Federal Taxation

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During 1995, as in past years, the Eleventh Circuit considered several procedural issues. The procedural issues decided in 1995 involved refund claims, tax liens, and litigation fees. As to substantive tax issues, the court affirmed the taxpayer-favorable Tax Court decision in *Estate of Hubert v. Commissioner*.[1] The estate tax issue involved, however, is a controversial one, and the Sixth and Federal Circuit Courts of Appeals have previously reached a contrary conclusion.

I. PROCEDURAL ISSUES

A. *Refund Claims*

The Eleventh Circuit decided three "refund claim" cases during 1995. The cases involve the sufficiency of a refund claim, amendments to a refund claim, and set-offs to refund claims.

In *United States v. Ryan*,[2] the Eleventh Circuit determined that the taxpayers' written request to have an overpayment applied to a particular year's unpaid tax liability constituted a refund claim. In a letter attached to their 1990 federal income tax return, the Ryans

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1. 63 F.3d 1083 (11th Cir. 1995). *See infra* note 58.
2. 64 F.3d 1516 (11th Cir. 1995).

directed the Internal Revenue Service ("IRS") to apply a 1990 overpayment to their unpaid 1989 tax liability.[3] The IRS refused and, instead, applied the overpayment to the Ryans' unpaid 1986 tax liability.[4] After filing for bankruptcy and receiving a discharge as to their earlier years' tax liability, which included the year 1986 but not 1989, the taxpayers brought an action in the bankruptcy court contending that the IRS should have followed their instructions and applied the overpayment to 1989.[5] The bankruptcy court agreed with the Ryans.[6]

On appeal, the IRS contended that the bankruptcy court lacked jurisdiction because the Ryans' action was a suit for a tax refund and the required claim for refund had not been filed.[7] The Eleventh Circuit rejected the government's contention and found that the letter attached to the Ryans' 1990 return constituted a claim for a refund because it stated the source and amount of the overpayment to be credited.[8] On the merits of the refund claim, however, the court held that pursuant to section 6402(a)[9] the government could properly refuse to follow the taxpayers' directions regarding the application of the overpayment to a particular tax liability.[10]

The only issue presented in *Mutual Assurance, Inc. v. United States*[11] was whether Mutual Assurance could amend the original refund claim to increase the amount of an overpayment after the refund claim was paid in full and after the expiration of the statute of limitations.[12] In *Mutual Assurance*, the taxpayer filed a timely claim for refund for an overpayment resulting from changes in the permitted discount factors

3. *Id.* at 1518.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* at 1520. A bankruptcy court may determine the amount of any tax. 11 U.S.C. § 505(a)(1) (1994). However, it may not determine any right of the estate to a tax refund before the earlier of (i) 120 days after such a request has been made or (ii) a determination by the government with respect to such request. 11 U.S.C. § 505(a)(2)(B) (1994). Similarly, "no suit or proceeding may be maintained *in any court* for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected . . . until a claim for refund or credit has been duly filed with the Secretary." 26 U.S.C. § 7422(a) (1994) (emphasis added).
8. 64 F.3d at 1521.
9. 26 U.S.C. § 6402(a) (1994) specifically authorizes the IRS to credit an overpayment against any tax liability of a taxpayer.
10. 64 F.3d at 1522-23. *Cf.* Rev. Rul. 73-305, 1973-2 C.B. 43, *modified*, Rev. Rul. 79-284, 1979-2 C.B. 83 where the IRS has ruled that certain voluntary payments would be applied as directed by the taxpayer. The Court held that these rulings did not extend to overpayments. 64 F.3d at 1523.
11. 56 F.3d 1353 (11th Cir. 1995).
12. *Id.* at 1355.

applicable in the computation of the taxpayer's unpaid insurance loss reserves. After the IRS paid the full amount of the claim and after the statute of limitations for filing a refund claim had run, an audit revealed that the correct amount of the overpayment was larger than the amount requested in the taxpayer's refund claim.[13] The district court allowed the taxpayer to amend its refund claim, and the government appealed.[14]

During oral argument, the government conceded that the timely original claim for refund provided it with a sufficient basis for accurately computing the correct amount of the overpayment.[15] The court held that, according to the IRS' own published ruling[16] and a United States Supreme Court decision,[17] the IRS was required to compute the correct amount of the overpayment.[18] Thus, the IRS' payment in full of the timely filed, original refund claim did not extinguish the claim.[19] Further, because the taxpayer's amended claim did not set forth any new grounds for relief,[20] the court allowed the original claim to be amended and required the government to fully refund the amount set forth therein.[21]

Whether the government can assess new penalties as a set off to a refund claim after the statute of limitations has lapsed was answered affirmatively in *Allen v. United States*.[22] An increase in tax liability (*e.g.*, due to denial of a previously allowed deduction) determined after the statute of limitations has run is properly set off against a refund

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13. *Id.* at 1354.
14. *Id.* at 1354-55.
15. *Id.* at 1357 n.2.
16. *Id.* at 1357 (citing Rev. Rul. 81-87, 1981-1 C.B. 580 ("'[I]n order to ascertain whether there has been an overpayment of tax, adjustments that decrease the tax must be considered as well as adjustments that increase the tax.'")).
17. *Id.* at 1356 (citing Bemis Bros. Bag Co. v. United States, 289 U.S. 28 (1933) ("'[T]he suitor shall have the relief appropriate to the facts that he has pleaded, whether he has prayed for it or not.'")).
18. *Id.* at 1356-57.
19. *Id.* at 1355-57. The government argued that, if full payment did extinguish the claim, a refund claim did not exist at the time the statute of limitations expired, and there was nothing to amend. *Id.* at 1355-56.
20. *Id.* at 1356.
21. *Id.* at 1355-57. The court rejected, as not binding on the Eleventh Circuit, the United States Court of Claims holding in Union Pacific R.R. v. United States, 389 F.2d 437 (1968), that "[t]he disposition of a taxpayer's refund claim by allowance of the amount requested in full . . . precludes an amendment asserting an additional amount after the expiration of the statutory period for refund." 56 F.3d at 1357.
22. 51 F.3d 1012 (11th Cir. 1995).

claim,[23] and the Internal Revenue Code provides that "'penalties . . . shall be assessed, collected, and paid in the same manner as taxes . . . [and that any] reference . . . to 'tax' imposed . . . shall be deemed also to refer to . . . penalties.'"[24] Accordingly, the court was unpersuaded by the taxpayer's argument that a set off attributable to penalties is distinguishable from a set off attributable to an increase in tax liability, and the court held in favor of the government.[25]

B. Tax Liens

Griswold v. United States[26] set forth the requirements the IRS must abide by when releasing a federal tax lien under section 6325.[27] In *Griswold*, the IRS assessed responsible person penalties against Griswold which resulted in liens against his property.[28] The IRS filed a total of seven original or refiled notices of federal tax liens in three counties.[29] Pursuant to a settlement agreement, Griswold satisfied the assessments.[30] The IRS promptly filed certificates of release.[31] However, one of the certificates of release could not be matched with the corresponding tax lien or notices filed. Over a period of eighteen months, Griswold repeatedly requested the IRS to issue a certificate of release corresponding to this notice.[32] After exhausting administrative remedies for the damages incurred as a result of the IRS' failure to properly issue the certificate, Griswold filed suit against the government.[33]

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23. *Id.* at 1014 (citing Lewis v. Reynolds, 284 U.S. 281, *modified*, 284 U.S. 599 (1932) (holding that a claim for refund involves the redetermination of the entire tax liability)).

24. *Id.* at 1015 (citing former 26 U.S.C. § 6659(a) (1994)).

25. *Id.*

26. 59 F.3d 1571 (11th Cir. 1995).

27. 26 U.S.C. § 6325 (1994) directs the IRS, subject to prescribed regulations, to issue a certificate of release of any lien imposed with respect to any internal revenue tax within 30 days after the Secretary finds that the liability assessed and interest thereon has been satisfied or has become legally unenforceable, or a bond is presented to and accepted by the Secretary ensuring satisfaction of the assessed liability and interest thereon. 26 U.S.C. § 6325.

28. 59 F.3d at 1573.

29. *Id.* at 1573-75. Although a tax lien arises automatically under 26 U.S.C. §§ 6321 and 6322 (1994), a notice must be filed or recorded for the lien to have priority over certain creditors of the taxpayer. 26 U.S.C. § 6323(a) (1994). *See also In re* Haas v. IRS, 31 F.3d 1081, 1084 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 2578 (1995).

30. 59 F.3d at 1573.

31. *Id.* at 1573, 1575. Once the underlying tax obligation giving rise to a federal tax lien has been satisfied, the IRS must release the lien within 30 days. 26 U.S.C. § 6325.

32. 59 F.3d at 1573.

33. *Id.* at 1574. Taxpayer based its claim on 26 U.S.C. § 7432 (1994), which provides for civil damages when the IRS, knowingly or by reason of negligence, fails to release a lien

Prior to evaluating the sufficiency of the certificates of release in this case, the Eleventh Circuit outlined the requirements the IRS must abide by in releasing a federal tax lien.[34] First, the certificate of release must sufficiently identify the underlying tax obligation and lien.[35] Second, the certificate of release must sufficiently identify any corresponding notices of a federal tax lien to allow a person searching title to the property to match the documents and discover whether a lien currently exists.[36] Third, unless the lien is self-releasing,[37] the IRS must either deliver the certificate of release to the recording office in which the corresponding notice of federal tax lien was filed or deliver it to the taxpayer.[38]

As to the fairly detailed facts before it, the court found that none of the filed certificates of release adequately identified one of the liens against Griswold's property or the corresponding notices.[39] As a result, the court held that the IRS failed to release this lien.[40]

In determining whether the IRS was liable for civil damages, the court rejected the district court's holding that the law surrounding the issues contained in this case was sufficiently uncertain that the IRS personnel could not have acted knowingly or negligently in their failure to release the lien.[41] Instead, the court explained that "[t]he provisions requiring the IRS to act responsibly in identifying and releasing the liens are part of its own regulations and internal procedures."[42] This issue was remanded to the trial court to determine whether such actions were either knowing or negligent.[43]

C. *Litigation Fees*

In *Cooper v. United States*,[44] Cooper was a passive investor in a financially-troubled business that failed to pay its federal employment

under 26 U.S.C. § 6325.

34. 59 F.3d at 1575-81.

35. *Id.*

36. *Id.*

37. *Id.* at 1580-81. Original notices of Federal Tax Lien filed on IRS Form 668(Y) are self-releasing. Refiled notices of Federal Tax Lien filed on IRS Form 668-F, however, are not self-releasing.

38. 59 F.3d at 1581.

39. *Id.* at 1580.

40. *Id.*

41. *Id.* at 1581-82.

42. *Id.* at 1581.

43. *Id.* at 1582.

44. 60 F.3d 1529 (11th Cir. 1995).

taxes.[45] Despite evidence that Cooper had no involvement in the day-to-day operation or management of the business, the IRS assessed penalty taxes on Cooper as a "responsible person" under section 6672.[46] Cooper paid the assessment, and, after exhausting administrative remedies, he filed a claim in district court for a refund of the penalty and interest paid and a claim for costs and attorney fees incurred in the collection of the refund.[47] Three days after Cooper filed suit, the IRS refunded the entire amount of the penalty plus interest.[48]

As to the claim for costs and attorney fees, the district court held that Cooper failed to prove that the IRS' position was "not substantially justified"[49] and denied his claim. The Eleventh Circuit reversed.[50] It reasoned that the willfulness requirement of section 6672[51] demands that a person have some knowledge of the failure or of the risk of failure to remit the employment taxes.[52] Based on evidence that Cooper lacked such knowledge, the Court held that Cooper's action could not have been willful as required under section 6672.[53] Finding that Cooper had exhausted all administrative remedies, the court remanded the case to the district court for a determination of the reasonable costs and fees to which Cooper was entitled.[54]

II. ESTATE TAXES

During 1995, the Eleventh Circuit decided two estate tax cases, both in favor of the taxpayers. One involved marital and charitable

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45. *Id.* at 1530.

46. *Id.* 26 U.S.C. § 6672 (1994) imposes a penalty tax on a responsible person who has willfully failed to perform a duty to collect, truthfully account for, or pay over federal employment taxes. The amount of the penalty tax is one hundred percent of the tax not collected, accounted for or paid over. 26 U.S.C. § 6672.

47. 60 F.3d at 1530-31. Costs and attorney fees are available under 26 U.S.C. § 7430 (1994) to a claimant seeking a determination or refund of any tax, interest or penalty, provided all administrative remedies have been exhausted (26 U.S.C. § 7430(b)(1)), the claimant is a "prevailing party" (§§ 7430(a) and 7430(c)(4)(A)), and the requested award constitutes reasonable litigation or administrative costs (§§ 7430(a)(1), 7430(a)(2), 7430(c)(1) and 7430(c)(2)).

48. 60 F.3d at 1530.

49. To qualify as a prevailing party the taxpayer must establish that the IRS' position was not substantially justified. 26 U.S.C. § 7430(c)(4)(A)(i).

50. 60 F.3d at 1532.

51. 26 U.S.C. § 6672.

52. 60 F.3d at 1532 (citing Cheek v. United States, 498 U.S. 192, 200 (1991)).

53. *Id.*

54. *Id.*

deductions under sections 2055[55] and 2056,[56] and the other involved the deductibility of a settlement payment under section 2053.[57]

In *Estate of Hubert v. Commissioner*,[58] a will contest led to a settlement agreement providing for the division of the decedent's residuary estate.[59] According to the settlement, the decedent's wife was beneficiary of a part of the residue in two trusts.[60] A charity received the remainder of the residue outright.[61] The dispositions as provided in the settlement qualified for the marital and charitable deductions.

The executors of the estate had the power to charge any administrative expenses against income or principal or apportion the same.[62] During the period of administration, the estate generated substantial income and incurred substantial administration expenses.[63] Under applicable state law and the will of the decedent, the executors allocated certain administrative expenses to the principal of the estate. The executors paid the remainder of the administrative expenses out of post death income and deducted them on the estate's income tax return.[64]

The government argued that the amount of the marital and charitable deductions[65] must be reduced by the entire amount of administrative expenses, whether those expenses are allocated to principal or income.[66] The Eleventh Circuit held, contrary to the Sixth and Federal Circuits,[67]

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55. 26 U.S.C. § 2055 (1994).

56. 26 U.S.C. § 2056 (1994).

57. 26 U.S.C. § 2053 (1994).

58. 63 F.3d 1083 (11th Cir. 1995).

59. Estate of Hubert v. Commissioner, 101 T.C. 314, 315-18 (1993), *aff'd*, 63 F.3d 1083 (11th Cir. 1995).

60. 101 T.C. at 317.

61. *Id.*

62. 63 F.3d at 1085.

63. *Id.* at 1084.

64. *Id.*

65. Generally, an estate is allowed a deduction for the net value of any interest which passes from the aecedent to the surviving spouse or qualified charities. 26 U.S.C. §§ 2055 & 2056.

66. 63 F.3d at 1085. The payment of interest on estate and inheritance taxes allocated to income does not reduce the marital deduction. Rev. Rul. 93-48, 1993-2 C.B. 580; Estate of Richardson v. Commissioner, 89 T.C. 1193 (1987); Estate of Street v. Commissioner, 56 T.C.M. (CCH) 774 (1988), *aff'd in part, rev'd in part*, 974 F.2d 723 (6th Cir. 1992) (affirmed on this issue).

67. 974 F.2d 723 (6th Cir. 1992). (The Sixth Circuit held that payment of administrative expenses reduces the marital deduction regardless of whether such expenses are allocated to income or principal); Burke v. United States, 994 F.2d 1576 (Fed. Cir.), *cert. denied*, 114 S. Ct. 546 (1993). *But cf.* Estate of Warren v. Commissioner, 981 F.2d 776 (5th Cir. 1993) (holding that allocation of administrative expense to income allowed by state law did not reduce the charitable deduction).

that the marital and charitable deductions must be reduced only by the amount of administrative expenses paid by the estate and allocated to the principal, where the power to allocate to income is provided in the will and recognized by state law.[68] The court reasoned that administrative expenses paid out of principal reduce the amount of principal received by the beneficiaries and reduce the marital and charitable deductions.[69] Administrative expenses allocable to income do not change the amount of the estate principal received by the spouse or the charity and do not reduce the marital and charitable deductions.[70]

Estate of Kosow v. Commissioner[71] involved an interesting set of facts that required the Eleventh Circuit to determine whether a former wife's acceptance in a marital separation agreement of a significantly lower support award, together with a waiver of her right to seek a modification of the award due to changed circumstances ("foregone marital rights"), was adequate and full consideration for the decedent's promise to leave a portion of his estate upon his death to their children. If so, the settlement payment made by the estate to the children after the death of the decedent in satisfaction of the decedent's promise would be deductible as a "claim against the estate" under section 2053(a)(3).[72]

Although conceding that the marital settlement agreement between the decedent and his former wife was bona fide and resulted from arm's length bargaining,[73] the IRS argued that there was insufficient evidence to determine as a factual matter whether the former wife gave adequate consideration for the decedent's promise.[74] The Tax Court agreed, holding that the facts before it were insufficient to make a finding of adequate and full consideration.[75]

68. 63 F.3d at 1084. *Cf.* Alston v. United States, 349 F.2d 87 (5th Cir. 1965) (although permitted by Georgia law, there was no provision in the will for the payment of the administration expenses); Ballantine v. Tomlinson, 293 F.2d 311 (5th Cir. 1961) (Neither the will nor Florida law permitted the expenses there involved to be paid out of income.).

69. 63 F.3d at 1085.

70. *Id.*

71. 45 F.3d 1524 (11th Cir. 1995).

72. 45 F.3d at 1529-30. Deductions are allowed in the case of claims against an estate when founded on a promise or agreement to the extent that there is a bona fide contract for adequate and full consideration in money or money's worth. 26 U.S.C. § 2053(a)(3), (c)(1)(A) (1994).

73. 45 F.3d at 1530.

74. *Id.* at 1531. The record did not contain any detailed evidence of the family's standard of living, costs, net worth, annual income, and financial resources at the time of separation. *Id.* at 1529. Thus, the IRS contended it was impossible to show, as was required under applicable state law, that (i) the former wife would have been entitled to a greater support award than that to which she agreed, and (ii) decedent had the financial ability to pay a greater amount. *Id.* at 1531-32.

75. *Id.* at 1528.

On appeal, the Eleventh Circuit found the Tax Court's decision to be clearly erroneous.[76] The court pointed out that shortly after their divorce, the decedent's former wife married Benjamin Sack, a man who recently divorced. At the time of the decedent's divorce, his family and the Sack family shared comparable standards of living and travelled in similar circles.[77] The court also noted the Sacks did not reach a settlement agreement relating to their divorce, but the state court awarded Mr. Sack's former wife twice the amount of support agreed upon by decedent's former wife.[78] Based on the comparable support award in the Sack case and other evidence,[79] the court found that the reciprocal promises in the marital settlement agreement were substantially equal in value, and therefore, the foregone marital rights constituted adequate and full consideration for the decedent's promise.[80] Accordingly, the estate's settlement payment to the decedent's children in satisfaction of such promise was deductible under section 2053.[81]

III. EMPLOYEE/INDEPENDENT CONTRACTOR STATUS

The Eleventh Circuit focused on two fact scenarios during 1995 involving the frequently litigated distinction between employee and independent contractor classifications. In both situations the court found independent contractor status.

In *Hospital Resource Personnel, Inc. v. United States*,[82] the Eleventh Circuit found that the taxpayer, who provided specialized nurses to hospitals in need of additional temporary staffing, had a reasonable basis under the statutory safe havens[83] for treating the nurses as

76. *Id.* at 1534. The court found the appropriate standard of review to be "clearly erroneous" based on Sherman v. United States, 462 F.2d 577, 578 (5th Cir. 1972). 45 F.3d at 1528-29.

77. 45 F.3d at 1534.

78. *Id.*

79. *Id.* The taxpayer presented expert testimony regarding the likely support award to decedent's former wife under applicable state law at the relevant time, and decedent's former wife testified that she was unable to maintain the same standard of living on the support award alone. In addition, the court found sufficient evidence in the record to demonstrate that decedent was financially capable of paying a greater support award. *Id.*

80. *Id.* at 1531-34.

81. *Id.* at 1534.

82. 68 F.3d 421 (11th Cir. 1995).

83. There are several means through which a taxpayer may prove a reasonable basis for not treating a worker as an employee. For example, if the taxpayer did not treat an individual as an employee for purposes of employment taxes and all federal tax returns required to be filed by the taxpayer are filed on a basis consistent with the taxpayer's treatment of the individual, then the individual shall be deemed not an employee unless

independent contractors.[84] The court's finding was based on an analysis of the twenty factors considered at common law,[85] the taxpayer's reasonable reliance on Revenue Ruling 61-196,[86] and *Critical Care Register Nursing, Inc. v. United States*.[87] In Revenue Ruling 61-196, the IRS ruled that "private duty nurses" are generally independent contractors, not employees, except when engaged on a full-time basis receiving a salary in the regular employ of individuals or institutions with prescribed routines during fixed hours.[88] In the case at hand, the taxpayer provided undisputed evidence that its nurses did not work fixed hours or full-time, but rather exercised full discretion in making schedules, administering their professional services, and accepting or declining assignments at will.[89] The nurses were paid on an hourly basis and could hold themselves out to the public for direct employment with hospitals, other agencies, or private parties.[90] *Critical Care* involved facts that were practically indistinguishable from the facts in *Hospital Resource Personnel*. The United States District Court for the Eastern District of Pennsylvania concluded in *Critical Care* that the taxpayer had established a reasonable basis for not treating its workers as employees under traditional common law rules.[91] Accordingly, the taxpayer in *Hospital Resource Personnel* was not required to withhold and pay employment taxes for the specialized nurses.[92]

In *Butts v. Commissioner*,[93] the Eleventh Circuit affirmed two Tax Court determinations,[94] which involved identical facts. The court held

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the taxpayer had no reasonable basis for not treating such individual as an employee. A taxpayer will have a reasonable basis for not treating a worker as an employee if such treatment was in reasonable reliance of any of the following: (i) judicial precedent, published rulings, technical advice with respect to the taxpayer, or a letter ruling to the taxpayer; or (ii) long-standing recognized practice of a significant segment of the industry in which such individual was engaged. Sections 530(a)(1) and (a)(2)(A), (C) of the Revenue Act of 1978, Pub. L. No. 95-600, 92 Stat. 2763, 2885-86 (1981).

84. 68 F.3d at 428.

85. *Id.* at 427 (listing the factors provided in Rev. Rul. 87-41, 1987-1 C.B. 296, for determining an employer-employee relationship). Note that the taxpayer failed to prove that it was exempt from employment taxes under Section 530(a)(2)(C) of the Revenue Act of 1978, 92 Stat. at 2885-86.

86. 1961-2 C.B. 155.

87. 776 F. Supp. 1025 (E.D. Pa. 1991).

88. 1961-2 C.B. 155.

89. 68 F.3d at 426.

90. *Id.*

91. *Id. See* 776 F. Supp. at 1025.

92. 68 F.3d at 426.

93. 49 F.3d 713 (11th Cir. 1995).

94. Smithwick v. Commissioner, 66 T.C.M. (CCH) 1545 (1993), *aff'd*, 49 F.3d 713 (11th Cir. 1995); Butts v. Commissioner, 66 T.C.M. (CCH) 1041 (1993), *aff'd*, 49 F.3d 713 (11th

that insurance salespersons of Allstate Insurance Company were independent contractors, not employees; thus, they could report their claimed business deductions on Schedule C of their income tax returns, rather than on Schedule A as unreimbursed business expenses.[95]

IV. ACTIVITIES NOT ENGAGED IN FOR PROFIT

Osteen v. Commissioner[96] involved the activity of breeding and raising Percheron horses in Florida. Percherons are a breed of large draft horses originally bred for moving or towing heavy objects before the advent of tractors.[97] There were no Percheron horse breeders nor was there a market for Percherons in Florida at the time.[98] For several consecutive years, the taxpayers generated losses from the horse breeding activity.[99] The government disallowed the losses on the grounds that the breeding activity was not engaged in for profit, and it imposed substantial understatement penalties.[100]

The court agreed with the government and the Tax Court's decision that the taxpayers' breeding activity was not engaged in for profit. It focused on (i) the taxpayers' lack of experience in horse breeding, (ii) the absence of an established market for the horses, (iii) the failure to hire or associate with experienced persons, (iv) the limited time spent managing the operation, (v) the lack of any profitability assessment of breeding Percherons in Florida, (vi) the significant income of the taxpayers—a full-time bank executive and a full-time registered nurse—which allowed them to tolerate the losses, and (vii) the string of consistent losses.[101] Accordingly, the disallowed losses were not deductible.[102]

As for the substantial understatement penalties, the court found substantial authority for the taxpayers' position.[103] Some evidence in

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Cir. 1995).

95. 49 F.3d at 714.

96. 62 F.3d 356 (11th Cir. 1995).

97. *Id.* at 358.

98. *Id.*

99. *Id.*

100. *Id.* at 357.

101. *Id.* at 358. *See* Treas. Reg. § 1.183-2(b) (stating nine factors to be considered in determining a profit motive).

102. 62 F.3d at 360.

103. *Id.* The court criticized the Tax Court for giving little explanation as to why there is substantial authority in one case, but not in another. Further, it found the application of the substantial authority test confusing in this case where the issue before the court involved the application of the facts to clear legal standards. It called for the Tax Court to set forth a "consistent and workable" test in these and similar cases. *Id.* at 359-60.

the record supported a profit motive, and the court referenced cases involving similar facts where the Tax Court rendered the opposite conclusion.[104]

V. CONCLUSION

As in prior years, procedural cases were an important part of the cases decided by the Eleventh Circuit. The most significant substantive case was the taxpayer favorable decision in *Estate of Hubert*.

104. *Id.*