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ACTION ON DECISION

Subject: Barry I. Fredericks v. Commissioner
No. 96-7748 (3d Cir., filed September 11, 1997, amended September 18, 1997), rev'g T.C. Memo. 1996-222
T.C. Dkt. No. 16442-92

Issue: Whether the Court of Appeals erred in determining that the Service is equitably estopped from relying on a Form 872-A to indefinitely extend the period of limitations when the Service's actions misled the taxpayer into believing that the form was not in effect.

Discussion: In January 1981, a revenue agent contacted the taxpayer and asked him to extend the assessment period for the tax year 1977 by executing consent Form 872. The taxpayer stated that he had already signed a Form 872-A at the request of another agent which extended the period of limitations for that year indefinitely. The agent replied that there was no Form 872-A in his file and that the Form 872-A probably was lost in the mail. The taxpayer then executed the Form 872 as requested. The taxpayer and the Service subsequently executed two additional Forms 872, the last of which extended the period of limitations to June 30, 1984. At some point, presumably before that date, the Service located the original Form 872-A; however, the taxpayer was not notified that the Form 872-A had been found and the Service did not contact the taxpayer for eight years. In 1992, a notice of deficiency for the tax year 1977 was issued to the taxpayer. The only issue raised in the taxpayer's Tax Court petition was whether the statute of limitations had expired. In response to the Service's production of the original Form 872-A, the taxpayer argued that the Service was equitably estopped from relying on that Form in defending the statute of limitations issue.

The following elements must be shown before equitable estoppel applies: 1) A false representation or misleading silence; 2) error in a statement of fact; 3) ignorance of the facts; 4) reasonable reliance on the representation, silence or error in statement; and 5) a resulting detriment. See Norfolk S. Corp. v. Commissioner, 104 T.C. 13, 60 (1995). In addition, the Third Circuit requires a showing of "affirmative misconduct" on the part of governmental officials to establish estoppel against the Government. See United States v. Asmar, 827 F.2d 907 (3d Cir. 1987).

The Tax Court held in favor of the Service. The Tax Court found that the agent did not affirmatively misrepresent any fact concerning the receipt and execution of the Form 872-A. The Tax Court also found that the taxpayer had not established reasonable reliance on the acts and statements of the IRS or a resulting detriment.

On appeal, the Third Circuit concluded that the agent's statement that the Form 872-A was not in his file, confirmed by repeated requests for single-year extensions, constituted a false representation of fact that no Form 872-A existed. The Third Circuit concluded that the Service's silence regarding the reappearance of the Form 872-A further misled the taxpayer. The Court of Appeals also found that the remaining elements of estoppel had been established, because, by believing that no Form 872-A existed, the taxpayer lost the ability to terminate that indefinite extension, and the penalty interest under I.R.C. § 6621(c) continued to accrue after the time that the taxpayer reasonably believed assessments were barred. The Court of Appeals concluded that estoppel against the government was appropriate because the IRS's actions amounted to affirmative misconduct and the application of estoppel was consistent with the policy underlying the enactment of statutes of limitations.

Although the agents' statements with respect to the existence of the Form 872-A were not intentionally false, those statements and subsequent acts of soliciting annual extensions of the limitations period led the taxpayer to reasonably believe that no such form was in existence to control the limitations period. Upon locating the Form 872-A, the Service was obligated to advise the taxpayer that the form did exist and that it would be relied upon to extend the limitations period. The Service's silence, while permitting the last annual extension to expire, further misled the taxpayer into reasonably believing that the limitations period had been permitted to expire without the Service having taken any action to determine a deficiency. By being induced to believe that the limitations period had been permitted to expire by the Service, the taxpayer was prevented from exercising his options to terminate the Form 872-A according to its terms or to prepay the tax deficiency in order to limit the penalty interest imposed by I.R.C. § 6621(c) [as in effect for tax year 1977]. Under the unique facts of this case, we believe that foreclosing these options was sufficient detriment to sustain the defense of estoppel.

Recommendation: Acquiescence.

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