

American College of Tax Counsel Files Brief Urging Supreme Court to Resolve a Split Among Circuit Courts Regarding Ownership of Income Tax Refunds in the Context of Consolidated Tax Reporting Groups

Nationwide non-profit association of tax lawyers filed a “friend of the court” brief in the United States Supreme Court case of Rodriguez v. FDIC (No. 18-1269), asking the court to accept the case and resolve an important legal issue that impacts thousands of tax filers.

The American College of Tax Counsel (the “College”) announces the filing on May 3, 2019 of an amicus brief with the United States Supreme Court in the case of *Rodriguez v. FDIC* (No. 18-1269). The issue in the case, as stated in court documents, is the ownership of a tax refund arising from the losses of a subsidiary when a corporate group of companies files a consolidated tax return: Is a tax refund that is attributable to a subsidiary company the property of the subsidiary or that of the parent company when either entity is in bankruptcy? Resolution of this question can have significant repercussions for resolution of the bankruptcy proceeding, including for the bankrupt’s general creditors. The amicus brief was filed in support of a certiorari petition filed on behalf of a bank holding company’s bankruptcy trustee. The amicus brief does not take a position on the substantive question; rather, it urges the Supreme Court to take up the case to resolve the question one way or the other.

Background of the Case

According to the petition for writ of certiorari filed with the Supreme Court, Petitioner contends that there is an underlying split in the circuits, stating that the various regional U.S. Courts of Appeals around the country that have addressed this question have not been uniform in their rulings and have come to different conclusions, a state of affairs that is considered to be a standard prerequisite for U.S. Supreme Court review. The divide in the Courts of Appeals pertains to the recognition of the co-called *Bob Richards* rule, which provides (according to the courts that follow it) a default rule that a tax refund received by the parent of a consolidated group is held in trust for the subsidiary that generated the tax refund, absent a tax sharing agreement that unambiguously departs from the rule. The College agrees with Petitioner’s assessment of the split and believes that the sheer number of companies that file consolidated returns (over 35,000 in 2013) supports the argument that the Supreme Court should review this case in order to resolve the split in the circuits. According to Peter Connors, Vice President of the College and counsel of record on the brief, “The issue is important since so many companies that file consolidated returns do not have tax sharing agreements or if they do, most companies would not have anticipated this issue.”

About Amicus Briefs

A brief by Amicus Curiae (“friend of the court”), or an amicus brief, allows a person or organization with a strong interest in or important views on the subject matter of a case to file a brief explaining those views and urging the court to rule in a manner consistent with those views. Amicus briefs are often filed in cases of broad public interest and are filed with the permission of the court and typically, as in this instance, with the consent of all the parties in the case.

About the American College of Tax Counsel

The American College of Tax Counsel is a nonprofit association of tax lawyers in private practice, in law school teaching positions, and in government, who are recognized for their excellence in tax practice and for their substantial contributions and commitment to the profession. One of the chief purposes of the College is to provide a mechanism for input by tax attorneys into the development of U.S. tax laws and policy. The College’s brief was submitted by its governing Board of Regents, represented by attorneys Peter J. Connors, Thomas M. Bondy and Stephen C. Lessard of Orrick, Herrington & Sutcliffe LLP of New York and Washington, D.C.