

ARIZONA STATE UNIVERSITY  
CORPORATE AND BUSINESS LAW JOURNAL  
FORUM

---

---

VOLUME 1

MARCH 2020

NUMBER 16

---

---

**COMMENTARY**

*PETITIONER AND RESPONDENT REACH AN AGREEMENT IN  
SCOTUS TAX REFUND CASE*

HONG DENG\*

The Internal Revenue Service (IRS) allows an affiliated group of corporations to file a consolidated federal return instead of separate returns.<sup>1</sup> In doing so, the IRS will pay the group's designated agent a single refund that discharges the government's liability to all group members.<sup>2</sup> However, federal law says little on how to distribute the money among the group members.<sup>3</sup> The circuit courts generally agree that the group members are free to enter into a tax allocation agreement.<sup>4</sup> A tax allocation agreement specifies what share of a group's tax liability each member will pay, along with the share of any tax refund each member will receive.<sup>5</sup>

When there is no tax allocation agreement or the agreement is ambiguous, the circuits diverge on how they allocate tax refunds among group members. Some federal courts created their own federal common law rule—the *Bob Richards* rule, named after a Ninth Circuit case.<sup>6</sup> The *Bob Richards* rule provides that, in the absence of a tax allocation agreement, a tax refund belongs to the group member responsible for the losses that led to it.<sup>7</sup> In contrast, the Sixth Circuit rejected the *Bob Richards* rule because it is an announcement of federal common law, which is disfavored by many jurists.<sup>8</sup> The Sixth Circuit found that federal common law should be indulged only when

---

\* J.D. Candidate, 2021, Arizona State University Sandra Day O'Connor College of Law.

<sup>1</sup> See 26 U.S.C. §1501.

<sup>2</sup> See 26 C.F.R. § 1.1502-77(d)(5).

<sup>3</sup> *Rodriguez v. FDIC*, No. 18-1269, 2020 U.S. LEXIS 1364, at\*4-5 (Feb. 25, 2020).

<sup>4</sup> See, e.g., *In re Prudential Lines, Inc.*, 928 F.2d 565, 570 (2d Cir. 1991); *Cantor v. FDIC (In re Downey Fin. Corp.)*, 593 F. App'x 123, 126 (3d Cir. 2015).

<sup>5</sup> *Rodriguez*, 2020 U.S. LEXIS 1364, at\*5.

<sup>6</sup> *In re Bob Richards Chrysler-Plymouth Corp.*, 473 F.2d 262, 265 (9th Cir. 1973).

<sup>7</sup> *Id.*

<sup>8</sup> *FDIC v. AmFin Fin. Corp.*, 757 F.3d 530, 535 (6th Cir. 2014).

there is a significant conflict between some federal interest and the state law.<sup>9</sup> The Eleventh Circuit also rejected the *Bob Richards* rule, holding that federal law does not govern the allocation of the consolidated tax refunds.<sup>10</sup>

In *Rodriguez v. FDIC*, the Tenth Circuit employed a more expansive version of the *Bob Richards* rule, which asked whether the tax allocation agreement, taking into account state law, deviated from the *Bob Richards* rule.<sup>11</sup> In *Rodriguez v. FDIC*, Federal Deposits Insurance Corporation (FDIC) took over United Western Bank after the bank hit hard times.<sup>12</sup> United Western Bancorp, the bank's parent, was forced into bankruptcy before the IRS issued the tax refund.<sup>13</sup> The petitioner, Simon Rodriguez, trustee for United Western Bancorp, and the respondent, FDIC, both sought claim to the tax refund.<sup>14</sup> The Tenth Circuit held that the tax allocation agreement was ambiguous, and the agreement itself provided a method for resolving the ambiguity.<sup>15</sup> It issued the tax refund to the FDIC and held that this allocation did not deviate from the *Bob Richards* rule.<sup>16</sup> The Supreme Court resolved this circuit split, holding that the federal government has no unique interests to protect in regulating how to distribute tax refunds among the group members.<sup>17</sup> "The *Bob Richards* rule is not a legitimate exercise of federal common lawmaking."<sup>18</sup>

At the oral argument, the *Bob Richards* rule had no advocates—not even the respondent, who wanted it affirmed theoretically. Respondent's counsel said, "I do not think that [the *Bob Richards* rule] is correct as a rule of federal common law."<sup>19</sup> He also conceded that courts should not apply a federal common law rule to "put a thumb on the scale where the parties have a contract."<sup>20</sup> Justice Kagan noted that if she had known that the respondent did not intend to defend the *Bob Richards* rule, the Court would probably have appointed an amicus.<sup>21</sup>

This issue is significant because of the large number of consolidated returns. For the 2013 tax year, 35,185 corporate consolidated returns were filed.<sup>22</sup> The circuit split also hinders proper tax planning because the members of consolidated corporate groups can be located in different states, where the rules governing the ownership of tax refunds may vary by circuit.<sup>23</sup> The Supreme Court successfully eliminated this uncertainty caused by the *Bob Richards* rule and the federal common law will no longer govern the distribution of tax refunds among group members.

The takeaway of *Rodriguez v. FDIC* is that groups of corporations filing consolidated federal returns need unambiguous tax allocation agreements to clarify how to distribute tax

---

<sup>9</sup> *Id.*

<sup>10</sup> See *Zucker v. FDIC (In re BankUnited Fin. Corp.)*, 727 F.3d 1100, 1102–03 (11th Cir. 2013).

<sup>11</sup> *Rodriguez*, 2020 U.S. LEXIS 1364, at \*6.

<sup>12</sup> *Id.* at \*3.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *In re United Western Bancorp, Inc.*, 914 F.3d 1262, 1274.

<sup>16</sup> *Id.*

<sup>17</sup> *Rodriguez*, 2020 U.S. LEXIS 1364, at\*7–8.

<sup>18</sup> *Id.* at \*2.

<sup>19</sup> Transcript of Oral Argument at 33, *Rodriguez v. FDIC*, No. 18-1269, 2020 U.S. LEXIS 1364 (Feb. 25, 2020).

<sup>20</sup> *Id.* at 40.

<sup>21</sup> *Id.* at 61.

<sup>22</sup> IRS, *2013 Corporation Income Tax Returns Complete Report* 156, <https://www.irs.gov/pub/irs-soi/13coccr.pdf> [<https://perma.cc/2LYU-X2T9>].

<sup>23</sup> Amicus Brief, *Rodriguez v. FDIC*, No. 18-1269, 2020 U.S. LEXIS 1364 (Feb. 25, 2020).

refunds. The ambiguous tax allocation agreement caused for an amusing hearing in the Supreme Court<sup>24</sup> and the initial bankruptcy case filed in 2016 is still pending.<sup>25</sup>

---

<sup>24</sup> Laughter was recorded after respondent's counsel conceded that the *Bob Richards* rule is incorrect. Transcript of Oral Argument, *supra* note 19, at 34.

<sup>25</sup> *United W. Bancorp, Inc. v. FDIC (In re United W. Bancorp, Inc.)*, 558 B.R. 409 (Bankr. D. Colo. 2016).