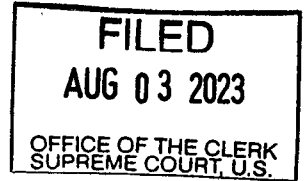


ORIGINAL

No. 23-382



In The
Supreme Court of the United States

PHYLLIS CARR,

Petitioner,

v.

UNITED STATES INTERNAL
REVENUE SERVICE, et al.,

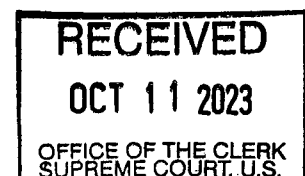
Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the closing of an examination/audit following complaints of violation of the Taxpayer Bill of Right against the IRS auditors during the audit allow IRS to pay a refund pursuant to the examination as it did in this case?
2. Can the Taxpayer Advocate Service help the taxpayer obtain their refund in helping the taxpayer resolve complaints against IRS arising from the examination?

PARTIES TO THE PROCEEDING

Plaintiff/Petitioner, Phyllis Carr.

Defendants/Respondents, UNITED STATES INTERNAL REVENUE SERVICE; CHARLES P. RETTIG, in his official capacity as Commissioner of Internal Revenue; MIN JIE MA; UNITED STATES OF AMERICA.

CORPORATE DISCLOSURE STATEMENT

There are no relationships between plaintiff to institutions involved in this petition.

RELATED CASES

Carr v. IRS Administrative Decision: Claim Accepted, January 31, 2019

IRS decision on referral from Taxpayer Advocate Service to IRS Small Business/Self Employed Planning and Special Programs

Carr v. IRS United States District Court Ninth Circuit CV 20-0744: Motion for Summary Judgment Granted/Denied: November 22, 2022

Carr v. IRS United States District Court Ninth Circuit CV 20-0744: Judgment entered January 15, 2023

Carr v. IRS United States Court of Appeals for the Ninth Circuit 21-17100: Rehearing Denied: May 5, 2023

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The opinions in this case have not been published.

The opinion of the United States Court of Appeals for the Ninth Circuit the highest to review the merits appears at App. 1 in the appendix to this petition and is unpublished.

The opinion of the United States District Court for the Northern District of California appears at App. 2 and is unpublished.



INTRODUCTION

This case involves an audited taxpayer and their right to know what is happening with their tax matters and whether they are entitled to notice of such from the Internal Revenue Service (IRS). It also determines whether a taxpayer has any actionable rights, as specified under the Internal Revenue Code and the Taxpayer Bill of Rights, particularly under, Title 26 U.S.C. Section 7803.

Here, during a tax examination (audit) Carr was subject to abuse and misconduct by the Internal Revenue Service examiners (auditors). Carr requested assistance from the Taxpayer Advocate Service (TAS) addressing the IRS employee misconduct. During the pendency of the assistance, TAS resubmitted petitioner's form 1040x forms to different IRS offices resulting in the taxpayer having their claim accepted. The auditors refused to respond to inquiries of the

taxpayer issuing an incorrect refund. Carr's audit was reconsidered for 3 years after multiple submissions of documentation including the same form 1040x resulting in a no change finding. Carr is denied the sum result of the resolution of the audit dispute. The issue here is whether Carr, after exercising those rights is entitled to any remedies therefrom.

◆

STATEMENT OF JURISDICTION

Jurisdiction is proper as the request for rehearing was denied on May 5, 2023, and final judgment was entered by the United States Court of Appeals for the Northern District on January 25, 2023 (App. 1). Thus, this petition was timely filed. The statutory basis of the Court's jurisdiction is Title 28 U.S.C. Section 1254(1).

Judgment was entered November 22, 2021, by the United States District Court for the Northern District.

◆

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional, statutory, and regulatory provisions are as follows:

26 U.S.C. Section 6402, 26 U.S.C. Section 6511, 26 U.S.C. Section 7803(a)(3)(A)—right to be informed, 26 U.S.C. Section 7803(a)(3)(B)—right to quality service, 26 U.S.C. Section 7803(a)(3)(C)—right to pay no more than the correct amount of tax, 26 U.S.C. Section

7803(a)(3)(D)—right to challenge the position of the Internal Revenue Service and be heard, 26 U.S.C. Section 7803(a)(3)(E)—right to appeal a decision of the Internal Revenue Service in an independent forum, 26 U.S.C. Section 7803(a)(3)(F)—right to finality, 26 U.S.C. Section 7803(a)(3)(I)—right to retain representation, and 26 U.S.C. Section 7803(a)(3)(J)—right to a fair and just tax system.

◆

STATEMENT OF THE CASE

Three years after the initial complaint about IRS employee misconduct, TAS submitted Carr's claim to IRS Planning and Special Programs (PSP) for resolution. TAS re-submitted 1040x forms for Carr and she received IRS Letter 570 notice ostensibly resolving the violation of those rights. (App. 5) The notice is the written resolution of an examination dispute pursuant to the exercise of those rights.

Refunds of overpayments are among the methods of resolving examination disputes. The accepted claim can be binding. Carr alleged the IRS:

1. Refused communication with Carr.
2. Refused to accept some of Carr's schedule A and all schedule C substantiating documentation.

3. Supervisor and auditors refused to have a requested conference and closed the examination as unagreed,
4. Without notice or a conference recommended an incorrect refund.¹¹

The important issue is whether a taxpayer is entitled to rely on a written resolution of an audit dispute and promise to pay from IRS. A claim for a refund may be made within 3 years of the initial filing of a tax return or 2 years after payment of the taxes. Title 26 Section 6511.

Petitioner contends the IRS transcripts are incorrect. At App. 9 it shows a refund being paid before the taxes are credited which is incorrect.

An informal claim for refund requires communications such that it gives IRS constructive or actual notice a refund is being sought. A formal claim is a writing such as a form 843 or 1040 or 1040x after payment of all taxes owed. Carr submitted a form 1040 and, subsequently a form 1040x which was examined.

During this examination, Carr employed representatives, either a certified public accountant or an attorney who attempted to regularly communicate with IRS. IRS employees Ma and Nicozi, the expert witness for the defendant closed the audit. IRS never paid the undisputed refund.

Carr alleged violations of the above mentioned taxpayer rights. Those violations were resolved by personally drafted IRS Letter 570 from PSP Section Chief

Archer. Carr filed an amended income tax return form 1040x for tax year 2010 in 2013, resulting in a refund of all payments made for the 2010 tax year that was credited for taxes owed for tax year 2012.

In October, 2013, without substantiating documents, Carr timely filed a form 1040 for 2012 with a balance due on which Carr made installment payments.

In February, 2015, with the substantiating schedule C business expense deductions in hand, Carr filed a form 1040x for 2012 showing a substantial loss resulting in no taxable income and taxes owed with Carr expecting a refund of the payments made minus any assessments. Carr owed no other Federal or State taxes.

Notwithstanding, in July, 2015, the 2012 1040x was selected for examination by IRS and audited initially by Min J. Ma. After complaints to TAS the return was also examined by Lulu Nicozi, a pseudonym used by that examiner. Carr proffered substantiating schedule A and C documents which Ma refused to consider merely demanding additional documents. Nicozi did not see Carr's substantiating documents. (App. 11) Ma and Nicozi refused to communicate with Carr or her representatives. Carr amended her 2012 state of California return which was also audited. California accepted Carr's amendments and made a full refund.

Pursuant to U.S.C. Section 7803, Carr requested a conference with the auditor for an explanation of the auditors refusal to accept proffered documentation and

demand for additional documentation supporting the schedule A and C deductions. Ma earlier refused to have a conference. Carr again requested a conference with the auditors' supervisor who also refused. The auditors closed the audit as unagreed in 2016 and later in 2018. IRS retained all taxes paid by Carr and, without giving Carr full credit for their schedule A or C deductions, ordering a refund to Carr in 2015 pursuant to 26 U.S.C. Section 6402. (App. 11)

In 2016, following payment of the 2012 taxes and pursuant to the intervention of TAS, Carr provided IRS with the 2012 form 1040x. TAS confirmed with Carr receipt of the 1040x and advised they had not been processed. (App. 7) The matter was transferred from the TAS office in Oakland, California to Philadelphia and then to IRS Planning and Special Programs (PSP) Section Chief Peggy Archer in Colorado.

To address the violations of Carr's taxpayer rights, IRS PSP Section Chief Peggy Archer accepted Carr's claim by issuing IRS Letter 570 notice. A Letter 570 notice is the formal acknowledgment of an acceptance of a refund claim in full in an audited tax return. (App. 4) The Circuit court held Carr did not file a refund claim. (App. 9, App. 2) The Appellate court affirmed.

This case further involves a dispute as to what constitutes a refund claim and, the authority of TAS to resolve taxpayer problems with IRS. The instant case was cited in *Johnson v. United States*, 2022 WL 1524602 (2022) whereby the court after ruling for the taxpayer that TAS could pursue the taxpayer's claim

reversed itself ruling the taxpayer in *Johnson* failed to pay the taxes before making the claim and that their claim was a request for abatement. Notwithstanding, *Johnson* was allowed to amend their complaint. *Johnson*, WL 1524602 *ibid*. *Johnson* cited the instant case as support for the notion that IRS does not have to pay a refund claim until all taxes are paid. In this case all taxes were paid. *Johnson* *infra* @ fn4. The US attorney admitted she never authenticated the letter 570 with the author (App. 12).

The instant case is distinguishable from *Johnson* because of the following:

1. Notwithstanding the fact the auditor mistakenly noted the 1040x was a request for abatement, the auditor actually accepted the form 1040x claim and issued an incorrect refund to the taxpayer.
2. The taxpayer resubmitted a 2012 1040x in 2015 and 2016.
3. The mishandled audit was completed and closed by the Planning and Special Procedures (PSP) Section Chief Peggy Archer who had the IRS audit file containing the taxpayer's substantiating documentation thus drafting and sending the claim acceptance notice to Carr.



REASONS FOR GRANTING THE PETITION

I. THE SUPREME COURT HAS NOT SPOKEN ON WHETHER RESOLUTION OF EXAMINATIONS AND REFUND CLAIMS VIA TAS ARE ENFORCEABLE

A. Taxpayers do not have and, need an enforceable means to address IRS problems. Ostensibly, TAS intervention is that avenue.

Congress has attempted to ensure that the United States has a fair and just taxation system enacting safeguards, so the taxpayers, government and IRS are treated without favoritism or discrimination. (See 26 U.S.C. Section 7803(a)(3)(J)). A refund claim, formal or informal, may be made during an examination. *Mobil v. United States*, 67 Fed.Cl. 708 (2005) Refund claims can be established by information from IRS officers. *Paresky v. United States*, 139 Fed.Cl. 196 (2018). While a refund claim cannot be made to the TAS, TAS can forward the taxpayer's claim, especially their form 1040x.

Andary-Stern v. Commissioner, T.C. Memo. 2002-212 (2002). Representations, even oral ones made by a governmental entity can be an equitable estoppel and are enforceable. *Heckler v. Community Health Services of Crawford County*, 467 U.S. 51 (1984). Taxes credited during an examination are considered paid. *Donahue v. United States*, 33 Fed.Cl. 600 (1995). While negligence of an IRS employee is not actionable misconduct for injunctive relief, intentional misconduct is such.

In re Howell, 120 B.R. 137 (1990). Here, the auditors committed acts that were addressed by PSP Section Chief Archer:

1. The initial auditor Ma refused to have a conference with Carr and her representative why their documentation was insufficient.
2. The defendant admitted the taxpayer overpaid taxes.
3. Nicozi, who closed the audit and testified in a declaration on summary judgment that Carr had unreported income.¹
4. Nicozi also testified at deposition that she made her decision to close Carr's file without seeing all of Carr's substantiating documentation or to have a conference with Carr.
5. The supervisor at IRS Oakland which handled the audit also refused to have a conference with Carr's representative thus causing the audit to be referred to TAS and PSP to resolve the violation of Carr's taxpayer rights.



¹ The additional income was actually from a confidential personal injury settlement that is not taxable income.

CONCLUSION

In sum, the IRS used the appropriate means to correct a wrong refund being paid to the taxpayer due to improper conduct of the auditors. In sum:

1. Carr made a timely claim on filing the 1040x and a refund was paid and if necessary, TAS forwarded a claim for Carr to IRS which after 3 years was accepted.
2. There were no notices from IRS that Carr's claim was rejected or otherwise as required by the Internal Revenue Manual (IRM).
3. The IRS has the statutory authority to classify an examination as a request for abatement or claim for refund depending on the circumstances. Here, the auditors' improper handling of Carr's audit was addressed by the appropriate Section Chief after a careful, 3 year review in the taxpayer's favor.
4. PSP, acting on policy and the substantiating Schedule A charitable documentation and Schedule C documentation accepted the claim.²

² IRS practice is to allow for reasonable deductions, even guesses for business deductions. Here, the auditor allowed for no reasonable business deductions even though the taxpayer was and is a licensed real estate broker in California, had reasonable office expenses and must have incurred some reasonable expenses to produce the income claimed.

The lower court presumed PSP Section Chief Peggy Archer did not know what she was doing even though IRS took 3 years to review the case.

The expert witness, Nicozi, one of the auditors who mishandled the audit, was not authorized to opine as to the thought processes of her superior at IRS. She was allowed by the court to overrule Peggy Archer, her superior at IRS. Here, IRS addressed and resolved violations of taxpayer rights in favor of the taxpayer.

Failure to enforce the timely IRS remedy leaves the taxpayer without remedy for IRS misconduct. This case allows for specific enforcement of taxpayer rights and reversal of prior rulings.

Respectfully submitted,

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