

Fall 2000

## New Provision for Tolling the Limitations Periods for Seeking Tax Refunds: Its History, Operation and Policy, and Suggestions for Reform, The

Bruce A. McGovern

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# MISSOURI LAW REVIEW

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VOLUME 65

FALL 2000

NUMBER 4

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## **The New Provision for Tolling the Limitations Periods for Seeking Tax Refunds: Its History, Operation and Policy, and Suggestions for Reform**

*Bruce A. McGovern\**

### ABSTRACT

This Article examines a provision of the Internal Revenue Code that Congress enacted in 1998 that suspends the running of the limitations periods that apply to claims for tax refunds. The provision suspends the limitations periods when a taxpayer is “financially disabled,” which is defined as being unable to manage one’s financial affairs due to a sufficiently severe, medically determinable physical or mental impairment. Congress enacted this provision in response to a series of cases that culminated in a decision of the United States Supreme Court in which the Court held that courts could not equitably suspend, or “toll,” the refund limitations periods under any circumstances. The Article discusses the long-standing judicial practice of tolling limitations periods as a matter of equity and shows how the contours of this practice as applied to claims against the federal government remain uncertain despite the Court’s recent efforts to provide guidance. The Article also sets forth the history of, explains and illustrates the limitations periods that apply to administrative claims for tax refunds, and demonstrates how an interpretation of these provisions that has gained acceptance in some courts is incorrect. After chronicling the series of cases that led Congress to enact the new Code provision, the Author critically examines the new provision and provides guidance on issues of interpretation that are likely to arise. The Author argues that the new provision is not well

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suites to the needs of the majority of taxpayers who are likely to seek its relief and contains requirements that are antithetical to its underlying purpose. The Article concludes by proposing four specific amendments to the new provision and by suggesting specific areas in which administrative guidance is necessary under the provision as it currently exists.

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## I. INTRODUCTION

Those who pay too much in tax recover their overpayments by filing a claim for refund.<sup>1</sup> For many taxpayers the process is straightforward. A worker who has had too much tax withheld from her wages, for example, typically claims a refund by filing with the Internal Revenue Service (the "Service") a return that sets forth the amount of the overpayment and the portion to be refunded.<sup>2</sup> But for many others the process is not straightforward. Taxpayers who suffer from mental illness, for example, are often delayed in filing their claims for refund. If the delay is too great, then their claims are barred by the limitations periods set forth in Section 6511 of the Internal Revenue Code (the "Code").<sup>3</sup> If a taxpayer's administrative claim is barred, then the taxpayer also is precluded from bringing suit for a refund in either a federal district court or the United States Court of Federal Claims, the two courts with jurisdiction over refund actions.<sup>4</sup> A taxpayer's filing of an administrative claim for refund thus gives rise to two important questions: (1) whether the taxpayer has complied with the limitations periods of Section 6511, and if not, (2) whether there are circumstances in which the Service or a court can overlook the taxpayer's noncompliance and treat the claim as timely filed. This Article addresses both questions, but focuses primarily on the second. Specifically, the Article examines Section 6511(h), a provision that Congress enacted in 1998<sup>5</sup> to define

1. I.R.C. § 7422(a) (1994); Treas. Reg. § 301.6402-2(b)(1) (as amended in 1977); see *infra* notes 87-104 and accompanying text.

2. See *infra* notes 96-97 and accompanying text.

3. See *infra* notes 105-12 and accompanying text. Unless otherwise indicated, all references to a "Section" or "Sections" are to a Section or Sections of the Internal Revenue Code of 1986, as amended.

4. See I.R.C. § 7422(a) (1994) (stating that administrative claim for refund is prerequisite to bringing suit for refund); 28 U.S.C. § 1346(a)(1) (1994) (granting United States Court of Federal Claims and United States District Courts jurisdiction over tax refund actions); *infra* notes 102-04 and accompanying text.

5. See Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L.

the circumstances in which the limitations periods in Section 6511 are suspended, or “tolled,” due to the taxpayer’s incapacity.

One might expect that the analysis required to answer the question whether a taxpayer has filed a timely claim for refund would be routine. But as the United States Supreme Court recently observed, the language and interplay of the various provisions of Section 6511 are “not simple.”<sup>6</sup> Indeed, within the last ten years the Court has considered the impact or proper interpretation of Section 6511 on five occasions.<sup>7</sup> This complexity is a potential problem for a large number of persons. According to the Service’s most recent statistics, the Service issues more than ninety million income tax refunds to individuals each year.<sup>8</sup>

The complexity of Section 6511 presents an especially difficult barrier for taxpayers with disabilities. In a series of cases decided between 1990 and 1997,<sup>9</sup> taxpayers who had failed to comply with the limitations periods of Section 6511 made a three-part argument: (1) under the Supreme Court’s 1990 decision in *Irwin v. Department of Veterans Affairs*,<sup>10</sup> federal courts can, as a matter of equity, toll all limitations periods that run in favor of the federal government, including the limitations periods of Section 6511, (2) the taxpayers had been unable to comply with Section 6511’s limitations periods for reasons such as mental incompetence,<sup>11</sup> severe alcoholism,<sup>12</sup> or imprisonment with lack of access to financial records,<sup>13</sup> and therefore (3) the court should equitably toll Section 6511’s limitations periods for the period during which the taxpayers were unable to comply and treat their administrative claims for refund as timely filed. The federal courts of appeals divided on the proper analysis of this argument.<sup>14</sup> In 1997, the Supreme Court resolved the dispute when it held in *United States v. Brockamp*<sup>15</sup> that Congress had not intended to permit tolling of Section 6511’s limitations periods. In response to the *Brockamp* decision, Congress added to the Code new Section 6511(h), which provides that the running of certain

No. 105-206, § 3202(a), 112 Stat. 685, 740-41.

6. *United States v. Brockamp*, 519 U.S. 347, 350 (1997).

7. *See Baral v. United States*, 528 U.S. 431 (2000); *Brockamp*, 519 U.S. at 347; *Comm’r v. Lundy*, 516 U.S. 235 (1996); *United States v. Williams*, 514 U.S. 527 (1995); *United States v. Dalm*, 494 U.S. 596 (1990).

8. *See INTERNAL REVENUE SERV., STATISTICS OF INCOME BULLETIN* tbl.1, at 164 (Spring 2000) (setting forth statistics for 1998).

9. *See infra* Part IV.A.

10. 498 U.S. 89 (1990).

11. *See, e.g., Wiltgen v. United States*, 813 F. Supp. 1387, 1394 (N.D. Iowa 1992); *Johnsen v. United States*, 758 F. Supp. 834, 836 (E.D.N.Y. 1991).

12. *See Scott v. United States*, 847 F. Supp. 1499, 1503 (D. Haw. 1993), *aff’d*, 95-2 U.S. Tax Cas. (CCH) ¶ 50,557 (9th Cir. 1995), *rev’d*, 519 U.S. 347 (1997).

13. *See Henderson v. Backaric*, 95-2 U.S. Tax Cas. (CCH) ¶ 50,329 (D. Kan. 1995).

14. *See infra* Part IV.A.

15. 519 U.S. 347, 354 (1997); *see infra* Part IV.B.

limitations periods in Section 6511 is suspended in a narrow set of circumstances: when the taxpayer is unable to manage her financial affairs because of a sufficiently severe, medically determinable physical or mental impairment.<sup>16</sup>

This Article examines Section 6511(h). Part II discusses the policy concerns embodied in statutes of limitations and the long-standing practice of tolling limitations periods both by statute and as a matter of equity. Part II also discusses both the Supreme Court's decision in *Irwin* regarding equitable tolling of limitations periods in actions against the federal government and the confusion that the Court's decision has engendered. In Part III, the Article explains the procedures for and limitations on obtaining a refund of tax and traces the history of the limitations periods that apply to administrative claims for refund. Part IV discusses the disagreement that developed in the federal courts regarding whether the limitations periods of Section 6511 are subject to equitable tolling and the Supreme Court's resolution of the issue in *Brockamp*. Part V critically examines the operation and policy of the congressional response to the *Brockamp* decision, new Section 6511(h). In Part VI, the Article proposes four specific changes to Section 6511(h) to tailor the provision to the needs of the majority of taxpayers who will seek its relief, to make the provision less burdensome for both taxpayers and the government, and to eliminate requirements that are antithetical to the statute's underlying purpose. Part VI also argues that, until Congress amends the statute, the Service should implement changes to the manner in which it interprets and administers Section 6511(h) as it currently exists.

## II. STATUTES OF LIMITATIONS AND THE DOCTRINE OF EQUITABLE TOLLING

### A. General Principles

#### 1. Statutes of Limitations

A statute of limitations sets forth a period of time during which a party can assert a claim.<sup>17</sup> The limitations period that a statute sets forth represents a policy decision concerning the appropriate balance among the interests of those asserting claims, those defending them, and society as a whole.<sup>18</sup> Plaintiffs have

16. See I.R.C. § 6511(h) (Supp. IV 1998); *infra* Part V.

17. For a discussion of the history of statutes of limitations and references to earlier works, see Note, *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1177-81 (1950).

18. See *Wilson v. Garcia*, 471 U.S. 261, 271 (1985) (stating that limitations period represents “the State’s judgment on the proper balance between the policies of repose and the substantial policies of enforcement embodied in the state cause of action”). For a

an interest in obtaining any legal or equitable relief to which they might be entitled. Defendants, for a variety of reasons, have an interest in being relieved of the need to defend against claims. For example, assurance that any claims are barred assists defendants in choosing to dispose of records and in planning for the future. Society as a whole has several, sometimes conflicting, interests. These interests include seeing that meritorious claims of a plaintiff are adjudicated, promoting the security of transactions, and promoting the integrity of the judicial system by precluding the litigation of claims that present an unreasonable risk of erroneous factfinding, i.e., those with respect to which “evidence has been lost, memories have faded, and witnesses have disappeared.”<sup>19</sup> With the passage of time, the balance among these interests gradually shifts.<sup>20</sup> At first the balance favors the assertion of claims, but eventually favors repose. The limitations period that applies to a plaintiff’s claim defines the point at which the interests of plaintiffs and society in asserting claims are outweighed by those of defendants and society in precluding them. This is not to say that the shift in balance can be measured with scientific precision, for the precise limitations period that a legislature chooses is to some extent arbitrary.<sup>21</sup> Rather, the specific limitations period chosen is a sort of “rough justice” that represents the legislature’s judgment as to when, in most cases, the balance tips in favor of repose.

## 2. Tolling and Other Forms of Relief from the Statutory Bar

A limitations period will bar a claim only if two conditions are satisfied: (1) before the party asserting the claim takes the required action (e.g., filing the complaint), the limitations period begins to run, continues its full course, and

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thoughtful discussion of these interests, see Eli J. Richardson, *Eliminating the Limitations of Limitations Law*, 29 ARIZ. ST. L.J. 1015, 1019-26 (1997). See also Christopher R. Leslie, *Den of Inequity: The Case for Equitable Doctrines in Rule 10b-5 Cases*, 81 CAL. L. REV. 1587, 1589-91 (1993) (discussing purposes of statutes of limitations); Note, *Statutes of Limitations*, *supra* note 17, at 1185-86 (same).

19. *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 428 (1965) (quoting *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944)); see also *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (stating that statutes of limitations free courts from “having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise”).

20. See *Order of R.R. Telegraphers*, 321 U.S. at 349 (stating that “even if one has a just claim[,] it is unjust not to put the adversary on notice to defend within the period of limitation and . . . the right to be free of stale claims in time comes to prevail over the right to prosecute them”).

21. See John P. Dawson, *Undiscovered Fraud and Statutes of Limitations*, 31 MICH. L. REV. 591, 596 (1933) (noting that “[t]he lack of exact methods for measuring these vague and remote interests of society will undoubtedly justify the use, in legislation, of exact and even arbitrary tests”).

expires, and (2) the party defending the claim is permitted to assert the bar of the statute of limitations. The concept of tolling addresses the first condition. A related concept, estoppel, addresses the second.

### a. Statutory Tolling

Depending on the context, the term “tolling” can refer either to postponing the commencement of a limitations period or to suspending the running of the period once it has begun.<sup>22</sup> In both senses of the word, tolling has long been prescribed by statute. The statute of James I,<sup>23</sup> from which the first American statutes of limitations were derived,<sup>24</sup> provided that if, at the time the cause of action accrued, the person entitled to assert the claim was “within the age of twenty-one years, *feme covert*,<sup>25</sup> *non compos mentis*,<sup>26</sup> impris]oned or beyond the [s]jea[s],” then the limitations periods of the statute would not commence until the impediment to bringing the claim had ceased.<sup>27</sup> Modern American statutes continue this tradition. For example, state statutes commonly defer or suspend the running of limitations periods for periods of time during which a resident defendant is absent from the state<sup>28</sup> or a plaintiff is either a minor or mentally incompetent.<sup>29</sup> Similarly, state statutes often contain a “date of discovery” rule for certain actions, such as for professional malpractice, under which the limitations period begins to run only from the date on which the plaintiff discovered or should have discovered the basis for her cause of action.<sup>30</sup>

22. See Richardson, *supra* note 18, at 1039-40.

23. 21 Jam., ch. 16, 7 Stats. at Large 273 (1623).

24. See Hanger v. Abbott, 73 U.S. 532, 538 (1867); Dawson, *supra* note 21, at 597 & n.14.

25. A married woman. BLACK'S LAW DICTIONARY 617 (6th ed. 1990).

26. Not of sound mind. *Id.* at 1051.

27. 21 Jam., ch. 16, § 7, 7 Stats. at Large 275 (1623).

28. See, e.g., FLA. STAT. ANN. § 95.051(1)(a) (West 1982 & Supp. 2000); GA. CODE ANN. § 9-3-96 (1999); 735 ILL. COMP. STAT. ANN. 5/13-208 (West 1992); MO. REV. STAT. § 516.200 (1994); N.Y.C.P.L.R. 207 (McKinney Supp. 2000); WASH. REV. CODE ANN. § 4.16.180 (West 1988). See generally Note, *Statutes of Limitations*, *supra* note 17, at 1224-28 (discussing development of these “absence” exceptions).

29. See, e.g., ALA. CODE § 6-2-8 (Supp. 1999); CAL. CIV. PROC. CODE § 352 (West 1982 & Supp. 2000); FLA. STAT. ANN. § 95.051(1)(h) (West Supp. 2000); 735 ILL. COMP. STAT. ANN. 5/13-211 (West 1992); MASS. ANN. LAWS ch. 260, § 7 (Law. Co-op. 1992 & Supp. 2000); N.Y.C.P.L.R. 208 (McKinney 1990); VA. CODE ANN. § 8.01-229(A) (Michie 2000); WASH. REV. CODE ANN. § 4.16.190 (West Supp. 2000).

30. See, e.g., CAL. CIV. PROC. CODE § 340.6(a) (West 1982); CONN. GEN. STAT. § 52-584 (1991); MISS. CODE ANN. § 15-1-36(2) (Supp. 2000); NEB. REV. STAT. § 25-222 (1995); UTAH CODE ANN. § 78-14-4 (1996); VT. STAT. ANN. tit. 12, § 521 (Supp. 2000). Many of these “date of discovery” statutes impose an absolute, outside limit on the plaintiff's ability to assert a claim. For example, the Nebraska statute, which applies to actions for professional negligence, provides that the action must be commenced within

Although less commonly than their state counterparts, some federal statutes of limitations also expressly defer or suspend the running of limitations periods under specified conditions.<sup>31</sup>

### b. Equitable Tolling

Even when a statute of limitations is silent on the availability of tolling, courts are often persuaded to apply the doctrine of equitable tolling. Under this doctrine, courts defer or suspend the running of a limitations period in two general circumstances: (1) when the nature of the alleged wrong, or the defendant's subsequent actions to conceal the alleged wrong, have prevented the plaintiff from discovering the basis for her claim, and (2) when extraordinary circumstances beyond the plaintiff's control have prevented the plaintiff from asserting the claim in a timely manner.

The first of these two justifications for judicial tolling originated in the context of civil actions based on the defendant's alleged fraud.<sup>32</sup> From an early date, courts were receptive to the argument that the plaintiff's claim, although seemingly asserted after the limitations period had expired, should not be barred because the nature of the fraud prevented the plaintiff from discovering her claim.<sup>33</sup> Under this fraud exception, courts delayed the commencement of the limitations period until the plaintiff discovered or should have discovered the claim. In circumstances where the defendant's alleged wrong could not be labeled "fraudulent," such as the defendant's mere breach of contract, some courts acknowledged a similar doctrine, known as fraudulent concealment, under

two years after the alleged act or omission, but if the plaintiff did not and could not with reasonable diligence discover the act or omission within that two-year period, then the plaintiff may commence the action within one year after the plaintiff discovered or should have discovered the alleged act or omission. In no event, however, can the plaintiff bring the action more than ten years after the alleged act or omission. *See* NEB. REV. STAT. § 25-222 (1995).

31. *See* 28 U.S.C. § 2401(a) (1994) (civil actions against the United States generally must be commenced within six years from time right of action accrues, but "[t]he action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases"); 26 U.S.C. § 7508(a) (1994) (period of service in armed forces in "combat zone" not included in determining whether taxpayer has timely taken certain actions, such as filing income tax return).

32. *See* *Cerbone v. Int'l Ladies' Garment Workers Union*, 768 F.2d 45, 48 (2d Cir. 1985). *See generally* *Dawson*, *supra* note 21, at 597-606 (discussing development of fraud exception); Lyman Johnson, *Securities Fraud and the Mirage of Repose*, 1992 WIS. L. REV. 607, 633-55 (same).

33. *See* *Booth v. Lord Warrington*, 2 Eng. Rep. 111 (1714); *First Mass. Turnpike Co. v. Field*, 3 Mass. 201 (1807); *see also* *Bailey v. Glover*, 88 U.S. 342, 348 (1874) (discussing courts' applications of the fraud exception in actions at law and in equity). *See generally* *Dawson*, *supra* note 21, at 597-606 (discussing cases).

which the court would defer the commencement of a limitations period because of the defendant's subsequent, affirmative steps to conceal the alleged wrongdoing from the plaintiff.<sup>34</sup> Under the fraudulent concealment doctrine, the wrong that gives rise to the plaintiff's claim is not self-concealing; rather, it is the defendant's subsequent action that conceals the wrong from the plaintiff.

The distinction between the fraud and fraudulent concealment exceptions has become blurred over the years.<sup>35</sup> The United States Supreme Court first applied these exceptions to a federal limitations period in *Bailey v. Glover*,<sup>36</sup> in which the Court held that "when the fraud has been concealed, or is of such character as to conceal itself, the [two-year limitation on a bankruptcy assignee's right to recover property] does not begin to run until the fraud is discovered by, or becomes known to, the party suing, or those in privity with him," provided that "there has been no negligence or laches on the part of a plaintiff in coming to the knowledge of the fraud."<sup>37</sup> By the time of the Court's decision seventy-three years later in *Holmberg v. Armbrecht*,<sup>38</sup> the acceptance and fusion of these exceptions in the federal courts appears to have been complete.<sup>39</sup> The Court in *Armbrecht* stated categorically that "[t]his equitable doctrine is read into every federal statute of limitation."<sup>40</sup> Today, the federal courts generally apply the doctrine of "equitable tolling" to delay the commencement of limitations periods without distinguishing between the original fraud and fraudulent concealment exceptions. Unfortunately, the modern legacy of these judicially-created exceptions is confusion as to what a plaintiff must show in order to be eligible for equitable tolling based on the defendant's alleged fraud or fraudulent concealment. For example, it is often unclear whether a court will treat a

34. See, e.g., *Quimby v. Blackey*, 63 N.H. 77 (1884); *Munson v. Hallowell*, 26 Tex. 475 (1863). See generally John P. Dawson, *Fraudulent Concealment and Statutes of Limitations*, 31 MICH. L. REV. 875, 880 (1933); Johnson, *supra* note 32, at 637-41; Note, *Statutes of Limitations*, *supra* note 17, at 1220-24.

35. Commentators continue to debate the extent to which the fraud and fraudulent concealment exceptions originally were separate doctrines. Compare Johnson, *supra* note 32, at 644 ("[A]fter *Bailey v. Glover*[, 88 U.S. 342 (1874),] as before, they were separate doctrines. The Court, recognizing this, often invoked the separate doctrine of fraudulent concealment to suspend a limitations period."), with Richard L. Marcus, *Fraudulent Concealment in Federal Court: Toward a More Disparate Standard?*, 71 GEO. L.J. 829, 856-57 (1983) ("Thus arose the often-cited distinction between tolling requirements for fraud (in which concealment need not be proved) and fraudulent concealment (in which it was required), a supposed dichotomy that has had an uneasy life.").

36. 88 U.S. 342 (1874).

37. *Id.* at 349-50.

38. 327 U.S. 392 (1946).

39. See Marcus, *supra* note 35, at 839-42 (discussing federal development of fraudulent concealment doctrine and the Court's decision in *Armbrecht*); Johnson, *supra* note 32, at 646-50 (same).

40. *Armbrecht*, 327 U.S. at 397.

plaintiff's claim as an assertion of "fraud," thereby eliminating the need to prove concealment,<sup>41</sup> and whether a plaintiff who seeks tolling must show diligence in discovering the alleged wrong in all cases, or only in cases where the plaintiff has not alleged active concealment by the defendant.<sup>42</sup>

The second justification that courts commonly give for applying the doctrine of equitable tolling is that extraordinary circumstances beyond the plaintiff's control have prevented the plaintiff from asserting the claim in a timely manner. For example, courts have tolled limitations periods when war has closed the courts with jurisdiction over the matter<sup>43</sup> or has prevented the plaintiff from serving the defendant with process.<sup>44</sup> Similarly, at least one court has tolled a limitations period when the plaintiff could not timely bring his action because during war he was imprisoned overseas.<sup>45</sup> Other extraordinary circumstances that have formed the basis for tolling include the plaintiff's effective lack of access to fair adjudication of claims because the military had seized power<sup>46</sup> and the plaintiff's inability to bring an action because the court had declared, in response to legislation found unconstitutional on appeal, that it would not consider the plaintiff's claim.<sup>47</sup> The federal courts currently are divided on the question whether a plaintiff's mental incapacity is a circumstance that justifies equitable tolling.<sup>48</sup>

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41. See Marcus, *supra* note 35, at 865-70 (discussing how courts have excused plaintiffs from proving concealment through liberal interpretations of the term "fraud").

42. See Marcus, *supra* note 35, at 874-901 (discussing relationship between plaintiff's diligence and defendant's concealment); Leslie, *supra* note 18, at 1593-95 (discussing the courts' varying requirements regarding the need for a plaintiff to show diligence in order to obtain tolling).

43. See *Levy v. Stewart*, 78 U.S. 244, 253-55 (1870) (state limitations period suspended because courts of Louisiana closed during war); *The Protector*, 76 U.S. 687, 690 (1869) (time for filing appeal in Supreme Court from judgment of federal district court in Alabama suspended during war); *Hanger v. Abbott*, 73 U.S. 532, 541 (1867) (state limitations period suspended because courts of Arkansas closed during war); *Borovitz v. Am. Hard Rubber Co.*, 287 F. 368, 370-71 (N.D. Ohio 1923) (Ohio's two-year limitations period for wrongful death actions suspended during World War I because plaintiff, resident of Austria-Hungary, could not bring suit in United States during those years).

44. See *United States v. Wiley*, 78 U.S. 508, 512-14 (1870) (federal limitations period for suits based on bond given by United States Marshal suspended because Marshal resided in Virginia during war and could not be served with process).

45. See *Osbourne v. United States*, 164 F.2d 767, 769 (2d Cir. 1947).

46. See *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1550-51 (N.D. Cal. 1987) (claims under 28 U.S.C. § 1350 by individuals who had been seized by military personnel in Argentina, for torts committed by aliens in violation of international law).

47. See *Seattle Audubon Soc'y v. Robertson*, 931 F.2d 590, 595-97 (9th Cir. 1991), *rev'd on other grounds*, 503 U.S. 429 (1992).

48. Compare *Ebrahimi v. E.F. Hutton & Co.*, 852 F.2d 516, 522-23 (10th Cir. 1988) (limitations period applicable to claim under Section 4(b) of Commodities

The two categories of cases in which courts apply the doctrine of equitable tolling differ in that in the first (the defendant has committed fraud or has fraudulently concealed the basis for the plaintiff's claim), the defendant is in some way responsible for the plaintiff's failure to assert the claim in a timely manner. In the second category (extraordinary circumstances beyond the plaintiff's control), the defendant might not be responsible for the plaintiff's delay. In essence, however, both categories reflect judicial dissatisfaction with the results obtained by mechanically applying a fixed limitations period in specific cases. One might view equitable tolling as a form of highly suspect judicial legislation because its application upsets the balance among competing interests established by the legislature. The courts, however, appear to view themselves as fulfilling the legislature's intent by taking into account the unstated assumptions underlying the statute, such as the assumptions that the plaintiff is aware of the defendant's wrongdoing, that the plaintiff has not been prevented from becoming aware of it by the defendant's affirmative attempts to hide it, and that extraordinary circumstances, such as closure of the court involved, have not made it impossible for the plaintiff to comply with the limitations period.<sup>49</sup> Under this view, the balance struck by the legislature is provisional and subject to adjustment in individual cases.<sup>50</sup>

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Exchange Act cannot be tolled based on mental illness), *and Casias v. United States*, 532 F.2d 1339, 1342 (10th Cir. 1976) (insanity cannot form basis for tolling period for filing administrative claim under Federal Tort Claims Act), *and Accardi v. United States*, 435 F.2d 1239, 1241 n.2 (3d Cir. 1970) (same), *and Williams v. United States*, 228 F.2d 129, 132 (4th Cir. 1955) (two year period for filing suit under Suits in Admiralty Act cannot be tolled due to insanity), *cert. denied*, 351 U.S. 986 (1956), *with Nunnally v. MacCausland*, 996 F.2d 1, 5 (1st Cir. 1993) (mental illness provides an available ground for tolling 30-day period for filing suit set forth in Civil Service Reform Act), *and Thomas v. Humfield*, 916 F.2d 1032, 1035 (5th Cir. 1990) (remanding civil rights suit for determination of applicable statute of limitations and whether it was tolled due to plaintiff's mental incompetence), *and Miller v. Gould*, 1992 U.S. Dist. LEXIS 7299 (N.D. Ill. May 15, 1992) (plaintiff presented sufficient evidence of incapacity to withstand summary judgment motion based on plaintiff's failure to comply with 30-day period for seeking administrative action in discrimination suit under Title VII).

49. Examples of this view include the following statement by the Supreme Court: Statutes of limitations are . . . enacted upon the presumption that one having a well-founded claim will not delay enforcing it beyond a reasonable time, if he has the power to sue. Such reasonable time is therefore defined and allowed. But the basis of the presumption is gone whenever the ability to resort to the courts has been taken away. In such a case the creditor has not the time within which to bring his suit that the statute contemplated he should have.

*Wiley*, 78 U.S. at 513-14; *see also Osbourne*, 164 F.2d at 769 ("when a plaintiff has been denied access to the courts, the basis of the [legislative] assumption has been destroyed"); *Johnson*, *supra* note 32, at 636 (discussing possible justifications for deferring or suspending limitations periods).

50. *See Johnson*, *supra* note 32, at 634.

### c. Equitable Estoppel and its Relationship to Equitable Tolling

A doctrine that is closely related to equitable tolling is equitable estoppel.<sup>51</sup> Under the doctrine of equitable estoppel, courts preclude a defendant from raising the statute of limitations as a defense when the plaintiff was aware of her claim, but was somehow misled by the defendant into not asserting it until after the limitations period had passed. For example, courts have estopped defendants from asserting the statute of limitations when they have misled a plaintiff into believing that the statutory period for filing was longer than it actually was<sup>52</sup> or when they have assured plaintiffs of their intent to settle and the plaintiff, “in reasonable reliance on that assurance, delay[ed] in bringing his suit until after the statute ha[d] run.”<sup>53</sup>

To state with accuracy the distinction between equitable tolling and equitable estoppel is an elusive and ultimately unproductive goal. The difficulty in establishing the distinction is reflected in the confusing manner in which the courts discuss the doctrines. For example, courts sometimes state that equitable estoppel is merely another name for fraudulent concealment,<sup>54</sup> a doctrine that, as discussed earlier,<sup>55</sup> has to some extent lost its separate identity and is now viewed by many courts as merely one justification for equitable tolling.<sup>56</sup>

51. See generally John P. Dawson, *Estoppel and Statutes of Limitation*, 34 MICH. L. REV. 1 (1935) (discussing different factual circumstances in which courts apply the doctrine of estoppel and other possible theories that courts might use to reach the same results).

52. See, e.g., *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 235 (1959) (“petitioner was justifiably misled into a good-faith belief that he could begin his action at any time within seven years after it had accrued”); cf. *Wilson v. Pena*, 79 F.3d 154, 162-64 (D.C. Cir. 1996) (ninety-day period never began to run because EEOC notice to plaintiff incorrectly stated that plaintiff had thirty, rather than ninety days, to bring suit).

53. *Cerbone v. Int’l Ladies’ Garment Workers Union*, 768 F.2d 45, 50 (2d Cir. 1985) (Newman, J.).

54. See *Hentosh v. Herman M. Finch Univ. of Health Sciences/The Chicago Med. Sch.*, 167 F.3d 1170, 1174 (7th Cir. 1999) (“[e]quitable estoppel—sometimes referred to as fraudulent concealment”); see also *United States v. Beggerly*, 524 U.S. 38, 49 (1998) (Stevens, J., concurring) (“We are not confronted with the question whether a doctrine such as fraudulent concealment or equitable estoppel might apply if the Government were guilty of outrageous misconduct that prevented the plaintiff, though fully aware of the Government’s claim of title, from knowing of her own claim. Those doctrines are distinct from equitable tolling.”).

55. See *supra* notes 32-42 and accompanying text.

56. Although the situations in which courts apply equitable estoppel resemble some situations in which courts apply equitable tolling based on fraudulent concealment, the doctrines are not the same because equitable estoppel presumes that the plaintiff is aware of her claim and fraudulent concealment presumes that she is not. See Dawson, *supra* note 51, at 23-24; see also Marcus, *supra* note 35, at 863 (discussing similarity between situation in which courts apply fraudulent concealment because the defendant denied any

Similarly, courts sometimes state that the critical distinction between equitable tolling and equitable estoppel is that tolling applies when the plaintiff is unaware of her claim and equitable estoppel applies when the plaintiff is aware of it.<sup>57</sup> This distinction is not accurate, however, because it refers only to the first category of cases in which courts toll limitations periods, i.e., those that involve the defendant's self-concealing wrongdoing or subsequent attempts to conceal the wrongdoing. The second category of cases in which courts permit tolling—extraordinary circumstances beyond the plaintiff's control—often involve situations in which the plaintiff is aware of her claim but nevertheless is prevented from asserting it in a timely manner.<sup>58</sup> Such attempts to distinguish the doctrines ultimately serve little purpose.<sup>59</sup> The doctrines are best thought of as different labels that courts apply to their long-standing practice of deferring or suspending limitations periods in appropriate factual circumstances.

## B. Equitable Tolling in Actions Against the Federal Government

### 1. The Issue

The question whether a federal court can equitably toll a limitations period in an action against the federal government has long defied a clear answer. In contrast to a private party, the government is immune from suit unless it expressly consents to be sued.<sup>60</sup> The government's consent to be sued, i.e., its waiver of sovereign immunity, is contingent on the plaintiff's compliance with the applicable statute of limitations.<sup>61</sup> Further, federal courts are courts of limited subject matter jurisdiction in the sense that they generally possess only whatever jurisdiction Congress has granted.<sup>62</sup> Therefore, a plaintiff's failure to assert her claim against the government within the prescribed limitations period deprives a court of jurisdiction to hear the claim.<sup>63</sup> If a claimant's failure to

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wrongdoing and situations in which courts apply equitable estoppel).

57. See, e.g., *Am. Airlines, Inc. v. Cardoza-Rodriguez*, 133 F.3d 111, 124 (1st Cir. 1998); *Cerbone*, 768 F.2d at 49-50; *Armbrister v. Roland Int'l Corp.*, 667 F. Supp. 802, 809 (M.D. Fla. 1987).

58. See *supra* notes 43-48 and accompanying text.

59. See *Dawson*, *supra* note 51, at 23-25 (discussing relationship of estoppel to the fraud and fraudulent concealment doctrines and concluding that "[a] sharp line of demarcation between estoppel and other recognized grounds for suspension of limitation acts would serve no useful purpose").

60. See, e.g., *United States v. Testan*, 424 U.S. 392, 399 (1976); *United States v. Sherwood*, 312 U.S. 584, 586 (1941).

61. See *United States v. Mottaz*, 476 U.S. 834, 841 (1986); *United States v. Kubrick*, 444 U.S. 111, 117-18 (1979).

62. See, e.g., *Aldinger v. Howard*, 427 U.S. 1, 15 (1976).

63. See *Mottaz*, 476 U.S. at 841; *Henderson v. United States*, 517 U.S. 654, 677 (1996) (Thomas, J. dissenting) ("Although no one would claim that failure to satisfy a

comply with a limitations period deprives a court of subject matter jurisdiction, then the court seemingly is without power to grant itself jurisdiction by tolling the period.

The incongruity of a federal court granting itself subject matter jurisdiction by tolling a limitations period has led to a number of inconsistent decisions and approaches to tolling in actions against the government. Some decisions have suggested that tolling is never permissible.<sup>64</sup> Others have suggested that the court must determine whether Congress intended the time period to be “jurisdictional.”<sup>65</sup> If so, then the period cannot be tolled.<sup>66</sup> But if Congress intended the period to be merely a “nonjurisdictional” statute of limitations, then the period can be tolled.<sup>67</sup> In attempting to discern congressional intent on this point, courts have focused on factors such as the particular language used in the statute, the location of the time limitation in the statutory structure, and whether Congress had a broad remedial purpose in enacting the legislation of which the time limitation was a part. In a decision rendered as recently as 1985, the Supreme Court suggested that the availability of tolling in actions against the government was an unanswered question.<sup>68</sup>

## 2. The Supreme Court’s 1990 Decision in *Irwin v. Department of Veterans Affairs*

In *Irwin v. Department of Veterans Affairs*,<sup>69</sup> the Supreme Court sought to clarify the analysis for determining whether periods of limitation that run in favor of the federal government can be equitably tolled. In *Irwin*, the plaintiff asserted that he had been unlawfully discharged from his position with a Veterans Administration Medical Center in violation of Title VII of the Civil

statute of limitations in a case between private parties would serve as a jurisdictional bar to the plaintiff’s suit, we have long held that a statute of limitations attached to a waiver of sovereign immunity functions as a condition on the waiver and defines the limits of the district court’s jurisdiction to hear a claim against the United States.”).

64. See *Soriano v. United States*, 352 U.S. 270, 276 (1957) (“[C]ongress was entitled to assume that the limitation period it prescribed meant just that period and no more.”).

65. See generally Perry Dane, *Jurisdictionality, Time, and the Legal Imagination*, 23 HOFSTRA L. REV. 1 (1994) (critically analyzing doctrine of jurisdictional time limits).

66. See, e.g., *McIntyre v. United States*, 789 F.2d 1408, 1411 (9th Cir. 1986).

67. See, e.g., *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982); *Bowen v. New York*, 476 U.S. 467, 479 (1986); see also Dane, *supra* note 65, at 5 n.7, 12 n.27 (collecting cases).

68. See *United States v. Locke*, 471 U.S. 84, 94 n.10 (1985) (“Statutory filing deadlines are generally subject to the defenses of waiver, estoppel, and equitable tolling. . . . Whether this general principle applies to deadlines that run in favor of the Government is a question on which we express no opinion today.”).

69. 498 U.S. 89 (1990).

Rights Act of 1964<sup>70</sup> and other federal statutes. After the Veterans Administration rejected Mr. Irwin's claim, he appealed to the Equal Employment Opportunity Commission ("EEOC"). The EEOC similarly rejected his claim and issued a notice that informed him of the EEOC's decision and of his right to challenge the decision by bringing an action in federal district court. By statute, Mr. Irwin was required to bring the action within thirty days after "receipt" of the notice.<sup>71</sup> He filed his action within thirty days after the date on which he claimed to have personally received the EEOC's notice, but more than thirty days after the notice was received in the office of his attorney. His attorney, a sole practitioner, was overseas training with his U.S. Army Reserve unit on the date the notice was delivered to his office.

The Court held that Mr. Irwin's action was untimely because the thirty-day limitations period ran from the date the notice was received in his attorney's office,<sup>72</sup> and then addressed whether the thirty-day period could be equitably tolled. The Court acknowledged that the thirty-day time limit "is a condition to the waiver of sovereign immunity and thus must be strictly construed."<sup>73</sup> The Court further acknowledged that its "previous cases dealing with [tolling] ha[d] not been entirely consistent."<sup>74</sup> After noting that the language used by Congress in establishing limitations periods for claims against the government often varies, the Court concluded:

[W]e are not persuaded that the difference [in statutory language] is enough to manifest a different congressional intent with respect to the availability of equitable tolling. Thus a continuing effort on our part to decide each case on an *ad hoc* basis, as we appear to have done in the past, would have the disadvantage of continuing unpredictability without the corresponding advantage of greater fidelity to the intent of Congress. *We think that this case affords us an opportunity to adopt a more general rule to govern the applicability of equitable tolling in suits against the Government.*

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70. 42 U.S.C. §§ 2000e to 2000e-17 (1994 & Supp. III 1997).

71. *See Irwin*, 498 U.S. at 91-92. In 1991, Congress lengthened the period for bringing suit to ninety days after receipt of the EEOC notice. *See Civil Rights Act of 1991*, Pub. L. No. 102-166, § 114(1), 105 Stat. 1071, 1079 (codified as amended at 42 U.S.C. § 2000e-16(c) (1994)); *see also* *Wilson v. Pena*, 79 F.3d 154, 162 (D.C. Cir. 1996) (discussing 1991 amendment).

72. *See Irwin*, 498 U.S. at 92-93.

73. *Id.* at 94.

74. *Id.* The Court specifically referred to its prior decisions in *Soriano*, *see supra* note 64, which suggested that equitable tolling is never available in actions against the government, and *Locke*, *see supra* note 68, which suggested that the availability of equitable tolling is an unanswered question.

. . . Once Congress has made . . . a waiver [of sovereign immunity], we think that making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver. Such a principle is likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation. *We therefore hold that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States. Congress, of course, may provide otherwise if it wishes to do so.*<sup>75</sup>

After the crescendo leading to the Court's new rule, the Court's disposition of Mr. Irwin's claim was anticlimactic. The Court noted that, in untimely suits between private parties, "[f]ederal courts have extended equitable relief only sparingly."<sup>76</sup> The Court further noted that its own decisions had permitted equitable tolling only when (1) a claimant had diligently pursued his judicial remedies by filing a complaint in the wrong court, or (2) the claimant had been induced or tricked by his adversary into missing the filing deadline.<sup>77</sup> Mr. Irwin's case, the Court concluded, involved "at best a garden variety claim of excusable neglect" that did not warrant tolling.<sup>78</sup>

### 3. Equitable Tolling in the Wake of *Irwin*

Unfortunately, the *Irwin* decision has done little to clarify when a federal court can equitably toll a limitations period that applies to a claim against the federal government. In some respects, it has added to the confusion. This is so for at least two reasons. First, the Court's subsequent decisions make clear that tolling may be impermissible even when Congress does not prohibit tolling explicitly, thereby requiring federal courts to divine congressional intent on this point.<sup>79</sup> In two post-*Irwin* decisions that address equitable tolling in the context

75. *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990) (emphasis added).

76. *Id.* at 96.

77. *Id.* The Court's characterization of its prior decisions reflects the difficult time that courts have in distinguishing equitable tolling from equitable estoppel. *See supra* notes 54-59 and accompanying text. The *Irwin* Court's reference to a prior decision in which it had "equitably tolled" a limitations period because "the claimant had been induced or tricked by his adversary into missing the filing deadline" is to *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231 (1959), a decision in which the Court expressly applied the doctrine of equitable estoppel. *See supra* note 52 and accompanying text.

78. *Irwin*, 498 U.S. at 96.

79. The Court has thus dashed the hopes of some judges in the lower federal courts.

of claims against the federal government, the Court has demonstrated that the inquiry now required is whether the language and structure of a statute and its underlying legislative purpose suggest that Congress intended to preclude tolling.<sup>80</sup> This is precisely the type of inquiry with which pre-*Irwin* courts struggled in attempting to determine whether a limitations period was “jurisdictional” or “nonjurisdictional”<sup>81</sup> and with which courts continue to struggle in analyzing statutes to determine the scope of the government’s waiver of sovereign immunity.<sup>82</sup> Thus, the Court in *Irwin* did not provide a simplified mode of analysis. Rather, it clarified only one point: that in the absence of congressional intent to the contrary, limitations periods that favor the government can be tolled.

A second reason that the *Irwin* decision has failed to clarify the law is that it is open to the interpretation that federal courts can equitably toll a limitations period that favors the government only when (1) the same type of claim can be asserted against both private parties and the federal government, and (2) tolling would be available in the action against the private party. A number of lower federal courts read *Irwin* in this manner.<sup>83</sup> The Supreme Court itself contributed

concurring) (After *Irwin*, “[i]t is no longer necessary for courts to offer unconvincing explanations as to why some statutory time limits are waivable and some not. It is now presumed that Congress intends traditional waivers to be available, unless Congress expressly specifies otherwise.”).

80. See *United States v. Beggerly*, 524 U.S. 38, 48-49 (1998); *United States v. Brockamp*, 519 U.S. 347, 350 (1997); see also Richard Parker & Ugo Colella, *Revisiting Equitable Tolling and the Federal Tort Claims Act: The Impact of Brockamp and Beggerly*, 29 SETON HALL L. REV. 885, 897-98 (1999) (discussing the Court’s approach to tolling in *Beggerly* and *Brockamp*). For a discussion of the Court’s decision in *Brockamp*, see *infra* Part IV.B.

81. The lower federal courts continue to be mired by the “jurisdictional” and “nonjurisdictional” labels. A debate has arisen as to whether limitations periods that favor the federal government are no longer “jurisdictional” after *Irwin*. See *Bath Iron Works Corp. v. United States*, 20 F.3d 1567, 1572 n.2 (Fed. Cir. 1994); *Wood-Ivey Sys.*, 4 F.3d at 965-68 (Nies, J., dissenting); *Dillard v. Runyon*, 928 F. Supp. 1316, 1324-25 (S.D.N.Y. 1996) (collecting cases), *aff’d*, 108 F.3d 1369 (2d Cir. 1997) (unpublished table decision).

82. See, e.g., *Lane v. Pena*, 518 U.S. 187, 192-97 (1996) (assessing whether United States waived sovereign immunity against monetary damages in Section 504(a) of the Rehabilitation Act of 1973); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-37 (1992) (assessing whether United States waived sovereign immunity against monetary damages in Section 106(c) of the Bankruptcy Code).

83. See, e.g., *Bailey v. West*, 160 F.3d 1360, 1370 (Fed. Cir. 1998) (Michel, J., concurring) (“in *Irwin* equitable tolling was permitted against the government in Title VII suits because equitable tolling was also permitted in Title VII private suits”); *RHI Holdings, Inc. v. United States*, 142 F.3d 1459, 1462-63 (Fed. Cir. 1998) (“equitable tolling may not always be available to a plaintiff in a cause of action against the Government when that cause of action is not identical to a private cause of action”);

*United States v. Laneman*, Civ. No. 4-95-880, 1998 U.S. Dist. LEXIS 9173, at 18 (D. https://scholarship.law.missouri.edu/mlr/vol65/iss4/1

to this confusion in *United States v. Brockamp*,<sup>84</sup> in which the Court considered whether federal courts can equitably toll the limitations period on filing claims for tax refunds.<sup>85</sup> The Court stated cryptically that it was “willing to assume, favorably to the taxpayers but only for argument’s sake, that a tax refund suit and a private suit for restitution are sufficiently similar to warrant asking *Irwin*’s negatively phrased question: Is there good reason to believe that Congress did *not* want the equitable tolling doctrine to apply?”<sup>86</sup> This statement appears to confirm that, to receive the benefit of tolling in connection with a claim against the government, a claimant must first establish that the same, or at least a similar claim, could be asserted against a private party, and that tolling would be available in such a private action. Such a requirement is inappropriate. The *Irwin* opinion contains no suggestion that the Court’s holding is limited to situations in which the same action is available against both private parties and the government. Nor would such a limitation make sense: the message of *Irwin* is not that there should be parity of treatment when the same action is brought against either a private party or the government, but that the difficult question of congressional intent regarding tolling can best be answered by presuming that tolling applies unless Congress provides otherwise. Requiring a preliminary inquiry into whether comparable actions are available against both private parties and the government will serve only to make the analysis of whether tolling is permissible for claims against the government even more complex.

### III. PROCEDURES FOR AND LIMITATIONS ON OBTAINING CREDITS OR REFUNDS OF TAX

#### *A. Overview of Procedure*

When a taxpayer makes an overpayment of tax, the Code authorizes the Service to credit the overpayment against any tax liability of the taxpayer and to refund the balance.<sup>87</sup> In the case of an individual, overpayments of income tax<sup>88</sup>

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Minn. Jan. 20, 1998) (“In our view, however, the Supreme Court’s reasoning in *Irwin* strongly suggests that its holding is limited to statutes which authorize similar actions against both private entities and the Federal Government.”).

84. 519 U.S. 347 (1997).

85. See *infra* Part IV.B.

86. *Brockamp*, 519 U.S. at 350.

87. See I.R.C. § 6402(a) (1994 & Supp. IV 1998). The Code does not specifically define the term “overpayment.” I.R.C. § 6401(a) (1994) (overpayment “includes” tax assessed or collected after expiration of statute of limitations). In general terms, an overpayment is any payment of tax in excess of the tax properly due. See *Jones v. Liberty Glass Co.*, 332 U.S. 524, 531 (1947); *Video Training Source, Inc. v. United States*, 991 F. Supp. 1256, 1259-60 (D. Colo. 1998); MICHAEL I. SALTZMAN, *IRS PRACTICE AND PROCEDURE* ¶ 11.02[1], at 11-5 to 11-6 (2d ed. 1991).

88. Because requests for relief from the limitations periods that apply to claims for

commonly arise in one of two ways: (1) the taxpayer makes excessive advance payments of tax in the form of estimated tax payments or amounts withheld from wages,<sup>89</sup> or (2) the taxpayer is audited by the Service and, following the Service's issuance of a notice of deficiency<sup>90</sup> and assessment<sup>91</sup> of the tax due,

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refunds arise most commonly in connection with income taxes, this Article will focus on the income tax and provide references to estate, gift, and other taxes in appropriate places.

89. In accordance with prescribed tables and procedures, employers generally are required to withhold income tax from wages that they pay to employees. *See* I.R.C. § 3402(a)(1) (1994). Employers are liable for the tax withheld, which acts as an obvious incentive for employers to remit the tax to the government. *See* I.R.C. § 3403 (1994). In addition, certain taxpayers, including individuals, are required to make installment payments of estimated tax during their taxable year. The requirement to make estimated tax payments is not set forth explicitly in the Code, but instead is implicit in the penalties that apply if a taxpayer fails to make adequate prepayments of tax. *See* I.R.C. § 6654 (1994).

90. In general terms, a tax "deficiency" is the excess of the amount of tax properly due from the taxpayer over the amount shown as the tax due on the taxpayer's return. *See* I.R.C. § 6211(a) (1994). As the name suggests, a "notice of deficiency" is the document by which the Service notifies the taxpayer of the amount of the deficiency determined by the Service. *See* I.R.C. § 6212(a) (1994) (authorizing Service to issue notice of deficiency). In response to a notice of deficiency, a taxpayer who wishes to contest the deficiency has two choices: either (1) file a petition for redetermination of the deficiency with the United States Tax Court, which is an attractive option because the taxpayer need not pay the alleged deficiency before bringing suit, *see* I.R.C. §§ 6213(a), 7442 (1994), or (2) pay the tax allegedly due, file a claim for credit or refund with the Service and, if the Service fails to act upon or denies the claim, bring suit for a refund in either the United States Court of Federal Claims or a United States District Court, *see* I.R.C. §§ 6532(a)(1), 7422(a) (1994); 28 U.S.C. § 1346(a)(1) (1994). A taxpayer who wishes to pursue the first option, i.e., file a petition with the Tax Court, must do so within ninety days after the Service mails the notice of deficiency (or 150 days if the notice is addressed to a person outside the United States). *See* I.R.C. § 6213 (a), (c) (1994). If the taxpayer fails to meet this time requirement, then the taxpayer can contest the deficiency only by pursuing the second option.

91. An "assessment" of tax is the formal recording of the taxpayer's tax liability by the Secretary of the Treasury. *See* I.R.C. § 6203 (1994); Treas. Reg. § 301.6203-1 (as amended in 1982); *see also* Fullmer v. United States, 93-2 U.S. Tax Cas. (CCH) ¶ 50,657, at 90,166 (D. Wyo. 1993); Elias v. United States, 93-1 U.S. Tax Cas. (CCH) ¶ 50,131, at 87,482 (C.D. Cal. 1992); SALTZMAN, *supra* note 87, ¶ 10.01, at 10-2 & S10-2 (Supp. 2000). The Secretary generally cannot assess a tax before the expiration of ninety days after the date on which the Secretary mails to the taxpayer a notice of deficiency. *See* I.R.C. § 6213(a) (1994); *supra* note 90 (explanation of deficiency and notice of deficiency). The purpose of this ninety-day period is to give the taxpayer an opportunity to contest the deficiency by filing a petition with the United States Tax Court. If the taxpayer does not file a petition within the ninety-day period, then the Secretary is free to assess the tax. Assessment is significant in part because, absent an assessment of the tax within the prescribed limitations period, the Service cannot collect or retain an

pays an additional amount of tax. In either case, the first step that a taxpayer must take to recover the overpayment is to file a claim with the Service for credit or refund<sup>92</sup> of the tax.<sup>93</sup>

A claim for refund must satisfy certain requirements. Among other requirements, the claim must set forth the amount of the tax overpayment, direct the Service whether to refund the overpayment or apply it against the following year's tax liability, and state in detail each ground upon which the refund is claimed.<sup>94</sup> If the claim fails to satisfy the applicable requirements, then the taxpayer generally will be precluded from recovering her overpayment of tax.<sup>95</sup> In the case of income taxes, a taxpayer generally must claim a refund on the original return that the taxpayer files for the year.<sup>96</sup> Thus, in the typical case of an individual who has made a tax overpayment by making excessive estimated tax payments or having too much withheld from her wages, the individual's

amount as a tax. *See generally* SALTZMAN, *supra* note 87, ¶ 10.01, at 10-2.

92. For convenience, this Article will refer to a claim for credit or refund of tax simply as a "claim for refund."

93. *See* I.R.C. § 7422(a) (1994).

94. *See* Treas. Reg. §§ 301.6402-3(a)(5) (as amended in 1997), 301.6402-2(b)(1) (as amended in 1977).

95. *See, e.g.,* Weiler v. United States, 96-1 U.S. Tax Cas. (CCH) ¶ 50,241, at 83,895 (9th Cir. 1996) (claim filed by taxpayer did not contain required declaration under penalties of perjury); Clement v. United States, 405 F.2d 703, 705 (1st Cir. 1969) (referring to previous dismissal of taxpayer's refund suit because refund claim filed "[t]o protect taxpayer's Constitutional rights" failed to meet specificity requirements of regulations); Irwin v. United States, 99-2 U.S. Tax Cas. (CCH) ¶ 50,804, at 89,641 (E.D. Mich. 1999) (return filled out with zeros on which taxpayer requested refund was not valid claim for refund); England v. United States, 90-2 U.S. Tax Cas. (CCH) ¶ 50,590, at 86,036 (D. Kan. 1990) (taxpayers failed to file claim articulating that they sought a refund and on what basis); Cole v. Comm'r of Internal Revenue, 81-2 U.S. Tax Cas. (CCH) ¶ 9538, at 87,791 (W.D. Wash. 1981) (taxpayer's claim did not set forth grounds for refund with particularity); Davis v. United States, 80-2 U.S. Tax Cas. (CCH) ¶ 9794, at 85,614 (D. Mass. 1980) (same). Despite the general requirements that a claim must satisfy in order to constitute a valid claim for refund, the courts, in an apparent exercise of their equitable powers, have developed the doctrine that a technically deficient communication from the taxpayer to the Service can constitute an "informal" claim that satisfies the requirement that the taxpayer file an administrative claim for refund. *See, e.g.,* United States v. Kales, 314 U.S. 186, 197 (1941); United States v. Memphis Cotton Oil Co., 288 U.S. 62, 67 (1933); Radin v. United States, 702 F. Supp. 38, 40-41 (D. Conn. 1988); Crocker v. United States, 563 F. Supp. 496, 500 (S.D.N.Y. 1983). To be considered an informal claim, the communication generally must be in writing and set forth sufficient information to apprise the Service that the taxpayer seeks a refund and to allow the Service to begin an examination of the claim. *See, e.g.,* Yuen v. United States, 825 F.2d 244, 245 (9th Cir. 1987); O'Day Equip., Inc. v. United States, 454 F. Supp. 444, 447 (D.N.D. 1978).

96. *See* Treas. Reg. § 301.6402-3(a)(1) (as amended in 1997).

income tax return constitutes a claim for refund.<sup>97</sup> If the taxpayer already has filed the return and wishes to claim a refund (e.g., because the taxpayer inadvertently neglected to claim a valid deduction and therefore overpaid her tax), the taxpayer must file an amended return.<sup>98</sup>

Once the taxpayer files a claim for refund, the Service reviews the claim and will either allow or disallow it, in whole or in part.<sup>99</sup> If the Service does not render a decision on the claim within six months after the taxpayer files it, the taxpayer can initiate a suit for refund in either the United States Court of Federal Claims or a United States District Court.<sup>100</sup> If the Service disallows the taxpayer's claim, the taxpayer must commence the refund action within two years after the date on which the Service mails the taxpayer a notice of disallowance.<sup>101</sup> The jurisdiction of both the Court of Federal Claims and the district court to hear tax refund actions is limited, however, to those cases in which the taxpayer has "duly filed" a claim for refund with the Service.<sup>102</sup> To be "duly filed," a claim for refund must be filed within the period of limitations prescribed by Code Section 6511.<sup>103</sup> That is, unless the taxpayer files a timely claim for refund with the Service, neither court has jurisdiction to hear the taxpayer's refund action.<sup>104</sup>

97. See Treas. Reg. § 301.6402-3(a)(5) (as amended in 1997) (properly executed return constitutes claim for refund).

98. See Treas. Reg. § 301.6402-3(a)(2) (as amended in 1997). In the case of an individual, the proper form for an amended return generally is I.R.S. Form 1040X. Treas. Reg. § 301.6402-3(a)(2) (as amended in 1997).

99. See Treas. Reg. § 601.103(c)(3) (as amended in 1984). The Service must provide the taxpayer with an explanation of the reason or reasons for the disallowance. See I.R.C. § 6402(k) (Supp. IV 1998).

100. See I.R.C. § 6532(a)(1) (1994) (taxpayer may not commence suit before the expiration of six months from filing claim); 28 U.S.C. § 1346(a)(1) (1994) (granting United States Court of Federal Claims and United States District Courts jurisdiction over tax refund actions).

101. See I.R.C. § 6532(a)(1) (1994).

102. See I.R.C. § 7422(a) (1994). Section 7422(a) provides:

No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

I.R.C. § 7422(a) (1994).

103. See, e.g., *United States v. Dalm*, 494 U.S. 596, 601-02 (1990); *Little People's Sch., Inc. v. United States*, 842 F.2d 570, 573-74 (1st Cir. 1988).

104. See, e.g., *Comm'r v. Lundy*, 516 U.S. 235, 240 (1996); *Dalm*, 494 U.S. at 601-02.

Accordingly, in order for a taxpayer to maintain a tax refund action, it is critical that the taxpayer's filing with the Service constitute a "claim for refund" and, more important for present purposes, that the claim be filed with the Service within the period of limitations set forth in Section 6511 of the Code.

### *B. Limitations on Claims for Refund*

#### 1. Current Limitations: Section 6511 of the Code

##### a. The Statutory Provisions

To obtain a refund of tax, a taxpayer must file a claim for refund within a specified period of time. Section 6511(a) of the Code provides in relevant part:

Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid.<sup>105</sup>

Thus, under Section 6511(a), the taxpayer must file a claim for refund either within three years from the date the taxpayer filed the return or within two years from the date the taxpayer paid the tax. If the taxpayer fails to file the claim within one of these periods, then Section 6511(b)(1) prohibits the Service from making the refund.<sup>106</sup>

In order to simplify determinations under Section 6511(a), the Code sets forth rules for determining the dates on which a taxpayer files a return and pays tax. If the taxpayer files a tax return before it is due, the return is treated for purposes of Section 6511(a) as if it were filed on the due date.<sup>107</sup> For most individual taxpayers, the due date of the return is the fifteenth day of April following the close of the calendar year for which tax liability is being determined.<sup>108</sup> Similarly, advance payments of tax made by individuals through

105. I.R.C. § 6511(a) (1994).

106. See I.R.C. § 6511(b)(1) (1994). Refunds of tax made after the periods of limitation in Section 6511(a) have expired are treated as "erroneous" unless the taxpayer has filed a claim for refund within those periods. See I.R.C. § 6514(a)(1) (1994). The government can recover an erroneous refund through a civil court action. See I.R.C. § 7405(a) (1994).

107. See I.R.C. § 6513(a) (1994).

108. The vast majority of individual taxpayers use the calendar year as their taxable year and therefore are required to file their returns on or before April 15 of the year following the close of the taxable year. See I.R.C. § 6012(a)(1) (1994) (individuals generally required to file income tax returns); I.R.C. § 6072(a) (1994) (income tax returns

estimated tax payments or withholding from wages<sup>109</sup> generally are treated for purposes of Section 6511(a) as if they were made on the following April 15.<sup>110</sup>

Even if a taxpayer files a claim for refund within one of the periods prescribed by Section 6511(a), the amount of tax that the taxpayer can recover may be limited by Section 6511(b)(2). Section 6511(b)(2) provides in relevant part:

(A) Limit where claim filed within 3-year period

If the claim was filed by the taxpayer during the 3-year period prescribed in subsection (a), the amount of the credit or refund shall not exceed the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return. . . .

(B) Limit where claim not filed within 3-year period

If the claim was not filed within such 3-year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim.<sup>111</sup>

Thus, under Section 6511(a) a taxpayer must file a claim for refund either within three years from the time the return was filed or within two years from the time the tax was paid. If the taxpayer files the claim within the three-year period of Section 6511(a), then under Section 6511(b)(2)(A) the taxpayer can recover only the portion of the tax paid during the period preceding the filing of the refund claim equal to three years plus any extension of time the taxpayer may have obtained for filing the return. If the taxpayer files the refund claim more than three years after the taxpayer filed the return, but within two years after the taxpayer paid the tax (so that the two-year period of Section 6511(a) is satisfied), then under Section 6511(b)(2)(B) the taxpayer can recover only the portion of the tax paid during the two years preceding the filing of the refund claim. If the taxpayer files the refund claim outside of both the three-year and two-year periods of Section 6511(a), then the claim is untimely and the Service has no authority to make a refund.<sup>112</sup>

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based on calendar year must be filed on or before the following April 15).

109. See *supra* note 89 and accompanying text.

110. See I.R.C. § 6513(b)(1)-(2) (1994).

111. I.R.C. § 6511(b)(2)(A), (B) (1994).

112. See I.R.C. § 6511(b)(1) (1994).

b. Some Examples

The following examples illustrate the interaction of Sections 6511(a) and 6511(b)(2).

(1) Example 1: The Typical Case—An Original Return as a Claim for Refund

During calendar year 1995, a taxpayer has \$5,000 of income tax withheld from her wages and, on April 15, 1996, files an income tax return showing a tax liability of only \$4,200. Provided that the return is properly executed, the return constitutes a claim for refund.<sup>113</sup> Because the taxpayer filed the return and the claim for refund simultaneously, the refund claim was filed within three years from the time the return was filed and therefore is timely under Section 6511(a). The tax payments withheld from the taxpayer's wages are treated for purposes of Section 6511 as made on April 15, 1996.<sup>114</sup> Because this date is within the three year period preceding the filing of the refund claim, Section 6511(b)(2)(A) does not limit the amount of the taxpayer's claimed \$800 refund.

(2) Example 2: An Amended Return as a Claim for Refund

During calendar year 1995, a taxpayer has \$5,000 of income tax withheld from her wages and, on April 15, 1996, files an income tax return showing a tax liability of \$5,000. On June 1, 1998, the taxpayer files an amended return for 1995 that shows a tax liability of only \$4,200. Provided that the amended return is properly executed, it constitutes a claim for refund.<sup>115</sup> Because the taxpayer filed the claim for refund within three years after filing her original return, the claim is timely under Section 6511(a). The tax payments withheld from the taxpayer's wages are treated for purposes of Section 6511 as made on April 15, 1996.<sup>116</sup> Because this date is within the three year period preceding her filing of the refund claim, Section 6511(b)(2)(A) does not limit the amount of the taxpayer's claimed \$800 refund.

(3) Example 3: A Late Return as a Claim for Refund—the Majority and Minority Views

During calendar year 1995, a taxpayer has \$5,000 of income tax withheld from her wages. The taxpayer does not request an extension of time to file her 1995 income tax return. On June 1, 1999, the taxpayer files a properly executed return for 1995 showing a tax liability of \$4,200. That is, the taxpayer's return

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113. See *supra* note 96 and accompanying text.

114. See I.R.C. § 6513(b)(1) (1994); *supra* notes 107-10 and accompanying text.

115. See *supra* note 98 and accompanying text.

116. See I.R.C. § 6513(b)(1) (1994); *supra* notes 107-10 and accompanying text.

is late. In this situation, there is a split of authority on how Section 6511(a) applies. Under the Service's published position<sup>117</sup> and the prevailing view in the courts,<sup>118</sup> the phrase "within 3 years from the time the *return* was filed" in Section 6511(a) does not distinguish between timely and untimely returns. If this is correct, then the taxpayer's filing of the return in this example triggers a three-year period within which she can file a claim for refund. As in example 1, because the taxpayer filed her return and claim for refund simultaneously, she filed her claim for refund within three years of filing the return and the claim therefore is timely under Section 6511(a). The taxpayer's refund nevertheless is barred by Section 6511(b)(2)(A): the tax withheld from the taxpayer's wages is treated as paid on April 15, 1996,<sup>119</sup> which is more than three years before June 1, 1999, the date on which the taxpayer filed the claim for refund. Thus, under the majority view, the taxpayer's refund claim is timely under Section 6511(a), but is barred by Section 6511(b)(2)(A).

Under the minority view, which appears to be confined to courts in the Ninth Circuit, the taxpayer's refund claim in this third example is not timely under Section 6511(a).<sup>120</sup> In *Miller v. United States*,<sup>121</sup> the Ninth Circuit held that, to constitute a "return" for purposes of Section 6511(a), a return must be filed within two years from the time the tax was paid.<sup>122</sup> Because the taxpayer in this example filed her return more than two years after the date on which she

117. See Rev. Rul. 76-511, 1976-2 C.B. 428.

118. See, e.g., *Lundy v. Internal Revenue Serv.*, 45 F.3d 856, 867-68 (4th Cir. 1995), *rev'd on other grounds*, 516 U.S. 235 (1996); *Richards v. Comm'r*, 37 F.3d 587, 591 (10th Cir. 1994), *cert. denied*, 516 U.S. 1092 (1996); *Galuska v. Comm'r*, 5 F.3d 195, 197 (7th Cir. 1993); *Video Training Source, Inc. v. United States*, 991 F. Supp. 1256, 1260-62 (D. Colo. 1998); *Smith v. United States*, 96-2 U.S. Tax Cas. (CCH) ¶ 50,593, at 86,050 (E.D. Mo. 1996); *Mills v. United States*, 805 F. Supp. 448, 450 (E.D. Tex. 1992); *Graham v. Internal Revenue Serv.*, 602 F. Supp. 864, 865 (W.D. Pa. 1984); *Joseph v. Internal Revenue Serv.*, 637 F. Supp. 1219, 1219 (D. Mass. 1983); *Rainey v. United States*, 82-2 U.S. Tax Cas. (CCH) ¶ 9442, at 84,584 (N.D. Ala. 1982); *Chatman v. United States*, 82-1 U.S. Tax Cas. (CCH) ¶ 9240, at 83,498 (E.D. Va. 1981); *McLeod v. United States*, 229 Ct. Cl. 810, 810 (1982) (per curiam).

119. See I.R.C. § 6513(b)(1) (1994); *supra* notes 107-10 and accompanying text.

120. See *Miller v. United States*, 38 F.3d 473, 475-76 (9th Cir. 1994); see also *Ott v. United States*, 141 F.3d 1306, 1307 (9th Cir. 1998); *Ratzesberger v. United States*, 99-2 U.S. Tax Cas. (CCH) ¶ 50,858, at 89,835 (E.D. Wash. 1999); *Roman v. United States*, 95-2 U.S. Tax Cas. (CCH) ¶ 50,591, at 89,958 (N.D. Cal. 1995); *Musser v. United States*, 92-1 U.S. Tax Cas. (CCH) ¶ 50,245, at 83,951 (D. Alaska 1991); *Armzen v. Internal Revenue Serv.*, 91-1 U.S. Tax Cas. (CCH) ¶ 50,020, at 87,099 (W.D. Wash. 1990); *SALTZMAN*, *supra* note 87, ¶ 11.05[1][a], at 11-27 to 11-28 & S11-22 to S11-28 (Supp. 2000) (advocating minority view).

121. 38 F.3d 473 (9th Cir. 1994).

122. See *id.* at 475 ("The point at which one must determine whether a return has or has not been filed, for purposes of [Section 6511(a)], must be two years after payment.").

is treated as having paid the tax, she is treated, according to the Ninth Circuit, as if she had not filed a return. Her claim for refund therefore can satisfy Section 6511(a) only if she filed it within two years of the time the tax was paid.<sup>123</sup> Because she is treated as having paid the tax withheld from her wages on April 15, 1996, and filed her claim for refund on June 1, 1999, she fails to meet this requirement. Under the minority view of these facts, the refund claim is untimely under Section 6511(a) and the limits on the amount of tax recoverable, found in Section 6511(b)(2), never come into play. Although in the current example the majority and minority views lead to the same result (the taxpayer's inability to obtain a refund), this will not always be the case.<sup>124</sup>

The minority view is unpersuasive<sup>125</sup> and is contrary to the Supreme Court's recent analysis in *Baral v. United States*.<sup>126</sup> In *Baral*, the Court assumed on facts substantially similar to those of the present example that the taxpayer's late return constituted a timely claim for refund under Section 6511(a) and that the taxpayer's claim was barred by the three-year look-back period of Section 6511(b)(2)(A).<sup>127</sup>

The minority position also has been called into serious question by Congress's 1997 amendment of Code Section 6512(b)(3), which limits the amount of tax that the Tax Court can order to be refunded.<sup>128</sup> Congress amended this provision in response to the Supreme Court's decision in *Commissioner v. Lundy*.<sup>129</sup> The facts in *Lundy* were similar to those in the current example. The taxpayers in *Lundy* had income tax withheld from their wages for their 1987 taxable year, which were treated for purposes of Section 6511 as paid on April 15, 1988.<sup>130</sup> They did not file their 1987 income tax return, on which they

123. See I.R.C. § 6511(a) (1994) (refund claim must be filed within two years from time tax was paid "if no return was filed by the taxpayer").

124. See *Rossmann v. Comm'r*, 95-1 U.S. Tax Cas. (CCH) ¶ 50,081, at 87,291 (9th Cir. 1995) (holding refund claim untimely that would have been timely under majority view had taxpayer brought refund action in district court or Court of Federal Claims), *cert. denied*, 516 U.S. 1092 (1996).

125. See *infra* notes 144-51 and accompanying text.

126. 528 U.S. 431 (2000).

127. The taxpayer's claim in *Baral* would have been barred whether the Court adopted the majority or minority view. Because the Court did not acknowledge the division in the lower federal courts on this question and did not offer any extended analysis of the proper treatment of a late return under Section 6511(a), it is possible to view *Baral* as leaving the proper treatment of a late return in this situation as an unanswered question.

128. See I.R.C. § 6512(b)(3) (Supp. IV 1998) (last sentence). Although a taxpayer cannot bring a suit for refund in the Tax Court, *see supra* note 90, the Tax Court has jurisdiction to order a refund if, in considering the taxpayer's request for a redetermination of the alleged deficiency, it determines that a refund is due. See I.R.C. § 6512(b)(1) (1994).

129. 516 U.S. 235 (1996).

130. See I.R.C. § 6513(b)(1) (1994); *supra* notes 107-10 and accompanying text.

claimed a refund, until December 1990.<sup>131</sup> The Service had mailed a notice of deficiency<sup>132</sup> to the taxpayers in September 1990, i.e., before the taxpayers had filed their 1987 return.<sup>133</sup> After filing their return and claim for refund in December 1990, the taxpayers chose not to bring an action for a refund in either a federal district court or the Court of Federal Claims, but instead to seek a redetermination of the alleged deficiency in the Tax Court.<sup>134</sup>

In the Tax Court, the taxpayers in *Lundy* claimed not only that they did not owe the deficiency, but also that they had overpaid their tax for 1987.<sup>135</sup> The Service argued that, even if this were the case, Section 6512(b)(3)(B) barred the Tax Court from ordering a refund.<sup>136</sup> Section 6512(b)(3)(B) directs the Tax Court to apply the look-back periods of Section 6511(b)(2) in determining the amount of tax that can be refunded. The Service argued that Section 6512(b)(3)(B) imposed the two-year look-back period of Section 6511(b)(2)(B), rather than the three-year look-back period of Section 6511(b)(2)(A), when, as in *Lundy*, the taxpayers had not filed a return on the date the Service mailed the notice of deficiency.<sup>137</sup> The taxpayers in *Lundy* responded that, had they chosen to bring a refund action in a federal district court or the Court of Federal Claims, their late return would have constituted a timely claim for refund under Section 6511(a) and they would have been eligible for the three-year look-back period of Section 6511(b)(2)(A), so that their refund would not be barred (the majority view discussed above).<sup>138</sup> Congress, they argued, could not have intended that taxpayers be penalized by choosing instead to pursue their claim in the Tax Court.

The Court in *Lundy* agreed with the Service. It assumed without deciding that the taxpayers were correct that their refund claim would not be barred had they chosen a different forum.<sup>139</sup> Nevertheless, the Court concluded, “[w]e . . . find in this disparity no excuse to change the limitations scheme that Congress has crafted.”<sup>140</sup>

131. See *Lundy*, 516 U.S. at 237.

132. See *supra* note 90 (discussing deficiency and notice of deficiency).

133. See *Lundy*, 516 U.S. at 237.

134. See *id.*; *supra* note 90 (discussing choice of forum available to taxpayer who has received notice of deficiency).

135. *Comm’r v. Lundy*, 516 U.S. 235, 237 (1996).

136. See *id.* at 238.

137. See *id.* at 245.

138. See *id.* at 250-51.

139. See *id.* at 251. In his dissenting opinion, Justice Thomas indicated that he is prepared to hold that the Service’s position in Rev. Rul. 76-511, see *supra* notes 117-18 and accompanying text, which is the majority view on the proper treatment of a late-filed return under Section 6511(a), is correct. See *Lundy*, 516 U.S. at 253-57 (Thomas, J., dissenting).

140. *Lundy*, 516 U.S. at 252.

In the following year, Congress amended Section 6512(b)(3) to change the result in *Lundy* by making clear that the three-year look-back period of Section 6511(b)(2)(A) should apply in similar cases in the Tax Court.<sup>141</sup> According to the Committee Reports that accompanied the amendment, Congress believed that the taxpayers in *Lundy* would have been entitled to a refund had they brought a refund action in a district court or the Court of Federal Claims, and that “it is appropriate to eliminate this disparate treatment” of actions brought in the Tax Court.<sup>142</sup> Thus, the Congress that amended Section 6512(b)(3) adopted the majority view discussed above regarding the proper treatment of a late-filed return under Section 6511(a). Although the views of a subsequent Congress on previously enacted legislation are not binding on the courts,<sup>143</sup> a compelling reason now exists for the abandonment of the minority view. Under the minority view, taxpayers such as those in *Lundy* will be barred from obtaining a refund in a district court or the Court of Federal Claims, but will successfully obtain a refund if they pursue their claim in the Tax Court. This is precisely the disparity that Congress intended to eliminate.

In *Miller v. United States*,<sup>144</sup> the Ninth Circuit offered three rationales for the minority view, none of which are persuasive. First, the court reasoned that to allow the late filing of a return to trigger a three-year period for filing a claim for refund would render meaningless the rule in Section 6511(a) that a refund claim must be filed within two years after the tax was paid “if no return was filed by the taxpayer.” That is, this latter rule would never apply, according to the court, if the late filing of a return can at any time trigger a three-year period for filing a refund claim. This concern is unfounded because circumstances exist in which taxpayers who have not filed a return file claims for refund. For example, if a taxpayer has failed to file a return, the Service often prepares a substitute return<sup>145</sup> and assesses the tax due for the year. The taxpayer can choose to pay the tax and then seek a refund of it without ever filing a return. The taxpayer might do this by sending a letter to the Service that meets the requirements of a formal claim for refund or that a court is willing to treat as a valid informal refund claim.<sup>146</sup> Indeed, the legislative history of Section 6511(a) suggests that

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141. See I.R.C. § 6512(b)(3) (Supp. IV 1998) (last sentence).

142. S. REP. NO. 105-33, at 656 (1997).

143. See, e.g., *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 355 (1998) (quoting *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321, 348-49 (1963)).

144. 38 F.3d 473 (9th Cir. 1994).

145. See I.R.C. § 6020(b) (1994).

146. See *Elias v. United States*, 93-1 U.S. Tax Cas. (CCH) ¶ 50,131, at 87,483 (C.D. Cal. 1992) (treating taxpayer who never filed tax returns but who sent to IRS letters seeking refund as having filed valid claims for refund, but granting summary judgment to government), *aff’d in part*, 17 F.3d 394 (9th Cir. 1994) (unpublished table decision); *supra* note 95 (discussing informal claims for refund).

Congress in 1934 added the language regarding circumstances in which “no return was filed *by the taxpayer*” to address precisely this situation.<sup>147</sup>

Second, the Ninth Circuit in *Miller* argued that a contrary position “would render meaningless . . . the two-year period of § 6511(b)(2)(B).”<sup>148</sup> That is, the court could foresee no circumstances in which this limit on the amount of tax recoverable would apply if a late return is treated in all circumstances as a “return” for purposes of Section 6511(a). This concern similarly is unfounded; as this Article will demonstrate shortly,<sup>149</sup> the two-year limit on the amount of tax recoverable in Section 6511(b)(2)(B) was designed to (and often does) apply in situations where a taxpayer files a timely return but makes a subsequent tax payment more than three years after the return was filed.

Finally, the court in *Miller* reasoned that a contrary holding would lead to a disparity in results between refund actions brought in district court and actions for redetermination of a deficiency brought in the Tax Court.<sup>150</sup> As discussed above,<sup>151</sup> it is now the Ninth Circuit’s minority position that leads to a disparity in results.

#### (4) Example 4: An Audit and Subsequent Payment of Additional Tax

During calendar year 1995, a taxpayer has \$4,200 of income tax withheld from her wages and, on April 15, 1996, files an income tax return showing a tax liability of \$4,200. After a subsequent audit in which the Service determines that the taxpayer’s correct tax liability for 1995 is \$5,000, the taxpayer pays an additional \$800 in tax on June 1, 1999. On December 31, 1999, the taxpayer files a claim for refund seeking to recover both the \$800 paid on June 1 and an additional \$1,000 based on her inadvertent failure to claim a valid deduction in 1995. Although the taxpayer filed the claim for refund more than three years after she filed the return, the claim for refund is timely under Section 6511(a) because the taxpayer filed the claim within two years from the time she paid the additional \$800 in tax. The taxpayer’s potential recovery is limited, however, by Section 6511(b)(2)(B) to \$800, the tax paid within the two years preceding the date on which the taxpayer filed the refund claim.

147. See Revenue Act of 1934, ch. 277, § 322(b)(1), 48 Stat. 680, 750; *An Act to Provide Revenue, Equalize Taxation and For Other Purposes: Hearings on H.R. 7835 Before the S. Comm. on Finance*, 73d Cong. 210, 211 (1934) (statements of Sen. Barkley and L.H. Parker, Chief of Staff of the J. Comm. on Internal Revenue Taxation).

148. *Miller*, 38 F.3d at 476.

149. See discussion *infra* Parts III.B.1.b.(4) (example 4), III.B.2.b.

150. *Miller v. United States*, 38 F.3d 473, 476 (9th Cir. 1994).

151. See *supra* notes 128-43 and accompanying text.

## 2. History and Policy of the Limitations on Claims for Refund

Two concepts discussed in the preceding section have been present in the federal tax system from a very early stage: (1) taxpayers who seek a refund of tax must do so by presenting to the Service a claim for refund within specified periods of time and subject to limits on the amount of tax recoverable, and (2) federal courts have no jurisdiction to hear a suit for refund unless the taxpayer has first filed with the Service a claim for refund that conforms to the applicable limits. The purpose of the second rule is fairly obvious: a claim for refund provides the agency charged with the administration of the tax laws the opportunity to consider the basis for the taxpayer's claim and to resolve the matter without resort to litigation.<sup>152</sup> The purpose of the first rule, and particularly the intricate rules of Section 6511, is less obvious. To understand their purpose, one must first understand how the current rules developed.

### a. Origin of the Limitations on Claims for Refund

Soon after the enactment of the federal income tax in 1913,<sup>153</sup> Congress enacted a provision that specifically authorized claims for refund of income tax.<sup>154</sup> This provision imposed no limit on either the period during which taxpayers could file claims for refund or the amount of tax recoverable.<sup>155</sup> The first restriction on claims for income tax refunds, enacted in 1918, provided simply that no refund could be allowed more than five years after the taxpayer's return was due "unless before the expiration of such five years a claim therefor is filed by the taxpayer."<sup>156</sup> Congress chose a five-year period in order to

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152. See, e.g., John W. Piester, *Tax Refund Claims and District Courts Actions*, 4 TRIAL LAW. GUIDE 273, 287 (1960); Maurice E. Stark, *Claims for Refund of Federal Taxes*, 41 IOWA L. REV. 496, 498 (1956).

153. Prior to 1954, claims for refund of income, estate, and gift taxes were governed by separate limitations provisions. In that year, claims for refund of all three taxes became subject to the limitations set forth in Section 6511. See H.R. REP. NO. 83-1337, at A415 (1954). Because Section 6511 derives from the pre-1954 provisions that governed claims for refund of income taxes, this Article will not discuss the pre-1954 provisions that governed claims for refund of estate and gift taxes.

154. See Revenue Act of 1916, ch. 463, § 14(a), 39 Stat. 756, 772.

155. Prior to Congress's enactment of the income tax, claims for refund of federal taxes were governed by Section 3228 of the Revised Statutes, which required that claims for refund be filed within two years after the tax was paid. See Act of June 6, 1872, ch. 315, § 44, 17 Stat. 230, 257. The provision that Congress enacted specifically to address income tax refund claims, Section 14(a) of the 1916 Act, see *supra* note 154, took claims for refund of income tax outside of the general rule of Section 3228 and imposed no limit on either the filing period or the amount of the refund.

156. Revenue Act of 1918, ch. 18, § 252, 40 Stat. 1057, 1085.

provide taxpayers with the same period of time within which to seek a refund as the government had to assess tax.<sup>157</sup>

b. Revenue Act of 1924: The Predecessor of Section 6511(b)(2)

The first limit on the *amount* of tax recoverable, i.e., the first predecessor of current Code Section 6511(b)(2), appeared in 1924. In the Revenue Act of 1924, Congress abandoned the original rule that a claim for refund must be filed within a specified period after the return was due. Instead, the 1924 legislation required that claims for refund of income tax be filed within four years from the time the tax was paid.<sup>158</sup> At the same time, Congress added the further limitation that “the amount of the credit or refund [shall not] exceed the portion of the tax paid during the four years immediately preceding the filing of the claim.”<sup>159</sup> Congress enacted this restriction “[i]n order that a late payment of a small portion of the tax due may not extend the time for filing a claim for refund of the entire tax.”<sup>160</sup> That is, the restriction was targeted at situations such as that described in example number four, discussed earlier.<sup>161</sup> The restriction precluded a taxpayer from arguing that she was entitled to recover tax paid more than four years before she filed the claim because the claim was filed within four years after the *full amount* of the tax due for the year was paid.<sup>162</sup> Stated another way, by limiting the amount of the refund recoverable Congress intended to permit refunds of only those portions of the tax paid with respect to which the refund claim was filed in a timely manner.

157. See S. REP. NO. 65-617, at 10 (1918).

158. See Revenue Act of 1924, ch. 234, § 281(b), 43 Stat. 253, 301. By 1924, the filing limitations period originally enacted in the Revenue Act of 1918 had been amended in 1921 and again in 1923 to provide that claims for refund must be filed within five years from the time the return was due or within two years from the time the tax was paid. See Revenue Act of 1921, ch. 136, § 252, 42 Stat. 227, 268; Act of March 4, 1923, ch. 276, 42 Stat. 1504, 1505. The 1924 amendment’s “four-year-from-payment” rule was an attempt to simplify the filing limitations period. See S. REP. NO. 68-398, at 33 (1924). Unfortunately, as current Section 6511 is witness, the quest for simplicity ultimately failed.

159. Revenue Act of 1924, ch. 234, § 281(b), 43 Stat. 253, 301.

160. S. REP. NO. 68-398, at 33 (1924).

161. See *supra* Part III.B.1.b.(4).

162. Section 3228 of the Revised Statutes, which during the 1920s limited the period during which claims for refund of estate tax could be filed, contained no similar restriction on the amount of tax recoverable. See *supra* note 155. Several taxpayers successfully asserted that the absence of such a restriction allowed an estate, by making a small payment of additional tax, to recover tax paid many years earlier. See, e.g., *Estate of Hills v. United States*, 50 F.2d 302, 304-07 (Ct. Cl. 1931) (estate recovered taxes paid in 1921 (the year in issue) through 1928 refund claim because estate had paid additional tax in 1925).

## c. Revenue Act of 1934: A "Clerical" Change

By 1934, the provision limiting refunds of income tax had begun to resemble closely current Section 6511 of the Code. Like Sections 6511(a) and 6511(b)(1), Section 322(b)(1) of the Revenue Act of 1934 provided that no refund could be made more than three years from the time the taxpayer filed the return or more than two years from the time the taxpayer paid the tax, whichever was later, unless the taxpayer filed a claim for refund within the applicable period.<sup>163</sup> Congress again chose these periods to ensure that taxpayers would not have a longer period within which to seek a refund than the Service had to assess tax,<sup>164</sup> a situation that sometimes had arisen under prior law.<sup>165</sup> Regardless of whether the taxpayer satisfied the three-years-from-filing or two-years-from-payment period, Section 322(b)(2) of the 1934 legislation limited the amount of the refund to the portion of the tax paid during the three years immediately preceding the filing of the claim.<sup>166</sup> The only explanation given for this limit was that it constituted "a clerical change . . . to carry out the policy in subsection (b)(1)."<sup>167</sup>

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163. See Revenue Act of 1934, ch. 277, § 322(b)(1), 48 Stat. 680, 750.

164. See H.R. REP. NO. 73-704, at 35 (1934).

165. When the Revenue Act of 1934 was adopted, taxpayers were permitted to pay their income tax in installments, with the last installment due nine months after the due date of the return. Under the limitations period that existed immediately before the adoption of the 1934 legislation, taxpayers had to file claims for refund within two years from the *time the tax was paid*. See Revenue Act of 1932, ch. 209, § 322(b), 47 Stat. 169, 242. This meant that taxpayers could file claims for refund for at least a portion of their tax up to two years and nine months after filing their timely returns. In contrast, the limitations period on assessments of tax was two years from the *date the return was due*, so that taxpayers in many cases had a nine month advantage over the government. The 1934 Act corrected this perceived imbalance by establishing the basic limitations periods for both refund claims and assessments as three years from the date the return was filed. See H.R. REP. NO. 73-704, at 35 (1934); STAFF OF HOUSE COMM. ON WAYS AND MEANS, 73d CONG., 2d SESS., PREVENTION OF TAX AVOIDANCE: PRELIMINARY REPORT OF A SUBCOMM. OF THE COMM. ON WAYS AND MEANS RELATIVE TO METHODS OF PREVENTING THE AVOIDANCE AND EVASION OF THE INTERNAL REVENUE LAWS TOGETHER WITH SUGGESTIONS FOR THE SIMPLIFICATION AND IMPROVEMENT THEREOF 21 (Comm. Print 1933); *An Act to Provide Revenue, Equalize Taxation and For Other Purposes: Hearings on H.R. 7835 Before the S. Comm. on Finance*, 73d Cong. 210, 211 (1934) (statement of Dr. Roswell Magill, Assistant to the Secretary of the Treasury). Congress undoubtedly enacted the alternative "two year from payment" limitation to cover the common situation in which, following an audit, a taxpayer makes an additional tax payment many years after the taxpayer filed the return. See *supra* text accompanying notes 151-52.

166. See Revenue Act of 1934, ch. 277, § 322(b)(2), 48 Stat. 680, 750.

167. H.R. REP. NO. 73-704, at 35 (1934).

The 1934 legislation thus represents the first time that Congress combined (1) the rule currently found in Section 6511(a) that treats a claim for refund as timely if it is filed within three years from the time the taxpayer files the return, with (2) a limit on the amount of tax recoverable (comparable to the rules of current Sections 6511(b)(2)(A) and (B)). Although Congress provided no clear explanation as to why this combination was necessary, the reason is readily apparent: like the event that triggers the two-year period for filing a refund claim (the payment of tax), the event that triggers the three-year period for filing a claim (filing the return), is within the taxpayer's control and can occur many years after the tax year in question. Absent a limit on the amount of tax recoverable, a taxpayer could at any time file a late return that also constitutes a timely claim for refund (the majority view discussed above in example three)<sup>168</sup> and thereby recover tax paid many years earlier. This view of Congress's motive for combining a three-year-from-filing rule with a limit on the amount of tax recoverable is consistent with the general focus of the Revenue Act of 1934, which was the prevention of tax avoidance and the improvement and simplification of the revenue laws.<sup>169</sup>

#### d. Revenue Act of 1942: The Form of Current Section 6511(b)(2) Emerges

In 1942, Congress apparently recognized that the three-year look-back rule enacted in 1934<sup>170</sup> allowed taxpayers to recover tax for which they could not have filed a timely claim for refund. To illustrate, assume that a taxpayer files her return for year 1 on April 15 of year 2 and, because of a lack of funds, delays making her final tax payment for year 1 until August 1 of year 2. After April 15 of year 5, the taxpayer no longer can file a timely claim for refund of the tax she paid in year 2, because the claim would be filed neither within three years from the time she filed the return nor within two years from the time she paid the tax. Under the statute enacted in 1934, however, if the taxpayer makes a small additional payment of tax, e.g., a payment on June 1 of year 5 in response to an IRS audit, the taxpayer could file an immediate claim for refund, which would be timely because it would be filed within two years from the time she paid the tax on June 1 of year 5. Thus, the taxpayer could potentially recover all taxes paid within the preceding three-year period, including the tax she paid on August

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168. See *supra* notes 117-19 and accompanying text.

169. See, e.g., STAFF OF HOUSE COMM. ON WAYS AND MEANS, 73d CONG., 2d SESS., PREVENTION OF TAX AVOIDANCE: PRELIMINARY REPORT OF A SUBCOMM. OF THE COMM. ON WAYS AND MEANS RELATIVE TO METHODS OF PREVENTING THE AVOIDANCE AND EVASION OF THE INTERNAL REVENUE LAWS TOGETHER WITH SUGGESTIONS FOR THE SIMPLIFICATION AND IMPROVEMENT THEREOF, at III (Comm. Print 1933) ("it is thought imperative to transmit to the Ways and Means Committee a preliminary report recommending methods of preventing tax evasion and avoidance, together with certain suggestions for improving and simplifying the revenue laws").

170. See *supra* notes 163-67 and accompanying text.  
<https://scholarship.law.missouri.edu/mlr/vol65/iss4/1>

1 of year 2. Congress addressed this problem in the Revenue Act of 1942 by specifying that, when a refund claim is timely under the two-year-from-payment rule, the applicable look-back period is two years.<sup>171</sup>

e. Internal Revenue Code of 1954: A Source of Confusion

In 1954, the refund provision found its current home in Section 6511 of the Code.<sup>172</sup> The House version of Section 6511 kept the basic structure adopted in 1934 and 1942: a refund claim was timely under Section 6511(a) if filed either within three years from the time the taxpayer filed the return or within two years from the payment of tax, and the look-back period of Section 6511(b)(2) was three or two years, depending on the period used to qualify the claim as timely.<sup>173</sup> The House Ways and Means Committee emphasized that the limitations of Section 6511(a) were “consistent with the new uniform rule in Section 6501, relating to the period of limitations on assessments.”<sup>174</sup> In the Senate, the filing periods of Section 6511(a) were changed, without explanation, to the later of three years from the *due date of the return* (determined without regard to extensions of time to file) or two years from the time the taxpayer paid the tax.<sup>175</sup> Given the consistent congressional effort to have the period for filing a refund claim be consistent with the government’s period for assessment (which ran from the date of actual filing of the return), this amendment seems out of place. The Senate nevertheless prevailed, and Section 6511(a) was enacted in that form.<sup>176</sup> The 1954 legislative history never mentions the look-back periods of Section 6511(b)(2).

Under the 1954 statute, the three-year look-back provision of Section 6511(b)(2)(A) was superfluous: the three-year period for filing a refund claim in Section 6511(a) ran from a fixed, immovable date, and there was therefore no need to specify in Section 6511(b)(2)(A) the particular tax payments that were

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171. See Revenue Act of 1942, ch. 619, § 169(a), 56 Stat. 798, 876; H.R. REP. NO. 77-2333, at 118-19 (1942) (“Under section 322(b) as so amended, the amount of the refund will be measured . . . by those payments for which the claim could be filed . . . under the provisions of paragraph (1) if there were no later payments.”), *reprinted in* 1942-2 C.B. 372, 460; see also 2 *Hearings on H.R. 7378 Before the S. Comm. on Finance*, 77th Cong. 1758-59 (1942) (statement of Albert L. Hopkins, Esq.) (“The proposed amendment [to Section 322(b)(2)] is an attempt to limit the amount of the refund to the amount of taxes paid within the time limit of each kind of claim.”).

172. See Internal Revenue Code of 1954, ch. 736, § 6511, 68A Stat. 3, 808. As part of the restructuring of the Code that took place in 1954, Congress made the limitations provision that previously had applied to income taxes applicable as well to estate and gift taxes. See H.R. REP. NO. 83-1337, at A415 (1954).

173. See H.R. REP. NO. 83-1337, at A415 (1954).

174. H.R. REP. NO. 83-1337, at A415 (1954).

175. See S. REP. NO. 83-1622, at 586 (1954).

176. See Internal Revenue Code of 1954, ch. 736, § 6511(a), (b), 68A Stat. 3, 808.

recoverable.<sup>177</sup> That is, a look-back provision is necessary only if the event that triggers the limitations period for filing a claim for refund under Section 6511(a) is within the taxpayer's control. In contrast, a look-back period is unnecessary if the event that triggers the limitations period is fixed, such as the due date of the return. Therefore, only the two-year look-back period of the 1954 version of Section 6511(b)(2) served a purpose, and that purpose was the same one served by its first ancestor in 1924: to clarify that a late payment of a portion of the tax due did not extend the statute of limitations for the entire tax.<sup>178</sup>

#### f. Technical Amendments Act of 1958: Back to the Future

Sections 6511(a) and 6511(b)(2) were last amended in 1958. The 1958 legislation amended Section 6511(a) to provide that a claim for refund must be filed within three years from the time the *return was filed* or within two years from the time the tax was paid, which was the rule enacted in 1934 and inexplicably changed in 1954 as described above.<sup>179</sup> At the same time, Congress amended the look-back rule of Section 6511(b)(2)(A) to provide that, if the claim for refund is timely under the three-year period in Section 6511(a), then the amount of tax recoverable is the portion of the tax paid during the period preceding the taxpayer's filing of the claim equal to three years *plus the period of any extension of time for filing the return that the taxpayer obtained*.<sup>180</sup>

The 1958 amendments extended the three-year look-back period of Section 6511(b)(2)(A) so that a taxpayer who timely files a return pursuant to an extension of time for filing is not precluded from recovering a tax overpayment when the taxpayer files a timely claim for refund. Without the extension of the three-year look-back, a taxpayer who files a timely claim for refund within three years after filing a timely return, but more than three years after paying the tax, would be barred from recovery. This could occur, for example, if the taxpayer

177. At least one commentator perceived this same lack of purpose served by the 1954 version of Section 6511(b)(2)(A):

[The look-back period of former Section 322(b)(2)] had the two-fold purpose of preventing a taxpayer from creating his own limitations periods by (1) merely filing a delinquent return, where no return had been filed, or (2) by making a supplemental payment of tax after the expiration of the applicable limitation period. *The limitations provisions of the 1954 Code would seem to be limited to the latter situation, however, since the three year limitation period under the new Code is geared to the date the return is required to be filed rather than the date it was actually filed.*

Stark, *supra* note 152, at 506 (emphasis added).

178. See *supra* notes 158-62 and accompanying text.

179. See Technical Amendments Act of 1958, § 82, 72 Stat. 1606, 1663; *supra* notes 172-76 and accompanying text.

180. See Technical Amendments Act of 1958, § 82, 72 Stat. 1606, 1663. See generally S. REP. NO. 85-1983, at 98-99 (1958), reprinted in 1958-3 C.B. 922, 1019-20. <https://scholarship.law.missouri.edu/mlr/vol65/iss4/1>

(1) is deemed to have paid tax on April 15 of year 1,<sup>181</sup> (2) files a return on August 15 of year 1 pursuant to an extension of time to file,<sup>182</sup> and (3) files a timely claim for refund on June 1 of year 4.

g. Conclusions Dictated by the Legislative History

Throughout the history of Section 6511, Congress consistently has expressed one clear concern: that the period within which a taxpayer can file a claim for refund be consistent with (or at least no more favorable than) the period within which the government can assess tax. The two-year look-back rule of Section 6511(b)(2)(B), first enacted in 1924,<sup>183</sup> is in one sense merely a manifestation of Congress's principal objective. If a taxpayer were permitted to make an additional tax payment after the period of limitations on assessment had expired and thereby recover tax paid many years earlier, the Service would be at a disadvantage because it has no similar mechanism for unilaterally opening a closed tax year. The two-year look-back period of Section 6511(b)(2)(B) clarifies that the only portions of a tax overpayment that are recoverable under the two-year-from-payment rule of Section 6511(a) are those portions for which the claim for refund is timely filed.

Congress has never directly explained the purpose of the three-year look-back period of Section 6511(b)(2)(A). This provision first appeared as a "clerical change" in 1934.<sup>184</sup> The reason for its enactment, however, is readily apparent: without it, a taxpayer effectively could create her own limitations period for filing a refund claim by filing a late return that also constitutes a claim for refund. It is hard to disagree with the proposition that taxpayers should not have an unlimited period within which to file a claim for refund. Nevertheless, the provision's effect puts it at odds with Congress's desire to treat taxpayers and the government in a similar manner. Although taxpayers can file a claim for refund and the government can assess tax within three years after the taxpayer files the return,<sup>185</sup> the government, unlike taxpayers, is not subject to a limit on the amount of tax it can recover.

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181. See I.R.C. § 6513(b) (1994); *supra* notes 107-10 and accompanying text.

182. See I.R.C. § 6081(a) (1994); Treas. Reg. § 1.6081-4 (as amended in 1996) (automatic four-month extension for individuals).

183. See *supra* notes 158-62 and accompanying text.

184. See *supra* notes 163-69 and accompanying text.

185. See I.R.C. §§ 6501(a), 6511(a) (1994).

#### IV. THE PRE-1997 DISPUTE REGARDING WHETHER THE LIMITATIONS PERIODS FOR FILING CLAIMS FOR TAX REFUNDS COULD BE EQUITABLY TOLLED

Before the Supreme Court's 1990 decision in *Irwin v. Department of Veterans Affairs*,<sup>186</sup> the lower federal courts routinely held that the limitations periods that apply to claims for tax refunds under Sections 6511(a) and 6511(b)<sup>187</sup> were not subject to equitable modification.<sup>188</sup> After *Irwin*, several taxpayers requested relief from these limitations periods under the doctrine of equitable tolling, and the lower federal courts divided on the question. In 1997, the Supreme Court's decision in *United States v. Brockamp*<sup>189</sup> settled the issue. This Part discusses the various approaches to the issue that the lower federal courts took before the Supreme Court's decision in *Brockamp*, and then discusses the *Brockamp* decision.<sup>190</sup>

186. 498 U.S. 89 (1990); see *supra* notes 69-78 and accompanying text.

187. See *supra* notes 105-12 and accompanying text.

188. See, e.g., *Republic Petroleum Corp. v. United States*, 613 F.2d 518, 527 (5th Cir. 1980); *Kreiger v. United States*, 539 F.2d 317, 320-21 (3d Cir. 1976); *Estate of Cowan v. Dep't of the Treasury*, 81-1 U.S. Tax Cas. (CCH) ¶ 9454, at 87,312 (S.D.N.Y. 1981); *Stepka v. United States*, 196 F. Supp. 184, 185 (E.D.N.Y. 1961); *Ellis v. United States*, 229 Ct. Cl. 814, 815 (1982).

The courts have permitted refund actions to proceed despite the taxpayer's late filing of a claim for refund in several cases involving Native Americans. See, e.g., *Harrington v. United States*, 70-1 U.S. Tax Cas. (CCH) ¶ 9215, at 82,860 (N.D. Okla. 1970); *Daney v. United States*, 247 F. Supp. 533, 535 (D. Kan. 1965), *aff'd on other grounds*, 370 F.2d 791 (10th Cir. 1966); *Nash v. Wiseman*, 227 F. Supp. 552, 555-56 (W.D. Okla. 1963); *Dodge v. United States*, 362 F.2d 810, 814-15 (Ct. Cl. 1966). These cases emphasize the fiduciary nature of the relationship between the federal government and Native Americans, and therefore represent a unique exception to the general refusal of courts to toll or otherwise modify the limitations periods of Section 6511. With respect to the fiduciary nature of the government-Native American relationship, see Ellen P. Aprill, *Tribal Bonds: Indian Sovereignty and the Tax Legislative Process*, 46 ADMIN. L. REV. 333, 334 & n.7 (1994). For general background that is helpful in understanding the terminology used in these cases, see D. Faith Orłowski & Robbie Emery Burke, *Oklahoma Indian Titles*, 29 TULSA L.J. 361 (1993).

189. 519 U.S. 347 (1997).

190. For other works that address the pre-1997 conflict in the lower federal courts, see Malcolm L. Morris, *Troubled Taxpayers' Tolling Troubles*, 47 SYRACUSE L. REV. 121, 130-44 (1996); Richard M. Gaal, Comment, *Equitable Tolling of Internal Revenue Code Section 6511: Bridging the Divide Between Rules and Equity*, 27 CUMB. L. REV. 297, 303-22 (1996); Andrea Sharetta, Note, *The Problem of Equitable Tolling in Tax Refund Claims*, 72 NOTRE DAME L. REV. 545, 577-86 (1997); Matthew L. Weidner, Note, *A Webb of Confusion: Equitable Tolling in Tax Refund Suits*, 53 WASH. & LEE L. REV.

### A. *The Pre-Brockamp Split in the Lower Federal Courts*

Between the Supreme Court's 1990 decision in *Irwin* and its 1997 decision in *Brockamp*, several courts addressed whether the limitations periods of Sections 6511(a) and 6511(b) could be equitably tolled. These decisions fall into three general groups: (1) those concluding that the limitations periods of Sections 6511(a) and 6511(b) could not be tolled under any circumstances, (2) those assuming or holding that the periods could be tolled but concluding that the facts did not warrant tolling, and (3) those holding that the periods could be tolled and concluding either that the facts warranted relief or that further factfinding was required.

#### 1. Courts Concluding that Tolling is Impermissible

The Courts of Appeals for the First, Fourth, Eleventh, and Federal Circuits,<sup>191</sup> as well as a number of federal district courts, concluded that courts could not equitably toll the limitations periods of Sections 6511(a) and 6511(b) under any circumstances. These courts reached this conclusion by three separate paths.

##### a. Courts that Failed to Consider the *Irwin* Analysis

The Eleventh and Federal Circuits,<sup>192</sup> as well as several district courts,<sup>193</sup> appeared not to recognize *Irwin*'s mandate that, with respect to claims against the government, courts must analyze the specific limitations period to determine whether Congress intended that it not be subject to tolling. The Eleventh Circuit briefly referred to *Irwin* in a footnote<sup>194</sup> and the Federal Circuit failed to mention the case at all. Instead, these courts concluded that the limitations periods of Sections 6511(a) and 6511(b)(2) could not be tolled because to do so would be contrary to *United States v. Dalm*.<sup>195</sup> As explained below, however, *Dalm* does

191. See *Lovett v. United States*, 81 F.3d 143 (Fed. Cir.), *cert. denied*, 519 U.S. 933 (1996); *Webb v. United States*, 66 F.3d 691 (4th Cir. 1995), *cert. denied*, 519 U.S. 1148 (1997); *Oropallo v. United States*, 994 F.2d 25 (1st Cir. 1993), *cert. denied*, 510 U.S. 1050 (1994); *Vintilla v. United States*, 931 F.2d 1444 (11th Cir. 1991).

192. See *Lovett*, 81 F.3d at 143; *Vintilla*, 931 F.2d at 1444.

193. See, e.g., *Tanzola v. Internal Revenue Serv.*, No. 95-CV-4408, 1996 U.S. Dist. LEXIS 20,222 (E.D.N.Y. June 21, 1996); *Katz v. United States*, 885 F. Supp. 24, 28 (D. Conn. 1995); *Kishnani v. United States*, 93-1 U.S. Tax Cas. (CCH) ¶ 50,115, at 87,441 (E.D.N.Y. 1993); see also *Joosten v. United States*, 96-2 U.S. Tax Cas. (CCH) ¶ 50,393, at 85,300 (D.N.J. 1996) (discussing *Irwin* at length and concluding that its analysis does not apply to claims for tax refunds).

194. See *Vintilla*, 931 F.2d at 1447 n.1.

195. 494 U.S. 596 (1990).

not address equitable tolling, but rather the separate doctrine of equitable recoupment.

In *Dalm*, the taxpayer paid gift tax on amounts received in 1976 and, following an audit, the Service asserted an income tax deficiency with respect to the same funds.<sup>196</sup> The taxpayer challenged the income tax deficiency in the Tax Court and, as part of a pre-trial settlement with the government, paid one-half of the income tax that the Service claimed was due.<sup>197</sup> Immediately following the settlement and dismissal of the Tax Court proceeding, which occurred in 1984, the taxpayer filed a claim for refund of the gift tax she had paid in 1976.<sup>198</sup> After the Service failed to act upon the claim within six months, the taxpayer brought an action for a refund in federal district court.<sup>199</sup>

The taxpayer argued that the doctrine of equitable *recoupment* allowed the court to consider her claim<sup>200</sup> notwithstanding that the refund claim was untimely under Section 6511(a) and that the court seemingly was barred from hearing the claim by Section 7422(a). In general, the doctrine of equitable recoupment permits a taxpayer to "recoup" (i.e., recover) tax paid in certain situations where the same transaction has been taxed under two inconsistent theories.<sup>201</sup> Although the taxpayer's 1976 receipt of funds in *Dalm* had been subject to two inconsistent taxes (both income and gift taxes), the Supreme Court held that the district court lacked jurisdiction to hear her claim.<sup>202</sup> In its previous decisions involving equitable recoupment, the Court explained, the trial court had always had jurisdiction to hear the taxpayer's claim with respect to one of the taxes involved because the refund claim with respect to that tax had been timely filed. In that situation, according to the Court, the trial court can exercise its equitable power to consider the entire transaction and permit the taxpayer to recover a tax that was not properly due, even if recovery of that tax technically is barred by the

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196. *See id.* at 599.

197. *See id.*

198. *See id.* at 599-600.

199. *See id.* at 600.

200. *See id.*

201. *See, e.g., Bull v. United States*, 295 U.S. 247 (1935). *Bull* involved facts very similar to those of *Dalm*. In *Bull*, the taxpayer paid estate tax on amounts received and, once the statute of limitations on filing a claim for refund of the estate tax had expired, was required to pay income tax on the same receipts. The taxpayer filed a timely claim for refund of the *income* tax and argued in the alternative that, if the income tax was properly due, then the taxpayer should be allowed to recoup the estate tax previously paid by offsetting it against the income tax. The Supreme Court held that the income tax was properly due and that the estate tax should not have been paid. The Court accepted the taxpayer's alternative argument and—in a discretionary exercise of its equitable powers—permitted the taxpayer to offset the estate tax previously paid against the income tax due even though the taxpayer technically was barred by the statute of limitations from recovering the estate tax.

202. *See United States v. Dalm*, 494 U.S. 596, 610-11 (1990).  
<https://scholarship.law.missouri.edu/mlr/vol65/iss4/1>

statute of limitations.<sup>203</sup> In contrast, the taxpayer's refund claim in *Dalm* was untimely. The doctrine of equitable recoupment, the Court held, could not remedy this defect, i.e., the doctrine does not provide an independent basis for the district court's jurisdiction to hear the claim.

The Eleventh and Federal Circuits construed *Dalm* as precluding equitable tolling in tax refund cases. This reading is not wholly unreasonable because the *Dalm* opinion contains fairly strong language regarding the importance of statutes of limitations in the scheme of federal taxation.<sup>204</sup> Further, Justice Stevens, in a scathing dissent in *Dalm*, characterized the "ultimate question" in the case as "whether a statute of limitations otherwise barring a refund of federal income tax is *tolled* by Government [mis]conduct."<sup>205</sup> Nevertheless, the fact remains that the taxpayer in *Dalm* never argued that the statute should be equitably tolled and the Court never addressed the question.<sup>206</sup>

#### b. The Fourth Circuit's Approach: *Irwin*'s Presumption of Tolling Does Not Apply

In contrast to the Courts of Appeals for the Eleventh and Federal Circuits, the Fourth Circuit in *Webb v. United States*<sup>207</sup> acknowledged the relevance of the Supreme Court's decision in *Irwin* to the question whether the limitations periods in Sections 6511(a) and 6511(b) are subject to tolling. The Fourth Circuit interpreted *Irwin*, however, as establishing a rebuttable presumption of tolling in actions against the government only when a comparable claim is available against private parties.<sup>208</sup> Because a plaintiff can assert a claim for refund of tax against only the government, the Fourth Circuit reasoned, *Irwin*'s holding does not apply.<sup>209</sup> As discussed earlier,<sup>210</sup> this interpretation of *Irwin* is

203. *See id.* at 611.

204. For example, the Court stated that, "[r]ead together, the import of [the statutory provisions] is clear: unless a claim for refund of a tax has been filed within the time limits imposed by § 6511(a), a suit for refund, regardless of whether the tax is alleged to have been 'erroneously,' 'illegally,' or 'wrongfully collected,' . . . may not be maintained in any court." *Id.* at 602.

205. *Id.* at 612 (emphasis added).

206. It is unclear why the taxpayer in *Dalm* did not expressly raise the equitable tolling issue. Although the parties' briefs and the Court's opinion provide no definitive answer, it is possible that the limitations period for seeking a refund of the gift tax had not yet expired when the Service first began to question whether the taxpayer's 1976 receipt should be subject to income tax. If so, then the taxpayer in *Dalm* should have filed a protective claim for refund of the gift tax within the period prescribed by Section 6511(a). If this was the case, then the taxpayer's counsel may have chosen not to argue that the statute should be tolled, knowing that the Court likely would not be receptive to the argument given the taxpayer's missed opportunity to file a timely claim.

207. 66 F.3d 691 (4th Cir. 1995), *cert. denied*, 519 U.S. 1148 (1997).

208. *See id.* at 697.

209. *See id.* at 698; *see also* *Murphy v. United States*, No. 9J-2006, 1996 U.S. App.

flawed and therefore should not form the basis for holding that the limitations periods in Sections 6511(a) and 6511(b) cannot be tolled.<sup>211</sup>

c. The First Circuit's Approach: The *Irwin* Analysis Applies, But Congress Did Not Intend for the Periods in Section 6511 to Be Tolled

In *Oropallo v. United States*,<sup>212</sup> a panel of the First Circuit that included then-Circuit Judge Breyer, the author of the Supreme Court's later opinion in *United States v. Brockamp*,<sup>213</sup> also concluded that courts cannot toll the limitations periods on filing claims for tax refunds. The plaintiff in *Oropallo* claimed that the effects of carbon monoxide poisoning and other factors had prevented him from filing his 1983 return, on which he claimed a refund, until 1990. The court assumed for the sake of argument that the taxpayer's claim for refund was timely under Section 6511(a) (the majority view on this issue),<sup>214</sup> so that the bar to recovery was Section 6511(b)(2)(A). The First Circuit concluded that, under *Irwin*, the limitations periods of Section 6511 are presumed to be subject to tolling. The court further concluded, however, that the way in which Congress had structured the limitations periods in Sections 6511(a) and 6511(b) indicated that tolling was inappropriate. In support of this proposition, the First Circuit looked to the Supreme Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*.<sup>215</sup>

In *Lampf*, the Court addressed what statute of limitations applies in actions based on misrepresentations that violate Section 10(b) of the Securities Exchange Act of 1934 (the "1934 Act") and Securities and Exchange Commission Rule 10(b)-5.<sup>216</sup> The Court held that a uniform federal statute of

LEXIS 1176 (4th Cir. Jan. 30, 1996) (unpublished opinion in which Fourth Circuit adhered to its holding in *Webb*). In *Webb*, the Fourth Circuit held in the alternative that, assuming *Irwin*'s rebuttable presumption of tolling applies, Congress had indicated that tolling of the refund limitations provisions was inappropriate for the reasons stated by the First Circuit in *Oropallo v. United States*, 994 F.2d 25 (1st Cir. 1993), cert. denied, 510 U.S. 1050 (1994). See *Webb*, 66 F.3d at 699; *infra* notes 212-26 and accompanying text (discussing *Oropallo*).

210. See *supra* notes 83-86 and accompanying text.

211. The government's brief in *Webb* did not advocate the reading of *Irwin* that the Fourth Circuit adopted.

212. 994 F.2d 25 (1st Cir. 1993), cert. denied, 510 U.S. 1050 (1994).

213. 519 U.S. 347 (1997); see *infra* Part IV.B.

214. See *supra* notes 117-51 and accompanying text (discussing majority and minority views on whether a late return triggers a three-year period for filing a claim for refund).

215. 501 U.S. 350 (1991).

216. See *generally id.* A plaintiff's right to bring an action under Section 10(b) of the 1934 Act and Rule 10b-5 is an implied right of action, i.e., the right to bring an action is not explicit in the statute, but has been inferred by the courts. See *generally* *Herman & MacLean v. Huddleston*, 459 U.S. 375, 380 n.10 (1983). Accordingly, the statute

<https://scholarship.law.missouri.edu/mlr/vol65/iss4/1>

limitations should apply, and selected the “one-and-three year” statute of limitations that appears, in various forms, in sections of the 1934 Act and of the Securities Act of 1933.<sup>217</sup> In general, these statutes of limitations provide that actions must be brought within one year after discovery of the facts constituting the alleged violation *and* within three years after the violation occurred.<sup>218</sup> Because the plaintiffs in *Lampf* had met neither the one nor the three-year period, the Court considered whether the limitations periods could be equitably tolled. The Court held that tolling was impermissible. The one-year period, the Court reasoned, “begins after discovery of the facts constituting the violation, making tolling unnecessary.”<sup>219</sup> The three-year period, the Court stated, was designed “to serve as a cutoff” and therefore could not be tolled.<sup>220</sup> In other words, Congress already had provided for tolling in the statute *and* had set an outside limit, rendering any further *equitable* tolling of the statute contrary to congressional intent.<sup>221</sup>

The First Circuit in *Oropallo* reasoned that the structure of Sections 6511(a) and 6511(b) is analogous to the one-and-three year structure of the statute in *Lampf*.<sup>222</sup> That is, under the majority view of Section 6511(a),<sup>223</sup> the filing of a late return can at any time trigger a three-year period for filing a claim for refund. In this sense, the filing of a return is analogous to “discovery” of a cause of action, which under the statute in *Lampf* can at any time trigger a one-year period for bringing an action. Section 6511(b)(2)(A), the First Circuit reasoned, provides that recovery of tax is limited to the amount of tax paid within the three-years preceding the filing of the refund claim, and therefore is analogous to the three-year period in *Lampf* because it serves as an absolute, outside limit

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itself provides no guidance on what limitations period governs actions brought under Section 10(b).

217. See *Lampf*, 501 U.S. at 354-55.

218. See, e.g., 15 U.S.C. § 78i(e) (1994).

219. *Lampf*, 501 U.S. at 363.

220. *Id.*

221. The Court’s decision in *Lampf* has been the subject of a great deal of criticism. See, e.g., Johnson, *supra* note 32, at 612-13 (arguing that “the Court’s understanding of equitable tolling is deeply flawed” and that “*Lampf* is not the show-stopping decision it first appears to be”); Leslie, *supra* note 18, at 1588 (“After *Lampf*, as long as the Ponzi operator can keep the pyramid standing for three years without selling additional fraudulent securities, she is not accountable to her victims. So while Charles Ponzi invented his illegal scheme in 1919, the Court perfected it in 1991.”).

Congress initially appeared prepared to change the result in *Lampf* by statute, but ultimately overturned only the Court’s retroactive application of its holding to all pending cases. See 15 U.S.C. § 78aa-1 (1994) (new Section 27A of the Securities Exchange Act of 1934); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) (holding portion of new provision unconstitutional); Leslie, *supra* note 18, at 1608-10 (discussing congressional response to *Lampf*).

222. See *Oropallo v. United States*, 994 F.2d 25, 30 (1st Cir. 1993).

223. See *supra* notes 117-19 and accompanying text.

on a taxpayer's ability to recover. Given that Section 6511(b)(2)(A) is an outside limit, the court held, to toll that provision would, as in *Lampf*, be contrary to congressional intent.<sup>224</sup>

The First Circuit's analysis in *Oropallo* is questionable because, in contrast to the statute in *Lampf*, Sections 6511(a) and 6511(b)(2) do not constitute a discovery period combined with a statute of repose.<sup>225</sup> Sections 6511(a) and 6511(b)(2)(B) essentially work together to establish a three-year statute of limitations, measured from the earlier of the date the taxpayer filed the return or the date the taxpayer paid the tax. In contrast to the three-year period in *Lampf*, there is no indication that Congress intended Section 6511(b)(2)(B) to serve as an absolute, outside limit for taxpayers who have failed to discover their entitlement to a refund.<sup>226</sup>

## 2. Courts Assuming or Holding that Tolling is Permissible, But Concluding that the Facts Did Not Warrant Relief

The Courts of Appeals for the Eighth<sup>227</sup> and the Tenth Circuits,<sup>228</sup> along with several district courts,<sup>229</sup> assumed without deciding that the *Irwin*

224. See *Oropallo*, 994 F.2d at 31.

225. A statute of repose is "an absolute time limit beyond which liability no longer exists and is not tolled for any reason because to do so would upset the economic balance struck by the legislative body." *First United Methodist Church v. United States Gypsum Co.*, 882 F.2d 862, 866 (4th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990).

226. In contrast to Section 6511, the statute that the Court interpreted in *Lampf* expressly contemplates that a plaintiff will be barred from bringing an action more than three years after an alleged violation occurred, even if the plaintiff has not discovered her cause of action at that point. The legislative history of that statute reinforces the conclusion that foreclosing claims despite a plaintiff's lack of knowledge was an explicit legislative choice. See 78 CONG. REC. 8198 (1934) (statement of Sen. Fletcher); 78 CONG. REC. 8200 (1934) (statement of Sen. Barkley).

227. See *Git v. Dep't of the Treasury*, No. 9J-1899, 1996 U.S. App. LEXIS 86 (8th Cir. Jan. 4, 1996).

228. See *Amoco Prod. Co. v. Newton Sheep Co.*, 85 F.3d 1464, 1472 (10th Cir. 1996). The Tenth Circuit appears to base its holding on the absence of a sufficient factual justification for tolling, as if tolling were possible in appropriate circumstances, but then suggests that tolling the three-year look-back period of Section 6511(b)(2)(A) would be inappropriate because the provision is a statute of repose. Because the court appears to rely primarily on the absence of compelling facts, it seems appropriate to place it in the category of cases that did not reach a firm conclusion on whether tolling is permissible in tax refund actions.

229. See, e.g., *Hannahs v. United States*, 95-1 U.S. Tax Cas. (CCH) ¶ 50,111 (W.D. Tenn. 1995); *Henderson v. Backaric*, 95-2 U.S. Tax Cas. (CCH) ¶ 50,329 (D. Kan. 1995); *Roman v. United States*, 95-2 U.S. Tax Cas. (CCH) ¶ 50,591 (N.D. Cal. 1995); *Brennan v. United States*, 94-1 U.S. Tax Cas. (CCH) ¶ 50,247 (C.D. Cal. 1994); *Hofman v. United States*, No. 93-6091-10, 1994 U.S. Dist. LEXIS 11,422 (D. Or. June 14, 1994);

presumption of tolling applies to the limitations periods for filing claims for tax refunds, but concluded that, even if tolling is permissible, the facts did not warrant tolling. Similarly, some courts held that the *Irwin* presumption applies to these limitations periods, yet concluded that tolling was not warranted under the circumstances.<sup>230</sup> The taxpayers in these cases offered a wide variety of justifications for their failures to file timely claims for refund. In general, the courts rejected the taxpayers' requests for equitable tolling on the ground that the taxpayers had not offered sufficient evidence of an impediment that prevented them from filing a timely claim. For example, the courts rejected taxpayer claims that mental incompetence or poor health prevented timely filing, either because of inadequate evidence of the alleged condition<sup>231</sup> or because a conservator had been appointed who could have filed a timely claim.<sup>232</sup> Similarly, the courts rejected claims that incarceration prevented timely filing<sup>233</sup> and that timely filing was impossible because the taxpayer realized his error in including an item in gross income only when a court issued a favorable decision on the issue to another taxpayer, at which point the limitations period for the taxpayer's claim already had expired.<sup>234</sup>

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Willis v. Dep't of the Treasury, 848 F. Supp. 1127 (S.D.N.Y. 1994).

230. See, e.g., *Barker v. United States*, 96-2 U.S. Tax Cas. (CCH) ¶ 50,421 (S.D. Cal. 1996).

231. See, e.g., *Git*, 1996 U.S. App. LEXIS at 49; *Roman*, 95-2 U.S. Tax Cas. (CCH) at 89,961; *Brennan*, 94-1 U.S. Tax Cas. (CCH) at 84,025.

232. See *Hofman*, 1994 U.S. Dist. LEXIS at 11,422; see also *S. Cal. First Nat'l Bank v. United States*, 298 F. Supp. 1249, 1253 (S.D. Cal. 1969) (pre-*Irwin* case denying equitable relief because conservator could have filed a claim for refund within the limitations period).

233. See *Henderson*, 95-2 U.S. Tax Cas. (CCH) at 89,016; see also *Williams v. United States*, 715 F. Supp. 272, 275 (W.D. Mo. 1988) (pre-*Irwin* case reaching same result).

234. See *Barker*, 96-2 U.S. Tax Cas. (CCH) at 85,407. Two other cases presented facts almost identical to those of *Barker*, but the courts never considered whether the taxpayer's delayed discovery of favorable precedent was a sufficient justification for tolling because they concluded that the limitations periods in Sections 6511(a) and 6511(b) cannot be tolled under any circumstances. See *Lovett v. United States*, 81 F.3d 143 (Fed. Cir. 1996); *Tanzola v. Internal Revenue Serv.*, No. 95-CV-4408, 1996 U.S. Dist. LEXIS 20,222 (E.D.N.Y. June 21, 1996); *supra* notes 192-206 and accompanying text (discussing these cases); see also *Bramble v. Internal Revenue Serv.*, 82-1 U.S. Tax Cas. (CCH) ¶ 9380 (E.D.N.Y. 1982) (pre-*Irwin* case in which taxpayer argued unsuccessfully that limitations period did not begin to run until taxpayer discovered subsequent favorable precedent); *Canton v. United States*, 265 F. Supp. 1018 (D. Minn. 1967), *aff'd per curiam*, 388 F.2d 985 (8th Cir. 1968) (same).

### 3. Courts Holding that Tolling is Permissible and Concluding . Either that the Facts Warranted Relief or that Further Factfinding was Required

Research has revealed seven post-*Irwin* cases in which the courts both held that the limitations periods of Sections 6511(a) and 6511(b) can be tolled and concluded either that the taxpayer had established circumstances that warranted tolling or that the taxpayer might be able to do so at trial. One of these cases is an unreported opinion that gives few details as to the reason for tolling.<sup>235</sup> In a second case, the court concluded with virtually no analysis that the three-year limitations period of Section 6511(a) did not begin to run until the taxpayer realized that amounts he had received several years earlier might be characterized as disability payments that were excludable from gross income.<sup>236</sup> The holding of this second case is contrary to that of other courts that have considered similar taxpayer arguments<sup>237</sup> and ultimately was reversed on appeal.<sup>238</sup> In each of the remaining five cases, the taxpayers asserted that mental incompetence prevented them from filing timely claims for refund.

Of the five cases in which the taxpayers asserted mental incompetence, in only two—*Scott v. United States*<sup>239</sup> and *First Interstate Bank of Nevada v. United States*<sup>240</sup>—did the court enter judgment for the taxpayer and order a refund. In both cases the taxpayers themselves or a relative had made overpayments of income tax by making excessive estimated tax payments.<sup>241</sup> Similarly, in both

235. See *Johnson v. United States*, No. 88-NC-1096, 1992 U.S. Dist. LEXIS 16,976 (D. Utah Oct. 22, 1992) (stating that “[p]laintiff’s delays were a result of seeking redress through Internal Revenue Service administrative procedures. All statutory time periods which may have acted as a bar to Plaintiff’s refund were tolled as a result of ongoing communications, meetings, and conferences between Plaintiff and Defendants regarding the tax refunds.”).

236. See *Neilsen v. United States*, No. 6-91-3619-RFP, 1992 U.S. Dist. LEXIS 13,536 (N.D. Cal. June 10, 1992).

237. See *Murphy v. United States*, No. 95-2006, 1996 U.S. App. LEXIS 1176 (4th Cir. Jan. 30, 1996); *Robertson v. United States*, 92-2 U.S. Tax Cas. (CCH) ¶ 50,529 (D. Colo. 1992); see also *Lovett v. United States*, 81 F.3d 143 (Fed. Cir. 1996); *Barker v. United States*, 96-2 U.S. Tax Cas. (CCH) ¶ 50,421 (S.D. Cal. 1996); *Tanzola*, 1996 U.S. Dist. LEXIS at 20,222; *supra* notes 192-211 and accompanying text (discussing these other cases).

238. See *Neilsen v. United States*, No. 92-C-2597, 1994 U.S. App. LEXIS 3216 (9th Cir. Mar. 17, 1994).

239. 847 F. Supp. 1499 (D. Haw. 1993), *aff’d*, 95-2 U.S. Tax Cas. (CCH) ¶ 50,557 (9th Cir. 1995), *rev’d*, 519 U.S. 347 (1997).

240. 874 F. Supp. 286 (D. Nev. 1994), *rev’d*, 108 F.3d 1185 (9th Cir. 1997) (reversing in light of Supreme Court’s decision in *United States v. Brockamp*, 519 U.S. 347 (1997), discussed *infra* part IV.B).

241. See *Scott*, 847 F. Supp. at 1500 (father and taxpayer made estimated tax payments); *First Interstate Bank*, 874 F. Supp. at 290 (son made estimated tax

cases the taxpayers failed to file income tax returns claiming a refund until many years after the tax years in issue.<sup>242</sup> In *Scott*, the court concluded after trial, based largely on the consistent testimony of both the taxpayer's and the government's expert witnesses, that the taxpayer's severe alcoholism had rendered him incompetent and unable to file a timely claim for refund, and that the limitations periods of Section 6511 were tolled during the taxpayer's period of incapacity.<sup>243</sup> In *First Interstate Bank*, a refund action brought by the executor of the taxpayer's estate, the court concluded that the taxpayer had established through affidavits of doctors and nurses that she suffered from senile dementia that rendered her unable to file a timely claim for refund and accordingly granted the taxpayer's motion for summary judgment.<sup>244</sup> The district court's decision in *Scott* was affirmed by the Ninth Circuit<sup>245</sup> but ultimately reversed by the Supreme Court on the ground that the limitations periods of Section 6511 are not subject to equitable tolling.<sup>246</sup> The Ninth Circuit subsequently reversed the district court's decision in *First Interstate Bank* in light of the Supreme Court's reversal of *Scott*.<sup>247</sup>

The remaining three cases in which the taxpayers requested tolling based on their mental incompetence are *Johnsen v. United States*,<sup>248</sup> *Wiltgen v. United States*,<sup>249</sup> and *Brockamp v. United States*.<sup>250</sup> In each case the taxpayers remitted funds to the Internal Revenue Service<sup>251</sup> that exceeded their income tax liability for the year and, like the taxpayers in *Scott* and *First Interstate Bank*, failed to file returns claiming refunds until many years later. In both *Johnsen* and

payments); *supra* notes 87-93 and accompanying text (discussing tax overpayments and estimated tax payments).

242. See *Scott*, 847 F. Supp. at 1500; *First Interstate Bank*, 874 F. Supp. at 287. The facts in each case are essentially the same as those in example three, discussed *supra* text accompanying notes 117-51.

243. See *Scott*, 847 F. Supp. at 1507-08.

244. See *First Interstate Bank*, 874 F. Supp. at 291.

245. See *Scott v. United States*, 95-2 U.S. Tax Cas. (CCH) ¶ 50,557 (9th Cir. 1995).

246. See *United States v. Brockamp*, 519 U.S. 347, 354 (1997) (reversing two Ninth Circuit decisions, including *Scott*); *infra* Part IV.B.

247. See *First Interstate Bank of Nev. v. United States*, 108 F.3d 1185 (9th Cir. 1997).

248. 758 F. Supp. 834 (E.D.N.Y. 1991).

249. 813 F. Supp. 1387 (N.D. Iowa 1992).

250. 859 F. Supp. 1283 (C.D. Cal. 1994), *rev'd*, 67 F.3d 260 (9th Cir. 1995), *rev'd*, 519 U.S. 347 (1997).

251. In *Johnsen*, the taxpayer apparently made estimated tax payments. See *Johnsen*, 758 F. Supp. at 836. In *Wiltgen*, the taxpayer remitted several payments to the Internal Revenue Service without specifying their purpose. See *Wiltgen*, 813 F. Supp. at 1388-89. In *Brockamp*, the taxpayer enclosed a payment with IRS Form 4868, the form used to request an automatic extension of time to file an income tax return. See *Brockamp*, 859 F. Supp. at 1284.

*Wiltgen*, the taxpayer had been declared incompetent after making the payments in question and a court-appointed conservator filed a late return claiming a refund.<sup>252</sup> In each of these two cases the district court denied the government's motion to dismiss on the ground that the taxpayer's mental incompetence, if proved, could form the basis for tolling the relevant limitations period. Following the district court's denial of the government's motion, the taxpayers in *Johnsen* and *Wiltgen* apparently reached a settlement with the government, as there are no further proceedings reported in connection with these cases. In *Brockamp*, the taxpayer had not been declared incompetent, but the administrator of the taxpayer's estate asserted that the taxpayer's senility had prevented the taxpayer from filing a timely claim for refund.<sup>253</sup> The district court in *Brockamp* granted the government's motion for summary judgment on the ground that the limitations periods of Sections 6511(a) and 6511(b) could not be tolled under any circumstances.<sup>254</sup> The Ninth Circuit, however, based on the Supreme Court's decision in *Irwin*, reversed.<sup>255</sup> As discussed below, the government successfully sought the Supreme Court's review of the Ninth Circuit's decisions in both *Brockamp* and *Scott*.

### B. The Supreme Court Settles the Issue

In *United States v. Brockamp*,<sup>256</sup> the Supreme Court reviewed the Ninth Circuit's decisions in both *Brockamp*<sup>257</sup> and *Scott*,<sup>258</sup> discussed above.<sup>259</sup> In each case, the Ninth Circuit had held that, pursuant to the Supreme Court's decision in *Irwin v. Department of Veterans Affairs*,<sup>260</sup> the limitations periods on filing claims for tax refunds in Section 6511 are presumed to be subject to equitable tolling in appropriate circumstances, and that neither the statutory language nor legislative history of Section 6511 indicate that Congress intended to preclude tolling. The Supreme Court reversed.

The preliminary issue that the Court faced was the scope of its prior decision in *Irwin*. As discussed earlier, some courts read *Irwin* as holding that, to receive the benefit of tolling in connection with a claim against the government, a claimant must first establish both that the same, or at least a similar claim, could be asserted against a private party and that tolling would be

252. See *Johnsen*, 758 F. Supp. at 835-36; *Wiltgen*, 813 F. Supp. at 1389, 1395.

253. See *Brockamp*, 859 F. Supp. at 1285, 1287.

254. See *id.* at 1289.

255. See *Brockamp v. United States*, 67 F.3d 260, 263 (9th Cir. 1995).

256. 519 U.S. 347 (1997).

257. *Brockamp*, 67 F.3d at 260.

258. *Scott v. United States*, 95-2 U.S. Tax Cas. (CCH) ¶ 50,557 (9th Cir. 1995).

259. See *supra* notes 239-55 and accompanying text.

260. 498 U.S. 89 (1990); see *supra* notes 69-78 and accompanying text (discussing the *Irwin* decision).

available in such a private action.<sup>261</sup> Although this reading is contrary to the language and rationale of the *Irwin* decision,<sup>262</sup> the Court in *Brockamp* suggested that this reading is correct. It characterized *Irwin* as holding that equitable tolling applies to Title VII suits against the government in the same way that it applies to Title VII suits against private employers,<sup>263</sup> and then stated that it was “willing to assume, favorably to the taxpayers but only for argument’s sake, that a tax refund suit and a private suit for restitution are sufficiently similar to warrant asking *Irwin*’s negatively phrased question: Is there good reason to believe that Congress did not want the equitable tolling doctrine to apply?”<sup>264</sup> The Court thus assumed that the *Irwin* presumption of tolling applied. The question then became whether there was evidence that Congress intended to preclude tolling.

The Court in *Brockamp* unanimously concluded that Congress did not intend to permit equitable tolling of the Section 6511 limitations periods. The Court advanced two main reasons for its conclusion. First, Section 6511 sets forth the limitations on claims for refund in a complex manner that “cannot easily be read as containing implicit exceptions.”<sup>265</sup> The Court emphasized that Sections 6511(a) and 6511(b) are intricate provisions that impose limits both on the time within which a claim must be filed and on the amount of tax that a taxpayer may recover.<sup>266</sup> Further, Sections 6511(a) and 6511(b) are part of a larger, complex scheme: Congress has enacted specific exceptions to the general limitations periods<sup>267</sup> and has created a mechanism for the government to recover

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261. See *supra* notes 83-86 and accompanying text.

262. See *supra* notes 83-86 and accompanying text.

263. See *United States v. Brockamp*, 519 U.S. 347, 349 (1997).

264. *Id.* at 350.

265. *Id.*

266. See *id.* at 350-52.

267. Section 6511(d) sets forth special limitations periods that apply in several specific situations. For example, Section 6511(d)(1) provides that the limitations period in Section 6511(a) for filing a claim for refund based on a deduction for a bad debt under Code Section 166 or for a loss from a worthless security under Section 165(g) is seven years from the due date of the taxpayer’s return, and that the taxpayer can recover tax paid outside the look-back periods prescribed in Section 6511(b)(2) to the extent of the amount of the overpayment attributable to these two deductions. See I.R.C. § 6511(d)(1) (1994); *infra* note 358 (discussing rationale for rule of Section 6511(d)(1)).

In addition, in Sections 1311 through 1314 of the Code, commonly known as the mitigation provisions, Congress has delineated specific circumstances in which taxpayers can obtain refunds and the government can assess tax outside the normal limitations periods that apply to claims for refund and assessments. Generally, the mitigation provisions attempt to prevent inequitable results in certain narrowly enumerated situations for either the taxpayer or the government due to the expiration of the relevant limitations periods. For example, if a taxpayer has included an amount in gross income for a specific year and, after the limitations period for claiming a refund with respect to that year has expired, the Service successfully asserts in court that the taxpayer must

refunds made to a taxpayer who has not filed a timely refund claim.<sup>268</sup> “Section 6511’s detail, its technical language, the iteration of the limitations in both procedural and substantive forms, and the explicit listing of exceptions, taken together, indicate to us that Congress did not intend courts to read other unmentioned, open-ended, ‘equitable’ exceptions into the statute that it wrote.”<sup>269</sup>

Second, given the large number of returns filed and refunds claimed each year, to hold that the limitations periods of Section 6511 contain implicit equitable exceptions could create serious administrative problems for the Service. At the least, the Court suggested, the potential magnitude of these administrative problems “tells us that Congress would likely have wanted to decide explicitly whether, or just where and when, to expand the statute’s limitations periods, rather than delegate to the courts a generalized power to do so wherever a court concludes that equity so requires.”<sup>270</sup> As discussed in Part V, Congress did just that.

## V. THE CONGRESSIONAL RESPONSE TO THE DISPUTE: NEW SECTION 6511(h) OF THE CODE

### A. *The Call for a Legislative Solution and the First Proposals*

Even before the Supreme Court’s decision in *United States v. Brockamp*,<sup>271</sup> the highly publicized decisions of the courts of appeals on the tolling issue<sup>272</sup> led to the call for a legislative solution. Simultaneously with the Solicitor General’s

include the amount in gross income for a later year, the taxpayer will be entitled to a refund that compensates for the taxpayer’s double inclusion of the amount in gross income. See I.R.C. §§ 1311(a), 1312(1), 1313(a)(1), 1314(b) (1994). See generally John A. Lynch, Jr., *Income Tax Statute of Limitations: Sixty Years of Mitigation—Enough, Already!!*, 51 S.C. L. REV. 62, 68-78 (1999) (discussing mitigation provisions); Camilla E. Watson, *Equitable Recoupment: Revisiting an Old and Inconsistent Remedy*, 65 FORDHAM L. REV. 691, 749-52 (1996) (same).

268. See I.R.C. §§ 6514(a), 7405(a) (1994); *supra* note 106 and accompanying text.

269. *United States v. Brockamp*, 519 U.S. 347, 352 (1997).

270. *Id.* at 353.

271. 519 U.S. 347 (1997); see *supra* Part IV.B.

272. See *supra* Part IV.A. With respect to the publicity surrounding these cases, see interview with Melvin Lefkowitz, Former IRS District Counsel for Washington, D.C. (Feb. 19, 1996) (government never should have let these cases progress to the Supreme Court), TAX NOTES TODAY, Mar. 6, 1996 (Doc. No. 96-6370), available in LEXIS, Fedtax library, TNT file; Robert G. Nath, *Taxpayer Pleads “Drunk” to Statute of Limitations—and Wins!*, 62 TAX NOTES 1315 (Mar. 7, 1994); Leslie Berger, *Woman’s Battle with IRS May Reach High Court; She Wants Refund of \$7,000 Check Her Senile Father Wrote to the Agency, Which Fears A Flood of Suits Citing Disabilities*, L.A.

request for a writ of *certiorari* in *Brockamp*, the Clinton Administration directed the Treasury Department to craft a solution.<sup>273</sup> Members of Congress also took notice of the issue. In March 1996, Representative Jennifer Dunn, a member of the House Ways and Means Committee, considered offering a legislative proposal<sup>274</sup> as an amendment to the Taxpayer Bill of Rights 2,<sup>275</sup> which was then working its way through Congress. Representative Dunn's proposal would have added to the Code a new Section 6511(h), which would have provided expressly for the suspension of the limitations periods in subsections (a), (b), and (c) of Section 6511 in certain cases.<sup>276</sup> Her proposal was identical in substance with draft language produced by the Treasury Department.<sup>277</sup> Representative Dunn never offered her proposal as a formal amendment, due in part to the projected revenue loss associated with it.<sup>278</sup>

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273. A statement issued by the White House Office of the Press Secretary on January 31, 1996, provides:

Today, the Solicitor General filed with the Supreme Court petitions for certiorari in two Ninth Circuit cases interpreting the tax code's rules about how long a taxpayer has to seek a refund for overpayment of taxes. The President recognizes the necessity of applying the current law to pending cases, and that is the position of the government in these two cases. In reviewing the policies at issue in these cases, however, the President has concluded that the law at times may produce harsh results. . . . Accordingly, he has directed the Secretary of the Treasury promptly to make recommendations to him concerning whether and how the law should be changed to avoid such unfair results.

TAX NOTES TODAY, Feb. 2, 1996 (Doc. No. 96-3438), available in LEXIS, Fedtax library, TNT file.

274. See *Ways-Means Approves Taxpayer Rights 2 Measure, Adds Intermediate Sanctions*, DAILY REPORT FOR EXECUTIVES, Mar. 22, 1996, at G56, available in LEXIS, Legis library, Drexec file.

275. Pub. L. No. 104-168, 110 Stat. 1452 (1996).

276. Section 6511(h), as set forth in Representative Dunn's proposal, would have read:

(h) SUSPENSION OF PERIOD OF LIMITATION ON FILING CLAIMS.—The running of any period of time specified in subsection (a), (b), or (c) shall be suspended for the period during which it is established to the satisfaction of the Secretary that—

- (1) the taxpayer is incompetent (as determined by a court),
- (2) the taxpayer is committed to a mental institution or hospital, or
- (3) to the extent provided in regulations, the taxpayer suffers from any debilitating physical or mental condition which prevents the taxpayer from managing the taxpayer's financial affairs.

*Dunn's Equitable Tolling Amendment to Section 6511*, TAX NOTES TODAY, Feb. 6, 1997 (Doc. No. 97-3678), available in LEXIS, Fedtax library, TNT file.

277. See *Draft of Treasury's 1996 Equitable Tolling Proposal*, TAX NOTES TODAY, Feb. 6, 1997 (Doc. No. 97-3677), available in LEXIS, Fedtax library, TNT file.

278. See *Ways-Means Approves Taxpayer Rights*, *supra* note 274, at G56 (stating

These legislative proposals lay dormant until early 1997 when, as part of his fiscal year 1998 budget, President Clinton proposed extending the period during which taxpayers with serious disabilities could file claims for tax refunds.<sup>279</sup> Although Congress enacted major tax legislation in 1997,<sup>280</sup> the legislation did not include a tolling provision. In late 1997, however, Congress incorporated a tolling provision in the bill<sup>281</sup> that was later enacted as the Internal Revenue Service Restructuring and Reform Act of 1998.<sup>282</sup>

## B. New Code Section 6511(h)

### 1. The Statutory Language and Its Origin

As part of the Internal Revenue Service Restructuring and Reform Act of 1998,<sup>283</sup> Congress added to the Code a new Section 6511(h) that provides as follows:

(h) Running of periods of limitation suspended while taxpayer is unable to manage financial affairs due to disability

(1) In general

In the case of an individual, the running of the periods specified in subsections (a), (b), and (c) shall be suspended during any period of such individual's life that such individual is financially disabled.

(2) Financially disabled

(A) In general

For purposes of paragraph (1), an individual is financially disabled if such individual is unable to manage his financial

that Dunn "opted to continue working with the administration in the hopes of finding an acceptable solution that could be accommodated within budget constraints").

279. See Budget of the United States Government, Fiscal Year 1998, reprinted in TAX NOTES TODAY, Feb. 7, 1997 (Doc. No. 97-3736), available in LEXIS, Fedtax library, TNT file. The President also included the same proposal in his budget for fiscal 1999. See DEPARTMENT OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION'S REVENUE PROPOSALS, reprinted in TAX NOTES TODAY, Feb. 3, 1998 (Doc. No. 98-4800), available in LEXIS, Fedtax library, TNT file. By the time of the fiscal 1999 budget proposal, however, the House of Representatives had already passed a bill that included a tolling provision and the bill was under consideration in the Senate. See *infra* notes 281-82 and accompanying text.

280. See Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 788.

281. See H.R. 2676, 105th Cong. § 322 (1997).

282. Pub. L. No. 105-206, 112 Stat. 685.

283. Pub. L. No. 105-206, 112 Stat. 685.

affairs by reason of a medically determinable physical or mental impairment of the individual which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. An individual shall not be considered to have such an impairment unless proof of the existence thereof is furnished in such form and manner as the Secretary may require.

(B) Exception where individual has guardian, etc.

An individual shall not be treated as financially disabled during any period that such individual's spouse or any other person is authorized to act on behalf of such individual in financial matters.<sup>284</sup>

The legislative process produced no substantive changes to Section 6511(h). The language and structure of Section 6511(h) as enacted are virtually identical to those of the version included in the original House Bill.<sup>285</sup>

284. I.R.C. § 6511(h) (Supp. IV 1998). The new tolling provision applies to all claims for refund other than those that were barred by operation of law, including the doctrine of *res judicata*, as of July 22, 1998. See Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3202(b), 112 Stat. 685, 741; 144 CONG. REC. D831 (daily digest July 23, 1998) (legislation signed by the President on July 22, 1998). The period of disability that suspends the limitations periods can take place before, on, or after July 22, 1998. See Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3202(b), 112 Stat. 685, 741. The effective date provision precludes relief for taxpayers whose claims for refund were barred because the periods of limitation in Sections 6511(a) or 6511(b) already had expired as of July 22, 1998.

285. The language proposed in Section 322 of the original House Bill was as follows:

(h) RUNNING OF PERIODS OF LIMITATION SUSPENDED WHILE TAXPAYER IS UNABLE TO MANAGE FINANCIAL AFFAIRS DUE TO DISABILITY.—

(1) IN GENERAL.—In the case of an individual, the running of the periods specified in subsections (a), (b), and (c) shall be suspended during any period of such individual's life that such individual is financially disabled.

(2) FINANCIALLY DISABLED.—

(A) IN GENERAL.—For purposes of paragraph (1), an individual is financially disabled if such individual is unable to manage his financial affairs by reason of his medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. An individual shall not be considered to have such an impairment unless proof of the existence thereof is furnished in such form and manner as the Secretary may require.

The legislative history of Section 6511(h) is silent as to the origin of the definition of “financially disabled.”<sup>286</sup> It is clear, however, that Congress based the statutory language on the definition in Section 22(e)(3) of “permanently and totally disabled,”<sup>287</sup> which is used for purposes of determining whether a taxpayer is entitled to the tax credit provided by Section 22.<sup>288</sup> The language of Section 22(e)(3) first appeared in the definition of “disabled” that Congress enacted as part of the Social Security Amendments of 1956<sup>289</sup> (and later amended in 1965)<sup>290</sup> for purposes of determining whether individuals are entitled to Social Security Disability Insurance (“SSDI”) benefits. Congress used the SSDI language in 1958 for the definition of “disabled” in former Section 213(g)(3)<sup>291</sup>

(B) EXCEPTION WHERE INDIVIDUAL HAS GUARDIAN ETC.—

An individual shall not be treated as financially disabled during any period that such individual’s spouse or any other person is authorized to act on behalf of such individual in financial matters.

H.R. 2676, 105th Cong. § 322 (1997).

286. The reports of the congressional committees that considered the provision do not discuss the origin of its language. *See* H.R. REP. NO. 105-364, pt. 1, at 68-69 (1997); S. REP. NO. 105-174, at 145 (1998); H.R. CONF. REP. NO. 105-599, at 146-47 (1998).

287. Section 22(e)(3) provides:

PERMANENT AND TOTAL DISABILITY DEFINED.—An individual is permanently and totally disabled if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. An individual shall not be considered to be permanently and totally disabled unless he furnishes proof of the existence thereof in such form and manner, and at such times, as the Secretary may require.

I.R.C. § 22(e)(3) (1994).

288. Section 22 provides a tax credit to those who either have attained age 65 or are retired and, when they retired, were permanently and totally disabled. *See* I.R.C. § 22(a), (b) (1994). Congress made this credit available to those who are permanently and totally disabled in the same year that it repealed former Section 105(d). *See infra* notes 293-94.

289. Pub. L. No. 84-880, § 103(a), 70 Stat. 807, 815 (codified as amended at 42 U.S.C. § 423(d)(1)(A) (1994)). Congress used the same language, as amended in 1965, *see infra* note 290, to create the definition of “disabled” used for purposes of determining those who are eligible for Supplemental Security Income (“SSI”) benefits. *See* Social Security Amendments of 1972, Pub. L. No. 92-603, § 301, 86 Stat. 1329, 1465 (codified as amended at 42 U.S.C. § 1382c(a)(3)(A) (1994 & Supp. III 1997)). For background on the SSDI and SSI programs, see Lance Liebman, *The Definition of Disability in Social Security and Supplemental Security Income: Drawing the Bounds of Social Welfare Estates*, 89 HARV. L. REV. 833, 840, 855 (1976).

290. Social Security Amendments of 1965, Pub. L. No. 89-97, § 303(a), 79 Stat. 286, 366. With respect to the nature and effect of the 1965 amendment, *see infra* notes 313-17 and accompanying text.

291. *See* Technical Amendments Act of 1958, Pub. L. No. 85-866, § 17(a), 72 Stat.

and again in 1965 to define the same term in Section 72(m)(7).<sup>292</sup> In 1976, Congress again looked to the SSDI definition, as amended in 1965, in enacting the definition of “permanently and totally disabled” for purposes of former Section 105(d)(4).<sup>293</sup> Finally, Congress incorporated the language of former Section 105(d) verbatim when it enacted what is now Section 22(e)(3).<sup>294</sup> These

1606, 1613 (codified at I.R.C. § 213(g)(3) (repealed 1965)). Former Section 213(g) increased the limit on an individual’s ability to deduct medical expenses for those who had attained the age of 65 and were disabled. *See Van Lede v. Comm’r*, 28 T.C.M. (CCH) 1422, 1427-31 (1969); Rev. Rul. 63-101, 1963-1 C.B. 55.

292. *See* Social Security Amendments of 1965, Pub. L. No. 89-97, § 106(a), 79 Stat. 286, 336 (codified as amended at I.R.C. § 72(m)(7) (1994)). Several provisions of the Code make use of the definition of disabled in Section 72(m)(7). For example, Sections 72(q) and 72(t) provide that the penalty taxes that apply to premature withdrawals from annuity contracts and qualified retirement plans do not apply to withdrawals made by those who are disabled within the meaning of Section 72(m)(7). I.R.C. §§ 72(q)(2)(C), 72(t)(2)(A)(iii) (1994). For the Treasury Department’s regulations that interpret Section 72(m)(7), see *Treas. Reg. § 1.72-17A(f)* (1979). For cases interpreting Section 72(m)(7), see *Fohrmeister v. Commissioner*, 73 T.C.M. (CCH) 2483 (1997); *Brown v. Commissioner*, 72 T.C.M. (CCH) 651 (1996); *Dwyer v. Commissioner*, 106 T.C. 337 (1996); *Kovacevic v. Commissioner*, 64 T.C.M. (CCH) 1076 (1992).

293. Tax Reform Act of 1976, Pub. L. No. 94-455, § 505(a), 90 Stat. 1520, 1566 (codified as amended at I.R.C. § 105(d)(4) (repealed 1983)). Before Congress’s 1976 amendment, former Section 105(d) permitted taxpayers to exclude from gross income amounts that “constitute wages or payments in lieu of wages for a period during which the employee is absent from work on account of personal injuries or sickness.” As amended in 1976, Section 105(d) made the exclusion available only to retired individuals under age 65 who, when they retired, were “permanently and totally disabled.” Following Congress’s 1976 amendment of former Section 105(d), the Treasury Department issued temporary regulations, *see* Temp. *Treas. Reg. §§ 7.105-1, 7.105-2, 41 Fed. Reg. 56,630* (1976), and later issued superseding proposed regulations, *see* Prop. *Treas. Reg. § 1.105-9, 45 Fed. Reg. 46,082, 46,090* (1980). The proposed regulations ultimately were withdrawn. *See* 52 Fed. Reg. 2724-25 (1987). For cases interpreting former Section 105(d), as amended in 1976, see *Bullard v. United States*, 631 F. Supp. 811 (E.D. Va. 1985); *French v. Commissioner*, 61 T.C.M. (CCH) 2532 (1991); *Beard v. Commissioner*, 47 T.C.M. (CCH) 911 (1984); *Smith v. Commissioner*, 48 T.C.M. (CCH) 1420 (1984); *Schulz v. Commissioner*, 46 T.C.M. (CCH) 1519 (1982); *Chapman v. Commissioner*, 44 T.C.M. (CCH) 554 (1982); *Pearson v. Commissioner*, 76 T.C. 701 (1981).

294. Before 1984, the credit now provided by Section 22, *see supra* note 288, was provided by Section 37. In 1984, Congress redesignated Section 37 as Section 22. *See* Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 474(d), 98 Stat. 494, 830-31. Former Section 37 provided the credit only to those age 65 and over until 1983, when Congress amended Section 37 to extend the credit to those who are permanently and totally disabled. *See* Social Security Amendments of 1983, Pub. L. No. 98-21, § 122(a), 97 Stat. 65, 85. The Treasury Department’s regulations under former Section 37 still are in effect, but they do not reflect Congress’s extension of the credit to the permanently and totally disabled. *See* *Treas. Reg. §§ 1.37-1, 1.37-2, 1.37-3* (as amended in 1980).

other contexts in which Congress has used similar language might provide sources of guidance to those interpreting Section 6511(h).

## 2. The Elements of Section 6511(h)

Section 6511(h) amounts to an elaborate “if . . . then” statement. If an individual meets specific requirements, then the limitations periods specified in subsections (a), (b), and (c) of Section 6511<sup>295</sup> are suspended. Specifically, Section 6511(h) can be restated as follows:

If:

1. the individual is “unable to manage his financial affairs,”
2. the inability to manage is due to a “medically determinable physical or mental impairment of the individual,”
3. the physical or mental impairment either:
  - a) is expected to result in death, or
  - b) has lasted or can be expected to last for a continuous period of not less than twelve months, and
4. the individual submits proof of elements 1, 2, and 3 in such form as the Secretary of the Treasury requires,<sup>296</sup>

then:

the periods specified in subsections (a), (b), and (c) are suspended for the period during which the taxpayer was unable to manage her financial affairs,

unless:

someone was authorized to act on the taxpayer’s behalf in financial matters, in which case the periods in subsections (a),

295. With respect to the periods specified in Sections 6511(a) and 6511(b), see *supra* notes 105-12 and accompanying text. Section 6511(c) provides that, when a taxpayer has agreed to extend the period within which the government can assess tax, the period within which the taxpayer can file a claim for refund is extended six months beyond the expiration of the period within which the government can assess tax. See I.R.C. § 6511(c)(1) (1994). Subject to several exceptions, the government can assess tax within three years from the time the taxpayer files the return for the year in question. See I.R.C. § 6501(a) (1994). The government commonly asks taxpayers during an audit to agree to extend this period. See I.R.C. § 6501(c)(4) (1994). Section 6511(c) preserves the right of those taxpayers who agree to such extensions to file claims for refund for the years under examination by automatically extending the limitations periods that apply to claims for refund. See I.R.C. § 6511(c) (1994).

296. The statute technically requires the taxpayer to submit proof of only the existence of the impairment. See I.R.C. § 6511(h)(2)(A) (Supp. IV 1998). Given the statute’s purpose, however, it seems proper to interpret it as requiring the taxpayer to submit proof of all of the first three elements. The Service has interpreted it in this manner. See *infra* notes 319-22 and accompanying text.

(b), and (c) are not suspended during the periods when someone was authorized.

Each part of this statement is discussed below.

a. Inability to Manage Financial Affairs

Neither Section 6511(h) nor its legislative history elaborate on what it means to be unable to manage one's financial affairs or on how the existence or non-existence of this inability should be determined. A similar concept, however, arises in at least two other contexts. First, courts are commonly called upon to determine whether an individual's condition requires the appointment of a conservator.<sup>297</sup> A widely-used standard for determining whether a conservator should be appointed is whether the person is unable to manage her property and business affairs effectively for reasons such as mental or physical illness or chronic intoxication.<sup>298</sup> Similarly, in construing state statutes that permit tolling of limitations periods for those who are "incompetent" or of "unsound mind,"<sup>299</sup> state courts commonly determine whether a person is incompetent by inquiring whether she could manage her affairs.<sup>300</sup> This is not to suggest that a person should be deemed "financially disabled" for purposes of Section 6511(h) only if the standards for appointing a conservator or for tolling

297. Many jurisdictions distinguish between a conservator and a guardian. In these jurisdictions, a conservator is a person appointed to manage the property and business affairs of another, *see, e.g.*, VA. CODE ANN. § 37.1-137.4 (Michie Supp. 1999), and a guardian is a person entrusted with the health and welfare of another, *see, e.g.*, VA. CODE ANN. § 37.1-137.1 (Michie Supp. 1999). One person could be appointed to serve in both capacities. *See generally* Paula L. Hannaford & Thomas L. Hafemeister, *The National Probate Court Standards: The Role of the Courts in Guardianship and Conservatorship Proceedings*, 2 ELDER L.J. 147, 149-50 (1994).

298. *See, e.g.*, ALA. CODE § 26-2A-130(c) (1992); ALASKA STAT. § 13.26.165(2)(A) (Michie 1998); IDAHO CODE § 15-5-401(b) (Michie 1979 & Supp. 2000); N.D. CENT. CODE § 30.1-29-01(2)(a) (1996). These provisions derive from either Section 5-401(c) of the UNIFORM PROBATE CODE ("UPC"), 8 U.L.A. 1, 378 (1983), or its free-standing counterpart, Section 2-301(c) of the UNIFORM GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT ("UGPPA"), 8A U.L.A. 439, 499 (1993). In 1997, the National Conference of Commissioners on Uniform State Laws promulgated revised versions of the UPC and UGPPA. The statutory provisions listed here were derived from the pre-1997 versions of these uniform acts.

299. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-502 (West 1956 & Supp. 1999) ("unsound mind"); IDAHO CODE § 5-230 (1998) ("insane"); MD. CODE ANN., CTS. & JUD. PROC. § 5-201 (1998) ("mental incompetent").

300. *See, e.g.*, *Adkins v. Nabors Alaska Drilling, Inc.*, 609 P.2d 15, 23 (Alaska 1980); *Doe v. Roe*, 955 P.2d 951, 964 (Ariz. 1998) (en banc); *Feeley v. S. Pac. Transp. Co.*, 285 Cal. Rptr. 666, 667 (Ct. App. 1991); *Charter Peachford Behavioral Health Sys., Inc. v. Kohout*, 504 S.E.2d 514, 524 (Ga. Ct. App. 1998).

a state limitations period would be met. The scope of the inquiry whether someone is “*financially disabled*,” for example, seems narrower than the inquiry required by many state tolling statutes. That is, it seems quite possible that an individual could be unable to manage her financial affairs and yet continue to function competently with respect to other aspects of her life. Similarly, the inquiry whether a conservator should be appointed is heavily influenced by a concern not present in the tax refund context: the desire to avoid an unnecessary deprivation of personal liberty.<sup>301</sup> Nevertheless, each of these bodies of law can serve as useful sources of guidance.

The scope of the Service’s planned inquiry into whether the taxpayer was unable to manage her financial affairs is unclear. In both conservatorship proceedings and decisions involving state tolling statutes, the inquiry typically is detailed and fact-intensive.<sup>302</sup> One therefore would expect the Service to require that taxpayers submit a statement setting forth facts based on which the Service could evaluate whether and for what period the taxpayer was unable to manage her affairs. Instead, the Service requires taxpayers to submit the statement of a physician setting forth the physician’s opinion as to the existence, nature and duration of the taxpayer’s impairment and as to whether (and for how long) the impairment caused the taxpayer to be unable to manage her financial affairs.<sup>303</sup> It could be that the Service is prepared to defer completely to the physician’s opinion, but this seems unlikely. In the absence of a mechanism by which the Service can obtain other relevant information regarding the taxpayer’s situation, it is unclear on what basis the Service will decide whether to grant or refuse relief. The merits of the Service’s approach are discussed in Part VI.<sup>304</sup>

An advantage of breaking Section 6511(h) down into its individual elements is that their interrelationship becomes clear. One clarification that emerges is that the taxpayer’s inability to manage her financial affairs need not last for any minimum length of time. Rather, it is the taxpayer’s physical or mental impairment that must be expected to result in death or to last for a continuous period of not less than twelve months. There may well be situations in which the taxpayer’s impairment lasts (or is expected to last) for twelve months yet causes the taxpayer to be unable to manage her affairs for a shorter period. For example, some degree of impairment from a stroke, such as

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301. See Norman Fell, *Guardianship and the Elderly: Oversight Not Overlooked*, 25 U. TOL. L. REV. 189, 190 (1994) (noting that appointment of a guardian deprives an individual of the right to make personal life decisions, to control finances, and to manage property).

302. See, e.g., *Florez v. Sargeant*, 917 P.2d 250, 255 (Ariz. 1996) (en banc) (tolling); *In re Estate of Wagner*, 367 N.W.2d 736, 738-41 (Neb. 1985) (conservatorship); *In re Conservatorship of Gessler*, 419 N.W.2d 541, 541 (N.D. Ct. App. 1988) (three-day hearing on conservatorship).

303. See *infra* notes 319-22 and accompanying text.

304. See *infra* Part VI.B.

paralysis or inability to communicate, may last for the requisite period of time, yet cause the taxpayer to be unable to manage her affairs for only a brief period.

b. Due to a Medically Determinable Physical or Mental Impairment

Section 6511(h)(2)(A) requires that (1) the taxpayer have a physical or mental impairment, (2) the impairment be medically determinable, and (3) the impairment bear a causal relationship to the taxpayer's inability to manage her financial affairs.

In many cases, determining the presence or absence of a physical or mental impairment will not present significant issues.<sup>305</sup> For example, a taxpayer who suffers a stroke or who lapses into a coma after being struck on the head obviously would qualify. But certain cases may prove troublesome. Cases involving alleged mental illness are likely to present particularly challenging issues on a number of levels. Establishing the existence, nature and extent of mental disorders is inherently difficult because of their subjective quality.<sup>306</sup> Compounding this difficulty is the fact that those who suffer from mental illness often delay seeking treatment,<sup>307</sup> so that formal assessments of an individual's mental condition may never take place, or may take place only years after the relevant time period. The facts of *United States v. Brockamp*,<sup>308</sup> the case that prompted the enactment of Section 6511(h), illustrate this point.<sup>309</sup>

It is reasonable to ask why the taxpayer's impairment must be "medically determinable." The likely answer is that the requirement attempts to distinguish between those who truly could not file their refund claims within the prescribed period and those who were merely neglectful.<sup>310</sup> In this sense, the medically determinable requirement is an example of the "distinct preference [of legislatures] for basing eligibility for certain statutory benefits on presumably objective diagnostic judgments made by medical professionals."<sup>311</sup> As will be

305. In an analogous context, a physical or mental impairment is defined by statute as "an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. § 423(d)(3) (1994) (definition used for purposes of determining eligibility for SSDI benefits).

306. See Lawrence Joseph, *The Causation Issue in Workers' Compensation Mental Disability Cases: An Analysis, Solutions, and a Perspective*, 36 VAND. L. REV. 263, 271-73 (1983).

307. See OFFICE OF THE SURGEON GENERAL, MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL 8 (1999) [hereinafter "SURGEON GENERAL'S REPORT"].

308. 519 U.S. 347 (1997); see *supra* Part IV.B.

309. See *infra* notes 348-57 and accompanying text.

310. Cf. Liebman, *supra* note 289, at 843 (stating that the medical disability requirement in the SSDI and SSI context is "an attempt to draw a line between voluntary and involuntary unemployment").

311. Lars Noah, *Pigeonholing Illness: Medical Diagnosis as a Legal Construct*,

discussed in Part VI, the requirement of a “medically determinable” physical or mental impairment should be removed from the statute.<sup>312</sup>

c. Expected to Result in Death or to Last for a Continuous  
Period of Not Less Than Twelve Months

To be eligible for relief under Section 6511(h), the taxpayer’s physical or mental impairment must be one that (1) is expected to result in death, or (2) has lasted or can be expected to last for a continuous period of not less than twelve months. This requirement has its origin in the Social Security Amendments of 1965,<sup>313</sup> which modified the definition of “disabled” that is used for determining whether an individual is eligible for SSDI benefits. As originally enacted in 1956, the SSDI definition of disabled required that the individual’s physical or mental impairment “be expected to result in death or to be of long-continued and indefinite duration.”<sup>314</sup> The 1965 amendment changed this language to require that the impairment be one that “can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.”<sup>315</sup> By substituting a fixed period of twelve months for an expected existence of “long continued and indefinite duration,” Congress intended to increase the number of people eligible for SSDI benefits.<sup>316</sup> Nevertheless, Congress viewed the amended definition as distinguishing between those with temporary and those with permanent impairments.<sup>317</sup> As will be discussed in Part VI, requiring a permanent impairment as a condition of relief from Section 6511’s limitations periods is inappropriate.<sup>318</sup>

50 HASTINGS L.J. 241, 274-75 (1999).

312. See *infra* notes 365-71 and accompanying text.

313. Pub. L. No. 89-97, 79 Stat. 286.

314. Social Security Amendments of 1956, Pub. L. No. 84-880, § 103(a), 70 Stat. 807, 815 (codified as amended at 42 U.S.C. § 423(d)(1)(A) (1994)).

315. Pub. L. No. 89-97, § 303(a), 79 Stat. 286, 366-67 (codified as amended at 42 U.S.C. § 423(d)(1)(A) (1994)).

316. See S. REP. NO. 89-404 (1965), *reprinted in* 1965 U.S.C.C.A.N. 1943, 2040.

317. See S. REP. NO. 89-404 (1965), *reprinted in* 1965 U.S.C.C.A.N. 1943, 2038-39. The amendment as passed by the House would have made benefits available to those disabled for a continuous period of six months. The Senate Finance Committee viewed the House provision as extending benefits to those with short-term, temporary disabilities. The Senate Finance Committee recommended requiring that the impairment be expected to result in death or to last for at least twelve months because “in the great majority of cases in which total disability continues for at least a year the disability is essentially permanent.” S. REP. NO. 89-404 (1965), *reprinted in* 1965 U.S.C.C.A.N. 1943, 2038-39. The House-Senate conferees adopted the Senate Finance Committee’s recommendation. See H.R. CONF. REP. NO. 89-682, *reprinted in* 1965 U.S.C.C.A.N. 2228, 2249 (amendment number 312).

318. See *infra* notes 372-76 and accompanying text.

d. Submission of Proof to the Service

Section 6511(h)(2) provides that a taxpayer is not considered to have the requisite physical or mental impairment “unless proof of the existence thereof is furnished in such form and manner as the Secretary may require.” The Service has issued guidance on what taxpayers must submit.<sup>319</sup> Specifically, the Service requires a taxpayer who seeks relief from the limitations periods to submit a claim for refund accompanied by two written statements: (1) a statement by a physician,<sup>320</sup> and (2) a statement by the person signing the claim for refund. The physician’s statement, which must be made by a physician “qualified to make the determination,” must (a) name and describe the taxpayer’s physical or mental impairment, (b) provide the physician’s medical opinion that the physical or mental impairment prevented the taxpayer from managing her financial affairs, (c) provide the physician’s medical opinion that the physical or mental impairment was or can be expected to result in death, or that it has lasted (or can be expected to last) for a continuous period of not less than twelve months, and (d) specify, to the best of the physician’s knowledge, the time period during which the taxpayer was prevented by the impairment from managing her financial affairs.<sup>321</sup> The second written statement—that of the individual signing the claim for refund—must provide either (a) that no person was authorized to act on behalf of the taxpayer in financial matters during the period in which the taxpayer was unable to manage her own financial affairs, or (b) that someone was authorized to act on behalf of the taxpayer, in which case the statement must specify the beginning and ending dates of the authorization.<sup>322</sup>

As will be discussed in Part VI, the Service should modify its requirements regarding the taxpayer’s submission to place less emphasis on the role of a physician’s medical opinion and should clarify when a person will be considered “authorized” to act on the taxpayer’s behalf in financial matters.<sup>323</sup>

e. Suspension of the Limitations Periods

Assuming that a taxpayer has the necessary physical or mental impairment, Section 6511(h)(1) provides that the running of the periods specified in subsections (a), (b), and (c) of Section 6511<sup>324</sup> are suspended for the period

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319. See Rev. Proc. 99-21, 1999-17 I.R.B. 18.

320. The Revenue Procedure specifies that the term “physician” in this context has the same meaning as in Section 1861(r)(1) of the Social Security Act, which is codified at 42 U.S.C. § 1395x(r) (1994). See Rev. Proc. 99-21, § 4(1).

321. See Rev. Proc. 99-21, § 4(1).

322. See Rev. Proc. 99-21, § 4(2).

323. See *infra* Part VI.B.

324. With respect to the periods specified in subsections (a) and (b) of Section 6511, see *supra* notes 105-12 and accompanying text. With respect to the periods specified in subsection (c), see *supra* note 295.

during which the impairment causes the taxpayer to be unable to manage her financial affairs.

Of the three subsections listed, the most significant is likely to be Section 6511(b). The cases in which taxpayers have asserted that they failed to file a timely claim for refund because they were unable to manage their affairs follow a common fact pattern, which is the pattern illustrated earlier in example three.<sup>325</sup> The taxpayer typically pays tax in the form of withholding from wages, estimated tax payments, or unspecified payments remitted to the Service, and then fails to file a return. Ultimately, either the taxpayer or a representative such as a conservator or the administrator of the taxpayer's estate claims a refund by filing a late return for the year in question.<sup>326</sup> Under the majority and better reasoned view discussed earlier,<sup>327</sup> the taxpayer's claim is timely under Section 6511(a) because the return and claim for refund are filed simultaneously. The bar to recovery in these cases is Section 6511(b)(2)(A), which provides that the taxpayer's refund is limited to the portion of the tax paid within the period immediately preceding the filing of the refund claim equal to three years plus the period of any extension the taxpayer obtained for filing the return. Because amounts withheld from wages and estimated tax payments are generally treated by statute as paid on April 15 following the tax year in question,<sup>328</sup> Section 6511(b)(2)(A) operates as a bar in these typical cases when the taxpayer or representative claims a refund by filing a return more than three years after April 15, which normally is the due date of the return.<sup>329</sup> Thus, it is likely that in most cases in which taxpayers are eligible for relief under Section 6511(h) the limitations period from which relief will have to be granted is that set forth in Section 6511(b)(2)(A).<sup>330</sup>

325. See *supra* notes 117-51 and accompanying text.

326. See, e.g., *Marco v. United States*, 98-1 U.S. Tax Cas. (CCH) ¶ 50,337, at 83,837 (D. Conn. 1998); *First Interstate Bank of Nevada v. United States*, 874 F. Supp. 286, 287, 290 (D. Nev. 1994), *rev'd*, 108 F.3d 1185 (9th Cir. 1997); *Wiltgen v. United States*, 813 F. Supp. 1387, 1388-89 (N.D. Iowa 1992); *Johnsen v. United States*, 758 F. Supp. 834, 835-36 (E.D.N.Y. 1991).

327. See *supra* notes 117-19 and accompanying text.

328. See *supra* notes 107-10 and accompanying text.

329. See *supra* note 108 and accompanying text.

330. The periods specified in Section 6511(a) are likely to be a less significant bar because, as discussed in the text, in the most common fact pattern the refund claim is timely under Section 6511(a). Similarly, it would appear to be a rare case in which the periods in Section 6511(c) would operate as a bar for taxpayers unable to manage their financial affairs. Section 6511(c) extends the time for filing a claim for refund when a taxpayer has agreed to extend the time during which the Service can assess tax. See *supra* note 295. Specifically, Section 6511(c)(1) extends the time for filing a refund claim to six months after the expiration of the Service's period for assessment. It is the running of this six-month period (and the related look-back provision of Section 6511(c)(2)) that is suspended pursuant to Section 6511(h). For suspension of the six-month period to become necessary, it appears that the taxpayer's inability to manage her

A problem of interpretation arises from Section 6511(h)'s use of the term "suspended." To say that the running of a period is suspended presumes that the period runs forward in time. But the period that will present the most significant bar in these cases—the limit in Section 6511(b)(2)(A) on the amount of tax recoverable—looks *backward* from the date the taxpayer filed the claim for refund. Presumably, Congress intended that the taxpayer's period of disability be *added to* the look-back periods of Section 6511(b)(2). For example, a taxpayer who is unable to manage her financial affairs for fifteen months would, upon filing a claim for refund, be entitled to recover the portion of the tax paid within the preceding three years and fifteen months.

f. Running of the Limitations Periods When Someone  
is Authorized to Act on the Taxpayer's Behalf

Even if a taxpayer otherwise would be considered "financially disabled" by reason of being unable to manage her financial affairs due to the requisite physical or mental impairment, under Section 6511(h)(2)(B) the taxpayer is not treated as financially disabled during any period that the taxpayer's spouse or another person is "authorized" to act on the taxpayer's behalf in financial matters. That is, the running of the limitations periods in subsections (a), (b), and (c) of Section 6511 are not suspended during any period in which someone is authorized within the meaning of the statute. As discussed below, the circumstances in which a person should be treated as authorized within the meaning of Section 6511(h)(2)(B) are narrow.

The rationale underlying Section 6511(h)(2)(B) provides a guide to the provision's proper interpretation. The apparent rationale is that, if someone is authorized to act on the taxpayer's behalf, then during the period of authorization the taxpayer is capable of filing a claim for refund through the authorized person, and therefore there is no need during the period of authorization to suspend the running of the limitations periods. Accordingly, the proper inquiry for determining whether someone was authorized within the meaning of the statute is whether the person was capable of filing a claim for refund on the taxpayer's behalf. As discussed earlier, taxpayers generally must claim a refund by filing either an original or an amended return for the tax year in question.<sup>331</sup> Therefore, the only persons who should be considered authorized within the meaning of Section 6511(h)(2)(B) are those who can claim a refund for the taxpayer by signing and filing such returns.

The issue of a representative's authorization will arise with respect to two distinct categories of taxpayers: those who have died and those who are still living but who are unable to make their own returns. The Code and the Treasury

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financial affairs would have to begin during the six-month period itself. There are likely to be few cases in this category.

331. See *supra* notes 96-98 and accompanying text.

Department's regulations provide guidance in both situations. With respect to taxpayers who have died, Section 6012(b)(1) provides that "[i]f an individual is deceased, the [income tax] return of such individual . . . shall be made by his executor, administrator, or other person charged with the property of such decedent."<sup>332</sup> Thus, in the case of a decedent, it is the court-appointed personal representative of the decedent's estate who must claim an income tax refund by signing and filing either an original return for the year in question (if the decedent never filed one) or an amended return (if the decedent did file one). In either case, the personal representative must submit with the claim for refund a certified copy of the letters testamentary, letters of administration, or other similar evidence of the representative's authority.<sup>333</sup> Accordingly, a personal representative should be considered authorized to act on behalf of a deceased taxpayer for purposes of Section 6511(h)(2)(B) only on and after the date on which letters testamentary or letters of administration are issued.

With respect to taxpayers who are living but unable to make their own returns, Section 6012(b)(2) provides that, "[i]f an individual is unable to make [an income tax] return . . . , the return of such individual shall be made by a duly authorized agent, his committee, guardian, fiduciary or other person charged with the care of the person or property of such individual."<sup>334</sup> This provision describes two basic categories of persons: (1) duly authorized agents, and (2) guardians, conservators, and other court-appointed representatives. A court-appointed representative, like the personal representative of a deceased taxpayer's estate, should be treated as authorized to act on the taxpayer's behalf in financial matters beginning only on the date of the representative's appointment.<sup>335</sup> Determining when an agent other than a court-appointed representative should be treated as authorized is somewhat more complex and is discussed below.

332. I.R.C. § 6012(b)(1) (1994); *see also* Treas. Reg. § 1.6012-3(b)(1) (as amended in 1995) (executor or administrator of estate of decedent, or other person charged with decedent's property, shall make the decedent's income tax return); Treas. Reg. § 601.503(d)(3) (as amended in 1992) (executor, personal representative or administrator acting for decedent in tax matters should file Form 56, "Notice Concerning Fiduciary Relationship").

333. *See* Treas. Reg. § 301.6402-2(e) (as amended in 1982).

334. I.R.C. § 6012(b)(2) (1994).

335. *See* Treas. Reg. § 1.6012-3(b)(3) (as amended in 1995) (fiduciary acting as guardian or committee of "insane person" must make the person's income tax return); Treas. Reg. § 601.503(d)(4) (as amended in 1992) (guardian or other fiduciary appointed by court of record should file with Service Form 56, "Notice Concerning Fiduciary Relationship," and Service may require submission of court certificate or court order regarding fiduciary's appointment); Treas. Reg. § 301.6402-2(e) (as amended in 1982) (when claim for refund is filed by fiduciary other than fiduciary who filed original return, documentary evidence of the fiduciary's authority must be submitted with the claim).  
<https://scholarship.law.missouri.edu/mlr/vol65/iss4/1>

The circumstances in which agents other than court-appointed representatives are treated as authorized to claim a refund for a living taxpayer for purposes of Section 6511(h)(2)(B) should be few in number. To file an original or an amended return that serves as a claim for refund, such an agent must have received from the taxpayer authority to do so pursuant to a written power of attorney, which the agent must submit with the refund claim.<sup>336</sup> Further, the Service regards an agent as authorized to sign an original or amended return on behalf of the taxpayer only when the power of attorney specifically gives the agent authority in this regard.<sup>337</sup> Even the Service's prescribed form for powers of attorney, Form 2848,<sup>338</sup> does not grant a representative authority to sign returns for the taxpayer unless the taxpayer inserts a specific provision that grants such authority.<sup>339</sup> Therefore, a person other than a court-appointed representative should be treated as authorized to act for a living taxpayer under Section 6511(h)(2)(B) only if the person holds a written power of attorney that specifically grants the person authority to sign tax returns on the taxpayer's behalf. As a specific example, spouses and other relatives of the taxpayer who do not hold such a power of attorney should not be treated as authorized for purposes of the statute.<sup>340</sup>

Even if a person falls into one of the categories of those who should be considered authorized to act on the taxpayer's behalf for purposes of Section 6511(h)(2)(B), the limitations periods of Section 6511 should not run against the taxpayer in all circumstances. For example, suppose that a taxpayer, while fully able to manage her financial affairs, specifically grants authority to sign tax returns to her accountant or attorney on Form 2848. If the taxpayer subsequently becomes unable to manage her affairs and loses touch with her authorized

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336. See Treas. Reg. § 1.6012-1(a)(5) (as amended in 1986); Treas. Reg. § 301.6402-2(e) (as amended in 1982).

337. See Treas. Reg. § 601.503(a)(6) (as amended in 1992) (power of attorney must contain "a clear expression of the taxpayer's intention concerning the scope of authority granted"); Treas. Reg. § 601.504(a)(6) (as amended in 1992) (power of attorney does not authorize agent to sign tax return on behalf of taxpayer unless such act is both permitted under Code and regulations and specifically authorized in power of attorney).

338. See Treas. Reg. § 601.503(b)(1) (as amended in 1992); Treas. Reg. § 1.6012-1(a)(5) (as amended in 1986).

339. See, e.g., Tech. Adv. Mem. 81-19-001 (Dec. 30, 1980) (Form 2848 that granted CPA authority to represent taxpayers before the Service did not provide CPA with authority to sign amended return that served as claim for refund, even though taxpayers orally authorized CPA to sign the return).

340. A spouse is permitted to sign a joint return on behalf of a spouse who is physically unable to sign the return due to disease or injury as long as the disabled spouse orally consents to the signature. See Treas. Reg. § 1.6012-1(a)(5) (as amended in 1986). This rule should not form the basis for treating the disabled spouse as having someone who is authorized to act on her behalf in financial matters for purposes of Section 6511(h)(2)(B). Doing so effectively would make relief under Section 6511(h) unavailable to all married taxpayers.

representative (e.g., if the taxpayer begins to suffer from mental illness and becomes homeless), it would be inequitable for the limitations periods to run against the taxpayer by virtue of her previous grant of authority. The attorney or accountant in this example should not be treated as authorized to act on the taxpayer's behalf in financial matters. The Service and the courts could reach this result by applying the general common law rule that a principal's loss of capacity terminates the agent's authority.<sup>341</sup>

A similar situation could arise in the case of the death of a taxpayer who was unable to manage her financial affairs. Assume that, before her death, the taxpayer authorized a person to sign returns on her behalf pursuant to a written power of attorney, so that the taxpayer was not considered financially disabled pursuant to Section 6511(h)(2)(B) while living. Unless the power of attorney is one that survives the principal's death, the taxpayer's death should terminate the agent's authority.<sup>342</sup> In that case, the limitations periods of Section 6511 should not run against the taxpayer between the date of the taxpayer's death and the date that a court appoints a personal representative for the taxpayer's estate.

A third situation in which the limitations periods of Section 6511 should not run against the taxpayer, despite the presence of an authorized representative, is when a fiduciary authorized to manage the taxpayer's financial affairs acts adversely to the taxpayer.<sup>343</sup> For example, if the fiduciary of a taxpayer who is unable to manage her affairs makes "gifts" to himself and pays gift tax from the taxpayer's assets,<sup>344</sup> the taxpayer should not be treated for purposes of Section 6511(h)(2)(B) as having a person authorized to act on her behalf. It would be contrary to the policy underlying Section 6511(h) to interpret it in a manner that allows the government to benefit from the fiduciary's malfeasance in this situation. Treating such a fiduciary as unauthorized for purposes of the statute can be supported by the same rationale that underlies the adverse domination doctrine. Under this doctrine, the running of limitations periods on claims

341. See RESTATEMENT (SECOND) OF AGENCY § 122 & cmt. d (1957); cf. Halper v. Comm'r, 73 T.C.M. (CCH) 1897 (1997) (authority granted on Form 2848 to taxpayer's representative terminated when taxpayer became incapacitated due to a stroke, and representative therefore had no authority to consent to extension of limitations period for assessment of tax).

342. See RESTATEMENT (SECOND) OF AGENCY § 120 (1957).

343. Cf. RESTATEMENT (SECOND) OF AGENCY §§ 228(1)(c), 235 (1957) (master not subject to liability in tort for act of servant committed without intent to serve the master); RESTATEMENT (SECOND) OF AGENCY § 282(1) (1957) (knowledge of agent not attributed to principal when agent acts adversely to the principal and entirely for his own or another's purposes).

344. See, e.g., Webb v. United States, 66 F.3d 691, 692-93 (4th Cir. 1995) (taxpayer asserted that her doctor and lawyer, who kept her isolated and sedated and obtained control over taxpayer's financial matters, made "gifts" to themselves and their families and paid more than \$11 million in gift tax from taxpayer's assets), cert. denied, 519 U.S. 1148 (1997).

against a fiduciary, such as a claim by a corporation against its directors and officers, is suspended for periods during which the fiduciary acts adversely and therefore cannot be expected to protect his ward's interests by asserting a claim against himself.<sup>345</sup>

As discussed in Part VI, the Service should issue guidance that specifies when a person will be treated as authorized to act on the taxpayer's behalf in financial matters.<sup>346</sup>

## VI. SUGGESTIONS FOR REFORM

Congress should amend Section 6511(h) to tailor the provision to the needs of the majority of taxpayers who will seek its relief, to make the provision less burdensome for both taxpayers and the government, and to eliminate requirements that are antithetical to the statute's underlying purpose.<sup>347</sup> Until Congress takes action, the Service should implement changes to the manner in which it interprets and administers Section 6511(h) as it currently exists.

### A. Amendment of Section 6511(h)

This section proposes four specific changes to Section 6511(h). Congress should: (1) add a simpler, alternative means by which taxpayers can avail themselves of the provision's relief, (2) eliminate the requirement that the taxpayer's physical or mental impairment be "medically determinable," (3) eliminate the requirement that the taxpayer's impairment be expected to

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345. See, e.g., *In re Estate of Payroll Express Corp.*, 186 F.3d 196, 205-07 (2d Cir. 1999), *cert. denied*, 120 S. Ct. 1419 (2000); *Fed. Deposit Ins. Corp. v. Henderson*, 61 F.3d 421, 425-31 (5th Cir. 1995); *Fed. Deposit Ins. Corp. v. Grant*, 8 F. Supp. 2d 1275, 1282-84 (N.D. Okla. 1998); *Fed. Deposit Ins. Corp. v. Smith*, 980 P.2d 141, 144-47 (Or. 1999); *Admiralty Fund v. Peerless Ins. Co.*, 191 Cal. Rptr. 753, 757-59 (Ct. App. 1983).

346. See *infra* Part VI.B.

347. Section 6511(h) takes the same general approach as the early tolling proposals put forth by Representative Jennifer Dunn and the Treasury Department, i.e., it limits relief to those unable to manage their financial affairs. See *supra* notes 271-82 and accompanying text (discussing early proposals). One commentator has criticized this approach as too narrow, and has advocated that Congress permit the late filing of claims for refund when the taxpayer can establish that the late filing was due to reasonable cause and not due to willful neglect. See Morris, *supra* note 190, at 149-56; *infra* notes 383-86 and accompanying text (discussing reasonable cause). In essence, Professor Morris advocates permitting the late filing of refund claims when extraordinary circumstances beyond the taxpayer's control have prevented the taxpayer from asserting the claim in a timely manner, which, as discussed earlier, is a ground upon which courts toll limitations periods in other contexts as a matter of equity. The Author does not necessarily disagree with Professor Morris's proposal. Rather, now that Congress has enacted legislation, the Author has chosen in this Article to focus attention on problems inherent in the approach that Congress adopted.

result in death or to last for a continuous period of twelve months, and (4) clarify that the relevant limitations periods will run against a taxpayer who is otherwise financially disabled only when someone is authorized to claim a refund on the taxpayer's behalf. This section discusses each of these proposed changes and then sets forth suggested statutory language.

### 1. Add a Simpler Alternative

As discussed earlier,<sup>348</sup> the cases in which taxpayers have asserted that they failed to file a timely claim for refund because they were unable to manage their affairs follow a common fact pattern. In this pattern, the taxpayer pays too much income tax in the form of withholding from wages, estimated tax payments, or unspecified payments remitted to the Service. The taxpayer fails to claim a refund by filing a return for the year because, the taxpayer asserts, at the time the return was due and the tax payments are treated as made (normally April 15),<sup>349</sup> she was unable to manage her affairs. Either the taxpayer or a representative such as a conservator or the administrator of the taxpayer's estate later claims a refund by filing a late return. For this most common situation, the approach of current Section 6511(h) is not well suited.

Current Section 6511(h) requires the Service and the courts to determine the precise period of time during which the taxpayer was unable to manage her financial affairs. It is this precise period of time (less any period of time in which someone was authorized to act on the taxpayer's behalf) that constitutes the additional time within which the taxpayer is permitted to claim a refund. This approach is unsuitable for the typical situation described above for two related reasons. First, the limitations periods in subsections (a), (b), and (c) of Section 6511 are short, which increases the likelihood that any imprecision in ascertaining the dates on which the taxpayer's disability began and ended will work to the taxpayer's disadvantage.<sup>350</sup> Second, determinations of whether a

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348. See *supra* notes 325-30 and accompanying text.

349. See *supra* notes 108-10 and accompanying text.

350. This risk is particularly acute for taxpayers who bring refund actions in federal district courts within the Ninth Circuit. The following example, based on the facts of *Roman v. United States*, 95-2 U.S. Tax Cas. (CCH) ¶ 50,591 (N.D. Cal. 1995), illustrates this point. Assume that a taxpayer has amounts withheld from her wages during 1999. The amounts withheld would be treated as tax payments made on April 15, 2000. See *supra* notes 107-10 and accompanying text. Assume further that the taxpayer dies in September 2002 without ever filing a return for 1999, and that her executor, appointed in October 2002, can establish that the taxpayer was unable to manage her financial affairs for only twelve months prior to her death (i.e., beginning in September 2001). Under the Ninth Circuit's interpretation of Section 6511(a), the executor would have only seven months within which to claim a refund by filing a 1999 return. According to the Ninth Circuit, because the return that the executor files will be filed more than two years after the taxpayer paid the tax, the return will not constitute a "return" for purposes of

taxpayer was unable to manage her financial affairs will commonly take place many years after the relevant time periods,<sup>351</sup> which increases the risk of imprecision in identifying the taxpayer's precise period of disability. For example, in the case that prompted the enactment of Section 6511(h), *United States v. Brockamp*,<sup>352</sup> there is no indication in the opinions of the district court,<sup>353</sup> the court of appeals<sup>354</sup> or the Supreme Court,<sup>355</sup> or in the briefs filed by the parties in the Supreme Court,<sup>356</sup> that the taxpayer, an elderly man described by his administrator as "senile," ever had a formal assessment of his mental condition. Current Section 6511(h) nevertheless would require such a determination at the time his administrator submitted the refund claim, which was nearly seven years after he paid the tax in question. Such after-the-fact determinations of the precise beginning and ending dates of the disability are likely to be highly inaccurate. The risk of harm from this inaccuracy should not

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Section 6511(a). *See supra* notes 120-24 and accompanying text. The taxpayer will be treated for purposes of Section 6511(a) as if she had not filed a return. In order to be timely, therefore, the executor's claim for refund must be filed within two years from the time the taxpayer paid the tax. *See* I.R.C. § 6511(a) (1994) (refund claim must be filed within two years from time tax was paid "if no return was filed by the taxpayer"). This two year period would run against the taxpayer from April 15, 1999, until she became unable to manage her financial affairs in September 2001, a period of approximately seventeen months. Her executor therefore would have only the seven months remaining in the two-year period within which to claim a refund by filing a 1999 return.

351. In this respect, the determination required by Section 6511(h) differs from the determination required in the contexts from which Congress borrowed the language and structure of the new provision. As discussed earlier, Congress borrowed the language of Section 6511(h) from Section 22(e)(3), which is the definition of "permanently and totally disabled" used for purposes of determining who is eligible for the tax credit provided by Section 22(a). *See supra* notes 287-88 and accompanying text. The language of Section 22(e)(3) originated in the definition of "disabled" used for purposes of determining eligibility for SSDI benefits. *See supra* notes 286-94 and accompanying text. In both of those contexts, the question is whether an individual is "unable to engage in any substantial gainful activity" by reason of a physical or mental impairment, rather than whether the individual is "unable to manage his financial affairs" as in Section 6511(h). The determination whether an individual is unable to engage in any substantial gainful activity is likely to take place much more contemporaneously with the condition's onset than is the determination whether a person was unable to manage her financial affairs.

352. 519 U.S. 347 (1997).

353. *See Brockamp v. United States*, 859 F. Supp. 1283 (C.D. Cal. 1994).

354. *See Brockamp v. United States*, 67 F.3d 260 (9th Cir. 1995).

355. *See Brockamp*, 519 U.S. at 347.

356. *See* Petitioner's Brief at 4-5 & n.1, *Brockamp* (No. 95-1225), available in 1996 WL 403,339; Respondent's Brief at 1-3, *Brockamp* (No. 95-1225), available in 1996 WL 496,832. The government's reply brief in *Brockamp* provides no information on the taxpayer's condition because it addresses only questions of law. *See* Reply Brief, *Brockamp* (No. 95-1225), available in 1996 WL 554,432.

needlessly be visited upon taxpayers who suffer from mental illness. To utilize such post-hoc determinations effectively penalizes such taxpayers for their delay in seeking treatment, a delay that often is attributable to the stigma that society continues to attach to mental illness.<sup>357</sup>

To avoid the risk of harm from imprecise determinations of the beginning and ending dates of a taxpayer's disability, and to reduce the government and taxpayer resources consumed in such detailed factfinding, Congress should add to Section 6511(h) an alternative means of satisfying the statute that is more tailored to the most common factual situation. Under this alternative, the taxpayer would be required to establish, first, that she was unable to manage her financial affairs at the time she is treated as having paid the tax for purposes of Section 6511, and second, that no person was authorized to claim a refund on her behalf on the deemed payment date. If the taxpayer meets these requirements, then under Section 6511(a) the taxpayer would have a longer, fixed period of time, measured from the due date of the return, within which to file a claim for refund. The recommended fixed period is seven years. A seven-year period would be consistent with Section 6511(d)(1), which adopts the approach recommended here in a situation that presents an analogous problem.<sup>358</sup> Under this proposal, if the taxpayer files a claim for refund within the seven-year period, then the taxpayer would be permitted to recover the amount of the overpayment attributable to the taxpayer's inability to manage her financial affairs, notwithstanding the limits on the amount recoverable in Section 6511(b)(2).

To illustrate the proposal, consider the facts of *Brockamp*. In *Brockamp*, the taxpayer, who was ninety-three years old, mailed to the Service on April 15, 1984, a check for \$7,000 accompanied by an application for automatic extension of time (Form 4868) to file his 1983 income tax return.<sup>359</sup> The taxpayer died in 1988 without ever having filed an income tax return for the 1983 taxable year.<sup>360</sup> The taxpayer's daughter, Mrs. Brockamp, was appointed administrator of his

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357. See SURGEON GENERAL'S REPORT, *supra* note 307, at 8.

358. Section 6511(d)(1) permits a taxpayer to file a claim for refund within seven years from the due date of the return if the claim relates to an overpayment of income tax that arises from the taxpayer's deduction of a bad debt or worthless security. See I.R.C. § 6511(d)(1) (1994). Congress enacted this extended period of limitation because of the difficulty taxpayers often have in determining the specific taxable year in which the debt or security became worthless. See H.R. REP. NO. 77-2333, at 44-45 (1942), *reprinted in* 1942-2 C.B. 372, 408. If the taxpayer files the claim within the prescribed seven-year period, then Section 6511(d)(1) permits the amount of the refund to exceed the amount normally permitted under Section 6511(b)(2) to the extent of the amount of the overpayment attributable to the taxpayer's deduction of the bad debt or worthless security.

359. See *Brockamp v. United States*, 859 F. Supp. 1283, 1284 (C.D. Cal. 1994).

360. See *id.* at 1284-85.

estate on January 4, 1989.<sup>361</sup> During the administration of the estate, Mrs. Brockamp discovered the \$7,000 payment to the Service and sought a refund by filing an income tax return for 1983 on March 27, 1991.<sup>362</sup> The return reflected that the taxpayer's actual income tax liability for 1983 was \$427.<sup>363</sup> Under the proposed addition to current Section 6511(h), Mrs. Brockamp would be required to establish that her father was unable to manage his financial affairs in a period of time that includes April 15, 1984, the date on which the tax is treated as paid for purposes of Section 6511. She also would be required to establish that no person was authorized to file a claim for refund on his behalf on the deemed payment date. If she meets these requirements, then the period in Section 6511(a) for filing a claim for refund would be seven years, measured from the due date of the 1983 return. Accordingly, she would have until April 15, 1991, to claim a refund by filing the 1983 return. Because she filed the 1983 return before this date, her refund claim would be timely under Section 6511(a). The amount of tax recoverable would be permitted to exceed the amount normally recoverable under Section 6511(b)(2)(A) to the extent of the amount of the overpayment attributable to the taxpayer's inability to manage his financial affairs, or in this case, \$6,573.

A seven-year period should enable virtually all taxpayers in this most common scenario to file timely claims for refund. Refund claims in this situation are typically filed within three to five years after the taxpayer's earliest payment of tax.<sup>364</sup> In *Brockamp*, the refund claim was filed almost seven years after the taxpayer's payment of tax, but this unusually long period is due in part to the fact that the taxpayer's administrator did not file the refund claim until more than two years after her appointment.

The proposed addition to Section 6511(h) set forth above is tailored to the most common factual scenario in which taxpayers unable to manage their financial affairs seek a tax refund. It focuses attention on the relevant point in time, which is the date on which the taxpayer is treated as having paid too much

361. *See id.* at 1285.

362. *See id.*

363. *See id.*; Petitioner's Brief at 5, *Brockamp* (No. 95-1225), available in 1996 WL 403339.

364. *See* *Marco v. United States*, 98-1 U.S. Tax Cas. (CCH) ¶ 50,337 (D. Conn. 1998) (payments deemed made April 1988, refund claim filed September 1991); *First Interstate Bank of Nev. v. United States*, 874 F. Supp. 286, 287 (D. Nev. 1994) (earliest payment deemed made April 1986, refund claim filed October 1991), *rev'd*, 108 F.3d 1185 (9th Cir. 1997); *Scott v. United States*, 847 F. Supp. 1499, 1501 (D. Haw. 1993) (payments deemed made April 1984, refund claim filed November 1989), *aff'd*, 95-2 U.S. Tax Cas. (CCH) ¶ 50,557 (9th Cir. 1995), *rev'd*, 519 U.S. 347 (1997); *Wiltgen v. United States*, 813 F. Supp. 1387, 1389, 1391 (N.D. Iowa 1992) (earliest payments deemed made April 1982, refund claim filed December 1986); *Johnsen v. United States*, 758 F. Supp. 834, 835 (E.D.N.Y. 1991) (payments deemed made April 1984, refund claim filed 1987).

tax and on which the taxpayer should have, but did not, file a return claiming a refund. The proposal would permit the Service and the courts to resolve most cases involving alleged financial disability without relying on inherently imprecise determinations of the beginning and ending dates of the taxpayer's disability. Because the proposal would not cover all possible scenarios in which financially disabled taxpayers might seek refunds, however, Congress should retain the current date-specific approach of Section 6511(h) as an alternative means by which taxpayers can obtain the provision's relief. For example, a taxpayer who is fully capable of managing her financial affairs when she pays tax, but who subsequently becomes incapacitated before filing a claim for refund, would not be eligible for relief under the proposal set forth above. As an illustration, a taxpayer might pay estimated tax and file a request for an automatic extension of time to file her return while fully competent, and shortly afterward become physically injured and lapse into a coma. Congress should retain the statute's current approach to address this type of less common situation.

## 2. Eliminate the "Medically Determinable" Requirement

The requirement in current Section 6511(h) that the taxpayer's physical or mental impairment be "medically determinable" represents an abdication of responsibility. The difficult issue that Section 6511(h) addresses is whether there are circumstances in which, as a matter of policy, we will not insist on strict compliance with the limitations periods that apply to claims for tax refunds. The statute's overall approach is a sensible response: we will not insist on strict compliance when, due to a physical or mental impairment, the taxpayer was incapable of complying. But to require that the taxpayer's impairment be medically determinable is an inappropriate attempt to place the burden of determining who is eligible for relief under the statute on the medical community.<sup>365</sup> Medical evidence is, of course, relevant to the determination of whether a taxpayer suffered from a condition that caused her to be unable to comply. But the responsibility for making the ultimate determination regarding the taxpayer's ability to comply should rest with the Service and the courts. To require that the taxpayer demonstrate a medically determinable impairment encourages excessive and perhaps exclusive reliance on medical evidence, a risk to which the Service's current published guidance on Section 6511(h), discussed below, is witness.<sup>366</sup>

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365. Cf. Noah, *supra* note 311, at 282 (noting in the SSDI and SSI context that delegating the assessment of the functional impact of impairments to the medical profession obscures the difficult political choices involved in determining which individuals to excuse from work).

366. See *infra* Part VI.B.

The requirement that the taxpayer's physical or mental impairment be medically determinable might be supported as necessary to eliminate false claims of inability to comply with Section 6511's limitations periods. The requirement, however, does little to address this concern. The cases in which the courts have expressed willingness to grant relief typically present compelling facts involving taxpayers who suffer from an obvious inability to manage their affairs.<sup>367</sup> In these cases, the requirement of a medically determinable impairment serves little purpose. The situations in which there will be some question as to the taxpayer's ability to comply with the limitations period are precisely those in which a physician's determination is likely to be least helpful in distinguishing false from meritorious claims. The primary situation of this type is that in which the taxpayer received no care from a treating physician at the time the taxpayer paid too much in tax and failed to file a claim for refund. In this situation, the taxpayer likely will submit reports from physicians who examined the taxpayer long after the fact or even from those who have never examined the taxpayer but who have reviewed any medical records that the taxpayer might possess. In analogous contexts, such reports are properly given limited weight.<sup>368</sup>

This is not to suggest that the Service and the courts should not take medical evidence into account in determining whether to grant relief. The point is that the statutory prerequisite of a medically determinable impairment encourages excessive reliance on medical evidence in situations in which such evidence should be only one factor in the assessment of a taxpayer's ability to comply with the relevant limitations periods. To avoid such undue reliance, Congress should amend Section 6511(h) to incorporate the standard put forth by Representative Jennifer Dunn in her early legislative proposal: the taxpayer should be required to establish that her inability to manage her financial affairs

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367. See, e.g., *First Interstate Bank*, 874 F. Supp. at 289-90 (taxpayer "confused and disoriented as to person, place and time, and was unable to handle her personal hygiene or to conduct any financial affairs" and ultimately admitted to convalescent hospital); *Wiltgen*, 813 F. Supp. at 1389 (conservator and guardian appointed for taxpayer); *Johnsen*, 758 F. Supp. at 835 (husband, wife, and son all adjudicated incompetents). In contrast, the courts have demonstrated that they are quite capable of recognizing spurious claims of inability to file timely claims due to mental incompetence. See *Roman v. United States*, 95-2 U.S. Tax Cas. (CCH) ¶ 50,591, at 89,958 (N.D. Cal. 1995) (taxpayer failed to meet burden of establishing inability to comply); *Brennan v. United States*, 94-1 U.S. Tax Cas. (CCH) ¶ 50,247, at 84,025 (C.D. Cal. 1994) (same).

368. See, e.g., *Cruz v. Sullivan*, 912 F.2d 8, 13 (2d Cir. 1990) (noting in SSI context that consultative exams by nontreating physicians are often brief and give only a glimpse of the claimant on a single day); *Hidalgo v. Bowen*, 822 F.2d 294, 296-97 (2d Cir. 1987) (stating in SSI context that expert opinion of treating physician is binding on factfinder absent substantial evidence to the contrary, and opinion of non-examining physician does not constitute such substantial evidence); *Nelson v. Heckler*, 712 F.2d 346, 348 (8th Cir. 1983) (stating in SSDI context that opinion of non-examining physician should be given little weight).

was due to a “debilitating” physical or mental impairment.<sup>369</sup> The term debilitating is appropriate in this context because it conveys that the taxpayer’s condition must be one that weakens or enfeebles, which accurately describes the sorts of conditions that typically render a taxpayer unable to manage her financial affairs.

The facts of *Brockamp* illustrate the type of situation in which medical evidence should be only one factor that the Service and the courts take into account in assessing a taxpayer’s inability to manage his financial affairs. As discussed earlier,<sup>370</sup> there is no indication that the taxpayer in *Brockamp* ever had a formal assessment of his mental condition. Assuming this is the case, his administrator might submit to the Service reports of physicians who had never examined the taxpayer but who could offer opinions concerning his condition based on any medical records that might exist and on descriptions of the taxpayer’s behavior. Although such reports could be helpful, they should not be conclusive. The Service should also take into account specific facts that tend to indicate whether the taxpayer was unable to manage his affairs. In the taxpayer’s brief to the Supreme Court in *Brockamp*, the administrator suggested that she would be able to prove several facts of this nature, such as that the taxpayer looked dazed and disoriented, was unaware when confronted that he had walked to the corner mailbox in a state of undress, and often paid bills for \$100 and \$400 with checks for \$1,000 and \$4,000.<sup>371</sup> If proven, such facts should establish the requisite debilitating mental condition.

### 3. Eliminate the Requirement that the Taxpayer’s Impairment be Expected to Result in Death or to Last for Twelve Months

As discussed earlier,<sup>372</sup> the requirement that an impairment be expected to result in death or to last for a continuous period of at least twelve months has its origin in the Social Security Amendments of 1965,<sup>373</sup> which modified the definition of the term “disabled” used for purposes of determining eligibility for SSDI (and later SSI) benefits. Congress viewed this requirement as a means of distinguishing between those with temporary and those with permanent impairments.<sup>374</sup> Although this distinction might be appropriate in the context in which it originated, it has little relevance in the tax refund context.

When an individual applies for SSDI or SSI benefits, the policy question presented is whether, due to the individual’s claimed inability to work, society

369. See *supra* note 276 and accompanying text.

370. See *supra* notes 352-56 and accompanying text.

371. See Respondent’s Brief at 1-3, *Brockamp* (No. 95-1225), available in 1996 WL 496832.

372. See *supra* notes 313-17 and accompanying text.

373. Pub. L. No. 89-97, 79 Stat. 286.

374. See *supra* note 372 and accompanying text.

is willing to support that person. It is a reasonable response to that question to say that we are willing to support only those who have a permanent impairment that renders them unable to work, and that we expect those with short-term, temporary disabilities to provide for themselves. Such a distinction makes little sense, however, when the policy question is whether we are prepared to excuse an individual from the obligation to seek a tax refund within a specified period of time. For example, suppose that two and one-half years after filing her timely return a taxpayer discovers that she is entitled to a refund, begins to prepare her claim for refund, and then receives a blow to the head that incapacitates her for six months. There is no compelling reason why the limitations period should not be suspended for these six months merely because the taxpayer did not have an impairment of a permanent nature. Indeed, to require a permanent impairment is inconsistent with the underlying premise of both statutory and equitable tolling, which is that a claimant is temporarily unable to assert a claim but will be able to do so at some point in the future.<sup>375</sup> It is perhaps for this reason that state tolling statutes do not condition relief on the existence of an impairment that lasts for a minimum period of time.<sup>376</sup> Congress should amend Section 6511(h) to eliminate this requirement.

#### 4. Clarify that the Limitations Periods Will Run Against an Otherwise Financially Disabled Taxpayer Only When a Person is Authorized to File on the Taxpayer's Behalf a Claim for Refund

Section 6511(h)(2)(B) provides that the relevant limitations periods are not suspended during any period in which someone was "authorized to act on behalf of [the taxpayer] in financial matters." As discussed earlier,<sup>377</sup> however, the proper inquiry in this context is not whether the person was authorized in connection with "financial matters," but rather whether the person was capable of filing a claim for refund on the taxpayer's behalf. Although the Service can (and, as discussed below,<sup>378</sup> should) implement this distinction administratively by making clear that a person will be treated as authorized for purposes of Section 6511(h) only when the person can file a claim for refund on the taxpayer's behalf, Congress should clarify this point by amending the statute.

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375. See *supra* Part II.A.

376. See, e.g., ALA. CODE § 6-2-8 (Supp. 1999); CAL. CIV. PROC. CODE § 352 (West 1982 & Supp. 2000); FLA. STAT. ANN. § 95.051(1)(h) (West Supp. 2000); 735 ILL. COMP. STAT. ANN. 5/13-211 (West 1992); MASS. ANN. LAWS ch. 260, § 7 (West 1992), N.Y.C.P.L.R. 208 (McKinney 1990); VA. CODE ANN. § 8.01-229 (Michie 2000); WASH. REV. CODE ANN. § 4.16.190 (West Supp. 2000).

377. See *supra* notes 331-40 and accompanying text.

378. See *infra* Part VI.B.

## 5. Suggested Statutory Language

The following statutory language would implement the four specific changes to Section 6511(h) discussed in the preceding parts of this section:

**(h) SPECIAL RULES FOR TAXPAYERS UNABLE TO MANAGE FINANCIAL AFFAIRS DUE TO DISABILITY. —**

**(1) IN GENERAL. — In the case of an individual —**

**(A) SPECIAL SEVEN-YEAR PERIOD OF LIMITATION. —**

If the claim for credit or refund relates to an overpayment of tax imposed by this title in respect of which tax the taxpayer is required to file a return, and if, on the date the taxpayer is treated for purposes of this section as paying the tax the taxpayer was financially disabled, then, in lieu of the 3-year period of limitation prescribed in subsection (a), the period shall be 7 years from the date prescribed by law for filing the return (determined with regard to any extension of time granted the taxpayer) for the tax with respect to which the claim is made. In the case of a claim described in this subparagraph the amount of the credit or refund may exceed the portion of the tax paid within the period prescribed in subsection (b)(2) or (c), whichever is applicable, to the extent of the amount of the overpayment attributable to the taxpayer's being financially disabled.

**(B) SUSPENSION OF LIMITATIONS PERIODS. —**

Regardless of whether a taxpayer is eligible for the special limitations period set forth in subparagraph (A), the running of the periods specified in subsections (a), (b), and (c) shall be suspended during any period of an individual's life that such individual is financially disabled.

**(2) FINANCIALLY DISABLED. —**

**(A) IN GENERAL. —** For purposes of paragraph (1), an individual is financially disabled if such individual is unable to manage his financial affairs by reason of a debilitating physical or mental impairment of the individual. An individual shall not be considered to have such an impairment unless proof of the existence thereof is furnished in such form and manner as the Secretary may require.

**(B) EXCEPTION WHERE INDIVIDUAL HAS GUARDIAN, ETC. —** An individual shall not be treated as financially disabled during any period in which another person both is authorized to act for the individual and could, under this subtitle and regulations prescribed by the Secretary, submit a claim for refund on the individual's behalf.

*B. Changes in the Interpretation and Administration of  
Current Section 6511(h)*

Until Congress amends Section 6511(h), the Service should take two important steps with respect to the manner in which it interprets and administers the statute.

First, the Service should place less emphasis on the role of a physician's medical opinion. According to the Service's published guidance on Section 6511(h)<sup>379</sup> a physician's opinion is the only evidence that the Service requires taxpayers to submit on four significant issues: (1) the existence of a physical or mental impairment, (2) the duration of the impairment, (3) whether the impairment caused the taxpayer to be unable to manage her financial affairs, and (4) for how long the taxpayer was unable to manage her financial affairs due to the impairment.<sup>380</sup> Although a physician's opinion is relevant to each of these issues, it should not be the sole evidence that the Service considers. Such exclusive reliance is contrary to congressional intent.<sup>381</sup> It also is questionable from a policy perspective because a medical opinion's degree of reliability decreases with each issue.<sup>382</sup> Even if one accepts that a medical opinion constitutes sufficient evidence to establish the existence of an impairment, it does not follow that it is equally sufficient to establish the impairment's duration, its causal relationship to the taxpayer's inability to manage her financial affairs, and the length of time for which the impairment caused the inability. Particularly with respect to the latter two issues, the Service should take into account other relevant evidence.

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379. See Rev. Proc. 99-21, 1999-17 I.R.B. 18.

380. See *supra* notes 319-22 and accompanying text.

381. The legislative history of Section 6511(h) sets forth Congress's expectation that "in applying the medically determinable test, the Secretary will evaluate whether a medical opinion that a physical or mental impairment exists has been offered by a person qualified to do so with respect to that particular type of impairment." H.R. REP. NO. 105-364, pt. 1, at 68-69 (1997). Congress clearly did not envision that the Service would rely exclusively on a physician's opinion. Rather, Congress appears to have contemplated that the Service would consider a physician's opinion along with other relevant evidence. Indeed, the legislative history suggests that the Service has authority to grant relief even in the absence of a medical opinion.

382. The reliability of the opinion also depends on the nature of the relationship between the taxpayer and the physician. For example, it would be reasonable for the Service to assign greater value to the opinion of the taxpayer's treating physician, and less value to the opinions of an examining physician (one who does not provide treatment but rather examines the taxpayer solely for the purpose of determining the existence and duration of the impairment) or a review physician (one who bases an opinion solely on a review of the taxpayer's medical records). Cf. 20 C.F.R. § 404.1527(d)(2) (1995) (opinion of treating physician given greatest weight in determining claimant's eligibility for SSDI benefits).

As an illustration, the Service might consider specific examples of the taxpayer's successful or unsuccessful handling of financial matters, such as whether the taxpayer managed bank accounts and complied with state tax filing obligations during the time period in question. To gather this evidence, the Service should require taxpayers or their representatives to submit a factual statement. This is the same approach that the Service takes in analogous areas. For example, taxpayers are subject to penalties if they do not timely file their income tax returns<sup>383</sup> or certain informational returns,<sup>384</sup> but the penalty is not imposed if, among other requirements, the taxpayer establishes that the failure was due to "reasonable cause."<sup>385</sup> To assist it in determining whether the taxpayer's failure was due to reasonable cause, the Service requires that taxpayers submit a detailed factual statement.<sup>386</sup>

The second step that the Service should take is to provide guidance on when a person will be treated as authorized to act on the taxpayer's behalf in financial matters for purposes of Section 6511(h)(2)(B). This is a critical issue because, even if a taxpayer otherwise qualifies as "financially disabled," the limitations periods of Section 6511 run against the taxpayer during any period in which someone was authorized to act for the taxpayer within the meaning of the statute. Although the Service's current guidance on Section 6511(h) requires the person signing the taxpayer's claim for refund to submit a written statement concerning whether and for what periods someone was authorized to act for the taxpayer, it does not specify the circumstances in which a person will be treated as authorized.<sup>387</sup>

As discussed earlier,<sup>388</sup> the circumstances in which a person should be treated as authorized for purposes of Section 6511(h)(2)(B) are narrow. The general test for determining whether someone was authorized should be whether the person could have claimed a refund on the taxpayer's behalf by signing and filing an original or amended return.<sup>389</sup> More specifically, with respect to a taxpayer who was financially disabled before death but who is now deceased, only the court-appointed personal representative of the taxpayer's estate should be treated as authorized. The period of the personal representative's authorization should begin only on the date the court issues letters testamentary or letters of administration.<sup>390</sup> In the case of a taxpayer who is living but unable to file her own claim for refund, only two categories of persons should be treated as authorized to act on her behalf: (1) court-appointed fiduciaries such as a

383. See I.R.C. § 6651(a)(1) (1994).

384. See I.R.C. §§ 6721(a)(1), (a)(2)(A) (1994), 6724(d)(1) (Supp. III 1997).

385. See I.R.C. §§ 6651(a)(1), 6724(a) (1994).

386. See Treas. Reg. §§ 301.6651-1(c)(1) (as amended in 1997), 301.6724-1(m) (as amended in 1999).

387. See Rev. Proc. 99-21, § 4(2), 1999-17 I.R.B. 18.

388. See *supra* notes 331-45 and accompanying text.

389. See *supra* note 331 and accompanying text.

390. See *supra* notes 332-33 and accompanying text.

guardian or conservator, who should be treated as authorized beginning only on the date of their appointment, and (2) agents who hold a written power of attorney that specifically authorizes them to sign tax returns on the taxpayer's behalf.<sup>391</sup>

Even if a person falls into one of the categories of those who should be considered authorized to act on the taxpayer's behalf, there are circumstances in which the limitations periods of Section 6511 nevertheless should not run against the taxpayer. These situations include the incapacity or death of a taxpayer who previously authorized a person to sign returns on her behalf<sup>392</sup> and the victimization of a taxpayer by a fiduciary who acts adversely to the taxpayer's interests.<sup>393</sup> The Service's guidance should explicitly recognize the existence of such exceptions and provide non-exclusive examples of them.

## VII. CONCLUSION

Congress's enactment of Section 6511(h) is laudable. Despite the importance of preserving the government's sources of revenue and ensuring that the government is not perpetually at risk of defending against stale claims, compelling circumstances sometimes exist in which taxpayers are simply unable to submit claims for refund within the prescribed limitations periods. Section 6511(h) is a welcome effort to permit relief in some of these exceptional cases. Certain aspects of the statute, however, require modification. With these changes the provision will be more responsive to the needs of the majority of taxpayers who will seek its relief, less burdensome for both taxpayers and the government, and more consistent with the statute's underlying policy.

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391. *See supra* notes 334-40 and accompanying text.

392. *See supra* notes 341-42 and accompanying text.

393. *See supra* notes 343-45 and accompanying text.

