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PROCEEDINGS BEFORE
**THE SUPREME COURT
OF THE
UNITED STATES**

CAPTION: UNITED STATES, Petitioner

V. FRANCES L. DALM

CASE NO: 88-1951

PLACE: Washington, D.C.

DATE: January 10, 1990

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, *HUSSON, ESQ.* :
Pro Hac Vice Petitioner :
V. *Petitioner* : No. 88-1951
FRANCES L. DALM, *ESQ.* :
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PAGE

Washington, D.C.
Wednesday, January 10, 1990

Pro The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
1:47 p.m.

APPEARANCES:

CHRISTINE DESAN-HUSSON, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.,
pro hac vice; on behalf of the Petitioner.
ROBERT B. PIERCE, ESQ., West Bloomfield, Michigan; on
behalf of the Respondent.

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1 Here, Sections 7422 and 6511 of the Internal
2 Revenue Code make it clear that no suit for a tax refund
3 may be maintained against the United States unless a
4 refund claim for that tax has been timely filed. The
5 refund claim for the gift tax at issue here was untimely,
6 and nothing in the doctrine of equitable recoupment
7 changes that.

8 The dispute -- this dispute began because of the
9 tax treatment of a lump sum payment received by the
10 respondent in 1976. At that time, she was serving as the
11 administrator of her former employer's estate. She
12 received two lump sum payments from the brother of her
13 employer and the beneficiary of his estate.

14 In 1976 she received \$180,000. A gift tax
15 return was filed and the respondent paid a gift tax of
16 approximately \$20,000. In 1977 she received approximately
17 \$133,000. No return or gift tax was paid on that.

18 QUESTION: Do you know why there was no gift tax
19 return filed that year?

20 MS. DESAN-HUSSON: The record does not reflect
21 that.

22 QUESTION: Maybe I should ask your opponent.

23 MS. DESAN-HUSSON: Yes, you could.

24 QUESTION: In theory, if the government later
25 decides that income tax was owing on it, that it wasn't a

1 gift, should the government give credit for the gift tax
2 that was paid?

3 MS. DESAN-HUSSON: The government will give
4 credit. In fact, what happened in this case is that in
5 1983 the Internal Revenue Service determined that the
6 amount was income and asserted the deficiency.

7 The Internal Revenue Service can't in the notice
8 of deficiency just lop off a certain amount because the
9 amount of the deficiency is statutorily defined. So, that
10 amount goes off in credits or recoupment can't be
11 performed.

12 The Service could -- does have the authority to
13 settle a claim, at which point it may make -- it may take
14 into account the fact that a gift tax was paid.

15 QUESTION: And there was some settlement here?

16 MS. DESAN-HUSSON: There was a settlement in
17 this case. In this case --

18 QUESTION: Did that give credit in the
19 settlement for the gift tax?

20 MS. DESAN-HUSSON: It's unclear whether -- the
21 court of appeals decided that it was necessary to remand
22 the case to determine whether or not the settlement had
23 given credit for the gift tax.

24 It's clear that --

25 QUESTION: But you do avow that one way or

1 another credit will be given for the gift tax that was
2 paid?

3 MS. DESAN-HUSSON: Well, at this point I don't
4 think any court has jurisdiction over this claim, this
5 claim for a gift tax. It's possible that credit was given
6 in the settlement. It's also possible that -- a taxpayer
7 can also file -- pay a tax and file a refund claim.

8 QUESTION: Right.

9 MS. DESAN-HUSSON: And at that point the IRS
10 will give credit, will -- it's given notice to taxpayers
11 in its Revenue Ruling 7156 that it will at that point
12 perform equitable recoupment. So, it --

13 QUESTION: Well, can -- can that happen now?

14 MS. DESAN-HUSSON: It can't happen now because
15 the --

16 QUESTION: Can or cannot?

17 MS. DESAN-HUSSON: Cannot. Cannot happen now.

18 The income tax deficiency -- the way recoupment
19 works is to reduce a currently owed debt. So, it could
20 have reduced the income tax deficiency.

21 And the administrative claim that would have
22 been timely was an income tax administrative claim. At
23 that point, the Service could have reduced the
24 administrative claim. It doesn't have the authority to --
25 to consider an untimely claim for the gift tax. That

1 would just have been a claim for a refund of gift tax, and
2 that was outside of its authority.

3 The point is only that -- that the taxpayer had
4 to litigate the income tax deficiency and seek to reduce
5 the amount of the income tax deficiency because the gift
6 tax claim was untimely in 1985, which is when this claim
7 -- this claim began.

8 QUESTION: May I just interrupt, if I may? 1984
9 I think it was, wasn't it, that they filed the --

10 MS. DESAN-HUSSON: Well, the -- the district
11 court suit was filed in '85. But the -- that's right, the
12 administrative claim was filed in '84.

13 QUESTION: I thought the refund suit for the
14 recovery of the gift tax was filed on December 1, 1984.

15 MS. DESAN-HUSSON: I believe it was November 1,
16 1984. But, then, I was just saying the district court's
17 was in '85.

18 QUESTION: Which was before the deficiency
19 matter had been concluded?

20 MS. DESAN-HUSSON: That's right.

21 QUESTION: And is it correct that had the
22 taxpayer at that time paid the income tax in dispute and
23 filed a claim for refund that the taxpayer could have
24 recovered the gift tax --

25 MS. DESAN-HUSSON: If she --

1 QUESTION: -- erroneously --

2 MS. DESAN-HUSSON: If she had paid the income
3 tax and filed the income tax refund, she could have --

4 QUESTION: She could have --

5 MS. DESAN-HUSSON: Well, one -- excuse me --
6 once -- once the claim was in the tax court, the tax court
7 has jurisdiction over that claim.

8 QUESTION: Well, yes, but --

9 MS. DESAN-HUSSON: If she hadn't gone to tax
10 court in 1983 --

11 QUESTION: If instead of proceeding in the tax
12 court --

13 MS. DESAN-HUSSON: Right.

14 QUESTION: -- she had paid her income tax and
15 filed a refund suit which had two counts in it. Count one
16 says I want the money back for the erroneously collected
17 income tax; count two, I want the gift tax repaid also.
18 Would the gift tax claim have been timely?

19 MS. DESAN-HUSSON: I -- I believe what would
20 have happened is that the Service would have considered --
21 the way you stated it, would have considered under number
22 one that what in fact had happened was that the taxpayer
23 was filing a refund claim for the income tax. And it
24 would then have used the gift tax, the payment of the gift
25 tax, as an equitable reason why the income tax could be

1 reduced. So she would have gotten credit.

2 QUESTION: It might have given her credit if --
3 but would it have had the authority under your argument
4 you make here to strike count 2 of her complaint and say
5 it's too late to sue for the gift tax?

6 MS. DESAN-HUSSON: Yes. I believe if count 2
7 constituted a gift tax refund claim, it wouldn't have had
8 the authority to do otherwise. It wouldn't have had the
9 authority under its Section 6402 of the Code. When --

10 QUESTION: Assume for a moment that the income
11 tax claim is \$100,000 and the gift tax claim is \$30,000,
12 so we have -- and she files the two counts. And you say
13 you could strike count one for 30 but would they then --
14 could they then have defended the 100,000 on the ground --
15 the \$100,000 claim on the ground that there's -- it's too
16 late to get the 30 back?

17 MS. DESAN-HUSSON: I don't think that the IRS
18 would have done that. I mean, --

19 QUESTION: Well, I -- are we relying on the good
20 faith or sort of the equitable judgment of the
21 administrator or did she have a right? I'm asking if she
22 had a right at that time --

23 MS. DESAN-HUSSON: She did have a right.

24 QUESTION: -- to 30,000?

25 MS. DESAN-HUSSON: And if -- if for some reason

1 the Service hadn't given her the -- hadn't reduced the
2 \$100,000 by \$30,000, she could have filed suit in the
3 district court.

4 QUESTION: And she could have --

5 MS. DESAN-HUSSON: And the district court
6 would --

7 QUESTION: And she had a right to prosecute
8 successfully a refund claim for the \$30,000?

9 MS. DESAN-HUSSON: I wouldn't call it a refund
10 claim. I think -- the distinction that --

11 QUESTION: Well, she had a right to recover
12 \$30,000.

13 MS. DESAN-HUSSON: She had a right to have her
14 income tax reduced by \$30,000.

15 QUESTION: So she could do it by an independent
16 action but not by way of a counterclaim. That's what it
17 boils down to.

18 MS. DESAN-HUSSON: She couldn't do it by way of
19 an independent action for the gift tax.

20 QUESTION: But as a separate count she could.

21 MS. DESAN-HUSSON: What I'm trying to --

22 QUESTION: Well, okay.

23 MS. DESAN-HUSSON: What I'm trying to -- the
24 distinction I'm trying to draw is that the difference
25 between an independent suit for the gift tax and a suit

1 for the income tax is not a subtle distinction. It's a
2 distinction on which jurisdiction rests.

3 Specifically, the Tucker Act gives the district
4 courts jurisdiction over a tax refund suit. However, that
5 jurisdiction is expressly limited by provisions of the
6 Internal Revenue Code.

7 Section 7422(a) provides that no suit or
8 proceeding shall be maintained in any court for a tax
9 refund unless an administrative claim has been duly filed
10 according to relevant law.

11 Now, Section 6511(a) of the Code in turn
12 specifies that an administrative claim for a refund must
13 be filed within three years of the time the return is
14 filed or within two years of the time a return is paid.

15 That is, the limiting words of the statute are
16 express and make it explicit --

17 QUESTION: Yes, but it seems to me if you read
18 those as you -- literally, that would bar her refund claim
19 for the 30,000 even if she'd filed it in connection with
20 an income tax refund claim.

21 MS. DESAN-HUSSON: Well, the theory of equitable
22 recoupment -- I mean, it could be that --

23 QUESTION: Because it's not a defense anymore at
24 this point. She's not a defendant. She is now the
25 plaintiff seeking money.

1 MS. DESAN-HUSSON: Under -- the Court explained
2 in Bull that it considered her a defendant. That is, as
3 the Court put it in Bull, a collection -- there could be a
4 hypothetical collection action by the government in which
5 equitable recoupment was raised as a defense.

6 But under current revenue procedures the
7 government goes ahead and summarily collects tax, and the
8 refund suit for that tax is functionally a defense. It's
9 the taxpayer's opportunity to litigate the amount of the
10 income tax deficiency due.

11 So that in that refund action, in an action here
12 for the income tax deficiency, the taxpayer could raise an
13 equitable recoupment claim and it would be functioning
14 according to this Court's reasoning in Bull as a defense.
15 It would be an equitable reason why the income tax should
16 be reduced.

17 Now, I would note that --

18 QUESTION: Could a claim like that ever be not
19 just kind of a recoupment or -- but lead to an affirmative
20 recovery against the government on the basis --

21 MS. DESAN-HUSSON: No. No. Recoupment is
22 always limited by the amount of the affirmative claim.

23 QUESTION: Well, it -- it is an affirmative
24 recovery against the government in the sense that you're
25 talking about a suit for a refund.

1 MS. DESAN-HUSSON: In the sense that the
2 government --

3 QUESTION: She's paid the tax and she is -- she
4 can sue to get back the amount of the gift tax, although
5 it would not be described as a refund of the gift tax, it
6 would be described as a recoupment and, therefore, a
7 reduction of her income tax.

8 MS. DESAN-HUSSON: That's right. I mean, the
9 government would have to write her a check because it
10 already had her money. I was --

11 QUESTION: And perhaps -- perhaps you think that
12 you have been through this with Justice Stevens, but I
13 want to make sure I understand it.

14 Your position is that if she had filed a suit
15 for a refund -- I know she didn't, but suppose she had
16 paid the income tax, filed the suit for a refund, would
17 she have had a right -- a right -- to recoup the gift tax
18 previously paid even though the gift tax -- even though
19 the statute of limitations had long since run?

20 MS. DESAN-HUSSON: Yes.

21 QUESTION: Yes, she would have had that right?

22 MS. DESAN-HUSSON: Yes, she would have. And --

23 QUESTION: Now, what if -- if in Justice
24 Stevens' hypothetical instead of the income tax being
25 \$100,000 and the gift tax \$30,000, the income tax is

1 \$100,000 and the gift tax \$200,000, could she possibly
2 have recovered more than \$100,000 from the government?

3 MS. DESAN-HUSSON: No. No. I mean, in any
4 other way the gift tax -- the claim for the gift tax as an
5 independent -- as a counterclaim in that kind of
6 situation, is barred. And in this -- in that situation
7 this taxpayer is not in any different posture than any
8 other taxpayer for whom the statute of limitations has
9 barred. And she's simply lost a meritorious claim.

10 QUESTION: Well, in that situation the
11 government wouldn't have -- wouldn't have sought to
12 convert a \$200,000 gift tax into a \$100,000 income tax
13 anyway. I mean --

14 MS. DESAN-HUSSON: Well, --

15 QUESTION: -- presumably the IRS would have been
16 quite happy to have her pay the gift tax instead of the
17 properly due income tax.

18 MS. DESAN-HUSSON: Well, presumably they would
19 have assessed whatever they thought the correct deficiency
20 was.

21 QUESTION: That lawyers are required to answer
22 hypothetical questions from judges.

23 (Laughter.)

24 QUESTION: Well, but -- but under your theory I
25 suppose the government would not have been diffident about

1 asking for a deficiency for the extra \$100,000. That's
2 exactly what happened here.

3 MS. DESAN-HUSSON: That's right. That's right.

4 QUESTION: I'm sure that the Service has not
5 been this charitable always, has it? It certainly opposed
6 Daniel Bull in his case.

7 MS. DESAN-HUSSON: Well, I don't think there's
8 anything in the record in this case that indicates that
9 the Service acted incorrectly.

10 QUESTION: Well, the -- Daniel Bull is an old
11 client.

12 (Laughter.)

13 QUESTION: And I remember how the Service
14 opposed it rather vigorously.

15 MS. DESAN-HUSSON: Well, the decision was
16 correct in Bull.

17 To play this out a little further --

18 QUESTION: While you're interrupted, could I ask
19 you one other question --

20 MS. DESAN-HUSSON: Oh.

21 QUESTION: -- about the fact? Is it the
22 government's theory -- I guess about a third of the estate
23 is -- we're treating as income here if we -- at least,
24 that's the impression I get -- that this was income --
25 taxable as income because it was on account of services

1 that she'd performed during the decedent's lifetime, or is
2 this supposedly an executor's fee or an administrator's
3 fee?

4 MS. DESAN-HUSSON: It was supposedly an
5 executor's fee.

6 QUESTION: A third of the estate?

7 MS. DESAN-HUSSON: That's right.

8 QUESTION: Wow.

9 MS. DESAN-HUSSON: That's right. And that was
10 litigated in the tax court.

11 QUESTION: And that's --

12 MS. DESAN-HUSSON: But that's not before the
13 Court.

14 QUESTION: Yeah. I see.

15 MS. DESAN-HUSSON: To play this out a little
16 farther, just to make sure that the theory -- I'm getting
17 across the theory, once the respondent petitioned the tax
18 court, she was in a forum that this court has considered
19 to be without equitable powers to apply equitable
20 recoupment.

21 In theory she could have raised her equitable
22 recoupment claim there because she at least would have
23 been in the middle of the right litigation. She would
24 have been in litigation about the income tax deficiency
25 and she could have argued that the income tax should be

1 recomputed because it didn't correctly reflect equitable
2 reasons, in this case the fact that a gift tax had already
3 been paid.

4 The district -- the tax court would have had
5 jurisdiction and this case would have been about whether
6 it could apply equitable recoupment and it would have been
7 about Gooch Milling, the old case in this Court. But that
8 case turned on somewhat different facts and there may have
9 been an argument.

10 In short, the respondent could have raised her
11 claim in the district court; she could have attempted to
12 raise her claim in the tax court. What she couldn't do
13 was conduct her challenge to the income tax deficiency --

14 QUESTION: Let me just say -- I'm sorry to keep
15 interrupting.

16 You say she could have attempted to raise it. I
17 got the impression from your briefs that it was not at all
18 clear that she could raise it.

19 MS. DESAN-HUSSON: That's the Gooch Milling
20 case. My only point was that in theory she could raise
21 it. In fact, I think that case -- that case turned on
22 very different facts, and their reasoning was quite
23 specific to the facts. And there is a reasonable legal
24 argument.

25 QUESTION: Well, is the -- is the government

1 making an unqualified representation that in this set of
2 facts if she had raised it in the tax deficiency
3 proceeding, she could have -- it would have been proper?
4 I didn't understand --

5 MS. DESAN-HUSSON: It would have been proper to
6 raise it.

7 QUESTION: Okay.

8 MS. DESAN-HUSSON: I'm not -- I'm not taking any
9 position on what the result would be.

10 QUESTION: Well, you can always raise anything.
11 I mean, it was proper for her to file --

12 MS. DESAN-HUSSON: I just mean --

13 QUESTION: -- the refund suit, too. But --

14 MS. DESAN-HUSSON: Excuse me. I just --

15 QUESTION: -- you're just saying she ought to
16 lose. And I think you're also saying she could have
17 raised it but she would have lost.

18 MS. DESAN-HUSSON: I just mean jurisdictionally.
19 That our main point here is that the district court didn't
20 have jurisdiction over this -- this case.

21 QUESTION: But I'm -- I have the distinct
22 impression that they would have denied the claim in the
23 tax deficiency proceeding because it's not a proceeding on
24 which you get refunds of incorrectly paid tax --

25 MS. DESAN-HUSSON: I think that the -- it

1 wouldn't have been a refund. It would have been a
2 recoupment claim. And I think that the litigation then
3 would have gone up on whether this court followed Gooch
4 Milling or not is a different question.

5 I was only trying to make the jurisdictional
6 point and I don't mean to convert this into a discussion
7 of what the recoupment powers of the tax court are.

8 In any event, what the respondent couldn't do
9 was conduct the entire litigation about the income tax
10 deficiency and then, independently of that challenge,
11 raise the gift tax refund claim later. Nothing but the
12 income tax --

13 QUESTION: But again, it wasn't later. It was
14 before that case was over.

15 MS. DESAN-HUSSON: Right. It doesn't matter.
16 It could have been concurrently --

17 QUESTION: All right.

18 MS. DESAN-HUSSON: -- with the income tax
19 litigation. It would have been separate from that
20 litigation. And once that litigation was going -- in
21 fact, in this case it's exceptionally clear. There's a
22 provision in the Code, Section 6512, which provides that
23 once a petition has been filed in the tax court no suit
24 for recovery of any part of the tax at issue there can be
25 filed in another court.

1 QUESTION: Which means, if I understand it
2 correctly, had she'd filed her gift tax refund case the
3 day the government asserted the deficiency, your same
4 argument would be made here?

5 MS. DESAN-HUSSON: That's right.

6 QUESTION: Yeah.

7 MS. DESAN-HUSSON: That's right.

8 QUESTION: Okay.

9 MS. DESAN-HUSSON: It's barred. And this
10 provision makes it clear that once you're in tax court,
11 you have to litigate out completely the income tax
12 deficiency in that court.

13 So that there was no -- there could be no other
14 litigation, no subsequent litigation after the tax court
15 proceeding about any part of the income tax deficiency.
16 Or, conversely, if in fact in substance this proceeding
17 was about the income tax deficiency in order to be
18 consistent with equitable recoupment theory, then it
19 violated this provision of the Internal Revenue Code that
20 says all -- that that litigation had to be in the tax
21 court.

22 The court of appeals had no jurisdiction to
23 reach the equities of the situation here. But it's worth
24 noting that Congress' decision to limit jurisdiction in
25 this case is also based on the equities as well as on

1 other needs of the government.

2 Statutes of limitation are necessary to promote
3 values of repose and finality. We recognize that they can
4 work harshly in individual cases, but Congress has decided
5 that's the price it's willing to pay to increase the
6 fairness of the entire system.

7 In this case, I would maintain that the
8 situation is not as troubling as in many others because
9 Respondent was actually in a better position than other
10 taxpayers. This was the type of overpayment that she had
11 a chance to recoup. She had alternatives available to
12 her.

13 We've already talked about the alternatives in
14 court and I've reviewed the administrative alternatives.
15 In short, Respondent had her opportunity to litigate the
16 amount of the income tax deficiency. Nothing about the
17 defenses that could have been raised in that litigation
18 give the courts jurisdiction over this litigation.

19 QUESTION: And so it was just a -- just a bad
20 oversight not to claim recoupment when they were talking
21 about settling the income tax claim?

22 MS. DESAN-HUSSON: That's right. It was a very
23 big mistake. I think it was a jurisdictional mistake.

24 QUESTION: They -- they could claim that
25 alternatively. That is, they could claim recoupment

1 without admitting that -- that it was properly not a gift
2 tax.

3 MS. DESAN-HUSSON: Yes. Yes. That's what the
4 taxpayer claimed in Bull.

5 I would like to reserve the remainder of my
6 time.

7 QUESTION: Very well, Ms. Desan-Husson.
8 Mr. Pierce.

9 ORAL ARGUMENT OF ROBERT B. PIERCE

10 ON BEHALF OF THE RESPONDENT

11 MR. PIERCE: Mr. Chief Justice and Honorable
12 Justices, may it please the Court:

13 With the Court's permission, I would like to
14 very briefly restate the salient facts to bring this
15 matter into perspective, and it will be very short.

16 In December of 1976 Frances Dalm believed she
17 had received a gift and a check was sent to IRS on the
18 premise that a gift tax was due. That was in December of
19 1976.

20 In 1983 the government asserted an income tax
21 deficiency against Frances stating that she owed \$160,000
22 in income tax plus penalties and interest that at that
23 time would amount to approximately \$300,000.

24 Now, contrary to the nuances in the government's
25 brief --

1 QUESTION: Mr. Pierce, may I -- may I interrupt
2 you? The same routine was not gone through in 1977 was
3 it? No gift tax return was filed?

4 MR. PIERCE: No. No, Your Honor.

5 QUESTION: And why -- why the difference in
6 treatment of the two years?

7 MR. PIERCE: The -- the first question, why was
8 a gift tax not filed in 1977. The gift tax is a tax that
9 falls on the donor and I believe it is in the record in
10 the tax court proceeding that at that time Clarence
11 Schrier had had an automobile accident and became
12 incompetent. It was the duty of the donor to file a gift
13 tax return. That's why the gift tax return in '77 was not
14 filed.

15 QUESTION: Of course, the donee is also liable
16 secondarily.

17 MR. PIERCE: The donee is liable secondarily.

18 QUESTION: Who took the initiative with respect
19 to the '76 return?

20 MR. PIERCE: Clarence Schrier.

21 QUESTION: Uh-huh.

22 MR. PIERCE: All right. Contrary, as I was
23 saying, Your Honor, to the nuances in the government's
24 brief that in 1983 that Frances could have filed a
25 protective claim for refund of gift tax, that's an

1 abstraction. At that time she could not do that because
2 the time had expired then. So she couldn't do it.

3 QUESTION: Well, could -- could she have paid
4 the income tax deficiency and filed suit in district court
5 seeking the setoff on --

6 MR. PIERCE: Your Honor --

7 QUESTION: -- on the gift tax as paid.

8 MR. PIERCE: -- you're getting to the heart of
9 the issue. The answer is no, and the reason --

10 QUESTION: Why not?

11 MR. PIERCE: -- and the reason the answer is no
12 is that she could not pay \$300,000 and go to tax court --
13 I mean, go to the district court or the court of claims.

14 And, as a matter of fact --

15 QUESTION: You mean she lacked the money --

16 MR. PIERCE: She lacked the money to do that.

17 QUESTION: -- to pay the deficiency?

18 MR. PIERCE: That is correct. And, as a matter
19 of fact, Your Honor, as I was going to get into the real
20 world, the majority of the taxpayers today cannot pay the
21 tax first and then go to the district court. They are
22 financially unable. They, therefore, go to the tax court
23 without paying the tax.

24 That's the reason, the basic reason, for going
25 to the tax court. So -- and that is exactly what happened

1 here.

2 Now, on November 1, 19 -- in 1984 she did
3 petition the tax court, and after approximately two day's
4 trial the parties settled the matter for exactly one-half
5 the amount the amount the government claimed.

6 That \$80,000 plus interest then was paid, and
7 that was done prior to the tax court settlement becoming
8 final and --

9 QUESTION: And there was never any mention in
10 those settlement proceedings, or anything else, about the
11 gift tax that had been paid?

12 MR. PIERCE: There -- there had been, yes. And
13 I think --

14 QUESTION: Yes, what?

15 MR. PIERCE: -- there's an allegation in the
16 petition that the gift tax had been paid as well, yes.

17 QUESTION: Well, was there any claim that the
18 Service should -- should recognize that they were trying
19 to tax to -- the same event twice and that they should
20 grant equitable recoupment?

21 MR. PIERCE: There was a claim in the petition
22 that the government had received an economic benefit to
23 which it was not entitled. There was oral claims for
24 equitable recoupment.

25 QUESTION: Well, then why -- why shouldn't the

1 settlement figure represent a settlement of everything
2 that was involved?

3 MR. PIERCE: Because the government and the
4 revenue officials threw out, denied, any credit whatsoever
5 of the gift tax for the erroneous -- to the income tax --
6 the gift tax being erroneous only upon collection of the
7 second tax.

8 QUESTION: But if I sue you one count in
9 contract and one count in tort and we -- in the middle of
10 the trial we settle for a stipulated amount of \$80,000
11 without specifying, both those claims are barred
12 thereafter, aren't they?

13 MR. PIERCE: No, Your Honor. Both claims --

14 QUESTION: What's your authority for that?

15 MR. PIERCE: What is my authority --

16 QUESTION: What is your authority for saying
17 both of those claims are not barred?

18 MR. PIERCE: Number one, the tax court does not
19 have jurisdiction over equitable recoupment. This court
20 --

21 QUESTION: Well, so it couldn't -- you filed
22 this complaint and alleged the government had gotten money
23 was -- but it could -- the tax court couldn't have given
24 you any relief in it?

25 MR. PIERCE: The tax court had no jurisdiction

1 over the doctrine of that --

2 QUESTION: Why did you make the allegation?

3 MR. PIERCE: Because it was a fact, Your Honor.

4 QUESTION: Well, that isn't really the reason
5 you ordinarily put something in a pleading. There are
6 lots of facts you don't put in pleadings.

7 MR. PIERCE: We believed it was very unfair. We
8 believe it was unfair, as this Court has held in one
9 single transaction, which this is and which the government
10 admits -- one taxable transaction, two taxes on
11 inconsistent legal theories.

12 And we believe it was unfair and -- and the
13 authority, Your Honor, the answer -- the answer to that is
14 that the taxpayer had a cause of action. And that cause
15 of action -- she has been denied a hearing on the merits
16 of that substantive right given to her by this Court in
17 the Bull doctrine. And that's the authority for the
18 situation.

19 QUESTION: I don't find it persuasive.

20 MR. PIERCE: All right.

21 QUESTION: Mr. Pierce, how did you ever effect a
22 settlement in the tax court, 50 percent of the asserted
23 deficiency? It sounds like a good deal to me.

24 MR. PIERCE: It was a very poor deal, Your
25 Honor. And it was a poor deal --

1 QUESTION: That's all the money that he had.
2 The government probably settled for all they could get.

3 MR. PIERCE: It was a poor deal for the taxpayer
4 for the simple reason that he could not take the chance of
5 losing and going bankrupt. And so prior to this -- prior
6 to the litigation in the tax court that -- the IRS people
7 would not even discuss settlement.

8 It was only after trial when they became aware,
9 in my opinion, that they were going to lose and so they
10 would settle. But they refused any credit for the gift
11 tax. And I think that -- I think that that is a direct
12 answer to your question, Your Honor.

13 In any event --

14 QUESTION: Well, why did you settle?

15 MR. PIERCE: Why did the taxpayer settle?

16 QUESTION: Yeah.

17 MR. PIERCE: The taxpayer settled because --

18 QUESTION: If you thought you were going to
19 win --

20 MR. PIERCE: Because they would have been
21 bankrupt if they had lost, and that was the taxpayer's
22 very words.

23 QUESTION: Well, but if they -- do you suppose
24 on review if they had -- if they had lost, do you suppose
25 on review -- and the government wanted to collect the

1 income tax -- don't you suppose you could have claimed
2 equitable recoupment in reviewing the tax court?

3 MR. PIERCE: No, Your Honor.

4 QUESTION: Why not?

5 MR. PIERCE: Because --

6 QUESTION: You say the tax court didn't have
7 jurisdiction to rule on it. Some court must have
8 jurisdiction on it.

9 MR. PIERCE: We believe the district court has
10 jurisdiction to rule on it.

11 QUESTION: You mean later.

12 MR. PIERCE: Yes.

13 QUESTION: How about on review of the tax court?

14 MR. PIERCE: I don't believe so. I don't
15 believe that the court of appeals would accept a case that
16 you would raise the doctrine at that point of time when
17 the tax court lacked jurisdiction. And it seems to me
18 pretty clear that the tax court did not have jurisdiction.

19 We agree with the government's brief in that
20 respect, that the tax court did not have jurisdiction over
21 the doctrine.

22 QUESTION: So you say -- you say that this is
23 the only way that you could get equitable recoupment and
24 that you -- there was no way, as long as you didn't have
25 money to pay the tax, that you could have --

1 MR. PIERCE: That is correct, Your Honor.

2 This --

3 QUESTION: -- tried to exercise the setoff?

4 MR. PIERCE: That is correct, Your Honor. This
5 is the only way.

6 I would like to point out in my mind how the
7 issue has been narrowed by the government's reply brief.
8 And in the government's reply brief, it -- it flows well
9 and it's good, but we think superficially. We think if
10 you look beneath the surface of that brief, it's not on a
11 very solid foundation.

12 QUESTION: But is it -- is it clear in this
13 record that -- that the IRS in the course of settlement
14 absolutely refused any recognition of the prior payment of
15 the gift tax?

16 MR. PIERCE: Absolutely. Absolutely. I was
17 there. And that's a factual issue.

18 QUESTION: Well, I know you were there, but does
19 the record show it? I didn't know that the --

20 MR. PIERCE: I don't -- I don't know that the
21 record will show it. It would have to be on testimony.
22 It is a factual issue, and that is why the court of
23 appeals remanded the case for that purpose to the district
24 court.

25 But I'm trying to answer Your Honor as to what

1 the facts were.

2 QUESTION: What did -- the court of appeals
3 remanded to see if -- if what? That the government had
4 refused --

5 MR. PIERCE: Yes. Yes, Your Honor. For that --
6 for that limited factual determination.

7 QUESTION: Well, the -- so you did claim in the
8 court of -- I see. All right. Go ahead.

9 MR. PIERCE: I -- I would like to point out some
10 of the government's concessions in their reply brief that
11 I think narrows the issue for this Court.

12 Now, the government, in their reply brief, said
13 that she, Frances Dalm, could properly have invoked Bull's
14 doctrine of equitable recoupment to diminish the amount of
15 the income tax deficiency by the amount of the gift tax
16 she had paid.

17 In short, they have admitted that the basic
18 elements of equitable recoupment are present in the Dalm
19 situation. They admit one taxable event. They admit two
20 taxes, two different taxes, on the same transaction.

21 So, those essential elements are admitted in
22 this case.

23 QUESTION: But what -- what -- how would you
24 describe the one transaction?

25 MR. PIERCE: One transaction is the receipt of

1 the money in 1976. That receipt of money --

2 QUESTION: Taxed twice.

3 MR. PIERCE: -- has been subjected to two
4 inconsistent treatments, inconsistent taxes -- that one
5 single transaction. Those are the tests set by this Court
6 for equitable recoupment, and the government in their
7 reply admits that that's present in this case.

8 They summarize their admissions on page 10 of
9 their reply brief, where they say that both the payment of
10 the gift tax and the later assessment of a deficiency --

11 QUESTION: The brief only has eight pages, as I
12 see it. Their reply brief.

13 MR. PIERCE: Their reply brief.

14 QUESTION: I only see -- I thought you said page
15 10.

16 MR. PIERCE: It's page 10 of the government's
17 reply brief on the writ of certiorari.

18 QUESTION: Oh, the --

19 MR. PIERCE: This is on the merits, Your Honor.
20 On the merits.

21 QUESTION: Merits.

22 MR. PIERCE: And they state that both the
23 payment of the gift tax and the later assessment of a
24 deficiency and payment of the income tax concerned one
25 transaction that could have been examined in all its

1 aspects without offending the policies underlying the
2 statute of limitations.

3 Now, I'd like to point out our area of
4 disagreement and our area of agreement here. The area of
5 disagreement, and it's a big area, a tremendous area, is
6 that tax -- that by going to the tax court that Frances
7 Dalm gave up her substantive right of equitable
8 recoupment.

9 The areas of agreement are that by virtue of a
10 1926 law, which was a statute enacted before this Court
11 determined the Bull case, that the tax court decisions
12 become final as to the taxes brought before it.

13 We agree with that proposition. We further
14 agree with the government's proposition that the tax court
15 lacked jurisdiction over the doctrine of equitable
16 recoupment.

17 Now, with that it seems to me the issue comes
18 right into focus. And the issue is may a taxpayer be
19 denied a hearing of a substantive right by going to the
20 tax court which had no jurisdiction to hear it on the
21 merits. That is the issue, and that is scary to me. The
22 government's argument is very scary.

23 They treat this as a normal situation. They
24 treat this -- this situation abstractly, as academic. It
25 isn't. It's a fundamental doctrine of a fairness

1 established by this Court. That's precisely what it is.
2 And that's -- that's -- they are not treating it that way.

3 What they are saying -- and the only way I can
4 illustrate it would be as if Congress had enacted a law
5 that provided that the only way any of us could -- could
6 contest a government deficiency would be to pay the tax
7 and then go to the tax court or the court -- or the
8 district court. And that means only the extremely rich
9 would ever be able to hear -- have a hearing on the
10 merits. And that is exactly where their argument leads
11 us.

12 And that is not true because this is a cause of
13 action that this court has held is a right, a fundamental
14 right, and protected by due process. And we submit that
15 is exactly what this situation is.

1 QUESTION: Has the government assessed you --
2 assessed your client some income taxes with penalties and
3 interest?

4 MR. PIERCE: Yes, Your Honor.

5 QUESTION: And if you hadn't gone to the tax
6 court, what would the government have done? I suppose
7 they would have what -- put --

8 MR. PIERCE: The government would have put them
9 out of business. They would have come and taken their
10 property. And that would be it.

11 QUESTION: Well, at that point would you have
12 had any way of asserting your setoff?

13 MR. PIERCE: No, Your Honor, we would not
14 because the only method of doing it would be to pay the
15 tax in full. You have no right to go to the district
16 court without payment of the tax in full, and that
17 includes the interest.

18 QUESTION: Uh-huh.

19 QUESTION: Mr. Pierce, you don't really say this
20 is a due process right, do you? I mean, --

21 MR. PIERCE: Oh, yes, Your Honor.

22 QUESTION: -- don't you think the government
23 could say any erroneous taxes you pay, too bad? They
24 could tell you if you pay a tax -- if you pay a gift tax
25 that you didn't owe, that's not our fault, it's your

1 fault? Don't you think the government could say that?
2 Would that violate due process?

3 MR. PIERCE: No, Your Honor, I'm not saying
4 that. I'm saying that --

5 QUESTION: Well -- Well, if they can do that,
6 then I assume you could -- you could disallow -- you could
7 disallow recoupment entirely, couldn't you? If you -- I
8 mean, that's -- that's -- Bull was less than that.

9 QUESTION: If it was a constitutionally required
10 case.

11 MR. PIERCE: No, you could not. Your Honor, the
12 doctrine of equitable recoupment is a substantive right,
13 and without that there would be a denial of due process.

14 QUESTION: What's your case --

15 QUESTION: (Inaudible) authority that stands for
16 that proposition?

17 MR. PIERCE: For the proposition that it would
18 be a lack of due process?

19 QUESTION: That Bull -- you're saying Bull was
20 required by the Constitution, I take it.

21 MR. PIERCE: No, I'm -- no. I'm -- I'm saying
22 that in the Bull case itself, that Court held that the
23 right of equitable recoupment was a substantive right. At
24 page --

25 QUESTION: Well, what if it was? I -- I'll

1 stipulate that it was his substantive right. But that
2 doesn't prove that it's a substantive right that is
3 required to be accorded by the Constitution. It's one
4 that the Court found existed. But that doesn't mean it
5 has to be expanded so that you can assert it in all
6 circumstances.

7 MR. PIERCE: No, Your Honor. Not in all
8 circumstances. Only in the circumstance where you have a
9 single transaction and where that single transaction has
10 been subjected to two taxes inconsistency --
11 inconsistently.

12 Now, what you have when the government collects
13 the second tax -- you have a cause of action, and you have
14 a cause of action at that time only. The cause of action
15 comes about by the collection of the second tax. It
16 didn't come about in 1976 because Frances Dalm thought she
17 had paid a proper tax. It came about came about when a
18 second tax was collected.

19 And this Court has held, as we've stated in our
20 brief, that a cause of action is a right that is protected
21 by due process provisions. And I believe that was the
22 Zimmerman case, and I'm sure there must be other cases on
23 that point. And that --

24 QUESTION: Well, even -- even the Bull case,
25 Counsel, says that the taxpayer has a right of

1 restitution, but nevertheless, he may be without a remedy.

2 MR. PIERCE: Your Honor, I would refer to Judge
3 Hand in the Elbert case, that I believe was way before his
4 time, where he said one does not lose a remedy by going to
5 a forum where the remedy in fact did not exist.

6 And that is precisely this situation. Frances
7 Dalm did not lose her remedy by going to the tax court
8 when that remedy did not exist in that court.

9 I would -- I think that case and Judge Hand's
10 decision in that concurring opinion becomes very relevant
11 because if you could take the Dalm situation from the
12 present and lift it up and put it back into the Elbert
13 situation, Judge Hand held that the district court had
14 jurisdiction.

15 The majority court did not hold in that case
16 that there was no jurisdiction of the district court
17 because of an untimely claim. The majority in that court
18 held merely that the taxpayer by going to the tax court
19 could not then later contest the income tax, which we
20 agree.

21 The majority opinion there merely held that
22 there was no jurisdiction because there was no allegation
23 that a gift had been paid and equitable recoupment was not
24 proper on the merits. But it is here in Dalm, as the
25 government admits.

1 And if you would take this case and put it right
2 over there, you would have a decision for the respondent
3 in this case. And I think the case is very material.

4 I -- I disagree with the government's statement
5 when they challenged Judge Hand's statement that this
6 Court held that the statute of limitations is tolled by -
7 - in the Bull case. This Court did not hold that.

8 In the Bull case you had a situation where the
9 taxpayer had been subjected to an estate tax. The revenue
10 people increased the value of the property and subjected
11 it to an additional estate tax and then the petitioner
12 taxpayer argued that because the government had done that
13 by virtue, in effect, of estoppel they could not take
14 inconsistent positions and assert an income tax that was
15 inconsistent.

16 And this Court merely said that that does not
17 toll the limits of the statute of limitations. But the
18 way the government states it takes that statement out of
19 context. It takes it completely out of context.

20 What has happened here is that we have done no
21 violence to the statute of limitations because we have
22 pursued the action when the cause of action arose. And I
23 think it's fundamental that no statute of limitations
24 begins to run until the cause of action accrues. It's
25 impossible. And that alone would be a denial of due

1 process, it seems to me. And I would --

2 QUESTION: And what was the total -- what was
3 the total income tax claim? \$300,000?

4 MR. PIERCE: The -- the principal was \$160,000.

5 QUESTION: And -- but with penalty and interest?

6 MR. PIERCE: With penalties and interest you'd
7 have approximately \$300,000 at that time.

8 QUESTION: And you settled it for 150?

9 MR. PIERCE: No. It was settled for 80 plus
10 interest, which was over 50 percent.

11 QUESTION: Your cause of action really arose --
12 I mean, this is -- this is recoupment of -- recoupment
13 assumes recoupment of something that you had a cause of
14 action for.

15 I think, to be realistic about it, your cause of
16 action arose when you erroneously paid the gift tax and
17 had a cause of action for unjust enrichment of the
18 government of sorts.

19 And -- and basically what's going on here is an
20 extension of the statute of limitations within which you
21 can assert that cause of action. And the issue we're
22 debating is whether that cause of action to extend the
23 statute of limitations can only be asserted in certain
24 contexts or, as you contend, must be able to be asserted
25 in all contexts.

1 But I think that's quite different from whether
2 you're being deprived of a cause of action. You could
3 have filed for a refund of that gift tax the day after you
4 paid it on the basis that it was erroneously paid.

5 MR. PIERCE: But it wasn't erroneously paid,
6 Your Honor. There was no reason to believe it was
7 erroneously paid.

8 QUESTION: Well, it was in fact. They didn't
9 know it was, but -- but in fact it was.

10 MR. PIERCE: In fact it was not. It only became
11 erroneous when the government collected the second tax.
12 It wasn't erroneous at that time. It was the collection
13 of the second tax that gave --

14 QUESTION: But it was not determined to have
15 been erroneous until -- until it was determined that an
16 income tax was due instead of a gift tax. But, in fact,
17 the gift tax shouldn't have been paid. Isn't that right?

18 MR. PIERCE: Our position is that it was a gift.
19 Our position throughout is that it was a gift.

20 QUESTION: You -- you were wrong. I mean,
21 that's --

22 MR. PIERCE: No, Your Honor, we were not wrong.
23 We were not wrong. It was settled on litigations hazards.
24 That's what happened here. It was settled on litigation
25 hazard. And the cause of action arose at that time when

1 they collected the second tax through the doctrine of
2 equitable recoupment that this -- this Court gave birth to
3 in the Bull case.

4 QUESTION: Well, no court has ruled that you
5 were wrong?

6 MR. PIERCE: Not really. No, Your Honor.

7 QUESTION: Not really. After a two-day trial
8 you settled it?

9 MR. PIERCE: That is correct, Your Honor. That
10 is absolutely correct. And that's the situation. I think
11 the government's position becomes very scary to me because
12 it is a denial of due process, and that's what this issue
13 comes to.

14 QUESTION: The government just wants the statute
15 of limitations applied equitably to all taxpayers, it
16 says, so that everybody gets a fair shake in the tax
17 thing. You're trying to come in at a time when the
18 statute of limitations has run. And you're trying to take
19 advantage of the Bull case but it seems to me you want to
20 expand that.

21 MR. PIERCE: No, Your Honor. The issue is not
22 whether the doctrine should be expanded, as the government
23 seeks to have you believe. The issue here is whether it's
24 going to be drastically restricted to --

25 QUESTION: Well, but --

1 MR. PIERCE: -- where it virtually has no
2 existence.

3 QUESTION: It was fairly drastically restricted
4 in Rothensies, wasn't it?

5 MR. PIERCE: I believe Rothensies restricted the
6 doctrine to -- to where it should have been restricted, to
7 this Dalm situation. To one single transaction, one
8 taxable event.

9 Two taxes on inconsistent legal theories,
10 precisely this situation, which they admit -- all they say
11 is that we had an opportunity to pay the tax, which is not
12 true because we couldn't pay the tax. And that -- that's
13 an unreal world. The real world out there is taxpayers
14 cannot pay the tax first. Congress has given the right --

15 QUESTION: At least, many of them can't.

16 MR. PIERCE: Most of them can't. Most of them
17 can't. That's why you have the system the way we have it.

18 QUESTION: Mr. Pierce, you're arguing now that
19 the gift tax was not wrongly paid?

20 MR. PIERCE: We -- we --

21 QUESTION: If it was not wrongly paid, what is
22 your basis for recoupment?

23 MR. PIERCE: Because of the collection of the
24 second tax on an inconsistent theory treating it as an
25 income tax transaction.

1 QUESTION: Therefore you must assume it was
2 wrongly paid. I mean, whether it was adjudicated by the
3 earlier court or not, the whole theory of your case is
4 that the gift tax was wrongly paid. Isn't that right?

5 MR. PIERCE: The whole theory of the case is
6 that -- is the doctrine of equitable recoupment, Your
7 Honor.

8 QUESTION: Well, whichever one it was --

9 MR. PIERCE: That is --

10 QUESTION: -- it doesn't justify two taxes.

11 MR. PIERCE: That's correct. Absolutely.

12 QUESTION: It was either a gift tax -- it was
13 either a gift or an income.

14 MR. PIERCE: One tax. That is correct.

15 QUESTION: And there was supposed to be one tax,
16 not two.

17 MR. PIERCE: That is correct. I would -- I
18 would state -- I think -- I've got five minutes and I'd
19 probably just like to state and use Justice O'Connor's
20 language in discussing equitable estoppel.

21 I would paraphrase her language and say that the
22 government's interest in the simplistic interpretation of
23 the statute of limitations here is outweighed by the
24 taxpayer's countervailing interest in some medium, some
25 reliable standard of honor and reliability in dealing with

1 IRS.

2 And that's what you have here. You have an
3 unfairness. You don't have -- you don't have tax
4 administration on a high plane. You're going to a lower
5 level. And the Bull court opted for a higher plane of tax
6 administration.

7 I believe that it's an absolute certainty this
8 Court give moral instructions for future guidance because
9 if you don't, the revenue people will collect the most tax
10 without regard to principle, and that's exactly what
11 they'll do.

12 I think that my time is about up, and I'd merely
13 conclude to say that my grandfather said that -- he was a
14 circuit rider minister -- said that a man, if he had
15 anything to say, he could say it in 30 minutes, and I
16 believe that's true and I've said it.

17 And I think we're right and I certainly hope you
18 decide the case for Frances.

19 QUESTION: Thank you, Mr. Pierce.

20 Ms. Desan-Husson.

21 REBUTTAL ARGUMENT OF CHRISTINE DESAN-HUSSON

22 PRO HAC VICE, ON BEHALF OF THE PETITIONER

23 QUESTION: Let me.

24 QUESTION: Go ahead. Go ahead.

25 QUESTION: One of Mr. Pierce's points, as I

1 understood it, was that if instead of going into the tax
2 court the respondent here had been able to pay the tax and
3 go into the district court, she would now be in a position
4 to recover what she wants here whereas she isn't, under
5 your view, having gone to the tax court.

6 What's your response to that?

7 MS. DESAN-HUSSON: If she had gone to the
8 district court before going to the tax court, and if the
9 claim in the district court had been a claim for the
10 income tax deficiency, she could raise equitable
11 recoupment.

12 Once she went to the tax court, provision 6512
13 precludes further litigation about the income tax
14 deficiency in the district court. So, she couldn't have
15 done that.

16 As far as sort of the larger point about the
17 unfairness of the tax --

18 QUESTION: Well, if she had paid the tax and --
19 and went in for an income tax refund --

20 MS. DESAN-HUSSON: Right.

21 QUESTION: -- she could have raised the
22 recoupment?

23 MS. DESAN-HUSSON: That's right.

24 QUESTION: Yes.

25 MS. DESAN-HUSSON: That's right.

1 QUESTION: How about the larger point?

2 MS. DESAN-HUSSON: The larger point I was just
3 going to make is that I think -- I mean, Congress decided
4 that collecting taxes first and settling disputes later
5 was the way it was going to build the revenue code. And
6 the IRS actually has the authority to work out installment
7 payments, and if that had become necessary --

8 QUESTION: Should we --

9 MS. DESAN-HUSSON: -- I guess that would have
10 been -- that would have been the way to guard access to
11 the district court.

12 QUESTION: Can we judge this case on the
13 assumption that the Internal Revenue Service did not give
14 any credit in the settlement for the prior payment of the
15 gift tax?

16 MS. DESAN-HUSON: You can do that, yes, because
17 the --

18 QUESTION: The -- our adversary said they -- it
19 was urged that the Service give credit and that was
20 denied.

21 MS. DESAN-HUSSON: It's unclear. The only thing
22 I can say from the record is --

23 QUESTION: But, anyway, we judge the case as
24 though there was no credit given?

25 MS. DESAN-HUSSON: Yes.

1 QUESTION: Well, is that entirely accurate to --
2 you have an \$80,000 payment -- and what more about it do
3 you know than that? That there was no credit expressly
4 given.

5 MS. DESAN-HUSSON: That's all -- that's all we
6 know. All I'm saying is that it's irrelevant to the
7 equitable recoupment -- to whether the statute of
8 limitations had run on the gift tax claim, exactly what
9 was decided in the settlement.

10 The point is that the court didn't have
11 jurisdiction to reach that question.

12 QUESTION: So you say it's irrelevant whether
13 they gave credit or not.

14 MS. DESAN-HUSSON: That's right. That's right.
15 If the Court has no further questions --

16 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Desan-
17 Husson.

18 The case is submitted.

19 (Whereupon, at 2:37 p.m., the case in the above-
20 entitled matter was submitted.)
21
22
23
24
25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#88-1951 - UNITED STATES, Petitioner V. FRANCES L. DALM

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Judy Freilicher

(REPORTER)

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