

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 93-1429

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RENE CABRERA, ET AL.,

Defendants,

RAUL R. CABRERA and ELEAZAR A.
CABRERA,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Texas
(5:91-CV-294-C)

(January 4, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:*

The United States filed this action against defendants Raul Cabrera and Eleazar Cabrera ("defendants"), seeking to recover tax refunds erroneously paid to them. The district court found that the defendants had received erroneous refunds and entered judgment

* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

against them. The defendants now appeal, raising several claims of error. We affirm.

I

The Cabrera family operated several small businesses under one roof. Eleazar Cabrera operated a barber shop; daughter Ruth Lara ran a beauty shop; son Raul, in combination with Eleazar, operated a electronics repair shop; son Rene operated a bookkeeping service; and Rene, Raul, and Eleazar owned and operated Cabrera's, Inc., a dry cleaning business.¹ Rene acted as the family accountant, although he was not a certified public accountant and did not have an accounting degree. Accordingly, Rene had access to various bank accounts used to pay the businesses' bills.²

In 1986, 1987, and 1988, Rene and Ruth Cabrera prepared and filed false income tax returns for Raul Cabrera and his wife, Virginia. Similarly, Rene prepared and filed false returns for Eleazar Cabrera and his wife, Sofia, for the year 1984 through 1987. Based on these returns, the Internal Revenue Service issued refunds of over \$26,900 to Raul and over \$26,800 to Eleazar. Each refund check was mailed to the address where Rene, Eleazar, and Sofia Cabrera resided. Rene or Ruth then forged the signatures of Raul and Virginia on the checks issued to them, and Rene deposited the checks into one of the family accounts he controlled. The

¹ The dry cleaners was owned by Rene, Raul, and Eleazar until 1986 or 1987, when Raul and Eleazar sold their interests to Rene.

² Rene was listed with his parents, Eleazar and Sofia, as a signatory on one joint checking account. Rene also had access to a second account belonging to Eleazar and Raul.

refund checks issued to Eleazar and Sofia Cabrera were deposited into the account that Rene, Eleazar, and Sofia jointly held.

Upon discovering the fraudulent scheme, the government filed suit against eight people, including the defendants, alleging that they falsely reported earnings and withholding credits, thereby allowing them to receive erroneous tax refunds between 1984 and 1987. The government's claims against the defendants proceeded to trial. Based on the evidence presented at trial, the district court found that the defendants were "unjustly enriched and received a benefit [from the refunds] which would be unconscionable for them to retain." Accordingly, the district court entered judgment against Raul Cabrera in the amount of \$7,176³ and against Eleazar Cabrera in the amount of \$26,831.34.⁴

II

An action to recover an erroneously paid tax refund is essentially an equitable action for restitution. *United States v. Russell Mfg. Co.*, 349 F.2d 13, 16 (2d Cir. 1965). The government, to recover the refund, must demonstrate that "the taxpayer `has money which, *ex aequo et bono*, it ought not to retain.'" *Id.* (quoting *Houston Prod. Co. v. United States*, 4 F. Supp. 715, 718 (S.D. Tex. 1933)); see also *United States v. Commercial Nat'l*

³ The district court found that Raul Cabrera had received benefits of \$5,176 from the 1986 refund and \$2,000 from the 1987 refund.

⁴ The district court found that Eleazar Cabrera had received benefits of \$8,870.89 from the 1984 refund, \$574.45 from the 1985 refund, \$7,705 from the 1986 refund, and \$9,681 from the 1987 refund.

Bank, 874 F.2d 1165, 1169 (7th Cir. 1989). Although the government's right to sue for an erroneous refund is independent of statutory authorization, *United States v. Wurts*, 303 U.S. 414, 58 S. Ct. 637, 638, 82 L. Ed. 2d 932 (1938), Congress nevertheless has provided statutory authorization for such suits:

Any portion of a tax imposed by this title which has been erroneously refunded . . . may be recovered by civil action brought in the name of the United States.

26 U.S.C. § 7405(b).

"At the root of the notion of restitution in equity is the principle that no person should be allowed unjustly to retain a benefit conferred by another at the other's expense; in short, that no person should be unjustly enriched." *United States v. Bell*, 818 F. Supp. 444, 449 (D.Mass. 1993) (citing Restatement of Restitution § 1 (1937)). Because recipients of erroneously issued tax refunds would be unjustly enriched if allowed to retain them, "the government will almost invariably be entitled to recover the full amount of any refund that it demonstrates to have been erroneously issued." *Id.* Applying these principles, the district court found that the government should recover the erroneously paid refunds from the defendants because they had received either the refunds or benefits from the refunds.

Findings of fact made by the district court shall not be set aside unless clearly erroneous. The burden of demonstrating that the district court's findings are clearly erroneous is on the party attacking them. *Cobb v. Natural Gas Pipeline Co. of America*, 897 F.2d 1307, 1309 (5th Cir, 1990). Findings of fact are clearly

erroneous only when the reviewing court is "left with the definite and firm conviction that a mistake has been committed." *Anderson v. Bessemer City*, 470 U.S. 564, 573, 105 S. Ct. 1504, 1511, 84 L. Ed. 2d. 518 (1985). Thus, if the district court's findings are plausible in light of the record as a whole, we may not reverse them. *Id.* at 573-74, 105 S. Ct. at 1511.

Here, the defendants do not dispute either that the refunds were erroneously paid or the amount of the refunds. Instead, they argue that they neither received the refunds nor any benefits from the refunds. However, the record indicates that both defendants received benefits from the refunds. For example, all of the refund checks issued to Eleazar Cabrera were deposited into the joint checking account he held with his wife and Rene Cabrera. Rene testified that he used money from this account to: (1) pay debts incurred by the family businesses; (2) write checks to the dry cleaning business; (3) pay Eleazar Cabrera over \$14,000; (4) make payments on loans for which Eleazar Cabrera was personally liable; (5) pay the monthly mortgage payments on the house owned by Eleazar and Sofia Cabrera; (6) make payments on the automobile owned by Sofia Cabrera; and (7) purchase furniture for Eleazar and Sofia Cabrera's home. Moreover, Eleazar Cabrera wrote checks on the account into which his refund checks were deposited. Furthermore, although he testified otherwise, Rene Cabrera initially told IRS agents that Eleazar and Sofia received the refunds issued to them. Thus, the district court's determination that Eleazar Cabrera is

liable for the full amount of the erroneous refunds issued to him is not clearly erroneous.

Similarly, the record supports the district court's determination that Raul Cabrera is liable for \$7,176, a portion of the erroneous refunds issued to him. The 1986 refund issued to Raul Cabrera was deposited into the account he held jointly with Eleazar; a check payable to Rene Cabrera in the amount of \$3,000 was drawn on the account the next day, leaving \$5,176 of the refund under Raul's control. The evidence adduced at trial demonstrated that funds from this account were used to pay debts incurred by Raul's electronics repair business. Moreover, Raul used the funds in this account to pay debts incurred by his business. Raul Cabrera's 1987 refund of \$9,795 was deposited by Rene into the joint account held by Rene, Eleazar, and Sofia. However, on the same day the refund was deposited, Rene wrote Raul a check on that account for \$2,000. This check was deposited into the personal account held by Raul and his wife, and the \$2,000 was used to pay personal and household expenses. Moreover, Raul, when initially interviewed by IRS agents, admitted both receiving the erroneous refunds and dividing the proceeds between himself and Rene. Accordingly, the district court's finding that Raul received a benefit of \$7,176 from refunds is not clearly erroneous.

III

The defendants further argue that the district court erred in refusing to award them their attorney's fees. In tax cases, a litigant may recover attorney's fees from the government only if he

satisfies the district court that he is a "prevailing party." Section 7430 of the Internal Revenue Code provides that a "prevailing party" is one who both "establishes that the position of the United States in the [litigation] was not substantially justified" and "substantially prevails" with respect to either "the amount in controversy" or "the most significant issue . . . presented." 26 U.S.C. § 7430(c)(4)(A).⁵ We review the district court's denial of an award of litigation costs for an abuse of discretion. *Heasley v. Commissioner*, 967 F.2d 116, 120 (5th Cir. 1992).

Substantially justified means "`justified in substance or in the main'))that is, justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565, 108 S. Ct. 2541, 2550, 101 L. Ed. 2d 490 (1988). To be substantially justified, the government's position must have a "reasonable basis in both law and fact." *Id.* Here, we find that the government's

⁵ To be a prevailing party, a litigant, within thirty days of final judgment in the action, must:

submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award . . . and the amount sought, including an itemized statement from any attorney . . . representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses are computed.

28 U.S.C. § 2412(d)(1)(B). Because Eleazar Cabrera did not submit such an application, he is not a "prevailing party." The government argues that because Raul and his wife, whom the district court found did not receive a benefit from the erroneously paid returns, submitted a joint application for costs, Raul did not fulfill the "itemized statement" requirement. We need not decide this issue, however, as we find that the government's position with regard to the claim against Raul was "substantially justified."

position was substantially justified. It is undisputed that the refunds based on Raul Cabrera's tax returns were erroneously issued. Moreover, as we have found, the government was entitled to recover a portion of the erroneously paid returns. Accordingly, the district court did not abuse its discretion by denying Raul Cabrera his litigation costs.

IV

For the foregoing reasons, we AFFIRM the judgment of the district court.