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Federal Taxation

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Unlike in prior years, in 1996 the Eleventh Circuit Court of Appeals considered nearly as many cases involving substantive tax law as procedural tax law. The procedural matters involved waivers of the statute of limitations for assessment and collection, tax liens and levies, the disclosure of "return information," and certain procedural requirements for a special use valuation election. Substantive tax issues decided included trusts as tax-exempt purchasers of insurance, perjury and tax evasion, split elections for net operating losses, and eligibility for QTIP treatment.

I. PROCEDURAL ISSUES

A. *Waivers of the Statute of Limitations for Assessment and Collection*

The Eleventh Circuit decided two cases involving waivers of the statute of limitations in 1996. The first involved the revocation by mail of a waiver of the statute of limitations for assessment. The second involved a change in the law that extended the statute of limitations for collection beyond the date set forth in a waiver.

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In *Coggin v. Commissioner*,[1] the taxpayer mailed two Form 872-Ts (Notice of Termination of Special Consent to Extend the Time to Assess Tax)[2] to the Internal Revenue Service ("IRS") in an attempt to revoke his prior consent to indefinitely extend the time to assess tax on his 1980, 1981, and 1982 federal income tax returns that he made by filing Form 872-A (Special Consent to Extend the Time to Assess Tax).[3] Taxpayer mailed the completed Form 872-Ts to the correct IRS office but failed to address them to the attention of the proper division within that office.[4] Ten months later, the IRS issued a notice of deficiency for the same taxable years.[5] The taxpayer argued that the notice of deficiency was time-barred due to the earlier filed Form 872-Ts.[6]

In affirming the Tax Court, the Eleventh Circuit held that a taxpayer must sign and mail a Form 872-T in strict compliance with the instructions contained on the form in order to terminate a Form 872-A Special Consent to Extend the Time to Assess Tax.[7] The court determined that the improperly addressed revocation of waiver was not an effective "filing" until the proper division discovered the document.[8]

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1. 71 F.3d 855 (11th Cir. 1996).
2. Form 872-T (Rev. July 1980) allows a taxpayer who previously consented to an extension of the assessment period to revoke such consent. The Form 872-T instructions state in relevant part:

> If the tax return(s) to which this notice applies is under consideration by the Examination Division, mail this notice to the District Director of Internal Revenue having jurisdiction over the return(s), Attention: Chief Examination Division.
>
> . . . .
>
> If the tax return(s) to which . . . this notice applies is under consideration by Appeals, mail this notice to the Chief, Appeals Office, having jurisdiction over the return(s).

Form 872-T (Rev. July 1980).

3. Form 872-A (Rev. Oct. 1987) allows the taxpayer and the District Director of Internal Revenue, or the Regional Director of Appeals, to consent and agree to extend the time to assess tax to anytime on or before the ninetieth day after the IRS receives a properly filed Form 872-T from the taxpayer.
4. 71 F.3d at 859.
5. *Id.* at 858.
6. *Id.* The period for assessment of any tax is limited to three years after the return is filed. 26 U.S.C. § 6501(a) (1994). However, the Commissioner and the taxpayer may extend this limitations period by entering into a written agreement prior to the original period's expiration. *Id.* § 6501(c)(4). A properly filed Form 872-T, however, would limit the extension to ninety days after its receipt by the proper division of the IRS. *See supra* note 3.
7. 71 F.3d at 862-63, *aff'g* Coggin v. Commissioner, 65 T.C.M. (CCH) 2623, 2635 (1993). *See* Rev. Proc. 79-22, 1979-1 C.B. 563 (emphasizing that a taxpayer must properly address Form 872-T in order to terminate a Form 872-A extension).
8. 71 F.3d at 864.

Consequently, the Commissioner's issuance of a notice of deficiency within ninety days from the date of discovery was timely.[9]

In *Behren v. United States*,[10] the Eleventh Circuit addressed the issue of whether a waiver to extend the time to collect tax binds the IRS to the date specified in the waiver despite a congressional amendment extending the statutory collection period past the collection deadline contained in the waiver. In 1984, the IRS made a timely assessment of deficiency for the taxpayer's 1974 federal income taxes.[11] In April 1990, the taxpayers and the IRS, pursuant to section 6502(a)(2),[12] extended the period for collection of the assessment from November 1990 to June 1991 by signing a Form 900 (Tax Collection Waiver).[13] In November 1990, Congress amended section 6502[14] and substituted a ten-year limitations period in place of the previous six-year limitations period for the collection of previously assessed taxes.[15] The IRS sought collection of the deficiency in March 1994, after the June 1991 extension date contained in the waiver but before November 1994, the amended statutory collection deadline.[16]

The taxpayers argued against application of the new ten-year limitations period on the grounds that the June 30, 1991 date set by the waiver was binding on the IRS.[17] Citing *Florsheim Bros. Drygoods Co. v. United States*,[18] a Supreme Court decision rejecting this argument in a similar context, the Eleventh Circuit noted that waivers have no effect on Congress' power to amend the statute of limitations.[19]

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9. *Id.* at 861.
10. 82 F.3d 1017 (11th Cir. 1996).
11. *Id.* at 1018.
12. *See infra* text accompanying note 14.
13. 82 F.3d at 1018. Form 900 (Rev. Sept. 1992) allows the taxpayer and the District Director of Internal Revenue to agree that the specified amount of outstanding tax, interest, penalties, etc., may be collected from the taxpayer by levy or court proceeding on or before the date to which the statutory period for collection has been extended.
14. The "Collection after Assessment" statute currently states that if an assessment of tax has been made within the proper period of limitation, the tax may be collected by levy or by a court proceeding, but only if the levy is made or the proceeding begun within ten years after the assessment of the tax, or prior to the expiration of the collections period agreed upon in writing by the Secretary and the taxpayer before the ten-year period expires. 26 U.S.C. § 6502 (1994).
15. 82 F.3d at 1018 (citing Pub. L. No. 101-508, § 11317(c), 104 Stat. 1388, 1388-458 (1990)).
16. *Id.* at 1019.
17. *Id.*
18. 280 U.S. 453 (1930).
19. 82 F.3d at 1019 (citing *Florsheim Bros. Drygoods Co.*, 280 U.S. at 466 (waivers are voluntary, unilateral waivers of a defense by a taxpayer which do not rise to the level of binding contracts)). *See also* Foutz v. United States, 72 F.3d 802, 805-06 (10th Cir. 1995)

Consequently, a waiver does not bar the IRS from making collections after the period specified in the waiver where a subsequent statutory amendment extends the collection period.[20]

B. Tax Liens

In *Bilzerian v. United States*,[21] the court examined, (i) whether the IRS can rely on an original assessment to collect taxes paid pursuant to that assessment but later erroneously refunded back to the taxpayer, and (ii) whether the mere filing of a suit by the IRS to collect an erroneous refund is sufficient to validate a federal tax lien. In October 1989, the IRS sent taxpayers a notice of deficiency for taxes, interest, and penalties relating to their 1985 joint tax return.[22] The taxpayers paid the alleged deficiency, filed an amended return claiming a refund, and actually received the refund in the following year.[23] Later, however, the IRS contended that the refund was due to computer error and sought recovery of the erroneous refund by filing a claim under section 7405.[24] Before judgment was rendered in the erroneous refund suit, the IRS filed a federal tax lien against property owned by one of the taxpayers.[25] The taxpayer requested the lien be released under section 6325 on the theory that the underlying tax liability was satisfied when that liability was originally paid.[26] After the IRS refused the request, the taxpayer filed a two-count complaint, one for damages for failure to release the lien under section 7432,[27] and the second seeking

(holding that a Form 900 Tax Collection Waiver is a waiver, not a contract, and applying the new ten-year statute of limitations after expiration of waiver period); Kaggen v. Internal Revenue Serv., 57 F.3d 163, 165 (2d Cir.) (same), *aff'd on reh'g*, 71 F.3d 1018 (2d Cir. 1995).

20. 82 F.3d at 1019.

21. 86 F.3d 1067 (11th Cir. 1996), *rev'g* 887 F. Supp. 1509 (M.D. Fla. 1995).

22. 86 F.3d at 1068.

23. *Id.*

24. *Id.* The Code section entitled "Action for Recovery of Erroneous Refunds," states that any portion of tax imposed which has been erroneously refunded may be recovered by civil action brought in the name of the United States. 26 U.S.C. § 7405 (1994).

25. 86 F.3d at 1068.

26. *Id.* The Code section entitled "Release of Lien or Discharge of Property," states that the Secretary must issue a certificate of release of any lien imposed with respect to any internal revenue tax not later than thirty days after the day on which the liability is satisfied or becomes unenforceable or a bond is accepted. 26 U.S.C. § 6325 (1994).

27. The statute dealing with "Civil Damages for Failure to Release Lien" provides that if any officer or employee of the IRS knowingly, or by reason of negligence, fails to release a lien under section 6325, *see supra* note 26, on property of the taxpayer, such taxpayer may bring a civil action for damages against the United States in a district court of the United States. 26 U.S.C. § 7432 (1994).

preliminary and permanent injunctions ordering the IRS to release the lien.[28]

The Eleventh Circuit agreed with the district court's finding that the original tax liability was extinguished when the 1985 deficiency was originally paid.[29] Therefore, the IRS could not rely on the original assessment to collect the erroneous refund.[30] However, the Eleventh Circuit reversed the district court's finding that the mere filing of an erroneous refund suit by the IRS is sufficient to validate a federal tax lien.[31] Rather, the proper procedure for the IRS to collect an erroneous refund is either to prevail on an erroneous refund suit under section 7405, or to make a new assessment, including the mailing of a new notice of deficiency.[32]

As to taxpayer's claim for damages, the IRS contended that, based on the lack of controlling law in the Eleventh Circuit, it honestly and reasonably did not believe taxpayer's liability had been satisfied within the meaning of section 7432.[33] The court remanded the case with instructions for the taxpayer to demonstrate that the IRS employee knew, or should have known, that the requirements of section 6325 had been satisfied.[34]

C. *Tax Levies*

In *United States v. Ruff*,[35] the court held a bankruptcy trustee personally liable to the IRS for a commission paid to a broker after receipt by the trustee of a Notice of Levy relating to any property of, or amounts owed to, the broker. In that case, the broker arranged for sale of certain of the bankruptcy estate's property. Upon consummation of the sale, the broker sought his commission by filing a fee application with the bankruptcy court.[36] In July 1989, before the bankruptcy court ruled on the broker's fee application, the IRS served on the trustee a Notice of Levy seeking "[a]ll property, rights to property, money, credits, and bank deposits now in your possession and belonging to [the broker] (or for which you are obligated), and all money or obligations you owe [to

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28. 86 F.3d at 1068.
29. *Id.*
30. *Id.* at 1069.
31. *Id.*, *rev'g* 887 F. Supp. 1509, 1515 (M.D. Fla. 1995). *See also* Rodriguez v. United States, 629 F. Supp. 333, 346 (N.D. Ill. 1986) (holding that section 7405 does not authorize pre-suit levy procedure).
32. 86 F.3d at 1068.
33. *Id.* at 1070. *See supra* notes 26 and 27.
34. 86 F.3d at 1070.
35. 99 F.3d 1559 (11th Cir. 1996).
36. *Id.* at 1562.

the broker]."[37] Because the bankruptcy court had not yet ruled on the broker's fee application, the trustee responded to the levy by stating that she held no funds due the broker and that she did not know when the estate would next owe the broker any money.[38] Two weeks later, the bankruptcy court approved the fee application, and the trustee executed a check payable to the broker.[39]

The IRS contended that the bankruptcy estate's obligation to the broker at the time of the levy was property within the meaning of section 6332(a)[40] and that the trustee was personally liable for failure to pay over the commission under section 6332(d)(1).[41] The trustee claimed that when she received the notice of levy, she was not in possession of property, or rights to property, subject to levy within the meaning of section 6332(a),[42] because the bankruptcy court's approval of the fee application was a condition precedent to the payment of the commission.[43]

The court held that under Florida law, the broker had rights to the commission as soon as the purchaser executed a binding contract to purchase the property, and that under federal law, the commission was a fixed and determinable obligation[44] properly subject to levy because the broker's underlying performance was complete and the commission was capable of precise measurement.[45] Accordingly, the court held the

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37. *Id.*

38. *Id.* At the time of the levy, the trustee knew that the bankruptcy court had scheduled a hearing on the broker's fee application for August 3, 1989. *Id.*

39. *Id.*

40. *Id.* "[A]ny person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary, surrender such property or rights . . . to the Secretary." 26 U.S.C. § 6332(a) (1994).

41. A person who fails to surrender property subject to levy is personally liable for the value of the property not surrendered. 26 U.S.C. § 6332(d)(1) (1994).

42. A third party may raise only two defenses for its failure to surrender levied property to the government. First, the party can show it was not in possession of any delinquent taxpayer's property within the meaning of section 6332(a). Second, the party can show that when the notice of levy was received, the property in question was already subject to a prior attachment. United States v. National Bank of Commerce, 472 U.S. 713, 722 (1985).

43. 99 F.3d at 1563. The broker's commission was not only dependent upon the sale of the property to his prospective buyer but also upon the subsequent application to, and approval by, the bankruptcy court. *Id.*

44. "[A] levy extends only to property possessed and obligations which exist at the time of the levy. Obligations exist when the liability of the obligor is fixed and determinable although the right to receive payment thereof may be deferred until a later date." 26 C.F.R. § 301.6331-1(a)(1) (1996). The broker was entitled to a commission equal to one-third of ten percent of the sales price. 99 F.3d at 1562.

45. 99 F.3d at 1563-67.

trustee personally liable for the value of the commission she failed to pay over to the IRS.[46]

D. Disclosure of Return Information

In *Ryan v. United States*,[47] the Eleventh Circuit addressed whether certain financial information gathered from statements of witnesses in a taxpayer's criminal trial was "return information" within the meaning of section 6103(b)(2).[48] Taxpayer, a criminal defense lawyer who was indicted and convicted on drug charges and conspiracy to defraud the IRS in the ascertainment of taxes of other persons, asserted that the criminal prosecutor illegally released return information by disclosing a prosecution memorandum to a reporter.[49] Taxpayer argued that the disclosure of the memorandum constituted an illegal release of return information because an IRS agent assisted in the prosecution, and the memorandum included information contained in the taxpayer's return.[50]

The court rejected taxpayer's argument. Recognizing that the purpose of the statute was to control loose disclosure practices by the IRS, the court held that the information contained in the memorandum did not fall within the statutory definition of return information because it was the work product of the prosecutor and not acquired from the IRS.[51]

E. Procedural Requirements for a Special Use Valuation Election

In *Lucas v. United States (In re Estate of Lucas)*,[52] the Eleventh Circuit determined that an estate is not entitled to special use valuation[53] where the estate neglected to attach a recapture agreement[54] to

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46. *Id.* at 1567.
47. 74 F.3d 1161 (11th Cir. 1996).
48. *Id.* at 1161-62. Return information includes:

> [A] taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense.

26 U.S.C. § 6103(b)(2)(A) (1994).
49. 74 F.3d at 1162.
50. *Id.* at 1163.
51. *Id.*
52. 97 F.3d 1401 (11th Cir. 1996).
53. Special use valuation allows qualified real property to be valued for purposes of calculating federal estate tax according to its actual use rather than its highest and best

its initial estate tax return.[55] Generally, when a person dies the highest and best use fair market value for his property is included on his estate tax return.[56] The special use valuation allows the estate to value the decedent's property according to the property's actual use, rather than its highest and best use.[57] To be eligible to make the special use valuation election, the estate must file with the estate tax return a recapture agreement which generally restricts the heirs' use and disposition of the property.[58]

The estate argued that, although it failed to attach the recapture agreement, it had substantially complied with the requirements for making a special use valuation election and, therefore, was entitled to relief under section 2032A(d)(3).[59] That provision states that an executor of an estate who makes an election under this section will have a reasonable period of time (not exceeding ninety days) to cure any failure to provide required information after being notified of such failure, but only if the executor initially had substantially complied with the special use valuation requirements.[60] Distinguishing the failure to file a recapture agreement altogether with the filing of a recapture agreement that merely lacked certain required information or signatures, the court held that there can be no substantial compliance when a recapture agreement is not attached to the original return.[61]

II. SUBSTANTIVE ISSUES

In 1996, the Eleventh Circuit Court of Appeals decided four cases involving substantive tax law. The income tax cases involved: (i) trusts as tax-exempt purchasers of insurance, (ii) perjury and tax evasion, and (iii) net operating loss elections. The estate tax case involved the qualification of a QTIP trust.

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use fair market value. 26 U.S.C. § 2032A (1994).

54. The recapture agreement is the contract which binds the heirs under state law to be personally liable to the government for a recapture tax in the event of a premature disposition of the property, or an early cessation of the qualified use of the property. 97 F.3d at 1404 (citing 26 U.S.C. § 2032A (1994) and 26 C.F.R. § 20.2032A-8(c) (1996)).

55. *Id.* at 1413.

56. *See generally* 26 U.S.C. § 2031(a) (1994).

57. 26 U.S.C. § 2032A(d)(3) (1994).

58. 97 F.3d at 1403-1404.

59. *Id.* at 1406. *See* 26 U.S.C. § 2032A(d)(3) (1994).

60. 26 U.S.C. § 2032A(d)(3) (1994).

61. 97 F.3d at 1406. The court also denied the estate relief under the Tax Reform Act of 1986, Pub. L. No. 99-514, § 1421(a)(2), 100 Stat. 2085, 2716, by holding that the recapture agreement falls within the meaning of "information" for purposes of section 1421. 97 F.3d at 1413. *Compare* Prussner v. United States, 896 F.2d 218, 225-28 (7th Cir. 1990) (en banc) *with* Estate of Merwin v. Commissioner, 95 T.C. 168, 181 (1990).

A. *Trusts as Tax-Exempt Purchasers of Insurance*

In *Florida Hospital Trust Fund v. Commissioner*,[62] the court examined whether three trust funds organized to allow hospitals to "self-insure" reciprocally, qualified as tax-exempt "cooperative hospital service organizations" under section 501(e)(1).[63] In order to accomplish their stated objective of providing centralized, cooperative insurance services to their members, the funds were organized as follows: (i) each member hospital agreed to pool its resources reciprocally to self-insure; (ii) the funds paid claims made against the member hospitals with the income it derived from member premiums and investment of the premiums; and (iii) the funds determined and adjusted each member's premium based on the member's loss experience.[64]

Affirming the Tax Court's decision,[65] the Eleventh Circuit held that the trust funds did not qualify as a tax-exempt cooperative hospital service organization because they did not qualify as a purchaser of insurance on a group basis under section 501(e)(1)(A).[66] The court noted that "the plain meaning of the phrase 'purchasing of insurance on a group basis' denotes a commercial transaction in which a cooperative hospital service organization negotiates and executes the purchase of insurance for its membership as a group."[67] Because the funds assumed the same role typically assumed by commercial insurance companies, the court found the trust funds' transactions, including determining and adjusting member premiums, to be those of a provider of insurance and not a purchaser of insurance.[68] Finally, the court rejected the trusts' argument that applicable legislative history indicated congressional intent to broaden the scope of qualified insurance activities under section 501(e) to include the trusts' activities by effectively

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62. 71 F.3d 808, 809 (11th Cir. 1996).

63. 26 U.S.C. § 501(e)(1) (1994) is the exclusive and controlling section under which a cooperative hospital service organization can qualify to be treated as a section 501(c)(3) organization, exempt from taxation under section 501(a).

64. 71 F.3d at 810.

65. Florida Hosp. Trust Fund v. Commissioner, 103 T.C. 140 (1994), *aff'd*, 71 F.3d 808 (11th Cir. 1996).

66. 71 F.3d at 813. *See also* Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 6202(a), 102 Stat. 3342, 3730. Congress added the parenthetical phrase "(including the purchasing of insurance on a group basis)" after the word "purchasing" in the description of qualified exempt activities under 26 U.S.C. § 501(e)(1)(A) (1994).

67. 71 F.3d at 812.

68. *Id.* at 813. *See also id.* at 813 n.9 (noting the similarity of the trust's arrangement to that of a "reciprocal insurance exchange" organization).

interchanging the phrase "providing insurance" with "purchasing insurance."[69]

B. *Perjury and Tax Evasion*

In *United States v. Mueller*,[70] the Eleventh Circuit found the trial record contained evidence sufficient to sustain felony convictions for tax evasion and perjury where the taxpayer failed to report monies constructively received and failed to correct a false statement on his tax return.[71]

In *Mueller*, the shareholders of a corporation voted to liquidate the corporation.[72] Taxpayer, the majority shareholder and a director of the corporation, became trustee for the shareholders with the power to distribute liquidating dividends.[73] Evidence that the taxpayer had control over corporate bank accounts from which money was improperly removed and unaccounted for supported findings that (i) such funds were properly taxable to taxpayer,[74] and (ii) the taxpayer's willful failure to report such amounts constituted tax evasion under section 7201.[75] In addition, the taxpayer responded "no" on his individual tax return to the question of whether he had authority over a foreign bank account, despite undisputed evidence to the contrary.[76] The government established that the taxpayer failed to correct the false statement when he filed an amended return the following year.[77] Accordingly, the court held that there was sufficient evidence to find the defendant guilty of perjury.[78]

C. *Net Operating Loss Elections*

Based on the advice of their certified public accountant, the taxpayers in *Miller v. Commissioner*[79] attempted to make what is called a "split

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69. *Id.* at 813.
70. 74 F.3d 1152 (11th Cir. 1996).
71. *Id.* at 1155-56.
72. *Id.* at 1154.
73. *Id.*
74. *Id.* at 1155 (citing Rutkin v. United States, 343 U.S. 130 (1952) (gain constitutes income when the recipient has sufficient control over it to derive readily realizable value from it)).
75. Any person who willfully attempts to in any manner evade or defeat any tax imposed by Title 26 shall be guilty of a felony. *See* 26 U.S.C. § 7201 (1994).
76. 74 F.3d at 1156.
77. *Id.*
78. *Id.*
79. 99 F.3d 1042 (11th Cir. 1996).

election" with respect to their net operating losses ("NOLs").[80] In the context of NOLs, a split election is an attempt to give disparate treatment to regular and alternative minimum tax ("AMT") NOLs. Taxpayers intended their split election to permit them to relinquish the right to carry back regular NOLs, while retaining the right to carry back AMT NOLs.[81] The Commissioner issued a notice of deficiency alleging that the taxpayer's election applied to both types of NOLs and precluded them from carrying back the AMT NOLs as reported.[82] Although the law was not clear at the time the taxpayers made the split election, the taxpayers conceded that, at the time of trial, they were not permitted under the law to split their carryback period.[83] The taxpayers argued, however, that their election was invalid, and therefore, they should retain the right to carry back both the regular and AMT NOLs.[84] The Eleventh Circuit agreed, finding that because the taxpayers had used the word "loss" instead of the word "losses" on their election (thereby referring to regular NOLs, but not AMT NOLs), and because a split election is not permitted, the taxpayers had caused the election to be ambiguous and equivocal on its face, and thus invalid.[85] Accordingly, the court in *Miller* held that the taxpayers retained their right to carryback both the regular NOLs and the AMT NOLs.[86]

The court also distinguished *Miller* from *Branum v. Commissioner*,[87] where the split election precluded the taxpayer from carrying back both regular NOLs and AMT NOLs. In that case, the taxpayer's attempted split election contained the word "losses" and the phrase "all losses."

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80. *Id.* at 1043. A taxpayer may offset taxable income by carrying back net operating losses ("NOL") to each of three preceding years (beginning with the earliest year first), then to the extent the NOL has not been absorbed, carry it forward to each of the next fifteen years. 26 U.S.C. § 172(b) (1994). Section 172(b)(3) permits a taxpayer to elect to forgo the three year carryback period and only carry its net operating losses forward. *Id.* § 172(b)(3).

81. 99 F.3d at 1043-44.

82. *Id.* at 1044.

83. *Id. See* Branum v. Commissioner, 17 F.3d 805 (5th Cir. 1994) (taxpayer unable to repudiate its earlier split election found to be effective for both types of NOLs where the election was unequivocal and unambiguous); Powers v. Commissioner, 43 F.3d 172 (5th Cir. 1994) (taxpayer attempted split election was ambiguous and not effective where the election referenced the wrong section number); Plumb v. Commissioner, 97 T.C. 632, 636 (1991) (ruling that regular NOLs and AMT NOLs could not be split); Rev. Rul. 87-44, 1987-1 C.B. 3 (section 172(b)(3) election cannot be split).

84. 99 F.3d at 1044.

85. *Id.* at 1044-45.

86. *Id.* at 1045.

87. 17 F.3d 805, 806 (5th Cir. 1994).

The plural form of the word was found to be unambiguous and effective as to both types of NOLs.[88]

D. QTIP Election Provisions

In *Estate of Shelfer v. Commissioner*,[89] the Eleventh Circuit addressed the issue of whether a trust is eligible for qualified terminable interest property ("QTIP")[90] treatment when the surviving spouse does not control the trust income that accumulates between the date of the last distribution to the surviving spouse and the surviving spouse's death ("stub income").[91] Generally, the estate of the first spouse to die is entitled to a marital deduction only if the surviving spouse (i) is entitled to receive the trust income annually or in more frequent intervals, and (ii) controls all of the income generated from the trust property.[92] As a consequence of the estate of the first spouse to die taking the marital deduction, the surviving spouse's estate is required to include untaxed property that passed to the surviving spouse.[93]

Notwithstanding the fact that, in *Shelfer*, the estate of the first spouse to die claimed a marital deduction and did not include the value of the trust in its gross estate, the surviving spouse's estate refused to include the trust in its gross estate under section 2044,[94] on the theory that the trust did not qualify for QTIP treatment because the surviving spouse had no control over the stub income.[95] The court held the QTIP trust

88. 99 F.3d at 1044-45.

89. 86 F.3d 1045 (11th Cir. 1996).

90. Qualified terminable income interest property is property

> (I) which passes from the decedent,
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> (II) in which the surviving spouse has a qualifying income interest for life, and
>
> (III) to which an election under this paragraph applies . . . .
>
> The surviving spouse has a qualifying income interest for life if—
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> (I) the surviving spouse is entitled to all the income from the property, payable annually or at more frequent intervals, or has a usufruct interest for life in the property, and
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> (II) no person has a power to appoint any part of the property to any person other than the surviving spouse.

26 U.S.C. § 2056(b)(7)(B) (1994).

91. 86 F.3d at 1046. "Stub income" is defined by the court as the trust income accumulating between the date of the last distribution and the distributees' death. *Id.*

92. *Id.*

93. *Id.* at 1048. *See* Estate of Clayton v. Commissioner, 976 F.2d 1486, 1491 (5th Cir. 1992).

94. The value of the gross estate shall include the value of any QTIP property in which the decedent had a qualifying income interest for life. 26 U.S.C. § 2044(a), (b)(1)(A) (1994).

95. 86 F.3d at 1046. The surviving spouse must be entitled to all of the income from the QTIP property to make a QTIP election valid. 26 U.S.C. § 2056(b)(7)(B) (1994). *See*

requirement that the surviving spouse control "all of the income" can be met despite the fact that trust documents do not grant control over the stub income to the surviving spouse.[96] Finding the plain language of the statute ambiguous, the court reached its decision by reasoning that the two purposes for the QTIP legislation—treating the married couple as one economic unit and expanding the marital deduction to include arrangements divesting the surviving spouse of control over property—were best served by not requiring the surviving spouse to control the stub income.[97]

IV. CONCLUSION

Although procedural issues were an important part of the cases decided by the Eleventh Circuit in 1996, the court addressed more substantive tax issues than in recent years.

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also supra note 91.

96. 86 F.3d at 1053.

97. *Id.* at 1050.