UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

LITTLE ITALY OCEANSIDE
INVESTMENTS, LLC

Plaintiff,

v. Civil Action No. 14-cv-10217

UNITED STATES OF AMERICA,
DEPARTMENT OF TREASURY,
INTERNAL REVENUE SERVICE, Hon. Matthew F. Leitman

Defendant.
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BRIEF OF THE AMERICAN COLLEGE OF TAX COUNSEL AS AMICUS CURIAE

I. INTRODUCTION

The American College of Tax Counsel is a nonprofit professional association of tax lawyers in private practice, in law school teaching positions, and in government, who are recognized for their excellence in tax practice and for their substantial contributions and commitment to the profession. The purposes of the College are:

- To foster and recognize the excellence of its members and to elevate standards in the practice of the profession of tax law;
- To stimulate development of skills and knowledge through participation in continuing legal education programs and seminars;
- To provide additional mechanisms for input by tax professionals in development of tax laws and policy;

and

- To facilitate scholarly discussion and examination of tax policy issues.

The College is composed of approximately 700 Fellows chosen in recognition of their outstanding reputations and contributions in the field of tax law, and is governed by a Board of Regents consisting of one Regent from each federal judicial circuit, two Regents at large, the Officers of the College, and the last retiring President of the College.

This Amicus Brief is submitted by the College's Board of Regents and does not necessarily reflect the views of all members of the College, including those who are government employees. Also it should be noted that one Regent, Kathryn Keneally, recused herself and did not participate in the consideration or preparation of this brief.

The College submits this brief solely at the request of the Court in an effort to assist in its analysis of the tax issues presented in the instant case and in no way is this brief intended to advocate for the position of either party to this action.

II. FACTS

For the purposes of this amicus brief, in light of the procedural posture of the case, the following recitation of the facts is based on the presumption that the allegations made in the Amended Complaint are true, and any reasonable inferences allowed by the allegations are drawn in Plaintiff's favor.

Plaintiff in this matter, Little Italy Oceanside Investments, LLC ("LIOI" or "Plaintiff"), is seeking the return of funds collected by Defendant, the United States by way of the Internal Revenue Service (the "IRS" or the "government"), pursuant to an alter-ego

tax lien. The alter-ego lien was the result of an IRS determination that LIOI is the alter-ego of an individual named Remo Polselli. Compl. ¶ 5.

Mr. Polselli had an outstanding tax liability of $555,749.06. Compl. ¶6. At some point prior to September 18, 2008, the IRS made the determination that LIOI is an alter-ego of Mr. Polselli. Compl. ¶ 5. As a result of that determination, on or about September 18, 2008 the IRS filed a Notice of Federal Tax Lien ("NFTL"). *Id.* The NFTL indicated that the IRS held a lien against all of LIOI's property and rights to property. Compl. ¶ 6. The NFTL further stated that the lien was the result of the IRS's determination that LIOI is an alter-ego of Mr. Polselli. Compl. ¶ 5.

LIOI alleges that it never received "statutory due process rights or notices" with regard to either the NFTL or any tax liability assessed against it as an alter-ego. Compl. ¶¶ 18-20. LIOI emphatically claims not to be an alter-ego of Mr. Polselli, and states in the Amended Complaint that they are separate entities with "wholly separate books and records and financial dealings." Am. Compl. ¶ 7.

In 2013, five years after the alter-ego designation, LIOI's ability to finalize a real property transaction was impacted by the NFTL.[1] Compl. ¶¶ 9-12. Plaintiff alleges that

[1] Based solely on the allegations in the Amended Complaint, the College proceeds on the inference that LIOI did not learn of the NFTL until it became an issue for the real property transaction. While this is not explicitly stated in the Amended Complaint, it is a reasonable assumption drawn from the other relevant allegations.

time was of the "extreme essence" for the transaction, and that when faced with the NFTL, the buyer insisted on full release of the lien.[2] *Id.*

Allegedly under pressure from the buyer, LIOI went through with the real property transaction. *Id.* On December 20, 2013 the IRS collected $784,853.57 of the proceeds from the real property transaction, thereby fully satisfying Mr. Polselli's tax obligations, and extinguishing the alter-ego tax lien applicable to LIOI's assets.[3] *Id.*

In January 2014, LIOI brought this suit, seeking to recover the approximately $785,000 collected by the IRS in satisfaction of Mr. Polselli's tax obligations. The IRS did not remove the NFTL by recording a Certificate of Release until after LIOI brought this suit. Pl.'s Resp. to Def.'s Mot. to Dismiss 3.

The IRS made a previous motion to dismiss, which was denied, but LIOI was directed by the Court to file an amended complaint. [Dkt. 14, Order Directing Plaintiff to File Amended Complaint and Denying Defendants' Motion to Dismiss Without Prejudice.]

LIOI complied with the Court's Order and filed its Amended Complaint, which

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[2] Plaintiff does not explain why the buyer insisted on a full release of the lien when a discharge as to the real property being sold would likely have sufficed for the transaction. Given the procedural posture of the case, the College accepts LIOI's allegations as true. If, after discovery, it is learned that a discharge as to the real property at issue would have satisfied the buyers, it is possible that certain conclusions reached herein will no longer be applicable to LIOI's circumstances.

[3] It is not stated why the IRS collected almost $785,000 where Mr. Polselli's tax obligations are identified as being $555,749.06, but we assume it is because interest or penalties had accrued on the taxes.

the IRS now moves to dismiss.

The College now submits this brief to aid the Court in its assessment of the tax-related issues presented by the Amended Complaint and the subsequent Second Motion to Dismiss and Response thereto.

III. ANALYSIS

A. Standard of Review

As noted above, for the purposes of analyzing the tax issues in this brief the College is taking all facts as alleged in the Amended Complaint as true and drawing all reasonable inferences in Plaintiff's favor. Such an approach is mandated by the analytical requirements of Federal Rules of Procedure 12(b)(1)[4] and 12(b)(6) under which the IRS makes its motion, and with which the Court is undoubtedly familiar. *See, e.g., Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Golden v. Gorno Bros.*, 410 F.3d 879, 881 (6th Cir. 2005) (noting the two avenues – facially or factually – by which a district court can approach a jurisdictional challenge under Fed. R. Civ. P. 12(b)(1)).

B. Count I – Claim To Quiet Title

Plaintiff asserts a claim to quiet title under 28 U.S.C. § 2410 with regard to

[4] The College assumes that the Court will take the facial approach to resolving the Fed. R. Civ. P. 12(b)(1) aspect of the Government's motion, given the lack of factual development at this stage of the litigation, and therefore, as with the Fed. R. Civ. P. 12(b)(6) analysis, take the Amended Complaint's allegations at face value for the purposes of applying the relevant jurisdictional law.

property it sold prior to the initiation of this lawsuit. This claim seeks a return of the $784,853.57 by way of a declaration that the lien was improper.[5] In response to Plaintiff's claim to quiet title, Defendant argues that the Court does not have jurisdiction to hear the claim because the property was sold and the lien was extinguished prior to the initiation of this action, thereby taking this case out of the jurisdictional grant for quiet title cases found in 28 U.S.C. § 2410(a).[6] Plaintiff counters that because the Notice of Federal Tax Lien was not officially removed from the recording books by way of the filing of a Certificate of Release until after the filing of the Complaint, that the claim to quiet title is properly before the Court.

Neither party contests the fact that 28 U.S.C. § 2410(a) allows the United States to be sued in the federal courts for the purposes of challenging tax liens. Indeed, that section explicitly authorizes such an action:

> Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter—

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[5] That is, this count seeks to return the cash to Plaintiff even if a claim for refund, which is Count III, fails.

[6] In a footnote, the government also argues that the Amended Complaint fails to provide information about Mr. Polselli and therefore is defective. The Amended Complaint, however, appears to provide the requisite information about Mr. Polselli in Paragraph 6. In a separate footnote, the government argues that this claim should have been brought in Florida, where the subject property was located. As this argument presents a matter of pure civil procedure, with no direct tax elements, the College will not undertake to address it.

> (1) to quiet title to
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> * * *
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> real or personal property on which the United States has or claims a mortgage or other lien.

28 U.S.C. § 2410(a).

The dispute here focuses on what it means for the United States to "ha[ve] or claim[] a...lien" on real property. The government argues that the lien against LIOI's property ceased to exist upon payment of $784,853.57 in satisfaction of Mr. Polselli's tax liability, which was the reason for the lien in the first place. The fact that a Certificate of Release was not filed until sometime later does not, according to the government, mean that the lien was still in place at the time the Complaint was filed. The government argues, therefore, that there was no lien at the time of filing and § 2410(a) is not applicable. Plaintiff counters that §2410(a) is applicable because the Notice of Federal Tax Lien was still present at the time of filing, and this Court has jurisdiction to hear the matter, despite the fact that the NFTL has subsequently been released.

The relevant statutory language conflicts with the government's position. Section 2410(a) states that an action may be brought either where the government has or *claims* to have a lien on real property. Using the plain meaning of the word "claim," a Notice of Federal Tax Lien is a claim by the government that there is a lien on a given asset. That claim is present until the NFTL is removed by way of the filing of a Certificate of Release. The government's argument that the removal of the NFTL is merely a "ministerial task giving

notice to the world of the elimination of the lien" even supports this conclusion, because it implicitly acknowledges that until such notice is given, the government *is still claiming* that a lien exists, even where the lien has been satisfied by payment.

Moreover, the cases cited by the government on this issue support this conclusion. For instance, *Koehler v US*, while distinguishable in that it dealt with a government sale of liened-upon property, notes that several courts have concluded that "a taxpayer may maintain an action under § 2410(a) only if, at the time the §2410(a) action is commenced, the government *still claims a lien* or mortgage on the property." 153 F.3d 263, 266-67 (5th Cir. 1998) (emphasis added) (internal citations and quotation marks omitted). While the *Koehler* court ultimately found that § 2410(a) did not apply under the facts of that case because the government's sale of the property took place prior to the initiation of the lawsuit, there is no mention of the NFTL made by the court, and given that the sale took place almost two months before the lawsuit was filed, it can be inferred that any NFTL was released at some point during that two month period, if one was present at all. Here, the lawsuit was initiated less than a month after the sale and before the filing of the release of the NFTL.

More to the point is the Third Circuit case of *Kabakjian v. United States*, 267 F.3d 208 (3d Cir. 2001). In *Kabakjian*, the Third Circuit found § 2410(a) to apply where the encumbered property was sold prior to the initiation of the law suit, but the Certificate of Release was not filed until after the initiation of the lawsuit. Additionally, the *Kabakjian* lien

purported to attach to all of the plaintiff's property, just as the LIOI lien did. The instant matter is directly analogous to the *Kabakjian* case. As Plaintiff's argument in this case hinges on the timing of the filing of a Certificate of Release and the fact that the lien attached to all of its property, the College suggests that *Kabakjian* provides the most useful guidance for the Court on this issue.

In short, because there is a window of time between the payment of funds that may extinguish the legal existence and enforceability of a lien and the actual recording of a release of the lien, it can be said that in that window the government is still "claiming" to have a lien not only on the subject property, but on all of the property specified in the NFTL. Therefore an action under 28 U.S.C. § 2410(a) – which allows for an action both where the government has a lien and also where it claims a lien – is authorized until a release of the lien is recorded, thereby terminating the government's claim of a lien.[7]

C. **Count II – Due Process**

Plaintiff also brings a claim for violation of its procedural due process rights.

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[7] The government also points out that having title, possession, or constructive possession of the property at issue is a prerequisite for a quiet title action. That contention, however, while supported by a district court opinion, runs counter to the holding of *Kabakjian*, discussed above. *McIntosh v. United* States, 1998 U.S. Dist. LEXIS 15221, *40 (S.D. Ohio Sept. 17, 1998). While neither case is binding on this Court, the College believes that the *Kabakjian* decision provides the correct analysis of this issue, as that prerequisite is not mentioned in the statute. For example, a case from this District allowed a claim under 28 U.S.C. § 2410 to proceed where the Plaintiff was a bank seeking to foreclose on a property. In that case, the bank presumably did not hold anything more than a mortgage on the property at the time it brought the claim. *See Fifth Third Bank v. Flynn*, 2003 U.S. Dist. LEXIS 20724, 3 (E.D. Mich. 2003).

As in Count I, this is a claim for damages that would return the $784,853.57 to the plaintiff even if Count III, the claim for refund, is not allowed. This claim is founded on the allegation that Plaintiff never received any notice of the placement of the tax lien against its assets or the recording of the NFTL.

As we understand the government's primary argument, either (i) LIOI is not entitled to notice because the tax code only provides for notice to the "taxpayer" – as that term is defined by the tax code – and LIOI is alleging that it is not the "taxpayer" or (ii) LIOI's allegations are false, and that in fact LIOI is the taxpayer by way of its status as Mr. Polselli's alter-ego and that therefore it received constructive notice when Mr. Polselli received actual notice of his obligations to pay the tax.

The government follows up that argument with reference to the longstanding "pay first, sue later" principle often relied on in tax collection related due process cases, and notes that Plaintiff could have availed itself of the remedies prescribed at 26 U.S.C. §§ 6325(b)(4) and 7426(a)(4).[8] The government bolsters its argument by pointing to the more than five years that passed between the creation of the tax lien and the real property transaction that prompted the IRS's collection of LIOI's assets in satisfaction of Mr. Polselli's tax obligations.

Plaintiff, on the other hand, argues that because it received no notice of the

[8] The details of these provisions are addressed more fully in the following section regarding Plaintiff's refund claim.

lien, that it did not have an opportunity to avail itself of the statutory remedies offered by the government's argument, and furthermore, Plaintiff states that those remedies do not address the problem faced by an alleged alter-ego that is claiming that the alter-ego designation is erroneous.

1. **Procedural Due Process In the Tax Context**

As the Court is well aware, in general, the concerns raised by constitutional procedural due process claims are satisfied by notice and a hearing where the government acts to deprive an individual of life, liberty, or property. *See, e.g. Matthews v. Eldridge*, 424 U.S. 319 (1976). Whether the hearing occurs prior or subsequent to the deprivation leading to the due process claim depends on a number of factors. *Flatford v. City of Monroe*, 17 F.3d 162, 168-69 (6th Cir. 1994). In the tax context, a post-deprivation hearing is generally accepted to be constitutional. *Morris v. United States*, 540 F. App'x 477, 479 (6th Cir. 2013).

Moreover, in general, and as Plaintiff freely admits, the tax code is rife with procedural protections for delinquent taxpayers, and to some extent, aggrieved third-parties. These protections, coupled with the acceptability of the post-deprivation hearing have resulted in the so-called "pay first, sue later" principle. For example, in *Morris* the plaintiff had a tax lien attached to her property as a result of the IRS determining that she was a nominee or alter-ego of a delinquent taxpayer. 540 F. App'x at 479. The plaintiff argued "that due process requires a hearing prior to the imposition of a nominee tax lien." *Id.* The Sixth Circuit made short shrift of that argument, noting that it "is clearly foreclosed by nearly

100 years of precedent holding that the 'pay first, sue later' principle embodied in the Internal Revenue Code is constitutional." *Id.*

It bears noting, however, that the plaintiff in *Morris* received a notice of her designation as a nominee or alter-ego of a delinquent taxpayer, either prior to or concurrent with the imposition of the IRS's lien. The Sixth Circuit's easy disposition of the *Morris* plaintiff's argument regarding a *hearing* prior to the imposition of the lien is entirely predicated on the plaintiff's receipt of notice of the lien. Additionally, the Sixth Circuit's treatment of the plaintiff's claim in *Morris* suggests that the placement of a tax lien likely constitutes a deprivation of property rights sufficient to implicate constitutional due process.

Here, LIOI appears to only be arguing that it was entitled to notice of the liens and its status as an alleged alter-ego, which it alleges it did not receive. As discussed below, the government's position on this issue is problematic from a procedural due process standpoint.

2. **The Government's Primary Argument Highlights the Procedural Due Process Problem Presented By the Alter-Ego Classification Where No Notice Is Provided**

The government's primary argument on this issue is twofold. First, it states that because LIOI claims not to be the alter-ego of a delinquent taxpayer, that it should not expect, nor is it entitled to, any notice of the alter-ego tax lien placed against its property. Then, the government asserts that because it has determined that LIOI is the alter-ego of a delinquent taxpayer, LIOI received notice constructively when the delinquent taxpayer, Mr.

Polselli, received notice of the lien against *his* property. The College believes this presents obvious due process problems.

Earlier this year, the District Court for the Western District of Michigan noted that in the context of due process analyses generally, "it has been clearly established in this Circuit that a meaningful post-deprivation review process is constitutionally required, and that *direct, personal notice of such a process to affected individuals is also required.*" *Gardner v. Evans*, 2015 U.S. Dist. LEXIS 9536, 54-55 (W.D. Mich. Jan. 28, 2015) (emphasis added) (citing *Flatford*, 17 F.3d at 168-69). As is further discussed below, in the case of the alleged alter-ego, the deprivation comes from the determination that a party is an alter-ego and the resultant placement of a lien across all of the alleged alter-ego's property. This is a separate and distinct deprivation from that which arises due to the payment of money to the IRS in satisfaction of an alter-ego lien.

The government's assertion that LIOI had access to a meaningful process after the alter-ego designation may be technically true in that such a process exists, but absent notice of the alter-ego designation, the availability of such process is profoundly limited. Furthermore, the government's reliance on constructive notice is particularly troublesome on two points. First, as the district court in *Gardner* noted, "direct, personal notice" is the standard in this Circuit, *id.*, and second, even if constructive notice were acceptable, here, the constructive notice offered by the government is 100% dependent

upon the IRS being correct about its alter-ego determination.[9] Given that the risk of government error is a concern that is recognized in the general due process calculus, pinning procedurally sound notice to the government's accuracy is problematic. *Flatford*, 17 F.3d at 168-69 (noting that due process "requires truly remedial process at a meaningful time, which is determined by balancing the competing interests involved. Among those factors considered are the risk of government error, the importance of the protected interest, the length or finality of the deprivation, and the magnitude of the government interest." (internal citation omitted)).

3. The Deprivation That Required Notice Was the Placement of the Lien Resulting From the Alter-Ego Classification

LIOI's problem, and the problem of similarly situated alleged alter-egos, is that without an effective notice provision in the tax code, such parties cannot effectively avail themselves of the "pay first, sue later" option offered by the government and deemed

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[9] The government does not argue that the filing of the NFTL itself should constitute constructive notice to an alleged alter-ego, although such an argument could be made given that such filings are considered sufficient to put certain third-parties, such as prospective purchasers, on notice. However, in addition to the fact that the Sixth Circuit requires personal notice for due process purposes, as noted above, the College is of the opinion that alleged alter-egos are in a different position than other third-parties, and as such, the mere filing of an NFTL is not sufficient notice for due process purposes. For example, other third-parties, like purchasers, are voluntarily entering into a transaction and are likely in a position to engage in at least minimal risk assessment, for instance, a prospective purchaser would likely check the title of the assets it seeks to purchase. The alleged alter-ego, however, has no reason to check the status of the title to property it owns on a regular basis. Moreover, the filing of an NFTL does not force anything upon or deprive any rights from third-parties, whereas it clearly does both for an alleged alter-ego.

constitutional by the courts. This problem is compounded in circumstances where, as here, the government argues that the alleged-alter ego cannot bring a refund suit under 28 U.S.C. § 1346, as is further discussed in the next section. As a result, parties like LIOI, find themselves in the situation where a lien is discovered during a title search conducted incident to the sale of an asset, and, depending on the circumstances of the sale, the party is left with severely reduced options for addressing the lien.

Another way to frame the issue is that the "pay first, sue later" paradigm is not relevant to the alleged alter-ego scenario because the procedural deprivation does not come from the payment to the IRS, but rather from the lack of notice of the lien, which in turn, is rooted in the IRS's unilateral determination that a party is really the alter-ego of a delinquent taxpayer. It is true, as the government argues, that an alleged-alter ego can bring an action to quiet title prior to the time the lien is collected upon, and thereby address the IRS's alter-ego determination prior to any problems created by an attempt to sell property encumbered by a tax lien. The existence of the right to bring that action is meaningless, however, if the alleged alter-ego does not know about its designation as an alter-ego. Therein lies the due process violation. If, as LIOI alleges, it never received notice of the IRS's alter-ego determination, then none of the remedies identified by the government were truly open to it because it did not know that it even needed to avail itself of any of those remedies. At the same time, its property rights were heavily curtailed by a tax lien against all of its assets, which is a deprivation of property rights without notice.

There is, however, a provision in the tax code that provides constitutionally sound statutory notice rights to the taxpayer against whom a federal tax lien is established. *See* 26 U.S.C. § 6320. As noted at the beginning of this section, however, the government's position is that the notice rights found in § 6320 do not extend to alleged alter-egos because either the alleged alter-ego does not need separate notice due to its receipt of constructive notice of the lien when the taxpayer receives notice of the lien, or the alleged-alter ego really is not the taxpayer, and therefore it is not covered by § 6320.

Given that the essence of an alter-ego determination is the IRS's conclusion that the alleged alter-ego *is* the taxpayer, the College is of the opinion that if the IRS is relying on its alter-ego determination, it must commit fully to doing so. That is, once an alter-ego determination has been made, the IRS should be required to treat the alleged-alter ego in the same way it treats the delinquent taxpayer, which would include extending § 6320 notice rights to the alleged alter-ego. The fact that an alleged alter-ego claims not to be an alter-ego, and therefore not the taxpayer, should be irrelevant to this calculus, because *of course* the alleged alter-ego is going to claim to not be the taxpayer, whether or not that is the case. It is the IRS, however, not the taxpayer or any third-parties, that is bound by the notice provisions of § 6320, and as such, where the IRS finds that a third-party is really a delinquent taxpayer by way of an alter-ego determination, the § 6320 procedures should apply to the newly identified incarnation of the delinquent taxpayer. Indeed, it is likely that due process requires such action on the part of the IRS, because despite the singularity-of-

identity implications of an alter-ego determination, the person or entity alleged to be an alter-ego is both physically and legally distinct from the delinquent taxpayer. That distinction is crucial to this analysis because it is in the space between the alter-ego determination and the physical and legal otherness of the alleged alter-ego where the potential for due process violations takes hold, particularly if the IRS's alter-ego determination turns out to be incorrect.

Finally, it should not go without noting that the government is, with its motion, implicitly stating that LIOI cannot even truly avail itself of the "pay first, sue later" paradigm, because, according to the government, the "sue later" portion of that equation is not available to LIOI as a result of the IRS Restructuring and Reform Act of 1998, as discussed below in Section D.

For the foregoing reasons, the College suggests that a violation of procedural due process occurs, via a lack of notice, where the IRS fails to notify an alleged alter-ego of its status as such and the resulting lien against the alleged-alter ego's property, because without proper notice the alleged alter-ego has no ability to avail itself of the variety of remedies that may be available to it under the tax code and the laws of the United States more generally.

D. **Count III– Tax Refund Claim**

As an initial matter, from the facts alleged in the Amended Complaint, it does not appear that any effort was made by LIOI to engage with the IRS prior to filing this

lawsuit in an effort to secure a refund by way of any of the IRS's internal administrative functions. For instance, LIOI could likely have submitted a claim for a refund using IRS Form 843 or even by way of a letter simply requesting a refund. The IRS, however, has not raised the issue of administrative exhaustion, and so the issue may have been waived. *See, e.g. Colton v. Scutt*, 2011 U.S. Dist. LEXIS 140557, 6, 2011 WL 6090152 (E.D. Mich. Dec. 7, 2011) (noting that "failure to exhaust administrative remedies is an affirmative defense. Because failure to exhaust administrative remedies is an affirmative defense, defendants have the burden of pleading and proving the defense. And, like any other affirmative defense, reliance on [an] exhaustion requirement can be waived.") (internal citations and quotation marks omitted).

Moving on to the substance of Plaintiff's claim for a tax refund pursuant to 28 U.S.C. § 1346, the government argues that the Sixth Circuit case *Munaco v U.S.*, 522 F.3d 651 (6th Cir. 2008) should bar the refund claim. That is, the government argues that *Munaco* stands for the proposition that third-party actions for a refund by way of 28 U.S.C. § 1346, while approved by the Supreme Court in *United States v. Williams*, 514 U.S. 527 (1995), have since been replaced by the statutory framework passed into law as a part of the IRS Restructuring and Reform Act of 1998.

Plaintiff counters by stating that the post-*Williams* legislation noted above was not a legislative attempt to address every possible third-party refund scenario, and that

while it may have reduced the options available for certain aggrieved taxpayers in specific situations, some third-party refund claims are still available under *Williams*.

1. *United States v. Williams* and the IRS Restructuring and Reform Act of 1998

In *Williams*, the IRS collected funds in satisfaction of a tax debt from the ex-spouse of the taxpayer by way of a lien on the ex-spouse's property. The Supreme Court held that the ex-spouse could proceed with a claim for a refund under 28 U.S.C. § 1346, noting that "Section 1346(a)(1) is a postdeprivation remedy, available only if the taxpayer has paid the Government in full." *Williams*, 514 U.S. at 538. Additionally, under the facts of *Williams*, the ex-spouse had no other options available to her but to pay off the liens and then sue for a refund because the timing of the filing of the liens coincided with her attempt to sell the property subject to the liens, and so there was no time to take advantage of the then existing pre-deprivation remedies.

Three years later, Congress passed the IRS Restructuring and Reform Act of 1998, which, *inter alia*, added sections 6325(b)(4) and 7426(a)(4) to Title 26 of the U.S.C. These two provisions work hand-in-hand to provide a means for a property owner to have a lien discharged as to a given asset. Specifically, § 6325(b)(4) requires the IRS to issue a discharge as to a specific asset (as opposed to a general release of lien) where the owner of property encumbered by a tax lien "(i) deposits with the Secretary an amount of money equal to the value of the interest of the United States (as determined by the Secretary) in the property; or (ii) furnishes a bond acceptable to the Secretary in a like amount." Then,

under § 7426, once a party has made the deposit or furnished the bond under § 6325(b)(4), that party has 120 days to "bring a civil action against the United States in a district court of the United States for a determination of whether the value of the interest of the United States (if any) in such property is less than the value determined by the Secretary." In essence, §§ 6325(b)(4) and 7436(a)(4) allow a party to deposit money with the IRS in exchange for a discharge of a lien as to a given asset, and then sue the government for the return of the deposit. Additionally, § 7426 provides that "[n]o other action may be brought by such person for such a determination."

The government makes much of this last provision, and insists that the IRS Restructuring and Reform Act of 1998 was passed with the intent of responding to *Williams* by creating a sole remedy for third-parties to contest tax liens on their property. A review of the Conference Report To Accompany H.R. 2676, however, reveals only that Congress was aware of the Supreme Court's ruling in *Williams*, and that it was attempting to add a remedy for third-parties to challenge a lien, both administratively and judicially. The Conference Report is silent as to Congress's intent to supplant all 28 U.S.C. § 1346 refund claims as authorized by *Williams*. *See* Conference Report To Accompany H.R. 2676, H.R. Rpt. No. 105-599, at 248-49 (1998) (Conf. Rep.).

2. *Munaco v United States* Should Not Bar Plaintiff's Refund Claim Under 28 U.S.C. § 1346

While a surface reading of *Munaco* may lead to the conclusion that LIOI's 28 U.S.C. § 1346 refund claim is barred, a closer look at the facts of LIOI's circumstances

suggests another outcome may be appropriate. It is true that both Munaco and LIOI paid off federal tax liens as third-parties to the tax obligation and then sued for a refund under 28 U.S.C. § 1346. However, a key distinction is the fact that Munaco was a transferee, and LIOI is an alleged alter-ego. These two categories, along with nominees, are often lumped together due to the fact that they involve third-parties saddled with another's tax obligation. *See, e.g. Morris,* 540 F. App'x at 478. However, there are practical differences between the two that make the alter-ego distinguishable from the transferee. That is, for Munaco, and other transferees, the IRS's lien attaches only to the subject property. On the other hand, for the alleged alter-ego, including LIOI, the tax lien attaches to all of the third-party's property, just as it would for the actual delinquent taxpayer.

This distinction is key, because the framework for addressing tax liens set forth in §§ 6325(b)(4) and 7426(a)(4) works to discharge a lien from a given piece of property, not release a lien as to all property owned by a third-party. Indeed, 26 U.S.C. § 6325(a) addresses releases as a separate statutory species from discharges, available only after "[t]he Secretary finds that the liability for the amount assessed, together with all interest in respect thereof, has been fully satisfied or has become legally unenforceable" or a bond conditioned on payment of full amount assessed plus interest is posted. The release, therefore, is the comprehensive removal of the lien as against all of a party's assets, and the discharge, as noted above, addresses only the government's interest in a given piece of property.

A party that has been incorrectly designated as an alter-ego would have little use for the discharge of a lien as to one asset, as that leaves the lien against the rest of its assets. On the other hand, a transferee needs nothing more than a discharge as to a discrete asset, and its needs may be fully met by the §§ 6325(b)(4) and 7426(a)(4) process, assuming, of course that ample time exists to engage in that process prior to the sale of the subject asset.

Another distinction between a party designated as a transferee and one designated an alter-ego flows from the relationship between the party, the encumbered property, and the lien. That is, in the case of the transferee, the property is acquired from the delinquent taxpayer, with all of the attendant risks associated with the acquisition of property (including that someone else may stake a claim to it), and then a tax lien is placed on only that property acquired from the delinquent taxpayer, leaving the transferee with one encumbered asset, which was a risk going into the acquisition from the outset. On the other hand, in the case of the alleged alter-ego, no new property is necessarily acquired, but all of the alleged alter-ego's assets become subject to a lien that is based on an uncontestable, unilateral determination by the IRS regarding the alleged alter-ego's ties to a delinquent taxpayer. These two categories of parties, therefore, can hardly be said to be in the same position.

All of the distinctions between the *Munaco* case the instant matter are important because the *Munaco* court explicitly stated that the §§ 6325(b)(4) and 7426(a)(4)

process is a "specific statutory remedy for persons in [Munaco's (i.e., a transferee's)] position." *Munaco*, 522 F.3d at 657. Moreover, the Supreme Court, in *EC Term of Years Trust v. United States*, noted that the holding in *Williams* was predicated on the facts of that case. 550 U.S. 429, 434-35 (2007) ("Although we decided that 1346(a)(1) authorizes a tax-refund claim by a third-party whose property was subjected to an allegedly wrongful tax lien, *we so held on the specific understanding* that no other remedy...was open to the plaintiff *in that case*") (emphasis added). That is, Williams herself did not have another remedy, in part due to the fact that she "urgently sought" to sell the encumbered property and simply did not have time to pursue other remedies, such as a quiet title action. *Williams*, 514 U.S. 536-37.

The *EC Term of Years Trust* Court had the opportunity to declare that *Williams* had been legislatively overturned for all third-party refund claims, but it did not. Instead the Supreme Court simply distinguished *Williams* and stated that it stands for the proposition that a third-party may seek a refund claim under 28 U.S.C. § 1346 if in a given case, the facts support a conclusion that the taxpayer did not have another remedy. *EC Term of Years Trust*, 550 U.S. at 434-35. That is, the treatment the *EC Term of Years Trust* Court gave to *Williams* in 2007 – well after passage of the IRS Restructuring and Reform Act of 1998 – strongly suggests that the 28 U.S.C. § 1346 third-party lien-payoff refund claim may continue to be available on a case-by-case basis, depending on the specific facts of a given plaintiff.

Here, LIOI has repeatedly stated that it needed to secure a full release of the lien against all of its assets. Short of going through the §§ 6325(b)(4) and 7426(a)(4) process for each of its assets, real and personal, LIOI and similarly situated alleged alter-egos really do not have a satisfactory pre-deprivation remedy. This is particularly true where the government asserts the notice argument it proffers in this case, leaving the alter-ego without notice of the deprivation until it is forced to pay the full amount of the tax obligation in satisfaction of the lien.

Additionally, and more importantly perhaps, is that LIOI, just like Williams, was in a time sensitive sale situation and did not have, practically speaking, any other remedy.

In light of the foregoing, the College believes that the IRS Restructuring and Reform Act of 1998 was not a legislative overruling of the *Williams* case. Rather, the Act simply narrowed the set of circumstances that would qualify for a 28 U.S.C. § 1346 refund under the *Williams* case-by-case, fact-sensitive analysis. Based solely on the allegations in the Amended Complaint, LIOI may qualify for such a claim, but the ultimate availability of 28 U.S.C. § 1346 to LIOI may not be clear until further factual development establishes the veracity of its claims regarding the need for a fast sale and a total release.

IV. CONCLUSION

The College thanks the Court for this opportunity to highlight several important issues in the ongoing development of the federal tax law. To briefly recapitulate

the ideas presented above:

1. There is a window of time between payment to the IRS upon the sale of property encumbered by a federal tax lien and the recording of a Certificate of Release by the IRS during which an aggrieved party can bring a claim to quiet title against the United States under 28 U.S.C. 2410(a) for the property that has been sold. *See, e.g. Kabakjian v. United States*, 267 F.3d 208 (3d Cir. 2001);

2. Where the IRS fails to actually notify a party that has been designated an alter-ego of a delinquent taxpayer and places a tax lien on all of the alleged alter-ego's assets, the lack of notice works a procedural due process violation, because it forecloses any meaningful opportunity for the alleged-alter ego to make use of the tax code's remedial provisions. *See, e.g. Morris v. United States*, 540 F. App'x 477, 479 (6th Cir. 2013); and *Flatford v. City of Monroe*, 17 F.3d 162, 168-69 (6th Cir. 1994); and

3. The IRS Restructuring and Reform Act of 1998 did not supersede the ruling in *United States v. Williams*, 514 U.S. 527 (1995), which allowed for a tax refund claim under 28 U.S.C. § 1346 by a third-party whose property was subject to a tax lien. Rather, the Act merely narrowed the applicability of *Williams* to parties whose circumstances allow for a factual determination that no other remedy was available to them, as a practical matter, to address the tax lien.

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of May, 2015, I caused a copy of the foregoing Brief of the American College of Tax Counsel As Amicus Curiae and this Certificate of Service to be electronically filed with the United States District Court, Eastern District of Michigan, and notice will be sent by operation of the Court's electronic filing system to all ECF participants.

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