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OPINIONS AND ORDERS

REHEARING ORDERS

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT (APRIL 23, 2019)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ESTELLE STEIN,

Defendant-Appellant.

No. 18-14625

D.C. Docket No. 1:15-cv-20884-UU

Appeal from the United States District Court
for the Southern District of Florida

Before: William PRYOR,
Julie CARNES and BRANCH, Circuit Judges.

PER CURIAM:

This appeal is the second occasion we have reviewed whether Estelle Stein's affidavit constituted substantial evidence that could defeat summary judgment in an action to reduce federal income tax assessments to judgment. In Stein's first appeal, we initially affirmed on the ground her affidavit failed to create a material factual dispute about the validity of the

assessments because, under *Mays v. United States*, 763 F.2d 1295, 1297 (11th Cir. 1985), her "general and self-serving assertions" failed to rebut the presumption of correctness given the assessments, *United States v. Stein*, 840 F.3d 1355, 1357 (11th Cir. 2016), but later we granted Stein's petition for rehearing *en banc*, overruled *Mays* to the extent it outlawed self-serving affidavits, *United States v. Stein*, 881 F.3d 853, 856-59 (11th Cir. 2018), and remanded the case to the district court, *United States v. Stein*, 889 F.3d 1200, 1202 (11th Cir. 2018). In this second appeal, Stein argues that her affidavit is specific, relevant, and detailed enough to preclude summary judgment and that the district court on remand violated Federal Rule of Civil Procedure 56 and her right to due process under the Fifth Amendment. We affirm.

I. Background

The history of this case is well-documented in our earlier published opinions. We describe only the facts pertinent to the issues in this appeal.

The government moved for summary judgment in its action to reduce to judgment assessments against Stein on five federal tax returns that she filed late. The government assessed Stein penalties for the late filings and late payments of her income taxes for 1996, 1999, and 2000, and penalties and interest for her failure to pay, late filing, and late payment of her income taxes for 2001 and 2002. The government submitted copies of Stein's federal tax returns, transcripts of her tax accounts for 1996 and 1999 through 2002, and an affidavit from Officer Michael Brewer of the Internal Revenue Service to establish that Stein had outstanding tax assessments.

Stein opposed summary judgment and submitted an affidavit as evidence that the assessments were erroneous. Stein averred that the Internal Revenue Service had acknowledged having misapplied her tax payment for 1996 to tax year 1979 and that she had paid the taxes due and a late penalty for each of her tax returns. The relevant paragraphs of her affidavit stated as follows:

> 8. For 1996, this tax return was filed on November 15, 2004. The IRS had no record of receiving any payment and is claiming that full amount of the tax is due, along with interest and penalties.
>
> 9. Subsequently, the IRS admitted to having received my check, but we later learned that it was misapplied to 1979, a closed and paid year.
>
> 10. For the year 1999, I filed the return as surviving spouse on February 11, 2005. This return showed an amount due of $33,612. I paid $35,226, which included the late penalty. The IRS has a record of that payment.
>
> 11. For the year 2000, I filed my return as surviving spouse on January 11, 2005. The amount due on the return was $4,127. I paid $4,349.00, which amount included the late penalty. The IRS has a record of having received that payment.
>
> 12. For the year 2001, I filed my return, as surviving spouse, on March 10, 2005. The amount on the return shows $15,998 due. Although I recall paying the tax on that return, including a late penalty consistent with the

other returns that I filed, the IRS does not have a record of receiving such payment.

13. For the year 2002, I filed my return on March 10, 2005, as surviving spouse. The amount of tax shown on the return was $52,342. Although I recall writing a check for this amount, plus, late penalties, the IRS has no record of receiving this amount.

[. . .]

17. The only record I could find, by sheer coincidence, was a check stub dated November 2004, for the exact amount of the tax due for 1996, which, apparently, the check previously attached to said stub was mailed with the 1996 tax return, similar to each of the tax returns in question.

18. I showed this tax stub to Mr. Michael Brewer, Revenue Office[r] with the IRS. After [he] did some research, he then confirmed that the IRS had, in fact, received the check for the 1996 tax year . . . ([In] [t]he handwritten notes . . . he agreed to correctly apply this missing payment to the 1996 tax year and calculated and credited accrued interest to 2015.)

[. . .]

21. Notwithstanding the IRS' objective in pursuing this claim to foreclose on my home, it is my unwavering contention that I paid the taxes due, including late filing penalties, at such time as I filed the returns for each of the tax years in question.

On remand, the district court ordered the government to "file a new motion for summary judgment" that addressed "ONLY . . . [whether her] self-serving affidavit create[s] a genuine issue of material fact about [her] tax liability" and Stein to "address ONLY the same question." The district court based its order on our decision "[*e*]*n banc*, . . . [that] overruled *Mays*, . . . [our] conclu[sion] that 'a non-conclusory affidavit which complies with Federal Rule of Civil Procedure 56 can create a genuine dispute concerning an issue of material fact, even if it is self-serving and/or corroborated,'" and our statement "that 'a self-serving and/or uncorroborated affidavit will not always preclude summary judgment. . . . '" (Alterations adopted.) The district court also mentioned that we had "declined to decide whether 'substantive federal tax law' require[d] corroboration of a taxpayer's affidavit." The district court prohibited the parties from "engag[ing] in further discovery, . . . supplement[ing] the record, or otherwise . . . mak[ing] new arguments which they could have made when [the government] moved for summary judgment the first time."

The government moved for summary judgment on the ground that Stein's affidavit failed to create a material factual dispute that she had paid her tax debts. The government argued that, to rebut the presumption of correctness of its assessment, Stein had to present documentary evidence that the Service received her tax payments. The government also argued that Stein's "general rather than specific" allegations failed to create a genuine factual dispute that she had paid her tax debts.

The government attached to its motion current transcripts of Stein's accounts for tax years 1996 and

1999 through 2002 and an affidavit from Revenue Officer Brewer stating that he had revised the assessment against Stein for tax year 1996 and that he had updated Stein's assessments for tax years 1999 through 2002. The transcripts reflected that, for tax year 1996, Stein paid income taxes of $548 yet owed a late-filing penalty of $123.30, a late-payment penalty of $137, and accrued interest of $486.72, and that, for tax year 1999, she paid income taxes of $33,612 and an estimated penalty of $1,614 yet owed a late-filing penalty of $7,562.70, a late-payment penalty of $8,403, and accrued interest of $52,734.23. The transcripts also reflected that, for tax year 2000, Stein paid income taxes of $4,127 and an estimated penalty of $222 yet owed a late-filing penalty of $928.57, a late-payment penalty of $949.46, and accrued interest of $1,178.46. Additionally, the transcripts reflected that Stein reported, but failed to pay, income taxes and estimated penalties of $16,631 for tax year 2001 and of $52,342 for tax year 2002.

Stein opposed summary judgment. She argued that, with "*Mays* overruled, there is absolutely no justification under substantive federal tax law or otherwise . . . [that] required . . . corroborat[ion]" of her averments that she had paid her taxes and that her affidavit "create[d] a genuine issue of material fact concerning [her] payment of her tax liability." In a footnote, Stein complained that the government had "file[d] a new affidavit" and had made a "new argument" that her affidavit was "insufficient since it fails to assert that her payment was 'delivered'" in "violat[ion] [of] the Court's July 2, 2018 Order." Stein argued that, "[i]f supplemental affidavits were permitted, then

certainly [she] could clarify her testimony in opposition to the Government's newly filed Motion for Summary Judgment," and she "request[ed] permission to file a supplemental affidavit." Stein also argued that she defeated summary judgment even "if the Court considers this new argument without . . . [her] having an opportunity to supplement her affidavit or file an additional affidavit" because she "attested that she mailed her check for payment together with the filing of each of her tax returns" and she was entitled to "a presumption of receipt of properly mailed documents. . . . "

The district court granted summary judgment in favor of the government. The district court ruled that "a taxpayer needs to show that they paid the taxes assessed" and that "the IRS actually received the funds in question" to rebut the presumption of correctness given an assessment. The district court determined that "Stein's affidavit [was] insufficient to create [a] genuine dispute of material fact" because it was "speculative; based on nothing more than 'the best of her recollection.'" The district court ruled that summary judgment was appropriate because Stein "offered nothing else to counter the government's evidence" to "show that the government was paid and that the assessment . . . is incorrect."

II. Standard of Review

We review *de novo* a summary judgment. *United States v. White*, 466 F.3d 1241, 1244 (11th Cir. 2006). Summary judgment is appropriate if "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. 56(a).

III. Discussion

Stein had to satisfy a well-established standard to defeat the motion of the government for summary judgment. Because the evidence submitted by the government created a presumption that its tax assessments were correct, Stein had to prove that the assessments were erroneous. *See White*, 466 F.3d at 1248-49. She had to produce "significant probative evidence," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986), to create a "genuine issue as to any material fact" that she had paid her tax debts, *id.* at 250. Her evidence had to be more than "merely colorable," *id.* at 249; it had to be of sufficient quality and weight "that a reasonable jury could return a verdict" in her favor, *id.* at 248.

The affidavit that Stein submitted as evidence that the assessments were erroneous had to satisfy certain criteria. Her affidavit had to "made on personal knowledge." Fed. R. Civ. P. 56(c)(4). The affidavit had to contain statements that Stein knew, as opposed to subjectively believed, that "a certain fact exist-[ed] . . . [to] creat[e] a genuine issue of fact about the existence of that certain fact." *Pace v. Capobianco*, 283 F.3d 1275, 1278-79 (11th Cir. 2002); *see Ellis v. England*, 432 F.3d 1321, 1326 (11th Cir. 2005). Stein's affidavit also had to "set out facts that would be admissible in evidence." Fed. R. Civ. P. 56(c)(4); *see Gossett v. Du-Ra-Kel Corp.*, 569 F.2d 869, 872 (5th Cir. 1978) (stating that "opposing affidavits [must] set[ ] forth specific facts to show why there [was] an issue for trial"). The affidavit had to consist of facts, not "conclusory allegations . . . [, which] have no probative value." *Evers v. Gen. Motors Corp.*, 770 F.2d 984, 986 (11th Cir. 1985).

Stein's affidavit failed to create an issue of fact about the validity of the assessments. Several of Stein's averments did not conform to Rule 56(c)(4). Stein's averments that she had an "unwavering contention that" and believed "to the best of [her] recollection" that she had paid all her taxes and late penalties conveyed her subjective belief, not personal knowledge, that she had satisfied her tax debts. *See Jameson v. Jameson*, 176 F.2d 58, 60 (D.C. Cir. 1949) ("Belief, no matter how sincere, is not equivalent to knowledge.") (cited in *Pace*, 283 F.3d at 1279). Her averment that she recalled paying her income tax and penalty for tax year 2001 had no probative value because she failed to support it with any facts about the time, place, or form of her payment. *See Evers*, 770 F.2d at 986. And Stein remaining averments did not dispute her tax debts. With respect to the 1996 tax year, Stein's averments that she filed her tax return "on November 15, 2004," and that her "check stub . . . [reflected payment] for the exact amount of the tax due" confirmed, rather than contested, that she still owed accrued interest and late-filing and late-payment penalties for that tax year. Stein's averment that she paid her income taxes and estimated penalties for tax years 1999 and 2000 did not address the validity of the related assessments for accrued interest and penalties imposed for the late filing and the late payment of her taxes. As to tax year 2002, Stein recalled "writing a check" for income taxes and penalties, yet she did not state that she delivered the check, so no dispute existed that she owed assessments for failing to pay, for paying and filing late, and for accrued interest.

Stein produced no substantial competent evidence to defeat summary judgment. Viewed in the light most

favorable to Stein, her affidavit provided "a scintilla of evidence," which is not enough to survive summary judgment. *See Liberty Lobby*, 477 U.S. at 252. And Stein failed to submit any other evidence to support her assertion that the tax assessment was erroneous. *See* Fed. R. Civ. P. 56(c)(1). Without the existence of a "genuine dispute as to any material fact . . . [the government was] entitled to judgment as a matter of law." *See id.* R. 56(a).

Stein argues that the district court on remand violated Federal Rule of Civil Procedure 56 and her right to due process under the Fifth Amendment, but we disagree. Stein argues that she was improperly "limited [in] what arguments [she] could assert," but the district court appropriately limited the parties' arguments based on our instruction to "determin[e] the impact of Ms. Stein's affidavit" on the motion of the government for summary judgment, *Stein*, 881 F.3d at 859. Stein argues that the district court violated Rule 56 by prohibiting her from filing new evidence in opposition to summary judgment, but Rule 56 does not address the supplementation of the record on remand. Furthermore, the admission of evidence is a matter of discretion, and Stein fails to explain why it was inappropriate for the district court to refuse to admit new evidence. *See Cambridge Univ. Press v. Albert*, 906 F.3d 1290, 1302 (11th Cir. 2018) ("The question whether to reopen the record on remand is 'left to the sound discretion of the trial court.' *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 551, 103 S. Ct. 2541, 76 L.Ed.2d 768 (1983)."). And we find unpersuasive Stein's conclusory argument that the district court violated her right to due process by denying her an opportunity to file a new affidavit. Stein fails to state

what facts she would have included in the affidavit or how she was prejudiced by the inability to file a new affidavit.

IV. Conclusion

We AFFIRM the summary judgment in favor of the government.

ORDER OF THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA (OCTOBER 22, 2018)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,

Plaintiff,

v.

ESTELLE STEIN,

Defendants.

Case No.15-cv-20884-UU

Before: Ursula UNGARO,
United States District Judge.

THIS CAUSE is before the Court upon Plaintiff's Motion for Summary Judgment (D.E. 52).

THE COURT has reviewed the motions, the pertinent portions of the record and is otherwise fully advised of the premises. For the reasons discussed below, the motion is granted.

Procedural History

In 2015, the government sued Defendant, Estelle Stein, seeking to recover unpaid tax penalties. D.E. 1. The government moved for summary judgment and

submitted copies of Stein's tax returns, transcripts of her accounts, and an affidavit from and Internal Revenue Service officer to show that Stein never paid the penalties. D.E. 31. In opposition to the government's summary judgment motion, Stein proffered an affidavit attesting that "to the best of [her] recollection," she paid the taxes and penalties for all the years in question. D.E. 32-1. This was the only evidence Stein proffered in opposition to the motion.

Relying on *Mays v. United States*, 763 F.2d 1295 (11th Cir. 1985), the Court granted summary judgment for the government because a self-serving affidavit was insufficient to establish a dispute of material fact. D.E. 40. A three-judge panel of the Eleventh Circuit Court of Appeals affirmed. D.E. 48. But, *en banc*, the Circuit overruled *Mays* and held that "[a] non-conclusory affidavit which complies with [Federal Rule of Civil Procedure] 56 can create a genuine dispute concerning an issue of material fact, even if it is self-serving and/or uncorroborated." *United States v. Stein*, 881 F.3d 853, 858-59 (11th Cir. 2018) (*en banc*) ("*Stein II*"). The court cautioned, however, that "a self-serving and/or uncorroborated affidavit will [not] always preclude summary judgment." *Id.* And it left unresolved the question of whether substantive federal tax law requires corroboration of a taxpayer's affidavit. *Id.*

Upon remand, the Court ordered the government to file a new motion for summary judgment that addressed the following question: "does [Stein's] self-serving affidavit create a genuine issue of material fact?" D.E. 49. The motion is now fully briefed and ripe for disposition.

Facts

The facts are few and, except for the ultimate question of whether Stein paid her tax assessment, undisputed.

In 2005, Stein and her late husband filed their tax returns for the years 1996-1999 and 2002. D.E. 52, pp. 2-3. The Steins paid the taxes due and some additional amounts for anticipated interest and penalties. *Id.* But the government claimed that she did not pay all of the accrued interest and penalties. *Id.* Stein responded that, to the best of her recollection, she paid all the taxes and penalties that she owed for each of the disputed years. D.E. 32-1. She was unable, however, to provide any supporting documentary evidence. *Id.* She explained that neither she nor her bank had copies of any of the relevant bank records. *Id.*

Legal Standard

Summary judgment is authorized only when the moving party meets its burden of demonstrating that "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. When determining whether the moving party has met this burden, the Court must view the evidence and all factual inferences in the light most favorable to the non-moving party." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Rojas v. Florida*, 285 F.3d 1339, 1341-42 (11th Cir. 2002).

The party opposing the motion may not simply rest upon mere allegations or denials of the pleadings;

after the moving party has met its burden of proving that no genuine issue of material fact exists, the non-moving party must make a showing sufficient to establish the existence of an essential element of that party's case and on which that party will bear the burden of proof at trial." *See Celotex Corp. v. Catrell*, 477 U.S. 317 (1986); *Poole v. Country Club of Columbus, Inc.*, 129 F.3d 551, 553 (11th Cir. 1997); *Barfield v. Brierton*, 883 F.2d 923, 933 (11th Cir. 1989).

If the record presents factual issues, the Court must not decide them; it must deny the motion and proceed to trial. *Envtl. Def. Fund v. Marsh*, 651 F.2d 983, 991 (5th Cir. 1981). Summary judgment may be inappropriate even where the parties agree on the basic facts, but disagree about the inferences that should be drawn from these facts. *Lighting Fixture & Elec. Supply Co. v. Cont'l Ins. Co.*, 420 F.2d 1211, 1213 (5th Cir. 1969). If reasonable minds might differ on the inferences arising from undisputed facts, then the Court should deny summary judgment. *Impossible Elec. Techs., Inc. v. Wackenhut Protective Sys., Inc.*, 669 F.2d 1026, 1031 (5th Cir. 1982); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("[T]he dispute about a material fact is 'genuine' . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.").

Moreover, the party opposing a motion for summary judgment need not respond to it with evidence unless and until the movant has properly supported the motion with sufficient evidence. *Adickes*, 398 U.S. at 160. The moving party must demonstrate that the facts underlying the relevant legal questions raised by the pleadings or are not otherwise in dispute, or else summary judgment will be denied notwithstanding

that the non-moving party has introduced no evidence whatsoever. *Brunswick Corp. v. Vineberg*, 370 F.2d 605, 611-12 (5th Cir. 1967). The Court must resolve all ambiguities and draw all justifiable inferences in favor of the nonmoving party. *Liberty Lobby, Inc.*, 477 U.S. at 255.

Analysis

The question before the Court is whether Stein's self-serving affidavit precludes summary judgment. It will if it creates a genuine dispute of material fact, and whether there is a genuine dispute of material fact depends on the substantive law at issue. *Stein II*, 881 F.3d at 858-59. Thus, the Eleventh Circuit directed this Court consider whether as a matter of federal tax law, Stein's affidavit must be corroborated with documentary evidence to create a material dispute of fact. *See* D.E. 48.

I. The Impact of *Stein II*

In *Stein II*, the Eleventh Circuit held that "an affidavit which satisfies Rule 56 of the Federal Rules of Civil Procedure may create an issue of material fact and preclude summary judgment even if it is self-serving an uncorroborated." *Stein II*, 881 F.3d at 853 (emphasis added). It did not hold that an uncorroborated affidavit always creates an issue of material fact. Indeed, it took pains to avoid that holding. *See id.* at 859 ("We hold only that the self-serving and/or uncorroborated nature of an affidavit cannot prevent it from creating an issue of material fact."). Unfortunately for the district courts, the Circuit offered little guidance for the practical application of this rule.

What's more, although *Stein II* arose out of this tax assessment case, the Circuit declined to consider how its holding applies in the unique framework of tax assessment cases. It said only: "[a]s far as we can tell, there are no federal cases addressing what evidence a taxpayer needs to present to show that an IRS assessment has been paid or satisfied." *Id.* Instead, it instructed this Court to consider that question in the first instance.

II. Framework for Tax Assessment Cases

From the outset, a tax assessment case is unlike most other civil cases because an IRS tax assessment is entitled to a presumption of correctness. Quoting the Supreme Court, the Eleventh Circuit has held that "[a] tax assessment made by the IRS constitutes a 'determination that a taxpayer owes the Federal Government a certain amount of unpaid taxes,' and such determination 'is entitled to a legal presumption of correctness.'" *United States v. Morgan*, 419 Fed. Appx. 958, 959 (11th Cir. 2011) (citing *United States v. Fior D'Italia, Inc.*, 536 U.S. 238, 242, 122 S. Ct. 2117, 2122, 153 L.Ed.2d 280 (2000)). "In reducing a tax assessment to judgment, the Government must first prove that the assessment was properly made." *United States v. Korman*, 388 Fed. Appx. 914, 915 (11th Cir. 2010) (citing *United States v. White*, 466 F.3d 1241, 1248 (11th Cir. 2006)). A taxpayer carries "the burden of proving that the IRS's computations in this regard were erroneous." *Morgan*, 419 Fed. Appx. at 958 (citing *Pollard v. Comm'r, IRS*, 786 F.2d 1063, 1066 (11th Cir. 1986)).

The question before the Court now is: what is the taxpayer's burden to overcome the presumption of correctness? That question has two parts: (1) what is the taxpayer's burden of proof; and (2) what evidence is sufficient, at the summary judgment stage, to allow the jury to consider whether the taxpayer has satisfied that burden.

A. Stein's Burden of Proof Is, at Least, Preponderance of the Evidence, and May Be Clear and Convincing Evidence

Several cases from outside this district have held that, in order to rebut the presumption of correctness,[1] the taxpayer bears the burden of proving by preponderance of the evidence, that the assessment is incorrect. *See, e.g.*, *Fisher v. United States*, 61 F. Supp. 2d 621, 630 (E.D. Mich. 1999); *United States v. Red Stripe, Inc.*, 792 F. Supp. 1338, 1341 (E.D.N.Y. 1992); *United States v. Dixon*, 672 F. Supp. 503, 506 (M.D.Ala.1987).

Two district courts in this circuit, including one from this district, have held taxpayers to the even higher standard of clear and convincing evidence. *See, United States v. Mathewson*, 839 F. Supp. 858, 860 (S.D. Fla. 1993); *United States v. Dixon*, 672 F. Supp. 503, 506 (M.D. Ala. 1987), aff'd, 849 F.2d 1478 (11th Cir. 1988). Those cases relied upon the Supreme Court's opinion in *United States v. Chem. Found.*, 272 U.S. 1, 14 (1926), which held that official acts of public officers are entitled to a "presumption of regularity" rebuttable only by "clear evidence to the contrary."

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[1] Here "correctness" refers to the IRS's determination that Stein has not paid the assessment; this is not an issue of computation.

Here, for the reasons discussed below, Stein's affidavit is insufficient to defeat summary judgment under either standard.

B. To Rebut the Presumption, Stein Must Provide More Than an Uncorroborated Self-Serving Affidavit

Several cases have addressed what evidence a taxpayer needs to show that she satisfied an IRS assessment. For example, in *United States v. Graham*, No. 13-CV-1288 WFK VMS, 2015 WL 1003458 (E.D.N.Y. Mar. 6, 2015), the government moved for summary judgment to collect unpaid tax liability and to enforce tax liens. The government provided all the relevant records in its control. *Id.* at *4. In opposition, the taxpayer filed an uncorroborated affidavit saying that he sent the government seven checks, which the government deposited. *Id.* The government had no record of the checks. *Id.* Neither did the taxpayer's bank. *Id.* The taxpayer also was unable to present copies of the checks or show that any money had been deducted from the referenced account. *Id.* at *5. Lastly, the taxpayer was unable to prove the correct amount of the tax assessment. *Id.* For these reasons, the Court ruled that the taxpayer's affidavit, without documentary support, was not sufficient to rebut the government's presumptively valid assessments.

Stein attempts to distinguish *Graham* on the grounds that the assertions in the taxpayer's affidavit there were "speculative." Opp. at p. 5, n. 2. However, the statement there (that the taxpayer sent, and the government deposited, seven checks) is no more speculative that Stein's statement here. *Compare id. with* D.E. 32-1 ¶ 7 ("All of the tax returns were filed and, to

the best of my recollection, I paid the tax, including late penalties, for each unfiled tax return when the tax returns were filed.").

Latham v. United States, No. CIV. A. 91-2397-O, 1992 WL 403030, (D. Kan. Dec. 1, 1992) is also helpful. There, the government moved for summary judgment to collect income and social security taxes that an employer failed to withhold from wages paid to her employees. *Id.* at *1. In opposition, the employer insisted that she sent the IRS a check. *Id.* at *3. She also offered as evidence, two illegible copies of checks and a copy of the company's cash disbursements for the relevant period. *Id.* The Court ruled that the checks and disbursements show "that some checks were drafted to the IRS. . . . " but "fail[ed] to prove, however, that the IRS ever received payment . . . . " *Id.* (emphasis added). The Court required that in order to prevail against the government's motion for summary judgment, the employer had to present evidence tending to show "that the checks were deposited and accepted in payment of taxes by the IRS." *Id.*

Latham highlights an important requirement in tax assessment cases: to rebut presumptive correctness of a tax assessment, a taxpayer needs to show that they paid the taxes assessed. In other words, that the IRS actually received the funds in question. *See generally Grange Mut. Cas. Co. v. Woodard*, 861 F.3d 1224, 1232 (11th Cir. 2017) ("[P]ayment is complete only when the money changes hands."). It is not sufficient for a taxpayer to say that they recall sending the IRS a check.

The Seventh Circuit discussed this requirement in *United States v. Johnson*, 355 F. App'x 963 (7th Cir. 2009). In *Johnson*, the taxpayer argued, among other

things, that the amount of the tax assessment leveled against him was incorrect. *Id.* at 965. In affirming summary judgment for the government, the Seventh Circuit summed up the evidentiary requirement for rebutting the presumption in favor of the IRS:

> What Johnson needs, if he wants to call that position [that the taxes remain unpaid] into question, is proof of payment. A cancelled check (corporate or personal) might do. Bank statements showing a debit equal to the outstanding taxes might do. But Johnson has not demonstrated payment. He cannot use bureaucratic error as a substitute.

Id.

III. Applying These Principles Here, Summary Judgment in Favor of the Government Is Appropriate

Under either a preponderance of the evidence or clear and convincing evidence standard, Stein's affidavit is insufficient to create genuine dispute of material fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (holding that a dispute is "genuine" only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party."). Here, the weakness of Stein's affidavit and the lack of any other evidence preclude a reasonable jury from returning a verdict in her favor.

As in *Graham*, 2015 WL 1003458, Stein's affidavit is speculative; based on nothing more than "the best of [her] recollection." D.E. 32-1 ¶ 7. And the Eleventh Circuit has repeatedly held that speculation cannot defeat summary judgment. *See, e.g.*, *Brown v. Publix Super Markets, Inc.*, 626 F. App'x 793, 797 (11th Cir.

2015) ("[B]ut she provided no evidence to support this claim. Such speculation, unsupported by evidence, cannot defeat summary judgment."); *Cordoba v. Dillard's, Inc.*, 419 F.3d 1169, 1181 (11th Cir.2005) ("Speculation does not create a genuine issue of fact; instead, it creates a false issue, the demolition of which is a primary goal of summary judgment.").

Furthermore, as in *Johnson*, 355 F. App'x 963, *Fisher*, 61 F. Supp. 2d 621, *Dixon*, 672 F. Supp. 503, and *Latham*, 1992 WL 403030, Plaintiff has offered nothing else to counter the government's evidence. She has no proof of payment; no canceled checks, no bank statements, no carbon copies from an old checkbook, nor any other evidence with which to rebut the presumption in favor of the government. Thus, she cannot show that the government was paid and that the assessment, therefore, is incorrect.

IV. Denying Summary Judgment Would Lead to an Absurd Result

The cases relied upon above articulate rules that accord with the policy of the tax code, which is to facilitate the prompt and efficient collection of federal revenue. *See, e.g.*, *Meyer's Estate v. Comm'r*, 200 F.2d 592, 596 (5th Cir. 1952) (recognizing that the overarching policy of the tax code is to "further[ ] orderly administration of the tax laws and prompt collection of the Federal revenues."). If those cases are ignored and, post *Stein II*, any tax collection action can be forced to trial by an affidavit based solely on the taxpayer's uncorroborated recollection, then the IRS cannot promptly and efficiently collect the federal revenues. Furthermore, if *Stein II* is mean to have that effect, it

would, for all practical purposes, nullify the presumption of correctness; reducing it to no more than a footnote in the jury's instructions. The Court stands holding Pandora's Box, so to speak, and absent a clear command from the Eleventh Circuit to open it, sound policy counsels the Court to keep it closed.

Conclusion

For these reasons, it is hereby

ORDERED AND ADJUDGED that the government's renewed motion for summary judgment (D.E. 52) is GRANTED. The Court will enter a separate judgment. It is further

ORDERED AND ADJUDGED that the case is CLOSED for administrative purposes.

DONE AND ORDERED in Chambers at Miami, Florida, this 22nd day of October, 2018.

/s/ Ursula Ungaro
United States District Judge

ORDER OF THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA (JULY 2, 2018)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,

Plaintiff,

v.

ESTELLE STEIN,

Defendants.

Case No.15-cv-20884-UU

Before: Ursula UNGARO,
United States District Judge.

THIS CAUSE is before the Court upon the mandate from the United States Court of Appeals for the Eleventh Circuit, issued July 2, 2018 (D.E. 48).

THE COURT has reviewed the pertinent portions of the record and is otherwise fully advised of the premises.

On February 22, 2016, this Court granted summary judgment for the Plaintiff, the United States of America, in this tax liability case. The Court granted summary judgment because Defendant supported her arguments only with a self-serving affidavit. The Eleventh Circuit originally affirmed because it had held in

Mays v. United States, 763 F.2d 1295 (11th Cir. 1985) that a self-serving affidavit was insufficient to establish a disputed fact. *En banc*, however, the court overruled *Mays*, and concluded that "[a] non-conclusory affidavit which complies with [Federal Rule of Civil Procedure] 56 can create a genuine dispute concerning an issue of material fact, even if it is self-serving and/or uncorroborated." *United States v. Stein*, 881 F.3d 853, 181-59 (11th Cir. 2018) (en banc). The court cautioned, however, that "a self-serving and/or uncorroborated affidavit will [not] always preclude summary judgment" and it declined to decide whether "substantive federal tax law" requires corroboration of a taxpayer's affidavit. *Id.*

The Court of Appeals has now remanded the case so that this Court may consider, in the first instance, whether Defendant's self-serving affidavit created a genuine dispute of fact. Accordingly, it is hereby

ORDERED AND ADJUDGED that this case is REOPENED. The Court will enter a new scheduling order for trial, but discovery remains closed. It is further

ORDERED AND ADJUDGED that Plaintiff SHALL file a new motion for summary judgment by Monday, July 23, 2018, that addresses ONLY the following question: does Defendant's self-serving affidavit create a genuine issue of material fact about Defendant's tax liability? Plaintiff's response to the motion shall address ONLY the same question. The Parties ARE NOT permitted to engage in further discovery, to supplement the record already before the court, or otherwise to make new arguments which they could have made when Plaintiff moved for summary judgment the first time. Failure to comply with this order will result in the imposition of appropriate sanctions.

DONE AND ORDERED in Chambers at Miami, Florida, this 2nd day of July, 2018.

/s/ Ursula Ungaro
United States District Judge

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT (MAY 9, 2018)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ESTELLE STEIN,

Defendant-Appellant.

No. 16-10914

D.C. Docket No. 1:15-cv-20884-UU

Appeal from the United States District Court
for the Southern District of Florida

Before: William PRYOR, JORDAN, and
Julie CARNES, Circuit Judges.

PER CURIAM

Estelle Stein appeals the grant of summary judgment in favor of the United States for unpaid federal income taxes, late penalties, and interest accrued for five tax years. This appeal has evolved several times since Stein appealed. Bound by *Mays v. United States*, 763 F.2d 1295 (11th Cir. 1985), this panel initially affirmed because Stein could offer only a self-serving

affidavit to establish that she paid the disputed assessments. But our Court later granted rehearing en banc and overruled *Mays* in *United States v. Stein*, 881 F.3d 853 (11th Cir. 2018) (en banc). On remand to the original panel, the parties now advance arguments that no longer resemble the arguments they made to the district court. Because we are not a court of first review, we vacate the judgment of the district court and remand to allow the district court to consider the new arguments in the first instance.

In 2015, the government sued Estelle Stein and moved for summary judgment to reduce certain income tax assessments to judgment. It submitted copies of her federal tax returns, transcripts of her accounts, and an affidavit from an officer of the Internal Revenue Service. Stein responded with an affidavit that attested that, "to the best of [her] recollection," she had paid the taxes and penalties owed for the years in question. But she acknowledged that she no longer had, and could not obtain, bank statements to corroborate her account.

The government prevailed in the district court on the theory that a taxpayer's self-serving affidavit is insufficient to defeat summary judgment. It argued that it had made timely assessments and that those assessments were presumptively correct. It then cited *Mays* and declared that "Stein's self-serving uncorroborated pleadings are insufficient to rebut th[at] presumption of correctness." The district court agreed and granted summary judgment in favor of the government. It ruled that Stein did not satisfy her burden to overcome the presumption of correctness because "she did not produce any evidence documenting [her alleged] payments."

This panel affirmed. We cited *Mays* and explained that "Stein's general and self-serving assertions that she paid the taxes owed and related late penalties . . . failed to rebut the presumption established by the assessments." *United States v. Stein*, 840 F.3d 1355, 1357 (11th Cir. 2016) (citing *Mays*, 763 F.2d at 1297). But the full Court vacated the panel opinion and reheard the appeal en banc.

The en banc Court overruled *Mays*. We held that "[a] non-conclusory affidavit which complies with [Federal Rule of Civil Procedure] 56 can create a genuine dispute concerning an issue of material fact, even if it is self-serving and/or uncorroborated." *Stein*, 881 F.3d at 858-59. But we cautioned that "a self-serving and/or uncorroborated affidavit will [not] always preclude summary judgment," and we declined to decide whether "substantive federal tax law" requires corroboration of a taxpayer's affidavit. *Id.* at 859.

On remand to the panel, the government dispenses with any reliance on *Mays* but argues that it is still entitled to summary judgment. The government contends that Stein's affidavit fails to create a genuine issue of material fact about her tax liability. For example, it maintains that Stein must "show that funds were actually delivered to the [Internal Revenue Service]" to defeat summary judgment.

Because these arguments were never presented by the government to the district court, we decline to consider them in the first instance. "[A]s a court of appeals, we review claims of judicial error in the trial courts." *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1331 (11th Cir. 2004). "If we were to regularly address questions . . . that district[ ] court[s] never had a chance to examine, we would not only waste our

resources, but also deviate from the essential nature, purpose, and competence of an appellate court." *Id.* Indeed, "[t]oo often our colleagues on the district courts complain that the appellate cases about which they read were not the cases argued before them." *Irving v. Mazda Motor Corp.*, 136 F.3d 764, 769 (11th Cir. 1998).

We VACATE the summary judgment entered by the district court and REMAND for further proceedings consistent with our en banc opinion.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT (JANUARY 31, 2018)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ESTELLE STEIN,

Defendant-Appellant.

No. 16-10914
D.C. Docket No. 1:15-cv-20884-UU

Appeal from the United States District Court
for the Southern District of Florida

Before: ED CARNES, Chief Judge, TJOFLAT, MARCUS, WILSON, William PRYOR, MARTIN, JORDAN, ROSENBAUM, Julie CARNES, NEWSOM, and HULL, Circuit Judges.*

JORDAN, Circuit Judge:

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* Judge Jill Pryor is recused from this case and did not participate in this decision. Judge Frank Hull continued to participate in this decision after she assumed senior status pursuant to 28 U.S.C. § 46(c).

We hold that an affidavit which satisfies Rule 56 of the Federal Rules of Civil Procedure may create an issue of material fact and preclude summary judgment even if it is self-serving and uncorroborated. And because this principle applies in all civil cases, including those in the realm of tax law, we overrule that portion of *Mays v. United States*, 763 F.2d 1295, 1297 (11th Cir. 1985), which is (or may be interpreted to be) to the contrary.

I

This case concerns IRS assessments, so we begin with some basic tax concepts. An assessment "amounts to an IRS determination that a taxpayer owes the [f]ederal [g]overnment a certain amount of unpaid taxes," and is "entitled to a legal presumption of correctness—a presumption that can help the [g]overnment prove its case against a taxpayer in court." *United States v. Fior D'Italia, Inc.*, 536 U.S. 238, 242 (2002). "In reducing an assessment to judgment, the [g]overnment must first prove that the assessment was properly made. . . . [If it does so,] the taxpayer must then prove that the assessment is erroneous in order to prevail." *United States v. White*, 466 F.3d 1241, 1248 (11th Cir. 2006). As far as we can tell, there are no reported federal cases addressing what evidence a taxpayer needs to present to show that an IRS assessment has been paid or satisfied.

A

In 2015, the government sued Estelle Stein for outstanding tax assessments, late penalties, and interest owed for tax years 1996, 1999, 2000, 2001, and 2002. *See* 26 U.S.C. § 7402. Its complaint alleged

that Ms. Stein owed approximately $220,000 plus fees and statutory additions.

When it moved for summary judgment, the government sought to demonstrate that Ms. Stein had outstanding tax assessments by submitting copies of her federal tax returns, transcripts of her accounts for the tax years in question, and an affidavit from an IRS officer. The government acknowledged that Ms. Stein had paid the taxes due for 1996, 1999, and 2000 (as well as some additional small amounts), but claimed she had not satisfied the accrued penalties and interest for those years. As for 2001 and 2002, the government asserted that Ms. Stein had not paid any taxes, penalties, or interest. The government did not depose Ms. Stein.

In response to the government's summary judgment motion, Ms. Stein submitted an affidavit of her own stating that, "to the best of [her] recollection," she had paid the taxes and penalties owed for the years in question. Her affidavit specified that she had retained an accounting firm to file the tax returns after the death of her husband, who had been solely responsible for filing the couple's tax returns and paying their taxes; that she recalled paying the taxes due, including penalties, for each of those tax returns; that she no longer had bank statements to establish her payments to the IRS; that she could not obtain statements from her bank to prove her payments; and that the IRS had acknowledged misapplying her tax payment for 1996 to tax year 1979. The relevant paragraphs of Ms. Stein's affidavit stated as follows:

> 8. For 1996, this tax return was filed on November 15, 2004. The IRS had no record of receiving any payment and is claiming the

full amount of the tax is due, along with interest and penalties.

[* * *]

10. For the year 1999, I filed the return as surviving spouse on February 11, 2005. The return showed an amount due of $33,612. I paid $35,226, which included the late penalty. The IRS has a record of that payment.

11. For the year 2000, I filed my return as surviving spouse on January 11, 2005. The amount due on the return was $4,127. I paid $4,349.00, which amount included the late penalty. The IRS has a record of having received that payment.

12. For the year 2001, I filed my return, as surviving spouse, on March 10, 2005. The amount of the return shows $15,998 due. Although I recall paying the tax on that return, including a late penalty consistent with the other returns that I filed, the IRS does not have a record of receiving such payment.

13. For the year 2002, I filed my return on March 10, 2005, as surviving spouse. The amount of tax shown on the return was $52,342. Although I recall writing a check for this amount, plus, late penalties, the IRS has no record of receiving his amount.

[* * *]

21. . . . [I]t is my unwavering contention that I paid the taxes due, including late filing penalties, at such time as I filed the returns for each of the tax years in question.

D.E. 32-1 at 2-3.

The district court entered summary judgment in favor of the government. *See* D.E. 40. It first concluded that the evidence submitted by the government created a presumption that its assessments were correct. Turning to Ms. Stein's affidavit, the district court ruled that "[a] number of the facts contained within [the] affidavit [were] not relevant facts for . . . consideration." *Id.* at 6. Although Ms. Stein maintained that payments had been made, she "did not produce any evidence documenting said payments," *id.*, and therefore did not satisfy her burden to overcome the presumption of correctness given to the government's assessments. As a result, there was "no genuine dispute as to any material fact," *id.* at 7, and the government was entitled to judgment as a matter of law.

Ms. Stein appealed, and a panel of this court affirmed. The panel ruled that her "affidavit failed to create a genuine factual dispute about the validity of the [government's] assessments" because, under *Mays*, 763 F.2d at 1297, her "general and self-serving assertions . . . failed to rebut the presumption established by the assessments." *United States v. Stein*, 840 F.3d 1355, 1357 (11th Cir. 2016). We vacated the panel's opinion and took the case en banc to determine whether *Mays* should be overruled.

II

Mays, a tax refund case, came to us in a summary judgment posture. We affirmed the district court's grant of summary judgment in favor of the government, holding that the taxpayer's submissions were insufficient to create an issue for trial. *See* 763 F.2d at 1297. We first noted that a taxpayer in a refund suit has the

twin burdens of showing that the government's assessment is wrong, and of establishing the "correct amount of the refund due." *Id.* We then explained that a taxpayer's claim "must be substantiated by something other than tax returns, uncorroborated oral testimony, or self-serving statements." *Id.* (internal citations omitted). Turning to the record in the case, we concluded that the taxpayer's computer printout of business expenses (prepared after a tax audit) and net worth statements (which did not refer to any original records) "did not overcome the presumption of correctness due [to] determinations" of the Commissioner of the IRS: "[The taxpayer] has submitted only self-serving documents which do not substantiate his claims." *Id.*

We overrule *Mays* to the extent it holds or suggests that self-serving and uncorroborated statements in a taxpayer's affidavit cannot create an issue of material fact with respect to the correctness of the government's assessments. Nothing in Rule 56 prohibits an otherwise admissible affidavit from being self-serving. And if there is any corroboration requirement for an affidavit, it must come from a source other than Rule 56.

A

Rule 56(a) authorizes summary judgment only when "there is no genuine dispute as to any material fact" and the moving party is "entitled to judgment as a matter of law." Rule 56(c), in turn, allows a nonmoving party to dispute a material fact through an affidavit, which must be "made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." *See generally Celotex Corp. v.*

Catrett, 477 U.S. 317, 322 (1986) ("[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof a trial.").

An affidavit cannot be conclusory, *see, e.g., Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990), but nothing in Rule 56 (or, for that matter, in the Federal Rules of Civil Procedure) prohibits an affidavit from being self-serving. Indeed, as the Seventh Circuit observed, "most affidavits submitted [in response to a summary judgment motion] are self-serving." *Payne v. Pauley*, 337 F.3d 767, 772 (7th Cir. 2003). Not surprisingly, most of our cases correctly explain that a litigant's self-serving statements based on personal knowledge or observation can defeat summary judgment. *See, e.g., Feliciano v. City of Miami Beach*, 707 F.3d 1244, 1253 (11th Cir. 2013) ("To be sure, Feliciano's sworn statements are self-serving, but that alone does not permit us to disregard them at the summary judgment stage."); *Price v. Time, Inc.*, 416 F.3d 1327, 1345 (11th Cir.) ("Courts routinely and properly deny summary judgment on the basis of a party's sworn testimony even though it is self-serving."), *modified on other grounds on denial of reh'g.*, 425 F.3d 1292 (11th Cir. 2005).

It makes no difference that this is a tax case. We apply the same summary judgment standard in tax cases as we do in other areas of law. *See, e.g., Roberts v. Comm'r*, 329 F.3d 1224, 1227 (11th Cir. 2003) (citing Tax Ct. R. 121, which mirrors Rule 56). *See also Lewis v. United States*, 336 F. App'x 535, 538 (6th Cir. 2009)

(rejecting the argument that the ordinary summary judgment standard does not apply in tax cases).

To support its statement that a taxpayer needs more than his self-serving testimony to preclude summary judgment, *Mays* relied on *Gibson v. United States*, 360 F.2d 457 (5th Cir. 1966). But *Gibson* does not hold that self-serving statements in a taxpayer's affidavit cannot create a genuine issue of material fact. In *Gibson*, which involved a claim for a refund of excise taxes, the taxpayer appealed certain unfavorable factual findings made by the district court following a bench trial. The taxpayer argued primarily that the district court had erred in disregarding his testimony and the tax liability calculations contained in his own "excise tax journal." *See id.* at 460-62. The former Fifth Circuit held that the district court's factual findings were not clearly erroneous and explained that the taxpayer's self-serving testimony did "not compel a contrary result." *Id.* at 462.

Gibson does not hold that a district court can reject or ignore a taxpayer's affidavit at summary judgment on the ground that it is self-serving. *Gibson* was an appeal from a bench trial, and in that setting a district court can certainly take into account the self-serving nature of a litigant's testimony. A district court is, after all, permitted to assess credibility and weigh evidence at a bench trial, and the same goes for the jury when it is the trier of fact.[1]

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[1] Of note, none of the cases cited in *Gibson* arose in a summary judgment posture. *See Pinder v. United States*, 330 F.2d 119, 121 (5th Cir. 1964) (reviewing jury verdict); *Mendelson v. Comm'r*, 305 F.2d 519, 521 (7th Cir. 1962) (reviewing tax court's factual findings); *Urban Redevelopment Corp. v. Comm'r*, 294 F.2d 328, 332 (4th Cir. 1961) (same); *Comm'r v. Smith*, 285 F.2d 91, 93 (5th

Properly understood, *Gibson* stands only for the unremarkable proposition that a fact-finder can choose to disregard a litigant's self-serving (and unsupported) trial testimony, and that its decision to do so generally will not constitute clear error. That proposition has no place at summary judgment, where "the [court's] function is not . . . to weigh the evidence." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). *See also Danzer v. Norden Sys., Inc.*, 151 F.3d 50, 57 (2d Cir. 1998) (rejecting the argument that a self-serving affidavit is insufficient to defeat summary judgment because it would "thrust the courts—at an inappropriate stage—into an adjudication of the merits").

B

Nor does Rule 56 require that an otherwise admissible affidavit be corroborated by independent evidence. As noted, Rule 56(c) states only that an affidavit must be "made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated."

We see no basis for imposing a corroboration gloss on Rule 56, *cf. Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168-69 (1993) (rejecting a judicially-imposed "heightened pleading standard" not found in Federal Rules of Civil Procedure 8 and 9 for municipal liability cases), and reaffirm that "even in the absence of collaborative evidence, a plaintiff's own testimony may be sufficient to

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Cir. 1960) (same); *Carter v. Comm'r*, 257 F.2d 595, 596, 599 (5th Cir. 1958) (same); *Anderson v. Comm'r*, 250 F.2d 242, 246-47 (5th Cir. 1957) (same); *Archer v. Comm'r*, 227 F.2d 270, 272 (5th Cir. 1955) (same).

withstand summary judgment." *Strickland v. Norfolk S. Ry. Co.*, 692 F.3d 1151, 1160 (11th Cir. 2012). *Accord E.E.O.C. v. Warfield-Rohr Casket Co.*, 364 F.3d 160, 163-64 (4th Cir. 2004); *Jackson v. Ducksworth*, 955 F.2d 21, 22 (7th Cir. 1992); *Weldon v. Kraft, Inc.*, 896 F.2d 793, 800 (3d Cir. 1990); *Becho, Inc. v. United States*, 47 Fed. Cl. 595, 603-04 & n.11 (2000); *Marsh v. Hog Slat, Inc.*, 79 F. Supp. 2d 1068, 1076 (N.D. Iowa 2000). If corroboration is needed, then that requirement must come from a source other than Rule 56, such as the substantive law that governs the parties' dispute or the Federal Rules of Evidence. *See, e.g.,* Fed. R. Evid. 804(b)(3)(B) (requiring corroboration to support the admission of statements against the declarant's interest).[2]

III

A non-conclusory affidavit which complies with Rule 56 can create a genuine dispute concerning an issue of material fact, even if it is self-serving and/or uncorroborated. We overrule *Mays* to the extent that

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[2] In the appeal of a tax refund case that went to trial, we stated almost 40 years ago that a taxpayer cannot meet his burden through his "uncorroborated oral testimony." *Griffin v. United States*, 588 F.2d 521, 530 (5th Cir. 1979) (concluding that, because the taxpayer's testimony was corroborated, the issue was for the jury). *Mays*, itself a tax refund case, cited *Griffin* for the proposition that a taxpayer's refund claim needs to be substantiated by "something other than . . . uncorroborated oral testimony." *Mays*, 763 F.2d at 1297. This case does not involve a refund claim, and the appeal is from a summary judgment order. Given the posture and nature of this en banc proceeding, we do not express any views on whether the quoted statement from *Griffin* is correct as a matter of substantive federal tax law.

it holds or suggests otherwise, and remand the case to the panel for consideration of Ms. Stein's appeal.

We do not mean to suggest that a self-serving and/or uncorroborated affidavit will always preclude summary judgment. We hold only that the self-serving and/or uncorroborated nature of an affidavit cannot prevent it from creating an issue of material fact. And we leave to the panel the task of determining the impact of Ms. Stein's affidavit.

Finally, we recognize that the government, in its en banc brief, has made a number of additional and related arguments in support of the district court's summary judgment order. For example, the government argues that, in a case like this one, a taxpayer's affidavit concerning the matter of payment must be substantiated and corroborated (for example, by documentary evidence) pursuant to principles of substantive federal tax law, particularly given the presumption of correctness that attaches to its assessments. Given the narrow question presented for en banc review, we think it is best for the panel to consider the government's arguments, as well as Ms. Stein's responses to them.

REMANDED TO THE PANEL
WITH INSTRUCTIONS.

CONCURRING OPINION OF WILLIAM PRYOR

WILLIAM PRYOR, Circuit Judge, concurring:

I concur fully in the majority opinion, but I write separately to highlight the irony of our earlier precedent when viewed in the light of the history of the Seventh Amendment. The precedent we overrule today, *Mays v. United States*, prevented juries from resolving factual disputes when a taxpayer offered only a self-serving affidavit in support of his position. 763 F.2d 1295, 1297 (11th Cir. 1985). As the majority opinion explains, that rule had no basis in law. But it also flouted the history of the right to a jury trial in civil cases.

In the decades before the American Revolution, Parliament developed procedures to enforce its revenue measures by evading colonial juries. *See* 1 Julius Goebel, Jr., *History of the Supreme Court of the United States* 85-86 (Paul A. Freund ed., 1st ed. 1971); Philip Hamburger, *Is Administrative Law Unlawful?* 150 (2014). England had struggled to enforce its trade laws in the colonies, and colonial officials in America blamed local juries for refusing to be impartial in customs disputes. *See* Carl Ubbelohde, *Vice-Admiralty Courts and the American Revolution* 15 (1960). In response, Parliament expanded the jurisdiction of admiralty courts, which sat without juries, to include trade cases that would have been tried by a jury in England. *See* Ubbelohde, *supra* at 15-16, 21. Later, seeking to extract more revenue from the colonies, Parliament enacted the Sugar Act for "the improvement of 'the Revenue of th[e] Kingdom'" and extended the power of customs officials, at their discretion, to "channel cases into admiralty courts, and so to eliminate

jury trial." Goebel, *supra* at 85-86 (quoting 4 Geo. 3, c. 15 (Eng. 1764)); *see also* Caleb Nelson, *The Constitutionality of Civil Forfeiture*, 125 Yale L.J. 2446, 2463 (2016). And the Stamp Act, 5 Geo. 3, c. 12 (Eng. 1765), provided that customs officials could enforce not only the stamp tax, but also "revenue acts in general" in the juryless admiralty courts. Goebel, *supra* at 86.

Colonial Americans vehemently objected to these measures, and the denial of the right to a jury in tax cases became a chief complaint animating the American Revolution. The "colonies formed a Congress to protest 'the tyrannical acts of the British Parliament.'" Hamburger, *supra* at 150 (quoting Resolutions of the Stamp Act Congress (Oct. 19, 1765)). The Stamp Act Congress declared that "trial by jury, is the inherent and invaluable right of every British subject in these colonies." Resolutions of the Stamp Act Congress (Oct. 19, 1765), in *Select Charters and Other Documents Illustrative of American History 1606-1775*, at 315 (William MacDonald ed., MacMillan & Co. 1906). And it denounced "extending the jurisdiction of the courts of admiralty beyond its ancient limits" because of its "manifest tendency to subvert the rights and liberties of the colonists." *Id.* In the Declaration of Independence, Americans cited the "depriv[ation] in many cases, of the benefit of Trial by Jury" as one of the "Usurpations" committed by King George III that they would no longer tolerate. The Declaration of Independence paras. 2, 20 (1776).

The failure to guarantee the right to a jury trial in civil cases almost prevented the ratification of the Constitution. In attempting to persuade New York to ratify the Constitution, Alexander Hamilton acknowledged "[t]he objection" that had "met with most

success" in his home state and "several of the other states" was "the want of a constitutional provision for the trial by jury in civil cases." The Federalist No. 83, at 558 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). And he discussed the specific argument that the civil jury is a necessary "safeguard against an oppressive exercise of the power of taxation." *Id.* at 563. As Justice Story later explained, Americans decided that it was not enough that Congress had the authority "to provide in all cases for the trial by jury." *United States v. Wonson*, 28 F. Cas. 745, 750 (C.C. Mass. 1812) (No. 16,750). The defenders of the Constitution prevailed in the ratification debates only after promising an amendment that guaranteed the right to trial by jury in civil cases. Stanton D. Krauss, *The Original Understanding of the Seventh Amendment Right to Jury Trial*, 33 U. Rich. L. Rev. 407, 412-13 (1999). Americans then enshrined that right in the Seventh Amendment. U.S. Const. Amend. VII.

Our precedent in *Mays* lost sight of the historical basis for the right to a civil jury when it denied a taxpayer a jury trial if all he offered in his favor was a self-serving affidavit to rebut official records of his delinquency. In so doing, *Mays* ousted the jury from its historical role in the exact context—the enforcement of tax laws—that prompted the founding generation to adopt the Seventh Amendment in the first place. Today, we rectify that error.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT (NOVEMBER 4, 2016)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ESTELLE STEIN,

Defendant-Appellant.

No. 16-10914
D.C. Docket No. 1:15-cv-20884-UU

Appeal from the United States District Court
for the Southern District of Florida

Before: William PRYOR, JORDAN and
Julie CARNES, Circuit Judges.

PER CURIAM:

Estelle Stein appeals the summary judgment in favor of the United States for unpaid federal income taxes, late penalties, and interest accrued for tax years 1996 and 1999 through 2002. Stein argues that the district court erred because her affidavit created a genuine factual dispute about whether she had paid the taxes and penalties owed. The government responds that

Stein's conclusory affidavit was insufficient to rebut the presumption that its assessment was valid. The government also requests that we remand for the district court to revise its judgment to credit Stein for a $548 payment for tax year 1996. We affirm the entry of summary judgment regarding Stein's liability, but we vacate that part of the judgment computing the amount of the assessments and remand for the district court to recalculate the assessment against Stein for tax year 1996.

We review *de novo* a summary judgment and view the evidence in the light most favorable to the nonmovant. "If the party seeking summary judgment meets the initial burden of demonstrating the absence of a genuine issue of material fact, the burden then shifts to the nonmoving party to come forward with sufficient evidence to rebut this showing with affidavits or other relevant and admissible evidence." *Avirgan v. Hull*, 932 F.2d 1572, 1577 (11th Cir. 1991). When the evidence presented by the nonmoving party "is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986) (citations omitted).

The district court did not err by entering summary judgment in favor of the United States. The United States submitted copies of Stein's federal tax returns, transcripts of her accounts for tax years 1996 and 1999 through 2002, and an affidavit from Officer Michael Brewer of the Internal Revenue Service that established Stein had outstanding tax assessments. This evidence created a presumption that the assessments were proper and shifted the burden to Stein to

rebut the presumption with evidence that the assessments were erroneous. *See United States v. White*, 466 F.3d 1241, 1248-49 (11th Cir. 2006). Stein submitted an affidavit stating that she "retained an accounting firm to file . . . tax returns for [her]"; she "recalled" paying "the tax, including late penalties, for each unfiled tax return"; and she "no longer [had] . . . bank statements in her possession" and could not obtain statements from her bank to "prove [her] payments made to the IRS." But Stein's affidavit failed to create a genuine factual dispute about the validity of the assessments. Stein did not dispute that she owed interest accrued on her belated filings and payments for tax years 1999 through 2002. And Stein's general and self-serving assertions that she paid the taxes owed and related late penalties for tax years 1996 and 1999 through 2002 failed to rebut the presumption established by the assessments. *See Mays v. United States*, 763 F.2d 1295, 1297 (11th Cir. 1985) (a taxpayer's claim "must be substantiated by something other than . . . self-serving statements").

The United States requests that we remand for the district court to credit Stein for a tax payment. In its filings, the United States acknowledged that Stein had remitted $548 that applied to her assessment for tax year 1996. The district court failed to account for Stein's payment when computing her tax liabilities. We vacate that part of the judgment addressing the amount of Stein's assessments and remand for the district court to credit Stein's payment and to recalculate her assessment for tax year 1996.

We AFFIRM the entry of summary judgment regarding Stein's liability, but we VACATE that part

of the judgment computing the amount of the assessments and REMAND for the district court to recalculate Stein's assessment for tax year 1996.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

CONCURRING OPINION

JORDAN, Circuit Judge, joined by WILLIAM PRYOR, Circuit Judge, concurring:

We are bound by our decision in *Mays v. United States*, 763 F.2d 1295, 1297 (11th Cir. 1985), a summary judgment case holding that self-serving statements in a taxpayer's affidavit, without more, are insufficient to genuinely dispute the presumption that the government's tax assessment is correct. I therefore reluctantly agree that we must affirm the district court's grant of summary judgment.

I write separately, however, because the cases upon which *Mays* relies arise in the post-trial context, where the standard of review is much more deferential than at the summary judgment stage. The principle articulated in *Mays* has no place in a summary judgment posture. And I believe that the single precedent supporting *Mays*' analytical leap, *Heyman v. United States*, 497 F.2d 121 (5th Cir. 1974), was itself wrongly decided.

I

In support of the proposition that uncorroborated, self-serving testimony by a taxpayer cannot create an issue of fact to defeat summary judgment, *Mays* cites two non-summary judgment cases. Neither one justifies the ruling in *Mays*.

The government in *Griffin v. United States*, 588 F.2d 521 (5th Cir. 1979), sought to set aside a jury verdict finding a taxpayer liable for less than the amount claimed by the government on the basis that the taxpayer had "introduced no evidence other than

his own uncorroborated testimony supporting an estimate of tax liability lower than the government's, thus failing in his burden of rebutting the government's estimate of liability." *Id.* at 523-24. The Fifth Circuit, in dicta, agreed with the general principle articulated by the government, but denied relief because other evidence introduced at trial had corroborated the taxpayer's testimony. *See id.* at 529-30.

Similarly, in *Gibson v. United States*, 360 F.2d 457 (5th Cir. 1966), a taxpayer appealed unfavorable factual findings made by the district court at his bench trial, arguing primarily that the court erred by disregarding the tax liability calculations in his "excise tax journal" and the testimony he had offered in support. *Id.* at 458-60. The Fifth Circuit held that the district court's findings were not clearly erroneous and explained that the taxpayer's self-serving statements did "not compel a contrary result." *Id.* at 461-62.

These two cases do not support *Mays*' holding. At summary judgment the moving party has an affirmative obligation to establish the absence of a genuine issue of material fact and to show that it is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56. A single material fact genuinely in dispute makes it the proper province of the jury, and not the court, to decide the outcome. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) ("[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.").

Gibson involved a bench trial, and in that context we do not disturb a district court's factual findings unless the appellant accomplishes the herculean task of demonstrating that "the record lacks substantial

evidence to support [them]," such "that our review of the entire evidence leaves us with the definite and firm conviction that a mistake has been committed." *Ocmulgee Fields, Inc. v. C.I.R.*, 613 F.3d 1360, 1364 (11th Cir. 2010). And reversing a jury verdict for insufficient evidence, as the government attempted to do in *Griffin*, occurs only when "the facts and inferences point overwhelmingly in favor of the moving party, such that reasonable people could not arrive at a contrary verdict"—the polar opposite of the standard that applies at summary judgment. *See Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1275 (11th Cir. 2002).

Likewise, none of the binding cases cited by *Griffin* and *Gibson* arose in a summary judgment posture. *See Carson v. United States*, 560 F.2d 693, 695 (5th Cir. 1977) (reviewing factual findings by district court following bench trial); *Pinder v. United States*, 330 F.2d 119, 121 (5th Cir. 1964) (reviewing jury verdict); *C.I.R. v. Smith*, 285 F.2d 91, 93 (5th Cir. 1960) (reviewing tax court's factual findings following bench trial); *Carter v. C.I.R.*, 257 F.2d 595, 596, 599 (5th Cir. 1958) (same); *Anderson v. C.I.R.*, 250 F.2d 242, 246-47 (5th Cir. 1957) (same); *Kite v. C.I.R.*, 217 F.2d 585, 588 (5th Cir. 1955) (same); *Archer v. C.I.R.*, 227 F.2d 270, 272 (5th Cir. 1955) (same); *Boyett v. C. I. R.*, 204 F.2d 205, 208 (5th Cir. 1953) (same); *Carmack v. C.I.R.*, 183 F.2d 1, 2 (5th Cir. 1950) (same). *See also Quock Ting v. United States*, 140 U.S. 417, 422 (1891) (reviewing factual findings by district court). In short, these cases, with their more deferential standards of review, do not provide the proper framework at summary judgment.

II

Heyman, a non-summary judgment case, is the only other precedent besides *Mays* that supports entering summary judgment over a taxpayer's unsubstantiated, self-serving testimony. The taxpayers in *Heyman* paid wagering excise taxes and sued for a refund. *See* 497 F.2d at 122. In response, the government counterclaimed for the unpaid portion of the assessment against each taxpayer. *See id.* At trial, one taxpayer claimed that the government overtaxed him because it misunderstood the amount of wagers that he had actually placed, and offered uncorroborated testimony contradicting the government's assessment. *See id.* at 122-23. The district court directed a verdict in favor of the government despite this testimony, and the taxpayer appealed. *See id.* at 122. The Fifth Circuit affirmed the directed verdict, holding that the taxpayer's uncorroborated testimony was insufficient to meet his burden of showing that the government's assessment was incorrect. *See id.* at 122-23.

The standard for a directed verdict under Federal Rule of Civil Procedure 50(a)—now referred to as a judgment as a matter of law—mirrors the standard for summary judgment. *See Liberty Lobby, Inc.*, 477 U.S. at 250 ("[T]he trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict."). *Heyman* supports the outcome in *Mays* because, though at a different stage in litigation, *Heyman* effectively held that "reasonable minds could [not] differ" as to whether uncorroborated, self-serving statements could overcome the presumption of correctness due to the government's assessment. *Id.* at 250-51.

But *Heyman*, a case which cited no authority whatsoever for its ruling, was wrongly decided. As explained above, none of the cases cited by *Mays*, nor any of those cases' antecedents, hold that self-serving statements made by a taxpayer with personal knowledge cannot create a jury question as to the correctness of the government's assessment. All they say is that a reasonable factfinder—be it the jury, the district court, or the tax court—may properly disregard uncorroborated, self-serving statements as suspect. This is a far cry from the conclusion in *Heyman* that no reasonable factfinder could decide differently.

III

Mays should be overruled. Though the evidentiary weight of self-serving testimony may warrant discounting by the factfinder at trial, that logic has no place at summary judgment, where "the judge's function is not . . . to weigh the evidence." *Id.* at 249. And it makes no difference that this is a tax case. As the Sixth Circuit previously noted, albeit in an unpublished decision, there is no authority for the proposition that the ordinary summary judgment standard does not apply to tax cases. *See Lewis v. United States*, 336 F. App'x 535, 538 (6th Cir. 2009).

More problematically, *Mays* controverts Rule 56. Rule 56(a) authorizes summary judgment only when "there is no genuine dispute as to any material fact" and Rule 56(c), in turn, allows a nonmoving party to genuinely dispute a material fact through an affidavit. That affidavit must be "made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c).

Nothing in the Federal Rules of Civil Procedure prohibits a Rule 56 affidavit from being self-serving. Indeed, as the Seventh Circuit wisely observed, "most affidavits submitted [in response to summary judgment] are self-serving." *Payne v. Pauley*, 337 F.3d 767, 772 (7th Cir. 2003). Yet it is not the self-serving nature of the affidavits that often renders them ineffective against summary judgment, but some other deficiency under Rule 56(c). *See id.*

By requiring that taxpayers corroborate otherwise admissible affidavits to dispute a material fact, such as the tax liability owed or, as here, payments made, *Mays* imposes an additional burden on nonmoving parties that Rule 56(c), by its own terms, does not. This is precisely the sort of court-imposed, heightened standard the Supreme Court has admonished as an improper amendment of the Federal Rules of Civil Procedure. *See Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168-69 (1993) (reversing the Fifth Circuit for imposing a "heightened pleading standard" for municipal liability cases not found in Federal Rules of Civil Procedure 8 and 9). *See also Adinolfe v. United Techs. Corp.*, 768 F.3d 1161, 1168-69 (11th Cir. 2014).

IV

Mays was wrongly decided, as it constituted an unwarranted and unsupported deviation from Rule 56. We should convene en banc and overrule *Mays*.

ORDER OF THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA (FEBRUARY 26, 2016)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,

Plaintiff,

v.

ESTELLE STEIN,

Defendants.

Case No.15-cv-20884-UU

Before: Ursula UNGARO,
United States District Judge.

THIS CAUSE is before the Court upon United States' Motion for Summary Judgment. D.E. 31.

THE COURT has reviewed the Motion, the pertinent portions of the record and is otherwise fully advised of the premises.

Background

On March 4, 2015, Plaintiff, the United States of America ("United States"), filed this action against Defendant, Estelle Stein ("Stein"), pursuant to 26 U.S.C. § 7402, for unpaid tax liabilities resulting from

the years 1996 and 1999 through 2001. D.E. 1. In its Complaint, the United States alleges that Stein and her now-deceased husband filed joint federal returns, but they did not pay the income tax that was reported on those tax returns, plus the accrued interest and appropriate penalties. *Id.* ¶ 5. In this action, the United States seeks a judgment against Stein in the amount of $230,310.53, with any interest accrued thereafter in accordance with 26 U.S.C. §§ 6621 and 6622. D.E. 31.

On December 24, 2015, the United States moved for summary judgment on the grounds that the transcripts of Stein's account establish the Internal Revenue Service ("IRS") made timely assessments of income tax, penalties, and interest against Stein in accordance with the income that she reported on her filed tax returns for 1996, 1999, 2000, 2001, and 2002. D.E. 31. The United States argues that Stein has offered no income, expense, or payment records to support her claim that the assessments are invalid, and therefore, her affidavit is insufficient to rebut the presumption of correctness that is afforded to such assessments. *Id.*

In responding to the United States' Motion for Summary Judgment, Stein failed to comply properly with Local Rule 56.1(a) for the Southern District of Florida. Rule 56.1 requires that "[s]tatements of material facts submitted in opposition to a motion for summary judgment shall correspond with the order and with the paragraph numbering scheme used by the movant, but need not repeat that test of the movant's paragraphs." In addition, "[a]ll material facts set forth in the movant's statement filed and supported as required above will be deemed admitted unless controverted by the opposing party's statement, provided that the Court finds that the movant's statement

is supported by evidence in the record." Local Rule 56.1(b). Despite Stein's blatant deficiencies in failing to properly respond to the United States' Motion for Summary Judgment, the Court still considered Stein's pleadings to assess whether there is a disputed issue of material fact. The relevant undisputed facts are recited below.

Stein filed her tax returns on behalf of herself and her deceased husband for the tax year 1996 on November 15, 2004. (Aff. Brewer ¶ 4, Ex. 1; D.E. 31, Ex. B); (Aff. Stein ¶ 8). Stein filed her joint tax return for the tax year 1999 on February 11, 2005. (Aff. Brewer ¶ 4, Ex. 1; D.E. 31, Ex. C); (Aff. Stein ¶ 10). Stein filed her joint tax return for the tax year 2000 on January 11, 2005. (Aff. Brewer ¶ 4, Ex. 1; D.E. 31, Ex. D); (Aff. Stein ¶ 11). Stein filed her joint tax return for the tax year 2001 on March 10, 2005. (Aff. Brewer ¶ 4, Ex. 1; D.E. 31, Ex. E); (Aff. Stein ¶ 12). Stein filed her joint tax return for the tax year 2002 on March 10, 2005. (Aff. Brewer ¶ 4, Ex. 1; D.E. 31, Ex. F); (Aff. Stein ¶ 13).

The IRS maintains a database to record assessments and payments of specific tax liabilities owed by taxpayers. (Aff. Brewer ¶ 4). This information can be obtained from a transcript of an account that is retrieved from an IRS computer. *Id.* The IRS made the following assessments with respect to Stein's joint income tax liabilities for 1996 and 1999 through 2002:

Tax Year	Assessment Date	Assessed Tax	Assessed Penalty	Assessed Interest
1996	3/28/05	$ 548.00	* $123.30 #$137.00	$ 486.72
1999	4/11/05	$33,612.00	*$7,562.70 #$8,403.00	$ 14,153.01
2000	3/07/05	$ 4,127.00	* $928.57 #$949.21	$ 1,178.46
2001	5/30/05	$15,998.00	*$3,599.55 #$3,309.62 ^$181.46	$ 3,340.67
2002	5/16/05	$52,342.00	*$11,776.95 #$6,804.46	$ 6,600.43

* is used to indicate a late-filing penalty, # is to indicate a failure to pay a penalty, and ^ is for an estimated tax penalty.

(Aff. Brewer ¶ 6, Ex. 1). In total, the IRS is seeking an outstanding balance of the federal income tax, penalty and interest currently owed by Stein and her husband for tax years 1996 and 1999 through 2002 to be $230, 130.53 as of November 30, 2015. (Aff. Brewer ¶ 12).

Legal Standard

Summary judgment is authorized only when the moving party meets its burden of demonstrating that "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to

judgment as a matter of law." Fed. R. Civ. P. 56. When determining whether the moving party has met this burden, the Court must view the evidence and all factual inferences in the light most favorable to the non-moving party." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Rojas v. Florida*, 285 F.3d 1339, 1341-42 (11th Cir. 2002).

The party opposing the motion may not simply rest upon mere allegations or denials of the pleadings; after the moving party has met its burden of proving that no genuine issue of material fact exists, the non-moving party must make a showing sufficient to establish the existence of an essential element of that party's case and on which that party will bear the burden of proof at trial." *See Celotex Corp. v. Catrell*, 477 U.S. 317 (1986); *Poole v. Country Club of Columbus, Inc.*, 129 F.3d 551, 553 (11th Cir. 1997); *Barfield v. Brierton*, 883 F.2d 923, 933 (11th Cir. 1989).

If the record presents factual issues, the Court must not decide them; it must deny the motion and proceed to trial. *Envntl. Def. Fund v. Marsh*, 651 F.2d 983, 991 (5th Cir. 1981). Summary judgment may be inappropriate even where the parties agree on the basic facts, but disagree about the inferences that should be drawn from these facts. *Lighting Fixture & Elec. Supply Co. v. Cont'l Ins. Co.*, 420 F.2d 1211, 1213 (5th Cir. 1969). If reasonable minds might differ on the inferences arising from undisputed facts, then the Court should deny summary judgment. *Impossible Elec. Techs., Inc. v. Wackenhut Protective Sys., Inc.*, 669 F.2d 1026, 1031 (5th Cir. 1982); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("[T]he

dispute about a material fact is 'genuine' . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.")

Moreover, the party opposing a motion for summary judgment need not respond to it with evidence unless and until the movant has properly supported the motion with sufficient evidence. *Adickes*, 398 U.S. at 160. The moving party must demonstrate that the facts underlying the relevant legal questions raised by the pleadings or are not otherwise in dispute, or else summary judgment will be denied notwithstanding that the non-moving party has introduced no evidence whatsoever. *Brunswick Corp. v. Vineberg*, 370 F.2d 605, 611-12 (5th Cir. 1967). The Court must resolve all ambiguities and draw all justifiable inferences in favor of the nonmoving party. *Liberty Lobby, Inc.*, 477 U.S. at 255.

Analysis

In its Motion for Summary Judgment, the United States argues that the IRS's records documenting the income tax, penalty, and interest against Stein are presumed to be correct, and Stein's affidavit is insufficient to rebut the presumption of correctness afforded to these documents. D.E. 31. In response, Plaintiff argues that Defendant paid all taxes due and owed, including late penalties, for tax years 1996, 1999, 2000, 2001, and 2002. D.E. 32.

The Eleventh Circuit Court of Appeals has acknowledged that "[a] tax assessment made by the IRS constitutes a 'determination that a taxpayer owes the Federal Government a certain amount of unpaid taxes,' and such determination 'is entitled to a legal presumption of correctness.'" *United States v. Morgan*,

419 Fed. Appx. 958, 959 (11th Cir. 2011) (citing *United States v. Fior D'Italia, Inc.*, 536 U.S. 238, 242, 122 S. Ct. 2117, 2122, 153 L.Ed.2d 280 (2000)). "In reducing a tax assessment to judgment, the Government must first prove that the assessment was properly made." *United States v. Korman*, 388 Fed. Appx. 914, 915 (11th Cir. 2010) (citing *United States v. White*, 466 F.3d 1241, 1248 (11th Cir. 2006)). A taxpayer carries "the burden of proving that the IRS's computations in this regard were erroneous." *Morgan*, 419 Fed. Appx. at 958 (citing *Pollard v. Comm'r, IRS*, 786 F.2d 1063, 1066 (11th Cir. 1986)).

In this case, the United States supported its summary judgment motion with (1) a declaration of Michael Brewer, an Internal Revenue Service Officer, stating that Stein filed federal income tax returns for 1996 and 1999 through 2002 with a tax liability of $230,130.53, and that Stein has not paid the assessment despite notice and demand for payment, (2) transcripts of account concerning Stein's unpaid federal income tax liabilities for years 1996 and 1999 through 2002, and (3) Stein's Form 1040 for the years 1996, 1999, 2000, 2001, and 2002. D.E. 31. Considered together, the submission of these documents creates a presumption that the IRS's assessment was proper. *See United States v. Lena*, 370 Fed. Appx. 65 (11th Cir. 2010) ("A tax assessment made by the IRS constitutes a 'determination that a taxpayer owes the Federal Government a certain amount of unpaid taxes,' and such a determination 'is entitled to a legal presumption of correctness.'"); *see also United States v. Chila*, 871 F.2d 1015, 1017-18 (11th Cir. 1989) (noting that Certificates of Assessments and Payments amount to presumptive proof of a valid assessment). In responding, Stein filed

her own affidavit. D.E. 32-1. Aside from her affidavit, Stein did not cite to any record evidence and did not file additional documentation.

A number of the facts contained within Stein's affidavit are not relevant facts for the Court's consideration. While Stein contends that payments were made, and that the IRS allegedly has a record of Stein having made the required payments for the years 1999, 2001, and 2002, she did not produce any evidence documenting said payments. D.E. 32-1 ¶¶ 10-13. Furthermore, Stein admits that she "no longer ha[s] bank statements in [her] possession" to prove the payments were made. *Id.* at ¶ 14. As the Supreme Court has stated, "Rule 56(e) . . . requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 2553 (1998). In a federal income tax liability case, it is Stein's burden to overcome the presumption of correctness that is attributed to the IRS's documentation. In considering the pleadings filed and the record evidence, the Court finds there is no genuine dispute as to any material fact, and the United States is entitled to judgment as a matter of law. Accordingly, it is hereby

ORDERED AND ADJUDGED that United States' Motion for Summary Judgment is GRANTED.

ORDERED AND ADJUDGED that this case is CLOSED for administrative purposes.

DONE AND ORDERED in Chambers at Miami, Florida, this 22nd day of February, 2016.

/s/ Ursula Ungaro
United States District Judge

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT GRANTING REHEARING EN BANC (MARCH 23, 2017)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ESTELLE STEIN,

Defendant-Appellant.

No. 16-10914-BB

Appeal from the United States District Court
for the Southern District of Florida

Before: ED CARNES, Chief Judge, TJOFLAT, HULL, MARCUS, WILSON, William PRYOR, MARTIN, JORDAN, ROSENBAUM, and Julie CARNES, Circuit Judges.[1]

BY THE COURT:

A petition for rehearing *en banc* having been filed, a member of this Court in active service having requested a poll on whether this case should be reheard *en banc*,

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[1] Judge Jill Pryor is recused from this case

and a majority of the judges of this Court in active service having voted in favor of granting rehearing *en banc*, it is ORDERED that this case will be reheard *en banc*. The panel's opinion is VACATED.