

In the

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Supreme Court of the United States

JAMES BURNETT MCKAY LAING,

Petitioner,

v.

UNITED STATES, et al.,

Respondents.

No. 73-1808

UNITED STATES, et al.,

Petitioner,

v.

No. 74-75

ELIZABETH JANE HALL,

Respondent.

Washington, D.C.
October 15, 1975

Pages 1 thru 56

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No. 74-75

ELIZABETH JANE HALL,

Respondent.

Washington, D. C.,

Wednesday, October 15, 1975.

The above-entitled matters came on for consolidated
argument at 11:43 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

STUART A. SMITH, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of the United States, et al.

DONALD M. HEAVRIN, ESQ., 914 Republic Building, Louisville, Kentucky 40202; on behalf of Elizabeth Jane Hall.

JOSEPH S. OTERI, ESQ., Crane, Inker & Oteri, 20 Ashburton Place, Boston, Massachusetts 02108; on behalf of James Burnett McKay Laing.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 73-1808, Laing against the United States, and 74-75, United States against Hall; consolidated cases.

Mr. Smith, I think the Clerk has indicated to you that since the case has been argued before, we hope that counsel will be able to present the consolidated cases in less than the total of two hours.

MR. SMITH: I think that will be quite possible.

MR. CHIEF JUSTICE BURGER: Very well.

ORAL ARGUMENT OF STUART A. SMITH, ESQ.,

ON BEHALF OF THE UNITED STATES, ET AL.

MR. SMITH: Mr. Chief Justice, and may it please the Court:

These two consolidated cases come here on writs of certiorari from the United States Courts of Appeals for the Second and Sixth Circuits. The Circuits have split on the question whether the Commissioner of Internal Revenue is required to issue a notice of deficiency in connection with his termination of a taxpayer's taxable year pursuant to his statutory authority under section 6851 of the Code.

The practical significance of this procedural question focuses on the Anti-Injunction Act, which the Court has had recent opportunity to explore, Section 7421(a) of the Code, which is set forth in our brief at page 65 in the Appendix.

That provisions generally provides that no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person. And if the Commissioner of Internal Revenue is not required to issue a notice of deficiency in these cases, which we submit is the case, then these suits are barred by that Act.

Now, the taxpayers in these cases, and the courts that have held against our position, have focused on the prefatory exception phrase of the Anti-Injunction Act, which provides "except as provided in section 6212(a) and (c), 6213(a)."

Now, that prefatory exception deals with cases which are adjudicable by the Tax Court. So, when stripped of all the statutory language, these cases really present the question whether an assessment of taxes which are deemed to be immediately due and payable under section 6851(a) are adjudicable by the Tax Court.

Now, we submit that the terms of the statute and the historical evidence clearly indicates that Congress decided not to give the Tax Court jurisdiction in these cases. That is, that when the Commissioner terminates someone's taxable year in the middle of that year and then makes an assessment pursuant to section 6201(a) of the taxes immediately due and payable, that that administrative action is not immediately reviewable in the Tax Court, but that the taxpayer must seek other remedies, specially the refund suit route in the District Court.

QUESTION: Am I right now, that the Congress, or at least the House Ways and Means Committee, is contemplating changing this whole thing?

MR. SMITH: There is -- there are a variety of legislative proposals currently being considered --

QUESTION: But isn't there one in the House Ways and Means Committee?

MR. SMITH: There is -- there was testimony held this summer before the Senate -- before the -- before a subcommittee of the Ways and Means Committee, I understand. But I am not prepared to speak about the details of those proposals, and I think that it's entirely speculative at this juncture whether there will be any litigation.

QUESTION: Yes.

MR. SMITH: Nevertheless, the conflict continues to exist.

The facts of the --

QUESTION: Incidentally, while we have you interrupted, there is pending here another tax case, United States against Shapiro, and somewhere in your argument will you relate that one to these cases, if there is any relationship?

MR. SMITH: I can do it right now, Mr. Justice Blackmun.

The issue in the Shapiro case -- Shapiro involved a jeopardy assessment under section 6861(a), which is the --

which we contend in this case is an entirely distinct statutory provision, which should not be merged into the termination provision.

The question in Shapiro is a burden of proof question. Our position in that case is that the Court of Appeals has improperly imposed upon the government the burden of proving the validity of its assessment in a straight injunctive action.

In other words, what happened to the taxpayer in Shapiro was simply that he was subjected to a early assessment under section 6861(a), not a termination. And he sued to enjoin that assessment and was of course bound by the Court's judicially created exception in the Williams vs. -- Enochs vs. Williams Packing case.

And the Court of Appeals for the District of Columbia Circuit held that in those circumstances the Commissioner was obliged to come forward with some sort of evidence demonstrating the validity of his assessment.

And we think our position in that case is that the burden of proof rests on the taxpayer to demonstrate that, No. 1, he is entitled to equitable relief because no adequate remedy of law is available; and, No. 2, that under no circumstances can the government prevail on the merits of its claim.

So, to the extent that both cases involve the Anti-Injunction Act, they are related, but they involve these disparate provisions of the Code, the termination provision and

the early assessment provision.

I think that the facts can be briefly stated, and they are basically undisputed, --

QUESTION: But you feel they are disparate provisions?

MR. SMITH: Yes. Yes, we do. And, in fact, it is our submission that the confusion that has arisen in the area has been -- has arisen out of an incorrect interpretation of the statutory history, that these statutes both came in separately, were designed to do quite separate things, and that the terms of one should not be judicially incorporated into the other.

Before I get into that, into the legal questions, I think it probably would be worthwhile to review briefly the facts in both of these cases.

In the Laing case from the Second Circuit, the taxpayer is a citizen of New Zealand. In May 1972 he entered the United States from Canada on a visitor's visa. On the evening [sic] of July 24, 1972, in fact in the early morning hours, he and two other people, in a rented automobile, attempted to re-enter Canada. The Canadian officials were dissatisfied with the identification proffered by one of the passengers in the vehicle. And they refused entry to the trio, into Canada.

They then had to turn around and go back to the United States. This was the crossing at Derby, Vermont.

Upon attempted re-entry back into the United States,

they were subjected to a search of their vehicle by the United States Customs, and the search revealed that a suitcase under the -- in the engine compartment of the car, contained approximately \$300,000 in United States currency.

Search of the persons revealed that the petitioner in this case, Laing, had a quantity of hashish on his possession.

The customs officials thereupon, as is the procedure, notified the District Director of Internal Revenue for the District of Vermont, because of the unusual happenstance, it's a highly unusual circumstance that people are traveling with so much cash concealed in the engine compartment of their car. And the Internal Revenue Service exercised its statutory power under section 6851, the termination provision, and terminated the taxable years of all three passengers as of that date, June 24, 1972.

Now, ultimately, assessments of approximately \$195,000 were imposed against each of the three persons. These assessments, as I mentioned last time, were computed on the well-established net worth plus non-deductible expenditures method.

The people were questioned as to how long -- the petitioner, Laing, was questioned as to how long he had been in the United States. It turned out to be 25 or 30 days. The amount of money was part of his net worth, a sum was computed also for his non-deductible living expenses, and then

the tax computation easily follows from that.

Now, --

QUESTION: I suppose he never before had been a taxpayer in the United States, had he?

MR. SMITH: I suppose that is correct, although the record is silent on that.

QUESTION: As far as the record shows, in his whole life he's been in our country only 25 days; is that right?

MR. SMITH: I'm not -- well, I can't say that with certainty, but of course --

QUESTION: So far as the record shows, that's it.

MR. SMITH: So far as the record shows, that's the case, although that doesn't contradict the notion that the money in his possession could have been earnings from U. S. sources.

QUESTION: Could have been, could well have been.

MR. SMITH: Could well have been, and I think in a situation -- this is exactly the kind of situation that the statute is designed to protect the revenue. People trying to leave the country with large amounts of property. I mean, you know, the statute uses the terms, "If the Secretary or his delegate finds that a taxpayer designs quickly to depart from the United States or to remove his property therefrom." I mean, it seems to use that the statute fits these facts like a glove.

QUESTION: Mr. Smith, let me be sure, was your net worth computation based on 25 days expanded to the full year, or was this regarded in Mr. Laing's case as the entire income, in quotations, for the year; do you know?

MR. SMITH: Well, the record is silent on this, but my understanding is that a sum of money was allocated for living expenses for each day, and that was added on to the amount of his net worth. In other words, you know, in a normal computation you have an opening net worth and a closing net worth. The opening net worth, I suppose, had to be deemed to be zero.

QUESTION: How on earth could they do that except by just arbitrary fiat?

MR. SMITH: Well, I mean, when people are, you know, essentially it's not --

QUESTION: When somebody has been, as far as we know, been in this country only 25 days, he's lived in -- where -- New Zealand, comes from New Zealand; how do they know his opening net worth is zero?

MR. SMITH: Well, --

QUESTION: Or how could they assume it, except --

MR. SMITH: Well, I think that it's a warranted assumption under the -- you know, essentially our system works under the ground rules that the taxpayer has the burden of proof --

QUESTION: Well, it's normally the ground rules,

but --

MR. SMITH: Right, and I think those ground rules --

QUESTION: -- applied to United States taxpayers.

MR. SMITH: Well, I think that in connection with a nonresident alien taxpayer, they are even more applicable, where people are coming and going.

QUESTION: Well, you made him a taxpayer, we don't even know he's a taxpayer, --

MR. SMITH: Well, that's true. He has to have income from U. S. sources.

QUESTION: -- ever, until he could --

MR. SMITH: Yes, I suppose, but he could have -- his explanation could be forthcoming that it was his grandmother's inheritance. At the same time, you know, when someone is concealing money in the trunk -- in the engine compartment of an automobile, it's an unconventional means of transporting a large sum of money.

QUESTION: Maybe things are different in New Zealand.

MR. SMITH: They may be --

QUESTION: There may be bandits -- there may be bandits along the road.

MR. SMITH: Bandits along the road; yes, there are a number of possibilities. But it's equally plausible that this was earnings from U. S. sources, which was subject to United States tax. And I think that the equal --

QUESTION: But he has a chance to explore all these things, of course, doesn't he?

MR. SMITH: Oh, absolutely. Absolutely. But the point is that unless the Commissioner takes this action, the money is gone, and the statute is designed to provide the Treasury with the mechanism of insuring that money doesn't slip through the fingers of the Treasury, because tax returns are normally due on the following April 15th or, in the case when you live abroad, on June 15, and if they just examined this situation and said, "Well, thank you very much; please file your tax return next June, and explain this happenstance to us," the strong likelihood is that they would never hear from him again.

So I think that it's not an entirely unreasonable response to an extraordinary set of facts.

QUESTION: In any event, the basic validity of the termination provisions are not in issue in this case.

MR. SMITH: The basic validity of the termination provisions are not at issue, nor is the Commission's application of them in this case at issue.

QUESTION: Right.

MR. SMITH: Now, the taxpayer -- Laing refused to pay the tax, so the Commissioner then was forced to levy on this --

QUESTION: You mean they're not at issue in Laing?

MR. SMITH: They're not at issue in Laing, and I don't view them at issue in Hall, either.

It seems to us that these cases came up on the narrow question as to whether the Commissioner of Internal Revenue has to issue a notice of deficiency in these cases, and that if he does --

QUESTION: Well, I thought there was some question if he wasn't, that there might be some constitutional issue.

MR. SMITH: Oh, there is a constitutional issue in -- waiting in the wings, so to speak; but that depends upon --

QUESTION: Well, you shouldn't say, then, that they aren't subject to question in these cases.

MR. SMITH: Well, they are subject to question only if --

QUESTION: Well, only on a constitutional basis.

MR. SMITH: -- only if the courts which have held against us are correct in their assumption that that Tax Court remedy is the sole remedy in this circumstances. We think that that is based on a misreading of the Court's Flora opinion, and that there is a remedy in the -- inadequate remedy in the District Court. So we think the constitutional issue vanishes once that's considered in some detail.

Now, the District Court dismissed this suit on the basis of the Anti-Injunction Act, and the Second Circuit affirmed on the basis of its decision in the Irving case.

The whole facts are relatively parallel. The Commissioner of Internal Revenue received information that Mrs. Hall was engaged in narcotics trafficking and he terminated her taxable year as of January 31, 1973.

The assessment in that case also proceeded on a projection of volume of activity, and it came out to be something like \$52,000.

Now, the taxpayer Hall also refused to pay the tax, but, contrary to what happened in the District Court in Vermont, in the Second Circuit, the District Court granted a preliminary injunction, and the Sixth Circuit affirmed on the authority of its decision in Rambo, which is still awaiting disposition by the Court on our petition.

Now, we think that it is worthwhile to consider how these statutes come into play. I mean, if you look at page 60 and 61 of our brief, you see, as I mentioned, that the -- "If the Secretary or his delegate finds that a taxpayer either designs quickly to depart from the United States or intends to conceal himself or his property," he can terminate someone's taxable year.

Now, that termination by itself, that administrative action does not affect any collection activity. All that we have is an artificial termination of the taxable year, and a declaration that the taxes are immediately due and payable. Without more, the Commissioner could not collect these taxes.

But there is an assessment provision of the Code, which we set forth at page 53 of our brief, section 6201(a). And that provisions empowers the Secretary to make inquiries, determinations, and assessments of all taxes.

So it is a combination of the termination power and the assessment power, which is a very old statute, which, in its present form, dates from 1872, but actually is much older than that, because it basically is the essential assessment power for the collection of taxes, which has been going on since the beginning of the Republic, when the Secretary of the Treasury was Alexander Hamilton, and the taxes were excise and molasses and whiskey taxes.

So there's no doubt that this power exists, and that it is independent of any other provision of the Code.

Now, once the Commissioner makes --

QUESTION: This simply amounts to setting up an account against the taxpayer --

MR. SMITH: It simply amounts to setting --

QUESTION: -- in a certain amount in favor of the government against the taxpayer, isn't that it?

MR. SMITH: Right. Exactly; it's simply a notation. But it's an important notation, because it enables the Commissioner then, once the assessment is made, to exercise his extraordinary collection, involuntary collection, and he can then -- I see that we're --

MR. CHIEF JUSTICE BURGER: We will resume there at one o'clock.

[Whereupon, at 12:00 noon, the Court was recessed, to reconvene at 1:00 p.m., the same day.]

- - -

AFTERNOON SESSION

[1:02 p.m.]

MR. CHIEF JUSTICE BURGER: You may continue, Mr. Smith.

ORAL ARGUMENT OF STUART A. SMITH, ESQ.,

ON BEHALF OF THE UNITED STATES, ET AL. - Resumed

MR. SMITH: Mr. Chief Justice, and may it please the Court:

When the Court adjourned, I was discussing the operation of the various statutory provisions that come into play upon a termination, and they are essentially the termination out of section 6851, and then the assessment that follows this clerical notation by the Commissioner, which has the effect of a judgment upon which the taxes can then be collected by involuntary means, which were done in these cases because the taxpayers both refused to pay the amount deemed to be immediately due and payable.

QUESTION: What authority did you have to seize the money?

MR. SMITH: The authority to seize the money comes

from section 6331, which is set forth at page 57 of our brief, which is entitled, "Levy and Distraint". And that essentially allows the Commissioner to collect the tax from any person liable to pay who neglects and refuses to pay.

QUESTION: And you didn't give them ten days' notice of that, --

MR. SMITH: No, we didn't.

QUESTION: -- so you have to take the last sentence of that?

MR. SMITH: Yes, you have to take -- yes, Mr. Justice White, you have to take the last sentence of that, because it says that the Secretary or his delegate -- well, of course, that's one way to look at it, because -- well, if you take that, then we --

QUESTION: Why didn't you give them ten days' notice of the seizure?

MR. SMITH: Well, I think we -- you don't have to give them ten days' notice, because the -- for either one of two reasons: either, one, because section 6851 --

QUESTION: Well, section 6851 says the tax shall become immediately due and payable.

MR. SMITH: That's right.

QUESTION: And it doesn't speak at all about what you can do to collect it.

MR. SMITH: That's right.

QUESTION: All right, and then you say you have to look at 6331 to collect it.

MR. SMITH: I see. So looking at the last sentence --

QUESTION: So why didn't you give him ten days' notice?

MR. SMITH: Well, on account of the last sentence which says that "If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy," and it seems to us that --

QUESTION: Then, where was that finding made?

MR. SMITH: Where was that finding?

QUESTION: Yes.

MR. SMITH: Well, it seems to us that that finding is implicit in the operation --

QUESTION: So you didn't make it expressly, did you?

MR. SMITH: Well, it seems to us that that finding is implicit in the invocation in section --

QUESTION: Well, you didn't make it expressly, did you?

MR. SMITH: Well, it seems to me that --

QUESTION: Well, the answer must be no.

MR. SMITH: Well, the answer is no, but I would suggest that once you make a finding under section 6851, that a taxpayer designs quickly to depart from the United States or to conceal himself or his property therein, or to do any

act tending to prejudice or render partly ineffectual proceedings to collect the income tax; it seems to me that the collection of the revenue is endangered by the taxpayer's action.

QUESTION: But is there any word like "jeopardy" in 6851?

MR. SMITH: There is no word -- there is no word "jeopardy" in section 6851, no. But --

QUESTION: Now, what about if you make a jeopardy assessment?

MR. SMITH: Okay, ah --

QUESTION: If you make a jeopardy assessment, you still -- all you do is declare the tax immediately due and payable.

MR. SMITH: No; wel, it's slightly -- it's somewhat different.

QUESTION: But your authority to seize property is still under 6331, isn't it?

MR. SMITH: That's right. But may I just go back a moment. When we make a finding under section 6861, that the assessment or collection of a deficiency will be jeopardized by delay, that --

QUESTION: That's 61.

MR. SMITH: That's 61.

QUESTION: That's right.

MR. SMITH: That tax is already due.

QUESTION: All right.

MR. SMITH: And that's really -- I think that distinction was -- has been missed by the courts that have merged these two provisions.

In the case of the termination provision, the tax is not due, because there is no return for the short period --

QUESTION: Oh, but it does, it says it's due and payable.

MR. SMITH: That's right, the Commissioner makes a declaration --

QUESTION: Well, the only reason you can use 6331 is because there's something that's due and payable.

MR. SMITH: That's right. That's right. And what makes it due and payable, we submit, is the Commissioner's finding that the taxpayer's actions have contributed to a termination type situation -- have contributed to a situation which warrants termination and declaration that the tax is immediately due and payable.

Now, section 6861, what I would call the early assessment provision.

QUESTION: Yes.

MR. SMITH: Right. I think that the word "jeopardy" confuses the matter, because I -- and I think that's where the Fifth Circuit and the Sixth Circuit have gone awry here, because it's very easy to use the word "jeopardy" in a loose

sort of way, and then conclude that the statutes were designed to do roughly the same thing. But they are designed to do quite different things. In one case you have a taxpayer, where his taxes are not due. He's in the middle of the year, he doesn't have to pay any -- he has only to --

QUESTION: Until the Commissioner terminates his year.

MR. SMITH: Exactly. And declares them due and payable. Now, in the --

QUESTION: And they become, then, due and payable.

MR. SMITH: They then become due and payable.

In the section 6861, what we call the early assessment provision, the taxes are already due and payable --

QUESTION: I understand that.

MR. SMITH: -- but the Commissioner has determined that if he waits to collect them, then they are not going to be -- the assets will no longer be available, and I think that's a big difference.

Because, in the first situation, the taxpayer's own actions have contributed to the necessity of the Commissioner taking the extraordinary action of terminating his taxable year and determining his taxes due and payable. In the other situation, while it could be the taxpayer's own actions, there are a variety of other situations which can contribute to an early assessment under section --

QUESTION: You think that every time there's an assessment and the assessment is valid, that there is a deficiency?

MR. SMITH: Would I say that every time there is an assessment and the assessment is valid there is a deficiency? Not necessarily so. I mean, unless you use "deficiency" in a colloquial way to mean --

QUESTION: No, I mean as defined under the statute and the regulation.

MR. SMITH: I would have to -- I would say that every time we make an assessment there is an amount owing. It is not necessarily a deficiency.

QUESTION: It's a balance of the tax that's owing?

MR. SMITH: It's the balance of the tax that's owing. It seems to us that the --

QUESTION: Even if there's been no return filed?

MR. SMITH: Even if there's been no return filed, because the Commissioner had made an artificial termination of the taxable year, and declared it closed.

QUESTION: Well, there's not much artificial about it, if he says, --

MR. SMITH: No, no, essentially --

QUESTION: -- there's some tax due and payable, and I'm seizing \$190,000 worth of your money.

MR. SMITH: Exactly. Exactly.

QUESTION: That's not very artificial.

MR. SMITH: Well, by artificial, I mean simply it's not by operation of the calendar.

Now, I think that once the distinction between the two situations is made clear, because in the early assessment provision it could simply mean that the taxpayer is going bankrupt, or he's a person who fritters away his assets for one reason or another, and the taxpayer in such a situation, if the Commissioner is going to take the normal route of allowing the Tax Court proceeding to stay collection until that's finished, then it's quite possible that whatever decision the Court reaches to what tax is owing, there's not going to be any ability to collect on the deficiency.

Now, that's really why, it seems to us, that once that is really understood, that's why the Tax Court has jurisdiction in the early assessment provision and not in the termination provision, because if you look at page 71 of our brief, which sets forth the Revenue Act of 1921, the proviso on page 71 of our brief, which reads, "Provided, That in cases where the Commissioner believes that the collection of the amount due will be jeopardized by such delay he may make the assessment without giving such notice or awaiting the conclusion of such hearing."

That proviso came in as an exception to an administrative appeal procedure, which was enacted in 1921, under which

a taxpayer could seek an administrative review and collection would not occur during that time.

Now, in order to provide for the situation where the taxpayer's assets might not be available after the administrative review was complete, Congress enacted that proviso.

Now, that proviso is the direct statutory antecedent of section 6861, the jeopardy assessment provision.

QUESTION: But under that provision, even though you can levy while the Tax Court proceeding is going on, --- but you might be able to levy, but you can't sell.

MR. SMITH: Under that provision -- well, yes. But, of course, those --

QUESTION: Can you? Can you?

MR. SMITH: Yes, that's true, we cannot sell. But the reason --

QUESTION: And now you're claiming you could not only seize, but sell under 6851?

MR. SMITH: Exactly. Congress has made that choice, because the no sale restrictions didn't come in until the 1954 Code.

I think the important point is that the termination provision operated -- stood in the statutes independently of the early assessment provision, for three years, from 1918 to 1921. And under those circumstances, a taxpayer could be terminated, his taxable year could be terminated, the

Commissioner could sell -- seize his assets if he didn't voluntarily pay, and, in fact, he wouldn't have any remedy to go to the Tax Court, because the Tax Court didn't even exist at that time. His only remedy would be a refund suit.

QUESTION: Your statutory argument rests in large part on that three-year interval, doesn't it?

MR. SMITH: It rests on --

QUESTION: Without it, you would have a much harder case.

MR. SMITH: Well, it rests in part on that three-year interval, Mr. Justice Blackmun; but I don't think that's the only thing it rests on. I think that another important thing, which I think deserves emphasis, is the fact that when the Board of Tax Appeals was created in the Revenue Act of 1924, the Board was authorized to hear specifically enumerated cases, and those enumerated cases are set forth in our brief at page 32.

They involve Section 274, that is the ordinary kind of deficiency case; 279, relating to claims for abatement of deficiencies assessed under Section 274(d). And 274(d) is this early assessment provision. And then there are some others.

I think the important thing is that when Congress set up the Board of Tax Appeals, which is the predecessor of the Tax Court, it enumerated a class of cases and notably absent from this list was termination cases under what was then

Section 146 of the Code, or the Revenue Act; and is now the termination provision in the Revenue Act of 1954 -- Revenue Code of 1954.

Now, it seems to us that Congress has made a conscious choice, and I think that the courts that have gone astray on this question have taken the creation of the Board of Tax Appeals in the loosest possible, and derived from it a lesson which we don't think is properly learned from it. Congress created this Court, it's a creature of statute, it's designed to hear certain cases. For example, it's not designed to hear excise tax cases. And under section 6862 of the Code, we can terminate a taxpayer's taxable year in an excise tax case, and there's no notice of deficiency, there's no Tax Court review; I think that's absolutely plain.

We think that this case represents the same kind of congressional decision.

Now, it seems to us that the positions of the courts that have projected the Commissioner's assertion that no notice of deficiency is required rests on two notions, essentially: one, that the assessment power in a termination case derives from section 6861, and therefore the statutes has to be merged, because they operate in tandem. We don't think that's right.

In fact, the three-year gap really proves that it's not right. Because for three years the Commissioner of Internal

Revenue could assess taxes pursuant to a termination, and there was no section 6861 to provide him with any assessment authority. The assessment authority derived from the predecessor of section ---

QUESTION: Well, why is there an argument about the source of the assessment authority --

MR. SMITH: It's very important.

QUESTION: -- in the case?

Well, that's -- I know you say --

MR. SMITH: It is very important, because the courts that have rejected our position have -- in order to find the requirement of a notice of deficiency, they have had to look to subsection (b) of the early assessment provision, section 6861.

And they have merged those -- essentially merged those two statutory provisions.

We don't think that they are properly merged, because we think they develop quite independently of each other.

QUESTION: But, now, just spell it out for me, so I understand it. I don't know the Code like you do.

What is the -- why do you need an assessment to have a notice of deficiency?

MR. SMITH: Well, let me go back.

The courts that have rejected our position have said section 6861 by itself, and I agree, does not arm the

Commissioner with any assessment authority. It simply gives him the power to terminate and declare the taxes immediately due and payable.

But there can be no collection without an assessment.

Now, in order to --

QUESTION: Well, now, you say there cannot be a collection, now, where do you get that?

MR. SMITH: Well, essentially, I mean -- I get that from the fact that -- well, I get that from the -- I mean, I think that's generally so.

QUESTION: Well, 6331 says that -- that gives you the power to collect, and it just says if taxes are due and payable, doesn't it?

MR. SMITH: Yes, but you have to have an assessment of the tax before --

QUESTION: Now, where do you get -- that's what I want to know, where is that?

MR. SMITH: Well, I think that -- I mean, I'm not sure I can point to any particular provision in the Code, but --

QUESTION: Well, there's another provision; 6851 says the taxes shall become immediately due and payable.

MR. SMITH: That's right.

QUESTION: And 6331 says any taxes due and payable you can collect.

Now, why do you need an assessment?

MR. SMITH: We need an assessment because essentially it's upon the existence of an assessed -- the assessment --

QUESTION: I know, you're restating your position here.

MR. SMITH: Okay. Well, I think that you need an assessment because that sort of -- that Act, that administrative act, that notation of, in the Commissioner's books of account is -- provides the basis for the operations or the collection provisions. I don't think that there's -- I don't think there is any quarrel about that in this case. I think the quarrel in this case arises out of where that assessment authority comes from, you know, in connection with the termination of a taxable year.

Now, we say it comes from the basic assessment authority, which says the Commissioner shall be empowered to assess all taxes. And once you realize that, that it doesn't come from section 6861, that that thing simply came in as a proviso, and the Commissioner's assessment authority long antedates that provision, then I think one of the major props upon which the courts, like Clark vs. Campbell and the Schreck case, I think fall away.

Now, I think that the other prop of those cases is essentially that Tax Court review is an important matter, and without it we are depriving the taxpayers of some basic right.

Now, it seems to us that the taxpayer can seek an

immediate refund -- can file a claim for refund and seek immediate redress in the District Court.

I think that the facts in the Laing case demonstrate that, because a refund suit has been pending in the District Court of Vermont since 1973, with no action on it. It's waiting for the disposition of this case. But it need not await the disposition of this case.

It seems to us that the Flora rule, as we point out more fully in our brief, has no application here, because that case was premised on the existence of Tax Court review, which we say Congress had specifically foreclosed in these cases.

I think that if the Court has no further questions, I would --

QUESTION: I have one. Are you going to make any comment at all on the suggestion of unconstitutionality by your opponents?

MR. SMITH: Yes. I think that that -- the suggestion of unconstitutionality, I think, is without merit.

The reason it's without merit essentially is because the suggestion of unconstitutionality rests on the fact that we are blocking taxpayers' access to the courts to review these actions by the Commissioner.

QUESTION: Aren't you?

MR. SMITH: No, we're not. We're not, because the taxpayer can file a claim for refund after one of these

collection actions, and then bring a refund suit in the District Court. And I think --

QUESTION: How long does he have to wait?

MR. SMITH: How long does he have to wait? Well, I think that the Code provides that the Commissioner has a maximum of six months to act on a refund suit, a refund claim, and after that he can commence his suit.

But I think that if -- you know, the time is misleading in a way, too, because it's not entirely clear that Tax Court review would be that much faster than the District Court suit.

In fact, here, in the Laing case, where a suit is pending in the District Court in Vermont, it could have been resolved, you know, ages ago, without the necessity of -- or need for Tax Court review. I think that's absolutely clear.

QUESTION: Well, you're saying that he's not been deprived of a prompt determination?

MR. SMITH: Absolutely not, and we think that --

QUESTION: As long as you think six months is prompt.

MR. SMITH: Well, let's put it this way: --

QUESTION: Well, let's put it that way for a minute. As long as you think six months is prompt enough, --

MR. SMITH: I think that's --

QUESTION: -- he gets a prompt hearing.

MR. SMITH: Exactly. I think that's --

QUESTION: Well, that's all you can say. It doesn't

make any difference if the Tax Court would be as slow.

MR. SMITH: Yes, we think that -- although I must point out that in the facts of this case, the refund suit, the refund claim was filed by the taxpayer, Laing, on March 1st, 1973, and it was denied on March 9th, 1973, and the suit could have been brought on March 10th.

QUESTION: So your six-month provision is a statutory one, and I suppose as a practical matter, if a Tax Court case is assigned to the field at the taxpayer's request, it may sit there for a year, may it not?

QUESTION: Yes.

QUESTION: Before it's heard, or close to it?

MR. SMITH: Absolutely. Absolutely. And here you have a -- essentially the Commissioner has a maximum of six months, and he often takes much less to dispose of a refund claim like this one, in which it was clear that it was going to be denied.

QUESTION: And of course he often doesn't act at all? But if he waits --

MR. SMITH: If he doesn't act at all, then, at six months and one day the taxpayer can go to the District Court. We think that that's an adequate remedy, which fully meets the Court's test of due process in the Phillips case.

QUESTION: At least it's a congressional determination?

MR. SMITH: Well, yes, because if the six-month rule

didn't exist, then I think the courts would be flooded with all sorts of refund suits that could easily wash out after administrative review. And I think that the Commissioner of Internal Revenue is an administrative matter, is entitled to a reasonable amount of time to appraise the validity of a claim before the taxpayer seeks judicial redress.

QUESTION: What if we were to conclude that a six-month delay, as permitted by statute, would be unconstitutional, but that in fact the amount of time taken here was within permissible bounds; which way should our ruling be?

MR. SMITH: Well, I think it's hard to -- it's hard to generalize, but it would seem to me that, then, on the facts of the Laing case, of course, the injunction should not issue. That's very plain, because the Commissioner denied the -- the Court, I suppose, would have to announce a timeframe of somewhat less than six months. I mean, I --

QUESTION: Well, would we ever be confronted with that if, in fact, this didn't take six months? I mean, do we pass on the constitutionality of the statutes in the abstract?

MR. SMITH: I would think not. I would think not. I don't think the constitutional issue is presented on the facts of this case, as you put it.

QUESTION: What about Hall?

MR. SMITH: What about Hall? Well, Hall has never brought a refund suit at all, has never filed a refund claim.

So I don't think the constitutional -- it's hard to imagine that the constitutional issue is properly framed on those facts, either.

Because she hasn't availed herself of that remedy that would --

QUESTION: You just -- yes, you just sold her car without notice.

MR. SMITH: We didn't sell her car without notice, because she was able to post a bond.

QUESTION: Yes.

MR. SMITH: As the termination provision provides. She still has her car, as I understand it.

QUESTION: Yes. Yes. But you've got her bond.

MR. SMITH: We have her bond, but that, of course, is always --

QUESTION: It must be a pretty ancient Volks by this time, isn't it?

MR. SMITH: I suppose so.

[Laughter.]

MR. SMITH: Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Heavrin, will you and your colleague adjust your time to 35 minutes?

MR. HEAVRIN: Yes, I will do the very best I can, Your Honor.

MR. CHIEF JUSTICE BURGER: Very well.

ORAL ARGUMENT OF DONALD M. HEAVRIN, ESQ.,
ON BEHALF OF ELIZABETH JANE HALL

MR. HEAVRIN: Mr. Chief Justice, and may it please the Court:

I'd like to comment briefly on something Mr. Justice Brennan said earlier. He mentioned that the House Ways and Means Committee is considering legislation to alter the jeopardy assessment procedure. And this summer I had the pleasure of testifying as a witness before that Committee, but I hope that the fact that there is a move afoot in Congress to alter the jeopardy assessment provisions of the Code does not stop this Court from taking proper action in this case.

The reason I say that is that sometimes Congress takes a long time to do what should be done right away.

In starting the argument, specifically in reference to Elizabeth Jane Hall, I'd like to start with a comment made by Mr. Smith. He said that there has been a great deal of confusion concerning these Code issues and what's before the Court and the various courts, and he indicates that the courts are confused because of various interpretations of these Code sections that are at stake.

Well, I would respectfully submit that a lot of the confusion that has occurred in these tax cases has been brought about by the activities of the Internal Revenue Service.

The government, each time I think that I understand its argument and what is at stake and what is in issue, they seem to wiggle away a little bit and change it slightly. Today I heard, for the first time, in Mr. Smith's oral argument, that the tax that was assessed against Mrs. Hall was based on a proposed amount of illegal controlled substances that she had sold during this 31-day period.

In the first argument in January, he said that the amount was based on information given by confidential informant, and when the government argued this case at the Sixth Circuit they stated they had no idea how this \$52,000 figure was reached.

Also, in the genesis of this case, if we go back, and on page 13 of the Appendix in this case, this is from the Sixth Circuit, this is actually a Xerox copy of the government document, but if we look at page 13 of the Appendix, we see that the government sends out a tax bill to Mrs. Hall, and on the tax bill -- I'll read this to the Court -- it says, "This is a notice of tax due on your return identified above."

Then we look above and we see that this is a 1040 return, according to the government. Well, such is not the case.

When we first entered this case, the government was alleging that there was a \$52,000 deficit on Mrs. Hall's tax return, when no return had been filed at all. So we filed a complaint and said that if any return had been filed in Mrs.

Hall's name, it was a fraudulent tax return, because Mrs. Hall did not file any tax return for that short period of time.

Then when we get to the legal issues, we see that --

QUESTION: Well, isn't that notice just a form to advise --

MR. HEAVRIN: Well, yes, but I have to assume that the government is intelligent enough to select the correct form, Mr. Justice Blackmun. I can't -- as counsel for Mrs. Hall, I can't be responsible for the government taking out the wrong document and alleging that she's filed a tax return. I have to refute that --

QUESTION: I guess I don't get your point. What are you leading to?

MR. HEAVRIN: Okay. I'm saying --

QUESTION: I've known many instances where wrong forms were employed, without any prejudice to anybody.

MR. HEAVRIN: All right. Well, I'm not saying necessarily that there's prejudice. I'm saying that a lot of the confusion that Mr. Smith refers to has been caused by the government. And when we get to the actual legal decisions in this area -- for example, in the Schreck case -- the government has had an enormous difficulty overcoming the idea of the assessment authorities.

As Mr. Justice White said, 'where does the authority come from?

Well, Mr. Smith in his argument, he says, well, it originates in 6201. But originally the government argued in the Schreck case that 6851, in and of itself, contained the implicit power to assess.

QUESTION: It isn't required, there is plenty of law to this effect, that the government doesn't have to be consistent in tax cases, and they certainly haven't been over the years.

Again, I ask, what the point is.

MR. HEAVRIN: All right. And this is no exception.

Well, the point is that every time you nail them down and you say, "Is this what you're arguing, and you're wrong on this issue", they slip away and argue a little bit differently.

Now, before this Court --

QUESTION: Well, in practice we have all been subjected to that frustration, but it isn't --

MR. HEAVRIN: Yes, that's true.

QUESTION: Why don't you just say what you mean.

MR. HEAVRIN: Okay.

Now, I was getting into the meat of the case. In this particular case, the government has argued that the assessment authority originates in 6201, and this is a general provision of assessment authority granted by Congress. But if we examine 6201, as I stated in the brief, this particular section refers to taxes that are payable by stamp, such as:

liquor taxes; gambling taxes, and so forth.

Taxes that relate to income and jeopardy situations in income tax situations are found in 6851 and 6861 or a combination of both.

Now, on the issue of deficiency, which the Court questioned Mr. Smith about, the government, in the cases where they have prevailed -- for example, in the Irving case -- they were able to convince the Court that what was assessed against the taxpayer really wasn't a tax at all, and if we take a look in the government's brief -- and I don't recall the exact page, but I believe it's about page 26 of the government's brief -- they say, We are not really assessing a tax, we're assessing a provisional amount that has to be paid, sort of an insurance policy that assures that the money will be there when and if the tax liability is established.

Now, at this point, the government is telling this Court and the Second Circuit and all the other courts that there really is no tax. Then when we raise the objection of Flora, where he says that we haven't paid the tax, we can't pay the tax because Mrs. Hall doesn't have the money -- when we raise the Flora objection and say the full payment rule prevents us from filing suit, they answer by saying, No, it doesn't, because this really isn't a tax, and no deficiency is created.

Well, I think that that statement is incorrect. I

think the only thing the government can collect against the citizen, the IRS at least, is a tax, and I cannot accept the provisional amount theory.

Now, if we accept the provisional amount theory, today Mr. Smith is in Court and he is rigorously asserting the Anti-Injunction Act prohibits this type of suit, and he recited it to the Court.

But if we read the Anti-Injunction Act, it says that no action to restrain the collection of taxes shall be made. So if we adopt Mr. Smith's theory that this really isn't a tax, I would respectfully submit that the Anti-Injunction Act has no application, and they can be enjoined from what they are doing.

I do-'t believe we have to go that far, because I believe it's in 6861, the jeopardy assessment. I believe that is the correct Code section.

But if we accept his argument on the provisional theory idea, then this really isn't a tax, and the Anti-Injunction Act does not apply.

This puts the government, in my opinion, in the interesting position where if they are trying to stop you from suing them, they say it's a tax; but if they're trying to keep you out of Tax Court and keep you from litigating your claim without full payment, they say it is only a provisional amount.

Now, the case, when it reached my desk, I had the

feeling, and I still do, that there was something seriously wrong in a situation where the government could go out to a lady's house and say, "Here is a tax bill for \$52,000; pay it."

And Mr. Smith very cavalierly says that we refused to pay the bill. Well, there wasn't any way we could pay the bill. Because Mrs. Hall simply didn't have \$52,000. The bill \$52,000/was approximately ten times her entire worth.

The provisions under the Code, "full payment or post bond for the total amount" and "full payment and file a refund suit" left Mrs. Hall literally without a remedy.

And the further I get into the case, the more unjust it seems. Every citizen, I think, has a fear of the Internal Revenue Service; more so than the FBI or the CIA or any of these other organizations.

And it may be veiled fear and a remote fear at most times, but in the instant case the fear of IRS was not only real but it was realized by Mrs. Hall.

Now, the government is not the type of organization that ever admits that it was in error. Whether it's -- no matter what they're doing, they always justify their actions by saying, "This is for the common good" and "this is for some lofty purpose".

QUESTION: Well, you don't suggest that some citizens ought not to have a fear of the IRS, do you? Certainly, some of them shouldn't.

MR. HEAVRIN: Well, I don't think, Mr. Justice Rehnquist, that citizens should fear their government.

QUESTION: Well, how about a guy who's been dodging taxes for the last twenty years and the IRS --

MR. HEAVRIN: Well, I think the guy should be prosecuted.

QUESTION: Well, shouldn't he be -- wouldn't he very likely be in fear of the IRS?

MR. HEAVRIN: I'm not talking specifically about the man who's been dodging taxes, I'm talking about the average guy who goes to work at a factory every day, eight days a week, he has more fear of IRS than he does any other governmental agency.

QUESTION: Well, I thought your statement --

QUESTION: Just a general statement.

MR. HEAVRIN: Yes, I think that it is a generalization.

MR. CHIEF JUSTICE BURGER: Yes, why don't you get on with your argument.

MR. HEAVRIN: So the -- what I'm pointing out -- I did, I thought I had gotten onto it by saying that the fear was realized in Mrs. Hall's case. The IRS actually showed up on her doorstep. The IRS actually made a demand of her for a sum of money that far exceeded her total net worth, and, as we have stated in the argument here in January and in the brief, at that time Mrs. Hall was without a remedy.

Mrs. Hall then proceeded to the United States District Court, where she filed a suit.

Now, 6851 assessments, according to the government, are tentative in nature. And this is admitted by the government in its brief -- I can't recall exactly where it is in the brief. But they say these things are tentative in nature.

Yet, based on this tentative tax liability, the IRS immediately drags off her automobile. A few days later they put it up for sale.

What could the government gain in such a situation?

In one of these equity balancing situations, Mrs. Hall was the one with everything to lose and in theory she could have lost, actually lost her livelihood, because, not being able to make the full payment, not being able to make the \$52,000 payment, the assessment against her would continue, unless she could stop the Internal Revenue Service from continuing the process of collection.

In the last argument I mentioned to the Court that the example, if she goes to work on the following Monday morning and she draws a paycheck at the end of the week, the government can attach that paycheck and apply it to the \$52,000. In a way she's in a very much more difficult position than Mr. Laing, because Mr. Laing actually had the money. And in the Clifford Irving case, Clifford Irving actually had the money.

But what happens to the taxpayer who doesn't have the money, and cannot stop the collection procedure?

They are trapped in a snowball that's rolling down hill, that keeps getting bigger as it goes, and there's nothing they can do about it, unless they have the option of going into the United States District Court, as Mrs. Hall did, filing a suit enjoining the Internal Revenue Service from the collection of its taxes.

I think that I've pretty well explained our position.

If there are no questions, I'll quit.

I want to say that when I argued this case at the Sixth Circuit, the lawyer who represented the government came over to me and we had lunch and he said, "We've stopped this. IRS is not" ---

MR. CHIEF JUSTICE BURGER: Is this in the record now? Or are you going out on a limb?

MR. HEAVRIN: No, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Then I suggest you abstain.

MR. HEAVRIN: Okay.

MR. CHIEF JUSTICE BURGER: Confine yourself to the record.

MR. HEAVRIN: Okay. Well, I was going to close by saying I hope that this Court hands down a ruling that will cause IRS to not be tempted to restart this procedure of jeopardy assessments, where there really is no jeopardy. And

the purpose of the assessment is punitive in nature.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Oteri.

ORAL ARGUMENT OF JOSEPH S. OTERI, ESQ.,

ON BEHALF OF JAMES BURNETT MCKAY LAING

MR. OTERI: Mr. Chief Justice, may it please the Court:

Addressing myself, if I may, to Mr. Laing's situation, Mr. Laing is a foreign national. He had been in this country 23 days, 24 days at the time of this event. He comes in by vehicle on a B-2 visa from Canada to New York. He's leaving by motor vehicle from New York to Canada. He is turned back at the border, and the American officials search his car, even though he had left and only been gone five minutes when he makes the swing and they search his car.

They find, Your Honor, a suitcase with \$300,000 in the motor of his automobile. This has occasioned a certain degree of skepticism and shock on the part of people who hear this particular thing. But I ask, Your Honor, considering in a jeopardy framework, where do you carry \$300,000 on a 500-mile auto trip in the middle of the night?

QUESTION: Go to the bank for a certified check is one way.

MR. OTERI: In the middle of the night, Your Honor?

QUESTION: You can carry a certified check in the

middle of the night.

MR. OTERI: Well, Your Honor, you may do that, because you have credentials --

QUESTION: Well, I don't pick up \$250,000 in the middle of the night!

[Laughter.]

MR. OTERI: That may be true, Your Honor. But what I'm saying, in effect, Judge, is I'm referring to the situation as we have it: cash, Judge. And there are people, Your Honor, who deal in nothing but cash, for their own idiosyncratic reasons. And I don't know what those --

QUESTION: They are mostly honest people.

MR. OTERI: Your Honor, I can't say that they are dishonest. I know gamblers who deal in large amounts of money, who pay their taxes every year; and I don't think this case should be decided on the fact that the money was in a suitcase in the motor block of an automobile.

QUESTION: But the jeopardy assessment structure of the statute is aimed at precisely this kind of situation among many others like it, is it not?

MR. OTERI: No, Your Honor. For one reason, Judge, and I say this only because one of the other Judges this morning -- one of the other Court members this morning pointed out something. We are assuming one thing. We're assuming that Mr. Laing is a taxpayer. You know, that's the assumption that

we seem to have neglected to fight in this case. There's no evidence whatsoever, and that's the constitutional problem I face also, that Mr. Laing is a taxpayer in the United States, Your Honor. Any more evidence than there would be if, when this Court was in Paris this summer, upon leaving you happened to have a couple of thousand dollars in cash in your pocket, you were searched and that money seized.

QUESTION: I thought the assumption of this case was that he ought to be a taxpayer.

MR. OTERI: Well, no, Your Honor, what the government has done is the government has assumed that he is a taxpayer, and taken his money and treated him this way.

One of my basic arguments, and in an effort to keep within a time framework for this Court, I'm going to basically stay away from the codal argument, Your Honor, and just address myself, if I can, to the constitutional issues -- one of the basic arguments, Judge, is that there is no evidence whatsoever that he was a taxpayer.

And when you read the case, Your Honor, when you read the facts in this particular case, in the Appendices, you find that he gets stopped at the border at 2:00 a.m., that there was a Mr. Fields, who is the District Director in Vermont, was called by Customs at 2:00 a.m. And it's right in the Appendix, Your Honor, his deposition and testimony.

And he said to the Customs man, "How long can you

keep him?" And the Customs man said, "Well, I can hold him for two hours, but if you send somebody here, I'll keep him till they get here."

At ten o'clock the next morning, Your Honor, eight hours later, Mr. Laing is sitting in a room up at Derby Line, Vermont, being held, waiting for IRS people. At ten o'clock in the morning, two IRS people show up, and they talk to Mr. Laing and they talk to the other two people. And I think this is of key import, Your Honor, they talk to all three people.

The other two people disclaim any knowledge of the money. Laing claims knowledge of the money, and ownership of the money.

The IRS then assesses, Your Honor, a \$310,000 jeopardy assessment and seizure against each of the three people. They assessed \$930,000 in taxes, even though they only seized \$310,000.

Now, Your Honor, later on we go and we want to file a suit for a refund, figuring, "All right, fellows, you owe us \$150,000, give us back half the money." We file a claim for a refund, Judge, and we find out that they went even further than that, on their own initiative, with no notice to anyone, the IRS has now gone and they've taken the \$310,000 that they have assessed each person, and they've distributed the \$310,000 they seized. They gave each person credit for \$100,000, and then they very graciously cut the assessment from 300 to 200.

But we still owe \$100,000, so we can't bring a refund suit.

Now, we're in a position where it's our money, we admit it's our money, we say it's our \$300,000, we file for a refund to the Commissioner, we say, "Give us back \$150,000 and we'll fight over whether or not I'm a taxpayer." But they won't even let us do that.

Now, Your Honor, there's been some conversation and questioning this morning concerning the fact that the -- we have a right to a suit for refund. But, Your Honor, there's two things involved. The time span is a minimum of six months and a maximum of eighteen months on a suit for a refund.

For example, if the Commissioner terminates a year on January 2nd, 1975, they terminate a tax year, you then have to wait until the conclusion of 1975 to file for your refund, twelve months. You then file and the Commissioner can sit back and wait six months, so you have eighteen months.

In our case, the tax year was terminated on June 24th; nine months later, in March, after much negotiation, we filed for the refund, and, granted, it was denied within eight days. But we still had a nine-month wait.

But, Your Honor, what's available to my client, to this foreign national? He does not have available to him a refund suit, as a practical matter, because of the rule of the Flora case, the non-full-payment rule.

Secondly, my client is being discriminated against, I think invidiously, in that he has to make full payment and is denied access to the non-prepayment form in the Tax Court, which is where we want to go.

Why is he denied, or how is he denied access to the Tax Court? Very simply, the government won't issue a deficiency notice.

Mr. Justice White asked today, why do they want an assessment? I think they want assessments so that they can then say, "There's a deficiency."

QUESTION: Well, a deficiency notice, do you know why -- is a deficiency notice contingent on there being an assessment?

MR. OTERI: I think it is, Judge. I think when reading the statute --

QUESTION: Well, where do you find that?

MR. OTERI: Well, I can't say that I find it at any specific statute, Your Honor; but again, in reading the --

QUESTION: Well, I know, but all the deficiency -- a deficiency is defined.

MR. OTERI: Yes, Your Honor, it is; 6201.

QUESTION: It's defined, and it doesn't mention the word "assessment".

MR. OTERI: No, Your Honor, but I think it conditions on --

QUESTION: And all it talks about is some balance that's due and owing.

MR. OTERI: Right, Your Honor.

QUESTION: And if there's a balance due and owing, you can issue -- the statute authorizes the Commissioner to send a notice of deficiency.

MR. OTERI: Your Honor, I think that's wonderful. I just -- I have been trying --

QUESTION: Well, I know it's wonderful, but I don't know why you get in a big argument about an assessment, about the source of some assessment. When 6851, on its face, says "tax shall be due and owing at that time."

MR. OTERI: Your Honor, I will accede to that in a moment. I have been trapped like most lawyers into arguing on the IRS grounds, because of a basic unfamiliarity with the IRS Codes. And I brought the idea that you need an assessment, and I fought the IRS argument --

QUESTION: I still don't know why you need -- I don't know why there had to be an assessment to issue a notice.

MR. OTERI: Well, Your Honor, in that particular situation, then, there's no problem --

QUESTION: But you do need a notice to get in the Tax Court.

MR. OTERI: No question I need what they call a 90-day notice, Your Honor, or a letter of deficiency to get

into the Tax Court. And I think I'm entitled to that in this particular case.

Because, in either case, whether you need an assessment or you don't need an assessment, the fact of the matter is there's a deficiency here.

QUESTION: That there's taxes -- they've told you you owe some taxes?

MR. OTERI: They told me we owe \$195,985.85, Your Honor, and my man has --

QUESTION: What does it take to have a notice of deficiency?

MR. OTERI: All it takes, Your Honor, --

QUESTION: Let's assume that the government comes out in the middle of the night and seizes your cash and gives you a piece of paper that says you owe some taxes. And, furthermore, you owe \$190,000 worth of taxes.

Now, why isn't that a notice of deficiency? Because it wasn't on a form or what?

MR. OTERI: I think because it's not the statutory notice that's required by the Code, Your Honor.

QUESTION: Well, how do you know it isn't?

MR. OTERI: Well, quite frankly, Your Honor, again I'm fighting them on their own grounds, and I've gone for their bait, instead of fighting on the grounds that in effect there is a deficiency created by the very fact that a 6851 was filed.

But, again, Your Honor, if I go for that, and I do now petition the Tax Court without a ruling from you, I'll probably be thrown out on a jurisdictional ground from the Tax Court and have to be back here again in a year, if you will allow me to, to try to convince you that this avenue has been foreclosed to me.

You see, my biggest problem, Judge, on a constitutional basis, basically, is that I have a foreign national who has his money taken away from him, and he has nowhere to go.

Do you realize, Your Honor, that up till today, three years and four months -- three years and three months after the seizure, there's still been no assessment of putting aside, or any kind of letter issued. My man's money is sitting some place in the government. I petitioned to have it placed in an interest-bearing account and pay the man the interest, he's still living on the houseboat in Wales without any money. I've been trying to get him income from the \$300,000. They won't do it.

QUESTION: I thought he was down in New Zealand.

MR. OTERI: No, he's back in Wales.

QUESTION: He's in Wales now.

MR. OTERI: Yes, Your Honor. And still has no money, though, and calls me collect, Your Honor.

But the fact of the matter is that in this particular case, constitutional rights that are guaranteed to American

citizens, the rights of access to a court, have been denied this man. And, most importantly, Judge, --

QUESTION: Well, you're claiming constitutional rights for your man, too?

MR. OTERI: Yes, Your Honor, that's what I did for Laing. I mean, just thinking, Your Honor, in this particular case, you can't terminate a probation without a hearing, you can't take away a welfare check without a hearing, you cannot condemn obscene material without a prior hearing; but in my particular man's case, whether there's any adjudication prior to the fact that the money is seized that he is a taxpayer, he's taken -- his money is taken away from him.

If I concede, arguendo only, that because of the peculiar nature of this case, perhaps the government had a right to hold that money for a short period of time while there was a determination.

But, Your Honor, three years, three years and four months, with no action whatsoever by the government could demonstrate to any kind of an impartial judicial body that in fact there was justification for the seizure, by the fact that this man was a taxpayer, seems to me to fly in the face of all our constitutional guarantees of due process.

And, even further, Your Honor, the fact that my man not only has lost the use of the money, but my man doesn't have any forum readily available to him to determine that the money

shouldn't be paid to the government anyway. We're in a position where we have nowhere to go. We can't go on the refund suit, because of the Flora rule; we can't go to the Tax Court because of the no deficiency; and we can't get any kind of a hearing to determine whether or not the government has the right to assess taxes and seize money on a totally specious basis.

Going back to that, Mr. Perry, Your Honor, who was the Internal Revenue agent who came to Derby Line, where my man was with the money, when he came there, Your Honor, he set \$310,000, the exact amount of money that was seized, as the tax due and owing.

Now, we talked, we had a deposition with him, we couldn't go into how he set it, only generally.

But in Rimieri, which is a Southern District of New York case, which I'm sure you're familiar with, a Frenchman was arrested at Kennedy Airport with \$247,850 on his person. The IRS was called in. The IRS set a tax of \$247,500; they left him \$320, and seized his money.

When the agent, a Mr. Vida was on the witness stand in New York at the hearing which was granted by a District Court Judge, they went into how the assessment was made. And the attorney for Rimieri asked the agent: "In fact, sir, weren't you sent there for the specific purpose of seizing the exact amount of money that was found?" And he said yes.

MR. CHIEF JUSTICE BURGER: Now, are you arguing his case or yours?

MR. OTERI: My case, Your Honor, because that's what happened to me.

MR. CHIEF JUSTICE BURGER: Well, I suggest you confine yourself to the record of this case, counsel.

MR. OTERI: Well, Your Honor, that is part of --

MR. CHIEF JUSTICE BURGER: You're using your valuable time --

MR. OTERI: Well, Your Honor, that is part of the record in my case. I direct you to Mr. Perry, to show you that that's how the assessments are made, to point out to you that again we are being deprived of a constitutional right, which we have: the right to some kind of a speedy determination of this particular type of tax in this particular type of situation.

Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:50 o'clock, p.m., the case in the above-entitled matter was submitted.]

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