

Win By Losing: The Weird World of Tax Court Jurisdiction.

In the world of tax law, much is counter-intuitive. As a long-time litigator, my personal favorite is when the taxpayer moves to dismiss his own case for lack of subject matter jurisdiction. Tax being tax, this move actually makes sense. A recent case from the D.C. Circuit, *Edwards v. Commissioner*, 2015 U.S. App. LEXIS 10323 (D.C. Cir. June 19, 2015), illustrates the point.

The taxpayers, Lisa Edwards and Joseph Thomas, were audited by the IRS in 2009, a process that resulted in significant additional tax liability. Then it got messy: the IRS claims it sent the taxpayers a notice of deficiency in March of 2010, but the taxpayers apparently did not receive it. *Edwards*, 2015 U.S. App. LEXIS 10323, slip op. at *2. After the IRS seized a few refunds, the taxpayers filed a tax court petition.

The IRS moved to dismiss for lack of jurisdiction because the petition was filed more than ninety days after the notice of deficiency was issued, but it couldn't produce a copy as it lost the taxpayers' file. *Id.*, slip op. at *5-*6. The taxpayers then cross-moved for dismissal, arguing that the tax court lacked subject matter jurisdiction because no notice of deficiency was ever sent. *Id.*, slip op. at *6. The tax court granted this motion in 2013: does this mean that the taxpayers won the motion but lost their case? No, they won because they received a binding ruling that the IRS did not send a notice of deficiency. Assuming that the assessment limitation had expired, this meant that the IRS could not assess or collect the additional tax liability that it identified in the audit.

The taxpayers then sought to recover their costs. Because the case was closed, this required a motion to vacate the prior dismissal. Ultimately, in December 2013 the Court issued an order denying the motion for costs and dismissing the petition for lack of subject matter jurisdiction without explaining whether it lacked jurisdiction because the case was filed too late or because the IRS did not send the notice of deficiency. *Id.*, slip op. at *7-*8.

On appeal, the D.C. Circuit expressed concern over the tax court's failure to explain the grounds for dismissing the petition since the consequences of the dismissal could be very different and would directly affect the liability of the taxpayers. *Id.*, slip op. at *9-*10. Accordingly the court of appeals remanded the case for further proceedings on both the jurisdictional issue and the taxpayers' request for costs.

So sometimes it really does make sense to ask a judge to throw out your case. You might even recover your attorneys' fees.

Jim Malone is a tax attorney in Philadelphia; he focuses his practice on federal, state and local tax controversies. This post is intended to provide background on a relevant issue; it is not intended as legal advice. © 2015, MALONE LLC.