

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4088
No. 93-4215

Summary Calendar

DONALD E. FRANTZ and
PATRICIA FRANTZ,

Petitioners-Appellants,

versus

COMMISSIONER OF INTERNAL
REVENUE SERVICE,

Respondent-Appellee.

* * * * *

CHRISTOPHER M. and JUDITH
H. JOB,

Petitioners-Appellants,

versus

COMMISSIONER OF INTERNAL
REVENUE SERVICE,

Respondent-Appellee.

Petition for Review of an Order of the
United States Tax Court
(8424-86 & 35890-84)

(August 27, 1993)

Before HIGGINBOTHAM, SMITH, and DEMOSS, Circuit Judges.

PER CURIAM:*

*Local Rule 47.5 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

We affirm the United States Tax Court's finding in these cases that it had no jurisdiction over a dispute about assessed but unpaid interest due on a deficiency. It is not necessary to reach the alternative bases of their decision.

The United States Tax Court lacks jurisdiction to hear disputes about interest in the majority of cases. E.g., Transport Mfg. & Equip. Co. v. Commissioner of Internal Revenue, 434 F.2d 373, 381 & n.10 (8th Cir. 1970); 508 Clinton Street Corp. v. Commissioner of Internal Revenue, 89 T.C. 352, 354 (1987). The Tax Court reviews deficiencies before the IRS assesses or collects them. Once the Tax Court has fixed the amount of the deficiency the IRS determines the interest due on the deficiency and then assesses the deficiency and the interest. The Tax Court's job ends in most deficiency cases once it determines the amount of the deficiency. 508 Clinton Street, 89 T.C. at 355.

Appellants claim to fall in an exception to that rule. Section 7481(c) of the Internal Revenue Code provides that if:

- (1) an assessment has been made by the secretary under section 6215 which includes interest as imposed by this title [Title 26],
- (2) the taxpayer has paid the entire amount of the deficiency plus interest claimed by the Secretary, and
- (3) within 1 year after the date the decision of the Tax Court becomes final . . . the taxpayer files a petition in the Tax Court for a determination that the amount of interest claimed by the Secretary exceeds the amount of interest imposed by this title,

then the Tax Court may reopen the case solely to determine whether the taxpayer has made an overpayment of such interest and the amount of any such overpayment.

26 U.S.C. § 7481(c). The question in this case is whether the appellants can invoke the jurisdiction of the Tax Court even though they have not paid the interest assessed against them.

The plain language of the statute weighs heavily against appellants' position. The statute speaks of a taxpayer who appears before the Tax Court after he "has paid" and "has made an overpayment." The legislative history of the statute also suggests that it requires payment before invoking the Tax Court's jurisdiction. The House Conference Report on the provision states:

If a dispute arises over the IRS' computation of the interest due on a deficiency, then within one year from the date the Tax Court decision becomes final the taxpayer may move to reopen the Tax Court proceeding for a determination of interest due. The Taxpayer *is required to pay* the entire deficiency redetermined by the Tax Court and the interest determined by the IRS *before challenging* the IRS' computation of interest in the Tax Court.

H.R. Conf. Rep. No. 1104, 100th Cong., 2d Sess. (1988), reprinted in 1988 U.S.C.C.A.N. 5048, 5292.

Appellants make three arguments against the government's reading of the statute. First, they contend that the "has paid" language means payment after the Tax Court renders its decision adjusting the assessment made by the IRS. This argument is not consistent with the language of the statute, which provides that only if the taxpayer "has paid" then can the Court reopen the case. nor is it consistent with the legislative history.

Second, they argue that interest only has to be prepaid if it is included in one of the rare Tax Court deficiency decisions that involves interest. They cite the reference in subsection (1) of

the statute to § 6215 of the Code, which deals with the effect of a Tax Court deficiency decision. But this argument ignores the rest of the language in subsection (1), which refers to "an assessment made by the Secretary" pursuant to a Tax Court deficiency decision. Such an assessment includes the power to assess interest. See 26 U.S.C. § 6601; Clinton Street, 89 T.C. at 535. The better interpretation of subsection (1) reads it as stating that the IRS has to have made an assessment before a taxpayer can invoke the Tax Court's jurisdiction.

Third, appellants argue that the government's reading creates a tension between § 7481(c) and § 6404 of the Internal Revenue Code. Section 6404 authorizes abatement of assessments which are excessive, were made after limitations expired, or were erroneously or illegally assessed. 28 U.S.C. § 6404(a). The tension arises because section 6404(a) authorizes abatement only as to "the unpaid portion of the assessment." Appellants argue that if they tender the entire interest assessment then no part of it remains "unpaid" and their abatement claim will disappear.

This alleged tension does not exist. The language about an "unpaid portion" comes from § 6404(a), which does not apply to the appellants' claim because § 6404(b) keeps it from applying to income taxes. See Asciutto v. Commissioner, T.C. Memo. 1992-564 at 7 n.5 (1992) (1992 RIA T.C. Memo ¶ 92-564). Appellants' claim is under § 6404(e)(1), which allows relief either by "abatement," "credit," or "refund" of interest. Id. at 7. Since a credit or refund assumes that payment has already been made, the existence of

an unpaid portion of the assessment is not a prerequisite to relief under that section of the Code.

AFFIRMED.