No. ______

In The
Supreme Court of the United States

JOSEPH P. NACCHIO and ANNE M. ESKER,

Petitioners,

v.

UNITED STATES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether funds forfeited pursuant to a criminal conviction are deductible in cases in which such forfeited funds (in contrast with a simultaneously imposed punitive fine) are earmarked and used to compensate victims of the underlying criminal offense; and whether the Federal Circuit's holding in this case that such forfeited funds are not deductible conflicts with the Second Circuit's holding in *Stephens v. Comm'r*, 905 F.2d 667 (2d Cir. 1990) and the First Circuit's holding in *Fresenius Med. Care Holdings, Inc. v. United States*, 763 F.3d 64 (1st Cir. 2014).

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PETITION FOR A WRIT OF *CERTIORARI*

Petitioners Joseph P. Nacchio and Anne M. Esker respectfully petition the Supreme Court of the United States for a writ of *certiorari* to the United States Court of Appeals for the Federal Circuit, so as to resolve the split of authority across federal judicial circuits that the Federal Circuit's decision in this case has created.

OPINIONS BELOW

The panel opinion of the United States Court of Appeals for the Federal Circuit in this case is reported at 824 F.3d 1370 (Fed. Cir. 2016), and is reprinted at App. 1a-25a.[1] The opinion of the United States Court of Federal Claims in this case, granting partial summary judgment to Plaintiffs, is reported at 115 Fed. Cl. 195 (Ct. Fed. Cl. 2014) and is reprinted at App. 29a-50a. The order of the United States Court of Appeals for the Federal Circuit denying the motion for rehearing *en banc* is not reported, but is reprinted at App. 51a-53a.

JURISDICTION

A three-judge panel of the United States Court of Appeals for the Federal Circuit issued its opinion in this case on June 10, 2016. App. 1a-25a.

[1] Citations to "App." refer to the appendix to this petition for *certiorari*. Citations to "JA" refer to the Joint Appendix before the United States Court of Appeals for the Federal Circuit in this case, which is Document No. 34 on the docket of *Nacchio v. United States*, Nos. 15-5114, 15-5115 (Fed. Cir.).

That court denied a petition for rehearing *en banc* on September 23, 2016. App. 51a-53a. This Court has jurisdiction over this case under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case concerns whether Mr. Nacchio and Ms. Esker, as Taxpayers, are entitled to a refund under 26 U.S.C. § 1341, which provides as follows:

> (a) GENERAL RULE If—
>
> > (1) an item was included in gross income for a prior taxable year (or years) because it appeared that the taxpayer had an unrestricted right to such item;
> >
> > (2) a deduction is allowable for the taxable year because it was established after the close of such prior taxable year (or years) that the taxpayer did not have an unrestricted right to such item or to a portion of such item; and
> >
> > (3) the amount of such deduction exceeds $3,000,
>
> then the tax imposed by this chapter for the taxable year shall be the lesser of the following:
>
> > (4) the tax for the taxable year computed with such deduction; or

(5) an amount equal to—

(A) the tax for the taxable year computed without such deduction, minus

(B) the decrease in tax under this chapter (or the corresponding provisions of prior revenue laws) for the prior taxable year (or years) which would result solely from the exclusion of such item (or portion thereof) from gross income for such prior taxable year (or years).

This case also concerns the applicability to Taxpayers' situation of 26 U.S.C. § 162(f), which provides as follows:

(f) FINES AND PENALTIES

No deduction shall be allowed under subsection (a) [of 26 U.S.C. § 162] for any fine or similar penalty paid to a government for the violation of any law.

INTRODUCTION

The Federal Circuit's decision in this $19,000,000+ tax refund case conflicts sharply with prior decisions of both the Second Circuit and the First Circuit, thus warranting the grant of a writ of *certiorari* in order to resolve this circuit split.

In a precedential decision, the Federal Circuit held that the funds that Mr. Nacchio was made to forfeit upon his conviction for insider trading are *not* deductible under any section of the Internal Revenue Code. The Federal Circuit reasoned that a forfeiture (in supposed contrast with restitution) necessarily constitutes a "fine or similar penalty" under 26 U.S.C. § 162(f), and is therefore never deductible (not even in a case, such as Mr. Nacchio's case, in which the forfeited funds were earmarked and used to compensate victims).

The Federal Circuit's decision in this case conflicts directly with the Second Circuit's decision in *Stephens v. Comm'r*, 905 F.2d 667 (2d Cir. 1990), which establishes that even in criminal cases, court-ordered payments that are compensatory in nature (such as Mr. Nacchio's forfeiture here) do *not* constitute a "fine or similar penalty" under 26 U.S.C. § 162(f), and thus *are* deductible.

Under the Federal Circuit's decision in this case, deductibility turns entirely on the procedural mechanism that prosecutors choose to employ when routing the proceeds of a crime back to victims, so that *restitution* payments are always deductible whereas *forfeitures* (even if earmarked and remitted to victims) are never deductible. Here the Federal Circuit's decision conflicts directly with the Second Circuit's decision in *Stephens*, under which deductibility turns *not* on the procedural mechanism employed, but rather on whether the payment in question is punitive or compensatory in nature.

The Federal Circuit's decision in this case also conflicts with the First Circuit's decision in *Fresenius Med. Care Holdings, Inc. v. United States*, 763 F.3d 64 (1st Cir. 2014). In *Fresenius*, the First Circuit stated the same fundamental principle that the Second Circuit established in *Stephens*, which is that deductibility turns on "the clear statutory and regulatory language conferring deductibility upon compensatory payments." *Id.* at 70. Yet the First Circuit in *Fresenius* went further, explaining that "[u]nder generally accepted principles of tax law," a court should determine deductibility by inquiring as "to the economic realities of the transaction." *Id.*

The Federal Circuit's decision in this case departs dramatically from the First Circuit's holding in *Fresenius* by ignoring the economic reality that Mr. Nacchio's forfeiture was earmarked and used to compensate victims. The Federal Circuit's fixation on the procedural mechanism used to extract payment from the defendant, as opposed to the economic reality that victims are being compensated, stands in stark contrast to the First Circuit's holding in *Fresenius* that deductibility must hinge on substance rather than form.

This split of authority across circuits presents more than sufficient reason for this Court to grant the petition for a writ of *certiorari*.[2] Yet the circuit split in this case presents evils far more severe than

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[2] In addition to the circuit split described herein, the decision of the Federal Circuit in this case conflicts with an applicable Treasury Department regulation, Treas. Reg. § 1.162-21(b)(2), which provides that "[c]ompensatory damages . . . paid to a government do not constitute a fine or penalty."

those of a typical circuit split. This is because Congress has enacted jurisdictional statutes that allow a plaintiff in a tax refund case to choose to bring his or her case *either* in the United States Court of Federal Claims, 28 U.S.C. § 1491(a)(1), *or* in the federal district court for the district in which the plaintiff resides, 28 U.S.C. § 1346(a)(1).

If the Federal Circuit's decision in this case is allowed to stand, the result will be forum shopping to the extreme, as no plaintiff seeking a deduction for forfeited funds will bring his or her case in the Court of Federal Claims (upon which decisions of the Federal Circuit are binding) in light of the Federal Circuit's decision in this case. This will be especially true of cases originating within the Second Circuit (*Stephens*) or the First Circuit (*Fresenius*), as the circuit split described in this petition will steer plaintiffs to the federal district courts in those circuits rather than to the Court of Federal Claims.

This Court should grant this petition for a writ of *certiorari* in order to resolve the circuit split described herein and to rectify the incentive to forum shopping that the Federal Circuit's decision in this case has created.

STATEMENT OF THE CASE

In 2007 Mr. Nacchio was found guilty on nineteen out of forty-two counts of insider trading in shares of Qwest Communications International, Inc. ("Qwest"), the company at which Mr. Nacchio had served as Chief Executive Officer. JA45-56. In 2008 Mr. Nacchio's conviction and sentence were vacated

by a majority of a three-judge panel of the Tenth Circuit. *See United States v. Nacchio*, 519 F.3d 1140 (10th Cir. 2008). In 2009 the full Tenth Circuit, sitting *en banc*, reinstated Mr. Nacchio's conviction, by the narrowest possible margin of five to four, over vigorous dissents. *See United States v. Nacchio*, 555 F.3d 1234 (10th Cir. 2009).

On remand, the trial court resentenced Mr. Nacchio to serve seventy (70) months in prison; to pay a fine of $19,000,000.00; and to forfeit $44,632,464.38. JA140-48. At the resentencing hearing, both the prosecution and the sentencing judge expressed their common intent that the forfeited funds would be used to compensate victims.[3] The proceeds of Mr. Nacchio's forfeiture were then disbursed, through the remission process, to Qwest shareholders who stock had lost value. On May 3, 2012, the Department of Justice issued a press release stating that "$44 million in funds were forfeited to the United States as a result of the 2007

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[3] At the resentencing hearing, the resentencing judge noted that "the forfeiture money can be used to assist victims within limitations under law." JA486. Counsel for Mr. Nacchio later asked whether the court would "direct" that the forfeited money "go to a fund, or whether that is something that [the court] would prefer that the Government and Mr. Nacchio work out," adding that "[t]he SEC has a fair fund that is set up for distribution to victims." JA494. The Court responded by asking whether the forfeited funds would "automatically go there." *Id.* The prosecutor responded to the Court's question by stating that "there is a process" set forth in applicable regulations to direct the money that Mr. Nacchio had forfeited to the preexisting fund that Mr. Nacchio's counsel had referenced. *Id.* The prosecutor added that "*the Government's intention is for those funds, the forfeiture funds, to be used to compensate victims.*" JA494-95 (emphasis added).

federal conviction of Qwest's chief executive officer, Joseph P. Nacchio, for securities fraud. The forfeited funds are being returned to 112,210 victims who incurred losses on Qwest securities purchased during the fraud scheme." JA256.[4]

On their 2007 tax return, Mr. Nacchio and his wife, Anne M. Esker (as Taxpayers) claimed a credit of approximately $18,000,000.00 pursuant to 26 U.S.C. § 1341. This represented the amount of tax paid on the gain attributable to Mr. Nacchio's exercise of Qwest options (and sales of corresponding shares) in 2001, to which Mr. Nacchio no longer had an unrestricted right (due to the intervening event of the court-ordered forfeiture). The I.R.S. disallowed Taxpayers' claim and later denied Taxpayers' appeal. JA524, JA551-52.

Taxpayers (as Plaintiffs) commenced an action in the Court of Federal Claims, arguing that neither 26 U.S.C. § 162(f) nor public policy precludes such a deduction, because the forfeiture payment was compensatory in purpose, having been restored to victims through the remission process.

The Government argued that both 26 U.S.C. § 162(f) and public policy precluded a deduction,

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[4] On April 26, 2012, the Remission Administrator responsible for the Qwest Victims Remissions Fund sent checks to claimants of that fund. Attached to each check was a notice stating, in relevant part, that "[t]he attached check represents your share of a remission distribution authorized by the United States Department of Justice. The distribution is from funds that were forfeited to the United States in the case of *United States v. Joseph P. Nacchio* (D. Colo.)." JA513.

contending that Mr. Nacchio's forfeiture was similar to a "fine" for purposes of 26 U.S.C. § 162(f).

On cross-motions for summary judgment, the Court of Federal Claims held that Mr. Nacchio's forfeiture is deductible under 26 U.S.C. § 165, reasoning that "Mr. Nacchio's forfeiture was used for a compensatory purpose and was not a 'similar penalty' to his [$19 million] fine under § 162(f)." App. 46a. The Court of Federal Claims thus granted partial summary judgment to Taxpayers.

After losing a motion for reconsideration, App. 28a, the Government stipulated judgment in favor of Taxpayers, in the amount of $17,974,832.00 plus interest, reserving its right to appeal. App. 26a-27a. The Government then appealed to the United States Court of Appeals for the Federal Circuit.

A three-judge panel of the Federal Circuit reversed the Court of Federal Claims, holding that a forfeiture (in supposed contrast with restitution) necessarily constitutes a "fine or similar penalty" under 26 U.S.C. § 162(f), and is therefore necessarily non-deductible. App. 1a-25a. Mr. Nacchio and Ms. Esker then petitioned the Federal Circuit for rehearing *en banc*, to which the Federal Circuit responded by inviting the Government to submit briefing in opposition to the rehearing petition. The Federal Circuit denied the petition for rehearing *en banc* on September 23, 2016. App. 51a-53a.

REASONS FOR GRANTING THE WRIT OF *CERTIORARI*

The Federal Circuit's erroneous decision that forfeitures are necessarily non-deductible, which the Federal Circuit has designated as precedential, presents an acute split from the decision of the Second Circuit in *Stephens* and the decision of the First Circuit in *Fresenius*. The severity of this circuit split is compounded by applicable jurisdictional statutes, under which a plaintiff in a tax refund case has the choice to bring his case *either* in the Court of Federal Claims, 28 U.S.C. § 1491(a)(1), *or* in the federal district court for the district in which the plaintiff resides, 28 U.S.C. § 1346(a)(1). The combined operation of this circuit split and these jurisdictional statutes will necessarily result in undesirable forum shopping across circuits on the part of plaintiffs in all future similar cases.

This Court should grant a writ of *certiorari* in this case so as to resolve this split of authority across circuits and to prevent such forum shopping.

I.

THE FEDERAL CIRCUIT'S HOLDING THAT FORFEITURES ARE NECESSARILY NON-DEDUCTIBLE CONFLICTS WITH THE SECOND CIRCUIT'S HOLDING IN *STEPHENS*.

The Federal Circuit's holding that forfeitures are necessarily non-deductible conflicts with the Second Circuit's decision in *Stephens*, 905 F.2d 776.

In *Stephens*, the Second Circuit held that even in criminal cases, court-ordered payments that are compensatory in nature do not constitute a "fine or similar penalty" under 26 U.S.C. § 162(f), and thus are deductible, as follows.

The defendant in *Stephens* was convicted in a criminal proceeding of various crimes in connection with his embezzlement of funds from Raytheon Company. *See* 905 F.2d at 668. In addition to a five-year prison term and a fine, the criminal trial court in which the defendant's case was prosecuted had ordered the defendant to make a restitution payment to Raytheon. *See id.* In a related proceeding, the United States Tax Court held that this restitution payment was not deductible.

On appeal, the Second Circuit analyzed the question of deductibility with reference to 26 U.S.C. § 162(f), which is also at issue in this case. The Second Circuit held that the restitution payment in *Stephens* was deductible because the "restitution payment is primarily a remedial measure to compensate another party, not a 'fine or similar penalty,' even though Stephens repaid the embezzled funds as a condition of his probation." *Id.* at 672-73.[5]

[5] In determining that the restitution payment "was more compensatory than punitive in nature," the Second Circuit in *Stephens* looked to the transcript of the defendant's sentencing, in which the sentencing judge had "reiterated her concern that Raytheon must get its money back." *Id.* at 673. *See also Allied-Signal, Inc. v. Comm'r.*, T.C. Memo 1992-204, 63 T.C.M. (CCH) 2672 (Tax Ct. 1992) (relying on a sentencing transcript to determine whether 26 U.S.C. § 162(f) disallowed a deduction for a payment made to a charity *in lieu* of an additional criminal fine). Similarly in Mr. Nacchio's case, reference to the

The unmistakable takeaway from *Stephens* is that payments that are compensatory in nature are deductible. The United States Tax Court has also said as much, in a case in which the Tax Court commented on the Second Circuit's opinion in *Stephens*. In *Cavaretta v. Comm'r.*, T.C. Memo 2010-4, 99 T.C.M. (CCH) 1028 (Tax Ct. 2010), the Tax Court explained that the Second Circuit's finding of deductibility in *Stephens* was the correct result because the Second Circuit had "carefully distinguished punitive from compensatory restitution, even in criminal cases, and reasoned that Stephens' restitution payment had both law-enforcement [punitive] and compensatory purposes, but that it was primarily a remedial measure to compensate another party."

The Second Circuit's holding in *Stephens*, as buttressed by *Cavaretta*, will come as no surprise to any tax law attorney. This is because there exists an applicable regulation, promulgated by the United States Department of the Treasury, that mandates the exact same result that the Second Circuit reached in *Stephens*. Treas. Reg. § 1.162-21(b)(2) provides that "[c]ompensatory damages . . . paid to a government do not constitute a fine or penalty." This regulation, of course, merits judicial deference.

The Federal Circuit's decision in this case, in finding Mr. Nacchio's forfeiture payment to be non-

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transcript of Mr. Nacchio's resentencing establishes that everyone involved in the proceedings – Mr. Nacchio, the prosecution and most importantly the sentencing judge – intended all along that the funds that Mr. Nacchio would forfeit would be used to compensate victims. *See* n.3, *supra*.

deductible, hinges on the notion that there is some distinction between restitution (on the one hand) and forfeiture/remission (on the other) that renders the former deductible, but the latter necessarily nondeductible.[6] The Federal Circuit's decision conflicts directly with *Stephens* because, under the Federal Circuit's decision, deductibility would turn not on whether funds extracted from a criminal defendant are earmarked and used to compensate victims (which is the correct test under *Stephens*), but rather on what *mechanism* prosecutors choose to employ to deliver such funds to those victims.

Prosecutors have available a variety of procedural mechanisms by which they might return to victims proceeds of a crime held by a defendant. These include restitution, restoration and forfeiture/ remission (which was the mechanism used in Mr. Nacchio's case). As a matter of substance, these various mechanisms have the same result, in that they return to victims the proceeds of a crime held by a defendant.[7] Although these mechanisms for

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[6] The cases that the Federal Circuit cites for the proposition that forfeiture is necessarily punitive, *see* App. 19a, are inapposite. None of those cases involved the determinative circumstance of Mr. Nacchio's case, which is that the proceeds of the forfeiture were earmarked and used to compensate victims. For example, both *United States v. Venturella*, 585 F.3d 1013 (7th Cir. 2009) and *United States v. Blackman*, 746 F.3d 137, 143 (4th Cir. 2014) are distinguishable from this case because those cases involved *both* forfeitures and restitution payments. In such cases, the purpose of the forfeiture was of course punitive, as any and all compensatory purpose was completely fulfilled by the separate payment of restitution.

[7] This equivalency of substance is reflected in the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA"), P.L. 106-185 (2000),

returning to victims the proceeds of a crime held by a defendant are equivalent in their compensatory substance, the Federal Circuit's decision incorrectly sets aside one such mechanism, forfeiture/remission, as automatically rendering payments to be non-deductible. This conflicts sharply with the holding of the Second Circuit in *Stephens*, which establishes that deductibility turns on whether a payment is punitive or compensatory in nature (*not* on the mechanism employed to make the payment).

The dichotomy between *Stephens* and the Federal Circuit's opinion in this case is further demonstrated by *United States v. Boylan*, 392 F.3d 1002 (9th Cir. 2004). The Federal Circuit's opinion in this case conflicts with *Stephens* by singling out one mechanism for returning the proceeds of a crime to victims – forfeiture/remission – as being necessarily punitive and thus necessarily non-deductible. In *Boylan*, the Ninth Circuit recognized that the victims of a large fraudulent investment scheme had established a sufficient interest in the forfeited illegal proceeds so as to have rights in the forfeited property under a theory of constructive trust. *See Boylan, id.* at 1005 (when the Government "moved for forfeiture without recognizing the rights of the beneficiaries of the constructive trust" that the court had recognized as existing over the seized property,

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which is the statute that created the remission process for forfeited funds. Section 6 of CAFRA uses interchangeably the terms "restitution" and "restoration" when describing the purpose of the newly enacted remission procedure. In a section entitled "Use of Forfeited Funds to Pay *Restitution* to Crime Victims," CAFRA describes the remission process as a transfer of forfeited property serving as "*restoration* to any victim of the offense giving rise to the forfeiture." *Id.* (emphasis added).

the Government's "acquisition of the res did not wipe out these equitable interests.").

Thus under the Ninth Circuit's theory of constructive trust, as set forth in *Boylan*, the remission process merely returns the *res* to the victims who had held rights in the forfeited property all along. Such a return of property to its rightful owners is necessarily compensatory in nature.

As set forth herein, the Federal Circuit's decision in this case stands in direct conflict with the Second Circuit's decision in *Stephens*. The Ninth Circuit's decision in *Boylan*, the Tax Court's decision in *Cavaretta* and Treas. Reg. § 1.162-21(b)(2) underscore the severity of this circuit split. This Court should grant a writ of *certiorari* so as to bring uniformity to this important area of law.

II.

THE FEDERAL CIRCUIT'S HOLDING THAT FORFEITURES ARE NECESSARILY NON-DEDUCTIBLE CONFLICTS WITH THE FIRST CIRCUIT'S HOLDING IN *FRESENIUS*.

The Federal Circuit's holding that forfeitures are necessarily non-deductible also conflicts with the First Circuit's decision in *Fresenius*, 763 F.3d 64.

Fresenius concerned the deductibility of payments that a defendant had made to the Government in settlement of claims under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733. The Government argued in *Fresenius* that absent a

provision in the settlement agreement spelling out that such settlement payments are deductible, payments for settlement of claims under the FCA are necessarily punitive and thus nondeductible. The First Circuit rejected this argument. Like the Second Circuit in *Stephens*, the First Circuit in *Fresenius* was unequivocal in stating that deductibility turns on "the clear statutory and regulatory language conferring deductibility upon compensatory payments," such as Treas. Reg. § 1.162-21(b)(2). 763 F.3d at 71.

Taking its analysis one step further, the First Circuit held in *Fresenius* that "[u]nder generally accepted principles of tax law," a court should determine deductibility by inquiring as "to the economic realities of the transaction." *Id.* at 70. As the First Circuit explained in *Fresenius*, only an inquiry into the economics of the transaction is consistent with "the case law's sensible emphasis on economic reality." *Id.* at 71. Like the Second Circuit's decision in *Stephens*, the First Circuit's decision in *Fresenius* has an unmistakable takeaway. As the First Circuit in *Fresenius* itself concluded, "[s]ubstance matters." *Id.* at 70.

Applying the lesson of *Fresenius* to Mr. Nacchio's case, there can be no denying that the substantive economic reality of Mr. Nacchio's forfeiture and remission is that the funds that Mr. Nacchio forfeited were used to compensate victims. *See* pp. 7-8, nn.3,4, *supra*. In light of this reality, Mr. Nacchio's forfeiture and remission is – using the language of 26 U.S.C. § 162(f) – "similar" to a restitution payment and dissimilar to a "fine" or to a

"penalty." The Federal Circuit's supposed distinction among the procedural mechanisms used to bring about such compensation (*i.e.*, the notion that restitution is necessarily compensatory whereas forfeiture/remission is somehow necessarily punitive)[8] implodes in the face of the First Circuit's mandate in *Fresenius* to look to the "economic realities of the transaction." 763 F.3d at 70.

In light of the foregoing, the Federal Circuit's decision in this case conflicts directly with the decision of the First Circuit in *Fresenius*, warranting this Court's granting this petition for a writ of *certiorari* so as to resolve this circuit split.

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[8] The Federal Circuit's decision that funds that are returned to victims via restitution are deductible, whereas funds that are forfeited and remitted to victims are non-deductible, has the additional undesirable result of incentivizing creative attorneys to structure compensatory payments to victims so as to bring about such attorneys' preferred tax result, regardless of any considerations of substance. Under the Federal Circuit's reasoning, a creative defense attorney can attempt to preserve deductibility by making payments directly to identifiable victims. This could be done by settling concurrent civil litigation brought by such victims before forfeiture can be concluded in a criminal action; it could be done by making restitution payments to identifiable victims in situations in which there is no concurrent civil litigation; or by placing the proceeds of an alleged crime in a trust, so that the funds could be turned over to victims if the criminal proceedings take a turn towards likely forfeiture. Meanwhile, crafty prosecutors will seek to bring about their desired outcome of denying a tax deduction for payments made to compensate victims, by refusing to make restitution to easily identifiable victims, preferring the much more laborious (but non-deductible) process of forfeiture and remission. Congress's intent that victims be compensated as efficiently as possible would thus be subverted in favor of aggressive attorneys playing games to bring about their preferred tax result.

III.

THE ATTORNEY GENERAL'S SUPPOSED DISCRETION TO GRANT REMISSION HAS NO BEARING ON THE ECONOMIC REALITY THAT MR. NACCHIO'S FORFEITURE WAS COMPENSATORY IN NATURE.

Petitioners anticipate that the Government, in opposing this petition, will argue that Mr. Nacchio's case is distinguishable from *Stephens* and *Fresenius*. In so arguing, the Government will contend that the Attorney General's supposed discretion in granting remission eliminates any possibility of a forfeiture being compensatory in purpose. Indeed, the Federal Circuit (incorrectly) held below that the "Attorney General's post-hoc decision to use the forfeited funds to remission did not transform the character of the forfeiture so that it was no longer a 'fine or similar penalty' under § 162(f). This holding is in error, on both the facts and the law.

Factually, the decision to remit the proceeds of Mr. Nacchio's forfeiture to victims was not made *post-hoc*, but rather was made *at least* as early as Mr. Nacchio's resentencing, when both the prosecution and the resentencing court expressed their intent that the forfeited funds would be directed to Qwest shareholders whose stock had lost value. This is detailed in footnote 3, *supra*.

Legally, the process set forth in federal law for carrying out the prosecution's representations that the forfeited funds would be used to compensate victims – including the Attorney General ordering

remission – are mere mechanics necessary to bring about that pre-ordained outcome. This is reflected in 28 C.F.R. § 9.8 ("Regulations Governing the Remission or Mitigation of Administrative, Civil and Criminal Forfeitures"), which sets forth detailed and mandatory regulations that the Attorney General *must* follow in deciding whether to grant or deny individual petitions for remission.

Under 28 C.F.R. 9.8(e), remission may be denied only when "(1) There is substantial difficulty in calculating the pecuniary loss incurred by the victim or victims; (2) The amount of the remission, if granted, would be small compared with the amount of expenses incurred by the Government in determining whether to grant remission; or (3) The total number of victims is large and the monetary amount of the remission so small as to make its granting impractical." The Attorney General is bound by these regulations. The notion that the Attorney General may deny remission whenever he or she happens to feel like doing so simply does not exist in the applicable law or regulations.

The obligation of the Attorney General to return forfeited funds to victims, as set forth in these regulations, dovetails with the Attorney General's obligations under the Crime Victims' Rights Act, 18 U.S.C. § 3771 *et seq.* That statute states that "[o]fficers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection

(a)[;]" 18 U.S.C. § 3771(a)(6), meanwhile, provides that a crime victim has "[t]he right to full and timely restitution as provided in law." Indeed, CAFRA (*see* n.7, supra), which amended federal forfeiture law to create the remission process (where none had existed before), manifests Congress's intent that forfeited assets be returned to victims of the offense that gave rise to the forfeiture whenever possible.[9]

In light of the foregoing, the supposed discretion of the Attorney General with regard to the remission of forfeited funds has no bearing on the substantive economic reality that Mr. Nacchio's forfeiture was compensatory in nature. Mr. Nacchio's forfeiture therefore is deductible under the reasoning of the Second Circuit in *Stephens* and the First Circuit in *Fresenius*, with which the Federal Circuit's decision in this case stands in sharp conflict.

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[9] The Federal Circuit's decision incorrectly relies upon 18 U.S.C. § 981(e) for the proposition that the Attorney General may "retain property forfeited pursuant to this section, or to transfer such property on such terms and conditions as he may determine ... as restoration to any victim of the offense giving rise to the forfeiture." App. 21a. Yet 18 U.S.C. § 981(e) is not applicable to Mr. Nacchio's case. This is because 28 U.S.C. § 2641(c) provides that if notice of forfeiture is included in a criminal indictment (as it was in Mr. Nacchio's case), then 21 U.S.C. § 853, as opposed to 18 U.S.C. § 981(e), governs the forfeiture. 21 U.S.C. § 853(i), entitled "Authority of the Attorney General," does *not* contain any such broad discretionary language, but rather vests the Attorney General with the power to "grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this subchapter, or take any other action to protect the rights of innocent persons which is in the interest of justice." 21 U.S.C. § 853(i) is yet another authority evincing the intent of Congress that the Attorney General's role in the remission process is to further a compensatory purpose.

IV.

THE FEDERAL CIRCUIT'S DECISION WILL RESULT IN FORUM SHOPPING THAT WILL UNDERMINE CONGRESS'S INTENT THAT THERE BE CONCURRENT JURISDICTION.

The circuit split that the Federal Circuit's precedential decision has created is exceptionally severe because it incentivizes plaintiffs in future tax refund cases involving forfeited funds to employ the applicable jurisdictional statutes to forum shop.

The applicable jurisdictional statutes give a plaintiff in a tax refund case the choice to bring his or her case *either* in the Court of Federal Claims, 28 U.S.C. § 1491(a)(1), *or* in the federal district court for the district in which the plaintiff resides, 28 U.S.C. § 1346(a)(1). The Federal Circuit's holding in this case that forfeitures are necessarily non-deductible will undoubtedly signal plaintiffs in similar cases to steer clear of the Court of Federal Claims (which is bound by precedents of the Federal Circuit). In light of the Federal Circuit's decision, any plaintiff who seeks a refund of taxes paid on forfeited funds will (without hesitation) invoke 28 U.S.C. § 1346(a)(1) and bring his or her case in federal district court, rather than in the Court of Federal Claims. This will be especially true of any similar case arising in the First Circuit or the Second Circuit, in light of the clear conflict between the Federal Circuit's decision in this case and both the First Circuit's decision in *Fresenius* and the Second Circuit's decision in *Stephens* (as described in detail, *supra*).

In enacting jurisdictional statutes that provide for concurrent jurisdiction of the federal district courts and the Court of Federal Claims, Congress intended that both forums would hear such cases. The split between the decision of the Federal Circuit in this case (on the one hand) and both the First Circuit's decision in *Fresenius* and the Second Circuit's decision in *Stephens* (on the other) frustrates that congressional intent, since every plaintiff who seeks a refund of taxes paid on forfeited funds will, in light of the decision of the Federal Circuit in this case, bring his or her case in federal district court, not in the Court of Federal Claims.

Such forum shopping among the courts of the federal judiciary is to be discouraged. This Court should grant the petition for a writ of *certiorari* so that this Court can overturn the Federal Circuit's decision in this case, which creates an incentive for plaintiffs in future similar cases to forum shop.

CONCLUSION

For the foregoing reasons, this petition for a writ of *certiorari* to the United States Court of Appeals for the Federal Circuit should be granted.

Dated: December 21, 2016

Respectfully submitted,

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[ENTERED JUNE 10, 2016]

United States Court of Appeals for the Federal Circuit

JOSEPH P. NACCHIO, ANNE M. ESKER,
Plaintiffs-Cross-Appellants

v.

UNITED STATES,
Defendant-Appellant

2015-5114, 2015-5115

Appeals from the United States Court of Federal Claims in No. 1:12-cv-00020-MCW, Judge Mary Ellen Coster Williams.

Decided: June 10, 2016

THOMAS A. GENTILE, Wilson, Elser, Moskowitz, Edelman & Dicker LLP, Florham Park, NJ, argued for plaintiffs-cross-appellants. Also represented by WILLIAM D. LIPKIND, Lampf, Lipkind, Prupis & Petigrow PC, West Orange, NJ

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Before O'MALLEY, CLEVENGER, and BRYSON, *Circuit Judges.*

O'MALLEY, *Circuit Judge.*

This is a tax case arising out of a criminal conviction for insider trading. Joseph P. Nacchio and Anne M. Esker ("Nacchio")[1] filed this action in the Court of Federal Claims seeking an income tax credit of $17,974,832 for taxes paid on trading profits of $44,632,464.38, which Nacchio was later ordered to forfeit to the United States following his conviction for insider trading with respect to those profits. The government opposed Nacchio's request, contending that his forfeiture payment was a nondeductible penalty or fine and that he was estopped from seeking tax relief because of his criminal conviction. The parties filed cross-motions for summary judgment.

The Court of Federal Claims denied the government's motion for summary judgment and granted Nacchio's cross-motion for partial summary judgment, holding that: (1) Nacchio may deduct his criminal forfeiture payment under Internal Revenue

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[1] We refer to Joseph Nacchio alone as the "taxpayer" for purposes of this appeal. Anne Esker, Nacchio's spouse, is a party to this case by virtue of having filed a joint income tax return with Nacchio for tax year 2007. She does not, however, have a separate or independent interest in the refund claim at issue.

Code (I.R.C.)[2] § 165, but not under I.R.C. § 162; and (2) Nacchio is not collaterally estopped from pursuing special tax relief under I.R.C. § 1341. Rather than proceed to trial on Nacchio's claim for special relief under I.R.C. § 1341, the government stipulated to the entry of final judgment in favor of Nacchio, waiving its right to challenge Nacchio's claims under § 1341 on other than deductibility and estoppels grounds; the government expressly reserved its right to appeal the court's adverse rulings on those issues. Nacchio reserved his right to appeal the court's adverse ruling as to deductibility under § 162.

The government filed this appeal on the grounds reserved in the parties' stipulation. Nacchio filed a cross-appeal. We find that Nacchio has failed to establish that his criminal forfeiture was not a "fine or similar penalty" and, therefore, reverse the court's judgment of deductibility under § 165. We affirm the court's judgment of non-deductibility under § 162. Because establishing deductibility under another section of the tax code is a prerequisite to pursuing special relief under § 1341, Nacchio cannot pursue a deduction under § 1341. Judgment must be entered in favor of the government.

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[2] The Internal Revenue Code is codified at Title 26 of the United States Code.

Background

A. Nacchio's Insider Trading Conviction

From 1997 to 2001, Nacchio served as Chief Executive Officer ("CEO") of Qwest Communications International, Inc. ("Qwest"). *Nacchio v. United States*, 115 Fed. Cl. 195, 197 (Fed. Cl. 2014). As part of his compensation for serving as Qwest's CEO, Nacchio received options to purchase shares of Qwest stock. *Id.* at 197-98. When Qwest opened a "trading window" in April 2001, Nacchio exercised his options to purchase, and then "sold 1,255,000 shares of Qwest stock." *Id.* On May 16, 2001, Nacchio entered into an automatic sales plan to sell his Qwest stock, and he sold his stock until May 29, 2001, the day before the price of Qwest stock fell below $38 per share. *Id.* Nacchio reported a net gain from these stock sales of $44,632,464.38 in his 2001 joint tax return and paid $17,974,832 in taxes on this gain. *Id.*

In 2005, a federal grand jury indicted Nacchio on forty-two counts of insider trading. *United States v. Nacchio*, No. 05-cr-00545-EWN, 2007 U.S. Dist. LEXIS 54655, at *2 (D. Colo. July 27, 2007). The indictment alleged that Nacchio "did knowingly and willfully sell . . . more than $100 million worth of Qwest common stock" in 2001 "while [he was] aware of and on the basis of material, non-public information," in violation of 15 U.S.C. §§ 78j, 78ff, and SEC Rules 10b-5 and 10b-5-1 (17 C.F.R. §§ 240.10b-5, 240.10b5-1). Government's Mot. Summ. J. Ex. 1, Dkt. 17 at 3-5, *Nacchio*, 115 Fed. Cl. 195 (No. 1:12-cv-00020), ECF No. 17. The indictment

also included criminal forfeiture allegations, pursuant to 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c), which would require Nacchio, if convicted, to forfeit to the United States the proceeds of his insider trading offenses. Joint Appendix ("J.A.") 41-42.

In April 2007, a jury found Nacchio guilty on nineteen of forty-two counts of insider trading. *Nacchio*, 2007 U.S. Dist. LEXIS 54655, at *2. The district court sentenced Nacchio to serve 72 months in prison, pay a 19 million dollar fine, and forfeit the gross income of $52,007,545.47 that Nacchio derived as a result of the insider trading. *Id.*

On March 17, 2008, a three judge panel of the Tenth Circuit reversed Nacchio's conviction and sentence. *United States v. Nacchio,* 519 F.3d 1140, 1169 (10th Cir. 2008). Specifically, the court held that the district court erred in excluding expert testimony that Nacchio had sought to introduce at trial. *Id.* at 1149-50. The Tenth Circuit then granted the government's petition for rehearing en banc and reinstated Nacchio's conviction, holding that the expert testimony was properly excluded. *See United States v. Nacchio*, 555 F.3d 1234, 1239 (10th Cir. 2009) (en banc). The en banc court remanded the matter to the panel for further proceedings on Nacchio's challenge to his sentence. *Id.*

On remand, the initial decisional panel upheld most aspects of the original sentence, but concluded that 18 U.S.C. § 981(a)(2)(B), rather than 18 U.S.C. § 981(a)(2)(A), applied to calculate the amount that Nacchio was required to forfeit. *United States v.*

Nacchio, 573 F.3d 1062, 1088-90 (10th Cir. 2009). Specifically, the panel held that the district court had "applied the wrong legal framework" when it imposed a forfeiture amount representing the "gross proceeds" from Mr. Nacchio's sales of Qwest stock, rather than a forfeiture amount "that more closely approximates Mr. Nacchio's gain *resulting from the offense* of insider trading." *Id.* at 1087-90 (emphasis in original). The panel remanded the case to the district court for resentencing.

On June 24, 2010, the district court resentenced Nacchio to serve 70 months in prison, pay a 19 million dollar fine, and forfeit the net proceeds from his insider trading—$44,632,464.38. J.A. 140-48. At the conclusion of the resentencing hearing, Nacchio's attorney inquired whether the district court would "direct that the [forfeited] money go to a fund . . . set up for distribution to [Nacchio's] victims." J.A. 494-95. In response, the prosecutor advised the court that "the Government's intention is for . . . the forfeiture funds[ ] to be used to compensate victims," but that the decision would be made by the Asset Forfeiture and Money Laundering Section ("AFMLS") in Washington pursuant to its regulations. *Id.*

In January 2011, Nacchio entered into a settlement of a concurrent action against him by the Securities and Exchange Commission. The settlement required that Nacchio disgorge the sum of $44,632,464, less any amounts forfeited and paid to the United States by Nacchio in connection with his criminal case. Nacchio's criminal forfeiture thus satisfied his disgorgement obligation in the SEC civil

action. Nacchio's forfeited gain was subject to remission, pursuant to 18 U.S.C. § 981(e)(6). Thus, in September of 2011, the remission administrator retained by the Department of Justice ("DOJ") notified prior participants in private securities class action litigation or SEC civil litigation concerning Qwest stock that they were eligible to receive a remission from Nacchio's forfeiture. J.A. 508. In April of 2012, the Chief of the AFMLS authorized remission of the forfeited funds to eligible victims of Nacchio's fraud. J.A. 251-54.

B. Governing Provisions of the Tax Code

Section 1341 provides special relief to a taxpayer who is required to restore funds to a third party where the taxpayer included the funds in his income in a prior taxable year when it then "appeared that the taxpayer had an unrestricted right" to the funds. I.R.C. § 1341. Thus, a taxpayer must establish that *he* reasonably believed he had an unrestricted right to the funds at issue at the time he included those funds in his income. *See McKinney v. United States*, 574 F.2d 1240, 1243 (5th Cir. 1978). We have said that where a taxpayer knowingly obtains funds by fraudulent means, "it simply cannot appear from the facts known to him at the time that he has a legitimate, unrestricted claim to the money." *Culley v. United States*, 222 F.3d 1331, 1335 (Fed. Cir. 2000). As a prerequisite to relief under § 1341, the taxpayer must also establish that he is "entitled to a deduction (in excess of $3,000) under another section of the Internal Revenue Code for the loss." *Culley*, 222 F.3d at 1333; *see also Griffiths v. United States*, 54 Fed. Cl. 198, 202 (Fed. Cl. 2002)

("Section 1341 does not independently create a deduction.") (citation omitted).

Section 165(a) provides for the deduction of "any loss sustained during the taxable year and not compensated for by insurance or otherwise." I.R.C. § 165(c) provides limitations on losses of individuals. Section 165(c)(2) provides for the deduction of "losses incurred in any transaction entered into for profit, though not connected with a trade or business."

We agree with the parties that § 165 is subject to a "frustration of public policy" doctrine. Under this doctrine, a taxpayer cannot deduct a loss where its allowance "would frustrate sharply defined national or state policies proscribing particular types of conduct, evidenced by some governmental declaration thereof." *Tank Truck Rentals v. Comm'r*, 356 U.S. 30, 33-36 (1958) (citing *Comm'r v. Heininger*, 320 U.S. 467, 473-74 (1943)). In *Tank Truck Rentals*, the Supreme Court upheld the disallowance of a deduction for fines paid by a trucking company for violations of state maximum weight laws, observing that "[w]here a taxpayer has violated a federal or a state statute and incurred a fine or penalty he has not been permitted a tax deduction for its payment." *Id.* at 34. We agree with the government, moreover, that prior to 1969, the deduction of trade or business expenses under § 162(a) was limited by the same public policy doctrine that precluded loss deductions under § 165 when their allowance would frustrate sharply defined public policies. Section 162(a) provides for deductions of "ordinary and necessary expenses paid or incurred . . . in carrying on any trade or business."

In 1969, Congress codified the "frustration of public policy" doctrine as part of the Tax Reform Act of 1969, Pub. L. No. 91-172, § 902(a), 83 Stat. 487, 710, in the form of I.R.C. § 162(f). Section 162(f) provides: "FINES AND PENALTIES.—No deduction shall be allowed under subsection (a) for any *fine or similar penalty* paid to a government *for the violation of any law*." I.R.C. § 162(f) (emphases added). Although the amendments to § 162 did not explicitly affect § 165, the "frustration of public policy" doctrine has continuing vitality with respect to § 165. *See Stephens v. Comm'r*, 905 F.2d 667, 671 (2d Cir. 1990) ("Although *Tellier* and *Tank Truck Rentals* were both decided pursuant to Tax Code provisions relating to business expenses, the test for nondeductibility enunciated in those opinions is applicable to loss deductions under Section 165."). *See also Wood v. United States*, 863 F.2d 417, 421 (5th Cir. 1989) (holding that "it is easy to sustain a public policy rationale for denying a loss deduction" sought under § 165); *Medeiros v. Comm'r*, 77 T.C. 1255, 1261 n.7 (1981) ("we cannot ascribe to Congress the intent, in enacting section 162(f), to disallow the deduction of this penalty under section 162(a) but to allow it as a loss deduction under section 165(a)"); Treas. Reg. (26 C.F.R.) § 1.165-1(a) (loss deductions under § 165(a) are "subject to any provision of the internal revenue laws which prohibits or limits the amount of the deduction"). The *Stephens* Court, thus, looked to § 162(f) when interpreting the scope of permissible loss deductions under § 165. We do the same.

C. Nacchio's Tax Credit Claim

In 2009, following Nacchio's forfeiture, Nacchio amended his 2007 tax return, claiming a $17,999,030 credit pursuant to I.R.C. § 1341. This amount represented the amount of tax Nacchio and his wife had paid on the profits attributable to Nacchio's exercise of Qwest options. In a letter dated September 3, 2009, the Internal Revenue Service ("IRS") disallowed Nacchio's credit, explaining that § 1341 may be invoked only after the right to claim a deduction is established elsewhere in the tax code. The IRS found, however, that Nacchio's forfeiture was "the payment of a penalty for a violation of the law and, unlike restitution, is not remedial in nature," so a deduction was not permitted under any section of the tax code, including I.R.C. § 165(c)(2). J.A. 552. Nacchio's counsel appealed this decision within the IRS, but Nacchio was again denied a refund.

On January 10, 2012, Nacchio commenced this action before the Court of Federal Claims, seeking a credit of $17,974,832[3] pursuant to I.R.C. § 1341. Appellees and the United States agreed to litigate cross-motions for summary judgment prior to discovery. The government argued that: (1) § 162(f)

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[3] When Appellees filed their amended return for the 2007 tax year, they erroneously calculated the amount of tax that they had previously paid on Mr. Nacchio's gain from his exercise of Qwest stock options (and sales of corresponding shares), by failing to deduct from the amount of Mr. Nacchio's gain $60,081.00 in brokerage fees. As a result, the amended return for the 2007 tax year claimed a refund of $17,999,030.00, when the correct amount was $17,974,832.00. Appellee Br. 12 n.3.

barred any deduction under either § 165 or § 162, and (2) even if the loss caused by the forfeiture was a deductible loss under § 165 or § 162, Nacchio was estopped from seeking the special tax relief authorized by § 1341 because his criminal conviction was conclusive with respect to his state of mind. Nacchio argued that his loss was deductible under both § 165 and § 162 and that the question of whether it appeared that he had an unrestricted right to his trading profits in 2001 was not actually litigated in his criminal trial.

The Court of Federal Claims denied the government's motion for summary judgment and granted-in-part Nacchio's motion for partial summary judgment. The court held that Nacchio's forfeiture payment was deductible under I.R.C. § 165. *Nacchio*, 115 Fed. Cl. at 203. First, it noted that the government did not dispute that Nacchio's forfeiture is a loss under § 165. Second, it found that the public policy against insider trading did not prevent the deduction of the amount forfeited here. Specifically, the court compared Nacchio's case to *Stephens* and reasoned that "[d]isallowing the deduction would result in a 'double sting' by requiring taxpayers to both make restitution and pay taxes on income they did not retain." *Nacchio*, 115 Fed. Cl. at 202.

The court expressly rejected the government's argument that deduction of the forfeiture was barred by I.R.C. § 162(f), which prohibits deductions "for any fine or similar penalty paid to the government for the violation of any law." *Id.* The court's rationale was that, unlike the 19 million dollar fine, which

was clearly punitive and was paid from assets unrelated to insider trading, the forfeiture "exclusively represented the disgorgement of Mr. Nacchio's illicit net gain from insider trading." *Id.* at 203. In addition, the court found that "Nacchio's forfeiture was used for a compensatory purpose" because, even if not characterized as restitution, the amounts paid ultimately were returned to victims of Nacchio's crimes through remission. *Id.* In a footnote, the court rejected Nacchio's attempt to deduct his forfeiture under § 162 as an "ordinary and necessary business expense." *Id.* at 203 n.7.

The court then rejected the government's argument that Nacchio was collaterally estopped from pursuing special relief under § 1341. Relying on *Culley*, the government argued that, because fraudulent intent is a necessary element of the crime of which Nacchio was convicted, Nacchio could not now argue that he lacked such intent, or that he somehow could have both subjectively believed he had an unrestricted right to the funds and fraudulently engaged in trades to obtain them. Nacchio contended that the precise issue arising under § 1341 was not presented to the jury. He also asserted that he had not had a full and fair opportunity to litigate the question of his intent because certain evidentiary rulings in the criminal action prevented him from doing so. On both of these grounds, Nacchio argued that collateral estoppel should not apply. The Court of Federal Claims agreed with Nacchio, finding that "[t]he precise issue of whether Mr. Nacchio himself subjectively believed he had an unrestricted right to the funds he received from trading in 2001 was not adjudicated in the

criminal proceeding." *Id.* at 204. The court concluded that the question of whether Nacchio acted with the mistaken belief required by § 1341 was a factual one to be decided at trial.

The government moved for reconsideration of the court's decision, but the court denied the motion. Rather than proceed to trial on the issue of Nacchio's subjective belief under § 1341, the government stipulated to the entry of a final judgment in favor of Nacchio, reserving its right to appeal the court's adverse rulings on the applicability of § 162(f) and estoppel. In the stipulation, Nacchio also reserved the right to appeal the Court of Federal Claims's determination that the forfeited funds were not deductible as a business expense under § 162.

The government appealed and Nacchio cross-appealed. We have jurisdiction under 28 U.S.C. § 1295(a)(3).

DISCUSSION

We review the Court of Federal Claims's grant of Nacchio's motion for partial summary judgment *de novo*. *Culley*, 222 F.3d at 1333. Whether Nacchio is entitled to an income tax deduction for the amount he forfeited to the government as part of his sentence for insider trading is a question of law, reviewable *de novo*. The question presented is, in essence, whether Nacchio must forfeit his insider trading gains to the government using after-tax dollars.

A. I.R.C. § 165(c)(2)

To begin with, it is questionable whether § 165(c)(2) is even applicable where, as here, the "loss" sustained arose from a mandatory forfeiture of profit pursuant to a criminal conviction. Instead, the "losses" that § 165(c)(2) generally seems to contemplate are losses in the value of assets purchased for investment that failed to bear fruit. *See, e.g.*, *Nathel v. Comm'r*, 615 F.3d 83, 94 (2d Cir. 2010) (involving deductibility of capital contributions allegedly made to obtain releases from loan guarantees); *Chen v. Comm'r*, No. 12982-12S, 2014 Tax Ct. Summary LEXIS 6, at *11 (T.C. 2014) (involving deductibility of allegedly abandoned investment property); *Seed v. Comm'r*, 52 T.C. 880, 884-85 (1969) (involving deductibility of financial contributions to an abandoned venture).

In any event, the government conceded before the Court of Federal Claims that Nacchio's forfeiture was a "loss" under § 165(c)(2), and we do not revisit that question on appeal. *Nacchio*, 115 Fed. Cl. at 201. Instead, the government argues that, despite being a "loss," the forfeiture is not deductible under § 165 because allowing the deduction would contravene public policy, as codified in § 162(f). The relevant question for resolving this appeal, accordingly, is whether Nacchio's criminal forfeiture is a "fine or similar penalty" under § 162(f), or if allowing a deduction in these circumstances would otherwise frustrate public policy.

We recognize that, as a general matter, we must use a flexible standard to "accommodate both

the congressional intent to tax only net income, and the presumption against congressional intent to encourage violation of declared public policy." *Tank Truck Rentals*, 356 U.S. at 35. And "[i]ncome from a criminal enterprise is taxed at a rate no higher and no lower than income from more conventional sources." *Comm'r v. Tellier*, 383 U.S. 687, 691 (1966). We further understand Nacchio's argument that not being allowed to deduct his forfeited income from his taxes would result in a sort of "double sting": both giving up his ill-gotten gains and paying taxes on them. But in this case, the relevant statutes, regulations, and body of relevant case law lead us to conclude that Nacchio's criminal forfeiture must be paid with after-tax dollars, just as fines are paid with after-tax dollars. Specifically, as explained below, the government has demonstrated that Nacchio's criminal forfeiture is a "fine or similar penalty" within the meaning of § 162(f).

First, the plain language of the statutory provision under which the amount Nacchio forfeited was calculated supports the view that Congress intended the forfeiture to be paid with after-tax dollars. The Tenth Circuit held on remand that Nacchio's forfeiture should be calculated in accordance with § 981(a)(2)(B), not § 981(a)(2)(A). *Nacchio*, 573 F.3d at 1090. Section 981(a)(2)(B) states that:

> [T]he term "proceeds" means the amount of money acquired through the illegal transactions resulting in the forfeiture, less the direct costs incurred in providing the goods or services. . . .

> The direct costs *shall not include* . . . any part of *the income taxes* paid by the entity.

18 U.S.C. § 981(a)(2)(B) (emphases added). Thus, the language of the statute suggests that—by design—the forfeiture amount does not account for taxes paid on the amount of money acquired through the illegal transactions.

Next, Treasury Regulation § 1.162-21(b)(1) defines "fine or similar penalty" for the purposes of § 162(f) as including, *inter alia*, "an amount—(i) Paid pursuant to conviction or a plea of guilty or *nolo contendere* for a crime (felony or misdemeanor) in a criminal proceeding." 26 C.F.R. § 1.162-21. In *Colt Industries, Inc. v. United States*, we looked to the Treasury Regulation's definition of a "fine or similar penalty" in denying deductions a taxpayer sought under § 162(a) for civil penalties it had paid to the state for violations of the Clean Water Act and the Clean Air Act. 880 F.2d 1311, 1313 (Fed. Cir. 1989) ("If there were any doubt about the meaning of the phrase 'fine or similar penalty', it is readily removed by reference to Treasury regulations promulgated in interpretation of the provision.").

Similarly, in this case, Nacchio's criminal forfeiture meets the definition of a "fine or similar penalty" under Treasury Regulation § 1.162-21(b)(1). Nacchio's criminal forfeiture was imposed pursuant to 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c), as part of his sentence in a criminal case. Section 981(a)(1)(C), as amended by the Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185,

§ 20, 114 Stat. 202, 224, authorizes the forfeiture of "proceeds" traceable to numerous felony offenses, including any offense constituting "specified unlawful activity" as defined by 18 U.S.C. § 1956(c)(7)(A). Section 1956(c)(7)(A), in turn, defines "specified unlawful activity" as any act or activity constituting an offense under 18 U.S.C. § 1961(1)(D), which includes "any offense involving . . . fraud in the sale of securities."

28 U.S.C. § 2461(c) requires forfeiture whenever a defendant in a criminal case "is convicted of the offense giving rise to the forfeiture," in which case the court "shall order the forfeiture of the property as part of the sentence in the criminal case." This forfeiture is mandatory when the relevant prerequisites are met. *See United States v. Blackman*, 746 F.3d 137, 143 (4th Cir. 2014) ("Notably, § 2461(c) (in conjunction with § 981) provides that the district court 'shall order' forfeiture in the amount of the criminal proceeds. As the Supreme Court remarked in a related context, 'Congress could not have chosen stronger words to express its intent that forfeiture be mandatory in cases where the statute applied.'") (quoting *United States v. Monsanto*, 491 U.S. 600, 607 (1989)).

Though we have not considered the precise question posed here, other courts of appeals have done so, repeatedly concluding that forfeitures of property to the government similar to the one at issue are not deductible because they are punitive. *See King v. United States*, 152 F.3d 1200, 1202 (9th Cir. 1998) ("on this matter of national tax policy there is something to be said for uniformity among

the circuits"). For example, in *Wood*, the Fifth Circuit denied a loss deduction under § 165 for the civil forfeiture of proceeds from the taxpayer's drug trafficking activities. 863 F.2d at 418. The appellant pled guilty to a criminal offense, conspiracy to import marijuana and importation of marijuana, and was sentenced to serve four years in prison and pay a $30,000 fine. *Id.* The appellant argued, *inter alia*, that, because he already paid his criminal debt by means of imprisonment and the $30,000 fine, he should not have to pay taxes on proceeds he forfeited to the government. *Id.* at 421. The court, nevertheless, found that his drug proceeds were taxable income and that "[f]orfeiture cannot seriously be considered anything other than an economic penalty for drug trafficking." *Id. See also Fuller v. Comm'r*, 213 F.2d 102, 105-06 (10th Cir. 1954) (disallowing business loss deduction under the precursor of § 165 for the cost of whiskey confiscated by law enforcement agencies of a "dry" state); *King*, 152 F.3d at 1201-02 (no loss deduction under § 165(a) for voluntary disclosure and forfeiture of hidden drug trafficking profits).

In non-tax cases, our sister courts of appeals have confirmed that, while restitution is compensatory, criminal forfeiture under § 2461(c) serves a distinct, punitive purpose. The Eleventh Circuit held in *United States v. Joseph* that a convicted criminal could not offset his restitution by the amount he forfeited under 18 U.S.C. § 981 and 28 U.S.C. § 2461. 743 F.3d 1350, 1354 (11th Cir. 2014). The court held that, "[w]hile restitution seeks to make victims whole by reimbursing them for their losses, forfeiture is meant to punish the defendant

by transferring his ill-gotten gains to the United States Department of Justice (DOJ)." *Id.* In *Blackman*, the Fourth Circuit reversed the trial court's ruling that it did not need to order criminal forfeiture under 28 U.S.C. § 2461(c) when it had ordered restitution in the same amount for a different offense than the one at issue in the case. In so doing, the court stated that, restitution and forfeiture serve "distinct purposes: restitution functions to compensate the victim, whereas forfeiture acts to punish the wrongdoer." *Blackman*, 746 F.3d at 143.

In *United States v. Venturella*, defendants who were convicted of mail fraud argued that "imposing restitution and forfeiture for the same crime is an improper double payment, which constitutes double jeopardy." 585 F.3d 1013, 1019 (7th Cir. 2009). The Seventh Circuit disagreed, stating that "forfeiture seeks to punish a defendant for his ill-gotten gains by transferring those gains . . . to the United States Department of Justice . . . while restitution seeks to make the victim whole." *Id.* at 1019-20 (quoting *United States v. Emerson*, 128 F.3d 557, 567 (7th Cir. 1997) (internal quotation marks omitted)); *see also United States v. Taylor*, 582 F.3d 558, 567 (5th Cir. 2009) ("Courts have also declined to offset restitution based on the distinct purposes served by restitution and forfeiture.").

Like the trial court, Nacchio cites to *Stephens* to argue that not all payments ordered by a court pursuant to a criminal conviction are non-deductible losses. The taxpayer in *Stephens*, like Nacchio, was

convicted of white collar crimes. At sentencing, the prosecutor recommended that Stephens pay restitution to the company whose funds he had embezzled. *Stephens*, 905 F.2d at 668. Stephens was then sentenced to several years in prison and fines, but part of the prison term was suspended "on the condition that he make restitution to Raytheon" in the amount he embezzled plus interest. *Id.* The Second Circuit held that the restitution was "a remedial measure to compensate another party, not a 'fine or similar penalty.'" *Id.* at 672-73. It thus found the restitution deductible under § 165.

Stephens is distinguishable. Unlike Nacchio's case, the *Stephens* case involved court-ordered restitution—imposed as a condition of his partially suspended sentence—which was clearly remedial, as it restored the embezzled funds to the injured party. The court noted that the payment was so "Raytheon [would] get its money back" and that "Stephens' payment was made to Raytheon and not 'to a government.'" *Id.* at 673. Thus, allowing the restitution to be deducted comported with those cases explaining the difference between restitution orders and forfeiture orders. In Nacchio's case, by contrast, forfeiture, not restitution, is at issue. The court's amended judgment specifically provided that the amount of restitution owed was "$0.00" and that restitution was "not applicable." J.A. 143, 148. At the resentencing hearing, the district court judge described Nacchio's sentence of imprisonment, fine, and disgorgement as "three forms of penalty." J.A. 486. The judge further found that "the goal of restitution, sadly [ ] is not applicable here" because "there is no provision in the law for restitution." *Id.*

Instead, the district court directed that the fine of 19 million dollars "be deposited to the Crime Victims' Fund" to "help fund state and local victims' assistance programs[,] . . . And the forfeiture money can be used to assist victims *within limitations* under the law." *Id.* (emphasis added).

Nacchio clings to this last point—the fact that the forfeited funds made their way to the victims of the crimes. He argues that the remission process by which the funds were distributed to the victims is governed by the Civil Asset Forfeiture Reform Act of 2000, which has a compensatory purpose: to restore forfeited assets to victims of the offense giving rise to the forfeiture. He also points out that the remission payments were made to identifiable persons who would have a civil cause of action against Mr. Nacchio to recover those funds. He insists that the forfeiture was tantamount to restitution.

The Attorney General's post-hoc decision to use the forfeited funds for remission did not transform the character of the forfeiture so that it was no longer a "fine or similar penalty" under § 162(f). The decision to use the forfeited funds to compensate the victims was discretionary. Section 981(e) authorizes the Attorney General to "retain property forfeited pursuant to this section, *or* to transfer such property on such terms and conditions as he *may* determine" "(6) as restoration to any victim of the offense giving rise to the forfeiture." 18 U.S.C. § 981 (emphases added). In addition, 21 U.S.C. § 853(i), which describes criminal forfeiture procedures applicable to § 2461(c), empowers the Attorney General to "grant petitions for . . .

remission of forfeiture . . . *or* take *any other action* to protect the rights of innocent persons" with respect to forfeited property. 21 U.S.C. § 853(i) (emphases added).

Consistent with these statutes, the prosecutor stated at resentencing that the decision as to whether Nacchio's forfeiture would be used to compensate victims would be made by the AFMLS in Washington. J.A. 494-95. The Attorney General has delegated the authority to grant petitions for remission to the Chief of the AFMLS. J.A. 252.

Allowing Nacchio to deduct his forfeiture because the AFMLS decided to distribute it to victims through remission would mean that whether two people convicted of the same crimes could deduct their criminal forfeiture would turn not on their actions, or the statutes governing their sentencings, but on the after-the-fact discretionary decisions of a third party. This is not the law. Instead, "[t]he characterization of a payment for purposes of § 162(f) turns on the origin of the liability giving rise to it." *Bailey v. Comm'r*, 756 F.2d 44, 47 (6th Cir. 1985) (citing *Middle Atl. Distribs. v. Comm'r*, 72 T.C. 1136, 1145 (1979); *Uhlenbrock v. Comm'r*, 67 T.C. 818, 823 (1977)). We think Congress could not have intended to create a scheme in which the applicability of § 162(f) would depend upon how the government, in its discretion, later decided to use the funds generated by a fine or similar penalty.

Second, although the forfeited funds wended their way to Nacchio's victims, the forfeited amount is unrelated to the amount of losses suffered by the

victims. While Nacchio forfeited his criminal "proceeds"—about 44 million dollars—the victims claim to have suffered almost 12 billion dollars in cumulative losses. J.A. 513. Though not dispositive, the fact that Nacchio's forfeiture was pegged to his profits and not to the victims' losses weighs against a conclusion that Nacchio's forfeiture was restitution to those victims. Nacchio cites *Fresenius Medical Care Holdings, Inc. v. United States*, 763 F.3d 64 (1st Cir. 2014), for the proposition that this court must look to the "economic reality," rather than the form, of the particular transaction at issue when deciding proper tax treatment. Here, the economic reality is that Nacchio was punished through forfeiture, not that Nacchio's victims were fully compensated. Even when a fine subsequently is applied as restitution, deduction of the fine is disallowed. *Bailey*, 756 F.2d at 47.

For all of these reasons, we hold that the trial court erred in ruling that Nacchio may deduct his forfeiture under § 165.

B. I.R.C. § 162(a)

We briefly address Nacchio's cross-appeal, in which he argues that the Court of Federal Claims erred in holding that the forfeited funds are not deductible under I.R.C. § 162. *Nacchio*, 115 Fed. Cl. at 203 n.7. It is necessary to address this cross-appeal in light of our holding of non-deductibility under § 165 because Nacchio contends that § 162 provides an alternative basis for him to deduct the

forfeiture.[4] Section 162(a) allows "as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." Nacchio argues that his criminal forfeiture was an "ordinary and necessary expense paid or incurred in carrying on his trade or business" because he was required to forfeit funds that Qwest, through the mechanism of options, had given to him as compensation in the course of his employment as Qwest's CEO.

Because § 162(f) also applies to loss deductions under § 162(a), we affirm the trial court's ruling that Nacchio cannot deduct his forfeiture under § 162 for the reasons articulated in Section A. above.

C. I.R.C. § 165(c)(1)

Nacchio also argues that the Court of Federal Claims did not specify in its holding whether the deduction was allowed under § 165(c)(2) or § 165(c)(1). Therefore, Nacchio argues, for the first time on appeal, that his forfeiture payment is deductible under *either* provision. Thus, his position is that the forfeiture is alternatively deductible under § 165(c)(1) as a "loss" incurred in a "trade or business." We generally do not consider issues that were not clearly raised in the proceeding below. *Mass. Mut. Life Ins. Co. v. United States*, 782 F.3d

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[4] Because Nacchio's argument is really one that urges an alternative ground in support of the trial court's judgment, that argument is not properly raised as a cross-appeal. No matter the procedural posture, we conclude that the argument is not well taken.

1354, 1369 (Fed. Cir. 2015) (citing *Hormel v. Helvering*, 312 U.S. 552, 556 (1941) and *San Carlos Apache Tribe v. United States*, 639 F.3d 1346, 1354-55 (Fed. Cir. 2011)). We think it is clear that the Court of Federal Claims only considered deductibility under (c)(2) and not (c)(1) of § 165. *See Nacchio,* 115 Fed. Cl. at 201. In any event, Nacchio's new argument is meritless. Nacchio's forfeiture is not deductible under either provision of § 165(c) because it is a fine or similar penalty.

CONCLUSION

For the foregoing reasons, we reverse the trial court's holding that Nacchio may deduct his forfeiture as a loss under § 165 and affirm its holding that Nacchio may not deduct his forfeiture as a loss under § 162. Because the parties do not dispute that deductibility under another provision of the tax code is a prerequisite to deductibility under § 1341, we further hold that Nacchio also may not seek special tax relief under § 1341. We, thus, do not reach the government's contention that Nacchio is stopped by his criminal conviction from seeking tax relief under § 1341. We affirm-in-part, reverse-in-part, and remand for entry of judgment in favor of the government.

AFFIRMED-IN-PART, REVERSED-IN-PART, AND REMANDED

COSTS

Each side to bear their own costs.

[ENTERED APRIL 30, 2015]

In the United States Court of Federal Claims
No. 12-20T
(Filed: April 30, 2015)

JOSEPH P. NACCHIO and ANNE M. ESKER,	*
Plaintiffs,	*
v.	*
UNITED STATES OF AMERICA,	*
Defendant.	*

ORDER

Plaintiffs, Joseph P. Nacchio and Anne M. Esker, and Defendant, the United States of America (collectively the "Parties"), having jointly moved for entry of final judgment in favor of Plaintiffs, and the Court having reviewed the terms of the Parties' Joint Motion for Entry of Stipulated Final Judgment in this matter, it is

ORDERED that the Parties' Joint Motion for Entry of Stipulated Final Judgment is **GRANTED**; and it is further

ORDERED that, pursuant to Rule 58 of the Rules of the Court of Federal Claims, and the Parties' stipulations set forth in their Joint Motion for Entry of Stipulated Judgment in this case filed with the Court and incorporated herein, the Clerk is directed to enter judgment in favor of Plaintiffs for a tax refund in the amount of $17,974,832 due for the 2007 tax year, pursuant to Section 1341 of the Internal Revenue Code, plus interest as provided by law (including such pre-judgment and post-judgment interest as provided by law). The Parties reserve all rights to appeal and to seek allowable costs and fees; and it is further

ORDERED, that the trial set for October 12-23, 2015, is canceled.

s/Mary Ellen Coster Williams
MARY ELLEN COSTER WILLIAMS
Judge

[ENTERED JUNE 25, 2014]

In the United States Court of Federal Claims
No. 12-20T
(Filed: June 25, 2014)

* *
JOSEPH P. NACCHIO and ANNE M. ESKER, *
*
Plaintiffs, *
*
v. *
*
UNITED STATES OF AMERICA, *
*
Defendant. *
* *

ORDER DENYING DEFENDANT'S MOTION FOR RECONSIDERATION

On April 9, 2014, Defendant filed a motion for reconsideration asking the Court to reconsider its March 12, 2014 Opinion denying Defendant's motion for summary judgment. Upon consideration of the parties' moving papers, supporting documents, and oral argument, the Court **DENIES** Defendant's motion.

s/Mary Ellen Coster Williams
MARY ELLEN COSTER WILLIAMS
Judge

[ENTERED MARCH 12, 2014]

In the United States Court of Federal Claims
No. 12-20T
(Filed: March 12, 2014)

* * * * * * * * * * * * * * * * * * * *	
JOSEPH P. NACCHIO and	*
ANNE M. ESKER,	*
	*
Plaintiffs,	*
	*
v.	*
	*
THE UNITED STATES,	*
	*
Defendant.	*
* * * * * * * * * * * * * * * * * * * *	

Income Tax Refund; Forfeited Income; 26 U.S.C. §§ 162, 165, 1341; Deduction of Loss; Business Expense; Nondeductible Fine or Similar Penalty under 26 U.S.C. § 162(f); Claim of Right under 26 U.S.C. § 1341; Issue Preclusion.

William D. Lipkind and Thomas A. Gentile, Lampf, Lipkind, Prupis & Petigrow, 80 Main Street, Suite 350, West Orange, NJ 07052, for Plaintiffs.

Kathryn M. Keneally and Jacob E. Christensen, United States Department of Justice, Tax Division, Court of Federal Claims Section, P.O. Box 26, Ben Franklin Post Office, Washington, D.C. 20044, for Defendant. David I. Pincus, United States Department of Justice, Tax Division, of Counsel.

OPINION AND ORDER

WILLIAMS, Judge.

Plaintiffs Joseph P. Nacchio and Anne M. Esker seek a refund of $17,974,832 in taxes they paid on gain Mr. Nacchio realized in 2001, but forfeited in 2007 when he was convicted for insider trading.

This matter comes before the Court on Defendant's motion for summary judgment and Plaintiffs' cross-motion for partial summary judgment. To qualify for a tax refund under 26 U.S.C. § 1341, Plaintiffs must establish both that Mr. Nacchio believed he had a claim of right to gain included in Plaintiffs' 2001 joint return, and that they are entitled to deduct the amount forfeited under a separate section of the Internal Revenue Code. Plaintiffs invoke 26 U.S.C. §§ 162 and 165 to claim the forfeiture is deductible as a business expense or loss.[1]

The Government contends that because Mr. Nacchio's forfeiture was imposed as punishment for insider trading, permitting a deduction would contravene both public policy and the prohibition in § 162(f) against the deduction of a "fine or similar penalty" paid to the United States. In addition, the

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[1] Hereinafter, unless otherwise indicated, all short form statutory citations refer to Title 26 of the United States Code ("Code") as codified in 2006.

Government submits that Plaintiffs cannot demonstrate that Mr. Nacchio believed that he had a bona fide claim to his 2001 trading gain because he was convicted of "willfully" violating securities laws.

The Court grants Plaintiffs' motion in part, finding that Plaintiffs may deduct the amounts forfeited as a loss under § 165. Whether Mr. Nacchio believed he had a claim of right to the trading proceeds in 2001 is a genuine issue of material fact that cannot be resolved on summary judgment.

Background[2]

Plaintiffs' Joint Return Includes Net Gain From Mr. Nacchio's Sale of Qwest Stock

From 1997 to 2001, Mr. Nacchio served as the Chief Executive Officer ("CEO") of Qwest Communications International, Inc. ("Qwest").

[2] This background is derived from the appendices to the parties' cross-motions for summary judgment and the opinions of the United States Court of Appeals for the Tenth Circuit: United States v. Nacchio, 519 F.3d 1140 (10th Cir. 2008); United States v. Nacchio, 555 F.3d 1234 (10th Cir. 2009) (en banc); United States v. Nacchio, 573 F.3d 1062 (10th Cir. 2009).

The Government objects to Plaintiffs' Exhibits A-I and J, K, N, O, Q, and R, but the Court does not rely on these exhibits in resolving the motions. The Court only considers Exhibits K, O, Q and R for purposes of jurisdiction. The Government also objects to Plaintiffs' Exhibit P on relevance grounds. The Court denies this objection. Exhibit P, the September 28, 2011 Notice of Qwest Communications Remission, is relevant to the proper legal characterization of Mr. Nacchio's forfeiture and a determination of whether that forfeiture is similar to a fine under § 162(f). Pls.' Mot. Summ. J. ("Mot.") iii, May 17, 2013; Fed. R. Evid. 401 (2011).

Compl. ¶ 2, Jan. 10, 2012; see Def.'s Mot. Summ. J. ("Mot.") Ex. 1 ¶ 1, Mar. 1, 2013. In lieu of cash, Mr. Nacchio received a large portion of his compensation as CEO in the form of stock options. United States v. Nacchio, 519 F.3d 1140, 1146 (10th Cir. 2008), vacated in part on reh'g en banc, 555 F.3d 1234 (10th Cir. 2009).

In April 2001, when Qwest opened a "trading window" pursuant to company policy to allow its officers to sell Qwest stock, Mr. Nacchio exercised his options and sold 1,255,000 shares of Qwest stock. Id. at 1147. On May 16, 2001, Mr. Nacchio entered into an automatic sales plan to sell his Qwest stock and continued to sell his stock until May 29, 2001, when it fell in price. Id. As the Tenth Circuit explained:

> One way that a corporate official can dispose of stock without liability for insider trading is to do so pursuant to a fixed sales plan. Under SEC rules, if a person has no material inside information when he "[a]dopt[s] a written plan for trading securities," and that plan sets fixed rules for when he will buy and sell shares in the future, then his trades are not "on the basis of" inside information even if he later does acquire inside information. [citation] Qwest's general counsel, Drake Tempest, was required to approve each stock sales plan entered into by each Qwest officer; doing so required a determination that the officer was not

> in possession of material nonpublic information at the time he entered into the plan. Except for sales according to a fixed sales plan, Qwest policy only permitted officers to sell stock during short "trading windows" each quarter immediately after quarterly earnings were announced. App. 1879.

Id. (first and second alterations in original).

Plaintiffs reported $44,632,464.38 in net gain from these stock sales in their 2001 joint tax return and paid $17,974,832 in taxes on this gain. Compl. ¶¶ 4, 10; Pls.' Mot. Summ. J. ("Mot.") 13 n.2, May 17, 2013.[3]

The Government's Civil and Criminal Actions Against Mr. Nacchio

On March 15, 2005, the United States Securities and Exchange Commission ("SEC") initiated a civil action alleging that Mr. Nacchio and other named defendants orchestrated a scheme to defraud the investing public by misrepresenting Qwest's performance and growth in 2001. Pls.' Mot. Ex. J. The SEC claimed Mr. Nacchio earned approximately $176.5 million selling Qwest stock while in possession of insider information. Id. at ¶ 158.

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[3] The $44,632,464.38 forfeiture represented the net profits Mr. Nacchio derived from selling Qwest stock between April 26, 2001 and May 29, 2001. Pls.' Mot. Ex. L.

On December 20, 2005, a federal grand jury indicted Mr. Nacchio on 42 counts of insider trading in connection with this conduct. Def.'s Mot. Ex. 1. During a 16-day trial in 2007, Mr. Nacchio exercised his Fifth Amendment right against self-incrimination and did not testify. See Def.'s Mot. Ex. 3 at 23:8-12. The jury convicted Mr. Nacchio on 19 counts of insider trading relating to stock Mr. Nacchio sold between April 26, 2001 and May 29, 2001. Def.'s Mot. Ex. 2. The Colorado District Court sentenced Mr. Nacchio to serve 72 months in prison, pay a $19 million fine, and forfeit the gross income Mr. Nacchio derived from insider trading in the amount of $52,007,545.47. Def.'s Mot. Ex. 4.

A three-judge panel of the United States Court of Appeals for the Tenth Circuit reversed Mr. Nacchio's conviction and sentence. Nacchio, 519 F.3d at 1169. On rehearing en banc, the Tenth Circuit reinstated Mr. Nacchio's conviction and remanded the matter to the Tenth Circuit panel for further proceedings on Mr. Nacchio's challenge to his sentence. United States v. Nacchio, 555 F.3d 1234, 1259 (10th Cir. 2009) (en banc). On remand, the panel held that the District Court erred by requiring Mr. Nacchio to forfeit his gross income rather than his net gain, reversed the sentence, and remanded to the District Court for resentencing. United States v. Nacchio, 573 F.3d 1062, 1088-90 (10th Cir. 2009).

Mr. Nacchio's Forfeiture of $44,632,464.38

During Mr. Nacchio's resentencing hearing on June 24, 2010, the District Court resentenced Mr. Nacchio to 70 months in prison, a $19 million fine,

and a $44,632,464.38 forfeiture. Pls.' Mot. Ex. M at 40:2-3, 45:1-4.[4] While the District Court could not order restitution as a matter of law, it directed that the $19 million fine be deposited into the Crime Victims' Fund to help fund state and local victims' assistance programs. Id. at 40:6-7, 9-14. At the conclusion of the resentencing hearing, the prosecution advised the District Court that the Government intended to use Mr. Nacchio's forfeiture "to compensate victims." Id. at 40:15-16, 48:25-49:5.

The Government's Remission of Approximately $44 Million Of The Forfeiture To Victims

Because Mr. Nacchio forfeited his gain from insider trading as "property which constitutes and is derived from proceeds traceable to" securities fraud, the forfeited proceeds were subject to remission. Def.'s Mot. Ex. 9 at 2-3. The remission administrator retained by the Department of Justice ("DOJ") notified certain victims of the Qwest securities fraud that they were eligible to receive a remission from Mr. Nacchio's forfeiture. Pls.' Mot. Ex. P.[5] In a memorandum dated April 17, 2012, DOJ's Chief of the Asset Forfeiture and Money Laundering Section authorized this remission. Def.'s Mot. Ex. 9 at 3-4. In

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[4] Mr. Nacchio and the prosecution stipulated to the amount of the forfeiture, and the $44,632,464.38 represented Mr. Nacchio's net proceeds from his insider trading. Pls.' Mot. Ex. L.

[5] These individuals participated in one of two private securities class action suits: In re Qwest Commc'ns Int'l Inc. Sec. Litig., No. 01-cv-1451 (D. Colo.) or U.S. Securities and Exchange Commission Fair Fund, SEC v. Qwest Commc'ns Int'l Inc., Civ. A. No. 04-D-2179 (D. Colo.). Pls.' Mot. Ex. P.

a press release dated May 3, 2012, DOJ announced it "ha[d] returned approximately $44 million to [112,210] victims of a securities fraud scheme related to Qwest . . . ." Def.'s Mot. Ex. 10.

Plaintiffs' Request For A Refund Of Taxes Paid In 2001

On or about October 6, 2008, Plaintiffs filed a joint income tax return for the 2007 tax year. Pls.' Mot. Ex. T at 4. Following Mr. Nacchio's forfeiture, Plaintiffs amended this tax return in March 2009, claiming a $17,999,030.00 credit pursuant to § 1341. Pls.' Mot. Ex. S at 8, 11.[6] In a letter dated September 3, 2009, the Internal Revenue Service ("IRS") disallowed Plaintiffs' credit, stating that § 1341 can be invoked only after a valid deduction is claimed pursuant to another Code section. Id. at 11. The IRS further stated that because Mr. Nacchio's forfeiture was a penalty for violating the law, it was "not remedial in nature" and a deduction was not permitted under any section of the Code. Id. Plaintiffs appealed this decision. Pls.' Mot. Ex. T. On January 14, 2010, the IRS Appeals Office denied Plaintiffs' refund claim, citing the same grounds for denial that the IRS set forth in its September 3, 2009 letter. Pls.' Mot. Ex. V.

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[6] When they filed an amended return for the 2007 tax year, Plaintiffs failed to deduct $60,081.00 in brokerage fees and erroneously calculated the amount of tax they had paid in 2001 on Mr. Nacchio's gain from insider trading. Pls.' Mot. 13 n.2. Thus, Plaintiffs' refund claim in this action is for $17,974,832.00, not $17,999,030.00. Id.

Discussion

Summary Judgment Standard

Summary judgment is appropriate where the evidence demonstrates there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Rule 56(a) of the Rules of the Court of Federal Claims; see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). A genuine dispute is one that "may reasonably be resolved in favor of either party." Liberty Lobby, 477 U.S. at 250. A fact is material if it "might affect the outcome of the suit." Id. at 248.

The moving party bears the burden of establishing the absence of any material fact, and any doubt over factual disputes will be resolved in favor of the non-moving party. Mingus Constructors, Inc. v. United States, 812 F.2d 1387, 1390 (Fed. Cir. 1987). Once this burden is met, the onus shifts to the non-movant to point to sufficient evidence to show a dispute over a material fact that would allow a reasonable finder of fact to rule in its favor. Liberty Lobby, 477 U.S. at 256-57. A court does not weigh each side's evidence when considering a motion for summary judgment, but "the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88 (1986) (quoting United States v. Diebold, Inc., 369 U.S. 654, 655 (1962) (per curiam)) (omission in original). When opposing parties both move for summary judgment, "the court must evaluate each party's motion on its own merits,

taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration." Mingus Constructors, 812 F.2d at 1391.

In adjudicating a motion for summary judgment, "the Court may neither make credibility determinations nor weigh the evidence and seek to determine the truth of the matter. Further, summary judgment is inappropriate if the factual record is insufficient to allow the Court to determine the salient legal issues." Mansfield v. United States, 71 Fed. Cl. 687, 693 (2006) (citation omitted). Cross-motions for summary judgment "are not an admission that no material facts remain at issue." Massey v. Del Labs., Inc., 118 F.3d 1568, 1573 (Fed. Cir. 1997) (citation omitted).

Section 1341 Refunds Of Taxes Paid On Monies Returned

Plaintiffs contend they are entitled to a refund of $17,974,832 under § 1341. Section 1341 "provides a special rule favorable to the taxpayer" that "applies when a taxpayer repays money in a current year that belongs to someone else, but was money that [the taxpayer] received and included in gross income in a prior year." Culley v. United States, 222 F.3d 1331, 1332 (Fed. Cir. 2000). The taxpayer must have subjectively believed he had an unrestricted right to the money in the year it was received based on all the facts available that year. Treas. Reg. § 1.1341-1(a)(2) (2007); Culley, 222 F.3d at 1335 (citing McKinney v. United States, 574 F.2d 1240, 1243 (5th Cir. 1978)). Further, the taxpayer must be

entitled "to a deduction (in excess of $3,000) under another section of the Internal Revenue Code for the loss resulting from" repaying the money. Culley, 222 F.3d at 1335; see also Griffiths v. United States, 54 Fed. Cl. 198, 202 (2002) ("Section 1341 does not independently create a deduction.") (citation omitted). If the taxpayer meets the requirements of § 1341, then "the taxpayer 'is entitled to either the equivalent of a refund for income tax paid in the earlier year, or a deduction from income in the year of repayment, whichever is more beneficial to the taxpayer.'" Pennzoil-Quaker State Co. v. United States, 511 F.3d 1365, 1368 (Fed. Cir. 2008) (quoting Chernin v. United States, 149 F.3d 805, 815 (8th Cir. 1998)).

Here, Plaintiffs submit they are entitled to a refund for taxes they paid in the 2001 tax year because Mr. Nacchio believed he had a claim of right to the gain he later forfeited, Plaintiffs paid taxes on this gain, and the amount forfeited is deductible as a loss or business expense. The Government argues that Plaintiffs do not qualify for § 1341 relief because both public policy considerations and § 162(f) preclude the deduction. In addition, the Government claims that because Mr. Nacchio was convicted for acting willfully, knowingly and with the intent to defraud, Plaintiffs cannot prove that Mr. Nacchio believed he had a claim of right to the forfeited funds and are barred from relitigating whether he had such a belief under the doctrine of issue preclusion.

Mr. Nacchio's Forfeiture Is A Deductible Loss Under § 165

Plaintiffs seek to deduct Mr. Nacchio's forfeiture as a loss under § 165. Section 165(a) allows a deduction for "any loss sustained during the taxable year and not compensated for by insurance or otherwise." Under § 165(c)(2), an individual may deduct losses from a for-profit transaction unconnected to a business or trade.

The Government does not dispute that Mr. Nacchio's forfeiture is a loss under § 165. See, e.g., Stephens v. Comm'r, 905 F.2d 667, 670 (2d Cir. 1990) (stating that a forfeiture paid as restitution is a loss under § 165); Holt v. Comm'r, 69 T.C. 75, 78-79 (1977) (concluding that property forfeited pursuant to a taxpayer's guilty plea is properly characterized as a loss item), aff'd per curiam, 611 F.2d 1160 (5th Cir. 1980). Instead, the Government contends the forfeiture is not deductible under § 165 because the deduction "would contravene public policy by 'reducing the sting' of the forfeiture penalty." Def.'s Mot. 19 (citation omitted). Specifically, the Government argues that allowing Plaintiffs to deduct the amount Mr. Nacchio forfeited would frustrate the policy in the federal criminal code prohibiting deception, misrepresentation and fraud in connection with the purchase or sale of any security and diminish Mr. Nacchio's punishment. Id. at 22. In pressing this argument, the Government aims to both tax Mr. Nacchio and his wife on income they did not realize and to broaden the public policy grounds for disallowing the deduction of forfeitures.

As the Supreme Court recognized in Commissioner v. Tellier, "the federal income tax is a tax on net income, not a sanction against wronging," a "principle [that] has been firmly imbedded in the tax statute from the beginning." 383 U.S. 687, 691-92 (1966) ("[T]he object of [the income tax] bill is to tax a man's net income; that is to say, what he has at the end of the year after deducting from his receipts his expenditures or losses. It is not to reform men's moral characters; that is not the object of the bill at all." (first alteration in original) (quoting 50 Cong. Rec. 3849 (1913)). In the instant case, there is no reason to compound Mr. Nacchio's criminal punishment with a tax burden Congress has neither expressly nor impliedly directed. As the Government recognizes, Mr. Nacchio's forfeiture is a loss. The proceeds from Mr. Nacchio's insider trading evaporated -- they were disgorged. Yet, the Government seeks to tax these proceeds not on the ground that they are income, but on an amorphous notion that the public policy against securities fraud must prevent the deductibility of monies that were received due to insider trading even though the monies were disgorged.

Applying public policy to preclude a deduction here would not comport with precedent. A deduction is permitted "unless it is clear that the disallowance is a device to avoid the consequence of violations of a law" or "otherwise contravenes the federal policy expressed in a statute or regulation . . . ." Comm'r v. Sullivan, 356 U.S. 27, 29 (1958). "Only where the allowance of a deduction would [immediately and severely] 'frustrate sharply defined national or state policies proscribing particular types of conduct' [has

the Supreme Court] upheld its disallowance." Tellier, 383 U.S. at 694 (quoting Comm'r v. Heininger, 320 U.S. 467, 473 (1943)). For example, in Tank Truck Rentals, Inc. v. Commissioner and Hoover Motor Express Company v. United States, the Supreme Court upheld the disallowance of deductions claimed by taxpayers for fines and penalties imposed for violating state penal statutes because such deductions "would have directly and substantially diluted the actual punishment imposed." Tellier, 383 U.S. at 694 (citing Tank Truck Rentals, 356 U.S. 30, 34-35 (1958); Hoover Motor, 356 U.S. 38, 40 (1958)).

Allowing Plaintiffs to deduct the monies forfeited would neither "immediately and severely frustrate sharply defined policies" proscribing insider trading nor "directly and substantially dilute the punishment imposed." In Stephens v. Commissioner, the United States Court of Appeals for the Second Circuit allowed a deduction for a loss where the taxpayer had paid taxes on funds he had embezzled, but repaid as restitution, reasoning that the deduction did not severely and immediately frustrate public policy because the taxpayer had received a "stern" sentence. 905 F.2d at 671. Here, as in Stephens, Mr. Nacchio's punishment was stern; it included a 70-month jail sentence, a $19-million fine, as well as a forfeiture of his gain.

Allowing the deduction would not increase the odds in favor of insider trading or destroy the effectiveness of the securities laws. The law under which Mr. Nacchio was convicted, 15 U.S.C. § 78j, has ample weapons to combat insider trading without adding taxation of unretained income to the

arsenal. See 15 U.S.C. § 78ff (2006) (imposing a fine, imprisonment or both for insider trading). Indeed, because Plaintiffs paid over $17.9 million in taxes on a $44.6 million gain they did not retain, disallowing Plaintiffs' loss deduction would impose a punitive tax consequence uncalled for by criminal statute, the Internal Revenue Code, or precedent. See Tellier, 383 U.S. at 694-95 ("We decline to distort the income tax laws to serve a purpose for which they were neither intended nor designed by Congress."). Disallowing the deduction would result in a "double sting" by requiring the taxpayers to both make restitution and pay taxes on income they did not retain. See Stephens, 905 F.2d at 671. In sum, the public policy against insider trading does not prevent the deduction of the amount forfeited here as a loss under § 165.

Section 162(f) Does Not Prohibit The Deduction Of Mr. Nacchio's Forfeiture

The Government further contends that § 162(f) prohibits Plaintiffs' deduction. Section 162(f) provides, "No deduction shall be allowed under [§ 162(a) for a business expense] for any fine or similar penalty paid to a government for the violation of any law." In codifying the public policy exception to deductibility of business expenses in § 162(f), Congress limited the exception to illegal "bribes, kickbacks, and other illegal payments (subsection 162(c)), fines or similar penalties paid to a government for the violation of any law (subsection 162(f)), and a portion of treble damage payments under the antitrust laws (subsection 162(g))." Stephens, 905 F.2d at 672 (stating that "Congress

intended these 'provision[s] for the denial of the deduction for payments in these situations which are deemed to violate public policy . . . to be all inclusive.'" (alterations in original) (citation omitted)).

The Government attempts to extend § 162(f)'s prohibition for § 162(a) business expense deductions to § 165 losses by invoking Treasury Regulations §§ 1.162-21 and 1.165-1. Section 1.162-21(b)(1)(i) states that a § 162(f) fine or similar penalty includes an amount paid pursuant to a conviction in a felony or misdemeanor criminal proceeding, and § 1.165-1(a) adds that a § 165 deduction is subject to any provision of the Code that prohibits or limits a deduction. From this, the Government concludes that § 162(f) would encompass a § 165 loss even though § 162(f) only applies to deductions for business expenses and. as the Government acknowledges, "Congress did not explicitly amend § 165 to include a similar provision . . . ." Def.'s Mot. 19, 23.

As the United States Court of Appeals for the Second Circuit recognized in Stephens, whether or not these regulations mandate the application of § 162(f) to § 165, it is appropriate to take into account the public policy considerations embodied in § 162(f) in assessing deductibility under § 165. The Stephens Court stated:

> Though Congress, in amending Section 162, did not explicitly amend Section 165, we believe that the public policy considerations embodied in Section

> 162(f) are highly relevant in determining whether the payment to Raytheon was deductible under Section 165. Congress can hardly be considered to have intended to create a scheme where a payment would not pass muster under Section 162(f), but would still qualify for deduction under Section 165.

905 F.2d at 672. Thus, the Stephens Court looked to § 162(f) "as an aid in applying Section 165," and not as an additional independent statutory basis for disallowing the deduction. Id.

In invoking § 162(f) to preclude the deduction, the Government contends that Mr. Nacchio's forfeiture comes within this section's prohibition against deducting a "fine or similar penalty" because the forfeiture was imposed to punish Mr. Nacchio as a result of his conviction, and thus can be characterized as a penalty. Merely characterizing Mr. Nacchio's forfeiture as a "penalty," however, would not bring it within § 162(f)'s narrow prohibition against the deduction of the type of penalty that is "similar to" a fine. See S. Pac. Transp. Co. v. Comm'r, 75 T.C. 497, 651 (1980) ("[T]he literal language of section 162(f) implies the existence of penalties imposed by law which are not within the intended scope of section 162(f) because Congress must have had some reason for including the word 'similar' in the statute."). Mr. Nacchio was ordered to forfeit insider trading gains in addition to paying the $19 million fine the Colorado District Court imposed. See Pls.' Mot. Ex. M at 13:15-22,

15:2-10, 41:13-44:3. Unlike the fine, which was clearly punitive and was paid from assets unrelated to insider trading, the forfeiture exclusively represented the disgorgement of Mr. Nacchio's illicit net gain from insider trading.

While the Colorado District Court mandated that Mr. Nacchio's $19 million fine be deposited into a general Crime Victims' Fund for state and local victims' assistance programs, the Court did not similarly order that the forfeiture be deposited into this fund. Rather, Mr. Nacchio's forfeiture served to compensate victims of the Qwest securities fraud. When counsel for Mr. Nacchio inquired into the distribution of the forfeiture during the June 24, 2010 resentencing hearing, the prosecution advised the District Court that a separate process would apply to the forfeiture to "compensate victims" of the Qwest securities fraud. Id. at 48:17-49:5. In keeping with this statement, the DOJ remission administrator notified certain victims that they were eligible to receive a remission from Mr. Nacchio's forfeiture, and on April 17, 2012, DOJ authorized the remission of approximately $44 million of Mr. Nacchio's $44,632,464.38 forfeiture to compensate 112,210 victims. Pls.' Mot. Ex. P; Def.'s Mot. Ex. 9 at 3-4, Ex. 10. As such, contrary to the Government's assertion here, Mr. Nacchio's forfeiture was used for a compensatory purpose and was not a "similar penalty" to his fine under § 162(f).

In sum, in analyzing Plaintiffs' refund claim under § 1341, the Court holds that Plaintiffs may deduct Mr. Nacchio's forfeiture as a loss under

§ 165.[7] However, this does not end the matter as Plaintiffs must also show that Mr. Nacchio believed he had an unrestricted right to the trading gain in 2001.

Whether Mr. Nacchio Believed He Had A Claim Of Right To The Gain He Forfeited Is A Genuine Issue Of Material Fact

Invoking issue preclusion, the Government argues that Plaintiffs are barred from litigating whether Mr. Nacchio believed he had a claim of right to the gain he forfeited because a jury convicted him of engaging in insider trading willfully, knowingly and with the intent to defraud. As the proponent of this issue preclusion defense, the Government must

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[7] Plaintiffs also seek to deduct Mr. Nacchio's forfeiture under § 162 as a business expense "because the amount forfeited represented gain from Mr. Nacchio's exercise of Qwest options, that is, compensation for carrying out his ordinary trade or business as the CEO of Qwest." Pls.' Reply 3 n.2, July 18, 2013. The Court does not agree. To qualify for a deduction under § 162(a), an item must be an ordinary and necessary business expense paid or incurred during the taxable year and used for carrying on any trade or business. INDOPCO, Inc. v. Comm'r, 503 U.S. 79, 85 (1992) (citations and quotation marks omitted). To be "necessary," the expense must at a minimum "be 'appropriate and helpful' for the 'the development of the [taxpayer's] business.'" Comm'r v. Tellier, 383 U.S. 687, 689 (1966) (alteration in original) (quoting Welch v. Helvering, 290 U.S. 111, 113 (1933)); see also Danville Plywood Corp. v. United States, 899 F.2d 3, 7 (Fed. Cir. 1990). To qualify as "ordinary," the transaction giving rise to the expense must be "of common or frequent occurrence in the type of business involved." Danville, 899 F.2d at 7 (citing Deputy v. du Pont, 308 U.S. 488, 495 (1940); Welch, 290 U.S. at 113-14). Mr. Nacchio's forfeiture arose from his 2007 conviction for insider trading, not from carrying out business as Qwest's CEO.

establish that this action presents an issue identical to that previously adjudicated in the criminal case. Bourns, Inc. v. United States, 210 Ct. Cl. 642, 654 n.6 (1976) (citation omitted).

The issue governing deductibility under § 1341 is whether, in including the trading gains in gross income for 2001, Mr. Nacchio believed that he had "an unrestricted right to such item." This is a subjective standard that hinges on the taxpayer's belief during the year of inclusion. See, e.g., Culley, 222 F.3d at 1336 ("[T]he issue presented by § 1341 is not simply whether Mr. Culley obtained funds unlawfully, but whether it appeared to him that he had an unrestricted right to those funds."); Cinergy Corp. v. United States, 55 Fed. Cl. 489, 504 n.23 (2003) ("[T]he taxpayer must have had a semblance of an unrestricted right to the item in the inclusion year . . . ." (citation omitted)).

The precise issue of whether Mr. Nacchio himself subjectively believed he had an unrestricted right to the funds he received from trading in 2001 was not adjudicated in the criminal proceeding. Mr. Nacchio did not plead guilty to insider trading -- an admission which could result in a finding that he had subjectively believed he was not entitled to the gain. See Culley, 222 F.3d at 1335-36 (holding that taxpayer who pled guilty to mail fraud could not have subjectively believed that he had an unrestricted right to the fraudulently obtained proceeds); Kraft v. United States, 991 F.2d 292, 297-99 (6th Cir. 1993); Wang v. Comm'r, 76 T.C.M. (CCH) at *8 (finding that a taxpayer who plead guilty to insider trading was not entitled to § 1341

relief because he knowingly received illegally obtained income).

As the Federal Circuit recognized in Culley, the issue "is not simply whether [the taxpayer] obtained funds unlawfully, but whether it [subjectively] appeared to him that he had an unrestricted right to those funds." 222 F.3d at 1336; see also McKinney, 574 F.2d at 1242-43 (stating that income included under a § 1341 claim of right means the taxpayer received the income with the semblance of a bona fide claim of right). Although the jury in the criminal trial believed Mr. Nacchio was guilty of willfully engaging in insider trading, this does not equate to a finding of what Mr. Nacchio himself believed. Mr. Nacchio professed his innocence, and nothing in this Court's record from the criminal proceeding sheds any light on the bona fides of Mr. Nacchio's belief. Indeed, Mr. Nacchio did not testify in his criminal trial, invoking his Fifth Amendment privilege against self-incrimination. Mr. Nacchio's subjective belief as to his claim of right to the forfeited gain was not adjudicated in his criminal trial, and Plaintiffs are not barred from litigating his belief under the doctrine of issue preclusion. So too, Mr. Nacchio's subjective belief as to his entitlement to the trading gains in 2001 is a question of material fact that cannot be resolved on summary judgment.

Conclusion

Plaintiffs' Motion for Partial Summary Judgment is **GRANTED** in part. Defendant's Motion for Summary Judgment is **DENIED**. The Court will convene a telephonic status conference to

schedule further proceedings on **March 20, 2014 at 2:00 p.m. EST.** s/Mary Ellen Coster Williams

s/Mary Ellen Coster Williams
MARY ELLEN COSTER WILLIAMS
Judge

[ENTERED SEPTEMBER 23, 2016]

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

JOSEPH P. NACCHIO, ANNE M. ESKER,
Plaintiffs-Cross-Appellants

v.

UNITED STATES,
Defendant-Appellant

2015-5114, 2015-5115

Appeals from the United States Court of Federal Claims in No. 1:12-cv-00020-MCW, Judge Mary Ellen Coster Williams.

ON PETITION FOR REHEARING EN BANC

Before PROST, *Chief Judge*, NEWMAN, LOURIE, CLEVENGER*, BRYSON*, DYK, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, CHEN, and STOLL, *Circuit Judges*. **

PER CURIAM.

ORDER

Cross-Appellants Anne M. Esker and Joseph P. Nacchio filed a petition for rehearing en banc. A response to the petition was invited by the court and filed by appellant United States. The petition was first referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

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* Circuit Judges Clevenger and Bryson participated only in the decision on the petition for panel rehearing.

** Circuit Judge Hughes did not participate.

The mandate of the court will issue on September 30, 2016.

FOR THE COURT

September 23, 2016
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

[ENTERED OCTOBER 21, 2016]

In the United States Court of Federal Claims

No. 12-20 T

JOSEPH P. NACCHIO and
ANNE M. ESKER

JUDGMENT

v.

THE UNITED STATES

Pursuant to the court's Order, filed October 20, 2016,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that judgment is entered in favor of defendant.

Lisa L. Reyes
Acting Clerk of Court

October 21, 2016 By: s/ Debra L. Samler

Deputy Clerk

[ENTERED APRIL 30, 2015]

In the United States Court of Federal Claims

No. 12-20 T

JOSEPH P. NACCHIO and
ANNE M. ESKER

v.

JUDGMENT

THE UNITED STATES

Pursuant to the court's Order, filed April 30, 2015, and the parties' joint motion for entry of judgment, filed April 21, 2015,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the plaintiffs recover of and from the United States the sum of $17,974,832.00 due for the 2007 tax year, pursuant to Section 1341 of the Internal Revenue Code, plus interest as provided by law (including such pre-judgment and post-judgment interest as provided by law). The parties reserve all rights to appeal and to seek allowable costs and fees.

Hazel C. Keahey
Clerk of Court

April 30, 2015 By: s/ Debra L. Samler

Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $505.00.