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Income Tax--Jurisdiction of Federal District Court to Grant Refund of Partial Income Tax Payment

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there is no language in the decision to militate against wifely recovery were a proper case to be submitted for consideration.

At present, this area of damage and tort law is typified by many cases denying recovery to the wife, citing voluminous authority, and a few cases granting such recovery, with a reevaluation of these principles of law. There are also New York and California. It appears that to achieve clarity in this field and to obtain equality of legal status for the wife, recognition of her right may have to come by way of legislative action. It is felt, however, that justice will be better served in this area when the courts free themselves from the intellectually inhibiting remnants and pristine legalistics of the medieval common law and recognize the basic rights of all humanity in its most intimate relationship.

Orton Alan Jones

Income Tax — Jurisdiction of Federal District Court to Grant Refund of Partial Income Tax Payment

P, for the taxable year 1950, reported certain losses as ordinary losses. The Commissioner of Internal Revenue treated them as capital losses and levied a deficiency assessment in the amount of $28,908.60. *P* paid $5058.54 and then filed a claim with the Commissioner for refund of that amount. The claim was disallowed and *P* sued for refund in the District Court. The District Court stated that the *P* "should not maintain the action because he had not paid the full amount of the assessment", but still entered judgment in favor of the Government. The Court of Appeals of the Tenth Circuit agreed with the District Court upon the jurisdictional issue, and remanded with directions to vacate the judgment and dismiss the complaint. The United States Supreme Court affirmed in 1959.

Held, affirmed on re-hearing. The statute giving district courts jurisdiction of any civil action against the United States for 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 internal-revenue laws, considered in the light of the language used therein and the legislative history of the statute and the historical background and the harmony of the statutory system of tax litigation

and the uniformity of the pre-1940 judicial belief that full payment had to precede suit, must be construed as requiring full payment of the assessment before an income tax refund suit can be maintained in federal District Court. *Flora v. United States,* 80 Sup. Ct. 630 (1960).

It has been the established policy of our system of tax litigation that the taxpayer must first pay the entire tax assessed against him before bringing suit for its recovery. *United States v. Jefferson Elec. Mfg. Co.,* 291 U.S. 386 (1933); *Cheatham v. United States,* 92 U.S. 85 (1875); *Suhr v. United States,* 18 F.2d 81 (3d Cir. 1927).

This established policy seems to have suffered its first setback in *Coates v. United States,* 111 F.2d 609 (1940), where the Court of Appeals of the Second Circuit held that payment of remaining installments of income tax need not be made as a "condition precedent" to institution of an action to recover over-payments in the District Court. The Court of Appeals of the Third Circuit further chipped away at this precedent by holding in *Sirian Lamp Co. v. Manning,* 123 F.2d 776 (1941), that a taxpayer could bring suit to recover partial payment of a deficiency assessment before such assessment was paid in full. The same conclusion was reached in *Bushmiaer v. United States,* 230 F.2d 146 (1956), where the Circuit Court of Appeals of the Eighth Circuit held that under Act of June 25, 1948, 28 U.S.C. § 1346 (a) (1) (1952), as amended, 28 U.S.C. § 1346 (a) (1) (Supp. V, 1958), hereinafter referred to as Section 1346 (a) (1), payment of a portion of additionally assessed income taxes would allow the taxpayer to bring an action against the United States in federal District Court to recover taxes paid and test the validity of the additional assessment.

Section 1346 (a) (1), *supra,* provides that the District Court shall have 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 * * *."

The majority in the principal case feel, contrary to the expressed opinion of the court in the *Bushmiaer* case, *supra,* that the words of the statute are not clear and unambiguous, but that the

words "any sum", rather than referring to a part or portion of the "any internal-revenue tax" or "any penalty", may refer to amounts which are neither "taxes" nor "penalties" but interest. These same words have been similarly interpreted in several lower court decisions. *United States v. Magoon,* 77 F.2d 804 (9th Cir. 1935); *Union Trust Co. v. United States,* 70 F.2d 629 (2d Cir. 1934); *United States v. Clarke,* 69 F.2d 748 (3d Cir. 1934).

By relying on statutory interpretation alone, it would indeed be difficult to decide which view is better on its merits. The Supreme Court observed, quite candidly in the principal case, that "we are not here concerned with a single sentence in an isolated statute, but rather with a jurisdictional provision which is a keystone in a carefully articulated and quite complicated structure of tax laws." A more determinitive factor than mere conjecture regarding statutory construction can be considered in determining which party litigant has presented a more acceptable proposal.

That factor which seems to make the majority decision in this case a more feasible one is that in 1924 the Board of Tax Appeals, now known as the Tax Court, was established by congressional legislation in the form of Revenue Act of 1924, § 900 (a), 43 Stat. 235, 336. The House Committee, in its report on the bill, indicated that the right of appeal after payment of an additional assessment of income tax was an incomplete remedy and was one that did little to remove the hardship occasioned by an incorrect assessment. The establishment of the Board of Tax Appeals would allow the taxpayer a means for determining his tax liability prior to its payment. H.R. Res. 179, 68th Cong., 1st Sess. § 7 (1924).

The basic requirement for any orderly system of law enforcement is an organized means by which to enforce the law. The establishment of the Tax Court, we have seen, has given the taxpayer a tribunal for litigation prior to payment of any deficiency assessment. Respect for the rules of good order dictates that such a forum, seemingly created expressly for the purpose of prepayment litigation, should not arbitrarily be circumvented. Once a deficiency has been determined by the Tax Court, the taxpayer may stay assessment and collection of such deficiency by giving a bond to secure payment and appeal the adverse determination to the Circuit Court of Appeals of his respective circuit. *Phillips v. Commissioner,* 283 U.S. 589 (1931). If he does not wish to follow this course

of action, it is his privilege to engage in litigation at one of two other levels, the District Court or the Court of Claims. *United States v. Jefferson Elec. Mfg. Co., supra.* The prerequisite for entering the District Court to gain a refund, must, in and of itself, be payment of the entire deficiency assessment. For, if one can request a refund of a partially paid assessment in the District Court, of what value would the Tax Court be, either to the taxpayer or the government? Payment of a mere nominal sum to the Commissioner would gain for each and every taxpayer the right to enter a District Court and debate the merits of the deficiency assessment in that forum. This would defeat the basic purpose for establishment of our Tax Court, and hence one should not be permitted, prior to payment of his entire deficiency assessment, to litigate his case in the District Court, but instead should be made to find his remedy in the Tax Court, and if adverse, to appeal in the Circuit Court of Appeals.

The decision of the United States Supreme Court in this case is one of great insight and one which is indeed basic to the continued existence of our present system of tax litigation.

Aaron David Trub

Legal Ethics — Attorneys — Disbarment While Serving as Judge

Petitioners sought disbarment of defendant, an attorney and judge, because of numerous alleged acts of wilful, deceitful, unlawful and immoral conduct, both in his individual and official capacities. The trial court dismissed the petition on the grounds (1) that defendant, being a judge and constitutional officer, could be removed from office only by impeachment and (2) that the statute relating to disbarment of attorneys was not applicable. The Court of Appeals was equally divided on the question presented and the case came to the Supreme Court of Georgia for review. *Held,* reversed. The facts that a judge of the superior court is a constitutional officer, must be a lawyer with seven years' experience, may not practice law while serving as judge, and may be removed from office by impeachment, constitute no reasons for disallowing proceedings to disbar him as an attorney. *Gordon v. Clinkscales,* 114 S.E.2d 15 (Ga. 1960).