**J. EDGAR MURDOCK INN OF COURT**

**TEAM SIX, SKIT 2 - APRIL 13, 2015**

**Section 884 - Tax on income of foreign corporations connected with United States business**

**Section 874 - Allowance of deductions and credits**

**Section 6501 - Limitations on assessment and collection**

**Narrator:** The Tax Court is dealing with motions at a calendar call. In the next three cases, the court will hear from the parties regarding:

1. A foreign corporation that did not file its 2011 Form 1120-F (U.S. Income Tax Return of a Foreign Corporation) until after the foreign corporation was under examination;
2. An individual taxpayer who filed his Form 1040NR (U.S. Nonresident Alien Income Tax Return) late; and
3. A large corporate taxpayer that failed to file a Form 5471 (Information Return of U.S. Persons With Respect to Certain Foreign Corporations).

Now let’s listen in on the motions session…

**Clerk: Calling case number 1111-14, Argentine Imports S.A. v. Commissioner. Parties, please state your appearances.**

**Andrew Archer (respondent’s counsel):** Good morning, your Honor. Andrew Archer for Respondent. Your Honor, respondent is prepared to argue its motion for summary judgment with respect to deductions that Argentine Imports S.A. is claiming for its 2011 tax year.

**Anna Arrowsmith (petitioner’s counsel):** Good morning, your Honor. Anna Arrowsmith for petitioner Argentine Imports S.A. Your Honor, petitioner is prepared to oppose respondent’s motion.

**Judge:** Very well, please proceed with your argument, Mr. Archer.

**Mr. Archer:** Your Honor, under section 882(a)(1), a foreign corporation such as Argentine Imports S.A. that engaged in a trade or business within the U.S. is taxed on taxable income effectively connected with the conduct of the trade or business within the U.S. Under section 882(c)(2), Argentine Imports S.A. is not entitled to the deductions at issue if it did not file a true and accurate return including all information necessary to calculate the deductions.

**Judge:** Yes, Mr. Archer, I heard a section 882 case some time ago, and I remember the rule about no return, no deductions. But I understand that Argentine Imports S.A. did file a Form 1120-F. So why are we here?

**Ms. Arrowsmith:**  Your Honor, if I may, yes, my client Argentine Imports S.A. did indeed file its 2011 Form 1120-F on November 4, 2013.

**Mr. Archer:** Your Honor, under section 1.882-4(a)(3) of the regulations, the return at issue was due within 18 months of the due date of the return under section 6072. Argentine Imports S.A. is a calendar year taxpayer and 2011 was the first taxable year in which it was required to file a Form 1120-F. According to section 6072, the 2011 Form 1120-F was due on March 16, 2012. But Argentine Imports S.A. didn’t actually file until after the examination commenced on September 16, 2013. The return was untimely under the section 882 regulation, so Argentine Imports S.A. is not entitled to the deductions.

**Judge:** Thank you, Mr. Archer. Ms. Arrowsmith?

**Ms. Arrowsmith:** Your Honor, on May 15, 2013, the IRS notified my client about the missing Form 1120-F. It took a little time to pull together the information required. But on November 4, 2013, my client promptly filed the missing return . This was less than two months after the examination started and less than with six months after receiving the notice.

**Judge:** Mr. Archer?

**Mr. Archer:** Your Honor, section 1.882-4(a)(3) says that for first year filers like Argentine Imports, S.A., the return must have been filed within 18 months of the due date under section 6072. That date was March 16, 2012 but the return wasn’t filed until November 4, 2013. The notice Ms. Arrowsmith mentioned is discussed in the -4(a)(3) regulation but is not relevant for first-time filers.

**Judge:** Ms. Arrowsmith?

**Ms. Arrowsmith:** Nothing further, your Honor.

**Judge:** I have heard enough. Motion granted.

**Clerk: Calling case number 2222-14, Bruce Bolin v. Commissioner. Parties, please state your appearances.**

**Barbara Barton (respondent’s counsel):** Good morning, your Honor. Barbara Barton for Respondent. Your Honor, respondent is prepared to argue its motion to dismiss this case based on petitioner’s late filing of his 2011 Form 1040NR, which would reflect wages he received that were subject to U.S. withholding.

**Bruce Bolin (pro se):** Good morning, your Honor. Bruce Bolin, representing myself.

**Judge:** Very well, please proceed with your argument, Ms. Barton.

**Ms. Barton:** Your Honor, under section 874, a nonresident alien such as Mr. Bolin can only receive the benefit of deductions by filing a true and accurate return, including all the information which the Secretary may deem necessary for the calculation of the deductions.

**Judge:** And did Mr. Bolin file such a return?

**Ms. Barton:** Yes, your Honor, but he filed the return too late. The Service understands that this was the first time Mr. Bolin was required to file but the return was too late.

**Judge:** Mr. Bolin?

**Mr. Bolin:** Your honor, I just listened to the previous case that also involved a first time filer. If I heard correctly, I believe that I have 18 months from the return due date. My Form 1040NR was due April 16, 2012, and I filed it on September 16, 2013. That is 17 months, so I think the return was timely.

**Judge:** Ms. Bartin?

**Ms. Barton:** Your Honor, the rules on timeliness for Forms 1120-F and timeliness of Forms 1040NR are different. Under section 1.874-1(b) of the regulations, Mr. Bolin’s Form 1040-NR was due by August 16, 2013. He simply filed his return a month too late.

**Judge:** I am granting respondent’s motion.

**Clerk: Calling case number 3333-14, Century Cars, Inc. v. Commissioner. Parties, please state your appearances.**

**Cindy Craddock (petitioner’s counsel):** Good morning, your Honor. Cindy Craddock for petitioner Century Cars, Inc. I am prepared to defend petitioner’s motion for summary judgment on a statute of limitations issue. In our motion, we contend that petitioner’s failure to file a Form 5471 for 2011 does not to extend the statute for petitioner’s entire tax return for that tax year. Your Honor, respondent is simply looking for an excuse for more time to pursue a domestic tax issue that has nothing to do with the Form 5471. We do not think that is right.

**Craig Conroy (respondent’s counsel):** Good morning, your Honor. Craig Conroy for respondent. Your Honor, respondent is prepared to oppose petitioner’s motion.

**Judge:** Very well, please proceed with your argument, Ms. Craddock.

**Ms. Craddock:** Your Honor, my client understands it had an obligation to timely file its 2011 Form 1120, including Forms 5471 for certain of its officers and directors. My client actually did timely file the Form 1120 with six such forms but concedes that a seventh Form 5471 (for a director) was inadvertently overlooked and not filed until eight months ago. Our position is that the unfiled form has no real tax consequences. It certainly should not be a reason for the IRS to hold the statute of limitations open for a fishing expedition on an unrelated domestic tax issue.

Now, an extended open statute does have real financial reporting consequences in that my client cannot release reserves until the statute closes. But even if respondent is right that failure to file one of seven Forms 5471 keeps the statute open, I want to stress that my client’s failure to file was inadvertent and not due to willful neglect. And that my client has since filed the missing Form 5471. As such, we would ask for a reasonable cause exception.

**Judge:** Mr. Conroy?

**Mr. Conroy:** Your Honor, first of all, Form 5471 is required to satisfy the reporting requirements of sections 6038.

**Judge:** Yes, I know that, Mr. Conroy. What I am more interested in hearing from you is a response to Ms. Craddock’s argument that her client’s failure to file just one of seven Forms 5471 has no real tax consequences. Does it?

**Mr. Conroy:** Yes, your honor, it does. In 2010, Congress passed the HIRE Act which, among other things, amended section 6501(c)(8), relating to limitations on assessment and collection for failure to notify the IRS of certain cross-border transactions. As you know, the general rule on such limitations is in section 6501(a), which gives the Service only three years after the filing of the return. And the exceptions to the general rule are in section 6501(c).

**Judge:** Yes, yes, yes I know all that as well. Please get to the point, Mr. Conroy. What is this part about the HIRE Act?

**Mr. Conroy:** Your Honor, the Hire Act created an exception to the general rule as it applies to failures to file certain cross-border information returns. Specifically, Congress created a new exception in section 6501(c)(8), which says that failure to report information required on Form 5471 keeps the statute of limitations on assessment open for three years after the IRS receives the information. It is respondent’s position that the failure of Century Cars, Inc. to file one of seven Forms 5471 for 2011 until eight months ago means that the statute remains open for all issues for another two years and four months.

**Judge:** Only one Form 5471 missing out of seven? Isn’t that a little harsh, Mr. Conroy? What about Ms. Craddock’s reasonable cause argument?

**Mr. Conroy:** Your Honor, we have provided you with our arguments against reasonable cause and it is up to you to decide whether Century Cars, Inc. had reasonable cause.

**Judge:** OK. Anything else from you, Ms. Craddock?

**Ms. Craddock:** Your Honor, I wanted to emphasize that Section 6501(c)(8)(B) provides that if a taxpayer shows reasonable cause, the statute of limitations is kept open only with respect to items related to the failure to file. The adjustment the government has prosed here has nothing to do with the missing 5471, so we would ask for judgment in the taxpayer’s favor.

**Judge:** Very well. I am going to take this matter under advisement. Will the clerk please call the next case?

**Points for the Discussion Leader**

* What does the group think the judge should do with the third case?
	+ Does the taxpayer have reasonable cause?
		- Consider Treas. Reg. § 1.6664-4(b), which discusses reasonable cause and good faith, under the penalties provision and provides that “An isolated computational or transcriptional error generally is not inconsistent with reasonable cause and good faith.”
		- Should this case be viewed as similar to an “isolated transcriptional or computational error”? Should one take into account the taxpayer’s history of compliance with similar reporting obligations? Does that mean that the matter cannot be resolved on summary judgment?
	+ What would the result be if, instead of the form being overlooked by the taxpayer, the taxpayer had relied on a tax professional to assist with filing the forms. Would this constitute reasonable cause?
		- Consider that, under *U.S. v. Boyle*, 469 U.S. 241 (1985), a taxpayer’s reliance on a professional to carry out ministerial duties not requiring special expertise, such as timely filing a return, is not reasonable. Would this late filing fall under the *Boyle* exception to reliance on a tax professional?
	+ Alternatively, suppose that instead of the form being overlooked, the taxpayer had sought advice on whether it needed to file a form 5471 with respect to the relevant person and had been told that the individual did not fit the definition of “director” under the law.
		- Would this distringuish the fact pattern from that in *Boyle*?