

## **Tax Procedure: More on Refund Claims for Excise Taxes.**

The Internal Revenue Code imposes a variety of excise taxes, including taxes on telephone service, air passenger service, and air freight service. I.R.C. §§ 4251, 4261, 4271. Each of these taxes is actually the responsibility of the person who purchases the relevant service, but the Code generally requires that the service provider collect the tax. I.R.C. § 4291.

This arrangement complicates refund claims for excise taxes, as the Code provides that a credit or refund is available to the service provider paying the tax “if such person establishes, under such regulations as the Secretary may prescribe, that he has repaid the amount of such tax to the person from whom he collected it, or obtains the consent of such person to the allowance of such credit or refund.” I.R.C. § 6415(a). There are no regulations under Section 6415(a).

In January, I discussed this [issue](#) in the context of *Netjets Large Aircraft, Inc. v. United States*, 2015 U.S. Dist. LEXIS 8746 (S.D. Ohio Jan. 26, 2015). In *Netjets*, the district court that the requirements of Section 6415(a) were prerequisites to a recovery, not to assertion of the refund claim. *Id.*, slip op. at \*19-\*21. In other words, the entity collecting and paying the tax could sue for a refund and deal with its customers later. The *Netjets* court relied upon a railroad retirement act case, *Chicago Milwaukee Corp. v. United States*, 40 F.3d 373, 375 (Fed. Cir. 1994), among other authorities.

Last week, a different district court reached a completely different result. *Bombardier Aero. Corp. v. United States*, 2015 U.S. Dist. LEXIS 34801, slip op. at \*15-\*20 (N.D. Tex. Mar. 20, 2015). The court in *Bombardier* reached a different result for two basic reasons.

*First*, the court concluded that it was bound by pre-existing Fifth Circuit precedent. 2015 U.S. Dist. LEXIS 34801, slip op. at \*15. Specifically, the court pointed to language in a prior district court case indicating that payment of the refund or obtaining the consent was required to establish standing. *Id.* (citing *McGowan v. United States*, 222 F. Supp. 329, 330 (S.D. Fla. 1962), *aff'd*, 323 F.2d 655 (5th Cir. 1963)). While the *McGowan* opinion certainly had language concerning the need for the plaintiff to obtain consent or refund the tax to his customers, it was dicta since the plaintiff in *McGowan* had paid the tax out of his own pocket. *See McGowan v. United States*, 296 F.2d 252, 255 (5th Cir. 1961) (reversing contrary finding). And while the district court’s opinion in *McGowan* cited a variety of earlier Fifth Circuit cases, none squarely considered the question whether Section 6415(a) was simply a requirement for recovery.

*Second*, the court in *Bombardier* concluded that *Chicago Milwaukee* was unpersuasive, since it addressed a certification requirement that an employer seeking a refund of the Railroad Retirement Tax include a certification with its refund claim that the employee has been repaid the disputed or consented to the refund. *Bombardier*, 2015 U.S. Dist. LEXIS 34801, slip op. at \*16. In contrast, the court concluded that Section 6511 was more demanding as it called for the refund claimant to establish that it had either repaid the tax or obtained consent. *Id.*, slip op. at \*17.

To me, this reading of Section 6415(a) ignores the plain language of the statute, which provides that a refund or credit “may be allowed to the person who collected the tax and paid it to the Secretary if such person establishes . . . that he has repaid the amount of such tax to the person from whom he collected it, or obtains the consent of such person to the allowance of such credit or refund.” All this is says is that repayment or consent must be established prior to recovery.

In contrast, when Congress wants to erect a jurisdictional barrier to a tax claim it knows how to do it: “No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected . . . until a claim for refund or credit has been duly filed with the Secretary . . . .” I.R.C. § 7422(a).

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