To Stay or Not to Stay: That Is the Question - The Taxing Consequences of Section 362(a) of the U.S. Bankruptcy Code

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L INTRODUCTION

On May 4, 1999, the United States Court of Appeals for the Eleventh Circuit rendered its decision in *Roberts* v. *Commissioner*[1] holding that the automatic stay provisions of 11 U.S.C. §§362 (a)(1) and 362 (a)(8) did not stay the 90-day time period to appeal the United States Tax Court's decision.[2] The *Roberts* decision by the Eleventh Circuit was a direct and systematic rebuttal of the holding by the Ninth Circuit in *Delpit* v. *Commissioner** and a systematic ratification of the holding by the Fifth Circuit in *Freeman* v. *Commissioner*.[4] The significance of the *Roberts* decision is not only the comprehensive nature of its defense of the *Freeman* holding but also that it is the first instance of either *Freeman* or *Delpit* being cited outside of their respective circuits.[5] The *Delpit* decision had opened up for the debtor a greater flexibility in determining the forum before which a tax claim could be addressed and also provided more opportunities for the debtor to stretch a bankruptcy case out longer. Hence, the debtor had more time to recover financially, and the Internal Revenue Service ("IRS") had more incentive to settle the tax claims. If other circuits decide to follow the reasoning of the *Roberts* court all of the debtors' great hopes that had begun to germinate through *Delpit* will dissolve. *Roberts* has indeed stirred up the waters around the staying power of §362(a)(1), leaving uncertainty in its wake. Since the failure to navigate these waters properly most likely will lead to dire and irreversible consequences, not only academicians but also the conscientious bankruptcy and tax practitioner must gain a clear focus of these laws and their potential consequences.

The Roberts Case

This case arose when the Commissioner of the Internal Revenue Service issued

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[1] 175 F.3d 889 (11th Cir. 1999).

[2] *See id.* at 891. The court also held that §108(c) of the U.S. Bankruptcy Code did not stay or sufficiently extend the time period for the notice of appeal. *Seeid.* The effect of the holdings of the various courts of appeal regarding §108 (c) is considered in Section IV. C. *infra.*

318 F.3d 768 (9th Cir. 1994).

[4] 799 F.2d 1091 (5th Cir. 1986). (The *Roberts* holding was more comprehensive than *Freeman* in that *Freeman* was a short per curiam opinion dealing directly and exclusively with § 362(aXl) and whether the Tax Court proceeding was "against the debtor," whereas, *Roberts* dealt more broadly with not only the lull text of § 362 of the U.S. Bankruptcy Code, but also with § 108(c) of the U.S. Bankruptcy Code and Rule 6009 of the Federal Rules of Bankruptcy Procedure. Section 108(c) deals with extension of time for filing appeals at the time a bankruptcy petition is filed and Rule 6009 deals with the right of the trustees to prosecute a case on behalf of the debtor).

5.*See Freeman,* 799 F.2d 1091 (cited in *Delpit,* 18 F.3d at 772). However, *Delpit* was critical of *Freeman.*

notices of deficiency to John W. Roberts and Cheryl W. Roberts (hereinafter referred to as "Roberts") for the tax years 1979-1984 due to Roberts' unauthorized use of certain corporate funds for personal use.[6] The deficiency notices also included fraud penalties under 26U.S.C. §6653 (bXl)for the years 1982-1984. On October 29,1990, the Roberts timely filed a petition with the Tax Court, asking for a redetermination of the deficiencies and penalties.[7] The Tax Court entered its decision against the Roberts on March 23,1993, finding deficiencies and additions to taxes against the Roberts in the amount of $461,115 and fraud penalties against Mr. Roberts in the amount of $191,523 .[8]

On July 13, 1993, the Commissioner discovered that the Roberts had filed a voluntary petition for relief under Chapter 11 of the U.S. Bankruptcy Code on March 1,
1993. On July 19,1993, the Commissioner obtained an order from the Tax Court vacating the March 23,1993 decision by the Tax Court[9] because the decision had been entered in violation of 11 U.S.C. 362(a)(8).[10] Thereafter, on September 29, 1993, the Commissioner obtained an order from the U.S. Bankruptcy Court lifting the automatic stay and allowing the Commissioner to proceed with the case in the Tax Court "to permit the assessment, but not collection, of any liability determined by the Tax Court.[1] After being furnished the Bankruptcy Court's September 29,1993 order lifting and modifying the automatic stay, the Tax Court reentered its decision on October 27, 1993.[12]

The Roberts' bankruptcy petition (filed March 1, 1993) was dismissed on November 10, 1993, by the Bankruptcy Court. However, on December 30, 1993, the Roberts filed another Chapter 11 petition in the same Bankruptcy Court.[13] On March 7,
1994, the Roberts filed their notice of appeal from the decision of the Tax Court. This appeal, however, was dismissed by the Court of Appeals for the Eleventh Circuit on December 28,1995, in an unpublished per curiam opinion[14] for lack of jurisdiction.[15] The Roberts then went back to the Bankruptcy Court and obtained an order on April 22,1996, lifting the automatic stay for the purpose of "pursuing an appeal of a final decision from the United States Tax Court."[16] Then on May 3, 1996, the Roberts filed a second notice of appeal of the Tax Court decision.[17] The Commissioner filed a motion to dismiss for lack

6 See Roberts, 175 F.3d at 891.

7 *See id.*

8.See Roberts v. Commissioner, 65 T.C.M. (CCH) 2121(1993).

9. See Roberts, 175 F.3d at 891.

[10] *See* 11 U.S.C. § 362 (aX8) (1994). The statute provides that "a petition filed under § 301, 302, or 302 of this title ... operates as a stay, applicable to all entities, of... the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor." *See id.*

11.Roberts, 175 F.3d at 891-892, *quoting U.S.* Bankruptcy Court order of Sept. 29, 1993.

[12] *See id.* at 892.

[13] *See id.*

[14] Roberts v. Commissioner, No. 94-8283 (11 Cir. Dec. 28, 1995) (per curiam).

[15] *See Roberts,* 175 F.3d at 892. Both parties were alleging lack of jurisdiction but for different reasons. The Commissioner so alleged because the notice of appeal was not timely filed and the Roberts based their contention upon the claim that the appeal was in violation of the automatic stay of the December 30,1993, bankruptcy filing. The court asserted lack ofjurisdiction but declined to rule on the issue of the timely automatic stay of the notice of appeal after the automatic stay is lifted. *See id.*

[16] *Id., quoting* U.S. Bankruptcy Court order of Apr. 22,1996.

[17] *See id.*

of jurisdiction in the Court of Appeals based on the Roberts' alleged untimely filing of their notice of appeal. On May 4, 1999, the Court of Appeals granted the Commissioner's motion to dismiss[18] holding that § 362 (a)(1) and § 362 (a)(8) were insufficient to stay the running of the 90-day period in which the notice of appeal pursuant to 26 U.S.C. § 7483 (1994)[19] must be filed.[20]

The Delpit Case

The facts in *Delpit* are a bit more straightforward than the *Roberts* case. On December 12,1986, the Commissioner issued a deficiency notice to Larry D. Delpit and Dorothy D. Delpit (hereinafter referred to as "Delpits") in the amount of $38,939,020.97 claiming that the Delpits owed certain taxes because they engaged in sham transactions in Kern, Inc., an oil refining holding company formerly owned by the Delpits.[21] The Delpits timely filed a petition in the Tax Court on March 13, 1987, disputing the claim and requesting a redetermination of the deficiency.[22] On April 2, 1992, the Tax Court entered a decision in favor of the Commissioner and entered a judgment against the Delpits for $25,284,000 plus interest.[23] On September 18, 1992, the Delpits filed a timely notice of appeal of the Tax Court decision to the Court of Appeals for the Ninth Circuit.[24]

On December 2, 1993, the Delpits filed a voluntary petition for relief under Chapter 11 of the U.S. Bankruptcy Code. In their notice of the bankruptcy filing[25] to the Court of Appeals the Delpits claimed that their appeal was automatically stayed under § 362 of the Bankruptcy Code.[26] The Commissioner, on the other hand, urged the Court of

18.See id. at 891.

[19] 26 U.S.C. § 7483 (1994) Notice of Appeal:

"Review of a decision of the Tax Court shall be obtained by filing a notice of appeal within 90 days after the decision of the Tax Court is entered...."

[20] *See Roberts,* 175 F.3d at 891.

[21] *See* Delpit v. Commissioner of Internal Revenue, 18 F.3d 768,769 (9th Cir. 1994).

[22] *See id.*

[23] *See* Delpit v. Commissioner of Internal Revenue, 61 T.C.M. (CCH) 2303, (1991), supplemented by 63 T.C.M. (CCH) 3053 (1992).

[24] *See Delpit,* 18 F.3d at 769.

[25] *See id.*

26. 11 U.S.C. § 362(a) imposes a stay on eight types of proceedings:

(a) Except as provided in subsection (b) of this section, a petition filed . . . operates as a stay, applicable to all entities, of -

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any action to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(б) any act to collect, assess, or recover a claim against the debtor that arose before the commencemert of the case under this title;

Appeals to continue with the appeal on its merits.[27] The Court of Appeals decided to hear oral arguments on the question of the automatic stay prior to proceeding on the appeal on the merits.[28] On March 9,1994, the Court of Appeals held that § 362 (a)(1) was sufficient to stay the appeal from the Tax Court decision,[29] thus the Tax court proceeding was stayed during the pendency of the bankruptcy case.

The Freeman Case

On July 18,1985, Claude Freeman and Carol Freeman (hereinafter referred to as "Freemans") filed a petition in the Tax Court requesting a redetermination of their 1981 federal income tax liability.[30] The petition was dismissed by the Tax Court as untimely filed. The Freemans then filed a notice of appeal to the Court of Appeals for the Fifth Circuit and the Tax Court decision was affirmed by the Court of Appeals.[31] Ten days after filing their notice of appeal and prior to the Court of Appeals affirming the Tax Court's dismissal of their Tax Court petition the Freemans filed for relief under Chapter 11 of the U.S. Bankruptcy Code.[32] The Freemans' counsel inadvertently failed to notify the Court of Appeals of the bankruptcy filing; nevertheless, the Freemans claimed that the Court of Appeals' decision affirming the Tax Court's dismissal of their petition was void because 11 U.S.C. § 362 (a)(1) stayed the proceedings in the Court of Appeals.[33] The Court of Appeals held that § 362(a)(1) was not sufficient to stay an appeal from a Tax Court decision, thus, the Court of Appeal's decision affirming the Tax Court's dismissal of the Freeman's petition for redetermination was valid.[34]

II APPLICABILITY OF §362(A)(1)

The central issue in *Roberts, Delpit* and *Freeman* revolves around the power of 11 U.S.C. § 362 (a)(1)[35] to stay the 90-day statutory period to file a notice of appeal to a Court of Appeals of a decision in the Tax Court to the Court of Appeals and to stay the proceedings of the Court of Appeals where a case is properly on appeal at the time the bankruptcy petition is filed. The holding in *Freeman,* a Fifth Circuit case, is based solely upon the court's analysis of 11 U.S.C. § 362 (a)(1),[36] while, an Eleventh Circuit case,

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and
(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor. 11 U.S.C. § 362(aX1993).

27. *See Delpit, 1&* F.3d at 769.
28. *See id.*
29. *See id.*
30 *See* Freeman v. Commissioner, 799 F.2d 1091 (5* Cir. 1986).
31 *See id.* at 1092.
32 *See id.*
33 *See id.*
34 *See id.*
35 11 U.S.C. § 362(aXlX1993).
36 The Freeman court's analysis was in fact restricted to the first clause of 11 U.S.C. § 362 (>X1): "The commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title...." (emphasis in original). 799 F.2d at 1092 *(quoting* 11 U.S.C.

Roberts, and *Delpit,* a Ninth Circuit case, dealt with other issues of importance[37] which will be discussed later in this paper. Each court analyzes each clause in 362(aXl) separately.[38] Thus, this analysis will be conducted in similar fashion.[39]

A. "Against the Debtor": § 362 (a)(l)-First Clause

1. The Eleventh Circuit Analysis — *Roberts*

In *Roberts* the debtors asserted that the 90-day period allowed by statute to file a notice of appeal of a decision in the Tax Court to the U.S. Court of Appeals[40] was stayed pursuant to the first clause of 11 U.S.C. § 362 (aXl), in that, the Tax Court proceeding was a continuation of the IRS administrative proceeding against the debtor.[41] In essence, the debtors alleged that the filing of their December 30,1993 bankruptcy petition stayed the 90-day period[42] with regard to the Tax Court decision entered October 27,1993, and that they had an additional 26 days after the Bankruptcy Court lifted the automatic stay on April 22, 1996, to file their notice of appeal with the Tax Court. The Commissioner contended that the first clause of 11 U.S.C. § 362 (a)(1) did not stay the 90-day period and that the debtors simply had 90 days from October 27, 1993, to file their notice of appeal.

The Eleventh Circuit began its analysis of the validity of the automatic stay to suspend the 90-day period by focusing on the "against the debtor" language of the first clause in § 362(aX 1)• But a prerequisite to the analysis of the "against the debtor" language was to determine whether the Tax Court proceeding would be characterized as a continuation of the IRS administrative process or as an independent judicial proceeding.[43] This prerequisite was necessary because the Eleventh Circuit was looking to determine

§362(aXlX1993)).

[37] There are discussions of 11 U.S.C. § 362(a)(8) and 11 U.S.C. § 108 by both the *Roberts* and *Delpits* courts, while the *Delpit* court went further and discussed also 11 U.S.C. § 505 dealing with prior adjudicated issues.

38 11 U.S.C. § 362(aXlX1993).

[39] For purpose of analysis the *Roberts* and *Delpit,* courts bisect 11 U.S.C. § 362(aXl) as follows: "(1) The commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding [i] against the debtor that was or could have been commenced before the commencement of the case under this title, [ii] or to recover a claim against the debtor that arose before the commencement of the case under this title." *Delpit,* 18 F.3d at 770.

[40] *See* 26 U.S.C. § 7483 (1994) "Review of a decision of the Tax Court shall be obtained by filing a notice of appeal with the clerk of the Tax Court within 90 days after the decision of the Tax Court is entered ...." *Id.*

[41] *See Roberts,* 175 F.3d at 893.

[42] The posture of the *Freeman* and *Delpit* cases differs from the *Roberts* case, in that, while the *Roberts* case deals with a stay of the 90-day period to file a notice of appeal to the U.S. Court of Appeals, the debtors in the *Freeman* and *Delpit* cases had already perfected their notices of appeal and desired to stay the proceedings in the U.S. Court of Appeals. For the purposes of the § 362(aXl) analysis the posture of the case does not affect the analysis.

[43] The answer to the question of whether a proceeding before the Tax Court (as well as any appeal therefrom) constitutes a proceeding "against the debtor" under the first clause of section 362(aXl) largely depends on whether the filing of a petition for redeterminaiion with the Tax Court is viewed as the continuation of an administrative proceeding or the commencement of a judicial one. *See Roberts,* 175 F.3d at 893.

which party initiated the case. If the Eleventh Circuit characterized the proceeding as the continuation of the IRS administrative process, then the initial posture of the case would be at the administrative level where the IRS initiated action against the Roberts. However, if the proceedings were characterized as an independent judicial proceeding, then the initial posture of the case would be at the Tax Court level where the petition for redetermination of tax liability was filed for the Roberts' benefit and hence not "against the debtors."

The *Roberts* court then cited *Freeman* for the proposition that a petition for redetermination filed with the Tax Court by the debtor was a continuation of a judicial proceeding and was not a continuation of an administrative process.[44] While the Fifth Circuit in *Freeman* made a mere conclusionary statement without citing any legal authority[45] the Eleventh Circuit in *Roberts* added legal substance to its contention.

By citing *Freytag* v. *Commissionerf*[6] the Eleventh Circuit attempted to show that the Tax Court is solely a judicial forum with no political agenda,[47] i.e., that it was an independent entity that was not held captive by the IRS. Further, the U.S. Supreme Court in *Freytag* analogized the Tax Court to the federal district courts in its function[48] and as to the procedure for review of its decisions.[49]

The Eleventh Circuit court further cited the rationale of its previous decision in *Gatlin* v. *Commissioner*[50] that it would look only to the merits of the evidence presented before the trial court and not to the administrative record.[51] In the *Gatlin* case the taxpayers

[44] *See id.* at 894 (citing 799 F.2d at 1092).

[45] *See Freeman*, 799 F.2d at 1092.

[46] SOI U.S. 868 (1991) (challenging the independence of the Tax Court in a complex tax shelter case).

[47] The Tax Court exercises judicial, rather than executive, legislative, or aininistrative power, it was established by Congress to interpret and apply the Internal Revenue Code in disputes between taxpayers and the Government.... "The Tax Court exercises judicial power to the exclusion of any other function. It is neither advocate nor rulemaker. As an adjudicative body, it construes statutes passed by Congress and regulations promulgated by the Internal Revenue Service. It does not make political decisions." *Roberts*, 175 F.3d at 890-91.

[48] The Tax Court's function and role in the federal judicial scheme closely resemble those of the federal district courts, which indisputably are "Courts of Law." Furthermore, the Tax Court exercises its judicial power in much the same way as the federal district courts exercise theirs. It has power to punish contempts by fine or imprisonment, 26 U.S.C. § 7456 (c), to grant certain injunctive relief, § 6213(a), to order the Secretary of the Treasury to refund an overpayment determined by the court, § 6512 (bX2), and to subpoena and examine witnesses, order production of documents, and aAninister oaths, § 7456(a). All these powers are quintessentially judicial in nature. *See* id. at 891.

[49] The Tax Court remains independent of the Executive and Legislative Branches. Its decisions are not subject to review by either the Congress or the President. Nor has Congress made the Tax Court decisions subject to review in the federal district courts. Rather, like the judgments of the district courts, the decisions of the Tax Court are appealable only to the regional United States court of appeals, with ultimate review in this Court. The courts of appeals, moreover, review those decisions "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury." 26 U.S.C. § 7482(a). This standard of review contrasts with the standard applied to agency rulemaking by courts of appeal under § 10(e) of the Administrative Procedure Ad 5 U.S.C. § 706(2XA). *See* Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43-44 (1983). *Id.* at 891-92.

50 754 F.2d 921(11th Cir. 1985)

51."A trial before the Tax Court is a trial *de novo;* our determination of a petitioner's tax liability must be based on the merits of the case and not any previous record developed at the administrative level." *Id.* at 923, *quoting* Conforte v. Commissioner, 74 T.C. 1160,1177 (1980); *see also* Jackson v. Commissioner, 73 T.C. 394, 400 (1979); Greenberg's Express, Inc. v. Commissioner, 62 T.C. 324, 328 (1974).

challenged the fair market value determination of certain stock on the grounds that "the Commissioner's original deficiency notice was arbitrary, excessive, and without a rational basis or foundation" which should have shifted the burden of proof to the government.[52] Such a shift in the burden of proof, it was contended, would have given greater weight to the taxpayers' evidence and therefore given a more favorable determination to the taxpayer relative to the fair market value of the stock.[53] The *Gatlin* court held that to make a determination that the Commissioner's deficiency notice was arbitrary, excessive, and without a rational basis or foundation would cause the Tax Court necessarily "to review the evidence, motives, policies or procedures that may influence the Commissioner in making his determination."[54] The *Gatlin* court determined that the Tax Court starts anew making its determination on the record before it and does not depend on any record developed at the administrative level.[55]

The purpose of the *Roberts* and *Freeman* courts' characterizations of the petition for redetermination as a continuation of a judicial proceeding was to separate the IRS administrative proceedings from the subsequent Tax Court proceedings. By doing so the Eleventh and Fifth Circuits were in a position to determine whether the continuation of a judicial proceeding was "against the debtor" using the initial posture of the case to effectuate said determination.[56] Thus, if the debtor initiated the case by filing a petition for redetermination then the continuation of the judicial proceeding would not be "against the debtor" because the presumption would be that the debtor initiated the redeterminmation for the benefit of the debtor.[57] Since the continuation of the judicial proceeding was not "against the debtor" the Eleventh Circuit held that the first clause of §362(a)(l) was not applicable. Therefore, the Eleventh Circuit determined that the 90-day period to file a notice of appeal was not stayed, and the Commissioner's motion to dismiss for lack of jurisdiction must be granted. The Eleventh Circuit then asserted that were it to recognize the premise in *Delpit* that the IRS tax assessment and collection system is a homongeneous, monolithic structure, which included the Tax Court,[58] then it would in effect "create a fundamental and unwarranted inconsistency in the way that §362 applies to tax-related judicial proceedings."[59]

This fundamental and unwarranted inconsistency supposedly resulted from Congress' allowance for two tracks for the taxpayer to obtain redress for an alleged incorrect deficiency notice. Track one involves a petition to the Tax Court allowing the taxpayer to file a petition for redetermination of a tax deficiency without first paying the tax.[60] Track two involves a suit for refund filed in the U.S. District Court or U.S. Claims

[52] 754 F.2d at 922-923.

[53] *See id.* at 923.

[54] *See id.*

55.Id.

56 *See Roberts,* 175 F.3d at 894; *Freeman,* 799 F.2d at 1092-93.

57.See Roberts, 175 F.3d at 895.

58.See Section II.A.2, *infra.*

59.Roberts, 175 F.3d at 895.

60.*See* 26 U S C § 6213(aX1994). "Within 90 days.after the notice of deficiency authorized in §

Court, but in this instance the taxpayer must pay the tax prior to filing the refund suit.[61]

The Eleventh Circuit maintained that in *Valory* v. *United States* the Ninth Circuit has held that a track two tax refund suit is not an action against the debtor.[62] Therefore, it would be inconsistent for the Ninth Circuit to hold that a track one petition for redetermination is an action against the debtor.[63]

In the *Valory* case the debtors, Ross and Mary Valory (hereinafter referred to as "Valorys") filed a refund suit to claim a tax refund because of a final partnership administrative adjustment (hereinafter referred to as "FPAA"),[64] which was issued to the Valoiys by the IRS for the years 1983,1984 and 1985.[65] The FPAA was issued on March 29,1989 which resulted in a net operating loss for 1984, creating a loss carry-back for 1981 and a tax refund claim for the Valorys.[67] The Valorys were allowed 150 days from the date of the issuance of the FPAA to contest the FPAA. They failed to contest the adjustment within the time period which elapsed on August 26, 1989.[68] The Valorys had a statutory time limit of two years from this date to file suit for the tax refund owed to them.[69] On August 14, 1990, the Valorys filed for protection under Chapter 11 of the Bankruptcy Code[70] and on February 23, 1995, while still in the Chapter 11 proceeding, they filed the refund action in the U.S. District Court.[71] The Valorys claimed that under 11 U.S.C. § 108(c)[72] the 2 year time limit was stayed.[73] The *Valory* court disagreed with the debtors' assertion saying that the language of § 108(c) required that the civil action must

6212 is mailed... the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency." *Id.*

" *See 26* U.S.C. § 6532(aXl) (1994) gives the limitations on time for filing tax refund, 26 U.S.C. § 7422(aX1994) requires that a claim for refund or credit be duly filed, and 28 U.S.C. § 1346 (aXlX1^94) gives jurisdiction of tax refund suits to the United States District Courts and the United States Claims Court

[62] *See* Valory v. United States, 1997 U.S. Dist LEXIS 9122, 97-2 U.S. Tax Cas. (CCH) 150,805 (N.D. Cal. 1997), *affd mem.*, 1998 U.S. App. LEXIS 17623, 98-2 U.S. Tax Cas. (CCH) 150,659 (9th Cir. 1998). The facts of this case are fully set out in the district court opinion. The Ninth Circuit Court of Appeals issued only an affirming memorandum opinion.

[63] *See Roberts*, 175 F.3d at 895.

64. See 11 U.S.C. §§ 6231, 6234 (1994). A final partnership administrative adjustment is the IRS generated document that delineates the IRS' proposed changes to income and loss items at the partnership level.

65. *See Valory*, 1997 U.S. DisL LEXIS 9122 at »1.

66.See id. at *2.

67.See id. at *1.

68.*See id.* at *2.

69. See 26 U.S.C. § 6230 (6X2XBXUX1989).

[70] *See Valory*, 1997 U.S. Dist LEXIS 9122 at *3.

[71] *See id.* at *3.

[72] *See* 11 U.S.C. § 108(cX1989).

> [I]f applicable nonbankruptcy law... fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor...and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of—
> (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
> (2) 30 days after notice of the termination or expiration of the stay under 362...

Id.

[73] *See Valory*, 1997 U.S. Dist LEXIS 9122 at *3.

be "against the debtor."[74] However, the *Valory* court opinion does not give specific reasoning for the court's conclusion.[75] It is merely conclusory in holding that the Valorys' refund suit, as an action against the IRS, was not against the debtors as required by § 108(c).[76]

The Eleventh Circuit concluded, however, that the holding in *Valory* created a fundamental difference within the Ninth Circuit as to how the "against the debtor" language was to be interpreted for track one and track two proceedings.[77] It is the opinion of the author that the Eleventh Circuit may have made a critical mistake in failing to engage a more in depth factual analysis of *Valory*.

2. The Ninth Circuit Analysis — *Delpit*

In *Delpit* the debtors, unlike the debtors in the *Roberts* case, filed a timely notice of appeal on September 18, 1992,[78] and then subsequently on December 2, 1993, filed a voluntary petition under Chapter 11 of the Bankruptcy Code.[79] The Delpits asked that their appeal to the United States Court of Appeal be stayed and that all matters in regards to their tax liability be adjudicated in the Bankruptcy Court.[80]

The analysis by the Ninth Circuit in *Delpit* of whether the first clause of § 362(a)(1) operated to stay the appeal proceeding turned, as it did in *Roberts*, on whether the appeal was a continuation of a judicial or an administrative proceeding in order to determine if the proceeding was "against the debtor."[81] The Ninth Circuit, again like the Eleventh Circuit, referenced the initial posture of the case as the appropriate point of departure. Unlike the Eleventh Circuit, the Ninth Circuit, however, found that the appeal was a continuation of an administrative proceeding which began with the IRS audit of the debtor.[82] Because the initial posture of the case was deemed to be against the debtor, the Ninth Circuit held that the automatic stay provision of the first clause of §362(a)(l) did apply.[83]

The Ninth Circuit considered the IRS tax collection process to be a homogeneous, monolithic structure designed to assess taxes owed by taxpayers, which, once begun through the IRS audit, the taxpayer had virtually no choice but to continue.[84] The roots of

[74] *Id. m* *3- *4.

[75] *Id. aX* «4.

[76] *See Valory,* 1998 U.S. App. Lexis 17623 at *2.

[77] *See Roberts,* 175 F.3d at 895. As pointed out in more detail in Section IV. A *infra* there are several critical factual dissimilarities which the Eleventh Circuit failed to recognize.

78. *See* Delpit v. Commissioner, 18 F.3d 768,769 (9th Cir. 1994).

[79] *See id.*

80. *See id.; see also supra,* note 42.

81.See Delpit. 18F.3dat770.

[82] *See id.*

[83] *See id.*

[84] *See id* The IRS has established a comprehensive income tax assessmert procedure that begins with an audit and winds its way through the federal courts, including Court of Appeals. . . Under the income tax assessment procedure, a taxpayer is barred from petitioning the Tax Court until he has first participated in a number of administrative proceedings that were initiated "against" him. These proceedings include an audit, a meeting with a revenue agent and a supervisor, a 30-day letter ("Preliminary Notice"), formal proceedings before the IRS Appeals Division, and a 90-day letter ("Notice of Deficiency"). These proceedings may continue with

the Tax Court and Court of Appeals are firmly embedded in the IRS administrative process.[85] While criticizing the reasoning of the Fifth Circuit in *Freeman* as "faulty,"[86] the Ninth Circuit used an identical rationale[87] when it stated that it was necessary to examine the proceedings as a whole, and not simply rely on which person originated the action, to dispose of the question whether the action was in fact initiated against the debtor.[88]

While the Ninth Circuit cited very little case law in support of its holding it did cite the legislative history of § 362 and § 505[89] of the Bankruptcy Code to bolster its argument. First, the legislative history of § 362 was cited to underscore that the automatic stay is a vital provision to protect debtors.[90] Congress stated "[t]he automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy."[91] The *Delpit* court then quoted *2 Collier on Bankruptcy* to emphasize that § 362 is to be seen as *"extremely broad* in scope"[92] and "should apply to almost any type of formal or informal action against the debtor or the property of the estate."[93] The Ninth Circuit's salient point was that it was interpreting § 362 in exactly the manner envisioned by those who wrote the bankruptcy laws—the U.S. Congress. In applying this reasoning to the case before it, the Ninth Circuit stated, ”[h]ere the Delpits' primary debt consists of the $70 million (and growing) Tax Court judgment against them. Staying this case would allow the Delpits to reorganize their finances in an orderly fashion while postponing further legal proceedings and the attendant expenses they would otherwise incur before this court."[94]

Turning to the legislative history of § 505, the section of the Bankruptcy Code that established the process for determining tax liability by the Bankruptcy Court, the Ninth Circuit then discussed the support found in the legislative history of § 505 for the broad scope of its interpretation of § 362 (a)(1).[95] The Ninth Circuit honed in on the language of the legislative history where "Congress stated that it 'authorizes *the trustee* to prosecute an appeal or review of a tax case."'[96] However, the ability of the trustee to fully participate

the taxpayer's request to the Tax Court to remove or reduce the deficiency assessment and, next, are appealed by one party or the other to the Court of Appeals. *Id.*

85 *See id.* at 770.

86 *See id.* at 772.

87 *See id.* at 772 - 773.

88 *See id.* at 773; *see also* In re Bloom, 875 F.2d 224,226 (9th Cir. 1989) (holding that the automatic stay attached to a pre-bankruptcy civil action even though the civil action was filed by the debtor).

89 11 U.S.C. § 505 (1994) sets the procedure for determining tax liability within the Bankruptcy Court.

90. *See Delpit* at 771, *citing* H. R. Rep. No. 95-595, (1978), *reprinted in* 1978 U.S.C.C.A.N. at 6296-97.

91.Id.', partially quoted in *Delpit,* 18 F.3d at 771.

92 *Delpit,* 18 F.3d at 771 *quoting* 2 COLLIER ON BANKRUPTCY 1362.04, at 362-34 (15* ed. 1993) (emphasis added by *Delpit* court).

93 *Id.*

94 Id.

95 *See id.*

96. *Id., quoting* S. Rep. No. 1106 (1978), *reprinted in* 3 COLLIER ON BANKRUPTCY 1|505.03[1], at

in any and all appeals of a Tax Court decision will be maintained only if all appeals existing at the time of the filing of the bankruptcy petition are stayed.[97] To allow appeals to proceed without a respite could allow the debtor to "default on its appeal for any number of reasons (e.g., lack of funds, legal error), and thus deprive the trustee of its ability to prosecute an appeal on the debtor's behalf."[98] Hence the Ninth Circuit held that a narrow interpretation of § 362 (aXl) would do harm to the congressional intent of § 505. Conversely, a broader interpretation of § 362 (aXl) allowed more consistency in the greater scheme of bankruptcy law.

B. "To Recover a Claim": 362(a)(1)—Second Clause

1. The Eleventh Circuit Analysis — *Roberts*

The second clause of 362 (a)(1) states that the automatic stay applies to "the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding... to recover a claim against the debtor that arose before the commencement of the case..."[99] The Eleventh Circuit began by reiterating its conclusion of its analysis of the phrase "against the debtor" in the first clause of 362(a)(1) that "a Tax Court case is not continuation of an administrative proceeding—it is an independent judicial proceeding."[100] The Eleventh Circuit added, however, that even if it conceded that the Tax Court case was a continuation of an administrative audit process, it still could not conclude that "...the audit was initiated in order to recover an alleged tax deficiency."[101] The Roberts court contended that there was a separation between the IRS' audit and assessment process and its collection process. The audit was engaged solely for the purpose of ascertaining the existence of a deficiency. The collection of the deficiency was another matter altogether.[102]

The Eleventh Circuit then cited *Commissioner* v. *McCoy*,to show that the Supreme Court would not allow the U.S. Court of Appeals for the Sixth Circuit to give a remedy on appeal that the Tax Court could not give at the trial level, stating that "[t]he Tax Court is a court of limited jurisdiction and lacks general equitable powers." The

505-22 (emphasis in original); *see also* Fed. R. Bankr. P. 6009:

"With or without court approval, the trustee or debtor may prosecute or may enter an appearance and defend any pending actions or proceeding by or against the debtor, or commence and prosecute any action or proceeding in behalf of the estate before any tribunal." *Id.*

[97] *See Delpit*, 18F.3dat771

98.Id.

99. Supra note 39.

[100] *Roberts* v. *Commissioner*, 175 F.3d 889, 895 (11th Cir. 1999).

[101] *Id*, *see also supra* note 6.

[102]*See id.* The *Roberts* court also cited the Internal Revenue Code section for assessing the taxpayer, 26 U.S.C. § 6201, notifying the taxpayer of a deficiency 26 U.S.C. §§ 6212-6215 and collecting a deficiency 26 U.S.C. §§ 6301-6305.

[103] 484 U.S. 3,7(1987).

[104] *Roberts*, 175 F.3d at 896. *See supra* note 7, (*citing McCoy*, 484 U.S. at 7); *see also* Commissioner v. Gooch Milling & Elevator Co., 320 U.S. 418 (1943); Kelly v. Commissioner, 45 F.3d 348 (9th

Eleventh Circuit further asserted that the Tax Court had no power to assist the IRS in collecting the tax against the debtor because Congress had given it no such power.[105] It followed, the Eleventh Circuit reasoned, that action in the Tax Court cannot be a proceeding to recover a claim against the debtor because such act was beyond the scope of the Tax Court's jurisdiction. The Eleventh Circuit further reasoned that after the IRS receives a favorable ruling in the Tax Court, the IRS "must bring a suit for collection of tax in federal district court (or perhaps in state court) if it wants judicial assistance in recovering a tax deficiency."[106]

2. The Ninth Circuit Analysis — *Delpit*

The Ninth Circuit was short and to the point in dealing with the second clause of §362(a)(l).[107] Basically the court piggy-backed upon the factual basis and legal reasoning of its analysis of the first clause wherein it determined that the tax collection process was "against the debtor."[108] As to the recovery of a claim, the Ninth Circuit concluded that the IRS had commenced a process against the Delpits to collect a claim that had existed years before the Delpits filed their bankruptcy petition; hence, the matter before the court was a continuation of the process to collect the claim.[109] The issue was whether a claim existed at the time of the bankruptcy filing. The Ninth Circuit said that such claim did exist and the IRS was in the process of collecting the claim through their tax collection process which included the processing of the case through the Tax Court.[110] The *Delpit* court concluded that the IRS was attempting to recover a claim against the Delpits and, therefore, stayed the proceedings before the Court of Appeals.[111]

m. APPLICABILITY of § 362(A)(8)

A. The Eleventh Circuit Analysis — *Roberts*

Section 362(a)(8)[112] states that the automatic stay operates against "the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor."[113] In *Roberts* the debtors relied upon § 362(a)(8) to seek a stay of the 90-day appeal period, arguing that on December 30, 1993, the appeal period had not

Cir. 1995); Louisville Builders Supply Co. v. Commissioner, 294 F.2d 333 (6th Cir. 1961) (assertingthe limited powers of the Tax Court).

[105] *See Roberts,* 175 F.3d 896.

[106] *Id.*

[107] *See Delpit,* 18 F.3d at 770 - 771.

[108] *See supra* section II.A.2.

[109] "Here, the IRS initiated a proceeding (i.e. an audit) against the taxpayers in order to recover a $38 million claim for an alleged tax deficiency. The IRS's claim arose in 1986, well before the Delpits filed for bankruptcy. Because the Delpit's appeal is a 'continuation' of that proceeding, we also hold that the appeal is stayed under the second clause of § 362(aXl) " *Delpit,* 18 F.3d at 770, 771.

[110] *See id.*

[111] *See id.* at771.

[112] 11 U.S.C. § 362(aX8X1993).

[113] *Id.*

expired from the October 27, 1993, decision reentered by the Tax Court[114] Therefore, the debtors argued, they were "before the Tax Court" within the meaning of § 362(a)(8).[115] The Eleventh Circuit disagreed saying that "fa]ppeals from decisions of the Tax Court are not stayed by this provision."[116]

The Eleventh Circuit cited a Ninth Circuit case, *Cheng* v. *Commissioner*[117] to show that § 362(a)(8) was inapplicable. In *Cheng* the debtor sought to stay the proceedings of the U.S. Court of Appeals where he had perfected his notice of appeal and where his case was, in fact, scheduled for oral argument at the time he filed his bankruptcy petition.[118] The Ninth Circuit in *Cheng* concluded, "[t]he Tax Court has no jurisdiction over this matter. Its proceedings were concluded with the filing of a final judgment against Cheng."[119]

The Roberts argued, however, that they were still "before the Tax Court" because on December 30, 1993, they had not yet perfected their notice of appeal with the Tax Court.[120] The Eleventh Circuit disagreed with this contention, saying that the proceeding before the Tax Court ended on October 27, 1993, when the Tax Court reentered its decision.[121] The automatic running of the notice of appeals filing period had no effect on the finality of the court's decision.[122] Without a continuing proceeding before the Tax Court on December 30, the Eleventh Circuit concluded that there was nothing to which the automatic stay could attach under § 362(a)(8).[123]

[114] Roberts v. Commissioner, 175 F.3d 889, 896 (11th Cir. 1999).
[115] *See id.*
[116] *Id.*
[117] 938 F.2d 141 (9* Cir. 1991).
[118] *Id.* at 143.
[119] *Id.*
[120] *Roberts,* 175 F.3dat896.
[121] *See id.*

> Although their petition was still before the Tax Court (Hi December 30, we concluded that the proceeding before the Tax Court concerning their petition terminated when the Tax Court reentered its decision on October 27. This conclusion finds support in the common-sense principle that a judicial 'proceeding' within the meaning of § 362(a) ends once a decision on the merits has been rendered; ministerial aits or automatic occurrences that entail no deliberation, discretion, or judicial involvement—such as the running of the 90-day period for filing a notice of appeal and the resulting finality of the Tax Court's decision—do not constitute continuations of such a proceeding.

[122] *Id.* at 897. *citina* Production Credit Ass'n of Minot v. Burk. 427 N. W. 2d *See Roberts,* 175 F.3d at 897.
[123] *See id.*

B. The Ninth Circuit Analysis — *Delpit*

In *Delpit* the Commissioner advanced the *Cheng* decision to assert that appeals from Tax Court decisions were immune to the effects of the automatic stay provisions of § 362.[124] The Ninth Circuit disagreed resolving that the holding in *Cheng* was correct but inapplicable to *Delpit*[125] The *Cheng* decision was predicated only upon § 362(a)(8),[126] whereas the Ninth Circuit in *Delpit* considered the full scope of § 362, which included § 362(a)(1), a section with much broader language.[127] The *Cheng* court reasoned that once the Tax Court filed its final judgment against Cheng the Tax Court proceedings were over[128] and the *Delpit* court agreed.[129] In *Cheng* there was no proceeding before the Tax Court at the time of the filing of the bankruptcy petition. In *Delpit* the issue was whether there was a continuation of an administrative proceeding against the debtor[130] or a continuation of an administrative proceeding to recover a claim against the debtor.[131] Essentially, the Eleventh and Ninth Circuits are in agreement that neither case was before the Tax Court at the time the debtors filed their bankruptcy petitions and, therefore, § 362(a)(8) was inapplicable to either case.

IV. AUTHOR'S ANALYSIS

A. "Against the Debtor"

The issue in *Roberts, Delpit,* and *Freeman* that will probably have the most impact on bankruptcy law is the determination of what is meant by the language "against the debtor" in § 362(a). Consequently, because the determination of "against the debtor" is inextricably linked to the finding of whether the nature of the proceeding is a continuation of an administrative proceeding or a judicial proceeding, so, too, is the importance of ascertaining the nature of the proceeding. The controlling question then is, whether the proceeding was initiated by the debtors for the benefit of the debtors. In essence, the characterization of the nature of the proceeding defines how "against the debtor" is to be understood. All three circuits readily agree on this point.[132] Opinions diverge, however, when the three circuits try to decide the exact nature of the proceeding.

The Eleventh Circuit argued in *Roberts* that the nature of the proceeding was a continuation of a judicial proceeding and that the Tax Court was not an extension of the

[124] *See Delpit,* 18 F.3d. at 771.

[125] *See id.* at 772, *citing* First Nat'l Bank v. Bartow County Bd. of Tax Assessors, 470 U.S. 583, 593 n.6 (1985) (stating that it deals only with the specific issues before it).

[126] *See Cheng,* 938 F.2d at 143.

[127] *See Delpit,* 18 F.3d at 771.

[128] *See Cheng,* 938 F.2d at 143.

[129] *See Delpit.* 18 F.3d at 771-72.

[130] *See id.* at 770.

[131] *See id.* at 770-71.

[132] *See Roberts,* 175 F.3d at 894; *Delpit.* 18 F.3d at 770; *Freeman,* 799 F.2d at 1092-93.

IRS.[133] If a wall could be erected between the IRS administrative procedure and the Tax Court proceeding then the idea of a monolithic tax system would be much less tenable. The *Freytag*[134] and the *Gatlin*[135] cases in fact built just such a wall. *Freytag* noted the independence of the Tax Court[136] and *Gatlin* noted the "freshness" with which the Tax Court entertains its judicial review of the IRS administrative process.[137] But, even with the support of *Freytag* and *Gatlin* the *Roberts* court could not build this wall without some cracks in it. The Eleventh Circuit acknowledged that it was the IRS administrative process that initiated the Tax Court case.[138] Citing the relevant tax provisions[139] to show, respectively, that the notice of deficiency gave the taxpayer the right to file a petition for redetermination and that the filing of the petition for redetermination stayed the assessment of the deficiency, the Eleventh Circuit conceded that there was at least a "temporal interrelationship"[140] between the IRS administrative process and the Tax Court proceedings. The Eleventh Circuit then attempted to mitigate the importance of this "temporal relationship" that the Internal Revenue Code made between the IRS administrative process and the Tax Court by concluding that a mere "temporal interrelationship" was not enough to make the IRS administrative proceedings and the Tax Court proceeding sufficiently connected so as to create a single monolithic system.[141]

The Eleventh Circuit further stated that the basis for the Ninth Circuit's conclusion that in *Delpit* there was a single monolithic system was the existence of an extensive pre-litigation administrative system within the IRS.[142] This system "included audit, meeting with revenue agent and supervisor, preliminary notice, proceeding before the IRS Appeal Division, and notice of deficiency."[143] The Eleventh Circuit then observed that § 362(a) did not bar an audit to determine and assess tax liability. The logic here seemed to be that if there was a monolithic system and the automatic stay was inapplicable to the administrative level (audit) then it also should be inapplicable to the Tax Court level (notice of appeal).

The Eleventh Circuit cited three cases, *H & H Beverage Distributors,* v. *Department of Revenue*}[44] *In re Moore*[45] and *In re Ungar*,"[46] to show that courts have allowed audits and determination and assessments of taxes in the face of § 362(a). However, in the opinion of the author, the relevance of the holdings of these three cases is

[133] *See Roberts*, 175 F.3d at 894 (citing Freytag v. Commissioner, 501 U.S. 868, 890-91(1991)).

[134] 501 U.S. at 890-91.

[135] Gatlin v. Commissioner, 754 F.2d 921 (11th Circuit 1985).

[136] *See Roberts*, 175 F.3d at 894 (*citing* Freytag, 501 U.S. at 890-91).

[137] *See id. (citing Gatlin*, 754 F.2d at 923).

[138] *Roberts*, 175 F.3d at 894. *See also supra* note 5.

[139] 26 U.S.C. §§6213,6215 (1994).

[140] *See Roberts*, 175 F.3d at 895.

[141] *See id.*

[142] *See id.*

[143] ***Id.***

[144] *See* H & H Beverage Distribs. v. Department of Revenue, 850 F. 2d 165, 167 (3d Cir. 1988).

145 *See In re* Moore, 131 B.R. 893, 894 (Bankr. S.D. Fla. 1991).

[146] *See In re* Ungar, 104 B.R. 517, 520 (Bankr. N.D. Ga. 1989).

questionable. In the // *& H Beverage* and *Ungar* cases the courts decided that the stay was inoperable because of a statutory exception to § 362(a),[147] namely § 362(b)(9),[148] and not because of any language in 362(a) itself. So, while it is true that both cases held that § 362(a) could not stay audits or determinations and assessments of taxes, the rationale was inapposite in that it did not coincide with the rationale in *Roberts* which was based upon 362(a) alone. Further, while the *Moore* court did not say explicitly that it was relying on § 362(b)(9) for its holding, it cited *Ungar* as one of the principle cases for its holding.[149] It must be assumed, therefore, that § 362(b)(9) was implicit in the *Moore* court's reasoning. Since there was no direct and explicit statutory directive against staying either notices of appeal or appeals, the // *& H Beverage, Ungar* and *Moore* cases are not applicable to *Roberts* or *Delpit.*

Another problem with the Eleventh Circuit's rationale in *Roberts* was its rigidity. The Eleventh Circuit asserted that the initial posture of the case was the proper legal theory by which to determine which party had initiated the case.[150] Looking to the initial posture of the case the Eleventh Circuit found that, because the Tax Court case was a separate, independent activity from the IRS administrative proceedings, the initial posture of the case was deemed to occur at the point that the debtors filed the petition for redetermination,[151] the *Roberts* case, therefore, was a continuation of a judicial proceeding initiated by the debtors for the debtors' benefit and not against the interest of the debtors.[152] Upon close scrutiny of the Eleventh Circuit's reasoning, it appears that the court makes it virtually impossible for any tax debtor to get relief under § 362(a)(1). Since the debtor files the petition for redetermination because he is unsatisfied with the notice of deficiency and it is always the IRS which issues the notice of deficiency (never the debtor), the debtor must always initiate the petition for redetermination.[153] By building a wall between the administrative and Tax Court proceedings the Eleventh Circuit effectively precluded all taxpayers from relief under § 362(a)(1) because the process of getting one's grievance heard after the notice of deficiency is tendered to the taxpayer is for the taxpayer to file a petition for redetermination.[154] This in turn, using the logic of the Eleventh Circuit, automatically makes the initial posture of the case the commencement of the Tax Court case. Moreover, since the petition for redetermination must be filed by the taxpayer for the taxpayer's self-interest, that is, to lower or eliminate the tax deficiency, such a case, by definition, can never be "against the debtor."

In regard to the determination of the initial posture of the case, it is the opinion of the author that the more logical manner of approaching this matter is the analysis advanced by the Ninth Circuit: "[t]he mere fact that a debtor 'initiates' an action in the Tax

[147] *SeeH&HBeverage,* 850 F.2d at 169-70; *Ungar,* 104 B.R. at 520.

[148] 11 U.S.C. § 362(bX9XB) "The filing of a petition... does not operate as a stay...of the issuanoe to the debtor by a governmental unit of a notice of tax deficiency." *Id.*

[149] *See Moore,* 131 B.R. at 894.

[150] *See Roberts,* 175 F.3d at 894. *See supra* note 4.

151 *See id.* at 894.

152.See id. at 895.

[153] *See* 26 U.S.C. § 6213(aX1994).

[154] *See id.*

Court is not dispositive; we must examine the proceedings as a whole to determine whether they are in fact initiated 'against the debtor.'"[155] The Ninth Circuit in *Delpit* looked at all of the facts surrounding the initiation of the case to determine the pertinent reasons the case was commenced and not simply which party initiated the appeal.

This approach is clearly demonstrated in *In re Bloom*,[156] another Ninth Circuit case. In *Bloom*, the debtor and a creditor had engaged in prebankruptcy litigation in which they had entered into a consent decree obligating the debtor to make certain payments. The debtor filed a claim of exemption in the federal district court and a disposition hearing was set.[157] Prior to the disposition hearing being held the debtor filed her bankruptcy petition. Subsequent to notification of the debtor's bankruptcy proceeding the creditor filed a contempt motion, obtained security on a consent decree, and obtained a levy on the debtor's salary in the district court.[158] Despite the fact that it was the debtor who had initiated the nonbankruptcy prepetition claim of exemption in the district court, the Ninth Circuit held that the creditor's actions violated the automatic stay provisions of § 362.'[59]

Another case illustrating the flexibility of the Ninth Circuit's approach is *Valory*,[160] Paradoxically, this case was cited by the Eleventh Circuit in *Roberts* to point out the inconsistency of the Ninth Circuit's position in *Delpit* with respect to Tax Court redetermination of deficiency suits and the federal district court tax refund suits decided by the Ninth Circuit.[161] The salient fact in *Valory* is that the debtors filed a prebankruptcy claim for refund based on a tax adjustment to which the debtors had not objected.[162] Since the debtors had not objected to the adjustment, the refund suit was merely to collect money they believed owed to them and not to contest the actions of the IRS in its administrative proceedings. Therefore, the Valory's claim for refund was truly not "against the debtors," highlighting the fallacy of the Eleventh Circuit's discussion in *Roberts.*

Therein lies the beauty of the flexibility of the Ninth Circuit rationale. The court looks to the purpose of the parties' actions rather than the formal actions themselves. This approach elevates substance over form and such flexibility allows the court to let the specific and peculiar fact situation order the application of the law.

B. To Recover a Claim

Another shortcoming of the analysis of the Eleventh Circuit in *Roberts* was its perfunctory handling of the connection between the IRS administrative process and the Tax

[155] *Delpit,* 18 F.3d at 773.

[156] 75 F.2d at 224.

[157] *See id.* at 225.

[158] *See id.*

[159] *See id.* at 226-227.

[160] *Valory* v. *United States,* 1998 U.S. App. LEXIS 17623,98-2 U.S. Tax. Cas. (CCH) 150.659 (9th Cir. 1998).

[161] *See Roberts,* 175 F.3d at 895. The facts of *Valory* were discussed in Section II. A1., *supra.*

[162] *See* Valory v. United States, 1997 U.S. Dist. LEXIS 9122,97-2 U.S. Tax. Cas (CCH) 150,805 (N.D. Cal. 1997).

Court proceedings, especially as it related to the facts of the *Roberts* case. The most important factor was that the notice of deficiency stemmed from an investigation of the debtors because of alleged illegal tax practices regarding Mr. Roberts.[163] This was not a random audit but an investigative audit directed at discovering tax wrongdoing and collecting whatever moneys were owed. The investigation was hostile from the beginning and in fact resulted in a twelve count criminal indictment of Mr. Roberts and an eventual plea of guilty to one count of each crime,[164] in addition to the notice of deficiency. It seems remarkable that these facts were ignored in the court's analysis of clause two of § 362(a)(1) to recover a claim. The only aspect of the Eleventh Circuit's analysis that could have caused such myopic vision was the rigidity of its rationale. The Eleventh Circuit was so determined to build its wall of separation between the IRS administrative process and the Tax Court that it eliminated, without possibility of debate, any meaningful connection between the two. But this appears to be exactly the connection the Ninth Circuit in *Delpit* was making when it stated, "[h]ere the IRS initiated a proceeding (i.e. an audit) against the taxpayers in order to recover a $38 million claim for an alleged tax deficiency."[165] The IRS, after initiating an investigative audit cannot then allege that it did not initiate the process without implicitly determining that there would be a claim against the Delpits' estate and that this claim did not eventually lead to the appeal[166] that the Delpits desired to have stayed. Failure to even address the problem of the investigative nature of the IRS procedure further exemplifies the tunnel vision approach of the Eleventh Circuit.

C. Future Implications of the Cases

The scope and breadth of the applicability of the § 362(a)(1) automatic stay is of singular importance in that it gives the debtor substantial control over both the timing of notices of appeals and appeals themselves. In bankruptcy cases, as the Ninth Circuit recognized, timing is critical regarding the relevance of the stay to the *Delpit* case, "[m]ost important, it might afford the Delpits and the IRS an opportunity to work out a realistic settlement and compromise agreement that might not otherwise be possible."[167]

As important as the scope and breadth of § 362 (a)(1) may be, it is the opinion of this author that there are even more substantial issues to be considered by the debtors. The real targets here are the bankruptcy code provisions relating to §§ 108(c)(2)[168] and 505 (a)(2)(A).[169] If the standard for the determination of whether a proceeding is a continuation of an administrative or judicial proceeding is the flexible standard espoused by the Ninth

[163] *See Roberts,* 175 F.3d at 891.

164 See id.

165 Delpit, 18 F.3d at 770-71.

166 See id. at 771.

[167] *Id.* at 770.

[168] *See supra* note 72.

[169] 11 U.S.C. § J05(aX2XA):

"(2) The court may not so determine -

(A) the amount or legality of a tax, fine, penalty, or addition to tax if such amount or legality was contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction before the commencement of the case under this title..."(emphasis added). *Id.*

Circuit whereby the case is reviewed as whole,[170] then the debtor has a realistic opportunity to convince a court (under the proper fact scenario) that the proceeding is a continuation of an administrative proceeding and is, therefore, in fact, "against the debtor." However, once the proceeding is determined to be "against the debtor" such determination not only influences the application of the § 362(a)(1) stay provision, but also, strategically, § 108(c)(2). Under § 108(c)(2) the period for appeals and notices of appeals would be extended to "30 days after notice of the termination or expiration of the stay."[171]

The importance of § 08(c)(2) is readily seen by revisiting the Eleventh Circuit's reasoning as rejecting the applicability of § 108(c) to the facts of *Roberts.* [172] In essence the Eleventh Circuit said that if the *Roberts* case had been determined to be a claim against the Roberts, then § 108(c), including § 108(c)(2), would have been relevant to the Roberts' case, thereby giving the Roberts the necessary extension of time to keep the appeal alive. Such a determination would have given the Roberts one more bite at the apple and more of that all-important commodity to the debtor — time.

Once the high ground of § 108(c)(2) is taken by the debtors and trustees, then debtors and trustees will be poised for an attack to diminish the scope of § 505(a)(2)(A). § 505 sets the procedure for determining tax liability in Bankruptcy Court.[173] Section 505 (a)(2)(A) sets limitations on the jurisdiction of the Bankruptcy Court. The key concept in § 505(a)(2)(A), for the purposes of this analysis, is that the Bankruptcy Court lacks jurisdiction to relitigate tax claims contested and adjudicated prior to the filing of the bankruptcy petition.[174]

In regard to § 505(aX2)(A) the author anticipates a problem will arise when the courts consider the issue of whether a case is fully adjudicated when it is on appeal. This dilemma was alluded to in *Delpit* where the court said, "we note that the Commissioner's position would lead to an anomalous result. According to the Commissioner, a case is stayed if the debtor declares bankruptcy while he is before the Tax Court. However, the case is not stayed if the debtor happens to declare bankruptcy after either party has chosen to appeal the Tax Court's judgment to the Court of Appeals. But if we then hear the case on the merits and remand it back to the Tax Court, under the Commissioner's theory the case would once again be stayed. This convoluted approach defies both reason and common sense."[175]

Since a case on appeal may always theoretically be reversed and remanded to the lower court for furthering proceedings, can a case on appeal ever be considered fully

[170] *See Delpit,* 18 F.3d at 773.

[171] *Supra* note 72.

[172] The *Roberts* court states, "it is clear that subsection... (c) of § 108 did not even apply to this 90-day period.... Subsection (c) deals with time periods 'for commencing or continuing a civil action...on a claim against the debtor'.... The Tax Court proceeding below, however, was not a proceeding 'against' the petitioners." *Roberts,* 175 F.3d at 898.

[173] *See supra* note 169.

[174] This concept was upheld in United States v. Teal, 16 F.3d 619 (5th Cir. 1994), where the tax claim was held to be contested and adjudicated under § 505(aX2XA) even where a consent judgment was entered.

[175] *Delpit,* 18 F.3d at 773.

adjudicated? If the courts hold that cases on appeal are not fully adjudicated, then § 505(a)(2XA) will not affect cases on appeal, thereby giving Bankruptcy Courts jurisdiction to relitigate cases on appeal. Nullifying § 505 (a)(2)(A) would put yet another weapon in the debtor's arsenal. Such a nullification of § 505(aX2XA) is not an ironclad guarantee that the Bankruptcy Court will relitigate the case, since § 505(a)(1) says that court "may" determine the amount or legality of the tax matter before the Bankruptcy Court. Nevertheless, the possibility of relitigation is present and delays may allow the IRS and the debtor opportunities to work out an acceptable settlement.[176]

The forum in which a tax claim is litigated can be of utmost importance. In *In re: Laptops Etc. Corp*,[177] the debtor eliminated over $126,000.00 in taxes when the Bankruptcy Court redetermined a state court tax claim. In *Texas Comptroller of Public Accounts* v. *Trans State Outdoor Advertising* Co.[178] the debtor had to pay an additional $41,318.46 in taxes because the appeals court held that the Bankruptcy Court had no jurisdiction pursuant to § 505(a)(2)(A). Having an opportunity to relitigate tax claims in the bankruptcy courts so as to reduce tax liability is in many bankruptcy cases a crucial element of the reorganization plan.

V. CONCLUSION

While the Fifth Circuit started the debate in *Freeman* regarding the determination of the meaning of "against the debtor," it was the *Delpit* and *Roberts* cases that put substance into the legal arguments. The *Delpit* and *Roberts* cases clearly articulate the positions of their respective circuits regarding when a proceeding is against the debtor. The position of the Ninth and Eleventh Circuits are diametrically opposed with no real room for compromise. Further, the consequences of each position are real and substantial. In jurisdictions where courts follow the Eleventh Circuit bankruptcy debtors will not have the benefit of the protection of automatic stay because the nature of the case is automatically a continuation of a judicial proceeding. Therefore, such debtors will be locked into the results of the appeal process wherever it takes them. Conversely, in jurisdictions using the Ninth Circuit holding debtors will have the opportunity to show from the facts and circumstances of their case that the proceeding is against the debtor and therefore may be stayed. The stay will allow these debtors more time to martial their financial assets and quite possibly allow them a new forum in which to relitigate their tax grievances.

Since the holdings in these circuits are conflicting in an area of practice where the issue will repeatedly resurface because of the ever recurring problems of tax liability driven bankruptcies, this issue is ripe for review by the United States Supreme Court. The U.S. Supreme Court should appropriately step in to clarify these opposing positions and allow debtors to have a clearer idea as to how to navigate the now murky waters of § 362(a)(1).

[176] *See id.* at 772.
[177] 164 B.R. 506.
[178] 140 F.3d 618 (5th Cir. 1998).