Federal Court Cases

United States v. Grant, KTC 2005-235 (S.D.Fla. 2005)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case Number: 00-8986-CIV-JORDAN/KLEIN

UNITED STATES OF AMERICA, Plaintiff, v. RAYMOND GRANT and ARLINE GRANT, Defendants

Docket: 00-8986-CIV-JORDAN/KLEIN Filed September 2, 2005

REPORT AND RECOMMENDATION THAT THE GOVERNMENT'S AMENDED MOTION FOR REPATRIATION OF ASSETS BE GRANTED

THIS CAUSE came before the Court on the Government's Amended Motion for Repatriation of Assets (D.E. No. 108), filed June 17, 2005. For the reasons discussed below, the Government's Motion should be GRANTED.

BACKGROUND

In 1983 and 1984, two offshore trusts were established for the benefit of Raymond and Arline Grant: one with its situs in Bermuda, the other in Jersey, off the coast of England. Raymond was the settlor of both trusts, with Arline as the beneficiary of one, and Raymond of the other. <<ENDNOTE 1>> In 1991 and 1993, the United States Internal Revenue Service (IRS) assessed millions of dollars in back taxes against the Grants for the years 1977 through 1982, and 1984 through 1987. The Grants entered into an installment agreement with the IRS, where they were to pay $3000/month until their tax liability was fully paid. Ultimately the installment agreement was terminated, <<ENDNOTE 2>> the IRS referred the suit to the Untied States Department of Justice (DOJ), and suit was filed against the Grants for the full amount of their liability. On March 21, 2003, a final judgment was entered against the defendants for over S36 million in unpaid taxes. (D.E. No. 67).

The Government moved to repatriate the funds held in the Grants' offshore trusts in order to pay down a portion of the tax liability owed by the Grants, arguing that the trusts constitute property of the taxpayer which, under federal statutes, can and should be repatriated to the United States. The Defendants argue that the Government does not have the right to order repatriation of offshore trust accounts, that ordering repatriation would violate the laws of the countries in which the trust

are held, and finally, that Arline Grant does not wish to repatriate the funds. <<ENDNOTE 3>> As is explained more fully below, the funds can and should be repatriated.

ANALYSIS

The Government has a valid tax lien and judgment against the Grants. When a person fails to pay taxes due to the federal government, a lien arises in favor of the United States "upon all property and rights to property, whether real or personal, belonging to such person." 26 U.S.C. section 6321. "Property and rights to property" as described in section 6321 is broadly construed to include every type of property interest a person might have. United States v. National Bank of Commerce, 472 U.S. 713, 719-20 (1985).

In the instant case, a judgment was entered against the Grants--both Raymond and Arline--in favor of the Government for over $36 million in unpaid taxes. In her Response to the Government's Motion, Arline Grant argues that she did not participate in the creation or operation of the tax shelters which resulted in the tax liability assessed against the Grants. (D.E. No. 111 at 112). However, because the tax liability and judgment attached to the assets of both Raymond and Arline Grant, any property belonging to either or both of those individuals is subject to a lien by the United States. Moreover, a tax collection action survives the death of the taxpayer. See United States v. Bess, 357 U.S. 51 (1958). Raymond Grant's death, therefore, has no effect on the liability owed by Arline. <<ENDNOTE 4>>

District courts have broad authority to issue orders necessary for the government to collect unpaid federal tax liabilities. 26 U.S.C. section 7402(a). That authority extends to orders of repatriation of funds held in foreign countries, and district courts have repeatedly ordered that assets such as those held in foreign bank accounts be repatriated to pay down tax owed to the federal government. United States v. Greene, 1984 WL 256 (N.D. Cal. 1984); United States v. McNulty, 446 F. Supp. 90 (N.D. Cal. 1978); United States v. Ross, 196 F. Upp. 243 (S.D.N.Y. 1961) afPd 302 F.2d 831 (2d Cir. 1962).

The only issue here is whether, for purposes of repatriation, the corpus of a trust is any different than funds held in an ordinary offshore bank account, or for that matter, any offshore asset of a taxpayer. Therefore the query must be: is this a trust over which the beneficiary lacks any control, such that the beneficiary is simply that and nothing more, and regardless of what she does or says, she lacks the power to repatriate these assets to the United States?--or, does the beneficiary retain such control that she has the power vested in her in some way by the terms of the trust to repatriate the corpus? If she has such power, then this asset is no different than any other asset.

Once the power of the person who is either the owner or the beneficiary

of the asset to repatriate is established, the court can require that person to repatriate the funds. In the case of the Bermuda Trust, the trust document confers upon Arline Grant the power to change the trustee at any time, and further provides that should the trustee be changed, and the new trustee resides outside of the location of the trust, the law governing the trust will change to the law of the place in which the new trustee is located. Specifically, the Bermuda Trust document states that:

> During the lifetime of the Grantor, he (or, following his death,, his said spouse, ARLINE GRANT, if she shall survive him) shall have the right, at any time, to discharge an existing or acting Trustee (including the Trustee executing this Agreement) and to appoint such other Trustee in any jurisdiction throughout the world, as he (or his said surviving spouse) may in his (or her) sole and unreviewable discretion determine ... .

(D.E. No. 11, Exhibit A, FOURTH)(emphasis added). <<ENDNOTE 5>> The document further provides that:

> if in the course of time, a successor or substitute Trustee is appointed pursuant to the foregoing provisions of this Indenture, which is organized and is located and functions under the laws of a jurisdiction other than Bermuda, then and thereafter for so long as such successor or substitute Trustee shall remain in such capacity, the rights and duties of all persons with an interest in the Trust Estate . . . shall for all purposes be interpreted and construed exclusively in accordance with the laws of such other jurisdiction and the courts thereof shall be the sole forum for all purposes requiring judicial determination in the execution, operation or termination of the trusts herein created.

(D.E. No. 11, Exhibit A, TWENTIETH). <<ENDNOTE 6>>

Arline Grant contends that her power to appoint a new trustee to either trust is "limited to such trustees as I in my `sole and unreviewable discretion may determine.' (D.E. No. Ill at 64). She further argues that a court order requiring her to exercise her power would "violate the terms of each trust because / have no wish to appoint a U.S. trustee and such appointment would not be one that is made in my `sole and unreviewable discretion.' (D.E. No. 111 at 65)(emphasis added). In the context of offshore trusts, the seeming conundrum claimed by Ms. Grant has been addressed and debunked. See In re Lawrence, 251 B.R. 630 (S.D. Fla. 2000). In Lawrence, the Court found that a party who deliberately configured an offshore trust so as to prevent the beneficiary from having the power to access or repatriate the trust assets to pay judgment creditors was in contempt of a court order requiring him to do so. This Court need not even go so far as Lawrence in deciding it has the power to require Ms. Grant to repatriate. The trusts here have no limitations on the beneficiary's power preventing her from acting, as in Lawrence. To the contrary, Arline Grant's powers over the trusts are extensive, and thus the Court's powers are necessarily co-extensive.

The owner of an asset cannot avoid the impact of a lawful court order requiring repatriation by saying, "I choose not to do so," any more than any person can avoid the impact of any court order acting directly against his person by saying, "I choose not to do so." The fact that such a person may decide to exercise his will to not make such a choice does not insulate him from the court's power and authority to lawfully order such a choice against the person's desire not to do so. That is the nature and essence of the court's power to act upon the person. The consequences of disobeying such an order are clear. Likewise, if the Defendant here has the power to change trustees or to repatriate assets, she cannot avoid the obligation by saying, "I choose not to do so," without incurring the dire consequence of such an avowed choice. <<ENDNOTE 7>> The only question at issue is whether Ms. Grant has the power to effect a repatriation of the trust assets; if so, the court can order her to perform such acts which will in fact result in repatriation, to the same extent it can order any person owning or controlling an offshore account to repatriate the assets to the United States.

Clearly, she has such power. She has unreviewable discretion to change the trustees, and the present trustees must comply with such a request. This Court can, therefore, order Ms. Grant to change the trustee of each trust to a U.S. trustee, which will result in the repatriation of these assets. It is no different than requiring any other recalcitrant taxpayer who is a ..judgment debtor to repatriate an asset over which he has ownership and control against his desire and will, which is well within the power of United States district courts. See Green. McNulty, Ross, supra.

Likewise, Arline Grant has the virtual power to cause the withdrawal of any or all of the trust principal of at least the Bermuda Trust. <<ENDNOTE 8>> The trust documents use such broad and sweeping criteria as for "health, comfort, maintenance" so as to give her complete, unbridled discretion to use the trust corpus as she sees fit. The Bermuda Trust provides that

> In addition to the distribution of the net income made hereunder to Grantor's spouse, ARLINE GRANT, the Trustee may, in its sole discretion, at any time or from time to time during the lifetime of the said ARLINE GRANT pay to or apply for her sole use or benefit so much of the principal of the Trust Estate as the Trustee shall deem necessary, advisable or appropriate for her health, comfort, maintenance and living expenses (without any duty to take into account other resources of Grantor's said spouse or of any other person, whether or not legally obligated to support Grantor's said spouse); provided, however, that in making any determination as to the distribution of any portion of the principal of the Trust Estate pursuant to paragraph (B), the Trustee shall be entitled to rely absolutely upon any written statement of facts made to it by Grantor's said spouse without necessity for an independent verification thereof by the Trustee. (D.E. No. 11, Exhibit A).

The Jersey Trust contains nearly identical language:

> If Grantor's spouse, Arline Grant, shall survive him then upon and following the death of the Grantor the Trustee shall pay to, or apply the benefit of, the said Arline Grant during her lifetime, at least annually, all of the net income of the Trust Estate and, in addition thereto, such amounts or proportions of the Trust Estate as the Trustee, in its sole discretion, shall at any time or from time to time deem necessary or appropriate for her health, support, benefit and living expenses. In making its determination as to any distribution out of the principal of the Trust Estate to the Grantors's said spouse, Arline Grant, pursuant to this Paragraph (B), the Trustee shall be entitled to rely absolutely upon any written statement of facts made to it by the said Arline Grant without necessity for an independent verification thereof by the Trustee. (D.E. No. 11, Exhibit B).

Although the trusts purport to give each Trustee sole discretion to invade the corpus, by giving Arline Grant total unreviewable authority over discharge and appointment of the Trustees, she in actuality controls the corpus of each trust. The Trust document in each of the two trusts provides that the Trustee may rely on her unsupported statements of her needs without the necessity of independent verification. In other words, all she needs to do is ask, and the Trustee may then grant her request without anything more. There is no showing that either Trustee ever declined any of her requests to invade the corpus. A Trustee who declines to abide by her wishes will soon carry the title of ex-Trustee. As such, the monies funding the trusts are really her assets to do with as she wills. See, e.g., 76 Am Jur 2d, TRUSTS, section 130, and cases cited therein. If Ms. Grant has such power, which she clearly does, then the court likewise has the power to require her to cause the withdrawal of those funds for the payment of the judgment.

Arline Grant argues that the trusts were funded prior to any assessment of tax liability against the Grants, and that therefore the court cannot order their repatriation because they are not fraudulent transfers. Such a position has no legal support. While it is true that several of the cases relied upon by the Government involve the repatriation of funds which were transferred within the period in which they would be considered fraudulent transfers, others do not. <<ENDNOTE 9>> Moreover, Ms. Grant has failed to cite any law which holds that funds which are not fraudulently transferred are immune from repatriation. Nor does the law or logic compel such a result. The Government's power to seize assets for tax liability is broad: the United States will have a lien on "upon all property and rights to property, whether real or personal, belonging to such person." 26 U.S.C. section 6321. This language contains no exclusions, and Ms. Grant has presented no case law to suggest that any exclusions exist. Similarly broad is the power of the Court to enter orders to facilitate the Government's collection activities. See 26 U.S.C. section 7402(a); Greene, supra. The Government has a valid lien on the property at issue, and this

Court has the power to order its repatriation. <<ENDNOTE 10>>

Arline Grant has further argued that this court cannot order a Trustee to perform an act which would be a violation of the law of the country in which the trust is located. Such an argument is merely a red herring. The Government is not asking the Trustee to do anything; only Ms. Grant is being ordered to act. She can be required to act legally in this country, and once the trust is repatriated or a new, U.S. trustee is appointed, then foreign law will no longer apply, and no violations of foreign law will occur.

Since there is a serious question as to whether more than 10% of the Jersey Trust may be distributed in any one year, and the issue of trustee discretion as to the corpus exists as to both trusts, the easiest manner of accomplishing repatriation appears to be to require appointment of a U.S. trustee for each trust. Accordingly, it is the recommendation of this Court that such an appointment be required as a first step, and that requiring a directive to repatriate the corpus of the trusts be an alternative.

In light of the foregoing, it is hereby

RECOMMENDED that the Government's Motion for Repatriation of Assets (D.E. No. UN be GRANTED, and that Arline Grant be ordered to appoint a trustee in the United States for the Bermuda and Jersey trusts, or alternatively to otherwise repatriate the assets held in the Bermuda and Jersey trusts.

DONE AND SUBMITTED in Chambers at Miami, Florida, this Z&Xy of September, 2005.

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THEODORE KLEIN
UNITED STATES MAGISTRATE JUDGE

<<ENDNOTES>>

1/ The terms of both trusts provide that in the event of the death of the beneficiary, the surviving spouse becomes the beneficiary. After Raymond's death in January, 2005, Arline thus became the beneficiary of both trusts.

2/ The Defendants take issue with the legality of the termination of the installment agreement. However, that issue has already been ruled upon by Judge Jordan, and deemed a legal termination. (D.E. No. 68).

3/ In the interim between the filing of the Government's initial Motion and its recent renewed Motion, Raymond Grant died. The effect of Mr. Grant's death upon the trusts and repatriation is discussed below.

4/ Similarly, the trusts in question are both self-settled by Raymond Grant, and there is nothing to indicate that the corpus is not the joint property of Raymond and Arline. The fact that Raymond, prior to his death, renounced his rights to certain trust assets is irrelevant to Arline's property interest in the trusts. She has not renounced any of her rights, and retains all powers and benefits given to her under the trusts.

5/ The Jersey trust contains virtually identical language. (D.E. No. 11, Exhibit B, FOURTH).

6/ The Jersey trust does not contain a similar provision; rather, it provides that the law governing the trust shall be that of England, unless the Grantor declares it to be different. (D.E. No. 11, Exhibit B, TWENTIETH). However, Arline Grant has never argued that repatriating the assets would be impossible under English law; instead, she has argued that such an act would violate the laws of Jersey, which are inapplicable to the trust. In any event, once the trust is repatriated, if the choice of law is still in issue as to the Jersey' Trust, it may be addressed at that time.

7/ As a caveat, Ms. Grant cannot furnish a court-ordered directive and then privately tell the trustee to disregard the court ordered request without risking the full panoply of sanctions available for such an act. See Lawrence, supra.

8/ Whether Ms. Grant may withdraw all of the principal of the Jersey trust is in dispute. However, the documents make clear that she may at least withdraw 10% of the principal per year.

9/ In McNulty, supra, the defendant transferred lottery winnings into a foreign bank to avoid paying taxes on those funds; in Lawrence, supra, the defendant transferred funds into an offshore trust shortly before an arbitration award was entered against him. In Ross, supra, however, the defendant was ordered to repatriate stock located in the Bahamas to pay a U.S. tax debt, and there was no indication that the stock was transferred outside of the U.S. after the tax liability was assessed. Similarly in Greene, supra, the defendant made transfers prior to any assessment against it by the IRS. In all cases, repatriation was ordered.

10/ Ms. Grant and the Government have been in dispute over which state's law should govern the determination of whether the funds at issue were fraudulently transferred out of the U.S. Because the status of the funds as fraudulent transfers is not relevant to the questions of whether the funds are subject to repatriation, that issue need not be addressed by this Court.