter W. Flora v. United States,* 78 Sup. Ct. 1079 (1958).

Tax practitioners now have the Supreme Court's answer to a jurisdictional problem which has been the center of considerable recent discussion.[1] Some authorities apparently felt the issue was clear-cut in favor of the taxpayer,[2] while others were apprehensive of such view,[3] pointing to a possible upheaval in established tax practice which might result.

The Court's decision, written by Chief Justice Warren, involves, for the most part, a construction of the jurisdiction statute[4] governing refund suits against the United States in district courts. The words "action . . . for the recovery . . . of *any sum*"[4a] might cause one to feel that §1346 (a) (1) is unambiguous, but that would be to reckon without the principle of strict construction to waivers of sovereign immunity[5] and the sharp conflict which existed between the lower federal courts.[6]

Section 1346 was originally enacted as §1310 (c) of the Revenue

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[1] See McDowell, *Traps in Refund Claims and Filing Returns,* PROC. N.Y.U. 17th INST. ON FED. TAX. 485, 492 (1958); Riordan, *Must You Pay Full Tax Assessment Before Suing In The District Court?,* 8 JOURNAL OF TAXATION 179 (1958); Notes, 44 CAL. L. REV. 956 (1956), 2 HOWARD L. J. 290 (1956).

[2] *E.g.,* 3 CASEY, FEDERAL TAX PRACTICE §11.5 (1955): "Even though the assessed liability has not been fully paid, the courts have uniformly held that a taxpayer may maintain suit for the portion of the assessment which has been paid, whether the suit is against a collector (citing Sirian Lamp Co. v. Manning, 123 F. 2d 776 (3d Cir. 1941) and Hanchett v. Shaughnessy, 126 F. Supp. 769 (N.D.N.Y. 1954).) or the United States (citing Coates v. U.S., III F. 2d 609 (2d Cir. 1940).); whether the taxpayer has paid or rightfully owes the balance of the assessment is a matter of defense but does not affect jurisdiction of the court involved."

[3] Riordan, *Must You Pay Full Tax Assessment Before Suing In the District Court?* 8 JOURNAL OF TAXATION 179 (1958); Note, 2 HOWARD L. J. 290, 298 (1956).

[4] 68 Stat. 589, 28 U.S.C. 1346 (a) (1) (1954). "The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws; . . . ."

[4a] It would seem that the remaining two clauses in §1346 (a) (1) dealing with the recovery of "any tax" or "any penalty" do not necessarily negative an action after part-payment as they appear to be at most neutral on the subject.

[5] United States v. Michel, 282 U.S. 656 (1931).

[6] See Sirian Lamp Co. v. Manning, 123 F. 2d 776 (3rd Cir. 1941); Coates v. United States, 111 F. 2d 609 (2d Cir. 1940); Hanchett v. Shaughnessy, 126 F. Supp. 769 (N.D.N.Y. 1954); Rogers v. United States, 155 F. Supp. 409 (E.D.N.Y. 1957); Bushmaier v. United States, 230 F. 2d 146 (8th Cir. 1956); McFarland v. United States, 4 P-H 1957 Fed. Tax Serv. para. 72,798; Jones et al v. Fox, 4 P-H 1957 Fed. Tax Serv. para. 72,880; Flora v. United States, 142 F. Supp. 602 (D. Wyo. 1956), 246 F. 2d 929 (10th Cir. 1957).

Act of 1921.[7] Since its essential language seems to have been copied from R.S. 3226, the predecessor of the present claim for refund statute, §7422 (a),[8] the Court was impressed by the construction which R.S. 3226 had received in its earlier decisions, despite the disparity of factual conditions between them and the present case. In *Cheatham v. United States,*[9] the Court, by way of *obiter dictum,* stated:

> ". . . While a free course of remonstrance and appeal is allowed within the departments before the money is finally exacted, the general government has wisely made *the payment of the tax claimed,* . . ., a condition precedent to a resort to the courts by the party against whom the tax is assessed."[10] [Emphasis supplied.]

From the tenor of this brief statement, it would not seem to necessarily demand full payment, as the language could have as readily referred to payment of merely that tax for which suit is brought. It is obvious to even the most unsophisticated tax mind that some tax must be paid before it can be recovered. The actual holding of the Court in the *Cheatham* case was that no right of suit lay where the taxpayer had failed to appeal from an assessment of the Commissioner. But the above *dictum* was felt persuasive in the present case, inasmuch as the *Cheatham* case was decided after the clause beginning "any sum" was added to R.S. 3226, and later cases had included similar language.[11] These factors caused the present Court to feel that "a construction requiring full payment would be more consistent with established meaning of the statutory language," even though the language in each case might have been uttered without thought of the legality of part-payment refund suits.

Of additional impetus was the narrow-stated purpose of Congress in enacting the predecessor of §1346 (a) (1), that of removing the jurisdictional amount limitation of the Tucker Act in the special situation where the collector could not be sued.[12] The similarity of the pertinent language left no doubt in the minds of the present Court that the terms of the jurisdictional provision were copied from the

[7] 42 Stat. 311, 28 U.S.C. §1310 (c) (1921).

[8] 68 A. Stat. 876, 26 U.S.C. §7422 (1954) "(a) No suit prior to filing claim for refund.—No Suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof."

[9] 92 U.S. 85 (1875).

[10] *Ibid* at 89.

[11] Kings County Savings Institution v. Blair, 116 U.S. 200,205 (1885); Pollock v. Farmers' Loan and Trust Co., 157 U.S. 429,609 (1894) (dissenting opinion); Dodge v. Osborn, 240 U.S. 118,120 (1915); Old Colony Trust Co. v. Comm., 279 U.S. 716,721 (1929).

[12] See 61 Cong. Rec. 7507 (1921).

claim-for-refund statute. The fact that the language of the latter had for many years been considered to require full payment before suing the collector, and the fact that the avowed purpose of the 1921 amendment was merely to cure an inadequacy in suit against the collector, combined as cogent indications that no change was intended in the full-payment principle declared in the *Cheatham* case.[13]

Thus, the apparent conflict in the various circuits[14] has been resolved. But, it is submitted, the certainty of the instant decision may produce some harsh cases as an attendant result. There are, doubtless, many taxpayers who can not pay the full amount of the deficiency assessment before bring refund suit. Of course, the immediate answer of the Government is that the Tax Court is the proper forum for such taxpayers. But perhaps the time for appeal to the Tax Court has elapsed, or the taxpayer fears a jeopardy assessment which will preclude the advantages of the Tax Court.[15] And the availability of jury trial in the district court as well as the seemingly undeniable fact that the district court judge has a more practical approach to tax litigation[16] is another answer to the Tax Court proponent. The absence of any award for attorney's fees and witness expenses despite

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[13] See notes 9 and 10 *supra.*

[14] See Coates v. United States, 111 F. 2d 609 (2d Cir. 1940): "It is pressing technicality beyond all bounds to say that a taxpayer who has made a return on an excessive basis and has paid installments which are more than the correct amount of tax before discovering his error, must pay the remaining installments indicated by the incorrect return on pain of losing his remedy to recover the overpayment. The proposition has neither reason nor authority in its favor." (But the seemingly adamnant language is nothing more than the frustrating *dicta* as the taxpayer had actually made full payment before the trial.); Sirian Lamp Co. v. Manning, 123 F. 2d 776 (2d Cir. 1940); (It should be noted that this suit was against the Collector and that the Court stressed the absence of privity between the defendant and the United States. This argument is no longer valid because of the change which INT. REV. CODE OF 1954, §7422 (c) has wrought. See Hanchett v. Shaughnessy, 126 F. Supp. 769 (N.D.N.Y. 1954). But *cf.* a later decision from another district court in the 2d Circuit, Rogers v. United States, 155 F. Supp. 409 (E.D.N.Y. 1957). Presumably the Court in the Rogers case was not impressed with the words of the Court in the Hanchett case: "If an overriding policy of taxation requires a different result, it would appropriately come from an appellate court."). Bushmiaer v. United States, 230 F. 2d 146 (8th Cir. 1956): "The proceeding to recover a partial payment can in no wise jeopardize or impede the government in the collection of its revenue. So far as the taxes involved in the instant suit are concerned the government has received the money and as to the balance it can at once proceed to collect without let or hindrance invoking the drastic remedies provided by law for that purpose." (But when the taxpayer in the instant Flora case argued before the Court of Appeals for the 10th Circuit that the suit was but a claim for refund for an amount of tax actually paid and did not include a review of the total assessment or the remaining deficiency not paid, the court curtly answered: "Such approach is unrealistic and serves only to conveniently defeat the established purpose and function of the tax court." 246 F. 2d at 931.)

[15] This argument appeared to favorably impress the Court in Bushmiaer v. United States, 230 F. 2d 146 (8th Cir. 1956).

[16] See Dockery, *Refund Suits in District Courts,* 31 TAXES 523 (1953). The conclusion drawn therein is that your most favorable forum in tax litigation is a district court.

the outcome of the case in the Tax Court[17] is another weighty factor in the decision as to which forum to seek. What with the apparent conflict between the case law of the Tax Court and that of the various Courts of Appeals,[18] a taxpayer faced with adverse precedents in the former is almost forced to sue in the District Court or incur the expense of appeal. But of far greater importance is the often-ignored fact that certain taxes such as the excise tax cannot be litigated in the Tax Court.[19] To require a taxpayer contesting the assessment of a deficiency of such taxes to pay the entire tax and then litigate, even when the taxpayer is without funds to accomplish full payment, seems to the writer to work such hardship that it is a matter of concern, albeit the Supreme Court in the instant case felt it was properly that of Congress.[20]

The language of the creators of the Board of Tax Appeals was thought by the Court to support its decision. But it would appear that this argument, like Janus, is two-sided, for the House Committee stated:

> "The right of appeal after payment of the tax is an incomplete remedy, and does little to remove the hardship occasioned by an incorrect assessment. The payment of a large additional tax on income received several years previous and which may have since its receipt, been either wiped out by assets, or spent, sometimes forces taxpayers into bankrupcy, and often causes great financial hardship and sacrifice. These results are not remedied by permitting the taxpayer to sue for the recovery of the tax after this payment. He is entitled to an

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[17] Lore, *When Should a Tax Case be Taken to Court: The Many Costs of Litigation*, 3 JOURNAL OF TAXATION 2 (1955).

[18] See Comment, *Heresy in the Hierarchy: Tax Court Rejection of Court of Appeals Precedent*, 57 COLUM. L. REV. 717 (1957), where it is shown that often the Tax Court will ignore a decision of the exact Court of Appeals to which the litigant may appeal from the Tax Court.

[19] Jones et al. v. Fox, 162 F. Supp. 449 (D. Md. 1958), stressing the divisibility of the excise tax. The Court made a rather astute observation that: "While in the Flora case a deficiency assessment was levied prior to the part payment of said assessment by the taxpayer and, consequently, prior to the filing of a claim for refund or suit for refund, in the instant case the taxpayer first made payment of fifty dollars and simultaneously filed a claim for refund. By statutory mandate of Section 7422(e) of Title 26 U.S.C.A., 111, had this claim for refund been one for income tax and had it been disallowed, the taxpayer perfecting his suit in this Court prior to the issuance of notice of a deficiency assessment, the result would have been 'to give the taxpayer the choice of which court (the district court or Tax Court) shall have jurisdiction.' Why this choice expressly given by Congress or why 'concurrent jurisdiction in the district court (or Court of Claims) and in the Tax Court over the same case' explicitly recognized by Congress should be subject to defeat by the mere administrative act of assessing a deficiency prior to the rejection of a jurisdictional prerequisite to any suit, is open to serious question, a question not answered by the Supreme Court decision in Flora as the Court did not cite, comment upon or consider the effect of subsection (e) of section 7422."; McFarland v. United States, 4 P-H 1957 FED. TAX SERV. para. 72, 798.

[20] 78 Sup. Ct. at 1086.

appeal and to a determination of his liability for the tax prior to its payment."[21]

Though the House Committee was speaking in favor of the creation of the forerunner of the Tax Court, its language would appear applicable in favor of the litigant who must seek relief in the District Court and cannot pay the full tax prior to suit.

It would seem that an unqualified holding that full payment of the deficiency is a condition precedent to refund suit is somewhat inconsistent with the judicially-developed doctrine allowing injunctive relief against tax assessments or collections in extraordinary circumstances where the taxpayer will suffer irremediable damage if he is not permitted such remedy. The Supreme Court appars to have sanctioned this doctrine in the comparatively early case of *Miller v. Standard Nut Margarine Co. of Florida.*[22] The lower federal courts continue to apply its rationale in current cases.[23] If the *Miller* case is still of efficacy in the eyes of the present Supreme Court, its reasoning should be just as persuasive in the case of the partial-paying taxpayer seeking refund (in the exceptional case hypothesized above), as §7421(a),[24] which prohibits injunctive relief, was to the Court in the instant case.[25] Assuming that the Court would recognize such an exceptional refund case,[26] then there would not appear to be a pressing need for Congressional action by way of amendment to the refund statutes. But if the Court in the instant case meant its words to have literal effect,[27] they seem to dictate a necessity for relief by way of legislative action. Perhaps in the course of Congressional debate, the

[21] H. R. REP. No. 179, 68th Cong., 1st Sess. 7 (1924). The Senate Committee on Finance made a similar explanation. S. REP. No. 398, 68th Cong., 1st Sess. 8 (1924).

[22] 284 U.S. 498 (1932).

[23] Admittedly the injunctive remedy is granted by some courts only if valuable intangible assets of the taxpayer would be lost without possibility of recovery of the loss in money if distraint of tangible assets were not enjoined. *Compare* Midwest Haulers Inc. v. Brady, 128 F. 2d 496 (6th Cir. 1942) and John M. Hirst and Co. v. Gentsch, 133 F. 2d 247 (6th Cir. 1943), *with* Monge v. Smyth, 229 F. 2d 361 (9th Cir. 1956), *cert. denied,* 351 U.S. 976 (1956).

[24] INT. REV. CODE OF 1954 §7421 (a): ". . . no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

[25] See 78 Sup. Ct. at 1086. "For many years that principle (of paying first and litigating later) has been reenforced by the rule that no suit can be maintained for the purpose of restraining the assessment or collection of any tax."

[26] See Riordan, *Must You Pay Full Tax Assessment Before Suing in the District Court?,* 8 JOURNAL OF TAXATION 179, 181 (1958): "If a taxpayer is permitted in extraordinary circumstances to enjoin the collection of tax which could be collected by seizure of his property, he should be permitted in extraordinary circumstances to sue for refund of a partial payment where he can't pay the full deficiency assessed."

[27] 78 Sup. Ct. at 1086: "It is suggested that a part-payment remedy is necessary for the benefit of a taxpayer too poor to pay the full amount of the tax. Such an individual is free to litigate in the Tax Court without any advance payment. Where the time to petition that Court has expired, or where for some other reason a suit in the District Court seems more desirable, the requirement of full payment may in some instances work a hardship. But since any hardship would grow out of an opinion whose effect Congress

merits of the unmentioned policy reasons[28] that apparently controlled the instant decision could be put to an exacting test.

ADRIAN P. SCHOONE

Lack of Good Faith in Collective Bargaining—Petitioners in collective bargaining negotiations insisted upon a broad management function clause without an arbitration clause of real value, and also demanded a no strike clause in the contract. The employees' representatives achieved only the concession of grievance and security clauses which gave the union little voice in the determination of such matters. Petitioners had also, prior to the bargaining sessions, granted a unilateral wage raise to certain employees, and had allegedly made threats and promises to their employees. The National Labor Relations Board found that the strike that followed was not an unfair labor practice strike, because the petitioners had failed to bargain in good faith in failing to concede *anything* substantial, and in granting the wage increases. The petition to set aside the order of the Board was granted respecting the findings and order relating to refusal to bargain in good faith, and to the determination that the strike was an unfair labor practice strike. *White's Uvalde Mines v. NLRB,* 42 LRRA 2001 (5th Cir., April 23, 1958).

The statute pertinent here is §8 (d) of the National Labor Relations Act, as amended by the Taft-Hartley Act:[1]

> "(d) For the purpose of this section, to bargain collectively is the performance of the mutual obligation of employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: . . . ."

This subsection was inserted in the National Labor Relations Act to give more definiteness to §8 (a)(5)[2] of the original Act, which made it an unfair labor practice for an employer to bargain collectively with

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in successive statutory revisions has made no attempt to alter, if any amelioration is required it is now a matter for Congress, not this Court."

[28] Riordan, *supra* note 26, admits that a holding of part payment as sufficient to bring suit would not prevent the Government from utilizing its drastic remedies. But he feels that such use would produce an unsatisfactory tax administration because 1) it would affect the taxpayers' willingness to perform under our voluntary assessment program; 2) it would be burdensome to the Government; 3) it might cause hardships to those doing business with the taxpayer. But the query remains whether these arguments completely offset the dire circumstances in which many a taxpayer now finds himself.

[1] 29 U.S.C.A. §158 (d).

[2] 29 U.S.C.A. §158 (a) (5).