No. 07-187

In the Supreme Court of the United States

GORDON E. DAVENPORT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Under 26 U.S.C 6324(b), a donee is liable for any unpaid gift tax owed by the donor for the taxable period of the donee's gift to the extent of the value of the gift received by the donee. The question presented is whether a final decision of a court determining the donor's gift tax liability with respect to the gift to the donee is res judicata in a proceeding against the donee under 26 U.S.C. 6324(b).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 484 F.3d 321. The order of the district court addressing the res judicata issue (Pet. App. 51a-52a) is unreported. The report and recommendation of the magistrate judge on the res judicata issue (Pet. App. 40a-50a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 2007. A petition for rehearing was denied on May 14, 2007 (Pet. App. 85a-86a). The petition for a writ of certiorari was filed on August 13, 2007 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Birnie Davenport (Birnie) and her sister Elizabeth Davenport (Elizabeth) shared a home for most of their adult lives. Under a longstanding oral agreement, the sisters commingled all of their assets, although title to the assets was held in Elizabeth's name. The sisters' assets included 3220 shares of stock in Hondo Drilling Company (Hondo). Shortly after Elizabeth's death, Birnie transferred her 1610 shares of Hondo stock to her nephews, petitioner Gordon Davenport and Charles Botefuhr, and to her niece Patricia Vestal. Specifically, in July 1980, Birnie sold to petitioner and Vestal, respectively, 537 and 536 shares of Hondo stock for $804 per share. She transferred her remaining 537 shares to Botefuhr as an outright gift. No gift tax return was filed at that time for either the gift to Botefuhr or the sales to petitioner and Vestal. In July 1981, Hondo purchased all of Botefuhr's shares for $2190 per share. Pet. App. 2a-4a.[1]

Birnie died in 1991. Petitioner, Vestal, and Botefuhr were appointed personal representatives of her estate. The estate filed an estate tax return and a 1980 gift tax return that reported the 1980 gift to Botefuhr using a value of $804 per share for the Hondo stock. Pet. App. 4a.

The Internal Revenue Service (IRS) determined that the gift tax return undervalued the Hondo stock given to Botefuhr in 1980 and that Birnie should have filed a gift

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[1] At roughly the same time, the Internal Revenue Service (IRS) investigated the estate tax owed by Elizabeth. The investigation culminated in a judicial settlement under which the IRS and the estate, represented by petitioner and Vestal, agreed that 1610 shares of Hondo stock would be included in the estate and valued at $2400 a share. Pet. App. 4a n.4, 70a.

tax return for the 1980 sales to petitioner and Vestal because those transfers included a gift component. On September 20, 1994, the IRS sent the estate a notice of deficiency asserting a gift tax deficiency for the three transfers. Pet. App. 4a-5a, 83a.

2. Birnie's estate petitioned the Tax Court for a redetermination of the gift tax deficiency. Pet. App. 4a-5a, 58a-84a. The estate asserted that Birnie did not have a sufficient ownership interest in the Hondo stock in July 1980 to make a gift of the stock and that the gifts were not completed during the relevant time period. *Id.* at 5a, 76a-77a. The estate further argued that the notice of deficiency was issued after the expiration of the applicable statute of limitations. *Id.* at 5a, 82a-83a. The parties stipulated that, "[f]or the purposes of this litigation," at the time of the transfers, the stock was worth $2000 per share. *Id.* at 5a n.5, 76a n.7. The Tax Court held that a completed gift was made upon the bargain sale of the Hondo stock to petitioner and Vestal and that the notice of deficiency was issued before the expiration of the statute of limitations. *Id.* at 58a-84a. The court calculated the deficiency owed based on the stipulated value of $2000 per share. *Id.* at 5a & nn.5-6.

Birnie's estate appealed to the Tenth Circuit, which affirmed the Tax Court's deficiency determination. Pet. App. 5a-6a; *Estate of Davenport* v. *Commissioner*, 184 F.3d 1176 (10th Cir. 1999). The estate failed to pay the gift tax deficiency. Pet. App. 6a.

3. The government then brought suit in the United States District Court for the Northern District of Oklahoma to reduce to judgment both the estate's liability for the gift tax and the donees' liability for the same tax under 26 U.S.C. 6324(b). Pet. App. 6a. That statute provides that a donee is personally liable up to the value

of the gift he received for any unpaid gift tax arising from gifts the donor made during the same tax period. 26 U.S.C. 6324(b). As relevant here, the government argued that the estate's liability was a matter of res judicata (R. 175), and that the donees were similarly "prohibited from contesting their personal, transferee liability by principles of res judicata" (R. 177). Petitioner and Botefuhr argued that the district court lacked personal jurisdiction over them. Pet. App. 6a. The district court held that it had personal jurisdiction over all the donees and that they were liable for the unpaid gift tax under 26 U.S.C. 6324(b). *United States* v. *Estate of Davenport*, 159 F. Supp. 2d 1330 (N.D. Okla. 2001).

The United States Court of Appeals for the Tenth Circuit affirmed in part and reversed in part. *United States* v. *Botefuhr*, 309 F.3d 1263 (2002). The court of appeals held that the district court lacked personal jurisdiction over petitioner and Botefuhr. *Id.* at 1274. The court of appeals went on to address Vestal's liability for the gift tax deficiency. The court stated that, although there was "some confusion" over whether claim preclusion (res judicata) or issue preclusion (collateral estoppel) applied, "this matter must be evaluated as an assertion of issue preclusion, rather than claim preclusion," because "[c]laim preclusion is inapplicable to the situation here presented." *Id.* at 1281-1282. Applying principles of issue preclusion, the court held that Vestal was not bound by the Tax Court's determination of the value of the Hondo stock because the Tax Court had made that determination based on a stipulation by the parties. *Id.* at 1282-1283.

On remand, the District Court for the Northern District of Oklahoma transferred petitioner's case to the United States District Court for the Southern District

of Texas. Pet. App. 7a. In a series of opinions, that court held that (1) the statute of limitations barred assessment of the gift tax on the gift arising from the bargain sale of stock to petitioner, but that it did not bar assessment of the gift tax with respect to the outright gift to Botefuhr; (2) although res judicata and collateral estoppel bound petitioner to the Tax Court's finding that he was a donee, neither doctrine established the value of the gift to him (*i.e.*, the value of the Hondo stock on the date of transfer); and (3) all of the government's evidence relating to the value of Hondo stock was inadmissible. Accordingly, the district court granted summary judgment in petitioner's favor. *Ibid.*

4. The United States Court of Appeals for the Fifth Circuit reversed and remanded. Pet. App. 1a-17a. The court of appeals held that the Tax Court's decision was res judicata as to the value of the Hondo stock given to petitioner. *Id.* at 17a.

The court of appeals first observed that, for res judicata to apply, (1) the parties must be identical or in privity, (2) the judgment in the prior action must have been rendered by a court of competent jurisdiction, (3) the prior action must have resulted in a final judgment on the merits, and (4) the same claim or cause of action must have been involved in both actions. Pet. App. 10a. The court noted that petitioner did not contest the existence of the first three elements. *Id.* at 11a. The court explained that, in determining whether "two suits involve the same claim or cause of action," the appropriate "inquiry focuses on whether the two cases under consideration are based on 'the same nucleus of operative facts.'" *Id.* at 10a (citation omitted). Thus, the court elaborated, "[t]he nucleus of operative facts, rather than the type of relief requested, substantive theories ad-

vanced, or types of rights asserted, defines the claim." *Ibid.* (citing *Agrilectric Power Partners, Ltd.* v. *General Elec. Co.*, 20 F.3d 663, 665 (5th Cir. 1994)). The court concluded that "[t]he operative facts in this case and the tax court case are identical" because "[b]oth cases are based on the same two transactions and factual events: (1) the July 1980 installment sale of the Hondo stock from Birnie Davenport to Vestal and [petitioner] and (2) the July 1980 gift of the Hondo stock to Botefuhr." *Id.* at 12a. The court therefore held that the fourth requirement for res judicata also was satisfied. *Id.* at 12a-13a.

The court of appeals observed that its decision was consistent with *Baptiste* v. *Commissioner*, 29 F.3d 1533 (11th Cir. 1994), and *Baptiste* v. *Commissioner*, 29 F.3d 433 (8th Cir. 1994), cert. denied, 513 U.S. 1190 (1995), which held that a judgment that an estate had a tax deficiency was res judicata as to the liability of the transferees of the estate under 26 U.S.C. 6324(a)(2), the parallel estate tax provision to 26 U.S.C. 6324(b). Pet. App. 13a-15a. The court of appeals noted that its decision that res judicata, rather than collateral estoppel, applies was contrary to the Tenth Circuit's holding in *Botefuhr*. *Id.* at 15a-16a. But the court of appeals declined to follow *Botefuhr*, explaining that the Tenth Circuit had failed to offer any "insight into its conclusion that res judicata did not apply." *Id.* at 16a.

Accordingly, the court of appeals held that "res judicata binds [petitioner] to the value of the Hondo stock established in the tax court proceeding" and "precludes him from relitigating other issues that were or could have been litigated in that suit, such as whether the statute of limitations barred assessment of the gift tax on

either the gift to Botefuhr or the gifts involved in the installment sale transactions." Pet. App. 17a.

ARGUMENT

The court of appeals correctly held that res judicata bars a donee, who is liable for unpaid gift tax under 26 U.S.C. 6324(b), from raising in subsequent litigation matters that were or could have been raised in a prior Tax Court suit determining the gift tax. Although the decision of the court of appeals conflicts with *United States* v. *Botefuhr*, 309 F.3d 1263 (10th Cir. 2002), which held without analysis that collateral estoppel rather than res judicata applies in those circumstances, this case does not present a recurring question of substantial importance. This Court's review is therefore not warranted.

1. The Internal Revenue Code generally imposes on the donor a tax on transfers by gift. 26 U.S.C. 2501-2503 (2000 & Supp. IV 2004). The taxable value of a gift of property is the value of the property or, where the "property is transferred for less than an adequate and full consideration," "the amount by which the value of the property exceeded the value of the consideration." 26 U.S.C. 2512. Under 26 U.S.C. 6324(b), a donee is liable for any unpaid gift tax with respect to all gifts made during the period in which the donee received his gift, to the extent of the value of the donee's gift.

The doctrine of res judicata "precludes the parties or their privies from relitigating issues that were or could have been raised" in an earlier suit. *Allen* v. *McCurry*, 449 U.S. 90, 94 (1980); see *Federated Dep't Stores, Inc.* v. *Moitie*, 452 U.S. 394, 398 (1981); *Montana* v. *United States*, 440 U.S. 147, 153 (1979). The doctrine applies in federal tax cases. *Commissioner* v. *Sunnen*, 333 U.S.

591, 598 (1948) ("[A] judgment on the merits is *res judicata* as to any subsequent proceeding involving the same claim and the same tax year.").

As the court of appeals explained, four elements must be present for res judicata to apply: (1) the parties must be identical or in privity; (2) the first action must be concluded by a final judgment on the merits; (3) the judgment must be entered by a court of competent jurisdiction; and (4) the same claim or cause of action must be involved. Pet. App. 10a (citing *In re Southmark Corp.*, 163 F.3d 925, 934 (5th Cir.), cert. denied, 527 U.S. 1004 (1999)); see *Federated Dep't Stores,* 452 U.S. at 399; *Sunnen*, 333 U.S. at 597-598. Petitioner has not contested that the first three elements are satisfied here. Pet. App. 11a.

As the court of appeals recognized (Pet. App. 10a-11a), to determine whether two suits involve the same claim or cause of action, courts inquire whether the suits arise from the same transaction or series of transactions or share the same essential operative facts. See *Nevada* v. *United States*, 463 U.S. 110, 130 & n.12 (1983); 1 Restatement (Second) of Judgments § 24, at 196 (1982) (Restatement); *e.g.*, *Taylor* v. *Blakey*, 490 F.3d 965, 977 (D.C. Cir. 2007), petition for cert. pending, No. 07-371 (filed Sept. 17, 2007); *Mpoyo* v. *Litton Electro-Optical Sys.*, 430 F.3d 985, 987 (9th Cir. 2005); *Curtis* v. *Citibank, N.A.*, 226 F.3d 133, 139 (2d Cir. 2000); *Agrilectric Power Partners, Ltd.* v. *General Elec. Co.*, 20 F.3d 663, 665 (5th Cir. 1994).

The court of appeals correctly concluded that the suit here involves the same claim as the prior Tax Court judgment. Pet. App. 12a-13a. As the court of appeals observed, the factual basis of this action is "identical" to the factual basis in the Tax Court case. *Id*. at 12a. The

gift tax liability in the Tax Court was predicated on the following facts: (1) Birnie owned shares of Hondo stock; (2) she sold shares of that stock to petitioner and Vestal in 1980; (3) the sale price was $804 per share; (4) Birnie made a gift of stock to Botefuhr in 1980; (5) her gift tax return claimed the value of the gift to Botefuhr at $804 per share and did not report that any gifts were made to Vestal and petitioner; and (6) the stock was actually worth $2000 per share at the time of the transfers. See *id.* at 58a-84a. Those are the same facts necessary to establish petitioner's liability here, because, under 26 U.S.C 6324(b), petitioner and the other donees are liable for the exact same tax on the exact same transactions to the extent of their respective gifts. See *ibid.* ("the donee of any gift shall be personally liable *for such tax* to the extent of the value of such gift") (emphasis added).

Because res judicata applies, petitioner is precluded "from relitigating issues that were or could have been raised in that action." *Federated Dep't Stores*, 452 U.S. at 398. Thus, as the court of appeals held, petitioner is precluded from contesting "the value of the Hondo stock established in the [T]ax [C]ourt proceeding" as well as "whether the statute of limitations barred assessment of the gift tax." Pet. App. 17a.[2]

2. Petitioner incorrectly contends (Pet. 20-23) that res judicata cannot apply because he was not a party to

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[2] Petitioner incorrectly asserts (Pet. 23 n.14) that different statutes of limitations apply to the donor's gift tax liability and the donee's liability under 26 U.S.C. 6324(b). As the Tenth Circuit correctly held in *Botefuhr*, "the statute of limitations for the donee's liability depends upon the statute of limitations for the donor's liability: so long as the government could bring a timely action against the donor, its action against the donee will be considered timely." 309 F.3d at 1277.

the Tax Court suit. That contention ignores the well-established law that res judicata binds privies even if they were not parties to the prior suit. See *Richards* v. *Jefferson County*, 517 U.S. 793, 798 (1996) (res judicata applies "when it can be said that there is 'privity' between a party to the second case and a party who is bound by an earlier judgment"); *Montana*, 440 U.S. at 153 ("Under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action."). Petitioner does not contest that he is in privity with Birnie's estate. Pet. App. 11a; see Pet. 21 (conceding that "a transferor is deemed to be in privity with the transferee with regard to the final adjudication of the transferor's tax liability").

Petitioner erroneously asserts (Pet. 21-22) that *Montana* establishes that non-parties may be bound only under collateral estoppel and not res judicata. In the passage on which petitioner relies, the *Montana* Court was not addressing preclusion against parties who are in privity with a party to the prior judgment. Instead, the Court was addressing preclusion against non-parties who are subject to preclusion because they "assume[d] control over [the] litigation." 440 U.S. at 154. See also 1 Restatement § 39, at 382 (under principles of *issue* preclusion, "[a] person who is not a party to an action but who controls or substantially participates in the control of the presentation on behalf of a party is bound by the determination of issues decided as though he were a party") That is not the theory on which the court of appeals held that preclusion applies here.

Petitioner is also incorrect in asserting (Pet. 20-21) that he could not have intervened in the Tax Court litigation because he had not been issued a notice of deficiency or liability. See, *e.g.*, *Sampson* v. *Commissioner*,

710 F.2d 262, 264 (6th Cir. 1983) (per curiam) (holding that "the Tax Court has power to permit intervention by persons or entities who have not been served with notices of deficiency"). Petitioner never attempted to intervene in the Tax Court litigation, even though he participated in it as personal representative of Birnie's estate.[3]

3. Petitioner also claims (Pet. 23-26) that res judicata cannot apply here because Birnie's estate bore the burden of proof in the Tax Court litigation and the government bears the burden of proof under 26 U.S.C. 6324(b) on all issues except the estate's liability for the gift tax deficiency. That claim is not properly before this Court, because petitioner did not raise it in a timely manner in the court of appeals, and that court did not address it. Under Fifth Circuit rules, a party forfeits consideration of any issue on which the party "fail[s] to advance any argument * * * in the body of its opening brief on appeal." *In re Acosta*, 406 F.3d 367, 375 (2005). Petitioner first raised the burden of proof issue in a May 18, 2007, motion to stay the mandate of the court of appeals. Accordingly, the court of appeals did not address the issue. This Court should therefore decline to consider the issue as well. See *NCAA* v. *Smith*, 525 U.S. 459, 470 (1999) (Court does not ordinarily address issues not passed on below).

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[3] Petitioner also incorrectly suggests (Pet. 9-11) that the government argued for only a partial application of res judicata in the district court. As the court of appeals correctly concluded, the government argued in the district court that res judicata precluded relitigation of both the estate's tax liability and the valuation of petitioner's gift. Pet. App. 9a-10a n.9; see R. 177-178, 1037-1038; Pet. App. 48a. Thus, "[t]he government did not waive a res judicata argument." *Id.* at 10a n.9.

In any event, petitioner's contentions about the burden of proof lack merit. The only factual issue that petitioner has disputed is the value of the Hondo stock, and the parties stipulated to the stock's value in the Tax Court, so any difference in the burden of proof would be irrelevant. Moreover, petitioner is incorrect that the burden of proof was different in the Tax Court case than in this action to reduce petitioner's liability under Section 6324(b) to judgment. As petitioner notes, in the Tax Court case, once the government issued a notice of deficiency determining a gift tax delinquency, Birnie's estate bore the burden of proving that the delinquency determined by the government was incorrect. See Pet. 24. Here too, because petitioner is directly liable under Section 6324(b) as a donee for the gift tax assessed against Bernie's estate, he bears the burden of proof. See *United States* v. *Janis*, 428 U.S. 433, 440 (1976) (party challenging tax generally bears burden of proof once government establishes that an assessment was made); see, *e.g.*, *United States* v. *White*, 466 F.3d 1241, 1248 (11th Cir. 2006); *Palmer* v. *United States IRS*, 116 F.3d 1309, 1312 (9th Cir. 1997).

Petitioner mistakenly relies (Pet. 23-24) on 26 U.S.C. 6902(a) for the proposition that the government has the burden of proof. That provision applies only in transferee liability cases brought "before the Tax Court" under 26 U.S.C. 6901. 26 U.S.C. 6902(a). It does not apply to a district court action, such as this one, to reduce to judgment a donee's liability under Section 6324(b). As petitioner himself acknowledges (Pet. 21 n.13), although the government has the option of filing a notice of transferee liability and seeking to collect the tax owed by a donee under Section 6901, the government may instead seek to enforce the donee's liability under Sec-

tion 6324(b). Section 6324 affords the government "a separate remedy" from Section 6901. *United States* v. *Geniviva*, 16 F.3d 522, 524 (3d Cir. 1994). Because "the two sections [are] merely 'cumulative and alternative,'" *ibid.*, the procedures applicable to a suit in the Tax Court under Section 6901 do not apply to a suit in the district court under Section 6324. See *id.* at 524-525; *United States* v. *Russell*, 461 F.2d 605, 606-607 (10th Cir.), cert. denied, 409 U.S. 1012 (1972); *Ripley* v. *Commissioner*, 102 T.C. 654, 656-660 (1994).

Here, as petitioner himself notes (Pet. 20-21), the government did not send him a notice of transferee liability and proceed in a Tax Court suit under Section 6901. Instead, the government filed a district court action to reduce to judgment petitioner's donee liability under Section 6324(b). The burden of proof provisions in Section 6902(a) therefore do not apply.

For the same reason, the cases cited by petitioner for the proposition that the government bears the burden of proof are inapposite. All of those cases involved transferee liability cases litigated in the Tax Court. See *Healy* v. *Commissioner*, 345 U.S. 278, 279-280 & n.1 (1953); *Sather* v. *Commissioner*, 251 F.3d 1168, 1170-1171 (8th Cir. 2001); *Locke* v. *Commissioner*, 72 T.C.M. (CCH) 1481 (1996), aff'd, 152 F.3d 927 (9th Cir. 1998) (Table).

4. Petitioner also incorrectly contends (Pet. 13-19, 26-28) that this Court should grant review because the decision below conflicts with decisions of other courts of appeals. The only conflict is an extremely narrow one with the Tenth Circuit's decision in *Botefuhr*, which also arose out of this very case. And that conflict does not warrant this Court's review.

a. Petitioner erroneously asserts that the decision below conflicts with "*seventy years*" of federal court decisions that "have uniformly held" that collateral estoppel, rather than res judicata, applies in actions to enforce transferee liability when there has been a prior tax liability adjudication against the transferor. Pet. 16-17. Petitioner cites only four cases in support of that assertion. See Pet. 17-19 (citing *Pert* v. *Commissioner*, 105 T.C. 370 (1995); *First Nat'l Bank* v. *Commissioner*, 112 F.2d 260 (7th Cir.), cert. denied, 311 U.S. 691 (1940); *Baptiste* v. *Commissioner*, 29 F.3d 1533 (11th Cir. 1994); and *Baptiste* v. *Commissioner*, 29 F.3d 433 (8th Cir. 1994), cert. denied, 513 U.S. 1190 (1995)). None of those decisions conflicts with the decision in this case. Indeed, the cases confirm that res judicata, rather collateral estoppel, applies.

In *Pert*, the IRS sought to impose transferee liability on Pert for an income tax deficiency. The Tax Court held that "res judicata binds a transferee to a prior judicial decision in which the transferor was a party." 105 T.C. at 377. Moreover, it is clear that the court used the term "res judicata" to mean claim preclusion, rather than issue preclusion, because the court also held that "res judicata bars a transferee from relitigating the income tax liabilities of a transferor once a final decision has been entered by the Tax Court in the transferor's case" even "if the decision was stipulated." *Id.* at 379. Issue preclusion, unlike claim preclusion, does not bar relitigation of issues that were resolved by stipulation rather than actual litigation. 1 Restatement § 27 cmt. e at 256-257.

Although the Tax Court left for the trial the issue whether Pert was a transferee, 105 T.C. at 371, that action does not suggest that the court applied collateral

estoppel rather than res judicata. Res judicata would not have prevented litigation of Pert's status as a transferee, because res judicata would have applied only when that status was established. As noted above, res judicata applies to non-parties to the prior action only if they are in privity with a party to that action, and Pert's privity with the transferor was premised on his status as a transferee. See *id.* at 376. In this case, as well, res judicata would not have prevented petitioner from litigating his status as a transferee. But petitioner does not contest that status or the fact that he is in privity with Birnie's estate. Pet. App. 11a; see Pet. 21.

First National Bank also involved transferee liability for an income tax deficiency, and, once again, the court applied res judicata, not collateral estoppel. The court of appeals held that "the transferee is bound by all that was decided and *all that might have been decided* in the prior litigation." 112 F.2d at 262 (emphasis added). The court analogized preclusion against transferees in tax cases to preclusion against the grantees of judgment debtors, noting that "[p]ersonal defenses which *might have been pleaded* are thereupon barred." *Id.* at 263 (emphasis added). Because collateral estoppel bars relitigation only of issues that were actually litigated in the prior action, it is clear that the court was applying res judicata.

Petitioner notes (Pet. 17) that the court in *First National Bank* stated that the transferee was not precluded from litigating whether he had "received property as transferee sufficient to discharge" the income tax liability. *Id.* at 262. According to petitioner, that statement conflicts with the conclusion of the court of appeals in this case that petitioner could not relitigate the value of the Hondo stock that he received. See Pet.

App. 17a. But there is no conflict. Res judicata bars relitigation only of issues that "were or could have been raised" in the prior suit. *Allen*, 449 U.S. at 94. In a case involving a transferee's liability for an income tax deficiency, the value of the property received by the transferee could not have been determined in the action that established the income tax deficiency, because the income tax deficiency is unrelated to the property transfer that triggers the transferee liability. This case, which involved petitioner's liability as donee for the gift tax liability arising out of a gift to him, is very different. The value of the stock that petitioner received could have been—and was—determined in the action that established the gift tax liability. Indeed, the value of the stock that petitioner received had to be determined in that action, because that determination was necessary to establish the amount of the gift tax liability.

Petitioner's reliance on the two *Baptiste* decisions is similarly mistaken. As the court of appeals explained (Pet. App. 13a-15a), those decisions support the court of appeals' decision here. Those cases involved two brothers who were transferees of an estate that had been adjudicated in prior litigation to owe an estate tax deficiency. The Eleventh and Eighth Circuits held, in separate decisions, that, under the doctrine of res judicata, each of the brothers was bound by the prior decision for purposes of determining transferee liability. See *Baptiste*, 29 F.3d at 1539-1541; *Baptiste*, 29 F.3d at 435-437. Both courts of appeals described the preclusion doctrine that they were applying as "res judicata," not collateral estoppel. See *ibid.*; 29 F.3d at 1539-1541. Moreover, it is clear that the courts were applying res judicata rather than collateral estoppel because the estate tax deficiency had been established in the prior liti-

gation by stipulated order. See 29 F.3d at 1539; 29 F.3d at 436. As explained above, stipulations are binding under res judicata, but not under collateral estoppel.

Petitioner erroneously contends (Pet. 18-19) that the Eleventh Circuit in *Baptiste* could not have been applying res judicata because it separately held that Baptiste's status as a transferee had been established as a matter of law. Petitioner argues that the court's determination of Baptiste's transferee status "would have been superfluous" if the prior decision on the estate tax deficiency had res judicata effect. Pet. 18. That is incorrect. As explained above, transferee status is a precondition to the application of res judicata, because it is necessary to establish privity. Thus, the Eleventh Circuit's resolution of transferee status was not "superfluous."

b. The decision below does conflict with the decision of the Tenth Circuit in *Botefuhr*, which held that principles of collateral estoppel, rather than res judicata, apply to the situation here. See *Botefuhr*, 309 F.3d at 1281-1282. That narrow conflict, however, does not warrant this Court's resolution.

The question of which preclusion doctrine governs when a donee seeks to relitigate issues that were resolved in a prior action establishing the gift tax liability for the gift that the donee received is not an important or recurring legal issue. We are not aware of any previous case that has involved the issue nor of any pending case that presents it. The issue's lack of importance is highlighted by the fact that the decision below and *Botefuhr* both arose out of the very same transactions —Birnie's gifts of Hondo stock to petitioner, Botefuhr, and Vestal. Moreover, the choice of preclusion doctrine assumed significance only because petitioner and Vestal, in their capacities as donees, sought to relitigate the

value of that stock, even though they had previously stipulated to its value in their capacities as personal representatives of Birnie's estate. In the experience of the IRS, that situation does not occur with any frequency.

Moreover, the Tenth Circuit in *Botefuhr* failed to provide any reasoning in support of its conclusion that res judicata does not apply. Accordingly, if the issue were to arise again, other courts of appeals (and, quite possibly, the Tenth Circuit itself, if it were to consider the matter en banc) would likely follow the reasoned decision of the court of appeals here. Plenary review by this Court at this time is therefore unnecessary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2007