December 14, 2015

Why Citigroup's Motion to Dismiss Is Wrong

We must submit our reply memo to Citigroup by February 5, 2016. Comments welcomed.

Citigroup's motion to dismiss is based on two arguments: previous disclosure of the alleged underpayment in government reports and the news media, and IRS permission not to pay New York taxes via Treasury "Notices" that interpret Section 382 to exclude government ownership of shares. It is significant that the motion includes no defense whatsoever of Treasury's interpetation of Section 382. Citigroup relies entirely on the argument that if Treasury says it's the law, it's the law and does not try to rebut our arguments about Section 382's meaning.

Previous disclosure is important because the False Claims Act says the court "shall" dismiss an action "if substantially the same allegations or transactions as alleged in the action were publicly disclosed" in any of three places, including

> "(ii) in a federal, New York state, or New York local government report, audit, or investigation that is made on the public record or disseminated broadly to the general public . . .;
>
> (iii) in the news media . . . ." (N.Y. Fin. Law § 190(9)(b))

Citigroup's brief says that in 2009 both federal investigations and the news media criticized the Treasury Notices and Citigroup for underpaying federal taxes. That is not the subject of the Plaintiff's action, however. The subject is Citigroup's underpayment of New York taxes. The state underpayment was not mentioned or discussed in any forum whatsoever. Rasmusen derives his factual knowledge of it from Citigroup's annual reports. Citigroup is not a government agency or a news organization.

IRS permission is important because if it has the force of law, Citigroup has not violated the law. The issue is whether Citigroup had at least a 50% ownership change. Notice 2009-14 says that it is "guidance", that "Taxpayers may rely on the rules described in this Section," and, most importantly:

> "For purposes of section 382, **with respect to any stock** (other than preferred stock) **acquired by Treasury** pursuant to the Programs (either directly or upon the exercise of a warrant), **the ownership represented by such stock** on any date on which it is held by Treasury **shall not be considered to have caused Treasury's ownership in the issuing corporation to have increased** over its lowest percentage owned on any earlier date."

If, however, the IRS says that "white" means "black", that assertion does not have the force of law and taxpayers may not rely on it, even if the IRS says they can. If the IRS says that "stock acquired by Treasury shall not be considered to have caused Treasury's ownership in the issuing corporation to have increased," that does not have the force of law, and taxpayers may not rely on it.

Even a Treasury legal claim that did not directly contradict a statute would lack authority in court if Treasury issued it as a Notice rather than going through the APA's notice-and-comment procedures, if Treasury merely asserted it rather than providing explanation, if Treasury had a financial conflict of interest, or if the interpretation undermined the statute's purpose. In the present action, an additional obstacle is that U.S. Treasury assertions are not controlling authority for New York State law. New York law incorporates federal statutes, but it is administered by state agencies, agencies to which the state gives less deference than federal law gives federal agencies.