

News

# Foster Garvey Files Cert Petition to Determine Whether State Private Creditor Law Controls Whether the IRS Can Collapse Transactions to Impose Transferee Liability

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On January 30, 2020, Foster Garvey filed a petition for writ of certiorari with the U.S. Supreme Court asking it to review a decision by the U.S. Court of Appeals for the Ninth Circuit, upholding a U.S. Tax Court decision collapsing the petitioners' transactions and finding them liable as transferees for unpaid taxes.

The petition asks the Supreme Court to determine, in the context of the IRS seeking to hold a transferee of property liable for the transferor's federal taxes, "[w]hether, when the true form of the transaction is at issue, state law would permit a private creditor to collapse or recharacterize the transaction in analogous circumstances, or where the court can instead look to federal law, state tax law, and / or the law of other states."

In this case, the petitioners, owners of a heavy construction company, were awarded over \$40 million in contract damages and interest in a litigation dispute with the Bureau of Reclamation. This award was expected to result in significant taxable income. A private banking firm approached the petitioners about purchasing the construction company's stock, in order to use cash to buy credit card debt, operate a debt recovery business and offset the petitioners' company's income with losses. The purchaser After consulting with their accountants and legal counsel, the petitioners were told that the proposed transaction was permissible. They decided to pursue the proposal, and the deal proceeded in three transactions.

During the petitioners' ownership of the company they made estimated tax payments and had enough cash to pay its tax liabilities. The banking firm represented that it would continue to operate the company and that it would pay the company's taxes. Despite these assurances, the banking firm never paid the company's tax bill.

Nearly a decade later, the petitioners received a notice from the IRS asserting that they were liable for their former company's unpaid taxes, plus interest and penalties. The Tax Court agreed, only reaching that conclusion by collapsing the transactions and treating them as if the construction company had sold its assets and then made liquidating distributions to the shareholders. Since Oregon law did not address such collapsing, the Tax Court turned to decisions it had previously made and federal cases addressing out-of-

state law. The Ninth Circuit affirmed.

Foster Garvey is proud to act as co-counsel with Robert Chicoine Law and Latham & Watkins LLP, in representing petitioners before the Supreme Court. Read the [petition for writ of certiorari](#).

## Featured People

[Devra R. Cohen](#)

[Principal|Seattle](#)

[206.447.5143](tel:206.447.5143) [devra.cohen@foster.com](mailto:devra.cohen@foster.com)

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