Opinion No. 1186 A

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
TAX DIVISION

WM. BURTON
CLERK OF
SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
TAX DIVISION
AUG 9 1980
FILED

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DISTRICT OF COLUMBIA
TAX DIVISION
JAN 6 - 1981
FILED

Frederick P. Andrews and Edith W. Andrews, Petitioners,	)	
v.	)	No. 2190
District of Columbia, Respondent,	)	

FINDINGS OF FACTS, CONCLUSIONS OF LAW AND ORDER

This case having come on for trial and Respondent having represented that, without waiving any of its rights, defenses, determinations or authority previously asserted in this case, was withdrawing its opposition to the granting of the refund of income taxes requested by the Petitioners, and the Court having heard oral arguments relative to the rate of interest to be paid on the subject refund and attorney's fees, the Court pursuant to D.C. Code §47-2403 makes the following Findings of Facts, Conclusions of Law and Order:

FINDINGS OF FACTS

1. A total of $1,813.00 was collected by the Respondent from Petitioners as income taxes, in three payments: on January 6, 1971, for 1969 taxes in excess of those withheld for the period January 1 to November 14, 1969; on April 23, 1971, for 1970 taxes; and on April 13, 1972, for 1971 taxes in excess of tax withheld for the period January 1, 1971 - August 13, 1971. Petitioners' claims for refunds were dated March 2, 1971 and April 13, 1972.

2. Respondent's denials of the claims for refunds were dated March 24, 1972, and May 25, 1972.

3. Petition for review of the denials was timely filed in this Court.

4. This case was originally tried April 18-19, 1973. More than three years later, Judge Alexander, who had presided at the trial, resigned without having rendered a decision. The Court's file for the case, including the Court Reporter's transcript of the trial and the briefs filed by the parties, were then discovered to be missing. Their loss is still unexplained. Following a motion by Petitioners for an expedited decision, Judge Ugast held a conference in his chambers on December 7, 1976, in which counsel for both parties joined in undertaking to supply copies of the Reporter's transcript, the exhibits that had been received in evidence, and the briefs that had been filed. The parties jointly requested the Judge to decide the case on the record previously made. On January 3, 1977, Judge Ugast denied the joint request and sua sponte declared a mistrial without having received the agreed-upon copies of the missing exhibits. Petitioners' motion for reconsideration was denied May 11, 1977.

5. The Petitioners appealed Judge Ugast' Order to the District of Columbia Court of Appeals. The appeal was dismissed on November 9, 1977, on the ground that Judge Ugast's order was not a final appealable order.

6. On May 11, 1978, Judge John G. Penn, then an Associate Judge of the Superior Court of the District of Columbia, granted Petitioners' motion to use the evidence and transcript developed before Judge Alexander as its case-in-chief without

appearing in person before the trial court. This decision was followed by Judge Pryor on July 11, 1978.

7. The Respondent exercised its rights and proffered all defenses available to it.

8. The appropriate rate of interest to be paid on taxes erroneously collected and refunded is four percent (4%) per annum, pursuant to D.C. Code §47-2413(c).

9. There is no statutory authority, relating to the refund of taxes errouneously collected, which permits the awarding of attorney's fees to the Petitioners by the Court.

10. The Respondent has not, in this proceeding, acted in a dilatory or vexatious manner, or in "bad faith".

~~11. The Respondent does not waive any of its rights, determinations or authority previously asserted in this case, or its rights to assert the same rights, determinations or authority in another subsequent case.~~

CONCLUSIONS OF LAW

The Court based upon the foregoing Findings of Facts, concludes as a matter of law, that:

1. Petitioners are entitled to a refund of income taxes in the amount of $1,813.00.

2. Petitioners are entitled to interest on the refund in the amount of four percent (4%) per annum from the date of the filing of the claim for refund to the date of the payment of the refund.

3. The petitioners are not entitled to the award of attorney's fees in this proceeding.

Therefore, based upon the foregoing Findings of Facts and Conclusions of Law, it is by the Court this 31st day of December, 1980 ORDERED:

1. The Respondent be and the same hereby is directed to refund to the Petitioners income taxes previously paid in the amount of $1,813.00 for the years 1969, 1970 and 1971.

2. The Respondent pay to the Petitioners interest in the amount of four percent (4%) per annum, from the date of the filing of the claim for refund to the date of the payment of the refund.

Judge

Copies Served:

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R. Stanfield 1/8/81

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

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FREDERICK P. and EDITH ANDREWS, Petitioners	)	
v.	)	Docket No. 2190
DISTRICT OF COLUMBIA, Respondent	)	

MEMORANDUM ORDER

This comes before the Court on the petitioners' motion for a new trial and for the admission of the former testimony of the petitioners in that new trial. The respondent opposes the motion.

I

A brief statement of the underlying facts is necessary. The petitioners appealed to this court from District of Columbia income tax assessments made for the periods November 15 to December 31, 1969, calendar year 1970, and January 1 to August 13, 1971. The total taxes involved amount to $1,813. The only issue presented is whether the petitioners were domiciled in the District of Columbia during all or part of the taxable periods.

The case came before another judge of this court for trial (trial judge) on April 18 and 19, 1973. After hearing evidence in the case he took the case under advisement but thereafter resigned from the court in 1976 before rendering a decision in the case.

Petitioners then filed a motion for expedited judgment before a second judge (motions judge) requesting that he decide the case upon the record made before the trial judge. The motions judge denied that request and noted that since the question involved was one of domicile and therefor called for a determination of the intent of the parties, the court felt it was necessary to have the opportunity to observe the petitioners when they testified. The motions judge then declared a mistrial and provided that a new trial date would be set upon the request of the petitioners. The motions judge thereafter denied a motion for reconsideration and an appeal by the petitioners was dismissed by the District of Columbia Court of Appeals on the grounds that the order was not appealable.

The petitioners now live in Cyprus and have lived there since 1974. They now seek to have the Court admit their former testimony in a new trial so that they will not be required to return to the District of Columbia, and they argue that they cannot afford to return to the District for the purpose of a new trial.

II

Petitioners seek a new trial and, of course, that request was granted. They also request that their counsel be permitted to introduce the transcript of their former testimony in lieu of their returning from Cyprus for the new trial. As noted above, they contend that they cannot

afford to return to the District for another trial. It is this second request which the respondent opposes. Respondent notes that it would lose the opportunity to cross-examine the petitioners, and that the Court would not have an opportunity to observe their demeanor.

While it is to the advantage of the parties and to the finder of fact to have the party give live testimony in open court, D. C. Code 1973, §14-303 does provide for the use of the former testimony of a party who dies or becomes incapable of testifying. That statute dates back to at least 1902. More recently, the rules of this court, Super. Ct. Civ. R. 32(a)(3), provide that the deposition of a witness "whether or not a party, may be used by any party for any purpose" if the court finds that the witness is more than 25 miles from the place of trial or out of the United States, provided that the absence of the witness was not procured by the person seeking to use the deposition or upon application and notice where there are such exceptional circumstances as to make it desirable in the interest of justice "with due regard to the importance of presenting the testimony of witnesses orally in open court". The Civil Rules pertaining to discovery apply to matters before the Tax Division of this court. See Super. Ct. Tax R. 14.

There may be a question as to whether the petitioners are "incapable" of testifying under Section 14-303 although in the view of this Court these petitioners fall within that category since it is undisputed that they cannot afford to return to

the District for a second trial. In any event, it is clear that had the testimony been in the form of a deposition it would be admissible under Super. Ct. Civ. R. 32. While the testimony here was not by way of a deposition, that fact is even stronger grounds for the admissibility of the former testimony because that testimony was taken in open court under the watchful eyes of a trial judge, the respondent had a full opportunity to cross-examine both petitioners, and the respondent was able to compel the attendance of one of the petitioners who had not appeared originally as a witness but who was required to appear by the action of the trial court. The case involves the same parties and the same issues and is in fact merely a retrial of the original trial in this case. Although it is preferable to have the witness testify in open court before the finder of fact, the rules of the court allow the introduction of such testimony by way of deposition where the witness is not available for one or more reasons. These petitioners are more than 25 miles from the place of trial and are out of the United States. Super. Ct. Civ. R. 32(a)(3)(B). Finally, in the event their motion was denied, the petitioners would be required to either withdraw their appeal from the income tax assessment or make the expensive trip back to the District, if possible. These petitioners are not at fault for their present predicament. This Court is satisfied that these facts present exceptional circumstances and that in the interest of justice the petitioners

should be permitted to go forward with a new trial in this case and have their former testimony introduced in lieu of their live testimony. Accordingly, the petitioners' motion shall be granted.

Of course, both sides will be able to present any additional evidence, documents or testimony, and are not restricted to that evidence presented in the first trial of this case. The Court's ruling is limited simply to the former testimony of these petitioners.

ORDER

In view of the above, it is hereby

ORDERED that the petitioners' motion for a new trial is granted, and it is further

ORDERED that the petitioners may present their testimony by way of the introduction of the transcripts of their former testimony in the first trial in this case, and it is further

ORDERED that this case is set down for a status hearing on May 25, 1979, at 9:30 a.m., at which time the parties shall be prepared to set a trial date in the case.

Dated: May 11, 1979

JOHN GARRETT PENN
Judge

Copies to:

Howard E. Wahrenbrock, Esq.
Counsel for Petitioners

Melvin Washington, Esq.
Counsel for Respondent

Copies [illegible]
to [illegible] 5-11, 1977.
JS

and to
Mr. Hennah Back
Finance Officer, DC.

R. Stanfield
5/11/77