No.

IN THE

Supreme Court of the United States

WALTER C. ANDERSON, PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in direct conflict with the Fourth, Tenth, and Federal Circuits, the Third Circuit erred in holding that all independently sufficient alternative findings in support of a judgment should be given preclusive effect.

2. Whether the Third Circuit's holding that a criminal conviction under 26 U.S.C. § 7201 conclusively establishes liability for civil tax fraud under the doctrine of collateral estoppel is contrary to the Supreme Court's 2012 decision in *Kawashima v. Holder*.

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The decision of the United States Court of Appeals for the Third Circuit is reported as *Walter C. Anderson v. Commissioner of Internal Revenue*, 698 F.3d 160 (3d Cir. 2012). (App. 1a-15a) The Court of Appeals denied rehearing and rehearing en banc on December 6, 2012. (App. 92a-93a)

JURISDICTION

The decision of the United States Court of Appeals for the Third Circuit was rendered September 7, 2012. (App. 1a) Petitioner's timely petition for rehearing was denied December 6, 2012. (App. 92a) Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

The relevant statutory provision is 26 U.S.C. § 7201 - Attempt to evade or defeat tax, which provides:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

STATEMENT

This petition is brought against the Commissioner of Internal Revenue ("Commissioner") by Walter C. Anderson ("Petitioner"), an American telecommunications entrepreneur, commercial space advocate and venture capitalist who, in 2005, was alleged by the government and media to be the largest individual tax evader in the history of the United States.

On September 30, 2005, Petitioner was charged with federal tax evasion in violation of 26 U.S.C. § 7201 for each of the five tax years 1995 through 1999. On September 8, 2006, Petitioner entered into a Plea Agreement, in which he pleaded guilty to federal tax evasion for the years 1998 and 1999. Petitioner received a 108-month term of imprisonment, which he served in New Jersey and completed on or about December 28, 2012.

On July 17, 2007, the Commissioner issued a jeopardy assessment pursuant to 26 U.S.C. § 6861, showing the Commissioner's determination of deficiencies in income tax and tax penalties under 26 U.S.C. § 6663 for the tax years 1995 through 1999. On September 7, 2007, Petitioner filed a petition with the United States Tax Court, pursuant to 26 U.S.C. § 6213(a), to redetermine those deficiencies. Petitioner's dispute with the Commissioner focused primarily on the taxability of the income of Gold & Appel Transfer, S.A. ("G & A"), a British Virgin Islands corporation, and whether Petitioner fraudulently omitted reporting interest income from Barclay's Bank.

On February 24, 2009, in response to the parties' first set of cross-motions for summary judgment, the Tax Court issued a Memorandum Opinion holding, *inter alia*, that Petitioner's conviction for tax evasion for 1998 and 1999 collaterally estopped him from denying civil fraud for those two years, for purposes of both the statute of limitations and the fraud penalty. (App. 68a-69a) The court left open for further proceedings issues regarding tax years 1995-1997. (App. 34a)

Based on this ruling, on June 3, 2009, the Commissioner filed a Motion to Sever and conceded the tax and penalty issues for 1995-1997. On June 12, 2009, the Tax Court issued an Order denying the Commissioner's Motion to Sever, but indicated that it would take notice of respondent's concession of all tax and penalty issues for 1995, 1996, and 1997 and would reflect that concession in its eventual entry of decision in the case.

On October 25, 2010, following a Second Motion for Summary Judgment, the Tax Court ruled that petitioner was collaterally estopped from disputing that the income of G & A was taxable to him. (App. 26a, 32a)

On March 7, 2011, the parties entered into a Stipulated Decision, which enabled the Petitioner to appeal the Tax Court's adverse holdings to the United States Court of Appeals for the Third Circuit. The appeal was filed on March 11, 2011 and argued on May 7, 2012.

On September 7, 2012, the Court of Appeals filed its opinion. (App. 1a-15a) Two of the Court's holdings in that opinion, both with respect to the doctrine of collateral estoppel, are the subject of this petition. The Court ruled that:

(1) all independently sufficient alternative findings in support of a judgment should be given preclusive effect (App. 8a); and

(2) a conviction for criminal tax evasion conclusively establishes a defendant's civil liability for tax fraud for the same year (App. 6a).

Petitioner respectfully disagrees with the rulings of the Court on these points of law.

REASONS FOR GRANTING THE PETITION

I. This Court should resolve the split among the Circuits as to whether all independently sufficient alternative findings in support of a judgment should be given preclusive effect.

The legal system in the United States is based on unity. Cases litigated in our courts are intertwined and decisions by those courts deliberately affect each other. When the federal circuits adopt contradictory views of the law, litigants obtain conflicting treatment depending on where a case is brought. The objective of unity is thus lost. In this case, a split among the circuits has developed with respect to a critical aspect of the application of the doctrine of collateral estoppel.

The Supreme Court has articulated the general principle of collateral estoppel, also known as issue preclusion, as follows: once an issue is actually and necessarily (emphasis added) determined by a court of competent jurisdiction, the determination is conclusive in subsequent suits based on different causes of action involving a party to the prior litigation. *Montana v. United States*, 440 US 147, 153 (1979); Restatement (Second) of Judgments § 27. The requirement that a preclusive finding must have been necessary to a judgment is rooted in principles of fairness. This ensures that the finder of fact in the first case took sufficient care in determining the issue. In those cases, however, where there are multiple alternative determinations in support of a judgment, the application of collateral estoppel differs depending on where the case is litigated. The difficulty for the courts in such cases has been the fact that an alternative finding may not be strictly necessary to the judgment given that there is another stated basis in support of the decision.

The First Restatement of Judgments resolved the issue in favor of extending preclusion to each alternative holding, stating that "(w)here the judgment is based upon the matters litigated as alternative grounds, the judgment is determinative on both grounds, although either alone would have been sufficient to support the judgment." Restatement of Judgments § 68 cmt. n. Forty years later, the Second Restatement of Judgments adopted the opposite position, stating that "[i]f a judgment of a court of first instance is based on determinations of two issues, either of which standing independently would be

sufficient to support the result, the judgment is not conclusive with respect to either issue standing alone." Restatement (Second) of Judgments § 27 cmt. i.

To date, the courts of appeal have not formed a consensus view as to which is the better approach. In the present case, the Third Circuit, since 2006, has followed the approach of the First Restatement, giving preclusive effect to "all independently sufficient alternative findings." *Jean Alexander Cosmetics, Inc. v. L'Oreal USA, Inc.*, 458 F.3d 244, 255 (3d Cir. 2006). Other circuits that follow the First Restatement approach include: (1) the Second Circuit (See *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 45 (2d Cir. 1986)), (2) the Seventh Circuit (See *Magnus Elecs., Inc. v. La Republica Argentina*, 830 F.2d 1396, 1402 (7th Cir. 1987)), (3) the Ninth Circuit (See *In re Westgate-California Corp.*, 642 F.2d 1174, 1176-77 (9th Cir. 1981)), and (4) the Eleventh Circuit (See *DeWeese v. Town of Palm Beach*, 688 F.2d 731, 734 (11th Cir. 1982)). These circuits have reasoned that denying preclusive effect to a finding that would support a court's judgment merely because the case was disposed of on other grounds as well would result in the inefficient use of private and public litigation resources.

Conversely, the Restatement (Second) of Judgments position has been adopted by other courts of appeal: (1) the Fourth Circuit[1] (See *Tuttle v. Arlington*

[1] The Fourth Circuit, while acknowledging its general rule under the Second Restatement, has given preclusive effect to alternative findings that were fully litigated. *Ritter v. Mount St. Mary's College*, 814 F.2d 986, 993-94 (4th Cir. 1987).

County Sch. Bd., 195 F.3d 698, 704 (4th Cir. 1999)), (2) the Tenth Circuit (See *Turney v. O'Toole*, 898 F.2d 1470, 1472 n.1 (10th Cir. 1990)), and (3) the Federal Circuit (See *Comair Rotron, Inc. v. Nippon Densan Corp.*, 49 F.3d 1535, 1538-39 (Fed. Cir. 1995)). These circuits reasoned that alternative findings may not have been as carefully considered as they would have had they been necessary to the result. The losing litigant would also have little incentive to appeal an erronous determination if the appeal would be upheld on other grounds. Lastly, to avoid possible preclusive effects of an alternate holding, cautionary appeals would need to be filed, thus increasing the burden on litigation resources, rather than reducing them.

Still another view is held by the Sixth Circuit, which decided that a "primary" issue would be precluded from relitigation, while a "secondary ground" could be relitigated. *National Satellite Sports, Inc. v. Eliadis, Inc.*, 253 F.3d 900 (6th Cir. 2001). This decision created a brand new set of problems for the application of collateral estoppel because it did not provide guidance regarding what constitutes "primary" and "secondary" determinations.

One of the reasons stated by the Third Circuit in its support of the First Restatement approach was that it did not believe there was a "risk that preclusion (would) be applied unfairly against a litigant who failed to appeal a judgment because it was supportable on alternative grounds." *Jean Alexander Cosmetics, Inc.* at 254. This reasoning, however, neglected to consider the case of a negotiated plea agreement, as in the present case, where considerations other than the

truthfulness or accuracy of each and every alternative plea finding might come into play. Since the defendant in such a case has no incentive to appeal his conviction, even though there is a possibility of collateral consequences in the future, the requirement that he have a "full and fair opportunity to litigate" all alternative findings is clearly absent.

In the present case, the Third Circuit's decision precluded Petitioner from proving that all or a portion of the income of G & A was not taxable to him in 1998 and 1999. Was it necessary or essential to Petitioner's conviction under 26 U.S.C. § 7201 that all of the income of G & A was taxable to him in those years? Certainly not. It was only necessary under § 7201 to determine that Petitioner had a tax deficiency of some amount from some source. In this case, it could have been from the omission of interest income from Barclay's Bank, or from the omission of a portion of the income of G&A that was taxable to him. Had Petitioner brought his case in one of the circuits that follow the Second Restatement approach, he would have been able to litigate the issue of the taxability of G&A income in the Tax Court.

There is little doubt that the differing conclusions reached by the appellate courts have lead to uncertainty on this issue and the potential for forum shopping by litigants. This is contrary to our concept of uniformity, which forms the basis of the American federal court system. In terms of the proper preclusive effect to be given to multiple alternative findings, both of the First and Second Restatement approaches have their own particular strengths and weaknesses.

Petitioner submits that the later Second Restatement rule is the better of the two, especially in cases where there is no incentive to appeal. However, should this Court decide that the First Restatement view is the correct interpretation of the law, the Court should provide an exception that allows the party objecting to the application of issue preclusion to prove that an injustice will result if it is applied. Such a rule would protect the equitable and discretionary nature of the doctrine of collateral estoppel and maintain fairness to the parties.

II. The decision of the Court of Appeals that a criminal conviction under 26 U.S.C. § 7201 conclusively establishes liability for civil tax fraud under the doctrine of collateral estoppel is contrary to the Supreme Court's February 21, 2012 decision in *Kawashima v. Holder*.

Prior to 1964, a conviction under § 145(b) of the 1939 Code (recodified as 26 U.S.C. § 7201) for willfully attempting to evade or defeat a tax did not work an estoppel on the issue of fraud in a suit on the civil penalty. See *Meyer J. Safra*, 30 T.C. 1026 (1958) and *Eugene Vasallo*, 23 T.C. 656 (1955). Then in 1964, the Fifth Circuit Court of Appeals held in *Tomlinson v. Lefkowitz*, 334 F.2d 262 (5th Cir. 1964) that fraud is a necessary element in a criminal conviction for evasion, and that it forms the basis for the finding of fraud in a civil tax proceeding. The holding was based primarily upon two factors: (1) the court read into the term "willfully" a meaning that involves bad purpose or evil

motive (i.e., fraudulent intent), and (2) the court narrowly construed the holding of the Supreme Court in *United States v. Scharton*, 285 U.S. 518 (1932) (this case considered a statute of limitations provision where fraud was involved and held that it did not apply to a willful attempt to evade a tax).

Following the *Lefkowitz* case, one circuit after another followed suit and mechanically adopted the principle that a conviction under 26 U.S.C. § 7201 establishes civil tax fraud under the doctrine of collateral estoppel. The Court of Appeals in this case mechanically adopted the rule for the Third Circuit citing the decisions of four other circuits, the last of which was decided twenty years ago in 1993. See *Blohm v. Comm'r*, 994 F.2d 1542, 1554 (11th Cir. 1993); *Klein v. Comm'r*, 880 F.2d 260, 262 (10th Cir. 1989); *Gray v. Comm'r*, 708 F.2d 243, 246 (6th Cir. 1983); *United States v. Moore*, 360 F.2d 353, 356 (4th Cir. 1966).

On February 21, 2012, the Supreme Court decided *Kawashima v. Holder*, 132 S. Ct. 1166 (2012), a case involving the interpretation of an immigration deportation statute. As part of its statutory construction analysis, this Court was required to construct the scope and meaning of 8 U.S.C. § 1101(a)(43)(M)(i)) (concerning offenses that involve "fraud or deceit") and 8 U.S.C. § 1101(a)(43)(M)(ii) (concerning § 7201 offenses). The Court's analysis of § 1101(a)(43)(M)(ii) required a thorough examination of § 7201. The Court stated:

> …§ 7201 does not, on its face, mention fraud or deceit. Instead § 7201 simply provides that "[a]ny person who willfully attempts in any manner to evade or defeat any tax imposed by [the Internal Revenue Code] or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony." Accordingly, neither fraud nor deceit is among the elements of a conviction under § 7201 (emphasis added), which include: (1) willfulness; (2) the existence of a tax deficiency; and (3) an affirmative act constituting an evasion or an attempted evasion of the tax…A conviction under § 7201, therefore, only qualifies as an aggravated felony under Clause (i) if a willful, affirmative attempt to evade a tax necessarily (emphasis added) entails fraud or deceit.
> *Id.*, at 1173, 1174.

This Court cited the 1932 *Scharton* case and stated that its decision "gave Congress good reason to doubt that a conviction under § 7201 satisfies that condition" (i.e., that § 7201 *necessarily* entails fraud or deceit). *Id.* This Court's opinion clearly takes an expansive view of the holding in the *Scharton* case (as opposed to the narrow construction employed by the Fifth Circuit in the *Lefkowitz* case), and states that proof of fraud in a § 7201 offense "would be surplusage, for it would be sufficient to plead and prove a willful attempt to evade or defeat." *Id.* Finally, this Court noted the Government's unambiguous concession on the issue of fraud regarding the willful attempt to evade or defeat the "payment" of tax, but, even beyond that, this Court further emphasized that "it is still true that the

elements of tax evasion pursuant to § 7201 do not *necessarily* involve fraud or deceit." *Id.*, at 1175.

Given that the Supreme Court in *Kawashima* eliminated a major underpinning of the *Lefkowitz* holding (i.e., that the *Scharton* case should be construed narrowly), it can also be established that the *Lefkowitz* court's finding of "fraudulent intent" in the word "willfully" was erroneous. Just five years ago, this Court in the case of *Boulware v. United States*, 552 U.S. 421 (2008) (quoting the case of *Morissett v. United States*, 242 U.S. 246 (1952)) stated with respect to § 7201 that "the spirit of the doctrine which denies to the federal judiciary power to create crimes forthrightly admonishes that we should not enlarge (emphasis added) the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute (emphasis added)." *Id.*, at 431. The Court in *Boulware* said further that if § 7201 "could stand amending, Congress will have to do the rewriting." *Id.*, at 432. The plain dictionary meaning of the word "willfully" is to do something in a "purposeful or deliberate manner". There is simply no added condition in the word's definition that it must be done with "fraudulent intent." Furthermore, the Supreme Court in *Spies v. United States*, 317 U.S. 492 (1943) stated that:

> …Congress did not define or limit the methods by which a willful attempt to defeat and evade might be accomplished, and perhaps did not define lest its effort to do so result in some unexpected limitation. Nor would we by

> definition constrict the scope of the Congressional provision that it may be accomplished 'in any manner' (emphasis added). *Id.*, at 499.

In other words, it is possible to commit a § 7201 offense with or without fraudulent intent.

This point was soundly made by (now) Justice Alito in his dissent in the Third Circuit case of *Ki Se Lee v. Ashcroft*, 368 F.3d 218 (3d Cir. 2004) (a case dealing with the aforementioned immigration deportation statute). In reference to § 7201 offenses, he suggested that it was possible that Congress believed an evasion case could fall "outside the definition" of a case that involved "fraudulent or deceitful conduct", even if they "could not think" of such a case. Moreover, he was clear on the point that "neither 'fraud' nor 'deceit' is mentioned in the statute as a necessary element of tax evasion (and)…leading cases interpreting this language do not hold that fraud or deceit is an element of the offense." *Id.*, at 227. This last point was even made by the Government (obviously when it was to their strategic advantage) by (now) Justice Kagan in a Brief for the Respondent in Opposition to a Petition for Writ of Certiorari in *Arguelles-Olivares v. Mukasey*, 526 F.3d 171 (5th Cir. 2008), cert. denied sub. nom. *Arguelles v. Holder*, 130 S. Ct. 736 (2009). In the Brief (available at http://www.justice.gov/osg/briefs/2009/0responses/2008-1494.resp.pdf), the Solicitor General stated that "(t)he offense of tax evasion can require, but does not necessarily (emphasis added) require, proof of fraud or deceit; it can be accomplished 'in any manner'."

Furthermore, Solicitor General Kagan acknowledged, "26 U.S.C. 7201 does not include fraud or deceit as an element." (Brief, at p. 9)

In addition, an inference can be drawn in the manner Congress drafted 26 U.S.C. §§ 6501(c)(1) and 6501(c)(2) that the language "willful attempt in any manner to defeat or evade tax" does not *necessarily* involve "fraud." 26 U.S.C. § 6501 concerns limitation periods on the assessment and collection of taxes. As provided in § 6501(a), the general rule is that any tax must be assessed within three (3) years after a return is filed. Certain exceptions to the rule are provided in § 6501(c). Under § 6501(c)(1), there is no limitation period in the case of a "false or fraudulent return" for any tax. Under § 6501(c)(2), there is no limitation period in the case of a "willful attempt in any manner to defeat or evade tax" (statutory language that is virtually identical to § 7201) for a tax other than income, estate or gift tax. What is the intent of Congress in carving out an additional exception to the limitations period for taxes other than income, estate or gift taxes if in *every* case where there is "willful attempt in any matter to defeat or evade tax" under § 6501(c)(2) there is also the element of *fraud*, which would be covered under § 6501(c)(1)? It is a cardinal principal of statutory construction that the language of a statute should not be rendered "insignificant, if not wholly superfluous." *TRW Inc. v. Andrews*, 534 U.S. 19 (2001). Thus, Congress itself must believe that "fraud" is not *necessarily* an element of a "willful attempt in any manner to defeat or evade tax."

The Court of Appeals in the present case correctly held that the preclusive effect of a guilty plea extends only to issues that are *necessarily* admitted in the plea. The panel cited *Bobby v. Bies*, 556 U.S. 825, 835 (2009) as proper authority for requiring a *necessary* or essential admission to be one upon which an outcome "hinges." For collateral estoppel to apply, it must be unequivocal that "fraud" is a *necessary* and essential element of the offense of 26 U.S.C. § 7201, for which Petitioner pleaded guilty. Whether or not Petitioner possessed a fraudulent intent to violate § 7201 was not relevant in this particular case because proof by the prosecution of his criminal or fraudulent intent was not a *necessary* or essential element of the offense.

Finally, while there are equitable apects to the use of collateral estoppel, the courts, since the 1964 *Lefkowitz* case, have mechanically applied the doctrine in § 7201 cases on the issue of civil tax fraud and disregarded the doctrine's equitable considerations. With the possible exception of Judge Merritt's dissent in the *Gray* case, courts have generally failed to adequately address the doctrine's equitable requirement of a "full and fair opportunity" to litigate.

> (T)he Supreme Court reiterated the standards governing the use of collateral estoppel, recognizing that the doctrine may apply "once a court has decided an issue of fact or law necessary to its judgment ... [but] cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case." (citing *Montana v. United States*, 440 U.S. 147, 153 (1979)…

Conviction upon a plea of guilty does not rest on actual adjudication or determination of any issue. Just as issue preclusion should not rest on civil judgments by consent, stipulation or default, so it should not rest on a plea of guilty…

When a plea of guilty has been entered in the prior action, no issues have been "drawn into controversy" by a "full presentation" of the case. It may reflect only a compromise or a belief that paying a fine is more advantageous than litigation. Considerations of fairness to civil litigants and regard for the expeditious administration of criminal justice...combine to prohibit the application of collateral estoppel against a party who, having pleaded guilty to a criminal charge, seeks for the first time to litigate his cause in a civil action…

The majority's collateral estoppel rule permits the government to whipsaw tax fraud defendants by first inducing them to enter guilty pleas through attractive plea bargain offers and then suing them in civil proceedings where the taxpayers cannot contest their liability. A defendant's decision whether to plead guilty is often difficult when limited to criminal law considerations. I believe that the appending of civil consequences unfairly complicates the criminal defendant's position, and that for purposes of plea bargaining, the criminal process should stand alone. As in other settings where the government invites the cooperation of criminal defendants, the furthering of society's interest in expediting its judicial process should

not entitle the government to reap collateral dividends…

I would rely on the solution provided by the Federal Rules of Evidence making the plea admissible on the issue of civil liability, rather than a solution that takes unfair advantage of the taxpayer's decision to plead guilty, a decision made perhaps only to avoid the risks and uncertainty of a criminal trial and of years of imprisonment, a decision made without knowledge that the taxpayer, after paying his fine, would automatically lose his property as well in a later civil proceeding where he would be barred from litigating the issue of civil liability. *Gray* at 247-250, Merritt, Circuit Judge, dissenting.

Accordingly, when a conviction under § 7201 is based on a guilty plea, without litigation of the merits, there is no assurance that a subsequent mechanically determined finding of *fraud* in a civil proceeding by the use of the doctrine of collateral estoppel is trustworthy, especially in cases like the present one where *fraud* is not a *necessary* or essential element of the offense for which the guilty plea was made.

CONCLUSION

For the above and foregoing reasons, Petitioner respectfully requests the issuance of a writ of certiorari to the United States Court of Appeals for the Third Circuit.

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PRECEDENTIAL

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11-1704

WALTER C. ANDERSON, Appellant v. COMMISSIONER OF INTERNAL REVENUE

On Petition for Review of an Order of the United States Tax Court
(Agency No. 07-20364)
Administrative Judge: Honorable David Gustafson
Argued on May 7, 2012

Before: SLOVITER and ROTH, Circuit Judges and POLLAK*, District Judge (Opinion filed: September 7, 2012)

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OPINION

ROTH, Circuit Judge: This appeal arises out of a civil tax fraud proceeding in United States Tax Court. The

taxpayer challenges the Tax Court's determination that, under the doctrine of collateral estoppel, his previous guilty plea for criminal tax evasion conclusively established the taxability to him of specific income that his criminal indictment charged him with failing to report. He additionally argues on the basis of a number of preclusion doctrines that the Internal Revenue's (IRS) concession of all tax deficiency and penalty issues for certain years should have prevented it from obtaining recovery of such payments in other years because the issues for all years were identical. As explained below, we find that these arguments are without merit, and we will therefore affirm the Tax Court's judgment.

I. BACKGROUND

On September 30, 2005, Petitioner Walter Anderson was charged in a superseding indictment with federal tax evasion for tax years 1995 through 1999, in violation of 26 U.S.C. § 7201. During those years, Anderson was a telecommunications entrepreneur and venture capitalist who was actively involved in the operation of several international companies. Among these companies was Gold & Appel Transfer S.A. (G & A), a British Virgin Islands corporation which generated hundreds of millions of dollars of income during the tax years at issue. The government alleged that because G & A was a "controlled foreign corporation," under Anderson's control, he was required to recognize a share of its income on his tax return and that he fraudulently failed to do so. The government alleged that for the five-year period at issue, Anderson had fraudulently underpaid his taxes

by $184 million, 99% of which stemmed from the income of G & A. Pursuant to an agreement with the government, on September 8, 2006, Anderson pleaded guilty to the federal tax evasion charges for 1998 and 1999, while those same charges for 1995, 1996 and 1997 were dismissed.FN1 He was sentenced to 108 months imprisonment.

On July 17, 2007, the IRS issued a notice to Anderson determining civil tax deficiencies and fraud penalties for tax years 1995 through 1999. *See* 26 U.S.C. §§ 6212, 6663. (The deficiency amounted to the $184 million of underpaid taxes, resulting in a fraud penalty of $138 million.fn2) On September 7, 2007, while he was incarcerated in New Jersey, Anderson filed a petition in the United States Tax Court to redetermine these deficiencies. *See* 26 U.S.C. § 6213(a). In response to motions by both parties, the Tax Court granted partial summary judgment to the IRS, finding that under the doctrine of collateral estoppel, Anderson's criminal conviction for tax evasion in 1998 and 1999 precluded him from contesting that he fraudulently underpaid his incomes taxes in those two years. The Tax Court denied summary judgment on the fraud issue for tax years 1995-1997, without prejudice to renew the motion "with a better record and more focused contentions."

The holding on the 1998 and 1999 tax years had three principal effects. First, it established that Anderson had underpaid his income taxes in 1998 and 1999. Second, because a fraud penalty can only be assessed where a tax underpayment is due to fraud, it relieved the IRS of its burden of proving this penalty was

applicable to Anderson for those two years. *See* 26 U.S.C. § 6663(a). Finally, because the three-year statute of limitations on the assessment of a tax does not apply where a tax return has been filed falsely or fraudulently with the intent of evading tax, 26 U.S.C. § 6501(c)(1), it prevented Anderson from arguing that the IRS's attempts to collect taxes for 1998 and 1999 were untimely.fn3 Though this decision established that Anderson had fraudulently underpaid his income taxes in 1998 and 1999, it left open for further proceedings the determination of the amounts of the tax deficiencies and penalties for those years. Based on this ruling, the IRS filed a motion to sever tax years 1995, 1996, and 1997 from the case, stating that it "ha[d] decided to concede all tax and penalty issues for [those years] and wishe[d] to file a motion for entry of decision as to those years." In its motion, the IRS explained that nearly 80% of the total deficiency and penalties for the five-year period stemmed from just 1998 and 1999, and that because proving fraud for 1995 through 1997 via trial would needlessly complicate and lengthen the case for a comparatively limited additional monetary recovery, it preferred to abandon its efforts for those years. The Tax Court found that, given its particular procedural rules, severing the case in this way would needlessly create clerical and administrative complexities, and it therefore denied the motion. It stated in its order, however, that it would "take notice of the [IRS's] concession of all tax and penalty issues for 1995, 1996, and 1997 and [would] reflect that concession in its eventual entry of decision in [the] case."

This order led to the filing of a second set of summary judgment motions. Anderson argued in his motion that, notwithstanding the Tax Court's earlier holding that his criminal convictions for tax evasion collaterally estopped him from denying fraudulent underpayment of tax in 1998 and 1999, the IRS's subsequent concession of all tax and penalty issues for 1995, 1996, and 1997 established that the income of G & A and interest income from an account at Barclays Bank were not taxable to him even in 1998 and 1999. The IRS, meanwhile, argued in its motion that Anderson was precluded from contesting that the income of G & A in 1998 and 1999 constituted taxable income to him under Subpart F of the Tax Code. The Tax Court denied Anderson's motion and granted partial summary judgment to the IRS. It held, in favor of the IRS, that the concessions related to tax years 1995 through 1997 did not resolve the deficiency and penalty issues for 1998 and 1999. It further agreed with the IRS's position that the proceedings in Anderson's criminal case established that G & A's income in 1998 and 1999 was taxable to him. The Tax Court rejected the IRS's argument, however, that Anderson's guilty plea estopped him from contesting that the income of G & A was taxable to him specifically under Subpart F of the Tax Code. Anderson now challenges the adverse holdings.

II. DISCUSSION

This Court has jurisdiction to review final orders of the Tax Court based on 26 U.S.C. § 7482(a)(1). fn4 On March 7, 2001, pursuant to an agreement between the parties, the Tax Court entered an order determining

the tax deficiency and fraud penalty for each year from 1995 through 1999, leaving no issues for it to decide and thus providing this Court with jurisdiction under that statute. We review the Tax Court's legal conclusions *de novo* and its factual findings for clear error. *Capital Blue Cross v. Comm'r*, 431 F.3d 117, 123-24 (3d Cir. 2005).

A. The Preclusive Effect of Anderson's Criminal Conviction

Under the doctrine of collateral estoppel, "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana v. United States*, 440 U.S. 147, 153-54 (1979). It applies, however, only if: "(1) the issue sought to be precluded [is] the same as that involved in the prior action; (2) that issue [was] actually litigated; (3) it [was] determined by a final and valid judgment; and (4) the determination [was] essential to the prior judgment." *In re Graham*, 973 F.2d 1089, 1097 (3d Cir. 1992) (citations omitted). In light of these principles, we agree with the numerous courts that have held that, under the doctrine of collateral estoppel, a conviction for criminal tax evasion conclusively establishes the defendant's civil liability for tax fraud for the same year. *See Blohm v. Comm'r*, 994 F.2d 1542, 1554 (11th Cir. 1993); *Klein v. Comm'r*, 880 F.2d 260, 262 (10th Cir. 1989); *Gray v. Comm'r*, 708 F.2d 243, 246 (6th Cir. 1983); *United States v. Moore*, 360 F.2d 353, 356 (4th Cir. 1966). This is because the elements of evasion under 26 U.S.C. §

7201 and fraud under 26 U.S.C. § 6663 are identical. *See, e.g., Gray*, 708 F.2d at 246.

Anderson nevertheless argues that the Tax Court erred in holding that his tax evasion conviction collaterally estopped him from litigating the taxability to him in 1998 and 1999 of the income of G & A in the civil tax fraud proceedings. Where, as here, a conviction is the result of a guilty plea, its preclusive effect extends to all issues that are necessarily admitted in the plea. *See De Cavalcante v. Comm'r*, 620 F.2d 23, 27 n.9 (3d Cir. 1980); *United States v. $448,342.85*, 969 F.2d 474, 476 (7th Cir. 1992); *United States v. Wight*, 839 F.2d 193, 196 (4th Cir. 1987); *United States v. Podell*, 572 F.2d 31, 35 (2d Cir. 1978). We find that Anderson admitted in his plea that the income of G & A was taxable to him in 1998 and 1999, and that this admission was necessary to his conviction. Anderson pleaded guilty to a charge that in 1998 "a substantial additional tax was due and owing to the United States" from him and that "[s]pecifically, he failed to report . . . $126,303,951 Subpart F investment-type income from G & A." He also pleaded guilty to another charge that alleged the same with respect to 1999, except that the amount of unreported G & A income was $238,561,316. These charges essentially allege that Anderson underpaid his taxes in 1998 and 1999 because he did not report the income of G & A, which is comprehensible only to the extent that such income was taxable to him in those years. By pleading guilty to these charges, Anderson thus admitted that required premise.

This admission could be considered necessary, though, only if Anderson's conviction "hinge[d] on it." *Bobby v. Bies*, 556 U.S. 825, 835 (2009). To convict Anderson of tax evasion, the Government was required to prove the existence of a tax deficiency. *See* 26 U.S.C. § 7201. Were the income of G & A not taxable to him in 1998 and 1999, however, Anderson's failure to report it on his tax return would not have given rise to a deficiency. The Government thus could not have secured his conviction without establishing the taxability of this income. We therefore find that Anderson's conviction did hinge on that issue. Our conclusion is not affected by the fact that Anderson was also charged with failing to report income from other sources in 1998 and 1999 – including an account he held at Barclays Bank, a company called Esprit Telecom, and various capital gains – the taxability of which could also have substantiated his conviction. As we have previously held, all "independently sufficient alternative findings should be given preclusive effect," *Jean Alexander Cosmetics, Inc. v. L'Oreal USA, Inc.*, 458 F.3d 244, 255 (3d Cir. 2006). The taxability to Anderson of the income of G & A in 1998 and 1999 was independently sufficient to establish the existence of a tax deficiency in those years and was thus a fact that was necessary to his conviction. His admission to it in his guilty plea accordingly precludes him from contesting that issue in his civil tax fraud case.fn5

Finally, that the income of G & A is taxable to Anderson specifically under Subpart F of the Tax Code is also settled for purposes of this case. The Tax Court rejected the IRS's argument that Anderson's guilty plea estopped him from contesting this tax

treatment of G & A's income. It reasoned that, although G & A's income was described as "Subpart F income" in the charges of the indictment to which Anderson pleaded guilty, this detail was not essential to his judgment of conviction and thus could not be given preclusive effect in subsequent proceedings. Regardless of this holding, however, the parties' subsequent stipulation of the nature and composition of G & A's income, designating amounts for Deficiency and Penalty for 1998 and 1999, necessitate the determination that it is taxable to Anderson under Subpart F because the figures would not support Anderson's alternate theory that the income was capital gains. This conclusion, along with the preclusive effect of Anderson's conviction for tax evasion described above, effectively resolve his civil tax deficiency stemming from the income of G & A.

A. The Preclusive Effect of the IRS's Concession of All Deficiency and Penalty Issues for 1995-1997

Anderson argues that because the IRS conceded all tax deficiency and penalty issues for 1995, 1996, and 1997, the Tax Court was required to find in his favor on those issues for the 1998 and 1999 tax years as well. He specifically advances this argument in relation to the income of G & A and the interest income of his account at Barclays Bank. He relies on three separate legal doctrines to support this argument - collateral estoppel, law of the case, and judicial admission – but each is inapplicable.

1. Collateral Estoppel

Anderson claims that when the Tax Court issued its order denying the IRS's motion to sever, in which it stated that it "takes notice of [the IRS's] concession of all tax and penalty issues for 1995, 1996, and 1997 and will reflect that concession in its eventual entry of decision in [the] case," it decided those issues in his favor. He further claims that all deficiency and penalty issues for 1995 through 1997, including those related to G & A and his Barclays account, are "identical in all respects" to those for 1998 and 1999. On this basis, Anderson argues that, by virtue of collateral estoppel, it is conclusively established in his civil tax fraud proceeding that the income from G & A and from his Barclays account gave rise to no tax deficiency or fraud penalty in 1998 and 1999.

As we have already noted, an issue is conclusively established in future litigation through the doctrine of collateral estoppel only when it is determined by a final judgment. *Graham*, 973 F.2d at 1097. This principle is firmly established and beyond question. *See, e.g., G. & C. Merriaman Co. v. Saalfield*, 241 U.S. 22, 28 (1916) ("[I]t is familiar law that only a final judgment is *res judicata* . . ."); *Wilson v. City of Chicago*, 120 F.3d 681, 687 (7th Cir. 1997) ("[I]f there is no judgment, there is no preclusion."); *Clausen Co. v. Dynatron/Bondo Corp.*, 889 F.2d 459, 465-66 (3d Cir. 1989) (finding collateral estoppel did not apply to an interlocutory disposition). The Tax Court's denial of the IRS's motion to sever can therefore have no preclusive effect under that doctrine. It does not constitute a final judgment on any issue, including on that of whether Anderson was liable for tax deficiencies or fraud penalties for any year in relation

to income from G & A or from his account at Barclays. Instead, all the Tax Court did in that order was advise the parties that it was taking notice of the IRS's desire not to litigate tax years 1995 through 1997 and state that it would factor that position into its eventual final judgment. When that final judgment was issued, it showed deficiencies and penalties for 1998 and 1999 that implicitly included amounts related to G & A and the Barclays account. Anderson identifies no previous final judgment making a determination in conflict with this result, and his argument that the Tax Court should have held that it had been conclusively established via the doctrine of collateral estoppel that he was not liable for deficiencies or penalties in relation to these two items in 1998 and 1999 thus cannot be accepted.

2. Law of the Case

Anderson makes a similar argument that the Tax Court's denial of the IRS's motion to sever forecloses litigation of the taxability to him of the income G & A in 1998 and 1999 under the law of the case doctrine. Under that doctrine, "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages of the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983). Anderson asserts that the Tax Court's statement that it was "taking notice" of the IRS's desire not to litigate tax years 1995 through 1997 was actually a holding that he was not liable for tax deficiencies or penalties for those years, and that because the IRS had alleged that he should have recognized income from G & A on his tax return for those years, it is additionally a legal

determination that such income was not taxable to him in any year – including 1998 and 1999. We disagree. The Tax Court's statement that it took notice of the IRS's desire to concede tax and penalty issues for 1995 through 1997 simply does not represent any sort of decision. Even if it did constitute a decision as to those three years, there is no merit to Anderson's argument that it necessarily implies that the Tax Court determined as a matter of law that income from G & A is not taxable to him, as the "decision" could be supported by any number of rationales. For example, a finding that Anderson was not liable for deficiencies or penalties for 1995 through 1997 could just as easily rest on a lack of evidence of fraud in those years, which as discussed earlier, would bar the IRS's claims on statute of limitations grounds. Anderson's argument asks the Court to read more into the Tax Court's "tak[ing] notice" than is warranted or possible, and it must be rejected.

3. Judicial Admission

Finally, Anderson argues that the statement in the IRS's motion to sever conceding deficiency and penalty issues for 1995 through 1997 constitutes a judicial admission that prevents the IRS from arguing "that there is United States tax liability for [G & A]" or that interest income from his Barclays account was intentionally omitted from his tax return in 1998 or 1999. Judicial admissions are "admissions in pleadings, stipulations [or the like] which do not have to be proven in the same litigation." *Giannone v. U.S. Steel Corp.*, 238 F.2d 544, 547 (3d Cir. 1956). To be binding, judicial admissions "must be statements of fact that

require evidentiary proof, not statements of legal theories." *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 377 (3d Cir. 2007). For this reason, even if this Court were to accept the dubious claim that the IRS conceded in its motion to sever that income from G & A was not taxable to Anderson, that concession would not be binding on it because it would be a statement of a legal proposition. Additionally, to be binding, judicial admissions must be unequivocal. *Id.* The IRS's motion to sever very clearly relates only to tax years 1995, 1996 and 1997, and thus cannot be deemed to unequivocally state that the income of G & A was not taxable to Anderson or that he did not intentionally omit the interest on his Barclays account from his tax return in subsequent years. The doctrine of judicial admissions therefore has no application here.

III. CONCLUSION

We hold that Anderson's conviction for tax evasion in 1998 and 1999 precludes him, by virtue of the doctrine of collateral estoppel, from contesting in subsequent civil fraud proceedings that the income of G & A was taxable to him in those years. We additionally conclude that the IRS's concession of all deficiency and penalty issues for the years 1995, 1996, and 1997 has no preclusive effect on those issues for 1998 and 1999. For these reasons, we will affirm the Tax Court's judgment.

Footnotes

*Honorable Louis H. Pollak, Senior Judge of the United States District Court for the Eastern District

of Pennsylvania, sat by designation. Judge Pollak died on May 8, 2012; this opinion is filed by a quorum of the court pursuant to 28 U.S.C. § 46 and the Third Circuit I.O.P. 12.1(b).

1 Anderson had also been charged with obstruction of the internal revenue laws of the United States, in violation of 26 U.S.C. § 7212(a), fraud in the first degree under the laws of the District of Columbia, specifically 22 D.C. Code § 3221(a), in relation to D.C. income tax filings and payments for years 1995 through 1999, and evasion of D.C. use taxes on a number of purchases made between 1997 and 2001, also in violation of 22 D.C. Code § 3221(a). All of these charges were dismissed with the exception of the charge of first degree fraud under D.C. law for 1999, to which Anderson pleaded guilty.

2 The penalty is equal to 75% of the amount of the underpayment of tax that is due to fraud. *See* 26 U.S.C. § 6663(a).

3 Anderson filed his tax return for 1998 on September 30, 1999, and his tax return for 1999 on October 19, 2000. Without this exception to the three-year statute of limitations, the IRS's notice of tax deficiency issued on July 17, 2007, would have been untimely.

4 Venue in this Court is appropriate because Anderson was a resident of New Jersey at the time he filed his petition for redetermination. *See* 26 U.S.C. § 7482(b)(1)(A).

5Pursuant to this reasoning, we also find that Anderson was collaterally estopped from disputing that the income from his Barclays account was taxable to him in 1998 and 1999. Based on this additional finding and on our analysis relating to the income of G & A, we reject Anderson's argument that the Tax Court erred in denying him summary judgment on the issues of the taxability of income from the Barclays account and from G & A in 1998 and 1999.

UNITED STATES TAX COURT
WASHINGTON, DC 20217
Docket No. 20364-07.

WALTER C. ANDERSON, Petitioner,
V.
COMMISSIONER OF INTERNAL REVENUE,
Respondent,

ORDER

On September 7, 2007, petitioner Walter C. Anderson petitioned this Court, pursuant to section 6213(a), for a redetermination of the deficiencies and fraud penalties determined by respondent for tax years 1995, 1996, 1997, 1998 and 1999. The case is now before the Court on the parties' second set of cross-motions for summary judgment filed pursuant to Rule 121.

The Court will deny petitioner's motion, deny respondent's motion in part, and order that this case be set for trial.

I. Prior Proceedings

By its order of February 26, 2009, the Court decided the parties' first set of cross-motions for summary judgment, holding (inter alia) that petitioner's conviction for tax evasion for 1998 and 1999 collaterally estops him from denying civil fraud for those two years, for purposes of both the statute of limitations and the fraud penalty, and estops him from denying that Gold & Appel's income (in an amount not determined) was taxable to Mr. Anderson. Respondent

thereafter conceded his proposed deficiencies and additions to tax for tax years 1995, -1996, and 1997. By order dated December 16, 2009, the Court ordered the parties (inter alia) to inform the Court, on or before March 1, 2010, of the remaining issues in the case.

Through respondent's status report of March 1, 2010, and petitioner's status report of March 8, 2010, both parties identified the remaining issues in this case to be (i) whether Gold & Appel was a controlled foreign corporation (as defined by section 957), and whether petitioner was a United States shareholder of Gold & Appel (as defined under section 951(b)), thereby making the income of Gold & Appel attributable to petitioner under Subpart F of the Code; (ii) whether petitioner's unreported income from Esprit Telecom of $400,629 in tax year 1999 is subject to the fraud penalty under section 6663; and (iii) whether petitioner's unreported interest income from Barclay's Bank in the amounts of $24,760 in tax year 1998 and $16,822 in tax year 1999 is subject to the fraud penalty under section 6663.

II. Mr. Anderson's Motion for Summary Judgment

On March 8, 2010, coinciding with the filing of his status report, Mr. Anderson moved for summary judgment asking "this Court to resolve all of the remaining issues in this proceeding in his favor." Mr. Anderson argued that respondent should be collaterally estopped from litigating the first two of the remaining issues (i.e., Gold & Appel Subpart F income and the Barclay's interest income) because of respondent's. concessions regarding tax years 1995,

1996, and 1997. Mr. Anderson further argued that the remaining issue (i.e., the Esprit Income) should be resolved in his favor because "respondent has no evidence that will support all elements of fraud by petitioner." We disagree.

On June 3, 2009, respondent stated his concessions of tax years 1995, 1996, and 1997 in a Motion to Sever. In that motion respondent stated that, in light of the Court's order of February 26, 2009, granting summary judgment on the fraud penalty and on the existence of some deficiency based on collateral estoppel as to tax years 1998 and 1999, but denying the same as to tax years 1995, 1996, and 1997,

> it would be necessary for respondent to present the entire fraud case in order to support the penalty (and therefore the tax) determinations for 1995 through 1997, which substantially complicates and lengthens the evidence required to be presented. * * * In order to eliminate the need for a trial of the fraud issue, to avoid unnecessary inconvenience to a substantial number of third party witnesses, to minimize discovery issues, and to narrow the issue for trial to the amounts of the deficiencies for 1998 and 1999, respondent has decided to concede all tax and penalty issues for 1995, 1996, and 1997, and wishes to file a motion for entry of decision as to those years.

By order of June 12, 2009, this Court denied respondent's Motion to Sever, but noted that "the Court takes notice of respondent's concession of all tax

and penalty issues for 1995, 1996, and 1997 and will reflect that concession in its eventual entry of decision in this case.." Mr. Anderson relies on respondent's concessions contained in his Motion to Sever and the Court's order of June 12, 2009, taking notice of those concessions, to argue that "Respondent made the decision to admit the issues in favor of petitioner * * *."

Mr. Anderson incorrectly views respondent's concessions of all tax and penalty issues for 1995, 1996, and 1997 as an admission that petitioner would prevail on the merits of those claims. As a result, petitioner incorrectly views the Court's order of June 12, 2009, as a decision "on the merits" with preclusive effect for all later years sharing the same facts and issues; It is well settled that "[w]hen one party to a tax case concedes or stipulates the issue upon which the court bases its judgment, the issue is not conclusively determined for purposes of collateral estoppel unless it is clear that the parties so intended." Anderson, Clayton & Co. v. United States, 562 F.2d. 972, 992 (5th Cir. 1977) (emphasis added). As a result, a concession by respondent as to one tax year will not support a future claim of collateral estoppel unless it is expressly shown that respondent so intended. Green v. Commissioner, 322 Fed. Appx. 412, 418 (5th Cir. 2009), aff'g T.C. Memo. 2008-130. See also United States v. Intl. Bldg. Co., 345 U.S. 502 (1953) (where the court is unable to tell whether the agreement of the parties was based upon the merits or on some collateral consideration, collateral estoppel does not apply); Massaglia v. Commissioner, 33 T.C. 379, 386 (1959), affd. 286 F.2d 258 (10th Cir. 1961) ("A decision by this Court, entered

upon a stipulation of deficiencies, without a hearing on the merits, is not a decision on the merits such as will support a plea of collateral estoppel"); Estate of Cavett v. Commissioner, T.C. Memo. 2000-91.

In his Motion to Sever, respondent clearly explained that his concessions as to tax years 1995, 1996, and 1997 were intended solely to streamline the case and "to narrow the issue for trial to the amounts of the deficiencies for 1998 and 1999." Explicit in respondent's motion was his intention to proceed to trial with respect to tax years 1998 and 1999. As a result, we cannot not find that respondent, clearly or otherwise, intended to be bound by those concessions from litigating the same issues in later years. Accordingly, respondent's concession of tax years 1995, 1996, and 1997 does not collaterally estop him from disputing equivalent issue in tax years 1998 or 1999.

We also find unpersuasive Mr. Anderson's argument that summary judgment in his favor is appropriate with respect to the 1999 Esprit income because "respondent has no evidence that will support all elements of fraud by petitioner". Summary judgment will be granted under Rule 121 only if the pleadings and any other materials submitted to the Court show that there is no genuine issue of material fact and that a decision may be rendered as a matter of law. The burden of proving that there is no genuine issue of material fact is on the moving party (here, Mr. Anderson), and factual inferences will be read in a manner most favorable to the party opposing summary judgment (here, respondent). Jacklin v.

Commissioner, 79 T.C. 340, 344 (1982); Espinoza v. Commissioner, 78 T.C. 412, 416 (1982). We cannot accept Mr. Anderson's mere assertions that "respondent has no evidence that will support all elements of fraud by petitioner."

Regardless, even if we considered Mr. Anderson's statements as adequate to support a prima facie case on the issue, respondent has successfully disputed this contention by pointing to several facts that show the existence of fraud is still in dispute (e.g., petitioner's failure to disclose this income to his return preparer; see also Anderson v. Commissioner, T.C. Memo. 2009-44).

Furthermore, since the existence of fraud is inherently a question of fact to be determined from the entire record, Gaiewski v. Commissioner, 67 T.C. 181, 199 (1976), affd. Without published opinion 578 F.2d 1383 (8th Cir. 1978), we.do not think summary judgment on this point is proper.

III. Respondent's Motion for Partial Summary Judgment

On May 28, 2010, respondent opposed Mr. Anderson's motion and moved for partial summary judgment in "respondent's favor in this case upon the issue of collateral estoppel with regard to the taxability to petitioner in 1998 and 1999 of income received by Gold & Appel Transfer, S.A., (Gold & Appel) in those years." (Emphasis added). Respondent then goes on to assert in his motion that "petitioner is estopped from contesting in this case that the income realized by Gold

& Appel in 1998 and 1999 was taxable to petitioner during those years under the provisions of subpart F of the Internal Revenue Code". (Emphasis added). In essence, respondent is asking us to summarily decide two distinct issues: (i) that the income of Gold & A:ppel in tax years 1998 and 1999 constitutes taxable income to petitioner, and (ii) if so, that the income is taxable to petitioner under Subpart F of the Code. For the reasons stated below, we find that, based on the principle of collateral estoppel, the income of Gold & Appel in tax years 1998 and 1999 does constitute taxable income to Mr. Anderson, but that the character of that income remains an issue for trial.

A. Mr. Anderson is collaterally estopped from arguing that the income of Gold & Appel for tax years 1998 and 1999 constitutes taxable income to him.

In Monahan v. Commissioner, 109 T.C. 235, 240 (1997), we stated:

> The doctrine of issue preclusion, or collateral estoppel, provides that, once an issue of fact or law is "actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." Montana v. United States, 440 U.S. 147, 153 (1979) (citing Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n. 5 (1979)) .

Respondent posits that "[a]mong the issues of fact determined in the aforesaid criminal case was whether

Walter Anderson, the defendant therein, did in fact willfully file a false and fraudulent income tax return for each of the years 1998 and 1999 that omitted substantial"Subpart F investment-type income from G&A [Gold & Appel].'" We disagree. The District Court's findings did not go that far.

We note that petitioner's unreported income from Gold & Appel was characterized as "Subpart F income" in Counts Five and Six of the superseding indictment. Generally when a defendant does not specifically deny any particular fact, allegation, or issue in the superseding indictment, it is deemed admitted. United States v. Rivera Ramos, 856 F.2d 420, 423 (1st Cir. 1988); Williams v. Commissioner, T.C. Memo. 2009-81 ("[Taxpayer] did not specifically deny any particular fact, allegation, or issue in the tax evasion count of the superseding criminal information at his plea hearing or otherwise. Thus, [Taxpayer] is estopped from denying the contents of the tax evasion count"); United States v. Tolson, 988 F.2d 1494, 1500 "(7th Cir. 1993); United States v. Gilliam, 987 F.2d 1009, 1013, n.3 (4th Cir. 1993); United States v. Johnson, 888 F.2d 1255, 1256 (8th.Cir. 1989); United States v. Parker, 874 F.2d 174, 178 (3d. Cir. 1989) ("It is well recognized that by pleading guilty a defendant admits the material facts alleged in the charge"); United States v. Rivera Ramos, supra; United States v. Parker, 292 F.2d 2, 4 (6th Cir. 1961). However, this rule is not absolute.

Unless the facts alleged in the indictment are "essential to the judgment", the doctrine of collateral estoppel will not apply. Commissioner v. Sunnen, 333 U.S. 591, 601 (1948). Since a conviction under section

7201 requires proof of an omission of income--not of any definite amount or character of income--it is well settled that the determination of a petitioner's tax liability is not essential to his criminal conviction under section 7201. As a result, the doctrine of collateral estoppel is not applicable to the specific amount or character of income alleged in the indictment. Moore v. United States, 360 F.2d 353, 356 (4th Cir. 1965) ("the determination of an exact liability was not essential to the judgment, a prerequisite to the application of collateral estoppel"). See Arctic Ice Cream Co. v. Commissioner, 43 T.C. 68, 74 (1964); Ferguson v. Commissioner, T.C. Memo. 2004-90; Wapnick v. Commissioner, T.C. Memo. 1997-133; Larson v. Commissioner, T.C. Memo. 1993-188; Hanna v. Commissioner, T.C. Memo. 1976-32. Therefore, while we cannot find that Mr. Anderson is collaterally estopped from disputing the amount or character of the unreported income, we can find that Mr. Anderson is collaterally estopped from arguing that the income of Gold & Appel constitutes taxable income to him for 1998 and 1999.

First, there is no dispute that in accepting Mr. Anderson's guilty plea, the District Court did "actually and necessarily" find that Mr. Anderson substantially understated his income in tax years 1998 and 1999. That finding, in conjunction with Mr. Anderson's stipulation that the "tax loss" resulting from the omission of income exceeded $100 million which was essential to the District Court's acceptance of Mr. Anderson's plea and subsequent sentencing--requires us to find that the District Court "actually and necessarily" found that, based on the facts alleged in

the superseding indictment, Mr. Anderson's substantial understatement of income was at least in large part, attributable to unreported income from Gold & Appel. To find otherwise would be illogical. The other omissions of income alleged in the indictment--the $24,760 in interest income from Barclay's Bank in 1998 and the $400,629 in income from Esprit, $16,822 in interest income from Barclay's Bank, and $133,348 in capital gain income in 1999--are insufficient (under any theory of taxation or calculation of "tax loss" (as discussed below)), even in the aggregate, to account for a "tax loss" in excess of $100 million.

Second, statements made during Mr. Anderson's plea hearing will preclude him from arguing here that Gold & Appel's income is not taxable to him. During the plea hearing, the attorney for the Government summarized the factual basis of the tax evasion charges in counts Five and Six of the superseding indictment. In so doing, she explained Mr. Anderson's creation and control of Gold & Appel, and his subsequent omission of income from Gold & Appel in tax years 1998 and 1999.[1] To this, counsel for Mr. Anderson responded:

> Your Honor, Mr. Anderson does not concede that every fact contained within the indictment is accurate, and he wants to make one statement to the Court. And that is that Mr. Anderson has always intended that the vast majority of his earnings that were generated would be used to support causes such as the

> privatization of space travel and exploration, as well as other more traditional charitable causes.
>
> However, he admits that over the years he retained control over the assets and was required under U.S. law to pay taxes on the gains from those assets. Mr. Anderson admits that he willfully failed to include on his tax returns and to pay a large part of the taxes due and owing by him to the United States for the tax years 1998 and 1999.
> He acknowledges that under U.S. tax law he was obligated to pay taxes on all of his world wide income, and that he willfully failed to do so. [Emphasis added.]

As a result, we find that the Court's finding that Mr. Anderson failed to report income from Gold & Appel was part and parcel of the Court's finding that Mr. Anderson substantially understated his income in tax years 1998 and 1999. Mr. Anderson is collaterally estopped from disputing that the income of Gold & Appel constitutes taxable income to him for tax years 1998 and 1999. Of the two remaining issues--(1) the amount and (2) the character of the unreported Gold & Appel income attributable to Mr. Anderson--the parties have since stipulated the amount: Gold & Appel had net income of $126,350,693.32 and $238,558,402.11 in tax years 1998 and 1999, respectively. This leaves for trial solely the question of the character of the income.

B. Mr. Anderson is not collaterally estopped from arguing that the income of Gold & Appel for tax years

1998 and 1999 is taxable to him under Subpart F of the Code.

In his motion for partial summary judgment, respondent urges us to conclude that the omitted income in 1998 or 1999 from Gold & Appel was "Subpart F income" to Mr. Anderson based on Mr. Anderson's stipulation that the "tax loss" in his case exceeded $100 million. Respondent argues that "the only omissions alleged in the indictment large enough to produce the agreed $100 million of tax were the omissions of Subpart F investment income from Gold & Appel." For the reasons explained below, we disagree with respondent's assertion that the only way the "tax loss" for sentencing purposes could exceed $100 million would be for Gold & Appel's income to be taxable to Mr. Anderson under Subpart F of the Code.

First, as explained above, we observe that the District Court did not have to find the specific amount of Mr. Anderson's income tax deficiency to accept his guilty plea. Second, we are not convinced that the District Court "actually and necessarily" found, either directly or indirectly, that petitioner's omitted income in 1998 or 1999 from Gold & Appel was "Subpart F income" during the course of sentencing and/or determining restitution.

Due to a drafting error in the plea agreement, the District Court never explicitly determined any specific loss sustained by the Federal Government for purposes of restitution. Respondent concedes this in his memorandum in support of his motion. Although the District Court's ruling on this issue was

overturned by the Court of Appeals for the D.C. Circuit, see United States v. Anderson, 545 F.3d 1072 (D.C. Cir. 2008), no finding of loss or order of restitution has been issued. In fact, the District Court has deferred its judgment on that matter until disposition of the civil matter in this Court. Pursuant to the Amended Judgment filed in petitioner's criminal case on March 29, 2010, the District Court will impose restitution in the amount this Court determines petitioner's income tax to be deficient for tax years 1998 and 1999. See United States v. Anderson, No. 1:05-cr-00066 (D.C.D.C.). As a result, we do not find that the District Court judge "actually and necessarily" found for purposes of restitution that petitioner's omitted income in 1998 or 1999 from Gold & Appel was "Subpart F income".

Likewise, we cannot find that the District Court judge "actually and necessarily" found for purposes of sentencing that .petitioner's omitted income in 1998 or 1999 from Gold & Appel was "Subpart F income". While we note that the District Court had to find there was a "tax loss" of at least $100 million to properly apply the sentencing guidelines, there are several reasons we do not find that finding, for collateral estoppel purposes, to be conclusive that the Gold & Appel income was "Subpart F income" to Mr. Anderson.[2]

First, in Ferguson v. Commissioner, T.C. Memo. 2004-90, this Court found that a taxpayer's stipulation as to the "tax loss" for sentencing purposes was not sufficient to collaterally estop him from challenging the precise amount of deficiency in the civil

proceeding. We find no reason to depart from the Court's reasoning and holding in Ferguson.

Second, respondent alleges that "[t]he only omissions of income alleged in the superseding indictment that were substantial enough to generate a tax underpayment of $100 million were 'Subpart F investment type income from G&A [Gold & Appel]'".

In so arguing, respondent is concluding that the "tax loss" for sentencing purposes is synonymous with the deficiency to be determined here. We disagree. According to Application Note no. 1 of section 2T1.1 of the 2001 Federal Sentencing Guidelines --the guidelines used in Mr. Anderson's criminal case--".tax loss does not include interest and penalties, except in willful evasion of payment cases under 26 U.S.C. § 7201 and willful failure to pay cases under 26 U.S.C. § 7203." Since Mr: Anderson pleaded guilty to tax evasion under 26 U.S.C. § 7201, it is possible that the "tax loss" he stipulated to included interest and penalties. That being the case, it is feasible that the unreported income from Gold & Appel to Mr. Anderson could be something other than Subpart F income.

In United.States v. Anderson, 491 F.Supp.2d 1, 2-3, revd. 545 F.3d 1072 (D.C. Cir. 2008), the District Court observed:

> The government presented evidence by three expert witnesses concerning the amount of income received by Mr. Anderson during 1998 (Count 5) and 1999 (Count 6), and the

> calculation of taxes not paid to the United States and the District of Columbia governments. The government's experts testified that in 1998 and 1999 Mr. Anderson failed to report $365,484,654 in income on his federal and D.C. tax returns. According to those experts, the total amount of unpaid federal taxes for 1998 and 1999 was $140,587,613. The government's experts further testified that Mr. Anderson defrauded the D.C. government of taxes during 1999 (Count 11) in the amount of $22,809,032. The defendant presented evidence through his own expert witness as to the amount of tax loss under a different theory of tax assessment that led to a significantly lower tax liability, calculating his unpaid federal tax liability for 1998 and 1999 at a total of $73,407,227. The focus of the testimony throughout the hearing, by both the government and defense experts, was on the amount of loss suffered by the United States and by the District of Columbia.

Given that Mr. Anderson put on his own expert who, under a different theory of taxation, concluded that Mr. Anderson's unpaid Federal tax liability for 1998 and 1999 totaled $73,407,227, it is not a stretch of sound reasoning to conclude that an underpayment of $73 million with interest and penalties (particularly if a 75-percent fraud penalty is at issue) could result in a "tax loss", as contemplated under the sentencing guidelines, of more than $100 million.

In the alternative, even if we were to ignore the fact that the "tax loss" for sentencing purposes for tax evasion can include interest and penalties, we are still not convinced that Mr. Anderson's stipulated "tax loss" necessarily means Gold & Appel's income :Us taxable to Mr. Anderson under Subpart F of the Code. Note A of section 2T1.1 of the 2001 Federal Sentencing Guidelines provides that "[i]f the offense involved filing a tax return in which gross income was underreported, the tax loss shall be treated as equal to 28% of the unreported gross income * * * unless a more accurate determination of the tax loss can be made." It has been stipulated by the parties that Gold & Appel had net income of $126,350,693.32 and $238,558,40.2.11 in tax years 1998 and 1999, respectively. If we assume that income comprises the unreported Gold & Appel income to Mr. Anderson that respondent wants us to conclude is Subpart F income based on his stipulation that the "tax loss" exceeded $100 million, we cannot ignore the flat 28-percent tax rate that can be applied under the sentencing guidelines.[3] It is plausible that Mr. Anderson's stipulation of "tax loss" was based on this method of calculation, particularly since Mr. Anderson's attorney alluded to applying the 28-percent tax rate únder the guidelines during the sentencing hearing.

Under the rules of summary judgment, we must construe the facts most favorable to Mr. Anderson (the non-moving party) in deciding respondent's motion. Rule 121. In doing so, we are not convinced on the record before us that the only way the "tax loss" for sentencing purposes could exceed $100 million would be for Gold & Appel's income to be taxable to Mr.

Anderson under Subpart F of the Code. As a result, we must conduct a trial to determine the appropriate character of Mr. Anderson's unreported income from Gold & Appel in tax years 1998 and 1999.

In view of the foregoing, it is

ORDERED that petitioner's motion for summary judgment, filed March 8, 2010, is denied. It.is further

ORDERED that respondent's motion for partial summary judgment, filed May 28, 2010, is granted in part and denied in part. It is granted to the extent that petitioner is collaterally estopped from disputing that the income of Gold & Appel for tax years 1998 and 1999 represents taxable income to him. Respondent's motion is denied in that petitioner is not collaterally estopped from disputing that the income of Gold & Appel for tax years 1998 and 1999 is taxable to him under Subpart F of the Code. Consequently, we will later schedule a trial in this matter to address the remaining issues, i.e.:

(i) The character of Gold & Appel's income attributable to petitioner in tax years 1998 and 1999;
(ii) Whether petitioner's unreported income from Esprit Telecom of $400,629 in tax year 1999 is subject to the fraud penalty under section 6663; and
(iii) Whether petitioner's unreported interest income from Barclay' s Bank in the amounts of $24, 760 in tax year 1998 and $16,822 in tax year 1999 is subject to the fraud penalty under section 6663.

(Signed) David Gustafson

Judge
DATED: October 25, 2010
Washington, D.C.

Footnote

1Counsel characterized Gold & Appel as a controlled foreign corporation (as defined by section 957) ("CFC"), and thereby concluded that the income of Gold & Appel was attributable to petitioner under Subpart F of the Code. While we understand this to be respondent's position, we do not find this part of the proffer to be preclusive here since the determination of whether Gold & Appel was a CFC or whether the income was taxable to Mr. Anderson under Subpart F or some other part of the Code was not essential to the Court's finding that Mr. Anderson had substantially understated his income in tax years 1998 and 1999.

2This determination is separate and apart from our prior determination that Mr. Anderson's stipulation of a "tax loss" in excess of $100 million was sufficient to find that the District Court "actually and necessary" determined Mr. Anderson had unreported income from Gold & Appel.

3The tax loss that would exist on $126,350,693.32 and $238,5'58,402.11 of unreported income at a tax rate of 28-percent would, in the aggregate, be $102,174,546. This clearly exceeds the $100 million "tax loss" stipulated to by Mr. Anderson.

UNITED STATES TAX COURT
WASHINGTON, DC 20217
Docket No. 20364-07.

WALTER C. ANDERSON, Petitioner,
V.
COMMISSIONER OF INTERNAL REVENUE,
Respondent,

ORDER

Pursuant to the opinion of the Court filed February 24, 2009, it is

ORDERED that respondent's motion for partial summary judgment, filed August 26, 2008, is granted with respect to tax years 1998 and 1999 and denied with respect to tax years 1995, 1996, and 1997 . It is further

ORDERED that petitioner's motion for summary judgment, filed March 19, 2008, is denied .

(Signed) David Gustafson
Judge

DATED: Washington, D .C .
February 26, 2009

T.C. Memo. 2009-44
UNITED STATES TAX COURT
WALTER C. ANDERSON, Petitioner v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent

Docket No. 20364-07. Filed February 24, 2009.

P filed timely tax returns for 1995 through 1999. He was later charged with tax evasion under I.R.C. sec. 7201 for all five years. By agreement P pleaded guilty as to 1998 and 1999, and the charges for 1995 to 1997 were dismissed. By a notice of deficiency issued in July 2007, R determined deficiencies and fraud penalties for all five years. R sought from the District Court the information previously submitted to the grand jury, by a motion in which R argued that the information was "needed" to sustain the deficiency determinations. P filed a petition in this Court in which he asserted that the facts in all five years were the same, and that he was innocent of fraud in all five years. P moved for summary judgment, arguing that the deficiency determinations were invalid since R lacked the information "needed" to sustain them. R crossmoved for partial summary judgment on the issue of P's fraud for all five years.

Held: R's notice of deficiency was valid, notwithstanding R's lack of the grand jury information.

Held, further, P's conviction for tax evasion under I.R.C. sec. 7201 for 1998 and 1999 collaterally estops him from denying civil fraud for those years for

purposes of the statute of limitations, see I.R.C. sec. 6501(c)(1), and the fraud penalty, see I.R.C. sec. 6663(a).

Held, further, notwithstanding P's assertion that the facts for all five years at issue were the same, P's conviction of tax evasion for 1998 and 1999 does not collaterally estop him from denying civil fraud for the prior years 1995 through 1997.

Walter C. Anderson, pro se.

John C. McDougal, for respondent.

MEMORANDUM OPINION

GUSTAFSON, Judge: Petitioner Walter C. Anderson was charged with tax crimes for each of the five years 1995 through 1999. He pleaded guilty and was convicted for only the last two of the years, 1998 and 1999, and by agreement the charges as to the prior three years were dismissed. The Internal Revenue Service (IRS), issued to Mr. Anderson a statutory notice of deficiency pursuant to section 6212,fn1 showing the IRS's determination of the following deficiencies in income taxfn2 and accompanying fraud penalties under section 6663 for all five years:

Tax Year	Deficiency	Sec. 6663 Penalty
1995	$ 386,344	$ 289,758.00
1996	2,012,045	1,509,033.75
1997	36,490,421	27,367,815.75
1998	50,022,418	37,516,813.50

1999	94,868,390	70,993,002.00

Mr. Anderson petitioned this Court, pursuant to section 6213(a), to redetermine those deficiencies. The case is now before the Court on petitioner's and respondent's cross-motions for summary judgment pursuant to Rule 121. The issues for decision are (1) whether Mr. Anderson is entitled to summary judgment on all disputed issues because (he contends) sufficient evidence is lacking to support respondent's notice of deficiency and pleadings; and (2) whether instead respondent is entitled to partial summary judgmentfn3 because Mr. Anderson's plea to criminal tax evasion under section 7201 with respect to tax years 1998 and 1999 collaterally estops him from contesting that he fraudulently underpaid his income taxes in all five of the tax years at issue. Mr. Anderson's motion will be denied, and respondent's motion will be granted as to 1998 and 1999, but not as to 1995 through 1997.

Background

The following facts are not in dispute and are derived from the pleadings and the parties' motion papers, the supporting exhibits attached thereto, and the opinions in United States v. Anderson, 491 F. Supp. 2d 1 (D.D.C. 2007), affd. in part and revd. in part 545 F.3d 1072 (D.C. Cir. 2008).

Mr. Anderson's business activity During the tax years at issue, Mr. Anderson was a telecommunications entrepreneur and venture capitalist who was actively involved in the operation of several international

companies. Two of these companies are central to the dispute between the IRS and Mr. Anderson: (i) Gold & Appel, which was formed in 1992 as a British Virgin Islands corporation by Icomnet S.A. (Icomnet), another British Virgin Islands corporation that was subject to Mr. Anderson's control; and (ii) Iceberg Transport, S.A. (Iceberg Transport), which was formed in 1993 as a Panama corporation by Mr. Anderson under the alias of "Mark Roth". In 1993 Icomnet held 100 percent of the outstanding shares of Gold & Appel, and Mr. Anderson held 100 percent of the outstanding shares of Iceberg Transport. Later in 1993, Mr. Anderson caused Icomnet to transfer all of its shares of Gold & Appel to Iceberg Transport.fn4 Afterwards, from 1995 through 1999, Gold & Appel generated hundreds of millions of dollars in income.

Aside from the above, many facts with respect to the ownership of Gold & Appel and Iceberg Transport are disputed. Mr. Anderson alleges that he formed the Smaller World Trust in 1993 as a British Virgin Islands trust--the assets of which were subject to his management control--and simultaneously transferred all of his shares of Iceberg Transport, then the parent corporation of Gold & Appel, to the Smaller World Trust. Though Mr. Anderson acknowledges that he continued to control Gold & Appel for purposes of Federal securities law via his management control of the Smaller World Trust, he maintains that he ceased to be the true beneficial owner of Gold & Appel for Federal tax purposes after the alleged transfer to the Smaller World Trust. Instead, Mr. Anderson alleges that the Smaller World Trust was the true beneficial

owner of Gold & Appel for the tax years at issue. Mr. Anderson further alleges that the Smaller World Trust (i) was a valid irrevocable trust, the ownership or income of which is not attributable to him pursuant to sections 671 to 679, and (ii) was a valid charitable trust, which had no income tax liability.

In contrast, respondent (i) disputes the existence of the Smaller World Trust,fn5 (ii) alleges that Mr. Anderson was the true beneficial owner of Gold & Appel because he retained an option to purchase 99 percent of Gold & Appel's equity for nominal consideration; and (iii) alleges that Mr. Anderson was the true beneficial owner of Iceberg Transport because he retained 100 percent of the outstanding shares of Iceberg Transport in the form of so-called bearer shares (i.e., an unregistered form of stock certificates that do not identify the owner but confer ownership on whoever possesses them) that were sent to a private mailbox of Mr. Anderson's in the Netherlands. Respondent further alleges that Mr. Anderson's creation of Gold & Appel and Iceberg Transport in the British Virgin Islands and Panama, which are tax haven jurisdictions with financial secrecy laws and practices, and his use of bearer shares, aliases, and private mailboxes, among other things, were fraudulent acts that were performed with the intent to evade tax.

The examination and indictment

For each of the five years 1995 through 1999, Mr. Anderson filed income tax returns. He filed the return

for each year in the succeeding year, and he filed the latest of them (for 1999) in October 2000.fn6

The IRS conducted an investigation of Mr. Anderson, Gold & Appel, and related entities. The IRS's investigation culminated in Mr. Anderson's being indicted in February 2005 for one count of corruptly obstructing, impeding, and impairing the due administration of the internal revenue laws under section 7212(a), five counts of criminal tax evasion with respect to tax years 1995 through 1999 under section 7201, and six counts of fraud in the first degree in violation of D.C. Code sec. 22-3221(a) (2001). The record before us does not include a complete copy of the indictmentfn7 but includes only the text of the following two counts in a superseding indictment filed in September 2005 (as to which two counts, as we explain below, Mr. Anderson later pleaded guilty):

COUNT FIVE

Tax Evasion 1998

42. Paragraphs 1 through 18, 21 through 31, 33, 35, and 36 of this Indictment are hereby realleged and incorporated as if fully set forth herein.fn[8]

43. From on or about January 1, 1998, through on or about September 30, 1999, in the District of Columbia and elsewhere, ANDERSON did willfully attempt to evade and defeat a large part of the income tax due and owing by him to the United States for the tax year 1998 by various means, including but not limited to the following:

a) filing and causing to be filed a false and fraudulent 1998 United States Individual Income Tax Return, wherein he falsely stated that his total income was $67,939 and that the total tax due and owing thereon was $494, whereas, as he then and there well knew and believed, his total income was substantially greater than what he reported and a substantial additional tax was due and owing to the United States. Specifically, he failed to report the following additional items of income in the following approximate amounts:

(i) $126,303,951 Subpart F investment-type income from G&A [Gold & Appel]; and
(ii) $24,760 interest income from Barclays Bank.

b) failing to notify the IRS, as required by law, on a Schedule B of the 1998 United States Individual Income Tax Return of his signature authority and control of the G&A, ANDERSON 1 and ANDERSON 2 accounts at Barclays Bank;

c) failing to file the required Form TD-F, The Report of Foreign Bank and Financial Account, with the Department of the Treasury to report his control of G&A, ANDERSON 1 and ANDERSON 2 accounts at Barclays Bank;

d) operating his business affairs in a manner designed to conceal his ownership and control of G&A and Iceberg during tax year 1998, through various means, including but not limited to the following:

(i) directing nominees to create and sign documents of G&A and Iceberg;

(ii) engaging corporate service centers to receive mail addressed to G&A and Iceberg; and
(iii)making or causing to be made false and fraudulent statements regarding the ownership and control of G&A and Iceberg;

In violation of Title 26, United States Code, Section 7201.

COUNT SIX

Tax Evasion 1999

44. Paragraphs 1 through 18, 21 through 31, and 33 through 36 of this Indictment are hereby realleged and incorporated as if fully set forth herein.

45. From on or about January 1, 1999, through on or about October 19, 2000, in the District of Columbia and elsewhere, ANDERSON did willfully attempt to evade and defeat a large part of the income tax due and owing by him to the United States for the tax year 1999 by various means, including but not limited to the following:

a) filing and causing to be filed a false and fraudulent 1999 United States Individual Income Tax Return, wherein he falsely stated that his total income was $3,324,179, and that the total tax due and owing thereon was $458,370, whereas, as he then well knew and believed, his total income was substantially greater than what he reported and a substantial additional tax was due and owing to the United States.

Specifically, he failed to report the following additional items of income in the following approximate amounts:

(i) $238,561,316 Subpart F investment-type income from G&A;
(ii) $400,629 income from Esprit;
(iii)$16,822 interest income from Barclays Bank; and
(iv) $133,348 capital gain income;

b) failing to notify the IRS, as required by law, on a Schedule B of the 1999 United States Individual Income Tax Return of his signature authority and control of the G&A, ANDERSON 1 and ANDERSON 2 accounts at Barclays Bank; c) failing to file the required Form TD-F, The Report of Foreign Bank and Financial Account, with the Department of the Treasury to report his control of G&A, ANDERSON 1 and ANDERSON 2 accounts at Barclays Bank;

d) operating his business affairs in a manner designed to conceal his ownership and control of G&A and Iceberg during tax year 1999, through various means, including but not limited to the following:

(i) directing nominees to create and sign documents of G&A and Iceberg;
(ii) engaging corporate service centers to receive mail addressed to G&A and Iceberg; and
(iii)making or causing to be made false and fraudulent statements regarding the ownership and control of G&A and Iceberg;

In violation of Title 26, United States Code, Section 7201.

Mr. Anderson's confinement

Mr. Anderson was incarcerated for the entire pendency of his criminal case. He was originally confined in a "more modern facility" (not specified in our record). However, he was transferred to the District of Columbia jail after the first facility determined that he was unmanageable because he had violated facility rules. Among other violations, he possessed a cell phone. Mr. Anderson alleges--and both respondent and the trial judge in his criminal case agree--that the conditions in the D.C. jail are very poor. At his later sentencing hearing, the judge called those conditions "scandalous".

Mr. Anderson's September 2006 guilty plea and conviction

Mr. Anderson's prosecution ended with a conviction, based on his guilty plea, entered on September 8, 2006, to the two counts (quoted above) alleging criminal tax evasion under section 7201 with respect to tax years 1998 and 1999. Mr. Anderson also pleaded guilty to one count of fraud in the first degree under D.C. Code sec. 22-3221(a), and the remaining charges in the superseding indictment were dismissed. Under the guilty plea, Mr. Anderson and the Government agreed (i) on a maximum term of imprisonment of ten years; (ii) that the District Court is obligated to calculate and consider, but is not bound by, the 2001 United States Sentencing Guidelines (2001 Guidelines); (iii) that the Federal tax loss exceeded $100 million for the purpose of calculating a sentence under the 2001 Guidelines; and (iv) that the court may order restitution pursuant

to 18 U.S.C. sec. 3572 and D.C. Code sec. 16-711 (2001). United States v. Anderson, 545 F.3d 1072 (D.C. Cir. 2008).

In the course of taking Mr. Anderson's guilty plea, the District Court judge asked him a series of questions to ensure that Mr. Anderson understood the effect of his plea. The exchange included the following:

> THE COURT: Do you understand that in order for me to accept the plea, you're going to have toacknowledge your guilt and acknowledge that you've engaged in certain conduct that makes up the elements of each of the offenses to which you're pleading guilty?
>
> THE DEFENDANT: Yes.
>
> The judge summarized the three counts to which Mr. Anderson was pleading guilty (including Counts Five and Six), and then asked—
>
> THE COURT: * * * Do you understand those three specific charges, Mr. Anderson?
>
> THE DEFENDANT: I do.
>
> THE COURT: And you've discussed them and the plea to each of those charges in-depth with your lawyers?
>
> THE DEFENDANT: Yes. However, we don't agree with all of the allegations of the

government, but I am agreeing to plead guilty to those charges. [Emphasis added.]

* * * * * * *

THE COURT: I need to ask you, has anyone threatened you or anyone close to you, or forced you in any way to decide to enter this plea of guilty?

(Ms. Peterson [defense counsel] conferred with the defendant)

THE DEFENDANT: No, no one has.

The prosecutor read or paraphrased a substantial portion of the indictment (covering ten pages of the hearing transcript), and asserted facts about Mr. Anderson's dealings not just in 1998 and 1999 but beginning as early as 1992. The prosecutor's recitation included the following assertion:

> Between 1995 and 1999 Mr. Anderson used the assets of Gold and Appel and Iceberg, which included the profits realized from these three telecommunication corporations, to invest in other business ventures.
>
> Mr. Anderson successfully generated more than $450 million in earnings for Gold and Appel and Iceberg during this period. Mr. Anderson did not report these earnings as required by law on his United States and District of Columbia income tax returns for 1995 through 1999.

> As a result, Mr. Anderson evaded more than $200 million in Federal and District of Columbia income tax returns.

The prosecutor then read particular assertions as to 1998 and 1999. Defense counsel then made a statement that included the
following:

MS. PETERSON: Your Honor, Mr. Anderson does not concede that every fact contained within the indictment is accurate * * *. However, **he admits that over the years he retained control over the assets, and was required under U.S. law to pay taxes on the gains** from those assets.

[Emphasis added.]

Counsel made further specific admissions as to 1998 and 1999 and then stated:

> Mr. Anderson further concedes that for purposes of computing his sentencing guideline range, the government could prove that the total tax loss was in excess of $100 million.

The Court then addressed Mr. Anderson directly:

> THE COURT: All right. Mr. Anderson, you've heard what the government said, and you've heard what Ms. Peterson said about what you acknowledge and admit and concede. Do you agree with everything that Ms. Peterson said?

THE DEFENDANT: Yes, I do agree with Ms. Peterson's statement.

* * * * * * *

THE COURT: * * * Are you pleading guilty to these three offenses voluntarily and because you are guilty of each of them?

THE DEFENDANT: Yes.

* * * * * * *

THE COURT: * * * I find that your plea of guilty is a knowing and voluntary plea supported by an independent basis in fact containing each of the essential elements of the three offenses * * *. I will accept your plea of guilty to these three counts, and enter a judgment of guilty on those pleas.

Defense counsel then asked that Mr. Anderson be released pending sentencing. In the course of her argument--again, made in this same hearing, immediately after the court had accepted Mr. Anderson's guilty plea--his counsel asserted that the conditions of his confinement had been "deplorable", that the indoor temperature of the un-air-conditioned facility approached 120 degrees, and that he had "served a number of months in solitary confinement", had been "denied access to his attorneys a great deal of the time", and had been "denied medical care". The prosecutor opposed the request for release pending sentencing, and her comments included the following:

As Your Honor remembers, Mr. Anderson has not been a model prisoner. Some of the reasons why his experiences have been the way they have been was his own making. Mr. Anderson was placed in a different facility, not the D.C. Jail, by request of the Court, and he chose to violate not only their rules, he chose to violate the law. As the Court recognized and the Court heard the fact that contraband had been brought into CTF for Mr. Anderson, which included a cell phone that had Internet service, long distance, overseas capacity, the Court said I've had people in front of me in this courtroom who were found guilty of offenses like that, that was a crime. So I understand that he has not had an easy time in the D.C. Jail, but that is because of what he did.

The District Court denied the request for release and scheduled the sentencing hearing. At the September 2006 hearing at which Mr. Anderson pleaded guilty, neither Mr. Anderson, nor his counsel, nor the judge made any suggestion that the conditions of his confinement affected the voluntary nature of his plea.

The March 2007 sentencing hearing

Mr. Anderson's sentencing hearing took place over several days in March 2007. At that hearing,

The government presented evidence by three expert witnesses concerning the amount of income received by Mr. Anderson during 1998 (Count 5) and 1999 (Count 6), and the

> calculation of taxes not paid to the United States and the District of Columbia governments. The government's experts testified that in 1998 and 1999 Mr. Anderson failed to report $365,484,654 in income on his federal and D.C. tax returns. According to those experts, the total amount of unpaid federal taxes for 1998 and 1999 was $140,587,613. The government's experts further testified that Mr. Anderson defrauded the D.C. government of taxes during 1999 (Count 11) in the amount of $22,809,032. * * *

United States v. Anderson, 491 F. Supp. 2d at 2-3. At the hearing the Government put into evidence a 270-page summary of the computation of corrected taxable income.fn9

It appears that, at the sentencing hearing, Mr. Anderson argued that the length of his sentence should take into account the poor conditions of the D.C. jail in which he had been confined. On the subject of his having been moved to the D.C. jail, the judge observed:

> The truth is that Judge Kay and I evaluated the evidence that was presented to us and we made judgments that led to that, to his being there, and I think that it was the right judgment at the time, even though I don't like sending anybody to the DC jail. His own conduct led to part of his trauma there and part of his being in isolation, but not all of it. So I factor that into my sentence * * *.

Sentence was orally announced on March 27, 2007, and a written judgment reflecting the oral announcement was filed June 15, 2007. Mr. Anderson was sentenced to nine years' imprisonment for criminal tax evasion with respect to tax years 1998 and 1999. The District Court also imposed a concurrent sentence of four years' imprisonment on the fraud count.

The parties' appeals

Both parties appealed aspects of the sentence, but Mr. Anderson did not appeal the conviction itself.fn10 Mr. Anderson has taken no action to withdraw his guilty plea or to challenge the conviction based on the plea. Instead, Mr. Anderson has stated only that he intends, at some point in the future, to challenge his sentence by filing a so-called 2255 motion (i.e., a motion that is made pursuant to 28 U.S.C. sec. 2255 (2006) to vacate, set aside, or correct a sentence).

The IRS's notice of deficiency

On July 17, 2007, the IRS issued a notice of deficiency to Mr. Anderson for the years 1995 through 1999, more than six and a half years after he had filed the latest of his returns for those years. The adjustments in the notice of deficiency were derived from the amounts given in the superseding indictment in the criminal case.11 The computations in the notice of deficiency also reflect additional adjustments for itemized or standard deductions and for personal exemptions for each year.

At the time the IRS issued the notice of deficiency, the agency had access to the superseding indictment, the admission in Mr. Anderson's plea agreement that the tax loss in the criminal matter exceeded $100 million, and the 270-page summary of the computation of corrected taxable income that had been introduced in evidence at the sentencing hearing in Mr. Anderson's criminal case. However, the IRS did not have access to the supporting evidence that was presented to the grand jury, because such evidence is part of the record of the criminal case that is sealed pursuant to rule 6 of the Federal Rules of Criminal Procedure.

The parties' pleadings in this case

Mr. Anderson filed his petition in this case on September 7, 2007, at which time he resided in New Jersey. The petition alleges:

Due to the conditions in which he was held and threats to his witnesses,fn[12] petitioner was compelled to accept a plea agreement. * * * Petitioner and his legal counsel, on the record a[t] the plea hearing, made clear that petitioner did **not agree** with **most of the claims and allegations** made against him. He absolutely did not agree that he ever received any income or **had any onwership [sic] interest** fn[13] in Gold & Appel Transfer S.A. [Emphasis added.]

The petition denies that any fraud was committed, and it thereby implicitly asserts both that Mr. Anderson does not owe fraud penalties and that the assessment of any tax deficiency is barred by the statute of limitations.fn14

Respondent prepared the answer (filed November 7, 2007) on the basis of facts the IRS had developed prior to the criminal referral and documents available in the public record of the criminal case, including the superseding indictment, the summary computation of corrected taxable income, motion papers, and transcripts of various hearings.

In his reply filed November 27, 2007, Mr. Anderson stated that he is innocent of tax fraud with respect to tax years 1998 and 1999 because he is innocent of tax fraud with respect to the three prior tax years 1995 through 1997 (for which years the charges against him had been dismissed), and the facts and issues relating to tax fraud in 1998 and 1999 are "exactly the same" as in 1995 through 1997:

> [Petitioner d]enies that the[re] was any fraud by petitioner in 1998 and 1999 and denies that the doctrine of collateral estoppel (estoppel by judgement) applies in this matter.
>
> * * * * * * *
>
> The issues relating to tax fraud in 1998 and 1999 are exactly the same as the issues in 1995, 1996 and 1997. The exact same fact [sic] and circumstances are inextricably linked for all the years 1995 to 1999. It would be an injustice to not resolve the entire issue of fraud due to a technicality.
>
> * * * * * * *
>
> Petitioner however knows for certain without reservation that he did not commit a tax fraud. He had neither the motive, intent or history or

> dishonest acts needed to commit such a fruad [sic]. Petitioner ask[s] the court to review the entire 1995 to 1999 time period in relation to the issues raised in this matter.

The Government's Rule 6(e) motion After respondent filed the answer here, Jeffrey A. Taylor, the United States Attorney for the District of Columbia, filed with the D.C. District Court, at the request of the IRS, a motion for an order under rule 6(e) of the Federal Rules of Criminal Procedure authorizing disclosure of the grand jury evidence from Mr. Anderson's criminal case to the IRS (the Rule 6(e) motion).

In his memorandum in support of the motion Mr. Taylor stated:

> [U]nless the grand jury materials are disclosed to the Internal Revenue Service, the result may clearly be an injustice. Walter Anderson may not pay the full tax due because the Internal Revenue Service cannot fully and adequately defend against the assertions he has made in the United States Tax Court without the grand jury materials.

In support of the Rule 6(e) motion, Mr. Taylor submitted an affidavit of respondent's counsel (the Rule 6(e) affidavit) explaining as follows15 the need for the evidence developed through the grand jury investigation:

> [The] materials from the grand jury investigation of Walter Anderson contain the evidence needed to explain and support the Internal Revenue Service determinations of additional tax, as well as to prove the fraud necessary to sustain the civil fraud penalties and to hold open the statute of limitations on assessment of the tax for 1995 through 1997.
> * * * * * * *
>
> In the absence of the disclosure requested in this motion, it is likely that injustice will occur in the course of the resolution of the issues in the Tax Court cases. The ability of the Internal Revenue Service to obtain documents and testimony from third party witnesses through pre-trial discovery is limited under Tax Court Rules, making it difficult to replicate the work of the grand jury prior to a trial of the Tax Court case. **If the Internal Revenue Service is unable to develop the evidence needed to prove Mr. Anderson's fraud to the Tax Court for 1995 through 1997 (the years not included in the guilty plea and criminal judgment) it will not only be unable to carry its burden of proof on the fraud penalties, but it may be unable to overcome the defense of the statute of limitations.**

[Emphasis added.]

The District Court granted the Rule 6(e) motion on April 16, 2008. However, the District Court conditioned its allowance of the disclosure on the IRS's

providing an electronic copy of the grand jury evidence to Mr. Anderson. Since Mr. Anderson has no access to a computer at the Federal correctional institution where he is serving his sentence, and the IRS has yet to find an alternative means of sharing the information with him, the IRS still has no access to the grand jury evidence.

Discussion

I. Allegations of the Parties

Mr. Anderson moves for summary judgment on the grounds that the IRS's statements in support of the Rule 6(e) motion--representing that the grand jury evidence is "needed" for the IRS to prove its case, and that without such evidence respondent may be unable to carry the burden of proof or overcome the defense of the statute of limitations--constitute an admission that the IRS lacked sufficient evidence on which to base its notice of deficiency and to defend this case in the Tax Court.

Respondent cross-moves for partial summary judgment on the grounds that Mr. Anderson is collaterally estopped from contesting that he fraudulently underpaid his Federal income taxes in 1998 and 1999, because his guilty plea for criminal tax evasion under section 7201 as to 1998 and 1999 is "conclusive and binding" as to those tax years. Respondent further contends that collateral estoppel also applies to tax years 1995 through 1997, because, in his reply, Mr. Anderson stated that the issues relating to tax fraud in 1998 and 1999 are "exactly the same" as

the issues in 1995 through 1997. In essence, respondent argues that if Mr. Anderson concedes that the issues are "exactly the same" for all five tax years at issue, and Mr. Anderson is guilty of tax fraud for two of the five tax years, then he must be guilty of tax fraud for all five of the tax years at issue.

II. Standard for Summary Judgment

Summary judgment is intended to expedite litigation and avoid unnecessary and expensive trials. Fla. Peach Corp. v. Commissioner, 90 T.C. 678, 681 (1988). The Court may grant full or partial summary judgment where there is no genuine issue of any material fact and a decision may be rendered as a matter of law. Rule 121(b); Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Sundstrand Corp. v. Commissioner, 98 T.C. 518, 520 (1992), affd. 17 F.3d 965 (7th Cir. 1994). The moving party bears the burden of proving that no genuine issue of material fact exists, and the Court will view any factual material and inferences in the light most favorable to the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986); Sundstrand Corp. v. Commissioner, supra at 520; Dahlstrom v. Commissioner, 85 T.C. 812, 821 (1985). If there exists any reasonable doubt as to the facts at issue, the motion must be denied. Sundstrand Corp. v. Commissioner, supra at 520 (citing Espinoza v. Commissioner, 78 T.C. 412, 416 (1982) ("The opposing party is to be afforded the benefit of all reasonable doubt, and any inference to be drawn from the underlying facts contained in the record must be viewed in a light most favorable to the party opposing the motion for summary judgment")).

The issue of whether Mr. Anderson fraudulently underpaid his Federal income taxes in 1998 and 1999 can be resolved on the basis of the undisputed facts. However, the issue of whether Mr. Anderson fraudulently underpaid his Federal income taxes in the three previous tax years, and the issue of the amounts of the deficiencies (and the fraud penalty thereon) Mr. Anderson owes for all five of the tax years at issue, remain for trial.

III. Mr. Anderson's Motion for Summary Judgment

In his motion for summary judgment, Mr. Anderson asks this Court to grant him summary judgment on all disputed issues because (i) "no valid 'Determination' was made" with respect to him under section 6212, and thus, the notice of deficiency sent to him was invalid; and (ii) the claims in the notice of deficiency and in respondent's pleadings "can not be adequately supported" by the available evidence. This is the case, he argues, because the IRS admitted that it lacks sufficient evidence on which to base the notice of deficiency and to defend this case. It made these admissions (he contends) in the Rule 6(e) motion and the Rule 6(e) affidavit, which both request the District Court to release the grand jury evidence from Mr. Anderson's criminal case on the grounds that such evidence is likely to be "needed" for respondent to meet the burden of proof in this case. From this purported admission, Mr. Anderson argues that he has rebutted the presumption of correctness that is normally accorded to a notice of deficiency and has shifted the burden of proof to respondent--a burden that he argues respondent admits he cannot meet

because of the current lack of access to the grand jury evidence.

Thus, Mr. Anderson appears to make two distinct arguments. First, he appears to challenge whether the notice of deficiency reflects a valid determination under section 6212. Second, he argues, in effect, that he has supported, with evidence sufficient under Rule 121, his position that he committed no fraud, and because respondent lacks the "needed" evidence from the grand jury record in his criminal case, respondent cannot raise any genuine issue of material fact, and we must grant judgment in Mr. Anderson's favor as a matter of law.

A. The notice of deficiency reflects a valid determination.

Mr. Anderson argues that the IRS made no valid determination under section 6212 because the IRS lacked sufficient evidence on which to base its notice of deficiency.fn16 Section 6212(a) requires the IRS to determine that a deficiency exists before issuing a notice of deficiency. If a purported notice of deficiency reveals on its face that no determination of a tax deficiency has been made with respect to the taxpayer who is named in the notice, it does not meet the requirements of section 6212(a), and this Court has no jurisdiction to hear a case arising therefrom. Scar v. Commissioner, 814 F.2d 1363, 1370 (9th Cir. 1987), revg. 81 T.C. 855 (1983).

However, under Campbell v. Commissioner, 90 T.C. 110, 113 (1988), if "the notice of deficiency does not

reveal on its face that the Commissioner failed to make a determination, a presumption arises that there was a deficiency determination." This presumption is made "conclusive" upon the presentation of further evidence that ties the calculations in the notice of deficiency to the taxpayer who is named in the notice. See id. For example, in Campbell we held that the existence of other supporting schedules in the IRS's case file that clearly tied the notice of deficiency to items reported on the correct taxpayer's tax return made the presumption of a valid determination conclusive. Id.

The purpose of a notice of deficiency is to inform a taxpayer that a deficiency has been determined, specify the year for which the deficiency is determined, and state the amount of the deficiency in unequivocal terms, all in a communication sent to the right taxpayer at his last known address.fn17 In rare cases, such as Scar v. Commissioner, supra, where the calculation of the deficiency in the notice of deficiency has no connection whatsoever to the taxpayer who is named in the notice, the notice is invalid on its face.

In the instant case, the notice of deficiency is facially valid and the presumption of correctness applies, because the notice states a deficiency and the tax years for which the deficiency is determined, correctly refers to Mr. Anderson, and was sent to his last known address. In fact, the notice of deficiency even explains the IRS's calculation of the deficiency by reference to various sections of the Internal Revenue Code.fn18 Moreover, this presumption is made "conclusive", because the supporting documents attached to the

notice of deficiency all directly relate to Mr. Anderson's tax returns.

Furthermore, the facts of the instant case are not analogous to the extreme facts of Scar v. Commissioner, supra, where a notice of deficiency was held to be facially invalid because the IRS made no determination with respect to the taxpayers who were named in the notice. In that case, the Commissioner acknowledged that the deficiency shown on the notice of deficiency was not based on the taxpayers' return and that the notice of deficiency referred to a tax shelter that had no connection with the taxpayers or their return. Id. at 1368. In contrast, the notice of deficiency sent to Mr. Anderson calculates a deficiency based upon Mr. Anderson's returns, his bank accounts, and the income of a company that Mr. Anderson admittedly controlled for purposes of Federal securities law. Though Mr. Anderson disputes that he owned Gold & Appel for Federal tax purposes during the tax years at issue, even he does not allege that he had no connection with Gold & Appel prior to receiving the notice of deficiency. Thus, the notice of deficiency herein is not facially invalid under the rationale of Scar v. Commissioner, supra. Rather, the notice of deficiency is valid, and we have jurisdiction to hear this case pursuant to 6213(a).

B. Respondent raised genuine issues of material fact as to Mr. Anderson's contention that there is no evidence to support respondent's position.

As noted above in part II, we grant summary judgment only if the moving party shows that no

genuine issue exists as to any material fact and that the legal issues presented by the motion should be decided in favor of the moving party as a matter of law. In his memorandum in support of his motion for summary judgment Mr. Anderson alleges that the claims in respondent's pleadings are "not supported by any evidence" and, therefore, summary judgment should be granted in his favor. To support this contention, he cites the IRS's statements in support of its Rule 6(e) motion, in which it represented to the District Court that the grand jury evidence from his criminal case is likely to be "needed" in order to prove the IRS's case in the Tax Court. Mr. Anderson argues that these statements constitute respondent's admission that there is insufficient evidence to defend this case.

It is true that when a party (here, respondent) has the burden of proof on an issue (here, fraud), the other party (here, Mr. Anderson) may move for summary judgment on the grounds that evidence is lacking. The question whether the movant must instead somehow prove a negative was answered by the Supreme Court in Celotex v. Catrett, 477 U.S. 317 (1986). Mr. Anderson does not cite Celotex, but it vindicates his apparent intuition that respondent's burden of proof on the fraud issue should affect the summary judgment dynamic:

> [T]he plain language of Rule 56(c) [equivalent to Tax Court Rule 121(b)] mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish

> the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. * * * [Id. at 322-323.]

Mr. Anderson does cite Anastasato v. Commissioner, 794 F.2d 884, 887 (3d Cir. 1986) (citation omitted), which holds that--a court must not give effect to the presumption of correctness [of a deficiency determination] in a case involving unreported income if the Commissioner cannot present "some predicate evidence connecting the taxpayer to the charged activity." * * *fn[19]

Mr. Anderson cites Anastasato as pertinent to his own situation, where (he says) respondent admittedly "needs" still-unavailable grand jury information and therefore lacks evidence to support the determination of fraud. Since (Mr. Anderson argues) respondent has no evidence to connect him with the alleged unreported income, the IRS's determination can have no presumption of correctness under Anastasato. And, if Mr. Anderson were right as to the state of the evidence, he could round out the argument by stating that because respondent has no evidence to carry the

burden of proof on the fraud issue, Mr. Anderson is entitled to prevail on summary judgment.

However, Mr. Anderson has in fact failed to show that no genuine issue exists as to any material fact. Contrary to Mr. Anderson's claims, respondent does have evidence of civil tax fraud in all five tax years at issue.fn20 Though Mr. Anderson correctly notes that the IRS has been unable to access the "needed" grand jury evidence from his criminal case, the IRS does have access to his indictments for criminal tax evasion in 1995 through 1999,fn21 his guilty plea for criminal tax evasion in 1998 and 1999,fn22 and the statements he and his counsel made on the record at his plea hearing.

Furthermore, Mr. Anderson's reliance on Anastasato is misplaced. Though Mr. Anderson correctly states the rule of Anastasato, he has failed to show that respondent lacks "some predicate evidence" connecting him with Gold & Appel and its income. Instead, Mr. Anderson admits that he controlled Gold & Appel for purposes of Federal securities law; and like the taxpayer in Anastaso, Mr. Anderson is connected with the "charged activity" of fraudulently underpaying his income taxes by sufficient "predicate evidence"--including his superseding indictment, his guilty plea, and the statements he and his counsel made at his plea hearing. Therefore, the presumption of correctness applies to the IRS's determination in the instant case.

Since respondent has presented evidence of civil tax fraud in the form of Mr. Anderson's guilty plea for

criminal tax evasion in 1998 and 1999 and his indictments for criminal tax evasion in 1995 through 1999, we hold that Mr. Anderson has failed to show that no genuine issue exists as to any material fact, and his request for summary judgment will be denied.

Even if respondent's evidence were insufficient to raise, for the years 1995 through 1997, a genuine issue of material fact as to Mr. Anderson's motion, the motion should still be denied.
Rule 121(e) provides:

> If it appears from the affidavits of a party opposing the motion that such party cannot for reasons stated present by affidavit facts essential to justify such party's opposition, then the Court may deny the motion or may order a continuance to permit affidavits to be obtained or other steps to be taken or may make such other order as is just. * * * [Emphasis added.]

Respondent's opposition includes the affidavit submitted in support of the Government's Rule 6(e) motion before the District Court, and the District Court's order granting that motion. The IRS has demonstrated (both to that 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. That is, the IRS is being deprived of the information because

Mr. Anderson is incarcerated for committing a crime. This Court could hardly let Mr. Anderson's criminally adjudicated guilt become a reason that he prevails in the civil suit (by blocking the IRS's receipt of information). Rather, even if it were true that, for 1995 through 1997, respondent were unable to submit sufficient evidence to oppose summary judgment, 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.

IV. Respondent's Motion for Partial Summary Judgment

A. To prevail in this case, respondent must prove fraud.

The issue raised is whether Mr. Anderson is liable for penalties for fraud for the tax years at issue under section 6663. Respondent bears the burden of proving civil tax fraud. See sec. 7454(a); Rule 142(b). If respondent fails to prove fraud, then the statute of limitations may prevent the IRS from assessing and collecting any of the deficiencies or penalties. See sec. 6501(a).

Mr. Anderson filed income tax returns for 1995, 1996, 1997, 1998, and 1999 on April 15, 1996, June 21, 1997, August 31, 1998, September 30, 1999, and October 19, 2000, respectively. The IRS issued a notice of deficiency with respect to tax years 1995 through 1999 to Mr. Anderson on July 17, 2007. Generally, the IRS

must assess a deficiency within three years of the date on which the tax return that relates to the deficiency was filed. Sec. 6501(a). Here, more than three years has elapsed between the filing date of Mr. Anderson's tax return for each of the five tax years at issue and the date of issuance of the notice of deficiency, which is the first step in the process of assessing a deficiency. If the general rule of section 6501(a) applies, then the IRS has failed to assess the deficiency within the period of limitations and is barred from assessing and collecting any of the deficiencies or additions to tax for the five tax years at issue. However, if the deficiency is attributable to fraud, then the IRS may assess the deficiency at any time. See sec. 6501(c)(1). Thus, the entirety of the instant case may turn on whether Mr. Anderson is liable for fraud under section 6663. Because Mr. Anderson entered a plea of guilty to the charge under section 7201 of willfully attempting to evade or defeat income tax in 1998 and 1999, but not in 1995 through 1997, we will bifurcate our treatment of the fraud issue and first deal with 1998 and 1999 and respondent's assertion of collateral estoppel as to those tax years.

B. Collateral estoppel bars Mr. Anderson's relitigation of his fraud as to the years 1998 and 1999.

1. Mr. Anderson's plea of attempting to evade or defeat tax establishes his fraud.

Respondent asserts that Mr. Anderson's guilty plea to two counts of criminal tax evasion under section 7201 with respect to tax years 1998 and 1999 should collaterally estop him from contesting that he

fraudulently underpaid his income taxes in those tax years. In Montana v. United States, 440 U.S. 147, 153-154 (1979), the Supreme Court explained the doctrine of collateral estoppel as follows:

> Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation.

The three Internal Revenue Code sections involved in this collateral estoppel question are section 7201 (defining the crime of "attempt[ing] * * * to evade or defeat any tax"), section 6501(c)(1)fn23 (permitting an assessment of tax at any time "[i]n the case of a false or fraudulent return with the intent to evade tax"), and section 6663(a) (imposing a civil penalty for underpayments "due to fraud"). Mr. Anderson was previously convicted of "attempt[ing] * * * to evade or defeat" his income tax liability for 1998 and 1999 (under section 7201), whereas the issues now before us are whether he filed "false or fraudulent return[s] with the intent to evade tax" (under section 6501(c)(1)), and whether he had tax underpayments "due to fraud" (under section 6663). Though the "evade or defeat" wording of the criminal statute does not include the "fraud" vocabulary of the two civil statutes, an evasion conviction established fraud. We have repeatedly held that "[a] taxpayer is collaterally estopped from denying civil tax fraud under section [6663] * * * when convicted for criminal tax evasion under section 7201 for the same taxable year." DiLeo v. Commissioner, 96

T.C. 858, 885 (1991), affd. 959 F.2d 16 (2d Cir. 1992).fn24

2. Mr. Anderson's arguments against collateral estoppel lack merit.

Mr. Anderson contends that we should disregard his criminal conviction and that collateral estoppel therefrom should not constrain him in the current civil litigation, because (he says) (i) he pleaded guilty under duress to escape the poor conditions of the D.C. jail, (ii) he did not allocute to any specific facts in his guilty plea to which collateral estoppel could apply, (iii) the evidence before this Court is materially different from the evidence in his criminal case, (iv) his criminal case is unresolved because he intends to file a "2255 motion" at some time in the future, and (v) some caselaw exists to support his contention that a taxpayer is not necessarily collaterally estopped from denying civil tax fraud under section 6663 in a Tax Court proceeding when convicted for criminal tax evasion under section 7201 for the same taxable year.

a. Duress

Mr. Anderson alleges that he pleaded guilty only because of the conditions under which he was confined in the D.C. jail pending trial. For that reason he contends that we should disregard his guilty plea to the counts under section 7201. This argument cannot avail.

It is true that a conviction can be set aside upon a showing that the defendant's plea was coerced or

otherwise improper, but that relief generally must be requested either in a direct appeal from the court that entered the conviction or in a habeas proceeding.fn25 The facts about the D.C. jail that Mr. Anderson alleges in order to undermine the voluntary character of his plea were explicitly on the record at his plea hearing in the D.C. District Court. Those allegations were heard by the District Court judge who carefully examined Mr. Anderson to assure that the plea was knowing and voluntary and then accepted his plea.

However, we need not attempt to anticipate what the District Court might do if it were asked to set aside the plea, because Mr. Anderson has taken no action in the D.C. District Court to withdraw his guilty plea or to challenge the conviction based on the plea (perhaps because he sees that such a request would be futile).26 Mr. Anderson's attempted collateral attack in the Tax Court on the validity of his previous conviction in the District Court is improper. An issue resolved in favor of the United States in a criminal prosecution may not be contested by the same defendant in a civil suit. Tomlinson v. Lefkowitz, 334 F.2d 262, 264 (5th Cir. 1964) (citing Local 167, Intl. Bhd. of Teamsters v. United States, 291 U.S. 293 (1934), and Emich Motors Corp. v. Gen. Motors Corp., 340 U.S. 558, 568-569 (1951)); Ochs v. Commissioner, T.C. Memo. 1986-595, 52 TCM (CCH) 1218, 1220 ("A civil proceeding is an inappropriate vehicle for a collateral attack on a previous criminal proceeding"). Thus, Mr. Anderson's conviction for violating section 7201 is a final judgment from which collateral estoppel lies.

b. Allocution to Specific Facts

Mr. Anderson alleges that he did not allocute or admit to any specific facts in his guilty plea to which collateral estoppel could apply. He bases this argument, in large part, on a statement that he made at his plea hearing:

> THE DEFENDANT: Yes. However, we don't agree with all of the allegations of the government, but I am agreeing to plead guilty to those charges. [Emphasis added.]

If a defendant pleads guilty but denies particular allegations in the indictment, then it is possible that collateral estoppel will not bind the defendant to those denied allegations,fn27 but Mr. Anderson failed to specifically deny any particular fact, allegation, or issue in the indictment or plea agreement at his plea hearing or otherwise--he merely stated that he did not agree with "all of the allegations of the government".

Furthermore, Mr. Anderson did allocute to specific facts at his plea hearing. His defense counsel stated--and Mr. Anderson agreed--that "over the years" he retained control over the assets of Gold & Appel and was required to pay taxes on the gains from those assets by Federal law. Mr. Anderson also agreed that for purposes of computing his sentence, the Government could prove that the total tax loss was in excess of $100 million.fn28 Finally, when the District Court judge asked Mr. Anderson whether he was "pleading guilty to [tax evasion] voluntarily and because [he is] guilty", Mr. Anderson responded "Yes."

Morever, a "plea of guilty * * * is a conclusive judicial admission of all of the essential elements of the offense which the indictment charges." Arctic Ice Cream Co. v. Commissioner, 43 T.C. 68, 75 (1964). Therefore, in addition to his allocutions, Mr. Anderson admitted and is estopped from contesting the existence of the essential elements of criminal tax evasion with respect to tax years 1998 and 1999, which are "identical" to the elements of civil tax fraud. See Uscinski v. Commissioner, T.C. Memo. 2006-200.

c. Change in Evidence

Mr. Anderson alleges that "three significant and material evidentiary changes have occurred [since his criminal case] which completely change the complexion of the issues that the Tax Court will now consider." For that reason he contends that the facts before this Court are "so dissimilar" from the facts before the District Court in his criminal case that collateral estoppel should not apply. This argument cannot avail.

The three items that Mr. Anderson cites are (i) a report prepared at his request by Eisner LLP, an accounting and advisory firm, which analyzes Mr. Anderson's relationship to Gold & Appel and concludes, among other things, that he intended to legally avoid (rather than to criminally evade) Federal income taxes on the company's income; (ii) a Washington Post article29 that asserts the Government "has doubts about whether Anderson has any sizable assets hidden abroad" on the basis of two anonymous "law enforcement sources familiar with the case", which Mr. Anderson construes to be an

admission on the part of the Government that he is not hiding assets overseas; and (iii) respondent's admission, in the answer, that Mr. Anderson formed the Smaller World Trust in 1993.

As we noted (supra note 5), the Court permitted respondent to amend the answer and withdraw the admission that Mr. Anderson formed the Smaller World Trust in 1993, and therefore Mr. Anderson cannot rely on that admission. Neither the report by Eisner LLP nor the Washington Post article affects the application of collateral estoppel in this case. Quite apart from any hearsay or other evidentiary issues that would preclude reliance on those materials, the fact that Mr. Anderson has pleaded guilty to criminal tax evasion with respect to tax years 1998 and 1999 remains. A "plea of guilty * * * is a conclusive judicial admission of all of the essential elements of the offense which the indictment charges." Arctic Ice Cream Co. v. Commissioner, supra at 75. Therefore, even if we were to find the report by Eisner LLP or the Washington Post article to be persuasive, Mr. Anderson has admitted and is estopped from contesting the existence of the essential elements of criminal tax evasion with respect to tax years 1998 and 1999.

d. Mr. Anderson's Anticipated 2255 Motion

Mr. Anderson alleges that his criminal case is unresolved because he intends to file a "2255 motion" under 28 U.S.C. section 2255. For that reason, he contends that "[t]he matters related to his plea agreement which relates to tax years 1998 and 1999

are still open, have not been finally determined and thus collateral estoppel should not apply in this instance." This argument cannot avail.

No court has granted Mr. Anderson any relief under 28 U.S.C. section 2255, nor has he even filed any motion requesting such relief, so it would be speculative for this Court to imagine how the granting of such a motion might impact the finality of Mr. Anderson's criminal conviction for purposes of collateral estoppel in this or other civil cases. "It is the general rule that issue preclusion attaches only 'when an issue of fact or law is * * * determined by a valid and final judgment'", Arizona v. California, 530 U.S. 392, 414 (2000) (quoting 1 Restatement, Judgments 2d, sec. 27 (1982)); and Mr. Anderson's conviction is valid and final. Mr. Anderson has cited no authority, and the Court is aware of none, to suggest that a criminal conviction lacks finality for purposes of collateral estoppel unless and until all potential 2255 motions are resolved.30 Thus, the possibility that Mr. Anderson may file a 2255 motion does not affect the application of collateral estoppel in this case.

e. Application of Collateral Estoppel to Criminal Convictions in the Tax Court

Mr. Anderson argues--citing three opinions from this Court--that a taxpayer is not necessarily collaterally estopped from denying civil tax fraud under section 6663 in a Tax Court proceeding when convicted for a tax crime for the same taxable year. However, Mr. Anderson's reliance on Jondahl v. Commissioner, T.C. Memo. 2005-55, Bierschbach v. Commissioner, T.C.

Memo. 1988-199, and Nigra v. Commissioner, T.C. Memo. 1968-273, is misplaced.

Jondahl and Bierschbach both involved convictions for filing a false return under section 7206(1), a conviction that does not prove civil tax fraud under section 6663. Wright v. Commissioner, 84 T.C. 636, 643 (1985). Mr. Anderson's conviction, on the other hand, was for "attempt[ing] * * * to evade or defeat any tax" under section 7201, a conviction that does prove fraud under section 6663. See supra part IV.B.1.

Nigra, on the other hand, involved a plea of nolo contendere--not a guilty plea. "A plea of nolo contendere by a taxpayer to a charge of criminal tax fraud and resulting conviction do not bar him from disputing the imposition of civil fraud penalties for the same taxable years", because "[t]he doctrine of collateral estoppel raised by a plea of guilty to criminal tax fraud is not applicable to a plea of nolo contendere." Vazquez v. Commissioner, T.C. Memo. 1993-368, 66 TCM (CCH) 406, 415 n.12 (citing Doherty v. Am. Motors Corp., 728 F.2d 334, 337 (6th Cir. 1984), Hicks Co. v. Commissioner, 56 T.C. 982, 1027 (1971), affd. 470 F.2d 87 (1st Cir. 1972), and Godfrey v. Commissioner, T.C. Memo. 1968-199)). Mr. Anderson, however, entered a plea of guilt, not a plea of nolo contendere; and a guilty plea resulting in a conviction for criminal tax evasion under section 7201 conclusively establishes fraud in a subsequent civil tax fraud proceeding through the application of the doctrine of collateral estoppel. DiLeo v. Commissioner, 96 T.C. at 885; Marretta v. Commissioner, T.C. Memo. 2004-128, affd. 168 Fed. Appx. 528 (3d Cir. 2006).

C. Partial summary judgment is appropriate here.

Respondent has moved only for partial summary judgment. Respondent requests a holding that Mr. Anderson committed fraud but defers the question of the amounts of his liabilities. Mr. Anderson argues that it serves no purpose for this Court to rule on whether an underpayment in any of the tax years at issue is due to fraud before it has determined the amount, if any, of the underpayment. He observes that if the amount of the underpayment for a given year is later found to be zero, then there would be no fraud penalty. However, this scenario is not possible here. "'[T]he doctrine of collateral estoppel bars * * * [the taxpayer convicted under section 7201] from relitigating in the instant case the matters litigated in * * * [the taxpayer's] criminal tax proceeding, i.e., whether * * * [the taxpayer] underpaid his tax for each of the taxable years * * * **and** whether his underpayment of such tax for each such year wascdue to fraud.'" Christians v. Commissioner, T.C. Memo. 2008-220 (quoting, with alterations, Wilson v. Commissioner, T.C. Memo. 2002-234). Thus, Mr. Anderson is collaterally estopped from litigating whether there is an underpayment (however small) in either year and whether any such underpayment is due to fraud. Furthermore, in his allocution at his plea hearing, Mr. Anderson specifically conceded, for purposes of computing his sentence, that the Government could prove that the total tax loss for tax years 1998 and 1999 was in excess of $100 million. See supra p. 14. He cannot now deny that fact.

Therefore, we hold that respondent has shown that he is entitled to summary judgment with respect to the issue of whether collateral estoppel applies to establish civil tax fraud in 1998 and 1999. We hold that the statute of limitations does not bar assessment of Mr. Anderson's tax liability for those years and that he will be liable for the fraud penalty. However, the issue of the **amounts** of the deficiencies of tax and penalties in 1998 and 1999 remains for trial.

D. On the record before us, collateral estoppel does not bar Mr. Anderson's litigation of fraud as to the years 1995 through 1997.

Respondent asserts that Mr. Anderson's guilty plea to two counts of criminal tax evasion under section 7201 with respect to tax years 1998 and 1999 should collaterally estop him from contesting that he fraudulently underpaid his income taxes in 1995 through 1997. However, Mr. Anderson did not enter a guilty plea for tax years 1995 through 1997; rather, those charges were dismissed.

As noted above, the burden of proving fraud under section 6663 is on respondent. See sec. 7454(a); Rule 142(b). Furthermore, a guilty plea to criminal tax evasion under section 7201 in one tax year conclusively establishes fraud in that year, but not in other tax years. "[P]roof of fraud for one year will not sustain the respondent's burden of proving fraud in another year." Estate of Hanna v. Commissioner, T.C. Memo. 1976-32, 35 TCM (CCH) 128, 135 (citing McLaughlin v. Commissioner, 29 B.T.A. 247, 249 (1933)). Thus, the mere fact that Mr. Anderson had pleaded guilty to tax

evasion in 1998 and 1999 could not, by itself, be determinative of whether he had fraudulently underpaid his income taxes in the prior years 1995 through 1997.

However, to the mere fact of Mr. Anderson's 1998 and 1999 guilty plea respondent adds the observation that, in his reply, Mr. Anderson has admitted that the facts and issues relating to tax fraud in 1998 and 1999--tax years in which we have held that he is collaterally estopped from denying that he committed civil tax fraud--are "exactly the same" as the issues in 1995 through 1997.fn31 Respondent argues that since Mr. Anderson is guilty of tax fraud in 1998 and 1999, and since Mr. Anderson stated that the facts and issues are "exactly the same" in all five tax years at issue (1995 through 1999), he must be liable for civil tax fraud in all five tax years.

Respondent makes this argument under the rubric of collateral estoppel, but the argument in fact rests on two conjoined principles--i.e., collateral estoppel and judicial admission. Respondent argues that Mr. Anderson is barred by collateral estoppel from denying fraud in 1998 and 1999; that he is bound (in effect, by judicial admission) to his assertion that the facts and issues are the same in all five years; and that his guilt as to the later years should therefore be extrapolated to the earlier years.

However, this argument draws unwarranted inferences from Mr. Anderson's statement, deeming him to have admitted things that in fact he has explicitly denied. Mr. Anderson made his statement

(that the facts and issues are "exactly the same" in all five of the tax years at issue) in the context of professing his innocence--not admitting his guilt--and of protesting the application of collateral estoppel to 1998 and 1999. In essence, Mr. Anderson argues that he is innocent of tax fraud as to 1995 through 1997 (years for which the charges were dismissed); that the issues relating to tax fraud in 1998 and 1999 are "exactly the same" as the issues in 1995 through 1997; and that his asserted innocence as to the earlier years should therefore be extrapolated to the later years. He argues that he is innocent of tax fraud in 1998 and 1999 and that it would be an "injustice" to apply the doctrine of collateral estoppel--a mere legal "technicality" in his eyes--to prevent him from proving his innocence in those tax years. While we reject Mr. Anderson's argument as to 1998 and 1999 (the years as to which he pleaded guilty), we decline to hold that his protestations of innocence in those later tax years somehow constitute a backhanded admission of guilt in the earlier years.

Instead, we hold that, on the record now before us, respondent has failed to show that no genuine issue exists as to any material fact with respect to the question of whether Mr. Anderson fraudulently underpaid his Federal income taxes in 1995 through 1997, and respondent's request for partial summary judgment with respect to those earlier tax years will be denied. We do not hold today that the question of collateral estoppel is exhausted in this case as to the years 1995 through 1997. Respondent has failed in his broad attempt to use the doctrine to invoke Mr. Anderson's conviction for 1998 and 1999 in order to

impose an ultimate finding of fraud for 1995 through 1997; but a more focused presentation of the facts underlying Mr. Anderson's conviction may resolve some of the factual and legal issues still in the case. A "plea of guilty * * * is a conclusive judicial admission of all of the essential elements of the offense which the indictment charges," Arctic Ice Cream Co. v. Commissioner, 43 T.C. at 75; and it is possible that such "elements" could, with a fuller record, be demonstrated to be relevant to (and binding on) the earlier years. That is, there may be facts that were essential to Mr. Anderson's guilty plea as to 1998 and 1999, that are relevant to the years 1995 through 1997, and that he would be estopped from denying--but that are not yet in the record here.3fn2 In addition, Mr. Anderson's defense counsel's statement that "he admits that over the years he retained control over the assets, and was required under U.S. law to pay taxes on the gains from those assets", see supra p. 14, may have significance, not yet articulated here, for the years 1995 through 1997.fn33 For these reasons, today's partial denial of respondent's motion is without prejudice to his renewing that motion with a better record and more focused contentions.

To reflect the foregoing,

An appropriate order will be issued.

Footnotes

1Unless otherwise indicated, all citations to sections refer to the Internal Revenue Code of 1986 (26

U.S.C.), as amended, and all citations to Rules refer to the Tax Court Rules of Practice and Procedure.

2As is set out more fully below, over 99 percent of these deficiencies are attributable to the income of Gold & Appel Transfer, S.A. (Gold & Appel), a British Virgin Islands corporation, which Mr. Anderson controlled for purposes of Federal securities law. Respondent alleges that Gold & Appel is a "controlled foreign corporation" within the meaning of section 957, and that Mr. Anderson must therefore recognize a pro rata share of Gold & Appel's so-called subpart F income pursuant to section 951.

3Respondent seeks summary judgment for all five of the tax years at issue (i.e., both the years for which he pleaded guilty and the three prior years for which the charges were dismissed), but only as to the issue of whether Mr. Anderson fraudulently underpaid his income taxes, not as to the actual amounts of tax deficiency and fraud penalty.

4Respondent's answer states that Mr. Anderson caused Icomnet to transfer its shares of Gold & Appel to Iceberg Transport in 1993. In his petition Mr. Anderson refers to Iceberg Transport as Gold & Appel's "parent corporation", and in his memorandum in support of his motion for summary judgment, Mr. Anderson states that he ceased to be the owner of Gold & Appel in 1993. However, in his pleadings Mr. Anderson repeatedly states that he caused the shares of Gold & Appel to be transferred to the Smaller World Trust. We do not find this claim to be inconsistent with respondent's claim that the shares

were transferred to Iceberg Transport, because Mr. Anderson alleges that Iceberg Transport was also an asset of the Smaller World Trust, and under that assumption, a transfer to Iceberg Transport would be tantamount to a transfer to the Smaller World Trust.

5In Mr. Anderson's criminal case, the prosecution disputed the existence of the Smaller World Trust. Respondent's answer admitted that Mr. Anderson formed the Smaller World Trust in 1993, and Mr. Anderson subsequently cited this admission as evidence that the facts before this Court are materially different from the facts in his criminal case and, therefore, collateral estoppel should not apply. In response, respondent moved for leave to amend the answer to deny the existence of the Smaller World Trust, stating that the prior admission was in error because the prosecution in Mr. Anderson's criminal case had evidence that the formation documents of the Smaller World Trust were backdated. We granted respondent's motion for leave to file amendment to answer by our order dated October 9, 2008.

6Mr. Anderson filed his return for 1995 on April 15, 1996; for 1996 on June 21, 1997; for 1997 on August 31, 1998; for 1998 on September 30, 1999; and for 1999 on October 19, 2000.

7Our record does include the prosecutor's reading or paraphrasing of the indictment at the sentencing hearing. See infra p. 13.

8Presumably, the paragraphs incorporated by reference into Counts Five and Six include facts about

Mr. Anderson's ownership and control of Gold & Appel and the related entities, but those paragraphs are not in the record now before us. The record does include the transcript of the hearing of September 8, 2006 (when Mr. Anderson entered his guilty plea), at which (at 18-27) the prosecutor read from or paraphrased portions of the indictment.

9The record here does not include that 270-page summary. However, respondent's opposition to Mr. Anderson's motion alleged its existence, and in his reply he did not dispute its existence.

10Mr. Anderson appealed on two grounds: (1) That the District Court violated the Ex Post Facto Clause of Article I, Section 9 of the United States Constitution by using the 2001 Guidelines, which were not in effect at the time that he pleaded guilty, and (2) that the sentence of 108 months' imprisonment is unreasonable. The Government cross-appealed the District Court's denial of restitution. In United States v. Anderson, 545 F.3d 1072 (D.C. Cir. 2008), the Court of Appeals for the D.C. Circuit rejected Mr. Anderson's arguments and affirmed his sentence of imprisonment but reversed the District Court's denial of restitution. The Court of Appeals remanded the case to the District Court to determine the amount of restitution that was agreed to under the plea agreement.

11In his memorandum in support of his motion for summary judgment Mr. Anderson states that the notice of deficiency contained calculations which were "copied exactly" from the filings that were made by the prosecution in relation to his criminal case. The

record here includes the text of the superseding indictment for two of the years--1998 and 1999—and the amounts for those years in the indictment and in the notice of deficiency do correspond.

12As to the petition's allegations of threats to witnesses, compare Mr. Anderson's colloquy with the judge at the plea hearing (quoted above):

> THE COURT: I need to ask you, has anyone threatened you or anyone close to you, or forced you in any way to decide to enter this plea of guilty?
>
> (Ms. Peterson [defense counsel] conferred with the defendant)
>
> THE DEFENDANT: No, no one has.

13This allegation of the petition seems to be at odds with the comments actually made by Mr. Anderson's counsel at the plea hearing (quoted above), and explicitly agreed to by him, that "Mr. Anderson does not concede that every fact contained within the indictment is accurate * * *. However, he admits that over the years he retained control over the assets". (Emphasis added.)

14Under the normal three-year statute of limitations of section 6501(a), the July 2007 notice of deficiency would have been too late with respect to the 1995-1999 returns, the latest of which was filed in October 2000. However, section 6501(c)(1) provides, "In the case of a

false or fraudulent return with the intent to evade tax, the tax may be assessed * * * at any time."

15As is explained below, the sentences emphasized here are the basis for Mr. Anderson's motion for summary judgment.

16If Mr. Anderson were to prevail in demonstrating that there was no valid "determination" by the IRS, then the consequence would be that this Court would lack jurisdiction and would have to dismiss his petition. In his response to respondent's memorandum in opposition to his motion for summary judgment, Mr. Anderson has clarified that he did not intend to argue that this Court lacks jurisdiction. Rather, Mr. Anderson is "completely convinced" that this Court has jurisdiction. As is explained below, we agree. However, because he seems to persist with some aspects of the argument, we address it here despite his ostensible concession.

17See Commissioner v. Stewart, 186 F.2d 239, 242 (6th Cir . 1951); Foster v. Commissioner, 80 T.C. 34, 229-230, affd. in part and vacated in part on other grounds 756 F.2d 1430 (9th Cir. 1985); see also sec. 7522 (prescribing the content of a notice of deficiency); Shea v. Commissioner, 112 T.C. 183, 197 (1999) ("where a notice of deficiency fails to describe the basis on which the Commissioner relies to support a deficiency determination * * *, the Commissioner will bear the burden of proof").

18Mr. Anderson also objects that the notice of deficiency "didn't contain any explanation of the basis

upon which the Internal Revenue Service 'determined' that * * * [Mr. Anderson] had any tax liability for the income of" Gold & Appel. In fact, the notice of deficiency references various sections of the Internal Revenue Code to explain the alleged items of income and penalties. Furthermore, "the Commissioner need not explain how the deficiencies were determined" for a determination and a notice of deficiency to be valid. Scar v. Commissioner, 814 F.2d 1363, 1367 (9th Cir. 1987), revg. 81 T.C. 855 (1983).

19Anastasato goes on to say, "Most of the cases stating that the Commissioner is not entitled to the presumption based on a naked assessment without factual foundation have involved illegal income. * * * Given the obvious difficulties in proving the nonreceipt of income, we believe the Commissioner should have to provide evidence linking the taxpayer to the tax-generating activity in cases involving unreported income, whether legal or illegal." Id. at 887.

20In fact, as is explained below in part IV.B, Mr. Anderson is collaterally estopped from contesting that he fraudulently underpaid his income taxes for tax years 1998 and 1999.

21Respondent can rely on the indictment. See Whitfield v. Commissioner, T.C. Memo. 1972-139, 31 TCM (CCH) 654, 663 (1972) ("At the trial, respondent urged that petitioner was collaterally estopped from asserting her cash hoard defense. The * * * indictment * * * was admissible in connection with that allegation"). A grand jury's indictment that led to a conviction is admissible under the hearsay exception of

Fed. R. Evid. 803(22) ("Judgment of previous conviction"). See Mike's Train House, Inc. v. Lionel, L.L.C., 472 F.3d 398, 412 (6th Cir. 2006).

22See Mitchell v. Commissioner, T.C. Memo. 1982-162 (listing a guilty plea for criminal tax evasion in 1968 under sec. 7201, among other things, as evidence to prove fraud in 1968 through 1971), affd. without published opinion 720 F.2d 679 (6th Cir. 1983).

23Respondent's answer also asserts that section 6501(c)(8) (tolling the statute of limitation for assessment of tax until the date which is three years after the filing date of the information return that relates to such tax) applies with respect to Mr. Anderson's alleged subpart F income from Gold & Appel, because of his alleged failure to file a Form 5471, Information Return of U.S. Persons With Respect To Certain Foreign Corporations, for Gold & Appel and Iceberg Transport for each of the five tax years at issue. However, because neither party addresses section 6501(c)(8) in connection with the pending cross-motions, we do not address this issue here.

24See also Amos v. Commissioner, 43 T.C. 50, 55 (1964) ("one who 'willfully attempts * * * to evade * * * tax' within the meaning of the criminal sanction does so with the requisite fraudulent intent for the purpose of the civil sanction"), affd. 360 F.2d 358 (4th Cir. 1965); Arctic Ice Cream Co. v. Commissioner, 43 T.C. 68, 74-75 (1964) ("This conviction [for criminal tax fraud] necessarily carries with it the ultimate factual determination that the resulting deficiency * * * was

[attributable to civil tax fraud]"); Montalbano v. Commissioner, T.C. Memo. 2007-349, 94 TCM (CCH) 499, 500 ("It is well established that a final criminal judgment for tax evasion under section 7201 collaterally estops relitigation of the issue of fraudulent intent in a subsequent proceeding over the civil fraud penalty"), affd. without published opinion 103 AFTR 2d 379, 2009-1 USTC par. 50,153 (11th Cir. 2009); Uscinski v. Commissioner, T.C. Memo. 2006-200, 92 TCM (CCH) 285, 287 ("Because the elements of criminal tax evasion and civil tax fraud are identical, petitioner's prior conviction under section 7201 conclusively establishes the elements necessary for finding fraud under section 6663"); Wilson v. Commissioner, T.C. Memo. 2002-234, 84 TCM (CCH) 321, 324 ("We hold that the doctrine of collateral estoppel bars * * * [the taxpayer convicted under section 7201] from relitigating in the instant case the matters litigated in * * * [the taxpayer's] criminal tax proceeding, i.e., whether * * * [the taxpayer] underpaid his tax for each of the taxable years * * * and whether his underpayment of such tax for each such year was due to fraud"). Because a conviction for criminal tax evasion under section 7201 conclusively establishes civil tax fraud under section 6663 in the same tax year, the unlimited statute of limitations of section 6501(c)(1) is also applicable. See DiLeo v. Commissioner, supra at 885; Amos v. Commissioner, supra at 55.

25See Fed. R. Crim. P. 11(e) ("After the court imposes sentence, the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or collateral attack");

Connors v. Graves, 538 F.3d 373, 378 (5th Cir. 2008) (plaintiff sued police officers for use of excessive force after pleading guilty to discharging a weapon in the altercation with such officers; the court held that the lawsuit amounted to a contention that the plaintiff "admitted to something other than the crime for which he was convicted", which "constitutes a claim that his guilty plea was not knowing and voluntary--an issue properly raised only in either a direct appeal or a habeas proceeding").

26Mr. Anderson has professed an intention to challenge his sentence by filing a 2255 motion, discussed infra in part IV.B.2.d.

27See United States v. Tolson, 988 F.2d 1494, 1501 n.6 (7th Cir. 1993) ("absent evidence that the defendant reserved the issue in the plea, he may not challenge the facts in the indictment and plea agreement") (quoting United States v. Gilliam, 987 F.2d 1009, 1014 (4th Cir. 1993) ("'a plea of guilty to an indictment containing an allegation of the amount of drugs for which a defendant is responsible may, in the absence of a reservation by the defendant of his right to dispute the amount at sentencing, constitute an admission of that quantity for sentencing purposes'")).

28The Court of Appeals for the Third Circuit (to which an appeal in this case would lie) has held that "facts relevant to sentencing contained in the indictment and plea agreement are conclusively established by the entry of a guilty plea even if they are not elements of the offense charged." United States v. Dickler, 64 F.3d

818, 823 n.7 (3d Cir. 1995) (citing United States v. Parker, 874 F.2d 174, 178 (3d Cir. 1989)).

29Leonnig, "Prosecutors' Slip Keeps Money in Limbo", Wash. Post, Mar. 29, 2007, at B6.

30Rather, public policy and judicial economy would seem to weigh in favor of respecting the finality of criminal convictions in civil matters regardless of the possible pendency of a "2255 motion". Cf. Estate of Lunt v. Gaylor, No. 04-CV-398-PB (D.N.H., Aug. 4, 2005) ("several other courts have determined that it would be injurious to allow defendants to use habeas corpus as a tool to bar collateral estoppel"); Mueller v. J.C. Penney Co., 219 Cal. Rptr. 272, 277 (Ct. App. 1985) ("For purposes of collateral estoppel, a judgment free from direct attack is a final judgment"); 1 Restatement, Judgments 2d, sec. 13, cmt. g (1982) ("To hold invariably that * * * [collateral estoppel] is not to be permitted until a final judgment in the strict sense has been reached in the first action can involve hardship -- either needless duplication of effort and expense in the second action to decide the same issue, or, alternatively, postponement of decision of the issue in the second action for a possibly lengthy period of time until the first action has gone to a complete finish. In particular circumstances the wisest course is to regard the prior decision of the issue as final for the purpose of issue preclusion without awaiting the end judgment").

31Respondent latches on to the fact that Mr. Anderson, in his reply, stated that "The issues relating to tax fraud in 1998 and 1999 are exactly the same as

the issues in 1995, 1996 and 1997. The exact same fact [sic] and circumstances are inextricably linked for all the years 1995 to 1999." However, the petition itself had stated that the "issues" for 1998 and 1999 "are identical to 1995"--but the petition clearly professes Mr. Anderson's innocence as to all five years.

32See supra note 8 (allegations "incorporated by reference" into Counts Five and Six of Mr. Anderson's indictment are not yet in the record here).

33The Court is mindful that if a defendant pleads guilty but denies particular allegations in the indictment, then collateral estoppel may not bind the defendant to those denied allegations. See supra part IV.B.2.b. Of course, what will be relevant in that connection is Mr. Anderson's actual denials before the District Court, rather than his subsequent characterizations of those denials. Cf. supra note 13.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
No. 11-1704

WALTER C. ANDERSON, Appellant v.
COMMISSIONER OF INTERNAL REVENUE

Filed: 12/06/2012

Before: McKEE, Chief Judge, SLOVITER, SCIRICA, RENDELL, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE and ROTH[1], Circuit Judges POLLAK[2], District Judge

ORDER

The petition for panel rehearing and rehearing en banc filed by the appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit Judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit Judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,
/s/ Jane R. Roth
Circuit Judge

Footnotes

1Honorable Jane R. Roth's vote is limited to panel rehearing only.

2Honorable Louis H. Pollak, Senior Judge of the United States District Judge for the Eastern District of Pennsylvania, sat by designation. Judge Pollak died on May 8, 2012; this opinion is filed by a quorum of the court pursuant to 28 U.S.C. § 46 and the Third Circuit I.O.P. 12.1(b).