

UNITED STATES TAX COURT

WALTER C. ANDERSON,)
)
 Petitioner,)
)
 v.) Docket No. 20364-07
)
 COMMISSIONER OF INTERNAL REVENUE,)
)
 Respondent,)

PETITIONER'S MOTION FOR RECONSIDERATION

Respondent, Internal Revenue Service, has conceded all their claims in favor of petitioner, Walter C. Anderson for tax years 1995, 1996 and 1997, which are the first 3 tax years of the 5 tax years in dispute. The decision to concede was made less than 2 months after respondents legal counsel obtained access to documents and records that were originally prepared by prosecutors, to be used as exhibits in the event of a trial in the criminal proceeding against petitioner. Due to the plea by petitioner the files were not used. This was not a "concession" in the usual meaning of the word. There was no negotiations between the parties and no "settlement" since there was no settlement discussions. There was no quid pro quo in return for Internal Revenue Service absolutely and unequivocally abandoning all of their claims. Respondent's admission has resulted in a final decision on the merits of the case for those prior years. The record now shows that the income earned by Gold & Appel Transfer S.A., a venture capital corporation managed by the petitioner, was not subject to any tax liability and no fraud occurred for tax years 1995, 1996 and 1997. Respondent and petitioner have stated that the issues, claims and relevant facts are the same for all 5 tax years.

Respondent, has indicated that they still intend to pursue a claim of fraud against the petitioner for tax years 1998 and 1999.

The Claim that the "fraud penalty" should be applied for tax years 1998 and 1999, now is no longer viable and contradicts the most recent admissions of respondent. Many of the issues conceded by respondent were applicable to all the tax years originally in dispute. Respondent in their MOTION TO SEVER, filed on June 2, 2009, page 3, section 8., states:

"respondent has decided to concede all tax and penalty issues for 1995, 1996 and 1997, and wishes to file a motion for entry of a decision as to those years."

Black's Law (eight edition) defines an "issue" as "A point of dispute between two or more parties." In this instance all the issues between the parties were related to either "tax" or "penalty".

"In a federal civil procedure, an issue is a single, certain, and material point arising out of allegations and contentions of the parties: it is a matter affirmed on one side and denied on the other, and when fact is alleged in the complaint and denied in the answer, the matter is then put to issue between the parties."
35A C.J.S Federal Civil Procedure § 357 at 541 (1960)

Many issues were put forward by petitioner in his PETITION, RESPONSE and PETITIONER'S MOTION FOR SUMMARY JUDGEMENT. Many of the "issues" affirmed by petitioner are applicable and relevant to all tax years originally in dispute. Respondent is precluded from arguing any issue which has already been resolved already by a final decision.

Respondent, through some hypertechnical legerdemain, attempts to claim that petitioner's guilty plea in a prior criminal proceeding in which all issues were not litigated, is more probative than the intervening adjudication which has resolved issues which related to tax years 1998 and 1999. The final decision for tax years 1995, 1996 and 1997 has resolved issues which are inextricably linked to all the years in dispute. It is **practically and** logically impossible for petitioner to have incurred any United States tax liability on the income of Gold & Appel transfer S.A., an investment vehicle

owned by the Smaller World Trust, a charitable trust that was created and endowed by petitioner, in 1993. If no tax liability was incurred in 1995, 1996 and 1997, per the now final record of this Court, then it is not possible for there to be a tax liability for 1998 and 1999 absent any changes to law and facts. Respondent and petitioner have agreed that all the relevant facts are the same for all the years that were in dispute.

The intervening final decision on its merits which resolved all tax and penalty issues in favor of the petitioner is effectively a final judgment. The doctrine of collateral estoppel and res judicata would be applicable to the final decision of the Tax Court now on the record and would preclude respondent from relitigating the resolved issues. The doctrine of collateral estoppel in relation to the prior criminal proceeding would not be preclusive, due to the intervening final decision and due to the fact that petitioner did not choose to litigate many issues once a plea agreement had been reached in that proceeding for strategic reasons.

Petitioner asks the Court to reconsider the decisions that were made in response to PETITIONER'S MOTION FOR SUMMARY JUDGMENT and RESPONDENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT. Respondent has made significant admissions via their decision to concede all of the issues for 3 prior years. The admissions, are new evidence that was unavailable to the Court previously. Petitioner has reviewed and carefully considered the Court's February 24, 2009 MEMORANDUM in support of the Court's February 26, 2009 ORDER. The facts now on the record in this proceeding are substantially different than when the Court made its original determination. Respondent's unilateral decision to concede all the most significant issues and factual elements has changed the landscape considerably

A. INTERVENING FINAL DECISION RELATING TO TAX YEARS 1995, 1996 AND 1997, HAS PRECLUSIVE EFFECT ADEQUATE FOR PURPOSE OF APPLYING THE DOCTRINE OF COLLATERAL ESTOPPEL AND IS EFFECTIVELY A FINAL JUDGMENT

Respondent in their MOTION TO SEVER, did not make any reservations qualifications or limit the scope of their concession. They conceded "all" of the tax and penalty issues for the 1995, 1996 and 1997. No other issues beyond issues related to tax and penalty were pending for those years and a final decision has now been entered by the Court in their June 12, 2009 ORDER and affirmed in the Court's July 6, 2009 ORDER. Many of the issues that were affirmed by petitioner and which are now resolved in petitioner's favor, were inextricably linked to all 5 tax years originally in dispute.

"In *In re Brown*, 951 F.2d 564, 569 (3rd Cir. 1991), we made the point clearly: "unlike claim preclusion, the effectiveness of issue preclusion, sometimes called collateral estoppel, does not require the entry of a final judgment, final in the sense of being appealable." We also cited section 13 of the Second Restatement of Judgments, which states that "for purposes of issue preclusion, . . . 'final judgment' includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect."
Henglein v. Colt Industries Operating Corp, 260 F.2d 201 (3rd Cir 2001)

All issues related to all 5 tax years, have been fully and finally resolved. In tax cases, each year is considered to be a separate cause of action and so each year is easily separable from other tax years for the purpose of adjudication and resolution. Respondent proposed to sever tax years 1995, 1996 and 1997 from the remaining 2 years and to then concede all issues in favor of the petitioner. Petitioner agreed not to object to such a course of action. Respondent filed a MOTION TO SEVER as the first step in the process. The Tax Court, in its response to the MOTION TO SEVER, issued an ORDER dated June 12, 2009. In that ORDER the Court cited considerations related to the "clerical effort" needed to sever and create 2 separate cases. The Court also cited concerns related to Fed R. Civ. P. 54(b) as well. These concerns and

and considerations were cited by the Court as the reasons why they denied the severance, proposed in accordance with the wishes of the parties, in the MOTION TO SEVER. The Court did however resolve the issue. The June 12, 2009 ORDER stated:

"Rather, the final decision that will eventually be entered in this case as a whole will reflect respondent's concession of the three tax years 1995, 1996 and 1997 and will include a decision in petitioner's favor for those years."

The ORDER concluded with:

"ORDERED that the Court takes notice of respondent's concession of all the tax and penalty issue for 1995, 1996 and 1997 and will reflect that concession in its eventual entry of decision in this case."

While it was clear that an irrevocable and final adjudication had occurred and that this was the final decision of the Court for the 3 prior tax years, petitioner was disappointed that the Court had not abided by the resolution proposed by the respondent. Petitioner believed that the proposed approach would have resolved any Fed. R. Civ. P. 54(b) considerations. Petitioner filed PETITIONER'S MOTION TO SEVER on June 22, 2009 in response to the statement in the Court's June 12, 2009 ORDER which said:

"there might be circumstance in which this clerical effort would be justified."

Petitioner in his motion indicated that the proposed severance would:

"not only be beneficial to resolving the Tax Court matter, but petitioner has other pending legal matters in which such a final resolution will help resolve claims that have been made and indemnification issues now being stipulated between parties"

as well as other argument in support of the proposed severance and resolution. The Court issued an ORDER dated July 6, 2009 denying petitioner's request, citing as part of the reason for the denial the "duplication of papers" that would be related to docketing a separate case. The Court did however make clear that the "Court's prior order explicitly" took notice of the concession.

There appears to be no question that a final decision has been reached by the court for the prior 3 tax years and the tax and ~~penalty~~ issues for those have been fully adjudicated and resolved.

"A 'final decision' generally is one which ends litigation on its merits and leaves nothing for the court to do but execute the judgment."
Isador Paiewonsky Assoc. v. Sharpe Properties, Inc., 998 F.2d 145, 150
(3rd Cir. 1993)

Respondent ~~should be~~ precluded from making claims on issues that were previously litigated and resolved in favor of petitioner. Respondent ~~made~~ admissions to issues through their decision to concede and now should abide by their own decision.

"Once a party has fought out a matter in litigation with the other party, he cannot renew the duel."

"These same concepts are applicable to federal income tax field. Income taxes are levied on an annual basis. Each tax year is the origin of a separate cause of action. Thus if a claim of liability or non-liability relating to a particular tax year is litigated, a judgment on the merits is res judicata as to any subsequent proceeding involving the same claim and same tax year. But if a later proceeding is concerned with a similar or unlike claim relating to a different year, the prior judgment acts as collateral estoppel only as to those matters in the second proceeding which were actually presented and determined in the first suit."
C.I.R. v. Sunnen, 333 US 591 (1947)

Respondent ~~should not be~~ able to relitigate claims that have been resolved by a final decision of the Court for tax years 1995, 1996 and 1997 in spite of the fact that no formal "final judgment" has been entered for the entire case.

The case law in the 3rd Circuit appear to allow the application of collateral estoppel once an issue has been sufficiently determined and is fully resolved and adjudicated. A final judgment is not needed in this instance. The final decision on the merits that has been reached in relation to tax years 1995, 1996 and 1997 is effectively a final judgment. This

decision was fully litigated. It was reached on it's merits. It resolved completely all issues for tax years 1995, 1996 and 1997 respectively. The decision cannot be modified or revoked by the Court. The judgment is now fully known, even though it will not be turned into an official "final judgment" until some later time. In all respects the final decision for tax years 1995, 1996 and 1997 has all the usual characteristics of a final judgment.

The "clerical effort" cited by the Court for it's approach to resolving these 3 years, is not a matter of fact or law. All the issues of fact and law have been resolved in favor of petitioner. The Court's decision to withhold the actual formal entry of a final judgment for it's own internal administrative reasons does not change the substance of the matter. For all practical purposes a final judgment has occurred for the 3 prior tax years.

B. FINAL DECISION / JUDGMENT FOR TAX YEARS 1995, 1996 AND 1997 IS PRECLUSIVE FOR ISSUES WHICH HAVE ALREADY BEEN DETERMINED.

The issue of whether petitioner, Walter C. Anderson, had any tax liability in relation to the income earned by Gold & Appel Transfer S.A., has been determined. The issue of whether petitioner committed a fraud in not reporting this income that was earned outside the United States, by an entity that did not have any United States tax obligations, has already been determined. The issue of whether petitioner has any beneficial ownership or interest in the Smaller World Trust, a charitable trust, which he created and endowed in 1993, has been determined. The issue of whether petitioner had any fraudulent intent when he created that trust has been determined. That the petitioner did not mingle his assets with those of the trust has been resolved. All these issues have been determined unconditionally in favor of petitioner.

Respondent and petitioner have agreed that the relevant issues are the same for all the tax years originally in dispute. Respondent's MOTION TO SEVER, page 1, section 3., stated:

"Because of the similarity of the facts and issues with respect to the fraud penalty between the years 1995 through 1997 and the years 1998 and 1999"

There is no dispute between the parties that the relevant facts and issues were the same for all the tax years in dispute. It is not possible to separate many of the issues that were affirmed by petitioner into individual years. Many of the issues petitioner affirmed describe how he created the Smaller World Trust in 1993 and how Gold & Appel Transfer S.A. became an investment asset of the trust. Many of the issues affirmed go to the heart of petitioner's intent and are inextricably linked to a 5 years.

The PETITION, RESPONSE and PETITIONER'S MOTION FOR SUMMARY JUDGMENT contain detailed affirmations of issues which are backed up by numerous supporting exhibits. Based on this record now fully resolved and determined, it is not practically or logically possible for the petitioner to have acted in good faith from 1993 until 1997 and incurred no tax liability and then in 1998 without any relevant change of circumstance, to have committed a fraud and incurred tax liability from a source that previously have no United States tax obligations.

All the relevant issues and facts still pending in this matter for tax years 1998 and 1999, were fully adjudicated and resolved in a final decision.

"Judgment acts as collateral estoppel only as to those matters in the second proceeding which were actually presented and determined in the first suit."

C.I.R. v. Sunnen, 333 US 591 (1947)

The prior determination relating to tax liability and fraud were clearly

necessary to the decision in favor of petitioner for tax years 1995, 1996 and 1997. The issues for 1998 and 1999 are identical in all respects, to those in the prior tax years. The final decision of the Tax Court for tax years 1995, 1996 and 1997 was made on the merits. The Internal Revenue Service is represented by experienced legal counsel and they have vast resources to draw on if needed. Respondent has previously agreed the issues are the same for all 5 tax years. In relation to the final test relating to the invocation of collateral estoppel of the Third Circuit, the Internal Revenue Service has had a "full and fair opportunity to litigate the issue to a final and valid judgment in prior litigation." All the issues and facts for all the tax years have been determined and resolved by the admissions of respondent for the prior years.

"Collateral estoppel precludes relitigation of both issues of law and fact if those issues were conclusively determined in a prior action."
United States v. Stauffer Chem. Co., 464 U.S. 165, 170 (1984)

Respondent no longer has any basis for the claim that petitioner has any tax liability or is subject to the "fraud penalty."

"Thus, issues that were "actually and necessarily decided" previously cannot constitute the subject of a subsequent lawsuit."
I.A.M. Nat'l Pension Fund v. Indus. Gear Mfg. Co., 232 US App. D.C. 418 (DC Cir. 1983)

The substance of the remaining issues and claims, in 1998 and 1999, are exactly the same as those resolved by final judgment in 1995, 1996 and 1997.

"The substance of the complaint involves virtually identical allegations of misconduct by the IRS ... The Court will not waive the exhaustion requirement, nor will it contenance repletitious litigation that clogs the federal court and wastes both the opposing party and the Court's time."
Brandt v. United States, 2006 U.S. Dist. LEXIS 60649

While each tax year is considered to be a separate cause of action, in the event that the same precise issue has already been determined, then collateral

should be applied. Now, where respondent conceded and admitted claims and facts that are inextricably linked to all 5 tax years that were in dispute, collateral estoppel may be applied to other tax years. All necessary issues and facts have already been determined

"We agree with the Tax Court that recent decisions, particularly *Montana v. United States*, 440 U.S. 147, 99 S. Ct. 970, 59 L Ed. 2d 210 (1979), indicate that it is appropriate to invoke collateral estoppel here to bar the Commissioner from relitigating with the same taxpayer the precise issue on which the Commissioner has already lost for the prior year."

Union Carbide v. Commission, 671 F.2d 67 (2nd 1982)

In the instant case the argument is even stronger. Not only are the issues necessary to resolve the dispute determined already, but they were determined by virtue of the Commissioner deciding to concede them in favor of petitioner. Since the Internal Revenue Service has made a decision to not litigate issues, claims and facts, they now should have to live with that decision and accept that the determination has already been made in a final judgment.

Petitioner asks the Court to apply the doctrine of collateral estoppel to the final adjudication for tax years 1995, 1996 and 1997 and bar the respondent from arguing claims inconsistent with that judgment. This would be in effect relitigating the same issue with the same taxpayer that the Internal Revenue Service has fully conceded for a prior year. The only loose end is the tax liability which petitioner has admitted in relation to some unreported personal income for tax years 1998 and 1999. Petitioner has denied any fraudulent intent in not properly reporting this income.

C. MOTION FOR RECONSIDERATION IS APPLICABLE IN THIS INSTANCE

The Court in its February 24th, 2009 Memorandum in support of its February 26th, 2009 Order, pointed out that any appeals from this case would be adjudicated in the Third Circuit. Petitioner has attempted to review

The case law available to him, with the limited resources now at his disposal. There are grounds under which a reconsideration can be justified.

"The purpose of a motion for reconsideration of an order is to correct manifest errors of law or fact, or to present newly discovered evidence." Max's Seafood Cafe v. Max Quinteros, 176 F.3d 669, 677 (3rd 1999)

Petitioner has identified errors in both laws and fact. Evidence now exists which was not previously available to the court. News facts and evidence which are relevant to the remaining issues for tax years 1998 and 1999 can now be considered by the Court. The decision of the respondent to admit all of petitioners claims for prior tax years and the final decision on the merits, which was a result of those admissions, has created an intervening adjudication relevant to both the legal and factual issues, and considerations in the interest of avoiding a manifest injustice.

The Third Circuit has created certain tests which must be met in order to justify a motion for reconsideration.

"A prior decision may be altered or amended only if the party seeking reconsideration establishes at least one of the following grounds: (1) an intervening change of controlling law; (2) the availability of new evidence that was not available when the Court issues its order; (3) the need to correct a clear error of law or to prevent manifest injustice."

Continental Casualty Co. Inc. v. Diversified Indus. Inc., 884 F. Supp. 937 (E.D. Pa. 1995)

Petitioner is pursuing this motion under grounds (2) and (3) above. New evidence has become available in the form of admissions of the respondent to all of petitioner's claims in prior tax years. The admissions: a) provide evidence that is highly relevant to the unresolved issues in tax years 1998 and 1999, since many of the claims and facts conceded apply to all the tax years initially in dispute. Many of the admissions of respondent are contradictory to prior claims of those in privity with respondent. b.) have resulted in a final judgment in an intervening adjudication. This final

judgment itself is new evidence and may have preclusive effect on elements that are still unresolved and in the prior criminal proceeding. The final judgment should also be considered in the light of the contradictions caused by the complete abandonment of claims by the respondent after they reviewed their best available evidence which purportedly would support their claims. Respondent has given up claims that relate to hundreds of millions of dollars. This dramatic change of stories by respondent, Internal Revenue Service, is in itself evidence impinging on their credibility in this matter.

Petitioner also has arguments relating to his decision not to litigate many of the issues in his criminal proceeding once he had obtained a plea agreement. Many issues relevant to the Tax Court proceeding had no further relevance in the criminal proceeding once the plea agreement was negotiated. Petitioner should not be prejudiced in this civil case, by issues which were not actively litigated for strategic reasons in the criminal case.

D. RESPONDENT'S EXPLANATIONS OF THEIR DECISION TO CONCEDE ARE NOT CREDIBLE

Respondent has offered a number of explanations to support their unilateral and unequivocal decision to concede all of petitioner's claims for all the years in which they would have the burden of proof at trial in support of their claims. These explanations have appeared in RESPONDENT'S STATUS REPORT, filed 5/21/09 and in MOTION TO SEVER, filed 6/2/09.

"The amounts of tax, penalty, and therefore accruals, for 1998 and 1999 for which the Court has already granted summary judgment on the fraud issue, constitute approximately 80 percent of the total such amounts in dispute for the five year period covered by the notice of deficiency."
(MOTION TO SEVER - Page 2, Section 4)

This is not accurate. Per a collection notice (see exhibit 1,) showing "amount you owe" as of 2/18/08, the amount conceded is \$127,125,224.60 (One Hundred Twenty Seven Million One Hundred Twenty Five Thousand Two Hundred Twenty Four and 60/100 Dollars). The remaining amount claimed is 72%

of the total, not 80% as claimed. When dealing with hundreds of millions of dollars a few percentage points can be significant. It exceeds the bounds of credibility that the Internal Revenue Service would give up more than One Hundred Twenty Seven Million to avoid making some copies. It is even less credible since respondent actually was not labouring under any burden of discovery at the time they decided not to dispute any of petitioner's claims for prior tax years. Respondent said the District Court had not ruled on the petitioner's MOTION TO COMPEL, now pending.

"The District Court has not yet ruled on petitioner's motion."
(RESPONDENT'S STATUS REPORT - Page 7, Section 13, last sentence)

Respondent had no discovery burden whatsoever when they decided to concede all of petitioner's claims. Their explanation does not ring true and does not make sense. Petitioner has never heard of a litigator that would give up the challenge of a major case with hundreds of millions at stake, just because of some routine discovery issues that are found in every civil action. The respondent even had other options to resolve any genuine concerns about the discovery process. Petitioner met with respondent's legal counsel, John C. McDougal in February of 2008 and discussed cooperation on discovery issues. In the event of a Court ordered furlough, petitioner would be able to access documents on-site and this would have eliminated the need to make copies, in the event that a court granted petitioner access to the documents. The respondent did not explore this option or even wait for a court order, before deciding unilaterally to fully concede and admit to petitioners claims for the prior tax years.

Even in the event that this case were to go to trial, solely on the issues of the amount of tax liability and "fraud penalty" for 1998 and 1999, petitioner would still need to access all relevant materials in order

prepare for the issues to be tried. In that instance, petitioner would not need to prepare as many documents and records for trial, but would need to go through all the available and relevant materials to locate the evidence to support his position. The oddly timed decision by the respondent to admit all petitioner's claims for prior tax years, does not in any way reduce their potential discovery burden.

Respondent's explanations for why they decided to give up their claims for prior years does not make sense. It would not make any sense to abandon claims that were valid and could be proven. If the respondent were able to prove the single claim that the the charitable trust, that was created and endowed by petitioner, Walter C. Anderson in 1993, was in fact not created until after 2002, then the entire matter would likely be resolved in favor of respondent. Respondent amended their ANSWER in order to mirror the claims made by the prosecutors in the criminal proceeding, on this claim. The respondent admitted that he was acting on faith and did not actually have any evidence at the time of the amendment to support the claim. Now respondent has seen the best evidence that the prosecutors had, and they have walked away from this claim and all the other claims that were previously made. If the claims were supportable, why concede. If they are not, why not admit it and concede tax years 1998 and 1999 as well.

Petitioner knows that respondent can not support the claims that have been made. The prosecutors never had the evidence to support their claims. These same prosecutors requested the District Court to hold petitioner, Walter C. Anderson in the dungeons of the Waashington DC Department of Corrections for almost 2 1/2 years. They must have known the conditions that could lead to a confession. They must have known that their case was not

not supported by any facts or evidence.

Petitioner believes once the more experienced legal counsel representing the respondent, and his reviewers obtained access to the prosecutors records and document related to this matter, that they realized that they would be unable to bring this case to a trial. Respondents unusual explanations as to why they abandoned all their claims for prior tax years do not have any legal effect on the final decision and the admissions now on the record. The explanations hopefully will be taken by the Court with the same credibility as respondents claims on the unresolved issues for tax years 1998 and 1999

E. COLLATERAL ESTOPPEL MAY BE BARRED IN RELATION TO THE CRIMINAL PROCEEDING

The Court determined in it's February 26th, 2009 Order, to grant the respondent's MOTION FOR PARTIAL SUMMARY judgment for tax years 1998 and 1999. The Court indicated that based on petitioner's guilty plea in the criminal proceeding, that it intended to impose the "fraud penalty" under § 6663 of the Internal Revenue Code. The Court also indicated that the amount of tax that would be subject to the "fraud penalty" would be determined by the Court. Since that interlocutory ruling, respondent has made admissions which have resulted in a intervening adjudication and a final decision on it's merits which is entirely in favor of petitioner. This decision and the admissions themselves are new evidence in this proceeding.

Petitioner did not litigate a number of issues and facts in the criminal proceeding. Once the plea agreement was signed,, petitioner was no longer motivated to pursue those issues for strategic reasons. Petitioner should not be penalized precluding opportunities to litigate those issues now.

Separate from the technical and legal arguments, respondent's concession effectively exonerates petitioner. The unilateral withdrawal of claims by

respondent raises the question of an injustice. It is practically and logically impossible for the prior claims of the government to be true as well as the more recent admissions in favor of all petitioner's claims. Many of the claims conceded by respondent are related to all the tax years in dispute and are inextricably linked together. The recent admissions of the respondent are consistent with all the evidence now in front of the Court. There are factors specific to this case which may not support the decision to give collateral estoppel effect to the prior criminal judgment.

"Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances: (1) The party against whom preclusion is sought could not as a matter of law, have obtained a review of the judgment in the initial action; or (2) The issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) A new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of laws; or (3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them; or (4) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action; or (5) There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or interests of persons not themselves parties in the initial action, (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded; as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action. Restatement (Second) of Judgments § 28 (1982) AMTRAK, 288 F.3d at 526

The Third Circuit has previously considered the effect of an intervening decision on the application of collateral estoppel.

"Accordingly we think that it would be unjust and improper to apply the doctrine of collateral estoppel here. For there has truly been an intervening state decision upon a relevant question of local law which which has created a new situation...."
COMM v. Thomas Flexible Coupling Co 198 F.2d 350 (1952 3rd)

An intervening judgment which resolves and determines all the necessary issues and claims for all tax years that were in dispute and all the remaining issues and claims for tax years 1998 and 1999 fits the criteria established under AMTRAK, section (2)(b). The final judgment for prior tax years is certainly "an intervening change in the applicable legal context" and the complete turnabout of respondent claims certainly should be considered by the Court in order to "avoid the inequitable administration of laws." These admissions completely change the situation

"And where the situation is vitally altered between the time of the first judgment and the second, the prior determination is not conclusive."

State Farm Ins. Co. v. Duel, 324 U.S. 154, 162

Collateral estoppel can not be applied when a supervening decision overturns all the prior facts.

"the supervening decision cannot justly be ignored by blind reliance upon the rule of collateral estoppel."

Hendrickson v. Seward, 135 F.2d 986, 988 (9th Cir.)

The decision by respondent to concede all the claims of petitioner for prior tax years, is a significant development, especially in light of the fact that many of the claims and facts conceded and admitted are relevant to all the years that the Smaller World Trust existed, since it owned Gold & Appel Transfer S.A. from 1993, when it was created until 2004. This significant change should not be ignored.

"A material change in the law or development in controlling legal principles may vitiate issue preclusion."

Montana, 440 U.S., 155

"a new court decision, or even an administrative ruling--can justify a later court's refusal to give collateral estoppel effect to an earlier decision."

Graphic Communications Int'l Union, Local 554 v. Salem-Gravure Div. of World Color Press, Inc., 269 U.S. App. D.C. 162, 843 F.2d 1490, 1493

Now that the same parties who initiated the investigation which led to the

criminal investigation and criminal proceeding, have recanted their claims, there are no further issue to be resolved, Internal Revenue Service employees were the only Government witnesses in the hearing during the criminal proceeding. The claims made by the Internal Revenue Service were never proven. Many of the claims were shown to be inaccurate, insupported or speculative fantasy by petitioner's legal counsel at that time.

The intervening final adjudication for prior tax years, now on the record, bars the doctrine of collateral estoppel in this instance, in relation to the criminal proceeding. The intervening decision is not only more recent in time, more complete in it's determinations of all necessary issues and is completely unambiguous, but it also is consistent with the the vuluminous evidence submitted by petitioner in his motion for summary judgment.

F. NEW FACTS AND EVIDENCE ARE GROUNDS FOR SUMMARY JUDGMENT IN FAVOR OF PETITIONER

The admissions by respondent in favor of petitioner in prior tax years provides new facts and new evidence upon which the Court can render a just decision. Unrelated to the technical legal issues of the "intervening final adjudication", the admissions of respondent leave no undisputed facts or issues to be resolved for tax years 1998 and 1999. Respondent has stated:

"In summary, both parties now appear to be in possession of the files necessary to proceed to trial."

(RESPONDENT'S STATUS REPORT - Page 7, Section 16, first sentence)

Respondent now has all the evidence that they want or need. Respondent's admissions for prior tax years was made with full knowledge after having all the discovery opportunities that they desired.

The Court in it's February 24th, 2009 Memorandum considered issues

related to the 6(e) evidence that was requested by both respondent and petitioner. The Court stated:

"The IRS has demonstrated (both to the court and here) that it is entitled to get the information that the Government developed during its investigation and prosecution of Mr. Anderson. The only reason that it does not yet have that information is that Mr. Anderson is still incarcerated, and the IRS therefore cannot fulfill a precondition of receiving the rule 6(e) information--i.e., it cannot yet share it with Mr. Anderson."

This is not entirely accurate. Respondent has made more of his "burden's" of discovery than actually exist. As has now been learned the materials that have been released from the 6(e) materials were easily sent to petitioner. Respondent had discussions with petitioner earlier in the case and visited him at the minimum security "camp" where he is housed. Respondent was advised by petitioner that he would work cooperatively on discovery issues. Petitioner discussed the routinely granted furloughs which are allowed to inmates held in a "camp". The Court also indicated in its Memorandum, that:

"the Court would deny Mr. Anderson's motion and defer any summary adjudication of its issues until respondent has had a reasonable opportunity to obtain the rule 6(e) information and to conduct reasonable followup discovery."

This process is apparently complete according to respondent's assertion that they are in possession of "the files necessary to proceed with trial preparation." Petitioner now asks the Court to consider his motion for summary judgment in light of the new evidence which admits all his claims for prior tax years and in light of the fact that respondent has completed their discovery and instead of presenting any evidence to the Court in support of their position, has actually provided all the necessary evidence needed to determine that petitioner's claims are entirely correct. It is now practically and logically impossible to conclude that petitioner had any tax

liability for any of the 5 tax years which were originally in dispute.

It is indisputable that respondent has conceded all their prior claims. Many of the admissions of respondent are, by their nature applicable to all the tax years and could not possibly be only true for 3 of the tax years.

"The inquiry must be set in a practical frame and viewed with an eye to all circumstances of the proceedings."

Ashe v. Swenson, 397 U.S. 436, 443-44 (1970)

In section (3) of AMTRAK, which describes the tests which bar the application of collateral estoppel, it states: "A new determination of an issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of justice between them." The admissions by the respondent are totally and completely at odds with their prior claims and the claims of the prosecutors, who relied on facts provided by respondent's investigators during the criminal proceeding. The appeals court in Washington DC, noted that "inconsistency is the antithesis to the rule of law." Lashawn v. Barry, 318 U.S. App. (DC Cir. 1996). In this instance the inconsistencies have been generated entirely by respondent, and should not accrue to their benefit.

The practical and logical result of the admissions made by respondent is the resolution of all remaining issues in this case in favor of the petitioner. All the issues necessary to resolve the pending matters have already be determined and resolved by respondent's admissions for prior tax years.

"A court should take a "practical," rather than a "hypertechnical" approach in determining what issues were necessarily resolved by the prior proceedings."

United States v. Abatti, 463 F. Supp. 596, (9th Cir. 1978)

It would be an injustice to still credit any prior claim or the results of

criminal proceeding. That proceeding is more remote in time than the more recent admissions and it is not entirely clear which issues were actually adjudicated by the District Court. The more recent admissions also have the advantage of being consistent with the evidence which petitioner has submitted to the Court in PETITIONER'S MOTION FOR SUMMARY JUDGMENT.

Petitioner now renews his request that the Court grant summary judgment in his favor on the remaining issues for tax years 1998 and 1999. Respondent has obtained all the discovery material that they want. They have apparently concluded that it is not helpful since they now rely solely on the technical and now barred claim of collateral estoppel in relation to the criminal proceeding. The practical and logical conclusion is consistent with the technical arguments. It is now abundantly clear that respondent does not have any evidence upon which they can rely to support the claim petitioner had any tax liability subject to fraud in 1998 and 1999.

G. COLLATERAL ESTOPPEL SHOULD BE BARRED FOR THE CRIMINAL PROCEEDING DUE TO THE FACT THAT PETITIONER WAS NOT MOTIVATED OR ABLE TO LITIGATE MANY OF THE ISSUES ONCE HIS PLEA AGREEMENT WAS ENTERED

Petitioner did not have the opportunity to fully litigate many issues in the criminal proceeding. Once he had entered into a plea agreement, his legal counsel were focused on certain issues to the exclusion of others. It was not to his benefit for him to attempt to disprove elements that were not directly relevant to sentencing issues. Per the tests for a party seeking to invoke collateral estoppel, in Pfizer v. Ranbaxy, related to litigation issues: "(2) the identical issue is previously litigated." and also "the Third Circuit also considers whether the party being estopped has had a full and fair opportunity to litigate the issues to a final judgment in prior litigation.

Petitioner did not litigate many of the relevant issues. Once the plea agreement was signed. The plea established an amount of loss "solely" for the purpose of calculating the guidelines. Once this was established, it did not make any sense to contest the details of loss amount. The District Court determined that it did not have the authority, per the language of the plea agreement, to impose restitution for any federal tax liability. The Court did not make a determination and even though petitioner believed that no tax liability was due on the income from Gold & Appel Transfer S.A. and that the only tax liability that he had was for some personal income which he had failed to report. There was no benefit and tremendous downside in making this argument in sentencing hearings. The District Court Judge had made very clear in prior hearings that no matter how ridiculous or implausible the claims of the prosecutors were, that he did not want to hear the word lie or any accusations of prosecutorial misconduct. In many cases he made this feeling clear by gesture, so it is not always clearly reflected on the record. Nevertheless, petitioner got the message. Petitioner focused on other issues once the plea hearing was completed. In the sentencing hearing, petitioner emphasized his long history of charitable and community involvement, The fact that prior to the tax investigation he had not had any other criminal charges, that he had been the Chairman of 3 public corporations without even a hint of scandal or improprieties and finally the letters and testimony of support from over 70 family, friends and associates.

Petitioner should not be subject to the doctrine of collateral estoppel on issues that he intentionally **was not** motivated to pursue due to a strategic reason in the criminal proceeding.

H. THE MANY IRRECONCILABLY INCONSISTENT POSITIONS TAKEN BY THE UNITED STATES GOVERNMENT IN PRIOR CRIMINAL PROCEEDING AND IN THE TAX COURT PROCEEDING JUSTIFIES THE APPLICATION OF JUDICIAL ESTOPPEL

Respondent, Internal Revenue Service is an organ of the United States Government. The United States Government, through the United States Attorney's Office in the criminal proceeding and through respondent in the Tax Court proceeding have taken many inconsistent positions that can no possibly be reconciled with each other.

"The Supreme Court has identified several factors that "inform" a court's decision whether to apply judicial estoppel. Not only must the court find that a party adopted inconsistent positions, but it should also consider whether the party succeeded in convincing a tribunal to accept it's position and whether the party would derive an unfair advantage in the absence of estoppel. Id 751-51. Our Court's decisions instruct that judicial estoppel has three threshold requirements: first, the party in question must have adopted irreconcilably inconsistent positions; second, the party must have adopted these positions in "bad faith"; and third, there must be a showing the judicial estoppel is tailored to address the harm and that no lesser sanction would be sufficient.

Chao v. Roy's Construction, Inc., 517 F.3d 180 (3rd Cir. 2008)

During the criminal proceeding against petitioner. the United States Attorney, through his assistants, asserted numerous position and issues of fact in relation to the charges of tax fraud. Many of the positions asserted by the AUSA went far beyond the actual issue related to the tax fraud that was charged. The prosecutors, Internal Revenue Service investigators and officials, launched a venomous campaign of character assassination in an attempt to destroy the reputation of petitioner, prior to his conviction. Petitioner had an excellent reputation within the Washington DC, business and charitable communities, within the international space/aerospace communities, and within the international telecommunications communities. Petitioner had previous served a the CEO or Chairman of 3 different publicly traded corporations without even a hint of scandal or impropriety. The

prosecutors made numerous claims to the District Court after petitioner's indictment, that were completely inconsistent or the oposite of positions that they had taken in pre-indictment hearings. Many of these positions were then asserted in the Tax Court, many of which had been proven to be untue or unsupported by any evidence in the criminal proceedings. Now finally, the respondent has abandoned all of their prior positions on the issues affirmed by petitioner in relation to tax years 1995, 1996 and 1997. Then, respondent wants to continue to assert that a fraud occurred in tax years 1998 and 1999, even though this assertion is completely inconsistent with and impossible to reconcile with their concession of the issues which were affirmed by the petitioner. It should be noted that respondent could have taken other steps to withdraw from the civil tax dispute for tax years 1995, 1996 and 1997. Respondent themselves, unilaterally decided to "concede" all the issues. The issues that were affirmed by petitioner, which were conceded by respondent related in many instances to all the 5 years originally in dispute. The now final decision for those prior tax years, places the positions affirmed by petitioner as the unopposed record for those issues in the Tax Court.

Respondent in trying to say that it is "night" and "day" at the same time is not respecting the judicial process.

"Judicial estoppel prevents a party from "playing fast and loose with the court: by adopting a conflicting position in different proceedings (or different stages of the same proceeding)
Delgrosso v. Spang & Co., 903 F.3d 234, 241 (3rd Cir 1990)

Respondent has taken inconsistent positions in the Tax Court procceding and positions which are inconsistent from the positions taken by the government in the prior criminal proceedings. The positions affirmed by petitioner in relation to tax laibility and fraud for tax years 1995 through 1999 are

completely inconsistent with the positions adopted by the prosecutors and Internal Revenue Service witnesses, in the prior criminal proceeding.

Respondent may have different interests and goals than the federal prosecutors, but they are dealing with the exact same set of issues.

"judicial estoppel can be applied when a party asserts a certain position in a legal proceeding and prevails only to assert a contrary position later because of change interests."
New Hampshire v. Maine, 532 US 742. 749 (2001)

Respondent has claimed that they have a greater "interest" in reducing their discovery burden, than in the 127 million dollars that they previously claimed for tax years 1995, 1996 and 1997. Their interest may be avoiding the embarrassment of not having the ability to prove any of their claims at a trial. Whatever the interest, no matter how serious or trivial, they have now agreed that the positions taken by petitioner relating to many relevant points are correct, accurate and true. To then assert the position that the petitioner has committed a tax fraud and should be subject to the fraud penalty for a later year, is just not consistent with their admissions and is completely irreconcilable with their decision to concede these positions.

Hundreds of positions have been taken by the federal prosecutors and respondent that are inconsistent and irreconcilable. It is not realistic to attempt to describe them all. Two examples will illustrate the point. First, During the pre-indictment hearing in the criminal proceeding, the prosecution wanted to pursue discovery of the activities of various corporations files through the use of grand jury subpoena's. Some of the corporations that were subpoenaed were domiciled outside of the United States. The prosecutors argued that since, petitioner, Walter C. Anderson, had some management role in these entities and was based in Washington DC, with both his home and office in the city, that he personally was required to respond and provide

the information requested. After petitioner's indictment for tax fraud, the government changed their story. They claimed that petitioner had homes and vast financial resources outside of the United States and that there was "nothing to hold him here", in a hearing related to petitioner's pre trial incarceration. Even though these wild claims were made in a Washington DC courtroom filled with the family, friends and associates of the petitioner, the District Court judge believed the prosecutor. The truth is that the petitioner had no assets outside the United States, and his only home was in Washington DC, as the prosecutors had originally asserted in pre-indictment hearings. Petitioner affirmed many of these issues relating to his home and personal financial situation among the issues that have now been conceded by respondent. The concession/admission was too late to prevent petitioner from being held for 2 1/2 years prior to his trial in the dungeons of the Washington DC Department of Corrections. Too late to return to him the mental and physical health that he lost from sleep deprivation, sensory deprivation, denial of medical care, abuse, excessive heat and cold and other tortures. The second inconsistency is the government's claims relating to the Smaller World Trust. It is now part of the record, in the final decision for tax years 1995, 1996 and 1997, that petitioner, created and endowed the Smaller World Trust in 1993. It is also part of the record that the Smaller World Trust owned 100% of Gold & Appel Transfer S.A., and that Gold & Appel earned significant income in the years 1995, 1996 and 1997, which due to the fact it was a foreign corporation, that operated outside the United States with no United States owners, had no United States tax liability. During the criminal proceeding, the Internal Revenue Service witnesses stated under oath at hearings, two different stories about the trust. (1) that the trust

was a "sham" and (2) that the trust was not created until after 2002, when petitioner learned of the tax investigation which targeted him.

If the trust were a sham, it would have been a very unusual one. Sham trusts are often used to hide assets used by the creator of the trust. The prosecutors in the criminal proceeding, never contested the forensic accountant's report (see EXHIBIT B, PETITIONER'S MOTION FOR SUMMARY JUDGMENT) Petitioner in the 11 years that he managed the assets of the trust, never benefitted personally from those assets and in fact continued to contribute his assets to not-for-profit organizations during that time.

The claim that the trust was not created in Fall of 1993, per the dates on the trust documents themselves is also not supportable. The trust had been reviewed by legal and accounting professionals long prior to year 2002. The trust had entered into contractual arrangements with various business professionals and adequate evidence exists that shows that petitioner informed his personal tax preparers of the existence of the trust in 1994. The prosecutors had access to this evidence. They however asserted positions which were not consistent with that evidence. Now, in the Tax Court, the respondent has admitted that "the Smaller World Trust was created and endowed in 1993 by Walter Anderson". This is one of the issues which was affirmed by petitioner and which was fully conceded by respondent. This is of course completely inconsistent with the prior claims of the government prosecutors, the prior claims of respondent in his RESPONSE, RESPONDENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT, and other filing that respondent present to the Tax Court. It can also not be reconciled with respondent's continuing claim that petitioner should be subject to the "fraud penalty" for tax years 1998 and 1999.

Respondent understands that judicial estoppel is an extreme remedy. Petitioner is not certain that the respondent's legal counsel is completely culpable in creating the irreconcilable inconsistencies. It is certain that the federal prosecutors and employees of the Internal Revenue Service made claims and established positions which are now insupportable.

Respondent's legal counsel originally filed their response and other pleading, without having the evidence to back up their claims. They perhaps believed that the United States Attorney's Office had done their jobs. The "job" of a federal prosecutor includes finding the truth, not just blind advocacy or careerism. In this instance the truth was lost. The venomous and nasty personal attacks against petitioners character, the threats against petitioner's witnesses and the his pre trial incarceration can now be seen as a distraction, to call attention away from the fact that their case could not be supported with the evidence they had.

It took the more experienced legal counsel, representing respondent, under 2 months after obtaining access to the prosecutors best evidence, to decide not to go to trial. The irreconcilable inconsistencies must have been just as apparent to the federal prosecutors during the 2 1/2 years that petitioner was held prior to trial. The advantage gained by the prosecutors in making the claims they did and taking the positions that they did is obvious. It allowed them to obtain a confession and "win" this high profile case.

The fact that these inconsistencies played fast and loose with justice, is more than adequate reason to apply judicial estoppel in this instance.

CONCLUSION

Respondent has made claims and taken positions on issues which are not consistent with the real world evidence or their prior claims, and which are both practically, logically and legally unsupportable.

The unilateral decision of respondent to concede all the issues related to the tax and penalty for tax years 1995, 1996 and 1997, and the resulting final decision on its merits, is preclusive in relation to claims on issues in later tax years which have already been fully and finally determined.

The determinations resulting in a final decision of the Court for the prior tax years 1995, 1996 and 1997, is effectively a final judgment. It can not be revoked or altered. It simply must be executed by the Court.

There are ample grounds for reconsideration in this instance. New evidence is now available to the Court. The Court did not consider other issues that are relevant to petitioner's guilty plea in the criminal proceeding. A manifest injustice would be the result of a lack of reconsideration. It is not possible to ignore the unusual inconsistencies created by the respondent.

The respondent has provided explanations to the Court in relation to their decision to concede all the issues that have been affirmed by the petitioner for prior tax years. The explanations are not credible or consistent. They misrepresent the actual discovery burdens of the respondent. The fact that respondent has completely changed his story and has abandoned 127 million dollars of claims is highly unusual.

The application of collateral estoppel to the criminal proceeding is barred due to (1) the intervening final decision for the prior tax years and (2) the fact that petitioner did not choose to litigate many of the

issues now relevant in the tax Court case, once he had entered a plea. He should not be prejudiced due to the strategic decisions made upon the advice of his legal counsel in that proceeding.

Unrelated to the legal technicalities, the concession by respondent creates new facts which are completely inconsistent with their prior claims, but are entirely consistent with the claims of petitioner and the evidence which petitioner has placed before the Court. Respondent has not provided the Court with any evidence, other than publicly available documents related to petitioner's criminal proceeding. Respondent has now admitted that the issues affirmed by petitioner in prior tax years are completely accurate and true. Many of these issues affirmed are relevant and related to the years that remain unresolved, 1998 and 1999. It is practically and logically not possible for the petitioner to have any tax liability or to have committed a tax fraud in light of the respondent's admissions. Hypertechnical considerations should not trump the actual facts in the real world.

The many irreconcilable inconsistencies in the positions taken by the United States Government in the prior criminal proceeding and in the Tax Court justifies the application of judicial estoppel. The federal prosecutors pursuing the case against petitioner in the criminal proceeding, must have known the entire time that he was going through the ordeal, that they did not have the evidence needed to support their claims. Respondent has made claims and taken positions which cannot be reconciled with their prior claims.

No decision at this point in time, can return to petitioner, Walter C. Anderson, what was taken from him. He lost his reputation and his physical and mental health were destroyed. Please end this matter now.

WHEREFORE, Petitioner hereby requests the Court to reconsider the prior order and enter a judgment in his favor.

Walter C. Anderson
Petitioner, Pro See

Date: 7/20/09



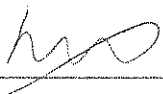
Walter Anderson #27981-016
FCI CAMP
P. O. Box 420
Fairton, NJ 08320

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing PETITIONER'S MOTION FOR RECONSIDERATION was served on respondent by mailing the same on 7/20/09 in a postage paid wrapper addressed as follows:

John C. McDougal
Internal Revenue Service
600 E. Main Street
Suite 1601
Richmond, VA 23219

Date: 7/20/09



Walter C. Anderson
Petitioner, Pro Se

Exhibit

1

Paying Late - Internal Revenue Code Section 6651(a)(2)

We charge a penalty when your tax is not paid on time. Initially, the penalty is ½% of the unpaid tax for each month or part of a month the tax was not paid.

If you have recently paid this tax or you can't pay it, call us immediately at the telephone number shown at the top of this letter and let us know.

Sincerely yours,



Marie Maple
Revenue Officer

The amount you owe through 02/18/2008 is shown below. If you pay the full amount after this date, additional penalty and interest will be due.

Form Number	Tax Period	Unpaid Amount from Prior Notices	Additional Penalty	Additional Interest	Amount You Owe
1040	12/31/1995	\$1,497,806.45		\$89,825.53	\$1,587,631.98
1040	12/31/1996	\$7,145,213.65		\$428,508.35	\$7,573,722.00
1040	12/31/1997	\$59,241,102.24		\$3,552,770.91	\$62,793,873.15
1040	12/31/1997	\$59,241,102.24		\$3,552,770.91	\$62,793,873.15
1040	12/31/1998	\$75,151,875.65		\$4,506,962.02	\$79,658,837.67
1040	12/31/1999	\$87,580,178.90		\$5,252,304.57	\$92,832,483.47
1040	12/31/1999	\$87,580,178.90		\$5,252,304.57	\$92,832,483.57
1040	12/31/1999	\$87,580,178.91		\$5,252,304.57	\$92,832,483.57

Enclosures:

- Copy of this letter
- Publication 594
- Publication 1660