



NEW YORK CITY LAW DEPARTMENT
OFFICE OF THE CORPORATION COUNSEL

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Press Release

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**U.S. SUPREME COURT RULES 9-0
IN NEW YORK CITY'S FAVOR IN TAX MATTER;
WIN IS FIRST UNANIMOUS RULING FOR THE CITY
AT THE NATION'S HIGHEST COURT IN MORE THAN 20 YEARS**

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New York, June 8, 2009 – The U.S. Supreme Court today ruled 9-0 for the City today in a tax case, making the win the first unanimous ruling for the City in more than 20 years at the nation's highest court. Executive Assistant Corporation Counsel Paul Rephen of the New York City Law Department argued the case, with assistance on the legal brief by Senior Counsel Andrew Lipkin of the Tax & Bankruptcy Litigation Division.

The matter concerned an action brought by an individual against the City under the federal False Claims Act (FCA). The plaintiff, Irwin Eisenstein, along with other New York City employees, had asserted that the City Charter provision which requires City employees who reside outside the City to pay a residency waiver fee equal to the amount of city income tax that they would have paid if they lived in the City somehow deprived the federal government of tax revenue.

Under the FCA, cases are brought in the name of the United States government, and the government has the right to enter the case and assume responsibility for its prosecution. In this instance, the government declined to get involved. (If the government declines to get involved initially, it may do so later only upon a showing of good cause.)

Eisenstein represented himself – called a *pro se* plaintiff -- in the lower or district court. However, the court dismissed the action for failure to state a claim.

Fifty-four days later, Eisenstein appealed that decision to the midlevel appellate court, the U.S. Court of Appeals for the Second Circuit. The exact filing date is important, because Eisenstein argued that he and the other plaintiffs should be able to file beyond the normal 30-day deadline, since they were acting -- in their opinion -- as private attorneys general on behalf of the government. If the United States was a party, then all parties would be entitled to up to 60 days to take an appeal.

However, the midlevel appellate court – the Second Circuit -- ruled against Eisenstein and held that since the government had declined to participate in the case initially, it was not a party and the 30-day period applied. The Second Circuit dismissed Eisenstein's appeal.

A number of other federal circuit appeals courts had held in similar cases that the 60-day period should apply, reasoning that the United States government in an FCA case is the real party in interest. One of those decision was issued while this case was pending before the Court. So opposing legal decisions existed.

To resolve this conflict among the lower federal courts, the U.S. Supreme Court agreed to hear the case, and it was argued in April. Today, the Supreme Court unanimously affirmed the Second Circuit ruling.

“So the 60-day period applies in a FCA cases where the government declines to get involved,” explained Paul Rephen. “The Court held the government was not a party to a FCA case where it initially declines to participate and may become a party later only if it attempts to intervene in accordance with the provisions of the false claims act. Therefore, this ends Mr. Eisenstein’s case.

“I am pleased that a unanimous Supreme Court agreed with our position. The issue had divided six lower federal courts, and this decision finally resolves the question once and for all,” added Rephen.

Andrew Lipkin, who worked with Paul Rephen in crafting the City’s legal papers, noted: “I am delighted that the Court agreed with the City’s position in this case and, in doing so, adopted every argument we made in our Brief. We were honored for the chance to have our case heard before the nation’s highest legal authority.”

Today’s decision was of particular interest, since it’s the first one in more than 20 years – either a win or a loss – where the City had a unanimous ruling. “This is truly a unique occurrence, and I’m glad that Paul and Andrew proved to be such a successful team,” noted Corporation Counsel Michael A. Cardozo (who himself had a win in the U.S. Supreme Court a few years ago in an unrelated tax matter).

The New York City Law Department is one of the oldest, largest and most dynamic law offices in the world, ranking among the top three largest law offices in New York City and one of the largest public law offices in the country. Tracing its roots back to the 1600’s, the Department has an active caseload of 90,000 matters and transactions in 17 legal divisions. The Corporation Counsel heads the Law Department and acts as legal counsel for the Mayor, elected officials, the City and all its agencies. The Department’s 690 attorneys represent the City on a vast array of civil litigation, legislative and legal issues and in the criminal prosecution of juveniles. For more information, please visit nyc.gov/law.

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