No. 02-1389

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ABEL COSMO GALLETTI AND SARAH GALLETTI;
FRANCESCO BRIGUGLIO AND ANGELA BRIGUGLIO

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in order to enforce the derivative liability of partners for the tax debts of their partnership, the United States must make a separate assessment of the taxes owed by the partnership against each of the partners directly.

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The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in these consolidated cases.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-17a), which superseded the initial opinion of the court (298 F.3d 1107), is reported at 314 F.3d 336.[1] The

[1] The opinion and judgment of the court of appeals, as well as the order denying the petition for rehearing, contain separate docket numbers for the associated bankruptcy cases of the Gallettis and the Briguglios, who are the general partners of the partnership whose tax liabilities are at issue in this case.

opinions of the district court (App., *infra*, 18a-30a, 31a-43a) are reported at 88 A.F.T.R.2d (RIA) 5580 and 87 A.F.T.R.2d (RIA) 1639. The opinions of the bankruptcy court (App., *infra*, 44a-55a, 56a-68a) are reported at 86 A.F.T.R.2d (RIA) 6433 and 86 A.F.T.R.2d (RIA) 6438.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 2002. The petition for rehearing was denied on November 20, 2002. App., *infra*, 1a-4a. On February 6, 2003, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including March 20, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of 11 U.S.C. 101 and 502, 26 U.S.C. 3102, 3111, 3403, 3404, 6201, 6203, 6501 and 6502, and Cal. Corp. Code 16306 and 16307 (West 2003), are set forth in the Appendix, *infra*, 69a-73a.

STATEMENT

1. Respondents are the general partners of a partnership named Marina Cabrillo Partners. App., *infra*, 4a. During the years relevant to this case, the partnership employed various workers and, as a consequence, accrued liability for federal employment taxes. Federal employment taxes accrue against the "employer" (*e.g.*, 26 U.S.C. 3102(b), 3111(a)) of any person who "performs or performed any service, of whatever nature, as the employee of such person." 26 U.S.C. 3401(d). Because the partnership was the "employer," the social security (FICA) taxes and Federal Unemployment Tax Act (FUTA) taxes relating to its employees were direct liabilities of the partnership. App., *infra*, 62a.

On various dates between 1994 and 1996, the Internal Revenue Service made assessments for the unpaid federal employment tax liabilities of the partnership that accrued for periods from 1992 through the first quarter of 1995. Each of those assessments was made within three years after the filing of the partnership's employment tax return. App., *infra*, 4a-5a, 42a. As a consequence of those timely assessments (26 U.S.C. 6501(a)), the federal limitations period for commencing a judicial action to collect the unpaid tax liabilities of the partnership was extended to ten years from the dates of assessment (26 U.S.C. 6502(a)(1)).[2]

2. After respondents encountered financial difficulties, they sought protection from their creditors under Chapter 13 of the Bankruptcy Code. The United States filed proofs of claim in their personal bankruptcy cases to recover the unpaid federal employment taxes owed by the partnership. App., *infra*, 45a, 57a.

a. Respondents objected to the proofs of claim. They acknowledged that, as general partners, they were derivatively liable for all lawful debts of the partnership under state law (Cal. Corp. Code § 16306 (West 2003)). They also acknowledged that the assessment of the tax against the partnership was timely and valid. They contended, however, that, federal law prohibits the collection of the tax liabilities of the partnership from its partners unless a separate assessment of the taxes has been made against the partners individually. App., *infra*, 45a, 58a. They further

[2] "Until 1990 the statute of limitations for the collection of tax debts was six years from assessment. That year Congress increased the period to ten years. Pub. L. 101-508, amending 26 U.S.C. § 6502(a)." *United States* v. *Wright*, 57 F.3d 561, 562 (7th Cir. 1995).

contended that the United States is now barred by 26 U.S.C. 6501(a) from making such assessments against the partners because more than three years had elapsed since the partnership filed the tax returns for the periods for which the tax liabilities arose. App., *infra*, 46a, 59a.

In response, the government explained (i) that the assessment against the partnership was timely and valid and (ii) that the derivative liability of the general partners for the resulting debt of the partnership arises under state law, not under the Internal Revenue Code. Accordingly, when, as here, a valid assessment has been made of the taxes owed by the *partnership*, no additional, individual assessment against the partners is required to permit suit to proceed against them for their derivative, state-law liability. App., *infra*, 47a, 59a.

b. The bankruptcy court disallowed the government's claims, and the district court affirmed that ruling. Relying on the general principle that "a valid assessment is a prerequisite to tax collection" (App., *infra*, 28a (quoting *El Paso Refining, Inc.* v. *IRS*, 205 B.R. 497, 499 (Bankr. W.D. Tex. 1996)), these courts held that the employment taxes owed by the partnership must be assessed against the partners directly before they could be collected directly from them. Because no assessment had been made against the partners individually within the three-year period provided by 26 U.S.C. 6501, the bankruptcy court and district court concluded that the government's claims are now barred in this case. App., *infra*, 28a-29a, 41a-42a; *id.* at 51a- 54a, 62a-66a.

3. The court of appeals affirmed. App., *infra*, 1a-17a. The court first stated that, under Section 6501(a) of the Internal Revenue Code, the government is to

collect tax deficiencies "by making an assessment against the taxpayer within three years of the filing of the taxpayer's return." App., *infra*, 6a. The court reasoned that respondents, as general partners, are "taxpayers" who are subject to assessment for the employment taxes owed by the partnership. The court noted the term "taxpayer" is defined in Section 7701(a)(14) of the Code as "any person subject to any internal revenue tax" and Section 7701(a)(1), in turn, defines the word "person" to include "an individual" as well as a "partnership." App., *infra*, 7a-8a. Relying on these definitional provisions, the court concluded that, while "[t]he Partnership is a 'taxpayer' within the meaning of the statute, * * * so [also] is each individual [partner] a separate 'taxpayer'" subject to assessment for this tax. *Id.* at 8a.

The court next concluded that the timely assessments against the partnership in this case "extended the statute of limitations only with respect to the Partnership" and "left unaltered the limitations period applicable to [respondents]." App., *infra*, 8a. Because the government did not "assess" the partnership's tax liabilities against the partners individually within three years after the partnership returns were filed, the court held that the government is now barred by Section 6501(a) from collecting those taxes from respondents. *Ibid.*

The court of appeals rejected the government's argument that assessments against the individual partners are unnecessary in this action brought to enforce the derivative, state-law liability of the partners for the valid debts of the partnership. The court acknowledged that, "under California law, partners are 'personally liable for the debts and liabilities of the partnership, including its tax liability.'" App., *infra*, 14a (quoting *Young* v. *Riddell*, 283 F.2d 909, 910 (9th Cir. 1960)). Even though "under state law each individual partner is liable for the debts of the partnership," the court stated that "a creditor may collect a debt for which the partner is jointly and severally liable only by first obtaining a judgment against the partner." App., *infra*, 16a. The court concluded that, since "[t]he IRS has obtained no judgment against [respondents,]" and since "[t]he time for doing so has expired," the partners may not now be held liable for the tax debts of the partnership. *Ibid.*

4. In a petition for rehearing with suggestion for rehearing en banc, the government argued that the panel decision in this case conflicts with the decision of the Seventh Circuit in *United States* v. *Wright*, 57 F.3d 561 (1995). In response to the petition for rehearing, the court amended its opinion to state that "*Wright* is distinguishable because, in that case, the IRS had assessed both the partnership * * * and the individual partners." App., *infra*, 2a. The court acknowledged that the action by the government to collect taxes owed by the partnership from the individual partners in *Wright* was brought *after* the end of the limitations period that would have been applicable if the individual partners had been directly liable for the tax under federal law. *Id.* at 3a. The court nonetheless stated that, because both the partners and the partnership received assessments in *Wright*, "[t]he Seventh Circuit * * * had no opportunity to address the question before us." *Ibid.*

REASONS FOR GRANTING THE PETITION

The court of appeals has decided an important and recurring question concerning the enforcement of partnership tax liabilities in a manner that conflicts with decisions of other circuits. In this case, the United States made a timely assessment of federal employment tax obligations owed by a partnership. When the partnership failed to pay, the United States sought to enforce these tax liabilities against the partners who were liable under state law for all valid debts of the partnership. The court of appeals concluded, however, that, even though the United States has a valid claim against the partnership for the unpaid taxes, the United States could not enforce its derivative claim against the partners without first "assessing" the tax against the partners individually. Because the assessment of the taxes owed by the partnership had not been made directly against the partners, the court held the government's claim to be barred.

By contrast, in *Remington* v. *United States*, 210 F.3d 281, 283 (2000), the Fifth Circuit held that the United States may collect a partnership debt "from any one of the general partners" and, as a prerequisite, need only establish that the taxes are a valid "partnership debt." Similarly, in *United States* v. *Wright*, 57 F.3d 561, 564 (1995), the Seventh Circuit held that suits against partners who are "derivatively liable for taxes are timely, or not," based on whether the suit, if brought against the partnership directly, would be timely. See also *United States* v. *Updike*, 281 U.S. 489, 494-495 (1930) (timeliness of suit imposing derivative liability on a transferee depends on timeliness of suit against directly liable taxpayer).

The decision of the court of appeals in this case thus creates a conflict among the circuits on a matter of substantial and recurring importance. The Internal Revenue Service has determined that there are currently outstanding in excess of $10 billion of employment tax liabilities for partnership activities that have been timely assessed, but for which separate assessments have not been made against partners individually. The decision of the court of appeals in this case could routinely bar collection of those liabilities from individual partners in cases in which the ordinary three-year period for the assessment of taxes in 26 U.S.C. 6501(a) has expired. The imperatives of efficient and effective federal tax collection and of national uniformity in the application of the Internal Revenue Code warrant review by this Court of the conflict created by the decision in this case.

1. The decision of the court of appeals is erroneously premised on the notion that federal law requires the United States to make separate assessments against each individual partner for the taxes owed by the partnership.

a. The court erred initially by misapprehending the nature of government's claim in this case. The government's claim in these proceedings is not brought under federal law. It is instead brought under the principles of state partnership law, which specify that "all *partners are liable* jointly and severally *for all obligations of the partnership*" (Cal. Corp. Code § 16306(a) (West 2003) (emphasis added)).[3] Under these state-law principles, it is well established that general partners are "personally liable for the debts and liabilities of the partnership, including its tax liability." *Young* v. *Riddell*, 283 F.2d 909, 910 (9th Cir. 1960). Accordingly, when (as in this case) a valid "obligation[ ] of the partnership" exists under federal law, that lawful debt of

[3] This provision is contained in Section 306(a) of the Uniform Partnership Act (1997), which has been adopted by 30 States, the District of Columbia and the Virgin Islands. 6 U.L.A. 1-2, 117 (2001).

the partnership may be enforced directly against *the partners* under state law. See *Remington* v. *United States*, 210 F.3d at 283 (under state law, "the IRS is entitled to collect the trust fund tax liability, indisputably a partnership debt, from any one of the general partners," because "[t]he partnership is the primary obligor and its partners are jointly and severally liable on its debts"); *Ballard* v. *United States*, 17 F.3d 116, 118 (5th Cir. 1994) ("it is state law that determines when a partner is liable for the obligations —including employment taxes—of his partnership"); *United States* v. *Hays*, 877 F.2d 843, 844 n.3 (10th Cir. 1989) ("the liability of a general partner for the obligations of the partnership is determined by state law rather than federal law"); *Calvey* v. *United States*, 448 F.2d 177, 180 (6th Cir. 1971) (same).[4]

b. There is no dispute in these cases (i) that timely assessments of the partnership's tax liabilities were made within the three-year period allowed by 26 U.S.C. 6501(a), (ii) that those timely assessments extended the time for collection of those liabilities for an additional ten-year period (26 U.S.C. 6502(a)), and (iii) that this ten-year period has not yet expired. See App., *infra*, 16a. It is therefore undisputed that a valid obligation of *the partnership* exists in this case.

Without directly challenging the established rule that general partners are liable for the valid debts of their partnerships under applicable state law, however, the court of appeals concluded that the taxes could not be collected from the partners in this case because they had been assessed by the IRS only against the partner-

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[4] Accord, *e.g.*, *Livingston* v. *United States*, 793 F. Supp. 251 (D. Idaho 1992); *In re Ross*, 122 B.R. 462 (Bankr. M.D. Fla. 1990); *In re Robby's Pancake House*, 24 B.R. 989 (Bankr. E.D. Tenn. 1982).

ship and not directly against the partners. App., *infra*, 7a-8a. The court stated that, because no assessment was made against the partners "within the three- year period provided under § 6501(a), [that statute] bars [the government] from collecting the unpaid debts of the Partnership directly from [the partners]." App., *infra*, 8a.

This conclusion of the court of appeals is based on a fundamental misunderstanding of the function and nature of an assessment under the Internal Revenue Code. Section 6201(a) of the Internal Revenue Code authorizes the Secretary of the Treasury "to make * * * assessments of all taxes * * * imposed by this title." 26 U.S.C. 6201(a). The federal employment taxes at issue in this case are imposed on the "employer." 26 U.S.C. 3102(b), 3111(a), 3301(a), 3403. When the partnership paid wages to its employees, it thereby created employment tax liabilities for itself, as the "employer," under federal law. See *Otte* v. *United States*, 419 U.S. 43, 51 (1974); *In re Armadillo Corp.*, 410 F. Supp. 407, 410 (D. Colo. 1976), aff'd, 561 F.2d 1382 (10th Cir. 1977). The government thereafter made a timely "assessment" of those taxes within the three-year period allowed by Section 6501(a). App., *infra*, 5a. Under Section 6502(a), that timely assessment of the tax extended for ten years the period in which a judicial action could be commenced to collect that liability (26 U.S.C. 6502(a)):

> Where the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court * * * begun * * * within 10 years after the assessment of the tax.

This provision applies without regard to the identity of the party against whom the action is commenced. It therefore applies equally to a proceeding against a taxpayer who is directly liable for a tax and to a proceeding against a person who is only derivatively liable for the tax. Because the current "proceeding in court" to collect the assessed taxes was "begun * * * within 10 years after the assessment of the tax" (*ibid.*), it is timely as a matter of federal law under these provisions.

The court of appeals rejected this straightforward application of these statutes on the grounds that they apply only when the assessment is made "against the taxpayer" from whom the taxes are being collected. App., *infra*, 6a. That conclusion, however, has consistently been rejected by other courts. In the early decision in *Anderson* v. *United States*, 15 F. Supp. 216 (Ct. Cl. 1936), cert. denied, 300 U.S. 675 (1937), the predecessor of the Federal Circuit explained that it is incorrect to assume "that the Commissioner of Internal Revenue assesses the taxpayer instead of assessing the tax." *Id.* at 225.[5] Because it is the "tax," and not the "taxpayer," that is assessed, the court in *Anderson* held that a separate assessment is not required to collect a tax from a party who is derivatively liable for it. *Ibid.* (estate executor liable without separate assessment for taxes owed by decedent).[6] As the court explained in a

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[5] As the predecessor of the Federal Circuit, the decisions of the Court of Claims are binding precedent in that circuit. *South Corp.* v. *United States*, 690 F.2d 1368, 1370 (Fed. Cir. 1982).

[6] The assessment is a written record of the calculated amount of taxes due. The resulting "liability of the taxpayer" is to be recorded "in the office of the Secretary [of the Treasury] in accordance with rules or regulations prescribed by the Secretary." 26

companion case in *Anderson*, so long as the assessment of the "tax" was timely, "the Commissioner had six [now ten] years thereafter within which to make collection" from any person who may be liable for it. *Anderson* v. *United States*, 15 F. Supp. 225, 229 (Ct. Cl. 1936), cert. denied, 302 U.S. 695 (1937).

That same basic rule described in the *Anderson* case has been adopted and applied by numerous courts, which have stressed that a "further independent assessment [against the party derivatively liable for the tax] would accomplish nothing." *United States* v. *Dixieline Financial, Inc.*, 594 F.2d 1311, 1312 (9th Cir. 1979).[7] See also *Payne* v. *United States*, 247 F.2d 481,

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U.S.C. 6203. As the Court of Claims explained in *Anderson* v. *United States*, 15 F. Supp. at 225 (emphasis added):

> *The assessment contemplated by and referred to in the statute is the assessment by the Commissioner of the tax and the Commissioner's assessment list*, which the Commissioner actually signs when he makes an assessment of the tax, *does not contain the names of any taxpayers but contains only the amounts and the total tax* as "additional assessments' made by the Commissioner." * * * Attached to this assessment list of the Commissioner are separate sheets for use by the collector in keeping his record of collections, credits, and balances due on which is written the name of the person or corporation in respect of whose taxes the amount stated on the Commissioner's assessment list has been assessed.

The designation on supplementary sheets "of the person in respect of whose income a tax was assessed or the person from whom collection should be made is for the information and guidance of the collector." *Anderson* v. *United States*, 15 F. Supp. at 228.

[7] The Ninth Circuit has held in analogous situations that, when the IRS makes a timely assessment of employment taxes against an employer, that assessment is sufficient by itself to extend the time for bringing suit to recover the derivative liability of a lender under Section 3505 of the Code. The lender's derivative liability

484 (8th Cir. 1957) (limitations period for suit claiming derivative liability of a transferee extended for six [now ten] years after assessment of the tax even though "no assessment * * * had ever been made" against the transferee), cert. denied, 355 U.S. 923 (1958); *United States* v. *Walker*, 217 F. Supp. 888, 890 (W.D.S.C. 1963) (for a collection action to proceed against a derivatively liable party, "[t]he Commissioner is required to assess the tax * * * rather than assess the taxpayer").

The Tenth Circuit reached this same conclusion in *United States* v. *Botefuhr*, 309 F.3d 1263 (2002). In that case, the government sought to collect a gift tax from the donee who was derivatively liable for the tax only

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for employment taxes closely parallels the derivative liability of a partner under state law. Under Section 3505(a), a lender that pays wages directly to the employees of another employer is liable itself for the amount of taxes required to be deducted and withheld from the wages. 26 U.S.C. 3505(a). Under Section 3505(b), a lender is also liable if it supplies funds to an employer for the specific purpose of paying wages "with actual notice or knowledge * * * that such employer does not intend to or will not be able to make timely payment" of the requisite withholding taxes. 26 U.S.C. 3505(b). The lender's liability, like the partner's liability for partnership employment taxes, is derivative because it arises when the employer has failed to pay the taxes imposed. In decisions that were not explained or even discussed by the panel in this case, the Ninth Circuit has held that an assessment of liability against the employer is sufficient to extend the limitations period for filing suit against the lender on its derivative liability for the tax. *United States* v. *Dixieline Financial, Inc.*, 594 F.2d at 1313 ("the assessment of the tax against [Framing Systems], the employer, met the requirements of § 6501(a); no assessment of the § 3505(b) liability of [the lender] was required"); *United States* v. *Hunter Engineers & Constructors, Inc.*, 789 F.2d 1436, 1441 (9th Cir. 1986) ("[t]he assessments against [the employer] served to extend the statute of limitations against [the lender] so that this suit was timely filed"), cert. denied, 479 U.S. 1063 (1987).

"to the extent of the value of such gift" (26 U.S.C. 6324(b)).[8] The court rejected the argument of the donee that he was relieved of liability because an assessment had not been made directly against him. The court explained that a timely "assessment" of the tax had been made against the donor (who was primarily liable) and that, since "the suit would be timely brought against the donor under these provisions, it will be considered timely against the donee or transferee" even though no separate assessment had been made against him. 309 F.3d at 1277-1278. "[B]ecause the IRS is acting within the time period in which it could act against the donor, * * * its case against [the derivatively liable] donee is timely." *Id.* at 1278.

This Court reached an analogous conclusion in *Leighton* v. *United States*, 289 U.S. 506 (1933), which involved the derivative liability of a transferee of corporate assets for taxes owed by the corporation. The Court held that the right of the United States to enforce this derivative liability is based on the assessment against the primarily liable corporation and exists even "without assessment" of the tax against the parties whose liability was only derivative. *Id.* at 508-509. In *United States* v. *Updike*, 281 U.S. 489, 494 (1930), the Court similarly concluded that, because the tax imposed on the corporation "is the basis of the liability" of the transferee, the same limitations period that applies in a suit to collect from the directly liable corporation also applies in a suit against the derivatively liable transferee.

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[8] The Internal Revenue Code imposes primary liability for the federal gift tax upon the donor. 26 U.S.C. 2502(c). If the donor fails to pay the tax, however, the donee is personally liabile for the tax to the extent of the value of the gift. 26 U.S.C. 6324(b).

In the present case, the court of appeals ignored this substantial body of precedent in holding that "the assessment of tax liability against the Partnership, without more, does not allow the IRS to collect those taxes directly from the individual partners." App., *infra*, 14a. As the Seventh Circuit recently summarized in *United States* v. *Wright*, 57 F.3d 561, 564 (1995), "suits against persons derivatively liable for taxes are timely, or not, according to the rules for timeliness * * * against [the primarily liable] taxpayers." The government's collection action in this case is thus timely because it was brought "within 10 years after the assessment of the tax." 26 U.S.C. 6502(a)(1).

c. The court of appeals erred in suggesting that the United States could not prevail in a claim against the partners under state law. The court relied for this proposition on Section 16307(c) of the California Corporations Code, which specifies that "a judgment against a partnership may not be satisfied from a partner's assets unless there is also a judgment against the partner." Cal. Corp. Code § 16307(c) (West 2003). The court noted that the IRS had not yet obtained a judgment against respondents, and it opined that "it is too late to do so [now] because the applicable [federal] statute of limitations [in 26 U.S.C. 6501(a)] was three years" and that term has now expired. App., *infra*, 17a.

As the decisions of the Federal Circuit, Seventh Circuit, Eighth Circuit and Tenth Circuit described above all make clear, however, the timely assessment of the employment tax liability permits an action to collect that tax against any primarily or derivatively liable party "by a proceeding in court * * * begun * * * within 10 years after the assessment of the tax." 26 U.S.C. 6502(a)(1). Because the government's collection action in this case was brought against the partners "within 10 years after the assessment of the tax" (*ibid.*), it is timely.

d. The court of appeals erred in concluding (App., *infra*, 13a-14a) that the decision in this case does not conflict with the decision of the Seventh Circuit in *United States* v. *Wright*, 57 F.3d 561 (1995). In *Wright*, as in the present case, the court addressed the statute of limitations that governs an action to collect a partner's derivative liability for unpaid federal employment taxes incurred by a partnership. The question in that case, like in the present one, was "whether, if a suit against the taxpayer would be timely, then suit is also timely against persons derivatively liable." *Id.* at 564. The answer to that question in *Wright* directly conflicts with the answer given to that same question by the court below (*ibid.*):[9]

> [S]uits against persons derivatively liable for taxes are timely, or not, according to the rules for time-

[9] The district court and Seventh Circuit opinions in *Wright* belie the assertion of the court below that "*Wright* is distinguishable because * * * the IRS had assessed both the partnership * * * and the individual partners." App., *infra*, 13a. The government had maintained in *Wright* that "the assessments were levied against the partnership only and not against any of the partners individually." 868 F. Supp. 1070, 1071 n.1 (S.D. Ind. 1994). The district court in *Wright* "made clear" that, although it appeared that an assessment had been entered against the partners as well as against the partnership, that question was "not material to the resolution" of the case. *Ibid.* The Seventh Circuit also did not suggest that the existence of assessments against the partners would be relevant in that case. See 57 F.3d at 562-563. To the contrary, in a holding that directly conflicts with the decision in this case, the court concluded that "suits against persons derivatively liable for taxes are timely, or not, according to the rules for timeliness of suits against taxpayers." *Id.* at 564.

> liness of suits against taxpayers. It is hard to escape that conclusion, for both [26 U.S.C.] § 6502 and § 6503 establish rules for suing taxpayers; they do not set up separate periods for persons secondarily liable. Their structure presumes that there is only one period per tax *debt*, no matter how many different persons may be liable on the debt.

Other circuits have agreed that actions to enforce derivative liabilities for taxes are based upon, and subject to the rules applicable to collection of, the taxes assessed against the primarily liable taxpayer. *United States* v. *Botefuhr*, 309 F.3d at 1277; *Anderson* v. *United States*, 15 F. Supp. at 225. The contrary holding in this case—that "the IRS cannot collect a partnership's tax deficiency directly from the partners without first making individualized assessments against the partners" (App., *infra*, 4a)—thus creates a conflict among the circuits on a matter of recurring importance.

2. This Court has stressed the importance of avoiding "inequalities in the administration of the revenue laws." *Commissioner* v. *Sunnen*, 333 U.S. 591, 599 (1948). The decision of the court below, however, would cause different rules to be applied in different circuits on the basic question of partnership tax liability presented in this case. The result would be a disparate treatment of similarly situated taxpayers based solely upon the happenstance of geography. Indeed, since partners may reside in different circuits, two partners of the *same* partnership may receive different treatment—one liable for partnership taxes and one not—due to the conflict among the circuits created by the decision in this case. Resolution of this conflict by this Court is warranted by the overriding importance, in a national system of taxation, of "ensur[ing] as far as

possible that similarly situated taxpayers pay the same tax." *Thor Power Tool Co.* v. *Commissioner*, 439 U.S. 522, 544 (1979).

The Internal Revenue Service has determined that there are currently outstanding partnership employment tax liabilities in excess of $10 billion that have been timely assessed but for which separate assessments have not been made against partners individually. The decision of the court below would routinely bar collection of those liabilities from individual partners in cases in which the ordinary three-year period for assessment of taxes in 26 U.S.C. 6501(a) has expired.

It is undisputed that, under applicable principles of state law, general partners are ordinarily jointly and severally liable for *all* outstanding debts of the partnership. See note 3, *supra*. Until now, the IRS has ordinarily pursued collection of partnership tax obligations from the partnerships before commencing litigation with partners to satisfy outstanding tax obligations. Under the abbreviated limitations period that would result from the decision in this case, however, the government would be forced to bring collection suits against partners within the three-year period of Section 6501(a) even though parallel efforts against the partnership may remain ongoing. Such duplicative proceedings would be burdensome for taxpayers as well as for the government, for they would subject partners to the necessity of litigation over matters that the partnership should routinely resolve. The decision of the court of appeals thus creates inefficiencies and obstacles for the routine collection of partnership tax liabilities and places in jeopardy the collection of large sums of outstanding taxes already assessed.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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MARCH 2003

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-55953
D.C. No. CV-00-00753-VAP

IN RE ABEL COSMO GALLETTI, AKA AL GALLETTI, AND SARAH GALLETTI, DEBTORS

UNITED STATES OF AMERICA, ON BEHALF OF ITS AGENCY, THE INTERNAL REVENUE SERVICE, APPELLANT

v.

ABEL COSMO GALLETTI; SARAH GALLETTI, APPELLEES

No. 01-55954
D.C. No. CV-00-00842-VAP

IN RE FRANCESCO BRIGUGLIO, AKA FRANK BRIGUGLIO, AND ANGELA BRIGUGLIO, AKA ANGIE BRIGUGLIO, DEBTORS

UNITED STATES OF AMERICA, APPELLANT

v.

FRANCESCO BRIGUGLIO, AKA FRANK BRIGUGLIO; ANGELA BRIGUGLIO, AKA ANGIE BRIGUGLIO, APPELLEES

Appeals from the United States District Court for the Central District of California Virginia A. Phillips, District Judge, Presiding

Argued and Submitted
May 9, 2002—Pasadena, California

Filed Aug. 8, 2002
Amended Nov. 20, 2002

ORDER AND AMENDED OPINION

Before: KLEINFELD and GRABER, Circuit Judges, and BOLTON*, District Judge.

The opinion filed August 8, 2002, 298 F.3d 1107, is amended as follows:

On slip opinion page 11556, just before the summary paragraph, add the following two paragraphs:

> In its petition for rehearing, the IRS asserts that the Seventh Circuit has held that the IRS can bring suit against individual partners, and obtain a judgment against them, for as long as the tax obligations remain a valid debt of the partnership, citing *United States v. Wright*, 57 F.3d 561 (7th Cir. 1995). *Wright* is distinguishable because, in that case, the IRS had assessed both the partnership (Empire Wood Company) and the individual partners. *United States v. Wright*, 868 F. Supp. 1070, 1071 & n.1 (S.D. Ind. 1994). Those assessments extended to six years the

* The Honorable Susan R. Bolton, United States District Court for the District of Arizona, sitting by designation.

> statute of limitations with respect to both the partnership and the partners. By contrast, here, no assessment was made against the individual partners.
>
> Subsequently, the Empire Wood partnership filed for bankruptcy protection and entered a period of reorganization, thus tolling of the statute of limitations as to the partnership. *Wright*, 57 F.3d at 562. *See* 26 U.S.C. § 6503(h) (tolling the statute of limitations during the period in which the Bankruptcy Code prohibits the government from pursuing a collection action). More than six years after the initial tax assessment but before the end of the limitations period applicable to the partnership, the IRS brought an action against the individual partners to collect the unpaid taxes. *Wright*, 57 F.3d at 562-63. The partners argued that, although an action against the partnership would have been timely, the statute of limitations had expired as to them because it had not been tolled during the period of the partnership's bankruptcy. *Id.* Accordingly, the only relevant question in *Wright* was whether the statute of limitations applicable to the partners should be tolled while the limitations period was tolled with respect to the partnership. The Seventh Circuit therefore had no opportunity to address the question before us.

With this amendment, the panel has voted to deny the petition for rehearing. Judges Kleinfeld and Graber have voted to deny the petition for rehearing en banc, and Judge Bolton has so recommended.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it.

The petition for rehearing and petition for rehearing en banc are DENIED. No further petitions for rehearing or rehearing en banc may be filed.

OPINION

GRABER, Circuit Judge.

Debtors Abel Cosmo Galletti, Sarah Galletti, Francesco Briguglio, and Angela Briguglio filed Chapter 13 bankruptcy petitions. The United States Internal Revenue Service (IRS) filed proofs of claim against Debtors for unpaid employment taxes assessed against a partnership in which Debtors were general partners. The bankruptcy court disallowed the IRS's claims, and the district court affirmed. We also affirm. The IRS's claims were properly disallowed because (1) the IRS cannot collect a partnership's tax deficiency directly from the partners without first making individualized assessments against the partners or obtaining judgments against the partners holding them jointly and severally liable for the partnership's tax debts; and (2) the statute of limitations now bars the IRS from making such individual assessments or obtaining such judgments.

FACTUAL AND PROCEDURAL BACKGROUND

Debtors were general partners of Marina Cabrillo Partners (the Partnership). From 1992 to 1995, the Partnership failed to pay the requisite amount of federal employment taxes, prompting the IRS to assess those unpaid taxes against the Partnership in 1994, 1995, and 1996.

On October 20, 1999, Debtors Abel and Sarah Galletti filed a joint petition for relief under Chapter 13 of the Bankruptcy Code. Debtors Francesco and Angela Briguglio filed a joint petition under Chapter 13 on February 4, 2000. In the course of those bankruptcy proceedings, the IRS filed proofs of claim against all Debtors for the unpaid taxes that the IRS had assessed against the Partnership. Debtors objected to the claims on the ground that the IRS had assessed only the Partnership and not the individual partners and that the statute of limitations for assessment had run. The IRS conceded that it had not assessed Debtors within the usual three-year limit, 26 U.S.C. § 6501, but argued that its timely assessments against the Partnership extended the time for collection of the taxes from Debtors, 26 U.S.C. § 6502(a). The bankruptcy court sustained Debtors' objections in two separate orders.

The IRS timely appealed those orders. The district court affirmed, and the IRS filed timely notices of appeal. We consolidated the two appeals.

STANDARD OF REVIEW

We review de novo the district court's decision on an appeal from a bankruptcy court. *Neilson v. Chang* (*In re First T.D. & Inv., Inc.*), 253 F.3d 520, 526 (9th Cir. 2001) (citing *Gruntz v. County of Los Angeles* (*In re Gruntz*), 202 F.3d 1074, 1084 n.9 (9th Cir. 2000) (en banc)). We review the bankruptcy court's conclusions of law de novo and its factual findings for clear error. *Id.* (citing *Beaupied v. Chang* (*In re Chang*), 163 F.3d 1138, 1140 (9th Cir. 1998)).

DISCUSSION

In order to collect unpaid taxes from a taxpayer, the IRS must, within three years after the filing of the taxpayer's return, either assess the tax against the taxpayer or bring an action to collect the tax. 26 U.S.C. § 6501(a). Here the IRS did neither. Nonetheless, it seeks to collect unpaid taxes from Debtors by way of proofs of claim in their bankruptcy proceedings. The IRS offers two theories to justify its filing of these claims against Debtors. First, the IRS argues that its timely assessment of taxes against the Partnership allows it to collect taxes directly from the individual partners even though no separate assessment of tax liability was made against them. Second, the IRS argues that, because California law makes partners jointly and severally liable for the debts of the partnership, the IRS could bring a state-law action against Debtors to collect the tax liability assessed against the Partnership. Neither theory gives rise to an allowable bankruptcy claim in the circumstances of this case.

A. *Assessment of the Partnership*

As noted, the IRS may collect tax deficiencies from a taxpayer by making an assessment against the taxpayer within three years of the filing of the taxpayer's return. 26 U.S.C. §§ 6203, 6501(a). By assessing a tax deficiency, the IRS gains advantages in its collection efforts. For example, assessment extends the statute of limitations for a judicial action to collect the tax liability to ten years from the date of the assessment. 26 U.S.C. § 6502(a).[1] Similarly, because a final assess-

[1] Title 26 U.S.C. § 6502(a) provides, in relevant part:

> Where the assessment of any tax imposed by this title has been made within the period of limitation properly applicable

ment operates in much the same way as a judgment, the IRS may proceed directly against the assets of a taxpayer whose tax deficiency has been properly assessed. *Id.*[2]

The IRS made a timely assessment against the Partnership for unpaid employment taxes. The IRS argues that Debtors, as partners, are not separate "taxpayers" within the meaning of the statutory provisions governing assessment and collection of taxes. It follows, says the IRS, that the timely assessment against the Partnership allows the IRS to collect taxes directly from the individual partners. We are not persuaded.

1. *Statutory Provisions*

Section 6203 of the Internal Revenue Code provides that an "assessment shall be made by recording the liability of the taxpayer in the office of the Secretary in accordance with rules or regulations prescribed by the Secretary." 26 U.S.C. § 6203. As defined under the code, a "taxpayer" is "any person subject to any internal revenue tax," and a "person" includes "an individual, a trust, estate, partnership, association, company or corporation." 26 U.S.C. § 7701(a)(14), (a)(1).

As noted, an "individual" is included in the statutory definitions of "person" and "taxpayer" in § 7701 and, by

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thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun—

(1) within 10 years after the assessment of the tax[.]

[2] Alternatively, so long as the IRS brings an action to collect the taxes within three years after the taxpayer's return was filed, an assessment is unnecessary. 26 U.S.C. § 6501(a); *Goldston v. United States* (*In re Goldston*), 104 F.3d 1198, 1200-01 (10th Cir. 1997). The IRS filed no action to collect taxes, either against the Partnership or against Debtors.

extension, in §§ 6203 and 6501. An "individual" can be a partner but is distinct from a "partnership." The regulation interpreting § 6203 provides that a valid assessment "shall provide identification of *the taxpayer*." 26 C.F.R. § 301.6203-1 (emphasis added). Section 6502, which governs collection of tax after an assessment has been made, likewise presumes that "the taxpayer" against whom a deficiency has been assessed is the same taxpayer for whom the statute of limitations is extended. In all these statutes, the individual or entity assessed must be a separately identified "taxpayer."

The Partnership is a "taxpayer" within the meaning of the statute, but so is each individual Debtor a separate "taxpayer." Each has its, his, or her own taxpayer identification number. Thus, the IRS's failure to assess tax deficiencies against Debtors within the three-year period provided under § 6501(a) bars it from collecting the unpaid debts of the Partnership directly from Debtors. The assessment against the Partnership extended the statute of limitations only with respect to the Partnership, but it left unaltered the limitations period applicable to Debtors. Because the bankruptcy court may disallow claims that are "unenforceable against the debtor and the property of the debtor," 11 U.S.C. § 502(b)(1), the court did not err in sustaining Debtors' objections to the IRS's claims.

2. *Case Law*

Although no published Ninth Circuit decision directly addresses the question before us, our precedents weigh against the IRS's position.

The IRS argues that we should follow *Young v. Riddell*, 60-1 U.S. Tax Cas. (CCH) ¶ 9831, at 76,049

(S.D. Cal. 1959), *aff'd* 283 F.2d 909 (9th Cir. 1960).[3] In that case, the IRS had assessed unpaid taxes against a partnership called the "Riviera Room." *Id.* at 76,054. One of the general partners paid his share of the taxes but later brought an action for a refund. *Id.* at 76,050. The district court held that the partner was not entitled to a refund:

> Where taxes are assessed against a partnership and under state law each member of the partnership is jointly and severally liable for the debts of the partnership, it is unnecessary and superfluous to name the individual partners in the assessment in order to create liability; their liability arises as a matter of state law.

Id. at 76,054. Although the government had not made a valid assessment against the partner, the court refused to order a refund because state law made the partner substantively liable for taxes assessed against the partnership.

The district court's holding in *Young* was more limited than the IRS suggests. The court did not hold that the government would have been entitled to *collect* the same tax in the absence of an individual assessment, a judgment against the partner, or a voluntary payment. In fact, other portions of the court's opinion demonstrate that the opposite is true:

> It is the government's contention that where an assessment names an entity such as in the instant case, that it is unnecessary to name the individual

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[3] We discuss the district court's opinion in *Young* at some length, to respond to the IRS' contentions and to provide context for our own opinion in *Young*.

> members of the entity in order to establish individual liability and that *the only reason for naming such individual or adding such individuals' names as here is to enable collection of the tax without resorting to court action. With this contention I agree* . . . .

Id. at 76,050 (emphasis added). Thus, the court acknowledged that to *collect* the tax for which the partner was liable, the IRS would have had to either resort to court action or individually assess the taxes against the partner. An assessment was unnecessary only because the tax already had been collected. *Id.* at 76,054. The district court's holding, therefore, was much narrower than the IRS acknowledges, namely, that "[a] person liable for taxes *may not recover a refund of taxes* he paid because of the fact the assessment did not name him." *Id.* at 76,054 (emphasis added).

Our affirmance of the district court's decision in *Young* did not reject the district court's interpretation. *Young v. Riddell*, 283 F.2d 909 (9th Cir. 1960). Only one passage in our opinion lends any support to the IRS's position: "Having been found a general member of the partnership, appellant is personally liable for the debts and liabilities of the partnership, including its tax liability, even though his status as a partner was not discovered or formally noted in tax records until after termination of the partnership." *Id.* at 910. That statement does not aid the IRS, however, as it merely restates the holding of the district court that the partner was not entitled to a refund because he was liable for the debts of the partnership under state law. Nothing in our opinion contradicts the district court's suggestion that the IRS could not have *collected* the tax against the partner had he refused to pay it.

Thus, ultimately our opinion in *Young* supports Debtors' position because their *liability* for the tax assessed against the Partnership is not at issue in this case. To the contrary, Debtors concede that they are liable for the tax but argue only that, in the absence of individual assessments or judgments against them, the IRS is procedurally barred from *collecting* the unpaid taxes from them.

The foregoing limited interpretation of *Young* is buttressed by *United States v. Coson*, 286 F.2d 453 (9th Cir. 1961). In that case, the IRS assessed unpaid taxes against a partnership and later claimed a lien against the property of Coson, who allegedly was a general partner. *Id.* at 454. Coson challenged the validity of the lien on a number of grounds, including that the assessment against the partnership did not name him individually. *Id.* at 458; *Coson v. United States* 169 F. Supp. 671, 675 (S.D. Cal. 1958) (The "plaintiff does not seek to contest the correctness of an assessment; instead, he contends there just never was any assessment of the taxes in question against him.").

The district court, pointing to § 6203 and its implementing regulations, noted that one of the requirements for a valid assessment was that the taxpayer be identified. *Id.* Further, it noted that the assessment at issue named only the partnership and "an unknown number of unidentified taxpayers." *Id.* Relying on the fact that Coson had never been assessed individually, the district court held that the IRS's attempts to collect the unpaid taxes from Coson were improper:

> "[T]his court is of the opinion that such a lien does not exist against a particular individual's property pursuant to § [§] 6321 and 6322 unless the underly-

> ing tax obligation has been assessed against him under § 6203.
>
> Since plaintiff never was assessed and no lien exists without such an assessment, it follows that the Government does not have any lien."

Id. at 676 (footnote omitted).[4]

On appeal, we affirmed. We relied on a different ground than the district court had used, namely, that the lien was procedurally defective for reasons other than the government's failure to timely assess the tax against Coson. *Coson*, 286 F.2d at 458, 462-63. Nonetheless, in a passage that supports Debtors' position in dictum, we noted:

> In holding as we do that the lack of proper notice or demand was fatal to the acquisition of the Government's lien against Coson, the emphasis here is somewhat different than that employed by the trial judge who held that the assessment itself was void as against Coson because the taxes were never assessed to Coson, the record of assessment in the office of the Bureau making no reference whatever to Coson. The Government argues that there is no requirement that an assessment be made against any person. Although our decision as to the lack of proper notice or demand is sufficient to dispose of this case, it would appear that *the trial court was right in holding the assessment was insufficient for failure to comply with the statutory requirements*.

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[4] The IRS attempts to distinguish this case on the ground that Coson was challenging the validity of a lien on his property, while no lien is challenged here. However, the asserted lien was a tax lien, the validity of which depended on an underlying assessment.

Id. at 464 (emphasis added).

In its petition for rehearing, the IRS asserts that the Seventh Circuit has held that the IRS can bring suit against individual partners, and obtain a judgment against them, for as long as the tax obligations remain a valid debt of the partnership, citing *United States v. Wright*, 57 F.3d 561 (7th Cir. 1995). *Wright* is distinguishable because, in that case, the IRS had assessed both the partnership (Empire Wood Company) *and* the individual partners. *United States v. Wright*, 868 F. Supp. 1070, 1071 & n.1 (S.D. Ind. 1994). Those assessments extended to six years the statute of limitations with respect to both the partnership and the partners. By contrast, here, no assessment was made against the individual partners.

Subsequently, the Empire Wood partnership filed for bankruptcy protection and entered a period of reorganization, thus tolling of the statute of limitations as to the partnership. *Wright*, 57 F.3d at 562. *See* 26 U.S.C. § 6503(h) (tolling the statute of limitations during the period in which the Bankruptcy Code prohibits the government from pursuing a collection action). More than six years after the initial tax assessment but before the end of the limitations period applicable to the partnership, the IRS brought an action against the individual partners to collect the unpaid taxes. *Wright*, 57 F.3d at 562-63. The partners argued that, although an action against the partnership would have been timely, the statute of limitations had expired as to them because it had not been tolled during the period of the partnership's bankruptcy. *Id.* Accordingly, the only relevant question in *Wright* was whether the statute of limitations applicable to the partners should be tolled while the limitations period was tolled with respect to the partnership. The Seventh Circuit therefore had no opportunity to address the question before us.

In summary, we hold that the assessment of tax liability against the Partnership, without more, does not allow the IRS to collect those taxes directly from the individual partners.

B. *California Partnership Law*

In an attempt to avoid the time-bar on assessments, the IRS argues in the alternative that it was not required to make individual assessments against Debtors because they are jointly and severally liable for the debts of the Partnership under California law. This argument overreaches under state law.

Superficially, the IRS's argument is logical. The IRS assessed unpaid employment taxes against the Partnership in 1994, 1995, and 1996. Therefore, under federal law, the IRS has a right to bring proceedings against the Partnership to collect those taxes for up to ten years after assessment, in this case until 2004, 2005, and 2006. 26 U.S.C. § 6502(a)(1). Under California law, general partners such as Debtors are "liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law." Cal. Corp. Code § 16306(a); *see also Young*, 283 F.2d at 910 (holding that, under California law, partners are "personally liable for the debts and liabilities of the partnership, including its tax liability"). Because the assessed employment taxes are a debt of the Partnership that the IRS has a right to collect against it, the IRS asserts that it may bring an action under state law to obtain a judgment holding Debtors responsible for the unpaid taxes. Cal. Corp. Code § 16307(b); *see also Remington v. United States*, 210 F.3d 281, 282-83 (5th

Cir. 2000) (holding that, under the Texas Uniform Partnership Act, the government was "entitled to collect the . . . tax liability, indisputably a partnership debt, from any one of the general partners"); *United States v. W. Prods., Ltd.*, 168 F.Supp.2d 84, 91 (S.D. N.Y. 2001) (allowing government to collect withholding taxes from general partner under the New York Partnership Law even though the assessments were made in the name of the partnership); 14 Mertens, The Law of Federal Income Taxation § 55:109 (West 2002) (stating that the government may bring an action to "collect the withholding taxes from one or more general partners under the applicable state partnership laws"). The Bankruptcy Code permits a creditor to make a claim against the estate of a debtor so long as the creditor has a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5)(A). Such a claim may be disallowed by the bankruptcy court only if it "is unenforceable against the debtor and property of the debtor, under . . . applicable law for a reason other than because such claim is contingent or unmatured." 11 U.S.C. § 502(b)(1). The IRS argues that, at the time Debtors' petitions were filed, its state-law claim against Debtors for the tax liability of the Partnership was not unenforceable and, therefore, the bankruptcy court erred as a matter of law by disallowing the claim.

Under California law, however, a creditor may not automatically collect from a general partner a debt that the partnership owes to the creditor. To the contrary, the creditor must first obtain a judgment against the partner holding the partner liable for the partnership's debt: "A judgment against a partnership is not by itself a judgment against a partner. A judgment against a partnership may not be satisfied from a partner's assets unless there is also a judgment against the partner." Cal. Corp. Code § 16307(c); 9 B.E. Witkin, Summary of California Law § 60V (9th ed. Supp. 2001) ("[A]lthough a partner need not be named individually in an action against a partnership, the partner must be individually named and served in the action or in a later suit, and judgment entered against that partner, in order to reach the partner's personal assets."). Thus, although under state law each individual partner is *liable* for the debts of the partnership, a claim against the partnership does not automatically give rise to a right to *collect* against the individual partners. Instead, a creditor may collect a debt for which the partner is jointly and severally liable only by first obtaining a judgment against the partner.

The IRS has obtained no judgment against Debtors. The time for doing so has expired. 26 U.S.C. § 6501(a). As we have explained, the assessment extended the statute of limitations only as to the Partnership.

CONCLUSION

The assessment against the Partnership was not an assessment against the individual partners (Debtors), because they are separate taxpayers. Consequently, the assessment against the Partnership extended the statute of limitations (to ten years from the date of assessment) only for the Partnership; it had no effect on the ordinary three-year statute of limitations for Debtors.

California partnership law does not aid the IRS because, under state law, a creditor may not collect a partnership debt from an individual partner without first obtaining a judgment against the partner. The IRS did not obtain a judgment against Debtors, and it is too late to do so because the applicable statute of limitations was three years.

Thus, the IRS does not have allowable bankruptcy claims under either of its theories. Accordingly, we affirm the bankruptcy court's disallowance of the claims.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT,
CENTRAL DISTRICT OF CALIFORNIA

No. EDCV 00-00753-VAP

UNITED STATES OF AMERICA, ON BEHALF OF ITS AGENCY, THE INTERNAL REVENUE SERVICE, PLAINTIFF

v.

ABEL COSMO GALLETTI, AKA AL GALLETTI AND SARAH GALLETTI, DEFENDANTS

Filed: Mar. 23, 2001

MEMORANDUM OPINION AND ORDER

PHILLIPS, District J.

The Court has received and considered all papers filed in conjunction with Appellant's Appeal of the United States Bankruptcy Court Order. The Appeal is appropriate for resolution without oral argument. *See* Fed. R. Civ. P. 78; Local Rule 7. For the reasons set forth below, the Order of the Bankruptcy Court is AFFIRMED.

I. BACKGROUND AND PROCEDURAL HISTORY

Abel Cosmo Galletti[1] and Sarah Galletti ("Debtors") were general partners of Marina Cabrillo Partners ("Partnership").[2] [*See* Appellant's Opening Brief ("Appellant's Br.") at 1.] On October 20, 1999 the Debtors filed a joint voluntary chapter 13 petition. [Appellant's Br. at 4.] The Internal Revenue Service ("IRS") filed a proof of claim in the amount of $395,179.89 ("claim"). [*Id.*] The claim consists of the following: 1) secured claims totaling $395,006.37 for taxes assessed between January, 1994 and July, 1995 against the Partnership (taxpayer assessment number 86-0641090); 2) an unsecured priority claim in the amount of $160.36 for taxes assessed on December 4, 1995 against the Partnership; and 3) an unsecured general claim in the amount of $13.16 for penalties against the unsecured priority claim. [Appellant's Br. at 5-6; Appellant's Excerpt of Record ("Record"), Ex. 7 (Bankruptcy Court Order ("Sept. 11, 2000 Order")).]

Debtors filed an objection to the IRS claim on April 17, 2000. [*See* Record, Ex. 1 (Debtors' objection).] Debtors argued that the claim should not be allowed as it was a claim assessed against the Partnership and was not a proven claim against the estate. [Sept. 11, 2000 Order at 2.] Specifically, Debtors argued that while there were jointly and severally liable for the Partnership's debts, the claim must be individually assessed before it could be collected against them. [*Id.*]

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1 A.k.a Al Galletti.

2 This case raises the same issues as those in *In re Briguglio*, [2001-1 USTC ¶50,360], 2001 U.S. Dist. LEXIS 4829, 00-00842-VAP, and involves the same Partnership. Debtors' social security numbers are 379-34-6851 (Mr. Galletti) and 371-42-5311 (Ms. Galletti).

A. BANKRUPTCY COURT RULING

This matter went before the bankruptcy court on July 31, 2000. In a September 11, 2000 Order the court found for the Debtors. [Sept. 11, 2000 Order at 1.]

Neither party disputed that under California law all partners are jointly and severally liable for the debts of a partnership. The main issue before the court was whether or not the tax assessments against the Partnership were effective to bind the Debtors as partners and whether or not the collection itself was barred by the statute of limitations. [Sept. 11, 2000 at 6.]

The Court held that under the Internal Revenue Code ("Code"), to be held liable for tax obligations, a taxpayer must be validly assessed. [Sept. 11, 2000 Order at 8 (citing IRS-Code § 6203).] Under the Code, a valid assessment is made by recording the liability of the "taxpayer" in the office of the Secretary. [*Id.*; *See* § 6203.] A "taxpayer" is defined as "any person subject to any internal revenue tax." [*Id.*; *See* § 7701(a)(14).] A "person" includes "an individual, a trust, estate, partnership, association, company, or corporation." [*Id.*] The definitions of "taxpayer" or "person" do not include "partner" or "general partner." [Sept. 11, 2000 Order at 9.] The court found, however, that a general partner may be an "individual" subject to taxation. Under these definitions a partner "must be assessed individually under § 6203 before he can be held liable." [*Id.*] The court concluded, "therefore, contrary to the IRS's argument, a partner must be assessed individually under § 6203 before he can be held liable." [*Id.*]

As the Court required the Debtors to be assessed individually, under the Code's three year statute of limitations, the 1992 to 1995 claims against the Debtors as individual partners were time-barred.[3] [Sept. 11, 2000 Order at 11; Code § 6501(a).] The Debtors as individual partners were not assessed within the three year statute of limitations, and therefore collection was barred. [*Id.*]

The IRS ("Appellant") filed an Appeal on November 24, 2000. The Debtors filed Opposition on December 21, 2000. Appellant filed a Reply on January 2, 2001.

II. STANDARD OF REVIEW

A reviewing court reviews a bankruptcy court's conclusions of law *de novo*. *See Siriani v. Northwestern Nat'l Ins. Co.*, 967 F.2d 302, 303-04 (9th Cir.1992). Findings of fact are reviewed for clear error. *See id.* The bankruptcy court's choice of remedies is reviewed for an abuse of discretion, since it has broad equitable remedial powers. *See In re Goldberg*, 168 B.R. 382, 384 (9th Cir.1994). A bankruptcy court necessarily abuses its discretion if it bases its ruling on an erroneous view of the law or a clearly erroneous assessment of the evidence. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 S. Ct. 2447, 110 L.Ed.2d 359 (1990). Under this standard, "a reviewing court cannot reverse unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *In re Sunnymead Shopping Center Co.*, 178 B.R. 809, 814 (9th Cir. 1995) (citing *Goldberg*, 168 B.R. at 384).

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[3] The court noted that in this case the proof of claim is the equivalent of a lien. [Sept. 12, 2000 Order at 6.]

III. DISCUSSION

A. ISSUES ON APPEAL

1. STATUTORY ANALYSIS

Appellant disputes the bankruptcy court's interpretation of the applicable code sections. [*See* Appellant's Reply Brief ("Reply") at 2.] It argues that a general partner is within neither the statutory definition of "taxpayer" nor "person," and is not an "individual" as the bankruptcy court found. [*Id.*] Appellant claims that defining "individual" to include a general taxpayer would produce absurd results, but offers no authority to support this contention. [Reply at 3.]

Appellant argues that requiring separate assessment of partners would be unconstitutional because it would require the IRS to assess the liability of a general partner premised on state law. [Reply at 4.] It is well-established, however, that state law definitions determine liability, especially in the area of partnership law.

The United States Supreme Court has long held that, although the consequences that attach to property interests is a matter left to federal law, the definition of underlying property interests is left to state law. *See United States v. Mitchell* [71-1 USTC ¶ 9451], 403 U.S. 190, 205, 91 S. Ct. 1763, 1771, 29 L.Ed.2d 406 (1971) (finding state law determines income attributable to wife as community property); *Aquilino v. United States* [60-2 USTC ¶ 9538], 363 U.S. 509, 513-515, 80 S. Ct. 1277, 1280-1281, 4 L.Ed.2d 1365 (1960) (holding attachment of federal lien depends on whether "property" or "rights to property" exist under state law but priority of federal lien depends on federal law); *see also Pahl v. C.I.R.* [98-2 USTC ¶ 50,602], 150 F.3d 1124, 1128 (9th

Cir. 1998) ("Courts look to the tax statutes and interpreting cases to determine what interest is sufficient to trigger tax liability, and to state law to determine whether the taxpayer had such an interest."); *Ballard v. United States* [94-1 USTC ¶ 50,152], 17 F.3d 116, 118 (5th Cir. 1994) ("Although federal law defines partnerships for purposes of applying the partnership income taxation scheme . . . it is state law that determines when a partner is liable for the obligations—including employment taxes—of his partnership."); *United States v. Hays* [89-2 USTC ¶ 9570], 877 F.2d 843, 844 n. 3 (10th Cir. 1989) ("Courts have assumed that the liability of a general partner for the tax obligations of the partnership is determined by state law rather than federal law."). While the bankruptcy court determined liability according to California law, it based the requirement of an individual assessment on an interpretation of federal code. [Sept. 12, 2000 Order at 8.] Such analysis comports with the analysis of both circuit courts and the Supreme Court.

Appellant analyzes Internal Revenue Code section 3403 in the context of other sections imposing liability on third partes. [Reply at 4.] Appellant argues that if Congress had intended to require individual assessment of general partners, Congress would have enacted a provision requiring such assessment. [*Id.*] While Appellant cites one example of a Code section requiring assessment (section 6627(a)) and one example of a Code section in which assessment is not mentioned or required (section 3505(a)), Appellant still offers no authority stating that a court cannot, based on statutory definition and caselaw, find that individual assessment is required. [*See* Reply at 5.]

Accordingly, Appellant cites no compelling reason, nor authority to substantiate, why it was error for the bankruptcy court, in interpreting the statute, to read "individual" as including individuals who are general partners of partnerships.

2. THE BANKRUPTCY COURT'S ANALYSIS OF RELEVANT CASELAW

a. *YOUNG v. RIDDELL*

Much of the appeal centers on the bankruptcy court's assessment of the caselaw on the binding nature of assessments against individual partners. Specifically, the court noted: "The only case cited by the IRS in support of their argument is an unpublished decision." [Sept. 11, 2000 Order at 10.] The bankruptcy court referred to Appellant's citation to *Young v. Riddell*, 5 A.F.T.R.2d (RIA) 1037, 60-1 U.S. Tax Cas. (CCH) ¶ 9381, 1959 WL 12113, Civil No. 576-58-K (S.D. Cal. 1959), an unpublished opinion, in which the court held

> Where taxes are assessed against a partnership and under state law each member of the partnership is jointly and severally liable for the debts of the partnership, it is unnecessary and superfluous to name the individual partners in the assessment in order to create liability; their liability arises as a matter of state law.

The Ninth Circuit affirmed the lower court's ruling. *See Young v. Riddell* [60-2 USTC ¶ 15,322], 283 F.2d 909 (9th Cir. 1960). The bankruptcy court, however, found that the Ninth Circuit only focused on the fact that a dormant partner can be liable for the partnership's debts, and did not address the assessment issue. [Sept. 11, 2000 Order at 10.]

Appellant attacks this reading of Young, and claims that the case does hold that partners can be individually liable without being personally assessed. [Appellant's Br. at 9.] Debtors contend that Young is inapplicable as it only holds that liability is not created by assessment, but rather arises as a matter of law. [*See* Appellees' Brief. ("Appellees' Br.") at 13.] As there is no error in the bankruptcy court's interpretation of Young, the Court is inclined to agree with the reading.

The district court ruling in Young (upheld by the Court of Appeals) does not hold that the individual assessment of a partners is not required. In the first of the two paragraphs cited by Appellant, the court states, "A person liable for taxes may not recover a refund of taxes he paid because of the fact the assessment did not name him." 60-1 U.S. Tax Cas. (CCH) ¶ 9381, 5 A.F.T.R.2d (RIA) 1037 (emphasis added). In other words, this holding dealt with refunds, rather than the collection of taxes. Moreover, cases cited by the *Young* court following this statement do not address the issue of assessment and collection against a partnership, *See Anderson v. United States* {36-2 USTC ¶ 9316], 83 Ct. Cl. 561, 15 F. Supp. 216 (Ct. Cl. 1936) (holding Commissioner is required to assess the tax (income, estate, gift, *etc*.) rather than assess the taxpayer), *cert. denied*, 300 U.S. 675, 57 S. Ct. 668, 81 L.Ed. 880 (1937); *Pickering v. Alyea-Nichols Co*. [1 USTC ¶ 247], 21 F.2d 501 (7th Cir. 1927), (construing section 503 of the 1917 Revenue Act to allow taxation of an individual in an insurance association as well as the association), *cert. denied*, 276 U.S. 617, 48 S. Ct. 208, 72 L.Ed. 733 (1928).

The Young court continues in the following paragraph, "Where taxes are assessed against a partnership and under state law each member . . . is jointly and severally liable for the debts of the partnership, it is unnecessary and superfluous to name the individual partners in the assessment in order to create liability." *Id.* (emphasis added). Again, the court speaks to the issue of individual assessment and the partners' liability, and not to the issue of assessment and collection. The Debtors do not dispute their liability as partners; rather, they dispute Appellant's attempt to collect taxes without individual assessments. This issue was not resolved by the circuit court's decision in Young. Accordingly, it was not error for the bankruptcy court to find that even if the Court of Appeals upheld these findings in Young the findings were inapplicable to this matter.

3. APPELLANT'S ARGUMENT

The authorities cited by Appellant do not address the issue before the Court: whether or not an individual assessment of the Debtors was required in order for the IRS to collect taxes from them.

For example, Appellant cites to *Farrow, Schildhause & Wilson, et al. v. Kings Prof'l Basketball Club*, 1988 U.S. Dist. LEXIS 17331, 1988 WL 161237, Civ. Nos. S-86-1012 RAR, S-86-1459 RAR, *2 (E .D. Cal. Feb. 24, 1988) in which the court held that a federal tax lien for unpaid partnership taxes also attaches to the property of the general partners. Farrow, however, relies upon *Lidberg v. United States* [74-1 USTC ¶ 9287], 375 F. Supp. 631, 633 (D. Minn. 1974) for support. While Lidberg held that the government was entitled to levy a partner's individual property rather than the partnership's overall assets, in Lidberg the partner had been separately assessed. [74-1 USTC ¶ 9287] 375 F. Supp. at 632.

Appellant also cites to *Tony Thornton Auction Service, Inc. v. United States* [86-1 USTC ¶ 9434], 791 F.2d 635 (8th Cir. 1986), in which the court held that a notice was sufficient to perfect a tax lien as to the interests of a husband and wife even though the notice was filed only in the husband's name. Accordingly, Appellant relies on this case in vain.

In *Underwood v. United States* [41-1 USTC ¶ 9296], 118 F.2d 760, 761 (5th Cir. 1941), cited by Appellant, the Government filed notices of tax liens for gasoline taxes owing by a partnership. The court held that the tax liens attached not only to the partnership property but attached also to the property individually owned by the partners. Again, Debtors in this case do not dispute their liability. While Underwood is oft-cited in the courts of the Fifth Circuit, it has yet to be cited for the proposition that a lien filed against a partnership is sufficient for the IRS to collect taxes. *See also Claude F. Atkins Enterprises*, *Inc. v. United States*, 1995 U.S. Dist. LEXIS 17263, 76 A.F.T.R.2d (RIA) 7453 (E.D. Cal. 1995) (analyzing application of payments to partnership without addressing assessment as a prerequisite to tax collection); *Livingston v. United States* [92-1 USTC ¶ 50,137], 793 F. Supp. 251 (D. Idaho, 1992) (addressing issue of responsibility of partners for partnership's unpaid taxes); *United States v. Ross* [59-2 USTC ¶ 9671], 176 F. Supp. 932 (D. Neb. 1959) (focusing on partner liability).

None of the cases discussed above, nor any others cited by Appellant, directly address individual assessment of the Debtors. The bankruptcy court did not err in finding them inapposite.

4. ASSESSMENT AS A PREREQUISITE TO TAX COLLECTION

Although Appellant's authorities are inapplicable to the issue of assessment and collection as currently presented, cases offered by Appellees do address this.

In *El Paso Refining, Inc. v. I.R.S.* [97-1 USTC ¶ 50,386], 205 B.R. 497, 499 (W.D. Tex. 1996) the court held that "a valid assessment is a prerequisite to tax collection" and failure to assess can result in a finding that the lien in question is void. This case speaks directly to the issue presented here. *See also U.S. v. Coson* [61-1 USTC ¶ 9219], 286 F.2d 453 (9th Cir. 1961) ("Although our decision as to the lack of proper notice or demand is sufficient to dispose of this case, it would appear that the trial court was right in holding the assessment was insufficient for failure to comply with the statutory requirements."); *In re Fingers* [94-2 USTC ¶ 50,434], 170 B.R. 419, 426 (S.D. Cal. 1994) ("Under the Internal Revenue Code, a valid tax assessment is a prerequisite to tax collection."). *Cf. Baily v. United States* [73-1 USTC ¶ 9472], 355 F. Supp. 325 (E.D. Penn. 1973) (finding separate assessment not necessary when the certificate of assessment against the partnership listed individual partners as well). These cases speak directly to this issue. Debtors do not dispute their liability or responsibility to the partnership. Rather, they challenge the effect of the claim against them on the basis of the requirements set forth in El Paso and In re Fingers.

Similarly, in *Valley National Bank of Arizona v. A.E. Rouse & Co.*, 121 F.3d 1332, 1335 the court held judgment was not authorized against partners who were neither named nor served in the underlying suit, as "partnership to an action does not in itself make the partners parties." While this addresses service and not assessment, the principles are analogous. As service is a prerequisite to judgment, assessment is prerequisite to tax collection. *El Paso* [97-1 USTC ¶ 50,386], 205 B.R. at 499, *In re Fingers* [94-2 USTC ¶ 50,434], 170 B.R. at 426. *See also Detrio v. United States* [59-1 USTC ¶ 9367], 264 F.2d 658 (5th Cir. 1959) (finding individual partner not personally served not subject to a lien or execution in satisfaction of the lien); *Fazzi v. Peters*, 68 Cal.2d 590, 440 P.2d 242, 68 Cal. Rptr. 170 (1968) (finding judgment could not be entered against a party served but not named).

Again, as these authorities both address and support Debtors' challenge, the bankruptcy court did not err in relying on them in sustaining the objection to the IRS claim.

5. STATUTE OF LIMITATIONS

Under 26 U.S.C.A. § 6501(a) any tax imposed shall be assessed within three years. The taxes were incurred between 1992 and 1995 and were assessed against the partnership between 1994 and 1995. [Sept. 11, 2000 Order at 11; Appellant's Br. at 5-6] Appellant's argument that the statute of limitations does not bar collection presumes that an assessment of the partnership was sufficient for collection of taxes from the individual Debtors. As this Court finds otherwise, the bankruptcy court was correct in holding that collection was barred because the debtors were not assessed within the three year period.

6. DEBTORS' BURDEN OF PROOF

Finally, under 11 U.S.C. § 502, the IRS claim is valid unless there is an objection, and the debtor has the "burden of presenting evidence to rebut this *prima* *facie* validity." *In re MacFarlane*, 83 F.3d 1041, 1044 (9th Cir. 1996). Based on the applicable statutes and decisions, the bankruptcy court correctly found that the Debtors had-presented sufficient evidence to rebut the claim's *prima facie* validity. *See In re Holm*, 931 F.2d 620, 623 (9th Cir. 1991) (setting forth burden shifting analysis).

IV. CONCLUSION

Accordingly, the bankruptcy court's ruling sustaining the claim objection is AFFIRMED.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. EDCV 00-00842-VAP

UNITD STATES OF AMERICA, PLAINTIFF

v.

FRANCESCO BRIGUGLIO, AKA FRANK BRIGUGLIO AND ANGELA BRIGUGLIO, AKA ANGIE BRIGUGLIO, DEFENDANTS

Filed: Mar. 23, 2001

PHILLIPS, District J.

The Court has received and considered all papers filed in conjunction with Appellant's Appeal of the United States Bankruptcy Court Order. The Appeal is appropriate for resolution without oral argument. *See* Fed. R. Civ. P. 78; Local Rule 7. For the reasons set forth below, the Order of the Bankruptcy Court is AFFIRMED.

I. BACKGROUND AND PROCEDURAL HISTORY

Francesco and Angela Briguglio[1] ("Debtors") were general partners of Marina Cabrillo Partners ("Partnership").[2] [*See* Appellant's Opening Brief ("Appellant's Br.") at 4.]. On February 4, 2000 Debtors filed a Joint voluntary chapter 13 petition. [*See* Appellant's Excerpt of Record ("Record"), Ex. 7 (Bankruptcy Court order ("September 12, 2000 Order").] On or about April 21, 2000 the Internal Revenue Service ("IRS") filed a Proof of Claim in the amount of $427,402.74 ("claim"). [Appellant's Br. at 4.] The claim consisted of the following: 1) secured claims totaling $403,264.06 for taxes assessed between January, 1994 and November, 1996 against the Partnership (taxpayer assessment, number 86-0641090); 2) unsecured priority claims totaling $23,296.27 for taxes assessed between September, 1995 and December, 1999 against the Partnership, Francesco Briguglio (in the amount of $21,600.80), and an unidentified taxpayer identification number; and 3) an unsecured general claim in the amount of $872.41 for penalties against the unsecured priority claim. [Appellant's Br. at 4-6.]

The IRS filed notices of federal tax lien with respect to all of the tax liability for which it filed a secured claim. [Appellant's Br. at 6.] On May 4, 2000 Debtors filed an objection to the IRS claim. [*See* Record, Ex. 1 (Debtors' objection).] Debtors object to the claim on the grounds that a substantial portion of the claim

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[1] A.k.a. Frank and Angle Briguglio.

[2] This case raises the same issues as those in *In re Galletti*, EDCV 00-00753-VAP, and involves the same Partnership. Debtors' social security numbers are 380-40-7057 (Mr. Briguglio) and 573-49-1256 (Ms. Briguglio).

consists of taxes assessed the partnership, and the claim is not a proven claim against the estate. [*Id.*; September 12, 2000 order at 3.] While Debtors agree that under California law they are jointly and severally liable for the debts of the Partnership, they argue that the claim must be *individually assessed* before it could be collected against them. [September 12, 2000 Order at 4.]

A. BANKRUPTCY COURT RULING

On September 12, 2000 the bankruptcy court sustained in part and overruled in part the IRS claim.

Neither party disputed that under California law all partners are jointly and severally liable for the debts of a partnership. The main issue before the court was whether or not the tax assessments against the Partnership were effective to bind the Debtors as partners and whether or not the collection itself was barred by the statute of limitations. [Sept. 12, 2000 at 6.]

The Court held that under the Internal Revenue Code ("Code"), to be held liable for tax obligations, a taxpayer must be validly assessed. [Sept. 12, 2000 Order at 8 (citing IRS Code § 6203).] Under the Code, a valid assessment in made by recording the liability of the "taxpayer" in the office of the Secretary. [*Id.*; *See* § 6203.] A "taxpayer" is defined as "any person subject to any internal revenue tax." [*Id.*; *See* § 7701(a)(14).] A "person" include a "an individual, a trust, estate, partnership, association, company, or corporation." [*Id.*] The definitions of "taxpayer" or "person" do not include "partner" or "general partner." [Sept. 12, 2000 order at 9.] The court found, however, that a general partner may be an "individual" subject to taxation. Under these definitions a partner "must be assessed individually under § 6203 before he can be hold liable." [*Id.*] The court concluded, "[t]herefor, contrary to the IRS's argument, a partner must be assessed individually under § 6203 before be can be held liable." [*Id.*]

As the Court required the Debtors to be assessed individually, under the Code's three year statute of limitations of limitations, the 1992 to 1995 claims against the Debtors as individual partners were time-barred.[3] [Sept. 12, 2000 order at 11; Code § 6501(a).] The Debtors as individual partners were not assessed within the three year statute of limitations, and therefore collection was barred. [*Id.*]

The court sustained Debtors' objection to the claim in the amount of $403,264.06. [Sept. 12, 2000 Order at 12.] As Debtors presented no evidence to dispute the validity of the $21,600.80 apportioned to Mr. Briguglio's socal security number, the $1,501.31 owed by taxpayer identification number 95-6537344, and the unsecured general claim for penalties in the amount of $ 862,41, the court overruled the objections to those amounts.[4] [Sept. 12, 2000 Order at 12-13].

The IRS ("Appellant") filed an Appeal on November 24, 2000. Debtors filed Opposition on December 21, 2000. Appellant filed a Reply on January 2, 2001.

II. LEGAL STANDARD

A reviewing court reviews a bankruptcy court's conclusions of law *de novo*. *See Siriani v. Northwestern Nat'l Ins. Co.*, 967 F.2d 302, 303-04 (9th Cir. 1992).

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[3] The court noted that in this case the proof of claim is the equivalent of a lien. [Sept. 12, 2000 Order at 6.]

[4] The appeal, therefore, only discusses the objection to the $403,264.06 claim.

Findings of fact are reviewed for clear error. *See id.* The bankruptcy court's choice of remedies is reviewed for an abuse of discretion, since it has broad equitable remedial powers. *See In re Goldberg*, 168 B.R. 382, 384 (9th Cir. 1994). A bankruptcy court necessarily abuses its discretion if it bases its ruling on an erroneous view of the law or a clearly erroneous assessment of the evidence. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990). Under this standard, "a reviewing court cannot reverse unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *In re Sunnymead Shopping Center Co.*, 178 B.R. 809, 814 (9th Cir. 1995) (citing *Goldberg*, 168 B.R. at 384).

III. DISCUSSION

A. ISSUES ON APPEAL

1. STATUTORY ANALYSIS

Appellant disputes the bankruptcy court's interpretation of the applicable code sections. [*See* Appellant's Reply Brief ("Reply") at 2.] It argues that a general partner is within neither the statutory definition of "taxpayer" nor "person," and is not an "individual" as the bankruptcy court found. [*Id.*] Appellant claims that defining "individual" to include a general taxpayer would produce absurd results, but offers no authority to support this contention. [Reply at 3.]

Appellant contends that requiring separate assessment of partners would be unconstitutional because it would require the IRS to assess the liability of a general partner premised on state law. [Reply at 4.] It is well-established, however, that state law definitions determine liability, especially in the area of partnership law.

The United State Supreme Court has long held that, although the consequences that attach to property interests is a matter left to federal law, the definition of underlying property interests is left to state law. *See United States v. Mitchell* [71-1 USTC ¶ 9451], 403 U.S. 190, 205, 91 S. Ct. 1763, 1771, 29 L. Ed. 2d 406 (1971) (finding state law determines income attributable to wife as community property) *Aquilino v. United States* [60-2 USTC ¶ 9538], 363 U.S. 509, 513-515, 80 S. Ct. 1277, 1280-1281, 4 L. Ed. 2d 1365 (1960) (holding attachment of federal lien depends on whether "property" or "rights to property" exist under state law but priority of federal lien depends on federal law); *see also Pahl v. C.I.R.* [98-2 USTC ¶ 50,602], 150 F.3d 1124, 1128 (9th Cir. 1998) ("[C]ourts look to the tax statutes and interpreting cases to determine what interest is sufficient to trigger tax liability, and to state law to determine whether the taxpayer had such an interest."); *Ballard v. United States* [94-1 USTC ¶ 50,152], 17 F.3d 116, 118 (5th Cir. 1994) ("Although federal law defines partnerships for purposes of applying the partnership income taxation scheme . . . it is state law that determines when a partner is liable for the obligations-including employment taxes—of his partnership."); *United States v. Hays* [89-2 USTC ¶ 9570], 877 F.2d 843, 844 n.3 (10th Cir. 1989) ("Courts have assumed that the liability of a general partner for the tax obligations of the partnership is determined by state law rather than federal law."). While the bankruptcy court determined liability according to California law, it based the requirement of an individual assessment on an interpretation of federal code. [Sept.

12, 2000 Order at 8.] Such analysis comports with the analysis of both circuit courts and the Supreme Court.

Appellant analyzes Internal Revenue Code section 3403 in the context of other sections imposing liability on third partes. [Reply at 4.] Appellant argues that if Congress had intended to require individual assessment of general partners, Congress would have enacted a provision requiring such assessment. [*Id.*] While Appellant cites one example of a Code section requiring assessment (section 6627(a)) and one example of a Code section in which assessment is not mentioned or required (section 3505(a)). Appellant still offers no authority stating that a court cannot, based on statutory definition and caselaw, find that individual assessment is required. [See Reply at 5.]

Accordingly, Appellant cites no compelling reason, nor authority to substantiate, why it was error for the bankruptcy court, in interpreting the statute, to read "individual" as including individuals who are general partners of partnerships.

2. THE BANKRUPTCY COURT'S ANALYSIS OF RELEVANT CASELAW

a. *YOUNG v. RIDDELL*

Much of the appeal centers on the bankruptcy court's assessment of the caselaw on the binding nature of assessments against individual partners. Specifically, the court noted: "The only case cited by the IRS in support of their argument is an unpublished decision." [Sept. 12, 2000 Order at 10.] The bankruptcy court referred to Appellant's citation to *Young v. Riddell*, 5 A.F.T.R. 2d 1037, 60-1 USTC [¶ 9381], 1959 WL 12113, Civil No. 576-58-K (S.D. Cal. 1959), an unpublished opinion, in which the court held:

> Where taxes are assessed Against a partnership and under state law each member of the partnership is jointly and severally liable for the debts of the partnership, it is unnecessary and superfluous to name the individual partners in the assessment in order to create liability; their liability arises as a matter of state law.

The Ninth Circuit affirmed the lower court's ruling. *See Young v. Riddell* {60-2 USTC ¶ 15,322], 283 F.2d 909 (9th Cir. 1960). The bankruptcy court, however, found that the Ninth Circuit only focused on the fact that a dormant partner can be liable for the partnership's debts, and did not address the assessment issue. [Sept. 12, 2000 order at 10.]

Appellant attacks this reading of *Young*, and claims that the case does hold that partners can be individually liable without being personally assessed. [Appellant's Br. at 13.] Debtors contend that *Young* is inapplicable as it only holds that liability is not created by assessment, but rather arises as a matter of law. [*See* Appellees' Brief ("Appellees' Br.") at 12-13.] As there is no error in the bankruptcy court's interpretation of *Young*, the Court is inclined to agree with the reading.

The district court ruling in *Young* (upheld by the Court of Appeals) does not hold that the individual assessment of a partner in not required. In the first of the two paragraphs cited by Appellant, the court states, "A person liable for taxes may not recover a *refund* of taxes he paid because of the fact the assessment did not name him." 5 A.F.T.R.2d 1037 (emphasis added). In other words, this holding dealt with refunds, rather than the collection of taxes. Moreover, cases cited by the *Young* court following this statement do not address the issue of assessment and collection against a partnership. *See Anderson v. United States* [36-2 USTC ¶ 9342], 15 F. Supp. 216 (Ct. Cl. 1936) (holding Commissioner is required to assess the tax (income, estate, gift, *etc.*) rather than assess the taxpayer), *cert. denied*, 300 U.S. 675, 57 S. Ct. 668, 81 L.Ed. 880 (1937); *Pickering v. Alyea-Nichols Co.*, [1 USTC ¶ 247], 21 F.2d 501 (7th Cir. 1927), (construing section 503 of the 1917 Revenue Act to allow taxation of an individual in an insurance association as well as the association), *cert. denied*, 276 U.S. 617, 48 S. Ct. 208, 72 L.Ed. 733 (1928).

The *Young* court continues in the following paragraph, "Where taxes are assessed against a partnership and under state law each member . . . is jointly and severally liable for the debts of the partnership, it is unnecessary and superfluous to name the individual partners in the assessment in order *to create liability* ." *Id.* (emphasis added). Again, the court speaks to the issue of assessment and the partners' liability, and, not to the issue of individual assessment and collection. The Debtors do not dispute their liability an partners; rather, they dispute Appellant's attempt to collect taxes without individual assessments. This issue was not resolved by the circuit court's decision in *Young*. Accordingly, it was not error for the bankruptcy court to find that even if the Court of Appeals upheld theme findings in *Young* the findings were inapplicable.

3. APPELLANT'S ARGUMENT

The authorities cited by Appellant do not address the issue before the Court: whether or not an individual assessment of the Appellees was required in order for the IRS to collect taxes from them.

For example, Appellant cites to *Farrow, Schildhause & Wilson. et al. v. Kings Prof'l Basketball Club* [88-1

USTC ¶ 9333], 1998 WL 162237, Civ. Nos. S-86-1012 RAR, S-86-1459 RAR,*2 (E.D. Cal. Feb. 24, 1988) in which the court held that a federal tax lien for unpaid partnership taxes also attaches to the property of the general partners. *Farrow*, however, relies upon *Lidberg v. United States* [74-1 USTC ¶ 9287], 375 F. Supp. 631, 633 (D. Minn. 1974) for support. While *Lidberg* held that the government was entitled to levy a partner's individual property rather than the partnership's overall assets, in *Lidberg* the partner *had* been separately assessed. [74-1 USTC ¶ 9287] 375 F. Supp. at 632.

Appellant also cites to *Tony Thornton Auction Service, Inc. v. United States* [86-1 USTC ¶ 9434], 791 F.2d 635 (8th Cir. 1986), in which the court held that a notice was sufficient to perfect a tax lien as to the interests of a *husband* and *wife* even though the notice was filed only in the husband's name. Accordingly, Appellant relies on this case in vain.

In *Underwood v. United States* [41-1 USTC ¶ 9296], 118 F.2d 760, 761 (5th Cir. 1941), cited by Appellant, the Government filed notices of tax liens for gasoline taxes owing by a partnership. The court held that the tax liens attached not only to the partnership property but attached also to the property individually owned by the partners. Again, Debtors in this case do not dispute their liability. While *Underwood* is oft-cited in the courts of the Fifth Circuit, it has yet to be cited for the proposition that a lien filed against a partnership *is sufficient for the IRS to collect taxes. See also Claude F. Atkins Enterprises, Inc. v. United States*, 76 A.F.T.R.2d 95-7453 (E.D. Cal. 1995) (analyzing application of payments to partnership without addressing assessment as a prerequisite to tax collection);

Livingston v. United States [92-1 USTC ¶ 50,137], 793 F. Supp. 251 (D. Idaho, 1992) (addressing issue of responsibility of partners for partnership's unpaid taxes); *United States v. Ross*, 176 F. Supp. 932 (D. Neb. 1959) (focusing on partner liability).

None of the cases discussed above, nor any others cited by Appellant, directly address individual assessment of the Debtors. The bankruptcy court did not err in finding them inapposite.

4. ASSESSMENT AS A PREREQUISITE TO TAX COLLECTION

Although Appellant's authorities are inapplicable to the issue of assessment and collection, cases offered by Debtors do address this.

In *El Paso Refining, Inc. v. I.R.S.* [97-1 USTC ¶ 50,386], 205 B.R. 497, 499 (W.D. Tex. 1996) the court hold that "a valid assessment is a prerequisite to tax collection" and failure to assess can result in a finding that the lien in question is void. This case speaks directly to the issue presented here. *See also U.S. v. Coson* [61-1 USTC ¶ 9219], 286 F.2d 453 (9th Cir. 1961) ("Although our decision as to the lack of proper notice or demand is sufficient to dispose of this case, it would appear that the trial court was right in holding the assessment was insufficient for failure to comply with the statutory requirements."); *In re Fingers* [94-2 USTC ¶ 50,434], 170 B.R. 419, 426 (S.D. Cal. 1994) ("Under the Internal Revenue Code, a valid tax assessment is a prerequisite to tax collection."). *Cf. Bailey v. United States* [73-1 USTC ¶ 9472], 355 F. Supp. 325 (E.D. Penn. 1973) (finding separate assessment not necessary when the certificate of assessment against the partnership listed individual partners as well).

These cases speak *directly* to this issue. Debtors do not dispute their liability or responsibility to the partnership. Rather, they challenge the effect of the claim against them on the basis of the requirements set forth in *El Paso* and *In re Fingers*.

Similarly, in *Valley National Bank of Arizona v. A.E. Rouse & Co.*, 121 F.3d 1332, 1335 the court held judgment was not authorized against partners who were neither named nor served in the underlying suit, as "partnership to an action does not in itself make the partners parties." While this addresses service and not assessment, the principles are analogous: as service is a prerequisite to judgment, assessment is a prerequisite to tax collection. *El Paso*, 205 B.R. at 499, *In re Fingers* 94-2 USTC ¶ 50,434], 170 B.R. at 426. *See also Detrio v. United States* [59-1 USTC ¶ 9367], 264 F.2d 658 (5th Cir. 1959) (finding individual partner not personally served not subject to a lien or execution in satisfaction of the lien); *Fazzi v. Peters*, 68 Cal.2d 590, 440 P.2d 242, 68 Cal. Rptr. 170 (1968) (finding judgment could not be entered against a party served but not named).

Again, as these authorities both address and support Debtors' challenge, the bankruptcy court did not err in relying on them in sustaining the objection to the IRS claim.

5. STATUTE OF LIMITATIONS

Under 26 U.S.C.A. § 6501(a) any tax imposed shall be assessed within three years. The taxes were incurred between 1992 and 1995 and were assessed against the partnership between 1994 and 1995. [Sept. 12, 2000 Order at 11; Appellant's Br. at 5-6] Appellant's argument that the statute of limitations does not bar collection presumes that an assessment of the partnership was sufficient for collection of taxes from the individual Debtors. As this Court finds otherwise, the bankruptcy court was correct in holding that collection was barred because the debtors were not assessed within the three year period.

6. DEBTORS' BURDEN OF PROOF

Finally, under 11 U.S.C. § 502, the IRS claim is valid unless there is an objection, and the debtor has the "burden of presenting evidence to rebut this *prima facie* validity." *In re MacFarlane*, 83 F.3d 1041, 144 (9th Cir. 1996). Based on the applicable statutes and decisions, the bankruptcy court correctly found that the Debtors had presented sufficient evidence to rebut the claim's *prima facie* validity. *See In re Holm*, 931 F.2d 620, 623 (9th Cir. 1991) (setting forth burden shifting analysis).

IV. CONCLUSION

Accordingly, the bankruptcy court's ruling sustaining the claim objection is AFFIRMED.

IT IS SO ORDERED.

APPENDIX D

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

No. LA 99-48587-ER

IN RE: ABEL COSMO GALLETTI, AKA AL GALLETTI AND SARAH GALLETTI, DEBTORS

Filed: Sept. 11, 2000

MEMORANDUM OF DECISION

ROBLES, Bankruptcy J.

On May 15, 2000, the Court heard the Objection to Claim of United States of America, Department of the Treasury, Internal Revenue Service ("Claim Objection") filed by the Debtors and the Opposition thereto filed by the United States of America, Department of the Treasury, Internal Revenue Service ("IRS"). Appearances were as noted on the record. The Court continued the matter to July 31, 2000 and ordered further briefing on the issues presented. After entertaining oral argument at the continued hearing on July 31, 2000, the Court took the matter under submission. For the reasons set forth more fully below, the Court sustains the Claim Objection.

I.

FACTS

Debtors filed a joint voluntary chapter 13 petition on October 20, 1999. The IRS filed a proof of claim in the amount of $395,179.89 (the "claim"). The claim consists of the following:

1. Secured claims totaling $395,006.37 for taxes assessed between January, 1994 and July, 1995 against taxpayer identification number 86-0641090.

2. Unsecured priority claim in the amount of $160.36 for taxes assessed on December 4, 1995 against taxpayer identification number 86-0641090.

3. Unsecured general claim in the amount of $13.16 for penalties against the unsecured priority claim.

Debtors' social security numbers are 379-34-6851 and 371-42-5311. Taxpayer identification number 86-0641090 belongs to the Marina Cabrillo Partners. The Debtors were partners of Marina Cabrillo Partners (the "partnership").

Debtors filed an objection to the IRS claim on April 17, 2000. Debtors argue that the claim should be disallowed because it is not a proven claim against the estate. The claim consists of taxes assessed against the partnership. While Debtors do not dispute that California law makes all partners jointly and severally liable for the debts of a partnership, they argue that they must be *individually* assessed before collection can be effected against them.

Debtors assert that relevant case law supports their position. In *El Paso Refining, Inc. v. IRS*, the bankruptcy court held that a valid assessment against individual partners was a prerequisite to tax collection by the IRS. *See El Paso* [97-1 USTC ¶ 50,386], 205 B.R. 497 Bankr. W.D. Tex. 1996. The *El Paso* court strictly interpreted Internal Revenue Code § 6203, which provides that an assessment is made by recording the liability of the taxpayer in the office of the Secretary. *See id.*; 26 U.S.C. § 6203.[1]

Debtors also rely on the holdings of *Coson v. United States* [59-1 USTC ¶ 9168], 169 F. Supp. 671 [3 AFTR 2d 462] (S.D. Cal. 1958), *modified on other grounds*, 286 F.2d 453 [7 AFTR 2d 589] (9th Cir. 1961), and *Bailey v. United States* [73-1 USTC ¶ 9472], 355 F. Supp. 325 [32 AFTR 2d 73-5138] (E.D. Penn. 1973). In *Coson*, the court held that assessment against the plaintiff's business was insufficient to create a lien against the individual plaintiff's property because the individual was never assessed. *See id.* However, in *Bailey*, the court found that although the individual partner was never assessed, he was liable because he was listed on the certificate of assessment against the partnership. Here, only the partnership was listed on the assessment. Therefore, Debtors assert that they have not been properly assessed as individuals and the IRS claim is invalid.

Further, Debtors assert that the IRS claim is invalid because it is beyond the statute of limitations. Under § 6501, tax liabilities must be assessed within three years of the date a tax return is filed or should have been filed. Because the tax liabilities are for the years

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[1] All statutory references are to the Internal Revenue Code unless otherwise indicated.

1992 through 1995, Debtors assert that the statute of limitations has passed.

In Opposition, the IRS asserts that a separate assessment against a general partner is not required by the Internal Revenue Code if the partnership was properly assessed. The IRS asserts that in order to determine whether the assessment is valid against the Debtors as general partners, § 6203 is not applicable. Under that provision, an assessment is made by recording the liability of the taxpayer in the office of the Secretary. The term "taxpayer" is defined as any person subject to any Internal Revenue tax and the definition of "person" includes an individual or partnership. *See* §§ 7701(a)(1) and (a)(13). The IRS argues that "general partner" is not included in the definition of "taxpayer" and, therefore, § 6203 does not apply.

The IRS asserts that the starting point in this analysis is § 3401. Under § 3401, an employer is liable for the payment of employment taxes required to be withheld from an employee's salary. The term "employer" is defined to be an individual or a partnership (among other entities). However, the definition of the term "employer" does not include a "general partner" or "partner" and, therefore, the IRS asserts that they are not subject to liability under § 3401. Based upon the foregoing, the IRS argues that a general partner is neither a "taxpayer" subject to an internal revenue tax nor a "person." Therefore, the assessment referred to in § 3401 is the assessment against the partnership and the applicable "taxpayer" for identification purposes is the partnership.

The IRS argues that requiring a separate assessment against the general partner would require expansion of the definitions of "employer" and "taxpayer" to include "general partners" in order to make them liable under § 3401. However, such interpretation is not the result intended by Congress and would render portions of § 3401 unconstitutional "because the making of such assessment expansion is premised upon the IRS' making an interpretation of the applicable state law that a general partner is liable for its debts." IRS Supplemental Memorandum at 5.

Further, the IRS asserts that binding Ninth Circuit authority favors the government's position. The IRS asserts that the only binding case is *Young v. Riddell*, 60-1 USTC ¶ 9381 (S.D. Cal. 1959), *aff'd* [60-2 USTC ¶ 15,322], 283 F.2d 909 (9th Cir. 1960), which held that

> where taxes are assessed against the partnership and under state law each member of the partnership is jointly and severally liable for the debts of the partnership, it is unnecessary and superfluous to name the individual partners in the assessment in order to create liability; their liability arises as a matter of state law.

The IRS asserts that the cases relied upon by the Debtors are not directly on point because they do not address whether a separate assessment is required against the individual partners of a partnership.

Finally, the IRS argues that if no separate assessment against the general partners are required, then the Debtors' statute of limitation argument is rendered moot because the employment taxes were assessed within three years of the due date of employment tax returns under § 6501.

In Response, the Debtors assert that the IRS's statutory interpretation argument is without merit. Section 3401 does not exclude the individual liability of general partners. The terms "individual" and "taxpayer" include general partners. Further, Debtors argue that there is no binding authority to support the IRS's position. The case relied upon by the IRS, *Young v. Ridell*, is an unpublished opinion. The Ninth Circuit opinion did not adopt or restate the language quoted by the IRS from the lower court decision.

Debtors assert that the IRS's attempt to distinguish the case law cited by the Debtors is false. The issue is whether a separate assessment is required to collect or enforce the payment of taxes against an individual partner. In the instant case, the proof of claim is the equivalent of a lien. Therefore, the issue is whether individual assessment was a procedural prerequisite to a lien (proof of claim).

II.

ANALYSIS

Neither party disputes that under California law all partners are jointly and severally liable for the debts of a partnership, including tax liabilities. *See* California Corporations Code Section 16306(a).[2] The Debtors do not dispute that they were partners in the partnership. The issues, therefore, are whether the tax assessments against the partnership were effective to bind the Debtors as partners and whether collection is barred by the statute of limitations.

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[2] California Corporations Code § 16306(a) provides:

> Except as otherwise provided in subsections (b) and (c), all partners are liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law.

A. The tax assessments against the partnership were not effective to bind the Debtors as partners.

1. The Partnership is liable for the taxes required to be deducted or withheld.

Section 3403 provides that the "employer shall be liable for the payment of the tax required to be deducted and withheld under this chapter." § 3403. As used in § 3403, "employer" means "the person for whom an individual performs or performed any service." § 3401(d). "Person" is defined in § 7701(a)(1) to include an individual or partnership. *See* § 7701(a)(1). The "person" for whom the Debtors performed services was the partnership. Therefore, the partnership is liable for the payment of taxes required to be deducted and withheld.

2. To hold a partner liable for the debts of a partnership under California law, a judgment must be entered against the partner.

In California, "a partnership is an entity distinct from its partners." California Corporations Code § 16201. Although all partners are liable jointly and severally for the obligations of the partnership, "a judgment against a partnership is not by itself a judgment against a partner." California Corporations Code §§ 16306 and 16307(c). In fact, "a judgment against a partnership may not be satisfied from a partner's assets unless there is also a judgment against the partner." California Corporations Code § 16307(c). It naturally follows that in order for partners to be jointly and severally liable for tax liabilities, they must be assessed separately.

3. To be deld liable for tax obligations, a taxpayer must be validly assessed.

In order to be held liable for taxes owed, the first requirement is valid assessment of the taxpayer. The Internal Revenue Code provides that a valid assessment is made by recording the liability of the "taxpayer" in the office of the Secretary. *See* § 6203.[3] "Taxpayer" is defined as "any person subject to any internal revenue tax." § 7701(a)(14). The definition of "person" includes "an individual, a trust, estate, partnership, association, company or corporation." § 7701(a)(1). As noted by the IRS, the definitions of "taxpayer" and "person" do not include "partner" or "general partner." However, the definition of "person" includes an "individual" and the definition of "taxpayer" is simply one who is subject to taxation. A general partner may be, as is the case here, an individual person subject to taxation. Therefore, contrary to the IRS's argument, a partner must be assessed individually under § 6203 before he can be held liable.

4. Relevant case law provides that individual assessment is required in order to hold partners liable for the tax obligations of a partnership.

In *El Paso*, the bankruptcy court was faced with a similar fact situation. The IRS assessed the partnership, but not the partner individually. The bankruptcy court held that a valid assessment against a

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[3] Section 6203 provides in relevant part:

> The assessment shall be made by recording the liability of the taxpayer in the office of the Secretary in accordance with the rules or regulations prescribed by the Secretary.

partner was a "prerequisite to tax collection," even when the partnership had been assessed. *See El Paso* [97-1 USTC § 50,386], 205 B.R. at 500. The court reasoned that the IRS must strictly comply with § 6203. *See id.*[4]

Further, in *Coson v. United States* [59-1 USTC ¶ 9168], 169 F. Supp. 671 (S.D. Cal. 1958), *modified and aff'd. on other grounds* [61-1 USTC ¶ 9219], 286 F.2d 453 (9th Cir. 1961), the taxpayer brought an action to quiet title against the government's notice of federal tax liens against his property. The assessment did not identify the taxpayer. The court stated that "[n]o case has been discovered which deals with the required identification of an individual in order for there to be an assessment of taxes against him. However, on the facts of this case, it is concluded that the [taxpayer] herein never was assessed for these taxes." *Id.* at 676. Since a tax lien arises at the time of assessment, the court held that since the taxpayer was never assessed, the government did not have a lien. *See id.*

On appeal, the Ninth Circuit affirmed the lower court's decision that the lien was invalid. *See Coson* [61-1 USTC ¶ 9219], 286 F.2d 453. However, the Court focused on the fact that notice and demand had not been given to the taxpayer instead of the assessment problem. The Court did state, however, that "[a]lthough our decision as to the lack of proper notice and demand is sufficient to dispose of this case, it would appear that the trial court was right in holding the

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[4] The court also held that demand and notice on the partnership was insufficient to establish a federal tax lien on the separate property of the partner. *See El Paso* [97-1 USTC ¶ 50,386], 205 B.R. at 500.

assessment was insufficient for failure to comply with the statutory requirements," *Id.* at 464.

The court in *Bailey v. United States* [73-1 USTC ¶ 9472], 355 F. Supp. 325 (E.D. Penn. 1973), did not hold that separate assessment was mandatory in order to find individual partners liable. However, the certificate of assessment against the partnership listed the individual partners as well. In the instant case, the certificate of assessment only listed the partnership.

The only case cited by the IRS in support of their argument is an unpublished decision. In *Young v. Riddell*, 60-1, USTC ¶ 9381 (S.D. Cal. 1959), the court held that:

> Where taxes are assessed against a partnership and under state law each member of the partnership is jointly and severally liable for the debts of the partnership, it is unnecessary and superfluous to name the individual partners in the assessment in order to create liability; their liability arises as a matter of state law.

The Ninth Circuit decision which affirmed the lower court's ruling did not address the issues before the Court at this time. See *Young v. Riddell* [60-2 USTC ¶ 15,322], 283 F.2d 909 (9th Cir. 1960). The Court's holding was focused on the fact that a dormant partner is also liable for the debts of a partnership.

Based upon the foregoing, the Court finds that the Debtors, as general partners, are not bound by the assessment of the partnership.

B. The statute of limitations bars collection of the partnership tax liability from the Debtors.

Section 6501(a) provides that "the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed . . ." § 6501(a). The partnership taxes were incurred between 1992 and 1995 and were assessed against the partnership between January, 1994 and December, 1995. Since the Debtors, as individual partners, were not assessed within the three year statute of limitations, collection is barred. See § 6501(a).

C. The Debtors have met their burden to defeat the IRS claim.

Title 11 U.S.C. § 502(a) provides that "a claim or interest, proof of which is filed under § 501 of this title, is deemed allowed, unless a party in interest . . . objects." A proof of claim "executed and filed in accordance with [the Bankruptcy Rules constitutes] prima facie evidence of the validity and amount of the claim." Federal Rule of Bankruptcy 3001(f). "The debtor or trustee has the burden of presenting evidence to rebut this prima facie validity." *In re MacFarlane*, 83 F.3d 1041, 1044 (9th Cir. 1996). The objecting party must show facts which would tend to defeat the claim by "probative force equal to that of the allegations of the proofs of claim themselves." *In re Holm*, 931 F.2d 620, 623 (9th Cir. 1991).

If that burden is met, the creditor must present evidence to prove the claim. The claimant must prove the validity of the claim by a preponderance of the evidence. "The ultimate burden of proof therefore is on the creditor." *MacFarlane*, 83 F.3d at 1044.

In the instant case, the Debtors have met their burden of proof to rebut the validity of the IRS claim. Therefore, the Court sustains the Debtors' claim objection.

III.

CONCLUSION

Based upon the foregoing, the claim objection is sustained. The Court will prepare an order consistent with this memorandum of decision.

APPENDIX E

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
Los Angeles Division

No. LA 00-13574-ER

IN RE: FRANCESCO BRIGUGLIO, AKA FRANK BRIGUGLIO AND ANGELA BRIGUGLIO, AKA ANGIE BRIGUGLIO, DEBTORS

Filed: Sept. 11, 2000

MEMORANDUM OF DECISION

ROBLES, Bankruptcy J.

On June 19, 2000, the Court heard the Objection to Claim of United States of America, Department of the Treasury, Internal Revenue Service ("Claim Objection") filed by the Debtors and the Opposition thereto filed by the United States of America, Department of the Treasury, Internal Revenue Service ("IRS") Appearances were as noted on the record. The Court continued the matter to July 31, 2000 and ordered further briefing on the issues presented. After entertaining oral argument at the continued hearing on July 31, 2000, the Court took the matter under submission. For the reasons set forth more fully below, the Court sustains the Claim Objection in part.

I. FACTS

Debtors filed a Joint voluntary chapter 13 petition on February 4, 2000. The IRS filed a proof of claim in the amount of $427,402.14 (the "claim"). The claim consists of the following:

1. Secured claims totaling $403,264.06 for taxes assessed between January, 1994 and November, 1996 against taxpayer identification number 86-0641090.

2. Unsecured priority claims totaling $23,266.27 for taxes assessed between September, 1995 and December, 1999 against taxpayer identification numbers 86-0641090, 380-40-7057 and 95-6537344.[1]

3. Unsecured general claim in the amount of $872.41 for penalties against the unsecured priority claim.

Debtors' social security numbers are 380-40-7057 and 573-49-1256, Taxpayer identification number 86-0641090 belongs to the Marina Cabrillo Partners. The Debtors were partners of Marina Cabrillo Partners (the "partnership"). Neither party has presented the Court with any evidence as to the identity of Taxpayer identification number 95-6537344.

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[1] The amount consists of:

1. $164.16 assessed in October, 1998 against taxpayer identification number 86-0641090.

2. $21,600.80 assessed in November, 1998 and estimated for the year 1999 against taxpayer identification number 380-40-7057.

3. $1,501.31 estimated for the tax year 1999 against taxpayer identification number 95-6537344.

Debtors filed an objection to the IRS Claim on May 4, 2000. Debtors argue that the claim should be disallowed because it is not a proven claim against the estate. A substantial portion of the claim consists of taxes assessed against the partnership. While Debtors do not dispute that California law makes all partners jointly and severally liable for the debts of a partnership, they argue that they must be *individually* assessed before collection can be effected against them.

Debtors assert that relevant case law supports their position. In *El Paso Refining, Inc. v. IRS*, the bankruptcy court held that a valid assessment against individual partners was a prerequisite to tax collection by the IRS. *See El Paso*, [97-1 USTC ¶ 50,386] 205 B.R. 497 (Bankr. W.D. Tex. 1996). The *El Paso* court strictly interpreted Internal Revenue Code Section 6203, which provides that an assessment is made by recording the liability of the taxpayer in the office of the Secretary. *See id.*; 26 U.S.C. Section 6203.[2]

Debtors also rely on the holdings of *Coson v. United States*, [59-1 USTC ¶ 9168] 169 F. Supp. 671 (S.D. Cal. 1958), *modified on other grounds* [61-1 USTC ¶ 9219], 286 F.2d 453 (9th Cir. 1961), and *Bailey v. United States*, 355 F. Supp. 325 (E.D. Penn. 1973). In Coson, the court held that assessment against the plaintiff's business was insufficient to create a lien against the individual plaintiff's property because the individual was never assessed. *See id.* However, in *Bailey*, the court found that although the individual partner was never assessed, he was liable because he was listed on the certificate of assessment against the partnership.

[2] All statutory references are to the Internal Revenue Code unless otherwise indicated.

Here, only the partnership was listed on the assessment. Therefore, Debtors assert that they have not been properly assessed as individuals and the IRS claim is invalid.

Further, Debtors assert that the IRS claim is invalid because it is beyond the statute of limitations. Under Section 6501, tax liabilities must be assessed within three years of the date a tax return is filed or should have been filed. Because the tax liabilities are for the years 1992 through 1994, Debtors assert that the statute of limitations has passed.

In Opposition, the IRS asserts that a separate assessment against a general partner is not required by the Internal Revenue Code if the partnership was properly assessed. The IRS asserts that in order to determine whether the assessment is valid against the Debtors as general partners, Section 6203 is not applicable. Under that provision, an assessment is made by recording the liability of the taxpayer in the office of the Secretary. The term "taxpayer" is defined as any person subject to any internal revenue tax and the definition of "person" includes an individual or partnership. *See* Sections 7701(a)(1) and (a)(13). The IRS argues that "general partner" is not included in the definition of "taxpayer" and, therefore, Section 6203 does not apply.

The IRS asserts that the starting point in this analysis is Section 3401. Under Section 3401, an employer is liable for the payment of employment taxes required to be withheld from an employee's salary. The term "employer" is defined to be an individual or a partnership (among other entities). However, the definition of the term "employer" does not include a "general partner" or "partner" and, therefore, the IRS asserts that they are not subject to liability under

Section 3401. Based upon the foregoing, the IRS argues that a general partner is neither a "taxpayer" subject to an internal revenue tax nor a "person." Therefore, the assessment referred to in § 3401 is the assessment against the partnership and the applicable "taxpayer" for identification purposes is the partnership.

The IRS argues that requiring a separate assessment against the general partner would require expansion of the definitions of "employer" and "taxpayer" to include "general partners" in order to make them liable under Section 3401. However, such interpretation is not the result intended by Congress and would render portions of Section 3401 unconstitutional "because the making of such assessment expansion is premised upon the IRS' making an interpretation of the applicable state law that a general partner is liable for its debts." IRS Supplemental Memorandum at 5.

Further, the IRS asserts that binding Ninth Circuit authority favors the government's position. The IRS asserts that the only binding case is *Young v. Riddell*, 60-1 USTC paragraph 9381 (S.D. Cal. 1959), *aff'd*, [60-2 USTC ¶ 15,323] 283 F.2d. 909 (9th Cir. 1960), which held that

> where taxes are assessed against the partnership and under state law each member of the partnership is jointly and severally liable for the debts of the partnership, it is unnecessary and superfluous to name the individual partners in the assessment in order to create liability; their liability arises as a matter of state law.

The IRS asserts that the cases relied upon by the Debtors are not directly on point because they do not address whether a separate assessment is required against the individual partners of a partnership.

Finally, the IRS argues that if no separate assessment against the general partners are required, then the Debtors' statute of limitation argument is rendered moot because the employment taxes were assessed within three years of the due date of employment tax returns under Section 6501.

In Response, the Debtors assert that the IRS's statutory interpretation argument is without merit. Section 3401 does not exclude the individual liability of general partners. The terms "individual" and "taxpayer" include general partners. Further, Debtors argue that there is no binding authority to support the IRS's position. The case relied upon by the IRS, *Young v. Ridell*, is an unpublished opinion. The Ninth Circuit opinion did not adopt or restate the language quoted by the IRS from the lower court decision.

Debtors assert that the IRS's attempt to distinguish the case law cited by the Debtors is false. The issue is whether a separate assessment is required to collect or enforce the payment of taxes against an individual partner. In the instant case, the proof of claim is the equivalent of a lien. Therefore, the issue is whether individual assessment was a procedural prerequisite to a lien (proof of claim).

II. ANALYSIS

Neither party disputes that under California law all partners are jointly and severally liable for the debts of a partnership, including tax liabilities. *See* California Corporations Section 16306(a).[3] The Debtors do not

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[3] California Corporations Code Section 16306(a) provides:

dispute that they were partners in the partnership. The issues, therefore, are whether the tax assessments against the partnership were effective to bind the Debtors as partners and whether collection is barred by the statute of limitations.

A. The tax assessments against the partnership were not effective to bind the debtors as partners.

1. The partnership is liable for the taxes required to be deducted or withheld

Section 3403 provides that the "employer shall be liable for the payment of the tax required to be deducted and withheld under this chapter" Section 3403. As used in Section 3403, "employer" means "the person for whom an individual performs or performed any service." Section 3401(d). "Person" is defined in Section 7701(a)(1) to include an individual or partnership. *See* Section 7701(a)(1). The "person" for whom the Debtors performed services was the partnership. Therefore, the partnership is liable for the payment of taxes required to be deducted and withheld.

2. To hold a partner liable for the debts of a partnership under California law, a judgment must be entered against the partner

In California, "a partnership is an entity distinct from its partners," California Corporations Code Section 16201. Although all partners are liable jointly and severally for the obligations of the partnership, "a

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Except as otherwise provided in subsections (b) and (c) all partners are liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law.

judgment against a partnership is not by itself a judgment against a partner." California Corporations Code Sections 16306 and 16307(c). In fact, "a judgment against a partnership may not be satisfied from a partner's assets unless there is also a judgment against the partner." California Corporations Code Section 16307(c). It naturally follows that in order for partners to be jointly and severally liable for tax liabilities, they must be assessed separately.

3. To be held liable for tax obligations, a taxpayer must be validly assessed

In order to be held liable for taxes owed, the first requirement is valid assessment of the taxpayer. The Internal Revenue Code provides that a valid assessment is made by recording the liability of the "taxpayer" in the office of the Secretary. *See* Section 6203.[4] "Taxpayer" is defined as "any person subject to any internal revenue tax" Section 7701(a)(14). The definition of "person" includes "an individual, a trust, estate, partnership, association, company or corporation." Section 7701(a)(1). As noted by the IRS, the definitions of "taxpayer" and "person" do not include "partner" or "general partner." However, the definition of "person" includes an "individual" and the definition of "taxpayer" is simply one who is subject to taxation. A general partner may be, as is the case here, an individual person subject to taxation. Therefore, contrary to the IRS's argument, a partner must be assessed individually under Section 6203 before he can be held liable.

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[4] Section 6203 provides in relevant part:

> The assessment shall be made by recording the liability of the taxpayer in the office of the Secretary in accordance with the rules or regulations prescribed by the Secretary.

4. Relevant case law provides that individual assessment is required in order to hold partners liable for the tax obligations of a partnership.

In *El Paso*, the bankruptcy court was faced with a similar fact situation. The IRS assessed the partnership, but not the partner individually. The bankruptcy court held that a valid assessment against a partner was a "prerequisite to tax collection," even when the partnership had been assessed. *See El Paso*, [97-1 USTC ¶ 50,386] 205 B.R. at 500. The court reasoned that the IRS must strictly comply with Section 6203. *See id.*[5]

Further, in *Coson v. United States*, [59-1 USTC ¶ 9168] 169 F. Supp. 671 (S.D. Cal.1958), *modified and aff'd. on other grounds*, [61-1 USTC ¶ 9219] 286 F.2d 453 (9th Cir. 1961), the taxpayer brought an action to quiet title, against the government's notice of federal tax liens against his property. The assessment did not identify the taxpayer. The court stated that "[n]o case has been discovered which deals with the required identification of an individual in order for there to be an assessment of taxes against him. However, on the facts of this case, it is concluded that the [taxpayer] herein never was assessed for these taxes." *Id.* at 676. Since a tax lien arises at the time of assessment, the court held that since the taxpayer was never assessed, the government did not have a lien. *See id.*

On appeal, the Ninth Circuit affirmed the lower court's decision that the lien was invalid. *See Coson*, [61-1 USTC ¶ 9219] 286 F.2d 453. However, the Court

[5] The court also held that demand and notice on the partnership was insufficient to establish a federal tax lien on the separate property of the partner. *See El Paso*, [97-1 USTC ¶ 50,386] 205 B.R. at 5000.

focused on the fact that notice and demand had not been given to the taxpayer instead of the assessment problem. The Court did state, however, that "[a]lthough our decision as to the lack of proper notice and demand is sufficient to dispose of this case, it would appear that the trial court was right in holding the assessment was insufficient for failure to comply with the statutory requirements." *Id.* at 464.

The court in *Bailey v. United States*, [73-1 USTC ¶ 9472] 355 F. Supp. 325 (E.D. Penn. 1973), did not hold that separate assessment was mandatory in order to find individual partners liable. However, the certificate of assessment against the partnership listed the individual partners as well. In the instant case, the certificate of assessment only listed the partnership.

The only case cited by the IRS is support of their argument is an unpublished decision. In *Young v. Riddell*, 60-1 USTC [ ]paragraph 9381 (S.D. Cal. 1959), the court held that:

> Where taxes are assessed against a partnership and under state law each member of the partnership is jointly and severally liable for the debts of the partnership, it is unnecessary and superfluous to name the individual partners in the assessment in order to create liability; their liability arises as a matter of state law.

The Ninth Circuit decision which affirmed the lower court's ruling did not address the issues before the Court at this time. *See Young v. Riddell* [60-2 USTC ¶ 15,322], 283 F.2d 909 (9th Cir. 1960). The Court's holding was focused on the fact that a dormant partner is also liable for the debts of a partnership.

Based upon the foregoing, the Court finds that the Debtors, as general partners, are not bound by the assessment of the partnership.

B. The statute of limitations bars collection of the partnership tax liability from the Debtors.

Section 6501(a) provides that "the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed . . ." Section 6501(9). The partnership taxes were incurred between 1992 and 1995 and were assessed against the partnership between February, 1994 and November, 1996. Since the Debtors, as individual partners, were not assessed within the three year statute of limitations, collection is barred. See Section 6501(a).

C. The Debtors have met their burden to defeat the partnership portion of the IRS claim.

Title 11 U.S.C. Section 502(a) provides that "a claim or interest, proof of which is filed under Section 501 of this title, is deemed allowed, unless a party in interest . . . objects." A proof of claim "executed and filed in accordance with [the Bankruptcy Rules constitutes] *prima facie* evidence of the validity and amount of the claim." Federal Rule of Bankruptcy 3001(f). "The debtor or trustee has the burden of presenting evidence to rebut this *prima facie* validity." *In re MacFarlane*, 83 F.3d 1041, 1044 (9th Cir.1996). The objecting party must show facts which would tend to defeat the claim by "probative force equal to that of the allegations of the proofs of claim themselves." *In re Holm*, 931 F.2d 620, 623 (9th Cir. 1991).

If that burden is met, the creditor must present evidence to prove the claim. The claimant must prove the validity of the claim by a preponderance of the evidence. "The ultimate burden of proof therefore is on the creditor." *MacFarlane*, 83 F.3d at 1044.

In the instant case, the Debtors have met their burden of proof as to the portion of the claim relating to partnership tax liability. Therefore, the Court sustains the Debtors' claim objection in the amount of $403,428.22.[6]

Of the remainder, $21,600.80 is apportioned to taxpayer identification number 380-40-7057, which is Debtor Francesco Briguglio's social security number. Debtors have not presented any evidence to dispute the validity of this portion of the claim. Therefore, Debtors have not defeated the *prima facie* evidence of the validity and amount of the claim. The Court overrules the Debtors' claim objection in the amount of $21,600.80.

Finally, the remaining portion of the claim consists of an unsecured priority claim in the amount of $1,501.31 owed by taxpayer identification number 95-6537344 and an unsecured general claim for penalties in the amount of $872.41. Again, Debtors have not presented any evidence to dispute the validity of this portion of the claim. Therefore, Debtors have not defeated the *prima facie* evidence of the validity and amount of the claim. The Court overrules the Debtors' claim objection in the amount of $2,373.72.

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[6] The amount consists of:

1. secured claims in the amount of $403,264.06; and
2. an unsecured claim in the amount of $164.16.

III. Conclusion

Based upon the foregoing, the claim objection is sustained in part. The Court will prepare an order consistent with this memorandum of decision.

ORDER

Pursuant to the Court's Memorandum of Decision of this date in the matter referenced above, it is hereby

ORDERED that the Debtors' Objection to Claim of United States of America, Department of the Treasury, Internal Revenue Service is SUSTAINED in the amount of $403,428.22 and OVERRULED in the amount of $23,974.52.

APPENDIX F

STATUTORY APPENDIX

1. 11 U.S.C. 101 provides, in relevant part:

In this title—

* * * * *

(5) "claim" means—

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

* * * * *

(10) "creditor" means—

(A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;

* * * * *

2. 11 U.S.C. 502 provides, in relevant part:

(a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.

(b) Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that—

(1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured;

* * * * *

3. 26 U.S.C. 3102 provides, in relevant part:

(a) Requirement

The tax imposed by section 3101 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid. * * *

(b) Indemnification of employer

Every employer required so to deduct the tax shall be liable for the payment of such tax, and shall be indemnified against the claims and demands of any person for the amount of any such payment made by such employer.

* * * * *

4. 26 U.S.C. 3111 provides, in relevant part:

(a) Old-age, survivors, and disability insurance

In addition to other taxes, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 3121(a)) paid by him with respect to employment (as defined in section 3121(b))— * * *

5. 26 U.S.C. 3403 provides:

Liability for tax

The employer shall be liable for the payment of the tax required to be deducted and withheld under this chapter, and shall not be liable to any person for the amount of any such payment.

6. 26 U.S.C. 3404 provides:

Return and payment by government employer

If the employer is the United States, or a State, or political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any one or more of the foregoing, the return of the amount deducted and withheld upon any wages may be made by any officer or employee of the United States, or of such State, or political subdivision, or of the District of Columbia, or of such agency or instrumentality, as the case may be, having control of the payment of such wages, or appropriately designated for that purpose.

7. 26 U.S.C. 6201 provides, in relevant part:

(a) Authority of Secretary

The Secretary is authorized and required to make the inquiries, determinations, and assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title, or accruing under any former internal revenue law, which have not been duly paid by stamp at the time and in the manner provided by law. * * *

8. 26 U.S.C. 6203 provides:

Method of assessment

The assessment shall be made by recording the liability of the taxpayer in the office of the Secretary in accordance with rules or regulations prescribed by the Secretary. Upon request of the taxpayer, the Secretary shall furnish the taxpayer a copy of the record of the assessment.

9. 26 U.S.C. 6501 provides, in relevant part:

(a) General rule

Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) * * *, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period. For purposes of this chapter, the term "return" means the return required to be filed by the taxpayer (and does not include a return of any person from whom the taxpayer has received an item of income, gain, loss, deduction, or credit).

10. 26 U.S.C. 6502 provides, in relevant part:

(a) Length of period

Where the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun—

(1) within 10 years after the assessment of the tax, or

* * * * *

If a timely proceeding in court for the collection of a tax is commenced, the period during which such tax may be collected by levy shall be extended and shall not expire until the liability for the tax (or a judgment against the taxpayer arising from such liability) is satisfied or becomes unenforceable.

11. Cal. Corp. Code § 16306 (West Supp. 2003) provides, in relevant part:

> (a) Except as otherwise provided in subdivisions (b) and (c), all partners are liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law.

* * * * *

12. Cal. Corp. Code § 16307 (West Supp. 2003) provides:

> (a) A partnership may sue and be sued in the name of the partnership.
>
> (b) Except as otherwise provided in subdivision (g) of Section 16306, an action may be brought against the partnership and any or all of the partners in the same action or in separate actions.
>
> (c) A judgment against a partnership is not by itself a judgment against a partner. A judgment against a partnership may not be satisfied from a partner's assets unless there is also a judgment against the partner.

* * * * *