Or 29, 4th DIST

No. 09-3741

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellant

v.

KENNETH H. BEARD and SUSAN W. BEARD,
Petitioners-Appellees

ON APPEAL FROM THE ORDER AND DECISION OF
THE UNITED STATES TAX COURT
No. 13372-06

PETITION FOR REHEARING *EN BANC* OF PETITIONERS – APPELLEES KENNETH H. BEARD AND SUSAN W. BEARD

DATE OF DECISION

JAN 26 2011

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No.: 09-3741
Short Caption: Commissioner of Internal Revenue v. Kenneth H. Beard and Susan W. Beard

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3): Kenneth H. Beard and Susan W. Beard.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court: Arnstein & Lehr LLP (Robert E. McKenzie, Adam S. Fayne)

(3) If the party or amicus is a corporation:

(i) Identify all its parent corporations, if any; and N/A

(ii) list any publicly held company that owns 10% or more of the party's or amicus' stock: N/A

Attorney's Signature: /s/ Adam S. Fayne Date: March 7, 2011
Attorney's Printed Name: Adam S. Fayne

Please indicate if you are *Counsel of Record* for above listed parties pursuant to Circuit Rule 3(d). Yes X

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PETITION FOR REHEARING *EN BANC*

Kenneth H. and Susan W. Beard (hereafter "Beard" or "Appellees") respectfully petition this Court for Rehearing *en banc*.

1. The Seventh Circuit Panel (hereafter "Panel") decision concluding that an overstatement of basis is an omission of gross income under Internal Revenue Code ("Section" or "Code") Section 6501(e) is contrary to the decisions and law of the Supreme Court of the United States, the Fourth Circuit Court of Appeals (decided after the instant case), the Fifth Circuit Court of Appeals (decided after the instant case), the Ninth Circuit Court of Appeals, the Federal Circuit, and the United States Tax Court. Consideration by this entire Court *en banc* is necessary in order for the Seventh Circuit to consider the current split with its sister courts and the Supreme Court of the United States. *Easley v. Reuss*, 532 F.3d 592, 594 (7th Cir. 2008); Fed. R. App. P. 35(b).

2. The Panel's decision, which relied on the Fifth Circuit Court of Appeals' decision in *Phinney v. Chambers*, 392 F.2d 680 (5th Cir. 1968), was misplaced. The Fifth Circuit Court of Appeals in *Burks v. U.S.*, decided after the instant case, specifically stated that the Panel misinterpreted its decision in *Phinney*. *Burks v. U.S.*, — F.3d —, No. 09-11061, 2011 WL 438640 (5th Cir. Feb. 9, 2011); Fed. R. App. P. 35(b).

3. This proceeding involves questions of exceptional public importance because there are far reaching effects of this decision.[1] The effect of this decision applies to not only

[1] Due to the exceptional importance of the Panel's Decision, it is unclear why Fed. Cir. R. 40(e) was not addressed in the Panel's decision, which states "[a] proposed opinion approved by a panel of this court adopting a position which would overrule a prior decision of this court or create a conflict between or among circuits shall not be published unless it is first circulated among the active members of this court and a majority of them do not vote to rehear en banc the issue of whether the position should be adopted. In the discretion of the panel, a proposed opinion which would establish a new rule or procedure may be similarly circulated before it is issued. When the position is adopted by the panel after compliance with this procedure, the opinion, when published, shall contain a footnote worded, depending on the

Appellees, but all taxpayers in the Seventh Circuit that sell an asset with basis (i.e. capital asset and goods held as inventory). All Seventh Circuit taxpayers, and Seventh Circuit taxpayers alone, may now be subject to an extended six-year statute of limitations under IRC Section 6501(e) if the IRS *alleges* an overstatement of basis; i.e. real estate investors who allegedly overstate their basis, homeowners who allegedly overstate their basis, taxpayers involved in the sale of their business, individual and institutional investors who invest in the stock market and allegedly overstate their basis in the underlying securities, a business that sells "widgets" to another business or individual, and any other taxpayer in the Seventh Circuit that sells goods. *Easley*, 532 F.3d at 594 (Rehearings en banc are designed to address issues that affect the development of the law); Fed. R. App. P. 35(b) .

SUMMARY OF THE ARGUMENT

I. The Panel Decision Is Contrary To Settled Law

A. The Panel's Opinion Placed The Seventh Circuit As An Outlier To Its Sister Courts

The Appellee's position is that the issue in this case was decided by the U.S. Supreme Court in *Colony, Inc. v. Commissioner.* 357 U.S. 28 (1958). In *Colony,* the Supreme Court held that an overstatement of basis does not constitute an omission of income that can trigger an extended limitations period. Although the *Colony* case dealt with the predecessor statute to Section 6501 *(i.e.,* before the Code was amended in 1954), the relevant language in Section 6501(e) remains essentially the same as the language in the predecessor statute. *Kenneth H. Beard and Susan W. Beard v. Commissioner of Internal Revenue Service*, — F.3d —, No. 09-3741, 2011 WL 222249, (7th Cir. Jan. 26, 2011) ("Essentially the same language is found in

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circumstances..." The Panel's decision conflicted with the Ninth and Federal Circuit; *Bakersfield Energy Partners v. Commissioner,* 568 F.3d 767 (9th Cir. 2009); *Salman Ranch Ltd.* v. *U.S.*, 573 F.3d 1362 (Fed. Cir. 2009).

current Section 6501(e)(1)(A)..."). Analyzing Section 6501(e), and relying on *Colony*, all other Circuit Courts that have addressed this issue have held that an overstatement of basis is not an omission of gross income. *See Burks,* — F.3d —, 2011 WL 438640 (5th Cir. Feb. 9, 2011); *Home Concrete & Supply, LLC v. U.S.*, — F.3d —, No. 09-2353, 2011 WL 361495 (4th Cir. Feb. 7, 2011); *Salman Ranch Ltd v. United States,* 573 F.3d 1362 (Fed. Cir. 2009); *Bakersfield Energy Partners v. Commissioner,* 568 F.3d 767 (9th Cir. 2009). The Tax Court and the Court of Federal Claims have reached the same conclusion. *Grapevine Imports, Ltd. v. United States*, 77 Fed. Cl. 505 (2007); *Intermountain Insurance Service of Vail, LLC v. Commissioner*, T.C. Memo. 2009-195 (Sept 1, 2009). The instant case stands alone in holding that an overstatement of basis is an omission of gross income.

In the instant case, the Panel stated that the question of whether an overstatement of basis is an omission of gross income is a "contentious issue and a close call..." *Beard*, — F.3d —, 2011 WL 222249 at *3. The Panel cited four (4) cases in support of its proposition that *Colony* does not apply and an overstatement of basis constitutes an omission from gross income:

> The question facing us then is: Was the tax court correct to apply the principles of *Colony* to this dispute involving the 1954 Code? The question has been addressed by multiple federal courts, with differing results. Some have found that *Colony* does not apply and an overstatement of basis can be an omission from gross income. *See, e.g. Phinney v. Chambers,* 392 F.2d 680 (5th Cir. 1968); *Home Concrete & Supply, LLC v. United States*, 599 F. Supp. 2d 678 (E.D. N.C. 2008), *appeal docketed*, No. 09-2353 (4th Cir. Dec. 9, 2009); *Burks v. United States*, 2009 WL 2600358 (N.D. Tax. June 13, 2008), *appeal docketed*, No. 09-11061 (5th Cir. Oct. 26, 2009); *Brandon Ridge Partners v. United States*, 100 A.F.T.R. 2d 2007-5347, 2007 WL 2209129 (M.D. Fla. Jul. 30, 2007) .

Id.

At the time the opinion was issued, the Panel stated that a total of three (3) trial courts and one (1) Appellate Court have found that an overstatement of basis can be an omission from

gross income. *Id.* Since the issuance of the Panel's opinion, two (2) of these four (4) cases have been decided by your sister Appellate courts, which found contrary to the Panel's decision and held that an overstatement of basis in not an omission of gross income under Section 6501. *Burks v. U.S.*, — F.3d —, 2011 WL 438640 (5th Cir. Feb. 9, 2011); *Home Concrete & Supply, LLC v. U.S.*, — F.3d —, 2011 WL 361495 (4th Cir. Feb. 7, 2011)[2]. And one (1) of these four (4) cases was clarified - the Fifth Circuit, in reversing *Burks* stated "[t]he Seventh Circuit in *Beard* incorrectly read our decision in *Phinney* as limiting *Colony's* holding." *Burks*, — F.3d —, 2011 WL 438640 at *13, n.5. That leaves only the unpublished opinion in *Brandon Ridge Partners* which found that *Phinney* compelled application of the extended limitations period. 2007 WL 2209129, *8 (M.D. Fla. July 30, 2007) (unpublished). We now know that the Middle District of Florida's reliance on *Phinney* was misplaced. Based on the split among the circuits, we believe that a rehearing en banc is appropriate. Fed. R. App. P. 35(b).

B. Changes To Section 6501(e)(1)(A) Under The 1954 Code Does Not Render *Colony* Irrelevant

It is the Panel's position that *Colony* does not control and an overstatement of basis can be treated as an omission from gross income under the 1954 Code. *Beard*, — F.3d —, 2011 WL 222249 at *6-7. Although noting that the critical statutory language "omits from gross income" remained in the 1954 Code, the Panel interpreted the addition of a new subsection in the 1954 Code to mean that a special definition of "gross income" applies in all other cases. *Id.* Coupling this interpretation with the Supreme Court's statement in *Colony* that its holding was "in

[2] Judge James Wynn for the Fourth Circuit stated, "[l]ike the Ninth and Federal Circuits, we hold that the Supreme Court in Colony straightforwardly construed the phrase 'omits from gross income,' unhinged from any dependency on the taxpayer's identity as a trade or business selling goods or services. There is, therefore no ground to conclude that the holding in *Colony* is limited to cases in involving a trade or business selling goods or services." *Home Concrete & Supply, LLC*, — F.3d —, 2011 WL 361495 at *4.

harmony with the unambiguous language of Section 6501(e)(1)(A)", 357 U.S. at 37, the Panel concluded that *Colony's* holding was limited to the trade or business context.

The Supreme Court, and your sister courts, found nothing in *Colony* that limited its reach to the trade or business context. The Supreme Court could not have intended that its holdings be limited to the trade or business context. We believe it is important to look at the historical nature of *Colony*. The Supreme Court granted certiorari in *Colony* to resolve a split in the circuits regarding the scope of the extended limitations period – the Sixth Circuit's decision in that case conflicted with decisions in four other appellate courts. 357 U.S. at 31 n.2. The conflicting decisions were not limited to sales of goods or services by a trade or business. A few of the conflicting decisions included *Slaff,* which involved an individual's omission of wages; *Foster's Estate*, which involved an estate's omission of interest income; and *Lazarus* which involved the sale of real property. *Lazarus v. United States*, 136 Ct. Cl. 283 (1956); *Slaff v. Commissioner*, 220 F.2d 65 (9th Cir. 1955); *Foster's Estate v. Commissioner*, 131 F.2d 405 (5th Cir. 1942). *Colony* could not have resolved the circuit split cited by the Supreme Court in granting certiorari had it been limited only to the trade or business context.

Importantly, *Colony* did not involve a sale of "goods or services" – the circumstances to which Section 6501(e)(1)(A)(i) applies. *Colony* involved the sale of improved real property, which is neither a "good" nor a "service." While the Code does not define "goods," the ordinary meaning of the term, embraced by the Appellant in *Salman Ranch*, is limited to "tangible" or "movable personal property." *Salman Ranch, Ltd. v. United States*, No. 2008-5053, Brief for the Appellee, 2008 WL 4133498 (Fed. Cir. June 25, 2008); *Black's Law Dictionary* at 701 (7th ed. 1999). The dissenting judge in *Salman Ranch*, whose opinion the Panel felt "said it better", *Beard*, — F.3d —, 2011 WL 222249 at *4, wrote that "[t]he Ranch sale proceeds are not income

from sales of 'goods or services,' but are gain from the sale of real property." 573 F.3d at 1383 (Newman, J., dissenting). The Panel's holding that "*Colony's* holding is inherently qualified by the facts of the case before the [Supreme] Court" to include only a sale of goods or services in a trade or business is directly at odds with the facts of the very case that it purports to limit. *Beard*, — F.3d —, 2011 WL 222249 at *4.

The Panel believed that the "key phrase" overlooked by the Supreme Court was "gross income." The Panel also believed that the term "amount" used in the statute was a quantitative reference suggesting that the inquiry is whether gross income is *understated* by at least twenty-five percent ("25%"). The Supreme Court rejected these same arguments in *Colony*. As it explained, the use of the term "omits" – as opposed to "reduces" or "understates" – reflects Congress's intent to restrict the longer limitations period to the specific situation where items are "left out" of the computation, not put in and overstated. *Colony*, 357 U.S. at 32-33.

According to Judge James Wynn for the Fourth Circuit, *Colony's* discussion of the legislative history of former Section 275(c) is compelling with regard to Section 6501(e)(1)(A). *Home Concrete & Supply, LLC*, — F.3d —, 2011 WL 361495 at *5. Judge Wynn wrote:

> The language the [Supreme] Court construed in former Section 275(c) – 'omits from gross income an amount properly includable therein' – is identical to the language at issue in Section 6501(e)(1)(A). Because there has been no material change between former Section 275(c) and current Section 6501(e)(1)(A), and no change at all to the most pertinent language, we are not free to construe an omission from gross income as something mother than a failure to report 'some income receipt or accrual.'

Id.

Based on the split among the Courts of Appeal, we believe that this matter is ripe for this Court to rehear this matter *en banc*. Fed. R. App. P. 35. The above demonstrates that the Panel decision conflicts with a decision of the United States Supreme Court. Fed. R. App. P.

35(b)(1)(A). Further, it is clear that the Panel decision is an issue of exceptional importance because it involves an issue on which the Panel's decision conflicts with the authoritative decisions of other Courts of Appeals that have addressed the issue. Fed. R. App. P. 35(b)(1)(B).

II. We Now Know That The Panel's Reliance On *Phinney* Was Misplaced

The Fifth Circuit, on February 9, 2011, found that an overstatement of basis which resulted from the taxpayers' use of a Son-of-BOSS tax strategy does not constitute an omission from gross income for the purposes of Section 6501(e)(1)(A). *Burks*, — F.3d —, 2011 WL 438640. The Panel, in the instant case, relied heavily on the Commissioner's interpretation of *Phinney*, purportedly "distinguishing *Colony* as the *Phinney* court did." *Beard*, — F.3d —, 2011 WL 222249 at *5. This reliance was misplaced. The Fifth Circuit recently stated:

> The Seventh Circuit in *Beard* incorrectly read our decision in *Phinney* as limiting *Colony's* holding...[T]he Seventh Circuit failed to note the distinct factual pattern presented in *Phinney*, where the taxpayers had misstated the very nature of the item so that the IRS would not have had any reasonable way of detecting the error on the tax returns. That is not the case here.

Burks, — F.3d —, 2011 WL 438640 at *13, n.5.

The Fifth Circuit stated that they "do not read *Phinney* as limiting *Colony's* holding." *Id.* The Fifth Circuit further stated that "[a] fair reading of *Colony* and *Phinney* supports our finding that both an actual omission of an amount from the tax return or a fundamental misstatement of the nature of an item reported in a tax return...may result in application of the extended limitations period." *Id.*

The Fifth Circuit found its determination consistent with other courts' analysis regarding the applicability of *Colony* in the context of tax advantaged transactions. The Fifth Circuit indicated that, with exception of the Seventh Circuit, the courts before them found that an overstatement of basis does not constitute an omission from gross income for purposes of

Section 6501(e)(1)(A) such that the extended limitations period applied, because of the similarity of the language and meaning of Section 275(c) and Section 6501(e)(1)(A). *See Id.* citing the following: *Home Concrete & Supply, LLC (Home Concrete II)*, — F.3d —, 2011 WL 361495, *5 (4th Cir. Feb. 7, 2011) (finding that because the legislative history of Section 275(c) is "equally compelling" with respect to Section 6501(e)(1)(A) and that because there are no material differences in the language of the statutes, "we are not free to construe an omission from gross income as something other than a failure to report "some income receipt or accrual") (quotations omitted); *Salman Ranch Ltd (Salman Ranch II)*, 573 F.3d 1362, 1373-74, 1377 (Fed. Cir. 2009) (finding that "[t]he meaning of 'omits' in today's parlance appears to be no different than its meaning at the time of the *Colony* decision" and further noting that in the years since *Colony* had been decided Congress had not indicated that its holding was inapplicable to the revised statute despite ongoing debate surrounding the decision); *Bakersfield Energy Partners, LP*, 568 F.3d 767, 771-72 (9th Cir. 2009) (finding that the 1939 Code was so substantially similar to the 1954 Code that *Colony* was controlling); *UTAM, Ltd. v. Commissioner*, 98 T.C.M. (CCH) 422, at *3 (2009) (rejecting the government's reliance on *Phinney* because under the facts before it the Commissioner was not at a disadvantage in "identifying the error in the reporting of the transaction" when the return adequately identified the nature of the item at issue); *Intermountain Ins. Serv. of Vail v. Commissioner (Intermountain I)*, 98 T.C.M. (CCH) 144, at *2-3 11 (2009 (applying *Colony* and holding that an overstatement of basis was not an omission from gross income) *cf. Benson v. Commissioner*, 560 F.3d 1133, 1136 (9th Cir. 2009) (finding six year limitations period applied when failure to report "did not result from an overstatement of basis or other technical miscalculation"); *Grapevine Imports*, 77 Fed. Cl. at 510 (holding that "the meaning of the word 'omits,' has as much application to the 1954 version of the statute, as it

did the 1939 version, for, in both, that word is pivotal," and further finding no compelling reason to hold that the common understanding of the term "omits" had "shifted" since *Colony* and revisions to the Code).

III. This Proceeding Involves Matters Of Great Public Importance Due To The Extraordinary Potential For Disparate Treatment Of Taxpayers Residing In The Seventh Circuit Jurisdiction

The six-year statute of limitations that is at issue in this case applies when a taxpayer has omitted twenty-five percent (25%) or more of her gross income. Section 6501(e)(1)(A). The effect of the instant decision is that the IRS can now apply this extended six-year statute of limitations to not merely omissions of twenty-five percent (25%) or more of a taxpayer's income, but also when there is a tax *effect* sufficient to have the economic impact of such an omission.

A. Seventh Circuit Taxpayers Are Subject To A Different Standard Than All Other Taxpayers

The primary area, as we have seen in the instant case, where the IRS assets this extended limitations period, is where the taxpayer allegedly overstates her basis in a capital asset. However, this is not the only area where the IRS has asserted this extended statute of limitations issue. For example, Bausch + Lomb pointed out in its Amicus Brief that the IRS is not using this attempt to extend the statute of limitations in solely those instances where a tax advantaged transaction is alleged to have occurred.[3] The Panel's decision opens up Pandora's Box to a plethora of items the IRS can now allege are subject to the extended limitations period. The dramatic effect this has is disparately enforced against Seventh Circuit taxpayers only.

Based on the decision of the Panel, taxpayers in the Seventh Circuit will now face the extended limitations period where the effect of an alleged overstatement of basis amounts to an

[3] Bausch + Lomb's Motion for Leave to File its Amicus Brief was denied.

omission of income. By way of example, the following illustrates the extraordinary effect the Panel's decision has on commerce within the Seventh Circuit:

- Taxpayer purchased a building more than 10 years ago for $50,000. Taxpayer sells the building this year for $1,000,000. Taxpayer has a gain of $950,000, and the IRS statute of limitations is three (3) years under Section 6501(a). Taxpayer inadvertently claimed basis in the building of $500,000, and reported a capital gain of $500,000. Taxpayer may now face a six-year statute of limitations period.
- Taxpayer purchases securities in a publicly traded company more than 15 years ago. Taxpayer sells the securities today but inadvertently overstates the basis in these securities. Taxpayer may now face a six-year statute of limitations period.
- Taxpayer sells his small family owned business. The accountant, who prepares the taxpayer's final return, determines the taxpayer's basis in her family owned business by review of company records. Taxpayer may now face a six-year statute of limitations period. A mere allegation by the IRS will force the taxpayer or accountant to support a basis number from the distant past.
- Taxpayer sells a piece of machinery. The taxpayer treated that machinery as a capital asset on its books and records and took depreciation. The taxpayer allegedly overstates its basis in the machinery. The taxpayer may now face a six-year statute of limitations period and be required to prove basis and depreciation from many years prior the IRS audit.
- Taxpayer is in the business of selling "widgets". Taxpayer sells widgets to many individuals and companies. Taxpayer may now face a six-year statute of limitations for its sale of inventory.

For all of the above examples, the IRS already has a tool in its arsenal if any of these hypothetical taxpayers willfully overstate their basis – the fraud exception. If a taxpayer intentionally misstates an item on her tax return, there is no statute of limitations for fraud. Section 6501(c). The issue now in the Seventh Circuit, is that the mere allegation by the IRS that the taxpayer overstated her basis, puts the taxpayer on her heels and subjects the taxpayer to a six-year statute of limitations, and that the taxpayer will then be required to find and produce long ago records or other support to substantiate her basis figure.

To further demonstrate the extraordinary effects of the instant decision, we may look at cases in the past that have addressed this issue in non-tax advantaged transactions. In *Davis v. Hightower*, the IRS unsuccessfully tried to use the extended limitations period to challenge the capital gain treatment of a sale of cotton. 230 F.2d 549 (5th Cir. 1956). The Fifth Circuit held that the extended statute of limitations period could not apply unless the taxpayer abandoned his claim to capital gain treatment. *Id.* The court reasoned:

> It cannot be thought that if a taxpayer accurately fills in every blank space provided for his use in the income tax form, giving every "gross" or maximum figure called for, and arrives at an incorrect computation of the tax only by reason of a difference between him and the Commissioner *as to the legal construction to be applied to a disclosed transaction*, the use of a smaller figure that that ultimately found to be correct in one stage of the computation amounts to an omission from "gross income" of the difference between the correct and incorrect item.

Id. at 553 (emphasis added).

A similar case dealing with the character of a disclosed item is *Slaff*. 220 F.2d 65. There, the taxpayer reported the full amount of his income earned abroad on his tax return but (erroneously) claimed it was tax exempt. *Id.* The court held the Commissioner was barred from invoking the extended limitations period because there was no omission of income on the return. *Id.*

All of the above hypothetical examples, and cases, illustrate the importance of the instant decision and why this Petition should be granted. *See Easley*, 532 F.3d at 594. In the Seventh Circuit, and the Seventh Circuit alone, all taxpayers may be subject to the extended statute of limitations period where there is an *alleged* overstatement of basis.

B. The Panel's Decision Discriminates Against Taxpayers That Overstate Basis Versus Taxpayers That Overstate Deductions

There is one more item of great importance that this Court should be made aware. The effect of this decision discriminates against taxpayers who overstate their deductions versus taxpayers who overstate their basis. This was a concern for the Supreme Court in *Colony*. Specifically addressing this potential discrimination issue where a taxpayer who overstates basis is subject to an extended limitations period, and the taxpayer who overstates deductions is not extended to an extended limitations period, the Supreme Court stated:

> On the other hand, when, as here, the understatement of a tax arises from an error in reporting an item disclosed on the face of the return the Commissioner is at no such disadvantage. And this would seem to be so whether the error be one affecting 'gross income' or one, such as overstated deductions, affecting other parts of the return. To accept the Commissioner's interpretation and to impose a five-year limitation when such errors affect 'gross income,' but a three-year limitation when they do not, not only would be to read s 275(c) more broadly that is justified by the evident reason for its enactment, but also to create a patent incongruity in the tax law.

Colony, 357 U.S. at 36-37.

By way of example, an individual who inadvertently overstates her charitable deduction or mortgage interest could never be subject to the extended statute of limitations under Section 6501(e), but her neighbor who sells her house can now be subject to the extended statute of limitations period because the sale involved an item with basis. This discrimination would only occur for taxpayers within the Seventh Circuit.

C. Uniformity Among The Circuits Is Important

We believe that in the spirit of uniformity with your sister courts, the entire Court should rehear this matter *en banc*. At present time, all of your sister courts to address this identical issue have found that an overstatement of basis is not an omission of gross income. *See Burks,* — F.3d —, 2011 WL 438640 (5th Cir. Feb. 9, 2011); *Home Concrete & Supply, LLC,* — F.3d —, 2011 WL 361495 (4th Cir. Feb. 7, 2011); *Salman Ranch Ltd,* 573 F.3d 1362 (Fed. Cir. 2009); and *Bakersfield Energy Partners,* 568 F.3d 767 (9th Cir. 2009). The effect that the instant decision has on commerce within the Seventh Circuit could be extraordinary because of the disparate treatment of Seventh Circuit taxpayers compared to taxpayers throughout the rest of the country. Seventh Circuit taxpayers would be subject to a completely different set of Internal Revenue Service standards and guidelines. To the extent the economics of an audit require, Seventh Circuit taxpayers may be advised by their accountants to move to a state outside the Seventh Circuit. If the IRS asserts the extended statute of limitations, the taxpayer could then seek protection in the more taxpayer friendly environs of other Circuits.

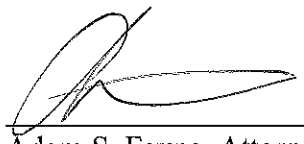
Finally, taxpayers with resources could easily elect out of the Seventh Circuit jurisdiction by paying the alleged tax deficiency in full and filing a complaint with the Court of Federal Claims, which is bound by the Federal Circuit's decision in *Salman Ranch,* 573 F.3d 1362 (Fed. Cir. 2009). This would discriminate against taxpayers who do not have the resources readily available to pay the entire tax liability in full for a "ticket" to the Court of Federal Claims. For example, if the IRS proposes a deficiency against a taxpayer in the amount of $250,000 based on the taxpayer's alleged overstatement of basis in the sale of her home six (6) years ago, a wealthy taxpayer can simply pay the $250,000, go to the Court of Federal Claims, and likely receive a final order holding that the IRS is barred by the three (3) year statute of limitations. Conversely,

a taxpayer who does not have $250,000 available will be bound by the laws of the Seventh Circuit and ultimately be found liable for that $250,000 deficiency for a transaction that occurred six (6) years ago. *See Golsen v. Commissioner*, 54 T.C. 742 (1970) (taxpayers are bound by the laws of the highest court in the jurisdiction where they reside).

CONCLUSION

WHEREFORE, the Petitioners-Appellees respectfully request this Court to rehear this matter *en banc* based on the above.

Respectfully Submitted



Adam S. Fayne, Attorney for Appellees

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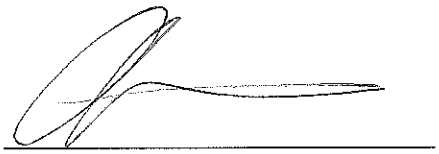
CERTIFICATE OF SERVICE

It is hereby certified that service of the foregoing Petition for Rehearing *En Banc* has been made on counsel for the Appellants on this 7th day of March 2011, by sending a copy thereof in an envelope, via Express Mail, properly addressed to her as follows:

Joan I. Oppenheimer
5-23215
CMN 2010100405
Appellate Section
P.O. Box 502
Washington, D.C. 20044



Adam S. Fayne, Attorney

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