Statutes of Limitations in Tax Litigation: Friend or Foe?

ABA Section of Taxation
May Meeting

Moderator: Kelley C. Miller, Reed Smith LLP

Panelists: Paul Butler, Kostelanetz & Fink, LLP
T. Keith Fogg, Clinical Professor of Law and Director of the Federal Tax Clinic, Harvard Law School
Eliezer Mishory, Internal Revenue Service Office of Chief Counsel, Procedure & Administration
Lawrence A. Sannicandro, McCarter & English, LLP
Rebecca M. Stork, Eversheds Sutherland LLP

Washington, D.C.
Thursday, May 9, 2019
Introduction
Overview

• Statutes of limitations can affect the outcome of a case
  – Shield or sword?

• Policy reasons for statutes of limitations
  Statutes of limitations find their justification in necessity and convenience rather than logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate…. [Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945) (citations and footnotes omitted)].

• Competing presumptions in construction
Period of Limitations on Assessment
Analyzing the ASED

• When is a tax return filed?
  – The filing date of the return is important for evaluating the assessment statute expiration date (ASED)
  – Personally delivered or mailed tax returns
    • Deemed filed when it is physically delivered to the IRS office prescribed in I.R.C. § 6091, in applicable Treasury Regulations, or in applicable filing instructions
  – The mailbox rule
    • Timely mailing treated as timely filing under I.R.C. § 7502
    • U.S. Postal Service postmark controls
    • Private delivery services
      – Notice 2016-30
  – Electronic filing
    • Deemed filed on the date of the electronic postmark (i.e., generally, the record of the date and time (in a particular time zone) that an authorized electronic return transmitter received the transmission of a return. See Treas. Reg. § 301.7502-1(d)
  – Early returns
  – Substitute returns
## Calculating the ASED

<table>
<thead>
<tr>
<th>Returns Without Filing Extensions:</th>
<th>Statute Runs From:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Return mailed and received on or before due date</td>
<td>Due date of return</td>
</tr>
<tr>
<td>Return mailed and received after due date</td>
<td>Date return received</td>
</tr>
<tr>
<td>Return mailed on or before due date but received after due date</td>
<td>Due date of return</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Returns With Filing Extensions:</th>
<th>Statute Runs From:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Return mailed and received on or before extension date</td>
<td>Date return received</td>
</tr>
<tr>
<td>Return mailed and received after extension date</td>
<td>Date return received</td>
</tr>
<tr>
<td>Return mailed on or before extension date but received after extension date</td>
<td>Postmark date of return</td>
</tr>
</tbody>
</table>
Periods of Limitation on Assessment

• General rule – I.R.C. § 6501(a)
  – Tax must be assessed within the later of:
    • Three years after a return is filed; or
    • The due date for filing the return

• Exception # 1: False or fraudulent return (I.R.C. § 6501(c)(1))
  – Three-year rule does not apply; unlimited statute of limitations
  – An amended return does not undo the fraud on an original return
  – Effect of third-party fraud on statute of limitations
    • See Allen v. Commissioner, 128 T.C. 37, 42 (2007) v. BASR Pship v. United States, 113 Fed. Cl. 181 (Fed. Cl. 2013), aff’d, 795 F.3d 1338 (Fed. Cir. 2015)

• Exception # 2: Willful attempt to evade tax (I.R.C. § 6501(c)(3))
  – Three-year rule does not apply; unlimited statute of limitations
Periods of Limitation on Assessment (con’t)

• Exception # 3: No return (I.R.C. § 6501(c)(3))
  – Three-year rule does not apply; unlimited statute of limitations
  – Substitute returns under I.R.C. § 6020(b)
    • Period of limitations on assessment does not begin to run until, if at all, the taxpayer signs the substitute return
    • Deficiency procedures apply

• Exception # 4: Extension by agreement (I.R.C. § 6501(c)(4))
  – Waiver of affirmative defense
  – Must be agreed to before the expiration of the statute of limitations
  – Estate tax may not be extended by agreement
Periods of Limitation on Assessment (con’t)

• Exception # 5: Substantial omission of items (I.R.C. § 6501(e))
  – Omission of item of gross income in excess of 25% of the gross income reported on the income tax return
  – Omission of item of gross income in excess of $5,000 that is foreign-sourced and reportable on Form 8938, *Statement of Specified Foreign Financial Assets*
  – Omission of item from gross estate in excess of 25% of the gross estate reported on the estate tax return
  – Omission of gift in excess of 25% of the total amount of gifts reported on the gift tax return
  – Omission from gross income of item constituting a constructive dividend under I.R.C. § 951(a) (relating to certain subpart F income)

• Exception # 6: Amended Returns Filed Within 60 Days of ASED (I.R.C. § 6501(c)(7))
  – Amended returns filed within 60 days of the ASED extend the statute of limitations by 60 days after the receipt of the amended return
Periods of Limitation on Assessment (con’t)

- Exception # 7: Certain Taxes Attributable to Partnership Items (I.R.C. § 6501(c)(12))
  - Partnership and affected items under TEFRA
    - General rule under I.R.C. § 6229(a)
      - Partner’s assessment period for tax attributable to partnership and affected items remains open until the date that is three years after the later of:
        » The date on which the partnership return for the taxable year was filed; or
        » The last day for filing the return for that year (determined without regard to extensions).


- Exception # 1: Written agreement (I.R.C. § 6229(b)(1))
- Exception # 2: Fraudulent return (I.R.C. § 6229(c)(1))
- Exception # 3: Gross omissions of 25% of gross income and related to Form 8938 (I.R.C. § 6229(c)(2))
- Exception # 4: No return (I.R.C. § 6229(b)(1))
- Exception # 5: FPAA issued (I.R.C. § 6229(d))
Periods of Limitation on Assessment (con’t)

• Exception # 7: Certain Taxes Attributable to Partnership Items (I.R.C. § 6501(c)(12))
  – BBA self-employment and net investment income tax
    • The period of limitations with respect to the assessment of self-employment tax or the net investment income tax extended until one year after:
      – In the case of an adjustments pursuant to the decision of a court in a proceeding brought under I.R.C. § 6324, such decision becomes final; or
      – In any other case, 90 days after the date on which the notice of the final partnership adjustment is mailed under I.R.C. § 6231.
  – Other pass-through items
    • Determined by reference to the partner’s assessment period
Periods of Limitation on Assessment (con’t)

- Exception # 8: Failure to Notify Secretary of Certain Foreign Transfers (I.R.C. § 6501(c)(8))
  - The failure to provide information of foreign activities can hold open the statute of limitations for the entire income tax return
  - The failure to report the following foreign activity information affects the statute of limitations:

<table>
<thead>
<tr>
<th>Code Section</th>
<th>Corresponding Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>I.R.C. § 6038</td>
<td>Forms 5471, 8865, 8858</td>
</tr>
<tr>
<td>I.R.C. § 6038A</td>
<td>Form 5472</td>
</tr>
<tr>
<td>I.R.C. § 6038B</td>
<td>Form 8865</td>
</tr>
<tr>
<td>I.R.C. § 6046</td>
<td>Form 5471</td>
</tr>
<tr>
<td>I.R.C. § 6046A</td>
<td>Form 8865</td>
</tr>
<tr>
<td>I.R.C. § 6048</td>
<td>Forms 3520, 3520-A</td>
</tr>
</tbody>
</table>
Periods of Limitation on Assessment (con’t)

• Exception # 9: Listed Transactions (I.R.C. § 6501(c)(10))
  – The statute of limitations is held open where a taxpayer fails to properly disclosed a listed transaction
    • Extended to one year after the earlier of the date on which:
      – The IRS is furnished the information by the taxpayer; or
      – A material advisor maintains a list with respect to such taxpayer under I.R.C. § 6012
  – Adequate disclosure for listed transactions
    • Form 8886, Reportable Transaction Disclosure Statement
    • Additional detailed information is required under Treas. Reg. § 301.6111-3(c)(2)
  – Subsequently designated listed transactions

• Exception # 10: Criminal Restitution Orders (I.R.C. § 6501(c)(11))
  – Amounts of criminal restitution paid pursuant to 18 U.S.C. § 3556 for the failure to pay tax may be assessed at any time
Periods of Limitation on Assessment (con’t)

• Exception # 11: Gift Tax on Certain Gifts Not Shown on Return (I.R.C. § 6501(c)(9))
  – The statute of limitations on gift tax returns is held open unless the gift is reported in such a way so as to apprise the IRS of the nature of the gift
  – Adequate disclosure of gifts
  – The propriety of filing zero gift tax returns

• Exception # 12: DSUE of First to Die Spouse (I.R.C. § 2010(c)5)(B))
  – With the advent of portability came I.R.C. § 2010(c)(5)(B)
  – The IRS can examine the deceased spouse unused exclusion amount (DSUE) of a predeceased spouse on the audit of the surviving spouse’s death
  – The practical effect of the statute is the statute of limitations for estate tax with respect to a first-to-die-spouse is held open until three years after the death of the second-to-die-spouse
Periods of Limitation on Assessment (con’t)

• Exception # 13: Joint Returns Filed After Separate Returns (I.R.C. § 6013(b)(4))
  – If spouses elect married filing jointly filing status after filing separate returns, the period of limitations on assessment is extended for one year following the date the joint return is filed, regardless of when the joint tax return is filed

• Exception # 14: Incorrect Tax Returns Filed in Good Faith (I.R.C. § 6501(g))
  – Trusts or partnerships determined to be corporations
  – Exempt organizations determined to be taxable organization
  – DISCs determined not to be DISCS

• Exception # 15: NOLs or Capital Loss Carryovers (I.R.C. § 6501(h))
  – Deficiency attributable to a reduction of a net operating loss (NOL) carryback or capital loss carryback can be assessed for open years
Periods of Limitation on Assessment (con’t)

• Exception # 16: Foreign Tax Carrybacks (I.R.C. § 6511(i))
  – A deficiency attributable to the reduction of a foreign tax credit carryback under I.R.C. § 904(c) can be assessed at any time before the expiration of one year after the period within which a deficiency may be assessed for the taxable year of the foreign tax credit carryback

• Exception # 17: Tax Resulting From Changes in Certain Income or Estate Tax Credits (I.R.C. § 6501(c)(5))
  – Assessments related to adjustments of foreign tax credit under I.R.C. § 905(c)
  – Assessments related to adjustments of State or foreign death tax credits (limited applicability as to State credit)

• Other exceptions
  – Special rules for transferees
    • See, e.g., I.R.C. §§ 6901; 6324(a)(2)
  – Special rules for personal representatives
    • See I.R.C. § 6905; see also I.R.C. § 2204
  – Special rules for certain Service Members
    • See I.R.C. § 7508A
Prompt Assessment Requests – I.R.C. § 6501(d)

- I.R.C. § 6501(d) authorizes the personal representative of an estate or the liquidating trustee of a liquidating corporation to make a request for prompt assessment
  - Generally shortens the period of limitations from 3 years to 18 months
    - Prompt assessment request under I.R.C. § 6501(d) does not override a written agreement to extend the assessment date under I.R.C. § 6501(c)(4)
    - Does not affect transferee liability
  - File with the IRS Form 4810, Request for Prompt Assessment Under Internal Revenue Code Section 6501(d)

- For an estate:
  - Prompt assessment procedures apply to any tax other than the federal estate tax
Other Limitations – I.R.C. § 6751(b)(1)

• I.R.C. § 6751(b) bars the assessment of most penalties unless the IRS obtains written, supervisory approval for its “initial determination” to assess the penalty
  – The “initial determination” is a temporal condition, not dissimilar from statutes of limitation

• Recent updates
    • Held, for purposes of I.R.C. § 6751(b), the RAR and the 30-day letter to which the RAR was attached constitutes the initial determination to assess penalties
    • Held, further, the Government must show that written supervisory approval for penalties was obtained before the first formal communication to the taxpayer of the initial determination to assess penalties
    • Held, further, the 30-day letter was the first formal communication to the taxpayer of the initial determination to assess penalties
    • Held, further, the Government did not obtain written supervisory approval before the first formal communication of the initial determination to assess penalties and did not meet his burden of production for penalties under I.R.C. § 7491(c)
Other Limitations – I.R.C. § 6751(b)(1) (con’t)

- **Roth v. Commissioner**, --- F.3d ---, No. 18-9006 (10th Cir. Apr. 19, 2019)
  
  - Conservation easement case
  - The notice of deficiency asserted a 20% penalty
  - In the answer, consistent with the IRS’s determinations during the audit, which did not make it into the notice of deficiency, the Office of Chief Counsel asserted that the taxpayers were liable for a 40% gross valuation misstatement penalty
  - The taxpayers argued that the notice of deficiency constitutes the IRS’s “final determination” and, by implication, the initial determination to assert the penalty must precede the final determination
  - The Tenth Circuit held (consistent with the Tax Court in *Graev v. Commissioner*, 149 T.C. 485 (2017)):
    - Multiple initial determinations are allowed
    - I.R.C. § 6214 contemplates assertion of penalties after the notice of deficiency
    - Adopting the taxpayers argument would be tantamount to the Tax Court’s well-settled jurisdiction to hear cases where increased penalties are asserted
  - Reconciling Clay and Roth on burden of proof grounds.
Period of Limitations on Collection After Assessment
Periods of Limitation on Collection Generally

• General rule – I.R.C. § 6502
  – The IRS generally has ten years to collect a tax debt
    • The ten-year period runs from the date of the assessment

• Exception # 1: Court Actions (I.R.C. § 6502(a))
  – If a court action is brought against the taxpayer prior to the collection statute expiration date (CSED), the collection period is extended until the liability for the tax (or the judgment against the taxpayer) is satisfied or becomes unenforceable

• Exception # 2: Joint Returns Filed After Separate Returns (I.R.C. § 6013(b)(4))
  – If spouses elect married filing jointly filing status after filing separate returns, the period of limitations on collection is extended for one year following the date the joint return is filed, regardless of when the joint tax return is filed
Tolling of CSED

- The period of limitations on collection is tolled (suspended) for any period that the IRS is statutorily barred from pursuing collection activity against the taxpayer.

- Common tolling provisions include:
  - For the period during which an offer in compromise is pending and, if the offer in compromise is rejected, for 30 days thereafter, see I.R.C. § 6331(k)(1);
  - For the period during which an installment agreement is pending and, if the offer in compromise is rejected, for 30 days thereafter, see I.R.C. § 6331(k)(2)(A), (B);
  - For the period during which an installment agreement is in effect (unless the terms of the installment agreement provide otherwise), see I.R.C. § 6331(k)(2)(C);
  - For the period during which an installment agreement is in effect and, if terminated, for 30 days thereafter, see I.R.C. § 6331(k)(2)(D);
  - Signing a waiver to extend the period of limitations on collection in the context of an installment agreement or otherwise, see I.R.C. § 7121;
Tolling of CSED (con’t)

• Common tolling provisions also include:
  – During the time within which a collection due process hearing request is pending, see I.R.C. § 6330(e)(1), or generally during the time within which an equivalent hearing request is pending, see I.R.M., pt. 8.22.4.3(4) (Mar. 29, 2012);
  – Bankruptcy, see I.R.C. § 6503(h);
  – Leaving the country for more than six months, see I.R.C. § 6503(c);
  – Request for a Taxpayer Assistance Order, see I.R.C. § 7811(d);
  – In the case of the estate tax, during the time that an extension of time for payment is granted under the provisions of I.R.C. §§ 6161, 6163, or 6166, see I.R.C. § 6503(d); and
  – In the case of the estate and gift tax, (a) for the 90-day period during which the IRS is barred from assessing or collecting tax under I.R.C. § 6213(a) (if a notice of deficiency is mailed but a petition is not filed with the United States Tax Court), (b) for the period during which the IRS is barred from assessing or collecting tax under I.R.C. § 6213(a) (if a case is docketed before the Tax Court and until the Tax Court’s decision becomes final), and (c) for 60 days after either date, see I.R.C. § 6503(a)(1)
Suspension of Running of Periods of Limitation on Assessment and Collection
Suspension of Periods of Limitation on Assessment and Collection

- The periods of limitation on assessment or collection can also be suspended by statute
- Suspension Rule #1: Issuance of 90-Day Letter (I.R.C. § 6503(a)(1)):
  - General rule
    - The period of limitations on assessment and collection are suspended when the IRS issues a notice of deficiency
  - Effect of Tax Court petition
    - If a taxpayer petitions the Tax Court, the period of limitations on assessment is tolled until 60 days after the Tax Court’s decision becomes final
    - “Final” is a term of art, aptly summarized in I.R.M., pt. 36.2.5.3 (May 2, 2012)
  - Settled cases
    - An agreement in a stipulated decision to an immediate assessment does not deprive the IRS of the benefit of the suspension under I.R.C. § 6503(a)(1)
  - Invalidly issued notices of deficiency
    - The period of limitations on assessment is not suspended for an invalidly issued notice of deficiency
Suspension of Periods of Limitation on Assessment and Collection (con’t)

• **Suspension Rule # 2: Assets in Control or Custody of Court (I.R.C. § 6503(a)(2)):**
  
  – The period of limitations on collection is suspended while all or substantially all of the taxpayer’s assets are in control or custody of a court and for six months thereafter.

  • Bankruptcy proceedings are controlled by I.R.C. § 6503(h)

• **Suspension Rule # 3: Bankruptcy Cases and Receivership Proceedings (I.R.C. § 6503(h)):**
  
  – Bankruptcy cases

    • The periods of limitation on assessment and collection are suspended for the period during which the IRS is prohibited from making an assessment or collecting tax, plus 60 days thereafter

  – Receivership proceedings

    • The periods of limitation on assessment and collection are suspended from the date of the institution of a receivership proceeding until 30 days after the date on which the IRS receives notice of the receiver’s qualifications

      – Subject to an overall two-year cap

      – Notice required by Treas. Reg. § 301.6036-1(a)(2)
Suspension of Periods of Limitation on Assessment and Collection (con’t)

• Suspension Rule # 4: Taxpayer Outside of United States (I.R.C. § 6503(a)(3)):
  – The period of limitations on collection is suspended while a taxpayer is located outside of the United States for a continuous period of at least six months
    • Bankruptcy proceedings are controlled by I.R.C. § 6503(h)

• Suspension Rule # 5: Extension of Time for Payment of Estate Tax (I.R.C. § 6503(d)):
  – The period of limitations on collection is suspended where the time for paying the federal estate tax has been extended under I.R.C. §§ 6161, 6163(a), or 6166
Suspension of Periods of Limitation on Assessment and Collection (con’t)

- Suspension Rule # 6: Extension in Case of Certain Summonses (I.R.C. § 7609(e)(2)):
  - Third-party summons
    - Where a taxpayer intervenes in a summons enforcement proceeding or begins a proceeding to quash a third-party summons, the periods of limitation on assessment (under I.R.C. § 6501) and criminal prosecutions (under I.R.C. § 6531) are suspended
  - John Doe summons
    - The issuance of a John Doe summons also suspends the periods of limitation on assessment and collection
      - A summoned party with respect to a John Doe summons must give notice of the suspension to the persons involved. See I.R.C. § 7609(i)(4).
  - Other summons
    - The periods of limitation on assessment and collection are not suspended when a summons is issued under I.R.C. § 7602, but the summons is not a third-party summons under I.R.C. § 7609 or a designated summons under I.R.C. § 6503(j)
Suspension of Periods of Limitation on Assessment and Collection (con’t)

• Suspension Rule # 7: Certain Tax Return Preparer Penalties (I.R.C. §§ 6694(b), 6700, 6701, 6708, 6713):
  – Arguably, there is no statute of limitations with respect to:
    • Preparer penalties under I.R.C. § 6694(b) for willful or reckless conduct; or
    • Penalties under I.R.C. §§ 6700, 6701, 6708, 6713
  – Under I.R.C. § 6694(c)(3), the ten-year period of limitations on collection is suspended for the period during which the IRS is prohibited from assessing paid return preparer penalties on account of the special claims procedures of I.R.C. § 6694(c)(1)

• Other suspension provisions
  – Extension of time attributable to recoveries of foreign expropriation losses
  – Wrongful seizure of property
  – Wrongful lien on property of third party
  – Suspension of tax-exempt status pending corrective action
  – Undistributed PFIC earnings tax liability
  – Certain deficiency dividends of personal holding companies, RICs, or REITS
Periods of Limitation on Credits and Refunds
The Refund Process Generally

- Authority for refund (I.R.C. § 6402)
  - The Commissioner is authorized, within the applicable period of limitations, to credit or refund taxpayers for overpayments of tax

- Steps in obtaining the credit or refund
  - Timely file an administrative refund claim (I.R.C. § 7422(a))
    - Option 1: IRS allows refund claim
    - Option 2: IRS disallows refund claim
    - Option 3: IRS takes no action (or not quick enough action)
  - Timely initiate a refund suit (28 U.S.C. §§ 1491(a)(1) (Claims Court) and 1346(a)(1) (U.S. district courts))
    - If the IRS disallows the refund claim, or does not act on it within six months, then the taxpayer can file suit in the Claims Court of the appropriate U.S. district court to:
      - Determine the existence of an overpayment; and
      - That the taxpayer is entitled to the refund or credit
Period of Limitations on Administrative Refund Claims

• General rule – I.R.C. § 6511(a)
  – Refund of taxes for which return is required
    • A valid administrative refund claim must be filed no later than:
      – Three years from the date on which the tax return was filed; or
      – Two years from the date on which the tax was paid
  – Refund of taxes for which no return is required
    • Administrative refund claim must be filed no later than two years from the date on which the tax is paid

• Extension by agreement under I.R.C. § 6501(c)(4) extends the time to file a refund claim
  – I.R.C. § 6511(c)
Period of Limitations on Administrative Refund Claims (con’t)

• When is a tax return filed?
  – Same rules apply when computing the ASED

• When is tax paid?
  – The date of receipt generally controls (not the date on which the check or other method of payment is deposited by the IRS)
    • Mailbox rule
  – Overpayments through offset
    • The date on which the IRS applies the overpayment to the liability
  – Credit card payments
    • The date the card issuer authorizes the payment
  – Taxes paid through withholding
    • Deemed paid on the 15th day of the 4th month of the close of the taxable year
  – Other rules
    • Estimated tax payments, Social Security withholdings, and certain credits
Period of Limitations on Administrative Refund Claims (con’t)

• Suspension of running of period of limitations
  – Unable to manage financial affairs due to disability (I.R.C. § 6511(h))
  – Other exceptions
    • Bad debts and worthless securities (I.R.C. § 6511(d)(1))
    • NOLs and capital loss carrybacks (I.R.C. § 6511(d)(2))
    • Wrongfully incarcerated individuals (I.R.C. § 139F)
    • And many more!!
• When (is) equitable tolling available?
Period of Limitations on Administrative Refund Claims (con’t)

• What is a valid administrative refund claim?
  – Separate refund claims required for each period
  – Forms to be used
    • Original or amended tax return
    • Form 843
  – Legal theories and factual bases required
    • Variance doctrine
    • The filing of the administrative refund claim defines the litigation
  –Submitted under penalties of perjury

• Amending and supplementing of administrative refund claims allowed
Limitations in Case of Petition to Tax Court

• General rule
  – No refund may be allowed or made unless the administrative claim for refund is timely filed as to the amount to be refunded or credited

• Lookback Rule # 1 – allowable credits and refunds within three-year period (I.R.C. § 6511(b)(2))
  – Where an administrative claim for refund is filed within three years of filing of the tax return, the taxpayer can recover taxes paid within three years immediately preceding the filing of the refund claim

• Lookback Rule # 2 – allowable credits and refunds within two-year period (I.R.C. § 6511(b)(3))
  – Where an administrative claim for refund is not filed within the foregoing three-year period, the taxpayer can recover taxes paid within two years immediately preceding the filing of the refund claim

• Nuanced rules can apply, so be sure to review I.R.C. § 6511 in its entirety
Setoffs, Equitable Recoupment, and Mitigation

• Setoffs
  – Allows the Government to assert a setoff to an otherwise time-barred adjustment as a defense in refund litigation
    • What about penalties and I.R.C. § 6751(b)(1)?
  – Lewis v. Reynolds, 284 U.S. 281 (1932)

• Equitable recoupment
  – Extends the setoff principle to cover other taxes
  – Allows an otherwise time-barred claim to be overcome to prevent inequitable windfalls resulting from inconsistent tax treatment of the same transaction, item, or event

• Mitigation
  – A disallowed tax benefit in one year may be revived for another year in a refund forum or as part of a closing agreement with the IRS with respect to both years
    • I.R.C. §§ 1311 through 1314
Periods of Limitation in Judicial and Quasi-Judicial Proceedings
Suits by Taxpayers for Refunds

• Statute of limitations for filing suit: General Rule:
  – I.R.C. §6532(a) specifies the time during which a taxpayer may commence a suit for a refund of tax under I.R.C. § 7422(a)
  – A suit may be brought on the earlier of:
    • Six months from the date the administrative claim for refund is filed; or
    • The date on which the IRS disallows the claim
  – A tax refund suit may be brought no later than two years from the date on which the IRS issues the taxpayer a notice of claim disallowance by certified or registered mail

• Exception # 1: Extension by Agreement (I.R.C. § 6532(a)(2))
  – The two-year period for commencing a refund suit can be extended by a written agreement between the IRS and the taxpayer

• Exception # 2: Waiver of Notice of Claim Disallowance (I.R.C. § 6532(a)(3))
  – Where a taxpayer waives the requirement for a notice of claim disallowance, the statute of limitations begins to run on the date the waiver is filed
Suits by Taxpayers for Refunds (con’t)

- 28 U.S.C. § 2401 as a six-year outside limit for refund suits
  - Claims Court
    - I.R.C. § 6532(a) is a statutory override to 28 U.S.C. § 2401, so there is not an overall six-year statute of limitations on filing suit
    - See, e.g., Detroit Trust Co. v. United States, 131 Ct. Cl. 223 (1955)
  - The IRS and some District Courts
    - The six-year period of limitations on assessment in 28 U.S.C. § 2401 overrides I.R.C. 6532, so there is an overall six-year statute of limitations on filing suit

- Reconsideration after mailing of notice of claim disallowance
  - If the IRS agreed to reconsider its decision to disallow a claim, the reconsideration does not extend the two-year period for filing suit

- Premature refund suits
  - Premature refund suits are dismissed without prejudice
Suits by Taxpayers for Refunds (con’t)

• *Flora* Full-Payment Rule
  – A refund court’s jurisdiction is predicated on full-payment of the tax
  – General rule
    • A taxpayer must full-pay the tax before a refund court acquires subject matter jurisdiction
  – Exception for penalties and interest
    • A taxpayer need not pay interest or penalties unless the computation of either is in dispute
  – Exception for divisible taxes
    • *E.g.*, employment taxes or excise taxes
Suits by the United States to Recover Erroneous Refunds

• Statute of limitations for filing suit: General Rule:
  – I.R.C. §6532(b) specifies the time during which the United States may commence a suit to recover an erroneous refund under I.R.C. § 7405
  – A suit must be brought, if at all, within two years of the date on which the refund is made

• “Making of the Refund”
  – A refund is made on the date of payment or the date of receipt of the refund check
Special Rules

• **Background**
  
  - Certain penalties in the Code can be assessed at any time
    
    • See, e.g., I.R.C. §§ 6700 (relating to promoting abusive tax shelters); 6701 (relating to penalties for aiding and abetting an understatement of tax liability)

  - Some taxpayers have recently argued that, absent a specific exception to the contrary, 28 U.S.C. § 2462 places an outside date of five years by which all penalties must be asserted

    • See, e.g., Groves v. United States, No. 16 C 2485 (N.D. Ill. May 5, 2017).

• **The statute**

  Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

• **Current trends in litigation**
Questions

- Paul Butler, Kostelanetz & Fink, LLP
  - (202) 790-6998, pbutler@kflaw.com

- T. Keith Fogg, Clinical Professor of Law and Director of the Federal Tax Clinic, Harvard Law School
  - (617) 390-2645, kfogg@law.harvard.edu

- Kelley C. Miller, Reed Smith
  - (215) 851-8855, kmiller@reedsmith.com

- Eliezer Mishory, Internal Revenue Service Office of Chief Counsel, Procedure & Administration

- Lawrence A. Sannicandro, McCarter & English, LLP
  - (973) 639-2081, lsannicandro@mccarter.com

- Rebecca M. Stork, Eversheds Sutherland LLP
  - (404) 853-8135, rebeccastork@eversheds-sutherland.com