

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Securities and Exchange Comm'n,

Plaintiff,

vs.

Case no. 8:09-cv-87-T-26TBM

Arthur Nadel, et al.

Defendants.

**UNITED STATES OF AMERICA'S MOTION FOR CLARIFICATION OF ORDER
AUTHORIZING RECEIVER'S EXECUTION AND SUBMISSION OF AMENDED
TAX RETURN OF ARTHUR NADEL**

The United States of America hereby moves for clarification or alternatively, reconsideration, of the Court's order entered at Doc. No. 1100 ("the Order") in this matter, to the extent that it directed the Internal Revenue Service "to accept and timely process the Amended Return [of Arthur Nadel], and deliver any applicable tax refund resulting from the Amended Return to the Receiver in a timely manner." Doc. No. 1100 at 2. In support of its motion, the United States refers to the memorandum of law below.

Legal Memorandum

On December 31, 2013, the Receiver in this case filed its Unopposed Motion for Order (1) Authorizing Receiver to Execute and Submit Amended Tax Return of Arthur Nadel; (2) Directing the Internal Revenue Service to Accept Tax Return, (3) Directing the IRS to deliver any tax refund payable to Nadel to the Receiver; and (4) Authorizing Receiver to Negotiate and Deposit Any Tax Refund

Payable to Arthur Nadel (Doc. No. 1097; “the Motion”). The IRS is not a party to this case, which was brought by the Securities and Exchange Commission (SEC) as an initial matter. The Motion sought relief in the nature of an injunction against the IRS and is styled as “unopposed,” although the Receiver did not consult with either the United States Attorney’s Office or counsel for the IRS in advance of its filing. Evidently, the Receiver consulted only with counsel for the SEC about the Motion, but the SEC is an independent litigating agency that does not represent the interests of any other federal agency such as the IRS. The Court entered the Receiver’s proposed order on the morning of January 15, 2014 without the benefit of a response by the IRS.¹

The following phraseology of the Order raises issues requiring clarification:

The IRS is directed to accept and timely process the Amended Return, and deliver any applicable tax refund resulting from the Amended Return to the Receiver in a timely manner.

IRS seeks two clarifications.² First, while IRS does not object to the Receiver filing the return on behalf of Mr. Nadel, and further does not object to delivering

¹ The Office of the United States Attorney, Attorney General, and IRS were served by certified mail on December 31, 2013. Under Rule 3.01(a) and Fed.R.Civ.P. 6(d), the response of the IRS would have been due by the close of business on January 17, 2014.

² Under Fed. R. Civ. P. 60(b), “[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for . . . mistake, inadvertence, surprise, or excusable neglect; . . . [or] any other reason that justifies relief.” Moreover, the Court has the inherent power “to reconsider, rescind, or modify an interlocutory order for cause seen by it to be sufficient.” Melancon v. Texaco, Inc., 659 F.2d 551, 553 (5th Cir. 1981); see also Toole v.

any refund ultimately determined to be due to the Receiver, there are many reasons why (in the abstract) a return may not be accepted by IRS. The Internal Revenue Code (IRC) and its implementing regulations contain a number of specific requirements for the form and content of returns, and the Court lacks jurisdiction to render those portions of the IRC nugatory in advance. 26 U.S.C. § 6011; Treas. Reg. § 301.6011. We respectfully ask that the Court clarify that its Order is not intended to nullify any statutory or regulatory requirement governing the form and/or content of the Amended Return, except to the extent explicitly addressed in the Order.

Second, federal law controls the timing for taxpayer claims to refunds and the Court lacks jurisdiction to superimpose an amorphous “timeliness” requirement upon the processing of the Amended Return and delivery of the refund. See e.g., 26 U.S.C. §§ 6532(a)(1); 7422. Specifically, the potential size of the refund sought in the Amended Return requires that it be reviewed and approved by the congressional Joint Committee on Taxation. 26 U.S.C. § 6405(a). This review is expected to be time consuming and is not a process that the IRS controls. In any event, sovereign immunity would preclude any claim to a refund that is made prior to the expiration of those statutorily required time periods. Accordingly, we respectfully ask that the Court clarify that its Order shall not be interpreted to preempt the time limits that would apply under sections 6405(a), 6532 and 7422 of the IRC. At the very least, the Receiver should make

Baxter Healthcare, Inc., 235 F.3rd 1307, 1315 (11th Cir. 2000) (recognizing “plenary power ... to reconsider, revise, alter or amend [an] interlocutory order”).

whatever specific timeliness claim he desires to make, when such a claim appears to be ripe for review and legally available to him.

Local Rule 3.01(g) Certificate

The undersigned has consulted with counsel for the Receiver in this matter concerning the relief that is sought here. The Receiver's counsel could not state his client's position without seeing the Motion and the clarifications sought.

Conclusion

For these reasons the IRS requests that the its Motion be granted and that the Court clarify its earlier Order on the two issues addressed above

Respectfully submitted,

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Certificate of Service

I hereby certify that on January 28, 2014, I caused a true copy of the foregoing to be filed using the Court's CM/ECF filing system, which will send an electronic notice of filing.

/s/Lacy R. Harwell, Jr.
LACY R. HARWELL, JR.
Assistant United States Attorney