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

REPLY 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. Additions are in italicized text.

1. Breazeale, Joe – Settlement Officer with Respondent-Appellee's Office of Appeals who presided over Petitioner-Appellant'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. *Clark, Thomas J. – Appellate counsel for Respondent-Appellee;*
7. Craig, Anne – Counsel for Respondent-Appellee who consulted during administrative appeal;
8. Gilmore, Nancy M. – Trial counsel for Respondent-Appellee;
9. Indek, David A. – Trial counsel for Respondent-Appellee;
10. *Hubbert, David A. – Acting Assistant Attorney General;*
11. Koskinen, Josh – Commissioner of Internal Revenue, Respondent-Appellee;
12. Lansdale, Alexander A. – Revenue Officer with Respondent-Appellee's Collection Division;

13. Levy, Mann, Caplan, Hermann & Polashuk, LLP – Trial counsel for Petitioner-Appellant;

14. Moe, Debra K. – Trial counsel for Respondent-Appellee;

15. Paul, William M. – Appellate counsel for Respondent-Appellee;

16. Polashuk, David J. – Trial counsel for Petitioner-Appellant;

17. Romano, Nancy B. – Trial counsel for Respondent-Appellee;

18. Rosen, David S. – Certified Public Accountant who represented Petitioner-Appellant in the administrative appeal;

19. Rothenberg, Gilbert Steven – Appellate counsel for Respondent-Appellee;

20. Schumann, John – Appellate counsel for Respondent-Appellee;

21. Schuster, Neil – Petitioner-Appellant;

22. Schuster, Wilma (Deceased) – Mother of Petitioner-Appellant whose payment was erroneously applied to Petitioner-Appellant's account with IRS;

23. Schwartzberg, Scott A. – Trial counsel for Petitioner-Appellant.

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

November 16, 2017

/s/ Thomas Burns
Thomas A. Burns

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I. THE TAX COURT OVERLOOKED GENUINELY DISPUTED MATERIAL FACTS REGARDING PREJUDICE TO MR. SCHUSTER AND FAILED TO CONSIDER EQUITIES REGARDING PENALTIES AND INTEREST

The Commissioner contends his errors never prejudiced Mr. Schuster or affected the outcome of the Tax Court case. Comm'r Br. 15, 27-29. He is wrong.

A. The IRS Cannot Correct Clerical Errors When It Would Prejudice A Taxpayer

Misinterpreting the Internal Revenue Code,[1] the Tax Court ruled the circumstances in this case did not give rise to an erroneous refund, the recoupment of which would be governed by the special two-year statute of limitations found in 26 U.S.C. § 7405 and § 6532(b). Instead, the Tax Court ruled:

> It was only because of an IRS error that petitioner's 2006 account showed that the IRS had applied the erroneous 2006 credit of $80,000 (to the extent of $47,045) against the assessed 2006 total tax due of $47,045. The IRS thereafter correct that error and petitioner's 2006 account by removing the erroneous 2006 credit of $80,000 from that account. After that correction, petitioner's 2006 account showed that, of the assessed 2006 total tax of $317,265, there was a balance of $47,045 that remained unpaid.

[1] There is no need to belabor the parties' differing interpretations of the Internal Revenue Code vis-à-vis the governing statute of limitations. *Compare* Schuster Br. 10-13, *with* Comm'r Br. 16-27. That issue is now for the Court to decide.

App. 12 at 23.

In effect, the Tax Court ruled the IRS erred in applying the $80,000 payment to Mr. Schuster's account, but was free to correct its error at any time within the general 10-year statute of limitations. Although the IRS generally can correct clerical errors, black letter law forbids it from doing so whenever it causes prejudice to the taxpayer. *E.g.*, *Bugge* v. *United States*, 99 F.3d 740, 743 n.3 (5th Cir. 1996); *United States* v. *Cooper*, 83-1 USTC ¶ 9266, at *1 (D.D.C. 1983); *Crompton-Richmond Co., Inc.* v. *United States*, 311 F. Supp. 1184, 1187 (S.D.N.Y. 1970); *Kroyer* v. *United States*, 55 F.2d 495, 499 (Ct. Cl. 1932).

B. The Tax Court Failed To Consider Prejudice

The Tax Court failed to consider the issue of prejudice to Mr. Schuster despite his affidavit, which established he was prejudiced by the IRS's misapplication of the $80,000 payment and its delay in correcting it. App. 11 at 1-3. As such, the Commissioner's assertion that a finding of prejudice would not have affected the outcome of the Tax Court case is mistaken. Instead, a finding of prejudice would have imposed limits on the IRS's ability to correct its error six years after the fact. "In no way should this opinion … be interpreted as granting the

IRS a special shield from responsibility for its errors, inadvertent or otherwise, that prejudice the taxpayer." *Bugge*, 99 F.3d at 746 n.7. In reinstating Mr. Schuster's tax liability, the IRS seeks this Court's approval to do precisely what *Bugge* forbade: *i.e.*, to shield itself from responsibility for its actions in an unacceptable delay it alone had caused.

Because the Tax Court never considered prejudice in the first instance, which it was required to do, remand is appropriate. This Court has long recognized that remands of summary judgment rulings preserve judicial resources and promote judicial economy: "[r]emand after reversal of summary judgment does not seriously impair judicial economy, because, unlike remand after a full trial, it does not involve the district court in redundant proceedings." *Roofing & Sheet Metal Servs., Inc.* v. *La Quinta Motor Inns, Inc.*, 689 F.2d 982, 990 (11th Cir. 1982). And even though appellate review of summary judgment orders is de novo, absent the "benefit of the district court's reasoning," this Court necessarily "commence[s] [such] analysis on appeal at a 'decided disadvantage,'" much akin to the "'proverbial blind hog, scrambling through the record in search of an acorn.'" *Hulsey* v. *Pride Restaurants, LLC*, 367 F.3d 1238, 1243-44 (11th Cir. 2004) (citations omitted).

C. The Commissioner's Argument That The Equities Are In His Favor Is Mistaken

Citing Mr. Schuster's temporary relief from tax liability, the Commissioner then argues Mr. Schuster was not prejudiced and that the equities favor the government. *See* Comm'r Br. 16, 28-29. Again, the Commissioner is wrong.

As established by Mr. Schuster's affidavit, had he known at the time he owed tax for 2006, he then had the ability to pay and would have paid it. App. 11 at 2-3. But by the time the IRS belatedly corrected its error in 2011—and sent Mr. Schuster an abrupt letter so notifying him, which gave him five days to repay the funds—his financial condition had worsened "[d]ue to the unforeseen collapse in the real estate market and the impact this had on [his] real estate business and financial picture," and he was no longer in a position to pay. App. 11 at 2-3.

Moreover, Mr. Schuster did not understand why the IRS was telling him he owed back taxes. After seeking out advice from his accountants and significant back and forth with the IRS Collection Division, Appeals Office, and Chief Counsel, it became apparent how the IRS had fumbled the ball. Defending himself from the IRS's mistake caused Mr. Schuster to incur professional fees and, despite the fact that the delay

was caused solely by an IRS error, the IRS now seeks to recover several years of onerous penalties and interest in addition to the tax.

Indeed, the Commissioner's claim that the equities favor him when the delay was due solely to his own negligence takes real chutzpah: "The 'classic definition' of chutzpah has been described as 'that quality enshrined in a man who, having killed his mother and father, throws himself on the mercy of the court because he is an orphan.'" *Motorola Credit Corp.* v. *Uzan*, 561 F.3d 123, 128 n.5 (2d Cir. 2009) (quoting LEO ROSTEN, THE JOYS OF YIDDISH 92 (1968)). The IRS was not a victim of its own negligence; instead, Mr. Schuster was its victim.

That is, Mr. Schuster had established through his affidavits that he was prejudiced by the IRS's payment misapplication and in its delay in correcting its own mistake. Accordingly, the IRS should not be allowed to reap the reward of belatedly correcting its error (*i.e.*, collection of interest and penalties dating back to 2006). At minimum, the Tax Court's grant of summary judgment without considering whether Mr. Schuster was prejudiced by the IRS's delay was erroneous because the determination of prejudice is a question of fact. *McKay* v. *Comm'r*, 89 T.C. 1063, 1068 (1987). Mr. Schuster's affidavits established he was

prejudiced and, at the very least, created a genuine dispute of a material fact.

D. The Commissioner's Suggestion That Mr. Schuster Invited The Court To Disregard Prejudice Is Mistaken

Seeking to avoid that outcome, the Commissioner asserts Mr. Schuster acknowledged during a hearing that there were no material facts in dispute. *See* Comm'r Br. 11, 28. This argument is misguided.

Specifically, at the February 8, 2016 hearing, Mr. Schuster did acknowledge that there were no material facts in dispute. App. 8 at 6. But that concession was limited to the arguments raised *at that time*, and the IRS raised its "clerical error exception" argument for the first time in a supplement filed *after* that hearing. *See* App. 9 at 10-11. Indeed, the IRS filed that supplement solely to comply with the Tax Court's oral directions at the hearing. *See* App. 8 at 45-46.

Importantly, the IRS's new "clerical error exception" argument raised a new factual issue that if Mr. Schuster were prejudiced by the IRS error, the "clerical error" cannot be corrected. *See* App. 9 at 10-11. Mr. Schuster's prior acknowledgement that no facts were in dispute was based on the legal arguments that had been raised by the IRS up until that point in time and did not contemplate this new position, which was

raised later. *Compare* App. 8 at 6, *with* App. 9 at 10-11. Promptly after the IRS raised its new argument, Mr. Schuster asserted prejudice in his response to that supplemental filing (App. 10 at 7-10) and filed an affidavit (App. 11 at 1-3) to provide factual support.

E. The Commissioner Conflates Mr. Schuster's Separate Arguments Regarding Statutory Interpretation And Prejudice

Finally, the Commissioner asserts Mr. Schuster "cites no authority supporting the proposition that the application of the two-year period of limitations depends on prejudice suffered by the taxpayer." Comm'r Br. 28. This misstates Mr. Schuster's position by conflating his two primary arguments.

The two-year statute of limitations has nothing to do with prejudice suffered by the taxpayer. Mr. Schuster's first contention is that the facts underlying this case give rise to an erroneous refund, recoupment of which is governed and limited by a two-year statute of limitations as set forth in the Internal Revenue Code, 26 U.S.C. § 7405 and 6532(b). His second contention, in the alternative (*i.e.*, assuming *arguendo* the Tax Court correctly ruled this case involves the correction of a clerical error as opposed to an erroneous refund), is that the law is clear that

the IRS cannot correct a clerical error when it would prejudice the taxpayer. *See supra* Argument I.A. These two arguments are separate arguments that do not intertwine, as the Commissioner wrongly states. *See* Comm'r Br. 28.

CONCLUSION

The Court should either reverse the Memorandum Opinion (App. 12) and Order and Decision (App. 13) outright or vacate them and remand for further proceedings regarding prejudice.

Respectfully submitted,

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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 1,574 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.

November 16, 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 16th day of November, 2017, to:

David J. Smith, Clerk of Court
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ELEVENTH CIRCUIT
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I FURTHER CERTIFY that I served a true and correct copy of the foregoing brief via CM/ECF on this 16th day of November, 2017, to:

Department of Justice, Tax
Thomas J. Clark
John Schumann

November 16, 2017

/s/ Thomas Burns
Thomas A. Burns