

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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Case No. 1:19-CV-00194-wmc

MARK W. HARRISON &  
ELLEN C. HARRISON,

Plaintiffs,

v.

INTERNAL REVENUE SERVICE,  
COMMISSION (*sic*) OF INTERNAL REVENUE,  
& UNITED STATES DEPARTMENT OF  
JUSTICE,

Defendants.

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**UNITED STATES' NOTICE OF NON-OPPOSITION TO PLAINTIFFS' MOTION FOR  
RECONSIDERATION**

The United States, on behalf of the Defendants, respectfully states that it does not oppose the Plaintiffs' *Motion for Reconsideration of the Court's January 9, 2020 Order and Opinion* filed at ECF No. 24 in the above-captioned case for the following reasons:

1. This case involves the federal income tax liabilities of the Plaintiffs for tax year 2012. (ECF No. 1, Complaint.)

2. The Plaintiffs did not file a federal income tax return for tax year 2012 when it was due on October 15, 2013. (ECF No. 12, U.S. Motion at Facts 3-5.)

3. Three years later, on October 11, 2016, the Plaintiffs postmarked their late 2012 federal income tax return and mailed it to the IRS. (ECF No. 1, Complaint ¶ 7.) This return reported that the Plaintiffs were due a refund of \$7,386.48 for tax year 2012. (*Id.*)

4. On October 17, 2016, when it was received the IRS, the Plaintiffs' late-filed federal income tax return was treated as a claim for refund. (ECF No. 12, U.S. Motion at Facts 2-7.)

5. On March 13, 2017, the IRS denied the Plaintiffs' refund claim as untimely. (*Id.* at Fact 8.)

6. On March 12, 2019, the Plaintiffs filed their complaint in this case seeking a refund of \$7,386.48. (ECF No. 1, Complaint at ¶ 9.)

7. After consulting with the IRS and receiving its views in this matter, we moved to dismiss, or in the alternative, moved for entry of summary judgment finding the Plaintiffs were entitled to no refund for tax year 2012 because none of the Plaintiffs' tax payments had been made during the statutory look back period.<sup>1</sup> (ECF No. 12, U.S. Motion.)

8. The United States' Motion described that because the Plaintiffs' return had been late-filed, the statutory look back period was calculated by reference to the date the late-filed return was received by the IRS pursuant to 26 U.S.C. § 7502(a). (*Id.* at pp. 9-12; *see also*, U.S. Reply at pp. 6-8.)

9. On January 9, 2020, the Court granted the United States' motion and entered summary judgment in its favor. (ECF Nos. 22-23.)

10. After the entry of the Order and Opinion, it came to the United States attention that, following the Second Circuit's opinion in *Weisbart v. United States*, 222 F.3d 93 (2d. Cir.

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<sup>1</sup> As described in the United States Motion (ECF No. 12) and the Court's Opinion (ECF No. 23), in a refund suit, among other requirements, a taxpayer can only recover those tax payments made during the limitations period set forth in 26 U.S.C. § 6511(b)(2)(A)(limiting recovery to tax payments made within three years of the refund claim plus any extensions of time to file the return (called the "look back" period).) Therefore, a primary issue in this suit is the date of the Plaintiffs' claim for refund and then, based on that date, whether payments were made in the requisite look back period from that date.

2000), the IRS issued a Chief Counsel's Notice that it was changing its litigation position with respect to determining the date of a refund claim submitted as part of a late-filed return. See IRS Chief Counsel Notice CC-2001-019, 2001 WL 34771235 (March 22, 2001).

11. The change in the litigation position was that the IRS would not apply 26 U.S.C. § 7502(a) to determine the date of a claim for refund that was “included in an original return mailed after the due date of the return.” *Id.* Rather, the date of a claim for refund which was submitted to the IRS as part of a late-filed return would be deemed received on the date it was postmarked, not the date it was received by the IRS.

12. This change in position was incorporated in the Treasury Regulations at 26 C.F.R. § 301.7502-1(f).

13. The IRS did not identify the *Weisbart* case, the Chief Counsel's Notice, or the resulting Treasury Regulation when consulted for its views in this case.

14. We identified the *Weisbart* case in our research, but did not find it controlling in this Circuit. Further, and regrettably, the undersigned did not find the Chief Counsel's Notice or the Treasury Regulation.

15. The Plaintiffs' claim for refund was submitted in the form of a late-filed return. Therefore, the change in the IRS litigating position applies to the Plaintiffs' refund claim in this case and, through this oversight, we failed to correctly determine the date of the Plaintiffs' refund claim in our analysis. We apologize for this failure and sincerely regret the resulting expense of judicial resources on this matter.

16. As identified by Plaintiffs in their Motion for Reconsideration, following the litigating position adopted post-*Weisbart* and set forth in 26 C.F.R. § 301.7502-1(f), while the Plaintiffs filed their federal income tax return over three years after its October 15, 2013 due

date, their claim for refund should be deemed to have been received by the IRS on the date the return was postmarked – October 11, 2016. (ECF No. 1, Complaint ¶ 7; ECF No. 21, U.S. Reply at p. 5 (agreeing that return was postmarked October 11, 2016).)

17. Using October 11, 2016 as the date of the Plaintiff's refund claim, the statutory look back period spans October 11, 2016 through April 11, 2013 (the three year statutory period, plus the one six month extension received by the Plaintiffs). Therefore, the Plaintiffs' withholdings, deemed paid on April 15, 2013, were paid within the statutory look back period. (ECF No. 21 at p. 5.)

18. Accordingly, the IRS has confirmed that it will issue a refund in the amount claimed on the Plaintiffs' late-filed return if the Court grants the Plaintiffs' motion for reconsideration.

19. A check for the claimed \$7,386.48 refund, plus statutory interest that has accrued since April 15, 2013, will be issued to the Plaintiffs.

20. In summary, for these reasons, the United States does not oppose the Plaintiffs' motion for reconsideration.

21. If the Court chooses to grant the motion and vacate the judgment, the United States consents to the entry of judgment against the United States and in favor of the Plaintiffs (in the amount of \$7,386.48, plus statutory interest that has accrued since April 15, 2013).

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Dated: January 24, 2020

Respectfully submitted,

RICHARD E. ZUCKERMAN  
Principal Deputy Assistant Attorney General

/s/ Gretchen Ellen Nygaard  
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 24<sup>th</sup> day of January, 2020 I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system.

/s/ Gretchen Ellen Nygaard

GRETCHEN ELLEN NYGAARD

Trial Attorney

Civil Trial Section, Central Region