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Counsel for Parties.

The burden of proof is upon them to show that they have the right. Immigration Act of 1924, § 23, 43 Stat. 165; Code, Title 8, § 221. By § 13, and the regulations under it, as remarked by the court below, a returning alien can not enter unless he has either an immigration visa or a return permit. The relators must show not only that they ought to be admitted but that the United States, by the only voice authorized to express its will, has said so. Obviously it has not done so, and therefore the judgment must be affirmed.

Judgment affirmed.

LEWIS ET AL., TRUSTEES, v. REYNOLDS, COLLECTOR OF INTERNAL REVENUE.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 115. Argued December 8, 9, 1931.—Decided January 4, 1932.

In acting upon a claim for refund based upon the disallowance of a particular deduction, the Commissioner of Internal Revenue has authority to reaudit the return and to reject the claim on the basis of the disallowance of another deduction even though the statute of limitations prevents him from making an additional assessment for the year involved. P. 283.

48 F. (2d) 515, affirmed.

CERTIORARI, *post* p. 600, to review a decision affirming a judgment in favor of the Collector in an action for a refund of income taxes.

Mr. N. E. Corthell for petitioners.

Assistant Attorney General Youngquist, with whom *Solicitor General Thacher*, *Messrs. Whitney North Seymour* and *Sewall Key*, and *Miss Helen R. Carloss* were on the brief, for respondent.

MR. JUSTICE McREYNOLDS delivered the opinion of the Court.

Petitioners sued the respondent Collector in the United States District Court for Wyoming, September 20, 1929, to recover \$7,297.16 alleged to have been wrongfully exacted as income tax upon the estate of Cooper.

February 18, 1921, the administrator filed a return for the period January 1 to December 12, 1920, the day of final settlement. Among others, he reported deductions for attorney's fees, \$20,750, and inheritance taxes paid to the State, \$16,870. The amount of tax as indicated by the return was paid.

November 24, 1925, the Commissioner, having audited the return, disallowed all deductions except the one for attorney's fees and assessed a deficiency of \$7,297.16. This sum was paid March 21, 1926; and on July 27, 1926, petitioners asked that it be refunded.

A letter from the Commissioner to petitioners, dated May 18, 1929, and introduced in evidence by them, stated that the deduction of \$20,750 for attorney's fees had been improperly allowed. He also set out a revised computation wherein he deducted the state inheritance taxes. This showed liability greater than the total sums theretofore exacted. The Commissioner further said: "Since the correct computation results in an additional tax as indicated above which is barred from assessment by the statute of limitations your claim will be rejected on the next schedule to be approved by the commissioner."

The trial court upheld the Commissioner's action and its judgment was affirmed by the Circuit Court of Appeals.

Counsel for petitioners relies upon the five year statute of limitations (Rev. Act. 1926, § 277).¹ He maintains

¹"Sec. 277. (a) Except as provided in § 278 [not here important]—. . . (3) The amount of income, excess-profits, and war-

that the Commissioner lacked authority to redetermine and reassess the tax after the statute had run.²

After referring to § 284, Revenue Act of 1926, 44 Stat. 66, and § 322, Revenue Act of 1928, 45 Stat. 861, the Circuit Court of Appeals said [48 F. (2d) 515, 516]—

“The above quoted provisions clearly limit refunds to overpayments. It follows that the ultimate question presented for decision, upon a claim for refund, is whether the taxpayer has overpaid his tax. This involves a re-determination of the entire tax liability. While no new assessment can be made, after the bar of the statute has fallen, the taxpayer, nevertheless, is not entitled to a refund unless he has overpaid his tax. The action to recover on a claim for refund is in the nature of an action for money had and received, and it is incumbent upon the claimant to show that the United States has money which belongs to him.”

We agree with the conclusion reached by the courts below.

While the statutes authorizing refunds do not specifically empower the Commissioner to reaudit a return whenever repayment is claimed, authority therefor is necessarily implied. An overpayment must appear before refund is authorized. Although the statute of limitations may have barred the assessment and collection of any additional sum, it does not obliterate the right of the United States to retain payments already received when they do not exceed the amount which might have been properly assessed and demanded.

profits taxes imposed by . . . the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.”

² The opinion is printed here as amended by an order of February 15, 1932, to be published in the last part of this volume.

Bonwit Teller & Co. v. United States, 283 U. S. 258, says nothing in conflict with the view which we now approve.

Affirmed.

DENVER & RIO GRANDE WESTERN RAILROAD
CO. ET AL. *v.* TERTE, JUDGE.

CERTIORARI TO THE SUPREME COURT OF MISSOURI.

No. 130. Argued November 24, 1931.—Decided January 4, 1932.

1. A court of a State where a foreign railroad corporation is authorized to do business, owns and operates part of its lines, maintains an office, and has agents for the transaction of its general business, has jurisdiction of a suit against the company in damages for personal injuries under the Federal Employers' Liability Act, brought by a resident upon a cause of action which arose in another State when he was residing there. P. 287.
2. Jurisdiction in such case is not defeated by the fact that a second railroad company, over which the court is without jurisdiction, is named codefendant. *Id.*
3. A foreign railroad corporation which is not authorized to do business within the State, and does not own or operate any of its lines within the State, although it owns some property there and employs agents who solicit traffic, *held* not subject to the jurisdiction of a court of that State in a suit in damages for personal injuries under the Federal Employers' Liability Act, brought by a resident upon a cause of action which arose in another State when he was residing there, as otherwise an undue burden upon interstate commerce would result. *Id.*
4. The prohibition against burdening interstate commerce can not be evaded merely by attaching the property of the foreign railroad corporation within the State, nor may it be avoided by joining as codefendant in the suit a second railroad company over which the court has jurisdiction. The burden and expense which the carrier must incur in order to make defense in a State where the accident did not occur has no relation to the nature of the process used to bring it before the court. *Id.*
5. The fact that witnesses for the plaintiff reside within the State, thus enabling him to try his cause there with less inconvenience