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FEDERAL TAX LAW—*MULLIKIN v. UNITED STATES*: “BIG BROTHER” IS STILL WATCHING; THE IRS CAN ASSESS PENALTIES AT ANY TIME

INTRODUCTION

In *Mullikin v. United States*,¹ the Court of Appeals for the Sixth Circuit addressed a case of first impression. That issue and the subject of this Note is whether the statute of limitations established in title 28, section 2462 of the United States Code applies to penalty assessments made under the authority of section 6701 of the Tax Equity & Fiscal Responsibility Act of 1982.² The Internal Revenue Service assessed penalties against Mullikin, an accountant, for aiding and abetting the understatement of taxes for his client,

1. 952 F.2d 920 (6th Cir. 1991), *cert. denied*, 113 S. Ct. 85 (1992).

2. The Tax & Fiscal Responsibility Act of 1982, Pub. L. 97-248, 96 Stat. 615 (1982) (codified at 26 U.S.C. § 6701 (1982)) (current version at 26 U.S.C. § 6701 (1988 & Supp. IV 1992)). There was a second issue raised in *Mullikin*. The court was also asked to address the issue of whether the district court erred in only allowing the Internal Revenue Service to assess one penalty per calendar year against Mullikin. *Mullikin*, 952 F.2d at 930. The district court held the IRS was not entitled to assess penalties for each quarter of the calendar year even though Mullikin had prepared and filed the returns for his client quarterly instead of yearly. *Mullikin v. United States*, 90-2 U.S. Tax Cas. (CCH) 85,304, 85,306-08 (E.D. Ky. 1990), *rev'd*, 952 F.2d 920 (6th Cir. 1991), *cert. denied*, 113 S. Ct. 85 (1992). The district court interpreted the words “taxable period” in 26 U.S.C. § 6701(b)(3) to mean calendar year. *Id.* Therefore, the IRS could only assess penalties for each year.

The Court of Appeals for the Sixth Circuit reversed. *Mullikin v. United States*, 952 F.2d 920 (6th Cir. 1991), *cert. denied*, 113 S. Ct. 85 (1992). The court held that Congress intended the words “taxable period” to permit quarterly tax penalty assessments if the returns were filed quarterly, instead of yearly. *Mullikin*, 952 F.2d at 931. However, because the facts in *Mullikin* are easily distinguishable from the facts of cases offering a different interpretation of “taxable period,” and the dissent in *Mullikin* agreed with the majority’s reasoning on the interpretation of “taxable period,” this Note will not address the issue of the proper interpretation of “taxable period” under § 6701(b)(3). 26 U.S.C. § 6701(b)(3) (1982) (current version at 26 U.S.C. § 6701(b)(3) (1988)).

The court’s interpretation of “taxable period” is, however, divergent from other circuit court cases addressing the same issue. *See, e.g.*, *Mattingly v. United States*, 924 F.2d 785 (8th Cir. 1991) (holding that “taxable period” means calendar year); *Emanuel v. United States*, 705 F. Supp. 434 (N.D. Ill. 1989) (interpreting that the phrase “taxable period” refers to calendar year). Both cases involved situations where the tax preparer had amended returns which referred to annual, not quarterly, returns previously filed. But in *Mullikin*, the quarterly returns did not reference any annual return. *Mullikin*, 952 F.2d at 931. The *Mullikin* court found this fact dispositive and held Mullikin liable for penalties for each quarterly return filed during the years in question. *Id.*

Vanco International, Inc.³ The penalties were assessed more than six years after the infractions occurred. Because there is no express limitations period enunciated in the text of section 6701,⁴ the court held that no statute of limitations applied to the federal government because the IRS was enforcing an anti-fraud provision of the Internal Revenue Code.⁵ This holding may have far reaching implications for all penalty actions initiated by the federal government because the holding suggests that no time limitation is imposed on the government to assess penalties, even in nontax related disputes.

Section One of this Note will examine the factual background of the dispute and the legislative history of title 28, section 2462 of the United States Code and title 26, section 6701 of the United States Code. Section One will also discuss the case law precedent of the United States Supreme Court which the United States District Court for the Eastern District of Kentucky and Court of Appeals for the Sixth Circuit used in deciding the issue presented in *Mullikin*. Section Two will discuss the principal case, *Mullikin*, from its disposition at the district court level as well as at the appellate court level. Section Two will also examine the legal reasoning of the majority in reaching its conclusion and the dissent's objections to the majority's reasoning. Section Three will analyze the holding and argue that the Court of Appeals for the Sixth Circuit incorrectly interpreted section 2462 and the legislative history behind section 6701. Section Three will also show that other federal courts have applied section 2462 differently in factual situations similar to that presented in *Mullikin*. Finally, this Note will show that the majority in *Mullikin* incorrectly decided the case because it failed to apply a relevant statutory provision to its legal analysis.

I. BACKGROUND

A. *Factual Setting*

James Mullikin was an accountant who prepared tax returns during the years of 1982 and 1983.⁶ Mullikin prepared eight quarterly employment tax returns for Vanco International, Inc. for the fiscal years of 1982 and 1983.⁷ Mullikin also provided additional

3. *Mullikin*, 952 F.2d at 921.

4. 26 U.S.C. § 6701 (1982) (current version at 26 U.S.C. § 6701 (1988 & Supp. IV 1992)) (originally enacted as part of the Tax Equity & Fiscal Responsibility Act of 1982, Pub. L. 97-248, 96 Stat. 615 (1982)). See *infra* note 10 for the text of 26 U.S.C. § 6701.

5. *Mullikin*, 952 F.2d at 929.

6. *Id.* at 921.

7. *Id.*

financial services to Vanco by preparing nine Wage and Tax statements (“W-2 Forms”) for Vanco’s employees for 1982 returns, and preparing ten such forms for 1983 returns.⁸ The W-2 Forms omitted cash wages paid to Vanco employees, which caused the understatement of the employees’ tax liabilities.⁹

The Internal Revenue Service (“IRS”) later determined that Mullikin’s failure to include the cash wages on the W-2 Forms constituted the aiding and abetting of an understatement of tax liability in violation of title 26, section 6701 of the United States Code.¹⁰ Mullikin paid the required amount of the penalty and subsequently followed the assessment challenge procedure¹¹ to request a refund for the amounts already paid.¹² The IRS denied one of Mullikin’s requests for a refund and failed to address the second claim within the time allotted by the Internal Revenue Code.¹³ Mullikin then

8. *Id.*

9. *Id.*

10. *Id.* 26 U.S.C. § 6701 (1982) (current version at 26 U.S.C. § 6701 (1988 & Supp. IV 1992)) (originally enacted as part of the Tax Equity & Fiscal Responsibility Act of 1982, Pub. L. 97-248, 96 Stat. 615 (1982)) states, in relevant part:

(a) Imposition of Penalty. Any person—

(1) who aids or assists in, procures, or advises with respect to, the preparation or presentation of any portion of a return, affidavit, claim, or other document in connection with any matter arising under the internal revenue laws,

(2) who knows that such portion will be used in connection with any material matter arising under the internal revenue laws, and

(3) who knows that such portion (if so used) will result in an understatement of the liability for tax of another person, shall pay a penalty with respect to each such document. . . .

Id.

11. 26 U.S.C. § 6703(c)(1) and (2) (1982) (current version at 26 U.S.C. § 6701(c)(1) and (2) (1988 & Supp. IV 1992)) (originally enacted as part of the Tax Equity & Fiscal Responsibility Act of 1982, Pub. L. 97-248, 96 Stat. 613 (1982)) states:

(1) If, within 30 days after the day on which notice and demand of any penalty under section 6700, 6701, or 6702 is made against any person, such person pays an amount which is not less than 15 percent of the amount of such penalty and files a claim for refund of the amount so paid, no levy or proceeding in court for the collection of the remainder of such penalty shall be made, begun, or prosecuted until the final resolution of a proceeding begun as provided in paragraph (2). . . .

(2) If, within 30 days after the day on which his claim for refund of any partial payment of any penalty under section 6700, 6701, or 6702 is denied . . . the person fails to begin a proceeding in the appropriate United States district court for the determination of his liability for such penalty, paragraph (1) shall cease to apply. . . .

Id. Mullikin complied with these statutory provisions by paying fifteen percent of the total \$99,000 in penalty assessments. *Mullikin v. United States*, 952 F.2d 920, 921 (6th Cir. 1991), *cert. denied*, 113 S. Ct. 85 (1992).

12. *Mullikin*, 952 F.2d at 921.

13. *Id.* Section 6703(c)(2) requires the IRS to rule on a taxpayer’s request for a

filed suit in the United States District Court for the Eastern District of Kentucky to obtain a refund of the penalty assessment portions he had already paid, claiming that the limitations period in title 28, section 2462 of the United States Code barred the IRS from assessing penalties after five years.¹⁴ However, to fully understand Mullikin's dispute with the IRS, it is necessary to briefly examine the language and purpose of title 26, section 6701 of the United States Code and title 28, section 2462 of the United States Code.

B. *Statutory Basis for Mullikin's Conflict with the IRS*

1. Brief History of Title 26, Section 6701 of the United States Code

Congress enacted section 6701, as part of the Tax Equity & Fiscal Responsibility Act of 1982. Section 6701 basically provides that any person who aids or assists in preparing tax returns that understate the taxpayer's tax liability, and knows the tax returns will understate the taxpayer's liability, is subject to a civil fine.¹⁵ Until section 6701 was enacted, criminal charges were the only remedy available to the IRS to prevent tax preparers from intentionally understating their client's tax liabilities.¹⁶

The Senate Finance Committee gave four reasons why it was necessary to create a new civil penalty to enforce the restrictions against aiding and abetting the understatement of tax liability.¹⁷ The first reason the Senate Finance Committee gave was that a civil penalty would discourage those who would otherwise assist taxpayers in fraudulently understating their tax liability.¹⁸ Next, the Committee cited the inequity of subjecting taxpayers to large civil penalties for underpaying taxes, while allowing their tax preparers

refund within six months and thirty days after the taxpayer files a request. 26 U.S.C. § 6703(c)(2) (1982) (current version at 26 U.S.C. § 6703(c)(2) (1988 & Supp. IV 1992)). The IRS failed to rule on Mullikin's second claim within the statutory time allotted. *Mullikin*, 952 F.2d at 921. Pursuant to provisions established in § 6703(c)(2), Mullikin filed a timely proceeding in the United States District Court of Kentucky for a determination of his liability on his first refund claim. *Id.* at 921-22.

14. *Mullikin*, 952 F.2d at 921-22.

15. 26 U.S.C. § 6701 (1982) (current version at 26 U.S.C. § 6701 (1988 & Supp. IV 1992)). See *supra* note 10 for text of 26 U.S.C. § 6701(a)(1)-(3). A violation of § 6701 results in a fine of \$1,000 per violation. 26 U.S.C. § 6701(b)(1) (1982) (current version at 26 U.S.C. § 6701(b)(1) (1988 & Supp. IV 1992)) (originally enacted as part of the Tax Equity & Fiscal Responsibility Act of 1982, Pub. L. 97-248, 96 Stat. 615 (1982)).

16. S. REP. NO. 494, 97th Cong., 2d Sess. 275 (1982), *reprinted in* 1982 U.S.C.C.A.N. 781, 1022.

17. *Id.*

18. *Id.*

to escape any civil fine.¹⁹ The third justification was that a civil penalty would be more appropriate than criminal proceedings since the act of assisting others to understate taxes is culpable, but not worthy of criminal prosecution.²⁰ Finally, the Committee believed that a civil penalty would help protect innocent taxpayers who are falsely misled by advisors and tax preparers seeking to make a profit at the taxpayer's expense.²¹

However, in its report, the Senate Finance Committee did not address the significance of the omission in section 6701 of an express limitations period on the assessment of penalties. Mullikin argued that the omission of a limitations period in section 6701 indicated that Congress intended the limitations period established in section 2462 to apply.²² Therefore, it is necessary to briefly study the language and purpose of title 28, section 2462 of the United States Code to understand Mullikin's argument as to why section 2462 applies to section 6701 cases.

2. Legislative History of Title 28, Section 2462 of the United States Code

For nearly two centuries, section 2462 and its predecessors have provided a catch-all statute of limitations that applies to certain actions initiated by the federal government.²³ The origins of the present version of title 28, section 2462 of the United States Code date back to the Judiciary Act of 1799.²⁴ In the Judiciary Act of 1799, Congress moved away from the rule of sovereign immunity and subjected the federal government to statutory limitations periods. The language of the statute of limitations has changed over the years, but the basic purpose of maintaining an equitable system of government has remained the same. Congress did not want citizens to be subjected to the inconvenience of unwarranted and untimely law suits instigated by the government.²⁵ Title 28, section 2462 of the United States Code states:

Except as otherwise provided by Act of Congress, an action, suit

19. *Id.*

20. *Id.*

21. *Id.*

22. *Mullikin v. United States*, 90-2 U.S. Tax Cas. (CCH), 85,304, 85,304-06 (E.D. Ky. 1990), *rev'd*, 952 F.2d 920 (6th Cir. 1991), *cert. denied*, 113 S. Ct. 85 (1992).

23. 28 U.S.C. § 2462 (1978) (current version at 28 U.S.C. § 2462 (1988 & Supp. IV 1992)) (originally Pub. L. 80-773, 62 Stat. 974 (1948)).

24. Judiciary Act of 1799, ch. 22, § 89, 1 Stat. 695 (1799).

25. *Id.*

or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.²⁶

The significance of both sections 6701 and 2462 in *Mullikin* is twofold. First, *Mullikin* was the first successful attempt, at the lower court level, to use section 2462 to bar the IRS from assessing penalties because the time period had expired.²⁷ Second, the *Mullikin* court was forced to weigh the IRS's need to enforce anti-fraud provisions of the Internal Revenue Code against the taxpayer's interest in being free from governmental interference after a reasonable amount of time had passed. However, to comprehend *Mullikin's* dispute with the IRS, it is necessary to examine the development of the doctrines and case law that have defined statute of limitation law as it applies to the federal government.

C. *United States Supreme Court Precedent*

1. *E.I. Du Pont De Nemours & Co. v. Davis*²⁸

E.I. Du Pont De Nemours & Co. involved a situation where the United States had taken control of the nation's railroads and was seeking to recover charges from the defendant that had accrued on shipments of cotton under the Transportation Act of 1920.²⁹ The district court sustained a demurrer by the defendant on the grounds that the action was time-barred by section 424 of the Transportation Act.³⁰ The Court of Appeals for the Eighth Circuit reversed,³¹ and the United States Supreme Court upheld the Court of Appeal's decision. The Court held that the United States was acting in its governmental capacity, and therefore was not subject to any statute of

26. 28 U.S.C. § 2462 (1978) (current version at 28 U.S.C. § 2462 (1988 & Supp. IV 1992)) (originally Pub. L. 80-773, 62 Stat. 974 (1948)).

27. *Mullikin v. United States*, 90-2 U.S. Tax Cas. (CCH), 85,304, 85,306 (E.D. Ky. 1990), *rev'd*, 952 F.2d 920 (6th Cir. 1991), *cert. denied*, 113 S. Ct. 85 (1992).

28. 264 U.S. 456 (1924).

29. *Id.* at 459.

30. *Id.* The relevant language stated, "(3) All actions at law by carriers subject to this Act for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after." *Id.* (quoting the Transportation Act of 1920 § 424, 41 Stat. 459, 492 (1920)).

31. *Davis v. E.I. Du Pont De Nemours & Co.*, 287 F. 522 (1923), *aff'd*, 264 U.S. 456 (1924).

limitations unless Congress expressly enacted one.³²

The Court in *E.I. Du Pont De Nemours & Co.* noted that there were five titles in the Transportation Act of 1920, none of which made reference to a statute of limitations that would apply against the federal government.³³ The Court, unable to find a time restriction on the federal government, interpreted this omission to mean that Congress intended no statute of limitations to apply.³⁴ The Court reasoned that if Congress wanted a statute of limitations to apply to the Act, Congress would have specifically placed such a provision into the Act.³⁵ The Court thus concluded that there was no specific time restriction established in the Act, and therefore the United States was not subject to any statute of limitations.³⁶

2. *Badaracco v. Commissioner*³⁷

In *Badaracco*, a taxpayer initially filed a fraudulent tax return, then later filed an accurate, amended return.³⁸ Except in cases of fraud, the Internal Revenue Code generally provides for a three year limitations period in section 6501(a), in which the IRS may initiate legal proceedings against a taxpayer.³⁹ The issue before the Court was whether the general three year statute of limitations of the Internal Revenue Code⁴⁰ would allow penalty assessments after the time period had expired.⁴¹ The Court held that the general three year statute of limitations established in section 6501(a) did not apply.⁴²

32. *E.I. Du Pont De Nemours & Co.*, 264 U.S. at 462.

33. *Id.*

34. *Id.* at 461.

35. *Id.*

36. *Id.* at 461-62.

37. 464 U.S. 386 (1984).

38. *Badaracco*, 464 U.S. at 389.

39. 26 U.S.C. § 6501(a) (1982) (current version at 26 U.S.C. § 6501(a) (1988 & Supp. IV 1992)). See *infra* note 40 for text of the Internal Revenue Code's three year statute of limitations, 26 U.S.C. § 6501(a).

40. *Id.* Section 6501(a) provides in pertinent part:

Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.

Id.

41. *Badaracco*, 464 U.S. at 388.

42. *Id.* at 397.

The Court in *Badaracco* reasoned that the plain language in section 6501(c)(1) expressly stated that no statute of limitations was to apply if a return was filed fraudulently.⁴³ The Court then reasserted its position articulated in *E.I. Du Pont De Nemours* that statutes of limitation barring the collection of taxes otherwise due and unpaid are strictly construed in favor of the government.⁴⁴ Thus, the Court did not find that the defendant's amended and accurate return could toll the statute of limitations, because the plain language of the statute indicated that no limitations period was to apply when a fraudulent return is filed.⁴⁵ However, there is conflicting United States Supreme Court precedent that indicates taxpayers should be favored in tax cases.

3. *Bowers v. New York & Albany Lighterage Co.*⁴⁶ and *Rothensies v. Electric Storage Battery Co.*⁴⁷

Bowers v. New York & Albany Lighterage Co. involved a taxpayer who paid his taxes and, nearly five years later, was assessed additional income and profit taxes.⁴⁸ The taxpayer refused to pay the additional taxes.⁴⁹ In ruling that the IRS illegally sold the taxpayer's property to pay the tax deficiency,⁵⁰ the United States Supreme Court held that provisions of taxing statutes are to be interpreted liberally in favor of the taxpayer.⁵¹

In an even more sweeping decision, *Rothensies v. Electric Stor-*

43. *Id.* at 395-96 (citing 26 U.S.C. § 6501(c)(1) (1982)) (current version at 26 U.S.C. § 6501(c)(1) (1988)). *Badaracco* argued the fraudulent return was a "nullity," therefore only the amended, non-fraudulent return should commence the limitations period. *Id.* at 396. The Court expressly rejected the taxpayer's argument, holding that the plain language of § 6501(a) referenced the original return, not the amended return. *Id.*

44. *Id.* at 391 (citing *E.I. Du Pont De Nemours & Co. v. Davis*, 264 U.S. 456 (1924)).

45. *Id.* at 396. However, one commentator has provided an extensive, critical analysis of the reasoning in *Badaracco*. Douglas A. Kahn, *The Supreme Court's Misconstruction of a Procedural Statute - A Critique of the Court's Decision in Badaracco*, 82 MICH. L. REV. 461 (1983-84). The author uses logical reasoning and statutory interpretation to suggest the result achieved by the United States Supreme Court in *Badaracco* was erroneous. *Id.* For a view supporting the holding of *Badaracco*, see Preston Rutledge, Note, *Amended Returns and the Limitations Period for Tax Fraud*, 51 GEO. WASH. L. REV. 600 (1983).

46. 273 U.S. 346 (1927).

47. 329 U.S. 296 (1946).

48. *Bowers*, 273 U.S. 346, 347 (1927).

49. *Id.* at 347.

50. *Id.* at 352.

51. *Id.* at 350 (citing *Eidman v. Martinez*, 184 U.S. 578, 583 (1902); *Shwab v. Doyle*, 258 U.S. 529, 536 (1922)).

age Battery Co.,⁵² the United States Supreme Court addressed the issue of limitation periods on the actual assessment of taxes.⁵³ In *Rothensies*, the Electric Storage Battery Company paid excise taxes to the government over a period of several years.⁵⁴ The company later found it had unnecessarily paid the tax. The taxpayer filed suit for a refund and received a settlement from the IRS, but the company had been deducting the amount it anticipated receiving from the IRS as a business deduction before the settlement.⁵⁵ The IRS treated the amount deducted as income to the taxpayer and assessed a deficiency against the taxpayer. The taxpayer paid the deficiency, and then sued to recover the deficiency assessment.⁵⁶

In ruling that the taxpayer was allowed to recover the deficiency, the United States Supreme Court held that an income tax system must have a final date of reckoning upon which the taxpayer would be free from government intrusion.⁵⁷ The Court believed that time limitations against the IRS's ability to assess taxes were beneficial because the limitations prevented the revival of stale claims and provided for swift, efficient justice.⁵⁸ Thus, the court in *Mullikin v. United States* could choose from either of the competing doctrines represented by *Bowers* and *Rothensies*.

II. DISCUSSION OF *MULLIKIN v. UNITED STATES*

A. *Disposition by the United States District Court for the Eastern District of Kentucky*

Before the district court, Mullikin argued that the penalty assessments against him were time-barred because of the statute of limitations established in title 28, section 2462 of the United States Code.⁵⁹ Mullikin contended that because no specific statute of limitations was established in section 6701, the statute of limitations provided in section 2462 applied by default.⁶⁰ Both Mullikin and the IRS moved for summary judgment on the statute of limitations issue.

52. 329 U.S. 296 (1946).

53. *Id.* at 297.

54. *Id.* at 298.

55. *Id.*

56. *Id.*

57. *Id.* at 301.

58. *Id.*

59. *Mullikin v. United States*, 90-2 U.S. Tax Cas. (CCH), 85,304, 85,304-05 (E.D. Ky. 1990), *rev'd*, 952 F.2d 920 (6th Cir. 1991), *cert. denied*, 113 S. Ct. 85 (1992).

60. *Id.*

The IRS argued that where Congress has not established a specific statute of limitations to apply to actions commenced by the government, courts are not at liberty to impose one.⁶¹ The IRS contended that "statutes of limitation sought to be applied to bar rights of the Government must receive a strict construction in favor of the Government."⁶² The IRS used *Badaracco*⁶³ to argue that it was entitled to summary judgment as a matter of law.

The district court agreed with Mullikin's argument and granted his motion for summary judgment on the statute of limitations issue.⁶⁴ The IRS appealed the decision to the Court of Appeals for the Sixth Circuit.⁶⁵

B. *The Majority Opinion for the United States Court of Appeals for the Sixth Circuit*

On appeal, the *Mullikin* majority noted the particular issue of the applicability of the section 2462 statute of limitations to section 6701 penalties was one of first impression.⁶⁶ The IRS advanced two primary arguments. First, it argued that section 6701 did not provide a limitations period and therefore no statute of limitations applied to the assessment of penalties under section 6701.⁶⁷ The IRS buttressed this argument by noting the general rule that statutes of limitation applied against the government must be interpreted strictly in favor of the government.⁶⁸ The IRS, therefore, concluded that no statute of limitations should apply to penalty assessments under section 6701, and thus, penalties levied under section 6701

61. *Id.* at 85,306.

62. *Id.* (quoting *Badaracco v. Commissioner*, 464 U.S. 386, 391 (1984)).

63. *Badaracco v. Commissioner*, 464 U.S. 386 (1984).

64. *Mullikin*, 90-2 U.S. Tax Cas. (CCH) at 85,307.

65. *Mullikin v. United States*, 952 F.2d 920 (6th Cir. 1991), *cert. denied*, 113 S. Ct. 85 (1992). Following the district court's decision in *Mullikin*, another taxpayer successfully used § 2462 to bar penalty assessments made under § 6701 of the Internal Revenue Code. *Lamb v. United States*, 779 F. Supp. 116 (W.D. Ark. 1991), *rev'd*, 977 F.2d 1296 (8th Cir. 1992). *Lamb* was a tax preparer who was assessed penalties under § 6701 for understating eight clients' tax returns. *Id.* at 116-17. The *Lamb* court found the policy reasons in *Rothensies v. Electric Storage Battery Co.*, 329 U.S. 296 (1946), and the logical reasoning of *Mullikin v. United States*, 90-2 U.S. Tax Cas. (CCH), 85,304 (E.D. Ky. 1990) persuasive, and ruled the penalty assessments were time-barred. *Lamb*, 779 F. Supp. 118-19. However, the *Lamb* decision occurred before the Court of Appeals for the Sixth Circuit decision reversed the district court's decision in *Mullikin*, and has subsequently been reversed itself. *See Lamb*, 779 F. Supp. 116, *rev'd*, 977 F.2d 1296.

66. *Mullikin*, 952 F.2d at 926.

67. *Id.* at 925.

68. *Id.*; *see supra* notes 62-63 and accompanying text.

could be assessed at any time.⁶⁹

The IRS's second argument was that a penalty "assessment" was not an action, suit, or proceeding for the enforcement of a civil penalty because "assessment" was not specifically mentioned in section 2462; therefore, it was outside the definitional reach of section 2462.⁷⁰ The IRS contended that "assessment" under section 2462 was merely an "administrative act."⁷¹ Finally, the IRS directed the court's attention to section 6502, arguing that section 6502 provides a penalty may be assessed at any time, but an action to enforce a penalty following the assessment must be brought within six years.⁷² Since *Mullikin* was a penalty assessment case, and not an enforcement case, the IRS should be allowed to assess penalties at any time.

Mullikin, in turn, reasserted his successful argument used in the district court. Mullikin contended that title 28, section 2462 of the United States Code provides a catch-all statute of limitations that is applicable to any governmental attempt to collect penalties.⁷³ Mullikin argued that the only exception to section 2462 is where Congress has otherwise specifically provided for a limitations period, which is not the case with section 6701.⁷⁴ Thus, Mullikin asserted that Congress intended section 2462 to apply to any government "proceeding," including administrative actions and judicial proceedings to enforce statutory penalties.⁷⁵ Therefore, he argued, the penalty assessments for the 1982 tax returns were time-barred because the IRS did not initiate any proceeding until the limitations period established in section 2462 had expired.⁷⁶ However, the majority for the Court of Appeals for the Sixth Circuit rejected Mulli-

69. *Id.*

70. *Id.*; see also *supra* text accompanying note 26 for the text of § 2462.

71. *Id.*

72. *Id.* at 925-26. See 26 U.S.C. § 6502(a) (1982) (current version at 26 U.S.C. § 6502(a) (1988 & Supp. IV 1992)) which provides:

(a) Where the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun-

(1) within 6 years after the assessment of the tax

Id. For similar time limitations on IRS court proceedings, but not on assessments, see *supra* note 40 for text of 26 U.S.C. § 6501 (1982) (current version at 26 U.S.C. § 6501 *et seq.* (1988 & Supp. IV 1992)). Under the current version of 26 U.S.C. § 6501, the time limitation is ten years, not three. *Id.*

73. *Mullikin*, 952 F.2d at 926.

74. *Id.*

75. *Id.*

76. *Id.*

kin's argument and reversed the district court's ruling.⁷⁷

The majority in *Mullikin* agreed with the IRS and followed the general rule established by the United States Supreme Court in *E.I. Du Pont De Nemours & Co. v. Davis*⁷⁸ that "[a]n action on behalf of the United States in its governmental capacity . . . is subject to no time limitation, in the absence of congressional enactment clearly imposing it."⁷⁹

The majority in *Mullikin* also followed the rule articulated in *Badaracco*,⁸⁰ stating that where a statute of limitations seeks to bar the United States from acting in its governmental capacity, the statute must receive strict construction in favor of the government.⁸¹ Since the issue of whether section 2462 applied to penalty assessments was an issue of first impression, the *Mullikin* majority had no binding precedent on which to base its decision. Section 6501 of the Internal Revenue Code is a general three year limitations period that applies to all actions commenced by the IRS, unless a specific Internal Revenue Code provision provides differently.⁸² Therefore, the *Mullikin* majority was forced to analogize federal cases that addressed the issue of whether the limitations period for the assessment and collection of taxes established in section 6501 applied to penalties assessed under sections 6700 or 6701 to determine which, if any, limitations period applied to section 6701.⁸³

The *Mullikin* majority examined one court of appeals case and several district court cases which held that penalty assessments levied under either section 6700 or section 6701 were not subject to the statute of limitations established in section 6501.⁸⁴ The *Mullikin* majority found these cases to be persuasive and adopted much of

77. *Id.* at 929.

78. 264 U.S. 456 (1924).

79. *Mullikin*, 952 F.2d at 926 (quoting *E.I. Du Pont De Nemours & Co. v. Davis*, 264 U.S. 456, 462 (1924)).

80. *Id.* at 926 (citing *Badaracco v. Commissioner*, 464 U.S. 386, 398 (1984)).

81. *Id.*

82. 26 U.S.C. § 6501(a) (1982) (current version at 26 U.S.C. § 6501(a) (1988 & Supp. IV 1992)); see also *supra* note 40 for text of 26 U.S.C. § 6501(a).

83. *Mullikin*, 952 F.2d at 926.

84. *Id.* (citing *Sage v. United States*, 908 F.2d 18, 25 (5th Cir. 1990) (holding the common law doctrine of laches is the only time bar to actions instituted by the government, when Congress has not specifically established a statute of limitations)); *Emanuel v. United States*, 705 F. Supp. 434, 436 (N.D. Ill. 1989) (holding that penalties assessed under both § 6700 and § 6701 were not subject to the three year statute of limitations in § 6501); *Agbanc, Ltd. v. United States*, 707 F. Supp. 423, 426 (D. Ariz. 1988) (holding § 6501(a) is inapplicable to § 6700 penalties); *Kuchan v. United States*, 679 F. Supp. 764, 768 (N.D. Ill. 1988) (holding § 6701 was enacted to combat fraud and therefore Congress did not intend § 6501(a) to apply).

their reasoning, despite the fact the cases were not directly on point. The cases, which the *Mullikin* majority used as persuasive authority, dealt with the issue of whether the general Internal Revenue Code statute of limitations in section 6501 applied to penalty assessments, whereas the issue in *Mullikin* was whether the general federal catch-all statute of limitations⁸⁵ applied to penalty assessments levied under the authority of the Internal Revenue Code. The majority drew an analogy between the issue in *Mullikin* and the legal analysis in *Sage v. United States*⁸⁶ and *Kuchan v. United States*⁸⁷ and concluded that section 2462 did not apply to penalties assessed under section 6701.⁸⁸

In *Sage*, the defendant, John Sage, was charged with selling allegedly abusive tax shelters.⁸⁹ The defendant argued that the limitations period established in section 6501(a) barred any penalty assessed under section 6700.⁹⁰ Sage contended that the language of section 6671(a)⁹¹ states a penalty shall be assessed and collected in the same manner as taxes.⁹² Therefore, Sage argued, the statute of limitations, as it applied to the assessment and collection of taxes, must also be applied in the same manner to assessment of penalties.⁹³ Because the penalty assessment was made at a point in time past the three year limitations period in section 6501(a), Sage asserted that the proceedings by the IRS were time-barred.⁹⁴

In *Sage*, the IRS based its counter argument on the *Badaracco* holding, arguing that the “[s]tatutes of limitations must receive a strict construction in favor of the government.”⁹⁵ Thus, the IRS wanted the court to interpret section 6501(a) strictly. The IRS emphasized the plain language of section 6501(a), which “sets up the

85. 28 U.S.C. § 2462 (1988).

86. 908 F.2d 18 (5th Cir. 1990).

87. 679 F. Supp. 764 (N.D. Ill. 1988).

88. *Mullikin*, 952 F.2d at 928.

89. *Sage*, 908 F.2d at 20.

90. *Id.* at 23.

91. 26 U.S.C. § 6671(a) (1988) states:

The penalties and liabilities provided by this subchapter shall be paid upon notice and demand by the Secretary, and shall be assessed and collected in the same manner as taxes. Except as otherwise provided, any reference in this title to “tax” imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter.

Id.

92. *Sage*, 908 F.2d at 23.

93. *Id.*

94. *Id.*

95. *Id.* at 24 (citing *Badaracco v. Commissioner*, 464 U.S. 386 (1984)).

filing of a tax return as a prerequisite to the running of the limitations period."⁹⁶ This filing requirement of section 6501(a) was the dispositive factor to the IRS because section 6501(a) only applies if the taxpayer filed a return.⁹⁷ Penalties assessed under section 6700, conversely, do not have a filing requirement.⁹⁸ Therefore, the IRS argued, that the general three year statute of limitations articulated in section 6501(a) does not apply to penalties assessed pursuant to section 6700.⁹⁹

The court in *Sage* agreed with the IRS and concluded that a section 6700 assessment of penalties does not depend on the filing of a tax return.¹⁰⁰ The court noted that, if Sage's argument was adopted, it would be extremely difficult to determine when the limitation period should begin to run, "i.e., when the prohibited activity took place or when the IRS became aware of the prohibited activity."¹⁰¹ The *Sage* court adopted the IRS's position that no statute of limitations is to apply to section 6700 penalties,¹⁰² reasoning that there is no specific language in section 6700 or elsewhere in the Code which "cuts down the power of [s]ection 6700."¹⁰³ The court opined that the intent of Congress when enacting section 6700 was to prevent transactional fraud.¹⁰⁴ Therefore, the *Sage* court concluded that Congress did not intend to have a statute of limitations apply to section 6700¹⁰⁵ and noted that the only option available to a taxpayer when attempting to time-bar a claim by the government was the doctrine of laches.¹⁰⁶

The *Mullikin* majority then examined *Kuchan v. United States*,¹⁰⁷ a district court case. In *Kuchan*, the IRS assessed penalties pursuant to section 6701 against the defendant accountant for

96. *Id.*

97. *Id.* at 25 (citing *Agbanc, Inc. v. United States*, 707 F. Supp. 423 (D. Ariz. 1988)).

98. *Id.*

99. *Id.* (quoting *Agbanc, Inc. v. United States*, 707 F. Supp. 423, 426-27 (D. Ariz. 1988)).

100. *Id.*

101. *Id.* at 25.

102. *Id.* at 24.

103. *Id.* at 25.

104. *Id.*

105. *Id.*

106. *Id.* "Laches" is the doctrine in which failure to assert a right or cause of action within a reasonable amount of time results in a bar to that claim in a court of equity. BLACK'S LAW DICTIONARY 875 (6th ed. 1990).

107. 679 F. Supp. 764 (N.D. Ill. 1988).

aiding and abetting the understatement of tax liability.¹⁰⁸ The IRS imposed the penalties on Kuchan because of statements in letters Kuchan wrote to his clients, which *if used* in computing income tax, would lead to the understatement of tax liability. Yet, the IRS imposed this penalty even though Kuchan did not prepare and file a tax return for his clients.¹⁰⁹ Kuchan argued that the penalties were barred because of the three year statute of limitations expressed in section 6501(a).¹¹⁰ However, the district court did not agree with Kuchan's argument.

The *Kuchan* court adopted the IRS's position that section 6501(a) required a filing of a tax return to initiate the statute of limitations, whereas section 6701 was silent as to filing tax returns.¹¹¹ Therefore, the court concluded that the three year limitations period established in section 6501(a) could not be used to bar penalty assessments since section 6701 of the Internal Revenue Code had no filing requirement.¹¹²

The holding in *Kuchan* is significant given the factual background of the case because the defendant did not file, or prepare, an income tax return.¹¹³ In *Kuchan*, it appeared that the court did not want to establish a rule as to when the statute of limitations would toll in cases where there was no tax return filed. The *Kuchan* court followed *Badaracco* and held that no statute of limitations applied.¹¹⁴ The *Kuchan* court interpreted section 6701 as being similar to other sections in the Internal Revenue Code that were intended to combat fraud and allow unrestricted periods of limitation.¹¹⁵

The *Mullikin* majority found the reasoning in both *Sage* and *Kuchan* persuasive.¹¹⁶ The *Mullikin* majority concluded that these cases represented the position that Congress did not intend a limitation period to apply to any fraud prevention Code section, including section 6701.¹¹⁷ The majority noted that sections 6700 and 6701

108. *Id.* at 766.

109. *Id.* at 766-67.

110. *Id.* at 767-68.

111. *Id.* at 768.

112. *Id.*

113. *Id.* at 766-67.

114. *Id.* at 768.

115. *Id.*; see also *infra* note 120 for the text of Internal Revenue Code anti-fraud sections which supply express periods of limitation.

116. *Mullikin v. United States*, 952 F.2d 920, 928 (6th Cir. 1991), *cert. denied*, 113 S. Ct. 85 (1992).

117. *Id.*

are anti-fraud provisions under which Congress has traditionally allowed an unrestricted period of limitation.¹¹⁸

In reaching its conclusion, the *Mullikin* majority placed its initial emphasis on the legislative history behind section 6701. The majority found that the legislative history showed that the section was intended as an anti-fraud measure, and as such, it should be interpreted in a similar manner as other anti-fraud provisions.¹¹⁹

The *Mullikin* majority then reviewed other anti-fraud provisions of the Internal Revenue Code and concluded that Congress had provided for unlimited periods for assessment of penalties under those provisions.¹²⁰ The *Mullikin* majority concluded that title 28, section 2462 of the United States Code by its express language only applied where Congress has not already provided for a statute of limitations.¹²¹ In so concluding, the majority stated that Congress has expressly provided limitation periods in other sections of the Internal Revenue Code. Therefore, the omission of a limitations period in section 6701 indicated Congressional intent to have no statute of limitations apply to section 6701.¹²² Thus, the *Mullikin* majority held that section 2462 was inapplicable to penalty assessments made pursuant to the Internal Revenue Code.¹²³

118. *Id.*

119. *Id.* The court quoted the Senate report which indicated the legislative intent for § 6701. *Id.* (quoting S. REP. NO. 494, 97th Cong., 2d Sess. 275 (1982), reprinted in 1982 U.S.C.C.A.N. 781, 1022); see also *supra* note 10 and accompanying text for the text and a discussion of § 6701.

120. *Id.* at 928 nn.14 & 15. The court examined two anti-fraud provisions which allowed for unlimited assessment periods. The two sections were 26 U.S.C. §§ 6501(c)(1) & (2) and 6696(d)(1). 26 U.S.C. § 6501(c)(1) & (2) (1982) (current version in 26 U.S.C. § 6501(c)(1) & (2) (1988 & Supp. IV 1992)) states:

(1) False return

In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time.

(2) Willful attempt to evade tax

In case of a willful attempt in any manner to defeat or evade tax imposed by this title . . . , the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

Id.; see 26 U.S.C. § 6696(d)(1); which allows for an unlimited assessment period when used in conjunction with a penalty assessed under § 6694(b). 26 U.S.C. § 6696(d)(1)(1982) (current version at 26 U.S.C. § 6696(d)(1) (1988 & Supp. IV 1992)). This section states: "The amount of any penalty under . . . section 6694(b), the penalty may be assessed, or a proceeding in court for the collection of the penalty may be begun without assessment, at any time." *Id.*

121. *Mullikin*, 952 F.2d at 929.

122. *Id.*

123. *Id.*

The majority made a distinction between a limitations period for the initial penalty assessment, where no time constraint exists, and a later action to collect penalties already assessed.¹²⁴ The *Mullikin* majority observed that section 6703¹²⁵ made specific reference “to the suspension of the running of the period of limitations on collection provided in section 6502.”¹²⁶ The majority interpreted this specific reference to mean that Congress intended there to be a limitations period for initiation of actions for collection of penalties already assessed, but not on the initial penalty assessments themselves.¹²⁷

The majority concluded its reasoning on the statute of limitations issue by recognizing that its decision followed the trend of other courts in allowing the IRS to combat fraud by permitting that an unlimited period exists to assess penalties.¹²⁸ The majority did not address the IRS’s second argument, namely, that an assessment is purely an administrative act. By simply holding section 2462 inapplicable, the *Mullikin* majority avoided deciding the difficult issue of whether an assessment is purely an administrative act.¹²⁹

C. *The Dissenting Opinion for the United States Court of Appeals for the Sixth Circuit*

Although the majority noted that Mullikin’s argument on the issue of whether section 2462 applied to penalty assessments had merit and was logically sound,¹³⁰ the majority still ruled in favor of the IRS.¹³¹ The dissent, however, found both Mullikin’s argument and the district court’s opinion persuasive. The dissent looked at the plain language of title 28, section 2462 of the United States Code and argued that the section provided for a catch-all limitations period where the Code had not specifically allocated one.¹³²

124. *Id.*

125. 26 U.S.C. § 6703(c)(1) and (2) (1982) (current version at 26 U.S.C. § 6703(c)(1) and (2) (1988 & Supp. IV 1992)). Section 6703(c) establishes the applicable rules to penalties established under § 6701. See *supra* note 11 for the text of § 6703(c).

126. *Mullikin*, 952 F.2d at 929 (emphasis added).

127. *Id.*

128. *Id.*

129. *Id.* at 929-30, n.17.

130. *Id.* at 929.

131. *Id.*

132. *Id.* at 933 (Boggs, J., concurring in the majority’s definition of “taxable period” and dissenting in the majority’s refusal to apply the statute of limitations articulated in 28 U.S.C. § 2462). See also *supra* note 2 for a discussion of the “taxable period” issue raised in *Mullikin*.

Although the dissent did not cite any cases¹³³ to support its position, the dissent formulated a logical argument based on the plain statutory language to support its conclusion that the IRS's penalty assessments were time-barred.¹³⁴

In his dissenting opinion, Judge Daniel Boggs pointed out that the majority opinion went to great lengths to hold that "no statute of limitation *should* apply" given the factual background of the case.¹³⁵ The dissent argued that the policy concerns the majority used to reach its conclusion¹³⁶ were really just reasons that "simply demonstrate why Congress *might* have not enacted a specific statute of limitations for the section in question."¹³⁷

Judge Boggs argued that by enacting title 28, section 2462 of the United States Code, Congress provided a limitations period to apply in all actions initiated by the government. Judge Boggs viewed the plain language of section 2462 as an unqualified statute of limitation which is applicable in all sections of the United States Code.¹³⁸ He analyzed the language in section 2462, noting that the section made no qualifying statement that tax or fraud situations were outside its reach.¹³⁹ The only exception to section 2462 was where Congress had otherwise provided a limitations period. Therefore, the dissent concluded that Congress intended section 2462 to be a catch-all provision, applicable to section 6701 penalties.¹⁴⁰ The dissent found it difficult to agree with the majority's interpretation that section 2462, which by its own terms applies to

133. This is a case of first impression, not only for the Court of Appeals for the Sixth Circuit, but also throughout all the circuits. Therefore, there are no court of appeals cases directly on point for the dissent to cite as authority for its position.

However, there was one district court case which supports the dissent's view. *Lamb v. United States*, 779 F. Supp. 116 (W.D. Ark. 1991) (granting summary judgment in favor of the taxpayer and barring penalty assessments under § 6701 because the plain language in the section cannot be ignored), *rev'd*, 977 F.2d 1296 (8th Cir. 1992). *Lamb* was, however, subsequently overturned on the authority of *Mullikin v. United States*. *Lamb v. United States*, 977 F.2d 1296 (8th Cir. 1992).

134. *Mullikin*, 952 F.2d at 933 (Boggs, J., concurring in part and dissenting in part).

135. *Id.*

136. Judge Boggs categorized the majority's policy argument as two separate policies. Judge Boggs cites the reasons as "(1) statutes of limitations against actions by the government are not usually favored; and, (2) statutes of limitations do not generally apply to sections combating fraud." *Mullikin*, 952 F.2d at 933 (Boggs, J., concurring in part and dissenting in part).

137. *Id.*

138. *Id.*

139. *Id.* (quoting 28 U.S.C. § 2462 (1977) (current version at 28 U.S.C. § 2462 (1988 & Supp. IV 1992))).

140. *Id.*

all proceedings initiated by the government, did not apply to a section of the Internal Revenue Code which is silent as to a time limitation.¹⁴¹

Judge Boggs noted that the majority's reasoning placed a great deal of weight on the treatment of other Code sections enacted to combat fraud.¹⁴² For example, he noted that the majority concluded that Congress did not intend a limitation on assessment periods in other Code sections, therefore Congress must not have intended a limitation period for section 6701.¹⁴³ However, Judge Boggs illustrated that of the Internal Revenue Code sections that the majority cited to show that Congress did not intend a statute of limitation to apply to penalty assessments, each section *expressly stated* that no limitations period was to apply.¹⁴⁴ He noted that, in contrast, section 6701 makes no specific reference to a limitations period. Judge Boggs interpreted the omission of any reference to a limitations period in section 6701 as indicative of Congress' intent to have section 2462 apply.¹⁴⁵

In a footnote, Judge Boggs addressed the majority's avoidance of defining whether an assessment is purely an administrative act.¹⁴⁶ He rejected the IRS's contention that an assessment was only an administrative act on the ground that the assessment is a prerequisite to commencing an action in court to enforce a civil penalty and, therefore, is really part of the entire proceeding.¹⁴⁷ Judge Boggs noted that it was illogical for the IRS to contend that an assessment is outside the definitional reach of section 2462 since the penalty assessment was the proceeding which initiated the actions leading to the collection of the penalty.¹⁴⁸ Therefore, he reasoned, it is only logical to conclude that the event which starts the progression toward the collection of the penalty is itself part of the proceeding.¹⁴⁹

141. *Id.* Judge Boggs' exact words in disagreeing with the majority were strong. He called the majority's reasoning an "ingenious interpretation that what is clearly a 'catch-all' statute does not in fact catch a clearly relevant section." *Id.*

142. *Id.*

143. See *supra* note 120 and accompanying text for a discussion of Internal Revenue Code sections that make specific reference to limitation periods.

144. *Mullikin*, 952 F.2d at 933 (emphasis added).

145. *Id.* Judge Boggs found it "ironic that the court refers . . . to the concession by the IRS that 'Congress [] fail[ed] to include . . . a statute of limitations' in § 6701, yet on the very next page it 'finds that Congress has otherwise provided for a statute of limitations.'" *Id.*

146. *Mullikin*, 952 F.2d at 933 n.1.

147. *Id.*

148. *Id.*

149. *Id.*

The *Mullikin* majority based its conclusion on the governmental policy consideration of preventing fraud. The *Mullikin* dissent used statutory analysis to conclude that the IRS should be barred from assessing penalties after a period of time allotted by statute. The Court of Appeals for the Sixth Circuit erroneously decided the case because it failed to address relevant legislative history and United States Supreme Court precedent.

III. LEGAL ANALYSIS

A. *The Mullikin Court Erroneously Interpreted the Legislative History of Title 26, Section 6701 of the United States Code*

The *Mullikin* majority emphasized that the legislative history showed Congress intended not to have any statute of limitations apply to section 6701 disputes.¹⁵⁰ However, in its report, the Senate Finance Committee did not address the significance of the omission of a statute of limitations in section 6701.¹⁵¹ The *Mullikin* majority interpreted the legislative history and the language of section 6701 to mean that Congress did not want any statute of limitations to apply¹⁵² since section 6701 is silent on this issue, and the legislative history only refers to fraud prevention policy goals.¹⁵³

However, such an interpretation was not fully warranted.¹⁵⁴ In

150. *Id.* at 928. See also *supra* notes 117-19 and accompanying text for the *Mullikin* majority's discussion of the Congressional purpose behind § 6701.

151. S. REP. NO. 494, 97th Cong., 2d Sess. 275 (1982), reprinted in 1982 U.S.C.C.A.N. 781, 1022. See also *supra* notes 16-22 and accompanying text for a discussion of the legislative history of § 6701.

152. *Mullikin*, 952 F.2d at 928. See also *supra* notes 116-29 and accompanying text for a discussion of the *Mullikin* majority's reasoning.

153. See *supra* notes 16-22 and accompanying text for a discussion of the policy considerations behind § 6701.

154. Basic statutory interpretation rules generally require that revenue legislation be given a strict construction in favor of the citizen who is taxed. 3A NORMAN J. SINGER, SUTHERLAND STAT. CONST. § 66.01 (5th ed. 1992). Even if courts do not give a favorable statutory interpretation to the taxpayer, these courts still hold that the interpretation must be reasonable, without bias to either the government or taxpayer. *Id.* at 66.02. There is a strong presumption that the legislature enacting the revenue laws knows of the pre-existing legislation that covers the relevant subject matter. *Id.* at 66.03.

"[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). Although § 6701 is a recent addition to the Internal Revenue Code, it is still an anti-fraud provision. 26 U.S.C. § 6701 (1982) (current version at 26 U.S.C.

Bowers v. New York & Albany Lighterage Co.,¹⁵⁵ the United States Supreme Court held that provisions of taxing statutes are to be construed favoring the taxpayer.¹⁵⁶ Since section 6701 is part of the Internal Revenue Code, the section is a provision that is part of a taxing statute. As a taxing statute, according to the United States Supreme Court's decision in *Bowers*, the taxpayer is entitled to a liberal construction of the statute. Because section 6701 is silent on the time limitation issue, statutory interpretation is necessary to determine whether section 2462 should apply to penalty assessments under section 6701.

A liberal construction of section 6701 would subject the section to the 5 year limitation period in section 2462 because section 6701 "does not otherwise provide" for an explicit limitations period.¹⁵⁷ Congress enacted section 2462 in order to allow citizens to be free from arbitrary and untimely lawsuits filed against them by the government. The *Mullikin* majority failed to address this concern of the taxpayer. More importantly, the *Mullikin* majority conveniently ignored the argument advanced by the taxpayer in order to reach its conclusion.¹⁵⁸ Not only is it clear from the legislative history of section 2462 that Congress sought to impose time restraints on the federal government for penalty proceedings, but it is also clear that Congress believed statutes of limitations against the government are necessary for a just and efficient system of government.¹⁵⁹

§ 6701 (1988 & Supp. IV 1992)). See also *supra* notes 16-22 and accompanying text. Unlike other anti-fraud provisions, § 6701 does not have an express provision making statutes of limitation inapplicable. 26 U.S.C. § 6701. Congress should be presumed to know of the other anti-fraud sections of the Internal Revenue Code which contain express waivers of limitation periods. SUTHERLAND, at 66.03. Therefore, under this logic, the omission by Congress of an express waiver of any statute of limitations should be construed as Congressional intent to have the catch-all statute of limitations of 28 U.S.C. § 2462 apply to 26 U.S.C. § 6701.

155. 273 U.S. 346 (1927).

156. *Id.* at 350.

157. 28 U.S.C. § 2462 (1977) (current version at 28 U.S.C. § 2462 (1988 & Supp. IV 1992)). See also *supra* note 26 and accompanying text for provisions of 28 U.S.C. § 2462. See also *supra* note 10 and accompanying text for provisions of 26 U.S.C. § 6701.

158. The district court found the argument that the taxpayer has a right to be free from government interference after an acceptable period of time to be persuasive. *Mullikin v. United States*, 90-2 U.S. Tax Cas. (CCH), 85,304 (E.D. Ky. 1990).

159. S. REP. NO. 363, 89th Cong., 1st Sess. 7 (1965), *reprinted in* 1965 U.S.C.C.A.N. 1826, 1832. See *infra* notes 170-181 and accompanying text for a discussion of the legislative history behind § 2462.

B. *Critique of the Mullikin Majority's Analysis*

The *Mullikin* majority placed a great deal of emphasis on the doctrines established in *E.I. Du Pont De Nemours & Co., Inc. and Badaracco*.¹⁶⁰ However, the *Mullikin* majority failed to address a competing, contrary doctrine established by the Supreme Court in *Rothensies v. Electric Storage Battery Co.*¹⁶¹ The Supreme Court in *Rothensies* found it irrational that an income tax system would never have a date at which the taxpayer would be free from arbitrary and capricious intervention by the government.¹⁶² The *Rothensies* Court held that Congress did not intend for the IRS to be able to assess taxes at any time.¹⁶³ Justice Jackson, speaking for the Court, stated, "a statute of limitation is an almost indispensable element of fairness as well as of practical administration of an income tax policy."¹⁶⁴

Although there are no Courts of Appeals cases which have applied this doctrine in the context of statute of limitations and section 6701, there is at least one district court case, *Lamb v. United States*,¹⁶⁵ that has followed the *Rothensies* doctrine. The *Lamb* court held that Congress intended to subject section 6701 to the five year limitation period in section 2462 because to hold otherwise would be inequitable.¹⁶⁶ However, the *Mullikin* majority failed to address the argument that persuaded the court in *Lamb*, though the majority did give a cursory explanation for the unfair policy results that would stem from its decision.¹⁶⁷ The *Mullikin* majority stated: "It is not the duty of this Court to write statutes of limitations into statutes; rather, that is the duty of Congress."¹⁶⁸

However, Congress *did* write a statute of limitations for all actions commenced by the federal government. That limitation period was enacted in section 2462. If the *Mullikin* majority had applied the statute of limitations set forth in section 2462, the ma-

160. *Mullikin v. United States*, 952 F.2d 920, 926 (6th Cir. 1991), *cert. denied*, 113 S. Ct. 85 (1992); *see supra* notes 28-45 and accompanying text.

161. 329 U.S. 296 (1946); *see also supra* notes 52-58.

162. *Id.* at 301.

163. *Id.*

164. *Id.*

165. 779 F. Supp. 116 (W.D. Ark. 1991), *rev'd*, 977 F.2d 1296 (8th Cir. 1992).

166. *Id.* at 119.

167. *Mullikin v. United States*, 952 F.2d 920, 929 (6th Cir. 1991), *cert. denied*, 113 S. Ct. 85 (1992). "Although this may seem a harsh result, the result is in accordance with jurisprudence regarding the applicability of statutes of limitations to causes of action in favor of the government." *Id.*

168. *Id.*

majority only would have been applying an established statute of limitations. It is illogical for Congress to have passed a statute which, by its own terms, applies to all actions commenced by the federal government, but to later have courts rule that they have no authority to use such a statute on the reasoning that the courts would be writing unwarranted limitation periods into statutes. As seen by the legislative history of section 2462 and other judicial interpretation of section 2462, Congress wished to avoid results similar to *Mullikin* when it enacted section 2462.¹⁶⁹

C. *The Mullikin Majority Did Not Examine the Legislative History of Title 28, Section 2462 of the United States Code*

In 1966, Congress enacted title 28, section 2415 of the United States Code, which imposed time limitations on tort and contract law suits initiated by the government.¹⁷⁰ In its report on section 2415, the Senate Judiciary Committee indicated the purpose of the section, as well as its view of statutes of limitations in general.¹⁷¹ The Committee asserted that the purpose of statutes of limitations was to speed up litigation by unclogging the federal courts.¹⁷² The Committee also noted that time limitations ensure citizens a fair and equitable procedure when dealing with the federal government.¹⁷³ According to the report, the Committee also believed that statutes of limitations were necessary for a fair and just system of government.¹⁷⁴

In a specific reference to section 2462, the Senate Judiciary Committee noted that the newly enacted section 2415 would not affect any pre-existing time limitation periods.¹⁷⁵ This was a significant development because it showed a general Congressional intent to place greater time restrictions on the government. More importantly, the executive branch also agreed that it is good public policy to place time restraints on the federal government when it is initiating a law suit.¹⁷⁶ The Office of the Comptroller General stated that,

169. *Lamb*, 779 F. Supp. at 119, *rev'd*, 977 F.2d 1296 (8th Cir. 1992).

170. 28 U.S.C. § 2415(a)-(g) (1978) (current version at 28 U.S.C. § 2415(a)-(i) (1988 & Supp. IV 1992)) (originally Pub. L. No. 89-505, 80 Stat. 304 (1966)).

171. S. REP. No. 1328, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S.C.C.A.N. 2502.

172. *Id.* at 2503.

173. *Id.*

174. *Id.*

175. *Id.* at 2509.

176. Both the Attorney General's and the Comptroller General's offices wrote

as an element of basic equity, time limitations were beneficial because the Comptroller General concluded individuals who deal with the government are entitled to protection when the actionable event took place many years earlier.¹⁷⁷ The Senate Finance Committee weighed this factor heavily when it adopted section 2415.¹⁷⁸ The *Mullikin* majority failed to address the IRS's contention that penalty assessments were merely administrative acts and therefore outside the scope of section 2462. However, even if the *Mullikin* majority did hold that an assessment is only an administrative proceeding, the legislative history of section 2462 indicates that Congress intended section 2462 to apply to administrative proceedings as well.

Furthermore, in 1949 Congress passed the Export Control Act.¹⁷⁹ In a 1965 report addressing amendments to the Export Control Act, the Senate Banking and Currency Committee stated that it intended the five year statute of limitations established in title 28, section 2462 of the United States Code to apply to proceedings brought under the Act because the Act did not explicitly establish a limitations period.¹⁸⁰ More significantly, the Committee wrote that it intended section 2462 to apply to both judicial and administrative proceedings.¹⁸¹ It is therefore rational to conclude Congress intended section 2462 to apply in all penalty proceedings instituted by the government, regardless of any differentiation between purely administrative or judicial acts. Given the Congress-

letters advising the adoption of more statutes of limitation to be applied against the federal government. Letter from the Attorney General to the Vice President (Mar. 10, 1966), *reprinted in* 1966 U.S.C.C.A.N. 2502, 2512-14; Letter from Frank H. Weitzel, Assistant Comptroller General, to Hon. Emanuel Celler, Chairman, House Committee on the Judiciary (Apr. 13, 1966), *reprinted in* 1966 U.S.C.C.A.N. 2502, 2514.

177. Letter from Frank H. Weitzel, Assistant Comptroller General to Hon. Emanuel Celler, Chairman, House Committee on the Judiciary (Apr. 13, 1966), *reprinted in* 1966 U.S.C.C.A.N. 2502, 2514.

178. S. REP. NO. 1328, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S.C.C.A.N. 2502, 2508.

179. Export Control Act of 1949, Pub. L. No. 87-515, 63 Stat. 7 (1949) (current version at 50 U.S.C. app. §§ 2401-2420 (1988)).

180. S. REP. NO. 363, 89th Cong., 1st Sess. 7 (1965), *reprinted in* 1965 U.S.C.C.A.N. 1826, 1832.

181. *Id.* at 1832. The Senate Banking and Currency Committee gave a candid report of § 2462 and its applicability to administrative acts. The report stated:

It is intended that the general 5-year limitation imposed by section 2462 of title 28 shall govern. *Under that section, the time is reckoned from the commission of the act giving rise to the liability, and not from the time of imposition of the penalty, and it is applicable to administrative as well as judicial proceedings.*

Id. (emphasis added).

sional intent that section 2462 apply to all government penalty actions, a logical progression would be to examine how federal courts have applied section 2462.

D. *Application of Title 28, Section 2462 of the United States Code by the Courts*

As an exception to the general rule of sovereign immunity from the running of statutes of limitations, courts have found the sovereign is not exempt under the federal statute of limitations for the imposition of civil fines and penalties.¹⁸² However, federal courts have only applied section 2462 to a narrow group of cases. The usual factual situation where federal courts have applied section 2462 is an action that is a penalty or forfeiture proceeding brought on behalf of the government.¹⁸³

The federal courts have refused to expand the application of section 2462 outside these narrow interpretations. The courts have held that section 2462 will only apply if the penalty is imposed as a result of a violation of a public law and is penal in nature. Courts have never held the words “penalty, fine, or forfeiture” in section 2462 to mean damages or compensation for injuries received, either in tort or in contract.¹⁸⁴ Courts have interpreted the word “penalty” to mean punishment for breaking a law.¹⁸⁵ Still, even with such a narrow application of section 2462, courts have consistently

182. See, e.g., *United States v. Summerlin*, 310 U.S. 414, 416 (1940) (holding that the general rule is that the government is exempted from time limitations) (citations omitted); *United States v. Weaver*, 207 F.2d 796, 798 (5th Cir. 1953) (holding the government is generally immune to statutes of limitations; section 2462 is a specific exception to that general immunity).

183. *Meeker v. Lehigh Valley R.R.*, 236 U.S. 412, 423 (1915) (holding § 2462, previously § 791, does not apply to an action for damages brought under the Transportation Act); *Bertha Building Corp. v. National Theatres Corp.*, 269 F.2d 785, 788 n.5 (2d Cir. 1959), *cert. denied*, 361 U.S. 960 (1960) (ruling § 2462 inapplicable in a suit for treble damages under the Sherman Anti-Trust Act); *Erie Basin Metal Products, Inc. v. United States*, 150 F. Supp. 561, 566 (Ct. Cl. 1957) (holding § 2462 does not apply to a suit by a contractor against the federal government).

184. *United States v. Hougham*, 364 U.S. 310, 313 (1960) (holding that when the government recovers under the Surplus Property Act, the recovery is not a “penalty” but is liquidated damages, therefore, § 2462 does not apply) (citations omitted); *United States v. Perry*, 431 F.2d 1020, 1024-25 (9th Cir. 1970) (ruling that recovery under the Anti-Kickback Act is compensatory, not a penalty).

185. *Chattanooga Foundry and Pipe Works v. City of Atlanta*, 203 U.S. 390 (1906) (holding that a penalty or forfeiture in § 2462, formerly § 791, referred to something imposed in a punitive way for an infraction of a public law); *Meeker*, 236 U.S. at 423 (ruling that a penalty under § 2462 means the government wishes to punish the offender for violating a public law).

held that the limitations period is applicable unless it is clear that Congress did not intend the section to apply.¹⁸⁶

The factual circumstances disputed in *Mullikin* fit squarely into the fact paradigm that federal courts have established for the application of section 2462. In *Mullikin*, there was (i) a penalty assessed for violation of federal law;¹⁸⁷ (ii) which was not intended to compensate, but rather to punish and deter;¹⁸⁸ and (iii) there is no clear legislative intent that section 2462 is to be ignored by the courts in dealing with section 6701 penalties.¹⁸⁹ Thus, since neither the language nor the legislative history of title 26, section 6701 of the United States Code provides a clear legislative directive *not* to apply title 28, section 2462 of the United States Code, courts should impose the five year limitations period established in section 2462 to penalties assessed pursuant to title 26, section 6701 of the United States Code.¹⁹⁰ The *Mullikin* majority either mistakenly, or purposely, failed to address the legislative history behind section 2462. Had the *Mullikin* majority addressed the congressional intent and legislative history of section 2462, the case may have been decided in favor of the taxpayer. Instead, the *Mullikin* majority based its holding on conflicting authority established in several United States Supreme Court cases.

CONCLUSION

The decision in *Mullikin* sought to advance anti-fraud policy goals by allowing the IRS to make penalty assessments without regard to any time restraints. However, the reasoning of the decision in *Mullikin* was purely policy-driven and failed to address the policy concerns which support the taxpayer's position. The majority misapplied the legislative history of section 6701 and ignored the plain language of section 2462. The majority also ignored relevant

186. *H.P. Lambert Co. v. Secretary of the Treasury*, 354 F.2d 819, 822 (1st Cir. 1965) (holding statutes of limitations, such as § 2462, are not to be avoided unless that intent is "manifestly clear").

187. 26 U.S.C. § 6701 (1982) (current version at 26 U.S.C. § 6701 (1988 & Supp. IV 1992)).

188. *Id.* See also *supra* notes 16-22 and accompanying text for a discussion of the legislative purpose of § 6701.

189. 26 U.S.C. § 2462 is silent on the issue of the applicability of a statute of limitations. *Mullikin v. United States*, 952 F.2d 920, 925 (6th Cir. 1991), *cert. denied*, 113 S. Ct. 85 (1992). In the absence of a clear legislative intent that § 2462 is not to apply, the five year limitations period of § 2462 is to be imposed. *H.P. Lambert Co.*, 354 F.2d at 822.

190. See *supra* note 154.

Supreme Court cases that would have enabled the taxpayer to receive a favorable interpretation of section 6701. In short, the *Mullikin* majority ignored sound legal reasoning to reach an inequitable and unjust result.

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