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Garzon v. United States: A Venue Gap is Closed for Nonresident Aliens Under Internal Revenue Code Section 7429

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COMMENTS

GARZON v. UNITED STATES: A VENUE GAP IS CLOSED FOR NONRESIDENT ALIENS UNDER INTERNAL REVENUE CODE SECTION 7429

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I. INTRODUCTION

On July 17, 1984, Jorge E. Garzon, a citizen of Colombia, was stopped for a traffic violation.¹ During routine questioning by the police regarding his immigration status, Garzon admitted that he had a shopping bag containing \$91,000 in cash in the rear of his vehicle. He claimed that he planned to use the money to purchase some shoes.² The officers were suspicious and called investigative

1. Garzon's automobile was stopped by officers of Miami's Metro-Dade Police Department. *Garzon v. United States*, 605 F. Supp. 738 (S.D. Fla. 1985).

2. Garzon further asserted that he was a shoe store manager at a shop called Emerald Shoes. This was confirmed. *Id.* at 740.

agents³ who searched Garzon's car and apartment and interrogated him for several hours.⁴ No evidence of criminal activity was found as a result of the search.⁵

Garzon was released, but all of his money was retained. The Internal Revenue Service (IRS) was notified of the possible need for an assessment.⁶ The IRS employs both jeopardy and termination assessments to prevent suspect individuals from fleeing without paying taxes or from dissipating assets while tax liabilities are calculated.⁷ In such cases, an estimated tax may be collected immediately without following normal tax assessment procedure (which includes notice and a period of time during which the taxpayer may challenge an assessment without paying any money due).⁸

Using Section 61 of the Internal Revenue Code as authority,⁹ the IRS agent included \$91,000 as gross income and determined that Garzon owed \$38,346 in taxes. Garzon said that the currency was part of an inheritance from his father's estate in 1981 and had been brought into the United States in installments from Colombia by Hernan Cortes Ortiz, the man to whom Garzon had sold his inherited farm. Customs was able to locate CMIRs¹⁰ which reflected that Ortiz had properly reported bringing in currency in excess of \$350,000.¹¹

Garzon brought an action against the United States Govern-

3. Detectives from the Organized Crime Bureau of the Miami-Dade County Public Safety Department were called in who, in turn, summoned the U.S. Customs Service and the Immigration and Naturalization Service. *Id.* at 740.

4. Garzon voluntarily consented to the search. A dog trained to sniff narcotics was used to sniff the currency, automobile and apartment. *Id.* at 741.

5. *Id.* at 741. It is notable that Miami has a reputation as the "Wall Street of the illegal drug world." Most of the marijuana and cocaine used in the United States enters through South Florida, pouring billions of untaxed "narcobucks" into the state's economy. The Reagan administration has increasingly concentrated on this money and on the middlemen who manage, launder and invest it. So, it is not unexpected behavior, in the Miami area, for local police to call in the full force of the IRS and other federal agencies to reinforce "the war on drugs." Shopping bags filled with cash and possessed by Latins are instantly suspect. *See A New Attack on Drugs*, NEWSWEEK, July 20, 1986, at 30-31.

6. *Garzon*, 605 F. Supp. at 741.

7. *Vicknair v. United States*, 617 F.2d 1129, 1131 (5th Cir. 1980).

8. 26 U.S.C. § 6861 (1982).

9. 26 U.S.C.A. § 61 (West 1985).

10. CMIRs [Form 4790] are Currency or Monetary Instruments Reports of the Department of Treasury. These forms must be filed with Customs whenever more than \$5,000 is transported into the United States. The \$91,000 seized by police was allegedly part of the farm money transported by Ortiz from Colombia. *Garzon*, 605 F. Supp. at 741.

11. *Id.*

ment in the U.S. District Court for the Southern District of Florida, seeking judicial review of the IRS assessment. A speedy review mechanism is available under 26 U.S.C. Section 7429(f), which affords prompt administrative and judicial review of the propriety of any jeopardy assessment.¹² The Government asserted that Garzon could not avail himself of this immediate judicial review because Section 7429(e) refers matters of venue to 28 U.S.C. Section 1402(a)(1), which provides that "a civil action may be prosecuted against the United States . . . only in the judicial district where the plaintiff resides."¹³ The Government filed a motion to dismiss for improper venue,¹⁴ as Garzon was clearly a nonresident alien.

The presiding judge, Clyde Atkins, noted that the Government seemed willing to saddle Garzon with the burdens and obligations of taxation while insisting that he was not entitled to the expedited review remedies allowed other taxpayers.¹⁵ Judge Atkins decided that his court could not condone what appeared to be "a logically inconsistent and patently unfair result."¹⁶ The *Garzon* court held that nonresident alien taxpayers would be allowed to avail themselves of the statutory benefits of expedited review in contesting jeopardy and termination assessments.¹⁷ No other court has permitted a nonresident alien to escape the venue bar asserted under a literal interpretation of Sections 7429(e) and 1402(a)(1). This comment will trace the reasoning underlying the statutory need for jeopardy assessments, the advent of Section 7429, the venue problems faced by aliens subjected to U.S. jeopardy taxation and the seminal cases that have led to the *Garzon* recognition of equal rights for nonresident alien taxpayers.

12. *Vicknair*, 617 F.2d at 1131.

13. *Garzon*, 605 F. Supp. at 742 (citing 28 U.S.C. §1402 (a)(1)).

14. *Id.* at 742.

15. *Id.* at 743. See 28 U.S.C. § 1391(d), which provides that an alien may be sued in any district. See generally Berger, *Alien Venue: Neither Necessary Nor Constitutional*, 9 N.Y.U.J. INT'L L. & POL. 155 (1976) (a complete discussion of alien venue).

16. *Garzon*, 605 F. Supp. at 745. See *United States v. Cortes*, 588 F.2d 106, 110 (5th Cir. 1979) ("once aliens become subject to liability under United States law, they also have the right to benefit from its protection"); *United States v. Cadena*, 585 F.2d 1252, 1262 (5th Cir.1978).

17. *Garzon*, 605 F. Supp. at 745.

II. BACKGROUND

A. *Jeopardy Assessments*

Article I of the United States Constitution is the source of the broad congressional taxing powers.¹⁸ The Internal Revenue Service is authorized by Congress to implement the taxing power as an essential component of the revenue raising function of the Government. The IRS is also responsible for preventing tax avoidance, and in this connection, has been granted jeopardy and termination assessment powers.¹⁹

Sections 6851, 6861 and 6862²⁰ of the Internal Revenue Code

18. U.S. CONST. art. I § 8, cl. 1 authorizes Congress to "lay and collect taxes."

19. See S. REP. NO. 938, 94th Cong., 2d. Sess. 364 (1976), reprinted in U.S. CODE CONG. & ADMIN. NEWS 3793, for a thorough discussion of jeopardy and termination assessments.

20. 26 U.S.C. §§ 6851, 6861, 6862 (1982).

26 U.S.C. § 6851 *Termination Assessments of Income Tax*. If the Secretary finds that a taxpayer designs quickly to depart from the United States or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act (including in the case of a corporation distributing all or part of its assets in liquidation or otherwise) tending to prejudice or to render wholly or partially ineffectual proceedings to collect the income tax for the current or the immediately preceding taxable year unless such proceeding be brought without delay, the Secretary shall immediately make a determination of tax for the current taxable year or for the preceding taxable year, or both, as the case may be, and notwithstanding any other provision of law, such tax shall become immediately due and payable. The Secretary shall immediately assess the amount of the tax so determined (together with all interest, additional amounts, and additions to the tax provided by law) for the current taxable year of such preceding taxable year or both, as the case may be, and shall cause notice of such determination and assessment to be given the taxpayer, together with a demand for immediate payment of such tax.

26 U.S.C. § 6861 *Jeopardy Assessments of Income, Estate, Gift, and Certain Excise Taxes*. If the Secretary believes that the assessment or collection of a deficiency, as defined in § 6211, will be jeopardized by delay, he shall, notwithstanding the provisions of § 6213(a), immediately assess such deficiency (together with all interest, additional amounts, and additions to the tax provided for by law), and notice and demand shall be made by the Secretary or his delegate for the payment thereof.

26 U.S.C. § 6862 *Jeopardy Assessment of Taxes Other Than Income, Estate, Gift, and Certain Excise Taxes*. If the Secretary believes that the collection of any tax (other than income tax, estate tax, gift tax, and the excise taxes imposed by chapters 41, 42, 43, 44, and 45) under any provision of the Internal Revenue laws will be jeopardized by delay, he shall, whether or not the time otherwise prescribed by law for making return and paying such tax has expired, immediately assess such tax (together with all interest, additional amounts, and additions to the tax provided for by law). Such tax, additions to the tax, and interest shall thereupon become immediately due and payable, and immediate notice and demand shall be made by the Secretary for the payment thereof.

embody methods of tax assessment and collection available to the Internal Revenue Service. These sections are pertinent in cases where the more routine methods of tax collection are ineffective or "jeopardized" to some degree because collection efforts are delayed.²¹

Ordinarily if a taxpayer objects to an IRS audit, he can petition the Tax Court for a review and he need not remit any funds until he has a full hearing and a final judgment. However, if a taxpayer appears to be planning to flee the country, conceal himself or his assets or hide, remove, transfer or dissipate his property.²² The IRS can abbreviate the ordinary assessment process and secure an immediate seizure of assets, effectively freezing them until the existence and amount of tax liability can subsequently be determined.²³ The IRS utilizes jeopardy and termination assessments to assist other government agencies in a quest to outwit illegal money laundering and drug operations.²⁴ Assessments so made, prior to any formal Tax Court hearing, help insure against a suspect taxpayer leaving the jurisdiction or rendering himself judgment proof.

21. *Garzon*, 605 F. Supp. at 741. Note that a termination assessment (§ 6851) is made for a tax year which has ended but for which the due date for filing the required return has not yet passed. A jeopardy assessment (§ 6861 or § 6862) is made for a tax year which has ended and for which the due date for filing the required return has passed. See *Nolan v. United States*, 539 F. Supp. 788 (D.C. Ariz. 1982).

22. *Simpson v. I.R.S.*, 573 F. Supp. 146 (D.C. Tenn. 1983) See also, § 5213.21(2) of the INTERNAL REVENUE MANUAL which states the standards for jeopardy and termination assessments.

The stated IRS position concerning both jeopardy assessments and terminations is that they should be made 'sparingly,' be 'reasonable in amount in the light of existing facts,' and be personally approved by the district director. Further, it is the policy of the IRS that they should not be made unless at least one of the following conditions concerning the taxpayer in question is met: (1) he is, or appears to be, designing quickly either to leave the United States or otherwise conceal himself; or (2) he is, or appears to be, designing quickly either to remove his property from the United States, or to conceal or transfer it to others, or to dissipate it; or (3) his financial solvency is, or appears to be, endangered.

S. REP. No. 938, *supra* note 19, at 360 n.1. For a review of jeopardy and termination assessments, see *Andrews, Jeopardy, Termination, and Mathematical or Clerical Error Assessments After the Tax Reform Act of 1976*, 30 U. FLA. L. REV. 1 (1977).

23. *United States v. Doyle*, 660 F.2d 277 (7th Cir. 1981).

24. *Oversight Subcommittee Seeks Ways to Clean Up Money Laundering Operations*, TAX NOTES 1320 (1985) [hereinafter *Oversight Subcommittee*]. For an in depth discussion of jeopardy procedures see *Armen, Assessing Internal Revenue Service Jeopardy Procedures*, 26 CLEV. ST. L. REV. 413 (1977). Note that the use of jeopardy assessments to assist law enforcement of drug and money laundering operations may be an improper use of the tax laws. This is a topic open to wide debate, but beyond the scope of this Comment.

B. Section 7429 Reform

Prior to the Tax Reform Act of 1976, a taxpayer had limited procedural rights to contest a jeopardy or termination assessment.²⁵ Alternatives were slow and expensive, particularly in the case of termination assessments.²⁶ A taxpayer was forced to pay the full amount of the tax and then file for a refund. If the refund was denied, it then became necessary to bring a lawsuit. Since the question of jeopardy was not resolved promptly, the taxpayer often suffered "disastrous effect"²⁷ in his business and other economic life because his assets were tied up for long periods of time.

Section 7429²⁸ was enacted to provide taxpayers, against

25. Janes, *Judicial Review of Jeopardy Assessments*, 58 TAXES 762-69 (1980).

26. *Id.* at 762.

27. Goldner, *Taxpayers Under Jeopardy Assessment Have Expanded Rights and Remedies*, 50 J. TAX'N 174-77 (1979).

28. 26 U.S.C. § 7429. *Review of Jeopardy Assessment Procedures*:

(a) Administrative review.

(1) Information to taxpayer. Within 5 days after the day on which an assessment is made under § 6851(a), 6861(a), or 6862, the Secretary shall provide the taxpayer with a written statement of the information upon which the Secretary relies in making such assessment.

(2) Request for review. Within 30 days on which the taxpayer is furnished the written statement described in paragraph (1), or within 30 days after the last day of the period within which such statement is required to be furnished, the taxpayer may request the Secretary to review the action taken.

(3) Redetermination by Secretary. After a request for review is made under paragraph (2), the Secretary shall determine whether or not

(A) the making of the assessment under § § 6851, 6861, or 6862, as the case may be, is reasonable under the circumstances and

(B) the amount so assessed or demanded as a result of the action taken under § 6851, 6861, or 6862 is appropriate under the circumstances.

(b) Judicial review.

(1) Actions permitted. Within 30 days after the earlier of: (A) the day the Secretary notifies the taxpayer of his determination described in subsection (a)(3), or

(B) the 16th day after the request described in subsection (a)(2), was made the taxpayer may bring a civil action against the United States in a district court of the United States for a determination under this subsection.

(2) Determination by district court. Within 20 days after an action is commenced under paragraph (1), the district court shall determine whether or not:

(A) the making of the assessment under § § 6851, 6861, or 6862, as the case may be, is reasonable under the circumstances, and

(B) the amount so assessed or demanded as a result of the action taken under § § 6851, 6861, or 6862, is appropriate under the circumstances.

If the court determines that proper service was not made on the United States within 5 days after the date of the commencement of the action, the running of the 20-day period set forth in the preceding sentence shall not begin before the day on which proper service was made on the United States.

(3) Order of district court. If the court determines that the making of such assessment

whom the IRS has made a jeopardy or termination assessment of taxes, a procedure whereby they can obtain an "expedited" judicial and administrative review of that assessment.²⁹ The statute provides that within five days after an assessment has been made, the IRS is required to give the taxpayer a written statement of the information upon which it has relied in making the assessment.³⁰

Within thirty days of receipt of the statement, the taxpayer may request the IRS to review the assessment to determine if it is reasonable or appropriate under the circumstances.³¹ If the taxpayer is not satisfied with the results of the administrative review, he may request judicial review and bring a civil action against the United States in a federal district court. The taxpayer must file within thirty days after the earlier of either the day the IRS notified him of its determination or the sixteenth day after he requested an administrative review.³² Within twenty days, the district court is supposed to make an independent determination as to whether or not it was reasonable for the IRS to make the assessment and whether the amount is appropriate under the

is unreasonable or that the amount assessed or demanded is inappropriate, the court may order the Secretary to abate such assessment, to redetermine (in whole or in part) the amount assessed or demanded, or to take such other action as the court finds appropriate.

(c) Extension of 20-day Period where taxpayer so requests. If the taxpayer requests an extension of the 20-day period set forth in subsection (b)(2) and establishes reasonable grounds why such extension should be granted, the district court may grant an extension of not more than 40 additional days.

(d) Computation of days. For purposes of this section, Saturday, Sunday, or a legal holiday in the District of Columbia shall not be counted as the last day of any period.

(e) Venue. A civil action under subsection (b) shall be commenced only in the judicial district described in § 1402(a)(1) or (2) of Title 28 of the United States Code.

(f) Finality of determination. Any determination made by a district court under this section shall be final and conclusive and shall not be reviewed by any other court.

(g) Burden of proof.

(1) Reasonableness of termination or jeopardy assessment. In an action under subsection (b) involving the issue of whether the making of an assessment under §§ 6851, 6861, or 6862 is reasonable under the circumstances, the burden of proof in respect to such issue shall be upon the Secretary.

(2) Reasonableness of amount of assessment. In an action under subsection (b) involving the issue of whether an amount assessed or demanded as a result of action taken under §§ 6851, 6861, or 6862 is appropriate under the circumstances, the Secretary shall provide a written statement which contains any information with respect to which his determination of the amount assessed was based, but the burden of proof in respect of such issue shall be upon the taxpayer.

29. Section 7429 was introduced into the I.R.C. of 1954 under the Tax Reform Act of 1976. See Pub. L. No. 94-455, 90 Stat. 1520 § 1204(a)(1976).

30. § 7429(a)(1).

31. § 7429(a)(2).

32. § 7429(b)(1).

circumstances.³³

Section 7429 was enacted to confer due process scrutiny on all future jeopardy and termination assessments³⁴ adhering to the policy of *Fuentes v. Shevin*³⁵ which requires a speedy hearing in any case where there is a denial of property by the Government. Section 7429 was promulgated to mitigate the "hardship" of a jeopardy assessment that could result from tying up a substantial part or all of a taxpayer's assets. Taxpayers' rights against any IRS "arrogance or abuse"³⁶ were to be strengthened by Section 7429 provisions for quick resolution as to the legitimacy of any jeopardy assessment.

C. *The Venue Bar to Aliens Under Section 7429(e): Botero v. United States*

Section 7429(e) provides that a civil action brought under Section 1346(a)³⁷ where the United States is a defendant shall be commenced only in the judicial district described in Section 1402(a)(1) or (2)³⁸ of the United States Code. Section 1402(a)(1) places venue

33. § 7429(b)(2).

34. See *United States v. Hall*, consolidated with *Laing v. United States*, 423 U.S. 161 (1976) and *Commissioner of I.R.S. v. Shapiro*, 424 U.S. 614, which stated that due process requires that when a person's property is taken, he must be given a prompt hearing with a showing of probable validity for the deprivation.

35. 407 U.S. 67 (1972). Note that U.S. CONST. amend. V states in part ". . . nor [shall any person] be deprived of life, liberty or property, without due process of law. . . ."

36. In some cases, taxpayers are not able to pay accounting or legal fees for representation in pending civil or criminal tax cases. See *Shapiro*, 424 U.S. 614. See generally *Proposals for Administrative Changes in Internal Revenue Service Procedures: Hearings on H.R. 10612 before the Subcommittee on Oversight of the House Ways and Means Committee*, 94th Cong., 1st Sess. (1975) and Armen, *Assessing Internal Revenue Service Jeopardy Procedures: Recent Legislative and Judicial Reforms* 26 CLEV. ST. L. REV. 413 (1977).

37. 28 U.S.C. § 1346 *United States as defendant*.

(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:

(1) Any civil action against the United States for the recovery of an Internal Revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the Internal Revenue laws . . . but

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in § 6226, 6228(a), 7426 and 7428 (in the case of the United States District Court for the District of Columbia) or § 7429 of the Internal Revenue Code of 1954.

38. 28 U.S.C. § 1402 *United States as defendant*.

(a) Any civil action in a district court against the United States under subsection (a) of § 1346 of this title may be prosecuted only:

(1) Except as provided in Paragraph (2), in the judicial district where the plaintiff resides.

in the district where the plaintiff resides. The IRS has construed a literal reading of Section 1402(a)(1) to be a powerful venue bar for aliens who seek district court redress under Section 7429.

A dramatic example is *Botero v. United States*³⁹ where the Government interpreted the term "residence" for venue purposes as synonymous with "citizenship". Under this interpretation of Section 1402(a)(1), an alien does not reside within any judicial district of the United States.

In 1981, Roberto Botero was indicted in an alleged \$57 million money laundering scheme.⁴⁰ An IRS jeopardy assessment froze his U.S. bank accounts and placed a lien on his Florida home. The IRS claimed that Botero, a Colombian national⁴¹ but long-time U.S. resident, owed tax on \$4.5 million in unreported income.⁴² Botero brought a Section 7429 action seeking review of the termination assessment against him. The district court held that it lacked venue under Section 1402(a)(1),⁴³ and that even though resident aliens have fifth amendment rights,⁴⁴ Botero was not truly deprived of due process because he could litigate in either the Court of Claims or the Tax Court.⁴⁵

In 1985, after a protracted and extremely expensive legal battle, the tax assessment against Mr. Botero was reduced to practically nothing. Judge Dawson of the U.S. Tax Court, who approved an out-of-court settlement said, "[I]t appears the IRS made a big mistake."⁴⁶ The district court, relying on the Government's questionable definition of residency, deprived Botero of speedy review. Botero's tax attorney remarked:

Section 7429 was designed to prevent exactly the factual situation of the *Botero* case. The Government, without any concrete basis and without an audit, tied up all of Mr. Botero's assets for four years. If the court had interpreted the word residence to mean domicile, Roberto Botero would have had a quick District Court review, his money would have been released and he would

Note: Section 1402(a)(2) applies only to corporations.

39. *Botero*, 560 F. Supp. 616, (S.D. Fla. 1983).

40. *The Miami News*, May 29, 1985 at 8A, col. 1.

41. *Botero*, 560 F. Supp. at 617.

42. *The Miami News*, *supra* note 40.

43. *Botero*, 560 F. Supp. at 617.

44. *See Kwong Hai Chew v. Colding*, 344 U.S. 590 (1952).

45. *Botero*, 560 F. Supp. at 618.

46. *The Miami News*, *supra*, note 40. *See Roberto Botero v. Commissioner*, T.C. No. 8163-82 (1985).

not have lost his home.⁴⁷

The *Botero* court relied on *Malajalian v. United States*⁴⁸ where the district court dismissed a refund suit pursuant to two jeopardy assessments because of improper venue. The court of appeals affirmed the decision because of the taxpayer's status as an alien.

The rationale in *Botero* and *Malajalian* appears contrary to the traditional concept of venue. Venue relates, not to the power to adjudicate, but to the place where the power is to be exercised. Venue statutes are designed to promote the convenience of the litigants.⁴⁹ There is no indication that Congress intended to permit district courts to deprive taxpayers of a prompt post-deprivation remedy with impunity, by dismissing Section 7429 proceedings on procedural grounds.⁵⁰ The true purpose of Section 1402(a)(1) is to protect a plaintiff and not force him to litigate a controversy in an inconvenient forum.⁵¹

Section 7429 was promulgated to expedite judicial review for a taxpayer. Roberto Botero and Antranik Malajalian were deemed taxpayers; yet, as of March 1983, they were unable to maintain an action for jeopardy assessment review in the district court, even though the Supreme Court had stated "Congress does not in general intend to create venue gaps which take away with one hand what Congress has given by way of jurisdictional grant with the other."⁵²

47. Interview with Robert G. Breier, Roberto Botero's tax attorney (Jan. 10, 1986). Mr. Botero had to change his entire life-style, including having to move out of his home.

48. 504 F.2d 842 (1st Cir. 1974). The court stated that 28 U.S.C. § 1402(a)(1) restricts venue in actions against the United States to the district where the plaintiff resides, and the venue of a nonresident alien taxpayer's action against the United States to recover amounts seized from him, cannot properly be laid in the Federal District Court of Massachusetts if 28 U.S.C. § 1402(a)(1) is read literally, since the nonresident alien did not reside in Massachusetts. Also, 28 U.S.C. § 1402(a)(2) accords a nonresident alien corporate taxpayer the privilege of bringing suit in the district where a tax return was filed but does not extend this benefit to individuals.

49. C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 42 (4th ed. 1983).

50. *Zuluaga v. United States*, 774 F.2d 1487, 1491 (9th Cir. 1985) (Wiggins, J., concurring).

51. *Jones v. United States*, 407 F. Supp. 873, 876 (N.D. Tex. 1976).

52. *Brunette Machine Works Ltd. v. Kochum Industries Inc.*, 406 U.S. 706, 710 (1972). This was a patent infringement suit against an alien. The court reasoned that "Venue provisions are designed, not to keep suits out of the federal courts, but merely to allocate suits to the most appropriate or convenient federal forum." The *Malajalian* court distinguished *Brunette* by stating that it involved the construction of conflicting statutory provisions rather than a single governing venue statute. *Malajalian*, 504 F.2d at 843.

*D. The Government Turnabout in Favor of Resident Aliens:
Williams v. United States*

Norma Williams was a British citizen who lived most of the year in Boca Raton, Florida.⁵³ Her husband had extensive business dealings in the United States and their two children were enrolled in a Florida school.⁵⁴

A Section 6861 jeopardy assessment⁵⁵ was made against Mrs. Williams as a transferee of her husband.⁵⁶ She requested and received an administrative review⁵⁷ and the IRS upheld its assessment.⁵⁸ Williams then filed a motion in U.S. District Court for the Southern District of Florida to abate the assessment, but the court held that "pursuant to Sections 7429(e)⁵⁹ and 1402(a)(1),⁶⁰ Williams failed to establish venue."⁶¹ The venue gap and the *Botero*, *Malajalian* rationale remained unchanged.

However, when *Williams* came up on appeal before the Eleventh Circuit in May of 1983⁶² the court said, "We have before us a case vastly different from the case that was . . . before the District Court. The Government, by supplemental brief, has changed its position . . . 'Upon more mature reflection' the Government . . . now concedes that a resident alien may attack a jeopardy assessment without any venue bar."⁶³ The *Williams* court concluded that resident alien taxpayers could establish venue under 26 U.S.C. Sections 7429 and 1402(a)(1),⁶⁴ but withheld an application of the holding until the district court could ascertain on remand whether

53. *Williams v. United States*, 704 F.2d 1222, 1223 (11th Cir. 1983).

54. *Id.*

55. See the text of § 6861, *supra* note 20.

56. *Williams*, 704 F.2d at 1224. At the time of the jeopardy assessment notice, which demanded prompt payment, Williams had her house up for sale.

57. See the text of § 7429(a)(2), *supra* note 28.

58. *Williams*, 704 F.2d at 1224.

59. See the text of § 1402(a)(1), *supra* note 38.

60. *Williams*, 704 F.2d at 1224. The court conferred judgment dismissing the case for lack of venue.

61. *Id.* The *Williams* appeal came only two months after the *Botero* decision.

62. *Williams*, 704 F.2d at 1224. This was quite a turnabout for the Government. At oral argument before the 11th Circuit and for its district court stance, the Government had insisted that no alien taxpayer, resident or nonresident, could avail himself of I.R.C. § 7429. The Government also submitted its reconsidered view in other 1983 cases. See *Fernandez v. United States*, 704 F.2d 592 (11th Cir. 1983) and the unreported *Botero v. United States*, No. 81-5818 (11th Cir. 1983) (This Mr. Botero was Hernan, an older brother of Roberto).

63. *Williams*, 704 F.2d at 1227.

64. *Id.*

Norma Williams was a resident or nonresident alien.⁶⁵

With *Williams*, the residency status of an alien took on added importance; resident aliens could now invoke the aegis of Section 7429.⁶⁶ The Government, reflecting on its earlier position, conceded resident aliens venue under Section 7429 given that they were taxed as if they were U.S. citizens. Markedly different, is the treatment accorded nonresident aliens, who are taxed under the Treasury regulations.⁶⁷

65. *Id.*

66. See generally Langer, *When Does a Nonresident Alien Become a Resident for U.S. Tax Purposes*, 44 J. TAX'N 220-24 (1976).

67. Treas. Reg. § 1.871-1 (1986).

(a) *Classes of aliens.* For purposes of the income tax, alien individuals are divided generally into two classes, namely, resident aliens and nonresident aliens. Resident alien individuals are, in general, taxable the same as citizens of the United States; that is, a resident alien is taxable on income derived from all sources, including sources without the United States. See § 1.1-1(b). Nonresident alien individuals are taxable only on certain income from sources within the United States and on the income described in § 864(c)(4) from sources without the United States which is effectively connected for the taxable year with the conduct of a trade or business in the United States. However, nonresident alien individuals may elect, under § 6013(g) or (h), to be treated as U.S. residents for purposes of determining their income tax liability under chapters 1, 5 and 24 of the Code. Accordingly, any reference in §§ 1.1-1 through 1.1388-1 and §§ 1.1491-1 through 1.1494-1 of this part to nonresident alien individuals does not include those with respect to whom an election under § 6013(g) or (h) is in effect, unless otherwise specifically provided. Similarly, any reference to resident aliens or U.S. residents includes those with respect to whom an election is in effect, unless otherwise specifically provided.

(b) *Classes of non-resident aliens(1) in general.* For purposes of the income tax, nonresident alien individuals are divided into the following three classes:

(i) Nonresident alien individuals who at no time during the taxable year are engaged in a trade or business in the United States,

(ii) Nonresident alien individuals who at any time during the taxable year are, or are deemed under § 1.871-9 to be, engaged in a trade or business in the United States, and

(iii) Nonresident alien individuals who are bona fide residents of Puerto Rico during the entire taxable year.

Treas. Reg. § 1.871-2 (1987). *Determining Residence of Alien Individuals.*

(a) *General.* The term "nonresident alien individual" means an individual whose residence is not within the United States, and who is not a citizen of the United States. The term includes a nonresident alien fiduciary. For such purposes the term "fiduciary" shall have the meaning assigned to it by § 7701(a)(6) and the regulations in part 301 of this chapter (regulations on Procedure and Administration). For the presumption as to an alien's nonresidence, see paragraph (b) of § 1.871-4.

(b) *Residence defined.* An alien actually present in the United States who is not a mere transient or sojourner is a resident of the United States for purposes of the income tax. Whether he is a transient is determined by his intentions with regard to the length and nature of his stay. A mere floating intention, indefinite as to time, to return to another country is not sufficient to constitute him a transient. If he lives in the United States and has no definite intention as to his stay, he is a resident. One who comes to the United States for a definite purpose which in its nature may be promptly accomplished is a transient; but, if his purpose is of such a nature that an extended stay may be necessary for its accomplish-

The *Williams* court did not answer whether nonresident aliens may properly be denied venue under Section 7429(e).⁶⁸ This question was not before the court, but presaged the recognition of the issue and stressed that the "most readily apparent problem concerns the extent of the deprivation of the constitutional rights of alien taxpayers, whose property has been seized by the Government without the statutory benefits afforded all other taxpayers."⁶⁹ The issue for nonresident aliens concerns their right to equal protection under U.S. law.

Hernan Botero, a nonresident alien whose unreported jeopardy case⁷⁰ came up in the same month as *Williams*, contended that the words "upon more mature reflection" really meant that the Government had been totally incorrect and that a perusal of the legislative history shows a clear intent that every taxpayer, including nonresident aliens, have review available under Section 7429.⁷¹ The Internal Revenue Code defines "taxpayer" as *any person* (emphasis added) subject to any IRS tax.⁷² However, the Government remained solidly entrenched: "[W]e continue to remain firmly of the view . . . that a nonresident alien . . . does not satisfy . . . statutory [venue] provisions, and is thus prohibited from bringing a Section 7429 action in any federal district court."⁷³ The Government went on to cite the traditional Treasury regulations⁷⁴ as showing a sharp differentiation between alien residents and nonresidents:

We believe it reasonable to conclude that the Congress determined that only resident aliens, who are obliged to report all of their income . . . are appropriately entitled to immediate judi-

ment, and to that end the alien makes his home; temporarily in the United States, he becomes a resident, though it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned. An alien whose stay in the United States is limited to a definite period by the immigration laws is not a resident of the United States within the meaning of this section, in the absence of exceptional circumstances.

68. *Williams* 704 F.2d at 1226.

69. *Id.* at 1227.

70. *Botero v. United States*, No. 81-5818 (11th Cir. 1982).

71. See Supp. Reply Brief for Appellant at 7-8. *Botero v. United States*, No. 81-5818 (11th Cir. 1983) (on file at the University of Miami INTER-AM. L. REV. office (IALR)).

72. 26 U.S.C. § 7701(a)(14) (1984). The term "taxpayer" means any person subject to any Internal Revenue tax.

73. See Supp. Brief for Appellee at 4 (on file at the IALR office). See also *De Maria Campos v. United States*, No. C 84-180 A (N.D. Ga. 1984) where Mexican nonresident aliens were barred from the use of § 7429 because of venue.

74. See *supra* note 67.

cial review [of IRS actions]. . . .⁷⁵ [S]ince it does not violate due process to tax resident aliens differently from nonresident aliens, it does not vitiate elementary principles of due process for the Congress to . . . insist that nonresident aliens are limited to judicial procedure . . . available . . . in the Tax Court . . . or in the Court of Claims.⁷⁶

The Government appeared to confuse language from Treasury regulations with the intent of venue provisions in the federal court system. Venue is a procedural device instituted to assist litigants rather than to deprive them of a forum.

III. THE SIGNIFICANCE OF *Garzon*

A House Ways and Means Subcommittee, examining the Treasury Department's role in fighting illegal drug and money laundering operations, interviewed a convicted money launderer called "Mario".⁷⁷ Mario referred to a typical courier as a "smurf",⁷⁸ usually a Latin male, known to arrive with cash in a car trunk,⁷⁹ ready to visit banks in town in order to exchange cash for money orders or cashier's checks in amounts less than \$10,000.

Miami has been labelled the drug capital of the world since the narcotics boom of the mid-1970's.⁸⁰ The influx of hot "narcobucks" has made Miami a wealthy and a dangerous city; "the Casablanca on the Gulf Stream".⁸¹

It is understandable that Miami police were suspicious when they picked up Jorge Garzon, a Latin male with a shopping bag full of cash in his car, and that they called in federal agents.⁸² The IRS, in turn, felt duty-bound to make a jeopardy assessment since to do so, it need only establish that the taxpayer's circumstances

75. Supp. Brief for Appellee at 7-8 (on file at the IALR office).

76. *Id.* at 8. The Government cites, in support of its reasoning, *United States v. Maryland Savings Share Insurance Corp.* 400 U.S. 4, 6 (1970); *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 611 (1974) (citing *Phillips v. Commissioner*, 283 U.S. 589, 596, 597 (1931); and *Barter v. United States*, 550 F.2d 1239, 1240 (7th Cir. 1977)) (noting that "perfect equality . . . between persons subject to the Internal Revenue Code has [not] been . . . a constitutional *sine qua non*").

77. See *Oversight Subcommittee*, *supra* note 24.

78. *Id.* at 1320.

79. *Id.*

80. For an interesting view of Miami's drug involvement see Lernoux, *Golden Gateway for Drugs - the Miami Connection*, *The Nation* (Feb. 18, 1984).

81. *Id.* at 186.

82. *Garzon*, 605 F. Supp. at 738.

appear to be jeopardizing tax collection, not that they definitely do so,⁸³ and that the ultimate collection of the tax might be imperiled by delay.⁸⁴ Garzon and his cache of currency evidently fit the "Mario" profile of a money launderer. Garzon's seized money became the basis for gross income the IRS assessed for income tax purposes.⁸⁵

The *Garzon* court strongly questioned the prevailing statutory interpretation that would deprive Garzon of his constitutional rights and the use of the review procedures provided by Section 7429. Judge Atkins evaluated the issue left open by the *Williams* court:⁸⁶ is venue in the federal district court proper under Section 7429(e) even for a suspect and nonresident alien? Significantly, the court found venue necessary because "[t]o hold otherwise would constitute . . . a denial of equal protection. . ."⁸⁷ Counsel for Garzon and the district court found support for the theory that the venue bar was a violation of the right to equal protection in the Supreme Court opinion in *Plyler v. Doe*.⁸⁸ *Plyler* held that a Texas statute, which denied undocumented [alien] schoolchildren the free public education that it provided to children who were citizens of the United States or legally admitted aliens, violated the equal protection clause of the fourteenth amendment.⁸⁹

Jorge Garzon was able to present documented evidence⁹⁰ that the cash in his possession was derived from a nontaxable source.⁹¹ That there are large amounts of cash in a taxpayer's possession is not automatically a reason for the conclusion that there is taxable income. There was no evidence offered to indicate that Garzon was engaged in any criminal activity.⁹² The opinion noted that: "On a continuum with arbitrary and capricious at one end and substan-

83. *Miller v. United States*, 615 F. Supp. 781 (N.D. Ohio 1985).

84. *Transport Mfg. & Equipment Co. of Del. v. Trainor*, 382 F.2d 793 (8th Cir. 1967).

85. *Garzon*, 605 F. Supp. at 743.

86. *Williams*, 704 F.2d at 1227.

87. *Garzon*, 605 F. Supp. at 745; *see supra* note 35.

88. 457 U.S. 202 (1982).

89. U.S. CONST. amend. XIV states in part: ". . . nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person . . . the equal protection of the laws." *See generally* *Barber v. Gonzales*, 347 U.S. 637 (1954), *Fong Haw Tan v. Phelan*, 333 U.S. 6 (1948), *Pacheco v. Immigration and Naturalization Service*, 546 F.2d 448 (1st Cir. 1976) (doubts in the construction of a statute are to be resolved in favor of the alien).

90. Based on entry dates stamped in Ortiz' passport, Customs located the CMIR's (*see supra* note 10) which documented the transported currency. *Garzon*, 605 F. Supp. at 741.

91. *Id.* at 746.

92. *Id.* at 745.

tial evidence at the other, the termination assessment in this case falls uncomfortably near the arbitrary and capricious end. . . .⁹³

An interesting collateral aspect of the *Garzon* case is that the IRS estimated Garzon's tax liability improperly. The IRS based its figures on Section 61 of the Code⁹⁴ when it should have referred to Section 872.⁹⁵

Garzon's guilt or innocence is not at issue here; what is at issue is any taxpayer's right to a speedy judicial review when jeopardedly assessed by the IRS. Jorge Garzon's property was seized by the U.S. Government because he fit the profile of a suspect money launderer. The IRS improperly computed his tax liability, and no criminal charges could be brought against him. Yet, under the *Botero* and *Manajalian*⁹⁶ rationale, Garzon, as a nonresident alien, was unable to avail himself of speedy judicial review because of a venue technicality. His money could have been tied up for years while he litigated and incurred costs and attorney's fees. Judge Atkins found this untenable. Equal protection requires that Garzon be given the opportunity for a prompt preliminary determination by an unbiased tribunal as to the assessment's validity.⁹⁷

The Government's interest in collecting taxes is strong, but not strong enough to deprive any plaintiff of prompt post-seizure judicial review. The *Garzon* holding is an important addition to the developing doctrine that federal courts be given great discretion in determining venue. It defeats the purpose of the venue statutes to use them, in some situations, to bar a worthy litigant from having his day in court.⁹⁸ The Government did file an appeal in *Garzon*⁹⁹ but opted to have it dismissed¹⁰⁰ because it did not consider the case a "proper vehicle" to further press the venue issue.¹⁰¹

93. *Id.* The court in *Loretto v. United States*, 440 F. Supp. 1168 (E.D. Pa. 1977) struggled to find parameters for "reasonable" jeopardy assessments.

94. 26 U.S.C. § 61 defines and discusses the derivation of gross income for citizens and resident aliens.

95. 26 U.S.C. § 872 provides special rules for nonresident aliens.

96. *Malajalian*, 504 F.2d at 842 and *Botero*, 560 F. Supp. at 616.

97. Justice Brennan in his concurring *Laing* opinion, 423 U.S. at 161.

98. *Jones v. United States*, 407 F. Supp. 873 (N.D. Tex. 1976).

99. *Garzon v. United States*, No. 85-6028 (11th Cir. 1985).

100. *Id.* Pursuant to Rule 42(b) of the Fed. R. App. P., the parties stipulated and agreed to a dismissal with prejudice in December 1985. Subsequently, an order of dismissal was entered.

101. Interview with Stanley P. Kaplan, attorney for Jorge E. Garzon (Jan. 27, 1987).

IV. CONCLUSION

Congress was aware of the necessity for an expeditious review of jeopardy and termination assessments, and in 1976 it enacted Section 7429 of the Internal Revenue Code to help mitigate the drastic summary action taken in connection with these tax assessments. Yet, in 1984 Jorge Garzon had no pre-seizure opportunity to present evidence of his innocence.¹⁰² Congress established the Section 7429 *de novo* review mechanism for taxpayers to deal with exactly this type of problem. Burdening Garzon with the obligations of taxation and then denying him a remedy afforded to all other taxpayers was a violation of his constitutional right to equal protection,¹⁰³ and a contradiction to the legislative intent of Section 7429 and the venue statutes. A person should not be subjected to a taking of his assets without an opportunity to promptly prove that he is entitled to a refund.

Where an IRS jeopardy assessment is reasonable and appropriate, the IRS can retain the money it is owed. Section 7429 was promulgated to protect the taxpayer whether citizen, resident or nonresident alien. Anyone who is taxed by the U.S. Government is entitled to "the same right and to the full and equal benefit of all laws and proceedings."¹⁰⁴ In accordance with the holding in *Garzon*, all taxpayers, resident and nonresident aliens included, should be entitled to a prompt post-seizure judicial review under Section 7429.

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102. *Id.*; see also *Garzon*, Supp. Memorandum of Law in Opposition to Motion to Dismiss at 5-6 (on file at the IALR office).

103. *Id.*

104. *Hagl v. Jacob Stern & Sons, Inc.*, 396 F. Supp. 779 (E.D. Pa. 1975) (citing 42 U.S.C. § 1981).