

No. 25-10775

IN THE
United States Court of Appeals
for the Eleventh Circuit

BANKUNITED, INC.,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

On Appeal from the
United States District Court for the Southern District of Florida
Case No. 1:23-cv-20379
(Hon. K. Michael Moore)

BRIEF OF *AMICUS CURIAE*
AMERICAN COLLEGE OF TAX COUNSEL
IN SUPPORT OF APPELLANT BANKUNITED, INC.
AND REVERSAL OF JUDGMENT

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**CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT**

Pursuant to FED. R. APP. P. 26.1(a) and 29(a)(4)(A) and 11th Cir. R. 26.1-1, 26.1-2 and 26.1-3, *Amicus Curiae*, American College of Tax Counsel certifies that it does not have any parent corporation and no publicly traded corporation owns 10 percent or more of its stock.

Amicus Curiae further submits the following list of persons known to it and that have an interest in the outcome of this appeal, including the trial judge, all attorneys, persons, associations of persons, firms, partnerships and corporations; and including any subsidiaries, conglomerates, affiliates, parent corporations, any publicly held company that owns 10 percent or more of the party's stock and other identifiable legal entities related to a party:

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STATEMENT OF FINANCIAL INTEREST

Pursuant to FED. R. APP. P. 29(a)(4)(E), counsel for *Amicus Curiae* states that no counsel for a party authored this brief in whole or in part, and none of its Fellows, its counsel or any person other than *Amicus Curiae*, made a monetary contribution to fund the preparation or submission of this brief.

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The American College of Tax Counsel (the “College”) respectfully submits this brief as *Amicus Curiae* in support of petitioner-appellant BankUnited, Inc. (“Appellant” or “BankUnited”). Pursuant to FED. R. APP. P. 29(a)(2), this *amicus* brief is filed with the consent of all parties.

INTEREST OF AMICUS CURIAE

The College 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 includes approximately 700 Fellows recognized for their outstanding reputations and contributions to 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.

This case involves an important issue regarding the distinction between federal courts’ subject matter jurisdiction over tax refund actions and the evaluation of those actions on their merits. Here, while facts and legal issues deriving from prior years may be relevant to the merits of the tax refund action BankUnited filed with respect to its 2019 tax year (the “2019 Refund Suit”), they are not elements of the District Court’s subject matter jurisdiction over that action. Furthermore, the case involves an important issue regarding the analysis necessary to apply the duty of consistency doctrine, which the District Court did not undertake. The College agrees with the positions taken by BankUnited in its opening brief with respect to these issues, and submits this Brief to inform the Court of the significant adverse tax administration and policy implications of the District Court’s decision. The College urges this Court to remand the case for a determination on the merits.

STATEMENT OF THE ISSUES

Whether the District Court erred in determining it lacked subject matter jurisdiction over BankUnited’s 2019 Refund Suit; and whether the District Court erred in determining that BankUnited’s 2019 Refund Suit was barred by the duty of consistency doctrine.

SUMMARY OF THE ARGUMENT

The District Court erred on both issues and its opinion should be reversed and the case remanded. First, the District Court had subject matter jurisdiction over BankUnited's 2019 Refund Suit, which seeks a refund of taxes paid for 2019 and meets all jurisdictional prerequisites. The District Court erroneously viewed the case as seeking to recover taxes paid for the prior 2009, 2010 and 2011 tax years. Order, ECF No. 84 at 8. This view conflates the substantive legal analysis required by the 2019 Refund Suit (including consideration of facts and legal issues arising in 2009, 2010 and 2011) with a jurisdictional analysis of the 2019 Refund Suit (governed by an entirely separate set of requirements). The College takes no position on the merits of the substantive tax issues presented by BankUnited's 2019 Refund Suit. Rather, the College takes the position that the 2019 Refund Suit should not have been dismissed on jurisdictional grounds. If the opinion is allowed to stand, the District Court's opinion could result in the erroneous denial of a broad range of refund claims, the merits of which happen to involve facts and legal issues arising in prior years.

Second, the District Court did not adequately engage in the analysis required by the duty of consistency doctrine. The District Court's analysis demonstrates a fundamental misapplication of the doctrine and fails to make sufficient findings of disadvantage to the government, an essential element. This application of the duty

of consistency could lead to many meritorious refund claims being dismissed improperly if other courts were to follow.

ARGUMENT

I. The Dismissal of BankUnited’s 2019 Refund Suit was Improper because All Jurisdictional Requirements are Satisfied.

BankUnited filed suit to recover overpaid income taxes for its 2019 tax year. Complaint, ECF No. 1 ¶¶ 1, 2. Such refund suits are authorized by 28 U.S.C. § 1346(a)(1), which grants original jurisdiction for the “recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected” This waiver of sovereign immunity is subject to requirements imposed by statute or under case law, including: (i) the taxpayer fully paid all tax assessed for the tax year before filing suit (*Flora v. United States*, 362 U.S. 145 (1960)); and (ii) that the taxpayer submitted a timely administrative claim for refund, such as an amended return. 26 U.S.C. §§ 6511, 7422. Any suit for refund must be filed within the prescribed period of limitations. 26 U.S.C. § 6532.

There appears to be no dispute between the parties that these jurisdictional prerequisites are satisfied. BankUnited alleges it fully paid its reported income tax liabilities for the 2019 tax year and timely filed an amended federal income tax return seeking a refund of taxes paid for that tax year on or about March 30, 2022. Complaint ¶¶ 7, 8. The complaint filed on January 30, 2023, was thus timely under

Sections 6532 and 7422 of the Internal Revenue Code.¹ The government conceded that BankUnited cleared these jurisdictional hurdles with respect to the 2019 tax year. U.S.’ Answer & Affirm. Defenses, ECF No. 26 ¶¶ 8, 9.

Nevertheless, the District Court concluded that it was “without jurisdiction to adjudicate the merits of this case.” Order at 8. Because BankUnited’s refund claim involved consideration of circumstances occurring in 2009, 2010 and 2011, the District Court misinterpreted this case as an attempt by BankUnited to package a refund suit for the 2009-2011 tax years (for which the statute of limitations is closed) in the guise of a refund suit for the 2019 tax year. Order at 7-8.² The District Court failed to appreciate two key points: first, that the issue of its subject matter jurisdiction over BankUnited’s 2019 Refund Suit is separate from the issue of whether, on the merits, BankUnited was entitled to a refund in 2019; and second, that the merits of the 2019 Refund Suit may appropriately turn on the resolution of factual and legal issues arising in prior years. If, on the merits, the District Court were to conclude that BankUnited is not entitled to a refund of taxes paid for 2019,

¹ Unless otherwise indicated, all “section” references are to the Internal Revenue Code of 1986, codified in Title 26 of the U.S. Code, as amended and in effect as of the date of this brief (the “Code”). Similarly, all “Treasury regulation” references are to the regulations promulgated by the Department of Treasury, codified in Title 26 of the Code of Federal Regulations, as amended and in effect as of the date of this brief.

² Notably, the District Court made no findings that BankUnited’s 2019 Refund Suit failed to satisfy the requirements for subject matter jurisdiction. *See* Order at 6-8.

BankUnited may have no further recourse (as the statute of limitations for 2009-2011 is closed), an issue the College does not weigh in on. But that does not convert *this* action into a time-barred suit to recover prior year taxes, and dismissal of the 2019 Refund Suit on jurisdictional grounds was improper.

II. Facts and Legal Issues from Prior Years Often Are Relevant to Assess the Merits of a Refund Suit for an Open Year.

The merits of a tax refund suit commonly require courts to consider facts and legal issues arising in prior years and their impact on the open year at issue. A foundational principle of our income tax system is that tax is assessed and collected on an annual basis. *See Burnet v. Sanford & Brooks Co.*, 282 U.S. 359, 365 (1930). Thus, in tax refund litigation, the “ultimate question presented for decision, upon a claim for refund, is whether the taxpayer has overpaid his tax” for the year at issue. *Lewis v. Reynolds*, 284 U.S. 281, 283 (1932). To address that issue, and because application of the tax law often involves transactions, investments and other circumstances that play out over an extended period of time, courts regularly examine facts and legal issues arising in prior years to determine their impact on a refund suit brought for an open year. If allowed to stand, the District Court’s ruling would insert jurisdictional uncertainty into a broad range of refund actions that happen to involve such prior year facts and issues and would result in harm to taxpayers and the tax system in general where those actions are dismissed without a proper evaluation of their merits.

An example involving cost basis illustrates this. A taxpayer who purchases property in Year 1 will immediately acquire a cost basis in the property. If the taxpayer sells the property in Year 20, the gain or loss from that sale will depend on the cost basis determined in Year 1. In this way, the tax consequences in the later year require an analysis of what happened in the earlier year. There are many examples of this kind of review among the federal courts, some of which involve unique refund claim limitations periods or other operation of the Code. This Court in *Ellinger v. United States*, 470 F.3d 1325 (11th Cir. 2006), considered facts arising in prior closed years to determine the taxpayer's outside basis in two S corporations in connection with the recognition of cancellation of indebtedness income in an open year. Similarly, the U.S. Court of Appeals for the Fifth Circuit in *Holder v. United States*, 444 F.2d 1297 (5th Cir. 1971), looked to events occurring in prior years to make findings on the taxpayer's remaining unrecovered basis in real property in determining eligibility for a loss deduction in a later year at issue. In *United States v. Waterman Steamship Corp.*, 330 F.2d 128, 132 (5th Cir. 1964), the Fifth Circuit made findings of fact and legal determinations regarding the taxpayer's basis in several ships, purchased in prior years, in order to determine the correct amounts of tax depreciation during the years at issue. And in *Panhandle Eastern Pipe Line Co. v. United States*, 654 F.2d 35 (Ct. Cl. 1981), the Court of Claims looked to facts in

prior years to determine the taxpayer's basis in property for purposes of determining the investment tax credit in an open year.

An inquiry into facts and legal issues arising in prior years is also routinely required for refund claims based on the carryback or forward of tax attributes from the tax year in which they arise, such as net operating losses ("NOLs"). In *Springfield Street Railway Co. v. United States*, 312 F.2d 754 (Ct. Cl. 1963), the Court of Claims allowed a refund in 1954, an open tax year, after recomputing the taxpayer's taxable income for 1953, a closed tax year, to compute the amount of NOLs available in each year. The taxpayer had realized an NOL in 1955, which under then applicable law was carried back first to 1953 and then, should any NOL remain, carried forward to 1954. As originally reported, the taxpayer's 1953 tax liability would have absorbed the entire NOL carryback. But the taxpayer identified a previously unclaimed deduction for 1953 that, if applied in computing its NOL carryback, would reduce its 1953 tax liability and free up losses to apply against its 1954 tax liability.

The Court of Claims concluded that it was appropriate to apply the unclaimed deduction in 1953, such that the taxpayer was entitled to a refund in 1954. *Id.* at 759. The Court of Claims held that the taxpayer was entitled to advocate for adjustments to tax items in closed years to establish eligibility for NOLs in an open year. The court rejected the notion that "recomputation of income for a closed year should only

beallowed [sic] when it will benefit the Government”—which was “undisputable”—“and not under similar circumstances when it will benefit the taxpayer.” *Id.*

In *Barenholtz v. United States*, 784 F.2d 375 (Fed. Cir. 1986), the taxpayer sought refunds for improperly denied interest expense deductions in 1975, 1976 and 1977. While examining those claims, the Internal Revenue Service (“IRS”) also examined charitable contribution deductions arising in prior closed years (1971-1974) because the taxpayer carried those deductions into the open years. The IRS ultimately made upward adjustments to income for the prior years that exhausted the charitable contribution deduction carry forwards. As a result, the taxpayer had no remaining charitable contribution deductions to carry forward to the open years. On appeal, the Federal Circuit affirmed this outcome because the Code bars untimely “assessments, not calculations, and no assessments were made for the years 1971 through 1974.” *Id.* at 380. “It is well settled that the IRS and the courts may recompute taxable income in a closed year in order to determine tax liability in an open year.” *Id.* at 380-81.³

³ Outside the context of refund suits, for nearly a century, Congress has directed the United States Tax Court to consider and adjust tax attributes in prior (and generally closed) years to determine the correct tax liability for the open year before it. *See* Revenue Act of 1926, Pub. L. No. 69-20, § 273(g), 44 Stat. 1977 (1926); 26 U.S.C. § 6214(b).

These are just some of the many examples of the need for courts to examine facts and circumstances arising in prior years, and to apply the law to those facts and circumstances to determine whether a refund is warranted for an open tax year. Analyzing issues in prior years does not transform an otherwise timely suit for refund of taxes paid in the open year into an untimely suit for refund of taxes paid in a closed year. In the instant case, the District Court's Order contravened these principles. Were the District Court's ruling to stand, it would create a precedent for courts to sidestep substantive tax issues that require an analysis of facts and circumstances arising in prior years that have a direct bearing on the proper computation of tax liability in an open year.

III. The Merits of BankUnited's 2019 Refund Suit Appropriately Invoke a Review of Facts and Issues Arising in Prior Years, and an Analysis of the Legal Consequences of Those Facts and Issues in 2019.

The substantive tax issues posed by BankUnited's 2019 Refund Suit appropriately—and necessarily—require consideration of events occurring in 2009, 2010 and 2011. In 2009, BankUnited acquired a failed bank in an FDIC-facilitated transaction and entered two loss sharing agreements with the FDIC. U.S.' Mot. Summ. J. & Memo. L. Support Mot., ECF No. 64 at 10-11. Under a loss share agreement, the FDIC agreed to assume a portion of any losses that BankUnited would otherwise bear in connection with the loan assets it acquired. *See* 26 C.F.R. § 1.597-1(b). Section 597, and the regulations thereunder, provide complex rules to

determine and allocate basis in FDIC-assisted acquisitions such as BankUnited's. 26 C.F.R. § 1.597-5. In general, basis under Section 597 is the acquiring bank's purchase price, which includes the amount of any liabilities it assumes. Basis is then allocated across the acquired assets using a residual or "waterfall" allocation method that first applies basis to asset classes with the greatest liquidity. 26 C.F.R. § 1.338-6(b). If the basis, or fair market value, of any cash and general deposits (Class I) and securities and loans (Class II) covered by the loss share agreements exceeds the purchase price for the acquired assets, the excess is included in the acquiring bank's taxable income, spread over six years beginning with the year of the acquisition. 26 C.F.R. § 1.597-5(d)(1), (d)(2)(iii). This taxable income is referred to as "Section 597 income."

BankUnited's acquisition of the failed bank included the acquisition of certain Real Estate Investment Trusts ("REITs"). One of the central disputes in this matter is whether loans held in the REITs are included in Class II assets for purposes of BankUnited's Section 597 basis allocation and income computation. BankUnited, based on its reading of the applicable regulations in 2009, included the REIT loans in its Class II assets, which resulted in taxable Section 597 income prorated across 2009-2014. BankUnited has since taken the position that, although it followed then extant law, subsequent events—including a change to the relevant Treasury Regulations—suggested it overpaid its taxes in 2009-2014 in reporting Section 597

income. The IRS agreed and reversed the inclusion of Section 597 income for 2012-2014, issuing refunds for those tax years. First Stip. Facts, ECF No. 54 ¶ 63. For the 2009-2011 tax years, however, the statute of limitations to claim refunds had expired. *Id.* ¶ 64.

In its 2019 Refund Suit, BankUnited contends the Section 597 income reported in 2009, 2010 and 2011 from assigning basis to the REIT loans as required under then applicable law resulted in what the bank labels an “independent capitalized asset.” U.S.’ Statement Undisputed Material Facts Supp. Mot. Summ. J., ¶ 26; 2019 Refund Claim, ECF No. 1-1 Ex. A at 7; Complaint ¶ 52. More specifically, BankUnited contends that the tax basis arising under Section 597 became part of its Class II Assets by operation of the then applicable Treasury Regulations § 1.597-5(d)(2)(iii) and § 1.597-3(a). BankUnited further contends that it was entitled to write off this notional asset under Section 165 as a total loss in 2019, because the FDIC loss share guarantee (which, in Bank United’s view, triggered an income inclusion requirement in prior years) had a ten-year term that lapsed in 2019. 2019 Refund Claim at 8; Complaint ¶¶ 54-55. In the alternative, BankUnited argues the Section 597 gain should be treated as a premium associated with acquiring the REIT loans (among others). BankUnited contends it can amortize these premiums over 15 years under Section 197 because they constituted a “premium associated with a bundled acquisition” giving rise to deductions in 2019.

U.S.’ Statement Undisputed Material Facts Supp. Mot. Summ. J. ¶ 26; 2019 Refund Claim at 9; Complaint ¶ 58.

Both of these legal theories for refund—described in the administrative refund claim for 2019 and pled and presented in the District Court—are predicated on the legal position that tax basis was created in 2009, 2010 and 2011 and is recoverable in whole or part through a loss deduction in 2019. For the District Court to decide these theories on their merits, it will need to decide a number of questions, including: (i) whether the Section 597 income in 2009, 2010 and 2011 created a notional asset or alternatively an amortizable premium, and (ii) if so, whether events in 2019 triggered a write down of the notional asset or alternatively amortization deductions of the premium. Importantly, while BankUnited’s 2019 Refund Suit requires findings and legal conclusions from the District Court about how events in 2009, 2010 and 2011 should be characterized for federal income tax purposes, the relief sought is limited to the 2019 tax year, i.e., a refund of tax paid for the 2019 tax year. BankUnited has not requested tax refunds or any other form of relief for 2009, 2010 or 2011. Dismissal on jurisdictional grounds was therefore improper.

IV. Dismissal Under the Duty of Consistency was also Improper because the District Court Did Not Engage in the Necessary Inquiry.

The District Court also held in the alternative that BankUnited’s 2019 Refund Suit was barred by the duty of consistency doctrine. The District Court’s analysis of this doctrine was brief (in contrast with the complexity of the issues in the refund

action), departs from the well-established elements of the doctrine and did not include sufficient and necessary findings of fact. This alternative holding should be reversed and remanded for additional factual findings.

This Court and others have recognized three common elements to invoke the duty of consistency doctrine: (i) a representation made by the taxpayer; (ii) on which the IRS relied; and (iii) an attempt by the taxpayer, after the statute of limitations has run, to change the previous representation in such a way as to disadvantage the IRS. *See Herrington v. Commissioner*, 854 F.2d 755, 758 (5th Cir. 1988); *Shook v. United States*, 713 F.2d 662, 667 (11th Cir. 1983); *Beltzer v. United States*, 495 F.2d 211, 212 (8th Cir. 1974). Application of the doctrine depends on the facts and circumstances of each case, such as whether changed circumstances tend to justify the inconsistency. *E.g.*, 60 Mertens L. Fed. Income Tax'n § 5 (2024).

The District Court's discussion of BankUnited's alleged change in position misstates the doctrine. The District Court points to BankUnited's 2016 letter to the IRS that recognized the inclusion of Section 597 gain in 2009-2014 could be in error, finding this letter "flatly contradicts [BankUnited's] current assertion" in the 2019 Refund Suit that it "strictly followed" the Section 597 regulations. Order at 10. But the stated consequence of this alleged change is confused. The District Court says BankUnited is estopped from arguing, on the one hand, that it *did* comply with the Section 597 regulations and, on the other hand, that it *did not* comply with the

regulations. *Id.* at 10-11. Such a complete bar to the arguments available to a taxpayer on how a complex provision of tax law should be interpreted and applied is not a proper application of the duty of consistency.

Even assuming that BankUnited did change its position on application of Section 597 (and the College takes no position on whether it did), such a change alone is not a basis for applying the duty of consistency doctrine. The tax law and interpretations of it (including the IRS's own interpretations) constantly evolve, and taxpayers routinely reevaluate and sometimes change their prior year reporting positions. If such changes were prohibited under the duty of consistency, as the District Court's opinion seems to suggest, claims for refund of overpaid taxes would often be barred, locking a taxpayer into what could be an erroneous reporting position. That outcome would frustrate a core element of the tax law, which expressly allows taxpayers to change their return reporting positions via refund claims. *See* 26 U.S.C. §§ 6511, 7422.

To avoid that outcome, courts have applied the duty of consistency when the taxpayer changes a position, the government relied on the taxpayer's original position, *and* the change caused disadvantage to the government. Such disadvantage is an essential element of the doctrine and commonly includes a detriment or undue revenue harm to the government and a tax windfall to the taxpayer. *See, e.g., Building Syndicate Co. v. Commissioner*, 292 F.2d 623, 626 (9th Cir. 1961). Here,

the District Court made no findings, nor pointed to stipulations or other undisputed evidence, that BankUnited's alleged change in position inappropriately disadvantaged the government. The government specifically recognized that "[BankUnited] really did overpay its income taxes," U.S.' Mot. Summ. J. & Mem. L. Support Mot. at 30, so no tax windfall occurred. Moreover, the government did not advance the duty of consistency issue in its summary judgment briefing. *Id.*; U.S.' Reply Supp. Mot. Summ. J., ECF No. 79 at 14. Without disadvantage to the government, the duty of consistency cannot be invoked. Allowing courts to overlook this essential element of the doctrine, as the District Court did here, would undermine the fair and consistent administration of the tax law.

CONCLUSION

The District Court's dismissal of BankUnited's 2019 Refund Suit should be reversed and the case remanded. The District Court inappropriately conflated the merits of the suit, which require a consideration of prior years, with the requirements for subject matter jurisdiction over the 2019 tax year. The District Court also failed to engage in the necessary inquiry to apply the duty of consistency and fundamentally misunderstood the doctrine. If left unchecked, these fundamental errors would irreparably harm taxpayers and result in the inconsistent application of the tax law.

DATED: July 9, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the Contents and Form requirements of FED. R. APP. P. 29(a)(4) and 11th Cir. R. 29-2;
2. This brief complies with the type-volume limitation of FED. R. APP. P. 29(a)(5) and 32(a)(7)(B) because it contains 4,027 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(f);
3. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type-style requirements of FED. R. APP. P. 32(a)(6) because it uses Times New Roman 14-point type face throughout, which is proportionally spaced and includes serifs.

DATED: July 9, 2025

/s/ Michael Desmond
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CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2025 I electronically filed the foregoing Brief of *Amicus Curiae* with the Clerk of the Eleventh Circuit Court using the CM/ECF System, which will send notice of such filing to all attorneys of record in this matter.

DATED: July 9, 2025

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