

No. 04-860

In the Supreme Court of the United States

AMMEX, INC., PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly applied the doctrine of collateral estoppel to bar petitioner's tax refund claims.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 384 F.3d 1368. The decisions of the Court of Federal Claims (Pet. App. 9a-36a, 37a-48a, 49a-88a) are reported at 52 Fed. Cl. 303, 52 Fed. Cl. 555, and 56 Fed. Cl. 1.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 2004. The petition for a writ of certiorari was filed on December 23, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Apart from the tax years at issue, the relevant facts in this case are identical to those in *Ammex, Inc. v. United States*, No. 04-822, as petitioner notes (Pet. 1).

1. Petitioner operates a United States Customs Class 9 bonded warehouse, commonly known as a duty-free store, in Detroit, Michigan. Pet. App. 10a. Petitioner's warehouse is "sterile," which means that petitioner's customers must cross the border into Canada upon exiting the warehouse due to the physical design and operation of the facility. *Id.* at 10a-11a. In short, petitioner's store is beyond the point of no return for individuals exiting the United States.

During the quarterly periods at issue, petitioner sold gasoline and diesel fuel to individuals driving into Canada that it had purchased from local fuel suppliers. Pet. App. 12a. Under 26 U.S.C. 4081, those suppliers were required to pay a federal excise tax on the fuel when it was removed from their fuel terminals for delivery to purchasers, such as petitioner. Pet. App. 12a. The suppliers included in their invoices to petitioner a line item amount for the excise tax they had paid on the fuel. *Id.* at 12a-13a. Accordingly, petitioner paid its suppliers an amount for the fuel that included the excise tax assessed against the suppliers.

Petitioner subsequently filed refund claims with the IRS, seeking to recoup the fuel excise taxes on the ground that the fuel was exported to Canada. Pet. App. 14a. Petitioner had not filed federal excise tax returns reporting liability for the taxes in the periods at issue. *Id.* at 15a. Moreover, petitioner had not paid the excise tax to the IRS, and the IRS had not assessed the excise tax against petitioner or otherwise attempted to collect

the tax from it. *Ibid.* The IRS disallowed the claims. *Ibid.*

2. Petitioner commenced this action in the United States Court of Federal Claims for a refund of the fuel excise taxes it claims to have paid from 1994 to 1998.* Pet. App. 9a. Petitioner argued that it was entitled to a refund because, as an exporter, it was exempt from the fuel excise tax under the Export Clause of the Constitution, Art. I, § 9, Cl. 5, and also claimed that it could recover under 26 U.S.C. 6416(c) and 6421(c), both of which permit third parties to recoup excise taxes paid by others in special circumstances. Pet. App. 9a-10a. Petitioner and the government cross-moved for summary judgment.

3. The Court of Federal Claims denied petitioner's motion for summary judgment and granted the government's motion in part. Pet. App. 9a-36a. As is relevant here, the court held that petitioner lacked standing to seek a refund based on the Export Clause, because any injury that petitioner may have suffered was not "caused" by the government. *Id.* at 22a-23a. The court reasoned that "[w]here the defendant by direct act has not laid any tax or duty upon the plaintiff, and no such act is fairly traceable to the defendant (since the incidence of the tax was upon the supplier(s)), plaintiff cannot establish an injury in fact caused by the defendant." *Id.* at 23a. The court also determined that petitioner was not an "exporter" entitled to seek a refund under 26 U.S.C. 6416(c). Pet. App. 27a. In the

* Petitioner also commenced an action in the United States District Court for the Eastern District of Michigan that raised the same issue but involved taxes allegedly paid during the first six months of 1999. A petition for a writ of certiorari in that case is pending before this Court. See *Ammex v. United States*, No. 04-822 (filed Dec. 16, 2004).

court's view, petitioner operated solely as "a domestic retailer and a mere facilitator of exportation." *Ibid.* (internal quotations omitted). The court concluded, however, that a trial was necessary to determine whether petitioner sold its gasoline "for export" and thus could seek relief under 26 U.S.C. 6421(c). Pet. App. 30a-32a.

Before the trial on petitioner's Section 6421(c) claim began, the United States District Court for the Eastern District of Michigan, considering the same issues raised herein but for different tax years, see note *, *supra*, granted summary judgment in favor of the government in the refund action before it. C.A. App. 2900-2920. Accordingly, the government, both prior to and during trial in the action before the Court of Federal Claims, asserted the affirmative defense of collateral estoppel, contending that petitioner was precluded from re-litigating the merits of its refund claim in a different court. Pet. App. 57a. The Court of Federal Claims rejected that defense. *Id.* at 59a.

After trial, the Court of Federal Claims entered judgment in the government's favor on petitioner's claim under 26 U.S.C. 6421(c). The court found that petitioner had failed to prove that it had not passed on the cost of the tax to its customers, as is required to obtain relief under Section 6421(c). Pet. App. 63a-88a.

4. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-8a. In its view, the entire action had to be dismissed on collateral estoppel grounds, because the Sixth Circuit had considered identical claims and resolved all issues against petitioner after providing it a full and fair opportunity to litigate the case. *Id.* at 7a. Thus, the court of appeals affirmed those aspects of the district court's order granting

summary judgment to the government and reversed the district court's conclusion that petitioner was entitled to a trial on its Section 6421(c) claim. *Ibid.*

ARGUMENT

Petitioner contends that the underlying decision to which the court of appeals gave preclusive effect, *i.e.*, the decision of the Sixth Circuit in petitioner's related refund suit, was incorrectly decided. Petitioner has filed a petition for a writ of certiorari in that related case, and the government has filed a brief in opposition. See *Ammex, Inc. v. United States*, No. 04-822. As the government explains in its brief in opposition in that related case, review of the Sixth Circuit's decision by this Court is not warranted. Accordingly, and because petitioner does not challenge any other aspect of the court of appeals' application of collateral estoppel principles to bar the refund claims at issue in this case, this petition should be denied for all the reasons stated therein.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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