Washington and Lee Law Review

Volume 32 | Issue 4 Article 19

Fall 9-1-1975

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often employed in other tax contexts as grounds for allowing the Davises' reformation of the transaction. A prerequisite for a valid reformation was that the alteration occur during the same taxable year.[100]

What is noteworthy about the *Davis* ruling is the court's underlying acceptance, virtually as a starting point in its analysis, of a donor's ability to make a net gift. The decision, perhaps, is another indication that the Sixth Circuit's conclusions in *Johnson* will not be followed.

VIII. TAX PROCEDURE

A. *Timely Filings of Returns and Alternate Valuation Election*

The procedural and administrative provisions of the Code establish various requirements for the proper and timely filing of income, estate, and gift tax returns. A frequently recurring source of litigation is the tardy filing of a decedent's estate tax return by the executor.[1] The executor is normally required to file the estate's return within

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that a surviving husband, who, as executor of his wife's estate, had mistakenly paid too many proceeds of the estate to himself, but, who had discovered the error and adjusted his books to correct the mistake in the same taxable year, was not liable for any additional annual income. The court explained the "claim of right" rule as follows:

> The usual case for application of the rule involves a taxpayer who has received funds during a taxable year, *who maintains his claim of right thereto during that year* . . . is compelled to restore the sum when his claim proves invalid. We are not aware that the rule has ever been applied where, as here, in the same year that the funds are mistakenly received, the taxpayer discovers and admits the mistake, renounces his claim to the funds, and recognizes his obligation to pay them . . . . We think there is no warrant for extending the harsh claim of right doctrine to such a situation.

Id. at 304.

[100] The court in United States v. Merrill, 211 F.2d 297 (9th Cir. 1954), provided the rationale for requiring the taxpayer to make the necessary alteration during the same taxable year:

> Th[e] ["claim of right"] rule is founded upon the proposition that, when funds are received by a taxpayer under claim of right, he must be held taxable thereon, for the Treasury cannot be compelled to determine whether the claim is without legal warrant, and repayment of the funds in a later year cannot, consistently with the annual accounting concept, justify a refund of the taxes paid.

Id. at 304.

[1] INT. REV. CODE OF 1954, § 6018 requires the filing of an estate tax return.

nine months after the date of the decedent's death.[2]

The failure to file a proper and timely return may result in two distinct but closely related consequences. First, an estate guilty of such an omission is potentially liable for an "addition to the tax" under § 6651.[3] Second, the opportunity to use the alternate valuation date[4] will be squandered since the election must be exercised in a timely return.[5] However, circumstances exist under which a tardy executor will nevertheless be allowed to have his estate tax return treated as timely, thereby possibly enabling him to retain the use of the optional valuation date and to avoid the imposition of augmented taxes. The nature and extent of these circumstances were explored in several 1974 tax decisions.[6]

In *Estate of Dorothy P. Crute*,[7] the decedent died on July 25, 1969. Under the terms of her will, William Osborn, a bank president who was a resident of Indiana and was experienced in handling probate estates, was appointed executor of the estate. After the admission of the will to probate in an Indiana court, the executor retained an accounting firm which had previously assisted him in the administration of estates. Subsequently, a question arose as to whether Mrs. Crute was domiciled in Indiana or Connecticut at the date of her death. Aware of the uncertainty created by the domiciliary controversy, the accounting firm advised the executor to delay any filing of an estate tax return until the ancillary proceedings in Connecticut

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[2] Prior to 1970, representatives of estates were allowed 15 months for the filing of estate tax returns and for the payment of the tax. In that year, however, Congress reduced the time limits to nine months in an effort to accelerate the administrative process. INT. REV. CODE OF 1954, § 6075. Revised § 6075 is applicable to estates of decedents dying after December 31, 1970.

One related 1974 revenue ruling should be noted. In Rev. Rul. 74-424, 1974 INT. REV. BULL. No. 35, at 10, the Commissioner ruled that the time and date of death of a non-resident American citizen who died in the foreign country is the time and date in the place of his domicile at the moment of death.

[3] INT. REV. CODE OF 1954, § 6651.

[4] INT. REV. CODE OF 1954, § 2032 provides that by election in a timely return the executor may value the decedent's estate as of the date six months after the date of death. Section 2032 is a modification of its predecessor, which required an election within one year of decedent's death. Revised § 2032 is applicable to decedents dying after December 31, 1970.

[5] INT. REV. CODE OF 1954, § 2032. The optional election is also operative if exercised by the executor before the expiration of any extension of time for filing. *See* C. LOWNDES, R. KRAMER, & J. MCCORD, FEDERAL ESTATE AND GIFT TAXES 494-97 (3d ed. 1974).

[6] For 1974 developments concerning timely filings of returns and elections in addition to those in the textual discussion, see notes 23 & 35 *infra*.

[7] 33 CCH Tax Ct. Mem. 1073 (1974).

were resolved. This counsel was tendered on the basis that Osborn presently had no standing to file a return as an executor or to request a time extension. Consequently, on March 10, 1971, Osborn received notice that the return was delinquent. He then filed a return which was received by the Internal Revenue Service on March 22, 1971. The government thereupon informed the executor of a deficiency as well as an addition to the tax.[8]

In order for a taxpayer to avoid any such addition, he must demonstrate that the delay in filing was "due to reasonable cause and not due to willful neglect."[9] The standard for reasonable cause has typically been articulated as requiring the taxpayer to prove "the exercise of ordinary business care and prudence."[10] In *Crute*, the Tax Court ruled that the executor had met this burden. It noted that Osborn had been confronted with a complex legal question and had consequently relied on the advice of an accounting firm expert in the estate tax field. The court concluded that the executor's actions were commensurate with ordinary business care.

A second 1974 decision, *Estate of Norma S. Bradley*,[11] reached conclusions similar to those expressed in *Crute*. Decedent Norma Bradley's estate tax return was due on April 30, 1970.[12] The co-executor, Joseph Arnold, was an attorney with no prior experience in administration of estates. He retained a local accounting firm, previously employed by him in the preparation of his personal tax returns, to complete Bradley's estate tax return. An accountant in the firm, confusing Arnold's filing obligation for the federal estate tax with the deadline for filing a Kentucky state inheritance tax, told

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[8] *See* note 3 *supra*.

[9] *Id.*

[10] Southeastern Finance Co. v. Commissioner, 153 F.2d 205 (5th Cir. 1946); Treas. Reg. § 301.6651-1(a)(3) (1967), *as amended* T.D., 7260, 38 F.R. 4259 (Feb. 12, 1973).

Cases in which reasonable cause was not demonstrated include: Paula Construction Co., 58 T.C. 1055 (1972); Electric & Neon, Inc., 56 T.C. 1324 (1971), *aff'd*, 496 F.2d 876 (5th Cir. 1974); Estate of Henry P. Lammerts, 54 T.C. 420 (1970); Estate of Frank Duttenhofer, 49 T.C. 200 (1967), *aff'd*, 410 F.2d 302 (6th Cir. 1969); Estate of William T. Mayer, 43 T.C. 403 (1964); Estate of Louis Lewis, 22 CCH Tax Ct. Mem. 1732 (1963); Estate of Minnie S. Pridmore, 20 CCH Tax Ct. Mem. 47 (1961).

For cases concluding that reasonable cause was proven, see *In re* Fisk's Estate, 203 F.2d 358 (6th Cir. 1953); Haywood Lumber & Min. Co., 178 F.2d 769 (2d Cir. 1950); Estate of Daisy F. Christ, 54 T.C. 493 (1970); Estate of H. B. Hundley, 52 T.C. 495 (1969); R.A. Bryan, 32 T.C. 104 (1959); Brooklyn & Richmond Ferry Co., 9 T.C. 865 (1947); Safety Tube Corp., 8 T.C. 757 (1947); C.R. Lindback Foundation, 4 T.C. 652 (1945).

[11] 33 CCH Tax Ct. Mem. 70 (1974).

[12] Prior to December 31, 1970, estate tax returns were due within 15 months of the date of the decedent's death. *See* note 2 *supra*.

Arnold that the return was due within eighteen months of Bradley's death. After the firm's preparation of the federal estate tax return, the executor mailed it to the IRS on May 28, 1971. The Commissioner determined a deficiency and an addition to the tax.

The Tax Court, however, concluded that there was reasonable cause for the late return. The government's contention that Arnold as an attorney should be charged with knowledge of the due date of the return so as to obviate any reliance on an accountant's advice was rejected. Rather, the court determined that in view of the executor's inexperience in the field of estate taxes and his previous use of the firm for the preparation of his own taxes, he could not reasonably be held to know the deadline for the filing of the return. Thus, consistent with ordinary business prudence, he could rely on the firm's advice as to when the return was due.

The government conceded that an executor may rely on incorrect advice but contended that since Arnold knew that a return was required, he could not rely on erroneous information as to the time for the return. The court rejected the government's proposed distinction and ruled that such reliance was allowable:

> To sustain respondent's argument would require a holding that an executor may rely upon the advice of an expert on substantive tax law questions but, as a matter of law, may not do so with respect to the requirements of the law as to the due date of tax returns—that he must research that question for himself. We decline to so hold. We fail to see a significant distinction between the reasonableness of a failure to file at all and the reasonableness of a failure to file on time, where in both circumstances the taxpayer has relied on the advice of competent counsel.[13]

Thus, the court determined that Arnold could be excused for the delay in filing even though he was aware of the necessity of a return.

The *Crute* and *Bradley* decisions, however, are not likely to have a substantial impact upon any judicial delineation of the guidelines to be utilized in determining whether a taxpayer has demonstrated reasonable cause. As those decisions indicated, each case must be considered on its own facts and "[o]ther decisions *pro* and *contra* are of little help."[14] However, even allowing for the factual distinctiveness of each case, such decisions seem to have little precedential value

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[13] 33 CCH Tax Ct. Mem. at 73.

[14] Mayer's Estate v. Commissioner, 351 F.2d 617 (2d Cir. 1965), *cert. denied*, 383 U.S. 935 (1966).

primarily because of the failure of courts to apply uniformly the reasonable cause standard. The main decisional inconsistency centers around the extent to which executors, generally ignorant of tax laws, may delegate their responsibility for the administration of estates to more knowledgeable attorneys or accountants. Unlike the *Bradley* court, many judges have suggested that a significant element in an analysis of the reasonable cause requirement is whether the executor's misreliance concerned the necessity of filing a return at all or merely the due date for the return.[15] One court was quite stringent in its requisites for demonstrating reasonable cause in the context of an executor's cognizance of the necessity for a return:

> The only question here involved was "when" the return was due, and not "whether" one was due. It is our opinion that where a taxpayer should know a tax return is required . . . but delegates the responsibility of preparing and filing the return to a third person, the delegate's subsequent failure in this appointed task does not alone constitute reasonable cause . . . .[16]

At the other extreme, the Second Circuit in *Haywood Lumber & Mining Co. v. Commissioner*[17] applied the standard in an extraordinarily lenient manner. In that case the court ruled that a corporate taxpayer was not liable for deficiencies and additions though it had not filed personal holding company returns:

> When a corporate taxpayer selects a competent tax expert, supplies him with all necessary information, and requests him to prepare proper tax returns, we think that the taxpayer has

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[15] *See, e.g.*, Paula Construction Co., 58 T.C. 1055 (1972); Estate of Daisy F. Christ, 54 T.C. 493 (1970); Estate of H.B. Hundley, 52 T.C. 495 (1969); Estate of Frank Duttenhofer, 49 T.C. 200 (1967), *aff'd*, 410 F.2d 302 (6th Cir. 1969); Estate of Louis Lewis, 22 CCH Tax Ct. Mem. 1732 (1963); *Cf.* Robert L. Reed, Ex'r v. United States, 64-2 U.S. Tax Cas. ¶ 12, 265, at 94,431 (W.D.N.Y. 1964) (reasonable cause found where deadline for filing was known but was missed because of "mere accident" in executor's law office).

[16] Estate of Frank Duttenhofer, 49 T.C. 200, 205 (1967), *aff'd*, 410 F.2d 302 (6th Cir. 1969). *See also* Estate of Henry P. Lammerts, 54 T.C. 420 (1970) (failure to make timely fiduciary income tax return when inexperienced executor thought he had fulfilled his duties held not reasonable cause; executor "had a positive duty to ascertain the nature of his responsibilities as such"); Estate of Louis Lewis, 22 CCH Tax Ct. Mem. 1732 (1963) (held: no reasonable cause where executor knew of accountant's ill health and had been advised that delay would likely ensue; this was sufficient to put executor on notice that steps would be necessary to ensure timeliness of return).

[17] 178 F.2d 769 (2d Cir. 1950).

> done all that ordinary business care and prudence can reasonably demand. . . .
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> The respondent contends that where all responsibility for the preparation of tax returns is delegated to an agent, the taxpayer should be held to accept its agent's efforts *cum onere* and be chargeable with his negligence. . . . To impute to the taxpayer the mistakes of his consultant would be to penalize him for consulting an expert; for if he must take the benefit of his counsel's or accountant's advice *cum onere*, then he must be held to a standard of care which is not his own and one which, in most cases, would be far higher than that exacted of a layman.[18]

The Second Circuit's position does not seem to be a sufficiently demanding standard, because the duty "of vigilance and promptness is not a delegable one, so far as an executor is concerned. It is *personal*."[19] Under the rule propounded by the Second Circuit, it is difficult to perceive many situations not involving fraud or collusion whereby reasonable cause would not be found. In fact, most courts appear to adopt an interpretation of reasonable cause positioned somewhere between the two extremes. Factors that may be determinative of the result include: the executor's educational and legal background;[20] the complexity of thc legal question concerning the filing of the return;[21] and, the extent to which the delegated agent assumes the everyday administration of the estate.[22] However, until the courts and the IRS prescribe more concrete and consistent guidelines, the confusion as to what constitutes reasonable cause for failure to make a timely return is likely to continue unabated.[23]

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[18] *Id.* at 771.

[19] Ferrando v. United States, 245 F.2d 582, 586 (9th Cir. 1957) (emphasis in original).

[20] *See, e.g.*, Estate of Henry P. Lammerts, 54 T.C. 420, 446 (1970); Estate of William T. Mayer, 43 T.C. 403, 406 (1964).

[21] *See, e.g.*, Paula Construction Co., 58 T.C. 1055, 1061 (1972).

[22] *See, e.g.*, Estate of William T. Mayer, 43 T.C. 403, 406 (1964).

[23] In sharp contrast to the flexible utilization of the reasonable cause standard in the *Crute* and *Bradley* decisions, the Sixth Circuit in a 1974 *per curiam* opinion affirmed a remarkably harsh Tax Court decision. In Estate of Geraci v. Commissioner, 502 F.2d 1148 (6th Cir. 1974), *aff'g* 32 CCH Tax Ct. Mem. 424 (1973), *petition for cert. filed*, 43 U.S.L.W. 3468 (U.S. Jan. 11, 1975) (No. 853), the decedent's federal tax return was filed on August 28, 1968, with the due date being June 27, 1968. The executrix offered three reasons as grounds for reasonable cause: 1) the executrix, a housewife with virtually no business experience, placed her entire reliance on the attorney for the estate to file the return; 2) during June and July of 1968 the attorney was unable to work because of illness; and 3) the attorney mistakenly thought that the return was

When an estate tax return is not timely filed, a second issue as to whether the optional valuation date can be exercised is also likely to be litigated.[24] For example, in the *Bradley* case when the executor filed the estate's return, due to his unawareness of the passage of the deadline, he elected the later valuation date. The issue was thus presented whether an election could be made on an untimely return if the failure to file the return on time was due to reasonable cause. The Tax Court held the election was not effective even upon a showing of reasonable cause. The court reasoned that § 2032, in contrast to § 6651, provided for no exceptions to the rule that the deadline be met. The regulations were also absolute in their language: "In no case may the election be exercised, or a previous election changed, after the expiration of [the nine month time limit]."[25]

Because of this seeming absolutism in § 2032, the provision has been applied with great stringency.[26] This position with regard to § 2032 is difficult to explain in light of the similar purposes that underlie the statutory requirements regarding the filing of returns and elections. The deadlines for filings of returns and elections were both shortened in 1970 in an effort to accelerate the payment of estate taxes.[27] It seems illogical to permit exceptions to this legislative mandate for filings, while not similarly applying § 2032 with flexibility. However, courts have concluded that any remedy for alleviating such inconsistencies must be prescribed by legislatures rather than by the judiciary.[28] Therefore, the *Bradley* court determined that the govern-

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due fifteen months from the date of the appointment of the executrix rather than from the date of decedent's death. Despite all of these factors, the Tax Court found no reasonable cause that would excuse the delay. The Sixth Circuit affirmed the decision "unenthusiastically" since it could not adjudge the decision of the Tax Court to be clearly erroneous. While admittedly the scope of review for the Sixth Circuit was limited, it is difficult to perceive why reasonable cause was not found present in *Geraci* while it was so found in *Bradley*.

[24] *See* note 5 and accompanying text *supra*.

[25] Treas. Reg. § 20.2032-1(b)(2) (1958), *as amended*, T.D. 7238, 37 F.R. 28718 (Dec. 29, 1972).

[26] *See, e.g.*, Rosenfield v. United States, 156 F. Supp. 780 (E.D. Pa. 1957), *aff'd per curiam*, 254 F.2d 940 (3d Cir.), *cert. denied*, 358 U.S. 833 (1958) (first election, made on basis of attorney's error, could not be revoked in favor of second after due date for return); Estate of Henry S. Downe, 2 T.C. 967 (1943) (election ineffective when return was mailed on due date but not received by Commissioner until next day); Estate of Frederick L. Flinchbaugh, 1 T.C. 653 (1943) (election ineffective because of executor's failure to verify return).

[27] *See* notes 2 & 4 *supra*; C. LOWNDES, R. KRAMER, & J. MCCORD, FEDERAL ESTATE AND GIFT TAXES 623 (3d ed. 1974).

[28] As the Supreme Court stated in J. E. Riley Investment Co. v. Commissioner, 311 U.S. 55 (1940);

ment was correct in valuing the decedent's gross estate as of the date of her death.

However, another 1974 decision, *Estate of Johanna Ryan*,[29] indicates that this hardline approach of the *Bradley* court may not be completely accepted by the courts. Johanna Ryan died on March 15, 1967. In response to an inquiry from the executor, William O'Donnell, the IRS indicated its initial opposition to a charitable deduction established by Ryan's will. On May 24, 1968, the executor was advised that the government would retract its opposition if the life income beneficiaries and trustee would file disclaimers of all rights relating to the exercise of any power to divert trust principal received from wasting assets to income, and second, that such disclaimers be approved by a court decree. The executor agreed to meet these demands. On May 27, 1968, O'Donnell requested a six-month extension[30] for the filing, which was granted on June 5 of that year. Six days later the requested disclaimers were filed[31] with a New York court and proceedings were initiated for a determination of the disclaimers' validity and of the will's wasting assets provision. During the interim, the executor requested another extension on November 15, 1968. This request was rejected on December 9 with the admonition that O'Donnell file quickly in order to meet the deadline of December 15. On April 9, 1969, the court approved the disclaimers. Subsequently,

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> It seems clear that Congress provided that the election must be made once and for all in the first return in order to avoid any such shifts. And to require the administrative branch to extend the time for filing on a showing of cause for delay would be to vest in it discretion which the Congress did not see fit to delegate.
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> Petitioner urges that this result will produce a hardship here . . . . That may be the basis for an appeal to Congress in amelioration of the strictness of that section. But it is no ground for relief by the courts from the rigors of the statutory choice which Congress has provided.

Id. at 59. *See also* Elizabeth Lewis Saigh, 36 T.C. 395 (1961); Estate of Frederick L. Flinchbaugh, 1 T.C. 653 (1943). *Cf.* Sugar Creek Coal and Min. Co., 31 B.T.A. 344 (1934).

[29] [1974 Transfer Binder] CCH TAX CT. REP. (62 T.C. ___, No. 2) at 2496 (April 8, 1974).

[30] INT. REV. CODE OF 1954, § 6081.

[31] It is unclear why the executor acquiesced in both of the demands. For disclaimers filed in a timely manner "by a person not under any legal disability will [ordinarily] be considered irrevocable when filed with the probate court." Treas. Reg. 20.2055-2(c)(2) (1972), *as amended*, T.D. 7318, 39 F.R. 25452 (July 11, 1974). As the court pointed out, if this had been followed by a timely return, the likely result would have been the withdrawal of the IRS's opposition to the charitable deduction. [1974 Transfer Binder] CCH TAX CT. REP. (62 T.C. ___, No. 2) at 2498 (April 18, 1974).

on June 16, the Commissioner withdrew his opposition to the charitable deduction. On July 23 of that year O'Donnell filed Ryan's estate tax return and indicated thereon his election of the alternate valuation date.

The Tax Court held that the government was justified in denying the election and thus determining a deficiency. However, in so holding the court chose not to rely on the strict language of § 2032, but rather to base its denial of the election on the fact that it found no reasonable cause which would excuse the delay.[32] O'Donnell, after the filing of the disclaimers, should have subsequently made a timely return and then, after favorable action by the court, obtained judicial modification of the determined tax with supplemental information.[33] The court could not countenance the petitioner to "unilaterally impose . . . a condition on the filing of the return: that [the IRS] first consent to the withdrawal of his letter ruling."[34] Therefore, in the absence of a demonstration of reasonable cause, the executor forfeited the opportunity to choose the alternate valuation date. The *Ryan* court added that the effect of a finding of reasonable cause need not be examined. This dictum appeared to suggest that, despite the language of *Bradley*, courts may yet be willing to allow the alternate valuation election when reasonable cause for the late return can be affirmatively shown.[35]

B. Government Prosecutions and the Statute of Limitations

The Code provides civil penalties[36] for the failure of a taxpayer to

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[32] The court also determined that the petitioner could not claim estoppel as a basis for obviating the interposition of the time limitation in § 2032(c) since there had been no misleading conduct by the government. *See* Elizabeth Lewis Saigh, 36 T.C. 395, 425 (1961); Sugar Creek Coal & Min. Co., 31 B.T.A. 344, 346-47 (1934).

[33] Treas. Reg. § 20.6081-1(c) (1958), *as amended*, T.D. 7238, 37 F.R. 28722 (Dec. 29, 1972) provides for the filing of supplemental information after the due date of the return.

[34] [1974 Transfer Binder] CCH TAX CT. REP. (62 T.C. ____, No. 2) at 2499 (April 18, 1974).

[35] A 1974 revenue ruling should be noted briefly. The question involved the correct valuation date under § 2032(a)(2) for undistributed property when there was no day in the sixth month following the decedent's death which corresponded numerically to the date of death. The Commissioner determined in Rev. Rul. 74-260, 1974 INT. REV. BULL. No. 22, at 11, that the correct date would be the last day of the sixth month. The decision was analogized to a similar provision in the estate tax regulations affixing the due date for an estate tax return as the last day of the ninth month. Treas. Reg. § 20.6075-1 (1958), *as amended*, T.D. 7238, 37 F.R. 28721 (Dec. 29, 1972). Thus, if the decedent died on October 31, 1972, the correct alternate valuation date would be April 30, 1973.

[36] *See also* note 57 *infra*.

make proper tax returns and criminal penalties[37] for such failures if they are willful. Generally, the Commissioner must make an assessment within three years of the time the taxes and applicable penalties become due.[38] Section 6531, however, provides for a three-year statute of limitations from the date of the commission of a criminal act, with certain exceptions extending the period to six years.[39] If a timely complaint is instituted, the statute is tolled for nine months.[40] The purpose underlying such limitations on criminal prosecutions is to effectuate an accommodation between two countervailing considerations, the right of the individual to be free from overly delayed prosecutions and the government's need for adequate time in which to develop its case, which is a frequently recurring problem in tax investigations.[41]

The most significant recent development concerned criminal prosecutions and the statute of limitations.[42] In *United States v. Smith*,[43] the court held that governmental prosecution of the defendant was not barred by § 6531 despite the fact that the indictment was returned beyond the statute of limitations. On April 13, 1973, a complaint was served on the defendant, James Smith, charging him

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[37] *See* INT. REV. CODE OF 1954, §§ 7201-7216.

[38] INT. REV. CODE OF 1954, § 6501.

[39] INT. REV. CODE OF 1954, § 6531.

[40] INT. REV. CODE OF 1954, § 6531 provides in pertinent part:

> Where a complaint is instituted before a commissioner of the United States within the period above limited, the time shall be extended until the date which is 9 months after the date of the making of the complaint before the commissioner of the United States.

[41] In discussing the right of the individual to a speedy trial under the Sixth Amendment, the Supreme Court stated in United States v. Ewell, 383 U.S. 116 (1966):

> This guarantee is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself. However, in large measure because of the many procedural safeguards provided an accused, the ordinary procedures for criminal prosecution are designed to move at a deliberate pace. A requirement of unreasonable speed would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself . . . . [T]he applicable statute of limitations . . . is . . . considered the primary guarantee against bringing overly stale criminal charges.

Id. at 120, 122.

[42] For a 1974 development concerning civil suits and the statute of limitations, see note 57 *infra*.

[43] *Smith* was decided in 1973 but not reported until the following year. 371 F. Supp. 672 (M.D.N.C. 1973).

with a willful attempt to evade his gift tax obligations[44] as of April 15, 1967. Since no grand jury was then in session, an indictment was returned on May 11, 1973, during the next regular session of the grand jury. Smith argued that the six year statute of limitations[45] barred his prosecution since the indictment was not issued until the period had run. Normally, the issuance of a complaint within the proper time limit would toll the period of limitation for an additional nine months.[46] The defendant argued, however, on the basis of *Jaben v. United States*[47] that the tolling exception should not be triggered by the complaint.

The Supreme Court had held in *Jaben* that for the tolling exception in § 6531 to be activated the complaint must be sufficient to begin effectively the criminal process mandated by the Federal Rules of Criminal Procedure.[48] Specifically, as the government acknowledged, the complaint must indicate the essential facts constituting the alleged offense.[49] However, the court ruled that such adherence to Rule 3 was insufficient alone to trigger automatically the time extension in § 6531. As Mr. Justice Harlan stated:

> Clearly the statute was not meant to grant the Government greater time in which to make its case (a result which could have been accomplished simply by making the normal period of limitation six years and nine months) . . . . The Government's interpretation . . . provides no safeguard whatever to prevent [it] from filing a complaint at a time when it does not have its case made, and then using the nine-month period to make it.[50]

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[44] A willful attempt to evade the payment of a tax is a criminal act under INT. REV. CODE OF 1954, § 7201.

[45] Section 6531(2) extends the statute of limitations to six years when the alleged offense involves a willful attempt to evade the payment of the due tax. INT. REV. CODE OF 1954, § 6531(2).

[46] *See* note 40 *supra*.

[47] 381 U.S. 214 (1965). In *Jaben*, on the day before the expiration of the six year limitation period for willful attempt to evade income taxes, the Internal Revenue Service filed a complaint against the defendant for the violation of such offense. The complainant indicated to a United States Commissioner the manner in which he had conducted his investigation and the factors underlying his belief in the guilt of the defendant. The Supreme Court affirmed the conviction of the defendant, concluding that the complaint afforded probable cause for the belief in the guilt of the defendant.

[48] In effect, *Jaben* required that Rules 3, 4 and 5 of the Federal Rules of Criminal Procedures be institutionalized in order for complaints and indictments to be effective. 381 U.S. at 220.

[49] *See* FED. R. CRIM. P. 3.

[50] 381 U.S. at 219-20.

Therefore, the majority determined that a complaint must satisfy the probable cause requirement of Rule 4 in order to toll the statute of limitations. Also, as demanded by Rule 5, the defendant must be given adequate notice and be brought before a Commissioner for a preliminary hearing unless a superseding indictment had subsequently been returned.

The defendant in *Smith* contended that *Jaben* was authority for the proposition that the government cannot utilize the tolling exception when it has adequate time to obtain an indictment within the six year period. Smith argued that since a government investigation had been initiated in 1970 and since a grand jury had been in session on March 22, 1973, the government had unnecessarily delayed the issuance of the complaint and thus was attempting to utilize the tolling exception in the proscribed manner. The court in *Smith*, however, concluded that the concern articulated in *Jaben* was not applicable to the prosecution of Smith and that consequently the tolling mechanism could be triggered. It viewed *Jaben* as permitting the complaint method to be employed when the government had sufficiently made out its case to meet the probable cause standard.[51] The court acknowledged that if a grand jury had been in session at the time of the issuance of the complaint, the government might have been required to obtain an indictment prior to the expiration of the statute of limitations.[52] Nevertheless, in the absence of such a sitting grand jury, the government was not obligated to call a special session of the grand jury.[53] The concern of the Supreme Court in *Jaben*, that the government might use the extension "to make its case,"[54] was to

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[51] 371 F. Supp. at 674. This presumably would allow the government to continue to develop its case during the nine month tolling period as long as the complaint initially met the probable cause requirement. Since the Court in *Jaben* did not detail the manner in which the prosecution could not continue its investigation, the *Smith* court's conclusion was, if not mandated, at least a permissible one.

[52] *Id.*

[53] The court acknowledged that a special session could be obtained if the court so allowed and if a judge would be available for supervision of the session. *Id.* at 674. A strict reading of *Jaben* would seem to demand that the government make an attempt to call such a special session. As the court stated:

> [B]asically, the evident statutory purpose of the nine-month extension provision is to afford the Government an opportunity to indict criminal tax offenders in the event that a grand jury is not in session at the end of the normal limitation period. . . . Clearly the statute . . . was intended to deal with the situation in which the Government has its case made within the normal limitation period *but cannot obtain an indictment* because of the grand jury schedule.

381 U.S. at 219-20 (emphasis added).

[54] *Id.* at 219. *See* note 50 and accompanying text *supra*.

be alleviated by ascertaining whether the complaint did in fact make a showing of probable cause. Additionally, the court reasoned that Smith had the right to move for a preliminary hearing before such right was superseded by the return of an indictment. Therefore, the tolling period was triggered since its activation would endanger none of the safeguards preserved by *Jaben*.

Although *Jaben* had a seemingly restrictive effect on the utilization of § 6531, subsequent decisions have appeared to limit its impact.[55] The refusal of the court in *Smith* to apply the tolling exception of § 6531 automatically evinces a greater sensitivity to the rationale underlying *Jaben* than that manifested by other courts.[56] However, the decision of the court not to require a special session of the grand jury may well result in the same decisional limitation of *Jaben*. Hopefully, *Smith* will imperil none of the protections sought to be effectuated by *Jaben*.[57]

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[55] *See, e.g.*, United States v. Bland, 458 F.2d 1 (5th Cir.), *cert. denied*, 409 U.S. 843 (1972) (return of "no-bill" by first grand jury was not equivalent of dismissal of complaint and thus succeeding grand jury could return an indictment during the same tolling period). *Cf.* United States v. Grayson, 416 F.2d 1073 (5th Cir. 1969), *cert. denied*, 396 U.S. 1059, *rehearing denied*, 397 U.S. 1003 (1970).

[56] Some courts have ignored the express statement in *Jaben* that the tolling provision is not to be applied mechanically. For example, the court in United States v. Bland, 458 F.2d 1 (5th Cir.), *cert. denied*, 409 U.S. 843 (1972) asserted:

> Even the liberal policy in favor of repose [citations omitted] can not overcome the plain meaning of an unambiguous statute. The extension provided by the Congress in the proviso to § 6531 is by its terms absolute. A sufficient complaint having been filed during the prime period of the statute, the government is entitled to make its presentation to the grand jury . . . until the expiration of a time nine months from the filing of the complaint with the commissioner.

458 F.2d at 5-6. *See also* United States v. Grayson, 416 F.2d 1073 (5th Cir. 1969), *cert. denied*, 396 U.S. 1059, *rehearing denied*, 397 U.S. 1003 (1970); Bruce v. United States, 351 F.2d 318 (5th Cir. 1965), *cert. denied*, 384 U.S. 921 (1966).

[57] Another 1974 decision, but one involving civil rather than criminal penalties, also centered around a dispute as to whether the government's suit was barred by the applicable statute of limitations. In United States v. Russell, 327 F. Supp 632 (1971), *rev'd*, 461 F.2d 605 (10th Cir.), *cert. denied*, 409 U.S. 1012 (1972), the government filed suit on April 3, 1969 against Harriet Russell under § 6324(a)(2) of the Code, which imposes liability for unpaid estate taxes on a surviving joint tenant. The district court originally granted Russell's motion for summary judgment on the theory that since no assessment of taxes was ever made against her as transferee, the action was barred by § 6901(c). This provision establishes a one-year statute of limitations for assessment of any estate tax liability against initial transferees after the expiration of the three-year statute of limitations under § 6501(a) against transferors. The Tenth Circuit, however, reversed and remanded, concluding that § 6901 was not the exclusive method for tax collection but was "cumulative and alternative" to other methods. United States v. Russell, 461 F.2d 605, 606 (10th Cir.), *cert. denied*, 409 U.S. 1012 (1972).

On remand, the district court adjudged § 6502, which deals with the collection of unpaid taxes and not with their assessment, to be the applicable statute of limitations to actions brought under § 6324(a)(2). The court concluded that the action was timely under § 6502 since only a total amount of four years and nine months had elapsed since the assessment of taxes against the decedent-husband (the six-year statute of limitations having started to run at the time of such assessments). Since the suit was timely filed under § 6502, the government could utilize the general tax lien established by § 6321 to collect the owed estate taxes. 74-2 U.S. Tax Cas. ¶ 13,036, at 85,871 (D. Kan. 1974).

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