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Federal Taxation

by Michael H. Plowgian
Svetoslav S. Minkov
and Mark S. Davis

I. INTRODUCTION

While the legal holdings of the tax cases decided in the Eleventh Circuit in 2006 do not appear remarkable at first blush, the cases present somewhat conflicting considerations of equity that make them noteworthy. The Eleventh Circuit held in Ellinger v. United States\(^1\) that a taxpayer, who owned half of the stock in three S corporations, could not rely on language in a closing agreement between the Internal Revenue Service (the "Service") and one of the corporations to determine his tax liability with respect to transactions between the first corporation and the other two corporations.\(^2\) Reversing a district court decision, the Eleventh Circuit held in Wachovia Bank, N.A. v. United States\(^3\) that the three-year statute of limitations on filing a tax refund claim applied to a trustee corporation that filed a return when it was not required to do so.\(^4\) In McGowan v. Commissioner,\(^5\) the Eleventh Circuit affirmed a Tax Court decision providing that the Service cannot rely solely on an

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\(^{1}\) 470 F.3d 1325 (11th Cir. 2006).
\(^{2}\) Id. at 1339.
\(^{3}\) 455 F.3d 1261 (11th Cir. 2006).
\(^{4}\) Id. at 1262.
\(^{5}\) 187 F. App'x 915 (11th Cir. 2006).
individual's criminal tax conviction for filing false returns to establish that he had the specific intent to evade taxes. In *Steffen v. United States*, the U.S. District Court for the Middle District of Florida affirmed a bankruptcy court decision denying an individual's refund request pursuant to § 1341 of the Internal Revenue Code of 1986, as amended (the "Code"); for a failure to establish a nexus between income included in a prior taxable year and the individual's later disgorgement of property as a result of Securities and Exchange Commission ("SEC") litigation against the taxpayer's spouse. Finally, in *Planes v. United States*, a magistrate judge in the U.S. District Court for the Middle District of Florida held that the Service did not abuse its discretion in finding that a CEO breached an offer in a compromise agreement with the Service when a corporation for which the CEO was a responsible person failed to pay its taxes, even though the notice of such breach never reached the CEO.

II. ELEVENTH CIRCUIT CASES

A. Closing Agreements Strictly Construed

In *Ellinger v. United States*, the Eleventh Circuit held that the taxpayer provided insufficient evidence of valid loans between three subchapter S corporations in which the taxpayer owned a fifty percent interest; therefore, the taxpayer was not entitled to a refund based on increased basis in the stock of two of the corporations. The Eleventh Circuit ruled that the taxpayer could not rely on language in a closing agreement, pursuant to § 7121, between the Service and one such corporation to establish that the advances in question were bona fide loans with respect to the other corporations.

6. *Id.* at 917-18.
7. 349 B.R. 734 (M.D. Fla. 2006).
9. Unless otherwise noted, all section references are to the Code.
12. *Id.* at 2006-7044-45.
13. 470 F.3d 1325 (11th Cir. 2006).
14. *Id.* at 1328.
Emery Ellinger, III ("Ellinger") was the owner of a fifty percent interest in three closely held corporations: Aberdeen Marketing, Inc. ("Aberdeen"), GlobalTel, Inc. ("GlobalTel"), and ProMail, Inc. ("ProMail"). Aberdeen, GlobalTel, and ProMail each elected to be treated as subchapter S corporations pursuant to § 1361. In 1995 Aberdeen made monetary transfers of $78,659 to GlobalTel and $469,916 to ProMail. In its accounting records, Aberdeen initially characterized these transfers as debt obligations owed by GlobalTel and ProMail.

At the end of 1995, Aberdeen made adjustments to its books and recharacterized the transfers as though it had distributed cash to Ellinger and Ellinger had contributed the cash to GlobalTel and ProMail. This deemed distribution and contribution, if respected by the Service, would have increased Ellinger's basis in his stock of GlobalTel and ProMail, which would have enabled Ellinger to claim additional net operating losses allocable to Ellinger from such corporations.

The Service audited Ellinger's 1995 federal income tax return and rejected Ellinger's characterization of the transfers as deemed distributions and contributions. Ellinger settled the dispute with the Service, and each of the three corporations entered into a closing agreement with the Service under § 7121 of the Code. The closing agreement between the Service and Aberdeen stated that "advances made by the taxpayer [Aberdeen] to GlobalTel in the amount of $78,659 and to ProMail in the amount of $469,916 constitute[d] genuine indebtedness owed by GlobalTel and ProMail in the amount of $469,916 constitute[d] genuine indebtedness owed by GlobalTel and ProMail to the taxpayer [Aberdeen] as of

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17. Ellinger's wife, Burchie, was a party to the case because she filed a joint tax return with Ellinger for the years at issue, but she was not a shareholder of the subchapter S corporations, nor did she participate in any of the transactions at issue. Id. at 1328 n.1.
18. Id. at 1328.
19. Id. at 1328 & n.2; see I.R.C. § 1361 (2000 & Supp. IV 2004).
20. Ellinger, 470 F.3d at 1328-29.
21. Id. at 1329.
22. Id. at 1329 n.2. Generally, the shareholders of a subchapter S corporation include in their taxable income their pro rata share of each item of income and loss of the corporation. See I.R.C. § 1366 (2000 & Supp. IV 2004). A shareholder may not recognize his pro rata share of the corporation's loss, however, to the extent such loss exceeds the shareholder's basis in the stock of the corporation. See I.R.C. § 1366(d)(1). If the corporation's losses exceed the shareholder's basis, the losses are "suspended" until the shareholder's basis is increased. See Gitlitz v. Comm'r, 531 U.S. 206, 210 (2001). The suspended loss carries over indefinitely. See I.R.C. § 1366(d)(2).
23. Ellinger, 470 F.3d at 1329.
25. Ellinger, 470 F.3d at 1329.
The Service entered into separate written agreements with GlobalTel and ProMail. In those agreements, however, the transfers were not explicitly characterized as debt. Instead, the two closing agreements stated that "[n]one of the amount of [funds] advanced by Aberdeen to [either GlobalTel or ProMail] in 1995 is attributable to loans from, or paid in capital contributed by, [either GlobalTel or ProMail]'s shareholders for purposes of determining shareholder basis under I.R.C. § 1367."^{28}

In 1996 Aberdeen acquired all of the assets of GlobalTel and ProMail, and both companies ceased to exist as independent entities. Apparently no written document governed this acquisition.^{29} In connection with the acquisition, Aberdeen made adjustments to its accounting records to write off the advances owed to it by GlobalTel and ProMail.^{30}

Five years later, the U.S. Supreme Court decided Gitlitz v. Commissioner.^{31} In Gitlitz the Supreme Court held that cancellation of debt ("COD") income constitutes an "item of income" under § 1366^{32} of the Code, even if it is excluded from gross income for tax purposes under § 108(a)^{33} of the Code.^{34} As such, COD income recognized by a subchapter S corporation passes through to the shareholders of the corporation and increases the shareholders' basis in the stock of the subchapter S corporation.^{35} The increased basis can then be used by the shareholders to claim previously suspended losses.

In the wake of Gitlitz, Ellinger filed an amended tax return for the tax year 1996, wherein he claimed additional net operating losses attributable to GlobalTel and ProMail. Ellinger claimed that GlobalTel and ProMail recognized COD income when Aberdeen acquired their assets and wrote off the debts owed to Aberdeen. Thus, Ellinger claimed that his basis in the stock of GlobalTel and ProMail was increased by his

[^26]: Id. at 1330.
[^27]: Id.
[^29]: See Ellinger, 470 F.3d at 1330 & n.6.
[^30]: Id. at 1330.
[^32]: I.R.C. § 1366.
[^34]: Gitlitz, 531 U.S. at 209-10, 212.
[^35]: See id. at 216-18. This holding was narrowed by section 402(a) of P.L. 107-147, which amended § 108(d)(7)(A) of the Code, and is generally effective for tax years ending on or after October 11, 2001. Pub. L. No. 107-147, § 402(b), 116 Stat. 40, 2002 (codified as amended at I.R.C. § 108(d)(7)(a) (2000 & Supp. IV 2004)). The amendment makes clear that any amount of COD income of a subchapter S corporation that is excluded from gross income under § 108(a) of the Code does not pass through to the shareholders under § 1366(a) of the Code. Id.
proportionate share of such income, thereby allowing him to claim additional suspended losses and carry them back. Accordingly, Ellinger filed amended returns for 1994 and 1995 and sought refunds in the amount of $1,146 and $111,596, respectively. The Service denied Ellinger's claim for a refund, and Ellinger filed suit.

Ellinger contended that the language in the Aberdeen closing agreement, in which the transfers from Aberdeen to GlobalTel and ProMail were characterized as "genuine indebtedness," established that the transfers were debt as between the three corporations and that the write-off of the advances by Aberdeen gave rise to COD income. The Service disagreed, arguing that the advances were not genuine indebtedness and the closing agreement with Aberdeen did not make the advances debt with respect to GlobalTel and ProMail.

The magistrate judge who heard the case first determined whether the advances were debt or equity by applying the multi-factor analysis established in Lane v. United States. Under this analysis, the magistrate judge found that the advances lacked the characteristics of bona fide indebtedness and that the advances were more likely capital contributions by Aberdeen to GlobalTel and ProMail. Additionally, the magistrate judge agreed with the Service that the closing agreements with the three corporations must be read as separate contracts and that there was nothing in the GlobalTel or ProMail agreements to suggest that the advances were debt with respect to those corpora-

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36. Ellinger, 470 F.3d at 1331. Although not discussed by the Eleventh Circuit, the COD income recognized by GlobalTel and ProMail must have been excluded under § 108(a) of the Code. See I.R.C. § 108(a). If the income were not excluded, the COD income would offset exactly the amount of any additional losses that Ellinger could take due to the increased basis, leaving him with no net tax benefit.

37. Ellinger, 470 F.3d at 1331.

38. Id.

39. Id. at 1331-32.

40. 742 F.2d 1311, 1314-15 (11th Cir. 1984).

41. Ellinger, 470 F.3d at 1332; see also Ellinger v. United States, 94 A.F.T.R.2d (RIA) 2004-5786, 5791-92, 5794 (M.D. Fla. 2004) ("Ellinger I"). This characterization is somewhat problematic, as presumably a capital contribution by Aberdeen to GlobalTel and ProMail would have entitled Aberdeen to an equity interest in each corporation. This might have violated the requirement in § 1361(b)(1)(B) that a subchapter S corporation not have a corporation as a shareholder. See I.R.C. § 1361(b)(1)(B). If this limitation were violated, Ellinger would have faced a host of other income tax issues. Alternatively, the advances could have been treated as a gift for tax purposes. However, regardless of whether the advances were capital contributions or gifts, Ellinger would not have been entitled to the basis step up and thus would not have been entitled to the claimed losses. Therefore, it was not necessary for the court to decide exactly how to characterize the advances to dispose of the case.
Because there was no debt to be cancelled, there was no COD income to pass through to Ellinger, and thus Ellinger was not entitled to the claimed losses. The district court adopted the report of the magistrate judge and granted summary judgment in favor of the Service.

The Eleventh Circuit affirmed the district court, essentially reiterating the analysis of the magistrate judge. The court applied the multi-factor test from *Lane* to determine whether the advances were debt for income tax purposes and concluded that they were not. The court noted, in particular, that (1) there were no promissory notes executed in connection with the advances, (2) there was no evidence to show that the purported loan had a fixed maturity date (which the court considered highly probative), (3) no interest was charged in connection with the advances, and (4) Aberdeen apparently expected to collect on the advances only if GlobalTel and ProMail became profitable.

The court then turned to Ellinger's argument that the closing agreement between Aberdeen and the Service conclusively established that the advances were debt. The court first noted that a closing agreement is to be strictly construed and that premises not specifically addressed in the agreement are not binding on the parties. Because this case involved Ellinger in his capacity as a shareholder of GlobalTel and ProMail, the closing agreement with Aberdeen was irrelevant to the issue in the case. Thus, the court looked solely to the closing agreements with GlobalTel and ProMail.

The court concluded that the closing agreements with GlobalTel and ProMail did not state that the advances were loans but instead left considerable uncertainty concerning how the advances should be treated for tax purposes. Indeed, in footnote 11, the court discussed the characterization difficulties noted *supra* in footnote 41 of this Article.
The court noted that the advances could be one of only three things: gifts, capital contributions, or loans.\textsuperscript{52} The parties agreed that the transfers were not gifts, and the closing agreements appeared to suggest that the advances were not capital contributions.\textsuperscript{53} Because the court decided that the advances were not loans, their proper classification presents a "'metaphysical' mystery."\textsuperscript{54} The court noted (probably with some relief) that it was not necessary to decide the proper classification of the transfers to dispose of the case; it was sufficient to conclude that Ellinger had not established that they were bona fide loans.\textsuperscript{55}

The court also addressed Ellinger's argument that the closing agreements with GlobalTel and ProMail were vague and must be read with the Aberdeen closing agreement to remedy the vagueness.\textsuperscript{56} The court stated that while the closing agreements with GlobalTel and ProMail were unclear as to how the advances should be treated, this did not mean that they must be read with the Aberdeen closing agreement to clarify such treatment.\textsuperscript{57} Instead, the court reasoned that closing agreements are of limited scope, and the fact that the characterization of the advances was not resolved simply meant that the agreements did not govern their characterization.\textsuperscript{58}

Finally, the court rejected Ellinger's appeal to a Service memorandum in which the Service stated that GlobalTel and ProMail had agreed that the advances were loans.\textsuperscript{59} The court held that the closing agreements were fully integrated and therefore the memorandum could not be used as evidence that the closing agreements meant something other than what they said.\textsuperscript{60}

While the court's holding (that a closing agreement with one corporation should not control another taxpayer's tax liability) seems noncontroversial, it seems at least inequitable that the Service would argue in this case that the advances were debt with respect to Aberdeen (thereby denying Ellinger the claimed basis) but not debt with respect to GlobalTel and ProMail (resulting in the same denial).
B. Statute of Limitations Applies Even Where No Return Is Required

In Wachovia Bank, N.A. v. United States, the Eleventh Circuit, reversing a district court decision, held that the statute of limitations period established in § 6511(a) applies to a tax refund claim filed by a taxpayer who is not required to file a tax return with respect to the relevant tax.

Wachovia Bank ("Wachovia") was the trustee for the George C. Nunamann Trust, which was created in 1984. The trust was reformed in 1991 to qualify as a charitable remainder trust that is exempt from federal income tax under § 664(c)(1). As a result, the trust has not been obligated since 1991 to file a fiduciary income tax return or pay income tax but rather has only been required to file an information return. Wachovia, however, remained unaware of the trust's tax-exempt status, and it continued to file income tax returns for the trust and pay taxes out of the trust for the years 1991 through 2001.

Wachovia realized its mistake in 2003, at which time it requested a refund of the taxes mistakenly paid out of the trust for the 1997 and 1998 tax years. The Service denied this request, stating that the refund claims for 1997 and 1998 were barred by the three-year statute of limitations under § 6511(a) of the Code. Wachovia filed a lawsuit in the U.S. District Court for the Middle District of Florida seeking the amounts it had mistakenly paid in the 1997 and 1998 tax years.

Section 6511(a) states, in relevant part:

Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such
This provision limits a court's subject matter jurisdiction over a refund claim under § 7422(a). Pursuant to § 7422(a), a court may not hear an administrative claim for refund until a taxpayer has filed the claim in accordance with the relevant regulations and provisions of law, which include § 6511(a).

While Wachovia conceded that its refund claims fell outside the time limit imposed by § 6511(a), it believed that § 6511(a) did not apply in this case because this provision applies only to claims for the refund of taxes "in respect of which tax the taxpayer is required to file a return." Because Wachovia was not required to file the tax return, it argued that § 6511(a) was not a relevant provision of law under § 7422(a). Instead, Wachovia contended that only the general six-year statute of limitations on civil actions against the federal government, set forth outside the Code in 28 U.S.C. § 2401(a), applied to its claims. If the latter statute governed Wachovia’s claims, then both claims had been filed in a timely fashion under the relevant provisions of law and should not be barred by § 7422(a).

The district court agreed with Wachovia’s position that § 6511(a) unambiguously applies only to taxpayers who are required to file returns and entered summary judgment for Wachovia. The government appealed the case to the Eleventh Circuit Court of Appeals. The case was one of first impression.

72. I.R.C. § 6511(a) (emphasis added).
73. I.R.C. § 7422(a) (2000). Pursuant to § 7422(a):
   No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.
74. Id.
75. Id.
77. See Wachovia Bank, 455 F.3d at 1263. In relevant part, § 2401(a) reads: "Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a).
79. Wachovia Bank, 455 F.3d at 1263.
80. Id. at 1265.
As an initial matter, the Eleventh Circuit noted that § 6401(c)\textsuperscript{81} of the Code provides that a tax payment may constitute an “overpayment” under the Code, including § 6511(a), even when no tax liability exists.\textsuperscript{82} The logic of this provision, as explained by the court, “is that because anything is more than nothing, any payment is an overpayment when no payment was due.”\textsuperscript{83} Wachovia’s tax payments were thus “overpayments” as that word is used in § 6511(a), although the court had yet to determine whether Wachovia’s particular overpayments were governed by § 6511(a).

The government urged the Eleventh Circuit to read § 6511(a) in conjunction with other provisions of the Code and the Treasury Regulations.\textsuperscript{84} While § 6511(a) states that it applies to “any tax imposed by this title in respect of which tax the taxpayer is required to file a return,”\textsuperscript{85} the government argued that “the taxpayer” referred to in this section is not the specific refund claimant.\textsuperscript{86} Instead, the government contended that § 6511(a) refers to a taxpayer in the general sense, meaning that the provision applies to any tax in respect of which a taxpayer must generally file a return, or in other words, any tax payable by return. Contextual analysis reveals that the disputed language in § 6511(a) was not meant to limit the applicability of the section to taxes payable by a particular type of taxpayer. Instead, this language was intended to limit § 6511(a)’s applicability to taxes payable in a particular manner.\textsuperscript{87}

The government argued that Treasury Regulations § 301.6511(a)-1,\textsuperscript{88} which relates to § 6511(a) of the Code, clarifies how to interpret § 6511(a).\textsuperscript{89} The regulation states, in relevant part:

(a) In the case of any tax (other than a tax payable by stamp):
(1) If a return is filed, a claim for credit or refund of an overpayment must be filed by the taxpayer within 3 years from the time the return

\textsuperscript{81}I.R.C. § 6401(c) (2000).
\textsuperscript{82}See Wachovia Bank, 455 F.3d at 1263. Pursuant to § 6401(c): “An amount paid as tax shall not be considered not to constitute an overpayment solely by reason of the fact that there was no tax liability in respect of which such amount was paid.” I.R.C. § 6401(c). As the Eleventh Circuit explained, “The double negative in that provision means that even if one never owed tax in the first place but paid tax anyway, the mistaken payment constitutes an overpayment.” Wachovia Bank, 455 F.3d at 1263.
\textsuperscript{83}Wachovia Bank, 455 F.3d at 1263.
\textsuperscript{84}Id. at 1264.
\textsuperscript{85}I.R.C. § 6511(a).
\textsuperscript{86}Wachovia Bank, 455 F.3d at 1265.
\textsuperscript{87}See id.
\textsuperscript{88}Treas. Reg. § 301.6511(a)-1(a) to (b).
\textsuperscript{89}Wachovia Bank, 455 F.3d at 1264-65.
was filed or within 2 years from the time the tax was paid, whichever
of such periods expires the later.
(2) If no return is filed, the claim for credit or refund of an overpay-
ment must be filed by the taxpayer within 2 years from the time the
tax was paid.
(b) In the case of any tax payable by means of a stamp, a claim for
credit or refund of an overpayment of such tax must be filed by the
taxpayer within 3 years from the time the tax was paid.90

Under the government's reading, § 6511(a), as clarified by Treasury
Regulations § 301.6511(a)-1(a), covers all refund claims, and hence no
tax refunds are governed by the general six-year statute of limitations
contained in 28 U.S.C. § 2401(a).91 The regulation applies the three-
year statute of limitations to all refund claims for "any tax (other than
a tax payable by stamp)" for which "a return is filed."92 The regulation
likewise establishes limitation periods for all other claims for refund of
"any tax" payable by stamp or not payable by stamp.93 In short, "either
a tax is payable by stamp or it is not, and if it is not, a claim for refund
of an overpayment must be made within three years from the time the
return was filed."94

The Eleventh Circuit sided with the government's position. The court
agreed that "the taxpayer" could plausibly mean either the particular
taxpayer before the court or the generic taxpayer.95 Due to this
ambiguity, the court looked to the rest of the Code for context in
interpreting § 6511(a).96 The court, adopting the government's argu-
ment, concluded that "reading 'the taxpayer' as a reference to taxpayers
generally makes more sense in light of the rest of the Tax Code,
producing a more harmonious result."97 In addition to the context
provided by the Code and Treasury Regulations, the court also stated
that its conclusion was justified by the purpose of § 6511(a), which is to
prevent litigation of the merits of late-filed claims.98 The court
reasoned that Wachovia's interpretation of the section would undermine
the section's purpose by requiring a court to address the merits of a
refund claim before determining whether the claim is time-barred:

90. Treas. Reg. § 301.6511(a)-1(a) to (b).
91. See Wachovia Bank, 455 F.3d at 1264-65.
92. Treas. Reg. § 301.6511(a)-1(a).
93. Id.
94. Wachovia Bank, 455 F.3d at 1265.
95. Id. at 1268.
96. Id.
97. Id.
98. Id.
Determining 'whether a particular taxpayer is required to file a return often involves inquiry into the merits of a refund claim. If we adopted Wachovia's position, no one could know whether the § 6511(a) statute of limitations provision applied to a claim until the merits of the claim were decided. First would come the decision on the merits, then would come the decision on whether a decision on the merits was barred. To switch the order of decision around like that would make as little sense as having the issue of whether a runner is disqualified from competing in a race depend on whether he wins it.99

The Eleventh Circuit held that because Wachovia failed to file its claims for a refund within the three-year limitation period set forth in § 6511(a), the district court was barred by § 7422(a) from exercising any jurisdiction over the claims.100 The Eleventh Circuit reversed the district court and remanded with instructions to dismiss the complaint for lack of subject matter jurisdiction.101

C. Willful Filing of False Returns Does Not Prove Specific Intent to Evade Taxes

In McGowan v. Commissioner,102 the Eleventh Circuit affirmed the Tax Court's holding that for purposes of assessing a deficiency, the Service cannot rely solely on an individual's criminal tax conviction for filing false returns to establish that he had the specific intent to evade tax.103

Paul McGowan was the sole owner of McGowan Construction Company.104 The company was formed as a subchapter S corporation, meaning that McGowan was required to report the company's income on his personal income tax return.105 McGowan under-reported his income from 1991 to 1993, and he was convicted in 1998 of three counts of willfully making and subscribing false individual income tax returns

99. Id. at 1269.
100. Id.
101. Id.
102. 187 F. App'x 915 (11th Cir. 2006).
103. Id. at 917-18 (affirming McGowan v. Comm'r, 87 T.C.M. (CCH) 1421 (2004), amended by McGowan v. Comm'r, No. 13587-01, 2004 U.S. Tax Ct. LEXIS 48 (amending original opinion to clarify issues raised by the Service in its motion for reconsideration)).
104. McGowan, 187 F. App'x at 915.
105. Id. at 915-16; see also supra note 22.
In violation of § 7206(1). McGowan received a prison sentence and a fine for these criminal convictions.

In 2001 McGowan received an income tax deficiency notice from the Service for the years 1991 through 1993. McGowan petitioned the Tax Court for a redetermination of the deficiency. McGowan argued that due to its extended delay in initiating the deficiency action, the Service was barred from assessing the deficiency by the standard three-year and six-year statutes of limitations on tax assessments, which are set forth in § 6501(a) and (e), respectively. The Service, however, contended that McGowan's underpayments were related to a specific intent to evade tax, meaning that the Service could assess the deficiency at any time under an exception to the standard limitation periods, which is set forth in § 6501(c)(1). Because the Tax Court hearing was a "proceeding involving the issue of whether the petitioner had been guilty of fraud with intent to evade tax," § 7454(a) of the Code placed the burden of proving McGowan's intent to evade tax on the Service.

McGowan testified before the Tax Court that the underpayments were the result of confusion between him and his accountant. McGowan cashed or deposited into his personal bank account a number of checks received by his company from its customers. While McGowan and his secretaries kept complete records of these customer checks in a handwritten ledger, his accountant failed to use those records when he calculated the company's shareholder accounts and compiled the


108. Id.

109. I.R.C. §§ 6501(a), (e) (2000 & Supp. 2004). Under § 6501(a), the amount of any tax payable by return "shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed)." I.R.C. § 6501(a). Section 6501(e) imposes a longer statute of limitations for the assessment of tax on any amount omitted from gross income. I.R.C. § 6501(e).

110. *McGowan*, 87 T.C.M. (CCH) at 1422.

111. Id.; I.R.C. § 6501(c)(1) (2000). Under § 6501(c)(1) there is an exception to the three-year and six-year statutes of limitations for the assessment of any tax. The section reads as follows: "In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time." I.R.C. § 6501(c)(1).

112. I.R.C. § 7454(a) (2000) ("In any proceeding involving the issue whether the petitioner has been guilty of fraud with intent to evade tax, the burden of proof in respect of such issue shall be upon the Secretary.").

113. See *McGowan*, 87 T.C.M. (CCH) at 1422.
company's returns. McGowan's accountant instead relied exclusively on the company's bank records and financial statements, which were prepared from the information in a different ledger. Based on a discussion with his accountant, McGowan believed that the checks he used for his personal benefit were included in the company's shareholder accounts. Although McGowan knowingly under-reported his income from 1991 to 1993, he "believed that any disparity between his reported income and the amounts reflected in the shareholder accounts would ultimately be reconciled and that, at some point, he would pay the appropriate amount of tax relating to all of his income."

The Service, however, chose not to address McGowan's argument that the deficiencies were caused by confusion. Instead, the government "inexplicably" rested its entire argument that McGowan acted with the intent to evade income tax on McGowan's criminal conviction. The Tax Court held that the government failed to meet its burden of establishing McGowan's intent to evade tax by clear and convincing evidence. The Tax Court determined that the typical indicia of intent to evade tax were not present and stated that the government could not rely solely on the prior conviction to demonstrate an intent to evade taxes.

On appeal, the Eleventh Circuit affirmed the Tax Court's judgment. The Eleventh Circuit held that the Tax Court was correct not to collaterally estop McGowan from arguing that he did not act with the specific intent to evade tax based on his prior criminal conviction. The jury in the criminal case found that McGowan willfully made and assisted in the preparation of tax returns that he did not believe to be true. Thus, McGowan's conviction in the criminal case collaterally estopped him from contesting that he filed false returns and underpaid his taxes from 1991 through 1993. In contrast, in the civil case tried by the Tax Court, the government was required to prove by clear and convincing evidence that McGowan intended to evade tax when he under-reported his taxes, an element that did not exist in the criminal case. Due to the lack of identity of issues between the criminal and

114. Id.
116. Id. at *3.
117. McGowan, 87 T.C.M. (CCH) at 1423.
118. Id.
119. Id.
120. Id. at 1422-23.
121. McGowan, 187 F. App'x at 918.
122. Id. at 917.
123. Id.
civil trials, the court held that collateral estoppel was not justified, and thus the government's reliance on McGowan's criminal conviction was insufficient to prove McGowan's intent to evade tax.\footnote{124}{\textit{Id.}}

The Eleventh Circuit's decision not to grant collateral estoppel based solely on McGowan's criminal conviction is consistent with the Tax Court's prior decisions on this issue.\footnote{125}{See, e.g., \textit{Wright v. Comm'r}, 84 T.C. 636, 643 (1985) (holding that conviction under I.R.C. § 7206(1) does not collaterally estop the taxpayer from denying his intent to evade tax).} Even if the taxpayer accused of intentionally evading tax has been convicted under § 7206(1), if a taxpayer "claims ignorance of the law or a good-faith belief that he was not violating any of the provisions of the tax laws, the [Service] must negate that claim by clear and convincing evidence."\footnote{126}{\textit{McCulley v. Comm'r}, 73 T.C.M. (CCH) 3163, 3164 (1997).}

While McGowan's criminal convictions were badges of fraud that the government could use to help satisfy its burden of proof, the convictions alone were not "conclusive proof that McGowan intentionally evaded his taxes."\footnote{127}{\textit{McGowan}, 187 F. App'x at 917.} The Eleventh Circuit thus affirmed the Tax Court, determining that the Tax Court's finding that McGowan lacked the intent to evade tax was a finding of fact that was not clearly erroneous.\footnote{128}{\textit{Id.}}

\section{III. District Court Cases}

\subsection{A. Transfer of Property to a Receiver to Avoid Public Sale Held "Voluntary" for Purposes of Section 1341}

In \textit{Steffen v. United States},\footnote{129}{\textit{Id.}} the U.S. District Court for the Middle District of Florida affirmed a bankruptcy court decision denying an individual's request for refund under § 1341\footnote{130}{I.R.C. § 1341 (2000).} of the Code.\footnote{131}{\textit{Steffen}, 349 B.R. at 741.} The court held that the taxpayer failed to establish a nexus between the profits from stock transactions included as income in a prior taxable year and the taxpayer's later transfer of property to a receiver to avoid public sale of such property as a result of SEC litigation against the taxpayer's spouse.\footnote{132}{\textit{Id.} at 740. The district court also held that the burden of proof in a § 1341 lawsuit falls on the taxpayer and that the taxpayer failed to introduce "credible evidence" to reverse such burden pursuant to § 7491. \textit{Id.} at 740-41; see I.R.C. § 7491 (2000). This holding of the court will not be analyzed in detail in this Article.}
The taxpayer, Terri Steffen, was married to Paul Bilzerian, a partner in Bilzerian & Brodovsky. Between May 1985 and October 1986, Bilzerian, on behalf of the partnership, engaged in transactions involving the common stock of Cluett, Peabody and Company, Inc. ("Cluett") and the Hammermill Paper Company ("Hammermill"). Bilzerian and Steffen filed a joint federal income tax return for the tax years of 1985 and 1986, and included $2,350,067 for 1985 and $16,068,617 for 1986 as Bilzerian's share of net income from the Bilzerian & Brodovsky partnership arising from Bilzerian's transactions involving the common stock of Cluett and Hammermill. In 1989 Bilzerian was convicted of securities fraud and conspiracy to defraud the United States based on his transactions with the common stock of Cluett and Hammermill. Following the criminal conviction, the SEC brought a civil suit against Bilzerian seeking disgorgement of any illegal profits Bilzerian received from the fraud involving Cluett and Hammermill, and in 1993 Bilzerian was ordered to disgorge $4,821,124 in total profits from Cluett and $28,319,663 in total profits from Hammermill (the "Disgorgement Order"). In August 2000 the court found Bilzerian in civil contempt of the Disgorgement Order and appointed a receiver for the purpose of "identifying, marshaling, receiving, and liquidating" Bilzerian's assets in order to satisfy the Disgorgement Order. In May 2001 the court entered another order temporarily freezing assets in which Bilzerian had an interest. Among the frozen assets were accounts in Wells Fargo Bank and real property in Tampa, Florida (the "Properties").

On May 29, 2001, Steffen filed a voluntary bankruptcy petition and thereafter voluntarily intervened in the SEC's case against Bilzerian to challenge the freezing of the Properties. In December 2001 Steffen entered into a settlement agreement with the SEC in which Steffen agreed to transfer to the receiver a fifty percent interest in the Properties in exchange for the release of the remaining fifty percent to Steffen. In February 2002 Steffen then claimed a refund pursuant to § 1341 in the amount of approximately $5.3 million because of her release of fifty percent of the Properties to the receiver. In October 2005 the bankruptcy court entered an order denying Steffen's claim for a tax refund because Steffen failed to establish a nexus between the transfer of fifty percent of the Properties to the receiver in 2002 and the

133. Steffen, 349 B.R. at 736.
134. Id.
135. Id.
136. Id. at 737.
137. I.R.C. § 1341.
Cluett and Hammermill income that Bilzerian and Steffen included in their joint tax returns for 1985 and 1986. Steffen appealed that order to the U.S. District Court for the Middle District of Florida.

Section 1341 provides that if an item was included in gross income for a taxable year because it appeared that the taxpayer had an unrestricted right to such item and a deduction in excess of $3,000 is allowable for a later taxable year because it is established after the close of the prior taxable year that the taxpayer did not have an unrestricted claim to such item of income, then the taxpayer is entitled to a refund of the taxes that it paid with respect to such item of income in the previous year. Courts have universally ruled that there must be a "substantive nexus between the right to the income at the time of receipt and the subsequent circumstances necessitating a refund." The bankruptcy court held that there was no nexus between the profits that Bilzerian and Steffen realized from the 1985 and 1986 Cluett and Hammermill transactions and the 2002 transfer of fifty percent of the Properties. The bankruptcy court reasoned that because the transfer of property from Steffen to the SEC was pursuant to the Disgorgement Order and not pursuant to the Cluett and Hammermill transactions, the obligation of Bilzerian to the SEC did not arise out of similar circumstances to Bilzerian's inclusion of his stock gains as income.

To support its conclusion, the bankruptcy court cited to Kraft v. United States and Bailey v. Commissioner, however, both cases appear to be factually distinguishable from Steffen.

139. In re Steffen, 342 B.R. 858 (Bankr. M.D. Fla. 2005). The bankruptcy court also held that Steffen submitted no evidence that any of the property transferred to the receiver was her own property as opposed to Bilzerian's property. Id. at 861.
140. Steffen, 349 B.R. at 736.
141. See I.R.C. § 1341.
143. Steffen, 342 B.R. at 861.
144. Id.
145. 991 F.2d 292 (6th Cir. 1993).
146. 756 F.2d 44 (6th Cir. 1985).
147. See Steffen, 342 B.R. at 860-61. In Kraft v. United States, the taxpayer submitted false claims to Blue Cross/Blue Shield of Michigan ("BCBS") in the amount of $2,245,000, and BCBS over-reimbursed Jess Kraft, D.P.M., P.C. (the "Kraft Corporation") for medical services performed. The Kraft Corporation included the payments from BCBS in gross income and paid salary to Kraft in the amount of approximately $230,000 for each of the taxable years between 1980 and 1983. Kraft reported his compensation from the Kraft Corporation on his federal income tax return. Pursuant to a plea agreement in 1985, Kraft paid back to BCBS approximately $160,000 and claimed a § 1341 refund. 991 F.2d at 294. The Sixth Circuit held that the "obligation to repay must arise out of the specific 'circumstances, terms and conditions' of the transaction whereby the amount was originally..."
In affirming the bankruptcy court's decision, the U.S. District Court for the Middle District of Florida did not follow the bankruptcy court's reasoning but instead focused its analysis on the "voluntary" nature of Steffen's intervention in the lawsuit between Bilzerian and the SEC and her voluntary settlement with the SEC leading to the payment of fifty percent of the Properties to the receiver.  

Citing to Cinergy Corp. v. United States, the district court stated that the lack of an unrestricted right to the item of income subject to a § 1341 refund claim must arise out of the circumstances, terms, and conditions of the original payment of such income and not out of the circumstances, terms, and conditions imposed by a subsequent agreement between the payor and

included in . . . income," and therefore, because Kraft did not report the BCBS payments on his individual income tax returns, but instead reported his salary from the Kraft Corporation, the restitution payment to BCBS did not result from the same circumstances as Kraft's receipt of salary from the Kraft Corporation. Id. at 299 (quoting Bailey v. Comm'r, 756 F.2d 44, 47 (6th Cir. 1985)). Unlike in Kraft, Bilzerian and Steffen's income in 1985 and 1986, while flowing through the Bilzerian & Brodovsky partnership, was income from Bilzerian's transactions with the common stock of Cluett and Hammermill and not compensation, dividends or other income that is related to, but different from, the income from the Cluett and Hammermill transactions.

In Bailey the taxpayer was an officer, shareholder, and director of Bestline Products, Inc. ("Bestline"), a "pyramid" multi-level sales organization. Bailey received salary, dividends, and bonuses from Bestline in his capacity as an officer, shareholder, and director and included such items in his gross income for several taxable years. In 1971 Bailey entered into a consent decree with the Federal Trade Commission (the "FTC"), under which he agreed, in his capacity both as an individual and as a corporate officer, to cease and desist from operating the Bestline business in a deceptive or fraudulent manner. In 1976 the U.S. District Court for the Northern District of California determined that Bailey, in his continued operation of Bestline, violated the terms of the consent decree and fined Bailey $1,036,000. 756 F.2d at 45-46. The district court then granted Bailey's request that his payment of the $1,036,000 fine be applied as restitution in a settlement of a multidistrict class action against Bestline and its officers pending in the U.S. District Court for the Southern District of Florida. Id. at 46. The district court's order authorizing the transfer of funds, however, expressly stated that "the ultimate disposition of these funds in no way shall alter their status as civil penalties." Id. In his federal income tax return for 1977, Bailey claimed that his payment of the $1,036,000 qualified him for a refund under § 1341. Id. The Sixth Circuit held that Bailey did not meet the requirements of § 1341 because the payment of the $1,036,000 did not arise out of his original salary, dividend, or bonus payment from Bestline, but instead was a nondeductible penalty. Id. at 47. Bilzerian and Steffen's case is different from that of Bailey because (1) Bilzerian and Steffen's gross income in 1985 and 1986 was flow-through income from Bilzerian's transactions involving the common stock of Cluett and Hammermill and not compensation, dividends, or bonus payments and (2) the 2002 payment by Steffen to the receiver was not in the form of a penalty but pursuant to a disgorgement order which was restorative in nature.

Thus, the district court noted that if the taxpayer "voluntarily took some action after the receipt of apparently unrestricted income which required the taxpayer to thereafter return the remuneration," § 1341 does not apply. Applying this law to Steffen's case, the district court held that because Steffen "voluntarily" intervened in Bilzerian's lawsuit with the SEC and "voluntarily" settled with the SEC to pay fifty percent of the Properties to the receiver, Steffen took a voluntary action after the receipt of apparently unrestricted income which required Steffen to return the remuneration, and therefore § 1341 was inapplicable.

In reaching its conclusion the court distinguished Barrett v. Commissioner. In Barrett a stockbroker filed a joint federal income tax return with his spouse and reported income from a sale of options. The SEC notified the stockbroker that it was instituting administrative proceedings to remove his brokerage license for possible insider trading violations related to the sale of the options. In addition, two groups of specialist market maker option brokers filed civil lawsuits against the stockbroker for $10 million. The stockbroker settled the civil suits by disgorging $54,400 of the profit he made from the sale of the options. The SEC then dropped all administrative proceedings against the stockbroker. The stockbroker then filed for a § 1341 refund claim. The Service argued that because the stockbroker's liability was not litigated to judgment, the stockbroker could not have been compelled to make the restoration, and thus he would not be entitled to a § 1341 refund. The Tax Court noted that in order for a taxpayer to have sufficient nexus to file a § 1341 refund claim, the taxpayer must prove "a legal obligation to restore the item [of income]," or stated another way, that "the payee must have at least the ability to legally compel the repayments before the repayments can be deducted by the payor" and that a voluntary restoration will not suffice. The Tax Court then held that a bona fide, noncollusive, arm's-length settlement constitutes a legal obligation to restore an item of income and therefore establishes that the taxpayer did not have an unrestricted right to such item of income for purposes of § 1341. In distinguishing Barrett, the district court

150. Steffen, 349 B.R. at 738.
151. Id.
152. Id. at 740.
154. Id. at 714-15.
155. Id. at 718.
156. Id. at 718-19 (citations omitted).
157. Id. at 721.
court noted that while Barrett was under a legal obligation to disgorge the $54,400, it was Bilzerian, not Steffen, that was under an obligation to disgorge his profits from the Cluett and Hammermill transactions, and therefore Steffen's payment of fifty percent of the Properties was voluntary in nature.\textsuperscript{158} It is hardly plausible, however, to think of Steffen's payment of fifty percent of the Properties as a voluntary payment, given that if such amounts were not paid, the receiver probably would have foreclosed on the Properties to satisfy the Disgorgement Order.

The U.S. District Court for the Middle District of Florida also cited to \textit{Pahl v. Commissioner}\textsuperscript{159} for the proposition that "a restoration agreement voluntarily executed after [income] has been received does not establish that the taxpayer" is entitled to a refund pursuant to § 1341.\textsuperscript{160} The facts in that case, however, also appear distinguishable. In \textit{Pahl} the taxpayer was the president and holder of one hundred percent of the voting control of K-P-F Electric Co. ("K-P-F") and received compensation from K-P-F for the taxable years of 1969 and 1970.\textsuperscript{161} In December 1970 the taxpayer entered into an agreement with K-P-F whereby he agreed to repay amounts received as compensation that were subsequently disallowed to K-P-F as deductions. The contract was stated to be effective as of January 1, 1969. In 1972 the Service disallowed K-P-F's deduction for approximately $160,000 of excessive compensation for 1969 and 1970, and Pahl repaid the disallowed amounts in 1972 and claimed a § 1341 refund.\textsuperscript{162} The Tax Court disallowed the § 1341 refund claim with respect to the pre-December 1970 payments because Pahl had an unrestricted right to such amounts, not qualified by any circumstances, terms, or conditions existing at the time of the receipt of those funds.\textsuperscript{163} Pahl's subsequent voluntary agreement in December 1970 to return all compensation that may be disallowed as a deduction to K-P-F could not establish that Pahl did not "have an unrestricted right to such item" of income, and therefore, § 1341 would not apply.\textsuperscript{164} \textit{Pahl} is distinguishable from \textit{Steffen} because Pahl's 1970 agreement with its controlled corporation K-P-F was truly voluntary—it was not necessitated by any third-party litigation or

\begin{itemize}
\item \textsuperscript{158} \textit{Steffen}, 349 B.R. at 739.
\item \textsuperscript{159} 67 T.C. 286 (1976).
\item \textsuperscript{160} \textit{Steffen}, 349 B.R. at 740 (quoting \textit{Pahl}, 67 T.C. at 291).
\item \textsuperscript{161} \textit{Pahl}, 67 T.C. at 287. It is somewhat unclear whether the taxpayer in \textit{Pahl} actually claimed a § 1341 refund or a § 162 deduction. The court analyzed a § 1341 refund claim along with a § 162 deduction, but this Article will refer only to the § 1341 analysis.
\item \textsuperscript{162} \textit{Id.} at 287-88, 290.
\item \textsuperscript{163} \textit{Id.} at 289-90.
\item \textsuperscript{164} \textit{Id.;} I.R.C. § 1341(a)(1).
\end{itemize}
a mandatory court order, like the Disgorgement Order in Bilzerian and Steffen’s case, and was simply aimed at achieving the most tax-beneficial result for Pahl and K-P-F. Furthermore, the Tax Court distinguished the amounts repaid by Pahl to K-P-F after December 1970 from the ones repaid before December 1970, thus indicating that the December 1970 agreement, while voluntarily entered into, may still have been sufficient for a § 1341 claim to be successful with respect to payments made after December 1970.¹⁶⁵

Thus, it is uncertain to what extent the holdings in Barrett and Pahl support the district court’s holding in Steffen that Steffen’s payment of fifty percent of the Properties was voluntary and therefore not qualified for a § 1341 refund. Given that Steffen’s payment was prompted by the receiver’s actions to foreclose on the Properties, it is not clear whether such payment should be viewed as “voluntary.”¹⁶⁶ Nonetheless, the district court’s disallowance of Steffen’s refund claim appears to be the correct holding because either Steffen was the owner of the fifty percent of the Properties that she transferred to the receiver and such transfer was truly voluntary, or Steffen was not the owner of the transferred part of the Properties and the transfer would not entitle Steffen to a deduction, thus causing her to fail the requirements for a § 1341 refund.

B. Breach of Offer in Compromise Preceded Mailing of Notice of Breach

In Planes v. United States,¹⁶⁷ a magistrate judge in the U.S. District Court for the Middle District of Florida held that the Service did not abuse its discretion in finding that a CEO breached a prior offer in compromise (“OIC”) with the Service when a corporation for which the CEO was a responsible person failed to pay its taxes.¹⁶⁸ The court

¹⁶⁵. See Pahl, 67 T.C. at 289-90. The Tax Court analyzed only whether the post-December 1970 payments were qualifying deductions under § 162 and not whether they could give rise to a § 1341 refund claim. The Tax Court also stated, however, that such payments should be distinguished from the pre-December 1970 payments for purposes of § 1341, thus implying that the payments may give rise to a refund under § 1341. Id.

¹⁶⁶. The Authors of this Article believe that the second holding of the bankruptcy court, namely that Steffen did not establish any proof that the fifty percent of the Properties paid to the receiver were her property (rather than property of Bilzerian), may have been a stronger basis for the court’s holding. As previously noted, however, in light of its holding on the nexus issue, the district court did not address this argument at all. Without more information on the exact ownership of the Properties at the time Steffen settled with the SEC to transfer fifty percent of the Properties to the receiver, an analysis of the merits of this rationale is substantially impaired.


¹⁶⁸. Id. at 2006-7044.
found that the CEO had already breached the OIC when the Service mailed the CEO a notice of the proposed penalty against him for the corporation's unpaid tax liabilities; the fact that the CEO never received the notice was therefore irrelevant.\(^\text{169}\)

Each employer is required to deduct and withhold income tax and Federal Insurance Contributions Act ("FICA")\(^\text{170}\) tax from employees' wages as they are paid\(^\text{171}\) and to hold the withheld amounts in trust for the federal government.\(^\text{172}\) The employer is liable for payment of the withheld taxes, and to ensure such payment, certain persons within the employer may be held personally liable for an amount (called a trust fund recovery penalty, or "TFRP") up to the total amount of tax that they willfully fail to pay to the government on behalf of the employer.\(^\text{173}\) These individuals are typically referred to as "responsible persons," and they include any officer or employee of any employer who is responsible for collecting, accounting for, and paying any tax.\(^\text{174}\)

In 1999 William Planes admitted responsibility for failing to pay taxes withheld by several businesses for tax years spanning from 1988 to 1996. Rather than pay all of the resulting penalties and other outstanding tax liabilities, Planes entered into an OIC with the Service. One of the terms of the OIC required Planes to comply with all provisions of the Code and pay all required taxes for a period of five years. If Planes failed to fulfill this condition, the Service could terminate the OIC and reinstate all of the penalties and tax liabilities against Planes.\(^\text{175}\)

In 2002 the Service determined that Keen's Corner, an employer subject to the income and FICA tax withholding requirements, failed to pay payroll taxes for the first two quarters of 2002. Due to Planes's position as chief executive officer of Keen's Corner, the Service proposed to assess a penalty against Planes as a responsible person for the company. That assessment would expose Planes to liability for breach of the OIC as a result of his agreement to pay all taxes for the five-year period beginning in 1999.\(^\text{176}\)

On December 16, 2002, the Service mailed a notice of the proposed TFRP to the address Planes had entered on his most recently filed tax return. Planes, however, had moved to a new address during the

\(^{\text{169}}\) See id. at 2006-7047.


\(^{\text{172}}\) See I.R.C. § 7501(a) (2000).


\(^{\text{176}}\) Id.
intervening period and never received the notice. The notice included a warning that if Planes did not respond within sixty days of the date the letter was mailed, the Service would assess the TFRP against Planes for the taxes that Keen's Corner had failed to pay. Planes, unaware of the notice, never responded.\(^{177}\)

On November 25, 2003, the Service sent a letter to the same incorrect address, indicating that Planes had breached the OIC by failing to pay the Keen's Corner tax liabilities.\(^{178}\) On May 12, 2004, the Service sent Planes a notice of tax lien, which Planes finally did receive because he had since filed a new tax return which included his updated address. Following two collection due process hearings, a settlement officer for the Service issued a notice of determination finding that Planes was a responsible person for Keen's Corner's TFRP assessments and thus in breach of the OIC. The settlement officer reached these conclusions despite the fact that before the hearings occurred, Keen's Corner satisfied the outstanding amounts subject to the TFRP.\(^{179}\) As a result of the notice of determination, Planes was rendered liable for the taxes that had been conditionally absolved by the OIC.\(^{180}\)

Planes filed an action in the U.S. District Court for the Middle District of Florida, claiming that the Service's collection action for amounts previously absolved by the OIC was improper.\(^{181}\) Planes's major argument was that the notice of the proposed responsible person assessment was not sent to his last known address as required by § 6672 and § 6212.\(^{182}\) The Service's failure to properly notify Planes about the proposed assessment deprived him of the opportunity to pay the tax penalty and avoid the breach of the OIC. Thus, Planes argued, any

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177. *Id.*
178. *Id.* Although Planes never received this letter, a copy of the letter was sent to Planes's attorney, but the attorney did not advise Planes of the letter or of his default on the OIC. *Id.*
179. *Id.* at 2006-7046.
180. See *id.* at 2006-7045.
181. *Id.* at 2006-7046.
182. See *id.* Pursuant to § 6672(b)(1), the Service is required to notify a taxpayer in writing by mail "to an address as determined under § 6212(b) or in person" that the taxpayer shall be subject to the assessment of a responsible person penalty before the Service may assess the penalty. I.R.C. § 6672(b)(1) (2000). Under § 6212(b), the last known address of the taxpayer is the proper mailing address for purposes of § 6672(b)(1). I.R.C. § 6212(b) (2000). The regulations under § 6212 define the last known address as the address that appears on the taxpayer's most recently filed federal tax return unless the Service receives clear and concise notification of a different address. Treas. Reg. § 301.6212-2(a).
Because the propriety of the collection effort and not the merits of the underlying tax was at issue, the district court applied an abuse of discretion standard of review to the summary judgment motion filed by the government. Under this standard, the reviewing court must not interfere with the Service's determination unless it is "'arbitrary, capricious, clearly unlawful, or without sound basis in fact or law.'"185

The court demonstrated that Planes's argument suffered from a fundamental flaw—if Planes was in fact a responsible person with regard to Keen's Corner, then Planes breached the OIC once Keen's Corner failed to pay its taxes on time in early 2002. The OIC required Planes "to comply with all provisions of the [Code] relating to filing returns and paying required taxes for five years."186 Therefore, if Planes was a responsible person on behalf of Keen's Corner, Planes violated the OIC when Keen's Corner failed to pay its quarterly taxes on April 30, 2002.187 Planes's inability to lodge a timely protest of the penalty assessment was irrelevant to the determination of whether he breached the OIC.188 Contrary to Planes's argument, the Service was not compelled to provide Planes with the opportunity to pay the responsible person penalty before finding him in breach of the OIC.189

183. Planes, 98 A.F.T.R. 2d at 2006-7046. Planes structured his argument this way at oral argument, but he characterized the issues slightly differently in documents filed with the court. The court chose to address the issues in the manner they were raised by Planes at oral argument. See id. In addition, Planes raised a separate argument that the settlement officer denied the reinstatement of the OIC based on improper ex parte communications with the counsel for the Service. Planes proposed that settlement officers should not communicate with agents and officers of the Service if the communications would appear to compromise the independent judgment of the settlement officer. Id. at 2006-7048. The court easily dismissed this claim, citing an exception to the ex parte communications rule that applies for communications that relate only to administrative, ministerial, or minor procedural matters. Id.

184. Id. at 2006-7046.

185. Id. (citations omitted).

186. Id. at 2006-7047.

187. Id.

188. Nonetheless, the court found that the Service provided Planes with the opportunity to challenge the assessment. Id. The Service conceded at the prior hearings that Planes never received the first notice, restoring Planes to "the status he would have occupied had he properly received the notice of assessment." Id.

189. See id. The court also addressed the issue of whether the Service properly sent the notice of the proposed assessment to Planes's "last known address." Id. The court found that the settlement officer did not abuse his discretion by determining that the Service met this requirement, even though Planes never received the letter. Id. This analysis was superfluous because the court had already determined that if Planes was a
Hence, in order to rule that Planes defaulted on the OIC, the court merely needed to find that Planes was properly deemed liable as a responsible person for Keen's Corner. Once the government assesses a responsible person penalty, the individual against whom the penalty is assessed bears the burden of proving that he was not a responsible person or that the failure to pay the withheld taxes was not willful.\textsuperscript{190} The court found that the settlement officer did not abuse his discretion in determining that Planes failed to meet this burden.\textsuperscript{191} Planes admitted that he was responsible for a number of Keen's Corner's business tasks, such as paying bills, signing corporate checks, and making and authorizing bank deposits.\textsuperscript{192} This evidence justified the settlement officer's decision that Planes was "so connected with [Keen's Corner] as to have responsibility and authority to avoid the default which constitutes a violation of \$6672."\textsuperscript{193} The court thus refused to overrule the determination that Planes was a responsible person for Keen's Corner.\textsuperscript{194}

The district court granted the government's motion for summary judgment and allowed the Service to proceed with its collection action against Planes for the amounts previously absolved by the OIC.\textsuperscript{195}