ORIGINAL

№ 19-1460

In the

Supreme Court of the United States

Jan M. Mengedoht,

Petitioner,

UNITED STATES OF AMERICA,

Respondent

On Petition for Writ of Certiorari
to the United States Court of Appeals
For the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Jan M. Mengedoht*
19855 County Road 11
Herman, Nebraska 68029
402 290 2479
**Party Appellant In Propria Persona*

QUESTIONS PRESENTED

1. May a federal court exercise subject matter jurisdiction in an action to "reduce to judgment" an asserted estate tax lien case where exhibits in the court record establish that

   a. the decedent had conveyed the property sought to be sold "in satisfaction" years prior to his passing; and,

   b. there is no evidence in the administrative record that the estate involved met the federal estate tax filing threshold in effect for the year of decedent's passing?

2. May a federal court exercise such subject matter jurisdiction in said action where the administrative record establishes that

   a. the purported "assessment" upon which the claimed "estate tax lien" was made by an employee of the "Small Business/Self-Employed" ("Examination") Division; rather than

   b. by the delegate of the Secretary of Treasury duly-appointed as an assessment officer pursuant to 26 C.F.R. § 301.6203-1?

PARTIES TO THE PROCEEDINGS

Parties listed upon the notice of appeal filed in the Eighth Circuit Court of Appeals (Case No 19-1265) were UNITED STATES OF AMERICA and Jan M. Mengedoht, individually, and as Executor of the Charles A. Mengedoht Estate, and as Trustee of H C J Holdings Trust; the action filed in the United States District Court for the District of Nebraska included WASHINGTON COUNTY TREASURER, which was not party to the appeal filed in the Eighth Circuit, nor to this Petition.

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OPINIONS BELOW

The Eighth Circuit Court of Appeals affirmed the judgment of the District of Nebraska on January 24, 2020, and issued its mandate on March 16, 2020. Pet. App. Document 2, pp. 2-12.

The District of Nebraska granted Summary Judgment on January 9, 2019. Pet. App. Document 3, pp. 12-13.

JURISDICTION

Jurisdiction was asserted under 28 U.S.C. §§ 1340 and 1345 and 26 U.S.C. §§ 7402 and 7403.

The Eighth Circuit Court of Appeals had presumptive jurisdiction over cases from the District of Nebraska pursuant to 28 U.S.C. § 1291.

The Supreme Court has jurisdiction under the United States Constitution, Art. III § 2, Cl. 2; 28 U.S.C. § 1291; 28 U. S. C. §1651(a).

FEDERAL CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The federal constitutional provisions and statutes, involved in the case include Article III of, and the Fifth Amendment to, the United States Constitution; 26 U.S.C. §§ 2036; 2038; 2201; 6110(b)(1)(A); 6110(b)(2); 6203; 6303; 6321; 6322; 6651; 6671; 6672; 7433; 7442; 28 U.S.C. §§ 636(b); 636(c); 1291; 1651(a); 44 U.S.C. §§ 3101; 3301; 5 U.S.C. § 551(1); 551(6); 551(7); 551(12); 551(13); 554.

The federal regulations involved include 26 C.F.R. §§ 20.2036-1; 20.2038-1; 301.6203-1; 301.6303-1; 36 C.F.R. §§ 1220.18; 1222.10; 1222.10(b)(3).

STATEMENT OF THE CASE

Course of Proceedings

As described in great detail in my Briefs to the Eighth Circuit (hereinafter, Op. Brf.. Reply Brf.), Appendix, pp. # through #, the government brought a civil action on July 5, 2017 naming Petitioner in various capacities, and HCJ Holdings Trust.

The Complaint alleged that an unspecified "delegate of the Secretary of Treasury made assessments against the Estate" of Carl Mengedoht[1] on April 18, 2011; that the "Internal Revenue Service sent notice of the above assessments and demand for payment thereof to the Estate", and that "a federal tax lien arose on the April 18, 2011 assessment date", attaching to all property and rights to property... then owned or thereafter acquired."

The Complaint included other allegations (all dependent on the above, listed allegations), incorporated by reference to my Op. Brf.. Reply Brf.), Appendix, pp. # through #.

Appellant moved to dismiss on August 15, 2017, on a number of grounds, Op. Brf., pp. 4, 5, incorporated entirely by reference.

The following day, an unassigned Magistrate Judge lacking assignment by a district judge, 28 U.S.C. § 636(b), without consent, 28 U.S.C. § 636(c), issued an ORDER, Op. Brf., pp. 5, 6, incorporated entirely by reference, staying "Plaintiff's deadline for responding to Defendants' motion to dismiss... pending further order of the court."

On September 6, 2017, said unassigned Magistrate Judge, still prior to assignment by a district judge, 28 U.S.C. § 636(b), again without consent of any party, 28 U.S.C. § 636(c), issued FINDINGS, RECOMMENDATION AND ORDER Op. Brf., p. 6, incorporated entirely by reference, recommending default or default judgment against the Estate of Charles A. Mengedoht and HCJ Holdings Trust without further notice," failing to order the clerk to mail a

[1] Initially identified as "Charles Mengedoht", later corrected by Amended Complaint.

copy to the "Trustee of HCJ Holdings Trust", or to "Executor of the Charles A. Mengedoht Estate".

One week later, Appellant filed OBJECTIONS AND REFUSAL FOR CAUSE, incorporated entirely by reference, raising issues on seven grounds, including but not limited to lack of consent to a magistrate; failure to serve HCJ Holdings Trust; lack of joinder (indispensable party Executor of the estate had not been joined); and that the Complaint failed to state a claim upon which relief can be granted for failing to allege facts sufficient to show there was a federal tax lien against property of HCJ Holdings; and want of jurisdiction.

Appellee subsequently filed a Motion for Summary Judgment, Op. Brf, 6 Appx, SEE ALSO: Op. Brf, 7 Appx, 8 Appx, 9 Appx, and 10 Appx.

On December 12, 2017, Joseph F. Bataillon, Senior United States District Judge in the District of Nebraska, issued a MEMORANDUM AND ORDER, Op. Brf., pp. 7-10; Op. Brf, 10 Appx, relating to the unassigned Magistrate's ORDER, and Appellant's OBJECTIONS AND REFUSAL FOR CAUSE (Op. Brf, n.2 incorporated entirely by reference), alleging "Jan Mengedoht did not disclose to the court who this person [the co-trustee of "HCJ Holdings, identified in the seminal document claimed as a basis for DC № 8:17-cv-00238] might be as it relates to this case" (sic); purporting to find "that the service was in fact sent to Jan Mengedoht as Trustee of the HCJ Holdings Trust, and to Jan M. Mengedoht as the Executor of the Charles A. Mengedoht Estate", purporting to find further that "Jan Mengedoht contends that there is an indispensable party, a possible executor of the estate of Carl Mengedoht. He does not name this person." Op. Brf, 11 Appx, 2.

Judge Bataillon was silent Op. Brf., p. 9; Op. Brf, 10 Appx, in regard to Appellant's assertion that the "complaint fails to state a claim upon which relief can be granted by failing to show facts sufficient to support a claim that there was a federal tax lien against the property of

HCJ Holdings" found the Estate of Charles A. Mengedoht and HCJ Holdings Trust in default; stating "the court will now lift the stay", and ordering Appellant to file a brief in support of his Motion to Dismiss "within 14 days". 11 Appx, 2-3

On January 9, 2019, the assigned Senior District Judge lifted the unassigned Magistrate's stay, Op. Brf, 12 Appx, 2-3, on January 12, 2018 , Appellee filed a Motion for Leave to File and an Amended Complaint (effectively identical to the original)[2], correcting the erroneous name of the estate, pointing out that "The proper name, as used in the body of the complaint itself, is Jan M. Mengedoht, Executor of the Carl A. Mengedoht Estate." Op. Brf, 12 Appx., falsely asserting Appellant's August 15, 2017 motion to dismiss "was filed by Jan Mengedoht, individually, and Jan Mengedoht, Trustee."

On January 16, 2019, Appellee filed a BRIEF IN OPPOSITION TO MOTION TO DISMISS. Op. Brf, 16 Appx.

On January 25, 2019, while Appellee's Motion for Leave and Amended Complaint was pending, the judge granted summary judgment. Op. Brf, 17 Appx.

Appellant answered Appellee's Amended Complaint on January 31, 2018, incorporated entirely by refernce, Op. Brf, 18 Appx. denying the allegations of ¶¶ 1, 2, 3, 4, 5, 6, 8, 9, 10, 12, 13, 14, 15, 16, 17, admitting ¶¶ 7, 19, 20; and 22, Answer, ¶ 4; admitting in part and denying in part ¶ 6, and denying the remainder thereof; Answer, ¶ 6.

Appellant, specifically denying the allegations of ¶¶ 13, 14, and 16, affimatively alleged no bona fide Assessment was made; no Notice of Assessment, nor notice and demand for payment was served; and no Notice of Deficiency; and that the "Estate" "did not own the property at the date of Carl A. Mengedoht's death and does not now own the property identified in ¶ numbered 18 of the Complaint" Answer, ¶ 7.

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[2] See: *n* 1.

Appellant admitted only "the portion of Complaint ¶ numbered 18 describing the property", denied the existence of a bona fide federal tax lien to which the property is subject. Answer, ¶ 8.

Appellant further denied the allegations of ¶ 21 of the Amended Complaint, affirmatively alleging that "that any rights and authority retained by the '...creator, maker, or settler' of the Trust are subject to the Adverse Party Agreement and Trust Agreement", directing the Appellee (and the district court) to documents including the HCJ Holdings Trust Agreement, Answer, ¶ 9;

Appellant denied the allegations in Amended Complaint ¶ 23, admitting that "Carl transferred all of his assets to the Trust" upon its formation, Answer, ¶ 10;

Appellant denied the allegations in Amended Complaint ¶¶ 24, 25, directing the Appellee (and the district court) to "copies of Grant Deed, Bills of Sale and checks from HCJ Holdings attached and fully incorporated herein by reference thereto as Attachment #2", Answer, ¶ 11, again directing the Appellee (and the district court) to documents including the HCJ Holdings Trust Agreement, Answer, ¶ 12.

Appellant's Answer further admitted allegations in ¶¶ 26, 27, and 28, Answer, ¶ 13; denied the allegations in Amended Complaint ¶ 29; denied the allegations in Amended Complaint ¶ 30, affirmatively alleging that "the Trust paid full and adequate consideration, the Trust retains the full use, possession, and enjoyment of the property and its income, the Trust has its own federal employment identification number, the Trust received the income from the property the Trust paid taxes upon the income and filed tax returns, the Trust is the owner of :record of the property long before the death of Carl A. Mengedoht; 26 U.S.C. §§2036 and 2038 do not apply; further the Trust Agreement prevents involuntary alienation by anyone or its again directing the Appellee (and the district court) to documents including the HCJ Holdings Trust

Agreement, including copies of Grant Deed, Bills of Sale and checks from HCJ Holdings as Attachment #2", and ¶ 30 (as to 26 U.S.C. §§2036 and 2038), Answer, ¶ 15; and,

Appellant denied the allegations in Amended Complaint ¶ 31 in their entirety.

Appellant repeated, Affirmative Defense #1, and #2, asserted lack of proper service upon HCJ Holdings through its Co-Trustee, and upon the estate of Carl A. Mengedoht, through its executor, and lack of jurisdiction of an indispensable party, seeking relief in the form of "dismissal of the Complaint with prejudice and for such other and further "relief as the court deems just and proper."

Appellant's Petition for an Extraordinary Writ: Writ of Prohibition filed in the Eighth Circuit due to the district court granting a Motion for Order of Sale within the time for appeal.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

This Petition for Writ of Certiorari is, also, in the nature of a Petition for an Extraordinary Writ authorized by 28 U. S. C. §1651(a). It is in aid of the Court's appellate jurisdiction, and demonstrates exceptional circumstances of denials of Due Process of twenty-three (23) provisions of federal law, codified in four (4) Titles of the United States Code (and the Public Laws from which the provisions cited were derived) and at least five (5) federal regulations, that warrant the exercise of the Court's discretionary powers because adequate relief cannot be – and has not been – obtained in any other form.

The Sixteenth Amendment authorized Congress to enact the Internal Revenue laws. Congress enacted numerous revenue laws, at various times, enacting the Internal Revenue Code in 1954, and has amended the Code from time to time.

As enacted, and amended, the Internal Revenue Code imposes obligations on both citizens and officers of government. By any standard, Due Process of law is defined by obedience to

the Code, as amended[3], and the regulations promulgated thereunder, as well as by officers of government.

The case below was decided in a way that both conflicts with relevant decisions of this Court in respect of an important question of federal law that has not been, but should be, settled by this Court.

SUMMARY OF ARGUMENTS

Based upon a painstaking review of the record below, particularly

1. the government's Exhibits, and, more particularly, Exhibit C, specifically, "Doc # 39-1" and "Doc # 39-2", and
2. the H C J HOLDINGS TRUST AGREEMENT, identified in the lower court record as "Doc # 25, specifically, "Page 11 of 35 - Page ID # 172",

there was no evidence to establish that Plaintiff/Appellee had Article III standing, nor – once the government's exhibits (omitted from the Complaints) entered the district court record – that subject matter jurisdiction existed.

ARGUMENTS

Preserving, incorporating by reference, and clarifying the Arguments painfully detailed in my Opening Brief, pp. 16 -30:

Once the government's Exhibit C, the "Declaration of Shawn M. Kennedy", "Doc # 39-1" and "Doc # 39-2" Exhibit C, Form 4340, 9 Appx, pp. 4-6, was filed, Article III standing and subject matter jurisdiction were thrown into question.

As previously argued, Reply Brief, 13, 14, "the source of information [and] the method or circumstances of preparation indicate a lack of trustworthiness", under Federal Rule of

[3] Up to the time periods stated in government Exhibit C.

Evidence 803(6)(E); Federal Rule of Evidence 803(8)(B), p.1-2; discussing that issue, Ibid., pp. 17, 20, 25, 28 and 29. Thereafter,

I argued that the government Exhibits admitted to the district court "were nothing more than hearsay as defined in the Federal Rules of Evidence (hereinafter, "Fed.R.Ev."), Rule 801(c); are/were not admissible pursuant to Fed.R.Ev. 802; nor salvageable under Exceptions set forth in Fed.R.Ev. 803(6), (7), or (8)", Opening Brief, p. 16, particularly Exhibit C, pp. 17, 20.

Clarifying those arguments demonstrates existence of genuine disputes as to Article III standing and subject matter jurisdiction; and/or that genuine disputes as to sufficiency of evidence precluded summary judgment.

The record below, particularly the government's Exhibits, and, more particularly, documents in the government's Exhibit C, including identified in the lower court record, specifically, as

1. "Doc # 39-1", the "Declaration of Shawn M. Kennedy", in which Kennedy declares, ¶7, "The Estate failed to file a federal estate tax return (Form 706) with the IRS"; further declares (in part) ¶ 8, "As a result of an IRS examination of the Estate's tax liabilities, a delegate of the Secretary of Treasury made assessments"; but fails to identify, anywhere in "Doc # 39-1":
    a. the existence of any written determination - as defined in 26 U.S.C. § 6110(b)(1)(A) - or any background file document - as defined in 26 U.S.C. § 6110(b)(2) - that "the estate of Carl A. Mengedoht" met the federal estate tax filing threshold (at least $625,000) in effect for 1998[4],
    b. by whom any such unproduced written determination or background file document was made, or

[4] Such written determination would be a federal record of an "agency action", 5 U.S.C. § 551(13), *required* to be made pursuant to the Federal Records Act, 44 U.S.C. § 3301, *et seq.*, and 36 C.F.R. § 1220.18, discussed, respectively, on pp 19-21, below.

c. the date, prior to July 18, 2005,

i. by whom any such unproduced written determination or background file document was made, nor

ii. that notice of any such unproduced written determination or background file document was given with respect to any such unproduced written determination or background file document.

Based upon the facts related immediately above, a genuine factual dispute arises from Kennedy's unsupported ¶ 7, 8, declarations (discussed on next page). Further,

2. In "Doc # 39-1", the "Declaration of Shawn M. Kennedy", at, "Page 3 of 4 - Page ID # 271", Kennedy further declares, 13:

> "...according to documents associated with the HCJ Holdings Trust, Carl Mengedoht retained the full use, possession, and enjoyment of the subject property and its income during his lifetime and conveyed it to the Trust for less than full and adequate consideration. Mengedoht also retained at the date of his death the power to alter, amend, revoke, or terminate the transfer of the subject property."

A second (third) genuine factual dispute arises from Kennedy's 13 misinterpretation - the sole basis for Appellee's assertion in the Complaint(s), 25 - of express language in the H C J HOLDINGS TRUST AGREEMENT, identified in the lower court record as "Doc # 25, specifically, "Page 11 of 35 - Page ID # 172".

As stated in Appellant's Reply to Answering Brief, p. 10:

> "In the express language of the H C J HOLDINGS TRUST AGREEMENT, Article I, Paragraph A, "...the duties and liabilities of the Co-Trustees shall not be substantially changed without the Co-Trustees written consent."
> "Styled as 'revocable' or not, once 'CARL A. MENGEDOHT, as an individual... and CARL A. MENGEDOHT, and Jan Mengedoht, each acting in his or her role and separate capacity; hereinafter referred to as Co-Trustees...' executed the H C J HOLDINGS TRUST AGREEMENT, Carl Mengedoht lacked the power to unilaterally revoke; revocation would have required the assent of both Carl Mengedoht AND Jan Mengedoht, Co-Trustees. Thus, Carl Mengedoht's alleged 'dominion and control' did not exist."

The H C J HOLDINGS TRUST AGREEMENT, was an exhibit entered by both parties in the lower court. Further,

The government's Exhibit C, "Doc # 39-2", specifically, "Page 4 of 6 - Page ID # 276" , and "Page 6 of 6 - Page ID # 278" , introduced the "appearance" that subject matter was lacking; additional genuine factual disputes that precluded Fed.R.Civ.P. Rule 56 summary judgment. To wit,

Kennedy's declarations, 7, 8, formed the sole bases for the assertions in the Complaint(s), 11, 12, , respectively. See: "Doc # 1 Page 2 of 7 - Page ID # 2" and "Doc # 19-1 Page 2 of 7 - Page ID # 122"; and, the BRIEF IN SUPPORT OF UNITED STATES' MOTION FOR SUMMARY JUDGMENT, 11, 12, "Doc # 38 Page 3 of 11 - Page ID # 258".

Kennedy's " 13" formed the sole basis for the assertion in the Complaint(s), 25, "Doc # 1 Page 5 of 7 - Page ID # 5" and "Doc # 19-1 Page 5 of 7 - Page ID # 125"; and, the BRIEF IN SUPPORT OF UNITED STATES' MOTION FOR SUMMARY JUDGMENT, 8, "Doc # 38 Page 3 of 11 - Page ID # 258" - "Doc # 38" Page 4 of 11 - Page ID # 259", that "in accordance with the terms of the Trust Agreement, Carl retained dominion and control over the Trust's property...".

Assuming (for purposes of argument, only), that Kennedy's 7, 8, naked assertion were based upon a written determination or background file document , such "written determination" would, if it existed, have arisen from "agency action", as defined in the Administrative Procedure Act, 5 U.S.C. § 551(13).

Such "written determination" would, if it existed be, in law and fact, an "order", as defined in 5 U.S.C. § 551(6), resulting from an "adjudication", as defined in 5 U.S.C. § 551(7), to which "agency proceeding" as defined in 5 U.S.C. § 551(12), Appellant was "entitled to notice" pursuant to 5 U.S.C. § 554.

As a matter of law, 26 U.S.C. § 2001(a), (f)(2), such "order", 5 U.S.C. § 551(6), could only have been "finally determined" by such "agency action" 5 U.S.C. § 551(13).

Assuming (again, for purposes of argument, only), that all of those statutory mandates were met, the Federal Records Act, 44 U.S.C § 3101, et seq., and its regulations, found at Title 36 of the Code of Federal regulations, Parts 1220, 1222. 36 C.F.R.§§ 1220, 1222, required creation and maintenance of a record of each such event.

The Federal Records Act mandates:

> "The head of each Federal agency shall make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities."

44 U.S.C § 3101 (emphasis added).

The term "records" is defined in 44 U.S.C § 3301(a)(1)

> "(A) includes all recorded information, regardless of form or characteristics, made or received by a Federal agency under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government or because of the informational value of data in them;"

Title 36 of the Code of Federal regulations, Part 1222, 36 C.F.R.§ 1222.10, confirms, "(a) The statutory definition of Federal records is contained in 44 U.S.C. 3301 and provided in § 1220.18 of this subchapter."

36 C.F.R. § 1220.18 specifies:

> Records or Federal records is defined in 44 U.S.C. 3301 as including "all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the Government or because of the informational value of

the data in them (44 U.S.C. 3301)." (See also § 1222.10 of this part for an explanation of this definition).

With respect to such records, the terms "made" and "preserved" are defined in 36 C.F.R § 1222.10(b)(3); (5).

There is no written determination in the lower court record establishing that "the estate of Carl A. Mengedoht" met the federal estate tax filing threshold (at least $625,000) in effect for 1998, or of liability for purposes of 26 U.S.C. § 2201.

The absence of such federal records in the record of the court below supports existence of genuine factual disputes as to Kennedy's naked assertions "Doc # 39-1" 7, 8, 13; the sole bases for Appellee's assertion in the Complaint(s), 11, 12, 25, - without which Article III standing, and subject matter jurisdiction, cannot be established.

The record below, particularly the government's Exhibits, again, more particularly, Exhibit C, specifically, as identified in the lower court record, "Doc # 39-2", more specifically, "Page 4 of 6 - Page ID # 276" , (Form 4340) - a federal record - establishes that the "assessments" listed thereon were made "BY EXAMINATION" rather than by a duly-appointed assessment officer. Simply put, this federal record 44 U.S.C. 3301 appears to establish that no assessment was made by an assessment officer, i.e., "an officer in that office", appointed under 26 C.F.R. § 310.6203-1. See: March v. IRS, 335 F.3d 1186, 1189 (10th Cir. 2003). Further,

The government's Exhibit C (Form 4340) specifically "Doc # 39-2", "Page 6 of 6 - Page ID # 278" , 9 Appx, p. 4, was signed and certified by Gina Y. Gann, Operations Manager, Accounting Control / Services, on 06/14/2017, certifying nothing more than that the "assessments" listed thereon were made "BY EXAMINATION", reinforcing the appearance that no assessment was made by an assessment officer, i.e., "an officer in that office".

Based upon "Doc # 39-1", as well as "Doc # 39-2", specifically, "Page 4 of 6 - Page ID # 276", and "Page 6 of 6 - Page ID # 278", the government's Exhibit C, itself, introduced genuine factual disputes as to Article III standing and subject matter jurisdiction. In either instance, Fed.R.Civ.P. Rule 56 summary judgment was precluded.

"The objection that a federal court lacks subject-matter jurisdiction, see Fed. Rule Civ. Proc. 12(b)(1), may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment." Arbaugh v. Y & H Corp., 546 U.S. 500, 506, opining, "Rule 12(h)(3) instructs: 'Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action...", citing Id., at 507, "Kontrick v. Ryan, 540 U.S. 443, 455 (2004)".

Kontrick, in turn, cited Mansfield, C. & L. M. R.Co. v. Swan, 111 U. S. 379, 382 (1884) for the parenthetical proposition that

> "...(challenge to a federal court's subject-matter jurisdiction may be made at any stage of the proceedings, and the court should raise the question sua sponte); Capron v. Van Noorden, 2 Cranch 126, 127 (1804) (judgment loser successfully raised lack of diversity jurisdiction for the first time before the Supreme Court)..." .

Mansfield, 111 U. S. at 382 (emphasis added).

See also: Morrison v. National Australia Bank Ltd., 547 F.3d 167 (2d Cir. 2008), aff'd 130 S. Ct. 2869 (2010) (quoting Arar v. Ashcroft, 532 F.3d 157, 168 (2d Cir.2008) ("'Determining the existence of subject matter jurisdiction is a threshold inquiry Marley v. United States, 567 F.3d 1030, 1034 (9th Cir. 2008) ("As a threshold matter, we must decide whether we have jurisdiction . . . .").

Preserving, incorporating by reference, and clarifying the Arguments painfully detailed in my Opening Brief,

By order in which they appear, (in the government's Answer, Table of Authorities), Appellee cites Blodgett v. Commissioner, 394 F.3d 1030, 1035 (8th Cir. 2005), a tax court case, in support of presuming an assessment is correct . Notably, a case cited in Blodgett, at 1035, is Griffin v. C.I.R., 315 F.3d 1017, 1021 (8th Cir. 2003), upon which discussion includes:

" 'In Griffin, we defined "credible evidence" for purposes of § 7491 as "the quality of evidence, which after critical analysis, the court would find sufficient upon which to base a decision on the issue if no contrary evidence were submitted (without regard to the judicial presumption of IRS correctness)."' 315 F.3d at 1021."

The Eighth Circuit vacated and remanded Griffin, stating "On the record before us, we cannot determine whether the Commissioner has met his burden of proof. It is not sufficient to summarily conclude that the outcome is the same regardless of who bears the burden of proof...". 315 F.3d at 1022 .

As applicable to the instant case, I contend that critical analysis shows the government's Exhibits (particularly Exhibit C) failed Griffin's "credible evidence" test; and, that contrary evidence (the Trust Agreement and succeeding documents) met the standard set in Griffin, 315 F.3d at 1022.

Boles Trucking, Inc. v. United States, 77 F.3d 236, 239 (8th Cir. 1996), an employment tax case in support of "...the well-established principle... presumption of correctness...", 77 F.3d, at 239, citing "Helvering v. Taylor, 293 U.S. 507".

Helvering v. Taylor cites at 515, "Wickwire v. Reinecke, 275 U. S. 101, 275 U. S. 105"[5]

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[5] In *Wickwire*, Taft, C.J., opined:

> "It is within the undoubted power of Congress to provide any reasonable system for the collection of taxes and the recovery of them when illegal, without a jury trial — *if only the injunction against the taking of property without due process of law in the method of collection and protection of the taxpayer is satisfied*." (emphases added)

Wickwire v. Reinecke, 275 U.S. 101, 105-6, relying, in significant part, upon Murray's Lessee v. Hoboken Land and Improvement Co., 18 How. 272, 281, 282, 284.

(upon which Welch v. Helvering, 290 U. S. 111, 290 U. S. 115, and Lucas v. Structural Steel Co., 281 U. S. 264, 271 were based) in arriving at the conclusion:

> "But where, as in this case, the taxpayer's evidence shows the Commissioner's determination to be arbitrary and excessive, it may not reasonably be held that he is bound to pay a tax that confessedly he does not owe... the Board should have held the apportionment arbitrary and the Commissioner's determination invalid."

Helvering v. Taylor, 293 U.S. 507 (1935).

I maintain that the evidence introduced by Appellee (particularly Exhibit C, e.g., Kennedy's naked assertion; Form 4340 establishing "assessments" were made BY EXAMINATION rather than by a duly-appointed assessment officer, and certifying same) is facially defective, and that the evidence introduced by both parties (the H C J HOLDINGS TRUST AGREEMENT, at Article I, Paragraph A) clearly demonstrates "arbitrary and excessive... determination(s) that call for, in accord with Helvering v. Taylor, the lower court decision in the instant case to be vacated. If remanded, remanded with instructions.

Drye v. United States, 528 U.S. 49, is an "estate tax" case, inapposite to the instant case, based upon the express language of the H C J HOLDINGS TRUST AGREEMENT, Article I, Paragraph A. There is/was, in the instant case, no "estate" in respect of the H C J HOLDINGS TRUST as "beneficiary" of any "estate"; Carl A. Mengedoht relinquished all personally-held property and/or rights to property at issue to the "Co-Trustees" upon creation of the H C J HOLDINGS TRUST.

Based upon genuine factual disputes (government Exhibit C; the express language of the H C J HOLDINGS TRUST AGREEMENT, Article I, Paragraph A) in regard to Article III standing, and subject matter jurisdiction, the greater part of cases Appellee listed in Table of Authorities for the Answering Brief serve no purpose other than to "pad" the Table of Authorities.

Appellant had argued in the Opening Brief, pp. 26, 27

"Due in part to similarity of the circumstances to those in Stallard v. United States, 806 F.Supp. 152 (W.D.Tex. 1992), (the Stallard Court rejected a Form 4340 because it was not executed on the date of the alleged assessment. Opening Brief, p. 26. The Stallard Court's rejection of the 4340 was affirmed, 12 F.3d 499 (5th Cir. 1994); that similarity was also found in Huff v. United States, 10 F.3d 1440 (9th Cir. 1993), citing Farr v. United States, 990 F.2d 451 (9th Cir. 1993). Ibid.

"Also cited in Stallard, at 156, 158, and footnoted (Note 1) at 160, was Brafman v. United States, 384 F.2d, 863 (5th Cir. 1967), a case specifically about "estate tax", in which the 5th Circuit opined, at 867, that "What is important in any case is that assessment is not automatic upon recordation; it requires the action of an assessment officer. That action, as defined explicitly in the Treasury Regulations, is the signing of the certificate."

"As argued in Appellant's Opening Brief, p. 27 this "case is nearly identical (except that no Form 23C is included)".

As further previously argued in my Opening Brief, p. 27,

"In light of Stallard...", Huff, "...and Brafman, Kennedy's 8 and 10 declarations, 8 Appx, p. 2, also serve to invalidate the "04-18-2011" "ADDITIONAL TAX ASSESSED BY EXAMINATION AGREED AUDIT DEFICIENCY". Under 26 U.S.C. § 6203's regulation, 26 C.F.R. § 301.6203-1, "Examination" has no authority to make "assessments" ("agreed" or not); that function is specifically reserved by law to an assessment officer."

The Brafman Court stated, in clear and direct terms, "...assessment is not automatic upon recordation; it requires the action of an assessment officer. That action, as defined explicitly in the Treasury Regulations, is the signing of the certificate."

While not directly addressed, dicta in March v. IRS, 335 F.3d 1186, 1189 (10th Cir. 2003), e.g.,

"...various official seals of certain offices of the IRS may be used in lieu of the seal of the Treasury Department when the attestation or certification is required of an officer in that office" (emphasis added), and that "Form 4340 provided to the taxpayers establishes a presumption that a Form 23C or RACS 006 was validly signed and certified...", March, *supra*.

That presumption cannot reasonably apply when the Form 4340 at issue specifies every "assessment" listed thereon was made "BY EXAMINATION" rather than by an assessment officer duly appointed pursuant to 26 C.F.R. § 301.6203-1, *e.g.*, "an officer in that office", and the Form 4340 is based upon no evidence of a prior to a written determination , i.e., an "order", as defined in 5 U.S.C. § 551(6), resulting from an "adjudication", as defined in 5 U.S.C. §

551(7), to which Appellant was "entitled to notice" pursuant to 5 U.S.C. § 554; an "agency proceeding" as defined in 5 U.S.C. § 551(12); an "agency action" , as defined in the Administrative Procedure Act, 5 U.S.C. § 551(13).

A "challenge to subject matter" - whether so identified or not - was raised in my Opening Brief, p. 27. Whether it was raised in the district court is irrelevant; the government's Exhibit C (Form 4340) established on its face that "it appear[ed]... that the court lack[ed] jurisdiction of the subject matter", See: Rule 12(h)(3), because said Form 4340 establishes on its face that every "assessment" identified thereupon was made "BY EXAMINATION", and not by "officer in that office", i.e., a duly-appointed assessment officer. 26 U.S.C. § 6203; 26 C.F.R. § 301.6203-1.

The district court should have - but failed in its duty to - raise the question of subject matter jurisdiction *sua sponte*. Capron v. Van Noorden, 2 Cranch 126, 127 (1804). In any instance, subject matter jurisdiction is now raised.

As argued previously, below, the Kennedy Declaration, Exhibit C "Doc # 39-1" and "Doc # 39-2" were

- nothing more than hearsay as defined in the Federal Rules of Evidence (hereinafter, "Fed.R.Ev."), Rule 801(c);
- not admissible pursuant to Fed.R.Ev. 802; nor,
- salvageable under Exceptions set forth in Fed.R.Ev. 803(6), (7), or (8.)

Each of those Exceptions is/was inapplicable because "the sources of information or other circumstances indicate lack of trustworthiness." Fed.R.Ev. 803(6)(E); Fed.R.Ev. 803(8)(B). Exhibit C, "Doc# 39-1"; "Doc# 39-2" indicate both factors.

Fed.R.Civ.P. 56 is clear: "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

Fed.R.Civ.P. Rule 56.

Exhibit C establishes that Kennedy's "facts" are subject to dispute.

Kennedy's Exhibit C "Doc 39-2" (Form 4340, 9 Appx, pp. 4-6 (Form 4340) contains six (6) references to "ASSESSMENT DATE (23C, RAC 006)", the first two (2) of which identify "08-08-2005" and "08-17-2009" as two (2) such "23C Dates", and appear to document "0.00" amounts which cannot be lawfully assessed pursuant to CHAPTER 63, Subchapter A, § 6203 (26 U.S.C. § 6203). This "record" alleges acts that are factually impossible and legally absurd.

26 U.S.C. § 6203 states "The assessment shall be made by recording the liability of the taxpayer in the office of the Secretary in accordance with rules or regulations prescribed by the Secretary." The "rules or regulations prescribed by the Secretary" is at 26 C.F.R. § 301.6203-1, and specifies:

> "The district director and the director of the regional service center shall appoint one or more assessment officers. The district director shall also appoint assessment officers in a Service Center servicing his district. *The assessment shall be made by an assessment officer signing the summary record of assessment.* The summary record, through supporting records, shall provide identification of the taxpayer, the character of the liability assessed, the taxable period, if applicable, and the amount of the assessment. The amount of the assessment shall, in the case of tax shown on a return by the taxpayer, be the amount so shown, and in all other cases the amount of the assessment shall be the amount shown on the supporting list or record. *The date of the assessment is the date the summary record is signed by an assessment officer.*"

26 C.F.R. § 301.6203 (emphases added). Further, even if a "0.00" amount of assessment were possible, 26 U.S.C § 6303, 26 C.F.R. § 301.6303-1, required "notice of assessment":

> "Where it is not otherwise provided by this title, the Secretary shall, as soon as practicable, and within 60 days, after the making of an assessment of a tax pursuant to section 6203, give notice to each person liable for the unpaid tax, stating the amount and demanding

payment thereof. Such notice shall be left at the dwelling or usual place of business of such person, or shall be sent by mail to such person's last known address."

26 U.S.C. § 6303 (emphasis added).

26 C.F.R. § 301.6303-1 states, in subsection (a):

"Where it is not otherwise provided by the Code, the district director or the director of the regional service center shall, after the making of an assessment of a tax pursuant to section 6203, give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof. Such notice shall be given as soon as possible and within 60 days. However, the failure to give notice within 60 days does not invalidate the notice. Such notice shall be left at the dwelling or usual place of business of such person, or shall be sent by mail to such person's last known address.

Notably, the additional language contained in the third sentence of subsection (a) (beginning with "However...") is neither found in the statutory text of 26 U.S.C § 6303, nor has any available Treasury Decision[6] revealed when such language was interposed in 26 C.F.R. § 301.6303-1, nor the authority for it.

The legal mandate, "the Secretary shall," has been long upheld:

"Section 6303 requires the Secretary to provide a taxpayer notice of assessment within sixty days of making the assessment. That notice must "stat[e] the amount [of an unpaid tax] and demand[] payment.... 26 U.S.C. § 6303(a). ***
"Thus, the notice of assessment, unlike the assessment itself, is a precursor to the filing of a lien and the execution of a levy."

Kim v. United States, 632 F.3d 713, 716 (DC Cir.2011) (sic). 26 U.S.C. § 6303's legal mandate applies to the "08-08-2005" and "08-17-2009" "23C Dates", which Kennedy's Declaration fails to identify his "declaration", 10, 8 Appx, p. 2.

[6] As published in the Code of Federal Regulations, neither "32 FR 15241, Nov. 3, 1967, as amended by T.D. 8939, 66 FR 2820, Jan. 12, 2001", nor "32 FR 15241, Nov. 3, 1967, as amended by T.D. 8411, 57 FR 15241, Apr. 27, 1992", contains any explanatory text. In fact, "32 FR 15241, Nov. 3, 1967" contains Commissioner Sheldon S. Cohen's statement" "This republication is a compilation reflecting amendments to such part subsequent to January 1, 1961 and includes the latest amendment to the part dated June 17, 1967 (32 F.R. 8711). The compilation as set forth below contains no substantive changes". 32 F.R. 8711, June 17, 1967 omits § 301.6303-1 entirely.

26 U.S.C. § 6203 and 26 U.S.C. § 6303 were both discussed at some length in Stallard, supra, which arose over the same subject matter as the instant action: 26 U.S.C. § 6671 and 26 U.S.C. § 6672.

As argued above, a "written determination" would, if it existed be, in law and fact, an "order", as defined in 5 U.S.C. § 551(6), resulting from an "adjudication", as defined in 5 U.S.C. § 551(7), to which "agency proceeding" as defined in 5 U.S.C. § 551(12), Appellant was "entitled to notice" pursuant to 5 U.S.C. § 554.

As a matter of law, 26 U.S.C. § 2001(a), (f)(2), such "order", 5 U.S.C. § 551(6), could only have been "finally determined" by such "agency action" 5 U.S.C. § 551(13).

Assuming (again, for purposes of argument, only), that all of those statutory mandates were met, the Federal Records Act, 44 U.S.C § 3101, et seq., and its regulations, found at Title 36 of the Code of Federal regulations, Parts 1220, 1222. 36 C.F.R.§§ 1220, 1222, required creation and maintenance of a record of each such event.

The Federal Records Act mandates:

> "The head of each Federal agency shall make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities."

44 U.S.C § 3101 (emphasis added).

The term "records" is defined in 44 U.S.C § 3301(a)(1)

> "(A) includes all recorded information, regardless of form or characteristics, made or received by a Federal agency under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government or because of the informational value of data in them;"

As previously argued, the "FAILURE TO PAY TAX PENALTY" is governed by 26 U.S.C. § 6671; 26 U.S.C. § 6672. 26 U.S.C. § 6672(a) imposes its two (2) conditions precedent:

> "Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over."

26 U.S.C. § 6672(a).

26 U.S.C. § 6672(a)'s first condition precedent is that there must be a "willful[] fail[ure]", either "to collect", etc., or a "to evade", etc. On the basis of such occurrence,

26 U.S.C. § 6672(a)'s second condition precedent is that the penalty must be "equal to the total amount of the tax evaded, or not collected", and the "08-08-2005" and "08-17-2009" "assessments" each asserted "0.00"; rendering the first listed "04-18-2011" "ASSESSMENT DATE (23C, RAC 006)" for "FAILURE TO PAY TAX PENALTY" a reckless, intentional, or negligent disregard of 26 U.S.C. § 6672(a)(2), in connection with collection of Federal tax, actionable under 26 U.S.C. § 7433, as well as legally absurd.

26 U.S.C. § 6672(b) includes two (2) *additional* conditions precedent imposed in subsection (b), the first condition precedent in paragraph (1):

"No penalty shall be imposed under subsection (a) unless the Secretary notifies the taxpayer in writing by mail to an address as determined under section 6212(b) or in person that the taxpayer shall be subject to an assessment of such penalty." The *first listed* "04-18-2011" "ASSESSMENT DATE (23C, RAC 006)" for "FAILURE TO PAY TAX PENALTY" further establishes the

26 U.S.C. § 6672(b)(1). There is no evidence of a prior written determination , *i.e.*, an "order", as defined in 5 U.S.C. § 551(6), resulting from an "adjudication", as defined in 5 U.S.C. § 551(7), to which Appellant was "entitled to notice" pursuant to 5 U.S.C. § 554; an "agency

proceeding" as defined in 5 U.S.C. § 551(12) an "agency action", as defined in the Administrative Procedure Act, 5 U.S.C. § 551(13), that "the Estate of Carl Mengedoht" met the 1998 estate tax threshold, nor of liability under 26 U.S.C. § 2201, nor of notice.

Had there been such, the second condition precedent would automatically arise pursuant to 26 U.S.C. § 6672(b)(2):

"The mailing of the notice described in paragraph (1) (or, in the case of such a notice delivered in person, such delivery) shall precede any notice and demand of any penalty under subsection (a) by at least 60 days."

26 U.S.C. § 6672(b)(2).

Kennedy's 7, 8 declarations were, individually, "reckless, intentional, or negligent" disregards of 26 U.S.C. § 6672(a), 26 U.S.C. § 6672(b)(1), and 26 U.S.C. § 6672(b)(2), in connection with collection of Federal tax, actionable under 26 U.S.C. § 7433.

Kennedy's Exhibit C, "Doc # 39-2 Page 6 of 6 - Page ID # 278, was signed and certified by Gina Y. Gann, Operations Manager, Accounting Control / Services, on 06/14/2017 - Page 6 of 6; more than six (6) years after the date of alleged assessments and more than eleven (11) years after the earliest date entered upon "Doc # 39-2 Page 4 of 6".

In Brafman, supra, the 5th Circuit pointed out "What is important in any case is that assessment is not automatic upon recordation; it requires the action of an assessment officer. That action, as defined explicitly in the Treasury Regulations, is the signing of the certificate."

The instant case is nearly identical (except that no Form 23C - and no RACS I - is included).

As an attorney in the U.S. Dept. of Justice, Tax Division, Martin M. Shoemaker, Ga. Bar # 001340, and Joseph P. Kelly, a United States Attorney in the District of Nebraska, are

presumed to know that before a lien may arise "pursuant to 26 U.S.C. § 6321..." , that provision of the Internal Revenue Code imposes two (2) conditions precedent:

> "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States ...".

26 U.S.C. § 6321. Indeed, the chestnut that "ignorance of the law is no excuse" applies universally, even to government attorneys.

Shoemaker and Kelly are presumed to know that 26 U.S.C. § 6321's conditions precedent control, rendering 26 U.S.C. § 6322 inoperable in the absence of "neglect[] or refus[al] to pay the same after demand". Further,

Shoemaker and Kelly are presumed to know 26 U.S.C. § 6321's conditions precedent include a "demand", which is strictly governed by 26 U.S.C § 6303. Kim v. United States, 632 F.3d 713, 716 (DC Cir.2011), and, in respect of a "penalty", by 26 U.S.C. § 6672(b)(2).

Shoemaker and Kelly are presumed to know 26 U.S.C. § 6671 ("penalties and liabilities shall be paid on notice and demand"), trigger 26 U.S.C § 6303); 26 U.S.C. § 6672(a), 26 U.S.C. § 6672(b), imposing, altogether, four (4) conditions precedent, including "notice and demand".

Shoemaker and Kelly are presumed to know that CHAPTER 68, Subchapter A, 26 U.S.C. § 6651(a) "additions to tax" are limited:

> "[T]here shall be added to the amount required to be shown as tax on such return 5 percent of the amount of such tax if the failure is for not more than 1 month, with an additional 5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate;".

(inapplicable to the 26 U.S.C. § 6672(a) "FAILURE TO PAY" penalty "equal to the amount", assuming that is applicable).

Finally, as argued previously -

As a matter of (generally) disputed fact (established in the Internal Revenue Manual), Certificates of Assessments and Payments (Forms 4340) are made by "the typing function" in anticipation of litigation. Such documents are, presumably, inadmissible under the 64 year-old doctrine established in Palmer v. Hoffman, 318 US 109 (1943), denying the business records exception, "to any document prepared with an eye toward litigation when offered by the party responsible for making the record" (emphasis added).

CONCLUSION

The record in the lower court contains no evidence of existence of

- any written determination, 26 U.S.C. § 6110(b)(1)(A) of liability under 26 U.S.C. § 2201;
- any "order", as defined in 5 U.S.C. § 551(6); resulting from
- any "adjudication", 5 U.S.C. § 551(7);
- any "agency proceeding", 5 U.S.C. § 551(12);

showing that "the estate of Carl A. Mengedoht" met the federal estate tax filing threshold (at least $625,000) in effect for 1998; in the administrative record;

no evidence

- that notice of any such "written determination", of any such "agency proceeding", - to which Appellant was "entitled", 5 U.S.C. §§ 554(b) - was given prior to July 18, 2005;
- that Kennedy's naked Declarations, Exhibit C "Doc # 39-1", 7 or 8, had any basis giving rise to events alleged in to have occurred on or after July 18, 2005;

no evidence

- that Appellee met the fundamental elements required (injury in fact, causation, and redressability) to establish Article III standing; and,

no evidence

- upon which the lower court had subject matter jurisdiction.

Alternatively, the evidence summarized above showed failure to state a claim.

WHEREFORE,

Based upon the foregoing, showing (the totality of circumstances strongly suggesting the case on appeal was brought for improper purposes, if not outright fraud)

1. evidence of exceptional circumstances involving denials of Due Process of Law that warrant the exercise of the Court's discretionary powers; and,
2. evidence adequate relief cannot be – and has not been – obtained in any other form,

the Orders in the lower court should be vacated. If remanded, they should be remanded with instructions to dismiss with prejudice, and to impose sanctions upon IRS employees Kennedy and Gann, and upon attorneys Shoemaker and Kelly.

Respectfully entered on this 22 day of June, 2020.

Jan Mengedoht