UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

Civil Action No. 06-11753
Hon. Nancy G. Edmunds

PETER ERIC HENDRICKSON and
DOREEN M. HENDRICKSON,

Defendants.
_____/

BRIEF IN OPPOSITION TO
DEFENDANTS' MOTION FOR RELIEF FROM JUDGMENT

This is an action under section 7405 of the Internal Revenue Code (26 U.S.C.) ("IRC") to recover the erroneous federal tax refunds made to the defendants for 2002 and 2003, and to obtain an injunction barring defendants from filing tax returns that falsely claim that wages paid to private sector employees are not subject to federal taxes. Judgment in favor of the United States was entered on February 26, 2007 (doc. #22).

Defendants have moved for relief from judgment under Fed. R. Civ. P. 60(b)(4) and (6). Under Fed. R. Civ. P. 60(b)(4), a judgment is void only if the court lacked subject matter jurisdiction over the action. Defendants argue that the Court lacked jurisdiction because the IRS could recover the erroneous refunds only by issuing a notice of deficiency. The law is clear, however, that the Government is permitted to file suit in the district court under IRC § 7405 to recover an erroneous refund. Furthermore, there are no exceptional or extraordinary circumstances that mandate relief under Fed. R. Civ. P. 60(b)(6). Defendants' motion for relief from judgment should, accordingly, be denied.

QUESTIONS PRESENTED

1. Rule 60(b)(4) of the Federal Rules of Civil Procedure authorizes relief from "void" judgments. A judgment is void only if the Court that entered it lacked subject matter or *in personam* jurisdiction, or if it acted in a matter inconsistent with due process of law. Defendants assert that the Court lacked subject matter jurisdiction over this erroneous refund suit because the IRS did not send them a notice of deficiency for the tax years at issue. Should defendants' motion for relief from judgment be denied because the United States exercised its option to bring the instant action under IRC § 7405 instead of administratively assessing and collecting their income tax liabilities?

2. Rule 60(b)(6) of the Federal Rules of Civil Procedure allows a court to grant relief for "any other reason justifying relief from the operation of the judgment" when it determines in its discretion that substantial justice would be served. The Sixth Circuit has held that Rule 60(b)(6) applies only in exceptional or extraordinary circumstances which are not addressed by clauses (b)(1) through (b)(5), including a claim of legal error or mistake under Rule 60(b)(1). Defendants have not identified, in their brief, any exceptional or extraordinary circumstances that would mandate relief from judgment under Rule 60(b)(6). Should defendants' Rule 60(b)(6) motion be denied?

ARGUMENT

I. THE JUDGMENT IS NOT VOID FOR LACK OF SUBJECT MATTER JURISDICTION

Defendants have moved for relief from the judgment entered in favor of the United States in this erroneous refund case on February 26, 2007, citing Fed. R. Civ. P. 60(b)(4) and (6) as the basis for their motion. The thrust of defendants' motion is that the Court lacked subject matter jurisdiction because the monies that were withheld from Peter Eric Hendrickson's wages by his employer in 2002 and 2003 were not federal income, social security (FICA) and Medicare taxes. Because the IRS did not issue defendants a notice of deficiency that established they were required to pay income taxes (or have taxes withheld from Peter Eric Hendrickson's compensation for the tax years in question), defendants argue, the IRS was precluded from commencing this erroneous refund suit under IRC § 7405. Defendants' argument lacks merit.

Generally, "[r]elief under Rule 60(b) . . . is 'circumscribed by public policy favoring finality of judgments and termination of litigation.'" *Doe v. Lexington-Fayette Urban County Government,* 407 F.3d 755, 760 (6th Cir. 2005) (quoting *Waifersong Ltd. v. Classic Music Vending,* 976 F.2d 290, 292 (6th Cir. 1992)). Under Fed. R. Civ. P. 60(b)(4), a judgment is void if the court that rendered it lacked subject matter or personal jurisdiction, or if it acted in a manner inconsistent with due process of law. *Antoine v. Atlas Turner,* 66 F.3d 105, 108 (6th Cir. 1995). Defendants do not claim that the Court lacked *in personam* jurisdiction over them, or that it acted in a manner inconsistent with due process of law. As we demonstrate, *infra,* the Court had subject matter jurisdiction over this erroneous refund suit under IRC § 7405.[1]

[1] Defendants do not argue that the Court lacked subject matter jurisdiction over the Government's claim for an injunction against them under IRC § 7402(a).

Defendants contend that the Court lacked subject matter jurisdiction because, in their view, the IRS could not affirmatively file suit against them in the District Court seeking repayment of the erroneous refund. According to the defendants, the IRS could recover the monies that had been withheld from Peter Eric Hendrickson's compensation in 2002 and 2003 only by first issuing them a notice of deficiency, thereby giving them an opportunity to contest the deficiency in the United States Tax Court. Defendants' argument, however, has been conclusively rejected by every court that has considered it. *United States v. Foster,* 51 Fed. Appx. 915 (4th Cir. 2002); *Rushlight Automatic Sprinkler Co. v. United States*, 294 F.2d 572 (9th Cir. 1961).[2]

As defendants acknowledge in their motion for relief from judgment, the United States has two options when it seeks to recover an erroneous refund. *See* Motion for Relief From Judgment (Doc. # 26) at 2. The Government can either bring suit in the district court pursuant to IRC § 7405, as it did here, or it can issue a notice of deficiency and pursue administrative collection procedures. *Singleton v. United States,* 128 F.3d 833, 837 (4th Cir. 1997) (quoting *O'Bryant v. United States,* 49 F.3d 340, 342-43 (7th Cir. 1995)); *see also Brookhurst, Inc. v. United States*, 931 F.2d 554, 557 (9th Cir. 1991); *Beer v. Commissioner*, 733 F.2d 435, 436 (6th Cir. 1984) (*per curiam*) ("Commissioner had the option of proceeding against [the taxpayer] under section 7405 or under the deficiency procedures"); *Ideal Realty Co. v. United States,* 561 F.2d 1123 (4th Cir. 1977). In light of this precedent, defendants' contention that the Government was precluded from bringing this erroneous refund suit without first issuing a notice of deficiency must be rejected.

---

[2] Because the decision in *United States v. Foster,* 51 Fed. Appx. 915 (4th Cir. 2002) is unreported, a copy is attached to this brief in opposition to the plaintiff's motion for relief.

Rushlight Automatic Sprinkler Co. v. United States, supra, is instructive in this regard. Like the Hendricksons, the taxpayer in that case opposed the Government's suit that was instituted under the 1939 Code predecessor to IRC § 7405 on the ground that the Government was obliged to first follow the "deficiency assessment and notice" procedures of the Internal Revenue Code. The Ninth Circuit rejected that contention, holding that the Government "is entitled to maintain this action under . . . § 3746(b)," the 1939 Code equivalent to IRC § 7405.[3] 294 F.2d at 574. As the Court stated, "the United States had the choice of two remedies." *Id.*

The choice of remedies to recover an erroneous refund thus lies with the United States. Although defendants object to their being sued in the District Court, they nowhere explain how they have been harmed in any way by this procedure. Moreover, the defendants were not disadvantaged by having their case heard in the District Court (where erroneous refund claims are heard) rather than in the Tax Court. Any defenses that the defendants could have raised in the Tax Court could have been raised before the District Court, and any evidence that the defendants could have introduced in the Tax Court could have been introduced in the District Court.

What is really at issue here is defendants' absurd claim that Peter Eric Hendrickson did not receive taxable wages in 2002 and 2003 as a result of his employment with Personnel Management, Inc. Defendants argue that their tax returns, which reported "zero" wages for Peter Hendrickson for the 2002 and 2003 tax years, are conclusive on the issue of their income

---

[3] As the Supreme Court noted, IRC § 7405 (and its predecessors) was not enacted as an affirmative grant of relief, since "[n]o statute is necessary to authorize the United States to sue in such a case" to "recover funds which its agents have wrongfully, erroneously, or illegally paid" because "[t]he right to sue is independent of statute." *United States v. Wurts*, 303 U.S. 414, 415 (1938) (internal quotation marks and footnote omitted).

tax liabilities for those years. Because the IRS did not send them notices of deficiency for 2002 and 2003, defendants contend their tax returns were conclusive on the issue of their tax liabilities and the Government was precluded from bringing the instant erroneous refund action.

Defendants' argument misses the mark. It was precisely because defendants did not owe any deficiency, but rather obtained tax credits and refunds in excess of $20,000 to which they were not entitled, that the Government filed suit against them.[4] As the United States pointed out in its motion for summary judgment, defendants' argument that they had no tax liability for 2002 and/or 2003 is based on their fallacious interpretation of the Internal Revenue Code, primarily IRC § 3401(c). Defendants' contention that tax withholding applies only to federal and state employees (as well as District of Columbia workers) has been repeatedly rejected. *See United States v. Latham*, 754 F.2d 747, 750 (7th Cir. 1985) (contention that "under 26 U.S.C. § 3401(c) the category of 'employee' does not include privately employed wage earners is a preposterous reading of the statute.").

On page 7 of their brief, defendants argue that:

> Furthermore, it is entirely possible, even assuming *arguendo* the Hendricksons DID file fraudulent returns, that the refund may STILL not necessarily be erroneous. Had the Secretary followed the proper deficiency procedures, due to various deductions and exemptions, the refund may have been entirely proper or only partially correct. In any event, until and administrative agency determination has been made as to what part, if any, of the refund is an erroneous refund of a tax liability there is no possible method by which a District Court can exercise jurisdiction to determine a deficiency and assess a tax liability which Congress has reserved as a responsibility of the Secretary.

[4] The complaint sought the recovery of erroneous tax credits and refunds of federal income, social security and Medicare taxes in the total amounts of $10,152.96 and $10,228.00 for the 2002 and 2003 tax years, respectively.

Defendants' argument, however, ignores the fact that the IRS calculated their federal income tax liability for 2002 and 2003 and determined that defendants were not entitled to a refund of federal income, social security or Medicare taxes for the tax years in question because their federal income tax liabilities exceeded their income tax payments (*i.e.*, the income taxes withheld from the wages paid to Peter Eric Hendrickson by Personnel Management, Inc.) for both taxable years. *See* Declaration of Terri Grant (Doc. #9-15), ¶¶6-14 and Exhibit 10 thereto.[5] Defendants' federal income tax liabilities were $6,327 for 2002 and $6,061 for 2003. Grant Decl., ¶¶8 and 12. These amounts exceeded their income tax payments ($5,642.20 and $5,620.02, respectively) for 2002 and 2003.

Defendants, by their motion for relief from judgment, are merely attempting to relitigate the issue of whether the wages that Peter Eric Hendrickson received from his employer in 2002 and 2003 were taxable income. A movant under Fed. R. Civ. P. 60(b) fails to demonstrate entitlement to relief under any subsections thereof when he simply rephrases his prior allegations. *Johnson v. Unknown Dellatifa,* 357 F.3d 539, 543 (6th Cir. 2004). Because defendants simply reiterate the untenable arguments made in their motion to dismiss and in their brief in opposition to the Government's motion for summary judgment, they have not

[5] Terri Grant is a Tax Examining Technician for the Frivolous Return Program at the IRS's Ogden Compliance Services Campus in Ogden, Utah. As a Tax Examining Technician, Grant computes the taxpayer's correct tax liability with respect to frivolous tax returns that are filed with the IRS, and prepares Reports of Income Tax Examination Changes (Forms 4549). As part of the Government's motion for summary judgment in this case, Grant reviewed the defendants' 2002 and 2003 Form 1040 tax returns as well as the Form W-2 Wage and Tax Statements provided to Peter Hendrickson by his employer, Personnel Management, Inc., for the same tax years. Grant also reviewed the Form 1099 statements provided by Una E. Dworkin for the compensation paid to Doreen Hendrickson for the 2002 and 2003 tax years in calculating defendants' 2002 and 2003 tax liabilities. Her calculations and findings are set forth on the Report of Income Tax Examination Changes (Form 4549) that is attached to her Declaration as Exhibit 10.

demonstrated their entitlement to relief from the judgment entered against them on February 26, 2007.

II. DEFENDANTS ARE NOT ENTITLED TO RELIEF UNDER RULE 60(b)(6)

Rule 60(b)(6) of the Federal Rules of Civil Procedure provides for relief from a judgment "for any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(6). The Sixth Circuit has held that Rule 60(b)(6) applies "only in exceptional or extraordinary circumstances which are not addressed by the first five numbered clauses of the Rule." *Olle v. Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1990); *Hopper v. Euclid Manor Nursing Home, Inc.*, 867 F.2d 291, 294 (6th Cir. 1989) (courts apply Rule 60(b)(6) "as a means to achieve substantial justice when 'something more' that one of the grounds contained in Rule 60(b)'s first five clauses is present"). The "something more" referred to in *Hopper, supra*, includes "unusual and extreme situations where principles of equity *mandate* relief." *Olle, supra*, 910 F.2d at 366 (emphasis original).

Defendants' Rule 60(b)(6) motion for relief from judgment argues that the Court erred in refusing to dismiss the erroneous refund suit for lack of subject matter jurisdiction. "A claim of strictly legal error," however, "falls in the category of 'mistake' under Rule 60(b)(1) and thus is not cognizable under 60(b)(6) absent extraordinary circumstances." *Hopper*, 867 F.2d at 294. *Accord Cincinnati Insurance Co. v. Byers*, 151 F.3d 574, 578 (6th Cir. 1998). Because Rule 60(b)(6) is properly invoked only in unusual and extreme circumstances where principles of equity mandate relief, and defendants point to none in their brief, their motion for relief under Rule 60(b)(6) should be denied.

CONCLUSION

In their Rule 60(b) motion for relief from judgment, defendants primarily argued that the Court lacked subject matter jurisdiction

over the erroneous refund suit under IRC § 7405 because the Government had not issued a notice of deficiency that established that the wages paid to Peter Eric Hendrickson in 2002 and 2003 were taxable income. This argument does not show that the Court's judgment was void, as required by Fed. R. Civ. P. 60(b)(4). Nor does it demonstrate the kind of exceptional circumstances that mandate relief under Rule 60(b)(6). Defendants' motion for relief from the judgment should accordingly be denied.

Respectfully submitted this 19th day of March, 2007.

STEPHEN J. MURPHY, III
United States Attorney

WILLIAM L. WOODARD
Assistant United States Attorney

/s/ Robert D. Metcalfe
ROBERT D. METCALFE
ANNE NORRIS GRAHAM
STEPHEN J. SCHAEFFER
Trial Attorneys, Tax Division
U.S. Department of Justice
P.O. Box 7238
Ben Franklin Station
Washington, D.C. 20044
Tel. (202) 307-6525
Fax (202) 514-6770
Robert.D.Metcalfe@usdoj.gov

Attorneys for Plaintiff
United States of America

CERTIFICATE OF SERVICE

I hereby certify that on March 19, 2007, I electronically filed the foregoing **BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR RELIEF FROM JUDGMENT** with the Clerk of the Court using the CM/ECF system. I hereby certify that I have mailed by United States Postal Service the documents to the following non-CM/ECF participants:

Peter Eric Hendrickson
232 Oriole Road
Commerce Township, MI 48382

Doreen M. Hendrickson
232 Oriole Road Commerce
Commerce Township, MI 48382

/s/ Robert D. Metcalfe
ROBERT D. METCALFE
Trial Attorney, Tax Division
U.S. Department of Justice
Post Office Box 7238
Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 3-7-6525
Facsimile: (202) 514-6770
E-mail: robert.d.metcalfe@usdoj.gov

Westlaw Download Summary Report for METCALFE,ROBERT 706246

Date/Time of Request:	Monday, March 19, 2007 15:24:00 Central
Client Identifier:	DOJ
Database:	FEDFIND
Citation Text:	51 Fed.Appx. 915
Lines:	192
Documents:	1
Images:	0

H

Briefs and Other Related Documents

U.S. v. FosterC.A.4 (Va.),2002.This case was not selected for publication in the Federal Reporter.UNPUBLISHEDPlease use FIND to look at the applicable circuit court rule before citing this opinion. Fourth Circuit Rule 36(c). (FIND CTA4 Rule 36(c).)

United States Court of Appeals,Fourth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Crystal FOSTER; Robert Foster, Defendants-Appellants,
andRebecca Carpenter; Pamela Miffin; 1st Advantage Federal Credit Union; Wachovia Bank, N.A.; Mercedes-Benz Credit Corporation, Defendants.

No. 02-1086.

Argued Oct. 31, 2002.
Decided Dec. 3, 2002.

Internal Revenue Service (IRS) brought action to recover erroneously issued tax refund. The United States District Court for the Eastern District of Virginia, Richard L. Williams, J., 2002 WL 373345, found in favor of IRS, and taxpayer appealed. The Court of Appeals held that IRS was not required to issue notice of deficiency before filing suit to collect erroneous refund.

Affirmed.

West Headnotes

Internal Revenue 220 4543

220 Internal Revenue
220XXI Assessment of Taxes
220XXI(A) In General
220k4542 Notice of Deficiency Tax
220k4543 k. Necessity, and Effect of Failure to Give. Most Cited Cases

Internal Revenue 220 4974

220 Internal Revenue
220XXVIII Refunding Taxes
220XXVIII(A) In General
220k4974 k. Erroneous Refunds and Actions to Recover Them. Most Cited Cases

Internal Revenue Service (IRS) was not required to issue notice of deficiency before filing suit to collect amounts erroneously refunded to taxpayer, where IRS elected not to pursue administrative collection procedures, and suit was commenced within two year limitations period. 26 U.S.C.A. § 7405.

***916** Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Richard L. Williams, Senior District Judge. (CA-01-783-3).

ARGUED: David Lassiter, Jr., Jefferson & Lassiter, Richmond, Virginia, for Appellants. Gretchen M. Wolfinger, Tax Division, United States Department of Justice, Washington, D.C., for Appellee. **ON BRIEF:** Eileen J. O'Connor, Assistant Attorney General, Gilbert S. Rothenberg, Paul J. McNulty, United States Attorney, Tax Division, United States Department of Justice, Washington, D.C., for Appellee.

Before WILKINSON, Chief Judge, and LUTTIG and MOTZ, Circuit Judges.
Affirmed by unpublished PER CURIAM opinion.

OPINION

PER CURIAM.

****1** The Internal Revenue Service ("IRS") issued Crystal Foster a sizeable refund in the year 2001. Shortly thereafter, the IRS concluded that the refund was erroneous and brought suit in federal district court to recover the refunded amount. The district court held that the refund was in error and ordered Crystal Foster, and others who it found had received portions of the refund from Crystal, to return the funds. Crystal, and her father Robert, appealed. Finding no error in the rulings of the district court, we affirm.

I.

The testimony and evidence at the preliminary injunction hearing and at the bench trial established the following. Around July of 2001, Crystal Foster filed her income tax return for tax year 2000. Crystal's tax return reflected total income of $3429. On her return, Crystal also claimed that a $500,000 tax payment had been made on her behalf as described on her Form 2439. Her Form 2439 showed $500,000 in undistributed long-term capital

gains from a registered investment company (RIC) or real estate investment company trust (REIT), although the RIC/REIT was not identified on the form. J.A. 140. Crystal's return stated that the $500,000 should be refunded to her.

The IRS sent a letter to Crystal requesting the name of the RIC/REIT. The letter was returned to the IRS with a notation on the bottom identifying the RIC as "US Department of Treasury, Black Capital Investments." J.A. 137. Subsequently, on October 29, 2001, the IRS issued a United States Treasury check to Crystal in the amount of the requested refund of $500,000, plus $7534.95 in interest. Crystal received the check and proceeded to disburse portions of it to several others, including $100,000 to her father Robert Foster.

Upon further investigation, the IRS realized that "Black Capital Investments" did not exist under the auspices of the United States Treasury, or otherwise. Neither had any RIC or REIT withheld $500,000 and paid that amount to the IRS on behalf of Crystal. Realizing its mistake, on November 20, 2001, the United States filed a complaint in federal district court seeking recovery of the funds from both Crystal and Robert, among others. The United States obtained a preliminary injunction to prevent the Fosters from dissipating the proceeds of the refund. The Fosters filed a motion to dismiss for lack of jurisdiction, which the district court denied. The district court also denied the Fosters' motion for recusal. After a bench trial, the district court entered judgment in favor of the United States and ordered ***917** that the funds be returned. The Fosters appealed.

II.

On appeal, the Fosters argue that the district court erred in denying their motion to dismiss. Though the Fosters never specified the federal rule on which they were relying, their motion to dismiss was apparently one for lack of subject matter jurisdiction. We review *de novo* the denial of a motion to dismiss under Rule 12(b)(1). *See* *Puryear v. County of Roanoke*, 214 F.3d 514, 517 (4th Cir.2000).

****2** The Fosters moved to dismiss on the ground that the United States failed to send them a notice of deficiency before commencing suit. This failure allegedly deprived the Fosters of the opportunity to challenge the assessment in Tax Court. The United States argues that it had a choice of mechanisms by which to recover the erroneous refund; it could either bring suit in district court pursuant to 26 U.S.C. § 7405, as it did here, or it could issue a notice of deficiency and pursue administrative collection procedures.

The Fosters' argument is wholly without merit. Section 7405 states, in relevant part:

(a) Refunds after limitation period.-Any portion of a tax imposed by this title, refund of which is erroneously made, within the meaning of section 6514, may be recovered by civil action brought in the name of the United States.

(b) Refunds otherwise erroneous.-Any portion of a tax imposed by this title which has been erroneously refunded (if such refund would not be considered as erroneous under section 6514) may be recovered by civil action brought in the name of the United States.

26 U.S.C. § 7405. On its face, the statute clearly allows for the collection of an erroneous refund in district court. The only restriction on the ability of the United States to bring such a suit is the statute of limitations provided by section 7405(d), which is generally two years. *See* 26 U.S.C. § 6532(b). In *Singleton v. United States*, 128 F.3d 833 (4th Cir.1997), we noted that the government can elect to collect in district court an erroneous refund through section 7405, provided it does so within the specified limitations period, *or* it can issue a notice of deficiency and pursue administrative collection procedures. *Id.* at 837; *see also* *O'Bryant v. United States*, 49 F.3d 340, 342-43 (7th Cir.1995) ("There are two ways in which the IRS can recover an erroneous payment to a taxpayer. It can either file suit under § 7405, the erroneous refund suit provision, or pursue the post-assessment collection procedures ... (§ 6303 notice and demand, followed by judicial and/or administrative action)." (footnote omitted)); *Rushlight Automatic Sprinkler Co. v. United States*, 294 F.2d 572, 573-74 (9th Cir.1961) (examining the predecessor statute to section 7405 and concluding that the government was entitled to maintain an action under that statute for recovery of an erroneous refund without first following the deficiency notice procedures). In this case, the United States opted to proceed under section 7405, and thus no notice of deficiency was required. Because the United States commenced suit well within the two year limitations period, the district court had subject matter jurisdiction over the case.

III.

The Fosters also challenge the sufficiency of the evidence at trial. In order for the United States to prevail in its section 7405 action against Crystal Foster, it had to establish: 1) that a refund of a sum ***918** certain was made, 2) that the recovery action was timely, and 3) that Crystal Foster was not entitled to the refund. *See, e.g.*, *United States v. Commercial Nat'l Bank of Peoria*, 874 F.2d 1165, 1169 (7th Cir.1989). In addition, the United States was obliged to show that Robert was a transferee of Crystal in the amount of $100,000. This court may only set aside the district court's factual findings if they are clearly erroneous. Fed.R.Civ.P. 52(a).

****3** The Fosters do not challenge the district court's findings that the refund suit was timely, that the refund was erroneous, and that Robert Foster was a transferee of the alleged amount. They contend only that there was insufficient admissible evidence on which the court could find that Crystal received and cashed the refund check.

The Fosters' argument is once again without merit. The United States showed that the IRS issued an erroneous refund to Crystal Foster. *See, e.g.*, J.A. 117-18 ("Q: And is there anything in those exhibits that shows that a refund was sent? A: Yes. In exhibit 2 there is an indication on 10 A 2001 that a hold was reversed and refund issued on 10/29/02 in the amount of $507,534.95. Q: Should that refund have been issued? A: No."). The United States adduced circumstantial evidence that Crystal Foster received and cashed the refund check. *See* J.A. 120 ("Q: But do you know if Mrs. Foster actually physically received a refund check from you? A: Refund was issued in her name, and it was cashed."). In addition, Crystal Foster's attorney, Mr. Lassiter, admitted the she had received the money. At the preliminary injunction hearing, Mr. Lassiter said that "she received the check for $500,000." J.A. 30; *see also* J.A. 29 (Lassiter: "They got the check and simply didn't leave it in the bank to sit...."). The United States' case was essentially uncontroverted, as the Fosters chose not to put on any probative evidence or witnesses at the preliminary injunction hearing or at the bench trial. Given the evidence presented, it cannot be said that the district court's factual conclusions were clearly erroneous.[FN*]

FN* The Fosters also appeal the district court's denial of their motion for recusal. The Fosters do not assert any extrajudicial source of bias, and the remarks of the district court fall well short of displaying a "deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994). We accordingly affirm the district court's denial of their motion.

The judgment of the district court is affirmed.

AFFIRMED.

C.A.4 (Va.),2002.
U.S. v. Foster
51 Fed.Appx. 915, 2002 WL 31689448 (C.A.4 (Va.)), 90 A.F.T.R.2d 2002-7560, 2002-2 USTC P 50,801

Briefs and Other Related Documents (Back to top)

- 2002 WL 32717929 (Appellate Brief) Brief for the Appellee (May. 31, 2002) Original Image of this Document with Appendix (PDF)
- 2002 WL 32717928 (Appellate Brief) Brief of Appellant (May. 01, 2002) Original Image of this Document (PDF)
- 02-1086 (Docket) (Jan. 25, 2002)

END OF DOCUMENT