

NOTE

A Second Bite? The Availability of Section 1346(a)(1) as an Alternative Remedy to Section 7426(a)(1) in *EC Term of Years Trust v. United States*

If the Service levies upon your property to satisfy the tax liabilities of another, what possible remedies do you have?¹ You may certainly bring a wrongful levy action under section 7426(a)(1).² Unfortunately, however, the statute of limitations for bringing such an action is generally only nine months.³ If you miss this deadline, is there another remedy available? Can you get a second bite at the apple?

In *EC Term of Years Trust v. United States*, the Court answered this question in the negative.⁴ The Court held that a possible alternative remedy, that of a refund action under section 1346(a)(1), was not available to a party who could have brought a wrongful levy action under section 7426(a)(1).⁵ The Court had granted certiorari in order to resolve a conflict among the circuits,⁶ and its decision affirmed that of the Fifth Circuit.⁷

This Note argues that a section 1346(a)(1) refund action should be available to a third party even though a section 7426(a)(1) wrongful levy action may have been available. In light of the Supreme Court's decision, this Note argues that Congress should amend sections 1346 and 7426 to permit a third party to maintain a refund action even though a wrongful levy action was also available. In their relatively short opinions, the Fifth Circuit and Supreme Court did not give proper weight to certain counterarguments which this Note presents. In brief, the Supreme Court's holding in *Williams v. United States*⁸ allows third parties to bring refund suits under section 1346(a)(1),

¹See discussion *infra* Part I.A.2.

²I.R.C. § 7426(a)(1).

³I.R.C. §§ 7426(i), 6532(c).

⁴127 S. Ct. 1763, 1765 (2007).

⁵*Id.*

⁶The Fifth and the Tenth Circuits held, in opposition to the Ninth Circuit, that section 7426(a)(1) is the exclusive remedy for a wrongful levy. *EC Term of Years Trust v. United States*, 434 F.3d 807, 810 (5th Cir. 2006); *Dahn v. United States*, 127 F.3d 1249, 1253 (10th Cir. 1997). *Contra* *WWSM Investors v. United States*, 64 F.3d 456, 459 (9th Cir. 1995).

⁷See *EC Term of Years Trust v. United States*, 434 F.3d 807 (5th Cir. 2006).

⁸514 U.S. 527 (1995).

and section 7426 did not impliedly repeal third party actions under section 1346(a)(1). Part I of this Note examines the statutory framework of sections 1346 and 7426 and summarizes the facts of *EC Term of Years Trust*. Part II summarizes the reasoning of the Fifth Circuit and the Supreme Court. Part III examines the argument that section 7426(a)(1) limits the availability of relief under section 1346(a)(1). Part IV concludes that section 1346(a)(1) should be an additional remedy for third parties and sections 1346(a)(1) and 7426(a)(1) should therefore be amended.

I. Background

A. Statutory Framework

1. Section 1346(a)(1)

Congress enacted section 1346, the earlier section, in 1948.⁹ To file a claim under section 1346(a), the taxpayer must first pay the full amount of the tax, including any interest or penalties (the *Flora* requirement),¹⁰ and file an administrative refund claim.¹¹ The administrative refund claim must be filed within three years from the time the return was filed or two years from the time the tax was paid, whichever is longer.¹² The refund suit may not be commenced until six months after the administrative refund claim is filed or until the Service has issued a notice of claim disallowance.¹³ The period of limitations for commencing the suit is generally two years from the mailing of the notice of disallowance.¹⁴

2. Section 7426(a)(1)

In 1966, Congress noted that the rights of third parties in connection with the tax collection process were “quite limited.”¹⁵ Third parties could not sue the United States when its collection activities interfered with their property rights. This rule applied when the government wrongfully levied on a third party’s property to satisfy amounts owed by a taxpayer.¹⁶ On the other hand, Congress also noted that some courts were allowing third parties to bring actions against district directors of the Service when the Ser-

⁹See Act of June 25, 1948, Pub. L. No. 80-773, § 1346, 62 Stat. 869, 933 (1948).

¹⁰*Flora v. United States*, 362 U.S. 145, 177 (1960). In contrast, for a wrongful levy action under section 7426(a)(1), the Service may or may not be in possession of the property and the Service may or may not have sold the property levied upon. I.R.C. § 7426(a)(1). This is very different from the section 1346(a)(1) requirement that all liabilities be paid before suit.

¹¹I.R.C. § 7422(a).

¹²I.R.C. § 6511(a).

¹³I.R.C. § 6532(a)(1).

¹⁴I.R.C. § 6532(a)(1).

¹⁵S. REP. NO. 89-1708, at 29 (1966), as reprinted in 1966 U.S.C.C.A.N. 3722, 3750; H.R. REP. NO. 89-1884, at 27 (1966).

¹⁶See *supra* note 15.

vice had “wrongfully levied”¹⁷ on the property of the third party.¹⁸ Although such actions were, as a technical matter, not actions against the government, the United States represented the defendants and paid all costs.¹⁹ Congress concluded that a third party should have the explicit statutory right to bring a wrongful levy suit against the United States.²⁰ Congress enacted section 7426, along with section 6532(c),²¹ the applicable statute of limitations, to accomplish this result.

In contrast to section 1346(a)(1), which provides only for an action for a refund, section 7426(a) provides four causes of action for third parties: (1) a civil action for a wrongful levy;²² (2) a civil action to recover surplus proceeds from the sale of the property on which the Service levied property;²³ (3) a civil action to recover “substituted sale proceeds” for property sold pursuant to a section 6325(b)(3) agreement;²⁴ and (4) a civil action to determine whether the value of the interest of the United States in substituted property provided by the third party under section 6325(b)(4) is less than the value determined by the Service.²⁵ In contrast to section 1346(a)(1), which allows only a claim for a refund, section 7426 provides five possible remedies, to be applied appropriately to the four causes of action: (1) injunctive relief;²⁶ (2) recovery of property;²⁷ (3) recovery of surplus proceeds;²⁸ (4) recovery of substituted sale proceeds;²⁹ and (5) refund of money deposited by the third party under section 6325(b)(4) (relating to substitution of value).³⁰ For a wrongful levy action under section 7426(a)(1), the appropriate remedies could include an injunction or recovery of the property. The period of limitations is generally nine months from the date of the levy or the agreement giving rise to the action.³¹ If, however, the third party requests a return of the property as provided in section 6343(b), the period is extended until twelve months from the date of filing the request or six months from the date the Secretary

¹⁷A levy is “wrongful” not because of any mistake in the underlying assessment, which is not open to question under section 7426, but because the property levied is that of a third party, and not the assessed party. S. REP. NO. 89-1708, at 29; H.R. REP. NO. 89-1884, at 27.

¹⁸S. REP. NO. 89-1708, at 29; H.R. REP. NO. 89-1884, at 27.

¹⁹See *supra* note 18.

²⁰See *supra* note 18.

²¹Federal Tax Lien Act of 1966, Pub. L. No. 89-719, § 110, 80 Stat. 1125 (1966).

²²I.R.C. § 7426(a)(1).

²³I.R.C. § 7426(a)(2).

²⁴I.R.C. § 7426(a)(3).

²⁵I.R.C. § 7426(a)(4).

²⁶I.R.C. § 7426(b)(1).

²⁷I.R.C. § 7426(b)(2).

²⁸I.R.C. § 7426(b)(3).

²⁹I.R.C. § 7426(b)(4).

³⁰I.R.C. § 7426(b)(5).

³¹I.R.C. § 6532(c)(1).

mails the disallowance, whichever is shorter.³² In contrast to section 1346(a)(1), which requires filing of an administrative refund claim, section 7426 does not require such a filing.³³

Passage of the Federal Tax Lien Act of 1966 was due, in significant part, to the work of the American Bar Association (ABA), in conjunction with Treasury and committee staff.³⁴ Proposed section 7431 set forth in the ABA Report,³⁵ the predecessor of enacted section 7426, was intended to “codify the procedural rights of third parties.”³⁶ Proposed section 7431 would have allowed a third party to bring suit when a levy was made or might have been made on property in which the third party had an interest or lien.³⁷ It would have “[made] clear that any existing right to sue a collection officer for damages [would be] preserved. It also [would have preserved] whatever existing rights there may [have been] to sue such officers for the same relief obtainable against the United States under [proposed section 7431].”³⁸

Of particular interest is proposed section 7431(f), which explained the interaction of proposed section 7431 with other provisions.³⁹ Under proposed section 7431(f), section 2410 actions⁴⁰ could still be brought, as well as “any other right . . . at common law or in equity, to sue any officer or employee of the United States . . . whether or not an action therefore might be maintained under this section.”⁴¹ This wording would have allowed wrongful levy actions to continue to be brought under section 1346(a)(1), if such actions could be brought in the first place.⁴² Proposed section 7431 also stated that if an action *could have been* brought under proposed section 7431, but was brought under a different provision, the statute of limitation in section 7431(c) would apply to that action.⁴³ Proposed section 7431 also resolved the jurisdictional

³²I.R.C. § 6532(c)(2).

³³I.R.C. § 7426(f).

³⁴112 CONG. REC. 16, 22,224 (1966) (statement of Mr. Mills).

³⁵AMERICAN BAR ASSOCIATION, FINAL REPORT OF THE COMMITTEE ON FEDERAL LIENS 83 (1959) reprinted in STAFF OF H. COMM. ON WAYS AND MEANS, 89TH CONG., LEGISLATIVE HISTORY OF H.R. 11256, FEDERAL TAX LIEN ACT OF 1966 118, 202 (1966) [hereinafter ABA REPORT].

³⁶ABA REPORT, *supra* note 35, at 116.

³⁷ABA REPORT, *supra* note 35, at 83. There may also be an action for property delivered to the Secretary by a person who had had no right to deliver it; property sold pursuant to a levy; and an amount paid under protest for discharge of a lien. The district courts are given several different types of remedies, including a declaratory judgment, injunction, and recovery of the property or the value of the property. *Id.* at 83-84.

³⁸ABA REPORT, *supra* note 35, at 117.

³⁹ABA REPORT, *supra* note 35, at 85.

⁴⁰28 U.S.C. § 2410 (2002).

⁴¹ABA REPORT, *supra* note 35, at 85.

⁴²Perhaps the ABA did not mention section 1346(a)(1) actions explicitly as it mentions section 2410 actions because it preferred to defer to the courts on the existence of third party rights under section 1346(a)(1). By using the phrase “any other right” the ABA would be staying out of the ongoing debate. This debate was finally ended by *Williams*. *United States v. Williams*, 514 U.S. 527, 529 (1995).

⁴³ABA REPORT, *supra* note 35, at 85.

question by providing that if an action was brought against an officer, a court could substitute the United States as defendant instead either in an action under proposed section 7431 or in an action that could have been brought under proposed section 7431.⁴⁴

Unfortunately, proposed section 7431(f), which would have clarified the relationship of the enacted section 7426 to other provisions, is mostly missing from section 7426.⁴⁵ Proposed section 7431(f) would have allowed a third party action under section 1346(a)(1), if such right were deemed to exist, and provided that such action were brought within the one year statutory period of proposed section 7431, and with a possible substitution of the United States as defendant.⁴⁶ In contrast, enacted section 7426 makes no such implicit reference to section 1346(a)(1).

3. *The Williams Decision*

In *United States v. Williams*, the Supreme Court held that Williams, a third party, could bring a suit for a refund under section 1346(a)(1).⁴⁷ Williams had paid the tax assessed against her husband to remove the lien upon her house and convey clear title. Williams allowed the assessed amount to be taken from the sale proceeds and delivered to the Service.⁴⁸ Williams then brought suit for a refund under section 1346(a)(1), arguing that she had received her husband's interest in the property lien-free under section 6323(a). The Service argued that Williams did not have standing to bring suit under section 1346(a)(1) because although she had paid the tax, she was not the assessed party.⁴⁹

⁴⁴ABA REPORT, *supra* note 35, at 85.

⁴⁵See ABA REPORT, *supra* note 35, at 85; I.R.C. § 7426. For an explanation of what was not missing, see *infra* text accompanying note 124.

⁴⁶The proposed section stated:

[T]his section shall not impair any right of action which might be maintained under section 2410 of Title 28, United States Code, or any other right existing at common law or in equity, to sue any officer or employee of the United States . . . whether or not an action therefor might be maintained under this section. No such other action shall be commenced after expiration of the times prescribed in section (c), except for relief which could not be granted against the United States in a suit under this section If any action which might have been brought against the United States under this section is determined to have been improperly brought against any other person referred to in this subsection, the action shall not be dismissed on that account, but the court shall order the United States be made a party.

ABA REPORT, *supra* note 35, at 85.

⁴⁷514 U.S. 527, 529 (1995).

⁴⁸*Id.* at 530.

⁴⁹*Id.* at 530-31. The Service did not rely on the wording of section 1346(a)(1), but rather on section 7422, which requires the exhaustion of administrative remedies before bringing a refund suit, combined with section 6511 which adds that a "taxpayer" may exhaust these remedies, and section 7701(a)(14) which states that Williams would not be a "taxpayer." *Williams*, 514 U.S. at 532-33. The Court found that Williams was indeed a "taxpayer" for purposes of sections 7701(a)(14) and 6511. *Williams*, 514 U.S. at 535. Justice Scalia, though, in concurrence, found this step unnecessary due to the remote "bearing upon section 1346(a)(1)" that the administrative exhaustion provisions had. *Williams*, 514 U.S. at 541 (Scalia, J., concurring).

The Court found that William's case fit "within the broad language of 1346(a)(1)."⁵⁰ The Court also noted that Williams had no other remedies available and that Congress could not have intended to leave Williams without a remedy.⁵¹ Section 7426(a)(1), for example, was unavailable because there had been no levy upon her property.

Williams is significant because it clears away earlier doubts about whether a third party could bring a refund action under section 1346(a)(1). *Williams* stands for the proposition that third parties could bring such an action. *Williams* still leaves open the question, however, of whether section 1346(a)(1) is available when section 7426(a)(1) would have been available.

B. *Factual Background of EC Term of Years Trust*

EC Term of Years Trust was one of many trusts created by Elmer W. Cullers, Jr. and Dorothy Cullers.⁵² A trust is generally a separate taxpayer and distinct from its creators.⁵³ In 1993, the Service assessed additional taxes against the Cullers for the years 1981 through 1984.⁵⁴ In 1999, the Service alleged that the Cullers had transferred property to the trusts for tax avoidance purposes and that the trusts were, in actuality, the Cullers' alter egos.⁵⁵ The Service consequently filed transferee tax liens against some of the trusts for the amount owed by the Cullers.⁵⁶ The Service also suggested that it would seize and sell trust property to satisfy the liabilities owed by the Cullers.⁵⁷

To avoid this result, the trusts, including EC Term of Years Trust, created a bank account containing the full amount owed by the Cullers and contacted

⁵⁰*Williams*, 514 U.S. at 529.

⁵¹*Id.* at 536.

⁵²*BSC Term of Years Trust v. United States*, 01-1 U.S.T.C. ¶ 50,174, 87 A.F.T.R.2d 546 (W.D. Tex. 2000).

⁵³A trust will not be considered a separate entity, however, where the grantor retains too much control. *See* I.R.C. § 674.

⁵⁴*BSC Term of Years Trust*, 01-1 U.S.T.C. ¶ 50,174, 87 A.F.T.R.2d at 547. Generally, the statute of limitations for tax assessment is three years. I.R.C. § 6501(a). There are, however, several exceptions. There is a six year period available to the Service if the taxpayer omits gross income totaling 25% or more of his reported gross income. I.R.C. § 6501(e). If the taxpayer fails to submit a tax return, there is an unlimited time period for an assessment. I.R.C. § 6501(c)(3). There is likewise an unlimited time period for assessment if there is a "false or fraudulent return with the intent to evade tax" or if there is a "willful attempt to attempt to defeat or evade tax." I.R.C. § 6501(c)(1), (2). Presumably the tax here was assessed under section 6501(c)(1), (2), or (3).

⁵⁵*BSC Term of Years Trust*, 01-1 U.S.T.C. ¶ 50,174, 87 A.F.T.R.2d at 547. The Service was presumably arguing in the alternative that the trust was either a third party, but was a transferee for purposes of section 6901, or that the trust was not a third party, and therefore the Cullers' alter ego.

⁵⁶*Id.*

⁵⁷Brief for Petitioner at 3, *EC Term of Years Trust v. United States*, 127 S. Ct. 1763 (2007) (No. 05-1541) (Dec. 11, 2006) [hereinafter *Petitioner's Brief*].

the Service.⁵⁸ The Service levied on this account on September 10, 1999, and seized the full amount therein.⁵⁹ The trusts subsequently sought a refund.

On September 7, 2000, the EC Term of Years and other trusts brought actions under sections 7426(a)(1) and 1346(a)(1).⁶⁰ The district court dismissed the complaint for lack of subject matter jurisdiction because the complaint had not been filed within the nine month period of limitations required by sections 7426(i) and 6532(c)(1).⁶¹ While section 6532(c)(2) allows for an extension of the period of limitations, the trusts had attempted to, but had not made the requisite request.⁶² Furthermore, citing *Texas Commerce Bank Fort Worth, N.A. v. United States*⁶³ and *United Sand & Gravel Contractors, Inc. v. United States*,⁶⁴ the district court held that a refund action under section 1346(a)(1) was not available because section 7426(a)(1) was the exclusive remedy.⁶⁵ EC Term of Years Trust then filed another complaint for a refund exclusively under section 1346(a)(1).⁶⁶ While the district court found that res judicata did not apply,⁶⁷ it dismissed the complaint for lack of subject matter jurisdiction, citing *Dahn v. United States*,⁶⁸ and holding that petitioner's sole remedy was under 26 U.S.C. 7426.⁶⁹

II. The Fifth Circuit and Supreme Court Decisions

A. The Fifth Circuit Decision

The Fifth Circuit in *EC Term of Years Trust* affirmed the district court's dismissal for lack of subject matter jurisdiction.⁷⁰ The focus of the opinion was on the Supreme Court's decision in *Williams*.⁷¹ EC Term of Years Trust argued that *Williams* allowed EC Term of Years Trust to pursue a refund action under section 1346(a)(1), despite the fact that the trust would have been able to pursue an action for wrongful levy under section 7426(a)(1) if it had not been time barred.⁷² The Fifth Circuit disagreed with the trust, hold-

⁵⁸See *supra* note 57.

⁵⁹See *supra* note 57.

⁶⁰*BSC Term of Years Trust*, 01-1 U.S.T.C. ¶ 50,174, 87 A.F.T.R.2d at 547-48.

⁶¹*Id.*

⁶²*Id.* An extension under section 6532(c)(2) is allowed when the third party requests a return of the levied property. For an explanation of why the statute of limitations was not extended, see discussion *infra* Part III.D.

⁶³896 F.2d 152, 156 (5th Cir. 1990).

⁶⁴624 F.2d 733, 739-40 (5th Cir. 1980).

⁶⁵*BSC Term of Years Trust*, 01-1 U.S.T.C. ¶ 50,174, 87 A.F.T.R.2d 546.

⁶⁶*EC Term of Years Trust v. United States*, 93 A.F.T.R.2d 2005, 2006 (W.D. Tex. 2004).

⁶⁷*Id.* at 2008.

⁶⁸127 F.3d 1249, 1253-54 (10th Cir. 1997).

⁶⁹See *EC Term of Years Trust*, 93 A.F.T.R.2d at 2007.

⁷⁰*EC Term of Years Trust v. United States*, 434 F.3d 807, 810 (5th Cir. 2006).

⁷¹See *id.* at 809 (citing *Williams v. United States*, 514 U.S. 527 (1995)).

⁷²*Id.*

ing that “a refund action under section 1346 [is not] available *in addition* to a wrongful levy action under 7426.”⁷³ While *Williams* allowed a third party to bring a refund action under section 1346(a)(1), the crucial point for the Fifth Circuit was that section 7426, or any other remedy, had not been available to *Williams*. *Williams*, therefore, did not and could not have addressed whether section 1346(a)(1) was still available despite section 7426(a)(1) having been available.⁷⁴

Upon finding that *Williams* did not aid the taxpayer, the Fifth Circuit followed its own precedent in *United Sand & Gravel Contractors*,⁷⁵ which held that when available, a wrongful levy action under section 7426(a)(1) is the exclusive remedy.⁷⁶ The Fifth Circuit also noted that every sister court that had spoken on the matter, except the Ninth Circuit, had found section 7426(a) to be the exclusive remedy.⁷⁷

The Fifth Circuit also briefly considered legislative intent. Quoting *United Sand & Gravel Contractors*, it said that the short statute of limitations for section 7426(a)(1) aids in “resolving doubts concerning the status of the taxpayer’s account swiftly.”⁷⁸ It also “allows for the expeditious resolution of tax liability.”⁷⁹ Allowing a refund suit under section 1346(a)(1), with its longer period of limitations would undermine the shorter limitations period of section 7426 and the security it provides.⁸⁰ A refund action under section 1346(a)(1) would not have made section 7426 superfluous in *Williams*’s case because section 7426 was simply unavailable.⁸¹

The Fifth Circuit did not clearly state why the shorter nine month statute of limitation for actions under section 7426 is important and why “doubts” should be “resolved quickly.” *United Sand & Gravel Contractors*, cited by the court, sheds some light on the question, noting that, “[i]f someone else successfully claims property already credited against the taxpayer’s liability, the United States must look to other assets of the taxpayer to satisfy the taxpayer’s liability.”⁸² The underlying concern appears to be the general ten year statute of limitations, which begins running on the date of assessment on collections against the assessed party.⁸³ While the statute of limitations is suspended for the period of a section 7426 suit by a third party,⁸⁴ it presumably would not

⁷³*Id.*

⁷⁴*Id.* at 810.

⁷⁵*United Sand & Gravel Contractors v. United States*, 624 F.2d 733 (5th Cir. 1980).

⁷⁶*EC Term of Years Trust*, 434 F.3d at 810.

⁷⁷*Id.* (citing *WWSM Investors v. United States*, 64 F.3d 456, 458-59 (9th Cir. 1995)).

⁷⁸*Id.* at 809 (quoting *United Sand & Gravel Contractors*, 624 F.2d at 739).

⁷⁹*Id.*

⁸⁰*Id.* at 810.

⁸¹*Id.*

⁸²*United Sand & Gravel Contractors*, 624 F.2d at 739.

⁸³I.R.C. § 6502(a)(1).

⁸⁴I.R.C. § 6503(f). Congress was concerned about a taxpayer purposely waiting for the six year period to run and then aiding the third party in a refund action.

be with a refund suit by a third party under section 1346(a)(1). In addition, there is always the possibility that the taxpayer could become insolvent or in some other way judgment proof during the extra time. With a two year statute of limitations for suits under section 1346(a)(1) and with no suspension of the ten year collection period, it may become more difficult to ultimately collect from the taxpayer if the levy against the third party is found to be wrongful.⁸⁵

B. *The Supreme Court Decision*

In *EC Term of Years Trust*,⁸⁶ the Court delivered a unanimous opinion affirming the Fifth Circuit. The Court used the doctrine that a “precisely drawn, detailed statute preempts more general remedies.”⁸⁷ The Court likewise rejected the trust’s argument against implied repeal. The Court stated that the trust had read *Williams* too broadly and that section 1346(a)(1) was accordingly not a remedy open to the trust.⁸⁸ The Court added that even if the doctrine against implied repeals appeals could possibly be applied, sections 1346(a)(1) and 7426(a)(1) were in irreconcilable conflict due to the different statutes of limitation, preventing the application of that doctrine.⁸⁹ The Court also noted that the short statute of limitations was designed to aid the Service in ultimately collecting from the taxpayer. With a shorter statute of limitations, the Service would waste less time attempting to collect from the incorrect party, making it more likely that the Service would successfully collect from the correct party.⁹⁰

III. Analysis

A. *The Availability of Section 1346(a)(1).*

The Supreme Court rejected the trust’s argument that the doctrine against implied repeal applied, stating that *Williams* only allowed third parties who did not have other remedies available to use section 1346(a)(1). While this reading of *Williams* is correct in a limited sense, the Supreme Court confused two issues. The first issue is whether, prior to the enactment of section 7426(a)(1), third parties could bring an action for a refund under section 1346(a)(1). *Williams* answered this in the affirmative by finding that a third party could

⁸⁵For instance, in this case if the levy is found to be wrongful, the Service will not be able to collect from the taxpayer because the assessments were made in 1993 and 1994. See Brief for United States at 16, *EC Term of Years Trust v. United States*, 127 S. Ct. 1763 (2007) (No. 05-1541) (Jan. 16, 2007) [hereinafter Government’s Brief].

⁸⁶127 S. Ct. 1763 (2007).

⁸⁷*Id.* at 1767 (quoting *Brown v. Gen. Serv. Admin.*, 425 U.S. 820, 834 (1976)).

⁸⁸*Id.* at 1768.

⁸⁹*Id.*

⁹⁰*Id.* at 1766.

bring a refund action. The second issue is how much, if any, jurisdiction Congress removed from section 1346(a)(1) and made exclusively the province of section 7426. The Fifth Circuit correctly found that *Williams* did not address this issue, and the trust's argument that the holding in *Williams* did is untenable.⁹¹ Having the first issue answered by *Williams*, however, means that when a case fits within section 1346(a)(1), as it does here, third parties may bring an action under section 1346(a)(1) *unless* that section was partially repealed by section 7426(a)(1).⁹²

B. Partial Repeal by Implication

EC Term of Years Trust argued that there is no language in either section 7426 or section 1346 stating that section 7426 is the exclusive remedy.⁹³ Furthermore, Congress chose to use "may" instead of "shall" in section 7426 as it might have done if it had intended exclusivity.⁹⁴ The Service's counterargument to this was that it would not have occurred to Congress to include these provisions because the availability of third party remedies under section 1346 was unclear at the time section 7426 was enacted.⁹⁵ This argument is not particularly strong because any confusion in the law would warrant a clarification of exclusivity.⁹⁶ The Service argued that, because the state of third party remedies was muddled under section 1346, Congress must have intended section 7426 to be the exclusive remedy. This argument, however, supports the position of EC Term of Years Trust because Congress could not have intended

⁹¹The taxpayer argued, or was interpreted as having argued, that *Williams* allowed an action under section 1346 to be brought in addition to section 7426. *See id.* at 1768; EC Term of Years Trust v. United States, 434 F.3d 807, 809 (5th Cir. 2006). The Ninth Circuit also held that *Williams* allowed a section 1346(a)(1) action to be brought in addition to a section 7426(a)(1) action. WWSM Investors v. United States, 64 F.3d 456, 459 (9th Cir. 1995). The court found that a lien was substantially the same as a levy. The substantive similarities or differences between levies and liens are not, however, important. The distinction lies in that wrongful levies have a remedy under section 7426(a)(1), whereas in *Williams* there was a lien, and not a levy, and therefore no remedy under section 7426(a)(1) (or any other provision according to the court). Perhaps realizing that *Williams* cannot solve the entire problem, *EC Term of Years Trust* focused on congressional intent before the Supreme Court. *See* Petitioner's Brief, *supra* note 57, at 5. During oral arguments, however, the trust argued for an expansive reading of *Williams* and was rebuked by Justice Ginsburg, who authored *Williams* (though it should be noted that Justice Ginsburg emphasized that the taxpayer in *Williams* volunteered to pay the taxes, whereas in *Williams* the Court took pains to note that *Williams* was not a volunteer). Transcript of Oral Argument at 3-4, 9-13, *EC Term of Years Trust*, 127 S. Ct. 1763 (No. 05-1541) [hereinafter Oral Argument].

⁹²*See* Oral Argument, *supra* note 91, at 24 (documenting Justice Alito implying that this is the correct analysis).

⁹³*See* Petitioner's Brief, *supra* note 57, at 17.

⁹⁴*See* Petitioner's Brief, *supra* note 57, at 32.

⁹⁵Oral Argument, *supra* note 91, at 32.

⁹⁶Justice Roberts posed this issue to the Service during oral argument. Oral Argument, *supra* note 91, at 32.

to repeal, by implication, that which it did not think was available (but, under *Williams*, was later found to be available).⁹⁷ On the other hand, even if Congress did believe that a remedy was available, the Court should have applied the doctrine that repeals by implication are not favored.

When, as is the case here, there is no express repeal of an earlier provision, the repeal must be implied. It is, however, “a cardinal principle of construction that repeals by implication are not favored.”⁹⁸ Consequently, when there are two different provisions covering the same subject area, both provisions should be given effect if possible.⁹⁹ A repeal is implied “only if necessary to make the later statute work” and “even then only to the minimum extent necessary.”¹⁰⁰

There are two “well-settled” instances of repeal by implication: (1) “Where the provisions in the two acts are in irreconcilable conflict”; and (2) “if the later act cover the whole subject of the earlier one and is clearly intended as a substitute.”¹⁰¹ In both instances, however, Congress’s intent to repeal must be “clear and manifest; otherwise . . . the later act is to be construed as a continuation of, and not a substitute for, the first act.”¹⁰² “Irreconcilable conflict” is a “relatively stringent standard” that has resulted in implied repeals being a “rarity.”¹⁰³ When analyzing whether two provisions are in “irreconcilable conflict,” the rights and requirements of each are considered.¹⁰⁴ The fact that two statutes cover the same subject is not fatal. Effect will be given to two different statutes “so long as each reaches some distinct cases.”¹⁰⁵

In this case, the later enacted section 7426 does not cover the entire subject of section 1346, and so if there is repeal by implication, it must be due to “irreconcilable conflict.” Congress’s intent to repeal is far from “clear and

⁹⁷Justice Alito made this point during oral argument. Oral Argument, *supra* note 91, at 29; see also *Brown v. Gen. Serv. Admin.*, 425 U.S. 820, 837-38 (1976) (Stevens, J., dissenting) (“The fact that Congress incorrectly assumed that federal employees would have no judicial remedy if section 717 had not been enacted undermines rather than supports the Court’s conclusion that Congress intended to repeal or amend laws that it did not think applicable.”).

⁹⁸*United States v. Borden Co.*, 308 U.S. 188, 198 (1939).

⁹⁹*Id.*; *Posadas v. Nat’l City Bank of New York*, 296 U.S. 497, 503 (1936); see *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (“The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.”).

¹⁰⁰*Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 357 (1963).

¹⁰¹*Posadas*, 296 U.S. at 503.

¹⁰²*Id.*; *Red Rock v. Henry*, 106 U.S. 596, 601-02 (1883).

¹⁰³*Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 381 (1996).

¹⁰⁴See *J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int’l, Inc.*, 534 U.S. 124, 142-43 (2001) (finding no “irreconcilable conflict” between 35 U.S.C. § 101 and the later Plant Variety Protection Act because although section 101 has broader protections, it is more difficult to qualify under that section).

¹⁰⁵*Id.* at 144.

manifest.” The committee reports are silent on exclusivity and recourse must be had to congressional hearings.¹⁰⁶ The purpose of section 7426 is to give third parties a remedy that Congress was not sure that it had.¹⁰⁷ By allowing third party refund claims under section 1346(a)(1), a court would be carrying out the intent behind section 7426 in a more direct way than Congress thought possible. Refund actions that could have been brought under section 7426(a)(1) do not undermine that provision, because the basic purpose of section 7426 was to give third parties a remedy. Section 7426(a)(1) is a continuation of, not a substitution for, section 1346(a)(1).

Furthermore, sections 7426 and 1346(a)(1) have different requirements and levels of protection. It is more difficult to qualify for a refund under section 1346(a)(1) than for relief under section 7426(a)(1) because section 1346(a)(1) requires filing of an administrative refund claim¹⁰⁸ and the *Flora*¹⁰⁹ requirement must be met. Under section 7426(a)(1), the property need not be surrendered or sold by the Service before an action can be brought.¹¹⁰ It is fitting, therefore, to allow a longer statute of limitations for actions under section 1346(a)(1).

Due to the different remedies and requirements of the two provisions, some cases will fall exclusively under one or the other. If property is not levied upon, it would fall exclusively under section 1346(a)(1), as in *Williams*.¹¹¹ If third parties would prefer to have an injunction to prevent the sale of their property, instead of waiting and having to pay the full amount of the assessed party's liability, section 7426(a)(1) would exclusively be available. Because the two provisions can reach distinct cases, neither is superfluous.

Effect should be given to both provisions because they are distinct statutory schemes and neither completely overlaps the other. There is no “irreconcilable difference” between the two.

C. *Specific over General*

The United States argues for a different doctrine of statutory interpretation—that a specific statute will take precedence over a more general one. The United States argues that section 7426(a)(1) is a specific remedy, pertaining solely to wrongful levies, whereas 1346(a)(1) is a more general remedy.¹¹² “Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.”¹¹³

¹⁰⁶See S. REP. NO. 89-1708, at 29-31, 35, as reprinted in 1966 U.S.C.C.A.N. 3722 (1966); H.R. REP. NO. 89-1884, at 27-29, 75-79, 85 (1966).

¹⁰⁷See S. REP. NO. 89-1708, at 29; H.R. REP. NO. 89-1884, at 27.

¹⁰⁸I.R.C. § 7422(a).

¹⁰⁹*Flora v. United States*, 362 U.S. 145, 177 (1960).

¹¹⁰I.R.C. § 7426(a)(1).

¹¹¹*United States v. Williams*, 514 U.S. 527, 531-32, 537 (1995).

¹¹²See Government's Brief, *supra* note 85, at 6-8.

¹¹³*Morton v. Mancari*, 417 U.S. 535, 550-51 (1974).

This principal has been articulated in cases such as *Block v. North Dakota*, which states that “a precisely drawn, detailed statute preempts more general remedies.”¹¹⁴ This is particularly the case, according to *Brown v. General Services Administration*, where the specific remedy has “balance, completeness, and structural integrity.”¹¹⁵ Similarly in *United States v. A.S. Kreider Co.*,¹¹⁶ a remedy with a shorter statute of limitation preempted another remedy with a longer one. “The rule that the more specific legislation will usually take precedence over the more general rests on the quite reasonable assumption that the legislature’s attention was probably focused more directly on the subject matter of the specific than on only one aspect of a much broader subject matter.”¹¹⁷

To show that section 7426(a)(1) is “precisely drawn, detailed” and has “balance, completeness, and structural integrity,” the Service points to the shorter statute of limitations for actions under section 7426(a)(1)¹¹⁸ and the suspension of the running of the ten year collection period.¹¹⁹ Furthermore, Congress laid out the various types of actions under section 7426 and their exclusive remedies and added that the underlying assessment would be presumed valid.¹²⁰

Sections 7426(a)(1) should not, however, be considered “precisely-drawn.” The ABA, in proposed section 7431(f), laid out guidelines that would have clarified the interaction of 7426(a)(1) with 1346(a)(1).¹²¹ Section 7431(f) would have allowed an action under 1346(a)(1), if such right were deemed to exist, and if that action were brought within the one year statutory period of proposed section 7431.¹²² Regardless of why Congress chose not to include this provision, it was on notice that clarification was needed. By removing this clarification, Congress created a small vacuum at the intersection of sections 7426(a)(1) and 1346(a)(1).

Furthermore, section 7426(e) states that: “If an action, which could be brought against the United States under this section, is improperly brought

¹¹⁴461 U.S. 273, 285 (1983).

¹¹⁵425 U.S. 820, 832 (1976).

¹¹⁶313 U.S. 443 (1941).

¹¹⁷*Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 160 n.2 (1989) (Stevens, J., dissenting).

¹¹⁸See Government’s Brief, *supra* note 85, at 14.

¹¹⁹See Government’s Brief, *supra* note 85, at 15-16.

¹²⁰See Government’s Brief, *supra* note 85, at 21-22.

¹²¹See *supra* Part I.

¹²²“Proposed section 7431(f) makes clear that any existing right to sue a collection officer for damages is preserved. It also preserves whatever existing rights there may be to sue such officers for the same relief obtainable against the United States under this provision. However, such actions have been subject to many technical objections in the past concerning whether the Director is the proper defendant. To limit such technicalities, it is provided that, if an officer is held to have been improperly sued in an action that could have been brought under this section, the action shall not be dismissed but the United States shall be substituted as a party.” ABA REPORT, *supra* note 35, at 117-18.

against any officer or employee of the United States . . . the court shall . . . substitute the United States as a party for such officer or employee.”¹²³ Congress may have believed that this provision would aid those third parties who, unaware of the change, continued to bring actions against district directors. If section 7426 is the exclusive remedy available, however, a more direct way of saying this would have been “if an action under this section is improperly brought against any officer.” Is the “could have been” superfluous? The answer is that section 7426(e) is part of the missing proposed section 7431(f) which clarified the relationship between proposed section 7431 and other provisions and was meant to preserve “any existing right” that third parties may have had.¹²⁴

While the intention of Congress can be uncertain, it is clear that Congress enacted language that was meant to allow third parties to continue to bring actions under section 1346(a)(1) but with the United States substituted for the district directors.¹²⁵ Instead of being precise and detailed, section 7426 is merely a hodge-podge of the ABA proposal with no coherent congressional intent.

Ultimately, the rule that specific statutes should take precedence over more general ones rests on the premise that Congress gave more thought to the issue when it enacted the more specific remedy. When a specific remedy is “precisely drawn” and “detailed” it supports this premise. When, as here, the specific remedy is not precisely drawn or balanced, the premise is less justified. In this case, section 7426 is part of the much larger Federal Tax Lien Act of 1966, and it was predominately the work of the ABA, with some alterations by Congress. The presumption that Congress gave extra attention to section 7426 because it is a more specific provision is rebutted by the lack of clarity and coherence in that section, and it should not be given precedence simply because it is more specific than section 1346(a)(1).

D. Policy

As mentioned previously, the nine month statute of limitations for section 7426(a)(1) wrongful levies may be extended by a request for a return of the levied property.¹²⁶ The trusts had indeed attempted to request such return, but the request was addressed to “District Director, Department of the Treasury, Internal Revenue Service, Austin, Texas 73301” when the correct address was “300 E. Eight Street, Austin, Texas 78701.”¹²⁷ Because of the incorrect address,

¹²³I.R.C. § 7426(e).

¹²⁴ABA REPORT, *supra* note 35, at 117-18.

¹²⁵In a related way, section 7426(d) states: “No action may be maintained against any officer or employee of the United States . . . with respect to any acts for which an action *could be maintained* under this section.” I.R.C. § 7426(d) (emphasis added).

¹²⁶I.R.C. § 6532(c)(2).

¹²⁷BSC Term of Years Trust v. United States, 01-1 U.S.T.C. ¶ 50,174, 87 A.F.T.R.2d 546, 548 (W.D. Tex. 2000).

the request did not strictly comply with the requirements set out in Regulation section 301.6343-2(b) and the district court found that this was not a request within section 6532(c)(2).¹²⁸

On the other hand, the Service argued that allowing an action under section 1346(a)(1) with its longer statute of limitations would negate Congress's intent in enacting this more specific remedy with its shorter statute of limitations.¹²⁹ Congress's intent, the Service argued, was to hasten the process of resolving disputes so that the Service could find out sooner, rather than later, whether it had truly collected from the assessed party. A section 1346(a)(1) refund action by an assessed party is inherently different from a refund action by a third party, according to the Service.¹³⁰ If brought by the assessed party, the refund action finishes the collections process from the assessed party. With a third party refund action, the Service needs to return to the collections process again, possibly too late to ultimately collect.

While both arguments are persuasive, perhaps the balance should be tipped more in favor of the third party than it currently is. Considering that tax procedure is an area that even tax practitioners are relatively less fluent in, a third party should not have to labor under a particularly short statute of limitations. To add insult to injury, the reason that the third party is forced to act quickly is because the government mistakenly levied upon the wrong party.

IV. Conclusion

The statute of limitations for bringing a wrongful levy action under section 7426(a)(1) is generally nine months. Because this short statute of limitations may easily leave an unwary third party without a remedy, it would be an important development to allow a longer period of limitations. This change would give an extra opportunity to those unversed in the intricacies of tax procedure to recover what is theirs.

In *Williams*, the Court held that a third party could bring a refund action under section 1346(a)(1). *Williams* did not answer the question of whether section 7426(a)(1) is available in addition to an action under section 1346(a)(1). While it is a valid canon of construction that specific statutes take prece-

¹²⁸*Id.*

¹²⁹In *United States v. Williams*, 514 U.S. 527 (1995), however, there is the complete lack of discussion regarding the two year statute of limitations period. Although section 7426 was not available to Williams, the same reasoning for applying the shorter, nine month period of limitations would have applied to her suit under section 1346. By refunding third parties such as Williams, it may be more difficult to ultimately collect from the assessed party. The two year statute of limitations being unaddressed, it was presumably not considered to be a problem. The Government did make the argument that third parties might volunteer to pay, and then seek a refund once the Service ceased collecting from the assessed party. The Court dismissed this argument opining that there was no plausible reason for a third party to volunteer to pay the taxes of an assessed party, and, at any rate, Williams had not volunteered, so the precise issue of a volunteering third party did not need to be addressed. *Williams*, 514 U.S. at 540.

¹³⁰Oral Argument, *supra* note 91, at 27-28.

dence over general ones, section 7426 is not detailed enough to give it precedence over section 1346(a)(1). Congress did not give it the level of attention that it is presumed to have as a specific statute. Furthermore, section 7426(a)(1) did not impliedly repeal third party jurisdiction under section 1346(a)(1) because the statutes are not in “irreconcilable conflict.” For these reasons, section 1346(a)(1) should be an additional remedy. In light of the decision in *EC Term of Years Trust*, legislative action should be taken to remedy the ensuing inequities.

*Kara Soderstrom**

*The Author would like to thank Professor Lyons for aiding in the production of this Note.