No. 10-60515

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CONTAINER CORPORATION, Successor to Interest of Container Holdings Corporation, Successor to Interest of Vitro International Corporation,

Petitioner-Appellee

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellant

ON APPEAL FROM THE DECISION OF THE UNITED STATES TAX COURT

REPLY BRIEF FOR THE APPELLANT

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Cases:

Statutes: **Page(s)**

Regulations:

Miscellaneous:

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This reply brief addresses only those points raised in the appellee's answering brief that warrant further response. With respect to those points not discussed herein, we rely on our opening brief.

A. Container Corp.'s defense of the Tax Court's opinion ignores significant facts in the record

In its answering brief, Container Corp. characterizes Vitro's guaranty of International's indebtedness under the Notes as an "intangible benefit" to International (Ans. Br. 23), and it states that the

guaranty was a "contingent, secondary obligation" (Ans. Br. 34) that was "purely a backstop" behind International's "own assets, operations, and creditworthiness" (Ans. Br. 32). Such a characterization makes Vitro's guaranty seem an insignificant element in International's sale of the Notes. The record, however, shows that Vitro's guaranty was the *sine qua non*, without which the entire transaction would not have occurred. Seen correctly, it is clear that what International obtained through Vitro's guaranty was concrete and direct financial assistance without which International could not have sold the Notes.

As the Guaranty Agreement itself states, it is "a condition precedent to the Purchasers purchasing the Notes that the Guarantor execute this Guaranty." (Ex. 35-J at 1.) The reason for this was that, as the parties stipulated, "International did not actually have the cash flow needed to satisfy all of the interest payments under the International 1991 Senior Notes, as they came due over the three year term of such notes, without additional borrowings or equity contributions." (Doc. 8, ¶ 129.) Container Corp. refers vaguely to International's "own assets, operations, and creditworthiness" supporting the Notes (Ans. Br. 32), but it does not point to any evidence in the record describing what those "assets" and "operations" were.

Moreover, as the parties stipulated, International could not have paid interest on the Notes "without additional borrowings or equity contributions," and that, as of the date of the guaranty, International "was not expected to have . . . the cash flow to satisfy all of the principal requirements of the . . . Notes as they came due, without additional borrowings or equity contributions, unless THR made principal payments to International in cash prior to the due date(s) the [*sic*] . . . Notes." (Doc. 8, ¶¶ 129, 132.) As we discussed in our opening brief (at 24, n.8), such payments from THR were unlikely. International thus did not intend to rely solely on its own "assets" and "operations" to fund the Notes.

In holding that the guaranty fees were not analogous to interest (Doc. 18 at 28), the Tax Court stressed the fact that Vitro did not actually lend International any money (Doc. 18 at 28), as does Container Corp. (Ans. Br. 21, 24-25, 28). Indeed, Container Corp. contends that the Tax Court's decision means that, in all situations "where no funds are loaned, an analogy to interest is inapposite." (Ans. Br. 24-25.) The reasoning of the Tax Court begs the question. Obviously, if Vitro had loaned funds to International and had received a fee in return, the fee would constitute interest. The parties agreed in

the Tax Court that the guaranty fees paid to Vitro were not interest. The issue before the Tax Court was whether the guaranty fees were more analogous to interest than to a payment for the provision of services. The fact that Vitro did not lend any funds to International establishes only that the guaranty fees were not interest; it does not resolve the question whether the guaranty fees were more in the nature of interest than they were in the nature of compensation for services rendered.

Indeed, as the Tax Court noted (Doc. 18 at 29), it found alimony payments analogous to interest in *Howkins v. Commissioner*, 49 T.C. 689 (1968). Accordingly, contrary to Container Corp.'s argument, it does not necessarily follow that "where no funds are loaned, an analogy to interest is inapposite." In this case, an analogy to interest is particularly apposite. "Interest is the creditor's compensation for putting his own money at risk" (Doc. 18 at 28), as well as compensation for the use of money. *See Salley v. Commissioner*, 464 F.2d 479, 485 (5th Cir. 1972). The Commissioner is not arguing that the guaranty fees in this case *are* interest. Rather, the fees are more analogous to interest than to payments for services, because the fees were paid to Vitro by International for the use of its credit that allowed

International to borrow money. Although Vitro did not lend any money, facilitating a loan transaction was the reason behind the fees. Indeed, even Container Corp.'s expert witness, Dr. Robert Puelz, testified at the trial that an alternative to the Guaranty Agreement would have been for International to pay the Note purchasers a higher rate of interest to accomplish the same objective. (Tr. 190.) In other words, Vitro's guaranty served as an interest substitute. The Tax Court's holding that the fees were more closely analogous to payments for personal services than to interest therefore is a conclusion reached only by ignoring significant facts and circumstances surrounding the transaction.

Container Corp. takes issue with the Commissioner's emphasis on the fact that Vitro made substantial contributions of capital to International. (Ans. Br. 37-42.) Container Corp. contends that these contributions were not made under the terms of the Guaranty Agreement, and that the Commissioner is, in effect, arguing that Vitro "received guarantee fees for making those contributions." (*Id*. at 39.) The Commissioner is not contending that International paid the fees in question in return for the capital contributions Vitro made to International between 1990 and 1993. The substantial infusion of

capital by Vitro into International serves to confirm that, as expected (Doc. 18 at 13; Doc. 8, ¶126), International lacked the means to pay the interest and principal payments due under the Notes, which was the reason that the Note purchasers insisted on Vitro's guarantee of the Notes as a condition of the purchase agreement (Ex. 35-J at 1; Tr. 52, 129-30).

Container Corp. seeks to supply support for the Tax Court's decision by pointing to the "actions" it took in connection with its guaranty. (Ans. Br. 26-27.) It argues that the benefits International obtained from the guaranty were the "services provided by the guarantor for the benefit of the debtor and the lender" (Ans. Br. 26), and that International paid Vitro fees for Vitro's actions in "execut[ing] the guarantee, compy[ing] with its terms, and, most importantly, . . . hav[ing] and maintain[ing] assets to allow it to perform under its guarantee, if necessary" (*id.* at 26-27).

Even the Tax Court, however, rejected this contention, expressly finding that "International did not pay the guaranty fees to Vitro as compensation for services." (Doc. 18 at 23.) The court observed that Container Corp. presented "very little evidence about the specific acts [Vitro] performed and how much time it took to perform them" (*id.* at

22), and that the fees Vitro charged were based solely on the "amount of the outstanding principal that Vitro was standing behind," not upon the services Vitro performed or the amount of work required to fulfill the guaranty (*id*. at 23). Vitro was paid fees for guaranteeing International's Notes and not for any ministerial actions it performed in giving its guaranty. Vitro's "actions" in connection with its guaranty thus were irrelevant to the Tax Court's decision and are irrelevant in this appeal.

Having flatly rejected the notion that the guaranty fees represented compensation for services rendered by Vitro to International, the court offered surprisingly little explanation for its ultimate conclusion that the guaranty fees were more closely analogous to payments for services than to interest. Indeed, the court simply stated that the fees were more analogous to payments for services because like services, "[g]uaranties . . . are produced by the obligee." (Doc. 18 at 31.) As we pointed out in our opening brief (at 25), a guaranty is not "produced." It is an agreement between two parties, in this case one located in Mexico and the other located in the United States. Thus, the cryptic reason given by the Tax Court for its

conclusion that the guaranty fees were most analogous to compensation for the provision of services does not withstand analysis.

At all events, as we explained in our opening brief (at 25-26), even if the guaranty fees could be deemed to be analogous to payments for services, the Tax Court erred in holding that income received from services is sourced to the residence of the service provider (Doc. 18 at 31.) Such income is sourced to where the services are performed. I.R.C. §§ 861(a)(3), 862(a)(3); Treas. Reg. § 1.861-4(a)(1).[1] As even Container Corp. points out, income is to be sourced to "the business activities generating the income" and to "the earning point of the income." (Ans. Br. 21, citing *Hunt v. Commissioner*, 90 T.C. 1289, 1301 (1988).)

In this case, the business activities that generated the guaranty fees took place in the United States. The guaranty was issued to a United States subsidiary to allow that subsidiary to issue and sell debt

[1] Treas. Reg. § 1.861-4(a)(1) provides, in part: "Generally, compensation for labor or personal services . . . performed wholly within the United States is gross income from sources within the United States. Gross income from sources within the United States includes compensation for labor or personal services performed in the United States irrespective of the residence of the payer, the place in which the contract for service was made, or the place or time of payment."

obligations in the United States, to purchasers that appear to be American companies. (*See* Ex. 32-J.) Moreover, it was important to the Note purchasers that repayment of the Notes come from an American company. (Tr. 36, 61.) The guaranty thus had its economic effect in the United States. To the extent that the guaranty fees may be said to be analogous to payments for services, the fees therefore should be considered United States source income, because the guaranty was performed in the United States.[2]

In addition to arguing that the guaranty fees are most closely analogous to payments for services, Container Corp. also contends that even if the fees are analogous to interest, they are still income from outside the United States. It asserts in this regard that the "'residence of the obligor'" is the "'place where the . . . income is produced, and thus the source of the income.'" (Ans. Br. 50 (quoting *Howkins*, 49 T.C. at 694).) It then concludes that, because Vitro was the "obligor" under the Guaranty Agreement and is a resident of Mexico, the source of the guaranty fees must be Mexico. (Ans. Br. at 51-52.)

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[2] Indeed, the Guaranty Agreement provides that it "shall be governed by, and construed in accordance with, the laws of the State of New York, without regard to the provisions thereof relating to conflict of laws." (Ex. 35-J at 22, ¶12.)

Container Corp.'s argument is nonsensical. At issue is whether the guaranty *fees* paid by International to Vitro are United States sourced income or Mexican sourced income. The payment of the fees was the obligation of International and hence it obviously is the obligor with respect to such fees. Since payments analogous to interest are to be sourced to the residence of the obligor, here, International (*see* I.R.C. § 861(a); Treas. Reg. § 1.861-2(a)(1)), and since it is undisputed that the residence of International is the United States, it necessarily follows that if, as we maintain, the guaranty fees were most analogous to interest, they were United States sourced income. Moreover, as even Container Corp. acknowledges (Ans. Br. at 52), the Tax Court recognized that Vitro was the obligee, not the obligor, with regard to the guaranty fees in issue.

Container Corp. further offers this Court's decision in *Commissioner v. Piedras Negras Broadcasting Corp.*, 127 F.2d 260 (5th Cir. 1942), as additional authority for its position that the guaranty fees should be considered income from a source outside the United States. That case involved a Mexican radio station receiving income from advertisers located in the United States. This Court held that, where all of the services by the radio station were performed in Mexico,

the station did not derive income from sources within the United States. *Id.* at 260-61. Interpreting § 119 of the Revenue Act of 1936,[3] the Court noted that Congress distinguished between income from services performed in the United States and those performed without. The source of the radio station's income, the Court determined, was the act of transmission. Accordingly, the Court held that because "all of the services [the station] rendered in connection with its business in Mexico were preformed in Mexico," "[n]one of its income was derived from sources within the United States." *Id.* at 261 (footnote omitted). As is apparent, the decision in *Piedras Negras* is of no assistance to Container Corp., because the record shows, and the Tax Court found (Doc. 18 at 22-23), that the guaranty fees were not compensation to Vitro for services rendered to International -- in Mexico or in the United States.

I.R.C. §861(a)(3) provides that compensation for personal services performed in the United States shall be treated as income from a source within the United States. The focus of the statute and the

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[3] The case did not involve a loan transaction, a loan guaranty, or a substitution of credit, and the Court did not have to resolve the matter before it by analogy. Contrary to Container Corp.'s representation (Ans. Br. 52), the case did not involve I.R.C. §§ 861 and 862.

regulations is where the services are performed. Therefore, if the guaranty fees are most closely analogous to payments for services, they are also income from a source within the United States, because the guaranty was an integrated part of a transaction that occurred in the United States. *Piedras Negras*, to the extent it has any relevance, supports this conclusion, because all of the radio station's actions in the nature of services were performed in Mexico.[4]

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[4] Container Corp. wanders far afield in its attempt to provide authority supporting the Tax Court's decision. It cites, for example, three Revenue Rulings in which the IRS determined that certain payments did not qualify as interest under the Internal Revenue Code. (Ans. Br. 23-24, nn. 65-67.) The rulings do not deal with I.R.C. §§ 861, 862, or 881(a), and are not relevant, because they do not address whether the payments in issue were more analogous to interest than to compensation for services rendered.

In addition, Container Corp. cites an obsolete Committee on Appeals and Review Recommendation, A.R.R. 723, I-1 C.B. 113 (1922), and claims that it demonstrates that, "in a scenario remarkably similar to this case, the IRS actually ruled that guarantee fees should be sourced to the country in which the guarantor resides." (Ans. Br. 24.) This Recommendation, however, does not deal with a loan guaranty or the statutes at issue in this case, and it reaches no conclusion by analogy. It further involves a situation where "no incident of the transaction, out of which [income] accrued to [the foreign corporation], occurred in the United States." I-1 C.B. at 116. The "scenario" thus is far removed from the circumstances here.

B. *Bank of America and Centel* are highly relevant authority supporting the Commissioner's position

Container Corp. argues that two cases we relied on in our opening brief, *Bank of America v. United States*, 680 F.2d 142 (Ct. Cl. 1982) and *Centel Communications v. Commissioner*, 92 T.C. 612 (1989), are distinguishable and not apposite precedents. (Ans. Br. 42-49.) As cases discussing I.R.C. §§ 861 and 862 and analogizing other payments to interest, however, they are highly relevant. Moreover, Container Corp. is unable to cite a single case that actually supports its position that the guaranty fees are more closely analogous to payments for services than to interest.

Bank of America is distinguishable, Container Corp. argues, because as part of its role in accepting and confirming letters of credit, Bank of America advanced funds. As Container Corp. puts it, "Bank of America was not being paid for substituting its credit for that of the foreign bank, but for substituting its money for that of the foreign bank." (Ans. Br. 43.) Container Corp. thus concludes that, unless an actual loan occurs, payments from one party to another in return for financial assistance cannot be analogized to interest.

Container Corp.'s argument is plainly misconceived. To be sure, a transaction in the nature of a loan is necessary to reach the conclusion

that there was a payment of interest, which is commonly defined as compensation for the use of another party's funds. The issue here, however, is not whether the guaranty fees constitute the payment of interest. Indeed, the Commissioner has never contended that the fees were interest. The issue, as the Tax Court recognized, is whether the guaranty fees are more analogous to interest than they are to a payment for services. That Vitro did not advance funds to International in connection with its guaranty establishes no more than that the fees it received were not interest. It does not establish that the fees were not more analogous to interest than to a payment for services. Indeed, the courts in *Bank of America* did not regard the commissions paid as being compensation for its advancement of funds, because such compensation would have constituted interest *per se*, rather than payments most *analogous* to interest, as was the holding of the courts.

Bank of America holds that commissions paid for the substitution of one party's credit for another's are analogous to interest for the purposes of I.R.C. §§ 861 and 862. It does not delineate what a substitution of credit is or limit such a substitution to the situation where funds are advanced in connection with the credit substitution.

Here, Vitro's act of guaranteeing the Notes was also a substitution of its credit for that of another party, even though of a different type than that described in *Bank of America*. The purchasers of the Notes refused to go through with the Notes transaction without Vitro's guaranty of the Notes because of International's lack of creditworthiness. The effect of Vitro's guaranty was to substitute its credit for that of International, and the fees it received from International were its compensation for putting its credit on the line. This is similar to the role Bank of America played in accepting and confirming letters of credit. In order to facilitate a transaction between a buyer and a seller, Bank of America "substituted its credit for that of its customer." 680 F.2d at 144. Vitro, for a similar reason, substituted its credit for that of International. The Tax Court viewed Vitro as "augmenting" International's credit rather than substituting its own (Doc. 18 at 27), but given the insistence of the Note purchasers on Vitro's credit and assets and International's shaky financial condition, it is apparent that Vitro's far more substantial credit and assets were primary, and that International's "credit"at the most augmented Vitro's, rather than the other way around.

Equally important for purposes of this case is the Court of Claims' determination that the "services" or "actions" taken by Bank of America in handling the letter of credit transactions were secondary to its role as a supplier of credit and, as such, were insufficient to render the commissions received by the Bank as most analogous to payments for services rendered. Services such as "advising the letter of credit and making the actual payment of money," even services that foreign banks "require an agent in the United States to do" were not "the predominant feature of the transactions." 680 F.2d at 149. "The predominant feature of these transactions is the substitution of [Bank of America's] credit for that of the foreign banks." *Ibid*. Indeed, the most important aspect of Bank of America's actions with respect to the letters of credit is that its assurance of payment, rather than any actual payment, made the seller in question willing to perform. Similarly, Vitro's guaranty made the Note purchasers willing to perform. Vitro's "actions" in executing the guaranty, complying with its terms, and maintaining assets "to allow it to perform under its guarantee" (Ans. Br. 26-27), *i.e.*, "standing by to pay" (*id*. at 22), were all secondary in importance to the fact of its credit being the primary backing for the Notes. The guaranty fees purchased Vitro's credit, and, under *Bank of*

America, the fees are therefore more analogous to interest than to payments for services.

Container Corp.'s attempt to distinguish *Centel* is even less successful. In *Centel*, three shareholders of Fisk Telephone Systems, the predecessor of Centel, guaranteed a series of bank loans made to Fisk, and five years later Fisk granted the shareholders warrants authorizing them to purchase shares of stock at $1 per share. Centel claimed a deduction for the warrants on its tax return, claiming that the warrants were transfers to the shareholders "in connection with the performance of services." 920 F.2d at 1337. The Tax Court rejected the taxpayer's position, concluding that "services" were generally performed by employees and independent contractors, that the shareholders had executed their guarantees in their role as shareholders and investors, and that they had not performed services through their guarantees. *Centel Communications v. Commissioner*, 92 T.C. 612, 626-33 (1989). The Seventh Circuit agreed with the Tax Court's reasoning and affirmed the decision. 920 F.2d at 1342-43.

Container Corp. maintains that, unlike the shareholders in *Centel* who provided their guarantees to the company, Vitro is in the business of guaranteeing loans for its subsidiaries. (Ans. Br. 48.) Container

Corp. appears to argue that its guaranty of the Notes was therefore a service under the reasoning of *Centel*. First, merely because Vitro guaranteed loans for its subsidiaries does not mean it was in the business of guaranteeing loans. In this regard, there is no evidence that Vitro guaranteed loans for unrelated parties. Moreover, its relationship to International under the circumstances of this case is more like that of the shareholders in *Centel*. Vitro guaranteed the Notes because International's financial success and its own were synonymous.

In any case,Vitro's practice of guaranteeing loans is irrelevant, because both the Tax Court and the Seventh Circuit determined that, in addition to the fact that the shareholders in *Centel* were not in the business of providing guarantees, the shareholders "did not perform any 'service' to Fisk by guaranteeing Fisk's loans." 920 F.2d at 1344. *See also* 92 T.C. at 633-636. Relying on the Court of Claims' reasoning in *Bank of America*, the Seventh Circuit determined that by guaranteeing Fisk's loans, the shareholders had "substituted their credit for that of Fisk . . . . They did not receive warrants in return for any 'service' they supplied to Fisk." *Ibid*. The Seventh Circuit therefore concluded that providing a guaranty for a loan was a

substitution of the guarantor's credit for that of the borrower, and that, therefore, the warrants issued by Fisk to the shareholders did not constitute compensation to them for the provision of services. The same reasoning applies here. Accordingly, the guaranty fees paid by International to Vitro are most closely analogous to interest. It therefore follows that they were income to Vitro from a source within the United States and subject to tax under I.R.C. § 881(a).[5]

[5] As Container Corp. points out (Ans. Br. 19), Section 2122 of the Small Business Jobs Act of 2010, Pub. L. No. 111-240, enacted on September 27, 2010, added sections 861(a)(9) and 862(a)(9) to the Internal Revenue Code. These amendments to the Code "effect a legislative override" of the Tax Court's opinion in this case, and provide that "income from a noncorporate resident or a domestic corporation for the provision of a guarantee of indebtedness" is now expressly considered to be income from a United States source. *See* Technical Explanation prepared by the Joint Committee on Taxation regarding H.R. 5297 at 50 (Sept. 16, 2010). The amendments to the statute are not retroactive, but the Technical Explanation states that "no inference is intended with respect to the source of income received for the provision of a guarantee issued before the date of enactment." *Ibid*. at 51.

CONCLUSION

For the foregoing reasons, and for those discussed in our opening brief, the decision of the Tax Court should be reversed.

Respectfully submitted,

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NOVEMBER 2010

CERTIFICATE OF SERVICE

It is hereby certified that on this 1st day of November, 2010, the foregoing reply brief for the appellant was filed with the Court using the Court's CM/ECF system. On the same date, an original and six copies of this brief were mailed to the Clerk by first-class mail. Service of this brief was made via the Court's CM/ECF system on the following registered CM/ECF user:

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Pursuant to Fifth Circuit Rule 25.2, I hereby certify on this 1st day of November, 2010, that (i) any required privacy redactions have been made, and (ii) the electronic submission is an exact copy of the paper document, and (iii) the document has been scanned for viruses with a commercial virus scanning program and is free of viruses.

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No. 10-60515, Container Corporation v. CIR
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BR5