No. 21-

IN THE
Supreme Court of the United States

JUDITH S. COFFEY *et al.*,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The three-year statute of limitations established by Section 6501(a) of the Internal Revenue Code is triggered by filing "the [tax] return required to be filed by the taxpayer." Under Section 932(c)(2) of the Code, a "bona fide resident" of the U.S. Virgin Islands is required to file her U.S. income tax return with the Virgin Islands Bureau of Internal Revenue. The question presented in this Petition is:

Whether a Form 1040 (U.S. Individual Income Tax Return) filed with the U.S. Virgin Islands Bureau of Internal Revenue ("VIBIR") pursuant to Section 932(c)(2) is the "return required to be filed by the taxpayer" commencing the statute of limitations on assessment under Section 6501(a), even if it is subsequently determined that the taxpayer was not a *bona fide* resident of the Virgin Islands.

PARTIES

The parties to this case include:

- Judith S. Coffey (Petitioner)
- The Estate of James Coffey, Judith Coffey Executrix (Petitioner)
- Government of the United States Virgin Islands (Petitioner)
- The Commissioner of Internal Revenue (Respondent)

STATEMENT OF RELATED CASES

- *Melissa Coffey Hulett A.K.A. Melissa Coffey, et al. v. Commissioner of Internal Revenue*, Nos. 30676-09, 31119-09, 4720-10, 4949-10, United States Tax Court. Judgment entered January 29, 2018, Motion to Vacate granted, and revised Judgment entered July 24, 2018.

- *Judith S. Coffey v. Commissioner of Internal Revenue*, No. 18-3256, U.S. Court of Appeals for the Eighth Circuit. Judgment entered February 12, 2021, request for rehearing denied May 3, 2021.

- *Estate of James Coffey, Judith Coffey Executrix v. Commissioner of Internal Revenue*, No. 18-3259, U.S. Court of Appeals for the Eighth Circuit. Judgment entered February 12, 2021, request for rehearing denied May 3, 2021.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Judith S. Coffey, Estate of James Coffey, Judith Coffey, Executrix, and the Government of the United States Virgin Islands respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit in No. 18-3256, *Coffey v. Commissioner of Internal Revenue*, 987 F.3d 808 (8th Cir. 2021).

OPINIONS BELOW

The January 29, 2018 decision of the United States Tax Court in favor of the Coffeys (*Melissa Coffey Hulett A.K.A. Melissa Coffey, et al. v. Commissioner*, Consolidated Docket No. 4720-10) is reported at 150 T.C. 60 (T.C. 2018) and is found at Appendix F at page 47a. The July 24, 2018 Orders of the United States Tax Court denying the IRS's Motion for Reconsideration in each case are found at Appendix B, page 13a and Appendix D, page 30a. The July 24, 2018 Orders of the United States Tax Court granting the IRS's Motion to Vacate and issuing revised decisions in each case are found at Appendix C, page 27a and Appendix E, page 44a.

The Court of Appeals for the Eighth Circuit issued its original opinion in *Coffey v. Commissioner* on December 15, 2020, which is reported at 982 F.3d 1127 (8th Cir. 2020). The Eighth Circuit subsequently granted panel rehearing by Order dated February 10, 2021, which is found at Appendix H, page 118a. The February 12, 2021 superseding decision of the Eighth Circuit is reported at 987 F.3d 808 (8th Cir. 2021) and is found at Appendix A at page 1a. The Eighth Circuit's May 3, 2021 Order denying rehearing is found at Appendix G, page 116a.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit issued its final decision on February 12, 2021 and denied the Coffeys' request for rehearing on May 3, 2021. Pursuant to this Court's Order, this Petition is due within 150 days from the date rehearing was denied. *Order List: 594 U.S.*, 2021 U.S. LEXIS 3591 (Jul. 19, 2021). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS AND REGULATIONS

The following relevant statutory provisions have been reproduced verbatim at Appendix I beginning at page 120a:

26 USC § 932 (2003) 120a

26 USC § 932 (2004) 125a

26 USC § 934 (2004) 130a

26 USC § 6501 (2004) 133a

26 USC § 7654 (2004) 149a

26 CFR § 1.932-1 . . . . 151a

INTRODUCTION

This case is about whether the statute of limitations for assessment of U.S. Virgin Islands ("USVI") taxpayers is subject to the whim of the Internal Revenue Service ("IRS"). Specifically, the question presented here is whether the IRS can render a Form 1040 (U.S. Individual Income Tax Return) filed pursuant to Section 932(c)(2) [1] to be a nullity for statute of limitations purposes simply by determining that a taxpayer is not a *bona fide* USVI resident.

In a case heard by all 16 active judges, the Tax Court said "no." An eight-judge plurality relied on this Court's decisions in *Zellerbach Paper Co. v. Helvering*, 293 U.S. 172, 180 (1934) and *Germantown Trust Co. v. Commissioner*, 309 U.S. 304 (1940) in deciding that the statute of limitations under Section 6501(a) commenced when the tax return was filed with the VIBIR. The five-judge lead decision held, based on a concession by IRS counsel, that the statute of limitations would at least commence when the IRS Philadelphia Service Center received a copy of relevant portions of the return from the VIBIR.

The Eighth Circuit reversed, holding that tax returns filed with the VIBIR—for a USVI nonresident, as it assumed for summary judgment purposes—are not federal returns filed with the IRS and that, without such a filing, the "documents are…not filed returns." Appendix A at page 12a.

The Eighth Circuit's decision is contrary to long established case law by this Court and other Circuits holding unequivocally that a tax return is sufficient

1. All references to "Section" refer to 26 U.S.C., the Internal Revenue Code of 1986, unless otherwise indicated.

to trigger the statute of limitations if it (1) contains information sufficient to calculate the filer's tax liability, and (2) "evinces an honest and genuine endeavor to satisfy the law," even if the positions it takes are ultimately determined to be incorrect. *Zellerbach*, 293 U.S. at 180; *see also Germantown Trust*, 309 U.S. at 309-10.

Notwithstanding the clarity of this Court's jurisprudence on this issue, the IRS has a long history of attempting to defeat the protection of the statute of limitations in other cases by claiming that the taxpayer filed the wrong return. This Court has consistently denied its ploy. As the Tax Court plurality stated:

> Like the taxpayers in *Mabel Elevator*, *New Capital Fire*, and *Germantown Trust*, the Coffeys filed returns that were appropriate for reporting the positions taken on those returns. In this case, as in these earlier cases, the Commissioner seeks to defeat the statute of limitations by claiming, essentially, that reasonable and honest positions as to the taxpayers' filing status, which were clearly and adequately disclosed on their returns, are somehow not covered by the statute of limitations. Respondent's argument fails in this case for essentially the same reasons it failed in *Mabel Elevator*, *New Capital Fire*, and *Germantown Trust*.

Appendix F at page 106a.

The Eighth Circuit's decision reversing the Tax Court's ruling is irreconcilable with the jurisprudence of this Court and the other Courts of Appeals. The Court should grant this petition for a writ of certiorari and reverse.

STATEMENT OF THE CASE

Understanding the Eighth Circuit's violation of more than a half-century of this Court's jurisprudence requires a brief explanation of the U.S. Virgin Islands' treatment as a "mirror code" jurisdiction for purposes of the Internal Revenue Code; the unique income tax filing regime established by Congress for the U.S. Virgin Islands in Section 932; and the history of the IRS's pursuit of the Coffeys, which is now in its sixteenth year.

A. The U.S. Virgin Islands and the "Mirror Code"

The U.S. Virgin Islands is an insular area of the United States which was historically separated from the United States for federal tax purposes. In 1921, Congress established a "mirror tax system" for the Virgin Islands. This system replaced the term "United States" with the "Virgin Islands," and *vice versa*, in the Virgin Islands tax code. Appendix F at page 61a. Under the mirror code, the provisions of the Internal Revenue Code are applicable to the Virgin Islands so long as the specific section to be applied is "'not manifestly inapplicable or incompatible' with a separate territorial income tax". *Chicago Bridge & Iron Co. v. Wheatley*, 430 F.2d 973, 976 (3d Cir. 1970) (quoting *Sayre & Co. v. Riddell*, 395 F.2d 407, 410 (9th Cir. 1968)). This system caused some individual and corporate taxpayers to file two separate returns – one to the United States and one to the Virgin Islands, similar to filing a federal and state income tax return.

But the mirror tax system was dramatically changed in 1986 with the addition of Section 932 – which is not mirrored – as part of the Tax Reform Act of 1986, Pub. L. 99-514, sec. 1274(a) 100 Stat. 2596. That provision reflects Congress's intent to create a unified tax obligation for "bona fide residents and nonresidents of the VI with VI-source income" by creating a single "U.S. tax liability." Appendix F at page 62a (citing S. Rept. No. 99-313, at 482 (1986), 1986-3 (Part 3) C.B. 1, 482 ("[F]or purposes of determining the tax liability of individuals who are citizens or residents of the United States or the U.S. Virgin Islands, the United States will be treated as including the Virgin Islands (for purposes of determining U.S. tax liability) and, under the Virgin Islands 'mirror' Code, the Virgin Islands will be treated as including the United States (for purposes of determining liability for the Virgin Islands tax)")).

Therefore, Section 932 provides the current rules for coordinating the U.S. and USVI income taxation and filing requirements for individuals. It creates a "single title 26 liability" that, in some circumstances, is allocated between the United States and Virgin Islands. Appendix F at page 63a.

B. The Section 932 Regime

Title 26 mandates that U.S. citizens and residents file tax returns reporting their worldwide income. Section 932 provides for the coordination of the United States and Virgin Islands income taxes by setting forth the filing rules for taxpayers who live in the USVI and/or receive USVI-sourced or effectively connected income. Taxpayers who reside in the U.S. and receive USVI-sourced or effectively connected income are required to file their returns with IRS under Section 932(a)(2) and send a *copy* of that return to the VIBIR. The Form 1040 includes a Form 8689 calculating the portion of the tax allocable to VIBIR based upon USVI-sourced income. The USVI gets its allocable portion of the tax liability; the U.S. gets the remainder.

Taxpayers reporting USVI residency file their returns under Section 932(c)(2) with the VIBIR, and all of the tax remitted with those returns stays with the USVI. *All* Section 932(c)(2) filers *must* file their returns *only* with VIBIR. *They cannot file a Section 932(c)(2) return with IRS.* And they cannot file *both* a Section 932(c)(2) return *and* a Section 932(a)(2) return for the same year. They must determine the return that is appropriate for the position they are taking – right or wrong. Both of these returns are filed pursuant to the Internal Revenue Code. The IRS has the *sole* authority and responsibility for purposes of determining any U.S. tax liability based upon the filing of returns under Section 932(a)(2) *and* Section 932(c)(2).

The IRS is authorized to examine Section 932(a)(2) returns *and* Section 932(c)(2) returns to determine if the correct amount of U.S. tax liability has been paid. It is charged under Federal law with the responsibility of examining Section 932(c)(2) returns to verify compliance with Section 932(c)(4), *including that the taxpayers' reporting of USVI residency thereon is correct*. Section 932(c)(4)(A). The IRS's authority to examine Section 932(c)(2) returns is expressly recognized and provided for in the 1987 Tax Implementation Agreement between the IRS and the VIBIR. The IRS audits these returns for errors and to ensure correct allocation of tax revenue. To accomplish this, IRS Revenue Agents access the Section 932(c)(2) returns at VIBIR offices where they are maintained, and examine (audit) them to determine if they comply with the requirements of the Internal Revenue Code. VIBIR Revenue Agents are responsible for determining whether the returns comply with the mirror code.

Consistent with its authority over Section 932(c)(2) returns, the IRS refers taxpayers for criminal prosecution by the U.S. Department of Justice based on information and positions taken on those returns, and the U.S. has prosecuted taxpayers for filing false U.S. tax returns if they file Section 932(c)(2) returns with VIBIR that fraudulently claim USVI residency. Appendix F at page 86a-87a (citing *U.S. v. Miller*, Crim.No. 2013-07, Indictment at 1 (D.V.I. Apr. 4, 2013); *U.S. v. Auffenberg*, 1:07-cr-00047-HB-GWB, ECF Docs. 295, 429 (D.V.I. 2008)). The U.S. expressly alleges as an element of Title 26 Section 7206(1) charges that such returns are *filed*[2] *federal returns*:

> Defendant herein, did willfully make and subscribe *a United States Individual Income Tax Return, Form 1040, for year 2001, which was … filed with the BIR*, which said return

2. Filing, for civil and criminal purposes, is accomplished when the return is transmitted to the office or agent authorized to receive it. *United States v. Boitano*, 796 F.3d 1160, n.2 (9th Cir. 2015); Section 6091(b)(4); Treas. Reg. § 1.6091-2. Section 932(c)(2) returns filed with VIBIR are filed federal returns for purposes of Section 7206(1). The statute of limitations for the U.S. to prosecute a Section 7206(1) crime is 6 years *from the date the return is filed*. Section 6531(5).

> Defendant did not believe to be true and correct as to every material matter in that it stated that he was a bona fide resident of the Virgin Islands in the year 2001 …, whereas, as Defendant then and there well knew and believed, he was not a bona fide resident of the Virgin Islands in the year 2001 …. [I]n violation of Title 26, United States Code, Section 7206(1).

Auffenberg, 1:07-cr-00047-HB-GWB, ECF Doc. 429 at 53 (emphasis added).

It is well settled law that returns filed with the VIBIR under Section 932(c)(2) begin the statute of limitations on assessment under Section 6501(a) for *bona fide* USVI residents, even if those returns contain errors. *Appleton v. Commissioner*, 140 T.C. 273 (T.C. 2013). However, for tax years ending before December 31, 2006 for taxpayers whose gross income exceeds $75,000,[3] the IRS takes the position that the statute of limitations began *only if it acquiesced* in the taxpayer's USVI residency. It is undisputed that the IRS exercises its authority over the all Forms 1040 filed with the USVI under Section 932(c)(2) and IRS Instructions. But in the Tax Court proceedings in this case, it pretended that these returns are akin to

3. The IRS set forth the $75,000 rule in Notice 2007-19, I.R.B. 2007-11 in response to concerns from Congress that IRS was depriving USVI taxpayers of a statute of limitations. Congressional representatives promptly warned that a $75,000 threshold had "dubious legal basis." In response, IRS enacted Treas. Reg. 1.932-1(c)(2)(ii), which provides a statute of limitations to *all* USVI taxpayers, regardless of income. However, that Regulation was not made retroactive, and as set forth below, is invalid under the Eighth Circuit's opinion in this case.

returns filed in a foreign country.[4] The IRS relied on its age-old trick of claiming that, because its examination determined that a different return was required to be filed, it was unhinged from the assessment restraints imposed by Section 6501(a). This Court has long ago prevented the IRS from accomplishing this ruse in situations where the return that was filed contained sufficient information for the IRS to accomplish its duties.

C. The Coffeys' Tax Returns and Proceedings Below

Judith and James Coffey timely filed their 2003 and 2004 Forms 1040 with the VIBIR pursuant to Section 932(c)(2), which requires that *bona fide* residents of the Virgin Islands "shall file an income tax return for the taxable year with the Virgin Islands." Their returns – like all Federal Forms 1040 – reported the Coffeys' worldwide income and deduction items. The returns reflected their home address in St. Croix, USVI, and claimed a USVI economic development credit on Line 52 (2003) and Line 54 (2004) with respect to their Virgin Islands sourced income.

The VIBIR processed the Coffeys' returns, in accordance with Section 932(c). In addition, under protocols established by the Tax Implementation Agreement executed by the IRS and the VIBIR in 1987, the VIBIR also sent copies of the relevant portions of the Forms 1040 and specified attachments to the IRS's Philadelphia Service Center so that the IRS could allocate the Coffey's tax prepayments that it held with respect to those returns between the IRS and VIBIR and refund any

4. The IRS has since admitted that the returns filed in this case are Federal returns, and that it was authorized to access them at VIBIR, classify them for audit at VIBIR, and audit them. IRS thereby abandons its argument that they are foreign returns.

excess to the Coffeys, pursuant to Section 7654. The IRS processed the copies of the Coffey's 2003 and 2004 returns with the designation "Tax return filed – USVI return" on March 14, 2005, and March 27, 2006, respectively. Appendix F at pages 58a-59a.

The IRS initiated examinations of the Coffey's 2003 and 2004 returns on August 4, 2005, and March 25, 2006, respectively, within the three-year period of limitations imposed under Section 6501(a). Upon completion of its examination, the agency challenged two positions taken on the returns: (1) Judith Coffey's USVI residency and (2) the income and credit relating to the USVI Economic Development Program. But the IRS made those determinations in Notices of Deficiency that were not issued until September 28, 2009 – *after* the three-year period of limitations under Section 6501(a) had expired.

The Coffeys timely petitioned the United States Tax Court to challenge the IRS's determinations and subsequently filed a Motion for Summary Judgment on the statute of limitations issue. The Government of the USVI intervened on the Coffeys' behalf. For purposes of summary judgment, the Tax Court assumed that (1) Judith Coffey[5] would be unable to prove USVI residency and that, as a consequence, the Section 932(c)(2) returns she filed did not satisfy all of the requirements of Section 932(c)(4); and (2) to start the limitations period, those Section 932(c)(2) returns need only enable the IRS to

5. The residency determination in this case focuses on Mrs. Coffey as the spouse with the greater income. Pursuant to Section 932(d), "[i]n the case of a joint return, this section shall be applied on the basis of the residence of the spouse who has the greater adjusted gross income (determined without regard to community property laws) for the taxable year."

compute the tax liability the Coffeys would owe "if in fact they turn out not to be *bona fide* VI residents." Appendix F at page 86a, n.22.

In light of those assumptions, the Coffeys' position is that the federal returns they filed with the VIBIR pursuant to Section 932(c)(2) and the applicable IRS instructions began the statute of limitations on assessment – even if IRS later successfully challenged their assertion of USVI residency. A plurality of Tax Court judges—eight of the sixteen who heard the case—filed a concurring opinion agreeing with the Coffeys' position, relying heavily on this Court's decisions in *Germantown Trust* and *Zellerbach* for the proposition that a return is sufficient to trigger the statute of limitations if it "evinces an honest and genuine endeavor to satisfy the law," even if the positions it takes are ultimately determined to be incorrect.

The lead opinion, joined by only five judges, held that the statute of limitations on assessment began when a copy of the relevant portions of Coffeys' returns were sent to the IRS Philadelphia Service Center. The lead opinion was premised upon the IRS counsel's concession at oral argument that Section 6501(a) would be satisfied if the Coffeys had filed returns with IRS containing all zeros. Appendix F at page 90a. Four judges dissented.

The IRS filed a timely appeal, and the Eighth Circuit reversed. The Eighth Circuit held that, because of the assumption required for summary judgment that Judith Coffey was not a USVI resident, the returns the Coffeys filed with the VIBIR "are not returns filed with the IRS" as required under Section 932(a)(2) and as such, were not "an honest and genuine attempt to satisfy the tax law." Appendix A at page 12a. Thus, the Eighth Circuit held that the statute of limitations on assessment had not yet begun, and the IRS's Notices of Deficiency were timely. It based its holding on the following erroneous legal and factual premises:

(1) The Coffeys attempted to file a Section 932(a)(2) return (for non-USVI residents) in the wrong place (with the VIBIR rather than the IRS).

(2) The statute of limitations for assessment cannot start for Section 932(c)(2) filers unless and until the IRS acquiesces with the taxpayer's *bona fide* USVI residency.

(3) Because of the assumption for summary judgment purposes that Judith Coffey was not a USVI resident, the returns filed with the VIBIR were a nullity for Federal income tax purposes, regardless of whether the Forms 1040 "show[ ] the facts on which liability could be predicated." *Commissioner v. Lane-Wells Co.*, 321 U.S. 219, 223 (1944).

REASONS FOR GRANTING THE PETITION

The Eighth Circuit's decision conflicts with binding precedent of this Court in *Germantown Trust*, as well as persuasive authority from other Circuits, which hold that the filing of a return on the incorrect Form begins the statute of limitations on assessment if the return that was filed has sufficient information from which the IRS can calculate the correct tax liability on the return that the IRS asserts should have been filed. The decision also has catastrophic consequences for USVI taxpayers—

consequences that are inconsistent with Congress's design for the USVI tax regime.

A. The Eighth Circuit Opinion is in direct conflict with this Court's decision in *Germantown Trust*.

The Eighth Circuit's decision squarely contradicts this Court's decision in *Germantown Trust*, 309 U.S. 304. There, Germantown Trust filed a Form 1041 (U.S. Income Tax Return for Estates and Trusts) with the IRS office for trust return filers. *Id.* at 305. Upon examination, the IRS determined that the taxpayer was a corporation and should have filed a Form 1120 (U.S. Corporation Income Tax Return). *Id.* at 305-06. The IRS claimed that limitations period had not commenced because Germantown Trust failed to file the required corporate return with the correct individual – the IRS office for corporate return filers. *Id.* at 307. This Court disagreed, finding that the fiduciary return filed by Germantown Trust –

> which discloses all of the data from which the tax [imposed upon a corporation] can be computed [cannot] be deemed no return. … It cannot be said that the petitioner, whether treated as a corporation or not, made no return of the tax imposed by the statute. Its return may have been incomplete in that it failed to compute a tax, but this defect falls short of rendering it no return whatever. [6]

Id. at 309-10.

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6. Sections 275 and 276 of the Revenue Act of 1932 had no good faith exception similar to that eventually provided under Section 6501(g)(1) which codified this Court's decision in *Germantown Trust* for certain income tax returns of corporations.

In this case, the IRS argued – and the Eighth Circuit found – that because the Coffeys conceded, for summary judgment purposes only, that they would not prevail at trial with respect to their assertion of *bona fide* USVI residency, that the *only* return that would have started the Coffeys' statute of limitations is a return filed pursuant to Section 932(a)(2) (return for U.S. residents with USVI sourced income). Appendix A at 11a-12a.

The Eighth Circuit attempts to circumvent *Germantown Trust* by claiming that the Coffeys failed to file a return for non-USVI residents with the IRS: "As a prerequisite, however, an honest and genuine return must be filed with the correct individual…. A filing with the USVI is not automatically a filing with the IRS." Appendix A at page 10a-11a. While the IRS and the VIBIR are indeed two separate taxing authorities, Section 932 coordinates the income taxes and the required filings with each and actually treats the United States and the Virgin Islands as including each other as it relates to the taxes imposed under Chapter 1 of Title 26. *See*, Sections 932(a)(3) and 932(c)(3). As a result, a filing with the VIBIR cannot be dismissed as if it were a filing with a foreign country.

There is no dispute that the Coffeys did not file a Section 932(a)(2) return. Likewise, there was also no dispute that Germantown Trust had not filed a Form 1120. But, both the Coffeys and Germantown Trust did file the return required to be filed under the Internal Revenue Code for the position taken on the return – i.e., as a USVI resident and as a trust, respectively. But, both of these returns were filed with the "correct individual" for receiving that return – i.e., the VIBIR and IRS office for trust return filers, respectively. The fact that Congress required the Coffeys to file their return with *only* the VIBIR, and not the IRS, does not mean that these returns were not filed with the "correct individual."

The Coffeys could not have filed both a Section 932(c)(2) return and a Section 932(a)(2) return. Likewise, Germantown Trust could not have filed both a Form 1041 and Form 1120. Each return takes a different filing position, calculates a different tax and is required to be filed with a different individual so that it may be properly processed. The IRS had the authority, responsibility and ability to examine these returns to determine if the positions taken on the returns were correct and, if not, to determine the correct tax liability. However, Congress provided that such assessments must be timely made. In both cases, the IRS was untimely. The Eighth Circuit cannot do an end run around *Germantown Trust* by finding that the return required to be filed was filed with some foreign taxing authority rather than with the office directed under federal published guidance.

The Eighth Circuit further misapplies *Germantown Trust*. It ignores that a Section 932(c)(2) return is a Federal return filed pursuant to the Internal Revenue Code and it is *Congress* who mandates that Section 932(c) returns to be filed with the USVI. It is not a "territorial" or "foreign" return.[7] Indeed, this Court's holding would

7. While the Eighth Circuit cites 33 V.I.C. § 681(i) to make the return appear to be a "territorial return," the subsection it cites to as support for its conclusion did not exist until 2020 – nearly two decades after the years at issue in this case. Appendix A at page 12(a). Likewise, if the Virgin Islands was truly akin to a foreign country, then Section 932(c)(2) – which directs USVI residents to file their federal income tax returns in the Virgin Islands – is

have been precisely the same if *Germantown Trust* were, as here, a summary judgment case. The fact that *Germantown Trust* would have, for summary judgment purposes, been presumed to be a corporation that failed to file a Form 1120, would not have changed this Court's conclusion that the return that was filed had sufficient data to commence the limitations period.

There is no dispute that the Forms 1040 filed by the Coffeys contained enough information for the IRS to compute the tax liability at issue. Indeed, except for two items, the Notices of Deficiency mirrored the items reported on the Coffeys' Section 932(c)(2) returns. *See, e.g.*, Judith Coffey's Petition to the United States Tax Court at Exhibit A (1.g.), No. 4720-10 (Feb. 19, 2010). This makes sense. A Section 932(a)(2) return, like a Section 932(c)(2) return, is filed pursuant to the Internal Revenue Code on the same Federal Form 1040. Both returns report a taxpayer's income, deductions and credits, and contain a jurat attesting to the accuracy of the items contained on that return. Where the returns differ is that a Section 932(c)(2) return reports a USVI home address, and, if applicable, an Economic Development Program credit as an "Other Credit" on Line 52 (2003) and Line 54 (2004). There is no special form or "box" to check to claim USVI residency. Congress directs that Section 932(c) returns are filed directly with the VIBIR, while Section 932(a)(2) returns are filed with the IRS's Philadelphia Service Center with a copy sent to the VIBIR. The IRS can – and did here – determine a deficiency in Federal income tax based on the Section 932(c) return. This Court's seminal

invalid, since Congress lacks the authority to require tax filing with foreign countries.

holding in *Germantown Trust* concludes that this is enough to begin the statute of limitations on assessment. The Eighth Circuit is obligated to follow that binding precedent.

Germantown Trust is alive and well. Subsequent cases have also focused, not on whether the return the IRS claims *should have* been filed was filed but, rather, on whether the return that *was filed* contained enough information from which the IRS could compute the correct tax liability. *See*, *e.g.*, *Lane-Well*s, 321 U.S. at 223.

The Eighth Circuit ignored all of this. Instead, it erroneously focused solely on the failure to file a return which could *never* have been filed once the initial return was filed. Germantown Trust could not file both a Form 1041 trust return and a Form 1120 corporate return. Likewise, the Coffeys could not file both a Section 932(c) return and a Section 932(a) return. Indeed, if they had done so, the VIBIR would have received two returns for the same taxpayers for the same year – i.e., a Section 932(c) return reporting and paying taxes solely to the USVI and a copy of a Section 932(a) return allocating a portion of the taxes to the USVI. This Court's holding in *Germantown Trust* is both legally and practically correct. Its precedential holding is applicable and must be applied in this case.

B. The Eighth Circuit's opinion conflicts with decisions of five other Courts of Appeals.

The Eighth Circuit's holding also clashes with the holdings of several circuits. The Second, Sixth, Ninth, Eleventh, and Federal Circuits have recognized that the filing of a return other than the one prescribed by Treasury Regulations can be "the return."[8] *See Law Office of John H. Eggertsen P.C. v. Commissioner*, 800 F.3d 758, 763 (6th Cir. 2015) ("[T]he limitations clock may start in some settings even when the taxpayer fails to file the right return – say the taxpayer filed the same return for another reason, *see Lane-Wells*, 321 U.S. at 222-23, or filed the wrong return but with all of the necessary information, *see Germantown Trust Co. v. Comm'r*, 309 U.S. 304, 308 (1940). A key predicate for this exception is that the return filed must contain 'sufficient data to calculate a tax liability.'"); *Springfield v. United States*, 88 F.3d 750, 752 (9th Cir. 1996) (finding the relevant inquiry for statute of limitations purposes to be "whether the return filed sets forth the facts establishing liability." (citing *Lane-Wells*, 321 U.S. at 223)); *Siben v. Commissioner*, 930 F.2d 1034, 1036 (2d Cir. 1991) (distinguishing *Germantown Trust* by finding that a partnership return did not "furnish information necessary to calculate the individual partner's income tax, such as marital status, exemptions, and income, losses, deductions, or credits derived from sources other than the partnership."); *Neptune Mut. Ass'n, Ltd. of Bermuda v. United States*, 862 F.2d 1546, 1555 (Fed. Cir. 1988) ("Despite the taxpayer error, it is reasonable to expect prompt attempts at assessment….[t]he controlling question is whether the IRS was apprised of adequate

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8. The Eighth Circuit cites to an Eleventh Circuit case, *Commissioner v. Estate of Sanders*, 834 F.3d 1269 (11th Cir. 2016) for the proposition that a return filed with the VIBIR is a foreign return and not a federal return. Appendix A at 11a. The facts as developed in that case did not include a concession by the government that a Section 932(c)(2) ***is*** a federal return required by the Internal Revenue Code. The government made that concession here, yet the Eighth Circuit chose to ignore it.

information from which to compute the taxes owed."); *Atl. Land & Imp. Co. v. United States*, 790 F.2d 853, 858 (11th Cir. 1986) ("Supreme Court precedent demonstrates that substance should prevail over form in this area: a good faith tax return filed on the wrong form may trigger the limitations period.").

Most recently, on December 10, 2020, the Fifth Circuit affirmed this precedent by holding that a "taxpayer is not required to file the precise return prescribed by treasury regulations in order to start the limitations clock. Instead, 'the return' is filed, and the limitations clock begins to tick, when the taxpayer files a return that contains data sufficient (1) to show that the taxpayer is liable for the tax at issue and (2) to calculate the extent of that liability." *Quezada v. IRS (In re Quezada)*, 982 F.3d 931, 935 (5th Cir. 2020). The Fifth Circuit expressly rejected the notion that *Lane-Wells* precluded such a result, and instead found this Court's rationale in *Lane-Wells* to be consistent with that of this Court in *Germantown Trust* – "that the wrong form can be 'the return' so long as the form shows the facts on which liability could be predicated." *Id.*

C. The Eighth Circuit's Opinion Creates Catastrophic Consequence for USVI Taxpayers.

After the Eighth Circuit rendered its December, 2020 opinion in this matter, the Honorable Stacey Plaskett, Delegate to the United States House of Representatives representing the U.S. Virgin Islands, filed an *amicus* brief in support of the Coffeys and Intervenor USVI's requests for rehearing. Brief *Amicus Curiae* of the Hon. Stacey Plaskett, *Coffey v. Commissioner* No. 18-3256 (8th Cir. Apr. 9, 2021). Delegate Plaskett serves as the sole elected representative of the USVI in the United States government. Her *amicus* brief highlights the importance of the Eighth Circuit's decision, as well as the disastrous consequences that it causes USVI taxpayers who file their returns pursuant to Section 932(c)(2) and in accordance with IRS guidance.

Delegate Plaskett warned that the "impact of [the Eighth Circuit's] potential nullification of the millions of tax returns filed in the USVI since 1986 is difficult to overstate." Specifically, she aptly noted that the Eighth Circuit's decision renders every income tax return filed with VIBIR prior to 2006 vulnerable to audit. Moreover,

> in addition to its impact on all returns filed prior to 2006, [the decision] also invalidates 26 C.F.R. §1.932-1(c)(2)(ii), the Treasury regulation that grants all bona fide residents of the USVI the protection of the statute of limitations in §6501(a). Under this Court's ruling, this regulation has been rendered invalid because it conflicts with the statute.

Brief *Amicus Curiae* of the Hon. Stacey Plaskett at 6, *Coffey v. Commissioner* No. 18-3256 (8th Cir. Apr. 9, 2021).

The IRS's response that it is its "*discretionary*" policy, even for "non-filers," to "not initiate tax proceedings over six years after the tax year in question" provides little solace in this regard. Brief of Commissioner-Appellant at 27, *Coffey v. Commissioner*, No. 18-3256 (8th Cir. Apr. 9, 2021) (citing I.R.M. 4.12.1.3) (emphasis added). Intervention of this Court is necessary to ensure that Virgin Islands residents receive the same repose as U.S. mainland residents under the Internal Revenue Code.

D. The Coffeys' Section 932(c)(2) returns trigger Section 6501(a)

The Tax Court's plurality opinion remedies the catastrophic consequences described by Delegate Plaskett, is consistent with the Secretary's Treasury Regulation, and sets forth the correct interpretation of the law both in this case and for all USVI taxpayers. Section 6501(a) gives the IRS three years from the date the return was filed to assess taxes on that return. A filing commences the Section 6501(a) limitations period if (1) the document that the taxpayer submitted was the required return required to be filed under the Internal Revenue Code, and (2) the taxpayer properly filed that return.

The IRS conceded the first element before the Eighth Circuit: "the return that the Coffeys filed with the USVI is a return required to be filed under the Internal Revenue Code." Brief of Commissioner-Appellant at 5, *Coffey v. Commissioner*, No. 18-3256 (8th Cir. Oct. 16, 2020). Their Section 932(c)(2) returns reported their names, USVI address, gross income, deductions, credits, and taxable income. Appendix F at pages 84a-85a. The relevant question is *not* whether this information is substantively correct, but whether the return "evince[d] an honest and genuine endeavor to satisfy the law." *Zellerbach*, 293 U.S. at 180. "The honesty and genuineness of the filer's attempt to satisfy the tax laws should be determined from the face of the form itself." *In re Colsen,* 446 F.3d 836, 840 (8th Cir. 2006). Accordingly, there is no dispute that the Coffeys' Section 932(c)(2) returns are Federal returns.

The second element – proper filing – is a question of whether the taxpayer's mode of filing complied with the prescribed filing requirements. A return is filed when it is transmitted to the office or agent authorized to receive it. Section 6091(b)(4); Treas. Reg. § 1.6091-2. Section 932(c)(2), the IRS's instructions and the Secretary's Treasury Regulations all require "permanent residents of the Virgin Islands" to file that return with the VIBIR in St. Thomas. Section 932(c)(2) returns filed with VIBIR are properly filed under Section 6501(a) and Section 6091(b)(4). *Appleton*, 140 T.C. 273; Appendix F at page 53a.

Whether a return was properly filed is determined based upon the information on its face – right or wrong. *Winnett v. Commissioner*, 96 T.C. 802 (T.C. 1991). The Coffeys' Section 932(c)(2) returns report their "Home address" to be in the USVI. Appendix F at page 53a. The IRS's Instructions to Form 1040 instruct permanent USVI residents to file their returns with the VIBIR. Based on the information on the returns' face, the Coffeys properly filed them with VIBIR. Where a taxpayer properly files her return, she has satisfied all of her duties to trigger the statute of limitations period. Section 6501(a).

The IRS has many tools at its disposal to examine a filed return, but must use them within the prescribed limitations period. The IRS exercised its authority here and determined that there was a tax liability due to the United States. What's at issue is whether any assessment is precluded under Section 6501(a). The same sequence of events occurred in *Appleton*, 140 T.C. 273. In fact, Judith Coffey and Arthur Appleton were partners in the same approved USVI Economic Development Program entity, Stonetree Partnership in Christiansted, and were neighbors on St. Croix. They both filed Section 932(c)(2) returns for the same years as USVI residents. The

IRS examined the returns that both Mrs. Coffey and Mr. Appleton filed with the VIBIR and determined, in separate audits, that Mr. Appleton was a USVI resident and that Mrs. Coffey wasn't.[9]

The Eighth Circuit's revised decision acknowledges that the Section 932(c)(2) returns filed by Mr. Appleton starts the statute of limitations but that the Section 932(c)(2) returns filed by Mrs. Coffey do not *unless and until* she can prove to the IRS's (or the Tax Court's) satisfaction that she was a *bona fide* USVI resident. But the IRS's determination of a residency error on a return filed under the requirements of the Internal Revenue Code cannot disenfranchise the taxpayer from the protections afforded to all taxpayers filing returns under the Internal Revenue Code that Congress provided in Section 6501(a).

The Tax Court's plurality opinion correctly allows the IRS to exercise its authority over filed Section 932(c)(2) returns, but balances that authority with the need for repose for USVI taxpayers by restricting the IRS's assessment authority to be within the bounds of the statute of limitations set forth by Congress.

9. The IRS determined that this difference didn't matter and that it was unconstrained by Section 6501(a) in both cases because the returns were not filed with the IRS. Mr. Appleton petitioned the U.S. Tax Court, which determined that the IRS's position was incorrect. The IRS never challenged this holding and now agrees that Mr. Appleton met his Federal filing obligation. Brief of Commissioner-Appellant at 27, *Coffey v. Commissioner*, No. 18-3256 (8th Cir. Jan. 4, 2019) (citing *Appleton*, 140 T.C. 273).

CONCLUSION

The Coffeys filed their Section 932(c)(2) returns in satisfaction of their Federal filing obligations. There is nothing in the Internal Revenue Code which states that the failure to satisfy the requirements of Section 932(c)(4) eliminates or otherwise nullifies the Section 932(c)(2) return for purposes of Section 6501(a). And, just as the Court held in *Germantown Trust*, 309 U.S. 304, the mere fact that the IRS determined upon examination that a different return should have been filed in order to assess the correct tax liability will not eliminate the provisions of Section 6501(a) when the return that was filed contains enough information for the IRS to calculate that liability.

The Eighth Circuit's decision treats the Coffeys' Section 932(c)(2) returns as nullities, and in doing so not only contradicts the jurisprudence of this Court and the Secretary's Treasury Regulation, but also eliminates repose for *all* USVI taxpayers. This Court should grant the petition and reverse the decision of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, FILED FEBRUARY 12, 2021

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 18-3256

JUDITH S. COFFEY,

Appellee,

GOVERNMENT OF THE UNITED STATES VIRGIN ISLANDS, (“V.I. GOVERNMENT”),

Intervenor-Appellee,

v.

COMMISSIONER OF INTERNAL REVENUE,

Appellant;

No. 18-3259

ESTATE OF JAMES COFFEY,
JUDITH COFFEY EXECUTRIX,

Appellee,

v.

COMMISSIONER OF INTERNAL REVENUE,

Appellant.

February 10, 2021, Case Resubmitted
February 12, 2021, Filed

Appeal from The United States Tax Court.

Before SMITH, Chief Judge, BENTON and KOBES, Circuit Judges.

BENTON, Circuit Judge.

The Commissioner of Internal Revenue determined that because Judith S. Coffey was not a bona fide resident of the United States Virgin Islands (USVI), she and James L. Coffey owed federal income tax for the 2003 and 2004 tax years. The Coffeys invoked the three-year statute of limitations in 26 U.S.C. § 6501(a). The USVI intervened. *See Coffey v. Comm'r,* 663 F.3d 947 (8th Cir. 2011). The Tax Court granted the Coffeys' motion for summary judgment. The IRS appeals. Having jurisdiction under 26 U.S.C. § 7482(a)(1), this court reverses and remands.[1]

1. This opinion supersedes the opinion issued on December 15, 2020.

I.

The United States and the USVI are separate taxing entities. *Id.* at 949. The USVI "administers a 'mirror code' of the Internal Revenue Code that substitutes 'Virgin Islands' for the 'United States.'" *Id.*, citing 26 U.S.C. §§ 932(c)(2), 7654(a); and 48 U.S.C. § 1397.

Under the USVI's Economic Development Program, bona fide USVI residents owe only ten percent of the income tax on their "income derived from sources within the Virgin Islands or income effectively connected with the conduct of a trade or business within the Virgin Islands." 26 U.S.C. § 934(b)(1); 29 V.I.C. § 713b(b), (e)(1)(A).

Taxpayers with USVI-related income have different reporting requirements depending on their residency. A bona fide USVI resident "shall file an income tax return . . . with the Virgin Islands." § 932(c)(2), (c)(4). In contrast, any other taxpayer with USVI-related income "shall file his income tax return . . . with both the United States and the Virgin Islands." § 932(a)(2).

Generally, the IRS must assess taxes "within 3 years after the return was filed . . . ." § 6501(a). "Return" means "the return required to be filed by the taxpayer . . . ." *Id.* "In the case of failure to file a return," there is no time limit for IRS assessment. § 6501(c)(3).

The Coffeys filed only USVI returns, claiming Judith was a bona fide USVI resident for both 2003 and 2004. Their returns consisted of completed Form 1040s, their

USVI and federal W-2s, and numerous other schedules and forms. The returns claimed the EDP credit for both years.

The Coffeys did not file the returns with the IRS. However, for each year, the USVI's Bureau of Internal Revenue (VIBIR) sent the IRS the first two pages of their returns and their USVI and federal W-2s about five months after receiving these documents. The VIBIR sent these documents to the IRS so the Coffeys' prepayments to the IRS could be paid to the USVI, with any overpayment refunded to the Coffeys. *See* § 7654(a) (taxes collected by the IRS from bona fide USVI residents are "covered into the Treasury" of the USVI).

The IRS audited these documents. *See Coffey,* 663 F.3d at 949. It issued notices of deficiency to the Coffeys in 2009, more than three years after receiving the documents. According to the IRS, Judith was never a bona fide USVI resident and the Coffeys could not claim the EDP credit. The Coffeys asserted the three-year statute of limitations in section 6501(a) as a defense. The Tax Court granted their motion for summary judgment, holding that the statute of limitations began when the IRS received the documents from the VIBIR. *Hulett v. Comm'r,* 150 T.C. 60, 97 (2018). A concurring opinion stated that the statute of limitations began when the Coffeys filed their USVI returns with the VIBIR. *Id.* at 98. A dissenting opinion believed that neither the Coffeys or the VIBIR filed anything with the IRS. *Id.* at 104.

II.

This court reviews de novo the Tax Court's grant of summary judgment. *Nestle Purina Petcare Co. v. Comm'r,* 594 F.3d 968, 970 (8th Cir. 2010). Summary judgment is appropriate if "there are no issues of material fact, and the moving party is entitled to a judgment as a matter of law." *Bearden v. Int'l Paper Co.,* 529 F.3d 828, 831 (8th Cir. 2008), *citing* Fed. R. Civ. P. 56(c).

The Coffeys moved for summary judgment assuming as true that they were USVI nonresidents. The Tax Court assumed on summary judgment that Judith was a USVI nonresident. *Hulett,* 150 T.C. at 61, 78-79. *See generally Vento v. Dir. of Virgin Islands Bureau of Internal Revenue,* 715 F.3d 455, 466-68, 58 V.I. 753 (3d Cir. 2013) (listing factors to determine USVI residency).

Summary judgment may be appropriate where the parties dispute facts, so long as the court assumes as true the facts alleged by the nonmoving party for the purposes of the motion. *See Eichenwald v. Small,* 321 F.3d 733, 736 n.2 (8th Cir. 2003); *Britton v. City of Poplar Bluff,* 244 F.3d 994, 996 (8th Cir. 2001); *Summers v. Baptist Med. Ctr. Arkadelphia,* 91 F.3d 1132, 1138 (8th Cir. 1996) (en banc). *Cf. Jones v. Coonce,* 7 F.3d 1359, 1362 (8th Cir. 1993) (in qualified immunity cases, this court can "decide the essentially legal question of whether the acts [alleged by plaintiffs] violated clearly established law"). For the purposes of this appeal, Judith's USVI non-residency is acknowledged and is not a disputed issue of material fact.

III.

The Internal Revenue Code states that a USVI nonresident must "*file*" their "*return*" with "*both* the United States and the Virgin Islands." § 932(a)(2) (emphasis added). The Coffeys are USVI nonresidents for the purposes of this appeal. They did not file their return with both the IRS and the VIBIR. *Hulett,* 150 T.C. at 65.

There is no time limit for IRS assessment where the taxpayer fails to "file" a return. § 6501(c)(3). *See Kaplan v. Comm'r,* 795 F.3d 808, 812 (8th Cir. 2015) (stating that the statute of limitations does not begin until the taxpayer files their return). In determining whether the statute of limitations bars the IRS's claims, this court must give the statute of limitations a "strict construction" in favor of the IRS. *Badaracco v. Comm'r,* 464 U.S. 386, 391, 104 S. Ct. 756, 78 L. Ed. 2d 549 (1984) (Statutes of limitations barring the rights of the U.S. Government "must receive a strict construction in favor of the Government.").

The Coffeys propose two ways that they met the USVI nonresident filing requirements, beginning the three-year statute of limitations in section 6501(a) and barring the IRS's claims. First, they argue that the VIBIR sending some of their tax documents to the IRS was a filing. Second, they argue that their returns filed with the VIBIR alone met the USVI nonresident filing requirements.

A.

The Coffeys argue that the documents sent by the VIBIR to the IRS were "filed" under sections 932(a)(2) and 6501(a). The Tax Court agreed, concluding that the documents were filed because "the first two pages of [the Coffeys' USVI returns] somehow (and without their knowledge or explicit approval) ended up at the Philadelphia office of the IRS . . . ." *Hulett,* 150 T.C. at 97.

The Internal Revenue Code and the IRS regulations do not define the terms "file" or "filed." *See Allnutt v. Comm'r,* 523 F.3d 406, 412 (4th Cir. 2008). A taxpayer must show "meticulous compliance" with all filing requirements in the Internal Revenue Code or IRS regulations. *Lucas v. Pilliod Lumber Co.,* 281 U.S. 245, 249, 50 S. Ct. 297, 74 L. Ed. 829, 1930-2 C.B. 396 (1930) (requiring "meticulous compliance" by taxpayers with all statutory conditions to begin the statute of limitations); *Commissioner v. Lane-Wells Co.,* 321 U.S. 219, 223, 64 S. Ct. 511, 88 L. Ed. 684 (1944) (requiring compliance with IRS regulations to begin the statute of limitations). Returns are "filed" if "delivered, in the appropriate form, to the specific individual or individuals identified in the Code or Regulations." *Comm'r v. Estate of Sanders,* 834 F.3d 1269, 1274 (11th Cir. 2016), *quoting Allnutt,* 523 F.3d at 413. *Cf. Lane-Wells,* 321 U.S. at 223 (The purpose of filing requirements "is not alone to get tax information in some form but also to get it with such uniformity, completeness, and arrangement that the physical task of handling and verifying returns may be readily accomplished.").

In a similar case, the taxpayer's return did not report some taxable income that must be reported. *Heckman v. Comm'r*, 788 F.3d 845, 846 (8th Cir. 2015). The IRS learned of it during an unrelated audit of the taxpayer. *Id.* The IRS issued a deficiency notice over three years after the taxpayer filed the return. *Id.* The taxpayer invoked the three-year statute of limitations in section 6501(a), based on the IRS's "actual knowledge" of the unreported income within three years after the taxpayer filed the return. *Id.* at 847.

This court held that the IRS's actual knowledge of the income did not begin the three-year statute of limitations. *Id.* at 847-48. *See Nat'l Contracting Co. v. Comm'r*, 105 F.2d 488, 491 (8th Cir. 1939) (failure to file a return with the IRS "did not set the statute of limitations in operation," even where the IRS "examined the [taxpayer's] books and made a report" regarding the tax liability). Rather, the three-year statute of limitations begins only after the taxpayer's "return was filed." *Heckman*, 788 F.3d at 847, *quoting* § 6501(a). The IRS's actual knowledge is not a filing. *Id.* at 848 ("The Code provides only two statutes of limitations: three years or six years *after the return was filed*, not three years after the acquisition of actual knowledge.") (emphasis in original). Without a filing, the statute of limitations in section 6501(a) does not begin when the IRS received the information.

Heckman defeats the Coffeys' argument that the VIBIR sending the documents to the IRS began the statute of limitations. The IRS received actual knowledge of the Coffeys' information, not a filing. It is undisputed that the Coffeys did not intend to file tax returns with the IRS, but only with the VIBIR. *Hulett,* 150 T.C. at 80. The Coffeys did not meticulously comply with federal filing requirements for USVI nonresidents.

Similarly, the VIBIR did not file returns when it sent the Coffeys' documents to the IRS. Generally, taxpayers themselves must file their return with the IRS. *See* § 6501(a) (defining a "return" as the return required to be "filed by the taxpayer"). In some instances, an authorized third-party may file on behalf of the taxpayer. *See* 26 C.F.R. § 1.6012-1(a)(5). *Cf. Deaton Oil Co., LLC v. United States,* 904 F.3d 634, 641 (8th Cir. 2018) (An agent's failure to file a return "does not constitute reasonable cause for the principal's failure to comply with its tax obligations . . . ."), *citing United States v. Boyle,* 469 U.S. 241, 105 S. Ct. 687, 83 L. Ed. 2d 622 (1985). The Coffeys, however, never authorized the VIBIR to file their documents with the IRS. *Hulett,* 150 T.C. at 104 (dissenting opinion).

That the IRS actually received the documents, processed and audited them, and issued deficiency notices is irrelevant for statute of limitations purposes. *See Heckman,* 788 F.3d at 847-48. The IRS's actual knowledge did not create a filing. The statute of limitations in section 6501(a) begins only when a return is filed. Because the Coffeys did not meticulously comply with requirements to file with the IRS, the statute of limitations never began.

B.

The Coffeys, joined by the USVI, alternatively argue that filing solely with the VIBIR began the three-year statute of limitations in section 6501(a). *See Hulett,* 150 T.C. at 98. They read section 6501(a) as providing a repose to taxpayers who file an honest and genuine return, even if mistaken about residency. *See id.*

The Coffeys argue that for imperfect filings, the "honesty and genuineness of the filer's attempt to satisfy the tax laws should be determined from the face of the form itself, not from the filer's delinquency or the reasons for it." *In re Colsen,* 446 F.3d 836, 840 (8th Cir. 2006). The taxpayer's "subjective intent is irrelevant" in determining what is an honest and genuine return. *Id. See generally Zellerbach Paper Co. v. Helvering,* 293 U.S. 172, 180, 55 S. Ct. 127, 79 L. Ed. 264, 1934-2 C.B. 341 (1934) (holding, for a return filed with the IRS: "Perfect accuracy or completeness is not necessary to rescue a return from nullity, if it purports to be a return, is sworn to as such, and evinces an honest and genuine endeavor to satisfy the law.") (citation omitted); *Germantown Tr. Co. v. Comm'r,* 309 U.S. 304, 310, 60 S. Ct. 566, 84 L. Ed. 770, 1940-1 C.B. 178 (1940) (same, for a return filed with the IRS).

As a prerequisite, however, an honest and genuine return must be filed with the correct individual. *See Sanders,* 834 F.3d at 1277. In *Colsen*, this court determined "whether a document is a return," not whether it was filed. *Colsen,* 446 F.3d at 839, *citing Germantown,* 309 U.S. at 309; *Zellerbach,* 293 U.S. at 180; *and Beard v. Comm'r,* 82 T.C. 766, 774-79 (1984), *aff'd per curiam,* 793 F.2d 139 (6th Cir. 1986). *Colsen* stands for the proposition that a determination of what is an honest and genuine return "does not require inquiry into the circumstances under which a document was filed." *Id.* at 840. The honesty and genuineness of the Coffeys' returns does not affect whether they were filed.

The Coffeys argue at length that, because the IRS has the authority to audit, assess, and regularly receive returns filed with the VIBIR, USVI returns alone satisfy the nonresident filing requirements. The Coffeys believe that the United States and the USVI are not separate taxing entities. *See Hulett,* 150 T.C. at 103, *citing Puerto Rico v. Sánchez Valle,* 136 S. Ct. 1863, 1876, 195 L. Ed. 2d 179 (2016) (holding that the United States and Puerto Rico "are not separate sovereigns" for double jeopardy purposes, but not addressing whether they are separate taxing entities). To the contrary, "the USVI is a separate taxing entity" from the United States. *Coffey,* 663 F.3d at 949. A filing with the USVI is not automatically a filing with the IRS. *See Sanders,* 834 F.3d at 1278-79; *Gangi v. United States,* 453 Fed. Appx. 255, 257 n.1 (3d Cir. 2011); *Condor Int'l, Inc. v. Comm'r,* 78 F.3d 1355, 1358-59 (9th Cir. 1996); *Huff v. Comm'r,* 138 T.C. 258, 267 (2012).

The Coffeys claim that they made an honest and genuine attempt to satisfy the tax laws. Under the Internal Revenue Code, a taxpayer *either* "is a bona fide resident of the Virgin Islands," *or* "is a citizen or resident of the United States (other than a bona fide resident of the Virgin Islands) . . . ." § 932(c)(1)(A), (a)(1)(A)(i). The

Internal Revenue Code does not create an exception for a taxpayer's mistaken position about residency. *See Sanders,* 834 F.3d at 1277. *Cf. Heckman,* 788 F.3d at 849 (there is "no exception for omissions caused by a taxpayer's mistaken tax position" in section 6501(e)(1)(A)). As a USVI nonresident (for the purposes of this appeal), Judith's position that she was a USVI resident is irrelevant. A failure to file a return with the correct individual, even if done in a mistake of residency, does not create a "filed" return under section 6501(a). *See Sanders,* 834 F.3d at 1279 ("The three-year statute of limitations does not run when a taxpayer who is not a bona fide USVI resident files a return with the VIBIR, but not the IRS, regardless of his subjective good faith beliefs as to his residency.").

The Coffeys stress that the returns they filed with the VIBIR are identical to federal tax forms. *See Appleton v. Comm'r,* 140 T.C. 273, 283 (2013) (stating that the Form 1040 that a bona fide USVI resident files with the VIBIR is the same Form 1040 that individuals file with the IRS). Although the VIBIR uses the same forms, returns filed with the VIBIR—for a USVI nonresident, as in this case—are not returns filed with the IRS. *See* 33 V.I.C. § 681(i). Without a filing, the documents are not an honest and genuine attempt to satisfy the tax law and are not filed returns. The Coffeys did not file returns with the IRS, but only returns with the VIBIR.

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The judgment of the Tax Court is reversed, and the case remanded for proceedings consistent with this opinion.

APPENDIX B — ORDER OF THE UNITED STATES TAX COURT, FILED JULY 24, 2018

UNITED STATES TAX COURT
WASHINGTON, DC 20217

Docket No. 4720-10

JUDITH S. COFFEY, PETITIONER & THE GOVERNMENT OF THE UNITED STATES VIRGIN ISLANDS, INTERVENOR,

Petitioner(s),

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ORDER

This case was previously consolidated with others that had been on the Court's November 14,2011 trial calendar for Buffalo, New York. In 2013 we denied summary judgment motions from two of the Coffeys and the United States Virgin Islands (USVI), which had intervened. We later granted those parties' motions for reconsideration under Rule 161. The cases then went to conference where the entire Court reviewed them. A majority voted to grant the motion for summary judgment. On January 29, 2018, the Court issued its opinion, severed this case from the others, and dismissed it for lack of jurisdiction.

The Commissioner now moves for reconsideration under Rule 161, arguing that we committed two substantial errors.[1] First, he says we shouldn't have held that he conceded that the third-party filing in this case did not affect its outcome. *See Coffey v. Commissioner,* 150 T.C. _,_(slip op. at 30-31) (Jan. 29, 2018). Second, he says we shouldn't have held that it was undisputed that the IRS processed the returns the Coffeys filed with the Virgin Islands Bureau of Internal Revenue (VIBIR) once those returns found their way to the Philadelphia service IRS's center.

We discuss each.

I. Third-Party Filing

A. Did the Commissioner Make a Concession?

The Commissioner says he never conceded that a third party who isn't the taxpayer's agent can "file" the taxpayer's return. That's relevant here because VIBIR, and not the Coffeys, sent the Coffeys' returns to the IRS.

Let's look at what the Commissioner said.

During the October 2013 hearing on the Coffeys' motion for reconsideration we posed a hypothetical: A taxpayer on his way to mail his return to the IRS gets

1. We apply the standards of the district courts under Federal Rule of Civil Procedure 60(b) to motions to reconsider. *See Bedrosian v. Commissioner,* 144 T.C. 152, 156 (2015).

mugged. He drops the return, but a Good Samaritan picks it up and mails it to the IRS, who receives it. Tr. at 148. The Commissioner's counsel's response was simple: "it's filed." Tr. at 149. Later during the hearing the Commissioner's counsel said that the return the IRS received from VIBIR didn't count because the Coffeys hadn't sent it, but we reminded him of his answer to our hypothetical. Tr. at 162-64. He then asked for an opportunity to further consider the hypothetical, and said he would produce a written response to it. Tr. at 164.

He never did. Instead, in his January 9, 2014 memorandum in support of his opposition to the motions for reconsideration he wrote, "[a] taxpayer's subjective intent has no role to play in determining whether a valid return has been *filed";* cited *Allnutt v. Commissioner,* 523 F.3d 406,413 n.5 (4th Cir. 2008), *aff'g* 84 T.C.M. 669 (2002); and went on to say that "[o]n the other hand, it [i.e., subjective intent] does have a role to play in determining whether a filed document constitutes a valid *return.*" Mem. in Supp. ofResp't's Op. to the Mots. for Recons. Filed by Pet's and Intervener at 6 n.3 (emphasis added). We therefore said that the Commissioner didn't argue that there was a third-party filing problem and found that he conceded that a taxpayer's intent was not relevant to whether a return was "filed". *Coffey,* 150 T.C. at_ (slip op. at 30-31).

The Commissioner now claims that when he said intent doesn't matter he didn't mean to concede that a return can be "filed" by a third party. But that's exactly what he did when his counsel responded to our Good

Samaritan hypothetical, and he didn't change his position in his subsequent filings. *See* Tr. at 148-49. Under these circumstances, it wasn't substantial error to say the Commissioner didn't argue that there was a third-party filing problem.

B. Was the Concession a Misstatement of Law?

1. Third-Party Filing

Next the Commissioner says that even if he did concede that a third party can "file" a return, we should ignore him because that concession would be contrary to law. But the Code and the regulations don't require a taxpayer to intentionally file his return himself -- they just say returns "shall be" filed in particular places by particular times. *See, e.g.,* I.R.C. §§ 6072(a) and 6091(b); 26 C.F.R. §§ 1.6091-2(a)(1) and 1.6091-3.

The dissent, *see Coffey,* 150 T.C. at_ (slip op. at 71) (Marvel, J., dissenting), and the Commissioner, *see* Resp't's Mot. for Recons. at 4, point out that§ 6501(a) --which says that the Commissioner generally must assess tax within three years after a return "was filed"-- defines "return" as "the return required to be filed by the taxpayer." They think this means the taxpayer himself (or his agent) must intentionally do the actual filing. *See Coffey,* 150 T.C. at_(slip op. at 71-72) (Marvel, J., dissenting). But they leave out part of the definition -- it continues with a parenthetical that says a return "does not include a return of any person from whom the taxpayer has received an item of income, gain, loss, or credit." I.R.C. § 6501(a). In other words, § 6501(a) answers the question of *whose* return's filing starts the statute of limitations' running. The answer that section gives is that the statute runs from when the *taxpayer's* return "was filed," not from when any third-party's return was. It doesn't make an intent to file, much less an intent to file in a particular place, part of "filing".

The Commissioner also thinks that *Commissioner v. Estate of Sanders,* 834 F.3d 1269, 1273 (11th Cir. 2016), *vacating and remanding* 144 T.C. 63 (2015), "necessarily decided by implication either that [a] return transmitted [from VIBIR to the IRS is] not a federal tax return or that the transmission [is] not a 'filing.'" Resp't's Mot. for Recons. at 5-6. But the holding there was that "a taxpayer's mere good faith belief regarding his USVI residency is insufficient to cause a return filed with the VIBIR to start the statute of limitations period," *Estate of Sanders,* 834 F.3d at 1275, and the Eleventh Circuit didn't consider what effect VIBIR's transmission of the return to the IRS had on the statute of limitations. We therefore won't read into it a holding by implication, especially in a case appealable to a different circuit.

Allnutt--the case the Commissioner cited after saying "[a] taxpayer's subjective intent has no role to play in determining whether a valid return has been filed" --makes clear that a return can be "filed" by a third party regardless of the taxpayer's intent. There the taxpayer delivered his returns to the IRS's district *counsel* with the intent to file them, but he should've given them to the district *director.*[2] *Allnutt,* 523 F.3d at 408. The district

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counsel later sent them to the district *director*, and the Fourth Circuit held that the date the *director's* office-which was the correct office -- received them was the date the statute of limitations began to run -- meaning that was the day the returns were "filed". *Id.* at 409, 411, 414; *see also* I.R.C. § 6501(a). The court held this even though the taxpayer didn't intend to file his returns with the correct office and a third party -- a different part of the IRS -- that wasn't the taxpayer's agent sent them without the taxpayer's knowledge.[3] *See Allnutt,* 523 F.3d at 408-09.

We reached the same result in *Winnett v. Commissioner,* 96 T.C. 802, 808 (1991), where the taxpayers sent their returns to the wrong service center but that service center forwarded them to the right one. We held that the returns were "filed" when they arrived at the right service center -- even though the first service center necessarily wasn't the taxpayers' agent and the taxpayers didn't intend for their returns to go to the second one. *See id.; see also Coffey,* 150 T.C. at ___ (slip op. at 31).

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somehow made it to the IRS service center in Philadelphia months later. *Allnutt,* 523 F.3d at 409-10.

3. The Commissioner says that in *Allnutt,* 523 F.3d at 413 n.5, the court "declined to opine whether intent was an element of the filing requirements." Resp't's Mot. for Recons. at 4. What the footnote the Commissioner cites really says is that the court declined to opine whether a series of cases we cited in our Memorandum Opinion "can be read as adding an intent element to the listed filing requirements in the Code and Regulations." *Id. Allnutt* itself found an unintended third-party filing to be valid. *See id.* at 413-14.

Because neither the Code, regulations, nor caselaw invalidate unintentional third-party filings, it was not substantial error to accept the Commissioner's concession.

2. Intent

Because the Commissioner is right that "[a] taxpayer's subjective intent has no role to play in determining whether a valid return has been filed," *see* Mem. in Supp. of Resp't's Op. to the Mots. for Recons. Filed by Pet's and Intervenor at 6 n.3, it's hard to see why it would matter who physically "filed" a return. Is the Commissioner's third-party filing argument really an indirect way of saying that subjective intent is necessary for "filing" after all? That is of course what the dissent to our Opinion said. *See Coffey,* 150 T.C. at ___ (slip op. at 71-76) (Marvel, J., dissenting).

Allnutt and *Winnett* necessarily resolved this issue, too. The taxpayers in those cases didn't intentionally send their returns to the correct IRS offices, yet once their returns got to those offices the statute of limitations began to run. *See Allnutt,* 523 F.3d at 409, 411, 414; *Winnett,* 96 T.C. at 808. If the taxpayers had needed to subjectively intend for their returns to go to those particular offices the returns never would've been "filed" and the statute of limitations would never have begun to run. *See* I.R.C. § 6501(a). The taxpayers' intent therefore wasn't material. *See Allnutt,* 523 F.3d at 414; *Winnett,* 86 T.C. at 808.

We can see why this is confusing. After all, "[t]o be a *return* for statute of limitations purposes, [a] document 'must honestly and reasonably be intended as such' by the taxpayer." *Allnutt,* 84 T.C.M. at 673 (quoting *Florsheim Bros. Drygoods Co. v. United States,* 280 U.S. 453, 462 (1930) (filing of IRS form titled "tentative return" to request 45-day extension didn't start statute of limitations; later Form 1120 did)) (emphasis added). And determining whether a document is an honest and reasonable attempt to satisfy the tax law is part of the *Beard* test we used to determine that the Form 1040 VIBIR sent to the IRS was the Coffeys' "return". *See Coffey,* 150 T.C. at __ (slip op. at 45-48); *see also Beard v. Commissioner,* 82 T.C. 766, 777 (1984), *aff'd,* 793 F.2d 139 (6th Cir. 1986).

But whether a document is a "return" and whether it's "filed" are separate questions, and a taxpayer can't benefit from the statute of limitations unless each is answered affirmatively. *See* I.R.C. § 6501(a). The dissent confuses these questions and suggests that because the law requires that a taxpayer must intend that a particular document be his "return", it must also require him to intend a particular action for that return to be "filed". *See Coffey,* 150 T.C. at ___ (slip op. at 75) (Marvel, J., dissenting).

This isn't the first time our Court has conflated these questions. In *Berenbeim v. Commissioner,* 63 T.C.M. 2975, 2979-80, 2983-84 (1992), a wife who didn't know her husband was running a Ponzi scheme signed documents she intended to be joint returns and believed her husband filed them. He didn't. *Id.* at 2979, 2983. Later, she gave copies of the returns to a revenue agent, he filed them without her knowledge, and the Commissioner wanted to hold them against her in her innocent-spouse case. *Id.* at 2979-80, 2983-85. In our Memorandum Opinion, we focused on "whether petitioner wife intended to individually file a return at the time" she gave the copies to the agent and held "that no returns were filed" for the years at issue. *Id.* at 2984-85.

In reaching our holding we relied primarily on two other innocent-spouse cases. The first was *Shea v. Commissioner,* 780 F.2d 561, 567-68 (6th Cir. 1986), *aff'g in part, rev'g in part* 48 T.C.M. 304 (1984), where the Sixth Circuit held that a return a wife didn't sign or help prepare wasn't a joint return. The court considered only whether the wife intended for the document to be a *return* -- it said that "[w]hether a tax return is a joint return is a question of fact and is primarily a question of intent," *id.* at 567 (internal quotations omitted), and found that the taxpayer "did not intend for this particular tax return to be her own," *id.* at 568.

The second innocent-spouse case *Berenbeim* relied on was *Sharwell v. Commissioner,* 419 F.2d 1057, 1059-60 (6th Cir. 1969), *vacating and remanding* 27 T.C.M. 416 (1968), where the Sixth Circuit held that a wife who actively participated in the preparation of a joint return intended it to be her return even though she didn't sign it. The court there also focused on whether the taxpayer intended a particular document to be her return:

> [The taxpayer] contends that the returns were not joint because she did not sign them. We think there is no merit in this position. The

> question of whether a return is joint or not is a factual one. [Citations.] The signature of the wife is only one factor in determining whether the return is joint. It appears that the question is primarily one of intent.

Id. The court didn't even address whether that return was "filed".

Berenbeim didn't distinguish between an intent to file and an intent that a particular document be a return. *See Berenbeim,* 63 T.C.M. at 2984. But in light of its reliance on *Shea* and *Sharwell,* we think its holding only reaches whether a taxpayer intended a particular document to be his return -- which is probably why the Commissioner cited it only after stating that intent "does have a role to play in determining whether a filed document constitutes a valid *return.*" *See* Mem. In Supp. of Resp't's Op. to the Mots. for Recons. Filed by Pet's and Intervenor at 6 n.3 (emphasis added).

The dissent argues that other Memorandum Opinions of ours show that intent is required for "filing", but these are even less compelling than *Berenbeim.* The best for the dissent is our Memorandum Opinion in *Allnutt,* where we said: "[F]iling of a return is established by facts showing proper delivery or mailing of a return with the intent to file it as a return." 84 T.C.M. at 675. But the Fourth Circuit didn't affirm us on that point -- instead, it "decline[d] to opine" whether the cases we cited in support of our assertion actually added "an intent element to the listed filing requirements in the Code." *Allnutt,* 823 F.3d at 413 n.5. The *Allnutt* Memorandum Opinion therefore doesn't mean intent is a requirement of"filing".

The dissent also cites *Friedmann v. Commissioner,* 82 T.C.M. 381, 386 (2001), *aff'd without published opinion,* 80 F. App'x 285 (3d Cir. 2003), where we held that a taxpayer who gave copies of his returns to an IRS revenue agent never "filed" them because he didn't also send them to the correct IRS office. In that Memorandum Opinion we distinguished between the *Beard* test for whether a document is a "return" and the issue of whether a return is "filed". *See id.* at 386. But after reaching our holding, we made the statement the dissent cites: "More over, there is nothing in the record to show that petitioner intended his delivery of those documents to the agent * * * to constitute the filing of his returns"-- and then we cited *Berenbeim. Id.* at 387. That was dicta -- we'd already determined that the returns hadn't been "filed". *Id.* at 386. That phrase also repeated *Berenbeim's* conflation of intent to file and intent for a document to be a return -- which was not supported by the circuit court opinions *Berenbeim* relied on. *See id.* at 387. This dicta also doesn't make intent part of "filing".

The rest of the cases the dissent cites also fail to bolster the Commissioner's motion. In *Espinoza v. Commissioner,* 78 T.C. 412 (1982), the taxpayer initially filed fraudulent returns, but later gave amended nonfraudulent returns to the revenue agent. More than three years passed before the Commissioner issued notices of deficiency. *Id.* at 415. The taxpayer argued that the statute of limitations period began when he gave the nonfraudulent returns to the revenue agent, but we denied his motion for summary judgment because the record didn't show that the returns ever made it to the correct IRS office. *Id.* at 415, 422. We pointed out that the taxpayer never paid the tax his amended returns showed he owed, and then we made the statement the dissent cites: "His failure to pay the additional taxes raises a question as to whether he intended for the amended returns to be filed." *Id.* at 422. This is also dicta and doesn't make intent a requirement for "filing".

Finally, in *Dingman v. Commissioner,* 101 T.C.M. 1562, 1563 (2011), the taxpayer gave delinquent returns and payments to the IRS Criminal Investigation Division (CID), and the IRS cashed the checks and posted the payments to Dingman's transcripts. The Commissioner argued that the returns weren't "filed" because the taxpayer hadn't given them to the right part of the IRS. *Id.* at 1566. We first pointed out that during the years at issue there was no clear guidance on where taxpayers were supposed to send their returns. *Id.* at 1568. Then, citing *Winnett* and *Allnutt,* we said the fact that the IRS processed the returns meant that CID must've forwarded them to the right place, and we held that the returns were "filed" no later than the date the IRS cashed the checks and made the transcripts -- a holding that's consistent with our opinion in the Coffeys' cases. *See id.* at 1570.

In *Dingman* the Commissioner cited *Espinoza, Friedmann,* and our Memorandum Opinion in *Allnutt,* and said those cases "address the taxpayer's intent to file a return." *Id.* at 1569. We dealt with the Commissioner's argument with the statement the dissent quotes: "The record supports a conclusion that petitioner clearly intended to file the returns when his counsel submitted them to CID." *Id.* This statement merely dismissed a line of argument in a case where the IRS had clearly processed the taxpayer's returns -- it didn't create an intent requirement for filing.

The Code, regulations, and caselaw all show that a taxpayer's intent is not relevant to the question of whether his return is "filed". "On the other hand, it does have a role to play in determining whether a filed document constitutes a valid *return.*" Mem. in Supp. of Resp't's Op. to the Mots. for Recons. Filed by Pet's and Intervenor at 6 n.3 (emphasis added). Because this is the law we followed, there was no substantial error.

II. Processing

The Commissioner also says we committed substantial error by finding that "the undisputed facts show that the IRS was able to stamp [the return] received, summarize its contents in its Individual Master File, and open an audit in due course." Resp't's Mot. for Recons. at 6 (quoting *Coffey,* 150 T.C. at ___ (slip op. at 45)). He first says this was error because he told us at oral argument that a computer, rather than a human being, processed the information and coded it as a USVI return. He also says that the computer processed the documents "*as cover-over documents* and not as federal income tax returns." But we fail to see why it matters that a computer processed the information and processed it a certain way -- the point is that the IRS had the information and was able to process it. *See Dingman,* 101 T.C.M. at 1570.

Second, the Commissioner says that VIBIR, not the IRS, stamped the top of the return "U.S. Claim." Resp't's Mot. for Recons. at 6. But when we said the IRS stamped it, we weren't talking about that stamp -- we were talking about the one on the left-hand side of the first page of the Coffeys' return that says "RECEIVED 02082005 IRS - PHILA., PA." *See Coffey,* 150 T.C. at ___ (slip op. at 12-13, 45). In light of this evidence, it wasn't error to find that the IRS's Philadelphia service center received the Coffeys' returns.

Respondent hasn't shown that we committed substantial error. It is therefore

ORDERED that Respondent's February 28, 2018 motion for reconsideration is DENIED.

(Signed) Mark V. Holmes
Judge

Dated: Washington, D.C.
July 24, 2018

APPENDIX C — ORDER AND DECISION OF THE UNITED STATES TAX COURT, DATED JULY 24, 2018

UNITED STATES TAX COURT
WASHINGTON, DC 20217

Docket No. 4720-10

JUDITH S. COFFEY, PETITIONER & THE GOVERNMENT OF THE UNITED STATES VIRGIN ISLANDS, INTERVENOR,

Petitioner(s),

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ORDER AND DECISION

This case was previously consolidated with others that had been on the Court's November 14, 2011 trial calendar for Buffalo, New York. In *Coffey v. Commissioner*, 150 T.C. __ (Jan. 29, 2018), we held that the statute of limitations barred the deficiencies the Commissioner determined. We therefore dismissed the case for lack of jurisdiction. We quickly realized our mistake, and amended our order to clarify that as a result of our dismissal there was no deficiency for 2003 and 2004, pursuant to I.R.C. § 7459(e).

This was still not quite right in the Commissioner's view, and he has moved for us to vacate our order dismissing the case and instead enter one granting the Coffeys' motion for summaryjudgment. He says that would be the proper way to dispose of the case because "the statute of limitations is an affirmative defense, not a jurisdictional bar to suit resulting in a dismissal."

The Commissioner is right. Our court gains jurisdiction in a deficiency case when there's a valid notice of deficiency and a timely petition. I.R.C. §§ 6212(a), 6213(a), 7442; *see also, e.g., GAF Corp. & Subs. v. Commissioner*, 114 T.C. 519, 521 (2000). I.R.C. § 6501(a) says the Commissioner has only three years after a return is filed to *assess* tax, and while a valid notice of deficiency tolls that three-year period, *see* I.R.C. § 6503(a), a notice of deficiency isn't automatically *invalid* if the Commissioner sends it after that period ends, see I.R.C. § 6212(a); *Genesis Oil & Gas, Ltd. v. Commissioner*, 93 T.C. 562, 564 (1989). A late notice therefore doesn't affect our jurisdiction, but the Commissioner also can't *assess* the tax it shows when a statute-of-limitations defense is properly raised. *See* I.R.C. § 6501(a).

The Coffeys properly raised that defense here, and don't care how the case ends except for decisions that show no deficiency. But to make the paperwork less sloppy, it is

ORDERED that respondent's February 28, 2018 motion to vacate order of dismissal for lack of jurisdiction as amended is granted. It is also

ORDERED that the Court's January 29, 2018 order of dismissal and February 6, 2018 amended order of dismissal are vacated. It is also

ORDERED that petitioners' March 19, 2012 motion for summary judgment is granted. It is also

ORDERED and DECIDED that there is no deficiency in income tax, and no additions to tax, due from petitioner for tax years 2003 and 2004.

(Signed) Mark V. Holmes
Judge

Entered: **JUL 24 2018**

APPENDIX D — ORDER OF THE UNITED STATES TAX COURT, DATED JULY 24, 2018

UNITED STATES TAX COURT
WASHINGTON, DC 20217

Docket No. 4949-10.

JAMES L. COFFEY,

Petitioner(s),

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ORDER

This case was previously consolidated with others that had been on the Court's November 14, 2011 trial calendar for Buffalo, New York. In 2013 we denied summary judgment motions from two of the Coffeys and the United States Virgin Islands (USVI), which had intervened. We later granted those parties' motions for reconsideration under Rule 161. The cases then went to conference where the entire Court reviewed them. A majority voted to grant the motion for summary judgment. On January 29, 2018, the Court issued its opinion, severed this case from the others, and dismissed it for lack of jurisdiction.

The Commissioner now moves for reconsideration under Rule 161, arguing that we committed two substantial errors.[1] First, he says we shouldn't have held that he conceded that the third-party filing in this case did not affect its outcome. *See Coffey v. Commissioner*, 150 T.C. __, __ (slip op. at 30-31) (Jan. 29, 2018). Second, he says we shouldn't have held that it was undisputed that the IRS processed the returns the Coffeys filed with the Virgin Islands Bureau of Internal Revenue (VIBIR) once those returns found their way to the IRS's Philadelphia service center.

We discuss each.

I. Third-Party Filing

A. Did the Commissioner Make a Concession?

The Commissioner says he never conceded that a third party who isn't the taxpayer's agent can "file" the taxpayer's return. That's relevant here because VIBIR, and not the Coffeys, sent the Coffeys' returns to the IRS.

Let's look at what the Commissioner said.

During the October 2013 hearing on the Coffeys' motion for reconsideration we posed a hypothetical: A taxpayer on his way to mail his return to the IRS gets

1. We apply the standards of the district courts under Federal Rule of Civil Procedure 60(b) to motions to reconsider. *See Bedrosian v. Commissioner*, 144 T.C. 152, 156 (2015).

mugged. He drops the return, but a Good Samaritan picks it up and mails it to the IRS, who receives it. Tr. at 148. The Commissioner's counsel's response was simple: "it's filed." Tr. at 149. Later during the hearing the Commissioner's counsel said that the return the IRS received from VIBIR didn't count because the Coffeys hadn't sent it, but we reminded him of his answer to our hypothetical. Tr. at 162-64. He then asked for an opportunity to further consider the hypothetical, and said he would produce a written response to it. Tr. at 164.

He never did. Instead, in his January 9, 2014 memorandum in support of his opposition to the motions for reconsideration he wrote, "[a] taxpayer's subjective intent has no role to play in determining whether a valid return has been *filed*"; cited *Allnutt v. Commissioner*, 523 F.3d 406, 413 n.5 (4th Cir. 2008), *aff'g* 84 T.C.M. 669 (2002); and went on to say that "[o]n the other hand, it [i.e., subjective intent] does have a role to play in determining whether a filed document constitutes a valid *return*." Mem. in Supp. of Resp't's Op. to the Mots. for Recons. Filed by Pet's and Intervenor at 6 n.3 (emphasis added). We therefore said that the Commissioner didn't argue that there was a third-party filing problem and found that he conceded that a taxpayer's intent was not relevant to whether a return was "filed". *Coffey*, 150 T.C. at __ (slip op. at 30-31).

The Commissioner now claims that when he said intent doesn't matter he didn't mean to concede that a return can be "filed" by a third party. But that's exactly what he did when his counsel responded to our Good

Samaritan hypothetical, and he didn't change his position in his subsequent filings. *See* Tr. at 148-49. Under these circumstances, it wasn't substantial error to say the Commissioner didn't argue that there was a third-party filing problem.

B. Was the Concession a Misstatement of Law?

1. Third-Party Filing

Next the Commissioner says that even if he did concede that a third party can "file" a return, we should ignore him because that concession would be contrary to law. But the Code and the regulations don't require a taxpayer to intentionally file his return himself -- they just say returns "shall be" filed in particular places by particular times. *See, e.g.*, I.R.C. §§ 6072(a) and 6091(b); 26 C.F.R. §§ 1.6091-2(a)(1) and 1.6091-3.

The dissent, *see Coffey*, 150 T.C. at __ (slip op. at 71) (Marvel, J., dissenting), and the Commissioner, see Resp't's Mot. for Recons. at 4, point out that § 6501(a) -- which says that the Commissioner generally must assess tax within three years after a return "was filed" -- defines "return" as "the return required to be filed by the taxpayer." They think this means the taxpayer himself (or his agent) must intentionally do the actual filing. *See Coffey*, 150 T.C. at __ (slip op. at 71-72) (Marvel, J., dissenting). But they leave out part of the definition -- it continues with a parenthetical that says a return "does not include a return of any person from whom the taxpayer has received an item of income, gain, loss, or credit." I.R.C.

§ 6501(a). In other words, § 6501(a) answers the question of whose return's filing starts the statute of limitations running. The answer that section gives is that the statute runs from when the *taxpayer's* return "was filed," not from when any third-party's return was. It doesn't make an intent to file, much less an intent to file in a particular place, part of "filing".

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center necessarily wasn't the taxpayers' agent and the taxpayers didn't intend for their returns to go to the second one. *See id.; see also Coffey*, 150 T.C. at __ (slip op. at 31).

Because neither the Code, regulations, nor caselaw invalidate unintentional third-party filings, it was not substantial error to accept the Commissioner's concession.

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Allnutt and *Winnett* necessarily resolved this issue, too. The taxpayers in those cases didn't intentionally send their returns to the correct IRS offices, yet once their returns got to those offices the statute of limitations began to run. *See Allnutt*, 523 F.3d at 409, 411, 414; *Winnett*, 96 T.C. at 808. If the taxpayers had needed to subjectively intend for their returns to go to those particular offices the returns never would've been "filed" and the statute of limitations would never have begun to run. See I.R.C. §

6501(a). The taxpayers' intent therefore wasn't material. *See Allnutt*, 523 F.3d at 414; *Winnett*, 86 T.C. at 808.

We can see why this is confusing. After all, "[t]o be a *return* for statute of limitations purposes, [a] document 'must honestly and reasonably be intended as such' by the taxpayer." *Allnutt*, 84 T.C.M. at 673 (quoting *Florsheim Bros. Drygoods Co. v. United States*, 280 U.S. 453, 462 (1930) (filing of IRS form titled "tentative return" to request 45-day extension didn't start statute of limitations; later Form 1120 did)) (emphasis added). And determining whether a document is an honest and reasonable attempt to satisfy the tax law is part of the *Beard* test we used to determine that the Form 1040 VIBIR sent to the IRS was the Coffeys' "return". *See Coffey*, 150 T.C. at __ (slip op. at 45-48); *see also Beard v. Commissioner*, 82 T.C. 766, 777 (1984), *aff'd*, 793 F.2d 139 (6th Cir. 1986).

But whether a document is a "return" and whether it's "filed" are separate questions, and a taxpayer can't benefit from the statute of limitations unless each is answered affirmatively. *See* I.R.C. § 6501(a). The dissent confuses these questions and suggests that because the law requires that a taxpayer must intend that a particular document be his "return", it must also require him to intend a particular action for that return to be "filed". *See Coffey*, 150 T.C. at __ (slip op. at 75) (Marvel, J., dissenting).

This isn't the first time our Court has conflated these questions. In *Berenbeim v. Commissioner*, 63 T.C.M. 2975, 2979-80, 2983-84 (1992), a wife who didn't know her husband was running a Ponzi scheme signed documents she intended to be joint returns and believed her husband filed them. He didn't. *Id.* at 2979, 2983. Later, she gave copies of the returns to a revenue agent, he filed them without her knowledge, and the Commissioner wanted to hold them against her in her innocent-spouse case. *Id.* at 2979-80, 2983-85. In our Memorandum Opinion, we focused on "whether petitioner wife intended to individually file a return at the time" she gave the copies to the agent and held "that no returns were filed" for the years at issue. *Id.* at 2984-85.

In reaching our holding we relied primarily on two other innocent-spouse cases. The first was *Shea v. Commissioner*, 780 F.2d 561, 567-68 (6th Cir. 1986), *aff'g in part, rev'g in part* 48 T.C.M. 304 (1984), where the Sixth Circuit held that a return a wife didn't sign or help prepare wasn't a joint return. The court considered only whether the wife intended for the document to be a *return* -- it said that "[w]hether a tax return is a joint return is a question of fact and is primarily a question of intent," *id.* at 567 (internal quotations omitted), and found that the taxpayer "did not intend for this particular tax return to be her own," *id.* at 568.

The second innocent-spouse case *Berenbeim* relied on was *Sharwell v. Commissioner*, 419 F.2d 1057, 1059-60 (6th Cir. 1969), *vacating and remanding* 27 T.C.M. 416 (1968), where the Sixth Circuit held that a wife who actively participated in the preparation of a joint return intended it to be her return even though she didn't sign it. The court there also focused on whether the taxpayer intended a particular document to be her return:

> [The taxpayer] contends that the returns were not joint because she did not sign them. We think there is no merit in this position. The question of whether a return is joint or not is a factual one. [Citations.] The signature of the wife is only one factor in determining whether the return is joint. It appears that the question is primarily one of intent.

Id. The court didn't even address whether that return was "filed".

Berenbeim didn't distinguish between an intent to file and an intent that a particular document be a return. *See Berenbeim*, 63 T.C.M. at 2984. But in light of its reliance on *Shea* and *Sharwell*, we think its holding only reaches whether a taxpayer intended a particular document to be his return -- which is probably why the Commissioner cited it only after stating that intent "does have a role to play in determining whether a filed document constitutes a valid *return*." See Mem. in Supp. of Resp't's Op. to the Mots. for Recons. Filed by Pet's and Intervenor at 6 n.3 (emphasis added).

The dissent argues that other Memorandum Opinions of ours show that intent is required for "filing", but these are even less compelling than *Berenbeim*. The best for the dissent is our Memorandum Opinion in *Allnutt*, where we said: "[F]iling of a return is established by facts showing proper delivery or mailing of a return with the intent to file it as a return." 84 T.C.M. at 675. But the Fourth Circuit didn't affirm us on that point -- instead, it "decline[d] to opine" whether the cases we cited in support of our assertion actually added "an intent element to the listed filing requirements in the Code." *Allnutt*, 823 F.3d at 413 n.5. The *Allnutt* Memorandum Opinion therefore doesn't mean intent is a requirement of "filing".

The dissent also cites *Friedmann v. Commissioner*, 82 T.C.M. 381, 386 (2001), *aff'd without published opinion*, 80 F. App'x 285 (3d Cir. 2003), where we held that a taxpayer who gave copies of his returns to an IRS revenue agent never "filed" them because he didn't also send them to the correct IRS office. In that Memorandum Opinion we distinguished between the *Beard* test for whether a document is a "return" and the issue of whether a return is "filed". *See id*. at 386. But after reaching our holding, we made the statement the dissent cites: "Moreover, there is nothing in the record to show that petitioner intended his delivery of those documents to the agent * * * to constitute the filing of his returns" -- and then we cited *Berenbeim*. *Id*. at 387. That was dicta -- we'd already determined that the returns hadn't been "filed". *Id*. at 386. That phrase also repeated *Berenbeim* 's conflation of intent to file and intent for a document to be a return -- which was not supported by the circuit court opinions *Berenbeim* relied on. *See id*. at 387. This dicta also doesn't make intent part of "filing".

The rest of the cases the dissent cites also fail to bolster the Commissioner's motion. In *Espinoza v. Commissioner*, 78 T.C. 412 (1982), the taxpayer initially filed fraudulent returns, but later gave amended nonfraudulent returns to the revenue agent. More than three years passed before the Commissioner issued notices of deficiency. *Id*. at

415. The taxpayer argued that the statute of limitations period began when he gave the nonfraudulent returns to the revenue agent, but we denied his motion for summary judgment because the record didn't show that the returns ever made it to the correct IRS office. *Id*. at 415, 422. We pointed out that the taxpayer never paid the tax his amended returns showed he owed, and then we made the statement the dissent cites: "His failure to pay the additional taxes raises a question as to whether he intended for the amended returns to be filed." *Id.* at 422. This is also dicta and doesn't make intent a requirement for "filing".

Finally, in *Dingman v. Commissioner*, 101 T.C.M. 1562, 1563 (2011), the taxpayer gave delinquent returns and payments to the IRS Criminal Investigation Division (CID), and the IRS cashed the checks and posted the payments to Dingman's transcripts. The Commissioner argued that the returns weren't "filed" because the taxpayer hadn't given them to the right part of the IRS. *Id*. at 1566. We first pointed out that during the years at issue there was no clear guidance on where taxpayers were supposed to send their returns. *Id*. at 1568. Then, citing *Winnett* and *Allnutt*, we said the fact that the IRS processed the returns meant that CID must've forwarded them to the right place, and we held that the returns were "filed" no later than the date the IRS cashed the checks and made the transcripts -- a holding that's consistent with our opinion in the Coffeys' cases. *See id*. at 1570.

In *Dingman* the Commissioner cited *Espinoza*, *Friedmann*, and our Memorandum Opinion in *Allnutt*, and said those cases "address the taxpayer's intent to file a return." *Id*. at 1569. We dealt with the Commissioner's argument with the statement the dissent quotes: "The record supports a conclusion that petitioner clearly intended to file the returns when his counsel submitted them to CID." *Id*. This statement merely dismissed a line of argument in a case where the IRS had clearly processed the taxpayer's returns -- it didn't create an intent requirement for filing.

The Code, regulations, and caselaw all show that a taxpayer's intent is not relevant to the question of whether his return is "filed". "On the other hand, it does have a role to play in determining whether a filed document constitutes a valid *return*." Mem. in Supp. of Resp't's Op. to the Mots. for Recons. Filed by Pet's and Intervenor at 6 n.3 (emphasis added). Because this is the law we followed, there was no substantial error.

II. Processing

The Commissioner also says we committed substantial error by finding that "the undisputed facts show that the IRS was able to stamp [the return] received, summarize its contents in its Individual Master File, and open an audit in due course." Resp't's Mot. for Recons. at 6 (quoting *Coffey*, 150 T.C. at __ (slip op. at 45)). He first says this was error because he told us at oral argument that a computer, rather than a human being, processed the information and coded it as a USVI return. He also says that the computer processed the documents "*as cover-over documents* and not as federal income tax returns." But we fail to see why it matters that a computer processed the information and processed it a certain way -- the point is that the IRS had the information and was able to process it. *See Dingman*, 101 T.C.M. at 1570.

Second, the Commissioner says that VIBIR, not the IRS, stamped the top of the return "U.S. Claim." Resp't's Mot. for Recons. at 6. But when we said the IRS stamped it, we weren't talking about that stamp -- we were talking about the one on the left-hand side of the first page of the Coffeys' return that says "RECEIVED 02082005 IRS - PHILA., PA." *See Coffey*, 150 T.C. at __ (slip op. at 12-13, 45). In light of this evidence, it wasn't error to find that the IRS's Philadelphia service center received the Coffeys' returns.

Respondent hasn't shown that we committed substantial error. It is therefore

ORDERED that Respondent's February 28, 2018 motion for reconsideration is DENIED.

(Signed) Mark V. Holmes
Judge

Dated: Washington, D.C.
July 24, 2018

APPENDIX E — ORDER AND DECISION OF THE UNITED STATES TAX COURT, FILED JULY 24, 2018

UNITED STATES TAX COURT
WASHINGTON, DC 20217

Docket No. 4949-10.

JAMES L. COFFEY,

Petitioner(s),

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

SERVED July 24 2018

ORDER AND DECISION

This case was previously consolidated with others that had been on the Court's November 14, 2011 trial calendar for Buffalo, New York. In *Coffey v. Commissioner,* 150 T.C. _(Jan. 29, 2018), we held that the statute of limitations barred the deficiencies the Commissioner determined. We therefore dismissed the case for lack of jurisdiction. We quickly realized our mistake, and amended our order to clarify that as a result of our dismissal there was no deficiency for 2003 and 2004, pursuant to I.R.C. § 7459(e).

This was still not quite right in the Commissioner's view, and he has moved for us to vacate our order dismissing the case and instead enter one granting the Coffeys' motion for summary judgment. He says that would be the proper way to dispose of the case because "the statute of limitations is an affirmative defense, not a jurisdictional bar to suit resulting in a dismissal."

The Commissioner is right. Our court gains jurisdiction in a deficiency case when there's a valid notice of deficiency and a timely petition. I.R.C. §§ 6212(a), 6213(a), 7442; *see also, e.g., GAF Corp. & Subs. v. Commissioner,* 114 T.C. 519, 521 (2000). I.R.C. § 6501(a) says the Commissioner has only three years after a return is filed to *assess* tax, and while a valid notice of deficiency tolls that three-year period, *see* I.R.C. § 6503(a), a notice of deficiency isn't automatically *invalid* if the Commissioner sends it after that period ends, *see* I.R.C. § 6212(a); *Genesis Oil & Gas, Ltd. v. Commissioner,* 93 T.C. 562, 564 (1989). A late notice therefore doesn't affect our jurisdiction, but the Commissioner also can't *assess* the tax it shows when a statute-of-limitations defense is properly raised. *See* I.R.C. § 6501(a).

The Coffeys properly raised that defense here, and don't care how the case ends except for decisions that show no deficiency. But to make the paperwork less sloppy, it is

ORDERED that respondent's February 28, 2018 motion to vacate order of dismissal for lack of jurisdiction as amended is granted. It is also

ORDERED that the Court's January 29, 2018 order of dismissal and February 6, 2018 amended order of dismissal are vacated. It is also

ORDERED that petitioners' March 19, 2012 motion for summary judgment is granted. It is also

ORDERED and DECIDED that there is no deficiency in income tax, and no additions to tax, due from petitioner for tax years 2003 and 2004.

(Signed) Mark V. Holmes
Judge

Entered: **JUL 24 2018**

APPENDIX F — OPINION OF THE UNITED STATES TAX COURT, DATED JANUARY 29, 2018

150 T.C. No. 4

UNITED STATES TAX COURT

Docket Nos. 30676-09, 31119-09, 4720-10, 4949-10

MELISSA COFFEY HULETT
A.K.A. MELISSA COFFEY, *et al.*,[1]

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

January 29, 2018, Filed

OPINION

HOLMES, *Judge*: Statute-of-limitations questions posed by taxpayers who filed returns with only the United States Virgins Islands (VI) are not new: This is the fourth case in a sequence. In *Appleton v. Comm'r*, 140 T.C. 273 (2013), we held that a *bona fide* resident of

1. Cases of the following petitioners are consolidated: Emily Coffey, docket No. 31119-09; Judith S. Coffey, Petitioner & The Government of the United States Virgin Islands, Intervenor, docket No. 4720-10; and James L. Coffey, docket No. 4949-10.

the Virgin Islands had to file a federal return, but that the return he filed with the Virgin Islands Bureau of Internal Revenue (VIBIR) was that return. In *Estate of Sanders v. Commissioner*, 144 T.C. 63 (2015), *vacated and remanded*, 834 F.3d 1269 (11th Cir. 2016), we held that we apply normal standards of residency when deciding who is a *bona fide* VI resident. And in *Cooper v. Commissioner*, T.C. Memo 2015-72, we held that a subjective good faith belief that one is a *bona fide* resident is not itself proof of *bona fide* residency. Here our focus shifts yet again. We will assume that the taxpayer who filed with the VIBIR is not a *bona fide* VI resident. But the VIBIR sent what she filed--or at least a substantial part of what she filed--on to the IRS.

A nonresident of the VI with both U.S. and VI income has to file with both the VIBIR and the IRS to satisfy her obligation to file a return under the Internal Revenue Code. But does the VIBIR's sharing of information with the IRS amount to the filing of a return?

Today we answer that question.

Background

We are asked to consider the Coffeys' motions for summary judgment.[2] We find no facts. The background

2. We consolidated docket numbers 30676-09, 31119-09, 4720-10, and 4949-10 for trial, briefing, and opinion. This opinion decides summary-judgment motions in two of these cases. Only Judith Coffey in docket number 4720-10, and James Coffey in docket number 4949-10, moved for summary judgment. When we refer to the "Coffeys", we refer only to them.

information comes from the documents that are in the record and facts that the Commissioner does not contest.

Judith and James Coffey have been married for over 35 years. They had a successful joint career in scholastic publishing and in May 1985 incorporated Rainbow Educational Concepts, Inc., an S corporation. Rainbow Concepts is a publisher's development company that focuses on the editorial design and production of school textbooks. It has an impressive list of big-name clients, such as Houghton Mifflin, McGraw-Hill, and Scholastic. Judith was the president of Rainbow Concepts until 2003, and James was and remains its vice president. It is a profitable business. They reported nearly $1.5 million of adjusted gross income on their 2003 joint income tax return and another $1.4 million on their 2004 return. With high income usually comes high taxes--at least sometimes.

The Coffeys first became aware of some of the advantages of VI taxation in 2003. Chief among these is the VI's Economic Development Program (EDP). The EDP's purpose is to bring business to the VI, and to do so, it offers very lucrative tax incentives to some taxpayers who establish that they are *bona fide* VI residents. *See* sec. 932;[3] *Huff v. Commissioner*, 135 T.C. 222 (2010). This is not a secret--Congress specifically allows the VI to reduce taxes on "income derived from sources within the

3. All section references are to the Internal Revenue Code in effect for the years at issue, and all Rule references are to the Tax Court Rules of Practice and Procedure. The subject of these cases requires citation of other titles of the United States Code, and we give the full citation for those.

Virgin Islands or income effectively connected with the conduct of a trade or business within the Virgin Islands." Sec. 934(b)(1). The EDP provides substantial benefits to participating companies: a 90% exemption from local-income taxation, a 90% exemption from dividend taxation, and a 100% exemption from gross-receipts taxation. *See Huff*, 135 T.C. at 227.

It didn't take long for the IRS to notice these incentives and to identify their potential for abuse. It made adventurous taxpayers aware of its skepticism of the EDP by issuing Notice 2004-45, 2004-2 C.B. 33. In this notice the IRS described what it believed to be a typical scenario where U.S. taxpayers improperly claim to be *bona fide* VI residents to take advantage of the EDP when in reality their situation hadn't changed one bit. An example given in the notice was of an employee of a company in the U.S. who terminated his employment only to become a partner in a VI partnership that provided the same services for the company that the employee used to perform--same job, but dressed up in consultant's clothes.

The Coffeys spoke with some tax professionals and decided to take advantage of the EDP in 2003. Judith ended her relationship with REC and became a partner in a VI partnership, IFW St. Croix Group, LLLP, later becoming StoneTree Group, LLLP (StoneTree). The Coffeys started looking for some property in October of that year, and closed on a house in St. Croix in December. They continued to own the house through at least 2010.

The Coffeys bought two cars, Judith got a VI driver's license, and she became a VI registered voter (and voted in its elections). Judith argues that she was a *bona fide* VI resident starting in 2003 through at least 2006. To that end, she believed that her filing obligations rested with the VIBIR and not the IRS. While not claiming to be a VI resident himself, James argues that he fell within the language of section 932(d). This section says that if two taxpayers file a joint return and the spouse who earns the higher adjusted gross income for the year is a VI resident, the spouse who isn't will be treated as one. *Id.*

With her VI contacts and section 932(d) in hand, the Coffeys filled out Forms 1040, U.S. Individual Income Tax Return, for each tax year from 2003 through 2007. As we explain in greater detail below, both VI residents and VI nonresidents fill out the same Form 1040 familiar to all Americans. On it they report their income and deductions and compute their tax. That much is simple. What has made these cases so complicated are questions of *allocation* and of *filing*. VI nonresidents who have income from inside the VI must include with their Forms 1040 a Form 8689, Allocation of Individual Income Tax to the U.S. Virgin Islands, on which they figure out what percentage of the total tax imposed by the Code they owe to the VIBIR and what percentage they owe to the IRS. Where to file is even more complicated, as some VI residents have to file only with the VIBIR, some VI residents and some VI nonresidents have to file with both the VIBIR and the IRS, and some VI nonresidents have to file only with the IRS.

For the two years at issue on these motions, Judith's income came from StoneTree. StoneTree performed services for Rainbow Concepts (and only Rainbow Concepts because of a noncompete agreement) that ranged from research and development, to management and consulting. Rainbow Concepts paid Stonetree the following fees in 2003 and 2004:

Year	**Project management**	**Sales commissions**	**Consulting**
2003	$545,693	$181,898	$447,500
2004	1,008,292	336,097	275,000

REC also paid StoneTree $600,000 in 2003 as consideration for its agreement not to compete.

The amounts REC paid to StoneTree did not go directly or entirely to Judith--StoneTree had other partners and local employees. Judith received a Schedule K-1 from StoneTree that reported her income as a partner for each year. As the Coffeys took the position that Judith was earning this income in the VI, they claimed an EDP credit for 2003 and 2004. For 2003 their Form 1040 showed a precredit tax due of more than $450,000, but after the EDP credit a total tax liability of less than $100,000.[4] The power of the EDP was even greater for their tax year 2004, when their credit lowered their tax bill from nearly $500,000 to less than $50,000.

4. They attached an EDP credit-calculation schedule to their returns.

The Coffeys' Forms 1040 were complete and accepted by the VIBIR. Judith and James, as well as their tax-return preparer, each signed the returns. Their returns were complex. Their 2003 return consisted of the two pages of Form 1040, Schedules A, B, D, and E, as well as Form 6251, Alternative Minimum Tax for Individuals, Form 4562, Depreciation and Amortization, and Form 8801, Credit for Prior Year Minimum Tax. Their 2004 return consisted of the first two pages and Schedules A, B, and E, as well as Form 4797, Sales of Business Property, Form 6251, and Form 8801. There were also some miscellaneous papers attached that explained some calculations, as well as any W-2s they had. The VIBIR stamped the 2003 return "received" on October 15, 2004, and stamped the 2004 return "received" on October 24, 2005.

On each of their 2003 through 2006 tax returns, the Coffeys listed their St. Croix address. They sent their returns to the proper address for permanent residents of the VI: the V.I. Bureau of Internal Revenue in Charlotte Amalie on St. Thomas. The instructions on these returns, along with IRS Publication 570, said that *bona fide* VI residents need file only with the VIBIR and not the IRS. The VIBIR received and processed their returns.[5]

Although the Coffeys didn't send anything directly to the IRS, the VIBIR and the IRS share tax information pursuant to the Tax Implementation Agreement (TIA),

5. Although they sent returns to the VI in 2005 and 2006, they didn't claim EDP credits for those years; and the IRS never proposed any adjustments for them.

U.S.-V.I. (Feb. 24, 1987), 1989-1 C.B. 347. Pursuant to the TIA, the United States and the VI will share information to administer and enforce their respective tax laws. *Id.* art. 4(1), 1989-1 C.B. at 348. Also, the VI will supply the United States with "copies of reports of individual * * * audit changes that disclose information relevant to the United States." *Id.* art. 4(2)(b), 1989-1 C.B. at 348-49. The TIA provides that the VIBIR will allow the IRS to examine VI tax returns. *Id.* app. A, sec. 3.1, 1989-1 C.B. at 352.

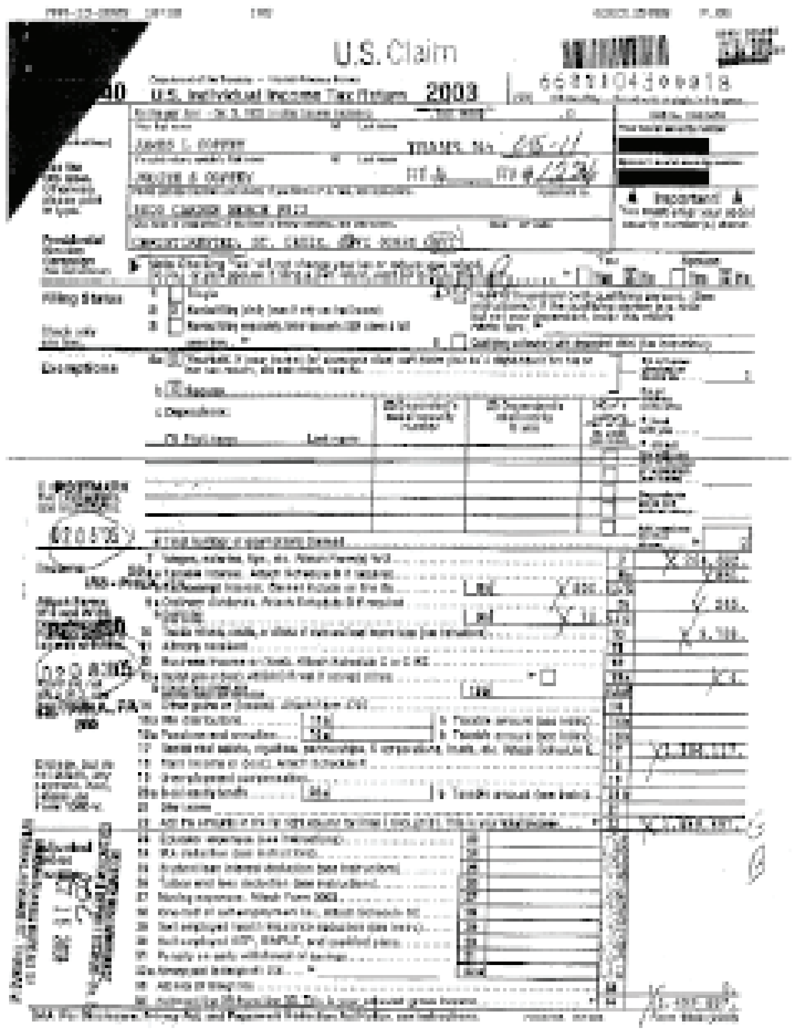
Section 7654(a) requires taxes collected by the IRS to "be covered into the Treasury" of the VI when collected from *bona fide* VI residents. When the VIBIR receives a return from a *bona fide* VI resident who had taxes withheld and remitted to the U.S. Treasury, the VIBIR will send a copy of the return (or parts of the return) to the IRS to ensure that those funds get sent to the VI. This process is known as "covering over." Before 2007, the VIBIR would send the information to the IRS's Philadelphia service center. *See* Internal Revenue Manual (IRM) pt. 21.8.1.6.4 (Oct. 1, 2010). In this case, the VIBIR electronically sent photocopies of the first two pages of the Coffeys' Forms 1040 for the years at issue, along with their W-2s (both U.S. W-2s and VI W-2s). It's not clear from the record if this was customary (as opposed to sending the entire return, including the schedules), but we know it's not the first time the VIBIR has done this. *See Estate of Sanders*, 144 T.C. at 69 (noting that the VIBIR only forwarded the first two pages of the 2002 Form 1040 to the IRS); *but see Appleton*, 140 T.C. at 275 n.3 (noting that the VIBIR forwarded the complete 2002-04 returns, including schedules, to the IRS).

The IRS service center in Philadelphia received the transmission of the Coffeys' 2003 and 2004 returns and stamped them with document locator numbers.[6] It also stamped the 2003 return with a "postmark date" of February 5, 2005, and a "received" date of February 8, 2005, but for an unknown reason waited until March 14, 2005, to enter the return as "received" in its records. It entered the 2004 return in its records as received on March 27, 2006.[7] These markings on the returns are important, and we reproduce the image of the 2003 Form 1040 here:

6. The IRS applies document locator numbers to documents for administrative, recordkeeping, and tracking purposes. It also makes retrieving the documents easier. *See, e.g., McCall v. Commissioner*, T.C. Memo 2009-75; *Ibeagwa v. IRS*, 2015 U.S. Dist. LEXIS 78970, 2015 WL 3791538, at *2 (W.D. Wis. 2015).

7. The 2004 Form 1040 didn't have stamps on it like the ones the 2003 Form 1040 had.

Appendix F


U.S. Claim
U.S. Individual Income Tax Return 2003
Filing Status
Exemptions
Important!

Appendix F

The IRS used these forms to create a "transcript of account" for each year.[8] The IRS's transcript of account for the Coffeys' 2003 tax year has a line that reads "return due date or return received date (whichever is later)." The date at the end of that line is "Oct. 15 2004", which is the date that the VIBIR stamped the Coffeys' 2003 return "received." The transcript also lists a "processing date" of March 14, 2005, the date the IRS says it received the Coffeys' tax forms in Philadelphia. The IRS's transcript of account for the Coffeys' 2004 return lists October 24, 2005 --the date the VIBIR stamped as received the Coffeys' 2004 return--as the "return due date or return received date" and shows March 27, 2006 as the "processing date."

The IRS also seemingly extracted some information from these forms beyond simply processing them as cover-over documents. Its records reflect that the Coffeys were joint filers for 2003 and 2004 and that they claimed two exemptions. It showed withholding credits from non-VI sources, and also initially recorded their adjusted gross income as zero for both years.

These records are also important, and we reproduce the image of the Coffeys' 2003 transcript of account here:

8. A transcript of account contains account information from the Commissioner's master files and shows various actions the IRS took with respect to a taxpayer in a given year. *See Tornichio v. Commissioner*, T.C. Memo. 2002-291, 84 T.C.M. (CCH) 578, 581-82 (2002).

--- ANY MINUS SIGN SHOWN BELOW SIGNIFIES A CREDIT AMOUNT ---

ACCOUNT BALANCE:	-[illegible]7,124.00	
ACCRUED INTEREST:	0.00	AS OF: Nov. 02, 2009
ACCRUED PENALTY:	0.00	AS OF: Nov. 02, 2009
ACCOUNT BALANCE PLUS ACCRUALS (this is not a payoff amount):	-[illegible]7,124.00	

** INFORMATION FROM THE RETURN OR AS ADJUSTED **

EXEMPTIONS:	02	FILING STATUS: Married Filing Joint
ADJUSTED GROSS INCOME:	0.00	
TAXABLE INCOME:	0.00	
TAX PER RETURN:	0.00	
SE TAXABLE INCOME TAXPAYER:	0.00	
SE TAXABLE INCOME SPOUSE:	0.00	
TOTAL SELF EMPLOYMENT TAX:	0.00	

RETURN DUE DATE OR RETURN RECEIVED DATE (WHICHEVER IS LATER) Oct. 15, [illegible]
PROCESSING DATE Mar. [illegible], [illegible]

TRANSACTIONS

CODE	EXPLANATION OF TRANSACTION	CYCLE	DATE	AMOUNT
150	Tax return filed - [illegible] return [illegible]	[illegible]	[illegible]	$0.00
806	W-2 or 1099 withholding		04-15-[illegible]	-$[illegible]7,124.00
460	Extension of time to file ext. Date 08-15-[illegible]		04-15-[illegible]	$0.00
140	Inquiry for non-filing of tax return		02-[illegible]-2005	$0.00
570	Additional account action pending		05-[illegible]-2005	$0.00
420	Examination of tax return		08-04-2005	$0.00
960	Appointed representative		10-[illegible]-2006	$0.00

This Product Contains Sensitive Taxpayer Data

Time passed and the IRS eventually picked the Coffeys' returns for audit. IRS records show that it selected the Coffeys' 2003 return in August 2005 and their 2004 return in May 2006. But the Commissioner took his time and concluded the exams by issuing them a notice of deficiency for both years only in September 2009. The deficiencies and penalties for Judith Coffey were:

		Additions to Tax		
Year	**Deficiency**	**Sec. 6651(a)(1)**	**Sec. 6651(a)(2)**	**Sec. 6654**
2003	$661,259.00	$143,835.53	$159,817.25	-0-
2004	521,416.00	117,318.60	130,354.00	$14,942.27

And for James Coffey:

		Additions to Tax		
Year	**Deficiency**	**Sec. 6651(a)(1)**	**Sec. 6651(a)(2)**	**Sec. 6654**
2003	$229,304.00	$45,938.25	$51,042.50	-0-
2004	139,905.00	30,408.53	33,787.25	$3,857.81

The Coffeys timely filed petitions to contest the deficiencies. They resided in Arkansas at the time. The VI intervened in the cases, and both it and the Coffeys moved for summary judgment on the ground that the Commissioner had blown the statute of limitations. We at first denied the motion because we believed that a material fact--whether the Coffeys were *bona fide* VI residents for those years--was in dispute. A little over a month later the Coffeys and the VI both moved for reconsideration. They believed that we had overlooked an important legal issue in our order.

They argued that we erred because they believe that a subjective good faith belief that one is a *bona fide* resident is what matters for the statute of limitations.[9] The Coffeys

9. We note this argument but will not discuss it further because we held in *Cooper v. Commissioner*, T.C. Memo 2015-72, *22, that

also argued in their motion (and the VI adopted this position at oral argument) that even if they were supposed to file with both the VIBIR and the IRS, they met this obligation because the VIBIR's forwarding of information to the IRS in Philadelphia amounted to their filing returns there. These are serious arguments that we overlooked. We granted the motions to reconsider and now proceed to review the summary-judgment motions on their merits.

This means we must revisit those sound-easy-but-are-really-hard questions: What is a "return", and what does it mean to "file" it?

Discussion

I. Section 932, VI Taxation, and How We Got Here

The VI has been an unincorporated territory of the United States since we bought it from Denmark in 1917, but is generally not a part of the United States for federal tax purposes. *See* Revised Organic Act of the Virgin Islands, ch. 558, sec. 2, 68 Stat. 497 (codified as amended at 48 U.S.C. sec. 1541(a) (2012)); sec. 7701(a)(9). Congress instead established a "mirror tax system" for the VI. This makes VI taxation very similar to U.S. taxation by replacing "United States" with "Virgin Islands," and *vice*

"[s]ection 932(c) does not provide that a taxpayer's subjective belief that he/she is a *bona fide* resident of the Virgin Islands is sufficient to place him/her into that section's single filing regime. More is required." The Eleventh Circuit recently adopted this view in *Commissioner v. Estate of Sanders*, 834 F.3d 1269 (11th Cir. 2016), *rev'g and remanding* 144 T.C. 63 (2015).

versa, in the VI tax code. *See* 48 U.S.C. sec. 1397; *see also Danbury, Inc. v. Olive*, 820 F.2d 618, 620, 23 V.I. 449 (3d Cir. 1987).

For most of the twentieth century, taxpayers who earned both U.S. - and VI - source income had to file returns and pay taxes to both jurisdictions, in a way similar to the filing of both federal and state income tax returns. *See Appleton*, 140 T.C. at 278. This all changed when Congress enacted section 932 of the Code as part of the Tax Reform Act of 1986, Pub. L. No. 99-514, sec. 1274, 100 Stat. at 2596.[10] Section 932 unifies the tax obligation of those individuals--both *bona fide* residents and nonresidents of the VI--with VI-source income. (The rules are different for corporations. This opinion is not for them.) The legislative history refers to this as a "U.S. tax liability." *See* S. Rept. No. 99-313, at 482 (1986), 1986-3 (Part 3) C.B. 1, 482. "[F]or purposes of determining the tax liability of individuals who are citizens or residents of the United States or the U.S. Virgin Islands, the United States will be treated as including the Virgin Islands (for purposes of determining U.S. tax liability) and, under the Virgin Islands 'mirror' Code, the Virgin Islands will be treated as including the United States (for purposes of determining liability for the Virgin Islands tax)." *Id.*

10. Section 932 is not part of the mirror code and is thus not present in the VI territorial tax system. Its purpose is to help ensure a unified tax split between the VI and the U.S. Treasury for those U.S. citizens who have VI-source income. *See Appleton v. Commissioner*, 140 T.C. 273, 280 n.12 (2013).

For nonresidents of the VI with VI income--the situation that we must assume that the Coffeys are in for these motions--

> tax liability to the Virgin Islands will be a fraction of the individual's U.S. tax liability * * *. Such an individual will file identical returns with the United States and the Virgin Islands. The Virgin Islands' portion of the individual's tax liability (if paid) will be credited against his total U.S. tax liability. Taxes paid to the Virgin Islands by the individual, *other than the Virgin Islands portion of his U.S. tax liability*, will be treated for U.S. tax purposes in the same manner as State and local taxes.

Id. at 483, 1986-3 C.B. (part 3) at 483 (emphasis added).[11]

This concept of a single title 26 liability, split between the IRS and the VIBIR, is found as well in the text of the Code. Section 932(a)(2) imposes a filing requirement for VI nonresidents with VI income and says such an individual "shall file *his income tax return* for the taxable year with both" the IRS and the VIBIR. *Id.* (emphasis added). Section 932(b)(1) requires the payment of a portion "of the taxes imposed by this chapter" to the VI. And section 7654 provides for the division between the federal and territorial governments of "[t]he net collection of taxes

11. There is nothing in the briefs on these motions to suggest that the VI has an additional territorial income tax that would be the equivalent of a state income tax. Even if it did, it's not relevant to the outcome of these motions.

imposed by chapter 1." The familiar Form 1040 (or its shorter versions) is how this liability is computed and reported.

It's only the place of filing that familiar return, and the allocation of the "U.S. tax liability" that is so complicated. Section 932 divides that single tax liability between the federal and territorial governments. It does this by distinguishing *bona fide* VI residents from U.S. residents who earned some VIsource income. U.S. residents with VI-source income must still file returns with both the IRS and the VIBIR. Sec. 932(a)(2).[12] A *bona fide* VI resident need file a return only with the VIBIR if he meets the requirements of section 932(c)(4):[13]

- is a *bona fide* VI resident;[14]

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12. Individual taxpayers would file Forms 1040 with the IRS, but they would not file Forms 1040 with the VIBIR. Rather, they send the VIBIR a copy of the Form 1040 they send to the IRS together with a Form 8689 (a form used to allocate and calculate income attributable to the VI). *See* IRS Pub. 570 (2003).

13. Section 932 tells taxpayers they don't have to file with the IRS in quite a roundabout way--if they meet the requirements of section 932(c)(4), their income is exempt from U.S. taxation. *See Appleton*, 140 T.C. at 281. With all income exempt, a taxpayer doesn't have a filing obligation in the United States under section 6012.

14. The current version of section 932(c)(4)(A) says "a bona fide resident of the Virgin Islands during the entire taxable year," but this wasn't always true. In 1954 Congress established the "inhabitant rule" that required filing only with the VIBIR for "permanent" VI residents. The newly enacted section 932 in 1986 stated that the taxpayer had to be a *bona fide* VI resident "at the close of the taxable

- reports all income and its sources on the VI tax return; and

- fully pays the tax liability shown on the VI return.

If the taxpayer fails any of these requirements, he falls right back into the normal federal filing regime. *See Appleton*, 140 T.C. at 281.

Although seemingly providing a benefit, section 932(c)'s rigid requirements are a stumbling block for many because its plain language means a taxpayer has to file a perfect return to get its protections. A taxpayer who forgets he won $50 on a scratch-off ticket he got in the mail technically fails section 932(c)(4)(B) if he doesn't report it. As the Coffeys and others have complained, this rigidity might lead to a serious consequence--an unlimited

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year." Congress then changed this in October 2004 by striking that language and replacing it with "during the entire taxable year." American Jobs Creation Act of 2004, Pub. L. No. 108-357, sec. 908(c)(2), 118 Stat. at 1656. At the same time, it also added section 937 to Code, which specifically defines *bona fide* residency as presence in the VI for at least 183 days during the year without having a tax home outside the VI or a "closer connection * * * to the United States or a foreign country." *Id.* sec. 908(a), 118 Stat. at 1655; sec. 937(a)(1) and (2). The years at issue here are 2003 and 2004, and the definition of *bona fide* residency was different for each year. Before the 2004 amendment, we'd look to the factors used in *Vento v. Dir. of V.I. Bureau of Internal Revenue*, 715 F.3d 455, 58 V.I. 753 (3d Cir. 2013) (citing *Sochurek v. Commissioner*, 300 F.2d 34 (7th Cir. 1962), *rev'g and remanding* 36 T.C. 131 (1961)), to determine *bona fide* residency. We aren't being asked to do that here because these are the Coffeys' summary-judgment motions and we have to assume that they weren't *bona fide* VI residents.

statute of limitations for the IRS to assess any taxes from years the taxpayer filed only with the VIBIR.[15] Congress seemingly recognized this problem and directed that the secretary "shall prescribe such regulations as may be necessary to carry out the provisions of * * * sections 931 and 932, * * * prescribing the information which the individuals to whom such sections may apply shall furnish to the Secretary." Sec. 7654(e).

The Secretary didn't get around to issuing regulations under section 932 by the time the Coffeys had to figure out their filing obligations for 2003 and 2004. The IRS finally did release some guidance in 2007, with Notice 2007-19, 2007-1 C.B. 689. This notice divided *bona fide* VI residents into two categories: those who earned $75,000 or more and those who didn't. If a *bona fide* VI resident earned less than that magic number, his U.S. statute of limitations under section 6501 would begin to run when he filed a

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15. The sharp teeth of this perfect-return rule can be worn down by other quirks of this system. We assumed in *Appleton*, for example, that the taxpayers failed at least one part of section 932(c)(4). Thus it put them back into the federal filing regime. But the taxpayers in *Appleton* were *bona fide* VI residents. Using regulations and other guidance available at the time the taxpayers filed their return, we determined the appropriate place for them to file was with the VIBIR. We therefore held the statute of limitations began to run when they filed their returns with the VIBIR because, even though they didn't get the protections of section 932(c), their filing obligations with the IRS said to file with the VIBIR, which is exactly what they did. *See Appleton*, 140 T.C. at 287. The real threat of an unlimited statute of limitations would have been realized if the IRS had required *bona fide* VI residents who failed section 932(c)(4) to file somewhere in the United States.

return with the VIBIR. If a *bona fide* VI resident earned $75,000 or more, he had to file with the VIBIR and send a zero return (i.e., return reporting no gross income) to the IRS office in Bensalem, Pennsylvania, with a statement attached explaining his VI residency. Perhaps seeing the arbitrariness of this distinction, the IRS issued Notice 2007-31, 2007-1 C.B. 971, less than two months later. This notice got rid of the income distinction and created a hard rule: If a taxpayer claimed to be a *bona fide* VI resident and filed a return only with the VIBIR, this return would start the section 6501 statute of limitations in the United States. But this was the IRS's position only for tax years ending on or after December 31, 2006. For any years before--including years from before that notice was even issued--the IRS's position was still that of Notice 2007-19 (i.e., if the taxpayer reported $75,000 or more of income, he had to file a zero return with the IRS).

The Secretary finally issued regulations under section 932 in 2008. Sec. 1.932-1, Income Tax Regs.[16] They pretty much mirror the IRS's position in the second 2007 notice:

> For purposes of the U.S. statute of limitations under section 6501(a), an income tax return filed with the Virgin Islands by an individual

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16. The Secretary did issue temporary regulations under section 932 in 2005 that applied to tax years ending after October 22, 2004. *See* sec. 1.932-1T, Temporary Income Tax Regs., 70 Fed. Reg. 18931 (Apr. 11, 2005). These temporary regulations did not address whether taxpayers taking the position that they were *bona fide* VI residents would be deemed to have filed their U.S. tax return for statute-of-limitations purposes.

> who takes the position that he or she is a bona fide resident of the Virgin Islands * * * will be deemed to be a U.S. income tax return, provided that the United States and the Virgin Islands have entered into an agreement for the routine exchange of income tax information satisfying the requirements of the Commissioner.

Sec. 1.932-1(c)(2)(ii), Income Tax Regs. Had this regulation been in effect for the years at issue here, the Coffeys would easily have won this case. Although the regulation does not explicitly say how a taxpayer "takes the position" of being a *bona fide* VI resident, the Commissioner admitted at oral argument that "Mrs. Coffey [filed] a return *claiming to be* * * * a bona fide resident of the [VI]." (Emphasis added). But, as it is, the regulation didn't exist in 2003 and 2004, and we're left to find an answer in the caselaw using analogical reasoning in the usual common-law fashion.

We'll start by remembering *Huff*, 135 T.C. 222. The taxpayer in *Huff* sent tax returns only to the VIBIR for 2002-04, and the IRS eventually sent him a notice of deficiency for those years in February 2009. The IRS felt that he wasn't a *bona fide* VI resident during the years in question. Huff argued that the deficiencies were VI tax matters and we lacked jurisdiction to hear them because 48 U.S.C. section 1612(a) grants exclusive jurisdiction to District Courts to hear VI tax matters. We held that whether the taxpayer met all the requirements of section 932(c)(4) was a federal-tax matter in which we had jurisdiction. *Id.* at 230.

We got great insight into determining if a taxpayer is a *bona fide* VI resident with *Vento v. Dir. of V.I. Bureau of Internal Revenue*, 715 F.3d 455, 58 V.I. 753 (3d Cir. 2013). In *Vento*, the taxpayers realized large capital gains in 2001 when they sold their business and they sent returns only to the VIBIR. Both the VIBIR and the IRS had problems with the taxpayers, so they challenged these two agencies in a district court in the VI. The court held that the taxpayers weren't VI residents and they quickly appealed. The Third Circuit looked to an eleven-factor analysis of residency from *Sochurek v. Commissioner*, 300 F.2d 34 (7th Cir. 1962), *rev'g and remanding* 36 T.C. 131 (1961), ultimately grouping the eleven factors into four clusters:

- the taxpayer's intent;
- the taxpayer's physical presence;
- the taxpayer's social, family, and professional relationships; and
- the taxpayer's own representations.

Id. at 467-68. After poking into these clusters, the court reversed the District Court's findings as to the Vento parents, and held instead that they were *bona fide* VI residents. Their daughters, on the other hand, were not.

A little over a month after *Vento* we decided *Appleton*, 140 T.C. at 273. In *Appleton*, the IRS agreed that the taxpayer was a *bona fide* VI resident, but it still treated him as a nonfiler because it believed he didn't meet all of the requirements of section 932(c)(4). The taxpayer filed a petition and a summary judgment motion with us, in which he claimed that the Commissioner was barred by the statute of limitations because the taxpayer filed a return with the VIBIR and that's all he was supposed to do. Looking at the facts in the light most favorable to the Commissioner, we held the undisputed facts didn't establish as a matter of law that the taxpayer met all of the requirements of section 932(c)(4). That section therefore didn't provide any filing protection. We nevertheless granted the taxpayer's motion and held that the IRS directed *bona fide* VI residents to file their returns with the VIBIR, regardless of whether they met all the section 932(c)(4) requirements. Appleton met his filing obligations because he was a *bona fide* VI resident and he sent his returns exactly where the IRS told him to.

The taxpayer in *Estate of Sanders*, 144 T.C. 63, also claimed to be a *bona fide* VI resident and also sent his returns for 2002-04 only to the VIBIR. We held a trial on the merits and, using the *Vento* factors, found that the taxpayer was a *bona fide* VI resident. Given this, we held that the taxpayer met his filing obligations. It wasn't necessary to determine if he met the other requirements of section 932(c)(4) because, as we held in *Appleton*, the IRS directed *bona fide* VI residents to send their returns to the VIBIR.[17]

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17. The Eleventh Circuit vacated our opinion, not on the question of where the taxpayers had to file their returns, but only for us to conduct further factfinding to decide whether the taxpayers were *bona fide* VI residents. *See Estate of Sanders*, 834 F.3d at 1285.

Finally, we come to *Cooper*, T.C. Memo. 2015-72. Yet again we had taxpayers who claimed to be *bona fide* VI residents in 2002 and 2003, and who had sent returns only to the VIBIR. The taxpayers moved for summary judgment because they felt the IRS issued the notices of deficiency after the statute of limitations had run. As in *Estate of Sanders*, the issue was whether the taxpayers were *bona fide* VI residents. They argued that the only thing that mattered was that they had a good-faith belief they were when they sent in their returns. We concluded that under section 932(c)(4), "[m]ore is required." *Cooper*, at P22. Although the ultimate issue in *Cooper* wasn't the same as here, we were quick to point out that we were "deciding only the issue of petitioners' residency. Even though the IRS received portions of petitioners' Forms 1040 that were filed with the VIBIR, we need not and do not herein determine whether those documents are 'returns' filed with the IRS under sec. 6501. Resolution of that issue is reserved for the future." *Id.* at P8 n.5.

That future has arrived.

II. The Parties' Arguments

The Coffeys urge us to focus our attention on an issue that seems to be an entirely legal question--did the information sent by the VIBIR to the IRS constitute a filed return? The usual rules for summary judgment apply: We may grant them summary judgment only if there is no genuine dispute of any material fact and they are entitled to judgment as a matter of law. *See* Rule 121(b); *Sundstrand Corp. v. Commissioner*, 98 T.C. 518, 520 (1992), *aff'd*, 17

F.3d 965 (7th Cir. 1994). The Commissioner cannot rest on allegations or denials in his pleadings, but he must present specific facts showing that there is a genuine issue for trial. *See* Rule 121(d); *Dahlstrom v. Commissioner*, 85 T.C. 812, 821 (1985). The Coffeys, however, still bear the burden of proving there is no genuine dispute of material fact, and we read factual inferences in a manner most favorable to the Commissioner. *See Dahlstrom*, 85 T.C. at 821.

The issue before us is entirely about section 6501(a)--the section that commands the Commissioner to assess a tax if at all within three years from the date the taxpayer files a return. It defines "return" in the most unhelpful of ways: "[T]he return required to be filed by the taxpayer." *Id.* It also explicitly says there is an unlimited amount of time to assess when the taxpayer fails to file a return. Sec. 6501(c)(3). In examining section 6501 in *Cooper*, we said "for a return to commence the running of the period of limitations, the return must be (1) properly filed and (2) the return required to be filed by the taxpayer." T.C. Memo. 2015-72, at P18. We will likewise follow that approach today.

The Coffeys' alternative argument, consistently with these standards, lets us assume they weren't *bona fide* VI residents in 2003 and 2004. They argue nonetheless that the VIBIR accepted their returns as sufficient to start the statute of limitations. The Commissioner did not, but the Coffeys argue that we should apply the test in *Beard v. Commissioner*, 82 T.C. 766 (1984), and find that their returns were filed with the IRS. After all, the right IRS office got at least a portion of their returns and it even selected them for audit based on this information.

The Commissioner laughs at any suggestion that this is a simple case and that the Coffeys filed a return with the IRS. To begin with, he argues that the Coffeys filed only territorial returns, not federal ones. He contended during oral argument that any smart taxpayer would've concurrently filed a zero return with the IRS, as the agency directed years later in Notice 2007-19. He admitted that the IRS had not actually provided this guidance when the Coffeys had to fill out their returns.[18] He also said that even if the Coffeys had sent their entire return to the IRS with an attachment clearly explaining their position that they were VI residents, this wouldn't have been enough because their correct return should've been a zero return. According to the Commissioner, less is more.

Notwithstanding what he believes the Coffeys should've sent, the Commissioner also argues that what the IRS did receive doesn't amount to a filed return. He feels that the two-pages-plus-W-2s simply lacked enough information to be a valid return, and the lack of an original signature also prevents it from being a return. We specifically note that the Commissioner does *not* argue that we have a third-party filing problem; i.e., that the return came from the VIBIR rather than from the Coffeys directly. He has since conceded that "[a] taxpayer's subjective intent has no role to play in determining whether a valid return has

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18. Despite the Commissioner's insistence that any reasonable taxpayer would've known to file a protective return, he also insinuated that perhaps only those with tax planners could understand, by saying "I don't expect Mrs. Coffey to get it, but I do expect the tax planner to get it."

been filed."[19] In other words, the Commissioner focuses entirely on the "return" argument and not on the "filed" issue. With this concession, we can treat the Coffeys' filing of their returns as analogous to the situation in *Winnett v. Commissioner*, 96 T.C. 802, 808 (1991), where the taxpayers sent their return to the wrong IRS service center. When this service center discovered the error, it forwarded the return to the correct one. We held that the return was filed on the date the correct service center received it. As in *Winnett*, the correct revenue office did eventually receive the documents in question here. The IRS Philadelphia office made clear markings on the Forms 1040 it received, such as stamping its own document ID numbers on them.

Here, the Coffeys intended to file a return under section 932(c) by sending it to the VIBIR. They might have been wrong about where to send it, but they intended to file a return as American citizens. Just as in *Winnett*, they sent it to the wrong place but at least parts of it ended up in the right place.

But were the documents that the IRS actually received the Coffeys' "returns"?

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19. The Commissioner does believe, however, that a taxpayer's subjective intent "does have a role to play in determining whether a filed document constitutes a valid return." The Commissioner specifically said that "We're not challenging Exhibits 2-P and 3-P [sic], the returns that she filed with the VIBIR. We're not saying those are not valid returns."

III. What's a Return?

Despite the many complexities of the Code and regulations, we are left without a definition of "return". And perhaps that's exactly the way it should be. After all, as the Commissioner himself acknowledged during oral argument, it is the taxpayer and not the return that is audited. This leaves us with the discretion to make the definition of return fit the context, and to be practical about it. "The purpose is not alone to get tax information in some form but also to get it with such *uniformity, completeness*, and *arrangement* that the physical task of handling and verifying returns may be readily accomplished." *Commissioner v. Lane-Wells Co.*, 321 U.S. 219, 223, 64 S. Ct. 511, 88 L. Ed. 684, 1944-1 C.B. 539 (1944) (emphasis added).

To determine if the information the IRS received from the VIBIR was a "return", both parties point us to the multifactor test we laid out in *Beard*, 82 T.C. 766. *Beard* has become the go-to case to answer this question, and we'll likewise apply the *Beard* test today. But we do note that this case is a shining example of why *Beard*'s definition ought to be applied with some consideration of the context of a particular case. *Beard* tells us that, for a document to be a "return" for statute-of-limitations purposes, it must:

- contain "sufficient data to calculate tax liability,"

- "purport to be a return,"

- "be an honest and reasonable attempt to satisfy the requirements of the tax law," and

- be executed under penalties of perjury.

Id. at 777. We'll look at each factor in turn.

A. Sufficiency of the Data

This is perhaps the main disagreement between the parties. The Coffeys argue that the IRS got enough information from the VIBIR. They also argue that the IRS could've requested any missing information from the VIBIR pursuant to the TIA. The Commissioner believes that the forms the IRS received "do not disclose information in such a way that [the returns] could be readily verified"; there was too much information missing.

We'll break this down into three parts:

- Does it matter that the IRS could have asked VIBIR for the information?

- Is there a distinction between a return that is valid and one that is verifiable? and

- Does it matter to these returns' validity that so many schedules were missing?

1. Asking for the Missing Information

We first discuss the Coffeys' point that the IRS could've asked for any missing information. This cannot be doubted--the information-sharing agreement says so. The Coffeys therefore think that *Holmes v. Dir. of Dep't of Revenue and Tax'n, Gov't of Guam*, 937 F.2d 481 (9th Cir. 1991), is directly on point. In *Holmes*, Guam disallowed a deduction on the Guamanian tax return of an individual who owned an S corporation in the Commonwealth of the Northern Mariana Islands (CNMI). Guam disallowed the deduction more than three years after the individual filed his return. After first deciding that Guam recognized S corporations in general, *see Holmes v. Dir. of Revenue and Tax'n, Gov't of Guam*, 827 F.2d 1243 (9th Cir. 1987), the court held that Guam was too late to the challenge. It reasoned that Guam was certainly on notice of the taxpayer's intent to take the deduction. It also said:

> As for future cases, no showing has been made that the CNMI Department of Finance refuses to release any information requested by the Guam Department of Revenue; in fact, the two jurisdictions agreed in 1984 to share relevant tax return information. Thus, absent some unusual circumstance, the Department may obtain informational returns filed by CNMI corporations simply by asking, and will be notified of any potential problems merely by scanning its individual returns for S corporation income or deductions. If it fails to request such information or neglects to act on the information it does have within the allotted time, without obtaining a waiver, its rights will expire, *as would the rights of its counterpart on the mainland, the I.R.S.*

Holmes, 937 F.2d at 484-85 (emphasis added).

We think *Holmes* is helpful, but not directly on point. The threshold question here is whether there was a return at all. In *Holmes*, Guam received the required return from its taxpayer, and that was never in dispute. The information Guam wanted was going to be helpful in auditing that taxpayer. There's certainly nothing in the opinion to support that that information was something the taxpayer was required to attach to his return. We also think it important to point out that the Ninth Circuit did not say that a document that otherwise would not have been a return became one because Guam could've asked for and received the missing information from another sovereign. We've already held that the IRS is under no obligation to inform taxpayers of defects in their filings that prevent them from being returns, even if the IRS easily could--or even normally does. *See, e.g., Doll v. Commissioner*, T.C. Memo. 1965-191 (IRS did not inform the taxpayer that he forgot to sign the return), *aff'd*, 358 F.2d 713 (3d Cir. 1966).

We therefore do not hold that the information-sharing agreement between the VIBIR and the IRS means that we have to pretend that all the information that the VIBIR has is also information that the IRS has. But that's not the end of the analysis because the IRS actually got a chunk of the return that the Coffeys sent to the VIBIR. We have to ask, then, whether that chunk was itself a "return". And that means asking how incomplete a return can be before it's not a "return" at all.

2. Validity v. Verifiability

Remember that the Commissioner said his objection to the Coffeys' assertion that what he actually had in hand was a return was that what he got did "not disclose information in such a way that [the returns] could be readily verified."

But is that a part of the test?

The Code itself suggests that it is not. Section 6611(g) is an obscure provision about interest on taxes, and specifically the interest that the Commissioner owes to taxpayers who overpay their tax. It governs a certain kind of situation where there's been a filed return but it's incomplete. It says that--for the purpose of getting interest on an overpayment--"a return shall not be treated as filed until it is filed in processible form." Sec. 6611(g)(1).

And a return is *processible* if it is filed on a "permitted form" and contains "sufficient required information (whether on the return or on required attachments) to permit the mathematical verification of tax liability shown on the return." Sec. 6611(g)(2)(B)(ii). Verifiability is important here, but it doesn't affect a return's *validity*; it affects a return's *processibility*.

There is no final regulation that addresses this situation, but there is a proposed regulation[20] that sensibly

20. Proposed regulations are entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed.

says a return includes the "components" of a return, and then defines components to include the various schedules that taxpayers are instructed to attach to their returns. *See* sec. 301.6611-1(h)(2), Proposed Proced. & Admin. Regs., 49 Fed. Reg. 39570 (Oct. 9, 1984). But section 6611(g)(2)(B)(ii) also says that missing information affects the processibility of a return only if its absence prevents "the mathematical verification of the tax liability as shown on the return."

This means that a return can be valid even if it does not allow for verification. The caselaw gives us a good example: Deutsche Bank filed its 1999 income tax return on time, but it didn't attach Form 1120F, Form 8805, or Form 1042-S. (These are uncommon forms -- what matters is that there were three of them and none was attached to the return.) The bank had overpaid its tax that year and wanted interest. But the defense of the government was not that the return was not filed, but that it was not complete enough to be mathematically verified. Even then, the Federal Circuit reasoned, "A return without a required attachment may nonetheless be processible when the information contained on that missing attachment is readily available elsewhere in the return or when the information is irrelevant to mathematical verification." *Deutsche Bank AG v. United States*, 742 F.3d 1378, 1383 (Fed. Cir. 2014).

The Commissioner's own IRM draws the same distinction: "Both a valid return and a processable return

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124 (1944), which means we defer to them if they persuade us.

must have sufficient data to calculate the tax liability shown on the return, but processability also takes into account the Service's processing tasks . . . . For example, a return will be valid even though it is missing Form W-2 or Schedule D, but it will not be processable because the calculations are not verifiable." IRM pt. 25.6.1.6.16(2) (Oct. 1, 2010). We can thus define three species in the return menagerie;

- valid returns that start the statute of limitations running because they have enough information to calculate a tax liability;

- processible returns that start the statute of limitations and trigger the IRS's obligation to pay interest because they are complete enough to allow mathematical verification, and

- perfect returns with no missing information at all.

What did the IRS have here?

3. Effect of the Missing Schedules Here

There are cases to help us apply this taxonomy. It is settled, for example, that a purported return need not be perfect to be a valid return. *See Zellerbach Paper Co. v. Helvering*, 293 U.S. 172, 180, 55 S. Ct. 127, 79 L. Ed. 264, 1934-2 C.B. 341 (1934) ("Perfect accuracy or completeness is not necessary to rescue a return from nullity * * *. This is so though at the time of filing the omissions or inaccuracies are such as to make amendment necessary"). Even a return filled with lies can be a return. The Supreme

Court held in *Badaracco v. Commissioner*, 464 U.S. 386, 104 S. Ct. 756, 78 L. Ed. 2d 549 (1984), that a taxpayer's original and *fraudulent* returns were still "returns". The Court reasoned that the fraudulent returns "purported to be returns, were sworn to as such, and appeared on their faces to constitute endeavors to satisfy the law." *Id.* at 397. Rather than not including information, fraudulent returns purposefully include wrong information. They are nonetheless returns.

What we have here, though, is not imperfection or fraud, but missing schedules. We and the IRS have overlooked missing schedules in the past. In *Blount v. Commissioner*, 86 T.C. 383 (1986), we held that even though the taxpayer failed to attach his W-2 to his return (an error he later corrected), the statute of limitations began to run from the date he filed the return. We applied the Beard test and concluded that "[t]he omission of a Form W-2 does not prevent the calculation of tax liability." *Id.* at 387. On another occasion, the IRS expressed its view that an otherwise complete return that was missing its Schedule A was nonetheless sufficient to start the statute of limitations as a "return". SCA 200010046 (Jan. 12, 2000). "While a return may lack supporting *schedules* for particular items of gross income, deductions, and credits, it will generally provide sufficient data to calculate a tax liability. The fact that the tax liability computed on the original return is later determined to be incorrect does not necessarily cause the return to fail the substantial compliance standard." *Id.* (emphasis added).[21]

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21. Although chief counsel memoranda (CCMs) are not precedential, they do provide "an expression of agency policy" and

And in *McCaskill v. Commissioner*, 77 T.C. 689, 698 (1981), there was a missing Schedule C, but though "[w]e agre[ed] with respondent that petitioners have failed to indicate the nature and source of their income * * * we [did] not agree that they thereby failed to file a return."

Of course the document here is missing not just a Schedule A or a Schedule C, but all the schedules that the Coffeys had attached to their returns as filed in the Virgin Islands -- all except their W-2s.

We're left to decide when so little is enough, and we think this is a holding that must reflect the facts of each case. *Blount* tells us to focus on what is necessary to "[calculate the] tax liability." 86 T.C. at 387. Of particular importance to us was that "the returns as filed contain[ed] sufficient information for respondent to make a computation of petitioners' income tax liability." *McCaskill*, 77 T.C. at 698. We distinguished such a return from others that "[contained] no information in the blanks provided for the taxpayer's income and deductions." *Id.* In *Morgan v. Commissioner*, 807 F.2d 81, 83 (6th Cir. 1986), aff'g T.C. Memo. 1984-384, the Sixth Circuit held, in affirming our opinion that a return that was mostly blank except for claims of the Fifth Amendment privilege was not a valid return, that "[t]o constitute a valid return,

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can be a helpful interpretative tool. *Dover Corp. v. Comm'r*, 122 T.C. 324, 341 n.11 (2004) (quoting *Taxation With Representation Fund v. IRS*, 646 F.2d 666, 682, 207 U.S. App. D.C. 331 (D.C. Cir. 1981)); *see also Tupper v. United States*, 134 F.3d 444, 448 (1st Cir. 1998); *Container Corp. v. Comm'r*, 134 T.C. 122, 133 n.12 (2010) (citing *Morganbesser v. United States*, 984 F.2d 560, 563 (2d Cir. 1993)).

Form 1040 must reflect a reasonable disclosure of gross income, deductions, and resulting net taxable income."

The focus in all these cases was on whether the information that the IRS had enabled it to *compute* taxable income--maybe not all the information it needed to compute the *correct* taxable income much less "mathematically verify it"--but enough, as we said in *Beard*, that the Commissioner did not have to handle it by special procedures and withdraw it from normal processing channels. *Beard*, 82 T.C. at 777. What do the undisputed facts here show? They show first of all that the IRS had enough to create a transcript of account --albeit one with zeros on almost all the lines. This is telling because, one should recall, the IRS's answer to the question at oral argument of what the Coffeys should have filed if they weren't sure they were residents was that they should have filed a return with all zeros. At the time the Coffeys actually filed their returns with the VIBIR this wasn't the official word of the IRS--rather at oral argument, IRS counsel stated that the protective zero return was "[his] little baby." But not too long afterward, the IRS did issue Notice 2007-19, 2007-1 C.B. 689, which also said taxpayers in the Coffeys' position should file zero returns.

And what the IRS actually got had *more* information than any zero return. It showed the first two pages of the Coffeys' Forms 1040. The forms the IRS received reported the Coffeys' gross income, deductions, and credits. Even if the IRS was going to deny the EDP credit reflected on page 2, the forms still disclosed "gross income, deductions, and resulting net taxable income." *Morgan*, 807 F.2d at 83. Missing schedules certainly may draw the eye of the IRS, but they don't prevent the computation of a taxpayer's liability--unlike the forms in *Morgan*, where the taxpayer failed to give the basic information needed for the IRS to even calculate a tax liability. In cases like *Morgan* and *Beard* the forms weren't returns because the taxpayers altered them and refused to include their basic gross income, deductions, and credits. That is not the case here. The forms sent by the VIBIR reported these income, deduction, and credit figures. And what did the IRS do with these? It created transcripts of account that showed all zeros--*exactly what would have happened if the Coffeys had sent in the zero returns that the IRS now says they should have sent.*

We find that they meet this factor of the *Beard* test.

B. What the Documents Purport To Be

The Forms 1040 that the VIBIR sent to the IRS also meet the second factor here. The IRS argues that these forms don't purport to be a return because they were territorial, rather than federal, returns. We are not persuaded. The Forms 1040 that people send to the VIBIR are identical in every respect to the Forms 1040 the IRS wants, made especially apparent with "Department of the Treasury--Internal Revenue Service" visible on the top of page 1. The attachments may be different, and some forms are unique to VI filers, as are some credits. But section 932 makes the filing of VI returns part of one's federal-filing obligation, which means the Code doesn't draw a distinction between "territorial" and "federal" returns but between territorial and federal filing obligations--not as much what Form 1040 is filed but where.[22]

This point is buttressed by what happens in criminal tax law. A taxpayer who files a fraudulent return with the VIBIR is not charged with violating territorial law. He is instead, like anyone who commits a tax crime on the mainland, charged with filing a fraudulent *federal* return. Here's typical language from an indictment:

> a resident of the Virgin Islands, did willfully cause and aid and assist in, and procure, counsel, and advise the preparation and presentation to the Virgin Islands Bureau of Internal Revenue, of an Individual Income Tax Return, Form 1040, of Rodney E. Miller for the calendar year 2006, which was filed with the Virgin Islands pursuant to the Internal Revenue Code, Title 26 of the United States Code, section 932(c)(4), and was false and fraudulent as to a material

22. One could argue that the Coffeys' federal-filing obligation might, under the assumptions we make at the summary-judgment stage, be discharged only by a return with enough information to compute the tax liability they would owe if in fact they turn out not to be *bona fide* VI residents. Our assumption in favor of the Commissioner on this motion, i.e., that the Coffeys were not *bona fide* VI residents, extends only to their obligation to file with the IRS, not that what was filed has to reflect a return position that they are not *bona fide* VI residents. The purpose of this part of the *Beard* test is, again, a practical one--did what the IRS receive disclose enough to compute the Coffeys' tax liability? It needn't be enough to compute that liability accurately.

> matter * * * [i]n violation of Title 26, United States Code, Section 7206(2).

United States v. Miller, Criminal No. 2013-07, Indictment at 1 (D.V.I. Apr. 4, 2013), ECF No. 1; *see also United States v. Auffenberg*, Criminal No. 2007-0047-F/B, Second Superseding Indictment at 1-8 (Mar. 18, 2008), ECF No. 295 (charging defendants with conspiracy to defraud the United States under 18 U.S.C. sec. 371 by fraudulently claiming EDC credits in the Virgin Islands).

The IRS wants returns on the forms it prescribes, and it got that form--at least a good part of it--here. There is no question that the IRS was clueless about how to handle what it got--but the undisputed facts show that the IRS was able to stamp it received, summarize its contents in its Individual Master File, and open an audit in due course; it just didn't issue the notices of deficiency before the statute of limitations ran out.

C. Honest and Reasonable Attempt To Satisfy the Requirements

We believe the third factor is also met here. The Commissioner makes an interesting argument why it can't be: He says that if the Coffeys truly believed they did not have any taxable income in the United States, how can a form that reports lots of income, deductions, and credits be their honest attempt to satisfy the requirements of federal tax law? He believes that "[t]he only return [the Coffeys] could file with [the IRS] that is not inconsistent with [their position] would be a protective all zero return." Here the Commissioner bases his argument on the Coffeys' subjective beliefs about their obligations. Let's assume that they truly believed that they didn't need to report anything to the IRS. We don't think their state of mind is material to whether the information that ended up at the IRS is a "return". We judge the reasonableness of an attempted return by its face. *Colsen v. United States (In re Colsen)*, 446 F.3d 836, 840 (8th Cir. 2006) ("[T]he honesty and genuineness of the filer's attempt to satisfy the tax laws should be determined from the face of the form itself * * *. The filer's subjective intent is irrelevant.") Such a rule makes sense given the Supreme Court's decision in *Badaracco*. A fraudulent return, which by definition is not an honest attempt to accurately report income and deductions, was still a "return" because it looked like a genuine return. If the Court was concerned about the subjective beliefs of the taxpayer, then the return in *Badaracco* could not be a return.

The precedents that tell us to look at the face of a purported return to decide if it is a return make sense here. The IRS is a mass-processing organization, and we'd hesitate to resolve any ambiguity in the meaning of "return" that would place any burden on an IRS intake clerk of having to contemplate anything this complicated about the state of mind of an unknown taxpayer. *See, e.g., Andre v. Commissioner*, 127 T.C. 68, 74 (2006) (noting "the human limits of the IRS in processing as efficiently as possible the correspondence that it receives from a multitude of taxpayers"). The point of this part of the *Beard* test is to distinguish tax protester returns such as zero returns, *see, e.g., Cabirac v. Comm'r*, 120 T.C. 163, 169 (2003), *aff'd*, 94 A.F.T.R.2d (RIA) 2004-5490 (3rd Cir. 2004), and Fifth Amendment returns, *see, e.g., Daly v. United States*, 393 F.2d 873, 878 (8th Cir. 1968)--returns that on their face show a lack of any honest and reasonable attempt to satisfy the law--from returns that on their face show an attempt to properly report income and deductions.

Looking at what the IRS got here, we see an objective attempt to report income and deductions. The return is nothing like the typical protester returns we've seen but instead includes a breakdown of the Coffeys' income, deductions, exemptions, and credits. The documents include the EDP credit, which doesn't exist in the United States, but even if the Coffeys turn out not to be entitled to it, that makes the item erroneous, not the form itself objectively unreasonable. The Supreme Court tells us a return need not be perfect to start the statute of limitations. *Zellerbach*, 293 U.S. at 180; *see also Sakkis v. Commissioner*, T.C. Memo 2010-256 (finding return valid despite frivolous deduction reducing liability to zero); *Steines v. Commissioner*, T.C. Memo. 1991-588 (finding a return with a frivolous $100 billion business loss a "return" because it enabled tax computation), *aff'd without published opinion*, 12 F.3d 1101 (7th Cir. 1993).

We also note the Commissioner's argument contradicts his assertion that the Coffeys would've received the protections of the statute had they filed a zero return for the purposes of this motion. At oral argument counsel for the Commissioner said that the Coffeys ran the risk of being wrong about being VI residents and that they should have filed protective returns with the Philadelphia office.

When we asked him what exactly they were supposed to send to Philadelphia, he said "[W]hatever [they want] to file. We're talking about a protective return." If the Coffeys are indeed not VI residents, it means they are supposed to send a *completed* return to the IRS. Nonetheless, the Commissioner argues that a return with all zeros would be sufficient to start the statute of limitations in such a situation. But if the Coffeys were required to send a return to the IRS that showed a reasonable attempt to reflect their true income and deductions, how could a return with all zeros constitute such an attempt? It seems to us that a form reporting all the Coffeys' income and deductions, even if it included an erroneous credit on its face, is a much more reasonable attempt to satisfy their obligations than one containing all zeros.

D. Documents Executed Under Penalties of Perjury

The fourth factor is a bit complicated. The Code requires a taxpayer to sign his return under penalty of perjury. Secs. 6061, 6065. The parties do not appear to dispute that the Coffeys signed the forms before sending them to the VIBIR. But the Commissioner argues that the forms the IRS received had to have original signatures (i.e., wet-ink signatures). If that's true, then these documents must not be returns because the VIBIR transmitted them to the IRS electronically, which means the entire return was scanned, including the signatures. The Coffeys argue that the signature requirement falls under *Zellerbach*'s conclusion that a return need not be perfect to start the statute of limitations. They also point out that the IRS routinely accepts nonoriginal signatures.

We agree with the Commissioner that Congress granted the IRS great leeway in prescribing the signature method. *See* sec. 6061(a) ("any return * * * required to be made under any provision of the internal revenue laws or regulations shall be signed in accordance with forms or regulations prescribed by the Secretary"). The Commissioner tells us it has been his longstanding custom that an original signature is required. *See, e.g., Berenbeim v. Commissioner*, T.C. Memo. 1992-272 ("It is generally the practice of the Internal Revenue Service Centers, however, not to file a return unless it has an original signature.") He even points us to a sentence in one of our own opinions where we said that "[a] return is valid only if it is verified under penalty of perjury by an original signature and filed in the appropriate office." *Turco v. Commissioner*, T.C. Memo. 1997-564. Nonetheless, we are unable to find anything in the Code or regulations that explicitly calls for an "original" signature.[23] The Code and regulations instead require only that the taxpayer "shall sign" the return. Sec. 1.6061-1(a), Income Tax Regs.

As the Coffeys point out, the IRS does accept returns without original signatures. In Rev. Rul. 68-500, 1968-2 C.B. 575, the IRS concluded that it would accept Forms 1041 and Forms 1040NR with facsimile signatures. This ruling admittedly required that the fiduciary or agent could make such a signature only if he sent the IRS a letter with an original signature that listed all of the returns being signed via facsimile. *Id.* And the ruling required that

23. The Commissioner couldn't find anything either, admitting he too "[doesn't] know the answer."

the facsimile signature be affixed after any photocopying. *Id.* Nonetheless, we find it notable that the ruling said that "[a] reasonable construction of the regulations permits some flexibility with respect to the method of affixing signatures to income tax returns." *Id.*, 1968-2 C.B. at 576.[24]

Despite the Commissioner's insistence that he has complete discretion in prescribing the manner of signing, this isn't entirely correct. We have on a number of occasions found a joint return to be valid despite the missing signature of one spouse. *See, e.g., Estate of Campbell v. Commissioner*, 56 T.C. 1 (1971); *Strong v. Commissioner*, T.C. Memo 2001-103. These decisions stand despite the Commissioner's continued insistence that they're wrong because the regulations require both spouses to sign. *See* sec. 1.6013-1(a)(2), Income Tax Regs.; G.C.M. 38440 (July 11, 1980) (noting that, despite our opinions to the contrary, the IRS "believe[s] the omission of one signature on a submitted joint return should render the return invalid and be treated the same as single unsigned returns").

24. This is consistent with the Commissioner's position at oral argument. When we asked him if the IRS has the authority to change the Code, he adamantly said "no * * * the Code is the Code." If the IRS is willing to accept some returns without original signatures and it doesn't have the power to change the Code, then that means the Code doesn't always require an original signature. Neither the Code nor the regulations define "sign", and despite the Commissioner's belief that an original signature is required, we see no reason to find that "sign" means one thing in the Code and another in the regulations. When we asked the Commissioner's counsel why he accepts facsimile signatures under some circumstances, he honestly answered "I don't know."

We've also overlooked a lack of a signature outside the world of joint returns. In *Gen. Mfg. Corp. v. Commissioner*, 44 T.C. 513 (1965), a parent and a subsidiary filed a consolidated return. The president of the parent corporation signed the return and affixed the parent corporation's seal to it. *Id.* at 517. The subsidiary never filed its own corporate return, and the IRS eventually sent it a notice of deficiency. *Id.* at 518. The subsidiary argued that it didn't need to file a separate return because the parent filed a consolidated one, and it argued in the alternative that the consolidated return constituted its individual return and the notice of deficiency was sent too late. *Id.* at 520, 522. The Commissioner argued that the subsidiary corporation didn't sign the consolidated return, thus making it a nullity for income tax purposes. *Id.* at 523. We disagreed. Although we did find that the consolidated return was invalid, we held that the form did constitute the subsidiary's individual return. *Id.* at 522. We noted that according to *Zellerbach* a return need not be perfect, and the return in question was in substantial compliance with the requirements of a return. *Id.* at 523. The complete lack of the subsidiary's signature (seemingly worse than a copied one) did not prevent the statute of limitations from starting to run. We placed particular emphasis on the fact that the filing gave the IRS enough information about the subsidiary to examine the return, and concluded that the "notice could have been issued prior to" the end of the three-year period. *Id.* at 524.

Signatures have two important functions in the legal world. They give something legal effect and they provide means of authentication. *See* 1-1 Arthur Linton Corbin,

Corbin on Contracts, sec. 1.12, at 32 (2015); 1-2 Arthur Linton Corbin, Corbin on Contracts, sec. 2.10, at 162 (2015). Signing a tax return gives it legal effect because it's a way of saying that "this is my tax return and I really mean it." In other words, it distinguishes it from other tax returns one might've filled out but later edited. The signature helps with authentication in case the IRS ever needs to question the taxpayer about the return. Making sure it's really his tax return is a good way to start.

As discussed above, the IRS does at least sometimes allow nonoriginal signatures. In each of these situations, "the Service was careful to require authenticating safeguards to ensure that the alternative signature was reliable." Program Manager Technical Advice (PMTA) 00389 (Aug. 1, 2000). We can see safeguards at work in those cases where we looked past a problem with the signature. In the missing-signature-of-the-spouse cases, the signing spouse is there to assure us the spouse really meant to join the return. In *Gen. Mfg.*, even though the subsidiary didn't sign the return, its parent signed it and even affixed the corporate seal. There are strong safeguards here too. The IRS didn't receive the Forms 1040 from just anyone. It received them from the VIBIR, the official revenue agency of a U.S. possession and one with which the IRS has a longstanding information-sharing agreement. It's undisputed that the VIBIR accepted the Coffeys' forms as valid returns.

We do not hold today that photocopied or scanned signatures are always sufficient to make a return valid. Rather, based on *Zellerbach*'s idea that a return doesn't have to be perfect and the strong authenticating safeguards in place in this case, we are satisfied the Coffeys' scanned signatures were sufficient to meet this factor of the *Beard* test.[25] "The error, if any, in filing a photocopy which has not been actually, physically, and manually signed * * * is one which is minor and not seriously misleading." *Sommers v. IBM* (*In re Legal Cooperatives, Inc.*), 5 B.R. 382, 386 (Bankr. S.D. Tex. 1980), *rev'd on other grounds*, 640 F.2d 686 (5th Cir. 1981).

Conclusion

We are certainly cognizant of the concerns of both parties here. The Coffeys and the VI argue that a finding against them gives the IRS an eternally open statute of limitations to assess taxes against anyone it doesn't believe is a *bona fide* VI resident. And they are quick to point out that the IRS adopted their approach starting with the tax years ending on or after December 31, 2006, in section 1.932-1 of the regulations. Most troubling perhaps is that Congress commanded the Secretary to issue regulations under section 932 and he simply failed to do so by the time

25. We don't believe this holding contradicts *Turco*. Although we did use the phrase "original signature," our holding in *Turco* is distinguishable from this case and *Gen. Mfg.* because the taxpayer in *Turco* gave the photocopy to an IRS agent. We concluded that the taxpayer failed to file his return because the IRS agent isn't the designated place for filing. As we concluded above, the forms in question here did find their way to the designated filing place. *Turco* certainly didn't mean to overrule *Gen. Mfg.*, a case where the return didn't have the taxpayer's signature at all, and we do not believe it meant to say all tax returns have to have original signatures without fail. This would be too expansive a reading.

the Coffeys had to fill out their returns. *See* sec. 7654(e) ("The Secretary shall prescribe such regulations as may be necessary to carry out the provisions of * * * sections 931 and 932.").

Although these concerns are valid, they're not as devastating as they might seem to be. A finding against the Coffeys would not give the IRS an unlimited statute of limitations. It's true that taxpayers might be hauled into court long after three years had passed, but they'd be fighting over whether they're *bona fide* VI residents. This would not be a dispute on the merits of their tax liability. *See Cooper*, T.C. Memo. 2015-72, at P23. And the absence of regulations doesn't repeal section 932. The Code says that a taxpayer who "is" a *bona fide* VI resident need file only with the VIBIR. Both the Eleventh Circuit and we have already found this to be unambiguous. *See Estate of Sanders*, 834 F.3d 1269; *Cooper*, T.C. Memo. 2015-72, at P22.

The Coffeys, and particularly the VI, also stress that finding for the Commissioner creates an opportunity for double taxation. If the IRS can send notices of deficiency to people like the Coffeys long after three years have passed, they run the risk of having to pay tax to the United States and not being able to get a refund from the VIBIR. The VI has its own statute of limitations for filing for refunds and this period will have come and gone long before the taxpayers get their notice of deficiency from the IRS. We accept this risk as real, and the Commissioner similarly accepted it during oral argument.[26] But the existence for potential double taxation is not determinative, even if some inequities exist. *See, e.g., Vento v. Commissioner*, 147 T.C. 198 (2016) (taxpayers not eligible for credit of tax paid to VIBIR in computing tax owed to IRS); *McGrogan v. Commissioner*, No. 2009-167, 2011 U.S. Dist. LEXIS 87601, 2011 WL 3472336, at *7 (D.V.I. 2011) (unreported) (finding no mitigation of potential double tax for a taxpayer with uncertain VI residency). Despite cases like these, we also note that the Third Circuit has observed that the competent authorities[27] of the United States and the VI are supposed to provide a remedy for this problem. *Cooper v. Comm'r of Internal Revenue*, 718 F.3d 216, 223, 58 V.I. 804 (3d Cir. 2013).

But those competent authorities are not available here, contrary to the Commissioner's assertions during oral argument. The IRS sent the Coffeys a letter in February 2009 that advised them that they had to settle their case in order to obtain relief from double taxation. The letter

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26. The IRS understood this risk when it published Rev. Proc. 2006-23, 2006-1 C.B. 900, where it recommended that those claiming to be VI residents file protective refund claims with the VIBIR to ensure they were timely.

27. Income-tax treaties generally include a "competent authority" clause which enables a taxpayer to appeal to the competent authorities of the two participating sovereigns if his particular situation is not covered by the treaty and will result in inequitable taxation. It's an administrative procedure conducted by the two sovereigns, with the "competent authority" being some sort of governmental body. *See, e.g., Filler v. Commissioner*, 74 T.C. 406, 408-09 (1980).

considered their case to be one of an "improperly claimed" EDP credit, and pursuant to an agreement the United States had with the VI, settling their case and naming the adviser that promoted their plan would be the only way they could secure relief from double taxation; otherwise they would "not be eligible for general competent authority relief."

The Commissioner believes we should construe any ambiguities in the law in his favor because of the sheer potential for abuse. The IRS announced its skepticism of people's claims of VI residence in Notice 2007-19, *supra*. We acknowledge these concerns, but we also understand the importance of the statute of limitations and the ability of taxpayers to plan their affairs. As we noted throughout this opinion, the Commissioner's assertion that the Coffeys should've known to send in protective zero returns is very farfetched. Not only did the IRS not tell taxpayers this,[28] but it is bizarre to believe a zero return would start the running of the statute of limitations here when the same two pages of Form 1040 with significantly more information would not (with one notable difference being that the zero return would presumably contain an original signature).[29] To sum it up, the IRS failed to

28. The Commissioner's counsel at oral argument told us that the IRS simply "[d]idn't do it." Remember also that IRS counsel said that the protective zero return was "[his] little baby."

29. Taking it to an even further extreme, the Commissioner actually told us that even the Coffeys' complete return (i.e., including all the attachments) would've been worse than a zero return because such a return would've been incompatible with their belief that they were *bona fide* VI residents.

promulgate mandatory regulations under section 932, failed to tell taxpayers that they should file protective zero returns, and failed to send the Coffeys a notice of deficiency within three years of receiving the cover-over documents. And, only a few short years later, the IRS finally did promulgate regulations that adopt precisely the position that the Coffeys took about how to start the statute of limitations. Despite all this, the Commissioner tells us that the Coffeys lose--though one is left to wonder how the current regulation is valid if the Commissioner is correct that filing anything other than a zero return with the IRS would be inadequate under the Code.

Our conclusion today might seem strange at first--the Coffeys sent their return to the VIBIR, but because the first two pages of it somehow (and without their knowledge or explicit approval) ended up at the Philadelphia office of the IRS, we hold they're protected by the statute of limitations. But as we said in *Appleton*, 140 T.C. at 292 n.23 (citing *Holmes*, 937 F.2d at 481), "[i]t is not unprecedented for a court to determine that a return filed in one tax jurisdiction may commence the period of limitations in a second tax jurisdiction." We stress that this is not an opinion on the merits of the Coffeys' claims of VI residency: It concerns only the time limit the IRS has to challenge their claims. The IRS received the Coffeys' returns. The Coffeys might not have sent the forms themselves, but we have not found any authority to say they had to. It's the IRS's receipt that matters. The returns were not without their flaws, such as missing schedules and scanned signatures, but it's long been settled that returns don't need to be perfect. We hold the forms the IRS received contained enough information and complied with the IRS's form to a sufficient degree that they constituted returns for the purposes of section 6501.

Appropriate orders will be issued.

Reviewed by the Court.

FOLEY, VASQUEZ, GUSTAFSON, and BUCH, *JJ.*, agree with this opinion of the Court.

THORNTON, J., concurring in the result only: I agree with the result the opinion of the Court reaches but write separately to explain why I would reach that result on a narrower basis, focusing on the text of sections 932 and 6501(a). More specifically, I think that considering the particular facts presented in this case, the returns James Coffey and Judith Coffey (Coffeys, *see* op. Ct. note 2) filed with the Virgin Islands Bureau of Internal Revenue (VIBIR) under section 932(c)(2) sufficed to commence the limitations period under section 6501(a) for Federal income tax purposes.

Section 932(c)(2) provides that a bona fide resident of the Virgin Islands "shall file an income tax return for the taxable year with the Virgin Islands." Respondent has not disputed that the returns the Coffeys filed with the VIBIR qualify as returns under the four-part test laid out in *Beard v. Commissioner*, 82 T.C. 766, 777 (1984), *aff'd*, 793 F.2d 139 (6th Cir. 1986), with respect to the Coffeys' Virgin Islands filing requirement. Respondent claims, however, that the Coffeys were not bona fide residents of the Virgin Islands and that therefore their filings with the VIBIR did not commence the limitations period for Federal income tax purposes under section 6501(a).

The opinion of the Court focuses not on the returns the Coffeys filed with the VIBIR but on copies of those returns which the VIBIR eventually sent to the Internal Revenue Service (IRS). Assuming for the purposes of summary judgment that the Coffeys were not bona fide residents, the opinion of the Court concludes that under the *Beard* test these copies were returns, sufficient to begin the Federal limitations period.

While I agree with the ultimate result the opinion of the Court reaches, I think that it is unnecessary to decide whether the Coffeys were bona fide residents of the Virgin Islands, as respondent asks us to do, or to decide whether the documents the VIBIR sent to the IRS meet the *Beard* test, because the returns the Coffeys filed with the VIBIR under section 932(c)(2) started the section 6501(a) period of limitations for Federal income tax purposes.

The section 6501(a) limitations period is meant to provide repose to taxpayers who file honest and genuine --though possibly erroneous--returns. Long ago, in *Mabel Elevator Co. v. Commissioner*, 2 B.T.A. 517, 519 (1925), the Board of Tax Appeals held that a return which the taxpayer erroneously filed on a fiscal year basis instead of the requisite calendar year basis nevertheless triggered the limitations protection:

> It is urged that since the return filed by the taxpayer was made upon a fiscal year basis, while the law required a return upon a calendar year basis, the return filed was not the return required by the law and could not operate to start running the statutory period of limitations. With this we can not agree. The return filed purported to be made in accordance with the law; it purported to and did include the income of the taxpayer for the period in question. In the absence of any evidence or claim that such return was false or fraudulent with intent to evade tax, it became the duty of the Commissioner to determine, within the time provided by law, whether or not such return was erroneous in any respect.

> There can be no doubt that such limitations are placed on assessments for the purpose of assuring the taxpayer, who has made an honest return, that after such period his tax liability will not be reopened; otherwise the business of the country would always have before it the threat of additional taxes against the income of years long past when-ever a new theory for interpreting the tax law or for the application of accounting principles occurred to the taxing authorities. If the limitation can be avoided on the plea that the return filed was not such a return as is required by law, although filed in good faith, there is no such assurance for the taxpayer and the limitation becomes of doubtful value at least.[1]

Similar considerations pertain in this case. If a taxpayer's Virgin Islands filing were insufficient to start the limitations period unless the taxpayer was actually

1. In *Paso Robles Mercantile Co. v. Commissioner*, 12 B.T.A. 750, 753 (1928), *aff'd*, 33 F.2d 653 (9th Cir. 1929), the Board of Tax Appeals provided further guidance:

> In our opinion the statute of limitations does not begin to run until a return or returns have been filed which at least purport to cover or include the period involved. Where there are two returns which must be considered, each of which includes a part of the taxable year, the period of limitation must be considered as to both and the statute does not run until it expires as to both these returns.

See also Atlas Oil & Ref. v. Commissioner, 22 T.C. 552, 556-557 (1954) (citing *Mabel Elevator* and *Paso Robles* with approval).

a bona fide resident of the Virgin Islands at the relevant time, then the repose offered by the limitations period would be of doubtful value: Even bona fide residents who filed correct returns would never be free from the threat of a possible IRS challenge and future litigation with respect to their residency status.

In this case, as is generally true of tax cases involving the operation of the statute of limitations, the relevant question is *not* whether the positions the taxpayers took on their returns were substantively correct, but whether the returns "evince[d] an honest and genuine endeavor to satisfy the law." *Zellerbach Paper Co. v. Helvering*, 293 U.S. 172, 180, 55 S. Ct. 127, 79 L. Ed. 264, 1934-2 C.B. 341 (1934).

A recent case illustrates the application of this principle. In *New Capital Fire, Inc. v. Commissioner*, T.C. Memo. 2017-177, New Capital Fire, Inc. (New Capital), filed a return for 2002 on which it claimed to be the continuation of the Capital Fire Insurance Co. (Old Capital) and disclosed that Old Capital had been merged into New Capital during 2002 (in what New Capital claimed was an F reorganization). New Capital and Old Capital took the position that they were the same corporation for Federal income tax purposes and that therefore New Capital's filing, which reported both Old Capital's and New Capital's tax items for that year, sufficed to commence the period of limitations for both. The IRS disagreed, claiming that the F reorganization was invalid and that therefore New Capital and Old Capital were separate taxpayers, with separate filing requirements. On that basis, the IRS concluded that Old Capital had never filed for its last partial year and that therefore the period of limitations had not commenced.

This Court held that the Commissioner's determination was time barred because the period of limitations began for Old Capital when New Capital filed its return (i.e., regardless of whether the F reorganization was valid). Citing *Mabel Elevator*, the Court (1) noted that the Commissioner had "not alleged * * * that New Capital's 2002 return was false or fraudulent with intent to evade tax" and (2) stated that "[i]t was * * * [the Commissioner's] duty to determine, within the period of limitations provided by section 6501(a), whether New Capital's 2002 return, as it pertain[ed] to Old Capital, was erroneous in any respect." *New Capital Fire, Inc. v. Commissioner*, T.C. Memo. 2017-177, at *8-*9.

Somewhat similarly, in *Germantown Tr. Co. v. Commissioner*, 309 U.S. 304, 60 S. Ct. 566, 84 L. Ed. 770, 1940-1 C.B. 178 (1940), a trust company filed a fiduciary tax return instead of a corporate tax return, i.e., the company took the position that it was not a taxable entity and filed according to that position. The Commissioner determined that the company was subject to tax as a corporation and argued that a then-applicable two-year period of limitations had not commenced because no corporate return had been filed. The Supreme Court held that the *fiduciary* return was sufficient to begin the period of limitations for the *corporate* tax liability, although the return failed to compute a tax and although it was reported on the incorrect form.

As the opinion of the Court finds, the Coffeys' returns represented honest and reasonable attempts to file correctly. *See* op. Ct. pp. 45-48. Like the taxpayers in *Mabel Elevator*, *New Capital Fire*, and *Germantown Trust*, the Coffeys filed returns that were appropriate for reporting the positions taken on those returns. In this case, as in these earlier cases, the Commissioner seeks to defeat the statute of limitations by claiming, essentially, that reasonable and honest positions as to the taxpayers' filing status, which were clearly and adequately disclosed on their returns, are somehow not covered by the statute of limitations. Respondent's argument fails in this case for essentially the same reasons it failed in *Mabel Elevator*, *New Capital Fire*, and *Germantown Trust*.

Respondent suggests that the Coffeys should have filed a second, protective return with the IRS for the purpose of commencing the running of the section 6501(a) limitations period. But respondent's position is difficult to reconcile with the established caselaw under which, as just discussed, the period of limitations was held to have begun even without a protective return. And in any event respondent's position does not explain how a taxpayer is to surmount various practical difficulties alternate filings would present.

For example, in suggesting that the Coffeys should have filed protective zero returns with the Philadelphia, Pennsylvania, IRS Service Center, respondent references on brief page 8 of Publication 570, Tax Guide for Individuals With Income From U.S. Possessions (For use in preparing 2004 returns), claiming that it provided guidance. But Publication 570 says absolutely nothing about filing a protective zero return, nor does it explain where a taxpayer should file such a protective return in the event the taxpayer believes him or herself to be a bona fide resident. Rather, Publication 570 explains only what a taxpayer should do if he or she definitely is (or is not) a bona fide resident. As we noted in *Appleton v. Comm'r*, 140 T.C. 273, 288-289 (2013) (a case very similar to the present one): (1) there was no guidance at the time which would have directed taxpayers to file a second protective return; (2) in any event, we have traditionally considered a zero return to be a frivolous return, *see, e.g., Hill v. Commissioner*, T.C. Memo 2014-134 (finding that a zero return was frivolous and holding that a frivolous return does not commence the section 6501(a) period of limitations); and (3) "to expect a taxpayer to file a protective zero return with a service center to which the taxpayer was not directed, and where IRS employees were not alerted to expect such returns, is unreasonable."

In different ways *Mabel Elevator*, *New Capital Fire*, and *Germantown Trust* all recognize that it would be unreasonable to require a taxpayer to file one or more additional returns staking out phantom positions the taxpayer does not believe are correct, at least in situations where a return that was actually filed discloses enough information for the IRS to flag the relevant issues. While taxpayers must report enough information for the IRS to flag issues and compute the proper amount of tax (which, by the way, a protective zero return would not do), for purposes of section 6501(a) we do not generally require perfection. *See Zellerbach Paper Co. v. Helvering*, 293

U.S. at 180 ("Perfect accuracy or completeness is not necessary to rescue a return from nullity[.]"). In this case, the Coffeys made an honest and reasonable effort to comply with their filing obligations and provided enough information on the return they filed with the VIBIR to allow proper computation of tax. That should be enough.[2]

Respondent objects that the returns the Coffeys filed with the VIBIR did not clearly disclose their residency position *to the IRS*. In fact, the IRS was eventually

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2. This conclusion is consistent with the current regulations, sec. 1.932-1(c)(2)(ii), Income Tax Regs., which provide:

> For purposes of the U.S. statute of limitations under section 6501(a), an income tax return filed with the Virgin Islands by an individual who takes the position that he or she is a bona fide resident of the Virgin Islands * * * will be deemed to be a U.S. income tax return, provided that the United States and the Virgin Islands have entered into an agreement for the routine exchange of income tax information satisfying the requirements of the Commissioner.

Although these regulations were not in effect for the Coffeys' tax years, we note that they align with the position of this concurring opinion except that they condition the limitations protection on the existence of an information-sharing agreement between the IRS and the VIBIR. While we have no occasion to question the validity of these regulations, we see no reason to think that this requirement for an information-sharing agreement should preclude limitations protection in appropriate cases for periods before the regulations were effective. Indeed, interim guidance which preceded the final regulations was not similarly conditioned on the existence of an information-sharing agreement. *See* Notice 2007-19, 2007-1 C.B. 689.

informed of the Coffeys' position. Copies of the Coffeys' Virgin Islands returns were forwarded to the IRS (and as explained, *see* op. Ct. p. 7, the forms used for the Virgin Islands filing were Forms 1040, U.S. Individual Tax Return, repurposed for use as the Virgin Islands return without any changes). But whether the IRS happens to have been informed in this specific context is not controlling. Under the plain statutory text, section 6501(a) applies where a return has been filed, and section 932(c)(2) directs the taxpayer to file a "return" with the Virgin Islands under certain circumstances--it does not say that such a return will not commence the period of limitations unless the IRS gets the message, or unless the return is correct with respect to the taxpayer's residency status. The return, and not the correctness of the return, is the focus of section 6501(a).[3]

Respondent also contends that no filing with the Virgin Islands can start the period of limitations for Federal income tax purposes because the United States and the Virgin Islands are separate taxing jurisdictions. As the Supreme Court recently stated, however: "U.S. territories * * * are not sovereigns distinct from the United States." *Puerto Rico v. Sanchez Valle*, 579 U.S. 1863, 1866, 136 S. Ct. 1863, 1866, 195 L. Ed. 2d 179 (2016) (holding that the United States and Puerto Rico are not separate sovereigns for double jeopardy purposes). And in any event, we are not today considering the effect of

3. Respondent similarly argues that a return cannot commence the Federal period of limitations unless the return is filed with the IRS. But again, sec. 932(c)(2) does not require that the return referred to in that section be filed with the IRS--it requires that the return be filed with the Virgin Islands.

a law passed by the Virgin Islands under the authority delegated to the Virgin Islands by Congress; we are dealing with section 932, which is part of the Internal Revenue Code and which labels a return filed with the Virgin Islands a "return". The authority for treating a filing with the Virgin Islands as a return therefore flows from the Internal Revenue Code and not from any powers delegated to the Virgin Islands territorial government.

For these reasons respondent's argument fails, and I concur with the result, if not the reasoning, of the opinion of the Court.

GALE, GOEKE, PARIS, KERRIGAN, PUGH, and ASHFORD, *JJ.*, agree with this concurring opinion.

GUSTAFSON, J., agrees with this concurring opinion, except as to the word "only" in the first line of the concurring opinion and the phrase "if not the reasoning" in the last sentence of the concurring opinion.

MARVEL, *CJ.*, dissenting: The opinion of the Court concludes that the transmittal by the Virgin Islands Bureau of Internal Revenue (VIBIR) to the Internal Revenue Service (IRS) pursuant to a Tax Implementation Agreement of part of a Form 1040 filed by James Coffey and Judith Coffey (petitioners) only with the VIBIR constitutes a return filing for purposes of section 6501(a). Because neither petitioners nor anyone authorized by petitioners to act on their behalf filed or intended to file a Form 1040 with the IRS, the period of limitations on assessment under section 6501(a) did not begin to run. I respectfully dissent.

Section 6501(a) provides for a three-year period of limitations on assessment after a return is filed. In determining whether the section 6501(a) period of limitations has begun to run, we examine (1) whether the document the taxpayer submitted was a return and (2) whether the taxpayer properly filed it. *Appleton v. Comm'r*, 140 T.C. 273, 284 (2013).

Section 6012 generally provides that every individual having for the taxable year gross income which exceeds the exemption amount must file a return. Section 6501 defines a return as "the return required to be *filed by the taxpayer*". (Emphasis added.) Because section 6501 defines a return as the return "filed by the taxpayer", a document purporting to be a return that satisfies the requirements of section 6012 must be filed by the taxpayer or by someone legally authorized to file the return on the taxpayer's behalf and the taxpayer or his designee must intend to file it. *Florsheim Bros. Drygoods Co. v. United*

States, 280 U.S. 453, 462, 50 S. Ct. 215, 74 L. Ed. 542, 1930-1 C.B. 260 (1930); *see also Allnutt v. Commissioner*, T.C. Memo. 2002-311, slip op. at 13 ("A taxpayer may not, by his or her ambiguous conduct, even if unintentional, secure the benefit of the limitations period."), *aff'd*, 523 F.3d 406 (4th Cir. 2008).

In this case, petitioners filed a Virgin Islands (VI) return with the VIBIR, and the VIBIR then transmitted a portion of the VI return (the first two pages and copies of Forms W-2, which were attached to the VI return) to the IRS to facilitate the transfer to the VIBIR of moneys collected from petitioners. The opinion of the Court does not analyze whether the VIBIR was authorized by petitioners to act as their agent for purposes of filing a Federal income tax return, nor does it identify any evidence in the record to support a finding that the VIBIR was so authorized. In fact, the record contains no evidence that the VIBIR was authorized to act as petitioners' agent; and it appears that petitioners were not even aware that any portion of the VI return they filed would be transmitted to the IRS.[1] *See Huff v. Comm'r*, 135 T.C. 222, 230 (2010) (stating that taxpayers who were not bona fide residents of the VI were "required to file a Federal income tax return even if * * * [they] filed a Virgin Islands tax return").

Absent evidence proving that petitioners authorized the VIBIR to file the Form 1040 with the IRS on their behalf, there is no factual basis for concluding that

1. For a Federal income tax return to be considered properly filed, a taxpayer or someone authorized to act for the taxpayer must comply with any applicable filing requirements. *See Dingman v. Commissioner*, T.C. Memo. 2011-116, slip op. at 30-31.

petitioners filed a Federal income tax return sufficient to begin the running of the period of limitations on assessment. Petitioners simply did not file a Federal income tax return, on the facts of this case.

The opinion of the Court addresses whether a taxpayer's subjective intent is relevant when considering whether a valid return has been "filed". It asserts that respondent conceded this issue but acknowledges that a taxpayer's subjective intent "does have a role to play in determining whether a filed document constitutes a valid return." *See* op. Ct. note 19. The obligation to file a return imposed by section 6012 is that of the taxpayer, and the preparation and filing of a Federal income tax return must be a purposeful act. Our caselaw supports a conclusion that it is the taxpayer or someone authorized to act on the taxpayer's behalf who must file the return and, in so doing, must necessarily intend to file it as the taxpayer's return. *See, e.g., Espinoza v. Commissioner*, 78 T.C. 412, 422 (1982) ("His failure to pay the additional taxes raises a question as to whether he intended for the amended returns to be filed."); *Dingman v. Commissioner*, T.C. Memo. 2011-116, slip op. at 31 ("The record supports a conclusion that petitioner clearly intended to file the returns when his counsel submitted them to the CID."); *Allnut v. Commissioner*, T.C. Memo. 2002-311, slip op. at 20 ("[F]iling of a return is established by facts showing proper delivery or mailing of a return with the intent to file it as a return."); *Friedmann v. Commissioner*, T.C. Memo. 2001-207, slip op. at 19 ("[T]here is nothing in the record to show that petitioner intended his delivery of those documents to the agent in April 1992 to constitute the filing of his returns.").

The opinion of the Court avoids a head-on collision with cases like those cited above by relying on a supposed concession by respondent. It is wholly unclear that respondent has made any such concession; respondent explicitly argues that a taxpayer's subjective intent "does have a role to play in determining whether a filed document constitutes a valid return." *See* op. Ct. note 19.

Even assuming that the opinion of the Court has accurately understood respondent's position regarding a taxpayer's intent to file a return, we are bound to apply section 6501(a) as written and as interpreted by our caselaw. Section 6501(a) requires the filing of a return by the taxpayer, and the taxpayer must intend the document he files to be a return.

Moreover, in *Beard v. Commissioner*, 82 T.C. 766 (1984), *aff'd*, 793 F.2d 139 (6th Cir. 1986), in which we set forth factors for determining whether a document qualified as a Federal income tax return, we held that a document must be an honest and reasonable attempt to satisfy the requirements of Federal tax law. It is very hard to reconcile the assumption made by the opinion of the Court--that petitioners were *not* bona fide VI residents--with a finding that petitioners in filing their VI returns honestly and reasonably intended to file U.S. Federal income tax returns. Petitioners did not reasonably intend to file *any* Federal income tax return with the IRS. Contending that they were bona fide residents of the VI, they intended to file only VI territorial returns and only the VI territorial returns were executed under penalties of perjury, another *Beard* requirement. *Id.* at 777. What the VIBIR transmitted to the IRS were copies of parts of the VI returns filed by petitioners. The signatures on those copies were not original signatures (or their electronic equivalent), and they did not attest to the accuracy of the returns for purposes of U.S. tax law.[2]

The mirror system that the opinion of the Court addresses and the lack of regulatory guidance during the years at issue complicate the analysis and give some cover for the conclusions that the opinion of the Court reaches. I am concerned, however, that the opinion of the Court opens a door regarding what constitutes a valid return filed by the taxpayer that should not be opened. Filing a valid Federal income tax return with the IRS for purposes of section 6501(a) requires an intentional act by the taxpayer, and there was none here.

MORRISON, LAUBER, and NEGA, *JJ.*, agree with this dissent.

2. A portion of a return with no original signature cannot be a "return" for U.S. income tax purposes, and it therefore seems impossible for the IRS to prosecute a tax crime or assert a civil fraud penalty on the basis of the transmission of such a document.

APPENDIX G — ORDER DENYING REHEARING IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, FILED MAY 3, 2021

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-3256

JUDITH S. COFFEY AND GOVERNMENT OF THE UNITED STATES VIRGIN ISLANDS, ("V.I. GOVERNMENT"),

Appellees,

v.

COMMISSIONER OF INTERNAL REVENUE,

Appellant,

STACEY E. PLASKETT, DELEGATE TO THE UNITED STATES HOUSE OF REPRESENTATIVES FOR THE UNITED STATES VIRGIN ISLANDS,

Amicus on Behalf of Appellee(s).

No: 18-3259

ESTATE OF JAMES COFFEY, JUDITH COFFEY EXECUTRIX,

Appellee,

Appendix G

v.

COMMISSIONER OF INTERNAL REVENUE,

Appellant.

STACEY E. PLASKETT, DELEGATE TO THE UNITED STATES HOUSE OF REPRESENTATIVES FOR THE UNITED STATES VIRGIN ISLANDS,

Amicus on Behalf of Appellee(s).

Appeals from United States Tax Court
(004720-10)
(004949-10)

ORDER

The petitions for rehearing en banc are denied. The petitions for rehearing by the panel are also denied.

May 03, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX H — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, FILED FEBRUARY 10, 2021

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-3256

JUDITH S. COFFEY AND GOVERNMENT OF THE UNITED STATES VIRGIN ISLANDS, ("V.I. GOVERNMENT"),

Appellees,

v.

COMMISSIONER OF INTERNAL REVENUE,

Appellant.

No: 18-3259

ESTATE OF JAMES COFFEY,
JUDITH COFFEY EXECUTRIX,

Appellee,

v.

COMMISSIONER OF INTERNAL REVENUE,

Appellant.

Appendix H

Appeals from United States Tax Court
(004720-10)
(004949-10)

ORDER

Appellees' petitions for rehearing by the panel have been considered by the Court and are granted. The petitions for rehearing en banc are denied as moot. The opinion and judgment of this Court filed on December 15, 2020 are vacated.

February 10, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX I — RELEVANT STATUTORY PROVISIONS

2003 26 USCS § 932

§ 932. Coordination of United States and Virgin Islands income taxes

(a) Treatment of United States residents.

(1) Application of subsection. This subsection shall apply to an individual for the taxable year if--

(A)such individual--

(i)is a citizen or resident of the United States (other than a bona fide resident of the Virgin Islands at the close of the taxable year), and

(ii)has income derived from sources within the Virgin Islands, or effectively connected with the conduct of a trade or business within such possession, for the taxable year, or

(B)such individual files a joint return for the taxable year with an individual described in subparagraph (A).

(2) Filing requirement. Each individual to whom this subsection applies for the taxable year shall file his income tax return for the taxable year with both the United States and the Virgin Islands.

(3) Extent of income tax liability. In the case of an individual to whom this subsection applies in a taxable year for purposes of so much of this title (other than this section and section 7654) as relates to the taxes imposed by this chapter, the United States shall be treated as including the Virgin Islands.

(b) Portion of United States tax liability payable to the Virgin Islands.

(1) In general. Each individual to whom subsection (a) applies for the taxable year shall pay the applicable percentage of the taxes imposed by this chapter for such taxable year (determined without regard to paragraph (3)) to the Virgin Islands.

(2) Applicable percentage.

(A) In general. For purposes of paragraph (1), the term "applicable percentage" means the percentage which Virgin Islands adjusted gross income bears to adjusted gross income.

(B) Virgin Islands adjusted gross income. For purposes of subparagraph (A), the term "Virgin Islands adjusted gross income" means adjusted gross income determined by taking into account only income derived from sources within the Virgin Islands and deductions properly apportioned or allocable thereto.

(3) Amounts paid allowed as credit. There shall be allowed as a credit against the tax imposed by this chapter for the taxable year an amount equal to the taxes required to be paid to the Virgin Islands under paragraph (1) which are so paid.

(c) Treatment of Virgin Islands residents.

(1) Application of subsection. This subsection shall apply to an individual for the taxable year if--

(A)such individual is a bona fide resident of the Virgin Islands at the close of the taxable year, or

(B)such individual files a joint return for the taxable year with an individual described in subparagraph (A).

(2) Filing requirement. Each individual to whom this subsection applies for the taxable year shall file an income tax return for the taxable year with the Virgin Islands.

(3) Extent of income tax liability. In the case of an individual to whom this subsection applies in a taxable year for purposes of so much of this title (other than this section and section 7654) as relates to the taxes imposed by this chapter, the Virgin Islands shall be treated as including the United States.

(4) Residents of the Virgin Islands. In the case of an individual--

> **(A)**who is a bona fide resident of the Virgin Islands at the close of the taxable year,
>
> **(B)**who, on his return of income tax to the Virgin Islands, reports income from all sources and identifies the source of each item shown on such return, and
>
> **(C)**who fully pays his tax liability referred to in section 934(a) to the Virgin Islands with respect to such income,
>
> for purposes of calculating income tax liability to the United States, gross income shall not include any

amount included in gross income on such return, and allocable deductions and credits shall not be taken into account.

(d) Special rule for joint returns. In the case of a joint return, this section shall be applied on the basis of the residence of the spouse who has the greater adjusted gross income (determined without regard to community property laws) for the taxable year.

(e) Special rule for applying section to tax imposed in Virgin Islands. In applying this section for purposes of determining income tax liability incurred to the Virgin Islands, the provisions of this section shall not be affected by the provisions of Federal law referred to in section 934(a).

Appendix I

2004 26 USCS § 932

§ 932. Coordination of United States and Virgin Islands income taxes

(a) Treatment of United States residents.

(1) Application of subsection. This subsection shall apply to an individual for the taxable year if--

(A)such individual--

(i)is a citizen or resident of the United States (other than a bona fide resident of the Virgin Islands during the entire taxable year), and

(ii)has income derived from sources within the Virgin Islands, or effectively connected with the conduct of a trade or business within such possession, for the taxable year, or

(B)such individual files a joint return for the taxable year with an individual described in subparagraph (A).

(2) Filing requirement. Each individual to whom this subsection applies for the taxable year shall file his income tax return for the taxable year with both the United States and the Virgin Islands.

(3)Extent of income tax liability. In the case of an individual to whom this subsection applies in a taxable year for purposes of so much of this title (other than this section and section 7654 [26 USCS § 7654]) as relates to the taxes imposed by this chapter, the United States shall be treated as including the Virgin Islands.

(b) Portion of United States tax liability payable to the Virgin Islands.

(1) In general. Each individual to whom subsection (a) applies for the taxable year shall pay the applicable percentage of the taxes imposed by this chapter for such taxable year (determined without regard to paragraph (3)) to the Virgin Islands.

(2) Applicable percentage.

(A) In general. For purposes of paragraph (1), the term "applicable percentage" means the percentage which Virgin Islands adjusted gross income bears to adjusted gross income.

(B) Virgin Islands adjusted gross income. For purposes of subparagraph

(A), the term "Virgin Islands adjusted gross income" means adjusted gross income determined by taking into account only income derived from sources within the Virgin Islands and deductions properly apportioned or allocable thereto.

(3) Amounts paid allowed as credit. There shall be allowed as a credit against the tax imposed by this chapter for the taxable year an amount equal to the taxes required to be paid to the Virgin Islands under paragraph (1) which are so paid.

(c) Treatment of Virgin Islands residents.

(1) Application of subsection. This subsection shall apply to an individual for the taxable year if--

(A)such individual is a bona fide resident of the Virgin Islands during the entire taxable year, or

(B)such individual files a joint return for the taxable year with an individual described in subparagraph (A).

(2) Filing requirement. Each individual to whom this subsection applies for the taxable year shall file an income tax return for the taxable year with the Virgin Islands.

(3) Extent of income tax liability. In the case of an individual to whom this subsection applies in a taxable year for purposes of so much of this title (other than this section and section 7654 [26 USCS § 7654]) as relates to the taxes imposed by this chapter, the Virgin Islands shall be treated as including the United States.

(4) Residents of the Virgin Islands. In the case of an individual--

> **(A)**who is a bona fide resident of the Virgin Islands during the entire taxable year,
>
> **(B)**who, on his return of income tax to the Virgin Islands, reports income from all sources and identifies the source of each item shown on such return, and
>
> **(C)**who fully pays his tax liability referred to in section 934(a) [26 USCS § 934(a)] to the Virgin Islands with respect to such income,

> for purposes of calculating income tax liability to the United States, gross income shall not include any amount included in gross income on such return, and allocable deductions and credits shall not be taken into account.

(d) Special rule for joint returns. In the case of a joint return, this section shall be applied on the basis of the residence of the spouse who has the greater adjusted gross income (determined without regard to community property laws) for the taxable year.

(e) Special rule for applying section to tax imposed in Virgin Islands. In applying this section for purposes of determining income tax liability incurred to the Virgin Islands, the provisions of this section shall not be affected by the provisions of Federal law referred to in section 934(a) [26 USCS § 934(a)].

2004 26 USCS § 934

§ 934. Limitation on reduction in income tax liability incurred to the Virgin Islands.

(a) General rule. Tax liability incurred to the Virgin Islands pursuant to this subtitle, as made applicable in the Virgin Islands by the Act entitled "An Act making appropriations for the naval service for the fiscal year ending June 30, 1922, and for other purposes", approved July 12, 1921 (48 U.S.C. 1397), or pursuant to section 28(a) of the Revised Organic Act of the Virgin Islands, approved July 22, 1954 (48 U.S.C. 1642), shall not be reduced or remitted in any way, directly or indirectly, whether by grant, subsidy, or other similar payment, by any law enacted in the Virgin Islands, except to the extent provided in subsection (b).

(b) Reductions permitted with respect to certain income.

> **(1)**In general. Except as provided in paragraph (2), subsection (a) shall not apply with respect to so much of the tax liability referred to in subsection (a) as is attributable to income derived from sources within the Virgin Islands or income effectively connected with the conduct of a trade or business within the Virgin Islands.
>
> **(2)**Exception for liability paid by citizens or residents of the United States. Paragraph (1) shall not apply to any liability payable to the Virgin Islands under section 932(b) [26 USCS § 932(b)].

(3) Special rule for non-United States income of certain foreign corporations.

(A) In general. In the case of a qualified foreign corporation, subsection (a) shall not apply with respect to so much of the tax liability referred to in subsection (a) as is attributable to income which is derived from sources outside the United States and which is not effectively connected with the conduct of a trade or business within the United States.

(B) Qualified foreign corporation. For purposes of subparagraph (A), the term "qualified foreign corporation" means any foreign corporation if less than 10 percent of--

(i)the total voting power of the stock of such corporation, and

(ii)the total value of the stock of such corporation,

is owned or treated as owned (within the meaning of section 958 [26 USCS § 9581) by or more United States persons.

(4) Determination of income source, etc. The determination as to whether income is derived from sources within the United States or is effectively connected with the conduct of a trade or business within the United States shall be made under regulations prescribed by the Secretary.

Appendix I

2004 26 USCS § 6501

§ 6501. Limitations on assessment and collection.

(a) General rule. Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period. For purposes of this chapter, the term "return" means the return required to be filed by the taxpayer (and does not include a return of any person from whom the taxpayer has received an item of income, gain, loss, deduction, or credit).

(b) Time return deemed filed.

> **(1)**Early return. For purposes of this section, a return of tax imposed by this title, except tax imposed by chapter 3, 21, or 24, filed before the last day prescribed by law or by regulations promulgated pursuant to law for the filing thereof, shall be considered as filed on such last day.
>
> **(2)**Return of certain employment taxes and tax imposed by chapter 3. For purposes of this section, if a return of tax imposed by chapter 3, 21, or 24 for any period ending with or within

a calendar year is filed before April 15 of the succeeding calendar year, such return shall be considered filed on April 15 of such calendar year.

(3) Return executed by Secretary. Notwithstanding the provisions of paragraph (2) of section 6020(b) [26 USCS § 6020(b)], the execution of a return by the Secretary pursuant to the authority conferred by such section shall not start the running of the period of limitations on assessment and collection.

(4) Return of excise taxes. For purposes of this section, the filing of a return for a specified period on which an entry has been made with respect to a tax imposed under a provision of subtitle D (including a return on which an entry has been made showing no liability for such tax for such period) shall constitute the filing of a return of all amounts of such tax which, if properly paid, would be required to be reported on such return for such period.

(c) Exceptions.

(1) False return. In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time.

(2) Willful attempt to evade tax. In case of a willful attempt in any manner to defeat or evade tax imposed by this title (other than tax imposed by subtitle A or B), the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

(3) No return. In the case of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

(4) Extension by agreement.

> **(A)**In general. Where, before the expiration of the time prescribed in this section for the assessment of any tax imposed by this title, except the estate tax provided in chapter 11, both the Secretary and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.
>
> **(B)**Notice to taxpayer of right to refuse or limit extension. The Secretary shall

notify the taxpayer of the taxpayer's right to refuse to extend the period of limitations, or to limit such extension to particular issues or to a particular period of time, on each occasion when the taxpayer is requested to provide such consent.

(5) Tax resulting from changes in certain income tax or estate tax credits. For special rules applicable in cases where the adjustment of certain taxes allowed as a credit against income taxes or estate taxes results in additional tax, see section 905(c) [26 USCS § 905(c)] (relating to the foreign tax credit for income tax purposes) and section 2016 [26 USCS § 2016] (relating to taxes of foreign countries, States, etc., claimed as credit against estate taxes).

(6) Termination of private foundation status. In the case of a tax on termination of private foundation status under section 507 [26 USCS § 507], such tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

(7) Special rule for certain amended returns. Where, within the 60-day period ending on the day on which the time prescribed in this section for the assessment of any tax imposed by subtitle A for any taxable year would otherwise expire, the Secretary receives a written document signed by the taxpayer showing that the taxpayer owes an additional amount of such tax for such taxable year, the period for the assessment of such additional amount shall not expire before the day 60 days after the day on which the Secretary receives such document.

(8) Failure to notify secretary of certain foreign transfers. In the case of any information which is required to be reported to the Secretary under section 6038, 6038A, 6038B, 6046, 6046A, or 6048 [26 USCS § 6038, 6038A, 6038B, 6046, 6046A, or 6048], the time for assessment of any tax imposed by this title with respect to any event or period to which such information relates shall not expire before the date which is 3 years after the date on which the Secretary is furnished the information required to be reported under such section.

(9) Gift tax on certain gifts not shown on return. If any gift of property the value of which (or any increase in taxable gifts required under section 2701(d) [26 USCS § 2701(d)] which) is required to be shown on a return of tax imposed by chapter 12 (without regard to section 2503(b) [26 USCS § 2503(b)]), and is not shown on such return, any tax imposed by chapter 12 on such gift may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time. The preceding sentence shall not apply to any item which is disclosed in such return, or in a statement attached to the return, in a manner adequate to apprise the Secretary of the nature of such item.

(10) Listed transactions. If a taxpayer fails to include on any return or statement for any taxable year any information with respect to a listed transaction (as defined in section 6707A(c)(2) [26 USCS § 6707A(c)(2)]) which is required under section 6011 [26 USCS § 6011] to be included with such return or statement, the time for assessment of any tax imposed by this title with respect to such transaction shall not expire before the date which is 1 year after the earlier of--

(A)the date on which the Secretary is furnished the information so required, or

(B)the date that a material advisor (as defined in section 6111 [26 USCS § 6111]) meets the requirements of section 6112 [26 USCS § 6112] with respect to a request by the Secretary under section 6112(b) [26 USCS § 6112(b)] relating to such transaction with respect to such taxpayer.

(d) Request for prompt assessment. Except as otherwise provided in subsection (c), (e), or (f), in the case of any tax (other than the tax imposed by chapter 11 of subtitle B, relating to estate taxes) for which return is required in the case of a decedent, or by his estate during the period of administration, or by a corporation, the tax shall be assessed, and any proceeding in court without assessment for the collection of such tax shall be begun, within 18 months after written request therefor (filed after the return is made and filed in such manner and such form as may be prescribed by regulations of the Secretary) by the executor, administrator, or other fiduciary representing the estate of such decedent, or by the corporation, but not after the expiration of 3 years after the return was filed. This subsection shall not apply in the case of a corporation unless--

> **(1)(A)** such written request notifies the Secretary that the corporation contemplates dissolution at or before the expiration of such 18-month period, (B) the dissolution is in good faith begun before the expiration of such 18-month period, and (C) the dissolution is completed;
>
> **(2)(A)** such written request notifies the Secretary that a dissolution has in good faith been begun, and (B) the dissolution is completed; or
>
> **(3)**a dissolution has been completed at the time such written request is made.

(e) Substantial omission of items. Except as otherwise provided in subsection (c)--

(1) Income taxes. In the case of any tax imposed by subtitle A--

(A) General rule. If the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 percent of the amount of gross income stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return was filed. For purposes of this subparagraph--

(i)in the case of a trade or business, the term "gross income" means the total of the amounts received or accrued from the sale of goods or services (if such amounts are required to be shown on the return) prior to diminution by the cost of such sales or services; and

(ii)in determining the amount omitted from gross income, there shall not be taken into account any amount which is omitted from gross income stated in the return if such amount is disclosed in the return, or in a statement attached to the return, in a manner adequate to apprise the Secretary of the nature and amount of such item.

(B) Constructive dividends. If the taxpayer omits from gross income an amount properly includible therein under section 951(a) [26 USCS § 951(a)], the tax may be assessed, or a proceeding in court for the collection of such tax may be done without assessing, at any time within 6 years after the return was filed.

(2) Estate and gift taxes. In the case of a return of estate tax under chapter 11 or a return of gift tax under chapter 12, if the taxpayer omits from the gross estate or from the total amount of the gifts made during the period for which the return was filed items includible in such gross estate or such total gifts, as the case may be, as exceed in amount 25 percent of the gross estate stated in the return or the total amount of gifts stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return was filed. In determining the items omitted from the gross estate or the total gifts, there shall not be taken into account any item which is omitted from the gross estate or from the total gifts stated in the return if such item is disclosed in the return, or in a statement attached to the return, in a manner adequate to apprise the Secretary of the nature and amount of such item.

(3) Excise taxes. In the case of a return of a tax imposed under a provision of subtitle D, if the return omits an amount of such tax properly includible thereon which exceeds 25 percent of the amount of such tax reported thereon, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return is filed. In determining the amount of tax omitted on a return, there shall not be taken into account any amount of tax imposed by chapter 41, 42, 43, or 44 which is omitted from the return if the transaction giving rise to such tax is disclosed in the return, or in a statement attached to the return, in a manner adequate to apprise the Secretary of the existence and nature of such item.

(f) Personal holding company tax. If a corporation which is a personal holding company for any taxable year fails to file with its return under chapter 1 for such year a schedule setting forth--

(1)the items of gross income and adjusted ordinary gross income, described in section 543 [26 USCS § 543], received by the corporation during such year, and

(2)the names and addresses of the individuals who owned, within the meaning of section 544 [26 USCS § 544] (relating to rules for determining stock ownership), at any time during the last half of such year more than 50 percent in value of the outstanding capital stock of the corporation,

the personal holding company tax for such year may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return for such year was filed.

(g) Certain income tax returns of corporations.

(1) Trusts or partnerships. If a taxpayer determines in good faith that it is a trust or partnership and files a return as such under subtitle A, and if such taxpayer is thereafter held to be a corporation for the taxable year for which the return is filed, such return shall be deemed the return of the corporation for purposes of this section.

(2) Exempt organizations. If a taxpayer determines in good faith that it is an exempt organization and files a return as such under section 6033 [26 USCS § 6033], and if such taxpayer is thereafter held to be a taxable organization for the taxable year for which the return is filed, such return shall be deemed the return of the organization for purposes of this section.

(3) DISC. If a corporation determines in good faith that it is a DISC (as defined in section 992(a) [26 USCS § 992(a)]) and files a return as such under section 6011(c)(2) [26 USCS § 6011(c)(2)] and if such corporation is thereafter held to be a corporation which is not a DISC for the taxable year for which the return is filed, such return shall be deemed the return of a corporation which is not a DISC for purposes of this section.

(h) Net operating loss carryback or capital loss carrybacks. In the case of a deficiency attributable to the application to the taxpayer of a net operating loss carryback or a capital loss carryback (including deficiencies which may be assessed pursuant to the provisions of section 6213(b)(3) [26 USCS § 6213(b)(3)]), such deficiency may be assessed at any time before the expiration of the period within which a deficiency for the taxable year of the net operating loss or net capital loss which results in such carryback may be assessed.

(i) Foreign tax carrybacks. In the case of a deficiency attributable to the application to the taxpayer of a carryback under section 904(c) [26 USCS § 904(c)] (relating to carryback and carryover of excess foreign taxes) or under section 907(f) [26 USCS § 907(f)] (relating to carryback and carryover of disallowed oil and gas extraction taxes), such deficiency may be assessed at any time before the expiration of one year after the expiration of the period within which a deficiency may be assessed for the taxable year of the excess taxes described in section 904(c) or 907(f) [26 USCS § 904(c) or 907(f)] which result in such carryback.

(j) Certain credit carrybacks.

> **(1)**In general. In the case of a deficiency attributable to the application to the taxpayer of a credit carryback (including deficiencies which may be assessed pursuant to the provisions of section 6213(b)(3) [26 USCS § 6213(b)(3)]), such deficiency may be assessed at any time before the expiration of the period within which a deficiency for the taxable year of the unused credit which results in such carryback may be assessed, or with respect to any portion of a credit carryback from a taxable year attributable to a net operating loss carryback, capital loss carryback, or other credit carryback from a subsequent taxable year, at any time before the expiration of the period within which a deficiency for such subsequent taxable year may be assessed.

(2) Credit carryback defined. For purposes of this subsection, the term "credit carryback" has the meaning given such term by section 6511(d)(4)(C) [26 USCS § 6511(d)(4)(C)].

(k) Tentative carryback adjustment assessment period. In a case where an amount has been applied, credited, or refunded under section 6411 [26 USCS § 6411] (relating to tentative carryback and refund adjustments) by reason of a net operating loss carryback, a capital loss carryback, or a credit carryback (as defined in Section 6511(d)(4)(C) [26 USCS § 6511(d)(4)(C)]) to a prior taxable year, the period described in subsection (a) of this section for assessing a deficiency for such prior taxable year shall be extended to include the period described in subsection (h) or (j), whichever is applicable; except that the amount which may be assessed solely by reason of this subsection shall not exceed the amount so applied, credited, or refunded under section 6411 [26 USCS § 6411], reduced by any amount which may be assessed solely by reason of subsection (h) or (j), as the case may be.

(l) Special rule for chapter 42 and similar taxes.

(1) In general. For purposes of any tax imposed by section 4912 [26 USCS § 4912], by chapter 42 (other than section 4940 [26 USCS § 4940]), or by section 4975 [26 USCS § 4975], the return referred to in this section shall be the return filed by the private foundation, plan, trust, or other organization (as the case may be) for the year in which the act (or failure to act) giving rise to liability for such tax occurred. For purposes of section 4940 [26 USCS § 4940], such return is the return filed by the private foundation for the taxable year for which the tax is imposed.

(2) Certain contributions to section 501(c)(3) organizations. In the case of a deficiency of tax of a private foundation making a contribution in the manner provided in section 4942(g)(3) [26 USCS § 4942(g)(3)] (relating to certain contributions to section 501(c)(3) [26 USCS § 501(c)(3)] organizations) attributable to the failure of a section 501(c)(3) organization to make the distribution prescribed by section 4942(g)(3) [26 USCS § 4942(g)(3)], such deficiency may be assessed at any time before the expiration of one year after the expiration of the period within which a deficiency may be assessed for the taxable year with respect to which the contribution was made.

(3) Certain set-asides described in section 4942(g)(2). In the case of a deficiency attributable to the failure of an amount set aside by a private foundation for a specific project to be treated as a qualifying distribution under the provisions of section 4942(g)(2)(B)(ii) [26 USCS § 4942(g)(2)(B)(ii)], such deficiency may be assessed at any time before the expiration of 2 years after the expiration of the period within which a deficiency may be assessed for the taxable year to which the amount set aside relates.

(m) Deficiencies attributable to election of certain credits. The period for assessing a deficiency attributable to any election under section 30(d)(4), 40(f), 43, 45B, 45C(d)(4), or 51(j) [26 USCS § 30(d)(4), 40(f), 43, 45B, 45C(d)(4), or 51(j)] (or any revocation thereof) shall not expire before the date 1 year after the date on which the Secretary is notified of such election (or revocation).

(n) Cross references.

> **(1)**For period of limitations for assessment and collection in the case of a joint income return filed after separate returns have been filed, see section 6013(b)(3) and (4) [26 USCS § 6013(b)(3) and (4)].
>
> **(2)**For extension of period in the case of partnership items (as defined in section 6231(a)(3) [26 USCS § 6231(a)(3)]), see section 6229 [26 USCS § 6229].
>
> **(3)**For declaratory judgment relating to treatment of items other than partnership items with respect to an oversheltered return, see section 6234 [26 USCS § 6234].

Appendix I

2004 26 USCS § 7654

§ **7654. Coordination of United States and certain possession individual income taxes.**

(a) General rule. The net collection of taxes imposed by chapter **1** for each taxable year with respect to an individual to whom section 931 or 932(c) [26 USCS § 931 or 932(c)] applies shall be covered into the Treasury of the specified possession of which such individual is a bona fide resident.

(b) Definition and special rule. For purposes of this section--

> **(l)**Net collections. In determining net collections for a taxable year, an appropriate adjustment shall be made for credits allowed against the tax liability and refunds made of income taxes for the taxable year.
>
> **(2)**Specified possession. The term 'specified possession' means Guam, American Samoa, the Northern Mariana Islands, and the Virgin Islands.

(c) Transfers. The transfers of funds between the United States and any specified possession required by this section shall be made not less frequently than annually.

(d) Federal personnel. In addition to the amount determined under subsection (a), the United States shall pay to each specified possession at such times and in such manner as determined by the Secretary--

> **(1)**the amount of the taxes deducted and withheld by the United States under chapter 24 with respect to compensation paid to members of the Armed Forces who are stationed in such possession but who have no income tax liability to such possession with respect to such compensation by reason of the Servicemembers Civil Relief Act (50 App. U S.C. 501 et seq.), and
>
> **(2)**the amount of the taxes deducted and withheld under chapter 24 with respect to amounts paid for services performed as an employee of the United States (or any agency thereof) in a specified possession with respect to an individual unless section 931 or 932(c) [26 USCS § 931 or 932(c)] applies.

(e) Regulations. The Secretary shall prescribe such regulations as may be necessary to carry out the provisions of this section and sections 931 and 932 [26 USCS §§ 931 and 932], including regulations prohibiting the rebate of taxes covered over which are allocable to United States source income and prescribing the information which the individuals to whom such sections may apply shall furnish to the Secretary.

Appendix I

26 CFR 1.932-1

§ 1.932-1 Coordination of United States and Virgin Islands income taxes.

(a) Scope —

(1) In general. Section 932 [26 USCS § 932] and this section set forth the special rules relating to the filing of income tax returns and income tax liabilities of individuals described in paragraph (a)(2) of this section. Paragraph (h) of this section also provides special rules requiring consistent treatment of business entities in the United States and in the United States Virgin Islands (Virgin Islands).

(2) Individuals covered. This section will apply to any individual who—

(i) Is a bona fide resident of the Virgin Islands during the entire taxable year;

(ii)

(A) Is a citizen or resident of the United States (other than a bona fide resident of the Virgin Islands) during the entire taxable year; and

(B) Has income derived from sources within the Virgin Islands, or effectively connected with the conduct of a trade or business within the Virgin Islands, for the taxable year; or

(iii) Files a joint return for the taxable year with any individual described in paragraph (a)(2)(i) or (ii) of this section.

(3) Definitions. For purposes of this section—

(i) The rules of § 1.937-1 will apply for determining whether an individual is a bona fide resident of the Virgin Islands;

(ii) The rules of § 1.937-2 will apply for determining whether income is from sources within the Virgin Islands; and

(iii) The rules of § 1.937-3 will apply for determining whether income is effectively connected with the conduct of a trade or business within the Virgin Islands.

(b) U.S. individuals with Virgin Islands income —

(1) Dual filing requirement. Subject to paragraph

(d) of this section, an individual described in paragraph (a)(2)(ii) of this section must make an income tax return for the taxable year to the United States and file a copy of such return with the Virgin Islands. Such individuals must also attach Form 8689, “Allocation of Individual Income Tax to the U.S. Virgin Islands,” to the U.S. income tax return and to the income tax return filed with the Virgin Islands.

(2) Tax payments.

> **(i)** Each individual to whom this paragraph (b) applies for the taxable year must pay the applicable percentage of the taxes imposed by this chapter for such taxable year (determined without regard to paragraph (b)(2)(ii) of this section) to the Virgin Islands.
>
> **(ii)** A credit against the tax imposed by this chapter for the taxable year will be allowed in an amount equal to the taxes that are required to be paid to the Virgin Islands under paragraph (b)(2)(i) of this section and are so paid. Such taxes will be considered creditable in the same manner as taxes paid to the United States (for example, under section 31 [26 USCS § 31]) and not as taxes paid

to a foreign government (for example, under sections 27 and 901 [26 USCS §§ 27 and 901]).

(iii) For purposes of this paragraph (b)(2)—

(A) The term applicable percentage means the percentage that Virgin Islands adjusted gross income bears to adjusted gross income;

(B) The term Virgin Islands adjusted gross income means adjusted gross income determined by taking into account only income derived from sources within the Virgin Islands and deductions properly apportioned or allocable to such income. For purposes of the preceding sentence, the rules of § 1.861-8 will apply; and

(C) Pursuant to § 1.937-2(a), the rules of § 1.937-2(c)(1)(ii) and (c)(2) do not apply.

(c) Bona fide residents of the Virgin Islands. Subject to paragraph (d) of this section, an individual described in paragraph (a)(2)(i) of this section will be subject to the following income tax return filing requirements:

(1) Virgin Islands filing requirements. An individual to whom this paragraph (c) applies must file an income tax return for the taxable year with the Virgin Islands. On this return, the individual must report income from all sources and identify the source of each item of income shown on the return.

(2) U.S. filing requirements

(i) For purposes of calculating the income tax liability to the United States of an individual to whom this paragraph (c) applies, gross income will not include any amount included in gross income on the return filed with the Virgin Islands pursuant to paragraph (c)(1) of this section, and deductions and credits allocable to such income will not be taken into account, provided that—

(A) The individual fully satisfied the reporting requirements of paragraph (c)(1) of this section; and

(B) The individual fully paid the tax liability referred to in section 934(a) [26 USCS § 934(a)] to the Virgin Islands with respect to such income.

(ii) For purposes of the U.S. statute of limitations under section 6501(a) [26 USCS § 6501(a)], an income tax return filed with the Virgin Islands by an individual who takes the position that he or she is a bona fide resident of the Virgin Islands described in paragraph (a)(2)(i) of this section (or an individual who files a joint return with such an individual under paragraph (d) of this section) will be deemed to be a U.S. income tax return, provided that the United States and the Virgin Islands have entered into an agreement for the routine exchange of income tax information satisfying the requirements of the Commissioner. The working arrangement announced in Notice 2007-31 satisfies the condition of the preceding sentence. See Notice 2007-31 (2007-16 IRB 971) (applicable to taxable years ending on or after December 31, 2006, unless and until arrangement terminates). In the absence of such an agreement, individuals to whom this paragraph (c) applies generally must file an income tax return for the taxable year with the United States to begin the period of limitations for Federal income tax purposes as provided in section 6501(a) [26 USCS § 6501(a)], and in such circumstances the Commissioner may by revenue procedure, notice, or other administrative pronouncement specify U.S. filing and other information reporting requirements for such individuals. For taxable years ending before December 31, 2006, the rules provided in section 3 of Notice 2007-19 (2007-11 IRB 689) will apply. See § 601.601(d)(2)(ii)(b).

(3) U.S. tax payments. In the case of an individual who is required to file an income tax return with the United States as a consequence of failing to satisfy the requirements of paragraphs (c)(2)(i)(A) or (B) of this section, there will be allowed as a credit against the tax imposed by this chapter for the taxable year an amount equal to the amount of the tax liability referred to in section 934(a) [26 USCS § 934(a)] to the extent paid to the Virgin Islands. Such taxes shall be considered creditable in the same manner as taxes paid to the United States (for example, under section 31 [26 USCS § 31]) and not as taxes paid to a foreign government (for example, under sections 27 and 901 [26 USCS §§ 27 and 901]).

(d) Joint returns. In the case of married persons, if one or both spouses is an individual described in paragraph (a)(2) of this section and they file a joint return of income tax, the spouses must file their joint return with, and pay the tax due on such return to, the jurisdiction (or jurisdictions) where the spouse who has the greater adjusted gross income for the taxable year would be required under paragraph (b) or (c) of this section to file a return if separate returns were filed and all of their income were the income of such spouse. For this purpose, adjusted gross income of each spouse is determined under section 62 [26 USCS § 62] and the regulations under that section but without regard to community property laws; and, if one of the spouses dies, the taxable year of the surviving spouse will be treated as ending on the date of such death.

(e) Place for filing returns —

> **(1)** U.S. returns. Except as otherwise provided for returns filed under paragraph (c)(2)(ii) of this section, a return required under the rules of paragraphs (b) and (c) of this section to be filed with the United States must be filed as directed in the applicable forms and instructions.
>
> **(2)** Virgin Islands returns. A return required under the rules of paragraphs (b) and (c) of this section to be filed with the Virgin Islands must be filed as directed in the applicable forms and instructions.

(f) Tax accounting standards —

> **(1)** In general. A dual filing taxpayer must use the same tax accounting standards on the returns filed with the United States and the

Virgin Islands. A taxpayer who has filed a return only with the United States or only with the Virgin Islands as a single filing taxpayer for a prior taxable year and is required to file a return only with the other jurisdiction as a single filing taxpayer for a later taxable year may not, for such later taxable year, use different tax accounting standards unless the second jurisdiction consents to such change. However, such change will not be effective for returns filed thereafter with the first jurisdiction unless before such later date of filing the taxpayer also obtains the consent of the first jurisdiction to make such change. Any request for consent to make a change pursuant to this paragraph (f) must be made to the office where the return is required to be filed under paragraph (e) of this section and in sufficient time to permit a copy of the consent to be attached to the return for the taxable year.

(2) Definitions. For purposes of this paragraph (f), the terms—

> **(i)** Dual filing taxpayer means a taxpayer who is required to file returns with the United States and the Virgin Islands for the same taxable year under the rules of paragraph (b) or (c) of this section;

(ii) Single filing taxpayer means a taxpayer who is required to file a return only with the United States (because the individual is not described in paragraph (a)(2) of this section) or only with the Virgin Islands (because the individual is described in paragraph (a)(2)(i) of this section and satisfies the conditions of paragraphs (c)(2)(i) and (ii) of this section) for the taxable year; and

(iii) Tax accounting standards includes the taxpayer's accounting period, methods of accounting, and any election to which the taxpayer is bound with respect to the reporting of taxable income.

(g) Extension of territory —(1) Section 932(a) [26 USCS § 932(a)] taxpayers —

(i) General rule. With respect to an individual to whom section 932(a) [26 USCS § 932(a)] applies for a taxable year, for purposes of taxes imposed by Chapter 1 of the Internal Revenue Code (Code), the United States generally will be treated, in a geographical and governmental sense, as including the Virgin Islands. The purpose of this rule is to facilitate the coordination of the tax systems of the United States and the Virgin Islands. Accordingly, the rule will have no effect where it is manifestly inapplicable or its application would be incompatible with the intent of any provision of the Code.

(ii) Application of general rule. Contexts in which the general rule of paragraph (g)(1)(i) of this section apply include—

> **(A)** The characterization of taxes paid to the Virgin Islands. An individual to whom section 932(a) [26 USCS § 932(a)] applies may take income tax required to be paid to the Virgin Islands under section 932(b) [26 USCS § 932(b)] into account under sections 31, 6315, and 6402(b) [26 USCS §§ 31, 6315, and 6402(b)] as payments to the United States. Taxes paid to the Virgin Islands and otherwise satisfying the requirements of section 164(a) [26 USCS § 164(a)] will be allowed as a deduction under that section, but income taxes required to be paid to the Virgin Islands

under section 932(b) [26 USCS § 932(b)] will be disallowed as a deduction under section 275(a) [26 USCS § 275(a)];

(B) The determination of the source of income for purposes of the foreign tax credit (for example, sections 901 through 904 [26 USCS §§ 901 through 904]). Thus, for example, after an individual to whom section 932(a) [26 USCS § 932(a)] applies determines which items of income constitute income from sources within the Virgin Islands under the rules of section 937(b) [26 USCS § 937(b)], such income will be treated as income from sources within the United States for purposes of section 904 [26 USCS § 904];

(C) The eligibility of a corporation to make a subchapter S election (sections 1361 through 1379 [26 USCS §§ 1361 through 1379]). Thus, for example, for purposes of determining whether a corporation created or organized in the Virgin Islands may make an election under section 1362(a) [26 USCS § 1362(a)] to be a subchapter S corporation, it will be treated as a domestic corporation and a shareholder to whom section 932(a) [26 USCS § 932(a)] applies will not be treated as a nonresident alien individual with respect to such corporation. While such an election is in effect, the corporation will be treated as a domestic corporation for all purposes of the Internal Revenue Code. For the consistency requirement with respect to entity status elections, see paragraph (h) of this section;

(D) The treatment of items carried over from other taxable years. Thus, for example, if an individual to whom section 932(a) [26 USCS § 932(a)] applies has for a taxable year a net operating loss carryback or carryover under section 172 [26 USCS § 172], a foreign tax credit carryback or carryover under section 904 [26 USCS § 904], a business credit carryback or carryover under section 39

[26 USCS § 39], a capital loss carryover under section 1212 [26 USCS § 1212], or a charitable contributions carryover under section 170 [26 USCS § 170], the carryback or carryover will be reported on the return filed in accordance with paragraph (b)(1) of this section, even though the return of the taxpayer for the taxable year giving rise to the carryback or carryover was required to be filed with the Virgin Islands under section 932(c) [26 USCS § 932(c)]; and

(E) The treatment of property exchanged for property of a like kind (section 1031 [26 USCS § 1031]). Thus, for example, if an individual to whom section 932(a) [26 USCS § 932(a)] applies exchanges real property located in the United States for real property located in the Virgin Islands, notwithstanding the provisions of section 1031(h) [26 USCS § 1031(h)], such exchange may qualify as a like-kind exchange under section 1031 [26 USCS § 1031] (provided that all the other requirements of section 1031 [26 USCS § 1031] are satisfied).

(iii) Nonapplication of the general rule. Contexts in which the general rule of paragraph (g)(1)(i) of this section does not apply include—

(A) The application of any rules or regulations that explicitly treat the United States and any (or all) of its possessions as separate jurisdictions (for example, sections 931 through 937, 7651, and 7654 [26 USCS §§ 931 through 937, 7651, and 7654]).

(B) The determination of any aspect of an individual's residency (for example, sections 937(a) and 7701(b) [26 USCS §§ 937(a) and 7701(b)]). Thus, for example, an individual whose principal place of abode is in the Virgin Islands is not considered to have a principal place of abode in the United States for purposes of section 32(c) [26 USCS § 32(c)];

(C) The characterization of a corporation for purposes other than subchapter S (for example, sections 367, 951 through 964, 1291 through 1298, 6038, and 6038B [26 USCS §§ 367, 951 through 964, 1291 through 1298, 6038, and 6038B]). Thus, for example, if an individual to whom section 932(a) [26 USCS § 932(a)] applies transfers appreciated tangible property to a corporation created or organized in the Virgin Islands in a transaction described in section 351 [26 USCS § 351], he or she must recognize gain unless an exception under section 367(a) [26 USCS § 367(a)] applies. Also, if a corporation created or organized in the Virgin Islands qualifies as a passive foreign investment company under sections 1297 and 1298 [26 USCS §§ 1297 and 1298] with respect to an individual to whom section 932(a) [26 USCS § 932(a)] applies, a dividend paid to such shareholder does not constitute qualified dividend income under section 1(h)(11)(B) [26 USCS § 1(h)(11)(B)].

(2) Section 932(c)[26 USCS § 932(c)] taxpayers —

(i) General rule. With respect to an individual to whom section 932(c) [26 USCS § 932(c)] applies for a taxable year, for purposes of the territorial income tax of the Virgin Islands (that is, mirrored sections of the Code), the Virgin Islands generally will be treated, in a geographical and governmental sense, as including the United States. The purpose of this rule is to facilitate the coordination of the tax systems of the United States and the Virgin Islands. Accordingly, the rule will have no effect where it is manifestly inapplicable or its application would be incompatible with the intent of any provision of the Code.

(ii) Application of general rule. Contexts in which the general rule of paragraph (g)(2)(i) of this section apply include—

(A) The characterization of taxes paid to the United States. A taxpayer described in section 932(c)(1) [26 USCS § 932(c)(1)] may take income tax paid to the United States into account under mirrored sections 31, 6315, and 6402(b) [26 USCS §§ 31, 6315, and 6402(b)] as payments to the Virgin Islands;

(B) The determination of the source of income for purposes of the foreign tax credit (for example, mirrored sections 901 through 904 [26 USCS §§ 901 through 904]). Thus, for example, any item of income that constitutes income from sources within the United States under the rules of sections 861 through 865 [26 USCS §§ 861 through 865] will be treated as income from sources within the Virgin Islands for purposes of mirrored section 904 [26 USCS § 904];

(C) The eligibility of a corporation to make a subchapter S election (mirrored sections 1361 through 1379 [26 USCS §§ 1361 through 1379]). Thus, for example, for purposes of determining whether a corporation created or organized in the United States may make an election under mirrored section 1362(a)

[26 USCS § 1362(a)] to be a subchapter S corporation, it will be treated as a domestic corporation and a shareholder to whom section 932(c) [26 USCS § 932(c)] applies will not be treated as a nonresident alien individual with respect to such corporation. While such an election is in effect, the corporation will be treated as a domestic corporation for all purposes of the territorial income tax. For the consistency requirement with respect to entity status elections, see paragraph (h) of this section;

(D) The treatment of items carried over from other taxable years. Thus, for example, if an individual to whom section 932(c) [26 USCS § 932(c)] applies has for a taxable year a net operating loss carryback or carryover under mirrored section 172 [26 USCS § 172], a foreign tax credit carryback or carryover under mirrored section 904 [26 USCS § 904], a business credit carryback or carryover under mirrored section 39 [26 USCS

§ 39], a capital loss carryover under mirrored section 1212 [26 USCS § 1212], or a charitable contributions carryover under mirrored section 170 [26 USCS § 170], the carryback or carryover will be reported on the return filed in accordance with paragraph (c)(1) of this section, even though the return of the taxpayer for the taxable year giving rise to the carryback or carryover was required to be filed with the United States; and

(E) The treatment of property exchanged for property of a like kind (mirrored section 1031 [26 USCS § 1031]). Thus, for example, if an individual to whom section 932(c) [26 USCS § 932(c)] applies exchanges real property located in the United States for real property located in the Virgin Islands, notwithstanding the provisions of mirrored section 1031(h) [26 USCS § 1031(h)], such exchange may qualify as a like-kind exchange under mirrored section 1031 [26 USCS § 1031] (provided that all the other requirements of mirrored section 1031 [26 USCS § 1031] are satisfied).

(iii) Nonapplication of general rule. Contexts in which the general rule of paragraph (g)(2)(i) of this section does not apply include—

(A) The determination of any aspect of an individual's residency (for example, mirrored section 7701(b) [26 USCS § 7701(b)]). Thus, for example, an individual whose principal place of abode is in the United States is not considered to have a principal place of abode in the Virgin Islands for purposes of mirrored section 32(c) [26 USCS § 32(c)].

(B) The determination of the source of income for purposes other than the foreign tax credit (for example, sections 932(a) and (b), 934(b), and 937 [26 USCS §§ 932(a) and (b), 934(b), and 937]). Thus, for example, compensation for services performed in the United States and rentals or royalties from property located in the United States do not constitute income from sources within the Virgin Islands for purposes of section 934(b) [26 USCS § 934(b)]; and

(C) The definition of wages (mirrored section 3401 [26 USCS § 3401]). Thus, for example, services performed by an employee for an employer in the United States do not constitute services performed in the Virgin Islands under mirrored section 3401(a)(8) [26 USCS § 3401(a)(8)].

(h) Entity status consistency requirement —

(1) In general. Taxpayers should make consistent entity status elections (as defined in paragraph (h)(3) of this section), where applicable, in both the United States and the Virgin Islands. In the case of a business entity to which this paragraph (h) applies—

(i) If an entity status election is filed with the Internal Revenue Service (IRS) but not with the Virgin Islands Bureau of Internal Revenue (BIR), the Director of the BIR or his delegate, at his discretion, may deem the election also to have been made for Virgin Islands tax purposes;

(ii) If an entity status election is filed with the BIR but not with the IRS, the Commissioner, at his discretion, may deem the election also to have been made for Federal tax purposes; and

(iii) If inconsistent entity status elections are filed with the BIR and the IRS, both the Commissioner and the Director of the BIR or his delegate may, at their individual discretion, treat the elections they each received as invalid and may deem the election filed in the other jurisdiction to have been made also for tax purposes in their own jurisdiction. See Rev. Proc. 2006-23 (2006-1 CB 900) (see § 601.601(d)(2)(ii)(b) of this chapter) for procedures for requesting the assistance of the IRS when a taxpayer is or may be subject to inconsistent tax treatment by the IRS and a U.S. possession tax agency.

(2) Scope. This paragraph (h) applies to the following business entities:

(i) A business entity (as defined in § 301.7701-2(a) of this chapter) that is domestic (as defined in § 301.7701-5 of this chapter), or otherwise treated as domestic for purposes of the Code, and that is owned in whole or in part by any person who is either a bona fide resident of the Virgin Islands or a business entity created or organized in the Virgin Islands.

(ii) A business entity that is created or organized in the Virgin Islands and that is owned in whole or in part by any U.S. person (other than a bona fide resident of the Virgin Islands).

(3) Definition. For purposes of this section, the term entity status election includes an election under § 301.7701-3(c) of this chapter, an election under section 1362(a) [26 USCS § 1362(a)], and any other similar elections.

(4) Default status. Solely for the purpose of determining classification of an eligible entity under § 301.7701-3(b) of this chapter and under that section as mirrored in the Virgin Islands, an eligible entity subject to this paragraph (h) will be classified for both Federal and Virgin Islands tax purposes using the rule that applies to domestic eligible entities.

(5) Transition rules —

(i) In the case of an election filed prior to April 11, 2005, except as provided in paragraph (h)(5)(ii) of this section, the rules of paragraph (h)(1) of this section will apply as of the first day of the first taxable year of the entity beginning after April 11, 2005.

(ii) In the unlikely circumstance that inconsistent elections described in paragraph (h)(1)(iii) of this section are filed prior to April 11, 2005, and the entity cannot change its classification to achieve consistency because of the sixty-month limitation described in § 301.7701-3(c)(1)(iv) of this chapter, then the entity may nevertheless request permission from the Commissioner or the Director of the BIR or his delegate to change such election to avoid inconsistent treatment by the Commissioner and the Director of the BIR or his delegate.

(iii) Except as provided in paragraphs (h)(5)(i) and (h)(5)(ii) of this section, in the case of an election filed with respect to an entity before it became an entity described in paragraph (h)(2) of this section, the rules of paragraph (h)(1) of this section will apply as of the first day that such entity is described in paragraph (h)(2) of this section.

(iv) In the case of an entity created or organized prior to April 11, 2005, paragraph (h)(4) of this section will take effect for Federal income tax purposes (or Virgin Islands income tax purposes, as the case may be) as of the first day of the first taxable year of the entity beginning after April 11, 2005.

(i) Examples. The rules of this section are illustrated by the following examples:

Example 1.

(i) A is a U.S. citizen who resides in State R. For 2008, A files with the IRS a Form 1040, "U.S. Individual Income Tax Return," reporting adjusted gross income of $ 90x, which includes $ 30x from sources in the Virgin Islands. The income tax liability reported on A's Form 1040 is $ 18x. A files a copy of his Form 1040 with the Virgin Islands as required by section 932(a)(2) [26 USCS § 932(a)(2)] and paragraph (b)(1) of this section. A pays to the Virgin Islands the applicable percentage of his Federal income tax liability as required by section 932(b) [26 USCS § 932(b)] and paragraph (b)(2) of this section, computed as follows: $ 30x/$ 90x x $ 18x = $ 6x income tax liability to the Virgin Islands.

(ii) A claims a credit in the amount of $ 6x against his Federal income tax liability reported on his Form 1040. A attaches a Form 8689, “Allocation of Individual Income Tax to the U.S. Virgin Islands,” to the Form 1040 filed with the IRS and to the copy filed with the Virgin Islands.

Example 2.

> **(i)** B, a U.S. citizen, files returns on a calendar year basis. In November 2008, B moves to the Virgin Islands, purchases a house, and accepts a permanent position with a local employer. For the remainder of the year and throughout 2009, B continues to live and work in the Virgin Islands and has a closer connection to the Virgin Islands than to the United States or any foreign country. As a consequence of his employment in the Virgin Islands, B earns income from the performance of services in the Virgin Islands during 2008 and 2009.
>
> **(ii)** For 2008, B does not qualify as a bona fide resident under section 937(a) [26 USCS § 937(a)] and § 1.937-1(b) and (f)(1). Therefore, B is subject to the rules of sections 932(a) and (b) [26 USCS §§ 932(a) and (b)] and paragraph (b) of this section for 2008 because he has income derived from sources within the Virgin Islands as

determined under the rules of section 937(b) [26 USCS § 937(b)] and § 1.937-2.

(iii) For 2009, assuming that B otherwise satisfies the requirements of section 937(a) [26 USCS § 937(a)] and § 1.937-1(b), B qualifies as a bona fide resident of the Virgin Islands. Therefore, section 932(c) [26 USCS § 932(c)] and paragraph (c) of this section apply to B for 2009, and he must file his income tax return with the Virgin Islands under paragraph (c)(1) of this section. Provided that B fully satisfies the reporting requirements of paragraph (c)(1) of this section and fully pays the tax liability referred to in section 934(a) [26 USCS § 934(a)], B will have no Federal income tax filing requirement or liability under paragraphs (c)(2) and (3) of this section.

Example 3. H and W are U.S. citizens. H resides in State T and W is a bona fide resident of the Virgin Islands. For 2008, H and W prepare a joint Form 1040, "U.S. Individual Income Tax Return," reporting total adjusted gross income of $ 75x, of which $ 40x is attributable to compensation that W received for services performed in the Virgin Islands and $ 35x to compensation that H received for services performed in State T. Pursuant to section 932(d) [26 USCS § 932(d)] and paragraph (d) of this section, because W would have the greater adjusted gross income if computed separately, H and W must file their joint Form 1040 with the Virgin Islands as required by section 932(c) [26 USCS § 932(c)] and paragraph (c)(1) of this section. H and W may claim a tax credit on such return for income tax withheld during 2008 and paid to the IRS.

Example 4.

(i) The facts are the same as in Example 3, except that H also earns $ 25x for services performed in the Virgin Islands, so that H and W's total adjusted gross income is $ 100x, and their total income tax liability is $ 20x.

(ii) Pursuant to section 932(d) [26 USCS § 932(d)] and paragraph (d) of this section, because H would have the greater adjusted gross income if computed separately, H and W must file their joint Form 1040 with the IRS and must file a copy of that joint Form 1040 with the Virgin Islands as required by section 932(a)(2) [26 USCS § 932(a)(2)] and paragraph (b)(1) of this section. H and W must pay the applicable percentage of their Federal income tax liability to the Virgin Islands as required by section 932(b) [26 USCS § 932(b)] and paragraph (b)(2) of this section, computed as follows: $ 65x /$ 100x x $ 20x = $ 13x income tax liability to the Virgin Islands.

(iii) H and W claim a credit against their Federal income tax liability reported on their joint Form 1040 in the amount of $ 13x, the portion of their Federal income tax liability required to be paid to the Virgin Islands. H and W attach a Form 8689, "Allocation of Individual Income Tax to the U.S. Virgin Islands," to their joint Form 1040 filed with the IRS and to the copy filed with the Virgin Islands.

Example 5. N, a U.S. citizen and calendar year taxpayer, takes the position that he is a bona fide resident of the Virgin Islands for the 2007 taxable year. On April 15, 2008, N files a Form 1040, "U.S. Individual Income Tax Return," with the Virgin Islands for his 2007 taxable year. N does not file a Form 1040 with the IRS. Because there is an agreement in force between the United States and the Virgin Islands for the routine exchange of income tax information, under paragraph (c)(2)(ii) of this section, the Federal 3-year period of limitations under section 6501(a) [26 USCS § 6501(a)] will expire on April 15, 2011, and the IRS will make no further assessment of income tax after that date for N's 2007 taxable year except as otherwise authorized by section 6501 [26 USCS § 6501].

Example 6.

(i) J is a U.S. citizen and a bona fide resident of the Virgin Islands. In 2008, J receives compensation for services performed as an employee in the Virgin Islands in the amount of $ 40x. J files with the Virgin Islands a Form 1040, "U.S. Individual Income Tax Return," reporting gross income of only $ 30x. Based on these facts, J has not satisfied the conditions of section 932(c)(4) [26 USCS § 932(c)(4)] and paragraph (c) of this section for an exclusion from gross income for Federal income tax purposes.

(ii) The facts are the same as in paragraph (i) of this Example 6 except that on or before the last day prescribed for filing an income tax return for J's 2008 taxable year, J files with the Virgin Islands an amended Form 1040 for 2008, correctly reporting the full $ 40x of compensation. Provided that J otherwise fully satisfies the reporting requirements of paragraph (c)(1) of this section and fully pays the tax liability referred to in section 934(a) [26 USCS § 934(a)], J will have no Federal income tax filing requirement or liability under paragraphs (c)(2) and (3) of this section.

Example 7.

(i) N is a U.S. citizen and a bona fide resident of the Virgin Islands. In 2008, N receives compensation for services performed in Country M. N files with the Virgin Islands a Form 1040, "U.S. Individual Income Tax Return," reporting the compensation as income effectively connected with the conduct of a trade or business in the Virgin Islands. N claims a special credit against the tax on this compensation pursuant to a Virgin Islands law enacted within the limits of its authority under section 934 [26 USCS § 934].

(ii) Under the principles of section 864(c)(4) [26 USCS § 864(c)(4)] as applied pursuant to section 937(b)(1) [26 USCS § 937(b)(1)] and § 1.937-3(b), compensation for services performed outside the Virgin Islands may not be treated as income effectively connected with the conduct of a trade or business in the Virgin Islands for purposes of section 934(b) [26 USCS § 934(b)]. Consequently, N is not entitled to claim the special credit under Virgin Islands law with respect to N's income from services performed in Country M. Because N has not fully paid his tax liability referred to in section 934(a) [26 USCS § 934(a)], he has not satisfied the conditions of section 932(c)

> (4) [26 USCS § 932(c)(4)] and paragraph (c) of this section for an exclusion from gross income for Federal income tax purposes. Therefore, income reported on the Form 1040 as filed with the Virgin Islands must be included in N's Federal gross income. Under paragraph (c)(3) of this section, the amount of tax paid to the Virgin Islands on such income will be allowed as a credit against N's Federal income tax liability.

(j) Effective/applicability date. Except as otherwise provided in this paragraph (j), this section applies to taxable years ending after April 9, 2008. Taxpayers may choose to apply paragraph (c)(2)(ii) of this section to open taxable years ending on or after December 31, 2006.