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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Federal Tax Cases To Watch In 2020

By **Amy Lee Rosen**

Law360 (January 1, 2020, 12:04 PM EST) -- In the new year, the U.S. Supreme Court will decide whether President Donald Trump is immune from subpoenas for his financial documents, including his tax returns, as well as whether a bankrupt bank holding company or the Federal Deposit Insurance Corp. is the owner of a tax refund.

Here, Law360 explores important and interesting federal tax cases to watch in 2020.

Trump Subpoenas

Trump is battling the release of his financial documents, including his tax returns, on multiple fronts in three Supreme Court cases that may carry major implications for the scope of presidential immunity. The court said on Dec. 13 that it would hear the three cases: two involving subpoenas by congressional committees that will be consolidated and one by Manhattan District Attorney Cyrus Vance. Oral arguments on the cases will be held in June.

In one case, the justices will weigh a subpoena by the House Committee on Oversight and Government Reform to Trump's longtime accounting firm, Mazars USA LLP, seeking his personal and business records, along with a subpoena to Deutsche Bank and Capital One by the House Financial Services Committee and Permanent Select Committee on Intelligence. Those committees have asked for the documents in connection with investigations they are pursuing and legislation they are considering.

The other case involves a subpoena by Vance to Mazars seeking Trump's tax returns as part of an investigation into hush-money payments to two women who say they had affairs with Trump: Stephanie Clifford, also known as Stormy Daniels, and Karen McDougal.

In the Vance case, Trump's legal team has told the court that Trump has “absolute immunity” from criminal investigations while he is president and asked the justices to block the subpoena because it violates the U.S. Constitution and therefore is unenforceable. Meanwhile, Trump has said the House committees' subpoenas also shouldn't be enforced because they were issued outside the committees' legislative purview.

Erwin Chemerinsky, dean of the University of California, Berkeley School of Law, told Law360 that if Trump's arguments succeed, the court will uphold a broader immunity than ever recognized before in constitutional law.

“My hope is that the court will ... affirm the lower courts,” he said. “No one, not even the president, is above the law."

The cases are Donald J. Trump et al. v. Mazars USA LLP et al., case number 19-715, Donald J. Trump et al. v. Deutsche Bank et al., case number 19A640, and Donald J. Trump v. Cyrus R. Vance Jr. et al., case number 19-635, in the U.S. Supreme Court.

Rodriguez v. Federal Deposit Insurance Corp.

The Supreme Court recently heard oral arguments in a case over whether a bankrupt holding company or the FDIC owns a $4.1 million tax refund. Attorneys for the FDIC, which is the receiver for failed Colorado bank United Western Bank, and counsel for its parent, United Western Bank Inc., each tried convincing the high court that their clients are the rightful owners of the tax refund, given the terms of a tax allocation agreement between the two.

The $4.1 million refund stems from a $35.4 million loss that United Western Bank incurred in the 2010 tax year and carried back to its 2008 tax year under prior Section 172 of the Internal Revenue Code, which allowed a corporation to carry back net operating losses for up to two taxable years.

As the parent company, United Western Bank Inc. had filed consolidated returns for its subsidiary and had argued it was entitled to the refund under state law while the FDIC said the parent was merely an agent for the bank and did not have title to the money.

The two sides have argued about the application of a Ninth Circuit case from 1973, In re Bob Richards Chrysler-Plymouth Corp., which established federal common law holding that a tax refund goes to the bank subsidiary whose losses gave rise to that refund.

It is unusual for a 50-year-old case to be challenged after standing for such a long time, according to Todd F. Maynes, a tax partner at Kirkland & Ellis LLP.

“I predict we’ll be talking about Rodriguez and what it has to say about net operating losses, consolidated groups and consolidated returns for years to come,” Maynes said.

The case should be watched, said Pamela M. Capps, a tax partner at Kramer Levin Naftalis & Frankel LLP, because at its heart is whether the refund goes to the FDIC or, since the parent filed a consolidated return and received the refund check, whether it becomes part of the parent’s bankruptcy estate.

“In a bankruptcy, when a company is failing, a tax refund can provide much-needed cash for the company to restructure and emerge from bankruptcy,” she said. “Whether the company is entitled to retain its tax refund will affect the planning and structuring of bankruptcy plans.”

The case is Simon E. Rodriguez in His Capacity as Chapter 7 Trustee for the Bankruptcy Estate of United Western Bancorp Inc. v. Federal Deposit Insurance Corp. in Its Capacity as Receiver for United Western Bank, case number 18-1269, in the U.S. Supreme Court.

Mayo Clinic v. U.S.

The Eighth Circuit this year will explore whether the government exceeded its authority in creating extra requirements for groups to qualify as tax-exempt educational organizations when it decides whether to

uphold an $11.5 million tax refund for the Mayo Clinic.

In August, a Minnesota federal court found for the Mayo Clinic when it determined that the hospital had met the requirements of being a tax-exempt educational facility under Internal Revenue Code Section 170 and that the government had exceeded its power in making a regulation that imposed extra requirements.

The government had asked the Minnesota district court to uphold the definition as stated in the regulations. The court, though, followed a precedent set in a recent U.S. Supreme Court case, Kisor v. Wilkie, which allows deference to government regulations only if a five-part test is met.

"What you have [in Mayo] is a lower court that's being constrained by the Supreme Court," said Kevin Spencer, a tax partner at McDermott Will & Emery LLP. "It has to be one of the first cases because Kisor just came out in" June 2019.

Before Kisor, Spencer said, many practitioners were floating on this deference to how a government agency interprets rules, but the Supreme Court said in Kisor that there's a strictness about when and if deference to the government's authority is warranted. If a government agency does not follow the five-part test set out in Kisor, he said, then there can be no deference for its interpretation of regulations, he said.

"So what Mayo is teaching us is that there's a lot more to come in the wake of Kisor," Spencer said. "It's much-needed structure to this amorphous concept of deference."

The brief for the government is due on Jan. 17, according to the Eighth Circuit's order.

The case is Mayo Clinic v. U.S., case number 19-3189, in the U.S. Court of Appeals for the Eighth Circuit.

Americans for Prosperity v. Becerra

The Supreme Court has been urged to evaluate whether a California law that requires charitable organizations to disclose donor information to the state violates the First Amendment, a request that has broad implications for the exercise of freedoms of speech and association.

Americans for Prosperity Foundation, a conservative advocacy group affiliated with Charles Koch, asked the court to reverse a Ninth Circuit finding that the organization had to turn over its secret donor list. The foundation contends that sharing the information violates the First Amendment rights of donors who choose to express controversial opinions through their contributions. The case is being heard along with a similar appeal by the Thomas More Law Center.

The government has argued that the Ninth Circuit's finding should be upheld because the group did not show how compliance would infringe on its First Amendment rights by deterring future contributions.

Alexander Reid, a partner at Morgan Lewis & Bockius LLP, told Law360 he hopes the Supreme Court agrees to consider Americans for Prosperity Foundation's case to determine whether the bulk collection of donor information serves a compelling state government interest. States are demanding donor information on federal returns without guaranteeing not to use it for political or retaliatory purposes, Reid said.

The Supreme Court “may say, ‘Sure, let's allow California to collect this information from AFPF,’ and that would put all the nonprofits at risk,” he said.

The better answer, Reid said, would be to bolster federal election law by saying that if an organization spends even $1 on any political activity, it must follow disclosure requirements under Internal Revenue Code Section 527.

“If you engage in politics, you should be deemed to have formed a PAC," he said. "You are still tax-exempt, you can spend your money on politics, but you must disclose your donors.”

The cases are Americans for Prosperity Foundation v. Xavier Becerra, case number 19-251, and Thomas More Law Center v. Becerra, case number 19-255, in the U.S. Supreme Court.

--Additional reporting by David Hansen, Hailey Konnath, Kevin Stawicki, Daniel Tay, Dylan Moroses and Joshua Rosenberg. Editing by John Oudens.