UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

STATUS REPORT OF CASE ON APPEAL

Docket: Pikeville

Date: June 6, 1984

To: Judge G. Wix Unthank

Re: (style) Elbo Coals, Inc. vs: United States Of America (No.) 82-54

Date of Entry of Order/Judgment appealed: May 9, 1984

Date Notice of Appeal filed: June 6, 1984

By: Plaintiff - Defendant - Both

Appeal dismissed on motion of: Appellant - By Agreement

6CCA Action:

Judgment - Date filed District Court: _____

Order - Date filed District Court: _____

Mandate - Date filed District Court: _____

Affirmed - Reversed - Modified _____
(date filed)

Dismissed for lack of prosecution: _____
(date filed)

_____
Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

CIVIL ACTION NO. 82-54

ELBO COALS, INC., PLAINTIFF,

VS. ORDER

UNITED STATES OF AMERICA, DEFENDANT.

* * * *

In accordance with the memorandum opinion entered on the same date herewith,

IT IS HEREBY ORDERED, as follows:

1. The joint Stipulation of Facts and Issues of Law, tendered to the Court on March 23, 1983, shall now be FILED.

2. Plaintiff's motion for summary judgment is DENIED.

3. Defendant's motion for summary judgment is SUSTAINED, and the plaintiff shall recover nothing from the defendant.

4. Each party shall bear its respective costs herein.

5. This action is now DISMISSED and STRICKEN from the docket.

This the 14 day of May, 1984.

G. WIX UNTHANK, JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

CIVIL ACTION NO. 82-54

ELBO COALS, INC., PLAINTIFF,

VS. MEMORANDUM OPINION

UNITED STATES OF AMERICA, DEFENDANT.

* * * *

Plaintiff brought this action, pursuant to 28 U.S.C. §1346(a)(1), seeking a refund of income taxes it alleges the Internal Revenue Service erroneously assessed and collected from the plaintiff concerning the plaintiff's tax year ending June 30, 1974. This matter is before the Court on cross-motions for summary judgment. The parties have tendered a very detailed, joint stipulation of the facts, and they have agreed that this action concerns the following issues:

1. Whether the plaintiff is barred from litigating this lawsuit by reason of the doctrine of equitable estoppel on the grounds that plaintiff's 1974 tax year was closed by the execution of a Form 870-AD.

2. Whether the plaintiff's claim for refund is limited to $7,586.75, for the reason that litigation of any greater amount is barred due to the expiration of the applicable statute of limitations as to such greater amounts.

3. Whether plaintiff is entitled to all or any part of the depletion allowance of Internal Revenue Code of 1954, 26 U.S.C. §611, for its 1974 tax year by reason of its interest in coal mining in that year.

In an effort to succinctly summarize the background chain of events resulting in the filing of this action and the facts to which the parties have stipulated, the record reveals that:

1. The Internal Revenue Service conducted an audit of the plaintiff's 1974 income tax return and determined that the plaintiff was not entitled to any portion of the deduction for the depletion allowance of $553,239.00, which was claimed on the 1974 tax return. The disallowed depletion allowance resulted in a tax deficiency of $265,555.00 being assessed against the plaintiff.

2. During the time frame from 1974 through 1977, the I.R.S. conducted at least one other audit of the plaintiff's tax returns. Plaintiff's tax returns for those four years were subject to numerous amendments resulting from the carryback of an investment credit, the carryback of a net operating loss, and the allowance of a consolidated subsidiary loss.

3. On May 22, 1979, the Regional Office of the Director of Appeals issued an audit statement covering the fiscal years June 30, 1974 through June 30, 1977. In the statement, the I.R.S. retreated from its original position that plaintiff was not entitled to any portion of the claimed depletion allowance

of $553,239.00, and the I.R.S. allowed plaintiff a depletion allowance of $192,138.00 for the 1974 tax year.

4. The Court infers that in an attempt to finally resolve the plaintiff's tax liability for the fiscal years from 1974 through 1977, inclusive, and to put an end to the continuing adjustments to plaintiff's income tax liability for those years, the parties hereto executed Form 870-AD, Offer of Waiver of Restrictions on Assessments and Collection of Deficiency in Tax and of Acceptance of Overassessment, which, by its language, except for circumstances not present herein, ostensibly closed the door to any additional adjustments in the plaintiff's income tax returns for the aforementioned years.

5. The Form 870-AD was signed by the plaintiff on June 5, 1979, and it was accepted for the Commissioner of Internal Revenue on June 19, 1979.

6. Subsequently, on July 9, 1979, the I.R.S. determined that plaintiff owed interest in the amount of $7,586.75, being the difference between the amount of interest due of $24,100.75, and the net tax overpayment of $16,514.00. The plaintiff paid this difference on July 24, 1979.

7. On June 7, 1981, plaintiff filed a claim for refund of taxes allegedly overpaid for the 1974 tax year in the amount of $173,328.48, plus interest. The I.R.S. did not act on plaintiff's claim for refund, resulting in the filing of this action to collect said taxes.

The Court shall first address the issue of whether the doctrine of equitable estoppel should operate to estop plaintiff from proceeding herein.

A review of the current state of the law concerning equitable estoppel indicates that there is no general consensus among the different Circuit Courts of Appeal, as is pointed out in McGraw-Hill, Inc. v. United States, 623 F.2d 700 (U.S. Court of Claims, 1980), as follows:

> There is a long-standing conflict amount [sic] the federal courts as to whether a taxpayer can be estopped from suing for a refund by an agreement less formal than the closing agreement or compromise statutorily described in Sections 7121 and 7122 of the Code. However, the Court of Claims has consistently adhered to a more "liberal" view of estoppel. It has applied the doctrine of equitable estoppel whenever the I.R.S. cannot be placed in the same position it was in when the agreement was executed.

Ibid, at 706.

Before analyzing other case law dealing with equitable estoppel, the Court is of the opinion that a portion of the relevant language contained in Form 870-AD should be set forth below:

> This offer is subject to acceptance for the Commissioner of Internal Revenue. It shall take effect as a waiver of restrictions on the date it is accepted. Unless and until it is accepted, it shall have no force or effect.

> If this offer is accepted for the Commissioner, the case shall not be reopened in the absence of fraud, malfeasance, concealment or misrepresentation of material fact, an important mistake in mathematical calculation, or excessive tentative allowances or carrybacks provided by law; and no claim for refund or credit shall be filed or prosecuted for the year(s) stated above other than for amounts attributed to carrybacks provided by law.

Turning now to the defendant's argument, in support of its position that this action should be barred by equitable estoppel, the defendant relies on the factually similar case of Stair v. U.S., 516 F.2d 560 (CA2, 1975). In Stair, the taxpayers' treatment of condemnation proceedings as a long-term capital gain was disallowed by the I.R.S., which determined that this income should be taxed as ordinary income, and the I.R.S. proposed a deficiency against the Stairs.

The dispute over the correct classification of the income from the condemnation proceeding advanced to the appellate conferee level; however, prior to litigating this issue, the taxpayer and the appellate conferee reached a compromise whereby the taxpayers agreed to pay roughly 50% of the deficiency originally assessed. Ibid, at 561.

Subsequently, the parties executed Form 870-AD, which has the same pertinent language as the Form 870-AD in the case at bar, which is set forth above. On December 30, 1966, the Stairs paid the compromised deficiency, plus accrued interest.

The language of the foregoing Form 870-AD notwithstanding, approximately two years subsequent to the payment of the tax deficiency, on November 25, 1968 the taxpayers filed a Form 843 claim for refund on the portion of their 1966 payment attributable to the treatment of the monies recieved from the condemnation as ordinary income. At the time the refund claim was filed, the statute of limitations on assessment barred the I.R.S. from asserting its claim to the remainder of the 1964 deficiency which it had conceded in the settlement agreement. Ibid, at 562.

The I.R.S. rejected the Stairs' claim for refund, and the United States District Court for the Northern District of New York granted the government's motion for summary judgment, holding that the taxpayers were estopped by the failure to assert their claim until after the period of limitations had run against the government. Ibid, at 562.

On appeal to the United States Court of Appeals for the Second Circuit, Chief Judge Irving R. Kaufman affirmed the district court, holding that,

> . . . statement that no refund claim would be filed, in settlement agreement arising out of dispute as to whether revenues received upon condemnation of taxpayers' property were subject to ordinary income or long-term capital gain treatment, was a misrepresentation of a kind sufficient to ground estoppel once taxpayers reneged by filing for a refund of taxes paid after period of limitations had run against Government.

Ibid, at 561.

The Court observes that the main ingredients found in Stair are also present in this action, viz., (1) the dispute between the taxpayer and the I.R.S. was apparently resolved when the parties executed the Form 870-AD in June of 1979; (2) the I.R.S. gave up its right to reopen the case for the tax years in question; (3) the taxpayer agreed to not file a claim for refund or credit for those same years; (4) subsequent to the execution and acceptance of the Form 870-AD, the taxpayer paid the difference between the interest on a deficiency and a credit for an overassessment; (5) the statute of limitations had run against the government (on September 17, 1979); (6) approximately two years later, on June 4, 1981, the taxpayer filed a claim for refund pertaining to the depletion allowance.

The defendant asserts that Stair v. U.S., supra, is factually indinstinguishable from the present action and submits that the manner in which the Second Circuit dealt with the issue of equitable estoppel should be equally applicable herein. The Second Circuit stated as follows:

> The Stairs assert that equitable estoppel is improper in any event, since no misrepresentation was made at the time they signed the 870-AD. Rather, the argument proceeds, their intention to file for refund did not crystallize until after Tri-S Corp. was decided in August of 1968, several months after the period of limitations on assessments had expired. . .

* * *

> Quite apart from such considerations, however, we conclude that the statement that no refund claim would be filed--once the taxpayer has reneged--is misrepresentation of a kind sufficient to ground estoppel. (Citations omitted). . . To insist that the Government must fail since it cannot establish that the statement was a misrepresentation at the time it was made, ignores the reality of the situation. For the misrepresentation in fact inheres in the failure to state--at the time the settlement is made--that the representation is only conditional, and that there are circumstances under which the promise may be revoked. We may be sure that, had the Stairs explicitly reserved the right to seek a refund in the event of a later favorable decision on the condemnation issue, the Commissioner would have been considerably less willing to forego his right to assess a full deficiency.

Ibid, at 564-565.

The plaintiff relies on Joyce v. Gentsch, 141 F.2d 891 (CA6, 1944), to support its position that the Sixth Circuit has rejected the doctrine of equitable estoppel as a means of extinguishing a claim for refund in a similar case. Although there are some common features between Joyce and the instant action, the major differences owtweigh the similarities; therefore, the Court finds that the plaintiff's reliance on Joyce is misplaced.

The main distinguishing point in Joyce is that the language of the Form 870 (a predecessor to the Form 870-AD) signed by the taxpayer did not preclude the I.R.S. from

asserting a further deficiency against the taxpayer if the I.R.S. subsequently determined that additional tax is due. Furthermore, the Form 870 was not signed by or accepted on behalf of the Commissioner of Internal Revenue. The Sixth Circuit held that since the informal closing was not binding on the government, it therefore did not bind the taxpayer.

In the instant action, the Form 870-AD was accepted on behalf of the Commissioner. Pursuant to the language of the document entered into by the parties, the taxpayer promised to not file an additional claim for refund for the tax years 1974 through 1977, and the I.R.S. agreed to not impose any further assessments or deficiencies. Additionally, in the process of the negotiations, the I.R.S. allowed plaintiff a portion of the disputed depletion allowance. The bottom line is that both parties made mutual concessions, and both parties agreed to be bound by those concessions.

A review of the facts herein leads the Court to conclude that this matter is ripe for the application of the doctrine of equitable estoppel, on the grounds that (1) the parties apparently mutually agreed to conclude their ongoing dispute over the plaintiff's tax liability by executing Form 870-AD, and (2) the plaintiff did not file its claim for refund until after the statute of limitations had run against the I.R.S. Therfore, the I.R.S. could not be placed in the same position it was in when the agreement was executed.

In the final analysis, a comparison of this action with Stair v. U.S., supra, persuades the Court that Stair is virtually on all fours with the case at bar. Consequently, the Court is of the opinion that on such authority, the doctrine of equitable estoppel is likewise applicable to the present action, and that the defendant is entitled to summary judgment as a matter of law.

The Court has reviewed the record herein and now finds that there are no genuine issues of material fact, as the parties have stipulated.

Therefore, the Court holds that this action should be resolved by application of the doctrine of equitable estoppel against the plaintiff. It is unnecessary for the Court to address the remaining issues raised by the parties.

An Order in accordance with this memorandum opinion will issue herewith.

This the 14 day of May, 1984.

G. WIX UNTHANK, JUDGE

United States Court of Appeals

FOR THE SIXTH CIRCUIT

FILED

JUN 10 1985

JOHN P. HEHMAN, Clerk

No. 84-5504
Pike 82-54

ELBO COALS, INC.,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

Eastern District of Kentucky
FILED
JUL 05 1985
AT PIKEVILLE
LESLIE G. WHITMER
CLERK, U. S. DISTRICT COURT

Before: KENNEDY and MILBURN, Circuit Judges; and GUY, District Judge.

J U D G M E N T

ON APPEAL from the United States District Court for the Eastern District of Kentucky.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby affirmed.

No costs taxed.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

John Hehman
Clerk

Issued as Mandate: July 2, 1985

COSTS: NONE

Filing fee.....$
Printing.....$

Total.....$

A True Copy.

Attest:

Nancy Schulkens
Deputy Clerk

6CA-80
11/82

Dist. Ct. No. 82-54 HON. G. WIX UNTHANK

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 84-5504

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ELBO COALS, INC., *Plaintiff-Appellant,* v. UNITED STATES OF AMERICA, *Defendant-Appellee.*	ON APPEAL from the United States District Court for the Eastern District of Kentucky.

Decided and Filed June 10, 1985

Before: KENNEDY and MILBURN, Circuit Judges; and GUY, District Judge.*

MILBURN, Circuit Judge. Plaintiff appeals the decision of the district court granting the defendant's motion for summary judgment in this action seeking a refund of taxes. 588 F. Supp. 745 (E.D. Ky. 1984). We affirm.

I.

Plaintiff, a Kentucky corporation engaged in the buying, processing, and selling of coal, claimed a mineral depletion

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* The Honorable Ralph B. Guy, Jr., Judge, United States District Court for the Eastern District of Michigan, sitting by designation.

allowance deduction on its 1974 federal tax return which was subsequently disallowed by the Internal Revenue Service ("IRS"). Thereafter, audits and amendments for the years 1975-1977 resulted in additional adjustments, both up and down, to numerous items on plaintiff's returns. In 1979, representatives of plaintiff and the IRS reached an informal agreement resolving plaintiff's tax liabilities for its taxable years 1974-1977, which resulted in the issuance of an audit statement by the IRS.

On June 5, 1979, representatives of plaintiff signed an "Offer of Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and of Acceptance of Overassessment," on Form 870-AD, agreeing to the tax liabilities and overpayments as computed in the audit statement covering plaintiff's tax years 1974-1977. The form was accepted on behalf of the Commissioner of the IRS on June 19, 1979. In the agreement, the Commissioner agreed that the subject tax years would not be reopened absent certain well-defined exceptions which are not applicable herein, and the plaintiff agreed not to seek a refund. On July 9, 1979, the IRS billed plaintiff for the net amount owed pursuant to the agreement, which plaintiff paid on July 24, 1979.

By 1981, the statute of limitations had run against the IRS for any of the taxable years 1974-1977. On June 7, 1981, however, plaintiff, against whom the applicable statute of limitations had *not* run as a result of its July 24, 1979, payment, filed a claim for refund of taxes paid with respect to its taxable year 1974. After the IRS did not act upon the refund request within six months, plaintiff filed the present action. The district court thereafter granted defendant's motion for summary judgment holding that the plaintiff is barred from seeking the refund under the doctrine of equitable estoppel as set forth in *Stair* v. *United States,* 516 F.2d 560 (2d Cir. 1975).

II.

In *Stair,* the IRS had disallowed a long-term capital gain claimed by the taxpayers, which resulted in a proposed deficiency. After attempted negotiations failed, the taxpayers' representatives recommended litigation of the issue. Several months thereafter, one of the taxpayers met with an agent of the IRS and the two agreed upon a payment of roughly fifty per cent (50%) of the deficiency originally assessed. The agreement was thereafter embodied in the execution of Form 870-AD. The taxpayers then paid the deficiency.

Some two years later, the taxpayers filed a claim for refund for taxes paid pursuant to the 870-AD agreement. At the time the refund claim was filed, the statute of limitations barred the IRS from asserting a claim to the remainder of the deficiency conceded in the settlement agreement. After the taxpayers filed suit, the district court granted the government's motion for summary judgment, holding that the taxpayers were estopped by the failure to assert their claim before the statute of limitations had run against the government.

On appeal, the Second Circuit first noted in *Stair* that the use of equitable estoppel in similar tax refund cases derives from the Supreme Court's opinion in *Botany Worsted Mills* v. *United States,* 278 U.S. 282, 49 S. Ct. 129 (1929). In *Botany Mills,* the Supreme Court held tht agreements between taxpayers and the IRS which do not satisfy the formalities set forth in the Internal Revenue Code[1] for a definitive settlement or compromise are not binding on the government or the taxpayer. However, as the Second Circuit noted, *Botany Mills* left open the question whether an informal settlement agreement, "though not binding in itself, may when executed become, under some circumstances, binding on

[1] The requirements for formal settlement and compromise agreements are today set forth in I.R.C. §§ 7121 and 7122, respectively.

the parties by estoppel . . . ." *Stair*, 516 F.2d at 563 (quoting *Botany Mills*, 278 U.S. at 289, 49 S. Ct. at 132).

After reviewing the case law which developed following the *Botany Mills* decision, the Second Circuit in *Stair* affirmed the decision of the district court. The court concluded that the taxpayers were estopped from claiming a refund because (1) the recital by the taxpayers in the Form 870-AD that no refund claim would be filed — once the taxpayer had reneged — was misrepresentation of a kind sufficient to ground estoppel, and (2) that by its reliance on the taxpayers' promise not to file for a refund, the government was adversely affected when it lost its opportunity to litigate the issue of capital gain or ordinary income treatment, and to collect the full deficiency originally assessed.

In the instant case, the district court was of the opinion that *Stair* is virtually on all fours with the case at bar and that the doctrine of equitable estoppel is likewise applicable to the present action. The plaintiff argues that the above-stated holding is error because this case should be controlled by the principles set forth in *Joyce* v. *Gentsch*, 141 F.2d 891 (6th Cir. 1944), wherein this court refused to hold that the taxpayer was estopped from seeking a refund after signing a modified Form 870 settling a tax dispute and after the statute of limitations had run against the government.

We agree with the government that the instant case is distinguishable from *Joyce*. The Form 870 executed by the taxpayers in *Joyce* was very different from the one at issue here. In the Form 870-AD at issue in this case, the government promised that "the case shall not be reopened in the absence of fraud, malfeasance, concealment or misrepresentation of material fact, an important mistake in mathematical calculation, or excessive tentative allowances or carrybacks provided by law; . . ." On the other hand, in *Joyce*, there was no such promise by the government because the Form 870 expressly provided that the execution of the form would not "preclude the assertion of a further deficiency in the

manner provided by law should it subsequently be determined that additional tax is due, . . ." 141 F.2d at 892. In considering the Form 870 in *Joyce*, it was noted that "by its very terms, an intention not to bind the Government to a final settlement was manifest." *Id.* at 895.

In *Joyce*, therefore, this court concluded that since the government had made no promise not to assess further tax liabilities, it could not have been relying upon an agreement when it failed to assess any deficiencies during the remaining period of the statute of limitations. Moreover, there was no detriment to the government as a result of the *Joyce* "agreement," since it was expressly free, if it had found reason, to further assess deficiencies against the taxpayers. The same cannot be said of the instant agreement, Form 870-AD, since the government expressly promised not to seek further taxes for the years covered by the agreement and relied to its detriment upon the taxpayer's corresponding promise not to seek a refund of taxes paid.

Here the taxpayer further argues that it is unclear that the government actually made concessions in the agreement, and, therefore, doubt exists as to whether it actually relied upon the agreement, or would suffer any harm from the taxpayer's repudiation. We disagree. It is apparent from the parties' stipulation of facts that the government made substantial concessions, both for the taxable year ending in 1974, and the other years covered in the agreement. For example, for the taxable year ending in 1974, although the IRS originally took the position that the taxpayer's claimed mineral depletion allowance deduction would be disallowed in its entirety, the government later agreed to allow the taxpayer a depletion allowance of One Hundred Ninety-two Thousand, One Hundred Thirty-eight Dollars ($192,138.00) pursuant to the agreement embodied in the Form 870-AD. This fact alone demonstrates that the Commissioner actually made concessions.

Finally, the taxpayer argues that the failure of the government to establish reliance and detriment here is similar to that found in *Uinta Livestock Corporation* v. *United States*, 355 F.2d 761 (10th Cir. 1966), in which the court found that the taxpayer was not estopped from bringing a refund action after the execution of a Form 870-AD. The *Uinta* court based its decision on the ground that there was no false representation contained in the taxpayer's later broken promise not to file a refund. However, we believe the better view is stated in *Stair, supra,* that the statement by the taxpayer that no refund claim would be filed is misrepresentation of a kind sufficient to ground estoppel once the taxpayer has reneged. *See Stair, supra,* 516 F.2d at 565 and cases cited therein.

As to the statement by the *Uinta* court that it should not "breathe life" into the noncontractually binding Form 870-AD, we agree with the government that this statement ignores the fact that in all estoppel situations no enforceable contract exists and that, indeed, where there is an enforceable contract there is no need for invoking equitable estoppel principles. The estoppel doctrine does not convert the Form 870-AD into a binding contract, but merely operates to avoid injustice.

III.

This case presents "an interesting illustration of tax gamesmanship." *Stair, supra,* 516 F.2d at 561. Under the facts of this case, we are of the opinion that equitable estoppel was appropriately applied to promote the ends of justice. Accordingly, we AFFIRM the decision of the district court.

Judge's copy

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 84-5504

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ELBO COALS, INC.,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Eastern District of Kentucky.

Decided and Filed June 10, 1985

Before: KENNEDY and MILBURN, Circuit Judges; and GUY, District Judge.*

MILBURN, Circuit Judge. Plaintiff appeals the decision of the district court granting the defendant's motion for summary judgment in this action seeking a refund of taxes. 588 F. Supp. 745 (E.D. Ky. 1984). We affirm.

I.

Plaintiff, a Kentucky corporation engaged in the buying, processing, and selling of coal, claimed a mineral depletion

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allowance deduction on its 1974 federal tax return which was subsequently disallowed by the Internal Revenue Service ("IRS"). Thereafter, audits and amendments for the years 1975-1977 resulted in additional adjustments, both up and down, to numerous items on plaintiff's returns. In 1979, representatives of plaintiff and the IRS reached an informal agreement resolving plaintiff's tax liabilities for its taxable years 1974-1977, which resulted in the issuance of an audit statement by the IRS.

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II.

In *Stair*, the IRS had disallowed a long-term capital gain claimed by the taxpayers, which resulted in a proposed deficiency. After attempted negotiations failed, the taxpayers' representatives recommended litigation of the issue. Several months thereafter, one of the taxpayers met with an agent of the IRS and the two agreed upon a payment of roughly fifty per cent (50%) of the deficiency originally assessed. The agreement was thereafter embodied in the execution of Form 870-AD. The taxpayers then paid the deficiency.

Some two years later, the taxpayers filed a claim for refund for taxes paid pursuant to the 870-AD agreement. At the time the refund claim was filed, the statute of limitations barred the IRS from asserting a claim to the remainder of the deficiency conceded in the settlement agreement. After the taxpayers filed suit, the district court granted the government's motion for summary judgment, holding that the taxpayers were estopped by the failure to assert their claim before the statute of limitations had run against the government.

On appeal, the Second Circuit first noted in *Stair* that the use of equitable estoppel in similar tax refund cases derives from the Supreme Court's opinion in *Botany Worsted Mills* v. *United States*, 278 U.S. 282, 49 S. Ct. 129 (1929). In *Botany Mills*, the Supreme Court held tht agreements between taxpayers and the IRS which do not satisfy the formalities set forth in the Internal Revenue Code[1] for a definitive settlement or compromise are not binding on the government or the taxpayer. However, as the Second Circuit noted, *Botany Mills* left open the question whether an informal settlement agreement, "though not binding in itself, may when executed become, under some circumstances, binding on

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the parties by estoppel . . . ." *Stair,* 516 F.2d at 563 (quoting *Botany Mills,* 278 U.S. at 289, 49 S. Ct. at 132).

After reviewing the case law which developed following the *Botany Mills* decision, the Second Circuit in *Stair* affirmed the decision of the district court. The court concluded that the taxpayers were estopped from claiming a refund because (1) the recital by the taxpayers in the Form 870-AD that no refund claim would be filed — once the taxpayer had reneged — was misrepresentation of a kind sufficient to ground estoppel, and (2) that by its reliance on the taxpayers' promise not to file for a refund, the government was adversely affected when it lost its opportunity to litigate the issue of capital gain or ordinary income treatment, and to collect the full deficiency originally assessed.

In the instant case, the district court was of the opinion that *Stair* is virtually on all fours with the case at bar and that the doctrine of equitable estoppel is likewise applicable to the present action. The plaintiff argues that the above-stated holding is error because this case should be controlled by the principles set forth in *Joyce* v. *Gentsch,* 141 F.2d 891 (6th Cir. 1944), wherein this court refused to hold that the taxpayer was estopped from seeking a refund after signing a modified Form 870 settling a tax dispute and after the statute of limitations had run against the government.

We agree with the government that the instant case is distinguishable from *Joyce.* The Form 870 executed by the taxpayers in *Joyce* was very different from the one at issue here. In the Form 870-AD at issue in this case, the government promised that "the case shall not be reopened in the absence of fraud, malfeasance, concealment or misrepresentation of material fact, an important mistake in mathematical calculation, or excessive tentative allowances or carrybacks provided by law; . . ." On the other hand, in *Joyce,* there was no such promise by the government because the Form 870 expressly provided that the execution of the form would not "preclude the assertion of a further deficiency in the

manner provided by law should it subsequently be determined that additional tax is due, . . ." 141 F.2d at 892. In considering the Form 870 in *Joyce,* it was noted that "by its very terms, an intention not to bind the Government to a final settlement was manifest." *Id.* at 895.

In *Joyce,* therefore, this court concluded that since the government had made no promise not to assess further tax liabilities, it could not have been relying upon an agreement when it failed to assess any deficiencies during the remaining period of the statute of limitations. Moreover, there was no detriment to the government as a result of the *Joyce* "agreement," since it was expressly free, if it had found reason, to further assess deficiencies against the taxpayers. The same cannot be said of the instant agreement, Form 870-AD, since the government expressly promised not to seek further taxes for the years covered by the agreement and relied to its detriment upon the taxpayer's corresponding promise not to seek a refund of taxes paid.

Here the taxpayer further argues that it is unclear that the government actually made concessions in the agreement, and, therefore, doubt exists as to whether it actually relied upon the agreement, or would suffer any harm from the taxpayer's repudiation. We disagree. It is apparent from the parties' stipulation of facts that the government made substantial concessions, both for the taxable year ending in 1974, and the other years covered in the agreement. For example, for the taxable year ending in 1974, although the IRS originally took the position that the taxpayer's claimed mineral depletion allowance deduction would be disallowed in its entirety, the government later agreed to allow the taxpayer a depletion allowance of One Hundred Ninety-two Thousand, One Hundred Thirty-eight Dollars ($192,138.00) pursuant to the agreement embodied in the Form 870-AD. This fact alone demonstrates that the Commissioner actually made concessions.

Finally, the taxpayer argues that the failure of the government to establish reliance and detriment here is similar to that found in *Uinta Livestock Corporation* v. *United States*, 355 F.2d 761 (10th Cir. 1966), in which the court found that the taxpayer was not estopped from bringing a refund action after the execution of a Form 870-AD. The *Uinta* court based its decision on the ground that there was no false representation contained in the taxpayer's later broken promise not to file a refund. However, we believe the better view is stated in *Stair, supra,* that the statement by the taxpayer that no refund claim would be filed is misrepresentation of a kind sufficient to ground estoppel once the taxpayer has reneged. *See Stair, supra,* 516 F.2d at 565 and cases cited therein.

As to the statement by the *Uinta* court that it should not "breathe life" into the noncontractually binding Form 870-AD, we agree with the government that this statement ignores the fact that in all estoppel situations no enforceable contract exists and that, indeed, where there is an enforceable contract there is no need for invoking equitable estoppel principles. The estoppel doctrine does not convert the Form 870-AD into a binding contract, but merely operates to avoid injustice.

III.

This case presents "an interesting illustration of tax gamesmanship." *Stair, supra,* 516 F.2d at 561. Under the facts of this case, we are of the opinion that equitable estoppel was appropriately applied to promote the ends of justice. Accordingly, we AFFIRM the decision of the district court.

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY

PIKEVILLE

CIVIL ACTION NO. 82-54

ELBO COALS, INC.	)	
	)	Stipulations and issues of law
	)	
	)	during pretrial conference
VS:	)	
	)	held March 1, 1983
	)	
	)	
UNITED STATES OF AMERICA	)	

APPEARANCES

For the Plaintiff:

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For the Defendant:

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THE COURT: Let me get this on the record. And redline this, Madam Reporter.

It is agreed by counsel that the depletion allowance for the year 1974 is the issue in this case. Is that correct?

MR. LEVY: I think that--I don't think there is any dispute about that. This is a question of economic interest involved here as well, but I think the depletion allowance is the primary issue, the amount we are entitled to.

THE COURT: For 1974?

MR. LEVY: That's correct.

THE COURT: It is agreed that an 874--

MR. SHANNON: It is a 870-AD.

THE COURT: Was executed when? What day?

MR. SHANNON: The taxpayer executed the 870-AD on the 5th of June, 1979, Your Honor.

THE COURT: Fifth of June, 1979. This was executed by the taxpayer.

Now, who has authority to bind the United States on this, Mr. Salem?

MR. SALEM: In this case it was the chief of the appeals office for this internal revenue district. That would have been a Mr. D. W. Weaver. And he signed for the Government on 6-19-79.

THE COURT: So we agree that was done. What does the agreement in substance state?

MR. SALEM: The operative language upon which the equitable estoppel defense is based--

THE COURT: No, sir. Let's just leave equitable estoppel out of it at the present time.

MR. SALEM: Very good.

THE COURT: What did they agree on as to the facts there?

MR. SALEM: They agreed that the offer which is reflected on this form--

THE COURT: What was the offer?

MR. SALEM: It's too complicated to read, Your Honor. It is quite a number of figures.

THE COURT: Yes, but just give me a summation of it.

MR. SALEM: Basically, what happened was the Internal Revenue Service would assess an additional amount of money against the taxpayer in the form of an interest payment and would permit the taxpayer to claim an overassessment of $16,514. Everybody would say we are settled up at that point.

THE COURT: I don't know. Let me see that, Mr. Marshal. Let me have that. Have you got a copy of that 870-AD?

(Document was handed to the Court.)

It was agreed there was no deficiency in 1974?

MR. SALEM: That would be the agreement, yes, Your Honor.

THE COURT: All right. And it was agreed that the Elbo Coals had been overassessed in taxes $16,514; is that correct?

MR. SALEM: As respects '74, yes, sir.

THE COURT: Now, what, Elbo Coals is contending that what? It overpaid in 1974 $173,328?

MR. SHANNON: That's correct, Your Honor. What these figures indicate is that it was decided or it was determined that there was a tax liability actually in the year of '74 in

the amount of $173,328, which was offset by an overpayment of $189,842, so it was later determined from the net operating loss carry-backs and investment tax credit carry-backs and consolidated subsidiary loss.

And that offsetting is where we get the $16,514 over-assessment.

THE COURT: Are you stating that they used the depletion allowance in finding the overassessment of $16,000?

MR. SHANNON: Yes, Your Honor. There was-- We had taken a depletion deduction and $361,101 of that was disallowed, which is what resulted in the tax liability of $173,328, which was later offset by these other carry-backs.

THE COURT: What are we going to need to get this for trial, gentlemen?

(Discussion followed concerning trial by deposition.)

THE COURT: Gentlemen, where are we?

MR. SALEM: Your Honor, we have been able to reach an agreement. We have a stipulation here in principle which we can reduce to writing. Perhaps in the next seven days we will be able to file it with the Court.

THE COURT: If you will just state it and let's get it on the record.

MR. SALEM: First of all, as the first element of the stipulation, the defendant and the plaintiff will stipulate that

all five of the proposed paragraphs in plaintiff's stipulations as filed with the Court are acceptable by both parties.

Two, the parties will stipulate as follows: There was a written agreement dated January 1, 1974. That written agreement will be accepted into evidence as Joint Exhibit No. 1, Roman Numeral I.

In addition to the written statement there was an oral agreement. The oral agreement was as follows: Elbo Coals was to operate the leases of Call & Ramsey Coal Company. In exchange for the right to operate the leases of Call & Ramsey Coal Company, Elbo Coals was to pay to Call & Ramsey $1 million for the one year lease and was also to make payment of all base royalties, severance taxes and other obligations under the leases of Call & Ramsey. This included the right to mine, process and sell the coal obtained in connection with the Call & Ramsey leases.

The parties further stipulate that Mr. James Beard if called would testify as set forth in the plaintiff's list of witnesses filed with the Court.

As the third element of the stipulation, all of the exhibits as tendered by the plaintiffs--the plaintiff and the defendant shall be accepted by both parties as part of the record.

MR. LEVY: Statement of facts?

MR. SALEM: In addition, the parties also have stipulated to the statement of facts as contained in the plaintiff's pretrial memorandum.

THE COURT: Is that it, gentlemen?

MR. SALEM: I am finished, Your Honor, if Mr. Levy has anything to add.

MR. LEVY: I believe that covers everything, Your Honor.

THE COURT: Let me ask you this: By reason of this stipulation, do we have any disputed issues of fact?

MR. SALEM: We have no dispute at this point.

MR. LEVY: None at all. We have resolved all the issues of fact.

THE COURT: What are the issues of law, now?

MR. SALEM: First of all, the first issue that the Government will raise is that the Government contends that the litigation of this case is barred in its entirety by reason of the doctrine of equitable estoppel, relying on the form 870-AD.

The second issue the Government will raise is that the refund is barred by the statute of limitations except to the extent of the $7,000 payment made on July 24, 1979.

Thirdly, the merits of the depletion allowance will be placed before the Court as a legal matter. The question being whether Elbo Coals had an economic interest in the coal which was mined and sold in the 1974 tax year.

THE COURT: All right.

MR. LEVY: That's correct.

THE COURT: Is that the sole issue of law?

MR. LEVY: As far as we are concerned after our discussion today, yes, sir.

If it please Your Honor, it would be the parties' preference we would like to reduce our stipulation to writing and sign it

ourselves. There are some technical language that we want to insure that is contained for both parties' benefit.

THE COURT: Now, let's do this: Once the stipulation of fact is made, stating the issues of law, and then each party will move for a summary judgment and will prepare a memorandum of points and authorities in support of their position.

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2 September PRELIMINARY CONFERENCE

82-54 ELBO COAL vs. UNITED STATES (Tax case)

Plaintiff sues the U.S to recover $173,328 in overpaid taxes.

ISSUES:

1) Equitable Estoppel. US says that plaitiff settled the matter administratively, and the statute of limitations has run (other circuits have agreed to this position; 6th circuit has not address the point).

2). (Where plaintiff paid only $7,586 in the past 2 years, as interest), US says plaintiff's possible refund is limited to just this amount because claim not filed within statutory limits - 3 years.

3). US disallowed depletion allowance of $553,239 on grounds that plaintiff has not shown that it is entitled to the allowance. US concedes that someone is entitled, but not necessariyly this taxpayesr

Elbo pd to US. 7,586 in past 2 yrs interest on