

20-3493-ag
Ruesch v. Commissioner of Internal Revenue

1 **UNITED STATES COURT OF APPEALS**
2 **FOR THE SECOND CIRCUIT**

3
4 August Term, 2021

5
6 (Argued: November 23, 2021 Decided: January 27, 2022)

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8 Docket No. 20-3493-ag
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11 _____
12 VIVIAN RUESCH,

13
14 *Petitioner-Appellant,*

15
16 v.

17
18 COMMISSIONER OF INTERNAL REVENUE,

19
20 *Respondent-Appellee.*
21 _____

22
23 Before:

24
25 KEARSE, LOHIER, and LEE, *Circuit Judges.*
26

27 We are asked to consider whether the United States Tax Court (Lauber,
28 L.) properly dismissed the Petitioner's challenge to the certification of her tax
29 debt as "seriously delinquent" under 26 U.S.C. § 7345. Under that statute, if a
30 court determines that such a certification was erroneous, it may order the
31 Secretary of the Treasury to notify the Secretary of State of that fact. No other
32 relief is authorized. While Petitioner's claims were pending before the Tax
33 Court, the Commissioner of Internal Revenue reversed the certification and so
34 notified the Secretary of State. The Commissioner's action thus granted the
35 Petitioner all the relief to which she was entitled under Section 7435.
36 Accordingly, the Tax Court's order dismissing the case is **AFFIRMED** in part
37 insofar as it dismissed certain of Petitioner's claims as moot, and is
38 **VACATED** and **REMANDED** in part with instructions to the Tax Court to

1 dismiss all the remaining claims as moot insofar as it dismissed those claims
2 for lack of statutory jurisdiction.

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11 *brief*), *for* David A. Hubbert, Acting Assistant
12 Attorney General, Tax Division, United States
13 Department of Justice, Washington, D.C., *for*
14 *Respondent-Appellee* Commissioner of Internal
15 Revenue.

16
17 PER CURIAM:

18 Under 26 U.S.C. § 7345, if the Internal Revenue Service (“IRS”) certifies
19 that an individual taxpayer has a “seriously delinquent tax debt,” the
20 Secretary of the Treasury must transmit the certification to the Secretary of
21 State, who is then authorized to deny, revoke, or limit the taxpayer’s passport.
22 In 2018 the Commissioner of Internal Revenue assessed civil penalties against
23 Vivian Ruesch for failing to provide the IRS with financial and other
24 information regarding foreign businesses it believed she controlled. When
25 Ruesch refused to pay the penalties, the IRS certified that she had a “seriously
26 delinquent tax debt” under 26 U.S.C. § 7345, thus imperiling her ability to use
27 her passport. In April 2019 Ruesch filed a petition with the United States Tax

1 Court challenging the Commissioner's certification. While her challenge was
2 pending, the Commissioner reversed the certification as erroneous and so
3 notified the Secretary of State. By order dated June 29, 2020, the Tax Court
4 (Lauber, L.) dismissed Ruesch's petition, holding that it lacked jurisdiction to
5 assess the validity of her underlying liability for the penalties the IRS had
6 assessed against her, which formed the basis for her debt, and that her
7 challenge to her certification was moot in light of the IRS's reversal. Ruesch
8 appeals from that order, and we now **AFFIRM** in part insofar as the Tax
9 Court dismissed some of Ruesch's claims as moot and **VACATE** and
10 **REMAND** in part with instructions to the Tax Court to dismiss all the
11 remaining claims as moot insofar as it dismissed those claims for lack of
12 statutory jurisdiction.

13 **BACKGROUND**

14 On February 12, 2018, the IRS notified Ruesch, a United States citizen,
15 that it had assessed \$160,000 in civil penalties against her for tax years 2005
16 through 2010. The penalties were assessed under 26 U.S.C. § 6038, which
17 requires United States taxpayers to pay a fine for failing to file information
18 returns relating to foreign business entities in which they have a controlling

1 interest. The IRS's notice advised Ruesch of her various options, including
2 paying the penalties within ten days or filing a written request to appeal
3 within thirty days. In April 2018 the IRS notified Ruesch of its intent to seize
4 (or levy) her property or right to property if she failed to pay the penalties. In
5 September 2018, when Ruesch had still failed to pay, the IRS sent her a Notice
6 of Federal Tax Lien alerting her that the Government had filed a lien on her
7 property.

8 In December 2018 the Commissioner certified that Ruesch owed a
9 "seriously delinquent tax debt" under 26 U.S.C. § 7345, a law enacted in 2015
10 as part of the Fixing America's Surface Transportation Act (the "FAST Act"),
11 Pub. L. No. 114-94, § 32101(a), 129 Stat. 1312, 1729–30 (2015), to increase tax
12 compliance. Under Section 7345, "if the Secretary [of the Treasury] receives
13 certification by the Commissioner of Internal Revenue that an individual has
14 a seriously delinquent tax debt, the Secretary shall transmit such certification
15 to the Secretary of State for action with respect to denial, revocation, or
16 limitation of a passport." 26 U.S.C. § 7345(a).

17 The following April, Ruesch filed a petition with the Tax Court
18 challenging both the Commissioner's certification as well as the underlying

1 penalties that were assessed against her. The Commissioner moved to
2 dismiss the challenge to Ruesch's penalties for lack of subject matter
3 jurisdiction. While the petition before the Tax Court remained pending, the
4 Commissioner discovered that Ruesch had tried to contest her underlying tax
5 liability in October 2018 by requesting a due process hearing before the IRS
6 Independent Office of Appeals, but that the IRS had somehow misplaced her
7 request.¹ Section 7345(b)(2)(B)(i) of the federal Tax Code provides that if a
8 person has requested a due process hearing, or if such a hearing is pending,
9 he or she cannot be certified as having a "seriously delinquent tax debt." 26
10 U.S.C. § 7345(b)(2)(B)(i). After realizing its error, the IRS reversed Ruesch's
11 certification, so notified the Secretary of State, and moved to dismiss
12 Ruesch's petition as moot.

13 On June 29, 2020, the Tax Court granted both the IRS's motion to
14 dismiss for lack of jurisdiction and its motion to dismiss the petition as moot.
15 First, the Tax Court held that Section 7345(e) limited the court's jurisdiction to
16 "determining whether the Commissioner erred in certifying (or in failing to

¹ At oral argument, counsel for the Commissioner acknowledged that there had been "several administrative lapses in this case" as a result of "the IRS's very outdated computer system." Oral Arg. at 11:55–12:06.

1 reverse a certification) that a taxpayer owes a ‘seriously delinquent tax debt.’”

2 Ruesch v. Comm’r of Internal Revenue, 154 T.C. 289, 296 (2020). The Tax

3 Court explained that the text of Section 7345 did not authorize it to rule one

4 way or the other on the validity of Ruesch’s underlying liability for the

5 penalties the IRS had assessed against her. Id. Second, the Tax Court held

6 that Ruesch’s remaining claims were moot “because the IRS ha[d] reversed its

7 certification and so informed the Secretary of State.” Id. at 298. Ruesch had

8 therefore received “all of the relief that she requested and that [the Tax Court]

9 could grant.” Id. at 299.

10 This appeal followed.

11 DISCUSSION

12 I

13 We begin by reviewing de novo the Tax Court’s conclusion that some

14 of Ruesch’s claims are moot. See Comer v. Cisneros, 37 F.3d 775, 787 (2d Cir.

15 1994). Although the Tax Court is an Article I court, see Freytag v. C.I.R., 501

16 U.S. 868, 870 (1991), the “case or controversy requirement under Article III

presumptively applies [there],”² Battat v. Comm’r of Internal Revenue, 148 T.C. 32, 46 (2017). That requirement exists to ensure that a “litigant’s interest in the outcome continues throughout the life of the lawsuit.” Comer, 37 F.3d at 798 (quotation marks omitted). “In general, a case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.” Id. (quotation marks omitted). Typically, no live controversy remains where a party has obtained all the relief “she could receive on the claim through further litigation.” Radha Geismann, M.D., P.C. v. ZocDoc, Inc., 909 F.3d 534, 541 (2d Cir. 2018) (quotation marks omitted); see Lane v. Williams, 455 U.S. 624, 633 (1982).

As we have stated, the IRS’s certification under Section 7345 threatened Ruesch’s ability to access or use her passport. With respect to Ruesch’s so-called “passport” claims challenging the certification, the Tax Court concluded that “there remains no justiciable case or controversy between the

² We do not appear to have previously addressed this issue in a published opinion, but we agree with those sister circuits that have applied the “case or controversy” requirement to the Tax Court. See, e.g., Wilson v. Comm’r of Internal Revenue Serv., 805 F.3d 316, 319 (D.C. Cir. 2015); Charlotte’s Office Boutique, Inc. v. Comm’r of Internal Revenue, 425 F.3d 1203, 1211 n.7 (9th Cir. 2005).

1 parties . . . because the IRS has reversed its certification and so informed the
2 Secretary of State.” Ruesch, 154 T.C. at 298. We agree.

3 Ruesch has received all the relief to which she is entitled by statute.

4 Under Section 7345, an individual may bring a civil suit in the Tax Court or in
5 federal district court for a limited purpose: “to determine whether the
6 certification was erroneous or whether the Commissioner has failed to reverse
7 the certification.” 26 U.S.C. § 7345(e)(1). If the court determines that the
8 certification was made in error, “then the court may order the Secretary [of
9 the Treasury] to notify the Secretary of State that such certification was
10 erroneous.” 26 U.S.C. § 7345(e)(2). The statute authorizes no other relief. By
11 the time the Tax Court issued its order in this case, the IRS had already
12 conceded that its certification was erroneous, reversed that certification, and
13 notified the State Department. There was thus no longer a reasonable risk
14 that Ruesch’s passport would be denied, revoked, or limited. In light of these
15 actions, the Tax Court could not have afforded Ruesch “any further relief
16 with respect to her passport claims.” Ruesch, 154 T.C. at 299.

17 Ruesch relies on the voluntary cessation doctrine to argue that her
18 passport claims in fact remain live. That doctrine—an exception to mootness

1 that applies where a defendant voluntarily ceases the offending conduct—
2 aims to prevent parties from “evad[ing] judicial review . . . by temporarily
3 altering questionable behavior.” Connecticut Citizens Def. League, Inc. v.
4 Lamont, 6 F.4th 439, 446 (2d Cir. 2021) (quotation marks omitted). But the
5 doctrine is not absolute. A case can be moot notwithstanding a defendant’s
6 voluntary cessation if the defendant can demonstrate, first, that “interim relief
7 or events have completely and irrevocably eradicated the effects of the
8 alleged violation,” and second, that “there is no reasonable expectation that
9 the alleged violation will recur.” Id. (quotation marks omitted).

10 As the Tax Court determined, both conditions are satisfied here. By
11 reversing Ruesch’s certification and notifying the Secretary of State, the IRS
12 completely eradicated the effect of the erroneous certification. See Shitrit v.
13 Comm’r of Internal Revenue, 121 T.C.M. (CCH) 1481, 2021 WL 2012626, at *4
14 (T.C. 2021). Moreover, there is no reasonable expectation that the alleged
15 violation will recur since, by statute, the Commissioner may not recertify
16 Ruesch’s tax debt as seriously delinquent while her IRS appeal is pending.
17 See 26 U.S.C. § 7345(b)(2)(B)(i). If Ruesch were to prevail on appeal,
18 moreover, the IRS would have no basis to recertify her debt. It is true that the

1 IRS could decide to recertify Ruesch's tax debt if her appeal were to fail, but
2 its recertification would not then constitute a violation of Section 7345 if all of
3 the requirements of Section 7345 were met, and, even if the requirements
4 were not met, Ruesch could challenge the recertification in court. To the
5 extent that the voluntary cessation doctrine exists primarily to keep parties
6 from acting strategically to avoid judicial review, that is not a concern here.
7 We therefore affirm the Tax Court's dismissal of Ruesch's passport claims as
8 moot.

9 II

10 We turn next to the Tax Court's dismissal of Ruesch's challenge to her
11 underlying liability for the penalties the IRS assessed against her for lack of
12 jurisdiction. The Tax Court concluded that it lacked statutory jurisdiction to
13 consider these claims because "nothing in the text of [S]ection 7345 . . .
14 authorize[d it] to redetermine petitioner's underlying liability for" those
15 penalties. Ruesch, 154 T.C. at 296. Before addressing whether it had
16 jurisdiction under Section 7345 to evaluate Ruesch's underlying debt,
17 however, the Tax Court should first have asked whether those claims were
18 also moot. This is because questions relating to Article III jurisdiction,

1 including those concerning the doctrine of mootness, see Stagg, P.C. v. U.S.
2 Dep't of State, 983 F.3d 589, 601 (2d Cir. 2020), are antecedent to and should
3 ordinarily be decided before other issues such as statutory jurisdiction or the
4 merits, see Butcher v. Wendt, 975 F.3d 236, 242 (2d Cir. 2020); see also Parella
5 v. Ret. Bd. of Rhode Island Emps.' Ret. Sys., 173 F.3d 46, 54 (1st Cir. 1999).

6 We conclude that Ruesch's challenge, under Section 7345, to the
7 underlying penalties assessed against her was moot at the time the Tax Court
8 issued its order in this case. Even if the Tax Court had jurisdiction to assess
9 the validity of Ruesch's underlying debt, Ruesch had already received the
10 only relief she could obtain under the statute, namely, reversal of her
11 certification as an individual with "seriously delinquent tax debt." See 26
12 U.S.C. § 7345(e)(2). Since there was no further relief the Tax Court could have
13 provided under the statute, and since the statute provided Ruesch's only
14 claimed basis for relief, it should have determined that Ruesch's remaining
15 claims were moot.³

³ We note that Ruesch may yet have the chance to challenge her underlying liability in court. That liability is currently the subject of an IRS appeals process that has still to run its course. See 26 U.S.C. § 6320. After receiving a final determination through that process, Ruesch will be able, if necessary, to "petition the Tax Court for review of such determination (and the Tax Court shall have jurisdiction with respect to

1 **CONCLUSION**

2 For the foregoing reasons, the order of the District Court is **AFFIRMED**
3 in part insofar as the Tax Court dismissed some of Ruesch's claims as moot
4 and **VACATED** and **REMANDED** in part with instructions to the Tax Court
5 to dismiss all the remaining claims as moot insofar as it dismissed those
6 claims for lack of statutory jurisdiction.

such matter)." Id. § 6330(d)(1); see id. § 6320(c). If Ruesch continues to object to the IRS's position regarding her underlying liability, she will eventually have her day in court. For now, however, there is nothing further for our Court or the Tax Court to do.