No. 98-932

In the Supreme Court of the United States

OCTOBER TERM, 1998

DOMINICK LAROSA AND CATHERINE LAROSA,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

LORETTA C. ARGRETT
Assistant Attorney General

RICHARD FARBER
ANNETTE M. WIETECHA
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether equitable principles bar the United States from recovering an erroneous refund made to petitioners.

2. Whether, under the facts of this case, interest accrued on petitioners' tax liability after the date of the jeopardy assessment and seizure of their assets.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. Item 2) is unofficially reported at 82 A.F.T.R.2d (RIA) 98-5257. The opinion of the district court (Pet. App. Item 3) is reported at 993 F. Supp. 907.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 1998. The petition for rehearing was denied on September 8, 1998. The petition for a writ of certiorari was filed on December 7, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On December 3, 1985, the Internal Revenue Service made a jeopardy assessment of outstanding taxes and interest against petitioners and levied on their assets (Pet. App. Item 3, at 5). Although the Service was entitled to liquidate the seized assets to satisfy the jeopardy assessment, petitioners requested that such action not be taken because they believed it would ruin their business (*id.* at 5, 27). To accommodate this concern, the government entered into an escrow agreement with petitioners that placed these assets in escrow pending the Tax Court's determination of their federal tax obligations (*id.* at 5). The escrow agreement prevented the liquidation of the assets during the pendency of the litigation and expressly provided that these assets were not to be treated as a payment of any federal tax obligation (*ibid.*). When the tax litigation was settled in 1991, the escrowed assets and the income earned on those assets were returned to petitioners (*id.* at 18).

2. The 1991 settlement was embodied in an agreed decision filed in the Tax Court (Pet. App. Item 3, at 5). Under the settlement, the parties stipulated that petitioners had underpaid their tax obligations for 1981, 1982 and 1983 and overpaid their taxes for 1984 and 1985 (*id.* at 5-6). Petitioners elected to have the overpayments (inclusive of interest) from 1984 and 1985 applied against their underpayments for 1981 through 1983. On May 1, 1991, petitioners paid the remaining balance owed (*ibid.*).

In the settlement, petitioners reserved the right to contest the amount of interest that they owed on their tax liabilities. Petitioners submitted refund claims for the interest they paid, asserting that interest should

not have accrued on their tax obligations after December 3, 1985, the date of the jeopardy assessment. That refund claim sought to recover interest in the amount of $3,694,418 (Pet. App. Item 3, at 6). Although the Service denied that claim, the Service thereafter made a refund of approximately $1.5 million for the interest that accrued between the dates on which the overpayments for 1981 and 1982 arose and the date of the final payment of tax on May 1, 1991 (*id.* at 6-7).

3. The Service subsequently determined, however, that this $1.5 million had been refunded to petitioners in error (Pet. App. Item 3, at 7). Within the time permitted by the applicable statute of limitations, the United States commenced this action to recover the erroneous refund pursuant to 26 U.S.C. 7405.[1] Petitioners asserted that the United States should be equitably estopped from recovering the refund and, in a counterclaim, sought an additional refund based upon the contention that interest on the underpayments stopped accruing on December 3, 1985, the date of the jeopardy assessment and seizure of their assets.

The district court granted summary judgment to the United States on all issues (Pet. App. Item 3, at 33). The court held that the $1.5 million refund was erroneous (*id.* at 19-22) and that the Service was not estopped from recovering that amount because "[t]here is nothing special about the case at bar in this regard" (*id.* at 25-26). The court also rejected petitioners' contention that interest should not have accrued after

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[1] Section 7405 provides that an erroneous refund "may be recovered by civil action brought in the name of the United States." 26 U.S.C. 7405. Under 26 U.S.C. 6532(b), an action for an erroneous refund is to be commenced "within 2 years after the making of such refund."

the date of the jeopardy assessment and seizure. The court held that interest continued to accrue on the underpayments after the seizure because the escrow agreement had specified that the seized assets could not be liquidated to pay the tax liabilities (*id.* at 26-30).

4. The court of appeals affirmed for the reasons set forth in the district court's opinion (Pet. App. Item 2).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Under Section 7405 of the Internal Revenue Code, the United States is authorized to recover the amount of any tax (or interest on such tax) that has been erroneously refunded to a taxpayer. 26 U.S.C. 7405. A suit to recover such an erroneous refund may be brought at any time within two years from the date the refund is made. 26 U.S.C. 6532(b). In the present case, the United States timely sued to recover an erroneous refund of approximately $1.5 million. The courts below correctly concluded that the refund had been made erroneously (Pet. App. Item 3, at 19-24), and petitioners no longer contest that determination.

Instead, petitioners contend (Pet. 12-16) that the United States should be equitably estopped from recovering the erroneous refund simply because petitioners had not anticipated that the government would seek to recover the improper windfall that they had received. That contention has no support in the case law or governing statutes. As the courts below concluded, there is nothing about this case that takes it out of the ordinary: "it is hard to conjure a case where prior to * * * suit a taxpayer would not believe that the

IRS had acted correctly and would not make use of the refund" (Pet. App. Item 3, at 26). The plain language of Section 7405 authorizes the government "to undo such mistakes regardless of who is to blame for the error" (*ibid.*). If the sort of facts that petitioners contend creates an "estoppel" prevented the government from bringing a suit for refund, then the provisions of Section 7405 would be deprived of their natural and obvious meaning.[2]

There is no conflict among the courts of appeals on the application of equitable estoppel to suits for the recovery of erroneous refunds under Section 7405. None of the decisions cited by petitioner (Pet. 12-15) addresses that issue, and certainly no court has ever adopted petitioners' novel contention that the government may be estopped from bringing suit under Section 7405 to recover an erroneous refund of tax or interest. Further review of the decision in this case is therefore not warranted.

2. Petitioners err in claiming (Pet. 16-23) that interest was incorrectly imposed on their tax liabilities after the date of the jeopardy assessment and the seizure of their assets. The Service generally sells a

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[2] Moreover, equitable estoppel does not apply against the government on the same terms that it applies to private parties. *E.g.*, *OPM* v. *Richmond*, 496 U.S. 414, 419 (1990); *Heckler* v. *Community Health Servs.*, 467 U.S. 51, 60 (1984). When estoppel is sought against the government, the plaintiff must prove not only the traditional elements of estoppel but must, at a minimum, also show affirmative misconduct by a government employee. *Id.* at 61. No showing of any affirmative misconduct was made in this case. Moreover, the repayment of funds that should not have been received by petitioners in the first place is hardly the sort of irreparable injury that could support an estoppel against a private party, much less against the United States.

taxpayer's assets as soon as practicable after a seizure. If it fails to do so, interest on the unpaid taxes stops accruing as of the date of the seizure (to the extent that the seized assets were sufficient to satisfy the tax liability). *United States* v. *Barlow's, Inc.*, 767 F.2d 1098 (4th Cir. 1985). As the courts below correctly concluded, however, that general rule does not apply to this case.

Petitioners requested the Service not to sell the seized assets because of their concern that such a sale would ruin their business. As an accommodation to petitioners, the Service entered into an escrow agreement (i) that barred any sale of these assets during the pendency of the tax litigation and (ii) that expressly specified that the seized assets were not held as a payment of the taxes then outstanding (Pet. App. Item 3, at 5, 27). The earnings on the escrowed assets were distributed to petitioners either during the litigation or at its conclusion, when all of the escrowed assets were also returned to petitioners (*id.* at 27). It was thus petitioners, and not the Service, that received all economic benefits from the assets placed in escrow.

In these circumstances, the courts below properly concluded (Pet. App. Item 3, at 27) that petitioners' delinquent taxes could not be deemed to have been paid on the date their assets were seized and placed in escrow.[3] Interest therefore continued to accrue after the date of seizure and until the date of payment of petitioners' tax liabilities.

Petitioners err in claiming (Pet. 20) that the decision in this case conflicts with *St. Louis Union Trust Co.* v.

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[3] The district court correctly concluded that petitioners' contentions "can be restated as 'I want my cake and to eat it too.'" Pet. App. Item 3, at 27.

United States, 617 F.2d 1293 (8th Cir. 1980), supplemented by *Stone* v. *Commissioner*, 47 T.C.M. (CCH) 1502 (1984), and *Stone* v. *Commissioner*, No. 5311-72 (T.C. Mar. 30, 1987) (Memorandum Sur Order) (Pet. App. Item 7). In *St. Louis Union Trust Co.*, the court of appeals held that the Service was entitled to levy upon certain escrowed property. The Tax Court therafter held that interest on the taxpayer's liabilities stopped accruing as of the date of the levy because, following the levy, the Service had constructive possession of the assets and could have required the assets to be delivered to it. In the present case, by contrast, the escrow agreement prevented the Service from selling the assets and using the resulting proceeds to satisfy petitioners' tax underpayments. As the courts below correctly concluded, since the government was precluded from taking the steps that would have stopped the running of interest on petitioners' outstanding tax obligations, interest continued to accrue until the taxes were ultimately paid.[4]

[4] For these same reasons, petitioners err in relying (Pet. 19) on the prior decisions of the Fourth Circuit in *United States* v. *Eiland*, 223 F.2d 118 (1955), and *United States* v. *Barlow's, Inc.*, 767 F.2d 1098 (1985). Moreover, a conflict among the decisions of different panels of the same circuit does not warrant review by this Court. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
LORETTA C. ARGRETT
Assistant Attorney General
RICHARD FARBER
ANNETTE M. WIETECHA
Attorneys

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