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# Top Federal Tax Cases To Watch In The 2nd Half Of 2024

By **Kat Lucero**

*Law360 (July 5, 2024, 11:08 AM EDT)* -- In the coming months, the U.S. Treasury and the IRS will defend rules designed to go after what they consider as abusive tax practices, including the economic substance doctrine, the Corporate Transparency Act and the moratorium on employee retention tax credits.

Meanwhile, the U.S. Supreme Court has agreed to review a now-defunct transportation company's case that implicates federal tax and bankruptcy laws.

Here, Law360 looks at key federal tax cases to watch in the rest of 2024.

**Economic Substance**

In the Tenth Circuit, the IRS is seeking to maintain a Colorado district court's decision to reject multinational telecommunications giant Liberty Global's $109 million foreign tax deduction on the grounds that the underlying transactions — known as Project Soy — lacked economic substance, which is a common law doctrine that has evolved into a powerful anti-abuse tool.

Congress codified the doctrine in 2010 under Internal Revenue Code Section 7701 to clarify the standard that the IRS should be employing. Even before it became law, the doctrine was rarely used or narrowly applied by the government. It was not until two years ago that the agency started to assert its authority in examinations and litigation, including in the Liberty Global dispute.

In Liberty Global, the IRS found success last year in convincing a Colorado district court that a large company's sophisticated set of intercompany deals had lacked economic substance. Many practitioners said the success could embolden the agency to invoke the doctrine frequently to scrutinize various transactions that it does not like.

That is because, practitioners said, the Colorado court's decision expanded the interpretation of the doctrine. The court rejected Liberty Global's arguments that Congress intended to carve out common transactions, such as the debt and equity transactions that made up the disputed arrangements, in codifying Section 7701 — which practitioners said potentially gives the IRS wide latitude to go after the most ordinary tax planning and structures.

"What is most interesting about Liberty Global is to see how courts are going to react to these arguments under the statutory construction" of the doctrine, Melissa L. Wiley, a partner at Lowenstein Sandler LLP, told Law360.

"This is a huge case where we're going to get our first taste, at least of what one circuit court thinks," she said. "So that's exciting."

In a late June filing, the IRS emphasized that Liberty Global had admitted the lack of economic substance in the first three transactions in Project Soy that generate overnight earnings and profits; yet the company still believed it is entitled to the multimillion-dollar deduction because other aspects of Project Soy had complied with the tax code.

But courts for almost a century have disregarded transactions for being tax avoidance schemes that lack economic substance even if the transactions complied with the tax code, according to the brief.

"This court — like every other circuit — has repeatedly disallowed tax benefits under the economic-substance doctrine even where taxpayers 'comply with the letter of the tax code,'" the IRS said in the brief.

Meanwhile, in another suit, the IRS is defending its characterization of a multinational pharmaceutical giant's transactions with a foreign entity as lacking economic substance. Perrigo filed the case in 2017 to claw back a $163 million tax payment that the agency demanded on income earned by the company's Israeli affiliate from 2009 to 2012 for sales of over-the-counter heartburn drug omeprazole.

However, the IRS has insisted that Perrigo created a foreign subsidiary to primarily keep most profits from omeprazole overseas, making the arrangement with a shell company that requires the IRS to reallocate those profits to the U.S. to claim $163 million in refunds tied to those profits.

The case is Liberty Global Inc. v. U.S., case number 23-1410, in the U.S. Court of Appeals for the Tenth Circuit.

The case is Perrigo Co. et al. v. U.S., case number 1:17-cv-00737, in the U.S. District Court for the Western District of Michigan.

**Corporate Transparency Act**

Congress created the Corporate Transparency Act, or CTA, three years ago to prevent tax fraud, money laundering, corruption, terrorist financing and other illicit activities through business entities, but many small businesses objected to the law's reporting requirements and sued the U.S. Department of the Treasury.

The National Small Business Association is among them. The trade group earlier this year got an Alabama district court to enjoin the CTA reporting requirements on the grounds that the law goes beyond Congress' Article 1 legislative powers.

Now, Treasury is seeking to reverse that decision in the Eleventh Circuit in what could be an expedited review, given that the businesses and individuals have until the end of this year to meet the reporting requirements.

The appeal has drawn various amicus filings from conservative and small business groups, as well as **22** state governments, that support enjoining the CTA reporting requirements. For example, the Americans for Prosperity Foundation said the law is unconstitutional because it mandates state-registered entities

to disclose personal information.

Since the reporting requirements took effect in January, four challenges all over the country including Maine, Massachusetts and Michigan, have emerged to oppose the 2021 law. But the National Small Business Association suit in an Alabama district court is the only one that got a decision, according to Wiley.

Depending on how liberal or conservative the courts are, in the next year or two, Wiley said there could potentially be circuit splits over the legality of the CTA reporting requirements, which would create an inconsistent reporting regime.

"The whole regime doesn't work if you can just choose to be in an area that's not going to enforce" the CTA requirements, said Wiley.

The case is National Small Business United et al. v. U.S. Department of the Treasury et al., case number 24-10736, in the U.S. Court of Appeals for the Eleventh Circuit.

**Moratorium on Employee Retention Credits**

In September, the IRS announced a moratorium on processing employee retention tax credit claims in response to the growing number of questionable claims submitted to the agency ever since Congress enacted the tax perk in 2020. The temporary credit program under IRC Section 2301(b), which expired in 2021, was intended to partially offset the cost of paying workers during the COVID-19 pandemic. Claims were still filed through amended returns after the expiration.

In a new case before the Arizona district court, tax advisory Stenson Tamaddon LLC, which was helping businesses apply for the credit, called for the IRS to resume the program, saying the suspension was not properly vetted by the public under the Administrative Procedure Act, or APA.

The case is significant because suits with APA claims have recently become a popular litigation tactic to defang controversial IRS measures, such as the listed notices imposing additional disclosure rules for microcaptive insurance companies and syndicated conservation easements.

However, the Stenson Tamaddon case is more narrow than past APA suits against IRS enforcement on easements and microcaptives, which are provisions that have been part of the tax code for decades, according to Thomas V. Linguanti, a partner at Morgan Lewis & Bockius LLP.

After Congress created the credit program to immediately address a problem during the pandemic, the IRS had to implement the provisions of Section 2301(b) right away. The agency had "a narrow period of time to do that, so there's practically no way for it to do so through regulatory procedures," Linguanti told Law360.

"This is the kind of case, given the circumstances, that may go too far," he said. "It's a narrow statute for a limited period of time addressing a very narrow problem."

The case is Stenson Tamaddon v. IRS et al., case number 2:24-cv-01123, in the U.S. District Court for the District of Arizona.

**U.S. v. Miller**

In a late June session, the Supreme Court agreed to review the government petition to reverse a Tenth Circuit decision that allowed a Chapter 7 bankruptcy trustee of a defunct Utah company to recover $145,000 in tax payments from the IRS.

The case stemmed from the company's bankruptcy trustee, David Miller, who sought to recover the tax payments under U.S. Bankruptcy Code Section 544(b), which allows a trustee to retroactively avoid a payment that is rendered void by other applicable laws, including state laws on fraudulent transfers.

The Tenth Circuit upheld a district court ruling and bankruptcy court ruling that found the government was not protected from certain suits brought by unsecured creditors. But the government said there is a circuit split on the matter, such as the Seventh Circuit saying that the plain language of the bankruptcy law forces a trustee to show that an actual creditor could use a state's applicable law to recoup payment to the IRS.

The overlap between the tax collection and bankruptcy laws makes the case interesting, according to Joshua Smeltzer, a partner at Gray Reed.

The way the IRS administers its collection and lien activities "ends up getting kind of strange when you get into the bankruptcy context," such as the agency itself has a completely separate area that is dedicated only to the processing of bankruptcy claims, Smeltzer told Law360.

Bankruptcy actions aim to "provide orderly relief to businesses in trouble," which is in contrast with the IRS, charged with essentially collecting as much taxes that are due, he said.

The case is U.S. v. Miller, case number 23-824, in the U.S. Supreme Court.

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