

No. 17-11647

**In the United States Court of Appeals
for the Eleventh Circuit**

NEIL SCHUSTER,

Petitioner-Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

On Appeal from the United States Tax Court
Case No. 28217-14L, Hon. Carolyn P. Chiechi

APPELLANT'S BRIEF OF NEIL SCHUSTER

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**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

Pursuant to Eleventh Circuit Rules 26.1-1 and 26.1-3, the following is an alphabetical list of the trial judges, attorneys, persons, and firms with any known interest in the outcome of this case.

1. Breazeale, Joe – Settlement Officer with Respondent-Appellee’s Office of Appeals who presided over Petitioner’s administrative appeals hearing;
2. Burns, P.A. – Appellate counsel for Petitioner-Appellant;
3. Burns, Thomas A. – Appellate counsel for Petitioner-Appellant;
4. Chiechi, Carolyn P. – United States Tax Court Judge;
5. Clark III, Franklin D. – Supervisory Settlement Officer with Respondent-Appellee’s Office of Appeals;
6. Craig, Anne – Counsel for Respondent-Appellee who consulted during administrative appeal;
7. Gilmore, Nancy M. – Trial counsel for Respondent-Appellee;
8. Indek, David A. – Trial counsel for Respondent-Appellee;
9. Koskinen, Josh – Commissioner of Internal Revenue, Respondent-Appellee;
10. Lansdale, Alexander A. – Revenue Officer with Respondent-Appellee’s Collection Division;
11. Levy, Mann, Caplan, Hermann & Polashuk, LLP – Trial counsel for Petitioner-Appellant;
12. Moe, Debra K. – Trial counsel for Respondent-Appellee;
13. Paul, William M. – Appellate counsel for Respondent-Appellee;

14. Polashuk, David J. – Trial counsel for Petitioner-Appellant;
15. Romano, Nancy B. – Trial counsel for Respondent-Appellee;
16. Rosen, David S. – Certified Public Accountant who represented Petitioner-Appellant in the administrative appeal;
17. Rothenberg, Gilbert Steven – Appellate counsel for Respondent-Appellee;
18. Schumann, John – Appellate counsel for Respondent-Appellee;
19. Schuster, Neil – Petitioner-Appellant;
20. Schuster, Wilma (Deceased) – Mother of Petitioner-Appellant whose payment was erroneously applied to Petitioner-Appellant's account with IRS;
21. Schwartzberg, Scott A. – Trial counsel for Petitioner-Appellant.

No publicly traded company or corporation has an interest in the outcome of this appeal.

September 20, 2017

/s/ Thomas Burns

Thomas A. Burns

STATEMENT REGARDING ORAL ARGUMENT

Petitioner-Appellant Neil Schuster does not request oral argument.

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STATEMENT OF JURISDICTION

The United States Tax Court had subject-matter jurisdiction under 26 U.S.C. § 6330(d) (“[t]he person may, within 30 days of a determination under this section, petition the Tax Court for review of such determination (and the Tax Court shall have jurisdiction with respect to such matter)”) because Mr. Schuster timely petitioned for review of the Internal Revenue Service’s determination concerning collection actions under 26 U.S.C. § 6330 for tax year 2006. App. 1.

This Court has appellate jurisdiction under 26 U.S.C. § 7482(a)(1) (“[t]he United States Courts of Appeals ... shall have exclusive jurisdiction to review the decisions of the Tax Court ... in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury”) because the Tax Court entered both its Memorandum Opinion and its Order and Decision on January 17, 2017 (App. 9, 10), which Mr. Schuster timely appealed on March 31, 2017 (App. 11). *See* Fed. R. App. P. 13(a)(1)(A) (“An appeal as of right from the United States Tax Court is commenced by filing a notice of appeal with the Tax Court clerk within 90 days after the entry of the Tax Court’s decision.”); *id.* 13(a)(2) (“[i]f sent by mail the notice is considered filed on the post-

mark date”). Venue is proper in this Court under 26 U.S.C. § 7482(b)(1)(A) because Mr. Schuster resides in Ocklawaha, Florida.

STATEMENT OF THE ISSUES

1. Did the Tax Court err when it ruled the special two-year statute of limitations of 26 U.S.C. § 7405 and § 6532(b) did not prevent the Commissioner of Internal Revenue from correcting its \$80,000 clerical error almost six years after the fact?

2. Did the Tax Court err when it (1) granted summary judgment to the Commissioner without considering genuine disputes of material fact regarding prejudice to Mr. Schuster, and (2) permitted the Commissioner to recover penalties and interest that accrued solely due to his own oversights and delays?

STATEMENT OF THE CASE

This appeal arises from the Tax Court's decision to award judgment to the Commissioner of Internal Revenue against Mr. Schuster for an amount due on his 2006 Form 1040 income tax return. The liability exists because the Commissioner erroneously applied an \$80,000 payment to Mr. Schuster's tax year 2004 Form 1040 account, which the Commissioner failed to correct for approximately six years.

Course Of Proceedings

Mr. Schuster timely petitioned the Tax Court for review of the Internal Revenue Service's Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330 of the Internal Revenue Code for tax year 2006. App. 1. The Commissioner answered. App. 2.

Thereafter, the Commissioner moved for summary judgment. App. 3. In support, the Commissioner attached an IRS employee's declaration. App. 4. Mr. Schuster responded in opposition. App. 5. In support of his response, Mr. Schuster attached his own affidavit. App. 6. The Commissioner replied. App. 7.

The Tax Court convened a hearing, which was transcribed. App. 8. Thereafter, the Commissioner supplemented his reply. App. 9. Mr. Schuster responded to the supplement. App. 10. In support of his response, Mr. Schuster attached another affidavit. App. 11.

The Tax Court entered a Memorandum Opinion (i.e., the order on appeal), which ruled in the Commissioner's favor. App. 12. The same day, the Tax Court entered its Order and Decision (i.e., the judgment). App. 13. This timely appeal followed. App. 14.

Statement Of Facts

A. The Misapplied \$80,000 Payment

On or about April 15, 2005, Mr. Schuster mailed a \$580,000 payment to the Commissioner along with a request for extension of time to file his 2004 Form 1040. App. 5 at 2. At the same time, Mr. Schuster, who was assisting his elderly mother attend to her tax obligations, mailed a second \$80,000 payment on his mother's behalf to be applied to her 2004 Form 1040 account. App. 5 at 2. This \$80,000 check bore his mother's name and social security number. App. 5 at 2.

Instead of applying the \$580,00 payment to Mr. Schuster's account and the \$80,000 payment to his mother's account, the Commissioner erroneously applied both Mr. Schuster's payment and his mother's payment to Mr. Schuster's 2004 Form 1040 account. App. 5 at 2. Without the misapplied payment, Mr. Schuster had overpaid his 2004 Form 1040, and the Commissioner credited the misapplied payment as an additional credit to his 2004 Form 1040 account, thereby increasing the amount of his 2004 overpayment. App. 5 at 2. The Commissioner classified that overpayment as a refund on the 2004 Form 1040 Account

Transcript for Taxpayer. App. 5 at 2. Mr. Schuster elected to apply his 2004 income tax refund to the following tax year 2005. App. 5 at 2.

In addition to the 2004 Form 1040 refund that was applied to his 2005 Form 1040, Mr. Schuster paid additional funds toward the 2005 tax year, which resulted in another tax overpayment, which he again elected to apply forward to the following tax year 2006. App. 5 at 3. The Commissioner again classified that overpayment as a refund on the 2005 Form 1040 Account Transcript for Taxpayer. App. 5 at 3.

For the 2006 tax year, Mr. Schuster again overpaid his tax, but to a lesser extent. App. 5 at 3. Of the \$80,000 misapplied payment, \$47,045 was applied toward his 2006 income tax and resulted in its satisfaction. *See* App. 5 at 3. The balance of the misapplied payment in the amount of \$32,955 (\$80,000 less \$47,045 that was applied to the 2006 Form 1040) was carried forward and applied to Mr. Schuster's 2007 Form 1040 and then to his 2008 Form 1040, at which time he elected to receive a refund and did receive a refund during calendar year 2009. App. 5 at 3. The Commissioner concedes he is barred from recovering the portion of the misapplied payment that he refunded to Mr. Schuster

in calendar year 2009 as barred by limitations under 26 U.S.C. § 7405 and § 6532(b). App. 9 at 2-3 n.2

B. The Administrative Collection Actions

On April 8, 2011, almost six years after it received and erroneously applied the \$80,000 payment to Mr. Schuster's 2004 Form 1040 account, the Commissioner issued Mr. Schuster a Letter 510C.¹ App. 5 at 3-4. For the first time, this letter informed Mr. Schuster:

[W]e incorrectly applied a payment of \$80,000.00 to your 2004 tax year and the payment was credit[ed] to your 2005 estimated tax. The payment was credit[ed] to your 2006 estimated tax. This made your account appear to be overpaid. We have corrected the error. Your tax account is in a balance due status.

App. 5 at 3-4.

Having not received payment from Mr. Schuster as requested and without the issuance of a Notice of Deficiency or providing any other procedural due process to Mr. Schuster, the Commissioner began taking administrative collection actions against him to collect the liability plus penalties and interest thereon. App. 5 at 4. On February 28, 2014, the Commissioner mailed Mr. Schuster a Final Notice of Intent to Levy and Notice of Your Right to a Hearing ("CDP Notice"), in response to which

¹ A Letter 510C is a "Refund in Error" letter. See Internal Revenue Manual § 21.4.5.

Mr. Schuster timely filed a Form 12153 Request for Collection Due Process Hearing (“CDP Hearing”) disputing that liability. App. 5 at 4-5. This was Mr. Schuster’s first opportunity to dispute this liability. App. 5 at 5.

Joe Breazeale, a Settlement Officer with the IRS Office of Appeals was assigned to preside over the CDP Hearing. App. 5 at 5. At the CDP Hearing, Mr. Schuster disputed his liability for the alleged 2006 Form 1040 balance due, taking the position that the IRS’s application of his overpayment credit and resulting refund constituted an erroneous refund. App. 5 at 5-6. Mr. Schuster asserted that the two-year statute of limitations on recovering an erroneous refund had long since expired. App. 5 at 5-6. Mr. Breazeale took the position that the credit transfer was not a refund. App. 5 at 6.

On October 24, 2014, the Commissioner issued a Notice of Determination upholding the proposed levy action and the underlying liability. App. 5 at 6. Mr. Schuster filed a timely petition with the Tax Court for reconsideration of the Commissioner’s ruling in its Notice of Determination. App. 5 at 6.

C. The Tax Court Proceedings

After considering the summary judgment papers (App. 3-7, 9-11) and convening a motion hearing (App. 8), the Tax Court issued a Memorandum Opinion (App. 12) that ruled in the Commissioner's favor.

Specifically, the Tax Court ruled the IRS could correct its \$80,000 clerical error at any time within 26 U.S.C. § 6502(a)'s ordinary 10-year statute of limitations, notwithstanding the special two-year statute of limitations found in 26 U.S.C. § 7405 and § 6532(b). App. 12 at 23-24. In that regard, the Tax Court ruled the misapplied payment did not satisfy Mr. Schuster's tax liability because it was not "tendered" by Mr. Schuster but was instead caused by an IRS error. App. 12 at 23. Therefore, the Tax Court ruled, Mr. Schuster's liability had not been satisfied and the IRS could correct its clerical error at any time and collect the liability within their ordinary 10-year statute of limitations on collections. App. 12 at 23-24.

Without expressly addressing any prejudice to Mr. Schuster, the Tax Court claimed it had "considered all of the contentions and arguments of the parties that are not discussed herein, and [found] them to be without merit, irrelevant, and/or moot." App. 12 at 24.

Standard Of Review

1. This Court reviews the Tax Court's interpretation and application of the Internal Revenue Code de novo. *Estate of Jelke v. Comm'r*, 507 F.3d 1317, 1321 (11th Cir. 2007).

2. This Court reviews the Tax Court's grant of summary judgment de novo. *Baptiste v. C.I.R.*, 29 F.3d 1533, 1537 (11th Cir. 1994). In doing so, this Court must review the facts and apply the same legal standards as the Tax Court. *Id.* Under Tax Court Rule 121(b), the Tax Court must deny summary judgment whenever there is a genuine dispute of material fact. *Sundstrand Corp. v. Comm'r*, 98 T.C. 518, 520 (1992), *aff'd*, 17 F.3d 965 (7th Cir. 1994).

SUMMARY OF THE ARGUMENT

1. The Tax Court misinterpreted the Internal Revenue Code when it ruled the IRS could correct its \$80,000 clerical error at any time within 26 U.S.C. § 6502(a)'s ordinary 10-year statute of limitations, notwithstanding the special two-year statute of limitations found in 26 U.S.C. § 7405 and § 6532(b). In so ruling, the Tax Court failed to recognize that the \$80,000 overpayment credit was in fact an erroneous refund once it was (partially) applied to Mr. Schuster's 2006 tax liability.

In other words, when the IRS mistakenly generated the \$80,000 overpayment credit and misapplied it to Mr. Schuster's tax year 2006 liability, it was virtually identical to a situation in which the IRS cut Mr. Schuster a refund check, albeit erroneously.

In particular, the Tax Court's ruling was inconsistent with *United States v. Guy*, in which the Sixth Circuit held, "a tax credit, which was improperly allowed, is in the nature of an erroneous refund." 978 F.2d 934, 939 (6th Cir. 1992) (citing *Rushlight Automatic Sprinkler Co. v. United States*, 294 F.2d 572 (9th Cir. 1961) and *Wilkes-Barre Carriage Co. v. Comm'r*, 39 T.C. 839, 844 (1963)). *Guy*'s holding controls the situation here because Mr. Schuster's overpayment credit (a prior year refund) was applied to the following tax year's federal tax liability. Despite saying at the hearing that "the *Guy* case I think is relevant" (App. 8 at 60), the Tax Court failed to distinguish (or even address) *Guy*'s holding in its decision.

2. The Tax Court also committed procedural error when it granted summary judgment without considering genuinely disputed material facts regarding prejudice. Mr. Schuster's affidavit (App. 11) established the IRS's delay in correcting its error prejudiced him. There-

fore, this Court should vacate summary judgment and remand for the Tax Court to consider prejudice. Additionally, the Tax Court erred when it allowed the Commissioner to recover penalties and interest that accrued solely due to his own oversights and delays.

ARGUMENT AND CITATIONS OF AUTHORITY

I. THE TAX COURT MISINTERPRETED THE TAX CODE WHEN IT FAILED TO RECOGNIZE THAT THE OVERPAYMENT CREDIT APPLIED TO TAX YEAR 2006 GENERATED BY THE MISAPPLIED \$80,000 PAYMENT WAS AN ERRONEOUS REFUND GOVERNED BY A SPECIAL TWO-YEAR STATUTE OF LIMITATIONS

The Tax Court misinterpreted the Tax Code. Contrary to its ruling, the overpayment credit produced by the misapplied \$80,000 payment, when credited to tax year 2006, was an erroneous refund governed by a two-year statute of limitations. By the time the Commissioner sought to recover the erroneous refund, the two-year statute of limitations had already expired.

When the Commissioner seeks to recover an erroneous non-rebate refund, the sole procedural mechanism the Internal Revenue Code provides is for the Commissioner to file a civil action in the name of the United States. *See* 26 U.S.C. § 7405(a)-(b); *Lesinski v. Comm'r*, 73

T.C.M. 2819 (1997) (Tax Court lacked jurisdiction over Commissioner’s attempt to recover non-rebate refunds through deficiency procedures).

But that power to file suit is subject to a special two-year statute of limitations. *See id.* § 7405(d). Unless “the refund was induced by fraud or misrepresentation of a material fact”—which did not occur here because the Commissioner was solely responsible for his clerical error—any “[r]ecovery of an erroneous refund by suit under section 7405 shall be allowed only if such suit is begun within 2 years after the making of such refund.” *Id.* § 6532(b).

Accordingly, this statutory framework poses two questions. First, was the overpayment credit generated by the misapplied \$80,000 payment an erroneous refund within the meaning of 26 U.S.C. § 7405(a)-(b)? Second, if so, does the special two-year statute of limitations of 26 U.S.C. § 6532(b) bar the Commissioner from correcting his clerical error six years after the fact?

A. The Overpayment Credit Applied To Tax Year 2006 Generated By The Misapplied \$80,000 Payment Was An Erroneous Refund Within The Meaning Of 26 U.S.C. § 7405(a)-(b)

The Tax Court ruled the misapplied \$80,000 payment misapplication was a “clerical error” the IRS could simply correct at any time. But

United States v. Guy establishes that “a tax credit, which was improperly allowed, is in the nature of an erroneous refund.” 978 F.2d 934, 939 (6th Cir. 1992) (citing *Rushlight Automatic Sprinkler Co. v. United States*, 294 F.2d 572 (9th Cir. 1961) and *Wilkes-Barre Carriage Co. v. Comm’r*, 39 T.C. 839, 844 (1963)). Moreover, while most erroneous refund litigation involves the issuance of an actual refund check (or direct bank deposit) to a taxpayer, it is also true that that “a suit for an erroneous refund encompasses payments made to creditors on the taxpayer’s behalf, and in this regard, the government stands in the shoes of any other creditor.” *Id.*

Here, the Commissioner was owed taxes for tax year 2006 and the misapplied payment was applied to Mr. Schuster’s liability. Therefore, the holding in *Guy* applies, and the Tax Court erred when it ruled the IRS could correct its clerical error without running afoul of 26 U.S.C. § 7405’s and § 6532(b)’s special two-year statute of limitations.

B. As An Erroneous Refund, The Special Two-Year Statute Of Limitations Of 26 U.S.C. § 6532(b) Bars The Commissioner From Correcting His Clerical Error Almost Six Years After The Fact

Guy establishes that a credit transfer is in the nature of an erroneous refund. As an erroneous refund, it must be governed by the spe-

cial two-year statute of limitations found in 26 U.S.C. § 7405 and § 6532(b). When the IRS finally corrected the error four years later in 2011, that two-year statute of limitations had expired. Put more concretely, if the two-year statute of limitations applied, the Commissioner would have had to file suit before November 5, 2009. *See* App. 5 at 17. But it did not do so. Ergo, that statute of limitations has expired.

II. WHEN IT GRANTED SUMMARY JUDGMENT, THE TAX COURT OVERLOOKED GENUINELY DISPUTED MATERIAL FACTS REGARDING PREJUDICE TO MR. SCHUSTER AND FAILED TO CONSIDER EQUITIES REGARDING PENALTIES AND INTEREST

Even if the two-year statute of limitations does not apply, the Tax Court still erred when it granted summary judgment despite genuinely disputed material facts regarding prejudice to Mr. Schuster.

A. The Tax Court Erred When It Overlooked Prejudice

The Tax Court ruled the credit transfer did not constitute an erroneous refund. App. 12 at 23-24. Instead, the Tax Court ruled the payment misapplication was a “clerical error” by the Commissioner that could be corrected at any time. App. 12 at 23-24.

Although it is true the IRS can correct a clerical error, black letter law makes clear it can do so only when it does not cause prejudice to the taxpayer. *E.g.*, *Bugge v. United States*, 99 F.3d 740 (5th Cir. 1996);

United States v. Cooper, 83-1 USTC ¶ 9266 (D.D.C. 1983); *Crompton-Richmond Co., Inc. v. United States*, 311 F. Supp. 1184 (S.D.N.Y. 1970).

Here, Mr. Schuster had submitted affidavits establishing prejudice. App. 11 at 1-3. But the Tax Court never considered this factual issue. *See* App. 12 at 24. Therefore, at the very least, the summary judgment should be vacated and remanded to the Tax Court to consider prejudice.

B. The Tax Court Erred When It Allowed The Commissioner To Recover Penalties And Interest That Accrued Due Solely To The Commissioner's Oversights And Delays

The equities of this case require special consideration. Mr. Schuster was assisting his elderly mother in attending to her obligations. The error was the sole fault of the IRS, and the IRS's delay in correcting it was horrific. In addition, once the IRS corrected its error, it sent a form letter to the Taxpayer demanding repayment within five days. There was no telephone call or attempt to explain what had happened. It would seem to be an extremely harsh result for Mr. Schuster, under these circumstances, to be forced to pay any penalties and interest due to an error that was completely beyond his doing. *Cf. Avon Products*,

Inc. v. United States, 588 F.2d 342, 344 & n.4 (2d Cir. 1978) (interest does not accrue until “a tax becomes both due and unpaid”).

CONCLUSION

The Court should either reverse the Order and Decision (i.e., the judgment) or vacate it and remand for further proceedings.

Respectfully submitted,

/s/ Thomas Burns

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CERTIFICATE OF COMPLIANCE

1. This brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B)'s type-volume requirement. As determined by Microsoft Word 2010's word-count function, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and 11th Circuit Rule 32-4, this brief contains 2,829 words.

2. This brief further complies with Federal Rule of Appellate Procedure 32(a)(5)'s typeface requirements and with Federal Rule of Appellate Procedure 32(a)(6)'s type-style requirements. Its text has been prepared in a proportionally spaced serif typeface in roman style using Microsoft Word 2010's 14-point Century Schoolbook font.

September 20, 2017

/s/ Thomas Burns

Thomas A. Burns

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I filed the original and six copies of the foregoing brief with the Clerk of Court via CM/ECF and regular mail on this 20th day of September, 2017, to:

David J. Smith, Clerk of Court
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ELEVENTH CIRCUIT
56 Forsyth Street N.W.
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I FURTHER CERTIFY that I served a true and correct copy of the foregoing brief via CM/ECF on this 20th day of September, 2017, to:

Department of Justice, Tax
John Schumann

September 20, 2017

/s/ Thomas Burns

Thomas A. Burns