

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Gitlitz v. Commissioner

6 F. App'x 770 (10th Cir. 2001) · Decided March 26, 2001

SUMMARY

On remand from the Supreme Court, the Tenth Circuit vacated its prior judgment concerning whether discharge-of-indebtedness income of an S corporation passes through to shareholders before or after tax-attribute reduction under 26 U.S.C. § 108(b). The court remanded to the Tax Court with directions to enter judgment for the taxpayers because the deficiency determinations depended exclusively on the sequencing issue resolved by the Supreme Court.

CASE DETAILS

COURT	United States Court of Appeals for the Tenth Circuit
WRITING FOR THE COURT	Briscoe; Magill; Tacha
JURISDICTION	Federal
DECIDED	March 26, 2001
DISPOSITION	vacated
PROCEDURAL POSTURE	On remand from the United States Supreme Court after reversal of the Tenth Circuit's prior judgment concerning the tax treatment and sequencing of pass-through income from discharge of indebtedness in an S corporation.
PRECEDENTIAL VALUE	nonprecedential
PARTIES	David and Louise Gitlitz, Phillip and Eleanor Winn v. Commissioner of Internal Revenue

TOPICS

[s corporation tax](#)[tax basis](#)[tax deficiency](#)[statutory interpretation](#)[appellate procedure](#)

PRACTICE AREAS

[federal income taxation](#)[S corporation taxation](#)[appellate procedure](#)

QUESTIONS PRESENTED

1. Whether the Tenth Circuit's prior judgment should be vacated and the case remanded to the Tax Court after the Supreme Court held that pass-through of an S corporation's untaxed discharge-of-indebtedness

income occurs before reduction of the corporation's tax attributes under 26 U.S.C. § 108(b).

2. Whether the taxpayers were entitled to judgment in their favor because the deficiency determinations depended exclusively on the sequencing issue resolved by the Supreme Court.

HOLDINGS

1. Under the Supreme Court's controlling decision, pass-through of an S corporation's untaxed discharge-of-indebtedness income to shareholders occurs before reduction of the corporation's tax attributes under 26 U.S.C. § 108(b).
2. The Tenth Circuit vacated its prior judgment and remanded to the Tax Court with directions to enter judgment in favor of the taxpayers.

KEY QUOTATIONS

“We therefore VACATE our prior judgment and REMAND the case to the Tax Court with directions to enter judgment in favor of taxpayers.” (at 771)

“This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.” (at 771)

FACTUAL BACKGROUND

The taxpayers used untaxed discharge of indebtedness from an S corporation to increase their bases in the corporation's stock. The Commissioner determined that the taxpayers had tax deficiencies, and the taxpayers challenged those determinations. The validity of the deficiencies depended on whether the discharge-of-indebtedness income passed through to shareholders before or after reduction of the corporation's tax attributes.

PROCEDURAL HISTORY

The Commissioner assessed tax deficiencies against the Gitlitzes and Winns based on their use of untaxed discharge of indebtedness to increase their S corporation stock bases. The Tax Court upheld the deficiencies, and the Tenth Circuit affirmed, holding that attribute reduction under 26 U.S.C. § 108(b) preceded pass-through to shareholders. The Supreme Court reversed and held that pass-through occurs before attribute reduction, then remanded to the Tenth Circuit. Because the deficiency determinations turned exclusively on that sequencing issue, the Tenth Circuit vacated its prior judgment and remanded to the Tax Court to enter judgment for the taxpayers.

DISPOSITION

vacated

REMAND INSTRUCTIONS

The prior Tenth Circuit judgment was vacated, and the case was remanded to the United States Tax Court with directions to enter judgment in favor of the taxpayers.

CASES CITED

- *Gitlitz v. Commissioner of Internal Revenue*, 531 U.S. 206, 121 S. Ct. 701, 148 L. Ed. 2d 613 (2001)
- *Gitlitz v. Commissioner of Internal Revenue*, 182 F.3d 1143 (10th Cir. 1999)

OPINION

BRISCOE, J.

ORDER AND JUDGMENT² BRISCOE, Circuit Judge. This case is before us on remand from the Supreme Court of the United States. See *Gitlitz v. Comm’r of Internal Revenue*, 531 U.S. 206, 121 S.Ct. 701, 148 L.Ed.2d 613 (2001).

The Commissioner of Internal Revenue assessed tax deficiencies against David and Louise Gitlitz and Phillip and Eleanor Winn because they used untaxed discharge of indebtedness to increase their subchapter S corporate bases. Taxpayers contested the deficiency determinations.

The Tax Court upheld the deficiency de*771terminations, holding that shareholders may not use a subchapter S corporation’s untaxed discharge of indebtedness to increase their bases in corporate stock. We affirmed the Tax Court. *Gitlitz v. Comm’r of Internal Revenue*, 182 F.3d 1143 (10th Cir.1999).

In doing so, we held that untaxed discharge of indebtedness of an S corporation must first be used to reduce certain tax attributes of the S corporation under 26 U.S.C. § 108(b), and that only the leftover amount “passes-through” and can be used to increase the shareholders’ bases.

The Supreme Court reversed. After first concluding that untaxed discharge of indebtedness is an “item of income” available for “pass-through” to shareholders of an S corporation, 531 U.S. at -, 121 S.Ct. at 708, the Court held that the “pass-through” to shareholders is performed before, rather than after, reduction of the S corporation’s tax attributes under § 108(b).

Id., 121 S.Ct. at 709. The Court remanded the case to us for further proceedings in conformity with its decision. We perceive no need for additional briefing or extended proceedings. The deficiency determinations challenged by taxpayers hinged exclusively on the outcome of the “pass-through” sequencing issue decided by the Supreme Court. See *id.* at 708 (“[T]he sequence of the steps of pass-through and attribute reduction determines whether petitioners here were deficient when they increased their bases by the discharged debt amount.”).

We therefore VACATE our prior judgment and REMAND the case to the Tax Court with directions to enter judgment in favor of taxpayers. IT IS SO ORDERED.. This order and judgment is not binding precedent, except under the doctrines of law of the case, *res judicata*, and collateral estoppel.

The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir.R. 36.3.

