No. 13-863

In the Supreme Court of the United States

JAMES F. HOLMES, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the timely assessment of federal income tax against a delinquent taxpayer begins the running of the ten-year statute of limitations on collecting that tax from the taxpayer's transferee pursuant to 26 U.S.C. 6502, even though the government did not make a separate assessment directly against the transferee pursuant to 26 U.S.C. 6901.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-37) is reported at 727 F.3d 1230. The order of the district court denying petitioner's motion to dismiss on statute-of-limitations grounds (Pet. App. 78-89) is unreported but is available at 2009 WL 1841583. The order of the district court granting summary judgment to the United States is also unreported but is available at 2011 WL 1158675.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 2013. A petition for rehearing was denied on October 21, 2013 (Pet. App. 90-91). The petition for a writ of certiorari was filed on January 17, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In general, a tax imposed by the federal government must be assessed, or a proceeding without assessment must be commenced, "within 3 years after the return [required to be filed by the taxpayer] [i]s filed." 26 U.S.C. 6501(a). If an assessment is made within that three-year period, the tax "may be collected by * * * a proceeding in court" that is brought "within 10 years after the assessment of the tax." 26 U.S.C. 6502(a)(1).

The United States may collect unpaid tax from a transferee of the taxpayer through "proceedings to enforce the tax lien or actions at law and in equity." *Phillips* v. *Commissioner*, 283 U.S. 589, 592 n.3 (1931). In such proceedings, the transferee's substantive liability for a transferor's taxes is determined under state law. See *Commissioner* v. *Stern*, 357 U.S. 39, 45 (1958).

The United States may also make an assessment directly against a taxpayer's transferee. Under 26 U.S.C. 6901(a), the liability of a transferee "shall * * * be assessed, paid, and collected in the same manner and subject to the same provisions and limitations as in the case of the taxes with respect to which the liabilities were incurred." For an initial transferee of the taxpayer's property, an assessment must be made against the transferee "within 1 year after the expiration of the period of limitation for assessment against the transferor." 26 U.S.C. 6901(c)(1). If a timely assessment is made against the transferee, the United States has ten years to begin court proceedings to collect that assessment from the transferee. 26 U.S.C. 6502(a)(1).

2. Petitioner was the sole shareholder, president, and a director of Colorado Gas Compression, Inc. (taxpayer). Pet. App. 60, 121, 130. From 1995 through 2002, while it was winding up its operations, taxpayer distributed a total of $3,671,610 in cash to petitioner without receiving consideration in return, leaving taxpayer defunct and insolvent. *Id.* at 3, 62.

In 1998, the Internal Revenue Service (IRS) determined deficiencies in taxpayer's income taxes for the years 1994, 1995, and 1996. Pet. App. 7. Taxpayer challenged the determination of deficiency in the United States Tax Court. *Id.* at 3. In proceedings that concluded in 2005, the Tax Court determined that taxpayer owed $923,049 in tax deficiencies. *Ibid.* The United States assessed the taxes, plus $1,134,563.90 in interest, against taxpayer in 2002 (after the Tax Court's initial determination of deficiency) and again in 2005 (after the Tax Court redetermined the amount of the deficiency on remand from the court of appeals). *Id.* at 3, 122. Taxpayer did not fully pay the assessments. *Id.* at 3, 79.

On November 10, 2008, within ten years of the earliest assessments against taxpayer in 2002, see 26 U.S.C. 6502(a)(1), the United States filed this suit against petitioner under 26 U.S.C. 7403, seeking to collect the taxes from him, as taxpayer's transferee, under Colorado law. See Pet. App. 3-4, 50. The United States proceeded under three theories: (1) petitioner was liable as an owner who had received assets in liquidation, see Colo. Rev. Stat. § 7-90-913(1)(b) (2013); (2) petitioner was liable under a Colorado statute covering fraudulent conveyances, see *id.* § 38-8-106; and (3) petitioner was liable as a director who

had voted for an unlawful distribution of the company's assets, see *id.* § 7-108-403. Pet. App. 4, 63.

Petitioner moved to dismiss the suit. He contended that, since no separate assessment had been made against him under Section 6901, the suit was governed by Colorado law and was barred by state-law limitations periods. Pet. App. 82, 86.

3. a. The district court denied petitioner's motion to dismiss. Pet. App. 78-89. The court held that, under *United States* v. *Summerlin*, 310 U.S. 414 (1940), the United States is not subject to state-law limitations periods when it brings suit to collect taxes in its sovereign capacity. Pet. App. 82-89. The court declined petitioner's request to take judicial notice that the government was not proceeding against him under Section 6901 as a transferee of the taxpayer. *Id.* at 81-82. The court explained that "there is no cause for concern or reason to take judicial notice" because the collection procedures contained in Section 6901 "are not exclusive and mandatory, but are cumulative and alternative to the other methods of tax collection recognized and used prior to the enactment of [Section] 6901 and its statutory predecessors." *Id.* at 82 (citation omitted).

b. The district court granted summary judgment to the United States. Pet. App. 59-74. The court concluded that petitioner was liable under Colorado law for taxpayer's unpaid taxes because the distributions to petitioner were part of a liquidation. *Id.* at 68 (citing Colo. Rev. Stat. § 7-90-913(1)(b) (2013)). Because the court concluded that petitioner was liable for the tax under that provision, it did not address the United States' other state-law theories of liability. *Ibid.* The

court entered judgment against petitioner in the amount of $2,533,930.94. *Id.* at 40-41.

4. The court of appeals affirmed. Pet. App. 1-37.

a. On appeal, petitioner "raise[d] only a single issue: whether the claims of the government are barred by the Colorado statute of limitations." Pet. App. 5. The court of appeals held that the government's suit was timely. The court explained that the government's claim was not subject to extinguishment under state law because the United States was proceeding in its sovereign capacity to enforce rights grounded in federal law. *Id.* at 11-13.

The court of appeals further explained that the IRS had timely assessed the tax against taxpayer under Section 6501(a), thus extending the limitations period to ten years from the date of assessment under Section 6502(a)(1). Pet. App. 8-9. The court rejected petitioner's argument that, in order to proceed against petitioner as taxpayer's transferee, the government was required to make a separate assessment of tax against petitioner within the time allowed by Section 6901(c)(1). Like the district court, the court of appeals concluded that "[t]he collection procedures contained in [Section] 6901 are not exclusive and mandatory, but are cumulative and alternative to the other methods of tax collection recognized and used prior to the enactment of [Section] 6901 and its statutory predecessors." *Ibid.* (quoting *United States* v. *Russell*, 461 F.2d 605, 606 (10th Cir. 1972), and citing *Leighton* v. *United States*, 289 U.S. 506 (1933)).

The court of appeals further explained that petitioner's argument "is at odds with *United States* v. *Galletti*, 541 U.S. 114 (2004)," in which this Court held that "[o]nce a tax has been properly assessed, nothing

in the [Internal Revenue] Code requires the IRS to duplicate its efforts by separately assessing the same tax against individuals or entities who are not the actual taxpayers but are, by reason of state law, liable for payment of the taxpayer's debt." Pet. App. 9-10 (quoting *Galletti*, 541 U.S. at 123). The court concluded that the United States had "validly invoke[d] the ten-year period of limitations" provided in Section 6502(a)(1) by making a timely assessment against taxpayer under Section 6501(a). *Id.* at 11.

b. Judge Tymkovich dissented. Pet. App. 16-37. In his view, "unless the IRS assesses a transferee" under Section 6901, "it cannot bring suit to collect the transferee tax liability after the period for assessing that transferee has passed." *Id.* at 20. Judge Tymkovich stated that this Court had "reached the same conclusion" in *United States* v. *Continental National Bank & Trust Co.*, 305 U.S. 398 (1939). Pet. App. 25-26. He further stated that the Court's decision in *Galletti* "does not apply to this case" because *Galletti* involved "[g]eneral partners" who are "'secondarily-liable' for a partnership's debt, which shareholders and transferees are not." *Id.* at 33, 35.

ARGUMENT

Petitioner contends (Pet. 6-15) that the United States' suit against him to collect tax owed by taxpayer is time-barred because no assessment was made against him within the time permitted for making an assessment against a taxpayer's transferee under 26 U.S.C. 6901(c)(1), and the government's current suit was filed against him after that assessment period had expired. The court of appeals correctly rejected that argument, and its decision does not conflict with any

decision of this Court or another court of appeals. Further review is not warranted.

1. a. If the United States makes a timely assessment of tax against a taxpayer, *i.e.*, if the assessment is made within three years after the taxpayer's return is filed, see 26 U.S.C. 6501(a), the United States has ten years from the date of the assessment to bring a proceeding to collect the tax. 26 U.S.C. 6502(a)(1). In this case, it is undisputed that the government assessed the additional tax against taxpayer within the applicable three-year period, and that the government filed suit against petitioner within ten years after making that assessment.

It has long been established that the United States may collect unpaid taxes from a taxpayer's transferee through "proceedings to enforce the tax lien or actions at law and in equity." *Phillips* v. *Commissioner*, 283 U.S. 589, 592 n.3 (1931). In such proceedings, the transferee's substantive liability for the transferor's tax is determined under state law. *Commissioner* v. *Stern*, 357 U.S. 39, 45 (1958). The court of appeals correctly held, however, and petitioner no longer disputes, that such suits are not governed by state-law limitations periods. See Pet. App. 11-13; *United States* v. *Summerlin*, 310 U.S. 414, 416 (1940). Instead, such suits are governed by 26 U.S.C. 6501(a) and 6502(a)(1), the federal limitations period for collecting a tax assessment from the taxpayer.

In 1926, Congress created an additional mechanism by which the United States can collect tax from a taxpayer's transferee. Under Section 280 of the Revenue Act of 1926, ch. 27, 44 Stat. 61, which appears in its current form at 26 U.S.C. 6901, the government can make an assessment directly against the taxpay-

er's transferee within one year after the expiration of the three-year period for making an assessment against the taxpayer under Section 6501(a), and thereby invoke the extended limitations period set forth in Section 6502(a)(1) for collecting that assessment. See 26 U.S.C. 6901(c)(1).

b. Petitioner contends (Pet. 7-10) that Section 6901 establishes the exclusive procedure for collecting tax from a taxpayer's transferee. According to petitioner, if the United States does not make a timely assessment against the transferee or commence suit against the transferee within the time permitted for making an assessment under Section 6901(c)(1), the extended ten-year limitations period provided in Section 6502(a)(1) does not come into effect, and an action against the transferee to collect a tax is time-barred, even if the government has timely assessed the tax against the taxpayer. That is incorrect.

This Court has never held that the government *must* use the tax-collection remedy provided in Section 6901 to collect tax from a taxpayer's transferee. To the contrary, the Court has recognized that the remedy provided in Section 6901 "is in addition to proceedings to enforce the tax lien or actions at law or in equity." *Phillips*, 283 U.S. at 592-593 n.3; see *id.* at 592, 601 (stating that, "[b]efore the enactment of section 280(a)(1), such payment by the [transferee] could be enforced only by bill in equity or action at law," and that "[t]he power of Congress to provide an additional remedy for the enforcement of existing liabilities is clear"). It is therefore widely understood that Section 6901 "neither creates nor defines a substantive liability but provides merely a new procedure by which the Government may collect taxes." *Stern*, 357 U.S. at 42.

It is an optional or cumulative alternative to collecting from a transferee who is liable for the taxpayer's taxes under state law after timely assessment of the tax on the taxpayer. See *Leighton* v. *United States*, 289 U.S. 506, 508-509 (1933) (holding that failure by the government to assess shareholders of a defunct corporation did not bar an action to impose transferee tax liability on them); *United States* v. *Geneviva*, 16 F.3d 522, 524-525 (3d Cir. 1994); *United States* v. *Russell*, 461 F.2d 605, 607-608 (10th Cir.), cert. denied, 409 U.S. 1012 (1972).

Petitioner's contention that Section 6901 is the exclusive remedy for collecting tax from a taxpayer's transferee is also at odds with the Court's decision in *United States* v. *Updike*, 281 U.S. 489, 494-495 (1930). In *Updike*, the United States brought suit to collect tax from shareholder transferees who had received the property of a defunct corporate taxpayer. *Id.* at 490-491. The government did not assess the tax against the transferees under the predecessor to Section 6901. Instead, the government assessed the tax against the corporation, and then filed suit to collect the tax against the corporation's shareholder transferees. *Id.* at 491. The Court concluded that the suit was untimely because it was brought more than six years (the then-applicable statute of limitations provided in the predecessor to Section 6502(a)) after the assessment was made against the corporation. *Id.* at 491-495. The Court reasoned that "[t]he tax imposed upon the corporation is the basis of the liability, whether sought to be enforced directly against the corporation or by suit against its transferees." *Id.* at 494. That analysis logically implies that the suit would have been timely if it had been brought within six

years of the assessment against the taxpayer, even without a separate assessment against the transferee.

The court of appeals' decision is further supported by *United States* v. *Galletti*, 541 U.S. 114, 123-124 (2004). In that case, the Court held that the government's timely assessment of a tax against a partnership was sufficient to extend the statute of limitations to collect the tax against "the partnership itself *or* * * * those liable for its debts." *Id.* at 116 (emphasis added). The Court explained that "it is *the tax* that is assessed, not the taxpayer," and the Court cited *Updike* for the proposition that the ten-year limitations period that begins to run when the tax is assessed "attache[s] to the debt as a whole." *Id.* at 123. The Court concluded that, "[o]nce a tax has been properly assessed, nothing in the Code requires the IRS to duplicate its efforts by separately assessing the same tax against individuals or entities who are not the actual taxpayers but are, by reason of state law, liable for payment of the taxpayer's debt." *Ibid.*

Petitioner contends (Pet. 13-15) that *Galletti* is inapposite because, unlike the general partners in that case, who were "secondarily liable" for the partnership's tax liability, petitioner has only limited liability for taxpayer's debt as a shareholder. Although *Galletti* involved a general partnership and the Court did not address Section 6901, the Court cited *Updike*, a case involving shareholder transferees of a defunct corporation, for the proposition that "the same limitations period applie[s] in a suit to collect the tax from the corporation as in a suit to collect the tax from the derivatively liable transferee." 541 U.S. at 123. The decision supports the understanding that an assessment against the taxpayer triggers the ten-year limi-

tations period in Section 6502(a)(1) for suits against both the taxpayer and his transferees.

The court of appeals' reading of Section 6901 as an "alternative to the other methods of tax collection recognized and used prior to the enactment of [Section] 6901 and its statutory predecessors," Pet. App. 9, does not render Section 6901 "meaningless," as petitioner contends. Pet. 8. Even after the time has expired for assessing a tax directly against the taxpayer under Section 6501(a), Section 6901 allows the government an additional year to assess the tax directly against the transferee. See 26 U.S.C. 6901(c)(1). The procedure through which the government sought to collect tax in the present case, by contrast, depended on the assessment of tax against the taxpayer within the generally-applicable three-year period. Section 6901 thus expands the government's ability to collect unpaid taxes in circumstances where the taxpayer has transferred its property to others, even though it does not displace the pre-existing mechanisms for collecting unpaid taxes from transferees.

2. Petitioner contends (Pet. 10-12) that the court of appeals' decision conflicts with this Court's decision in *United States* v. *Continental National Bank & Trust Co.*, 305 U.S. 398 (1939). Petitioner's reliance on *Continental National Bank* is misplaced. In that case, the IRS had assessed a tax against a dissolved corporation. *Id.* at 399. The government subsequently attempted to collect the tax from secondary transferees who had received the defunct corporation's property through operation of a will when the initial transferee died. *Id.* at 400-401. The government realized that the suit had not been brought within six years of the assessment against the taxpayer (the then-

applicable limitations period under the predecessor to Section 6502(a)(1)), and therefore found it necessary to amend its complaint to allege that it had also made an assessment against the initial transferee. *Id.* at 401. The government argued that the timely assessment of the tax against the initial transferee was sufficient to invoke the extended limitations period of the predecessor to Section 6502(a)(1) for collecting the tax from subsequent transferees.

The Court held that the relevant statutes were "not broad enough to impose on [subsequent transferees] any liability on account of the assessment against the [initial transferee]." *Continental Nat'l Bank*, 305 U.S. at 404. The Court recognized that the statutes *were* broad enough to encompass a suit against transferees "upon assessment of deficiency against the taxpayer." *Id.* at 403; see *id.* at 404-405. It concluded, however, as the government had acknowledged, that the statute of limitations for such a suit had expired. *Id.* at 405; see Pet. App. 11 n.4 (court of appeals distinguishing *Continental National Bank* on this basis and pointing out that petitioner had never cited the case or relied on it). Because *Continental National Bank* involved the distinct question whether a timely assessment against an initial transferee triggers an extended limitations period for collecting tax against subsequent transferees, it does not conflict with the court of appeals' decision in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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