11th Circuit Punts Tax Shelter Question to Florida Justices

When should the beneficiaries of an IRS-targeted tax shelter be allowed to sue their enablers?

That's the question the federal appellate court in Atlanta posed to the Florida Supreme Court April 17 in an ongoing bankruptcy-related case.

The answer, which turns on statutes of limitations, probably will boil down to this matter of timing and knowledge: At what point did the parties who want to sue know or have good reason to suspect something shady was going on?

A CARDS is a multi-step transaction that creates a tax loss only on paper. In December 1999, according to the New York Times, the IRS first called into question the Custom Adjustable Rate Debt Structure, or CARDS; the agency banned this tax dodge in March 2002.

In 2012 the U.S. Tax Court assessed almost $1 million in CARDS-related deficiencies against Donald Kipnis. Deficiencies against his business partner Lawrence Kibler totaled about $980,000. Kipnis and Kibler own Miller & Solomon in Miami, one of South Florida's biggest general contractors.

The following year the owners filed a fraud and racketeering lawsuit against HVB, the large German bank that financed their CARDS between Dec. 5, 2000 and Dec. 5, 2001. The trustees in Kipnis' and Kibler's Chapter 7 bankruptcies are trying to recoup the deficiency money, and much more in exemplary damages and attorney fees, from HVB.

U.S. District Judge Cecilia Altonaga granted HVB's motion to dismiss the complaint as barred by the relevant statutes of limitations—four years for fraud and related claims, five years for racketeering.

Instead of affirming or reversing Altonaga, the U.S. Court of Appeals for the Eleventh Circuit sent the case to Tallahassee. The court asked for clarification about when, under Florida law, these plaintiffs suffered the alleged injury that started the clock.

Corali Lopez-Castro argues it would be fair and efficient to conclude the ticking began when the tax court ruled against Kipnis and Kibler. She represents Barry Mukamal of Kapila & Co in Fort Lauderdale, trustee for Kipnis.

"You should be able to conclude your tax court case first. You should know if you have damages before you bring another action," said Lopez-Castro of Kozyak Tropin & Throckmorton in Coral Gables.

J. ALBERT DIAZ

U.S. District Judge Cecilia Altonaga ruled a motion to dismiss a complaint was barred by the statutes of limitations. The U.S. Court of Appeals for the Eleventh Circuit decided the Florida Supreme Court should review Altonaga's ruling.

MELANIE BELL

Corali Lopez-Castro of Kozyak Tropin & Throckmorton argues the statute of limitations clock began when the tax court ruled against the owners of Miller & Solomon in Miami.

CARDS PLAYERS

CARDS has been a disreputable game for some time now. It helped get a top Manhattan tax-shelter lawyer, as well as HVB, into a heap of trouble.

In 2003 Raymond Ruble was dismissed from the prestigious law firm Sidley Austin Brown & Wood (now Sidley Brown & Wood). Government investigators had just informed the firm that millions of dollars from a seller of tax shelters had somehow wound up in a Delaware trust created by Ruble, according to the New York Times.

Ruble was charged in a high-profile criminal prosecution of former partners and employees of the KPMG accounting firm. The litigation highlighted tax avoidance schemes for the wealthy. Ruble was tried in the Southern District of New York and convicted of 10 counts of tax evasion in 2008.

CARDS was one of about a dozen questionable tax dodges Ruble aggressively pursued at the Sidley firm. He wrote opinion letters that assured clients the maneuvers would withstand IRS scrutiny.

When the IRS scrutinized the shelters and pounced, civil lawsuits were filed against Ruble and his former employer, the New York Times reported.

In 2003 Ruble and Thomas R. Smith Jr., managing partner of Sidley's Manhattan office, were called before a Senate subcommittee that was looking into abusive tax shelters. Ruble took the Fifth; Smith described him as "a rogue partner."

Evidence presented at the hearing showed the firm charged an average of $74,000 per opinion letter. Ruble's work translated to an hourly fee of $9,000.

In 2006 HVB entered into a deferred prosecution deal with the federal government in which it agreed to pay $29.6 million in restitution, fines and penalties. The company admitted that between 1996 and 2003 "it assisted tax evasion by U.S. citizens by participating in and implementing fraudulent tax shelter transactions, including CARDS," the Eleventh Circuit's HVB opinion states.

WHO KNEW?

A Sidley Brown & Wood opinion letter figures prominently in the Miami HVB case.

Miller & Solomon had suffered losses in 1999, just as South Florida construction took off. Kipnis and Kibler later explained they agreed to the CARDS transaction because they wanted to obtain funds to increase their company's bonding capacity and grow their business.

They said they didn't understand all the intricacies of the tax shelter but relied on the reputations of HVB and Sidley Brown & Wood. The firm "had prepared an opinion letter representing CARDS as an economically substantive strategy that would pass IRS scrutiny," according to the Eleventh Circuit opinion.

In the 2013 complaint lawyers for Kipnis, Kibler and their bankruptcy trustees—Mukamal for Kipnis, and for Kibler, Kenneth Welt of Plantation—asserted they did not sustain any damages until the tax court ruled in 2012.

Before that, if they had sued HVB in district court, they would have been forced to take inconsistent positions there and in the tax court. Therefore they had until 2016 to file the fraud claims and until 2017 to file the racketeering allegation, they argued.

They described themselves as victims of HVB's and CARDS dealers' conspiracy "to perpetuate a fraudulent tax shelter scheme on thousands of their clients, including Plaintiffs," the Eleventh Circuit opinion states. The purported motive was to generate "unconscionable fees."

Kipnis was discharged from his bankruptcy. Kibler's more recently filed bankruptcy hasn't yet reached that stage.

DONALD KIPNIS, ET AL., APPELLANTS, V. BAYERISCHE HYPO-UND VEREINSBANK AND HVB U.S. FINANCE, APPELLEES
Case no.: 14-11959
Date: April 17, 2015
Case type: Statute of limitations
Court: U.S. Court of Appeals for the Eleventh Circuit
Author of opinion: Per curiam
Lawyers for petitioners: Michael Guerra Dickler and Scott F. Hessell, Sperling & Slater, Chicago
Lawyers for respondents: Ann Marie St. Peter-Griffith, Miami, Michael Hanin and Mark P. Ressler, New York, and Henry Brownstein, Washington, Kasowitz Benson Torres & Friedman
Panel: Circuit Judges Frank M. Hull and Susan H. Black and Eighth Circuit Judge Michael J. Melloy
Originating court: Southern District of Florida