

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>UNITED STATES OF AMERICA</b>	:	<b>CIVIL ACTION</b>
	:	
<b>v.</b>	:	<b>No. 02-9363</b>
	:	
<b>ELNOR WHITEHEAD, EXECUTRIX OF THE ESTATE OF JOHN WHITEHEAD, DECEASED</b>	:	

\_\_\_\_\_ **AND NOW**, this 4th day of August, 2005, after a nonjury trial at which it had the opportunity to observe the demeanor of the witnesses and to evaluate their credibility and testimony, the Court makes the following findings of fact and conclusions of law.

**FINDINGS OF FACT**

1. The United States Department of Justice (“DOJ”) is charged with enforcement of the United States tax laws.
2. John Whitehead, the original defendant, died on May 11, 2004, after this action was initiated. *Suggestion of Death*, 5/13/04 (Document No. 14).
3. Elnor Whitehead, the administrator of John Whitehead’s estate, was substituted as the defendant on March 17, 2005. *Order* 3/17/05 (Document No. 29).
4. Elnor Whitehead was the common law wife of John Whitehead. Tr. 10/7/04 at 3.
5. From 1992 until his death, John Whitehead resided with Elnor Whitehead at 1916 Dallas Street, Philadelphia, Pennsylvania. Tr. 10/7/04 at 5.
6. On October 3, 1988, John Whitehead had signed waivers extending the statute of limitations for the collection of his 1970s and 1980s tax liabilities to December 31, 2015. Tr. 9/15/04 at 28-29.

7. James M. Dugan (“Dugan”), an Internal Revenue Service (“IRS”) Revenue Officer, was assigned to collect John Whitehead’s unpaid taxes. Tr. 9/15/04 at 26.

8. In April 2001, Dugan was originally assigned to investigate and collect Whitehead’s unpaid taxes for tax years 1996, 1997 and 1999. Tr. 9/15/04 at 26; Tr. 4/6/05 at 7, 13.

9. In March 2002, Dugan was assigned to collect Whitehead’s additional unpaid taxes for tax years 1992, 1993 and 1994. Tr. 9/15/04 at 26-27; Tr. 4/6/05 at 29.

10. Researching Whitehead’s tax history in June 2001, Dugan learned that Whitehead had unpaid tax liabilities from the 1970s and 1980s, totaling approximately \$5 million. Tr. 9/15/04 at 34, 38.

11. Between June 2001 and March 2002, Dugan and the Whiteheads exchanged several telephone conversations in an attempt to work out an installment payment plan covering all of John Whitehead’s outstanding tax liabilities. 4/6/05 at 15, 28.

12. The IRS rejected an installment plan proposed by John Whitehead because it was insufficient to cover even the accrued interest on the tax liabilities. Tr. 9/15/04 at 34-36, 39; 4/6/05 at 15.

13. In March 2002, Dugan informed the Whiteheads that, pursuant to the extensions signed by John Whitehead, the IRS had until December 31, 2015, to collect the back taxes from the 1970s and 1980s. Tr. 9/15/04 at 31.

14. At a second meeting with the Whiteheads on April 12, 2002, Dugan advised the Whiteheads that in light of the new Internal Revenue Service Restructuring Reform Act, the statute of limitations on all the tax liabilities from the 1970s and 1980s would now expire on December 31, 2002 despite the extensions Whitehead had previously executed

unless the IRS took steps to collect them before then. Tr. 9/15/04 at 31-32, 41-42.

15. Dugan told the Whiteheads that there was a chance that, because the statute of limitations had been accelerated and was now set to expire at the end of 2002, some of the liabilities might expire if they remained in uncollectible status.<sup>1</sup> Tr. 9/15/04 at 48.

16. The IRS had the option of either allowing the statute of limitations to expire or reducing the outstanding liabilities for the tax years 1975 through 1990 to judgment. 4/6/05 at 33-36.

17. If the IRS had determined that the Whiteheads were unable to pay the 1970s and 1980s taxes, it could have kept the taxes in uncollectible status, which would have allowed them to expire by operation of the statute of limitations. Tr. 9/15/04 at 48.

18. Dugan instructed the Whiteheads to submit their 2001 tax return and verify approximately \$50,000 in expenses listed on the return so the IRS could determine whether they actually had an inability to pay the back taxes. Tr. 9/15/04 at 43-44, 48; Tr. 10/7/04 at 26-28; Tr. 4/6/05 at 37-38.

19. Dugan did not advise the Whiteheads that the statute of limitations on any of the outstanding tax liabilities had expired or that the liabilities had been written off by the IRS. Tr. 9/15/04 at 42, 47-48, 50, 58-59; Tr. 4/6/05 at 33-34, 61-63.

20. At John Whitehead's request, Dugan extended the time for him to submit the necessary expense information. Tr. 9/15/04 at 57; Tr. 10/7/04 at 27; Tr. 4/6/05 at 53.

21. Because the Whiteheads never submitted the requested expense information, Dugan was unable to determine whether John Whitehead had the ability to

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<sup>1</sup> When an account is in "uncollectible" status, the account is frozen and the IRS makes no effort to enforce collection, and it does not require any monthly installment payment. *Id.* However, the account is not written off, nor do penalties and interest stop running.

pay the taxes. Tr. 9/15/04 at 54; Tr. 4/6/05 at 53.

22. John Whitehead had one substantial asset which was the sole source of his income, royalties from Warner/Chappell Music, Inc. for his song-writer's share of income from the publication of his musical compositions. *John Whitehead Decl.* ¶ 2 (Document No. 11).

23. In August 2002, Dugan levied against the royalties being paid by Warner/Chappell to John Whitehead and collected approximately \$15,000, which was applied to John Whitehead's tax liabilities from the 1990s. Tr. 9/15/04 at 27, 54-55; Tr. 4/6/05 at 38-39.

24. Facing the imminent expiration of the statute of limitations, Dugan initiated steps to reduce the 1975-1990 liabilities to judgment and re-filed the liens associated with those liabilities in order to prevent the tax liabilities from expiring. Tr. 9/15/04 at 28, 32-33.

25. An income tax assessment made on December 4, 2002, showed that John Whitehead owed \$5,242,994.69 in back taxes, accrued interest and penalties for the tax years 1975-80, 1984, 1986-87 and 1990. Tr. 4/6/05 at 4.

26. On December 23, 2002, the United States filed this action against John Whitehead seeking a judgment for the outstanding assessed liability owed by John Whitehead for all liabilities from 1975-1990. *Compl.* 12/23/02 (Document No. 1).

27. The complaint does not cover any tax liability after 1990.

28. On January 11, 2003, a copy of the summons and complaint were served on Aaliyah Medley Castro ("Castro"), Elnor Whitehead's 26 year old granddaughter and adopted daughter, at the Whitehead residence. *Aff. of Service* 2/7/03 (Document No. 2); Tr. 10/7/04 at 4, 6-7.

29. When Castro received the summons and complaint at the Whitehead residence, she was there at Elnor Whitehead's direction. Tr. 10/7/04 at 6-7.

30. On February 7, 2003, the United States filed a completed return of service with the Clerk of Court. *Aff. of Service 2/7/03* (Document No. 2).

31. On May 1, 2003, default judgment was entered against John Whitehead in the amount of \$5,435,253.70. *Order 5/1/03* (Document No. 7).

32. On May 3, 2004, John Whitehead filed a motion to set aside the default judgment. (Document No. 10).

33. On March 9, 2005, after a hearing, the default judgment was opened. *Order 3/9/05* (Document No. 26).

34. As of May 20, 2005, the total tax liability including penalties and interest owed by John Whitehead for the period of 1975-1990 was \$5,900,987.13. *Exhibit: Transcripts of Accounts* (Document No. 33).

#### **CONCLUSIONS OF LAW**

1. This Court has jurisdiction over this tax collection action pursuant to 28 U.S.C. §§ 1340, 1345.

2. Venue is proper in this district because the defendant resides here.

3. Under the Federal Rules of Civil Procedure, an individual may be served "pursuant to the law of the state in which the district court is located, or in which service is effected, for the service of a summons upon the defendant in an action brought in the courts of general jurisdiction of the State." FED. R. CIV. P. 4(e)(1).

4. Under Pennsylvania law, original process may be served by handing a copy, to an adult member of the family or adult person in charge of the defendant's residence.

PA. R. CIV. P. 402(a)(2)(i).

5. A person can be in charge of the residence on a temporary basis and need not permanently reside there. *Simmons v. Del. County Tax Claim Bureau*, 796 A.2d 400, 404-05 (Pa. Commw. Ct. 2002); see *Drury v. Zingarelli*, 180 A.2d 104, 105 (Pa. Super. Ct. 1962) (service upon mother-in-law, who was not a permanent resident at defendant's residence, was valid).

6. Due process is satisfied if service at the proper residence is reasonably calculated to give the defendant notice because the adult who received service has a sufficient connection to the defendant to be in charge of the premises as contemplated by PA. R. CIV. P. 402(a). *Simmons*, 796 A.2d at 405.

7. Service upon Castro, who was an adult in charge of the Whiteheads' Dallas Street residence at the time, was proper.

8. The Internal Revenue Code establishes a ten year statute of limitations for tax collection, beginning at the time of assessment. 26 U.S.C. § 6502(a)(1); *Remington v. United States*, 210 F.3d 281, 284 (5th Cir. 2000).

9. In 1998, Congress passed the Internal Revenue Service Restructuring Reform Act ("RRA 1998") which provides that extensions of the ten year limitation on collection may only be made in connection with the simultaneous execution of installment agreements. Internal Revenue Service Restructuring and Reform Act of 1998, sec. 3461, § 6502 nt, 112 Stat. 685 (1998) (codified at 26 U.S.C. § 6502) ("RRA 1998").

10. The RRA 1998 established that pre-2000 extensions (not made in conformity with an installment agreement) shall expire on the latest of (1) the last day of the ten year collection period provided in 26 U.S.C. § 6502(a)(1), (2) December 31, 2002, or (3) in the

case of an extension executed in connection with an installment agreement, the 90th day after the expiration if such an extension. *Id.*

11. RRA 1998 altered the expiration date of any extensions not pursuant to an installment plan and entered into before December 31, 1999. *Id.*

12. RRA 1998, as applied to Whitehead, modified the waivers he had previously executed in 1988, resulting in the statute of limitations for collection of unpaid taxes for the 1970s and 1980s expiring on December 31, 2002. *Id.*

13. The IRS had until December 31, 2002, to reduce John Whitehead's tax liability to judgment for the taxes he owed from 1975 through 1990 or it would be barred by the statute of limitations. Tr. 4/6/05 at 27-36.

14. The four elements of estoppel are 1) a false representation or wrongful misleading silence; 2) an error in a statement of fact; 3) the person claiming the benefit of estoppel must be ignorant of the true facts; and 4) an adverse affect against the person claiming estoppel. *Frederick v. Comm'r of Internal Revenue*, 126 F.3d 433, 438 (3d Cir. 1997).

15. When estoppel is claimed as an equitable defense against the government, the claimant has the additional burden of establishing "affirmative misconduct" by government officials. *Frederick*, 126 F.3d at 438.

16. Affirmative governmental misconduct occurs when the misrepresentation induced the other party to act or not act to his or her detriment. *Frederick*, 126 F.3d at 438-39.

17. The defendant has the burden of establishing "affirmative misconduct" on the part of Dugan. *Frederick*, 126 F.3d at 438.

