

Federal Taxation

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Introduction

In 1999, the Eleventh Circuit Court of Appeals decided several substantive tax cases as well as a number of procedural cases. The substantive tax issues addressed by the court included the definition of control under Section 1504(a), whether S corporation shareholders can increase basis in their stock by the amount of guaranteed loans, the allocation of the purchase price of real property among depreciable and non-depreciable assets, employment tax issues, and worthless debt deductions under Section 166. As to procedural issues, the court decided cases relating to remittances made in connection with Forms 4868, the statute of limitations for willful evasion of payment of tax, and how bankruptcy stays affect the period for appealing Tax Court Decisions.

I. Definition of Control under Section 1504(a)

In *Alumax Inc. and Consolidated Subsidiaries v. Commissioner of Internal Revenue*,¹ the Eleventh Circuit affirmed a Tax Court decision which held that Alumax Inc. (“Alumax”) could not join the consolidated return of its shareholder Amax Inc. (“Amax”) for the years 1984-86 because Amax did not have control of 80% of the voting power in Alumax as required by section

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1504(a) of the Internal Revenue Code. The decision resulted in a deficiency for federal tax purposes of \$129,000,000 for the years 1981-86.

Alumax is a Delaware corporation based in Atlanta that manufactures aluminum products.² From 1974 until 1984, Alumax's voting shares were owned equally by Amax and a changing group of Japanese interests (including at times, Nippon Steel Corporation and Mitsui & Co. Ltd.).³ During this period, votes on shareholder matters, board elections and board voting were distributed equally between Amax and the Japanese interests.⁴

In 1984, Alumax underwent a restructuring. While the number of voting shares owned by Amax and the Japanese interests stayed the same, the number of votes per share of stock changed to four votes per share held by Amax and one vote per share held by the Japanese.⁵ The Japanese-held stock also was given a call right to purchase the Amax-held stock under certain circumstances described below, subject to a right of Amax to exchange its shares for shares in Alumax with only one vote per share.⁶ New class voting requirements were also instituted. After the restructuring, a majority of each class of stock (e.g. stock held by Amax or stock held by the Japanese interests) was required for any of the following: (i) merger, (ii) asset purchase or sale of at least 5% of Alumax's net worth (approximately \$36 million during the period in question), (iii) capital appropriation or asset disposition worth more than \$30 million, (iv) election or dismissal of Alumax's CEO, and (v) loans to affiliated corporations not in the ordinary course of business.⁷

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Under the new voting regime, Amax had the power to elect four of six voting directors of the Alumax board.⁸ The Japanese interest elected the remaining two voting directors.⁹ The Amax-elected directors held two votes each and the Japanese-elected directors held one vote.¹⁰ While this arrangement gave the Amax-elected directors 80% of the voting power over most matters, in the six instances outlined above a majority vote of the Japanese-elected directors and a majority vote of the Amax-elected directors was required.¹¹ In addition, if any Japanese-elected director disagreed with a board vote he could object, which objection if ratified by the appropriate Japanese corporation would nullify the Alumax board vote.¹² This procedure in essence gave the Japanese-elected directors veto rights over decisions by the Alumax board. Amax could challenge the veto, however, within five days of notice.¹³ Once challenged, if a panel of arbitrators ruled within fourteen days that the vote would not have a material adverse effect on the Japanese interest's investment, the veto would be overridden.¹⁴ If Amax lost the challenge, the vote would remain ineffective and the call right described above held by the Japanese-interests would become effective.¹⁵ Similar veto provisions were applicable to shareholder votes as well.¹⁶

Finally, the authority of the Alumax board was limited under its certificate of incorporation. Contrary to the default provisions of Delaware law which permit a board of directors to determine the timing and amount of dividends made, the Alumax certificate of incorporation required Alumax to pay a certain percentage its net income out as a dividend every year.¹⁷ Further, 80% of these dividends were required to be paid to the Japanese-interests and

20% to Amax.¹⁸

In order for Alumax to join in the consolidated return of Amax, Alumax had to be in Amax's affiliated group.¹⁹ Prior to amendment in 1984, section 1504(a)(2) of the Internal Revenue Code required a parent of an affiliated group to own at least 80 percent of the voting power of all classes of subsidiary stock and at least 80% of each class of nonvoting subsidiary stock for the subsidiary to be included in the affiliated group.²⁰ From the discussion in the Tax Court it appears Alumax was not authorized to issue any nonvoting stock.²¹

The Deficit Reduction Act of 1984 amended section 1504(a)(2) to require a parent to own both 80% of the voting power of all classes of stock and 80% of the fair market value of each class of stock.²² Corporations meeting the old test on June 22, 1984 were grandfathered for years prior to 1988.²³ The Eleventh Circuit ruled that because Alumax's restructuring was completed before June 22, 1984, it only had to meet the pre-1984 test to be included in Amax's consolidated return for 1984-86. The Tax Court correctly stated though, that given the holding that under pre-1984 law the voting requirement was not met, that Amax would have to meet the post-1984 requirements (i.e. 80% vote and value) in order to be permitted to file a consolidated return with Alumax for Amax in 1985 and 1986.²⁴ Given that the tests interpreting voting power are the same before and after the 1984 amendments, however, this distinction is ultimately irrelevant, except to the extent that the voting power requirements were met in which case the value requirement would have to be met too. In any event, the only question the Eleventh Circuit ruled on was whether Amax held at least 80% of the voting power of Alumax.

In order to determine the answer to this question, the court first turned to the statutory construction of section 1504, which it determined was not conclusive.²⁵ The court next turned to judicial interpretations of section 1504. Citing *Erie Lighting Co. v. Commissioner*,²⁶ the court stated that “historical judicial and IRS interpretation is that ‘voting power’ means the power to control the corporation’s business through the election of the board of directors.”²⁷ The court posited that this rule is built on the assumptions that a corporation’s directors manage a corporation’s business and that a supermajority of directors controls the board.²⁸ As the court pointed out, however, these assumptions do not hold true in the case of Amax, where majority shareholder and board votes were required in certain circumstances, where the Japanese-interest shareholders had virtual veto rights over board votes, where contingent call arrangements existed, and to a lesser extent where the Alumax board itself lacked customary powers to determine dividend amounts and times.²⁹

Nevertheless, the Petitioner argued that it had meet the 80% voting power requirement because it could elect directors with 80% of the vote. The court rejected this purely mechanical test, arguing that it failed to take into account circumstances, such as those of Alumax, where section 1504’s underlying assumptions were invalid. A more appropriate analysis in the eyes of the court was that of the Tax Court which looked at the effect on voting power of the limitations on the Alumax stock held by Amax. Concluding that these limitations restricted Amax’s voting power to a level below 80%, the court affirmed the Tax Court’s ruling that Alumax was not entitled to join Amax’s consolidated return.³⁰

II. S Corporation Stock Basis And Allocation Of Real Property Purchase Price

In *Sleiman v. Commissioner*,³¹ the Eleventh Circuit considered two issues arising from the businesses of three brothers: whether S corporation shareholders can increase the basis in their stock by the amount of loans to the S corporations that they guaranteed, and whether the Commissioner is able to allocate the purchase price of real property among depreciable and non-depreciable assets in a method contrary to the terms of the sale agreement.

A. Basis in S Corporation Stock

In July 1991, Eli Sleiman (“Eli”) entered into a lease agreement with Blockbuster Video, Inc. (“Blockbuster”). This agreement obligated Eli to purchase land on Dunn Avenue (located in Jacksonville, Florida), build a store on this land, and subsequently lease the Dunn Avenue property to Blockbuster. The agreement also allowed Blockbuster to terminate the lease if the property was environmentally contaminated. In August 1991, Eli formed Real Estate Equities, Inc. (“REE”), an S corporation, and assigned his rights under the lease to REE. By October 1991, REE had identified the Dunn Avenue property that it wished to purchase, but encountered difficulties in obtaining financing. The financing difficulties had two sources: one, REE had no history of long-term financing, and two, the Dunn Avenue property was environmentally contaminated. Finally, in October 1991, REE obtained a one year, \$450,000 loan from SouthTrust Bank of Alabama, N.A. (“SouthTrust”). As security for this loan REE pledged the Dunn Avenue property (and any improvements thereon), its interest in the Blockbuster lease, and indemnified SouthTrust against any liability arising from the environmental contamination.³²

Additionally, Eli personally guaranteed both the \$450,000 note and the contamination liability indemnification. Eli pledged no assets pursuant to this guarantee, but promised instead to refrain from transferring or pledging any asset for less than full consideration without SouthTrust's consent. In December 1992, a ten-year note with a similar structure replaced the expired one-year note. REE booked both loans as liabilities owed to SouthTrust, not as capital contributions from Eli.

In 1992, Eli received \$55,400 in distributions from REE. On his tax return for that year, Eli claimed that none of this amount constituted capital gain. His theory for this position came from two Subchapter S basis provisions: an S corporation shareholder only recognizes capital gain on a distribution from the corporation to the extent the distribution exceeds the basis in his shares (assuming, as was the case in *Sleiman*, that the corporation has no accumulated earnings),³³ and an S corporation shareholder's basis in his stock includes amounts contributed to the corporation's capital.³⁴ By treating his personal guarantee of the corporate liability as a contribution to capital, he was able to increase the basis in his stock by the amount of the SouthTrust loans. The Commissioner disagreed and issued a Notice of Deficiency. In a memorandum opinion,³⁵ the Tax Court held for the Commissioner - Eli could not include the amount of the SouthTrust loans in the basis of his REE shares, and therefore must recognize capital gain to the extent the distribution exceeded his adjusted basis.³⁶

Eli's argument on appeal was identical to his argument in the Tax Court: under the Eleventh Circuit's holding in *Selfe v. United States*³⁷ he was entitled to count in basis the amount

of a personally-guaranteed S corporation liability. The taxpayer in *Selfe* had guaranteed corporate loans, pledging her personally-owned stock in the corporation as security. Because she wished to recognize large corporate losses (allowable only to the extent of basis),³⁸ the taxpayer included the loans in basis by treating the corporate liability as a loan from the bank to her, followed by a capital contribution by her to the S corporation. In finding for the taxpayer, the *Selfe* court held that an S corporation shareholder that personally guarantees a debt may increase her basis in the corporation by the amount of the debt “where the facts demonstrate that, in substance, the shareholder has borrowed funds and subsequently advanced them to her corporation.”³⁹ In making this determination, the *Selfe* court looked to the general rule that some sort of “economic outlay is required” before an S corporation shareholder can increase her basis, though noting that this does not require in all cases that the shareholder “absolve a corporation’s debt before she may recognize an increased basis as a guarantor of a loan to a corporation.”⁴⁰

Citing *Plantation Patterns, Inc. v. Commissioner*,⁴¹ the court held that an S corporation shareholder’s guarantee of a corporate liability “may be treated for tax purposes as an equity investment in the corporation where the lender looks to the shareholder as the primary obligor.”⁴²

Affirming the Tax Court, the Eleventh Circuit found that the SouthTrust loans to REE were not equivalent to loans from SouthTrust to Eli followed by a capital contribution by Eli to REE, thereby disallowing the basis increase and requiring the recognition of capital gain. The court found that SouthTrust looked to REE as the primary obligor on the loan. SouthTrust’s internal documents showed that SouthTrust was confident that cashflow from the Blockbuster

lease would be significantly higher than the debt payments, and that Eli was only considered a “viable secondary repayment source,” and that it was the bank’s general policy to require personal guarantees on loans to closely-held companies.⁴³ Also, unlike in *Selfe*, where the bank had originally made the loan to the taxpayer (which was later transferred to the corporation) secured by actual assets of the taxpayer, the SouthTrust loan was made directly to REE without the pledge of any of Eli’s personal assets. Eli’s best argument was that SouthTrust could not have looked primarily to REE for repayment because their income stream via the Blockbuster lease was at risk, since the contamination of the Dunn Avenue property would allow Blockbuster to terminate the lease at any time. Though the court agreed that the contamination did make REE’s income stream less secure, it found that the “mere presence of a risk”⁴⁴ did not require the Tax Court to find that SouthTrust could not have expected repayment. At trial the Commissioner presented evidence that Blockbuster would likely not exercise its right to terminate the lease, and that SouthTrust did not consider the contamination a significant risk. The court concluded by repeating the warning issued in *Selfe*: “arguments similar to [the taxpayer]’s -- that the taxpayer’s guarantee is in reality a loan made to the shareholder/taxpayer that is subsequently advanced to the corporation -- usually meet with little success because the taxpayer is unable to demonstrate that the substance of his transaction is different than its form.”⁴⁵

B. Allocation of Basis

Transactions involving a third Sleiman brother, Anthony, were the focus of the second part of the opinion. In July 1992, Miramar Equities, Inc. (“ME”), an S corporation of which

Anthony was the sole shareholder, purchased the Miramar Shopping Center (the “Shopping Center”) from Country, Inc. The purchase and sale agreement allocated \$60,000 of the \$745,000 purchase price to land, presumably leaving \$685,000 to be allocated to the depreciable Shopping Center.

On its 1992 income tax return, ME used the \$60,000 valuation of the land to establish depreciation deductions on the Shopping Center. The Commissioner, on the strength of two appraisals - one before and one after the sale of the Shopping Center - valuing the land at over \$500,000, reallocated \$377,735 of the purchase price to land in his Notice of Deficiency, thereby disallowing a portion of the depreciation deduction. Like his brothers, Anthony lost in the Tax Court; he had not met the burden of proving that the Commissioner’s reallocation of basis was incorrect.

The Eleventh Circuit affirmed the decision of the Tax Court and upheld the determination of the Commissioner. Anthony contended on appeal that he had ample evidence to prove that the Commissioner’s allocation of basis was incorrect. First, even the Tax Court acknowledged that the two appraisals presented at trial were not conclusive of the land’s value, as one was based on proposed renovations and the other failed to value the buildings. More importantly, he claimed, he had the purchase and sale agreement stating that the land was being sold for \$60,000, and argued that the best evidence of the fair value of property is the price arrived at through arm’s length negotiations. But as the court noted, several decisions in this Circuit⁴⁶ have held that while the overall purchase price may reflect arm’s length negotiation, the internal allocation

of price among the components of the property may be disregarded if it does not reflect the actual relative value of each component, as sellers are often disinterested in how the total price is allocated. Because the two appraisals of the land cast enough doubt on the purchase and sale agreement's \$60,000 valuation, the Eleventh Circuit found that the Tax Court did not err in accepting the Commissioner's reallocation.

III. Employment Taxes

Under section 6672 of the Internal Revenue Code, any person responsible for the collection and payment of federal employment taxes who willfully fails to pay such taxes is liable for a penalty equal to the unpaid amount.⁴⁷ In *Harris v. United States*,⁴⁸ the Eleventh Circuit vacated a summary judgment order issued by the United States District Court for the Southern District of Florida and held that the Government had raised a genuine issue as to whether a corporation's vice president of sales was a responsible person for purposes of the statute.

After Savoy Electronics, Inc. ("Savoy") failed to pay withholding and social security taxes for the last three quarters of 1991, the IRS made penalty assessments for unpaid taxes in the amount of \$86,421.37 against Oscar Eugene Lussier ("Lussier"), who was Savoy's president, and against June Harris ("Harris"), who was Savoy's vice president of sales. Harris paid a portion of the assessment and then filed suit in the district court pursuant to 26 U.S.C. § 7422(a), seeking a refund of that payment and cancellation of the assessment against her. The Government counterclaimed against Harris for the unpaid portion of the assessment and

impleaded Lussier as a third-party defendant.⁴⁹

Contending that she was not a responsible person for purposes of section 6672, Harris moved for summary judgment. She made several arguments to support her motion: first, that her job responsibilities did not include control over Savoy's financial or tax matters and that she was not aware that Savoy was delinquent on its tax payments; second, that she had only limited authority to disburse funds without the approval of Lussier or his wife; third, that she did not own any stock in Savoy; and fourth, that she had no authority to hire and fire employees generally, although she probably had the authority, subject to Lussier's approval, to hire and fire employees in the sales department.⁵⁰ The Government introduced a number of documents in response to Harris's assertions, including bank signature cards and a corporate resolution that appeared to give Harris unlimited authority to sign checks on behalf of Savoy, two Savoy checks signed by Harris in payment of unemployment taxes, a copy of an IRS form in which Harris admitted that she loaned money to Savoy to meet its payroll, and a signed declaration from Lussier that stated, *inter alia*, that Harris was authorized to sign checks for Savoy and that Harris was a shareholder of Savoy's publicly owned parent company.⁵¹

Finding that the Government had failed to offer any "real evidence" that Harris was a responsible person, the district court granted Harris's summary judgment motion and ordered the remainder of the case, including the Government's claim against Lussier, closed.⁵² The Government appealed the judgment in favor of Harris and also appealed the district court's denial of its motion to reopen the case against Lussier.

The Eleventh Circuit first addressed whether it had jurisdiction to entertain the Government's appeal. The court of appeals concluded that it lacked appellate jurisdiction over the Government's claim against Lussier because the district court did not enter a "final judgment" on that claim.⁵³ The court did have jurisdiction, however, to hear the Government's appeal of the judgment in favor of Harris.⁵⁴

Turning to the merits, the court explained that to determine whether an individual constitutes a responsible person under section 6672 requires an examination of the individual's status, duty, and authority within the corporation and, contrary to Harris's assertion, does not depend on whether the individual had knowledge of the tax liability at issue.⁵⁵ According to the case law, indicia of responsible person status include the holding of corporate office, control of financial matters, the authority to disburse corporate funds, ownership of stock in the company, and the authority to hire and fire employees.⁵⁶

Applying these factors, the court of appeals concluded that the Government's evidence was sufficient to create a genuine issue of material fact as to whether Harris was a responsible person. First, the Government's evidence showing that Harris's check-signing authority was unlimited refuted the contention that her authority to disburse corporate funds was limited. Second, after noting that Harris was a shareholder of Savoy's parent company, the court stated that a reasonable trier of fact could conclude that her indirect ownership interest in Savoy, together with her status as an officer of Savoy, afforded her sufficient authority to ensure that the taxes were paid. Third, the two Savoy checks signed by Harris in payment of unemployment

taxes refuted her contention that she had no control over Savoy's financial or tax affairs and, moreover, suggested that she had the ability to pay Savoy's delinquent taxes. Finally, the fact that Harris had loaned money to Savoy to meet its payroll obligations created a reasonable inference that Harris could exert a substantial influence over the payment of payroll taxes.⁵⁷

In light of the substantial evidence presented by the Government, the court of appeals concluded that the district court inappropriately granted summary judgment in favor of Harris. The court vacated the summary judgment order and remanded the case to the district court for further proceedings.⁵⁸

IV. Denial Of Worthless Debt Deduction Under The "Danielson" Rule

In *Plante v. Commissioner*,⁵⁹ the Eleventh Circuit denied a worthless debt deduction under section 166 of the Internal Revenue Code to a taxpayer in connection with funds he had advanced to his wholly owned corporation. The court based its decision on the fact that the taxpayer had agreed in writing to convert the advances into a capital contribution when he sold the corporation's stock to a third party.

In 1987, Robert Plante ("Plante") acquired a marina business that he operated through a wholly owned corporation, Boating Center of Baltimore, Inc. ("BCBI"). Due to operating losses suffered by BCBI, Plante decided to sell the business and negotiated a selling price of \$1,050,000 for all of BCBI's outstanding stock. At a meeting on December 20, 1991, the buyer discovered that Plante had made advances to BCBI totaling \$475,000, which were reflected in BCBI's books as a liability to Plante. The buyer refused to purchase the BCBI stock without the

elimination of the liability, and the parties added a provision to the Stock Purchase Agreement in which Plante made the following representation:

[Plante] has transferred Four Hundred Seventy-Five Thousand (\$475,000.00) Dollars of notes and accrued interest of [BCBI] due [Plante] as of 11/1/91 to the equity account of [BCBI] and has made this an irrevocable capital contribution to [BCBI].⁶⁰

On their joint 1991 federal income tax return, Plante and his wife originally reported a long-term capital loss in the amount of \$693,492 from the sale of the BCBI stock.⁶¹ They deducted \$3,000 of the loss currently and treated the remaining portion as a long-term capital loss carryover to 1992.⁶² On an amended 1991 return, however, the taxpayers claimed the entire amount of the loss from the sale of the BCBI stock as an ordinary loss under section 1244 of the Code, which resulted in a net operating loss for the taxable year.⁶³ The taxpayers used a portion of this 1991 net operating loss on amended returns filed with respect to their 1988, 1989, and 1990 taxable years.⁶⁴ In addition, on their 1992 federal income tax return, Plante and his wife claimed a net operating loss carryover deduction in the amount of \$587,581.⁶⁵ The IRS issued a notice of deficiency with respect to the 1992 tax year, asserting that only \$100,000 of the \$693,492 loss from the sale of the BCBI stock could be treated as an ordinary loss in 1991 under section 1244 of the Code.⁶⁶ Treating the balance of the loss as a long-term capital loss resulted in disallowance of the entire amount of the net operating loss carryover deduction claimed by the taxpayers in 1992.⁶⁷ In the Tax Court, Plante conceded that section 1244(b)(2) limited the

amount of the ordinary loss deduction to \$100,000 and supported his claim for a 1992 net operating loss carryover deduction on the theory that he was entitled to a previously unclaimed worthless debt deduction in 1991 with respect to the \$475,000 advanced to BCBI.⁶⁸

The Tax Court rejected Plante's worthless debt deduction on two grounds. First, with respect to a portion of the advances not represented by promissory notes, the Tax Court concluded that Plante had failed to establish the existence of bona fide indebtedness, which is a prerequisite to a worthless debt deduction.⁶⁹ Second, with respect to the portion of the advances that was evidenced by promissory notes, the Tax Court held that Plante had made a capital contribution to BCBI by converting the advances into equity in connection with his sale of the BCBI stock.⁷⁰ As a result of the disallowance of the 1991 worthless debt deduction, the taxpayer's net operating loss carryover deduction to 1992 also was disallowed, and the Tax Court entered a decision in favor of the IRS.⁷¹ Plante appealed.

On appeal, the Eleventh Circuit concluded that it was unnecessary to decide whether Plante's advances to BCBI constituted bona fide indebtedness in the first place because the Tax Court's theory about the portion of the advances evidenced by promissory notes applied with equal force to the full amount (\$475,000) claimed by Plante.⁷² Pointing out that Plante had characterized his advances to BCBI as capital contributions in the Stock Purchase Agreement, the court invoked the so-called *Danielson* rule and refused to allow Plante to ignore the language of the Stock Purchase Agreement in order to obtain tax benefits.⁷³ Under the *Danielson* rule, "[a] party can challenge the tax consequences of his agreement as construed by the

Commissioner only by adducing proof which in an action between the parties [to the agreement] would be admissible to alter that construction or to show its unenforceability because of mistake, undue influence, fraud, duress, et cetera.”⁷⁴

Plante contended that the Stock Purchase Agreement was ambiguous in characterizing his advances as capital contributions and that the court therefore should use extrinsic evidence to decide whether the advances constituted capital contributions or loans. The court found no ambiguity, however: the agreement stated clearly that the advances were to be made into capital contributions at the closing of the stock sale.

Plante also argued that the *Danielson* rule should not apply in his case because there was no danger of the IRS being “whipsawed” by having to litigate against two taxpayers taking inconsistent positions.⁷⁵ Plante asserted that BCBI was insolvent both before and after its indebtedness was canceled and that, accordingly, BCBI would not recognize taxable income from cancellation of indebtedness.⁷⁶ The Eleventh Circuit rejected Plante’s argument, stating that the record as to BCBI’s insolvency was not clear. In addition, although it agreed that one purpose of the *Danielson* rule is to prevent the IRS from being whipsawed by taxpayers, the court noted that the rule has other purposes that were applicable to Plante’s case. According to the court, allowing a party to alter the express terms of a contract by arguing that its terms do not represent economic reality would impose an undue burden on the IRS, forcing it to litigate the underlying factual circumstances of countless agreements.⁷⁷ In addition, since business agreements often are structured “with an eye toward the tax consequences,” it would

“considerably undermine the certainty of business deals” to allow one party to realize a better tax consequence than the consequence for which he or she bargained.⁷⁸

After rejecting some additional arguments made by Plante, the court concluded that Plante’s advances to BCBI constituted a capital contribution and affirmed the judgment of the Tax Court.

V. Procedural Issues

A. Remittances Made in Connection with Forms 4868

In *Dantzer v. Internal Revenue Service*,⁷⁹ the Eleventh Circuit addressed the question whether taxpayers’ remittances submitted with requests for extensions of time constitute payments for purposes of the statute of limitations for refund claims.

In *Dantzer*, the taxpayers submitted to the Internal Revenue Service (the “IRS”) in each April of 1986, 1987 and 1988 Forms 4868 requesting four-month extensions of time for filing their federal income tax returns.⁸⁰ With each request for an extension, the taxpayers enclosed a remittance, and the IRS granted each request. The taxpayers, however, did not file their tax returns within the extended period. Instead, they filed their returns for the years 1985, 1986 and 1987 in December 1992. Each return sought a refund, because the tax liability reported on the returns was less than the remittances made in connection with the Forms 4868. The IRS notified the taxpayers that it had disallowed their refund requests because the statute of limitations barred the claims.⁸¹

Section 6511(a) of the Internal Revenue Code provides that a refund claim must be filed

“within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid.” Section 6511(b)(2)(A), however, limits the amount of a refund to “the portion of the tax paid within the period immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return.”

Given these jurisdictional time bars, in order for the taxpayers to recover in this case, their refund claims must have been filed within three years and four months from when the tax was paid.⁸² Because the refund claims at issue were made more than three years and four months after each remittance, if the remittances were payments as contemplated by section 6511, the taxpayers’ claims are time-barred.⁸³

The taxpayers argued that the remittances were deposits and not payments, and that until there has been an assessment of tax, there can be no payment of tax.⁸⁴ Because there had been no assessment at the time of filing their returns, the taxpayers argued that their claims were timely.⁸⁵ The taxpayers’ position rested on precedent from the Eleventh Circuit.⁸⁶

The Eleventh Circuit, however, was not persuaded by the taxpayers’ arguments, and instead focussed on the language of Form 4868, section 6513 of the Internal Revenue Code, and related Treasury regulations in reaching its decision.⁸⁷ The Form 4868 plainly states that it “is not an extension of time for payment of tax.” Section 6513(b)(2) provides that “any amount paid as estimated income tax for any taxable year shall be deemed to have been paid on the last day prescribed for filing the return ... (determined without regard to any extension of time for filing

such return).” Further, Treas. Reg. 1.6081-4(b) provides that “any automatic extension of time ... shall not operate to extend the time for payment of any tax due on such return.” Based on these statutory and regulatory guidelines, the court concluded that the remittances were payments of tax.⁸⁸ As a result, the limitations period on claims for refund began to run when the taxpayers filed their remittances with the IRS, and the taxpayers’ claims were time-barred.⁸⁹

B. Statute of Limitations for Willful Evasion of Payment of Tax

In *United States v. George Hunerlach*,⁹⁰ the Eleventh Circuit considered a taxpayer’s appeal from his conviction and sentence which he received for willful evasion of payment of taxes and filing a false statement. One of the taxpayer’s primary arguments on appeal was that the district court erred in denying his motion to dismiss one count of the indictment (i.e., the count relating to willful evasion of payment of taxes), based on the statute of limitations.⁹¹

Count I of the two count indictment charged the taxpayer with a violation of section 7201, which states, “any person who willfully attempts in any manner to evade or defeat any tax imposed ... or the payments thereof shall, ... be guilty of a felony....”⁹² There is an additional element in cases of willful evasion of payment that the taxpayer engage in some affirmative act constituting an evasion of payment of tax.⁹³ In a prior case,⁹⁴ the Eleventh Circuit had concluded that for statute of limitations purposes, the crime of willful tax evasion includes evasive acts that occurred after the tax return was due.

The taxpayer appeared to concede that in evasion of *assessment* cases the statute of limitations begins to run from the last act of concealment.⁹⁵ The taxpayer argued, however, that

a different rule should apply in evasion of *payment* cases.⁹⁶ The taxpayer contended that commencing the limitations period upon the last affirmative act in evasion of *payment* cases operates to eliminate the statute of limitations because if the taxpayer refuses to pay, but continues in financial transactions rather than pay his taxes, he would be subject to continued prosecution.⁹⁷

The Eleventh Circuit rejected the taxpayer's argument and held that the statute of limitations for willful evasion of payment of taxes begins to run from the last affirmative evasive act, even if that act occurs more than six years from the date when the tax was due.⁹⁸ In support of its holding, the court stated that it could not find any authority to support the contention that there should be a distinction between evasion of payment and evasion of assessment for purposes of applying the statute of limitations.⁹⁹ In addition, the court could find no reason to have different limitations rules for evasion of assessment and evasion of payment of taxes.¹⁰⁰

C. Bankruptcy Stays and the Period for Appealing Tax Court Decisions

In *Roberts v. Commissioner*,¹⁰¹ the Eleventh Circuit dismissed an appeal from the Tax Court as untimely. The court held that sections 362(a)(1), 362(a)(8) and 108 of the Bankruptcy Code neither stayed nor extended the ninety-day period provided by section 7483 of the Internal Revenue Code for filing appeal notices from Tax Court decisions.

In March 1993, the Tax Court entered a decision against the taxpayers.¹⁰² Three weeks prior to that decision, however, the taxpayers had filed for bankruptcy, and neither the IRS nor the Tax Court was aware of this filing.¹⁰³ The IRS learned of the bankruptcy case in July 1993

and moved the Tax Court to vacate its March 1993 decision.¹⁰⁴ The Tax Court granted the motion.¹⁰⁵ The IRS then obtained relief from the bankruptcy court which lifted the automatic stay to allow the Tax Court proceeding to continue.¹⁰⁶ The Tax Court re-entered its decision on October 27.¹⁰⁷

In November 1993, the bankruptcy court dismissed the taxpayers' case.¹⁰⁸ In December 1993, however, the taxpayers filed another bankruptcy petition, and in March 1994 the taxpayers filed a notice of appeal from the Tax Court decision.¹⁰⁹ The Eleventh Circuit dismissed that appeal in December 1995 based on the automatic stay in the second bankruptcy case.¹¹⁰ The taxpayers obtained relief from the stay in April 1996 and filed a new notice of appeal from the Tax Court decision ten days later.¹¹¹ The IRS moved to dismiss. It is this second notice of appeal that is the subject of this case.¹¹²

First, the taxpayers argued that the Tax Court proceeding and the appeal from the Tax Court's decision was stayed by operation of 11 U.S.C. § 362(a)(1).¹¹³ That section provides that the filing of a bankruptcy petition "operates as a stay, applicable to all entities, of . . . the commencement or continuation . . . of a judicial, administrative, or other action or proceeding i) against the debtor . . . , or ii) to recover a claim against the debtor" The Eleventh Circuit rejected this argument and held that a taxpayer's filing of a Tax Court petition constitutes the commencement of a judicial proceeding against the IRS. It is not the continuation of an administrative proceeding by the IRS against the taxpayer. Thus, the ninety-day period is not stayed by 11 U.S.C. § 362(a)(1).¹¹⁴

Second, the taxpayers argued that 11 U.S.C. § 362(a)(8) which stays “the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor” would stay appeals from Tax Court decisions. The Eleventh Circuit rejected this argument.¹¹⁵ Even though the Tax Court technically retained jurisdiction over the taxpayers’ petition for ninety days after the Tax Court rendered its decision, or until the taxpayers filed a notice of appeal, the Tax Court “proceeding” terminated when that court re-entered its decision in October 1993. This was before the taxpayers filed their second bankruptcy petition. Because there was no Tax Court proceeding when the taxpayers refiled for bankruptcy, the automatic stay of section 362(a)(8) was not triggered.¹¹⁶

Third, the taxpayers argued that 11 U.S.C. § 108 extended the ninety-day period for appeals. Section 108 provides an extension of time in which a bankruptcy trustee or debtor in possession may take certain actions under applicable non-bankruptcy law. The Eleventh Circuit held, however, that the filing of a notice of appeal is not the “commencement of an action” within the meaning of section 108(a). Further, subsection (c) of section 108 only applies to the commencement of continuation of actions on claims against the debtor. Although section (b)(2) could apply to the taxpayers, their appeal notice was still untimely. The ninety-day period ended

on January 25, 1994 and subsection (b)(2) extended that period to February 28. The taxpayers,

however, did not file their notice of appeal until May 1994.¹¹⁷

165 F.3d 822 (11th Cir. 1999).
165 F.3d at 822.

Id.

Id.

Id.

165 F.3d at 823.

165 F.3d at 822-23.

165 F.3d at 823.

The Alumax board of directors had two non-voting members, one of which was required to be an Alumax employee and the other
Alumax's CEO. *Id.*

Id.

Id.

Id.

165 F.3d at 823.

Id.

Id.

Id.

Id.

165 F.3d at 823.

I.R.C. §1501 (1985).

I.R.C. §1504(a)(2) (1983).

Alumax Inc. and Consolidated Subsidiaries v. Commissioner of Internal Revenue, 109 T.C. 133, 139-140.

Deficit Reduction Act of 1984 § 60(a), Pub.L.No. 98-369, § 60(a), 98 Stat. 494, 577-79.

Id. § 60(a).

109 T.C. at 160-162.

165 F.3d at 824.

93 F.2d 883 (1st Cir. 1937).

165 F.3d at 824.

Id.

165 F.3d at 824-25.

165 F.3d at 825.

187 F.3d 1352 (11th Cir. 1999).

Because the Dunn Avenue property was covered by Florida's Early Detection Initiative, a program

which covers the cost of certain environmental contamination remediation, neither Eli or SouthTrust was liable for
actual cleanup costs.

26 U.S.C. § 1368(b).

26 U.S.C. § 1367.

T.C. Memo. 1997-530.

The Tax Court and the Eleventh Circuit also heard the claims of Eli's brother, Peter Sleiman. Peter had entered into a nearly identical series of transactions: he signed a lease agreement with Blockbuster, assigned the lease to his newly-formed S corporation, bought environmentally contaminated land, personally guaranteed the loan from SouthTrust, received a distribution from the S corporation, then failed to report the distribution as capital gain. Since both courts applied the same analysis to each of the brothers, this article only discusses Eli.

778 F.2d 769 (11th Cir. 1985).

26 U.S.C. § 1366(d).

778 F.2d at 773.

Id. at 772.

462 F.2d 712 (5th Cir. 1972).

778 F.2d at 774.

187 F.3d at 1358.

Id. at 1359.

778 F.2d at 774.

See *Dixie Finance Co. v. United States*, 474 F.2d 501 (5th Cir. 1973); *Blackstone Realty Co. v.*

missioner, 398 F.2d 991 (5th Cir. 1968) (Decisions by the former Fifth Circuit issued before October 1, 1981 are

ing precedent in the Eleventh Circuit. See *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981)).

26 U.S.C. § 6672(a) states that “[a]ny person required to collect, truthfully account for, and pay

any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such

or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to

r penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or

accounted for and paid over.”

175 F.3d 1318 (11th Cir. 1999) (per curiam).

Id. at 1319.

Id.

Id. at 1319-20.

Id. at 1320. Thus, the court did not reach the issue of whether Harris acted willfully in her failure

ly Savoy’s taxes. *Id.* at 1320 n.3.

Id. at 1320. Subject to certain limited exceptions, the U.S. Court of Appeals only has jurisdiction

an appeal from a “final judgment” of the district court. *See* 28 U.S.C. § 1291.

The court construed the district court’s summary judgment order as an entry of final judgment in favor of Harris under Fed.R.Civ.P. 54(b), which allows a district court to enter final judgment with respect to fewer than all of the parties to a case only if it certifies that “there is no justification for delay.” Although the district court purported to enter final judgment in favor of Harris under Fed.R.Civ.P. 58, it also had granted a motion by the Government to certify the judgment in favor of Harris under Fed.R.Civ.P. 54(b). In addition, the court of appeals noted that, because the district court had not entered final judgment regarding the claim against Lussier, it could not have entered final judgment in favor of Harris unless it had entered final judgment under Fed.R.Civ.P. 54(b). *Harris*, 175 F.3d at 1320.

Id. at 1320-21 (citing *Mazo v. United States*, 591 F.2d 1151, 1156 (5th Cir. 1979)).

Id. at 1321 (citing *George v. United States*, 819 F.2d 1008, 1011 (11th Cir. 1987)).

Id.

Id. at 1322. The court stated that it assumed that the district court would entertain the Government’s claim against Lussier on remand.

168 F.3d 1279 (11th Cir. 1999) (per curiam).

Id. at 1280.

Plante v. Commissioner, T.C. Memo. 1997-386, 74 T.C.M. (CCH) 382, 384 (1997).

Id. *See* 26 U.S.C. § 1211(b)(1) (providing that non-corporate taxpayers generally are allowed to use capital losses only to the extent of capital gains, except that up to \$3,000 of a net capital loss for a taxable year may be used to offset ordinary income for that year); 26 U.S.C.

12(b)(1) (providing that non-corporate taxpayers may carry unused capital losses forward to subsequent taxable years but may not carry such losses to prior years).

Plante, 74 T.C.M. at 384. Section 1244(a) of the Code provides that individual taxpayers may treat a capital loss recognized from the stock of a small business corporation meeting certain requirements as an ordinary loss under certain circumstances.

Plante, 74 T.C.M. at 384.

Id.

^{66.} *Id.* Under section 1244(b) of the Code, the amount of a loss from the sale of section 1244 stock that may be treated as ordinary under section 1244(a) is \$50,000 for an individual filing a separate return, or \$100,000 in the case of a husband and wife filing a joint return. 26 U.S.C. 1244(b).

Id.

Id. at 383-84.

Id. at 386.

Id.

Id. at 386-87.

Plante, 168 F.3d at 1280.

Id. at 1280-81.

Id. (quoting *Commissioner v. Danielson*, 378 F.2d 771, 775 (3d Cir. 1967)). The Eleventh Circuit has adopted the *Danielson* rule.

Bradley v. United States, 730 F.2d 718, 720 (11th Cir. 1984).

Plante, 168 F.3d at 1281-82.

Id. Under section 108(a)(1)(B) of the Code, any income arising from cancellation of indebtedness is not taxable if the discharge occurs when the taxpayer is insolvent. 26 U.S.C. § 108(a)(1)(B). Section 108(b) of the Code, however, provides that the amount excluded from gross income under section 108(a)(1)(B) of the Code must be applied to reduce certain tax attributes of the taxpayer, including net operating losses and net capital loss carryovers, certain tax credits, net capital losses and capital loss carryovers, and the tax basis of the taxpayer's property. *See* 26 U.S.C. § 108(b).

Plante, 168 F.3d at 1282 (quoting *North Am. Rayon Corp. v. Commissioner*, 12 F.3d 583,587 (6th Cir. 1983)).

Id.

183 F.3d 1247 (11th Cir. 1999).

183 F.3d at 1248.

Id.

Id. at 1249.

Id.

Id.

Id.

See *Thomas v. Mercantile National Bank*, 204 F.2d 943 (5th Cir. 1953) (involving taxpayers in an estate tax case who responded to a notice of deficiency to prevent accruing interest on any possible deficiency); *Ford v. United States*, 618 F.2d 357 (5th Cir. 1980) (involving taxpayers who responded to a notice of deficiency proposed by the IRS after the taxpayers had filed their returns).

183 F.3d at 1250-51.

Id. at 1252.

Id.

197 F.3d 1059 (11th Cir. 1999).

197 F.3d at 1062.

Id. at 1064.

Id.

United States v. Winfield, 960 F.2d 970 (11th Cir. 1992).

197 F.3d at 1065.

Id.

Id.

Id.

Id.

Id.

175 F.3d 889 (11th Cir. 1999).

173 F.3d at 891.

Id.

Id.

Id.

Id. at 891-92.

Id.

Id.

Id.

Id.

Id.

Id.

Id. at 893-94.

Id. at 896.

Id. at 896-97.

Id.

Id. at 898.

