A HISTORY OF THE CERTIFIED ASSESSED TAX IN THE UNITED STATES SUPREME COURT REPORTS

By
DR. EDUARDO M. RIVERA

Ironically, the certified assessed tax emerged late in the Nineteenth Century as the source of protection of the tax collector against the taxpayer's claims of trespass. I believe that further inquiry will establish that Judge Stephen J. Field either was the first modern jurist to identify and name the concept. The certified assessed tax continued intact for the remainder of the century and remained dormant through the first third of the Twentieth Century. The end of the Twentieth Century saw it metamorphose and meld into the older principle that the unauthorized acts of a government officer cannot cause an estoppel to arise against the government. That change created the appearance that the burden of proof was shifted to the alleged taxpayer to show an absence of the certified assessed tax. The government had to find a substitute for the certified assessed tax because if one did not exist the collector would not have authority to collect a tax. Despite the change to a focus on unauthorized acts and estoppel all tax collecting authority is still bound to the certified assessed tax.

The manner in which the certified assessed tax protects the tax collector in the performance of his duties appears to have first arisen in a case of trespass against George Q. Erskine, Collector of Internal Revenue. Justice Stephen J. Field, who had presided over the California Supreme Court as Chief Justice, and who had become a tax expert in the course of his long judicial career, wrote this for the Supreme Court of the United States: "The Collector could not revise nor refuse to enforce the assessment regularly made by the assessor in the exercise of the latter's jurisdiction. The duties of the Collector in the enforcement of the tax assessed were purely ministerial. The assessment duly certified to him, was his authority to proceed and, like an execution to a sheriff, regular on its face, issued by a tribunal having jurisdiction of the subject matter, constituted his protection." *Erskine v. Hornbach*, 81 U.S. 14 Wall 613-620 (1871).

A year later *Haffin v. Mason,* 15 Wall. 671, 675, was decided on the authority of *Erskine v. Hornbach*:

> "The assessment in this case, duly certified by Hyatt, the assessor, was received in evidence without objection, and no point was raised as to its form or sufficiency. If, then, the assessor had the right to decide the question, whether the plaintiffs were liable to the increased taxation, the list delivered by him to the collector, properly certified, was his warrant to seize and sell the property, in case the taxes were not paid, after he had made demand for them."
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> "It was not the business of the collector to inquire into the case to ascertain whether the assessor had reached a proper conclusion upon the matter submitted to his judgment, nor had he any right to refuse to enforce the assessment." *Haffin v. Mason,* 15 Wall. 671, 675 (1872)

Justice Field, again had occasion to address the issue almost twenty years after *Erskine* in *Harding v. Woodcock,* 137 US 43 (1890). John Harding a distiller unsuccessfully contested an assessment for $4,339.37. The Collector had seized 578 gallons of whiskey belonging to Harding and sold it for $32. Some time later more of Harding's personal property was sold. The distillery and ten acres were levied upon and sold for $76.72. Harding sued the Collector and in the trial the court instructed the jury that since the taxes for which the Collector seized and sold the distiller's property were properly assessed and the assessment certified to Harding the certified assessment was the Collector's protection against Harding's suit. The jury returned a directed verdict for the Collector and Harding appealed to the Supreme Court from the instruction for the directed verdict.

Justice Field sought a balance between government and citizen when he concluded the opinion of the Court this way: "What remedy the plaintiff may have for the loss of his property or for the amount of the proceeds obtained on its sale, we are not called upon to determine in this case. There may be, perhaps, a claim against the government. All that we decide is, that a liability cannot be fastened upon the Collector, a ministerial officer, for the enforcement of an assessment of taxes regular on its face, made by the commissioner of internal revenue. Of such an officer the law exacts unhesitating obedience to its process." *Harding v. Woodcock,* 137 US 43, 48 (1890).

The requirement for the certified assessed tax takes on a new face in the Twentieth Century in *Royal Indemnity v. United States,* 313 U.S. 289 (1941) Emphasis is shifted from the power that the certified assessed tax gives to the collector to the ministerial duties themselves without reference to their source. As the Court explained in *George Moore Ice Cream Co. v. Rose,* 289 U.S. 373 (1933), without actually crediting the requirement of collecting a certified assessed tax, the collector will not be sued as a mere trespasser.

"A suit against a collector who has collected a tax in the fulfillment of a ministerial duty is today an anomalous relic of bygone modes of thought. He is not suable as a trespasser, nor is he to pay out of his own purse. He is made a defendant because the statute has said for many years that such a remedy shall exist, though he has been guilty of no wrong, and though another is to pay". Philadelphia v. The Collector, supra, page 731 of 5 Wall., 18 L.Ed. 614. There may have been utility in such procedural devices in days when the government was not suable as freely as now. United States v. Emery, supra; Ex parte Bakelite Corp., 279 U.S. 438, 452, 49 S.Ct. 411, 73 L.Ed. 789; Act of February 24, 1855, c. 122, 10 Stat. 612, §§1 and 9; Judicial Code, §145, 28 U.S.C. §250 (28 USCA §250); Judicial Code, §24(20), 28 U.S.C. § 41(20), 28 USCA §41(20). They have little utility to-day, at all events where the complaint against the officer shows upon its face that in the process of collecting he was acting in the line of duty, and that in the line of duty he has turned the money over. In such circumstances his presence as a defendant is merely a remedial expedient for bringing the government into court." *George Moore Ice Cream Co. v. Rose,* 289 U.S. 373, 383 (1933)

"Power to release or otherwise dispose of the rights and property of the United

States is lodged in the Congress by the Constitution. Art. IV, §3, Cl. 2. Subordinate officers of the United States are without that power, save only as it has been conferred upon them by Act of Congress or is to be implied from other powers so granted. Whiteside v. United States, 93 U.S. 247, 256, 257, 23 L.Ed. 882; Hart v. United States, 95 U.S. 316, 318, 24 L.Ed. 479; Hawkins v. United States, 96 U.S. 689, 691, 24 L.Ed. 607; Utah Power & Light Co. v. United States, 243 U.S. 389, 409, 37 S.Ct. 387, 391, 61 L.Ed. 791; Wilber Nat. Bank v. United States, 294 U.S. 120, 123, 124, 55 S.Ct. 362, 363, 364, 79 L.Ed. 798; cf. United States v. Shaw, 309 U.S. 495, 501, 60 S.Ct. 659, 661, 84 L.Ed. 888; Ritter v. United States, 3 Cir., 28 F.2d 265; United States v. Globe Indemnity Co., 2 Cir., 94 F.2d 576. Collectors of internal revenue are subordinate officers charged with the ministerial duty of collecting the taxes. R.S. §3183, 26 U.S.C.A. Int.Rev.Code §3651. Erskine v. Hohnbach, 14 Wall. 613, 616, 20 L.Ed. 745; Harding v. Woodcock, 137 U.S. 43, 46, 11 S.Ct. 6, 7, 34 L.Ed. 580; Moore Ice Cream Co. v. Rose, 289 U.S. 373, 380, 381, 53 S.Ct. 620, 622, 623, 77 L.Ed. 1265. There is no statute in terms authorizing them to remit taxes, to pass upon the claims for abatement of taxes or to release any obligation for their payment. Only the Commissioner, with the consent of the Secretary of the Treasury, is authorized to compromise a tax deficiency for a sum less than the amount lawfully due. R.S. § §3220, 3229, 26 U.S.C. §1661, (26 U.S.C.A. Int.Rev.Code §§3770, 3776, 3761); 45 T.R., Art. 1011 (1918 Act); Botany Worsted Mills v. United States, supra, 278 U.S. page 288, 49 S.Ct. page 131, 73 L.Ed. 379; Loewy & Son v. Commissioner, 2 Cir., 31 F.2d 652, 654. *Royal Indemnity v. United States,* 313 U.S. 289, 295 (1941)

George Moore Ice Cream Co. v. Rose, 289 U.S. 373 (1933), cites *Erskine, Haffin* and *Harding* among others. This case helps bridge our modern cases with those of the Nineteenth Century.

"This collector did act under the directions of the Secretary of the Treasury, or other proper officer of the government, in the collection of the tax. The complaint shows upon its face that the tax had been duly assessed by the Commissioner of Internal Revenue. In that situation the collector was under a ministerial duty to proceed to collect it. R.S. §3182, 26 U.S.C. §102 (26 USCA §102); Erskine v. Hohnbach, 14 Wall. 613, 20 L.Ed. 745. There was nothing left to his discretion. Other duties less definitely prescribed may leave a margin for judgment and for individual initiative. Cf. Agnew v. Haymes (C.C.A.) 141 F. 631. There was no such margin here. His duty being imperative, he is protected by the command of his superior from liability for trespass (Erskine v. Hohnbach, supra; Haffin v. Mason, 15 Wall. 671, 675, 21 L.Ed. 196; Harding v. Woodcock, 137 U.S. 43, 46, 11 S.Ct. 6, 34 L.Ed. 580), and is entitled as of right to a certificate converting the suit against him into one against the government (United States v. Sherman, supra). His position could be no better if there had been protest at the time of payment. He would still have been under a duty to obey the command of his superior and collect the tax assessed. Also he would still have been under a duty to make prompt remittance to the Treasury. There had been confided to him no power to review or to revise. Erskine v. Hohnbach, supra; Harding v. Woodcock, supra. The case is not one for a certificate of probable cause, as it might be if the officer had trespassed under a mistaken sense of duty. In such circumstances a certain latitude of judgment may be accorded to the certifying judge, though even

then it is enough that a seizure has been made upon grounds of reasonable suspicion. Locke v. United States, 7 Cranch, 339, 3 L.Ed. 364; Agnew v. Haymes. . ." *George Moore Ice Cream Co. v. Rose,* 289 U.S. 373, at 382.

Federal Crop Insurance Corp. v. Merrill, 332 U.S 380 (1947) and *Heckler v. Community Health Services,* 467 U.S. 51(1984) contain the citations to the Twentieth Century cases discussed in my research. These two cases re-establish the long standing proposition that the government is not responsible for the unlawful acts of its officials and employees and the public must make itself aware of the limitations on their authority when they deal with them. To me, it is clear that in the case of a tax collector that authority is still solely contained in the certified assessed tax. The authority of the tax collector is inextricably bound up in the collection of a certified assessed tax. It is the fundamental constituent of all the governmental power that can be exercised by any collector of internal revenue.

The remaining two thirds of the Twentieth Century will see a steady erosion of the concept of the certified assessed tax by the Internal Revenue Service. The tax collector's duties still consist of the collection of a certified assessed tax but no tax collector can be found that can or will trace his or her authority to that source. The tax text writers and publishers have effectively severed any current connection to the early cases and their link to the certified assessed tax is now hidden among all federal employees because now the tax collector is just one of the many ministerial officers of the United States.

There exists in realm of all creation the thought that law is not made but discovered. The certified assessed tax is such a principle. A tax liability simply cannot exist without it.

> "The 'Government' is an abstraction, and its possession of property largely constructive. Actual possession and custody of Government property nearly always are in someone who is not himself the Government but acts in its behalf and for its purposes. He may be an officer, an agent, or a contractor. His personal advantages from the relationship by way of salary, profit, or beneficial personal use of the property may be taxed as we have held." (1943) United States v. County of Allegheny, 322 US 174,187,188

The collector has no authority only duties. Whatever authority a collector may lay claim to arises from the duty to collect only certified assessed taxes. *Erskine v. Hornbach*, (1872) 81 U.S. 14 Wall 613-620; *Harding v. Woodcock*, (1890) 137 US 43, 48; *Moore v. Rose*, (1940) 289 US 373; *Radinsky v. United States* 622 F. Supp. 412 (D.C. Colo. 1985).

Our system requires that the collector collect only taxes that have been assessed and certified. *Radinsky v. United States* 622 F. Supp. 412 (D.C. Colo. 1985).

A collector of federal tax is purely a ministerial officer. He or she is powerless without a certified assessed tax. *Erskine v. Hornbach*, (1872) 81 U.S. 14 Wall 613-620. *Harding v. Woodcock*, (1890) 137 US 43, 48. *Radinsky v. United States* 622 F. Supp. 412 (D.C. Colo. 1985).

Without such a tax that collector has no authority to invade the privacy of this or any other law abiding citizen without such a liability. *Erskine v. Hornbach*, (1872) 81 U.S. 14 Wall 613-620. *Harding v. Woodcock*, (1890) 137 US 43, 48. *Radinsky v. United States* 622 F. Supp. 412 (D.C. Colo. 1985).

). Taxes must be assessed before they can be collected. (1858) Ferris v. Coover 10 Cal. 589. Others appear in the Appellate Court: the taxing statutes must be in strictly construed in favor of the citizen and against the taxing power. (1935) *RCA Photophone Inc. Huffman.,* 5 Cal .App. 2d. 401, 403.

United States v. Miller, 313 F.2d 637 (7th Cir.,1963), at 638:

We think it clear that the term 'assessment' referred to in this section of the Internal Revenue Code of 1954 has a technical meaning spelled out in the Code and that meaning is binding on this court.

Radinsky v. United States, 622 F.Supp. 412 (D.C.Colo. 1985), at 413:

In the two briefs filed in this action, the IRS has not explained where it finds statutory authority to employ its tax collection procedures to collect from the plaintiffs a sum of money that has never been assessed as a tax. Since the IRS had no authority to adjust the plaintiffs' account or employ deficiency procedures in these circumstances, it is self-evident that the collection of the sum in this manner was wrongful.

Goetz v. United States, 286 F.Supp. 128 (D.C. SW Mo. 1968), at 131:

It does not follow from the fact that the Service had the taxpayers' money in hand prior to the running of the statute of limitations, that the money was duly collected. In order for the tax liability to have been duly collected it must have been properly assessed and such was not the case here in that the assessment was made at a time subsequent to the running of the statute of limitations.

We cannot accept the distinction that the defendant would have us draw, that the mailing of plaintiff's check in response to the statutory notice of deficiency amounted to a payment and that, therefore, the tax in question was duly collected. On the contrary, we believe that plaintiffs' check served as a deposit to be utilized by the Government in the event a tax obligation were subsequently defined and imposed.

We are persuaded in so holding by the reasoning of the court in *Rosenman v. United States*, 323 U.S. 658, 65 S.Ct. 536, 89 L.Ed. 535 (1945) which recognized that payments prior to assessment are deposits and not payments of taxes duly collected.

In *United States v. Dubuque Packing Company*, 233 F.2d 453 (8th Cir. 1956) the court followed the *Rosenman* case, supra, and held that transfers of money in anticipation of further assessments did not have the status of payments until tax deficiencies were formally assessed by the commissioner.

Goetz, Footnote 6, cites 26 U.S.C. § 6401, "Amount treated as overpayments", and in the text of the decision determines that payments for which taxes are not assessed are overpayments that are recoverable.

United States v. Coson, 286 F.2d 453 (9th Cir., 1961), at 462:

This procedural prerequisite to the securing of a Government lien for such taxes is made plain by the statute. See *Detroit Bank v. United States*, 317 U.S. 329, 335, 63 S.Ct. 297, 87 L.Ed. 304. § 6321 of Title 26 U.S.C. recites that the amount of taxes shall be a lien upon the property of a person liable to pay the tax who "neglects or refuses to pay the same after demand." The procedure for making such demand is set forth in § 6303(a) of the same title as follows: "Where it is not otherwise provided by this title, the Secretary or his delegate shall, as soon as practicable, and within 60 days, after the making of an assessment of a tax pursuant to § 6203, give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof."

At 464: In holding as we do that the lack of proper notice or demand was fatal to the acquisition of the Government's lien against Coson, the emphasis here is somewhat different than that employed by the trial judge who held that the assessment itself was void as against Coson because the taxes were never assessed to Coson, the record of assessment in the office of the Bureau making no reference whatever to Coson. The Government argues that there is no requirement that an assessment be made against any person. Although our decision as to the lack of proper notice or demand is sufficient to dispose of this case, it would appear that the trial court was right in holding the assessment was insufficient for failure to comply with the statutory requirements.

Bafman v. United States, 384 F.2d 863 (9th Cir., 1967), at 865 et seq.:

For a tax to be collected upon any deficienty, an assessment must be against the taxpayer within three years after his return is filed. Int.Rev.Code of 1939, § 874 (§ 6501 or the 1954 Code). The mailing of a ninety-day letter of deficiency or the filing of any court action will suspend the running of the statute of limitations, and the time will not begin to run again until sixty days from the entry of final judgment of that court or until ninety days following the mailing of the letter of deficiency if no proceedings are begun. See Int.Rev.Code of 1954, § 6213. In the case of a transferee, a separate section provides that the assessment must be filed against the transferee within one year after the expiration of the period of limitation for assessment against the original transferor. Int.Rev.Code of 1939, § 900(b)(1) (§ 6901(c)(1) of the 1954 Code)

Section 6203 of the Internal Revenue Code of 1954 specifies that an assessment shall be made by recording the liability of the taxpayer in the office of the Secretary or his delegate in accordance with rules or regulations prescribed by the Secretary or his delegate. The Treasury Regulations set forth the procedures governing the assessment process as follows:

> The District Director shall appoint one or more assessment officers, and *the assessment shall be made by an assessment officer signing the summary record of assessment*. The summary record, through supporting records, shall provide identification of the taxpayer, the character of the liability assessed, the taxable period if applicable, and the amount of the assessment. The amount of the assessment shall in the case of tax shown on a return by the taxpayer, be the amount so shown, and in all other cases the amount of the assessment shall be the amount shown on the supporting list or record. *The date of the assessment is the date the summary record is signed by an assessment officer*. *** Treas. Reg. § 301.6203-1 (1955) (emphasis added.)

The assessment certificate involved in this case, a photostated copy of which is in the record, is not signed by an assessment officer or by any other official. The certificate refers to July 23, 1956, but shows that it was "prepared" August 1, 1956. Apparently this is the date on which the assessment was to be formally certified, as it appears twice in the certification portion of the form. Since the certificate lacks the requisite signature, it cannot constitute a valid assessment.

We are not moved by the Government's argument that the assessment was valid and effective on July 23rd because it is certified for authenticity under the seal of the United States Treasury. There is no question as to the authenticity of the document or its admissibility into evidence. But authenticity of the certificate cannot be equated with validity of the

assessment on the alleged date: a seal establishes the former, a signature of the assessment officer — as required by the Treasury Regulations — establishes the latter.

We find section 301.6203-1 of the Treasury Regulations reasonably adapted to carry out the intent of Congress as reflected in § 6203 of the Code. We therefore adhere to our pronouncement in *United States v. Fisher*, 5 Cir. 1965, 353 F.2d 396, 398-399, that:

> In the absence of any better test, we give effect to the general recognized rule that Regulations issued by the Secretary of the Treasury, pursuant to statutory authority, and when necessary to make a statute effective, although not a statute, may have the force of law. *Fawcus Machine Co. v. United States*, 282 U.S. 375, 51 S.Ct. 144, 75 L.Ed. 397; *Commissioner of Internal Revenue v. South Texas Lumber Co.*, 333 U.S. 496, 501, 68 S.Ct. 695, 92 L.Ed. 831.

The Treasury Regulations are binding on the Government as well as on the taxpayer: "Tax officials and taxpayers alike are under the law, not above it." *Pacific National Bank of Seattle v. Commissioner*, 9 Cir. 1937, 91 F.2d 103, 105. Even the instructions on the reverse side of the assessment certificate, Form 23C, specify that the original form "is to be transmitted to the District Director for signature, after which it will be returned to the Accounting Branch for permanent filing. ***"

Case after case has quoted Treasury Regulation § 301.6203-1 and cited it approvingly, and the treatises on taxation take its literal application for granted. In *United States v. Miller*, 7 Cir. 1963, 318 F.2d 637, the administrator of an estate executed an estate tax Waiver or Restrictions on Assessment, which was accepted by the Commissioner on February 16, 1956. The Commissioner made assessments by certificate on March 8 and April 13, 1956. Suit for collection was not brought until March 2, 1962. An intervenor argued on appeal that acceptance of the waiver amounted to assessment which commenced the running of the statute of limitations. The Court rejected this argument, saying that "assessment", as referred to in § 6502 of the Code, "Has a technical meaning spelled out in the Code and that meaning is binding on this court."

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Bothke v. Fluor Engineers and Constructors, Inc., 713 F.2d 1495 (9th Cir. 1983), at 1414:

For a levy to be statutorily authorized in the circumstance here, two conditions must be fulfilled. First, a 10-day notice of intent to levy must have issued. *See* 26 U.S.C. § 6331(a). Terry ascertained that this had been done. Second, the taxpayer must be liable for the tax. *Id.* Tax liability is a condition precedent to the demand. Merely demanding payment, even repeatedly, does not cause liability.

For the condition precedent of liability to be met, there must be a lawful assessment, either a voluntary one by the taxpayer or one procedurally proper by the IRS. Because this country's income tax system is based on voluntary self-assessment, rather than distraint, *For a v. United States*, 362 U.S. 145, 176, 80 S.Ct. 630, 646-47, 4 L.Ed.2d 623 (1960), the Service may assess the tax only in certain circumstances and in conformity with proper procedures.

Also, see *Bothke* relative to "qualified immunity" of IRS personnel, and administrative due process requirements.

In the Matter of the Western Trading Company, Debtor, 340 F.Supp. 1130 (D.C. Nev. 1972), at 1133:

… While the bankruptcy court may be required to reconsider its order of confirmation or to modify the plan of arrangement or dismiss the proceeding on account of the impact of such a late filed claim (see In re Gates, *supra*, 256 F.Supp. at page 4), it need do so only if the delayed claim is for a tax "found to be owing" within one year of the filing of the petition. "Found to be owing," as used in this section, means "assessed." The Internal Revenue Code provides for a specific procedure for assessment (26 U.S.C. § 6203). An assessment is an administrative determination of tax liability. *Kurio v. United States*, 281 F.Supp. 252 (S.D.Tex. 1968); *United States v. Miller*, 318 F.2d 637 (7th Cir. 1963). And until the assessment has been made, the tax has not been found to be owing.