

NOTE: This order is nonprecedential.

**United States Court of Appeals  
for the Federal Circuit**

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**LYMAN F. BUSH INDIVIDUALLY AND AS  
PERSONAL REPRESENTATIVE OF THE ESTATE  
OF BEVERLY J. BUSH,**  
*Plaintiffs-Appellants,*

v.

**UNITED STATES,**  
*Defendant-Appellee.*

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2009-5008

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Appeal from the United States Court of Federal  
Claims in consolidated case nos. 02-CV-1041 and 04-CV-  
1598, Judge George W. Miller.

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**TOMMY J. SHELTON,**  
*Plaintiff-Appellant,*

v.

**UNITED STATES,**  
*Defendant-Appellee.*

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2009-5009

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Appeal from the United States Court of Federal  
Claims in consolidated case nos. 02-CV-1042 and 04-CV-  
1595, Judge George W. Miller.

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Before RADER, *Chief Judge*, NEWMAN, LOURIE, BRYSON, GAJARSA, LINN, DYK, PROST, and MOORE, *Circuit Judges*.

PER CURIAM.

## ORDER

Each Plaintiff-Appellant, Lyman F. Bush (individually and as personal representative of the Estate of Beverly J. Bush) and Tommy J. Shelton, filed a combined petition for panel rehearing and rehearing en banc in their respective appeals. Defendant-Appellee United States filed a petition for panel rehearing covering both appeals. Pursuant to the panel's requests, Appellee filed a response to the petition in each appeal, and each appellant filed a response to the United States' petition.

All petitions for panel rehearing were considered by the panel that heard the appeals, and thereafter the combined petitions for rehearing en banc and the responses to the combined petitions were referred to the circuit judges who are authorized to request a poll on whether to rehear the appeal en banc. A poll was requested, taken, and the court has decided that the appeal warrants en banc consideration.

Upon consideration thereof,

IT IS ORDERED THAT:

(1) The petition of Plaintiff-Appellant Lyman Bush, individually and as personal representative of the Estate of Beverly J. Bush, for panel rehearing is denied.

(2) The petition of Plaintiff-Appellant Tommy J. Shelton for panel rehearing is denied.

(3) The petition of Defendant-Appellee United States for panel rehearing is denied.

(4) The combined petitions of Plaintiffs-Appellants Lyman F. Bush, individually and as personal representative, and Tommy J. Shelton for rehearing en banc are granted.

(5) The court's March 31, 2010 opinion is vacated, and the appeals are reinstated.

(6) The parties are requested to file new briefs addressing the following issues:

a) Under I.R.C. § 6213, were taxpayers in this case entitled to a pre-assessment deficiency notice? Were the assessments the results of a "computational adjustment" under § 6230 as the term "computational adjustment" is defined in § 6231(a)(6)?

b) If the IRS were required to issue a deficiency notice, does § 6213 require that a refund be made to the taxpayers for amounts not collected "by levy or through a proceeding in court"?

c) Are taxpayers entitled to a refund under any other section of the Internal Revenue Code? For example, what effect, if any, does an assessment without notice under § 6213 have on stopping the running of the statute of limitations?

d) Does the harmless error statute, 28 U.S.C. § 2111, apply to the government's failure to issue a deficiency notice under I.R.C. § 6213? If so, should it apply to the taxpayers in this case?

(7) This court consolidates case nos. 2009-5008 and 2009-5009.

(8) This appeal will be heard en banc on the basis of the originally filed briefs and additional briefing ordered herein. The court will determine whether oral argument is appropriate after reviewing the briefs. An original and thirty copies of all originally-filed briefs shall be filed within 20 days from the date of filing of this order. An original and thirty copies of new en banc briefs shall be filed, and two copies of each en banc brief shall be served

on opposing counsel. Plaintiff-Appellant, Lyman F. Bush (individually and as personal representative of the Estate of Beverly J. Bush) and Plaintiff-Appellant, Tommy J. Shelton shall file a consolidated en banc brief. Plaintiffs-Appellants' en banc brief is due 45 days from the date of this order. Defendant-Appellee's en banc response brief is due within 40 days of service of Plaintiffs-Appellants' new en banc brief, and Plaintiffs-Appellants' consolidated reply brief is due within 15 days of service of Defendant-Appellee's response brief. Briefs shall adhere to the type-volume limitations set forth in Federal Rule of Appellate Procedure 32 and Federal Circuit Rule 32.

(9) Briefs of amici curiae will be entertained, and any such amicus briefs may be filed without leave of court or the parties' consent but otherwise must comply with Federal Rule of Appellate Procedure 29 and Federal Circuit Rule 29.

(10) If needed, oral argument will be held at a time and date to be announced later.

FOR THE COURT

October 29, 2010

/s/ Jan Horbaly

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Date

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Jan Horbaly  
Clerk

cc: Sallie W. Gladney, Esq.  
Thomas E. Redding, Esq.  
Andrew M. Weiner, Esq.