The Virgin Islands Consortium

Tax Refund Class Action Suit Back on Table After Appeals Court Vacates Disrict Court's Order

Government / **Published On September 12, 2022 03:12 PM /**

Janeka Simon September 12, 2022

The question of a class action lawsuit against the Government of the Virgin Islands over delays and confusion in the tax refund process is once again a live one, after an appeals court recently vacated the local court’s dismissal of a motion by Jenifer Duncan that sought class certification for her claim.

Weeks after filing her initial claim in 2018, Duncan applied for class certification, attempting to bring the case on behalf of everyone who has filed a timely claim for a tax refund since 2003, who has not received a notice that their claim has been disallowed, but who has still not been paid their due refund by the Government of the Virgin Islands. The massive proposed class action is seeking to:

- Issue refunds as required under Title 26, section 7422 of the US Code and Title 33 section 1692 of the Virgin Islands Code.
- Have the court mandate that the Department of Finance and the Bureau of Internal Revenue set aside the 10% reserve as required by Title 33, Section 1102 b) of the Virgin Islands code.
- Receive declaratory and injunctive relief for violations of the Fourteenth Amendment and other laws by the Bureau's practice of automatically expediting refunds for a select group of people - BIR employees and some Department of Finance staffers.

However, Duncan's initial attempt to get her claim turned into a class action suit was denied by Judge Robert Molloy, on grounds the appeals panel deemed erroneous. The issue hinged around Duncan's receipt of a tax refund check while her suit was wending its way through the court process.

During class discovery, a former employee of the Bureau of Internal Revenue detailed an ad hoc refund process that was opaque and inconsistent. The recent retiree disclosed that the general public had to apply for an expedited refund, providing the reason why the funds were needed urgently. Each application is reportedly considered by the Director of BIR, who makes a decision on whether or not to allow the expedited refund. Said decision is reportedly not appealable or subject to further review, according to the complaint, and the basis and procedures for approving and denying requests are not clearly set out. The former employee also disclosed that there was another procedure for issuing refunds to employees of the BIR and those Finance Department staffers who process refund checks - automatic expedited refunds, no request or reason required. The former employee's testimony clearly outlined a two-tier system by the BIR - fast refunds for us and delays for everyone else.

During that discovery process, Duncan was sent a check for $2,474, which the government claimed was owed as a refund for tax year 2016. Duncan did not accept the check because she says she's owed more - over $7,000. Nevertheless, Judge Molloy determined that because she had received something from BIR, her claim was no longer valid — her issue was no longer whether or not she had received the refund check but instead whether the refunded amount was correct. As such, the District Court judge ruled that Duncan's claim was different from those in the class she sought to represent, and thus denied her class certification.

The District Court also found that receipt of the refund check meant that Duncan no longer had standing to bring her original claim on behalf of the class, and further that she was not an adequate representative of the class.

However on Appeal, the 3-judge panel ruled that Judge Molloy erred in his finding that the receipt of a refund check meant that Duncan could not represent a class in which the majority had not received such funds. The issue hinged on the concept of "mootness" — when a happenstance occurs after a claim is filed that obviates the need for the claim to be adjudicated. A court will obviously not want to spend time considering a claim that has subsequently been made moot, but the appeals court noted some circumstances in which a claim can still live on after being made moot.

Duncan's claim, the appeals court found, aligned with those circumstances. First, she declared her intention to seek class certification status very early on in the proceedings. Further, Duncan's claim was found to be particularly vulnerable to being "picked off". The term "picking off" refers to a practice by a defendant of settling the claims made by each plaintiff that seeks to represent a mass of people in a class action, so that those claims become moot. Individually "picking off" representatives of a class as they come forward would in effect fatally compromise any class action suit, and thus the courts view litigants with claims particularly susceptible to being "picked off" as being protected from having those claims mooted as a strategy by the defense.

Having vacated the order denying Duncan class certification, the 3rd District Court of Appeals then sent the matter back down to the District Court for reconsideration. Duncan is being represented in the matter by Joseph A. DiRuzzo, while Ian Clement from the Office of the Attorney General argued the appeal on behalf of the Government of the Virgin Islands.