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Section 7433's Statute of Limitations: How Courts have Wrongly Turned a Taxpayer's Exclusive Sword into the IRS's Shield against Damages

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SECTION 7433'S STATUTE OF LIMITATIONS: HOW COURTS HAVE WRONGLY TURNED A TAXPAYER'S EXCLUSIVE SWORD INTO THE IRS'S SHIELD AGAINST DAMAGES

DIANA LEYDEN*

ABSTRACT

Over twenty years ago, Congress took the extraordinary step of authorizing taxpayers to sue the Internal Revenue Service (IRS) for damages if the IRS engaged in "unauthorized collection action" when trying to collect a federal tax debt. For many years the IRS has generally been immune from any private action by three laws. Thus, fashioning a private cause of action against the IRS for damages was an extraordinary act.

Congress expressly authorized taxpayers to bring a private cause of action against the United States for economic damages caused by "unauthorized collection." Codified as section 7433 of the Internal Revenue Code, this statute provides taxpayers with the exclusive remedy for abuses by IRS employees in connection with the collection of taxes. The legislative history, although sparse, reflects Congress's concern that unless taxpayers were given the right to bring a private cause of action against the IRS for abusive tortious tax collection action, such activities would go unchecked. Because the IRS was and continues to be shielded from other private causes of action by the Tax Anti-Injunction Act and the Declaratory Judgment Act, without a specific private right of action to sue the government taxpayers would never have the ability to stop excessive and illegal collection action by the IRS.

Despite the importance of section 7433 to check government unauthorized tortious collection activity, federal courts have turned section 7433 into a shield against excessive or unsupported IRS collection action, rather than maintain it as the small, but important, sword that Congress intended to give taxpayer. This Article contributes to the sparse literature on section 7433¹ by demonstrating that federal courts have effectively vitiated section 7433 by misreading its statute of limitations

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¹ R. Tracy Spouls, *IRC §§ 7431 and 7433; Civil Remedies for Abusive Practices by the IRS*, 1 FLA. TAX REV. 563 (1993); Ridgeley A. Scott, *Suing the IRS and Its Employees For Damages: David and Goliath*, 20 S. ILL. U. L.J. 507 (1996).

to: (1) require a taxpayer to be put on notice that all collection action taken by the IRS is unauthorized and therefore to file section 7433 actions from the first time collection action is taken; and (2) prevent continuous unauthorized collection action to extend the statute of limitations start date until the last of such series.

These readings contravene the purpose of section 7433 in two ways. First, as the legislative history of section 7433 demonstrates Congress intended section 7433's statute of limitations to be interpreted no less liberally than the statute of limitations for actions brought under the Federal Tort Claims Act.

Second, even absent the legislative history, the purpose and goal of section 7433 are best advanced by reading section 7433 not to start when the taxpayer is notified of the first collection action taken by the IRS. In so ruling, the courts have made a simple category mistake. The courts have treated section 7433 like a typical tax claims procedure—i.e., a procedure for a taxpayer to file a claim with the IRS to get back a taxpayer's monies that that he claims the IRS wrongfully collected. The statutes of limitations for such typical tax claims procedures actions are properly strictly construed against the taxpayer because they reflect the policy that taxpayers may not sit on their rights to get their money back.

The mistake is that section 7433 is not a typical tax claims procedure statute, but a statute to protect citizens against tortious acts by government employees in the course of their work. In this respect, a claim under section 7433 belongs in the category of tort claims against federal employees under the Federal Tort Claim Act (FTCA). This is further supported by Congress's action to make section 7433 the exclusive private action for tortious acts by IRS employees in connection with the collection of tax. Once the courts treat section 7433 claims like tort claims, not typical tax claim actions, courts will see why they should read section 7433's statute of limitations just as they read the statute of limitations under FTCA.

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I. INTRODUCTION

Over twenty years ago, Congress took the extraordinary step of authorizing taxpayers to sue the Internal Revenue Service (IRS) for damages if the IRS engaged in “unauthorized collection action” when trying to collect a federal tax debt.² As discussed *infra*, for many years the IRS has generally been immune from any private action by three laws. Thus, fashioning a private cause of action against the IRS for damages was an extraordinary act.

Congress expressly authorized taxpayers to bring a private cause of action against the United States for economic damages caused by “unauthorized collection.”³ Codified as section 7433 of the Internal Revenue Code, this statute provides taxpayers with the exclusive remedy for abuses by IRS employees in connection with the collection of taxes. The legislative history, although sparse, reflects Congress’s concern that unless taxpayers were given the right to bring a private cause of action against the IRS for abusive tortious tax collection action, such activities would go unchecked. Because the IRS was and continues to be shielded from other private causes of action by the Tax Anti-Injunction Act and the Declaratory Judgment Act, without a specific private right of action to sue the government taxpayers would never have the ability to stop excessive and illegal collection action by the IRS.

Despite the importance of section 7433 to check government unauthorized tortious collection activity, federal courts have turned section 7433 into a shield

² 26 U.S.C.A. § 7433 (West 2012). As originally enacted, Congress required a taxpayer to prove that the unauthorized collection action was reckless or intentional, a very high standard. In 1998, the statute was amended to add an action for negligent disregard of the Code or regulations. (Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, Tit. III, § 3102(a), (c), 112 Stat. 730).

³ This right was enacted as part of the first “Taxpayer Bill of Rights” (TABOR). In hearings on TABOR in 1987, taxpayers testified that collection actions taken by the IRS went above and beyond what was needed and caused extreme hardship. *See The Time for Action on Taxpayers’ Rights Has Come*, 133 CONG. REC. 22,842-44 (1987) (statements of Sens. Pryor and Reid).

against excessive or unsupported IRS collection action, rather than maintain it as the small, but important, sword that Congress intended to give taxpayer. This Article contributes to the sparse literature on section 7433⁴ by demonstrating that federal courts have effectively vitiated section 7433 by misreading its statute of limitations to: (1) require a taxpayer to be put on notice that all collection action taken by the IRS is unauthorized and therefore to file section 7433 actions from the first time collection action is taken; and (2) prevent continuous unauthorized collection action to extend the statute of limitations start date until the last of such series.

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The mistake is that section 7433 is not a typical tax claims procedure statute, but a statute to protect citizens against tortious acts by government employees in the course of their work. In this respect, a claim under section 7433 belongs in the category of tort claims against federal employees under the Federal Tort Claim Act (FTCA). This is further supported by Congress's action to make section 7433 the exclusive private action for tortious acts by IRS employees in connection with the collection of tax. Once the courts treat section 7433 claims like tort claims, not typical tax claim actions, courts will see why they should read section 7433's statute of limitations just as they read the statute of limitations under FTCA.⁵

Part A of this Article discusses ways that the IRS engages in unauthorized collection action, the lack of administrative checks against such action, and damages that might occur. By recognizing and understanding ways that the IRS may commit tort like actions it becomes clearer as to why Congress acted to provide a private remedy to address such wrongs. Part B summarizes Congress's concerns about IRS unauthorized collection action and how those concerns lead to the enactment and subsequent amendment of section 7433. Both the initial enactment and subsequent amendment support the conclusion that Congress intended to give taxpayers a liberal right to sue the sovereign—the IRS—but limited the amount of damages that could be recovered. Part C shows how the federal courts have misread section 7433's statute of limitations in contravention of its legislative history. Part D shows how, even absent the Congressional intent expressed in its legislative history, section 7433

⁴ Spouls, *supra* note 1; Scott, *supra* note 1.

⁵ Prior to the enactment of section 7433, taxpayers (often times tax protestors) would bring actions under the *Bivens* doctrine (*Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971)), the Racketeer Influence and Corrupt Organizations Act (RICO), or the Federal Tort Claims Act to try to recover damages against an IRS employee for alleged damages in connection with the employee's collection actions.

is in the nature of a remedy for tortious acts and not in the nature of a tax claim action. The legislative history and subsequent hearings about section 7433 recite horrible collection actions taken by IRS employees, including harassment and intimidation, which are best described as torts for which IRS employees enjoyed sovereign immunity.

The incorrect reading of section 7433 has turned it from the taxpayer sword against tortious acts by IRS employees to a complete shield against any private cause of action for IRS employees who engage in the tortious acts. In so doing, the courts have reinstated sovereign immunity for torts committed by the IRS in contravention of both the legislative history and purpose of section 7433.

A. Examples of Unauthorized Collection by IRS Employees and the Lack of Administrative Checks to Stop Abuses

Because most people consider the IRS to be given great power to collect taxes owed, it might not be obvious how IRS collection action can step over the line from proper to tortious. To appreciate the importance of a private cause of action against IRS collection action, it is necessary to understand how the IRS power can become tortious, and thus illegal.

The IRS has two very strong tools for enforcing tax debts—a lien against a taxpayer's current and future property interests and the power to levy. Both often get the attention of delinquent taxpayers with respect to what the IRS determines are delinquent federal tax obligations. However, both may be used in unauthorized ways. Below are descriptions of the two ways the IRS enforces collection, an explanation of the collection due process procedure and why it is an ineffective check on unauthorized enforced collection, and finally examples of how an IRS employee might abuse the enforced collection procedures resulting in tortious acts.

1. The Federal Lien

Congress gave the IRS a lien interest in all property and rights to property of a taxpayer who owes federal tax debts.⁶ The federal tax lien is essentially a security interest in property rights of a taxpayer who owes federal taxes. It exists so that the government can get paid for past tax debts if a taxpayer sells his property interest or if the IRS obtains judicial approval to sell the property. The policy behind the super-powerful federal tax lien is understandable and necessary to protect the fisc and to encourage voluntary compliance with paying owed taxes.

The government's security interest is created as soon as the IRS assesses the tax.⁷ It is more powerful than other creditor security interests⁸ because it attaches to

⁶ 26 U.S.C.A. § 6321 (West 2012). A federal tax lien arises as soon as a tax is assessed. However, if a taxpayer has other creditors, then the priority of the IRS lien generally depends on when it is filed. First in time, first in right. However, section 6323 changes the priority of the federal tax lien *vis-à-vis* other creditors, thereby reducing to some extent the power of a federal tax lien. 26 U.S.C.A. § 6323 (West 2012).

⁷ 26 U.S.C.A. § 6321 (West 2012). The collection of tax due may begin ten days after the IRS issues a notice of demand. 26 U.S.C.A. § 6303(a) (West 2012).

⁸ See *United States v. Craft*, 535 U.S. 274 (2002) (a husband's interests in entireties constituted a property interest to which a federal tax lien attached); *Drye v. United States*, 528 U.S. 49 (1999) (federal tax lien attached to an heir's interest despite the heir his interest after the death of the decedent).

property and rights in property owned by the taxpayer at the time the tax is assessed and all future property interests that the taxpayer obtains during the period the IRS can collect the tax.⁹ Further, unlike a judgment lien that has to be filed on the appropriate state records, a federal lien exists even if the IRS does not file a notice of lien on the appropriate state records. Filing the lien, however, secures the priority of the IRS to collect *vis-à-vis* other creditors.¹⁰

While the filed lien does not allow the IRS to seize the property, it does have serious effects on the taxpayer. First, the notice of filing of tax lien is noted by credit reporting agencies and will affect the taxpayer's credit score.¹¹ For some taxpayers, a notation of a federal tax lien on a credit report can scare off landlords and employers. Second, a filed federal tax lien will often scare off potential lenders and terminate existing lines of credit. This can cripple a business that needs to buy supplies or inventory on credit. While there is a provision that allows the IRS to subordinate the federal tax lien to another creditor,¹² it is difficult to navigate and the IRS does not exercise its discretion to do so unless the action will result in some substantial payment of the tax debt. Federal lien filings even have serious impacts on low income taxpayers, especially those with homes who try to refinance or reduce predatory interest rates.¹³

After the lien is filed, the taxpayer has the right to try to raise an alternative means for collecting the tax. The filing of the lien, however, has already done damage to the taxpayer's credit score and even if it is fully satisfied, it stays on a taxpayer's credit report for seven years.¹⁴ Speculation that the filed lien may damage credit or impair operations of a business are not enough to support a decision that a

⁹ 26 U.S.C.A. § 6502(a) (West 2012). With the enactment of the Tax Reform and Restructuring Act of 1998, the period of time that the IRS has to collect is ten years, with some limited instances where the statute period may be tolled.

¹⁰ However, if a taxpayer has other creditors, the IRS may not have a superior right in a taxpayer's property that is secured as to other creditors just because a lien interest exists in the property. Congress adopted rules similar to the Uniform Commercial Code (UCC) and provided mechanisms to deal with disputes between the IRS and other creditors. 26 U.S.C.A. § 6323 (West 2012). Generally, in order for the IRS to have a higher priority in the property interest, the IRS must properly file a notice of federal tax lien. 26 U.S.C.A. § 6323(a) (West 2012).

¹¹ TAXPAYER ADVOCATE SERV., NATIONAL TAXPAYER ADVOCATE ANNUAL REPORT TO CONGRESS VOL. 1 109-14 (2011).

¹² 26 U.S.C.A. § 6325(d) (West 2012).

¹³ T. Keith Fogg, *Systemic Issues with Low-Dollar Lien Filings*, 133 TAX NOTES 88, 97 (2011). In 1998, Congress provided taxpayers with a hearing opportunity before an IRS Appeals office after the IRS filed a notice of federal lien. This is often referred to as a Collection Due Process, even though the term "due process" is not at all the equivalent of a citizen's constitutional due process right. The Collection Due Process hearing has been interpreted by both the IRS and courts to provide no opportunity for a taxpayer to challenge collection actions, but rather to afford a taxpayer an opportunity to suggest an alternative to enforced collection. See *infra* Part I.C.

¹⁴ NAT'L TAXPAYER ADVOCATE, 2012 ANNUAL REPORT TO CONGRESS, VOL. 1 406 (Dec. 31, 2013), available at <http://www.taxpayeradvocate.irs.gov/userfiles/file/Full-Report/volume-1.pdf>.

lien must be removed.¹⁵ The National Taxpayer Advocate, in its 2010 Annual Report, identified the IRS nearly automatic lien filing procedure as quite detrimental to taxpayers and urged reconsideration of the practice.¹⁶

Recently, the Treasury Inspector General for Tax Administration reported that the IRS has continued to not follow procedures for notifying taxpayers and taxpayer representatives about the filing of liens thereby impacting their rights to contest the filing through a collection due process hearing. This criticism has been leveled for several years.¹⁷

The National Taxpayer Advocate has also criticized the way the IRS uses the lien filing procedures. Even if notice of the filing of the federal tax lien is timely given, the filing itself may have non-tax consequences that far out weigh the tax interest in collecting the tax.¹⁸ In its latest Annual Report to Congress, it recommended:

The National Taxpayer Advocate reiterates [its] previous recommendations that the IRS immediately rescind its policy of automatically filing liens, based on an unpaid balance threshold, against accounts designated as "currently not collectible" due to economic hardship; require managerial approval for NFTL filings in all cases where the taxpayer has no significant equity in assets; base lien filing determinations on a thorough review of information including the taxpayer's assets, the taxpayer's income, and the value of the taxpayer's equity in the assets; and determine after weighing all the facts and circumstances whether (i) the lien will attach to property, (ii) the benefit to the government from the NFTL filing outweighs the harm to the taxpayer, and (iii) the filing will jeopardize the taxpayer's ability to comply with the tax laws in the future. To reverse the damage to a taxpayer's credit rating, the IRS also should develop and issue guidance allowing, upon the request of the taxpayer, the withdrawal of an NFTL where the statutory withdrawal criteria are satisfied.¹⁹

Further harm may occur if the IRS does not timely release a lien. While section 7432 of the Code provides the right to bring an action for the negligent or intentional failure of the IRS to release a lien if the taxpayer sustains economic damages,²⁰ it only provides economic relief and does not remedy the damage that the lien may

¹⁵ See *Hall v. Comm'r of Internal Revenue*, T.C. Summary Op. 2008-128.

¹⁶ TAXPAYER ADVOCATE SERV., NATIONAL TAXPAYER ADVOCATE ANNUAL REPORT TO CONGRESS VOL. 1 17-40 (2009); TAXPAYER ADVOCATE SERV., NATIONAL TAXPAYER ADVOCATE ANNUAL REPORT TO CONGRESS VOL. 2 1-17 (2009); see also Danshera Cords, *Lien on Me: Virtual Debtors Prisons, The Practical Effects of Tax Liens, and Proposals for Reform*, 49 U. LOUISVILLE L. REV. 341 (2011).

¹⁷ TREASURY INSPECTOR GEN. FOR TAX ADMIN., CHALLENGES REMAIN WHEN PROCESSING UNDELIVERABLE MAIL AND PREVENTING VIOLATIONS OF TAXPAYERS' RIGHTS DURING THE LIEN DUE PROCESS (2011).

¹⁸ See Fogg, *supra* note 13.

¹⁹ TAXPAYER ADVOCATE SERV., NATIONAL TAXPAYER ADVOCATE ANNUAL REPORT TO CONGRESS 24-25 (2010).

²⁰ 26 U.S.C.A. § 7432(a), (b)(1) (West 2012).

have caused on a taxpayers' credit, business relationships, or emotional damages.²¹ Failure to release a lien can wreak further harm on the taxpayer. It can prevent the taxpayer from moving forward and repairing the damage done by public notice that the taxpayer owed the IRS. Even if the taxpayer can prove that the IRS negligently or intentionally failed to release a lien, to prevail and get damages, the taxpayer must exhaust all administrative remedies,²² which presumably would include exercising a right to a collection due process hearing, and mitigate his economic damages.²³

Thus, if an IRS employee who files a federal tax lien to bully a taxpayer into paying a tax or to get even with an especially disagreeable taxpayer, such action would be in the nature of harassment or intimidation and tortious. Once the lien is filed, harm is done to the taxpayer and such harm is not easily repaired.

2. The Federal Levy—A Right to Seize

The power of levy is an even a more powerful collection tool than a lien filing and, unlike the lien, has immediate effects on the finances of a taxpayer. The IRS is given the authority to levy many funds due a taxpayer, including wages,²⁴ Social Security benefits,²⁵ unemployment benefits,²⁶ bank accounts,²⁷ pension payments,²⁸ accounts receivable,²⁹ and payments made under a federal government contract.³⁰ In certain instances, Congress gave the IRS the authority to execute a continuous levy on certain payments.³¹

In the case of a levy, the taxpayer has the opportunity to present an alternative at the CDP hearing before the levy is executed. A taxpayer can provide a financial statement³² with supporting documentation to prove that a levy would create an economic hardship.³³ However, the IRS's basis of determining a taxpayer's ability to pay—so-called "reasonable collection potential"—is very rigid and often does not fully account for the expenses a taxpayer may need to make.³⁴ If the IRS determines

²¹ 26 U.S.C.A. § 7432 (West 2012).

²² 26 U.S.C.A. § 7432(d)(1) (West 2012).

²³ 26 U.S.C.A. § 7432(d)(2) (West 2012).

²⁴ 26 U.S.C.A. § 6331(e), 6331(h)(2)(B) (West 2012).

²⁵ 26 U.S.C.A. § 6331(a), 6331(h)(2)(A), 6331(h)(2)(B) (West 2012). Treas. Reg. § 301.6331-1(a) (2012) (taking the position that Social Security benefits are fixed and determinable payments that can be levied under section 6331).

²⁶ 26 U.S.C.A. §§ 6331(h)(2)(B), 6334(a)(4) (West 2012).

²⁷ 26 U.S.C.A. § 6331 (West 2012).

²⁸ *Id.*

²⁹ *Id.*

³⁰ 26 U.S.C.A. § 6331(h)(3) (West 2012).

³¹ 26 U.S.C.A. § 6331(h) (West 2012).

³² See Internal Revenue Serv. Form 433-A (Dec. 2012).

³³ See *Vinatieri v. Comm'r*, 133 T.C. 392 (2009).

that the taxpayer can afford to make installment payments over time (especially within the period the IRS has to collect the tax debt), the Tax Court has ruled that the IRS does not abuse its discretion by levying funds.³⁵

Like the filing of a notice of lien, the National Taxpayer Advocate has recognized the serious impact that a levy can have on taxpayers living at the margin. Taxpayers living on fixed incomes, such as Social Security old age benefits or Social Security disability incomes, often live payment to payment. A levy of 15% on a continuous basis can prevent such taxpayers from paying rent, buying groceries, or buying necessary medicines.³⁶

3. The Collection Due Process—An Ineffective Tool to Stop IRS Collection Action

While the IRS has these extraordinary powers, Congress did not give taxpayers very effective administrative ways to stop liens or levies which might not have any legal basis and which may be used in a tortious way by an IRS employee. One tool that was added by Congress in 1998, the Collection Due Process hearing,³⁷ has been interpreted by both the IRS³⁸ and courts³⁹ to provide very little opportunity for a taxpayer to challenge collection actions. Another tool, the creation of the National Taxpayer Advocate, allowed a part of the IRS to stop or undo collection action that is creating an economic hardship, but does not allow a taxpayer to obtain damages for harm the wrongful collection action may have caused.⁴⁰

4. The IRS Takes Much More Care to Prevent Unauthorized Assessment

In contrast to the relative lack of power to stop the IRS from enforcing collection are the numerous ways that taxpayers have to question and stop the IRS from assessing additional tax. If the IRS audits a taxpayer's return, before the change can be proposed as a deficiency, the taxpayer has a right to receive a written explanation of the changes, to talk, meet or write to the examiner, to ask to talk, meet or correspond with the examiner's supervisor, and to appeal a proposed change to the Appeals Division, a national division that is separate from the Compliance Division (the division that examines and assesses the tax).⁴¹ If the exam changes are sustained

³⁴ In its 2010 Annual Report to Congress, the National Taxpayer Advocate listed as the seventh most serious problem the fact that the IRS does not know the impact of ignoring non-IRS debt when analyzing a taxpayer's ability to pay. TAXPAYER ADVOCATE SERV., *supra* note 19, at 98.

³⁵ See *Taylor v. Comm'r*, 100 T.C.M. (CCH) 303 (2010).

³⁶ TAXPAYER ADVOCATE SERV., *supra* note 19, at 81.

³⁷ 26 U.S.C.A. §§ 6320, 6330 (West 2012).

³⁸ 26 C.F.R. §§ 301.6320-1, 301.6330-1 (West 2012).

³⁹ See Leslie Book, *The Collection Due Process Rights: A Missed Step in the Right Direction?*, 41 HOUS. L. REV. 1145 (2004); 26 U.S.C.A. § 7432 (d)(2) (West 2012).

⁴⁰ See *TAS History*, TAXPAYER ADVOCATE SERV. (Mar. 31, 2013, 5:05 PM), <http://www.taxpayeradvocate.irs.gov/About-TAS/History>.

⁴¹ The same rights to contest a proposed change in tax also exists if the IRS detects unreported income through the Automated Underreporter Unit and proposes to increase a taxpayer's tax or, through a Math Error Notice, the IRS proposes to adjust a taxpayer's tax

(either because the taxpayer had not exercised his right to an Appeals hearing or the Appeals division sustained the determination), and the IRS issues a Notice of Deficiency, the taxpayer has the right to a *de novo* review by the U.S. Tax Court prior to having to pay the deficiency, and the right to try to settle the case.⁴² (If the taxpayer did not exercise his right to an Appeals conference, such meeting may be held with an Appeals Officer. If he did exercise such right, then the taxpayer may meet with an IRS attorney handling the case.) Further, the Appeals Division's mission is to settle disputes based on hazards of litigation.⁴³ Thus, there is a built-in incentive into the administrative process to review perceived abuses of the power of the IRS to assess the tax in the first instance.

5. Abuses of Collection Power by IRS Employees

One reason why it is more important to provide remedies to taxpayers in collection matters than in assessment matters is that many taxpayers are represented at audits, but not many taxpayers can afford to be represented when the IRS attempts to collect assessed taxes.

In his testimony before the Senate Oversight Subcommittee, Jule R. Herbert, Jr., president of the National Taxpayers Legal Fund, identified two important reasons why the collections area is perhaps more prone to abusive practices by the Internal Revenue Service than the area of assessment: first, although as many as fifty percent of taxpayers being audited are represented by tax practitioners, less than five percent are represented during the collection process; and, second, even when taxpayers are represented in the collection process, tax practitioners themselves know very little about Internal Revenue Service collection procedures.⁴⁴

For the most part, IRS employees, follow the IRS rules.⁴⁵ However, when the IRS or its employees break the rules such as engaging in unauthorized collection actions, taxpayers may suffer real economic damages.⁴⁶ The most striking example

because of a mathematical error committed by the taxpayer. 26 U.S.C.A. § 6213(b) and (g) (West 2012).

⁴² Jones v. Comm'r, 97 T.C. 7, 18 (1991); I.R.M. 8.4.1.1 and DRM 8.6.4.1.

⁴³ IRM 8.6.4.1 (Aug. 15, 2012).

⁴⁴ Sprouls, *supra* note 1, at 591.

⁴⁵ As a measure of caution, Congress, as part of the 1998 IRS Reform and Restructuring Act, provided ten specific forms of misconduct for which an IRS employee could be terminated. Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 720-21. According to a study by the Joint Committee on Taxation, as of March 31, 2003, there were 490 substantiated violations of section 1203 of which 386 were for failure by an IRS employee to file his or her return. Of the nearly 90,000 employees in 2003, there were 3,970 complaints and more than 60% were found to be unsubstantiated. JOINT COMM. ON TAXATION, REPORT OF THE JOINT COMMITTEE ON TAXATION RELATING TO THE INTERNAL REVENUE SERVICE AS REQUIRED BY THE IRS REFORM AND RESTRUCTURING ACT OF 1998 44 (2003), available at <https://www.jct.gov/publications.html?func=startdown&id=2036>.

⁴⁶ In an investigation by the United States Treasury Inspector General for Tax Administration (TIGTA) closed during January 1, 2007 and December 31, 2008, IRS employees were found to have made unauthorized seizures of assets, falsified or destroyed documents to hide work error, retaliated or harassed, threatened audits of a taxpayer for personal gain, and committed civil rights violations, all of which constituted violations of

of abuse of the collection process by the IRS was set forth in the testimony of Messrs. Treadway, Tucker, and Maestri as part of hearings in 1987 on the then proposed first Taxpayer Bill of Rights.⁴⁷

Since the enactment of section 7433 in 1988, the IRS continues to engage in unauthorized collection actions. Examples are mostly anecdotal because there are not many reported cases that describe what collection action taxpayers allege is unauthorized. As discussed in this Article, this is because courts' interpretations of section 7433 have made it very difficult to proceed to the merits of cases. In turn, this leaves a shortage of reported cases describing alleged unauthorized collection cases.⁴⁸ However, the National Taxpayer Advocate, as discussed above, has

section 1203. Letter from Amy P. Jones, Disclosure Officer, Treasury Inspector Gen. for Tax Admin., TIGTA Investigations Closed Between January 1, 2007 and October 27, 2008 (Dec. 19, 2008), available at http://www.governmentattic.org/2docs/TIGTA-Closed-Invs_2007-2008.pdf.

⁴⁷ In hearings on TABOR in 1987, taxpayers testified that collection actions taken by the IRS went above and beyond what was needed and caused extreme hardship. On April 10, 1987, Mr. Thomas Treadway testified before the Senate Finance Committee on the Oversight of the IRS that the IRS had "ruined his business and harassed his friend (sic) Shirley Lojeski over an assessment that later proved to be incorrect." *The Time for Action on Taxpayers' Rights has Come*, 133 CONG. REC. 22,842-44 (1987) (statements of Sens. Pryor and Reid).

Two other small business owners also testified as to extreme collection measures by the IRS. Mr. Alan Tucker, who was involved in restoring slum housing in Denver, Colorado, testified that he discovered an error in his employment tax payments and contacted the IRS to report this. Within a few hours of meeting with an IRS revenue officer, the IRS seized his bank account. As a result of the IRS action, Alan Tucker and his thirty-one employees went out of business. *Id.*

Another small business owner, Danny Maestri, testified that when he reported to the IRS his error, the IRS only gave him ten days to pay the full amount. He testified that he was forced to put his sixty-year-old restaurant into Chapter 11 bankruptcy "to avoid having it taken and seized entirely by the Internal Revenue Service." Mr. Maestri's credit rating was damaged, but he managed to save his business. *Id.*

Senator Reid, who co-sponsored the legislation with Senator Pryor, reported:

There are many examples of small business people who simply were run out of business by the IRS. One example that comes to my mind is a business in operation 14 years. They owed taxes. They employed over 100 people. The owner said, "We will pay 60 percent of it today and we want to work out the balance with you." "No thanks," replied the IRS. The result: the business was closed; 100 people out of work; and the Government collected no taxes.

Id.

⁴⁸ The Conference Committee report in enacting section 7433 indicated that it was Congress's intent "that the general settlement authority of the IRS provided under Code section 7122 be utilized, where appropriate, to settle actions brought under this provision." *Conference Report on H.R. 4333 Technical and Miscellaneous Revenue Act of 1988*, 134 CONG. REC. 32, 890 (1988). When this author submitted a FOIA request to the IRS to get a statistical compilation of the dispositions of section 7433 claims, the Disclosure Office replied that such statistics were not kept. Freedom of Info. Act (FOIA) Request from Univ. of Conn. Law School Tax Law Clinic, to Taxpayer Advocate (on file with author). Hence, one cannot determine whether the IRS is following the Congressional mandate to settle section 7433 cases.

published reports discussing the incidence of abuse of the levy and lien procedures by the IRS. Such abuses have been handled by its local offices and are not reported section 7433 cases.

Many of the cases litigated under section 7433 are dismissed because the taxpayer either alleges unauthorized action connected with the assessment of tax rather than the collection of tax⁴⁹ or fails to exhaust administrative remedies.⁵⁰

The National Taxpayer Advocate in its reports to Congress for the annual years 2007 and 2008, listed actions under section 7433 as one of the ten most litigated area.⁵¹ During the period beginning June 1, 2006 through May 31, 2008, 178 cases were identified as section 7433 cases. None of the cases were decided on the merits for a taxpayer. Of the cases in which taxpayers prevailed in part or in full, all but one case involved prevailing on a motion to dismiss by the government, but failing at a later stage.⁵²

The IRS does not keep statistical records of the cases where the taxpayer prevails at an administrative stage and, thus, we cannot determine whether at the administrative level in a claim for damages for unauthorized collection whether there are any patterns.⁵³

However, in at least four cases the alleged unauthorized collection action involved levies by the IRS on a taxpayer's Social Security benefits at a rather greater than 15%.⁵⁴ As described below the alleged abuse in these cases is that the IRS has disregarded a statute enacted by Congress, section 6331(h), to limit the amount that the IRS can continually levy from a taxpayer's Social Security benefits to 15% of each payment until the statute on collections expires.⁵⁵ The IRS position contravenes

⁴⁹ See *Brewer v. Comm'r*, 430 F. Supp.2d 1254 (S.D. Ala. 2006); *Wood v. United States*, No. 02-21320-CIV-HUCK, 2002 WL 31973260 (S.D. Fla. Dec. 17, 2002); *Overton v. United States*, No. MO-02-CA-169, 2003 WL 21541566 (W.D. Tex. May, 27, 2003); *Bennett v. United States*, No. 6:06-CV-00017, 2007 WL 1976741 (W.D. Va. July 3, 2007); *Boritz v. United States*, 685 F. Supp. 2d 113 (D.D.C. 2010).

⁵⁰ *Mathis v. Skaluba*, No. 02-CV-102-B, 2003 WL 92159 (D. Wyo. Jan. 28, 2003), *aff'd*, 94 F. App'x 701 (10th Cir. 2003); 26 C.F.R. § 301.7433-1(e) (2012); *Johnson v. United States*, No. 5-92-67, 1992 WL 359632 (D. Minn. 1992); *McGarvin v. United States*, No. 4:92CV001816 JCH, 1993 WL 208814 (E.D. Mo. 1993); *Valladares v. Internal Revenue Serv.*, No. CV-F-00-4041-AWI/SMS, 2001 WL 670629 (E.D. Cal. 2001); *McGuirl v. United States*, 360 F. Supp. 2d 125 (D.D.C. 2004); *Martin v. United States*, No. 05-2506 (RMC), 2006 WL 2714944 (D.D.C. 2006).

⁵¹ TAXPAYER ADVOCATE SERV., NATIONAL TAXPAYER ADVOCATE ANNUAL REPORT TO CONGRESS 558 (2007); TAXPAYER ADVOCATE SERV., NATIONAL TAXPAYER ADVOCATE ANNUAL REPORT TO CONGRESS 455 (2008).

⁵² See *supra* note 51.

⁵³ The author's clinic submitted a Freedom of Information Act request asking for such statistics and was informed that such information was not available. FOIA Request, *supra* note 48.

⁵⁴ Two are described herein; the others are *Wallace v. United States*, 372 F. App'x 826, 830-31 (10th Cir. 2010); *Bowers v. United States*, 861 F. Supp. 2d 921 (C.D. Ill. 2012), *aff'd*, No. 12-2650, 2012 U.S. App. LEXIS 26043 (7th Cir. Dec. 20, 2012).

⁵⁵ Only one case has reached the merits of the IRS's position that it can continually levy a taxpayer's Social Security benefits at a rate higher than 15%. *Bowers*, 861 F. Supp. 2d at 923.

an express limitation enacted on continuous levies against Social Security benefits. As such, and as articulated in *Keohane*, it is an unauthorized collection action. The IRS has continued to choose in arbitrary instances to disregard this limitation and levy whatever amount it decides is appropriate of a taxpayer's Social Security benefit by issuing one levy that continues indefinitely; *Keohane v. United States*⁵⁶ articulates most clearly this unauthorized collection action.

Mr. Keohane is a U.S. citizen who lived in Malaysia. Mr. Keohane failed to file a tax return in 1994, the last year he was in the United States, due to a misunderstanding with his then employer that a return would be prepared for him. The IRS prepared a substitute for return for him and assessed a deficiency of \$18,903. The IRS sent Mr. Keohane notices of intent to levy, but he did not receive them.⁵⁷

In June 2005, the IRS began levying Mr. Keohane's Social Security payments in an amount equal to about 38% of his monthly payments. In December 2006, Mr. Keohane contacted the University of Connecticut School of Law Tax Clinic, a low-income taxpayer clinic, by email. The clinic accepted Mr. Keohane as a client and began researching his case. The first step taken by the clinic was to try to release the levy because it was causing Mr. Keohane an economic hardship. To do that, the clinic arranged to have a *pro bono* accountant prepare an original return. Mr. Keohane had worked in Indonesia during that time and was entitled to certain exemptions and credits. The original joint income tax return showed that Mr. Keohane and his wife did not owe taxes and all of the levied amounts were refunded.

However, in researching the action taken by the IRS, the clinic and Mr. Keohane found that the IRS had issued a paper or so-called manual levy on Mr. Keohane's Social Security payments; this paper was based on a legal position initially set forth in an IRS Counsel Advice issued in 1999.⁵⁸ The clinic only learned about this after asking the local Taxpayer Advocate Office to obtain a copy of the levy. The transcript we obtained indicated that the levy was executed under the federal payment tax levy program, which should have been limited to the 15% under section 6331(h).

Subsequently, Mr. Keohane was told that the IRS issued one paper (noncomputerized) levy against his Social Security payments.⁵⁹ The levy required the Social Security Administration to withhold and remit to the IRS an amount that was approximately 38% of Mr. Keohane's monthly Social Security payment without issuing a new levy each month.

In contrast, under section 6331(h), a continuous levy is a one-time notification to the holder or payor of the taxpayer's funds that directs the payor to continually levy

However, as Mr. Bowers appeared *pro se* there was not a well-articulated argument against the IRS. *See id.*

⁵⁶ *Keohane v. United States*, 775 F. Supp. 2d 87, 89 (D.D.C. 2011).

⁵⁷ *Id.* at 88.

⁵⁸ Memorandum from Alan C. Levine, Chief, Branch 1 of the Dep't of the Treasury on the Levy on Right to Social Sec. Payments, to Michael Calabrese, Midwest Dist. Counsel (Dec. 3, 1999); *see also* Office of Chief Counsel, Internal Revenue Serv., Dep't of the Treasury, General Litigation Bulletin 200130046 77-78 (2001).

⁵⁹ *Keohane*, 775 F. Supp. 2d at 89.

a set percentage (usually 15% as discussed below) until notified by the IRS to stop. In this way, it is what the IRS refers to as automated.

A manual levy, however, is a form sent to the payor or holder of the taxpayer's funds directing it to pay over to the IRS an amount or percentage of funds. Generally, this type of levy is a one-time levy and the IRS must reissue it to continue to grab the same amount or percentage of funds. The IRS in this case, however, argued that the levy had a continuous effect just like the automated levies.⁶⁰

Under regulations promulgated under section 6331(a), the IRS has ruled that "a levy extends only to property possessed and obligations which exist at the time of the levy. Obligations exist when the liability of the obligor is fixed and determinable although the right to receive payment thereof may be deferred until a later date."⁶¹ When the IRS levies Social Security benefits in excess of the 15% set forth in section 6331(h), it relies on a determination that Social Security benefits are "fixed and determinable."⁶²

The legal position taken by the IRS is that despite the enactment in 1998 of section 6331(h), which expressly authorizes the IRS to continuously levy a taxpayer's Social Security payments up to 15%, the IRS retained the right to levy Social Security payments in excess of that amount. The IRS argued that section 6331(h) did not replace the IRS's general levy power under section 6331(a), but instead gave it an additional power. The IRS reasoned that under section 6331(a) Social Security payments are determinable and fixed in amount and, as such, once the IRS issues one levy on a taxpayer's Social Security it remains in place at the amount initially levied and has a continuous effect until the full amount of the tax debt is paid.⁶³

Mr. Keohane argued that section 6331(h) replaced the authority of the IRS to issue any type of levy on Social Security that had a continuous effect and that by its express terms such levies were limited to 15%. Thus, the action taken by the IRS was reckless, intentional unauthorized collection action.⁶⁴

Mr. Keohane was not the only taxpayer to be subject to this unauthorized collection. Unfortunately for Mr. Keohane, the U.S. District Court for the District of Columbia ruled, and the Court of Appeals for the District of Columbia affirmed, that his action was filed outside the statute of limitations. The court did so by applying

⁶⁰ Michael Calabrese, Midwest Dist. Counsel, Opinion—Levy on Right to Social Security Payment, 2000 IRS NSAR 11574, 2000 WL 34423459 (July 16, 2000) (IRS Non-Docketed Service Advice Review).

⁶¹ 26 C.F.R. § 301.6331-1(a) (2012).

⁶² See *Gessert v. United States*, No. 06-C-448, 2007 U.S. Dist. LEXIS 24484 (E.D. Wis. Mar. 30, 2007).

⁶³ *Id.* Recently, the U.S. District Court for the Central District of Illinois ruled that the IRS position that it can levy on Social Security benefits in excess of 15% was allowable under section 6631(a), even after the enactment of section 6331(h). However, the reported case does not indicate whether the levy in that instance had a continuous effect as in *Keohane*. Further, as with many of the reported section 7433 cases, the plaintiff appeared *pro se* and thus, it is not clear if the legal arguments were framed as robustly as possible. *Bowers v. United States*, 861 F. Supp. 2d 921, 923 (C.D. Ill. 2012), *aff'd*, No. 12-2650, 2012 U.S. App. LEXIS 26043 (7th Cir. Dec. 20, 2012).

⁶⁴ *Keohane*, 775 F. Supp. 2d at 89.

the rule of strictly construing statutes of limitations in actions against the government; this analysis will be critiqued later in this Article.⁶⁵

Other taxpayers, all appearing *pro se*, have failed to convince courts that the IRS's similar actions contravened section 6331(h). Mr. Michael Ross Behr had his Social Security payments levied in excess of 60%.⁶⁶ Mr. Behr, who appeared *pro se*, the U.S. District Court for the District of Minnesota ruled that he had not articulated the reason why continually levying more than 15% was unauthorized collection action.⁶⁷ Mr. Behr had 60% of his Social Security payments continually levied by the IRS.⁶⁸ The court summarily dismissed his argument that this was unauthorized.⁶⁹ Ms. Wallace likewise failed to convince the U.S. District Court for the District of Wyoming that the IRS excessive levy of her Social Security benefits was unauthorized.⁷⁰ It is not possible to know how many other taxpayers have been subjected to continual levies against Social Security in excess of 15%. However, the fact that the IRS issued a Chief Counsel Advice and included it in a General Litigation Bulletin suggests that it could be many. This is the type of alleged illegal, unauthorized collection action that Congress envisioned should be examined through a section 7433 action.⁷¹

Some might point to the dearth of unreported cases as proof that it the relief under section 7433 is unnecessary. Some might conclude that the dismissal of almost all actions brought under section 7433 indicate that the perceived abuses by the IRS when collecting tax was in practice unfounded. However, the few cases that do exist, especially Mr. Keohane's case, instead suggest that the lack of cases illustrate just the opposite. It indicates that the IRS is so powerful that taxpayers have an almost Herculean task of discovering how the IRS took collection action, navigating the administrative process to exhaust administrative relief provisions, and finally challenging in federal district court unauthorized collection action by the IRS. For unrepresented taxpayers, this is impossible. In doing so, the courts have ignored the admonition by Congress to allow taxpayers to curb such abuses through the use of an appropriately limited cause of action against the IRS.

⁶⁵ See *infra* Part I.B.

⁶⁶ Behr v. United States, No. 09-502 (JRT/RLE), 2010 U.S. Dist. LEXIS 26039, at *23 (D. Minn. Feb. 8, 2010), *aff'd*, 399 F. App'x 125 (8th Cir. 2010).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Wallace v. United States, No. 08-CV-156-B, 2009 WL 6317440 (D. Wyo. Apr. 8, 2009).

⁷¹ Recently, the U.S. District Court for the Central District of Illinois ruled that the IRS could properly issue a manual levy against Social Security benefits that would have a continuous effect under section 6331(a). Such as levy could reach more than the 15% cap as set forth in section 6331(h). The plaintiff in this case was unrepresented and did not bring the cause of action under section 7433. The court, on its own, construed it as a cause of action under section 7433. As indicated above, many cases involving important legal issues suffer from the lack of legal representation for the litigating taxpayer. Bowers v. United States, 861 F. Supp. 2d 921, 923 (C.D. Ill. 2012), *aff'd*, No. 12-2650, 2012 U.S. App. LEXIS 26043 (7th Cir. Dec. 20, 2012).

B. Congressional Intent to Provide Taxpayers a Sword to Check Abuse of the Collection Actions by the IRS

Congress recognized that unbridled collection power could financially ruin taxpayers.⁷² As a result, Congress in 1988 enacted a Taxpayer's Bill of Rights (TABOR), giving taxpayers the express right to sue the IRS if it engaged in unauthorized collection action. Longstanding laws prohibiting taxpayers from suing the IRS stood in the way of taxpayers recovering from tortious IRS collection action.⁷³ Without a separate statutory right to litigate against the IRS for unauthorized collection action, a taxpayer is without any power to stop IRS action to collect taxes even if the taxpayer can prove it is unauthorized or illegal.

1. The "Berlin Wall" of Tax Collection Protection.

The ability to collect tax revenues has long been recognized as something that should be guarded against unfounded impediments. Accordingly, Congress provided three laws that prohibit taxpayers from stopping IRS collection actions: the Federal Torts Claim Act (FTCA),⁷⁴ the Tax Anti-Injunction Act,⁷⁵ and the Declaratory Judgment Act.⁷⁶ These have been described as the "Berlin Wall" of Tax Collection Protection.⁷⁷ All three of these statutes prohibit a taxpayer from filing a private action to stop IRS collection action.

Under the Federal Torts Claim Act, generally the U.S. government can be sued if its officers or employees conducted a tort against a person. The Act, however, expressly excludes tort actions against the IRS or its employees in connection with both the assessment and collection of tax. Thus, a taxpayer cannot try to recover damages in a tort action against an IRS employee if the employee engaged in tortious conduct while trying to enforce federal taxes. Actions against the IRS or its collection employees for wrongful death,⁷⁸ invasion of privacy and infliction of

⁷² *The Time for Action on Taxpayers' Rights has Come*, 133 CONG. REC. 22,842-44 (1987) (statements of Sens. Pryor and Reid).

⁷³ Omnibus Taxpayer Bill of Rights, Pub. L. 100-647, 102 Stat. 3730 (1988) (codified as amended in scattered sections of Titles 5 and 26 of the United States Code).

⁷⁴ 28 U.S.C.A. § 2674 (West 2012). Specifically exempted from the general provisions that allow tort damages against the government is "[a]ny claim arising in respect of the assessment or collection of any tax." 28 U.S.C.A. § 2680(c) (West 2012).

⁷⁵ 26 U.S.C.A. § 7421(a) (West 2012).

⁷⁶ 28 U.S.C.A. § 2201 (West 2012); 26 U.S.C.A. § 7421(a) (West 2012).

⁷⁷ *Implementation of the Taxpayers' Bill of Rights: Hearing Before the S. Comm. on Private Retirement Plans and Oversight of the Internal Revenue Service*, 101st Cong. 22 (1990) (statement of David L. Keating, Executive Vice President, National Taxpayers Union, Washington, D.C.).

⁷⁸ *Perkins v. United States*, 55 F.3d 910 (4th Cir. 1995). The widow of an employee of a mine retrieval company sued the United States for damages alleging a wrongful death claim. The IRS contracted with the widow's husband's company to retrieve certain mining equipment of a taxpayer, such equipment being located underground. The company, through the husband/employee, arranged to dewater the mine so the equipment could be retrieved. To do so, Perkins, along with three other employees, had to operate the pumps around the clock. This required them to sleep in a shack located near the mine. Perkins turned off a main ventilation fan that was disrupting his sleep. In doing so, contaminated air built up in the mine

emotional distress,⁷⁹ harassment,⁸⁰ and common law torts⁸¹ have been dismissed when brought under the Federal Torts Claim Act.

The Tax Anti-Injunction Act prohibits a court from enjoining certain government action. It is an especially powerful shield for the IRS. All actions to stop the IRS from collecting taxes are barred by this act.⁸² The collection action does not have to be alleged to have been unauthorized or excessive to be shielded. Ordinary collection activities, including filing liens, executing bank or wage levies, and offsetting subsequent refunds against past tax debts, even if they cause an economic hardship to the taxpayer, may not be stopped by a taxpayer filing a civil action. The policy reason for this is obvious: to facilitate the expeditious collection of taxes by the government.⁸³ Enjoining the government from collecting taxes until a federal court action has been fully resolved would give a whole new meaning to “budget deficits.”

Finally, the Declaratory Judgment Act, also embodied in section 7421(a) of the Internal Revenue Code, prevents a federal court from enjoining the IRS from collecting a tax.⁸⁴ There is a very limited exception to this prohibition: if a taxpayer can prove under a most liberal view, the U.S. could not establish its claim (such as where the IRS action is merely in the guise of collecting taxes) and the taxpayer would be irreparably harmed.⁸⁵ If such exception is proven then a federal court can exercise its equitable powers to enjoin the IRS action.⁸⁶

Actions by third parties, who are not taxpayers, may survive the throes of the Declaratory Judgment Act. For example, if the IRS serves a levy on a taxpayer's employer to turn over wages of the employee in payment of the employee's tax, the Act does not prevent the employer from seeking a declaratory ruling that complying with the IRS levy request would violate another law or contract.⁸⁷ In such a case, the plaintiff is not seeking to enjoin the collection of the tax, but rather whether the IRS

and when Perkins went down to check on the equipment, he was overcome by oxygen deprived air and died of asphyxiation.

⁷⁹ *Standifird v. Augustine*, No. CIV 93-1835, 1994 WL 637351 (D. Ariz. June 30, 1994) (Taxpayer brought an action in district court alleging invasion of privacy and infliction of emotional distress, tort actions, because an IRS revenue officer came to his property to serve an administrative summons. The action was dismissed because such action was barred by the exception for IRS collection actions from the Federal Tort Claims Act.).

⁸⁰ *Brewer v. Comm'r*, 430 F. Supp. 2d 1254 (S.D. Ala. 2006).

⁸¹ *Webb v. Smith*, No. 97 Civ. 0787, 1997 U.S. Dist. LEXIS 11308 (S.D.N.Y. Aug. 4, 1997).

⁸² *Baker v. United States*, No. 1:08-0268, 1997 U.S. Dist. LEXIS 11308 (S.D. W. Va. Sept. 11, 2009).

⁸³ *See Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7 (1962).

⁸⁴ 26 U.S.C.A. § 7421(a) (West 2012) provides: “No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person.”

⁸⁵ *See McGough v. United States*, No. 38747, 1974 U.S. Dist. LEXIS 12117 (E.D. Mich. Feb. 25, 1974) (holding that a loss of reputation does not constitute irreparable harm).

⁸⁶ *Enochs*, 370 U.S. at 7.

⁸⁷ *Sea-Land Serv., Inc. v. United States*, 622 F. Supp. 769 (D.N.J. 1985).

can use the plaintiff to do the collecting. However, if the plaintiff is the taxpayer and is alleging that the collection of the tax violates a statute or is unconstitutional and, therefore, the IRS should be stopped from collecting the tax, then the Declaratory Judgment Act shields the IRS from such an action.

2. Exceptions to the Sovereign Immunity Protection of the IRS

Despite the wall these statutes create prohibiting private actions against the IRS, there are gates that allow the government to waive its sovereign immunity and permit private citizens to sue the government. Without specific legislative action, the U.S. government and its employees are immune from suit by private persons under the doctrine of sovereign immunity. As discussed above, it is a long-standing rule of law that the U.S. government cannot be sued by its citizens unless it consents or Congress expressly waives this bar.⁸⁸ The origin of the rule that sovereign immunity can be waived is the Tucker Act, enacted in 1887.⁸⁹ Prior to the Tucker Act, citizens were prohibited from suing the government or its employees for monetary damages. Rather, to obtain relief, a citizen had to petition Congress to enact a private bill to appropriate funds to pay for such claims.⁹⁰

The Tucker Act gave the Court of Claims (now the United States Court of Federal Claims) and United States District Courts concurrent, nationwide jurisdiction to consider actions by citizens against the federal government for monetary damages.⁹¹ The actions had to be based on a federal statute, executive regulations, contracts, or the Constitution. In the federal tax area, the Tucker Act created a right for taxpayers to sue the IRS for refunds of taxes they had paid and now argued should be refunded.⁹² To do so, a taxpayer must file a timely claim for the refund with the IRS⁹³ and the amount of money that can be refunded is limited.⁹⁴ Further, the taxpayer must bring a suit within two years from the date the administrative claim for refund is denied by the IRS.⁹⁵ Under this statute, the taxpayer is not seeking to obtain money damages against the government. Rather, the taxpayer is trying to get back money he alleges was erroneously paid to the IRS.

⁸⁸ For an excellent history of this rule, see George Sisk, *The Continuing Drift of Federal Sovereign Immunity Jurisprudence*, 50 WM. & MARY L. REV. 517, 521-43 (2008). Professor Sisk explains that despite its mainstream acceptance, scholars continue to debate whether the rule of sovereign immunity has a sound basis in law and is more of a legal anachronism. *Id.* at 528. For purposes of this Article, however, the legal basis for the rule will not be questioned.

⁸⁹ Tucker Act, ch. 359, 24 Stat. 505 (1887). The act has subsequently been codified in various sections of Title 28 of the United States Code.

⁹⁰ See Richard H. Seamon, *Separation of Powers and the Separate Treatment of Contract Claims Against the Federal Government for Specific Performance*, 43 VILL. L. REV. 155, 175 (1988).

⁹¹ The U.S. District Courts, however, were limited to actions for monetary damages less than or equal to \$10,000. See 28 U.S.C.A. 1346(a)(2) (West 2012).

⁹² 26 U.S.C.A. § 6511 (West 2012); 26 U.S.C.A. § 7422 (West 2012).

⁹³ 26 U.S.C.A. § 6511(b)(1) (West 2012).

⁹⁴ 26 U.S.C.A. § 6511(b)(1)(B) (West 2012).

⁹⁵ 26 U.S.C.A. § 6532 (West 2012).

After opening the door to suing the federal government, Congress proceeded to provide other specific causes of action against the federal government. Most notably, Congress enacted the Federal Torts Claim Act in 1947 that allowed citizens to file tort claims against the United States.⁹⁶ However, Congress limited the reach of this act by excepting certain kinds of tort claims, most notably: (1) assault; (2) libel; (3) misrepresentation; (4) interference with contract; (4) discretionary or policy making functions; (5) transmission of mail; and (6) military combat.⁹⁷

In the beginning, as courts began to interpret these new causes of action they were nervous with exposing the government to monetary claims.⁹⁸ As a result, early Supreme Court decisions considered the statutes and its conditions or elements a matter of jurisdiction.⁹⁹ Hence, the rule that sovereign immunity is strictly construed in favor of the government emerged.¹⁰⁰ Under this theory, the statute of limitations begins when the act that created the cause of action occurs; there are no exceptions.¹⁰¹

Beginning in the late 1980s up to the present, federal courts, including the U.S. Supreme Court, have loosened the notion that all parts of statutes that waive sovereign immunity are jurisdictional. In 1990, in *Irwin v. Department of Veterans Affairs*, the Supreme Court held that equitable tolling applied to suits against the government in the same way it applied to private suits.¹⁰² At issue in *Irwin* was whether Title VII of the Civil Rights Act of 1964 provided for equitable tolling of the statute of limitations.¹⁰³ Equitable tolling means that rather than beginning the statute of limitations period on the date the act that created the action, the limitations period begins on the date the plaintiff *discovered* the facts or the date the plaintiff *reasonably should have discovered* the facts.¹⁰⁴ Further, if the act that begins the cause of action is continuous, then the statute of limitations does not begin until the continuous harm ends.¹⁰⁵ As a result, with respect to the federal causes of action

⁹⁶ Federal Tort Claims Act of 1946, ch. 753, 60 Stat. 832, 843.

⁹⁷ In the 1970s. Congress allowed citizens to sue the federal government for employment discrimination, *id.*, age discrimination, 42 U.S.C.A. § 2000e-16a (West 2012), discrimination based on disability, 29 U.S.C.A. § 621-634 (West 2012) and Pub. L. No. 101-336, 104 Stat. 327 (1990), codified at 42 U.S.C.A. §§ 12 and 111-113 (West 2012), and violation of environmental protection laws. *See, e.g.*, Clean Water Act, 33 U.S.C.A. §§ 1365(a)(2) and 1369(b) (West 2012); Clean Air Act, 42 U.S.C.A. §§ 7604(a)(1)-(2) and 7607(b) (West 2012).

⁹⁸ Sisk, *supra* note 88, at 551.

⁹⁹ *See id.* at 550-52.

¹⁰⁰ *See id.*

¹⁰¹ *See id.* at 562 (“It is quite another thing to allow the canon of strict construction to devolve into a methodology by which the government wins automatically whenever plausible arguments can be made for alternative interpretations of a statutory provision that sets forth standards, limitations, exceptions, or procedural rules for claims against the government already authorized by an express waiver.”).

¹⁰² *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 95-96 (1990).

¹⁰³ *Id.*

¹⁰⁴ *See id.* at 457-58.

¹⁰⁵ *See Hoery v. United States*, 324 F.3d 1220, 1222 (10th Cir. 2003).

that waive sovereign immunity, the Supreme Court has concluded that the statute of limitations on such actions is not jurisdictional and thus, is subject to equitable tolling.¹⁰⁶

3. The Legislative History Section 7433 Enacted in the First Taxpayer's Bill of Rights

In 1987, Senator David A. Pryor held hearings in connection with a the first proposed IRS Taxpayer Bill of Rights and additional hearings with respect to the IRS's implementation of that bill of rights.¹⁰⁷ During the hearings on the proposed bill, Senator Pryor highlighted how unchecked IRS collection actions could produce irreparable harm. In subsequent hearings to determine how the IRS was implementing the Taxpayer Bill of Rights, particularly powerful testimony of Mrs. Council, whose husband had committed suicide after years of unsuccessfully trying to get the IRS to release an improper lien, was given:

Statement of Kay M. Council, Taxpayer, High Point, NC

Mrs. Council: Mr. Chairman, my name is Kay Council and I have lost my voice today of all days. I live in High Point, North Carolina. I am 48 years old and because of the IRS I am a widow.

I came home in June 1988 and found the lights on, the house empty, and a note from my husband that said he had committed suicide. . . .

I don't remember many details from the rest of the night, but I will never get over what I had lost that night—what the IRS did to us, what the IRS drove my husband to do. He was 49 years old.

Four months later, finally able to pay our attorneys up to date with the money from Alex's life insurance, I went to court and beat the IRS. The court entered a judgment barring the IRS from collecting \$300,000 in tax, penalties and interest it claimed that we owed. The court agreed that we owed nothing. The court ordered the IRS to cancel the tax lien that it had placed on our property, an illegal lien that had ruined our business. Our income barely covered our expenses.

The IRS was wrong from the day they sent us the first notice. We were innocent from day one and the court decisions and court orders say that. But look what was done to my life. People sit back and say, well, this is a terrible story, but it is surely an exception to the rule and this sort of thinking can never happen to me. They are very wrong. This could happen to anyone.¹⁰⁸

¹⁰⁶ See *Irwin*, 498 U.S. at 96.

¹⁰⁷ *Implementation of the Taxpayers' Bill of Rights Hearing Before the S. Comm. on Private Retirement Plans and Oversight of the Internal Revenue Service*, 101st Cong. 18 (1990) (statement of Kay M. Council).

¹⁰⁸ *Id.*

Section 7433 was first enacted as part of the first Taxpayer's Bill of Rights. Originally introduced in a Senate bill, and later subject to review by the Conference Committee, the report described the reason for the provision as follows:

The conference agreement follows the Senate amendment, with several modifications. First, the right to sue authorized by the provision is limited to allegations of reckless or intentional disregard by an IRS employee. An action may not be brought under this provision alleging mere negligence or carelessness on the part of an IRS employee. Second, the provision is limited to reckless or intentional disregard in connection with the collection of tax. An action under this provision may not be based on alleged reckless or intentional disregard in connection with the determination of tax. Third, the provision is limited to reckless or intentional disregard of the Internal Revenue Code and the regulations thereunder. An action may not be brought under this provision based on an alleged violation of a Federal law other than the Internal Revenue Code or a regulation promulgated thereunder. Fourth, the conference agreement deletes the provision barring a taxpayer from any recovery if the taxpayer was contributory negligent. Fifth, the total of actual damages plus the costs of the action recoverable under this provision may not exceed \$ 100,000. Sixth, an action under this provision may be brought only in Federal district court and not in the Tax Court. Seventh, except as provided by new Code section 7432, an action brought under this provision shall be the exclusive remedy for recovering damages resulting from reckless or intentional disregard of a provision of the Internal Revenue Code, or a regulation promulgated thereunder, by an IRS employee engaged in the collection of any Federal tax. Eighth, a taxpayer's claim under this provision is barred unless the action is commenced within two years after the date the right of action accrues. Ninth, the conference agreement deletes the specific authority granted the IRS to settle administratively claims under this provision. However, it is the intent of the conferees that the general settlement authority of the IRS provided under Code section 7122 be utilized, where appropriate, to settle actions brought under this provision. However, the amount of damages awarded under the provision shall be reduced by the amount of such damages which could have reasonably been mitigated by the taxpayer. The conferees intend that the general accrual rule applied under the Federal Tort Claims Act (28 U.S.C. sec. 2401(b)) be applied to actions under this provision; that is, the right of action does not accrue until a claimant has had a reasonable opportunity to discover all the essential elements of a possible cause of action.¹⁰⁹

Section 7433 was enacted as the exclusive form of relief for a taxpayer to obtain damages for unauthorized collection action and remains the exclusive relief form

¹⁰⁹ H.R. CONF. REP. NO. 100-1104 at 5589, 1988 U.S.C.C.A.N. 5048, 5289 (1988). The report went on to cite *Rosales v. United States*, 824 F.2d 799 (9th Cir. 1987) and *Ziedler v. United States*, 601 F.2d 527 (10th Cir. 1979). These cases and their liberal interpretations of the Federal Tort Claims Act's statutes of limitation is discussed in Part I.B.4., *infra*.

today.¹¹⁰ As originally enacted, it provided for damages topped at \$100,000 for unauthorized collection that was reckless or intentional.¹¹¹ Since its original enactment, Congress has added actions for negligent unauthorized collections actions and increased the amount of damages to one million dollars for reckless or intentional action by the IRS or for willful violation of the automatic stay or discharge provisions of the Bankruptcy Code.¹¹² Further, Congress clarified that a taxpayer must exhaust all administrative remedies before filing an action.¹¹³

In its initial form, the Conference Committee specifically indicated that the statute of limitations did not begin until a taxpayer had a reasonable opportunity to discover all the essential elements of the action.¹¹⁴ Further, the Committee noted two cases involving the Federal Torts Claim Act in referring to the two year statute of limitation provision of section 7433: (1) *Rosales v. United States*, 824 F.2d 799 (9th Cir. 1987); and (2) *Zeidler v. United States*, 601 F.2d 527 (10th Cir. 1979).

4. The Importance of *Rosales* and *Zeidler*

The two cases cited by the Conference Committee conferees were decided under the Federal Tort Claims Act and applied a liberal reading of the statute of limitations. In *Rosales*, the plaintiff was the wife of a serviceman.¹¹⁵ In the summer of 1981, she became pregnant and went to a medical center at the Marine Corps installation in California.¹¹⁶ During an examination by a physician at Camp Pendleton Regional Medical Center, Mrs. Rosales told the doctor that she had been using an intrauterine device (IUD) as a form of birth control.¹¹⁷ At this initial examination, the doctor did not find it, told her it must have fallen out, and referred her to an outside clinic.¹¹⁸ Medical personnel at that clinic told her that many women with IUDs in place

¹¹⁰ 26 U.S.C.A. § 7433 (West 1998).

¹¹¹ Omnibus Taxpayer Bill of Rights, Pub. L. No. 100-647, 102 Stat. 3342 (1988), amended by An Act to Amend the Internal Revenue Code of 1986 to Provide for Increased Taxpayer Protections, Pub. L. No. 104-168, 110 Stat. 1452 (1996).

¹¹² An Act to Amend the Internal Revenue Code of 1986 to Restructure and Reform the Internal Revenue Service, and for Other Purposes, Pub. L. No. 105-206, 112 Stat. 685, § 3102 (1998).

¹¹³ See An Act to Amend the Internal Revenue Code of 1986 to Provide for Increased Taxpayer Protections, Pub. L. No. 104-168, 110 Stat. 1452, § 801(a) (1996) (increasing the level of damages to \$1,000,000); see also An Act to Amend the Internal Revenue Code of 1986 to Restructure and Reform the Internal Revenue Service, and for Other Purposes, Pub. L. No. 105-206, 112 Stat. 685 § 3102(a), (c) (1998) (adding as a basis of recovery negligent action, but made it clear that administrative remedies must first be exhausted).

¹¹⁴ While the conference report for the public act that enacted section 7433 made it clear that the IRS was to use its general settlement powers to settle section 7433 cases, the IRS has not kept or published any statistics on how many section 7433 claims are filed and how many are settled. FOIA Request, *supra* note 48.

¹¹⁵ *Rosales v. United States*, 824 F.2d 799, 801 (9th Cir. 1987).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

deliver normal, healthy babies and no one informed her of the risks of continuing the pregnancy or of alternatives to continuing the pregnancy.¹¹⁹

In October 1981, the hospital performed an ultrasound, which revealed the IUD in place.¹²⁰ At that time, no one at the hospital informed Mrs. Rosales of the possible dangers to her or the fetus with the IUD in place.¹²¹ A few months later, in December 1981 Mrs. Rosales was referred through a federal program to a civilian doctor.¹²² The doctor told her there were risks associated with the pregnancy in light of the IUD, but did not specify the risks; he also counseled her on the dangers of aborting at that stage in the pregnancy.¹²³

In March 1982, Mrs. Rosales delivered her baby by Cesarean section, three weeks prematurely.¹²⁴ The delivering doctor indicated that her baby girl was healthy and at her six week check-up, the doctor merely noted that she was small for her age.¹²⁵ In July 1982, Mrs. Morales took the baby for a four-month check-up to a local clinic, at which a doctor noted that she was small for her size and had a "lag on her eyelid."¹²⁶ A month later, when Mrs. Rosales returned for a follow up visit, the doctor indicated a concern for the baby's size and lethargy; a month after that after being referred to a specialist, Mrs. Rosales was informed that her baby had nonprogressive encephalopathy (retardation) and that one of the possible causes was an intrauterine infection, which later was found to have been caused by the IUD.¹²⁷

On September 27, 1984, Mrs. Rosales filed an action under the Federal Claims Tort Act asserting medical malpractice.¹²⁸ The action was filed more than three years after Mrs. Rosales was first seen with respect to her pregnancy.¹²⁹ The United States moved to dismiss based on the action being outside the statute of limitations, arguing that a claim under the FTCA must be filed within two years of when the action accrues (the same language used in section 7433).¹³⁰

First, the court concluded that where the jurisdictional and substantive issues are so intertwined, the court should not entertain a motion to dismiss—a jurisdictional motion.¹³¹ Rather, it should decide using the summary judgment standard.¹³²

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 802.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 803.

¹³² *Id.* at 802-03, 803 n.4.

Second, the court rejected the government's claim that the statute of limitations started in December 1981 when the doctor informed Mrs. Rosales that an IUD could pose risks.¹³³ The court rejected this interpretation of the statute, holding:

This approach misconstrues the "should have reasonably known" standard. As we have recently held, the standard "looks not to the likelihood that a plaintiff would in fact have discovered the cause of his injury if he had only inquired, but instead focuses on whether the plaintiff could reasonably have been expected to make the inquiry in the first place." In this case, not only did the Rosaleses have no reason at Victoria's birth to inquire about any cause of injury; they also had no reason to believe there was an injury to Victoria at all.

A medical malpractice claim under the FTCA accrues only when the injury has manifested itself. Patients may reasonably rely on assurances by physicians that complications are normal and do not indicate that an actual injury has occurred.¹³⁴

The court concluded that Rosales did not know the cause of the baby's injury until the September 1982 when the doctor specifically informed them that her retardation may have been caused by an intrauterine infection.¹³⁵ Prior to that, including at the birth of the child, no doctor had given them reason to inquire as to the effect that the IUD may have had on their baby's development.¹³⁶ In doing so, the court rejected the government's position that at the first inference that an IUD may cause risks to the fetus, the plaintiff's became aware or could have exercised reasonable diligence to determine the connection.¹³⁷

In *Zeidler*, the other case cited by the Conference Committee, the plaintiff had served in the Air Force and after discharge, entered a Veterans Administration Hospital in February 1945.¹³⁸ In 1947 and again in 1948, doctors at the hospital performed lobotomy operations.¹³⁹ The plaintiff brought an action under the Federal Tort Claims Act in 1976 through his conservator, who claimed that the Veterans Administration Hospital was negligent in performing the operations and the care of the plaintiff and that the operations had taken away the Mr. Zeidler's mental function.¹⁴⁰

The conservator, who was appointed in October 1975, asserted that he was first able to examine Mr. Zeidler's medical records in January 1976 and that was the first time the asserted negligence was discovered; the government argued that the statute

¹³³ *Id.* at 803.

¹³⁴ *Id.* at 804 (citations omitted).

¹³⁵ *Id.* at 804-05.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Zeidler v. United States*, 601 F.2d 527, 528 (10th Cir. 1979).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

of limitations was to be strictly construed and that it began when the lobotomies were performed.¹⁴¹

The District Court agreed with the government concluding that the statute of limitations in Federal Tort Claims Acts, actions against the government, must be strictly construed.¹⁴² However, the Court of Appeals, the case cited by the Conference Committee, reversed.¹⁴³ It ruled that in actions involving medical malpractice under the Federal Tort Claims Act a more liberal rule applies and the cause of action does not accrue until the plaintiff has had a reasonable opportunity to discover all the essential elements of the action.¹⁴⁴ The court reasoned that “A tort growing out of malpractice is not to be barred by the statute of limitations when the delay in commencing the suit resulted from blameless ignorance.”¹⁴⁵

The rulings in *Rosales* and *Zeidler* were subsequently upheld by the U.S. Supreme Court in *United States v. Kubrick*.¹⁴⁶ The Supreme Court agreed that that under the FTCA a medical malpractice claim accrues when a claimant became aware of, or should have become aware of, the facts constituting the negligent act, not when the claimant became aware that the doctor's act constituted legal negligence.¹⁴⁷

The citations to *Zeidler* and *Rosales* in the legislative history of section 7433 are highly persuasive in the interpretation of the liberal interpretation of the statute of limitation. As the Supreme Court has recognized, legislative history instructs the interpretation of statutes.¹⁴⁸ Because the strong history of limitations on taxpayer actions against the United States, Congress had to indicate that section 7433 was a game changer. Without reference to cases decided under the Federal Tort Claims Act, there would not be any suggestion that Congress intended the statute to be interpreted unlike usual tax statutes. Thus, the express reference to cases where the statute of limitations was liberally interpreted to give plaintiffs more time to bring a tort action against the government signals the intention of Congress to take align section 7433 with statutes that provide relief for tortious acts and not with usual taxing authorities. By expressly citing these two cases in a footnote referring to how the statute of limitations should be applied, Congress made clear that the statute of limitations in section 7433 was to be applied under the more liberal discover/reasonable opportunity standard rather than the strictly construed standard usually applied to actions seeking money damages against the government.

¹⁴¹ *Id.*

¹⁴² *Id.* at 529.

¹⁴³ *Id.* at 530.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 529.

¹⁴⁶ *United States v. Kubrick*, 444 U.S. 111 (1979).

¹⁴⁷ *See id.* at 123-24.

¹⁴⁸ *Chandler v. United States*, 425 U.S. 840, 848-49 (1949). The Court looked to the committee reports when considering whether the legislative history supported the claim that a federal employee's right to a trial *de novo* was the same right enjoyed by a private-sector employee. *Id.* at 849-59.

C. Courts Have Misread the Section 7433 Statute of Limitations in Contravention of its Legislative History

Having concluded that the Conference Committee reference to *Zeidler* and *Rosales* signaled a congressional intent to frame section 7433 as action to prevent tortious actions by the IRS, the courts' narrow interpretation of the sections statute of limitations is incorrect. As under the FTCA, the statute of limitations must be liberally construed to assist taxpayers in bringing actions to stop tortious unauthorized collection by the IRS. Given that in enacting section 7433 Congress expressly referenced two cases decided under the FTCA that liberally interpreted the statute of limitations as guidance for interpreting the statute of limitations in Section 7433, if the issue were presented to the Supreme Court we would expect that the Court would hold that its interpretation is subject to equitable tolling, rather than the strict jurisdictional interpretation. Hence, the proper inquiry for purposes of determining when the statute of limitations on a section 7433 begins is when did the taxpayer know about the facts that constituted the alleged unauthorized collection action or when should the taxpayer reasonably have known such facts. As discussed below, the courts that have considered the application of the statute of limitations under section 7433 have misapplied it by concluding that it begins when a taxpayer first gets a notice of the IRS collection notice, equating that notice with the taxpayer then having an opportunity to reasonably determine the facts that constituted the alleged unauthorized collection action.¹⁴⁹ While this applies the rule set forth in the IRS's regulations under section 7433,¹⁵⁰ applying the regulation rule ignores the clear legislative history to provide a taxpayer with a longer opportunity to discover the reason for IRS collection action to determine if it is unauthorized. By applying this rule, the courts would require a taxpayer to file a claim under section 7433 each and every time the IRS takes enforced action without any knowledge of whether or not such collection action is unauthorized or proper. Such an interpretation not only ignores the legislative guidance but would create an administratively unworkable system. If every taxpayer filed a claim for damages every time the IRS took collection action, the IRS would quickly become overwhelmed with investigating such claims or else would be forced to summarily dismiss such claims.

The most recent example of misapplying the legislative history in a section 7433 case is the U.S. Court of Appeals for the District of Columbia decision in *Keohane v. United States*.¹⁵¹ The Court of Appeals held that section 7433:

[R]equires only "a reasonable opportunity to discover" every element of the cause of action. The language in the regulation—a reasonable opportunity—sets a relatively low bar. In other contexts, we have said that the "reasonable opportunity to discover" language in a statute of limitations "bars a suit if the plaintiff had such notice as would lead to a reasonable person either to sue or to launch an investigation that would likely uncover the requisite facts."

Here, Mr. Keohane knew that a levy existed. As soon as he knew of that levy, he had a "reasonable opportunity" to learn that the IRS was relying

¹⁴⁹ See *supra* Part I.A.5.

¹⁵⁰ Treas. Reg. § 301.7433-1(g)(2) (1967).

¹⁵¹ *Keohane v. United States*, 669 F.3d 325 (D.C. Cir. 2012).

upon a single paper levy rather than issuing a new paper levy each month.¹⁵²

The court's reliance on the decision in *Sparshott* is misplaced and disingenuous support for narrowly applying the regulation's rule of reasonable opportunity.¹⁵³ To begin with, the statute involved in that case involved a cause of action between two private parties, not the government and a private party. Title III of The Omnibus Crime Control and Safe Streets Act of 1968, also known as the Wiretap Act, allows a private person to sue either another private person or a government agency for the unauthorized, nonconsensual interception of "wire, oral, or electronic communications."¹⁵⁴ Secondly, the statute of limitations expressly provides that the "action under this section may not be commenced later than two years after the date upon which the claimant first has a reasonable opportunity to discover the violation."¹⁵⁵ In contrast, the statute of limitations under section 7433 provides "may be brought only within 2 years after the date the right of action accrues."¹⁵⁶ Thirdly, the facts in *Sparshott* clearly indicate that the plaintiff had actual knowledge of the nonconsensual recording of her phone conversations more than two years from the date the action was filed.¹⁵⁷

Another case decided earlier by the Court of Appeals for the District of Columbia under the same statute is more closely related to the *Keohane* facts. In *Berry v. Funk*,¹⁵⁸ a private party brought a claim of action against U.S. Department of State employees for recording telephone conversations between him and an employee of the U.S. Department of State without his knowledge or consent. In that case, as in *Keohane*, the government challenged the action as having been filed outside the statute of limitations under the applicable statute. The government in that case, as in *Keohane*, argued that "Berry must have realized—presumably as a matter of law—that he had been monitored once one of his calls was broadcast throughout the Operations Center on October 4[, 1996]."¹⁵⁹

However, the Court of Appeals for the District of Columbia, concluded that:

Berry was not in the Watch Center, and the government has not explained how or why Berry would have known that his call was broadcast. To

¹⁵² *Id.* at 329 (citations omitted). The court cited *Sparshott v. Feld Entm't, Inc.*, 311 F. 3d 425, 428-29 (D.C. Cir. 2002) (interpreting 18 U.S.C. § 2520(e)).

¹⁵³ The statute in issue in *Sparshott*, 18 U.S.C. § 2520, expressly included language that started the statute of limitations when the plaintiff had a "reasonable opportunity to discover the violation." 18 U.S.C.A. § 2520 (West 2012). Section 7433, in contrast, does not contain such specific language.

¹⁵⁴ Omnibus Crime Control and Safe Streets Act of 1968, Tit. III, 18 U.S.C. § 2511 (2008).

¹⁵⁵ 18 U.S.C.A. § 2520(e) (West 2012).

¹⁵⁶ 26 U.S.C.A. § 7433(d)(3) (West 2012).

¹⁵⁷ *See Sparshott*, 311 F.3d at 427-29.

¹⁵⁸ *Berry v. Funk*, 146 F.3d 1003 (D.C. Cir. 1999).

¹⁵⁹ *Id.* at 1009.

conclude on this record that the government has met its burden of showing Berry was contemporaneously on notice of the monitoring is out of the question. Indeed, the government's claim is so conclusory it is doubtful that it has even raised a genuine issue as to a material fact—let alone established that the factual issue was conclusively resolved in its favor under Rule 56.¹⁶⁰

Thus, the court's reasoning does not support its disregard of the express legislative history of section 7433 nor support its application of a regulation standard that has no basis in the legislative history.¹⁶¹

The Court of Appeals was not alone in this approach; it followed other lower court cases in applying the "reasonable opportunity" rule narrowly.¹⁶² However, the upshot of the application of its articulation of the reasonable opportunity rule is that a taxpayer must proactively file a claim under section 7433 as soon as it learns the IRS is taking enforced collection, whether or not the taxpayer suspects that it is unauthorized.

This absurd result does not reflect the legislative history of section 7433. By citing to the cases it did, Congress articulated its understanding that it may be very difficult for a taxpayer to find out the facts that support a claim that IRS collection action is unauthorized. As in *Zeidler*, a taxpayer may not have the ability by himself to investigate the actions of the IRS to learn the cause of collection action. In *Zeidler* it was not until a conservator obtained the records of the plaintiff thirty years after the operation that was the alleged tort occurred.¹⁶³ Yet under the rule applied by the courts in section 7433, a court would have determined that Mr. Zeidler had a reasonable opportunity to know of the tortious action by the doctor as soon as the operation ended.

Congress enacted Section 7433 to provide relief to taxpayers from IRS tortious collection misconduct by the IRS or its employees.¹⁶⁴ By its express terms the collection action has to be a negligent, intentional or reckless disregard of the law or IRS regulations, rules and procedures. As discussed below in Part D, the nature of section 7433 distinguishes it from tax relief claims where the statute of limitation narrow construction is warranted.

Even when courts have applied the notion of equitable tolling, they have misunderstood the action that begins the statute or the difficulties that a taxpayer has in discovering IRS unauthorized collection. To begin with, most courts have relied upon an IRS notice to the taxpayer that a collection action occurred to be the point at which a taxpayer did know or should have known that a cause of action under section 7433 began.

¹⁶⁰ *Id.*

¹⁶¹ *Conference Report on H.R. 4333 Technical and Miscellaneous Revenue Act of 1988*, 134 CONG. REC. 32, 890 (1988).

¹⁶² *See Berry*, 146 F.3d at 1009.

¹⁶³ *Zeidler v. United States*, 601 F.2d 527, 528 (10th Cir. 1979).

¹⁶⁴ *See supra* Part I.A.

For example, in *Ranciato v. United States*,¹⁶⁵ the unauthorized collection action was the execution of six levies served on Mr. Ranciato's clients when he did not agree to extend the period for collecting taxes that were due.¹⁶⁶ The IRS decided not to permit Ranciato to enter an installment agreement unless he agreed to extend the period of time the IRS had to collect the tax.¹⁶⁷ Due to the unauthorized collection action, Mr. Ranciato paid nearly \$40,000 more than if he had paid under the installment agreement up to the time the collection period expired.¹⁶⁸

The IRS sent notices of intent to levy during 1995 and 1997. The IRS, however, issued a press release on June 5, 1998, "admitting that its practice of terminating installment agreements because taxpayers would not agree to extend the collection period was "not in accordance with law."¹⁶⁹ The court agreed with the government and concluded that even applying equitable tolling to the statute of limitations under section 7433 the taxpayer:

[H]ad a reasonable opportunity to discover all the essential elements of a cause of action under 26 U.S.C. § 7433 at the time he became aware of the collection activity. He became aware of the collection activity at issue as early as February of 1997, when he received the notice of the levies, and certainly no later than April 21, 1997, when he made a full payment for the 1985 taxes owed.¹⁷⁰

However, at that time the taxpayer did not have any way of discovering or knowing that the conduct by the IRS—the threat of not levying without an extension of the period for collection—was unauthorized. The first time the taxpayer could have reasonably discovered that fact was on June 5, 1998 when the IRS issued a notice indicating that such action was unauthorized.¹⁷¹ The court mistook the basis for the cause of action as collection action, generally, rather than unauthorized collection action. The court incorrectly concluded that prior to the announcement the conduct of the IRS employees was authorized.¹⁷² The fact that the IRS announced that what the IRS employees were doing was illegal does not by itself make all such prior actions legal or authorized.

The court further misinterpreted the basis of the action under section 7433 when it concluded that the IRS announcement was equivalent to the law and that the taxpayer is charged with knowledge of the law. Finding that the only way the taxpayer could have made an equitable tolling argument was to prove that the IRS withheld information, committed covert deeds, discovering the facts required a

¹⁶⁵ *Ranciato v. United States*, No. 3-00-CV-1024, 2001 U.S. Dist. LEXIS 743 (D. Conn. Jan. 23, 2001).

¹⁶⁶ *Id.* at *3.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at *2-3.

¹⁶⁹ *Id.* at *1 (citing Taxpayer Advocate, IR Notice 98-44).

¹⁷⁰ *Id.* at *8-9.

¹⁷¹ *Id.* at *4.

¹⁷² *Id.* at *13.

lengthy investigation, or that the taxpayer was under a disability or faced an impediment to bringing the action, the court held that:

Taxpayers—like the IRS itself—[are] chargeable with knowledge of the law . . . [t]he IRS is not obligated to notify taxpayers which of its actions constitute illegal actions and such notification is not an element of a § 7433 claim. In this case, Ranciato knew the essential elements of his § 7433 claim by April 21, 1997. Therefore, the statute of limitations had expired at the time he filed his complaint and his action is time barred.¹⁷³

While the IRS may not be obligated to notify a taxpayer that its collection actions are unauthorized, likewise a taxpayer should not be expected to interview supervisors, ask for a legal opinion, or take extraordinary action to discover unauthorized collection action.

Courts have also held that the date the IRS files a federal tax lien or the first date that it executes a levy begins the statute of limitations period under section 7433, again equating standard collection action with knowledge that such collection action may be unauthorized.

In *Manant v. United States*, the taxpayers alleged the IRS took the unauthorized collection action of filing a federal tax lien because it failed to issue a notice of demand.¹⁷⁴ Notice and demand are indeed statutory requirements before the IRS can take enforced collection action, which includes filing a federal tax lien.¹⁷⁵ The court held that the fact that a federal tax lien was filed, automatically put the taxpayers on notice that a notice of demand was missing when they received the notice that the tax lien had been filed.¹⁷⁶ Quite the contrary is true. A reasonable taxpayer would believe that the IRS took all the necessary steps it had to before filing a notice of federal tax lien. According to the court's reasoning, every collection action that the IRS takes should be presumed to be unauthorized and trigger the duty of the taxpayer to investigate.

Likewise, in *Wallace v. United States*¹⁷⁷ and *Keohane*,¹⁷⁸ the courts incorrectly held either the notice of levy or the first executed levy is when the taxpayers reasonably should have known that the IRS's actions were unauthorized. In both *Wallace* and *Keohane*, the taxpayers were notified that the IRS was levying their Social Security or retirement funds. In *Wallace*, the taxpayer had received an IRS notice of levy before the levies began¹⁷⁹ and in *Keohane* the taxpayer, who lived outside the United States, did not receive the notice of intent to levy or notice of levy sent by the IRS, but was notified by the Social Security Administration that the IRS

¹⁷³ *Id.* at *10-11 (citations omitted).

¹⁷⁴ *Manant v. United States*, 2011-2 T.C. ¶50, 516, (D. Haw. 2011).

¹⁷⁵ 26 U.S.C.A. § 6331(a) (West2012).

¹⁷⁶ *Id.*

¹⁷⁷ *Wallace v. United States*, 372 F. App'x 826 (10th Cir. 2010).

¹⁷⁸ After holding that the statute of limitations was to be strictly and narrowly construed in favor of the government, the District Court went on to consider the plaintiff's argument as to equitable tolling. *Keohane v. United States*, No. 08-02081, 2011 U.S. Dist. LEXIS 34489 (D.D.C. Mar. 31, 2011).

¹⁷⁹ *Wallace*, 372 F. App'x at 829.

was levying his Social Security benefits.¹⁸⁰ In both cases, the alleged unauthorized collection action was that the IRS was levying Social Security benefits under a manual levy kept in effect continuously. The taxpayers were aware that the law provided for a continuous levy under section 6331(h), but that such levy was limited to 15% of the monthly payment. From these two facts, the courts reasoned that because the IRS was levying more than 15% per month the taxpayer was put on notice and had the opportunity to learn that the IRS was taking unauthorized collection. However,

What the courts did not recognize is that even if the taxpayers' had called the IRS toll free number, they would most likely not have learned that the levy was a manual levy being exercised in an unauthorized continual effect. In *Keohane*, the clinic was only able to find out the basis for the IRS levy after asking for the Taxpayer Advocate to investigate and submitting a Freedom of Information Act (FOIA) request for the levy document.¹⁸¹ Such action is well beyond the abilities or means of most taxpayers, especially those like Mrs. Wallace who are unrepresented.

The reference to both the *Rosales* and *Zeidler* cases in the Conference Committee report regarding the statute of limitations under section 7433 cannot be treated as a gratuitous reference. Both of those cases involve action by the government (in *Rosales*, action by the first treating doctor and in *Zeidler*, action by the Veterans Administration Hospital) that occurred well before the two years from the date the action was filed, was obviously difficult for the harmed parties to find out, and showcased how bureaucracies often make it impossible for unsophisticated parties to discover facts that led to action that ended up being tortious. Even if the taxpayers know the underlying facts, they may not know the actions are tortious; if they don't know the underlying facts, they will have no chance of knowing if they are tort victims.

To be consistent with the Congressional intent in enacting section 7433 as part of the first Taxpayer Bill of Rights, courts must allow a taxpayer to bring an action for unauthorized collection action against the IRS within two years of when the IRS is informed by the IRS that the action is unauthorized or confirms based on a direct request (either written or oral) the basis of the collection action.

Courts have applied the reasonable opportunity to discover rule in section 7433 cases without truly understanding the extreme burden a taxpayer has to discover the precise actions of IRS employees. For example, in *Gessert v. United States*,¹⁸² a taxpayer alleged that the IRS officer made misrepresentations as to how certain payments would be applied to trust fund liabilities of a corporation. The taxpayer filed a motion to amend his complaint, which the government opposed.¹⁸³ The court denied the taxpayer's motion to amend, ruling that such amendment was futile.¹⁸⁴

¹⁸⁰ *Keohane*, 2011 U.S. Dist. LEXIS 34489, at *2.

¹⁸¹ FOIA Request, *supra* note 48.

¹⁸² *Gessert v. United States*, No. 06-C-448, 2007 U.S. Dist. LEXIS 24486 (E.D. Wis. Mar. 30, 2007), *aff'd*, in later proceedings at 627 F. Supp. 2d 942 (E.D. Wis. 2009), 703 F.3d 1028 (7th Cir. 2013).

¹⁸³ *Gessert*, 2007 U.S. Dist. LEXIS 24486, at *1.

¹⁸⁴ *Id.* at *6.

The amendment was futile because alleged unauthorized action was against his corporation, not him.¹⁸⁵

Nevertheless, the court did recognize that a taxpayer might have difficulty in discovering the cause of the alleged unauthorized collection action, stating:

A claim generally accrues when the harm it causes occurs. However, when through no fault of their own, parties do not discover the harm until well after it has occurred, courts often conclude that the claim does not accrue until the date of discovery. See *Sylvester v. United States*, 978 F. Supp. 1186, 1190 (E.D. Wis. 1997) (applying the discovery rule to a § 7433 action); see also Treas. Reg. § 301.7433-1(g)(2) (providing that the statute of limitations begins to run when "the taxpayer has had a reasonable opportunity to discover all essential elements of a possible cause of action"). In the present case, plaintiffs argue that they did not discover the revenue official's wrongdoing until 2005, when the government turned over transcripts that they had repeatedly requested. Taking plaintiffs' allegations in the light most favorable to them, I cannot conclude that they can prove no set of facts indicating that they timely asserted the allegations in paragraphs 6, 7, 9, and 11. Therefore, I cannot say that such allegations are futile.¹⁸⁶

Similarly, in *Sylvester v. United States*,¹⁸⁷ the court recognized that a taxpayer may not be able to discover important facts until after he can obtain his case file and have a chance to review it.¹⁸⁸

A very few courts, however, have recognized the difficulties that taxpayers have to discover facts that would put them on notice that collection action is unauthorized. In *Gessert v. Internal Revenue Service*,¹⁸⁹ the taxpayer challenged misrepresentations made by an IRS Revenue Officer, including a representation that a payment would be applied to the trust fund recovery penalty first before to other liabilities. This was indeed wrong. The court ruled in an opinion and order to denying Gessert's motion to amend his complaint that:

[W]hen through no fault of their own, parties do not discover the harm until well after it has occurred, courts often conclude that the claim does not accrue until the date of discovery. See *Sylvester v. United States*, 978 F. Supp. 1186, 1190 (E.D. Wis. 1997) (applying the discovery rule to a §

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 4.

¹⁸⁷ *Sylvester v. United States*, 978 F.Supp. 1186, 1190 (E.D. Wis. 1997). In *Sylvester*, the taxpayer moved to amend his complaint after the government moved for judgment on the pleadings. The court permitted one amendment as it related to the taxpayer's allegation that the IRS agent had altered a document to cover up information. The court agreed that the taxpayer could not have discovered such alleged unauthorized action until he had obtained and reviewed his file. *Id.* at 1191.

¹⁸⁸ Implicitly, the court recognized that a reasonable opportunity to discover does not begin when the alleged unauthorized action first occurs, but rather may not begin until the taxpayer has a reasonable opportunity to review files or other internal documents maintained by the IRS. See *id.*

¹⁸⁹ *Gessert*, 2007 U.S. Dist. LEXIS 24486.

7433 action); *see also* Treas. Reg. § 301.7433-1(g)(2) (providing that the statute of limitations begins to run when "the taxpayer has had a reasonable opportunity to discover all essential elements of a possible cause of action"). In the present case, plaintiffs argue that they did not discover the revenue official's wrongdoing until 2005, when the government turned over transcripts that they had repeatedly requested.¹⁹⁰

In this case, the taxpayers were represented by counsel, something that, as noted, many taxpayers cannot afford. The level of inquiry should not turn upon whether or not a taxpayer is represented. The courts have impliedly recognized that without access to internal documents, such as a tax transcript or an administrative file, a taxpayer would be unable to discover unauthorized collection action.

In *Claitor*, the court also recognized that the continuing violation doctrine is necessary to prevent injustices by the IRS.¹⁹¹ In *Claitor*, the taxpayer alleged unauthorized collection action in the form of the IRS's failure to release a lien on property he owned after the IRS postponed a sale to satisfy the lien and did not schedule a new sale within a month of the postponement.¹⁹² The IRS did not release the lien after the sale was postponed, and in fact did not release the lien until after the taxpayer filed the action.¹⁹³

First, the court held that the unauthorized collection continued making it a continuous violation until the lien was released. In disagreeing with the Court of Appeals for the First Circuit, which held that if there were no ability to show a continuing violation, the IRS would be free to continue its unauthorized collection action:

The Court respectfully disagrees with the conclusion reached by the First Circuit in *Dziura* in light of the injustice that would result from its application to this action. Here, the IRS failed to release the levy until more than six months after *Claitor* had filed suit against it. If the statute of limitations were held to have run in 1996, nothing would have prevented the IRS from wrongfully maintaining the levy in place on the Silver Creek property indefinitely. Since "one should not be allowed to acquire a right to continue [] tortious conduct" by operation of a statute of limitations, the statute of limitations cannot be said to have run. There is no reason to either dismiss this action or enter summary judgment in favor of the United States based on the statute of limitations.¹⁹⁴

¹⁹⁰ *Id.* at *4.

¹⁹¹ *Claitor v. United States*, No. 97-20524, 1999 U.S. Dist. LEXIS 12666, at *12 (N.D. Cal. July 29, 1999).

¹⁹² *See* 26 U.S.C.A. § 6335(e)(2)(F) (West 2012).

¹⁹³ *Claitor*, 1999 U.S. Dist. LEXIS 12666, at *2. *Claitor* filed his section 7433 action on June 13, 1997; the lien, incorrectly referred to as a "levy" in the opinion, was released on January 28, 1998. *Id.* at *3.

¹⁹⁴ *Id.* at *12 (citations omitted).

The IRS is a mammoth agency, employing over 100,000 employees. It is also divided across many functions.¹⁹⁵ A taxpayer calling a toll-free telephone line may never be able to learn whether the exact facts of action taken by one part of the IRS. Further, the mere mention of the IRS often strikes fear in the hearts of many taxpayers. Concern that the IRS is ever powerful is often a real deterrent to a taxpayer asking probing questions about how the IRS took certain collection action.

Under the current protocol of collection due process hearings, a taxpayer may not learn the facts of how the IRS took certain collection action well after two years from the date the action occurred. For example, the usual series of collection notices often are issued over a period of months.¹⁹⁶ If the IRS does not locate any assets to collect, it may not issue a notice of intent to levy or file a tax lien.¹⁹⁷ The IRS has ten years during which to collect the tax.¹⁹⁸ If the IRS locates assets during that period, it can then take collection action. At that point, the IRS will provide a taxpayer with a collection due process hearing.¹⁹⁹ However, currently most such hearings are handled by correspondence or telephone, neither of which are conducive atmospheres for a taxpayer to ask probing questions to find out how the IRS proposes to actually collect the tax.

The Congressional intent to provide a very circumscribed way for taxpayers to stop the IRS from taking illegal or unauthorized collection action, together with the difficulty of navigating the IRS to learn the facts behind collection action, weigh in favor of a more liberal and expansive interpretation of equitable tolling of the statute of limitation. Without such interpretation, the ability to check IRS action will all but disappear.

D. Regardless of the Legislative History of Section 7433, the Harm it is Meant to Protect Against is Tortious Action by IRS Employees and so Should be Interpreted Consistently with the Federal Torts Claim Act

Regardless of the legislative history, the courts have misclassified section 7433 like other tax claims statutes and have totally disregarded its purpose and nature as a tort relief act.²⁰⁰ By misclassifying it as a tax claim statute, the courts have erroneously applied a narrow statute of limitations.²⁰¹

Tax claims statutes are statutes whereby a taxpayer seeks to get back monies it has paid to the IRS or the IRS seeks to get back monies that the IRS erroneously paid to the taxpayer as a refund. In both such instances, the moving party (either the taxpayer or the IRS) have command of all the information, and is seeking to get back monies claimed to have been erroneously paid. The most common tax claim

¹⁹⁵ INTERNAL REVENUE SERV. DATA BOOK 71 (2011), available at <http://www.irs.gov/pub/irs-soi/11datbk.pdf>.

¹⁹⁶ See, e.g., 26 U.S.C.A. § 6330 (West 2012)

¹⁹⁷ See *id.*; TAXPAYER ADVOCATE SERV., NATIONAL TAXPAYER ADVOCATE ANNUAL REPORT TO CONGRESS VOL.1 226-30 (2004); see also TAXPAYER ADVOCATE SERV., NATIONAL TAXPAYER ADVOCATE ANNUAL REPORT TO CONGRESS VOL. 1 332-39 (2011).

¹⁹⁸ 26 U.S.C.A. § 6502(a)(1) (West 2012).

¹⁹⁹ 26 U.S.C.A. §§ 6320, 6330 (West 2012).

²⁰⁰ See *supra* Part I.C.

²⁰¹ *Id.*

statutory scheme is section 6511, a claim for refund, and section 7422, a suit for refund. Under section 6511(a) a taxpayer must file a claim for refund of taxes he believes were erroneously paid to the IRS and there is a strict statute of limitations to making such claims.²⁰² For example, if a taxpayer filed an amended return and forgot to claim a deduction or credit that would have lowered his taxes due, the taxpayer must file a claim for refund (usually by filing an amended return) showing the amount of the erroneously overpaid tax and asking for a refund of that amount. Generally, a taxpayer has three years from the time he filed his return or two years from the date he paid the tax to file the claim with the IRS.²⁰³ If the IRS denies the claim for refund, then the taxpayer has two years from the date of the denial to file a suit in a United States District Court to litigate the denial of the refund claim.

The other common tax claim statutory scheme is where the IRS issues a refund erroneously. In that case, by statute the IRS must bring an action in a United States District Court to get back the erroneous payment of tax to a taxpayer within two years of the date the refund was paid (five years if the IRS can prove that making the refund was induced by fraud or misrepresentation of a material fact).²⁰⁴

These tax claim statutes correctly rely upon the doctrine of laches and limit the period of time the taxpayer or the IRS can bring suit. In such cases, the taxpayer or the IRS has full knowledge of the facts and is asking for taxes that were paid to be returned.

Section 7433, however, is quite different. The recovery under section 7433 has nothing to do with the amount of a taxpayer's taxes collected by the IRS. Under section 7433 a taxpayer cannot sue for overpaid taxes. Rather, the suit is solely for economic damages for tortious acts. Section 7433 claims are the exclusive remedy for damages if the IRS or its employees take unauthorized action in the course of collecting a tax due.²⁰⁵ Such action might be wrongly filing a lien when the IRS knows that the taxpayer does not own the property, pursuing a form of collection that is not authorized by law (such as the alleged collection action in *Keohane*), executing a levy on a taxpayer's wages in retaliation, and negligently or intentionally ignoring the law (such as the stay on collection when a case is pending at the United States Tax Court) and levying a taxpayer's funds. The taxpayer pursues such action not to get the wrongly levied funds return, but for other damages to a taxpayer's business, costs of fighting the unauthorized action, or a reduction in economic value to an asset.²⁰⁶

Both the action that prompts a section 7433 claim and the damages that are recoverable put it in the category of tort recovery statutes and takes it out of the category of tax recovery statutes. Consequently, it also places the analysis of its statute of limitations in the category of analyses of statutes of limitations on tort recovery actions, specifically the Federal Tort Claims Act.

²⁰² 26 U.S.C.A. § 6511 (West 2012).

²⁰³ A taxpayer may file a return showing an amount due and not pay that amount due with the return. This is why there is a two-year from date of payment rule. 26 U.S.C.A. § 6511(a) (West 2012).

²⁰⁴ 26 U.S.C.A. §§ 6532(b), 7405 (West 2012).

²⁰⁵ *Wicks v. United States*, No. 07-00653, 2008 U.S. Dist. LEXIS 22389, at *4 (D.D.C. Mar. 24, 2008).

²⁰⁶ See 26 U.S.C.A. § 7433 (West 2012).

As discussed in Part III, the courts have failed to recognize that section 7433 was enacted to allow a taxpayer to recover damages, not previously paid taxes, for tortious action by an IRS employee. This fundamental misunderstanding by the courts has resulted in their misapplied narrow interpretation of section 7433's statute of limitations.

II. CONCLUSION

The few taxpayers who have had the ability to bring cases under section 7433 should have been able to proceed to a review on the merits of their case. The obstacle placed in these taxpayers' path is the failure of courts to recognize the obvious difference between usual tax recovery statutes and section 7433. Courts have prevented the examination of asserted tortious collection actions by the IRS by interpreting the time when the section 7433 statute of limitations begins as when the taxpayer first gets notice of the IRS collection action. This is wrong for two reasons: (1) it is contrary to the clear legislative history that the section 7433 statute of limitations starts when a taxpayer knows or has reason to know that the collection action is unauthorized; and (2) section 7433 is not an ordinary tax relief claim statute, but rather is a unique, and the exclusive, remedy for damages for IRS tortious conduct. As such, the statute of limitations must be read consistent with the history of the Federal Tort Claims Act to provide a liberal reading of when the claim begins to accrue.