No. 12-1051

IN THE

# Supreme Court of the United States

WALTER C. ANDERSON, PETITIONER,

*v.*

COMMISSIONER OF INTERNAL REVENUE

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

## REPLY BRIEF


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**CASES**

**REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI**

Petitioner, Walter C. Anderson, herewith submits his Reply to the Opposition Brief of Respondent.[1]

**ISSUES BEFORE THE COURT**

There are two issues presented for review by this Court, both of which involve collateral estoppel. As previously stated: 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. Pet-5. Courts throughout the American judicial system deal with this doctrine daily. Petitioner respectfully suggests that review here is imperative in order to clarify the requirement that a finding must be necessarily determined for a judgment to have preclusive effect, especially in the two circumstances addressed herein.

First of all, how does this requirement apply when there are multiple independent alternative findings in support of a judgment? The First Restatement of Judgments suggests that all findings are necessarily determined. Pet-5. The Restatement (Second) of Judgments suggests conversely that none of the findings are necessarily determined. Pet-5-6. Presently, courts in different jurisdictions apply the

[1] Respondent's Brief in Opposition is referred to as "Opposition," and cited as "Opp-__;" the Petition is cited as "Pet-__."



rule differently and this invites forum shopping. The Solicitor General ("Respondent") seems to believe that this Court is not capable of providing a unifying rule for the courts. Opp-11. Petitioner believes this Court can and should resolve the split among the courts. Additionally, what about the case where there are multiple independent findings in support of a judgment that was based on a negotiated plea agreement? Does this Court agree with Judge Merritt that a "conviction upon a plea of guilty does not rest on actual adjudication or determination of any issue?" Pet-16.

Secondly, since it is not necessary to prove the element of fraud for a conviction under §7201, why does such a conviction conclusively establish civil fraud for purposes of both the statute of limitations and the fraud penalty? This Court has stated, "neither fraud nor deceit is among the elements of a conviction under §7201." Pet-11. Solicitor General (now Justice) Kagan has stated that "(t)he offense of tax evasion can require, but does not necessarily require, proof of fraud or deceit; it can be accomplished in any manner." Pet-13. Does the "necessarily determined" requirement for the application of collateral estoppel cease to exist in these cases? Why have courts enlarged the preclusive effect of a criminal conviction under §7201 beyond the plain words used in the statute? See Pet-12. Is that fair? The Supreme Court previously wrote that it is "the general view of courts and commentators that 'among the most critical guarantees of fairness in applying collateral estoppel is the guarantee that the party sought to be estopped had not only a full and fair opportunity but an adequate incentive to litigate 'to the hilt' the issues in question'." *Haring v. Prosise*, 462 U.S.

306, 311 (1983). How does that apply in the case of a §7201 conviction that is the result of a negotiated plea agreement? Judge Merritt made the point clear-cut:

> 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… 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. Pet-16.

## ARGUMENT

### 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.

It would seem that Respondent believes that the courts' divergent holdings on this particular aspect of collateral estoppel can be squared in Petitioner's case because it "does not directly conflict with any decision of another court of appeals." Opp-8. He indicates that the First and Second Restatement rules are not so rigid that they directly conflict with one another. Opp-9. He further believes that the availability of issue preclusion is solely a matter of the facts of the case. Opp-10. Petitioner disagrees. The rules are polar opposites of each other and the facts of any particular case will not alter that conclusion. Courts that follow the First



Restatement and courts that follow the Second Restatement will likely decide differently on identical fact patterns presented to them.

In Petitioner's case, the appellate court concluded that Petitioner was precluded from "proving that all or a portion of the income of G&A was not taxable to him in 1998 and 1999." Pet-8. This decision was based on the circuit's precedent that "all independently sufficient alternative holdings" should be given preclusive effect. Pet-6; Opp-9. With respect to the essential determination of a tax deficiency under §7201, the court presumed that the issue must have been litigated to secure Petitioner's conviction. Pet-8a. (Although not addressed in the decision, Petitioner had argued to the court that the taxability of G&A's income could not be determined without first determining its nature and character.) But, whether or not the issue had been fully litigated is of limited or no consequence in circuits that follow the strict interpretation of the Second Restatement rule:

> …the American Law Institute…endorses (the) position 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." Furthermore, one leading commentary describes the Restatement's view as the "new" and "modern" rule. *National Satellite Sports, Inc. v. Eliadis, Inc.*, 253 F.3d 900, 909 (6th Cir. 2001).

…The Restatement… favors the stricter rule (emphasis added) that when a judgment may have been based on alternative grounds, any of which would be sufficient to support the result, the judgment is not preclusive with respect to any ground standing alone (because) a determination that is supportable on alternative grounds may not have been as thoroughly considered on all of the possible grounds. *Comair Rotron, Inc. v. Nippon Densan Corp.*, 49 F.3d 1535, 1538-39 (Fed. Cir. 1995).

…North Dakota has adopted comment i to the *Restatement (Second) of Judgments* §27… Thus, the courts of North Dakota would not give preclusive effect to either of two determinations by a court of first instance when each determination independently supports the court's judgment. *Baker Elec. CopOp., Inc. v. Chaske*, 28 F.3d 1466, 1475 (8th Cir. 1994).

…collateral estoppel applies only to issues which have been actually and necessarily decided… Because either proposed reason would have been a sufficient ground…it cannot be said that either issue was actually and necessarily decided… Therefore…no preclusive effect. *Turney v. O'Toole*, 898 F.2d 1470, 1472 n.1 (10th Cir. 1990)

…issue preclusion, under which holdings in the alternative, either of which would independently be sufficient to support a result, are not conclusive in subsequent litigation with respect



to either issue standing alone. *Peabody Coal Co. v. Spese*, 117 F.3d 1001, 1008 (7th Cir. 1997).

One argument favoring the application of the Second Restatement rule is that a litigant has little or no incentive to appeal all alternative independent findings that support an adverse judgment. Respondent suggests that there is no basis to conclude that Petitioner lacked an incentive to appeal the prior judgment. Opp-12. Clearly, this is not the case. After two years of confinement under appalling conditions in the D.C. jail, Petitioner entered into a "negotiated plea agreement" with the government to resolve the charges against him and allow him to transfer to a more hospitable minimum-security environment. Where was the incentive to appeal? Petitioner's appeal on the issue of sentencing was principally of a technical nature. See *United States v. Anderson*, 545 F.3d 1072 (D.C. Dir. 2008). There was no incentive to appeal the conviction itself or the related tax loss computation, which had been "negotiated".

Respondent further suggests that Petitioner's agreement on the amount of tax loss for sentencing purposes somehow establishes the basis for preclusion on the issue of the taxability of G&A income, despite the fact it was not necessarily determined in support of Petitioner's conviction. Opp-13. In accordance with the preferred view of Judge Merritt, this fact should only be admissible as evidence under the Federal Rules, and it should not be used to preclude Petitioner from offering contrary evidence on the issue. Pet-17.

Petitioner reiterates his view that the split among the circuits on this issue is evident and it is incumbent upon the Supreme Court to establish uniformity. Petitioner submits that the modern view fashioned by the Second Restatement rule is the better approach, especially in cases where judgments are determined by negotiated plea agreements. Such an approach protects the equitable and discretionary nature of collateral estoppel and maintains fair treatment to all parties.

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

§7201 provides:

> Any person who willfully attempts in any manner (emphasis added) 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…

Nowhere in the Respondent's opposition brief does he address the significance of the three underlined words above: "in any manner." The words simply cannot be superfluous, for this Court has held that words of a statute should not be rendered insignificant. *TRW Inc. v. Andrews*, 534 U.S. 19 (2001); Pet-14.



As cited in Petitioner's petition, the Supreme Court in *Spies* 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). Pet-12-13.

Later on, the decision illustrated, without limitation, the type of acts that are covered by a willful attempt, and included one that does not necessarily involve fraud: "the handling of one's affairs to avoid making the records usual in transactions of the kind." *Spies*, *at 499*.

The quoted passage from *Spies* was also referenced by (now) Justice Alito in his dissent in the appellate case of *Ki Se Lee v. Ashcroft*, 368 F.3d 218, 227 (3d Cir. 2004). He stated further that in reference to §7201 offenses:

> Neither "fraud" nor "deceit" is mentioned in the statute as a necessary element of tax evasion… Likewise, leading cases interpreting this language do not hold that fraud or deceit is an element of the offense. Pet-13.

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. Pet-13.

Consequently, it is possible to commit a §7201 offense with or without the element of fraud. Undoubtedly, in the majority of cases under §7201, the element of fraud will be present. But, the words used in this statute suggest that there is a line that can be crossed even beyond those instances encompassing fraud where a conviction under §7201 is still possible. Fraud includes and requires proof that the perpetrator possessed a knowing subjective intent to commit a deceitful act. A willful attempt to evade or defeat merely requires proof that taxpayer's objective conduct reasonably shows that he knew what he was doing.

Respondent asserts:

> …that, for any set of facts on which the government is able to prove…that a taxpayer has evaded or defeated a tax within the meaning of…§7201, the government will also be able to prove… that the taxpayer engaged in a course of action amounting to fraud. Opp-19.

Conceding arguendo that fraud is indeed present in every case involving a conviction under §7201, the judicial use of collateral estoppel is still improper. Since a conviction under §7201 does not necessarily require the determination of fraud, the test that a finding be "necessarily determined" in support of such a judgment fails. This is despite the fact that fraud may be "actually determined." If fraud is actually determined, it would be properly admissible as evidence in a civil case.



Respondent continues his argument by quoting part of *United States v. Moore*, 360 F.2d 353, 355 (4th Cir. 1966), which, more fully, states that:

> Though the evasion statute does not in terms require a finding of fraud, we can recall no case in our experience where, accepting the truth of the facts leading to conviction for evasion, one could say that there was not sufficient proof for a finding of fraud in the civil case. In fact, the taxpayers in the argument of this case have been unable to hypothesize a case contrary to this experience. (omitted parts are underlined) Opp-19.

Petitioner hereby accepts the challenge of the court by providing a hypothetical case where the element of fraud is lacking in a §7201 case:

A U.S. employee/taxpayer in the wireless telephone industry decides to venture out on his own and start a business. As a fledgling entrepreneur he does not make much money, but personal wealth is not important to him. His passion is space exploration and how it will aid humankind. He decides to donate the bulk of money he makes in the future to charitable causes in this area. With limited resources at the beginning, he cannot afford lawyers to advise him on the formation of new corporate and charitable organizations. So, he reads do-it-yourself books and decides to do it himself. He is by nature a very cautious man and wary of others knowing much about him or his business plans. He uses the forms found in these books and forms an overseas corporation using bearer stock

certificates and places the stock in an unregistered overseas charitable trust that he also creates. As the years pass during the dot.com 1990's, the taxpayer's business thrives. His business requires frequent travel, and when he does he uses pseudonyms for reasons of personal safety. He takes a small amount of salary to maintain his modest lifestyle and assumes that the reinvested gains and profits earned by the charitable trust are neither taxable nor reportable in the United States. Later, an audit by the IRS reveals that he failed to cross all the t's and dot all the i's in forming his business and charitable entities, which results in a massive tax liability. Ultimately, the IRS is left with the impression that he evaded taxation. It was beyond their belief that a U.S. citizen could legitimately and reasonably avoid paying taxes on hundreds of millions of dollars of income that was earned by the taxpayer's organizations, which the government claimed were legally deficient in their formation. At the end of the 1990's, the dot.com bubble bursts and the taxpayer's business is virtually worthless. The case is referred to the U.S. attorney and the taxpayer is charged with tax evasion under §7201. Now insolvent and unable to obtain bail, the taxpayer is locked in the DC jail for two years pending trial. Finally, left with no other recourse, a negotiated plea agreement is executed convicting the taxpayer under §7201. Taxpayer states at his plea hearing that he pleads guilty but does not agree with all of the government's allegations. He further states that he is not a criminal by intent or by habit, and that he believes that he's tried to do the right thing most of his life. The court accepts the plea of guilty on the "essential elements" of the offense.



Can it be said that this taxpayer's objective conduct reasonably gave rise to a legitimate conviction under §7201? Yes. In accordance with the *Spies* case, did he handle his affairs in a way that avoided making the records of his business transactions readily apparent? Yes. Did the taxpayer subjectively believe that his actions regarding tax liability and tax reporting complied with the law? Yes. Did the taxpayer have fraudulent intent? No.

As this hypothetical case illustrates, there is no assurance that a finding of fraud is trustworthy in a civil proceeding by the use of collateral estoppel after a §7201 conviction. Neither is such a finding proper under the "necessarily determined" test set forth in *Montana*. Pet-5. In order for collateral estoppel to be applied, the court must, in addition to actually determining that fraud is present, necessarily determine that it is present as well. And, since a conviction under §7201 does not "hinge" on the determination of fraud, it cannot be said that it is, in fact, "necessarily determined." See *Bobby v. Bies*, 556 U.S. 825, 835 (2009); Pet-15.

Finally, the issue regarding the collateral estoppel effect of a §7201 conviction has been litigated in the courts for many years and will continue to be litigated until and unless this Court finally makes a definitive ruling. As indicated by Respondent, this issue was recently revisited in the Fourth Circuit. Opp-14. Given that this Court has before it the largest individual tax evasion case in the history of the United States, it is the perfect opportunity to settle this matter once and for all. Petitioner submits that the best and

ultimate solution is for Congress to amend the civil tax statutes that deal with limitation periods and fraud penalties and include the willful attempt to evade or defeat language in them to remove all doubt, if that is their intent. The use of semantics by the courts to enlarge the effect of a §7201 conviction in a civil setting by the use of collateral estoppel has been and still is a poor substitute.

## 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.

Respectfully submitted,

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