No. 19-7580

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

CONSTANTINE GUS CRISTO

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Fourth Amendment guarantees that the people shall have a right: "to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." Responding to acknowledged disadvantages of individuals and small businesses litigating against the Internal Revenue Service ("IRS"), Congress enacted the INTERNAL REVENUE SERVICE RESTRUCTURING AND REFORM ACT OF 1998, otherwise known as the "TAXPAYER BILL OF RIGHTS." § 7491 of the Act provides that if the taxpayer introduces credible evidence with respect to any factual issue relevant to ascertaining the proper tax liability, the burden of proof shifts to the IRS for that issue.

The United States Code, specifically, 1 USC §1; 22 USC §6010; 28 USC § 3002; and 29 USC §53, all essentially state, in the meaning of any Act of Congress, that a "person" includes corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.

1. Whether the Petitioner's production of "credible" evidence in the form of written admissions of unconstitutional conduct by a federal agent, citing § 7491 and thereby meeting the threshold to shift the burden of proof to the Commissioner, can be deemed insufficient by the Tax Court and the Ninth Circuit, to *eliminate* the Commissioner's requirement to *prove* the non-applicability of the claimed exception by submitting contrary evidence, as required in other Circuit Courts?

2. Whether written admissions of *intentional* unconstitutional conduct by a federal agent constitute fraud, and thereby prohibit the collection of statutory interest, by virtue of the Federal Common Law, Equitable Doctrines, and Decisions of this Court?

3. Whether the Tax Court and Ninth Circuit, in contradiction of documentation, evidence and testimony, can assign a legal taxpayer's payment for, and deduction of, a single necessary business expense to a separate employee taxpayer — not entitled to such a deduction — and thereby deny said expense, solely on the basis of using employee's credit card, when all other business expenses charged in the same manner were approved, since the employee did not pay the credit card company for these expenses and did not attempt to deduct the expenses on his tax return?

LIST OF PARTIES

CONSTANTINE GUS CRISTO,
Plaintiff and Petitioner;

COMMISSIONER OF INTERNAL REVENUE,
Defendant and Respondent.

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The opinion of the United States Tax Court (2161-12), issued on November 28, 2017, appears as *Appendix B at A3*, and is reported at T.C. Memo 2017-239 *, 2017 Tax Ct. Memo LEXIS 239 **, 114 T.C.M. (CCH)

STATEMENT OF JURISDICTION

The date on which the United States Court of Appeals for the Ninth District decided the case was on July 24, 2019. A timely petition for rehearing *en banc* was denied by the United States Court of Appeals for the Ninth Circuit on November 13, 2019. A copy of the order denying rehearing appears as *Appendix C at A17*.

Jurisdiction is invoked under 28 U.S.C. § 1254(1) for cases from federal courts.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

U.S. Const. Amend. IV provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

I.R.S. Restructuring and Reform Act of 1998, Section 7491 provides:

> ``SEC. 7491. BURDEN OF PROOF.
>
> (a) Burden Shifts Where Taxpayer Produces Credible Evidence.
>
> (1) General rule. If, in any court proceeding, a taxpayer introduces credible evidence with respect to any factual issue relevant to ascertaining the liability of the taxpayer for any tax imposed by subtitle A or B, the Secretary shall have the burden of proof with respect to such issue.

<<NOTE: Entire Section 7491 appears as *Appendix D at A18*>>

<u>12 U.S.C. § 3402(2) provides</u>:

> No Government authority may have access to or obtain copies of, or the information contained in the financial records of any customer from a financial institution unless the financial records are reasonably described and—
>
> > (2) such financial records are disclosed in response to an administrative subpoena or summons which meets the requirements of section 3405 of this title;

<u>12 U.S.C. § 3405(2) provides</u>:

> A Government authority may obtain financial records under section 3402(2) of this title pursuant to an administrative subpoena or summons otherwise authorized by law only if—
>
> > (2) a copy of the subpoena or summons has been served upon the customer or mailed to his last known address on or before the date on which the subpoena or summons was served on the financial institution.

<u>18 U.S.C. § 872 provides:</u>

> Whoever, being an officer, or employee of the United States or any department or agency thereof, or representing himself to be or assuming to act as such, under color or pretense of office or employment commits or attempts an act of extortion, shall be fined under this title or imprisoned not more than three years, or both; but if the amount so extorted or demanded does not exceed $1,000, he shall be fined under this title or imprisoned not more than one year, or both.

<u>1 U.S.C. § 1 provides</u>:

> In determining the meaning of any Act of Congress, unless the context indicates otherwise—
>
> . . . the words "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals;

<u>22 U.S.C. § 6010 provides</u>:

> As used in this title [22 USCS §§ 6001 *et seq.*], the term "United States person" means any United States citizen or alien admitted for permanent residence in the United States, and any corporation,

partnership, or other organization organized under the laws of the United States.

28 U.S.C. § 3002 provides:

(10) "Person" includes a natural person (including an individual Indian), a corporation, a partnership, an unincorporated association, a trust, or an estate, or any other public or private entity, including a State or local government or an Indian tribe.

29 U.SC. § 53 provides:

The word "person" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

STATEMENT OF THE CASE

A. Facts Giving Rise to the Case

This case is the consequence of Respondent's 2005 accusation that Petitioner was a participant in a serious crime against the federal government: [1]

> "you have been identified as a participant or directly associated with an abusive offshore/domestic tax promotion, promoted by individuals who have pled guilty to various charges, including conspiracy to defraud the United States Government, aiding and counseling the filing of false tax returns, and making and subscribing to a false tax return."[2]

The accusation triggered an investigation and audit of Petitioner and his tax returns for the 2002 tax year. Although no evidence of participation or association was ever found to implicate Petitioner in the fraud conspiracy, the investigation audit, and appeal would continue for more than six years resulting in Petitioner's financial insolvency.

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[1] *SEC v. Itex Corp., Terry L. Neal, et al,* CV-99-1361-BR (D. Ore. 9/27/1999). *See Appendix E at A19.*

[2] IRS Letter to Petitioner (10/4/2005), *See Appendix F at A21.*

The only basis for Respondent's accusation was the formation of Petitioner's related entity, Desperado, LLC ("Desperado"), purchased online from a company owned by a minor participant in the fraud case.

Refusing to acknowledge Desperado as the successor entity to MediaMax Productions, Inc. ("MediaMax"), a production company that Petitioner operated since the mid-1980s, in 2007, Respondent denied *all* deductions for expenses, thereby assessing Petitioner additional tax, penalty and interest of $231,087.65.[3] Petitioner appealed the assessment.

The appeal would take more than four years during which, on multiple occasions, the appeals officer was reassigned, allegedly to teach "new appeals officers."[4] The net effect of those reassignments were extended periods totaling approximately three years without any activity or contact from Respondent except in order to obtain extensions of time to collect additional assessed tax.

On February 19, 2009, in a meeting with Respondent's appeals officer, Petitioner was handed an unsigned letter on IRS stationery, with the word '*Draft*,' hand-written across its face.[5] Respondent's offer to Petitioner, was that if he would agree to accept the Respondent's 2007 tax assessment, Respondent would immediately sign and deliver said letter to Petitioner — a letter Petitioner had earlier requested so he could satisfy his investors that he was not a participant in the tax fraud case. This act violated 18 U.S.C. §872.

[3] IRS Form 4549 Assessment of tax deficiency (7/5/2007) *See Appendix G at A33.*
[4] IRS Letter to Petitioner (7/29/2009) re: reassignment to teach. *See Appendix H at A47.*
[5] Unsigned IRS Draft Letter offered to accept tax assessment (2/19/2009). *See Appendix I at A53.*

On October 28, 2011, Respondent provided a letter clearing Petitioner of any involvement in the tax fraud case[6] — more than 27 months after Respondent presented the identical letter as a draft, to solicit Petitioner's acceptance of the auditor's $231,087.65 additional tax assessment.

Six days later, on November 3, 2011, a Notice of Deficiency was issued to Petitioner, assessing $119,395.00 in tax, $22,681.04 in penalty, with interest accruing from 2003 until paid.[7]

B. Tax Court Proceedings

On January 23, 2012, Petitioner timely-filed suit in U.S. Tax Court, challenging Respondent's declaration of Desperado as a start-up entity, and thereby, denying all Desperado expense deductions. Shortly after commencement of the case, the Tax Court accepted Desperado as MediaMax's successor — later reducing the assessed additional tax by $89,578 ($119,295 — $29,817), eliminating the $22,681 accuracy penalty, and thereby, invalidating the Notice of Deficiency's 'presumption of correctness.'

In December 2015, Petitioner was forced to continue the litigation *pro se,* after his *pro bono* counsel (local low-income tax clinic) questionably withdrew. *Pro bono* counsel, (later determined to be funded by an IRS grant) filed a Motion to Withdraw.[8] The motion was approved by the Tax Court just hours after filing, eliminating Petitioner's ability to oppose the Motion. Subsequently, Petitioner's request for

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[6] IRS Letter Clearing Petitioner of participation in Tax Fraud. *See Appendix J at A54.*
[7] IRS Form 4089 Notice of Deficiency (11/3/2011). *See Appendix K at A55.*
[8] T.C. Order granting *pro bono* counsel Motion to Withdraw (12/11/2015). *See Appendix L at A70.*

continuance to seek new counsel in advance of the upcoming trial was denied by the Tax Court.[9] The incident was reduced to a vague footnote in the Tax Court's Memorandum:

> "For reasons irrelevant here, petitioner's counsel withdrew before the submission of this case under Rule 122."[10]

Despite Petitioner's argument that the interest should be suspended until the completion of the litigation, on February 29, 2016, the Tax Court instructed the parties to stipulate, pursuant to 26 U.S.C. § 6404(g):

> "29. Interest on any deficiency for the taxable year 2002 is suspended pursuant to I.R.C. § 6404(g) beginning on April 18, 2005 and ending on July 26, 2007." [11]

Also, in early 2016, Petitioner first learned that a decade earlier, Respondent had issued IRS administrative summonses to financial institutions. In June 2016, Petitioner obtained in discovery, among others, administrative summonses issued to Charles Schwab & Co., Inc. ("CS&CI").[12] The summons ordered CS&CI to submit all Petitioner's financial records for the 2002 tax year. The summons included Respondent's certification of service to Petitioner's 'last known address,' pursuant to 26 U.S.C. §7603:

> "a taxpayer's last known address is the address that appears on the taxpayer's most recently filed and properly processed Federal tax return, unless the Internal Revenue Service (IRS) is given clear and

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[9] T.C. Order Denying Petitioner's Motion for Continuance (12/21/2015). *See Appendix M at A73.*
[10] Memorandum Findings of Fact and Opinion, T.C. Doc #100, *See Appendix B at A7*, fn. 4.
[11] 1st Supplemental Stipulation of Facts, T.C. Doc #74, (2/29/2016) *See Appendix N at A75.*
[12] IRS Administrative Summons to CS&CI (08/17/2006). *See Appendix O at A77.*

> concise notification of a different address." 26 C.F.R. § 301.6212-2(a).

The Noticee copy was mailed to an address that had not been Petitioner's 'last known address' for three years — an address that possessed *no mail receptacle*.

Also, in July 2016, Petitioner obtained in discovery, IRS FORM 9984- EXAMINING OFFICER'S ACTIVITY REPORT.[13] The entry for 07/07/2006 (*See A90*) notes the preparation of the CS&CI summons to be issued on 07/14/2006. The entry for 07/25/2006 notes that the certified receipt for the summons had been received and that (emphasis added):

> "the ***Noticee copy of the summons was return[ed] "undeliverable" by the Post[m]aster***; associated with case file." (*See A90*).

A later entry for 01/10/2007 notes (emphasis added):

> "Reviewed summons records from Charles Schwab Account #****-****, ****-****; ***Summons issued covered the 2002 tax year.*** However, ***records provided*** by Charles Schwab ***covered the account from opening in 1995 through 6/30/2006. Revised Bank Deposit Analysis to reflect additional bank account and deposit data.***" (*See A91*).

Petitioner *never* received the statutory Noticee copy and thus, had no idea any summonses had been issued, or that CS&CI had submitted Petitioner's entire confidential financial transactional history — more than a decade of confidential financial data that was utilized by Respondent for the next 7 years.

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[13] IRS Form 9984- Exam. Officer's Activity Record (10/3/2005). *See Appendix P at A85.*

Having knowledge of Petitioner's 'last known address' since October 2003, and notification by the Postmaster, that the notice was "undeliverable," in 2006, Respondent should have realized that the address certified as the 'last known address' — was improper. In order to comply with 12 U.S.C. §3405(2), Respondent was duty bound to notify Petitioner of the government's improper certification and therefore, reset the time for Petitioner to intervene.

Instead, Respondent intentionally remained silent, except for her notations in Form 9984 which were never supposed to be seen outside of the IRS firewall, thereby obtaining unfettered access to Petitioner's entire financial history. Evidence suggests Respondent continued to search for hidden assets and offshore bank accounts until at least 2013.[14] ICS Report in November 2013 stated (emphasis added):

> "[Taxpayer] ***did buy an Off-shore LLC*** that ***was involved in a tax fraud scheme***, however, the [taxpayer] claims he knew nothing about this, and ***was duped by the sellers, who have disappeared***.
>
> "Solely ***to Delay Collection*** ***might be in play*** but proving [taxpayer's] ***intentional impecuniousness, has yet to be established***."

Petitioner purchased a Nevada LLC — not an offshore LLC — and was not duped by the seller in his purchase. Moreover, seller did not disappear as this was an online purchase from someone Petitioner had never met. The phrase "intentional impecuniousness has yet to be established" suggests that the Respondent was still looking for assets two years after issuing a letter clearing him of the tax fraud. More

[14] IRS Integrated Collection System (ICS) History Transcript created by Emp # 33-04544 Dana R. Powys (11/22/2013).

importantly, by incorporating and utilizing the data in its case file, Respondent violated Petitioner's protections under the United States Constitution, Amendment IV.

As a result of obtaining the issued summonses and IRS Form 9984 in 2016, Petitioner determined that Respondent (a) ignored statutory requirements to issue summonses to obtain Petitioner's financial records; (b) intentionally failed to provide statutory notice to Petitioner of the third-party summonses; (c) violated the Petitioner's Fourth Amendment rights by incorporating financial data obtained outside of its summons; (d) populated the Respondent's analyses and worksheets with the unlawfully-obtained data; (e) attempted what amounted to a *quid pro quo,* by offering Respondent's letter clearing Petitioner of involvement in the tax fraud case, in exchange for Petitioner's agreement to accept Respondent's inflated tax assessment; and (f) armed with Petitioner's entire financial history, continued searching for non-existent assets and offshore bank accounts for at least two years after clearing Petitioner, in writing, of any involvement in the tax fraud case.

In its Memorandum Opinion, the Tax Court briefly mentioned § 7491 and, in general, the exception that the burden of proof shifts to the Commissioner.[15] However, the Opinion carefully avoided any reference to what triggered the audit in the first place — the accusation of fraud and its investigation of the Petitioner. Instead, the Memorandum reduced the case to: "Petitioner's return was selected for audit."[16]

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[15] Memorandum Findings of Fact and Opinion, T.C. Doc. #100, *See Appendix B at A9-A10.*
[16] *Id., See A7.*

Notwithstanding these facts in the record, the Memorandum stated:

> "petitioner does not contend, and the evidence does not establish, that the burden of proof shifts to respondent under § 7491(a) as to any issue of fact."[17]

The Tax Court dismissed the relevant Act of Congress as a nullity, by reducing it to a footnote (emphasis added):

> "In his briefs, petitioner argues that the ***burden of proof should shift to respondent*** with respect to the question of ***whether petitioner's constitutional rights were violated before the notice of deficiency was issued***. Generally, the Court will not look behind a notice of deficiency. *Greenberg's Express, Inc. v. Commissioner*, 62 T.C. 324, 327 (1974). ***Although unconstitutional conduct is an exception to the general rule that the Court will not look behind the notice of deficiency, this Court has not declared a notice of deficiency void as a sanction for such conduct,*** *See Riland v. Commissioner*, 79 T.C. 185, 207 (1982); *Jackson v. Commissioner*, 73 T.C. 394, 401 (1979); *Greenberg's Express, Inc. v. Commissioner*, 62 T.C. at 328; *Human Eng'g Inst. v. Commissioner*, 61 T.C. 61, 66 (1973); *Suarez v. Commissioner*, 58 T.C. 792, 814 (1972)." [18]

Petitioner had not engaged in implausible factual assertions, frivolous claims, or tax protestor-type arguments. His 'credible' evidence was the Respondent's own written admissions. At that point, the Tax Court should have declared the exception to the general rule, and thereby require Respondent to "*prove* the non-applicability" of the exception claimed by the taxpayer, "by submitting contrary evidence." (*See Reasons Why Certiorari Should be Granted* (A) p.11).

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[17] *Id. See A9-A10.*

[18] *Id.,* footnote 7.

Instead, the Tax Court dismissed the matter stating: "this Court has not declared a notice of deficiency void as a sanction for such conduct." However, Petitioner never requested the Notice of Deficiency be declared void as in *Greenberg's Express*. The Tax Court improperly ruled on something that was never at issue in the instant case.

Once Petitioner had learned of Respondent's Fourth Amendment violation, in PETITIONER'S SERIATIM ANSWER BRIEF, however inartfully pleaded, referred to the § 7491(a) violations, making it incumbent on the Tax Court to review § 7491(a) as the authority Petitioner cited. Instead, the Tax Court presented a ruling that amounted to a temporal impossibility (emphasis added):

> "Respondent's objections are sustained with respect to the stipulations of facts and the accompanying exhibits that relate to ***petitioner's prenotice dealings with the IRS***."[19]

How is it possible for evidence to be judicially dismissed as "prenotice dealings with the IRS" when the evidence was unknown to the Petitioner until five years after the issuance of the Notice of Deficiency due to Respondent's intentionally unlawful act?

From the outset of the audit and continuing through the Tax Court litigation, Respondent had continually conflated references to the Petitioner and Desperado, as if they were interchangeable.

According to the Nevada Secretary of State, Desperado was a properly formed, validly existing Nevada limited liability company, that filed its 2002 Form 1065 on

[19] *Id.*

9/15/2003. Among its 'Other' scheduled deductions (Line 20), Desperado listed "Training Costs" in the amount of $28,377.

Since Desperado's primary mode of financing films was to assemble a Private Placement Memorandum ("PPM") under Reg. D for potential investors, Petitioner's son, the film's editor, and only member of the production team without college level training, who, as a gifted writer and seasoned filmmaker, would contribute to the PPM in addition to the film, the $28,377 in film-related courses were reported and deducted as Desperado training costs. Accordingly, Desperado issued a Schedule K-1 to Petitioner, to reflect his share of income, credits, deductions, etc., which were then reported on Petitioner's 2002 Form1040.

Notwithstanding 1 USC § 1; 22 USC § 6010; 28 USC § 3002; and 29 USC §53, the Tax Court stated that (emphasis added):

> "***Petitioner deducted $28,377*** as a training expense; this amount, ***he argues is the amount he paid for Alex's undergraduate courses taken in 2002.***"[20]

There is neither any evidence or testimony that Petitioner paid $28,377 as a training expense, nor is there any evidence or testimony that Petitioner argued that he paid for Alex's undergraduate courses in 2002. This fact is affirmed by (a) the absence of the expense anywhere in Petitioner's financial records (in the possession of Respondent) or any deduction on his 2002 Form 1040 tax return; (b) the appearance of the $28,377 as a training expense on Desperado's Form 1065 tax return; and (c)

[20] *Id., See A15.*

Desperado's issuance of a Form K-1 Statement to be used to reflect Petitioner's portion of Desperado income and expense. Moreover, the Court was cognizant that Petitioner had no responsibility to pay for his sons' education expenses pursuant to a divorce agreement with his former wife in Joint Stipulation 120:[21]

> "120. Respondent has no objections to the admission of the fact that, according to a divorce agreement between Petitioner and Petitioner's former wife, the former wife was responsible for all educational expenses of their two sons."[22]

C. Appellate Court Proceedings

As a 'not for publication,' Memorandum ruling, pursuant to Ninth Circuit Rule 36-3, Petitioner is unable to determine the extent of review by the Ninth Circuit before it affirmed the Tax Court's rulings related to the Questions above. However, the Ninth Circuit's one-sentence rulings suggest that, (a) it minimized this Court's position on unconstitutional conduct by a federal agent; and (b) it, like the Tax Court before it, fell victim to the Respondent's continual conflation of the Petitioner and Desperado.

Relative to Petitioner's Questions above, numbered accordingly:

1. *Re: Question 1*:

   In APPELLANT'S OPENING BRIEF, STANDARD OF REVIEW, Petitioner specifically cited 26 U.S.C. § 7491(a)(1) as his first authority.[23] He also referred to § 7491(a) in his argument regarding exceptions to the General Rule. Most importantly, Petitioner cited this Court's direction

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[21] *Id., See footnote 3, at A6.*
[22] 4th Supplemental Stipulation of Facts, T.C. Doc #92, *See Appendix Q at A105.*
[23] Appellant's Opening Brief, Dkt. Entry: 7. *See Appendix R at A108.*

regarding the "far greater capacity for harm" when unconstitutional conduct occurs "in the name of the United States" *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 US 388 (1971).

The Respondent dismissed *Bivens* as an authority, by claiming Petitioner's reliance was misplaced, stating (emphasis added):

> "Under certain circumstances, ***an action for damages*** against a federal agent acting under color of his federal authority who violates a citizen's constitutional rights ***may be brought in federal district court, not the Tax Court***. *See Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328, 1332 (9th Cir. 1987)."[24]

Petitioner did not seek damages for Respondent or the federal agent violating his Fourth Amendment rights in the Tax Court case. He merely cited this Court's position as the supreme authority for describing the "far greater capacity for harm" of unconstitutional conduct by a federal agent as opposed to a private citizen. In effect, the Ninth Circuit appears to concur that this Court's authority in *Bivens* is only valid if it is cited in district court cases seeking damages.

Also, in his opening brief, Petitioner sought some consideration from the Ninth Circuit by citing:

> "It is settled law that the allegations and assertions of a *pro se* litigant, 'however inartfully pleaded' are held 'to less stringent standards than formal pleadings drafted by lawyers. *See Haines v. Kerner*, 404 U.S. 519,520 (1972). The court noted that *pro se* litigants should be provided 'special solicitude.'

[24] Brief for the Appellee, Dkt. Entry: 19, p. 19. *See Appendix S at A109-10.*

> *Rabin v. Dep't of State*, No. 95-4310, 1997 U.S. Dist. LEXIS 15718." [25]

Notwithstanding, the evidence to the contrary, the Ninth Circuit ruled, (emphasis added):

> "Contrary to Cristo's contention, ***there is no authority that dictates that the Tax Court should have shifted the burden of proof to the Respondent***."[26]

2. *Re: Question 2*:

Although the Ninth Circuit accepted the Tax Court's suspension of interest due to failing to notice Petitioner of its final tax assessment, it too, remained silent regarding the Tax Court's decision to permit the collection of interest as a result of the fraudulent use of confidential financial data by the Respondent.

3. *Re: Question 3*:

Contrary to the Government's contention: (a) Petitioner did not pay or deduct the $28,377 on his 2002 Form 1040, (b) Desperado did pay and deduct $28,377 on its 2002 Form 1065; (c) Desperado did send a Schedule K-1 to be filed on Petitioner's 2002 Form 1040; (d) Petitioner included his share of income, credits, deductions, etc., on his 2002 Form 1040; and (e) by virtue of a divorce agreement with his former spouse, stipulated by Respondent, Petitioner had no responsibility to pay for his sons'

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[25] Appellant's Opening Brief, DktEnt#7. *See Appendix Q at A67-A68.*
[26] Ninth Circuit Memorandum Opinion (7/24/2019). *See Appendix A at A2.*

education. The Ninth Circuit ignored these exculpatory facts in order to affirm the Tax Court decision.

Notwithstanding the evidence and testimony to the contrary, the Ninth Circuit concluded (emphasis added):

> "***The Tax Court did not clearly err in determining that Cristo was not entitled to deduct educational expenses for his son*** as a business expense under 26 U.S.C. § 162. *See Lee v. Comm'r*, 723 F.2d 1424, 1426 (9th Cir. 1984) (describing when educational expenses may be deductible as business expenses)."[27]

Petitioner agrees he was not entitled to deduct educational expenses for his son. He did *not* attempt to do so. After being accused of participating in a tax fraud case in 2005, 17-years later, the Tax Court improperly accused Petitioner, in contradiction of the evidence and testimony, of attempting to deduct education expenses he was not entitled to.

The Ninth Circuit's stated conclusion demonstrates that it too, was a victim of Respondent's conflation of two distinctly separate taxpayers.

REASONS WHY CERTIORARI SHOULD BE GRANTED

A. Ninth Circuit Ruling Conflicts with 26 U.S.C. § 7491

The Ninth Circuit's interpretation of 26 U.S.C. § 7491 relative to this case, renders the statute a virtual nullity, and thereby, negates the legislative intent to level the

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[27] *Id.*

playing field between taxpayers and the IRS. The case also reveals a disagreement between the Ninth Circuit's interpretation, and other Circuit Courts of Appeal.

By enacting § 7491, Congress altered the protocol of Tax Court adjudication, placing the burden of proof on the Commissioner where a taxpayer has, *inter alia,* made a "credible" evidentiary showing on a factual issue. The mandate of the legislature is clear — if the taxpayer meets his/her/its threshold, the burden of proof shifts to the Commissioner to prove that a contrary finding is required. Circuit Courts, including the Ninth Circuit have agreed that § 7491 applies to tax court findings.

It appears however, the Ninth Circuit in this case, has ruled that the Tax Court may dismiss Respondent's written admissions of constitutional violations as insufficient to switch the burden of proof. The Ninth Circuit has gone even further by not requiring Respondent to prove that a contrary finding is required via appropriate arguments or evidence in opposition to the Petitioner's claimed exception. This interpretation of the burden of proof, renders § 7491 meaningless.

The Ninth Circuit's decision contradicts both the letter and spirit of the statute that, in an income tax case, the Respondent can submit a baseless claim that is in complete contradiction of its own written admissions and count on the Tax Court arbitrarily 'toe' the Respondent's line — even when, as here, the Petitioner's claim has met the requirements of § 7491.

The Ninth Circuit's decision not only conflicts with the approach taken in other Circuits but, contrary to the mandate for judicial economy implicit in the statute, it provides a blueprint for an increased burden upon the Tax Court, and upon the Courts of Appeals by virtue of the absence of fairness and clarity.

Background of the Statute

§ 7491 was enacted as part of the INTERNAL REVENUE SERVICE RESTRUCTURING AND REFORM ACT OF 1998 (Pub. L. 105-206, 112 Stat. 685, enacted 1998.07.22), also known as the "TAXPAYER BILL OF RIGHTS." stating:

> "individual and small business taxpayers frequently are at a disadvantage when forced to litigate with the Internal Revenue Service." SENATE REP. NO. 105-174, at 44-46 (1998).

Following oversight hearings of the Senate Finance Committee, focusing in part on expanded protections for taxpayers, (*See, generally,* PRACTICES AND PROCEDURES OF THE INTERNAL REVENUE SERVICE, HEARINGS BEFORE THE SENATE COMM. ON FINANCE, 105th Cong. (1997)), initial proposals were presented by both House and Senate for a burden shifting provision.

The House version provided that the burden of proof would shift to the Respondent when, along with all other requirements, the taxpayer "asserts a reasonable dispute with respect" to any factual issue. H.R. 2676, 105th Cong. §301 (1997). However, the bill as enacted, imposes a far more rigorous threshold for the taxpayer to meet for shifting burden.

The "credible evidence" test in the final version of § 7491 has been consistently interpreted to require the taxpayer not merely to demonstrate a "reasonable dispute," but to effectively establish a basis for decision in the taxpayer's favor — subject only to the introduction of contrary evidence from the Commissioner. Surely, a written admission by the Respondent in this instance, passes the "credible evidence" test.

Courts that have addressed and determined the meaning of "credible" in the context of § 7491, have referenced and relied upon the definition suggested by the legislative history. The House Conference Report that preceded enactment of the Restructuring Act states:

> "Credible evidence is the quality of evidence which, after critical analysis, the court would find sufficient upon which to base a decision on the issue if no contrary evidence were submitted (without regard to the judicial presumption of IRS correctness). A taxpayer has not produced credible evidence for these purposes if the taxpayer merely makes implausible factual assertions, frivolous claims, or tax protestor-type arguments. The introduction of evidence will not meet this standard if the court is not convinced that it is worthy of belief." HOUSE CONF. REPORT, 105-599, at 240-241 (1998), 1998-3 C.B. 747, 994-995 (emphasis added). *See, e.g., Blodgett v. C.I.R.*, 394 F.3d 1030, 1035 (8th Cir. 2005) (adopting language from House Report to define "credible evidence"); *Thompson v. United States*, 523 F.Supp.2d 1291, 1296-97 (N.D. Ala. 2007) (same).

The taxpayer must also demonstrate that he/she/it has maintained all records required for purposes of § 7491(a)(2)(B) and has cooperated with reasonable requests from the IRS for witnesses, information, documents, meetings and interviews for purposes of § 7491(a)(2)(B).

Thus, for a taxpayer, meeting the initial burden under § 7491 is not, by any means, a nominal threshold. The tax court is required to subject the taxpayer's evidence to "critical analysis" and determine that this evidence, standing alone, would support a decision for the taxpayer. Considering the nature of the test, it is hardly surprising that since the enactment of § 7491:

> "the cases in which the taxpayer has successfully shifted the burden of proof, absent a concession by the Commissioner, have been few."[28]

Shifting the burden of proof is a formidable obstacle for the taxpayer and success has been a frequent matter of dispute. In the instant case, the Petitioner's evidence is the Respondent's own written admissions. Moreover, Respondent has stated in open court that Petitioner maintained segregated and comprehensive detailed records.[29]

Once a taxpayer has met the substantial hurdle of submitting evidence sufficient to satisfy the statute, and associated requirements, then holding the Respondent to his burden of proof is appropriate, reasonable, and consistent with the language of the statute.

In this case, Respondent not only failed to prove his case, but did little or nothing to refute Petitioner's evidence. This negates the clear congressional intent to correct the historic imbalance in tax jurisprudence.

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[28] M. McMahon, Jr. & L. Zelenak, FEDERAL INCOME TAXATION OF INDIVIDUALS, 3d Ed., Warren Gorham & Lamont (2007), ¶ 51.02.

[29] T.C. Trial Transcript, T.C.Doc.#16, *See Appendix T at A114.*

B. Conflicting Appellate Decisions

The Ninth Circuit's view of the burden of proof in this case, with respect to § 7491 in particular, conflicts with that of the Circuit Courts of Appeals in other jurisdictions.

1. **<u>The Fifth Circuit</u>** embraced the principle that, once the burden of proof shifts to the Commissioner, he must prove the correct amount of taxes owed. *See e.g. Carson v. United States,* 560 F.2d 693 (5th Cir. 1977). That principle was applied in a dispute over valuation in *Caracci v. C.I.R.,* 456 F.3d (5th Cir. 1977), where the burden of proof in valuing a closely-held business was found to have shifted to the Commissioner.[30] The tax court rejected testimony of the Commissioner's valuation expert, but also found fault with taxpayer's appraisal — and proceeded to assemble its own appraisal:

> . "The Tax Court adopted only one part of [the expert's] market-value approaches, making adjustments and filling in gaps to reach its own conclusion as to value." *Id.* at 454.

Reversing, the Fifth Circuit found that the tax court should have found for the taxpayer:

> "[T]he Tax Court rejected most of the only support the Commissioner provided for the net excess benefit finding, the testimony of the Commissioner's valuation expert. At that point, the Commissioner failed to meet his burden of proof. At that point, the

[30] In *Caracci,* the burden shifted as a matter of case law due to "naked assessment" 456 F.3d at 457, not pursuant to § 7491.

> Tax Court should have found in the taxpayer's favor." *Id.* at 457-58.

This analysis by the Fifth Circuit directly conflicts with that of the Ninth Circuit, which accepted the Tax Court rejection, where no attempt was made by the Respondent to defeat Petitioner's credible evidence.

2. **The Eighth Circuit** in *Griffin v. C.I.R.,* 315 F.3d 1017 (8th Cir. 2003), *reversed* the tax court ruling that taxpayers had failed to establish entitlement to shift the burden of proof under § 7491, on deduction of certain real estate payments.

The *Griffin* court rejected the argument that the burden of proof could be assumed to be of no consequence to the outcome: "[I]f that were the case, § 7491(a) would have no meaning." *Id.* at 1022.

Accordingly, the Eighth Circuit directed the tax court to hold the Commissioner to his burden of proof and "*prove* the non-applicability" of the exception claimed by the taxpayer, by submitting contrary evidence. *Id.* at 1021.

Following the directives of the Eighth Circuit, the tax court found for the taxpayers after concluding the Commissioner:

> "has offered insufficient contrary evidence to overcome petitioners' evidence. Accordingly, respondent has failed to sustain his burden of proof." *Griffin v. C.I.R.,* Memo 2004-64, 2004 WL 440431 (U.S. Tax Ct. Mar. 11, 2004), at *4 (footnote omitted}.

Unlike the Ninth Circuit in this case, the Eighth Circuit did *not* accept the dismissal of the Petitioner's claim without any relevant legal authority or explanation.

3. **<u>The Ninth Circuit</u>** is itself, conflicted with its own prior ruling, treating the burden of proof as a meaningful and rigorous basis for entering a finding for the taxpayer — and not as an invitation for the tax court to simply ignore the Petitioner's evidence. *See, e.g., Morrissey v. C.I.R.,* 243 F.3d 1145, 1147-48 (9^{th} Cir. 2001), *rev'g and rem'g,* 77 T.C.M. (CCH) 1779 (1999) (ordering that judgment be entered for taxpayer where expert report of Commissioner, who had burden of proof, was rejected by tax court, which attempted an independent valuation); *Estate of Simplot v. C.I.R.* 249 F.3d 1191, 1196 (9^{th} Cir. 2001), rev'g and rem'g, 112 T.C. 130 (1999)) (same).

Had Petitioner's claim been mere speculation without evidence from a credible source, the Tax Court and Ninth Circuit might have been justified in rejecting the plea to switch the burden of proof. But here, the credible source *was* the Respondent. The conflict of this ruling by the Ninth Circuit requires a corrective ruling by this Court to provide the necessary clarity and uniformity to § 7491.

C. The Federal Common Law, Equitable Doctrines, and Decisions of this Court Prohibit Collection of Statutory Interest which Accrues as the Result of Government Fraud (*Litchfield v. County of Webster*, 101 U.S. 773, 779 (1879).

Pursuant to 26 U.S.C. § 6404(g)(1)(A), on February 29, 2016, based upon Respondent's failure to provide notice to the Petitioner specifically stating Petitioner's liability, at trial, the Tax Court instructed the counsels to enter into a Supplemental Stipulation of Facts that:

> "29. Interest on any deficiency for the taxable year 2002 is suspended pursuant to I.R.C. §6404(g) beginning on April 18, 2005 and ending on July 26, 2007."[31]

However, rather than granting a token suspension of interest, the Tax Court should have prohibited the collection of statutory interest which continues to accrue today as a result of an IRS agent's unlawful acts.

In *Dixon,* the Ninth Circuit found:

> "... the actions of McWade and Sims amounted to a fraud on both the taxpayers and the Tax Court ..." *Dixon v. C.I.R.,* 316 F.3d at 1041 (9th Cir. 2003).

This case accentuates the notion of whether Congress dislodged the long-established equity and common law powers of this Court to remedy fraud in the assessment and collection of interest on tax deficiencies, and whether Congress ever intended to limit this Court's traditional powers. 26 U.S.C. § 6601.

This Tax Court chose to grant a suspension of interest due to Respondent's failure to provide notice of a tax assessment, but over objections by Petitioner, completely

[31] 1st Supplemental Stipulation of Facts, T.C. Doc #74, *See Appendix N at A75.*

dismissed the issue of an unlawfully and intentionally not providing Petitioner mandated notice of administrative summonses — thereby facilitating Respondent to carry on an extended multi-year fishing expedition in search of hidden assets and offshore accounts. The Ninth Circuit chose to concur with the Tax Court's discretion to suspend accrued interest for 16 months (from April 18, 2005 through July 26, 2007) but to retain in place, interest accruing from July 2007 through the present day — more than 235 months.

This issue has serious national implications as the operation of our federal judiciary must not be successfully perverted by the executive branch — to perpetrate what amounts to a fraud on the taxpayers and thereby undermine the integrity of the courts. The Ninth Circuit Opinion in *Dixon* recognized this fact.

The Government stands to profit from the intentionally unlawful behavior committed by an agent of the United States Government. This should not be allowed to stand. Government, or its agencies, should not be allowed to profit from its malfeasance. One of the duties of this Court, is to ensure relief from fraud where there is no adequate remedy at law or where the dictates of the common law demand it.

The federal courts which have applied equitable principles to cases before them, and are subject to their jurisdiction, act within the powers conferred on them by the Constitution. Over 140 years ago, this Court in *Litchfield rejected* the tax court and court of appeals' holding, that the legal requirements for tax collection of statutory interest in order to feed the U.S. Treasury, trump any equitable power to abate interest due to delays borne of Government malfeasance.

Granting relief from said Government misconduct, this Court in *Litchfield* observed:

> "It is an elementary principle in equity jurisprudence, that if money is lying dead to meet an obligation, and delay in its payment is caused by fault of him to whom it is to be paid, interest during the delay is not recoverable. Here, the delay was caused by the fraudulent act of a federal agency of the United States. Litchfield himself has been guilty of no fraud or willful default."

This Court is bound by its own precedent and the Tax Court and Ninth Circuit's scheduled imposition of statutory interest on unlawfully generated periods of delay must be prevented. This Court's decision in *Litchfield* bars the collection of such interest under the rule of *stare decisis*.

It has been argued in the tax court and court of appeals that equitable relief may not be granted from the statutory imposition of interest — even if such interest is generated by Government fraud. *Litchfield* is still viable after over a hundred years and dispels any notions of statutory superiority over the traditional legal and equitable powers of the judiciary.

As this Court admonished in *Califano v. Yamasaki,* 442 U.S. 682, 705 (1979): "Only the clearest Congressional 'command' displaces Courts' traditional equity powers . . ." None has been shown. Rather, the statutory history of relief from penalties and interest under the Code lends further support for the prohibition of the imposition of interest on any deficiencies of this Petitioner.

Is this Court Without Sufficient Authority to Grant Relief from Interest Stemming from Government Unlawfulness?

Since its formation, this Court has followed the precept of federal common law and equitable jurisprudence set out in *Glus v. Brooklyn Eastern Terminal,* 359 U.S. 231, 232 (1959):

> "To decide the case, we need look no further than the maxim that no man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitations."

What then, is the effect of strict construction in this case? The answer is found in cases like *United States v. Texas,* 507 U.S. 529 (1993):

> "Just as longstanding is the principle that "statutes which invade the common law. . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *Isbrandtsen Co. v. Johnson,* 343 U.S. 779, 783, 96 L. Ed. 1294, 72 S. Ct. 1011 (1952); *Astoria Federal Savings & Loan Assn.* v. *Solimino*, 501 U.S. 104, 108, 115 L. Ed. 2d 96, 111 S. Ct. 2166 (1991). In such cases, Congress does not write upon a clean slate. *Astoria,* supra, at 108. In order to abrogate a common law principle, the statute must "speak directly" to the question addressed by the common law. *Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618, 625 (1978); *Milwaukee v. Illinois*, 451 U.S. 304, 315 (1981).

Unless the statute "speaks directly" to federal common law right, it does not invalidate it. In this instance, as in *U.S. v. Texas,* the tax statutes imposing interest on unpaid tax deficiencies do not "speak directly" to relief from interest brought about by fraud either under federal common law or federal courts' traditional equitable authority. This Court's decision in *U.S. v. Texas* once more reaffirms the principle that federal common law rights which are not invalidated by a specific statutory directive, survive, and therefore, must be enforced.

This Court's authority to remedy Respondent's unlawful acts in this particular case, faced with statutory arguments or interpretations to the contrary, is supported by the principle that an equitable construction must be given to the law. *See Crawford v. Washington,* 541 U.S. 36, 47 (2004).

An equitable construction of the interest statutes requires application of federal common law and equitable principles prohibiting Government from profiting from malfeasance perpetrated by its own agents. Moreover, supporting the grant of relief requested in this Petition is the additional legal and equitable maxim that fraud soils everything it touches. Therefore, the statutory right to collect interest generated by fraud is vitiated and must give way. *See Boyce's Executors v. Grundy,* 28 U.S. 210, 220 (1830).

In *Boyce's Executors* this Court explained:

> "It has been further argued, that the misrepresentation, if at all established, was but of a personal character, and susceptible of compensation or indemnity, to be assessed by a jury. On this there may be made several remarks; and first, that if the facts made out such a case, yet the law, which abhors fraud, does not incline to permit it to purchase indulgence, dispensation, or absolution."

Respondent is no *lex imperator* — excluded from any law he breaks or commits. His act, unwisely affirmed by the Tax Court and the Ninth Circuit, leaves the impression to the general public, that crime pays and that the fraud perpetrated by Respondent's agents will be profitable even if he is caught.

Created in fraud, Petitioners' obligation to pay statutory interest is vitiated and has no legal force or effect. This is so because "fraud vitiates every act whether public or private, contracts, deeds, and judgments." *The Amiable Isabella*, 19 U.S. 1, 52 (1820). As part of their traditional equity powers, federal courts have general jurisdiction to remedy fraud. *United States v. Bell Telephone Co.*, 128 U.S. 315, 370 (1888). The decision, like all administrative decisions under the standards of this Court's rules of administrative review, must not be:

> "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 403 (1971).

Clearly, the Respondent's decision to retain the fraudulent benefits his agent garnered is "not in accordance with the law" under the above standards irrespective of whether the tests for administrative review under the Administrative Procedure Act apply to the Respondent. Here, both law and equity require complete vitiation of the interest charges worked by the Respondent agent's fraud. Thus, there is "law to apply" and the Respondent has no discretion to withhold complete relief. *See Citizens* at p. 410.

By deferring their responsibilities to provide interest relief to the Respondent, both the Tax Court and the Ninth Circuit violated this Court's rule in *Rothensies v. Electric Battery Co.*, 329 U.S. 296, 299 (1946) which requires a Petitioner's case to be:

> "examined in all its aspects, and judgment to be rendered that does justice in view of the one transaction as a whole."

Other than the application of the interest statutes, this case is no different from *United States v. State Bank*, 96 U.S. 30, 36 (1877) in which this Court made the following observations concerning the Government's effort to benefit from its own fraud:

> "In these cases, and many others that might be cited, the rules of law applicable to individuals were applied to the United States. Here the basis of the liability insisted upon is an implied contract by which they might well become bound in virtue of their corporate character. Their sovereignty is in no wise involved.
>
> But surely it ought to require neither argument nor authority to support the proposition, that, where the money or property of an innocent person has gone into the coffers of the nation by means of a fraud to which its agent was a party, such money or property cannot be held by the United States against the claim of the wronged and injured party."

Despite this Court's observation in *U.S. v. State Bank*, Petitioner must argue that the Respondent may not retain his "ill-gotten gains" in the form of fraudulently generated interest charges. *See also Bull v. United States*, 295 U.S. 247 (1935).

> "Retention by the Government of money wrongfully exacted in taxes, is immoral and amounts to a fraud on the taxpayer's rights."

To allow the Respondent to retain the fraudulent interest benefits resulting from his agent's misconduct would be to give the test-case stipulation contract between the Government and the taxpayers an impermissible construction which would allow the Government to commit a fraud. *See Wm. Cramp and Sons v. United States*, 216 U.S. 494, 496 (1910).

Despite any claims to the contrary, the Tax Court in this case, had the necessary equitable jurisdiction to give full and complete relief in the matter before it. *See Kelley v. C.I.R.*, 45 F.3d 348,351 (9th Cir. 1995). Having granted the Government equitable relief when necessary to protect the revenue in the numerous decisions cataloged in *Kelley*, the Tax Court and the Ninth Circuit are hardly in position to argue that the Petitioner is not entitled to the same protection.

Finally, refusal to grant relief from the Tax Court and Ninth Circuit's decision, thereby allowing the Government to retain the fraudulent benefits obtained by its agent, violates the public policy which this Court in *United States v. Mississippi Valley Co.*, 364 U.S. 520 (1961) described:

> "The question is whether the Government may disaffirm a contract which is infected by an illegal conflict of interest. As we have indicated, the public policy embodied in [SECTION] 434 requires nonenforcement, and this is true even though the conflict of interest was caused or condoned by high government officials."

This Court's approval of the Government's rejection of a contract tainted with fraudulent conflict of interest is in keeping with the admonition that prevention and correction of fraud is a matter of high public policy. *See United States v. Acme Process Equipment Co.*, 385 U.S. 138, 87 S.Ct. 350, 17 L.Ed.2d 249 (1966). *Also, PSI Corp. v. United States*, 655 F.2d 1072, 1077 (Ct. Cl. 1981). All of the above principles support the continuing viability of *Litchfield* and require its application in this case.

As it relates to an anticipated invocation by the Government of *United States v. Johnston*, 268 U.S. 220, 227 (1925) for the proposition: "We do not grant a certiorari to review evidence and discuss specific facts." Petitioner responds that there are no factual issues concerning the Government's fraud — the fraud as well as the violation of the Fourth Amendment protections are already admitted in the record.

The Tax Court's decision and the Ninth Circuit's Memorandum concurrence, allowing the Respondent to retain fraudulent benefits, should be reversed and the cause rendered in Petitioner's favor that Petitioner owes no interest on the deficiencies during the audit, appeal and litigation periods.

D. The Ruling Conflicts with an "Ordinary and Necessary" Expense Within the Meaning of § 162(a).

Pursuant to 1 U.S.C. §1; IRS Publication 3402; and 26 U.S.C. §162(a); Desperado, LLC was a "legal person," permitted to operate a business enterprise, report its income, and deduct its ordinary and necessary expenses on Form 1065 Partnership Return. Alternatively, Petitioner, is a distinctly separate "legal person" who reported his *pro rata* share of Desperado's "net income" on his Form 1040 tax return.

After a review of the Government's denial of all business expenses of Desperado, the Tax Court correctly reversed the Government's position. The treatment of income and expenses in joint Stipulations 9 and 11,[32] are exactly how Petitioner's CPA had prepared the tax returns in 2003. As a result of the Tax Court's reversal, the parties agreed on appropriate deductions for Desperado's ordinary and necessary expenses — with one glaring exception.

[32] Stipulation of Facts, Stipulations Nos. 9 and 11. *See Appendix U at A116.*

Although extensively briefed to the Tax Court and subsequently to the Ninth Circuit, the conflated statements made by the Respondent, somehow influenced the Tax Court to ignore its own findings and decide regarding Desperado's training expense deduction that (a) Petitioner's son was not an employee of Desperado, LLC; and (b) Petitioner's son who took the film courses leading to Desperado's education/training deduction, was an instance of a parent attempting to improperly deduct educational expenses to which he was not entitled. Based on this unsupported theory in contradiction of the evidence and testimony, the Tax Court accepted the Government's argument and incorrectly denied the education/training deduction.

The Tax Court, apparently misled by the Respondent's continuous conflation of "Petitioner-Cristo" and "Desperado" as interchangeable, ruled that this single, isolated expense, somehow differed from all other Desperado deductions. For example, the Respondent stated its position as follows (emphasis added):

> "On the 2002 income tax return prepared for Desperado, L.L.C., ***Petitioner included a deduction*** for training expenses of $28,377.00. ***These are expenses paid by Petitioner for his son, Alex Cristo's college education*** while attending Emerson College in Boston, Massachusetts." [33]

The facts do not support this position that the $28,377 deduction was for Appellant's son's college education. In fact, the film courses were clearly not for Alex Cristo's college education, as they were outside his son's course syllabus for an

[33] Respondent's Seriatim Opening Brief, T.C.# 95, p. 12, ¶ 15. *See Appendix V at A121.*

English Composition degree at Emerson College. They were expenses paid and deducted by Desperado.

There was also nothing to suggest that there was any comingling of expenses of Petitioner and Desperado. Separate books and records were kept for this very purpose. Even the Respondent admitted during the trial:

> "His records were so detailed on all other categor[ies], and he did give us copies of checks and itemized check by check expenses; there wasn't a dispute about payment. It was just about whether it was ordinary and necessary." [34]

The training expense deducted by Desperado, was paid in the same manner as most other deductions in the Form 1065 tax return. Only in this particular expense, Respondent declared, that the use of Petitioner's credit card to pay the expense was proof of it being a personal expense. Most other 2002 expenses were also paid using Petitioner's credit card because most were expenses incurred out-of-town and Desperado had yet to obtain its own credit card. Yet, no other deductions were rejected by Respondent as personal expenses. The Tax Court simply accepted the Respondent's improper conclusion for this isolated expense.

The Tax Court's Memorandum Ruling Contradicts Itself

In its Memorandum Opinion, the Tax Court minimized Alex Cristo's credentials as a seasoned filmmaker in order to justify the Government's position. However, in so doing, its Memorandum placed the Ninth Circuit and now, this Court, in an awkward position. First in claiming that (emphasis added): "Alex was ***not an***

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[34] T.C. Trial Transcript, of May 14, 2013, p. 68, ln. 9-13. *See Appendix T at A114.*

employee or owner of petitioner's film production company;"[35] only to state later in the Memorandum that (emphasis added):

> "Alex ***applied the skills and knowledge gained through his coursework to the preproduction activity of "Walking on Water" during 2002 and continued in that capacity*** through its production in 2003 and release in 2007." [36]

— contradicting the filed founding documents with the Nevada Secretary of State showing Alex Cristo as a founding manager — that now jeopardizes the integrity of the judicial process. By affirming the Tax Court decision, the Ninth Circuit's affirmation joins a Tax Court ruling that contradicts itself.

— The Memorandum states that Alex Cristo "continued in that capacity through its production in 2003 and release in 2007" which is further supported by the credits on the released feature film.[37] The Tax Court states Alex Cristo worked on preproduction in 2002 [38] contradicting its earlier statement that he was not an employee six lines earlier in the Memorandum.

The Tax Court's Memorandum footnote #3 states:

> "Although a divorce agreement required petitioner's ex-wife to bear all of the costs of Alex's education, petitioner paid for the spring 2002 and fall 2002 semesters of Alex's undergraduate education."[39]

Yet, there is no evidence or testimony showing that Petitioner paid for Alex's undergraduate education or the film courses at Emerson College. Although Petitioner

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[35] Memorandum Findings of Fact and Opinion, T.C. Doc. No. 100, *See Appendix B at A16.*
[36] *Id., See A6 and A15.*
[37] DVD Case Cover w/credits for Production Team. *See Appendix W at A123.*
[38] Memorandum Findings of Fact and Opinion, T.C. Doc. No. 100, *See Appendix B at A16.*
[39] *See Appendix B at A6.*

used his credit card to comply with Emerson College's advance tuition payment requirements, the evidence shows that Desperado paid American Express in 2002 — not the Petitioner.

The Tax Court stretched the limitations imposed by reality when it stated in its Memorandum Opinion that (emphasis added):

> "***Petitioner's payment of the tuition*** for these semesters was a kind gesture to his son and ***relieved his ex-wife of her tuition responsibilities under the divorce decree***."[40]

This Tax Court statement was made while cognizant that Respondent had already stipulated:

> "*Stipulation 120*. Respondent has no objections to the admission of the fact that, according to a divorce agreement between Petitioner and Petitioner's former wife, the former wife was responsible for all educational expenses of their two sons."[41]

To conclude without any supporting evidence that Petitioner volunteered to ignore the terms of the divorce agreement so that he could relieve his former spouse of her responsibilities under the divorce agreement is speculative at best. Yet, the Tax Court, without any knowledge of the circumstances or details of a divorce thirteen years before, drew an unsupported conclusion to explain a non-existent Petitioner expense.

In summation, (a) Petitioner did not pay any of the $28,377.00 expense; (b) Petitioner did not deduct the $28,377.00 expense on his 1040 tax return; (c) Petitioner

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[40] *Id., See A16.*

[41] 4th Supplemental Stipulation of Facts, T.C. Doc #92, *See Appendix Q at A105.*

did correctly report his *pro rata* share of net income per Schedule K-1 from Desperado; (d) Desperado did pay the $28,377.00 expense in 2002; (e) Desperado did deduct the $28,377.00 expense on its 2002 Form 1065; (f) Desperado did issue a Schedule K-1 to Petitioner for his share of the net income; (g) Petitioner did not intermingle personal and Desperado affairs and kept separate, comprehensive records; (h) Respondent did stipulate that Petitioner was not responsible for his sons' education expenses; (i) Respondent did repeatedly conflate the term 'taxpayer' such that Desperado and Petitioner were inappropriately interchangeable when in fact, they were separate and distinct legal taxpayers; (j) the film courses were outside of Emerson College's English Composition Degree Program syllabus (the degree program Petitioner's son was enrolled in); (k) The film courses were directly related to Desperado's business as stated on its 2002 Form 1065 return; (l) the film courses taken by Petitioner's son were college-level film courses to demonstrate academic competence for the Private Placement Memorandum (PPM) that was distributed to potential investors in the film; and (m) by agreement with Petitioner's former spouse, Desperado did pay all film-related Emerson College expenses in 2002.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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