5/20/04

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ROBERT L. SCHULZ,

Plaintiff-Appellant.

v.

Docket No. 04-0196-cv

IRS. UNITED STATES, ANTHONY ROUNDTREE,

Defendants-Appellees.

MEMORANDUM BRIEF FOR THE DEFENDANTS-APPELLEES

JURISDICTIONAL STATEMENT

Plaintiff-appellant Robert L. Schulz appeals from the Order of the United States District Court for the Northern District of New York, Hon. David N. Hurd, dismissing his motions to quash administrative summonses served upon him by the Internal Revenue Service ("IRS"). This Court would appear to have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. However, for the reasons found by the district court and discussed below, the district court did not have jurisdiction over plaintiff's underlying motions, and they were properly dismissed.

ISSUE PRESENTED

I. Did The District Court Err In Ruling That It Lacked Jurisdiction Over Schulz' Motions To Quash IRS Administrative Summonses Where The Government Had Not Initiated Any Enforcement Action?

STATEMENT OF FACTS AND THE CASE BELOW

The facts of this case were summarized in the Memorandum-Decision and Order of United States Magistrate Judge David R. Homer as follows:

> On May 30, 2003, Schulz was served with an administrative summons by Anthony Roundtree, an IRS Revenue Agent, in connection with an investigation of Schulz "relating to penalties and an injunction action for promoting abusive tax shelters." Schulz filed a motion to quash this summons on June 19, 2003. On June 23, 2003, Schulz was served with additional summonses by IRS and thereafter moved to quash those summonses. In his motions, Schulz alleges that the summonses should be quashed for lack of jurisdiction, bad faith, defects in the issuance of the summonses, and related grounds. It does not appear that the IRS has yet commenced any proceeding to enforce any of these summonses as permitted by 26 U.S.C. § 7604.

A.13 (citations omitted).[1]

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[1] While consideration of Schulz' underlying claims is not necessary for resolution of the jurisdictional issue at issue in this case, by way of background, he appears to be claiming in substance that the IRS administrative summonses were issued in retaliation for his exercise of what he alleges are protected rights to petition the government for redress of grievances regarding his claim that the IRS lacks authority to tax labor under various constitutional provisions. Brief at 2-3, 4, 10, 13-15. While it is difficult to understand how "promotion of an abusive tax

The IRS did not appear in response to the motions, *id.*, and, on October 16, 2003, the magistrate judge dismissed Schulz' motions to quash the summonses because, even "[a]ccepting the facts asserted by Schulz as true," the court lacked jurisdiction because the IRS had not commenced an enforcement action. A.14 (citing cases). Schulz filed an appeal and objections with the district court claiming, in substance, that he was seeking equitable relief and, therefore, that the court below should have reached the merits, quashed the summonses, and issued other injunctive relief against the government. A.168-203. The district court denied the objections and ordered the appeal dismissed. A.11. This appeal followed.

ARGUMENT

I. The District Court Did Not Err In Ruling That It Lacked Jurisdiction Over Schulz' Motions To Quash IRS Administrative Summonses Where The Government Had Not Initiated Any Enforcement Action.

Title 26, United States Code, Section 7604(a) vests jurisdiction in the district courts to adjudicate motions to compel compliance with IRS administrative summonses. The means by which enforcement may be sought for refusal to comply with IRS summonses are set forth in Section 7604(b).

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shelter" could be considered a legitimate "petition for redress of grievances," Brief at 16, 18, that issue is not before this Court.

The court below was correct in concluding that Schulz' motions to quash were "fatally defective" for two reasons: (1) until the IRS commences an enforcement proceeding under 26 U.S.C. § 7604, the taxpayer is under no compulsion to disclose information or records; and (2) such enforcement proceedings afford the taxpayer an adequate method of asserting any defenses he may have to compliance with a summons. A.14.

"Except for the rule created by § 7609(b), concerning third party record keeper summonses, it is firmly established that courts cannot entertain pre-enforcement challenges to IRS subpoenas like those at issue in this case." *Gutierrez v. United States*, No. CS-95-599, 1996 WL 751342, at *2 (E.D. Wash. July 31, 1996) (citing cases); *accord Bragg v. United States*, No. 92-0168-CIV-ORL-18, 1992 WL 310796, at * 1 (M.D. Fla. Sept. 1, 1992) ("because the IRS can only enforce its summonses through judicial proceedings and a taxpayer may challenge an IRS summons on any appropriate grounds at an enforcement proceeding, a taxpayer may not act preemptively to enjoin a personal summons that the IRS has not sought to enforce."), *aff'd*, 998 F.2d 1020 (11th Cir. 1993) (table); *see also Friedman v. United States*, No. 96-4880, 1997 WL 151287, at *2 (D.N.J. Jan. 22, 1997) (attorney-accountant could not challenge summonses directed at his personal records under third-party record keeper provision of 26 U.S.C. § 7609 and, therefore, "must await a government

enforcement proceeding"); RIA, *Federal Tax Coordinator* ¶ T-1359 (2d ed. 2004) (available on WESTLAW) ("A taxpayer cannot petition a district court to quash a summons that IRS has not yet sought to enforce. Taxpayer must wait until the summons enforcement proceeding to challenge the summons on any grounds.").

Schulz asserted in the court below, A.182-84, and maintains on appeal, Brief at 23. that the district court had jurisdiction to quash the petitions because he was seeking equitable relief. He bases this argument on a misreading of the Supreme Court's decision in *Reisman v. Caplin*, 375 U.S. 440 (1964), which actually held that a complaint seeking declaratory and equitable relief against IRS summonses was properly dismissed because the plaintiff had an adequate remedy at law through the statutory enforcement process. 375 U.S. at 443. In *Reisman*, summons were served on accountants who had assisted the taxpayers' attorney. The accountants had not yet refused to provide the records, and the government had not brought an enforcement action. *Id.* at 444. Analyzing the statutory scheme, the Supreme Court held that, if the IRS wanted to enforce the summons, it would have to bring an action in district court, which "would be an adversary proceeding affording a judicial determination of the challenges to the summons and giving complete protection to the witness." *Id.* at 445-46. Thus, contrary to Schulz' arguments below and on appeal, the magistrate judge properly relied on cases that all cited *Resiman* in holding that the adequacy of

the statutorily prescribed remedy at law divested the district court of jurisdiction to grant the requested equitable relief. *See Gutierrez*, 1996 WL 751342, at *2; *Rodio v. Commissioner*, 138 F.R.D. 341, 344 (D.R.I. 1991); *Ramos v. United States*, 375 F. Supp. 154, 155 (E.D. Pa. 1974); *see also First National City Bank, et al. v. FTC*, Nos. 75 Civ. 4365, 4417, 4449, 4478, 4486, 1975 WL 1000, at *1 (S.D.N.Y. Dec. 31, 1975) (dismissing complaints seeking pre-enforcement review of legality of subpoenas issued by the FTC based on "controlling precedent" of *Reisman*).

Like Schulz, Brief at 26-27, the petitioners in *Reisman* argued that they should be eligible for injunctive relief because of the risk of arrest or attachment under § 7604(b). 375 U.S. at 447-48. However, the Supreme Court rejected this argument, finding that this provision deals with "a default or contumacious refusal to honor a summons before a hearing officer," and that, "even in such cases, . . . the witness may assert his objections at the hearing before the court which is authorized to make such order as it 'shall deem proper.'" *Id.* at 448-49 (quoting 26 U.S.C. § 7604(b)). Thus, "finding that the remedy specified by Congress works no injustice and suffers no constitutional invalidity," *id.* at 450, the Court affirmed the dismissal of the equitable complaint.

Contrary to Schulz' suggestion, Brief at 26, the Supreme Court's decision in *Reisman* did not turn on the nature of the allegations against the taxpayer. Rather,

that case, and the many decisions that have followed it, rest on the clear statutory scheme and the simple proposition that the district courts have no jurisdiction to quash IRS administrative summonses unless and until the government files an action seeking to enforce them. *See, e.g., Rodio*, 138 F.R.D. at 344; *accord Ring v. United States*, No. M97-09B, 1997 WL 718503, at *2 n.2 (S.D. Ill. June 23, 1997).

Schulz emphasizes the fact that the IRS did not appear to contest his motions in the court below. Brief at 9, 28. However, the district court did not request a written response from the government and it was under no other obligation to appear, as the court was manifestly without jurisdiction to consider Schulz' claims unless and until the government pursued an enforcement action.

As with other arguments, Schulz incorporates on appeal his lengthy arguments in the court below that the summonses should have been quashed because the IRS lacked "territorial and enforcement jurisdiction as well as subject matter jurisdiction." Brief at 29, incorporating argument from A.71-78 and A.191-203; *see also* Brief at 22-23 (directing this Court's attention to the "entire argument regarding the meaning, history and significance of Plaintiff's Right to Petition the government for Redress of Grievances" from his Memorandum of Law in Support of Motion to Quash, at A.58-144). Putting aside the propriety of incorporating lengthy legal arguments from the court below to avoid this Court's restrictions on the length of briefs, *see* Fed. R.

App. P. 32(a)(7)(A) (imposing 30 page limitation on principal briefs), Schulz' substantive complaints about the defendants' jurisdiction over him again miss the point – whether or not the summonses were valid is something that the district court lacked jurisdiction to consider because the IRS had not brought an action seeking to enforce the summonses. If and when that happens, Schulz presumably will have ample opportunity to raise any good faith defenses he may possess.[2]

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[2] There are other grounds, such as sovereign immunity, upon which Schulz' motions might well falter. *See, e.g., Smith v. Stark*, No. 96-9011-MC-1, 1996 WL 512323, at *2 (W.D. Mo. June 27, 1996) (granting motion to dismiss action seeking to quash IRS summons because government had not waived sovereign immunity). However, this Court need not reach such issues, as the district court properly found that it lacked jurisdiction to consider Schulz' motions. *See Reisman*, 375 U.S. at 442-43 (not reaching Court of Appeals' decision that suit had not been consented to by the United States because there was no basis for equitable relief due to adequacy of remedy at law); *see also Ramos*, 375 F. Supp. at 155 (court need not reach sovereign immunity or other grounds for dismissal of petition to quash because taxpayer had adequate remedy at law under tax code's enforcement provisions).

CONCLUSION

For the foregoing reasons, the decision of the district court should be affirmed.

Respectfully submitted,

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Albany, New York
August 20, 2004

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee of the United States Attorney for the Northern District of New York and is a person of such age and discretion as to be competent to serve papers. On August 20, 2004, she served two copies of the Memorandum Brief for the Defendants-Appellees, in a sealed envelope addressed to the following, at the place and address stated below, which is the last known address, by delivering said envelope and contents via first class mail:

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