"Equitable Tolling"

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Abstract:

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Body

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About a year ago, in *Pollock v. Commissioner*,[1] the Tax Court held that the 90-day time limit to file a "stand-alone" innocent spouse petition under section 6015(e) was jurisdictional and not a time period subject to **equitable tolling**. In so ruling, the Tax Court disagreed with the only other court to have ruled on the question -- a district court in Florida dealing with the same taxpayer. Mrs. Pollock appealed the Tax Court dismissal to the Eleventh Circuit and filed her brief. Months passed, and the Justice Department kept asking for and receiving permission to postpone the filing date of its answering brief. Then suddenly, on Christmas Eve, Justice abandoned the *Pollock* appeal, having never filed its brief. It absolved Mrs. Pollock of all joint liability, but did not tell her why.

One can only speculate why Justice abandoned pursuing Mrs. Pollock after both it and the IRS spent so many years fighting to keep her liable. My speculation, and that of her attorney, is that Justice could not adequately find an answer to her Eleventh Circuit brief and wanted to avoid adverse circuit court precedent that would not only provide that the section 6015(e) 90-day limit is tollable, but also suggest that some other code filing time limits -- such those in the collection due process area -- are also tollable.

In this article, I give the facts of *Pollock* and set out the reasoning of each court in the case. Then I analyze why, based on a series of Supreme Court rulings over the last 25 years, I think the Tax Court is wrong and why both the innocent spouse and CDP time limits should be tollable for equitable reasons.

As a point of full disclosure, I recently asked the Tax Court to overrule its *Pollock* opinion in a case involving a client of the Cardozo Tax Clinic, Suzanne Gormeley. The Tax Court rejected my request in a memorandum opinion issued on November 9, 2009.[2] Ms. Gormeley has just filed an appeal of that ruling in the Third Circuit.

Facts of *Pollock*

Arlene Pollock and her husband divorced in November 2000, with Mrs. Pollock getting the family's home. During the marriage, they accumulated more than $ 400,000 of joint unpaid federal income tax debts.

Under section 6015(f), Mrs. Pollock could have been allowed relief from those joint debts if, taking into account all the facts and circumstances, it would have been inequitable to hold her liable for them. Under section 6015(b) and (c), spouses can also be relieved of liability from deficiencies in tax caused by the other spouse. Under section 6015(b), one of the factors for being relieved is also that the spouse seeking relief prove inequity. But neither section 6015(b) relief nor section 6015(c) relief was available to Mrs. Pollock, because her tax debts did not arise from "deficiencies" -- that is, miscalculations of the amount of tax due on the returns, say, for example, from excessive deductions or unreported income. There were no deficiencies in the tax reported on the Pollocks' joint returns. The couple simply had not sent in with their correct returns the balances they showed as due. Thus, pure equitable relief under section 6015(f) provided Mrs. Pollack the only possibility to be relieved as an innocent spouse.

There are at least four ways to seek innocent spouse relief under section 6015(b), (c), or (f) in court. First, a spouse can raise the issue in a case that has reached the Tax Court through a notice of deficiency under section 6213(a). Mrs. Pollock's case did not involve any alleged deficiencies. Second, a spouse can invoke innocent spouse relief in a refund suit in district court or the Court of Federal Claims.[3] But this requires full payment of the disputed amount before bringing suit[4] -- something Mrs. Pollock could not afford to do. Third, a spouse can claim innocent spouse relief in response to a CDP-triggering notice of a tax lien filing or of intention to levy.[5] Mrs. Pollock did not do so.

The fourth and most common way to request innocent spouse relief is to file a Form 8857 with the IRS. Mrs. Pollock submitted a Form 8857 asking for relief under section 6015(f). Section 6015(e) gives the Tax Court jurisdiction to hear a stand-alone case[6] for section 6015(b), (c), or (f) relief if the IRS does not rule on the Form 8857 within six months. When the IRS does rule, however (in a notice of determination (NOD)), the statute requires that the spouse file a petition in the Tax Court within 90 days after the issuance of the NOD.

In 2002, at the urging of the IRS, the Tax Court held in *Ewing v. Commissioner*[7] that it had jurisdiction under an earlier version of section 6015(e) to consider a stand-alone case for equitable relief under section 6015(f). But the government then reversed its position and argued on appeal that the Tax Court did not have section 6015(f) jurisdiction. The Ninth Circuit agreed and reversed the Tax Court.[8]

On April 27, 2006, four months after the Ninth Circuit ruled in *Ewing*, the IRS mailed Mrs. Pollock an NOD denying her innocent spouse relief. On its first page was a warning that she had only 90 days to file a petition in the Tax Court challenging the NOD. Just days after the IRS mailed the NOD, the Eighth Circuit in *Bartman v. Commissioner*[9] adopted the Ninth Circuit's position that the Tax Court lacked jurisdiction to hear section 6015(f) cases under the former version of section 6015(e). Then, 88 days after the IRS issued the NOD to Mrs. Pollock, the Tax Court in *Billings v. Commissioner*[10] changed its mind and agreed with both circuits that it lacked jurisdiction to hear section 6015(f) cases under section 6015(e).

Mrs. Pollock was confused by all these rulings. She did not want to perform the useless act of filing a Tax Court petition when the court lacked jurisdiction to hear it. So she let the 90 days run without filing a Tax Court petition.

In September 2006, Justice filed a lien enforcement action against the Pollocks in the U.S. District Court for the Southern District of Florida. If the government won, it would be able to foreclose on the home transferred to Mrs. Pollock during the divorce settlement.

Thereafter, on December 20, 2006, Congress amended section 6015(e) to explicitly grant the Tax Court jurisdiction to hear section 6015(f) nondeficiency stand-alone cases, effective for tax liabilities "arising or remaining unpaid on or after the date of the enactment."[11] The amendment did nothing to change the time period in which a stand-alone suit was to be brought under section 6015(e), however.

The District Court Allows Equitable Tolling

In 2007 the United States moved for summary judgment against the Pollocks in district court. In response, Mrs. Pollock argued that she was entitled to innocent spouse relief under section 6015(f). However, several courts have questioned whether section 6015(f) can be raised as a defense in a district court enforcement action.[12] (To resolve this confusion, National Taxpayer Advocate Nina Olson has requested that the law be clarified to allow district courts to address section 6015 issues in collection enforcement cases.[13] No corrective legislation has yet been enacted.)

After granting summary judgment against Mr. Pollock, the district court on July 12, 2007, stayed the case against Mrs. Pollock and granted her 30 days to file a petition under section 6015(e) in the Tax Court. In his order, the district judge stated:

> Ms. Pollock's failure to file a petition in the ninety-day window is excusable, given the uncertainty in the law over this issue. I find that the ninety-day review period for 6015(f) petitions is analogous to the ninety-day window for filing a complaint with the Equal Employment Opportunity Commission (EEOC) in Title VII cases. In that situation, the Supreme Court has held that the filing window is a "requirement subject to waiver, estoppel, and **equitable tolling**." Zipes v. TWA, 455 U.S. 385, 393 (1982). Waiver and **equitable tolling** should also be available to those seeking review of a denial of innocent spouse relief. . . . Ms. Pollock's situation merits either a waiver or tolling of the ninety-day time period for filing a petition for review with the tax court.[14]
> for filing a petition for review with the tax court.[14]

The Tax Court Rules Otherwise

Mrs. Pollock filed her petition with the Tax Court by the deadline set in the district court's order. Among her arguments was that "section 6015 invokes equity on its face and therefore should allow **equitable tolling**."[15]

In *Pollock*, the Tax Court first held that it was not bound by the district court's interpretation of section 6015(e) under the "law of the case" doctrine because the district court cannot expand the Tax Court's jurisdiction and because, according to the Tax Court, this was "not a close case."[16] The Tax Court then disagreed with the district court and held that the 90-day period in section 6015(e) was jurisdictional, not a statute of limitations subject to **equitable tolling**. Because the Tax Court petition was filed over a year after the IRS issued the NOD, the Tax Court dismissed Mrs. Pollock's case for lack of jurisdiction.

Pollock was a case of first impression in the Tax Court. In its opinion the Tax Court acknowledged the Supreme Court's recent statement in *John R. Sand & Gravel Co. v. United States* that *Irwin v. Department of Veterans Affairs*,[17] decided in 1990, "adopted a ['rebuttable presumption'] of **equitable tolling**. That presumption seeks to produce a set of statutory interpretations that will more accurately reflect Congress' likely meaning in the mine run of instances where it enacted a Government-related statute of limitations."[18] *John R. Sand & Gravel* is the most recent discussion by the Supreme Court of the **equitable tolling** issue.

In *John R. Sand & Gravel*, the Court faced an assertion that the time period in 28 U.S.C. section 2501 was a statute of limitations subject to **equitable tolling**. That section reads: "Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six

years after such claim first accrues." In *John R. Sand & Gravel*, the Court admitted that the statute was very similar to the statute interpreted in *Irwin* that it had held was subject to **equitable tolling**. The statute at issue in *Irwin* was 42 U.S.C. section 2000e-16(c), which required that a suit for employment discrimination be brought in court:

> Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection 717(a), or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit.

In *John R. Sand & Gravel*, the Supreme Court explained:

> Most statutes of limitations seek primarily to protect defendants against stale or unduly delayed claims. . . . Thus, the law typically treats a limitations defense as an affirmative defense that the defendant must raise at the pleadings stage and that is subject to rules of forfeiture and waiver. . . . Such statutes also typically permit courts to toll the limitations period in light of special equitable considerations.
>
> Some statutes of limitations, however, seek not so much to protect a defendant's case-specific interest in timeliness as to achieve a broader system-related goal, such as facilitating the administration of claims, see, *e.g.*, *United States v. Brockamp*, 519 U.S. 347 (1997), limiting the scope of a governmental waiver of sovereign immunity, see, *e.g.*, *United States v. Dalm*, 494 U.S. 596, 609-610 (1990), or promoting judicial efficiency. . . . The Court has often read the time limits of these statutes as more absolute, say as requiring a court to decide a timeliness question despite a waiver, or as forbidding a court to consider whether certain equitable considerations warrant extending a limitations period. . . . As convenient shorthand, the Court has sometimes referred to the time limits in such statutes as "jurisdictional."[19]
> to the time limits in such statutes as "jurisdictional."[19]

In *John R. Sand & Gravel*, the Court said that there were two ways of rebutting the presumption that a time limit was a statute of limitations subject to **equitable tolling**: "Specific statutory language, for example, could rebut the presumption by demonstrating Congress' intent to the contrary. And if so, a definitive earlier interpretation of the statute, finding a similar congressional intent, should offer a similarly sufficient rebuttal."[20] The Court made clear that the "definitive earlier interpretation" must be an interpretation by the Court itself.

In *John R. Sand & Gravel*, the Court stated that the two statutes -- the one presented and the one in *Irwin* -- were similar, but it held that the presumption was rebutted in the Court of Federal Claims statute because,

for over 100 years, the Supreme Court had interpreted that statute or its predecessors as "jurisdictional." Thus, the presumption was rebutted, but only by the rule of *stare decisis*.

In *Pollock*, the Tax Court quoted the portion of section 6015(e) that provided it with jurisdiction to hear a case and then quoted the provision imposing a 90-day filing limit after the issuance of an NOD. The court concluded that the use of the word "jurisdiction" in the statute was indicative of the 90-day time limit being jurisdictional: "Statutes granting a court 'jurisdiction' if a case is filed by a stated deadline look more like jurisdictional time limits. Zipes, 455 U.S. at 393-94."[21]

Second, the Tax Court found that the 90-day period was jurisdictional because "it's part of a system of detailed rules on requests for relief and appeals from their denial."[22] In this respect, the court analogized the section 6015(e) 90-day limit to the 30-day time limit to file a CDP appeal in the Tax Court under section 6330(d), the time limits throughout section 6511 for filing, and the limits on the amounts of, claims for credit or refund. In 2005, in *Boyd v. Commissioner*, the Tax Court found that the CDP appeal time limit at section 6330(d) was jurisdictional.[23] In 1997 the Supreme Court held that section 6511's time limits for credit or refund claims were jurisdictional in *United States v. Brockamp*.[24]

Brockamp is particularly important because it is the only code case decided by the Supreme Court after *Irwin*, and it distinguishes *Irwin*. In *Brockamp*, the Supreme Court asked: "Is there good reason to believe that Congress did *not* want the **equitable tolling** doctrine to apply?"[25] The Court answered, "yes":

> Section 6511 sets forth its time limitations in unusually emphatic form. Ordinarily limitations statutes use fairly simple language, which one can often plausibly read as containing an implied "**equitable tolling**" exception. See, *e.g.*, 42 U.S.C. section 2000e-16(c) (requiring suit for employment discrimination to be filed "within 90 days of receipt of notice of final [EEOC] action"). But section 6511 uses language that is not simple. It sets forth its limitations in a highly detailed technical manner, that, linguistically speaking, cannot easily be read as containing implicit exceptions. Moreover, section 6511 reiterates its limitations several times in several different ways.
>
> To read an "**equitable tolling**" provision into these provisions, one would have to assume an implied exception for tolling virtually every time a number appears. To do so would work a kind of linguistic havoc. Moreover, such an interpretation would require tolling, not only procedural limitations, but also substantive limitations on the amount of recovery -- a kind of tolling for which we have found no direct precedent. 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. There are no counter-indications. Tax law, after all, is not normally characterized by case-specific exceptions reflecting individualized equities.
>
> The nature of the underlying subject matter -- tax collection -- underscores the linguistic point. The IRS processes more than 200 million tax returns each year. It issues more than 90 million refunds. See Dept. of Treasury, Internal Revenue Service, 1995

> Data Book 8-9. To read an "**equitable tolling**" exception into section 6511 could create serious administrative problems by forcing the IRS to respond to, and perhaps litigate, large numbers of late claims, accompanied by requests for "**equitable tolling**" which, upon close inspection, might turn out to lack sufficient equitable justification.[26]

Finally, in *Pollock*, the Tax Court distinguished *Bowen v. City of New York*,[27] a pre-*Irwin* 1986 Supreme Court case. *Bowen* interpreted 42 U.S.C. section 405(g), which provides that a person aggrieved by an adverse decision regarding Social Security benefits by the commissioner of Social Security "may obtain a review of such decision by a civil action commenced [in district court] within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow." The Supreme Court held in *Bowen* that 42 U.S.C. section 405(g) is a statute of limitations subject to **equitable tolling**. In *Pollock*, the Tax Court said of *Bowen*: "But the statute being construed there did not use any jurisdictional terms, explicitly provided discretion to the Commissioner of Social Security to extend the 60-day filing deadline, and lacked any other indication that Congress wouldn't want courts to apply **equitable-tolling** doctrine."[28]

The Tax Court Was Wrong

With all due respect to the Tax Court, I think it got this one wrong.

First, the Tax Court cites the 1982 Supreme Court opinion of *Zipes v. TWA*[29] as support for the proposition that the presence of the word "jurisdiction" in a statute is an indication that it is jurisdictional and not a tollable statute of limitations. In fact, the Court in *Zipes* said that the absence (not presence) of the word "jurisdiction" suggested that a provision was probably a statute of limitations. *Zipes* involved a statute providing a time period within which to bring an employment discrimination suit under Title VII against a private employer. The Court found the following to be one factor leading it to hold that the provision was a statute of limitations:

> The provision granting district courts jurisdiction under Title VII, 42 U.S.C. sections 2000-5(e) and (f), does not limit jurisdiction to those cases in which there has been a timely filing with the EEOC. It contains no reference to the timely-filing requirement. The provision specifying the time for filing charges with the EEOC appears as an entirely separate provision, and it does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.[30]

The mere fact that the word "jurisdiction" appears in a statute that has a time limit is thus not much of an indication whether the time limit is jurisdictional or is a statute of limitations. It hardly rebuts the *Irwin* presumption.[31]

Second, the Tax Court's quotation of section 6015(e) is too short. It leaves out the portion of section 6015(e)(1)(A) that says a petition may be brought in the Tax Court "at any time after . . . the date which is 6 months after the date such election is filed or request is made with the Secretary." The 90-day post-NOD period in section 6105(e)(1)(A) limits only the otherwise indefinite time period to bring suit. Presumably, this means that in the absence of an NOD, a spouse could bring a suit to stop collection during the entire remaining portion of the (at least) 10-year statute of limitations on collection under section 6502. This anytime-after-six-months period is almost identical to the anytime-after-180-days period in 42 U.S.C. section 2000e-16(c) that was interpreted to be a tollable statute of limitations in *Irwin*. Like section 6015(e), the statute in *Irwin* cut off the time for bringing suit at 90 days after final action from the government, if the government acted. Thus, section 6015(e) is far more like *Irwin*'s statute than the multiple section 6511 time and amount limits at issue in *Brockamp*.

Third, unlike the situation in *John R. Sand & Gravel*, there is no *stare decisis* reason for the Tax Court to hold that the usual *Irwin* presumption of **equitable tolling** should not apply under section 6015(e). The Supreme Court has never had a case involving section 6015, let alone the 90-day filing limitation period in section 6015(e).

Fourth, I think the Tax Court's reliance on *Brockamp* is misplaced. *Brockamp* focused on how complicated the multiple section 6511 time limits were compared with the time limit at issue in *Irwin*. As noted above, the Supreme Court in *Brockamp* stated:

> Ordinarily limitations statutes use *fairly simple language*, which one can often plausibly read as containing an implied '**equitable tolling**' exception. See, *e.g.*, 42 U.S.C. section 2000e-16(c) (requiring suit for employment discrimination to be filed 'within 90 days of receipt of notice of final [EEOC] action').

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But section 6511 uses language that is not simple.[32]

Because section 6015(e)'s time limit language, on close inspection, is almost on all fours with 42 U.S.C. section 2000e-16(c), interpreted in *Irwin*, the Supreme Court would undoubtedly also describe section 6015(e)'s time limit language as simple.

Moreover, one cannot invoke *Brockamp* for a ruling on section 6015(e) by merely saying, as the Tax Court did, that "it's part of a system of detailed rules on requests for relief and appeals from their denial."[33] So too is 42 U.S.C. section 2000e-16(c) part of such a system. Indeed, if we want to use *Brockamp*, maybe we should ask regarding section 6015(e) the same question asked by the Supreme Court in *Brockamp*: "Is there good reason to believe that Congress did *not* want the **equitable tolling** doctrine to apply?"[34]

There is no good reason in section 6015(e).

Section 6015 was enacted as a broadened innocent spouse provision through section 3201 of the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA '98).[35] RRA '98 was passed after *Irwin*, so Congress presumably knew that any new time limits it enacted for the filing of lawsuits were presumptively statutes of limitations subject to **equitable tolling**. There is no indication in the legislative history that Congress did not want the section 6015(e) 90-day period to be equitably tolled.[36]

Indeed, in the next section of RRA '98 (and grouped with the innocent spouse provision within the committee reports), at section 3202, Congress also modified section 6511 to add a new subsection (h), allowing a provision somewhat like **equitable tolling**. It suspends the statutes of limitations in section 6511 for claims for credit or refund during the time an individual is financially disabled.[37] This was a partial legislative overruling of *Brockamp*, suggesting that Congress was comfortable with tolling even complicated tax deadlines for equitable reasons.

Then there is the issue of how much administrative trouble the IRS would undergo if section 6015(e)'s 90-day filing deadline could be equitably tolled. The Supreme Court in *Brockamp* was worried about more than 200 million tax returns being filed annually and the IRS paying more than 90 million refunds each year. The issue of stale claims for credit and refund under section 6511 and constant litigation over **equitable tolling** seemed a nightmare. But the 90-day period in section 6015(e) applies only if the IRS issues an NOD -- which it does not do in every innocent spouse case. The Appeals Office is believed to issue nearly all NODs. In its 2008 fiscal year, Appeals closed 3,993 innocent spouse cases under section 6015,[38] presumably by the issuance of NODs. How many of those might involve a spouse who did not get relief in the NOD, filed a late Tax Court petition, and had an **equitable tolling** argument to excuse not filing in the 90-day period? Would it even be a handful?

Moreover, as a policy matter, how important are the time limits in section 6015 -- not just that in the Tax Court provision of section 6015(e)? A few months after deciding *Pollock*, the *en banc* Tax Court in *Lantz v. Commissioner* invalidated a regulation requiring that a request for equitable relief under section 6015(f) be made within two years of the first collection activity against the requesting spouse -- the same two-year

period imposed for elections for relief under subsection (b) and (c). The Tax Court stated:

> Congress provided section 6015(f) as a last resort to avoid potential harsh circumstances imposed upon one spouse in a joint return situation, and Congress specifically omitted a temporal limitation on a request for equitable relief. Because the failure to comply with a 2-year limitations period does not necessarily indicate that a taxpayer should not be eligible for equitable relief, to deny a taxpayer relief under section 6015(f) for failure to comply with a limitation rule that would also prevent the taxpayer from obtaining relief under section 6015(b) or (c) is impermissible.[39]
> relief under section 6015(b) or (c) is impermissible.[39]

Therefore, a spouse requesting relief under section 6015(f) from an outstanding balance may at least file a Form 8857 with the IRS at any time that the balance may still be collected under the statute of limitations of section 6502 for collection (generally 10 years after assessment). Given that the Tax Court has now held that Congress was not concerned that equitable relief be raised with the IRS within the two-year period, it is hard to believe that the same Congress would not want the doctrine of **equitable tolling** to apply to the time in which to petition the Tax Court if an NOD cut off an otherwise indefinite period to file the petition.[40]

Further, in *Lantz*, the Tax Court said: "It is a central tenet of statutory construction that, when interpreting any one provision of a statute, the entire statute must be considered. . . . Accordingly, we must consider the significance of the omission of a deadline for requesting relief in section (f) in the light of section 6015 as a whole."[41] Again, with all due respect, I believe the Tax Court in *Pollock* violated this rule of statutory construction by focusing too much on the language of section 6015(e) and not enough on the whole section, which includes the equitable relief subsection, (f), and a second subsection, (b), that also inquires into equity as a grounds for relief. After all, how can one argue that a statute designed overall to provide equitable relief should not allow **equitable tolling** of a time deadline within it?

A few weeks after issuing its opinion in *Lantz*, the Tax Court handed down another *en banc* opinion in *Porter v. Commissioner*.[42] There, the court reconsidered its previous precedent and held that the Tax Court's standard of review of the IRS's action on innocent spouse relief under section 6015(f) is *de novo* -- that is, that any ruling by the IRS in an NOD as to equitable relief under section 6015(f), or any failure of the IRS to rule is effectively ignored by the Tax Court when it decides the taxpayer's entitlement to that equitable relief. After *Porter*, the Tax Court, and not the IRS, is in effect, the primary arbiter of whether a taxpayer is entitled to equitable relief under section 6015(f). Because section 6015(f) is an equitable section, it makes even less sense post-*Porter* that Congress would want section 6015(e)'s 90-day period after issuance of the now-unimportant NOD to operate without the possibility of **equitable tolling**.

I also do not feel that the Tax Court in *Pollock* convincingly distinguished the highly analogous provision at issue in *Bowen* that the Supreme Court held to be a statute of limitations subject to **equitable tolling**. Although section 6015(e) differs from 42 U.S.C. section 405(g) in that the former contains no comparable explicit delegation to the Treasury secretary to allow additional time to file a Tax Court petition, both statutes are simple provisions authorizing the filing of a court proceeding against the government. Thus, presumptively, under *Irwin*, both statutes should be subject to **equitable tolling**. Neither provision contains complicated rules like those of section 6511.

Finally, I am troubled by the Tax Court's reliance in *Pollock* on the its prior holding in *Boyd* regarding section 6330(d), the CDP provision that authorizes the appeal of a CDP NOD to the Tax Court. *Boyd*'s toss-off comment, which does not use the words "**equitable tolling**," is an inadequate analysis and, I think, wrong.

CDP Deadlines Should Be Tollable Too

There are two statutory time periods in CDP. The first is the 30 days to request a hearing at Appeals (i) after the day after the issuance of a notice of intention to levy (NOIL) under section 6330(a)(3)(B), or (ii) after the day after the five-business-day notice period ends concerning a notice of filing of a tax lien under section

6320(a)(3)(B). The second time period is the 30 days to "appeal" an adverse CDP NOD under section 6320 or 6330 to the Tax Court under section 6330(d).

In 2005 the Tax Court in *Boyd* faced taxpayers whose requested refund for one year was offset by the IRS as a credit against the husband's unpaid tax for an earlier year without the issuance of an NOIL for the earlier year. The IRS issued the couple a notice of the offset on May 5, 2003. At some unspecified time (but presumably within 30 days of the notice), the taxpayers filed a Form 9423 -- a collection appeals program request for a hearing at Appeals. The program is the nonstatutory predecessor of CDP but carries no right of further appeal to the Tax Court. By a letter dated September 10, 2003, the Appeals Office issued a denial of the appeal, and on October 14, 2003, the Tax Court received and filed a petition from the taxpayers (which may or may not have been mailed to the court within 30 days of the September 10 letter). The couple argued that the IRS should have sent them an NOIL entitling them to a CDP hearing, but the Tax Court disagreed, finding that an offset was not a levy. The entire **equitable tolling** analysis on which the Tax Court in *Pollock* relied from *Boyd* reads as follows:

> Our jurisdiction under section 6330(e)(1) to enjoin an improper levy is dependent on both a section 6330 determination and an appeal to this Court within 30 days of that determination. Sec. 6330(d)(1), (e)(1). Thus, even if we were to consider the notice as evidence of a concurrent Section 6330 determination, petitioners failed to seek our review of that determination within 30 days of May 5, 2003, and, for that reason alone, we would be required to dismiss for lack of jurisdiction. See, e.g., Jones v. Commissioner, T.C. Memo. 2003-29 ("statutory periods are jurisdictional and cannot be extended").[43]

Jones v. Commissioner is a Tax Court memorandum opinion that has only slightly more analysis of the **equitable tolling** issue. In *Jones*, an NOD showing December 18, 2001, as its date of issue told the taxpayers they had 30 days to file an appeal in the Tax Court. But the NOD also contained a mysterious date stamp of February 16, 2002 -- a date that was 60 days after the date of issue. Confused, the taxpayers mailed a petition to the Tax Court on February 15, 2002. In granting the IRS's motion to dismiss the case as untimely, the Tax Court first held that the equities did not favor the taxpayers because they had not even asked the IRS about the confusing dates until after the initial 30 days had expired. The entire discussion of whether section 6330(d)'s 90-day period can be equitably tolled was as follows:

> Statutory periods are jurisdictional and cannot be extended. McCune v. Commissioner, 115 T.C. 114, 117 (2002); Joannou v. Commissioner, 33 T.C. 868, 869 (1960). See also *In re Smith v. United States*, 96 F.3d 800, 802 (6th Cir. 1996), in which the Court of Appeals for the Sixth Circuit (the court to which an appeal from this decision would lie) noted that it has been "rather consistent in denying 'equitable' pleas to disregard the strict timing rules of the Tax * * * [Code]," and *United States v. Brockamp*, 519 U.S. 347 (1997), in which the Supreme Court refused to permit **equitable tolling** of the limitations period on income tax refund claims.

This analysis in *Jones* is particularly unpersuasive because (1) it contains no discussion of why CDP time limits might be different from other code sections that were previously held to be jurisdictional, and (2) the court's citation of *In re Smith* is problematic. *In re Smith* was a bankruptcy case involving how the mailbox rule might affect a two-years-before-filing tax liability discharge rule when the debtor used a private delivery service to mail in late tax returns. The quote from *In re Smith* has been foreshortened in *Jones*. The Sixth Circuit in *In re Smith* actually said that it had been rather consistent in denying "equitable" pleas to disregard the strict timing rules "of the Tax *and Bankruptcy Codes*."[44] This was said in 1996. But six years later, in

Young v. United States[45] -- a year before *Jones* was decided -- the Supreme Court held that the three-years-before-bankruptcy-filing lookback rule of 11 U.S.C. section 507(a)(8)(A)(i) for discharging a tax debt was a statute of limitations that could be equitably tolled by a debtor's previous bankruptcy filing during the period. So **equitable tolling** is now allowed by the Supreme Court at least sometimes in the Bankruptcy Code when taxes are involved.

How do the 30-day time periods for requesting a CDP hearing at Appeals and for appealing CDP NODs to the Tax Court stack up under a thorough analysis of Supreme Court opinions on **equitable tolling** over the last 25 years?

First, the 30-day periods under sections 6320(a)(3)(B) and 6330(a)(3)(B) for requesting a CDP hearing do not contain the word "jurisdiction." Under *Zipes*, that makes them less likely to be jurisdictional time limits. Although the 30-day period to file in the Tax Court under section 6330(d) does contain the word "jurisdiction" (as does section 6015(e)), that is a slender reed on which to rely to rebut *Irwin*'s presumption.

Second, there is no legislative history that explicitly says no **equitable tolling** is allowed in CDP.[46] Indeed, contrary to the usual rule that if the NOD is mailed to the taxpayer's last known address, the taxpayer has only 90 days to file a Tax Court petition under 6213(a) -- even if the taxpayer never receives the NOD[47] -- the conference committee report states: "If the taxpayer did not receive the required notice [NOIL] and requests a hearing after collection activity has begun, then collection shall be suspended and a hearing provided to the taxpayer."[48] This is itself a form of "**equitable tolling**" of the 30-day period to request a CDP hearing.

Third, as with sections 6511(h) and 6015, Congress adopted CDP as part of RRA 1998. All three are remedial provisions to help taxpayers making essentially equitable pleas not to enforce regular rules of the code in a harsh fashion. See section 6330(c)(3), which requires the appeals officer to "take into consideration . . . whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary."

Fourth, given that CDP was enacted after the Supreme Court in *Irwin* had held that there is a presumption in favor of time periods in statutes being equitably tollable, Congress was likely aware of the *Irwin* rule and likely assumed the rule would apply to CDP deadlines.

Fifth, the 30-day deadlines in CDP are clearly "simple" like those in *Irwin* and not complex like those in *Brockamp*.

Sixth, there is no Supreme Court opinion interpreting the CDP time periods as jurisdictional. So there is no *stare decisis* concern.

Finally, there would be little administrative harm in allowing **equitable tolling** in CDP.

CDP-triggering notices can be issued at any time during the 10-year collection statute of limitations under section 6502. There is little urgency to a lien-removal CDP notice, because the lien sits there on file throughout the CDP hearing. If there is urgency to an NOIL hearing, the IRS may levy during the hearing in cases of jeopardy under section 6330(f)(1). Indeed, Congress and the IRS recognize that there is no big administrative problem in missing the 30-day deadline, even without an equitable excuse. Each year, as required by the legislative history of CDP,[49] the IRS offers thousands of "equivalent hearings" at Appeals for taxpayers with no good reason for missing the 30-day deadline to request a CDP hearing. Allowing **equitable tolling** of the CDP hearing request time period also would not hurt the IRS administratively, but would potentially help it. In return for the hearing being converted from "equivalent" to CDP, although the taxpayer would gain a possibly useless and rarely pursued right to Tax Court review, the IRS would benefit from a tolling of the collections statute of limitations under section 6330(e)(1). Tolling of the collections statute of limitations does not happen when Appeals holds an "equivalent hearing."

What big problems would result if the Tax Court could toll the 30-day period under section 6330(d) to appeal a CDP NOD for equitable reasons? I do not see any. The IRS would simply stop enforcing the holding in the NOD and allow the Tax Court proceeding to go forward, again, in return for getting a tolling of the collections statute of limitations under section 6330(e)(1). Under section 6330(e)(2), the IRS is also permitted to apply to the Tax Court for permission to levy during the case if the underlying tax liability is not in dispute and if

the Service shows the Tax Court "good cause not to suspend the levy." As of the end of fiscal 2008, only 1,333 CDP appeals were pending in the Tax Court, and 157 CDP appeals were pending before the courts of appeals.[50] This is a small fraction of the Tax Court's docket of over 30,000 cases a year. Would allowing **equitable tolling** of the section 6330(d) time limit add even 100 more cases to the Tax Court's docket? I doubt it.

In sum, nearly every test devised by the Supreme Court since *Irwin* indicates that the CDP time limits should also be treated as statutes of limitations subject to **equitable tolling**.

Conclusion

Tax lawyers, tax administrators, and lower court judges should go back and read the Supreme Court's opinion in *Brockamp*. *Brockamp* does not hold that all deadlines in the code are jurisdictional. More recent Supreme Court opinions, such as *John R. Sand & Gravel*, suggest that the *Irwin* presumption that statutory time limits may be equitably tolled has more force in the tax world than those people usually credit it for. Perhaps that is why the Justice Department abandoned its defense of the Tax Court's holding in *Pollock*. Although the issue does not arise often, the next time it does, tax lawyers should question whether their case might be another good litigation vehicle for **equitable tolling** -- of either the innocent spouse or CDP time limit.

References

Subject Area:
Individual income taxation;
Litigation and appeals
Equitably Tolling Innocent Spouse And Collection Due Process Periods
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Carlton M. Smith is a clinical associate professor of law and tax clinic director at the Benjamin N. Cardozo School of Law and an adjunct professor of law at the New York University School of Law.
This article analyzes a recent Tax Court decision involving innocent spouse relief, concluding that the court erred by holding that two time periods in the innocent spouse and collection due process provisions are not subject to **equitable tolling**.

Footnote 1

132 T.C. No. 3 (Feb. 12, 2009), *Doc 2009-3185*, *2009 TNT 28-9*.

Footnote 2

Gormeley v. Commissioner, T.C. Memo. 2009-252, *Doc 2009-24729*, *2009 TNT 215-14*.

Footnote 3

Section 6015(e)(3).

Footnote 4

Flora v. United States, 362 U.S. 145 (1960).

Footnote 5

Section 6330(c)(2)(A)(i) allows "spousal defenses" to be raised at the CDP hearing.

Footnote 6

The Tax Court calls section 6015(e) cases "stand-alone" because they stand alone from a notice of deficiency case in which section 6015 may be raised as only one of several defenses to the deficiency.

Footnote 7

118 T.C. 494 (2002), *Doc 2002-13179*, *2002 TNT 106-9*.

Footnote 8

439 F.3d 1009 (9th Cir. 2006), *Doc 2006-3915, 2006 TNT 40-8*.

Footnote 9

446 F.3d 785, 787 (8th Cir. 2006), *Doc 2006-8459*, *2006 TNT 85-14*, *aff'g in part, vacating in part*, T.C. Memo. 2004-93, *Doc 2004-7609*, *2004 TNT 67-17*.

Footnote 10

127 T.C. 7 (2006), *Doc 2006-13996*, *2006 TNT 143-9*.

Footnote 11

Tax Relief and Health Care Act of 2006, div. C, section 408(a), (c), 120 Stat. 3061, 3062.

Footnote 12

United States v. Boynton, 99 AFTR 2d 920 (S.D. Cal. 2007), *Doc 2007-3011*, *2007 TNT 26-8*, *following* United States v. Feda, 97 AFTR 2d 1985 (N.D. Ill. 2006), *Doc 2006-7285*, *2006 TNT 76-12*.

Footnote 13

"IRS National Taxpayer Advocate 2009 Annual Report to Congress," Dec. 31, 2009, *Doc 2010-174, 2010 TNT 4-19*, pp. 378-380 (Legislative Recommendation No. 7: "Allow Taxpayers to Raise Relief Under Internal Revenue Code Sections 6015 and 66 as a Defense in Collection Actions").

Footnote 14

United States v. Pollock, No. 06-80903 (S.D. Fla., July 12, 2007) (order staying case; citation omitted), quoted in *Pollock v. Commissioner*, slip op. at 8.

Footnote 15

Pollock v. Commissioner, slip op. at 13.

Footnote 16

Id. at 12-19.

Footnote 17

498 U.S. 89.

Footnote 18

552 U.S. 130, 137 (citation to *Irwin* omitted).

Footnote 19

Id. at 133-134 (citations to nontax cases omitted).

Footnote 20

Id. at 137-138.

Footnote 21

Pollock v. Commissioner, slip op. at 16-17.

Footnote 22

Id. at 19.

Footnote 23

124 T.C. 296, *aff'd*, 451 F.3d 8 (1st Cir. 2006), *Doc 2006-4100*, *2006 TNT 42-8*.

Footnote 24

519 U.S. 347.

Footnote 25

Id. at 350 (emphasis in original).

Footnote 26

Id. at 352.

Footnote 27

476 U.S. 467 (1986).

Footnote 28

Pollock v. Commissioner, slip op. at 19.

Footnote 29

455 U.S. 385.

Footnote 30

Id. at 393-394.

Footnote 31

Moreover, section 7806(b) explicitly tells court interpreting the Internal Revenue Code: "No inference, implication, or presumption of legislative construction shall be made by reason of the location or grouping of any particular section or provision or portion of this title."

Footnote 32

519 U.S. 347 at 350 (emphasis added).

Footnote 33

Pollock v. Commissioner, slip op. at 19.

Footnote 34

Brockamp, 519 U.S. 347 at 350 (emphasis in original).

Footnote 35

Section 3201, 112 Stat. 734-740, 1998-3 C.B. 194-200.

Footnote 36

See H.R. Rep. 105-364, Part I (1997) at 60-62, 1998-3 C.B. 373, 432-434; S. Rep. 105-174 (1998) at 55-60, 1998-3 C.B. 537, 591-596; H.R. Rep. (Conf.) 105-599 (1998) at 249-255, 1998-3 C.B. 747, 1003-1009.

Footnote 37

Section 3202, 112 Stat. 740-741.

Footnote 38

IRS Data Book, 2008 (Table 21).

Footnote 39

132 T.C. No. 8 (Apr. 7, 2009), slip op. at 18 (footnote omitted).

Footnote 40

Indeed, query whether the two-year periods to file Forms 8857 under section 6015(b) and (c) use properly statutes of limitations subject to **equitable tolling**? I think they are.

Footnote 41

Id. at slip op. 13-14 (citations omitted).

Footnote 42

Porter v. Commissioner, 132 T.C. No. 11 (Apr. 23, 2009).

Footnote 43

Boyd, 124 T.C. at 303 (footnote omitted).

Footnote 44

96 F.3d 800, 802 (6th Cir. 1996) (emphasis added).

Footnote 45

535 U.S. 43 (2002).

Footnote 46

See S. Rep. 105-174 at 67-69, 1998-3 C.B. at 603-605; H.R. Rep. (Conf.) 105-599 at 263-267, 1998-3 C.B. at 1017-1021.

Footnote 47

DeWelles v. United States, 378 F.2d 37, 39 (9th Cir. 1967); Alta Sierra Vista, Inc. v. Commissioner, 62 T.C. 367, 373 (1974), *aff'd per order*, 538 F.2d 334 (9th Cir. 1976).

Footnote 48

H.R. Rep. (Conf.) 105-599 at 266, 1998-3 C.B. at 1020. The IRS seems to limit this sentence to the situation when the taxpayer did not receive the notice because of an IRS error, and thus, the IRS sends

thereafter a "substitute notice," but I do not see the IRS's authority for ignoring the lack of such a limitation in the legislative history. *See* reg. section 301.6330-1(a)(3) Q-A9 through A-A10.

Footnote 49

"The Secretary must provide a hearing equivalent to the pre-levy hearing if later requested by the taxpayer. However, the Secretary is not required to suspend the levy process pending completion of a hearing that is not requested within 30 days of the mailing of the Notice." *Id*.

Footnote 50

Respondent's October 31, 2008, memorandum of law filed in *Larry E. Tucker*, Tax Court Dkt. No. 3165-06L, at 33.