1 IN THE SUPREME COURT OF THE UNITED STATES

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3 UNITED STATES, :

4 Petitioner :

5 v. : No. 02-1389

6 ABEL COSMO GALLETTI, ET AL. :

7 - - - - - - - - - - - - - - - - -X

8 Washington, D.C.

9 Monday, January 12, 2004

10 The above-entitled matter came on for oral

11 argument before the Supreme Court of the United States at

12 10:02 a.m.

13 APPEARANCES:

14 KENT L. JONES, ESQ., Assistant to the Solicitor General,

15 Department of Justice, Washington, D.C.; on behalf of

16 the Petitioner.

17 DAVID R. HABERBUSH, ESQ., Long Beach, California; on

18 behalf of the Respondents.

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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument

4 now in No. 02-1389, the United States v. Abel Cosmo

5 Galletti.

6 Mr. Jones.

7 ORAL ARGUMENT OF KENT L. JONES

8 ON BEHALF OF THE PETITIONER

9 MR. JONES: Mr. Chief Justice, and may it please

10 the Court:

11 Federal employment taxes owed by a partnership

12 were assessed by the commissioner, and when the

13 partnership failed to pay the taxes, the United States

14 brought this action to recover the taxes against the

15 individual partners who were derivatively liable under

16 State law for all debts of the partnership, including its

17 tax debts.

18 QUESTION: Did the Government have to wait until

19 the partnership failed to pay? Could it have proceeded

20 immediately against the partners under -- under the

21 governing State law?

22 MR. JONES: You've addressed an -- an unanswered

23 question that isn't presented here, of course. It's

24 unanswered because Federal law --

25 QUESTION: It -- it's not presented, depending

1 on what you mean by derivative liability. I -- I always
2 thought that derivative liability would be liability that
3 doesn't attach unless and until the person primarily
4 liable fails to -- fails to pay up.
5 MR. JONES: And -- and I agree with that, and --
6 and the Uniform Partnership Act, which California has
7 adopted, contains a provision that specifies that the
8 creditor must exhaust his efforts to recover from the
9 partnership before he can recover from the partners.
10 QUESTION: I see.
11 MR. JONES: And -- and so that's what makes it
12 clear this indeed a derivative secondary liability.
13 QUESTION: You think maybe the United States may
14 not be bound by that. You -- you don't`want to -- you
15 don't want to concede that the United States is bound by
16 that.
17 MR. JONES: It's not so much I don't want to
18 concede. I don't feel that I'm able to concede that not
19 because it is related to this case, but because of a -- a
20 structural intellectual problem about the extent to which
21 whose law governs in that situation. If it's a
22 limitations provision, we know Federal law governs when
23 the United States is bringing a claim that it acquires in
24 its sovereign capacity. Whether this would be regarded as
25 a procedural restriction that the State substantive law

1 didn't -- now, whether you want to think this is
2 substantive or procedural may affect the answer to the
3 question -- the hypothetical that you've raised.
4 QUESTION: Well, can you tell me as a matter of
5 practice if -- if you know? Suppose there's a partnership
6 which is a little murky. It's in the Cayman Islands and
7 they're behind, but that one of the -- the general
8 partners is in California. Can you just proceed against
9 him, do you know? Does the Revenue Service --
10 MR. JONES: Well, there --
11 QUESTION: -- ever do that?
12 QUESTION: There -- there is an -- the uniform
13 -- in the case law, there's a discussion of situations
14 where the partnership is known to be insolvent. You're
15 not required to do a senseless act. You're not required
16 to pursue and exhaust against the partnership when it's
17 known to be insolvent. So in that situation, you have
18 exhausted because the partnership is insolvent.
19 QUESTION: And I take it in that situation --
20 you correct me if I'm wrong -- but you can't just levy on
21 the account if the tax has not been assessed against that
22 partner individually, but you can commence some other
23 sorts of proceedings which would allow a subsequent levy.
24 Or am I wrong, or is that clear?
25 MR. JONES: Well, you've brought me through --

1 to a lot of levels of complexity, but I think the answer
2 to the question is we -- we don't dispute that you need to
3 give a -- a notice of assessment in order to collect
4 administratively through liens and levies. That's not
5 relevant to this case because this is a judicial
6 collection case.
7 QUESTION: Of course.
8 MR. JONES: But, nonetheless, there is case law
9 that says that when you give notice to the partnership of
10 its liability, that's sufficient as constructive notice to
11 the partners to permit administrative collection through
12 liens and levies.
13 QUESTION: Mr. Kent, if you're not right about
14 that and you do have to have individual`notice and demand
15 to the partners, then there's a consequence other than
16 liens and levies, isn't there, where you have whopping
17 penalties and interest attached? I thought if you don't
18 give notice and demand within the 60-day period, then not
19 only can't you impose liens, but that the interest and
20 penalties stop running.
21 MR. JONES: I'm -- I'm familiar with the -- the
22 concept of interest doesn't run until notice of the
23 assessment is made, but nonetheless again, notice to the
24 partnership would be constructive to the partners.
25 QUESTION: But if you're wrong about that

1 constructive notice, then you could still say, well, the
2 statute has been extended 10 years because of the
3 assessment. However, one might conclude that the interest
4 stops running and that you can't use administrative
5 collection procedures.
6 MR. JONES: Well, I -- I don't mean to be -- I
7 don't mean to sound like I'm retreating from that issue.
8 I'm just -- it's not presented here, and so I'm not really
9 capable standing here --
10 QUESTION: Well, it would be to the extent on --
11 if -- if this thing is remanded with instructions that the
12 assessment counts against all of them, that there would be
13 the question remaining about the interest and penalties.
14 MR. JONES: That's -- I don't`-- it is possible,
15 and if the Court were to reverse and remand for further
16 proceedings, it's possible that that issue would be
17 raised.
18 QUESTION: Are you -- are you saying that we
19 should maybe flag it but not decide it? Is it --
20 MR. JONES: I don't -- I don't know what your
21 practice would be. I would think your practice would be
22 to decide the issue that's presented. You could note
23 other issues haven't been raised, but since those issues
24 haven't been briefed here, we're not really in a position
25 to advise you on their proper resolution.

1 QUESTION: Why don't you go ahead with the
2 issues that are presented?
3 MR. JONES: Okay. Well, the point I was making
4 was that the court ruled against us because they said that
5 the partnership taxes had not been assessed directly
6 against the partners. But respondents now correctly
7 concede that there is no requirement of Federal law that a
8 derivative or secondary State law liability to pay a tax
9 has to be assessed before it can be collected, and that
10 concession is plainly correct in light of this Court's
11 decision in 1933 in the Leighton case where the Court held
12 that a derivative or secondary liability that arises under
13 State law to pay a tax may be recovered -- and I quote --
14 without assessment of that liability. And there are
15 numerous cases that have applied that principle in -- in
16 related secondary and derivative liability contexts.
17 And as -- as I've already indicated, those
18 principles plainly apply here because under the Uniform
19 Partnership Act, which applies in California, the
20 liability of the partner is derivative for the -- and
21 secondary rather than principal, as I've discussed with
22 Justice Scalia. Not only is it clear from the legal
23 structure of the UPA, but the official comments to the --
24 of -- to that act state that the liability of the
25 partnership for partnership debts is principal and that

1 the liability of partners is -- is in the nature of a
2 guarantor. It's secondary. It arises only when the
3 partnership doesn't pay its own debts.
4 Federal law also makes clear that this is a
5 liability that attaches directly to the partnership. This
6 is a Federal employment tax. It applies to employers
7 because, under California law, the -- the partnership is a
8 separate and distinct legal entity. It is the employer.
9 It pays the wages. Its payment of wages is what causes
10 the taxes to be imposed.
11 QUESTION: But you -- you agree that it's the
12 law of California that imposes the derivative liability on
13 the partners?
14 MR. JONES: That's the way the cases describe
15 it. From my -- and that's the way this Court described it
16 in -- in Commissioner v. Stern.
17 QUESTION: What more do you want?
18 MR. JONES: Pardon me?
19 QUESTION: I say what more do you want.
20 MR. JONES: Well, I don't want more. I'm just
21 being finicky I guess, because to me we -- the Court in
22 Commissioner v. Stern said that these -- historically
23 these are substantive liabilities that Congress accepts
24 from State law. And therefore, the Court applies the
25 substantive body of State rules in -- in implementing that

1 liability.

2 You could also think of this -- and I'm not

3 asking the Court to reconsider Commissioner v. Stern. But

4 you can -- even in light of Commissioner v. Stern, you can

5 think of this as Federal law borrowing State law for this

6 remedial purpose, and Congress has sanctioned that by not

7 altering the principles that have long existed on this.

8 The -- but the -- the point that this Court made

9 in Leighton is that these principles that they apply come

10 from State law and you don't a -- actually respondents now

11 admit there's no mechanism in Federal law to assist this

12 -- assess this sort of secondary derivative State law

13 liability, and that's correct. That's what the Court

14 addressed in the Leighton case. And the court of appeals

15 in this case just misapplied those well-accepted

16 principles.

17 Once the assessment of the partnership taxes was

18 made, under section 6502 the United States has 10 years

19 from the date of the assessment to bring any proceeding in

20 court to collect the taxes. And in the Updike case in

21 1930, the Court held that that 10 years applies not only

22 to actions against the directly liable party but also to a

23 person whose liability is derivative or secondary and

24 arises from State law. And the Court explained that the

25 broad purpose and broad text of 6502 applies equally in

1 both cases because in the Court's words, in a real sense
2 the action against the derivatively liable party is a
3 proceeding in court to collect the tax. As the Court said
4 in Updike, the aim in the one case, as in the other, is
5 the same. It's to collect the tax liability.
6 Now, in this Court respondents do not dispute
7 that accepted understanding of 6502. Instead, they raise
8 here a new and, indeed, a radical claim that no court has
9 adopted and that they did not raise prior to their merits
10 brief in this Court. What they argue now for the first
11 time is that the Federal statute of limitations should not
12 govern this derivative liability claim because since it
13 stems from substantive State law, the State statute of
14 limitations should govern it. Now, since they didn't
15 raise that claim at any time before their merits brief in
16 this Court -- and it is a statute of limitations which is
17 an affirmative defense -- they're -- they've waived the
18 claim as too rate to -- too late to raise it.
19 But nonetheless, I think it is important to note
20 that their claim is plainly inconsistent with this Court's
21 decisions. For example, in the Summerlin case, this Court
22 held that whenever the United States acquires a claim
23 acting in its governmental capacity, that claim of the
24 United States is not subject to a State statute of
25 limitations because of the sovereign rights -- sovereign

1 immunity of the United States. And they applied that
2 holding in Summerlin to a situation where what the United
3 States obtained was a right to enforce a private note and
4 private mortgage that the --
5 QUESTION: May I interrupt for this question?
6 You know, there are some State statutes of limitations
7 that -- or some States have limitations provisions that
8 are either affirmative defenses or some are, in effect,
9 conditions precedent to bringing an action. If California
10 had the latter form of action, how would you decide this
11 case?
12 MR. JONES: I think that in -- in Commissioner
13 v. Bresson where the Ninth Circuit addressed that very
14 point, they -- they were -- they wrote à very useful
15 opinion that seems to me to be perfectly correct, that the
16 -- that if it is the passage of time after the United
17 States acquires its right that causes the claim to expire,
18 that that is what is barred by the Summerlin rationale
19 because the sovereign rights of the United States can't be
20 extinguished. And so whether you think of it as
21 extinguishing the claim or limiting the -- the period of
22 recovery, in either event what's instrumental is that the
23 -- the United States had the right at the time it obtained
24 the claim and that the State law could not thereafter cut
25 that right off.

1 QUESTION: Why not? Why -- why -- suppose that
2 you have a -- a bank that guarantees a debt, and the debt
3 is Smith's debt. And the guarantee is to pay, including
4 tax debts. That's what it says. It was a condition of
5 the borrowing or some other thing. Now, why wouldn't
6 State law govern the period of time in respect to which
7 any creditor, including the Government, has to assert a --
8 a claim under that note, let's say, or under that
9 particular written guarantee since the liability there is
10 a creation of State law and the State would have the right
11 to define its contours? And after all, that guarantor is
12 not the taxpayer. The -- the guarantor's liability arises
13 solely out of the fact that he happens to have entered
14 into a note with a guarantor who promised to pay.
15 MR. JONES: So you're talking about a -- a
16 private contractual right --
17 QUESTION: Yes. Say a private --
18 MR. JONES: -- that the United States somehow
19 obtained rights under by --
20 QUESTION: Yes.
21 MR. JONES: -- levying, for example --
22 QUESTION: Yes, yes.
23 MR. JONES: -- on the -- on the right.
24 QUESTION: Yes, yes, and then I'm going to say
25 why isn't this that.

1 MR. JONES: That's -- that's a -- that's exactly
2 frankly what happened in Summerlin --
3 QUESTION: Yes.
4 MR. JONES: -- except Summerlin involved a
5 housing program instead of the Internal Revenue Code. In
6 Summerlin, the Government obtained a private note and
7 enforced it, regardless of the State statute of
8 limitations, and the Court's reasoning was that the --
9 that the United States as sovereign cannot be subject to
10 limitations imposed on the rights that it obtains.
11 QUESTION: So if I -- if I enter into a promise
12 with you and say in return for my lending, you know,
13 whatever it is, I -- I promise that I will pay your tax
14 debts, but by the way, I don't want to pay any tax debt
15 that isn't definite before January the 5th, 2004 or 2010.
16 I don't want to pay anything that arises --
17 MR. JONES: It's a limit -- if you're talking
18 about a substantive limitation in the document itself,
19 well, the United States takes its -- stands in the shoes
20 of the assignor in that situation, and we don't get a
21 better substantive right -- substantive right.
22 QUESTION: Okay. So it's a substantive
23 procedural distinction.
24 MR. JONES: Well, certainly that's the way the
25 Court has looked at it, and I --

QUESTION: But you know, in -- in other cases, let's say when the -- when the Federal Government creates a Federal right without establishing a statute of limitations for that Federal right, State law does not govern, but Federal law looks to the -- to the State statute of limitations as a matter of Federal law. I don't know why it wouldn't be the same thing with respect to a -- a Federal claim. You mean there is no statute of limitations whatever on Federal claims?

MR. JONES: No. Well, that's the second route that the Court has used to say the State's limitations don't control, and that is, when there's a Federal limitations period that applies to the claim, then the State provision doesn't control.

QUESTION: Of course.

MR. JONES: And under -- under Updike, what this Court concluded in Updike was that there is a Federal statute of limitations that applies to these proceedings in court to collect the taxes, which includes the derivative claim.

QUESTION: Well, that -- that's fine. But I'm talking about the more general proposition that -- that you're -- that you're defending or -- or proposing that -- that State law does not -- never -- never applies to a -- to a Federal claim.

1 MR. JONES: Well, it doesn't --
2 QUESTION: I mean, a claim by the United States.
3 MR. JONES: It doesn't --
4 QUESTION: I think it does. Now, it may not
5 apply of its own force.
6 MR. JONES: Exactly.
7 QUESTION: But it applies because of adoption by
8 the United States.
9 MR. JONES: If the -- if the Court were to find
10 it appropriate in a particular instance to adopt a State
11 rule, that would not interfere with Summerlin, but that
12 would -- that would -- I can't think of a case exactly
13 like that. There may well be some.
14 But most Federal claims --
15 QUESTION: I can't imagine our not doing it. I
16 can't imagine our saying that, you know --
17 MR. JONES: Most --
18 QUESTION: -- the clock keeps ticking on Federal
19 claims forever and ever.
20 MR. JONES: Most Federal claims come within some
21 general statute of limitations, and this is certainly a
22 situation like that.
23 QUESTION: Is it -- is this question really
24 academic in this case because you have not one but two
25 Federal limitations, one, the regular 3-year period, then

1 the extension by 10 years following an assessment?
2 MR. JONES: Well, I think the Updike case makes
3 this discussion somewhat hypothetical, and I understood
4 Justice Scalia's question to be in that vein.
5 QUESTION: But here, what you're relying on are
6 the Federal limitations period. So you don't need to
7 worry about suppose there had been no Federal limitations.
8 MR. JONES: I -- I don't need to worry about
9 them, and I -- but I'm only addressing them because
10 respondents have raised them at this point in the case,
11 and so I'm just discussing the two theories that this
12 Court has applied in rejecting that kind of contention.
13 QUESTION: You're saying it's doubly
14 hypothetical because they can't raise the whole issue --
15 MR. JONES: Yes.
16 QUESTION: -- at this point anyway.
17 MR. JONES: Yes, sir.
18 QUESTION: I thought their primary position,
19 though, was that the partners are not secondarily liable,
20 they're primarily liable, so that they are the taxpayer
21 and they're entitled to assessment notice and demand.
22 MR. JONES: That is now clearly their primary
23 position, and for the reasons I've already described that
24 position can't be reconciled with the Uniform Partnership
25 Act or with -- or with the Federal law that applies to

1 these taxes.

2 QUESTION: Can you -- can you tell me in the

3 case of a corporation, if the responsible officer does not

4 withhold employment taxes, I -- I take it -- I thought I

5 remembered that -- that the responsible officer is

6 personally liable. Or am I wrong about that?

7 MR. JONES: Yes. There is a statute that

8 authorizes an assessment of that liability against a

9 responsible officer.

10 QUESTION: Ah, but you have to assess it.

11 MR. JONES: It -- it authorizes the assessment.

12 That's -- you know, it's interesting. There are certain

13 types --

14 QUESTION: Can -- can you proceed against the

15 responsible officer without the assessment?

16 MR. JONES: If you have a claim based on State

17 law or common law, and that's the reason we have a

18 responsible officer statute is that this is a Federal

19 claim. There isn't -- unlike in the partnership situation

20 and in the ordinary transferee situation, there's not a

21 backup State law action.

22 QUESTION: Well, if -- if in the case of

23 corporate officers, there must be an assessment, then by

24 analogy it would seem that it wouldn't be too much trouble

25 for the IRS to assess the partners in your case.

1 MR. JONES: Well, sometimes it is troublesome,
2 but it's not required in any situation under our
3 understanding of the existing law.
4 QUESTION: I -- I thought that it was required
5 in the -- in -- in the corporate case. You said it has to
6 be assessed against the responsible officer.
7 MR. JONES: Oh, I'm sorry. I thought you were
8 talking about the partnership then. Yes. I -- the
9 responsible officers -- officer liability is created by
10 Federal statute, unlike the partners' obligation for the
11 debts of the partnership.
12 QUESTION: I'm simply wondering if -- if that
13 isn't a model, if that's what happens in the corporate
14 instance, in this case where the statutè is -- is silent
15 on the point, whether we shouldn't just assume that since
16 it's not too much of a burden on the Government in the
17 corporate context to require it to assess the responsible
18 officer before the tax can be collected, that we shouldn't
19 say the same thing here.
20 MR. JONES: There is --
21 QUESTION: I'm just --
22 MR. JONES: I understand. But the responsible
23 officer liability is -- is really a radically different
24 concept. It only -- it only arises when that officer had
25 knowledge of the fact that the taxes weren't being paid as

1 they accrued and willfully failed to pay them and -- and
2 was responsible, had the responsibility to pay them. It
3 is a -- it is a malfeasance claim, whereas the derivative
4 liability claim is just under State law, you are liable as
5 is the partnership, and we can enforce that State law.
6 There's another example --
7 QUESTION: There's a --
8 MR. JONES: -- where the similar thing happened.
9 3505, which is the lender's liability. There was no
10 lender's liability for employment taxes that the Court
11 discussed in the Jersey Shore case. That liability didn't
12 have a -- a common law precedent, and so Congress created
13 the liability because they saw a specific problem where
14 lenders were allowing or in -- in effect, helping
15 employers evade employment taxes by loaning them money
16 from which they paid wages but didn't paid taxes. And so
17 Congress created this separate statutory scheme.
18 But respondents are correct in their concession
19 that there is no mechanism under Federal law for assessing
20 the derivative State law liability of a partner for the
21 debts of the partnership. And so as the Court held in --
22 in Leighton, we can proceed without assessment against
23 them to enforce that liability.
24 Now, I do want to also mention the -- the
25 citations that respondents make to section 6303. That

1 section appears in the portion of the code that addresses
2 administrative collection through liens and levies, and it
3 states that the Secretary is to give notice of the
4 assessment to any person liable for the tax. The cases
5 that have interpreted and applied that statute, which stem
6 from 1954, have -- have concluded correctly that that
7 statute applies only to administrative collection through
8 liens and levies and has no application to judicial
9 collection actions.
10 And there's a -- a sound historical explanation
11 for that, and that is that prior to 1954, there were two
12 independent routes for collecting taxes. The Secretary
13 was authorized by the code to bring a judicial collection
14 suit, but there was a separate officer known as the
15 collector of revenue for each district. And the collector
16 of revenue was, by the code, authorized to do the
17 administrative collection through liens and levies. And
18 the predecessor of 6303 had said that the collector is to
19 give notice of the assessment and make demands for
20 payment. And it was well established that that applied to
21 his actions in administrative collection and had no
22 application of the Secretary's independent authority to
23 bring a judicial collection suit.
24 In 1954 in revising the code, Congress
25 eliminated references to the collector in the code, placed

1 the Secretary in charge both of the -- of judicial and
2 administrative enforcement and changed the predecessor
3 language of 6303 from saying the collector is to give
4 notice to saying the Secretary is to give notice. But in
5 doing so, Congress did not mean to change -- and the
6 courts that have reviewed this have correctly concluded
7 did not change -- the fact that this notice of assessment
8 requirement applies only to the administrative collection
9 area, has no application to judicial collection suits like
10 this one.
11 QUESTION: Are you conceding then that there
12 could be no liens and levies against the partners here
13 because there was no notice and demand --
14 MR. JONES: I --
15 QUESTION: -- individually to them?
16 MR. JONES: I don't think the record discusses
17 whether there was notice to the partnership.
18 QUESTION: No, no. To the partners.
19 MR. JONES: No.
20 QUESTION: You just explained these two
21 different routes.
22 MR. JONES: Yes.
23 QUESTION: And you said that this is a judicial
24 collection proceeding.
25 MR. JONES: Yes.

QUESTION: So the other doesn't apply. So I'm asking you if you are now making the concession that those words -- what are they -- each person liable for unpaid tax, would stop you from using the administrative collection route because you didn't give notice and demand individually.

MR. JONES: Let me -- I can't say what we did or didn't do in notice because there's nothing in the record on that in this case because administrative collection isn't involved in this case.

QUESTION: Well, let's assume you gave notice and demand only to the partnership.

MR. JONES: Okay, let's assume that. If we gave notice and demand to the partnership, what we would be authorized to do is clearly under 6321 and -- make a lien and levy against any assets of the partnership. And then as I said, although -- the -- the cases are also perfectly consistent that the notice to the partnership is valid as constructive notice to the partners.

And so, for example, if we have a partnership employment tax liability from Smith Construction and the two partners are Bob Jones and Bill Wilson, notice of the assessment to the partnership is valid as notice to its two partners. And so our lien arises, if they don't pay the tax, but if a third party creditor is out there, First

1 National Bank, the First -- our notice to the partnership
2 may not be notice to the First National Bank. And so in a
3 lien contest we might not have the prior lien vis-a-vis
4 this other party, but vis-a-vis the two partners, the
5 cases say that our notice is valid for 6303 purposes to
6 them because, well, of course, a partnership only acts
7 through its partners and notice to one of them or to the
8 partnership is valid, constructive notice to all the
9 others.
10 There is no case inconsistent with that
11 conclusion, but again, it's plainly not presented in this
12 case and we would not ask the Court to address it.
13 There's no need for it to. This is just a judicial
14 collection case.
15 The only issue that is really before the Court
16 is whether we have to give notice -- I'm sorry -- whether
17 we have to assess the individual partners to collect the
18 State law derivative liability. And for the reasons I've
19 described, that the decision below is incorrect on that
20 and -- and should be reversed.
21 And I would like to reserve the balance of my
22 time.
23 QUESTION: Very well, Mr. Jones.
24 Mr. Haberbush.
25 ORAL ARGUMENT OF DAVID R. HABERBUSH

1 ON BEHALF OF THE RESPONDENTS

2 MR. HABERBUSH: Mr. Chief Justice, and may it

3 please the Court:

4 We've heard some interesting arguments, and I'd

5 like to address the history here of the way in which this

6 alleged derivative liability is imposed upon the partners.

7 We contend that the partners --

8 QUESTION: Now, the Government says you -- you

9 did not raise what is now your principal argument until

10 your merits brief. Do you agree with that statement?

11 MR. HABERBUSH: Your Honor, no, I don't. This

12 case has always been about statutes of limitation. We

13 were addressing, in fact, a argument raised in the merits

14 brief by the Government. If the Court will note, at page

15 5 -- I'm sorry -- page 12, footnote 5, this specific

16 question is addressed by the Government stating that it's

17 a Federal not a State statute of limitation that comes

18 into play. And our portion of the brief is simply a reply

19 to that.

20 QUESTION: Wait. It seems to me it's -- it's --

21 the burden is on you to make the claim that a State

22 statute applies, and you never claimed that any State

23 statute applies. Now, the Government here, out of an

24 excess of caution or maybe to explain the whole situation

25 to us, puts in that footnote, but that doesn't create a

1 claim on your part that the State statute governs.
2 Did you ever assert that -- that this matter was
3 governed by -- by a State statute of limitations until
4 your merits brief?
5 MR. HABERBUSH: Yes, we did in the courts below
6 and our briefs below.
7 QUESTION: You asserted that it was governed by
8 a State statute of limitations.
9 MR. HABERBUSH: Your Honor, what we argued was
10 that if the Federal statutes did not apply, section 6303
11 requiring notice and demand, if these partners are not
12 taxpayers under the Internal Revenue Code, then State law
13 would govern. And yes, we did raise it below.
14 QUESTION: Did the court of appeals touch on it?
15 MR. HABERBUSH: The court of appeals did not
16 need to touch upon it, because the court of appeals felt
17 and decided that these partners are taxpayers under the
18 Internal Revenue Code. And that's the precise question I
19 would like to address.
20 QUESTION: Did you raise the statute of
21 limitations point in your pleadings in the district court?
22 MR. HABERBUSH: In the United -- this originated
23 in the bankruptcy court, so the district court --
24 QUESTION: Well, I mean in the bankruptcy court.
25 MR. HABERBUSH: Your Honor, we did. We raised

1 it both in terms of the statute of limitations under
2 section 6303 and under State law.
3 QUESTION: Did you raise it as an affirmative
4 defense under State law?
5 MR. HABERBUSH: Well, we objected to the proof
6 of claim which is akin to an answer, and yes --
7 QUESTION: And one ground of your objection was
8 under State law it's barred?
9 MR. HABERBUSH: Our objection was a fairly
10 generic objection in all honesty --
11 QUESTION: So we're talking about did you ever
12 say this claim is barred by -- it -- it is too late under
13 this State statute of limitations, citing the State
14 statute of limitations?
15 MR. HABERBUSH: Yes, we did.
16 QUESTION: Would you provide us with --
17 QUESTION: Where can we find that in the record?
18 QUESTION: Where will we find that?
19 MR. HABERBUSH: I believe you'll find that at
20 the -- the district court level after the bankruptcy
21 court.
22 QUESTION: Well, isn't the place to raise it in
23 the bankruptcy court? I mean, that's where your pleadings
24 -- that's where your responsive pleadings were filed.
25 MR. HABERBUSH: If indeed it is an affirmative

1 defense, yes. Our objection to the claim was this was not
2 an enforceable claim under law, State or Federal, and our
3 reason for it was barred by the limitations periods.
4 QUESTION: As a Federal --
5 QUESTION: Under California practice, I assume
6 statute of limitations is an affirmative defense?
7 MR. HABERBUSH: Yes, Your -- Your Honor, it is.
8 We, however, believe that this case does not be
9 controlled by State law, but rather by Federal law. A
10 partner's liability for the debts of a partnership may
11 arise under State law, and this Court has noted in the
12 case of United States v. Kraft that State law defines the
13 rights as between the parties, but the manner by which it
14 may be collected, the tax itself or the`claim, is governed
15 by Federal law. And that is really the heart of what our
16 argument is.
17 There is no specific Internal Revenue Code
18 provision that makes a partner liable for a partnership
19 debt. What the Government in this case does is it relies
20 specifically upon historical cases that stem from old
21 section 280, which is adopted as section 6901 of the
22 Internal Revenue Code, whereby assessments may be made
23 against transferees, donees, and fiduciaries, and the
24 cases interpreting those statutes basically find that
25 there is a derivative liability with a coterminous statute

1 of limitations.

2 QUESTION: This would be an odd State law,

3 wouldn't it? Imagine that I guarantee a debt or suppose a

4 partner is like a guarantor. And suppose that the primary

5 -- person primary -- primarily liable is in litigation

6 with the debtor -- the creditor, rather. And because of

7 delays and so forth, it takes about 15 years to resolve

8 this litigation. I've never heard of a guarantor who

9 wouldn't become liable at the time the thing is final and

10 that the -- he just becomes -- I mean, how does it work?

11 I would have thought a guarantor is liable for the debt

12 the debtor owes. How does the statute work, the State

13 statute?

14 MR. HABERBUSH: Your Honor, we believe the State

15 statute is -- is one that does not require exhaustion of

16 remedies as against the partnership.

17 QUESTION: It has nothing to do with exhaustion

18 of remedies. I'm -- and I'm talking about States -- the

19 State insofar as it sees the partner as a guarantor of the

20 liability that is created by a different entity, namely

21 the partnership. And I'm asking if under State law of

22 California, wouldn't it be the case that if he's a

23 guarantor and you get the statute of limitations on a

24 matter to determine liability extended, that the guarantee

25 also extends.

1 MR. HABERBUSH: That would --
2 QUESTION: There's no State law that says you
3 have to sue the guarantor before the liability that he's
4 guaranteeing is determined.
5 MR. HABERBUSH: That is correct.
6 QUESTION: All right. If that's correct, what
7 are we arguing about?
8 MR. HABERBUSH: What we're arguing about here is
9 that this is not a suretyship or a secondary liability --
10 QUESTION: Yes, yes. You're back to your
11 question of whether under partnership law in fact this is
12 a guarantor or the equivalent or a surety. I understand
13 that argument, but it sounds to me as if that argument is
14 resolved against you, this statute of limitations argument
15 is a serious red herring because it won't matter.
16 MR. HABERBUSH: Well, unless Federal law
17 controls.
18 QUESTION: Right.
19 MR. HABERBUSH: Unless these parties are
20 taxpayers under Federal law, in which case --
21 QUESTION: No, no. If the primary argument,
22 which you want to argue, that they're taxpayers or that
23 they are primarily liable, you win it or you lose it. If
24 you win it, you win. If you lose it, your statute of
25 limitations argument adds nothing.

1 MR. HABERBUSH: I think not.
2 QUESTION: That's my -- that's what I'm
3 thinking.
4 MR. HABERBUSH: I think not. I think we win,
5 and let me explain why. It has nothing to do with
6 limitations periods. It has nothing to do with State law
7 governing guarantees. It has to do with the way this
8 Court is asked to define this particular claim in this
9 particular case. Is it a tax claim or is it a claim which
10 is derived from the partnership liability? In other
11 words, is it a tax debt or is it a debt because they're
12 liable for a debt of the partnership so that it loses its
13 nature as a tax claim?
14 If that's the case, this is a`bankruptcy case.
15 Tax claims in bankruptcy have priority over other claims
16 under section 507(a) of title 11 of the United States
17 Code. Those claims too are not dischargeable if they're a
18 tax claim under section 523 of title 11. So if the Court
19 determines this is nothing more than a guarantee pursuant
20 to State law and not a tax claim, then this debt will be
21 discharged in this bankruptcy case.
22 QUESTION: Do you have -- have any cases for
23 that, that a tax claim loses its character as a tax claim
24 when relief is sought not against the person primarily
25 liable but against somebody derivatively liable? It seems

1 to me it's still a tax claim.

2 MR. HABERBUSH: No, Your Honor, we do not have

3 authority for that. However, if it is a tax --

4 QUESTION: I wouldn't expect you to find any.

5 MR. HABERBUSH: However, if they are liable for

6 the tax, this Court has already stated on a number of

7 occasions, including the most recent case of U.S. v.

8 Kraft, someone who is subject to the tax is someone who

9 pays it, someone who is liable for it. These parties are

10 liable for the tax. They are subject to the tax under

11 section 7701(a)(14) of the Internal Revenue Code, and

12 therefore they are taxpayers. Once they are taxpayers,

13 that invokes the provisions of section 6501 requiring

14 assessment or suit within 3 years. We don't claim that

15 assessment is the only method. We claim assessment or

16 suit, which is consistent with the history of the cases,

17 and that's a 3-year limitation period as to these --

18 QUESTION: No, but you say that they're

19 taxpayers because they're partners, and therefore they --

20 and -- and that's why the -- their -- their right to an

21 assessment can be claimed. But by the same reasoning that

22 you follow, if they are taxpayers because they are

23 partners, why isn't notice to the partnership notice to

24 the partners or assessment against the partnership

25 assessment against the partners? Why -- why do you, in

1 effect, make a metaphysical distinction in the latter case
2 but not in the former?
3 MR. HABERBUSH: Well, Your Honor, I don't think
4 that we do. I think that the argument that there is
5 constructive notice merely because one is a partner
6 creates notice to -- notice to the partnership is notice
7 to the partners. There is no controlling case on this
8 idea, and that would be too a question I think of State
9 law, whether notice to a partnership is notice to the
10 partners. And we've clearly cited to California law that
11 says you must commence a separate suit against the partner
12 in order to obtain a judgment against it. There is no
13 California law that says that by filing a suit against the
14 partner, that's sufficient for due process purposes of
15 creating notice to the partners such that --
16 QUESTION: We don't ordinarily decide questions
17 of State law here. I think we would generally feel
18 perhaps the Ninth Circuit knows more about California law
19 than we do.
20 MR. HABERBUSH: Well, certainly that's true.
21 And that's --
22 QUESTION: I said, we would think.
23 (Laughter.)
24 MR. HABERBUSH: Well, thank you. And -- and
25 yes, this Court ordinarily does not address questions of

1 State law.

2 We think that this is a Federal statutory

3 interpretation. Either these persons are taxpayers liable

4 for a tax or they are not taxpayers liable some -- for

5 something that is not a tax.

6 QUESTION: The last part. They are for -- they

7 are not taxpayers in the meaning of the statute who are

8 liable for something that is a tax. And I don't know why

9 that wouldn't be.

10 MR. HABERBUSH: Well, Your Honor --

11 QUESTION: And State law makes them, in effect,

12 guarantors of debts. This is a tax debt. So they're

13 guarantors of the tax debt. So, therefore, they're liable

14 for the tax or sureties or some other equivalent word.

15 MR. HABERBUSH: All of the cases referred to for

16 the coterminous statute of limitations, which is what

17 would be suggested would be applied here if in fact they

18 are liable for this tax debt and therefore the provisions

19 of the Internal Revenue Code apply, are all cases where

20 specific enabling provisions created the liability of

21 those persons. Under section 6324, certain persons are

22 made personally liable. Under section 6901, certain

23 persons may be assessed with taxes as transferees. And

24 those specific statutes have provisions in them that say

25 that the assessment and collection and enforcement of the

1 tax -- this is 6901 and its predecessor, section 280,
2 where the collection assessment and enforcement of the tax
3 is subject to the same provisions and the same limitations
4 as the tax itself. So it's not surprising that you have
5 cases like Leighton and Updike where the statute of
6 limitations set forth in what is now 6502 applies to them
7 because they're subject to the same limitation periods.
8 There is nothing in the Internal Revenue Code
9 that sets forth a limitation period as to partners. If
10 one adopts the guarantor analogy, then this is conceivable
11 a case where any number of years could pass where the
12 partners would become liable.
13 Your -- I would point out the Court's record in
14 the joint appendix. At pages 100 and 102, we have the
15 proofs of claim that were filed in these bankruptcy cases,
16 and these proofs of claim on their face show that the
17 Government in this case is not simply filing a claim as
18 though it were a lawsuit against these partners. These
19 proofs of claim were filed as secured claims in both of
20 the two cases that are before the Court. Secured by what?
21 Motor vehicles and real estate. So the Internal Revenue
22 Service is taking the position clearly, unequivocally that
23 it can enforce this debt by the summary collection process
24 which has been called awesome and -- and super powers that
25 are not available otherwise.

QUESTION: Whether they could or not, they're saying that the question here is a judicial action.

MR. HABERBUSH: Well --

QUESTION: And -- and so maybe they're wrong and maybe they're right about that, but that's not before the Court.

MR. HABERBUSH: That's not -- that may not be before the Court, but the Government has taken the position the only way, the sole and single way, it can collect taxes is to file suits against partners. We would suggest that if the Court were to permit assessment, rule that they are taxpayers subject to assessment, subject to suit, that that would enhance collection. It would encourage partners at the earliest opportunity to cause their partnerships to pay taxes. It would cause partners at the earliest opportunity to pay the taxes. In this instance, you have proofs of claim --

QUESTION: It -- it would also cause an enormous number of assessments to be made that ultimately would have no -- no use. I mean, the -- the amount of administrative assessing going on would -- would be staggering.

MR. HABERBUSH: Well, the amount of suits could be staggering as well to collect these kinds of taxes.

QUESTION: What is the problem? Suppose -- I'm

1 -- I'm failing to see it but maybe -- suppose it's true
2 that what the Uniform Partnership Act says is true.
3 Partners are, quote, in the nature of guarantors, end
4 quote, rather than principal debtors on the debts of the
5 partnership. So let's suppose they're like guarantors. I
6 would have thought that State law was something along the
7 lines of a guarantor must be sued in order to collect a --
8 a guaranteed debt within a period of time after it becomes
9 determined that such a debt exists. Now, I would think
10 that that's how the normal State law runs.
11 So unless there's something Federal to the
12 contrary -- and by the way, if there is, they have 10 more
13 years. But unless there is something Federal to the
14 contrary, there's no problem with bringing this case.
15 So the only question in this case is are they in
16 the nature of guarantors. And I'd be interested -- well,
17 A, I'm interested in your comment on what I just said, and
18 I'm also interested in the comment of why they're not
19 guarantors.
20 MR. HABERBUSH: Very well. Here the Internal
21 Revenue Service has filed proofs of claim in the
22 bankruptcy court not for the debt of the tax but for the
23 tax, for the penalties, and for the interest. Guarantors
24 under California law are liable for the debt and perhaps
25 the interest, but not for the penalties. The Court will

1 note that these proofs of claim are approximately three to
2 four times as much as the amount of tax that was
3 originally assessed against the partnership in the initial
4 instance. There is nothing in the record to suggest that
5 these partners had knowledge or notice of these taxes at
6 any time before these proofs of claim were filed.
7 Now, under California law, if you have a
8 guarantor, the guarantor knows of the liability that that
9 guarantor is offering surety for. That guarantor knows
10 that that liability exists. That guarantor can encourage
11 the principal party to pay the tax or the debt in
12 question. Here the policies that are urged by the
13 Government do not encourage collection of this --
14 QUESTION: Mr. Haberbush, do you defend the
15 decision of the Ninth Circuit in this case?
16 MR. HABERBUSH: Yes, we do.
17 QUESTION: That in order to collect against the
18 partners, an assessment would have to be made against
19 them?
20 MR. HABERBUSH: No, not within that specific
21 limitation. We think that an assessment or a suit should
22 be brought within the statutory period --
23 QUESTION: Well, I thought -- I thought the
24 reasoning of the Ninth Circuit was that you couldn't
25 collect against the partners unless you assess them too.

1 MR. HABERBUSH: To that extent, the opinion is
2 wrong for the reason that it is a well-held proposition
3 that suit or assessment may be brought under section 6501
4 within the 3-year period, so that it's not exclusively
5 assessment that's involved. And this Court and other
6 courts, I believe, have -- have ruled that assessment is
7 not a prerequisite to collection. However, some action
8 must be taken within the statutory limitations periods.
9 QUESTION: And the filing of a claim in a
10 bankruptcy court is insufficient because?
11 MR. HABERBUSH: It's untimely. It is not done
12 within the period of time --
13 QUESTION: So this is simply a statute of
14 limitations case.
15 MR. HABERBUSH: That's our position. Yes, Your
16 Honor. It is simply a statute of limitations case. The
17 Government has contended that this is a tax governed by
18 the Internal Revenue Code. The liability may be created
19 by State law, and this Court has consistently said while
20 liability may be -- be created by State law, the
21 enforceability of that liability is a subject of Federal
22 law. The Federal laws provide for 6303 notice and demand.
23 They provide for -- 6501 provides that assessment must be
24 made. The -- the Government suggests that there can --
25 QUESTION: Mr. Haberbush, would you be able,

1 after the argument, to furnish the Court with the places
2 in the record available to us where it shows that you
3 raised the State statute of limitations issue below?
4 MR. HABERBUSH: Yes, I can.
5 QUESTION: Thank you.
6 MR. HABERBUSH: Yes, I can.
7 QUESTION: Why shouldn't an assessment against
8 the partnership be good as to the partners as well? I
9 mean, the whole difference is that you'd have to add the
10 -- the names of the individual partners. I mean, the
11 assessment itself is something in a file in some building.
12 Right?
13 MR. HABERBUSH: Well, the assessment is the
14 notation or recording of the liability.` However, section
15 6203 says that to be a proper assessment, it must record
16 the liability of the taxpayer and we, of course, say that
17 the taxpayer also includes the partners.
18 And yes, there could be a single assessment
19 naming numerous parties. There are examples of that. For
20 example, a husband and wife are jointly assessed. An
21 assessment against a husband or a wife independently is
22 not an assessment against the other. So there are
23 multiple assessments that are capable of being made under
24 the code.
25 There are numerous other instances where

1 assessments are made. 6901, for example, assessment --
2 QUESTION: Is it -- does it -- would it matter
3 if in fact the partners knew -- had received the -- I
4 assume that the notice and demand would come to the
5 partnership. This is a small partnership. There were
6 what? Four partners involved? If they had actual notice,
7 would that make any difference?
8 MR. HABERBUSH: Your Honor, that might make a
9 difference. We -- we would contend that it does not make
10 a difference. We have cited to cases -- and I don't
11 recall them right off the top of my -- my head at this
12 moment -- where the assessment -- in fact, that was Cool
13 Fuel, Inc. out of the Ninth Circuit where the assessment
14 actually has to be received and made. Ìt has to name who
15 the taxpayer is.
16 Marvel v. the United States. While the taxpayer
17 there was named as a partnership's name, the individuals'
18 Social Security numbers, taxpayer identification numbers,
19 were on that -- that assessment, and that was found to be
20 good as to those persons even though they were not
21 individually named.
22 QUESTION: But certainly they had actual notice.
23 Your big due process objection that you make would not --
24 would -- would be very thin, would it not?
25 MR. HABERBUSH: I don't disagree with that, Your

1 Honor. There is nothing in the record below where there
2 is -- that issue has been addressed. There is no facts
3 that were derived at the trial of this matter where that
4 was addressed. There is nothing in the record --
5 QUESTION: But you addressed it in your brief.
6 You said if they didn't get individual notice and demand,
7 that would be a violation of due process.
8 MR. HABERBUSH: Yes. It is not before the
9 Court, however, whether they did or didn't, and there's
10 nothing in the record suggesting that they did get such
11 notice. That's why the -- the Government relies so
12 heavily on its constructive notice theory, although
13 starkly absent from that argument is any California law to
14 support that idea that notice to a partnership is
15 constructive notice to its partners.
16 Turning back to the -- the idea of the -- the
17 assessment in this case, the -- there are striking
18 examples throughout the brief of the Government, although
19 the Government contends that it is not able legally to
20 assess partners, there are no less than 12 cases cited in
21 the briefs, 10 of which were cited by the Government, in
22 which summary collection process was instituted against
23 partners, and in -- in any of those cases there was an
24 assessment.
25 In fact, the one case that's cited by the

1 Government, the -- the United States v. Wright -- that's
2 the case which came out of the Seventh Circuit that the
3 Government contends is in direct conflict with the Ninth
4 Circuit case in this instance is one where the United
5 States District Court in its findings found that the
6 partners were assessed. And it's not surprising
7 therefore, that the Wright court found that there were --
8 QUESTION: It said that -- but I thought Judge
9 Easterbrook said that that was irrelevant, that there
10 might have been a fact question about that whether there
11 were individual assessments. But in any case, the court's
12 rationale had nothing to do with that.
13 MR. HABERBUSH: That is correct. However, the
14 district court did find that there were assessments. The
15 Seventh Circuit found that that was irrelevant to the --
16 the determination. However, it is entirely consistent
17 with the idea that in that case there were coterminous
18 statute of limitations. For the reason that assessments
19 were made within the statutory period of time -- that was
20 still within the coterminous periods -- then the
21 collection. The question was whether the 6502 allowed the
22 collection against the partners who were jointly liable
23 with the partnership in that instance. The statutory
24 period of time allowed to the partnership, because it had
25 been tolled during a bankruptcy, the court found

1 coterminous statute of limitations, relying on the Updike
2 case as its example.
3 We -- we believe that the collection of taxes
4 would be enhanced by adopting the position that we have
5 taken in this case. We believe that requiring the filing
6 of lawsuits in every instance where partners are liable
7 for the debts of a partnership which has failed to pay its
8 taxes and which may or may not be out of business, is
9 simply a policy which would have litigation that is not
10 required.
11 If the partnership is liable for the tax and
12 this Court were to find that the notice provisions of 6302
13 and the provisions of 6501 allowing suit or assessment
14 within 3 years applies, that that would`enhance the
15 collection of taxes. We believe that -- excuse me -- we
16 believe that by doing that, the tax will be paid at the
17 earliest possible time. Interest and penalties, such as
18 have accrued in this case, would not accrue because the
19 partners would be encouraged at every point and at every
20 spot to cause their partnership to pay or to pay the tax
21 themselves.
22 The Government is not in the business of banking
23 tax claims, if you will, allowing them to accrue penalties
24 and interest and thereafter, for who knows how many years,
25 potentially as many as 3 plus 10, and if suit is filed

1 within the 10 years under 6502, the -- the term for
2 enforcing a judgment. So it could be 20-25 years that a
3 partner could be out there liable for the tax during which
4 penalties and interest continue to accrue, and then
5 finally one day maybe that partner or that partner's
6 estate or the partner's beneficiaries of the partner's
7 estate might become liable for this tax.
8 We believe that by filing the tax -- by filing
9 an assessment at the earliest possible opportunity against
10 the partners, this would encourage tax collection.
11 QUESTION: Nothing would stop a partner from
12 paying the tax.
13 MR. HABERBUSH: If the partner knows, that is
14 correct. If the --
15 QUESTION: Isn't it reasonable to assume most
16 partners know what's happening in their business?
17 MR. HABERBUSH: I don't know that it's
18 unreasonable to assume that, but I suppose it is
19 reasonable. However, there are partnerships and there are
20 partnerships, and some partnerships have managing partners
21 who are actively involved in the business of the
22 partnership and --
23 QUESTION: Yes, but I -- I would think, by and
24 large, most partners know what's going on. I mean,
25 certainly there are exceptional cases, but certainly

1 that's not typical.

2 MR. HABERBUSH: Unfortunately, I'm only involved

3 in my law partnership and I know what's going on there.

4 I've not been involved --

5 QUESTION: Maybe you shouldn't be a general

6 partner if -- if you're not prepared to know what's going

7 on. It's pretty risky. I mean, that's -- that's the

8 responsibility you assume when he -- it only applies to

9 general partners. It doesn't apply to limited partners.

10 MR. HABERBUSH: That's exactly right.

11 QUESTION: So don't become a general partner if

12 you're not willing to know what's going on in the

13 partnership. I -- I thought that's the deal.

14 MR. HABERBUSH: Well, Your Honor, I don't know

15 whether that --

16 QUESTION: That's what it means to be a general

17 partner. You're -- you're going to be liable for what the

18 partnership does. So you better pay attention. I -- and

19 you're saying this is unjust somehow?

20 MR. HABERBUSH: Well, yes, it is, Your Honor,

21 for the reason that does that mean that every partner has

22 to go through every single piece of mail that enters the

23 partnership and be familiar with every single thing that

24 occurs?

25 QUESTION: No, but when you accumulate tax

1 liabilities of several hundred thousand dollars, they
2 ought to find that -- be able to find that out.
3 MR. HABERBUSH: Well, Your Honor, these are over
4 a number of quarters. These were not all assessed at one
5 time.
6 QUESTION: Which is all the more reason they
7 should have known about it a lot earlier.
8 MR. HABERBUSH: Well, husbands oftentimes hide
9 things from their wives who are a joint taxpayer as well.
10 QUESTION: But we're talking about a partnership
11 that has not paid -- what was it -- FICA and FUTA taxes.
12 Surely, the partners were aware that they were not paying
13 the taxes that were due year after year.
14 MR. HABERBUSH: There's nothing in the record
15 that suggests --
16 QUESTION: Who was responding to these letters
17 from the Government? The secretary?
18 MR. HABERBUSH: Your Honor --
19 QUESTION: I mean, does she take it in to -- to
20 her boss who was presumably one of the general partners
21 and say, hey, you know --
22 MR. HABERBUSH: If it's a --
23 QUESTION: -- the Government says we owe a lot
24 of money.
25 MR. HABERBUSH: If it's a managing -- if it's a

1 managing general partner, I assume that that's the case.
2 If in fact the partnership had ceased its operations and
3 these notices came afterwards, who knows who received the
4 notices. I don't think that the law imposes a burden upon
5 every single general partner to look at every single bill
6 and piece of paper that comes into a partnership.
7 QUESTION: No, but you shouldn't rely on the
8 United States Government to tell you what you -- how your
9 financial affairs are coming along and be the primary
10 source of information.
11 MR. HABERBUSH: That may be so, but if the -- if
12 the Government were required to do so, partners would at
13 every point in time be encouraged to cause the partnership
14 to meet its financial obligations.
15 QUESTION: It doesn't place that kind of a
16 burden on the partners that you're talking about. They're
17 entirely free not to read the mail.
18 MR. HABERBUSH: Well, that's -- that's correct.
19 QUESTION: But -- but the problem is they're
20 going to be liable for whatever debts are incurred by the
21 partnership if they don't do it. That's the only burden
22 imposed.
23 MR. HABERBUSH: Well, Your Honor, and looking at
24 burdens there is no -- there is no insignificant -- excuse
25 me. It's not a significant burden to place upon the

1 Government to simply send another notice to the partners
2 regarding their derivative liability for these claims.
3 QUESTION: And it's not a very significant
4 burden to a partner to say you better make sure they're
5 paying the taxes.
6 MR. HABERBUSH: Well, of course. However, there
7 -- there have been dishonest partners, and the cases that
8 I cite --
9 QUESTION: You better be careful who you form a
10 partnership --
11 MR. HABERBUSH: Well, yes, and there are cases
12 cited in the briefs that say exactly that. However, if --
13 if the policy is to collect taxes and collect them
14 promptly, then that is encouraged, rather than filing suit
15 against partners, by a simple assessment sent in the mail
16 to the partners.
17 If there is nothing further --
18 QUESTION: Does an assessment affect your credit
19 rating?
20 MR. HABERBUSH: Yes, it does. It does.
21 QUESTION: So -- so you want -- all right.
22 QUESTION: Thank you, Mr. Haberbush.
23 MR. HABERBUSH: Thank you.
24 QUESTION: Mr. Jones, you have 5 minutes
25 remaining.

1 REBUTTAL ARGUMENT OF KENT L. JONES
2 ON BEHALF OF THE PETITIONER
3 MR. JONES: Thank you.
4 At page 3 of respondents' brief on the merits,
5 they say -- and I quote -- if respondents are secondarily
6 liable for the partnership taxes, then the Ninth Circuit's
7 ruling that the IRS must assess respondents to collect the
8 partnership taxes is incorrect. It is clear to us that
9 there is -- this is a secondary derivative liability that
10 partners have under State law. I didn't hear respondents
11 give any explanation of why that isn't so.
12 Given those two facts, then this Court's holding
13 in Leighton seems clearly applicable, which is that we
14 don't have to assess a derivative State`law liability to
15 bring suit to recover upon that liability.
16 Now, respondents say, well, somehow that holding
17 is influenced by the fact that transferee liability is
18 provided in 6901 of the code. It's interesting that in --
19 in the Leighton case what the Court held was that the 6901
20 transferee liability is a supplementary remedy that did
21 not displace and, indeed, left in place the right of the
22 United States to bring its suit upon the derivative State
23 law liability without assessment.
24 So the -- the principle that we draw from the
25 Leighton case is not dependent on any of the specific

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1 statutes that address specific types of -- of assignments
2 of transferees. In fact, it's utterly independent of
3 that, which was the very issue the Court decided in
4 Leighton.
5 Given that and -- and given that there's a
6 derivative sub-secondary liability, we can recover against
7 State law. Then the only other question is, well, what
8 statute of limitations applies to that, which the Court
9 held in Updike that it's 6502 which applies both to the
10 direct liability and the derivative liability.
11 QUESTION: See, that's what I'm really wondering
12 about. I mean -- but -- but I mean, A, they may have not
13 have raised it below. B, it's not within the scope of the
14 question. C, it may not make any difference because the
15 State and Federal may give you enough time anyway. But if
16 you do have to get to it, I'm -- I'm a little worried
17 about it because I don't -- I don't really see why it
18 should be Federal.
19 MR. JONES: The reason it should be Federal is
20 because all of these actions are designed, as the Court
21 stressed in Updike, to collect the tax. We have different
22 remedies. Congress could Federalize all of this.
23 Congress could write a statute that said, you know, you
24 can bring suits for derivative liabilities and that those
25 suits will -- specifically subject to 6502. And what the

1 Court noted in Stern was that Congress hasn't done that
2 because the Court has consistently applied State law to
3 permit such tax collection to occur.
4 And -- and so that's why Updike has got to be
5 right because this is a strong Federal interest in
6 collecting taxes, not to be too big about it, but I mean,
7 this Court has noted that the collection of taxes is the
8 lifeblood of Government. This is as sovereign a claim as
9 we have, and -- and because of that, we need to have a
10 uniform statute of limitations, which Congress has
11 provided under 6502.
12 If -- if we were left to the haphazards of State
13 law, we would certainly want Congress to -- to address
14 that and correct it, but they don't need to correct it
15 because since 1930 in the Updike case, the Court has
16 explained that 6502 is broad enough to cover both types of
17 -- of judicial collection proceedings. In the Court's
18 words, the action against derivatively liable party is in
19 every real sense a proceeding in court to collect the tax,
20 and that's the -- that's the statutory language.
21 And -- and I -- there has been no contention
22 that that's not a correct interpretation of 6502. I do
23 not know what references respondents may have in mind to
24 arguments they raised under State statutes of limitations
25 before. We're not familiar with those. The statute

1 that's referred to in their merits brief is a specific
2 State statute. We're not aware that that statute was ever
3 cited before by the parties in this case, but even if it
4 was, it seems to us that the reasoning of the Summerlin
5 case and -- and of Updike, which is -- there's already a
6 Federal statute -- should control that question and --
7 QUESTION: Mr. Jones, why isn't Mr. Haberbush
8 right at least when he says everybody would be better off
9 if you went ahead and listed the partners as well on the
10 assessment and gave them notice and demand? Then there
11 would never be any hassle of whether you could use both
12 remedies, administrative and judicial.
13 MR. JONES: I think it's a question for Congress
14 what's -- you know, what makes everybody better off. And
15 what Congress has said is that we can assess these taxes
16 against the employer. The employer under State law is a
17 separate and distinct legal entity known as the
18 partnership.
19 QUESTION: Do you think you're impeded that you
20 have no authority to give the partners notice
21 individually?
22 MR. JONES: We -- well, we have authority to
23 give them notice of an assessment and collect from them
24 administratively, but in terms of, if you will, making an
25 assessment them directly, we're supposed to assess the

1 party whose subject to the tax.

2 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Jones.

3 The case is submitted.

4 (Whereupon, at 11:02 a.m., the case in the

5 above-entitled matter was submitted.)

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