FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INTERIOR GLASS SYSTEMS, INC., *Plaintiff-Appellant*, v. UNITED STATES OF AMERICA, *Defendant-Appellee*.	No. 17-15713 D.C. No. 5:13-cv-05563-EJD OPINION

Appeal from the United States District Court
for the Northern District of California
Edward J. Davila, District Judge, Presiding

Argued and Submitted September 13, 2018
San Francisco, California

Filed June 26, 2019

Before: A. Wallace Tashima, Johnnie B. Rawlinson, and Paul J. Watford, Circuit Judges.

Opinion by Judge Watford

COUNSEL

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OPINION

WATFORD, Circuit Judge:

The Internal Revenue Service (IRS) requires taxpayers to disclose their participation in certain transactions, known as "listed transactions," that the agency has designated for close scrutiny. 26 C.F.R. § 1.6011-4(a), (b)(2); *see* 26 U.S.C. § 6011(a). To compel compliance with this obligation, Congress has authorized the IRS to impose monetary penalties on those who fail to file the required disclosure statement. 26 U.S.C. § 6707A(a). The IRS determined that the taxpayer in this case, Interior Glass Systems, Inc., failed to disclose its participation in a listed transaction in three different tax years and imposed a penalty of $ 10,000 per year. Interior Glass paid the penalties and then challenged their imposition by seeking an administrative refund. When that challenge failed, the company filed this action in the district court to recover the money it had been forced to pay. *See* 28 U.S.C. § 1346(a)(1); 26 U.S.C. § 7422(a). The district court granted the government's motion for summary judgment, concluding that the penalties were properly imposed.

On appeal, Interior Glass raises two principal arguments. First, it contends that the penalties were wrongly imposed because it did not actually participate in a listed transaction and thus had nothing to disclose. Second, Interior Glass contends that its due

process rights were violated because it was not afforded an opportunity for pre-collection judicial review. We find neither contention meritorious and accordingly affirm.

I

Treasury Regulation § 1.6011-4, which imposes the disclosure obligation, defines the term "listed transaction" as follows: "A listed transaction is a transaction that is the same as or substantially similar to one of the types of transactions that the Internal Revenue Service (IRS) has determined to be a tax avoidance transaction and identified by notice, regulation, or other form of published guidance as a listed transaction." 26 C.F.R. § 1.6011-4(b)(2); *see also* 26 U.S.C. § 6707A(c)(2) (providing similar definition of the term). As the regulation states, one of the ways the IRS identifies listed transactions is by issuing published notices.

In 2007, the IRS issued Notice 2007-83, titled "Abusive Trust Arrangements Utilizing Cash Value Life Insurance Policies Purportedly to Provide Welfare Benefits." 2007-2 C.B. 960, 960. The Notice designates certain transactions involving cash-value life insurance policies as listed transactions because, in the agency's view, they improperly allow small business owners to receive cash and other property from the business "on a tax-favored basis." *Id.* The transaction takes place in two steps: A small or closely held business transfers funds to a trust; that trust then pays the

premium on the business owner's cash-value life insurance policy. Cash-value policies function differently from "term" life insurance, which guarantees coverage for a specified period of time. Under a term policy, the insurer pays out the so-called death benefit only if the policyholder dies during the coverage period. In contrast, with a cash-value policy, a portion of the premium goes into an investment account. The policyholder controls how the funds are invested, and when the plan terminates, the policyholder can withdraw the cash value that has accumulated within the policy, called the surrender value. *Id.*

The IRS required disclosure of these transactions given their potential for use in tax-avoidance schemes. In the typical arrangement, the business deducts its contributions to the trust, thereby reducing its taxable income. But the business owner does not include the payments as part of his own taxable income; at most, he reports "significantly less than the premiums paid on the cash value life insurance policies." *Id.* In effect, the business owner shifts the pre-tax earnings of the business into his own personal investment vehicle. Even when a death benefit is provided—such that there is a component of term life insurance grafted onto the transaction—"the arrangements often require large employer contributions relative to the actual cost of the benefits currently provided under the plan." *Id.* Thus, the IRS explained, the transfers to the trust could be, in substance, distributions of dividend income or deferrals of compensation. *Id.* at 960–61. Upon disclosure of the transaction, the IRS could challenge the

deductions by the business and seek to include the payments made to the trust in the business owner's gross income.

Notice 2007-83 states that the listed transaction described above consists of four elements. Simplified somewhat, and as relevant for our purposes, the four elements are:

- the transaction involved "a trust or other fund described in [26 U.S.C.] § 419(e)(3) that is purportedly a welfare benefit fund";
- contributions to the trust or other fund were not governed by the terms of a collective bargaining agreement;
- the trust or other fund paid premiums on one or more cash-value life insurance policies that accumulated value; and
- the employer took a deduction that exceeded the sum of certain amounts.

Id. at 961–62.

The Notice also identifies as a listed transaction "any transaction that is substantially similar" to a transaction with the four specified elements. *Id.* at 961. Although the term "substantially similar" appears in the penalty-imposing statute, 26 U.S.C. § 6707A, the statute does not define the term. The IRS has defined it in Treasury Regulation § 1.6011-4. (Interior Glass does not challenge the validity of the regulation here.) That definition states in relevant part:

> The term substantially similar includes any transaction that is expected to obtain the same or similar types of tax consequences and that is either factually similar or based on the same or similar tax strategy. . . . [T]he term substantially similar must be broadly construed in favor of disclosure. For example, a transaction may be substantially similar to a listed transaction even though it involves different entities or uses different Internal Revenue Code provisions.

26 C.F.R. § 1.6011-4(c)(4). The regulation includes two examples by way of illustration. In the first, the taxpayer inflates the basis in a partnership interest in a different manner from the listed transaction; in the second, the taxpayer employs an intermediary of a different type from that used in the listed transaction to prevent recognition of a gain. § 1.6011-4(c)(4), Examples 1 & 2. Both transactions remain substantially similar despite the change in form. As is often the case elsewhere in tax law, the disclosure obligation does not "exalt artifice above reality," which would "deprive the statutory provision in question of all serious purpose." *Gregory v. Helvering*, 293 U.S. 465, 470 (1935).

The IRS concluded that Interior Glass participated in a transaction substantially similar to the listed transaction identified in Notice 2007-83 during the 2009, 2010, and 2011 tax years. Specifically, Interior Glass joined the Group Term Life Insurance Plan (GTLP) to fund a cash-value life insurance policy owned by its sole shareholder and only employee, Michael Yates. All agree that this transaction satisfies

three of the Notice's four elements. The GTLP transaction lacks the first element because its intermediary was a tax-exempt business league, rather than a trust or § 419(e)(3) welfare benefit fund. The business league, however, performed the same functions as the trust or welfare benefit fund described in the Notice.

We agree with the district court that Interior Glass was required to disclose its participation in the GTLP transaction. Under the definition contained in the applicable Treasury Regulation, the GTLP transaction is substantially similar to the listed transaction identified in Notice 2007-83.

First, the GTLP transaction was "expected to obtain the same or similar types of tax consequences." 26 C.F.R. § 1.6011-4(c)(4). The transaction identified in the Notice seeks to "provide cash and other property to the owners of the business on a tax-favored basis." 2007-2 C.B. at 960. Those favorable tax consequences are achieved through (1) a deduction of the contributions by the business and (2) a failure by the business owner to declare the payments as income. The GTLP transaction promised similar tax benefits. On that score, the plan documents represented that "[c]ontributions [were] currently deductible" by Interior Glass and that only the cost of group-term life insurance (in contrast to the premium on the cash-value policy) may have been includible in Yates' income.

Second, the GTLP transaction is both "factually similar" to the listed transaction described in the Notice and "based on the same or similar tax strategy." 26

C.F.R. § 1.6011-4(c)(4). As to factual similarity, the GTLP transaction involved a small business, a cash-value life insurance policy that benefits the business owner, and payment of the premiums on the policy through an intermediary. The GTLP combined those three aspects in pursuit of the same tax strategy discussed in the Notice. By using the intermediary, the business and its owner attempted to do what they could not do outright: deduct payments made to the owner's investment vehicle without declaring the benefits as income.

Interior Glass identifies two differences between the GTLP transaction and the listed transaction in Notice 2007-83, but neither difference is material. First, as noted above, the GTLP transaction was filtered through a tax-exempt business league instead of a trust or welfare benefit fund. Second, rather than invoking 26 U.S.C. § 419's rules for welfare benefits, the GTLP transaction purported to provide § 79 group-term life insurance benefits, even though it also involved a cash-value life insurance policy. But the IRS's definition of "substantially similar" explicitly states that neither of these differences is sufficient to prevent a transaction from qualifying as a listed transaction: "[A] transaction may be substantially similar to a listed transaction even though it involves different entities or uses different Internal Revenue Code provisions." 26 C.F.R. § 1.6011-4(c)(4). Just as in the examples accompanying the regulation, Interior Glass cannot evade a finding of substantial similarity solely

by claiming a deduction on a different basis or by using a different intermediary to complete the transaction.

Interior Glass contends that, if read to encompass the GTLP transaction, the definition of "substantially similar" is unconstitutionally vague. That contention is without merit. For a civil penalty like 26 U.S.C. § 6707A, the definition is constitutionally valid so long as "a person of ordinary intelligence" could determine which transactions are substantially similar to the listed transaction identified in Notice 2007-83. *Fang Lin Ai v. United States*, 809 F.3d 503, 514 (9th Cir. 2015). As explained above, the regulation's definition of "substantially similar" is detailed enough to make that determination an easy one in this case. The only differences between the GTLP transaction and the listed transaction are expressly addressed—and expressly rejected as immaterial—in the definition itself.

II

We also find no merit in Interior Glass' contention that its procedural due process rights were violated.

To obtain judicial review of the penalties imposed by the IRS, Interior Glass first had to pay the penalties in full. *See* 28 U.S.C. § 1346(a)(1); *Flora v. United States*, 362 U.S. 145, 177 (1960). Interior Glass argues that, under the Due Process Clause of the Fifth Amendment, it should have been afforded an opportunity to obtain judicial review before having to part with its money. Neither the Supreme Court's nor our court's precedent supports that proposition.

As a general rule, the government may require a taxpayer who disputes his tax liability to pay upfront before seeking judicial review. Being compelled to part with one's money constitutes a deprivation of property, but the government's vital interest in securing tax revenues justifies a pay-first, litigate-later scheme of judicial review. *Phillips v. Commissioner*, 283 U.S. 589, 595, 597–98 (1931); *Franceschi v. Yee*, 887 F.3d 927, 936 (9th Cir. 2018). Under that rule, Interior Glass' ability to obtain post-collection judicial review would suffice, without more, to satisfy due process.

In *Jolly v. United States*, 764 F.2d 642 (9th Cir. 1985), however, we applied the three-factor framework from *Mathews v. Eldridge*, 424 U.S. 319 (1976), when deciding whether a taxpayer was entitled to pre-collection judicial review of a tax penalty. Applying that framework here, we conclude that Interior Glass was not entitled to pre-collection judicial review. *See Larson v. United States*, 888 F.3d 578, 585–87 (2d Cir. 2018) (upholding full-payment rule for related tax penalty).

The first factor is "the private interest that will be affected by the official action." *Mathews*, 424 U.S. at 335. Interior Glass' interest in the lost use of its property for the pendency of the refund action is "noteworthy, but not that substantial." *Jolly*, 764 F.2d at 645. After all, post-deprivation proceedings will provide "full retroactive relief" if the taxpayer prevails on its refund suit. *Mathews*, 424 U.S. at 340. Interior Glass would no doubt prefer to retain its money while litigating the validity of the penalties, but this is not a case

in which an individual faces abject poverty in the interim. *See Goldberg v. Kelly*, 397 U.S. 254, 264 (1970).

The second factor is "the risk of an erroneous deprivation" of the private interest. *Mathews*, 424 U.S. at 335. The IRS's listed-transaction determination turns on a side-by-side comparison of the listed transaction identified in an IRS notice or regulation and the transaction at issue. The decision to impose a penalty under 26 U.S.C. § 6707A "does not require any determinations of credibility of witnesses or claims, and would not be aided in most cases by a face-to-face meeting with the taxpayer before a penalty is assessed." *Jolly*, 764 F.2d at 646. The IRS is therefore unlikely to err in "the generality of cases," which is the proper focus for our analysis. *Mathews*, 424 U.S. at 344.

The risk of an erroneous deprivation is further mitigated by the availability of pre-collection review of the taxpayer's liability in an administrative forum. *See Larson*, 888 F.3d at 586. Taxpayers have two (likely mutually exclusive) routes to obtain review in the IRS Office of Appeals: an appeals conference or a collection-due-process hearing. 26 U.S.C. § 6330(c)(2)(B); 26 C.F.R. § 601.103(c)(1); *see Lewis v. Commissioner*, 128 T.C. 48, 59–60 (2007). If the taxpayer files a timely protest, an appeals officer will review the taxpayer's arguments and determine whether the taxpayer engaged in a listed transaction. *See*, *e.g.*, *Our Country Home Enterprises, Inc. v. Commissioner*, 855 F.3d 773, 781 (7th Cir. 2017). Although the IRS Office of Appeals may not rescind a listed-transaction penalty, *see* 26 U.S.C. § 6707A(d)(1)(A), that simply precludes the

Office from exercising prosecutorial discretion in deciding whether the penalty should stand. *See* 26 C.F.R. § 301.6707A-1(d)(3)–(5). The Office can still determine whether the penalty was erroneously imposed in the first place and, if so, revoke the penalty altogether. *See* § 601.106(f)(1).

Finally, the third factor, which measures the government's interest in retaining the full-payment prerequisite to this refund action, also weighs in the IRS's favor. *See Mathews*, 424 U.S. at 335. Even with the disclosure obligation on the books, "the IRS often did not learn of the existence of tax shelters until after it conducted audits." *Smith v. Commissioner*, 133 T.C. 424, 427 (2009). Congress added the § 6707A penalty provision in 2004 to encourage voluntary disclosure of listed transactions. This important objective "could be jeopardized if full-scale pre-deprivation hearings and court cases are required whenever the government attempts to collect" the authorized penalties. *Jolly*, 764 F.2d at 646; *see Larson*, 888 F.3d at 586–87.

In sum, the combination of pre-collection administrative review plus post-collection judicial review satisfies the requirements of the Due Process Clause. Interior Glass received all the process it was due in this context.

AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

INTERIOR GLASS SYSTEMS, INC., Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	Case No. 5:13-cv-05563-EJD **ORDER:** **GRANTING DEFENDANT'S FIRST MOTION FOR PARTIAL SUMMARY JUDGMENT;** **GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT; AND** **GRANTING IN PART AND DENYING IN PART DEFENDANT'S SECOND MOTION FOR SUMMARY JUDGMENT** Re: Dkt. Nos. 30, 31, 36 (Filed Aug. 12, 2016)

Plaintiff Interior Glass Systems, Inc. ("Interior Glass") filed the instant action against the United States of America (the "Government") seeking the recovery of federal income tax penalties assessed and collected under 26 U.S.C. § 6707A. Presently before the court are three matters: two motions for partial

summary judgment filed by the Government, and one motion for summary judgment filed by Interior Glass. Dkt. Nos. 30, 31, 36.

Federal jurisdiction arises pursuant to 28 U.S.C. § 1346(a)(1). Having carefully considered the parties' pleadings, supplemental briefing, and the oral argument presented at the two hearings addressing these matters, the court grant [sic] the Government's first Motion for Partial for Summary Judgment, and will grant in part and deny in part the parties' other motions for the reasons explained below.

I. FACTUAL AND PROCEDURAL BACKGROUND

Interior Glass is a glass-installation company located in San Jose, California, and is owned by Mike Yates. In 2012, the Internal Revenue Service ("IRS") imposed a $40,000 penalty on Interior Glass for failing to disclose its participation in a "listed transaction" as described in IRS Notice 2007-83. The facts underlying the penalty are as follows:

In 2005, certain insurance brokers began to market a plan they claimed allowed an employer to claim deductions for life insurance premiums paid on behalf of an employee, while the employee would not have to report any compensation income for the premiums paid on his behalf. One such insurance broker was Lawrence Cronin, who marketed the plan as the Insured Security Program ("ISP"). In 2006, Interior

Glass learned of the ISP and began participating in the plan.

In October 2007, the IRS targeted programs similar to the ISP and identified them as "abusive trust arrangements." To regulate such arrangements, the IRS issued Notice 2007-83 providing that abusive trust arrangements are transactions identified as "listed transactions" under the Internal Revenue Code. Notice 2007-83 requires taxpayers participating in a "listed transaction" to disclose their participation in such transaction to the IRS. A failure to disclose subjects the taxpayer to federal income tax penalties under § 6707A.

In light of Notice 2007-83, Cronin recognized the ISP plan would be considered a "listed transaction" subject to the disclosure requirement of the Notice. Thus, in 2009, Cronin developed a program that he believed would not be subjected to the disclosure requirement. He founded a tax-exempt business league called the Association for Small, Closely-Held Business Enterprises ("ASBE"), which would offer a group term life insurance plan ("GTLP") to its member-companies/employers. The ASBE attracted 139 member-companies/employers, including Interior Glass, who joined the ASBE in August 2009 and adopted the GTLP. The participating companies were told the GTLP was not a "listed transaction," and as such, was not subject to Notice 2007-83. Consequently, Interior Glass did not disclose its participation in the GTLP for the 2009, 2010, and 2011 tax years.

In March 2011, the IRS interviewed Cronin about the GTLP, obtained documents about the GTLP, and obtained the names of the companies that had joined the ASBE and adopted the GTLP. Cronin explained to the IRS that the GTLP was a different program than the ISP, and was therefore not subject to Notice 2007-83. In October 2011, the IRS initiated an audit of Interior Glass.

In November 2012, the IRS sent Interior Glass a letter stating that it was imposing penalties under § 6707A because Interior Glass failed to disclose its participation in the GTLP, which it determined was a "listed transaction" subject to the disclosure requirement of Notice 2007-83. Along with the letter, the IRS sent "Form 886A – Explanation of Items" describing the basis for the penalties. The IRS imposed a $10,000 penalty for each tax year Interior Glass failed to disclose its participation in the GTLP, from 2009 to 2011. In addition, the IRS imposed a $10,000 penalty for Interior Glass' failure to disclose its participation in the ISP in 2008. The penalties amounted to $40,000. In May 2013, Interior Glass paid $40,430.12 in assessed penalties and interest.

In June 2013, Interior Glass filed a claim for refund with the IRS, which the IRS denied. Interior Glass then commenced the instant action in December 2013 seeking recovery of the $40,430.12 it paid in penalties and interest. These motions followed.[1]

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[1] After the motions were filed, the Government withdrew its opposition to Interior Glass' request for a refund of the $10,000 it

II. LEGAL STANDARD

A motion for summary judgment or partial summary judgment should be granted 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); Addisu v. Fred Meyer, Inc., 198 F.3d 1130, 1134 (9th Cir. 2000).

The moving party bears the initial burden of informing the court of the basis for the motion and identifying the portions of the pleadings, depositions, answers to interrogatories, admissions, or affidavits that demonstrate the absence of a triable issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the issue is one on which the nonmoving party must bear the burden of proof at trial, the moving party need only point out an absence of evidence supporting the claim; it does not need to disprove its opponent's claim. Id. at 325.

If the moving party meets the initial burden, the burden then shifts to the non-moving party to go beyond the pleadings and designate specific materials in the record to show that there is a genuinely disputed fact. Fed. R. Civ. P. 56(c); Celotex Corp., 477 U.S. at 324. A "genuine issue" for trial exists if the non-moving party presents evidence from which a reasonable jury,

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paid as a penalty for the 2008 tax year. Dkt. No. 63. Based on the concession, Interior Glass is entitled to a judgment in its favor for that amount, and only the penalties assessed for the 2009, 2010, and 2011 tax years remain in dispute for the purposes of this order.

viewing the evidence in the light most favorable to that party, could resolve the material issue in his or her favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986).

The court must draw all reasonable inferences in favor of the party against whom summary judgment is sought. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). However, the mere suggestion that facts are in controversy, as well as conclusory or speculative testimony in affidavits and moving papers, is not sufficient to defeat summary judgment. Id. ("When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts."); Thornhill Publ'g Co. v. GTE Corp., 594 F.2d 730, 738 (9th Cir. 1979). Instead, the non-moving party must come forward with admissible evidence to satisfy the burden. Fed. R. Civ. P. 56(c).

"If the nonmoving party fails to produce enough evidence to create a genuine issue of material fact, the moving party wins the motion for summary judgment." Nissan Fire & Marine Ins. Co. v. Fritz Cos., Inc., 210 F.3d 1099, 1103 (9th Cir. 2000). "But if the nonmoving party produces enough evidence to create a genuine issue of material fact, the nonmoving party defeats the motion." Id.

III. DISCUSSION

A. Overview of IRS Notice 2007-83

A brief overview of Notice 2007-83 is warranted as a precursor to an analysis of the parties' arguments. Notice 2007-83, entitled "Abusive Trust Arrangements Utilizing Cash Value Life Insurance Policies Purportedly to Provide Welfare Benefits," was released on October 17, 2007. The Notice states that the IRS and Treasury Department "are aware of certain trust arrangements claiming to be welfare benefit funds and involving cash value life insurance policies that are being promoted to and used by taxpayers to improperly claim federal income and employment tax benefits." The Notice then goes on to state in the background section:

> Trust arrangements utilizing cash value life insurance policies and purporting to provide welfare benefits to active employees are being promoted to small businesses and other closely held businesses as a way to provide cash and other property to the owners of the business on a tax-favored basis. The arrangements are sometimes referred to by persons advocating their use as "single employer plans" and sometimes as "419(e) plans." Those advocates claim that the employers' contributions to the trust are deductible under §§ 419 and 419A as qualified cost, but that there is not a corresponding inclusion in the owner's income.
>
> . . . .

Under these arrangements, the trustee uses the employer's contributions to the trust to purchase life insurance policies. The trustee typically purchases cash value life insurance policies on the lives of the employees who are owners of the business (and sometimes other key employees), while purchasing term life insurance policies on the lives of the other employees covered under the plan.

It is anticipated that after a number of years the plan will be terminated and the cash value life insurance policies, cash, or other property held by the trust will be distributed to the employees who are plan participants at the time of the termination. While a small amount may be distributed to employees who are not owners of the business, the timing of the plan termination and the methods used to allocate the remaining assets are structured so that the business owners and other key employees will receive, directly or indirectly, all or a substantial portion of the assets held by the trust.

Those advocating the use of these plans often claim that the employer is allowed a deduction under § 419 (c) (3) for its contributions when the trustee uses those contributions to pay premiums on the cash value life insurance policies, while at the same time claiming that nothing is includible in the owner's gross income as a result of the contributions (or, if amounts are includible, they are significantly less than the premiums paid on the cash value life insurance policies). They may also claim

> that nothing is includible in the income of the business owner or other key employee as a result of the transfer of a cash value life insurance policy from the trust to the employee, asserting that the employee has purchased the policy when, in fact, any amounts the owner or other key employee paid for the policy may be significantly less than the fair market value of the policy. Some of the plans are structured so that the owner or other key employee is the named owner of the life insurance policy from the plan's inception, with the employee assigning all or a portion of the death proceeds to the trust. Advocates of these arrangements may claim that no income inclusion is required because there is no transfer of the policy itself from the trust to the employees.

The Notice also "informs taxpayers and their representatives that the tax benefits claimed for these arrangements are not allowable for federal tax purposes," and "further alerts persons involved with these transactions of certain responsibilities that may arise from their involvement with these transactions."

Importantly, Notice 2007-83 applies to "listed transactions," which are defined as:

> Any transaction that has all of the following elements, and any transaction that is substantially similar to such a transaction, are identified as "listed transactions" for purposes of [26 C.F.R.] § 1.6011-4 (b)(2) and [26 U.S.C.] §§ 6111 and 6112, effective October 17, 2007, the date this notice is released to the public.

> (1) The transaction involves a trust or other fund described in § 419(e)(3) that is purportedly a welfare benefit fund.
>
> (2) For determining the portion of its contributions to the trust or other fund that are currently deductible the employer does not rely on the exception in § 419A(f)(5)(A) (regarding collectively bargained plans).
>
> (3) The trust or other fund pays premiums (or amounts that are purported to be premiums) on one or more life insurance policies and, with respect to at least one of the policies, value is accumulated:
>
> . . .
>
> (4) The employer has taken a deduction for any taxable year for its contributions to the fund with respect to benefits provided under the plan (other than post-retirement medical benefits, post-retirement life insurance benefits, and child care facilities) that is greater than the sum of the following amounts:

The Notice requires taxpayers to disclose their participation in a "listed transaction" to the IRS. Those who fail to do so may be subject to a penalty under § 6707A. The minimum penalty is $10,000.

B. The Constitutional and Related Arguments

The court now addresses the issues raised in the Government's first Motion for Partial Summary

Judgment, as well as related issues raised by Interior Glass in its Motion for Summary Judgment. Dkt. Nos. 30, 31.

In its motion, the Government moves for summary judgment on three of Interior Glass' legal arguments: (1) that penalties imposed under § 6707A violate a taxpayer's right to due process, and constitute an unconstitutional taking, (2) that § 6707A is unconstitutionally vague, and therefore void, and (3) that § 6707A penalties cannot be imposed if the taxpayer did not know he or she was participating in a reportable transaction, or relied on competent advice in failing to disclose the participation. Each of these topics is discussed below.

i. Whether a § 6707A Penalty Violates Due Process and Constitutes a Taking

The Government contends that a penalty imposed under § 6707A does not violate the due process clause of the Fifth Amendment because it is an assessable penalty that is payable upon notice and demand from the Secretary of the Treasury, collected in the same manner as taxes, and is not subject to deficiency procedures. Penalized taxpayers also have the right to judicial review, as evidenced by this lawsuit. Furthermore, the Government argues that a § 6707A penalty is not an unconstitutional taking because Congress has been designated the power to "lay and collect taxes." U.S. Const, art. I, § 8, cl. 1.

In response, Interior Glass argues that, while there are limited instances of the Government's "necessity" to collect taxes, there is no such necessity for the imposition of penalties. Specific to § 6707A, Interior Glass points out that the section provides the IRS with a "more convenient" method to collect the penalty "than the notice and hearing procedure in [26 U.S.C.] § 6212."

Generally, "[t]he base requirement of the Due Process Clause is that a person deprived of property be given an opportunity to be heard at a meaningful time and in a meaningful manner." Buckingham v. Sec'v of U.S. Dep't of Agr., 603 F.3d 1073, 1082 (9th Cir. 2010) (internal quotations omitted). However, it is not required "that the notice and opportunity to be heard occur before the deprivation," and "due process does not always require an adversarial hearing, a full evidentiary hearing, or a formal hearing." Id. (internal quotations and citations omitted).

In the context of tax assessments and penalties, "[t]he right of the United States to collect its internal revenue by summary administrative proceedings has long been settled." Phillips v. Comm'r, 283 U.S. 589, 595 (1931); Todd v. United States, 849 F.2d 365, 369 (9th Cir. 1988) ("Well-settled is the rule that the United States government's revenue requirements justify use of summary procedures in collection of taxes."). To that end, "the Supreme Court has consistently held that post-deprivation hearings satisfy the demands of due process, when revenue collection is at issue." Todd, 849 F.2d at 369; Oropallo v. United States, 994 F.2d 25, 31

(1st Cir. 1993) ("[I]t is well settled that post-collection judicial review accords a taxpayer all the process that is due under our tax laws."). "Accordingly, taxpayers do not have the right to a hearing prior to collection efforts by the IRS." Id.

Here, Interior Glass alleges the IRS notified it in November, 2012, that it would be assessed penalties under § 6707A. Interior Glass also alleges – and the Government does not dispute – that it paid the penalties and interest and filed a claim for refund on June 26, 2013. As the above authority demonstrates, the IRS was not required to provide Interior Glass with a pre-assessment hearing, and the simple fact this court is now reviewing the § 6707A penalty subject to Interior Glass' appellate rights forecloses any argument based on a deprivation of due process. See Oropallo, 994 F.2d at 31 ("Both this court and the district court have reviewed the IRS's denial of Oropallo's refund claim and have issued opinions explaining that his claim is barred because it was untimely. Thus, Oropallo has received the post-collection judicial review to which he was entitled.").

As such, the Government is entitled to summary judgment as a matter of law, and its motion will granted [sic] with respect to the argument that imposition of the § 6707A penalty violated Interior Glass' due process rights or amounted to an unconstitutional taking in violation of the Fifth Amendment.

ii. Whether § 6707A is Void for Vagueness

The parties dispute whether § 6707A is unconstitutionally vague. "The Fifth Amendment's Due Process Clause requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Dimaya v. Lynch, 803 F.3d 1110, 1112 (9th Cir. 2015) (internal quotations omitted). "Although most often invoked in the context of criminal statutes, the prohibition on vagueness also applies to civil statutes[.]" Id.; see Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497-99 (1982) (explaining that while the void for vagueness doctrine applies to civil statutes, the Supreme Court has "expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe").

In its motion and in opposition to the first motion filed by the Government, Interior Glass argues that § 6707A is void for vagueness because no reasonable person, including the IRS, could know what "substantially similar" means. It argues that the statute's vagueness allows the IRS to determine that different policy plans are "substantially similar," therefore facilitating the imposition of penalties. For its part, the Government argues that § 6707A is not unconstitutionally vague since Notice 2007-83 describes a "listed transaction" in detail, and explicitly provides for "substantially similar" transactions, thereby incorporating

the definition for that phrase found in 26 C.F.R. § 1.6011-4(c)(4).

As their arguments demonstrate, the parties' vagueness dispute is focused on the phrase "substantially similar," as incorporated into § 6707A, and whether such phrase is " 'so vague and indefinite as really to be no rule or standard at all,' or 'whether a person of ordinary intelligence could understand' " what types of arrangements are "substantially similar" to a "listed transaction." Ai v. United States, 809 F.3d 503, 514 (9th Cir. 2015) (quoting Boutilier v. INS, 387 U.S. 118, 123 (1967) and Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris, 729 F.3d 937, 946 (9th Cir. 2013)). In assessing § 6707A for vagueness, the court is mindful that so long as "substantially similar" is "set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest," that portion of § 6707A is not unconstitutionally vague. U.S. Civil Serv. Commn'n v. Nat'l Ass'n of Letter Carriers, AFL-CIO, 413 U.S. 548, 579 (1973).

Here, the phrase "substantially similar" appears in § 6707A(c)(2), which section defines a "listed transaction" as "a reportable transaction which is the same as, or substantially similar to, a transaction specifically identified by the Secretary as a tax avoidance transaction for purposes of section 6011." This portion of the statute must therefore be read in conjunction with Notice 2007-83, because it is there that the Secretary identified "certain trust arrangements claiming to be welfare benefit funds and involving cash value

life insurance policies" as "tax avoidance transactions" and "listed transactions for purposes of § 1.6011-4 (b)(2) . . . and §§ 6111 and 6112." As indicated above, Notice 2007-83 defines a "listed transaction" with four specific elements, and provides that "[a]ny transaction that has all of the [] elements, and any transaction that is substantially similar to such a transaction, are identified as 'listed transactions'. . . . "

In turn, § 1.6011-4(b)(2) defines a "listed transaction" as "a transaction that is the same as or substantially similar to one of the types of transactions that the [IRS] has determined to be a tax avoidance transaction and identified by notice, regulation, or other form of published guidance as a listed transaction." "Substantially similar" is subsequently defined in § 1.6011-4(c)(4) as "any transaction that is expected to obtain the same or similar types of tax consequences and that is either factually similar or based on the same or similar tax strategy," and is illustrated with examples.

Given this direction, the court cannot accept Interior Glass' contention that use of the phrase "substantially similar" in § 6707A is "so vague and indefinite" as to provide no standard at all, or that "a person of ordinary intelligence" could not understand if he or she participated in an arrangement "substantially similar" to a "listed transaction." See Ai, 809 F.3d at 514. As explained, Notice 2007-83 lists specific elements to which an arrangement can be compared to determine whether it is "substantially similar" to a "listed transaction." For that reason, and contrary to Interior Glass'

position, § 6707A does not "effectively require[] the taxpayer [to] guess what arguments (and what revised facts) the IRS might come up with in the future to allege that two different items are 'substantially similar.'"

Interior Glass seems to take issue with the lack of preciseness in the definition of "substantially similar" because, in its words, "any low-level IRS employee can decide items are 'substantially similar' and impose the penalties." Interior Glass also speculates the IRS itself could not determine whether the GTLP was subject to penalty given the delay between its receipt of information and the issuance of a penalty notice. The court observes, however, that whether a statute is void for vagueness does not turn on whether the IRS applies or interprets § 6707A consistently, or how long it takes an agency to render a penalty decision. See id. ("[T]he question is not whether the government applied or interpreted FICA consistently."). Moreover, a statute need not define every factual scenario that falls within its purview in order to withstand a vagueness challenge. See Boyce Motor Lines v. United States, 342 U.S. 337, 340 (1952). Indeed, there are good reasons for such specificity to be absent here, given the creativity a taxpayer may employ in an effort to circumvent the statute.

In sum, Interior Glass' arguments are misplaced because the language of § 6707A is sufficiently [sic] to satisfy the more tolerant standard applied to statutes providing only for civil penalties. Vill. of Hoffman Estates, 455 U.S. at 498-99. The Government's motion as

to this issue will therefore be granted, and Interior Glass' motion will be denied.

iii. Whether Knowledge or Advice is Relevant to a § 6707A Penalty

The Government argues in its motion that § 6707A allows for a strict liability penalty, and contends that whether Interior Glass' failure to report was not willful or knowing, or was based on the advice of tax professionals, is irrelevant. In response, Interior Glass argues that a strict liability penalty is unconstitutional because it punishes taxpayers who are otherwise unaware of participation in a reportable transaction. As a corollary argument, Interior Glass argues "[i]t has long been recognized that even if the statute is silent, a penal statute implies a requirement of mens rea."

Initially, the court must agree with the Government that a § 6707A provides for a strict liability penalty. It notably states that "[a]ny person who fails to include on any return or statement any information with respect to a reportable transaction which is required . . . to be included with such return or statement *shall* pay a penalty. . . . " 26 U.S.C. § 6707A(a) (emphasis added). In addition, the definition of "substantially similar" in § 1.6011-4 (c)(4) specifies that "[r]eceipt of an opinion regarding the tax consequences of the transaction is not relevant to the determination of whether the transaction is the same as or substantially similar to another transaction."

However, the characterization does not mean the court must find that § 6707A is constitutionally infirm, because Interior Glass has not produced authority which requires such a result. Interior Glass' citation to cases calling for the implication of some form of scienter into criminal statutes, such as United States v. X-Citement Video, 513 U.S. 64 (1994) and United States v. United States Gypsum Co., 438 U.S. 422 (1978), are plainly distinguishable from the instant factual circumstances and unpersuasive on that basis. Similarly, the footnoted statement from National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2596 n. 9 (2012), and the intellectual debate over whether a particular payment requirement constitutes a tax or a penalty, is inapplicable here. Not only does this case not implicate that issue, but there is no evidence the § 6707A penalty is the type of criminal fine referenced in the statement cited by Interior Glass.

Based on this discussion, the court concurs with the Government's position that Interior Glass' state of mind or any advice it received are irrelevant to the imposition of a § 6707A penalty. Accordingly, the Government's motion will be granted as to this issue.

C. The Penalty Assessed to Interior Glass

With the constitutional arguments decided, the court examines the parties' arguments concerning the § 6707A penalty assessed to Interior Glass. This issue is addressed in the remaining portion of Interior Glass' summary judgment motion and in the second Motion

for Partial Summary Judgment filed by the Government. Dkt. Nos. 31, 36.

While Notice 2007-83 lists four elements to a "listed transaction," the parties only dispute the first element. Thus, the primary question is whether the GTLP involves a "trust or other fund described in § 419(e)(3) that is purportedly a welfare benefit fund."

i. Whether the GTLP is a Trust

Notice 2007-83 does not provide a definition for a "trust." Black's Law Dictionary defines a "trust" as "[t]he right, enforceable solely in equity, to the beneficial enjoyment of property to which another person holds the legal title; a property interest held by one person (the trustee) at the request of another (the settlor) for the benefit of a third party (the beneficiary)." TRUST, Black's Law Dictionary (10th ed. 2014).

In its motion, Interior Glass argues the GTLP does not involve a trust arrangement. Instead, Interior Glass states that it joined an established business league, ASBE, that was tax-exempt under § 501(c)(6) of the Internal Revenue Code, and that through this arrangement the ASBE controlled the insurance policies; no single member could control the money in the ASBE. In response, the Government acknowledges the GTLP involved a § 501(c)(6) association rather than a trust. Given the parties seemingly consistent positions on the issue, the court finds the GTLP does not constitute a trust for the purposes of Notice 2007-83.

ii. Whether the GTLP is an Other Fund Described in § 419(e)(3)

Since it is not a trust, the court turns to whether the GTLP involves an "other fund described in § 419(e)(3) that is purportedly a welfare benefit fund."

"The term 'welfare benefit fund' means any fund – (A) which is part of a plan of an employer, and (B) through which the employer provides welfare benefits to employees or their beneficiaries." 26 U.S.C. § 419(e)(1). In addition:

> The term "fund" means –
>
> (A) any organization described in paragraph (7), (9), (17) or (20) of section 501(c),
>
> (B) any trust, corporation, or other organization not exempt from the tax imposed by this chapter, and
>
> (C) to the extent provided in regulations, any account held for an employer by any person.
>
> 26 U.S.C. § 419(e)(3).

In its motion, Interior Glass argues that since the ASBE is a § 501(c)(6) organization, it is not covered by subsection (A) of § 419(e)(3). The Government acknowledges this fact. In addition, Interior Glass and the Government concur that the GTLP seeks tax deductions under § 79 of the Internal Revenue Code, not § 419. Accordingly, the court finds that the GTLP, strictly speaking, does not involve the type of "other

fund" described in § 419(e)(3) that is purportedly a "welfare benefit fund."

iii. Whether the GTLP is "Substantially Similar" to a "Listed Transaction"

Given the GTLP is neither a trust nor an "other fund," the first element of what constitutes a "listed transaction" is not directly satisfied. However, as suggested within the discussion of the parties' constitutional arguments, the Government contends the GTLP is nonetheless subject to Notice 2007-83 because it is "substantially similar" to a "listed transaction."

Again, an arrangement is "substantially similar" to a "listed transaction" if it "is expected to obtain the same or similar types of tax consequences and that is either factually similar or based on the same or similar tax strategy." 26 C.F.R. § 1.6011-4(c)(4). The phrase "must be broadly construed in favor of disclosure." Id. "[A] transaction may be substantially similar to a listed transaction even though it involves different entities or uses different Internal Revenue Code provisions." Id.

In its motion, the Government argues the GTLP is a "listed transaction" because it is expected to obtain the same tax consequences as such an arrangement. It contends that the tax consequences of the GTLP were the same as those of its predecessor, the ISP: under both plans, Interior Glass deducted its contributions to the arrangement while Yates received economic benefits (that is, the accumulated value of the life insurance

policies, and the value of the current death benefit coverage), but he did not report the contributions as taxable income. The Government also argues the GTLP and ISP are similar in the following ways: (1) the language of both plans are similar, except that the term "Trust" in the ISP plan document was replaced by the term "Association" in the GTLP plan document; (2) both plans had the same "plan administrator;" (3) like the ISP, the GTLP purported to provide "welfare benefits," or group-term life insurance; and (4) the insurance policy employed by the GTLP was the same policy that had been used by the ISP, a cash value life insurance policy No. xxxxx619V. The Government therefore surmises that since the GTLP was expected to obtain the same tax consequences as the scheme described in Notice 2007-83, it is "substantially similar" to a "listed transaction" such that it was subject to the disclosure requirement of the Notice.

In response, Interior Glass argues the Government has failed to show that the first element of a "listed transaction" has been met. It argues that Notice 2007-83 involved a trust that was controlled by a single employer, and that this type of control was critical to finding that such transaction was an abusive trust arrangement. Interior Glass explains that in a single-employer arrangement, the single employer has complete control of the trust and the life insurance policy; as such, the single employer could obtain the economic value of the policy that had been established, in part, by the employer's payment of the premium. According to Interior Glass, the GTLP, in contrast, was an

insurance plan offered by the business league composed of 139 members. Due to the existence of a multi-member business league, no single member could control the league or obtain any cash value of the life insurance policies.

To support the contention that the GTLP is "substantially similar" because of its tax consequences, the Government relies on certain facts that Interior Glass does not convincingly dispute. First, Interior Glass admits that the ABSE used payments from Interior Glass to pay premiums on a cash value life insurance policy in 2009, 2010 and 2011. Dkt. No. 45, at ¶ 13. Second, Interior Glass admits that it sought to deduct the payments it made in connection with the GTLP on its tax returns for those years. Id. at ¶ 14. Third, Interior Glass admits that its owner, Yates, was covered by a life insurance policy for 2009, 2010, and 2011, that he paid only part of the premiums for those policies, and did not report any of the payments made by Interior Glass as taxable income on his tax returns. Id. at ¶ 15.

Based on these admitted facts, the court finds that the GTLP is "substantially similar" to a "listed transaction," as that phrase is defined in § 1.6011-4(c)(4). Much like the arrangement described in the background section of Notice 2007-83, Interior Glass – the employer – made payments to the ABSE which were then used to purchase a cash value life insurance policy for Yates. Interior Glass then sought to deduct its contributions to the policy, while Yates did not declare any of the payments made by Interior Glass on his tax returns. The GTLP, therefore, was "expected to obtain

the same or similar types of tax consequences" as a "listed transaction," and is "factually similar" to a "listed transaction." The fact that the GTLP is not controlled by a single employer is not a distinction that makes a difference under these circumstances.

While it is true the GTLP is not a trust in the classic sense, or an "other fund described in § 419(e)(3)," it is substantially similar to the "listed transaction" described in Notice 2007-83. Accordingly, there is no genuine issue of material fact that Interior Glass was required to disclose its participation in the GTLP for the years 2009 through 2011, but did not do so. To that extent, the Government's second Motion for Partial Summary Judgment will be granted, and Interior Glass' cross-motion will be denied.

IV. ORDER

Based on the foregoing:

1. The Government's first Motion for Partial Summary Judgment (Dkt. No. 30) is GRANTED.

2. Interior Glass' Motion for Summary Judgment (Dkt. No. 31) is GRANTED IN PART and DENIED IN PART. The motion is GRANTED to the extent it seeks recovery of the $10,000 penalty it paid for 2008. It is DENIED on all other grounds.

3. The Government's second Motion for Partial Summary Judgment is GRANTED IN PART and DENIED IN PART. The motion is DENIED to as to the

$10,000 penalty paid by Interior Glass in 2008. It is GRANTED on all other grounds.

Judgment will [sic] entered in favor of Interior Glass consistent with this order. Since that result constitutes a final resolution of this action, all other hearing dates and deadlines are VACATED. The Clerk shall close this file.

IT IS SO ORDERED.

Dated: August 12, 2016

/s/ Edward J. Davila
EDWARD J. DAVILA
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

INTERIOR GLASS SYSTEMS, INC., Plaintiff-Appellant, v. UNITED STATES OF AMERICA, Defendant-Appellee.	No. 17-15713 D.C. No. 5:13-cv-05563-EJD Northern District of California, San Jose ORDER (Filed Aug. 2, 2019)

Before: TASHIMA, RAWLINSON, and WATFORD, Circuit Judges.

The panel unanimously votes to deny the petition for panel rehearing. Judge Rawlinson and Judge Watford vote to deny the petition for rehearing en banc, and Judge Tashima so recommends.

The full court has been advised of the petition for rehearing en banc, and no judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and rehearing en banc, filed July 10, 2019, is DENIED.