

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-1736

TITLE JERSEY SHORE STATE BANK, Petitioner V. UNITED STATES

PLACE Washington, D. C.

DATE December 8, 1986

PAGES 1 thru 56



(202) 628-9300

200 B STREET, N.W.

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 JERSEY SHORE STATE BANK, :

4 Petitioner :

5 v. : No. 85-1736

6 UNITED STATES. :

7 - - - - -x

8 Washington, D.C.

9 Monday, December 8, 1986

10 The above-entitled matter came on for oral argument
11 before the Supreme Court of the United States at 11:54
12 o'clock a.m.

13
14 APPEARANCES:

15 MARTIN A. FLAYHART, ESQ., Jersey Shore, Penn.;

16 on behalf of Petitioner.

17 ALAN I. MCROWITZ, ESQ., Washington, D.C.;

18 on behalf of Respondent.
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on behalf of Petitioner.	
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on behalf of Respondent.	
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1 Pennmount Industries, Incorporated. Subsequent to
2 entering into that commercial relationship, in which
3 Jersey Shore advanced funds which were secured by
4 mortgages and accounts receivable, Pennmount Industries
5 became delinquent from the fourth quarter of 1977
6 through the first quarter of 1980 with regard to paying
7 to the Government its employee withholding taxes which
8 it had withheld.

9 QUESTION: Do I understand that you concede
10 liability for a portion of that time, but I take it not
11 collectability in view of the lack of notice?

12 MR. FLAYHART: That is correct. For the
13 period of time from January of 1979 through March of
14 1980, we would concede that the bank would otherwise be
15 liable for the taxes except for the issue of notice,
16 which of course applies across the board to the entire
17 liability in this case.

18 And of course, if that were the only section
19 -- portion of taxes that the Government were seeking to
20 collect, we really wouldn't be here today. But the
21 issue which is before the Court applies across the
22 board. The principle remains the same.

23 On December the 30th, 1983, approximately six
24 years after the first tax liability of Pennmount arose,
25 the Government filed suit against Jersey Shore to

1 collect the --

2 QUESTION: May I. I didn't quite understand
3 part of your response to Justice Blackmun. You concede
4 liability for part of the tax, is that correct, you
5 say?

6 MR. FLAYHART: During the period of time from
7 January of 1979 through March of 1980.

8 QUESTION: Does that mean you also concede
9 that you had actual notice of the tax?

10 MR. FLAYHART: No, we do not concede that.

11 QUESTION: Well then, how could you be liable
12 under the statute?

13 MR. FLAYHART: Well, if I could rephrase my
14 answer perhaps just to clarify. With regard to -- the
15 statute provides under Section 6303(a) that the
16 Government is required to furnish notice to each person
17 liable for the tax once an assessment has been made.
18 For the purpose of considering the notice issue under
19 the 6303(a), we believe that in a procedural framework
20 that the bank must be considered to be a person liable
21 for the tax and therefore --

22 QUESTION: And therefore it concedes that it
23 had actual knowledge of the deficiency?

24 MR. FLAYHART: No, I don't mean to say --

25 QUESTION: Isn't the notice -- there's a

1 scienter requirement in the statute, isn't there?

2 MR. FLAYHART: Yes, there is. And I don't
3 mean to say that we concede the issue as to the ultimate
4 liability under the statute, and I'm sorry if I --

5 QUESTION: Well then, you don't concede
6 liability.

7 MR. FLAYHART: All right, yes, we don't, in
8 that limited context.

9 QUESTION: Well, because to concede liability
10 you've got to concede scienter, do you not?

11 MR. FLAYHART: Under 6303(a), yes.

12 QUESTION: All right, so you don't concede
13 liability.

14 MR. FLAYHART: No, we do not. I'm sorry.

15 QUESTION: Or anything?

16 MR. FLAYHART: We don't concede anything.
17 We'll start off on that basis.

18 The Government admits that no notice was
19 provided and asserts that none was required to be given
20 under Section 6303(a). To begin my discussion, I would
21 like to address my remarks to the function which the
22 furnishing of notice provides to a lender and then
23 examine briefly the plain statutory language of Section
24 6303(a).

25 It should be noted that furnishing of notice

1 to a lender is not simply a formalistic requirement
2 which is devoid of substance. Once an assessment has
3 been made against an employer within the three year
4 period of time for bringing assessments under Section
5 6501, then the statute of limitations is correspondingly
6 extended for an additional six year period of time under
7 Section 6502.

8 Not only is the statute extended against the
9 employer, but it is also extended against the lender as
10 well. In the present context, the employer receives
11 notice under Section 6303(a) and the lender does not.

12 Having the benefit of this extended period of
13 time, up to nine years, there is an inherent prejudice
14 which results in the failure of the Government to
15 provide notice to the lender. In the nine year
16 interval, the following may happen:

17 Personnel records -- personnel changes can be
18 made on the part of the lender; records can be lost.
19 The opportunity to mitigate damages is eliminated by
20 stopping the flow of the tax liability. And there will
21 indeed in --

22 QUESTION: Can the Government sue the taxpayer
23 or the lender without an assessment? Go right directly
24 into court?

25 MR. FLAYHART: Without an assessment having

1 been made at all, they can do it within a three year
2 period of time.

3 QUESTION: Only three years.

4 MR. FLAYHART: Three years, that's right.

5 QUESTION: That is, they could haul you into
6 court without you ever knowing until you were served
7 with a complaint?

8 MR. FLAYHART: Within that three year period,
9 yes. Of course, this is not the case in our instance.
10 It's six years down the road.

11 During this interval, a maximum of nine years,
12 there is lost the opportunity of stopping funds to
13 prevent the tax liability from accruing. In addition,
14 in many of these instances you will have the corporate
15 employer who has gone bankrupt and there will be
16 selective recollection on the part of the corporate
17 officers.

18 CHIEF JUSTICE REHNQUIST: We'll resume there
19 at 1:00 o'clock.

20 (Whereupon, at 12:00 noon, argument in the
21 above-entitled case was recessed, to reconvene at 1:00
22 p.m. the same day.)

1 AFTERNOON SESSION

2 (1:00 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll proceed with
4 the arguments in Jersey Shore. Mr. Flayhart.

5 ORAL ARGUMENT OF

6 MARTIN A. FLAYHART, ESQ.,

7 ON BEHALF OF PETITIONER - Resumed

8 MR. FLAYHART: Thank you, Mr. Chief Justice,
9 and may it please the Court:

10 I concluded my remarks this morning with a
11 discussion of the function that notice would provide if
12 timely given to a lender. Under the present practice,
13 an employer who is clearly liable for the tax receives
14 greater procedural protection than the lender does,
15 inasmuch as the lender receives no notice and yet is
16 subject to being sued by the Government for collection
17 of the tax for nine years after the employer's liability
18 for the tax arose.

19 The majority opinion of the Third Circuit --

20 QUESTION: Excuse me. The employer doesn't
21 necessarily receive any notice either if the tax isn't
22 assessed.

23 MR. FLAYHART: That's right. But if the --
24 once the employers files his tax return, he files it and
25 says, I owe X dollars of tax, the Government then either

1 can sue him within a three year period of time without
2 having furnished the assessment --

3 QUESTION: In which case he has no notice.

4 MR. FLAYHART: That's correct.

5 QUESTION: But you're arguing here that you
6 want notice before you can be sued.

7 MR. FLAYHART: No, Your Honor. If I can
8 explain, we are not here asking any different statute of
9 limitations period from what the employer receives. If
10 the Government had brought suit against Jersey Shore
11 within three years of the employer's tax liability
12 having arisen, we would not contest that fact.

13 What we are saying is that once the assessment
14 has been been, then that triggers the notice provision
15 under Section 6303(a), which must be given to each
16 person liable for the tax. That person would be the
17 employer and the lender as well.

18 QUESTION: Well, right here you're making a
19 statute of limitations argument. But I don't regard you
20 to have made that below. Were you making a statute of
21 limitations argument, or simply the argument that you
22 are not liable for the tax, period, because you had not
23 been assessed?

24 I thought it was the latter -- or had not
25 received notice.

1 MR. FLAYHART: We are making the argument that
2 we had not received notice. But in order for the
3 statute of limitations to be extended, the precondition
4 of that is that notice having been given. We were
5 arguing the fact that we had received no notice and
6 therefore the Government was precluded from bringing
7 suit against us.

8 QUESTION: Precluded because of the statute of
9 limitations or just because you weren't liable? Did you
10 argue the statute of limitations point below?

11 MR. FLAYHART: We argued it in regard to the
12 issue of notice, which was a precondition for the
13 institution of suit. We did not argue the statute of
14 limitations in terms of the bringing of the suit within
15 a six year period of time, because we are not really
16 questioning that.

17 As I say, we are not requesting a different
18 statute of limitations period than would be applicable
19 to the employer. The employer is entitled to notice.
20 If the employer had not received notice after the
21 assessment had been made, then the Government likewise
22 would be precluded from suing the employer as well.

23 QUESTION: After three years.

24 MR. FLAYHART: No. After it makes the
25 assessment and doesn't give the notice within the 60

1 days required by the statute. That's the prerequisite
2 for then commencing with the suit.

3 We are not requesting a different period of
4 time than what the employer receives.

5 QUESTION: I see what you're saying. You're
6 saying that, even against the employer, once you make an
7 assessment you have to give notice even though you could
8 have proceeded against the employer without making an
9 assessment?

10 MR. FLAYHART: That's correct.

11 QUESTION: Just bring a lawsuit. If you do
12 make an assessment, you can't bring suit at all, even
13 within the three years --

14 MR. FLAYHART: Without having provided --

15 QUESTION: -- without having provided notice.
16 Why would that be?

17 MR. FLAYHART: Well, that's under Section
18 6303(a), and that of course is the issue which is before
19 the Court. The Third Circuit in the majority opinion
20 here seemed to justify the lack of notice to the lender
21 on the basis that on the substantive grounds that actual
22 notice or knowledge under Section 3505 of the Code was
23 required to be shown on the part of -- by the
24 Government, in order to foist liability on the lender
25 for this tax.

1 However, as the Eight Circuit in Messina
2 Builders --

3 QUESTION: May I ask you, to be sure I
4 understand your colloquy with Justice Scalia, had there
5 never been an assessment in this case at all, would you
6 claim that you were entitled -- and say the Government
7 sued you. So the employer went bankrupt so there's no
8 money around, and within a three year period they
9 brought an action against you under the statute.

10 Would you contend that there was a -- that the
11 statute -- that the claim would be barred by the failure
12 to give a Section 6303(a) notice?

13 MR. FLAYHART: If there had been no
14 assessment, no.

15 QUESTION: You would agree that you could be
16 sued without any notice if there's no assessment?

17 MR. FLAYHART: Within a three year period of
18 time, that's right, yes.

19 QUESTION: But you're saying that since there
20 was an assessment you cannot be sued, neither within the
21 three year period of time nor, of course, later?

22 MR. FLAYHART: Nor beyond that, although for
23 the purposes of the facts of this case, of course, all
24 of the period of time that the Government seeks to
25 impose liability on the bank would be beyond the three

1 year period of time, although I understand your point as
2 far as the notice.

3 QUESTION: Suppose we disagree with you on
4 that. Do you think that you have adequately preserved
5 the further point, whether, even though without the
6 giving of notice you could have been sued within the
7 three year period, you cannot be sued beyond the three
8 year period?

9 MR. FLAYHART: Yes, we do, because of the
10 issue of the notice. In other words, the notice is
11 crucial to this, the entire issue.

12 QUESTION: Well, the notice is crucial, but
13 you never did say the magic words, statute of
14 limitations.

15 MR. FLAYHART: Well, not to belabor the point,
16 but the reason that we didn't is because we are not
17 requesting any different period of statute of
18 limitations. We're not trying to say that we ought to
19 -- you see, the Ninth Circuit in the Hunter Engineers
20 went off on this point, and I think mistakenly so,
21 saying that the lenders were really coming in and
22 saying, well, the Government would be forced to
23 institute a suit against the lender within a three year
24 period of time.

25 QUESTION: So you're saying you did not raise

1 the statute of limitations point?

2 MR. FLAYHART: No, we didn't raise it in that
3 context, no. We raised it in the context of the notice
4 issue.

5 The Third Circuit, however, in its majority
6 opinion seemed to justify this differing treatment
7 that's being afforded to a lender as opposed to an
8 employer on the basis of the notice requirement
9 contained in Section 3505 itself. In other words, the
10 Third Circuit said that a lender cannot be held liable
11 unless the Government can prove actual notice or
12 knowledge that the employer had not paid its employee
13 withholding taxes or that the funds were supplied by the
14 lender to the employer with knowledge that the employer
15 would not pay those taxes.

16 However, this distinction, as noted by the
17 Messina Builders case in the Eighth Circuit, is
18 inapplicable because of the fact that actual notice or
19 knowledge under Section 3505 is a defined term which
20 includes within it the definition contained in Section
21 6323 of the Code, which can indeed mean lack of due
22 diligence.

23 Therefore, a lender can be held liable under
24 Section 3505(b) not only on the basis of actual notice
25 or knowledge, but on the basis that the lender failed to

1 exercise due diligence with regard to ascertaining the
2 fact that the employee taxes had not been paid.

3 With regard to the legislative history of
4 Section 3505, there is nothing to show in that history
5 or the Congressional reports that Congress in creating a
6 new class of persons who were liable for this tax on a
7 derivative basis, that is to say lenders, intended to
8 exempt the Government from providing the notice required
9 under Section 6303(a) to persons liable for the tax.

10 It must be presumed, we would urge, that
11 Congress does not legislate in a vacuum. If Congress
12 had intended to place an exemption for Section 6303
13 notice and had intended to afford the Government the
14 right to that exemption, then it would have changed the
15 statute.

16 It did not do so and the statute remains under
17 Section 6303(a) that each person liable for the tax is
18 entitled to notice.

19 QUESTION: What's tax?

20 MR. FLAYHART: That is the unpaid employee
21 withholding tax and the Federal Contribution Insurance
22 Act taxes, which had not been paid by the employer.

23 QUESTION: But this provision about notice
24 applies across the board, doesn't it, not just to this
25 particular --

1 MR. FLAYHART: Yes, it applies to each person
2 liable for the tax.

3 QUESTION: Any tax? Any part of the income
4 tax, any income tax?

5 MR. FLAYHART: That's my understanding, yes,
6 it would. For the purpose of this case, of course, it's

7 --
8 .

9 QUESTION: So you would say, you would think
10 the employer ought to be told what the total assessment
11 is?

12 MR. FLAYHART: Yes, we would. Now, I wouldn't
13 just --

14 QUESTION: What information would that give
15 you?

16 MR. FLAYHART: You mean the lender receiving
17 --

18 QUESTION: Telling the lender, yes.

19 MR. FLAYHART: Okay. We would suggest that --
20 the Government has made the argument that such notice,
21 one, would not serve any function, because supposedly
22 the lender is already somehow on notice, that it must
23 know that it has supplied funds.

24 However, I think that's why we make the
25 argument in terms of the actual notice or knowledge
being a defined term within Section 6323, which can

1 include lack of due diligence on the part of the
2 lender.

3 Notice that would be given to a lender of the
4 employer's tax liability that the Government intends to
5 seek from the lender would allow the lender to evaluate
6 its ongoing relationship with its employer-borrower and
7 make a determination, one, either to monitor the funds
8 more closely to make sure that the taxes were paid, or
9 two, to stop the flow of money entirely, which of course
10 would have the effect of limiting the tax liability,
11 which in essence is --

12 QUESTION: Well, how is the Government
13 supposed to know at the time of an assessment who all
14 the people are that may be liable?

15 MR. FLAYHART: The Government makes this
16 argument, that at present it has no way of knowing
17 that. We would suggest that it would be a simple matter
18 for the Government to modify its 941 withholding tax
19 forms that the employer sends in.

20 Under Section 6011, the Government is
21 empowered to authorize or to make whatever forms are
22 necessary for the liabilities of taxpayers to be
23 reported. It would be a simple matter for the
24 Government to modify an employer's tax form to have a
25 line item to say, if any money is being furnished to you

1 for payroll from a lender, please list the lenders who
2 are furnishing such payroll money.

3 And in that event, when the employer files the
4 return and says that he doesn't -- acknowledges
5 liability for the tax, but doesn't forward the tax, the
6 Government then -- it would be a simple matter for the
7 Government to notify those lenders.

8 QUESTION: What if the employer doesn't
9 comply?

10 MR. FLAYHART: Well, this gets back to the --

11 QUESTION: Then are you off the hook?

12 MR. FLAYHART: I think that if the employer
13 engages in fraud, which I think for the general purpose
14 --

15 QUESTION: He just doesn't fill in the blank.

16 MR. FLAYHART: Well then, I think he would be
17 engaging in a fraudulent tax return in that instance.

18 QUESTION: So who pays for that?

19 MR. FLAYHART: Well, at that point I think it
20 would still be the Government's responsibility, because
21 of the statutory requirement. If Congress wanted to
22 rewrite the statute, then it could do so to take care of
23 that situation.

24 QUESTION: The language of 6303(a) doesn't
25 really square very well with the kind of notice you want

1 given here. It says that it shall give "notice to each
2 person liable for the unpaid tax, stating the amount."
3 And it is not the case that the amount that the employer
4 is liable for is the same as the amount that the lender
5 is liable for, is it?

6 MR. FLAYHART: That's right, there could be a
7 difference.

8 QUESTION: There would be, wouldn't there?

9 MR. FLAYHART: It quite probably could be that
10 situation, because the employer's liability will also
11 include an assessment for the amount of the employer's
12 contribution towards social security contributions.
13 However, that being said, we would envision a notice
14 which would say something to the effect that you -- and
15 it would be directed to the lender -- are hereby
16 notified that an assessment of X dollars has been been
17 made against Widget Corporation for unpaid withholding
18 taxes which are now due and owing; your liability for
19 these taxes as a lender is set forth under Section 6305
20 of the Internal Revenue Code, a copy of which is
21 attached to this notice.

22 QUESTION: That doesn't state the amount.

23 MR. FLAYHART: Well, if you put in the amount
24 of the dollars. You are hereby notified that an
25 assessment of \$50,000 has been made. It will not state

1 the amount of the lender's liability.

2 QUESTION: The lender's liability. But you're
3 arguing that this statute refers to liability of the
4 lender.

5 MR. FLAYHART: That is right.

6 QUESTION: And if it does refer to liability
7 of the lender, the amount in question has to be the
8 amount of the lender's liability.

9 MR. FLAYHART: The type of notice that we are
10 envisioning, though, would serve the purpose, we
11 believe, of placing the lender on notice that under 3505
12 the Government intends to seek that liability.

13 QUESTION: I have no doubt it would do a whole
14 lot of good for the lender. But I'm just saying it's
15 hard to see that this statute addresses it. It might be
16 a very good idea.

17 I'm just saying you haven't yet told us how
18 the Government can possibly state the amount of the
19 liability of the lender, and if it can't then one is not
20 inclined to think that this section is meant to address
21 that.

22 MR. FLAYHART: We would urge that, if in fact
23 the Government feels that it could not give a precise
24 indication of the liability, that the notice function as
25 we have discussed is still worthwhile, and that the

1 notice that can be contained under Section 6303(a) would
2 still provide the basic function of putting the lender
3 on notice of the fact that the Government intends to
4 seek a liability.

5 After all, Section 6303(a) does not say that
6 notice will be given to each person against whom an
7 assessment has been made. It says notice will be given
8 to each person liable for the tax.

9 QUESTION: Or the unpaid tax.

10 MR. FLAYHART: Pardon?

11 QUESTION: Liable for the unpaid tax.

12 MR. FLAYHART: Unpaid tax.

13 QUESTION: Which includes the entire unpaid
14 tax, does it not? And your client is not liable for the
15 total unpaid tax.

16 MR. FLAYHART: That is correct. It is a
17 portion of the liability. There's no argument with
18 regard to that factor. However, the Government clearly
19 believes that the lender is a person liable for the tax,
20 and if the lender is a person liable for the tax then
21 the question begins, which was raised by Judge Weis in
22 his dissenting opinion --

23 QUESTION: Well, they're liable for a sum
24 equal to a portion of the tax. That's not quite the
25 same as being liable for the tax.

1 MR. FLAYHART: Well, it says that notice of
2 assessment --

3 QUESTION: The statutory language in 3505(a)
4 and (b) is "a sum equal to a portion," basically a
5 portion.

6 MR. FLAYHART: Under 3505(a) it is the amount
7 equal to the unpaid tax liability for funds which are
8 advanced directly, and under 3505(b) Congress has placed
9 the limitation with regard to 25 percent of those funds
10 in the enumerated situations.

11 QUESTION: Well, would it satisfy the terms of
12 the notice requirement just to say, we have made an
13 assessment against the employer for his unpaid tax
14 liabilities, and part of this assessment is for
15 withholding tax, and we are notifying you that you are
16 liable for your proper share of that tax?

17 Would that satisfy that?

18 MR. FLAYHART: I think it would, really. And
19 I say that by simply saying that you could have this
20 type of notice notifying --

21 QUESTION: You would have to say that. You
22 have to take that position, don't you?

23 MR. FLAYHART: Excuse me?

24 QUESTION: You have to take that position,
25 because you wouldn't expect the Government to come out

1 with the dollars figure.

2 MR. FLAYHART: Not necessarily, no. It would
3 change, although we are not so sure that the duty is
4 still not imposed on the Government by the statute.

5 QUESTION: But if it did that with the
6 employer, you wouldn't suggest that you could satisfy
7 6303(a) by writing such a letter to the employer saying,
8 you know, we have checked our records and it doesn't
9 seem to me you've paid the right amount of tax, we
10 hereby give you notice of tax deficiency.

11 MR. FLAYHART: Well, it would be an
12 assessment. The President makes the statement against
13 the employer and then sends the notice on the amount of
14 the assessment for the unpaid tax, which could be less
15 than what the -- assuming the employer pays a portion of
16 the tax and doesn't remit the balance, why, it would be
17 a different figure, that's right.

18 I think it's important to note that we are not
19 here today requesting that this Court judicially craft a
20 notice requirement by imputation into the Code. The
21 language of Section 6303(a) plainly requires notice of
22 this tax to be given to each person liable for the tax,
23 of which the lender is one such person.

24 I think it is also important to emphasize that
25 the Government contends not only that it has no

1 obligation for furnishing notice to a lender under
2 Section 6303(a) in order for the statute of limitations
3 to be extended, it contends that it has no obligation
4 for furnishing notice to anyone, including the employer,
5 in order for the extended statute under Section 6501 and
6 Section 6502.

7 So our position is that the Government
8 basically is attempting to write Section 6303(a) out of
9 the Code entirely, while at the same time having the
10 benefit of the extended period of time for bringing suit
11 under Section 6502.

12 QUESTION: That's a statute of limitations
13 position, that they shouldn't be able to sue beyond
14 three years unless they have given notice. But you're
15 saying more than that. You're saying they can't sue at
16 all, even during the three years, unless they have given
17 notice.

18 MR. FLAYHART: We're saying, yes, under
19 6303(a) that the filing of the assessment triggers the
20 notice provision.

21 QUESTION: So you can't make the argument that
22 you've just made, that it's not fair for them to be able
23 to have the benefit of the supplemental three years.
24 You're saying they don't even have the benefit of the
25 three years, which they do against the employer himself

1 whether or not they've even made an assessment.

2 MR. FLAYHART: If the corollary as far as the
3 facts of our case are concerned, that in this instance
4 the Government wishes to go beyond the three year period
5 without giving the notice --

6 QUESTION: Do you have any cases involving
7 assessment against an employer in which an assessment
8 has been made, but notice has not been given, and the
9 employer is held therefore not subject to suit even
10 within the three year period?

11 MR. FLAYHART: At the moment I cannot think of
12 a case.

13 QUESTION: But that's the principle that
14 you're arguing be applied to your client.

15 MR. FLAYHART: Yes.

16 Lastly, the Government urges that it has a
17 common law right to bring suit that exists independent
18 of the statute. The Government argues that it has a
19 right to sue on the tax based as a debt. Both the
20 Eighth Circuit and the Eleventh Circuits have considered
21 this issue and rejected the claim.

22 Clearly, the tax imposed under Section 3505
23 creates a derivative liability on the part of the lender
24 which is unknown at common law. For such tax to be
25 imposed, we would therefore urge that there must be

1 compliance with all elements of the statute in creating
2 the liability on the part of the lender.

3 One of those statutory elements which must be
4 complied with is subtitle F notice under Section
5 6303(a).

6 If there are no other questions, I would wish
7 to reserve --

8 QUESTION: The bank can't really protect
9 itself with its customer, can it, as easily as the
10 Government can?

11 MR. FLAYHART: Well, the Government makes the
12 argument that the bank could have the employer execute,
13 I believe --

14 QUESTION: Because this is an ongoing
15 relationship, it happens every month. I mean, if you're
16 going to lend for payroll you are constantly -- it's
17 sort of a working capital advance.

18 MR. FLAYHART: It does happen perhaps on every
19 month. But again, it's the issue --

20 QUESTION: And I don't suppose it's
21 automatic. Some loan officer, isn't he always in on it,
22 or not?

23 MR. FLAYHART: In some cases it could be. In
24 other cases it could be a line of credit extension just
25 that's available on an ongoing basis.

1 QUESTION: Well --

2 MR. FLAYHART: But that could be drawn down.

3 QUESTION: Even with a line of credit, there
4 can be some checks as to what's the status of your
5 withholding tax.

6 MR. FLAYHART: That's a possibility. But
7 again, you'd have the same argument as to whether the
8 employer is going to be truthfully responding to that as
9 well. And we would suggest that if the Government --

10 QUESTION: Well, you'd like to shift that risk
11 to the Government?

12 MR. FLAYHART: We think the risk is already
13 there.

14 If there are no other questions, I wish to
15 reserve the remainder of my time for rebuttal.

16 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
17 Flayhart.

18 We'll hear now from you, Mr. Horowitz.

19 ORAL ARGUMENT OF

20 ALAN I. HORCOWITZ, ESQ.,

21 ON BEHALF OF RESPONDENT

22 MR. HOROWITZ: Thank you, Mr. Chief Justice,
23 and may it please the Court:

24 Let me make a couple of preliminary
25 observations about things that have already gone on in

1 the argument before I get to my main presentation.
2 First, as a factual matter, the district court's opinion
3 at page 29A of the appendix reflects that the Petitioner
4 did concede liability in this case in the district court
5 for a portion of the liability that the Government
6 sought to collect.

7 And it also reflects that that was liability
8 under Section 3505(a). That is, they concede that they
9 were actually paying the taxes directly, and under
10 3505(a) there is not even a scienter requirement at all,
11 since Congress understood that if they were paying the
12 taxes directly -- excuse me -- if they were paying the
13 wages directly, they would certainly know that
14 withholding taxes were not being paid.

15 So that I think is undisputed, and I think
16 there was just a little confusion earlier.

17 QUESTION: I'd also like to talk about exactly
18 what the issue is here, because I think that's gotten a
19 little bit confused before also. Petitioner does seem
20 to be at least partly making the argument that the
21 statute of limitations bars the suit here because we
22 brought suit more than three years after the tax return
23 was filed and that the suit is therefore timely only
24 under Section 6502.

25 That argument, that notice of assessment is

1 required to extend the statute of limitations, in fact
2 was not raised below and is now before the Court. I
3 think the argument is erroneous even if it were to be
4 raised, and I hope to address that later if I have
5 time.

6 But I think that the question that is before
7 the Court is whether -- is kind of a question of
8 remedy. Their claim is that there is this requirement
9 that a notice of assessment be sent both to the employer
10 and to the bank, and that the failure to send such a
11 notice somehow completely eliminates any possibility of
12 collecting 3505 liability, whether or not it's within
13 the three year period, whether or not it's within the
14 six year period.

15 QUESTION: If it did it for them, I presume it
16 would do it for the employer as well.

17 MR. HOROWITZ: If it did it for them, I
18 presume it would do it for the employer as well. In
19 fact --

20 QUESTION: Do you know of any --

21 MR. HOROWITZ: -- it does not it for the
22 employer as well.

23 QUESTION: It does not?

24 MR. HOROWITZ: It does not, no. We've cited
25 -- they're old cases. It hasn't come up very often.

1 But the Jenkins case, the Erie Forge case that are cited
2 in our brief, are cases like that where notice of
3 assessment through oversight was not sent, and we
4 brought suit against the employer.

5 And the Court said the notice of assessment is
6 relevant to the assessment process, to the
7 administrative collection process, but it has nothing to
8 do with the Government's right to collect by suit.

9 Their position is just, they're just saying
10 that failure to send this notice somehow completely
11 prevents the Government from doing other things that are
12 unrelated. They might as well say that we can't collect
13 income tax or we can't enforce --

14 QUESTION: Well, such a doctrine is not
15 unknown, Mr. Horowitz, holding a surety or a guarantor
16 liable in some situations under the common law. The
17 original debtor can never get off the hook just because
18 of the failure to give notice, but occasionally a surety
19 or a guarantor can, is my understanding.

20 MR. HOROWITZ: Well, if there were a notice
21 requirement that was of some significance, I suppose
22 theoretically the surety or the guarantor could. And I
23 guess that's why I'd like to turn to what I think the
24 case is about, which is whether there is such a notice
25 requirement at all, that it be given to the bank.

1 But I would say that I think, at least is this
2 situation, even if there were, the correct remedy would
3 not be to completely bar a 3505 suit. I think the cases
4 you're speaking about, Mr. Chief Justice, are cases
5 where the surety would be able to show that it was
6 somehow prejudiced by the failure to receive notice, and
7 that there was a reason why it shouldn't be sued.

8 This case is really just a case of statutory
9 interpretation, where this Court must divine
10 Congressional intent, the intent reflected in Section
11 6303(a). In our view, this is not a difficult case.
12 Petitioner's contention rests on an effort to create a
13 relationship between two provisions of the Code that are
14 simply not closely related.

15 It wrenches the language of 6303 from its
16 context and gives it a meaning that is plainly not
17 intended by Congress. Moreover, the practical effect of
18 their argument is to completely destroy the efficacy of
19 Section 3505.

20 Now, we think our position is clearly correct,
21 but I guess the only way to explain the fact that we've
22 lost several times in the lower courts is that I think
23 the Code provisions here are somewhat confusing. And
24 so, if the Court will bear with me, I'd like to have a
25 fairly detailed discussion of the statutory background

1 before I really get into the merits of Petitioner's
2 contentions.

3 QUESTION: Where are the sections you're going
4 to talk about? Are they in the appendix to the
5 petition?

6 MR. HOROWITZ: Well, the statutes are set out
7 at page 50A and 51A of the appendix to the petition.

8 QUESTION: Fine. Thank you.

9 MR. HOROWITZ: The Internal Revenue Code sets
10 up two distinct methods of collecting liabilities
11 against the Government. There is an administrative
12 collection system and a judicial collection system. The
13 judicial collection system I don't need to dwell on.
14 The Government files a suit in court and if it wins the
15 suit it has a judgment in its favor and it could
16 collect.

17 Now, the administrative system is triggered by
18 what is called a Government assessment of liability.
19 The assessment is a term of art, and that's what is
20 involved in this case.

21 When an assessment is made, triggering this
22 administrative system, the Government does not need to
23 go to court in order to satisfy its liability. It can
24 resort to summary collection procedures, which involve
25 levying on the property of the taxpayer. The issuance

1 of an assessment followed by a demand also establishes a
2 lien on the taxpayer's property.

3 And the only way the taxpayer can deal with an
4 assessment, really, is by paying the tax and then filing
5 the refund suit, in which case the burden is then on the
6 taxpayer to prove an entitlement to a refund. Because
7 of this, there is a preference for the Commissioner to
8 assess in many cases, because it's more convenient for
9 him.

10 On the other hand, all liabilities are not
11 assessable. There are classes of liabilities where an
12 assessment cannot be made. Most taxes are assessable,
13 but the Code also requires that certain taxes -- that
14 there must be a notice of deficiency issued before the
15 taxes can be assessed.

16 For example, if one files an income tax return
17 and the Commissioner determines that there is a
18 deficiency in that return, that the amount reported as
19 due on the return is less than what is actually owed,
20 and the Commissioner issues a notice of deficiency, the
21 taxpayer has the opportunity to contest that notice in
22 the Tax Court before an assessment can be made.

23 Now, for the purposes here we must remember
24 that employment taxes are assessable against the
25 employer. On the other hand, Section 3505 liability for

1 third party lenders is not assessable. The only way the
2 Government can collect that liability is by bringing a
3 suit.

4 Now, Section 6303, the provision at issue
5 here, is part of this assessment process. It's on page
6 51A, and it is triggered by the making of an
7 assessment. It provides that when an assessment is
8 made, the Secretary shall within 60 days after making
9 the assessment of the tax give notice to each person
10 liable for the unpaid tax, stating the amount and
11 demanding payment thereof.

12 Now, a little bit later I hope to talk about,
13 parse the statute carefully, and discuss Petitioner's
14 plain meaning argument. But for now I would just like
15 to explain how this fits into the system.

16 When an assessment is made, the Government
17 gives this notice of assessment to the taxpayer, who
18 then is on notice as to what he owes and what amount has
19 been assessed against him. And there is also a demand
20 for payment of that amount by the Government.

21 If the taxpayer refuses to make that payment,
22 at that point the lien provisions kick in and the
23 Government is entitled to levy on his property. The
24 purpose -- I think clearly the purpose of this section
25 -- and I'm not sure the Petitioner would dispute that

1 this is the primary purpose, although he tries to read
2 some other purposes into it as well -- the purpose is to
3 give the taxpayer the opportunity to take steps to avoid
4 the summary collection procedures, so that he is put on
5 notice that these things are about to commence.

6 Section 3505 is a completely different
7 animal. It creates a liability for third party
8 lenders. It was passed by Congress in 1966 to address a
9 specific problem that they had discovered, the practice
10 of net payroll financing.

11 The way the system works -- and it's described
12 in some detail in the Court of Appeals opinion at page
13 4A and 5A. It was pretty prevalent in the construction
14 industry. When a particular subcontractor started
15 running into financial difficulties, it would receive
16 funds, either from a prime contractor or from a lender,
17 to help it keep its business going.

18 But in order to limit their liability, the
19 lenders would advance funds only to the extent of the
20 net payroll, the money that the employer would actually
21 have to pay to the employees. The money that the
22 employers were withholding, at least on paper, would not
23 be advanced by the lender and would never appear --
24 would never be paid to the Government.

25 Now, this is the Government's money and the

1 Government is out the money at some point. For example,
2 if one of the employees has a significant amount listed
3 as withholding tax that's withheld from his paycheck,
4 but then it ultimately turns out he doesn't owe any tax,
5 the Government -- he'll file his tax return and the
6 Government will have to pay a refund of several thousand
7 dollars to him. It's refunding money that the
8 Government never got, because no one ever paid it in as
9 withholding tax.

10 So Congress viewed this as a serious problem,
11 and the way it sought to -- well, the reason -- I'm
12 sorry, let me backtrack for a minute.

13 The reason Congress could not collect this
14 money from the lenders before was because the Code only
15 defined, only gave the Government a right to collect it
16 from employers, and these lenders were not employers
17 within the meaning of the Code.

18 So they passed Section 3505 to give the
19 Government a direct remedy against these lenders, and
20 the statute, which is set out at page 50A, has two
21 sections. It applies to third party lenders who are
22 directly paying the net payroll. They are made subject
23 to liability in the amount of the withholding taxes.

24 And Section 3505(b) also extends this
25 liability, I think to prevent lenders from just

1 circumventing this by going through a conduit. It also
2 applies to lenders who are making loans for the purpose
3 of paying a payroll.

4 Now, the notion here was that these lenders
5 were sitting in the same position as the employers, and
6 the Government thought it was -- excuse me -- Congress
7 thought that it was reasonable to treat them the same as
8 employers for these purposes and to make them assume
9 liability for these taxes.

10 The overriding purpose of this statute was to
11 make sure that the Government got its withholding tax,
12 preferably at the outset, but if not through a later
13 suit under Section 3505.

14 Now, Petitioner's contention here is that it
15 can escape this liability that Congress deliberately put
16 upon it, simply by the essentially unrelated fact that
17 an assessment has been made against the employer and
18 that it did not receive a notice of that assessment.
19 This is really an absurd contention.

20 Clearly, clearly there is no entitlement to
21 notice at all. If the Government brought suit within
22 three years, without making a notice of assessment, it
23 could sue the employer, it could sue the lender, without
24 issuing any notice at all.

25 So the purported notice requirement only

1 arises somehow from the making of an assessment against
2 an employer. But that is not an event that has any
3 particular bearing on the lender.

4 QUESTION: But under the statute that duty
5 surely does arise, at least if you read the statute as
6 written, when there has been an assessment against the
7 employer. You don't dispute that, do you?

8 MR. HOROWITZ: There is a duty to give notice
9 to the employer. There is a duty to give notice to the
10 person against whom the tax is assessed.

11 QUESTION: Well, to give notice to each person
12 liable for the unpaid tax. You say the lender in this
13 situation is not such a person?

14 MR. HOROWITZ: That's correct, and I'll try to
15 explain that in a minute.

16 QUESTION: Mr. Horowitz, would you straighten
17 me out on one thing. In 3505 both (a) and (b), the
18 statute doesn't say that the lender is responsible for
19 the tax. It says that he is responsible for a sum equal
20 to the taxes.

21 MR. HOROWITZ: That's correct.

22 QUESTION: Is there any significance in that
23 language?

24 MR. HOROWITZ: Yes, there is significance in
25 that language. That's one of the reasons why the lender

1 is in fact not covered by Section 6303(a), because that
2 refers only to persons who are liable for the tax. A
3 lender is not subject to the tax; he is subject to
4 liability, to a separate liability created by Section
5 3505.

6 In fact, as I mentioned earlier, Section 3505
7 liability is not assessable. It probably would be
8 assessable if Congress had established it as a tax,
9 because all taxes are assessable. So this, the fact
10 that Congress set it up this way, redounds to the
11 benefit of the lenders because it immunizes them from
12 these administrative collection procedures and requires
13 the Government to resort to judicial action in order to
14 collect this liability.

15 QUESTION: If the situation were such that the
16 taxes were personally paid, that would be the lender's
17 liability? The statute says an amount equal to the
18 tax.

19 MR. HOROWITZ: I think -- well, I think -- I'm
20 sure that it means an amount equal to the unpaid tax. I
21 mean, there is no provision for double collection by the
22 Government.

23 QUESTION: It doesn't say that.

24 QUESTION: It isn't even that, is it? It's
25 the only the portion withheld from the wages of the

1 employee, not the employer contribution.

2 MR. HOROWITZ: No.

3 QUESTION: No liability for that.

4 MR. HOROWITZ: No. I thought Justice Blackmun
5 was only asking about the taxes that are referred to in
6 the section. No, the lender is liable --

7 QUESTION: But that's a different tax. That's
8 a different amount than the one referred to in 6303.

9 MR. HOROWITZ: Absolutely.

10 QUESTION: But it says "taxes which are not
11 paid over to the United States by such employer."

12 MR. HOROWITZ: Yes.

13 Well, deducted and withheld from such wages by
14 the employer. Well, at any rate, I think it's clear
15 that the statute, what it does make the lender liable
16 for is withholding taxes, not the employer's portion of
17 social security, but withholding taxes, which means
18 income tax that are withheld and the employee's portion
19 of social security; and that it does not require payment
20 of taxes over and above what has already been paid 100
21 percent.

22 I'm told that the legislative history makes it
23 clear that there is a credit.

24 Well, I think there are -- let me say two
25 things briefly about Petitioner's contention. One, this

1 notice that they're asking for tells them nothing that
2 they don't already know. It doesn't serve any purpose.
3 The only purpose I think that Petitioner adverted to in
4 his argument is this notion of extending the statute of
5 limitations.

6 Putting that aside for a moment, certainly
7 getting notice that the taxes have been assessed against
8 the employer doesn't tell the lender anything, because
9 there is this scienter requirement in the statute. They
10 can only be held liable under Section 3505 if they have
11 actual notice that withholding taxes have not been paid
12 by the employer.

13 And the amount, as has been discussed before,
14 the amount that is on the notice of assessment to the
15 employer, doesn't mean anything to the bank. It doesn't
16 tell it what its liability might be.

17 Nor does sending it a copy suggest that the
18 Government is planning to sue the bank. It would just
19 be sending it a copy.

20 And the other serious problem here is that the
21 interpretation sought by Petitioner would completely
22 eliminate 3505(a) from the Code, because there's just no
23 way that the IRS can know at the time it makes these
24 assessments, which is usually within a couple of months
25 of the time the withholding tax return is filed, whether

1 there is a lender, whether the lender might arguably be
2 subject to 3505(a) liability.

3 So I do think that Petitioner's contention
4 here makes absolutely no sense within the structure of
5 the Code. Now, given that, the only argument that he
6 has really is the plain meaning of the statute, and that
7 is the argument that the other Court of Appeals have
8 gone off on. I think even Judge Weis dissenting here
9 and some of the other courts have recognized that the
10 Government's position makes more sense, but they have
11 found themselves to be bound by the plain meaning.

12 So I would like to talk a little bit about the
13 plain meaning of the statute, because I think even
14 looking at 6303(a) alone, without considering its impact
15 on the rest of the Code, the plain meaning in fact does
16 support the Government's reading of it.

17 First of all, I won't dwell on this because it
18 came up quite a bit earlier, but Section 6303(a) clearly
19 contemplates the sending of a particular kind of
20 notice. It says: "After making of an assessment of
21 tax, shall give notice to each person liable for the
22 unpaid tax, stating the amount and demanding payment
23 thereof."

24 Now, the notice that Petitioner seeks just
25 doesn't do that. Sending a copy to the lender does not

1 demand payment of the taxes from the lender. The
2 Government can't demand payment of the taxes from the
3 lender, because the lender is not obligated to pay those
4 until we have brought a suit and established its
5 liability in a civil proceeding. And it does not state
6 the amount that we might even ultimately hope to hold it
7 liable for.

8 QUESTION: Before you establish the lender's
9 liability in a civil proceeding, you certainly have a
10 claim against the lender.

11 MR. HOROWITZ: Well, we have a potential claim
12 against the lender.

13 QUESTION: But you wouldn't say that your
14 claim against the employer is a potential claim, would
15 you, until you have won a suit in the district court?

16 MR. HOROWITZ: Well, no. The claim against
17 the employer -- the employer is liable right at that
18 time to pay the money because -- this is what I was
19 trying to explain before -- because the liability has
20 been assessed against the employer.

21 That means we don't have to go to court to
22 collect from the employer. That means that the levy
23 provisions of the Code come into play and that we can go
24 and seize the employer's car, seize the employer's
25 assets, if he doesn't pay. So he can demand --

1 QUESTION: But he can go into district court,
2 can't he?

3 MR. HOROWITZ: I'm sorry?

4 QUESTION: He can go into district court if he
5 disputes his liability, can't he?

6 MR. HOROWITZ: Not unless he's paid the money
7 first. He has to pay and then he can file a refund
8 suit.

9 But this notice and demand that is sent under
10 6303(a) is a demand for payment from the employer, and
11 he cannot refuse that payment except at the pain of
12 having his assets levied upon.

13 QUESTION: The word "liable" could mean that,
14 but it could mean the other. It could also mean what
15 the Chief Justice suggested. Are you saying that
16 whenever it's used in the Code it has that narrower
17 meaning, that it is not just a claim that remains
18 ultimately to be determined in court or by some
19 tribunal, but rather it means an unqualified obligation
20 here and now to pay?

21 That's a very unusual meaning of that word.

22 MR. HOROWITZ: I'm sorry, Justice Scalia. I'm
23 not sure which word you're asking about.

24 QUESTION: The phrase "liable."

25 MR. HOROWITZ: I'm not talking about the

1 phrase "liable." I'm talking about the word "demanding
2 payment thereof," which I think is the type of notice
3 that is contemplated by this section. It says "a notice
4 stating the amount and demanding payment thereof."

5 And what I'm trying to say is that sending
6 this notice to the employer does demand payment of that
7 money from the employer. The employer has no -- has
8 only two choices: it can either pay the money or it can
9 not pay the money, in which case the IRS has the power
10 to seize his assets to satisfy the debt.

11 And the only way he can contest that liability
12 in court is by paying the money and then filing the
13 refund suit.

14 The bank is in a very different position.
15 Sending a copy of this to the bank, even assuming it had
16 the right amount that the bank might potentially be
17 liable for, is not a demand for payment from the bank.
18 We have no right to demand payment from the bank until
19 we have sued them and established their liability in
20 court.

21 So I do think that sending the notice to the
22 bank is not at all the notice that is contemplated by
23 Section 6303(a). And I would say that even --
24 Petitioner tries to litigate this case by focusing on
25 the one phrase in the statute, "a person liable for the

1 unpaid tax," and not looking at the rest of the
2 statute.

3 Even looking at that particular phrase, the
4 plain meaning does not support its position. First of
5 all, "the unpaid tax" seems to me pretty clearly to
6 refer to same tax that is referred to in the previous
7 sentence, which is the tax that has been assessed. And
8 that is not the tax that the bank is liable for.

9 Another point is that, as I mentioned before
10 in talking with Justice Blackmun, it's not a tax at all
11 that is imposed on the employer. It is just a
12 liability, specially created by Section 3505, and that
13 is not a tax.

14 It is certainly not the tax that is listed in
15 the notice of assessment because, as we've mentioned
16 before, the amounts are not going to be the same. So I
17 don't think there's any reason why courts have to feel
18 compelled by the plain meaning of the statute to reach a
19 result that is really quite absurd in the context of the
20 rest of the Code.

21 If anything, the statute, if read in a
22 sensible way, I think reflects its intended purpose,
23 which is that when a liability, tax liability, is
24 assessed against an employer or any other taxpayer, he
25 has to be told what that assessment is so that he can

1 take whatever steps are necessary to avoid having his
2 property levied upon.

3 Now, I would like to talk about the statute of
4 limitations a little bit because I think that's the only
5 thing that Petitioner has come up with where the notice
6 could conceivably make any difference. First, there's
7 the general claim that there's an element of unfairness
8 here because he's not receiving -- the bank is not
9 receiving notice of this extended -- I'm sorry.

10 QUESTION: I thought Petitioner said that it
11 would certainly do him an awful lot of good to know as
12 soon as possible that you had made an assessment against
13 the bank's customer.

14 MR. HOROWITZ: Well --

15 QUESTION: They might want to stop this
16 monthly outlay.

17 MR. HOROWITZ: Well, I don't think Congress
18 intended the IRS to be out there doing the bank's work
19 for them. I don't think there's any statutory
20 obligation to assist banks in making good loans.

21 And as I said before, I don't think we're
22 telling the bank anything they don't already know,
23 because in order to be liable under 3505 they have to
24 have notice of the fact that the withholding taxes are
25 not being paid.

1 Now, there is this statute of limitations
2 issue, where Section 6502, which is the six year statute
3 of limitations, kicks in upon the making of an
4 assessment. I really think the statute of limitations
5 issue is a red herring, though.

6 There really is no unfairness in this present
7 system, and there's no reason for the bank to complain
8 about it. First of all, it's a little misleading to
9 talk about this as an extension of the statute of
10 limitations.

11 The Code sets up two different statutes of
12 limitations. There is a three year statute of
13 limitations on assessments, and along with that there is
14 the same statute of limitations on suits that are
15 brought without assessments.

16 Basically, what that section does is that it
17 tells the President that it has to get its act together
18 within three years. It has to decide what the
19 taxpayer's liability is for its own purposes, and either
20 make an assessment or bring a suit to get it going.

21 Then there is a second provision, Section
22 6502, which says that once an assessment is made, once
23 the Government has made this determination, it then has
24 six years to collect the liability.

25 Now, that's the way the system works. That's

1 the standard statute of limitations is six years after
2 assessment. The normal course of business -- and the
3 bank I don't think can deny this -- in almost every
4 case, since assessments are routinely sent out when
5 withholding tax is not paid, there is going to be an
6 assessment made and there is then going to be a six year
7 statute of limitations on the collection.

8 That will apply to the employer, that will
9 apply to the bank. And there is no reason for the bank
10 to think that the statute is going to be anything less.
11 So this isn't a situation where the bank has --

12 QUESTION: Let me stop you here. Why do you
13 say that? If the assessment is irrelevant to the
14 collection process against the bank, why should the
15 effect of the assessment on the statute of limitations
16 have anything to do with the bank either?

17 Why wouldn't the three year limitation simply
18 continue to apply? Because you're not using the
19 administrative collection proceeding against the --

20 MR. HOROWITZ: Well, I don't think -- the
21 three year limitations period doesn't directly apply to
22 the bank.

23 QUESTION: Well, what is the provision that
24 you say applies to the bank? Say there has never been
25 an assessment. What would apply?

1 MR. HOROWITZ: What statute of limitations
2 here?

3 QUESTION: Yes.

4 MR. HOROWITZ: I don't think there's any
5 statute of limitations provision that applies to the
6 bank. There are these provisions that --

7 QUESTION: That's either with or without an
8 assessment?

9 MR. HOROWITZ: Either with or without an
10 assessment, that's correct.

11 But there is -- the bank's liability is
12 derivative of the employer, and there is the Updike case
13 which was cited in our brief, which has generally taken
14 the view that these kinds of derivative liabilities are
15 subject to the same statute of limitations that is
16 applicable to the primary liability.

17 And we have conceded here that the bank
18 therefore has the right to the same statute of
19 limitations that applies to the employer. So I don't
20 think there is -- if it weren't for the Updike case, I
21 don't think there is any statute of limitations that
22 would apply to 3505 actions.

23 I think they could be brought at any time,
24 even 50 years down the road. But because there are
25 statutes of limitation that apply to suits against the

1 employer, and we've taken the view that the bank is
2 entitled to the same statute of limitations, so
3 therefore filing the assessment extends the period
4 against the employer, and the same thing would happen to
5 the bank.

6 QUESTION: What if notice of assessment had
7 not been given to the employer? Would you acknowledge
8 that then suit could not have been brought after three
9 years against either the employer or the bank?

10 MR. HOROWITZ: Yes.

11 I guess one other point I should make on the
12 statute of limitations is that the bank -- there's
13 really no reason for the bank to be thinking of a three
14 year statute, aside from the general practice of the
15 IRS.

16 If the bank is as ignorant of what's going on
17 with the employer as it's trying to make itself out to
18 be, it wouldn't even know that the employer had filed a
19 withholding tax return. It's quite possible that the
20 employer wouldn't file a return at all, and the three
21 year statute only runs from the time the return is
22 filed.

23 So if the employer doesn't file a return,
24 there's no statute of limitations running at all at any
25 time. So I don't think there's any reason for the bank

1 to be sitting here saying it thinks its statute of
2 limitations has expired without notice.

3 QUESTION: Mr. Horowitz, supposing that an
4 employer had an obligation to withhold \$25,000 out of a
5 particular payroll period and remit it to the Government
6 as the amount withheld from wages, then it had to pay
7 another \$25,000, I assume, for the employer's share; is
8 that how it works?

9 MR. HOROWITZ: Well, there are two separate
10 taxes here. There's the social security tax, which as
11 an employee's share and an equal employer's share.

12 QUESTION: Just confine this to that one for a
13 moment. And what if the bank knew that an amount equal
14 to the employee's share had been remitted with the
15 return? Would the Government always credit that on the
16 employee's share, or do they have the option to credit
17 that against the amount that the employer should have
18 contributed for its own share?

19 MR. HOROWITZ: I'm not sure of the answer to
20 that, but I don't see why we should credit it to the
21 employee's share.

22 QUESTION: Well, because conceivably the bank
23 might get a copy of a return showing an amount paid
24 equal to the only amount it could be liable for, and the
25 Government might say: No, no, we apply that to the

1 employer' liability.

2 MR. HOROWITZ: Well, the return would have to
3 list both liabilities. So the return would list as tax
4 due say \$20,000, just say it's \$10,000 each. The return
5 would list \$20,000 and you're saying only \$10,000 is
6 remitted with the return?

7 QUESTION: Presumably they didn't remit at
8 all. That's how you generally assess them, I suppose.
9 Or maybe they didn't file.

10 MR. HOROWITZ: Yes. Well, I don't see why --

11 QUESTION: It would seem to me that there
12 might be situations in which an employer might have
13 thought the full amount of the withheld wages was paid
14 over and it might now be true.

15 MR. HOROWITZ: Well, then it would have a
16 defense under 3505, if it didn't have any notice. Then
17 it wouldn't be liable. But I'm not sure that case would
18 qualify.

19 If there are no further questions.

20 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
21 Horowitz

22 Mr. Flayhart, do you have anything more to
23 say? You have three minutes remaining.

24 REBUTTAL ARGUMENT OF
25 MARTIN A. FLAYHART, ESQ.,

1 ON BEHALF OF PETITIONER

2 MR. FLAYHART: We would just like to address
3 two points, Mr. Chief Justice. The first is that
4 counsel for the Government seems to indicate that the
5 notice that is given to the employer of the assessment,
6 that we would urge to be given to the lender, doesn't
7 tell the lender already something that it doesn't know.

8 Well, of course the first response to that is,
9 well, what does the notice tell the employer? Certainly
10 the employer already knows that he's liable for the tax
11 because he's filed the return and indicates that he owes
12 the money.

13 Secondly --

14 QUESTION: It tells him that the Government's
15 about to come and garnish his -- you know, attach his
16 property.

17 MR. FLAYHART: That's right, and that the tax
18 is due and the Government agent's going to be there
19 within a period of time.

20 QUESTION: Up to that amount. That's
21 something important for him to know. The lender doesn't
22 have to know that, because it can't happen to the
23 lender.

24 MR. FLAYHART: Except for the fact that it
25 also tells the lender that the Government's going to be

1 there up to nine years later, about to do likewise in
2 terms of foisting liability on the lender for these same
3 taxes. The employer gets the notice, the lender
4 doesn't.

5 QUESTION: Well, that's a different point.
6 That shows why it would be useful to the lender, but it
7 doesn't show that it would be useful to the lender for
8 the same reason that it would be useful to the
9 employer.

10 MR. FLAYHART: Well, we wouldn't quibble with
11 that. I mean, I think the point is that it's useful to
12 both parties and therefore is required to be given to
13 both parties.

14 QUESTION: What statutory provision do you say
15 sets the limitations period against the lender?

16 MR. FLAYHART: It would be 6501 and 6502.

17 QUESTION: 6501 and 2.

18 MR. FLAYHART: Yes.

19 If there are no other questions from the
20 Court, I conclude my presentation.

21 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
22 Flayhart. The case is submitted.

23 (Whereupon, at 1:51 p.m., oral argument in the
24 above-entitled case was submitted.)

CERTIFICATION

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#85-1736 - JERSEY SHORE STATE BANK, Petitioner V. UNITED STATES

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