Update on U.S.A. v. Johnson

ACTEC Estate and Gift Tax Committee

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I. Brief Overview of Case. U.S.A. v. Johnson is a case involving trust distributions to four children who were beneficiaries of their deceased mother's revocable trust. The mother died in 1991, almost 27 years ago. Two of the children also served as personal representatives and trustees. The majority of the value in the estate consisted of a closely-held business. The estate paid $5,000,000 in estate taxes in 1992, which constituted about 75% of the total amount owing. Payment of the remaining balance was deferred pursuant to a § 6166 election. The assets of the trust were distributed in 1992 to the children, who signed an agreement at that time that they would be equally responsible for paying the deferred estate tax (the "Distribution Agreement"). All required tax and interest payments were made for about nine years until the closely-held business went bankrupt in 2002.

In January 2011, almost twenty years after their mother's death, the Government brought an action in Utah federal district court against the four children as transferees under § 6324(a)(2) and fiduciaries under 31 U.S.C. § 3713 (which is not in the Internal Revenue Code) without ever separately assessing them. In its lawsuit, the Government sought to recover approximately $1.6 million in unpaid estate taxes along with accrued interest for about seventeen years in the range of $400,000.

This case involves a number of important estate tax issues, including several of first impression. In addition to 31 U.S.C. § 3713, the legal arguments so far have involved more than 30 different code provisions, the majority of which specifically relate to the imposition and collection of the federal estate tax (see §§ 645, 676, 1022, 2002, 2033, 2035, 2036, 2037, 2038, 2042, 2043, 2203, 2204, 2205, 2207A, 2207B, 2512, 6151, 6166, 6321, 6322, 6323, 6324, 6324A, 6325, 6501, 6502, 6503, 6504, 6901, 7403, 7430, and 7701).

The following three opinions have been issued by the District Court: No. 2:11-cv-00087, 2013 BL 200401 (D. Utah July 29, 2013); No. 2:11-cv-00087, 2016 BL 399607 (D. Utah Dec. 1, 2016)); and No. 2:11-cv-00087-CW, Document 222 (D. Utah Jan. 8, 2018). A fourth opinion issued in May 2012 was replaced by the 2013 opinion.

II. District Court's 2013 Opinion. With respect to the defendants' motion to dismiss, the District Court issued an Amended Memorandum Decision and Order on July 29, 2013 in which it made the following rulings:

(1) Trust Beneficiaries are Neither "Transferees" nor "Beneficiaries" Under Section 6324(a)(2). The Court ruled that trust beneficiaries are neither "transferees" nor "beneficiaries" for purposes of § 6324(a)(2) and therefore dismissed the Government's claims made on that basis.

(2) Issue of Fact for Section 3713 Claim of Insolvency Distributions. The Court allowed the Government's claim for joint and several liability against the fiduciaries under 31 U.S.C. § 3713 because there was an issue of fact with respect to the question of whether distributions were made during or causing insolvency.

(3) Application of Assessment and Collection Procedures of Section 6901. In response to defendants' argument that, especially in the case of an election under § 6166, the Government was required to follow the provisions of § 6901 for purposes of assessing and collecting the estate tax, the Court instead followed a Tenth Circuit ruling stating that "the collection procedures of section 6901 are cumulative and alternative - - not exclusive or mandatory." United States v. Russell, 461 F.2d 607 (10th Cir. 1972).

(4) Application of Suspension of the Statute of Limitations Under Section 6503(d). The Court agreed that the personal liability of trustees and beneficiaries under § 6324(a)(2) was neither an estate tax nor a tax at all. The Court also addressed the impact of § 6503(d), which suspends the running of the ten-year statute of limitations under § 6502 during the time that an election under § 6166 is in effect. The Court appeared to agree with defendants' position that the plain language of § 6503(d), which suspends the statute of limitations with respect to the collection of "any tax imposed by chapter 11" (i.e., the estate tax), did not suspend the running of the statute with respect to the personal liability of transferees under § 6324(a)(2). However, the Court nonetheless felt constrained to follow the Tenth Circuit opinions in the two Russell cases, which held that if the statute of limitations was open against the estate, it was also open against the transferees.

III. District Court's 2016 Opinion. On December 1, 2016, the District Court issued a 46-page Memorandum Decision and Order in which it made the following rulings:

(1) Inclusion Under Section 2033. The Court concluded that the assets held by the decedent in her revocable trust had never been given away "such that Decedent lost the beneficial ownership of them during her lifetime." As a result, there was no transfer for purposes of either § 2036 or § 2038 and the assets were instead included under § 2033. Because the assets were not included under any of §§ 2034 through 2042, the trustees were not jointly and severally liable under § 6324(a)(2).

(2) Section 6324A Special Lien and Section 2204 Discharge. The District Court held that by offering the closely-held stock as collateral, the defendants had met the statutory requirements for a special lien under § 6324A and the IRS had no discretion to reject that lien. Because the special lien is the equivalent of a bond under § 2204 and the fiduciaries met the other requirements

of that code section, they were automatically discharged from joint and several liability under 31 U.S.C. § 3713(b).

(3) Statute of Limitations for Enforcing the Distribution Agreement. The District Court first ruled that the six-year statute of limitations under Utah law had already run prior to the time that the Government brought its action against the defendants. Based on U.S. v. Summerlin, 310 U.S. 414 (1940), the Government argued that it is not bound by state statutes of limitation. However, the Court stated that U.S. v. California, 507 U.S. 746 (1993), required "a more robust analysis of the cause of action under which the government is proceeding." In order to avoid the application of state statutes of limitation, the claim must be "obtained through or created by a federal statute" and must also be pursued by the Government in its "sovereign capacity." Because the claim was obtained by virtue of a private contract, the Government was required to step into the shoes of the trustees as a third party beneficiary and was therefore not acting in its sovereign capacity. As a result, the breach of contract claim was barred by the state statute of limitations.

(4) Enforcement of General Tax Lien. The Court determined that the Government had released its general tax liens with the result that "there is no section 6321 general lien remaining upon which the government can foreclose." The Court also concluded that the Government's attempt to refile its lien in 2015 was too late.

(5) Insurance Proceeds. Subject to their appeal rights with respect to the running of the statute of limitations, the defendants did not object to summary judgment as to their status as transferees under § 6324(a)(2) with respect to the life insurance proceeds. As a result, the Court entered judgment against the two surviving children in the total amount of approximately $185,000.

IV. District Court's 2018 Award of Attorneys' Fees and Costs. In May 2017, the defendants filed a motion for attorneys' fees and costs under § 7430, which provides that in a court proceeding brought by the United States, the "prevailing party may be awarded a judgment" for reasonable litigation costs. Section 7430 also provides that a party will not be treated as the prevailing party if the Government can establish that its position was "substantially justified." However, there is a presumption that the Government's position was not substantially justified if the IRS "did not follow its applicable published guidance."

The defendants limited their motion for fees to three specific issues: (1) the creation of the special estate tax lien under § 6324A discharging the fiduciaries from 31 U.S.C § 3713 liability pursuant to § 2204; (2) the includibility of the trust assets under § 2033; and (3) the untimely attempts by the Government to collect under the Distribution Agreement and to enforce a general tax lien.

On January 8, 2018, the Court issued an 11-page opinion in which it awarded the defendants about $286,000 in attorneys' fees and about $30,000 in expert witness costs. In doing so, the Court made the following rulings:

(1) Discharge under Section 2204. Although the Government argued that the fiduciaries did not make a written application for discharge under § 2204, the Court indicated that the Government could not point to any particular written form that was required for this purpose. As a result, the Court indicated that the fiduciaries' good faith efforts to comply with the requirements for discharge (e.g., providing all of the paperwork identified by the IRS for a special lien and corresponding discharge) constituted substantial compliance with the statute. See Baccei v. United States, 632 F.3d 1140, 1145-46 (9th Cir. 2011). Furthermore, the IRS did not have discretion to reject the closely-held stock that satisfied the requirements for a special lien under § 6324A. The Court therefore concluded: "Because the government has not demonstrated that its position on section 2204 discharge as a result of the section 6324A special lien had a reasonable basis in fact or law, the defendants should be awarded attorney's fees for all aspects of their defense to section 3713 claims."

(2) Inclusion under Section 2033. The Court also concluded that the Government's position that the assets were included under either § 2036 or § 2038 was not substantially justified because it was "inconsistent with the IRS statutory scheme and contradicted both IRS Technical Advice Memorandum 89-40-003 and IRS Revenue Ruling 75-553." Therefore, the Government had not followed its own published guidance. According to the Court, "the only potentially applicable transfer sections (§§ 2036 and 2038) require beneficial ownership to have been given away while at the same time retaining some of the value of what has been given away." Because the decedent had given nothing away during life, the Government's position had no "reasonable basis in fact or law."

(3) Enforcement of Distribution Agreement and General Tax Lien. According to the Court, "the government sat too long on its right to enforce the Distribution Agreement and failed to acknowledge its own numerous mistakes in releasing its tax lien twice and improperly attempting to revoke the liens it had previously released." The Court also stated: "The government's position ignored that it necessarily stood in the position of a third party beneficiary to the Distribution Agreement—rather than in its sovereign capacity—in its attempt to collect the unpaid tax. Similarly, it is not reasonable for the government to argue that the responsibility for its own numerous tax lien errors and lapses should be shifted onto the taxpayer as it did here." As a result, the Government's position was not substantially justified.

V. Tenth Circuit Appeals. On January 16, 2018, the Government filed a 53-page appellate brief in the Tenth Circuit Court of Appeals. The sole issue that the Government raises on appeal is the applicable statute of limitations relating to the enforcement of the Distribution

Agreement. This appeal is also significant because of what is not being pursued--the Government dropped its joint and several personal liability claims against the fiduciaries under 31 U.S.C. § 3713 and against the trustees under § 6324(a)(2), as well as a number of other issues. Instead, the Government is pursuing its contractual claim against the two surviving children with respect to each one's quarter-liability under the contract. The Government has also indicated that it will appeal the award of attorneys' fees.

Although the defendants have not yet filed their appellate brief, they have filed a notice of cross-appeal with respect to their liability under § 6324(a)(2) as transferees with respect to the life insurance proceeds of about $185,000 that they collectively received. The defendants' argument in this regard is that the Government's transferee liability claim against them is time-barred by the ten-year limitation period contained in section 6502(a).

In particular, the following arguments have either been made by the Government in its appellate brief or have been previously made by the defendants to the Government:

> (1) <u>Government's Third Party Beneficiary Claim</u>. The heart of the Government's argument is that the District Court erred in applying Utah's six-year statute of limitations to the Government's claim as a third party beneficiary of the Distribution Agreement. On appeal, the Government argues that the ten-year federal statute of limitations under § 6502(a) should apply. On this issue, the Tenth Circuit has stated: "Whether in general a state-law action brought by the United States is subject to a federal or state statute of limitations is a difficult question." <u>U.S. v. Holmes</u>, 727 F.3d 1230, 1234 (10th Cir. 2013), citing <u>U.S. v. California</u>, 507 U.S. 746, 758 (1993).
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> In general, it is well-settled that the Government is not bound by state statutes of limitation in enforcing its sovereign rights. See <u>U.S. v. Summerlin</u>, 310 U.S. 414, 416 (1940). According to the Tenth Circuit, the Government is not subject to state statutes of limitation when it is "acting in its sovereign capacity in an effort to enforce rights ultimately grounded in federal law." <u>Holmes</u>, 727 F.3d 1230 at 1234. In <u>Holmes</u>, the Government relied on Colorado law to collect federal income tax liability from a corporation's sole shareholder. Because the proceeding was "in every real sense a proceeding in court to collect a tax," the Government was acting in its sovereign capacity and the state statute of limitations could not divest the Government of its claims. Id. at 1235-36.
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> On the other hand, if the Government "comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there." <u>U.S. v. National City Bank of New York</u>, 28 F. Supp. 144, 150–52 (D.C.N.Y. 1939), quoting <u>Cooke, et al. v. United States</u>, 91 US 389, 398 (1875). For example, in <u>National City Bank</u>, the Government was simply a party to commercial paper and therefore was not acting in its sovereign capacity. Also, in <u>U.S. v. California</u>, 507 U.S. 746 (1993), the Supreme Court distinguished its decision in <u>Summerlin</u> and held that the California limitations period could bar the federal government's equitable state law claim of

subrogation because the Government was not acting as a sovereign based on rights grounded in federal law.

Because the Government's third party beneficiary claim is based on the voluntary acts of parties to a private contract rather than on actions taken in its sovereign capacity, the claim does not appear to be grounded in federal law. Although the estate tax assessment against the estate was a sovereign act, without the benefit of the Distribution Agreement that was subsequently and voluntarily entered into, the Government would have had no rights against the defendants. As noted above, the District Court concluded that the Government was not acting in its sovereign capacity in this case.

Three Circuit Courts have reached different answers on the specific question whether the Government's efforts to collect unpaid taxes as a third party beneficiary of a private contract are subject to state statutes of limitations, resulting in a split among the circuits.

In U.S. v. Scott, 167 F.2d 301 (8th Cir. 1948), the defendant had agreed to pay the taxpayer's "personal and individual debts and liabilities." In this case, the Government argued for the application of Missouri's ten-year limitations period for breach of a written contract because the six-year federal limitations period had expired. In its ruling, the Eighth Circuit stated: "We think the six-year limitation … on collecting income taxes after assessment, has reference only to such liabilities for payment as are imposed upon a party by law and not to any liability which a party may voluntarily impose upon himself by contract so as to give the United States an additional and special right of action" (emphasis added).

Finding that the defendant's liability "was not for taxes as such but for damages from breaching his obligation to satisfy a debt of the taxpayer" (emphasis added), the Eight Circuit also stated:

> The provisions of the Internal Revenue Code do not make such an obligor a 'taxpayer'. Indeed, the Revenue Code does not even make mention of such a contractual liability, and we can find nothing in its language or purpose to impliedly suggest that Congress intended such independent and voluntary undertakings, which might operate in favor of the Government, to be in any way subject to the prescriptions and limitations [of] the revenue statutes. Cf. United States v. Bessen, D.C.S.D.N.Y., 8 F.R.D. 75. The contract to pay the taxpayer's debts and liabilities, having been both made and intended to be performed in Missouri, was subject generally to the ten-year limitation of Mo. R. S.A. Sec. 1013. This is true as to the Government's debt the same as to the debts of other creditors.

The Fifth and the Sixth Circuits also considered this issue in U.S. v. Parker House Sausage, 344 F.2d 787 (6th Cir. 1965), and U.S. v. West Texas State Bank, 357 F.2d 198 (5th Cir. 1966). Parker House involved a contract in which the buyer of real estate promised to pay outstanding tax liens against the property. Although Michigan's six-year statute of limitations for breach of contract had expired, the Sixth Circuit ruled that the "United States is not barred in an action brought to enforce its claim by a state statute of limitations." In U.S.A. v. Johnson, the District Court concluded that Parker House had been discredited by the Supreme Court's analysis in California.

Similarly, in West Texas State Bank, the buyer of a business had agreed to indemnify the seller for corporate income taxes. Although the four-year Texas statute of limitations for breach of written contract had expired, the Fifth Circuit concluded that the Government was acting in its sovereign capacity to collect taxes and was therefore not subject to state statutes of limitation. However, West Texas State Bank was also decided long before the Supreme Court's opinion in California.

Although in the Summerlin case, the Supreme Court ruled against the taxpayer, that case can be read to support the District Court's opinion in U.S.A. v. Johnson. In Summerlin, the Court held that Florida's six-month limitation period for filing claims in a probate proceeding could not bar the Government's claim. However, the Court also noted that the outcome might have been different if there had been alternative methods for the Government to enforce its claim:

> If this were a statute merely determining the limits of the jurisdiction of a probate court and thus providing that the County Judge should have no jurisdiction to receive or pass upon claims not filed within the eight months, while leaving an opportunity to the United States otherwise to enforce its claim, the authority of the State to impose such a limitation upon its probate court might be conceded. But if the statute, as sustained by the state court, undertakes to invalidate the claim of the United States, so that it cannot be enforced at all, because not filed within eight months, we think the statute in that sense transgressed the limits of state power. Summerlin, 310 U.S. 414 at 417.

In this case, if the claim is broadly viewed as pertaining to the collection of the estate tax, then there were a number of ways for the Government to collect that tax, as demonstrated by the various causes of action that have been asserted against the defendants. Were it not for repeated errors and delays, those actions would have been successful. For example, if the IRS had accepted the closely-held stock that was pledged by the defendants as collateral, its interests would most likely have been protected in the bankruptcy. Also, were it not for multiple errors in connection with the Government's general tax lien, that lien could have been enforced.

In addition to the foregoing, the Government's argument that a federal ten-year statute of limitations applies is not consistent with the actual language of § 6502. In a normal breach of contract action, "the statute of limitations ordinarily begins to run when the breach occurs." Butcher v. Gilroy, 744 P.2d 311, 313 (Utah Ct.App.1987). In Utah, that limitation period is six years. In contrast, the ten-year period advocated by the Government begins to run under § 6502(a) on the date of assessment, and has nothing to do with the breach of a private contract. Furthermore, in this case the parties to the contract were never assessed, nor could they be assessed because their liability was for damages under a contract rather than for a tax. Significantly, as parties to a contract, the defendants were not transferees who could be assessed for their liability pursuant to § 6901. Also, the ten-year collection period under § 6502 actually began to run from the date of the 1992 assessment, and would have expired many years before this action unless extended pursuant to § 6503(d), which only applies to taxes imposed by chapter 11—not contract damages. As a result, the Government's argument rips a ten-year limitations period out of the Internal Revenue Code, shorn of all context, and arbitrarily applies it to parties to a private contract.

Even if the ten-year limitations period did apply, suspension under § 6503(d) only continues "for the period of any extension of time for payment granted under the provisions of … 6166." Section 6166(g), entitled "Acceleration of Payment," identifies a number of events that will terminate the extension of time for payment of the federal estate tax provided for in § 6166(a). In particular, § 6166(g)(1)(A) provides that if 50 percent or more of the value of the closely held business interest that formed the basis for the § 6166 election is "distributed, sold, exchanged, or otherwise disposed of . . . then the extension of time for payment of tax provided in subsection (a) shall cease to apply, . . ." (emphasis added). For this purpose, "the phrase 'distributed, sold, exchanged, or otherwise disposed of' comprehends all possible ways by which an interest in a closely held business ceases to form a part of the gross estate." Treas. Reg. § 20.6166A-3(e)(2) (emphasis added). It seems clear that a bankruptcy is one possible way for a closely-held business to cease being part of the gross estate.

Unlike termination for failure to pay pursuant to § 6166(g)(3), which occurs "upon notice and demand from the Secretary," it is significant that pursuant to § 6166(g)(1)(A), the "extension of time for payment" referenced in both § 6503(d) and in subsection (g)(1)(A) "shall cease to apply" upon disposition of the required amount, regardless of notice and demand. In this regard, the comma after the word "apply" should be noted.

In this case, the bankruptcy occurred in May 2002, with notice being sent to the Government at that time. Also, at the time of the bankruptcy, essentially all of the value of the closely-held stock "cease[d] to form a part of the gross estate." As a result, the extension of time under § 6166 arguably terminated at that time and the suspension of the limitations period under § 6503(d) also ended. Even if an additional one-year administrative extension of time granted by the IRS was determined to be an "extension of time for payment" under § 6166, the election ended at the latest by June 2, 2003, and the ten years began to run at that time. Therefore, the Government's addition of its contract claim in July 2013 appears to be too late.

(2) The Statute of Limitations for Transferee Liability. There is no question that the statute of limitations was open against the estate when this case was filed in January 2011. As previously noted, § 6502(a) allows the Government ten years to collect estate taxes from an estate, beginning on the date of assessment. However, in the case of a § 6166 election, § 6503(d) suspends the running of the statute of limitations "for the period of any extension of time for payment granted . . . under the provisions of section … 6166." For that reason, the statute was still open against the estate.

However, just because the statute was still open against the estate doesn't meant that it was still open against transferees under § 6324(a)(2). Section 6901(a) provides that transferee liability "shall, except as hereinafter in this section provided, be assessed, paid, and collected in the same manner and subject to the same provisions and limitations as in the case of the taxes with respect to which the liabilities were incurred" (emphasis added). Notwithstanding the express language of § 6901(a), the District Court felt compelled to follow a Tenth Circuit ruling stating that "the collection procedures of section 6901 are cumulative and alternative - - not exclusive or mandatory." United States v. Russell, 461 F.2d 607 (10th Cir. 1972). As a result, the lack of personal assessment against the transferees in this case was excused.

Even if a personal assessment is not required against a transferee, the express language of § 6901 demonstrates that the personal liability of the transferee is not the same as the underlying tax. As noted above, § 6901(a) states that the "following liabilities"--including transferee liability under § 6324(a)(2)--are to be "assessed, paid, and collected" in the "same manner . . . as in the case of the taxes with respect to which the liabilities were incurred." This language constitutes a statutory acknowledgement that the personal liability of a transferee under § 6324(a)(2) is not an estate tax. Because assessment is a prerequisite to collection, if the Government fails to assess under § 6901, it should not be able to collect under § 6901 because there is no personal assessment to start the collection period running. In other words, only for actions actually brought under § 6901 will the liabilities be "assessed, paid, and collected" as if they were the underlying tax. Thus, if utilized, § 6901(a) essentially converts the personal liability of transferees into a tax that can be assessed, paid, and collected in the same manner as the underlying tax.

The District Court agreed with defendants' argument that transferee liability under § 6324(a)(2) was neither an estate tax nor a tax at all. The Court also appeared to agree that § 6503(d), which suspends the statute of limitations with respect to the collection of "any tax imposed by chapter 11" (i.e., the estate tax), did not suspend the running of the statute with respect to such transferee liability. However, the Court nonetheless felt constrained to follow the Tenth Circuit opinions in the two Russell cases, which held that if the statute of limitations was open against the estate, it was also open against a transferee.

Notwithstanding the "cumulative and alternative" language of Russell, it should be recognized that there are significant substantive differences between the calculation of the estate tax imposed by chapter 11 and the determination of personal liability arising under § 6324(a)(2). These differences justify the requirement of a separate assessment under § 6901 and include the following: (1) personal liability is measured by the date of death value of the property held or received by the transferee, irrespective of deductions, liabilities, tax apportionment clauses, the size of the gross estate, alternate valuation dates, and other differences in valuation that might arise; (2) only property included in the gross estate under certain code sections (I.R.C. §§ 2034-2042) gives rise to personal liability under § 6324(a)(2), whereas the estate tax is calculated with respect to the entire gross estate; (3) I.R.C. § 2002, which states that the estate tax is to be paid by the executor, does not make the executor personally liable for that tax; and (4) there is no tax return for reporting personal liability under § 6324(a)(2).

Because assessment of initial transferees under § 6901(c)(1) must be made within one year after expiration of § 6501's period for assessing the transferor (essentially four years after filing the return), it could be argued that it is premature to assess transferees in the case of a § 6166 election because they may not be required to pay the tax for many years. However, the Government should still be able to immediately assess such transferees in order to ensure that its rights are fully protected. This is because personal liability under § 6324(a)(2) arises if the estate tax "is not paid when due." Even if the tax is not yet "due" in the sense that payment has been extended under § 6166, it is still due within the meaning of the Internal Revenue Code. Section 6151(c)—which is entitled "Time and place for paying tax shown on returns"--states that the "date fixed for payment of such tax" is to be "determined without regard to any extension of time for paying the tax." Furthermore, § 6166(d) provides that a § 6166 election is such an extension of time: "If an election under subsection (a) is made, the provisions of this subtitle shall apply as though the Secretary were extending the time for payment of the tax."

Based on the foregoing, it appears that all conditions for personal liability under § 6324(a)(2) exist from the first moment that the estate tax remains unpaid after the original due date, and assessments against transferees can therefore appropriately be made. Importantly, all of the information necessary for assessment against transferees should be readily available within the four-year time frame. Also, it is noteworthy that the IRS does not hesitate to assess estate tax liability against estates, even when their time for payment has been extended. Furthermore, it is much easier to assess transferees for the estate tax early on rather than waiting for twenty or more years. It should also be noted that the IRS is presumably free to agree with the transferee to indefinitely extend the time for assessment pursuant to § 6901(d). If the transferee's alternative is to have liability assessed immediately, that may be adequate incentive for the transferee to agree to such an extension.

Also, just because the estate tax has been assessed doesn't mean that it has to be collected. When an estate fails to pay the estate tax, the Government normally has ten years to collect that tax from the date it assessed the estate's liability. In the same way, if a transferee has been assessed under § 6901, the Government would normally have ten years in which to collect the tax from the transferee. As noted above, if the Government foregoes an assessment under § 6901 and instead chooses to sue a transferee directly under § 6324(a)(2), there is nothing in § 6503(d) that will suspend the statute of limitations against that transferee in the case of a § 6166 election. However, if the Government instead assesses the transferee under § 6901, the tax must be "collected <u>in the same manner</u> and subject to the <u>same provisions and limitations</u> as in the case of the taxes with respect to which the liabilities were incurred." This means that if a § 6166 election is in effect, a transferee who is assessed under § 6901(a) will be subject to the same suspension provisions of § 6503(d) as is the estate. <u>In other words, the Government can actually maximize its ability to collect the estate tax deferred under § 6166 by taking the simple step of assessing the transferees under § 6901</u>.

Finally, there is no valid argument that the four-year assessment window provided in § 6901 wasn't intended to apply in the case of a § 6166 election because of the much longer time frame that a deferral election involves. This point is demonstrated by the way § 6901 treats the assessment of fiduciary liability under 31 U.S.C. § 3713. Section 6901(c)(3) provides that the assessment of such liability can be made "not later than 1 year after the liability arises or not later than the expiration of the period for collection of the tax in respect of which such liability arises, whichever is the later" (emphasis added). In other words, fiduciary liability for the estate tax can be assessed until the very end of the § 6502 collection period with respect to the estate, as extended by suspension under § 6503(d)—a period of almost twenty-five years. Thus, Congress knows exactly how to protect against an assessment period that expires early on because it did so with respect to fiduciary liability under § 3713. Yet it did not do so with respect to transferee liability under § 6324(a)(2). This is evidence that even in the case of § 6166 elections, Congress intended to limit assessment of transferees to the four-year period provided under § 6901, and this statutory mechanism works just fine without a judicially-created alternative.

Statutory construction arguments aside, there are a number of other reasons why the rule in Russell should not be applied in this case, as discussed below:

(a) The Tenth Circuit repeatedly mentioned the particular and limited facts of its ruling in Russell, stating: “We hold that under these facts the Court did not err in finding that there need not be a separate assessment against *Russell*.” In other words, it appears that the standard of review was a “clearly erroneous” standard as opposed to a “de novo” review. The Tenth Circuit also expressly cautioned the Government that its ruling should not be relied upon the next time the Government failed to assess a transferee.

(b) At the time Russell was decided, the statute of limitations for collection was only six years, not the ten years provided under current law.

(c) Russell did not involve a § 6166 election, which extends the limitations period to almost twenty-five years, roughly four times as long as the six-year statute.

(d) Suspension under § 6503(d) was not involved.

(e) The surviving spouse in Russell paid less than a fourth of the estate tax that was due and there were no other assets to pay the tax. For that reason, the Court was concerned about intentional tax avoidance. In contrast, the defendants in this case paid about 75% of the estate tax and had a good faith plan in place for the remainder, making all required payments for almost ten years.

(f) The Government had many opportunities and methods to collect the estate tax in this case, but repeatedly failed to utilize them.

VI. Conclusion. After more than seven years of litigation at the District Court level and the deaths of two of the defendants, the U.S.A. v. Johnson case is continuing to the Tenth Circuit Court of Appeals. However, the Government has not appealed the rulings from the District Court with respect to the following matters: (1) the fact that trust beneficiaries are neither “beneficiaries” nor “transferees” for purposes of § 6324(a)(2); (2) the mandatory creation of a special estate tax lien under § 6324A based on the offering of qualifying stock; (3) the discharge of fiduciaries pursuant to § 2204 from joint and several liability arising under 31 U.S.C. 3713 as a result of offering a qualified special estate tax lien to the IRS and meeting all other statutory requirements; (4) the inclusion of assets in a lifetime revocable trust pursuant to § 2033 rather than § 2036 or § 2038; (5) the lack of joint and several personal liability of the trustees under § 6324(a)(2) based on § 2033 inclusion; and (6) the failure of the Government's general tax lien claim.

Instead, the Government has limited its appeal to its claim as a third party beneficiary for breach of contract. Because the defendants do not dispute the fact that the Government is a third party beneficiary, the issue on appeal centers on whether Utah's six-year statute of limitations applies or the ten-year federal statute applies. This depends in part on whether the Government is acting in its sovereign capacity with respect to a claim grounded in federal law when it stands in the shoes of parties to a private contract to pay a tax. However, even if the federal statute applies, there is also a question whether it is still open. This depends in part upon whether the 2002 bankruptcy terminated the deferral election pursuant to § 6166(g)(1) and caused the suspension provided by § 6503(d) to end.

At the same time, the defendants have filed notice of a cross-appeal with respect to the statute of limitations for transferee liability under § 6324(a)(2). Because § 6503(d) only suspends the statute of limitations with respect to the estate tax, and because the personal liability of transferees arising under § 6324(a)(2) is not a tax, the statute of limitations against the transferees is arguably closed. Although the Government could have assessed the defendants' transferee liability under § 6901 and presumably maximized the time for collection by essentially converting it into an estate tax subject to the same collection period, it chose to bring an action in court under § 6324(a)(2) instead.

Ironically, although the issues of inclusion under § 2033 and discharge under § 2204 are not part of this appeal, an appeal by the Government of the attorneys' fees award will make it necessary to determine whether the Government's positions on these issues were substantially justified for purposes of § 7430.